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Torrent Wars: Copyright trolls, legitimate IP rights, and the need for new rules vetting evidence and to amend the Copyright Act

By Jeffrey Antonelli

A torrent[1] is a technical name for a new way of sharing electronic files across the internet. When the internet was young, people were encouraged to "surf the web" and explore a new way of sharing information across vast distances and in remarkable time. An e-mail from the United States to Europe could receive a reply in a matter of minutes. Electronic files containing a photograph, a document, or even a short movie clip could be downloaded with the click of a mouse. Using a 56k modem connection this often took a few minutes (sometimes an hour or more). Millions became familiar with the progress bar watching it countdown from 0 to 100% complete. Then came Napster, a new software program that allowed faster distribution of those electronic files, opening up the ability to quickly share files with thousands or millions of others.

Today, a program called BitTorrent is spurring a new wave of internet file sharing, and along with it an ocean of online copyright infringement. Those running the program post torrent files on immensely popular websites like the Pirate Bay. While filed to ostensibly catch and stop the online infringers, critics of this practice contend it is really about revenue. Consequently, the blogs on the internet came up with an addition to the English and legal lexicon: the copyright troll.[2]

According to many vocal critics,[3] a cottage industry of enterprising lawyers sprang up not to help the owners of copyrighted works stop online piracy, but to recoup lost income for movies that bombed at the box office. Worse yet, allegedly unethical lawyers are accused of not only using unprofessional tactics to "shake down" and harass alleged infringers[4]—many of whom were actually innocent—but of actually providing the copyrighted content online for BitTorrent distribution in order to induce copyright infringement.[5] Once the consumer used BitTorrent or similar peer-to-peer software to obtain the copyrighted work, the copyright owner's computer network forensics team provided a log of internet addresses (internet protocol addresses, or "IP addresses") to lawyers who filed lawsuits seeking the identity of these individuals. Settlement demand letters then followed. In the case relating to the recently dissolved Prenda law firm of Chicago, the infamous law firm received national attention after Los Angeles federal judge Otis Wright issued what has become known as the "Star Trek" sanctions order,[6] in which Judge Wright accused the lawyers associated with Prenda of "brazen misconduct and relentless fraud," and referred the matter to the United States Attorneys Office, the Criminal Investigation Division of the IRS, and several federal and state bar associations for investigation.

This article provides practical advice for practitioners whose clients are on the receiving end of a summons for a federal copyright infringement lawsuit, or more commonly a call from a head of household who has received a notice from their Internet Service Provider (ISP) stating that a subpoena has been received requiring the ISP to release the subscriber's personal identifying information to the copyright infringement lawsuit's plaintiff. The article concludes by recommending a judicial "screening" process to prevent what the writer has seen as widespread wrongful accusations of copyright infringement, known as false positives, as well as a recommendation to amend the US Copyright Act to reduce the maximum statutory damages from $150,000[7] to $5,000 for consumers who do not distribute the copyrighted work for profit. These recommendations, if implemented, would reduce the extraordinarily high incidence of innocent individuals and families being targeted by copyright troll attorneys; and, likely, also have the effect of constraining new copyright infringing filings to those defendants who refused to pay a settlement demand of hundreds of dollars, rather than the current settlement demands of $2,000 to $20,000 or more currently seen today.

The ISP notice

Typically, the consumer's first notice about a federal copyright lawsuit will be a letter in the mail from their ISP, informing them that a lawsuit has been filed and a subpoena has been received to reveal their personal identity and contact information. The letter informs the consumer that the lawsuit alleges the home's internet connect was observed taking place in a BitTorrent "swarm" on a specific date and time and their Internet Protocol (IP) address was logged in association with this online activity. The ISP will then provide the consumer until a certain date, usually 30 days from the date of the letter, and the opportunity to file objections with

the court. Defendants can request that the subpoena be quashed or vacated, promising not to release the consumer's information to plaintiff's counsel unless and until the judge rules on the motion.

Oftentimes, motions to quash the subpoena are combined with motions to sever the defendant from the complaint if plaintiff has chosen to group a number of defendants into the same pleading (often referred to as "mass joinder" cases due to a previous trend by plaintiffs to attempt to group hundreds, or even thousands of defendants into the same complaint), asking that the subpoena be quashed as a consequence if the court agrees to sever the defendants. As recently noted by Northern Illinois District Judge John Tharpe, Jr., "There is a split of authority[8] nationally and within this district over whether it is appropriate to join[9] in a single lawsuit many anonymous defendants who are alleged to have participated in a single BitTorrent swarm.... The disagreement among the courts centers on the question of whether claims against multiple defendants who participated in the same BitTorrent swarm arise out of the same transaction or series of transactions, as required for joinder under Rule 20(a)(2)(A)."[10] For Judge Tharpe, Jr., at the early stage of discovery, because BitTorrent "requires a cooperative endeavor among those who use the protocol," and because "Plaintiff has limited its complaint to participants who are likely located in this district and who participated in a swarm over a relatively brief time frame....the Court will not *sua sponte* find misjoinder at this time and will grant the

Plaintiff leave of Court to issue the subpoenas it proposes."

For those not in Judge Tharpe's courtroom, the motion to sever and quash the subpoena may also request a protective order be entered allowing the defendant to proceed anonymously if the motion to sever is not granted. In order to have any realistic chance of success, the motion for protective order should only be presented if the underlying copyrighted work is adult in nature. However, in some circumstances it may be appropriate to ask for a protective order even if the copyrighted work is non-adult in nature, particularly if a showing can be made that plaintiff's counsel has acted in a harassing manner in the past once they received the identifying information from the ISP.

The settlement demand letter

In many BitTorrent copyright infringement cases, once plaintiff's counsel receives the consumer's identity information from the ISP, a settlement demand letter is immediately sent. These letters typically rely on citing cases whose outcomes may be outliers or have nothing to do with online infringement. Even when they are related to online infringement the cases cited may be those in which the defendants acted particularly egregiously, not only violating the Copyright Act[11] but also committing perjury and spoliation of evidence resulting in especially high judgments.[12] For example, in the first reported BitTorrent case to go to trial, *Malibu Media v. Does* (EDPA), in addition to the defendant admitting at the eleventh hour before trial he actually *did* commit copyright infringement, he also then admitted that he had lied to the court in proclaiming his innocence, and tried to cover it up in wiping his computer hard drive clean. To many observers including the writer, this "bellwether" trial appears to have been a dud because there was no cross examination of the witnesses put on by plaintiff. Cross examination is an element most attorneys consider essential to the adversarial process and the truth-seeking purpose of trial. Yet, these cases and the settlement demand letters which cite them, understandably make clients extremely anxious even if they did not commit any copyright infringement. These letters usually state the consumer can make it all go away for a settlement payment, usually in the range of $2,000 to $5,000.[13]

To settle or fight

It is no secret that litigation is expensive, and that fact is often used by plaintiffs as a factor in determining how much to demand in settlement. For an *innocent* defendant to choose not to pay a settlement of a few thousand dollars, and instead pay his or her attorney potentially tens of thousands of dollars or more in legal fees, clearly more than financial incentives must be at play. Often times, innocent defendants will pay a settlement of $2,000 or so rather than live through the ordeal of fighting a lawsuit and paying that amount of money many times over for legal defense. Yet sometimes innocent parties are sometimes so angered at being named that even after full disclosure by their counsel as to the costs of competent defense, they will decide to fight rather than to settle.[14] Of course, this dynamic often changes when the settlement demanded is closer to $10,000 or more, which occurs in cases of multiple alleged infringements by a copyright holder. Clients must be clearly advised that, strictly speaking in terms of money, it is likely to cost far less to settle than it is to defend the case. And, although the Copyright Act's Section 505 expressly allows attorneys fees to be awarded to the prevailing party, including the defendant,[15] the award of attorneys fees is discretionary, not absolute[16]. Furthermore, with the civil burden of proof being mere preponderance of the evidence rather than beyond a reasonable doubt or a clearly convincing standard, it is entirely possible that a judge or jury could find in favor of the plaintiff even when there is no more evidence that defendant committed the copyright infringement other than the plaintiff's proof that defendant's IP address was logged in a BitTorrent swarm.

Evidentiary problems—The failure to control for "false positives"

The computer science literature and federal courts across the country have cited problems with the reliability of BitTorrent copyright plaintiffs' methods of so-called identification of infringers. For example, a 2008 study, "*Challenges and Directions for Monitoring P2P File Sharing Networks – or – Why My Printer Received a DMCA Takedown Notice*"[17] found that practically any Internet user can be framed for copyright infringement: "By profiling copyright enforcement in the popular BitTorrent file sharing system, we were able to generate hundreds of real DMCA takedown notices for computers at the University of Washington that never downloaded nor shared any content whatsoever." "Further, we were able to remotely generate complaints for nonsense devices including several printers and a (non-NAT) wireless access point." "Our results demonstrate several simple techniques that a malicious user could use to frame arbitrary network endpoints." These results were affirmed years later in a study by the same authors, *The Unbearable Lightness of Monitoring: Direct Monitoring in BitTorrent*, <www.cs.bham.ac.uk/~tpc/Papers/P2PMonitor.pdf> accessed on March 11, 2013.

Courts, too, are cognizant of the fact that not all IP addresses point to an actual infringer. *See, e.g., Digital Sin, Inc. v. Does 1-176*, 279 F.R.D. 239, 242 (S.D.N.Y. 2012) (estimating

that 30% of the individuals whose names were disclosed to plaintiffs did not download the copyrighted material). The court in *SBO Pictures* stated: "the ISP subscriber to whom a certain IP address was assigned may not be the same person who used the internet connection for illicit purposes."[18] Similarly, *In re Bittorrent Adult Film Copyright Infringement Cases*,[19] the district court explained that 'it is no more likely that the subscriber to an IP address carried out a particular computer function ... than to say an individual who pays the telephone bill made a specific telephone call."[20] The court explained that due to the increasing popularity of wireless routers, it is even more doubtful that the identity of the subscriber to an IP address correlates to the identity of infringer who used the address.[21]

The Honorable Harold. A. Baker of the Central District of Illinois has stated, "Where an IP address might actually identify an individual subscriber and address[,] the correlation is still far from perfect.... The infringer might be the subscriber, someone in the subscriber's household, a visitor with her laptop, a neighbor, or someone parked on the street at any given moment."[22] Judge Baker was accurately articulating that IP subscribers are not necessarily copyright infringers,[23] and referred to an MSNBC article by Carolyn Thompson of a raid by federal agents on a home that was linked to downloaded child pornography. "Agents eventually traced the downloads to a neighbor who had used multiple IP subscribers' Wi-Fi connections (including a secure connection from the State University of New York)."[24]

The need for a court screening process

In BitTorrent copyright litigation, the connection between an IP address, an ISP subscriber, and the actual infringer is even more tenuous than in those situations illustrated in the child pornography raid above (where the problem is a "hijacked" wireless internet connections by a neighbor). In a nutshell, the additional problem posed in identifying copyright infringers in BitTorrent litigation is identity theft, where the infringer who is determined not to get caught simply fakes (or frames) the IP address of the computer account he or she is using.[25]

Much like the individual who wishes to get a job but has a criminal history and therefore uses a fake social security number in his or her employment application, in BitTorrent swarms, an IP address is often "made up" by the actual infringer through easily obtained software. The problem is, therefore, that the "made-up" IP address just happens to actually belong to someone else when the infringer is committing the infringer - possibly your client.

The writer believes that this unacceptably high incidence of identity theft, referred to in the computer science literature as "false positives", poses a serious due process problem and some technological screening process must be used by the court prior to copyright plaintiffs being granted leave to issue Rule 45 subpoenas to the ISPs to identify the accountholder associated with the IP address. Somewhat analogous to the grand jury in criminal cases, this screening process would be a vetting of the technical evidence presented by the plaintiff just as a prosecutor must present evidence to a grand jury prior to an indictment being issued.

This court screening process can be added to Section 502 (Injunctions), Section 503 (Impounding and disposition of infringing articles) and Section 504(Damages and profits) in a fashion similar to what the Maryland District Court has done with all cases filed by copyright plaintiff Malibu Media.[26] Maryland has appointed Professor William Hubbard, a member of the faculty at the University of Baltimore School of Law, who teaches copyright and intellectual property law, to serve as a Master in the Malibu cases.[27] When a copyright lawsuit is filed by Malibu Media, procedures are followed to, inter alia, a) allow the Master to obtain information from the ISP, b) allow the Subscriber to provide the Master with information to enable the Master to make a preliminary recommendation whether a plausible claim for copyright infringement may be brought against the Subscriber, and c) for the Master to makes a recommendation that a factual basis exists, or does not exist, for Malibu to assert a plausible claim for relief against a Subscriber for copyright infringement.

Even aside from the allegations that some unethical attorneys may actually be "seeding" their own copyrighted works online to induce others to download the work and then be sued later,[28] it is fundamentally unfair that innocent individuals and families are currently being subjected to the unnecessary worry and expense of being targeted by copyright trolls starting with the notice of subpoena from the ISPs, perhaps based on flimsy evidence. A court screening process, perhaps like the Maryland District Court's Master, is a necessity to prevent the current troublesome number of innocent individuals and families from continuing to be subjected to claims of online copyright infringement.

The need to amend the Copyright Act

Most people seem to agree that the average consumer who wrongfully obtains a copyrighted work should be subjected to the risk of being punished by a monetary fine. However, none of these BitTorrent copyright cases involve people attempting to redistribute the work for a profit. It seems incredibly unfair to subject consumers who are alleged to have downloaded a single movie or song on the internet for private viewing or listening purposes to be exposed to a potential $150,000 statutory damages award, plus attorneys fees as provided in Section 504(c)(2). In order to present the potential for a proportional remedy for non-profiteering copyright infringement by a consumer, the writer suggests amending the Copyright Act to a maximum of $5,000 statutory damages where willfulness is demonstrated, and $500 if willfulness is not demonstrated.(Change Section 504(c)(1)'s text from "an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, *in a sum of not less than $750 or more than $30,000 as the court considers just*" (italics added) to "an award of statutory damages for all infringements involved in the action, *when no monetary gain was intended by the infringement* with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, *in a sum of not less than $750 or more than $500 as the court considers just*." Change Section 504(c)(2)'s text to "In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $150,000. *However, if no monetary gain was intended by the infringement, the court may only increase the award of statutory damages to a sum of not more than $5,000.*"

This cap on damages for non-profit-motivated copyright infringements may reduce the number of the more frivolous copyright trolling lawsuits and, at the very least, reduce

the settlement amounts paid by those innocent defendants who just don't want to deal with a lawsuit down from thousands of dollars, to just hundreds of dollars.

Conclusion

The problems caused by the wave of BitTorrent copyright litigation flooding the federal courts is a classic case of the law needing to catch up to the current state of technology. In addition to the need to curb abuses and avoid burdening innocent people from becoming potential defendants to federal litigation, the Copyright Act should be amended to reflect the reality that few people believe a consumer should be at risk of a $150,000 statutory damage award for downloading a copyrighted movie, electronic book, or piece of software when there is no intent on distribution for profit. For all of these reasons, it is clearly time to modernize the "antiquated" copyright laws Judge Wright has so succinctly described.[29] ■

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1. In the BitTorrent file distribution system, a torrent file is a computer file that contains metadata about files and folders to be distributed, and usually also a list of the network locations of trackers, which are computers that help participants in the system find each other and form efficient distribution groups called *swarms*. A torrent file does not contain the content to be distributed; it only contains information about those files, such as their names, sizes, folder structure, and cryptographic hash values for verifying file integrity. Depending on context, a torrent may be the torrent file or the referenced content. Torrent files are normally named with the extension *.torrent*, as in *MyFile.torrent*. <http://en.wikipedia.org/wiki/BitTorrent_protocol>, accessed on August 6, 2013.

2. <http://en.wikipedia.org/wiki/Copyright_troll>

3. See, eg., bloggers at <fightcopyrighttrolls.com> and <dietrolldie.com>

4. Jason R. LaFond, *Personal Jurisdiction and Joinder in Mass Copyright Troll Litigation* 71 Md. L. Rev. Endnotes 51 (2012) *citing Raw Films, Ltd. v. Does 1–32*, No. 3:11CV532-JAG, 2011 WL 6182025, at *2–3 (E.D. Va. Oct. 5, 2011).

5. *See, e.g.*, Tim Worstall, "Quite Amazing, Prenda Law Was Seeding The Torrent Sites It Then Sues People For Downloading From," Forbes, Aug. 21, 2013, <http://www.forbes.com/sites/timworstall/2013/08/21/quite-amazing-prenda-law-was-seeding-the-torrent-sites-it-then-sues-people-for-downloading-from/>.

6. *Ingenuity 13, LLC v John Doe*, 2012-cv-0833 CDCA, entered May 6, 2013.

7. 17 USC §504(c).

8. *Compare, e.g., Malibu Media, LLC v. Does 1-6*, --- F.R.D ----, 2013 WL 2150679, *11 (N.D. Ill. May 17, 2013) (allowing joinder); *Pacific Century Int'l v. Does 1-31*, No. 11 C 9064, 2012 WL 2129003, *3 (N.D. Ill. June 12, 2012) (same); *First Time Videos, LLC v. Does 1-76*, 276 F.R.D. 254, 257 (N.D. Ill. 2011) (same); *with Malibu Media, LLC v. Reynolds*, No. 12 C 6672, 2013 WL 870618, *14 (N.D. Ill. Mar. 7, 2013) (rejecting joinder); *Digital Sins, Inc. v.* 1 A "MAC address" is a unique number assigned to the hardware of a particular computer or other device. *United States v. Schuster*, 467 F.3d 614, 618 n. 1 (7th Cir. 2006). Case: 1:13-cv-04901 Document #: 10 Filed: 08/20/13 #:64 5 *Does 1-245*, No. 11 C 8170, 2012 WL 1744838, *2 (S.D.N.Y. May 15, 2012) (same); *In re BitTorrent Adult Film Copyright Infringement Cases*, No. 11 C 3995, 2012 WL 1570765, *11 (E.D.N.Y. May 1, 2012) (same).

9. See, Fed. R. Civ. P. 20(a)(2)(A)

10. *Osiris Entertainment LLC v. Does* 1-38, 13-cv-04901 NDIL, August 20, 2013

11. 17 USC 101, et seq.

12. See, eg., *Malibu Media v. Does*, Case No. 12-cv-02088 (PAED), where the last remaining defendant was hit with a judgment exceeding $100,000 in addition to plaintiff's attorney's fees.

13. "...[Plaintiffs then] offer to settle—for a sum calculated to be just below the cost of a bare-ones defense." *Ingenuity 13 LLC v. John Doe*, 2:12-cv-8333 CDCA, currently on appeal.

14. Gregory S. Mortenson, BitTorrent Copyright Trolling: A Pragmatic Proposal for a Systemic Problem, 43 SETON HALL L. REV. 1105, 1111 (May 30, 2013).

15. 17 USC §505

16. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994)

17. "*Challenges and Directions for Monitoring P2P File Sharing Networks – or –Why My Printer Received a DMCA Takedown Notice*" coauthored by professors Tadayoshi Kohno and Arvind Krishnamurthy of the University of Washington's Department of Computer Science and Engineering

18. *SBO Pictures, Inc.*, *supra*, 2011 WL 6002620, at *3

19. *In re Bittorrent Adult Film Copyright Infringement Cases*, 2012 WL 1570765, at *3 13 (E.D.N.Y. May 1, 2012)

20. *Id.*

21. *Id.*

22. *VPR Internationale v. Does 1-1,017*, No. 11-02068 (ECF Doc. 15 at 2), 2011 WL 8179128 (C.D. Ill. Apr. 29, 2011).

23. *Id.*

24. *See* Carolyn Thompson, *Bizarre Pornography Raid Underscores Wi-Fi Privacy Risks* (April 25, 2011), <http://www.msnbc.msn.com/id/42740201/ns/technology_and_science-wireless/>. Id.

25. *The Unbearable Lightness of Monitoring: Direct Monitoring in BitTorrent*, <www.cs.bham.ac.uk/~tpc/Papers/P2PMonitor.pdf> *accessed on March 11, 2013.*

26. *In re Malibu Cases*, 12-cv-1195, entered May 16, 2013

27. Id.

28. Tim Worstall, "Quite Amazing, Prenda Law Was Seeding The Torrent Sites It Then Sues People For Downloading From," Forbes, Aug. 21, 2013, <http://www.forbes.com/sites/timworstall/2013/08/21/quite-amazing-prenda-law-was-seeding-the-torrent-sites-it-then-sues-people-for-downloading-from/>.

29. "They've discovered the nexus of antiquated copyright laws, paralyzing social stigma, and unaffordable defense costs. And they exploit this anomaly by accusing individuals of illegally downloading a single pornographic video. Then they offer to settle—for a sum calculated to be just below the cost of a bare-bones defense. For these individuals, resistance is futile; most reluctantly pay rather than have their names associated with illegally downloading porn. So now, copyright laws originally designed to compensate starving artists allow starving attorneys in this electronic-media era to plunder the citizenry." *Ingenuity 13 LLC v. John Doe*, 2:12-cv-8333 CDCA, currently on appeal.

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