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## What's Going on With Copyright Trolls?

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## WHAT'S GOING ON WITH COPYRIGHT TROLLS?

*Edward Grahovec\**

### I. INTRODUCTION

Imagine this: Betty, a seventy-year-old woman, is minding her own business when she receives a letter in the mail from her Internet Service Provider (“ISP”), Comcast Corporation states that they were subpoenaed by a movie company, which is accusing Betty of illegally downloading the movie company’s movies. “What’s a subpoena?” she thinks to herself. She has never been involved in a lawsuit before, so she has no idea what to do next. She searches online to learn a little more about the movie company and these kinds of lawsuits, only to find that the movie company, Bubble Gum Productions, creates pornographic content. Now she is really confused. She talks to her grandson, Allen, who knows a lot about computers, and he suspects someone is mooching off her unprotected Wi-Fi network. The two of them contemplate running up and down the neighborhood screaming, “Who’s the pervert?!” trying to figure out who used her Wi-Fi to download these videos. Then she looks down at her breathing machine and decides she has a few more years left in her. Betty consults a lawyer instead, who advises her that she can either fight the case or negotiate a settlement. “Why wouldn’t I fight the case? There’s no way the movie company can prove I downloaded the movies, right?” Betty asks. The lawyer responds, “That’s correct, but it will cost anywhere between \$3,000 and \$5,000 in legal fees and any additional filing fees, and we probably will not hear the judge’s decision on the matter for a few months, at which point the movie company can appeal it, resulting in more fees.” Betty’s heart sank. “OR, we can settle the case outside of court without admitting guilt for something less than that.”

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“Let’s do that. I just want this to be over and move on with my life.”

“And that, ladies and gentlemen, is why copyright ‘sue-for-settlement’ lawsuits are so successful.”<sup>1</sup>

Unfortunately, the above scenario is not a hypothetical.<sup>2</sup> For the past decade,<sup>3</sup> copyright trolls have been flooding the legal system in an attempt to profit off the Copyright Act. Under the Act, copyright holders are entitled to statutory damages resulting from unauthorized use of copyrighted material ranging from \$750-\$150,000 per work and appropriate attorney’s fees.<sup>4</sup> By filing lawsuits against John Does, citing technical forensic evidence, Courts generally defer to allowing expedited discovery so movie companies can subpoena ISPs and conduct further research to ensure the account subscriber (the one paying the bills) is, in fact, the infringer.<sup>5</sup>

But why is this movie company coming after end users to begin with? Wouldn’t it make more sense to go after the initial uploader? And how do these companies pinpoint specific IP address associated with the alleged downloads? And more importantly, what can be done about these cases that are clogging up the judicial pipeline? The primary purpose of this comment is to dive into not only the trend District Court judges are setting, but also whether these cases bring up data privacy concerns, and what other avenues exist in eradicating these tumultuous lawsuits. However, understanding the background of these lawsuits and the technology involved is crucial.

<sup>1</sup> *First It Was Grandma, Now it's the Blind Accused of Downloading Porn Videos*, <http://www.digital-digest.com/news-63099-First-It-Was-Grandma-Now-its-the-Blind-Accused-of-Downloading-Porn-Videos.html> (last accessed Oct. 15, 2019).

<sup>2</sup> *70 Year Old Grandma Sued For Downloading Porn Via BitTorrent*, <http://www.digital-digest.com/news-63079-70-Year-Old-Grandma-Sued-For-Downloading-Porn-Via-BitTorrent.html> (last accessed Oct. 15, 2019).

<sup>3</sup> See Matthew Sag, Jake Haskell, *Defense Against the Dark Arts of Copyright Trolling*, 103 Iowa L. Rev. 571, 573 (2018).

<sup>4</sup> 17 U.S.C.A. §§ 501-505 (West).

<sup>5</sup> See *Strike 3 Holdings, LLC v. John Doe subscriber assigned IP address 67.170.214.219*, No. 18-cv-02019-YGR (EDL), Doc. 29, at 6 (N.D. Cal. Sept. 14, 2018).

## II. BACKGROUND

### A. *The IP Address*

To understand the nature of BitTorrent copyright infringement lawsuits, a general understanding of IP Addresses and the BitTorrent protocol is necessary.

An IP Address is an internet subscriber's unique identifier for browsing the Web.<sup>6</sup> It is a series of digits (such as 78.192.192.244) that identifies the user to make connections with other websites.<sup>7</sup> Internet Service Providers ("ISPs") assign these unique identifiers dynamically or statically.<sup>8</sup> Static IP Addresses are fixed identifiers that do not change over time.<sup>9</sup>

Dynamic IP Addresses, as the name suggests, changes over time.<sup>10</sup> One day your IP Address can be 78.192.192.244, and the next day it could change to something different. ISPs primarily utilize this practice to conserve the number of IP Addresses in use at a given time.<sup>11</sup> Due to the nature of the IPv4 protocol, there are a finite number of IP Addresses to hand out to users, so ISPs assign new IP Addresses depending on the user's internet activity.<sup>12</sup> Inactive users' addresses are given to more active users.<sup>13</sup>

### B. *What is BitTorrent?*

BitTorrent is a communication protocol for peer-to-peer file sharing ("P2P") which is used to distribute data and electronic files

<sup>6</sup> Steven J. Vaughan-Nichols, *Static vs. Dynamic IP Addresses*, Avast, (last updated Oct. 31, 2019), <https://www.avast.com/c-static-vs-dynamic-ip-addresses>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *What is a Dynamic IP Address?*,

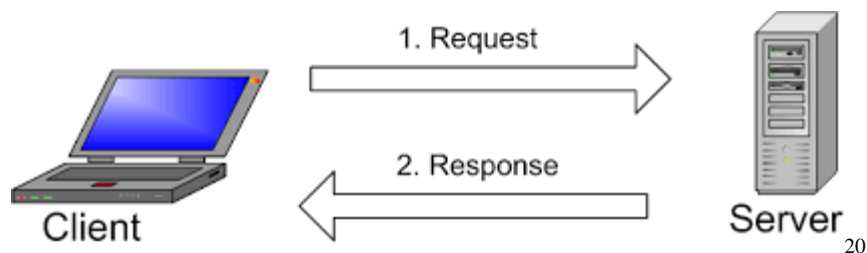
<https://www.noip.com/support/knowledgebase/what-is-a-dynamic-ip-address/> (last visited Nov. 1, 2019).

<sup>12</sup> *Getting Ready for IPv4 Run-out*, RIPE NCC, <https://www.ripe.net/manage-ips-and-asns/ipv4/getting-ready-for-ipv4-run-out> (last visited Nov. 9, 2019).

<sup>13</sup> *Id.*

over the Internet.<sup>14</sup> It is not a program.<sup>15</sup> You must, however, download a program, known as a BitTorrent client, to download files via the BitTorrent protocol.<sup>16</sup> Unlike downloading a normal file from a website (via the HTTP or FTP protocol), the BitTorrent protocol distributes the sharing of files across all users who have downloaded a file.<sup>17</sup> This means that instead of downloading an entire file from one server, you are downloading tiny pieces of a file from multiple users within the BitTorrent “swarm.”<sup>18</sup> This is highly lucrative to users who want to download large files quickly, or content creators that want to publicly share their songs or videos without having to pay for massive amounts of bandwidth.<sup>19</sup> The illustration below depicts the difference between the HTTP and BitTorrent protocols.

*HTTP Protocol Diagram:*



Here, a single request for a file from a single server sends a response to the client requesting the file.<sup>21</sup> For example, imagine a scenario where a user wants to download a song from their favorite artist’s website. The user opens a web browser, i.e. Chrome or Safari, and clicks a button on the artist’s website to initiate the

<sup>14</sup> Adam Pash & David Murphy, *A Beginner’s Guide to BitTorrent*, Lifehacker (July 11, 2019), <https://lifehacker.com/a-beginners-guide-to-bittorrent-285489>.

<sup>15</sup> Pash, *supra* note 14.

<sup>16</sup> Pash, *supra* note 14.

<sup>17</sup> Pash, *supra* note 14.

<sup>18</sup> Pash, *supra* note 14.

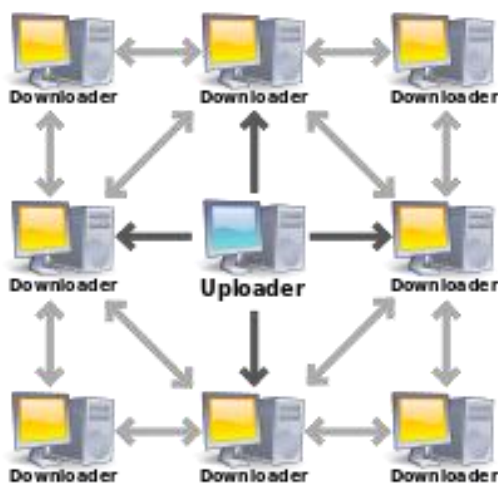
<sup>19</sup> Pash, *supra* note 14.

<sup>20</sup> Sampath Kumar, *How BitTorrent Works* (Sept. 29, 2018), <https://medium.com/@Sam278Kumar/how-bittorrent-works-abb29c9a4b88> (last visited Feb. 14, 2020).

<sup>21</sup> Kumar, *supra* note 20.

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download. Download speed implications arise when multiple clients are sending requests to the single server that, in turn, slow down the server's response time.<sup>22</sup> To combat this, server owners need to pay additional costs for more servers to handle large scale requests from clients.<sup>23</sup>

*BitTorrent Protocol:*

24

Here, the original uploader, or “seed,” makes a particular file available for download.<sup>25</sup> Subsequent downloaders then acquire the file by receiving “pieces” of the file from multiple users, or “peers,” that have either downloaded the file or are in the process of downloading the file.<sup>26</sup> The BitTorrent client then puts all the pieces it gathered together on the user's machine for use.<sup>27</sup>

The song scenario would go like this: Band RB uploads their latest single, “It's Friday,” via the BitTorrent protocol. B, C, and D connect as peers and begin downloading the song. B's BitTorrent

<sup>22</sup> Kumar, *supra* note 20.

<sup>23</sup> Kumar, *supra* note 20.

<sup>24</sup> *BitTorrent*, Wikipedia, <https://en.wikipedia.org/wiki/BitTorrent> (last visited Oct. 6, 2019).

<sup>25</sup> Pash, *supra* note 14.

<sup>26</sup> Pash, *supra* note 13.

<sup>27</sup> Pash, *supra* note 13.

client starts downloading the first minute of the song from RB's machine. C's client downloads the second minute from RB, and D's client downloads the third minute from RB. After each client downloads the first piece of the file, it then looks to download the next piece from either a peer or the seed, whichever is faster. For example, B begins downloading the second minute from C; C begins downloading the third minute from D; and D begins downloading the first minute from B. This process continues until the file is downloaded on each machine requesting the file. Notice how RB's machine only had to send out one request through its server to provide the file to three users. That is where the appeal lies. The heavy lifting is done by numerous users rather than one server.

### *C. Overview of the Copyright Trolling Legal Landscape*

Armed with an understanding of the BitTorrent protocol, it is easier to comprehend the framework of these lawsuits. Professor Sag, a professor at Loyola University School of Law, along with Jake Haskell, an intellectual property attorney in Chicago, go into great depth illustrating the legal landscape of BitTorrent copyright infringement lawsuits.<sup>28</sup> Professor Sag breaks down these lawsuits in four stages,<sup>29</sup> but this section will start where all lawsuits start: the complaint.

#### *i. The Complaint*

The first step of any lawsuit is to file a complaint.<sup>30</sup> Copyright infringement lawsuits are no different. However, the majority of complaints in BitTorrent copyright infringement cases contain boilerplate language, alleging the account subscriber, identified only by an IP address, infringed on the plaintiff's copyrighted material through online file sharing. At its core, these lawsuits are merely a "pretext to obtain third-party discovery orders

<sup>28</sup> See generally Sag & Haskell, *supra* note 3.

<sup>29</sup> Sag & Haskell, *supra* note 3, at 605.

<sup>30</sup> Fed. R. Civ. P. 8.

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to compel various ISP's to disgorge the account details of their subscribers."<sup>31</sup>

They specifically allege that the defendant participated in the BitTorrent "swarm" that distributed the copyrighted material.<sup>32</sup> As noted above, the "swarm" refers to the group of "peers" using BitTorrent to download and distribute large files. How do movie companies acquire this information? Movie companies such as Strike 3 Holdings, LLC, and Malibu Media, LLC, hire a German private investigator, IPP International UG, to "establish a direct TCP/IP connection with the Defendant's IP address [and] . . . downloaded from Defendant one or more pieces of each of the digital media files identified by the file hashes."<sup>33</sup> This means the private investigator posed as a "peer" and identified other "peers" in the swarm by their IP address when they requested plaintiff's copyrighted works.

A few questions to think about: (1) why do plaintiffs use an overseas private investigator when there are ample resources in the United States? From a business perspective, is hiring a foreign private investigator an effective use of resources versus hiring a state-side firm? (2) How are the IP addresses being located by IPP? (3) Is there any other information IPP gathers besides an IP address?

## ii. Subpoena

Once the movie company locates the infringing IP address, they subpoena the ISP to retrieve the name and address of the account subscriber.<sup>34</sup> The subpoena is the byproduct of a court granting early discovery based on the allegations in the complaint. Some courts, however, refuse to allow early discovery.<sup>35</sup>

<sup>31</sup> Sag & Haskell, *supra* note 3, at 606.

<sup>32</sup> Sag & Haskell, *supra* note 3, at 581.

<sup>33</sup> *Malibu Media, LLC v. Doe, subscriber assigned IP address 99.138.100.230*, Docket No. 1:19-cv-04737 (N.D. Ill. Jul. 15, 2019) (¶ 18-19 of Oral Argument).

<sup>34</sup> Sag & Haskell, *supra* note 3, at 606.

<sup>35</sup> Sag & Haskell, *supra* note 2, at 608 n. 168. "See *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 89 (E.D.N.Y. 2012) ("The most persuasive argument against permitting plaintiffs to proceed with early discovery arises from the clear indicia . . . that plaintiffs have employed abusive litigations tactics to extract settlements from John Doe defendants."); *Patrick Collins, Inc. v. John Does 1-37*, No. 2:12-cv-01259-JAM-EFB, 2012 WL



The ISP will usually notify the account subscriber of the subpoena and allow them to respond by either filing a motion to quash the subpoena or negotiating a settlement with the movie company.<sup>36</sup> If a settlement is reached prior to the ISP responding to the subpoena, the ISP will withhold the defendant's name and address.<sup>37</sup> However, ISPs only give subscribers approximately one month to understand the gravity of the situation and hire an attorney to negotiate a favorable settlement.<sup>38</sup>

### iii. Motion to Proceed Anonymously

Depending on the nature of the suit, defendants can file a Motion to Proceed Anonymously to protect their identity throughout the lawsuit.<sup>39</sup> Where the plaintiffs are pornographic content owners, judges typically grant the motions because its within their discretion, the potential shame and embarrassment to

2872832, at \*3 n.2 (E.D. Cal. July 11, 2012) (observing that the federal courts are not flexible enough to be shaped into “cogs in a plaintiff’s copyright-enforcement business model” and admonishing that “[t]he Court will not idly watch what is essentially an extortion scheme, for a case that [P]laintiff[s] ha[ve] no intention of bringing to trial.”); *Malibu Media, LLC v. John Does 1–5*, No. 12-cv-02950-JPO, 2012 WL 2001968, at \*1 (S.D.N.Y. June 1, 2012) (“This Court shares the growing concern about unscrupulous tactics used by certain plaintiffs, particularly in the adult films industry, to shake down the owners of specific IP addresses from which copyrighted adult films were allegedly downloaded.”); *Dig. Sins, Inc. v. John Does 1–245*, No. 11-cv-08170-CM, 2012 WL 1744838, at \*3 (S.D.N.Y. May 15, 2012) (“In these BitTorrent cases . . . numerous courts have already chronicled abusive litigation practices.”); *SBO Pictures, Inc. v. Does 1–20*, No. 12-cv-03925-SAS, 2012 WL 2034631, at \*1 (S.D.N.Y. June 5, 2012) (“[E]arly discovery has been used repeatedly in cases such as this one to harass and demand of defendants quick settlement payments, regardless of their liability.”); *Dig. Sin, Inc. v. Does 1–176*, 279 F.R.D. 239, 242 (S.D.N.Y. 2012) (“[P]laintiffs have used the offices of the Court as an inexpensive means to gain the Doe defendants’ personal information and coerce payment from them. The plaintiffs seemingly have no interest in actually litigating the cases, but rather simply have used the Court and its subpoena powers to obtain sufficient information to shake down the John Does.” (quoting Memorandum Order at 4, *K-Beech, Inc. v. Does 1–85*, No. 11-cv-00469-JAG (E.D. Va. Oct. 5, 2011), ECF No. 9)).”

<sup>36</sup> Sag & Haskell, *supra* note 3, at 606.

<sup>37</sup> Sag & Haskell, *supra* note 3, at 606-607.

<sup>38</sup> Sag & Haskell, *supra* note 3, at 606-607.

<sup>39</sup> Sag & Haskell, *supra* note 3, at 609.

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the defendant if wrongfully accused, and the lack of harm to the public.<sup>40</sup>

iv. When to Settle

Regrettably, most cases do not litigate beyond this stage.<sup>41</sup> The cost of court filings, discovery, summary judgment motions, a trial, and a lack of successful other John Does being awarded attorney's fees, drive defendants to accept a settlement even if they are innocent.<sup>42</sup> Professor Sag details strategies to employ in fighting these cases, but without clients willing to fight, these movie companies will continue to profit off the justice system.<sup>43</sup> In some cases, the movie companies are potentially generating more revenue from settlement funds than at the Box Office.<sup>44</sup>

### III. ANALYSIS

#### *A. Disagreement and Decision Trends among the District Courts*

There are two main points of contention in BitTorrent copyright infringement lawsuits: (1) whether the movie companies assert good cause in requesting expedited discovery under Fed. R. Civ. P. 26(f), and (2) whether the identification of Defendant's IP Address, alone, is enough to allow courts to proceed beyond the pleadings and to survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss.<sup>45</sup>

<sup>40</sup> Sag & Haskell, *supra* note 3, at 644-45.

<sup>41</sup> Sag & Haskell, *supra* note 3, at 573.

<sup>42</sup> Sag & Haskell, *supra* note 3, at 612-14.

<sup>43</sup> Sag & Haskell, *supra* note 3, at 614-16; 622-24;

<sup>44</sup> Julianne Pepitone, *50,000 BitTorrent Users Sued For Alleged Illegal Downloads*, CNN (June 10, 2011)

[https://money.cnn.com/2011/06/10/technology/bittorrent\\_lawsuits/index.htm](https://money.cnn.com/2011/06/10/technology/bittorrent_lawsuits/index.htm) ("as TorrentFreak, one of the first blogs to report on the Locker case, points out: If only 10,000 of the alleged infringers pay a \$2,000 settlement, it would *net* \$20 million for Voltage and USCG. In comparison, The Hurt Locker grossed \$17 million at the U.S. box office.") (emphasis added).

<sup>45</sup> "Compare *Countryman Nevada, LLC v. Pitts*, No. 6:14-cv-493-Orl-40GJK, 2014 WL 7178077, at \*2 (M.D. Fla. Dec. 16, 2014) (collecting cases finding that identification of defendant solely by IP address is sufficient at the pleading stage to state direct infringement claim), with *Elf-Man, LLC v. Cariveau*, No.

The question of whether an IP Address is enough to survive a motion to dismiss comes up time and time again. In relation to BitTorrent copyright infringement lawsuits, the IP Address retrieved from the forensic investigator's (i.e. IPP) analysis merely points to the internet *subscriber*, not necessarily the *infringer*. Courts routinely highlight that none of the technologies presented explicitly link the IP Address to the identity of the person actually downloading the copyrighted material.<sup>46</sup> The issuance of a subpoena is merely a stepping stone for the plaintiffs to continue their investigation in identifying someone to name in the complaint, much like throwing spaghetti at the wall and hoping something sticks. "And once the ISP outs the subscriber, permitting them to be served as the defendant, any future Google search of their name will turn-up associations with the websites *Vixen*, *Blacked*, *Tushy*, and *Blacked Raw*. The first two are awkward enough, but the latter two cater to even more particular tastes."<sup>47</sup> So how do companies acquire the court-ordered subpoenas to proceed with early discovery?

#### i. Acquiring Expedited Discovery

A plaintiff can only discover an unknown defendant's identity through a court order under Rule 26(d)(1).<sup>48</sup> But the rule harbors a district court's discretion to order discovery in circumstances where a plaintiff shows good cause.<sup>49</sup> To show good cause, courts require establishing likely personal jurisdiction.<sup>50</sup> Most often, using geolocation services to track an infringing IP

C13-0507RSL, 2014 WL 202096, at \*2 (W.D. Wash. Jan. 17, 2014) (dismissing direct infringement claim where plaintiff did not "provide specific facts tying the named defendant to the infringing conduct" and instead merely alleged that the defendant's IP address "was observed infringing Plaintiff's motion picture")." *Malibu Media, LLC v. Doe*, No. 18 C 450, 2018 WL 6446404, at \*3 (N.D. Ill. Dec. 10, 2018).

<sup>46</sup> See *Elf-Man, LLC v. Cariveau*, No. C13-0507RSL, 2014 WL 202096 (W.D. Wash. Jan. 17, 2014); *Cobbler Nevada, LLC v. Gonzales*, 901 F.3d 1142, 1145 (9th Cir. 2018).

<sup>47</sup> *Strike 3 Holdings, LLC v. Doe*, 351 F. Supp. 3d 160, 162 (D.D.C. 2018).

<sup>48</sup> *Id.*

<sup>49</sup> See Fed. R. Civ. P. 26(b)(1).

<sup>50</sup> *AF Holdings, LLC v. Does 1-1058*, 752 F.3d 990, 995 (D.C. Cir. 2014).

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address to a specific jurisdiction is enough to establish a good-faith belief that the court has personal jurisdiction.<sup>51</sup>

However, courts also consider the Arista test in determining whether good cause exists. The five principal factors include:

(1) the concreteness of the plaintiff's showing of a prima facie claim of actionable harm; (2) the specificity of the discovery request; (3) the absence of alternative means to obtain the subpoenaed information; (4) the need for the subpoenaed information to advance the claim; and (5) the objecting party's expectation of privacy.<sup>52</sup>

Judges vary in applying weight to each factor.<sup>53</sup> Some, like Judge Royce Lamberth and Magistrate Judge Joel Schneider, place the largest emphasis on the defendant's expectation of privacy.<sup>54</sup>

“Imagine having your name and reputation publicly—and permanently—connected to [pornographic] websites like Tushy and Blacked Raw. (Google them at your own risk.) How would an improperly accused defendant's spouse react? His (or her) boss? The head of the local neighborhood watch? The risks of a false accusation are real; the consequences are hard to overstate and even harder to undo.”<sup>55</sup>

<sup>51</sup> *Strike 3*, 351 F. Supp. 3d at 162.

<sup>52</sup> *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 119 (2d Cir. 2010) (citing *Sony Music Entm't Inc. v. Does 1-40*, 326 F.Supp.2d 556, 564-65 (S.D.N.Y. 2004) (Chin, J.)).

<sup>53</sup> *Strike 3 Holdings, LLC v. Doe*, 351 F. Supp. 3d 160, 162 (D.D.C. 2018).

<sup>54</sup> *Strike 3 Holdings, LLC v. Doe*, 351 F. Supp. 3d 160, 164 (D.D.C. 2018); see also *Strike 3 Holdings, LLC v. Does, et al.*, Order Denying Expedited Discovery, Case 1:18-cv-02674 (D. N.J. 2018) (“When the foregoing is weighed against the prejudice that may result to an innocent subscriber defendant, including the invasion of a constitutionally protected privacy interest recognized by the New Jersey Supreme Court, the balance falls in favor of denying Strike 3’s discovery motions.”).

<sup>55</sup> *Id.*

Others diminish defendant's privacy expectation in the context of illegally downloading copyrighted material, even though the defendants are merely the subscriber.<sup>56</sup>

The differing opinions can be attributed to a multitude of reasons. For example, they can be seen as a balancing act between enforcing valid copyrighted material and the rights of its owners, and Internet subscribers' expectation of privacy. The Copyright Act has deep roots in the Constitution, and the judiciary has a keen interest in upholding the rights of intellectual property holders.<sup>57</sup> But given the legal landscape, what is the cost? A robust argument against permitting early discovery stems from the abusive litigation tactics used to acquire settlements from Doe defendants.<sup>58</sup> Judge Otis Wright took a firm stance on the matter in 2012.

Although the Court is inclined to allow Malibu to conduct this discovery, the potential for abuse is very high. The infringed work is a pornographic film. To save himself from embarrassment, even if he is not the infringer, the subscriber will likely pay the settlement price. And if the subscriber is a business, it will likely pay the settlement to save itself from the hassle and cost of complying with discovery — even though one of its customers or employees is the actual infringer.<sup>59</sup>

The Court is familiar with lawsuits like this one. These lawsuits run a common theme: plaintiff owns a copyright to a pornographic movie; plaintiff sues numerous John Does in a single action for using BitTorrent to pirate the movie; plaintiff subpoenas the ISPs to obtain the identities of these Does; if successful, plaintiff will send out demand letters to the Does; because of embarrassment, many Does will send back a nuisance-value check to the plaintiff. The cost to the plaintiff: a single filing fee, a bit of discovery, and stamps. The rewards: potentially hundreds of thousands of dollars. Rarely do these cases reach the merits. The federal courts are not

<sup>56</sup> *Strike 3 Holdings, LLC v. Doe*, 351 F. Supp. 3d 160, 164 (D.D.C. 2018); *See also Strike 3 Holdings, LLC v. Doe*, 329 F.R.D. 518, 522 (S.D.N.Y. 2019).

<sup>57</sup> *See* The Copyright Clause, Art. I, § 8, cl. 8.

<sup>58</sup> *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 89 (E.D.N.Y.), report and recommendation adopted sub nom. *Patrick Collins, Inc. v. Doe 1*, 288 F.R.D. 233 (E.D.N.Y. 2012).

<sup>59</sup> *Malibu Media, LLC v. John Does 1 through 10*, 12-3632, 2012 WL 53832304, at \*3-4 (C.D. Cal. June 27, 2012).

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cogs in a plaintiff's copyright enforcement business model. The Court will not idly watch what is essentially an extortion scheme, for a case that plaintiff has no intention of bringing to trial.<sup>60</sup>

Even though movie companies such as Malibu Media and Strike 3 Holdings now file cases against each individual defendant, their tactics remain largely the same as described above. Moreover, other judges share similar sentiments with Judge Wright.<sup>61</sup>

So, as a whole, where do these types of lawsuits stand today? A majority of courts continually uphold these movie companies' claims, as evidenced through their litigation activity below. According to PACER, Strike 3 Holdings filed 1,170 cases and Malibu Media filed 494 cases from January to October 2019 alone. Moreover, "Malibu Media, LLC—another adult film company—filed 150 cases against anonymous defendants in this district (7,183 nationally) from 2012 to 2018, some joining dozens of individuals. How many of those cases reached the Court of Appeals? Zero."<sup>62</sup> Without proper oversight from an Appellate Court, district court judges are free to rule as they please.

ii. Is the IP Address Enough to Survive a Motion to Dismiss?

In order to establish a *prima facie* claim of copyright infringement two elements must be met: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.<sup>63</sup> In order to survive a motion to dismiss, a complaint must contain sufficient factual matter accepted as true to state a

<sup>60</sup> *Malibu*, 2012 WL at \*3–4.

<sup>61</sup> *Malibu Media, LLC v. John Doe subscriber assigned IP Address* 108.228.12.17, Order to Show Cause, 3:16-cv-05975 (N.D. Cal. 2016) (quoting Judge Wright's passage regarding abusive litigation tactics in an Order); *see also Strike 3 Holdings, LLC v. John Doe subscriber assigned IP address* 174.63.150.232, 2019 WL 4016043 (M.D.Fla.) ("This lawsuit and this subpoena will not reveal the copyright infringer, but only the subscriber. It is abundantly clear that, rather than seek other means to investigate its allegations, Plaintiff is attempting an expedient approach and using legal process and subpoena powers to invade privacy, confidentiality, and the personal information of individuals to fish for information. This process is well-known in Plaintiff's industry and has become increasingly scrutinized by the Courts.")

<sup>62</sup> *Strike 3 Holdings, LLC v. Doe*, 351 F. Supp. 3d 160, 163–64 (D.D.C. 2018).

<sup>63</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991).

claim to relief that is plausible on its face.<sup>64</sup> Importantly, a plaintiff's obligation to provide the grounds of his/her entitlement to relief requires more than labels and conclusions and a formulaic recitation of the elements of a cause of action.<sup>65</sup> While the plausibility standard is not a probability requirement, "a complaint must show more than a sheer possibility that the defendant acted unlawfully."<sup>66</sup> Facts merely consistent with a defendant's liability fall short of a plausible entitlement to relief.<sup>67</sup>

A minority of courts follow the *Cobbler* holding that plaintiffs need more than merely an IP Address to establish that the subscriber is plausibly the infringer. There the Ninth Circuit held that:

"an adult foster care home operator's status as the registered subscriber of an internet protocol (IP) address located at home did not, standing alone, create a reasonable inference that he was also infringer of a film that had been downloaded and distributed multiple times without authorization through peer-to-peer online networks associated with IP address, even though he had been sent infringement notices; numerous people lived and visited residence and used the same internet service that was registered to owner."<sup>68</sup>

The court reasoned that a direct infringement claim, without more than an IP Address, does not create a reasonable inference that the defendant was also the infringer.<sup>69</sup> Since several individuals could connect to that one IP Address, identifying the IP Address "solves only part of the puzzle."<sup>70</sup>

Some courts attempt to distinguish themselves from *Cobbler*. "*Cobbler Nevada* is factually and procedurally distinguishable. Unlike the subscriber in *Cobbler Nevada* who lived

<sup>64</sup> *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

<sup>65</sup> *Id.* at 555.

<sup>66</sup> *Twombly*, 550 U.S. at 678.

<sup>67</sup> *Id.* at 557.

<sup>68</sup> *Cobbler Nevada, LLC v. Gonzales*, 901 F.3d 1142 (9th Cir. 2018).

<sup>69</sup> *Id.* at 1145.

<sup>70</sup> *Id.* at 1145.

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in a multi-person dwelling, [defendant] does not refute that he lives alone, and [plaintiff] submitted evidence to show that it targeted him because he had downloaded over 80 copyrighted works before *London Has Fallen*, all of which reflect similar trends in content and genre.”<sup>71</sup>

Some courts follow the “most likely infringer” principle, meaning, more often than not, the release of the subscriber’s information by the ISP leads to the correct identification of the infringer.<sup>72</sup> “Bowser is the most likely infringer based on “[Bowser’s] profession and his public ally-declared interests on social media sites” and because he lived in his mother’s house.”<sup>73</sup> Although Malibu does not elaborate as to what Bowser’s profession or his alleged “publicly-declared interests” are, the Court finds that, at this early stage, Malibu has alleged a plausible link between the subscriber assigned to IP address 98.27.177.139, Bowser, and the alleged copyright infringement.<sup>74</sup> While it may be true that the IP subscriber, or the son of an IP subscriber as it is in this instance, is not undoubtedly the infringing individual, the Plaintiff’s burden at this stage is only to demonstrate plausibility.<sup>75</sup> A majority of courts follow this reasoning.<sup>76</sup>

<sup>71</sup> *LHF Prods., Inc. v. Kabala*, No. 216CV02028JADNJK, 2019 WL 4855139, at \*5 (D. Nev. Sept. 30, 2019).

<sup>72</sup> *Malibu Media, LLC v. Bowser*, No. 5:14CV2759, 2015 WL 5854076, at \*5 (N.D. Ohio Oct. 7, 2015).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> See *Malibu Media, LLC v. Roldan*, No. 8:13-CV-3007-T-30TBM, 2014 WL 3805494, at \*2 (M.D. Fla. Aug. 1, 2014) (finding the plaintiff alleged a plausible link between the subscriber and the copyright infringement based on the IP Address and merely the idea that further discovery will lead to the infringers’ identities).

<sup>76</sup> See, e.g., *Patrick Collins, Inc. v. John Doe 1*, 945 F. Supp. 2d 367, 375 (E.D.N.Y. 2013) (“the Plaintiff has adequately pled a plausible claim of copyright infringement by providing sufficient detail as to the acts the John Doe Defendant took in infringing the copyright, including going to a torrent site; participating in a swarm; and copying a piece of the copyrighted work identified by a unique hash number”); *In re Malibu Media Copyright Infringement Litigation*, 2016 WL 926906, at \*4 (N.D. Cal. Mar. 11, 2016) (“Malibu Media has pled that it received at least one piece of each allegedly infringed work from the defendants, and it has pled that defendants’ conduct occurred persistently, rather than in an isolated event. At the Rule 12 stage, the complaint has pled facts that plausibly demonstrate that the subscribers identified in the complaints



Even more recently, a Connecticut District Court held futile a defendant's argument that Malibu Media only alleged his IP Address was used for infringement and failed to identify *him specifically* in a motion to dismiss.<sup>77</sup> Without more, this ruling puts the burden on the defendant to prove his innocence, despite threadbare facts of infringement.<sup>78</sup> Also, allowing minimally pled complaints to reach discovery parallels Judge Wright's opinion on these litigation tactics. It puts individuals of diverse financial backgrounds to make a choice: either settle the case now or spend countless hours of time and money gathering forensic evidence, conducting depositions, interrogatories, etc., in order to plead innocence. For many, the choice is simple, even if the defendant is blind.

Nevertheless, some courts are beginning to follow the standard set forth in *Cobbler*. In denying Strike 3's motion for expedited discovery, Magistrate Judge Joel Schneider agreed with *Cobbler* and held:

Strike 3's complaints are devoid of facts sufficient to show it is entitled to relief from the named John Doe/IP subscriber. The only material fact pleaded in Strike 3's complaints is that the listed IP address is associated with the downloading of Strike 3's works and the John Doe is the subscriber of the address. All other material averments in Strike 3's complaints, e.g., that the John Doe subscriber downloaded Strike 3's works, are conclusory statements, not facts. If Strike 3's complaints are stripped of their conclusory statements, they are left with the notion that merely subscribing to an IP address that downloaded copyrighted works is sufficient to make out a cause of action for copyright infringement. This is not sufficient. As stated in *Twombly*, "where the well-

committed the alleged infringement."); *John Does 1-11*, 2013 WL 3732839, at \*4 (collecting cases) ("Courts have consistently found copyright infringement claims to be sufficiently pled where the defendant was only identified by an IP address.").

<sup>77</sup> *Malibu Media, LLC v. Doe*, No. 3:18-CV-1509 (SRU), 2019 WL 4093468, at \*2 (D. Conn. Aug. 29, 2019).

<sup>78</sup> *Id.*

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pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not shown – that the pleader is entitled to relief.”<sup>79</sup>

While this addresses the current trends in BitTorrent copyright infringement lawsuits, there are other avenues to explore regarding data privacy issues within IP Address monitoring, and potential solutions to standardize these lawsuits under the Digital Millennium Copyright Act (“DMCA”) and General Data Protection Regulation (“GDPR”) adoption.

iii. Solutions to the BitTorrent Copyright Action

a. *The Digital Millennium Copyright Act*

Pursuant to 17 U.S.C. § 512(a), the DMCA has been providing multiple safe harbors to ISP’s, that protect the ISP’s from liability arising from their users’ illegal activities. However, the statute conditions eligibility on the basis that the ISP has “adopted and reasonably implemented . . . a policy that provides for the termination in appropriate circumstances of subscribers . . . who are repeat infringers.”<sup>80</sup> While it is unclear what constitutes a “repeat” infringer, an ISP’s thirteen-strike policy was found to be unreasonable.<sup>81</sup>

In *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, BMG, a copyright holder, sued Cox, an ISP, for contributory liability of its customers’ infringement of BMG’s copyrights.<sup>82</sup> BMG, like Strike 3 and Malibu Media, hired a third party to monitor BitTorrent activity to find out when their works were infringed.<sup>83</sup> Upon discovery, BMG, instead of issuing subpoenas, sent DMCA

<sup>79</sup> *Strike 3 Holdings, LLC v. Does, et al.*, Order Denying Expedited Discovery, No. 1:18-cv-02674 (D. N.J. 2018) (quoting *Twombly*, 550 U.S. at 678).

<sup>80</sup> 17 U.S.C. §512 (i)(1)(A).

<sup>81</sup> See *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc.*, 881 F.3d 293 (4th Cir. 2018).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

notices to Cox, to suspend repeat infringers.<sup>84</sup> When Cox ignored all their communications, BMG filed suit.<sup>85</sup> Cox asserted the safe harbor defense, but the Court held CMG's thirteen strike policy and subsequent ignoring of BMG's notices was not a reasonable implementation of a repeat infringer policy.<sup>86</sup> The Court then affirmed the jury's award of \$25 million to BMG.<sup>87</sup>

In order to show good cause for expedited discovery, movie companies attempt to satisfy the *Arista* test by asserting there is no alternative route in preventing infringement.<sup>88</sup> However, *BMG* closes the door to that argument. Judge Joel Schneider reasoned that if an ISP ignores Strike 3 or Malibu Media's DMCA notices and fails to implement a reasonable repeat infringer policy, Strike or Malibu Media would have a *BMG* situation.<sup>89</sup> Due to the high volume of infringements Malibu Media and Strike 3 deal with on a case by case basis, akin to BMG's complaint, an ISP would have a considerable incentive to suspend subscribed infringers.<sup>90</sup> While the identity of the actual infringer is at issue, this alternative route eliminates any harm to the subscriber's privacy by eliminating the need for a subpoena.

#### *b. GDPR Adoption*

The mutually agreed General Data Protection Regulation (GDPR) came into force on May 25, 2018, and was designed to modernize laws that protect the personal information of individuals in the European Union ("EU").<sup>91</sup> The legislation was designed to "harmonize data privacy laws across Europe, protect and empower all EU citizens data privacy, and reshape the way organizations

<sup>84</sup> *Id.* at 299.

<sup>85</sup> *Id.*

<sup>86</sup> *BMG*, 881 F.3d at 299 (4th Cir. 2018).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Strike 3 Holdings, LLC v. Does, et al.*, Order Denying Expedited Discovery, No. 1:18-cv-02674 (D. N.J. 2018)

<sup>90</sup> *Id.*

<sup>91</sup> Matt Burgess, *What is GDPR? The summary guide to GDPR compliance in the UK*, (Jan. 21, 2019) <https://www.wired.co.uk/article/what-is-gdpr-uk-eu-legislation-compliance-summary-fines-2018>

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across the region approach data privacy.”<sup>92</sup> They are regarded as the world’s strongest data protection rules.<sup>93</sup> For example, Google was fined approximately \$57 million in February 2019, for GDPR non-compliance or lack of transparency, inadequate information, and lack of valid consent regarding its ad’s personalization.<sup>94</sup>

The United States, in contrast, does not have generally applicable privacy regulations outside of the heavily regulated industries such as health care and banking.<sup>95</sup> And in light of the Facebook and Cambridge Analytica scandal<sup>96</sup>, more and more commentators are calling for more stringent data privacy laws modeled after the GDPR.<sup>97</sup> In the context of BitTorrent copyright cases, GDPR adoption could potentially have an immediate compliance impact on not only the forensic agencies scraping data from the BitTorrent clients for movie companies, but the BitTorrent clients themselves.

The main point is that now GDPR categorizes IP Addresses as *personal data*<sup>98</sup> along with personal email addresses, metadata,

<sup>92</sup> EU GDPR, <https://eugdpr.org/> (last accessed November 2, 2019).

<sup>93</sup> *Id.*

<sup>94</sup> Glyn Moody, Google hit with first big GDPR fine over “forced consent”; eight new complaints filed over “right to access”, (Feb. 2, 2019) <https://www.privateinternetaccess.com/blog/2019/02/google-hit-with-first-gdpr-fine-over-forced-consent-eight-new-complaints-filed-over-right-to-access/>

<sup>95</sup> Seth P. Berman, *GDPR in the U.S.: Be Careful What You Wish For*, Government Technology (May 23, 2018) <https://www.govtech.com/analysis/GDPR-in-the-US-Be-Careful-What-You-Wish-For.html>

<sup>96</sup> See Sam Meredith, *Here’s everything you need to know about the Cambridge Analytica scandal* (Mar. 21, 2018) <https://www.cnn.com/2018/03/21/facebook-cambridge-analytica-scandal-everything-you-need-to-know.html> (Facebook and Cambridge Analytica, a political consulting company, came under fire after Britain’s Channel 4 News exposed the nature of the two companies’ relationship. Facebook gave Cambridge Analytica data for 50 million users’ profiles and was “then used to develop “psychographic” profiles of people and deliver pro-Trump material to them online”).

<sup>97</sup> *Id.*

<sup>98</sup> ‘Personal data’ means any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person. Art. 4(1) GDPR.

and a person's social media accounts and their posts.<sup>99</sup> This means companies that process<sup>100</sup> IP Addresses have a duty to ensure the data processing is lawful<sup>101</sup>, and that certain safeguards are in place to protect users' personal data from intrusion.

“[T]he GDPR requires that both technical and procedural security measures be implemented to ensure that personal data are protected from the risks presented by processing. The controller<sup>102</sup> and processor must implement appropriate technical and organizational measures to protect personal data from accidental or unlawful destruction or accidental loss, alteration, unauthorized disclosure or access, in particular where the processing involves the transmission of data over a network, and against all other unlawful forms of processing.”<sup>103</sup>

Since BitTorrent clients handle users' personal data, BitTorrent clients may be held accountable for any unauthorized access of personal data based on the requirement set forth in Articles 24-25 and 28 of the GDPR.

Moreover, when personal data is collected from the data subject, certain information needs to be provided to the data subject. BitTorrent client users would need to be notified when and by whom their personal data was being collected. An important

<sup>99</sup> EU GDPR Compliant Blog, (last visited November 20, 2019)

<https://eugdprcompliant.com/personal-data/>.

<sup>100</sup> 'Processing' means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction. Art. 4(3) GDPR.

<sup>101</sup> The purposes of the processing for which the personal data are intended as well as the legal basis for the processing. Art. 13(1)(c) GDPR.

<sup>102</sup> 'Controller' means the natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law. Art. 4(7) GDPR.

<sup>103</sup> § 11:3.GDPR—Scope and main provisions, 2 Data Sec. & Privacy Law § 11:3 (2019) (quoting Art. 24-25; 28 GDPR).

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question arises of whether the data scraping tactics employed by the investigative agencies (hired by movie companies like Strike 3 and Malibu Media) to collect thousands of IP Addresses and downloading activity would qualify for GDPR compliance standards. Do BitTorrent clients know that their users are being watched? Arguably, they do.<sup>104</sup> If so, each BitTorrent client would theoretically have to disclose to their users that their IP Addresses and downloading histories are being collected by outside agencies. Even if the BitTorrent client software companies do not know their users are being scraped, in order to comply with GDPR standards and avoid liability, they would need to protect their users' personal data via encryption or other methods illustrated in the GDPR. Therefore, it is certainly plausible to consider that GDPR compliance could force BitTorrent clients to effectively "hide" IP Addresses from outside agencies and even other users within their swarm.

#### IV. CONCLUSION

In conclusion, while pornographic and motion picture movie companies file thousands of legitimate copyright infringement lawsuits every year, their process of information gathering and pleading raises questions of users' expectation of privacy both procedurally and ethically. There are multiple fronts these cases can turn on, but adoption of a more rigorous data privacy policy, like the European Union's GDPR, may be the kickstart this legal landscape needs to eradicating minimally pleaded BitTorrent copyright infringement actions. This would force not only users to be more aware of how they are being watched online, but also movie companies looking to enforce their rights to seek out other avenues of acquiring information on potential infringers. However, until more Circuit Courts rule on the nature of these lawsuits and whether their claims are enough to proceed to discovery, many more defendants will be subject to these litigation tactics. The current trend is not in favor of defendants and due to the cost of litigation, this may never happen.

<sup>104</sup> See Dave Neal, *Torrent users are being monitored*, (Sept. 4, 202) <https://www.theinquirer.net/inquirer/news/2202852/torrent-users-are-being-monitored>.