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Copyright Trolling, An Empirical Study

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Copyright Trolling, An Empirical Study

Matthew Sag*

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.

This Article highlights a fundamental oversight in the 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 considered copyright trolling whenever it is 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 do not account for what is now arguably the most prevalent form of trolling.

In addition to these empirical and theoretical contributions, this Article 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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I. INTRODUCTION

Patent trolls are in the news,¹ 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 nearly 38% of all patent defendants.³ Depending on your definition of a patent troll, the incidence of patent troll litigation may be increasing.⁴ The President has condemned patent trolls,⁵ and new legislation targets patent trolls.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 commented on how copyright litigation is changing,⁷ but this is the first systematic in-depth analysis of the data.⁸

1. See, e.g., Edgar Walters, *Tech Companies Fight Back Against Patent Lawsuits*, N.Y. TIMES (Jan. 23, 2014), <http://www.nytimes.com/2014/01/24/us/tech-companies-fight-back-against-patent-lawsuits.html>.

2. See, e.g., FED. TRADE COMM'N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION (2011), available at <http://www.ftc.gov/sites/default/files/documents/reports/evolving-ip-marketplace-aligning-patent-notice-and-remedies-competition-report-federal-trade/110307patentreport.pdf>; FED. TRADE COMM'N, 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>. See generally Mark A. Lemley & A. Douglas Melamed, *Missing the Forest for the Trolls*, 113 COLUM. L. REV. 2117 (2013).

3. Christopher A. Cotropia et al., *Unpacking Patent Assertion Entities (PAEs)*, 99 MINN. L. REV. 649, 678 fig. 3 (2014) (using statistics from 2010 and 2012).

4. Colleen Chien reports that patent trolls filed 29% of patent lawsuits in 2010 and 62% in 2012. Colleen Chien, *Patent Trolls by the Numbers*, PATENTLYO (Mar. 14, 2013), <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. See Cotropia et al., *supra* note 3.

5. President Obama recently stated “[patent trolls] don’t actually produce anything themselves. They’re just trying to essentially leverage and hijack somebody else’s idea and see if they can extort some money out of them.” Gene Sperling, *Taking on Patent Trolls to Protect American Innovation*, WHITE HOUSE BLOG (June 4, 2013, 1:55 PM), <http://www.whitehouse.gov/blog/2013/06/04/taking-patent-trolls-protect-american-innovation>; see also EXEC. OFFICE OF THE PRESIDENT, PATENT ASSERTION AND U.S. INNOVATION 2 (2013), available at http://www.whitehouse.gov/sites/default/files/docs/patent_report.pdf.

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. See 35 U.S.C. § 299 (2012).

7. See, e.g., *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 82 (E.D.N.Y. 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 the Copyright Office’s recent report on Copyright Small Claims even mention them. See generally MARIA A. PALLANTE, U.S. COPYRIGHT OFFICE, COPYRIGHT SMALL CLAIMS (2013), available at <http://www.copyright.gov/docs/smallclaims/usco-smallcopyrightclaims.pdf>. For non-empirical

This empirical study of copyright trolling presents new data that reveals the astonishing growth of a particular kind of copyright trolling—the multi-defendant John Doe (“MDJD”) lawsuit that alleges 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 any form of copyright trolling, they are the dominant form. In 2013, these MDJD suits were the majority of copyright cases filed in 19 of the 92 federal districts.¹⁰

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 less expensive for the defendant to pay the troll rather than 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 asymmetric stakes faced by the patent assertion entities and the businesses they target.¹²

As this Article demonstrates, a similar numbers game increasingly dominates copyright litigation. Of the 3817 copyright law suits filed in 2013,

discussions of the MDJD phenomenon see, for example, 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, Note, *The Case Against Combating BitTorrent Piracy Through Mass John Doe Copyright Infringement Lawsuits*, 111 MICH. L. REV. 283 (2012); Gregory S. Mortenson, Comment, *BitTorrent Copyright Trolling: A Pragmatic Proposal for a Systemic Problem*, 43 SETON HALL L. REV. 1105 (2013); Patience Ren, Note, *The Fate of BitTorrent John Does: A Civil Procedure Analysis of Copyright Litigation*, 64 HASTINGS L.J. 1343 (2013). And for more recent discussion, see Christopher Civil, *Mass Copyright Infringement Litigation: Of Trolls, Pornography, Settlement and Joinder*, 30 SYRACUSE J. SCI. & TECH. L. 2 (2014), available at <http://jost.syr.edu/wp-content/uploads/Volume30.pdf>; Joshua A. Druckerman, Note, *The Uncertifiable Swarm: Why Defendant Class Actions and Mass BitTorrent Copyright Litigation Don't Mix*, 58 N.Y.L. SCH. L. REV. 931 (2013–2014); Evan Hoole, Note, *An Uncomfortable Threesome: Permissive Party Joinder, BitTorrent, and Pornography*, 63 EMORY L.J. 1211 (2014); Shipra Metha, Comment, *Light at the End of the Narrow Tunnel*, 24 DEPAUL J. ART TECH & INTELL. PROP. L. 425 (2014).

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 MDJD suits are by and large instances of trolling.

10. Alabama (S.D.); Colorado; Delaware; the District of Columbia; Florida (M.D.); Georgia (N.D.); Georgia (S.D.); Illinois (C.D.); Illinois (N.D.); Indiana (N.D.); Maryland; Michigan (E.D.); Ohio (S.D.); Pennsylvania (E.D.); Tennessee (E.D.); Tennessee (W.D.); Washington (W.D.); Wisconsin (E.D.); and Wisconsin (W.D.). In 2013, pornography MDJD suits accounted for over half of suits filed in 11 federal districts: Alabama (S.D.); the District of Columbia; Illinois (C.D.); Illinois (N.D.); Indiana (N.D.); Maryland; Michigan (E.D.); Pennsylvania (E.D.); Tennessee (E.D.); Tennessee (W.D.); and Wisconsin (E.D.).

11. See generally Lemley & Melamed, *supra* note 2.

12. See generally *id.*

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 II, these suits are 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 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 (“ISPs”) such as Comcast and AT&T to give plaintiff copyright owners the names and addresses that match the IP addresses that they already have.

After obtaining the names and addresses of account holders suspected of participating in a BitTorrent swarm, the plaintiff can get 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 attorney’s fees if he is unable to establish his innocence.¹⁹ Reports indicate

13. Of the 1667 John Doe cases, 1267 (or 76%) related to pornography, while 400 (or 24%) did not.

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

15. See *infra* Part III.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 his 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) (2012), are effectively prohibited by 47 U.S.C. § 551(c) (2012) from disclosing the identities of the putative defendants.

18. See, e.g., *Flava Works, Inc. v. Does 1–293*, No. 12 C 07869, 2014 WL 222722, at *1 (N.D. Ill. Jan. 21, 2014) (upholding defendant anonymity through discovery); *Malibu Media, LLC v. Does 1–68*, Nos. 12 cv 6675, 12 cv 6677, 2013 WL 5423872, at *1 (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 John L. Steele, Attorney, Steele Hansmeier, PLLC (May 16, 2011), http://msnbcmedia.msn.com/i/MSNBC/Sections/NEWS/z_Personal/AJohnson/110719_Steele_Steele_Hansmeier_Settlement_Letter.pdf (explaining statutory damages and offering to settle \$2900).

that settlements are usually in the range of \$2000 to \$4000. That is a lot to pay for a movie, but only a 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 III 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 II locates MDJD suits within the broader context of the IP troll debate. It explains why attempts to define copyright trolls in terms of 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 II explains why MDJD lawsuits have all of the hallmarks of copyright trolling, and it explores the basic economics of MDJD litigation. It then presents empirical data documenting the astonishing rise of MDJD lawsuits over the past decade. Part III explores the role of statutory damages and permissive joinder in MDJD lawsuits in terms of the economic model developed in Part II. Part III also explains why the economics of this type of litigation are so well-suited to allegations of infringement concerning pornography and presents new data on the prevalence of pornography-related MDJD lawsuits. Part IV 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 various procedural safeguards.

II. 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 II.A locates MDJD litigation within the broader context of the IP troll debate. It explains why the literature’s existing focus on examples such as Righthaven overlooks the most important manifestations of trolling. Part II.B explains why

20. See 17 U.S.C. § 504(c)(2) (2013).

21. *Ingenuity 13 LLC v. Doe*, No. 2:12-cv-833-ODW (JCx), 2013 WL 1898633, at *1 (C.D. Cal. May 6, 2013).

22. See *infra* Part III.C.

MDJD lawsuits typically should be regarded as trolling. Part II.C explores the basic economics of MDJD litigation. Part II.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 followed 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 of newspaper articles on blogs; and (3) acquire a partial assignment of copyright that is 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 established that their conduct fell under the fair use doctrine.²⁴ But the real problem for Righthaven was that its standing turned out to be “nothing more than a fabrication.”²⁵ Only the legal or beneficial owner of an exclusive right under copyright law is entitled, or has standing, to sue for infringement.²⁶ The limited exclusive rights to the original content that Righthaven received *appeared* to satisfy the requirement for copyright standing. But those assignments were subject to a secret “Strategic Alliance Agreement,” meaning that Righthaven possessed nothing more than a right to sue.²⁷ An agreement transferring the right to sue without any of the copyright owner’s other exclusive rights is ineffectual. Following these

23. See Shyamkrishna Balganes, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723, 739–40 (2013).

24. E.g., *Righthaven, LLC v. Hoehn*, 792 F. Supp. 2d 1138, 1147–51 (D. Nev. 2011), *aff’d in part, vacated in part*, 716 F.3d 1166 (9th Cir. 2013); *Righthaven LLC v. Realty One Grp., Inc.*, No. 2:10-cv-1036-LRH-PAL, 2010 WL 4115413, at *1–3 (D. Nev. Oct. 19, 2010); *Righthaven LLC v. Klerks*, No. 2:10-cv-00741-GMN-LRL, 2010 WL 3724897, at *2–5 (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. *Democratic Underground*, 791 F. Supp. 2d at 972 (stating Section 7.2 of the Strategic Alliance Agreement between Righthaven and Stephens Media provided that “[d]espite 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” (emphasis omitted)).

revelations, Righthaven's suits were dismissed, and the firm quickly succumbed to 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 delegation of enforcement itself but rather that it disrupts the "enforcement equilibrium" that is integral to copyright's function as an institution.³⁰

This seems to fit the Righthaven story, but perhaps a little too well. Righthaven targeted largely non-commercial defendants whose alleged infringements were inconsequential to the copyright owner's bottom line. Righthaven disrupted the previous enforcement equilibrium by attempting to monetize borderline infringement cases 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 instance.³¹ As this Article shows, a status-based conception of copyright trolling does not fit particularly well with the predominant form of copyright trolling 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 the reality of copyright trolling. Arguably, there is still a form of delegation in MDJD cases—these suits are given to specialized law firms who often 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. An entrepreneurial law firm's willingness to pursue infringement allegations on contingency makes any status-based definition of trolls and trolling in copyright obsolete.³²

28. Ian Polonsky, *You Can't Go Home Again: The Righthaven Cases and Copyright Trolling on the Internet*, 36 COLUM. J.L. & ARTS 71, 87–90 (2012).

29. Balganesh, *supra* note 23, at 732.

30. *Id.* at 728–29.

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 FASHION (Feb. 1, 2013), <http://lawoffashion.com/blog/story/02/01/2013/173> ("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."). See generally *L.A. Printex Indus., Inc. v. Aeropostale, Inc.*, 676 F.3d 841 (9th Cir. 2012).

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

Different economic fundamentals drive patent litigation, but the evidence from copyright raises serious doubts about the current status-based definition of patent trolls.

Discussions focusing on Righthaven promote 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 fair use or tolerated use. Unauthorized file sharing using BitTorrent is usually a clear-cut case of copyright infringement; it is not a legal gray area.³⁴ Mainstream creative industries strenuously object to unauthorized file sharing, and it is clearly not fair use or *de minimis*.

2. Beyond Righthaven

It makes more sense to define trolling in practice than to attempt to identify trolls in the abstract. In other words, to define what makes a litigant a troll, it is better to focus on conduct rather than status. 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. These indicia may be useful shortcuts, but they would exclude the majority of copyright troll litigation. We should, in short, identify instances of trolling rather than looking for trolls *per se*.

If there is a unifying characteristic of patent and copyright trolls, it is that they are systematic opportunists.³⁵ Agreeing on an exact definition of trolls is difficult because there are 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 is simply because those standards have failed to adequately promote investment in innovation and invention.

33. See Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 619 (2008) (discussing examples of tolerated use and the difference between tolerated use and implicitly licensed use).

34. See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 963 (2005); *BMG Music v. Gonzalez*, 430 F.3d 888, 890 (7th Cir. 2005); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020–21 (9th Cir. 2001).

35. On opportunism in general, see generally Kenneth Ayotte et al., *A Safety Valve Model of Equity as Anti-Opportunism* (Northwestern Law & Econ. Research Paper No. 13-15, 2013), available at <http://ssrn.com/abstract=2245098> (explaining the development of equity as part of the law's response to the problem of opportunism).

In addition to opportunism in litigation strategy, basing a business on litigation is arguably a form of opportunism itself. Patent trolls acquire and assert patents based on their litigation potential rather than the value of the underlying technology. On this view, the essence of trolling is that the plaintiff is more focused on the business of litigation than on selling a product or service.

Copyright trolls are best defined by a cluster of attributes rather than any single definitive feature. A troll that deserves its name asserts rights it does not have, makes poorly substantiated claims, or seeks disproportionate remedies.³⁶ Trolls do at least one of these things systematically. In copyright, this opportunism is primarily directed towards statutory damages. As Righthaven showed, statutory damages can make pursuing 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 such that the defendant's underlying liability is effectively irrelevant to the settlement calculation.

B. WHEN DO MULTI-DEFENDANT JOHN DOE LAWSUITS AMOUNT TO COPYRIGHT TROLLING?

Not all BitTorrent lawsuits are 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, after 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 to send a message, not create an independent revenue stream.

The RIAA sought to channel potential infringers back into the legitimate market. In contrast, recent MDJD suits appear to prefer the courthouse over

36. Of course, Rule 11 provides for sanctions against plaintiffs and attorneys who make frivolous or unsupportable claims. FED. R. CIV. P. 11. However, establishing a Rule 11 violation is notoriously difficult. *See, e.g.,* Raw Films, Ltd. v. Does 1–32, No. 3:11cv532-JAG, 2011 WL 6182025, at *2 (E.D. Va. Oct. 5, 2011) (issuing a show cause order for allegations of harassment, though sanctions were not ultimately imposed); *Giddings v. Vision House Prod., Inc.*, 584 F. Supp. 2d 1222, 1230 (D. Ariz. 2008) (finding that although plaintiff's legal theory ultimately proved to be incorrect, it was not "so objectively baseless to qualify as completely frivolous" and thus sanctions under Rule 11 were not warranted).

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

38. Annemarie Bridy, *Why Pirates (Still) Won't Behave: Regulating P2P in the Decade After Napster*, 40 RUTGERS L.J. 565, 602 (2009) (quoting an RIAA press release from September 8, 2003).

39. *See* Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J. (Dec. 19, 2008, 12:01 AM), <http://online.wsj.com/articles/SB122966038836021137>.

the market place. In 2010, a Hollywood production company, Voltage Pictures, filed a series of lawsuits against thousands of John Does for 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. The plaintiff's lawyers confirmed that this litigation campaign was not intended to deter or compensate but to "creat[e] a revenue stream and monetiz[e] the equivalent of an alternative distribution channel."⁴³

C. THE ECONOMICS OF MULTI-DEFENDANT JOHN DOE LAWSUITS

This section explores the economic fundamentals of copyright trolling by modeling the costs and benefits of MDJD litigation from the plaintiff's point of view.

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 for discovery. Detecting potential infringement requires an investment in technology 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 incurs the variable cost (C_v) of the time and effort it takes to persuade ISPs to divulge subscriber information and to persuade those subscribers 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 Complaint at 1, *Voltage Pictures, LLC v. Does 1–5000*, No. 1:10-cv-00873 (D.D.C. May 24, 2010), 2010 WL 4955131.

41. *Id.*

42. First Amended Complaint for Copyright Infringement at 1, *Voltage Pictures, LLC v. Vasquez*, No. 1:10-cv-00873-BAH (D.D.C. May 31, 2011), 2011 WL 2681946.

43. Eriq Gardner, *New Litigation Campaign Quietly Targets Tens of Thousands of Movie Downloaders*, HOLLYWOOD REP. (Dec. 21, 2010, 10:56 AM), <http://www.hollywoodreporter.com/blogs/thr-esq/litigation-campaign-quietly-targets-tens-63769> (internal quotation marks omitted).

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.

To be financially viable, copyright trolling through MDJD litigation requires (1) suing as many defendants as possible in a single action to keep costs low and (2) leveraging the threat of statutory damages (and sometimes other threats) to maximize the product of payoff and yield (P^*Y). Thus,

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

This model does not assume that all defendants are liable for copyright infringement, but it does assume that the plaintiff's case is strong enough to make some defendants want to settle.⁴⁶ Even so, a plaintiff cannot expect to find the person for every IP address in the lawsuit, nor can it expect every defendant to be solvent or to settle without a costly fight. However, the plaintiff can expect that most individuals it locates who can pay will eventually 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 costs less on a risk-adjusted basis than establishing their innocence in court. As discussed in Part III.A, the prospect of paying statutory damages ensures that a very small chance of liability is enough to make settlement the best option.⁴⁸ Making money from this litigation depends on dispersing fixed costs over a large group of defendants and persuading some defendants to settle quickly. Part III of this Article uses this basic economic model 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 are MDJD lawsuits?⁴⁹ To answer this question, I created a database that includes all copyright cases filed in all the federal district courts 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 on the year of filing, beginning with the year 2001.

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

47. See, e.g., *Ingenuity 13 LLC v. Doe*, No. 2:12-cv-8333-ODW (JCx), 2013 WL 1898633, at *2 (C.D. Cal. May 6, 2013) (finding that settlement offers were generally about \$4000).

48. See *infra* Part III.A.

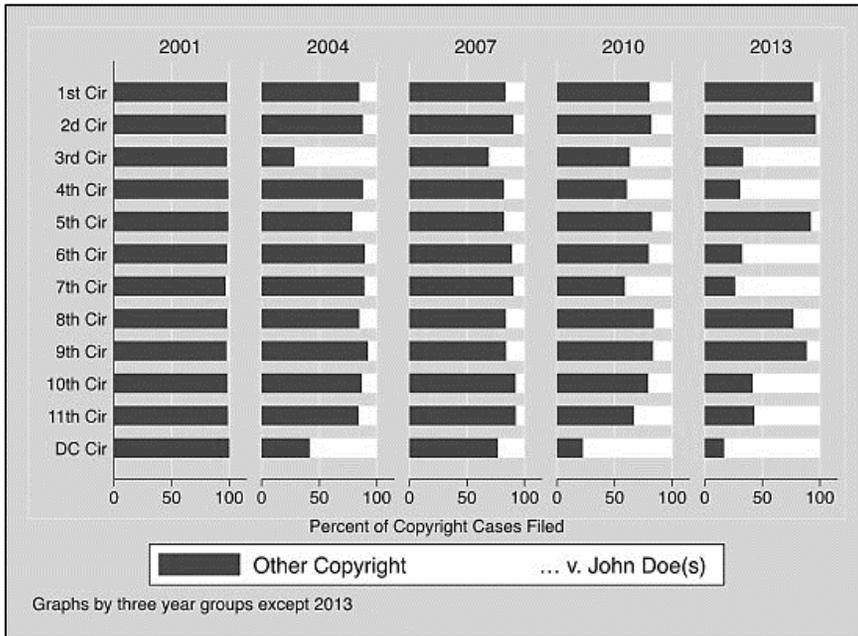
49. Many judges have noted the increasing prevalence of these suits. See, e.g., *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 82 (E.D.N.Y. 2012) ("These actions are part of a nationwide blizzard of civil actions brought by purveyors of pornographic films alleging copyright infringement by individuals utilizing a computer protocol known as BitTorrent.")

50. MATTHEW SAG, COPYRIGHT FILING DATA (TO JUNE 30 2014) (2014), available at http://matthewsag.com/?page_id=19.

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

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 the Third, Fourth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits in 2013.

Figure 1. Percentage of John Doe Lawsuits by Circuit, 2001–2003, 2004–2006, 2007–2009, 2010–2012, 2013–2014(Q1)



MDJD suits were almost non-existent ten years ago. As of 2013, they were the majority of filings in 19 of the 92 federal district courts.⁵² John Doe 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 John Doe copyright lawsuit is illustrated by Figure 2, below, which focuses 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.

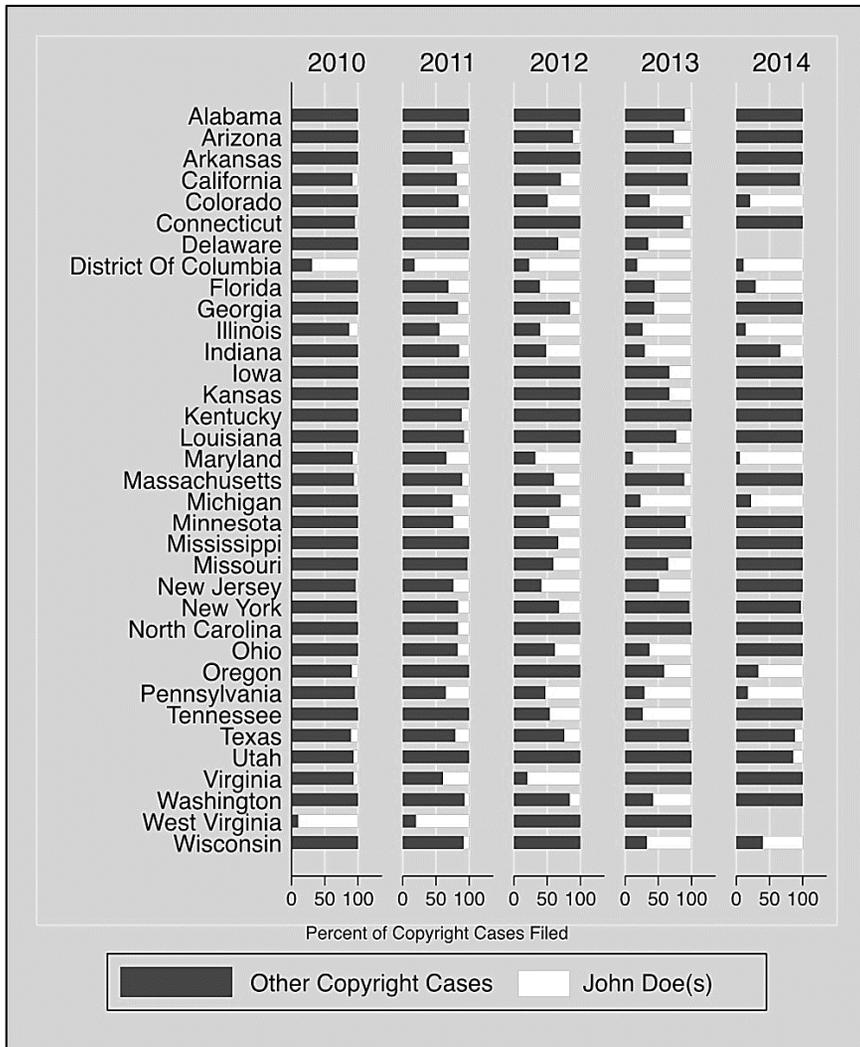
As the figure below shows, in 2010, there was substantial MDJD litigation in the District of Columbia and West Virginia, and small pockets in California, Connecticut, Illinois, Oregon, Maryland, Massachusetts, New Jersey, Oregon,

52. See *supra* note 10 and accompanying text.

53. To be exact, John Doe suits accounted for 8129 out of 41,769 filings.

Texas, Utah, and 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 to June 30, 2014, by State



This data shows the astonishing growth of John Doe lawsuits. They are not just the predominant form of copyright trolling; they are the dominant form of copyright litigation in several districts. The massive scale of John Doe litigation raises the question of how, if at all, should the Copyright Office respond? It is far from apparent that the policy issues John Doe litigation raises are on the Copyright Office's reform agenda.⁵⁴

III. STATUTORY DAMAGES, JOINDER & PORNOGRAPHY

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

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 restitution.⁵⁵ Statutory damages provide compensation for real world harms that may be difficult to establish in the courtroom.⁵⁶ 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.⁵⁷ A recent review of statutory damages by Samuelson and Wheatland cites several arbitrary, inconsistent, incoherent, and excessive statutory damage awards in copyright cases.⁵⁸ In one of the most striking examples, *Capitol Records v. Thomas*, a jury awarded statutory damages

54. See *The Register's Call for Updates to U.S. Copyright Law Before the Subcomm. on Courts, Intellectual Property, and the Internet*, 113th Cong. 4–6 (2013) (statement of Maria A. Pallante, Register of Copyrights), available at http://judiciary.house.gov/_files/hearings/printers/113th/113-20_80067.pdf (failing to mention copyright trolls, John Doe litigation); see also Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 329 (2013) (noting in passing that “arguments abound on the subject of statutory damages, suggesting that they are too high, too low, too easy or too hard to pursue”).

55. 17 U.S.C. § 504(c) (2012).

56. See Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 448 (2009) (discussing the inclusion of statutory damages in the 1909 Copyright Act to address complaints about the difficulty of calculating actual damages).

57. The only prerequisite for statutory damages is copyright registration. See 17 U.S.C. § 412 (requiring registration within three months of publication to qualify for awards of statutory damages and attorneys' fees). For a comprehensive review of the history and current application of statutory damages in copyright, see generally Samuelson & Wheatland, *supra* note 56.

58. Samuelson & Wheatland, *supra* note 56, at 442–43.

of \$1.92 million against a defendant who had illegally downloaded about \$54 worth of music on a peer-to-peer file-sharing network.⁵⁹ That is a ratio of over 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 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 \$150,000⁶⁰—that is the difference between an average-priced 50-inch flat-screen television⁶¹ and the median sale price of a single-family home in the American Midwest.⁶² Technically, the upper \$30,000 to \$150,000 of this range is confined to cases of willful infringement⁶³ and should be reserved for truly exceptional cases,⁶⁴ however “courts have interpreted willfulness so broadly that those who merely should have known their conduct was infringing are often treated as willful infringers.”⁶⁵

Recall the formula in Part II: $Profit = N(PY - C_v) - C_f$. Statutory damages play a significant role in the profitability of copyright trolling. Without statutory damages, defendants might decide 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 the retail price of their product or the defendant’s profits from infringement. For the typical music single, album, television show, or movie, this would range from \$1 to \$20.

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

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

60. 17 U.S.C. § 504(c).

61. For example, at the time of writing, the suggested retail price of the Samsung H6203, a 50-inch LED television, was \$749.99. See LED H6203 Series Smart TV, SAMSUNG, <http://www.samsung.com/us/video/tvs/UN50H6203AFXZA> (last visited Jan. 15, 2015).

62. NAT’L ASS’N. OF REALTORS, SALES PRICE OF EXISTING SINGLE-FAMILY HOMES (2014), available at <http://www.realtor.org/sites/default/files/reports/2014/embargoed/ehs-09-22/ehs-08-2014-single-family-only-2014-09-22.pdf> (reporting the median sales price of existing single-family homes in the American Midwest as \$143,700 in 2012, \$150,800 in November 2013, and \$155,700 for all of 2013).

63. 17 U.S.C. § 504(c)(2).

64. See, e.g., S. REP. NO. 94-473, at 144-45 (1975) (providing for enhanced damages in “exceptional cases”); H.R. REP. NO. 94-1476, at 162 (1976) (same); see also Samuelson & Wheatland, *supra* note 56, at 452-63 (summarizing the legislative history).

65. Samuelson & Wheatland, *supra* note 56 at 441; see also 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.04(B)(3)(a) (2013) (citing cases). Note that even those defendants with plausible fair use defenses may be characterized as “willful and egregious” infringers. See, e.g., Rogers v. Koons, 960 F.2d 301, 313 (2d Cir. 1992).

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 a maximum of \$20 to a maximum of \$150,000. But statutory damages do not just increase the average payoff (P); they also reduce the Plaintiff's variable cost (C_v) by helping bring reluctant defendants to settle more quickly. In addition, the possibility of a \$150,000 verdict makes the plaintiff's claim that it will pursue the case to the bitter end more credible, and so it should substantially increase settlement yield (Y).⁶⁶ 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 have to pay the other side's attorney's fees, only the plaintiff is entitled to statutory damages. Fee shifting for successful defendants should make troll-like behavior less rewarding in copyright, but statutory damages negates these benefits.

B. JOINDER

Joinder also plays an important role in the economics of MDJD litigation. Joinder rules favor the plaintiff if they permit joining defendants with a low level of relatedness. A low relatedness threshold allows the plaintiff to spread its fixed costs across a large number of defendants.⁶⁷ Joinder rules are also plaintiff-friendly if they allow discovery in a MDJD case without a substantial investment in proving the alleged underlying infringements.⁶⁸

The economic logic of MDJD lawsuits relies on permissive joinder 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.⁶⁹ All that the snapshot shows is that a download was initiated. Second, the MDJD cases assume that the account owner behind an IP address was in fact responsible for any use of that account.⁷⁰ The possibility of hacking, open Wi-Fi networks, Internet accounts accessed by multiple users, and mistakes by ISPs open the door to numerous highly fact-specific "it wasn't me" defense[s].⁷¹ Plaintiffs

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

67. Thus C_i/N is reduced.

68. Thus C_i itself is reduced.

69. *See, e.g.*, *Ingenuity 13 LLC v. Doe*, No. 2:12-cv-8333-ODW (JCx), 2013 WL 1898633, at *3 (C.D. Cal. May 6, 2013).

70. *Id.*

71. *Third Degree Films, Inc. v. Does 1-72*, No. 12-cv-14106, 2013 WL 1164024, at *6 n.7 (E.D. Mich. Mar. 18, 2013) (noting that "plaintiff's counsel represented that approximately 95%

can overcome these two weaknesses, but only by investing individual time and effort into the 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 plaintiffs to join defendants in a single action subject to two requirements. First, the complaint 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.”⁷² Second, there must be common questions of fact or law.⁷³ Importantly, 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 entertaining the broadest possible scope of action consistent with fairness to the parties.”⁷⁴ The current split in the district courts on whether joinder is proper in MDJD suits centers around whether the phrase “same transaction, 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. A group of individuals downloading the seeded file is known as a “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.⁷⁵ 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.⁷⁶

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*, 296 F.R.D. 80, 91 (E.D.N.Y. 2012) (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”).

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

73. *Id.* R. 20(a)(2)(B).

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

75. *Malibu Media, LLC v. Does 1–68*, Nos. 12 cv 6675, 12 cv 6677, 2013 WL 5423872, at *4–5 (N.D. Ill. Sept. 27, 2013).

76. *See infra* text accompanying notes 85–87.

Courts are divided about whether participation in a BitTorrent swarm by itself meets the “same transaction, occurrence, or series of transactions or occurrences” standard under Federal Rule of Civil Procedure 20(a)(2)(A).⁷⁷ Many courts have rejected joinder based on swarm participation alone.⁷⁸ For example, the district court in *Dragon Quest Products, LLC v. Does 1–100* held that:

[T]he initial seeder, other seeders, the various peers, and the Defendants may have participated in this swarm months apart from each other. While the four categories of individuals, 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.⁷⁹

A number of courts have taken a broader view, however, and held that merely participating in the same swarm is sufficient for joinder under Federal Rule 20.⁸⁰ As the court in *Malibu Media, LLC v. 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.”⁸¹ In *Patrick Collins, Inc. v.*

77. See *infra* note 78 (listing examples of cases concluding joinder is impermissible or inappropriate); *infra* note 80 (listing examples of cases allowing joinder).

78. See, e.g., *SBO Pictures, Inc. v. Does 1–57*, No. RWT 12cv22, 2012 WL 1415523, at *2 (D. Md. Apr. 20, 2012) (denying joinder); *Patrick Collins, Inc. v. Does 1–23*, No. 11-cv-15231, 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 “the same transaction or series of transactions”); *SBO Pictures, Inc. v. Does 1–3036*, No. 11-4220 SC, 2011 WL 6002620, at *3 (N.D. Cal. Nov. 30, 2011) (same); *MCGIP, LLC v. Does 1–149*, No. C11-02331 LB, 2011 WL 4352110, at *3 (N.D. Cal. Sept. 16, 2011) (finding 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 Prods., 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” (citations omitted) (internal quotation marks omitted)); *Boy Racer, Inc. v. Does 1–60*, No. C11-01738 SI, 2011 WL 3652521, at *4 (N.D. Cal. Aug. 19, 2011) (severing defendants where “[p]laintiff d[id] not plead facts showing that any particular defendant illegally shared plaintiff’s work with any other particular defendant”).

79. *Dragon Quest Prods., LLC v. Does 1–100*, Civ. Nos. 12–6611 (JHR/AMD), 12–6633 (NLH/AMD), 13–482 (NLH/AMD), 13–483 (NLH/AMD), 13–484 (NLH/AMD), 13–485 (NLH/AMD), 13–486 (NLH/AMD), 13–487 (NLH/AMD), 2013 WL 2949407, at *6 (D.N.J. June 14, 2013).

80. See, e.g., *Bicycle Peddler, LLC v. Does 1–12*, 295 F.R.D. 274, 277 (N.D. Ill. 2013); *Pac. Century Int’l v. Does 1–31*, No. 11 C 9064, 2012 WL 2129003, at *2 (N.D. Ill. June 12, 2012) (allowing joinder where “the anonymous defendants participated in the same ‘swarm’”); *Patrick Collins, Inc. v. Does 1–39*, No. 12-cv-00096-AW, 2012 WL 1432224, at *3 (D. Md. Apr. 24, 2012); *Digital Sin, Inc. v. Does 1–176*, 279 F.R.D. 239, 244 (S.D.N.Y. 2012); *First Time Videos, LLC v. Does 1–76*, 276 F.R.D. 254, 257 (N.D. Ill. 2011).

81. *Malibu Media, LLC v. John Does 1–6*, 291 F.R.D. 191, 204 (N.D. Ill. 2013); *TCYK, LLC v. Does 1–62*, No. 13 c 3842, 2013 WL 6671675, at *4 (N.D. Ill. Dec. 18, 2013) (quoting *Malibu Media, LLC*, 291 F.R.D. at 204).

Does 1–21, the court found that logical relationship was satisfied because “each Defendant affirmatively chose to download 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.”⁸²

Some plaintiffs have responded by pleading specifically that the Doe defendants did, in fact, share the same pieces of the file with each other.⁸³ Others have focused on groups of John Does who acted within a short time frame.⁸⁴

On this view, a BitTorrent swarm is in essence a cooperative endeavor, whether the participants are personally known to each other or not.⁸⁵ This interpretation is bolstered by Rule 20(a), which refers to a “series of transactions or occurrences” and not just the “same transaction.”⁸⁶ Astute plaintiffs have also bolstered the case for joinder by adding claims for inducement and contributory liability.⁸⁷

Even if the individual participants in a BitTorrent swarm are sufficiently related to permit joinder under the Federal Rules, which appears likely, courts can still disallow joinder for discretionary reasons.⁸⁸ Here too, the courts are

82. *Patrick Collins, Inc. v. Does 1–21*, 282 F.R.D. 161, 165 (E.D. Mich. 2012); *see also Malibu Media, LLC*, 291 F.R.D. at 202 (citing the same passage); *TCYK, LLC*, 2013 WL 6671675, at *3 (citing the same passage).

83. *See, e.g., Malibu Media, LLC v. Does 1–68*, Nos. 12 cv 6675, 12 cv 6677, 2013 WL 5423872, at *2 (N.D. Ill. Sept. 27, 2013) (“Plaintiff bases its allegations on . . . [the fact that] 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.*, 279 F.R.D. at 243 (declining to sever where the “[p]laintiff 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*, No. 12 C 1546, 2012 WL 3717768, at *3 (N.D. Ill. Aug. 27, 2012) (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”).

84. *TCYK, LLC*, 2013 WL 6671675, at *4 (finding temporal proximity of 62 Doe defendants alleged to have acted within a four-day period sufficient); *see also Pac. Century Int’l*, 2012 WL 2129003, at *2 (noting that the defendants allegedly participated in the same swarm at varying times spanning just over one month supported permissive joinder).

85. *TCYK, LLC*, 2013 WL 6671675, at *3 (“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.”).

86. *Id.* at *3 (quoting FED. R. CIV. P. 20(a)(2)(A)) (internal quotation marks omitted).

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

88. Federal Rule of Civil Procedure 21 provides that “[o]n motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party.” *See, e.g., Patrick Collins, Inc.*, 941 F. Supp. 2d at 156–57 (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”).

divided.⁸⁹ In part, the division of opinion is a conflict between formalism and realism.

For the formalist judge, the complaint ultimately leads to a hearing. If joining 5000 loosely related individuals would make it impossible to conduct a hearing on the merits, joinder is unsound.⁹⁰ The court in *Third Degree Films, Inc. v. Does 1-131* explained the practical problems that make joinder in MDJD suits inappropriate: differences in factual and legal defenses would generate 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 have 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; and any eventual trial would require a hundred separate mini-trials with different witnesses and evidence, "viscerating any 'efficiency' of joinder."⁹¹ Cumulatively, these obstacles would "needlessly delay the ultimate resolution of any particular defendant's case."⁹² Thus, from this perspective, joinder appears unsound.

For the realist judge, the complaint almost inevitably leads to settlement. Thus, joinder is an efficient way to aggregate claims at the early stage of litigation for which there is very likely no later stage. The defendants who actively contest liability can have their cases severed later. In the meantime, allowing MDJD suits to proceed to the discovery stage is efficient because it reduces the plaintiff's costs.

Realism and formalism are not the only ways to decide if joinder is appropriate 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."⁹³ These courts accept that "a valid copyright holder

89. See, e.g., *Malibu Media, LLC v. Does 1-22*, No. 12-CV-5091 (SRC)(CLW), 2013 WL 1704291, at *4-5 (D.N.J. Apr. 19, 2013) (severing and dismissing all defendants other than John Doe 1); *Malibu Media, LLC v. Does 1-30*, No. 12-3896-MAS, 2012 WL 6203697, at *8-9 (D.N.J. Dec. 12, 2012) (permitting joinder); *Amselfilm Prods. GMBH & Co. KG v. Swarm 6a6dc*, No. 12-3865 (FSH) (PS), 2012 U.S. Dist. LEXIS 186476, at *1-7 (D.N.J. Oct. 10, 2012) (finding joinder to be inappropriate and severing all defendants except John Doe 1); *Malibu Media, LLC v. Does 1-5*, 285 F.R.D. 273, 277 (S.D.N.Y. 2012) (permitting joinder); *Next Phase Distrib., Inc. v. Does 1-27*, 284 F.R.D. 165, 169-71 (S.D.N.Y. 2012) (declining to decide whether joinder was proper, but severing all defendants except John Doe 1 based on practical considerations).

90. See, e.g., *Malibu Media, LLC v. Does 1-39*, No. 12-6945-MAS-DEA, 2013 U.S. Dist. LEXIS 44053, at *4 (D.N.J. Mar. 28, 2013) (noting that the court's "ability to efficiently manage the pretrial phases of this action with the present number of defendants could be compromised by permitting joinder, causing a strain on judicial resources").

91. *Third Degree Films, Inc. v. Does 1-131*, 280 F.R.D. 493, 498-99 (D. Ariz. 2012), *reh'g denied*, No. CV 12-0108-PHX-JAT, 2012 WL 2383560 (D. Ariz. June 25, 2012).

92. *Id.* at 499.

93. *Third Degree Films v. Does 1-47*, 286 F.R.D. 188, 189-91 (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

is entitled to seek protection of its intellectual property in federal court,” but they are wary of suits filed “solely to facilitate demand letters and coerce settlement, rather than ultimately serve process and litigate the claims.”⁹⁴ Plaintiffs have reinforced this impression by failing to actually serve the individual defendants in many cases.⁹⁵ Courts have noted that in many instances settlement’s coercive force comes from the pornography at issue, not the alleged copyright infringement.⁹⁶ The number of Doe defendants who rush to settle before being identified in the public record shows the extraordinary leverage plaintiffs obtain in John Doe pornography cases.⁹⁷

Some courts have also taken issue with the evasion of filing fees.⁹⁸ 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.”⁹⁹ For these reasons many courts have severed all but the first-named defendant and required plaintiffs to re-file individually.¹⁰⁰

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.” (footnote omitted)); *see also Patrick Collins, Inc.*, 941 F. Supp. 2d at 156–57; *Kick Ass Pictures, Inc. v. Does 1–25*, C.A. No. 12-10810-MLW, 2013 WL 1497229, at *1 (D. Mass. Jan. 4, 2013); *Pac. Century Int’l, Ltd. v. Does 1–101*, No. C-11-02533 (DMR), 2011 WL 5117424, at *2 (N.D. Cal. Oct. 27, 2011).

94. *Third Degree Films*, 286 F.R.D. at 190; *see also Hard Drive Prods., Inc. v. Does 1–90*, No. C 11-03825 HRL, 2012 WL 1094653, at *3 & n.4, *7 (N.D. Cal. Mar. 30, 2012) (“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.”).

95. *See, e.g., Hard Drive Prods., Inc.*, 2012 WL 1094653, at *3-4, *3 n.4 (refusing 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).

96. *Patrick Collins, Inc.*, 941 F. Supp. 2d at 165–66 (expressing “concern[] that joinder is being used ‘to facilitate a low-cost, low-risk revenue model for the adult film companies’”) (quoting *Third Degree Films*, 286 F.R.D. at 197); *see also id.* at 157 (“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.”).

97. *Patrick Collins, Inc.*, 941 F. Supp. 2d at 157.

98. *E.g., In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 92 (E.D.N.Y. 2012).

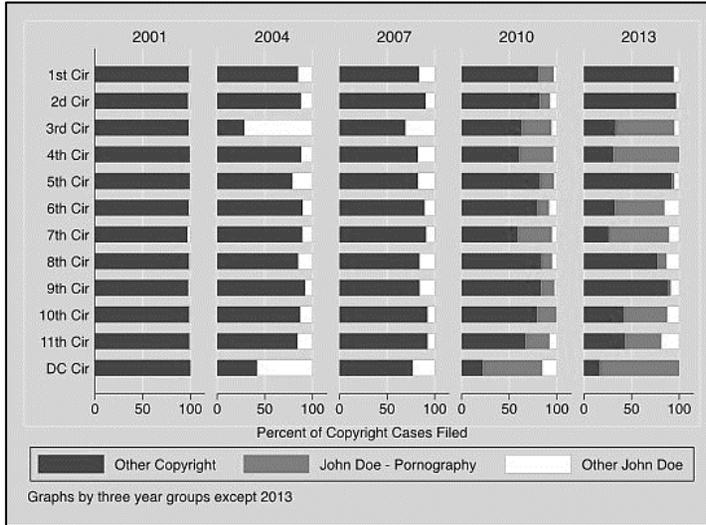
99. *Id.*

100. *Third Degree Films*, 286 F.R.D. at 198 (“[T]he Court has not observed any specific bad faith behavior in this case by [the plaintiff] to date . . . [T]he 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.” (footnotes omitted)); *see also Patrick Collins, Inc.*, 941 F. Supp. 2d at 166 (noting that “joinder is not in the best interests of the defendants and is likely to cause them prejudice”).

C. THE COPYRIGHT TROLLING-PORNOGRAPHY NEXUS

Conventional wisdom asserts that 15% of Internet traffic is comprised of cat videos¹⁰¹ and 30% is pornography.¹⁰² Cat videos do not feature prominently in MDJD lawsuits. Pornography is another story.¹⁰³ 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.¹⁰⁴

Figure 3. Percentage of John Doe Lawsuits by Circuit, 2001 to 2013



101. See, e.g., John Blackstone, *Cat Videos Take Over Internet*, *Marketing World*, CBS NEWS (Sept. 2, 2013, 8:18 AM), <http://www.cbsnews.com/videos/cat-videos-take-over-internet-marketing-world/>.

102. See *Porn Sites Get More Visitors Each Month Than Netflix, Amazon and Twitter Combined*, HUFFINGTON POST (May 4, 2013, 10:45 AM), http://www.huffingtonpost.com/2013/05/03/internet-porn-stats_n_3187682.html.

103. 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.” *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 755 (7th Cir. 2012); see also *Jartech, Inc. v. Clancy*, 666 F.2d 403, 406 (9th Cir. 1982) (arguing that “an obscenity defense would fragment copyright enforcement”); *Mitchell Bros. Film Grp. v. Cinema Adult Theatre*, 604 F.2d 852, 862–63 (5th Cir. 1979) (doubting the effectiveness of denying copyright protection as a way of discouraging obscenity production). 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).

104. 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 Internet Movie Database, and reasonable inferences from titles such as “My Little Panties # 2.” I did not watch any of the underlying titles.

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 1 in that it differentiates between pornography-related John Doe litigation and other John Doe litigation.

Figure 4. Percentage of John Doe Lawsuits in Selected Districts, 2010 to June 30, 2014

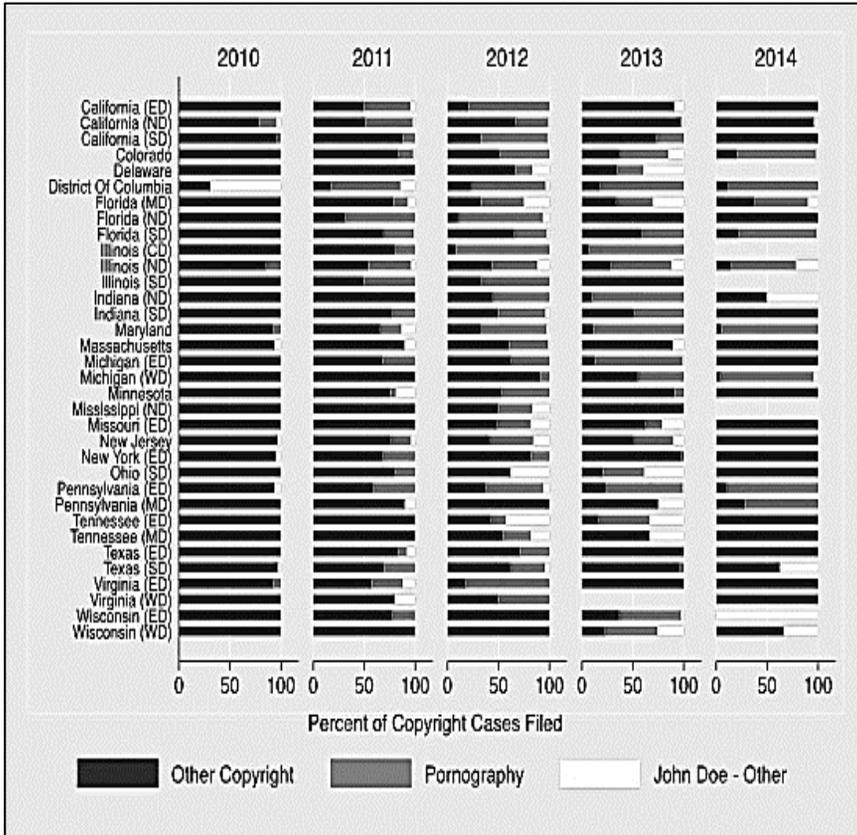


Figure 4 takes a selection of the same data and shows how the relative frequency of pornography-focused John Doe litigation has changed in selected districts over the last five years. The districts shown are those with high pornography filing ratios during at least one filing year from 2010 to 2014.

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.¹⁰⁵

Why so much pornography? The prevalence of pornography in MDJD lawsuits could be attributed to 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.¹⁰⁶ Indeed, there are anecdotal reports that low-budget and independent films are bringing MDJD suits. This suggests that the appeal of MDJD litigation may be expanding. A related explanation would be that pornography producers are less concerned about negative publicity than other creative industries.¹⁰⁷ A closer look into MDJD litigation suggests two additional structural explanations.

The first structural explanation is simply that copyright trolling is particularly well suited to pornography because the plaintiff can threaten accused infringers with public exposure. This additional incentive to settle fundamentally transforms 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 \$100,000 in fixed costs 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.¹⁰⁸ But assuming that the threat of public exposure as a pornography consumer 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%.¹⁰⁹ In short, one reason that the MDJD model is used in relation to pornography more than any other subject matter is that the social stigma 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 small number of entrepreneurial

105. In 2012 those districts were: California (E.D.); California (S.D.); the District of Columbia; Florida (N.D.); Illinois (C.D.); Illinois (S.D.); Indiana (N.D.); Maryland; Pennsylvania (E.D.); and Virginia (E.D.); In 2013 those districts were: Alabama (S.D.); the District of Columbia; Illinois (C.D.); Illinois (N.D.); Indiana (N.D.); Maryland; Michigan (E.D.); Tennessee (W.D.); Wisconsin (E.D.); Wisconsin (W.D.); and Pennsylvania (E.D.). In the first quarter of 2014 those districts were: Colorado; the District Of Columbia; Florida (M.D.); Florida (S.D.); Illinois (N.D.); Maryland; Michigan (W.D.); Pennsylvania (E.D.); and Pennsylvania (M.D.).

106. See generally 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).

107. This seems entirely speculative.

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

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

lawyers and plaintiffs initiate a significant amount of this litigation.¹¹⁰ The most well-known is the Prenda Law firm.¹¹¹ A group of entities associated with Prenda Law have amassed millions of dollars in MDJD settlements.¹¹² According to media reports and court records, Prenda leveraged the social stigma associated with pornography by “post[ing non-settling defendants’ names] on its website, along with a link to the lawsuit.”¹¹³ In an unrelated case, lawyers were censured for attaching an erroneous exhibit listing several other adult films that defendants were alleged to have downloaded that were unrelated to the litigation.¹¹⁴ These techniques leverage the threat of exposure to force settlement.

Attorneys associated with Prenda have been ruthless in pursuing profits and have also been sanctioned for deceit and unethical behavior.¹¹⁵ Defendants in a Florida case involving Prenda have presented evidence that

110. The appearance of the same counsel, 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).

111. *See* Guava, LLC v. Does 1–5, No. 1:12-CV-8000, 2013 WL 3270663, at *3 (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, ‘Porn Troll’ Prenda Law Sanctioned in Defamation Lawsuit, ARS TECHNICA (Jan. 23, 2014, 6:45 PM), <http://arstechnica.com/tech-policy/2014/01/porn-troll-prenda-law-sanctioned-in-defamation-lawsuit/>.

112. Kashmir Hill, *How Porn Copyright Lawyer John Steele Has Made a ‘Few Million Dollars’ Pursuing (Sometimes Innocent) ‘Porn Pirates’*, FORBES (October 15, 2012, 2:09 PM), <http://www.forbes.com/sites/kashmirhill/2012/10/15/how-porn-copyright-lawyer-john-steele-justifies-his-pursuit-of-sometimes-innocent-porn-pirates/>. Note that the Prenda legal team appears to have begun under the firm title Steele Hansmeier PLLC and has now changed its name to the Anti-Piracy Law Group. *See* Mike Masnick, *Prenda Law Accused of Trying to Start Over Again Under a New Name*, TECHDIRT (Dec. 18, 2012, 7:49 PM), <https://www.techdirt.com/articles/20121214/22290621392/prenda-law-accused-trying-to-start-over-again-under-new-name.shtml>.

113. Claire Suddath, *Prenda Law, the Porn Copyright Trolls*, BUS. WK. (May 30, 2013), <http://www.businessweek.com/articles/2013-05-30/prenda-law-the-porn-copyright-trolls>.

114. *Malibu Media, LLC v. Does 1–3*, Nos. 13-C-536, 13-C-544, 13-C-779, 2013 WL 6579338, at *5 (E.D. Wis. Dec. 12, 2013); *see also* *Malibu Media, LLC v. Does 1–11*, Nos. 13-cv-205-wmc, 13-cv-207-wmc, 13-cv-208-wmc, 13-cv-209-wmc, 13-cv-315-wmc, 13-cv-317-wmc, 13-cv-318-wmc, 13-cv-319-wmc, 13-cv-320-wmc, 13-cv-321-wmc, 13-cv-322-wmc, 2013 WL 4821911, at *5 (W.D. Wis. Sept. 10, 2013) (imposing sanctions). *But see* *Malibu Media, LLC v. Helferich*, No. 1:12-cv-00842-TWP-MJD, 2014 WL 690921, at *3 (S.D. Ind. Feb. 21, 2014) (denying Motion for Sanctions by defendants).

115. *Lightspeed Media Corp. v. Smith*, 761 F.3d 699, 712 (7th Cir. 2014) (affirming orders for sanctions and an order holding Duffy, Steele, and Hansmeier in civil contempt); *Lightspeed Media Corp. v. Smith*, No. 12-889-GPM, 2013 WL 6225093, at *4 (S.D. Ill. Nov. 27, 2013) (stating “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. Doe*, No. 2:12-cv-8333-ODW (JCx), 2013 WL 1898633, at *2–3, *5 (C.D. Cal. May 6, 2013) (finding that “the Principals engaged in vexatious litigation designed to coerce settlement” and that “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 firm and their clients AF Holdings and Ingenuity 13 based on the “Plaintiffs’ brazen misconduct and relentless fraud”).

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.¹¹⁶ Prenda lawyers have also been accused of colluding in litigation,¹¹⁷ lying to the court,¹¹⁸ forging documents,¹¹⁹ and identity theft.¹²⁰

The following two tables show the influence of Prenda and entities associated with it. They list the top plaintiffs in copyright suits against John Does. Table 1 lists the top 20 plaintiffs between 2001 and 2014 ranked according to the total number of John Doe defendants. Table 2 lists the top five John Doe plaintiffs in each year 2010 to 2014.

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	15,551	15,551
Patrick Collins, Inc.	224	3757	11,460
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	5941	5150
On The Cheap, LLC	1	5011	5011
West Coast Productions, Inc.	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, Inc.	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
Megip, LLC	18	1164	1698
Total	2370		106,379

116. Cyrus Farivar, *Prenda Seeded Its Own Porn Files Via BitTorrent, New Affidavit Argues*, ARS TECHNICA (June 3, 2013, 8:15 PM), <http://arstechnica.com/tech-policy/2013/06/prenda-seeded-its-own-porn-files-via-bittorrent-new-affidavit-shows/>.

117. Mike Masnick, *‘Defendant’ in Prenda Law Case Reveals He Agreed to Take a Dive*, TECHDIRT (Jan. 25, 2013, 6:44 PM), <https://www.techdirt.com/articles/20130125/15575421793/defendant-prenda-law-case-reveals-he-agreed-to-take-dive.shtml>.

118. See *Ingenuity 13 LLC*, 2013 WL 1898633, at *4.

119. *Id.*

120. *Id.* at *1.

The only Prenda-related entity listed on Table 1 is Hard Drive Productions, Inc.¹²¹ In Table 2, however, Prenda-related entities claim two of the top five positions in 2011 and 2012. It is important to note that the methodology of counting John Doe defendants is under-inclusive. Doe numbers were derived from the case captions themselves—for example, *Digital Sin, Inc v. Does 1–208* would be counted as 208 John Doe defendants, but *Digital Sin, Inc v. Does* or *Digital Sin, Inc. v. Unknown Parties* would be counted as a single John Doe defendant.

Table 2. Top Five Copyright John Doe Plaintiffs, 2010–2014

	Plaintiff	Cases	% John Doe	Cumulative %
2014	Malibu, LLC*	821	85.97	85.97
	Dallas Buyers Club, LLC	79	8.27	94.24
	Countryman Nevada, LLC	29	3.04	97.28
	TCYK, LLC	9	0.94	98.22
	Voltage Pictures	3	0.31	98.53
2013	Malibu Media, LLC*	1027	64.71	64.71
	TCYK, LLC	116	7.31	72.02
	Killer Joe Nevada, LLC	49	3.09	75.11
	Voltage Pictures	45	2.84	77.95
	Zambezia Film	41	2.58	80.53
2012	Malibu Media, LLC*	333	27.82	27.82
	Patrick Collins, Inc.*	131	10.94	38.76
	AF Holdings, LLC *†	124	10.36	49.12
	Ingenuity 13, LLC *†	67	5.6	54.72
	Quad International, Inc.	59	4.93	59.65
2011	Patrick Collins, Inc.*	88	21.31	21.31
	K-Beech, Inc.*	61	14.77	36.08
	Hard Drive Productions, Inc.*	52	12.59	48.67
	Boy Racer, Inc.*†	18	4.36	53.03
	First Time Videos, LLC *†	18	4.36	57.38
2010	IO Group, Inc.*	10	12.99	12.99
	LFP Internet Group, LLC*	5	6.49	19.48
	Digital Content Protection, LLC*	4	5.19	24.68
	Patrick Collins, Inc.*	4	5.19	29.87
	Griggs	3	3.9	33.77

* Lawsuits related to pornography

† Plaintiffs associated with the Prenda Law Firm

121. According to media reports, Hard Drive Productions stopped working with Prenda in late 2012. See Suddath, *supra* note 113.

The significance of repeat players may also explain the uneven geographic distribution of MDJD lawsuits.¹²² Table 3, below, shows the number of John Doe suits by district for the 21 districts with the most John Doe lawsuits from 2010 to mid-2014.

Table 3. John Doe Suits by District

District	John Doe (other)	Pornography	Combined
Illinois (N.D.)	147	438	585
Pennsylvania (E.D.)	11	374	385
Colorado	70	311	381
Maryland	4	316	320
Florida (M.D.)	101	172	273
Michigan (E.D.)	7	176	183
Florida (S.D.)	4	150	154
Ohio (S.D.)	64	72	135
California (N.D.)	5	127	132
California (C.D.)	13	115	128
New York (S.D.)	60	68	128
New Jersey	20	104	124
District of Columbia	15	104	119
Virginia (E.D.)	0	97	97
Michigan (W.D.)	5	73	78
California (E.D.)	2	68	70
Indiana (S.D.)	1	66	67
Illinois (C.D.)	11	51	62
Indiana (N.D.)	22	39	61
Ohio (N.D.)	32	27	59
Wisconsin (E.D.)	7	49	56

The copyright troll-pornography nexus illustrates how a system of incentives can lead to unintended results. Pornography 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 some plaintiffs, the litigation incentives established by permissive joinder and statutory damages are more attractive.

IV. REFORMS

A. *THE NORMATIVE FOUNDATIONS FOR REFORM*

For purposes of a rational discussion about copyright trolling, as opposed to a wholesale reappraisal of the copyright system, we should accept copyright's central dogma that exclusive rights effectively incentivize the

122. The courts have noticed the same counsel making the same claims and using the same filings. *See, e.g.,* Patrick Collins, Inc. v. Does 1–38, 941 F. Supp. 2d 153, 155 (D. Mass. 2013).

creation and distribution of expressive works.¹²³ In less abstract terms this means, at the very least, accepting that unauthorized file sharing is a civil wrong that deserves 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.¹²⁴ In short, the problem with John Doe 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 John Doe litigation relate to the fairness of the judicial process. John Doe suits against anonymous Internet fleesharers allow infringement accusations to proceed based on a minimal investigation. Defendants are often subject to leverage that crosses the line into extortion and cannot effectively defend themselves. Once an ISP names an individual, the burden of proof is effectively reversed. This is because, unless a defendant has a lawyer that is willing to work on contingency, the cost of establishing their innocence vastly exceeds the settlement payoffs demanded by plaintiffs. Fee shifting is available for successful defendants in copyright cases, but it is not guaranteed,¹²⁵ and it does not level the playing field. Innocent defendants must calculate the expected value of litigation versus settlement with reference to the small probability that the plaintiff will prevail. If the

123. 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. Statute of Anne, 8 Ann. c. 19 (1710). This purposive conception of copyright is also clearly reflected in the U.S. Constitution which provides that “[t]he Congress shall have Power . . . [t]o 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, § 8, cl. 8. The Supreme Court has repeatedly observed that “[t]he primary objective of copyright is not to reward the labor of authors, but ‘[t]o promote the Progress of Science and useful Arts.’” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991) (quoting U.S. CONST. art. I, § 8, cl. 8) (citing *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 154 (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*, “[b]y 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 Enters.*, 471 U.S. 539, 558 (1985); see also *Eldred v. Ashcroft*, 537 U.S. 186, 219 (2003). See generally William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325 (1989).

124. Unauthorized file-sharing is not fair use. See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 940 (2005); *BMG Music v. Gonzalez*, 430 F.3d 888, 890 (7th Cir. 2005); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1017 (9th Cir. 2001).

125. See 17 U.S.C. § 505 (2013) (allowing 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 § 505. *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534–35 (1994).

defendant prevails and is awarded attorney fees, his¹²⁶ profit is zero at best.¹²⁷ 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 \$5000. 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 demand letter is to settle. 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 is equivalent to suggesting that every trespass should lead to litigation. Like other property rights, copyright is a private right that creates the option of enforcement. We expect landholders and copyright owners alike to enforce their rights when their benefits outweigh their 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 is an important screening mechanism that deters marginal complaints and trivial claims. Filing fees and the like help allocate judicial resources toward 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 not hundreds of thousands of dollars.¹²⁸ The threat of statutory damages makes resistance—even to unreasonable plaintiff demands—irrational from an economic perspective. At their current levels,

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

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

128. *Capitol Records, Inc. v. Alaujan*, 593 F. Supp. 2d 319, 321 (D. Mass. 2009); *Capitol Records Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1213, 1227 (D. Minn. 2008).

statutory damages are a coercive tool that can be wielded just as effectively against the innocent as the guilty.

Ideally, Congress would reform statutory damages, but even if Congress fails to do so,¹²⁹ courts have a statutory and constitutional obligation to oversee the application of statutory damages.¹³⁰ Courts should recognize that, in the typical BitTorrent lawsuit, statutory damages are punitive: it is hard to see how damages that clearly exceed any plausible measure of compensation or restitution could be anything else.¹³¹ This does not mean that there is no place for them. On the contrary, it is quite likely that punitive damages are necessary to deter illegal file-sharing. Like parking violations and cheating on taxes, the probability of a file-sharer being detected is low but the cumulative harm of widespread infringement may be significant.¹³² 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 wrong suffered, they should be justified under a deterrence theory 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.* approved a \$53 million settlement for statutory damages and attorney fees against a music streaming service that relied on an aggressive (and ultimately flawed) reading of the fair

129. 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. 529, 536-44 (2013). Note also that Canada recently amended its copyright law to reduce the range of statutory damages to a maximum of \$5000 for non-commercial infringement. Copyright Act, R.S.C. 1985, c. C-42, s. 38.1 (2012).

130. Section 504 expressly states that 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.").

131. Tellingly, section 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 17 U.S.C. § 504(c) (1976), with 17 U.S.C. § 25(b) (1926).

132. There is 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 video games. See generally Stan J. Liebowitz, *File Sharing: Creative Destruction or Just Plain Destruction?*, 49 J.L. & ECON. 1, 15-16 (2006) (finding an effect); Alejandro Zentner, *Measuring the Effect of File Sharing on Music Purchases*, 49 J.L. & ECON. 63, 65-66 (2006) (same). 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); Joel Waldfogel, *Bye, Bye, Miss American Pie? The Supply of New Recorded Music Since Napster* 7-9 (Nat'l Bureau of Econ. Research, Working Paper No. 16882, 2011), available at <http://www.nber.org/papers/w16882.pdf> (finding no evidence that changes since Napster have affected the quantity of new recorded music or artists coming to market).

use doctrine.¹³³ Rational deterrence theory suggests that where the probability of detection is low, damages must be higher to reduce the expected gains from law-breaking.¹³⁴ The probability that MP3.com would be detected was 100%, however, because it was bound to attract the record industry's attention. The damages/profits accrued by the time of 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 approve a settlement well above the statutory minimum. 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."¹³⁵ Although copyright scholars have addressed the possible unconstitutionality of statutory damages, courts have not yet applied the constitutional standards of tort litigation to copyright law.¹³⁶

Statutory damages should take the need for deterrence into account, but the courts must recognize that there are logical and constitutional limits to the level of damages that deterrence justifies. 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.¹³⁷ Copyright owners should not be indifferent to whether the public thinks copyright penalties are fair.¹³⁸ Depoorter, Van Hiel, and Vanneste offer substantial experimental evidence to suggest that in the context of file sharing, effective

133. See generally *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349 (S.D.N.Y. 2000); Jim Hu, *MP3.com Pays \$53.4 Million to End Copyright Suit*, CNET (Nov. 15, 2000, 11:20 AM), http://news.cnet.com/MP3.com-pays-53.4-million-to-end-copyright-suit/2100-1023_3-248583.html.

134. Gary S. Becker, *Crime and Punishment: An Economic Approach*, in *ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT* 1, 17 (Gary S. Becker & William M. Landes, eds., 1974).

135. *Campbell*, 538 U.S. at 425. The Court also noted that "award[s] of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *Id.* (citing *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23–24 (1991)); see also *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 581 (1996).

136. See, e.g., *Sony BMG Music Entm't v. Tenenbaum*, 719 F.3d 67, 71–72 (1st Cir. 2013) (finding that an award of \$675,000 for infringement of 30 songs did not offend due process); *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 24 songs), *cert. denied*, 133 S. Ct. 1584 (2013); *Zomba Enters., 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); *Lowry's Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 458–60 (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).

137. The United States Sentencing Guidelines section 5E1.2 establishes a fine range of \$17,500 to \$175,000 for crimes at a base offense level from 32–34, such as kidnapping. See U.S. SENTENCING GUIDELINES MANUAL §§ 2A4.1, 5E1.2 (2013).

138. See generally Ben Depoorter et al., *Copyright Backlash*, 84 S. CAL. L. REV. 1251 (2011).

deterrence may be impossible “without raising enforcement to levels that undermine support for the underlying rules” and that “when enforcement reaches levels that are perceived as normatively excessive, this can have the inadvertent effect of moving behavior in the opposite direction from that intended by the law.”¹³⁹ They conclude, “[i]n the context of copyright law, enforcement has increased the gap between the social and legal perceptions of the law.”¹⁴⁰ Indeed, without completely discounting deterrence effects, the weight of evidence in sociology and behavioral psychology suggests that obeying the law is more normative than instrumental.¹⁴¹ Tom Tyler’s canonical research found that whether people obey the law depends on their perception that the law is legitimate; legitimacy in turn is influenced by perceptions of fairness.¹⁴² 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.¹⁴³ Copyright owners who want to reinforce their normative appeals with deterrence should increase the perceived probability of detection instead of pursuing million-dollar verdicts in show trials.¹⁴⁴ To the extent a theory of rational deterrence justifies large statutory damages, they must still comply with the Due Process clause. In *BMW of North America v. Gore*, the U.S. Supreme Court indicated that if punitive damages exceed compensatory damages by a ratio of more than 10 to 1, they probably violate the constitutional guarantee of Due Process.¹⁴⁵ Later, in *State Farm Mutual Automobile Insurance 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 without 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 what the court “considers just.”¹⁴⁸

139. *Id.* at 1256.

140. *Id.* at 1252.

141. *Id.* at 1267–68. See generally TOM R. TYLER, WHY PEOPLE OBEY THE LAW (1990).

142. TYLER, *supra* note 141, at 25.

143. Cf. Depoorter et al., *supra* note 138, at 1268–69.

144. See *Capitol Records, Inc. v. Alaujan*, 593 F. Supp. 2d 319, 321–22 (D. Mass. 2009); *Capitol Records Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1213, 1227 (D. Minn. 2008).

145. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

146. *Id.* at 425 (citing *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23–24 (1991); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 581 (1996)).

147. *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 676 (7th Cir. 2003) (explaining that the need for deterrence may require damages in excess of the *State Farm* formula).

148. 17 U.S.C. § 504(c)(1) (2012).

The 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 often-undetected violations. 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 the United States die in motor vehicle crashes that involve an alcohol-impaired driver” every day, and “[t]he 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 statutory damages available in Internet file-sharing cases would not impair general deterrence campaigns like those of the RIAA.¹⁵³ The prospect of nontrivial sanctions combined with an award of attorney’s fees will encourage accused infringers who are in fact liable to admit their wrongdoing and settle quickly. But the amounts at stake are not so great that no reasonable person could ever be expected to defend themselves against an erroneous accusation. Moreover, intermediaries that are currently in the business of monetizing infringements on a low-penalty/high-volume basis would not be greatly affected by a lower range of statutory damages. For example Rightscorp (aka DigitalRights Corp) and another company, CEG TEK, offer alleged infringers the chance to settle claims of copyright infringement for as

149. Vehicles parked in a space reserved for persons with disabilities without properly displaying disability license plates or a parking placard may be fined a minimum of \$250. 625 ILL. COMP. STAT 5/11-1301.3 (2014).

150. In lieu of more systematic data is 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 \$1700 fine with one year’s supervision. “[P]rosecutors dropped all other charges, including battery, leaving the scene of an accident and child endangerment.” The reporter’s drunk-driving was detected after a minor traffic accident in a Taco Bell parking lot. Clifford Ward, *CBS 2 Reporter Savini Pleads Guilty to DUI*, CHI. TRIB. (Feb. 4, 2014, 10:00 AM), <http://www.chicagotribune.com/suburbs/naperville-lisle/chi-savini-case-could-be-resolved-tuesday-20140203-story.html>.

151. *Impaired Driving: Get the Facts*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/motorvehiclesafety/impaired_driving/impaired_drv_factsheet.html (last updated Oct. 7, 2014).

152. Samuelson & Wheatland, *supra* note 56, at 509–10 (recommending that “[c]ourts should also have the power to lower statutory damages below the . . . minimum when an award based on this minimum would be grossly disproportionate to the harm caused”).

153. See *supra* notes 37–38 and accompanying text.

little as \$20 per infraction.¹⁵⁴ These settlement offers are communicated by DMCA takedown notices which the ISP is obliged to pass on to the relevant account holder.¹⁵⁵ The emphasis in these notices is the opportunity for the alleged file-sharer to settle inexpensively and quickly. These companies now send out tens of millions of these notices on behalf of copyright owners in the United States alone.¹⁵⁶

Reforming statutory damages would allow copyright owners to continue to litigate to deter infringement and steer consumers toward the legitimate market, but it would keep litigation from being an independent revenue stream.

This is not just an economic reform; it will also 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 upstanding plaintiffs and lawyers pursuing MDJD lawsuits as a revenue stream, but there is substantial evidence that the easy money of statutory damages has attracted those with dubious ethics and a propensity for cutting corners.¹⁵⁷ The threat of massive statutory damages gives plaintiffs and their attorneys enormous leverage with no accountability in John Doe file sharing litigation. Modern copyright law has invited blackmail and abuse of process by divorcing statutory damages from compensation and deterrence; that invitation has been eagerly accepted by some and it should be revoked.¹⁵⁸

154. See *Sample Settlement*, RIGHTSCORP, <http://www.rightscorp.com/enforcement/sample-settlement-agreement> (last visited Dec. 26, 2014).

155. See generally Ernesto, *Anti-Piracy Firm Wants to Fine Aussie and Canadian File-Sharers*, TORRENTFREAK (July 18, 2014), <http://torrentfreak.com/anti-piracy-firm-wants-fine-aussie-canadian-file-sharers-140718/>.

156. According to a recent press release, Rightscorp has “received settlements from subscribers of more than 140 ISPs and closed over 75,000 cases of copyright infringement to date.” *Rightscorp’s Copyright Monetization Service Increases Representation of ‘Billboard’ Hot 100 Songs*, RIGHTSCORP (July 31, 2014, 7:06 AM), <http://www.prnewswire.com/news-releases/rightscorps-copyright-monetization-service-increases-representation-of-billboard-hot-100-songs-269354671.html>.

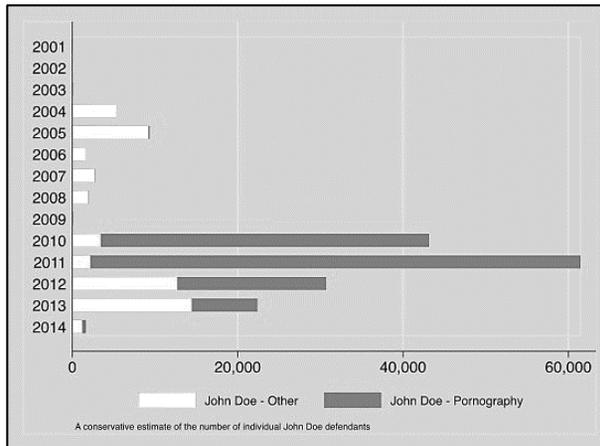
157. See *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 82 (E.D.N.Y. 2012); see also *Righthaven LLC v. Democratic Underground, LLC* 791 F. Supp. 2d 968, 979 (D. Nev. 2011) (ordering Righthaven to show cause “why it should not be sanctioned for [] flagrant misrepresentation[s] to the Court”).

158. Plaintiff Voltage Pictures, LLC has also filed multiple-defendant cases in at least one state court under a theory of trademark infringement. The relevant cause of action does not allow for statutory damages, but there would be nothing to prevent Voltage from threatening the account holders of the IP addresses it seeks to discover with statutory damages under copyright once it learns their identities. See, e.g., *Voltage Pictures, LLC, v. Doe No. 1*, Nos. 6:14-cv-812-MC, 6:14-cv-816-MC, 2014 WL 2830845, at *1 (D. Or. June 20, 2014) (holding state law claim was preempted by copyright law).

2. Denying Joinder, Severing Cases

A second option is to deny joinder (sever cases) as many courts have done.¹⁵⁹ Denying joinder increases the plaintiff's enforcement cost: it adds a \$350 filing fee for each defendant, and it demands substantially more court time from the plaintiff's lawyers. If courts force disfavored plaintiffs to endure greater expense because they doubt the social value of the copyright work, they abuse their discretion.¹⁶⁰ But refusing to allow plaintiffs to circumvent filing fees is legitimate. Filing fees are "a threshold barrier, albeit a modest one, against the filing of frivolous or otherwise meritless lawsuits."¹⁶¹ 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 open for litigation aimed at general deterrence or example setting. Because joinder makes abusive litigation tactics more likely, courts should use their discretion to curb such potential abuse. Disallowing joinder in MDJD cases would help ensure that litigation is used to protect the plaintiff's copyrights and not simply to monetize infringement.¹⁶²

Figure 5. Individual Doe Defendants in John Doe Copyright Cases, 2001–2014



159. *See supra* note 78 (citing examples of cases concluding joinder is impermissible or inappropriate).

160. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (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.")

161. *Patrick Collins, Inc. v. Does 1–38*, 941 F. Supp. 2d 153, 166 (D. Mass. 2013) (quoting *Third Degree Films v. Does 1–47*, 286 F.R.D. 188, 198 (D. Mass. 2012)) (internal quotation marks omitted).

162. *Id.* ("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 many courts allowed plaintiffs to join thousands of defendants in a single action, my data shows increasing judicial resistance. Figure 5, above, shows a conservative estimate of the number of Doe defendants in these cases.¹⁶³ As shown in Figure 5, the number of individual defendants peaked in 2010 and has declined since. 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 declined since 2011. Although the data does not definitively establish this, it does suggest that, in response to this mounting judicial skepticism, plaintiffs are suing fewer defendants in each MDJD suit to make joinder more palatable.¹⁶⁴

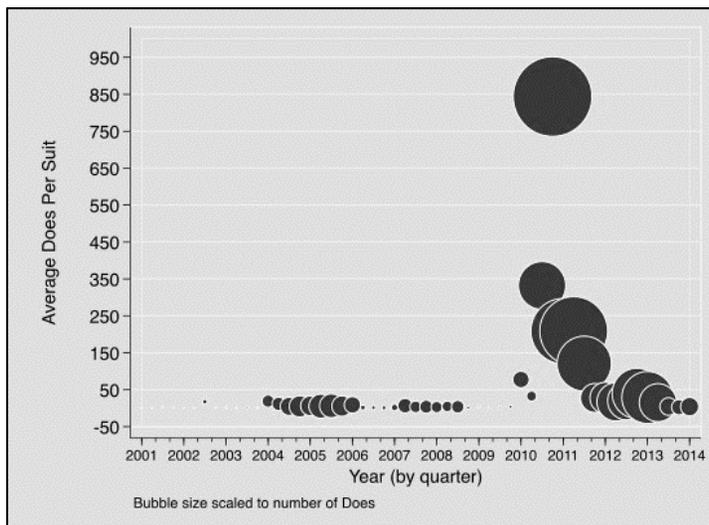
The opportunism associated with the current wave of MDJD suits is not confined to this format. Lawyers have reported that some plaintiffs have now abandoned the MDJD form for BitTorrent litigation and are now suing individual IP addresses and demanding significantly higher settlement amounts. The most significant actor in this field, Malibu Media, LLC only filed suits against single IP addresses in the first six months of 2014, demanding higher settlement amounts to compensate for its increased costs. Malibu Media filed nearly 2000 such cases from January 1, 2013 to June 30, 2014. Lawyers report that Malibu Media has increased its settlement demand for these cases.

Figure 6 illustrates the average number of John Doe defendants per suit filed on a year-by-year basis. The individual bowls in Figure 6 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, there has been a steady increase in filings. We should not expect this litigation environment to remain static. Malibu Media, now the most prolific litigator in this area, has adapted its strategy and no longer relies on joinder at all.

163. As noted previously, the methodology of counting John Doe defendants relies on the case captions themselves; it is likely to be underinclusive. See *supra* Tables 1 & 2 and accompanying text.

164. 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 6. 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.¹⁶⁵ Residency, minimum contacts, or purposeful availment under most state laws establishes personal jurisdiction.¹⁶⁶ Defendants are in a Catch-22. They do not want to be named individually, but until they are, some courts will not grant a motion to dismiss for lack of personal jurisdiction.¹⁶⁷ Nonetheless, as courts have grown more skeptical of

165. FED. R. CIV. P. 12(b)(2).

166. See generally *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (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.” *Id.* at 297.

167. 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) (noting that because Putative Defendants are not yet parties to the suit, their argument that the court lacks personal jurisdiction is premature); *First Time Videos, LLC v. Does 1–76*, 276 F.R.D. 254, 259 (N.D. Ill. 2011) (“Defendants arguments are once again premature.”); *MGCIP v. Does 1–316*, No. 10 C 6677, 2011 WL 2292958, at *2 (N.D. Ill. June 9, 2011) (“[P]utative defendants’s [sic] motions to dismiss for lack of personal jurisdiction are [] premature at this stage of the litigation.”). For further discussion, see, for example, *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 180–81 (D. Mass. 2008) (noting “[i]t would be 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 the complaint because of insufficient allegations of personal jurisdiction but noting that allegations were also insufficient to satisfy joinder requirements).

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

Severing cases would be inefficient if it required multiple judges to adjudicate the same issues, over and over again, for the exact same plaintiffs. But 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 (iii) the plaintiff's technical experts who log the IP addresses to begin with. Consolidation could be for limited purposes including (1) assessing the validity and ownership of the copyrights; (2) determining the reliability of plaintiff's proffered expert; and (3) 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

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 joinder and discovery. Even in the absence of legislative reform, 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 unavailable unless the plaintiff does not seek or 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 \$3000.¹⁶⁸

(ii) The court could appoint an independent attorney to supervise the discovery process and ensure that the names and addresses of individuals are not given to the plaintiff until the initial round of "it wasn't me defenses" have been raised and investigated. This will 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 a mini-trial on their "it wasn't me" defenses.

(iv) The court could grant defendants leave to proceed anonymously to protect their privacy, at least until liability has been definitively established.¹⁶⁹

168. See *supra* notes 149–52 and accompanying text.

169. *TCYK, LLC v. Does 1–62*, No. 13 C 3842, 2013 WL6671675, at *3 (N.D. Ill. Dec. 18, 2013) ("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

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

V. CONCLUSION

Although patent trolls have drawn more attention, there is an explosion of copyright trolling in U.S. federal district courts. The data in this Article shows that copyright trolling in the form of John Doe 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 John Doe litigation is dominated by claims of infringement relating to pornographic films. Highlighting these particular trends and their implications, this study has significant implications for the wider troll debate. This Article shows that previous studies have missed the core of the copyright troll phenomenon.¹⁷⁰

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 than licensing those uses in advance could ever have been. As the John Doe cases show, statutory damages stack such that the defendant's liability is effectively irrelevant to the settlement calculation.

The policy implications of John Doe litigation need to be carefully considered. One of the core problems with this type of litigation is the lack of due process. Once identified, rightly or wrongly, the rational defendant will settle in almost every case because of the threat of statutory damages and the difficulty of disproving infringement. Statutory damages and the settlements procured in the shadow of statutory damages are arbitrary and disproportionate to the underlying offense.

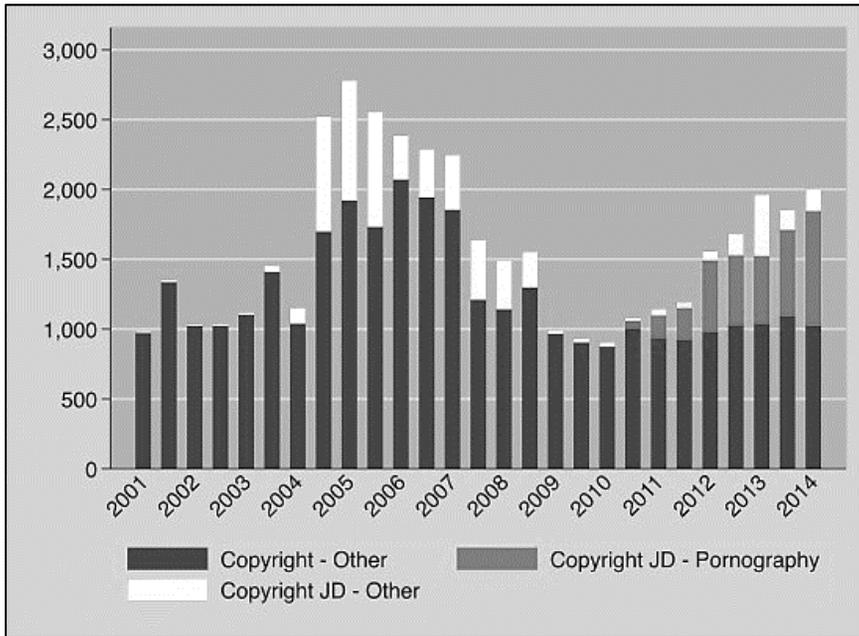
But these John Doe lawsuits are not invariably, or even primarily, frivolous. Mostly, the plaintiffs are the rights owners of copyrighted works that have been downloaded without permission in clear violation of the Copyright Act. In the aggregate this illegal downloading harms copyright owners and reduces their incentives to produce creative works, but avoiding this harm or being compensated for it has nothing to do with the current wave of John Doe litigation. These cases are about monetizing infringement over and above deterrence and compensation. Monetizing infringement is perfectly legal, but it is hard to square with the motivating purpose of copyright law: promoting social progress.¹⁷¹

copyrighted material.” (quoting *TCYK, LLC v. Does 1–87*, No. 13 C 3845, 2013 WL 3465186, at *4 (N.D. Ill. July 10, 2013)).

170. See generally Balganesch, *supra* note 23. One previous study focused on the application of fair use where copyright trolls attempt to exploit previously tolerated uses. See generally Brad A. Greenberg, *Copyright Trolls and Presumptively Fair Uses*, 85 U. COLO. L. REV. 53 (2014). Another argued that an independent market for copyright claims could be beneficial. See generally Shyamkrishna Balganesch, *Copyright Infringement Markets*, 113 COLUM. L. REV. 2277 (2013).

171. See U.S. CONST. art. I, § 8, cl. 8.

APPENDIX A: COPYRIGHT LAWSUITS FILED IN U.S. FEDERAL COURTS:
2001-2014



APPENDIX B: COPYRIGHT SUITS FILED IN U.S. DISTRICT COURTS:
2001 TO JUNE 30, 2014

The table below is current to June 30, 2014. The top section of the table shows how many cases were filed under the 820 code for Copyright in U.S. Federal District Courts in the years 2003 to 2014. The bottom section of the table translates the same information into percentages. The “Copyright-All” category includes all copyright cases. “Copyright-John Doe” includes all copyright cases where the defendant was a John Doe, without differentiating as to the underlying subject matter of the complaint. “Copyright-John Doe (Porn)” is a subset of the previous category and includes all cases identified as relating to pornography. The final category, “Malibu Media v. Doe(s)” includes every case filed by Malibu Media against one or more John Does.

Raw Numbers													
Year	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014*	
Copyright - All	2571	3674	5336	4674	3887	3046	1924	1984	2336	3237	3817	2004	
Copyright - John Doe	63	936	1685	661	822	610	56	105	475	1229	1670	977	
Copyright - John Doe (Porn)	3	0	1	0	1	4	1	53	386	1011	1267	827	
Malibu v. Doe(s)	0	0	0	0	0	0	0	0	0	332	1034	817	
Percentages													
Copyright - All	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	
Copyright - John Doe	2.45	25.48	31.58	14.14	21.15	20.03	2.91	5.29	20.33	37.97	43.75	48.75	
Copyright - John Doe (Porn)	0.12	0.00	0.02	0.00	0.03	0.13	0.05	2.67	16.52	31.23	33.19	41.27	
Malibu v. Doe(s)	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	10.26	27.09	40.77	

* 2014 includes cases filed from January 1 to June 30, 2014. Source data from PACER.