Notes

The Fate of BitTorrent John Does: A Civil Procedure Analysis of Copyright Litigation

PATIENCE REN*

Copyright owners can trace online violations to an infringer's Internet protocol address but cannot identify her unless they obtain court approval to serve a subpoena on an Internet service provider. As the most popular peer-to-peer file-sharing protocol today, BitTorrent requires users to share files with each other in a conspiracy-like fashion. By arguing that this feature imparts a "same transaction" character to BitTorrent infringement activities, a copyright owner can seek to join multitudes of Internet protocol addresses as John Doe defendants in an application for early discovery. Courts are divided as to whether early discovery should be granted where tens, hundreds, or sometimes thousands of Internet protocol addresses are joined together in one case. Many in the Internet user community fault copyright owners for using the courts as a mere instrument to seek identification information en masse as part of a coercive practice to induce monetary settlements. This Note examines how case law relating to early discovery and civil procedure joinder rules applies to multiple defendants allegedly participating in a "same transaction" that occurs solely within the inner workings of a file-sharing protocol. Even if BitTorrent usage legally supports joinder, this Note highlights the difficult balance between the right to enforce a copyright and the rights of Internet users to be free from litigation threats. Without a legislative response that is resilient in the face of an ever-changing technology, copyright infringement problems will continue to inundate our courts.

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INTRODUCTION

On May 24, 2010, Voltage Pictures, L.L.C. filed a complaint against five thousand unnamed individuals who allegedly used a peer-to-peer file transfer ("P2P") protocol called BitTorrent to illegally download Voltage Pictures' copyrighted and award-winning motion picture *The Hurt Locker*.[1] The defendants were unidentified John Does because their infringing activities could only be traced to their Internet protocol ("IP") addresses.[2] The court granted early discovery against all the defendants and allowed for the subpoena of identification information corresponding to each IP address from Time Warner and other Internet service providers ("ISPs").[3] Upon receiving the subpoenas, the ISPs provided notice to the defendants, informing them of their right to quash the subpoenas.[4] Without a successful challenge, the ISPs would be required to turn over subscriber information such as names, phone numbers, and addresses. Voltage Pictures subsequently received identification information on a rolling basis and requested several extensions of time to serve the defendants, which the court also granted. Public outcry ensued, branding this practice a "copyright troll."[5] One blog calculated that if putative defendants agreed to monetary settlements of $2000 each, Voltage

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1. Voltage Pictures, L.L.C. v. Doe, 818 F. Supp. 2d 28, 31 (2011).
2. An Internet protocol address is a unique number that identifies a computer or device connected to a network.
3. *Voltage Pictures*, 818 F. Supp. 2d at 32.
4. *Id*. at 32 n.3.
5. Third Degree Films v. Doe, No. 12-10761-WGY, 2012 U.S. Dist. LEXIS 142079, at *1 n.1 (D. Mass. Oct. 2, 2012).

Pictures and its attorneys would likely net millions, a number that is comparable to or more than *The Hurt Locker*'s U.S. box office sales.[6]

In April 2011, Voltage Pictures voluntarily dismissed 557 putative defendants,[7] implying that Voltage Pictures received satisfactory settlements from the dismissed defendants. A large number of the remaining defendants filed motions to quash based on several grounds, one of which was improper joinder.[8] According to the defendants' argument, there was no evidence to suggest that all of their alleged conduct constituted the same transaction or occurrence under Rule 20 of the Federal Rules of Civil Procedure, so there was no justification for joining multiple defendants in one lawsuit. The court rejected that argument and found joinder to be proper because the unique features of BitTorrent require online download and upload activities to occur in a collective fashion, satisfying the standard of "same transaction [or] occurrence" as required by Rule 20.[9]

Voltage Pictures is representative of hundreds of massive John Doe litigation cases that populate the dockets of district courts around the country.[10] An issue common to these cases is whether defendants' conduct, including the use of the BitTorrent protocol, constitutes the same transaction or occurrence to justify joinder during early discovery. The analysis requires a detailed examination of how the protocol operates to exchange files online.[11] Courts are divided on this joinder issue, and the decision of *Voltage Pictures* to grant joinder is far from being the consensus. On one hand, many courts closely follow the reasoning of *Voltage Pictures*. They conclude that the facts pleaded in the complaint satisfy joinder requirements because of the unique technological features of BitTorrent, which mandate simultaneous uploading and downloading in groups called "swarms."[12] On the other hand, other district courts have rejected this "swarm" theory as inadequate to meet the standard of the "same transaction [or] occurrence" required by Rule 20.[13]

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6. Julianne Pepitone, *50,000 BitTorrent Users Sued for Alleged Illegal Downloads*, CNNMONEY (June 10, 2011, 3:59PM), http://money.cnn.com/2011/06/10/technology/bittorrent_lawsuits/index.htm.

7. *Voltage Pictures*, 818 F. Supp. 2d at 32.

8. *Id.* at 38.

9. *Id.* at 40.

10. *See, e.g.*, *infra* notes 150, 156–195; *see also* Media Prods. v. Does, No. 12 Civ. 3719 (HB), 2012 U.S. Dist. LEXIS 125366, at *5 n.2 (S.D.N.Y. Sept. 3, 2012) (listing BitTorrent cases and commenting that "[i]t is difficult to even imagine the extraordinary amount of time federal judges have spent on these cases").

11. *See* Annemarie Bridy, *Is Online Copyright Enforcement Scalable?*, 13 VAND. J. ENT. & TECH. L. 695, 721 (2011).

12. *See infra* notes 156–166.

13. *See infra* notes 186, 189–191.

The issue of joinder in online copyright infringement cases is not completely new to the courts; it also arose during the first flood of John Doe litigation launched by the Recording Industry Association of American ("RIAA") in early 2003.[14] The RIAA lawsuits followed on the heels of court decisions that held liable P2P service providers that induced online copyright infringement.[15] Although such decisions snuffed out P2P technologies like Napster and Grokster,[16] P2P usage was anything but dampened,[17] and the John Doe litigation did not disappear after RIAA lawsuits waned.[18] A new wave of John Doe litigation has recently emerged, targeting users of BitTorrent.[19] BitTorrent replaced the older technologies and is currently the most popular P2P protocol,[20] boasting more than 150 million users and accounting for almost half of upload traffic during peak times.[21]

Because the BitTorrent litigation shares similarities with the RIAA litigation, the older decisions form a legal backdrop against which the courts now adjudge BitTorrent cases. Akin to the RIAA litigation, BitTorrent cases are filed against end users who actually participated in the transfer of copyrighted files, as opposed to P2P service providers who developed or supported the tools for file transfer.[22] Defendants in both the RIAA and BitTorrent litigation were initially named John Does and identified only by their corresponding IP addresses.[23] In both generations of lawsuits, the plaintiffs seek to aggregate claims against a large number

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14. David W. Opderbeck, *Peer-to-Peer Networks, Technological Evolution, and Intellectual Property Reverse Private Attorney General Litigation*, 20 Berkeley Tech. L.J. 1685, 1702–08 (2005); David Kravets, *File Sharing Lawsuits at a Crossroads, After Five Years of RIAA Litigation*, Wired (Sept. 4, 2008, 2:55 PM), http://www.wired.com/threatlevel/2008/09/proving-file-sh.

15. *E.g.*, A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1027 (9th Cir. 2001).

16. *See, e.g.*, MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 936–37 (2005) (holding that, by harboring an intention to promote to Grokster users a method of copyright infringement, defendant is liable for the resulting infringement by the third-party users); *In re* Aimster Copyright Litig., 334 F.3d 643, 653 (7th Cir. 2003) (shutting down Aimster); Arista Records L.L.C. v. Lime Group L.L.C., 715 F. Supp. 2d 481, 494 (S.D.N.Y. 2010) (holding that LimeWire, a Gnutella client, induced copyright infringement).

17. Bridy, *supra* note 11, at 703; Ankur R. Patel, *BitTorrent Beware: Legitimizing BitTorrent Against Secondary Copyright Liability*, 10 Appalachian J.L. 117, 119 (2011).

18. *See, e.g.*, Adam Langston, Note, *Return of the John Doe: Protecting Anonymous Defendants in Copyright Infringement Actions*, 41 Stetson L. Rev. 875, 879–85 (2012) (reviewing the history of copyright litigation since the RIAA litigation).

19. *See, e.g.*, *id*.

20. Bridy, *supra* note 11, at 703; Patel, *supra* note 17, at 119.

21. *BitTorrent and µTorrent Software Surpass 150 Million User Milestone; Announce New Consumer Electronics Partnerships*, BitTorrent Inc. (Jan. 9, 2012), http://www.bittorrent.com/intl/es/company/about/ces_2012_150m_users; *BitTorrent and Netflix Dominate America's Internet Traffic*, TorrentFreak (Oct. 27, 2011), http://torrentfreak.com/bittorrent-and-netflix-dominate-americas-Internet-traffic-111027.

22. For example, litigation against P2P users launched by RIAA. *See infra* note 129.

23. Eliot Van Buskirk, *RIAA to Stop Suing Music Fans, Cut Them off Instead*, WIRED (Dec. 19, 2008, 7:26 AM), http://www.wired.com/epicenter/2008/12/riaa-says-it-pl.

of defendants into single cases. RIAA lawsuits eventually tapered off after 2008, when RIAA obtained preliminary agreements from the ISPs to cooperate in RIAA's fight against online piracy.[24] However, critics claimed that the real reason for abandoning the lawsuits was that the litigation strategy did nothing to decrease copyright infringement and only increased negative publicity for RIAA.[25]

Differences in technology cause the BitTorrent litigation to differ in significant aspects from the RIAA litigation. First, RIAA's attempts to join several IP addresses were mostly based on the fact that the addresses were derived from a single ISP, such as a network on a college campus, and not much more. Although the question of joinder sometimes arose in the RIAA litigation, courts could easily find improper joinder for reasons unrelated to the type of P2P protocol employed. This was because in the RIAA cases, each of the multiple defendants allegedly downloaded different songs, owned by different plaintiffs, and there was no evidentiary support that they constituted the "same transaction, occurrence, or series of transactions or occurrences."[26] Unlike the RIAA cases, each BitTorrent case is concerned with only one copyrighted work.

Second, courts in the RIAA litigation neither reached a consensus nor had to delve deep into the legal issues[27] because, unlike BitTorrent, the older P2P technologies did not have any features in support of joinder, such as simultaneous uploading and downloading in a "swarm." Most importantly, the exact type of P2P technology was not a concern to either the courts or the parties.[28] These differences are the centerpiece of the BitTorrent plaintiffs' arguments in distinguishing their cases from those of RIAA. Thus, the BitTorrent plaintiffs' argument for joining multiple defendants mainly rests on the intrinsic nature of the BitTorrent file-sharing scheme. Another reason why the issue of joinder was not of great concern to RIAA was because RIAA launched this crusade as much to send a message to stem online piracy as to recoup losses from copyright infringement. As such, joining multiple defendants might not have been

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24. Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, at B1, http://online.wsj.com/article/SB122966038836021137.html.

25. *Id.*

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

27. *See infra* notes 28, 129.

28. *See, e.g.*, Fonovisa, Inc. v. Does 1–9, No. 07-1515, 2008 U.S. Dist. LEXIS 27170, at *3 (W.D. Pa. Apr. 3, 2008) (not disclosing the protocol used by plaintiffs but noting that they merely used the Internet); BMG Music v. Does 1–4, No. 3:06-cv-01579-MHP, 2006 U.S. Dist. LEXIS 53237, at *3 (N.D. Cal. July 31, 2006) (identifying that the plaintiffs used the same ISP, Covad Communications, but not disclosing the P2P protocol); Elektra Entm't Grp., Inc. v. Does 1–9, No. 04 Civ. 2289 (RWS), 2004 U.S. Dist. LEXIS 23560, at *2 (S.D.N.Y. Sept. 7, 2004) (finding that the defendants used the FastTrack network); Interscope Records v. Does 1–25, No. 6:04-cv-197-Orl-22DAB, 2004 U.S. Dist. LEXIS 27782, at *3 (M.D. Fla. Apr. 1, 2004) (noting that plaintiffs were using FastTrack, the protocol of several older P2P clients such as Grokster and KaZaa).

RIAA's top priority because obtaining a large sum of damages from one defendant could very well accomplish RIAA's objective of publicizing the penalty associated with piracy.

Small movie and adult film companies, which constitute the majority of plaintiffs in this recent influx of Doe litigation,[29] all share the same incentive of joining large number of defendants. These lawsuits essentially underlie a business model where it is only financially worthwhile if the names and addresses of multitudes of defendants can be subpoenaed in one filing. The usage of BitTorrent by defendants can make for a strong joinder claim since the means by which files are transferred over the BitTorrent network in groups called "swarms" may meet Rule 20's "same transaction and occurrence" requirement.

The BitTorrent plaintiffs first link IP addresses to instances of infringing activities by monitoring the BitTorrent network. Then the plaintiffs need to overcome a major procedural hurdle to pursue their claims following the filing of a complaint. Before the BitTorrent plaintiffs can serve complaints on the Doe defendants—identified only by their IP addresses—the plaintiffs need to obtain identification information, such as the names and addresses connected to the IP addresses from ISPs like AT&T and Comcast. However, Rule 45 of the Federal Rules of Civil Procedure requires court approval for such a subpoena.[30] When a court issues this discovery order, the court often imposes conditions pursuant to its discretion to protect persons affected by the subpoena.[31] Such conditions often include a notice to accompany the order instructing the ISPs to distribute information to the Internet service subscriber to inform her of her rights and options, such as filing a motion to quash the subpoena.[32]

Although the subpoena is sought in the name of serving the defendants so as to proceed with litigation, it is commonly assumed that the plaintiffs are only interested in obtaining identification information for a large number of IP addresses in one fell swoop in order to secure

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29. *See* Jason Koebler, *Porn Companies File Mass Piracy Lawsuits: Are You at Risk?*, U.S. News (Feb. 2, 2012), http://www.usnews.com/news/articles/2012/02/02/porn-companies-file-mass-piracy-lawsuits-are-you-at-risk. Later, publishing and video game companies joined this litigation frenzy. *See, e.g.*, John Wiley & Sons, Inc. v. Does 1–30, 12 Civ. 3782 (LTS)(JLC), 2012 U.S. Dist. LEXIS 135468 (S.D.N.Y. Sept. 18, 2012); Aerosoft GMBH v. Does 1–50, No. 12-21489-CIV-SEITZ/SIMONTON, 2012 U.S. Dist. LEXIS 68709, at *4 (S.D. Fla. May 16, 2012).

30. FED. R. CIV. P. 45(a)(3) ("The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it.").

31. *Id.* 45(c)(3)(B).

32. CP Prod. v. Doe, No. CIV 2:12-cv-0616 WBS JFM, 2012 U.S. Dist. LEXIS 107045, at *4 (E.D. Cal. July 30, 2012) ("The subpoenas required the ISPs to notify subscribers of the IP addresses whose information was to be released so that the subscribers would have an opportunity to file objections or motions to quash with the court.").

monetary settlements from putative defendants.[33] After a defendant pays the proposed settlement amount, the plaintiff then voluntarily dismisses the case against the defendant. The assumption that plaintiffs have no intention to pursue the claims to judgment or even to serve the defendants is reasonable because the strategy for profitability rests in the economies of scale of quick settlements from a large number of defendants.[34] Accordingly, joining a large number of defendants in one filing is key to the plaintiffs' business model.

Although the plaintiffs may legally justify joinder of a large number of defendants in a single case based on the swarm features of BitTorrent, they encounter a different type of hurdle in the public sphere that raises normative concerns. A defendant who receives an offer letter to settle for $3000, for example, often feels compelled to pay in order to avoid the hassle of litigation. For example, one of the many oft-circulated news stories publicizing the alleged predatory activities of plaintiffs involves a grandmother who was ignorant of the importance of securing her wireless connection. Unidentified neighbors might have used her wireless connection to infringe on copyrighted works. A BitTorrent plaintiff then accused the grandmother of downloading, for example, "Nude Nuns with Big Guns."[35] A grandmother defendant with unsecured wireless who receives such a settlement letter from an adult film company becomes the poster child for the many protests in the P2P user community.[36] The public outcry against such behavior underscores the need to address the normative concerns for parties on both sides of the BitTorrent litigation.

The BitTorrent litigation thus presents new challenges to the courts faced with this application of joinder rules to "transactions [or] occurrences" that exist solely in cyberspace and are coordinated only by a P2P protocol. In the absence of actual intent to litigate the claims, the plaintiffs' strategy in joining a large number of defendants is contrary to the purpose of judicial economy and trial convenience—the underlying purpose served by joinder in the rules of civil procedure.

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33. James DeBriyn, Note, *Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages*, 19 UCLA ENT. L. REV. 79, 90–94 (2012) (describing how plaintiffs use mass litigation as a business model).

34. This strategy of plaintiffs is not unique to P2P cases, nor is it new. *See, e.g.*, Buck v. Robinson, 42 F. Supp. 697 (S.D. W. Va. 1942) (finding for the defendant in a case where the American Society of Composers, Authors, and Publishers sued a restaurant for performing copyrighted songs); *see also* FIGHT COPYRIGHT TROLLS, http://fightcopyrighttrolls.com (last visited Feb. 25, 2013).

35. Keegan Hamilton, *The Five Funniest Porn Titles Involved in BitTorrent Piracy Lawsuits*, SEATTLE WEEKLY (Aug. 11, 2011, 12:31 PM), http://blogs.seattleweekly.com/dailyweekly/2011/08/the_5_funniest_porn_titles_bittorrent_piracy_lawsuits.php.

36. *See, e.g.*, James Temple, *Lawsuit Says Grandma Illegally Downloaded Porn*, S.F. CHRON, July 15, 2011, at D1.

Currently experiencing a great influx of these cases, courts around the country are divided as to whether early discovery should be granted to a case in which tens, hundreds, or sometimes thousands of IP addresses are joined together as putative defendants. The plaintiffs' reliance on the detailed operation of the BitTorrent technology places joinder rules of civil procedure front and center in a controversy to an extent never before confronted by the courts. Some courts maintain that joinder is proper at this early stage of the case, while others sever the parties on the grounds of misjoinder or lack of personal jurisdiction. The divide over whether to grant plaintiffs early discovery while joining a large number of defendants exists not just between circuits but persists even within the same federal district. The legal issue each district focuses on differs slightly and thus sometimes leads to different grounds for the various holdings. Nevertheless, the issue of joinder remains a recurring theme in all circuits and is the focus of the analysis here.[37]

This Note argues that the lack of a suitable means to resolve disputes between copyright owners and consumers forces copyright owners and the courts to apply civil procedure joinder rules in unintended ways. Part I describes how the BitTorrent protocol differs from older P2P technologies and how the current copyright enforcement scheme fails to address the needs of copyright owners here. Part II examines how previous case law involving older P2P technologies stands up to this new technology in the context of the BitTorrent litigation. This Note argues that the lack of consensus among district courts demonstrates that the Napster, Grokster, and previous Doe cases do not provide adequate guidance for this renewed struggle between copyright owners and P2P users. Lastly, Part III concludes that a new copyright enforcement mechanism, such as an alternative to lawsuits, is imperative not only to curtail the frustration currently experienced by the district courts, but also to discontinue the perverse application of civil procedure rules.

I. Background: The Rise of BitTorrent Litigation

A. Basics of BitTorrent Litigation

The rise of BitTorrent litigation coincided with a trend in P2P usage that never existed before. While the number of music file transfers has remained relatively constant since the RIAA litigation, the transfer of TV shows and movies has grown tremendously.[38] Relative to older

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37. *See, e.g.*, *infra* notes 155–196.
38. Eric Bangeman, *P2P Traffic Shifts Away from Music, Towards Movies*, Ars Technica (July 5, 2007, 9:26 PM), http://arstechnica.com/tech-policy/news/2007/07/p2p-traffic-shifts-away-from-music-towards-movies.ars.

technologies, BitTorrent is well suited to handle the large files necessary for TV shows and films, as it surpasses other existing P2P protocols by accomplishing complete decentralization and mandating file sharing, eliminating many of the common technological inefficiencies of older P2P protocols.[39]

Because BitTorrent is currently the top P2P protocol, data suggest that the quantity of infringing activities it enables is staggering, reaching over 99% of the P2P network traffic.[40] Although there is controversy about whether file sharing through BitTorrent leads to a reduction in profits to copyright holders,[41] it is undisputed that the majority of the traffic is infringing.[42] Owners of video and film copyrights are especially vulnerable, and in 2010 they started to file lawsuits to recoup their financial losses. Especially considering the economic woes that have befallen smaller entertainment industry players in the past few years, the BitTorrent plaintiffs might warrant more sympathy in comparison to the RIAA plaintiffs—popularly viewed as big and oppressive music companies.[43]

B. The File Distribution Scheme of Older P2P Protocols and Its Problems

Older P2P protocols adopt certain aspects of the traditional client-server model, where the client requests information from a server, which in turn seeks to fulfill that request.[44] Although a centralized server does not store files in a P2P network, the server's job is to match clients to establish P2P connections upon a request.[45] The server also indexes all of the files available for download so as to properly translate a file request into an appropriate connection.[46] The peers share certain resources with others in the network, such as files, storage space, or processing power.[47] As a network grows due to an increasing number of peers, not only are more files available for search, but options to find a faster downloading source also increase. On the other hand, since all queries are routed through a central server, increased usage of the P2P network often leads

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39. Ashwin R. Bharambe et al., Microsoft Research, Analyzing and Improving BitTorrent Performance 2 (2005).

40. Bridy, *supra* note 11, at 709–10.

41. Stan J. Liebowitz, *Economists Examine File-Sharing and Music Sales*, *in* Industrial Organization and the Digital Economy 145 (Gerhard Illing & Martin Peitz eds., 2006).

42. Bridy, *supra* note 11, at 709–10.

43. Steve Friess, *Porn Industry Sweats Recession, Piracy*, AolNews (Jan. 9, 2011, 10:39 AM), http://www.aolnews.com/2011/01/09/porn-industry-facing-hard-times-in-struggling-economy.

44. Patel, *supra* note 17, at 119.

45. *See, e.g.*, A&M Records v. Napster, Inc., 239 F.3d 1004, 1012 (9th Cir. 2001) ("Software located on the Napster servers maintains a 'search index' of Napster's collective directory.").

46. *Id*.

47. Col Perks & Tony Beveridge, Guide to Enterprise IT Architecture 190 (Springer 2003).

to a bottleneck, decreasing the efficiency of searches and file transfers.[48] In an attempt to mitigate congestion at the central server, later generations of P2P protocols adopted various decentralization schemes that ranged from mini-servers to complete decentralization.[49]

While congestion at a central server might be eliminated, the decentralization of P2P protocols raised searching and connection issues. A successful file transfer still requires searching for an available file owned by a peer on the network and establishing a connection with that peer for the duration of the transfer.[50] Unstable connections and increased file requests could still render the network unstable or incapacitated.[51]

Another major inefficiency problem confronted by the P2P communities is the lack of cooperation among peers sharing with each other, a phenomenon called "free riding."[52] Users may derive a benefit from downloading but may be reluctant to provide any uploads. Without any incentive for users to gift, a P2P network can include up to 70% of downloaders who never upload.[53] An increasing number of downloaders in a decentralized system can also create bottleneck situations akin to those found in a centralized system—if they do not also correspondingly contribute to sharing their files as uploads in the network.

C.   The File Distribution Scheme of BitTorrent

Unlike the older file-sharing protocols, BitTorrent provides a better user experience with faster download speed by increasing the efficiency of file transfers through two main features: (1) network decentralization and (2) mandatory simultaneous uploads and downloads in a group. Incidentally, decentralization is also the main reason why BitTorrent lacks a central infringement-inducing entity for purposes of lawsuits and why it slips under the radar of the Digital Millennium Copyright Act.[54]

BitTorrent elegantly solves the problems encountered by the older generations of P2P, in large part, by mandating simultaneous downloads and uploads in a "swarm-like" fashion. A BitTorrent peer not only

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48. Yung-Ming Li et al., *Analysis of Scale Effects in Peer-to-Peer Networks*, 16 IEEE/ACM Transactions on Networking 590, 590 (2008).

49. Bridy, *supra* note 11, at 699–700.

50. Stephanos Androutsellis-Theotokis & Diomidis Spinellis, *A Survey of Peer-to-Peer Content Distribution Technologies*, 36 ACM Computing Surveys 335, 346 (2004).

51. *Id.*

52. Murat Karakaya et al., *Free-Riding in Peer-to-Peer Networks*, 13 IEEE Internet Computing 92, 92 (2009); Lei Liu et al., *Experimental Investigation of a Peer-to-Peer-Based Architecture for Emerging Consumer Grid Applications*, 1 J. Optical Comms. & Networking 57, 57 (2009).

53. Eytan Adar & Bernardo A. Huberman, *Free Riding on Gnutella*, First Monday (Oct. 2, 2000), http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/792/701.

54. *See* Digital Millennium Copyright Act, 17 U.S.C. § 512 (2010) (stating that §§ 512(c) and (h) are only applicable to service providers that store data).

downloads content, but is also mandated to serve content to other peers. The system made this possible because a file in BitTorrent is broken down into fragments called blocks.[55] Uploading and downloading a file in blocks led to two important characteristics of BitTorrent. First, a file transfer connection is no longer restricted to peers who possess a complete file. Uploading from one peer can immediately start once that same peer downloads her first block of a file.[56] As such, BitTorrent protocol can mandate a peer who just finished downloading a first block to upload that same first block during the same time the peer proceeds to download her second block. Second, file transfer is not limited to a one-on-one transfer where one peer obtains her file solely from one other peer. A peer can download different blocks of a single file from different peers in a group. For example, a user may obtain the first block of the file from a first peer, the second block from a second peer, etc. This collectivity of peers sharing a file at any given time is called a "torrent" or "swarm."[57] A peer in a torrent that has a complete file is called a "seed" while a peer that is in the process of acquiring a file is a "leecher."[58] Every torrent requires at least one seed to remain in the torrent and to serve the multiple leechers. Aside from mandating simultaneous uploading and downloading, there is also a mechanism by which peers providing a fast upload rate to other users preferentially receive downloads.[59] As such, the simultaneous downloading in a swarm as well as the tit-for-tat feature allows the network to grow sustainably.[60]

Similar to how Internet surfers rely on Internet search engines to find websites of interest, BitTorrent users rely on indexing websites, such as PirateBay, to search for files.[61] In a decentralized network like BitTorrent where files are located in different peer locations, an indexing website serves a similar function as a card catalog in a library to help users find specific titles in the library stacks. These websites operate independently from the BitTorrent protocol and provide indexing information to BitTorrent users so the users can locate the swarm of peers sharing the file of interest and establish a connection to the swarm.[62] Accordingly, these websites could be exposed to secondary liability based on the purpose of inducing infringement and the profit-generating nature of their services.

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55. Bram Cohen, Incentives Build Robustness in BitTorrent 1 (2003).

56. *Id.* at 2.

57. Raymond Lei Xia & Jogesh K. Muppala, *A Survey of BitTorrent Performance*, 12 IEEE Comms. & Tutorials 140, 141.

58. *Id.*

59. *Id.* at 142.

60. Birdy, *supra* note 11, at 702.

61. Patel, *supra* note 17, at 137–42.

62. *Id.*

Indeed, Congress has attempted to curb their activities.[63] Unlike the indexing websites, BitTorrent protocol itself could be difficult to shut down because it exists merely as a software protocol that is completely decentralized and without claimed ownership.

D. BitTorrent and Copyright Infringement

Research data and expert testimonies based on the Napster and Grokster litigation support the conclusion that the majority of the P2P traffic is infringing. The numbers presented to the courts in these older lawsuits were either over 90% or high enough to support the plaintiffs' claims.[64] Copyright infringement culpability is no different for BitTorrent. One study found that only about 1% of the files in a BitTorrent sample were non-infringing,[65] while another found that only 0.3% of the files were non-infringing.[66]

Published numbers suggest a significant loss of industry revenue, tax revenue, and jobs because of online piracy. However, the connection between massive job losses and infringement is controversial, as many studies showing this are supported or affiliated with the music industry. The metrics and assumptions inherent in the studies, such as directly correlating instances of piracy to lost sales of a copyrighted work, are questionable.[67] Regardless of whether the studies correctly quantify the economic repercussions of P2P copyright infringement, the large amount of files illegally downloaded via BitTorrent does not appear to be disputed.[68]

Centralized content distribution systems, the staple of the old P2P networks, provided static and easily identifiable targets for litigation and other enforcement efforts.[69] Current copyright enforcement thus works best when infringing work is fixed on central servers.[70] The expansive,

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63. *Id.*; *see* Online Protection and Enforcement of Digital Trade Act, H.R. 3782, 112th Cong. (2012) (allowing the U.S. International Trade Commission to adjudicate cases involving foreign websites whose primary purpose is piracy); Stop Online Piracy Act, H.R. 3261, 112th Cong. § 102(a) (2011) (targeting Internet sites used for copyright infringement); Protect IP Act, S. 968, 112th Cong. § 3 (2011) (investing the attorney general with the power to combat rogue websites).

64. *See, e.g.*, MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 922–23 (2005).

65. Jackie Cheng, *BitTorrent Consensus: About 99% of Files Copyright Infringing*, Ars Technica http://arstechnica.com/media/news/2010/01/bittorrent-census-about-99-of-files-copyright-infringing.ars.

66. Robert Layton & Paul Watters, Internet Commerce Sec. Lab., Investigation into the Extent of Infringing Content on BitTorrent Networks 1, 7 (2010).

67. Bridy, *supra* note 11, at 711; Stuart Corner, *AFACT Repeats Claims: Over 90 Percent of BitTorrent Files Breach Copyright*, ITWire (Sept. 20, 2011, 5:07 PM), http://www.itwire.com/it-policy-news/regulation/49875-afact-repeats-claims-over-90-percent-of-bittorrent-files-breach-copyright.

68. Bridy, *supra* note 11, at 709–10.

69. *Id.* at 705 (citing Jonathan Zittrain, *Internet Points of Control*, 44 B.C. L. Rev. 653, 658 (2003)).

70. Bridy, *supra* note 11, at 716 (citing Niva Elkin-Koren, *Making Technology Visible: Liability of Internet Service Providers for Peer-to-Peer Traffic*, 9 N.Y.U. J. Legis. & Pub. Pol'y 15, 41 (2006) ("[The

ever-changing BitTorrent community of anonymous members, together with the decentralized approach, makes it very difficult to shut down BitTorrent swarms.[71] By eschewing a central server, BitTorrent minimizes its vulnerability—in distinction to the vulnerability of Napster—to the threats of existing copyright enforcement. Without a proper enforcement scheme or recourse outside of litigation to subpoena identification of infringers,[72] filing a lawsuit became a copyright owner's only answer.

II. Massive John Doe Litigation

A. Is Expedited Discovery Proper?

A copyright-owner plaintiff who seeks to identify defendants known only by their IP addresses must apply for discovery in order to proceed with infringement claims. Rule 26(d) of the Federal Rules of Civil Procedure forbids a party from seeking discovery before a Rule 26(f) conference unless the court orders otherwise.[73] A Rule 26(f) conference is an opportunity for parties to meet in order to develop a discovery plan. The plan will then be submitted to the court for review.[74] In a John Doe litigation case, a Rule 26(f) conference is not possible because defendants have not yet been identified. Only when the court permits a Rule 26(d) exception for expedited discovery can the plaintiff discover the defendants' identities and accordingly name the parties as defendants.

Based on the express wording of Rule 26(d) and the want of pertinent appellate decisions, district courts wield broad discretion to determine whether to grant expedited discovery prior to a Rule 26(f) conference. Generally, a decision "to deny discovery will not be disturbed except upon the clearest showing that the denial of discovery results in actual and substantial prejudice to the complaining litigant."[75] Only if

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Digital Millennium Copyright Act] was designed to address a mainly centralized architecture. . . . Peer-to-peer architecture, by contrast, is decentralized and allows users to search for files stored in the libraries of other users."); *see* Digital Millennium Copyright Act, 17 U.S.C. § 512 (2010) (stating that §§ 512(c) and (h) are only applicable to service providers that store data).

    71. Patel, *supra* note 17, at 121.

    72. *See* 17 U.S.C. § 512 (stating that §§ 512(c) and (h) are only applicable to service providers that store data).

    73. Fed. R. Civ. P. 26(d).

    74. Fed. R. Civ. P. 26(f)(2).

    75. Laub v. U.S. Dep't of Interior, 342 F.3d 1080, 1093 (9th Cir. 2003) (quoting Hallett v. Morgan, 287 F.3d 1193, 1212 (9th Cir. 2002)); *see* Ritchie Special Credit Invs., Ltd. v. U.S. Tr., 620 F.3d 847, 853 (8th Cir. 2010) (holding that whether to "deny expedited discovery [is] committed to the discretion of the bankruptcy court" and that decisions would not be reversed "unless that court has abused its discretion"); Long Island Lighting Co. v. Barbash, 779 F.2d 793, 795 (2d Cir. 1985) (holding that despite having considerable latitude in determining the scope of discovery, the district court abused its discretion "when the discovery is so limited as to affect a party's substantial rights" (citing Goldman v. Checker Taxi Co., 325 F.2d 853, 856 (7th Cir. 1963))).

there is a reasonable probability that the outcome would have been different had discovery been allowed can prejudice be established.[76]

Exercises of broad discretion have led district courts to develop different standards that govern whether a court should grant expedited discovery: the *Notaro* standard, the reasonableness standard, and the good cause standard.[77] These different standards result from practices that exist in different federal districts, and none have yet to be adopted consistently or exclusively in any one circuit.

The *Notaro* standard is similar to that required in a preliminary injunction: (1) irreparable injury, (2) some probability of success on the merits, (3) some connection between expedited discovery and avoidance of irreparable injury, and (4) some evidence that the injury that will result without expedited discovery looms greater than the injury that the defendant will suffer if the expedited relief is granted.[78]

Applying the *Notaro* standard, plaintiffs in these BitTorrent cases assert irreparable injury because ISPs keep log files of subscriber activities for only limited periods of time before erasing the data.[79] Accordingly, if they do not seek discovery in time to match identification information to the IP addresses that correspond to infringers, they lose their only means to seek redress for their injuries.[80] The presumption that plaintiffs suffered injury because of illegal downloads, however, is controversial. Analogizing to previous lessons from the music industry, the alleged injury could be specious because not all illegal downloads represent sales that copyright owners would have actually made.[81] However, it was the testimonies of music executives and research studies from the music industry about such injury that ultimately persuaded the

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76. Martel v. Cnty. of L.A., 56 F.3d 993, 995 (9th Cir. 1995).

77. Jesse N. Panoff, *Rescuing Expedited Discovery from Courts & Returning It to FRCP 26(d)(1): Using a Doctrine's Forgotten History to Achieve Legitimacy*, 64 ARK. L. REV. 651, 661 (2011).

78. Notaro v. Koch, 95 F.R.D. 403, 405 n.4 (S.D.N.Y. 1982) (applying the test to see if leave can be granted for the taking of depositions while recognizing that the test is from assessing the propriety of a preliminary injunction); *cf.* Winter v. NRDC, Inc., 555 U.S. 7, 20 (2008) (applying the standard in a case involving a preliminary injunction).

79. *See, e.g.*, Hard Drive Prods., Inc. v. Does 1–130, No. C-11-3826 DMR, 2011 U.S. Dist. LEXIS 132449, at *2 (N.D. Cal. Nov. 16, 2011); Patrick Collins, Inc. v. Does 1–11, No. 11-cv-01776-AW, 2011 U.S. Dist. LEXIS 128889, at *2 (D. Md. Nov. 8, 2011) (noting that ISPs keep "temporary internal logs that record the date, time, and customer identity for each IP address serviced"); Hard Drive Prods., Inc. v. Does 1–30, No. 2:11cv345, 2011 U.S. Dist. LEXIS 119333, at *6 (E.D. Va. Oct. 17, 2011) ("ISPs . . . keep the logs of these addresses for only a short period of time.").

80. *Cf.* Protecting Children from Internet Pornographers Act of 2011, H.R. 1981, 112th Cong. § 4 (2011) ("A commercial provider of an electronic communication service shall retain for a period of at least one year a log of the temporarily assigned network addresses . . . .").

81. *See, e.g.*, Liebowitz, *supra* note 41; Felix Oberholzer & Koleman Strumpf, THE EFFECT OF FILE SHARING ON RECORD SALES: AN EMPIRICAL ANALYSIS (2004); *cf.* OECD REPORT, DIGITAL BROADBAND CONTENT: MUSIC, DSTI/ICCP/IE(2004)12/FINAL (Jun. 8, 2005); Opderbeck, *supra* note 14.

Napster court.[82] Given this legal backdrop, the rights owners should not have an impediment in establishing irreparable injury.

Turning to the second and third prongs of the *Notaro* standard, the plaintiffs should also have no difficulty proving (2) some probability to succeed on the merits and (3) the connection between expedited discovery and avoidance of injury. The plaintiffs have started using forensic software, which has allowed investigators to observe the distribution of video (using the BitTorrent protocol) that is linked to individual defendants' IP addresses. This forensic software further allows investigators to verify that the distributed file is the registered work.[83] Considering that the language, "some probability" and "some connection," in these two prongs reflects general guidelines without a requirement for a heightened standard for specificity, plaintiffs are able to allege enough at the pleading stage to demonstrate the probability and connection needed to proceed.

The last prong of the *Notaro* standard requires balancing the injury to the plaintiff without expedited discovery against the injury suffered by the defendant from expedited discovery.[84] Courts' application of this prong to decide whether to grant early discovery follows how the standard has been used in preliminary injunction cases.[85] A typical situation where this prong can support granting early discovery is when a party wants to depose a person who would soon become unavailable. The objective here is to insulate defendants from "unfair" discovery for fear that defendants would not have enough time to prepare for the case and to hire an attorney.[86]

Given the objective served by the last prong of the *Notaro* standard, the BitTorrent plaintiffs should also meet no obstacles in their application for expedited discovery. In comparison to cases where the expedited discovery involves a deposition, the balancing inquiry in the BitTorrent cases favors plaintiffs. First, their discovery request merely seeks a subpoena to order ISPs to reveal identification information. Second, the defendants have yet to be identified and the burden of discovery production rests on the ISP and not on the defendant.[87] Third, the courts often narrowly fashion the scope of the expedited discovery to allow an

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82. A&M Records v. Napster, Inc., 239 F.3d 1004, 1015–17 (9th Cir. 2001).

83. *E.g.*, Pac. Century Int'l, Ltd. v. Does 1–48, No. C 11-3823 MEJ, 2011 U.S. Dist. LEXIS 116432, at *4 (N.D. Cal. Oct. 7, 2011).

84. Notaro v. Koch, 95 F.R.D. 403, 405 (S.D.N.Y. 1982).

85. *E.g.*, Crown Crafts, Inc. v. Aldrich, 148 F.R.D. 151, 152 (E.D.N.C. 1993) (recognizing that courts have borrowed the *Notaro* standard for "the test for granting a preliminary injunction and applied it to requests for expedited discovery").

86. Panoff, *supra* note 77, at 663–64.

87. *But cf.* Call of the Wild Movie, L.L.C. v. Does 1–1062, 770 F. Supp. 2d 332, 338 (D.D.C. 2011) (involving an ISP filing a motion to quash the subpoena because of the undue burden it faces with compliance).

opportunity for any defendants to contest the subpoena.[88] Although defendants' rights to anonymity[89] and the expense required in contesting the subpoena could be an issue, plaintiffs here have made a prima facie case for their injury. They also lack alternative means to garner information necessary to proceed with their claims.[90] Therefore, the recognizable injury to the defendants is relatively minimal, and an application of the *Notaro* standard in these BitTorrent cases favors granting limited expedited discovery to plaintiffs.

The reasonableness standard is similar to the *Notaro* standard and does not compel a different result.[91] The reasonableness standard takes into account all surrounding circumstances, including (1) whether a preliminary injunction hearing is pending, (2) the proposed discovery's scope, (3) the purpose for requesting expedited discovery, (4) the burden placed on the defendant to comply with the requests, and (5) how far in advance of the typical discovery process the request was made. Since the *Notaro* standard originated as a test to be applied in a preliminary injunction case, courts developed the reasonableness standard as an alternative to avoid confounding a determination for expedited discovery with that for a preliminary injunction. Otherwise, in a case where there is an expedited discovery in connection with a preliminary injunction, courts find it less than ideal to apply the *Notaro* standard twice.[92] Here, all the facts pertaining to the BitTorrent plaintiffs in favor of expedited discovery under the *Notaro* standard also would apply with equal force under the reasonableness standard.

The final standard conditions expedited discovery on a finding of "good cause." "Good cause" may be found where the "need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party."[93] Based on *Semitool, Inc. v. Tokyo*

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88. *E.g.*, Pac. Century Int'l, Ltd. v. Does 1–48, No. C 11-3823 MEJ, 2011 U.S. Dist. LEXIS 116432, at *22–23 (N.D. Cal. Oct. 7, 2011); Camelot Distrib. Group v. Does, No. 2:11-cv-02432 GEB KJN, 2011 U.S. Dist. LEXIS 108816, at *14 (E.D. Cal. Sept. 22, 2011); Pac. Century Int'l Ltd. v. Does 1–129, No. C11-03681 HRL, 2011 U.S. Dist. LEXIS 86779, at *8 (N.D. Cal. Aug. 5, 2011); *Call of the Wild Movie*, 770 F. Supp. 2d at 340.

89. *E.g.*, Raw Films, Ltd. v. Does, No. 11-7248, 2012 U.S. Dist. LEXIS 41645, at *22–26 (E.D. Pa. Mar. 23, 2012) (refusing to enter a protective order to allow the defendants to proceed anonymously); *cf.* Sunlust Pictures, L.L.C. v. Cisa, No. 12-cv-00656-CMA-KMT, 2012 U.S. Dist. LEXIS 150835, at *8–9 (D. Colo. Oct. 19, 2012) (allowing movant to proceed anonymously but noting that "Fed. R. Civ. P. 10(a), and Rule 17(a) specifically states that every action shall be prosecuted in the name of the real party in interest").

90. *E.g.*, *Call of the Wild Movie*, 770 F. Supp. 2d at 352–53.

91. *See* Panoff, *supra* note 77, at 668.

92. *Id*. at 664–66.

93. Semitool, Inc. v. Tokyo Electron Am., Inc., 208 F.R.D. 273, 276 (N.D. Cal. 2002); *see* Pod-Ners, L.L.C. v. N. Feed & Bean, 204 F.R.D. 675, 676 (D. Colo. 2002) ("[I] order expedited discovery upon a showing of good cause."); Yokohama Tire Corp. v. Dealers Tire Supply, Inc., 202 F.R.D. 612, 614 (D. Ariz. 2001) ("[T]he [c]ourt adopts a good cause standard to warrant the granting of any

Electron America, Inc., the good cause standard allows a trial court to grant expedited discovery where the *Notaro* standard would not, and the main reason for this broader discretion is the lack of an "irreparable injury" requirement.[94] The *Semitool* court found that although the plaintiff did not allege "irreparable injury," its argument pertaining to conservation of "party and court resources" was persuasive, for the benefit to the "administration of justice" outweighs the burden on the defendant. This standard is thus consistent with the general rule allowing trial courts wide discretion to manage discovery.[95]

Some district courts apply a modified "good cause" standard when anonymous Internet users are named as Doe defendants. For example, many judges in the Northern District of California break down the analysis further into four requirements as set forth in *Columbia Insurance Co. v. Seescandy.com*: (1) The plaintiff can identify the missing party with sufficient specificity that the court can determine that the 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 the defendant could withstand a motion to dismiss; and (4) the plaintiff has demonstrated that there is a reasonable likelihood of identifying the defendant through discovery such that service of process would be possible.[96]

Because the good cause standard affords trial judges broader discretion to grant expedited discovery than the *Notaro* standard, it is an easier standard for the BitTorrent plaintiffs to meet. Even if one were to apply the situation at hand to the four requirements in *Seescandy.com* used in the Northern District of California, the BitTorrent plaintiffs should be able to meet the requirements. First, the plaintiffs would have submitted a list of IP addresses corresponding to the infringers found to be downloading their copyrighted works. Second, plaintiffs would have explained in the complaints how they went about identifying and verifying these infringing activities using their forensic software, as well as provided declarations to that effect. Third, these IP addresses are the key to locating the defendants. All these facts, as alleged by the plaintiffs, should also satisfy the essential elements of a copyright infringement

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expedited discovery prior to the Rule 26(f) scheduling conference . . . .").

94. *Semitool*, 208 F.R.D. at 276.

95. *Id.*

96. Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578–80 (N.D. Cal. 1999); *see* Sony Music Entm't Inc. v. Does 1–40, 326 F. Supp. 2d 556, 564–65 (S.D.N.Y. 2004) (noting that the Second Circuit adopts a set of similar factors: (1) a concrete showing of a prima facie claim of actionable harm, (2) the specificity of the discovery request, (3) the absence of alternative means to obtain the subpoenaed information, (4) a central need for the subpoenaed information to advance the claim, and (5) the party's expectation of privacy).

claim at the pleading stage to survive a motion to dismiss.[97] Finally, as for the likelihood of being able to identify the defendant through such discovery, ISPs assign a unique IP address to each subscriber and retain records of subscriber activity. The information sought from the ISPs—such as the names and addresses of the subscribers—will enable plaintiffs to serve defendants.[98]

One might expect plaintiffs to fall short of the good cause standard, however, when probing deeper into the third prong of *Seescandy.com*: that the plaintiff's suit against the defendant can withstand a motion to dismiss. Facially, it seems that the plaintiffs have duly fulfilled this requirement because all the elements of the copyright infringement claim are adequately alleged in the complaint. The evidence generated by the plaintiffs' investigative efforts also corroborates the allegations. However, the plaintiffs' joinder of multiple defendants, each represented by an IP address, warrants further analysis under the third prong because if joinder is improper a court is free to drop one or more parties that are joined. Improper joinder thus can lead to dismissing the action against one or more parties. Since *Seescandy.com* requires that the suit against the defendant be able to withstand a motion to dismiss, granting expedited discovery would hinge on whether the BitTorrent plaintiffs have properly joined the defendants.

One question before proceeding to the joinder inquiry is whether misjoinder actually results in a dismissal as contemplated by the third prong of *Seescandy.com*. The Ninth Circuit in *Gillespie v. Civilett*,[99] the case to which *Seescandy.com* resorted for its reasoning, asserts that early discovery should be granted unless a "complaint would be dismissed on other grounds," while citing to cases in which discovery should have been granted because the complaints alleged facts under which a meritorious claim might be proved.[100] *Seescandy.com* then elaborated on *Gillespie* and explained that the requirement of having a suit be able to "withstand a motion to dismiss" serves to protect "against the misuse of ex parte procedures to invade the privacy" of those who might not have done

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97. *See, e.g.*, Digital Sin, Inc. v. Doe, No. C 11-04397 LB, 2011 U.S. Dist. LEXIS 128033, at *4–6 (N.D. Cal. Nov. 4, 2011); Third Degree Films v. Doe, No. C 11-02768 LB, 2011 U.S. Dist. LEXIS 128030, at *4–6 (N.D. Cal. Nov. 4, 2011); MCGIP, L.L.C. v. Does 1–30, No. C11-03680 HRL, 2011 U.S. Dist. LEXIS 88790, at *6–7 (N.D. Cal. Aug. 10, 2011).

98. *E.g.*, First Time Videos, L.L.C. v. Does 1–95, No. C 11-3822 MEJ, 2011 U.S. Dist. LEXIS 116434, at *4–12 (N.D. Cal. Oct. 7, 2011).

99. Gillespie v. Civilett, 629 F.2d 637, 642 (9th Cir. 1980).

100. *Id.* (citing Gordon v. Leeke, 574 F.2d 1147, 1152 (4th Cir. 1978)); *see* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 (1978) (holding that discovery is not strictly restricted to the merits of the case but should be allowed to litigate jurisdictional issues); Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 430–31 n.24 (9th Cir. 1977) (vacating the lower court's refusal to grant discovery because it is important in aiding a determination of jurisdiction).

anything wrong.[101] The court held that a "conclusory pleading will never be sufficient" and emphasized that a plaintiff must have "standing to pursue an action against [a] defendant."[102] Accordingly, the specific concern for both *Gillespie* and *Seescandy.com* was whether the complaint alleged sufficient facts for a legal remedy and whether the plaintiff had standing. In light of this context, dismissing a case based on misjoinder is not exactly the type of dismissal contemplated by *Gillespie* and *Seescandy.com*. If *Gillespie* and *Seescandy.com* circumscribe dismissals to situations where insufficient facts were alleged for a legal remedy or where there is a lack of standing, the BitTorrent plaintiffs' claims could survive the *Seescandy.com* test and should be able to procure expedited discovery.

Nevertheless, a trial court armed with the broad discretion to manage discovery is free to examine misjoinder as a ground for severance without being constrained to a narrow interpretation of *Gillespie* and *Seescandy.com*. Severance does not necessarily lead to dismissal, as Rule 21 of the Federal Rules of Civil Procedure specifically states that misjoinder is not "a ground for dismissing an action" though "the court may at any time, on just terms, add or drop a party."[103] Despite this facial prohibition of dismissal based on misjoinder, a severance of the parties in BitTorrent cases practically results in dismissal. Because dismissal against the dropped parties is without prejudice, it is now the plaintiffs' prerogative to file new suits against every one of those dropped individuals.

However, it is not in the plaintiffs' interest to lose the economies of scale by filing one suit against each individual defendant in response to a court-ordered severance. It is a well-known business model in cases like this that the plaintiffs would be unlikely to pursue the claims to judgment.[104] Rather, once identification information is in hand, a plaintiff will send out a letter informing potential defendants of the advantages of settlement and the disadvantages thereof.[105] Joinder is essential to maintain low filing and overhead costs in order to make filing these

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101. *Seescandy.com*, 185 F.R.D. at 579.

102. *Id.* at 579–80.

103. FED. R. CIV. P. 21.

104. *See, e.g.*, Arista Records, L.L.C. v. Does 1–27, Civ. No. 07-162-B-W, 2008 U.S. Dist. LEXIS 6241, at *18 (D. Me. Jan. 25, 2008) (rejecting the argument to adopt a heightened pleading standard even if plaintiffs are "using litigation . . . solely as a discovery mechanism, without actually intending to pursue their claims to judgment").

105. *See, e.g.*, Mike Masnick, *Springsteen Pissed at ASCAP for Implying He Instigated Lawsuit Against Pub; Demands His Name Removed*, TECHDIRT (Feb. 5, 2010, 10:13 AM), http://www.techdirt.com/articles/20100204/1525198055.shtml; *USCG v. The People*, ELEC. FRONTIER FOUND., https://www.eff.org/cases/uscg-v-people (last visited Feb. 25, 2013).

lawsuits worthwhile to copyright owners, and so satisfying joinder is an important hurdle the BitTorrent plaintiffs need to overcome.

B. Is Joinder Proper?

Rule 20(a)(2) of the Federal Rules of Civil Procedure permits the joinder of defendants if both of the following conditions are met: "(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action."[106] Designed to enhance judicial economy and trial convenience, the rule encourages courts to entertain the broadest possible scope of action with respect to joinder of parties, claims, and remedies that is consistent with fairness to the parties.[107] As a determination on expedited discovery, a trial court similarly wields broad discretion in deciding whether parties are properly joined.[108]

Whether there is "any question of law or fact common to all defendants" is not disputed because the BitTorrent plaintiffs often have adequately pled liability under copyright infringement with evidence supporting the fact that all the defendants downloaded the same copyrighted work.[109] The remaining issue is whether the joined defendants' conduct arises "out of the same transaction, occurrence, or series of transactions or occurrences."[110]

The doctrine of secondary liability that exists in copyright infringement cases can bolster the proposition that "same transaction [or] occurrence" should include a defendant in BitTorrent cases who knew or had reason to know that her act contributed to infringement. Courts have found contributory infringement based on the "doctrine that one who knowingly participates or furthers a tortious act is jointly and severally

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106. Fed. R. Civ. P. 20(a)(2).

107. United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 724 (1966); *see* Mosley v. Gen. Motors Corp., 497 F.2d 1330, 1332–33 (8th Cir. 1974); League to Save Lake Tahoe v. Tahoe Reg'l Planning Agency, 558 F.2d 914, 917 (9th Cir. 1977).

108. *See, e.g.*, Warner v. Rossignol, 513 F.2d 678, 684 (1st Cir. 1975) (stating that Fed. R. Civ. P. 42(b) commits sound discretion to the trial court as to whether to grant or deny separate trials); *Mosley*, 497 F.2d at 1332 (citing Chicago, Rock Island & Pac. R.R. v. Williams, 245 F.2d 397, 404 (8th Cir. 1957) (holding that the court has broad discretion in matters of Rule 20(b) and Rule 42(b) and that its ruling will not be disturbed on appeal in the absence of a clear abuse of discretion)).

109. *E.g.*, Third Degree Films v. Doe, No. 12-10760-FDS, 2012 U.S. Dist. LEXIS 159538, at *6 (D. Mass. Nov. 5, 2012) ("There is no question that there exist at least some questions of law or fact common to all defendants."); Malibu Media, L.L.C. v. Does 1–28, No. 12-cv-2599-WJM-MEH, 2012 U.S. Dist. LEXIS 144501, at *2 (D. Colo. Oct. 5, 2012) (noting that users of twenty-eight IP addresses were identified that had downloaded a file with a specific hash number associated with the copyrighted work and that these "28 IP addresses were allegedly assigned to the 28 John Doe Defendants").

110. *E.g.*, *Third Degree Films*, 2012 U.S. Dist. LEXIS 159538, at *6.

liable with the prime tortfeasor."[111] To successfully assert contributory infringement, a third-party—that is, a peer in a swarm—must directly infringe the plaintiff's copyright, the defendant must materially contribute to the infringement, and the plaintiff must demonstrate that the defendant knew or had reason to know that the third party was directly infringing.[112]

The main argument that all the joined defendants are acting concertedly "in the same transaction, occurrence, or series of transactions or occurrences" rests on BitTorrent's unique method of file sharing. A plaintiff's typical complaint lists a number of IP addresses, ranging from about twenty to more than a thousand, each corresponding to a Doe defendant that the plaintiff knew participated in a BitTorrent swarm.[113] Next to each IP address is a timestamp indicating the date and time at which forensic software observed that the IP address was involved in the file transfer.[114] The plaintiff then verifies that the transferred file is their copyrighted work by downloading and watching part or the entire video file.[115] The plaintiffs also allege that the same hash value was shared among all defendants' files.[116] A hash value is an alphanumeric value representing the "digital fingerprint" of a file.[117] The same hash value among the files is evidence that the files are copied or downloaded from a single source[118]—the seeder of a swarm. As described in Part I, BitTorrent protocol mandatorily makes every user a provider of a file to other peers the moment it downloads a small piece of a file.[119] Since each participant in the swarm acts as both a downloader and an uploader,[120] the nature of the swarm is consistent with the notion of "same transaction, occurrence, or series of transactions or occurrences."

1.   *Precedential Value of the RIAA Litigation*

Courts have looked to the previous massive Doe litigation brought by RIAA on behalf of the music industry for guidance because the RIAA cases are similar to the BitTorrent cases in many aspects. The

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111. NCR Corp. v. Korala Assocs. Ltd., 512 F.3d 807, 816 (6th Cir. 2008) (quoting Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1162 (2d Cir. 1971)); *see* Salton, Inc. v. Philips Domestic Appliances & Pers. Care B.V., 391 F.3d 871, 877 (7th Cir. 2004) (applying joint and several liability to federal copyright infringement).

112. Parker v. Google, Inc., 242 F. App'x 833, 837 (3d Cir. 2007); A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1020 (9th Cir. 2001).

113. *See infra* notes 144–145, 163–177.

114. *See infra* note 185.

115. *E.g.*, Patrick Collins, Inc. v. Doe, 843 F. Supp. 2d 565, 566 (E.D. Pa. 2011); New Sensations, Inc. v. Does, No. C-11-2770-MEJ, 2011 U.S. Dist. LEXIS 94909, at *7 (N.D. Cal. Aug. 24, 2011).

116. *See* Malibu Media, L.L.C. v. Doe, 285 F.R.D. 273. 275 (S.D.N.Y. 2012); *infra* note 127.

117. *See, e.g.*, Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 546–47 (D. Md. 2007).

118. *Id.*

119. *See supra* Part I.

120. *See supra* Part I.

RIAA cases, however, failed to produce a consensus on the issue of joinder. On one hand, courts that granted expedited discovery in the RIAA cases either postponed the issue of joinder for later analysis or found proper joinder at the time of the litigation.[121] One argument is that having the defendants joined could even favor the defendants now that they can resort to a joint defense.[122] On the other hand, many courts denied joinder, as the only factual allegation connecting all the defendants was that they used the same ISP or were connected to the same network on a university campus.[123] RIAA would often attempt to join multiple defendants, each of whom would be implicated in infringing on different songs that belonged to different plaintiffs. Given this lack of connection among defendants and without more facts to relate the defendants in the "same transaction [or] occurrence," courts concluded that being on the same network was insufficient for joinder.[124]

The BitTorrent cases present several important distinguishing features from the previous RIAA cases that denied joinder.[125] First, all BitTorrent users in a swarm both download and upload from each other simultaneously. Simultaneous file sharing in a swarm is absent from the P2P file-sharing protocols implicated in many of the RIAA cases involving older technologies, so the RIAA plaintiffs could not rely on the operation of the P2P protocol to support joinder.[126] Second, the BitTorrent cases

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121. *Arista Records, L.L.C. v. Does 1–17*, No. 07-6197-HO, 2008 U.S. Dist. LEXIS 106461, at *7–8 (D. Or. Sept. 25, 2008) (holding that the Digital Millennium Copyright Act is not the exclusive mechanism for the issuance of a subpoena and that the university must comply with discovery requests); *see Arista Records, L.L.C. v. Does 1–12*, No. 1:08-cv-1241-OWW-GSA, 2008 U.S. Dist. LEXIS 82548, at *4–5 (E.D. Cal. Sept. 4, 2008) (finding that some courts have denied the requests for expedited discovery while others have granted them).

122. *Arista Records L.L.C. v. Does*, No. 1:08-CV-765 (GTS/RFT), 2009 U.S. Dist. LEXIS 12159, at *28 (N.D.N.Y Feb. 18, 2009). *See generally* Assaf Hamdani & Alon Klement, *The Class Defense*, 93 CALIF. L. REV. 685 (2005); Jonathan Reich, *The Class Defense: Why Dispersed Intellectual Property Defendants Need Procedural Protections*, 2010 DUKE L. & TECH. REV. 9 (2010).

123. *See, e.g., infra* notes 126, 128.

124. *See infra* notes 126, 128.

125. *E.g., Raw Films, Ltd. v. Does*, No. 11-7248, 2012 U.S. Dist. LEXIS 41645, at *12 n.2 (E.D. Pa. Mar. 23, 2012) (finding the BitTorrent cases factually distinguishable from cases involving older technologies).

126. *See, e.g., IO Grp., Inc. v. Does*, No. C 10-03851 SI, 2010 U.S. Dist. LEXIS 133717, at *9 (N.D. Cal. Dec. 7, 2010) (finding misjoinder because the only factual allegation connecting the defendants was the allegation that they all used the "eDonkey 2000" P2P network to reproduce and distribute plaintiff's copyrighted works); *Fonovisa, Inc. v. Does 1–9*, No. 07-1515, 2008 U.S. Dist. LEXIS 27170, at *19 (W.D. Pa. Apr. 3, 2008) (finding misjoinder because none "of the Defendants downloaded and/or distributed the same copyrighted recordings belonging to the same set of Plaintiffs, and each of the Defendants accessed a different number of audio files on different dates"); *Laface Records, L.L.C. v. Does 1–38*, 5:07-CV-298-BR, 2008 U.S. Dist. LEXIS 14544, at *7 (E.D.N.C. Feb. 27, 2008) (granting severance because using the same ISP as well as some of the same P2P networks is not adequate for joinder); *BMG Music v. Does*, No. 3:06-cv-01579-MHP, 2006 U.S. Dist. LEXIS 53237, at *5 (N.D. Cal. July 31, 2006) (finding misjoinder because the only connection between defendants was the fact that

implicate only one plaintiff alleging the copyright infringement of a single copyrighted work that is identified by a unique hash value shared among all the joined defendants' files.[127] In contrast, the RIAA cases often involved two or more plaintiffs alleging that the defendants downloaded illegal copies of multiple sound recordings.[128] Accordingly, the circumstances surrounding the BitTorrent cases provide a stronger logical relationship among the claims against each defendant than previously asserted.[129]

The key question is whether the intrinsic nature of the BitTorrent file-sharing scheme imputes liability to its users where the older P2P protocols did not. There are arguments on both sides. On the one hand, the interconnected nature necessary for BitTorrent usage can also be found in older generations of P2P protocols. For example, using an older generation of P2P file sharing, a user would "(1) index files into shared directories on a specific computer that can be searched for and transferred to other users; (2) search for files stored on other users' computers; (3) transfer exact copies of files from one computer to another . . . ; and (4) allow [other] users to further distribute the files" in the network.[130] These activities could very well connect all P2P users into an enterprise akin to

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defendants allegedly used the same ISP, Covad Communications, to conduct the infringing acts); Elektra Entm't Grp., Inc. v. Does 1–9, No. 04 Civ. 2289 (RWS), 2004 U.S. Dist. LEXIS 23560, at *16 (S.D.N.Y. Sept. 7, 2004) (finding no logical relations to support a joinder because the only common questions of fact concerned the operation of NYU's network and the Fast Track network); DIRECTV, Inc. v. Adrian, No. 03 C 6366, 2004 U.S. Dist. LEXIS 8922, at *8 (N.D. Ill. May 17, 2004) (stating that each defendant, apparently acting on his own and at different times, purchased various types of offending devices which were used in different ways); DIRECTV v. Loussaert, 218 F.R.D. 639, 643–44 (S.D. Iowa 2003) (granting severance because having the offending device shipped through a common mailing facility did not satisfy the same transaction requirement of Rule 20).

127. *But cf.* Patrick Collins, Inc. v. Does 1–44, No. JFM 8:12-cv-00020, 2012 U.S. Dist. LEXIS 47686, at *21 (D. Md. Apr. 4, 2012) ("[W]hether the joined Doe defendants downloaded one work, or twenty, does not change the separate and discrete nature of their activity.").

128. *See, e.g.*, BMG Music v. Doe, No. 04-650, 2004 U.S. Dist. LEXIS 8457, at *3 (E.D. Pa. Apr. 2, 2004) (finding no connection to maintain joinder, especially when, for example, one Doe is alleged to have infringed nine works held by five plaintiffs and another is alleged to have infringed ten works owned by a different group of plaintiffs); Interscope Records v. Does 1–25, No. 6:04-cv-197-Orl-22DAB, 2004 U.S. Dist. LEXIS 27782, at *11 (M.D. Fla. Apr. 1, 2004) (finding misjoinder because none of the defendants disseminated the same copyrighted material or songs belonging to the same set of plaintiffs).

129. Some courts in the RIAA cases did note that if one defendant was to actually obtain the file from another defendant, there could be support for proper joinder. *See, e.g.*, *Fonovisa*, 2008 U.S. Dist. LEXIS 27170, at *17 (noting that facts tending to show that one or more of the defendants had actually downloaded songs from another defendant could conceivably link the defendants or show they acted in concert); *Interscope Records*, 2004 U.S. Dist. LEXIS 27782, at *10 (holding that joinder was improper due to failure "to show how or which of the Defendants have actually downloaded Plaintiffs' copyrighted songs from another Defendant (which could conceivably link such Defendants) as opposed to any other users of the systems").

130. Arista Records L.L.C. v. Does 1–16, No. 1-08-CV-765 (GTS/RFT), 2009 U.S. Dist. LEXIS 12159, at *4 (N.D.N.Y Feb. 18, 2009).

conspiracy. Thus there should be no reason to find jointly shared liability in one but not the other.

On the other hand, BitTorrent coordinates each of the user activities mentioned above differently from older P2P protocols, and this coordination could support joinder while the older P2P protocols would not. First, in an older protocol, each of the user activities is often attributed to a different user, while BitTorrent mandates all users who download a file also be an uploader. More importantly, each user in an older protocol decides to undertake an activity on the network only on a voluntary basis. Second, making a file available and transferring a file from one location to another does not necessarily occur simultaneously for older protocols. Accordingly, it is understandable why joinder could be an insurmountable obstacle for plaintiffs battling older generations of P2P file sharing without evidence that any of the defendants' activities were coordinated.

The mandatory requirement that BitTorrent users simultaneously upload and download a file in a swarm can be persuasive that the file-sharing activities of different users impute joint liability on everybody in the swarm. Based strictly on legal grounds, the BitTorrent plaintiffs here have provided enough evidence to obtain joinder for early discovery. Rule 20 merely requires that the subject matter is "in the same transaction, occurrence, or series of transactions or occurrences." Based on what the plaintiffs have alleged with respect to the method of the file sharing unique to BitTorrent, all the facts support the "same transaction" test.[131] The nature of the swarm is no different from a group of people who are physically present to conspire in sharing an item. There is no reason why the same actions happening over cyberspace should be subject to a different joinder standard from activities that happen in a confined physical space—for example, a room where conspirers are physically present. Lastly, the fact that the presence of more peers in a BitTorrent swarm increases the likelihood of a successful download—and that one less peer can make the file transfer less efficient—strongly supports the conspiracy characteristics of the BitTorrent file-sharing activities.[132]

Setting aside the file distribution scheme, a closer examination of actual human conduct may undercut the conspiracy theory necessary to the argument for joinder in BitTorrent cases. A typical BitTorrent user starts a computer program that runs the BitTorrent file-sharing protocol, finds a swarm to leech on, and starts a file transfer. One user probably does not make any direct human communication with any other users in the swarm—such as texting, phone calls, or Internet chats—in relation to

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131. *See supra* Part II.B.

132. Boy Racer v. Does, No. C 11-02834 LHK (PSG), 2011 U.S. Dist. LEXIS 86746, at *8 (N.D. Cal. Aug. 5, 2011) (describing the plaintiff's attempt to show a greater extent of "cooperation and concerted action" among BitTorrent users than among users of other protocols).

the file transfer, and does not know ahead of time the sources of the file from which she receives her copy.[133] Some courts express doubt as to how timestamps corresponding to infringing activities that span several days or even months could reflect the same transaction or occurrence.[134] One could even argue that the BitTorrent user lacks mental culpability because she does not know how the BitTorrent protocol creates a copy of the file for her. Merely looking at individual users in a swarm as persons, the human conduct of a BitTorrent user is no different from that of a user of an older P2P protocol. Accordingly, human conduct alone would not satisfy the traditional notions of "same transaction, occurrence, or series of transactions or occurrences." What would make their activities those of the "same transaction, occurrence, or series of transactions or occurrences" exists solely in the inner workings of the BitTorrent protocol. The protocol makes all the human conduct that would traditionally qualify an enterprise as a conspiracy unnecessary. Regardless of whether a user might knowingly be infringing on a copyright, it is less clear if clicking a mouse reflects an informed decision to participate in an activity that would ultimately lead to joint liability.[135]

2.   *Fundamental Fairness in Joinder*

Even if the BitTorrent plaintiffs were to meet the two conditions set forth in Rule 20(a)(2), courts in several circuits have developed "fundamental fairness" as an additional requirement in a motion to sever or join a party.[136] Relevant factors in a "fundamental fairness" analysis

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133. *See, e.g.*, SBO Pictures, Inc. v. Doe, No. 12 Civ. 3925 (SAS), 2012 U.S. Dist. LEXIS 84279, at *7 (S.D.N.Y. June 18, 2012) (finding that there is no allegation that the defendants "communicated or conspired with each other about their transactions").

134. Third Degree Films, Inc. v. Does 1–131, 280 F.R.D. 493, 498 (D. Ariz. 2012) (finding that a particular swarm "can last for many months," during which time "the initial participants may never overlap with later participants"); Patrick Collins, Inc. v. Doe 1–58, No. 3:11cv531-JAG, 2011 U.S. Dist. LEXIS 120235, at *5–6 (E.D. Va. Oct. 5, 2011); Hard Drive Prods., Inc. v. Does 1–188, 809 F. Supp. 2d 1150, 1164 (N.D. Cal. 2011) (finding that activities occurring on different days and times over a two-month period show that Doe Defendants may not have been physically present in the swarm on the exact same day and time). *But cf.* Malibu Media, L.L.C. v. Doe, 12 Civ. 2954 (NRB), 2012 U.S. Dist. LEXIS 120855, at *11 (S.D.N.Y. Aug. 24, 2012) (finding that eighty-eight days "does not undermine the interrelated nature of their actions," as the "law of joinder does not have as a precondition that there be temporal distance or temporal overlap" (citing Patrick Collins, Inc. v. Does 1–21, No. 11 Civ 1523, 2012 U.S. Dist. LEXIS 57962 (E.D. Mich. Apr. 5, 2012))).

135. *E.g.*, *Hard Drive Prods.*, 809 F. Supp. 2d at 1163 ("The bare fact that a Doe clicked on a command to participate in the BitTorrent Protocol does not mean that they were part of the downloading by unknown hundreds or thousands of individuals . . . ."). *But cf.* Tim Wu, *When Code Isn't Law*, 89 Va. L. Rev. 679, 707–08 (2003) (suggesting that computer software engineers design codes to take advantage of "loopholes and ambiguities in legal systems").

136. Coleman v. Quaker Oats Co., 232 F.3d 1271, 1296 (9th Cir. 2000) (holding that courts must decide whether permissive joinder would "'comport with the principles of fundamental fairness' or would result in prejudice to either side" (citing Desert Empire Bank v. Ins. Co. of N. Am., 623 F.2d

include: (1) possible prejudice that may result to any of the parties in the litigation; (2) possible jury confusion; (3) the motive that the moving party has in seeking the motion at issue; (4) the closeness of the relationship between the parties to be joined; (5) the effect of the motion on the court's jurisdiction; (6) the presence of notice to parties; and (7) judicial efficiency.[137] This analysis highlights the discretionary authority embodied in Rule 20 and also incorporates the principles propounded by Rule 42(b) that allow courts to order separate trials for "convenience, to avoid prejudice, or to expedite and economize."[138]

While the BitTorrent plaintiffs might have a good legal reason to join multiple defendants based on the concerted nature of their actions mandated by the BitTorrent protocol, the "fundamental fairness" requirement could prove fatal to the attempt to maintain joinder. First, defendants could suffer prejudice having to litigate their cases together despite having different evidence and testimony specific to their circumstances.[139] Each defendant would have to serve pleadings on other defendants and accommodate them during depositions.[140] The prejudice is especially acute when many defendants reside out of the district or even out of the state.[141] The fact that most defendants would appear pro se creates additional burdens at each step of the litigation process.[142]

Second, joining multiple defendants could greatly undermine judicial economy and trial convenience, which are the original purposes of Rule 20.[143] Assuming that joinder can efficiently resolve certain aspects of the case, there may be other logistical complications that outweigh the benefits of joinder. For example, courts facing BitTorrent cases often raise the concern that the many defendants sought to be joined creates a

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1371, 1375 (9th Cir. 1980)); McIntyre v. Codman & Shurtleff, Inc., 103 F.R.D. 619, 622 (S.D.N.Y. 1984) (asserting that joinder should comport with the principles of fundamental fairness and refusing to find plaintiff's motive in adding parties was fundamentally unfair to defendant); Intercon Research Assocs., Ltd. v. Dresser Indus., Inc., 696 F.2d 53, 57 (7th Cir. 1982) (dismissing Dresser Industries as a defendant in order to ensure fundamental fairness to all parties).

137. *See, e.g.*, *Desert Empire Bank*, 623 F.2d at 1375 (noting that one other consideration is the delay of the moving party in seeking an amendment to his pleadings); Wynn v. Nat'l Broad. Co., 234 F. Supp. 2d 1067, 1088 (C.D. Cal. 2002) ("[E]ven if Plaintiffs could somehow meet the minimum legal requirements for joinder, this Court would then exercise its discretion . . . to sever for at least two reasons: (1) to prevent jury confusion and judicial inefficiency, and (2) to prevent unfair prejudice to the Employer and Agency Defendants.").

138. Fed. R. Civ. P. 42(b).

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

140. *Id.*

141. On the Cheap, L.L.C. v. Does 1–5011, No. C10-4472 BZ, 2011 U.S. Dist. LEXIS 99831, at *10–11 (N.D. Cal. Sept. 6, 2011) (pointing out the difficulties out-of-state and out-of-district defendants would face if required to appear in this court).

142. *Hard Drive Prods.*, 809 F. Supp. 2d at 1164.

143. *See, e.g.*, League to Save Lake Tahoe v. Tahoe Reg'l Planning Agency, 558 F.2d 914, 917 (9th Cir. 1977).

daunting task for case management.[144] The different ISPs and factual circumstances surrounding the alleged infringing activities unique to each defendant could result in different motion filings and defenses, all of which would have to be resolved one at a time.[145] The problem is especially stark in cases where plaintiffs seek to join thousands of defendants. Finding a courtroom to hold that many parties for a case management conference provides a glimpse of potential logistical complications.[146]

Third, joining multiple defendants can affect the court's jurisdiction because courts may not have personal jurisdiction over every defendant. An Internet service subscriber identified by an IP address without any more information does not always guarantee that a court will have personal jurisdiction over her. In fact, many defendants are dismissed in later proceedings in BitTorrent cases because of lack of personal jurisdiction.[147] Fourth, joining multiple defendants, each of whom may present different defenses or relate different factual circumstances surrounding the alleged infringing activities, can also create possible jury confusion at trial.

However, concerns for lack of personal jurisdiction and jury confusion might be issues that are premature to entertain at this juncture of the litigation.[148] At the pleading stage, where defendants are not named and plaintiffs have not even served the complaints, there are no concrete facts to assess jury confusion or personal jurisdiction. Nevertheless, both issues remain a potential problem down the road: As the number of joined defendants reaches the hundreds and higher, the probability of jury confusion and personal jurisdiction problems increases. A court is unlikely to take on a case only to dismiss it in the future.

Factors such as the closeness of the relationship between the parties to be joined and the plaintiffs' motives do not bode well for joinder either. It is undeniable that the relationship between the defendants exists solely in their use of the BitTorrent protocol to download a specific file. If the functionality of BitTorrent and how it differs from older P2P

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144. *See* Tele-Media Co. of W. Conn. v. Antidormi, 179 F.R.D. 75, 76 (D. Conn. 1998) (finding that, although a single action reduced plaintiffs' fees and costs, it imposed significant burdens on the clerk's office, as each docketed order obligated the clerk to prepare and mail a copy of the order to every defendant who had appeared).

145. *Hard Drive Prods.*, 809 F. Supp. 2d at 1164 ("[The] courtroom could not accommodate all of the defendants and their attorneys, and therefore could not hold case management conferences . . . .").

146. *On the Cheap*, 2011 U.S. Dist. LEXIS 99831, at *9–10.

147. *E.g.*, Millennium TGA v. Doe, No. 10 C 5603, 2011 U.S. Dist. LEXIS 110135, at *2 (N.D. Ill. Sept. 26, 2011); DigiProtect USA Corp. v. Doe, No. 10 Civ. 5760, 2011 U.S. Dist. LEXIS 109464, at *13–14 (S.D.N.Y. Sept. 26, 2011).

148. *See, e.g.*, IO Grp., Inc. v. Does, No. C 10-03851 SI, 2010 U.S. Dist. LEXIS 133717, at *7 (N.D. Cal. Dec. 7, 2010); Elektra Entm't Grp., Inc. v. Does 1–9, No. 04 Civ. 2289 (RWS), 2004 U.S. Dist. LEXIS 23560, at *14 (S.D.N.Y. Sept. 7, 2004).

protocols are insufficient for the purpose of Rule 20 joinder, courts would be hard pressed to find "closeness of the relationship"[149] beyond the use of BitTorrent. The plaintiffs' motives also weigh against allowing joinder. Although unspoken, it is a common assumption that the plaintiffs' main goal is to settle the claims out of court, and joinder provides economies of scale that make this endeavor profitable.[150] If the motive of the plaintiffs is not exactly aligned with that of judicial economy and trial convenience, the self-serving motive of the plaintiffs probably cannot outweigh the other factors denying joinder.

However, shifting the focus of the "fundamental fairness" inquiry from the future prospects of litigation to what is currently at stake could favor joinder. The future problems implicated by issues of prejudice and judicial economy would probably never arise given the plaintiffs' motive to procure a settlement early on during litigation. Our judicial system traditionally encourages settlement out of court, and there is no reason to fault plaintiffs' reluctance in pursuing claims to judgment.[151] As such, while it could be unfair to the defendants to be joined in the face of their different circumstances, it is quite conceivable that those logistical problems might never become a reality.[152] An uncertain cost in the future does not necessarily outweigh a present benefit to plaintiffs.

There is also no requirement at this stage of the proceeding to require a plaintiff to file a case that will be completely free of case management issues in the future. Once joinder has been granted at the outset, Courts are not obligated to suffer judicial inefficiency when it arises later in a case.[153] Rather, courts are free to sever and dismiss sua sponte, reviewable only on abuse of discretion. On the contrary, one could even find that joinder actually serves judicial efficiency because it is more manageable for ISPs to respond to a single subpoena for all the defendants—as opposed to requiring the plaintiff to file one suit per defendant and forcing ISPs to respond to one subpoena per defendant.[154]

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149. Desert Empire Bank v. Ins. Co. of N. Am., 623 F.2d 1371, 1375 (9th Cir. 1980).

150. Hard Drive Prods., Inc. v. Does, No. C-11-3826 DMR, 2011 U.S. Dist. LEXIS 132449, at *9 (N.D. Cal. Nov. 16, 2011) (noting that the subpoena creates great potential for a coercive and unjust "settlement"); K-Beech, Inc. v. Does 1–85, No. 3:11cv469-JAG, 2011 U.S. Dist. LEXIS 124581, at *6 (E.D. Va. Oct. 5, 2011) ("[T]he plaintiff has contacted [the defendants] directly with harassing telephone calls, demanding $2,900 in compensation to end the litigation."); *see* Michael Roberts, *BitTorrent Motion Alleges Legal Business Model Targeting Porn Downloaders*, Denver Westword (Sept. 16, 2011, 12:13 PM), http://blogs.westword.com/latestword/2011/09/porn_downloaders_bittorrent_lawsuit.php.

151. *See, e.g.*, Fed. R. Civ. P. 68.

152. *See, e.g.*, Well Go USA, Inc. v. Unknown Participants in Filesharing Swarm Identified, No. 4:12-cv-00963, 2012 U.S. Dist. LEXIS 137272, at *11 (S.D. Tex. Sept. 24, 2012) ("The issue of joinder is better analyzed once unknown Defendants have been identified and served.").

153. Malibu Media, L.L.C. v. Does 1–15, No. 12-2077, 2012 U.S. Dist. LEXIS 113704, at *5 (E.D. Pa. Aug. 10, 2012) ("[T]he Rules allow for re-examination as the case progresses.").

154. Patrick Collins, Inc. v. Doe, No. 12-CV-3161, 2012 U.S. Dist. LEXIS 132813, at *8 (C.D. Ill. Sept.

Armed with the IP addresses as the only link to uncover the infringers, plaintiffs suffer a heavy burden from a denial of joinder that deprives them of the sole economically sustainable way to enforce their copyrights. Although employing joinder to efficiently obtain identification information may be a legitimate recourse, this application of joinder rules—in a way unintended by rulemakers—not only raises normative concerns but can also derogate court civil proceedings.

C. How Courts Have Responded

The BitTorrent litigation has yielded a wide spectrum of court decisions, ranging from granting early discovery against joined defendants to severing all defendants but one.[155] One of the oft-cited decisions granting early discovery comes from the U.S. District Court for the District of Columbia. In *Call of the Wild Movie, L.L.C. v. Does 1–1062*, Time Warner Cable received subpoenas to disclose identity information corresponding to IP addresses submitted in three cases and subsequently filed a motion to quash.[156] The Electronic Frontier Foundation, Public Citizen, and the American Civil Liberties Union Foundation submitted an amicus brief in support of Time Warner's motion.[157] The amici urged the court to address issues of improper joinder, lack of personal jurisdiction over the putative defendants, and the putative defendants' First Amendment right to anonymity.[158] In response, the court held that joinder was proper mainly because of the plaintiff's allegations concerning the nature of the BitTorrent protocol. The court first noted that a determination of whether parties are properly joined pursuant to Rule 20 depends on whether they are "logically related."[159] The court proceeded to

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18, 2012) ("Joinder at the discovery phase would be more efficient than conducting the same discovery in nine separate cases."); Third Degree Films, Inc. v. Does 1–108, No. DKC 11-3007, 2012 U.S. Dist. LEXIS 25400, at *17 (D. Md. Feb. 28, 2012) ("[R]esponding to the subpoenas all at once is more manageable than severing the case into potentially over one hundred individual cases and requiring a concomitant number of separate subpoenas . . . ."); *see* Call of the Wild Movie, L.L.C. v. Does 1–1062, 770 F. Supp. 2d 332, 344 (D.D.C. 2011) ("Severance of the putative defendants associated with different IP addresses may subject the same Time Warner customer to multiple suits for different instances of allegedly infringing activity and, thus, would not be in the interests of the putative defendants.").

155. *See, e.g.*, Bubble Gum Prods., L.L.C. v. Doe, NO. 12-20367-CIV-SEITZ/SIMONTON, 2012 U.S. Dist. LEXIS 100203, at *9–10 nn.5–6 (S.D. Fla. July 19, 2012) (collecting cases); Pac. Century Int'l v. Doe, 11 C 9064, 2012 U.S. Dist. LEXIS 82796, at *4–5 (N.D. Ill. June 12, 2012) (noting the split of authority in the Northern District of Illinois).

156. Call of the Wild Movie, L.L.C. v. Does 1–1062, 770 F. Supp. 2d 332, 338 (D.D.C. 2011) (ultimately holding that, in light of how the information subpoenaed is critical to the plaintiffs' lawsuits, Time Warner Cable failed to demonstrate that the subpoenas were overly broad and unduly burdensome).

157. *See* Memorandum of *Amici Curiae* Elec. Frontier Found. et al., in Support of Third Party Time Warner Cable's Motion to Quash or Modify Subpoena, *Call of the Wild Movie*, 770 F. Supp. 2d 332.

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

159. *Id.* at 342 (citing Disparte v. Corporate Exec. Bd., 223 F.R.D. 7, 10 (D.D.C. 2004)).

explain that in a BitTorrent network where every peer is obligated to share her file when downloading, "each putative defendant is a possible source for the plaintiffs' motion pictures, and may be responsible for distributing the motion pictures to the other putative defendants."[160] In light of the flexibility of joinder rules to entertain broad claims, the court found these facts satisfied Rule 20.[161] Additionally, the court found that at this procedural juncture, no defendants had been named or identified, and thus it was premature to decide on matters of personal jurisdiction or to evaluate the administrative burden going forward.[162]

Many other decisions in other federal districts grant early discovery and often deny motions to quash subpoenas based on the reasoning set forth in *Call of the Wild*. They include decisions from the D.C. and Maryland districts,[163] the eastern districts of Pennsylvania and Michigan,[164] and several others.[165] A plaintiff in one case even moved to sanction the defendant's attorney for presenting allegedly frivolous arguments in support of a motion to quash.[166] Although the court in that case ultimately denied the motion for sanctions, this is one extreme end of the wide spectrum of rulings across the country, where plaintiffs are not only favored but also emboldened.

Notably, in districts where courts often grant early discovery, plaintiffs are also successful in joining strikingly large numbers of defendants. While the number of defendants sought to be joined has varied widely and has been as low as five,[167] the D.C. district has received a

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160. *Id.* at 343.

161. *Id.*

162. *Id.* at 347–48.

163. *E.g.*, Hard Drive Prods., Inc. v. Does 1–1,495, No. 11-1741 (JDB/JMF), 2012 U.S. Dist. LEXIS 137719 (D.D.C. Sept. 26, 2012); Patrick Collins, Inc. v. Does 1–39, No. 12-cv-00096-AW, 2012 U.S. Dist. LEXIS 57187 (D. Md. Apr. 23, 2012); Third Degree Films, Inc. v. Does 1–108, No. DKC 11-3007, 2012 U.S. Dist. LEXIS 25400 (D. Md. Feb. 28, 2012); K-Beech, Inc. v. Doe, No. 11-cv-01774-AW, 2011 U.S. Dist. LEXIS 136757 (D. Md. Nov. 29, 2011); Voltage Pictures, No. 10-0873 (BAH), L.L.C. v. Doe, 2011 U.S. Dist. LEXIS 50787 (D.D.C. May 12, 2011); W. Coast Prods. v. Doe, 275 F.R.D. 9 (D.D.C. 2011).

164. *See, e.g.*, Malibu Media, L.L.C. v. Doe, No. 12-2078, 2012 U.S. Dist. LEXIS 143378 (E.D. Pa. Oct. 3, 2012); Malibu Media, L.L.C. v. Doe, No. 12-2077, 2012 U.S. Dist. LEXIS 113704 (E.D. Pa. Aug. 10, 2012); Third Degree Films v. Doe, No. 11-cv-15200, 2012 U.S. Dist. LEXIS 87891 (E.D. Mich. May 29, 2012); Raw Films, Ltd. v. Does, No. 11-7248, 2012 U.S. Dist. LEXIS 41645 (E.D. Pa. Mar. 23, 2012); Patrick Collins, Inc. v. Doe, 282 F.R.D. 161 (E.D. Mich. 2012); Patrick Collins, Inc. v. Does 1–28, 286 F.R.D. 319 (E.D. Mich. 2012).

165. For example, in New York, Malibu Media, L.L.C. v. Does 1–5, 12 Civ. 2950 (JPO), 2012 U.S. Dist. LEXIS 77469 (S.D.N.Y. June 1, 2012); in Massachusetts, Patrick Collins, Inc. v. Does 1–36, 286 F.R.D. 160 (D. Mass. 2012); in Florida, Malibu Media, L.L.C. v. Doe, No. 2:12-cv-266-FtM-29DNF, 2012 U.S. Dist. LEXIS 129163 (M.D. Fla. Aug. 21, 2012); in Texas, Hard Drive Prods., Inc. v. Does, No. H-12-0699, 2012 U.S. Dist. LEXIS 44810 (S.D. Tex. Mar. 30, 2012); and in California, Malibu Media, L.L.C. v. Does 1–59, No. 1cv12-0888 AWI DLB, 2012 U.S. Dist. LEXIS 137654 (E.D. Cal. Sept. 24, 2012).

166. Maverick Entm't Group, Inc. v. Doe, 276 F.R.D. 389, 395 (D.D.C. 2011).

167. Patrick Collins, Inc. v. Doe, No. 12 Civ. 2964 (JPO), 2012 U.S. Dist. LEXIS 77486 (S.D.N.Y. June 1, 2012) (attempting to join five defendants); Patrick Collins, Inc. v. Does 1–11, No. 11-cv-01776-

number of cases in which the number of defendants to be joined is staggeringly high.[168] On numerous occasions, plaintiffs have sought to join five thousand or more defendants—as many as 24,583 in one case.[169] This is evidence that the joinder and jurisdictional problems that necessarily derive from such a large group of defendants have not deterred certain courts from granting early discovery. There are a few cases from the District Court for the District of Columbia, however, where the court questioned the joinder of a large number of defendants and subsequently denied discovery on jurisdictional grounds.[170] In *Nu Image, Inc. v. Doe*, the court denied joining 23,322 defendants because a good faith showing at least requires the plaintiff to resort to geolocation technology in an attempt to locate the IP addresses to a locale within the court's jurisdiction, which the plaintiff failed to do.[171] The court reasoned that because the sole claim was copyright infringement, 28 U.S.C. § 1400(a) governed venue for claims asserted under the Copyright Act and required an action to enforce the Act be brought in a judicial district "in which the defendant or his agent resides or may be found."[172] Despite an acknowledgment that the plaintiff sought to identify all the infringers conveniently and cheaply, the court held that discovery should be denied if the information would be used in another lawsuit in a different venue.[173] Although early discovery was denied based on jurisdiction, the court did not address the issue of joinder.

Decisions from the Eastern District of Virginia fall at the other end of the spectrum. A handful of cases are representative.[174] All the defendants

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AW, 2011 U.S. Dist. LEXIS 128889 (D. Md. Nov. 8, 2011) (attempting to join eleven defendants).

168. *See* Nu Image, Inc. v. Doe, No. 2:11-cv-545-FtM-29SPC, 2012 U.S. Dist. LEXIS 72402 (M.D. Fla. May 9, 2012) (implicating more than three thousand defendants). Such decisions favoring plaintiff did not go unnoticed in the public sphere. *See, e.g.*, Nate Anderson, *RIAA Lobbyist Becomes Federal Judge, Rules on File-Sharing Cases*, Ars Technica (Mar. 28, 2011), http://arstechnica.com/tech-policy/ 2011/03/riaa-lobbyist-becomes-federal-judge-rules-on-file-sharing-cases.

169. Patrick Collins, Inc. v. Doe, No. 11-cv-01776-AW, 2011 U.S. Dist. LEXIS 128889 (D. Md. Nov. 8, 2011); Voltage Pictures, L.L.C. v. Vazquez, No. 10-00873 (BAH), 2011 U.S. Dist. LEXIS 121316 (D.D.C. Oct. 20, 2011); W. Coast Prods. v. Doe, 275 F.R.D. 9 (D.D.C. 2011).

170. Nu Image, Inc. v. Does 1–23,322, 799 F. Supp. 2d 34 (D.D.C. 2011); People Pictures v. Group of Participants in Filesharing Swarm Identified by Hash, No. 11-1968 (JEB/JMF), 2011 U.S. Dist. LEXIS 147859, at *7–9 (D.D.C. Dec. 23, 2011) (denying a discovery request because of the lack of information establishing personal jurisdiction and venue).

171. *Nu Image*, 799 F. Supp. 2d at 41.

172. *Id.* at 37.

173. *Id.* at 41 (citing Oppenheimer Fund v. Sanders, 437 U.S. 340, 353 n.17 (1978)).

174. *See, e.g.*, Hard Drive Prods., Inc. v. Does 1–30, No. 2:11cv345, 2011 U.S. Dist. LEXIS 119333 (E.D. Va. Oct. 17, 2011); K-Beech, Inc. v. Doe, No. 3:11cv469-JAG, 2011 U.S. Dist. LEXIS 124581 (E.D. Va. Oct. 5, 2011); Raw Films, Ltd. v. Doe, No. 3:11cv532-JAG, 2011 U.S. Dist. LEXIS 114996 (E.D. Va. Oct. 5, 2011); Patrick Collins, Inc. v. Does 1–58, No. 3:11cv531-JAG, 2011 U.S. Dist. LEXIS 120235 (E.D. Va. Oct. 5, 2011). The only other district in which all decisions consistently deny joinder is the Western District of Louisiana, although that district receives many fewer BitTorrent litigation cases than those that lack a consensus. *E.g.*, Twenty Media Inc. v. Swarm Sharing Hash Files, No. 6:12-

the plaintiffs sought to join in each case numbered fewer than one hundred. Except for one case,[175] most courts did not look favorably upon the plaintiffs' attempt to obtain early discovery. Describing the plaintiffs' demands for monetary settlements as reprehensible and threatening behavior, courts in these cases went as far as to order the attorneys to show cause why they should not be sanctioned for using the "offices of the Court as an inexpensive means to gain the Doe defendants' personal information and coerce payment from them."[176] The courts then severed the parties, finding the BitTorrent "swarm theory" insufficient to satisfy joinder.[177]

Between the two extremes—where at one end the defendant's attorney could be sanctioned and at the other the plaintiff's attorney is at risk—lie the remaining districts. The Northern District of California has had a particularly high number of BitTorrent cases. This large sample size presents a wide range of reasoning and legal grounds for court decisions.[178] Although other districts, such as the Southern District of New York,[179] the Northern District of Illinois,[180] and the District of Colorado,[181] have ruled on a significant number of BitTorrent cases, they often cite to cases decided in the Northern District of California with similar underlying reasons for their decisions.[182]

Most districts, including the Northern District of California, are currently split on whether to grant early discovery against joined defendants.[183] During early 2011, a number of cases were granted early

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cv-00031, 2012 U.S. Dist. LEXIS 123163 (W.D. La. Aug. 17, 2012).

175. *See* Hard Drive Prods., Inc. v. Doe, No. 2:11cv345, 2011 U.S. Dist. LEXIS 73159, at *4–5 (E.D. Va. July 1, 2011) (granting early discovery on the grounds of irreparable harm).

176. Raw Films, Ltd. v. Does 1–32, No. 3:11cv532-JAG, 2011 U.S. Dist. LEXIS 114996, at *6 (E.D. Va. Oct. 5, 2011); *see* Hard Drive Prods., Inc. v. Does 1–30, No. 2:11cv345, 2011 U.S. Dist. LEXIS 119333, at *9 (E.D. Va. Oct. 17, 2011); K-Beech, Inc. v. Does 1–85, No. 3:11cv469-JAG, No. 3:11cv531-JAG, 2011 U.S. Dist. LEXIS 124581, at *6 (E.D. Va. Oct. 5, 2011); Patrick Collins, Inc. v. Does 1–58, No. 3:11cv531-JAG, 2011 U.S. Dist. LEXIS 120235, at *7 (E.D. Va. Oct. 5, 2011).

177. Hard Drive Prods., Inc. v. Does 1–30, No. 2:11cv345, 2011 U.S. Dist. LEXIS 119333, at *6 (E.D. Va. Oct. 17, 2011).

178. *See infra* notes 184–187, 189–192.

179. *E.g.*, John Wiley & Sons, Inc. v. Does 1–30, 12 Civ. 3782 (LTS)(JLC), 2012 U.S. Dist. LEXIS 135468 (S.D.N.Y. Sept. 18, 2012) (permitting joinder); Zero Tolerance Entm't, Inc. v. Doe, No. 12 Civ. 1083 (SAS), 2012 U.S. Dist. LEXIS 78834 (S.D.N.Y. June 5, 2012) (severing defendants).

180. *E.g.*, Pac. Century Int'l v. Doe, 11 C 9064, 2012 U.S. Dist. LEXIS 82796 (N.D. Ill. June 12, 2012) (finding joinder proper); Millennium TGA Inc. v. Does 1–800, 10 C 5603, 2011 U.S. Dist. LEXIS 35406 (N.D. Ill. Mar. 31, 2011) (severing defendants).

181. *E.g.*, Sunlust Pictures, L.L.C. v. Cisa, No. 12-cv-00656-CMA-KMT, 2012 U.S. Dist. LEXIS 150835 (D. Colo. Oct. 19, 2012) (finding joinder proper); Malibu Media, L.L.C. v. Does 1–28, No. 12-cv-2599-WJM-MEH, 2012 U.S. Dist. LEXIS 144501 (D. Colo. Oct. 5, 2012) (finding joinder improper).

182. *See supra* note 181.

183. *See, e.g.*, Next Phase Distrib., Inc. v. Does 1–27, No. 12 Civ. 3755 (VM), 2012 U.S. Dist. LEXIS 107648, at *11–18 (S.D.N.Y. July 31, 2012); Third Degree Films, Inc. v. Doe, No. DKC 11-3007, 2012 U.S. Dist. LEXIS 59233, at *5–7 (D. Md. Apr. 27, 2012) (collecting cases).

discovery because the courts found that the pleadings satisfied the "good cause" standard, as well as the *Seescandy.com* factors.[184] However, not long after BitTorrent cases started flooding into the district, courts started to question the validity of the BitTorrent "swarm" theory.[185] Looking to earlier Doe litigation cases launched by the music industry, many courts started to sever the defendants, asserting that the architecture of BitTorrent is not enough to distinguish itself from older P2P technologies.[186] In a case where the plaintiff attempted to join 162 putative defendants, the court noted that even if all the IP addresses derived from a single swarm, "the lack of information regarding the period [including all the timestamps corresponding to] the activity associated with each of the addresses" and the lack of "proof that bits from each of these 162 addresses were ever assembled into a single file" undermined the proposition that there was common activity linking all the 162 addresses in the case.[187] Since certain precedents held that employing the same P2P protocol was insufficient for joinder, these BitTorrent cases should not compel a different result.[188] Based on such reasoning, file transfer among users, all of whom both download and upload a single file from each other on a network, would not satisfy the "same transaction [or] occurrence" standard unless the plaintiffs can describe all transfer steps to trace all the direct and indirect sources of every "block" of the file owned by each user. Based on the current forensic software, plaintiffs are unlikely to obtain evidence detailing such a level of specificity.

Starting in mid-2011, an increasing number of courts started severing parties by analogizing to cases that involved older P2P technologies.[189]

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184. *E.g.*, Hard Drive Prods., Inc. v. Does, No. C-11-01956 EDL, 2011 U.S. Dist. LEXIS 105229 (N.D. Cal. Aug. 1, 2011); Millennium TGA v. Does, No. 11-2258 SC, 2011 U.S. Dist. LEXIS 80065 (N.D. Cal. July 22, 2011); Boy Racer, Inc. v. Doe, No. 5:11-cv-02833 EJD (PSG), 2011 U.S. Dist. LEXIS 79735 (N.D. Cal. July 13, 2011); Pink Lotus Entm't, L.L.C. v. Does 1–46, No. C-11-02263 HRL, 2011 U.S. Dist. LEXIS 65614 (N.D. Cal. June 21, 2011); VPR Internationale v. Doe, No. C 11-01494 LB, 2011 U.S. Dist. LEXIS 45118 (N.D. Cal. Apr. 15, 2011).

185. *E.g.*, Diabolic Video Prods. v. Does 1–2099, No. 10-CV-5865-PSG, 2011 U.S. Dist. LEXIS 58351, at *11–12 (N.D. Cal. May 31, 2011); Millennium TGA, Inc. v. Does 1–21, No. 11-2258 SC, 2011 U.S. Dist. LEXIS 53465, at *6–7 (N.D. Cal. May 12, 2011) (stating that the decentralization of BitTorrent leading to vicarious liability is an unsupported and novel legal theory). For a change in the trend in the District of Maryland over time, see Malibu Media v. Does 1–34, No. PJM 12-1195, 2012 U.S. Dist. LEXIS 67567 (D. Md. May 11, 2012) (severing defendants); Patrick Collins, Inc. v. Does 1–11, No. 11-cv-01776-AW, 2011 U.S. Dist. LEXIS 128889 (D. Md. Nov. 8, 2011) (denying motion to quash).

186. Diabolic Video Prods. v. Does 1–2099, No. 10-CV-5865-PSG, 2011 U.S. Dist. LEXIS 58351, at *12–13 (N.D. Cal. May 31, 2011).

187. Media Prods. v. Does 1–162, No.: C 12-03801 EJD (PSG), 2012 U.S. Dist. LEXIS 134226, at *12 (N.D. Cal. Sept. 18, 2012).

188. *See supra* notes 126, 128. *But cf. supra* notes 121–122.

189. Malibu Media, L.L.C. v. Does 1–13, No. 2:12-cv-01513 JAM DAD, 2012 U.S. Dist. LEXIS 148215 (E.D. Cal. Oct. 12, 2012); Smash Pictures v. Does, No. 2:12-cv-301 JAM CKD, 2012 U.S. Dist. LEXIS 82985 (E.D. Cal. June 14, 2012); Liberty Media Holdings, L.L.C. v. BitTorrent Swarm, No.

Certain cases where early discovery had previously been granted against joined defendants now had their defendants severed.[190] As an alternative to finding joinder improper based on the test of common transaction or occurrence, some courts resort to the discretionary power grounded in the "fundamental fairness" doctrine to sever the parties in the name of judicial economy and case manageability.[191] Other courts in the same district, however, remain persuaded that BitTorrent technology is sufficiently different, and thus joinder is proper at this juncture of the litigation.[192]

Some decisions were crafted to be tentative, seemingly in an attempt to narrow holdings to specific circumstances. Courts that severed based on jurisdictional grounds opened up the possibility that early discovery might be granted against defendants whose IP addresses could be located within the district.[193] Indeed some courts decided to grant early discovery once the plaintiffs submitted additional information—for example, to support the assertion that all IP addresses were traced to the same "swarm" or information regarding the locations of the IP addresses.[194] Courts also

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1:11-cv-21567-KMM, 2011 U.S. Dist. LEXIS 135847, at *7 (S.D. Fla. Nov. 1, 2011); Liberty Media Holdings, L.L.C. v. BitTorrent Swarm, No. 1:11-cv-21525-KMM, 2011 U.S. Dist. LEXIS 126333, at *7 (S.D. Fla. Nov. 1, 2011); Boy Racer, Inc. v. Does 1–60, No. C 11-01738 SI, 2011 U.S. Dist. LEXIS 92994, at *4–5 (N.D. Cal. Aug. 19, 2011); McGip, L.L.C. v. Does 1–149, No. C 11-02331 LB, 2011 U.S. Dist. LEXIS 85363, at *10 (N.D. Cal. Aug. 3, 2011); Pac. Century Int'l Ltd. v. Does 1–101, No. C-11-02533-(DMR), 2011 U.S. Dist. LEXIS 73837, at *8–9 (N.D. Cal. July 8, 2011); Lightspeed v. Does 1–1000, 10 C 5604, 2011 U.S. Dist. LEXIS 35392, at *5 (N.D. Ill. Mar. 31, 2011).

190. Hard Drive Prods., Inc. v. Does 1–84, No. C11-03648 HRL, 2011 U.S. Dist. LEXIS 135565, at *3 (N.D. Cal. Nov. 23, 2011).

191. *See, e.g.*, On the Cheap, L.L.C. v. Does 1–5011, No. C10-4472 BZ, 2011 U.S. Dist. LEXIS 99831, at *10–11 (N.D. Cal. Sept. 6, 2011); Hard Drive Prods., Inc. v. Does 1–188, 809 F. Supp. 2d 1150, 1164 (N.D. Cal. 2011).

192. *See, e.g.*, First Time Videos, L.L.C. v. Does 1–95, No. C 11-3822 MEJ, 2011 U.S. Dist. LEXIS 116434 (N.D. Cal. Oct. 7, 2011); New Sensations, Inc. v. Does 1–1474, No. C 11-2770 MEJ, 2011 U.S. Dist. LEXIS 94909 (N.D. Cal. Aug. 24, 2011); McGip v. Doe, NO: 11-CV-03679 EJD, 2011 U.S. Dist. LEXIS 87913 (N.D. Cal. Aug. 9, 2011); Millennium TGA v. Does, No. 11-2258 SC, 2011 U.S. Dist. LEXIS 80065 (N.D. Cal. July 22, 2011; New Sensations, Inc. v. Doe, No. C 10-05863 WHA, 2011 U.S. Dist. LEXIS 132519 (N.D. Cal. July 18, 2011).

193. Millennium TGA v. Doe, No. 10 C 5603, 2011 U.S. Dist. LEXIS 110135, at *8 (N.D. Ill. Sept. 26, 2011) (dismissing the case for lack of personal jurisdiction based on the fact that the geolocation service indicated that the IP addresses were located outside of Illinois); DigiProtect USA Corp. v. Doe, No. 10 Civ. 5760, 2011 U.S. Dist. LEXIS 109464, at *13 (S.D.N.Y. Sept. 26, 2011) (dismissing the case because the plaintiff does not bear the burden of demonstrating that the IP addresses are connected to New York, despite the availability of free, publicly available technology that matches IP addresses to a geographic region); Lightspeed v. Does 1–1000, 10 C 5604, 2011 U.S. Dist. LEXIS 35392, at *7–8 (N.D. Ill. Mar. 31, 2011) (finding no reason why venue should have been in this district and no demonstration that the IP addresses were located in Illinois).

194. Digital Sin, Inc. v. Does 1–176, 12-CV-00126 (AJN), 2012 U.S. Dist. LEXIS 10803 (S.D.N.Y. Jan. 30, 2012) (declining to sever because the defendants were trading the exact same file as part of the same swarm); K-Beech, Inc. v. Does 1–57, No. 2:11-CV-00358-FtM-36SPC, 2011 U.S. Dist. LEXIS 132834, at *9 (M.D. Fla. Nov. 1, 2011) (finding that jurisdiction is proper because "Plaintiff took care to ensure that the IP addresses at issue in this case could be traced to a physical address located within this District"); OpenMind Solutions, Inc. v. Doe, No. C 11-3311 MEJ, 2011 U.S. Dist. LEXIS 116552, at *6, 17–18 (N.D.

tentatively granted early discovery because the time stamps that indicated the time at which the infringing activities were observed did not span more than two weeks, or the number of defendants sought to be joined was sufficiently small.[195] Alternatively, in exchange for granting joinder, at least one court has precluded plaintiffs from direct communication with the defendants without the court's permission out of concern for improper negotiation practices.[196] These various approaches can influence plaintiffs' strategies in order to obtain early discovery against joined defendants.

Conclusion

Although the BitTorrent protocol provides its users a unique environment where their conduct can legally meet the "same transaction [or] occurrence" test under Rule 20, this application of Rule 20 may be unsettling for normative reasons. The tension between the proper exercise of a legal right and reprehensibly predatory behavior underlies the lack of consensus among the courts. Since joinder rules poorly address the normative concerns raised by the BitTorrent litigation, courts developed diverse reasoning—including joinder, personal jurisdiction, and venue—in an attempt to rationalize severing the defendants. For example, one main reason is that IP addresses do not always definitively link to an infringer. Courts find the evidence inadequate because ISP "subscriber John Doe 1 could be an innocent parent whose Internet access was abused by her minor child, while John Doe 2 might share a computer with a roommate who infringed Plaintiffs' works," and as such, clicking a command to participate in a swarm is inadequate for joinder.[197]

Cal. Oct. 7, 2011) (noting that the plaintiff had traced all IP addresses within the state of California, as well as the fact that the hash associated with the file remains the same within the swarm).

195. Malibu Media, L.L.C. v. Does 1–14, No. 1:12-CV-263, 2012 U.S. Dist. LEXIS 174384, at *25 (N.D. Ind. Dec. 10, 2012) (granting joinder for a case involving only fourteen defendants located in the district); AF Holdings L.L.C. v. Does 1–96, No. C-11-03335 JSC, 2011 U.S. Dist. LEXIS 134655, *10–11 (N.D. Cal. Nov. 22, 2011) (noting that the time stamps spanned a two-week period and thus the plaintiff had made a prima facie showing that the Doe defendants were properly joined at this time of the litigation); Hard Drive Prods., Inc. v. Doe, No. C 11-01567 LB, 2011 U.S. Dist. LEXIS 130055, at *9 (N.D. Cal. Nov. 8, 2011) (noting that case management concerns were no longer present given that there were only two Does present); MCGIP, L.L.C. v. Doe, No. C-11-1495 EMC, 2011 U.S. Dist. LEXIS 64188, at *3 (N.D. Cal. June 2, 2011) (denying motion to quash and noting that only eighteen defendants were sought to be joined). *But cf.* New Sensations, Inc. v. Doe, No. 12-3800 JSC, 2012 U.S. Dist. LEXIS 142032, at *21–22 (N.D. Cal. Oct. 1, 2012) (denying joinder on manageability grounds); Hard Drive Prods., Inc. v. Does 1–188, 809 F. Supp. 2d 1150, 1164 (N.D. Cal. 2011) (denying joinder because different timestamps over a period of two weeks did not support participation in the same swarm at the same time).

196. W. Coast Prods. v. Does 1–1434, No. 11-55 (JEB/JMF), 2012 U.S. Dist. LEXIS 110847, at *24–25 (D.D.C. Aug. 6, 2012) (precluding the plaintiff from communicating directly with the Doe defendants prior to plaintiff's naming these individuals as actual defendants in the complaint and imposing a "good faith requirement" to name defendants who are D.C. residents).

197. Third Degree Films v. Doe, No. C 11-02768 LB, 2011 U.S. Dist. LEXIS 128030, at *9 (N.D. Cal. Nov. 4, 2011); Malibu Media, L.L.C. v. Doe, 12 Civ. 2950 (JPO), 2012 U.S. Dist. LEXIS 77469, at *3

Although IP addresses do not guarantee a successful claim against the subscriber of that Internet service, they are still the best means by which plaintiffs can initiate litigation and further their investigative efforts at this stage. There is no requirement that a certain percentage of the defendants joined in a case must turn out to be actual infringers.[198] Especially when the defendants are not identified, it seems premature to consider the potential activities of each defendant and the corresponding impact on joinder.[199] Nevertheless, probably out of normative concerns, courts do go to lengths such as this to defeat the BitTorrent plaintiffs' prima facie cases for joinder.

A major concern is that the BitTorrent plaintiffs' main goal to compel settlements after obtaining identification information is to harass and threaten innocent people. Many courts and the general public often characterize plaintiffs' communications to defendants as coercive. Allowing joinder and early discovery would be unfair to innocent defendants who feel the need to pay the settlement amount solely to avoid harassment—recall the grandmother with an unsecured wireless network.[200] Although the grandmother story might not be representative of most putative defendants, it is illustrative that any number of innocent defendants could be vulnerable to such litigation tactics.[201] As some courts have indicated, the "potential for coercing unjust settlements from innocent defendants trumps [the plaintiff's] interest in maintaining low litigation costs."[202] Other courts are less subtle and have directly charged plaintiffs of using the "offices of the Court as an inexpensive means to gain the Doe defendants' personal information and coerce payment from them."[203] A related concern is that, in joining multiple defendants,

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(S.D.N.Y. June 1, 2012) (noting that illegal downloads "from a certain IP address do[] not necessarily mean that the owner of that IP address was the infringer"); *In re* BitTorrent Adult Film Copyright Infringement Cases, No. 11-3995(DRH)(GRB), 2012 U.S. Dist. LEXIS 61447, at *8 (E.D.N.Y. May 1, 2012) ("[T]he assumption that the person who pays for Internet access at a given location is the same individual who allegedly downloaded a single sexually explicit film is tenuous . . . .").

198. Digital Sin, Inc. v. Doe, 12-CV-00126 (AJN), 2012 U.S. Dist. LEXIS 10803, at *9–10 (S.D.N.Y. Jan. 30, 2012) (stating that "Plaintiff's counsel estimated that 30% of the names turned over by ISPs are not those of individuals who actually downloaded or shared copyrighted material" as a reason to issue a protective order to accompany the subpoena).

199. *See, e.g.*, Malibu Media, L.L.C. v. Doe, No. 2:12-cv-266-FtM-29DNF, 2012 U.S. Dist. LEXIS 129163, at *21 (M.D. Fla. Aug. 21, 2012) (dismissing motion to sever as premature).

200. Hamilton, *supra* note 35.

201. Temple, *supra* note 36.

202. K-Beech, Inc. v. Does 1–41, No. V-11-46, 2012 U.S. Dist. LEXIS 31803, at *15 (S.D. Tex. Mar. 8, 2012); *see* Hard Drive Prods., Inc. v. Does 1–130, No. C-11-3826 DMR, 2011 U.S. Dist. LEXIS 132449, at *8 (N.D. Cal. Nov. 16, 2011) ("[T]he potential to draw numerous innocent Internet users into the litigation[] plac[es] a burden upon them that outweighs Plaintiff's need for discovery.").

203. K-Beech, Inc. v. Does 1–85, No. 3:11cv469-JAG, 2011 U.S. Dist. LEXIS 124581, at *6–7 (E.D. Va. Oct. 5, 2011); *see* New Sensations, Inc. v. Doe, No. 2:12-cv-1885-GEB-EFB, 2012 U.S. Dist. LEXIS 149786, at *11 n.3 (E.D. Cal. Oct. 17, 2012) (noting that "federal courts are not cogs in a plaintiff's

plaintiffs avoid paying the court filing fees required in an application for early discovery that are supposed to be filed for each defendant.[204] Courts find that "postponing a determination on joinder" would subject the government to "lost revenue of perhaps millions of dollars."[205]

As for plaintiffs' practice of coercing innocent defendants, it would be helpful if there were informative statistics as to the over-inclusiveness of a typical group of defendants that plaintiffs try to join. It is not clear if the harassment of innocent people is a cost the society is willing to pay in exchange for this scheme of copyright enforcement.[206] Alternatively, in an effort to prevent abusive settlement practice, courts can also appoint ad litem counsel to represent the Doe defendants.[207] However, this is still a burden on our judicial system in an attempt to resist the predatory behavior of plaintiffs that does not ultimately resolve the underlying problem.

Lastly, using joinder rules solely to gather identification information cheaply during early discovery confounds the real purpose of joinder. The purpose of joinder is to entertain the broadest possible scope of action for "judicial economy and trial convenience."[208] When copyright owners resort to the courts, it is financially worthwhile only if civil procedure joinder rules are employed for an unintended purpose—not to truly litigate, but to obtain identification information from IP addresses. If the only intention of the plaintiff is to obtain identification information, the concerns of "judicial economy and trial convenience" are entirely inapposite. Ultimately, when acquisition of confidential information

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copyright-enforcement business model" and that the court "will not idly watch what is essentially an extortion scheme"); K-Beech, Inc. v. Does 1–41, No. V-11-46, 2012 U.S. Dist. LEXIS 31803, at *17 (S.D. Tex. Mar. 8, 2012) (noting that enforcing copyright in "a cost-effective manner does not justify perverting the joinder rules").

204. Arista Records L.L.C. v. Doe, 589 F. Supp. 2d 151, 154 (D. Conn. 2008).

205. *In re* BitTorrent Adult Film Copyright Infringement Cases, No. 11-3995(DRH)(GRB), 2012 U.S. Dist. LEXIS 61447, at *38 (E.D.N.Y. May 1, 2012) (noting that plaintiffs attempt to "limit their expenses as against the amount of settlements they are able to negotiate"); Arista Records, L.L.C. v. Doe, No. 1:07-CV-2828, 2008 U.S. Dist. LEXIS 90183, at *17 (N.D. Ohio Nov. 3, 2008); Arista Records, L.L.C. v. Does 1–27, No. CV-07-162-B-W, 2008 U.S. Dist. LEXIS 6241, at *19–21 n.5 (D. Me. Jan. 25, 2008) (suggesting that plaintiffs might have violated Rule 11 by alleging that joinder is proper in order to avoid paying filing fees).

206. *Cf.* Media Prods. v. Does, No. 12 Civ. 3719 (HB), 2012 U.S. Dist. LEXIS 125366, at *10 (S.D.N.Y. Sept. 3, 2012) ("[S]ettlements are for notoriously low amounts relative to the possible statutory damages, but high relative to the low value of the work and minimal costs of mass litigation.").

207. *E.g.*, Mick Haig Prods., e.K. v. Does, No. 3:10-CV-1900-N, 2011 U.S. Dist. LEXIS 128366, at *5 (N.D. Tex. Sept. 9, 2011).

208. United Mine Workers v. Gibbs, 383 U.S. 715, 724 (1966); *see* Mosley v. Gen. Motors, 497 F.2d 1330, 1332–33 (8th Cir. 1974); League to Save Lake Tahoe v. Tahoe Reg'l Planning Agency, 558 F.2d 914, 917 (9th Cir. 1977).

replaces the resolution of a dispute in court as the real purpose, the integrity and purpose of the courts are left in question.

In the absence of an appropriate legislative response to P2P copyright infringement,[209] courts and plaintiffs are left battling with legal gymnastics. Congress had previously introduced a bill, SOPA, in an attempt to stem copyright infringement by targeting websites that index sources of copyrighted files available for download on P2P networks.[210] In effect, without the websites, finding files to download can prove laborious for P2P users. However, neither SOPA nor its successor, OPEN,[211] managed to draw enough support to make it out of the House. Despite these laudable, albeit unsuccessful, attempts to curb the activities of indexing websites, a future bill should anticipate that technology will soon evolve to circumvent the need for indexing websites.[212] It is important for the new copyright legislation to rely less on technology-related aspects for its effectiveness in order to impart some resilience in countering the ever-changing nature of technology.

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209. While § 512(h) of the Digital Millennium Copyright Act allows subpoena of identification information outside of litigation, this may not apply to the BitTorrent plaintiffs because of how certain courts have interpreted the Digital Millennium Copyright Act safe harbor provisions together with the subpoena provisions. *See* 17 U.S.C. § 512(a)–(d) (2012) (exempting certain service providers that do not provide storage, a category into which the ISPs implicated in the BitTorrent litigation would fall); *id.* § 512(h) ("A copyright owner or a person authorized to act on the owner's behalf may request the clerk of any United States district court to issue a subpoena to a service provider for identification of an alleged infringer . . . . The request may be made by filing with the clerk . . . a copy of a notification described in subsection (c)(3)(A); a proposed subpoena; and a sworn declaration to the effect that the purpose for which the subpoena is sought is to obtain the identity of an alleged infringer and that such information will only be used for the purpose of protecting rights under this title.").

210. Stop Online Piracy Act, H.R. 3261, 112th Cong. § 102(a) (2011); Protect IP Act, S. 968, 112th Cong. § 3 (2011); Jacquelin D. Lipton, *Law of the Intermediated Information Exchange*, 64 Fla. L. Rev. 1337, 1338 (2012) (critiquing the Stop Online Piracy Act).

211. Online Protection and Enforcement of Digital Trade Act, H.R. 3782, 112th Cong. (2012).

212. Computer science research to decentralize keyword search is ongoing. *See, e.g.*, *Cubit an Approximate Matching Peer-to-Peer Overlay*, Cubit Project, http://www.cs.cornell.edu/~bwong/cubit (last visited Feb. 25, 2013); *Tibler Makes BitTorrent Impossible to Shut Down*, TorrentFreak (Feb. 8, 2012), http://torrentfreak.com/tribler-makes-bittorrent-impossible-to-shut-down-120208; *Tibler Set to Make BitTorrent Sites Obsolete*, TorrentFreak (Oct. 28, 2008), http://torrentfreak.com/tribler-set-to-make-bittorrent-sites-obsolete-081028.

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