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Walk a Mile in the Shoes of a Copyright Troll: Analyzing and Overcoming the Joinder Issue in BitTorrent Lawsuits

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WALK A MILE IN THE SHOES OF A COPYRIGHT TROLL: ANALYZING AND OVERCOMING THE JOINDER ISSUE IN BITTORRENT LAWSUITS

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I. INTRODUCTION

You are a consumer who has compiled a list of movies you want to see, a list of songs you want to listen to, and a list of software programs you want to use. Either each movie could cost you $9.99, each song $0.99, and each program no less than $99; or you could get all these products bundled up into one package and delivered easily into your "Downloads" folder for a total of $0.00. What do you choose? Does your answer change if you are the producer of these works trying to make a living off your creations?

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"Technological advances have resulted in anonymous and stealthy tools for conducting copyright infringement on a large-scale."[2] Although the Internet provides access to a wealth of information in a short amount of time,[3] its fast-paced changes make it difficult for copyright laws to protect works disseminated online.[4] The anonymity of the Internet has made it easy for tortfeasors to hide, while those injured by the criminal acts stumble upon numerous roadblocks in finding, identifying, and suing these infringers.[5]

In recent years, copyright owners have raised issues with a file-sharing protocol called BitTorrent, which allows users to share files anonymously with other users.[6] Its ease of access, decentralized server, and free services and products[7] have made it one of the most popular file-sharing networks today.[8] However, copyright holders, having caught wind of this network and the illegal behavior of its users, have begun to assert their rights by suing individuals by the masses.[9] District courts across the United States are split over the issue of whether joinder[10] of BitTorrent users, who are part of the same swarm[11] during the download process of a particular copyrighted file, is appropriate.

This Comment analyzes the issues surrounding joinder of copyright infringers who use BitTorrent, explores how joinder can be used and limited to create a more viable solution for copyright holders and consumers, as well as,

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[2] Voltage Pictures, LLC v. Does, No. 6:13–cv–290–AA, 2013 WL 1900597, at *1 (D. Or. May 4, 2013).

[3] *Benefits of Internet Use Safe Internet*, CYBERETHICS, http://www.cyberethics.info/cyethics1/index.php?option=com_content&view=article&id=186&Itemid=83&lang=en (last visited Feb. 21, 2014).

[4] Ian Rubenstrunk, *The Throw Down Over TakeDowns: An Analysis of the Lenz Interpretation of 17 U.S.C. § 512(F)*, 10 J. MARSHALL REV. INTELL. PROP. 792, 796 (2011), *available at* http://repository.jmls.edu/cgi/viewcontent.cgi?article=1258&context=ripl (citing S. REP. No. 105–190, at 2 (1998), *available at* http://digital-law-online.info/misc/SRep105-190.pdf. Copyright law has struggled to keep up with emerging technology beginning with the "music played on a player piano roll in the 1900's to the introduction of the VCR in the 1980's." *Id.* (citing White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1 (1908); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984)).

[5] Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999).

[6] Call of the Wild Movie, LLC v. Does 1–1,062, 770 F. Supp. 2d 332, 339 (D.C. Cir. 2011).

[7] Campbell Simpson, *Everything You Ever Wanted to Know About BitTorrent*, PC&TECHAUTHORITY (Dec. 16, 2013), http://www.pcauthority.com.au/Feature/367732,everything-you-ever-wanted-to-know-about-bit-torrent.aspx/3.

[8] Bradley Mitchell, *Top 10 Free P2P File Sharing Programs—Free P2P Software*, ABOUT TECH, http://compnetworking.about.com/od/p2ppeertopeer/tp/p2pfilesharing.htm (last visited Jan. 10, 2014).

[9] *See, e.g.*, Achte/Neunte Boll Kino Beteiligungs GMBH & Co. v. Does 1–4,577, 736 F. Supp. 2d 212 (D.C. Cir. 2010) (stating 4,500 individuals were sued for illegally downloading a film).

[10] *See infra* Part II.B.

[11] *See infra* Part IV for an explanation of BitTorrent users and swarms.

supplements the sparse regulations that encompass joinder to create a rule that accommodates this technological era. Part II explains Copyright Law and the procedural aspects of a copyright infringement suit and joinder of defendants.[12] Part III delves into the history of peer-to-peer (P2P) file-sharing lawsuits and provides an illustration of where case law rests today regarding P2P networks.[13] Part IV describes the BitTorrent network and explains the way that content is transferred between users.[14] Part V highlights the issues that piracy presents and the arguments that the "Doe" defendants have proposed against joinder, and then proceeds to counter those arguments.[15] Part VI suggests joinder should be an available option in an effort to prevent illegal behavior and promote efficiency. It proposes a test that would establish limitations that would help ease the burden on defendants by preventing copyright holders from abusing their powers while balancing the copyright holders' interests in guarding their rights.[16] Part VII reiterates the necessity for joinder and analyzes the current and future positive impact on businesses that joinder will produce.[17]

II. LEGAL BACKGROUND

A. Copyright Law

Copyright Law was designed to protect "original works of authorship fixed in any tangible medium of expression, now known or *later developed* . . ."[18] Copyright law promotes the "progress of science . . . by securing for limited times to authors . . . the exclusive right to their respective writing . . ."[19] Copyright holders have the exclusive rights to do and authorize the following:

> (1) to reproduce the copyright work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial,

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[12] *See infra* Part II and accompanying notes 18–35.

[13] *See infra* Part III and accompanying notes 36–56.

[14] *See infra* Part IV and accompanying notes 57–78.

[15] *See infra* Part V and accompanying notes 79–216.

[16] *See infra* Part VI and accompanying notes 217–23.

[17] *See infra* Part VII and accompanying notes 224–44.

[18] 17 U.S.C. § 102 (2012) (emphasis added).

[19] U.S. CONST. art. I, § 8, cl. 8.

> graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.[20]

The exclusive rights can be separated and owned by different individuals,[21] meaning that the copyright holder may assign one or several of his rights and the assignment may be "subject to temporal or geographic limitations."[22] Title I of the Digital Millennium Copyright Act of 1998 brings the Copyright Act into the scope of the digital world.[23]

To present a prima facie case of direct copyright infringement, plaintiffs must: (1) show ownership of the allegedly infringing material; and (2) demonstrate that the alleged infringers violated at least one of the exclusive rights.[24] If the court finds that infringement occurred, the copyright owner may elect to recover either actual[25] or statutory[26] damages.[27]

B. Joinder

Under the rule of permissive joinder, defendants may be joined in one action if their claims "(1) aris[e] out of the same transaction or occurrence; and (2) some question of law or fact common to all parties will arise in the action."[28] All *logically related* events that authorize one person to bring suit against another are regarded as claims that arise out of the same transaction or

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[20] 17 U.S.C. § 106 (2012). This list of exclusive rights is exhaustive. Silvers v. Sony Pictures Entm't, Inc., 402 F.3d 881, 886–87 (9th Cir. 2005).

[21] Minden Pictures, Inc. v. John Wiley & Sons, Inc., No. C–12–4601 EMC, 2014 WL 295854, at *12 (N.D. Cal. Jan. 27, 2014).

[22] Saregama India Ltd. v. Mosley, 635 F.3d 1284, 1292 n.22 (11th Cir. 2011).

[23] S. REP. No. 105–190, at 2 (1998), *available at* http://digital-law-online.info/misc/SRep105-190.pdf. Title I creates the "legal platform for launching the global digital on-line marketplace for copyrighted goods." *Id.* The legislation warns against circumventing technological measures that protect copyrighted material. 17 U.S.C. § 1201 (2012).

[24] 17 U.S.C. § 106 (2012).

[25] 17 U.S.C. § 504(a)(i) (2012). If actual damages are chosen, the owner may "recover the actual damages suffered by him or her as a result of the infringement and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages." 17 U.S.C. § 504(b) (2012).

[26] 17 U.S.C. § 504(a)(ii) (2012). The owner may receive statutory damages to any one work "in a sum of not less than $750 or more than $30,000." 17 U.S.C. § 504(a)(ii) (2012). If the court determines that there was willful infringement, the damages may be increased to as much as $150,000, but, where the court finds that the infringer did not know that his or her acts constituted infringement, the damages may be reduced to no less than $200. 17 U.S.C. § 504(c)(2) (2012).

[27] 17 U.S.C. § 504(a) (2012).

[28] *See* League to Save Lake Tahoe v. Tahoe Reg'l Planning Agency, 558 F.2d 914, 917 (9th Cir. 1977) (summarizing 28 U.S.C. 20(a)(2) (2012)).

occurrence.[29] "[C]ourts are inclined to find that claims arise out of the same transaction or occurrence when the likelihood of overlapping proof and duplication in testimony indicates that separate trials would result in delay, inconvenience, and added expense to the parties and to the court."[30] In a case where defendants are joined in one suit, a defendant does not need to defend against all of the demanded relief; the court may grant judgment against defendants according to their liabilities.[31] The purpose of the joinder rule is to "promote trial convenience and expedite the final determination of disputes, thereby preventing multiple lawsuits."[32] However, the rule has exceptions.[33] Throughout the course of the lawsuit, the court may, if necessary, issue orders—like an order for a separate trial "to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party."[34] Regardless, because of the importance of expediting the resolution of cases, the rule of joinder is construed liberally.[35]

III. PEERING INTO THE HISTORY OF P2P FILE-SHARING NETWORKS

"File-sharing technology in effect created a worldwide online library of millions of computers, in which each user could access the contents of every

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[29] Mosley v. Gen. Motors Corp., 497 F.2d 1330, 1333 (8th Cir. 1974); *cf.* MISS. CODE ANN. § 20 (West 2012) (stating a claim is considered as part of the same transaction or occurrence if there is a "distinct litigable event linking the parties").

[30] BKGTH Productions, LLC v. Does 1–3, 5–10, 12, 15–16, No. 13–cv–01778–WYD–MEH, 2014 WL 36648, at *6 (D. Colo. Jan. 6, 2014) (quoting 7 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1653 (3d ed. 2001)).

[31] 28 U.S.C. § 20(a)(3) (2012).

[32] Thompson Film, LLC v. John Does 1–35, No. 13–cv–0126-TOR, 2013 U.S. Dist. LEXIS 97862, at *2 (E.D. Wash. July 12, 2013).

[33] *See* Cruz v. Bristol Myers Squibb Co. P.R., Inc., 264 F.R.D. 22, 25 (D.P.R. 2010) ("[T]he rule is not a license for unbridled joinder of unrelated claims"); *see also id.* (holding the court will not compromise the parties for the sake of providing convenience to plaintiff's legal counsel).

[34] 28 U.S.C. § 20(b) (2012).

[35] Davidson v. D.C., 736 F. Supp. 2d 115, 119 (D.C. Cir. 2010). "[The rule governing *permissive* joinder of parties] permits the joinder of a person who has some interest in an action even when that interest is not so strong as to *require* his or her joinder under [the rule governing *required* joinder of parties]." Hagan v. Rogers, 570 F.3d 146, 153 (3d Cir. 2009) (emphases added) (internal quotation marks omitted); *see* 28 U.S.C. § 19 (2012) (requiring joinder of a party if "(A) in the person's absence, the court cannot accord complete relief among existing parties; or (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect the interest; or (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest"). See *infra* Part V.A for an in-depth analysis of the transaction or occurrence test and its application to the BitTorrent lawsuits.

other user's computer."[36] Although P2P networks have a myriad of benefits,[37] they have also caused the decline of sales in the music industry and otherwise.[38] These infringements caused by file-sharing networks launched the Recording Industry Association of America's (RIAA) litigation campaign.[39] The RIAA began its fight by suing the providers of the file-sharing networks.[40]

It is difficult for a copyright holder to enforce his rights against all direct infringers, so a more practical solution has been to sue the distributor of the copying device or program under contributory infringement.[41] Contributory infringement occurs where one intentionally induces, encourages, or causes the direct infringing conduct of another.[42] One of the first prevalent cases regarding P2P file-sharing networks was *A&M Records, Inc. v. Napster, Inc.*,[43] in which record companies and music publishers brought suit against Napster for recording, distributing, and selling musical compositions and sound recordings of which the record companies owned the copyrights.[44] The court established, by downloading and uploading copyrighted material, the defendants violated the plaintiffs' exclusive rights to reproduction and distribution, respectively.[45]

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[36] Patrick Fogarty, *Major Record Labels and the RIAA: Dinosaurs in a Digital Age?*, 9 HOUS. BUS. & TAX L.J. 140, 146 (2008).

[37] *See generally* DEBORAH PLATT MAJORAS ET AL., FTC, PEER-TO-PEER FILE-SHARING TECHNOLOGY: CONSUMER PROTECTION AND COMPETITION ISSUES (2005), *available at* Westlaw 2005 WL 1541114 [hereinafter MAJORAS]. P2P technology is used for the "licensed distribution of games, movies, music, and software" as well as "video streaming, video on demand, [i]nstant [m]essaging . . . and use of computers to provide telecommunication service through voice-over Internet protocol." *Id.* at *5. It can also be used as a back-up memory drive. *Id.* P2Ps have also been used in non-commercial settings such as schools and universities because it is a convenient way of facilitating academic research because the network is secure and the users must be authorized to access it. *Id.* at *6.

[38] *See infra* notes 79–96 and accompanying text.

[39] David Kravets, *File Sharing Lawsuits at a Cross Roads, After 5 Years of RHIAA Litigation*, WIRED (Sept. 4, 2008, 2:55 PM), http://www.wired.com/threatlevel/2008/09/proving-file-sh/. The RIAA is a trade organization, comprised of music labels, "that supports and promotes the creative and financial vitality of the major music companies" by "protect[ing] the intellectual property and First Amendment rights of artists and musical labels; conduct[ing] consumer, industry and technical research; and monitor[ing] and review[ing] state and federal laws, regulations[,] and policies." *RIAA*, RIAA, http://www.riaa.com/aboutus.php?content_selector=about-who-we-are-riaa (last visited Jan. 26, 2014).

[40] *See* Fogarty, *supra* note 36.

[41] MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 929–30 (2005); *see also In re* Aimster Copyright Litigation, 334 F.3d 643, 645–46 (7th Cir. 2003).

[42] *MGM Studios, Inc.*, 545 U.S. at 930. To be guilty of contributory copyright infringement, the plaintiff must show: "(1) direct infringement by a primary infringer, (2) knowledge of the infringement, and (3) material contribution to the infringement." MGM Studios, Inc. v. Grokster, Ltd., 380 F.3d 1154, 1160 (9th Cir. 2004).

[43] 239 F.3d 1004 (9th Cir. 2001).

[44] *Id.* at 1010–11.

[45] *Id.* at 1013–14.

Though Napster asserted the fair use defense,[46] the court found Napster's activity did not qualify for fair use.[47] Thus, the Ninth Circuit agreed with the district court and held, because Napster had actual and constructive knowledge of direct infringement, it also had the requisite knowledge to establish contributory infringement.[48]

A company can also be liable for copyright infringement committed by users if the company took active steps to induce the infringement.[49] Inducement occurs where advertisements or solicitations relay messages that encourage others to engage in copyright violations.[50] In the case of *MGM Studios, Inc. v. Grokster, Ltd.*, the Court held Grokster contributorily liable for copyright infringement because its words and actions indicated that it had the intent "to cause and profit from third-party acts of copyright infringement."[51]

To prevent lawsuits like the one Grokster faced, P2P file-sharing networks have since posted "Notice-and-Takedown" provisions.[52] These statutory rules encourage file-sharing networks to take down works that a copyright owner alleges is infringing his or her exclusive rights.[53] Because service providers cannot constantly monitor the networks, copyright owners must monitor them and inform the file-sharing protocol of the infringement; if done correctly, the actual infringers are the ones who will be liable for the infringement instead of the P2P network.[54] These Notice-and-Takedown provisions have essentially

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[46] Under the fair use defense, the court may find that there was no infringement in considering four factors. 17 U.S.C. § 107 (2012). Note not all factors need to be met, and there is no clear line defining what falls under fair use and what does not. *Id.* The four factors are:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id.

[47] *A&M Records, Inc.*, 239 F.3d at 1015–16. Napster did not transform the work, the work was distributed for free when it otherwise would have made a profit, the works distributed were creative in nature, the entirety of the works were copied, and the infringement harmed the market by reducing audio CD sales among college students, making it more difficult for plaintiffs to enter the market of digital music downloads. *Id.* at 1015–17.

[48] *Id.* at 1021; *cf.* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 442 (1984) ("The sale of copying equipment . . . does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes.").

[49] MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 936–37 (2005).

[50] *Id.* at 937.

[51] *Id.* at 941.

[52] *See* 17 U.S.C. § 512 (2012).

[53] *Id.*

[54] *See generally id.*

immunized the file-sharing network from liability.[55] However, they have not diminished the infringing activity.[56]

IV. LEECHING OFF SEEDS: BITTORRENT BEHIND THE SCENES

As Grokster and Napster eventually died out, BitTorrent rose from the ashes as the dominant P2P network.[57] Similar to its predecessors, BitTorrent allows distribution of "large amounts of data" over the Internet;[58] however, what makes BitTorrent a more tenacious opponent than either Grokster or Napster is the fact it is a "cooperative endeavor,"[59] where each downloader is automatically an uploader and collaborates with other uploaders to help "speed the completion of each download of the file."[60]

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[55] *Id.* 17 U.S.C. § 512(d) provides:

> A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider—(1)(A) does not have actual knowledge that the material or activity is infringing; (B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or (C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material; (2) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and (3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.

[56] Bryan H. Choi, *The Grokster Dead End*, 19 HARV. J.L. & TECH. 393, 410–11 (2006).

[57] Timothy B. McCormack, *The Evolution of BitTorrent's Legality*, SEATTLE PI (July 26, 2013), http://blog.seattlepi.com/timothymccormack/2013/07/26/the-evolution-of-bittorrents-legality/.

[58] *Id.* (stating BitTorrent's popularity made it easy for pirates who needed a forum for illegal distribution); *see also* BKGTH Prods., LLC v. Doe, No. 13–cv–01778–WYD–MEH, 2013 U.S. Dist. LEXIS 182589, at *12 (D. Colo. Dec. 9, 2013).

[59] Malibu Media, LLC v. John Does 1–49, No. 12–cv–6676, 2013, U.S. Dist. LEXIS 119100, at *1 (N.D. Ill. Aug. 22, 2013) (quoting Sean B. Karunaratne, *The Case Against Combating BitTorrent Piracy Through John Doe Copyright Infringement Lawsuits*, 111 MICH. L. REV. 283, 290 (2012)).

[60] Liberty Media Holdings, LCC v. Swarm Sharing Hash File, 821 F. Supp. 2d 444, 451 (D. Mass. 2011); AF Holdings, LLC v. Does 1–1,058, 286 F.R.D. 39, 54 n.9 (D.C. Cir. 2012), *vacated*, 752 F.3d 990 (D.C. Cir. 2014) (explaining "individuals will be part of the same swarm if the user has the file available for sharing and has the BitTorrent application . . . open and connected that it will be shared with other people even if the user is doing something else on his/her computer.") (internal

To use BitTorrent, users must install BitTorrent on their computers.[61] Then, they may look for the song, movie, show, etc. they want to download on a torrent website[62] and download the ".torrent file,"[63] which is a digital file of a work created by the initial seeder.[64] Next, the file to be distributed is broken up into segments, known as pieces.[65] Peers connect to the seed to download the file.[66] Each peer becomes a source of the piece for other peers, thus creating a swarm: a group of peers sharing a particular file.[67] Upon establishing a connection, a peer can identify which pieces the other peers have by exchanging "bitfield" messages.[68] Once the peer has selected a piece for download and has downloaded an "x" number of pieces,[69] he begins automatically uploading those

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quotation marks omitted). Prior to BitTorrent, the file-sharing networks did not allow for as much interaction among the users. *See generally*, MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 921 (2005); Interscope Records v. Does 1–25, 6:04–cv–197–Orl–22DAB, 2004 U.S. Dist. LEXIS 27782 (M.D. Fl. Apr. 1, 2004) (naming FastTrack as the protocol used). The FastTrack protocol uses a two-tiered system of nodes. MAJORAS, *supra* note 37, at *4. The ordinary nodes send a query for the search of a file, and the super nodes search for the file and indicate any matches. *Id.* The user can click on one of the matches "to establish a direct [P2P] connection and obtain the file from the selected peer." *Id.* Where the FastTrack protocol was used, the court found each of the "[d]efendants offered for download a *unique* set of copyrighted songs owned by a unique set of owner-[p]laintiffs." Interscope Records, 2004 U.S. Dist. LEXIS 27782, at *11–12 (emphasis added). Due to this lack of uniformity, the transaction-occurrence standard under Federal Rule of Civil Procedure Section 20 was not satisfied. *Id.* Note BitTorrent does not involve sharing whole files, but rather *bits* of files *automatically* with every person in that seed when the user begins downloading the file. MAJORAS, *supra* note 37, at *5.

[61] Bradley Mitchell, *BitTorrent*, ABOUT TECH, http://compnetworking.about.com/od/bittorrent/g/bittorrent.htm (last visited Apr. 22, 2015).

[62] Bradley Mitchell, *BitTorrent File Downloads—Search for Bit Torrent Files*, ABOUT TECH, http://compnetworking.about.com/od/bittorrent/qt/bittorrentfiles.htm (last visited Feb. 20, 2014); *see, e.g.*, Paul Gil, *The Top Torrent Sites of 2015 – Reader Recommendations*, ABOUT.COM, http://netforbeginners.about.com/od/peersharing/a/torrent_search.htm (last visited Feb. 23, 2015) (compiling a list of websites to find downloadable content).

[63] Mitchell, *supra* note 62.

[64] BKGTH Prods., LLC v. Doe, No. 13–cv–01778–WYD–MEH, 2013 U.S. Dist. LEXIS 182589, at *11 (D. Colo. Dec. 9, 2013). A "seed" or "seeder" is a "peer who downloaded a complete file and is uploading all of its pieces to other peers in the swarm," while a "leecher" is a "peer in the process of downloading the file from the other peers." *Id.* at *9–10. Peers are BitTorrent "[u]sers who download and open the same [t]orrent file." Patrick Collins, Inc. v. Does 1–21, 282 F.R.D. 161, 164 (E.D. Mich. 2012).

[65] Malibu Media, LLC v. Does 1–49, No. 12–cv–6676, 2013 WL 4501443, at *1 (N.D. Ill. Aug. 22, 2013) (quoting Karunaratne, *supra* note 59).

[66] *Id.*

[67] *Id.*; *BKGTH Prods., LLC*, 2013 U.S. Dist. LEXIS 182589.

[68] Hyunggon Park, Rafit Izhak Ratzin & Mihaela van der Schaar, *Peer-to-Peer Networks—Protocols, Cooperation, and Competition*, *in* STREAMING MEDIA ARCHITECTURES, TECHNIQUES, AND APPLICATIONS (2010), *available at* http://medianetlab.ee.ucla.edu/papers/chapter_P2P_hpark.pdf. "[B]its that are set indicate valid and available pieces, which can be shared with other peers, and bits that are cleared indicate missing pieces, which must be downloaded from other peers." *Id.*

[69] *Id.* The number may vary. *Id.*

pieces to other interested peers in an effort to exchange files between each other to speed each other's download rates.[70] Near the end of its download, a peer sends a request to all of its associated peers for the rest of the pieces—the request is sent to avoid potential delays that may occur if the peer had been downloading from a slow peer.[71] When the download is complete, the peer sends cancel messages to those associated peers to avoid receiving redundant data.[72]

Individuals who participate in the swarm expose their Internet Protocol (IP) addresses.[73] A torrent file contains the file name, IP address ("unique identifying number of a device connected to the [I]nternet") of the tracker ("[a] server containing an updated list of peers in the swarm"), the number of and size of the pieces, and the hash identifier ("[a] 40-character alphanumeric string that forms a unique identifier of an encoded file") that is "unique to the pieces of that particular torrent file."[74] "[W]here [a] defendant has completed . . . the necessary steps for a public distribution, a reasonable fact-finder may infer that the distribution *actually took place*."[75] BitTorrent has raised issues for copyright holders because data is not stored on a central server; therefore, copyright holders cannot sue BitTorrent itself but must defer to suing the individual file sharers.[76]

In recent years, copyright holders have begun suing thousands of people in one suit.[77] The joinder of these defendants has created outrage among infringers and a split among the courts over the validity of joining people who use P2P file sharing to download the same copyrighted file.[78]

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[70] *Id.* The peer will be uploading data while still downloading its own missing pieces—meaning, the upload process begins before each peer has finished his or her own download. *Id.*

[71] *Id.*

[72] *Id.*

[73] Digital Sin, Inc. v. Does 1–176, 279 F.R.D. 239, 241 (S.D.N.Y. 2012).

[74] BKGTH Prods., LLC v. Doe, No. 13–cv–01778-WYD-MEH, 2013 U.S. Dist. LEXIS 182589, at *8–10 (D. Colo. Dec. 9, 2013).

[75] London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153, 169 (D. Mass. 2008) (emphasis added).

[76] *BKGTH Prods., LLC*, 2013 U.S. Dist. LEXIS 182589, at *11.

[77] *Copyright Trolls*, ELECTRONIC FRONTIER FOUND.: DEFENDING YOUR RIGHTS IN THE DIGITAL WORLD, https://www.eff.org/issues/copyright-trolls (last visited Apr. 21, 2015).

[78] Tricoast Smitty, LLC v. Does 1–45, No. 4:12–cv–2019 AGF, 2013 WL 4775913, at *2 (E.D. Mo. Sept. 6, 2013). Besides a split between the districts themselves, there is a split between various courts within the districts; for example, the Southern District of New York has occasionally ruled for and against joinder. *Compare* TCYK, LLC v. Doe, No. 13-c-3845, 2013 U.S. Dist. LEXIS 145722 (N.D. Ill. Oct. 9, 2013) (finding joinder permissible), *and* First Time Videos, LLC v. Does 1–76, 276 F.R.D. 254 (N.D. Ill. 2011) (finding joinder to be proper), *and* Patrick Collins, Inc. v. Does 1–21, 282 F.R.D. 161, 167 (E.D. Mich. 2012) (finding joinder of twenty-one defendants proper because "[d]efendants networked with each other and/or with other peers through a series of transactions in the same swarm to infringe on [p]laintiff's copyright"), *and* Malibu Media, LLC v. Does 1–5, 285

V. THINK BEFORE YOU CLICK

In the past, the lack of technology made copyright infringement easier to regulate. Making copies of tangible items, such as books, CDs, and videos requires materials like paper, computers, and cassettes.[79] Thus, even if music and books were plentiful, one's access to the materials needed for reproduction and distribution of these items was not.[80] However, today, that issue is irrelevant and obsolete thanks to the growing presence of P2P file-sharing networks.[81] The emergence of these networks has forced copyright holders to constantly face difficulties in combating infringement of their movies, music, and software.[82] BitTorrent makes infringement especially prevalent because every downloader is automatically an uploader of the material, which means that every person "who has a copy of the infringing media or content on a torrent network is also a source for others to download that media or content."[83]

F.R.D. 273 (S.D.N.Y. 2012) (finding joinder proper), *and* Malibu Media, LCC v. Does 1–30, No. 12-3896, 2012 U.S. Dist. LEXIS 175919, at *7–8 (D.N.J. Dec. 12, 2012) (finding joinder appropriate), *with* Next Phase Distrib., Inc. v. Does 1–27, 284 F.R.D. 165, 168 (S.D.N.Y 2012) (holding joinder of twenty-seven defendants improper), *and* Amselfilm Prods. GMBH & Co. v. Swarm 6a6DC, No. 12-3865 (FSH) (PS), 2012 U.S. Dist. LEXIS 186476, at *6–7 (D.N.J. Oct. 10, 2012) (holding joinder of 187 defendants improper), *and* Media Prods. v. Does 1–26, No. 12–cv–3719, 2012 U.S. Dist. LEXIS 125366, at *2 (S.D.N.Y. Sept. 4, 2012) (holding joinder of twenty-six defendants improper), *and* Third Degree Films, Inc. v. Does 1–131, 280 F.R.D. 493, 497–99 (D. Ariz. 2012) (finding joinder of 131 defendants improper), *and* West Coast Prods. v. Swarm Sharing Hash Files, No. 6:12–cv–1713, 2012 U.S. Dist. LEXIS 116722, at *7–8 (W.D. La. Aug. 17, 2012) (granting motion to sever 1,980 defendants), *and* Digital Sins, Inc. v. Does 1–245, No. 11-8170, 2012 U.S. Dist. LEXIS 69286, at *2 (S.D.N.Y. May 15, 2012) ("[W]here, as here, the plaintiff does no more than assert that the defendants merely committed the same type of violation in the same way, it does not satisfy the test for permissive joinder in a single lawsuit."), *and* DigiProtect USA Corp. v. Does 1–240, No. 10–cv–8760–PAC, 2011 WL 4444666, at *24 (S.D.N.Y. Sept. 26, 2011) (finding joinder improper), *and In re* BitTorrent Adult Film Copyright Infringement Cases, 296 F.R.D. 80 (E.D.N.Y. 2012) (holding joinder was inappropriate because the allegations were insufficient to show the defendants actually shared filed bits with one another). *See* Malibu Media, LLC v. Does, No. 12-07789, 2013 U.S. Dist. LEXIS 183958, at *5 (D.N.J. Jan. 21, 2014); *see also* Bicycle Peddler, LLC v. Does 1–177, No. 13–cv–0671–WJM–KLM, 2013 WL 1103473 (D. Colo. Mar. 15, 2013) (listing cases that allow or prohibit joinder).

[79] *See* John Perry Barlow, *The Economy of Ideas*, WIRED, Mar. 1994, at *2, *available at* http://www.wired.com/wired/archive/2.03/economy.ideas.html (explaining that distributing copyrighted works in the form of books, CDs, and videos was similar to distributing wine because to distribute wine, one needs bottles).

[80] *Id.*

[81] Voltage Pictures, LLC v. Does 1–198, No. 6:13–cv–290–AA, 2013 WL 1900597, at *1 (D. Or. May 4, 2013).

[82] *Id.*

[83] Thompsons Film, LLC v. Does 1–35, No. 13–cv–0126–TOR, 2013 U.S. Dist. LEXIS 97862, at *5; *see supra* notes 59–60 and accompanying text. "The nature of torrents is that you are sharing parts of the file while you download even though you are not seeding it." Aaron D. Hall, *Copyright Infringement Tips for Illegal Movie & Music Download Cases*, THOMSPON HALL, http://thompsonhall.com/copyright-infringement-tips-for-illegal-movie-music-download-cases/ (last

Many of the files currently traded by consumers using commercial P2P file-sharing networks are copyrighted music, movies, games, and software.[84] A 2003 study indicates more than 98% of all music files requested on one major file-sharing network was copyrighted files.[85] Another study found 100% of the movie or television show files in a BitTorrent sample was infringing.[86] Overall, 99% of files were found to be infringing.[87] However, because BitTorrent itself is *capable* of non-infringing uses, it cannot be held liable for copyright infringement.[88] So, who is to blame?

Millions of people illegally reproduce and distribute information without ever worrying about lack of materials or the cost to its right holders.[89] In 2009, only 37% of music downloaded by consumers was paid for.[90] However, piracy is not just limited to music: it has also spread to other areas, such as movies, software, and even books.[91] Because of e-book piracy, American publishers have lost $2.8 billion in sales.[92] Software piracy has cost software companies

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visited Feb. 22, 2015).

[84] Ed Felten, *Census of Files Available via BitTorrent*, FREEDOM TO TINKER (Jan. 29, 2010), https://freedom-to-tinker.com/blog/felten/census-files-available-bittorrent/. A research study found the following represents a breakdown of the content available on BitTorrent—almost all of which was illegally shared: 32.5% of the material of BitTorrent was films; 14.5% was TV shows; 6.7% was computer or console games; 4.2% was software; 2.9% was music content; 0.2% was books. ENVISIONAL, TECHNICAL REPORT: AN ESTIMATE OF INFRINGING USE OF THE INTERNET 4–5 (2011), *available at* http://documents.envisional.com/docs/Envisional-Internet_Usage-Jan2011.pdf. Pornographic content represented 35.8% of BitTorrent content, most of which was illegally shared. *Id.* at 5.

[85] MAJORAS, *supra* note 37.

[86] Felten, *supra* note 84.

[87] *Id*.

[88] *See* Sony Corp. of Am. v. Universal City Studios, 464 U.S. 417, 498 (1984) (emphasis added).

[89] *See* Nick Mokey, *Music, Movie, and Software Piracy: What's Your Chance at Getting Caught?*, DIGITAL TRENDS (Oct. 23, 2009), *http*://www.digitaltrends.com/features/music-movie-and-software-piracy-whats-your-chance-of-getting-caught/.

[90] *See For Students Doing Reports*, RHIAA, http://www.riaa.com/faq.php (last visited Nov. 2, 2013); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO–10–423, INTELLECTUAL PROPERTY: OBSERVATIONS ON EFFORTS TO QUANTIFY THE ECONOMIC EFFECTS OF COUNTERFEIT AND PIRATED GOODS 23–24 (2010), http://www.gao.gov/new.items/d10423.pdf (estimating the U.S. economy annually loses $58,000,000,000, over 370,000 jobs, and $2,600,000,000 in tax revenue as a result of copyright infringement over the Internet) (citing STEPHEN E. SIWEK, *The True Cost of Copyright Industry Piracy to the U.S. Economy*, *Institute for Policy Innovation*, INST. POL'Y INNOVATION 189 (2007)).

[91] *See* THE PIRATE BAY, www.thepiratebay.se (last visited Jan. 15, 2014).

[92] Paul Boutin, *E-Book Piracy Costs U.S. Publishers $3 Billion, Says Study*, VENTUREBEAT (Mar. 2, 2010), http://venturebeat.com/2010/03/02/book-piracy-costs-u-s-publishers-3b-says-study/. Business, investing, technical, and science books are some of the top most pirated types of books. *Id.*

billions of dollars in revenue.[93] In fact, the downloaders only profit while employees of music companies lose their jobs, music sales drop 47% from $14.6 billion to $7.7 billion, and music theft takes up 17.5% of Internet bandwidth in the United States.[94] The rate of piracy occurring on such networks has caused the loss of 71,060 jobs in the United States and $2.7 billion in wages and revenues for workers, as well as $12.5 billion in losses to the U.S. economy.[95] Needless to say, "[t]he advent of advanced technology, say, as with the Internet, should [not] vitiate long-held and inviolate principles of federal court jurisdiction."[96] This Comment will next focus on the major issues that have caused the ambivalence regarding joinder of defendants in BitTorrent lawsuits and will analyze how these issues may be resolved.

A. Same Transaction or Occurrence

Defendants argue they are not part of the same transaction or occurrence as their co-defendants and severance is necessary for a fair trial.[97] They state plaintiffs fail to show defendants "simultaneously participated in a single swarm" or the "defendants distributed files directly among themselves"[98] and, thus, fail to satisfy the "same transaction or occurrence" test under permissive joinder.[99] They assert "mere allegations of similar acts violating a single law, even if those acts use a common infrastructure such as the Internet or a particular network, do not create the common nexus of facts required to meet the transactional test set forth in the Rule."[100] Proponents of severance further proclaim, where courts find the transaction or occurrence test is satisfied, they are misrepresenting the "level of connectivity among such defendants,"

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[93] Jonathon Strickland, *Why Do People Pirate Software?* HOW STUFF WORKS, http://computer.howstuffworks.com/pirate-software.htm (last visited Feb. 16, 2014). According to the report from the Business Software Alliance, 41% of all software is illegally downloaded. *Id.* (citing *Sixth Annual BSA-IDC Global Software: 08 Piracy Study*, BUSINESS SOFTWARE ALLIANCE 2 (May 2009), http://globalstudy.bsa.org/2008/studies/globalpiracy2008.pdf. The software industry has lost approximately $63.4 billion in revenue. Britney Fitzgerald, *Software Piracy: Study Claims 57% of the World Pirates Software*, HUFFINGTON POST (June 1, 2012), http://www.huffingtonpost.com/2012/06/01/software-piracy-study-bsa_n_1563006.html.

[94] *See For Students Doing Reports*, *supra* note 90.

[95] STEPHEN E. SIWEK, THE TRUE COST OF COPYRIGHT INDUSTRY PIRACY TO THE U.S. ECONOMY 15 (Institute for Policy Innovation ed., 2007), *available at* http://www.ipi.org/docLib/20120515_SoundRecordingPiracy.pdf.

[96] GTE New Media Servs. v. BellSouth Corp., 199 F.3d 1343, 1350 (D.C. Cir. 2000).

[97] *See supra* Part II.B (providing a description of the joinder test).

[98] Sunlust Pictures, LLC v. Does 1–75, No. 12 C 1546, 2012 WL 3717768, at *11 (N.D. Ill. Aug. 27, 2012).

[99] *See supra* note 35 (providing a description of permissive joinder); *see also supra* note 29 and accompanying text.

[100] Fonovisa, Inc. v. Does 1–9, No. 07–1515, 2008 WL 919701, at *4 (W.D. Pa. Apr. 3, 2008).

explaining that when a user connects to the swarm, he or she is downloading from and uploading to only a few members of the swarm[101] because a peer can only download from and upload to four peers at any given time.[102]

Defendants are putting unwarranted weight on the transaction or occurrence standard by construing it narrowly where courts have generally interpreted this standard liberally to advance the guidelines of the Federal Rules of Civil Procedure.[103] First of all, the word "transaction" could be interpreted in many ways;[104] one meaning of the word is "a series of many occurrences."[105] The series could depend not on a chronological order, but rather on a logical relationship.[106] There is a logical relationship if there is "*some* nucleus of operative facts or law."[107] There need not be "*absolute* identity of all events,"[108] nor do all the facts have to be common to each of the defendants.[109] Plaintiffs just need to show *enough* to justify joinder.[110]

Notably, BitTorrent uses a process called "optimistic unchoking," which allows each peer to randomly choose a fifth peer (in addition to the four peers it is already connected to); this process is attempted once every thirty seconds.[111] According to this scenario, a peer only interacts with five other peers.[112]

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[101] Jason R. LaFond, *Personal Jurisdiction and Joinder in Mass Troll Litigation*, 7 MD. L. REV. ENDNOTES 51, 57 (2012) (citing http://www.cs.cmu.edu/~harchol/WORMS04/people/srikant/srikant.pdf).

[102] DONGYU QIU & R. SRIKANT, MODELING AND PERFORMANCE ANALYSIS OF BITTORRENT-LIKE PEER-TO-PEER NETWORKS 2 (Coordinated Science Lab and Department of Electrical and Computer Engineering, University of Illinois at Urbana-Champaign ed., 2004), *available at* http://www.cs.cmu.edu/~harchol/WORMS04/people/srikant/srikant.pdf.

[103] 6 ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, RICHARD L. MARCUS & ADAM N. STEINMAN, FED. PRAC. & PROC. CIV. § 1410 (3d ed. 2014) [hereinafter WRIGHT]. The transaction element does not require courts to distinguish between "legal and equitable claims or between claims in tort and those in contract." *Id.*

[104] *See id.*

[105] DIRECTV, Inc. v. Barrett, 220 F.R.D. 630, 631 (D. Kan. 2004) (quoting Mosley v. Gen. Motors Corp., 497 F.2d 1330, 1333 (8th Cir. 1974)); *see* Mangham v. Gold Seal Chinchillas, Inc., 69 P.2d 680 (Wash. 1966) (finding, where six separate sales were made to different people during a period of six years but using the same sales brochure and representations, the sales were considered a series of transactions).

[106] *DIRECTV*, 220 F.R.D. at 631 (quoting *Mosley*, 497 F.2d at 1333).

[107] Hanley v. First Investors Corp., 151 F.R.D. 76, 79 (E.D. Tex. 1993) (emphasis added).

[108] *Mosley*, 497 F.2d at 1333 (emphasis added).

[109] Music Merchs., Inc. v. Capitol Records, Inc., 20 F.R.D. 462, 464 (E.D.N.Y. 1957).

[110] *See* Call of the Wild Movie, LLC v. Does 1–1,062, 770 F. Supp. 2d 332, 344 (D.C. Cir. 2011); 28 U.S.C. § 21 (2012) ("[On] motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.").

[111] *See* QIU & SRIKANT, *supra* note 102, at 2, 3.

[112] *Id.*

However, due to the fact every thirty seconds one of the peers may change,[113] there is potential interaction with *each* peer and each peer is a *possible* source of bits of the file.[114] In addition, interaction between peers also occurs when the peers access each other's downloading rates to ensure they choose to download from the peer with the best downloading rate.[115] Furthermore, the network is anonymous,[116] and plaintiffs "currently have no way of showing who was connected to whom when each instance of infringement occurred;"[117] therefore, whether Doe 1 directly downloaded from Doe 2 or Doe 3 is not of significant concern—the main point is each of these peers has possibly accessed each other's downloading rates, requested a connection, and/or connected to each other.[118]

There are four ways in which each defendant may have downloaded the pieces of the file:

> 1) [T]he [d]efendant connected to and transferred a piece of the [m]ovie from the initial seeder; or 2) the [d]efendant connected to and transferred a piece of the [m]ovie from a seeder who downloaded the completed file from the initial seeder or from other peers; or 3) the [d]efendant connected to and transferred a piece of the [m]ovie from other [d]efendants who downloaded from the initial seeder or from other peers; or 4) the [d]efendant connected to and transferred a piece of the [m]ovie from other peers who downloaded from other defendants, other peers, other seeders, or the initial seeder.[119]

Basically, each defendant in that swarm at some point downloaded a piece that had been "transferred through a series of uploads and downloads" either directly or indirectly.[120] Although critics of joinder state the mere fact defendants clicked on a command to participate in the swarm "does not mean that they were part of the downloading by unknown hundreds or thousands of

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[113] *Id.* at 3.

[114] AF Holdings, LLC v. Does 1–1,058, 286 F.R.D. 39, 54 (D.D.C. 2012), *vacated*, 752 F.3d 990 (D.C. Cir. 2014).

[115] *See* QIU & SRIKANT, *supra* note 102.

[116] *See* Sunlust Pictures, LLC v. Does 1–75, No. 12 C 1546, 2012 WL 3717768, at *1–2 (N.D. Ill. Aug. 27, 2012).

[117] LaFond, *supra* note 101, at 57.

[118] *See* QIU & SRIKANT, *supra* note 102. "[E]ach swarm member is helping all other swarm members participate in illegal file sharing." Complaint at 3, reFx Audio Software, Inc. v. Doe, No. 13-C-03524 (N.D. Ill. 2014), 2014 U.S. LEXIS 38172. A swarm is not limited by geographical or temporal limitations, so these factors are irrelevant to the transaction or occurrence test. *Id.* at *15. These issues will either come up during the personal jurisdiction phase of the lawsuit or be a compelling argument to limit the number of Does to create a more manageable case. *Id.* See notes 217–19 and accompanying text for a discussion on manageability of the case.

[119] Patrick Collins, Inc. v. Does 1–21, 282 F.R.D. 161, 165 (E.D. Mich. 2012).

[120] *Id.*

individuals across the country,"[121] a thorough analysis of BitTorrent shows it *does* in fact mean they were part of a series of downloads. This is because concerted action is not required for joinder; so, the fact the file may not have been directly obtained from the plaintiff is irrelevant.[122] Consequently, the defendants are logically related,[123] and, under such circumstances, the facts are sufficient to provide a basis for joinder of the defendants.[124]

One article notes defendants are not part of the same transaction or occurrence because "BitTorrent users may upload different initial files of a given work, which results in the creation of distinct swarms," which means they have not interacted.[125] This statement is true but does not weigh against joinder because, with the nature of BitTorrent technology, if individuals upload different files, they would be part of entirely different swarms to begin with, and, thus, would not have been sued together in the first place.[126] Notably, a party's joinder is proper even if he or she does not have an interest in the controversy between *each* of the litigants but *does* have an interest in the subject matter of the lawsuit,[127] as long as there is a common question of fact arising out of the same transaction.[128]

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[121] Hard Drive Prods., Inc. v. Does 1–188, 809 F. Supp. 2d 1150, 1163 (N.D. Cal. 2011) (asserting, although the defendants may have at one point participated in the same swarm, they were not undoubtedly present at the same time and day).

[122] *Patrick Collins, Inc.*, 282 F.R.D. at 165.

[123] AF Holdings, LLC v. Does 1–1,058, 286 F.R.D. 39, 54 (D.D.C. 2012), *vacated*, 752 F.3d 990 (D.C. Cir. 2014).

[124] Sunlust Pictures, LLC v. Does 1–75, No. 12 c 1546, 2012 WL 3717768, at *4 (N.D. Ill. Aug. 27, 2012); *see* Arista Records, LLC v. Doe 3, 604 F.3d 110, 120 (2d Cir. 2010). "The Twombly plausibility standard . . . does not prevent a plaintiff from pleading facts alleged upon information and belief where the facts are peculiarly within the possession and control of the defendant or where the belief is based on factual information that makes the inference of culpability plausible." *Arista Records, LLC*, 604 F.3d at 120 (citations omitted) (internal quotation marks omitted).

[125] AF Holdings, LLC v. Does 1–97, No. C–11–03067–CW (DMR), 2011 WL 2912909, at *4 (N.D. Cal. July 20, 2011). The argument says one peer in a swarm may be uploading one version of the file—like a high definition version of a TV show—while another peer may be uploading different version of that file—like a low definition version. *Id.*

> Notably, because of the differences between the first, low definition file and the second, high definition file, the participants in the first swarm would not interact with those in the second swarm. (*See* Hansmeier Decl. ¶¶ 8–9 (noting swarms develop around [the] originally seeded *file*, as opposed to a particular *work*).) That BitTorrent users have downloaded the same copyrighted work does not, therefore, evidence they have acted together to obtain it.

Id.

[126] *The Basics of BitTorrent*, BITTORRENT (May 30, 2014, 11:29 AM), http://help.bittorrent.com/customer/portal/articles/178790-the-basics-of-bittorrent (defining a swarm as "a network of people connected to a *single* torrent") (emphasis added).

[127] Lumbermens Mut. Cas. Co. v. Borden Co., 241 F. Supp. 683, 694 (S.D.N.Y. 1965).

[128] *Id.* As mentioned, there is a common question or fact arising out of the same transaction or occurrence in this situation. *See supra* notes 97–127 and accompanying text.

Furthermore, *joint* wrongdoing is not required.[129] For example, even if the defendants' acts took place in different locations or at separate times, the defendants may still be sued together if they are part of the same transaction or occurrence.[130] In *United States v. Triumph Capital Group, Inc.*,[131] the defendants were charged with involvement in the *same* criminal acts—racketeering—so the majority of the evidence pertaining to each of the defendants was mutually admissible,[132] even though the acts occurred at different times with different investment amounts in different funds and different business arrangements.[133] Further, the defendants asserted there was no allegation that one defendant participated in the other defendant's scheme, and vice versa.[134] Similarly, in the case of the Doe defendants in the BitTorrent cases, the bulk of the evidence is similar: the protocol used (BitTorrent); the specific file downloaded; and the method in which the computers connected and the data transferred among the peers.[135] As presented in *Triumph Capital Group, Inc.*, the fact the acts occurred at different times is not a hindrance because the charges are facially sufficient violations.[136] In the case of BitTorrent litigation, at the pleading stage of the proceedings, there is no basis to rebut the fact defendants potentially exchanged pieces of plaintiff's work.[137]

At the earlier stages of litigation, the plaintiff is attempting to identify individuals who are infringing its copyright so it may investigate the feasibility of proceeding in lawsuits against them.[138] There is enough logical relation to

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[129] *In re* EMC Corp., 677 F.3d 1351, 1356 (Fed. Cir. 2012) (emphasis added); *see also* 28 U.S.C. § 20(a)(2) (2012) (stating defendants could be joined if "any right to relief is asserted against them jointly, severally, or in the alternative.").

[130] United States v. Mississippi, 380 U.S. 128, 143 (1965), *rev'g* United States v. Mississippi, 229 F. Supp. 925 (S.D. Miss. 1964). In *United States v. Mississippi*, three election commissioners and six county voting registrars acted to deprive black citizens of the right to vote. 229 F. Supp. at 943. The acts each took place apart from the other defendants. *Id.*

[131] 260 F. Supp. 2d 432 (D. Conn. 2002).

[132] *Id.* at 449.

[133] *Id.* at 432, 440.

[134] *Id.* at 440.

[135] MCGIP, LLC v. Does 1–18, No. C–11–1495 EMC, 2011 WL 2181620, at *1 (N.D. Cal. June 2, 2011). Similarly in *Sunlust Pictures, LLC v. Does 1–75*, the plaintiffs provided the IP addresses of each defendant and alleged the defendants downloaded the same torrent file, entered into the same swarm, and reproduced the video among themselves. No. 12 C 1546, 2012 WL 3717768, at *1 (N.D. Ill. Aug. 27, 2012).

[136] *Triumph Capital Grp.*, 260 F. Supp. 2d at 440; *see, e.g.*, AF Holdings, LLC v. Does 1–1,058, 286 F.R.D. 39, 55 (D.C. Cir. 2012), *vacated*, 752 F.3d 990 (D.C. Cir. 2014) (mentioning the four-month period during which the infringing acts occurred is not an impediment upon the transaction or occurrence standard).

[137] *AF Holdings, LLC*, 286 F.R.D. at 54.

[138] *Id.* After obtaining the identities of the defendants, the plaintiffs' decision to drop or pursue the claims "is of no consequence to the [c]ourt." *Id.* at 56.

uphold joinder at this early stage,[139] and joinder is more efficient than forcing plaintiffs to file thousands of different lawsuits just to receive the same information they would have received in the first place had the cases been joined.[140] Severance at such an early stage would render it unnecessarily difficult for plaintiffs to assert their rights.[141]

B. Potential Prejudice Produced by Different Defendants and Defenses

Defendants argue each of their cases and defenses are different from their co-defendants' and joining them in one lawsuit would inhibit each defendant from fully making their case.[142] They emphasize 30% of the names turned over by ISPs are not those of individuals who actually downloaded or shared copyrighted material,[143] and claim the actual perpetrators could have been the alleged infringer's teenage son, boyfriend, or neighbor in a "building . . . or a dormitory that uses shared wireless networks."[144] Defendants are concerned the various defenses each defendant could raise would result in mini-trials that involve distinct evidence and testimony.[145] Moreover, courts worry juries will not be able to compartmentalize the evidence and link it to its respective

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[139] *Id.* at 54.

[140] Purzel Video GMBH v. Does 1–84, No. 13 C 2501, 2013 WL 4478903, at *6 (N.D. Ill. Aug. 16, 2013).

[141] *AF Holdings, LLC*, 286 F.R.D. at 56. There is no reason to unduly prejudice plaintiffs before there is any evidence or basis for defendant's motion for severance—severance is premature if the court does not yet know the defendants' identities and the specific facts of each of their cases. *Id.* at 54; Thompson Film, LLC v. Does 1–35, No. 13–cv–0126–TOR, 2013 U.S. Dist. LEXIS 97862, at *5 (E.D. Wash. July 12, 2013); *see* 28 U.S.C. § 21 (2012) ("Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party."); *see also AF Holdings, LLC*, 286 F.R.D. at 54 ("[T]he remedy for improper joinder is severance and *not* dismissal.") (quoting Arista Records, LLC v Does 1–19, 551 F. Supp. 2d 1, 11 (D.D.C. 2008)) (emphasis added). Note, also, the court does not necessarily have to grant it, and it "*could* be appropriate if the defendants' methods or products were *dramatically* different." MyMail, Ltd. v. Am. Online, Inc., 223 F.R.D. 455, 457 (E.D. Tex. 2004) (emphases added); *see also Triumph Capital Grp.*, 260 F. Supp. 2d at 439 ("In determining whether severance should be granted, courts in this circuit have considered a number of factors, including: (1) the number of defendants; (2) the number of counts; (3) the complexity of the indictment; (4) the estimated length of trial; (5) disparities in the amount or type of proof offered against each defendant; (6) disparities in the degrees of involvement by each defendant in the overall scheme; (7) possible conflict between various defense theories or trial strategies; and (8) prejudice from evidence admitted against co-defendants which is inadmissible or excluded as to a particular defendant."). The defendants' are involved in the same overall process—their methods of obtaining the copyrighted files are not dramatically different. *Triumph Capital Grp.*, 260 F. Supp. 2d at 439.

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

[143] Digital Sin, Inc. v. Does 1–176, 279 F.R.D. 239, 242 (S.D.N.Y. 2012).

[144] *Id.*

[145] Hard Drive Prods, Inc. v. Does 1–188, 809 F. Supp. 2d 1150, 1164 (N.D. Cal. 2011).

defendant.[146]

Despite these issues, courts should not allow the overwhelming idea of mini-trials to sway their vote toward severance because "differing levels of culpability and proof are inevitable in *any* multiple defendant trial and, standing alone, are insufficient grounds for separate trials."[147] The Second Circuit has held severance is not necessary even if joinder would cause a lengthy and, factually and legally, complex trial.[148] The mini-trials should not impede upon joinder as they can be controlled through jury instructions, which would attenuate for any jury confusion[149] or prejudice.[150] The jury should be told to "consider each claim and the evidence pertaining to it separately, as [they] would, had each claim been tried before [them] separately."[151] The Second Circuit has even gone so far as to hold severance is not necessary where one of the co-defendants is on trial for an offense not committed by his or her co-defendant[152] and where their defenses are mutually antagonistic.[153] Applying this to the issue at hand, the hypothetical that one of the defendants charged is not actually guilty or never participated in the swarm should not stand in the way of joinder at the onset of the litigation.[154] Much of the issue concerning these lawsuits is that an innocent person will be pulled into the battle.[155] However, the innocent person issue does not weigh against joinder because the chance an innocent person may be threatened with a lawsuit is the same regardless of whether or not they are joined in a lawsuit; the innocent person issue actually stems from the problem that IP addresses cause.[156] Thus, before defendants have appeared in court and raised individual defenses, their concern

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[146] United States v. Abrams, 539 F. Supp. 378, 381 (S.D.N.Y. 1982).

[147] United States v. Triumph Capital Grp., Inc., 260 F. Supp. 2d 432, 439 (D. Conn. 2002) (emphasis added).

[148] *Id.* at 439.

[149] Duke v. Uniroyal, Inc., 928 F.2d 1413, 1421 (4th Cir. 1991).

[150] *Triumph Capital Grp., LLC*, 260 F. Supp. 2d at 439.

[151] *Duke*, 928 F.2d at 1421.

[152] *Triumph Capital Grp., LLC*, 260 F. Supp. 2d at 439.

[153] *Id.* at 439 (citing United States v. Harwood, 998 F.2d 91, 96 (2d Cir. 1993)). Even if there is a risk of prejudice in regards to the defenses, the court could easily instruct the jury to find someone guilty or innocent without any regard to the guilt or innocence of a co-defendant. *Harwood*, 998 F.2d at 96.

[154] AF Holdings, LLC v. Does 1–1,058, 286 F.R.D. 39, 54 (D.C. Cir. 2012).

[155] Patience Ren, *The Fate of BitTorrent John Does: A Civil Procedure Analysis of Copyright Litigation*, 64 HASTINGS L.J. 1343, 1377 (2013) (mentioning innocent people may get caught up in these suits).

[156] *See* Diana Liebelson, *Why It's Getting Harder to Sue Illegal Movie Downloaders*, MOTHER JONES (Feb. 17, 2014), http://www.motherjones.com/politics/2014/02/bittorrent-illegal-downloads-ip-address-lawsuit ("IP addresses are continuing to be less and less of an indicator of the identity of a particular person or computer on the net.").

is largely hypothetical;[157] so, several courts have held the issue of different defenses does not outweigh the benefit of joinder since these defendants can bring their defenses later in the proceedings.[158]

C. Personal Jurisdiction

ISPs have stated "the inclusion of thousands of [d]efendants in a single copyright action does not satisfy the demands of personal jurisdiction" and "imposes an undue burden on the ISPs without [a] corresponding benefit to the justice system."[159] It is worth mentioning the plaintiffs' lack of personal jurisdiction over the "Doe" defendants is not relevant to nor a defense against joinder.[160] This is because plaintiffs do not need to establish personal jurisdiction when filing a complaint.[161] It is premature to consider personal jurisdiction issues where the defendants' identities have not yet been produced,[162] especially because the defendants are able to waive personal jurisdiction and proceed with the litigation.[163] Whether suing one or multiple defendants, it is not possible to know whether personal jurisdiction is proper until the defendants' identities are produced.[164] To bar joinder due to personal jurisdiction before the identities of the defendants are produced would prove prejudicial to plaintiffs' cases.

D. Shame to Settlement

Defendants have pointed fingers at plaintiffs' ulterior motives in the BitTorrent lawsuits, alleging the copyright holders are merely using mass joinder to discover all the defendants' identifying information and then "us[ing]

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[157] Purzel Video GMBH v. Does 1–84, No. 13 C 2501, 2013 WL 4478903, at *6 (N.D. Ill. Aug. 16, 2013).

[158] Bicycle Peddler, LLC v. Does 1–99, No. 13–c–2375, 2013 WL 4080196, at *5 (N.D. Ill. Aug. 13, 2013).

[159] *AF Holdings, LLC*, 286 F.R.D. at 56; *see also* Hagen v. U-Haul Co. of Tenn., 613 F. Supp. 2d 986, 1001 (W.D. Tenn. 2009) (explaining personal jurisdiction only need be established when defendants file a motion under 28 U.S.C. § 12(b)(2) (2012)). Because in the early stages of the BitTorrent cases there are no named defendants, no one has standing to bring this motion at this stage. *AF Holdings, LLC*, 286 F.R.D. at 56.

[160] *AF Holdings, LLC*, 286 F.R.D. at 56.

[161] *Id.* at 56–57 (citing 28 U.S.C. § 8(a)(1) (2012)).

[162] *Id.* at 57. The plaintiffs first have the right to discovery to obtain information regarding the anonymous individuals, so they can correctly distinguish which defendants to serve in that particular jurisdiction. Humane Soc'y of the U.S. v. Amazon.com, Inc., No. 07–623 (CKK), 2007 WL 1297170, at *3 (D.C. Cir. May 1, 2007); *AF Holdings, LLC*, 286 F.R.D. at 56.

[163] *AF Holdings, LLC*, 286 F.R.D. at 58.

[164] *Id.*

the threat of disclosure of embarrassing information to achieve quick settlements."[165] Due to this allegation, the BitTorrent lawsuits have spurred lengthy analyses of the embarrassment and reputational harm concerns.[166] Though some courts have agreed with the defendants,[167] others have taken a less sympathetic approach by ruling these attempts at settlement are not proof of abuse of the legal process regardless of the plaintiffs' motivations.[168]

When defendants make a claim for abuse of process, they must prove three elements: "(1) an ulterior purpose or the use of a judicial proceeding; (2) willful action in the use of that process which is not proper in the regular course of the proceeding, i.e., use of a legal proceeding in an improper manner; and (3) resulting damage."[169] Note where the action, such as the settlement offer, "is confined to its regular and legitimate function in relation to the cause of action stated in the complaint, there is no abuse, even if the plaintiff had an ulterior motive in bringing the action or . . . knowingly brought suit upon an unfounded claim."[170]

Though defendants raise this argument as a reason to prohibit joinder, this argument is not strong enough to block joinder because the embarrassment one stands to face will not be eradicated through severance.[171] "Severing [d]efendants now might delay, but not eliminate, [p]laintiff's efforts to obtain [defendant's] identifying information from the ISP. Simply put, severance affects the timing of disclosure but not the underlying right."[172] Fear of embarrassment or reputational harm should not hinder joinder of defendants; however, the courts should be aware of circumstances where one or more of the defendants may feel at risk of serious harm and institute protective measures to

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[165] Sunlust Pictures, LLC v. Does 1–75, No. 12 C 1546, 2012 WL 3717768, at *5 (N.D. Ill. Aug. 27, 2012). People are worried their names would be associated with these embarrassing lawsuits. Bill Torpy, *BitTorrent's Popularity Leads to Mass Copyright Litigation*, PHYSORG (July 14, 2012), http://phys.org/news/2012-07-bittorrent-popularity-mass-copyright-litigation.html.

[166] *See, e.g.*, Liberty Media Holdings, LLC v. Swarm Sharing Hash File, 821 F. Supp. 2d 444, 453 (D. Mass. 2011); *Sunlust Pictures, LLC*, 2012 WL 3717768, at *8.

[167] *Sunlust Pictures, LLC*, 2012 WL 3717768, at *8.

[168] Malibu Media, LLC v. Lee, No. 12–03900, 2013 WL 2252650, at *5–6 (D.N.J. May 22, 2013). Some courts have dismissed the issue of ulterior motives and held offering a settlement to defendants is common prior to litigation. Metro Media Entm't, LLC v. Steinruck, 912 F. Supp. 2d 344, 352 (D. Md. 2012).

[169] Lauren Corp. v. Century Geophysical Corp., 953 P.2d 200, 202 (Colo. App. 1998).

[170] James H. Moore & Assocs. Realty, Inc. v. Arrowhead at Vail, 892 P.2d 367, 373 (Colo. App. 1994).

[171] BKGTH Productions, LLC v. Does 1–3, 5–10, 12, 15–16, No. 13–cv–01778–WYD–MEH, 2014 WL 36648, at *7–8 (D. Colo. Jan. 6, 2014).

[172] *Id.*

alleviate such harm.[173] One protective measure that would balance a plaintiff's interest in joinder with a defendant's interest in protecting themselves against reputational harm and embarrassment would be to allow the defendants to proceed anonymously.[174]

Courts must determine the type of harm defendants would face from disclosure because it may affect whether or not it is important to proceed anonymously. One court has held *mere* embarrassment or economic harm does not overcome the public's interest in disclosure.[175] "Whether a litigant may proceed anonymously requires balancing the 'litigant's substantial right to privacy' with the 'constitutionally embedded presumption of openness in judicial proceedings . . . .'"[176] Where the lawsuit involves copyrighted material regarding a sensitive topic, such as homosexual pornography, and disclosure of the defendants' identities "may cause reputational harm and intrusion upon their privacy" or "intrusive public scorn,"[177] courts should take proper steps to ensure anonymity.[178] Courts have allowed pseudonyms for cases involving "abortion, birth control, transexuality, mental illness, welfare rights of illegitimate children, AIDS, and homosexuality."[179] Although, arguably, an alleged infringement of homosexual pornography per se "only creates an innuendo as to the defendants'" sexual orientation, courts should contemplate an individual's concern about being publicly "outed."[180] Where the Does download pornography related to one of the sensitive topics mentioned, the courts should

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[173] Sunlust Pictures, LLC v. Does 1–75, No. 12 C 1546, 2012 WL 3717768, at *5 (N.D. Ill. Aug. 27, 2012).

[174] Roe v. Gen. Hosp. Corp., No. 11–991–BLS1, 2011 WL 2342737, at *1 (Mass. Supp. Ct. May 19, 2011)

[175] *Id.*

[176] *Id.*

[177] In *Liberty Media Holdings, LLC v. Swarm Sharing Hash File*, 821 F. Supp. 2d 444, 453 (D. Mass. Oct. 31, 2011), Doe 15 alleged fear of such scorn; however, the court found this was only "mere embarrassment," and it was not enough to override the public interest in disclosure. The court found "the potential embarrassment or social stigma that Does 1–38 may face once their identities are released in connection with this lawsuit is not grounds for allowing them to proceed anonymously." *Id.* Although in some cases embarrassment is only a small issue and not one that should affect the entire judicial proceeding, there are cases where defendants have a legitimate fear of public scorn or humiliation, and they should be able to proceed anonymously. *See Gen. Hosp. Corp.*, 2011 WL 2342737, at *1. In such sensitive areas of a person's personal life, the court should place more measures in protecting someone's identity especially if a person has a real fear of social isolation. *See Sunlust Pictures, LLC*, 2012 WL 3717768, at *5.

[178] *Id.*

[179] *See, e.g.*, Doe v. Megless, 654 F.3d 404, 408 (3d Cir. 2011) (citing Doe v. Borough of Morrisville, 130 F.R.D. 612, 614 (E.D. Pa. 1990)).

[180] *Liberty Media Holdings, LLC*, 821 F. Supp. 2d at 453.

extend this protection to them.[181] However, the court should be "careful to draw a line between the 'mere embarrassment' of being publicly named in a lawsuit involving hardcore pornography, which does not provide a basis for anonymity,[182] and concern over the exposure of one's sexual orientation."[183]

Where the case involves a topic of sensitive and highly personal nature, such as in a case where a defendant downloaded a pornographic movie, the court may allow the defendant to proceed under a pseudonym during the discovery phase of the lawsuit.[184] The plaintiffs would be required to conceal the defendant's identity "in any public filing or communication absent prior express authorization by [the] [c]ourt."[185] In such cases, there is little harm to the public interest if the defendant stays anonymous,[186] and there is no likelihood the plaintiff would be prejudiced by the anonymity, as he or she will know the defendants' identities.[187] Thus, the result would be the defendants will not be threatened by public disclosure and, therefore, will have no reason to fear embarrassment or harm, or feel coerced into settling due to inappropriate litigation tactics.[188]

E. Expedited Discovery

Because with BitTorrent technology, the infringement occurs over the Internet, the defendants can hide behind their IP addresses.[189] Thus, the courts

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[181] *Id.* The court presently declines, however, to grant anonymity to all of the defendants based on the generalized concerns of public scorn expressed by only two of the thirty-eight defendants. *Id.* at 453 n.8.

[182] *Id.* at 453. Although this court finds hardcore pornography is not enough to allow for an anonymous proceeding, many people do not want their names associated with such lawsuits. *See In re* BitTorrent Adult Film Copyright Infringement Cases, 296 F.R.D. 80, at *90 (E.D.N.Y. Aug. 24, 2012) ("[H]aving my name or identifying or personal information further associated with the work is embarrassing, damaging to my reputation in the community at large and in my religious community."). The law is currently taking extreme views on the subject by either stating pornography is not a sensitive enough issue or by sympathizing too strongly with the defendants and severing the cases. *Cf. Liberty Media Holdings, LLC*, 821 F. Supp. 2d at 453, *with In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. at *92. Rather than dismissing joinder altogether, the law should find a remedy that balances both the interests of the copyright holders as well as the consumers. *See infra* notes 220–21 and accompanying text.

[183] *Liberty Media Holdings, LLC*, 821 F. Supp. 2d at 453 n.8.

[184] Sunlust Pictures, LLC v. Does 1–75, No. 12 C 1546, 2012 WL 3717768, at *5 (N.D. Ill. Aug. 27, 2012).

[185] *Id.*

[186] *Id.* The public's interest in knowing his identity is small because, as defendants, the Does have not *purposely* availed themselves of the court. *Id.* (emphasis added).

[187] *Id.*

[188] *Id.*

[189] Braun v. Primary Distrib. Doe, No. 1 C 12–5786 MEJ, 2012 U.S. Dist. LEXIS 173465, at *3 (N.D. Cal. Dec. 6, 2012).

must first grant expedited discovery to the plaintiffs, so they can receive identity information for each defendant.[190] Courts conduct a "good cause" evaluation to determine whether or not to allow early discovery.[191] Good cause exists "where the need for expedited discovery . . . outweighs the prejudice of the responding party."[192] Most courts find plaintiffs have good cause for early discovery because they normally have established a prima facie case of copyright infringement, they have no other way of receiving the information, the ISPs may delete the necessary information before plaintiffs get access to it, plaintiffs specifically stated what they need as well as why they need it expedited, and "defendants' expectation of privacy [did] not outweigh the need for the requested discovery."[193]

Some courts, though having acknowledged the need for expedited discovery, have created an extra step by first severing defendants and thereafter allowing expedited discovery for one defendant at a time.[194] These courts rationalize that because the statute of limitations for copyright infringement is three years, the plaintiffs will have time to re-file the separate cases.[195] This reasoning fails to consider the ISPs may permanently delete the IP addresses before all these cases can be re-filed.[196] Joinder is necessary to obtain information about the defendants without delay.[197] Expedited discovery is necessary and important because the IP addresses are time sensitive and a delay in acquiring the identity of the defendants "may prove fatal to [p]laintiff's claims" because the information is subject to destruction.[198] Without connecting

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[190] *Id.* at *4.

[191] *Id.* (holding, under the good cause standard, courts consider whether: "(1) the plaintiff can identify the missing party with sufficient specificity such that the [c]ourt can determine that defendant is a real person or entity who could be sued in federal court; (2) the plaintiff has identified all previous steps taken to locate the elusive defendant; (3) the plaintiff's suit against defendant could withstand a motion to dismiss; and (4) the plaintiff has demonstrated that there is a reasonable, likelihood of being able to identify the defendant through discovery such that service of process would be possible.").

[192] *Id.*

[193] Patrick Collins, Inc. v. Does 1–37, No. 2:12–cv–1259–JAM–EFB, 2012 WL 2872832, at *1 (E.D. Cal. July 11, 2012); *see Braun*, 2012 US Dist. LEXIS 173465, at *4 (providing a full analysis of the good cause factors).

[194] *See, e.g.*, Malibu Media, LLC v. Does 1–13, No. 2:12–cv–01513 JAM DAD, 2012 WL 4956167, at *2 (E.D. Cal. Oct. 15, 2012).

[195] Bicycle Peddler, LLC v. Does 1–177, No. 13–cv–0671–WJM–KLM, 2013 WL 1103473 (D. Colo. Mar. 15, 2013).

[196] Digital Sin, Inc. v. Does 1–176, 279 F.R.D. 239, 242 (S.D.N.Y. 2012).

[197] BKGTH Prods., LLC v. Doe, No. 13–cv–01778–WYD–MEH, 2013 U.S. Dist. LEXIS 182589, at *22 (D. Colo. Dec. 9, 2013).

[198] BKGTH Prods., LLC v. Does 1–3, 5–10, 12, 15–16, No. 13–cv–01778–WYD–MEH, 2014 WL 36648, at *22 (D. Colo. Jan. 6, 2014); *see also* Patrick Collins, Inc. v. John Does 1–15, No. 11–cv–02164–CMA–MJW, 2012 WL 415436, at *4 (D. Colo. Feb. 8, 2012) ("[J]oinder of the Doe

the IP address to a person, the plaintiff would have no way of prosecuting infringement of his or her claimed copyright in the first place.[199] Furthermore, "without the additional information [regarding each defendant], the [c]ourt has no way to evaluate the defendants' jurisdictional defenses."[200] Expedited discovery without severance will not inconvenience the courts nor will it unduly prejudice the defendants.[201]

F. The Right to Bear Joinder

In line with this issue of expedited discovery is the allegation copyright holders are using joinder as a weapon for leveraging settlements[202] by using "the offices of the [c]ourt as an inexpensive means to gain the Doe defendants' personal information and coerce payment from them[]" without ever actually having interest in litigating the cases.[203] In *K-Beech, Inc. v. Does 1–85*, after the names of the defendants were turned over, the plaintiffs contacted each of them and alerted them of the lawsuit and their potential liability.[204] Some defendants complained, however, the plaintiff contacted them directly with "harassing telephone calls, demanding $2,900 in compensation to end the litigation."[205]

Although this behavior is clearly unfair and unjust, it should not be the determining factor in whether the joinder of the defendants is allowable for a few reasons. First, it is noteworthy to mention, although there are some unscrupulous lawsuits, there are many cases that are in fact legitimate.[206] It is unjust to penalize all future legitimate claimants because of the unfair battles some plaintiffs are fighting today. Furthermore, defendants are specifically targeting the issue of joinder and making it the culprit in such lawsuits, but it is speculative to state that removing joinder from the equation will remove the unscrupulous behavior because "whether it is one defendant or one hundred

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defendants 'facilitates jurisdictional discovery and expedites the process of obtaining identifying information, which is prerequisite to reaching the merits of [plaintiff's] claims.'").

[199] Malibu Media, LLC v. Does 1–49, 12–cv–6676, 2013 WL 4501443, at *2 (N.D. Ill. Aug. 22, 2013). Because the anonymous nature of BitTorrent disallows plaintiffs from getting specific information about the infringers, expedited discovery is necessary to obtain the information. *Id.* at *7.

[200] Call of the Wild Movie, LLC v. Does 1–1,062, 770 F. Supp. 2d 332, 346 (D.C. Cir. 2011).

[201] *BKGTH Prods., LLC*, 2013 U.S. Dist. LEXIS 182589, at *23.

[202] Pacific Century v. Does 1–101, No. C–11–02533 (DMR), 2011 WL 5117424, at *4, (N.D. Cal. Oct. 27, 2011).

[203] K-Beech, Inc. v. Does 1–85, No. 3:11cv469–JAG, 2011 U.S. Dist. LEXIS 124581, at *4 (E.D. Va. Oct. 5, 2011) (severing Doe defendants and issuing an order to show cause, which demands the plaintiff's attorney explain why Rule 11 sanctions were inappropriate).

[204] *Id.*

[205] *Id.*

[206] McCormack, *supra* note 57.

defendants named in a lawsuit, due simply to the suggestive content of the alleged infringed material, the copyright holder still has the ability to attempt to convince a defendant to settle or to be identified in a public lawsuit."[207] Another reason is the court may take protective measures to ensure against such behavior.[208] In *Digital Sin, Inc.*, the court issued a protective order "to the extent that any information regarding the Doe defendants released to Digital Sin by the ISPs shall be treated as confidential for a limited duration" and prevented ISPs from turning over the Doe's telephone numbers.[209]

Notably, if defendants go to trial, and if they prevail, they may be able to recover their attorney's fees pursuant to the Copyright Act.[210] Under the Copyright Act, "the court in its discretion may allow the recovery of full costs by or against any party . . . ."[211] Though there are no precise rules for determining whether attorney's fees should be awarded, the Supreme Court has considered the following nonexclusive factors: (1) frivolousness/objective unreasonableness; (2) motivation; (3) objective unreasonableness; and (4) the need to advance compensation or deterrence.[212] The Ninth Circuit has also considered the degree of success of the person suing for fees[213] and whether the award will "encourage the production of original, literary, artistic, and musical expression for the good of the public."[214] It is likely that assuming the threat of attorney's fees will prevent plaintiffs from bringing frivolous lawsuits or bad-faith claims.[215] The Lawsuit Abuse Reduction Act of 2013 "require[s] judges to impose monetary sanctions against lawyers who file frivolous lawsuits and

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[207] Malibu Media, LLC v. Does 1–2, 4–8, 10–16, 18–21, No. 12–cv–02598–REB–MEH, 2013 WL 1777706, at *8 (D. Colo. Feb. 12, 2013).

[208] Digital Sin, Inc. v. Does 1–176, 279 F.R.D. 239, 242 (S.D.N.Y. 2012) (quoting FED. R. CIV. P. 26(c)(1) (2014)) (reinforcing that a court may "issue a protective order to spare parties annoyance, embarrassment, oppression, or undue burden") (internal quotation marks omitted). Protective orders include but are not limited to the following: "specifying terms, including time and place, for the disclosure or discovery; forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters; designating the persons who may be present while the discovery is conducted;" etc. FED. R. CIV. P. 26(c)(1).

[209] *Digital Sin*, 279 F.R.D. at 242.

[210] 17 U.S.C. § 505 (2012).

[211] *Id.*

[212] Fogerty v. Fantasy, Inc., 510 U.S. 517, 534 (1994).

[213] Halicki Films, LLC v. Sanderson Sales & Mktg., 547 F.3d 1213, 1230 (9th Cir. 2008).

[214] Sofa Entm't, Inc. v. Dodger Prods., 709 F.3d 1273, 1280 (9th Cir. 2013).

[215] Todd Ruger, *House Committee Approves Bill on 'Frivolous' Lawsuits*, THE BLT: THE BLOG OF LEGAL TIMES (Sept. 11, 2013), http://legaltimes.typepad.com/blt/2013/09/house-committee-approves-bill-on-frivolous-lawsuits.html. In *AF Holdings, LLC v. Navasca*, the court granted Mr. Navasca's motion for fees and costs and awarded him a total of $22,531.93. No. C–12–2396 EMC, 2013 WL 450383 (N.D. Cal. Feb. 5, 2013).

require[s that] any sanction go to the defendant's attorney fees and costs."[216] The factors mentioned above may also be good factors for courts to consider in the early stages of the BitTorrent cases, as they will allow judges to evaluate the plaintiffs' true motives before allowing them to proceed with the lawsuit.

VI. SPECIAL TEST FOR COPYRIGHT INFRINGEMENT

Although joinder should be an option for plaintiffs, it should not be used as a weapon or a marketing strategy. At the same time, infringers should not take advantage of the mostly anonymous nature of the Internet. Due to some of the special issues that are set forth in P2P lawsuits that may not play a significant role in other lawsuits, courts should provide special rules and flexibility in such cases.

Because BitTorrent lawsuits are unique in that plaintiffs can target thousands of individuals at once,[217] the courts should create a special rule for manageability in such cases. Courts have regularly stressed, where there are too many defendants, a case may not be manageable;[218] however, courts have never identified what would constitute a manageable number of defendants. By defining manageability and placing a limit on the number of defendants that may be sued at one time in lawsuits regarding copyright infringement on P2P file-sharing networks, courts can ensure not only that joinder is not compromised for those plaintiffs with legitimate claims, but also that it is not taken advantage of by malicious plaintiffs with ulterior motives.[219]

Next, where the court finds the issue at hand is of a sensitive topic, it should be open to taking protective measures and providing anonymity to the defendants, which would, both, ensure that each defendant gets a fair trial without the burden of embarrassment or harm and allow the plaintiffs to pursue their joined claims.[220] However, this exception should not create a blanket rule for severance or anonymity, as it is unlikely someone would be embarrassed for

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[216] Ruger, *supra* note 215. The bill "encourages attorneys to think twice before filing frivolous lawsuits." *Id.* (quoting Representative Lamar Smith, a chief sponsor of the bill).

[217] *See* On the Cheap, LLC v. Does 1–5011, 280 F.R.D. 500 (N.D. Cal. 2011) (suing 5011 people for copyright infringement).

[218] *In re* BitTorrent Adult Film Copyright Infringement Cases, No. 11–3995(DRH)(GRB), 2012 WL 1570765, at *11 (E.D.N.Y. July 24, 2012); On the Cheap, LCC v. Does 1–5011, 280 F.R.D. 500, 503 (N.D. Cal. 2011) (finding there would be a lack of judicial efficiency and a creation of "significant case manageability issues").

[219] *See supra* Part V.F.

[220] *See supra* Part V.D. By allowing defendants to proceed anonymously, the court can alleviate the concern felt by most people in these proceedings.

merely downloading a popular movie playing in theaters, for example.[221]

Lastly, courts should consider the intent of the plaintiffs in mass joinder lawsuits of copyright infringers on P2P networks. Some factors courts could consider are: (1) whether the plaintiffs are communicating with the defendants and harassing them to settle; (2) whether the plaintiffs have attempted to provide their works on easy to use platforms for a reasonable price;[222] or (3) whether plaintiffs have forum-shopped[223] and only sued defendants in jurisdictions that have allowed joinder in the past, while neglecting to sue infringers who would have to be sued in jurisdictions that would not rule in their favor.

VII. NEGATIVE IMPACTS OF SEVERANCE ON COURTS AND BUSINESSES

P2P file-sharing networks have many commercial uses.[224] Due to the prevalence and ease of use of P2P networks, companies, producers, and copyright holders can use them to gain notoriety, as well as increase profits.[225]

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[221] *See* Roe v. Gen. Hosp. Corp., No. 11–991–BLS1, 2011 WL 2342737, at *1 (Mass. Supp. May 19, 2011) (asserting mere embarrassment is not enough of a basis for an anonymous proceeding).

[222] "Infringement happens because an effective online marketplace for content [has not] been built." *See* Matt Mason, *World Creators Summit: Copyright, Innovation, and Ending the Digital Divide*, BITTORRENT BLOG (June 5, 2013), http://blog.bittorrent.com/2013/06/05/world-creators-summit-copyright-innovation-and-ending-the-digital-divide/. For example, Spotify, 8tracks, Hulu, and Netflix have all become sources for legally obtaining access to a variety of movies, shows, and music. Opportunities for online streaming of content can positively affect copyright owners by decreasing piracy rates. Charles Poladian, *Online Piracy Does Not Negatively Affect Digital Music Sales, May Actually Help Music Industry*, INTERNATIONAL BUSINESS TIMES (Mar. 18, 2013), http://www.ibtimes.com/online-piracy-does-not-negatively-affect-digital-music-sales-may-actually-help-music-industry. Courts could look for signs that show that producers of content made an effort to provide easier access to their content. For example, when producers opted to legitimately release their movie through the BitTorrent network and then used "Vodo" (a kickstarter for films to get funding) to receive funding, the film received global reach, was downloaded more than one-million times, and received as much funding as it would have from "a Los Angeles sales agent." Jemina Kiss, *BitTorrent: Copyright lawyers' Favourite Target Reaches 200,000 Lawsuits*, THE GUARDIAN (Aug. 9, 2011), http://www.theguardian.com/technology/pda/2011/aug/09/bittorrent-piracy. Using these methods to distribute their work can prove copyright holders attempted to provide free and easy access to their works and made profits by doing so—it may prove to the courts they did not simply turn to lawsuits in order to make profits they would have not made otherwise.

[223] AF Holdings, LLC v. Does 1–1,058, 286 F.R.D. 39, 63 (D.C. Cir. 2012), *vacated*, 752 F.3d 990 (D.C. Cir. 2014).

[224] FEDERAL TRADE COMMISSION, PEER-TO-PEER FILE SHARING TECHNOLOGY: CONSUMER PROTECTION AND COMPETITION ISSUES 5 (2005), *available at* http://www.ftc.gov/sites/default/files/documents/reports/peer-peer-file-sharing-technology-consumer-protection-and-competition-issues/050623p2prpt.pdf. Some uses include the licensed distribution of games, movies, music, and software. *Id.*

[225] *See id.* For example, a major video game publisher who used P2P sharing to distribute his game received more than 200,000,000 downloads. *Id.* "[I]ndependent movie studios, music, recording labels, and artists have licensed copyrighted material and promote and sell their products over P2P networks." *Id.*

With the number of users on P2P networks increasing, the benefits will increase too, but this advantage is only available if the side effects, such as copyright infringement, are held at bay.[226] Unfortunately, about 45.6 million Americans admitted to illegally downloading music or videos online in 2008.[227] However, only 28,000 of those infringers were caught, meaning copyright infringers have about a 1 in 1,629 chance of getting caught.[228] With the chances so small, infringers have little reason not to copy. Besides, if an individual pirates $10,000 worth of content for free, they have technically saved $7,500 if they ever get caught and have to pay $2,500[229] to settle the lawsuit.

> [P]eople who use [P2P] technology for the unauthorized reproduction or distribution of copyrighted works are breaking the law. Surprisingly, many people do not appear to realize this. [There must be] more public education about copyright. In a perfect world, this could be done in classrooms and with billboards. But ours is not a perfect world, and public education can also be accomplished through enforcement of copyright.[230]

In evaluating joinder and copyright infringement claims, courts must not only look to the current harm but also to any future harm. If infringers do not fear punishment, the rate of infringing activity is likely to increase, as there will be little to no repercussions for violations of copyright holders' rights.[231] Books, software, and games have already made their way onto the P2P file-sharing platforms,[232] so it is plausible educational materials, such as textbooks and study aids, will soon be available for free as well, and the authors of such materials will not only lose profits if copyright holders cannot freely bring suit against infringers, but also will deal with thousands of lawsuits if they are forced to

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[226] *Id.* at 7.

[227] Nick Mokey, *Music, Movie, and Software Piracy: What's Your Chance at Getting Caught?*, DIGITAL TRENDS (Oct. 23, 2009), *http*://www.digitaltrends.com/features/music-movie-and-software-piracy-whats-your-chance-of-getting-caught/.

[228] *Id.*

[229] Jeffrey D. Neuburger, *Copyright Infringement Defendants Turn the Table on Righthaven*, MEDIASHIFT (Dec. 1, 2011), http://www.pbs.org/mediashift/2011/12/copyrightinfringementdefendants-turn-the-table-on-righthaven335.html.

[230] *Pornography, Technology, and Process: Problems and Solutions on Peer-to-Peer Networks Statement of Marybeth Peters the Register of Copyrights before the Committee on the Judiciary* 108th Cong. (2003), *available at* http://www.copyright.gov/docs/regstat090903.html; s*ee* EIGHTH ANNUAL BSA GLOBAL SOFTWARE: 2010 PIRACY STUDY 4 BUSINESS SOFTWARE ALLIANCE (May 2011) (noting 51% of PC users believe it is legal to buy one single copy of a software program and copy it to several different computers).

[231] Mokey, *supra* note 227.

[232] *See* Wendy Boswell, *The Top Nine Sites for Finding Torrents on the Web*, ABOUT.COM, http://websearch.about.com/od/imagesearch/tp/movie-torrents.htm (last visited Jan. 30, 2014) (providing a list of the websites BitTorrent draws content from and the specific content available to torrent).

sever each of their claims.[233] While the courts today may be taking a stand against copyright holders who have ulterior motives, they could be, at the same time, setting a precedent for future legitimate claims. By disallowing joinder, courts are unintentionally siding with infringers and allowing copyright holders to lose not only their liberties to assert their constitutional rights, but also any profits they may have otherwise acquired.[234]

The utilitarian theory, which is the primary theory of copyright protection, states, because of the great public benefit of literary and artistic creation, one's creative work is to be rewarded so as to give people an incentive to produce.[235] Notably, the rights are of limited duration and scope so as to not burden other creators or hinder one's freedom of expression.[236] In the digital age, it is difficult to strike the balance between allowing the public to benefit from copyright holders' works without placing those works in jeopardy of infringement.[237] Thus, because Copyright Law is intended to benefit both the owners and the public, measures should be taken in the case of digital copyright infringements to allow the beneficiaries to reap their respective benefits.

If joinder is barred, the justice system will have failed to "secure a just, speedy, and inexpensive determination of the action" and the potential prejudice to plaintiffs would go against "the interests of convenience and judicial economy."[238] The plaintiffs would have to bring thousands[239] of separate lawsuits and file "separate subpoenas to ISPs for *each* defendant's identifying information."[240] Further, plaintiffs would be forced to pay separate filing fees for each case, which would "limit their ability to protect their legal rights."[241]

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[233] *See supra* Part V (discussing that thousands of people commit piracy).

[234] IFPI Response to European Commission Joint Research Centre Study, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY (Mar. 20 2013), *available at* http://www.ifpi.org/content/library/IFPI-response-JRC-study_March2013.pdf [hereinafter IFPI Response]. One recent study claimed music piracy does not in fact hurt business, but rather may help it flourish. Luis Aguiar & Bertin Martens, *Digital Music Consumption on the Internet: Evidence from Clickstream Data*, JRC TECHNICAL REPORTS: INSTITUTE FOR PROSPECTIVE TECHNICAL STUDIES (2013), *available at* http://www.scribd.com/doc/131005609/JRC79605. However, the International Federation of the Phonographic Industry said the research was "flawed and misleading" and a deviation from commercial reality. IFPI Response, *supra* note 234.

[235] ROBERT P. MERGES, PETER S. MENELL, & MARK A. LEMLEY, INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE 436–37 (6th ed. 2012).

[236] *Id.* at 437.

[237] S. REP. No. 105–190, at 2 (1998), *available at* http://digital-law-online.info/misc/SRep105-190.pdf.

[238] Call of the Wild Movie, LLC v. Does 1–1,062, 770 F. Supp. 2d 332, 344 (D.C. Cir. 2011).

[239] *See generally id.* (mentioning the plaintiffs brought suit against 5,583 defendants).

[240] *Id.* at 344 (emphasis added).

[241] *Id.*; *see also* AF Holdings, LLC v. Does 1–1,058, 286 F.R.D. 39, 55 n.10 (D.C. Cir. 2012), *vacated*, 752 F.3d 990 (D.C. Cir. 2014) ("The [m]ovant ISPs acknowledged that the plaintiff would not be able to protect its copyright if the [c]ourt were to sever the unknown defendants in this action

To argue a filing fee is only a small price to pay for plaintiffs who file these claims is to neglect the number of infringements that occur.[242] The point of joinder is trial efficiency,[243] and this purpose will not be justified if courts are flooded with thousands of *separate* lawsuits. Joinder will protect the rights afforded to the plaintiff as a copyright owner.[244]

VIII. CONCLUSION

Everyone wants something for free, but they must consider how many other people are paying their price. The ease and speed in which digital works can be reproduced and distributed over the Internet have forced copyright owners to hesitate before making "their works readily available on the Internet without reasonable assurance that they will be protected against massive piracy."[245] Joinder will take the necessary steps in assuring copyright holders can bring suit without filing thousands of separate lawsuits. Though many can sympathize with those who face lawsuits, these sympathies should not weigh so far against joinder as to allow infringers to hide behind the masses of people illegally obtaining and distributing others' works and expressions. Where a network allows for the speedy and illegal download and distribution of copyrighted files, the justice system should allow for a speedy and efficient recovery of damages.

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due to the cost of filing an individual lawsuit for each of the thousands of IP addresses identified as being used for allegedly online infringing activity.").

[242] *See* generally Bicycle Peddler, LLC v. John Does 1–177, No. 13–cv–0671–WJM–KLM, 2013 WL 1103473 (D. Colo. Mar. 15, 2013) (stating that filing separate fees is not undue prejudice for the plaintiff).

[243] *See supra* Part II.B.

[244] *AF Holdings, LLC*, 286 F.R.D. at 56.

[245] S. REP. No. 105–190, at 2 (1998), *available at* http://digital-law-online.info/misc/SRep105-190.pdf.