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Defense Against the Dark Arts of Copyright Trolling

Matthew Sag

Jake Haskell

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Defense Against the Dark Arts of Copyright Trolling

*Matthew Sag & Jake Haskell**

ABSTRACT: In this Article, we offer both a legal and a pragmatic framework for defending against copyright trolls. Lawsuits alleging online copyright infringement by John Doe defendants have accounted for roughly half of all copyright cases filed in the United States over the past three years. In the typical case, the plaintiff's claims of infringement rely on a poorly substantiated form pleading and are targeted indiscriminately at noninfringers as well as infringers. This practice is a subset of the broader problem of opportunistic litigation, but it persists due to certain unique features of copyright law and the technical complexity of Internet technology. The plaintiffs bringing these cases target hundreds or thousands of defendants nationwide and seek quick settlements priced just low enough that it is less expensive for the defendant to pay rather than to defend the claim, regardless of the claim's merits.

We report new empirical data on the continued growth of this form of copyright trolling in the United States. We also undertake a detailed analysis of the legal and factual underpinnings of these cases. Despite their underlying weakness, plaintiffs have exploited information asymmetries, the high cost of federal court litigation, and the extravagant threat of statutory damages for copyright infringement to leverage settlements from the guilty and the innocent alike. We analyze the weaknesses of the typical plaintiff's case and integrate that analysis into a strategy roadmap for both defense lawyers and pro se defendants. In short, as our title suggests, we provide a useful guide to the defense against the dark arts of copyright trolling.

* Matthew Sag is a Law Professor at Loyola University Chicago School of Law and the Associate Director of the Institute for Consumer Antitrust Studies. Jake Haskell is a recent graduate of Loyola University Chicago School of Law and an attorney practicing intellectual property law in Chicago. We acknowledge the generous research funding of the Institute for Consumer Antitrust Studies at Loyola and the database access provided by Lex Machina. We thank Tonja Jacobi, and Spencer Waller for their many insights and comments and Wade Formo for additional research. The views presented in this Article are strictly our own. We emphasize that although this Article contains advice about the law, it is not legal advice, and we disclaim any inference of an attorney-client relationship between the reader and ourselves.

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I. INTRODUCTION

Over the past six years, a small group of copyright owners has deluged the federal court system with lawsuits against John Doe defendants alleging online copyright infringement. These lawsuits are sometimes directed against a single defendant, sometimes thousands. This new wave of file-sharing lawsuits is, in our view, copyright trolling because of the opportunistic way in which they seek to monetize assertions of infringement. More importantly, we regard these suits as a kind of trolling because the plaintiffs' claims of infringement rely on poorly substantiated form pleadings and are targeted indiscriminately at noninfringers as well as infringers. Plaintiffs have realized that there is no need to invest in a case that could actually be proven in court or in forensic systems that reliably identify infringement without a large ratio of false positives. The lawsuits described in this Article are filed primarily to generate a list of targets for collection and are unlikely to withstand the scrutiny of contested litigation. Sometimes the plaintiffs get lucky and target an actual infringer who is motivated to settle. Even when the infringement has not occurred or where the infringer has been misidentified, a combination of the threat of statutory damages—up to \$150,000 for a single download—tough talk, and technological doublespeak are usually enough to intimidate even innocent defendants into settling.

The plaintiffs play a numbers game, targeting hundreds or thousands of defendants and seeking quick settlements priced just low enough that it is less expensive for the defendant to pay than to defend the claim. This game is profitable, whether the lawsuits are targeted at actual infringers or not. It is difficult to overstate the extent to which copyright trolling has come to dominate the federal copyright docket. In this Article, we report new empirical data on the continued growth of copyright trolling in the United States. We show that around 10,000 copyright lawsuits have been filed against John Doe defendants in the last six years and that these suits have accounted for almost half of all the copyright cases filed in the United States between 2014 and 2016.¹ However, counting cases filed grossly understates the

1. We discuss the data *infra* Part II. It is enough to note here that copyright lawsuits against John Doe defendants outnumbered all other copyright claims in 29 federal districts in either 2015 or 2016. In 2016, John Doe cases accounted for more than half of copyright cases filed in the following federal districts: Arizona; the Eastern, Northern, and Southern Districts of California; Colorado; Connecticut; District of Columbia; the Northern District of Illinois; the

significance of copyright trolling, since an individual lawsuit may contain dozens, even thousands, of individual defendants.² This places the true number of defendants in the hundreds of thousands. Many of these defendants are noninfringers.

The infringement claims made in these file-sharing cases are a Potemkin village: Their impressive façade is only paper thin.³ Despite their underlying weakness, plaintiffs have exploited information asymmetries, the high cost of federal court litigation, and the extravagant threat of statutory damages for copyright infringement to leverage settlements from the guilty and the innocent alike. We believe that copyright trolling remains profitable primarily because the sorts of lawyers who would normally defend clients from this kind of victimization do not know enough about the law and the technology involved to put up a good fight. Furthermore, the lawyers who do have the right kind of expertise are usually too expensive to make defending these cases worthwhile. A handful of public-spirited defense lawyers have bridged this divide and are successfully defending these cases, but it is only when their knowledge and experience becomes widely diffused that these particular copyright trolls will recede into the darkness from whence they came. Our purpose in writing this Article is to accelerate that process. Specifically, we analyze the weaknesses of the typical plaintiff's case and integrate that analysis into a strategy roadmap for defense lawyers or even resourceful pro se defendants.

In this Article, we offer both a legal and a pragmatic framework for defending against copyright trolls. Part II establishes the essential background. It situates the current wave of file-sharing litigation in the broader context of trends in copyright litigation over the past two decades. It also provides a general overview of a typical file-sharing troll's case. Part III undertakes a comprehensive and methodical review of the weaknesses of a typical plaintiffs' case. Part IV divides file-sharing litigation into four distinct stages and maps out strategic considerations for defending against copyright trolls in each stage.

Western District of Kentucky; Maryland; Nevada; New Jersey; the Northern District of New York; the Eastern and Middle Districts of North Carolina; Oregon; the Eastern District of Pennsylvania; the Southern District of Texas; Utah; the Eastern District of Virginia; and the Western District of Washington. In addition to those listed for 2016, John Doe cases accounted for more than half of copyright cases filed in the Middle District of Florida, the Eastern and Western Districts of Michigan, the Eastern and Southern Districts of New York, the Northern and Southern Districts of Ohio, and the Middle District of Pennsylvania in 2015.

2. See, e.g., Complaint for Injunctive Relief, Damages and Profits for Copyright Infringement; and Demand for Jury Trial at 1, *Dig. Sin, Inc. v. Does* 1-5698, No. 11-cv-04397, 2011 WL 4048465 (N.D. Cal. Sept. 2, 2011) (naming 5,698 John Doe defendants); Complaint for Copyright Infringement at 1, *Ott v. Does* 1-15,551, No. 1:11-cv-00553, 2011 WL 2491677 (D.D.C. Mar. 11, 2011) (naming 15,551 John Doe defendants).

3. The term "Potemkin Village" is derived from the sham villages created in 18th-century Russia to impress Empress Catherine II on her tours of the country. See Thomas Seifrid, *"Illusion" and Its Workings in Modern Russian Culture*, 45 *SLAVIC & E. EUR. J.* 205, 205 (2001).

II. ESSENTIAL BACKGROUND

A. THE CURRENT WAVE OF FILE-SHARING LITIGATION

A cursory review of the copyright dockets of federal district courts shows that something very strange is going on. Although software companies, record labels, and motion picture studios conduct a fair amount of copyright litigation, in a large number of districts, cases filed by otherwise obscure LLCs—such as Malibu Media and PTG Nevada—make up more than half the copyright caseload.⁴ In 2015, the *Iowa Law Review* published an empirical study of copyright trolling by one of the authors of this Article.⁵ That article explains how copyright law's generous approach to statutory damages and certain structural features of civil litigation have led to an extraordinary number of John Doe lawsuits alleging online copyright infringement.⁶ We have updated the data from that first empirical study and the results are presented in Figure 1.

Figure 1 shows the frequency of John Doe copyright lawsuits from 1994 to 2016. These John Doe lawsuits are almost exclusively related to allegations of illegal file sharing, which explains why they were virtually nonexistent prior to 2004. As indicated in Figure 1, there are two distinct waves of file-sharing litigation—one ranging from 2004 to 2008, the other beginning in 2010 and continuing to the present day. In 2003 the Recording Industry Association of America (“RIAA”) began a widely publicized campaign of lawsuits against individual file sharers, characterized as “a teaching tool”⁷ or “the enforcement phase” of the RIAA’s education program.⁸

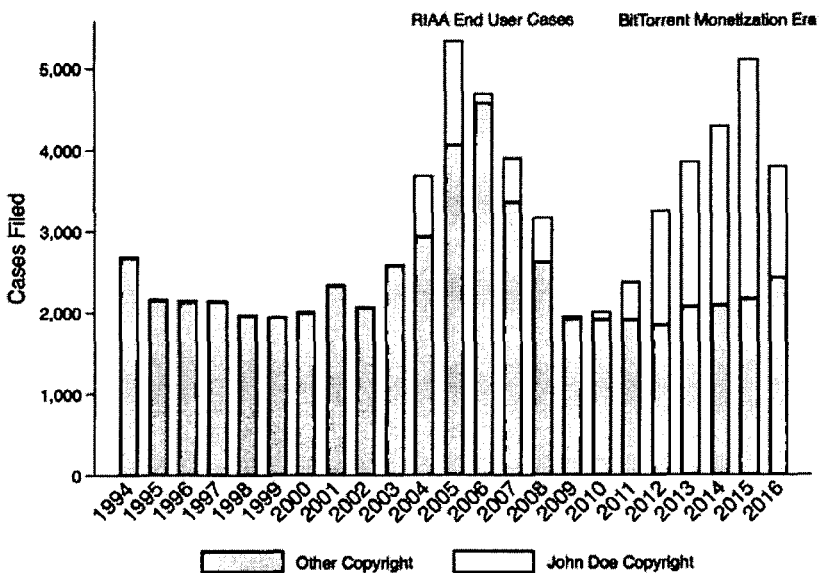
4. For districts in which file-sharing cases against John Doe defendant outnumber other copyright cases, see *supra* note 1. There are 15 districts in which cases by the top six plaintiffs—Malibu Media, LLC; LHF Productions, Inc.; Manny Film, LLC; Cobbler Nevada, LLC; Plastic The Movie, Ltd; and Dallas Buyers Club, LLC—outnumber all other copyright suits for 2015 and 2016 combined. These districts are the Eastern, Northern, and Southern Districts of California; the District of Columbia; the Northern District of Illinois; Maryland; the Eastern and Western Districts of Michigan; New Jersey; the Northern District of New York; the Northern and Southern Districts of Ohio; the Eastern and Middle Districts of Pennsylvania; and the Eastern District of Virginia.

5. See generally Matthew Sag, *Copyright Trolling, an Empirical Study*, 100 IOWA L. REV. 1105 (2015).

6. *Id.*

7. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 963 (2005) (Breyer, J., concurring).

8. Annemarie Bridy, *Why Pirates (Still) Won't Behave: Regulating P2P in the Decade After Napster*, 40 RUTGERS L.J. 565, 602 (2009) (quoting Press Release, RIAA, Recording Industry Begins Suing P2P File Sharers Who Illegally Offer Copyrighted Music Online (Sept. 8, 2003), <http://techinsider.org/internet/research/2003/0908.html>).

Figure 1: Copyright Cases Filed in U.S. District Courts (1994–2016)⁹

The RIAA wound down this program in 2008, after over 35,000 individuals had been targeted with letters of demand.¹⁰ The RIAA and its members are not copyright trolls because the industry’s end-user litigation strategy was focused on deterrence. It was designed to channel potential infringers back into the legitimate market, not as a way to monetize infringement as an end in itself. In 2010, others took up where the RIAA left off.

We refer to the current wave of file-sharing litigation as the “BitTorrent monetization era”—because the alleged infringement mostly involves the BitTorrent file-sharing protocol and because it appears the objective of the suits is to monetize infringement (or the assertion of infringement), as opposed to the pursuit of compensation or deterrence. This difference in motivation is important. In the normal paradigm of litigation, plaintiffs pursue their rights in court to seek compensation or to deter future wrongdoing. Litigation thus rights a private wrong and also performs a public good. The plaintiffs (or possibly the lawyers and litigation service providers)

9. Administrative Office of the U.S. Courts, PACER records, 1994–2016 (on file with the authors); see also Sag, *supra* note 5, at 1116 (explaining methodology used to collect and analyze the records); Matthew Sag, *IP Litigation in U.S. District Courts: 1994–2014*, 101 IOWA L. REV. 1065, 1070–71 (2016) (explaining methodology and updating analysis of copyright data in the context of broader trends in IP litigation).

10. See Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., <http://online.wsj.com/articles/SB122966038836021137> (last updated Dec. 19, 2008, 12:01 AM).

behind the current wave of file-sharing litigation are more interested in taking advantage of copyright law's generous statutory damages provisions to monetize little more than the assertion of infringement.¹¹

Copyright litigation has increased dramatically since the BitTorrent monetization era began in 2010. As we show in Table 1, although the number of cases filed in 2010 was small, lawsuits filed against John Doe defendants made up more than 52% of copyright cases in the United States by 2014 and 58% in 2015. The number of suits dropped slightly after Malibu Media lost a case on summary judgment in February 2016, but the rate of filing is increasing again.¹² Even so, between 2014 and 2016 copyright trolling accounted for 49.8% of the federal copyright docket. To focus more clearly on the BitTorrent monetization era, Table 1 shows the number of copyright cases filed in U.S. district courts from 2010 to 2016 and the number and percentage of John Doe copyright cases filed in such years.

Table 1: Copyright and John Doe Cases (2010–2016)¹³

Year	Cases: Copyright	Cases: John Doe	Percent: John Doe
2010	1,983	77	4%
2011	2,348	452	19%
2012	3,230	1,401	43%
2013	3,833	1,776	46%
2014	4,272	2,204	52%
2015	5,079	2,930	58%
2016	3,681	1,362	37%

As we noted in the Introduction, these figures show only cases filed, not the number of defendants.¹⁴ John Doe suits have named as many as 15,000 defendants, but over the past three years almost all cases have had 1 to 50

11. We invoke the triad of plaintiffs, lawyers, and litigation service providers to reflect our uncertainty as to whether the true principals directing the current wave of John Doe are the named plaintiffs, their lawyers, or the litigation service providers who claim to identify supposed instances of copyright infringement.

12. On February 8, 2016, the court granted the defendant's motion for summary judgment in *Malibu Media LLC v. John Doe*, No. 1:13-cv-06312, 2016 WL 464045 (N.D. Ill. Feb. 8, 2016). This appears to have precipitated a dispute between Malibu Media and its main litigation counsel. See Complaint at 1, *Malibu Media, LLC v. Lipscomb, Eisenberg & Baker, PL*, No. 2:16-cv-04715-R-FFM (C.D. Cal. June 28, 2016) (alleging professional negligence and other causes of action).

13. Administrative Office of the U.S. Courts, PACER records, 2010–2016 (on file with the authors); see *supra* note 9.

14. See *supra* note 2 and accompanying text.

defendants.¹⁵ Our analysis of the federal court filing records indicates that in 2016 the average number of defendants in each of the John Doe cases was, on a conservative estimate, 4.7 overall and 8.8 excluding Malibu Media cases.¹⁶ In other words, although there were 1,362 John Doe copyright cases filed last year, 6,483 individual defendants were targeted.¹⁷ Based on these findings, our best estimate is that the number of U.S. households who have received a settlement demand letter from the plaintiffs we regard as copyright trolls is in the hundreds of thousands.

Although the BitTorrent cases now dominate the federal copyright docket, there are only a handful of key players to consider. As shown in Table 2, the pornography distributor Malibu Media accounts for 62% of the John Doe cases in the 2015–2016 period alone. Another five companies—LHF Productions, Inc.; Manny Film, LLC; Cobbler Nevada, LLC; Plastic The Movie, Ltd.; and Dallas Buyers Club, LLC—collectively account for another 20%. Thus, the current wave of BitTorrent monetization lawsuits is a niche industry, rather than a general response to the problem of online copyright infringement.

Table 2: Plaintiffs in Copyright John Doe Cases (2015–2016)

Plaintiff	Cases Filed	Percent (Cumulative)
Malibu Media, LLC	2646	61.7%
LHF Productions, Inc.	225	66.9%
Manny Film, LLC	215	71.9%
Cobbler Nevada, LLC	208	76.7%
Plastic The Movie, Limited	137	79.9%
Dallas Buyers Club, LLC	110	82.5%
Mez Productions	82	84.4%
Criminal Productions, Inc.	66	85.9%
Clear Skies Nevada, LLC	66	87.4%
Good Man Productions, Inc.	62	88.8%

15. See, e.g., Complaint, *Dall. Buyers Club, LLC v. Does 1–56*, No. 1:14-cv-07044 (N.D. Ill. Sept. 11, 2014); First Amended Complaint, *Voltage Pictures, LLC v. Doe No. 1*, No. 6:14-cv-00816-MC, 2014 WL 8333643 (D. Or. June 20, 2014); Complaint for Copyright Infringement, *Countryman Nev., LLC v. Does 1–50*, No. 1:14-cv-01384, 2014 WL 916205 (N.D. Ill. Feb. 26, 2014).

16. Data on file with authors.

17. By running an algorithm over the entire set of cases, we are able to determine that, at a minimum, over 170,000 IP addresses have been targeted since 2010. However, this figure significantly undercounts the number of defendants because it only accounts for the number disclosed by the plaintiff in the title of the case. For example, some cases are captioned “Some Film, LLC v. John Does 1–76” while some cases are captioned simply “Some Film, LLC v. John Does,” and we were unable to inspect each record to determine the true number of defendants.

Plaintiff	Cases Filed	Percent (Cumulative)
QOTD Film Investment Ltd.	40	89.7%
Fathers & Daughters Nevada, LLC	37	90.6%
CELL Film Holdings, LLC	35	91.4%
Glacier Films (USA), Inc.	34	92.2%
Cook Productions, LLC	33	93.0%
PTG Nevada, LLC	31	93.7%
Survivor Productions, Inc.	29	94.4%
Poplar Oaks, Inc.	23	94.9%
I.T. Productions, LLC	19	95.3%
Elargo Holdings, LLC	13	95.6%
Killer Joe Nevada, LLC	11	95.9%
Automata Productions, Inc.	11	96.2%
September Productions, Inc.	10	96.4%
Countryman Nevada, LLC	7	96.6%
All other plaintiffs	140	99.9%

The business model that underpins the recent explosion in copyright litigation can be reduced to a few simple steps. The basic method is as follows:

- (1) Monitor online file-sharing networks and collect evidence of possible infringement. For the time being, it is best to think of this as a “black box” process that produces lists of alleged infringements and associated Internet Protocol (“IP”) addresses.¹⁸
- (2) File a complaint alleging copyright infringement by John Does identified only by their IP addresses in the appropriate federal district court.
- (3) Seek a court order to compel Internet Service Providers (“ISPs”)¹⁹ to provide individual account holder information matching the IP address.

18. An IP address is an identifier assigned to a device connected to a TCP/IP network. The IP addresses discussed in this Article are most often connected to the routers that connect consumer Internet access accounts to the Internet.

19. An ISP is an organization that provides services for accessing and using the Internet.

- (4) Contact account holders by letter and threaten to seek very large awards of statutory damages but offer to settle for amounts ranging from two to eight thousand dollars.²⁰
- (5) Settle as many cases as possible, and abandon virtually all the rest.
- (6) Repeat.

This formula has been profitable enough that one company, Malibu Media, filed 5,982 individual cases between 2012 and 2016, paying well over \$2.3 million in federal court filing fees.²¹ As we explain in more detail in the remainder of this Article, these lawsuits are filed primarily to generate a list of targets for collection; these are not cases that have been built to stand up to the scrutiny of litigation. In fact, of the 10,000 cases filed in the last six years, the only ones in which the plaintiff has prevailed on the merits are those in which the defendants have admitted to committing acts that constitute infringement.²² It is impossible to know for sure how many innocent individuals have settled these cases, and upon what terms. However, our discussions with numerous defense lawyers over the past three years suggest that these cases settle from anywhere between \$1,000 and \$8,000 and that these lawyers believe that as many as one-third of their clients are innocent.²³ Usually, we would treat such self-serving anecdotal data with a grain of salt; however, we have reviewed a number of these cases in detail and these estimates seem plausible, if imprecise.

B. AN OVERVIEW OF THE PLAINTIFF'S CASE

To date, the academic literature on copyright trolling has focused on broad public policy issues relating to statutory damages, civil procedure, and the appropriateness of allowing non-rights holders to profit from copyright enforcement litigation.²⁴ These are all worthy issues, but by focusing on the

20. Contact does not mean serve a summons. In fact, plaintiffs often go out of their way to delay formal service of process until the court runs out of patience.

21. Prior to May 1, 2013, filing fees were \$350, at which time they were increased to \$400. Based on the PACER records, we calculate that Malibu's initial filing fees for 2012 to 2016 would have been \$2,355,100.

22. See *infra* Part IV.D.

23. We spoke to several defense lawyers over the past two years, and their experiences have informed our research. However, these conversations were conducted in confidence, and we cannot report what we were told beyond this general summary.

24. Compare Sag, *supra* note 5 (arguing that copyright's statutory damages regime encourages opportunistic litigation), with Shyamkrishna Balganeshe & Jonah B. Gelbach, *Debunking the Myth of the Copyright Troll Apocalypse*, 101 IOWA L. REV. ONLINE 43, 44 (2016) (arguing that file-sharing litigation is simply another form of aggregate litigation and is no different to similar suits in antitrust, securities litigation, drug and medical device liability, and mass accidents). See generally 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 (2012) (arguing that statutory damages create perverse incentives in the copyright context); Brad A. Greenberg, *Copyright Trolls and Presumptively Fair Uses*,

more generalizable policy questions that are the usual bread-and-butter of law reviews, the academic community has neglected two very important realities on the ground.²⁵ The first reality is that the BitTorrent cases have victimized a substantial number of noninfringers—this seems to be a feature of the plaintiffs’ business model, not a bug. The second is that, although it would not be particularly difficult to amass credible and reliable evidence of online infringement over peer-to-peer networks, the plaintiffs do not appear to have done so in the cases we have studied.

In the typical case, the plaintiff asserts that it has evidence the defendant participated in something called a BitTorrent swarm, thereby illegally copying the plaintiff’s copyrighted work. BitTorrent is a popular communications protocol for transferring large files over peer-to-peer file-sharing networks, and although it has many lawful uses, it is widely used for illegal file sharing.²⁶ The plaintiff claims to be able to identify the defendant by his or her IP address. The plaintiff says that it can prove the defendant participated in the swarm and made a copy of the work because the plaintiff’s technology provider has exchanged part of the relevant file with a device associated with the defendant’s IP address.

The *modus operandi* of the typical plaintiff in file-sharing litigation has evolved considerably over the past six years. Initially, these cases relied on the courts’ permissive attitude to joinder and social embarrassment related to pornography.²⁷ Pornography is still well represented thanks to Malibu Media,

85 U. COLO. L. REV. 53 (2014) (discussing problems created by copyright trolls); Jason R. LaFond, *Personal Jurisdiction and Joinder in Mass Copyright Troll Litigation*, 71 MD. L. REV. ENDNOTES 51 (2012) (discussing procedural aspects of copyright trolling).

25. Professor Sag includes himself in this criticism.

26. ROBERT LAYTON & PAUL WATTERS, INTERNET COMMERCE SEC. LAB., INVESTIGATION INTO THE EXTENT OF INFRINGING CONTENT ON BITTORRENT NETWORKS 3, 21 (2010), <https://concen.org/old/forum/attachment.php?aid=4190> (concluding that 97.9% of nonpornographic files distributed via BitTorrent tracker websites were infringing copyright).

27. This point was made most famously in *Malibu Media, LLC v. Doe*, where Judge Wright commented that “[t]he federal courts are not cogs in a plaintiff’s copyright-enforcement business model. The Court will not idly watch what is essentially an extortion scheme, for a case that plaintiff has no intention of bringing to trial.” *Malibu Media, LLC v. John Does 1–10*, No. 2:12-cv-003623-OD-PJWx, 2012 WL 5382304, at *4 (C.D. Cal. June 27, 2012). More recently, Judge Alsup noted that even with single-defendant cases “[t]he damages exposure in this case, as with Malibu Media’s many other cases, is significant, so a defendant may feel pressure to settle even a meritless case. Coupled with the taboo nature of the subject matter, there remains potential for abuse.” *Malibu Media, LLC v. John Doe*, No. 3:15-cv-04441-WHA, 2016 WL 3383758, at *3 (N.D. Cal. June 20, 2016); see also *Malibu Media LLC v. John Doe*, No. 3:13-cv-00205, 2013 WL 4821911, at *1 (W.D. Wis. Sept. 10, 2013) (sanctioning Malibu Media attorney Schulz for “attaching an apparently unrelated and embarrassing” material to the plaintiff’s complaints); *Sunlust Pictures, LLC v. Does 1–75*, No. 1:12-cv-01546, 2012 WL 3717768, at *5 (N.D. Ill. Aug. 27, 2012) (“Judges within this district have recognized that plaintiffs in these types of cases might unfairly threaten to disclose defendants’ identities in order to improperly leverage settlement negotiations.”); *Hard Drive Prods. v. Does 1–48*, No. 1:11-cv-09062, 2012 WL 2196038, at *6 (N.D. Ill. June 14, 2012) (warning plaintiff to consider Rule 11 before naming defendant who disputed that he had illegally downloaded pornographic movie).

but Malibu Media is now the only pornography plaintiff of any significance.²⁸ The other main plaintiffs own the rights to general release motion pictures of varying quality.²⁹ Several of the most prolific plaintiffs still rely on joinder to reduce their overhead and economize on filing fees, but they join much smaller groups of defendants than in the 2010–2013 period and claim to rely on geolocation technology to address questions relating to personal jurisdiction.³⁰

No doubt, the lawyers who file these cases will read this Article and make some adjustments to their strategy. Anyone who played *Dungeons & Dragons* knows that trolls regenerate from their wounds,³¹ and any fan of *Harry Potter* knows that “[t]he Dark Arts . . . are many, varied, ever-changing, and eternal.”³² Some modifications may be purely cosmetic, but it is possible that others may be a welcome development. We have no interest in foreclosing the possibility of file-sharing litigation per se, and we would welcome a more targeted approach in which claims were well-pleaded, backed up with adequate evidence, and directed overwhelmingly at actual infringers of copyright.

III. THE WEAKNESSES OF THE PLAINTIFF’S CASE

In this Part, we undertake a methodical survey of the weaknesses of the typical plaintiff’s case. For ease of exposition, we have divided our analysis of the weaknesses of the plaintiffs’ claims into two categories: issues that would remain even if we accepted that the plaintiffs’ technology does what they say it does—i.e., “Outside the Black Box”; and issues relating to the black box process plaintiffs use to target particular IP addresses—i.e., “Inside the Black Box.”

A. OUTSIDE THE BLACK BOX

For the sake of completeness, we begin with a preliminary discussion of establishing copyright ownership and lack of authorization. However, the main issues outside the black box relate to plaintiffs’ reliance on joinder, personal jurisdiction, and IP addresses.

28. See *infra* Appendix A (listing top plaintiffs for the 2015–2016 period).

29. Dallas Buyers Club was nominated for six Oscars. *Dallas Buyers Club: Awards*, IMDB, <http://www.imdb.com/title/tt0790636/awards> (last visited Oct. 28, 2017). London Has Fallen has a Rotten Tomatoes critics rating of 25%. *London Has Fallen*, ROTTEN TOMATOES, https://www.rottentomatoes.com/m/london_has_fallen (last visited Oct. 28, 2017).

30. See, e.g., Amended Complaint for Copyright Infringement at 2, *PTG Nev., LLC v. Chan*, No. 1:16-cv-01621, 2016 WL 8541574 (N.D. Ill. Jan. 29, 2016) (pleading the use of geolocation technology).

31. GARY GYGAX, *ADVANCED DUNGEONS & DRAGONS: MONSTER MANUAL* 97 (4th ed. 1979), http://archmagev.com/1st_Ed/Rulebooks/AD&D%201st%20-%202009%20-%20Monster%20Manual.pdf.

32. J.K. ROWLING, *HARRY POTTER AND THE HALF-BLOOD PRINCE* 177 (2005).

1. Ownership of a Valid Copyright

Section 106(1) of the Copyright Act gives the copyright owner the exclusive right “to reproduce the copyright[] work in copies.”³³ To establish a violation of this right, a plaintiff must prove “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original” without authorization.³⁴ The plaintiff can usually establish ownership of a valid copyright with a Copyright Office registration. This should be straightforward; however, we are aware of one case where a plaintiff brought suit on the basis of a copyright it had assigned to a third party, while that third party pursued a suit of its own in a different district, based on the same copyright.³⁵ In some cases there have also been discrepancies between the plaintiff’s copyright registrations and the works it claimed were infringed.³⁶

Some defense lawyers may want to question whether pornographic works are entitled to copyright protection, either as a matter of public policy or because they fail to display sufficient amount of original authorship or creativity. In general, this is a losing argument; pornography has long been considered copyrightable.³⁷ However, at least one judge has suggested, in an order denying Malibu Media leave to issue a third-party subpoena, that obscene materials may not be copyrightable.³⁸ Nevertheless, this argument is not likely to have much traction, and attorneys tempted to pursue that route should be aware that a determination that a work is obscene requires a jury and a fairly steep standard of proof because of First Amendment concerns.³⁹

33. Copyright Act, 17 U.S.C. § 106(1) (2012).

34. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

35. See Declaration of J. Christopher Lynch in Support of Defendant’s Reply Memorandum in Support of His Motion to Compel at 3, *Elf-Man, LLC v. Lamberson*, No. 2:13-cv-00395-TOR (E.D. Wash. July 3, 2014) (citing Complaint at 7–8, *Vision Films Inc. v. Does 1–41*, No. 3:13-cv-00128, 2013 WL 1100187 (E.D. Tenn. Mar. 8, 2013)) (stating that, at the time of the litigation, the copyright was owned by a third party).

36. See Complaint—Demand for Jury Trial, *Malibu Media, LLC v. John Doe*, No. 15-cv-04441, 2015 WL 6471355 (N.D. Cal. Sept. 27, 2015). As a starting point, we suggest a brief check of the copyright status of the registration on the U.S. Copyright Office website. *Public Catalog, U.S. COPYRIGHT OFF.*, <http://cocatalog.loc.gov/cgi-bin/Pwebrecon.cgi?DB=local&PAGE> (last visited Oct. 28, 2017).

37. See *Mitchell Bros. Film Grp. v. Cinema Adult Theater*, 604 F.2d 852, 861 (5th Cir. 1979) (“Requiring authors of controversial, unpopular, or new material to go through judicial proceedings to validate the content of their writings is antithetical to the aim of copyrights.”).

38. See *Malibu Media, LLC v. Doe*, No. 15-cv-04369-AKH, 2015 WL 4092417, at *4 (S.D.N.Y. July 6, 2015) (noting that “if the Motion Picture is considered obscene, it may not be eligible for copyright protection” (quoting *Next Phase Distrib., Inc. v. John Does 1–27*, 284 F.R.D. 165, 171 (S.D.N.Y. 2012))).

39. See *Miller v. California*, 413 U.S. 15, 26 (1973).

2. Lack of Authorization

In many ways, the Prenda Law firm pioneered this form of copyright trolling. Prenda is now defunct as a firm. One of Prenda's principals, Paul Duffy died in 2015, and the remaining principals, John L. Steele and Paul R. Hansmeier, were placed under federal indictment in December 2016 for "an elaborate scheme to fraudulently obtain millions of dollars in copyright lawsuit settlements by deceiving state and federal courts throughout the country."⁴⁰ In addition to lying to the court,⁴¹ forging documents,⁴² and practicing identity theft,⁴³ the Prenda firm went so far as to "seed" their clients' movies on BitTorrent networks to make them available for download.⁴⁴ This self-seeding was proven in one case⁴⁵ and suspected in others. If any plaintiffs (or their lawyers or service providers) were continuing this practice today, it would negate their complaint altogether, as such an uploading would likely amount to an authorization to download. However, Prenda is long gone, and as spectacular as such a discovery would be, we do not believe that defense lawyers need to go down this particular path of investigation.

3. Improper Joinder

The Federal Rules of Civil Procedure allow plaintiffs to join multiple individual defendants in a single action in certain circumstances.⁴⁶ To understand the joinder issues raised in these cases, we need to explain some of the features of BitTorrent. The BitTorrent protocol is such a powerful and

40. Indictment, *United States v. Hansmeier*, No. 16-cr-00334-JNE-KMM, 2016 WL 7403809 (D. Minn. Dec. 14, 2016). John L. Steel has now plead guilty to these charges. See Plea Agreement and Sentencing Stipulations, *Hansmeier*, 16-cr-00334-JNE-KMM (Mar. 6, 2017); see also *Lightspeed Media Corp. v. Smith*, 761 F.3d 699, 712 (7th Cir. 2014) (affirming orders for sanctions and an order holding Duffy, Steele, and Hansmeier in civil contempt); *Lightspeed Media Corp. v. Smith*, No. 3:12-cv-00889-GPM, 2013 WL 6225093, at *4 (S.D. Ill. Nov. 27, 2013) (stating that "the Court has no doubt that Duffy, Steele, and Hansmeier are closely associated and acted in concert to file and prosecute this frivolous lawsuit"); *Ingenuity 13 LLC v. John Doe*, No. 2:12-cv-08333-ODW-JCx, 2013 WL 1898633, at *2, 3, 5 (C.D. Cal. May 6, 2013) (finding that "the Principals engaged in vexatious litigation designed to coerce settlement" and that "Plaintiffs have demonstrated their willingness to deceive not just this Court, but other courts where they have appeared" and awarding sanctions against lawyers Steele, Hansmeier, Duffy and Gibbs, the Prenda Law Firm, and their clients, AF Holdings and Ingenuity 13, based on the "Plaintiffs' brazen misconduct and relentless fraud").

41. See *Ingenuity 13 LLC*, 2013 WL 1898633, at *4.

42. *Id.*

43. *Id.* at *1.

44. Cyrus Farivar, *Prenda Seeded Its Own Porn Files via BitTorrent, New Affidavit Argues*, ARS TECHNICA (June 3, 2013, 8:15 PM), <https://arstechnica.com/tech-policy/2013/06/prenda-seeded-its-own-porn-files-via-bittorrent-new-affidavit-shows>.

45. See, e.g., Declaration of Delvan Neville at 11, *First Time Videos, LLC v. Oppold*, No. 6:12-cv-01493-CEH-KRS (M.D. Fla. June 3, 2013), ECF No. 37-11.

46. See FED. R. CIV. P. 20(a).

popular tool for file sharing because of the way it handles large files. At the beginning of the process, a BitTorrent client (software that implements the BitTorrent protocol) segments a large file into thousands of smaller “pieces” that can be downloaded in any order and reassembled by the end user.⁴⁷ This initial process is called “seeding.” Each piece of the original seed file is assigned a unique alphanumeric identifier and the client records each piece’s hash identifier within the torrent descriptor file.⁴⁸

Once a file has been broken into pieces in this way, it can be downloaded by multiple individuals simultaneously.⁴⁹ A group of individuals downloading the seeded file is known as a “swarm.”⁵⁰ One advantage of BitTorrent is that there is no need to maintain a connection between the original seeder and the downloader for the duration of the download; any participant in the swarm can download any piece from any other participant who already has it.⁵¹ “Piece” in this context does not mean any old chunk of ones and zeros; it refers specifically to the pieces into which the initial seeder broke up the file.⁵² Swarm members are typically downloading and uploading pieces from and to other computers in the swarm at the same time.⁵³

Participants in a BitTorrent swarm are not like criminals planning a bank heist. The “peers” who constitute the swarm do not directly communicate with each other and they are separated by time and distance. Swarms can last for months, during which their respective memberships may constantly change, and most participants in a BitTorrent swarm have direct connections with only a few other members of that swarm.⁵⁴ According to one expert, the average peer (a swarm member who is not the initial seeder) interacts with less than 1% of the total number of swarm participants.⁵⁵

There are two requirements for joining multiple individual defendants in a single action under Federal Rule of Civil Procedure 20(a)(2). First, the complaint must be asserted against the defendants “jointly, severally, or in the

47. Bram Cohen, *The BitTorrent Protocol Specification*, BITTORRENT.ORG (Feb. 4, 2017, 12:58 PM), http://www.bittorrent.org/beps/bep_0003.html.

48. *Malibu Media, LLC v. Reynolds*, No. 1:12-cv-06672, 2013 WL 870618, at *2 (N.D. Ill. Mar. 7, 2013).

49. *Id.* at *2.

50. *Id.* at *1–2.

51. *Id.* at *1.

52. *Id.* at *2.

53. *Malibu Media, LLC v. John Does 1–68*, No. 12-cv-06675, 2013 WL 5423872, at *4–5 (N.D. Ill. Sept. 27, 2013).

54. See Declaration of Expert Delvan Neville at ¶ 9, *Dall. Buyers Club, LLC, v. Does 1–20*, No. 1:14-cv-01142-WTL-MJD (S.D. Ind. Oct. 21, 2014) (“[T]he average peer contacts only 0.61% of the total number of swarm participants over the course of their time in the swarm, with a standard deviation of 1.35%. This indicates that a typical peer contacts only a sliver of all swarm participants, and while this distribution is also highly variable, 95% of swarm participants would have contacted between just a single peer to a maximum of 3.247%.”).

55. *Id.*

alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences.”⁵⁶ Second, there must be common questions of fact or law.⁵⁷ There is no clear consensus as to whether all of the participants in a BitTorrent swarm are involved in a “series of transactions or occurrences” that are sufficiently related to allow joinder. Certainly, “merely committing the same type of violation in the same way does not link defendants together for purposes of joinder.”⁵⁸ A number of courts have determined that mere participation in a swarm is not enough for joinder, because the plaintiff could not prove that any two defendants actually exchanged any information or that any two defendants participated concurrently.⁵⁹ Some courts have pointed to the vast network of uploads and downloads within a swarm as being simply too loosely conglomerated to permit joinder,⁶⁰ and one court has laid out a rule requiring all joined parties to have directly exchanged data.⁶¹ Other courts have been reluctant to allow discovery to proceed when the only basis for joinder is that all defendants used the same ISP or and were part of the same BitTorrent swarm.⁶² However, a

56. FED. R. CIV. P. 20(a)(2)(A).

57. *Id.* R. 20(a)(2)(B).

58. *LaFace Records, LLC v. Does 1-38*, No. 5:07-cv-298-BR, 2008 WL 544992, at *2 (E.D.N.C. Feb. 27, 2008).

59. *See, e.g., SBO Pictures, Inc. v. Does 1-57*, No. 8:12-cv-00022, 2012 WL 1415523, at *2 (D. Md. Apr. 20, 2012) (denying joinder); *Patrick Collins, Inc. v. John Does 1-23*, No. 11-cv-15231, 2012 WL 1019034, at *4 (E.D. Mich. Mar. 26, 2012) (severing the Doe defendants because the infringement of the film via BitTorrent did not constitute a “series of transactions or occurrences”); *SBO Pictures, Inc. v. Does 1-3036*, No. 11-4220 SC, 2011 WL 6002620, at *3 (N.D. Cal. Nov. 30, 2011) (severing Doe defendants because defendants did not satisfy test for permissive joinder); *MCGIP, LLC v. Does 1-149*, No. 11-cv-02331-LB, 2011 WL 4352110, at *3 (N.D. Cal. Sept. 16, 2011) (finding misjoinder where plaintiff “has failed to show that any of the 149 Doe defendants actually exchanged any piece of the seed file with one another”); *Hard Drive Prods., Inc. v. Does 1-188*, 809 F. Supp. 2d 1150, 1165 (N.D. Cal. 2011) (finding no concerted action where plaintiff conceded that defendants “may not have been physically present in the swarm on the exact same day and time”); *Boy Racer, Inc. v. Does 1-60*, No. 11-cv-01738-SI, 2011 WL 3652521, at *4 (N.D. Cal. Aug. 19, 2011) (severing defendants where plaintiff did “not plead facts showing that any particular defendant illegally shared plaintiff’s work with any other particular defendant”).

60. *See reFX Audio Software Inc. v. Does 1-85*, No. 1:13-cv-01790, 2014 WL 1293816, at *5 (N.D. Ill. Mar. 24, 2014) (granting dismissal for improper joinder) (“This application of ‘series’ of transactions or occurrences is at too high a level of generality, sweeping in Does who are multiple (maybe even hundreds or thousands of) levels away from Doe 1. All told, [plaintiff] is treating the 459 downloads/uploads that would be depicted in the diagram as *one* transaction or occurrence, or *one* series of transactions or occurrences.” (footnote omitted)).

61. *Id.* at *6 (“A plaintiff may only join as defendants those swarm members who have directly exchanged a part of a copyrighted work (identified by the same unique hash identifier) with one particular individual. In other words, a plaintiff can join with any one alleged infringer all the other alleged infringers who downloaded content directly from or uploaded content directly to that same infringer.”).

62. *See Interscope Records v. Does 1-25*, No. 6:04-cv-00197-Orl-22DAB, 2004 WL 6065737, at *1 (M.D. Fla. Apr. 1, 2004), *report and recommendation adopted*, 2004 WL 7078585 (M.D. Fla. Apr. 27, 2004) (recommending *sua sponte* that multiple defendants be severed because the only

number of other courts have taken a more permissive view, holding that, so long as there is at least some logical connection between each defendant, joinder is proper and that it is not necessary to prove that defendants acted in concert or specifically exchanged information.⁶³ Under this view, participation in a swarm is a “cooperative endeavor,” regardless of time or distance, because each member willfully assists in others’ infringement.⁶⁴

Even if participation in a swarm is sufficient to allow joinder, courts still have the power under the Federal Rules of Civil Procedure to disallow joinder for discretionary reasons.⁶⁵ Courts are more likely to deny joinder on discretionary grounds in the earliest stages of litigation, particularly when a defendant opposes joinder in conjunction with a motion to quash a subpoena. They are also more likely to do so if the number of defendants is so high as to seem unwieldy. Some judges have allowed joinder on the express understanding that these cases are never intended to go to trial and that joining defendants is an efficient way to handle the initial third-party discovery phase of the case.⁶⁶ Other judges have denied joinder on discretionary grounds in view of the practical problems that would result from aggregating

connection between them was the allegation that they used the same ISP and same file-sharing network to infringe); *see also* UMG Recordings, Inc. v. Does 1–51, No. A-04-CA-704-LY (W.D. Tex. Nov. 17, 2004) (dismissing all but the first named defendant in four separate file-sharing cases with a total of 254 defendants); Twentieth Century Fox Film Corp. v. Does 1–12, No. 04-cv-04862 WHA, 2004 WL 3241669, at *1 (N.D. Cal. Nov. 16, 2004) (staying discovery on all but the first named defendant in file-sharing case until proper joinder was demonstrated); BMG Music v. Does 1–203, No. Civ.A. 04-650, 2004 WL 953888, at *1 (E.D. Pa. Apr. 2, 2004) (severing the improper joinder of 203 defendants).

63. *See, e.g.*, Bicycle Peddler, LLC v. Does 1–12, 295 F.R.D. 274, 277 (N.D. Ill. 2013); Pac. Century Int’l v. Does 1–31, No. 11-cv-09064, 2012 WL 2129003, at *2 (N.D. Ill. June 12, 2012) (allowing joinder where “the anonymous defendants participated in the same ‘swarm’”); Patrick Collins, Inc. v. Does 1–39, No. 12-cv-00096-AW, 2012 WL 1432224, at *3 (D. Md. Apr. 24, 2012); Dig. Sin, Inc. v. Does 1–176, 279 F.R.D. 239, 244 (S.D.N.Y. 2012); First Time Videos, LLC v. Does 1–76, 276 F.R.D. 254, 257 (N.D. Ill. 2011).

64. TCYK, LLC v. Does 1–62, No. 13-cv-03842, 2013 WL 6671675, at *3 (N.D. Ill. Dec. 18, 2013) (“Every member of a swarm joins that cooperative endeavor knowing that, in addition to downloading the file, they will also facilitate the distribution of that identical file to all other members of the swarm.” (quoting TCYK, LLC v. Does 1–87, No. 13-cv-03845, 2013 WL 3465186, at *4 (N.D. Ill. July 10, 2013))).

65. Federal Rules of Civil Procedure 21 provides that the court may add or drop a party on motion or on its own “on just terms.” FED. R. CIV. P. 21. The court may also sever any claim against a party. *See, e.g.*, Patrick Collins, Inc. v. Does 1–38, 941 F. Supp. 2d 153, 156–57 (D. Mass. 2013) (finding that, although “joinder of the defendants may be permissible under Fed.R.Civ.P. 20(a), the interests of justice and judicial economy would best be served if all of the defendants except Doe Number 1 were severed and dropped from the case pursuant to Fed.R.Civ.P. 21”).

66. Call of the Wild Movie, LLC v. Does 1–1,062, 770 F. Supp. 2d 332, 344 (D.D.C. 2011) (“[P]laintiffs would face significant obstacles in their efforts to protect their copyrights from illegal file-sharers and this would only needlessly delay their cases. The plaintiffs would be forced to file 5,583 separate lawsuits, in which they would then move to issue separate subpoenas to ISPs for each defendant’s identifying information.”). Note this reasoning has most likely been reversed by the holding in AF Holdings, LLC v. Does 1–1058, 752 F.3d 990 (D.C. Cir. 2014).

large numbers of tenuously connected defendants into one case.⁶⁷ Still others have refused to allow joinder *en masse* because of its associations with “abusive litigation tactics.”⁶⁸ It is hard to predict in advance which courts will object to suits “solely to facilitate demand letters and coerce settlement, rather than ultimately serve process and litigate the claims”⁶⁹ and which will not.

4. Personal Jurisdiction

The defendant in a civil case can challenge personal jurisdiction at any time *before* filing the answer to the complaint. After that, the defense is waived.⁷⁰ ISPs usually notify individual defendants whose personal information is subject to third-party subpoena before complying with such a subpoena. This gives the defendant an opportunity to challenge the subpoena before her personal information is revealed and she is named as a defendant. In the context of copyright trolling cases, it particularly makes sense to challenge personal jurisdiction when contesting the plaintiff’s third-party subpoena, or in the alternative, in the context of a Rule 12(b)(2) motion to dismiss.⁷¹ However, lack of personal jurisdiction can also be raised as an affirmative defense in the answer to the complaint.⁷²

67. *Third Degree Films, Inc. v. Does 1–131*, 280 F.R.D. 493, 499 (D. Ariz. 2012) (“[T]he Court would effectively sever these cases for trial, and conduct over a hundred separate trials with different witnesses and evidence, eviscerating any ‘efficiency’ of joinder.”); *see also Malibu Media, LLC v. Doe*, No. 12-cv-06945, 2013 U.S. Dist. LEXIS 44053, at *4 (D.N.J. Mar. 28, 2013) (stating that its “ability to efficiently manage the pretrial phases of this action with the present number of defendants could be compromised by permitting joinder, causing a strain on judicial resources”); *Bubble Gum Prods., LLC v. Does 1–80*, No. 12-cv-20367, 2012 WL 2953309, at *5 (S.D. Fla. July 19, 2012) (stating that “the sheer number of [d]efendants . . . would cause an overly burdensome discovery process if [d]efendants remain joined”).

68. *Third Degree Films v. Does 1–47*, 286 F.R.D. 188, 189–91 (D. Mass. 2012) (“In recent months, this Court has grown increasingly troubled by ‘copyright trolling,’ specifically as it has evolved in the adult film industry Against this backdrop of mass lawsuits and potentially abusive litigation tactics, courts nationwide have become skeptical of allowing the adult film companies unfettered access to the judicial processes of subpoenas and early discovery.” (footnote omitted)); *see also Patrick Collins, Inc.*, 941 F. Supp. 2d at 156–57 (recommending that plaintiff’s claims against defendants other than the first named John Doe be dismissed without prejudice); *Kick Ass Pictures, Inc. v. Does 1–25*, No. 12-cv-10810-MLW, 2013 WL 1497229, at *1–2 (D. Mass. Jan. 4, 2013) (ordering plaintiff to show cause why its claims against defendants other than the first named John Doe defendant should not be dismissed without prejudice to being refiled as individual cases); *Pac. Century Int’l Ltd.*, 2011 WL 5117424, at *2 (denying motion for expedited discovery and severing defendants other than the first named John Doe defendant).

69. *Third Degree Films*, 286 F.R.D. at 190; *see also Hard Drive Prods., Inc. v. Does 1–90*, No. 11-cv-03825-HRL, 2012 WL 1094653, at *7 (N.D. Cal. Mar. 30, 2012) (“Plaintiff seeks to enlist the aid of the court to obtain information through the litigation discovery process so that it can pursue a non-judicial remedy that focuses on extracting ‘settlement’ payments from persons who may or may not be infringers. This the court is not willing to do.”).

70. FED. R. CIV. P. 12(h)(1)(B).

71. *Id.* R. 12(b)(2).

72. *Id.* R. 12(b).

As the Supreme Court explained in *International Shoe Co. v. Washington*, the Due Process Clause of the Constitution requires that for personal jurisdiction to attach, a defendant must “have certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”⁷³ John Doe defendants may not have minimum contacts in any jurisdiction other than the state in which they live. In the beginning of the copyright trolling era, plaintiffs paid very little regard to personal jurisdiction and would seek discovery against thousands of IP addresses in a single action without any investigation of the account holder’s likely location.⁷⁴

There is something of a Catch-22 here: If plaintiffs do not know the name and address of the IP address account holders, it is difficult for them to be confident about personal jurisdiction until they subpoena the John Doe’s ISP. The solution to this problem is to employ geolocation services that purport to match IP addresses with physical locations. The standard practice of copyright trolls at the moment is to simply assert that they have used such geolocation technology.⁷⁵ Some courts in the Ninth Circuit have refused to issue third-party subpoenas to ISPs until the plaintiff is able to provide sworn testimony regarding the use of this technology.⁷⁶ Courts in the Second Circuit have taken the same course.⁷⁷ Requiring more than a simple assertion that geolocation technology was used is appropriate in our view because geolocation technology is not always reliable. For example, some geolocation trackers will assign an IP address to a random geographic location within a country if it cannot identify a more specific location.⁷⁸ In addition, IP addresses are commonly spoofed or hacked using a variety of methods as

73. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Note that personal jurisdiction always exists in the defendant’s domicile. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011) (“For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s domicile . . .”).

74. *See, e.g., AF Holdings, LLC v. Does 1–1058*, 752 F.3d 990, 996 (D.C. Cir. 2014) (“[W]e think it quite obvious that AF Holdings could not possibly have had a good faith belief that it could successfully sue the overwhelming majority of the 1,058 John Doe defendants in this district.”).

75. An assertion that is terribly vague considering the various meanings that could be ascribed to geolocation and the varieties of geolocation technology available.

76. *See, e.g., Malibu Media, LLC v. John Doe*, No. 3:16-cv-442 (S.D. Cal. May 2, 2016), ECF No. 5; *Malibu Media, LLC v. Doe*, Docket No. 3:16-cv-00447 (S.D. Cal. April 26, 2016), ECF No. 5 (order denying motion for early discovery); *Malibu Media, LLC v. John Doe*, No. 3:15-cv-02931 (S.D. Cal. Mar. 17, 2016) (order denying plaintiff’s ex parte motion for leave to serve a third-party subpoena).

77. *See, e.g., Malibu Media, LLC v. John Doe*, No. 16-cv-01006-WHA, 2016 WL 3383830, at *4 (N.D. Cal. June 20, 2016) (staying compliance with third-party subpoena); *In re Malibu Media Adult Film Copyright Infringement Cases*, No. 2:15-cv-03504 (E.D.N.Y. Oct. 6, 2015) (staying court’s previous order pending resolution of defendant’s motion to quash).

78. Kashmir Hill, *How an Internet Mapping Glitch Turned a Random Kansas Farm into a Digital Hell*, SPLINTER (Apr. 10, 2016, 10:00 AM), <http://splinternews.com/how-an-internet-mapping-glitch-turned-a-random-kansas-f-1793856052>.

described below.⁷⁹ We address how to challenge a complaint based on lack of personal jurisdiction in Part IV.A.

5. Reliance on IP Addresses

Even if one accepted the results of the plaintiffs' black box process on faith, all that it shows is that some anonymous person on the Internet initiated a file transfer of part of a copyrighted work through the defendant's IP address. The plaintiff's inability to bridge the divide between an IP address and a specific person is a fundamental weakness that cannot be cured by a better black box.

IP addresses are not people. Indeed, IP addresses are often used by multiple people in ways that make it very difficult to be sure who is responsible for what activity. Routers are left unsecured or with factory defaults; passwords are shared with family members, roommates, guests and neighbors; unsecured guest accounts are created and then forgotten; passwords are cracked;⁸⁰ passwords are reused across different contexts (and once a password is guessed or compromised in one context it is worthless in all of them);⁸¹ and backdoors are opened up by malware⁸² and unsecure devices, including printers and even refrigerators.⁸³

In addition, there are a variety of ways that a hacker can hide their own IP address by using someone else's.⁸⁴ Regardless of whether IP addresses can be tracked reliably in other contexts, they may be particularly unreliable in the BitTorrent context, because the BitTorrent protocol was designed to allow high-bandwidth connections and thus "does not perform . . . source IP address validation."⁸⁵ In practice, this means that the header information

79. See Matthew Tanase, *IP Spoofing: An Introduction*, SYMANTEC, <https://www.symantec.com/connect/articles/ip-spoofing-introduction> (last updated Mar. 11, 2003).

80. Dan Goodin, *How I Cracked My Neighbor's WiFi Password Without Breaking a Sweat*, ARS TECHNICA (Aug. 28, 2012, 9:46 AM), <https://arstechnica.com/information-technology/2012/08/wireless-password-easily-cracked> (describing the ease with which one can crack WiFi passwords using widely available tools).

81. See Swati Khandelwal, *Hacker Selling over 1 Million Decrypted Gmail and Yahoo Passwords on Dark Web*, HACKER NEWS (Mar. 06, 2017), <http://thehackernews.com/2017/03/gmail-yahoo-password-hack.html> (noting that in 2016 billions of accounts were compromised and exposed on the Internet after hacks of LinkedIn, Tumblr, MySpace, Last.FM, Yahoo!, and VK.com).

82. Thomas Fox-Brewster, *Shockingly Simple Flaw Leaves 'Millions of Home Routers Open to Attack'*, FORBES (May 19, 2015, 10:26 AM), <https://www.forbes.com/sites/thomasbrewster/2015/05/19/home-routers-vulnerable-to-netusb-attack>.

83. Indeed, with the advent of technologies such as smart-home lighting, temperature control, and garage-door control, those seeking to exploit technology are faced with a growing number of opportunities for infiltration.

84. See generally Anirudh Ramachandran & Nick Feamster, *Understanding the Network-Level Behavior of Spammers*, SIGCOMM'06, Sept. 11–16, 2006 (discussing IP spoofing in the context of spam email).

85. Lucian Constantin, *BitTorrent Programs Can Be Abused to Supercharge Denial-of-Service Attacks*, PCWORLD (Aug. 17, 2015, 8:56 AM), <http://www.pcworld.com/article/2971892/security/bittorrent-programs-can-be-abused-to-amplify-distributed-denialofservice-attacks.html>.

(think of the envelope on a letter in the postal system) transmitted by a swarm participant can display someone else's IP address.⁸⁶ This problem is compounded by the fact that many sites coordinating BitTorrent swarms "inject random IP address[es] into their swarm list results."⁸⁷

The boilerplate complaints used by plaintiffs in John Doe file-sharing cases do not plead the identity of the defendant with specificity. Contrary to modern pleading standards, the plaintiffs rely on IP addresses and typically provide nothing to link the named defendant—the subscriber to the Internet account—to the act of infringement. Ironically, this problem becomes *more* acute once the plaintiff learns the identity of the IP address account holder. If we suspend our disbelief as to the plaintiff's black box process, it may seem reasonable to allege that an unknown person using an IP address, 91.220.139.137, for example,⁸⁸ infringed its copyright in a particular manner at a particular point in time.⁸⁹ However, when the plaintiff amends its complaint to replace "John Doe using IP address 91.220.139.137" with the name of whoever pays the bill on a particular Internet account, it is asserting, usually without any evidence, that the account holder and the John Doe are one and the same.

Courts have repeatedly found that the mere fact a defendant pays for the Internet account linked to an IP address does not prove that particular defendant was the infringer;⁹⁰ nor does it prove that she is somehow

86. See Expert Report of Bradley Witteman at 23–24, *Malibu Media v. John Doe*, No. 3:15-cv-04441-WHA, 2017 WL 2987894 (N.D. Cal. Feb. 2, 2017).

87. *Id.* at 24.

88. This is a fake, randomly-generated IP address. See *IP Address Generator—Test Data Generation*, FYICENTER, http://sqa.fyicenter.com/Online_Test_Tools/Test_IP_Address_Generator.php (last visited Oct. 28, 2017).

89. See *Malibu Media v. John Doe*, No. 1:13-cv-06312, 2016 WL 464045, at *7 n.5 (N.D. Ill. Feb. 8, 2016) (observing that "[e]vidence of a link between an IP address and Malibu's movies may be enough to justify discovery, but it is not enough to prove liability").

90. See, e.g., *PTG Nev. v. Chan*, No. 16-cv-01621, 2017 WL 168188, at *2 (N.D. Ill. Jan. 17, 2017) ("This Court agrees with those courts that have found that the plaintiff needs to allege more than just the registration of an IP address to an individual in order to proceed against that individual for copyright infringement."); *Cobbler Nev. v. Gonzales*, No. 3:15-cv-00866-SB, 2016 WL 3392368, at *3 (D. Or. June 8, 2016) (dismissing claim where plaintiff did not allege specific facts tying defendant to infringing conduct); *Dall. Buyers Club v. Doughty*, No. 3:15-cv-00176-AC, 2016 WL 1690090, at *11 (D. Or. Apr. 27, 2016) ("To show the defendant himself violated the plaintiff's exclusive rights and not someone else, the plaintiff must provide more than the mere fact that the IP address associated with the infringing activity is registered to the plaintiff."); *Elf-Man, LLC v. Cariveau*, No. 13-cv-00507-RSL, 2014 WL 202096, at *2 (W.D. Wash. Jan. 17, 2014) (dismissing direct infringement claim where plaintiff did not "provide specific facts tying the named defendant to the infringing conduct," and instead merely alleged that the defendant's IP address "was observed infringing Plaintiff's motion picture"); *AF Holdings LLC v. Rogers*, No. 12-cv-01519-BTM-BLM, 2013 WL 358292, at *2 (S.D. Cal. Jan. 29, 2013) ("[J]ust because an IP address is registered to an individual does not mean that he or she is guilty of infringement when that IP address is used to commit infringing activity."); *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 84 (E.D.N.Y. 2012) ("[I]t is no more likely that the subscriber

contributorily or vicariously liable for the infringement of others who use her IP address.⁹¹ However, district courts are hardly unanimous in this approach.⁹² In Part IV, we discuss how this potentially fatal weakness should be addressed as part of the defense strategy.

6. Reliance on Propensity Evidence

Even innocent defendants may not be angels. It is entirely possible that a defendant's hard drive will contain file-sharing applications including a BitTorrent client. However, there are perfectly legitimate uses of BitTorrent and similar software. Furthermore, any suggestion that, because the defendant has used a file-sharing application in the past, she is likely to have used one to infringe the plaintiff's work, is overreaching.⁹³ It would also be propensity evidence which is inadmissible in civil trials under the Federal Rules of Evidence.⁹⁴ Evidence that a defendant has installed a file-sharing application would be admissible to impeach or contradict defendant's other testimony, but it is not proof of infringement and cannot be considered as propensity evidence.⁹⁵

7. Using the Lack of Evidence as Evidence

At the end of the day, for reasons that will become clear in the next section, the plaintiffs' best hope of proving their accusations is to find evidence of infringement on the defendants' hard drives. However, in several cases where no such evidence was found plaintiffs tried to make lemonade out of lemons by arguing that, since the defendant must be guilty, the absence of evidence on his or her hard drive simply indicates that the defendant spoliated evidence by deleting the relevant files.⁹⁶

Certainly, a party who was on notice that litigation had commenced and had deleted evidence would be subject to a presumption that such spoliated

to an IP address carried out . . . the purported illegal downloading . . . than to say an individual who pays the telephone bill made a specific telephone call.").

91. See *Dall. Buyers Club*, 2016 WL 1690090, at *11 ("[Plaintiff]'s attempt to liken a shared Internet bill to a scenario in which an individual or entity knowingly received financial benefits in exchange for the availability of infringing activity would be an unwarranted extension of the Copyright Act.").

92. See *Countryman Nev., LLC v. Pitts*, No. 6:14-cv-00493-Orl-40GJK, 2014 WL 7178077, at *2 (M.D. Fla. Dec. 16, 2014) (collecting cases holding that bare factual allegations are sufficient to survive a Rule 12(b)(6) motion to dismiss).

93. See, e.g., *Dall. Buyers Club*, 2016 WL 1690090, at *4 (opinion and order denying in part and granting in part defendant's motion for summary judgment).

94. See FED. R. EVID. 404(a)(1).

95. See, e.g., *Dall. Buyers Club*, 2016 WL 1690090, at *4.

96. See, e.g., Brief in Opposition to Defendant's Motion for Summary Judgment at 2, *Malibu Media, LLC v. Doe*, No. 1:13-cv-06312 (N.D. Ill. Apr. 20, 2015).

evidence was helpful to the opposing party.⁹⁷ Defense attorneys need to strongly caution their clients against spoliation of evidence, and they should explain that a freshly-erased hard drive can be even harder to explain than a hard drive with evidence of infringement. However, spoliation is a serious accusation, and it requires proof beyond the plaintiff's belief that the evidence must have existed.⁹⁸ The plaintiff must show that files were deleted, not simply that the defendant knew how to delete files, and that this was done after the defendant was on notice of litigation,⁹⁹ and that the deleted files were relevant to the litigation.¹⁰⁰ Asserting spoliation in the absence of such evidence is merely a tactic used to harass the defendant and delay the inevitable.

B. INSIDE THE BLACK BOX

1. No Evidence of a Copy Being Made

The plaintiffs in the cases we have examined rely on records generated by a black box process. Those records strike us as entirely inadequate, and the limited available evidence suggests the process itself is unreliable, if not incredible. In this Section, we focus on why the records produced by the black box process are insufficient, even if one accepts their veracity. The heart of the problem is that the plaintiffs' technology providers do not appear to actually collect evidence that any individual John Doe has actually copied a substantial portion of any copyrighted work. Indeed, although the typical complaint alleges that the John Doe defendant joined a BitTorrent swarm, it

97. *Nation-wide Check Corp. v. Forest Hills Distribs., Inc.*, 692 F.2d 214, 218 (1st Cir. 1982) ("The evidentiary rationale [for the spoliation inference] is nothing more than the common sense observation that a party who has notice that [evidence] is relevant to litigation and who proceeds to destroy [evidence] is more likely to have been threatened by [that evidence] than is a party in the same position who does not destroy the [evidence].").

98. *See Dall. Buyers Club*, 2016 WL 1690090, at *7 ("[Plaintiff] does not indicate when it believes [Defendant] allegedly deleted the folder used to store and share downloaded files on his computer. Indeed, the only evidence in the record comes from [Defendant], who states he used BackBlaze and Apple software to restore his laptop in January 2015 and this may have resulted in a loss of data not subject to backup.").

99. *See id.* ("[T]here is no indication, and [Plaintiff] has provided none, that [Defendant] was on notice that litigation against him was likely to commence when he allegedly destroyed the evidence on his laptop that could be relevant to this litigation. While [Plaintiff] may argue the Comcast e-mails [Defendant] received in 2014 should have put him on notice of potential copyright-infringement litigation, the e-mails provide no indication litigation was imminent; in fact, they made no mention of litigation at all. Moreover, there is no indication in the record [Defendant] received an e-mail pertaining to the specific copyrighted work at issue in this case, *Dallas Buyers Club*. Thus, [Defendant] had no notice litigation was likely to be commenced; he therefore had no duty to protect potential evidence contained on his laptop.").

100. *See Malibu Media, LLC v. Doe*, 82 F. Supp. 3d 650, 658 (E.D. Pa. 2015) ("[Plaintiff] of course has no standing to complain of alleged infringement of works to which it does not hold the copyrights. Because the alleged spoliation is not relevant to [Plaintiff]'s claims in this case . . . we hold there has been no actual suppression of relevant evidence . . .").

falls short of alleging that the defendant actually made a copy of the work. This is not an oversight.

The black box process produces records of IP addresses that are supposedly matched to specific file exchanges.¹⁰¹ Understanding what these records do and do not show requires a short digression into Internet design and a brief discussion of some technical details about BitTorrent. As we have mentioned already, every time a file is seeded using BitTorrent, it is broken down into pieces. Each piece has a “hash value” identifier, as does the seed file itself. In computer science, a hash function is used to map information of indeterminate size to a string of letters and digits of fixed size. A “perfect” hash function will generate a unique hash for each unique input. For example, as shown in Figure 2 below, the 128-bit hash for the Gettysburg Address changes entirely if we change only the fourth last word from “perish” to “vanish.”

Figure 2: Text to Hash Value Illustration¹⁰²

<p>e80e65afd13c24f7fc525ce1285fab18</p> <p>Four score and seven years ago our fathers brought forth on this continent a new nation, conceived in liberty and dedicated to the proposition that all men are created equal. Now we are engaged in a great civil war, testing whether that nation or any nation so conceived and so dedicated can long endure. We are met on a great battlefield of that war. We have come to dedicate a portion of that field as a final resting-place for those who here gave their lives that that nation might live. It is altogether fitting and proper that we should do this. But in a large sense, we cannot dedicate, we cannot consecrate, we cannot hallow this ground. The brave men, living and dead who struggled here have consecrated it far above our poor power to add or detract. The world will little note nor long remember what we say here, but it can never forget what they did here. It is for us the living rather to be dedicated here to the unfinished work which they who fought here have thus far as nobly advanced. It is rather for us to be here dedicated to the great task remaining before us—that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain, that this nation under God shall have a new birth of freedom, and that government of the people, by the people, for the people shall not <u>perish</u> from the earth.</p>

101. Our understanding is that an agent of the plaintiff joins a BitTorrent swarm and sends out requests for pieces of the target file. The agent receives pieces, but any request made to the agent's software to send a piece of the file is rejected.

102. For this illustration, we used the text of the Gettysburg Address at, Abraham Lincoln, *The Gettysburg Address*, ESERVER <http://history.eserver.org/gettysburg-address.txt> (last visited Oct. 28, 2017), and an online hash value generator, *MD5 Hash Generator*, DAN'S TOOLS, <http://www.md5hashgenerator.com> (last visited Oct. 28, 2017).

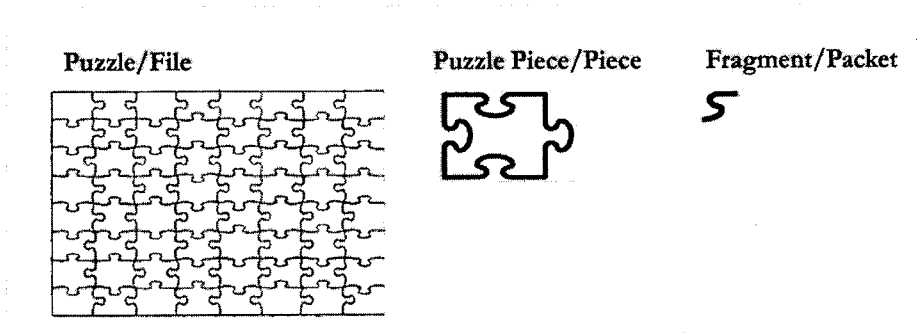
5a2ef5b59334310gcef936c1cf054d6d

Four score and seven years ago our fathers brought forth on this continent a new nation, conceived in liberty and dedicated to the proposition that all men are created equal. Now we are engaged in a great civil war, testing whether that nation or any nation so conceived and so dedicated can long endure. We are met on a great battlefield of that war. We have come to dedicate a portion of that field as a final resting-place for those who here gave their lives that that nation might live. It is altogether fitting and proper that we should do this. But in a large sense, we cannot dedicate, we cannot consecrate, we cannot hallow this ground. The brave men, living and dead who struggled here have consecrated it far above our poor power to add or detract. The world will little note nor long remember what we say here, but it can never forget what they did here. It is for us the living rather to be dedicated here to the unfinished work which they who fought here have thus far as nobly advanced. It is rather for us to be here dedicated to the great task remaining before us—that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain, that this nation under God shall have a new birth of freedom, and that government of the people, by the people, for the people shall not **vanish** from the earth.

Hash identifiers are used in BitTorrent to check errors. The hash identifier for a particular piece is compared to the hash identifier recorded in the torrent descriptor file for that piece every time it is downloaded. Courts sometimes say, “the hash identifier works like an electronic fingerprint,” but this is only true if that piece is downloaded in full. Information does not flow across the Internet like water flows from a hose. Instead, it is bundled into discrete “packets.” The fact that packets can be transmitted along different routes and received out of order makes the Internet flexible and resistant to central attack. Packets each contain instructions for delivery and assembly, i.e., where they should go and how they fit with other packets. Each packet is very small. A typical packet is around 1,500 bytes; a standard motion picture, even in the compressed formats popular on file-sharing networks, is around 900,000,000 bytes. This means that about 600,000 packets of data are required to download an average film using BitTorrent. Critically, the smallest piece of any file is still much larger than the standard packet, and thus even individual pieces are transmitted in several packets.

The plaintiffs’ black box process records some individual packets of data associated with a given IP address, but these packets do not add up to much by themselves. Combined with other packets, they may add up to a piece of the copyrighted work at issue, or they may not. So, if we think of a file as a completed jigsaw puzzle with a unique identifying number, then the pieces of that puzzle are like the pieces that BitTorrent breaks the file down into. However, as illustrated in Figure 3, the data transmitted in one single packet is like a fragment of a piece of a puzzle.

Figure 3: File, Piece and Packet Illustrated as Puzzle, Piece and Fragment



The plaintiffs' black box records individual packets along with a timestamp and a hash value. These records are kept in Packet Capture files ("PCAPs") and are stored in a file format that ensures they cannot be altered after the fact. Plaintiffs often describe in great detail the inviolability of the "WORM" drives they use to secure these recordings,¹⁰³ but this is largely a distraction from the gaps in their evidence. In the cases we have been able to examine, the plaintiff's technology provider does not record the entire work being transmitted to or from the John Doe; it does not even record an entire piece of the work—piece in the technical sense meaning a piece as defined by the initial seeder.¹⁰⁴ Instead, it simply records a few packets of data, which are just tiny fragments of pieces of the work.¹⁰⁵ One of the frequently used technology providers, Excipio, apparently records 16 kilobytes of data for each member of a swarm.

How small is 16 kilobytes?

In *Elf-Man, LLC v. Lamberson*, the 16,397 bytes of data transmitted between the investigator's machine and the IP address associated the defendant was, 0.0021961951% of the estimated 746,609,456 bytes that the file itself comprised.¹⁰⁶ In seconds, this amounts to 115 milliseconds of an 87 minute long film.¹⁰⁷ In literary terms this would amount to the words "Mr. and" from the first line of the 76,944 words in *Harry Potter and the Philosopher's*

103. WORM stands for Write Once Read Many and describes a data storage device in which information, once written, cannot be modified.

104. Cohen, *supra* note 47 ("[P]iece length is almost always a power of two, most commonly 2 [to the power of] 18 = 256 K (BitTorrent prior to version 3.2 uses 2 [to the power of] 20 = 1 M as default).").

105. See Expert Report of Bradley Wittman, *Malibu Media, LLC v. John Doe*, No. 3:15-cv-04441-WHA, 2017 WL 2987894, at *37 (N.D. Cal. Feb. 2, 2017), ECF No. 144-5; *Elf-man, LLC v. Lamberson*, No. 2:13-cv-00395-TOR, 2014 WL 11513119, at *4 (E.D. Wash. Oct. 31, 2014).

106. Declaration of J. Christopher Lynch in Support of Defendant's Motion for Attorney's Fees, *Elf-man, LLC v. Lamberson*, No. 13-CV-0395-TOR, (E.D. Wash. August 11, 2014), ECF No. 95.

107. *Id.*

Stone.¹⁰⁸ There is no technical reason that would prevent the technology provider from recording more data to show that an entire work was transmitted. The reason for this limited gathering of evidence appears to be related to the cost of storage.¹⁰⁹

One problem here is that although anyone can verify the hash value of a piece—and thus determine that piece X₁ is part of file X—no one can verify the hash value of less than the complete piece. Anything less than the original piece would by definition have a different hash value. No doubt, there are other ways to compare the content of less-than-a-piece to the original file, but it is far from clear that the plaintiff's contention that their technology provider observed the hash value of the fragment exchanged with defendant proves anything. Imagine if the only evidence of a traffic violation was a declaration that some custom-made software had recorded a particular license plate going through a red light. Naturally, the defendant would want a chance to examine that software, have it tested, find out who used it, and validate how it had been used. No defendant would simply accept a spreadsheet printout that showed only a street address and her license plate number as incontrovertible evidence of her guilt. This is why government red light cameras provide photos and not just lists of license plates.¹¹⁰

This raises a fundamental problem. The plaintiff's PCAP evidence fails to prove that the defendant reproduced a substantial portion of any copyrighted work. The spreadsheet of hash values and timestamps plaintiffs usually provide with their complaints only purport to show a one second connection between the John Doe's IP address and the plaintiff's black box data collector—a snapshot of a download that supposedly occurred. Plaintiffs could easily do a better job here. The pieces that a peer has obtained are specified in a "bitfield" and this information is transferred at the beginning of the connection between any two peers.¹¹¹ Thus, the bitfield should be at the beginning of the packet capture—in other words, it is in the PCAP files already if anyone would care to look. It should be easy for the plaintiff to show that a particular swarm member had downloaded anywhere from 0% to 100% of the file in question. Plaintiffs must have this data, but they do not include it in their pleadings or in any of their usual exhibits. It may be that this is because plaintiffs do not wish to confine their accusations to IP addresses that have in fact been associated with downloading substantial portions of their works.

108. *Id.*

109. See, e.g., Declaration of Plaintiff's Expert at 4–5, *Malibu Media LLC v. John Doe*, 1:13-cv-06312, (N.D. Ill. Sept. 4, 2013) (describing the use of expensive WORM drives to store investigation data).

110. See, e.g., *City Yellow Lights Too Short, Judge Says Before Tossing Red Light Tickets*, EXPIRED METER (Aug. 12, 2014), <http://theexpiredmeter.com/2014/08/city-yellow-lights-too-short-judge-says-before-tossing-red-light-tickets> (illustrating notice of violation).

111. Cohen, *supra* note 47.

Several courts have rejected this so-called “snapshot theory” of pleading in BitTorrent cases because a snapshot does not prove what happened next. If plaintiffs want to allege a copy was made, they should collect evidence that a copy was made, not simply that a small fraction of a copy was made. Moreover, copying a small fraction does not amount to copyright infringement in these circumstances because a small fraction of a piece of the copyrighted work is not sufficiently “substantially similar” to the original to prove infringement.¹¹²

Furthermore, a digital file that is too incomplete to play is not technically a “copy” of the work at all under the Copyright Act. Section 106(1) of the Copyright Act provides that “the owner of copyright under this title has the exclusive right[] . . . to reproduce the copyrighted work *in copies*.”¹¹³ Section 101 defines copies in the following terms:

“Copies” are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and *from which the work can be perceived, reproduced, or otherwise communicated*, either directly or with the aid of a machine or device. The term “copies” includes the material object, other than a phonorecord, in which the work is first fixed.¹¹⁴

In ordinary circumstances, a person who reproduced one chapter of a copyrighted novel would seem to have reproduced a substantial part of the work in a copy. Assuming copying in fact has been established, the test for whether the threshold for infringement has been met by an act of partial reproduction is usually expressed in terms of whether the ordinary observer would regard the two works as substantially similar or whether the amount reproduced is quantitatively and qualitatively significant.¹¹⁵ Prior to the substantial completion of a BitTorrent download, a file is simply “an

112. See, e.g., *Ingenuity 13 LLC v. Doe*, No. 2:12-cv-08333-ODW-JC, 2013 WL 765102, at *3 (C.D. Cal. Feb. 7, 2013) (“This snapshot allegedly shows that the Defendants were downloading the copyrighted work—at least at that moment in time. But downloading a large file like a video takes time In fact, it may take so long that the user may have terminated the download. The user may have also terminated the download for other reasons. To allege copyright infringement based on an IP snapshot is akin to alleging theft based on a single surveillance camera shot: a photo of a child reaching for candy from a display does not automatically mean he stole it. No Court would allow a lawsuit to be filed based on that amount of evidence.”); see also *Malibu Media, LLC v. John Doe*, 82 F. Supp. 3d 650, 658 (E.D. Pa. 2015) (“As to the snippet of ‘Good Night Kiss,’ . . . [i]t is not a copy of the work itself. Our Court of Appeals’s ‘substantial similarity’ test obliges us to determine whether Doe copied from the plaintiff’s work and whether the copying, if proven, constitutes an improper appropriation. Here we determine as a matter of law that there was no improper appropriation because no reasonable jury, properly instructed, could find that the data snippet bears a ‘substantial similarity’ to Malibu Media’s copyrighted work.”).

113. Copyright Act, 17 U.S.C. § 106(1) (2012) (emphasis added).

114. *Id.* § 101 (emphasis added).

115. See, e.g., *Hamil Am., Inc. v. GFI*, 193 F.3d 92, 100 (2d Cir. 1999) (“In most cases, the test for substantial similarity is the ‘ordinary observer test,’ which queries whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work.”).

encrypted, unusable chunk of zeroes and ones”—it is not a “copy” at all within the legal definition.¹¹⁶ It is not a copy because it is not a material object in “which the work *can be perceived, reproduced, or otherwise communicated*, either directly or with the aid of a machine or device.”¹¹⁷ The argument that a few fragments of a single piece of a work could ever meet the substantial similarity threshold seems tenuous in any context. However, in the context of partial digital files, it should be a nonstarter. We say should be because we are not aware of anyone that has made this argument before, but to us it is compelling.

2. The Black Box Has Credibility Problems

The reason we describe the plaintiffs’ system for identifying supposed instances of infringement and alleged infringers as a black box is because the corporate entities, people, software, and processes relied upon to prove infringement are somewhat shadowy and opaque. All of the key plaintiffs in the John Doe file-sharing cases from 2015 and 2016¹¹⁸ rely, at least in part, on investigation and technical assistance based in Germany.¹¹⁹ The corporate identity of the German company or companies providing this assistance is a matter of some speculation, but there are overlaps and coincidences to suggest that these companies—Guardaley, IPP International, Excipio GmbH, and MaverickEye UG—are all essentially the same entity or are at least controlled by the same people.¹²⁰

We cannot stress enough how strange it is that the plaintiffs rely on overseas technical advisers to collect their evidence. BitTorrent is somewhat technical, but the skills required are hardly unique to Germany. Connecting to peers, downloading data, performing packet captures, and storing and parsing the PCAP files are all well-understood tasks. Furthermore, most of these tasks can be performed using open source versions of the BitTorrent client and other off-the-shelf products.

Why Germany is one question; another is: Who exactly are these technical advisors? The corporations and people that comprise the black box (or boxes) form such a labyrinth that the only way to make sense of it is to pull on a thread and see where it leads. We begin with the Crystal Bay Corp. In at least 485 cases, plaintiffs have relied upon evidence gathered by Crystal

116. *Ingenuity 13 LLC*, 2013 WL 765102, at *3.

117. 17 U.S.C. § 101 (emphasis added).

118. See *infra* Appendix A (listing plaintiffs filing 10 or more John Doe suits in 2015 and 2016).

119. It might seem that Killer Joe Nevada, LLC is the exception to this rule. Killer Joe Nevada, LLC has obtained early discovery without providing any underlying declaration in several cases. See, e.g., Plaintiff’s Ex Parte Motion to Expedite Discovery, *Killer Joe Nev., LLC v. Doe*, No. 3:15-cv-01772 (D. Or. Sept. 18, 2015), ECF No. 3. In other cases, Killer Joe Nevada relied on “Darren M. Griffin” of Crystal Bay Corp.

120. See *infra* notes 121–32 and accompanying text.

Bay Corp. and its “software consultant,” Darren M. Griffin.¹²¹ However, Darren M. Griffin does not appear to exist, and Crystal Bay Corp. seems to be merely a “shelf corporation.”¹²²

Another figure associated with Crystal Bay Corp. is Daniel Macek.¹²³ Daniel Macek is also apparently a consultant to MaverickEye UG, and his declarations in that capacity are almost identical to his ones on behalf of Crystal Bay Corp.¹²⁴ Yet he also works at IPP.¹²⁵ We know that Mr. Macek exists, because he has been cross-examined in an Australian court, and during the course of that cross-examination, Macek admitted to not preparing his own affidavit.¹²⁶ Macek’s declarations are quite similar to those of Daniel Arheidt, who is also a consultant to MaverickEye UG¹²⁷ and, at other times, IPP.¹²⁸ At other times, Arheidt is the Director of Data Services for GuardaLey, International.¹²⁹ More curious still, when a defense attorney in *Elf-man, LLC v. Lamberson* telephoned the number for Mr. Macek (who declared himself to be a consultant for Crystal Bay Corp.) provided in his Initial Disclosures, the

121. See, e.g., Declaration of Darren M Griffin in Support of Plaintiff’s Motion for Leave to Take Discovery Prior to Rule 26(f) Conference at 1, *Zambezia Film (Pty.) Ltd. v. Does* 1–37, No. 1:13-cv-00392-WYD-MEH (D. Colo. Feb. 13, 2013). We have included a list of 485 such cases, sorted by district, in Appendix F. See *infra* Appendix F.

122. See Declaration of J. Christopher Lynch in Support of Defendant’s Motion for Rule 11 Sanctions at 10, *ElfMan, LLC v. Lamberson*, No. 2:13-cv-00395 (E.D. Wash. July 21, 2014), ECF No. 81. Over 190 Declarations of a “Darren M. Griffin” have been filed in multiple Districts on behalf of multiple BitTorrent plaintiffs. See *infra* Appendix F.

123. See Declaration of Daniel Macek in Support of Plaintiff, Countryman Nevada, LLC’s, Motion for Leave to Serve Non-Party Subpoena Prior to Rule 26(f) Conference at 1, *Countryman Nev., LLC v. Doe* 38, No. 8:14-cv-00761-JDW-TBM (M.D. Fla. Apr. 8, 2014), ECF No. 6-2; Declaration of Daniel Macek in Support of Plaintiff’s Motion for Leave to Take Discovery Prior to Rule 26(f) Conference at 1, *Dall. Buyers Club, LLC v. Does* 1–39, No. 1:14-cv-02153 (N.D. Ill. Apr. 7, 2014).

124. Declaration of Daniel Macek in Support of Plaintiff’s Motion for Leave to Take Discovery Prior to Rule 26(f) Conference, *Automata Prods., Inc. v. Does* 1–19, No. 1:15-cv-06423 (N.D. Ill. Aug. 6, 2015); Declaration of Daniel Macek in Support of Plaintiff’s Motion for Leave to Take Discovery Prior to Rule 26(f) Conference, *Clear Skies Nev., LLC, v. Does* 1–30, No. 1:15-cv-05736 (N.D. Ill. July 16, 2015).

125. Declaration of Tobias Fieser at 1, *Malibu Media, LLC v. Bui*, 1:13-cv-00162-RJJ (W.D. Mich. May 14, 2014).

126. Ben Grubb, *Pirate Hunter Daniel Macek’s Evidence, Integrity Under Fire in Australian Landmark Web Piracy Case*, SYDNEY MORNING HERALD (Feb. 18, 2015), <http://www.smh.com.au/digital-life/digital-life-news/pirate-hunter-daniel-maceks-evidence-integrity-under-fire-in-australian-landmark-web-piracy-case-20150217-13hlnd.html>.

127. See, e.g., Declaration of Daniel Arheidt in Support of Plaintiff’s Motion for Leave to Take Discovery Prior to Rule 26(f) Conference at 1, *Criminal Prods., Inc. v. Does* 1–22, No. 2:16-cv-01968-RFB-CWH (D. Nev. Aug. 20, 2016).

128. See, e.g., Affidavit of Daniel Arheidt, *Malibu Media, LLC v. Doe*, No. 1:14-cv-00223 (D. Md. Jan. 27, 2014).

129. See, e.g., Declaration of Daniel Arheidt in Support of Plaintiff’s Motion for Leave to Take Discovery Prior to Rule 26(f) Conference, *Nu Image, Inc. v. Does* 1–6,500, No. 1:11-cv-00301-RLW (D.D.C. Feb. 17, 2011).

phone was answered “GuardaLey.”¹³⁰ Guardaley, LLC is controlled by Ben Perino and Patrick Achache and a recent lawsuit by James S. Davis, a former plaintiff’s lawyer in several BitTorrent cases, suggests that the various other technical services providers are merely fronts for Guardaley. In July 2017, Davis filed suit against another plaintiff’s lawyer and several copyright trolls alleging that those parties deceived him into participating in a copyright litigation campaign by withholding “numerous material facts . . . which would have cast doubt on the value and ethical propriety of” that campaign.¹³¹ The *Davis* lawsuit refers to “Guardaley and its front companies.”¹³²

What does this rather unedifying game of six degrees of separation show? Without further discovery, it is difficult to say, but given the corporate shell games and game of musical chairs played by the various declarants, defendants surely will have questions about the credibility of the black box. These credibility questions are compounded by the admission that at least one technology provider was working on a contingency fee basis in Malibu Media cases.¹³³ As the First Circuit explained in *Crowe v. Bolduc*, “The majority rule in this country is that an expert witness may not collect compensation which by agreement was contingent on the outcome of a controversy. That rule was adopted precisely to avoid even potential bias.”¹³⁴ In some states this amounts to an ethical violation by the lawyer who procured the testimony. Surprisingly, nothing in the Federal Rules of Evidence expressly bars testimony from contingent fee experts, but such evidence may be excluded in some jurisdictions. At the very least, the contingency fee arrangement is grounds upon which the fact finder may discount the witness’s credibility.¹³⁵

130. Declaration of J. Christopher Lynch in Support of Defendant’s Motion for Attorney’s Fees, *supra* note 106, at 20.

131. Complaint at 5, *Davis v. Crowell*, No. 37-2017-00024909-CU-BT-CTL (Cal. Super. Ct. July 03, 2017).

132. *Id.* at 4.

133. The plaintiff in *Malibu Media, LLC v. Doe*, No. 1:13-cv-06312 (N.D. Ill. 2016) responded to an interrogatory on this issue as follows:

IPP International UG, is a fact witness who will testify that its technology detected that a person using Defendant’s IP address was downloading and distributing Plaintiff’s copyrighted works. Pursuant to an oral contingency fee agreement, IPP International UG is entitled to a small portion of the proceeds from the resolution of this case in consideration for the services it provides.

Motion to Bar Testimony of IPP International UG and for an Order Requiring Malibu to Show Cause Why It and Its Counsel Should Not Be Sanctioned Pursuant to § 1927 & This Court’s Inherent Authority at 6, *Malibu Media, LLC v. John Doe*, No. 1:13-cv-06312 (N.D. Ill. Sept. 4, 2013), ECF No. 27.

134. *Crowe v. Bolduc*, 334 F.3d 124, 132 (1st Cir. 2003); see also 33A FEDERAL PROCEDURE, LAWYERS EDITION § 80:369 (2017) (“In order to avoid even the potential for bias, a contract to give evidence for a compensation contingent upon the outcome of the case is illegal.”).

135. *In re Joy Recovery Tech. Corp.*, 286 B.R. 54, 69 (Bankr. N.D. Ill. 2002).

3. Defendants Never Get to See Inside the Black Box

More importantly, by relying on a black box (or even multiple black boxes) located in Germany, whose activities are distributed between various corporate entities, employees, and “consultants,” the principals behind the BitTorrent monetization litigation have made it very difficult to scrutinize the inner workings of the black box.¹³⁶ For example, in *Malibu Media, LLC v. Doe*, the plaintiff relied on evidence from two supposedly distinct companies, but relied on a witness who was only passingly familiar with one.¹³⁷ That witness provided no real insight into the black box process, as he had not actually seen the PCAP files that supposedly evidenced infringement,¹³⁸ and he had no relevant expertise with the software used to create them.¹³⁹

By setting up the black box (or black boxes) overseas, the plaintiffs make it very hard to depose witnesses or to investigate their technology. By dividing the functions of the black box into layers, the plaintiffs add another layer of obfuscation: They claim that the workings of the software are a trade secret and thus undiscoverable. Essentially, the plaintiffs seek to rely on the results of a black box process without providing any details of how the process works or, indeed, if it works at all.¹⁴⁰ We do not suggest that the plaintiffs never identify actual infringers, but we know that they often identify targets who can

136. To see just how murky the black box is, take for example Michael Patzer. Patzer has been a key witness for Malibu Media, and he apparently wrote the software that various plaintiffs rely upon. In a *Malibu Media, LLC v. Doe* case filed in Maryland, Patzer identifies himself as an employee of IPP Limited. However, when Malibu’s counsel suggested that, “you don’t actually work for IPP, Limited. You said you work for a firm that provides these services to IPP, Limited, correct?” Patzer agreed. Nonetheless, he continued to refer to IPP as “we” throughout his deposition. See ISP Subscriber’s Reply in Support of Motion for an Order to Show Cause as to Why All Evidence and Data from Tobias Fieser and His Company IPP Should Not Be Precluded and These Cases Dismissed at 14, *Malibu Media, LLC v. John Doe*, No. 1:14-cv-00223-MJG (D. Md. Jan. 27, 2014), ECF No. 27. More confusing still, in *Malibu Media, LLC v. John Doe*, No. 15-cv-3504 (JFB) (SIL), 2016 BL 273204, at *3 (E.D.N.Y. Aug. 23, 2016), Michael Patzer is described as “Senior Assistant Architect for the German copyright infringement detection firm Excipio,” but in *Malibu Media, LLC v. John Doe*, No. 13-cv-6312, 2016 BL 34458, at *3 (N.D. Ill. Feb. 8, 2016), he is “Excipio’s independent contractor, Mr. Michael Patzer.”

137. See Response to: Plaintiff’s Notice Advising that Record Expert Evidence from Patrick Paige Explains PCAP Computer Files at 2, *Malibu Media, LLC v. Doe*, No. 1:13-cv-06312 (N.D. Ill. February 8, 2016), ECF No. 174 (“Mr. Paige asserts he inspected IPP’s software, *not* the Excipio software used in this case.”).

138. See *id.* (“Moreover, Paige cannot provide sufficient foundation for any PCAPs involved in this case. Otherwise editable PCAPs are kept on WORM drives that Malibu does not have and will not bring to trial. ECF Doc 100-2, p. 2 (WORM drives are not in Malibu’s control and none will be presented as evidence at trial). Nothing indicates Paige has seen the PCAPs involved in this case.”).

139. See *id.* (“Finally, nothing in Patrick Paige’s Curriculum Vitae suggests or intimates that he is an expert in networking protocols governing the transfer of data on the Internet. Indeed, the opposite is true.”).

140. Patzer was deposed for the first time on October 13, 2016. See Exhibit 24 Transcript of the Deposition of Michael Patzer on October 13, 2016 at 1, *Malibu Media, LLC v. Doe*, No. 3:15-cv-04441-WHA (N.D. Cal. Feb. 2, 2017), ECF No. 144-24.

prove they were out of town or overseas at the time of the supposed infringement and others who are supposed to have downloaded movies in languages they do not speak.¹⁴¹ Once a process has been shown to be prone to error, it seems reasonable to question how common those errors might be, what caused them, etc. Answering these questions means getting inside the black box. The plaintiff's "expert" reports insisting that the technology provider's processes are foolproof must be treated with some skepticism if they fail to explain why infallible systems result in false positives from time to time.

Plaintiffs have also sought to avoid scrutiny by presenting expert witnesses who set up and monitor the black box system as merely fact or lay witnesses.¹⁴² The argument is that anybody could testify to the same facts after merely downloading and running the monitoring software and reviewing the resulting list of alleged instances of infringement. This keeps the experts from being deposed in a normal fashion and ensures that they can provide their testimony from the comfort of their home countries.¹⁴³ This strategy failed spectacularly in *Malibu Media v. John Doe*.¹⁴⁴ In that case, forensic examination of the defendant's electronic devices produced no evidence of infringement.¹⁴⁵ Nevertheless, the plaintiff argued that technical evidence gathered by its forensic investigators in Germany demonstrated that the defendant had copied and distributed its works. The plaintiff relied on declarations by Tobias Fieser and Michael Patzer for that evidence but failed to disclose those witnesses as experts under the Federal Rules of Civil Procedure.¹⁴⁶ In her memorandum opinion and order granting the defendant's motion for summary judgment, the Magistrate Judge noted that, when challenged to identify exactly which pieces of the plaintiff's copyrighted work came from the defendant, Malibu's counsel said:

It is *very technical*, your Honor. And perhaps the remedy for the issue is for them to have an expert look at the PCAP[']s, the SQL files in the spreadsheets that we have given them, because that's all we

141. Notice of Appeal by Defendant Leo Pelizzo at 4, *Malibu Media LLC v. Pelizzo*, No. 14-11795, 604 Fed. App'x 879 (11th Cir. 2015) (defendant tendered evidence that he was out of the country at the time of alleged infringement).

142. See, e.g., *Malibu Media LLC v. John Doe*, No. 1:13-cv-06312, 2016 WL 464045, at *4 (N.D. Ill. Feb. 8, 2016) ("[The expert] also states that he has testified 'as a fact witness' in a trial of consolidated cases for Malibu, and that he is not paid by Malibu for his testimony.").

143. There are significant obstacles to deposing a witness in Germany under the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 1970. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231.

144. *Malibu Media LLC*, 2016 WL 464045.

145. *Id.* at *5.

146. Federal Rules of Civil Procedure 26(a)(2) requires a formal disclosure of any witness who is to give testimony based on scientific, technical, or otherwise specialized knowledge. FED. R. CIV. P. 26(a)(2).

have . . . They are trying to get us to interpret that data for them when, first of all, I can't do it, my client can't do it.¹⁴⁷

In another exchange, Malibu's counsel also admitted, "It is *very complicated*. And I'm not going to stand here and say that I understand the technical aspects of it because it is way over my head."¹⁴⁸ The court had little choice but to conclude that the proffered testimony was that of a "witness who is qualified as an expert by knowledge, skill experience, training, or education" under Federal Rules of Evidence 702, as opposed to lay witness opinion under Federal Rules of Evidence 701. The testimony of both witnesses required familiarity with specialized software and with reading and analyzing data in the form of PCAPs. As underscored by Malibu's own counsel's protests quoted above, this is something no lay witness would comprehend, let alone be able to perform. As far as we know, this software is not documented, and has not been authenticated.¹⁴⁹ What is more, any evidence produced by the black box software is vulnerable to an attack under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, which requires the trial judge to act as a gatekeeper against evidence that is not reliable.¹⁵⁰ Under *Daubert*, a court should consider (1) whether a theory or technique "can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review and publication"; (3) "the known or potential rate of error"; and (4) whether it is generally accepted in the scientific community.¹⁵¹ The black box software is none of these things, because it has never been seen or tested by anyone not connected to a plaintiff in file-sharing litigation.

C. WHY DO SUCH WEAK CASES PERSIST?

In light of all of the weaknesses in the plaintiff's case addressed thus far, the obvious question is why do so many people settle? There are many possible answers to this question. Some defendants may settle because they know they were in fact responsible for the infringement and they reason it is better to pay now than to pay more later. The threat of statutory damages up to \$150,000 per work infringed plus attorneys' fees is obviously also a great motivator for settlement. In the Malibu Media cases, some defendants may also wish to avoid being named in a lawsuit involving pornography. For reasons that are well documented, many people targeted by copyright trolls will not seek legal assistance and will be overawed by the evidence that

147. *Malibu Media LLC*, 2016 WL 464045, at *9 (emphasis added).

148. *Id.* at *10 (emphasis added).

149. See Exhibit 5 Expert Report of Bradley Witteman, December 15, 2016, *Malibu Media, LLC v. Doe*, No. 3:15-cv-04441-WHA, 2016 WL 3383758 (N.D. Cal. June 20, 2016), ECF No. 144-5.

150. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993).

151. *Id.* at 593-94.

supposedly exists against them.¹⁵² Furthermore, defendants may seek legal advice from attorneys who do not know enough about copyright litigation to realize how weak the plaintiff's case is or who rightly conclude on a cost-benefit analysis that it would be cheaper to settle than to properly investigate the strength of the claim. Finally, and most dishearteningly, some defense lawyers prefer to settle every case, even when presented with concrete proof that the defendant could not have infringed.¹⁵³

As stated in the Introduction, our objective in this Article is to make it easier for lawyers without substantial experience in copyright law or a deep understanding of the Internet to defend their clients against copyright trolls. In our view, lawyers should not charge large fees to settle weak allegations but instead should either charge low fees for quick settlements for actual infringers or reasonable fees to defend their non-infringing clients. In the next Part, we map out a strategy for fighting copyright trolls that takes into account each of the weaknesses addressed thus far.

IV. STRATEGIES FOR DEFENDING AGAINST COPYRIGHT TROLLS

In this Part, we map out a fairly comprehensive strategy for defending against copyright trolls. We have compartmentalized the strategy into four distinct stages: Stage I begins with the copyright owner's complaint and addresses motions to quash and motions to proceed anonymously; Stage II begins when the plaintiff amends its generic complaint to name an individual defendant; Stage III spans from discovery to summary judgment; and finally, Stage IV encompasses the trial.

Compartmentalizing the various stages of litigation in this fashion should give lawyers and their clients some idea of what to expect. We also recognize that clients vary in terms of their social capital, financial resources, attitude toward risk, culpability, and sense of moral outrage. We have tried to anticipate some of this variation in the strategies we outline below, but we recognize that generic responses to generic accusations of copyright infringement can only go so far.

A. STAGE I: COMPLAINT, SUBPOENA, THREAT LETTER, AND RESPONSE

The first stage begins with the plaintiff's initial John Doe complaint, spans third-party discovery and the plaintiff's threat letter, and concludes with a letter on behalf of the defendant. Many cases will crumble at the end of Stage I, and lawyers should consider offering representation up to the end of Stage I for a low fixed fee (in the hundreds, not thousands). In most cases, all

152. See Latonia Haney Keith, *Poverty, the Great Unequalizer: Improving the Delivery System for Civil Legal Aid*, 66 CATH. U. L. REV. 55, 66 (2016).

153. In a conversation with one of the authors, one defense attorney, when presented with exactly this fact pattern, said, "I could get you a pretty good settlement, maybe \$1,500 or so."

that the defense lawyer needs to do at Stage I is to interview the client and respond to a boilerplate complaint with a general denial.¹⁵⁴

1. The Complaint

Stage I begins when the plaintiff files a complaint alleging that one or more John Does infringed its copyrights by engaging in online file sharing. The complaints are boilerplate and contain almost no specifics other than a list of copyrighted works and IP addresses. At this stage, the complaint is primarily a pretext to obtain third-party discovery orders to compel various ISP's to disgorge the account details of their subscribers.

2. Subpoena, Motions to Quash and to Sever

Typically, an ISP will notify its customers before responding to a subpoena. This gives the defendant a chance to challenge the subpoena before her information is revealed, i.e., before the issue becomes moot. Defense attorneys, or even pro se defendants, may wish to consider a motion to quash the plaintiff's subpoena, pursuant to Federal Rule of Civil Procedure 45(c)(3)(A).¹⁵⁵ Ordinarily, "[a] party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order";¹⁵⁶ however, a court may allow early discovery for good cause.¹⁵⁷ Countering the plaintiff's arguments for good cause is key to quashing its subpoena.

One argument against early discovery is that, even when the plaintiff obtains the account holder's personal information, it will not be any closer to making a prima facie case connecting a specific defendant to the alleged infringement. Courts take different views as to whether the inference that the account holder is the infringer is strong enough to sustain a third-party subpoena.¹⁵⁸ As one court noted: "[Plaintiff] has not established a violation

154. See *infra* Appendix B.

155. See FED. R. CIV. P. 45(c)(3)(A).

156. *Id.* R. 26(d)(1).

157. See *Arista Records LLC v. Doe 3*, 604 F.3d 110, 119 (2d Cir. 2010) (holding that five factors to consider in a determination of whether good cause exists are "(1) [the] concrete[ness] of the plaintiff's] showing of a prima facie claim of actionable harm, . . . (2) [the] specificity of the discovery request, . . . (3) the absence of alternative means to obtain the subpoenaed information, . . . (4) [the] need for the subpoenaed information to advance the claim, . . . and (5) the [objecting] party's expectation of privacy" (quoting *Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 564-65 (S.D.N.Y. 2004))).

158. For an example, see *Malibu Media, LLC v. John Doe*, No. 1:14-cv-20213-UU, 2014 U.S. Dist. LEXIS 185324, at *4-5 (S.D. Fla. Mar. 4, 2014) (inference that account holder is infringer or is able to identify infringer is not sufficient to grant subpoena); the opposite inference is made every time a judge grants a subpoena based on an IP address.

by the individual *to whom the relevant IP address is registered.*"¹⁵⁹ In our view, a court should not allow early discovery to reveal the personal information of the account holder linked to an IP address unless and until the plaintiff presents credible evidence regarding the methodology used to associate the IP address with a particular act of infringement. Plaintiffs in several cases have relied on experts who had no personal knowledge of the facts about which they testified and have instead simply asserted that the methods used by the plaintiffs were the same as those used by law enforcement and that, in other contexts, the account holder is always the infringer.¹⁶⁰ Even just as a basis of discovery, this level of proof is utterly inadequate.¹⁶¹

Even if a court was inclined to allow discovery to determine the account holder behind an IP address in some circumstances, it may refuse to do so because of other weaknesses in the plaintiff's initial case. An essential part of the plaintiff's good cause argument is that it can establish a *prima facie* claim for copyright infringement. The problem here is that, as discussed in Part II, plaintiffs do not appear to collect enough evidence to establish infringement. As one court noted in this context, "[Plaintiff] conspicuously fails to present any evidence that John Doe either uploaded, downloaded, or even possessed a complete copyrighted video file."¹⁶² Another court candidly found that "individual BitTorrent file pieces are worthless . . . [and] that [plaintiff]'s case is weak if all it can prove is that the Doe Defendants transmitted only part of all the BitTorrent pieces of the copyrighted work."¹⁶³

In multiple-defendant cases, a defendant can challenge the plaintiff's subpoena on the basis of improper joinder. This can be done either as a motion to quash or as a motion to sever.¹⁶⁴ Motions to sever the defendant from a large number of other defendants are typically granted,¹⁶⁵ while attacks on joinder for smaller numbers of defendants may or may not be successful.¹⁶⁶

159. See, e.g., Order and Opinion at 9, *Malibu Media, LLC v. John Doe*, No. 1:15-cv-04369-AKH, 2015 WL 4092417, at *4 (S.D.N.Y. July 6, 2015); *VPR Internationale v. Does 1-1017*, No. 11-cv-02068, 2011 WL 8179128, at *1-2 (C.D. Ill. Apr. 29, 2011) ("IP subscribers are not necessarily copyright infringers. . . . The infringer might be the subscriber, someone in the subscriber's household, a visitor with her laptop, a neighbor, or someone parked on the street at any given moment.").

160. See, e.g., Declaration of Patrick Paige at 2, *Good Man Prods., Inc. v. John Doe*, No. 2:14-cv-07902-SRC-CLW (D.N.J. Dec. 22, 2014).

161. See, e.g., Memorandum and Order, *Malibu Media, LLC v. Doe*, No. 1:15-cv-01883-LTS-KNF (S.D.N.Y. June 5, 2015), ECF No. 20.

162. Order and Opinion at 10, *Malibu Media, LLC v. Doe*, No. 1:15-cv-04369-AKH (S.D.N.Y. July 6, 2015).

163. *Malibu Media, LLC v. Does 1-10*, No. 2:12-cv-03623-ODW-PJWx, 2012 WL 5382304, at *3 (C.D. Cal. June 27, 2012).

164. For discussion of the merits of joinder, see *supra* Part III.A.3.

165. See, e.g., *Elf-man, LLC v. Lamberson*, No. 13-cv-0395-TOR, 2014 WL 11513119, at *8 (E.D. Wash. Oct. 31, 2014).

166. For the reasons addressed *supra* Part III.A.3.

In the alternative, the defendant can challenge the subpoena for lack of personal jurisdiction.¹⁶⁷

In addition to these specific objections, some courts have refused to allow early discovery due to their concerns about the connection between file-sharing litigation and abusive litigation tactics.¹⁶⁸ One judge described the problem succinctly: “[Plaintiff’s] corporate strategy relies on aggressively suing for infringement and obtaining accelerated discovery of the IP address holder’s identity from the ISP. It then seeks quick, out-of-court settlements which, because they are hidden, raise serious questions about misuse of court procedure.”¹⁶⁹ This argument is more persuasive when directed to plaintiffs or law firms with some history of stepping over the line. An attorney for Malibu Media, for example, has been sanctioned for repeatedly including irrelevant information in filings designed to embarrass defendants.¹⁷⁰

A strong note of caution is appropriate: Filing a motion to quash may simply put the defendant in the plaintiff’s cross hairs and could actually reduce the chance of a voluntary dismissal. It may also consume defense resources that are better spent elsewhere.

167. For the reasons discussed *supra* Part III.A.4.

168. See *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 89 (E.D.N.Y. 2012) (“The most persuasive argument against permitting plaintiffs to proceed with early discovery arises from the clear indicia . . . that plaintiffs have employed abusive litigation tactics to extract settlements from John Doe defendants.”); *Patrick Collins, Inc. v. John Does 1–37*, No. 2:12-cv-01259-JAM-EFB, 2012 WL 2872832, at *3 n.2 (E.D. Cal. July 11, 2012) (observing that the federal courts are not flexible enough to be shaped into “cogs in a plaintiff’s copyright-enforcement business model” and admonishing that “[t]he Court will not idly watch what is essentially an extortion scheme, for a case that [P]laintiff[s] ha[ve] no intention of bringing to trial.”); *Malibu Media, LLC v. John Does 1–5*, No. 12-cv-02950-JPO, 2012 WL 2001968, at *1 (S.D.N.Y. June 1, 2012) (“This Court shares the growing concern about unscrupulous tactics used by certain plaintiffs, particularly in the adult films industry, to shake down the owners of specific IP addresses from which copyrighted adult films were allegedly downloaded.”); *Dig. Sins, Inc. v. John Does 1–245*, No. 11-cv-08170-CM, 2012 WL 1744838, at *3 (S.D.N.Y. May 15, 2012) (“In these BitTorrent cases . . . numerous courts have already chronicled abusive litigation practices.”); *SBO Pictures, Inc. v. Does 1–20*, No. 12-cv-03925-SAS, 2012 WL 2034631, at *1 (S.D.N.Y. June 5, 2012) (“[E]arly discovery has been used repeatedly in cases such as this one to harass and demand of defendants quick settlement payments, regardless of their liability.”); *Dig. Sin, Inc. v. Does 1–176*, 279 F.R.D. 239, 242 (S.D.N.Y. 2012) (“[P]laintiffs have used the offices of the Court as an inexpensive means to gain the Doe defendants’ personal information and coerce payment from them. The plaintiffs seemingly have no interest in actually litigating the cases, but rather simply have used the Court and its subpoena powers to obtain sufficient information to shake down the John Does.” (quoting Memorandum Order at 4, *K-Beech, Inc. v. Does 1–85*, No. 11-cv-00469-JAG (E.D. Va. Oct. 5, 2011), ECF No. 9)).

169. *Malibu Media, LLC v. Doe*, No. 1:15-cv-04369-AKH, at 7 (S.D.N.Y. Jan. 28, 2016) (order denying leave to serve a third-party subpoena).

170. *Id.* at 8 (“[A] district court sanctioned [plaintiff] when it learned that [it] did not even own the copyrights for the titles [included as exhibits in the complaint]; rather, it had gratuitously listed them to coerce larger, faster settlements” (citing *Malibu Media LLC v. John Doe*, No. 3:13-cv-00205, 2013 WL 4821911, at *4 (W.D. Wis. Sept. 10, 2013))); *Malibu Media, LLC v. John Doe*, No. 2:13-cv-00536, 2013 WL 6579338, at *4 (E.D. Wis. Dec. 12, 2013).

3. Motion to Proceed Anonymously

At this stage, lawyers should consider whether to file a motion to proceed anonymously. These motions are routinely granted in pornography cases, and we have included a sample in Appendix C.¹⁷¹ There is a presumption in civil litigation that the parties' identities are public information. However, that presumption, and any prejudice that concealment may cause the opposing party, can be rebutted by a showing that harm to the party seeking to proceed anonymously "exceeds the likely harm from concealment."¹⁷² To that end, a court has a "duty to determine whether exceptional circumstances justify such a departure from the normal method of proceeding in federal courts."¹⁷³ Such "exceptional circumstances" are present when anonymity is necessary "to preserve privacy in a matter of sensitive and highly personal nature."¹⁷⁴ This is especially true if the disputed work is pornographic, as "[a]n allegation that an individual illegally downloaded adult entertainment likely goes to matters of a sensitive and highly personal nature, including one's sexuality."¹⁷⁵

In cases involving pornography, courts have proved receptive to the argument that the Doe defendant would be embarrassed by the litigation and potentially intimidated into settlement if named. Although courts have recognized that plaintiffs have relied on the coercive power of social stigma and tread very close to "extortion" in some cases,¹⁷⁶ no finding of bad faith or sharp practice by the plaintiff should be necessary for the court to reach this conclusion. Courts will generally permit defendants to proceed under a pseudonym until the end of all dispositive motions in the case.

4. Threat Letter

The threat letters sent on behalf of various plaintiffs are all of a piece. We focus here on the standard letter sent by PTG Nevada, as this letter is not materially different from others we have seen.¹⁷⁷ The letter informs the defendant that a lawsuit has been filed and his or her information has been obtained from his or her ISP. PTG Nevada's standard letter states: "Your contact information was supplied to us by your ISP as one of the [d]efendants

171. See *infra* Appendix C.

172. *Jane Doe v. City of Chicago*, 360 F.3d 667, 669 (7th Cir. 2004).

173. *John Doe v. Blue Cross & Blue Shield United of Wis.*, 112 F.3d 869, 872 (7th Cir. 1997) (citing *United States v. Microsoft Corp.*, 56 F.3d 1448, 1463–64 (D.C. Cir. 1995) (per curiam)).

174. *Does 1–23 v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000) (quoting *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993)).

175. *Third Degree Films v. Does 1–3577*, No. 11-cv-02768-LB, 2011 WL 5374569, at *4 (N.D. Cal. Nov. 4, 2011).

176. For judicial condemnation of "what is essentially an extortion scheme" and similar statements, see *supra* note 27.

177. See *infra* Appendix E.

who has illegally obtained or shared our client's copyrighted motion picture through a peer-to-peer network"¹⁷⁸

This statement is misleading because the ISP has not identified the account holder as the infringer but has instead merely identified the defendant as the account holder of a given IP address. The standard letter continues:

According to our records, you have placed a media file which contains the copyright-protected film content of our client's motion picture entitled [name of film] in a shared folder location on your computer In addition, we have evidence of the P2P client software that you used to obtain or share the film, and evidence of your file hash factor (a mathematical function through which a file can be identified with certainty) which was [a long number, such as A5A78463694R900495034B5B1374A2DEA5133]. We have also obtained the file name of the movie, the file size and the GUID, all corresponding to an IP address that was assigned to your ISP account at the time the infringing activity occurred.¹⁷⁹

This letter creates the impression that the plaintiff has detailed knowledge of the inner workings of the defendant's computer, which is almost certainly untrue. More significantly, these claims of omniscience are difficult to square with the plaintiff's reluctance to provide such detailed information in the course of discovery. The letter then moves on to explain that copyright infringement is a very serious problem for the entertainment industry and that the law provides various remedies, including attorneys' fees and statutory damages in the range of \$750 to \$150,000 per work infringed. The letter then proposes a settlement in the following terms:

In exchange for a *comprehensive release* of all legal claims which will enable you to avoid becoming a named Defendant in the lawsuit, our firm is authorized to accept the sum of \$3,900 as for settlement for its claims. This offer will expire on [a date 14 days after the date of the letter]. Thereafter, our client will accept no less than the sum of \$4,900 to settle this matter, but this increased settlement offer will expire on [a date approximately one month from the date of the letter] If you decide not to settle by [said date], we may add you to the list of Defendants to be served with a copy of the complaint in this lawsuit.¹⁸⁰

In short, you can avoid being named as a Defendant in the lawsuit if you act now. You can pay the settlement amount by cashier's check,

178. Defendant's Rule 12(b)(6) Motion to Dismiss Exhibit B at 27-1, PTG Nev., LLC v. Does 1-24, No. 1:16-cv-01621 (N.D. Ill. Sept. 13, 2016).

179. *Id.*

180. *Id.*

money order or by credit card. Please contact us to arrange payment and so we can forward a Release and Settlement Agreement. Once we have processed the settlement, we will confirm that your payment has been processed and that you have been dismissed from the lawsuit.¹⁸¹

The letter then continues that the plaintiff will seek the \$30,000 maximum in statutory damages for non-willful infringement and attorneys' fees and that the plaintiff will attempt to establish willful infringement and thereby seek the maximum statutory damages of \$150,000.¹⁸² The letter notes that, in *Sony BMG Music Entertainment v. Tenenbaum*, the plaintiff was awarded \$675,000, an amount which breaks down to \$22,500 for each song illegally downloaded in that case.¹⁸³ In short, the threat letter appears to make a compelling case for settling for a few thousand dollars now, rather than tens of thousands or even hundreds of thousands later.

5. Letter in Response

The plaintiff's threat letter is primarily a bluff at this stage. The best response to this bluff depends on the client: whether evidence of infringement exists, his or her attitude to risk and uncertainty, financial resources, etc. At a minimum, the response letter should indicate that the defendant understands the weaknesses of the plaintiff's case, and it should include any specific explanation available as to why the defendant could not or would not have been the infringer. Of course, if the defendant would be absolutely unable to pay any settlement amount and that information can be communicated in a credible manner, this may be the easiest way to discourage the plaintiff from pursuing the case.

B. STAGE II: AMENDED COMPLAINT, MOTION TO DISMISS, AND ANSWER

Stage II begins with the plaintiff's decision to move forward and amend the complaint to name the defendant and ends with: (1) a successful motion to dismiss; (2) a judgment on the pleadings in favor of plaintiff; or (3) the filing of an answer to the complaint. Lawyers could consider representing innocent clients on a pro bono basis or relying on an award of attorneys' fees to provide compensation for such representation.

1. Strategic Considerations

The most important strategic considerations at this stage are whether there is incriminating evidence against the defendant, and whether to pursue attorneys' fees. Contrary to the usual American Rule in civil litigation, the Copyright Act provides that "the court in its discretion may allow the recovery

181. *Id.* at 27-2.

182. *Id.*

183. *Sony BMG Music Entm't. v. Tenenbaum*, 660 F.3d 487, 490 (1st Cir. 2011).

of full costs by or against any party other than the United States” and that “the court may also award a reasonable attorney’s fee to the prevailing party as part of the costs.”¹⁸⁴ For present purposes, it is sufficient to understand that the defendant is unlikely to be entitled to attorneys’ fees if it files a motion to dismiss and the plaintiff responds with a voluntary dismissal.¹⁸⁵ In order to clearly satisfy the statutory requirement of being the “prevailing party,” the defendant seeking reimbursement for attorneys’ fees should file an answer to the complaint. This should be enough to secure prevailing party status. However, some defendants have gone further and made counterclaims for a declaration of noninfringement to stop the plaintiff from wriggling off the hook. We do not recommend a counterclaim in this form; it adds nothing to the denial of infringement and merely invites a tit-for-tat motion to dismiss adding to the cost and complexity of litigation.

The advantage of attorneys’ fees is obvious. However, pursuing attorneys’ fees may make the plaintiff’s attorneys more likely to drag a case out and fight for a draw if they are deprived of the option of simply walking. A motion to dismiss allowing the plaintiff the opportunity to withdraw without additional cost may better serve some clients.

2. When to Settle and How

Representing defendants with evidence of infringement on their computer hard drive raises some additional strategic questions. Regrettably, some clients will insist on their innocence even in the face of strongly incriminating evidence. Defense lawyers need to know with certainty at some point whether there is incriminating evidence on their client’s hard drive. We believe Stage II is the appropriate time to take that step or, at the very least, get the defendant’s hard drive “imaged,” i.e., copied. If the client’s hard drive is clean, there is almost no reason to settle for anything less than the plaintiff walking away. Lawyers should resist agreeing to nuisance value settlements and settlement agreements that impose gag orders. In our view, the copyright trolling business model has only lasted this long because of information asymmetries. Plaintiffs tend to insist on settlement terms that perpetuate these asymmetries. Thus, while we recognize that lawyers need to act in the best interests of their clients, we are hopeful that, if made aware of this paradigm, clients may wish to consider the social harm of private nuisance value settlements and resist such terms.

If the client’s hard drive is not clean, negotiating a reasonable settlement becomes the top priority. However, lawyers should keep in mind that even these cases could be won on a motion to dismiss that focuses on the plaintiff’s failure to satisfy modern pleading standards. Furthermore, demonstrating a willingness to pursue a motion to dismiss is vital to obtaining a fair settlement.

184. Copyright Act, 17 U.S.C. § 505 (2012).

185. See *infra* Part IV.B.7.

Another prerequisite to obtaining a fair settlement is estimating the client's potential exposure. This should be the basis of the defendant's best and final offer position.

We suggest calculating the defendant's best and final offer position in terms of the plaintiff's award based on minimum statutory damages, filing fees, and a small allowance for attorneys' fees. The plaintiff's business model operates at a very low marginal cost, and prior to discovery there should be almost no costs or attorneys' fees specifically attributable to the defendant's case. To minimize exposure, the defendant should consider making an "Offer of Judgment" under Federal Rule of Civil Procedure 68. Rule 68 provides that an offer of judgment can be made at any time more than 10 days before the trial begins.¹⁸⁶ The offer must be definitive, unconditional, in writing, and served upon the plaintiff.¹⁸⁷ If the offer is not accepted and "the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer."¹⁸⁸ Ideally this would mean that if the plaintiff rejects an offer of judgment that is more favorable than its eventual recovery, the defendant is entitled to her attorneys' fees post-offer. However, courts have not always applied Rule 68 this way in copyright cases. At least some circuits hold that a losing copyright defendant cannot recover his attorneys' fees under Rule 68 because it would contravene the limitation of attorneys' fees to the "prevailing party" under § 505 of the Copyright Act.¹⁸⁹ *Patry on Copyright* acknowledges that this is the majority interpretation, and yet argues that it leads to absurd results and should be rejected.¹⁹⁰ We agree. The Eleventh Circuit and one district court have held the defendant in a Rule 68 scenario is entitled to her attorneys' fees post-offer, so the question remains open.¹⁹¹

Even under the less favorable interpretation of Rule 68, there are significant benefits to making a valid Rule 68 offer of judgment if the plaintiff prevails in an amount less than the offer. In this scenario, "(1) the plaintiff may not collect its post-offer costs or attorneys' fees, and (2) [the] plaintiff must pay defendant its postoffer costs."¹⁹²

186. FED. R. CIV. P. 68.

187. *Id.*

188. *Id.*

189. Copyright Act, 17 U.S.C. § 505 (2012); *Harbor Motor Co. v. Arnell Chevrolet-Geo, Inc.*, 265 F.3d 638 (7th Cir. 2001); *see also Crossman v. Marcoccio*, 806 F.2d 329 (1st Cir. 1986).

190. WILLIAM F. PATRY, 6 PATRY ON COPYRIGHT § 22:218 (2017).

191. *Jordan v. Time, Inc.*, 111 F.3d 102, 105 (11th Cir. 1997) (copyright case); *see also Lucas v. Wild Dunes Real Estate, Inc.*, 197 F.R.D. 172, 178 (D.S.C. 2000) (awarding attorneys' fees); *cf. Utility Automation 2000, Inc. v. Choctawhatchee Elec. Co-op.*, 298 F.3d 1238, 1246 n.6 (11th Cir. 2002) (noting criticism of *Jordan*).

192. PATRY, *supra* note 190, § 22:218.

If an offer is to be made, it should be made as early as possible and calculated with the following factors in mind:

Minimum statutory damages (\$750 per work)
 +
 Filing fee of \$400
 +
 \$350 for attorneys' fees.¹⁹³

In a single-defendant, single-work case, the offer of judgment could be as low as \$1,500. Whether to offer anything more than this is a judgment call. The higher the offer, the greater the plaintiff's risk that at the end of drawn out process it is left with no additional costs or attorneys' fees. We believe that even at our minimum recommendation there is a substantial risk for the plaintiff here. For example, in *Cobbler Nevada, LLC v. Cerritos*, the court awarded costs and minimum statutory damages totaling \$1275 and declined to award attorneys' fees.¹⁹⁴ Technically, the offer amount could be even lower in a single-work, multiple-defendant case because the filing fee should be split between defendants.¹⁹⁵ Appendix D contains a sample offer of judgment.¹⁹⁶

3. The Motion to Dismiss

Copyright trolls rely on generic and boilerplate complaints to cast their net as widely as possible. This is the key to their success, but it is also one of their critical weaknesses. The complaints we have examined tend to be far too vague to satisfy modern pleading standards and should thus be attacked with a Motion to Dismiss for Failure to State a Cause under Federal Rule of Civil Procedure 12(b)(6).

In *Twombly* in 2007 and again in *Iqbal* in 2009, the Supreme Court raised the standard for a well-pleaded complaint,¹⁹⁷ requiring that it "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"¹⁹⁸ We note with interest the efforts of a plaintiff in a recent case to assert that *Twombly* only requires "fair notice" and "grounds

193. Copyright Act, 17 U.S.C. § 504 (2012). As far as we know, Malibu Media is the only plaintiff currently targeting defendants for the alleged infringement of multiple copyrighted works. This makes Malibu Media cases more difficult to settle.

194. *Cobbler Nev., LLC v. Cerritos*, No. 3:15-cv-01228-SB, 2016 WL 7177527, at *5 (D. Or. Dec. 9, 2016).

195. *LHF Prods., Inc. v. Doe 1*, No. 2:16-cv-01017 (W.D. Wash. June 30, 2016) (granting in part plaintiff's motion for default judgment); see *infra* Part IV.B.7.v.

196. The appendix is based on the Offer of Judgment in *Cobbler Nevada, LLC, v. Cerritos*, No. 3:15-cv-01228-SB, 2016 WL 7177527 (D. Or. Dec. 9, 2016).

197. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Ad. Corp. v. Twombly*, 550 U.S. 544 (2007).

198. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 570).

upon which the claim rests.”¹⁹⁹ That is precisely the standard in *Conley v. Gibson*,²⁰⁰ which the Supreme Court renounced in *Twombly*.²⁰¹ *Twombly* requires more than fair notice and grounds; a complaint must state sufficient factual context to make the claim plausible, rather than merely possible.²⁰² The Supreme Court in *Twombly* said that a complaint’s factual details “must be enough to raise a right to relief above the speculative level,” and that “[w]hile a complaint . . . does not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of a cause of action’s elements will not do.”²⁰³

It is true that the compliant does not need to be proven to survive a motion to dismiss, but it must provide a sufficient factual context to suggest that a substantial copy of the copyrighted work at issue was made and that this act was performed by the defendant. The complaints we have reviewed do not allege any evidence that a substantial copy of the copyrighted work was made and have nothing to show that the defendant was the person using the IP address for that purpose. As the court in *Cobbler Nevada, LLC v. Gonzales* noted, “While it is *possible* that the subscriber is also the person who downloaded the movie, it is also possible that a family member, a resident of the household, or an unknown person engage[d] in the infringing conduct.”²⁰⁴ Bare possibility clearly falls well below modern pleading standards. The typical complaint alleges only that an unknown device used the defendant’s IP address to participate in a file-sharing swarm and that this swarm unlawfully reproduced and distributed the plaintiff’s copyrighted work. That falls far short of suggesting any facts upon which one could conclude that someone using the defendant’s IP address made a substantial copy of the copyrighted work or that the named defendant was that person.

Plaintiffs appear unwilling to accept that they carry the burden of proof in a claim of copyright infringement and that the defendant is under no

199. See Plaintiff’s Response to Defendant’s Rule 12(b)(6) Motion to Dismiss at 2, PTG Nev., LLC v. Chan, No. 1:16-cv-01621, 2016 WL 8541547 (N.D. Ill. Jan. 17, 2017) (“Plaintiff’s Complaint states a claim upon which relief can be granted. A complaint must contain a ‘short and plain statement’ giving ‘the defendant fair notice’ of what the ‘claim is and the grounds upon which it rests.’” (quoting *Twombly*, 550 U.S. at 554–56)).

200. *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) (stating that a complaint “should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief”).

201. See *Twombly*, 550 U.S. at 563 (“But the passage so often quoted [referring to the passage in *Conley* above] fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement.”).

202. See *id.* at 570.

203. *Id.* at 545 (citations omitted).

204. *Cobbler Nev., LLC v. Gonzales*, No. 3:15-cv-00866-SB, 2016 WL 3392368, at *3 (D. Or. June 8, 2016).

obligation to submit evidence she is not liable.²⁰⁵ Defendants in copyright cases do not need to disprove their own liability; a defendant is perfectly entitled to insist on the plaintiff's filing of a well-pleaded complaint before going to the bother and expense of marshaling evidence of her innocence.

The key arguments to make in a motion to dismiss are:

(1) The plaintiff failed to meet the legal standard. As noted above, in order to survive a Rule 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"²⁰⁶ As both *Twombly* and *Iqbal* recognize, there is a world of difference between alleging facts and circumstances in which the defendant possibly acted unlawfully and alleging facts and circumstances in which the defendant plausibly did so.

(2) The person paying an Internet bill may not be the purported infringer.²⁰⁷ IP addresses are used legitimately and illegitimately by multiple people, and frequently without the account holder's knowledge.²⁰⁸

(3) Discovery should not be used for fishing expeditions.²⁰⁹ This is particularly significant where the plaintiff admits in its complaint that it intends to use the discovery process to discover "additional infringing parties."²¹⁰

(4) Either the plaintiff has failed to allege that an actual copy was made or the plaintiff's assertions that defendant "infringed" or "reproduced" the work are conclusory and unsupported by any factual allegations. To allege that a device associated with defendant's IP address participated in a

205. See, e.g., Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment at 1, *Dall. Buyers Club, LLC v. Doughty*, 3:15-cv-00176-AC, 2016 WL 6831278 (D. Or. Jan. 14, 2016) ("Defendant submits no evidence that he is not liable beyond his personal denials.").

206. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 570).

207. See *VPR Internationale v. Does 1-1017*, No. 11-cv-02068, 2011 WL 8179128, at *2 (C.D. Ill. Apr. 29, 2011) ("Where an IP address might actually identify an individual subscriber and address[,] the correlation is still far from perfect The infringer might be the subscriber, someone in the subscriber's household, a visitor with her laptop, a neighbor, or someone parked on the street at any given moment."); *Malibu Media, LLC v. Reynolds*, No. 12-cv-06672, 2013 WL 870618, at *13 (N.D. Ill. Mar. 7, 2013); *TCYK, LLC v. Doe*, No. 13-cv-03828, 2013 U.S. Dist. LEXIS 88402, at *6 (N.D. Ill. June 24, 2013) ("[T]he increasing ubiquity of wireless networks undermines the copyright holder's assumption that the ISP subscriber is the copyright infringer."); see also *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 84 (E.D.N.Y. 2012) ("[I]t is no more likely that the subscriber to an IP address carried out . . . the purported illegal downloading . . . than to say an individual who pays the telephone bill made a specific telephone call.").

208. See *supra* Part II.A.

209. *Pac. Century Int'l, Ltd. v. John Does 1-37*, 282 F.R.D. 189, 195 (N.D. Ill. 2012) (finding that there must be "a reasonable calculation that the individuals connected to the subpoenaed IP addresses will have any discoverable information related to the current defendants").

210. See, e.g., Complaint at ¶ 11, *PTG Nev., L.L.C. v. Does 1-24*, No. 1:16-cv-01621 (N.D. Ill. Jan. 29, 2016) ("Plaintiff . . . believes that additional information obtained [in discovery] will lead to the identification of additional infringing parties, as monitoring of online infringement of Plaintiff's motion picture is ongoing.").

file-sharing swarm is not the same as alleging that a device associated with that address actually made a copy of the work.

(5) Copyright law does not recognize any offense of attempted reproduction. Even if the allegation that defendant participated in a swarm was proven, it would not show that anyone in the swarm—let alone a device associated with the defendant’s IP address or the defendant—actually made a copy. Assertions that the defendant participated in a swarm “deliberately” and “willfully” are entirely beside the point. For copyright infringement to occur, a copy must be made that is substantially similar to the original and able to be viewed by an audience.²¹¹

(6) Courts have already rejected attempts to prove infringement by snapshot, wherein the allegation that a defendant made a copy is supported only by the assertion that the defendant transferred certain packets of information. As explained in detail in Part III, the few packets of data recorded by the plaintiff are just a fragment of a piece of a copyrighted work. Those fragments do not meet the statutory definition of a copy, because they are useless junk without the rest of the file. Those fragments also do not meet any of the usual threshold tests for what amounts to a substantial copy. Moreover, a mere snapshot that allegedly shows that the defendant was downloading the copyrighted work does not prove she succeeded.

(7) Complaints vary, but a not uncommon assertion is that the defendant or the defendant’s IP address “was observed” infringing the plaintiff’s copyright. No employee or agent of the plaintiff is described as performing this observation—the passive invocation of “was observed” is used here to elide the fact that no human witness actually saw anything relevant to the plaintiff’s case; the case is entirely reliant on records produced by software. It would thus be more accurate to say that it has software that reports certain events to have occurred, but doing so would invite further questions as to the origin, nature, reliability, and operation of that software—questions that plaintiffs would rather avoid. Advocates should challenge as unacceptably vague, if not misleading, a statement that something was observed, but not by what or by whom.

(8) The lawsuit is part of a broader litigation strategy that relies on the risks of large statutory damages, attorneys’ fees, and the high cost of litigation to coerce innocent defendants into nuisance value settlements.²¹² Allowing the plaintiff to proceed on factual allegations that are imprecise, incredible, and inconsistent with requirements of the Copyright Act allows it to “tak[e] up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.”²¹³ There is no doubt that

211. Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991).

212. See Sag, *supra* note 5, at 1105–46.

213. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 546 (2007) (quoting Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 347 (2005)).

online infringement is a problem for the creative industries, but coercing innocent people into settlements and using federal court litigation as a forum for conducting fishing expeditions is not a good answer to that problem.

It is also worth considering the merits of not filing a motion to dismiss, even in the face of a poorly pleaded complaint. Some judges are less receptive to motions to dismiss than others, and assuming there is no smoking gun on the defendant's hard drive, the same arguments may be more persuasive at the close of discovery. However, in most scenarios, defendants will be well advised to file a motion to dismiss to seek to avoid the significant cost and inconvenience of discovery and depositions.

4. Motion for Early Discovery

Attorneys should consider a motion for early discovery, with a specific plan in mind.²¹⁴ This plan has three goals: to prove that the plaintiff does not have the evidence it claims to have; to minimize the client's discovery burden; and to lay the foundation for a motion for summary judgment. Therefore, any such motion should ask for two things: for the plaintiff to produce the evidence upon which its complaint is based—the PCAPs; and for the defendant to produce a copy of his or her hard drive for examination by a qualified expert—either one agreed to by both parties or one appointed by the court. The motion should ask that searches of the hard drive be limited to searches for the hash value of the file allegedly downloaded or uploaded. Plaintiffs will, in our experience, want to impose a much more burdensome discovery protocol, seeking to depose the defendant's friends, neighbors, and others who may have used the IP address. This invasive and unwarranted fishing expedition should be resisted.²¹⁵

Under Rule 26(d), discovery may not be conducted prior to the discovery conference required by Rule 26(f), except "by stipulation, or by court order."²¹⁶ Unfortunately, the Federal Rules do not give us any further guidance, and federal courts across the nation have adopted a wide range of

214. In the alternative, defendant could make a Motion for a More Definite Statement under Federal Rule of Civil Procedure 12(e). The rule provides that "[a] party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired." FED. R. CIV. P. 12(e).

215. *See Pac. Century Int'l, Ltd. v. John Does 1-37*, 282 F.R.D. 189, 195 (N.D. Ill. 2012) ("To have relevance to the actions currently pending, however, the requested discovery must bear on the civil conspiracy and copyright claims against the current John Doe defendants. In light of the structure of the BitTorrent system, subpoenas seeking the identity of users of non-party IP addresses are not reasonably calculated to lead to the discovery of evidence relevant to the pending claims.").

216. FED. R. CIV. P. 26(d)(1).

standards,²¹⁷ although most have adopted either a preliminary injunction standard²¹⁸ or a “good cause” standard.²¹⁹ Therefore an attorney will need to determine the local standard before pursuing a motion to allow early discovery.

In general, any such motion will need to cover three main points: (1) why the defendant will be irreparably harmed without early discovery; (2) why the plaintiff will not be unduly burdened by early discovery; and (3) why early discovery will be more efficient for the court. These arguments should be made with the defendant’s circumstances in mind, but a few points are common to all file-sharing cases and can be stressed. First, allowing the plaintiff carte blanche access to defendant’s hard drive is incredibly invasive of a person’s personal life,²²⁰ and it is deeply unfair to allow plaintiff’s attorneys and experts free reign to search and view every part of the defendant’s hard drive on a bare assertion that someone using defendant’s IP address may have infringed. Thus, a directed discovery plan that only allows plaintiff to search for a specific hash value will greatly reduce the invasiveness of discovery. Second, a directed discovery plan will be cheaper for all involved: Both parties can save money on expert witnesses if the court appoints an expert (for which the parties can split the cost) and the court saves time and resources by keeping discovery disputes and motions to compel to a minimum. Third, unless the plaintiff is able to locate a copy of the disputed work *with the hash value* it claims to have identified, it cannot connect defendant to the instance of wrongful copying it claims as the basis for its suit.

217. See Jesse N. Panoff, *Rescuing Expedited Discovery from Courts & Returning It to FRCP 26(d)(1): Using a Doctrine’s Forgotten History to Achieve Legitimacy*, 64 ARK. L. REV. 651, 651 (2011) (noting that “courts have developed more than twenty standards for construing Rule 26(d)(1)”).

218. The preliminary injunction standard established by *Notaro v. Koch* is generally used in jurisdictions that require a preliminary injunction standard to be met for early discovery. *Notaro v. Koch*, 95 F.R.D. 403, 405 nn.3–4 (S.D.N.Y. 1982). This standard is a four-part test that requires the movant to show: (1) that it would suffer irreparable harm without early discovery; (2) a “probability of success on the merits; (3) some connection between the expedited discovery and . . . irreparable [harm]; and (4) some evidence that the injury that [would] result” if discovery is denied would be greater than the harm the opposing party would suffer if discovery were ordered. *Id.* at 405 n.2.

219. The factors considered under a “good cause” standard vary widely between jurisdictions, but in general, “[g]ood cause may be found where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party.” *Semitool, Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002). Other factors typically considered by courts include: “(1) whether a preliminary injunction is pending; (2) the breadth of the discovery requests; (3) the purpose for requesting the expedited discovery; (4) the burden on the defendants to comply with the requests; and (5) how far in advance of the typical discovery process the request was made.” *Am. LegalNet, Inc. v. Davis*, 673 F. Supp. 2d 1063, 1067 (C.D. Cal. 2009) (quoting *Disability Rights Council of Greater Wash. v. Wash. Metro. Area Transit Auth.*, 234 F.R.D. 4, 6 (D.D.C. 2006)).

220. See generally *Riley v. California*, 134 S. Ct. 2473 (2014) (finding that a warrantless search of a cellphone would violate the Fourth Amendment because of privacy interests).

5. Answer

If the motion to dismiss is denied, the answer should deny the specific allegation of copyright infringement. The answer could also raise a defense of *de minimis non curat lex* defense—in essence, that whatever infringement plaintiff can prove is too incomplete for the court to take notice. We do not suggest that file sharing is not a serious problem, but if the only proof the plaintiff offers is that the defendant shared a small piece (or just a fragment of a piece) of the work, there is no proof of infringement.²²¹ This defense should be raised in the context of the plaintiff's inability to prove or allege that a copyrighted work has been downloaded in its entirety.

In addition, certain affirmative defenses are worth considering. However, opinions differ as to whether adding counterclaims is an effective use of defendant's resources. Defendants have answered with counterclaims for a declaratory judgment of noninfringement in the past, but we do not recommend them. Counterclaims risk distracting the court from the weakness of the plaintiff's case. Also, the answer that plaintiff has failed to state a claim can also be couched as an affirmative defense.²²² We note, without necessarily recommending, that defendants have also argued that the damages requested are unconstitutionally high²²³ and that the plaintiff has unclean hands as a result of its unethical, extortionate litigation model.²²⁴

6. How Does Stage II End?

Stage II can end a number of different ways. If the defendant presents the plaintiff with actual evidence of innocence and files a motion to dismiss, we anticipate voluntary dismissal by the plaintiff. In this scenario, the defendant will not be eligible for attorneys' fees, but the case will be over. Assuming that the plaintiff persists, the complaints that we have reviewed should, in our opinion, be dismissed under 12(b) for their failure to comply with modern pleading standards. In this optimistic scenario, the dismissal should be with prejudice and thus sufficient to support an award of attorneys' fees to the defendant. However, succeeding on a motion to dismiss is not guaranteed. Recently, in the Northern District of Illinois, for example, nearly identical motions to dismiss were successful in one case and not in another.²²⁵

221. See *supra* Part III.B.1-2.

222. See, e.g., Declaration of J. Christopher Lynch in Support of Defendant's Lamberson's Response to Plaintiff's Motions in Response to Defendant's Second Amended Answer and Affirmative Defenses and Counterclaim, *Elf-Man, LLC v. Lamberson*, No. 2:13-cv-00395 (E.D. Wash. July 21, 2014).

223. See, e.g., *id.* at 26.

224. See *id.*

225. Compare *PTG Nev., LLC v. Does 1-24*, No. 1:16-cv-01621 (N.D. Ill. Jan. 17, 2017) (order granting defendant's motion to dismiss), with *Clear Skies Nev., LLC v. Does 1-30*, No. 1:15-cv-06708 (N.D. Ill. Dec. 19, 2016), ECF No. 62 (order denying Defendant's Motion to Dismiss).

If the defendant's motion to dismiss is unsuccessful and the defendant's hard drive contains incriminating evidence, it may be in her best interest to answer the complaint with an admission. The defendant would presumably then file a motion for Judgment on the Pleadings, and the attorney's role is simply to argue for the minimum award of statutory damages and attorneys' fees. Almost every case should end at Stage II. However, if the defendant's motion to dismiss is unsuccessful and the defendant is in possession of a clean hard drive, she will need to proceed to Stage III.

7. Attorneys' Fees and Statutory Damages

i. Attorneys' Fees

The Copyright Act empowers, but does not require, courts to award costs and attorneys' fees to the prevailing party in copyright cases—any such award is “a matter of the court's discretion.”²²⁶ The Supreme Court has twice granted certiorari in copyright cases where the prevailing defendant was denied attorneys' fees. In its unanimous 1994 decision in *Fogerty v. Fantasy, Inc.*, the Court expressly rejected a “dual standard” favoring plaintiffs and disfavoring defendants.²²⁷ The text of the Copyright Act provides no basis for preferring prevailing plaintiffs over prevailing defendants; it simply says “prevailing party.”²²⁸ Looking beyond the text of the Act, the Court found further support for a unitary standard in the Act's purpose, recognizing that “[w]hile it is true that *one* of the goals of the Copyright Act is to discourage infringement, it is by no means the *only* goal of that Act.”²²⁹ As the Court explained, the entirety of the Act reflects Congress's attempt to create, “a balance of competing claims upon the public interest The immediate effect of our copyright law is to secure a fair return for an ‘author's’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.”²³⁰

Yet even after *Fogerty*, courts in some circuits appeared to carry on a de facto dual standard, denying attorneys' fees to prevailing defendants as a matter of course.²³¹ The defendant in the long running case of *Kirtsaeng v. John Wiley & Sons, Inc.*, prevailed on the merits on a fairly nuanced point of statutory interpretation regarding the scope of copyright's first-sale doctrine,

226. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994); *see also* *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1985 (2016) (discussing the holding from *Fogerty v. Fantasy, Inc.*).

227. *Fogerty*, 510 U.S. at 534.

228. *Id.* at 522, 524 n.11 (discussing and interpreting the language in the Copyright Act of 1976).

229. *Id.* at 526.

230. *Id.* at 526–27 (quoting *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).

231. *See* PATRY, *supra* note 190, § 22:210 (describing the Ninth Circuit's objective unreasonableness standard as “a mere semantic trick used to continue to apply the dual system rejected in *Fogerty*”).

but only after appealing to the Supreme Court.²³² In spite of this famous victory, the district court (which had sided with the plaintiff in the first instance) denied the defendant's request for attorneys' fees, placing "substantial weight" on the objective reasonableness of the plaintiff's position.²³³ In doing so, the court may have shaded from substantial weight into presumption. Given that the court agreed with the plaintiff's position, it is not surprising that it thought it was objectively reasonable. The Second Circuit agreed with the lower court,²³⁴ and *Kirtsaeng* returned to the Supreme Court to argue the point. The Supreme Court vacated and remanded the denial of attorneys' fees, because, although it agreed that a district court should give substantial weight to the objective reasonableness of the losing party's position, it insisted that courts must still take into account all other circumstances relevant to granting fees.²³⁵

ii. *The Defendant's Case for Attorneys' Fees*

In *Fogerty*, the Court explained that "[t]here is no precise rule or formula for making these determinations,' but instead equitable discretion should be exercised."²³⁶ The Court reiterated the point in *Kirtsaeng*, when it said that district courts have "wide latitude to award attorneys' fees based on the totality of circumstances in a case."²³⁷ In *Fogerty*, the Supreme Court accepted in a footnote that the exercise of discretion could be aided with reference to nonexclusive factors, such as "frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and . . . considerations of compensation and deterrence."²³⁸ However, the Court also cautioned that "such factors may be used to guide courts' discretion, so long as such factors are faithful to the purposes of the Copyright Act and are applied to prevailing plaintiffs and defendants in an evenhanded manner."²³⁹

232. *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351, 1363–66 (2013) (holding that the first-sale doctrine applies to works lawfully made overseas).

233. *John Wiley & Sons, Inc. v. Kirtsaeng*, No. 08-cv-07834-DCP, 2013 WL 6722887, at *4 (S.D.N.Y. Dec. 20, 2013).

234. *John Wiley & Sons, Inc. v. Kirtsaeng*, 605 F. App'x 48, 49 (2d Cir. 2015).

235. *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1983 (2016) ("But the court must also give due consideration to all other circumstances relevant to granting fees; and it retains discretion, in light of those factors, to make an award even when the losing party advanced a reasonable claim or defense. Because we are not certain that the lower courts here understood the full scope of that discretion, we return the case for further consideration of the prevailing party's fee application.")

236. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983)).

237. *Kirtsaeng*, 136 S. Ct. at 1985.

238. *Fogerty*, 510 U.S. at 534 n.19 (quoting *Lieb v. Topstone Indus., Inc.*, 788 F.2d 151, 156 (3d Cir. 1986)).

239. *Id.*

Whether the prevailing defendant in copyright trolling cases should be entitled to attorneys' fees is a matter for the district court's discretion. However, there are several factors that support the appropriateness of exercising that discretion in the defendant's favor. The business model of copyrighted trolling places no premium on differentiating the guilty from the innocent. In one particularly troubling case, *Cobbler Nevada* filed against an Internet subscriber that it knew based on depositions was not "a regular occupant of the residence or the likely infringer."²⁴⁰ As a result, the court had little trouble concluding that its "concerns about the motivation behind Plaintiff's overaggressive litigation of this case and other cases" was a "factor weigh[ing] in favor of fee shifting."²⁴¹ In light of the coercive effect of statutory damages, if prevailing defendants are not entitled to their attorneys' fees, it is very difficult to see how any innocent defendant would be able to resist a plaintiff's demands. It stands to reason that attorneys' fees are most needed to promote the objectives of copyright law when the prevailing party otherwise obtains little in monetary compensation. And of course, the prevailing defendant "receives not a small award but no award" and is thus in the greatest need of attorneys' fees.²⁴²

Given the availability of third-party discovery under Rule 45, there is no reason to tolerate the speculative naming of defendants that is currently the norm in BitTorrent cases. When a copyright troll names a defendant in federal litigation without a sufficient factual basis, its lawsuit is no more meritorious than if it were advancing fanciful legal arguments. The Supreme Court made clear in *Fogerty* that objective unreasonableness encompasses both factual and legal reasonableness.²⁴³ In either case, there is significant public interest in defendants resisting overreaching claims.²⁴⁴ We note that the Ninth Circuit recently upheld a district court's award of over \$5 million in attorneys' fees to the prevailing defendant in *Perfect 10, Inc. v. Giganeus, Inc.*²⁴⁵ In so doing the court emphasized the Supreme Court's statement in *Fogerty*: "[I]t is peculiarly important that the boundaries of copyright law be demarcated as

240. *Cobbler Nev., LLC v. Gonzales*, No. 3:15-cv-00866-SB, 2016 WL 8677323, at *1 (D. Or. Dec. 2, 2016), *report and recommendation adopted*, 2017 WL 44948 (D. Or. Jan. 4, 2017) ("Despite having acknowledged that Gonzales is not the likely infringer, Plaintiff filed a First Amended Complaint on November 4, 2015, naming Gonzales as the defendant.")

241. *Id.* at *6.

242. *Assessment Tech. of Wis., LLC v. WIREdata, Inc.*, 361 F.3d 434, 437 (7th Cir. 2004); *see also DeliverMed Holdings, LLC v. Schaltenbrand*, 734 F.3d 616, 626 (7th Cir. 2013) (affirming award of reasonable attorneys' fees to the prevailing defendant).

243. *Fogerty*, 510 U.S. at 534 n.19.

244. *See Lumiere (Rights) Ltd. v. Baker & Taylor, Inc.*, 116 F.3d 484, 1998 WL 303244, *5 (9th Cir. 1997) (unpublished table decision) (finding that where a party's "copyright claims are, if not frivolous, at least factually unsupported . . . [a]n award of fees may deter other such suits").

245. *Perfect 10, Inc. v. Giganeus, Inc.*, 847 F.3d 657, 665 (9th Cir. 2017).

clearly as possible. To that end, defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them”²⁴⁶

iii. *Is the Defendant the “Prevailing Party?”*

The Copyright Act limits an award of attorneys’ fees to the “prevailing party” but leaves that term undefined.²⁴⁷ While it is self-evident that a party who obtains judgment on the merits of the claim in its favor is the “prevailing party,” the law in relation to dismissals is more nuanced. In *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, the Supreme Court held that a litigant “prevails” for the purpose of fee-shifting statutes when it obtains a “material alteration of the legal relationship of the parties.”²⁴⁸ This material alteration standard is not met simply by a voluntary change in the other party’s conduct.²⁴⁹ Elaborating on this standard, the Second Circuit has held that to be a prevailing party requires a “judicially sanctioned” material alteration of the legal relationship of the parties.²⁵⁰

Applying this standard, it seems clear that, if the plaintiff voluntarily dismisses an action without prejudice,²⁵¹ there has been no judicially sanctioned material alteration of the legal relationship of the parties and thus the defendant is not a prevailing party under § 505 of the Copyright Act.²⁵² The plaintiff can only take this course with either: “(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or (ii) a stipulation of dismissal signed by all parties who have appeared.”²⁵³

The defendant is the prevailing party in any case in which the plaintiff’s action is dismissed with prejudice, whether by court order, at the plaintiff’s own instigation, or by agreement between the parties. If a judge orders dismissal with prejudice, there has clearly been a judicially sanctioned material alteration of the legal relationship of the parties and the defendant is eligible for attorneys’ fees.²⁵⁴ If the plaintiff voluntarily dismisses an action

246. *Id.* at 675 (quoting *Fogerty*, 510 U.S. at 527).

247. Copyright Act, 17 U.S.C. § 505 (2012).

248. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 603–04 (2001) (quoting *Tex. State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792–93 (1989)).

249. *Id.* at 604.

250. *Roberson v. Giuliani*, 346 F.3d 75, 79–81 (2d Cir. 2003).

251. Under Federal Rule of Civil Procedure 41(a)(1), the plaintiff may dismiss an action without a court order by filing a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment. FED. R. CIV. P. 41(a)(1). That dismissal is without prejudice unless the notice states otherwise. *Id.*

252. *See, e.g., Cadkin v. Loose*, 569 F.3d 1142, 1145 (9th Cir. 2009).

253. *See* FED. R. CIV. P. 41(a).

254. *Nemaizer v. Baker*, 793 F.2d 58, 60 (2d Cir. 1986) (holding that “[a] dismissal with prejudice has the effect of a final adjudication on the merits favorable to defendant and bars future suits brought by plaintiff upon the same cause of action”); *Ninox Television Ltd. v. Fox Entm’t Grp., Inc.*, No. 04-cv-

with prejudice, moreover, the resulting material alteration of the legal relationship of the parties is still “judicially sanctioned,” even though such alteration required no ruling from the court.²⁵⁵ The judicial sanction is embedded within the Federal Rules of Civil Procedure themselves.²⁵⁶ As the court summarized in *Cobbler Nevada, LLC v. Gonzales*:

A plaintiff’s dismissal of a claim does not automatically “confer prevailing party status upon the defendant,” if the defendant remains at risk of plaintiff re-filing the claim. However, if a plaintiff is unable to re-file the dismissed claim in federal court, the defendant is the “prevailing party” on that claim.²⁵⁷

iv. The Plaintiff’s Case for Attorneys’ Fees

Several district courts have exercised their discretion to deny attorneys’ fees to prevailing plaintiffs in copyright trolling cases.²⁵⁸ There are several reasons for a court to deny the plaintiff’s request for attorneys’ fees. To begin with, an award of even minimum statutory damages and court costs should be sufficient to deter the defendant and third parties from illegally file sharing.²⁵⁹ As the district court explained in *Glacier Films (USA), Inc. v. Gallatin*,

common sense supports a conclusion that a \$750 financial penalty for illegal[ly] downloading one movie is more than sufficiently punitive to deter others from illegally downloading free movies on the BitTorrent network. With knowledge that it will now cost \$750 to watch a single movie on the BitTorrent network, consumers

07891-DLC, 2006 WL 1643300, at *2 (S.D.N.Y. 2006); *NXIVM Corp. v. Ross Inst.*, No. 1:03-cv-00976-GLS-DRH, 2005 WL 1843275, at *2–3 (N.D.N.Y. 2005) (holding that, when there is a dismissal with prejudice, a defendant is the prevailing party even if no written decision is issued). *But see* *Chambers v. Time Warner, Inc.*, 279 F. Supp. 2d 362, 365–66 (S.D.N.Y. 2003).

255. In *Bridgeport Music, Inc. v. London Music, U.K.*, the Sixth Circuit held to the contrary, i.e., that plaintiff’s voluntary dismissal with prejudice did not make defendant a prevailing party. *Bridgeport Music, Inc. v. London Music, U.K.*, 226 F. App’x 491, 492 (6th Cir. 2007). This position strikes us as clearly wrong, and *Patry on Copyright* finds it inexplicable. PATRY, *supra* note 190, § 22:211.

256. Such an impact is common in the federal rules. Rule 13, for example. *See* FED. R. CIV. P. 13.

257. *Cobbler Nev., LLC v. Gonzales*, No. 3:15-cv-00866-SB, 2016 WL 8677323, at *2 (D. Or. Dec. 2, 2016), *report and recommendation adopted*, No. 3:15-cv-00866-SB, 2017 WL 44948 (D. Or. Jan. 4, 2017) (citations omitted).

258. *See* *Cobbler Nev., LLC v. Cerritos*, No. 3:15-cv-01228-SB, 2016 WL 7177527, at *5–8 (D. Or. Dec. 9, 2016) (holding that fee-shifting was inappropriate under *Fogerty* and because the plaintiff had unnecessarily prolonged the litigation); *Cobbler Nev., LLC v. Anonymous Users of Popcorn Time*, No. 3:15-cv-01550-SB, 2016 WL 4238639, at *4 (D. Or. Aug. 10, 2016) (holding that fee-shifting in a mass copyright litigation does not satisfy the factors in *Fogerty*); *Glacier Films (USA), Inc. v. Turchin*, No. 3:15-cv-01817-SB, 2016 WL 4251581, at *3–5 (D. Or. Aug. 10, 2016), *appeal docketed*, No. 16-cv-35688 (9th Cir. Aug. 26, 2016) (same); *Countryman Nev., LLC v. Doe*, 193 F. Supp. 3d 1174, 1182–83 (D. Or. 2016) (finding that fee-shifting was inappropriate under the totality of the circumstances).

259. *See, e.g., Cobbler Nev.*, 2016 WL 7177527, at *5.

should be motivated instead to spend a few dollars to rent the same movie legally.²⁶⁰

Second, as the roughly 10,000 John Doe copyright cases filed between 2010 and 2016 illustrate, plaintiffs have been vigilant and resourceful in policing their copyrights. In *Cobbler Nevada, LLC v. Cerritos*, the district court required the defendant to pay a total financial penalty of \$1,275, comprising \$750 in statutory damages and \$525 in costs.²⁶¹ As the court explained:

In light of the substantial financial penalty already imposed, an attorney fee award is not necessary to deter further infringement, nor is a fee award necessary to encourage Plaintiff to continue to protect its rights, where Plaintiff has been vigilant to date and has the resources to police their copyright.²⁶²

Third, the plaintiff's degree of success has been characterized by courts as minimal and insufficient in order to support the plaintiff's claims for fees several multiples higher.²⁶³ Indeed, the Ninth Circuit, in a different copyright context, stated "an award of attorneys' fees that is ten times the amount recovered in damages seems unreasonable under the circumstances."²⁶⁴ Of course, attorneys' fees might be necessary for the plaintiff to be able to vindicate wrongs of nominal monetary damage, but the \$750 minimum on statutory damages hardly looks nominal for the pirating of a movie priced at \$14.99. Moreover, courts should query exactly why the fees claimed by plaintiffs are so high in many cases. The answer may well be that the plaintiff refused reasonable offers of settlement and deliberately ran up the total of attorneys' fees. The plaintiff should not be rewarded for its intransigence, nor its attempts to game the system. For example, in *Countryman Nevada, LLC v. Doe* the district court declined to award attorneys' fees where the defendant had acknowledged liability early in the case but the plaintiff insisted on a settlement of \$8,500.²⁶⁵ Denying plaintiff's fee motion, the court noted that "it appears to this Court that one of the primary objectives of Plaintiff in undertaking the litigation conduct described was to increase the bases for a prevailing party fee petition."²⁶⁶ Other courts have noted similar behavior.²⁶⁷

260. *Glacier Films (USA), Inc. v. Gallatin*, No. 3:15-cv-01632-SB, 2016 WL 3148401, at *3 (D. Or. May 12, 2016).

261. *Cobbler Nev.*, 2016 WL 7177527, at *5.

262. *Id.*

263. *Glacier Films (USA)*, 2016 WL 4251581, at *3.

264. *Milton H. Greene Archives, Inc. v. Julien's Auction House LLC*, 345 F. App'x 244, 249 (9th Cir. 2009).

265. *Countryman Nev., LLC v. Doe*, 193 F. Supp. 3d 1174, 1183 (D. Or. 2016).

266. *Id.*

267. *Cobbler Nev.*, 2016 WL 7177527, at *6 ("In these BitTorrent copyright cases, the threat of fee-shifting has emboldened Plaintiff's counsel to demand thousands of dollars to settle a claim, even where the infringing defendant admits early in the case that he illegally downloaded the movie.").

It should be self-evident that prolonging litigation simply to accumulate legal fees is inconsistent with the purposes of the Copyright Act, to say the least.²⁶⁸

Fourth, and most fundamentally, an award of attorneys' fees in these BitTorrent file-sharing cases will not generally further the purposes of copyright.²⁶⁹ Rather, the prospect of attorneys' fees simply encourages "the continued overaggressive assertion" of speculative infringement claims.²⁷⁰ In the online file-sharing cases, there is no doubt that infringement is widespread, but there is significant doubt as to the liability of the targeted defendants. The plaintiffs discussed in this Article target hundreds, even thousands, of defendants at a time and pursue them with minimal investigation. The plaintiffs extract settlements from the guilty and innocent alike based on the *in terrorem* effect of statutory damages and attorneys' fees.²⁷¹ Courts have recognized that "the resulting bargaining process is unequal, and unfair."²⁷² The threat of incurring tens of thousands of dollars of fees makes it hard for even innocent defendants to take the risk of standing up to unreasonable demands. The federal litigation system is not a vending machine for hunting licenses; it is a means of seeking justice and resolving disputes. Courts should be mindful of how copyright owners are using the tools of civil litigation before compounding their reward with attorneys' fees, and they "should make its tools available only with careful scrutiny, to avoid the potential for abuse."²⁷³

Even if the court does decide to award attorneys' fees to a plaintiff, the court must ensure that such fees are reasonable, proven, and specifically attributable to the case at hand.²⁷⁴ For plaintiff to file hundreds or even thousands of almost identical complaints and motions and then ask the court to believe that it spent several hours on each one simply beggars belief. Courts

268. *Id.*

269. *Glacier Films (USA), Inc. v. Turchin*, No. 3:15-cv-01817-SB, 2016 WL 4251581, at *4 (D. Or. Aug. 10, 2016) ("The Copyright Act, as it is being enforced in these BitTorrent cases, has created results inconsistent with the goals of the Act.").

270. *Id.*

271. *See, e.g., Cobbler Nev.*, 2016 WL 7177527, at *6 ("When an individual who has illegally downloaded a movie is contacted by Plaintiff's counsel, and faces the threat of a statutory damage award that could theoretically reach \$150,000, as well as the threat of a substantial fee award, the resulting bargaining process is unequal, and unfair." (citation omitted)).

272. *Id.*

273. *See, e.g., Glacier Films (USA), Inc.*, 2016 WL 4251581, at *5 ("Ordinarily, the 'federal court system provides litigants with some of the finest tools available to assist in resolving disputes.' Those tools can empower copyright-owners to enforce their rights, but they are also capable of being used as instruments of abuse. Where abuse is likely, as it is here, courts should not make those tools available without careful scrutiny.").

274. The party seeking fees "bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

in several BitTorrent cases have rejected plaintiffs' assertions as to their hourly billing rates and the number of hours attributable to any given case.²⁷⁵

v. Statutory Damages

The choice between actual damages and statutory damages is an easy one for the plaintiff to make in online file-sharing cases.²⁷⁶ Actual damages would be the cost of a legal download—between \$12 and \$20 based on current iTunes and Amazon prices.²⁷⁷ Statutory damages begin at \$750 and could theoretically be as high as \$150,000 per work infringed.²⁷⁸ As one of us has discussed at length, statutory damages are a useful part of the copyright ecosystem, where damage is hard to prove or where deterrence is an important consideration.²⁷⁹ However, in the context of individual file sharers, a range beginning at \$750 and ending at \$30,000 in general—\$150,000 in the case of willful infringement—bears no relationship to the harm of infringement, the need for deterrence, or generally accepted norms of proportionality in the administration of penalties.²⁸⁰ Fines for drunk driving (which kills thousands of Americans every year)²⁸¹ are typically in the high hundreds or low thousands.²⁸² Fines for parking in spaces reserved for the

275. LHF Prods., Inc. v. Does 1–19, No. 16-cv-01175-RSM, 2017 WL 615197, at *4 (W.D. Wash. Feb. 15, 2017) (“Given that Mr. Lowe’s work in this matter amounts to nothing more than form pleading, the Court . . . will reduce Mr. Lowe’s hourly rate to \$300.”); Qotd Film Inv. Ltd. v. Starr, No. 16-cv-00371-RSL, 2016 WL 5817027, at *4 (W.D. Wash. Oct. 5, 2016) (“[T]he Court will reduce counsel’s hourly rate to \$350 per hour”); Dall. Buyers Club, LLC v. Nydam, 14-cv-01684-RAJ, 2016 WL 7719874, at *5–6 (W.D. Wash. Aug. 8, 2016).

276. Copyright Act, 17 U.S.C. § 504(b), (c)(1) (2012) (allowing the copyright owner to elect, at any time before final judgment, to receive statutory damages in lieu of actual damages or restitution).

277. Scott Stein, *iTunes vs. Amazon: What’s the Best Video Service on the iPad?*, CNET (Aug. 1, 2012, 3:47 PM), <https://www.cnet.com/news/itunes-vs-amazon-whats-the-best-video-service-on-the-ipad> (finding the average price of iTunes and Amazon movie downloads were \$14.99 to \$19.99 and \$9.99 to \$14.99, respectively, in 2012).

278. Ben Depoorter, *Over-Claiming Willfulness: Statutory Damage Awards by the Numbers* 8, 10 (working paper on file with the authors); *see also id.* at 31 (demonstrating that enhanced damages based on willful infringement are often claimed in copyright cases but infrequently awarded).

279. Sag, *supra* note 5, at 1119. *See generally* Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009) (detailing the inconsistencies of statutory damage awards in copyright cases with legislative goals).

280. Sag, *supra* note 5, at 1119.

281. According to the Center for Disease Control and Prevention, “[i]n 2015, 10,265 people died in alcohol-impaired driving crashes, accounting for nearly one-third (29%) of all traffic-related deaths in the United States.” *Impaired Driving: Get the Facts*, CENTERS FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/motorvehiclesafety/impaired_driving/impaired-driv_factsheet.html (last visited Aug. 28, 2017).

282. *See DUI or DWI Punishments and Penalties*, NOLO, <http://www.nolo.com/legal-encyclopedia/dwi-or-dwi-punishments-penalties-30321.html> (last visited Oct. 28, 2017) (noting that courts impose fines for DUI or DWI ranging from \$500 to \$2,000, and that first-offense DUI or DWI is classified as a misdemeanor punishable by up to six months in jail).

disabled usually range from \$100 to \$500.²⁸³ Like file sharing, these are antisocial activities that may not always be detected and may not result in any harm in any given instance but are harmful in the aggregate. Statutory damages of \$750 for individual file sharers still seems high, but it is probably in the right ballpark given the need for deterrence; \$30,000 and \$150,000 seem absurd.

The most important thing for district courts to understand about the range of statutory damages is that the need for deterrence is already baked into the statutory minimum. Courts should justify any departure from that minimum with case-specific reasons rather than simply pulling multiples out of the air. In addition, although statutory damages relieves plaintiffs of the burden of proving their harm with particularity, the statutory scheme is not an invitation to abandon notions of proportionality altogether.²⁸⁴ District courts have “wide discretion in determining the amount of statutory damages to be awarded,”²⁸⁵ and they ought to take into account whether “the recovery sought is proportional to the harm caused by defendant’s conduct.”²⁸⁶ Courts may even chose to award a single unit of minimum statutory damages to a plaintiff who has alleged that multiple defendants in the same case conspired with one another to infringe the same digital copy of the copyright owner’s work, for which the defendants should be held jointly and severally liable.²⁸⁷ We are not aware of any authority applying such a single satisfaction rule across separately filed cases.

C. STAGE III: DISCOVERY AND SUMMARY JUDGMENT

1. Discovery

Spanning from discovery to summary judgment, Stage III is less-well-charted territory. The most important consideration in this stage is to manage the discovery process. The plaintiff’s most likely strategies are to drag out discovery as long as possible and to attempt to raise the defendant’s costs with spurious motions alleging spoliation and the like. The best response to these tactics is to urge the court to adopt a detailed discovery plan with a clear cutoff date at the outset.

283. See, e.g., CAL. VEHICLE CODE § 42001.5 (West 2016) (imposing a fine of \$250 for parking in disabled person’s space or sidewalk access area).

284. Courts have a statutory obligation to ensure the “just” application of statutory damages. See Copyright Act, 17 U.S.C § 504(c)(1) (2012) (providing that the award of statutory damages should be “as the court considers just”). This obligation is also Constitutional. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (“The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.”).

285. *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984).

286. *Landstar Ranger, Inc. v. Parth Enters., Inc.*, 725 F. Supp. 2d 916, 921 (C.D. Cal. 2010).

287. See *LHF Prods., Inc. v. Doe 1*, No. 2:16-cv-01017 (W.D. Wash. Feb. 15, 2017) (order granting in part motion for default judgment).

The full scope of discovery in online file-sharing cases could end up being quite broad. Ideally, courts would initially adopt a limited discovery plan as we suggested in Part IV.B.4. The presence of the infringing file or the inadequacy of the PCAP evidence would be an appropriate basis for summary judgment.

In general, defense lawyers will need to make repeated motions to compel the production of relevant evidence under Rule 37. A motion to compel cannot ordinarily be filed unless the opposing party is being evasive or failing to respond to a discovery request,²⁸⁸ so counsel are advised to expect a long haul and to document their requests. In the few cases that have reached this stage, plaintiffs have tried to avoid providing the actual PCAPs upon which they rely, by presenting one or more declarations from witnesses who claim to have analyzed the PCAPs. When presented with a motion to compel, plaintiffs argue that analyzing and extracting the PCAPs is expensive, as the company that does so charges by the hour.²⁸⁹ Plaintiffs have also argued that the evidence they rely upon is not in their possession.²⁹⁰ However, it is well settled that actual possession is not necessary;²⁹¹ so long as a litigant may “obtain documents on demand,” it must be disclosed.²⁹² The terms “possession, custody, or control” in the Federal Rules are disjunctive.²⁹³ Moreover, documents in foreign countries and those subject to confidentiality claims are still discoverable.²⁹⁴ Claims of confidentiality are not sufficient to avoid producing discoverable documents.

288. FED. R. CIV. P. 37(a)(3)-(4).

289. See *Malibu Media LLC v. Doe*, No. 1:13-cv-06312, 2016 WL 464045, at *3 (N.D. Ill. Feb. 8, 2016) (“Malibu objected to Doe’s request that it produce all of the PCAPs allegedly captured because IPP charges Malibu by the hour to extract the PCAPs.” (internal quotation marks omitted)). We note that this is walking a fine line; if the plaintiff wants the court to consider its experts to be lay “fact” witnesses, it should not be paying them. Any motion to compel should press the court to recognize the troll’s witnesses as experts, not lay witnesses.

290. See, e.g., *id.*

291. See, e.g., *Soto v. City of Concord*, 162 F.R.D. 603, 619 (N.D. Cal. 1995) (holding actual possession of documents is not required under Rule 34(a)).

292. *United States v. Int’l Union of Petrol. & Indus. Workers*, 870 F.2d 1450, 1452 (9th Cir. 1989) (“Control is defined as the legal right to obtain documents upon demand.”); see also *New York ex rel. Boardman v. Nat’l R.R. Passenger Corp.*, 233 F.R.D. 259, 268 (N.D.N.Y. 2006); *Prokosch v. Catalina Lighting, Inc.*, 193 F.R.D. 633, 636 (D. Minn. 2000) (holding that “control” does not require ownership, just the ability to obtain a document on demand).

293. FED. R. CIV. P. 34(a)(1); see also *Cumis Ins. Soc’y, Inc. v. S.-Coast Bank*, 610 F. Supp. 193, 196 (N.D. Ind. 1985) (holding the phrase “possession, custody, or control” to be disjunctive and requiring only one element be met).

294. *Union Oil Co. v. Leavell*, 220 F.3d 562, 567-68 (7th Cir. 2000) (“[T]he tradition that litigation is open to the public is of very long standing. People who want secrecy should opt for arbitration. When they call on the courts, they must accept the openness that goes with subsidized dispute resolution Judicial proceedings are public rather than private property” (citation omitted)); *Novelty, Inc. v. Mountain View Mktg., Inc.*, 265 F.R.D. 370, 377 (S.D. Ind. 2009); see also *In re Specht*, 622 F.3d 697, 701 (7th Cir. 2010) (“Documents that affect the disposition of federal litigation are presumptively open to public view, even if the litigants strongly prefer secrecy . . .”).

The most difficult question for the defense team is how aggressively to scrutinize the plaintiff's black box process. One strategy is to conserve resources and simply wait to see if the plaintiff offers any admissible evidence on this front. At a minimum, the plaintiff should be required to produce: the source code of the software that records the packets of information it captures;²⁹⁵ an expert to explain how that software works; a fact witness to say how that software was used in practice; and every person involved at every stage of their investigative process. To date, this evidence has never been produced in a satisfactory manner.²⁹⁶

2. Disqualification of Plaintiff's Experts

As discussed in Part III, the plaintiffs all rely on expert witnesses who are based overseas. These witnesses, who supposedly identify instances of online infringement, are undoubtedly not mere fact witnesses, yet they may not be experts either. If the plaintiff seeks to rely on evidence about PCAPs without filing a Rule 26 disclosure, the defendant should make a motion to strike.

Under Federal Rule of Civil Procedure 37, a plaintiff's undisclosed expert testimony should be automatically excluded unless the failure to make a Rule 26 disclosure is substantially justified or harmless.²⁹⁷ In determining whether a failure to disclose is harmless, a court should consider several factors, including "the prejudice or surprise to the party against whom the evidence is offered," and "the bad faith or willfulness involved in not disclosing the evidence at an earlier date."²⁹⁸ In *Malibu Media, LLC. v. Doe*, the court held that a plaintiff's failure to disclose evidence under Rule 26 was not harmless when the plaintiff's entire case rested squarely on its experts' depositions²⁹⁹ referred to earlier and the plaintiff had been reminded multiple times of the need to make expert disclosures.³⁰⁰

295. If the software constitutes a valuable trade secret, it can be subject to a protective order.

296. Defendants have sought production of the relevant PCAP files in several cases. To our knowledge they have only ever been produced, and after considerable delay, in three cases.

297. FED. R. CIV. P. 37(c)(1); *see also* *Tribble v. Evangelides*, 670 F.3d 753, 758 (7th Cir. 2012) (concluding that defendant police officers' failure to disclose Assistant State's Attorney as an expert witness was not justified and not harmless and ordering a new trial); *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 758 (7th Cir. 2004) (holding that expert testimony proffered in opposition to summary judgment was properly excluded as discovery sanction there was reasonable basis for district court's finding that sanctioned parties' failure to disclose experts lacked substantial justification and was not harmless).

298. *David v. Caterpillar, Inc.*, 324 F.3d 851, 857 (7th Cir. 2003).

299. *Malibu Media, LLC. v. Doe*, No. 1:13-cv-06312 (N.D. Ill. Sept. 04, 2013), ECF No. 180 ("Without the [experts'] declarations, there is no evidence linking Doe or Doe's IP address to [plaintiff's] work. The failure to disclose them under Rule 26(a)(2) was not harmless.").

300. *Id.* at *23 ("Weighing heavily in favor of exclusion is the fact that the court drew [plaintiff's] attention to the need for formal expert disclosures at the hearing on January 23, 2015 If [plaintiff] had, in fact, moved for and been given leave to serve additional expert disclosures even at that late date, the schedule could have been adjusted to allow Doe appropriate

Assuming that the plaintiff does make the required Rule 26 disclosure, its evidence should be challenged under a *Daubert* motion³⁰¹ on the grounds that it has not produced the data upon which it relied. The trial judge has the authority and duty to act as gatekeeper for expert evidence, allowing only that which is both relevant and reliable.³⁰² This authority extends not merely to scientific evidence but also to technical evidence, as well as “other specialized knowledge [that] will assist the trier of fact,”³⁰³ and the judge must determine “whether the reasoning or methodology underlying the [expert’s] testimony is scientifically valid.”³⁰⁴ For evidence from an expert to be admissible, it must be both *relevant* and *reliable*.³⁰⁵

Evidence about the plaintiff’s black box is definitely relevant, but the court cannot make a determination of whether it is *reliable* unless the plaintiff presents the data upon which the expert relies. If the court cannot make this determination, the evidence must be excluded. The plaintiff may argue that it cannot present the PCAP data because it is expensive to retrieve and analyze. But this is not persuasive; the party whose expert is challenged carries the burden of proof—by a preponderance of the evidence—that the expert’s testimony is admissible.³⁰⁶

In addition to being unreliable for not presenting the data relied upon, the plaintiff’s experts may simply be unreliable altogether. In *Dallas Buyers Club, LLC v. Doughty*, the plaintiff’s expert had no experience with peer-to-peer software and the only support he relied on for his statements about the software at issue was a Wikipedia page.³⁰⁷ The court found his “statements to be highly unreliable” and his testimony was stricken.³⁰⁸ As this incident demonstrates, nothing in these cases should be taken at face value.

3. Summary Judgment

Eventually discovery will end, and if the plaintiff has not dismissed or settled the case by then, a motion for summary judgment will be appropriate. The issue at summary judgment is whether the plaintiff has proven or can prove by admissible evidence that a defendant copied or distributed its

time to deal with those disclosures. Malibu did not so move That Malibu ignored the court’s admonition is evidence of at least willfulness, if not bad faith.”).

301. See generally *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) (describing the standard for admission of scientific evidence).

302. *Id.* at 580; FED. R. EVID. 702.

303. FED. R. EVID. 702; *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 137, 147 (1999).

304. *Daubert*, 509 U.S. at 592–93.

305. *Id.* at 589.

306. *Bourjaily v. United States*, 483 U.S. 171, 175–76 (1987).

307. *Dall. Buyers Club, LLC v. Doughty*, No. 3:15-cv-00176-AC, 2016 WL 1690090, at *2–3, (D. Or. Apr. 27, 2016).

308. *Id.*

works.³⁰⁹ If the plaintiff cannot, there is no genuine dispute of material fact. As is well known, to survive a motion for summary judgment, the nonmoving party bears the burden³¹⁰ of producing evidence that a reasonable jury could use “to return a verdict for that party”³¹¹ but also enjoys the benefit of the court’s construction of all reasonable and justifiable inferences in its favor.³¹²

The key issue—the presence or absence of the plaintiff’s work on the defendant’s computer—is not simply a matter of opinion. Where the defendant makes a statement of fact that she does not have a copy of the work on any of her devices, the plaintiff cannot simply respond by disputing the fact without any evidence to support the dispute. If forensic discovery shows the file is or was present on the defendant’s computer, the plaintiff meets this burden. If instead the absence of the file is disputed without supporting evidence, the defendant’s denial is considered admitted.³¹³

In the absence of evidence that defendant’s devices contain any copies of the plaintiff’s work, the only evidence the plaintiff could possibly have to rely upon is the defendant’s IP address, which was allegedly used to infringe. But, as we have discussed in detail earlier, an IP address only identifies a location in digital space, not an individual actor.³¹⁴ Indeed, courts have held that “[e]vidence of a link between an IP address and [the work] may be enough to justify discovery, but it is not enough to prove liability.”³¹⁵

Moreover, even if evidence linking an IP address to an instance of infringement were enough to prove liability, the typical plaintiff still cannot meet its burden, because the isolated “bits” of the movie that it supposedly received from the defendant’s IP address do not meet the standard for copyright infringement.³¹⁶ In the cases that we have studied, the plaintiffs have offered declarations that the defendant’s IP address was observed transmitting data with a certain hash value. That hash value, it is alleged, is the same as the hash value of a piece that the witness combined with other pieces to create a file identical to the copyright owner’s work. But note that these other pieces were not downloaded from a device associated with the

309. See, e.g., *Malibu Media v. Doe*, No. 1:13-cv-06312 (N.D. Ill. Sept 04, 2013), ECF No. 180 (order granting defendant’s motion for summary judgment).

310. *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562 (7th Cir. 1996).

311. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

312. *Id.* at 255.

313. FED. R. CIV. P. 56(e)(2); N.D. Ill. L.R. 56.1(b)(3)(B); see also *Cracco v. Vitran Express, Inc.*, 559 F.3d 625, 632 (7th Cir. 2009) (“When a responding party’s statement fails to dispute the facts set forth in the moving party’s statement in the manner dictated by the rule, those facts are deemed admitted for purposes of the motion.”); *Malibu Media, LLC v. Doe*, No. 1:13-cv-6312 (N.D. Ill. Sept 04, 2013), ECF No. 180.

314. *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 84 (E.D.N.Y. 2012) (“An IP address provides only the location at which one of any number of computer devices may be deployed, much like a telephone number can be used for any number of telephones.”).

315. *Malibu Media, LLC v. John Doe*, No. 1:13-cv-06312 (N.D. Ill. Sept. 4, 2013).

316. *Id.*

defendant's IP address and were instead downloaded from other members of the swarm.³¹⁷ Moreover, note that these declarations say nothing about the size or contents of the portions of the work actually downloaded from the defendant's IP address. In essence, the plaintiff can only state truthfully that its software observed the defendant's IP address transmitting a fraction of the work.³¹⁸

Evidence that a fragment of a piece of copyrighted work was transmitted is not sufficient evidence for a reasonable jury to rely upon to return a verdict for the plaintiff. As we explained in Part III.B.2, a fragment of piece of file is merely a chunk of useless zeros and ones and thus is not a "copy" as that term is defined by the Copyright Act.³¹⁹ Furthermore, even if it were a copy in the statutory sense, it still may not meet the threshold of substantial similarity required for copyright infringement. As the Supreme Court noted in *Feist Publications, Inc. v. Rural Telephone Service Co.*, "Not all copying . . . is copyright infringement."³²⁰ Even where the fact of copying is conceded or established, "no legal consequences will follow from that fact unless the copying is substantial."³²¹

D. STAGE IV: TRIAL

There is no Stage IV.

Our search of the LexMachina database shows 9,956 file-sharing cases, of which 4,290 were filed in 2015 and 2016 alone.³²² Plaintiffs have voluntarily dismissed 7,019 of these cases, with a further 1,240 stipulated dismissals. Defendants have obtained 397 dismissals under Rule 12B(6). Defendants have prevailed in one default judgment and one motion for summary judgment. Working with the LexMachina database, we determined that plaintiffs have obtained 273 default judgments, 120 consent judgments, one

317. *See, e.g., id.*

318. *Id.* ("There is nothing in either declaration that would allow the court to conclude that the 'bits' and 'pieces' captured by [plaintiff's experts'] technology as allegedly distributed from Doe's IP address meet the standard of originality justifying a finding that they are protectable elements of the works. Even if the hash value captured in the PCAP corresponds to portion of a digital file that is 'identical, strikingly similar or substantially similar to' [plaintiff's] copyrighted work, there is nothing before the court that describes the audio/visual material that is represented by that hash value. Is it the entire movie or is it some portion so small that it would not be identifiable as part of the movie? There is nothing in this record to answer that question.")

319. *Ingenuity 13 LLC v. Doe*, No. 2:12-cv-6662-OD-JCx, 2013 U.S. Dist. LEXIS 16952, at *7 (C.D. Cal. Feb. 7, 2013).

320. *Feist Publ'ns., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991).

321. 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.03(A) (rev. ed. 2017).

322. We conducted this search in mid-February 2017. The LexMachina figures are slightly different than our own calculations, which were made directly with the PACER data, but the differences are not significant. While generally we prefer working with the PACER data directly for the sake of transparency and replication, LexMachina has richer data in terms of case disposition.

favorable summary judgment,³²³ one judgment on the pleadings,³²⁴ and one victory at a bench trial.³²⁵ The plaintiffs were not put to proof in any of these cases.

The aforementioned summary judgment and judgment on the pleadings victories came about as follows. In *Malibu Media, LLC v. Bui*, the plaintiff prevailed on summary judgment because the defendant conceded that he ordered the plaintiffs' films from KickassTorrents, a website that provided a directory for torrent files to facilitate peer-to-peer file sharing using BitTorrent.³²⁶ In spite of this admission, the defendant maintained "the copying and downloading were done by KickAss Torrent, and not by him."³²⁷ In *Countryman Nevada v. Doe*, the plaintiff obtained Judgment on the Pleadings after the defendant admitted that he used his wife's computer to participate in peer-to-peer BitTorrent file sharing and to download the plaintiff's copyrighted work without its knowledge or permission.³²⁸

The plaintiff's bench trial victory hardly merits being labeled as a trial at all. In 2013, Malibu Media, prevailed in a bench trial in the Eastern District of Pennsylvania.³²⁹ The trial was framed by the court as a "Bellwether" trial to assess the merits of several Malibu Media cases that had been filed in that district.³³⁰ Following expedited pretrial proceedings, the court convened a non-jury trial on June 10, 2013.³³¹ None of the defendants contested liability; indeed, all but one had settled with the plaintiff and were merely used as witnesses for the prosecution.³³² Mr. White, the one defendant who had been expected to contest his liability, authorized his counsel at the last minute "to admit that he had downloaded Plaintiff's copyrighted works, had 'wiped

323. *Malibu Media, LLC v. Bui*, No. 1:13-cv-00162-RJJ (W.D. Mich. July 21, 2014). LexMachina listed *Dallas Buyers Club, LLC v. Doughty*, No. 3:15-cv-00176-AC (D. Or. 2016), as summary judgment in favor of the plaintiff, whereas in fact the court denied the defendant's motion for summary judgment on direct infringement and granted its motion on claims for contributory and vicarious copyright infringement. LexMachina also listed *Malibu Media, LLC v. Doe*, No. 2:14-cv-01280 (E.D. Pa. Feb 2, 2015), as summary judgment in favor of the plaintiff, whereas in fact, the plaintiff's motion for summary judgment was denied and the defendant's motion for summary judgment was granted.

324. *Countryman Nev., LLC v. Doe*, 193 F. Supp. 3d 1174, 1175 (D. Or. 2016).

325. *Malibu Media, LLC v. John Does 1, 6, 13, 14*, 950 F. Supp. 2d 779, 780 (E.D. Pa. 2013).

326. Order at 1-2, *Malibu Media, LLC v. Bui*, No. 1:13-cv-00162, 2014 WL 12469955 (W.D. Mich. July 21, 2014).

327. Plaintiff's Motion for Summary Judgment at 3, *Malibu Media, LLC v. Bui*, No. 1:13-cv-00162, 2014 WL 8727068 (W.D. Mich. May 14, 2014).

328. *Countryman Nev.*, 193 F. Supp. 3d at 1179.

329. *Malibu Media v. John Does*, 950 F. Supp. 2d at 780.

330. *Id.*

331. *Id.*

332. *Id.*; Transcript of Bench Trial at 3, *Malibu Media, LLC v. John Does 1, 6, 13, 14*, 950 F. Supp. 2d 779 (E.D. Pa. 2013) (No. 12-2078) (on file with the authors).

clean' his desktop computer and installed a new operating system to conceal the downloading, and had testified falsely at the Rule 104 hearing."³³³

The trial, such as it was, was for the purpose of determining the appropriate statutory damages to be assessed against White.³³⁴ Even so, it was a surreal affair. White was represented by a criminal defense lawyer with no apparent copyright experience. White's attorney was not present at the beginning of the trial, asked no questions, and neither examined nor cross-examined witnesses. In fact, he said virtually nothing other than to admit liability on behalf of his client.³³⁵

At the trial, one of the principles of Malibu Media, Colette Pelissier-Field, testified about how illegal file sharing affected her business and the difficulty of taking enforcement action against websites that facilitate illegal file sharing.³³⁶ She was not cross-examined. No one asked her, for example, how much money Malibu made from file-sharing litigation or why Malibu Media does not use industry standard countermeasures against piracy. Michael Patzer testified that he "designed, created, and implemented" the software used by Malibu's technology provider, IPP, Ltd., but that he did not work for IPP.³³⁷ Patzer explained that he worked for a different company that provides services to IPP, Excipio. He was not cross-examined. Tobias Fieser, an employee of IPP, testified that he verified that the copyright owner's work was the same as "the BitTorrent that has been downloaded."³³⁸ He was not cross-examined. A consultant named Patrick Paige testified that he conducted certain tests test as to IPP's IP detection software.³³⁹ He was not cross-examined.

In short, to call *Malibu Media, LLC v. John Does 1,6,13,14 and 16* a "Bellwether trial"³⁴⁰ is absurd. A trial where liability is admitted, no one is cross-examined, and nothing is contested, is not even a trial in the ordinary sense of the word.

V. CONCLUSION

We have attempted to provide lawyers with the information essential to defend clients, especially innocent clients, against the claims of copyright

333. *Malibu Media, LLC*, 950 F. Supp. 2d at 786.

334. *Id.* at 787 ("Thus, the entire focus of the non-jury trial was to establish a record, following which I would make a determination as to the amount of damages to be found against White.").

335. Transcript of Bench Trial, *supra* note 332, at 159, 161.

336. *Id.* at 24-53.

337. *Id.* at 54-89. In various declarations Patzer identifies himself as the creator of the software used by IPP/Excipio/Crystal Bay Corp. All of those declarations are notably short on details such as Patzer's education, qualifications, or experience. *See, e.g.*, Declaration of Michael Patzer, *Malibu Media, LLC v. John Doe*, No. 3:15-cv-04441-WHA, (N.D. Cal. February 2, 2017), ECF No. 144-8.

338. *Id.* at 92-102.

339. *Id.* at 109-42.

340. *See Malibu Media, LLC*, 950 F. Supp. 2d at 780.

trolls. In our opinion, the current model of file-sharing litigation is often both abusive and exploitative. Lawyers have played no small part in bringing about this situation and allowing it to continue. Our hope is that, armed with the information and legal analysis this Article provides, lawyers will find it easier to represent their clients and fight for justice.

However, lawyers are not the only ones with a social and ethical responsibility to take the problem of copyright trolling seriously. District court judges have the inherent authority to control their own proceedings, and significant discretion to supervise discovery and to determine attorneys' fees and statutory damages. District court judges see individual plaintiffs and defendants; they do not always see the big picture. Those who do have tended to take a more active role in managing these cases from the beginning. We hope that judges will take steps to discourage the abusive use of civil litigation and find ways to manage John Doe copyright litigation in the interests of justice and the goals of copyright.

Finally, no discussion of copyright trolling would be complete without noting the ongoing silence of the U.S. Copyright Office on this issue. The Copyright Office has traditionally been an enthusiastic proponent of statutory damages and has resisted calls for their reform. However, the evidence that statutory damages are being used to harass and intimidate vast numbers of defendants, many of whom have not infringed copyright, is now overwhelming. Acknowledging the problem of copyright trolls may require a more qualified enthusiasm for statutory damages but it is an issue that can no longer be ignored.

Appendix A:

Case	Cases Filed	Cases Filed 2015-2016	Voluntary Dismissal	Stipulated Dismissal	No Revocation	Dismissed	Defendant Sum. Judgment	Defendant Default Judgment	Plaintiff Default Judgment	Consent Judgment	Plaintiff Summary Judgment	Plaintiff Judgment on Pleadings	Trial
All File-Sharing Cases Identified by Lex Machina (as of Feb. 10, 2017)	9956	4590	7019	1240	820	393	1	1	273	120	1	1	1
Mailbu Media, LLC	5982	2646	4333	981	387	117	1		125	4	1		1
Dallas Buyers Club, LLC	321	110	202	45	1	8			22	39			
LHF Productions, Inc.	246	225	85	2	148	1			2	7			
Cobbler Nevada, LLC	232	208	142	4	8	5			20	30			
Manny Film, LLC	213	215	191	14		1			4				
Good Man Productions, Inc.	160	62	134	16	0	3			5				
Plastic The Movie Ltd.	134	137	123	5	0	1			3				
Mez Productions	119	82	3		112	0				3			

Case	Cases Filed	Cases Filed 2015-2016	Voluntary Dismissal	Stipulated Dismissal	No Resolution	Dismissed	Defendant Sum. Judgment	Defendant Default Judgment	Plaintiff Default Judgment	Consent Judgment	Plaintiff Summary Judgment	Plaintiff Judgment on Pleadings	Trial
Criminal Productions, Inc.	78	66	35	1	37	0				5			
Clear Skies Nevada, LLC	73	66	51	4	7	2			5	4			
Killer Joe Nevada, LLC	65	11	34	1	0	17			2	6			
Poplar Oaks, Inc.	50	23	43	5	0	0			2				
Glacier Films (USA), Inc.	42	34	25	1	3	0			4	8			
PTG Nevada, LLC	42	31	31	3	3	1			1	3			
QOTD Film Investment Ltd.	42	40	29	3	6	0			1	3			
Cook Productions, LLC	40	33	4		35	1							
Countrymen Nevada, LLC	40	7	27	5	0	1			2	3		1	
CELL Film Holdings, LLC	39	35	11	1	24	0			0	3			

Case	Cases Filed	Cases Filed 2015-2016	Voluntary Dismissal	Stipulated Dismissal	No Resolution	Dismissed	Defendant Sum. Judgment	Defendant Default Judgment	Plaintiff Default Judgment	Consent Judgment	Plaintiff Summary Judgment	Plaintiff Judgment on Pleadings	Trial
Fathers & Daughters Nevada, LLC	39	37	19	5	10	0			3	2			
Survivor Productions, Inc.	34	29	20	2	2	0			3	7			
I.T. Productions, LLC	22	19				0							
Automata Productions, Inc.	16	11	5		2	1			3	5			
ELargo Holdings, LLC	14	13	8	1	2	0				3			
September Productions, Inc.	10	10	5		5	0							

Appendix B: Suggested Talking Points for Client Intake

The Accused Infringement

Have you seen this film ever in any context?

Where you at home at the time of the alleged infringement?

Did you do it?

Do you have any idea who might have done it?

The Household

Who is in your household?

Who has access to your household?

How do you normally watch movies/tv? (e.g., Netflix, cable, Amazon)

Computing Environment

How many and what devices do you have?

Desktop

Laptop

Tablet

External hard drives, thumb drives, other plug-in storage

iPhone (can't run the BitTorrent client)

Other brand of smartphone

Gaming consoles (e.g., PS4, Xbox, etc.)

What is your internet set-up?

Do you have wifi?

Does it have a password?

Does it have a guest network?

Knowledge of Computers and BitTorrent

Do you know what BitTorrent is?

Do you use BitTorrent?

Do you use PopcornTime?

Do you know what PopcornTime is?

How proficient with computers are you?

Information to explain to a new client

Copyright Basics

File sharing is illegal, ignorance of the law is no excuse.

Plaintiff has to show that you did this, not just that your IP address did this.

Statutory damages and attorneys' fees.

How copyright trolling works and options to respond.

Fee structure and conditions of representation.

Appendix C: Sample Motion to Proceed Anonymously

IN THE UNITED STATES DISTRICT COURT

FOR THE [] DISTRICT OF []

<p>[Plaintiff's name here]</p> <p>Plaintiff,</p> <p>v.</p> <p>[John Doe as described in complaint</p> <p>e.g. JOHN DOE subscriber assigned to IP Address 12.34.56.789],</p> <p>Defendant.</p>	<p>Case No. []</p> <p>[Judge's name]</p>
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Now Comes JOHN DOE subscriber assigned to IP Address 24.14.81.195 (“Doe”), [either “pro se” or “by and through counsel,”], who moves this Court for leave to proceed anonymously. In support of his/her Motion Doe states to the Court as follows:

I. Introduction

[If the motion is unopposed] Based on [details of communication] on [date], this Motion is unopposed. However, even if unopposed, this Court must still consider the merits of the Motion and consider the harm to the public. *Doe v. Smith*, 429 F.3d 706, 710 (7th Cir. 2005). Being unopposed, it is respectfully requested that presentment of the Motion be excused unless the Court seeks oral argument.]

[Explain who John Doe is general terms]

[Explain who plaintiff is in general nonpejorative terms]

[Explain that plaintiff has accused John Doe of copyright infringement and that John Doe believes that it would be in the interests of justice to allow John Doe to proceed anonymously unless and until the case goes to trial]

II. Argument

1. Legal Standard

While a party is required to provide both his/her name and “full residence address” in their first filing with the Court, it is within the discretion of the district court to grant the dispensation of anonymity, see *United States v. Microsoft*, 56 F.3d 1448, 1464 (D.C. Cir. 1995). Despite “this country’s strong tradition of access to judicial proceedings,” there are situations in which “a party’s interest in privacy or confidentiality . . . outweighs this strong presumption in favor of public access.” See *Johnson v. Greater Se. Cmty. Hosp. Corp.*, 951 F.2d 1268, 1277 (D.C. Cir. 1991).

2. Shame and Embarrassment to Defendant

In many file-sharing cases, courts have recognized that the potential shame and embarrassment of being accused of online piracy is often used as unfair leverage by plaintiffs. See, e.g., *Sunlust Pictures v. Does 1-75*, No. 12-cv-01546, 2012 WL 3717768, at *5 (N.D. Ill. Aug. 27, 2012) (“Judges within this district have recognized that plaintiffs in these types of cases might unfairly threaten to disclose defendants’ identities in order to improperly leverage settlement negotiations.”) (citing *Hard Drive Productions v. Does 1-48*, No. 11-cv-00962, 2012 WL 2196038 (N.D. Ill. June 14, 2012)). This is especially true when the film defendant is accused of pirating is pornographic; at least one other has court recognized that a fundamental component of the business-litigation model is the fact that “the subscribers, often embarrassed about the prospect of being named in a suit involving pornographic movies, settle.” *MCGIP, LLC v. Does 1-149*, No. 11-cv-02331, 2011 WL 4352110, at *4 (N.D. Cal. Sept. 16, 2011).

Merely being named in a file-sharing case can be damaging. At this point in litigation, plaintiffs have submitted no proof that defendant has committed infringement, and yet because they are accused—and because they have been required to file their correct contact information—their reputations may be at permanent risk. Employers, landlords, and other interested parties can identify defendants through publicly available information, and in some cases such parties conducting a routine search of potential employees or tenants may discover a defendant’s involvement in a file-sharing case entirely by accident. In at least one file-sharing case, a court has *sua sponte* recognized this danger and ordered that all Doe defendants should proceed anonymously until further notice. See *Manny Film, LLC v. Doe*, No. 3:15-cv-00103 (S.D. Ohio 2015), ECF No. 7 (order granting John Doe defendant a protective order to proceed anonymously).

3. No Harm to the Public

An important consideration in whether to grant a motion to proceed anonymously is whether allowing anonymity would harm the public. *See Doe v. Smith*, 429 F.3d 706, 710 (7th Cir. 2005) (“The public has an interest in knowing what the judicial system is doing, an interest frustrated when any part of litigation is conducted in secret.”). There is no potential for public harm from the granting of this motion, because anonymity will not substantially affect this proceeding. Doe is merely seeking to proceed under a pseudonym until dispositive motions, and aside from this pseudonym, no aspect of litigation will change. Further, Doe is a defendant, inappropriately drug into this embarrassing litigation by Malibu. He is certainly not a plaintiff availing himself of this Court seeking to benefit from this litigation. A similar situation existed in the *Malibu Media v. Reynolds* case. *Malibu Media v. Reynolds*, No. 12-cv-06672 (N.D. Ill Mar. 7, 2013), ECF No. 51-11. In that case, involving only the possibility of embarrassment, the Court allowed the Doe to proceed anonymously.

III. Conclusion

For the foregoing reasons, Defendant Doe respectfully requests that this Honorable Court grant leave for Doe to proceed anonymously through dispositive Motions in this action, under the pseudonym of Doe [IP address].

Respectfully submitted,
[John Doe pro se or counsel details]

[Filing certification]

Appendix D: Sample Rule 68 Offer of Judgment

IN THE UNITED STATES DISTRICT COURT

FOR THE [] DISTRICT OF []

[Plaintiff's name here] Plaintiff, v. [Defendant's name here], Defendant.	Case No. [] Offer of Judgment
---	--

To: Plaintiff [], by and through [plaintiff's attorney]

Pursuant to Fed. R. Civ P. 68, defendant hereby offers to settle this matter and allow entry of judgment in favor of plaintiff and against defendant (i) in the sum of \$[statutory damages], (ii) and \$400 the cost of plaintiff's filing fee, and (iii) injunctive relief as set forth in the addendum hereto, and (iv) legally-recoverable costs and attorneys fees, if any, through the date of service of this Offer of Judgment and to be determined by the court pursuant to Fed. R. Civ P. 54. Noting that in a copyright action, the court "may" award costs and reasonable attorneys fees to the prevailing party, but is not required to do so. *See* 17 U.S.C. § 505.

Pursuant to Fed. R. Civ P. 68, this Offer of Judgment is not to be construed as an admission for any purpose except in a proceeding to determine attorney's fees and costs.

If this Offer of Judgment is not accepted within 14 days, it shall be deemed revoked.

[Date and signature]

PLAINTIFF ACCEPTS/DECLINES Defendant's Offer Of Judgment.

Addendum-injunctive relief

Defendant agrees to a permanent injunction enjoining defendant from infringing plaintiff's rights in plaintiff's motion picture including, without limitation, by using the Internet to reproduce or copy plaintiff's motion

picture, to distribute plaintiff's motion picture, automate plaintiff's motion picture available for distribution to the public, except pursuant to a lawful license or with the express authority of plaintiff, and defendant shall destroy all unauthorized copies of plaintiff's motion picture in his possession or under her control.

[Certificate of Service. . .]

Appendix E: Example of PTG Nevada Letter

This example is included so that the reader may judge for herself whether the letter has been accurately quoted, characterized and otherwise described. This critical and illustrative use is well within the parameters of the fair use doctrine as set out in Section 107 of the Copyright Act and interpreted by binding U.S. Supreme Court precedent in *Campbell v. Acuff-Rose*, 510 U.S. 569 (1994).

RE: COPYRIGHT INFRINGEMENT OF PAY THE GHOST – Settlement Purposes Only-Not Admissible Under FRE 408

U.S. District Court for the Northern District of Illinois
 Civil Action No. 16-cv-1621
 Plaintiff: PTG Nevada, LLC
 Your IP Address: 67.176.170.180
 ISP Providing Information: Comcast
 Date of Alleged Infringement: September 18, 2015

Dear

Our law firm has filed a Federal copyright infringement lawsuit in the U.S. District Court for the Northern District of Illinois on behalf of our client, PTG Nevada, LLC. The suit was filed against 24 Doe Defendants. We subsequently obtained identifying contact information for many of these Defendants from their Internet Service Providers (ISPs). A copy of the Complaint is enclosed. Your contact information was supplied to us by your ISP as one of the Defendants who has illegally obtained or shared our client's copyrighted motion picture through a peer-to-peer network [*Gnutilla, BitTorrent, etc.*]. We are sending you this letter as a courtesy before we are required to take additional legal action which would involve adding you as a named Defendant to the lawsuit.

According to our records, you have placed a media file which contains the copyright-protected film content for our client's motion picture entitled Pay the Ghost in a shared folder location on your computer. This enables others to download copies of this content. In addition, we have evidence of the P2P client software that you used to obtain or share the film, and evidence of your file hash factor (a mathematical function through which a file can be identified with certainty) which was 0495EF034BSB1374A2DEA4513372A5A18F022848. We also have obtained the file name of the movie, the file size and the GUID, all corresponding to an IP address that was assigned to your ISP account at the time the infringing activity occurred.

Copyright infringement (in this case, obtaining a film without paying for it or sharing a film with others who have not paid for it) is a very serious problem for the entertainment industry. The law provides protections for copyright owners through the Federal copyright statute found at 17 U.S.C. §§ 501-506, which allows the copyright owner to impound your material, recover their attorneys' fees, and seek damages of \$750 - \$150,000 per work, depending on the circumstances surrounding the infringement. While it is too late to undo the illegal file sharing you have already done, we have prepared an offer to enable our client to recoup the damages incurred by your actions, and defray the costs of preventing this type of activity in the future.

In exchange for a comprehensive release of all legal claims which will enable you to avoid becoming a named Defendant in the lawsuit, our firm is authorized to accept the sum of \$3,900 as full settlement for its claims. This offer will expire on April 22, 2016. Thereafter, our client will accept no less than the sum of \$4,900 to settle this matter, but this increased settlement offer will expire on May 6, 2016. In addition, you must remove the file from the shared folder or location where our client's film can be shared or copied within three (3) days of paying a settlement. If you decide not to settle by May 6, 2016, we may add you to the list of Defendants to be served with a copy of the complaint in this lawsuit.

In short, you can avoid being named as a Defendant in the lawsuit if you act now. You can pay the settlement amount by cashier's check, money order or by credit card. Please contact us to arrange payment and so we can forward a Release and Settlement Agreement. Once we have processed the settlement, we will confirm that your payment has been processed and that you have been dismissed from the lawsuit.

We look forward to resolving this matter without further legal action. However, if you do not comply with the above requests, we may be forced to name you as a Defendant in the lawsuit and proceed directly against you on behalf of our client. If forced to do so, our client will be seeking to recover the maximum amount of fees provided under the Copyright Act for copyright infringement, which is up to \$30,000 per illegally downloaded film, plus attorneys' fees and the costs of litigation. Because torrent file-sharing requires *deliberate* action by the uploader or downloader of a movie, we may be able to prove that your actions were intentional, rather than just negligent. In the event we are able to prove that the infringement was intentional, our client will be seeking the maximum statutory damages allowed by the Copyright Act in the amount of \$150,000 per infringement, attorneys' fees and costs.

We believe that in light of the verdicts awarded in recent cases, our client's \$3,900 settlement offer is extremely reasonable. For example, in the case of Sony BMG Music Entertainment v. Tenenbaum (D. Mass.) [1:07-cv-11446], a \$675,000 jury verdict against a Boston University graduate student for illegally downloading and sharing 30 songs has been upheld. This means that the jury awarded \$22,500 per illegally-shared song. We believe that by providing you with an opportunity to settle our client's claim for \$3,900 instead of you incurring thousands of dollars in attorneys' fees and being at risk for a high jury verdict, our client is acting reasonably and in good faith.

You have been on notice of our client's claim since you received the notice from your ISP that we subpoenaed your information. *Please consider this letter to constitute formal notice that unless and until we are able to settle our client's claim with you, we demand that you not delete any media files from your computer.* If forced to proceed against you in the lawsuit, we will most certainly have a computer forensic expert inspect your computer in an effort to locate the subject movie file, or to determine if you have deleted any media files since receipt of the notice of the subpoena from your ISP. If in the course of litigation the forensic computer evidence suggests that you did delete media files following receipt of the letter from your ISP, our client will amend its complaint to add a spoliation of evidence claim against you. Be advised that if we were to prevail on this additional claim, the court could award monetary sanctions, evidentiary sanctions and reasonable attorneys' fees. If you are unfamiliar with the nature of this claim in this context, please consult an attorney and review the following cases: Paramount Pictures Corp. v. Davis, 234 F.R.D. 102, 77 U.S.P.Q.2d 1933 (E.D. Pa. 2005); U.S.C.A. Arista Records, L.L.C. v. Tschirhart, 241 F.R.D. 462 (W.D. Tex. 2006); and U.S. ex rel. Koch v. Koch Industries, Inc., 197 F.R.D. 488 (N.D. Okla. 1999).

We strongly encourage you to consult with an attorney to review your rights and risk exposure in connection with this matter.

We thank you in advance for your anticipated cooperation in this matter, and we look forward to resolving our client's claim against you on an amicable basis, through settlement.

Signature

MAH:cb
Encl.

Appendix F: Cases with “Darren M Griffin” Declarations

Plaintiff	District	File No.	Case Filed
TCYK LLC	AL SD	1:13-cv-306	06/06/13
Riding Films Inc	AZ	2:13-cv-299	02/11/13
Bleiberg Entertainment LLC	AZ	2:13-cv-595	03/22/13
Bleiberg Entertainment LLC	AZ	2:13-cv-597	03/22/13
Bleiberg Entertainment LLC	AZ	2:13-cv-597	07/29/13
Zambezia Film (Pty.) Ltd	CO	1:13-cv-339	02/07/13
Zambezia Film (Pty.) Ltd	CO	1:13-cv-342	02/07/13
Zambezia Film (Pty.) Ltd	CO	1:13-cv-377	02/13/13
Zambezia Film (Pty.) Ltd	CO	1:13-cv-378	02/13/13
Zambezia Film (Pty.) Ltd	CO	1:13-cv-395	02/13/13
Zambezia Film (Pty.) Ltd	CO	1:13-cv-392	02/13/13
Zambezia Film (Pty.) Ltd	CO	1:13-cv-396	02/13/13
R&D Film 1 LLC	CO	1:13-cv-413	02/15/13
R&D Film 1 LLC	CO	1:13-cv-414	02/15/13
R&D Film 1 LLC	CO	1:13-cv-431	02/19/13
R&D Film 1 LLC	CO	1:13-cv-432	02/19/13
R&D Film 1 LLC	CO	1:13-cv-433	02/19/13
Bicycle Peddler LLC	CO	1:12-cv-671	03/14/13
Ledge Distribution LLC	CO	1:13-cv-688	03/14/13
Thompsons Film LLC	CO	1:13-cv-687	03/14/13
Voltage Pictures LLC	CO	1:13-cv-900	04/08/13
Voltage Pictures LLC	CO	1:13-cv-902	04/08/13
Voltage Pictures LLC	CO	1:13-cv-903	04/08/13
Voltage Pictures LLC	CO	1:13-cv-1121	04/26/13
Voltage Pictures LLC	CO	1:13-cv-1122	04/26/13
Voltage Pictures LLC	CO	1:13-cv-1123	04/26/13
Killer Joe Nevada LLC	CO	1:13-cv-1292	05/17/13
Killer Joe Nevada LLC	CO	1:13-cv-1309	05/19/13
Killer Joe Nevada LLC	CO	1:13-cv-1340	05/22/13
R&D Film 1 LLC	CO	1:13-cv-1343	05/23/13
TCYK LLC	CO	1:13-cv-1461	06/05/13
TCYK LLC	CO	1:13-cv-1476	06/09/13
TCYK LLC	CO	1:13-cv-1630	06/20/13
TCYK LLC	CO	1:13-cv-1691	06/26/13
BKGTH Productions LLC	CO	1:13-cv-1778	07/09/13
Power of Few LLC	CO	1:13-cv-2200	08/15/13
Power of Few LLC	CO	1:13-cv-2214	08/16/13
Power of Few LLC	CO	1:13-cv-2312	08/28/13
Power of Few LLC	CO	1:13-cv-2341	08/30/13

Power of Few LLC	CO	1:13-cv-2380	09/03/13
Power of Few LLC	CO	1:13-cv-2627	09/25/13
Power of Few LLC	CO	1:13-cv-2635	09/26/13
Power of Few LLC	CO	1:13-cv-2645	09/27/13
Lynn Peak Productions Inc	CO	1:13-cv-2911	10/24/13
Lynn Peak Productions Inc	CO	1:13-cv-2921	10/25/13
TCYK LLC	CO	1:13-cv-2950	10/29/13
Lynn Peak Productions Inc	CO	1:13-cv-2974	10/30/13
Lynn Peak Productions Inc	CO	1:13-cv-2984	10/31/13
Lynn Peak Productions Inc	CO	1:13-cv-2998	11/01/13
Lynn Peak Productions Inc	CO	1:13-cv-3026	11/05/13
Lynn Peak Productions Inc	CO	1:13-cv-3056	11/08/13
Lynn Peak Productions Inc	CO	1:13-cv-3071	11/12/13
Lynn Peak Productions Inc	CO	1:13-cv-3079	11/13/13
Lynn Peak Productions Inc	CO	1:13-cv-3100	11/14/13
TCYK LLC	CO	1:13-cv-3197	11/21/13
Lynn Peak Productions Inc	CO	1:13-cv-3203	11/22/13
Vision Films Inc	DE	1:12-cv-1746	12/20/12
Zambezia Film (Pty.) Ltd	DE	1:13-cv-91	01/16/13
Zambezia Film (Pty.) Ltd	DE	1:13-cv-92	01/16/13
Georgia Film Fund Four LLC	DE	1:13-cv-487	03/28/13
Georgia Film Fund Four LLC	DE	1:13-cv-488	03/28/13
Georgia Film Fund Four LLC	DE	1:13-cv-489	03/28/13
Killer Joe Nevada LLC	DE	1:13-cv-677	04/16/13
Killer Joe Nevada LLC	DE	1:13-cv-679	04/16/13
Killer Joe Nevada LLC	DE	1:13-cv-680	04/16/13
Killer Joe Nevada LLC	DE	1:13-cv-681	04/16/13
Killer Joe Nevada LLC	DE	1:13-cv-682	04/16/13
Thompsons Film LLC	ED MO	4:13-cv-577	03/27/13
Dead Season LLC	FL MD	8:12-cv-2436	10/29/12
Dead Season LLC	FL MD	8:12-cv-2435	10/29/12
Dead Season LLC	FL MD	2:13-cv-2435	11/07/12
Bait Productions PTY LTD	FL MD	8:13-cv-171	03/05/13
Bait Productions PTY LTD	FL MD	2:13-cv-86	03/08/13
Zambezia Film (Pty.) Ltd	FL MD	8:13-cv-873	04/05/13
Zambezia Film (Pty.) Ltd	FL MD	8:13-cv-874	04/05/13
Zambezia Film (Pty.) Ltd	FL MD	8:13-cv-872	04/05/13
Zambezia Film (Pty.) Ltd	FL MD	6:13-cv-567	04/09/13
Zambezia Film (Pty.) Ltd	FL MD	6:13-cv-568	04/09/13
Zambezia Film (Pty.) Ltd	FL MD	6:13-cv-569	04/09/13
Zambezia Film (Pty.) Ltd	FL MD	5:13-cv-172	04/09/13
Bicycle Peddler LLC	FL MD	8:13-cv-905	04/10/13

Bicycle Peddler LLC	FL MD	8:13-cv-906	04/10/13
Bicycle Peddler LLC	FL MD	6:13-cv-595	04/11/13
Bicycle Peddler LLC	FL MD	6:13-cv-594	04/11/13
Bicycle Peddler LLC	FL MD	2:13-cv-279	04/11/13
Thompsons Film LLC	FL MD	8:13-cv-1103	04/24/13
Thompsons Film LLC	FL MD	8:13-cv-1104	04/24/13
Breaking Glass Pictures LLC	FL MD	8:13-cv-1154	04/29/13
Breaking Glass Pictures LLC	FL MD	8:13-cv-1155	04/29/13
Breaking Glass Pictures LLC	FL MD	8:13-cv-1156	04/29/13
Breaking Glass Pictures LLC	FL MD	2:13-cv-331	04/30/13
Breaking Glass Pictures LLC	FL MD	2:13-cv-332	04/30/13
Breaking Glass Pictures LLC	FL MD	8:13-cv-1154	08/22/13
TCYK LLC	FL MD	8:13-cv-2209	08/27/13
TCYK LLC	FL MD	8:13-cv-2210	08/27/13
TCYK LLC	FL MD	8:13-cv-2211	08/27/13
TCYK LLC	FL MD	8:13-cv-2212	08/27/13
TCYK LLC	FL MD	8:13-cv-2213	08/27/13
TCYK LLC	FL MD	6:13-cv-1343	08/29/13
TCYK LLC	FL MD	6:13-cv-1344	08/29/13
TCYK LLC	FL MD	6:13-cv-1345	08/29/13
TCYK LLC	FL MD	6:13-cv-1346	08/29/13
TCYK LLC	FL MD	6:13-cv-1347	08/29/13
TCYK LLC	FL MD	6:13-cv-1348	08/29/13
TCYK LLC	FL MD	5:13-cv-425	09/06/13
TCYK LLC	FL MD	2:13-cv-643	09/06/13
Breaking Glass Pictures LLC	GA ND	1:13-cv-882	03/20/13
Breaking Glass Pictures LLC	GA ND	1:13-cv-886	03/20/13
Voltage Pictures LLC	GA ND	1:13-cv-897	03/20/13
Breaking Glass Pictures LLC	GA ND	1:13-cv-883	03/20/13
Breaking Glass Pictures LLC	GA ND	1:13-cv-888	03/20/13
Breaking Glass Pictures LLC	GA ND	1:13-cv-890	03/20/13
Voltage Pictures LLC	GA ND	1:13-cv-892	03/20/13
Voltage Pictures LLC	GA ND	1:13-cv-893	03/20/13
Voltage Pictures LLC	GA ND	1:13-cv-894	03/20/13
Voltage Pictures LLC	GA ND	1:13-cv-895	03/20/13
Voltage Pictures LLC	GA ND	1:13-cv-895	03/20/13
Georgia Film Fund Four LLC	GA ND	1:13-cv-1076	04/03/13
Georgia Film Fund Four LLC	GA ND	1:13-cv-1078	04/03/13
Georgia Film Fund Four LLC	GA ND	1:13-cv-1082	04/03/13
Georgia Film Fund Four LLC	GA ND	1:13-cv-1086	04/03/13
Georgia Film Fund Four LLC	GA ND	1:13-cv-1087	04/03/13
Georgia Film Fund Four LLC	GA ND	1:13-cv-1088	04/03/13

Georgia Film Fund Four LLC	GA ND	1:13-cv-1103	04/04/13
Georgia Film Fund Four LLC	GA ND	1:13-cv-1098	04/04/13
Georgia Film Fund Four LLC	GA ND	1:13-cv-1100	04/04/13
Georgia Film Fund Four LLC	GA ND	1:13-cv-1101	04/04/13
Georgia Film Fund Four LLC	GA ND	1:13-cv-1102	04/04/13
Killer Joe Nevada LLC	GA ND	1:13-cv-1450	04/30/13
Killer Joe Nevada LLC	GA ND	1:13-cv-1492	05/03/13
Killer Joe Nevada LLC	GA ND	1:13-cv-1508	05/03/13
Killer Joe Nevada LLC	GA ND	1:13-cv-1511	05/03/13
Killer Joe Nevada LLC	GA ND	1:13-cv-1513	05/03/13
Killer Joe Nevada LLC	GA ND	1:13-cv-1514	05/03/13
Killer Joe Nevada LLC	GA ND	1:13-cv-1515	05/03/13
Killer Joe Nevada LLC	GA ND	1:13-cv-1516	05/03/13
Killer Joe Nevada LLC	GA ND	1:13-cv-1517	05/03/13
Killer Joe Nevada LLC	GA ND	1:13-cv-1525	05/06/13
Killer Joe Nevada LLC	GA ND	1:13-cv-1527	05/06/13
Killer Joe Nevada LLC	GA ND	1:13-cv-1529	05/06/13
Private Lenders Group Inc	GA SD	4:13-cv-15	01/25/13
Riding Films Inc	GA SD	4:13-cv-18	01/25/13
Riding Films Inc	GA SD	4:13-cv-20	01/25/13
Zambezia Film (Pty.) Ltd	GA SD	4:13-cv-16	01/25/13
Zambezia Film (Pty.) Ltd	GA SD	4:13-cv-16	01/25/13
Maxcon Productions Inc	GA SD	4:13-cv-38	02/14/13
Voltage Pictures LLC	GA SD	4:13-cv-38	02/14/13
Killer Joe Nevada LLC	IA ND	5:13-cv-4036	04/26/13
TCYK LLC	IA ND	2:13-cv-1018	06/17/13
TCYK LLC	IA ND	2:13-cv-1019	06/17/13
TCYK LLC	IA ND	2:13-cv-1020	06/25/13
Killer Joe Nevada LLC	IA SD	3:13-cv-60	04/25/13
Killer Joe Nevada LLC	IA SD	4:13-cv-192	04/25/13
TCYK LLC	IA SD	3:13-cv-74	06/12/13
TCYK LLC	IA SD	3:13-cv-77	06/13/13
TCYK LLC	IL CD	4:13-cv-4041	04/30/13
TCYK LLC	IL CD	4:13-cv-4042	04/30/13
TCYK LLC	IL CD	2:13-cv-2100	04/30/13
TCYK LLC	IL CD	3:13-cv-3124	04/30/13
TCYK LLC	IL CD	3:13-cv-3125	04/30/13
TCYK LLC	IL CD	3:13-cv-3127	04/30/13
TCYK LLC	IL CD	4:13-cv-4081	09/09/13
R&D Film 1 LLC	IL ND	1:12-cv-9036	11/09/12
R&D Film 1 LLC	IL ND	1:12-cv-9041	11/09/12
R&D Film 1 LLC	IL ND	1:12-cv-9043	11/09/12

R&D Film 1 LLC	IL ND	1:12-cv-9039	11/09/12
Vision Films Inc	IL ND	1:13-cv-64	01/04/13
Vision Films Inc	IL ND	1:13-cv-66	01/04/13
Vision Films Inc	IL ND	1:13-cv-67	01/04/13
Vision Films Inc	IL ND	1:13-cv-68	01/04/13
Vision Films Inc	IL ND	1:13-cv-65	01/04/13
Vision Films Inc	IL ND	1:13-cv-71	01/04/13
Zambezia Film (Pty.) Ltd	IL ND	1:13-cv-1321	02/19/13
Zambezia Film (Pty.) Ltd	IL ND	1:13-cv-1323	02/19/13
Zambezia Film (Pty.) Ltd	IL ND	1:13-cv-1741	03/06/13
Zambezia Film (Pty.) Ltd	IL ND	1:13-cv-1743	03/06/13
Zambezia Film (Pty.) Ltd	IL ND	1:13-cv-1744	03/06/13
Zambezia Film (Pty.) Ltd	IL ND	1:13-cv-1745	03/06/13
Zambezia Film (Pty.) Ltd	IL ND	1:13-cv-1746	03/06/13
Zambezia Film (Pty.) Ltd	IL ND	1:13-cv-1747	03/06/13
Zambezia Film (Pty.) Ltd	IL ND	1:13-cv-1748	03/06/13
Zambezia Film (Pty.) Ltd	IL ND	1:13-cv-1724	03/06/13
Zambezia Film (Pty.) Ltd	IL ND	1:13-cv-1742	03/06/13
Zambezia Film (Pty.) Ltd	IL ND	1:13-cv-1749	03/06/13
RynoRyder Productions Inc	IL ND	1:13-cv-2364	03/29/13
Thompsons Film LLC	IL ND	1:13-cv-2368	03/29/13
Thompsons Film LLC	IL ND	1:13-cv-2368	03/29/13
TCYK LLC	IL ND	1:13-cv-3823	05/23/13
TCYK LLC	IL ND	1:13-cv-3824	05/23/13
TCYK LLC	IL ND	1:13-cv-3825	05/23/13
TCYK LLC	IL ND	1:13-cv-3826	05/23/13
TCYK LLC	IL ND	1:13-cv-3827	05/23/13
TCYK LLC	IL ND	1:13-cv-3828	05/23/13
TCYK LLC	IL ND	1:13-cv-3829	05/23/13
TCYK LLC	IL ND	1:13-cv-3833	05/23/13
TCYK LLC	IL ND	1:13-cv-3834	05/23/13
TCYK LLC	IL ND	1:13-cv-3837	05/23/13
TCYK LLC	IL ND	1:13-cv-3839	05/23/13
TCYK LLC	IL ND	1:13-cv-3840	05/23/13
TCYK LLC	IL ND	1:13-cv-3841	05/23/13
TCYK LLC	IL ND	1:13-cv-3842	05/23/13
TCYK LLC	IL ND	1:13-cv-3844	05/23/13
TCYK LLC	IL ND	1:13-cv-3845	05/23/13
Elf-Man LLC	IL ND	1:13-cv-3884	05/24/13
Elf-Man LLC	IL ND	1:13-cv-4293	06/10/13
BKGTH Productions LLC	IL ND	1:13-cv-4711	06/28/13
BKGTH Productions LLC	IL ND	1:13-cv-4712	06/28/13

BKGTH Productions LLC	IL ND	1:13-cv-4714	06/28/13
Osiris Entertainment LLC	IL ND	1:13-cv-4901	07/09/13
BKGTH Productions LLC	IL ND	1:13-cv-4710	08/20/13
TCYK LLC	IL ND	1:13-cv-6646	09/17/13
TCYK LLC	IL ND	1:13-cv-6650	09/17/13
TCYK LLC	IL ND	1:13-cv-6654	09/17/13
TCYK LLC	IL ND	1:13-cv-6657	09/17/13
TCYK LLC	IL ND	1:13-cv-6660	09/17/13
TCYK LLC	IL ND	1:13-cv-6663	09/17/13
TCYK LLC	IL ND	1:13-cv-6667	09/17/13
TCYK LLC	IL ND	1:13-cv-6671	09/17/13
TCYK LLC	IL ND	1:13-cv-6770	09/20/13
TCYK LLC	IL ND	1:13-cv-6772	09/20/13
TCYK LLC	IL ND	1:13-cv-6965	09/27/13
TCYK LLC	IL ND	1:13-cv-7074	10/02/13
TCYK LLC	IL ND	1:13-cv-6727	09/19/14
TCYK LLC	IL ND	1:13-cv-6728	09/19/14
TCYK LLC	IL ND	1:13-cv-6729	09/19/14
Elf-Man LLC	IL ND	1:13-cv-2362	02/29/13
TCYK LLC	IL ND	2:13-cv-320	09/11/13
TCYK LLC	IL ND	2:13-cv-459	09/11/13
TCYK LLC	IL ND	2:13-cv-460	09/11/13
TCYK LLC	IL ND	2:13-cv-461	09/11/13
TCYK LLC	IL ND	2:13-cv-462	09/11/13
TCYK LLC	IL ND	2:13-cv-463	09/11/13
TCYK LLC	IL ND	2:13-cv-464	09/11/13
TCYK LLC	IL ND	2:13-cv-465	09/11/13
TCYK LLC	IL ND	2:13-cv-466	09/11/13
TCYK LLC	IL ND	2:13-cv-467	09/11/13
TCYK LLC	IL ND	2:13-cv-468	09/11/13
TCYK LLC	IL ND	2:13-cv-469	09/11/13
TCYK LLC	IL ND	2:13-cv-470	09/11/13
TCYK LLC	IL ND	2:13-cv-471	09/11/13
TCYK LLC	IL ND	2:13-cv-472	09/11/13
TCYK LLC	IL ND	2:13-cv-473	09/11/13
TCYK LLC	IL ND	2:13-cv-474	09/11/13
TCYK LLC	IL ND	2:13-cv-475	09/11/13
TCYK LLC	IL ND	2:13-cv-476	09/11/13
TCYK LLC	IL ND	1:13-cv-296	10/15/13
TCYK LLC	IN SD	1:13-cv-1629	10/11/13
TCYK LLC	LA ED	2:13-cv-3064	05/17/13
Power of Few LLC	LA ED	2:13-cv-5006	07/08/13

Power of Few LLC	LA ED	2:13-cv-5320	08/08/13
BKGTH Productions LLC	LA ED	2:13-cv-5310	09/03/13
Sibling The Movie LLC	LA ND	5:13-cv-4059	06/25/13
Sibling The Movie LLC	LA SD	3:13-cv-60	04/25/13
Sibling The Movie LLC	LA SD	4:13-cv-271	06/24/13
TCYK LLC	MI ED	2:13-cv-14322	10/11/13
TCYK LLC	MN	0:13-cv-1727	07/02/13
TCYK LLC	MN	0:13-cv-1727	10/08/13
Battle Force LLC	MO ED	4:12-cv-2020	10/30/12
Night of the Templar LLC	MO ED	4:12-cv-2022	10/30/12
TriCoast Smitty LLC	MO ED	4:12-cv-2019	10/30/12
Vision Films Inc	MO ED	4:13-cv-20	01/04/13
Private Lenders Group Inc	MO ED	4:13-cv-285	02/15/13
Vision Films Inc	MO ED	4:13-cv-290	02/18/13
Breaking Glass Pictures LLC	MO ED	4:13-cv-388	03/01/13
Elf-Man LLC	MO ED	4:13-cv-576	03/27/13
Georgia Film Fund Four LLC	MO ED	4:13-cv-832	04/30/13
Battle Force LLC	NJ	1:12-cv-6539	10/17/12
Dragon Quest Productions LLC	NJ	1:12-cv-6611	10/19/12
R&D Film 1 LLC	NJ	1:12-cv-6633	10/22/12
Voltage Pictures LLC	NJ	1:12-cv-6885	11/06/12
Voltage Pictures LLC	OH ND	1:12-cv-2812	11/09/12
R&D Film 1 LLC	OH ND	1:12-cv-2822	11/12/12
Voltage Pictures LLC	OH ND	1:12-cv-2820	11/12/12
R&D Film 1 LLC	OH ND	1:12-cv-2832	11/13/12
Voltage Pictures LLC	OH ND	1:12-cv-2831	11/13/12
R&D Film 1 LLC	OH ND	1:12-cv-2895	11/20/12
Voltage Pictures LLC	OH ND	1:12-cv-2894	11/20/12
R&D Film 1 LLC	OH ND	1:12-cv-2919	11/26/12
R&D Film 1 LLC	OH ND	1:12-cv-2920	11/26/12
R&D Film 1 LLC	OH ND	1:12-cv-2929	11/27/12
R&D Film 1 LLC	OH ND	1:12-cv-2951	11/30/12
Safety Point Productions LLC	OH ND	1:12-cv-2820	12/08/12
Night of the Templar LLC	OH ND	1:13-cv-396	02/22/13
Night of the Templar LLC	OH ND	1:13-cv-397	02/22/13
D3 Productions LLC	OH ND	1:13-cv-461	03/03/13
Ledge Distribution LLC	OH ND	1:13-cv-459	03/03/13
Private Lenders Group Inc	OH ND	1:13-cv-460	03/03/13
Voltage Pictures LLC	OH ND	1:13-cv-463	03/04/13
Voltage Pictures LLC	OH ND	1:13-cv-464	03/04/13
Voltage Pictures LLC	OH ND	1:13-cv-465	03/04/13
Thompsons Film LLC	OH ND	1:13-cv-595	03/19/13

Elf-Man LLC	OH ND	1:13-cv-727	04/03/13
Breaking Glass Pictures LLC	OH ND	1:13-cv-800	04/10/13
Breaking Glass Pictures LLC	OH ND	1:13-cv-801	04/10/13
Breaking Glass Pictures LLC	OH ND	1:13-cv-802	04/10/13
Breaking Glass Pictures LLC	OH ND	1:13-cv-803	04/10/13
Breaking Glass Pictures LLC	OH ND	1:13-cv-804	04/10/13
Breaking Glass Pictures LLC	OH ND	1:13-cv-805	04/10/13
Breaking Glass Pictures LLC	OH ND	1:13-cv-806	04/10/13
Breaking Glass Pictures LLC	OH ND	1:13-cv-807	04/10/13
Breaking Glass Pictures LLC	OH ND	1:13-cv-808	04/10/13
Killer Joe Nevada LLC	OH ND	1:13-cv-1037	05/07/13
Killer Joe Nevada LLC	OH ND	1:13-cv-1038	05/07/13
Killer Joe Nevada LLC	OH ND	1:13-cv-1039	05/07/13
Killer Joe Nevada LLC	OH ND	1:13-cv-1040	05/07/13
Killer Joe Nevada LLC	OH ND	1:13-cv-1041	05/07/13
Safety Point Productions LLC	OH SD	2:12-cv-1090	11/27/12
Voltage Pictures LLC	OH SD	2:12-cv-1090	11/27/12
Safety Point Productions LLC	OH SD	2:12-cv-1102	11/30/12
Voltage Pictures LLC	OH SD	2:12-cv-1102	11/30/12
Safety Point Productions LLC	OH SD	2:12-cv-1110	12/03/12
Safety Point Productions LLC	OH SD	2:12-cv-1111	12/03/12
Voltage Pictures LLC	OH SD	2:12-cv-1111	12/03/12
Voltage Pictures LLC	OH SD	2:12-cv-1112	12/03/12
R&D Film 1 LLC	OH SD	2:12-cv-1112	12/04/12
R&D Film 1 LLC	OH SD	2:12-cv-1113	12/04/12
R&D Film 1 LLC	OH SD	2:12-cv-1115	12/04/12
R&D Film 1 LLC	OH SD	2:12-cv-1116	12/04/12
R&D Film 1 LLC	OH SD	2:12-cv-1117	12/04/12
R&D Film 1 LLC	OH SD	2:12-cv-1120	12/05/12
R&D Film 1 LLC	OH SD	2:12-cv-1136	12/10/12
R&D Film 1 LLC	OH SD	2:12-cv-1137	12/10/12
R&D Film 1 LLC	OH SD	2:12-cv-1138	12/11/12
R&D Film 1 LLC	OH SD	2:12-cv-1139	12/11/12
Bleiberg Entertainment LLC	OH SD	2:13-cv-40	01/15/13
Bleiberg Entertainment LLC	OH SD	2:13-cv-42	01/15/13
Night of the Templar LLC	OH SD	2:13-cv-182	02/28/13
Night of the Templar LLC	OH SD	2:13-cv-183	02/28/13
Private Lenders Group Inc	OH SD	2:13-cv-193	03/03/13
D3 Productions LLC	OH SD	2:13-cv-194	03/03/13
Voltage Pictures LLC	OH SD	2:13-cv-196	03/04/13
Voltage Pictures LLC	OH SD	2:13-cv-197	03/04/13
Voltage Pictures LLC	OH SD	2:13-cv-198	03/04/13

Voltage Pictures LLC	OH SD	2:13-cv-201	03/04/13
Voltage Pictures LLC	OH SD	2:13-cv-202	03/04/13
Voltage Pictures LLC	OH SD	2:13-cv-203	03/04/13
RynoRyder Productions Inc	OH SD	2:13-cv-252	03/18/13
Thompsons Film LLC	OH SD	2:13-cv-2368	03/29/13
Elf-Man LLC	OH SD	2:13-cv-308	04/03/13
Breaking Glass Pictures LLC	OH SD	2:13-cv-389	04/23/13
Breaking Glass Pictures LLC	OH SD	2:13-cv-390	04/23/13
Breaking Glass Pictures LLC	OH SD	2:13-cv-395	04/23/13
Breaking Glass Pictures LLC	OH SD	2:13-cv-391	04/23/13
Breaking Glass Pictures LLC	OH SD	2:13-cv-392	04/23/13
Breaking Glass Pictures LLC	OH SD	2:13-cv-393	04/23/13
Breaking Glass Pictures LLC	OH SD	2:13-cv-394	04/23/13
Breaking Glass Pictures LLC	OH SD	2:13-cv-396	04/23/13
Killer Joe Nevada LLC	OH SD	2:13-cv-439	05/07/13
Killer Joe Nevada LLC	OH SD	2:13-cv-440	05/07/13
Killer Joe Nevada LLC	OH SD	2:13-cv-441	05/07/13
Killer Joe Nevada LLC	OH SD	2:13-cv-442	05/07/13
TCYK LLC	OH SD	2:13-cv-525	05/31/13
TCYK LLC	OH SD	2:13-cv-534	06/05/13
TCYK LLC	OH SD	2:13-cv-535	06/05/13
TCYK LLC	OH SD	2:13-cv-536	06/05/13
TCYK LLC	OH SD	2:13-cv-539	06/05/13
TCYK LLC	OH SD	2:13-cv-540	06/05/13
TCYK LLC	OH SD	2:13-cv-688	07/16/13
TCYK LLC	OH SD	2:13-cv-690	07/17/13
TCYK LLC	OH SD	2:13-cv-691	07/17/13
Power of Few LLC	OH SD	2:13-cv-839	08/27/13
Breaking Glass Pictures LLC	OH SD	2:13-cv-849	08/28/13
Killer Joe Nevada LLC	OH SD	2:13-cv-848	08/28/13
TCYK LLC	OH SD	2:13-cv-842	08/28/13
TCYK LLC	OH SD	2:13-cv-843	08/28/13
Dragon Quest Productions LLC	TN ED	3:12-cv-597	11/16/12
Dimentional Dead Productions LLC	TN ED	3:12-cv-602	11/19/12
Dimentional Dead Productions LLC	TN ED	3:12-cv-603	11/19/12
Sojo Productions Incorporated	TN ED	3:12-cv-599	11/19/12
Vision Films Inc	TN ED	3:12-cv-642	12/12/12
Vision Films Inc	TN ED	3:12-cv-643	12/12/12
Vision Films Inc	TN ED	3:12-cv-644	12/12/12
NGN Prima Productions Inc	TN ED	3:13-cv-37	01/25/13

Voltage Pictures LLC	TN ED	3:13-cv-58	02/01/13
Breaking Glass Pictures LLC	TN ED	3:13-cv-75	02/13/13
Breaking Glass Pictures LLC	TN ED	3:13-cv-76	02/13/13
Breaking Glass Pictures LLC	TN ED	3:13-cv-77	02/13/13
Bleiberg Entertainment LLC	TN ED	3:13-cv-129	03/08/13
Vision Films Inc	TN ED	3:13-cv-128	03/08/13
Georgia Film Fund Four LLC	TN ED	3:13-cv-184	04/02/13
Georgia Film Fund Four LLC	TN ED	3:13-cv-185	04/02/13
Georgia Film Fund Four LLC	TN ED	3:13-cv-186	04/02/13
Georgia Film Fund Four LLC	TN ED	3:13-cv-187	04/02/13
Killer Joe Nevada LLC	TN ED	3:13-cv-217	04/21/13
Killer Joe Nevada LLC	TN ED	3:13-cv-218	04/21/13
Killer Joe Nevada LLC	TN ED	3:13-cv-219	04/21/13
Killer Joe Nevada LLC	TN ED	3:13-cv-220	04/21/13
Killer Joe Nevada LLC	TN ED	3:13-cv-221	04/21/13
Killer Joe Nevada LLC	TN ED	3:13-cv-222	04/21/13
Killer Joe Nevada LLC	TN ED	3:13-cv-223	04/21/13
Killer Joe Nevada LLC	TN ED	3:13-cv-224	04/21/13
Killer Joe Nevada LLC	TN ED	3:13-cv-225	04/21/13
Killer Joe Nevada LLC	TN ED	3:13-cv-226	04/21/13
Killer Joe Nevada LLC	TN ED	3:13-cv-227	04/21/13
Killer Joe Nevada LLC	TN ED	3:13-cv-228	04/21/13
TCYK LLC	TN ED	3:13-cv-251	05/06/13
TCYK LLC	TN ED	3:13-cv-252	05/06/13
TCYK LLC	TN ED	3:13-cv-253	05/06/13
TCYK LLC	TN ED	3:13-cv-254	05/06/13
TCYK LLC	TN ED	3:13-cv-255	05/06/13
TCYK LLC	TN ED	3:13-cv-256	05/06/13
TCYK LLC	TN ED	3:13-cv-257	05/06/13
TCYK LLC	TN ED	3:13-cv-258	05/06/13
Pounds Pictures Inc	TN ED	3:13-cv-262	05/07/13
TCYK LLC	TN ED	3:13-cv-259	05/07/13
TCYK LLC	TN ED	3:13-cv-260	05/07/13
Pounds Pictures Inc	TN ED	3:13-cv-263	05/07/13
TCYK LLC	TN ED	3:13-cv-261	05/07/13
Night of the Templar LLC	TN MD	3:12-cv-1124	10/30/12
R&D Film 1 LLC	TN MD	3:12-cv-1123	10/30/12
Riding Films Inc	TN MD	3:12-cv-1247	10/30/12
Maxcon Productions Inc	TN MD	3:13-cv-132	02/13/13
Private Lenders Group Inc	TN MD	3:13-cv-159	02/22/13
Killer Joe Nevada LLC	TN WD	2:13-cv-2528	07/16/13
Killer Joe Nevada LLC	TN WD	2:13-cv-2529	07/16/13

Killer Joe Nevada LLC	TN WD	2:13-cv-2530	07/16/13
Killer Joe Nevada LLC	TN WD	2:13-cv-2531	07/16/13
Killer Joe Nevada LLC	TN WD	2:13-cv-2532	07/16/13
TCYK LLC	TN WD	2:13-cv-2550	07/22/13
TCYK LLC	TN WD	2:13-cv-2551	07/22/13
TCYK LLC	TN WD	2:13-cv-2552	07/22/13
TCYK LLC	TN WD	2:13-cv-2553	07/22/13
TCYK LLC	TX ND	3:13-cv-3927	09/27/13
TCYK LLC	TX SD	4:13-cv-3082	10/18/13
Flypaper Distribution LLC	WA WD	2:13-cv-63	01/09/13
Private Lenders Group Inc	WA WD	2:13-cv-194	01/31/13
D3 Productions LLC	WA WD	2:13-cv-228	02/08/13
D3 Productions LLC	WA WD	2:13-cv-228	02/12/13
Riding Films Inc	WA WD	2:13-cv-255	02/12/13
Riding Films Inc	WA WD	2:13-cv-256	02/12/13
Riding Films Inc	WA WD	2:13-cv-277	02/13/13
Riding Films Inc	WA WD	2:13-cv-278	02/13/13
Riding Films Inc	WA WD	2:13-cv-287	02/14/13
Riding Films Inc	WA WD	2:13-cv-288	02/14/13
Riding Films Inc	WA WD	2:13-cv-289	02/14/13
Zambezia Film (Pty.) Ltd	WA WD	2:13-cv-315	02/18/13
Zambezia Film (Pty.) Ltd	WA WD	2:13-cv-316	02/18/13
Zambezia Film (Pty.) Ltd	WA WD	2:13-cv-317	02/18/13
Zambezia Film (Pty.) Ltd	WA WD	2:13-cv-307	02/18/13
Zambezia Film (Pty.) Ltd	WA WD	2:13-cv-308	02/18/13
Zambezia Film (Pty.) Ltd	WA WD	2:13-cv-309	02/18/13
Zambezia Film (Pty.) Ltd	WA WD	2:13-cv-310	02/18/13
Zambezia Film (Pty.) Ltd	WA WD	2:13-cv-311	02/18/13
Zambezia Film (Pty.) Ltd	WA WD	2:13-cv-312	02/18/13
Zambezia Film (Pty.) Ltd	WA WD	2:13-cv-313	02/18/13
Zambezia Film (Pty.) Ltd	WA WD	2:13-cv-314	02/18/13
Zambezia Film (Pty.) Ltd	WA WD	2:13-cv-318	02/18/13
Zambezia Film (Pty.) Ltd	WA WD	2:13-cv-319	02/18/13
Ledge Distribution LLC	WA WD	2:13-cv-328	02/20/13
Voltage Pictures LLC	WA WD	2:13-cv-455	03/13/13
Voltage Pictures LLC	WA WD	2:13-cv-457	03/13/13
Voltage Pictures LLC	WA WD	2:13-cv-458	03/13/13
Voltage Pictures LLC	WA WD	2:13-cv-459	03/13/13
Voltage Pictures LLC	WA WD	2:13-cv-460	03/13/13
Voltage Pictures LLC	WA WD	2:13-cv-461	03/13/13
Voltage Pictures LLC	WA WD	2:13-cv-462	03/13/13
R&D Film 1 LLC	WD WA	2:13-cv-50	01/08/13

R&D Film 1 LLC	WD WA	2:13-cv-51	01/08/13
R&D Film 1 LLC	WD WA	2:13-cv-52	01/08/13
R&D Film 1 LLC	WD WA	2:13-cv-53	01/08/13
R&D Film 1 LLC	WD WA	2:13-cv-54	01/08/13
R&D Film 1 LLC	WD WA	2:13-cv-55	01/08/13
R&D Film 1 LLC	WD WA	2:13-cv-56	01/08/13
R&D Film 1 LLC	WD WA	2:13-cv-57	01/08/13
Voltage Pictures LLC	WD WA	2:13-cv-456	03/13/13
TCYK LLC	WI ED	2:13-cv-539	05/14/13
TCYK LLC	WI ED	2:13-cv-554	05/16/13
BKGTH Productions LLC	WI ED	2:13-cv-666	06/12/13
BKGTH Productions LLC	WI ED	2:13-cv-667	06/12/13
TCYK LLC	WI ED	2:13-cv-1022	09/10/13
Breaking Glass Pictures LLC	WI WD	3:13-cv-275	04/24/13
Riding Films Inc	WI WD	3:13-cv-277	04/24/13
Breaking Glass Pictures LLC	WI WD	3:13-cv-276	04/24/13
R&D Film 1 LLC	WI WD	3:13-cv-279	04/25/13
R&D Film 1 LLC	WI WD	3:13-cv-280	04/25/13
Voltage Pictures LLC	WI WD	3:13-cv-282	04/25/13
Voltage Pictures LLC	WI WD	3:13-cv-283	04/25/13
Voltage Pictures LLC	WI WD	3:13-cv-281	04/25/13
TCYK LLC	WI WD	3:13-cv-295	04/30/13
TCYK LLC	WI WD	3:13-cv-296	04/30/13
TCYK LLC	WI WD	3:13-cv-297	04/30/13
TCYK LLC	WI WD	3:13-cv-298	04/30/13
TCYK LLC	WI WD	3:13-cv-299	04/30/13
TCYK LLC	WI WD	3:13-cv-300	04/30/13
Voltage Pictures LLC	WI WD	3:13-cv-634	09/11/13

