JOINDER IS COMING: WHY DENYING SWARM JOINDER IN BITTORRENT CASES MAY DO MORE HARM THAN GOOD

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I. INTRODUCTION

In 2017, the seventh season of the TV show Game of Thrones[1] ("GOT") was pirated[2] 1.03 billion times.[3] The true magnitude of this number may require some context. The premiere of GOT's seventh season was viewed by 16.1 million viewers,[4] either on its broadcasting television network or through the network's on-demand online platform.[5] This high viewership broke records among the network's TV shows as "the most-watched season premiere for any HBO series" up to that date.[6] The quantified popularity of that particular episode translated ten-fold onto piracy statistics, as the episode was illegally downloaded or streamed more than ten times the number of viewers it had during its airing.[7] This trend was consistent throughout the show's season, and the season's finale was pirated more than 120 million times within three days of its airing.[8]

The illegal download of protected works is not a problem exclusive to television. The Recording Industry Association of America ("RIAA") estimates that in the ten years that followed the creation of the peer-to-peer ("P2P") file-sharing site Napster in 1999, "music sales in the U.S. [] dropped 47 percent, from $14.6 billion to $7.7 billion."[9] This practice

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1. A fantasy-drama television series adapted from George R. R. Martin's series of novels titled A Song of Ice and Fire.

2. By "pirated" the author means illegally downloaded, distributed, copied, or streamed. This Article will refer to those who engage (or allegedly engage) in piracy, as "pirates."

3. Travis M. Andrews, *"Game of Thrones" Was Pirated More Than A Billion Times*, THE WASH. POST (Sept. 8, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/09/08/game-of-thrones-was-pirated-more-than-a-billion-times-far-more-than-it-was-watched-legally/?noredirect=on&utm_term=.fbc9b81a951c [https://perma.cc/6WXY-43D9].

4. *Id*.

5. The show is broadcasted through HBO's network and is also available through HBO's streaming platforms "HBO Go" and "HBO Now."

6. Joe Otterson, *"Game of Thrones" Season 7 Premiere Shatters HBO Rating Records*, VARIETY (July 17, 2017, 1:04 PM), http://variety.com/2017/tv/news/game-of-thrones-season-7-premiere-ratings-1202497751/ [https://perma.cc/F97F-A36R].

7. Andrews, *supra* note 3 (The premiere of the season was downloaded 187.4 million times).

8. *Id*.

9. *Why Does the RIAA Hate Torrent Sites So Much?*, MUSIC BUS. WORLWIDE (Dec. 6, 2014), https://www.musicbusinessworldwide.com/why-does-the-riaa-hate-torrent-sites-so-much/ [https://perma.cc/Z38Y-SGTG].

has also been a hard hit to the "big screen."[10] A study in 2016, estimates that a $1.3 billion loss of potential box-office revenue every year can be attributed to piracy.[11]

Evidently, these piracy statistics and their impact on the entertainment industry are the symptom of a much larger problem. Copyrighted works of music, films, TV shows, books, magazines, and software applications are currently being downloaded and uploaded through P2P protocols by the thousands, as the global file-sharing[12] traffic in 2018[13] is expected to be around 6,717 petabytes.[14] Despite the high number of protected materials being shared (through file-sharing), the creators do not realize the benefit of this vast consumption of their works. The damage done to the authors of these protected works is one of opportunity cost. Consumption of their works increases while revenue becomes stagnant—effectively decreasing the value of the work. Nonetheless, this loss is akin to proving a negative: how can the author be hurt by the free distribution of a protected work if the author never had possession of the benefit of selling the work? Some commentators—those that are willing to admit that piracy does *some* damage—go as far as stating that the copyright holder's actual loss to piracy is not *that* bad.[15] Efforts to eradicate the piracy problem have yielded little to no results—as actions against piracy-supporting websites are met with the sprouting of newer websites that replace those that get taken down—entangling copyright holders and governmental agencies in a never-ending proverbial game of "whack-a-mole" with pirates.[16] Nevertheless, copyright holders are

10. A term utilized to refer to the cinema industry.

11. Liye Ma et al., *The Dual Impact of Movie Piracy on Box-Office Revenue: Cannibalization and Promotion*, CARNEGIE MELLON UNIV. TEPPER SCH. OF BUS. AND HEINZ COLL. 2 (Feb. 2016), http://dx.doi.org/10.2139/ssrn.2736946 [https://perma.cc/ND2N-QZZK] ("Specifically, our estimates suggest that box-office revenue would be $1.3b (15%) higher per year if piracy could be eliminated entirely from the theatrical window and that piracy is particularly damaging to early sales.").

12. File-sharing is the practice of share electronic files between computers. File-sharing has become the sought-out method of sharing files, whether protected or otherwise, across the internet. For more information on how file-sharing works, see Mitchell, *infra* note 18.

13. *See* Cisco Systems, *Data Volume of Global Consumer File Sharing Traffic from 2016 Until 2021 (in Petabytes per Month)*, STATISTA, https://www.statista.com/statistics/267182/forecast-for-global-internet-traffic-through-file-sharing/ [https://perma.cc/J9WD-KJRZ] (last visited Aug. 25, 2018).

14. *See* Tim Fisher, *Terabytes, Gigabytes, & Petabytes: How Big are They?*, LIFEWIRE.COM (Apr. 24, 2018), https://www.lifewire.com/terabytes-gigabytes-amp-petabytes-how-big-are-they-4125169 [https://perma.cc/34MS-49JG] (A petabyte is a unit of measurement for data. One petabyte is equal to one million gigabytes).

15. Ernesto Van der Sar, *Music Piracy Not That Bad, Industry Says*, TORRENTFREAK.COM (Jan. 18, 2009), https://torrentfreak.com/music-piracy-not-that-bad-industry-says-090118/ [https://perma.cc/V25F-DV2Q] (The argument of the article's author is based on statements made by some industry players who have admitted that not every pirated song is a lost sale).

16. Timothy Geigner, *The Crackdown on Torrent Sites Has Produced Many More Moles to Whac*, TECHDIRT.COM (Sept. 8, 2017, 11:51 AM), https://www.techdirt.com/articles/20170907/10263638165/crackdown-torrent-sites-has-produced-many-

not ready to throw in the towel in the fight for the protection of their rights.

As of late, and with the adoption of the BitTorrent protocol,[17] some copyright holders have hit a brick wall when attempting to get restitution from defendants who infringe via P2P file-sharing.[18] The collective haul of defendants into court—commonly referred to as a "swarm joinder"[19]—has created a split at the federal district court level. Courts have disagreed over whether copyright holders should be able to join defendants in swarm joinder fashion or have their complaints severed, forcing copyright holders to go after each defendant individually. The crux of this split rests largely on the district courts' interpretation of Rule 20 of the Federal Rules of Civil Procedure ("FRCP"). At the time of the writing of this Article, only one circuit court—the U.S. Court of Appeals for the D.C. Circuit—has pitched in on the discussion, finding swarm joinders to not satisfy the requirements for permissive joinder under FRCP 20. Several pieces of scholarly writing can be found weighing in on the discussion as well, with the majority siding with the courts rejecting swarm joinder.[20]

This Article respectfully disagrees with the district courts whose decisions purport to align with the D.C. Circuit's decision, insofar as they misapply the Circuit's precedent and instead use denial of swarm joinder as a tool to preemptively punish "trolls."[21] Instead, this Article

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more-moles-to-whac.shtml [https://perma.cc/5UQB-DJV7].

17. The BitTorrent protocol is a decentralized method of peer-to-peer communication that allows users to transfer data between each other's computers. The Author explains how the protocol works later in this Article.

18. Bradley Mitchell, *Understanding P2P File Sharing*, LIFEWIRE.COM (Aug. 25, 2017), https://www.lifewire.com/definition-of-p2p-818026 [https://perma.cc/KYU8-JHP6] (explaining that P2P (or peer-to-peer) file sharing refers to the "distribution of digital media over a [decentralized] network, in which the files are located on individuals' computer[s] and shared with other members of the network").

19. *See* ME2 Prods. v. Bayu, 2017 WL 5165487 at *2 (D. Nev. Nov. 7, 2017) (The nature of the BitTorrent Protocol where users are able "to join 'swarms' [which are] cluster[s] of connected computers where[] users can simultaneously upload to and download from other users").

20. *See* Joshua M. Dickman, *Anonymity and the Demands of Civil Procedure in Music Downloading Lawsuits*, 82 TUL. L. REV. 1049 (2008) (claiming that John Doe lawsuits should not allow permissive joinder because it encroaches on the First Amendment); *see also* Joshua A. Druckerman, *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) (arguing that swarm joinder claims are inherently flawed because they raise fairness and due process concerns); *but see* John C. Heinbockel, *The Undiscovered Country: Fixing Copyright by Rethinking Pretrial Litigation*, 5 AM. UNIV. INTELL. PROP. BRIEF 152 (2014) (suggesting that swarm joinder can realistically meet the requirements of FRCP 20 and be useful in deterring infringers but with the use of special masters to assist the judges in determination of whether claims have merit).

21. *See generally* Jonathan Bailey, *What Is a Copyright Troll?*, PLAGIARISM TODAY (Apr. 12, 2018), https://www.plagiarismtoday.com/2018/04/12/what-is-a-copyright-troll/ [https://perma.cc/M8T9-HRZJ] (defining a copyright troll as someone who, while not really interested in exercising copyright protection rights, uses excessive and aggressive litigation tactics as a source of profit).

proposes that the courts should allow copyright holders to continue subpoenaing defendants in swarm joinders—at least through the early stage of the proceedings—and shift the focus of the debate to ways in which to prevent the misuse of the defendants' identification information obtained as a result of these subpoenas. Part II offers the reader a background, for context, on the main issues contemplated in this Article, including a brief primer on Copyright and FRCP 20 as well as P2P file-sharing and its evolution with the BitTorrent Protocol. Part III takes a look at some of the earlier case law that deals with swarm joinders and the road leading up to the D.C. Circuit's decision. Part IV summarizes the decisions issued after the D.C. Circuit weighed in, all the way up to the *Cell Film Holdings LLC v. McCray*[22] decision by the U.S. District Court for the District of Nevada. Lastly, Part V offers a more detailed discussion of the most common arguments against allowing swarm joinders. Part V also presents some legal and policy arguments that support a change in the current course of swarm joinder cases, in favor of allowing the use of swarm joinder.

II. BACKGROUND

Advances in technology have made possible the easy download of copyrighted work to personal computers, and with it, a class of cases referred to as "BitTorrent" cases arose.[23] This Part will outline the relevant information of all the moving pieces in BitTorrent cases, from a primer on the Copyright statute, FRCP 20 and 21, and the two main file-sharing protocols: client-server and peer-to-peer.

A. The Copyright Statute and What It Protects

Article I Section 8 Clause 8 of the Constitution of the United States provides that "Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[24] This clause, known as the copyright clause,[25] is the foundation upon which Congress enacted 17 U.S.C. §102.[26]

The statute protects works that are fixed in tangible mediums of expression including several categories of works such as books and novels, melodies and songs, plays and operas, pictures and sculptures,

22. 2017 U.S. Dist. LEXIS 196624 *
23. *See generally* On the Cheap, LLC v. Does 1-5011, 280 F.R.D. 500 (N. Dist. Cal. 2011).
24. U.S. Const. art. I, § 8, cl. 8.
25. *See* 1 Nimmer on Copyright § 1.02 (2017).
26. 17 U.S.C. § 102.

movies and other videos, sound recordings, and works of architecture.[27] Piracy has reached almost all of these categories in one way or another: books, novels, songs, scripts, pictures, movies, videos, and sound recordings can all be found on pirate websites, available for illegal download, in addition to other protected works such as software and video games.[28]

However, not every work that falls within these categories enjoys copyright protection; there are requirements and caveats to the process. First, §102(a) has an originality requirement that is fairly easy to meet.[29] In order for a work to be considered original under the statute, the work needs to (1) be the work of its author and not a copy, and (2) possess some *minimal* degree of creativity.[30]

The other requirement under §102 is that the original work must be "fixed in tangible medium[s] of expression."[31] The definition of a "tangible medium" is an important one, because a literal interpretation would leave outside of the statute's scope those materials reproduced electronically.[32] Although one cannot necessarily *touch* the code of a software program, its existence in a hard drive or Compact Disc makes it so that it is "sufficiently permanent or stable" to be "*perceived*, *reproduced*, or otherwise *communicated*," and that provides it with copyright protection.[33]

Lastly, copyright protection is only available to the "expression of [an] idea" and thus, does not extend to facts or to the idea itself.[34] In summary, an author that has an *original* work fixated in a *tangible* medium is able to obtain protection of the *expression* in the work, but not on the idea expressed.

Once protection has been obtained, the copyright holder owns the exclusive rights to create or authorize the reproduction, derivation, distribution, performance, display, and transmission of the protected work.[35] However, copyright protection is not absolute, and 17 U.S.C. §107 provides that, if the work is used in activities that constitute fair

27. *Id*.

28. For an example of the categories available for download see The Pirate Bay website at https://thepiratebay.org/browse [https://perma.cc/S5PQ-B8WJ] (last visited on Aug. 25, 2018).

29. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 358, (1991) ("[T]he originality requirement is not particularly stringent").

30. *Id*. at 345.

31. 17 U.S.C. § 102.

32. Some examples would include a song reproduced from a computer instead of a physical CD, a movie played in an electronic device instead of through a DVD, or a piece of software running in a computer instead of from an installation disk.

33. *See* Apple Comput., Inc. v. Franklin Comput. Corp., 714 F.2d 1240, 1247 (3d Cir. 1983) (emphasis added).

34. *See* M. Kramer Mfg. Co. v. Andrews, 783 F.2d 421, 433 (4th Cir. 1986).

35. 17 U.S.C. § 106.

use, the copyright holder cannot sue the user, even if the copyright holder did not grant any license or permission to use the work.[36] If the use does not meet the requirements to constitute fair use, the copyright is considered infringed and the copyright holder may file a claim for copyright infringement against the user.[37] The remedies available to the copyright holder under the statute include injunctions to prevent or restrain the infringement of the copyright,[38] impounding of the infringing works or materials,[39] actual damages suffered and the copyright holder's profits lost because of the infringement or statutory damages,[40] and costs of court and attorney fees.[41] Additionally, under some specific circumstances, infringers may find themselves subject to criminal charges for infringement.[42]

In order to find out if their material is being downloaded illegally, copyright holders often make use of the same tools that pirates use to obtain protected works.[43] Copyright holders search the name of their work and, just like any other user, can see the trackers generated through the BitTorrent client.[44] Because the tracker only identifies participants of the swarm through IP addresses,[45] once the copyright holders have confirmed the illegal download of their work, they often proceed to file a nameless lawsuit to acquire the identity of the IP addresses' owners and to properly name them as defendants.[46]

B. John Doe Lawsuits and Obtaining the Defendant's Identity

Claims against defendants engaged in online piracy are known as

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36. 17 U.S.C. § 107 (The criteria to determine whether a use qualifies as fair use under the statute includes: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the original work that is used, and the effect on the market for the original work).

37. *See generally* 17 U.S.C. § 501.

38. *See* 17 U.S.C. § 502.

39. *Id*. at § 503.

40. *Id*. at § 504(a).

41. *Id*. at § 505.

42. *Id*. at § 506.

43. *See How Can a Copyright Holder Find Out If I Have Copyrighted Materials on My Computer?* HARV. UNIV. DCMA https://dmca.harvard.edu/faq/how-can-copyright-holder-find-out-if-i-have-copyrighted-materials-my-computer [https://perma.cc/ZL57-JHSE] (last visited Aug. 25, 2018).

44. *See* Bradley Mitchell, *What Is a Bit Torrent Tracker?*, LIFEWIRE.COM (Jan. 3, 2018), https://www.lifewire.com/what-is-a-bit-torrent-tracker-817431 [https://perma.cc/9G96-37UJ].

45. *See* Chris Hoffman, *How Does BitTorrent Work?*, HOW-TO GEEK (Sept. 21, 2016), https://www.howtogeek.com/141257/htg-explains-how-does-bittorrent-work/ [https://perma.cc/Z2YR-48AZ].

46. *See* Cell Film Holdings LLC v. McCray, 2017 U.S. Dist. LEXIS 196624, at *5 (D. Nev. Nov. 29, 2017) ("Because the defendants are initially unidentified, the plaintiff [has to] file[] an ex parte motion [to obtain] the names and addresses" of the defendants).

"John Doe" lawsuits.[47] A typical John Doe claim generally follows a standard set of steps. First, the copyright holders file a claim in federal court against nameless defendants that are generally only identified and differentiated by their IP address.[48] The copyright holders then file a motion requesting the court to waive the discovery requirements set forth in Rule 26[49] of the FRCP and allow the copyright holders to subpoena the defendants' Internet Service Providers ("ISPs") for the defendants' identifying information[50] pursuant to FRCP 45.[51] If the court grants the motion, the court will subpoena the ISPs for this information, while allowing the ISPs to notify the defendants about the request for their information. This gives defendants a chance to protest the release of their information and contest the subpoena in general.[52] In most of the cases, there is at least one defendant who objects to the release of the information by raising jurisdiction and joinder issues. Therefore, once the court receives the defendants' answers, it determines whether the copyright holders' claims should be allowed to proceed as filed or whether they should be severed to address any jurisdiction or joinder issues.[53]

C. Rule 20 of the Federal Rules of Civil Procedure: Permissive Joinder

The Federal Rules of Civil Procedure allow plaintiffs and defendants to be joined in judicial actions, provided that the parties to be joined are able to meet certain requirements. Because the first provision of FRCP 20(a)(1) deals with the joinder of plaintiffs,[54] this Article will not address that particular provision. Instead, this Article will focus its

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47. *See generally Id*.

48. *See* Tim Fisher, *What Is an IP Address?*, LIFEWIRE.COM (Apr. 23, 2018), https://www.lifewire.com/what-is-an-ip-address-2625920 [https://perma.cc/DE6J-A9GK] (An IP address is "an identifying number for a piece of network hardware [that] allows a device to communicate with other devices over an IP-based network like the internet").

49. Fed. R. Civ. P. 26(d) (2015) (Section 26(d) states that discovery may not be sought until the parties have had a discovery conference as provided by Rule 26(f). The provision also provides for the timing with which discovery has to be provided; Fed. R. Civ. P. 26(f) (2015) (Section 26(f) provides for the steps and requirements needed to plan and execute discovery).

50. *See generally* Call of the Wild Movie, LLC v. Does 1-1,062, 770 F. Supp. 2d 332, 340 (D.D.C. 2011) (discussing how other districts have granted motions to subpoena ISPs to compel production of identifying information of defendants, such as names, addresses, emails, and phone numbers of the defendants).

51. *See generally* Fed. R. Civ. P. 45.

52. *See generally* Robert G. Larson & Paul A. Godfread, *Contemporary Issues in Cyberlaw: Bringing John Doe to Court*, 38 WM. MITCHELL L. REV. 328, 339 (Larson and Godfread provide a brief summary of the steps through which a John Doe claim goes from the filing of the suit through the defendants' opposition to the disclosure of their information).

53. *See ME2 Prods.*, 2017 WL 5165487 *8.

54. Fed. R. Civ. P. 20(a)(1).

analysis of the Rule on provisions 20(a)(2)-(3) and 20(b).

Provision 20(a)(2) establishes that a party "may be joined in one action as [a] defendant[] if" the party meets both of the provision's requirements, which are (1) transactional relationship and (2) commonality.[55] The history behind the Rule, and the case law interpreting it, agree that the focus of the Rule is to promote the efficient adjudication of claims and encourage the "joinder of claims, parties and remedies" whenever its requirements are met.[56]

The transactional relationship requirement refers to the relationship that the party to be joined has with an existing defendant, but specifically in relation to the transaction or occurrence for which that particular defendant is in court.[57] The commonality requirement provides that a defendant may be joined if "any question of law or fact common to all defendants will arise in the action."[58] Both of these requirements must be met in order for a party to be joined as a defendant. Provision 20(a)(3) simply states that "a defendant need [not] be . . . defending against all the relief demanded[,] [and] [t]he court may grant judgment . . . against one or more defendants according to their liabilities."[59]

Lastly, provision 20(b) recites the court's discretion in issuing orders that protect a party against embarrassment, delay, expense, or other prejudice that may arise from joinder of a person against whom the party asserts no claim.[60]

D. Rule 21 of the Federal Rules of Civil Procedure: Misjoinder and Nonjoinder

Rule 21 of the Federal Rules of Civil Procedure serves a dual purpose when determining whether joinder is proper. The Rule first states that the existence of improper joinder—misjoinder—is not a ground for dismissing an action.[61] Additionally, and maybe even more important to this Article's discussion, the Rule gives the court the right to add or drop a party at any time after a party's motion or in the court's sole discretion.[62]

The inclusion of Sections A, B, C, and D in this Part was meant to get

55. *Id*. at 20(a)(2).

56. *See* United Mine Workers v. Gibbs, 383 U.S. 715, 724 (1966) ("[J]oinder of claims, parties and remedies is strongly encouraged").

57. Fed. R. Civ. P. 20(a)(2)(A).

58. *Id*. at 20(a)(2)(B).

59. *Id*. at 20(a)(3).

60. *Id*. at 20(b).

61. Fed. R. Civ. P. 21.

62. *Id*.

the reader up to speed on some basic procedural concepts that will assist in the reading of this Article. Having dealt with these procedural concepts, Sections E and F will explore some technical concepts that will help the reader understand the role that technological advances have had in file-sharing, and in turn, how file-sharing has shaped piracy practices.

E. Client-Server vs. Peer-to-Peer File-Sharing

The creation of the Internet and the rapid evolution of technology created new and more streamlined ways of sharing information. Before long, a new form of sharing files was created: peer-to-peer or P2P, for short.[63] With the use of software, any person with an internet connection can join a P2P network and start sharing files with other users in the network.[64] By joining a P2P network, a user—also known as a "peer"—is able to access files from other peers' computers and can both download and contribute files to other peers in the network.[65] This method of sharing files is a shift from the P2P's predecessor, the client-server model.[66] In the file-sharing context, the client-server model works by creating a direct connection between two computers in order to initiate the sharing of a file. For instance, instead of joining a network, person A connects to person B directly and person A's copy of a particular song can easily be directly shared with person B. While the client-server model still has its uses, the P2P model solved some of the client-server model's issues, such as transfer speed and efficiency.[67]

The client-server model requires a computer to act as the server—the main computer that regulates the activity within the network—and any computer that connects to it becomes a client.[68] The centralized nature of this model means that the network is only as fast and as efficient as the computer acting as the server.[69] Although the server can handle more than one simultaneous connection, the transfer speed from the server to

63. *See generally* James Bruce, *How P2P (Peer to Peer) File Sharing Works*, MAKEUSEOF.COM (Aug. 24, 2012), https://www.makeuseof.com/tag/p2p-peer-peer-file-sharing-works/ [https://perma.cc/EF3M-DM3L] (P2P is a method of distribution based on a network of users that act as client and servers simultaneously in order to facilitate the transferring of files).

64. *Id*.

65. *Id*.

66. By "predecessor" the Author means that the client-server model used to be the standard for file-sharing purposes before the P2P model was adopted. However, this does not mean that the client-server model is outdated or has been abandoned. The client-server model is still utilized for other purposes.

67. *See generally* Bruce, *supra* note 63.

68. *Id*.

69. *Id*.

the clients is limited by the server's broadband's connection speed.[70] Much like people sharing a pizza, as the number of simultaneous clients increases, the transfer speed from the server to each client decreases—that is, each client gets a smaller piece of the pie.

As technology evolved and "bigger, faster, and better" became a need rather than a want, the P2P model solved some of the problems that came with its file-sharing predecessor. By joining a P2P network, each peer is able to be a client and a server at the same time.[71] This meant that as opposed to the client-server model, a P2P network allowed users to share each of their resources for the benefit of the network, significantly increasing the availability of files that can be shared at a given point in time.[72] Using the previous pizza-sharing analogy, every peer that joins the P2P network is considered to have brought a pizza of his own that can then be shared with the group. So, in the P2P model, the more users participating in the network, the more easily available files become—the more pizza there is for everyone to share. This relationship between peers abandoned the centralized nature of the client-server model and decentralized the sharing of files through P2P protocols.[73] While many P2P protocols have come and gone, there is one that revolutionized the way P2P networks are utilized: the BitTorrent Protocol.

F. The BitTorrent Protocol

The BitTorrent Protocol ("BT Protocol") upped the ante of P2P networks by essentially utilizing the benefits of a P2P network and increasing transfer speed and efficiency.[74] With the benefit of a decentralized network the BT Protocol transferred larger files with a relatively small impact on transfer speed.[75] Large files are broken down into smaller pieces with unique identifiers that a BitTorrent client—software that is installed in the user's computer—keeps track of. Using these trackers, a peer no longer gets the entire file from a single computer but instead gets pieces from other peers who have already downloaded them.[76] Once all the pieces have been downloaded, the BitTorrent client takes all of these pieces and assembles them into a complete file using the unique piece identifiers, much like pieces of a

70. *Id*.

71. Bruce, *supra* note 63.

72. *Id*.

73. *Id*.

74. *See generally* Chris Woodford, *How Does BitTorrent Work?* EXPLAINTHATSTUFF! (Oct. 22, 2017), http://www.explainthatstuff.com/howbittorrentworks.html [https://perma.cc/2NXX-DWHC].

75. *Id*.

76. *Id*.

puzzle.[77] Because each peer acts as a server and a client simultaneously—downloading the file from others and making it available for newer peers—as a peer successfully downloads a piece of the file, other peers are able to download that particular piece from him or her.[78]

The BT Protocol has not only contributed to the availability of files but also effectively increased their transfer speeds.[79] Additionally, due to its decentralized nature, the lack of a main server took away most of the accountability for its use or misuse.[80] It is precisely its misuse potential that made the BT Protocol so attractive to pirates, since the lack of a main server means that they are able to download files from other peers and if one peer gets "taken down" the others can continue to share the files.[81] While the BT Protocol is used to share all kinds of files, legally and illegally, it is the latter that accounts for most of its use.[82]

III. BITTORRENT CASE LAW

The increase in popularity of P2P networks and the BT Protocol allows users to share files with a speed and volume that exceed any foreseeable expectations. This Part explores the copyright holders' continuous fight to exercise their rights against users sharing protected works using P2P networks: from the RIAA series of lawsuits in the early 2000s and up until the latest BitTorrent case adjudicated by the District Court for the District of Nevada.

A. The RIAA Picks a Fight with P2P File-Sharers

In September of 2003, the Recording Industry Association of America (RIAA) filed copyright infringement suits against more than 200 individual defendants[83] for engaging in P2P file-sharing of copyrighted songs.[84] While the move was technically unprecedented[85]

77. Bruce, *supra* note 63.

78. *Id*.

79. *Id*.

80. *See generally* Johan Pouwelse, *The BitTorrent P2P File-Sharing System*, THE REGISTER (Dec. 18, 2004), https://www.theregister.co.uk/2004/12/18/bittorrent_measurements_analysis/ [https://perma.cc/QST6-RAMG].

81. Bruce, *supra* note 63.

82. *Id*.

83. Various news articles reporting on the lawsuits concur that the initial number of suits was 261. While the actual complaints are not available to the public, the Electronic Frontier Foundation has a sample redacted copy available at https://w2.eff.org/IP/P2P/sample_riaa_complaint.pdf [https://web.archive.org/web/20170206224925/https://w2.eff.org/IP/P2P/sample_riaa_complaint.pdf].

84. *See RIAA v. The People: Five Years Later*, ELECTRONIC FRONTIER FOUNDATION (Sept. 30, 2008), https://www.eff.org/wp/riaa-v-people-five-years-later [https://perma.cc/QV2H-FXKF]; *see also*

and it seemed counterintuitive for the organization to be suing its customers, the RIAA explained that it was the beginning of a movement that they hope would get P2P users to stop "offering [and sharing] music that does not belong to them."[86] This initial round of lawsuits had a shocking effect, mainly because it found target on some unsuspecting defendants.[87] Nonetheless, this did not slow down the RIAA's resolve and more lawsuits would later be added to the initial 261 defendants.[88] It seemed as though the RIAA would not rest until it accomplished its mission, and the RIAA remained unapologetic throughout the process.[89] Although the RIAA ultimately lost the war[90] by the time the RIAA stopped pursuing individual defendants,[91] the number of lawsuits had reached somewhere over 30,000.[92] In the end, the RIAA was at least

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David Kravets, *Copyright Lawsuits Plummet in Aftermath of RIAA Campaign*, WIRED (May 18, 2010), https://www.wired.com/2010/05/riaa-bump/ [https://perma.cc/CHC2-UJN5].

85. *See RIAA Brings Attack to Customers, Sues College Students*, THE MAC OBSERVER (Apr. 3, 2003), https://www.macobserver.com/tmo/article/RIAA_Brings_Attack_To_Customers_Sues_College_Students [https://perma.cc/F3RG-TQYS] (The RIAA had already sued four college students a few months alleging that the students were "operating a sophisticated network designed to enable widespread music thievery").

86. *See* John Borland, *RIAA Sues 261 File Swappers*, CNET (Sept. 8, 2003), https://www.cnet.com/news/riaa-sues-261-file-swappers/ [https://web.archive.org/web/20160803022942/https://www.cnet.com/news/riaa-sues-261-file-swappers/].

87. *See Music Firms Target 12-Year-Old*, BBC NEWS (Sept. 10, 2003), http://news.bbc.co.uk/2/hi/entertainment/3096340.stm [https://perma.cc/K279-PKAU] (One of the initial 261 defendants, 12 year-old Brianna LaHara, ended up settling for $2,000); *see also RIAA Sues Deceased Grandmother*, GEEK.COM (Feb. 8, 2005), https://www.geek.com/law/riaa-sues-deceased-grandmother-558332/ [https://perma.cc/TLB7-B8J8] (In 2005 the RIAA lawsuit reached Gertrude Walton, who had been deceased for some time).

88. *See* Jay Lyman, *RIAA Sues More P2P Users*, TECHNEWSWORLD (Dec. 4, 2003), https://www.technewsworld.com/story/32308.html [https://perma.cc/89Q5-HHKP] (The RIAA sued another 41 defendants in late 2003); *see also* Associated Press, *RIAA Sues 532 Alleged Music Swappers*, NBC NEWS (Jan. 21, 2004), http://www.nbcnews.com/id/4018675/ns/technology_and_science-games/t/riaa-sues-alleged-music-swappers/#.Ws2Omr3waiY [https://perma.cc/JU3B-7X3B] (Another round of 532 defendants were sued by the RIAA in January 2004; *see also RIAA v. The People*, supra note 84 (In 2007 the RIAA would broaden its focus and start targeting schools as well).

89. *See RIAA v. The People*, *supra* note 84 (When the lawsuit found another absurd target in an elder grandmother for allegedly downloading hard-core rap using a piece of software that was incompatible with her computer, the RIAA stated that "[w]hen you go fishing with a driftnet, sometimes you catch a dolphin").

90. *See* David Silverman, *Why the Recording Industry Really Stopped Suing Its Customers*, HARV. BUS. REV. (Dec. 22, 2008), https://hbr.org/2008/12/why-the-riaa-stopped-suing [https://perma.cc/WF76-ZHSZ] (The high costs of keeping up the large number of individual lawsuits led the RIAA to eventually drop the individual suits tactic in its war against copyright infringement).

91. *See* James Dye, *Who's Walking the Plank?: The Recording Industry's Fight to Stop Music Piracy*, 6 PGH. J. TECH. L. & POL'Y 5 (1964) (Dye offers that the campaign, with 261 initial complaints was a "shining example[] of judicial inefficiency given the similarity of the claims and the actions" that brought about the lawsuits).

92. *See* Eliot Van Buskirk, *RIAA to Stop Suing Music Fans, Cut Them Off Instead*, WIRED (Dec.

able to spearhead the current practice of copyright infringement notices provided by ISPs whenever infringing activity is detected.[93]

The RIAA's efforts did not end with its suits against individual file-sharers, but also broadened its scope to include the companies developing the software that enabled the infringing. One of the most popular examples of this is the RIAA's lawsuit against LimeWire in 2010.[94] A federal court found that LimeWire[95] was secondarily liable for encouraging the direct infringement of the plaintiffs' works[96] and granted summary judgment to the plaintiffs.[97] Following the test applied by the United States Supreme Court in *Grokster*,[98] the Court found that LimeWire was aware of the substantial infringement by its users,[99] marketed its software's capabilities of infringement,[100] and engaged in efforts to enable and assist with the infringement.[101] Although the case against LimeWire did not include a swarm joinder, it was one of the few victories that the RIAA had in its long mission to stop P2P file-sharing and the piracy practices that the model enabled.

B. The Legislature Chimes In

In the aftermath of the RIAA's attempt to shed light on the illegality of downloading and sharing protected works, the legislature attempted to bring some order to the piracy problem that did not slow down, in spite of the RIAA's efforts. One example of such attempts was the introduction of the Stop Online Piracy Act ("SOPA")[102] in late 2011.

19, 2008), https://www.wired.com/2008/12/riaa-says-it-pl/ [https://perma.cc/DD3E-4FNN]; *see also RIAA v. The People*, *supra* note 84.

93. *See* Van Buskirk, *supra* note 92.

94. Arista Records LLC v. Lime Grp. LLC, 715 F. Supp. 2d 481 (S.D.N.Y. 2010).

95. LimeWire was a file-sharing program that utilized the P2P model and allowed for users to download copyrighted materials.

96. *See Arista* at 492 (While Arista Records was the name plaintiff, there were over a dozen major recording companies including BMG Music, Capitol Records, Inc., Virgin Records America, Inc., Warner Bros Records Inc., Sony Corporation of America, Atlantic Recording Corporation, and the Recording Industry Association of America.)

97. *Id.* at 524.

98. *See* MGM Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (Stating that in order to determine whether the defendant intended to entice its customers to violate the copyright of the plaintiff, three factors needed to be analyzed: (1) whether the defendant's purpose was to supply the demand for copyright infringers, as supported by its marketing efforts; (2) whether the defendant made efforts to create filter or mechanisms to diminish the infringing activity through use of its software; and (3) whether the infringing activity was of financial value to the defendant).

99. *Arista* at 510.

100. *Id.*

101. *Id.* at 511.

102. House Bill H.R.3261, widely known as the Stop Online Piracy Act or SOPA, available at https://www.congress.gov/bill/112th-congress/house-bill/3261 [https://perma.cc/7XHA-SSUN].

While SOPA's objective was to give copyright holders some recourse against pirate sites whose servers were overseas (and outside U.S. jurisdiction), the protocols introduced by the bill put virtually any Internet website at risk of censorship.[103] The "Internet community"[104] rallied hard against the enactment of SOPA and its Senate counterpart PIPA,[105] encouraging website owners to "blackout" their websites and culminating in the indefinite shelving of both bills.[106] However, it is unlikely that the legislature will completely abandon its efforts to come up with laws that provide recourse for copyright holders, given the threat that piracy poses to commercial parties of all industries.[107]

C. The Courts Pick It Up from There

After the legislature failed to enact SOPA and PIPA—laws seeking to prevent the propagation of piracy—there have been no significant subsequent bills introduced. However, pirates wait for no one, and the courts have been responsible for picking up the slack left by the failed bills. To do this, courts have resorted to the usual suspects, including the FRCP and case law.

Before the Court of Appeals for the District of Columbia weighed in on the properness of swarm joinder in *AF Holdings*,[108] the district courts' opinions were more or less evenly distributed, yet still favored the rejection of its use.[109] The District Court for the Northern District of California is a good example of this ambivalence. In May of 2011, it denied a plaintiff's motion to join almost 2,100 defendants in one

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103. For a good introduction to how SOPA was supposed to work, *see* http://money.cnn.com/2012/01/17/technology/sopa_explained/index.htm [https://perma.cc/JF29-PAST].

104. *See* Julianne Pepitone, *SOPA and PIPA Protest Hits the Streets in New York*, CNN MONEY (Jan. 18, 2012), http://money.cnn.com/2012/01/18/technology/sopa_protest/index.htm [https://perma.cc/A9G6-RSC7] (Thousands of Internet users in different cities around the United States supported by important figures in the "Silicon Valley" scene such as Caterina Fake, co-founder of Flickr, and representatives from Mozilla, Google, Wikipedia, and Reddit).

105. Senate bill S.968 commonly known as the Protect IP Act or PIPA available at https://www.congress.gov/bill/112th-congress/senate-bill/968 [https://perma.cc/89H3-2UG3].

106. More information on the movement can be found at http://www.sopastrike.com/ [https://perma.cc/93BN-8XE8].

107. *See* Amy Rosen, *The Big Lawsuits Keep on Coming, an Analysis of Extortive Pornographic "Trolling Lawsuits" and Preventative Approaches*, 30 Ent. & Sports Law. 1, 1 (2014) (Rosen rightly points out that even the pornography industry, being so powerful, is worried about the availability of free pornography material).

108. AF Holdings, LLC v. Doe, 752 F.3d 990 (2014).

109. *See* Stefan Mentzer & Michael La Marca, *Joinder and Early Discovery in BitTorrent Copyright Infringement Lawsuits*, 33 CARDOZO ARTS AND ENT. L.J. 89, 116 (2015) (Mentzer and La Marca provide a very useful comparison table of district court decisions from 2011 through 2014).

action.[110] Later that year, the Court allowed the plaintiff to join 18 defendants[111] and it stated that, as opposed to other cases, the plaintiff here was attempting to join "only 18 Doe Defendants – not hundreds or thousands."[112] Just one month after, the Court denied another joinder motion, but in this case it did so because it found that the plaintiffs did not provide enough evidence that the requirements for FRCP 20 had been met.[113] Later that year, in August of 2011, the Court once more found swarm joinder impermissible for not meeting FRCP 20 requirements.[114] Nonetheless, a couple of months after that decision, the Court allowed a plaintiff to join 39 defendants.[115] However, the Court rested its decision on the fact that the plaintiff had provided supporting documentation that was specific enough to determine that "the 39 Doe Defendants [] were part of the same swarm[]" and, as such, met the transactional requirement of FRCP 20.[116]

Contrasting the California decisions, the District Court for the Northern District of Illinois initially consistently allowed the swarm joinder of defendants.[117] In a case decided in 2012, the Court took a slightly different view from the previous ones and added some qualifications to its ruling.[118] Although it also allowed joinder, it informed the plaintiffs that they would only be able to communicate with the defendants through counsel and not directly.[119] Additionally, and recognizing the emergence of "trolling" tactics,[120] the Court allowed defendants to continue to use pseudonyms at least through the discovery phase to prevent any embarrassment or other tactics that may lead to coercion.[121]

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110. *See* Diabolic Video Prods. v. Does 1-2099, 2011 U.S. Dist. LEXIS 58351, at *15 (N.D. Cal. May 31, 2011).

111. *See* MCGIP, LLC v. Doe, 2011 U.S. Dist. LEXIS 64188, at *3 (N.D. Cal. June 2, 2011).

112. *Id*.

113. *See* Pac. Century Int'l Ltd. v. Doe, 2011 U.S. Dist. LEXIS 73837, at *13 (N.D. Cal. July 8, 2011).

114. *See* Hard Drive Prods. v. Does 1-188, 809 F. Supp. 2d 1150, 1163 (N.D. Cal. 2011) ("[T]here is no evidence to suggest that each of the addresses acted in concert with all of the others.") (internal quotations omitted).

115. *See* OpenMind Sols., Inc. v. Doe, 2011 U.S. Dist. LEXIS 116552, at *18 (N.D. Cal. Oct. 7, 2011).

116. *Id*.

117. *See* Mgcip v. Doe, 2011 U.S. Dist. LEXIS 61879 (N.D. Ill. June 9, 2011) (allowing joinder at least during the initial phase of the case, stating that the issue of improper joinder was premature); *see also* First Time Videos, LLC v. Doe, 276 F.R.D. 241 (N.D. Ill. 2011) (same); *see also* First Time Videos, LLC v. Does 1-76, 276 F.R.D. 254 (N.D. Ill. 2011) (same).

118. *See generally* Sunlust Pictures, LLC v. Doe, 2012 U.S. Dist. LEXIS 121368 (N.D. Ill. Aug. 27, 2012).

119. *Id*. at *14.

120. *See* Matthew Sag, *Copyright Trolling, an Empirical Study*, 100 IOWA L. REV. 1105 (2015).

121. *See* Sunlust Pictures, 2012 U.S. Dist. LEXIS 121368 at *15.

IV. THE D.C. CIRCUIT WEIGHS IN AND *CELL FILM HOLDINGS*

Just like the California and Illinois courts, other districts have issued different decisions regarding the properness of swarm joinder. Some courts have found in favor and some against swarm joinder; some decisions were based on number of defendants the plaintiffs wanted to join and some others were based on meeting—or failing to meet—the requirements of FRCP 20.[122] Before long, the Court of Appeals for the District of Columbia became the first—and at the time of this Article's writing, the only—Circuit Court to weigh in on the issue.[123] In the years leading up to the D.C. Circuit's decision, District Courts in the District of Columbia had consistently allowed joinder[124] with the exception of a case in 2012.[125]

The D.C. Circuit Court tackled the issue by providing a background on the parties involved, paying special attention to the plaintiff.[126] Explaining the background and methodology of the plaintiff's lawsuit, the court stated that the lawsuit was "a quintessential example" of the modus operandi of plaintiffs who sue only to be able to coerce defendants to settle instead of to exercise their protection rights.[127] Speaking to jurisdiction concerns, the Court stated that the plaintiff had "made absolutely no effort to limit its suit . . . to those defendants who might live or have downloaded [the protected work] in the District of Columbia."[128] Addressing the issue of joinder, the Court stated that the plaintiff had "provided no reason to think that the Doe defendants" had

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122. *See* Patrick Collins, Inc. v. Doe, 2013 U.S. Dist. LEXIS 55413 (S.D. Cal. Apr. 16, 2013) (denying joinder because plaintiff's allegations were insufficient to prove the required logic relationship between the defendants to support joinder); *see also* Combat Zone, Inc. v. Doe, 2013 U.S. Dist. LEXIS 35439 (D. Mass. Feb. 20, 2013) (although the court refused to determine whether joinder was proper under FRCP 20, it exercised its discretion under FRCP 20(b) to sever all defendants but one); *but see* Liberty Media Holdings v. Swarm Sharing Hash File, 821 F. Supp. 2d 444 (D. Mass. 2011) (finding joinder was proper at that stage of the litigation because the requirements were met by the plaintiff); *see also* Patrick Collins, Inc. v. Doe, 286 F.R.D. 160 (D. Mass. 2012) (also finding joinder proper at the early stage of litigation but preserving the defendants' right to revisit the issue of improper joinder at a later time).

123. *AF Holdings*, 752 F.3d at 990.

124. *See* Call of the Wild Movie, LLC v. Does 1-1,062, 770 F. Supp. 2d 332 (D.D.C. 2011); *see also* Donkeyball Movie, LLC v. Doe, 810 F. Supp. 2d 20 (D.D.C. 2011); *see also* W. Coast Prods. v. Doe, 275 F.R.D. 9 (D.D.C. 2011).

125. *See* Malibu Media, LLC v. Doe, 286 F.R.D. 113 (D.D.C. 2012) (finding joinder improper for not meeting the FRCP 20 requirements).

126. *AF Holdings*, 752 F.3d at 992 (2014) (The court explained that AF Holdings was attorney Paul A. Duffy who was associated with Prenda Law. The court when ahead and stated that Prenda Law was a "porno-trolling collective[]" that acquired copyrights to pornographic movies only to initiate massive John Doe copyright infringement lawsuits).

127. *Id*. at 993.

128. *Id*. at 996.

been part of the same "swarm" at the same time[129] but rather only provided snapshots of the defendants' activities spanning a period of five months.[130] The Court found this supporting evidence and timeframe to be far too removed to be able to link the defendants as required by FRCP 20.[131]

In the years following the *AF Holdings* decision, the balance of district court decisions supporting and opposing joinder has skewed severely towards severing defendants and denying joinder. With a few exceptions,[132] most district courts now fall within the large majority denying joinder due to either lack of efficiency,[133] failure to meet FRCP 20 requirements,[134] or inconvenience and prejudice that can result from joining multiple defendants.[135]

At the time of the inception of this Article, the United States District Court for the District of Nevada decision in *Cell Film Holdings LLC v. Acosta*[136] was the latest decision addressing swarm joinder to be fully adjudicated.[137] However, while this Article was being written, the District Court for the Western District of Washington issued an opinion on the matter in *POW Nev., LLC v. Doe*.[138] In *POW*, twelve defendants were sued for using the BT Protocol to download the plaintiff's movie "*Revolt*."[139] The plaintiff argued that the defendants should be joined in a swarm because they resided in the same district and downloaded the protected work within the same period of time.[140]

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129. *Id*. at 998.

130. *Id*.

131. *Id*.

132. *See e.g.* Cell Film Holdings, LLC v. Does, 2016 U.S. Dist. LEXIS 180445, at *11 (E.D. Va. Dec. 29, 2016); *and* Cobbler Nev., LLC v. Doe, 2016 U.S. Dist. LEXIS 5623 (N.D. Ill. Jan. 15, 2016) (in both cases, the District Court for the Northern District of Illinois allowed joinder).

133. *See* ME2 Prods. v. Doe, 2016 U.S. Dist. LEXIS 163319, at *8 (N.D. Ga. Nov. 28, 2016) ("Because joinder in this case would not result in judicial economy, the Court exercises its discretion to sever the claims against each Defendant.").

134. *See* Cobbler Nev., LLC v. Doe, 2015 U.S. Dist. LEXIS 160665, at *15 (E.D. Mich. Dec. 1, 2015) ("that the defendants all used the same file sharing network . . . are analogous to the previous P2P actions where courts found such allegations insufficient to sustain permissive joinder.").

135. *See* Cell Film Holdings, 2016 U.S. Dist. LEXIS 180445, at *11 (E.D. Va. Dec. 29, 2016) ("Like others, this Court becomes wary of inefficient, unmanageable, and potentially prejudicial joinder of multiple defendants.").

136. *See* Cell Film Holdings LLC v. Acosta, 2017 U.S. Dist. LEXIS 195864 (D. Nev. Nov. 29, 2017) (This case is one of three identical cases that were filed by the plaintiff Cell Film Holdings (CFH). These cases were CFH v. Acosta, CFH v. McCray, 2017 U.S. Dist. LEXIS 196624, and CFH v. Galang U.S. Dist. LEXIS 195858 (D. Nev., Nov. 29, 2017)).

137. There was another decision in March 2018 but the determination of joinder properness was left for another time. *See* Venice PI, LLC v. Doe, 2018 U.S. Dist. LEXIS 53842 (N.D. Ind. Mar. 30, 2018).

138. 2018 U.S. Dist. LEXIS 11708 (W.D. Wash. Jan. 24, 2018).

139. *See POW Nev.*, 2018 U.S. Dist. LEXIS 11708 at *3.

140. *Id*.

Following the lead of the D.C. Circuit and the Nevada District court, the Washington District court also denied joinder for the plaintiff, saying that the FRCP 20 requirements were not met and that even if the requirements had been met, the plaintiff had "fail[ed] to comport with the principles of fundamental fairness."[141] For the most part, the *POW* Court echoed the arguments provided by the Nevada District and the D.C. Circuit courts, along with those other districts that had similarly denied joinder on similar grounds.[142]

Although *POW* was decided after the *Cell Film Holdings* decision, this Article will briefly discuss the *Cell Film Holdings* decision as cementing the precedent that the D.C. Circuit set, and that *POW* would later follow.

The *Cell Film Holdings* Court began its analysis of the properness of swarm joinder by briefly acknowledging the authority split on the issue.[143] The Court eloquently said that the split among the districts—and only touched by the D.C. Circuit at the appellate level—reflected how the only thing that was clear was that "there is no uniform protocol."[144] Immediately after, the Court stepped out of a stance it had taken in the past, declining to address the properness of swarm joinder,[145] and decidedly joined "those courts that hold that [FRCP 20] does not permit swarm joinder."[146] The Court proceeded to analyze the transactional requirement of FRCP 20 and concluded that none of the data provided by the plaintiffs suggested that the defendants had "acted in concert as part of the same transaction or occurrence."[147] Therefore, the Court severed the claims of all of the defendants without prejudice, with the exception of one defendant.[148] The remainder of the Court's decision was spent on the only defendant that was not severed from the lawsuit.

V. DISCUSSION

The *Cell Film Holdings* and the D.C. Circuit's decisions have undoubtedly influenced the decisions that have come after them. Nonetheless, more nuanced decisions, such as those made by the

141. *Id*. at *5.

142. *See generally Id.*

143. *See Cell Film Holdings*, 2017 U.S. Dist. LEXIS 195864 at *7.

144. *Id*. at *8.

145. *See* LHF Prods. v. Smith, 2017 U.S. Dist. LEXIS 175339, at *2 (D. Nev. Oct. 23, 2017) (The court had declined to address whether FRCP 20 allowed swarm joinder in a previous case concluding that joinder was permissibly improper rather than improper for failure to meet FRCP 20 requirements).

146. *Cell Film Holdings*, 2017 U.S. Dist. LEXIS 195864 at *9.

147. *Id*. at *11.

148. *Id*. at *11-12.

Northern District of Illinois, have kept the split alive and provide ripe timing for an in-depth discussion about the properness of swarm joinder in BitTorrent cases. The vast majority of district courts have found in FRCP 20 a way to keep copyright infringement claims in a relatively simple setting: one-on-one. These courts mainly argue that, by doing this, "trolls" are discouraged. While "trolling" practices are undoubtedly troubling, this Article suggests that precluding swarm joinder is not the best way to address the issue. This point of view, while certainly not a popular one, seeks to contrast the increasingly common cynicism with which plaintiffs in BitTorrent cases are met.[149] While district courts have grounded their denials of swarm joinder quoting other districts and the D.C. Circuit as persuasive authority, in some cases they resort to siding with other courts without engaging in the analysis that the D.C. Circuit engaged in. In other cases where the courts indeed follow the D.C. Circuit's analysis, the courts use FRCP 21 as an escape hatch to justify the denial of joinder, even if unwarranted.[150]

There is certainly a small number of scholarly writings in support of swarm joinder that provide some good arguments,[151] and others that offer sensible approaches to the issue while not necessarily taking a stand.[152] Nevertheless, the *Cell Film Holdings* decision did not care to address any of these proposed arguments and instead focused on the majority's view.[153] The repercussion of this decision—as evidenced by the subsequent *POW* decision—calls for another look at the arguments in favor of swarm joinder. This Part will present these arguments in two sections, first looking at permissibility of swarm joinder as a matter of law and then at desirability of swarm joinder as a matter of policy. The latter section will also look at other arguments that have been presented in opposition of swarm joinder and discuss the reasons why they are flawed or, in some cases, obsolete.

149. *See generally* Malibu Media, LLC v. John Does 1 through 10, 2012 WL 5382304 (C.D. Cal. June 27, 2012).

150. *Compare LHF Prods. v. Smith*, 2017 U.S. Dist. LEXIS 175339, *8 (D. Nev. October 23, 2017) (Denying to engage in FRCP 20 analysis and grounding its decision on FRCP 21 instead) *with ME2 Prods.*, 2017 U.S. Dist. LEXIS 184021, at *12-13 (Ruling that even if the defendant had indeed met the requirements of FRCP 20, permissive joinder was more of a burden on the defendants than on the plaintiff).

151. *See* John C. Heinbockel, *The Undiscovered Country: Fixing Copyright By Rethinking Pretrial Litigation*, 5 AM. U. INTELL. PROP. BRIEF 152 (2014).

152. *See* Morgan E. Pietz, *Copyright Court: A New Approach to Recapturing Revenue Lost to Infringement*, 64 J. COPYRIGHT SOC'Y 1 (2017).

153. *Cell Film Holdings*, 2017 U.S. Dist. LEXIS 195864 (The opinion is indeed very short. The court acknowledges the position of other districts but does not mention any of the arguments they offer to support permissive joinder in BitTorrent cases).

A. Joinder Should Be Permitted as A Matter of Law

Because a swarm joinder meets the statutory requirements under FRCP 20, the "fundamental fairness" factors, and does not affect the courts' powers under FRCP 21, courts can and should allow plaintiffs to join defendants as part of a swarm, if they are reasonably related geographically and in time.

1. Swarm Joinder Meets the Requirements of FRCP 20

Rule 20 of the Federal Rules of Civil Procedure allows for plaintiffs and defendants to be joined in judicial actions, provided that the parties to be joined meet two requirements: transactional relationship and commonality.[154] Swarm joinder meets both requirements under the Rule and should be allowed, at least during the initial stages of the litigation, to let the plaintiff get the necessary identity information to properly name the defendants.

The transactional relationship requirement asks for the party sought to be joined to be liable to the plaintiff for relief "with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences[.]"[155] Some courts have interpreted the Rule's language too narrowly, sometimes stating that because the defendants did not know each other, their actions could not be part of a transactional relationship.[156] However, the Rule's use of the word "or" indicates that its correct interpretation should be much broader. Namely, that a plaintiff's right against a defendant must arise out of *either* the same transaction, *or* the same occurrence, *or* the same series of transactions *or* the same series of occurrences. A user that is part of the same BitTorrent swarm would definitely fall within this broad interpretation of the language.

This broader interpretation calls for allowing swarm joinder in BitTorrent cases. The very nature of the BT Protocol is the biggest reason for allowing swarm joinder. The client-server protocol required User A to act as a server, allowing other users to be User A's clients and download files made available by User A. Once these users had obtained the files, they themselves would become servers by way of having files in their shared folder for other users to download. In this protocol, it

154. Fed. R. Civ. P. 20.

155. *Id.*

156. *See Hard Drive*, 809 F. Supp. 2d at 1163 (grounding part of its decision in the lack of evidence suggesting that each of the defendants had "acted in concert" with each other while illegally downloading the protected works).

made sense that in order for two or more users to be transactionally linked for purposes of FRCP 20, the plaintiff needed to prove that at any given point in time defendant 1 was (as a server) providing defendant 2 (as a client) with a file to download. A plaintiff then would be able to prove that defendants 1 and 2 were part of the same transaction.

However, the BT Protocol turned this relationship on its head and made it so that defendants 1 and 2 are each other's client *and* server at the same time while simultaneously allowing defendants 3 and 4 to join in as clients *and* servers as well; and so on, and so on. Admittedly, some decisions have raised valid points expressing the difficulty of justifying a broader interpretation of a "same transaction" when the plaintiff is joining several defendants from all over the country.[157] However, while in earlier cases plaintiffs were attempting to join dozens, hundreds, or sometimes thousands of defendants, plaintiffs in recent cases have driven this number down to manageable numbers.[158] Similarly, plaintiffs in recent cases have learned from previous decisions and have limited the timeframe in which they focus, seeking joinder of defendants that have interacted with the BitTorrent software over shorter periods of time.[159]

The *Cell Film Holdings* Court, in justifying its decision, referred to an analogy that the D.C. Circuit used illustrating why FRCP 20 does not permit swarm joinder. In short, the D.C. Circuit said that two BitTorrent users who downloaded the same file at different times were like two individuals who played at the same blackjack table at different times. The Court offered: "[while the defendants] may have won the same amount of money . . . and perhaps even played with the same dealer, [] they still engaged in entirely separate transactions."[160]

This analogy may have worked in a client-server protocol scenario where defendants 2 and 3 needed to be downloading the file from defendant 1 at the same time, so as to be sitting at the same proverbial blackjack table. The problem with this analogy, however, is that it does not hold true against the reality of BitTorrent swarms. The analogy ignores that in a BitTorrent swarm—at least when it comes to

157. *See* Call of the Wild Movie, 770 F. Supp. 2d at 339 (Plaintiffs were trying to join 1,062 unnamed defendants to the lawsuit); *see also AF Holdings*, 752 F.3d 990 at 994 (Plaintiff was trying to join 1,058 defendants, without evidence supporting that they had minimum contacts with the District of Columbia).

158. *E.g. McCray*, 2017 U.S. Dist. LEXIS 196624, at *4 (Plaintiffs initiated the lawsuit seeking to join 16 defendants, later amended their claim reducing the number to 12, and ending with a motion to join only 3 defendants); *see also LHF Prods*. 2017 U.S. Dist. LEXIS 175339, at *5 (Plaintiffs brought an initial claim against 21 defendants, reducing it to 17, and ending with only 4).

159. *E.g. McCray*, 2017 U.S. Dist. LEXIS 196624, at *11 (Plaintiffs had selected defendants within a time span of only 6 days).

160. *Cell Film Holdings*, 2017 U.S. Dist. LEXIS 195864 at *11 (citing AF Holdings).

defendants that participated in a swarm within a short span of time—users are each other's *dealers*, and one cannot play blackjack without a dealer. As more users join the swarm, the likelihood (and speed) of a successful download increases. The reality is that when defendants participate in a swarm that is connected in time, they all have acted as a blackjack dealer, enabling each other's ability to *play*—that is, to obtain the infringing work. Understanding this important relationship between members of a swarm can avoid misinterpretations that prejudice the plaintiffs seeking swarm joinder.[161]

The second requirement of FRCP 20 is the commonality of questions of fact or law. BitTorrent cases easily satisfy this requirement in both, questions of fact and of law. Most (if not all) of these actions relate to the illegal sharing of a *particular work* downloaded by all the defendants, violating the *same* copyright rights from the *same* owner.

Permitting plaintiffs to join a reasonable number of defendants as members of a swarm not only comports with the requirements set under FRCP 20 but also fall squarely on the efficiency purpose behind the enactment of the Rule, which includes the promotion of trial convenience and the prevention of multiplicity of suits.

2. Swarm Joinder Comports with the "Fundamental Fairness" Factors.

In assessing the properness of swarm joinder under FRCP 20, courts have looked at an additional consideration dubbed "fundamental fairness,"[162] which looks at different factors, such as: prejudice that may result to any of the parties; any delay of the moving party in seeking the joinder; the motive behind seeking joinder; the relationship between the new and old parties (similar to the transactional relationship requirement); whether joinder will affect the court's jurisdiction; and the new party's notice of the pending action.[163] These factors can be succinctly addressed in the context of swarm joinder. While defendants may not be entirely comfortable being joined as a swarm, plaintiffs can be severely financially prejudiced if they are forced to pursue each

161. The court in *Hard Drive Prods*, 809 F. Supp. 2d stated that the six-week span covering the illegal activity weighed against the plaintiff's case because it was unlikely that "an alleged infringer [] would patiently wait six weeks to collect the bits of the work" needed to be able to use the work as a whole. However, the court ignored the fact that users that join a swarm voluntarily decide to remain a part of the swarm for a period of time, not out of necessity but out of conviction. A user that remains in a swarm for a period of 6 weeks does so not because the user had to wait 6 weeks to download the protected work, but because the user decided to continue "seeding" the work (i.e. acting as a server) in order to allow other users to download it, before leaving the swarm.

162. *See* Desert Empire Bank v. Insurance Co. of North America, 623 F.2d 1371, *1375, (9th Cir. Cal. July 25, 1980).

163. *Id.*

defendant separately.[164] The plaintiffs are responsible for avoiding delays in seeking joinder and the courts can ensure that the plaintiffs are prompt in their request and use of discovery. The plaintiffs can exercise due diligence in selecting which defendants to join to satisfy transactional relationship requirements—such as geographical and time proximity—which would, at the same time, take care of any jurisdictional issues. The motive factor is admittedly a difficult one, but courts are well equipped to deal with litigation that is determined to be frivolous, unconscionable, or otherwise improper.

3. Courts Still Retain Discretion under FRCP 21

Rule 21 of the Federal Rules of Civil Procedure grants courts the discretion to join or drop a party "at any time" whether "[o]n motion or on its own[.]"[165] This Rule is entirely independent from FRCP 20 and does not require the court to look at FRCP 20 in order to exercise its discretion.

So, while permitting swarm joinder in BitTorrent cases may have disadvantages due to the risks of frivolous and coercive litigation by "trolls," this Article and some courts[166] suggest that the potential for prejudice is outweighed by the potential for efficiency *and* the fact that allowing swarm joinder at the outset of a lawsuit does not mean that a court has waived its rights under FRCP 21. Therefore, a federal court can allow for a swarm joinder of defendants at the outset and, if at any time it determines that the plaintiff's case is not in good faith, the court can exercise its rights under FRCP 21.

The D.C. Circuit did a great job analyzing the plaintiff's case and utilizing the tools available to rule on the properness of joinder in that case.[167] The Court reviewed the requirements of FRCP 20 and contrasted them against the plaintiff's claims.[168] The Court then noticed the improperness of the number of defendants that the plaintiffs sought to join,[169] the lack of attention to jurisdictional issues,[170] and how these factors provided a prima facie conclusion that the plaintiffs were

164. At the time of this writing, each filing in federal court costs $350.00. Additionally, the plaintiffs' legal fees would be multiplied by the number of defendants that they are suing.

165. Fed. R. Civ. P. 21.

166. *See Call of the Wild Movie*, 770 F. Supp. 2d at 344 (Granting swarm joinder at "this stage in the litigation" even though it reserved its rights as "[t]he defendants may be able to demonstrate prejudice once the plaintiffs proceed with their cases against them").

167. *See generally AF Holdings*, 752 F.3d 990.

168. *Id.* at 998.

169. *Id.*

170. *Id.*

attempting to engage in trolling.[171] The Court did not address FRCP 21, and instead mentioned that the plaintiffs could have tailored their claims to have a "reasonable basis for believing that the requirements for joinder would be satisfied[]" but had not done so.[172] By doing this, the Court implied that the requirements of FRCP 20 are not automatically wanting in a swarm joinder case, and instead, the claims need to be analyzed on a case-by-case basis.

B. Joinder Should Be Permitted as a Matter of Policy

Through adjudication of BitTorrent cases, courts have created a record that contemplates both legal and policy arguments in favor or against allowing swarm joinder. This subsection will attempt to touch on some of the most commonly used arguments against the use of swarm joinder and address them individually. First, this subsection will briefly address an argument that seeks to minimize the effect and culpability of piracy. Second, the Article will address the stigma that the RIAA's actions created and that weighs on today's plaintiffs in BitTorrent cases. Third, the Article will present the argument of the innocent defendant. Fourth, the Article will briefly address another collateral argument often raised against swarm joinder. Lastly, the Article will expand on the concept of trolling, how denying swarm joinder does not fix the trolling problem and offer alternatives to address trolls.

1. Piracy Is Not *That* Bad.

Piracy, the violation of copyright holders' rights, has considerable public policy implications in society.[173] However, the public opinion seems to often find ways to justify partaking in piracy practices. Although it may be uncomfortable to compare the culpability of a pirate to that of a burglar, the reality is that, in both cases, a crime has been committed. The tendency to minimize the culpability of piracy is precisely what triggered the RIAA's ire, and rightly so. Piracy is often seen as a victimless crime, but it is no more justifiable than tax evasion. The fact that a pirate victimizes copyright holders instead of the government should not automatically grant defendants with undue leniency. Regrettably, the massive widespread use of the BT Protocol and compatible software, making piracy a household practice, is not lost

171. *Id.*

172. *AF Holdings*, 752 F.3d at 998.

173. Be it direct impact on the industries to which the pirated works belong, as evidenced by the examples provided at the beginning of this Article, the availability of quality copyrighted work, or even the pricing of works of media.

on this Author. However, if there is ever a time when the legislature deems widespread practices lawful by virtue of their popularity, piracy may then be sanctioned. Until then, it is hard to imagine a day when breaking and entering might become acceptable if enough people do it. For the time being, plaintiffs should be allowed to make use of swarm joinder, as it represents one of the few tools they have to try and keep up.

2. Plaintiffs Are Evil

The Recording Industry Association of America's crusade was the first time that an industry giant went after file-sharers for engaging in piracy practices. At the time, there was a widespread feeling of David against Goliath. The RIAA was chastised for going against its customers, most of whom had only downloaded a few songs. To this argument there are two points this Article urges the reader to consider.

The first one is, since when should it matter that the pirates only downloaded *a few songs*? Should the police stop arresting anyone who only steals *a few dollars*? Should prosecutors stop going against the con man that defrauded only *a few people*? The truth of the matter is that culpability lies on the *action* just as much, if not more, than on *what* the wrongdoer got out of it.

Second, the stigma that attached to all BitTorrent plaintiffs because of the actions of the RIAA is unwarranted. For the most part, BitTorrent plaintiffs then and now are differently situated. The RIAA's objective was to prove a point and raise awareness. They wanted to make noise and make sure people knew that they were coming for the pirates. To accomplish this, the RIAA was willing to tap into its large proverbial pockets and file thousands of claims around the country for almost five years. Plaintiffs nowadays have different objectives and are no longer RIAA-sized or MPAA-sized companies with deep pockets and a team of lawyers that can fill up a van. Plaintiffs are now smaller film production studios that are not seeking to make a statement but rather get restitution for what they have lost in order to be able to move on to their next work.[174] Not that this last point should matter too much, since the copyright statute does not concern itself with the size or financial resources of the copyright holder. Neither of these plaintiffs deserves less or more protection with respect to the illegal reproduction and distribution of their work, nor their right to seek restitution for damages suffered. However, the point still stands: plaintiffs can no longer be automatically shoved into a stereotypical box of greedy, faceless

174. For examples *see generally* the plaintiffs in cases *supra* note 158.

companies that are out on a hunt, because they do not fit the profile.

Additionally, piracy practices were not as advanced as they are today. During the RIAA's crusade, the client-server protocol was the standard. Nowadays, pirates can download material much easier and faster. Rejecting the use of swarm joinder when it is proper is to force plaintiffs to try and keep a sinking ship afloat but only allowing them to bail water out with a SOLO cup.

Lastly, critics of BitTorrent plaintiffs, will find reasons to condemn their actions, regardless of whether swarm joinder is at issue. Although the RIAA sued individuals in their own district to avoid jurisdictional issues—avoiding the arguments that come with swarm joinder—the RIAA's move was still criticized for being a "shining example of judicial inefficiency" due to the similarity of the claims.[175] Had the RIAA sought to utilize swarm joinder, it would have most likely been the target of several of the arguments that criticize its use. A plaintiff-averse mindset does not further the resolution of legal issues, especially when this mindset forces the plaintiffs to a position where they are "damned if [they] do [and] damned if [they] don't."[176]

3. The Curious Case of the Innocent Defendant

Critics of swarm joinder bring up time and time again the case of the innocent defendant. Succinctly put, this argument presents a hypothetical defendant whose identification information is obtained through the subpoenas issued by the court, yet this particular defendant is not the actual infringer. Often times this innocent defendant is portrayed as either an elderly person or an oblivious internet user whose lack of technological savvy creates vulnerability for others to use their wireless internet connection to illegally download pornographic protected material without the knowledge of the innocent defendant.[177] In this scenario, the defenseless lady is caught off guard by the notice of service and rather than risk being portrayed in the media as a downloader of pornography, she decides to settle in exchange of being dropped from the suit.

Supporters of this theory continue to conjure up the image of the

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175. *See Dye*, *supra* note 91.

176. The idiom "[you are] damned if you do and damned if you don't" is used to describe someone who is in a position where there is no favorable result, regardless of their actions. *See* https://www.merriam-webster.com/dictionary/(you're)%20damned%20if%20you%20do%20and%20damned%20if%20you%20don't.

177. *See Rosen*, *supra* note 107 at 26 (offering how some of these swarm John Doe claims end up hailing innocent defendants into court as a result of joining the person that is paying the internet bill as opposed to the actual infringing user).

innocent defendant and contrast it with a portrayal of the tough, deep-pocketed, greedy, intimidating plaintiff whose only concern is to make money and does not care who he has to "troll" in order to get it. This sentiment cannot necessarily be considered unfounded, since the RIAA did remain unapologetic as its efforts found target in what would be considered innocent defendants. However, the real contemporaneous picture is no longer so black and white.

Concerns about "trolls" and "trolling" practices are certainly valid and—to the extent they portray a realistic picture—very troublesome. However, they ignore the changes that plaintiffs have made in order to address the potential risk of joining an innocent defendant and tend to blur the focus from what is at stake. The practice of "trolling," as portrayed by the swarm joinder rejecters, had plaintiffs seeking to join hundreds and sometimes thousands of defendants at once. Nowadays the picture is a lot less drastic. Some plaintiffs have taken affirmative steps and developed criteria to determine which defendants they take to court, often voluntarily dropping several defendants from the lawsuit.[178] While plaintiffs may still subpoena the identifying information of several defendants, they often utilize a filtered process to start dropping those defendants where there may be legitimate concerns about the culpability of the now identified defendant. This is not only a step in the right direction, but is also a show of good faith on behalf of the plaintiffs, demonstrating that their desire for restitution and exercise of their copyright protection does not mean they will trample over innocent people nor engage in questionable legal practices.

Additionally, while the innocent grandma paints a very persuasive image, this Author believes that the innocent defendant theory should be on its way out, and—no pun intended—be nearing its retirement. In this day and age, the concept of a technologically illiterate defendant gets more and more suspect as time goes by. At the time of this writing, the vast majority of Internet Service Providers set up password-protected networks by default for their customers.[179] The passwords are often a string of random alphanumerical characters, often printed on the actual router, that can only be accessed by the members of the household or visitors. Moreover, the elderly have grown consistently more receptive

178. *E.g. LHF Prods.*, 2017 U.S. Dist. LEXIS 175339, at *4-5 (Plaintiff "identified the 1-2% most egregious offenders and [sued them] in sets of 10-30 [per claim]," and further filtering according to the defenses raised by each defendant in an attempt to "impose the least expense on all parties involved—including the [c]ourt").

179. Information available for Spectrum (formerly Time Warner Cable) on its website states that self-install kits come with pre-set passwords by default printed on the router. This information is available at https://www.spectrum.net/support/internet/self-install-spectrum-internet-and-wifi-service/. A subsequent conversation with a Spectrum customer service representative confirmed that all Spectrum installations come with a default Wi-Fi password as well.

to adopting newer technology, such as smartphones, computers, and devices that interact with the Internet-of-Things (IoT) protocol. Long gone are the days where having wireless Internet was something only for tech-savvy people; nowadays wireless Internet is the standard.

Another factor often conveniently forgotten by objectors to swarm joinder is the fact that not all settlements arise out of shame, but may arise out of guilt. And the probability that a defendant is guilty increases when plaintiffs have already used criteria and filters to narrow down the number of defendants to be hailed into court. When a settlement is reached between the plaintiff and a guilty defendant, the settlement acts as a warranted retribution for the plaintiff and a deterrent for the defendant. However, when courts have a predisposed plaintiff-averse mindset and deny swarm joinder at the outset, neither party benefits.

Commentators argue that there is "inherent[] embarrass[ment]"[180] in associating a defendant with the download of porn, which effectively coerces the defendant to settle, lest the public associate their name with a pornographer. However, being accused of a crime is never something a defendant longs for, and a defendant who cares about their public image will find inherent embarrassment in *any* criminal trial, regardless of *what* the crime is. In the case of a presumably innocent defendant where the goal is to protect the defendant's reputation, a plaintiff that believes a defendant is guilty will sue the defendant either way, so the reputation is not really protected and unnecessary costs are imposed on the plaintiff. However, in the case of guilty defendants, the denial of joinder only allows them to resume downloading pirated material, effectively asking the plaintiff to choose between exercising its rights or preserving its financial resources.

Critics of the swarm joinder also ignore that a settlement is not a measure of guilt or innocence. If, even after the plaintiff has used selective criteria to narrow the number of defendants and the court has determined whether the plaintiff's claim is in good faith, an innocent defendant is still hailed into court, the copyright statute itself allows for the courts to make the defendant whole by ordering the plaintiff to cover the defendant's legal costs. However, because innocence or guilt is a determination that is almost impossible to make at the outset, courts should allow swarm joinder first and then force the plaintiffs to curtail their case to comport with fair standards, when needed, dropping any unjustified defendants from their claims.

Allowing swarm joinder may very well impose a burden on defendants. However, no person inherently desires to be a defendant, or is a defendant by pure conviction. Reasonable measures can be taken to

180. *See Rosen*, *supra* note 107 at 28.

ensure the fair joinder of defendants and the punishment of abusive plaintiffs. For instance, consider prank calls to the 911 emergency services line. Emergency responders do not stop responding to every call just because the person calling *may* be a prank caller. Instead, emergency responders attend every call and punish prank callers whenever they encounter them. Although innocent defendants need to be protected from trolls, deforming FRCP 20 in the name of innocent defendants is not the proper way to do it. Instead, courts should favor the introduction of defendants to promote judicial efficiency while keeping safety controls handy for plaintiffs who abuse the system.

4. Another Argument

Critics of swarm joinder have, in numerous times, also raised collateral arguments while advocating against the properness of swarm joinder. One of these arguments relates to the privacy of the defendant, in conjunction with First Amendment rights. Critics say that by subpoenaing the defendants' identifying information, their privacy is invaded[181] and that by utilizing the BT Protocol to download protected work, the defendant is expressing his or her taste and style.[182] This expression, defendants offer, should be entitled to First Amendment protection. However, courts have already determined that this compounded argument crumbles for two reasons. First, solid precedent has already established that an individual's privacy is fragile and must give way to an author's right to claim the protection of copyrighted work.[183] Second, the release of identifying information does not encroach on the defendants' First Amendment rights because the release does not threaten the prosecution of the expression of ideas but only seeks to identify defendants in order to be properly served.[184]

5. Slaying Trolls

Courts have often focused their decisions on attempts to eradicate trolling practices. However, the determination of whether swarm joinder is proper should be based on the requirements of FRCP 20 and notions of efficiency, justice, and fairness, and not on tangential issues. This does not mean that trolling practices should be kept unchecked, but there are alternatives that courts can use to minimize the damage caused by trolls, without having to sacrifice one of the very few recourses that

181. *See Rosen*, *supra* note 107 at 27.
182. *See generally Id.*
183. *Rosen*, *supra* note 107 at 27.
184. *Id.*

plaintiffs have to enforce their copyright protection rights.

A plaintiff is unreasonably characterized as a troll if the plaintiff is seeking a settlement. However, the pursuit of a settlement should not be the deciding factor of whether a plaintiff is a "troll" because judicial policy itself encourages settlements.[185] Moreover, litigation costs for both parties can run high and a plaintiff is not a "troll" for simply wanting to avoid unnecessary costs. Instead, the focus should turn to whether the plaintiff has the *intent* of taking the case to trial and arguing it on the merits. If courts permit joinder of carefully selected defendants, the plaintiff can get one sizable judgment and move on. The alternative, however, is not as straightforward, but rather burdensome. If a court denies swarm joinder, the plaintiff is forced to go against twenty different defendants individually, increasing its costs and decreasing the chance that it will obtain enough remuneration to justify and offset them. And, the defendants are still forced to go through the costly hassle of trial and risk ending up with a judgment that can certainly ruin their financial future.

While it is true that "trolling" is a disreputable practice, it is important for courts to remain focused on the matter at hand and not adopt a presumption of evil motives against all plaintiffs.[186] The American judicial system already has a presumption of innocence favoring the defendants. There is no need for the courts to exacerbate the plaintiff's already high burden with a presumption of evil that ends up forcing them to unfairly pay more for exercising their right to be paid for their work.

With absolutely no intention of justifying "trolling" practices, it is worth mentioning that if "trolls" exist it is largely because of the existence of pirates. Some commentators argue that "trolls" are now simply looking at ways to create work, without much quality, only to use it as bait for the pirates and to give plaintiffs standing to sue.[187] Be that as it may, the constitutional provision granting copyright protection does not concern itself with the *intent* of the author when it creates the work, but only with whether the work meets the requirements under the statute to obtain protection. Trolling practices must be eradicated and should be condemned, but not at the expense of the copyright holders' rights or the potentially harmful manipulation of FRCP 20.

6. Safeguards Against Trolling

Case law in BitTorrent cases suggests that a lot of courts have

185. Fed. R. Evid. 408.

186. *See Rosen*, *supra* note 107 at 23.

187. *Id*. at 21.

approached these issues with a black and white lens. The court either allows the plaintiff to join the defendants or, for all intents and purposes, ends the lawsuit by forcing the plaintiff to spend significantly higher costs to recover for damages. This Article suggests that the approach should be more nuanced. The proper use of FRCP 20 can either allow or deny the use of swarm joinder, depending on the plaintiff's motive for filing the claims and the plaintiff's careful selection of the right defendants and the right jurisdiction. The courts also have FRCP 21 to exercise their discretion, using their better—but unbiased—judgment and applying the Rules to the facts in front of them, instead of trying to use cookie cutter solutions.

Courts can require plaintiffs to use selective criteria for the defendants they wish to sue. These filters would narrow the number of defendants and bring it down to a reasonable and manageable amount, finding a happy medium between trying to sue hundreds of defendants and having to sue each one individually. Courts can even go as far as limiting the actual number of defendants that can be joined in each case. If, for instance, a court states that a BitTorrent plaintiff may only seek to join 15 defendants in any given claim, an additional burden will be placed on the plaintiff that wants to sue 30 defendants. However, even if the plaintiff has to split the claim in two separate claims of 15 defendants each, this is still preferable over having to file 30 individual lawsuits.

If a plaintiff is able to prove that the defendant was carefully selected, the court can then allow the plaintiff to draft a settlement offer that is supervised by the court. Preventing the direct communication between the plaintiff and the defendant can minimize the risk of coercion and undue influence. Courts can even go as far as asking each defendant to bring the letter they received to make sure that the plaintiff did not show the court one letter and sent the defendant a different one. The court could additionally restrict the plaintiff's communication with the defendant in regards to a particular claim in the event that the plaintiff were to attempt to drop the defendant to avoid the supervision of the court after obtaining the defendant's identifying information.

A commentator suggests the use of magistrates or special masters to help in the initial determination of whether the claims are brought in good faith, issuing then a recommendation for the judge that can promote judicial efficiency.[188] This suggestion, coupled with selective criteria that results in fewer defendants joined, can promote the policy behind FRCP 20 and mitigate many of the risks that critics bring up.

Additional criteria can be added to the interpretation of FRCP 20, in

188. *See generally Heinbockel*, *supra* note 151.

the same way that the "fundamental fairness" factors were added. One criterion may include geographic relationship, which can preemptively prevent jurisdictional issues. A geographic relationship requirement would ensure that the plaintiff is trying to join defendants upon which the court has proper jurisdiction, and not just threaten as many defendants as possible with litigation to coerce settlements. Another criterion may be time proximity. This criterion would ensure that plaintiffs are truly searching for a nexus between the defendants they are trying to join. Although plaintiffs are already grouping defendants that interact over shorter periods of time, courts could require this nexus to be tighter to ensure that the proper defendants are joined.

Lastly, in addition to granting legal fees to the defendants as provided for in 17 U.S.C. § 505, the courts can also add penalties for plaintiffs who do not follow these additional criteria or plaintiffs who repeatedly engage in trolling practices.

7. Denial of Swarm Joinder Will Not Prevent Trolling

An absolute denial of swarm joinder does more harm than good, because it provides pirates with a sense of security and encouragement to continue their illegal practices, while at the same time undervaluing the constitutionally given protection of the copyright holders.

What is even more telling of the inadequacy of using the denial of swarm joinder as a means to address trolls, is the fact that Malibu Media,[189] one of the most active plaintiffs in copyright infringement, has abandoned the use of swarm joinder in its lawsuits since 2013.[190] Instead, Malibu Media has been filing individual lawsuits—nearly 2,000 in a span of a year and a half[191]—and asking for higher settlement amounts to justify its filing costs. The fact that Malibu Media has been found able to modify its tactic to no longer be affected by the courts' aversion to swarm joinder is powerful evidence of two things: (1) a troll will always find a way to be a troll, and (2) swarm joinder *is not* the cause of the problem, and thus, denying it *is not* the solution.

189. *See* Gabe Friedman, *The Biggest Filer of Copyright Lawsuits? This Erotica Web Site*, THE NEW YORKER (May 14, 2014) https://www.newyorker.com/business/currency/the-biggest-filer-of-copyright-lawsuits-this-erotica-web-site [https://perma.cc/WM8K-LGNV] (This news article explores a bit of the history of Malibu Media LLC. Malibu Media is a producer of pornographic and adult films founded by Colette Pelisier Field and Brigham Field).

190. *See Sag*, *supra* note 120 at 1142.

191. *Id.*

CONCLUSION

Swarm joinder may not be the perfect solution to the piracy problem. However, it can be one that achieves the most efficient results in deterring the uncontrollable increase in copyright infringement, at least until the legislature and the courts are able to provide copyright holders with a more suitable recourse. Similarly, the suggestions made in this Article are far from ideal, but the slight probability of inconveniencing innocent defendants on a case by case basis is far less detrimental than hardening the interpretation of the FRCP resulting in an exception that does not cure the illness but only treats the symptoms, and does it poorly.

The BT Protocol and its lawful uses are a reminder of the direction in which technology is headed. Manipulating the FRCP solely to get rid of an incidental result of the advance of technology will not provide a long-term solution, and will only get tougher as technology progresses. With the advance of technology, suing individual defendants with limited financial resources is not a viable option for copyright holders to recover for their damages. If copyright holders are not going to be able to protect their work from illegal use, the entire purpose behind the Constitution's Copyright Clause, to secure original work and "*promote* the progress of science and useful arts" is undermined because, without protection, there is no longer value in creating new and better work. The curtailing of the already limited means that copyright holders have to enforce their constitutionally given protection is not the solution to either the piracy or trolling problems.

It may very well be true that the high caliber of shows, such as the Game of Thrones series, is precisely a strong pull factor that attracts pirates who wish to enjoy these shows without having to pay the subscription fees to watch them. This tempting factor in no way justifies partaking in piracy practices, and until the legislature is able to enact laws that better protect copyright holders and innocent defendants, it is up to the courts to ensure justice is carried. However, the undue manipulation of FRCP 20 presents more problems than solutions and erodes the explicit flexibility and efficiency purpose behind the Rule. The denial of swarm joinder, allowing pirates to enjoy unencumbered illegal access to protected works at the expense of the rights of copyright holders and the integrity of the FRCP, is not only to witness the tail wag the dog but to also muzzle the dog for protesting to the wagging.