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An Uncomfortable Threesome: Permissive Party Joinder, BitTorrent, and Pornography

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AN UNCOMFORTABLE THREESOME: PERMISSIVE PARTY JOINDER, BITTORRENT, AND PORNOGRAPHY

ABSTRACT

In recent years, media companies have struggled to combat the rampant growth of Internet piracy and the sharing of their copyrighted works. Lately, some copyright holders have taken to suing hundreds of file-sharers in a single suit. These suits were initially unsuccessful, as courts denied joinder of the file-sharers. The rise of a unique file-sharing program called BitTorrent, however, has caused some courts to give copyright holders a new opportunity to successfully file and settle these mass infringement lawsuits. A central issue in many of these suits is whether joinder of the many file-sharing users is appropriate. Disagreement among courts over this issue has centered around whether a copyright holder's claims against a group of BitTorrent users "aris[e] out of the same transaction, occurrence, or series of transactions or occurrences," as is required for joinder by Rule 20(a)(2) of the Federal Rules of Civil Procedure. This Comment examines the split that has occurred among courts in analyzing this joinder issue and argues that joinder is not appropriate in these suits.

Media companies bring these suits on the pretext of deterring copyright infringement, but, in reality, the companies are using these suits as massive collection schemes to coerce defendants to settle, without ever intending to litigate the suits. This Comment proposes that courts should sever all but one defendant from these mass copyright infringement suits against BitTorrent users for three reasons. First, recently there has been a shift toward heightened pleading requirements based on the plausibility of the pleadings. In analyzing the joinder issue in these file-sharing suits, courts have already implicitly considered the plausibility that the defendants participated in the same transaction or occurrence. This consideration has allowed courts permitting joinder in BitTorrent suits to distinguish BitTorrent cases from earlier cases involving other file-sharing programs. These courts have greatly overestimated this plausibility in suits involving BitTorrent. Second, in allowing joinder, courts have not properly applied the purposes and policies behind permissive party joinder and the Federal Rules of Civil Procedure. Finally, these courts have also effectively allowed copyright holders to

circumvent class action requirements by allowing them to bring class action–like suits using permissive party joinder under Rule 20.

INTRODUCTION

District courts across the country have experienced an influx of copyright infringement lawsuits aimed at mass groups of peer-to-peer (P2P) file-sharing users. In 2010 alone, plaintiffs filed 80 copyright infringement lawsuits involving nearly 100,000 P2P users.[1] These suits have continued unabated, with more than 220,000 P2P users sued as anonymous defendants from mid-2010 to early 2012.[2] A single suit can have as many as 5,000 file-sharing users.[3] The plaintiff initially names the users as John Doe defendants because the plaintiff can only identify the alleged infringers by their Internet Protocol (IP) addresses.[4] Soon after filing suit, the plaintiff moves for expedited discovery to obtain the names and addresses of the alleged infringers from the Internet service providers (ISPs) servicing the IP addresses.[5] The plaintiff then notifies the users of the suit and names them as defendants.[6]

The suits often "offer" up to a $3,000 settlement for each user.[7] This settlement offer is notably less than the likely cost for each user to defend against the suit.[8] This trend has raised concerns among judges that these lawsuits are serving as vehicles for companies to make a quick buck rather

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[1] Matthew J. Schwartz, *Mass P2P Lawsuits Targeted Nearly 100,000 Last Year*, INFORMATIONWEEK (Feb. 7, 2011, 12:36 PM), http://www.informationweek.com/internet/policy/mass-p2p-lawsuits-targeted-nearly-100000/229201274.

[2] *See* Jason Koebler, *Porn Companies File Mass Piracy Lawsuits: Are You at Risk?*, U.S. NEWS & WORLD REP. (Feb. 2, 2012), //www.usnews.com/news/articles/2012/02/02/porn-companies-file-mass-piracy-lawsuits-are-you-at-risk.

[3] *See, e.g.*, On the Cheap, LLC v. Does 1–5011, 280 F.R.D. 500 (N.D. Cal. 2011); Voltage Pictures, LLC v. Does 1–5000, 818 F. Supp. 2d 28 (D.D.C. 2011).

[4] *See, e.g.*, Third Degree Films, Inc. v. Does 1–131, 280 F.R.D. 493, 495 (D. Ariz. 2012); Digital Sin, Inc. v. Does 1–176, 279 F.R.D. 239, 241 (S.D.N.Y. 2012); First Time Videos, LLC v. Does 1–76, 276 F.R.D. 254, 255–56 (N.D. Ill. 2011). An IP address is a unique number assigned to each device on a network to identify the device. The number takes the form of x.x.x.x, with "x" representing numbers from 0 to 255. *See IP Address*, WEBOPEDIA, http://www.webopedia.com/TERM/I/IP_address.html (last visited May 3, 2014).

[5] *See, e.g.*, Hard Drive Prods., Inc. v. Does 1–188, 809 F. Supp. 2d 1150, 1152 (N.D. Cal. 2011); *First Time Videos*, 276 F.R.D. at 255–56; Call of the Wild Movie, LLC v. Does 1–1062, 770 F. Supp. 2d 332, 340 (D.D.C. 2011).

[6] *See, e.g.*, Patrick Collins, Inc. v. Does 1–22, No. 11-cv-01772-AW, 2011 WL 5439005, at *1 (D. Md. Nov. 8, 2011) ("[T]he Court granted Plaintiff's Motion to Expedite Discovery . . . so that Plaintiff can discover the identity of the defendants and serve them with process.").

[7] Koebler, *supra* note 2 ("The demands are usually the same. Pay a settlement of up to $3,000 or face as much as $150,000 in fines.").

[8] *See* Keegan Hamilton, *Porn, Piracy, & BitTorrent*, SEATTLE WEEKLY (Aug. 9, 2011, 12:00 AM), http://www.seattleweekly.com/home/875321-129/story.html ("To fight the case in court would set [the defendant] back thousands of dollars in attorney's fees. . . . 'The sad part about this entire porn thing is it will cost more to go to a judge,' [the defendant] says. 'At the end of the day, I'll probably settle and pay the fee to make this go away.'").

than furthering the purposes of copyright law.[9] Others have suggested that the mass suits are a way to avoid the standard per-case $350 filing fee for federal courts.[10] Yet those on the plaintiffs' side insist that the suits are nothing more than "effective enforcement and litigation of intellectual property law."[11]

The large number of defendants in each suit and the nature of the file-sharing systems have created several procedural issues, including those of personal jurisdiction and the proper application of the Federal Rules of Civil Procedure. One of the more common issues courts have grappled with is the application of Rule 20: Permissive Joinder of Parties to the numerous anonymous defendants joined in each suit. In cases that involved standard P2P networks, courts emphatically rejected joinder of large numbers of defendants under Rule 20.[12] However, the unique characteristics of BitTorrent, the world's most popular P2P network,[13] have led some courts to break away from the traditional practice of severing all but one defendant in mass copyright lawsuits against BitTorrent users. Courts are divided over whether Rule 20 allows plaintiffs to sue BitTorrent users collectively in one suit.[14] Courts have either

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[9] *See* On the Cheap, LLC v. Does 1–5011, 280 F.R.D. 500, 504 n.6 (N.D. Cal. 2011) ("If all the concerns about these mass Doe lawsuits are true, it appears that the copyright laws are being used as part of a massive collection scheme and not to promote useful arts.").

[10] Schwartz, *supra* note 1.

[11] Nate Anderson, *New Tactic in Mass File-Sharing Lawsuit: Just Insult the EFF*, ARS TECHNICA (Jan. 31, 2012, 4:11 PM), http://arstechnica.com/tech-policy/2012/01/new-file-sharing-lawsuit-tactic-just-insult-eff-when-it-tries-to-intervene/ (quoting a brief filed by the plaintiff in a case between Hard Drive Productions and 1,500 John Doe defendants) (internal quotation mark omitted).

[12] *See* IO Grp., Inc. v. Does 1–19, No. C 10-03851 SI, 2010 WL 5071605, at *3 (N.D. Cal. Dec. 7, 2010) ("Allegations that defendants used the same peer-to-peer network to infringe a plaintiff's copyrighted works, however, have been held to be insufficient for joinder of multiple defendants under Rule 20."); Fonovisa, Inc. v. Does 1–9, No. 07-1515, 2008 WL 919701, at *5 (W.D. Pa. Apr. 3, 2008) ("Other district courts faced with the same allegations to connect the defendants have concluded those allegations were insufficient to satisfy the transactional requirement [of Rule 20(a)(2)]."); Joshua M. Dickman, *Anonymity and the Demands of Civil Procedure in Music Downloading Lawsuits*, 82 TUL. L. REV. 1049, 1106 (2008) ("The courts that have reached the merits of [the joinder] question have answered it in the negative."). *But see* Arista Records LLC v. Does 1–27, 584 F. Supp. 2d 240, 251 (D. Me. 2008) (finding joinder appropriate at least until the defendants are named and served); Arista Records LLC v. Does 1–19, 551 F. Supp. 2d 1, 11–12 (D.D.C. 2008) ("[T]he Court also finds that [the joinder] inquiry is premature without first knowing Defendants' identities and the actual facts and circumstances associated with Defendants' conduct.").

[13] ENVISIONAL LTD., TECHNICAL REPORT: AN ESTIMATE OF INFRINGING USE OF THE INTERNET 7 (2011); Jason R. LaFond, *Personal Jurisdiction and Joinder in Mass Copyright Troll Litigation*, 71 MD. L. REV. ENDNOTES 51, 54 (2012), http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1019&context=endnotes.

[14] *Compare* Patrick Collins, Inc. v. Does 1–21, 282 F.R.D. 161, 167 (E.D. Mich. 2012), Digital Sin, Inc. v. Does 1–176, 279 F.R.D. 239, 244 (S.D.N.Y. 2012), Liberty Media Holdings, LLC v. Swarm Sharing Hash File, 821 F. Supp. 2d 444, 451 (D. Mass. 2011), First Time Videos, LLC v. Does 1–76, 276 F.R.D. 254, 257 (N.D. Ill. 2011), *and* Call of the Wild Movie, LLC v. Does 1–1062, 770 F. Supp. 2d 332, 343 (D.D.C. 2011),

severed all but one defendant,[15] or have allowed the case to proceed against all defendants listed in a plaintiff's complaint.[16] Some courts have allowed joinder pending developments in the next phase of the litigation process.[17]

This Comment argues that joinder of numerous anonymous defendants is not appropriate in copyright infringement suits brought against BitTorrent users. Part I of this Comment explains how BitTorrent operates to provide an understanding of why applying the principles of permissive party joinder to BitTorrent has caused such consternation among judges. Part II begins with a brief history of media groups' lawsuits against P2P networks and users and an overview of the requirements of Rule 20. This Part then examines how, although courts rejected joinder in suits involving users of pre-BitTorrent P2P networks, some courts have distinguished BitTorrent from these networks to permit joinder in suits against BitTorrent users. Specifically, Part II explains the courts' differing interpretations of a "series of transactions or occurrences"[18] and their weighing of the purposes and policies behind the Federal Rules of Civil Procedure.

Part III argues that courts should sever all but one of the anonymous defendants in mass copyright infringement suits against BitTorrent users. This Part first examines the recent rise of heightened pleading requirements, with an emphasis on plausible pleadings, in *Bell Atlantic Corp. v. Twombly*[19] and *Ashcroft v. Iqbal*.[20] Next, this Part explains how courts have implicitly considered plausibility to justify permitting joinder in suits involving BitTorrent, despite denying joinder in suits involving other P2P networks. Courts have overestimated this plausibility: suits against BitTorrent users should not be so distinguished from suits against users of other P2P networks. The plausibility does not rise to the level established in *Twombly* and *Iqbal*. Furthermore, the purposes and policies behind the Federal Rules of Civil

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with Third Degree Films, Inc. v. Does 1–131, 280 F.R.D. 493, 498 (D. Ariz. 2012), Liberty Media Holdings, LLC v. BitTorrent Swarm, 277 F.R.D. 669, 671–72 (S.D. Fla. 2011), *On the Cheap*, 280 F.R.D. at 502–03, *and* Hard Drive Prods., Inc. v. Does 1–188, 809 F. Supp. 2d 1150, 1163–64 (N.D. Cal. 2011).

15 *See Third Degree Films*, 280 F.R.D. at 498–99; *BitTorrent Swarm*, 277 F.R.D. at 671–72; *On the Cheap*, 280 F.R.D. at 502–03; *Hard Drive Prods.*, 809 F. Supp. 2d at 1163–65.

16 *See Patrick Collins*, 282 F.R.D. at 167; *Digital Sin*, 279 F.R.D. at 244; *Swarm Sharing Hash File*, 821 F. Supp. 2d at 451; *First Time Videos*, 276 F.R.D. at 257; *Call of the Wild Movie*, 770 F. Supp. 2d at 343.

17 *See Digital Sin*, 279 F.R.D. at 244; *First Time Videos*, 276 F.R.D. at 258; W. Coast Prods., Inc. v. Does 1–5829, 275 F.R.D. 9, 16 (D.D.C. 2011); Voltage Pictures, LLC v. Does 1–5000, 818 F. Supp. 2d 28, 40 (D.D.C. 2011).

18 FED. R. CIV. P. 20(a)(2).

19 *See* 550 U.S. 544, 555 (2007).

20 *See* 556 U.S. 662, 684 (2009).

Procedure and Rule 20 counsel against permitting joinder in suits against BitTorrent users. Part III concludes by exploring the concern that, by attempting to join large numbers of BitTorrent users in a single suit, copyright holders are trying to get around the requirements for bringing class actions, which they would be unable to satisfy.

I. AN INTRODUCTION TO THE BITTORRENT FILE-SHARING PROTOCOL

To fully understand why courts have struggled applying Rule 20 to copyright infringement suits against large numbers of BitTorrent users, it is important to understand exactly how a P2P file-sharing system, such as BitTorrent, works. This Part first explains how P2P technology works generally, and then how BitTorrent works.

A. P2P Technology

P2P technology is a "software architecture" that allows for the "decentralized" sharing of data files.[21] Instead of individual computers connecting to a centralized server to download files stored on the server, the individual computers connect to one another directly to download files stored on the computers themselves.[22] The individual computers that are connected in this system are known as "peers."[23] The theory behind P2P technology is that decentralizing the sharing process allows for faster transferring of files while also using less bandwidth.[24] There are a variety of P2P file-sharing systems, or "protocols," available today.[25] The protocols are sets of rules regulating how computers within the P2P system "communicate and transfer data with each other."[26] BitTorrent is the most popular of these protocols.[27] Indeed, in 2012 BitTorrent reached 150 million monthly active users worldwide.[28] A 2011

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[21] FTC, PEER-TO-PEER FILE-SHARING TECHNOLOGY: CONSUMER PROTECTION AND COMPETITION ISSUES 3 (2005).

[22] *Id.*

[23] *Id.*

[24] *Id.* Bandwidth is "the capacity to transmit information to and from a computer." *Id.*

[25] Johan Pouwelse et al., *The BitTorrent P2P File-Sharing System: Measurements and Analysis*, 3640 LECTURE NOTES COMPUTER SCI. 205, 205 (2005).

[26] *Glossary*, BITTORRENT, http://www.bittorrent.com/help/manual/glossary (last visited May 3, 2014) [hereinafter *BitTorrent Glossary*].

[27] *See supra* note 13.

[28] Press Release, BitTorrent, BitTorrent and µTorrent Software Surpass 150 Million User Milestone; Announce New Consumer Electronics Partnerships (Jan. 9, 2012), http://www.bittorrent.com/company/about/ces_2012_150m_users.

report estimated that BitTorrent usage accounted for as much as 17.9% of all Internet traffic worldwide.[29]

B. How BitTorrent Works

The driving idea behind BitTorrent is to minimize an individual computer's bandwidth usage without sacrificing the ability for a large number of peers to quickly share large files.[30] BitTorrent accomplishes this by breaking up a data file into smaller parts, called "pieces."[31] Files are usually broken up into thousands of pieces.[32] To download a file through BitTorrent, an individual needs to run a BitTorrent "client," such as µTorrent, which allows users to connect to other peers.[33] A user then downloads a torrent file,[34] which is "[a] small file containing metadata from the [data] file[]," such as a movie, that the user wishes to download.[35] Among this metadata is the IP address of the data file's "tracker," which serves a vital function in the downloading process.[36]

The tracker is a central server that contains information about other peers that have the data file, including the IP addresses of the peers.[37] The tracker updates this information periodically to determine which peers are still connected to the network.[38] Thus, the tracker serves as a list of active peers, called a "swarm,"[39] from which a user can download, and allows a user's computer to connect to these peers.[40] The peers within the swarm transfer the small pieces of the data file to one another.[41] Although the majority of swarms have few or no active peers at all,[42] swarms for popular files can consist of

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29 ENVISIONAL, *supra* note 13, at 2.

30 *The Basics of BitTorrent*, BITTORRENT, http://www.bittorrent.com/help/manual/chapter0201 (last visited May 3, 2014).

31 *Id.*

32 Pouwelse et al., *supra* note 25, at 206.

33 *BitTorrent Glossary*, *supra* note 26.

34 M. Izal et al., *Dissecting BitTorrent: Five Months in a Torrent's Lifetime*, 3015 LECTURE NOTES COMPUTER SCI. 1, 2 (2004).

35 *BitTorrent Glossary*, *supra* note 26.

36 Izal et al., *supra* note 34, at 2.

37 *The Basics of BitTorrent*, *supra* note 30.

38 Izal et al., *supra* note 34, at 2.

39 *BitTorrent Glossary*, *supra* note 26.

40 Izal et al., *supra* note 34, at 2.

41 *Id.*

42 ENVISIONAL, *supra* note 13, at 9; Chao Zhang et al., *Unraveling the BitTorrent Ecosystem*, 22 IEEE TRANSACTIONS ON PARALLEL & DISTRIBUTED SYS. 1164, 1171 (2011) (noting that 82% of swarms analyzed had ten or fewer peers).

thousands, and even tens of thousands, of active peers.[43] The tracker also contains a particular data file's "hash," which is a unique code given to the data file to identify it.[44]

Broadly speaking, a BitTorrent peer participating in a swarm will be doing two things: (1) downloading pieces of the file from other peers in the swarm and (2) uploading the pieces that it already has to peers that need those pieces.[45] BitTorrent only allows each peer to share a file with a small subset of peers in the swarm at once.[46] By default, a particular peer will only allow four other peers to download from it at a time and will "choke," or refuse to upload to, the other peers in the swarm.[47] The subset of peers that a particular peer is sharing with is determined by two main principles: a "tit-for-tat" sharing strategy and "optimistic unchoking."[48]

In the tit-for-tat strategy, a peer uploads to another peer who will reciprocally upload.[49] This strategy is used to encourage peers to share the pieces of files they have already downloaded and discourage "leeching," or downloading without uploading in return.[50] Reciprocal peers who offer the fastest download rates will be unchoked and allowed to download from the peer.[51] The peer will still remain connected to a set number of choked peers in the swarm, but will not upload data to or download data from these choked peers.[52] Every ten seconds, the peer will recalculate the download rates offered by connected peers.[53] If another peer offers a higher download rate than one of

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[43] *See* Mark Scanlon et al., *A Week in the Life of the Most Popular BitTorrent Swarms*, *in* 5TH ANNUAL SYMPOSIUM ON INFORMATION ASSURANCE: CONFERENCE PROCEEDINGS 32, 33 (detecting a swarm of 93,963 peers).

[44] ENVISIONAL, *supra* note 13, at 7.

[45] *The Basics of BitTorrent*, *supra* note 30.

[46] Izal et al., *supra* note 34, at 2.

[47] *Id.*; Bram Cohen, Incentives Build Robustness in BitTorrent 4 (May 22, 2003) (unpublished manuscript), http://www.bittorrent.org/bittorrentecon.pdf.

[48] Izal et al., *supra* note 34, at 2–3; Cohen, *supra* note 47, at 3–4.

[49] Cohen, *supra* note 47, at 4.

[50] Izal et al., *supra* note 34, at 2; *BitTorrent Glossary*, *supra* note 26.

[51] Cohen, *supra* note 47, at 4.

[52] Izal et al., *supra* note 34, at 2; Cohen, *supra* note 47, at 3–4. A BitTorrent user can specify the maximum number of peers in a swarm he wishes to connect to at any given time for a torrent file. *See Bandwidth*, BITTORRENT, http://www.bittorrent.com/help/manual/appendixa0205 (last visited May 3, 2014). A higher number of connections is not necessarily better, and users are advised to limit the maximum number of connections to maximize download speed. *See* Ernesto, *Optimize Your BitTorrent Download Speed*, TORRENTFREAK (June 26, 2006), http://torrentfreak.com/optimize-your-bittorrent-download-speed/; David Hakala, *Maximize BitTorrent P2P Download Speed*, TIPLET (Feb. 24, 2009), http://tiplet.com/tip/maximize-bittorrent-p2p-download-speed/.

[53] Izal et al., *supra* note 34, at 2; Cohen, *supra* note 47, at 4.

the four peers a peer is already connected to, the peer with the lowest rate is choked and the peer with the higher rate joins the subset of unchoked peers.[54] Additionally, every thirty seconds a peer implements an "optimistic unchoke," in which the peer unchokes a connected peer, regardless of the upload rate it offers, and begins to upload to that peer to determine if that peer offers a better download rate than the subset of unchoked peers.[55]

The above principles mean that peers are constantly searching among connected peers for other peers that offer the highest download and upload rates.[56] Swarms can remain very active with many peers for several months, if not years.[57] While the swarm is active, BitTorrent users connect to the network, joining the swarm and creating new connections between peers, or disconnect from the network, leaving the swarm and breaking existing connections.[58] Recall that peers are downloading pieces of the file from one another. Although some peers, known as "seeds," may have the entire file, seeds do not necessarily offer the fastest download speeds.[59] Peers use the tracker to announce to other peers which pieces of the file they have, and a peer will only download from another peer that has a piece that the first peer needs.[60] From which peer a peer is downloading depends on the transfer rates between peers, what pieces the peer needs, and what pieces other peers already have.[61] Thus, which peers are actually transferring data with one another is continuously changing, especially in larger swarms where there are a large number of active peers.[62] This nature of shifting interactions within a swarm of peers has created issues in applying traditional joinder rules to lawsuits against BitTorrent users.

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54 Izal et al., *supra* note 34, at 3.

55 *Id.*; Cohen, *supra* note 47, at 4. This optimistic unchoke is used to "discover[] if currently unused connections are better than the ones being used." *See* Cohen, *supra* note 47, at 4.

56 Izal et al., *supra* note 34, at 2.

57 *See* Zhang et al., *supra* note 42, at 1173.

58 *See* Scanlon et al., *supra* note 43, at 32.

59 *The Basics of BitTorrent*, *supra* note 30.

60 Cohen, *supra* note 47, at 2.

61 *See* Izal et al., *supra* note 34, at 2–3.

62 *See id.* One study of the swarms for 163 torrent files over the course of a week discovered 8,489,287 unique IP addresses participating in the swarms. Scanlon et al., *supra* note 43, at 33.

II. THE APPROACHES OF DISTRICT COURTS TO PERMISSIVE PARTY JOINDER IN SUITS AGAINST BITTORRENT USERS

District courts across the country, and even within the same state, are split as to whether joinder is appropriate in mass copyright infringement lawsuits against BitTorrent users. This Part first describes how suits against P2P users originated. Then it briefly summarizes Rule 20 of the Federal Rules of Civil Procedure, which sets forth the requirements for permissive party joinder. This Part also examines why courts have not permitted joinder of numerous anonymous defendants in suits involving P2P networks other than BitTorrent. This Part concludes by examining the split that exists between courts that permit joinder and courts that do not permit joinder in suits involving anonymous BitTorrent users.

A. A Brief History of P2P Copyright Infringement Suits Before BitTorrent

Initially, copyright holders did not pursue claims against individual users of P2P networks, but instead went after the P2P networks themselves.[63] After finding initial success in shutting down the early P2P network Napster by going after the network itself,[64] copyright owners faced difficulties using copyright infringement lawsuits to shut down more decentralized P2P networks that grew in popularity after the demise of Napster.[65] In response, the Recording Industry Association of America (RIAA) began to sue individual users of P2P networks in 2003.[66] Other copyright owners followed suit.[67]

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[63] *See, e.g.*, A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1095 (9th Cir. 2002); Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd. (*Grokster I*), 259 F. Supp. 2d 1029, 1031 (C.D. Cal. 2003), *aff'd*, 380 F.3d 1154 (9th Cir. 2004) *vacated and remanded*, 545 U.S. 913 (2005); *see also* Dickman, *supra* note 12, at 1055–58; Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1346 (2004) ("[C]opyright owners have mostly sued direct facilitators like Napster; makers of software that can be used to share files . . . ." (footnotes omitted)).

[64] *See A&M Records*, 284 F.3d at 1099. Napster is credited with sparking the growth of downloading music online for free. *See* Brad King, *The Day the Napster Died*, WIRED (May 15, 2002), http://www.wired.com/gadgets/portablemusic/news/2002/05/52540?currentPage=all.

[65] *See Grokster I*, 259 F. Supp. 2d at 1031; Dickman, *supra* note 12, at 1055–56 ("[C]ourts . . . concluded that [second-generation P2P networks] such as Grokster, KaZaA, and Morpheus could *not* be held liable for contributory or vicarious copyright infringement just because they created and distributed software that permitted users to connect to second-generation P2P networks.").

[66] Lemley & Reese, *supra* note 63, at 1346 ("[T]he [RIAA's] recent suits against some actual infringers on [P2P] networks sent shock waves through the legal community."); Sean B. Karunaratne, Note, *The Case Against Combating BitTorrent Piracy Through Mass John Doe Copyright Infringement Lawsuits*, 111 MICH. L. REV. 283, 286 (2012).

[67] Dickman, *supra* note 12, at 1058.

The Supreme Court reopened the possibility for copyright holders to sue the P2P networks themselves with its decision in *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.* (*Grokster III*).[68] The Court held that more decentralized P2P networks could be held liable for copyright infringement if there were evidence that the networks intended, and even promoted, the use of P2P systems as a vehicle for infringing upon copyrights.[69] However, *Grokster III* did not stop copyright holders from continuing to sue individual downloaders.[70] Indeed, the changing technology of P2P protocols has enabled more recent P2P networks, like BitTorrent, to maneuver around the intent test established in *Grokster III*.[71] Copyright holders have since almost exclusively gone after P2P users themselves, suing hundreds, and even thousands, of users in a single suit.[72] These suits have led to disagreement among courts about the application of the requirements of permissive party joinder. Before discussing the split, it will be helpful to briefly discuss the Federal Rules of Civil Procedure, specifically Rule 20.

B. The Federal Rules of Civil Procedure and Permissive Party Joinder

Promulgated in 1938, the Federal Rules of Civil Procedure were the result of an effort to create simplified, uniform procedures for federal courts.[73] Rule 1 reflects the purposes behind the Federal Rules,[74] declaring that the rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."[75] Although parts of the Federal Rules have been amended at various times after their promulgation,[76] Rule 20, which deals with the permissive joinder of parties in a suit, has remained substantively unchanged.[77]

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[68] Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd. (*Grokster III*), 545 U.S. 913, 940–41 (2005); Dickman, *supra* note 12, at 1061.

[69] *Grokster III*, 545 U.S. at 934–35 (2005) ("Thus, where evidence goes beyond a product's characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, . . . [courts] will not preclude liability."); Dickman, *supra* note 12, at 1061.

[70] Dickman, *supra* note 12, at 1062 ("[T]he record companies are simply continuing to sue after *Grokster III*.").

[71] Bryan H. Choi, Note, *The Grokster Dead-End*, 19 HARV. J.L. & TECH. 393, 394, 402–04 (2006) (noting that the disaggregated nature of BitTorrent enables it to escape legal liability in copyright infringement suits).

[72] *See* Hamilton, *supra* note 8; Koebler, *supra* note 2.

[73] 4 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §§ 1003, 1029 (3d ed. 2002).

[74] *Id.* § 1029.

[75] FED. R. CIV. P. 1.

[76] WRIGHT ET AL., *supra* note 73, § 1006.

[77] 7 *id.* § 1651 (3d ed. 2001).

Rule 20(a)(2) specifically addresses permissive joinder of defendants in a suit, and reads:

> Persons . . . may be joined in one action as defendants if: (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any questions of law or fact common to all defendants will arise in the action.[78]

Thus, the rule imposes two requirements that a plaintiff must satisfy to join multiple defendants in a single suit: a transactional requirement and the common question requirement.[79] Courts determine whether the transactional requirement is met on a case-by-case basis.[80] If parties have been improperly joined, Rule 21 states that a court may not dismiss the action.[81] Rather, a court may sever the improperly joined parties.[82]

Initially, the suits against large numbers of file-sharing users involved members of the RIAA targeting users who downloaded music via decentralized P2P networks other than BitTorrent.[83] One suit usually involved several different plaintiffs alleging the infringement of multiple copyrighted works by many downloaders using one of the P2P protocols.[84] Courts addressing the joinder issue in these suits generally found joinder inappropriate,[85] usually based on the allegations in the plaintiffs' complaints

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[78] FED. R. CIV. P. 20(a)(2).

[79] 7 WRIGHT ET AL., *supra* note 73, § 1653.

[80] *See id.* ("Instead of developing one generalized test for ascertaining whether a particular factual situation constitutes a single transaction or occurrence for purposes of Rule 20, the courts seem to have adopted a case-by-case approach."); Douglas D. McFarland, *Seeing the Forest for the Trees: The Transaction or Occurrence and the Claim Interlock Procedure*, 12 FLA. COASTAL L. REV. 247, 247 (2011) ("Many [courts] throw up their hands, muttering darkly about a case-by-case basis.").

[81] FED. R. CIV. P. 21.

[82] *See id.* ("On motion or on its own, the court may at any time, on just terms, add or drop a party.").

[83] *See* Arista Records, LLC v. Does 1–11, No. 1:07-CV-2828, 2008 WL 4823160, at *1 (N.D. Ohio Nov. 3, 2008) ("This action is a typical music downloading lawsuit that Plaintiffs and other members of the [RIAA] have filed across the country."); Karunaratne, *supra* note 66, at 287 (noting that the RIAA's mass lawsuits against copyright infringers predated the BitTorrent lawsuits).

[84] *See, e.g.*, Arista Records LLC v. Does 1–27, 584 F. Supp. 2d 240, 241 (D. Me. 2008); Fonovisa, Inc. v. Does 1–9, No. 07-1515, 2008 WL 919701, at *1 (W.D. Pa. Apr. 3, 2008); LaFace Records, LLC v. Does 1–38, No. 5:07-CV-298-BR, 2008 WL 544992, at *1 (E.D.N.C. Feb. 27, 2008); Elektra Entm't Grp., Inc. v. Does 1–9, No. 04 Civ. 2289(RWS), 2004 WL 2095581, at *1 (S.D.N.Y. Sept. 8, 2004).

[85] *See* IO Grp., Inc. v. Does 1–19, No. C 10-03851 SI, 2010 WL 5071605, at *3 (N.D. Cal. Dec. 7, 2010) ("Allegations that defendants used the same peer-to-peer network to infringe a plaintiff's copyrighted works, however, have been held to be insufficient for joinder of multiple defendants under Rule 20."); *Fonovisa*, 2008 WL 919701, at *5 ("Other district courts faced with the same allegations to connect the defendants have

alone.[86] The plaintiffs' complaints often merely consisted of allegations that several defendants downloaded different copyrighted works.[87] The courts pointed out a lack of allegations that the defendants downloaded from one another,[88] or, more generally, concert of action of any kind by the defendants.[89] The courts explained that "merely committing the same type of violation in the same way does not [sufficiently] link defendants together" to satisfy the transactional requirement of Rule 20(a)(2).[90] Eventually in 2008, the RIAA dropped its strategy of suing individual downloaders, and the number of mass copyright suits against anonymous defendants decreased.[91]

Owners of copyrights, especially those for adult films, have picked up the torch in going after individual users of BitTorrent. Most of these lawsuits in which the court has addressed the joinder issue have proceeded in a similar manner to the RIAA lawsuits.[92] The joinder issue in mass copyright infringement lawsuits against anonymous BitTorrent users arises in the very early stages of the suits. Before filing suit, the plaintiff[93] uses forensic

concluded those allegations were insufficient to satisfy the transactional requirement [of Rule 20(a)(2)]."); Dickman, *supra* note 12, at 1106 ("The courts that have reached the merits of [the joinder] question have answered it in the negative."). *But see Arista Records*, 584 F. Supp. 2d at 251 (finding joinder appropriate at least until the defendants are named and served); Arista Records LLC v. Does 1–19, 551 F. Supp. 2d 1, 11–12 (D.D.C. 2008) ("[T]he Court also finds that [the joinder] inquiry is premature without first knowing Defendants' identities and the actual facts and circumstances associated with Defendants' conduct.").

86 *See Arista Records*, 2008 WL 4823160, at *6–7; *Fonovisa*, 2008 WL 919701, at *6; *LaFace Records*, 2008 WL 544992, at *2–3; *Elektra Entm't Grp.*, 2004 WL 2095581, at *5–7.

87 *See IO Grp.*, 2010 WL 5071605, at *3; *Arista Records*, 2008 WL 4823160, at *6; *Fonovisa*, 2008 WL 919701, at *5–6; *LaFace Records*, 2008 WL 544992, at *2; *Elektra Entm't Grp.*, 2004 WL 2095581, at *6 (noting that only six of the twelve plaintiffs alleged that Defendant Doe 7 infringed their copyrights).

88 *Fonovisa*, 2008 WL 919701, at *5.

89 *See IO Grp.*, 2010 WL 5071605, at *3; *Arista Records*, 2008 WL 4823160, at *6; *LaFace Records*, 2008 WL 544992, at *2–3.

90 *LaFace Records*, 2008 WL 544992, at *2.

91 Karunaratne, *supra* note 66, at 286.

92 *See, e.g.*, Patrick Collins, Inc. v. Does 1–21, 282 F.R.D. 161, 161–62 (E.D. Mich. 2012); CineTel Films, Inc. v. Does 1–1052, 853 F. Supp. 2d 545, 548 (D. Md. 2012); Digital Sin, Inc. v. Does 1–176, 279 F.R.D. 239, 240–41 (S.D.N.Y. 2012); Liberty Media Holdings, LLC v. BitTorrent Swarm, 277 F.R.D. 669, 670 (S.D. Fla. 2011); On the Cheap, LLC v. Does 1–5011, 280 F.R.D. 500, 501–02 (N.D. Cal. 2011); Hard Drive Prods., Inc. v. Does 1–188, 809 F. Supp. 2d 1150, 1151–53 (N.D. Cal. 2011); Voltage Pictures, LLC v. Does 1–5000, 818 F. Supp. 2d 28, 31–33 (D.D.C. 2011); Call of the Wild Movie, LLC v. Does 1–1062, 770 F. Supp. 2d 332, 339–40 (D.D.C. 2011).

93 Sometimes the plaintiff is the original copyright holder of the work. *See Digital Sin*, 279 F.R.D. at 240 (noting that Digital Sin produced the copyrighted film allegedly shared by the defendants); Dara Kerr, *'Hurt Locker' Makers File New Suit Against Downloaders*, CNET (Apr. 23, 2012, 6:43 PM), http://news.cnet.com/8301-1023_3-57419579-93/hurt-locker-makers-file-new-suit-against-downloaders/. In some cases, however, the plaintiff is a "copyright troll," an entity that has acquired a copyright license for a work from the original copyright holder in order to sue file-sharing users who have downloaded the work. *See* LaFond, *supra* note 13, at 51.

software[94] or hires a third-party company[95] to investigate a BitTorrent swarm corresponding to a hash file for the plaintiff's copyrighted work.[96] The plaintiff or investigator observes a group of users participating in the swarm over a period of time, ranging from several hours[97] to several months,[98] and records their IP addresses.[99] The plaintiff then files suit in federal district court against the BitTorrent users for copyright infringement under the Copyright Act,[100] joining each user as an anonymous defendant in a single case, and identifying each defendant by only his IP address.[101]

Faced with only IP addresses for unknown file-sharing users, the plaintiff next seeks to obtain the unnamed defendants' identifying information by filing ex parte motions for expedited discovery.[102] These motions seek to subpoena the Internet service providers servicing the IP addresses listed in the complaint to obtain the names, addresses, and often telephone numbers associated with the IP addresses.[103] Ostensibly, with this information, the plaintiff can then

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94 *See* Hard Drive Prods., Inc. v. Does 1–55, No. 11 C 2798, 2011 WL 4889094, at *2 (N.D. Ill. Oct. 12, 2011) ("Hard Drive employs proprietary peer-to-peer network forensic software to perform real-time monitoring of BitTorrent-based swarms involved in distributing Hard Drive's copyrighted creative works.").

95 *See Digital Sin*, 279 F.R.D. 239 at 241 ("Digital Sin contracted 'Copyright Enforcement Group' ('CEG'), a company that discovers copyright infringements and arranges for enforcement." (citation omitted)); *Call of the Wild Movie*, 770 F. Supp. 2d at 339 ("[P]laintiffs . . . contracted with Guardaley Limited, an anti-piracy firm that uses proprietary technology to identify BitTorrent users sharing the plaintiffs' copyrighted works.").

96 *See Digital Sin*, 279 F.R.D. at 241; *Call of the Wild Movie*, 770 F. Supp. 2d at 339. Some third-party investigators actually connected to the tracker itself and downloaded at least a piece of the movie from each of the defendants. *See Patrick Collins*, 282 F.R.D. at 164–65.

97 *See* Complaint at 4, 20, Liberty Media Holdings, LLC v. Does 1–62, 2012 WL 628309 (S.D. Cal. Feb. 24, 2012) (No. 3:11-cv-00575-MMA-NLS) (alleging that Defendant Doe 1's infringing activity took place at 4:46 PM, while Defendant Doe 62's infringing activity took place at 11:46 PM the same day).

98 *See* Patrick Collins, Inc. v. Does 1–2590, No. C 11-2766 MEJ, 2011 WL 4407172, at *6 (N.D. Cal. Sept. 22, 2011) ("Defendants' alleged infringing activity occurred over a period of over nine months . . . .").

99 *See Patrick Collins*, 282 F.R.D. at 165; *Digital Sin*, 279 F.R.D. at 241; *Call of the Wild Movie*, 770 F. Supp. 2d at 339–40.

100 Plaintiffs in these suits sometimes also sue for conspiracy. *See, e.g.*, Hard Drive Prods., Inc. v. Does 1–188, 809 F. Supp. 2d 1150, 1152 (N.D. Cal. 2011); First Time Videos, LLC v. Does 1–76, 276 F.R.D. 254, 255 (N.D. Ill. 2011) ("Plaintiff . . . alleg[es] a claim for copyright infringement under the Copyright Act and a common-law claim for civil conspiracy." (citation omitted)).

101 *See, e.g.*, *Digital Sin*, 279 F.R.D. at 241 ("[The plaintiff] initiat[ed] its complaint against the 176 John Doe defendants, identifying them by their IP addresses . . . .").

102 *See, e.g.*, Third Degree Films, Inc. v. Does 1–131, 280 F.R.D. 493, 495 (D. Ariz. 2012); *Digital Sin*, 279 F.R.D. at 241; *First Time Videos*, 276 F.R.D. at 255–56.

103 *See, e.g.*, *Hard Drive Prods.*, 809 F. Supp. 2d at 1152; *First Time Videos*, 276 F.R.D. at 255–56; *Call of the Wild Movie*, 770 F. Supp. 2d at 340.

name and serve the defendants who allegedly downloaded the plaintiff's work.[104]

The joinder issue generally arises when the plaintiff subpoenas the ISPs. The court's order granting expedited discovery often requires the ISPs to notify the subscriber associated with the IP address of the subpoena, so the subscribers have an opportunity to challenge the subpoena.[105] One or more defendants then move to quash the subpoena, and assert various legal defenses, including improper joinder, lack of personal jurisdiction, improper venue, and failure to state a claim.[106] In some cases, the ISPs themselves may file a motion to quash the subpoena.[107] Alternatively, the court itself may raise the joinder issue when determining whether to grant the plaintiff's ex parte motion for expedited discovery.[108]

The disagreement among courts over whether joinder of the defendants is appropriate has arisen as courts have struggled to apply the transactional requirement of Rule 20(a)(2) to the BitTorrent system, while also ensuring a "just, speedy, and inexpensive determination" of the suit.[109] Courts permitting joinder have defined a "series of transactions or occurrences"[110] broadly and have emphasized the efficient packing of litigation.[111] Courts disallowing

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[104] *See* Patrick Collins, Inc. v. Does 1–22, No. 11-cv-01772-AW, 2011 WL 5439005, at *1 (D. Md. Nov. 8, 2011) ("[T]he Court granted Plaintiff's Motion to Expedite Discovery . . . so that Plaintiff can discover the identity of the defendants and serve them with process.").

[105] *See* W. Coast Prods., Inc. v. Does 1–5829, 275 F.R.D. 9, 11 (D.D.C. 2011) ("Pursuant to the Court's order permitting [expedited] discovery, ISPs that are served with such subpoenas must give notice to their subscribers before turning over their contact information."); Maverick Entm't Grp., Inc. v. Does 1–2115, 810 F. Supp. 2d 1, 4 (D.D.C. 2011) ("Prior to providing the plaintiff with a putative defendant's identifying information, however, the ISPs sent notices to the putative defendants informing them of their right to challenge release of their information in this Court.").

[106] *See* CineTel Films, Inc. v. Does 1–1052, 853 F. Supp. 2d 545, 548 (D. Md. 2012); *W. Coast Prods.*, 275 F.R.D. at 12; *Maverick Entm't Grp.*, 810 F. Supp. 2d at 5–6.

[107] *See, e.g.*, *Call of the Wild Movie*, 770 F. Supp. 2d at 340 ("Time Warner received subpoenas for information relating to [the IP addresses listed in the complaints]. Time Warner responded by moving to quash the subpoenas on grounds that producing the requested information would impose an undue burden and expense." (citations omitted)).

[108] *See* Digital Sin, Inc. v. Does 1–176, 279 F.R.D. 239, 240 (S.D.N.Y. 2012) ("The Court has serious reservations about the *ex parte* application and the proposed order submitted by the Plaintiff."); Liberty Media Holdings, LLC v. BitTorrent Swarm, 277 F.R.D. 669, 670 (S.D. Fla. 2011) ("This cause came before the Court upon a *sua sponte* examination of the record.").

[109] FED. R. CIV. P. 1 ("[The Federal Rules of Civil Procedure] should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.").

[110] *Id.* 20(a)(2)(A).

[111] *See, e.g.*, Patrick Collins, Inc. v. Does 1–21, 282 F.R.D. 161, 167 (E.D. Mich. 2012) ("'Transaction' is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship." (quoting Mosley v. Gen. Motors Corp.,

joinder have defined a "series of transactions or occurrences" more narrowly, and have placed greater weight on fairness to the defendants and the manageability of the case.[112] This Comment will now address the arguments that both sides of the split have set forth, first examining arguments by courts allowing joinder and permitting the case to proceed against all named defendants, and then examining arguments by courts disallowing joinder and severing all but one defendant.

C. Courts Permitting Joinder

Much of the disagreement over whether joinder is appropriate in copyright infringement lawsuits against numerous anonymous BitTorrent users has centered around the transactional requirement of Rule 20(a)(2).[113] Under this requirement, the plaintiff must assert a right to relief against the defendants "jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences."[114] Courts permitting joinder of numerous defendants in suits against BitTorrent users have tended to define a "series of transactions or occurrences" broadly.[115] These courts have emphasized that to satisfy the transactional requirement of Rule 20(a)(2), the claims asserted against the joined defendants must be "logically related."[116] Courts have noted that this is a flexible test,[117] as joinder

497 F.2d 1330, 1333 (8th Cir. 1974) (internal quotation marks omitted)); *Digital Sin*, 279 F.R.D. at 244 ("The Court simply holds that for purposes of carrying out the initial, necessary discovery in an efficient manner, the claims may remain joined together at this time."); Liberty Media Holdings, LLC v. Swarm Sharing Hash File, 821 F. Supp. 2d 444, 451 (D. Mass. 2011); First Time Videos, LLC v. Does 1–76, 276 F.R.D. 254, 257 (N.D. Ill. 2011); *Call of the Wild Movie*, 770 F. Supp. 2d at 343.

112 *See, e.g.*, Third Degree Films, Inc. v. Does 1–131, 280 F.R.D. 493, 498 (D. Ariz. 2012); *BitTorrent Swarm*, 277 F.R.D. at 671–72 (S.D. Fla. 2011); On the Cheap, LLC v. Does 1–5011, 280 F.R.D. 500, 502–04 (N.D. Cal. 2011) ("Additionally, I find that joinder would be inappropriate for this case because it would violate the 'principles of fundamental fairness' and be prejudicial to the defendants."); Hard Drive Prods., Inc. v. Does 1–188, 809 F. Supp. 2d 1150, 1163–64 (N.D. Cal. 2011) ("[Defendants] did not participate in the same transaction or occurrence or the same series of transactions or occurrences . . . . The bare fact that a [Defendant] 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.").

113 *Compare Patrick Collins*, 282 F.R.D. at 167, *Digital Sin*, 279 F.R.D. at 244, *Swarm Sharing Hash File*, 821 F. Supp. 2d at 451, *First Time Videos*, 276 F.R.D. at 257, *and Call of the Wild Movie*, 770 F. Supp. 2d at 343, *with Third Degree Films*, 280 F.R.D. at 497–98, *BitTorrent Swarm*, 277 F.R.D. at 671–72, *On the Cheap*, 280 F.R.D. at 502–03 & n.4, *and Hard Drive Prods.*, 809 F. Supp. 2d at 1163–64.

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

115 *See* cases cited *supra* note 111.

116 Voltage Pictures, LLC v. Does 1–5000, 818 F. Supp. 2d 28, 39 (D.D.C. 2011); *see also* Patrick Collins, Inc. v. Does 1–39, No. 12-cv–00096-AW, 2012 WL 1432224, at *2 (D. Md. Apr. 24, 2012); *Patrick Collins*, 282 F.R.D. at 167; Liberty Media Holdings, LLC v. Does 1–62, No. 11-cv-575-MMA (NLS), 2012

of parties is "strongly encouraged" to allow for "the broadest possible scope of action."[118]

In analyzing the transactional requirement of Rule 20(a)(2), some courts first confronted with mass copyright suits against BitTorrent users moved away from the principles established in earlier suits against users of other P2P networks.[119] Based on the descriptions of how BitTorrent works in the plaintiffs' complaints, these courts distinguished the mechanics of BitTorrent from the mechanics of other P2P networks.[120] Thus, unlike users of earlier P2P networks, BitTorrent users were not "merely committing the same violation in the same way."[121]

Across cases, plaintiffs characterize BitTorrent similarly in their complaints. In particular, plaintiffs usually highlight the tit-for-tat strategy employed by the BitTorrent protocol to prevent free riding.[122] The plaintiffs explain that this strategy "makes every downloader also an uploader of the

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WL 628309, at *7 (S.D. Cal. Feb. 24, 2012); Patrick Collins, Inc. v. Does 1–15, No. 11-cv-02164-CMA-MJW, 2012 WL 415436, at *2 (D. Colo. Feb. 8, 2012); K-Beech, Inc. v. Does 1–57, No. 2:11-cv-358-FtM-36SPC, 2011 WL 5597303, at *6 (M.D. Fla. Nov. 1, 2011); Patrick Collins, Inc. v. Does 1–2590, No. C 11-2766 MEJ, 2011 WL 4407172, at *6 (N.D. Cal. Sept. 22, 2011); Donkeyball Movie, LLC v. Does 1–171, 810 F. Supp. 2d 20, 28 (D.D.C. 2011).

117 *Voltage Pictures*, 818 F. Supp. 2d at 39.

118 *Call of the Wild Movie*, 770 F. Supp. 2d at 342 (quoting United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 724 (1966) (internal quotation mark omitted)); *accord Patrick Collins*, 282 F.R.D. at 166; *Digital Sin*, 279 F.R.D. at 243; *Donkeyball Movie*, 810 F. Supp. 2d at 27.

119 *See Donkeyball Movie*, 810 F. Supp. 2d at 28–29 ("Some courts . . . have granted motions by putative defendants for severance in analogous copyright infringement cases against unknown users of peer-to-peer file-sharing programs for failure to meet the 'same transaction or occurrence test' in Rule 20(a)(2). . . . [However,] [t]he plaintiff has provided detailed allegations about how the BitTorrent technology differs from other peer-to-peer file-sharing programs and necessarily engages many users simultaneously or sequentially to operate."); *see also* First Time Videos, LLC v. Does 1–76, 276 F.R.D. 254, 257.

120 *See, e.g.*, *Donkeyball Movie*, 810 F. Supp. 2d at 28 (quoting plaintiff's complaint); *Voltage Pictures*, 818 F. Supp. 2d at 39–41 (quoting plaintiff's complaint); *Call of the Wild Movie*, 770 F. Supp. 2d at 343 (quoting plaintiff's complaint).

121 *Compare* LaFace Records, LLC v. Does 1–38, No. 5:07-CV-298-BR, 2008 WL 544992, at *2 (E.D.N.C. Feb. 27, 2008) ("Plaintiffs argue that the claims asserted against the various defendants arise out of the same series of transactions because each defendant used the same ISP as well as some of the same P2P networks to commit the exact same violation of the law in the exact same way. However, merely committing the same type of violation in the same way does not link defendants together for purposes of joinder." (citation omitted) (internal quotation marks omitted)), *with First Time Videos*, 276 F.R.D. at 257 ("The nature of the BitTorrent distribution protocol necessitates a concerted action by many people in order to disseminate files, . . . and Defendants intentionally engaged in this concerted action with other Defendants by entering the torrent swarm." (quoting plaintiff's complaint) (internal quotation mark omitted)), *and Donkeyball Movie*, 810 F. Supp. 2d at 28–29.

122 Izal et al., *supra* note 34, at 2; Cohen, *supra* note 47, at 4.

illegally transferred file(s)."[123] Thus, "each putative defendant is a possible source for the plaintiff's [copyrighted work], and may be responsible for distributing this copyrighted work to the other putative defendants, who are also using the same file-sharing protocol to copy and distribute the same copyrighted work."[124] According to some courts, such statements rise above the "bare allegations that putative defendants used the same peer-to-peer network to infringe copyrighted works" that had led courts in earlier mass P2P copyright lawsuits to find joinder inappropriate.[125]

Initially, as in earlier P2P file-sharing infringement cases, plaintiffs alleged that the defendants infringed multiple works.[126] In later suits, however, plaintiffs began to limit their allegations to defendants downloading one file with a unique hash within one swarm.[127] According to several courts, this shift made it even clearer that joinder of the anonymous defendants was appropriate.[128] In fact, as one judge put it,

> [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).[129]

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[123] *Donkeyball Movie*, 810 F. Supp. 2d at 28 (quoting plaintiff's complaint) (internal quotation mark omitted); *Voltage Pictures*, 818 F. Supp. 2d at 39 (quoting plaintiff's complaint) (internal quotation mark omitted); *Call of the Wild Movie*, 770 F. Supp. 2d at 343 (quoting plaintiff's complaint) (internal quotation mark omitted).

[124] *Donkeyball Movie*, 810 F. Supp. 2d at 28; *Voltage Pictures*, 818 F. Supp. 2d at 40; *Call of the Wild Movie*, 770 F. Supp. 2d at 343.

[125] *Donkeyball Movie*, 810 F. Supp. 2d at 28; *Voltage Pictures*, 818 F. Supp. 2d at 40.

[126] *Call of the Wild Movie*, 770 F. Supp. 2d at 339.

[127] *See, e.g.*, Patrick Collins, Inc. v. Does 1–39, No. 12-cv-00096-AW, 2012 WL 1432224, at *3 (D. Md. April 24, 2012) ("Plaintiff alleges that each Defendant peer member participated in the same 'swarm' of BitTorrent users that illegally uploaded and downloaded Plaintiff's copyrighted movie."); Liberty Media Holdings, LLC v. Does 1–62, No. 11-cv-575-MMA (NLS), 2012 WL 628309, at *7 (S.D. Cal. Feb. 24, 2012) ("Plaintiff alleges all Defendants participated in the same 'swarm' and all of the IP addresses identified downloaded and shared the same unique 'hash' . . . ."); K-Beech, Inc. v. Does 1–57, No. 2:11-cv-358-FtM-36SPC, 2011 WL 5597303, at *6 (M.D. Fla. Nov. 1, 2011) ("Plaintiff limited the Defendants in this suit to those allegedly using the exact same swarm.").

[128] *See, e.g.*, *Patrick Collins*, 2012 WL 1432224, at *3; *Liberty Media Holdings*, 2012 WL 628309, at *7; *K-Beech*, 2011 WL 5597303, at *6.

[129] Digital Sin, Inc. v. Does 1–176, 279 F.R.D. 239, 244 (S.D.N.Y. 2012); *see also* Patrick Collins, Inc. v. Does 1–21, 282 F.R.D. 161, 167 (E.D. Mich. 2012); Patrick Collins, Inc. v. Does 1–15, No. 11-cv-02164-CMA-MJW, 2012 WL 415436, at *3 (D. Colo. Feb. 8, 2012).

In one case, the plaintiff alleged that its investigator actually connected to the defendants' computers, and the defendants transmitted pieces of the plaintiff's copyrighted film to the investigator's server.[130] In finding joinder appropriate, the court defined the "series of transactions or occurrences" as "the transmission of pieces of the same copy of the [film] to the same investigative server."[131] Another court traced the series of transactions connecting the defendants together back to the initial seeder who first uploaded the file to the swarm.[132] The court explained that this relationship "must exist between all users in the same Swarm."[133] This would seem to make joinder appropriate in any instance in which the plaintiff alleges that the defendants participated in the same swarm.[134] Indeed, at least one court appears to have adopted this approach.[135] Yet another court found joinder proper based on the plaintiff's allegation of a right to relief severally against the defendants for copyright infringement, because the "[d]efendants networked with . . . each other and/or with other peers through a series of transactions in the same swarm to infringe on Plaintiff's copyright."[136]

Some judges have further explained the rationale behind allowing joinder of defendants whom the plaintiff alleged participated in the same swarm.[137] One judge noted that although the defendants may not directly share with one another, the peers that a defendant did upload to "helped pass on pieces of the Work to the next 'generation' of active peers."[138] In other words, all of the defendants "jointly contributed to either growing the swarm or maintaining its existence [and] . . . contributed to an enterprise, the sole purpose of which was to distribute a particular version of Plaintiff's Work."[139] Thus, the transactional requirement of Rule 20(a)(2) was met because the defendants had engaged in a concert of action and the claims asserted against the defendants were logically related.[140] Another judge simply stated that the nature of BitTorrent itself

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130 Raw Films, Ltd. v. Does 1–15, No. 11-7248, 2012 WL 1019067, at *3 (E.D. Pa. Mar. 26, 2012).

131 *Id.* at *4.

132 *Patrick Collins*, 282 F.R.D. at 168.

133 *Id.*

134 *See id.*

135 *See* Digital Sin, Inc. v. Does 1–176, 279 F.R.D 239, 244 (S.D.N.Y. 2012).

136 *Patrick Collins*, 282 F.R.D. at 167.

137 *See, e.g.*, Third Degree Films v. Does 1–36, No. 11-cv-15200, 2012 WL 2522151, at *9 (E.D. Mich. May 29, 2012).

138 *Id.*

139 *Id.*

140 *Id.* Some courts permitting joinder have explicitly rejected the "concert of action" language in determining whether a series of transactions or occurrences has occurred. *E.g.*, *Patrick Collins*, 282 F.R.D. at 167–68 ("[C]oncert of action, *i.e.*, a right to relief jointly, is not a precondition of joinder.").

"necessitates a concerted action by many people in order to disseminate files."[141] Similarly, another judge explained that because of how the plaintiff characterized BitTorrent, "it is reasonable to conclude that each of the Doe Defendants may have facilitated directly the download of the Work by another of the Doe Defendants and was thus part of the 'same transaction, occurrence, or series of transactions or occurrences.'"[142]

Courts permitting joinder spend much less time parsing the second requirement of Rule 20(a)(2).[143] The second requirement for joining defendants in one action is that a "question of law or fact common to all defendants will arise in the action."[144] Rule 20(a)(2) does not require that the defendants in the suit have every question of law or fact in common.[145] One common question of law or fact is sufficient.[146] In the BitTorrent suits, courts allowing joinder point out that there are both questions of law and of fact common to all defendants.[147] The common questions of law involve the validity of the plaintiff's copyright of the work and the alleged infringement of the copyright by the anonymous defendants.[148] The common questions of fact include the nature of how BitTorrent works and how the plaintiffs uncovered

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141 Hard Drive Prods., Inc. v. Does 1–55, No. 11 C 2798, 2011 WL 4889094, at *5 (N.D. Ill. Oct. 12, 2011).

142 Third Degree Films, Inc. v. Does 1–108, No. DKC 11-3007, 2012 WL 669055, at *5 (D. Md. Feb. 28, 2012).

143 *See, e.g.*, W. Coast Prods., Inc. v. Does 1–5829, 275 F.R.D. 9, 16 (D.D.C. 2011) (stating only that "[t]he second prong of the [Rule 20(a)(2)] test, common questions of law or fact, is easily met because the claims asserted against each John Doe Defendant are identical"); *see also* Digital Sin, Inc. v. Does 1–176, 279 F.R.D. 239, 243–44 (S.D.N.Y. 2012); First Time Videos, LLC v. Does 1–76, 276 F.R.D. 254, 257–58 (N.D. Ill. 2011); Donkeyball Movie, LLC v. Does 1–171, 810 F. Supp. 2d 20, 29 (D.D.C. 2011); Call of the Wild Movie, LLC v. Does 1–1062, 770 F. Supp. 2d 332, 345 (D.D.C. 2011).

144 FED. R. CIV. P. 20(a)(2)(B).

145 7 WRIGHT ET AL., *supra* note 73, § 1653 (3d ed. 2001).

146 *Id.*

147 *See, e.g.*, Raw Films, Ltd. v. Does 1–15, No. 11-7248, 2012 WL 1019067, at *4 (E.D. Pa. Mar. 26, 2012); Patrick Collins, Inc. v. Does 1–15, No. 11-cv-02164-CMA-MJW, 2012 WL 415436, at *3 (D. Colo. Feb. 8, 2012); Liberty Media Holdings, LLC v. Swarm Sharing Hash File, 821 F. Supp. 2d 444, 451 (D. Mass. 2011); *First Time Videos*, 276 F.R.D. at 257–58; *Call of the Wild Movie*, 770 F. Supp. 2d at 343.

148 Third Degree Films, Inc. v. Does 1–108, No. DKC 11-3007, 2012 WL 669055, at *5 (D. Md. Feb. 28, 2012); *Patrick Collins*, 2012 WL 415436, at *3; *Swarm Sharing Hash File*, 821 F. Supp. 2d at 451; *First Time Videos*, 276 F.R.D. at 257–58; *W. Coast Prods.*, 275 F.R.D. at 16; *Call of the Wild Movie*, 770 F. Supp. 2d at 343.

the defendants' alleged infringing activity.[149] Thus, these courts find that the second requirement of Rule 20(a)(2) is satisfied.[150]

In addition to the two requirements for joinder listed in Rule 20(a)(2), courts also consider the purposes behind the Rule, specifically fairness to the parties and judicial economy.[151] When deciding whether to allow joinder, courts seek to avoid prejudicing either party,[152] and the posture of the case influences their analysis.[153] The joinder issue most often arises when the plaintiffs seek to subpoena the ISPs servicing the listed IP addresses to identify the defendants who allegedly infringed the plaintiffs' copyrights. Several courts have noted that at this stage, the defendants in the suits are not yet named parties, and so they are "not required to respond to the plaintiffs' allegations or assert a defense."[154] Most courts emphasize that while joinder is appropriate at this stage of the litigation,[155] if necessary they will reconsider the joinder issue later after the defendants are named in the suit.[156] However, because the defendants in the suit are not yet named parties when the plaintiffs move to subpoena the ISPs, the defendants have no obligation to respond to the plaintiffs' complaints.[157] Thus, there is no demonstrable harm to the defendants[158] and no danger of prejudice to them.[159] Judges have acknowledged that the defendants may be able to show prejudice after they are

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[149] *Patrick Collins*, 2012 WL 415436, at *3; *Swarm Sharing Hash File*, 821 F. Supp. 2d at 451; *First Time Videos*, 276 F.R.D. at 258; *Call of the Wild Movie*, 770 F. Supp. 2d at 343.

[150] *E.g.*, Digital Sin, Inc. v. Does 1–176, 279 F.R.D. 239, 244 (S.D.N.Y. 2012); *First Time Videos*, 276 F.R.D. at 257–58; *W. Coast Prods.*, 275 F.R.D. at 16; Donkeyball Movie, LLC v. Does 1–171, 810 F. Supp. 2d 20, 29 (D.D.C. 2011); *Call of the Wild Movie*, 770 F. Supp. 2d at 345.

[151] *See, e.g.*, *Call of the Wild Movie*, 770 F. Supp. 2d at 344.

[152] *Id.*

[153] *See, e.g.*, *Digital Sin*, 279 F.R.D. at 244; *First Time Videos*, 276 F.R.D. at 257; *Donkeyball Movie*, 810 F. Supp. 2d at 29–30.

[154] *E.g.*, *Patrick Collins*, 2012 WL 415436, at *4; Patrick Collins, Inc. v. Does 1–2590, 2011 WL 4407172, at *7 (N.D. Cal. Sept. 22, 2011); *Donkeyball Movie*, 810 F. Supp. 2d at 29–30; *Call of the Wild Movie*, 770 F. Supp. 2d at 344.

[155] *Digital Sin*, 279 F.R.D. at 244; *First Time Videos*, 276 F.R.D. at 257; *W. Coast Prods.*, 275 F.R.D. at 16; *Donkeyball Movie*, 810 F. Supp. 2d at 29–30; *Call of the Wild Movie*, 770 F. Supp. 2d at 345.

[156] *Digital Sin*, 279 F.R.D. at 244; *First Time Videos*, 276 F.R.D. at 258; *W. Coast Prods.*, 275 F.R.D. at 16; Voltage Pictures, LLC v. Does 1–5000, 818 F. Supp. 2d 28, 43 (D.D.C. 2011).

[157] *Patrick Collins*, 2011 WL 4407172, at *7; *Voltage Pictures*, 818 F. Supp. 2d at 41; *Call of the Wild Movie*, 770 F. Supp. 2d at 344.

[158] *Voltage Pictures*, 818 F. Supp. 2d at 41; *Call of the Wild Movie*, 770 F. Supp. 2d at 344.

[159] *Patrick Collins*, 2012 WL 415436, at *4; K-Beech, Inc. v. Does 1–57, No. 2:11-cv-358-FtM-36SPC, 2011 WL 5597303, at *6 (M.D. Fla. Nov. 1, 2011); *Patrick Collins*, 2011 WL 4407172, at *7; *Donkeyball Movie*, 810 F. Supp. 2d at 30; *Voltage Pictures*, 818 F. Supp. 2d at 41; *Call of the Wild Movie*, 770 F. Supp. 2d at 344.

named in the suit.[160] Some judges have gone further, finding that joinder may in fact be beneficial to the defendants by allowing each defendant to see the defenses raised by the other defendants.[161]

According to courts permitting joinder, not only does joinder not prejudice the defendants, but severing the defendants would prejudice the plaintiffs and harm the purposes behind Rule 20.[162] Specifically, courts have worried that forcing plaintiffs to file separate lawsuits against each file-sharing user would create "significant obstacles" for plaintiffs to protect their copyrighted works from file-sharers and would delay cases.[163] Plaintiffs would need to pay separate filing fees for each case and issue separate subpoenas to ISPs for the names and addresses of the downloaders.[164] Therefore, it would be "highly unlikely that the plaintiffs could protect their copyrights in a cost-effective manner."[165] By eliminating the possibility of multiple identical suits,[166] joining the defendants promotes judicial economy and administrative efficiency for all parties involved,[167] which are some of the driving purposes behind Rule 20 and the other Federal Rules of Civil Procedure.[168]

D. Courts Not Permitting Joinder

While courts permitting joinder have defined a "series of transactions or occurrences" broadly, courts not permitting joinder have defined the term narrowly. In determining that the transactional requirement in Rule 20(a)(2) is not satisfied, these courts more often emphasize a lack of a concert of action

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160 *See Patrick Collins*, 2011 WL 4407172, at *7; *W. Coast Prods.*, 275 F.R.D. at 16; *Voltage Pictures*, 818 F. Supp. 2d at 41; *Call of the Wild Movie*, 770 F. Supp. 2d at 344.

161 Raw Films, Ltd. v. Does 1–15, No. 11-7248, 2012 WL 1019067, at *4 (E.D. Pa. Mar. 26, 2012); *K-Beech*, 2011 WL 5597303, at *6; *Patrick Collins*, 2011 WL 4407172, at *7; *Call of the Wild Movie*, 770 F. Supp. 2d at 344 (citing London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153, 161 (D. Mass. 2008)).

162 *Patrick Collins*, 2012 WL 415436, at *3; Digital Sin, Inc. v. Does 1–176, 279 F.R.D. 239, 244 n.6 (S.D.N.Y. 2012); *Patrick Collins*, 2011 WL 4407172, at *7; *Call of the Wild Movie*, 770 F. Supp. 2d at 344.

163 *See* cases cited *supra* note 162.

164 *Patrick Collins*, 2011 WL 4407172, at *7; *Call of the Wild Movie*, 770 F. Supp. 2d at 344; *see also Patrick Collins*, 2012 WL 415436, at *3.

165 *Call of the Wild Movie*, 770 F. Supp. 2d at 345*; see also* Patrick Collins, Inc. v. Does 1–39, No. 12-cv-00096-AW, 2012 WL 1432224, at *3 (D. Md. Apr. 24, 2012); *Digital Sin*, 279 F.R.D. at 244 n.6.

166 *Raw Films*, 2012 WL 1019067, at *4.

167 *Call of the Wild Movie*, 770 F. Supp. 2d at 344.

168 *See* FED R. CIV. P. 1; WRIGHT ET AL., *supra* note 73, § 1652 ("The purpose of [Rule 20] is to promote trial convenience and expedite the final determination of disputes, thereby preventing multiple lawsuits." (footnotes omitted)).

among the defendants.[169] Although some judges have acknowledged that the defendants in the suit may be a source of the file for one another, they also note that under the mechanics of BitTorrent, it is not necessarily true that each defendant "participated in or contributed to the downloading by any of the [other defendants]."[170] In fact, a defendant could have received or shared pieces of the file with any of the possibly thousands of users in a given swarm.[171] Absent some specific allegation that the defendants actually shared with one another, courts have considered joinder inappropriate.[172] One judge has gone so far as to label allegations that defendants do meet the joinder requirements as "speculative and conclusory."[173]

Courts have noted that any cooperation or concert of action among defendants is especially unlikely when the plaintiffs' complaints allege that the defendants participated in the same swarm over a period of several days or weeks.[174] Indeed, the fact that the plaintiffs alleged that the defendants participated in the swarm over a protracted period of time appears to be a driving factor in many judges' decisions to find joinder of the defendants inappropriate.[175] As one judge put it, "In this age of instant digital gratification, it is difficult to imagine, let alone believe, that an alleged infringer of the copyrighted work would patiently wait six weeks to collect the bits of the work necessary to watch the work as a whole."[176] Some courts have even suggested that allegations that defendants participated in the same swarm on the same day and at same time may not be sufficient[177] because under the BitTorrent

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169 *See, e.g.*, W. Coast Prods., Inc. v. Swarm Sharing Hash Files, No. 6:12-cv-1713, 2012 WL 3560809, at *3 (W.D. La. Aug. 17, 2012); Malibu Media, LLC v. Does 1–23, 878 F. Supp. 2d 628, 632 (E.D. Va. 2012); Raw Films, Inc. v. Does 1–32, No. 1:11-CV-2939-TWT, 2011 WL 6840590, at *2 (N.D. Ga. Dec. 29, 2011); Liberty Media Holdings, LLC v. BitTorrent Swarm, 277 F.R.D. 669, 671–72 (S.D. Fla. 2011); Hard Drive Prods., Inc. v. Does 1–188, 809 F. Supp. 2d 1150, 1163–64 (N.D. Cal. 2011).

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

171 *Id.*

172 *See, e.g.*, *Malibu Media*, 878 F. Supp. 2d at 632.

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

174 *Id.* at 1163.

175 K-Beech, Inc. v. Does 1–41, No. V-11-46, 2012 WL 773683, at *4 (S.D. Tex. Mar. 8, 2012); Raw Films, Inc. v. Does 1–32, No. 1:11-CV-2939-TWT, 2011 WL 6840590, at *2 (N.D. Ga. Dec. 29, 2011); Liberty Media Holdings, LLC v. BitTorrent Swarm, 277 F.R.D. 669, 671–72 (S.D. Fla. 2011); *Hard Drive Prods.*, 809 F. Supp. 2d at 1163; Boy Racer, Inc. v. Does 1–60, No. C 11-01738 SI, 2011 WL 3652521, at *4 (N.D. Cal. Aug. 19, 2011); Diabolic Video Prods., Inc. v. Does 1–2099, No. 10-CV-5865-PSG, 2011 WL 3100404, at *3 (N.D. Cal. May 31, 2011).

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

177 *Malibu Media*, 878 F. Supp. 2d at 632 ("Furthermore, it is not clear that either *K-Beech* or *Hard Drive Productions* . . . required presence in the same swarm on the same day and at the same time. In *K-Beech*, this

protocol, these defendants still may not have shared any pieces of the file with one another.[178]

The courts finding joinder inappropriate are also much less willing to distinguish BitTorrent cases from cases involving earlier P2P networks in which courts usually did not allow joinder. Thus, anonymous defendants in BitTorrent suits are simply "commit[ing] the exact same violation of the law in exactly the same way," which is not sufficient to satisfy the transactional requirement of Rule 20(a)(2).[179] Some courts have also invoked their discretion to sever anonymous defendants even if the joinder of anonymous BitTorrent users satisfies the transactional requirement.[180] Courts derive this discretion from Rule 21[181] and section (b) of Rule 20 itself, noting that the joinder of these anonymous defendants is permissive and not a requirement.[182] In utilizing their discretion to sever, these courts have pointed to the policies underlying the Federal Rules of Civil Procedure, namely judicial efficiency and economy and fairness to the parties in the suit.[183]

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court stated only that the allegation that the defendants used the same protocol to share the same work on different days and times was insufficient.").

178 *BitTorrent Swarm*, 277 F.R.D. at 671–72 ("Two Defendants did use BitTorrent at the same time, but due to the decentralized operation of BitTorrent, this fact alone does not imply that Defendants participated in or contributed to the downloading of each other's copies of the work at issue." (internal quotation marks omitted)).

179 *Hard Drive Prods.*, 809 F. Supp. 2d at 1161 (quoting Pac. Century Int'l Ltd. v. Does 1–101, No. C-11-02533-(DMR), 2011 WL 2690142, at *4 (N.D. Cal. July 8, 2011)) (internal quotation marks omitted); *see also Diabolic Video Prods.*, 2011 WL 3100404, at *3.

180 *See, e.g.*, *BitTorrent Swarm*, 277 F.R.D. at 672 ("This Court finds it appropriate to exercise its discretion to sever and dismiss all but [one defendant] from the current action. Even if joinder were appropriate, severance is necessary . . . ."); On the Cheap, LLC v. Does 1–5011, 280 F.R.D. 500, 503 (N.D. Cal. 2011) ("Even if the plaintiff had satisfied FRCP 20(a)(2)'s conditions for joinder, I would still sever the Doe defendants based on my discretionary authority under FRCP 20(b) and FRCP 21."); *Hard Drive Prods.*, 809 F. Supp. 2d at 1164 ("Even if joinder of the Doe Defendants in this action met the requirements of Rule 20(a) of the Federal Rules of Civil Procedure, this Court finds it appropriate to exercise its discretion to sever and dismiss all but one Doe Defendant . . . .").

181 "Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party." FED. R. CIV. P. 21.

182 *See, e.g.*, *On the Cheap*, 280 F.R.D. at 503.

183 *See, e.g.*, W. Coast Prods., Inc. v. Swarm Sharing Hash Files, No. 6:12-cv-1713, 2012 WL 3560809, at *2 (W.D. La. Aug. 17, 2012); Malibu Media, LLC v. Does 1–24, No. 12-cv-2070-WJM-MEH, 2012 WL 3400703, at *3 (D. Colo. Aug. 14, 2012); Digital Sins, Inc. v. Does 1–245, No. 11 Civ. 8170(CM), 2012 WL 1744838, at *3 (S.D.N.Y. May 15, 2012); Third Degree Films, Inc. v. Does 1–131, 280 F.R.D. 493, 498 (D. Ariz. 2012); *BitTorrent Swarm*, 277 F.R.D. at 672; *On the Cheap*, 280 F.R.D. at 503; *Hard Drive Prods.*, 809 F. Supp. 2d at 1164.

For judicial efficiency, judges have highlighted the manageability problems that can result from having a single lawsuit against hundreds,[184] or even simply dozens,[185] of defendants. These problems can include the defendants presenting unique legal and factual defenses,[186] and the logistical hurdles that the defendants and the court would face to adhere to a court's procedural guidelines.[187] Judges have expressed fears that defendants raising differing defenses against the copyright claims would force courts to hear "scores of mini-trials" dealing with the various evidence and testimony associated with each defense.[188] One judge explained that he received motions to quash based on different grounds from different defendants, including one defendant claiming to be an out-of-state resident who had never used BitTorrent, and another regarding an out-of-state defendant who had passed away before the plaintiff had filed his complaint.[189]

As for fairness, courts have emphasized the burdens the suits have on the defendants and that such burdens can prejudice the defendants.[190] Specifically, courts have noted that the anonymous defendants would face daunting logistical hurdles in complying with the procedural requirements of the courts.[191] Defendants could be spread all over the state but would have to serve one another with all pleadings.[192] This burden would be exacerbated as many defendants would likely be pro se.[193] Judges have also highlighted that conferences and other courtroom proceedings would be difficult to stage with dozens, and possibly hundreds, of defendants.[194] Courts denying joinder have been more dismissive of the prejudices that plaintiffs claim they will experience if the defendants are severed, noting that plaintiffs can effectively

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184 *See, e.g.*, CineTel Films, Inc. v. Does 1–1052, 853 F. Supp. 2d 545, 554 (D. Md. 2012); *Third Degree Films*, 280 F.R.D. at 498; *On the Cheap*, 280 F.R.D. at 503–04; *Hard Drive Prods.*, 809 F. Supp. 2d at 1164.

185 *Malibu Media*, 2012 WL 3400703, at *4; Patrick Collins, Inc. v. Does 1–23, No. 11-cv-15231, 2012 WL 1019034, at *5 (E.D. Mich. Mar. 26, 2012) Raw Films, Inc. v. Does 1–32, No. 1:11-CV-2939-TWT, 2011 WL 6840590, at *2 & nn.4–5 (N.D. Ga. Dec. 29, 2011); Hard Drive Prods. v. Does 1–33, No. C 11-03827 LB, 2011 WL 5325530, at *4 (N.D. Cal. Nov. 3, 2011); *BitTorrent Swarm*, 277 F.R.D. at 672.

186 *On the Cheap*, 280 F.R.D. at 503; *Hard Drive Prods.*, 809 F. Supp. 2d at 1164.

187 *On the Cheap*, 280 F.R.D. at 503–04 ("This Court has already struggled with the logistical issues associated with keeping the identities of the moving Doe defendants sealed so that their privacy rights are protected.").

188 *Hard Drive Prods.*, 809 F. Supp. 2d at 1164, *quoted in On the Cheap*, 280 F.R.D. at 503.

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

190 *See, e.g.*, *Hard Drive Prods.*, 809 F. Supp. 2d at 1164.

191 *Id.*

192 *Id.*

193 *Id.*

194 *Id.*

protect their copyrighted works from infringement by suing BitTorrent users individually.[195] Although this method could be effective, the question remains as to whether plaintiffs should only be allowed to sue BitTorrent users individually.

III. WHY COURTS SHOULD SEVER DEFENDANTS IN SUITS AGAINST BITTORRENT USERS

This Part argues that courts should sever all but one of the anonymous defendants in mass copyright infringement suits against BitTorrent users. This Part first examines the rise of heightened pleading requirements for plaintiffs, with an emphasis on plausible pleadings, from *Bell Atlantic Corp. v. Twombly*[196] and *Ashcroft v. Iqbal*.[197] Next, this Part explains how courts have implicitly considered plausibility in permitting joinder in suits against BitTorrent users, while denying joinder in suits against other P2P users. This Part then examines the three main scenarios in which many BitTorrent users are joined in one suit: (1) the users participated in different swarms, (2) the users participated in the same swarm over a protracted period of time, and (3) and the users participated in the same swarm over a short period of time.

Courts have greatly overestimated the plausibility that joinder is appropriate in all three scenarios. The mechanics of the BitTorrent protocol alone undermine the plausibility of joinder in the first two scenarios; and these mechanics, along with a court's need for personal jurisdiction over the defendants, undermine the plausibility of joinder in the third scenario. As a result, suits against BitTorrent users should not be so distinguished from suits against users of other P2P networks, and the plausibility that the joinder requirements are satisfied in such suits does not rise to the plausibility level established in *Twombly* and *Iqbal*. Furthermore, the purposes and policies behind the Federal Rules of Civil Procedure and Rule 20 counsel against permitting joinder in suits against BitTorrent users. This Part concludes by discussing the concern that plaintiffs in these suits are using Rule 20 in an attempt to circumvent the requirements for bringing a class action under Rule 23 because the plaintiffs would be unable to satisfy the requirements of Rule 23.

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195 *Id.* at 1165.
196 550 U.S. 544 (2007).
197 556 U.S. 662 (2009).

A. The Rise of Plausible Pleading

Holding the pleadings of plaintiffs in mass copyright lawsuits against BitTorrent users to stricter plausibility requirements is not a radical idea. Pleading in federal courts has changed dramatically in recent years after the decisions of *Twombly*[198] and, more recently, *Iqbal*.[199] The Supreme Court first introduced a heightened pleading standard in *Twombly*,[200] which involved a complaint alleging violations of a federal antitrust statute.[201] In *Twombly*, the Court rejected the long-standing requirement that a complaint need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."[202] Instead, a plaintiff must allege facts that suggest plausible grounds for the complaint.[203] The "[f]actual allegations must be enough to raise a right of relief above the speculative level."[204]

The Supreme Court clarified *Twombly*'s reach in *Iqbal*, explaining that limiting *Twombly* to its antitrust context would be "incompatible with the Federal Rules of Civil Procedure."[205] The heightened pleading standard stemmed from the Court's interpretation of Rule 8,[206] which sets forth the general rules of pleading.[207] Under Rule 1, Rule 8 "governs the pleading standard 'in all civil actions and proceedings in the United States district courts.'"[208] Thus, the Court's decision in *Twombly* set forth "the pleading standard for 'all civil actions.'"[209] *Iqbal* did not stop there, however. The Court explained that the stricter plausible pleading requirement does not impose a

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198 Matthew A. Josephson, Note, *Some Things Are Better Left Said: Pleading Practice After* Bell Atlantic Corp. v. Twombly, 42 GA. L. REV. 867, 903 (2008).

199 Stephen R. Brown, *Reconstructing Pleading:* Twombly, Iqbal*, and the Limited Role of the Plausibility Inquiry*, 43 AKRON L. REV. 1265, 1266 (2010).

200 Josephson, *supra* note 198, at 869–70.

201 *Twombly*, 550 U.S. at 548–49.

202 *Id.* at 555 (alteration in original) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)) (internal quotation marks omitted).

203 Josephson, *supra* note 198, at 884.

204 *Twombly*, 550 U.S. at 555.

205 Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009). Initially, there was some uncertainty after *Twombly* as to whether the heightened plausibility pleading standards would apply beyond *Twombly*'s antitrust context. *See* Josephson, *supra* note 198, at 887–88 (noting that signals existed in the opinion that pointed to the stricter pleading standard applying both to all civil actions and just to antitrust actions). The Supreme Court eliminated this uncertainty with its decision in *Iqbal*, which involved an action for unlawful discrimination. *Iqbal*, 556 U.S. at 666, 684.

206 *Iqbal*, 556 U.S. at 684.

207 *See* FED. R. CIV. P. 8(a) (setting forth three requirements for a "pleading that states a claim for relief").

208 *Iqbal*, 556 U.S. at 684 (quoting FED. R. CIV. P. 1).

209 *Id.* (quoting FED. R. CIV. P. 1).

"'probability requirement,' but it asks for more than a sheer possibility."[210] According to observers, however, the Court effectively added a probability requirement to the new plausibility standard for federal pleading.[211] Indeed, the allegations in *Iqbal* were "implausible because the Court believed legal conduct to be a more likely explanation."[212] Analyzing a pleading to determine "if . . . legal conduct is a more likely explanation than illegal conduct . . . is functionally equivalent to a probability requirement."[213]

B. The Implausibility of BitTorrent Users Satisfying the Transactional Requirement of Rule 20

Courts have implicitly taken into account the probability of a plaintiff's allegations that anonymous defendants in mass P2P copyright infringement lawsuits have engaged in the same transaction or occurrence. In a traditional P2P network, users download the files from each other's computers, as users do in the BitTorrent protocol.[214] Thus, even if defendants in a mass copyright suit had all used a P2P network other than BitTorrent, "each putative defendant [would be] a possible source for the plaintiff's [copyrighted work], and may be responsible for distributing this copyrighted work to the other putative defendants, who are also using the same file-sharing protocol to copy and distribute the same copyrighted work."[215] However, courts found joinder inappropriate in the cases that involved earlier P2P networks.[216]

The key difference appears to be that users in traditional P2P networks did not have to upload files to one another, while users in the BitTorrent protocol do.[217] This implies that courts are considering probability in their decision to permit joinder: namely, that it is more likely that the BitTorrent users

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210 *Id.* at 678.

211 *E.g.*, *The Supreme Court, 2008 Term—Leading Cases*, 123 HARV. L. REV. 153, 262 (2009).

212 *Id.* at 261.

213 *Id.*

214 *See* FTC, *supra* note 21, at 3–4, 8.

215 Donkeyball Movie, LLC v. Does 1–171, 810 F. Supp. 2d 20, 28 (D.D.C. 2011); Voltage Pictures, LLC v. Does 1–5000, 818 F. Supp. 2d 28, 40 (D.D.C. 2011); *see also* Call of the Wild Movie, LLC v. Does 1–1062, 770 F. Supp. 2d 332, 343 (D.D.C. 2011).

216 *See* IO Grp., Inc. v. Does 1–19, No. C 10-03851 SI, 2010 WL 5071605, at *3 (N.D. Cal. Dec. 7, 2010) ("Allegations that defendants used the same peer-to-peer network to infringe a plaintiff's copyrighted works, however, have been held to be insufficient for joinder of multiple defendants under Rule 20."); Fonovisa, Inc. v. Does 1–9, No. 07-1515, 2008 WL 919701, at *5 (W.D. Pa. Apr. 3, 2008) ("Other district courts faced with the same allegations to connect the defendants have concluded those allegations were insufficient to satisfy the transactional requirement [of Rule 20(a)(2)]."); Dickman, *supra* note 12, at 1106 ("The courts that have reached the merits of [the joinder] question have answered it in the negative.").

217 Cohen, *supra* note 47, at 1, 4 (noting that BitTorrent users cannot free ride).

exchanged data and shared pieces of the file with each other than it is that users of traditional P2P networks exchanged data. In other words, the likelihood that a group of defendants using an earlier P2P protocol engaged in a cooperative activity was slim, as no defendant would have been required to actually upload to any other users. Conversely, due to the greater likelihood that a group of defendants using BitTorrent actually exchanged data and thus engaged in a "cooperative activity,"[218] joinder is appropriate. Courts have greatly overestimated this plausibility, however. Some scholars have advocated that a plaintiff in these mass copyright suits should demonstrate "not just a possibility but a high probability that the defendants were engaged in the same transaction or occurrence."[219]

There are three main scenarios in which plaintiffs have sued BitTorrent users: (1) the defendants in the suit did not participate in the same swarm for plaintiff's copyrighted work; (2) over an extended period of time, the defendants participated in the same swarm for the plaintiff's copyrighted work; and (3) over a brief period of time, the defendants participated in the same swarm for the plaintiff's copyrighted work. This Comment now addresses each scenario in turn, explaining why joinder would not be appropriate in any of these three scenarios.

The first scenario, in which the defendants in the suit did not participate in the same swarm for the plaintiff's copyrighted work, is relatively straightforward. Indeed, most courts have rejected plaintiffs' arguments that joinder is appropriate in these circumstances. Recall that BitTorrent users download a special torrent file associated with a particular media file, such as a movie. This torrent file contains a hash unique to that torrent file. Only users downloading the file associated with that hash will participate in the same swarm. To download a movie, a user can often choose from multiple possible torrent files. Each torrent file will have its own swarm. Users downloading the movie will only exchange data with the other users in their particular swarm. There is no possibility that any connections or exchanges of data will occur with any users in other swarms. The only commonality among users across swarms would be "committing the same type of violation in the same way."[220]

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218 Karunaratne, *supra* note 66, at 293.

219 *Id.* at 297.

220 LaFace Records, LLC v. Does 1–38, No. 5:07-CV-298-BR, 2008 WL 544992, at *2 (E.D.N.C. Feb. 27, 2008).

This is not enough to satisfy the transactional requirement of Rule 20; thus, joinder is not appropriate.[221]

The second scenario, in which the defendants participated in the same swarm over an extended period of time, has been a much thornier issue for courts. There have been numerous cases where a plaintiff has alleged that the defendants participated in the same swarm over a period of weeks and even months.[222] Some courts have found joinder appropriate in these circumstances, seizing upon the idea that participating in the same swarm on BitTorrent raises the possibility that the defendants were actually sources of the file for one another.[223] Over a protracted period of time, however, the possibility that a set of users were actually a source for one another is very slim.

Over long periods of time, the users in a swarm are constantly changing. Many users do not stay in a swarm much longer after they have downloaded the file.[224] If Defendant 1 was part of a swarm days before Defendant 100 and left before Defendant 100 ever joined the swarm, joinder of the two defendants would essentially be joining defendants who have merely committed the same violation in the same way.[225] Although BitTorrent itself "necessitates a concerted action by many people in order to disseminate files,"[226] BitTorrent does not necessitate a concerted action by the group of defendants in order to disseminate files. Stretching out a transaction over a period of several weeks, or possibly as far back as when the initial seeder first began sharing the file,[227] which could be several months,[228] also eliminates a major factor in

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221 *Id.* at *2–3.

222 *See, e.g.*, Donkeyball Movie, LLC v. Does 1–171, 810 F. Supp. 2d 20, 28 (D.D.C. 2011); Voltage Pictures, LLC v. Does 1–5000, 818 F. Supp. 2d 28, 39–40 (D.D.C. 2011); Call of the Wild Movie, LLC v. Does 1–1062, 770 F. Supp. 2d 332, 343 (D.D.C. 2011).

223 *See Donkeyball Movie*, 810 F. Supp. 2d at 28; *Voltage Pictures*, 818 F. Supp. 2d at 39–40; *Call of the Wild Movie*, 770 F. Supp. 2d at 343.

224 Pouwelse et al., *supra* note 25, at 210 ("[T]he majority of users disconnect from the [swarm] within a few hours after the download has been finished."). The authors analyzed a large swarm for a popular video game consisting of 90,155 peers, of which the activities of 53,883 of the peers could be traced. *Id.* Only 17% of the traced peers stayed in the swarm for more than an hour after completing the download, and only 3.1% stayed in the swarm for more than ten hours after completion. *Id.*

225 *See* Karunaratne, *supra* note 66, at 294–95.

226 Hard Drive Prods., Inc. v. Does 1–55, No. 11 C 2798, 2011 WL 4889094, at *5 (N.D. Ill. Oct. 12, 2011).

227 *See* Patrick Collins, Inc. v. Does 1–21, 282 F.R.D. 161, 165 (E.D. Mich. 2012).

228 *See* Zhang et al., *supra* note 42, at 1173.

determining transactional relatedness: time.[229] As such, joinder is not appropriate in this scenario either.

The third scenario, in which a plaintiff alleges that the defendants participated in the same swarm within a short period of time, presents a closer issue. Some observers have advocated that this represents the minimum that a plaintiff should allege in order for joinder to be appropriate in mass copyright lawsuits, as it forces the plaintiff to demonstrate "not just a possibility but a high probability that the defendants were engaged in the same transaction or occurrence."[230] However, this scenario also presents a problem for satisfying the joinder requirements, especially when factoring in the need for personal jurisdiction.

At any given time in an active BitTorrent swarm, there are potentially hundreds or thousands of users uploading and downloading.[231] Each user is only connected to a small subset of other users at any given time. In a short period of time, a user is only actually exchanging data with a much smaller subset of the connected users, with the default being four users.[232] Most of the connected users have a similar relationship with one another as was common among users of earlier P2P networks: that is, the users have or are seeking the same file but are not actually exchanging any pieces of the file with one another. The users are on the same P2P network and are using the P2P network to download or upload a copyrighted file. Put another way, the users are simply "committing the same type of violation in the same way."[233] Connections in the swarm fluctuate over time. As download speeds among users fluctuate, and the pieces that a user needs change, the peers with which a particular user exchanges data also change.[234] Over a period of a few hours, there is a greater possibility that users in the same swarm actually interacted with each other. However, personal jurisdiction requirements limit which users a plaintiff will

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[229] RESTATEMENT (SECOND) OF JUDGMENTS § 24 (1982) ("What factual grouping constitutes a 'transaction,' and what groupings constitute a 'series,' are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.").

[230] Karunaratne, *supra* note 66, at 297–98.

[231] *See* Scanlon et al., *supra* note 43, at 33.

[232] Cohen, *supra* note 47, at 4.

[233] LaFace Records, LLC v. Does 1–38, No. 5:07-CV-298-BR, 2008 WL 544992, at *2 (E.D.N.C. Feb. 27, 2008).

[234] Izal et al., *supra* note 34, at 2; Scanlon et al., *supra* note 43, at 32.

actually join as anonymous defendants in a suit, which affects the plausibility of transactional relatedness among the defendants.

C. The Personal Jurisdiction Wrinkle

The need for personal jurisdiction greatly decreases the plausibility in the third scenario that anonymous defendants in a mass BitTorrent suit were involved in the same transaction, occurrence, or series of transactions or occurrences. Initially in BitTorrent-related mass copyright suits, a plaintiff simply attempted to join any defendant who had participated in the swarm for a particular file, regardless of the defendant's contacts with the forum in which the plaintiff brought the suit.[235] BitTorrent users hail from all over the globe.[236] Any user downloading a specific file enters the swarm that corresponds to the unique hash associated with that file.[237] Thus, each swarm will consist of users spread across the United States[238] and even other countries.[239] In joining all of the users who actively participated in a particular swarm over a given length of time, a plaintiff is almost certainly including many defendants who reside outside the forum in which the plaintiff filed suit.[240] Indeed, some judges have noted this problem and have raised concerns that many of the defendants a plaintiff has joined may not be subject to the personal jurisdiction of the court,[241] and that venue may not be appropriate.[242]

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[235] *See, e.g.*, Digital Sin, Inc. v. Does 1–5698, No. C 11-04397 LB, 2011 WL 5362068, at *5 (N.D. Cal. Nov. 4, 2011) ("Digital Sin admits that only one of eight of the Doe defendants likely is located in this district."); Maverick Entm't Grp., Inc. v. Does 1–2115, 810 F. Supp. 2d 1, 16 (D.D.C. 2011); Voltage Pictures, LLC v. Does 1–5000, 818 F. Supp. 2d 28, 43 (D.D.C. 2011); Lightspeed v. Does 1–1000, No. 10 C 5604, 2011 WL 8179131, at *3 (N.D. Ill. Mar. 31, 2011) (noting that geolocation technology showed most of the named Doe defendants did not reside in the state).

[236] *See* ENVISIONAL, *supra* note 13, at 4 ("BitTorrent is the most used file sharing protocol worldwide with over 8 [million] simultaneous users and 100 [million] regular users worldwide.").

[237] *See id.* at 7; *BitTorrent Glossary*, *supra* note 26.

[238] *See* Scanlon et al., *supra* note 43, at 35–36 fig.5 (noting the distribution of BitTorrent users across the United States who participated in the 100 most popular BitTorrent swarms over the course of one week).

[239] *See id.* at 34–35 figs.1 & 2 (noting the distribution of BitTorrent users around the world who participated in the 100 most popular BitTorrent swarms over the course of one week).

[240] Karunaratne, *supra* note 66, at 298.

[241] *See, e.g.*, On the Cheap, LLC v. Does 1–5011, 280 F.R.D. 500, 504–05 (N.D. Cal. 2011). ("[P]laintiff's supporting declaration concedes that only 1 out of 7 defendants were likely using a California IP address . . . . Plaintiff also asserted that by virtue of their 'swarming' activity, the out-of-state defendants have engaged in concerted activity with the California defendants. The problem with this theory is that since plaintiff could have filed this 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. This is a far cry from the requirement[s] [for] . . . specific jurisdiction." (footnote omitted)).

[242] *See, e.g.*, Lightspeed v. Does 1–1000, No. 10 C 5604, 2011 WL 8179131, at *3 (N.D. Ill. Mar. 31, 2011) ("The court's decision to order severance is reinforced by its concerns regarding the plaintiff's choice of

Other judges, however, have held that deciding the personal jurisdiction issue is inappropriate at such an early stage in the litigation process, when the defendants are unnamed and the plaintiff is simply seeking the defendants' identifying information from the ISPs.[243] After the defendants are named, they can raise the issue of personal jurisdiction and the court can evaluate whether personal jurisdiction is appropriate.[244]

This ignores the fact that these cases seldom reach trial, and instead end with defendants settling after the plaintiff's attorney contacts them, using the identifying information obtained from these early discovery subpoenas to the ISPs.[245] Many of the defendants from a swarm will be out-of-state defendants.[246] By not making even a cursory inquiry into personal jurisdiction over defendants in these suits, courts are effectively allowing a plaintiff to collect from out-of-state defendants, who are unlikely to be subject to the court's jurisdiction.[247] To avoid this problem, courts should force a plaintiff to allege that it has a good-faith belief that the defendants reside or engaged in the infringing activity in the forum state.[248] A simple way for a plaintiff to accomplish this is to use a reverse IP check.

A reverse IP check, or the use of geolocation technology, to determine the states in which the IP addresses of the anonymous defendants are located is an inexpensive, simple method to ensure that out-of-state BitTorrent users are not pressured into settling a case.[249] Such technology can be as accurate as 98.2% in identifying the state in which an IP address is located.[250] Indeed, plaintiffs in more recent BitTorrent suits have used geolocation technology to allege that all of the anonymous defendants in the suits used an IP address traced to a

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venue. . . . [I]t appears that easily accessible tools exist to verify the locations of the IP addresses of the other named Doe Defendants, many (if not all) of which are not located in Illinois." (internal citation omitted)).

243 *See, e.g.*, AF Holdings, LLC v. Does 1–1058, 286 F.R.D. 39, 56–58 (D.D.C. 2012).

244 *Id.* at 57.

245 *See* Hamilton, *supra* note 8; Koebler, *supra* note 2.

246 Karunaratne, *supra* note 66, at 298.

247 *Id.* at 299–300 ("Given that BitTorrent file sharers are largely private individuals downloading files for private consumption, the defendants' internet activity hardly reaches the level of commerciality that would make personal jurisdiction appropriate. Moreover, the mere fact that a defendant's involvement in a swarm results in contact with a foreign jurisdiction does not mean that the defendant 'purposefully directed' his activity toward that jurisdiction." (footnotes omitted)).

248 *Id.* at 301.

249 Nu Image, Inc. v. Does 1–23,332, 799 F. Supp. 2d 34, 40–41 (D.D.C. 2011); Karunaratne, *supra* note 66, at 301.

250 *PriceWaterhouseCoopers (PwC) Completes Annual Audit of Quova IP Geolocation Data*, MARKETWIRED (Apr. 14, 2011, 8:00 AM), http://www.marketwire.com/press-release/pricewaterhousecoopers-pwc-completes-annual-audit-of-quova-ip-geolocation-data-1233911.htm.

physical location in the proper state,[251] and even in the proper district.[252] Some judges have asserted that this factual allegation is necessary for establishing a prima facie case of personal jurisdiction.[253]

Allaying personal jurisdiction fears by only joining users from a swarm whose IP addresses are traced to a physical location within the state in which the plaintiff brings the suit affects the plausibility that these users have transactional relatedness. The swarm will consist of users from all over the world. One user only connects to a small subset from the swarm. Which other users that user is exchanging data with depends on factors such as download speed, availability and necessity of pieces, and random switches.[254] Geographical proximity alone does not determine which users will share with each other.[255] Identifying the IP addresses for dozens of BitTorrent users from one swarm as physically existing in one state likely means that a much larger number of users outside of the state were also part of that swarm. Alleging that these dozens of defendants were the sources of the file for each other and engaged in any sort of interaction in the swarm would not rise above a "speculative level"[256] and would not be highly probable.[257] In fact, it is far more plausible that a named defendant's sources of the plaintiff's copyrighted work were users not named as defendants in the lawsuit. Thus, courts should not permit joinder in the third scenario—where a plaintiff alleges that the defendants participated in the same swarm within a short period of time—either.

D. Severance and the Purposes and Policies of the Federal Rules of Civil Procedure

The purposes and policies of the Federal Rules of Civil Procedure, and specifically Rule 20, also support the severance of anonymous defendants in these mass copyright infringement suits. Rule 1 expressly states that the

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[251] *See, e.g.*, Digital Sin, Inc. v. Does 1–176, 279 F.R.D. 239, 241 (S.D.N.Y. 2012); Hard Drive Prods., Inc. v. Does 1–55, No. 11 C 2798, 2011 WL 4889094, at *1 (N.D. Ill. Oct. 12, 2011).

[252] *See, e.g.*, Digital Sin, Inc. v. Does 1–27, No. 12 Civ. 3873(JMF), 2012 WL 2036035, at *2 (S.D.N.Y. June 6, 2012); Nu Image, Inc. v. Does 1–3932, No. 2:11-cv-545-FtM-29SPC, 2012 WL 646070, at *1 (M.D. Fla. Feb. 28, 2012); Third Degree Films, Inc. v. Does 1–108, No. DKC 11-3007, 2012 WL 669055, at *1 (D. Md. Feb. 28, 2012).

[253] *See, e.g.*, *Digital Sin*, 2012 WL 2036035, at *3; *Digital Sin*, 279 F.R.D. at 241; DigiProtect USA Corp. v. Does 1–240, No. 10 Civ. 8760(PAC), 2011 WL 4444666, at *4 (S.D.N.Y. Sept. 26, 2011).

[254] *See* Izal et al., *supra* note 35, at 2–3.

[255] However, geographical proximity can influence download speed.

[256] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

[257] *See* Karunaratne, *supra* note 66, at 297.

Federal Rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."[258] The Supreme Court has expounded on the purposes of the rules, explaining that "the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged."[259] These purposes and policies can aptly be labeled judicial efficiency and fairness.

There are some limited judicial efficiency gains to be had by allowing a plaintiff to sue dozens of anonymous BitTorrent users in one suit as opposed to suing individual users in separate suits. Courts permitting joinder have highlighted that joinder of the defendants will prevent numerous, duplicative trials with overlapping facts and legal issues.[260] Again, however, most of these suits do not make it to trial.[261] The only real efficiency gains are that the plaintiff only has to file one complaint and obtain one subpoena, instead of filing dozens of complaints and obtaining dozens of subpoenas that would be nearly identical. Instead of a plaintiff paying 100 separate filing fees to sue 100 BitTorrent users individually, a plaintiff can pay one filing fee to sue all 100 defendants together. In effect, courts permitting joinder end up subsidizing the plaintiff's collection efforts by allowing the plaintiff to only pay one filing fee. Ultimately, joinder just makes the plaintiff's collection attempts more efficient and allows the plaintiff to avoid the individual filing fee it would have to pay to sue each defendant individually.[262] These judicial efficiency gains are slight and are ultimately outweighed by fairness concerns.

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258 FED. R. CIV. P. 1.

259 United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 724 (1966).

260 *See, e.g.*, Maverick Entm't Grp., Inc. v. Does 1–2115, 810 F. Supp. 2d 1, 15–16 (D.D.C. 2011).

261 MCGIP, LLC v. Does 1–149, No. C 11-02331 LB, 2011 WL 4352110, at *4 n.5 (N.D. Cal. Sept. 16, 2011) ("Copyright infringement cases such as this ordinarily maintain a common arc: (1) a plaintiff sues anywhere from a few to thousands of Doe defendants for copyright infringement in one action; (2) the plaintiff seeks leave to take early discovery; (3) once the plaintiff obtains the identities of the IP subscribers through early discovery, it serves the subscribers with a settlement demand; (4) the subscribers . . . settle."); Karunaratne, *supra* note 66, at 292 ("These cases are neither designed nor intended to ever go to trial."); Hamilton, *supra* note 8 ("[A] whopping 94,000 John Does have been sued in just the first seven months of 2011. Tellingly, not a single case has ever been decided by a jury.").

262 *See MCGIP*, 2011 WL 4352110, at *4 n.5 ("[T]hese mass copyright infringement cases have emerged as a strong tool for leveraging settlements—a tool whose efficiency is largely derived from the plaintiffs' success in avoiding the filing fees for multiple suits and gaining early access *en masse* to the identities of alleged infringers."); On the Cheap, LLC v. Does 1–5011, 280 F.R.D. 500, 504 n.6 (N.D. Cal. 2011) ("If all the concerns about these mass Doe lawsuits are true, it appears that the copyright laws are being used as part of a massive collection scheme and not to promote useful arts."); IO Grp., Inc. v. Does 1–435, No. C 10-04382 SI, 2011 WL 445043, at *6 (N.D. Cal. Feb. 3, 2011) ("[F]iling one mass action in order to identify hundreds of

In considering fairness, courts must look at fairness both to the plaintiff and to the defendants. Severing defendants will not prejudice plaintiffs. Plaintiffs have alternatives to suing numerous BitTorrent users in a single lawsuit. One option is take legal action against websites that index torrent files. BitTorrent users seeking to download movies or music usually find the torrent file associated with the movie or music through these index sites.[263] Although courts have foreclosed copyright holders from suing BitTorrent directly,[264] these index sites could be held secondarily liable for copyright infringement.[265] Some sites have already shut themselves down to avoid legal action.[266]

Another option is to sue each user individually. Indeed, some media company plaintiffs are already following this strategy.[267] This strategy would not be cost prohibitive to plaintiffs, as some courts have argued.[268] A plaintiff would have to pay a $350 filing fee for each individual case.[269] Consider what happens if a plaintiff wants to sue 100 BitTorrent users in one suit. Assuming the plaintiff's initial litigation strategy of offering each defendant the opportunity to settle for $3,000,[270] a single suit could net $300,000, minus one $350 filing fee. Most defendants are likely to settle because it would cost a defendant much more than $3,000 to defend the case,[271] and if held liable, each defendant could be forced to pay as much as $150,000.[272] If the plaintiff were forced to sue each of the 100 defendants individually, the plaintiff would have to put up $35,000 to file the 100 suits, but will still likely receive $300,000 cumulatively from the 100 defendants through settlement. If plaintiffs are indeed filing these suits to protect their creative works and deter copyright infringers, the additional cost of suing each defendant individually seems a

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[D]oe defendants through pre-service discovery and facilitate mass settlement, is not what the joinder rules were established for.").

263 Scanlon et al., *supra* note 43, at 33.

264 *See* Choi, *supra* note 71, at 404.

265 Ankur R. Patel, Comment, *BitTorrent Beware: Legitimizing BitTorrent Against Secondary Copyright Infringement*, 10 APPALACHIAN J.L. 117, 142 (2011) ("BitTorrent index sites potentially face infringement liability through the doctrine of vicarious and contributory copyright infringement . . . .").

266 *E.g.*, Daniel Ionescu, *Top Torrent Site BTjunkie Shuts Voluntarily*, TECHHIVE (Feb. 6, 2012, 6:35 AM), http://www.techhive.com/article/249330/top_torrent_site_btjunkie_shuts_voluntarily.html.

267 Hamilton, *supra* note 8 ("A handful of copyright attorneys for adult studios generally abide by [the guidelines that BitTorrent defendants should be sued individually] . . . .").

268 Call of the Wild Movie, LLC v. Does 1–1062, 770 F. Supp. 2d 332, 344–45 (D.D.C. 2011).

269 Hamilton, *supra* note 8.

270 Koebler, *supra* note 2.

271 *See* Brian Noh, Note, *Fair Copyright Litigation: The Reverse Class Action Lawsuit*, 9 HASTINGS BUS. L.J. 123, 125 (2012); Hamilton, *supra* note 8 ("To fight the case in court would set [the defendant] back thousands of dollars in attorney's fees.").

272 Koebler, *supra* note 2.

small price to pay to ensure that procedural guidelines are followed. In the unlikely event that the individual cases proceed through regular discovery and toward trial, the costs to the plaintiff of each separate trial could become prohibitive. However, these duplicative costs can be avoided by consolidation of cases by the courts themselves, if indeed some of the defendants challenge the plaintiff's allegations.[273]

Severing defendants from these mass copyright suits will also not subject a plaintiff to inconsistent judgments, or "whipsawing," which is the major fairness concern underlying Rule 20. One of the dangers that joinder of defendants is designed to eliminate is whipsawing.[274] Whipsawing occurs when a defendant convinces the jury that he did not cause the damage to the plaintiff, but rather a party not present in the suit caused the damage.[275] When the plaintiff attempts to sue the absent party in a separate suit, that party may convince the jury in its case that the defendant in the first case caused the plaintiff's damage.[276] Thus, each jury may believe that the plaintiff is entitled to recover, but the plaintiff actually fails to recover.[277] Joining the defendants in a single suit would avoid this whipsaw effect and allow the plaintiff to recover the damages that the jury finds him entitled to.[278]

This danger of whipsawing the plaintiff is not present in the mass BitTorrent suits. In these suits, each anonymous defendant is alleged to have individually violated the U.S. Copyright Act and infringed the plaintiff's copyrighted work by "illegally reproduc[ing] and distribut[ing]" the work on BitTorrent.[279] Under the U.S. Copyright Act, each infringer of the plaintiff's copyright would be liable to the plaintiff for damages.[280] If the plaintiff, or the plaintiff's investigator, has indeed observed the IP address associated with an individual defendant's computer participating in the swarm, that defendant cannot point to an absent party as the real cause of the plaintiff's damages. The jury will find that a particular defendant has infringed and thus is liable for

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[273] See FED. R. CIV. P. 21 ("On motion or on its own, the court may at any time, on just terms, add or drop a party.").

[274] *See* Richard D. Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court's Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 824 (1989) ("[I]nclusive joinder of defendants robs the individual defendants of the ability to 'whipsaw' the plaintiff . . . .").

[275] *Id.*

[276] *Id.*

[277] *Id.*

[278] *Id.*

[279] *See, e.g.*, Hard Drive Prods., Inc. v. Does 1–188, 809 F. Supp. 2d 1150, 1151 (N.D. Cal. 2011).

[280] 17 U.S.C. § 504(a) (2012) ("[A]n infringer of a copyright is liable for either (1) the copyright owner's actual damages . . . or (2) statutory damages . . . .").

damages, or has not infringed. Either way, the inclusion or absence of any other downloaders does not affect an individual downloader's potential for liability. Not having this danger of whipsawing eliminates one of the bigger prejudices toward the plaintiff that may necessitate permissive joinder of numerous defendants.

There is a real danger of prejudice to the defendants, however. Courts have justified permitting joinder by explaining that defendants can contest joinder later in the suit, after they are named.[281] This ignores the fact that these suits rarely, if ever, reach trial.[282] In allowing joinder when the plaintiff seeks to obtain the defendants' identifying information, courts effectively foreclose the joinder issue in the case permanently. Once the plaintiff receives the identifying information for the defendants, the defendants often receive a letter demanding settlement. In at least one case, a plaintiff's lawyer served unauthorized subpoenas on the ISPs of the defendants, and then contacted the defendants to pressure them to pay a settlement fee.[283] Some of these defendants may even have valid defenses that they never get the opportunity to present.[284] Beyond fairness concerns, there is also a real concern that plaintiffs in these mass copyright suits against BitTorrent users are employing Rule 20(a)(2) to circumvent the stricter requirements for class actions under Rule 23.

E. An Attempt by Plaintiffs to Circumvent Rule 23

At first glance, mass copyright suits against BitTorrent users seem more appropriately brought as class actions under Rule 23. Indeed, class actions arose as a way for courts to hear a case involving such a large number of parties as to render joinder impracticable.[285] There is no set number at which joinder becomes impracticable, but the sheer number of defendants in most of the copyright infringement suits against BitTorrent users suggests that these

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[281] *See, e.g.*, Digital Sin, Inc. v. Does 1–176, 279 F.R.D. 239, 244 (S.D.N.Y. 2012); First Time Videos, LLC v. Does 1–76, 276 F.R.D. 254, 257, 259 (N.D. Ill. 2011); W. Coast Prods., Inc. v. Does 1–5829, 275 F.R.D. 9, 16 (D.D.C. 2011); Donkeyball Movie, LLC v. Does 1–171, 810 F. Supp. 2d 20, 29–30 (D.D.C. 2011); Call of the Wild Movie, LLC v. Does 1–1062, 770 F. Supp. 2d 332, 345–46 (D.D.C. 2011).

[282] Hamilton, *supra* note 8; Koebler, *supra* note 2.

[283] Karunaratne, *supra* note 66, at 305.

[284] *See id.* at 304 ("[The plaintiff's] lawyers do not need to take much care in ensuring that the John Doe actually was engaged in infringing activity."); Hamilton, *supra* note 8 (noting one particular defendant who believed his wireless router was used by a stranger to download copyrighted material through BitTorrent).

[285] 7A WRIGHT ET AL., *supra* note 73, § 1751 (3d ed. 2005).

suits fall under the situation for which class actions were designed.[286] Yet these suits would not meet the requirements for bringing a class action under Rule 23, which causes plaintiffs to try to circumvent these requirements by attempting to join BitTorrent users under Rule 20(a)(2).[287]

Rule 23(a) sets out four prerequisites for a class action:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.[288]

The class must also satisfy one of the three requirements in Rule 23(b).[289] The only applicable requirement in these mass copyright infringement cases is Rule 23(b)(3)[290]: "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[291]

The second requirement of Rule 23(a), the "commonality" requirement, creates the biggest problem for the use of defendant class actions in mass suits against BitTorrent users. The commonality requirement requires that "there are questions of law or fact common to the class."[292] Courts have traditionally

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[286] *See* Noh, *supra* note 271, at 130; Jonathan Reich, iBrief, *The Class Defense: Why Dispersed Intellectual Property Defendants Need Procedural Protections*, 2010 DUKE L. & TECH. REV., no. 009, ¶ 26. Although a class action is most commonly used when a large number of plaintiffs sue one defendant, Rule 23 leaves open the possibility that a class action can also be used a vehicle for a single plaintiff to sue many defendants. *See* FED R. CIV. P. 23(a) ("One or more members of a class may *sue or be sued* as representative parties on behalf of all members . . . ." (emphasis added)). In the past, the Supreme Court and other courts have certified defendant class actions. *See, e.g.*, ASARCO Inc. v. Kadish, 490 U.S. 605, 610 (1989); *see also* Noh, *supra* note 271, at 125.

[287] One judge has pointed this out, writing, "[I]t is no accident that plaintiff has not sought to bring this lawsuit as a class action, or to have a class of defendants certified—the Rule 23 requirements for certification could not possibly be met." Digital Sins, Inc. v. Does 1–245, No. 11 Civ. 8170(CM), 2012 WL 1744838, at *3 (S.D.N.Y. May 15, 2012).

[288] FED. R. CIV. P. 23(a).

[289] Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2548 (2011).

[290] *See* Noh, *supra* note 271, at 136. Rule 23(b)(1) is concerned with eliminating inconsistent judgments from trying separate cases, or "whipsawing," which, as discussed previously, is not an issue in these suits. *See id.* at 136 n.100. Rule 23(b)(2) does not apply to defendant class actions. *See id.*

[291] FED. R. CIV. P. 23(b)(3).

[292] FED. R. CIV. P. 23(a)(2).

applied this requirement permissively.[293] The Supreme Court's recent decision in *Wal-Mart v. Dukes* appears to have shifted the rule away from a permissive application.[294]

In *Wal-Mart*, the Court explained that class certification does not simply require "the raising of common questions—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation."[295] That is, the claims in a class action "must depend upon a common contention . . . of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[296] Simply "suffer[ing] a violation of the same provision of law" is not sufficient.[297] This stricter requirement is not "a mere pleading standard"; rather the "party seeking class certification must affirmatively demonstrate . . . that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc."[298] The rationale behind this stricter requirement is the concern that "any competently crafted class complaint literally raises common questions."[299]

The suits against BitTorrent users are defendant class actions—numerous defendants with defenses against the plaintiff—instead of the usual plaintiff class actions—numerous plaintiffs with claims against the defendant. Thus for these suits, instead of the claims depending on a common contention, the defenses must depend on a common contention.[300] Copyright infringement suits against large numbers of BitTorrent users certainly raise some common questions of law and fact among the defendants.[301] Yet, these common questions, such as how BitTorrent works and whether the downloaded file was

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293 7A WRIGHT ET AL., *supra* note 73, § 1763 (3d ed. 2005).

294 131 S. Ct. 2541; 7A WRIGHT ET AL., *supra* note 73, § 1763.

295 *Wal-Mart*, 131 S. Ct. at 2551 (internal quotation marks omitted).

296 *Id.* The Court gave as an example of a common contention suitable for *Wal-Mart* "the assertion of discriminatory bias on the part of the same supervisor." *Id.*

297 *Id.*

298 *Id.*

299 *Id.* (internal quotation marks omitted).

300 For a plaintiff class, "the[] claims must depend upon a common contention." *Id.* The text of Rule 23 suggests that analyzing the requirements for a plaintiff class involves analyzing the claims, while analyzing the requirements for a defendant class involves analyzing the defenses. *See* FED. R. CIV. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all members only if . . . the claims or defenses of the representative parties are typical of the claims or defenses of the class . . . .").

301 *See supra* notes 148–49 and accompanying text.

the plaintiff's copyrighted work, will not be the contentions in the suit that the defendants' defenses create.

The suits themselves center around the claim by a plaintiff that the defendants used BitTorrent to illegally infringe on the plaintiff's copyrighted work.[302] Broadly speaking, each defendant in the suits will have the same defense: he did not illegally infringe on the plaintiff's copyrighted work using BitTorrent. Yet this broad contention is similar to the broad contention the Court rejected in *Wal-Mart*: each plaintiff's claim that the Wal-Mart Company discriminated against her.[303] Each BitTorrent user in a suit will have different reasons underlying the reason that he did not illegally infringe on the plaintiff's copyrighted work. Some defendants may offer specific defenses that can be resolved classwide, such as fair use and copyright misuse.[304] Other defendants, however, will assert that, although their names correspond to the IP addresses listed in the complaint, they themselves did not use BitTorrent to download the plaintiff's work, but that someone else used their Internet connection to do so.[305] The circumstances surrounding the "it was not me" defense will vary from defendant to defendant.[306]

Resolving one defendant's defense will have little impact on the resolution of another defendant's defense, as each defense will rest on a separate set of facts. Thus, these defenses are not capable of "classwide resolution."[307] That is, a classwide proceeding would not "generate common *answers* apt to drive the resolution of the litigation,"[308] specifically the common answers as to whether the defendants in the suit actually used BitTorrent to infringe the plaintiff's copyright. With little knowledge about each defendant, plaintiffs would find it nearly impossible to affirmatively demonstrate in their pleadings that the defendants' defenses would raise a common contention.[309] As a result, the commonality requirement of Rule 23(a) would not be met and the plaintiffs

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302 *See, e.g.*, Donkeyball Movie, LLC v. Does 1–171, 810 F. Supp. 2d 20, 29–30 (D.D.C. 2011).

303 *Wal-Mart*, 131 S. Ct. at 2556–57.

304 Noh, *supra* note 271, at 131.

305 *See, e.g.*, Hard Drive Prods., Inc. v. Does 1–188, 809 F. Supp. 2d 1150, 1163 (N.D. Cal. 2011).

306 *See id.* ("John Doe [Defendant] 1 could be an innocent parent whose Internet access was abused by her minor child, while John Doe [Defendant] 2 might share a computer with a roommate who infringed Plaintiffs' works."); *see also* Hamilton, *supra* note 8 ("[The John Doe Defendant] believes his neighbors were using his unprotected wireless to download movies."). This also undermines the third requirement in Rule 23(a) that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." FED. R. CIV. P. 23(a)(3).

307 *Wal-Mart*, 131 S. Ct. at 2551.

308 *Id.*

309 *See id.*

could not bring these suits against BitTorrent users as class actions under Rule 23.[310] However, courts should not bend the joinder rules to allow plaintiffs bringing these mass copyright infringement suits to circumvent Rule 23.

CONCLUSION

The growth of Internet piracy has made it more difficult to protect the rights of copyright holders. The temptation is strong to use whatever legal means available to combat online copyright infringement. When the means used resemble a collection scheme to pressure and coerce defendants into paying, courts should examine the suits more closely. Many courts have mischaracterized how BitTorrent works to distinguish copyright infringement suits against BitTorrent users from copyright infringement suits against users of other P2P networks. This has led to some courts allowing copyright holders to bend joinder rules in suits against BitTorrent users. The implausibility that BitTorrent users actually participated in the same transaction, occurrence, or series of transactions or occurrences should push courts toward severing all but one of the defendants in mass copyright infringement suits against BitTorrent users.

The Federal Rules of Civil Procedure are designed to ensure the fairness of litigation for all parties involved. In permitting joinder, courts have given undue weight to plaintiffs' concerns at the expense of defendants. Courts have also neglected to consider the purposes behind permissive party joinder. As a result, copyright holders can bring class action–like lawsuits under the joinder rules to circumvent the class action requirements. Copyright holders have other avenues to protect their copyrighted works and fight online infringement—avenues that do not prejudice defendants or game the Federal Rules. Courts should push copyright holders to pursue these other avenues by denying joinder of anonymous BitTorrent users in mass copyright infringement suits.

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[310] *Id.* at 2551–57 (holding that because the plaintiff failed to satisfy the commonality requirement, the suit could not be brought as a class action under Rule 23).

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