

# PROBLEMS WITH BITTORRENT LITIGATION IN THE UNITED STATES: PERSONAL JURISDICTION, JOINDER, EVIDENTIARY ISSUES, AND WHY THE DUTCH HAVE A BETTER SYSTEM

## INTRODUCTION

In 2011, 23.76% of global internet traffic involved downloading or uploading pirated content, with BitTorrent accounting for an estimated 17.9% of all internet traffic.<sup>1</sup> In the United States alone, 17.53% of internet traffic consists of illegal downloading.<sup>2</sup> Despite many crackdowns, illegal downloading websites continue to thrive,<sup>3</sup> and their users include some of their most avid opponents.<sup>4</sup> Initially the Recording Industry Association of America (the “RIAA”) took it upon itself to prosecute individuals who

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1. ENVISIONAL LTD., TECHNICAL REPORT: AN ESTIMATE OF INFRINGING USE OF THE INTERNET (2011), available at [http://documents.envisional.com/docs/Envisional-Internet\\_Usage-Jan2011.pdf](http://documents.envisional.com/docs/Envisional-Internet_Usage-Jan2011.pdf). These percentages exclude pornography, because its infringing status can be difficult to determine. *Id.* The four most popular, public, English-language Torrent sites in 2013, with their corresponding internet traffic ranking, are: The Pirate Bay (74), KickassTorrents (116), Torrentz (166), and IsoHunt, (213). Ernesto, *Top 10 Most Popular Torrent Sites of 2013*, TORRENTFREAK (Jan. 6, 2013), <http://torrentfreak.com/top-10-most-popular-torrent-sites-of-2013-130106/>.

2. ENVISIONAL LTD., *supra* note 1. The following countries rank highest for unauthorized music downloads during the first six months of 2012: United States (96.7 million), United Kingdom (43.3 million), Italy (33.2 million), Canada (24 million), Brazil (19.7 million), Australia (19.2 million), Spain (10.3 million), India (9 million), and France (8.4 million). *Music Pirates: Top 9 Countries Which Download Music Illegally*, HINDUSTAN TIMES (Sept. 18, 2012), <http://www.hindustantimes.com/technology/IndustryTrends/Music-pirates-Top-9-countries-which-download-music-illegally/SP-Article1-931996.aspx>.

3. Ernesto, *BitTorrent Traffic Increases 40% in Half a Year*, TORRENTFREAK (Nov. 7, 2012), <http://torrentfreak.com/bittorrent-traffic-increases-40-in-half-a-year-121107/>. Traffic on BitTorrent “increased by 40% in North America over the past half-year . . . and [d]uring peak hours BitTorrent is credited for more than a third of all upload traffic” in the US. *Id.*

4. Indeed, major Hollywood movie studios, record labels, the U.S. Department of Homeland Security, the U.S. Department of Justice, and various European parliaments have been caught downloading movies and software on BitTorrent. Ernesto, *Hollywood Studios Caught Pirating Movies on BitTorrent*, TORRENTFREAK (Dec. 25, 2012), <http://torrentfreak.com/hollywood-studios-caught-pirating-movies-on-bittorrent-121225/>; Ernesto, *Exposed: BitTorrent Pirates at the DOJ, Parliaments, Record Labels and More*, TORRENTFREAK (Dec. 26, 2012), <http://torrentfreak.com/exposed-bittorrent-pirates-at-the-doj-parliaments-record-labels-and-more-121226/>. The list of unlikely infringers includes: Universal Music Group, Sony Music Entertainment, Warner Music Group, U.S. Department of Justice, U.S. Department of Homeland Security, Army Air Force Exchange Services, U.S. House of Representatives, Paramount Pictures, Warner Bros., Sony Pictures, 20th Century Fox, and Walt Disney, as well as national parliaments such as the “German Bundestag, the Dutch Tweede Kamer, the Spanish Cortes Generales, and also the European Parliament itself.” *Id.*

downloaded copyrighted material,<sup>5</sup> but as Christopher Swartout explains, the RIAA quickly learned that such cases are “expensive to bring, expensive to litigate, difficult to collect on, generate bad press, and have not produced a demonstrable deterrent effect.”<sup>6</sup> Today, infringement cases are largely brought by copyright trolls who, as will be discussed further in Part VI, variously abuse the judicial system in hopes of extorting a quick settlement from a potential BitTorrent user.<sup>7</sup> Indeed, many cases brought by copyright trolls are misjoined, have defective personal jurisdiction, and have insufficient evidence of infringement.<sup>8</sup>

In addition to the legal issues surrounding BitTorrent cases, there is the general question of harm. Does file sharing harm artists? If the mission of the RIAA is to protect artists,<sup>9</sup> and studies show that artists are better off financially with the advent of BitTorrent,<sup>10</sup> from what is the RIAA protecting artists? Some nations, such as the Netherlands, have tackled this question by allowing the downloading of copyrighted material for personal use and have imposed copyright levies to offset any losses to the affected industries.<sup>11</sup>

In this Note, I argue that the current legal framework in the United States concerning BitTorrent suits is not only subject to heavy abuse by copyright trolls, but the harm these suits seek to curtail might not in fact exist. First, I will explain how BitTorrent functions, and then dispel some misconceptions about the effects of file sharing on artists. In the sections that follow, I will discuss failed attempts to block or otherwise eliminate BitTorrent and explain the copyright law in the Netherlands as it relates to file sharing. I focus on the Netherlands in particular because it is an

5. RICHARD RAYSMAN & PETER BROWN, *COMPUTER LAW: DRAFTING AND NEGOTIATING FORMS AND AGREEMENTS* § 5.12 (2013).

6. Christopher M. Swartout, *Toward a Regulatory Model of Internet Intermediary Liability: File-Sharing and Copyright Enforcement*, 31 *NW. J. INT'L L. & BUS.* 499, 508–09 (2011).

7. For an explanation as to why an IP address only reveals a potential, rather than a definite, infringer, see *infra* note 131.

8. See *infra* Part V.

9. *Who We Are*, RECORDING INDUSTRY ASSOCIATION OF AMERICA, [http://www.riaa.com/aboutus.php?content\\_selector=about-who-we-are-riaa](http://www.riaa.com/aboutus.php?content_selector=about-who-we-are-riaa) (last visited Jan. 15, 2013).

10. See Richard Bjerkøe & Anders Sørbo, *The Norwegian Music Industry in the Age of Digitalization* (2010) (unpublished master's thesis, BI Norwegian School of Management) (on file with author, available at <http://www.espen.com/thesis-bjerkoe-sorbo.pdf>). From the advent of Napster in 1999 to 2009, “[o]n a per capita basis the artists have gone from NOK 80,000 in annual income from music to NOK 133,000 which is a 66% increase.” *Id.* at iii. A Swedish study found that “total artist revenues have increased in Sweden by 25.7% since 2000.” DAVID JOHANNSSON & MARKUS LARSSON, *THE SWEDISH MUSIC INDUSTRY IN GRAPHS—ECONOMIC DEVELOPMENT REPORT 2000–2008* 1, 6 (2009), available at [http://ec.europa.eu/avpolicy/docs/other\\_actions/col\\_2009/pub/kth\\_annex.pdf](http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/pub/kth_annex.pdf). See *infra* Part II.

11. See *infra* Part V.

example of a nation that has successfully dealt with technological change and the advent of the BitTorrent protocol. I will then discuss problems with joinder, personal jurisdiction, and snapshot evidence issues common to BitTorrent litigation, as well as the abusive practices of copyright trolls. I conclude that copyright levies, a solution that has been implemented in many countries, or an advertisement revenue sharing scheme should be considered by the United States.

### I. THE BITTORRENT PROTOCOL EXPLAINED

BitTorrent is a peer-to-peer<sup>12</sup> (“P2P”) file sharing protocol<sup>13</sup> that allows users in different geographic locations to share files. When a user uploads a file into the BitTorrent protocol, the file is broken down into small pieces called chunks, which are composed of ones and zeros, and assigned a cryptographic hash,<sup>14</sup> which serves as the piece’s identifying information.<sup>15</sup> The file is also assigned a torrent<sup>16</sup> file, which contains metadata about the file to be shared, such as how many chunks exist for this file, the name of each chunk, and the order the chunks should take for the file to be recreated.<sup>17</sup> The torrent file also contains information about the tracker, which is the computer that coordinates the file distribution by helping participants find each other and form distribution groups known as “swarms.” The torrent file does not contain the content of a work to be distributed. Users who wish to download data must first download the torrent file assigned to it, and using the tracker information provided in the

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12. “In a P2P network, the ‘peers’ are computer systems which are connected to each other via the Internet. Files can be shared directly between systems on the network without the need of a central server. In other words, each computer on a P2P network becomes a file server as well as a client.” *P2P*, TECHTERMS.COM, <http://www.techterms.com/definition/p2p> (last visited Feb. 15, 2013).

13. A specific set of communication rules that computers use to communicate with each other. *Protocol*, TECHTERMS.COM, <http://www.techterms.com/definition/protocol> (last visited Feb. 17, 2013).

14. “A cryptographic hash function is a kind of algorithm that can be run on a piece of data, often an individual file, producing a value called a checksum. Two files can be assured to be identical only if the checksums generated from each file, using the same cryptographic hash function, are identical.” Tim Fisher, *Cryptographic Hash Function*, ABOUT.COM, <http://pcsupport.about.com/od/terms/g/cryptographic-hash-function.htm> (last visited Feb. 17, 2013).

15. Complaint at 3, *Malibu Media, LLC v. John Doe*, No.1:13CV00307 (D. Colo. Feb. 5, 2013), 2013 WL 606138.

16. “A torrent is a file sent via the BitTorrent protocol. . . . During the transmission, the file is incomplete and therefore is referred to as a torrent.” *Torrent*, TECHTERMS.COM, <http://www.techterms.com/definition/torrent> (last visited Feb. 17, 2013).

17. “Metadata describes other data. It provides information about a certain item’s content. For example, an image may include metadata that describes how large the picture is, the color depth, the image resolution, when the image was created, and other data.” *Metadata*, TECHTERMS.COM, <http://www.techterms.com/definition/metadata> (last visited Feb. 17, 2013).

torrent file, connect to a tracker, which will lead the individual to a swarm of other computers running BitTorrent that have the complete or partial file the individual is looking to download.<sup>18</sup> A swarm consists of any individuals who are uploading or downloading a file at any given point in time. Using the information provided by the tracker, a user can connect to individuals within the swarm in order to download pieces of the file. When a download is initiated, multiple pieces of a file are downloaded simultaneously from many different computers, which allows for an increase in download speed. These pieces are then reassembled by the client.<sup>19</sup> One of the distinguishing factors of the BitTorrent protocol is that it uses the quid pro quo system in which one must give files in order to receive them. In addition, BitTorrent differs from a classic hypertext transfer protocol (the “HTTP”) download because it supports many small data requests over various transmission control protocol (the “TCP”) connections to different computers. An HTTP download, however, is typically completed with a single TCP connection to a single machine.<sup>20</sup> Moreover, while in BitTorrent, pieces of a file are downloaded from individuals within a swarm using a random or “rarest-first” approach, an HTTP download is sequential.<sup>21</sup>

## II. BENEFITS OF BITTORRENT

In suing individuals for illegal downloads, copyright trolls and the RIAA bolster their claims by citing billions of dollars’ worth of losses to the industry since the launch of Napster in 1999, and the subsequent rapid rise of peer-to-peer networks.<sup>22</sup> While such claims seem logical, there has been a growing amount of scholarship that claims the opposite—that file sharing has had positive implications for the entertainment industry. For instance, a comprehensive report commissioned by the Dutch government that analyzed economic and cultural effects of file sharing on music, film, and games concluded that file sharing has positive short- and long-term

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18. Carmen Carmack, *How BitTorrent Works*, HOWSTUFFWORKS, <http://computer.howstuffworks.com/bittorrent2.htm> (last visited Jan. 15, 2013).

19. Briefly, a BitTorrent Client is the software a user downloads on his or her computer which manages the incoming of bits of data, sharing, and reconstruction of bits into the actual work, as well as allows the user to open a file ending in “.torrent” and connect to the tracker. *Id.*

20. *Emerging Applications of P2P Technologies*, FRONTPAGE (June 10, 2010, 8:12 PM), <http://p2peducation.pbworks.com/w/page/8897427/FrontPage>.

21. Ernesto, *Why BitTorrent Works*, TORRENTFREAK (Sept. 4, 2006), <http://torrentfreak.com/why-bittorrent-works/>.

22. *FAQ*, RECORDING INDUSTRY ASSOCIATION OF AMERICA, <http://www.riaa.com/faq.php> (last visited Jan. 17, 2013).

effects on the economy.<sup>23</sup> The study also found that downloading and buying are complementary activities and that:

In fact, Dutch consumers who download unpaid-for music typically *buy as many* CDs as consumers who do not download, but tend to *visit concerts more* and *buy more* merchandise. Film downloaders *buy more films* than do non-file sharers and go to the cinema *equally frequently*. Game sharers buy *many more* games than people who do not download.<sup>24</sup>

Based on this data, the study concluded that if piracy prevention was impossible, it would not affect the purchasing habits of consumers.<sup>25</sup> While the Dutch study found no difference between the number of CDs purchased by downloaders and non-downloaders, a recent study in the United States found that file sharers buy 30% more music than their non-file-sharing peers.<sup>26</sup> Indeed, “[t]he biggest music pirates are also the biggest spenders on recorded music” and are thus the music industry’s biggest customers.<sup>27</sup> Studies from around the world have generated similar findings.<sup>28</sup>

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23. ANNELIES HUYGEN ET AL., ECONOMIC AND CULTURAL EFFECTS OF FILE SHARING ON MUSIC, FILM AND GAMES (2009), available at [http://www.ivir.nl/publicaties/vaneijk/Ups\\_And\\_Downs\\_authorized\\_translation.pdf](http://www.ivir.nl/publicaties/vaneijk/Ups_And_Downs_authorized_translation.pdf).

24. *Id.* at 61 (emphasis added).

[P]eople downloading the occasional piece of music or film do not buy their physical formats any less or more often. Sixty-eight per cent of free music downloaders also buy music, while 72% of non-file sharers do. And 61% of people reporting sharing films also buy them, while only 57% of non-file sharers do. For music and film, then, the differences are statistically insignificant. By contrast, game downloaders are significantly more often buyers too: 67% of file sharers buy, compared with 51% of non-file sharers.

*Id.* at 64. Indeed, a “film-buying file sharer typically bought nearly 12 DVDs in the previous year, compared with an average of over 7 purchased by consumers not into file sharing,” and “the average game sharer bought over 4 games, against less than 3 for people who do not download games.” *Id.* at 73. Moreover, “music sharers buy more merchandise than do non-file sharers . . . [and] go [to] quite a bit more [concerts] . . . than non-file sharers: an average of 3.8 times compared with 1.6 times a year.” *Id.* at 74.

25. The study noted that the “majority of respondents would not buy more—or less—if file sharing were impossible.” *Id.* at 76. However, “two exceptions to the rule are cinema visits and game sales—markets that would appear to be suffering from free downloading. By contrast, the survey suggests that music and DVD sales probably benefit from file sharing.” *Id.*

26. Karaganis, *Where Do Music Collections Come From?*, AM. ASSEMBLY (Oct. 15, 2012), <http://piracy.americanassembly.org/where-do-music-collections-come-from/>.

27. *Id.*

28. A Canadian study found “the effect of one additional P2P download per month . . . to increase music purchasing by 0.44 CDs per year.” BIRGITTE ANDERSEN & MARION FRENZ, THE IMPACT OF MUSIC DOWNLOADS AND P2P FILE-SHARING ON THE PURCHASE OF MUSIC: A STUDY FOR INDUSTRY CANADA 33 (2007), available at [http://www.ic.gc.ca/eic/site/ippd-dppi.nsf/vwapj/IndustryCanadaPaperMay4\\_2007\\_en.pdf/\\$FILE/IndustryCanadaPaperMay4\\_2007\\_en.pdf](http://www.ic.gc.ca/eic/site/ippd-dppi.nsf/vwapj/IndustryCanadaPaperMay4_2007_en.pdf/$FILE/IndustryCanadaPaperMay4_2007_en.pdf). A Norwegian study found that downloaders are ten times more likely to buy music. Joacim Lundarve Henriksen & Katrine

Although file sharing is often portrayed as an alternative to buying, that is not always the case. In fact, file sharing is often used for sampling of new genres, artists, and games, which opens demand to previously unfamiliar work. In addition, the Dutch study suggests that a large portion of file sharers will eventually purchase the files they first downloaded.<sup>29</sup> While record companies and copyright trolls claim to represent the interests of individual artists in pursuing copyright litigation, the artists themselves do not necessarily share these views.<sup>30</sup> A study conducted in the Netherlands representing a broad sample of artists found not only that about 22% of the artists surveyed downloaded copyrighted works without

Nordli, *Piratene er de Beste Kundene [Pirates Are the Best Customers]*, AFTENPOSTEN (Apr. 19, 2009), <http://www.aftenposten.no/kultur/musikk/article3034488.ece>. A German study found that video file sharers buy more DVDs, go to see films more often, and spend more on average than non-file sharers. EnigmaX, *Suppressed Report Found Busted Pirate Site Users Were Good Consumers*, TORRENTFREAK (July 19, 2011), <https://torrentfreak.com/suppressed-report-found-busted-pirate-site-users-were-good-consumers-110719/>; see also Rüdiger Suchsland, *Nutzer Von Kino.to Gehen Überdurchschnittlich Oft Ins Kino [Users Of Kino.to Go To the Movies More Often Than Average]*, TELEPOLIS (July 16, 2011), <http://www.heise.de/tp/blogs/6/150152>. Unfortunately, the study has not been published and has been made unavailable, because it contradicted the expectations of the company that commissioned it. *Id.* In France, one study found that file sharers spend more on average each month on “cultural assets,” including purchases of physical cultural assets on the internet, while another study found that individuals who upload videos on P2P networks buy more DVDs. HADOPI, CULTURAL ASSETS AND INTERNET USE: PRACTICES AND PERCEPTIONS OF FRENCH INTERNET USERS SUMMARY AND KEY FIGURES 9 (2011), available at <http://www.hadopi.fr/download/Synthesis-HadopiSurvey.pdf>; HADOPI, BIENS CULTURELS ET USAGES D’INTERNET: PRATIQUES ET PERCEPTIONS DES INTERNAUTES FRANÇAIS [CULTURAL ASSETS AND INTERNET USE: PRACTICES AND PERCEPTIONS OF FRENCH INTERNET USERS] 45 (2011), available at <http://www.hadopi.fr/download/hadopiT0.pdf>; Raphael Suire, Thierry Pénard, and Sylvain Dejean, *Une Étude Sur Les Pratiques De Consommation De Vidéos Sur Internet [A Study of the Practices of Internet Video Use]*, MARSOUIN.ORG (Dec. 12, 2008), <http://www.marsouin.org/spip.php?article250>. A UK study found that users of Vuze, a BitTorrent protocol file sharing site, “purchase more movie tickets, DVDs, and rentals than average Internet users” and spend more on “HDTVs, [buy] newer and more expensive computers . . . and the latest tech devices.” FRANK N. MAGID ASSOCIATES, INC., INTRODUCING HOLLYWOOD’S BEST CUSTOMERS: VUZE USER VS. GENERAL INTERNET COMPARATIVE DATA 2, 3 (2009), available at <http://www.magid.com/sites/default/files/pdf/vuze.pdf>. Finally, a recent study in the United States found no “evidence of elevated sales displacement in U.S. box office revenue following the adoption of BitTorrent, and . . . suggest that delayed legal availability of the content abroad may drive the losses to piracy.” Brett Danaher & Joel Waldfogel, *Reel Piracy: The Effect of Online Film Piracy on International Box Office Sales* 2 (unpublished manuscript 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1986299](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1986299); see also Ernesto, *BitTorrent Piracy Doesn’t Affect US Box Office Returns, Study Finds*, TORRENTFREAK (Feb. 10, 2012), <http://torrentfreak.com/bittorrent-piracy-doesnt-affect-us-box-office-returns-study-finds-120210/>.

29. HUYGEN ET AL., *supra* note 23, at 79–80. Indeed, 48% of film sharers, 63% of game sharers, and 68% of music sharers will buy a previously downloaded item at a later date. *Id.*

30. Out of more than 5,000 United States artists questioned in a recent study, only a quarter say that they are hurt by online file-sharing. Ernesto, *Sound Recording Just 6% of Average Musician’s Income (Updated)*, TORRENTFREAK (Jan. 14, 2013), <http://torrentfreak.com/music-sales-are-just-6-of-average-musicians-income-130114/>; see also Peter C. DiCola, *Money from Music: Survey Evidence on Musicians’ Revenue and Lessons About Copyright Incentives*, 55 ARIZ. L. REV. 301 (2013).

the owner's permission in the past twelve months,<sup>31</sup> but also that 30% of the artists believed that Digital Rights Management (the "DRM") hurts legitimate customers by access restrictions.<sup>32</sup> Perhaps most surprisingly, 42% of the artists surveyed believed that file sharing increased their current earning potential,<sup>33</sup> 51.5% believed that artists in general have more financial opportunities as a result of file sharing,<sup>34</sup> and more than half of the respondents believed that file sharing helped to get their work known.<sup>35</sup> Indeed, for that very reason, American rock band Counting Crows released four tracks from their new album free of charge on BitTorrent in March of 2012.<sup>36</sup> According to the band's front man, Adam Duritz, sites like BitTorrent have made musicians better off, because instead of competing for the slim chances of being signed-on by a record label, bands can now survive and thrive independently on the Internet.<sup>37</sup> In fact, this is exactly the approach Counting Crows has taken since 2009, when it left its record label in order to use the Internet to connect with fans.<sup>38</sup> Counting Crows is not alone in their support of BitTorrent protocol sites.<sup>39</sup> Indeed, many artists are attuned to BitTorrent's promotional

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31. Ernesto, *Artists Don't Think Piracy Hurts Them Financially, Study Shows*, TORRENTFREAK (Apr. 12, 2011), <http://torrentfreak.com/artists-dont-think-piracy-hurts-them-financially-110412/>; see also JARST WEDA, ILAN AKKER & JOOST POORT, WAT ER SPEELT; DE POSITIE VAN MAKERS EN UITVOEREND KUNSTENAARS IN DE DIGITALE OMGEVING [WHAT IS GOING ON: THE POSITION OF CREATORS AND PERFORMERS IN THE DIGITAL ENVIRONMENT] 50 (2011), available at <http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2011/04/11/rapport-wat-er-speelt.html>.

32. WEDA ET AL., *supra* note 31, at 58.

33. *Id.* at 24. In response to whether the artists currently have more opportunities to make money as a result of file sharing, 12% completely agreed, 30% agreed, 25% neither agreed nor disagreed, 17.5% disagreed, 9% strongly disagreed, and 7% did not know or held no opinion. *Id.*

34. *Id.* at 25. In response to whether artists in general have more financial opportunities as a result of file sharing, 12.5% completely agreed, 39% agreed, 21% neither agreed not disagreed, 9% disagreed, 4% strongly disagreed, and 14% did not know or held no opinion. *Id.* There is also evidence of a demographic rift in perception. While in all age groups only about 30% of respondents believe that file sharing is a threat, the older age groups were more likely to strongly agree, and the younger artists more likely to completely disagree, that file sharing was a threat. *Id.* at 26.

35. *Id.* at 25.

36. Ernesto, *BitTorrent is the New Radio, Says Counting Crows Frontman*, TORRENTFREAK (May 14, 2012), <http://torrentfreak.com/bittorrent-is-the-new-radio-says-counting-crows-frontman-120514/>.

37. *Id.*

38. *Id.*; see also Dave Thier, *How the Counting Crows Learned to Stop Worrying and Love BitTorrent*, FORBES (May 14, 2012), <http://www.forbes.com/sites/davidthier/2012/05/14/how-the-counting-crows-learned-to-stop-worrying-and-love-bittorrent/>.

39. A Finnish band, Älymystö, went so far as to publish an article on their website that explained to fans how to circumvent the block imposed on The Pirate Bay by several of the country's largest internet providers after a court ruling in favor of anti-piracy groups. Ernesto, *Band Shows Fans How to Unblock the Pirate Bay*, TORRENTFREAK (Aug. 1, 2012), <http://torrentfreak.com/band-shows-fans-how-to-unblock-the-pirate-bay-120801/>. Älymystö, like Counting Crows, believe that The Pirate Bay is an excellent promotional tool for their work. *Id.*

powers.<sup>40</sup> For example, RIAA artists in the U.S., including Lady Gaga, Neil Young, Shakira, Jack White, Norah Jones, Ed O'Brien, Liam Gallagher, Joss Stone, P Diddy, Kanye West, Alicia Keys, Snoop Dogg, Chris Brown, and others have voiced their support for file sharing.<sup>41</sup> In the Netherlands, a coalition of two Dutch artists' unions submitted a proposal to permanently legalize file sharing of music and movies in exchange for a copyright levy.<sup>42</sup> A recent study in the United States explains the willingness of many artists to embrace file sharing by suggesting that artists want "to gain a larger slice of the shrinking pie that is [the] music-

40. For instance, when The Pirate Bay rolled out a new promotion that offered "artists a prime advertising spot on the site's homepage," more than five thousand independent artists enlisted to be promoted. Ernesto, *5000+ Artists Line Up For a Pirate Bay Promotion*, TORRENTFREAK (Apr. 5, 2012), <http://torrentfreak.com/5000-artists-line-up-for-a-pirate-bay-promotion-120405/>. Fairfax, one of Australia's largest media outlets, seems to have recognized that it might be more productive for the entertainment industry to look to The Pirate Bay to promote artists and conduct talent searches instead of attempting to shut it down. Fairfax's head of video, Ricky Sutton, admitted that Fairfax determines what shows to buy based on the popularity of pirated videos online; it then acquires the show and advertises it on BitTorrent sites. Andrew Colley, *Fairfax TV Opens Up On Video Content Acquisition*, AUSTRALIAN (Oct. 9, 2012), <http://www.theaustralian.com.au/media/media-diary/fairfax-tv-opens-up-on-video-content-acquisition/story-fnab9kqj-1226491781938>; see also Ernesto, *Show Doing Well on BitTorrent? We'll Buy It, Says Media Giant*, TORRENTFREAK (Oct. 10, 2012), <http://torrentfreak.com/show-doing-well-on-bittorrent-well-buy-it-121010/>. Moreover, MediaDefender record label uses P2P sites as a market research tool to gage the preferences of the market before it makes a new release. Enigmax & Ernesto, *Record Labels Use Piracy Data to Please Fans*, TORRENTFREAK (Sept. 18, 2007), <http://torrentfreak.com/record-labels-use-piracy-data-to-please-fans-070918/>. Musicians and filmmakers are not alone, of course, in their support for sites like The Pirate Bay; the list of supporters include best-selling author Paulo Coelho, who made his novels available on The Pirate Bay and as a result sold tens of thousands of extra books. Ernesto, *Paulo Coelho Supports the Pirate Bay*, TORRENTFREAK (Apr. 15, 2009), <http://torrentfreak.com/paulo-coelho-supports-the-pirate-bay-090415/>. "When Paulo Coelho, the best-selling author of 'The Alchemist' made his Russian translation available . . . the sales in Russia went from 1,000 books a year, to over 1,000,000." Ernesto, *Publisher Posts Mac Books on the Pirate Bay*, TORRENTFREAK (Mar. 20, 2008), <http://torrentfreak.com/mac-book-on-bittorrent-080320/>.

41. Courteney Palis and Catharine Smith, *Lady Gaga, Jack White, Norah Jones and More: 10 Musicians OK with Piracy and Illegal File-Sharing*, HUFFINGTON POST (Feb. 9, 2012), [http://www.huffingtonpost.com/2012/02/06/lady-gaga-jack-white-norah-jones-musicians-piracy\\_n\\_1258319.html#s667178&title=Lady\\_Gaga](http://www.huffingtonpost.com/2012/02/06/lady-gaga-jack-white-norah-jones-musicians-piracy_n_1258319.html#s667178&title=Lady_Gaga). Even Madonna has recently embraced BitTorrent by posting her new "secretprojectrevolution" film free of charge on BitTorrent. Jon Blistein, *Madonna is Spilling a "Secret" With New Short Film*, ROLLING STONE (Sept. 17, 2013), <http://www.rollingstone.com/music/news/madonna-is-spilling-a-secret-with-new-short-film-20130917>. Others include Will.i.am, The Game, Mary J. Blige, Floyd Mayweather, Jamie Foxx, and Printz Board. MrKimDotcom, *Kim Dotcom—Megaupload Song HD*, YOUTUBE (Dec. 17, 2011), <http://www.youtube.com/watch?v=o0Wvn-9BXVc>; Enigmax, *RIAA Label Artists & A-List Stars Endorse Megaupload In New Song*, TORRENTFREAK (Dec. 8, 2011), <http://torrentfreak.com/riaa-label-artists-a-list-stars-endorse-megaupload-in-new-song-111209/>.

42. Ernesto, *Dutch Artist Unions Call Government to Legalize File-Sharing*, TORRENTFREAK (Nov. 24, 2010), <http://torrentfreak.com/dutch-artist-unions-call-government-to-legalize-file-sharing-101124/>; GEZAMENLIJKE VERKLARING, CONSUMENTENBOND EN ARTIESTENVAKBONDEN [JOINT STATEMENT, CONSUMERS' AND ARTISTS' UNIONS] (2011), available at [http://www.consumentenbond.nl/morello-bestanden/pdf-algemeen-2011/verklaring\\_cb\\_artiesten.pdf](http://www.consumentenbond.nl/morello-bestanden/pdf-algemeen-2011/verklaring_cb_artiesten.pdf).

industry revenues.”<sup>43</sup> By analyzing the effect of an additional download of an individual album on the individual artist’s sales, the study results “robustly suggest that the artist-level effect of file sharing is essentially zero.”<sup>44</sup>

Record sales were never a large source of income for musicians.<sup>45</sup> In fact, “artists receive a substantial part of their compensation through market-based mechanisms [such as concerts] where the role of copyright is not central.”<sup>46</sup> Recent studies showed that concerts provide a larger source of income for performers than record sales or royalties,<sup>47</sup> and thus it is “possible to make the argument that from the artists’ point of view, recordings are just one form of promotion *for* live performances.”<sup>48</sup> Combining these studies with those that show that BitTorrent protocol sites increase an artist’s popularity,<sup>49</sup> it becomes clear that artists gain from popularity generated by file sharing in their primary source of income: concert sales. It is the middlemen of the industry—the record labels—that are the losers in the BitTorrent saga, because the “contractual structure of the music industry implies that most of the record sales income is directed to record labels” and these are, to an extent, negatively impacted by file sharing.<sup>50</sup>

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43. ROBERT G. HAMMOND, PROFIT LEAK? PRE-RELEASE FILE SHARING AND THE MUSIC INDUSTRY 18 (2012), available at [http://www4.ncsu.edu/~rghammon/Hammond\\_File\\_Sharing\\_Leak.pdf](http://www4.ncsu.edu/~rghammon/Hammond_File_Sharing_Leak.pdf). There is disagreement among studies on whether file sharing democratizes music consumption. Hammond’s study found that file sharing “disproportionately benefit[s] established/popular artists.” *Id.* at 4.

44. *Id.* at 3. With regards to leaks, the study found that artists should not expect their sales to decline after pre-release availability. *Id.* at 18.

45. Ville Oksanen & Mikko Välimäki, *Copyright Levies As an Alternative Compensation Method for Recording Artists and Technological Development*, 2 REV. OF ECON. RES. ON COPYRIGHT ISSUES 25, 26, 33 (2005). See also Bjerkøe et al., *supra* note 10, at 71 (revealing that income “from record sales (physical copies) has never been high for the artists themselves . . . [for instance, in 1999] 70% of the respondents had 0 to 9% income from record sales . . . [and, in 2009] about 50% have 0 to 9% of their income from record sales.”).

46. Oksanen & Välimäki, *supra* note 45, at 27; see also DiCola, *supra* note 30 (revealing that only 6% of the average musician’s income comes from recorded sales).

47. “For the top 35 artists as a whole, income from touring exceeded income from record sales by a ratio of 7.5 to 1 in 2002.” Marie Connolly & Alan B. Krueger, *Roconomics: The Economics of Popular Music* 4 (National Bureau of Economic Research, Working Paper No. 11282, 2005), available at <http://www.nber.org/papers/w11282.pdf>.

48. Oksanen & Välimäki, *supra* note 45, at 26 (emphasis added).

49. See *supra* note 30.

50. Oksanen & Välimäki, *supra* note 45, at 26.

### III. BITTORRENT IS HERE TO STAY: FAILED BLOCKADES AND STRIKE SCHEMES

When an anti-piracy group wins a case against a BitTorrent protocol site, a court sometimes rules that the internet service provider that hosted the site must block the site's internet protocol (the "IP") address, in order to make it inaccessible to users.<sup>51</sup> However, such a blockade does not always have the intended effect. For instance, after the Hollywood-funded anti-piracy group, BREIN, claimed victory against The Pirate Bay—perhaps the world's most prominent BitTorrent protocol site—Dutch internet provider "XS4All" announced that BitTorrent traffic actually increased after The Pirate Bay blockade was introduced.<sup>52</sup> XS4All and The Pirate Bay administrator both agree that Torrent litigation is actually having the opposite effect than intended.<sup>53</sup> Instead of scaring consumers into compliance, the media attention of the lawsuits are attracting new users.<sup>54</sup>

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51. Recently RIAA has ordered Google to take down the URLs of infringing sites. Enigmax, *RIAA Set For Historic 10,000,000th Google URL Takedown*, TORRENTFREAK (Feb. 4, 2013), <http://torrentfreak.com/riaa-set-for-historic-10000000th-google-url-takedown-130204/>. By the end of April 2012, the RIAA asked for more than 200,000 URLs to be delisted every week. *Id.* Since May 2011 Google has removed 10,000,000 allegedly infringing URLs on RIAA's behalf. *Id.* The question is whether this takedown strategy works, considering that on February 17, 2013, a Google search for a "free mp3" yielded 1,170,000,000 results. In arguing that file sharing is here to stay, some point to similarities between the war on spam and file sharing. Both have tried to suppress an incredibly popular kind of online information transmission, and both have been unsuccessful. Cory Doctorow, *Copyright Enforcers Should Learn Lessons From the War on Spam*, GUARDIAN (July 15, 2008), <http://www.guardian.co.uk/technology/2008/jul/15/copyright.filessharing; Spam is Back, and Worse Than Ever>, NBC NEWS (Jan. 19, 2007), [http://redtape.nbcnews.com/\\_news/2007/01/19/6346030-spam-is-back-and-worse-than-ever?](http://redtape.nbcnews.com/_news/2007/01/19/6346030-spam-is-back-and-worse-than-ever?)

52. Niels Huijbregts, *Torrents Toegenomen Sinds Blokkade Pirate Bay [Torrents Have Increased Since the Blockade of Pirate Bay]*, XS4ALL BLOG (July 4, 2012), <https://blog.xs4all.nl/2012/07/04/torrents-toegenomen-sinds-blokkade-pirate-bay/>.

53. Ernesto, *ISP: BitTorrent Traffic Increased After Pirate Bay Blockade*, TORRENTFREAK (July 5, 2012), <http://torrentfreak.com/isp-bittorrent-traffic-increased-after-pirate-bay-blockade-120705/>.

54. *Id.* As another example, after "[t]he UK High Court ruled . . . that several of the country's Internet Service Providers (ISPs) must censor access to The Pirate Bay . . . [the latter] announc[ed] that the media coverage surrounding the events of its censorship has resulted in over 12 million more visitors from the UK public over the course of the week." Lee Kaelin, *Virgin Media Censors Pirate Bay in UK, Results in 12 Million More Visitors*, TECHSPOT (May 4, 2012), <http://www.techspot.com/news/48455-virgin-media-censors-pirate-bay-in-uk-results-in-12-million-more-visitors.html>. A study conducted by the University of Amsterdam months after the Dutch court ruled that "Ziggo, the largest ISP in the Netherlands, and competitor XS4AL, must block access to The Pirate Bay," revealed that the blockade has had no effect on the amount of file sharing by Ziggo and XS4ALL subscribers. Ernesto, *Censoring the Pirate Bay is Useless Research Shows*, TORRENTFREAK (Apr. 13, 2012), <http://torrentfreak.com/censoring-the-pirate-bay-is-useless-research-shows-120413/>; JEROEN VAN DER HAM, HENDRIK ROOD, COSMIN DUMITRU, RALPH KONING, NIELS SIJM, & CEES DE

When a BitTorrent protocol site is blocked, its domain and IP address are filtered, in which case the site adds a new IP address so that blocked subscribers can access the site again without problems, until the copyright holders inevitably add the new domain and address to the blockade list. There are, of course, many ways of circumventing a blockade.<sup>55</sup> For instance, to circumvent blockades in the UK, the Netherlands, Belgium, and Italy, The Pirate Bay has not only added a new website, but also made sure that it guarantees maximum compatibility with the many proxy sites available.<sup>56</sup> Indeed, it is “virtually impossible to completely prevent people from accessing The Pirate Bay. There are simply too many options for people to route around the block. [These range f]rom visiting a proxy, to simply adding a few lines to their ‘hosts’ file to access the site directly.”<sup>57</sup>

BitTorrent sites can also change their infrastructure by adopting cloud computing.<sup>58</sup> This is the approach taken by The Pirate Bay. Starting in 2012, The Pirate Bay began providing its services from several cloud-hosting providers located around the globe.<sup>59</sup> The move to the cloud will not only decrease costs and increase uptime, but will also “make the site virtually invulnerable to police raids<sup>60</sup>—all while keeping user data

LAAT, REVIEW EN HERHALING BREIN STEEKPROEVEN 7–9, April 2012, 1, 18 (2012) <http://staff.science.uva.nl/~vdham/research/publications/dutchpirate.pdf>. The study also noted that subscribers of “Ziggo and XS4ALL must have found different routes other than ‘The Pirate Bay’ to share files, and remain active as a seeder to upload files to others.” *Id.* at 18.

55. Ernesto, *Pirate Bay Simplifies Circumvention of ISP Blockades*, TORRENTFREAK (May 22, 2012), <http://torrentfreak.com/pirate-bay-simplifies-circumvention-of-isp-blockades-120522/>.

56. *Id.* A proxy is a

computer system or router that breaks the connection between sender and receiver . . . . The word proxy means ‘to act on behalf of another,’ and a proxy server acts on behalf of the user. All requests from clients to the Internet go to the proxy server first. The proxy evaluates the request, and if allowed, re-establishes it on the outbound side to the Internet. Likewise, responses from the Internet go to the proxy server to be evaluated. The proxy then relays the message to the client. Both client and server think they are communicating with one another, but, in fact, are dealing only with the proxy.

*Proxy Server*, FREE DICTIONARY, <http://encyclopedia2.thefreedictionary.com/Proxy+Sites> (last visited Sept. 3, 2013).

57. Ernesto, *supra* note 55.

58. For a definition of cloud computing, see PETER MELL & TIMOTHY GRANCE, NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY, U.S. DEP’T OF COMMERCE, THE NIST DEFINITION OF CLOUD COMPUTING (2011), available at <http://csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf>.

59. Ernesto, *Pirate Bay Moves to the Cloud, Becomes Raid-Proof*, TORRENTFREAK (Oct. 17, 2012).

60. If the police try to raid Pirate Bay,

[T]here are no servers to take, just a transit router. If they follow the trail to the next country and find the load balancer, there is just a disk-less server there. In case they find out where the cloud provider is, all they can get are encrypted disk-images. . . . They have to be quick about it too, if the servers have been out of communication with the load balancer for 8 hours they

secure.”<sup>61</sup> This creates further enforcement problems; as the result of Pirate Bay’s cloud-computing, “[t]he hosting providers have no idea that they’re hosting the Pirate Bay, and even [if] they found out it would be impossible for them to gather data on the users.”<sup>62</sup>

Deterrent measures are particularly relevant today as the Center for Copyright Information (“CCI”)<sup>63</sup> is planning to release the infamous “six strikes anti-piracy scheme,” in which BitTorrent users will have six warnings before internet service providers (“ISPs”) will have to take repressive measures.<sup>64</sup> The question is whether this strike system will be effective in decreasing or eliminating piracy. First, because these alerts only target a subgroup of online pirates, namely BitTorrent users, millions of users who use other file-hosting services will not be affected,<sup>65</sup> and in fact it is predicted that downloading on these sites will increase.<sup>66</sup> Moreover, those who continue using BitTorrent “can avoid the warnings by signing up for one of many anonymizer services.”<sup>67</sup> Indeed, the circumvention possibilities are no secret; even CCI’s Executive Director,

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automatically shut down. When the servers are booted up, access is only granted to those who have the encryption password.

Ernesto, *Pirate Bay Moves to The Cloud, Becomes Raid-Proof*, TORRENTFREAK (Oct. 17, 2012), <http://torrentfreak.com/pirate-bay-moves-to-the-cloud-becomes-raid-proof-121017/>.

61. *Id.*

62. *Id.*

63. CCI was formed by the Motion Picture Association of America, Inc. (“MPAA”), the Recording Industry Association of America (“RIAA”), 5 major ISPs (AT&T, Cablevision, Comcast, Time Warner Cable, and Verizon), the Independent Film and Television Alliance, and the American Association of Independent Music. *About the Center for Copyright Information*, CENTER FOR COPYRIGHT INFORMATION, <http://www.copyrightinformation.org/about-cci/> (last visited Sept. 3, 2013).

64. Ernesto, *Will the Upcoming Six Strikes Scheme Stop Piracy?*, TORRENTFREAK (JAN. 26, 2013), <http://torrentfreak.com/will-the-upcoming-six-strikes-scheme-stop-piracy-130126/>; Ernesto, *Verizon’s “Six Strikes” Anti-Piracy Measures Unveiled*, TORRENTFREAK (Jan. 11, 2013), <http://torrentfreak.com/verizons-six-strikes-anti-piracy-measures-unveiled-130111/>. While official repressive measures have not yet been announced, Verizon’s potential limitations on repeat offenders will likely include a reduction in bandwidth and a mandatory viewing of a film about the consequences of online piracy. *Id.* AT&T plans to “block users’ access to some of the most frequently-visited [sic] websites on the Internet, until they complete a copyright course . . . [and] Time Warner Cable will temporarily interrupt . . . [users’] ability to browse the Internet.” *Id.*

65. Ernesto, *Will the Upcoming Six Strikes Scheme Stop Piracy?*, *supra* note 64.

66. *Id.*

67. *Id.* For instance, BitTorrent proxies and virtual private network (“VPN”) services are often used by users who wish to remain anonymous while downloading, because “[t]hese services replace a user’s home IP-address with one provided by the proxy service, making it impossible for tracking companies to identify who is doing the file-sharing.” *Id.* (noting that 16% of all file sharers in U.S. already hide their IP address). A VPN allows an individual to send and receive data on the internet while the individual appears to be a part of a private instead of a public network. *Virtual Private Network*, PCMAG.COM, <http://www.pcmag.com/encyclopedia/term/53942/virtual-private-network> (last visited Sept. 4, 2013).

Jill Lesser, admitted that the main purpose of the alerts is to educate, that “there are ways around [the warning system],” and that the CCI is not targeting hardcore pirates, who know how to easily circumvent the warnings, but rather casual pirates.<sup>68</sup> However, even if the initially casual pirates are intimidated away from downloading, they will likely return once information disseminates about circumvention techniques, which will not take long given social media capabilities. In the meantime, the warnings will hurt an unintended group: businesses. For instance, if employees of a small business download files using BitTorrent without heeding the warnings, the business itself can be negatively affected by repressive measures.<sup>69</sup> Similarly, if customers of coffee shops or other small businesses that provide free Wi-Fi download copyrighted material, these businesses would have to face the repressive measures, and, as a result, some will likely choose to end their Wi-Fi services.<sup>70</sup>

#### IV. COPYRIGHT LAW IN THE NETHERLANDS—AN EXAMPLE TO FOLLOW

The Dutch Copyright Act of 1912 (the “Copyright Act”) allows “literary, scientific or artistic work to [be] reproduced in a limited number of copies for the sole purpose of private practice, study, or use of the person who makes the copies or orders the copies to be made exclusively for himself.”<sup>71</sup> A copy can be produced for private use if the following conditions are satisfied: “it is made by natural persons (not by businesses, institutions or organizations); . . . without any direct or indirect commercial aim; . . . exclusively for private practice, study or use (i.e. not for practice, study or use by third parties); . . . [and] the number of copies remains limited.”<sup>72</sup> Moreover, section 16(c)(2) of the Copyright Act makes fair levies an additional condition for making digital copies.<sup>73</sup> In the Netherlands, levies are imposed on producers or importers of blank recording media, such as CDs, who then pass on the cost of the levies onto

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68. Ernesto, *Will the Upcoming Six Strikes Scheme Stop Piracy?*, *supra* note 64.

69. See *supra* note 64 and accompanying text; Ernesto, “Six Strikes” *Anti-Piracy Scheme Affects Some Businesses, Public WiFi Forbidden*, TORRENTFREAK (Jan. 18, 2013), <http://torrentfreak.com/six-strikes-anti-piracy-scheme-affects-some-businesses-public-wifi-forbidden-130118/>.

70. Ernesto, *supra* note 69. Also, many WiFi hotspots will be affected because while the terms of service on such small business accounts do not allow for free public WiFi, these terms were difficult to monitor and enforce, leading to the proliferation of free WiFi in many small cafés. The advent of the alert system could very well change this. *Id.*

71. Stb. 1912, p. 308, artikel 16(b), available at [http://wetten.overheid.nl/BWBR0001886/geldigheidsdatum\\_17-02-2013#HoofdstukI](http://wetten.overheid.nl/BWBR0001886/geldigheidsdatum_17-02-2013#HoofdstukI) [hereinafter Dutch Copyright Act]; HUYGEN ET AL., *supra* note 23.

72. Dutch Copyright Act, art. 16(b)(1), (c)(1); see also HUYGEN ET AL., *supra* note 23.

73. HUYGEN ET AL., *supra* note 23.

the consumers.<sup>74</sup> Games, however, are considered to be computer programs and consequently enjoy wider protection as they cannot be copied for personal use.<sup>75</sup> Dutch law also specifies that uploading files without the permission of the copyright holder constitutes copyright infringement.<sup>76</sup> While uploading may result in both civil and criminal liability, criminal enforcement focuses, in particular, on commercial or large-scale uploading, because policymakers at the national and the multinational European level are reluctant to use criminal law instruments against individual users.<sup>77</sup>

Given that in a BitTorrent swarm every downloader is also an uploader of a file, it is questionable whether the exchange of small parts of a file itself constitutes an illegal upload, or whether file sharing on BitTorrent protocol programs is truly for private use. It is argued, however, that “the main reason for downloading content is still private use and that the users are not primarily concerned with sharing the content with third parties.”<sup>78</sup> Indeed, case law even suggests that “putting content on social networks in such a way that it is accessible only to friends and relatives is [not an] infringement . . . [because] . . . ‘non-public’ [use is] . . . narrowly interpreted . . . to [mean] sharing content with a close circle of relatives and friends or a similar group.”<sup>79</sup> Moreover, the “prevailing view in the Netherlands is that it makes no difference whether private copies come from an illegal source.”<sup>80</sup> In regards to intermediaries, such as ISPs or website operators,

The courts have held in various cases . . . that providing [an] opportunity to infringe copyright does not in itself constitute an infringement, but that intermediaries . . . are obliged, ‘on the grounds of the general duty of care owed in such circumstances to

74. The Dutch copyright levies in 2012 included a €0.03 on DVDs, a €5.00 levy on tablets with more than 8 gigabytes of memory and a €2.50 levy on tablets with less than 8 gigabytes of memory, and a €5.00 levy on laptops, among others. Armand Killan and Manon Rieger-Jansen, *Dutch Get New Copyright Levies For Electronics/Storage Devices*, BIRD & BIRD (Oct. 10, 2012), <http://www.two-birds.com/en/news/articles/2012/dutch-get-new-copyright-levies-for-electronics-storage-devices-1012>; Dutch Copyright Act, art. 16(b)(1), (c)(1); *see also* HUYGEN ET AL., *supra* note 23.

75. HUYGEN ET AL., *supra* note 23. The exception for private use does not apply to the downloading of games in the form of computer programs. Dutch Copyright Act, art. 45(n). Games may be reproduced without the consent of the right holder only if this is necessary for the use and study of the program for the purpose of the work concerned, for making a reserve copy, or if copying is essential in order to obtain the information needed in order to achieve interoperability with other programs. *Id.* art. 45(j)–(m).

76. Dutch Copyright Act, art. 12.

77. HUYGEN ET AL., *supra* note 23, at 49.

78. *Id.* at 51.

79. *Id.* at 53.

80. *Id.* at 51.

cooperate and take adequate measures if they are informed that users of [their] computer systems are committing copyright infringements or otherwise acting unlawfully through the service provider's home page.' According to the case law, ISPs still act unlawfully if and in so far as a) they are notified of the presence of copyrighted content . . . , b) there are no reasonable grounds for doubting the correctness of this notification, and c) the ISPs do not then take action as quickly as possible to remove this information from their computer systems or make this information inaccessible.<sup>81</sup>

#### V. PERSONAL JURISDICTION, JOINDER, AND OTHER LEGAL ISSUES

Aside from abusive practices of copyright trolls and doubtful negative effects of file sharing, there are also issues with personal jurisdiction and joinder. In the United States, personal jurisdiction exists over a defendant when he or she is domiciled in the jurisdiction, made purposeful contact with the jurisdiction, or has a reasonable expectancy of facing suit in the jurisdiction.<sup>82</sup> In asserting personal jurisdiction, plaintiffs typically argue that by participating in a swarm, the out-of-state defendants engage in concerted activity with the in-state defendants.<sup>83</sup> Using swarming activity as proof of personal jurisdiction fails, however, because "since [the] plaintiff could have filed [the] . . . lawsuit in any state, the logical extension would be that everybody who used P2P software such as BitTorrent would subject themselves to jurisdiction in every state," which is a "far cry from the requirement that 'there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State.'"<sup>84</sup> Indeed, claiming that participation in

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81. *Id.* at 53–54.

82. *Milliken v. Meyer*, 311 U.S. 457, 463 (1940); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296–97 (1980); Jason R. LaFond, *Personal Jurisdiction and Joinder in Mass Copyright Troll Litigation*, 71 MD. L. REV. ENDNOTES 51, 56 (2012).

83. *See, e.g., On the Cheap, LLC v. Does 1-5011*, 280 F.R.D. 500, 505 (N.D. Cal. 2011). "A 'swarm' is a group of BitTorrent users involved in downloading or distributing a particular file." *Id.* at 505 n.8.

84. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (citations omitted), *as quoted in On the Cheap*, 280 F.R.D. at 505; *see, e.g., 808 Holdings, LLC v. Collective Sharing Hash*, No. 12-CIV-191, 2012 WL 1581987, at \*6 (S.D. Cal. May 4, 2012) (holding that it is not only improbable that an individual in another jurisdiction would foresee that file sharing would subject him or her to the jurisdiction of the court, but also that "any allegation that personal jurisdiction exists because of the swarming activity is inadequate."); *Liberty Media Holding, LLC v. Tabora*, No. 11-CV-651-IEG (JMA), 2012 WL 28788, at \*4, \*7 (S.D. Cal. Jan. 4, 2012) (refusing to recognize participation in a swarm as a basis for jurisdiction); *Berlin Media Art v. Does 1-654*, No. 11-03770, 2011 U.S. Dist.

a swarm is concerted action is problematic because it misrepresents the level of connectivity between defendants.<sup>85</sup> First, when the tracker leads a user to a swarm, the user does not become connected to the entire swarm, but only a subset of the available swarm.<sup>86</sup> Second, not only is a swarm compiled by the tracker and consists of randomly chosen members, but the swarm is also constantly changing as members leave and visit the downloading website.<sup>87</sup> Currently there is no way to determine which members were connected in a swarm, and users can only connect to other users who are on the network at the same time.<sup>88</sup> These limitations on connectivity make claims that any one defendant was connected to any other defendant highly unlikely and very difficult, if not impossible, to prove.<sup>89</sup>

Joinder issues are also prevalent in mass BitTorrent suits. Under the Federal Rules of Civil Procedure, defendants can only be joined in one action if “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 . . . any question of law or fact common to all defendants will arise in the action.”<sup>90</sup> Joinder, however, is discretionary and a court may order separate trials to protect any party against embarrassment, delay, expense, or other prejudice.<sup>91</sup> Though many courts have permitted joinder of multiple John Doe defendants who are part of a single swarm,<sup>92</sup> others have held it improper

LEXIS 120257, at \*4–8 (N.D. Cal. Oct. 18, 2011) (also refusing to recognize participation in a swarm as a basis for jurisdiction); *Millennium TGA v. Doe*, No. 10 C 5603, 2011 U.S. Dist. LEXIS 110135, at \*2–8 (N.D. Ill. Sept. 26, 2011) (also refusing to recognize participation in a swarm as a basis for jurisdiction); *On The Cheap*, 280 F.R.D. at 505 (also refusing to recognize participation in a swarm as a basis for jurisdiction).

85. LaFond, *supra* note 82, at 57.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. Fed. R. Civ. P. 20(a)(2)(A)–(B).

91. Fed. R. Civ. P. 20(b). *See also On The Cheap*, 280 F.R.D. at 502.

92. *Voltage Pictures, LLC v. Doe*, 818 F. Supp. 2d 28 (D.D.C. 2011), *as quoted in* *MCGIP, LLC v. Doe*, No. C-11-1495 EMC, 2011 U.S. Dist. LEXIS 64188, at \*2–3 (N.C. Cal. June 2, 2011) (permitting joinder because the alleged infringement was conducted through “the same file-sharing software program [*i.e.*, BitTorrent] that operates through simultaneous and sequential computer connections and data transfers among the users.”); *Digital Sin, Inc. v. Does 1-176*, 279 F.R.D. 239, 244 (S.D.N.Y. 2012) (“[I]t is difficult to see how the sharing and downloading activity alleged in the Complaint—a series of individuals connecting either directly with each other or as part of a chain or ‘swarm’ of connectivity designed to illegally copy and share the exact same copyrighted file—could not constitute a ‘series of transactions or occurrences’ for purposes of Rule 20(a).”); *Third Degree Films v. Does*, 286 F.R.D. 188, 195 (D. Mass. 2012).

because downloading the same file does not equal being engaged in the same transaction or occurrence.<sup>93</sup> Indeed, many courts take issue with defendants' argument that participation in a swarm is a concerted activity that links defendants together for purposes of joinder.<sup>94</sup> As one court has noted,

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[D]istrict courts are . . . so divided over whether file sharing via the BitTorrent protocol constitutes a 'series of transactions or occurrences' in satisfaction of Rule 20(a)(2)(B). The inquiry is so fact-intensive, and the BitTorrent protocol so technologically complex, that no principled conclusions have emerged from the abundance of recent case law and this Court is not entirely comfortable hanging its hat on its own understanding of the process. Yet, . . . the Court holds that the interaction of the Doe defendants via BitTorrent—even if indirect—is significant enough to bring them within the broad scope of permissibly joined parties under Rule 20(a).

*Id.* at 8 n.11; *Call of the Wild Movie, LLC v. Does 1-1,062*, 770 F. Supp. 2d 332, 343 (D.D.C. 2011) (holding joinder proper because "[e]ach putative defendant is a possible source for the plaintiffs' [copyrighted work] . . . and may be responsible for distributing the [work] to the other putative defendants, who are also using the same file-sharing protocol to copy the identical copyrighted material."); *Donkeyball Movie, LLC v. Does 1-171*, 810 F. Supp. 2d 20, 27–28 (D.D.C. 2011); *W. Coast Prod., Inc. v. Does 1-5829*, 275 F.R.D. 9, 15–16 (D.D.C. 2011); *First Time Videos, LLC v. Does 1-76*, 276 F.R.D. 254, 257–58 (N.D. Ill. 2011);

93. Fed. R. Civ. P. 20(a)(2)(A); *On the Cheap*, 280 F.R.D. at 503; *see, e.g.*, *Hard Drive Prods., Inc. v. Does 1-188*, 809 F. Supp. 2d 1150, 1162–63 (N.D. Cal. 2011); *Boy Racer v. Does 2-52*, No. 11-2834-LHK, 2011 U.S. Dist. LEXIS 86746 (N.D. Cal. Aug. 5, 2011); *MCGIP, LLC v. Does 1-149*, No. 11-2331-LB, 2011 U.S. Dist. LEXIS 85363 (N.D. Cal. Aug. 3, 2011); *Pac. Century Int'l, Ltd. v. Does 1-101*, No. 11-2533-DMR, 2011 U.S. Dist. LEXIS 73837, at \*9–15 (N.D. Cal. July 8, 2011); *Diabolic Video Prods, Inc. v. Does 1-2099*, No. 10-5865-PSG, 2011 U.S. Dist. LEXIS 58351, at \*10–11 (N.D. Cal. May 31, 2011) (holding that "the mere allegation that defendants have used the same peer-to-peer network to infringe a copyrighted work is insufficient to meet the standards for joinder set forth in Rule 20"); *IO Group, Inc. v. Does 1-435*, No. 10-4382-SI, 2011 U.S. Dist. LEXIS 14123, at \*13 (N.D. Cal. Feb. 3, 2011) (holding that without facts tending to show "that any of the Doe defendants used eDonkey2000 to distribute or attempt to distribute plaintiff's films to each other, joinder is improper" and that "the fact that each of the doe defendants made available for distribution different titles at different dates undermines joinder"); *Fonovisa, Inc. v. Does 1-9*, Civil Action No. 07-515, 2008 U.S. Dist. LEXIS 27170, at \*20 (W.D. Pa. Apr. 3, 2008) (holding joinder improper because the "claims against the different Defendants most likely will involve separate issues of fact and separate witnesses, different evidence, and different legal theories and defenses, which could lead to jury confusion."); *Laface Records, LLC v. Does 1-38*, No. 5:07-CV-298-BR, 2008 U.S. Dist. LEXIS 14544, at \*7–8 (E.D.N.C. Feb. 27, 2008) (finding joinder improper where plaintiff alleged that each defendant used the same ISP and the same P2P network to commit the alleged copyright infringement); *BMG Music v. Does, 06-01579*, 2006 U.S. Dist. LEXIS 53237, at \*5–7 (N.D. Cal. July 31, 2006) (finding improper joinder because although each defendant used the same ISP, they engaged in distinct acts of file sharing on separate dates at separate times); *BMG Music v. Does 1-203*, No. 04-650, 2004 U.S. Dist. LEXIS 8457, at \*3–4 (E.D. Pa. Apr. 2, 2004) (finding joinder improper because defendants copied works on different dates, the actions constituted separate transactions and occurrences, the actual property at issue was different for each defendant, and each defendant is likely to have a different defense); *Interscope Records v. Does 1-25*, No. 6:04-cv-197-Orl-22DAB, 2004 U.S. Dist. LEXIS 27782, at \*16–17 (M.D. Fla. Apr. 1, 2004) (same with regards to use of the P2P network).

94. *See generally Boy Racer*, 2011 U.S. Dist. LEXIS 86746.

Any “pieces” of the work copied or uploaded by any individual Doe may have gone to any other Doe *or to any of the potentially thousands who participated in a given swarm*. 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 across the country or across the world.<sup>95</sup>

In addition, courts rightly find it significant that the file sharing activity occurs on different days over stretches of time, and therefore even if defendants participate in the same swarm, they may not, and likely have not, “been physically present in the swarm on the same day and time.”<sup>96</sup> Thus, the only link connecting the defendants is the fact that they have used the same ISP and the same P2P network to commit the alleged copyright infringement. Downloading the same file, however, does not mean that each defendant is engaged in the same transaction or occurrence.<sup>97</sup> Moreover, in suing defendants for downloading a certain copyrighted work, plaintiffs sometimes gloss over the fact that BitTorrent users often upload different files of a given work, such as a low- or a high-definition version, which would lead to a creation of distinct swarms.<sup>98</sup> Due to the differences between low-definition files and high-definition files, participants in the former swarm will not interact with those in the latter swarm since swarms develop around originally seeded *files*, as opposed to particular *works*.<sup>99</sup> Therefore, the fact that BitTorrent users have downloaded the same copyrighted work does not mean that they have acted together to obtain it.<sup>100</sup>

Another important factor that stands against joinder is that the “claims against the different [d]efendants most likely will involve separate issues of fact and separate witnesses, different evidence, and different legal theories and defenses, which could lead to jury confusion.”<sup>101</sup> Finally, of concern is the plaintiff’s motive for seeking joinder.<sup>102</sup> Plaintiffs seek

95. *Hard Drive Prods.*, 809 F. Supp. 2d at 1163.

96. *Id.* at 1165 (citations omitted).

97. *On the Cheap*, 280 F.R.D. at 503.

98. *Pac. Century Int’l*, 2011 U.S. Dist. LEXIS 73837, at \*11–12.

99. *Id.* at \*12–13.

100. *Id.*

101. *Fonovisa, Inc. v. Does 1-9*, Civil Action No. 07-515, 2008 U.S. Dist. LEXIS 27170, at \*20 (W.D. Pa. Apr. 3, 2008).

102. *Cf. Desert Empire Bank v. Ins. Co. of North America*, 623 F.2d 1371, 1375, 1376 (9th Cir. 1980) (noting that courts should consider a party’s motive in deciding whether to allow permissive joinder); *IO Group, Inc. v. Does 1-435*, No. 10-4382-SI, 2011 U.S. Dist. LEXIS 14123, at \*19 (N.D. Cal. Feb. 3, 2011).

joinder in order to decrease their own litigation costs, in the hope that defendants will settle for the initial low settlement demand.<sup>103</sup> However, as one court explains, “filing one mass action in order to identify hundreds of [D]oe defendants through pre-service discovery and [to] facilitate mass settlement, is not what the joinder rules were established for.”<sup>104</sup> Recently, to avoid personal jurisdiction and joinder issues, copyright trolls have adopted a clever new tactic in which they sue only a “single defendant who is connected to an IP address located in the district in which the plaintiffs brought suit, but . . . [seek] discovery about other IP addresses belonging to computer users who are not joined as defendants,” which they plan to later join in the suit.<sup>105</sup> In those cases, plaintiffs allege that additional IP addresses represent co-conspirators “who conspired to infringe the plaintiff’s copyright by downloading the same file through the BitTorrent system.”<sup>106</sup> Such allegations are baseless, as the mere fact that the computers of BitTorrent users communicated with one another does not create a conspiracy among users.<sup>107</sup> The *prima facie* case for a civil conspiracy requires an agreement,<sup>108</sup> but that requirement cannot be

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103. *IO Group*, 2011 U.S. Dist. LEXIS 14123 at \*19.

104. *Id.* at \*19–20; *see also* *Raw Films, Ltd. v. Does 1-11*, NO. 12cv368-WQH, 2012 U.S. Dist. LEXIS 28161, at \*7 (S.D. Cal. Mar. 2, 2012); *Liberty Media Holdings, LLC v. Does, No.11cv 575 MMA*, 2011 U.S. Dist. LEXIS 51526, at \*11 (S.D. Cal. May 12, 2011); *IO Group*, 2011 U.S. Dist. LEXIS 14123 at \*19–20; *Arista Records, LLC v. Doe, No. 1:07-CV-2828*, 2008 U.S. Dist. LEXIS 90183, at \*21 (N.D. Ohio Nov. 3, 2008); *Arista Records, LLC v. Does 1-27*, No. 07-162-B-W, 2008 U.S. Dist. LEXIS 6241, at \*6, n.5 (D. Me. Jan. 25, 2008) (questioning propriety of plaintiffs’ “clever scheme to obtain court-authorized discovery prior to the service of complaints,” where underlying claims would lead to misjoinder). Courts are also concerned that “a consequence of postponing a decision on joinder in [BitTorrent mass] lawsuits . . . results in lost revenue of perhaps millions of dollars [from lost filing fees] and only encourages Plaintiffs . . . to join (or misjoin) as many doe defendants as possible.” *Arista Records, LLC v. Doe, No. 1:07-CV-2828*, 2008 U.S. Dist. LEXIS 90183, at \*16 (N.D. Ohio Nov. 3, 2008), *as quoted in Liberty Media Holdings*, 2011 U.S. Dist. LEXIS 51526 at \*11–12; *see also Arista Records, LLC v. Doe, No. 1:07-CV-2828*, 2008 U.S. Dist. LEXIS 90183, at \*21 (N.D. Ohio Nov. 3, 2008) (suggesting that the plaintiffs likely violated Federal Rule of Civil Procedure 11, by alleging that joinder is proper in order to avoid paying filing fees).

105. *Pac. Century Int’l, Ltd. v. Doe*, 282 F.R.D. 189, 194 (N.D. Ill. 2012).

106. *Id.* at 195. “The plaintiffs’ contention, in essence, is that identities of the non-parties associated with the IP addresses will be relevant to claims against future defendants who have not yet been sued. By that device, the plaintiffs can avoid all personal jurisdiction and joinder hurdles, and yet obtain the identifying information connected with hundreds of IP addresses located all over the country through a single lawsuit.” *Id.*

107. Timothy B. Lee, *Judge Rejects Copyright Trolls’ BitTorrent Conspiracy Theory*, ARS TECHNICA (Apr. 1, 2012), <http://arstechnica.com/tech-policy/2012/04/judge-rejects-copyright-trolls-bittorrent-conspiracy-theory/>.

108. “To establish a *prima facie* case of civil conspiracy, [plaintiffs need] to prove: (1) an agreement between two or more persons (2) to participate in an unlawful act, and (3) injury caused by an unlawful overt act performed by one of parties to the agreement, and in furtherance of the common scheme.” *Hill v. Medlantic Health Care Group*, 933 A.2d 314, 334 (D.C. App. 2007). A claim for civil conspiracy must include an actual agreement, proven by clear and convincing evidence. *Wells Fargo*

satisfied in BitTorrent suits. First, it is the tracker and not the user that obtains a list of individuals that participate in a particular swarm,<sup>109</sup> and once the list is obtained, it is the BitTorrent client, and not the user, that decides to which individuals within the swarm the user should connect in order to download a bit of data. Second, “BitTorrent users remain anonymous to other BitTorrent users, and have no connection to them beyond the mere fact that they downloaded the same file.”<sup>110</sup> Indeed, it is quite a stretch to suggest that simply downloading the same work or connecting to a swarm constitutes a proactive step of joining a conspiracy.<sup>111</sup> In fact, “the only commonality between copyright infringers of the same work is that each ‘commit[ted] the exact same violation of the law in exactly the same way.’”<sup>112</sup>

Another legal issue common to BitTorrent suits is insufficient proof that the downloading activity actually took place. Plaintiffs often rely on “snapshot” evidence of an IP address that was observed in a BitTorrent swarm, correlating the snapshot with evidence from the user’s ISP, which reveals the identity of the user who leased the IP address during the exact time of the alleged downloading activity.<sup>113</sup> The conclusion plaintiffs mistakenly draw from a snapshot observation is that the defendant actually downloaded the entire copyrighted video, even though the snapshot only reveals that the defendant was downloading the copyrighted work at the very moment in time the snapshot was taken.<sup>114</sup> Not only could the user be merely in queue waiting to download the first byte of data, but there are

Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Trust Fund, 38 P.3d 12, 37 (Ariz. 2002).

109. *What Are Peers, Seeds, Torrent, Tracker, DHT, Peer Exchange (PEX), And Magnet Links?*, BITCOMET, [http://wiki.bitcomet.com/peers\\_seeds\\_torrent\\_tracker\\_dht\\_peer\\_exchange\\_pex\\_magnet\\_links](http://wiki.bitcomet.com/peers_seeds_torrent_tracker_dht_peer_exchange_pex_magnet_links) (last visited Feb. 15, 2013).

110. *Pac. Century Int’l*, 282 F.R.D. at 195.

111. Mike Masnick, *Not Securing Your Internet Access to Block Infringement Is ‘Negligence’?*, TECH DIRT (Mar. 30, 2011), <http://www.techdirt.com/articles/20110331/01112213706/not-securing-your-internet-access-to-block-infringement-is-negligence.shtml>; see also *Pac. Century Int’l*, 282 F.R.D. at 195 (denying the existence or a possibility of a conspiracy in the BitTorrent suit); *Hard Drive Prods. v. Doe*, 2011 U.S. Dist. LEXIS 118049, at \*12 (N.D. Ill. Oct. 12, 2011) (holding plaintiff’s conspiracy claim a failure because it did not plead the existence of an agreement among Does 1–55 to commit copyright infringement).

112. *Laface Records, LLC v. Does 1-38*, No. 5:07-CV-298-BR, 2008 U.S. Dist. LEXIS 14544, at \*7 (E.D.N.C. Feb. 27, 2008) (citation & quotation marks omitted), as quoted in *Pac. Century Int’l, Ltd. v. Does 1-101*, No. 11-2533-DMR, 2011 U.S. Dist. LEXIS 73837, at \*13 (N.D. Cal. July 8, 2011).

113. Houstonlawy3r, *California District Court Decides on the Definition of Copyright Infringement as to Bittorrent Downloads*, TORRENT LAWYER (Feb. 8, 2013), <http://torrentlawyer.wordpress.com/2013/02/08/new-law-in-california-district-courts-as-to-what-constitutes-copyright-infringement/>; *Ingenuity 13 LLC v. Doe*, No. 2:12-cv-8333-ODW(JCx), 2013 U.S. Dist. LEXIS 17693, at \*4–6 (C.D. Cal. 2013).

114. *Ingenuity 13*, 2013 U.S. Dist. LEXIS 17693 at \*6.

also many reasons why a user would terminate a download before the entire work is downloaded.<sup>115</sup> For instance, a user could terminate the download because of the internet connection speed or could shut off the download by mistake.<sup>116</sup> Indeed, “[t]o allege copyright infringement based on an IP snapshot is akin to alleging theft based on a single surveillance camera shot: a photo of a child reaching for candy from a display does not automatically mean he stole it.”<sup>117</sup> There is a further complication to using a snapshot observation as evidence of copyright infringement. In order to prove a *prima facie* copyright claim, “[p]laintiffs must show that [d]efendants copied the copyrighted work,” and the copied material must be a “substantially similar copy of the copyrighted work.”<sup>118</sup> If a download was not completed, a plaintiff’s suit may be frivolous, because the defendant in some instances would only be in possession, in the case of a video, of an un-viewable fragment—“an encrypted, unusable chunk of zeroes and ones.”<sup>119</sup> This downloaded fragment cannot rise to the level of substantial similarity needed to support a case of copyright infringement.<sup>120</sup> Even in cases where the fragment downloaded is not encrypted and is viewable immediately, one can still argue that the fragment is not a substantially similar work, because in copyright law the copyright infringement occurs “when the downloaded data becomes substantially a ‘copy’ of the *entire original work*.”<sup>121</sup> As one court established, plaintiffs need “evidence showing that [d]efendants downloaded the entire copyrighted work—or at least a usable portion of a copyrighted work.”<sup>122</sup>

## VI. COPYRIGHT TROLLS AND HOW THEY ABUSE THE LEGAL SYSTEM

In 2011 alone, the U.S. judicial system was overloaded with more than 200,000 torrent-related suits.<sup>123</sup> Although the RIAA campaign to change

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115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 7; *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); *Cognotec Servs. v. Morgan Guar. Trust Co.*, 862 F. Supp. 45, 49 (S.D.N.Y. 1994).

119. *Ingenuity 13*, 2013 U.S. Dist. LEXIS 17693 at \*7.

120. *Id.*

121. *Houstonlawy3r*, *supra* note 113; *Ingenuity 13*, 2013 U.S. Dist. LEXIS 17693 at \*7 (emphasis added).

122. *Ingenuity 13*, 2013 U.S. Dist. LEXIS 17693 at \*7.

123. Ernesto, *200,000 BitTorrent Users Sued in the United States*, TORRENTFREAK (Aug. 8, 2011), <http://torrentfreak.com/200000-bittorrent-users-sued-in-the-united-states-110808/>; Ernesto, *Hurt Locker BitTorrent Lawsuit Dies, But Not Without Controversy*, TORRENTFREAK (Dec. 22, 2011), <http://torrentfreak.com/hurt-locker-bittorrent-lawsuit-dies-but-not-without-controversy-111222/>. The

file sharing behavior has failed and the RIAA has largely chosen not to pursue individual litigation, today the system is abused by so-called “copyright trolls.”<sup>124</sup> Copyright troll is a name given to a plaintiff “who seeks damages for infringement upon a copyright it owns [or a copyright of another he or she represents], not to be made whole, but rather as a primary or supplementary revenue stream.”<sup>125</sup> Indeed, trolls often upload materials on which they own a copyright to peer-to-peer networks in order to later sue those who download these works.<sup>126</sup> Copyright trolls monetize, rather than deter, infringement by using the existence of statutory damages to threaten outlandish damage awards and force defendants into quick settlements.<sup>127</sup> The “aim of the copyright holders is not to take any of the defendants to court, but to get alleged infringers to pay a substantial cash settlement to make [the] legal action” disappear.<sup>128</sup> Moreover, it is often true that litigating a case is much more costly than paying a settlement fee that is usually around \$3,000.<sup>129</sup> Another reason to favor settlement is avoiding the exposure of some personal information to the community as a result of a lawsuit. For instance, copyright trolls in Germany threatened to publish “details . . . [about] individuals [they] claim[ed] [to] have infringed their clients’ copyrights by sharing hardcore pornography online.

numbers are staggering, considering it took the RIAA five years to sue 35,000 individuals. See James DeBriyn, *Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages*, 19 UCLA ENT. L. REV. 79, 91 (2012), quoting Will Moseley, *A New (Old) Solution for Online Copyright Enforcement After Thomas and Tenenbaum*, 25 BERKLEY TECH. L.J. 311, 315 (2010); but see Nate Anderson, *The RIAA? Amateurs. Here’s How You Sue 14,000+ P2P Users*, ARS TECHNICA (June 2010), <http://arstechnica.com/tech-policy/2010/06/the-riaa-amateurs-heres-how-you-sue-p2p-users/> (estimating that the RIAA filed about 18,000 suits).

124. Swartout, *supra* note 6, at 511. Indeed, the RIAA has spent \$64 million to win \$1.4 million from pirates between 2006 and 2008. Jason Mick, *RIAA Spent \$64M to Win \$1.4M From Pirates Between 06 and 08*, DAILYTECH (July 14, 2010), <http://www.dailytech.com/RIAA+Spent+64M+to+Win+14M+From+Pirates+Between+06+and+08/article19034.htm>; see also Eric Bangeman, *RIAA Anti-P2P Campaign a Real Money Pit, According to Testimony*, ARSTECHNICA (Oct. 2, 2007, 11:40 PM), <http://arstechnica.com/tech-policy/2007/10/music-industry-exec-p2p-litigation-is-a-money-pit/>.

125. DeBriyn, *supra* note 123, at 89.

126. *Who Are Copyright Trolls?*, FIGHT COPYRIGHT TROLLS, <http://fightcopyrighttrolls.com/about> (last visited Jan. 15, 2012). In some cases, the copyright trolls purposely mislabel the names of the files they upload onto peer-to-peer networks, so that when unsuspecting users download the baited files, those users are sued by the very trolls who uploaded the files in the first place. Ernesto, *U.S. P2P Lawsuit Shows Signs of a ‘Pirate HoneyPot,’* TORRENTFREAK (June 1, 2011), <http://torrentfreak.com/u-s-p2p-lawsuit-shows-signs-of-a-pirate-honeypot-110601/>.

127. See generally DeBriyn, *supra* note 123. For instance, a 70 year-old retired widow from San Francisco was accused of sharing pornography on BitTorrent and was offered a \$3,400 settlement, or the option to spend money on an attorney with the risk of paying a \$150,000 fine after losing the court case. Ernesto, *70 Year-Old Grandma Threatened Over BitTorrent Download*, TORRENTFREAK (July 15, 2011), <http://torrentfreak.com/70-year-old-grandma-threatened-over-bittorrent-download-110715/>.

128. Ernesto, *supra* note 127.

129. *Id.*

To make matters worse . . . [the trolls] threaten[ed] to target churches, police stations, and Arabs first.”<sup>130</sup>

Of course, to send the settlement letter the trolls first have to find out who the individual infringer was, which is when the abuse of the legal process comes into play. Infringers are traceable through the IP addresses generated by ISPs, which are assigned to every computer.<sup>131</sup> While copyright trolls can collect the infringers’ IP addresses,<sup>132</sup> they need the ISPs to match that information to a specific individual.<sup>133</sup> Because ISPs have not been willing to give up this information, copyright trolls have compelled them to do so by filing a complaint in order to subpoena ISPs.<sup>134</sup> In order to save on filing fees, the complaint lumps together many John Doe defendants regardless of jurisdiction.<sup>135</sup> It is a catch-twenty-two situation for defendants fighting against the subpoena to ensure that their names will not be revealed, because defendants must first reveal their names to fight the subpoena, and such a revelation is exactly what the

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130. Enigmax, *Anti-Piracy Law Firm Will Publicly Humiliate The Clergy, Police & Arabs*, TORRENTFREAK (Aug. 23, 2012), <http://torrentfreak.com/anti-piracy-law-firm-will-publicly-humiliate-the-clergy-police-arabs-120823/>.

131. It is important to note that a “recorded IP address is not equal to a person. There are many cases (open wireless network, IP spoofing, hacked connections, human error etc.) when innocent people are accused.” *Who Are Copyright Trolls*, *supra* note 126. Under Federal Rule of Civil Procedure 26(d)(1), discovery is permitted only upon showing of good cause, in which case the court considers whether the “plaintiff has demonstrated that there is a reasonable likelihood of being able to identify the defendant through discovery such that service of process would be possible.” *Hard Drive Prods. Inc. v. Does 1-90*, No. 5:11-cv-03825 HRL, 2012 WL 1094653, at \*2 (N.D. Cal. Mar. 30, 2012); *Semitoool, Inc. v. Tokyo Electron Am.*, 208 F.R.D. 273, 274-275 (N.D. Cal. 2002).

Although Plaintiffs contend that they will be able to identify the Doe defendants if they can subpoena the ISPs for subscriber information, that is not necessarily the case as the subpoena is only the first step in a lengthy extra-judicial investigation that may or may not lead to naming any Doe defendants in [the] . . . lawsuit. In response to a subpoena, the ISP produces the identity and contact information of the subscriber associated with a particular IP address. This subscriber may be the infringer who participated in the swarm, or he may just be the person who pays for internet access in a given household. Multiple people may, and often do, use a single ISP subscription—family members, roommates, guests, or other individuals (unknown to the subscriber) who access the internet using any unprotected wireless signals they can find. [Indeed t]he named ISP subscriber may or may not be the infringer.

*Hard Drive Prods.*, 2012 WL 1094653 at \*3. *See also* *West Coast Prods. v. Doe*, 2012 U.S. Dist. LEXIS 110847, at \*17-18 (D.D.C. 2012) (noting that although ISPs are sophisticated parties, the expense of resisting subpoenas may make it cheaper to comply and that the Court should not impose any unnecessary burden on the ISPs because they will pass it on to their consumers, which, today, means almost everyone in the United States.)

132. Ben Jones, *How Any BitTorrent User Can Collect Lawsuit Evidence*, TORRENTFREAK (Sept. 3, 2010), <http://torrentfreak.com/how-any-bittorrent-user-can-collect-lawsuit-evidence-100903/>.

133. DeBriyn, *supra* note 123, at 93.

134. *Id.*

135. *Who Are Copyright Trolls?*, *supra* note 126. “[A] fee to file a civil lawsuit is \$350; if [trolls filed] a lawsuit for each defendant separately, they would end up paying [a] prohibitively large amount of money.” *Id.*

trolls are looking for.<sup>136</sup> What ensues is a suit in which copyright trolls, acting as the plaintiffs, have “no interest in actually litigating the cases, but rather simply . . . [use] the Court and its subpoena powers to obtain sufficient information to shake down” the defendants.<sup>137</sup> Indeed, “[w]henver the suggestion of a ruling on the merits of the claims appears on the horizon, the plaintiffs drop the . . . matter in order to avoid the actual cost of litigation and an actual decision on the merits.”<sup>138</sup> Courts are catching onto these tactics, admonishing mass actions as nothing more than abusive settlement tactics. For instance, in *On the Cheap, LLC v. Does 1-5011*,<sup>139</sup> the court noted that the plaintiff “used the information from the subpoena . . . to extract settlements from out-of-state defendants by notifying them that they have been sued in California, knowing that it is highly unlikely that many of them will be amenable to suit in California.”<sup>140</sup>

#### CONCLUSION; ALTERNATIVE SOLUTIONS TO COPYRIGHT LITIGATION

Despite legal measures taken in countries all over the world to block BitTorrent sites, even in countries like the Netherlands where downloading copyrighted data for personal use is legal,<sup>141</sup> file sharing is here to stay. In the words of the Swiss government:

Every time a new media technology has been made available, it has always been ‘abused.’ This is the price we pay for progress. Winners will be those who are able to use the new technology to

136. *Id.* Indeed, if an individual reveals his or her name, he or she “becomes a target for selective prosecution by a troll,” and often becomes associated with downloading pornography, which, as discussed *supra* note 125, is often purposefully mislabeled. Kevin Goldberg, *More Trolls on a Roll*, COMMLAWBLOG (May 25, 2011), <http://www.commlawblog.com/2011/05/articles/intellectual-property/more-trolls-on-a-roll/>. See also *Who Are Copyright Trolls?*, *supra* note 126.

137. *Raw Films, Ltd. v. Does 1-32*, 2011 WL 6182025, at \*3 (E.D. Va. 2011).

138. *Id.* “The only goal is to obtain settlements—not judgments, which would require litigating and proving allegations. The only reason for bringing a case to a trial is to scare defendants and increase the pressure to settle.” *Who Are Copyright Trolls?*, *supra* note 126.

139. 280 F.R.D. 500, 505 (N.D. Cal. 2011).

140. *Id.* at 505; *Millennium TGA v. Doe*, No. 12-mc-00150 (RLW), 2012 U.S. Dist. Ct. Motions LEXIS 1321, at \*4 (D.D.C. Mar. 26, 2012) (“Courts have found that utilizing discovery to identify Does who are not subject to personal jurisdiction or joinder, and never sued, but are nonetheless contacted for settlement demands, is abusive.”); see also *Mick Haig Prods. E.K. v. Does 1-670*, 687 F.3d 649, 652 (5th Cir. 2012) (finding that Plaintiff employed a “strategy of suing anonymous internet users for allegedly downloading pornography illegally, using the powers of the court to find their identity, then shaming or intimidating them into settling for thousands of dollars—a tactic that he has employed all across the state and that has been replicated by others across the country.”).

141. Ernesto, *Court Forbids Linking to Pirate Bay Proxies*, TORRENTFREAK (May 10, 2012), <http://torrentfreak.com/court-forbids-linking-to-pirate-bay-proxies-120510/>.

their advantages and losers those who missed this development and continue to follow old business models.<sup>142</sup>

The most commonly suggested new business model is the imposition of a copyright levy, also known as the blank media tax, in return for legalization of file sharing. Proposals by academics and cyber liberties organizations center around the imposition of a fee on service providers or electronic devices with revenues to be distributed to artists and the recording industry based on popularity<sup>143</sup> of the copied item.<sup>144</sup> Copyright levies are very common in the European Union, with twenty-one<sup>145</sup> out of twenty-seven member states “provid[ing] for private copying and similar end-user copying exceptions accompanied by levy schemes.”<sup>146</sup> The

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142. EIDGENÖSSISCHES JUSTIZ UND POLIZEIDEPARTEMENT DER SCHWEIZERISCHEN EIDGENOSSENSCHAFT [FEDERAL JUSTICE AND POLICE DEPARTMENT OF THE SWISS CONFEDERATION], BERICHT DES BUNDESRATES ZUR UNERLAUBTEN WERKNUTZUNG ÜBER DAS INTERNET IN ERFÜLLUNG DES POSTULATES 10.3263 SAVARY [REPORT OF THE FEDERAL COUNSEL OF UNAUTHORIZED USE OF WORKS ON THE INTERNET IN COMPLIANCE WITH THE SAVARY POSTULATE 10.3163] (2011), available at <http://www.ejpd.admin.ch/content/dam/data/pressemitteilung/2011/2011-11-30/ber-br-d.pdf>.

143. Different models of calculating popularity have been suggested. Netanel and Fisher support the creation of a specific panel that would make the ultimate decisions as to how to distribute the collective levies. Neil Weinstock Netanel, *Impose a Noncommercial Use Levy to Allow Free Peer-to-Peer File Sharing*, 17 HARV. J.L. & TECH. 1, 65 (2003); WILLIAM FISHER, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT 252 (2004). The Electronic Frontier Foundation suggests distribution of collected levies should be made according to popularity of the artists based on calculated traffic to peer-to-peer sites and sampling of users' habits. Fred von Lohmann, *A Better Way Forward: Voluntary Collective Licensing of Music File Sharing*, ELECTRONIC FRONTIER FOUND. (Apr. 1, 2008), <https://www.eff.org/wp/better-way-forward-voluntary-collective-licensing-music-file-sharing>. In effect the approach is similar to the division of television advertising revenues. *Id.* Oksanen and Välimäki suggest distributing the levies based on users' subjective opinions, which would be calculated by a vote. Oksanen & Välimäki, *supra* note 45, at 5.

144. Fisher proposes an alternative compensation system in which a low, gradually increasing flat fee is charged to consumers who opt-in to using the services of a private organization that has received written permission from artists to have their work reproduced for non-commercial purposes. Fisher, *supra* note 143. Netanel proposes an “average levy of some four percent of the retail prices for P2P goods and services would provide ample reimbursement.” Netanel, *supra* note 143, at 4. This percentage is to be periodically adjusted. *Id.* at 44. The Electronic Frontier Foundation suggests a flat fee of a few dollars a month to be collected by organizations created by the music industry which allow unlimited file sharing for a flat fee. Von Lohman, *supra* note 143. Oksanen and Välimäki propose a flat five-dollar fee on broadband connections. Oksanen & Välimäki, *supra* note 45, at 5.

145. Fabian Niemann & Fidel Porcuna, *Spain Abolishes Its Copyright Levy System—Update on Copyright Levies in Europe*, BIRD & BIRD (Jan. 2012), <http://www.twobirds.com/~media/Files/Newsletters/2012/Copyright%20Levy%20Newsletter%20January%202012.ashx>. Interestingly, in Norway and Australia, The Pirate Party has been approved by the government as an official political party. Ben Jones, *Norwegian Pirate Party Gets Official Recognition*, TORRENTFREAK (Jan. 26, 2013), <http://torrentfreak.com/norwegian-pirate-party-gets-official-recognition-130126/>; Ben Jones, *Australian Pirate Party Gets Approved and Russians are Denied (Again)*, TORRENTFREAK (Jan. 22, 2013), <http://torrentfreak.com/australian-pirate-party-gets-approved-and-russians-are-denied-again-130122/>.

146. Niemann, *supra* note 145. Despite the fact that copyright levies are being increasingly criticized, the issue is not one of inherent dysfunction; rather, it is the lack of humanization among member states that has “distortional effects on the single market in the EU.” Fabian Niemann & Phil

difficulties associated with enforcement of copyright laws in the private sphere and the desire to tap into the profits of manufacturers of recording equipment and blank media, who are the main beneficiaries of file sharing, support the introduction of copyright exceptions combined with copyright levies.<sup>147</sup>

Another solution is to share part of the revenue generated from advertising on BitTorrent with artists.<sup>148</sup> Given the number of monthly

Sherrell, *Recent Developments in the Law Relating to Copyright Levies Could Result in an Overhaul of Copyright Levy System*, BIRD & BIRD (Nov. 2011), [http://www.twobirds.com/~media/Files/News\\_Letters/2011/Copyright\\_Levy\\_Newsletter\\_November.htm](http://www.twobirds.com/~media/Files/News_Letters/2011/Copyright_Levy_Newsletter_November.htm).

In the 22 Member States in which copyright levies have been introduced, the scope of the exceptions, the level of the levies and the products to which levies will pertain all vary materially from Member State to Member State. The application and the amount of levies are hotly disputed and are increasingly being challenged in courts in nearly all of these 22 Member States, especially with regard to modern IT and digital entertainment hardware and storage media.

The lack of harmonization (which has distortional effects on the single market in the EU), legal uncertainty and the absence of synergy between traditional levy systems and the new technical digital environment all cause serious economic problems for the IT and entertainment hardware industry in Europe, as well as for right holders.

*Id.* Given the single market structure in the United States, the harmonization problems associated with copyright levies in the EU should not be an issue.

147. Jörg Reinbothe, Head of the Unit “Copyright and Neighbouring Rights” of DG Internal Market of the European Commission, Address at the Conference on The Compatibility of DRM and Levies (Sept. 8, 2003), (transcript available at [http://ec.europa.eu/internal\\_market/copyright/documents/2003-speech-reinbothe\\_en.htm](http://ec.europa.eu/internal_market/copyright/documents/2003-speech-reinbothe_en.htm)); FRANCISCO JAVIER CABRERA BLÁZQUEZ, PRIVATE COPYING LEVIES AT THE CROSSROADS (2011), available at [http://www.obs.coe.int/oea\\_publ/iris/iris\\_plus/iplus4LA\\_2011.pdf.en](http://www.obs.coe.int/oea_publ/iris/iris_plus/iplus4LA_2011.pdf.en).

148. Ernesto, *uTorrent Helps Artists Monetize Free Content*, TORRENTFREAK (July 24, 2012), <http://torrentfreak.com/utorrent-helps-artists-monetize-free-content-120724/>. BitTorrent, Inc., the parent company of a BitTorrent client called uTorrent, has been experimenting with advertising models that would allow artists to monetize file sharing. *Id.* For instance, in 2012 BitTorrent offered to “promote a bundle of free content” to the site’s 150 million active monthly users, including the artist’s work and a piece of sponsored software that can be installed as an option. *Id.* See also Cameron Scott, *BitTorrent Could Share Ad Revenue With Artists and Digital Content Producers*, TECHWORLD (July 26, 2012), <http://news.techworld.com/mobile-wireless/3372373/bittorrent-could-share-ad-revenue-with-artists-and-digital-content-producers/>. If the user installs the free software, both the artist and BitTorrent will get a cut of the proceeds. *Id.* In another experiment, BitTorrent partnered up with a digital marketing firm, Fame House, to promote a well-known electronic music artist Pretty Lights, by offering a bundle file of the artist’s songs and a video for free on BitTorrent. Simon Owens, *BitTorrent Courts the Entertainment Industry: The File-Sharing Protocol Aims to Convert Its Users into Paying Customers*, U.S. NEWS & WORLD REP. (Feb. 11, 2013), <http://www.usnews.com/news/articles/2013/02/11/bittorrent-courts-the-entertainment-industry>. The results were remarkable:

Within months, the file had surpassed 6 million downloads worldwide. Pretty Lights’ E-mail list had increased by 60,000, his Facebook page by 30,000 likes, and his website traffic increased by more 700 percent. In terms of the value of 80,000 new fans . . . if . . . the average click-through rate in an E-mail is 10 percent, that means you just got about 8,000 new people who are going to buy something at some point. The value of that in a year? That might be \$80,000 a year, \$100,000 a year. It might be much more than that.

*Id.* (internal quotations omitted).

visits, BitTorrent has a very large advertising potential. For instance, compare BitTorrent's 150 million visitors per month with Wikipedia's 76.3 million, Google's 173 million, Facebook's 153 million, and YouTube's 128 million.<sup>149</sup> Although Facebook has fewer visitors per month than BitTorrent, it far outstrips BitTorrent in revenue.<sup>150</sup> Indeed, Facebook sells about \$1 billion worth of advertising every quarter, which is about \$333 million per month;<sup>151</sup> BitTorrent only generates \$15 to \$20 million.<sup>152</sup> If file sharing is legalized, more companies will want to advertise on sites like BitTorrent, which will increase not only the revenue potential generated by ads, but also the number of users. Part of the advertising revenue from this increased traffic can be shared with content creators.

Following the old business model of suing alleged infringers will soon prove unprofitable because courts are increasingly disillusioned with plaintiffs' attempts at joinder and have already begun to sever John Doe defendants.<sup>153</sup> BitTorrent sites, however, continue to thrive and generate new circumvention techniques that will enable users to avoid blockades and strike schemes. In the meantime, since copyright trolls continue to abuse the legal system, we need to find a viable solution that is fair to both artists and consumers.

*Violeta Solonova Foreman* \*

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149. John Burn-Murdoch, *US Web Statistics Released for May 2012: Which Sites Dominate, and Where Do We Go for Online News*, GUARDIAN (June 22, 2012), <http://www.guardian.co.uk/news/datablog/2012/jun/22/website-visitor-statistics-nielsen-may-2012-google>.

150. Jim Edwards, *How Facebook's Ad Revenue Could Top Out at \$10 Billion*, BUSINESS INSIDER (Feb. 17, 2012), [http://articles.businessinsider.com/2012-02-17/news/31070446\\_1\\_facebook-advertising-total-ad-revenue-mobile-advertising](http://articles.businessinsider.com/2012-02-17/news/31070446_1_facebook-advertising-total-ad-revenue-mobile-advertising).

151. *Id.*

152. Ernesto, *uTorrent Becomes Ad-Supported to Rake in Millions*, TORRENTFREAK (Aug. 11, 2012), <http://torrentfreak.com/utorrent-becomes-ad-supported-to-rake-in-millions-120810/>.

153. *Boy Racer, Inc. v. Does 1-60*, No. C 11-01738 SI, 2011 U.S. Dist. LEXIS 92994, at \*11 (N.D. Cal. Aug. 19, 2011); *Boy Racer v. Does 1-52*, No. 11-CV-2329-PSG, 2011 U.S. Dist. LEXIS 58345, at \*4 (N.D. Cal. May 31, 2011); *Boy Racer v. Does 1-71*, No. 11-CV-1958-PSG, 2011 U.S. Dist. LEXIS 57975, at \*4 (N.D. Cal. May 31, 2011); *Lightspeed v. Does 1-1000*, 10 C 5604, 2011 U.S. Dist. LEXIS 35392, at \*8 (N.D. Ill. Mar. 31, 2011); *IO Group, Inc. v. Doe*, No. C 10-04382 SI, 2011 U.S. Dist. LEXIS 31156, at \*4 (N.D. Cal. Jan. 10, 2011); *IO Group, Inc v. Does 1-9*, No. C 10-03851 SI, 2010 U.S. Dist. LEXIS 133717, at \*11 (N.D. Cal. Dec. 7, 2010); *Fonovisa, Inc. v. Does 1-9*, No. 07-151, 2008 U.S. Dist. LEXIS 27170, at \*21 (W.D. Pa. Apr. 3, 2008); *Laface Records, LLC v. Does 1 - 38*, No. 5:07-CV-298-BR, 2008 U.S. Dist. LEXIS 14544, at \*8 (E.D.N.C. Feb. 27, 2008) (severing claims because of improper joinder); *BMG Music v. Does*, No. 3:06-cv-01579-MHP, 2006 U.S. Dist. LEXIS 53237, at \*7 (N.D. Cal. July 31, 2006); *BMG Music v. Doe 1-203*, No. 04-650, 2004 U.S. Dist. LEXIS 8457, at \*4 (E.D. Pa. Apr. 2, 2004); *Interscope Records v. Does 1-25*, No. 6:04-cv-197-Orl-22DAB, 2004 U.S. Dist. LEXIS 27782, at \*19 (M.D. Fla. Apr. 1, 2004).

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