Two Wrongs Don't Make a Copyright

Mass-Defendant Copyright Infringement Litigation: the Plaintiffs, the Pirates & the People who Pay

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Ah, the internet. At this point, it's hard—if not impossible—to imagine our lives without it. A recent survey from the Pew Research Center found that approximately 77 percent of Americans went online daily; a staggering 26 percent of responders said they were online "almost constantly."[1] This connectivity gives everyone with a smartphone, laptop or tablet the power to access seemingly infinite amounts of information and entertainment options. However, like Thanos with the Infinity Gauntlet,[2] some people will not use this power for good.

Enter BitTorrent: a peer-to-peer file-sharing protocol that allows users to exchange enormous amounts of data in short periods of time.[3] Although there are many productive, legal uses for BitTorrent, it is unsurprising that people have used the file-sharing tool to illegally obtain movies, television shows and other copyrighted content free of charge. Technology has come a long way since a bootlegger would bring his camcorder into a theater to record a movie being shown and sell VHS copies while the movie was still in theaters. File-sharing for illicit purposes is so common, in fact, that many people equate the term BitTorrent with piracy.

In 2010, once BitTorrent had gained popularity, copyright holders of hardcore pornographic films realized an untapped revenue stream: ISP subscribers. These copyright holders (BitTorrent Plaintiffs) filed lawsuits against dozens, hundreds and sometimes even thousands of unnamed "Doe" defendants, identified only by the Internet Protocol (IP) addresses associated with alleged copyright infringement.

The typical mass-defendant infringement suit goes like this: BitTorrent Plaintiffs obtain leave to conduct early discovery and then issue subpoenas to the Internet Service Provider (ISP) that assigned the named IP addresses. Pursuant to those subpoenas, ISPs disclose the identity of the internet subscriber associated with each IP address. Armed with subscriber information, BitTorrent Plaintiffs send the now-identified defendants demand letters, threatening to name them personally in the pending litigation unless they pay a settlement, usually amounting to a few thousand dollars.

Supreme Court Justice Learned Hand once said, "as a litigant I should dread a law suit beyond almost anything else short of sickness and death."[4] Surely Hand would have dreaded a lawsuit *more* than sickness if the subject matter of the litigation was pirated hardcore pornography. One district court has noted that BitTorrent Plaintiffs "rel[y] on the combined threat of substantial statutory damages and the embarrassment of being publicly named

as illegally downloading a pornographic film … [to ensure] at least some of the defendants will settle for perhaps $2,000.00 or $3,000.00—which result comes at minimal cost to the company."[5]

BitTorrent suits are no longer confined to the realm of pornographers. Mass-defendant BitTorrent litigation has become a new business model in and of itself, providing copyright holders a means of realizing significant revenue with very little risk. BitTorrent Plaintiffs avoid paying tens of thousands of dollars in filing fees by joining dozens of unidentified defendants in a single suit, and often obtain expedited settlements or default judgments.[6] This practice has led to courts and scholars to routinely refer to BitTorrent Plaintiffs employing this strategy as "Copyright Trolls," which the District of Massachusetts defined as "an owner of a valid copyright who brings an infringement action 'not to be made whole, but rather as a primary or supplemental revenue stream.'"[7]

But what does this judicial and scholastic skepticism mean for someone who is already receiving demand letters or who has been wrongfully named in a suit? It turns out, very little—until recently, that is.

Although tracing alleged infringing activities to an IP address makes sense as an investigative method, it does not logically support the conclusion that the person who pays the internet bill unlawfully downloaded copyrighted material. Unfortunately, thousands of people across the country have received demands (and, often, paid handsomely), or have been sued based on this logical fallacy. Absent unique, limited circumstances, it is axiomatic that you cannot properly sue someone for the actions of another. A single ISP subscription often serves numerous individuals within a household, not to mention unknown third parties who piggyback on unsecured wireless connections. Moreover, technology has allowed for complex ways to try and mask one's true identity and location on the internet, including IP spoofing, proxies, virtual private networks and good old-fashioned hacking. All of this is to say that an IP address alone is not a foolproof identifier of a specific individual, and it cannot reasonably determine whether that person actually engaged in unlawful conduct.

Courts are beginning to acknowledge this logical disconnect. Recently, in *Cobbler Nevada, LLC v. Thomas Gonzales*,[8] the Ninth Circuit unequivocally stated that the bare allegations made by a BitTorrent Plaintiff were insufficient because one's "status as the registered subscriber of an infringing IP address, standing alone, does not create a reasonable inference that he is also the infringer." In that decision, the Ninth Circuit applied the *Twombly*/*Iqbal* standard and concluded *Cobbler Nevada*'s claim for direct copyright infringement necessarily failed because "simply identifying the IP subscriber solves only part of the puzzle. A plaintiff must allege something more to create a reasonable inference that a subscriber is also an infringer." The *Cobbler Nevada* court further affirmed the lower court's dismissal of a contributory copyright infringement claim because, "without allegations of intentional encouragement or inducement of infringement, an individual's failure to take affirmative steps to police his internet connection is insufficient to state a claim."

Perhaps more importantly, the *Cobbler Nevada* court affirmed an award of attorneys' fees to the prevailing defendant.[9] By making such a clear pronouncement regarding the insufficiency of *Cobbler Nevada*'s allegations, and by affirming award of fees, this ruling will hopefully encourage other improperly-named IP subscribers (and their attorneys) to defend their innocence rather than pay an unwarranted settlement. Questions remain as to whether attorneys' fees are available to defendants who are voluntarily dismissed prior to a judicial ruling on a pending motion to dismiss.[10]

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BitTorrent litigation raises other legal questions and concerns that have yet to (and may never), be addressed. For example, could a claim of infringement be successful if discovery revealed that the BitTorrent Plaintiff initially uploaded the protected content for file-sharing? Does it violate FRCP 11 or legal ethics to send demand letters without first conducting any investigation into whether that specific individual IP subscriber is the likely infringer? Is revenue generated by BitTorrent litigation classified as a component of a property's profit? If not, are third parties whose contracts provide for profit-sharing being wrongfully deprived of compensation? Though these questions are well beyond the scope of this article, they should be asked nonetheless.

Copyright infringement continues to present a real problem for the entertainment industry. The proliferation of peer-to-peer file sharing protocols has undoubtedly contributed to the large economic impact of piracy. However, as the Ninth Circuit recognized in *Cobbler Nevada*, the current state of BitTorrent litigation does not ensure that the people who pay are the actual pirates. Although aggrieved copyright holders are entitled to judicial redress, they must not be able to use litigation to coerce settlements from people who have done nothing other than have internet access. Weighing the competing interests of copyright holders and individual IP subscribers is no easy task, but decisions like *Cobbler Nevada* may help to balance the scales for innocent defendants. Until there is a better way to combat piracy, we should all be sure to secure our internet connections, consume our entertainment legally and try to keep infinite power out of Thanos' hands. NL

1. Pew Research Center, Andrew Perrin and Jingjing Jiang, *About a Quarter of U.S. Adults Say They Are 'Almost Constantly' Online*, http://pewrsr.ch/2FH8dCJ (March 14, 2018).
2. *Avengers: Infinity War* (Marvel Studios 2018).
3. For a more thorough explanation of how BitTorrent works, *see* Forbes.com, Costya Perepelitsa, *How Does BitTorrent Work in Layman's Terms*, https://www.forbes.com/sites/quora/2013/07/24/how-does-bittorrent-work-in-laymans-terms/#6d0538fff04c (last visited, Oct. 10, 2018).
4. L. Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, in 3 Association of the Bar of the City of New York, Lectures on Legal Topics 89, 105 (1926).
5. *Third Degree Films v. Does 1-47*, 286 F.R.D. 188, 197 (D. Mass. 2012). *See also, e.g.*, *Mick Haig Prods. E.K. v. Stone*, 687 F.3d 649 (5th Cir. July 12, 2012).
6. *Safety Point Products, LLC v. Does*, 1:12-CV-2812, 2013 WL 1367078, at *3 (N.D. Ohio Apr. 4, 2013) ("Plaintiff has saved over $67,500 by consolidating its claims into four separate actions.").
7. *Third Degree Films*, 286 F.R.D. 188, at n.1 (*quoting* James DeBriyn, *Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages*, 19 UCLA Ent. L. Rev. 79, 86 (2012)).
8. Case No. 17-35041 (9th Cir. Aug. 27, 2018).
9. Gonzales only sought fees related to the contributory infringement claim, which was the only claim the lower court dismissed with prejudice upon motion.
10. Kleiman is currently involved in litigation addressing this issue. Therefore, the authors have not addressed it in depth here.

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