

Copyright Trolling, An Empirical Study

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ABSTRACT

This detailed empirical and doctrinal study of copyright trolling presents new data showing the astonishing rate of growth of multi-defendant John Doe litigation in United States district courts over the past decade. It also presents new evidence of the association between this form of litigation and allegations of infringement concerning pornographic films. Multi-defendant John Doe lawsuits have become the most common form of copyright litigation in several U.S. districts, and in districts such as the Northern District of Illinois, copyright litigation involving pornography accounts for more than half of new cases filed.

This Article highlights a fundamental oversight in the extant literature on copyright trolls. Paralleling discussions in patent law, scholars addressing the troll issue in copyright have applied status-based definitions to determine who is, and is not, a troll. This Article argues that the definition should be conduct-based. Multi-defendant John Doe litigation should be counted as part of copyright trolling whenever these suits are motivated by a desire to turn litigation into an independent revenue stream. Such litigation, when initiated with the aim of turning a profit in the courthouse as opposed to seeking compensation or deterring illegal activity, reflects a kind of systematic opportunism that fits squarely within the concept of litigation trolling. This Article shows that existing status-based definitions of copyright trolls are inapt because they do not account for what is now the most widely practiced form of trolling.

In addition to these empirical and theoretical contributions, this Article explores the features of copyright doctrine that have facilitated the recent explosion in trolling litigation in the form of litigation against John Does. In particular, it shows how statutory damages and permissive joinder make multi-defendant John Doe litigation possible and why allegations of infringement concerning pornographic films are particularly well-suited to this model.

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INTRODUCTION

Patent trolls are in the news¹ and they have been high on the agenda of intellectual property policy makers and academics for over a decade now.² Those targeted by patent aggregators and patent holding companies accounted for 37.8% of all patent defendants,³ depending on one’s definition of a patent troll, the incidence of patent troll litigation may or may not be increasing;⁴ patent trolls have been condemned by the President;⁵ and

¹ See e.g., Edgar Walters, “Tech Companies Fight Back Against Patent Lawsuits” N.Y. TIMES January 24, 2014. (<http://www.nytimes.com/2014/01/24/us/tech-companies-fight-back-against-patent-lawsuits.html>)

² See e.g., FTC, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*, (2003), available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>; FTC, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* (2011), available at <http://www.ftc.gov/os/2011/03/110307patentreport.pdf>. See generally, Mark A. Lemley & A. Douglas Melamed, *Missing the Forest for the Trolls*, 113 Colum. L. Rev. 2117 (2013).

³ Christopher A. Cotropia, Jay P. Kesan & David L. Schwartz, Unpacking Patent Assertion Entities (PAEs) (working paper), see Figure 3.

⁴ Colleen Chien reports that patent trolls 29% filed in 2010 of patent lawsuits and 62% in 2012. Colleen Chien, *Patent Trolls by the Numbers* (available at <http://www.patentlyo.com/patent/2013/03/chien-patent-trolls.html>). However, new research using more transparent data finds that, based on the total number of patent litigants, there is almost no difference between 2010 and 2012. Christopher A. Cotropia, Jay P. Kesan & David L. Schwartz, Unpacking Patent Assertion Entities (PAEs) (working paper).

targeted by new legislation.⁶ While patent trolls hog the limelight, a particular type of copyright troll has been taking over the dockets of several United States District Courts, and yet copyright trolls have received comparatively little attention in policy and academic circles. District court judges have certainly commented on how the nature of copyright litigation is changing,⁷ but until now there has been no systematic in-depth analysis of the data.⁸ This Article remedies this deficiency.

This empirical study of copyright trolling presents new data revealing the astonishing growth of a particular kind of copyright trolling — the Multi-Defendant John Doe (“MDJD”) lawsuit alleging copyright violation through the file sharing software known as BitTorrent. Generally, these suits take the form of “Copyright Owner v. John Does 1 – N” where N is a large number.⁹ MDJD suits are not just a form of copyright trolling; they are the dominant form. In 2013, these MDJD suits were the majority of copyright cases filed in 19 out of 92 federal districts.¹⁰

⁵ President Obama recently stated “They don’t actually produce anything themselves...They are essentially trying to leverage and hijack somebody else’s idea and see if they can extort some money out of them.” <http://www.whitehouse.gov/blog/2013/06/04/taking-patent-trolls-protect-american-innovation>. See also, Executive Office of the President, *Patent Assertion and U.S. Innovation* (June 2013).

⁶ Leahy-Smith America Invents Act (AIA), Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified in scattered sections of 35 U.S.C.). The AIA included a revision to the joinder rules for patent litigation, which required lawsuits filed against multiple unrelated parties to be filed separately, a provision squarely aimed at patent trolls. The Saving High-Tech Innovators from Egregious Legal Disputes Act of 2013 (SHIELD Act), H.R. 845, 113th Cong. (2013) is a sweeping bill aimed at “stopping patent troll lawsuits” likely to consider by the Senate in early 2014.

⁷ See, e.g., *In re BitTorrent Adult Film Copyright Infringement Cases*, 2012 U.S. Dist. LEXIS 61447,1 (E.D.N.Y. May 1, 2012) (“These actions are part of a nationwide blizzard of civil actions brought by purveyors of pornographic films alleging copyright infringement by individuals utilizing a computer protocol known as BitTorrent.”)

⁸ The Copyright Office has never addressed the issue of copyright trolls, nor does Copyright Office’s recent report on Copyright Small Claims even mention them. COPYRIGHT OFFICE, *Copyright Small Claims, A Report to the Register of Copyrights*, September 2013 (available at <http://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>.) For non-empirical discussions of the MDJD phenomenon see e.g., James DeBriyn, *Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages*, 19 UCLA ENT. L. REV. 79 (2012); Sean B. Karunaratne, *The Case Against Combating BitTorrent Piracy Through Mass John Doe Copyright Infringement Lawsuits*, 111 MICH. L. REV. 283 (2012); Patience Ren, *The Fate of BitTorrent John Does: A Civil Procedure Analysis of Copyright Litigation*, 64 HASTINGS L.J. 1343 (2013); Gregory S. Mortenson, *BitTorrent Copyright Trolling: A Pragmatic Proposal for a Systemic Problem*, 43 SETON HALL L. REV. 1105 (2013).

⁹ Not all plaintiffs in such suits are trolls in the sense that this term is invoked in the patent literature – i.e., they are not all non-practicing entities – but the conclusion of this Article is that these massive multi-party john doe (“MDJD”) suits are by and large instances of trolling.

¹⁰ Alabama (SD), Colorado, Delaware, District Of Columbia, Florida (MD), Georgia (ND), Georgia (SD), Illinois (CD), Illinois (ND), Indiana (ND), Maryland, Michigan (ED), Ohio (SD), Pennsylvania (ED), Tennessee (ED), Tennessee (WD), Washington (WD), Wisconsin (ED) and Wisconsin (WD). In 2013, pornography MDJD suits accounted for over of suits filed in 11 federal districts: Alabama (SD), District Of Columbia, Illinois (CD), Illinois (ND), Indiana (ND), Maryland, Michigan (ED) Pennsylvania (ED), Tennessee (ED), Tennessee (WD) and Wisconsin (ED).

Defining exactly what makes an individual or an organization a troll is inevitably controversial.¹¹ The essence of trolling is that the plaintiff is more focused on the business of litigation than on selling a product or service or licensing their IP to third parties to sell a product or a service. The paradigmatic troll plays a numbers game in which it targets hundreds or thousands of defendants, seeking quick settlements priced just low enough that it is easier for the defendant to pay the troll directly rather than pay his lawyers to defend the claim. This is a familiar pattern in patent law where trolls thrive by opportunistically taking advantage of the uncertain scope of patent claims, the poor quality of patent examination, the high cost of litigation and the asymmetry of stakes faced by the patent assertion entities and the businesses they target.¹²

As this Article demonstrates, a similar numbers game is increasingly dominating copyright litigation. Of the 3817 copyright law suits filed in 2013, over 43% were against John Does and more than three-quarters of those related to pornography.¹³ The economic viability of MDJD litigation depends on suing as many defendants as possible in a single action to keep costs low and leveraging the threat of statutory damages in order to maximize the flow of settlement dollars. As discussed in more detail in Part I, it is fair to regard these suits as a form of copyright trolling.

Copyright trolls may draw inspiration from their patent counterparts, but they are a product of two unique features of copyright law: the first is the incentives created by statutory damages; the second is the permissive approach to joinder taken by many district courts in file-sharing cases.¹⁴ The theory behind these MDJD lawsuits is that individuals who share the same movies and other copyrighted works via BitTorrent are can be joined together in a single copyright lawsuit.¹⁵ Litigating a case all the way to trial against thousands of individuals in the same suit would be ridiculous and unwieldy,¹⁶ but these suits are not filed with an actual hearing in mind. MDJD lawsuits are filed to take advantage of court ordered discovery to break the veil of anonymity that separates IP addresses from the account information of actual human beings.¹⁷ They are means to compel Internet Service Providers such as Comcast and AT&T to give plaintiff copyright owners names and addresses to match the IP addresses that they already have.

¹¹ See generally, Lemley & Melamed, *Missing The Forest For The Trolls*, 113 COLUM. L. REV. 2117 (2013).

¹² *Id.*

¹³ Of the 1,667 John Doe cases, 1,267 (or 76%) related to pornography, 400 (or 24%) did not.

¹⁴ See *infra* Part II-A on statutory damages and Part II-B on joinder.

¹⁵ See *infra* Part II-B.

¹⁶ Just imagine how long a scheduling conference would take.

¹⁷ Parties generally may not initiate discovery prior to satisfying the meet and confer requirement of FED. R. CIV. P. 26(f), however this is not possible where the defendant is identified by their IP address and has not been served. Thus plaintiffs in MDJD suits must apply for earlier discovery under FED. R. CIV. P. 26(d). See, *Digital Sin, Inc. v. Does 1-176*, 279 F.R.D. 239, 241 (S.D.N.Y. 2012). Note also that without a Court-ordered subpoena, many of the ISPs, who qualify as “cable operators” for purposes of 47 U.S.C. § 522(5), are effectively prohibited by 47 U.S.C. § 551(c) from disclosing the identities of the putative defendants to Plaintiff. *Id.*

After obtaining the names and addresses of account holders suspected of participating in a BitTorrent swarm, the plaintiff can set to work negotiating settlements.¹⁸ An account holder accused of infringement is almost invariably threatened with statutory damages and the prospect of paying the plaintiff's attorneys fees if he is unable to establish his innocence.¹⁹ Reports indicate that settlements are usually in the range of \$2000 to \$4000 – this is a lot to pay for any movie, but a small fraction of the potential statutory damages for willful copyright infringement, which can be as high as \$150,000 per work infringed.²⁰ The \$4000 figure is also evidently “a sum calculated to be just below the cost of a bare-bones defense.”²¹ This does not prove that the plaintiffs are simply pursuing nuisance value settlements, but it is consistent with that theory.

In addition to relying on statutory damages and permissive joinder, Part II of this Article shows that the majority of MDJD suits also feature an additional ingredient—pornography.²² Not all MDJD lawsuits relate to pornography, but the association with pornography is far from coincidental. The MDJD model works especially well for pornography because the potential embarrassment of being accused (accurately or not) of downloading such material is a great motivation to settle.

This Article proceeds as follows: Part I locates MDJD suits within the broader context of the IP troll debate. It explains why attempts to define copyright trolls in terms status – i.e., in terms of the plaintiff's relationship to the underlying IP – are ultimately flawed and suggests a conduct focused approach based on identifying systematic opportunism. Part I explains why MDJD lawsuits should typically be regarded as copyright trolling and it explores the basic economics of MDJD litigation. Part I then presents empirical data documenting the astonishing rise of MDJD lawsuits over the past decade. Part II explores the role of statutory damages and permissive joinder in MDJD lawsuits in terms of the economic model developed in Part I. Part II also explains why the economics of in this type of litigation is so well-suited to allegations of infringement concerning pornography and presents new data on the prevalence of pornography related MDJD lawsuits. Part III presents concrete proposals for copyright reform designed to make copyright trolling less attractive. This Part explains how, even in the absence of legislative reform, district court judges can exercise their discretion over joinder and early discovery to ensure that statutory damages are not excessive and to insist on a variety of procedural safeguards.

¹⁸ *Malibu Media, LLC v. Doe*, 2013 U.S. Dist. LEXIS 139068, 2 (N.D. Ill. Sept. 27, 2013) (“Once the identities become known to the plaintiff, the John Does are served with process. The defendants then either settle with the plaintiffs, default, or contest the suit.”)

¹⁹ See e.g., Settlement Letter from Steele & Hansmeier, PLLC (May 16, 2011), available at <http://www.scribd.com/doc/80437326/Steele-Hansmeier-Settlement-Demand-Letter-First-Time-Videos>. (Explaining statutory damages and offering to settle \$2,900).

²⁰ 17 U.S.C. §504(c)(statutory damages).

²¹ *Ingenuity 13 LLC v. John Doe*, 2:12-CV-8333-ODW JCX, 2013 WL 1898633 (C.D. Cal. May 6, 2013)

²² See *infra*, Part II-C.

PART I THE RISE OF THE COPYRIGHT TROLL

This Part documents the rise of the copyright troll as an empirical phenomenon. As part of the foundation for the empirical exercise, Part I-A locates MDJD litigation within the broader context of the IP troll debate. It explains why the existing focus of the literature on examples such as Righthaven overlooks the most important manifestations of trolling. Part I-B explains why MDJD lawsuits typically should be regarded as trolling. Part I-C explores the basic economics of MDJD litigation. Part I-D then presents the empirical data on the rise of MDJD lawsuits over the past decade.

A. Copyright Trolls and Copyright Trolling

(1) *Righthaven*

From 2010 to 2011, a Nevada-based company called Righthaven LLC set about a business model that can be summarized in three simple steps: (1) recruit content owners, principally newspapers; (2) identify plausible cases of copyright infringement, such as the reposting newspaper articles on blogs; (3) acquire a partial assignment of copyright tailored precisely to the infringement identified in step two.²³ Note that steps one and two can easily be reversed. This model generated significant profits from a string of quick settlements.

The Righthaven model began to look vulnerable when a number of defendants were able to establish that their conduct fell within the scope of the fair use doctrine.²⁴ However, the real problem for Righthaven turned out to be that its standing to sue was built on a “nothing more than a fabrication”.²⁵ The limited exclusive rights that Righthaven had received from the original content *appeared* to satisfy the requirement for copyright standing – only the legal or beneficial owner of an exclusive right under copyright law is entitled, or has standing, to sue for infringement.²⁶ However, those assignments were subject to a secret “Strategic Alliance Agreement” that meant that all Righthaven possessed was a mere right to sue.²⁷ An agreement transferring the right to

²³ Shyamkrishna Balganes, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723 (2013).

²⁴ E.g., *Righthaven, LLC v. Hoehn*, 792 F. Supp. 2d 1138, 1147-51 (D. Nev. 2011); *Righthaven LLC v. Realty One Grp., Inc.*, No. 2:10-cv-1036-LRH-PAL, 2010 U.S. Dist. LEXIS 111576, at 4-6 (D. Nev. Oct. 18, 2010); *Righthaven LLC v. Klerks*, No. 2:10-cv-00741-GMN-LRL, 2010 U.S. Dist. LEXIS 105307, at 6-10 (D. Nev. Sept. 17, 2010) (finding a sufficient meritorious fair use defense to set aside a default).

²⁵ *Righthaven LLC v. Democratic Underground, LLC*, 791 F. Supp. 2d 968, 973 (D. Nev. 2011).

²⁶ See *Silvers v. Sony Pictures Entm’t Inc.*, 402 F.3d 881, 884 (9th Cir. 2005) (en banc).

²⁷ *Righthaven LLC v. Democratic Underground, LLC*, 791 F. Supp. 2d 968, 972 (D. Nev. 2011) (Section 7.2 of the Strategic Alliance Agreement between Righthaven and Stephens Media provided that “Despite any such Copyright Assignment, Stephens Media shall retain (and is hereby granted by Righthaven) an exclusive license to Exploit the Stephens Media Assigned Copyrights for any lawful purpose whatsoever and Righthaven shall have no right or license to Exploit or participate in the receipt of royalties from the Exploitation of the Stephens Media Assigned Copyrights other than the right to proceeds in association with a Recovery.”)

sue without any of the copyright owner's exclusive rights is ineffectual. Following these revelations, Righthaven's suits were dismissed and the firm quickly succumbed to the weight of legal fees and went into insolvency.²⁸

In his thought provoking article on the copyright troll phenomenon, Professor Shyamkrishna Balganesh offered the following definition: "A copyright troll refers to an entity whose business revolves around the systematic legal enforcement of copyrights in which it has acquired a limited ownership interest."²⁹ Balganesh argued that the real problem with copyright trolls is not this delegation of enforcement of itself, but rather the fact that such delegation disrupts the "enforcement equilibrium" that is integral to the functioning of copyright as an institution.³⁰

This seems to fit the Righthaven story, but perhaps a little too well. Righthaven targeted defendants who were largely non-commercial and whose alleged infringements were usually inconsequential to the copyright owner's bottom line. Righthaven disrupted the previous enforcement equilibrium by attempting to monetize borderline cases of infringement that without its intervention would have either been ignored or tolerated. Balganesh's definition of copyright trolls, which focuses on the delegation of enforcement to a separate entity, has echoes of patent law's concerns with non-practicing entities and patent aggregators.

Righthaven is a compelling example, but it is just one example.³¹ As the data in this Article shows, a status-based conception of copyright trolling does not fit particularly well with is the predominant form of copyright trolling witnessed in federal courts over the last few years. MDJD lawsuits typically do not involve any assignment of rights. By focusing on delegation through assignment, a status-based definition overlooks most of the reality of copyright trolling in practice. Arguably, there is still a form of delegation in MDJD cases in that the handling of these suits is given over to specialized law firms who in many instances recruit their clients. If these specialized law firms are working on contingency, their incentives will be virtually the same as an entity that acquired rights solely for the purpose of litigation. The willingness of entrepreneurial law firms to pursue allegations of infringement on contingency makes any status-based definition of trolls and trolling in copyright obsolete.³² Patent litigation is driven by different economic

²⁸ Ian Polonsky, *You Can't Go Home Again: The Righthaven Cases And Copyright Trolling On The Internet*, 36 Colum. J.L. & Arts 71 (2012).

²⁹ Balganesh *supra* note 150 at 732.

³⁰ *Id.*

³¹ Another example unrelated to MDJD litigation is arguably the textile printer L.A. Printex. Charles Colman, "California federal jury finds for copyright plaintiff L.A. Printex in Aeropostale fabric pattern case: blurgh" LAW OF FASHION February 1, 2013 ("L.A. Printex has developed something of a bad reputation in the fashion world, having brought more copyright infringement cases than one can count against a plethora of fashion designers and retailers, most of whom find it cheaper to settle than to fight the frequently questionable lawsuits.") (Available at <http://lawoffashion.com/blog/story/02/01/2013/173>).

³² Statements about the relationship between the plaintiffs and their legal counsel in MDJD cases are necessarily merely generalizations.

fundamentals, but the evidence from copyright at least raises a serious question as to whether the current status-based ideas of who is and is not a patent troll are really viable.

Another potentially misleading aspect of troll discussions focusing on Righthaven is the idea that the problem with copyright trolls is that they disrupt existing conventions of tolerated use.³³ MDJD file-sharing lawsuits typically do not relate to boundary issues fair use or tolerated use—unauthorized file sharing using BitTorrent and similar software tools is not a legal gray area.³⁴ It is strenuously objected to by the mainstream of creative industries and is clearly not fair use or *de minimus*. We would do better to define trolling than trolls.

(2) *Beyond Righthaven*

Copyright trolling cannot be defined by characteristics such as whether the plaintiff is the original owner of the copyright, or whether the plaintiff has attempted to license the work in the marketplace. Descriptively, these indicia may provide some useful shortcuts, but they would exclude the majority of troll litigation in copyright. In seeking to define what makes a litigant a troll, we would do better to focus on conduct rather than status. We should, in short, seek to identify instances of trolling rather than looking for trolls *per se*.

If anything unifies the patent law and copyright law experience of trolls, it is the sense that a troll is a systematic opportunist.³⁵ The reason why agreeing on an exact definition of trolls is so difficult is that there are so many different manifestations of opportunism in IP litigation. In the patent context, some plaintiffs are labeled as trolls because they exploit flaws in the administration of the patent system, such as the uncertain scope of patent claims and the poor quality of patent examination. Others are labeled as trolls because they take advantage of asymmetric stakes and the high cost of litigation to extract settlements or licensing fees based on dubious claims. The claims may be dubious in the sense that, if fully litigated, the defendant would be very likely to win. The troll's case may also be dubious in the sense that even if their patents are technically valid and infringed under our current legal standards, this simply reflects the failure of those standards to adequately promote investment in innovation and invention.

In addition to opportunism relating to litigation strategy, the decision to base a business model on litigation can be seen as a form of opportunism in itself. Patent trolls acquire and assert patents based on the their litigation potential rather than the value of the underlying technology. On this view, the essence of trolling is that the plaintiff is

³³ Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 619 (2008)

³⁴ See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir.2001); *BMG Music v. Gonzalez*, 430 F.3d 888, 890 (7th Cir.2005).

³⁵ On opportunism in general, see Kenneth Ayotte, Ezra Friedman and Henry E. Smith, *A Safety Valve Model of Equity as Anti-Opportunism* (Available at SSRN: <http://ssrn.com/abstract=2245098>) (explaining the development of equity as part of the law's response to the problem of opportunism).

more focused on the business of litigation than on selling a product or service or licensing their IP to third parties to sell a product or a service.

Copyright trolls are best defined in terms of a cluster of attributes rather than any single definitive feature. A troll deserving of the name either asserts rights it does not have, makes poorly substantiated claims or tenuous of infringement, or seeks disproportionate remedies. Trolls do at least one of these things on a systematic basis.³⁶ The opportunism of copyright trolls is primarily directed towards statutory damages. As the Righthaven example shows, statutory damages can make the pursuit of otherwise inconsequential infringements extremely profitable, more profitable than licensing those uses in advance could ever have been. As the MDJD cases show, statutory damages stack the deck in favor of the plaintiff such that the underlying liability of the defendant is effectively irrelevant to the settlement calculation.

B. When does Multi-Defendant John Doe Lawsuit Amount Copyright Trolling?

Not all BitTorrent lawsuits are exercises in copyright trolling. In fact the Recording Industry Association of America (“RIAA”) pioneered the MDJD model as part of its broader campaign against illegal file sharing over a decade ago. Modern copyright trolling follows the RIAA’s template, but with a different motivation.

In 2003 the RIAA began a widely publicized campaign of lawsuits against individual file sharers, characterized by Justice Breyer as “a teaching tool”³⁷ and by the RIAA itself as “the enforcement phase of its education program.”³⁸ The RIAA wound down this program in 2008, by which time over 35,000 individuals had been targeted with letters of demand.³⁹ The RIAA and its members are not copyright trolls because the industry’s end-user litigation strategy was aimed at sending a message not creating an independent revenue stream.

The RIAA sought to channel potential infringers back into the legitimate market: in contrast, more recent MDJD suits appear to prefer the revenues available in the courthouse to those of the market place. In 2010, a Hollywood production company, Voltage Pictures, filed a series of lawsuits against thousands of John Does for

³⁶ Of course, Rule 11 provides for sanctions against plaintiffs and attorneys who make frivolous or unsupported claims,³⁶ but establishing a Rule 11 violation is notoriously difficult. See e.g., *Giddings v. Vision House Production, Inc.*, 584 F.Supp.2d 1222 (D.Ariz 2008). (Plaintiff’s legal theory ultimately proved to be incorrect but was not “so objectively baseless to qualify as completely frivolous and subject to sanctions under Rule 11”). In *Raw Films, Ltd. v. Does 1–32* allegations of harassment lead to a show cause order relating to sanctions, but sanctions were not ultimately imposed. *Raw Films, Ltd. v. Does 1–32*, 2011 WL 6182025, at *2 (E.D.Va. Oct. 5, 2011).

³⁷ 545 U.S. at 963 (Breyer, J., concurring).

³⁸ Press Release, RIAA, *Recording Industry Begins Suing P2P File Sharers Who Illegally Offer Copyrighted Music Online* (Sept. 8, 2003), available at <http://www.riaa.org/newsitem.php?id=85183A9C-28F4-19CE-BDE6-F48E206CE8A1>.

³⁹ See, e.g., Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, at B1.

downloading its film *The Hurt Locker* over BitTorrent.⁴⁰ These suits were filed as *Voltage Pictures, LLC v. Does 1 – 5000*,⁴¹ and eventually totaled 24,500 defendants.⁴² The *Voltage Pictures* cases have now been voluntarily dismissed, but only after thousands of user records were subpoenaed from ISPs and thousands of demand letters were sent to account subscribers. Statements by the plaintiff’s lawyers confirm that this litigation campaign was not aimed at deterrence or compensation; their intention was to “creat[e] a revenue stream and monetize[e] the equivalent of an alternative distribution channel.”⁴³

C. The Economics of Multi-Defendant John Doe Lawsuits

To understand the copyright trolling phenomenon, it is useful to begin with its’ economic fundamentals. This section explores those fundamentals by developing a simple model the costs and benefits of MDJD litigation from the point of view of the plaintiff.

The plaintiff (or realistically, the plaintiff’s lawyer) in any MDJD lawsuit faces certain fixed costs (C_f) such as detecting potential infringement, drafting the initial complaint, drafting a motion for discovery, and appearing in court to argue in favor of discovery. Detecting potential infringement requires an investment in technology and/or technological expertise.⁴⁴ The remaining fixed costs largely consist of attorney time. These costs do not change significantly whether there is one defendant or 5000 in a single case. The plaintiff also faces variable costs (C_v) primarily related to the time and effort it takes to persuade Internet Service Providers to divulge subscriber information and to persuade the subscribers thus identified to settle. Where N is the number of defendants, the plaintiff’s costs can be represented as follows:

$$\text{Costs} = C_f + C_v * N$$

The plaintiff’s recovery depends primarily on the average settlement obtained (P or payoff), the percentage of defendants who can be persuaded to settle (Y or yield) and the number of defendants (N).⁴⁵ Thus,

$$\text{Recovery} = P * Y * N$$

⁴⁰ See e.g., *Voltage Pictures, LLC v. Does*, Docket No. 1:10-cv-00873 (D.D.C. May 24, 2010).

⁴¹ *Id.*

⁴² First Amended Complaint for Copyright Infringement at 1, *Voltage Pictures, LLC v. Vasquez*, No. 1:10-cv-00873 (D.D.C. Apr. 22, 2011), ECF No. 143-1.

⁴³ Eriq Gardner, *New Litigation Campaign Quietly Targets Tens of Thousands of Movie Downloaders*, HOLLYWOOD REP. (Dec. 21, 2010), <http://www.hollywoodreporter.com/blogs/thr-esq/litigation-campaign-quietly-targets-tens-63769>.

⁴⁴ It may also be the case that by contracting with outside technology firms, the cost of detecting infringement can be transformed into a variable cost.

⁴⁵ The obvious simplification here is that there is just one settlement price. In theory, a plaintiff with perfect information could extract high settlements from easy targets and low settlements from more intransigent ones.

The economic viability of copyright trolling in the form of MDJD litigation depends on suing as many defendants as possible in a single action to keep costs low and leveraging the threat of statutory damages (and sometimes other threats) in order to maximize the product of payoff and yield ($P*Y$). Thus,

$$\begin{aligned} \textit{Profit} &= (P*Y*N) - (C_f + C_v*N) \\ &= N(PY - C_v) - C_f \end{aligned}$$

This model does not assume that all defendants are in fact liable for copyright infringement, but it does assume that the plaintiff's case is strong enough to make a certain proportion of defendants want to settle.⁴⁶ Even so, a plaintiff cannot expect to be able to locate the person responsible for every IP address named in the lawsuit, nor can it expect every accused infringer to be solvent or to settle without a costly fight. However, the plaintiff can expect that most individuals who it does locate and who do have the capacity to pay will eventually capitulate and agree to settle for a few thousand dollars.⁴⁷ Most defendants in this situation will settle because even with fee shifting, settling for a few thousand dollars will cost less on a risk-adjusted basis than establishing their innocence in court. As discussed in more detail in Part II-A, the prospect of statutory damages ensures that despite the possibility of fee shifting, a very small chance of being found liable is enough to make settlement the defendant's best option.⁴⁸ Making money from this type of litigation depends on dispersing one's fixed costs over a large group of defendants and persuading a reasonable number of defendants to settle reasonably quickly. Part II of this Article will return to this basic economic model and use it to explain the significance of joinder, statutory damages and pornography in MDJD lawsuits.

D. The Rise of Multi-Defendant John Doe Lawsuits

Just how widespread is the practice of generating revenue through MDJD lawsuits?⁴⁹ To answer this question, I created a database that includes all copyright cases filed in the all federal district courts circuits between January 1, 2001 and March 31, 2014.⁵⁰ "John Doe" lawsuits were identified by hand, based initially on the appearance of the words "John Doe" and "Doe" in the case title (in plural and singular form).⁵¹ Figure 1 displays the resulting data broken down by circuit and into three-year time periods based

⁴⁶ Parts II-A (statutory damages) and II-C (pornography) further explain why defendants will be motivated to settle, even if the plaintiff's case is far from watertight.

⁴⁷ *Ingenuity 13 LLC v. John Doe*, 2:12-CV-8333-ODW JCX, 2013 WL 1898633 (C.D. Cal. May 6, 2013) (finding that settlement offers were generally about \$4,000)

⁴⁸ See *infra* Part II-A

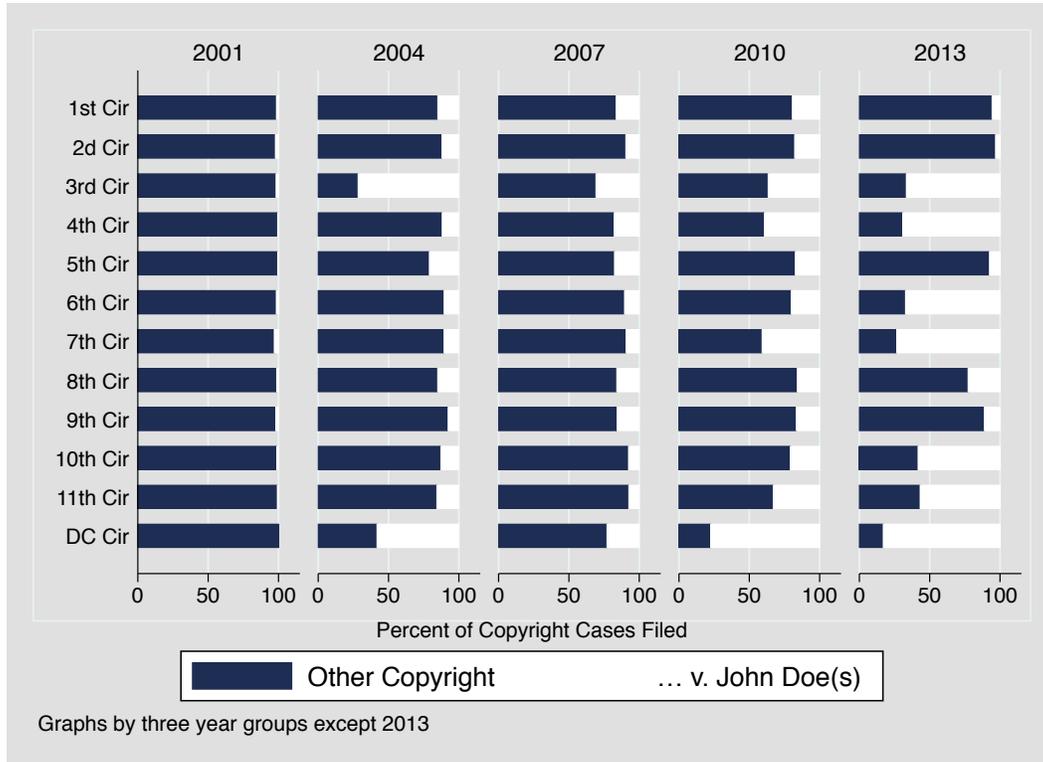
⁴⁹ Many Judges have noted the increasing prevalence of these suits. See e.g. *In re BitTorrent Adult Film Copyright Infringement Cases*, Nos. 11-3995(DRH)(GRB), 12-1147(JS)(GRB), 12-1150(LDW)(GRB), 12-1154(ADS)(GRB), 2012 WL 1570765, at *1 (E.D.N.Y. May 1, 2012) ("These actions are part of a nationwide blizzard of civil actions brought by purveyors of pornographic films alleging copyright infringement by individuals utilizing a computer protocol known as BitTorrent.")

⁵⁰ The data is available on the author's website.

⁵¹ Cases with titles such as " v. *Unknown Parties*" were also included.

on the year of filing, beginning with the year 2001. The figure shows the prevalence of John Doe actions as a percentage of all copyright filings in each circuit. The figure highlights the recent growth of MDJD lawsuits and their uneven geographic concentration. It is particularly noteworthy that MDJD suits made up the majority of copyright filings in Third, Fourth, Sixth, Seventh, Tenth, Eleventh and DC Circuits in 2013.

Figure 1: Percentage of John Doe Law Suits by Circuit, 2001-03, 2004-06, 2007-09, 2010-12, 2013-2014(Q1)



MDJD suits were almost non-existent 10 years ago; as of 2013 they were the majority of filings in 19 out of 92 federal districts.⁵² MDJD suits accounted for just over 19% of filings between 2001 and the first quarter of 2014,⁵³ but they account for over 43% of filings in 2013 and 46% of filings in the first quarter of 2014. The sudden rise of the MDJD copyright lawsuit is apparent from Figure 2, below which focuses in on the years 2010, 2011, 2012, 2013 and the first quarter of 2014. This Figure shows the prevalence of John Doe lawsuits as a percentage of all copyright lawsuits over the past four years, by state, excluding states with no John Doe copyright suits.

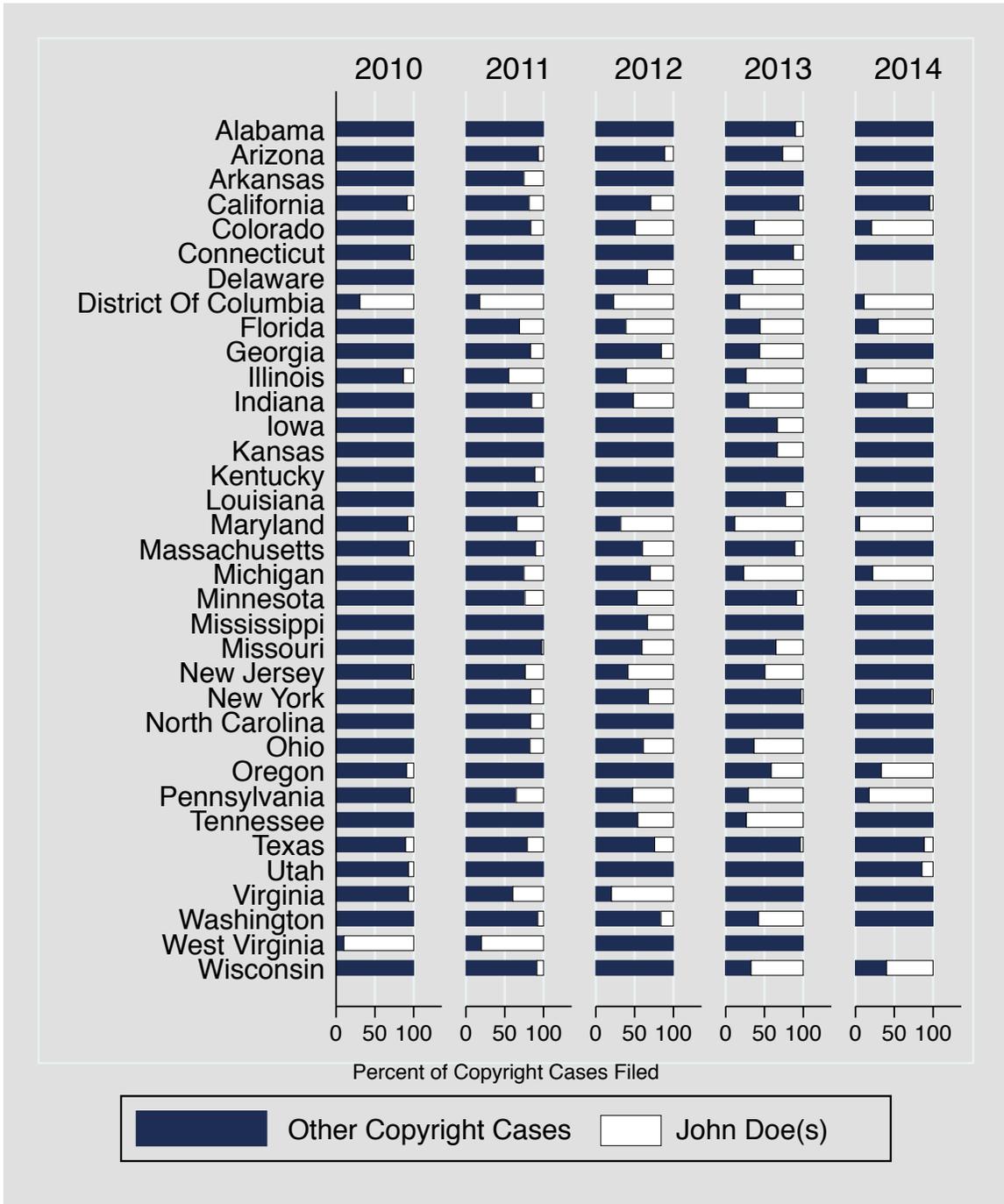
As the figure above shows, in 2010 there was substantial MDJD litigation in the District of Columbia and West Virginia and small pockets in California, Connecticut, Illinois, Oregon, Maryland, Massachusetts, New Jersey, Oregon, Texas, Utah and

⁵² See *supra* note 10.

⁵³ 8,129 out of 41,769, to be exact.

Virginia. By 2012, MDJD suits were the majority of all copyright cases filed in Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Maryland, Michigan, Ohio, Pennsylvania, Tennessee, Washington, Wisconsin and the District Of Columbia. Interestingly, 2013 saw a sharp decline in the proportion of these suits in California and New York.

Figure 2: John Doe lawsuits as a percentage of all copyright lawsuits 2010–2014, by State



This original data shows, for the first time, the astonishing rate of growth of this particular form of copyright trolling. MDJD lawsuits are not just the predominant form of

copyright trolling; they are the dominant form of copyright litigation in several districts. It is to be hoped that now that the extent of this kind of copyright trolling is apparent has been made apparent, it will receive some attention from policy makers.⁵⁴

II. STATUTORY DAMAGES, JOINDER & PORNOGRAPHY

This Part focuses on the role of statutory damages, permissive joinder and pornography in enabling MDJD litigation to thrive. Part II-A explores the role of statutory damages in MDJD lawsuits in terms of the economic model developed previously. Part II-B takes the same approach with joinder. Part II-C explains why MDJD litigation is so well-suited to allegations of infringement concerning pornography and presents new data on the prevalence of pornography in this context. Understanding these components is vital to developing sound reform proposals, the subject of Part III.

A. Statutory Damages

U.S. copyright law allows the plaintiff to elect, at any time before final judgment, to receive statutory damages in lieu of actual damages or an account of the defendant's profit.⁵⁵ Statutory damages were originally designed to overcome the difficulties injured plaintiffs faced in proving the true extent of their damage or of the defendant's profits.⁵⁶ However, statutory damages now appear to be largely divorced from that original purpose. Critically, statutory damages effectively guarantee a minimum rate of recovery regardless of proof of damages or profits.⁵⁷

Statutory damages provide compensation for real world harms that may be difficult to establish in the courtroom. The problem with statutory damages, as a matter of both design and application, is that the amounts awarded bear no relationship to the harm of infringement, the need for deterrence, or generally accepted norms of proportionality in the administration of penalties.⁵⁸ A recent review of statutory damages by Samuelson and Wheatland cites several arbitrary, inconsistent, incoherent and excessive awards of

⁵⁴ It is not apparent that the issues of copyright trolls or MDJD litigation are on the Copyright Office's reform agenda. See Statement of Maria A. Pallante Register of Copyrights United States Copyright Office before the Subcommittee on Courts, Intellectual Property and the Internet, Committee on the Judiciary, "The Register's Call for Updates to U.S. Copyright Law," (March 20 2013) (available at <http://www.copyright.gov/regstat/2013/regstat03202013.html>) (not mentioning copyright trolls, MDJD litigation). See also Maria A. Pallante, *The Next Great Copyright Act*, COLUMBIA JOURNAL OF LAW & THE ARTS (2013) (noting in passing that "arguments abound on the subject of statutory damages, suggesting that they are either too high, too low, too easy, or too hard to pursue.")

⁵⁵ 17 U.S.C. § 504(c)

⁵⁶ See, Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009) at 448 (Summarizing the legislative history of the 1909 Copyright Act.)

⁵⁷ The only prerequisite for statutory damages is copyright registration. 17 U.S.C. § 412 (requiring registration within three months of publication to qualify for awards of statutory damages and attorneys fees).

⁵⁸ For a comprehensive review of the history and current application of statutory damages in copyright, see Samuelson & Wheatland, *supra* note 50.

statutory damages in copyright cases.⁵⁹ In one of the most striking examples, *Capitol Records v. Thomas-Rasset*, a jury awarded statutory damages of more than \$1.92 million against a defendant who had illegally downloaded about \$54 worth of music on a peer-to-peer file-sharing network.⁶⁰ That is a ratio of more than 35,000 to 1.

There are many problems with the current statutory damages framework, but as they relate to the issue of copyright trolling, the basic defect of statutory damages is that the range is too broad and too high. The Copyright Act of 1976 allows for statutory damages anywhere in a range between \$750 and \$150,000⁶¹ – that is the difference between an average priced 55 inch flat screen television⁶² and the median sale price of a single-family home in the Mid-West of the United States.⁶³ Technically, the upper \$30,000 to \$150,000 of this range is confined to cases of “willful infringement”⁶⁴ and should be reserved for truly exceptional cases,⁶⁵ however “courts have interpreted willfulness so broadly that those who merely should have known their conduct was infringing are often treated as willful infringers.”⁶⁶

Recall the formula in Part I: $Profit = N(PY - C_v) - C_f$. Statutory damages play a significant role in the profitability of copyright trolling. Without statutory damages, defendants might cling to the idea that their infringements are so trivial that the plaintiff will not bother to pursue them. They might decide to wait it out and take the risk. An individual copyright owner who establishes a single instance of illegal downloading could hope to recover some approximation of the retail price of their product as the measure of damage they have suffered or as disgorgement of the defendant’s profits from infringement. For the typical music single, album, television show, or movie, this would be in the range from \$1 to \$20.

⁵⁹ *Id.* at 442-43.

⁶⁰ *Capitol Records v. Thomas-Rasset* 579 F. Supp. 2d 1210, 1213, 1227 (D. Minn. 2008) (“Thomas allegedly infringed on the copyrights of 24 songs-the equivalent of approximately three CDs, costing less than \$ 54.”).

⁶¹ 17 USC 504(c).

⁶² E.g., at the time of writing, the LG Electronics 55LN5400 55-Inch 1080p 120Hz LED-LCD HDTV with Smart Share was available on Amazon.com for \$749.

⁶³ NATIONAL ASSOCIATION OF REALTORS, *Existing-Home Sales Data* (available at <http://www.realtor.org/topics/existing-home-sales/data>) (reporting the median sales price of existing single-family homes in the Mid-West of the U.S. as \$143,700 in 2012, \$150,800 in November 2013 and 155,700 for all of 2013).

⁶⁴ 17 USC 504(c).

⁶⁵ See S. REP. No. 94-473, at 144-45 (1975) (enhanced damages should be available in “exceptional cases”); H.R. REP. No. 94-1476, at 162 (1975) (same). See also Samuelson & Wheatland, *supra* note 56 (summarizing the legislative history).

⁶⁶ Samuelson & Wheatland, *supra* note 50 at 441. See also Nimmer §14.04[B][3][a] (citing cases). Note that even those defendants with plausible fair use defenses may be characterized as “egregious and willful” infringers, see e.g. *Rogers v. Koons*, 960 F.2d 301, 313 (2d Cir. 1992).

The credible threat of damages as high as \$150,000 makes any real risk of being found liable for copyright infringement intolerable for anyone who is not completely insolvent or staggeringly wealthy. Without statutory damages, the plaintiff in a typical BitTorrent suit might recover only nominal damages, thus reducing their expected settlement payoff (P) to almost zero. For a single infringement, statutory damages increase the potential settlement range from \$0 – \$20 to \$0 – \$150,000. But the point is not just that statutory damages increase the average payoff (P); the threat of statutory damages also reduces the Plaintiff's variable cost (C_v) by acting as a tool of persuasion that brings reluctant defendants to heel more quickly. In addition, because the possibility of a \$150,000 verdict makes the plaintiff's claims that it will pursue the case to the bitter end more credible, it should substantially increase settlement yield (Y) compared to a world without statutory damages.⁶⁷ For the plaintiff in MDJD cases, statutory damages are the pot of gold at the end of the litigation rainbow. Statutory damages make the stakes of copyright litigation fundamentally uneven. While both plaintiff and defendant could lose and be forced to pay the other side's attorneys fees, only the plaintiff is entitled to statutory damages. The possibility of fee shifting for successful defendants should make troll-like behavior less rewarding in copyright, but the risk of statutory damages more than negates the benefits of fee shifting.

B. Joinder

Joinder also plays an important role in the economics of MDJD litigation. From the perspective of the plaintiff, rules relating to joinder are favorable if they permit the joining of defendants with a low level of relatedness. A low threshold of relatedness allows the plaintiff to spread its fixed costs across a large number of defendants.⁶⁸ Joinder rules are also plaintiff friendly to the extent that they allow a case to proceed to discovery in a MDJD case without a substantial investment in proving the alleged underlying infringements.⁶⁹

The economic logic of MDJD lawsuits relies on permissive joinder of large numbers of tenuously related defendants in thinly substantiated actions that are never intended to go to trial. There is no doubt that BitTorrent is widely used for copyright infringement, nonetheless many of the MDJD cases are questionable for two reasons. First, they typically rely on a snapshot of Internet activity that does not show that a complete file was downloaded.⁷⁰ All that the snapshot shows is that a download was initiated. Second, the MDJD cases rely on the inference that the account owner behind an IP address was in fact responsible for any use made of that account.⁷¹ The possibility of hacking, open Wi-Fi networks, Internet accounts accessed by multiple users, and

⁶⁷ The extent to which more explicitly punitive damages could substitute for statutory damages will be discussed in Part III, *infra*.

⁶⁸ Thus C_f/N is reduced.

⁶⁹ Thus C_f itself is reduced.

⁷⁰ See e.g., *Ingenuity 13 LLC v. John Doe*, 2:12-CV-8333-ODW JCX, 2013 WL 1898633 (C.D. Cal. May 6, 2013).

⁷¹ *Id.*

mistakes by ISPs open the door to numerous highly fact specific “it wasn’t me” defenses.⁷² These two weaknesses can be overcome, but only by investing individual time and effort into each case, something that is anathema to the copyright trolling model.

The appropriateness of joinder in MDJD litigation has divided federal district courts across the country. The Federal Rules of Civil Procedure allow defendants to be joined in a single action subject to two requirements set forth in Fed. R. Civ. P. 20(a)(2). First, the right to relief must be asserted 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.”⁷³ Second, there must be common questions of fact or law.⁷⁴ It is important to note that joinder is not merely allowed under the Federal Rules of Civil Procedure, it is strongly encouraged. The Supreme Court held in *United Mine Workers v. Gibbs* that “the impulse is toward the broadest possible scope of action consistent with fairness to the parties.”⁷⁵ The current split in the district courts on whether joinder is proper in MDJD suits centers around the courts’ understanding of the BitTorrent file sharing technology — specifically whether the phrase “same transaction or occurrence or series of transactions or occurrences” properly applies to the participants in a BitTorrent swarm.

BitTorrent works by segmenting a large file into thousands of smaller pieces that can be downloaded in any order and reassembled by the end user. This initial process is called “seeding”. Once a file is seeded, it can be downloaded by multiple individuals simultaneously. The group of individuals downloading the seeded file is known as the ‘swarm’. One advantage of BitTorrent over other file sharing programs is that there is no need to maintain a connection between the seeder and the downloader for the duration of the download. Any participant in the swarm can download any fragment from any other participant who already has it. Swarm members are typically downloading and uploading file-fragments from other computers in the swarm at the same time.⁷⁶ The probability that any two swarm members chosen at random have directly interacted is less than one, and it could be quite low in a large swarm. The basic theory in MDJD litigation is that all swarm participants are involved in a “series of transactions or occurrences” that are sufficiently related to allow joinder.⁷⁷

⁷² *Third Degree Films, Inc. v. Doe*, 2013 U.S. Dist. LEXIS 44131, 26, n7 (E.D. Mich. Mar. 18, 2013) (noting that “plaintiff’s counsel represented that approximately 95% of defendants in cases such as this raise some form of the ‘it wasn’t me’ defense.”); *In re BitTorrent Adult Film Copyright Infringement Cases*, 2012 U.S. Dist. LEXIS 61447, 2012 WL 1570765 at *12 (noting the “panoply of individual defenses including age, religious convictions, and technological savvy; misidentification of ISP accounts; the kinds of WiFi equipment and security software utilized; and the location of defendant’s router.”).

⁷³ Fed. R. Civ. P. 20(a)(2)(A).

⁷⁴ Fed. R. Civ. P. 20(a)(2)(B).

⁷⁵ *United Mine Workers v. Gibbs*, 383 U.S. 715, 724 (1966). (joinder of claims, parties and remedies is strongly encouraged.)

⁷⁶ *Malibu Media, LLC v. Doe*, 2013 U.S. Dist. LEXIS 139068, 4-5 (N.D. Ill. Sept. 27, 2013)

⁷⁷ See *infra*.

Courts are divided as to whether, by itself, participation in a BitTorrent swarm meets the “same transaction or occurrence or series of transactions or occurrences” standard under Fed. R. Civ. P. 20(a)(2)(A).⁷⁸ Many courts have rejected joinder based on swarm participation alone.⁷⁹ For example, the district court in *Dragon Quest Prods., LLC v. Does*, held that “the initial seeder, other seeders, the various peers, and the Defendants may have participated in this swarm months apart from each other. While ... the initial seeder, the other seeders, the peers, and the Defendants, may be connected by the same initial seed file, the Court finds that this connection alone is not sufficient to establish joinder.”⁸⁰ Some plaintiffs have overcome this obstacle by pleading specifically that the Doe defendants had in fact shared the same pieces of the file with each other.⁸¹ Others have focused on groups of John Does who acted within a short time frame.⁸²

However, a number of courts have taken a broader view and held that this specific level of interaction is not necessary and that merely participating in the same swarm is sufficient for joinder under Fed. Rule 20.⁸³ As the district court in *Malibu Media, LLC v.*

⁷⁸ See *infra* note 65 for examples of cases concluding joinder is impermissible or inappropriate. See *infra* note 69 for examples of cases allowing joinder.

⁷⁹ See e.g. *SBO Pictures, Inc. v. Does* 1-57, No. 12-22, 2012 U.S. Dist. LEXIS 56578, 2012 WL 1415523, *2 (D. Md. Apr. 20, 2012) (denying joinder); *MCGIP, LLC v. Does* 1-149, No. 11-2331, 2011 U.S. Dist. LEXIS 108109, 2011 WL 4352110, *3 (N.D. Cal. Sep. 16, 2011) (misjoinder where plaintiff “has failed to show that any of the 149 Doe defendants actually exchanged any piece of the seed file with one another”); *Hard Drive Productions, Inc. v. Does* 1-188, 809 F.Supp.2d 1150, 1164 (N.D. Cal. 2011) (finding no concerted action where plaintiff conceded that defendants “may not have been physically present in the swarm on the exact same day and time”); *Boy Racer, Inc. v. Does* 1-60, No. 11-1738, 2011 U.S. Dist. LEXIS 92994, 2011 WL 3652521, at *4 (N.D. Cal. Aug. 19, 2011) (severing defendants where plaintiff did not plead facts showing that any particular defendant illegally shared plaintiff’s work with any other particular defendant); *Patrick Collins, Inc. v. Does* 1-23, No. 11-CV-15231, 2012 U.S. Dist. LEXIS 40536, 2012 WL 1019034, at *4 (E.D. Mich. Mar. 26, 2012) (severing the Doe defendants because the infringement of the film via BitTorrent did not constitute a “series of transactions or occurrences”); *SBO Pictures*, 2011 U.S. Dist. LEXIS 137361, 2011 WL 6002620, at *3 (same).

⁸⁰ *Dragon Quest Prods., LLC v. Does*, 2013 U.S. Dist. LEXIS 83683, 24-25 (D.N.J. June 13, 2013).

⁸¹ See e.g., *Malibu Media, LLC v. Doe*, 2013 U.S. Dist. LEXIS 139068, 6 (N.D. Ill. Sept. 27, 2013) (Plaintiff alleges ... John Does accessed the same piece of the copyrighted work, and each piece is identified by a unique value known as a “Hash Identifier” or “Hash Number.”) *Digital Sin, Inc. v. Does* 1-176, 279 F.R.D. 239, 243 (S.D.N.Y. 2012) (Declining to sever where “Plaintiff claims to have carefully selected only a small group of New York-based defendants who traded the exact same file, identifiable by a hash value, as part of the same swarm within a six-week period.”) *Sunlust Pictures, LLC v. Does* 1-75, 2012 U.S. Dist. LEXIS 121368, 2012 WL 3717768, at *3. (Noting that “Sunlust alleges in its complaint that the defendants participated in the swarm simultaneously and that it observed the defendants transferring data from the Video between themselves.”)

⁸² *TCYK, LLC v. Does*, 2013 U.S. Dist. LEXIS 177765 (finding temporal proximity of 62 doe defendants alleged to have acted within a four day period sufficient). See also, *Pac. Century Int’l v. Does* 1-31, No. 11 C 9064, 2012 U.S. Dist. LEXIS 82796, 2012 WL 2129003, at *2 (N.D. Ill. June 12, 2012) (allegations that the defendants participated in the same swarm at varying times spanning just over one month supported permissive joinder).

⁸³ See e.g. *Pacific Century Int’l v. Does* 1-31, No. 11-9064, 2012 U.S. Dist. LEXIS 82796, 2012 WL 2129003, *2 (N.D. Ill. June 12, 2012) (allowing joinder where “the anonymous defendants participated in the same ‘swarm’”); *Digital Sin, Inc. v. Does* 1-176, 279 F.R.D. 239, 244 (S.D.N.Y. 2012); *Bicycle*

John Does 1-6 explained, Rule 20 does not require that defendants acted “in concert” or with any “temporal distance or temporal overlap”; all that Rule 20 requires is “a logical relationship between the separate causes of action.”⁸⁴ In *Patrick Collins, Inc. v. Does 1–21*, the court found that logical relationship was satisfied because “each Doe Defendant downloaded the same Torrent file that was created by the same initial seeder, intending to: 1) utilize other users’ computers to download pieces of the same [Copyrighted Works], and 2) allow his . . . own computer to be used in the infringement by other peers and Defendants in the same swarm.”⁸⁵

On this view, joining the participants in a BitTorrent swarm in a single action is proper because the swarm is more than a collection of individuals acting the same way, it is in essence a cooperative endeavor, whether the participants are personally known to each other or not.⁸⁶ This interpretation is bolstered by the fact that Rule 20(a) refers to a “series of transactions or occurrences” and not just the “same transaction.”⁸⁷ Astute plaintiffs have also bolstered the case for joinder by adding claims for inducement and contributory liability.⁸⁸

Even if the individual participants in a BitTorrent swarm are sufficiently related to permit joinder under the Federal Rules, which appears likely, district courts still have the power to disallow joinder for discretionary reasons.⁸⁹ Here too, the courts are divided.⁹⁰ In

Peddler, LLC v. Does 1-12, No. 13 C 2372, 2013 U.S. Dist. LEXIS 95184, 2013 WL 3455849, at *3-4 (N.D. Ill. July 9, 2013); *Patrick Collins, Inc. v. Does 1-39*, No. 12-CV-00096-AW, 2012 U.S. Dist. LEXIS 57187, 2012 WL 1432224, at *3 (D. Md. Apr. 24, 2012); *First Time Videos, LLC v. Does 1-76*, 276 F.R.D. 254, 257 (N.D. Ill. 2011).

⁸⁴ See e.g., *Malibu Media, LLC v. John Does 1-6*, 291 F.R.D. 191,204 (N.D. Ill. 2013); *TCYK, LLC v. Does 1-62*, 13 C 3842, 2013 WL 6671675 (N.D. Ill. Dec. 18, 2013).

⁸⁵ *Patrick Collins, Inc. v. Does 1–21*, 282 F.R.D. at 165 (ED Mich. 2012). See also *Malibu Media, LLC v. John Does 1-6*, 291 F.R.D. 191,204 (N.D. Ill. 2013)(same); *TCYK, LLC v. Does 1-62*, 13 C 3842, 2013 WL 6671675 (N.D. Ill. Dec. 18, 2013)(same).

⁸⁶ *Id.* (“Every member of a swarm joins that cooperative endeavor knowing that, in addition to downloading the file, they will also facilitate the distribution of that identical file to all other members of the swarm.”) See also *TCYK, LLC v. John Does 1-87*, 2013 U.S. Dist. LEXIS 95817, 2013 WL 3465186, at *4 (same).

⁸⁷ *Id.*

⁸⁸ See e.g., *Patrick Collins, Inc. v. Does 1-38*, 941 F. Supp. 2d 153, 158 (D. Mass. 2013).

⁸⁹ Fed. R. Civ. P. 21 provides that the court may add or drop a party on motion or on its own “on just terms”. The court may also sever any claim against a party. See e.g., *Patrick Collins, Inc. v. Does 1-38*, 941 F. Supp. 2d 153, 156-157 (D. Mass. 2013) (Finding that although “joinder of the defendants may be permissible under Fed. R. Civ. P. 20(a), the interests of justice and judicial economy would best be served if all of the defendants except Doe Number 1 were severed and dropped from the case pursuant to Fed. R. Civ. P. 21.”)

⁹⁰ See, e.g., *Malibu Media 1-30*, 2012 U.S. Dist. LEXIS 175919, 2012 WL 6203697 (permitting joinder); *Malibu Media, LLC v. John Does 1-5*, 285 F.R.D. 273 (S.D.N.Y. 2012) (permitting joinder); *Malibu Media, LLC v. John Does 1-22*, No. 12-5091, 2013 U.S. Dist. LEXIS 56147, 2013 WL 1704291 (D.N.J. Apr. 19, 2013)(severing and dismissing all defendants other than John Doe #1); *Amselfilm Prods. GMBH & Co. KG v. Swarm 6a6dc*, No. 12-3865, 2012 U.S. Dist. Lexis 186476, (D.N.J. Oct. 10, 2012)(finding joinder to be inappropriate and severing the defendants); *Next Phase Distribution, Inc. v.*

part, the division of opinion as to whether joinder is appropriate under the Federal Rules can be seen as a conflict between *formalism* and *realism*.

For the formalist judge, the complaint is the beginning of a process that ultimately leads to a hearing. If the joinder of 5000 very loosely related individuals would make it impossible to conduct a hearing based on the merits, joinder appears to be unsound.⁹¹ The court in *Third Degree Films, Inc. v. Does 1-131* explained at length the practical problems that make joinder in MDJD suits inappropriate: differences in factual and legal defenses would generate completely unrelated motions; scheduling and conducting hearings and discovery disputes among a large number of parties would be almost impossible; *pro se* defendants without access to the e-filing system would be forced to serve paper copies of all filings on all other parties; all defendants, including those proceeding *pro se* would have an interest in attending all other parties' depositions and may do so as a matter of right; any eventual trial would require a hundred separate mini-trials with different witnesses and evidence, "eviscerating any 'efficiency' of joinder."⁹² Cumulatively, these obstacles would substantially delay the ultimate resolution of any particular defendant's case and thus from this perspective joinder appears unsound.⁹³

For the realist judge, the complaint is the beginning of a process that almost inevitably leads to settlement and thus joinder is an efficient way of aggregating claims at the early stage of litigation for which there is very likely no later stage. The minority of defendants who actively contest that liability can have their cases severed at a later point in time. In the meantime, allowing MDJD suits to proceed to the discovery stage is efficient to the extent that it reduces the plaintiff's costs.

The conflict between realism and formalism is not entirely determinative of the appropriateness of joinder in MDJD cases. A number of courts have also refused to allow MDJD cases to proceed *en masse* because of their association with "potentially abusive litigation tactics."⁹⁴ These courts accept that "a valid copyright holder is entitled to seek

John Does 1-27, 284 F.R.D. 165 (S.D.N.Y. 2012) (not deciding whether joinder was proper, but severing the defendants based on practical considerations).

⁹¹ See e.g. *Malibu Media, LLC v. John Does 1-39*, No. 12-6945, Doc. No. 23, 2013 U.S. Dist. LEXIS 44053 (D.N.J. Mar. 28, 2013) (The court noted that its "ability to efficiently manage the pretrial phase of this action with the present number of defendants could be compromised by permitting joinder, causing a strain on judicial resources.")

⁹² *Third Degree Films, Inc. v. Does 1-131*, 280 F.R.D. 493, 498-99 (D. Ariz. 2012) reconsideration denied, CV 12-0108-PHX-JAT, 2012 WL 2383560 (D. Ariz. June 25, 2012)

⁹³ *Id.*

⁹⁴ *Third Degree Films v. Doe*, 286 F.R.D. 188, 189 (D. Mass. 2012) ("In recent months, this Court has grown increasingly troubled by 'copyright trolling,' specifically as it has evolved in the adult film industry. ... Against this backdrop of mass lawsuits and potentially abusive litigation tactics, courts nationwide have become skeptical of allowing the adult film companies unfettered access to the judicial processes of subpoenas and early discovery"). See also *Patrick Collins, Inc. v. Does 1-38*, 941 F. Supp. 2d 153, 156-157 (D. Mass. 2013); *Kick Ass Pictures, Inc. v. Does 1-25*, C.A. No. 12-10810-MLW, 2013 U.S. Dist. LEXIS 1386, 2013 WL 80162, at *1 (D. Mass. Jan. 4, 2013). See also *Pacific Century Int'l, Ltd. v. Does 1-101*, 2011 U.S. Dist. LEXIS 124518, 2011 WL 5117424, at *2.

protection of its intellectual property in federal court” but they remain wary of suits filed “solely to facilitate demand letters and coerce settlement, rather than ultimately serve process and litigate the claims.”⁹⁵ This doubtful impression has been reinforced by the failure of plaintiffs to actually serve the individual defendants in many cases.⁹⁶ Courts have noted that much of the coercive force of the settlement offer derives from the pornography at issue, not the alleged copyright infringement.⁹⁷ The extraordinary leverage plaintiffs obtain in John Doe pornography cases is manifest by the number of Doe defendants who rush to settle before being identified in the public record.⁹⁸

Some courts have also taken issue with one of the main sources of efficiency in the MDJD model, the evasion of filing fees.⁹⁹ For example, the court in *In re BitTorrent Adult Film Copyright Infringement Cases* estimated that “plaintiffs have improperly avoided more than \$25,000 in filing fees by employing its swarm joinder theory. . . . Nationwide, these plaintiffs have availed themselves of the resources of the court system on a scale rarely seen. It seems improper that they should profit without paying statutorily required fees.”¹⁰⁰

⁹⁵ Third Degree Films v. Does 1-47, 286 F.R.D. 188, 190 (D. Mass. 2012) (footnotes omitted). See also Hard Drive Prods., Inc. v. Does 1-90, No. C 11-03825 HRL, 2012 U.S. Dist. LEXIS 45509, 2012 WL 1094653, at *3 & n.4 (N.D. Cal. Mar. 30, 2012). 2012 U.S. Dist. LEXIS 45509, [WL] at *7. (“Plaintiff seeks to enlist the aid of the court to obtain information through the litigation discovery process so that it can pursue a non-judicial remedy that focuses on extracting ‘settlement’ payments from persons who may or may not be infringers. This the court is not willing to do.”)

⁹⁶ See e.g. Hard Drive Prods., Inc. v. Does 1-90, No. C 11-03825 HRL, 2012 U.S. Dist. LEXIS 45509, 2012 WL 1094653, at *3 & n.4 (N.D. Cal. Mar. 30, 2012). (magistrate judge refused to grant expedited discovery to subpoena the ISP providers for the Doe defendants’ identities after noting that the adult film company plaintiff conceded that to its knowledge, neither it nor any other plaintiff had ever served a single Doe defendant after early discovery had been granted.)

⁹⁷ Third Degree Films v. Does 1-47, 286 F.R.D. at 197; Patrick Collins, Inc. v. Does 1-38, 941 F. Supp. 2d 153, 165-166 (D. Mass. 2013) (expressing concern that joinder is being used “to facilitate a low-cost, low-risk revenue model for the adult film companies.”) Patrick Collins, Inc. v. Does 1-38, 941 F. Supp. 2d 153, 157 (D. Mass. 2013) (“Although the record before this court reveals no evidence of improper tactics or bad faith by Patrick Collins in this action, the fact that four settlements have occurred before any of the defendants have been identified in the public record illustrates how these types of cases create a strong tool for leveraging early settlements.”)

⁹⁸ *Id.*

⁹⁹ *In re BitTorrent Adult Film Copyright Infringement Cases*, 2012 U.S. Dist. LEXIS 61447, 2012 WL 1570765, at *13. (estimating that “plaintiffs have improperly avoided more than \$25,000 in filing fees by employing its swarm joinder theory. . . . Nationwide, these plaintiffs have availed themselves of the resources of the court system on a scale rarely seen. It seems improper that they should profit without paying statutorily required fees.”)

¹⁰⁰ *In re BitTorrent Adult Film Copyright Infringement Cases*, 2012 U.S. Dist. LEXIS 61447, 2012 WL 1570765, at *13.

For a combination of all of these reasons a substantial number of courts have severed all but the first named defendant and required plaintiffs to re-file individually in a substantial number of cases.¹⁰¹

C. The Copyright Trolling-Pornography Nexus

Conventional wisdom asserts that 15 percent of Internet traffic is comprised of cat videos¹⁰² and 30 percent is pornography.¹⁰³ Cat videos do not feature prominently in MDJD lawsuits; pornography is another story.¹⁰⁴ To investigate the copyright trolling-pornography nexus, I generally reviewed at least one underlying complaint per John Doe plaintiff in the dataset and coded the plaintiff as either ‘pornography’ or ‘not pornography’ accordingly.¹⁰⁵

¹⁰¹ Third Degree Films v. Does 1-47, 286 F.R.D. at 198. (“Although this court emphasizes that it has observed no bad faith behavior on the part of the plaintiff thus far, “the Court takes issue with the general structure of this case and like cases, and has determined that the most appropriate method to protect against any potential coercion is to sever the Doe defendants and require them to be sued individually.”) See also Patrick Collins, Inc. v. Does 1-38, 941 F. Supp. 2d 153, 166 (D. Mass. 2013).

¹⁰² See e.g., <http://www.cbsnews.com/videos/cat-videos-take-over-internet-marketing-world/>

¹⁰³ See “*Porn Sites Get More Visitors Each Month Than Netflix, Amazon And Twitter Combined*” THE HUFFINGTON POST, May 4, 2013, available at http://www.huffingtonpost.com/2013/05/03/internet-porn-stats_n_3187682.html.

¹⁰⁴ It is beyond the scope of this Article to address the question of the copyright status of pornographic works. Pornography is not generally illegal and even if it were, “the prevailing view is that even illegality is not a bar to Copyrightability,” see *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 755-56 (7th Cir. 2012). See also *Mitchell Bros. Film Grp. v. Cinema Adult Theatre*, 604 F.2d 852, 862-63 (5th Cir. 1979); *Jartech, Inc. v. Clancy*, 666 F.2d 403, 406 (9th Cir. 1982). But see Ann Bartow, *Copyright Law and Pornography*, 91 OR. L. REV. 1 (2012) (questioning whether copyright should protect pornography and particular sub-categories of pornography).

¹⁰⁵ For some plaintiffs an Internet search was sufficient to identify them as being in the pornography business. For others, I relied on descriptions of works as ‘adult content’, descriptions on IMDB and reasonable inferences from titles such “My Little Panties # 2”. I did not watch any of the underlying titles.

Figure 3: Percentage of John Doe Law Suits by Circuit, 2001 to 2013

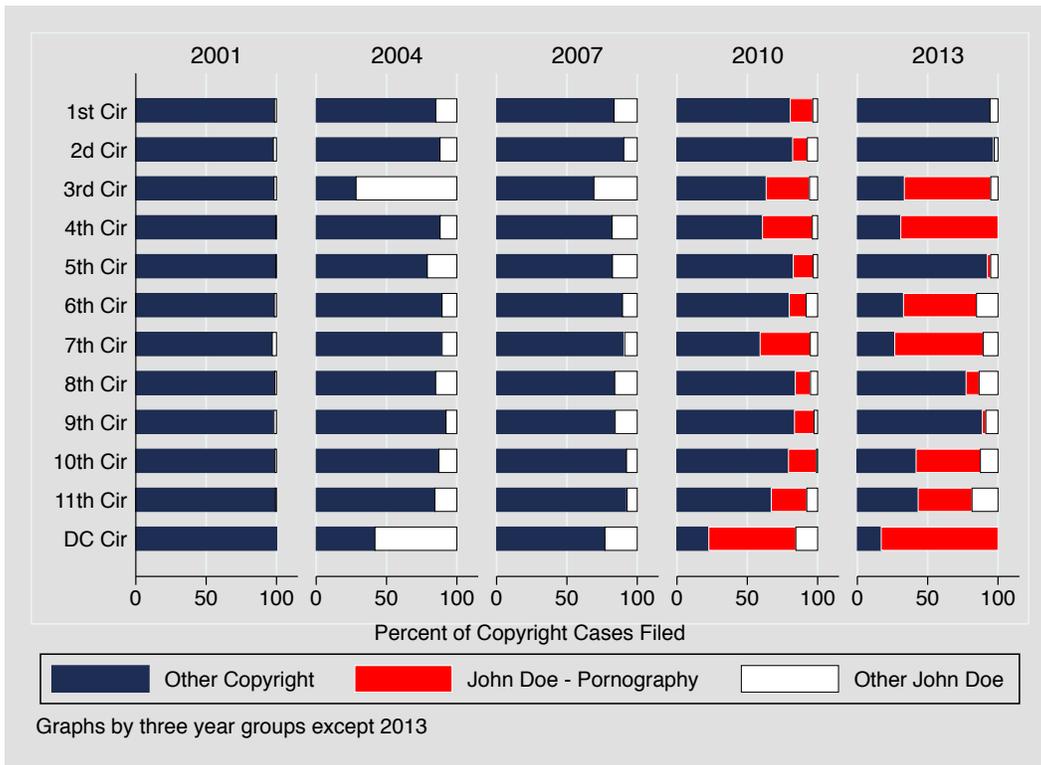


Figure 3 illustrates the relative frequency of John Doe litigation as a percentage of all copyright litigation broken down by circuit and into three-year time periods based on the year of filing, beginning with the year 2001. Figure 3 differs from Figure 1¹⁰⁶ in that it differentiates between pornography related John Doe litigation and other John Doe litigation.

¹⁰⁶ Part I, *Supra*.

Figure 4: Percentage of John Doe Law Suits in Selected Districts, 2010 to 2014

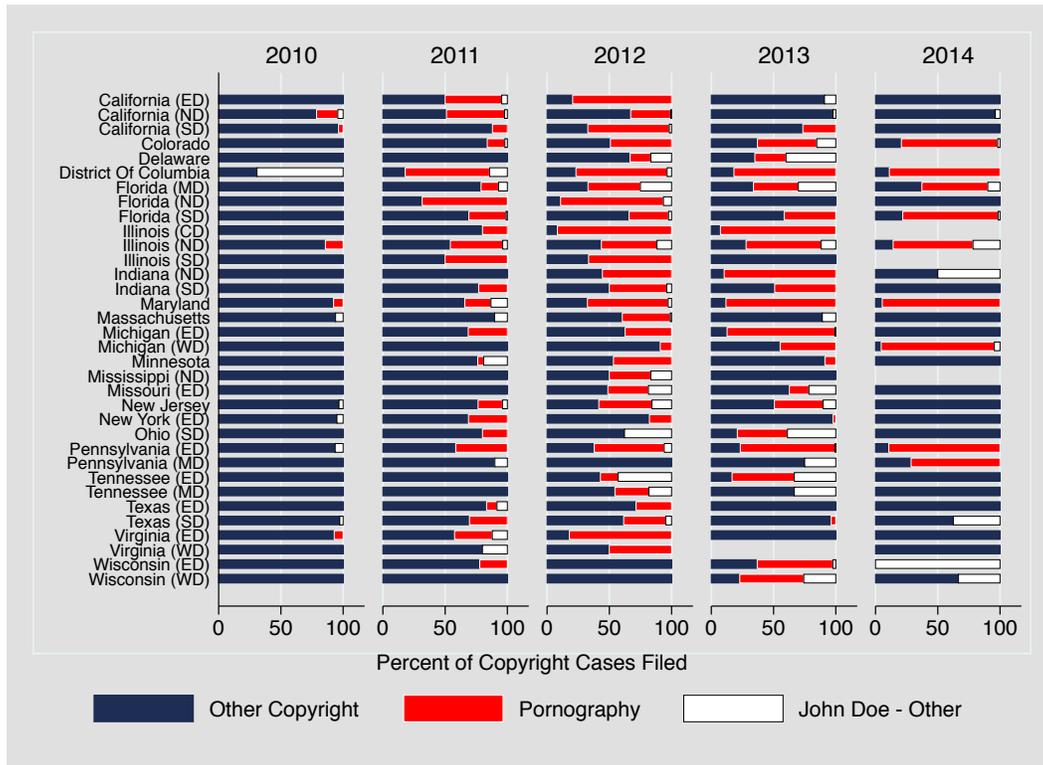


Figure 4 takes a selection of the same data and shows how the relative frequency of Pornography focused John Doe litigation has changed in selected districts over the last five years. The districts shown are those with high ratios of pornography filings from in at least one filing year from 2010 to 2014.

In 2010 only the Northern District of West Virginia saw more pornography cases than any other type of copyright case. In 2011 the Northern District of Florida and the District Of Columbia took that honor. In 2012, 2013 and the first quarter of 2014 there were 10, 11 and 9 districts respectively where pornography cases outnumbered any other type of copyright case.¹⁰⁷

¹⁰⁷ In 2012 those districts were: Indiana (ND); California (ED); Illinois (CD); District Of Columbia; Maryland; Virginia (ED); Illinois (SD); Pennsylvania (ED); California (SD) and Florida (ND). In 2013 those districts were: Michigan (ED); Tennessee (WD); Indiana (ND); Wisconsin (WD); Alabama (SD); District Of Columbia; Maryland; Illinois (CD); Wisconsin (ED); Pennsylvania (ED) and Illinois (ND). In the first quarter of 2014 those districts were: Maryland; Pennsylvania (MD); Michigan (WD); Florida (SD); Colorado; Florida (MD); Pennsylvania (ED); Illinois (ND) and the District Of Columbia.

Why so much pornography? The prevalence of pornography in MDJD lawsuits could be attributable to characteristics of the adult entertainment industry itself. It might be, for example, that the industry is generally more innovative and less convention bound and so is simply the first to adopt what may soon be a broader trend.¹⁰⁸ Indeed, anecdotal reports of the increasing appearance of low-budget and independent films in the MDJD format suggests that the appeal of MDJD litigation may be expanding. A related explanation would be that the producers of pornography are less concerned about negative publicity than other creative industries.¹⁰⁹ A closer look into the mechanics of MDJD litigation suggests two additional structural explanations.

The first structural explanation is simply that the economics of copyright trolling are particularly well suited to pornography because the plaintiff can threaten accused infringers with public exposure in addition to statutory damages. This additional incentive to settle can fundamentally transform the viability of such an enterprise. As noted previously, the profitability of MDJD lawsuits depends on keeping costs low and recovery high.

Recall that $Profit = N(PY - C_v) - C_f$. Hypothetically, if the plaintiff faces fixed costs of \$100,000 and an average variable cost of \$1000 per defendant, MDJD litigation would be unprofitable if the plaintiff achieved an average settlement of \$3000 ($P=3000$) and a yield of 30% ($Y=0.3$) in a lawsuit targeting 5000 IP addresses ($N=5000$). This would result in a loss of \$150,000 on an investment of \$5.1 million.¹¹⁰ But assuming that the threat of public exposure as a consumer of pornography motivates more people to settle more quickly, the enterprise would become profitable to the tune of \$3.9 million simply by increasing the yield from 30% to 60%.¹¹¹ In short, one reason that the MDJD model has been employed more in relation to pornography than an other subject matter is that the social stigma relating to pornography, or particular types of pornography, increases both yield (Y) and payoff (P) while keeping the plaintiff's variable costs (C_v) low.

The second structural explanation for the prevalence of pornographic subject matter in copyright trolling is that a significant amount of this litigation has been initiated by a small number of entrepreneurial lawyers and plaintiffs.¹¹² The most well-known of these is the Prenda Law firm.¹¹³ A group of entities associated with Prenda Law have

¹⁰⁸ Peter Johnson, *Pornography Drives Technology: Why Not to Censor the Internet*, 49 Fed. Comm. L.J. 217 (1996) (discussing pornography's role at the vanguard of new technology).

¹⁰⁹ This seems entirely speculative.

¹¹⁰ $Profit = N(PY - C_v) - C_f = 5000(3000 * 0.30 - 1000) - 100,000 = -150,000$.

¹¹¹ $Profit = N(PY - C_v) - C_f = 5000(3000 * 0.60 - 1000) - 100,000 = 3,900,000$

¹¹² The appearance of the same counsel and making virtually identical claims and using virtually identical filings has not gone unnoticed by the courts. See e.g. *Patrick Collins, Inc. v. Does 1-38*, 941 F. Supp. 2d 153, 155 (D. Mass. 2013).

¹¹³ *Guava, LLC v. Does 1-5*, 1:12-CV-8000, 2013 WL 3270663 (N.D. Ill. June 27, 2013) ("The aggressive tactics of Guava's counsel, Prenda Law, in litigating John Doe lawsuits have been widely reported and acknowledged by courts, including those in Illinois and California.") See also, Joe Mullin,

amassed millions of dollars in settlements in MDJD lawsuits.¹¹⁴ According to media reports and court records, Prenda has leveraged this fear of social stigma associated with downloading pornography by posting the names of defendants who do not settle on its website, along with a link to the lawsuit.¹¹⁵ Lawyers in an unrelated case were censured in several cases for attaching an erroneous exhibit listing several other adult films that defendants were alleged to have downloaded that were unrelated to the litigation.¹¹⁶ All of these techniques are aimed at forcing settlement by leveraging the threat of exposure.

Attorneys associated with Prenda have been ruthless in their pursuit of profits and have also been sanctioned for various forms of deceit and unethical behavior.¹¹⁷ Defendants in a Florida case involving Prenda have presented evidence that someone inside the firm was “seeding” its own content, i.e., making pornography available for illegal download in the first place, in an attempt to induce copyright infringement.¹¹⁸ Prenda lawyers have also been accused of colluding in litigation,¹¹⁹ lying to the court,¹²⁰ forging documents¹²¹ and identity theft.¹²²

“‘Porn troll’ Prenda Law sanctioned in defamation lawsuit” Ars Technica, January 23, 2014 (<http://arstechnica.com/tech-policy/2014/01/porn-troll-prenda-law-sanctioned-in-defamation-lawsuit/>).

¹¹⁴ Kashmir Hill “How Porn Copyright Lawyer John Steele Has Made A ‘Few Million Dollars’ Pursuing (Sometimes Innocent) ‘Porn Pirates’” FORBES (October 15, 2012). Note that the Prenda legal team appears to have began under the firm title Steele Hansmeier PLLC and has now changed its name to the Anti-Piracy Law Group.

¹¹⁵ Claire Suddath, “Prenda Law, the Porn Copyright Trolls”, BUSINESS WEEK, May 30, 2013 (available at <http://www.businessweek.com/articles/2013-05-30/prenda-law-the-porn-copyright-trolls>)

¹¹⁶ Malibu Media, LLC, Doe, subscriber assigned IP address 184.58.186.212 and related cases (Case Nos. 13-C-536, 13-C-544, 13-C-779 (E.D. Wis. December 12, 2013); *Malibu Media, LLC v. Doe*, 2013 WL 5276081 (E.D. Wis. Sept. 17, 2013); *see also Malibu Media LLC v. Doe*, 2013 WL 4821911 (W.D. Wis. Sept. 10, 2013) (Judge Conley’s Order imposing sanctions). MALIBU MEDIA, LLC v. MCSWEENEY et al, INSD (Motion for fees/costs against Malibu Media – Also 2 defaults v. 2 Does for \$67.5K), 1:12-cv-00842; *Malibu Media LLC v. Doe, ILND (80-Year Old Woman)*, 2:13-cv-00097

¹¹⁷ *Lightspeed Media Corp. v. Smith*, CV 12-889-GPM, 2013 WL 6225093 (S.D. Ill. Nov. 27, 2013) (“the Court has no doubt that Duffy, Steele, and Hansmeier are closely associated and acted in concert to file and prosecute this frivolous lawsuit.”) *Ingenuity 13 LLC v. John Doe*, 2:12-CV-8333-ODW JCX, 2013 WL 1898633 (C.D. Cal. May 6, 2013) (finding that “the Principals engaged in vexatious litigation designed to coerce settlement;” that the “Plaintiffs have demonstrated their willingness to deceive not just this Court, but other courts where they have appeared,” and awarding sanctions against lawyers Steele, Hansmeier, Duffy and Gibbs, the Prenda Law and their clients AF Holdings and Ingenuity 13 based on the “Plaintiffs’ brazen misconduct and relentless fraud.”)

¹¹⁸ Cyrus Farivar, “Prenda seeded its own porn files via BitTorrent, new affidavit argues” ARS TECHNICA (June 3, 2013).

¹¹⁹ Mike Masnick, “‘Defendant’ In Prenda Law Case Reveals He Agreed To Take A Dive”, TECHDIRT. Retrieved April 11, 2013. (January 25, 2013).

¹²⁰ See Judge Wright’s findings of fact in *Ingenuity 13 LLC v. John Doe*, 2:12-CV-8333-ODW JCX, 2013 WL 1898633 (C.D. Cal. May 6, 2013).

¹²¹ *Id.*

¹²² *Id.*

The influence of Prenda and entities associated with it can be seen on the following two tables which list the top 20 plaintiffs in copyright suits against John Does. Table 1 lists the top 20 plaintiffs between 2001 and 2013 ranked according to the total number of John Doe defendants. Table 2 lists the top 20 plaintiffs between 2010 and 2013, ranked according to the number of suits filed.

**Table 1: Top 20 Copyright John Doe Plaintiffs 2001–2014
By total number of defendants**

Plaintiff	Suits Filed	Largest single suit	Total Doe Defendants
Ott (an individual)	1	15551	15551
Patrick Collins, Inc	224	3757	11460
Third Degree Films	56	3577	8288
New Sensations, Inc	17	1768	7502
Braun	9	7098	7106
Digital Sin, Inc	19	5698	6476
Malibu Media, Llc	1709	81	6280
Discount Video Center, Inc	3	5041	5150
On The Cheap, Llc	1	5011	5011
West Coast Productions	24	2010	4761
Diabolic Video Productions, Inc	2	2099	4198
Sbo Pictures	13	3036	3637
Zero Tolerance Entertainment	6	2943	3128
Openminded Solutions, Inc	17	2925	2979
Third World Media, Llc	7	1568	2977
Hard Drive Productions, Inc	57	1000	2853
Teyk, Llc	128	131	2609
Media Products, Inc	24	1257	2550
Combat Zone	35	1037	2165
Mcgip, Llc	18	1164	1698
<i>total</i>	<i>2370</i>		<i>106379</i>

The only Prenda-related entity listed on Table 1 is Hard Drive Productions, Inc.,¹²³ however Prenda-related entities claim 5 out of the top 20 positions on Table 2. It is important to note that the methodology of counting John Doe defendants is under-inclusive. Doe numbers were derived from the case captions them-selves—e.g. “*Digital Sin, Inc v. Does 1-208*” would be counted as 208 John Doe defendants, but “*Digital Sin, Inc v. Does*” or “*Digital Sin, Incorporated v. Unknown Parties*” would be counted as a single John Doe defendant.

¹²³ According to media reports, Hard Drive Productions stopped working with Prenda in late 2012. See, Claire Suddath, “*Prenda Law, the Porn Copyright Trolls*”, BUSINESS WEEK, May 30, 2013 (available at <http://www.businessweek.com/articles/2013-05-30/prenda-law-the-porn-copyright-trolls>)

**Table 2: Top 20 Copyright John Doe Plaintiffs 2010–2014
By number of suits filed**

Plaintiff	Number of Cases Filed
Malibu Media, LLC	1710
Patrick Collins, Inc	224
Af Holdings, LLC*	138
Tcyk, Llc	128
Ingenuity 13, LLC*	67
<i>Voltage Pictures</i> [†]	66
K-Beech, Inc	62
<i>R&D Film 1</i> [†]	62
Quad International, Inc	59
Hard Drive Productions, Inc*	57
Third Degree Films	56
<i>Bait Productions Pty Ltd</i> [†]	55
Killer Joe Nevada, LLC	49
<i>United Fabrics International Inc</i> [†]	42
<i>Breaking Glass Pictures</i> [†]	41
<i>John Wiley & Son</i> [†]	40
Combat Zone	35
First Time Videos, LLC*	27
West Coast Productions	24
Media Products, Inc	24

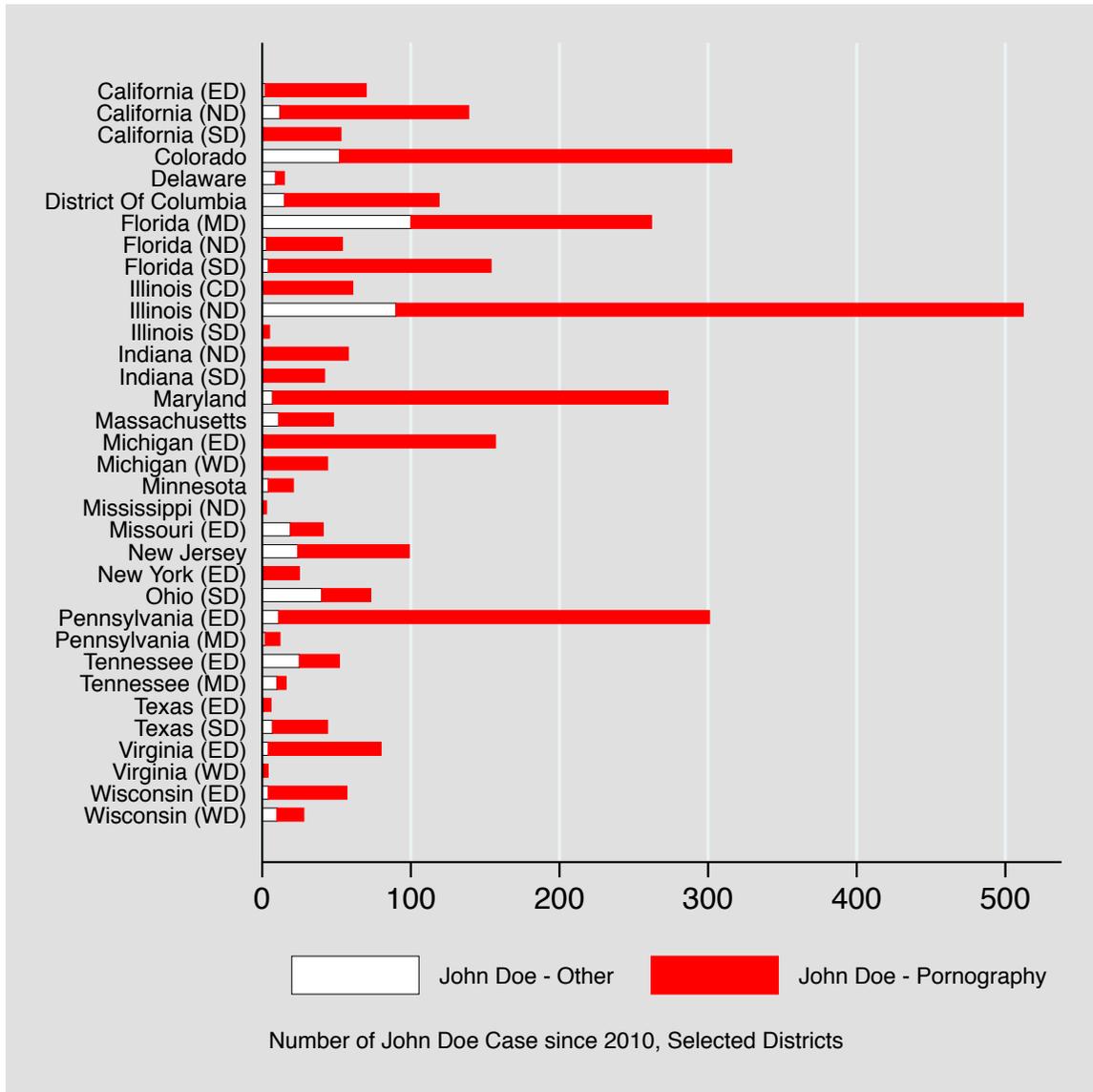
*Entities associated with the Prenda Law Firm at some time.

[†] Not related to pornography

The significance of repeat players may also explain the uneven geographic distribution of MDMJ lawsuits.¹²⁴ Figure 5A, below, shows the raw numbers for John Doe pornography and other John Doe copyright litigation, by district court. Measured by the number of John Doe defendants, the Northern District of Illinois is the clear leader in pornography related copyright trolling, whereas the District of Connecticut is the venue of choice for non-pornography trolling.

¹²⁴ The appearance of the same counsel and making virtually identical claims and using virtually identical filings has not gone unnoticed by the courts. See e.g. *Patrick Collins, Inc. v. Does 1-38*, 941 F. Supp. 2d 153, 155 (D. Mass. 2013).

**Figure 5: John Doe Copyright Lawsuits 2010–2014
Selected Districts**



The copyright troll-pornography nexus illustrates how a general system of incentives can lead to unintended results. Pornography may be no better and no worse than other genres, but it is uniquely well suited to exploit the litigation incentives of our current copyright system. Copyright is meant to establish market-based incentives for the production of creative works, however, for a particular breed of plaintiff, the litigation incentives established by permissive joinder and statutory damages are more attractive. No doubt, some readers will be concerned that pornography giving copyright litigation a bad name, but the conduct of plaintiff’s lawyers described in a number of copyright trolling cases might suggest the reverse: copyright litigation is sullyng the reputation of pornography.

Figure 5B

III. REFORMS

A. The Normative Foundations for Reform

Some question whether the system really works but that debate is entirely beyond the scope of this Article just as it is beyond the mandate of the judges who must apply the law.¹²⁵ For purposes of a rational discussion about copyright trolling, as opposed to a wholesale reappraisal of the copyright system, we should accept the central dogma of copyright that exclusive rights are an effective way to provide incentives for the creation and distribution of expressive works.¹²⁶ In less abstract terms this means, at the very least, accepting the premise that unauthorized file sharing is a civil wrong deserving of a remedy: there is no legal justification for someone who can pay a reasonable price for legitimate access to *Game of Thrones* to instead download it via BitTorrent.¹²⁷ In short, the problem with MDJD lawsuits is not that individual infringers face the risk of detection and sanction—an unenforceable copyright law would provide no incentives.

The primary problems with MDJD litigation relate to the fairness of the judicial process. MDJD suits allow accusations of infringement to be made based on a minimal investigation of the facts. Defendants in these cases are often subject to leverage that crosses the line into extortion, and effectively denied an opportunity to defend themselves. Once an ISP names an individual, the burden of proof is effectively reversed. This reversal takes place because, unless the defendant has a lawyer willing to work on contingency, the cost of establishing his innocence vastly exceeds the settlement payoffs demanded by plaintiffs. Fee shifting is available for the successful defendant in copyright

¹²⁵ For a representative sample of the literature, see Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569 (2009); Lydia Pallas Loren, *The Pope's Copyright? Aligning Incentives with Reality by Using Creative Motivation to Shape Copyright Protection*, 69 LA. L. REV. 1 (2008); Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. 29 (2011).

¹²⁶ The utilitarian foundation of copyright can be traced back to its origins in England the 1710 Act “for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned” or the Statute of Anne as it is now known. This purposive conception of Copyright is also clearly reflected in the U.S. Constitution which provides that “The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const., Art. I, Sect. 8, cl. 8. The Supreme Court has repeatedly observed that “the primary objective of copyright is not to reward the labor of authors, but to promote the Progress of Science and useful Arts.” *Feist v. Rural Telephone* at 350 (quoting Art. I, § 8, cl. 8., citing *Twentieth Century Music Corp. v. Aiken*, 422 U. S. 151, 156 (1975)). The rights of authors are not the ends of the copyright system, but they are an important means by which those ends are achieved. As the Court observed in *Harper & Row* “By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.” *Harper & Row, Publishers, Inc. v. Nation Enterprises* 471 U.S. 539, 558 (1985). See also *Eldred v. Ashcroft*, 537 US 186 (2003). See generally William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989)

¹²⁷ Unauthorized file-sharing is not fair use. See *Metro–Goldwyn–Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 125 S.Ct. 2764, 162 L.Ed.2d 781 (2005); *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir.2001); *BMG Music v. Gonzalez*, 430 F.3d 888, 890 (7th Cir.2005).

cases, but it is not guaranteed,¹²⁸ and it does not level the playing field. The innocent defendant must calculate the expected value of litigation versus settlement with reference to the small probability that the plaintiff will prevail. If the defendant prevails and is awarded attorney fees, his¹²⁹ profit is zero at best.¹³⁰ If the defendant loses, his combined liability for statutory damages and attorney fees could easily exceed \$100,000. Even if the chance of this catastrophic loss is only 5%, the defendant's expected loss is \$5,000. The potential for six-figure statutory damage awards compounds the problem of litigation costs by making the downside risk for a defendant who fails to establish his innocence untenable on most objective risk-reward calculations. For the innocent and guilty alike, the rational response to a letter of demand in these circumstances is to negotiate a settlement. In this context, the discovery orders that link IP addresses to personal individual information are little more than a judicially sanctioned hunting license.

Arguably, another problem with MDJD lawsuits is that they lower the cost of copyright enforcement too far. Although some enforcement is required for copyright's incentives to function, it is wrong to assume that more enforcement is always better. The idea that copyright should always be enforced equivalent to the suggestion that every trespass should lead to litigation. Like other forms of property, copyright is private right that creates the option of enforcement. We expect landholders and copyright owners alike to enforce their rights when the private benefits of doing so outweigh the private costs. Litigation invokes significant public resources and has potentially significant public costs. Attaching a positive cost to litigation through filing fees or other procedural mechanisms can act as an important screening mechanism that deters the marginal complaint and those with trivial claims. Filing fees and the like help allocate judicial resources to more valuable claims.

B. Reform Proposals

With these normative foundations in place, we can now consider some concrete reform proposals.

1. Reasonable Statutory damages

Copyright law's statutory damages framework leads to awards that are unreasonably high in contexts such as unauthorized file-sharing. In the standard BitTorrent case, statutory damages are likely to amount to tens of thousands of dollars, if

¹²⁸ 17 U.S.C. § 505 allows for attorney's fees to be awarded to the prevailing party at the court's discretion. The Supreme Court has held that prevailing plaintiffs and prevailing defendants must be treated alike under Section 505. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994).

¹²⁹ Perhaps because of the close association between copyright trolling and pornography, the vast majority of defendants appear to be men.

¹³⁰ It is not truly zero, because the defendant must finance the litigation and the cost of money (whether interest or opportunity cost) is not part of the attorney fee calculation. If the defendant's lawyer works on contingency, the cost is truly zero.

not hundreds of thousands of dollars.¹³¹ The threat of statutory damages makes resistance to even quite unreasonable plaintiff demands irrational from an economic perspective. At their current levels, statutory damages are a tool of coercion that can be wielded just as effectively against the innocent as the guilty.

Ideally, reform of statutory damages would come from Congress, but even if Congress continues to ignore the problems with statutory damages,¹³² courts have a statutory and constitutional obligation to oversee them.¹³³ Courts should recognize that in the typical BitTorrent lawsuit, statutory damages are punitive: it is hard to see that damages which clearly exceed any plausible measure of compensation or restitution could be considered to be anything else.¹³⁴ The fact that statutory damages are punitive does not mean that there is no place for them. On the contrary, it is quite likely that punitive damages are necessary as a deterrent to illegal file-sharing. Like parking violations and cheating on taxes, the probability of an individual file-sharer being detected is low but the cumulative harm of widespread infringement may be significant.¹³⁵ Where the probability of detection is low, punitive statutory damages tilt the cost-benefit calculation of buying versus stealing back in the direction of legal acquisition. Where statutory damages exceed the amount required to compensate the plaintiff for the wrong suffered, they should be justified under some rational theory of deterrence and subject to the same constitutional constraints as other forms of punitive damages. Currently, neither is the case. For example, the district court in *UMG Recordings, Inc. v. MP3.com, Inc.* awarded \$53 million in statutory damages and attorney fees against a technology startup that based its music streaming service on an aggressive (and ultimately flawed) reading

¹³¹ *Capitol Records v. Thomas-Rasset* 579 F. Supp. 2d 1210, 1213, 1227 (D. Minn. 2008); *Sony BMG Music Entertainment v. Tenenbaum* 593 F. Supp. 2d 319 (D. Mass. 2009).

¹³² Canada recently amended its copyright law to reduce the range of statutory damages to a maximum of \$5000 for non-commercial infringement. Copyright Modernization Act 2012 §38.1(1)(b). The current administration is clearly in favor of statutory damages in copyright law. The United States both encourages and mandates the adoption of statutory damage rules in copyright law through bilateral and regional trade agreements and through the Special 301 review process. See, Pamela Samuelson et al, *Statutory Damages: A Rarity in Copyright Laws Internationally, But for How Long?* 60 J. COPYRIGHT SOC'Y U.S.A. (2013).

¹³³ Section 504 expressly states within the applicable range, the award of statutory damages should be “as the court considers just”. 17 U.S.C § 504. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (“The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.”)

¹³⁴ Tellingly, § 504(c) of the 1976 Act omits the part of its 1909 Act predecessor that provided that statutory damages are not intended as a penalty. Compare § 504(c) 1976 and § 101(b) 1909.

¹³⁵ There is an extensive literature that attempts to establish and quantify the effect of file sharing. Proving causality and estimating the size of any effect is extremely difficult because although music sales declined sharply after Napster emerged in 1999, this decline was at least partially attributable to the end of the CD replacement cycle, a sustained economic downturn in much of the Western world, and the increased competition for entertainment spending attributable to the Internet and the games. See generally, Stan J. Liebowitz, *File Sharing: Creative Destruction or Just Plain Destruction?*, 49 J.L. & ECON. 1, 15-16 (2006); Alejandro Zentner, *Measuring the Effect of File Sharing on Music Purchases*, 49 J.L. & ECON. 63, 65-66 (2006). But see, Felix Oberholzer-Gee & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. POL. ECON. 1, 3 (2007) (finding no causality between declining music sales and peer-to-peer file-sharing).

of the fair use doctrine.¹³⁶ Rational deterrence theory suggests that where the probability of detection is low, damages must be higher in order to reduce the expected gains from law-breaking.¹³⁷ However, the probability that MP3.com would be detected was 100%, as its operation was no secret and was bound to attract the attention of the record industry. The damages/profits accrued by the time case went to trial were not substantial. Given the large number of copyrights infringed in that case, even the minimum statutory damages award plus attorney fees would have provided substantial deterrence and yet the trial judge saw fit to award damages well in excess of the statutory minimum.¹³⁸ Cases like *MP3.com* and *Capitol Records v. Thomas-Rasset* are also difficult to reconcile with the U.S. Supreme Court's guidance that "few awards [of punitive damages] exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."¹³⁹ Copyright scholars have addressed the possible unconstitutionality of statutory damages; courts have not yet seen fit to apply the constitutional standards of tort litigation to copyright law.¹⁴⁰

The imposition of statutory damages should take into account the need for deterrence, but the courts must recognize that the level of damages justified by deterrence has logical and constitutional limits. The fact that statutory damages for file-sharing can exceed the financial penalty for kidnapping violates the principle of marginal deterrence as well as common decency.¹⁴¹ Copyright owners should not be indifferent to public perceptions of the fairness of copyright penalties. Without completely discounting the effect of deterrence, the weight of evidence in sociology and behavioral psychology suggests that compliance with the law is much more normative than instrumental.¹⁴² Tom

¹³⁶ *UMG Recordings, Inc., et al v. MP3.com, Inc.*, Docket No. 1:00-cv-00472 (S.D.N.Y. Jan 21, 2000) Nov. 14 2000 (Final Judgment and Order Nov. 14, 2000).

¹³⁷ Gary Becker, *Crime and Punishment: An Economic Approach*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* 1, 24–34 (Gary S. Becker & William M. Landes, eds., 1974)

¹³⁸ *UMG Recordings, Inc., et al v. MP3.com, Inc.*, Docket No. 1:00-cv-00472 (S.D.N.Y. Jan 21, 2000) Nov. 14 2000 (Final Judgment and Order Nov. 14, 2000)

¹³⁹ *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 1524, 155 L.Ed.2d 585 (2003). The Court also noted that "four times the amount of compensatory damages might be close to the line of constitutional impropriety." *Id.*, citing *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991), and *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 581 (1996).

¹⁴⁰ See, e.g., *Sony BMG Music Entertainment v. Tenenbaum*, 719 F.3d 67, 70–72 (1st Cir. 2013) (an award of \$675,000 for infringement of thirty songs did not offend due process); *Zomba Enterprises, Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 586–88 (6th Cir. 2007) (rejecting Due Process Clause challenges and upholding a statutory damage award of \$806,000, representing a 44:1 ratio of statutory to actual damages), cert. denied, 553 U.S. 1032 (2008); *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 907–10 (8th Cir. 2012) (upholding an award of \$222,000 in statutory damages for infringement of twenty-four songs), cert. denied, 133 S. Ct. 1584 (2013); *Lowry's Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 459–60 (D. Md. 2004) (rejecting a due process challenge to a \$19 million jury verdict for copyright infringement where the defendant argued that actual harm was limited to \$59,000).

¹⁴¹ The United States Sentencing Guidelines §5E1.2 establishes a fine range of \$17,000 to \$175,000 for crimes at a base offense level from 23-24, such as kidnapping. See U.S.S.G. §2A4.1. and § 5E1.2

¹⁴² See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

Tyler's canonical research found that obedience to the law is largely a function of the perception that the law is legitimate, and that legitimacy in turn is significantly influenced by perceptions of fairness.¹⁴³ Persuading ordinary consumers who would pay for creative content in a world without illegal file-sharing to continue to do so in spite of the existence of BitTorrent means appealing to their sense of fairness as well as their fear of sanctions. Unreasonable and arbitrary sanctions undermine the normative case for copyright compliance. Copyright owners who want to reinforce their normative appeals with deterrence would do far better to increase the perceived probability of detection than to pursue million-dollar verdicts in sporadic show trials.¹⁴⁴ To the extent that high levels of statutory damages are justified under a theory of rational deterrence, they must still comply with the constitutional limits of the Due Process clause. In *BMW of North America, Inc. v. Gore*, the U.S. Supreme Court indicated that punitive damages are likely to violate the constitutional guarantee of Due Process if they exceed compensatory damages by a ratio of more than 10 to 1.¹⁴⁵ In the subsequent case of *State Farm Mutual Automobile Ins. Co. v. Campbell*, the Court noted that "four times the amount of compensatory damages might be close to the line of constitutional impropriety."¹⁴⁶ It is not clear that the Court's guidance should extend to every context,¹⁴⁷ but it does suggest that even in the absence of legislative reform, district court judges have a duty to ensure that statutory damages do not exceed the proportionality constraints of the Due Process clause. In addition to the general duty to uphold the Constitution, the Copyright Act clearly states that any award should be an amount that the court "considers just."¹⁴⁸

The range of statutory damages available in ordinary file-sharing cases should be reduced by Congress or circumscribed by the courts. Obviously, selecting any particular number may appear arbitrary, but we can at least move toward a rational basis for statutory damages by comparing file sharing to other violations of the law that may easily go undetected. My specific proposal is that the constitutionally plausible range of statutory damages for a first-time defendant found liable for illegal file-sharing should be between \$250 and \$3000. The lower boundary is equivalent to the fine for parking in a handicapped space.¹⁴⁹ The upper boundary is in the ballpark of fines imposed for driving under the influence.¹⁵⁰ According to the Centers for Disease Control, almost 30 people in

¹⁴³ *Id.* at 25.

¹⁴⁴ *Capitol Records v. Thomas-Rasset* 579 F. Supp. 2d 1210, 1213, 1227 (D. Minn. 2008); *Sony BMG Music Entertainment v. Tenenbaum* 593 F. Supp. 2d 319 (D. Mass. 2009).

¹⁴⁵ *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

¹⁴⁶ *Id.* (citing *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991), and *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 581 (1996).)

¹⁴⁷ *Mathias v. Accor Economy Lodging, Inc.*, 347 F. 3d 672 (7th Cir. 2003).

¹⁴⁸ 17 U.S.C. § 504(c) (2006).

¹⁴⁹ Vehicles parked in a space reserved for persons with disabilities without properly displaying disability license plates and/or a parking placard may be fined a minimum of \$250. 625 ILCS 5/11-1301.3.

¹⁵⁰ In lieu of more systematic data a recent example: a Chicago local television news reporter pled guilty in February 2014 to driving under the influence and was ordered to pay a \$1,700 fine with one year's supervision. Prosecutors dropped other charges, including battery, leaving the scene of an accident and child endangerment. The reporter's drink-driving was detected after a minor traffic accident at a Taco Bell

the United States die in motor vehicle crashes that involve an alcohol-impaired driver every day and the annual cost of alcohol-related crashes totals more than \$51 billion.¹⁵¹ There are no reported incidents of death by file-sharing. This range should not be exceeded even for multiple acts of infringement unless the plaintiff can establish that damages beyond the range are necessary for either compensation or deterrence.¹⁵²

Limiting the range of statutory damages available in Internet file-sharing cases would not significantly detract from general deterrence campaigns like those of the RIAA.¹⁵³ The prospect of nontrivial sanctions combined with an award of attorney's fees should still provide a powerful incentive for accused infringers who are in fact liable to admit their wrongdoing and settle quickly. However, the amounts at stake are not so great that no reasonable person could ever be expected to defend themselves against an erroneous accusation.

Reforming statutory damages would allow copyright owners to continue to use litigation to deter infringement and to steer consumers toward the legitimate market, but it would make litigation as an independent revenue stream less attractive. This is not just an economic reform; it may also be necessary to protect the integrity of the judicial system. Currently, the prospect of high statutory damages unrelated to any assessment of harm sounds like easy money. There may be plaintiffs and lawyers pursuing in MDJD lawsuits as a revenue stream who are fine upstanding people, but there is substantial evidence that the lure of easy money in the form of statutory damages has attracted those with dubious ethics and a propensity for cutting corners.¹⁵⁴ In the context of MDJD suits, the threat of massive statutory damages gives plaintiffs and their attorneys enormous leverage with no accountability. By divorcing statutory damages from either compensation or deterrence, modern copyright law has extended an invitation to blackmail and abuse of process that has been eagerly accepted. That invitation should be revoked.

2. *Denying Joinder, Severing Cases*

A second option for reform is to simply deny joinder (sever cases) as indeed many courts have done.¹⁵⁵ In practical terms, denying joinder increases the plaintiff's cost of

parking lot. Clifford Ward "TV reporter pleads guilty in DUI case," CHICAGO TRIBUNE, February 5, 2014, Pg. 7

¹⁵¹ CENTERS FOR DISEASE CONTROL AND PREVENTION, *Injury Prevention & Control: Motor Vehicle Safety*, April 17, 2013 (available at http://www.cdc.gov/motorvehiclesafety/impaired_driving/impaired-drv_factsheet.html).

¹⁵² Samuelson & Wheatland, *supra* note 40 at 509-10 (recommending that courts should also have the power to lower statutory damages when the award would be grossly disproportionate to the harm caused).

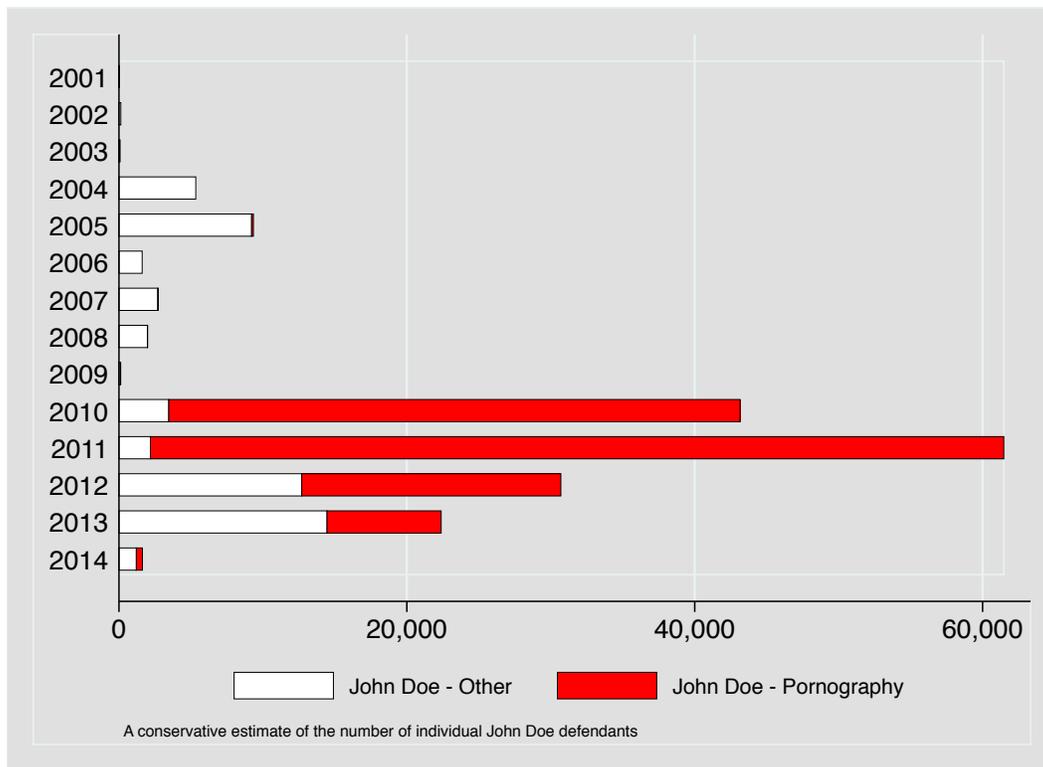
¹⁵³ See *supra* notes 25 to 26 and accompanying text.

¹⁵⁴ See *supra* note 99. See also *Righthaven LLC v. Democratic Underground, LLC*, 791 F. Supp. 2d 968, 979 (D. Nev. 2011) (Righthaven ordered to show cause why it should not be sanctioned for making "flagrant misrepresentation[s]" to the Court).

¹⁵⁵ See *supra* note 65 for examples of cases concluding joinder is impermissible or inappropriate.

enforcement: it adds a \$350 filing fee to the cost of proceeding against each defendant and it demands substantially more court time from the plaintiff’s lawyers. Forcing disfavored plaintiffs to endure greater expense merely because the court doubts the social value of the underlying copyrighted work would be an abuse of discretion.¹⁵⁶ But refusing to allow plaintiffs to circumvent filing fees is legitimate because filing fees act “as a threshold barrier, albeit a modest one, against the filing of frivolous or otherwise meritless lawsuits.”¹⁵⁷ Requiring individual filings, and thus filing fees, in BitTorrent infringement cases would destroy the financial appeal of litigation as a revenue source, but it would still leave the courthouse door open for litigation aimed at general deterrence or example setting. If allowing joinder makes abusive litigation tactics more likely, a court should use the discretion it has been given to take steps to curb such abuse. Disallowing joinder in MDJD cases would go a long way towards ensuring that litigation is used to protect the plaintiff’s copyrights and not simply to monetize infringement.¹⁵⁸

Figure 6 Individual Doe Defendants in John Doe Copyright Cases 2001 – 2014



¹⁵⁶ *Bleistein v. Donaldson Lithographing Company*, 188 U.S. 239 (1903) (It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits.)

¹⁵⁷ *Patrick Collins, Inc. v. Does 1-38*, 941 F. Supp. 2d 153, 166 (D. Mass. 2013) (quoting *In re Diet Drugs*, 325 F. Supp. 2d 540, 541 (E.D. Pa. 2004)).

¹⁵⁸ *Patrick Collins, Inc. v. Does 1-38*, 941 F. Supp. 2d 153, 166 (D. Mass. 2013) (“Furthermore, it will help to ensure that Patrick Collins is pursuing the Doe defendants for the purpose of protecting its intellectual property and not simply to coerce early settlements without any intention of litigating its claims to completion.”)

Although up until now many courts have been willing to allow plaintiffs to join thousands of defendants in a single action, the data examined in this study shows signs of increasing judicial resistance. Figure 6, above, shows a conservative estimate of the number of Doe defendants in these cases.¹⁵⁹ As shown in Figure 6, the number of individual defendants peaked in 2010 and is been declining since. It is also apparent that although pornography related suits have accounted for an increased number of filings over the past four years, the raw numbers of John Doe defendants in pornography related suits has been declining since 2011. Although the data does not definitively establish as much, it does reinforce the observation that plaintiffs are reducing the number of defendants in each MDJD suit so as to make joinder seem more palatable and that this is in response to mounting judicial skepticism.¹⁶⁰

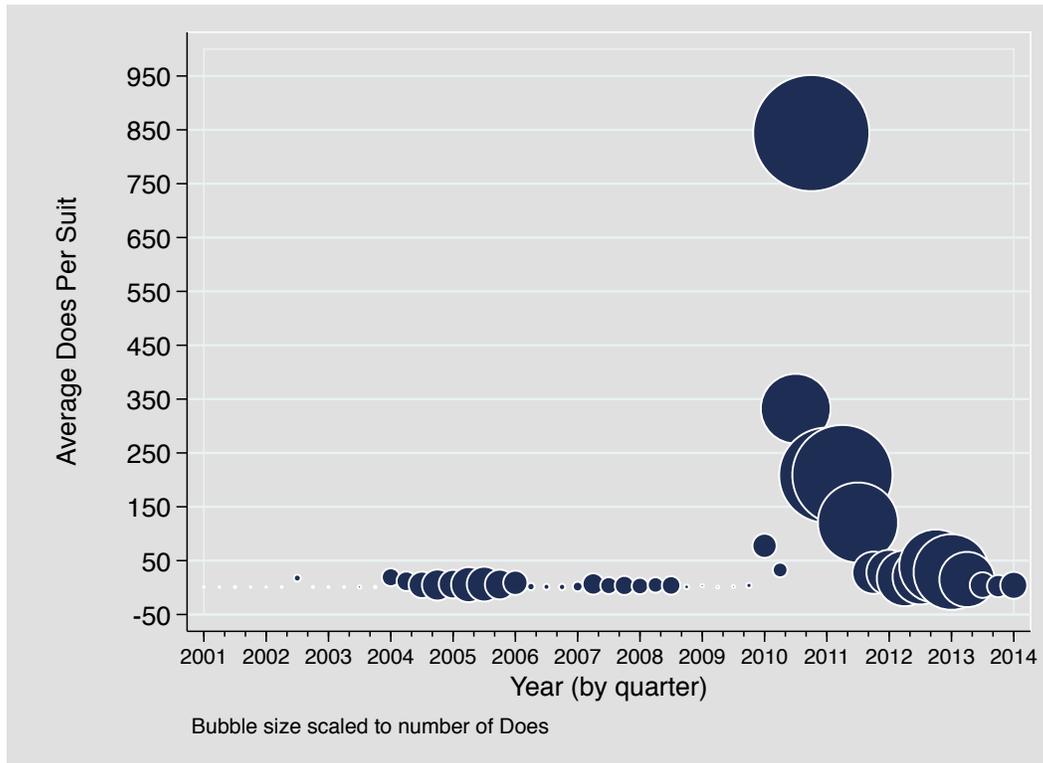
The opportunism associated with the current wave of MDJD suits is by no means confined to this format. Lawyers working in this area have reported that some plaintiffs have now abandoned the MDJD form for BitTorrent litigation and are now suing individual IP addresses and demanding significantly higher settlement amounts. Malibu Media, for example, now appears to filing suits against single IP addresses and demanding higher settlement amounts to compensate for its increased costs. Malibu Media has filed 197 such cases, 143 in 2013 alone. Lawyers working in this area report that Malibu Media's current settlements in the range of \$4000 to \$8000 for cases filed against individuals.

Figure 7 illustrates the average number of John Doe defendants per the suit filed on a year-by-year basis. The individual bowls in Figure 7 are scaled to reflect the total number of John Doe defendants in a given year. As illustrated, 2010 saw an extraordinary number of defendants, 41,025 to be exact, targeted in a mere 91 suits. In the following year 43,632 defendants were targeted, but these John Does were spread out over 435 individual suits. The total number of John Doe defendants fell in 2012 and again in 2013 to 30,666 and 22,239 respectively even as the number of lawsuits filed increased from 1211 to 1640. Thus although the average number of defendants per suit has decreased precipitously since 2010 this is been somewhat offset by a steady increase in filings. We should not expect this litigation environment to remain static. The broad trends revealed in the data are consistent with anecdotal observations that the serial litigators in this area have been adapting their tactics so that they are less dependent on permissive joinder.

¹⁵⁹ As noted previously, the methodology of counting John Doe defendants relies on the case captions them-selves; it is likely to be under-inclusive. See *supra* note 120 and accompanying text.

¹⁶⁰ Note that the number of Doe defendants in each case is calculated based on the case title. This data will be supplemented with additional research into cases titled "Copyright Owner v. Does" in the near future. As a result the numbers reported herein will increase.

Figure 7 Average Number of Doe Defendants per Suit 2001 – 2013



One explanation of the decline in John Does per suit relates to personal jurisdiction. Rule 12(b)(2) permits dismissal of a claim based on lack of personal jurisdiction.¹⁶¹ Personal jurisdiction can be established by either residency, minimum contacts or purposeful availment under most applicable state laws.¹⁶² Defendants are in something of a Catch 22. They do not wish to be named individually, but until they are so named, a number of courts will not grant a motion to dismiss for lack of personal jurisdiction.¹⁶³ Nonetheless, as courts have grown more skeptical of the propriety of these

¹⁶¹ Fed. R. Civ. P. 12(b)(2).

¹⁶² *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (Due Process requires the plaintiff to show that the defendant has "minimum contacts" with the forum, thereby ensuring that "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.")

¹⁶³ See e.g., *First Time Videos, LLC v. Does 1-500*, 276 F.R.D. 241, 251 (N.D. Ill. 2011) ("Defendants cannot be dismissed under Federal Rule of Civil Procedure 12(b)(2) from a lawsuit to which they are not yet parties."); see also *Malibu Media, LLC v. Does 1-6*, 291 F.R.D. 191, 206 (N.D. Ill. 2013); *First Time Videos, LLC v. Does 1-76*, 276 F.R.D. 254, 259 (N.D. Ill. 2011); *MGCIP v. Does 1-316*, No. 10 C 6677, 2011 WL 2292958, at *2 (N.D. Ill. June 9, 2011). See, e.g., *London-Sire Records, Inc. v. Doe 1*, 542 F.Supp.2d 153, 180-181 (D.Mass.2008) ("premature to adjudicate personal jurisdiction" and permitting plaintiff to engage in jurisdictional discovery); *Sony Music Entm't, Inc. v. Does 1-40*, 326 F.Supp.2d 556, 567 (S.D.N.Y.2004) (evaluating personal jurisdiction premature without defendants' identifying information). But see *DigiProtect USA Corp. v. Does 1-240*, No. 10 Civ. 8760(PAC), 2011 WL 4444666, at *3 n. 3 (S.D.N.Y. Sept. 26, 2011) (dismissing complaint because of insufficient allegations of personal jurisdiction but noting that allegations were also insufficient to satisfy joinder requirements)

MDJD suits, plaintiffs have had to work harder to establish a credible basis for pleading personal jurisdiction.

Severing cases would obviously be inefficient if it required multiple judges to adjudicate the same issues, over and over again, for the exact same plaintiffs. However, there is no reason why cases could not be severed and then consolidated. The basis of consolidation could be (i) the plaintiff, (ii) the plaintiff law firm or even (ii) the plaintiffs' technical experts who log the IP addresses to begin with. Consolidation could be for limited purposes including assessing the validity and ownership of the copyrights at issue; determining the reliability of plaintiff's proffered expert; entertaining affirmative defenses that are potentially applicable in all cases. The 'it wasn't me' defenses should then proceed on an unconsolidated basis.

3. Conditional Joinder and Other Safeguards

Severing John Doe defendants and forcing the plaintiff to proceed on an individual basis is not the only possible solution. District court judges have inherent power to supervise litigation and substantial discretion in matters relating to both joinder and discovery. Even in the absence of legislative reform of statutory damages, district courts could use their considerable powers to impose safeguards on the discovery process and constrain the potential for abuse. Specifically:

(i) Joinder in MDJD actions should be subject to an undertaking by the plaintiff not to seek and not to threaten to seek statutory damages above a specified amount. For the reasons stated in the previous section, that range, at least for a first-time defendant, should be between \$250 and \$3000.¹⁶⁴

(ii) In addition, the court could appoint an independent attorney to supervise the discovery process and ensure that the names and addresses of individuals are not given over to the plaintiff until the initial round of "it wasn't me defenses" have been raised and investigated. This should bring to light any systematic errors by ISPs (or by the plaintiff) in identifying IP addresses or matching IP addresses to subscribers.

(iii) In the same vein, the court could provide defendants with the option of an express mini-trial on their "it wasn't me" defenses.

(iv) The court could grant defendants leave to proceed anonymously in order to protect their privacy, at least until liability has been definitively established.¹⁶⁵

¹⁶⁴ Supra note 149 to 152 and accompanying text.

¹⁶⁵ TCYK, LLC v. Does, 2013 U.S. Dist. LEXIS 177765 ("Numerous courts have deemed it prudent to allow defendants to proceed by pseudonym during preliminary stages of copyright infringement proceedings, even when, as here, the material downloaded is innocuous, given the 'substantial possibility that the names turned over by ISPs will not accurately identify the individuals who actually downloaded or shared the copyrighted material.'" citing TCYK, LLC v. Does 1-87, 2013 U.S. Dist. LEXIS 95817, 2013 WL 3465186, at *4.)

These reforms and similar safeguards could reduce the threat of abusive litigation tactics while retaining the initial efficiency of the MDJD format.

IV. CONCLUSION

Although the problem of patent trolls has drawn more attention, we are currently witnessing an explosion of copyright trolling in U.S. federal district courts. The data in this Article shows that copyright trolling in the form of MDJD lawsuits has grown rapidly over the last decade and that much of the growth has taken place in the last four years. The data also shows that MDJD litigation is dominated by claims of infringement relating to pornographic films. As well as highlighting these particular trends and their implications, the results of this study have significant implications for the wider troll debate. What little attention has been paid to copyright trolls has largely focused on Righthaven and similar examples — this Article shows that these previous studies have missed the core of the copyright troll phenomenon.¹⁶⁶

The opportunism of copyright trolls is primarily directed towards statutory damages. As the Righthaven example shows, statutory damages can make the pursuit of otherwise inconsequential infringements extremely profitable, more profitable than licensing those uses in advance could ever have been. As the MDJD cases show, statutory damages stack the deck in favor of the plaintiff such that the underlying liability of the defendant is effectively irrelevant to the settlement calculation.

¹⁶⁶ Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723 (2013). See also, Brad A. Greenberg, *Copyright Trolls And Presumptively Fair Uses*, 85 U. COLO. L. REV. 53 (2014) (focusing on the application of fair use where copyright trolls attempt to exploit previously tolerated uses); Shyamkrishna Balganesh, *Copyright Infringement Markets*, 113 COLUM. L. REV. 2277 (2013) (arguing that an independent market for copyright claims could be beneficial).

APPENDIX A

Copyright Lawsuits Filed in U.S. Federal Courts 2001 – 2014

