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Personal Jurisdiction and Joinder in Mass Copyright Troll Litigation

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PERSONAL JURISDICTION AND JOINDER IN MASS COPYRIGHT TROLL LITIGATION

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INTRODUCTION

A copyright troll, roughly defined, is a person or entity that acquires a (usually narrow) license from an original copyright holder for the sole purpose of suing and obtaining settlements from alleged infringers.[1] This business model has been used with success in Europe[2] and is now showing up in United States courts. These suits are akin to recording industry litigation on steroids: hundreds, even thousands, of defendants are sued together in a single action.[3] Nearly 100,000 defendants were sued in such actions in 2010.[4] With settlements averaging $2,500, suits on this scale can be quite lucrative.[5] These suits, however, should raise alarm. While sophisticated plaintiffs use mass litigation to avoid the expense of filing multiple suits in different courts,[6] individual justice and fairness are threatened when legally unsophisticated individuals are brought into the court system on such a large scale. Most defendants have no knowledge of con-

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1. *See generally Who Are Copyright Trolls?*, FIGHT COPY RIGHT TROLLS, http://fightcopyrighttrolls.com/about (last visited Jan. 24, 2012) (discussing the evils of copyright trolls and recent mass copyright infringement cases).

2. One European group estimated that license holders can earn 150 times more money from suing illicit downloaders than from selling their copyrighted work through iTunes and other legal stores. Ernesto, *Illegal Downloads 150x More Profitable Than Legal Sales*, TORRENT FREAK (Oct. 9, 2009), http://torrentfreak.com/illegal-downloads-150x-more-profitable-than-legal-sales-091009.

3. *See, e.g.*, Nu Image, Inc. v. Does 1–23,322, 799 F. Supp. 2d 34, 36 (D.D.C. 2011) (accusing 23,322 unnamed BitTorrent users of copyright infringement); Achte/Neunte Boll Kino Beteiligungs GMBH & Co. KG v. Does 1–4,577, 736 F. Supp. 2d 212, 213 (D.D.C. 2010) (naming 4,577 defendants who had downloaded plaintiff's movie over the Internet).

4. Matthew J. Schwartz, *Mass P2P Lawsuits Targeted Nearly 100,000 Last Year*, INFORMATION WEEK (Feb 7, 2011, 1:16 PM), http://www.informationweek.com/news/internet/policy/showArticle.jhtml?articleID=229201274.

5. Jeffrey D. Neuburger, *Copyright Infringement Defendants Turn the Table on Righthaven*, MediaShift (Dec. 1, 2011), http://www.pbs.org/mediashift/2011/12/copyright-infringement-defendants-turn-the-table-on-righthaven335.html,

6. *Id.*

cepts such as personal jurisdiction[7] and joinder[8] and lack the means to hire a lawyer to defend themselves in often far-flung courts. Most will simply pay the settlement demanded by the plaintiff, with no knowledge of their rights.[9]

I argue in this Essay that courts should be concerned about these suits and should ask two questions of a plaintiff early on in a copyright troll suit to ensure that the processes of the court are not being abused: First, does the court have personal jurisdiction over the defendants?[10] And second, are the defendants properly joined in a single suit?[11]

This Essay will first discuss the litigation, arguing that the proper time to ask these questions is before discovery; the Essay will then describe the technology involved as it is relevant to the issues of personal jurisdiction and joinder; and finally it will detail the two inquiries courts should make in these cases.

I. THE LITIGATION

Copyright troll suits are essentially inverted mass tort cases.[12] In traditional mass torts, numerous plaintiffs bring related claims against a (most often) well-endowed corporate defendant based on one product or act.[13] By contrast, copyright troll suits involve a single corporation suing numerous individual defendants based on numerous separate acts.[14]

These suits follow a familiar pattern. First, a plaintiff will purchase a narrow license to a copyrighted work and use special software to obtain the Internet protocol ("IP") addresses of the Internet service provider ("ISP") accounts being used to download the copyrighted work. Next, the plaintiff will establish itself in the jurisdiction in which it wishes to bring suit. The plaintiff will then file suit against numerous Doe defendants, identifying defendants only by their IP

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7. For a discussion of personal jurisdiction requirements, *see infra* Part III.

8. For a discussion of joinder requirements, *see infra* Part IV.

9. *See* Schwartz, *supra* note 4 (noting that mass copyright lawsuits are controversial and considered "predatory" because they coerce plaintiffs into settling without knowledge of their rights).

10. *See infra* Part III.

11. *See infra* Part IV.

12. Others have referred to such suits as "reverse private attorney general litigation." *See, e.g.*, David W. Opderbeck, *Peer-to-Peer Networks, Technological Evolution, and Intellectual Property Reverse Private Attorney General Litigation*, 20 BERKELEY TECH. L.J. 1685, 1696 (2005).

13. Mitchell A. Lowenthal & Howard M. Erichson, *Modern Mass Tort Litigation, Prior-Action Depositions and Practice-Sensitive Procedure*, 63 FORDHAM L. REV. 989, 994 (1995).

14. Opderbeck, *supra* note 12, at 1696.

addresses. Shortly thereafter, the plaintiff will move *ex parte* for expedited discovery.[15] Courts often grant these motions in these circumstances as a matter of course.[16] Next, Rule 45 subpoenas are served by the plaintiff on ISPs, ordering them to provide to the plaintiff names of account holders corresponding to the IP addresses identified.[17] The ISPs often comply with the subpoenas, although some have begun to push back.[18] Once the plaintiff has the name of the account holder, a letter is issued demanding payment in exchange for an agreement not to add the potential defendant's name to the litigation.

An additional tactic often used by copyright trolls is to obtain licenses to distribute pornographic movies through peer-to-peer file sharing networks and then to sue those who download the movie using those networks.[19] This tactic has the added benefit of embarrassment, presumably further encouraging anyone threatened with suit to settle at an early stage to avoid having his or her name publicly linked

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15. *See* FED. R. CIV. P. 26(d)(1). Usually a discovery conference is required first, FED. R. CIV. P. 26(f), but in copyright troll cases, there are no identified defendants with whom to hold a conference. Courts often grant these motions as a matter of course.

16. *See, e.g.*, AF Holdings LLC v. Does 1–96, No. C–11–03335, 2011 WL 4502413, at *1 (N.D. Cal. Sept. 27, 2011) ("When a defendant's identify is not known at the time a complaint is filed, courts often grant plaintiffs early discovery to determine the doe defendants' identities."); Arista Records LLC v. Does 1–4, 589 F. Supp. 2d 151, 153 (D. Conn. 2008) (noting that "courts routinely find the balance favors granting a plaintiff leave to take early discovery" in claims of copyright infringement against unknown defendants) (internal quotation marks, citations, and alterations omitted).

17. *See* FED. R. CIV. P. 45.

18. For example, in *Achte/Neunte Boll Kino Beteiligungs GBMH & Co. KG v. Does 1–2,094*, plaintiffs served Time Warner Cable with subpoenas seeking identifying information about 2,049 Time Warner Cable subscribers who plaintiffs claimed infringed on their copyright through the use of peer-to-peer file sharing software. Memorandum of Points and Authorities in Support of Third Party Time Warner Cable Inc.'s Motion to Quash or Modify Subpoena at 2, Achte/Neunte Boll Kino Beteiligungs GBMH & Co. KG v. Does 1–2,094, No. 10-453, 2010 WL 2553275 (D.D.C. May 13, 2010). Time Warner filed a motion to quash or modify the subpoena, arguing primarily that it would not allow Time Warner a reasonable time to comply with the extremely large request and would constitute an undue burden. *Id.* at 9. Time Warner also argued that the plaintiffs had improperly joined the defendants and thus the burden on Time Warner was due to "discovery abuses." *Id.* at 10.

19. *See, e.g.*, Raw Films, Ltd. v. Does 1–32, No. 3:11CV532-JAG, 2011 WL 6182025, at *2–3 (E.D. Va. Oct. 5, 2011). The court noted,

> [T]he plaintiffs sought, and the Court granted, expedited discovery allowing the plaintiffs to subpoena information from ISPs to identify the Doe defendants. . . . Some defendants have indicated that the plaintiff has contacted them directly with harassing telephone calls, demanding $2,900 in compensation to end the litigation. . . . This course of conduct indicates that the plaintiffs have used the offices of the Court as an inexpensive means to gain the Doe defendants' personal information and coerce payment from them.

Id.

to such a product. These tactics have led some to describe these suits as nothing more than settlement shakedown operations.[20]

The crucial time for a court to question personal jurisdiction and joinder is when a plaintiff moves for expedited discovery, because once discovery is allowed, the settlement shakedown can begin.

II. A Primer on the Technology

Plaintiffs in these types of suits have recently put greater focus on the type of technology used by infringers. As will be discussed more below, plaintiffs argue that the interactive, interdependent, and highly connected nature of today's sharing networks justify the bringing of a single suit against geographically dispersed defendants. Because of this intensified focus on the technology, it is important to understand (as much as a lawyer can) how that technology works. For the purposes of this Essay, I will focus on the most popular type of file-sharing protocol known as "BitTorrent."[21]

First, some terms that may be helpful are:[22]

- *Peers.* Peers are devices connected to a sharing network.
- *Swarm.* A swarm is a set of peers concurrently sharing a file, for example, a movie, or a bundle of files that are distributed together. Swarms can be hundreds or even thousands of peers large and contain peers from across the United States and around the world.
- *Blocks.* A shared file is divided into blocks that peers upload to and download from each other.
- *Torrent.* A torrent is a file that organizes the sharing of content among peers.
- *BitTorrent.* BitTorrent is a popular sharing network.
- *Tracker.* A tracker is a server that assists in the communication between peers using the BitTorrent protocol and gathers statistics on download and upload speeds.
- *Bandwidth.* Bandwidth represents the maximum rate of data transfer. It is a "speed limit" for uploading and downloading.[23]

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20. *See id.* at *2 ("The plaintiffs seemingly have no interest in actually litigating the cases, but rather simply have used the Court and its subpoena powers to obtain sufficient information to shake down the John Does.").

21. For a description of BitTorrent technology, see *Beginner's Guide, What is BitTorrent?*, BITTORRENT, http://www.bittorrent.com/help/guides/beginners-guide (last visited Feb. 18, 2012).

22. Many of these terms are also defined in *Glossary*, BITTORRENT, http://www.bittorrent.com/help/manual/glossary (last visited Feb. 18, 2012).

The basic idea behind BitTorrent is that dividing a single large file into small blocks leads to more efficient downloading.[24] Peers attempting to download the file do so by connecting to several other peers simultaneously and downloading different blocks of the file from different peers. To facilitate this process, BitTorrent uses torrent files. In a BitTorrent network, a peer that wants to download a file (the "target file") first downloads the torrent file associated with that target file.[25] When this file is activated, it connects with a tracker. That tracker then enters a swarm, gathers a random set of peers that have the target file (the "swarm subset"), and establishes a connection between the connecting device and these other peers. The now-connected device then sends requests for blocks of the target file that it does not yet have to all the peers to which it is connected.[26]

An individual device cannot, however, connect to all peers in each swarm subset at the same time. Each peer is allowed to share with only a fixed number (usually four) of other peers at a given time. In addition, the total number of available blocks being shared by all peers easily maxes out the available downstream bandwidth for a given device. In other words, there are more blocks in the network than can be downloaded by one device.

Because of these limits, a method was developed to make the most efficient use of limited capacity. Which peers share with each other is determined by the current downloading rate from each peer, that is, each peer shares with the four peers that provide it with the fastest downloading rate. This is a tit-for-tat system meant to discourage free-riding: if a device is sharing at a higher rate, it will be able to download more quickly.[27] In addition, about every thirty seconds, each device randomly connects to an additional peer from which it has received a sharing request and begins to share with this peer, examining its downloading rate. Now, with five peers, the peer in the sharing group with the slowest downloading rate is dropped. This way, there is a constant search for the fastest download rate and peers

23. *See Bandwidth,* TECH TERMS, http://www.techterms.com/definition/bandwidth (last visited Feb. 18, 2012).

24. *The Basics of BitTorrent,* BITTORRENT, http://www.bittorrent.com/help/manual/chapter0201 (last visited Feb. 18, 2012).

25. *Frequently Asked Questions: What is BitTorrent?,* BITTORRENT, www.bittorrent.com/help/faq/concepts (last visited Feb. 18, 2012).

26. *The Basics of BitTorrent, supra* note 24.

27. *See* Michael Piatek et al., *Building BitTyrant, a (More) Strategic BitTorrent Client,* 32 LOGIN 8, 10 (2007), *available at* http://www.cs.washington.edu/homes/arvind/papers/login-bt.pdf (noting that BitTorrent's "tit-for-tat strategy rewards contribution" in that "[a] client who contributes quickly *tends* to receive quickly").

are continually shifting connections. This process continues until the device has disconnected from the network.

III. PERSONAL JURISDICTION

Questions of jurisdiction go to the heart of a court's power to render judgment against a defendant. Although a defect in the court's jurisdiction over a party is a personal defense that may be waived, when no defendant has appeared and a non-party may be subject to costly discovery, the court has a responsibility to look into its jurisdiction both over the subject matter and the parties.[28] This responsibility is even more important in these inverted mass tort actions where individuals, unfamiliar with the law and lacking means to obtain a lawyer, are likely to settle rather than assert their rights, thereby waiving a right they did not know they had.[29]

Courts in these cases should ask plaintiffs to make a *prima facie* showing of personal jurisdiction before the power and processes of the court will be at their disposal.[30] As a refresher, absent a waiver, a court has no personal jurisdiction over a defendant unless such a defendant is present or domiciled in the jurisdiction,[31] has made purposeful contact with the jurisdiction, or has a reasonable expectation of facing suit in the jurisdiction.[32]

Copyright plaintiffs have begun making the argument that the nature of the technology underlying BitTorrent justifies jurisdiction

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28. *Cf., e.g.*, Sinoying Logistics Pte Ltd. v. Yi Da Xin Trading Corp., 619 F.3d 207, 214 (2d Cir. 2010) (holding that by making a *sua sponte* inquiry into its personal jurisdiction a court properly exercises its responsibility to determine that it has the power to enter a default judgment); Sun v. Asher, No. 91-2646, 1992 WL 205671, at *4 (7th Cir. Aug. 20, 1992) (*sua sponte* dismissal of complaint against non-appearing defendant for lack of showing of personal jurisdiction); U.S. Olympic Comm'n v. Does 1–10, No. C 08-3514, 2008 WL 2948280 (N.D. Cal. July 25, 2008) (denying temporary restraining order after *sua sponte* examination of personal jurisdiction).

29. *See* Schwartz, *supra* note 4.

30. *See, e.g.*, Frontera Resources Azer. Corp. v. State Oil Co. of Azer. Rep., 582 F.3d 393, 402 (2d Cir. 2009) ("In the absence of any *prima facie* showing of personal jurisdiction . . . it [would be] inappropriate to subject [defendant] to the burden and expense of discovery.") (citations and internal quotation marks omitted); Cent. States, Se. and Sw. Areas Pension Fund v. Phencorp Reinsurance Co., 440 F.3d 870, 877 (7th Cir. 2006) (stating that the court must determine if plaintiff "made out a *prima facie* case for personal jurisdiction, which is required before it is allowed to conduct discovery").

31. Milliken v. Meyer, 311 U.S. 457, 463 (1940).

32. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 296–97 (1980) (analyzing and refining these central principles of personal jurisdiction jurisprudence); Hanson v. Denckla, 357 U.S. 235, 251–52 (1958) (same).

over all defendants in these cases.[33] Plaintiffs claim that users in a network like this are simultaneously receiving and transferring information to and from one another and therefore are acting simultaneously and in concert with one another.[34] This characteristic, they claim, links all out-of-state defendants to in-state defendants, thereby creating a sufficient connection for jurisdiction.[35]

This argument misrepresents the level of connectivity among such defendants. As described above, the torrent sharing process is much more dynamic than any copyright plaintiff would like the courts to believe.[36] For example, when a user connects to the torrent network to download a file, she is connected only to a subset of the available swarm, *not* the whole swarm. The members of this subset are chosen at random and are constantly changing. Plaintiffs currently have no way of showing who was connected to whom when each instance of infringement occurred. In addition, a user can only connect to peers that are on the network at the same time, further limiting connectivity. Furthermore, the intrinsic limit on the number of connections that a user can establish, described above, means that even within a subset not all peers online at the same time will actually be connected. As all of these dynamics accumulate, it becomes nearly impossible to claim that any one defendant would be connected to any other defendant simultaneously.

But even if it somehow could be shown that an out-of-state defendant was connected through the network to an in-state defendant and that both individuals were sharing the copyrighted work with each other, this connection would still fail to satisfy existing jurisdictional requirements. The Constitution requires more than a happenstance connection between two people over the Internet,[37] and it is inconceivable that the out-of-jurisdiction defendant made purposeful contact with the jurisdiction or reasonably expected that his signing on to the network would subject him to litigation in the jurisdic-

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33. *See, e.g.*, DigiProtect USA Corp. v. Does 1–240, No. 10 Civ. 8760(PAC), 2011 WL 4444666, at *2 (S.D.N.Y. Sept. 26, 2011) (offering one recent articulation of this all-encompassing jurisdictional theory).

34. Complaint at ¶ 10, DigiProtect USA Corp. v. Does, No. 10 Civ. 8760(PAC), 2011 WL 4444666 (S.D.N.Y. Sept. 26, 2011).

35. *Id.* at ¶¶ 5, 10.

36. *See supra* Part II.

37. *See, e.g.*, Boschetto v. Hansing, 539 F.3d 1011, 1017 (9th Cir. 2008) (finding personal jurisdiction to be lacking even where defendants sold plaintiff a vehicle online, because "the lone transaction for the sale of one item does not establish that the Defendants purposefully availed themselves of the privilege of doing business in [the jurisdiction]").

tion. Thus, the common arguments put forth by plaintiffs in these cases have neither a technological nor constitutional basis.

Therefore, to make the required *prima facie* showing, a plaintiff should be obliged, at the very least, to show that the IP addresses against which the suit is initially brought correspond to an ISP account within the jurisdiction.[38] This requirement would at least prevent plaintiffs from suing individuals who reside hundreds or even thousands of miles away from the court and give the court some comfort that those subjected to its processes may actually reside in its jurisdiction. Anything less does not satisfy due process requirements.

IV. JOINDER

Joining hundreds of unrelated defendants in a single suit makes litigation less expensive for plaintiffs by enabling them to avoid travel and to avoid the separate filing fees required for individual cases.[39] For defendants, however, this process presents tremendous problems of fairness and justice. Even when the court finds personal jurisdiction over multiple defendants, there is little to justify joining them in a single suit when they all may have wildly different circumstances and defenses.

The Federal Rules of Civil Procedure authorize defendants to be joined in one action only if there is "asserted against them jointly, severally, or in the alternative," a claim or right to relief "with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences" and "any question of law or fact common to all defendants will arise in the action."[40] Even if all the requirements are met, however, joinder remains discretionary, and a court is permitted to order separate trials to prevent prejudice.[41] Importantly for these types of cases, joinder is not justified merely because a plaintiff alleges that each defendant's acts involve violations of the same statu-

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38. *See Digiprotect*, 2011 WL 4444666, at *3 (endorsing this position in finding that plaintiff failed to make a *prima facie* showing that the necessary long arm jurisdiction existed). Information indicating whether an IP address corresponds to an ISP in the jurisdiction is easily obtained from publicly available sources. *See, e.g.*, IP-LOOKUP (Jan. 19, 2012), http://ip-lookup.net.

39. Schwartz, *supra* note 4.

40. FED. R. CIV. P. 20.

41. FED. R. CIV. P. 21.

tory duty,[42] or because defendants were using the same file sharing network.[43]

Plaintiffs in copyright troll cases attempt to avoid these barriers by mischaracterizing the connectivity of sharing networks and then arguing that defendants, by downloading and sharing simultaneously with other users, have engaged in a single transaction.[44] As with personal jurisdiction, however, when the dynamic nature of sharing in these networks is considered—particularly, as noted above, that it is virtually impossible that any two defendants (let alone all of them) were connected with each other simultaneously—any claim that defendants were acting in concert begins to fall apart. All plaintiffs can plausibly claim is that defendants were engaged in *identical* transactions, and courts have held repeatedly that this is an insufficient basis upon which to sustain joinder.[45]

Furthermore, even if a plaintiff could somehow show definitively that each defendant's account was simultaneously sharing and downloading from each other defendant, each instance of illegal downloading, although using the same network, is factually distinct. As an Eastern District of Pennsylvania court stated:

> John Doe 1 could be an innocent parent whose Internet access was abused by her minor child, while John Doe 2 might share a computer with a roommate who infringed Plaintiffs' works. John Does 3 through 203 could be thieves, just as Plaintiffs believe, inexcusably pilfering Plaintiffs' property and depriving them, and their artists, of the royalties they are rightly owed. Given this panoply of facts, law, and defenses, . . . [j]oinder is improper.[46]

This is reason enough to sever via Rule 21, which allows the court "at any time, on just terms, [to] add or drop a party."[47]

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42. *See, e.g.*, Coughlin v. Rogers, 130 F.3d 1348, 1351 (9th Cir. 1997); Nassau County Ass'n of Ins. Agents, Inc. v. Aetna Life & Cas. Co., 497 F.2d 1151, 1154 (2d. Cir. 1974).

43. *See, e.g.*, Arista Records LLC v. Does 1–11, No. 1:07-2828, 2008 WL 4823160, at *5 (N.D. Ohio Nov. 3, 2008).

44. *Compare, e.g.*, Hard Drive Prods., Inc. v. Does 1–30, No. 2:11cv345, 2011 WL 4915551, at *4 (E.D. Va. Oct. 17, 2011) (rejecting such an argument), *with* Voltage Pictures, LLC v. Does 1–5,000, No. 10-0873 (BAH), 2011 WL 1807438, at *5–8 (D.D.C. May 12, 2011) (accepting such an argument).

45. *See, e.g.*, *Hard Drive Prods., Inc.*, 2011 WL 4915551, at *4 (rejecting a request for joinder based on identical transactions made by defendants).

46. BMG Music v. Does 1–203, No. Civ.A. 04-650 (CCN), 2004 WL 953888, at *1 (E.D. Pa. Apr. 2, 2004).

47. FED. R. CIV. P. 21.

Thus, in most of the mass copyright cases, for those defendants for which plaintiff can make a *prima facie* showing of personal jurisdiction, all but one should be severed from the action and plaintiff should have to file individual cases against any other defendant it wishes to pursue.

V. CONCLUSION

Courts have a responsibility to make sure their processes are being used fairly. Mass copyright troll cases raise concerns about creating unfairness and denying individual justice to those sued. To make sure that the processes of the courts are not being abused, courts, at the expedited discovery stage, should examine issues of personal jurisdiction and joinder and refuse to move forward unless and until the plaintiff has made a *prima facie* showing of personal jurisdiction and has justified the joinder of multiple defendants. This will go a long way toward ensuring fairness and justice in these cases.