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## The Uncertifiable Swarm: Why Defendant Class Actions and Mass BitTorrent Copyright Litigation Don't Mix

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The Uncertifiable Swarm: Why Defendant  
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Copyright Litigation Don't Mix

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## I. INTRODUCTION

Throughout the Internet age, media industries and online file sharers have engaged in a cutthroat legal and technological arms race over the delivery, monetization, and infringement of digital music, movies, games, and books. This “war” has hurt almost everyone involved. The mainstream entertainment industry’s reputation has been marred by the Recording Industry Association of America’s (RIAA) campaign to stop online infringement;<sup>1</sup> accused infringers have been sued by rights holders for tens and even hundreds of thousands of dollars;<sup>2</sup> innocent customers have suffered from restrictive antipiracy Digital Rights Management measures;<sup>3</sup> and consumers and producers alike have lost alternative ways to view and distribute content.<sup>4</sup>

In recent years, the legal battles between copyright owners and accused infringers have only escalated, and the tactics used have evolved commensurately. In the newest breed of copyright infringement suits, the plaintiffs are independent film producers and adult film studios, rather than monolithic industry organizations such as the RIAA or the Motion Picture Association of America (MPAA).<sup>5</sup> The defendants in these actions are average people whose Internet protocol (IP) addresses<sup>6</sup> were found to have been connected to file-sharing networks—an identification method of questionable accuracy for finding the actual infringers.<sup>7</sup> In these new suits, plaintiffs’ attorneys no longer follow the one-plaintiff-one-defendant litigation strategy used by industry groups in the mid-2000s. Instead, plaintiffs’ attorneys now engage in so-called “swarm infringement” litigation to sue dozens, hundreds, or thousands of anonymous alleged infringers in a single suit. These attorneys focus on extracting

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1. See, e.g., Richard Koman, *‘Insane’ \$1.9 Million Verdict Could Prove RIAA’s Downfall*, ZDNET (June 19, 2009, 14:15 GMT), <http://www.zdnet.com/blog/government/insane-1-9-million-verdict-could-prove-riaas-downfall/4994>; David Kravets, *File Sharing Lawsuits at a Crossroads, After 5 Years of RIAA Litigation*, WIRED (Sept. 4, 2008, 2:55 PM), <http://www.wired.com/threatlevel/2008/09/proving-file-sh/>.
  2. E.g., ELEC. FRONTIER FOUND., *RIAA v. THE PEOPLE: FIVE YEARS LATER 5–6* (2008), available at <https://www.eff.org/files/eff-riaa-whitepaper.pdf>.
  3. Digital Rights Management (DRM) systems regulate, lock, or otherwise limit how a particular digital file or piece of content may be used, viewed, or reproduced. For instance, anyone who has tried to unsuccessfully transfer a music library from an iPod to another computer has run afoul of DRM software. See, e.g., *DRM*, ELEC. FRONTIER FOUND., <https://www.eff.org/issues/drm> (last visited Apr. 2, 2014).
  4. James Grimmelmann, *Why Johnny Can’t Stream: How Video Copyright Went Insane*, ARS TECHNICA (Aug. 30, 2012, 9:00 AM EDT), <http://arstechnica.com/tech-policy/2012/08/why-johnny-cant-stream-how-video-copyright-went-insane/>.
  5. See, e.g., *Sunlust Pictures, LLC v. Does 1–75*, No. 12 C 1546, 2012 WL 3717768 (N.D. Ill. Aug. 27, 2012); *Digital Sin, Inc. v. Does 1–176*, 279 F.R.D. 239 (S.D.N.Y. 2012); *Hard Drive Prods., Inc. v. Does 1–188*, 809 F. Supp. 2d 1150 (N.D. Cal. 2011).
  6. An Internet protocol (IP) address is a number that serves as a way of designating a computer’s “location” on the Internet. MICHAEL D. SCOTT, *INTERNET AND TECHNOLOGY LAW DESK REFERENCE* 450–51 (4th ed. 2003) (quoting *Avery Dennison Corp. v. Sumpton*, 189 F.3d 868, 872 (9th Cir. 1999)).
  7. See, e.g., *Media Prods., Inc. v. Does 1–26*, No. 12 Civ. 3719(HB), 2012 WL 3866492, at \*1 (S.D.N.Y. Sept. 4, 2012) (“Particularly troubling for courts is the high probability of misidentified Doe defendants [who may be the bill-payer for the IP address but not the actual infringer] settling a case for fear of the disclosure of the allegations against them or the high cost of litigation.”).

settlements, rather than bringing each case to trial on the merits.<sup>8</sup> Swarm infringement suits have proven to be remarkably profitable; one lawyer boasts of having earned a “few million dollars” by suing 20,000 defendants in 350 such cases.<sup>9</sup> The success of this litigation strategy has led to a “nationwide blizzard of civil actions.”<sup>10</sup>

Swarm infringement cases utilize Rule 20 of the Federal Rules of Civil Procedure to sue multiple defendants in one action. This rule allows persons to be joined in one action as defendants if:

- (A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
- (B) any question of law or fact common to all defendants will arise in the action.<sup>11</sup>

It is undisputed that much infringement occurs through the BitTorrent file transfer protocol,<sup>12</sup> and that the collective nature of this protocol ties multiple defendants to the “same transaction, occurrence, or series of transactions or occurrences.”<sup>13</sup> However, not every district court agrees that these cases should be allowed to proceed under Rule 20 joinder.<sup>14</sup> As a result, there have been attempts to sue alleged infringers as defendant classes under Rule 23, which allows “representative parties” to be sued on behalf of all members of a class when:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.<sup>15</sup>

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8. *See id.* at \*2.

9. Kashmir Hill, *How Porn Copyright Lawyer John Steele Has Made a 'Few Million Dollars' Pursuing (Sometimes Innocent) 'Porn Pirates'*, FORBES (Oct. 15, 2012, 2:09 PM), <http://onforb.es/RZQmtA>.

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

11. FED. R. CIV. P. 20(a)(2)(A)–(B).

12. The BitTorrent file transfer protocol is a fast, relatively efficient method for copying and distributing files. It involves breaking a larger file down into small pieces then allowing a “swarm,” or a group of users, to upload and download these pieces concurrently. Part II, *infra*, will discuss the BitTorrent protocol in detail.

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

14. *Compare Media Prods., Inc. v. Does 1–26*, No. 12 Civ. 3719(HB), 2012 WL 3866492, at \*2 (S.D.N.Y. Sept. 4, 2012), and *Next Phase Distrib., Inc. v. Does 1–27*, 284 F.R.D. 165 (S.D.N.Y. 2012), with *W. Coast Prods., Inc. v. Does 1–5829*, 275 F.R.D. 9 (D.D.C. 2011), and *Donkeyball Movie, LLC v. Does 1–171*, 810 F. Supp. 2d 20 (D.D.C. 2011).

15. FED. R. CIV. P. 23.

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Nearly four thousand named defendants in two defendant classes have been sued using this rule.<sup>16</sup>

This note contends that the Rule 23 defendant class action is poorly suited for swarm copyright infringement litigation. First, any such defendant class is uncertifiable under Rule 23. Second, class certification in such cases raises significant issues of fairness and judicial efficiency. To this end, this note aims to serve as a reference and a resource for courts and defendants in such cases, to help nip this improper use of defendant class actions in the bud.

Part II of this note explains how the BitTorrent peer-to-peer file-transfer system creates “swarms” of defendants. Part III describes the evolution of swarm infringement litigation and describes plaintiffs’ litigation strategy. Part IV discusses how the nature of swarm litigation suits precludes certification of a defendant class under Rule 23. Part V argues that swarm litigation tactics and practices raise serious policy and fairness concerns, which counsel against permitting the use of Rule 23 in this context. Part VI concludes that courts should not certify defendant classes in swarm infringement suits.

### II. THE BITTORRENT PROTOCOL

After the demise of Napster and its progeny,<sup>17</sup> the BitTorrent protocol became one of the most popular methods for sharing content over the Internet.<sup>18</sup> The BitTorrent protocol is designed to quickly distribute large files to other users while reducing the server and network impact on the party distributing those files.<sup>19</sup>

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16. Complaint, *VPR Internationale v. Does 1–1017*, No. 2:11-cv-02068 (C.D. Ill. Mar. 8, 2011), ECF No. 1 [hereinafter Complaint, *VPR Internationale*]; Complaint, *OpenMind Solutions, Inc. v. Does 1–2925*, No. 3:11-cv-00092 (S.D. Ill. Feb. 2, 2011), ECF No. 2 [hereinafter Complaint, *OpenMind Solutions*]. These defendants have been “named” in a lawsuit as anonymous “John Doe” placeholders, and remain unidentified until their identities are determined during discovery. For a description of a “defendant class,” see *infra* Part IV.B. These cases were voluntarily dismissed pursuant to Rule 41 of the Federal Rules of Civil Procedure before either court could hear and decide any disputes relating to class certification under Rule 23. See Order of Voluntary Dismissal, *OpenMind Solutions*, No. 3:11-cv-00092 (S.D. Ill. Mar. 27, 2012), ECF No. 45; Order of Voluntary Dismissal, *VPR Internationale*, No. 2:11-cv-02068 (C.D. Ill. Aug. 11, 2011), ECF No. 29.
  17. See, e.g., *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003); *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002).
  18. SANDVINE, THE GLOBAL INTERNET PHENOMENA REPORT: 1H 2013, at 6 (2013), available at <https://www.sandvine.com/downloads/general/global-internet-phenomena/2013/sandvine-global-internet-phenomena-report-1h-2013.pdf> (finding that BitTorrent traffic constitutes 9.2% of overall Internet traffic in North America). In fact, BitTorrent comes in fourth overall after “traditional” HTTP file transferors YouTube and Netflix. *Id.* While the percentage of overall Internet traffic that BitTorrent consumes actually dropped in 2013, the amount of BitTorrent traffic increased 40% in the last six months of 2012; the fact that BitTorrent traffic constitutes a smaller percentage of total traffic is due to dramatic growth in bandwidth-intensive streaming video services. SANDVINE, THE GLOBAL INTERNET PHENOMENA REPORT: 2H 2012, at 7 (2012), available at [http://www.electronics.dit.ie/staff/dclarke/Other%20Files/Sandvine\\_Global\\_Internet\\_Phenomena\\_Report\\_2H\\_2012.pdf](http://www.electronics.dit.ie/staff/dclarke/Other%20Files/Sandvine_Global_Internet_Phenomena_Report_2H_2012.pdf).
  19. See Rebecca Giblin, *A Bit Liable? A Guide to Navigating the U.S. Secondary Liability Patchwork*, 25 SANTA CLARA COMPUTER & HIGH TECH. L.J. 7, 9 (2008–2009); *Introduction*, BITTORRENT, <http://web.archive.org/web/20040919033827/bittorrent.com/introduction.html> (last visited Apr. 2, 2014).

The BitTorrent protocol has seen widespread use for both legal and illegal distribution of files, including software programs, patches, research data, videos, music, and e-books. Many companies, including Twitter and Facebook, use the BitTorrent protocol to distribute software updates to their customers; individuals and publishers also use it to share or sell authorized copies of files.<sup>20</sup> But BitTorrent is also used to copy and distribute files illegally on an enormous scale.<sup>21</sup> Content owners have been unable to stop this widespread infringement. The BitTorrent protocol's architecture and open-source nature have insulated service providers from legal action. As a result, copyright owners have turned to filing suits against infringing end users rather than the providers of a particular BitTorrent application or the operators of a particular website.<sup>22</sup>

#### A. Understanding the BitTorrent Protocol

BitTorrent shares files between its users by “break[ing] a large file into pieces while tagging each piece with a common identifier.”<sup>23</sup> Unlike sequentially downloading a file from a single source, BitTorrent allows “users [to] join forces to simultaneously

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20. See, e.g., Vince Veneziani, *BitTorrent DNA: Torrenting No Longer a Dirty Word*, TECHCRUNCH (Oct. 9, 2007), <http://techcrunch.com/2007/10/09/bittorrent-dna-torrenting-no-longer-a-dirty-word/>; Larry Gadea, *Murder: Fast Datacenter Code Deploys Using BitTorrent*, TWITTER ENGINEERING BLOG (July 15, 2010, 18:35 UTC), <https://blog.twitter.com/2010/murder-fast-datacenter-code-deploys-using-bittorrent>; Ryan Paul, *Exclusive: A Behind-the-Scenes Look at Facebook Release Engineering*, ARS TECHNICA (Apr. 5, 2012, 11:30 AM), <http://arstechnica.com/business/2012/04/exclusive-a-behind-the-scenes-look-at-facebook-release-engineering/>.
21. For example, unauthorized copies of popular television shows are downloaded millions of times each year. See, e.g., Eric Limer, *Last Night's Game of Thrones Premier Was the Hottest Torrent Ever*, GIZMODO (Apr. 1, 2013, 10:56 PM), <http://gizmodo.com/5993214/last-nights-game-of-thrones-premier-was-the-hottest-torrent-ever> (indicating that the day after the Season 3 premier of popular HBO show *Game of Thrones* it had already been downloaded over one million times); Ernesto, *Game of Thrones Crowned Most Pirated TV-Show of the Season*, TORRENTFREAK (June 8, 2012), <http://torrentfreak.com/game-of-thrones-most-pirated-tv-show-of-the-season-120608/>. These downloads were not authorized by rights holder HBO, and thus probably infringed (at the very minimum) the reproduction right granted in the Copyright Act. See 17 U.S.C. §§ 106(1) (2012).
22. The “BitTorrent protocol” is so resilient because it is an easily duplicated method for transferring files across the Internet. BitTorrent clients and trackers, which are programs that allow users to transmit files using the BitTorrent protocol, are easily reproduced, with much of the code publicly available and open source. As a result, there is little to be gained tactically (or monetarily) from suing a company or individual who provides BitTorrent services; shut down one provider, and a dozen imitators are immediately available. See Rebecca Giblin, *Physical World Assumptions and Software World Realities (And Why There Are More P2P Software Providers Than Ever Before)*, 35 COLUM. J.L. & ARTS 57, 112–15 (2011). For a more in-depth discussion of the pitfalls and possibilities associated with litigating against providers of BitTorrent protocol-related services, see Mark F. Schultz, *Will BitTorrent Go the Way of Grokster?: File Sharing After MGM v. Grokster*, A.B.A. SCITECH LAW., Winter 2006, at 4, 5–8; Rhys Boyd-Farrell, Comment, *Legal Analysis of the Implications of MGM v. Grokster for BitTorrent*, 11 INTEL. PROP. L. BULL. 77, 80–86 (2006); Eric Waldman, Note, *Going Straight: Whether P2P Technology Can Be Legitimized in the Wake of the Grokster Decision?*, 15 SYRACUSE SCI. & TECH. L. REP. 1 (2007).
23. *Media Prods., Inc. v. Does 1–26*, No. 12 Civ. 3719(HB), 2012 WL 3866492, at \*1 (S.D.N.Y. Sept. 4, 2012).

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download and upload pieces of the file from and to each other.”<sup>24</sup> This creates an “interconnected web of information flowing between users,” or a “swarm.”<sup>25</sup>

The users connected to a swarm send copies of these pieces to each other simultaneously. The BitTorrent “client”<sup>26</sup> reassembles these pieces like a jigsaw puzzle.<sup>27</sup> Eventually, every user connected to the swarm will have a complete copy of the file, or at least a copy of all the pieces that are available in the swarm.

In order to connect to a swarm and download a file, a user generally needs a small torrent file and a connection to a tracker, which is a server elsewhere on the Internet that coordinates the distribution of the file or files to be downloaded.<sup>28</sup> The torrent file contains data regarding the tracker as well as information about the files to be downloaded.

To download a file using the BitTorrent protocol, a BitTorrent client must read the information in a torrent file.<sup>29</sup> Upon opening a torrent file, the BitTorrent client announces itself to the tracker, which provides a list of up to two hundred IP addresses<sup>30</sup> associated with other users currently connected to the swarm.<sup>31</sup> The client connects to these other users and begins to download parts of the file. Periodically, the client will reconnect to the tracker, which will update the list of available IP addresses, allowing other users to join the swarm.<sup>32</sup>

Because these IP addresses are visible, there is the potential to identify and track down the owner of each IP address through the use of monitoring software.<sup>33</sup> This has led to a new copyright infringement litigation strategy that not only takes advantage of this vulnerability, but also exploits the collective nature of a BitTorrent swarm to attempt

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24. *Id.*

25. *Id.*

26. The term “client” in this context is an industry term for a software application on the end user’s computer that coordinates the BitTorrent file-sharing transaction.

27. See TOM CHOTHIA ET AL., THE UNBEARABLE LIGHTNESS OF MONITORING: DIRECT MONITORING IN BITTORRENT 5 (2012), available at <http://www.cs.bham.ac.uk/~tpc/Papers/P2PComm2012.pdf>.

28. *Id.* Magnet links, which perform a similar function to torrent files but are not required to be downloaded to the user’s computer, are a common alternative to torrent files. *E.g.*, Lital Helman, *Pull Too Hard and the Rope May Break: On the Secondary Liability of Technology Providers for Copyright Infringement*, 19 TEX. INTELL. PROP. L.J. 111, 153 (2010).

29. CHOTHIA ET AL., *supra* note 27, at 5.

30. An IP address is a thirty-two-digit binary number that serves as a way of designating a computer’s “location” on the Internet. See SCOTT, *supra* note 6, at 450. The Internet service provider (ISP), which provides the Internet connection, assigns IP addresses to its customers, and is generally the only party who is able to link an individual IP address to a particular customer account, although even the ISP cannot tell who was “behind the keyboard” committing the infringement. See *id.* at 451–52.

31. See CHOTHIA ET AL., *supra* note 27, at 6; Timothy B. Lee, *Trading Popular Files on BitTorrent? You’ll Be Spotted Within 3 Hours*, ARS TECHNICA (Sept. 4, 2012, 12:54 PM EDT), <http://arstechnica.com/tech-policy/2012/09/trading-popular-files-on-bittorrent-youll-be-spotted-within-3-hours/>.

32. CHOTHIA ET AL., *supra* note 27, at 6.

33. For an in-depth discussion of BitTorrent monitoring software, its use, and its efficacy, see generally CHOTHIA ET AL., *supra* note 27.

to legally connect multiple users together into a single suit. These mass anonymous copyright infringement suits are also known as “swarm infringement” suits.

*B. A Quick Primer on Copyright Infringement and BitTorrent*

Copyright infringement is defined in the Copyright Act as a violation of “any of the exclusive rights of [a] copyright owner.”<sup>34</sup> The use of BitTorrent implicates both the reproduction and distribution rights granted by the Copyright Act.<sup>35</sup>

The reproduction right protects against unauthorized reproductions of any copyrighted work.<sup>36</sup> Infringement of this right requires both access to a copyrighted file and that the reproduction be “substantially similar” to the copyrighted work.<sup>37</sup> In BitTorrent file-sharing cases, most courts have little trouble finding that the reproduction right has been infringed,<sup>38</sup> although one court has held that an incomplete BitTorrent download is *not* substantially similar to the original work until it is completed.<sup>39</sup>

The distribution right provides the copyright owner with the exclusive right “to distribute copies . . . of the copyrighted work to the public.”<sup>40</sup> The transfer of copyrighted files from one user to another violates this right, which implicates BitTorrent’s very nature.<sup>41</sup> District courts disagree about whether the distribution right is violated merely by making files available via a peer-to-peer network without

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34. 17 U.S.C. § 501(a) (2012).

35. *Id.* § 106(1), (3).

36. *See id.* § 106(1).

37. *See Jorgenson v. Epic/Sony Records*, 351 F.3d 46, 51, 55 (2d Cir. 2003); *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 137 (2d Cir. 1998). The underlying work must also be protectable under the Copyright Act by fulfilling the originality and fixation requirements. However, as those requirements focus primarily on the copyrightability of the underlying work rather than the infringement of the work, there is little need to discuss them in this context.

38. *See, e.g., Call of the Wild Movie, LLC v. Does 1–1062*, 770 F. Supp. 2d 332 (D.D.C. 2011); *Columbia Pictures Indus. v. Fung*, No. CV 06-5578, 2009 WL 6355911 (C.D. Cal. Dec. 21, 2009) *aff’d in part, vacated in part, injunction modified in part*, 710 F.3d 1020 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 624 (2013).

39. *Ingenuity 13 LLC v. Doe*, No. 2:12-cv-08333-ODW-JC, 2013 WL 765102, at \*3 (C.D. Cal. Feb. 7, 2013) (“[D]ownloading data via the BitTorrent protocol is not like stealing candy. Stealing a piece of a chocolate bar, however small, is still theft; but copying an encrypted, unusable piece of a video file via the BitTorrent protocol may not be copyright infringement. In the former case, some chocolate was taken; in the latter case, an encrypted, unusable chunk of zeroes and ones. And as part of its prima facie copyright claim, Plaintiff must show that Defendants copied the copyrighted work. . . . If a download was not completed, Plaintiff’s lawsuit may be deemed frivolous.”). For more information regarding the substantial similarity requirement and BitTorrent, see Declaration of Seth Schoen at 3–8, *Ingenuity 13*, 2013 WL 765102 (No. 2:12-cv-08333-ODW-JC), ECF No. 117-3.

40. 17 U.S.C. § 106(3) (2012).

41. CHOTHIA ET AL., *supra* note 27, at 5–7. Hundreds of multiple-defendant swarm infringement cases have been filed across the country. Only two of these cases have aggregated defendants by using a method other than Rule 20 joinder, namely Rule 23. *See* Complaint, *VPR Internationale*, *supra* note 16; Complaint, *OpenMind Solutions*, *supra* note 16.

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actual proof of distribution.<sup>42</sup> As a result, the BitTorrent protocol's unique method of transferring files might also raise unsettled legal questions regarding infringement of the distribution right.<sup>43</sup>

### III. SWARM INFRINGEMENT SUITS

Swarm infringement litigation evolved from the antipiracy campaigns waged by the RIAA and the MPAA against individual users of file-sharing services from 2003 to 2008.<sup>44</sup> However, swarm infringement litigation differs from those previous campaigns in three very important ways. First, swarm infringement litigation's true innovation is its sheer scale. BitTorrent, by its nature, groups many potential defendants together, allowing swarm infringement plaintiffs to use aggregate litigation techniques such as Rule 20 permissive joinder and Rule 23 defendant classes to sue numerous individual defendants in a single suit. Second, the plaintiffs in these cases are typically small independent movie studios or adult film production companies. Third, plaintiffs' priority in these cases is to recover money through the simplest and quickest means possible, rather than obtain complete vindication of their rights under the Copyright Act.<sup>45</sup> These differences illustrate the evolution of swarm infringement litigation from earlier anti-infringement campaigns. This Part provides a brief history of swarm infringement litigation and describes the strategy used by plaintiffs' attorneys in such suits.

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42. *Compare, e.g.,* Atl. Recording Corp. v. Howell, 554 F. Supp. 2d 976, 981–84 (D. Ariz. 2008), and London-Sire Records, Inc. v. Doe 1, 542 F. Supp. 2d 153, 176 (D. Mass. 2008), with Motown Record Co. v. DePietro, No. 04-CV-2246, 2007 WL 576284, at \*3 (E.D. Pa. Feb. 16, 2007), and Warner Bros. Records, Inc. v. Payne, No. W-06-CA-051, 2006 WL 2844415, at \*3–4 (W.D. Tex. July 17, 2006). Indeed, the U.S. Court of Appeals for the Eighth Circuit recently declined to address this issue entirely despite its pivotal nature in the district court cases, preferring to rule on the narrower issue of whether the damages award was constitutional. *See* Capitol Records, Inc. v. Thomas-Rasset, 692 F.3d 899, 903–07 (8th Cir. 2012), *cert. denied*, 133 U.S. 1584 (2013).

43. For instance, it is ultimately unsettled whether merely making a copyrighted work available via BitTorrent infringes the distribution right. The exploration of these issues is beyond the scope of this note; however, for a discussion of the distribution right in light of pre-BitTorrent file-sharing litigation, see Peter S. Menell, *In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age*, 59 J. COPYRIGHT SOC'Y OF THE U.S.A. 201 (2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1679514](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1679514); Diana Sterk, Comment, *P2P File-Sharing and the Making Available War*, 9 Nw. J. TECH. & INTELL. PROP. 495 (2011); Vincent J. Galluzzo, Note, *When "Now Known or Later Developed" Fails its Purpose: How P2P Litigation Has Turned the Distribution Right Upside-Down*, 61 FLA. L. REV. 1165 (2009).

44. *See* ELEC. FRONTIER FOUND., *supra* note 2, at 2–4.

45. For instance, until District Judge Baylson forced Malibu Media and several John Doe defendants to proceed to trial in an expedited manner in the so-called "bellwether trial" of *Malibu Media, LLC v. John Does 1, 6, 13, 14*, 950 F. Supp. 2d 779 (E.D. Pa. 2013), not a single swarm infringement case had been litigated past the pretrial stages, despite hundreds of cases against tens of thousands of defendants spanning nearly four years. A "bellwether trial" is a trial that involves "facts, claims, or defenses that are similar to the facts, claims, and defenses presented in a wider group of related cases." Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2325 (2008). Such a trial "assist[s] in the maturation of disputes" by demonstrating the "strengths and weaknesses of their arguments and evidence, and . . . the risks and costs associated with the litigation." *Id.*

*A. The Evolution of Swarm Infringement Litigation*

*1. Targeting the Technology: Suing the Service Providers*

To combat peer-to-peer file sharing of copyrighted content, content owners began by suing the creators of the peer-to-peer networks.<sup>46</sup> They won several victories, including the *Grokster* case, which created an inducement standard for secondary liability that doomed most of the Napster-style file-sharing applications.<sup>47</sup> With each victory, however, new and ever more decentralized methods for sharing files appeared, making it harder and harder to stop rampant infringement by suing the networks themselves.<sup>48</sup>

*2. Targeting the Infringers: Individual Copyright Infringement Lawsuits*

Because suing peer-to-peer networks proved ineffective, industry associations and other content owners switched tactics. By using software tools to collect the IP addresses of users on popular file-sharing networks, they targeted the actual individuals uploading and downloading copyrighted content.<sup>49</sup> An IP address, however, only provides the “location” of the computer on the Internet, not the actual name or physical location of the person who committed the allegedly infringing act. In order to tie these IP addresses to an actual person, content owners must seek assistance from Internet service providers (ISPs), the only parties with access to both their clients’ IP addresses and their names and street addresses.<sup>50</sup> Until this information is provided, defendants are unidentifiable, and content owners cannot serve them with a civil complaint or contact them to initiate settlement negotiations.

In early cases, plaintiffs would file suit against an unidentified John Doe defendant whose IP address had been traced to allegedly infringing activity.<sup>51</sup> Because the defendant was unidentified, the plaintiff would then seek an *ex parte*

46. See, e.g., *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

47. See *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*, 545 U.S. 913, 936–37 (2005); see also *In re Aimster Copyright Litig.*, 334 F.3d at 646; *A&M Records*, 239 F.3d at 1019–22.

48. For instance, Napster was vulnerable because its service utilized a centralized index server that contained a database of users and files. As a result, the entire Napster service could be easily shut down via court order. See Jeff Tyson, *How the Old Napster Worked*, HOWSTUFFWORKS, <http://computer.howstuffworks.com/napster2.htm> (last visited Apr. 2, 2014). In contrast, as explained in Part II, *supra*, the decentralized nature of the BitTorrent protocol makes it very difficult to shut down even a small portion of the total amount of infringing traffic by targeting a service provider or network that encouraged or enabled copyright infringement. Shutting down a single tracker, index website, or client provider has very little effect on the amount of infringement caused by BitTorrent traffic as a whole. See *supra*, note 22. While some torrent search indices and trackers have been shut down, it appears to have done little to stop BitTorrent traffic. See Tom Herrmann, *Demonoid Taken Down by Ukrainian Government; Domains for Sale*, INT’L BUS. TIMES (Aug. 14, 2012, 4:10 PM), <http://www.ibtimes.com/demonoid-taken-down-ukrainian-government-domains-sale-743141>; SANDVINE, *supra* note 18.

49. ELEC. FRONTIER FOUND., *supra* note 2, at 2–3.

50. *Id.* at 2.

51. *Id.* at 4; Paul Roberts, *RIAA Sues 532 ‘John Does’*, PCWORLD (Jan. 21, 2004, 1:00 PM), <http://www.pcworld.com/article/114387/article.html>.

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subpoena against the appropriate ISP in order to gain access to that defendant's name and contact information.<sup>52</sup> After the defendant was identified and served, the plaintiff's attorneys would typically contact him or her with settlement demands; if the defendant refused, the lawsuit could be amended to replace the John Doe defendant with the actual alleged infringer, and the case would proceed.<sup>53</sup> This subpoena procedure had to be done quickly, as IP address assignments change on a regular basis.<sup>54</sup>

Industry associations and other content owners filed thousands of parallel individual suits in this manner.<sup>55</sup> Their desire to police and protect their rights was demonstrated by their willingness to litigate fully despite the contentious, difficult, and expensive nature of these cases. Nowhere was this more evident than in the case of *Capitol Records, Inc. v. Thomas-Rasset*.<sup>56</sup> There, the defendant, a single mother of four, was sued by major record labels, including Capitol Records and Virgin Records, for online file sharing.<sup>57</sup> After she declined an initial settlement suggestion of \$5,000, she went to trial four separate times in six years over the alleged copyright infringement of twenty-four songs, facing damages ranging from \$54,000 to \$1.92 million.<sup>58</sup> The U.S. Court of Appeals for the Eighth Circuit finally set the award at \$222,000, or \$9,250 per song.<sup>59</sup> While this lawsuit alone almost certainly cost the record company plaintiffs far more than they were able to recover in damages, the message was clear: the industry was willing to litigate aggressively to enforce its copyright interests, no matter the cost.

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52. ELEC. FRONTIER FOUND., *supra* note 2, at 4. This proceeding is ex parte because no one knows who the accused are. "This means that [the plaintiff] generally gets to file [its] complaint and seek expedited discovery without opposition from any lawyer (though the ISPs have increasingly challenged what they view as burdensome mass subpoenas)." Nate Anderson, *Meet Evan Stone, P2P Pirate Hunter*, ARS TECHNICA (Feb. 7, 2011, 2:31 PM EST), <http://arstechnica.com/tech-policy/2011/02/meet-evan-stone-p2p-pirate-hunter/>.

53. Anderson, *supra* note 52.

54. Broadband ISPs typically assign dynamic IP addresses to their subscribers. This avoids the administrative necessity of assigning specific static (unchanging) IP addresses to each device on the network, and it allows new devices to function in an essentially "plug and play" fashion, without requiring the end user to enter any configuration information. However, since these IP addresses are dynamic, they can (and do) change, although the typical IP address "lease" on a broadband modem is quite lengthy. See RALPH DROMS, BUCKNELL UNIV., DYNAMIC HOST CONFIGURATION PROTOCOL 12 (1997), available at <http://tools.ietf.org/pdf/rfc2131.pdf>.

55. ELEC. FRONTIER FOUND., *supra* note 2, at 10; Nate Anderson, *Has the RIAA Sued 18,000 People . . . or 35,000?*, ARS TECHNICA (July 8, 2009, 2:50 PM EDT), <http://arstechnica.com/tech-policy/2009/07/has-the-riaa-sued-18000-people-or-35000/>.

56. *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899 (8th Cir. 2012), *cert. denied*, 133 U.S. 1584 (2013).

57. *Id.*

58. *Id.* at 901–02.

59. *Id.* at 902.

This litigation strategy drew substantial criticism and public ire. Targeting creators of file-sharing networks was one thing; suing twelve-year-old children<sup>60</sup> and single mothers<sup>61</sup> for thousands or tens of thousands of dollars was quite another.<sup>62</sup>

Further, using IP addresses as a basis to identify alleged infringers is inaccurate at best, as it only points to a particular Internet-connected device such as a router, modem, or networked printer, rather than the individual who committed the infringing act. The scale of the mainstream recorded music industry's litigation strategy meant that many defendants were misidentified, which undermined public perceptions of the accuracy, fairness, and legitimacy of the litigation campaign.<sup>63</sup> These embarrassments fanned the flames of anti-industry resentment and exposed the weaknesses inherent in using an IP address to find and sue infringers.

In the end, this strategy of litigating against end users resulted in enormous pecuniary losses. For example, the main industry plaintiff, the RIAA, accrued almost fifty times more in investigative and legal fees than it earned via judgments and settlements.<sup>64</sup> There was also mounting evidence that “[s]even years of copyright lawsuits have done little to stem the file-sharing tide; . . . most users don't know or don't care that the [industry's] private police might be watching their downloads.”<sup>65</sup> The public ire and embarrassment inspired by the suits, combined with the associated financial losses, led large copyright owners to quietly withdraw from this strategy.<sup>66</sup>

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60. John Borland, *RIAA Settles with 12-Year-Old Girl*, CNET (Sept. 9, 2003, 4:05 PM PDT), <http://news.cnet.com/2100-1027-5073717.html>.

61. Associated Press, *Minnesota Woman Caught in Crackdown on Music Downloaders*, USA TODAY (June 11, 2004, 1:15 PM), [http://usatoday30.usatoday.com/tech/webguide/music/2004-05-26-riaa-vs-minnesotan\\_x.htm](http://usatoday30.usatoday.com/tech/webguide/music/2004-05-26-riaa-vs-minnesotan_x.htm).

62. Greg Sandoval, *'Hurt Locker' Producers Follow RIAA Footsteps*, CNET (May 12, 2010, 4:34 PM PDT), [http://news.cnet.com/8301-31001\\_3-20004860-261.html](http://news.cnet.com/8301-31001_3-20004860-261.html) (characterizing the RIAA's campaign against individuals who illegally downloaded music as “a fantastic public relations flub”).

63. For example, the RIAA sued Sarah Ward, a sixty-six-year-old Macintosh-using grandmother, for downloading “hard-core rap about baggy jeans and gold teeth” on a Windows-only file-sharing network. Chris Gaither, *Recording Industry Withdraws Suit, Mistaken Identity Raises Questions on Legal Strategy*, BOS. GLOBE (Sept. 24, 2003), [http://www.boston.com/business/articles/2003/09/24/recording\\_industry\\_withdraws\\_suit/](http://www.boston.com/business/articles/2003/09/24/recording_industry_withdraws_suit/). In another case, the RIAA sued an eighty-three-year-old woman for distributing seven hundred songs via peer-to-peer networks; according to her daughter, the woman not only did not allow computers in her house, but had passed away months before. Eric Bangeman, *"I Sue Dead People . . ."*, ARS TECHNICA (Feb. 4, 2005, 4:43 PM EST), <http://arstechnica.com/uncategorized/2005/02/4587-2/>.

64. Ray Beckerman, *Ha Ha Ha Ha Ha. RIAA Paid Its Lawyers More Than \$16,000,000 in 2008 to Recover Only \$391,000!!!*, RECORDING INDUSTRY VS THE PEOPLE (July 13, 2010), <http://recordingindustryvspeople.blogspot.com/2010/07/ha-ha-ha-ha-ha-riaa-paid-its-lawyers.html> (citing tax filings which indicate that between 2006 and 2008 the RIAA spent over \$64 million in legal fees and investigative expenses to recover just over \$1.3 million in settlements and judgments).

65. James Grimmelmann, *Sealand, HavenCo, and the Rule of Law*, 2012 U. ILL. L. REV. 405, 463; *see also* ELEC. FRONTIER FOUND., *supra* note 2, at 9–10.

66. *See* Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J. (Dec. 19, 2008, 12:01 AM ET), <http://on.wsj.com/16RjNsg>; David Kravets, *Copyright Lawsuits Plummet in Aftermath of RIAA Campaign*, WIRED (May 18, 2010, 1:24 PM), <http://www.wired.com/threatlevel/2010/05/riaa-bump/>.

### 3. *Swarm Litigation: A New Way to Target the Infringers*

After almost a decade of legal battles, the traditional file-sharing model, in which one uploader sends a file to a single downloader, has become almost extinct.<sup>67</sup> The BitTorrent protocol has risen to fill the void, and the amount of peer-to-peer traffic attributable to BitTorrent file transfers has grown to consume considerable amounts of bandwidth in recent years.<sup>68</sup> With the widespread distribution of copyrighted works via the BitTorrent protocol, it was only a matter of time before BitTorrent users became the target of a new anti-infringement campaign.

These swarm litigation suits borrow techniques from previous anti-infringement campaigns against file sharers. IP addresses are collected and used to locate potential “John Doe” infringers, and ISPs are subpoenaed to provide defendants’ contact information.<sup>69</sup> Once plaintiffs have access to this information, they attempt to immediately settle the potential litigation.<sup>70</sup> However, these suits differ from the mass individual suits that preceded them in several important ways.

The primary innovation associated with swarm litigation, and indeed its defining feature, results from the very nature of BitTorrent’s protocol in transferring files. BitTorrent involves collecting file transfers among individuals in a swarm, and plaintiffs argue that should similarly allow them to collectivize their suits.<sup>71</sup> Instead of filing thousands of individual suits in parallel, these swarm infringement cases use joinder under Rule 20 or the class action procedures under Rule 23 to file a single suit against

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67. Most of the major single-uploader/single-downloader services, including Napster, Grokster, and LimeWire, used centralized servers, proprietary or closed-source software, or an easily targeted corporate entity, which made them vulnerable to legal action. *See* Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005); *In re Aimster Copyright Litig.*, 334 F.3d 643 (7th Cir. 2003); A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002); Arista Records LLC v. Lime Group LLC, 715 F. Supp. 2d 481 (S.D.N.Y. 2010). As a result, very few major players remain in this realm; they have been replaced by file lockers, BitTorrent clients, streaming services, direct download services, and very small open-source peer-to-peer services. *See* Ernesto, *Top 10 Largest File-Sharing Sites*, TORRENTFREAK (August 27, 2011), <https://torrentfreak.com/top-10-largest-file-sharing-sites-110828/>; Chloe Albanesius, *LimeWire Is Dead: What Are the Alternatives?* PCMag (Oct. 27, 2010, 4:49PM EST), <http://www.pcmag.com/article2/0,2817,2371590,00.asp>.

68. *See In re Formal Complaint of Free Press and Public Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer Applications*, 23 FCC Rcd. 13028, 13093 (2008), *vacated*, 600 F.3d 542 (D.C. Cir. 2010) (McDowell, Comm’r, dissenting) (noting, in a proceeding discussing Comcast’s blocking of BitTorrent peer-to-peer connections, that “[s]ome estimate that seventy-five percent of the world’s Internet traffic is [peer-to-peer]”).

69. Nate Anderson, *The RIAA? Amateurs. Here’s How You Sue 14,000+ P2P Users*, ARS TECHNICA (June 1, 2010, 8:38 PM EDT), <http://arstechnica.com/tech-policy/2010/06/the-riaa-amateurs-heres-how-you-sue-p2p-users/>.

70. *Id.*

71. It is important to note that the district courts disagree about when collective litigation (whether implemented through Rule 20 joinder or through a Rule 23 defendant class) is appropriate in BitTorrent cases. *Compare, e.g.*, AF Holdings LLC v. Does 1–1058, 286 F.R.D. 39 (D.D.C. 2012) (allowing swarm infringement suits to proceed collectively under Rule 20 joinder), *with* Next Phase Distrib., Inc. v. Does 1–27, 284 F.R.D. 165 (S.D.N.Y. 2012), *and* Malibu Media, LLC v. Does 1, 6, 13, 14, 950 F. Supp. 2d 779 (E.D. Pa. 2013) (finding Rule 20 joinder improper in swarm infringement cases).

dozens, hundreds, or even thousands of defendants.<sup>72</sup> This ability to pursue numerous defendants cheaply with a single filing makes bringing these cases a profitable and sustainable endeavor, leading to a dramatic proliferation of swarm infringement cases in nearly every circuit throughout the country.<sup>73</sup>

Additionally, swarm infringement lawsuits are no longer brought by major record labels, large film production studios, or deep-pocketed industry associations with enormous litigation budgets, as was the case in earlier anti-infringement campaigns.<sup>74</sup> Instead, these suits are typically brought by small independent film studios and adult entertainment companies,<sup>75</sup> and they are generally prosecuted by a handful of individual lawyers and small law firms.<sup>76</sup> This results in a dramatically different litigation strategy.

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72. *See, e.g.*, First Amended Complaint, *Voltage Pictures, LLC v. Vazquez*, No. 1:10-cv-00873-BAH (D.D.C. May 31, 2011), ECF No. 172, *available at* <http://torrentfreak.com/ip-addresses-of-the-24583-hurt-locker-victims-110524/> (naming 24,583 IP addresses as John Doe defendants); Complaint, *OpenMind Solutions*, *supra* note 16 (requesting defendant class certification against 2,925 John Doe defendants); Nate Anderson, *Reverse Class-Action? It's the Latest Tactic in the P2P Wars*, ARS TECHNICA (Feb. 5, 2011, 6:35 PM EST), <http://arstechnica.com/tech-policy/2011/02/reverse-class-action-its-the-latest-tactic-in-the-p2p-wars/>.
73. *See, e.g.*, Anderson, *supra* note 69 (noting that the US Copyright Group, a single small law firm, “has managed the rare feat of making the RIAA campaign look slow-moving and small-scale,” and that the 14,583 John Does sued by the US Copyright Group in the first six months of 2010 *alone* is more than twice the number of individuals sued by the RIAA at their peak in 2005). Dozens of cases have been filed in every circuit. *See, e.g.*, (1st Cir.) *Exquisite Multimedia, Inc. v. Does*, No. 12-10813-MLW, 2013 U.S. Dist. LEXIS 53457 (D. Mass. Apr. 12, 2013); (2d Cir.) *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80 (E.D.N.Y. 2012); (3d Cir.) *Battle Force, LLC v. Does 1-39*, No. 12-6539-JBS-KMW, 2013 U.S. Dist. LEXIS 153933 (D.N.J. Oct. 25, 2013); (4th Cir.) *Media Prods., Inc. v. Does 1-44*, No. PJM 12-1292, 2012 U.S. Dist. LEXIS 65641 (D. Md. May 10, 2012); (5th Cir.) *TCYK, LLC v. Does 1-20*, No. 3:13-cv-3927-L, 2013 U.S. Dist. LEXIS 174671 (N.D. Tex. Dec. 10, 2013); (6th Cir.) *Killer Joe Nev., LLC v. Does 1-57*, No. 3:13-CV-222, 2013 U.S. Dist. LEXIS 172150 (E.D. Tenn. Nov. 5, 2013); (7th Cir.) *TCYK, LLC v. Does 1-87*, No. 13 C 3845, 2013 U.S. Dist. LEXIS 145722 (N.D. Ill. Oct. 9, 2013); (8th Cir.) *W. Coast Prods., Inc. v. Does 1-71*, No. 4:12CV01551 AGF, 2013 U.S. Dist. LEXIS 140436 (E.D. Miss. Sept. 30, 2013); (9th Cir.) *Malibu Media LLC v. Does 1-10*, No. 2:12-cv-01642-RGK-SS, 2013 U.S. Dist. LEXIS 8031 (C.D. Cal. Jan. 17, 2013); (10th Cir.) *Instinctive Film GmbH v. Does 1-15*, No. 13-cv-02143-WYD-MEH, 2013 U.S. Dist. LEXIS 117044 (D. Colo. Aug. 19, 2013); (11th Cir.) *Ga. Film Fund Four, LLC v. Does 1-61*, No. 1:13-CV-1076-RWS, 2013 U.S. Dist. LEXIS 101566 (N.D. Ga. July 19, 2013); (D.C. Cir.) *Hard Drive Prods. v. Does 1-1495*, 892 F. Supp. 2d 334 (D.D.C. 2012).
74. Eriq Gardner, *New Litigation Campaign Quietly Targets Tens of Thousands of Movie Downloaders*, HOLLYWOOD REPORTER (Dec. 21, 2010, 10:56 AM PST), <http://www.hollywoodreporter.com/blogs/thr-esq/litigation-campaign-quietly-targets-tens-63769> (noting that the Independent Film & Television Alliance (IFTA) and MPAA were not as of yet interested in pursuing this litigation strategy, and that the suits had been brought on behalf of independent film producers and not major studios).
75. *See, e.g.*, *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. at 82 (noting that many of these civil actions have been “brought by purveyors of pornographic films”); David Kravets, *Indie Filmmakers Sue Thousands of BitTorrent Users*, WIRED (Mar. 31, 2010, 12:16 PM), <http://www.wired.com/threatlevel/2010/03/bittorrent-legal-attack/>. While the majority of these cases involve film studios, Century Media Ltd., a record label, has recently begun to file swarm infringement suits against downloaders of the heavy metal album *Dystopia* by the band Iced Earth. So far, almost 7,500 John Doe defendants have been sued for downloading these tracks in New Jersey. *See Century Media Ltd. v. Does 1-77*, No. 2:12-cv-3911(DMC)(JAD), 2013 U.S. Dist. LEXIS 27018 (D.N.J. Feb. 27, 2012).
76. Patrick Michaels, *Evan Stone's Battle Against Porn Pirates*, DALL. OBSERVER (Apr. 21, 2011), <http://www.dallasobserver.com/2011-04-21/news/barely-legal/>.

*B. Plaintiffs' Attorneys' Litigation Strategy: Settle, Settle, Settle!*

Having learned from the RIAA's expensive and unpopular campaign against file sharing, the plaintiffs' attorneys in swarm infringement cases approach their litigation strategy differently today. Their major objective is to "creat[e] a revenue stream and monetiz[e] the equivalent of an alternate distribution channel"—in other words, to earn as much money as possible for themselves and their clients by prosecuting alleged infringers.<sup>77</sup> While plaintiffs' attorneys certainly tout the punitive and deterrent effects of these cases, they have focused primarily on creating an economically sustainable, profitable business model; the litigation strategy is tailored to ensure this.<sup>78</sup>

One important ingredient that makes this strategy sustainable is the plaintiff content owners' relative immunity to the negative publicity that was typically associated with prior anti-infringement campaigns. Small independent film studios lack the household name recognition of the major production companies and are less damaged by negative coverage as a result, while the adult entertainment studios that bring a substantial portion of these cases have very little to lose in the public relations arena and much to gain by cracking down on piracy—especially if they can earn money while doing so.<sup>79</sup>

*1. Gathering IP Addresses and Identifying Defendants*

As before, the first step in these cases is identifying alleged infringers' IP addresses. Recall that the nature of the BitTorrent protocol makes gathering IP addresses en masse relatively simple through the "harvesting" of IP addresses from a BitTorrent tracker.<sup>80</sup> Plaintiffs then file a lawsuit using litigation procedures to bring as many John Does as possible to court in a single suit.<sup>81</sup> This allows plaintiffs' attorneys to create the largest possible pool of potential settlements for the least cost in time, filing fees, and

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77. Gardner, *supra* note 74; see also Nate Anderson, *Shlockmeister Uwe Boll Sues 2,000 "Far Cry" P2P Downloaders*, ARS TECHNICA (Mar. 31, 2010, 2:39 PM EDT), <http://arstechnica.com/tech-policy/2010/03/shlockmeister-uwe-boll-sues-2000-far-cry-p2p-downloaders/> ("What sets these cases apart [from the RIAA's campaign is] that the parties think they can make money.").

78. See Michaels, *supra* note 76 (noting that one plaintiffs' lawyer claims that he is "trying to recoup revenue lost to piracy," that he cares about protecting artists' livelihoods, but also notes that he receives about 45% of all settlement funds collected on behalf of his clients); see also Enigmax, *Rights Holders Get 30% From Mass BitTorrent Litigation*, TORRENTFREAK (Mar. 31, 2010), <http://torrentfreak.com/rights-holders-get-30-from-mass-bittorrent-litigation-100331/>.

79. Enigmax, *supra* note 78; Michaels, *supra* note 76; see also Patrick Michaels, *This Ain't Avatar. It's Another Round of Federal Suits Against BitTorrent Porn Downloaders*, DALL. OBSERVER (Oct. 18, 2010, 3:05 PM), [http://blogs.dallasobserver.com/unfairpark/2010/10/this\\_aint\\_avatar\\_its\\_another\\_r.php](http://blogs.dallasobserver.com/unfairpark/2010/10/this_aint_avatar_its_another_r.php) (quoting adult film studio president Michael Klein as saying that the pornography companies "don't look at the suits as a money-making venture on their own—it's about the long-term viability of the industry. From our group of studios, this is just the start of more of an organized effort to combat piracy").

80. CHOTHIA ET AL., *supra* note 27, at 2, 11. Remember, when a BitTorrent client initially connects to a tracker, that tracker sends the client a list of up to two hundred IP addresses belonging to other swarm members to facilitate the new user's connection to the swarm. *Id.* A recent study found that members of popular swarms are likely to have their IP addresses logged by monitoring agencies within three hours. *Id.* at 15; see *supra* Part II.A.

81. The vast majority of these cases use Rule 20 joinder, however two experimental cases in Illinois have used the Rule 23 defendant class to sue thousands of defendants. See *supra* note 16.

motions.<sup>82</sup> While courts have pushed back against the truly enormous cases involving thousands or tens of thousands of defendants,<sup>83</sup> swarm litigation cases involving dozens of John Does still appear in staggering numbers.<sup>84</sup>

Plaintiffs still subpoena defendants' names and contact information from ISPs.<sup>85</sup> The primary difference is the sheer number of defendants, which is so large that ISPs have balked at the proliferation of requests.<sup>86</sup> If a subpoena is granted, ISPs typically notify their customers, allowing defendants to move anonymously to quash these subpoenas.<sup>87</sup> Nevertheless, plaintiffs' attorneys unmask many John Does, and then move on to the profitable part of the litigation.

## 2. *Litigation Strategy or Settlement Strategy?*

So far, aside from the use of aggregate litigation mechanisms and some details relating to the use of BitTorrent, this strategy does not actually play out very differently from the preceding strategy of suing John Does individually in parallel. Once plaintiffs have secured defendants' contact information, however, things change. Rather than following up settlement negotiations with actual litigation, swarm infringement plaintiffs' litigation strategy generally begins and ends with procuring settlements.

Generally, swarm infringement suits are not intended to be litigated to completion. Complex litigation, such as this, is expensive and time-consuming; plaintiffs' attorneys tailor their strategy toward running a profitable legal campaign rather than protecting their clients' copyright interests against every defendant who refuses to settle. As a result, very few cases move forward against nonsettling defendants once the subpoenas have been granted. In fact, only one swarm infringement case has ever been litigated to completion,<sup>88</sup> despite the hundreds of these cases that have been filed.<sup>89</sup> Most

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

83. *See, e.g.*, *SBO Pictures, Inc. v. Does 1-3036*, No. 11-4220 SC, 2011 WL 6002620 (N.D. Cal. Nov. 30, 2011); *On The Cheap, LLC v. Does 1-5011*, 280 F.R.D. 500 (N.D. Cal. 2011); *Diabolic Video Prods., Inc. v. Does 1-2099*, No. 10-CV-5865-PSG, 2011 WL 3100404 (N.D. Cal. May 31, 2011).

84. *See, e.g.*, *Media Prods., Inc. v. Does 1-26*, No. 12 Civ. 3719(HB), 2012 WL 3866492, at \*3 n.2 (S.D.N.Y. Sept. 4, 2012) (describing a list of over thirty such cases as "but a sample").

85. *See, e.g.*, *Pac. Cent. Int'l Ltd. v. Does 1-101*, No. C-11-02533-(DMR), 2011 WL 2690142 (N.D. Cal. July 8, 2011); *Call of the Wild Movie, LLC v. Does 1-1062*, 770 F. Supp. 2d 332 (D.D.C. 2011).

86. Understandably, ISPs began to feel the administrative burden of this massive increase in subpoenas and began to place limits on the number of requests they would process. Michaels, *supra* note 76 (noting that Time Warner Cable has limited IP lookups to three per lawyer per month).

87. *See, e.g.*, *Next Phase Distrib., Inc. v. Does 1-27*, 284 F.R.D. 165, 167 (S.D.N.Y. 2012); *Hard Drive Prods., Inc. v. Does 1-188*, 809 F. Supp. 2d 1150 (N.D. Cal. 2011).

88. *See Malibu Media, LLC v. Does 1, 6, 13, 14*, 950 F. Supp. 2d 779 (E.D. Pa. 2013). Even then, the case only went to trial because the judge forced the parties to litigate through the mechanism of a bellwether trial, and the only issues remaining to be determined at trial were the damages that each individual defendant owed, as each had admitted liability prior to trial. *Id.*

89. Dan Browning, *Lawyers in BitTorrent Copyright Trolling Cases Under Scrutiny*, STAR TRIBUNE (Minneapolis) (Mar. 11, 2013, 6:00 AM), <http://www.startribune.com/local/196795991.html> (identifying "more than 660 federal lawsuits filed by more than a dozen entities" as swarm infringement lawsuits).

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swarm litigation cases end when plaintiffs voluntarily dismiss their own cases without prejudice, typically when they run into judicial resistance; further motion practice costs time and money, and plaintiffs would much rather focus on extracting settlement money.<sup>90</sup> As a result, even after years of swarm litigation, district courts remain split on almost every aspect of a swarm infringement case, from whether to allow joinder to grounds for challenging subpoenas.<sup>91</sup>

To effectuate the settlement process, plaintiffs' attorneys send letters and make phone calls to convince defendants to settle for sums typically ranging between \$1,500 and \$7,500.<sup>92</sup> Some even use automated calls that "strongly suggest[] that their recipients pay around \$3,000 or risk being sued for \$150,000 or more,"<sup>93</sup> while others accept "all major credit cards" so as to expedite settlement collection.<sup>94</sup> Plaintiffs' attorneys calculate settlement amounts just below the cost of mounting an effective defense to a claim of copyright infringement, ensuring that it is easier and cheaper for a defendant to pay the plaintiffs to go away rather than attempt to defend

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90. See, e.g., Nate Anderson, *Texas Chainsaw Massacre: Senior Judge "Severs" Most P2P Lawsuits*, ARS TECHNICA (Feb. 16, 2011, 4:33 PM EST), <http://arstechnica.com/tech-policy/2011/02/texas-chainsaw-massacre-senior-judge-severs-most-p2p-lawsuits/> (noting that West Virginia District Judge Furgeson severed all but the first John Doe in several swarm litigation cases; the plaintiff then dropped all of those cases); see also *Media Prods., Inc. v. Does 1–26*, No. 12 Civ 3719(HB), 2012 WL 3866492 (S.D.N.Y. Sept. 4, 2012) (plaintiff voluntarily dismissed three joinder cases after the court severed all defendants beyond the first); Cindy Cohn, *Mass Copyright Litigation: New Challenge for the Federal Courts*, ELEC. FRONTIER FOUND. (Apr. 19, 2011), <https://www.eff.org/deeplinks/2011/04/mass-copyright-litigation-new-challenge-federal> (raising procedural, jurisdictional, and venue concerns associated with swarm litigation, and noting that some courts have dismissed or severed cases on these grounds, while others have not).
  91. See, e.g., *Next Phase Distrib., Inc. v. Does 1–27*, 284 F.R.D. 165 (S.D.N.Y. 2012). This lack of litigation on the merits led District Judge Baylson in the Eastern District of Pennsylvania to decide to move forward with a bellwether trial. See *Malibu Media, LLC v. Does 1–16*, 902 F. Supp. 2d 690, 702 (E.D. Pa. 2012). This forced the plaintiffs to fully litigate a test case against a small number of John Does on an expedited basis in the hopes of establishing precedent that would allow the speedy resolution of the case against the remaining John Does. *Id.* However, the only issue remaining by the time the case actually went to trial was the issue of damages, as the five John Does remaining in the case admitted liability and entered settlement agreements or high-low agreements with the plaintiffs prior to trial. See *Malibu Media*, 950 F. Supp. 2d at 780. As a result, the bellwether trial provides no guidance when the parties dispute liability.
  92. Nate Anderson, *Settle Up: Voicemails Show P2P Porn Law Firms in Action*, ARS TECHNICA (Apr. 20, 2011, 6:50 PM EDT), <http://arstechnica.com/tech-policy/2011/04/settle-up-voicemails-show-p2p-porn-law-firms-in-action/>; Greg Sandoval, *Accused Pirates to Indie Filmmakers: Sue Us*, CNET (Oct. 21, 2010, 4:00 AM PDT), [http://news.cnet.com/8301-31001\\_3-20020260-261.html](http://news.cnet.com/8301-31001_3-20020260-261.html) (listing settlement payments collected by lawyers for several films as ranging from \$1,000 for a special, sympathetic case to \$1,500 if an accused file sharer settled before a set date; if the accused individual delayed past the set date, the amount would increase to \$2,500).
  93. Reyhan Harmanci, *The Pirates and Trolls of Porn Valley*, BUZZFEED (Aug. 30, 2012, 11:32 AM EDT), <http://www.buzzfeed.com/reghan/the-pirates-and-trolls-of-porn-valley>.
  94. *Defendant Login Page*, DGLLEGAL.COM, <http://web.archive.org/web/20111117075844/http://dglegal.force.com/SiteLogindglegal> (last visited Apr. 2, 2014) (showing an archived snapshot of a law firm's "Defendant Login Page" as it existed on November 17, 2012 during Dunlap, Grubb & Weaver's swarm litigation campaigns, which prominently includes the text "All Major Credit Cards Accepted").

against the plaintiffs' claims.<sup>95</sup> While these settlement amounts are much lower than statutory damages for infringement under the Copyright Act,<sup>96</sup> the threat of enormous damage awards places significant pressure on defendants to settle—pressure that is only exacerbated by the potential embarrassment associated with being publicly sued for downloading pornographic films.<sup>97</sup> These tactics are undeniably effective.<sup>98</sup>

#### IV. DEFENDANT CLASS ACTIONS ARE AN INAPPROPRIATE VEHICLE FOR SWARM INFRINGEMENT CASES

Courts are split on whether to allow plaintiffs to use Rule 20 to join multiple defendants. Some courts have allowed the cases to proceed, while others have severed defendants on jurisdictional, fundamental fairness, or trial management grounds.<sup>99</sup>

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95. Indeed, in cases where the plaintiffs set higher amounts for settlements, defendants have occasionally hired lawyers and fought back. For instance, in *Malibu Media, LLC v. Lee*, No. 12-03900, 2013 WL 2252650 (D.N.J. May 22, 2013), plaintiffs set settlement demands slightly higher, at around \$10,000. See Defendant Gregory Tarris's Memorandum of Law in Opposition to Plaintiff's Motion to Dismiss, *Malibu Media*, 2013 WL 2252650 (No. 12-03900), ECF No. 38. This brief was closely followed by a sua sponte Order to Show Cause from District Judge Michael A. Shipp as to why all John Does except the first should not be severed and dismissed without prejudice. See Order to Show Cause, *Malibu Media*, 2013 WL 2252650 (No. 12-03900), ECF No. 40. The plaintiffs then dismissed all claims against all anonymous defendants, leaving only a few named individuals within the suit who continued to oppose the plaintiffs.
96. Courts may award damages ranging from \$750 to \$30,000 per infringement, or up to \$150,000 if an infringement is found to be "willful." 17 U.S.C. § 504(c) (2012).
97. See *Malibu Media LLC v. John Doe Subscriber Assigned IP Address 24.183.51.58*, No. 13-cv-205-wmc, 2013 WL 4821911, at \*5 (W.D. Wis. Sept. 10, 2013) (sanctioning plaintiff for its "regular practice" of publicly filing as an exhibit a list of "particularly lewd and obscene" titles that the defendant had allegedly downloaded, and that the plaintiff did not own, which only served to "harass and intimidate defendants into early settlements by use of the salacious nature of others' materials, rather than the merit of its own copyright claims"); *Digital Sins, Inc. v. Does 1-245*, No. 11 Civ. 8170(CM), 2012 WL 1744838, at \*3 (S.D.N.Y. May 15, 2012) (noting that "the nature of the alleged copyright infringement—the downloading of an admittedly pornographic movie—has the potential for forcing coercive settlements, due to the potential for embarrassing the defendants, who face the possibility that plaintiff's thus-far-unsubstantiated and perhaps erroneous allegation will be made public").
98. See Michaels, *supra* note 76 (quoting a plaintiffs' attorney that 40% of defendants settle these claims); Anderson, *supra* note 92 (noting that the plaintiff's attorney in *Future Blue, Inc. v. Does 1-300*, No. 10-cv-06256 (N.D. Ill. June 8, 2011) voluntarily dismissed claims against fifteen defendants in order to settle claims at an estimated rate of \$2,900 each, or \$43,500 in total, at the cost of a \$350 filing fee). The sheer profitability of these cases ensures that this litigation strategy will remain sustainable and that swarm infringement cases will remain plentiful for the foreseeable future. Cohn, *supra* note 90 (observing that, in the fifteen months preceding April 2011, 130 swarm infringement cases against 135,000 defendants had been filed).
99. Compare, e.g., *AF Holdings LLC v. Does 1-1058*, 286 F.R.D. 39 (D.D.C. 2012) (allowing suits to proceed under Rule 20 joinder), with *Next Phase Distrib., Inc. v. Does 1-27*, 284 F.R.D. 165 (S.D.N.Y. 2012). See also *Digital Sin, Inc. v. Does 1-176*, 279 F.R.D. 239 (S.D.N.Y. 2012); *Boy Racer v. Does 2-52*, No. C 11-02834 LHK (PSG), 2011 U.S. Dist. LEXIS 86746, at \*8-9 (N.D. Cal. Aug. 5, 2011).

## DEFENDANT CLASS ACTIONS AND MASS BITTORRENT COPYRIGHT LITIGATION

As judicial resistance to Rule 20 cases has grown, plaintiffs' attorneys have continued to innovate, testing other potential strategies.<sup>100</sup>

Recently, plaintiffs' attorneys have sought to circumvent jurisdictional and joinder-related problems through the use of class action procedures under Rule 23.<sup>101</sup> No court has ruled on the availability of Rule 23 in swarm suits; the plaintiffs voluntarily dismissed the only two such suits that have been filed after both cases sat idle for almost a year.<sup>102</sup> This Part argues that a swarm infringement defendant class is uncertifiable under Rule 23, and therefore Rule 20 should be the only available method for joining defendants in swarm infringement suits.

Part IV.A explains how the permissive joinder rules under Rule 20 are applied in swarm infringement cases. Part IV.B discusses the legal basis for allowing both plaintiff and defendant classes under Rule 23. Part IV.C evaluates the class certification requirements for a defendant class under Rule 23, and argues that such classes do not satisfy Rule 23's requirements.

### *A. Permissive Joinder Under Rule 20*

The vast majority of swarm infringement cases group defendants through the Rule 20 permissive joinder provisions.<sup>103</sup> Rule 20 allows a plaintiff to join additional defendants to an action if “any right to relief is asserted against them . . . with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and . . . any question of law or fact common to all defendants will arise in the action.”<sup>104</sup>

Plaintiffs in swarm infringement cases argue that defendants participate in the same “series of transactions” under Rule 20 when they download a file cooperatively through a BitTorrent swarm.<sup>105</sup> While some courts have found this argument persuasive, a growing number find joinder to be improper and tend to sever all joined defendants.<sup>106</sup> This uncertainty (as well as the growing judicial awareness of and

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100. *See, e.g.*, Stipulated Motion for Expedited Discovery, *AF Holdings LLC v. Ciccone*, No. 4:12-cv-14442-GAD-MKM (E.D. Mich. Oct. 7, 2013), ECF No. 10 (adding an additional three hundred John Doe defendants to an ostensibly single-defendant copyright infringement suit); houstonlawy3r, *Why CEG-TEK's DMCA Settlement System Will Fail*, TORRENTLAWYER (Feb. 22, 2013), <http://torrentlawyer.wordpress.com/2013/02/22/six-strikes-system-effects-on-ceg-tek-dmca-copyright-letters/> (describing how one firm seeks to avoid litigation altogether by sending out low-value “DMCA” settlement notices through ISPs to alleged infringers without actually filing a lawsuit).

101. *See supra* note 41; Anderson, *supra* note 72.

102. *See supra* note 41.

103. *See id.*

104. FED. R. CIV. P. 20(a)(2).

105. Sean B. Karunaratne, *The Case Against Combating BitTorrent Piracy Through Mass John Doe Copyright Infringement Suits*, 111 MICH. L. REV. 283, 295 (2012).

106. *Compare, e.g.*, *AF Holdings LLC v. Does 1-1058*, 286 F.R.D. 39 (D.D.C. 2012) (allowing suits to proceed under Rule 20 joinder), *with* *Next Phase Distrib., Inc. v. Does 1-27*, 284 F.R.D. 165 (S.D.N.Y. 2012) (finding the use of Rule 20 joinder improper and severing all John Does beyond the first from the case). *See also* *Digital Sin, Inc. v. Does 1-176*, 279 F.R.D. 239 (S.D.N.Y. 2012); *Boy Racer v. Does 2-52*,

hostility to these cases) has resulted in plaintiffs' attorneys looking to the defendant class action as an alternative way to group defendants.<sup>107</sup>

*B. Defendant Class Actions Under Rule 23*

The class action has become a mainstay of litigation in many areas, and for good reason. It increases judicial efficiency and consistency on a grand scale, allowing dozens of similar or identical claims to be decided at once. A key part of what makes class actions so effective and powerful is that a ruling for or against a class has the power to bind all members of that class, even those members not before the court.<sup>108</sup>

Plaintiffs must satisfy several requirements under Rule 23 to successfully certify a defendant class, including the numerosity, commonality, typicality, and adequacy requirements. These requirements protect so-called "absent"<sup>109</sup> class members from potential due process violations (which would result from litigating their interests without their direct involvement).<sup>110</sup> A failure to meet any of these Rule 23 requirements indicates that the proposed class definition, class representatives, or class counsel inadequately protect the due process interests of all class members involved in the litigation. A court must deny certification if any of these requirements are not met. Further, Rule 23 requires predominance and superiority in cases seeking monetary damages in order to ensure that an expensive and complex class action is superior to all other methods of adjudicating the case (in terms of trial management and judicial efficiency). Thus, the Rule 23 class certification requirements are critical to protecting each class member's due process rights.<sup>111</sup>

Although most class actions involve a class of plaintiffs suing one or more individual defendants, the Federal Rules of Civil Procedure also allow an individual to sue a defendant class, in that a class may "sue *or be sued*."<sup>112</sup> Beyond that language, the rules do little to distinguish plaintiff and defendant classes. Both classes must fulfill the same Rule 23 requirements of numerosity, commonality, typicality, and adequate representation, and both must fall within one of the "niches carved out by Rule 23(b)," which add additional predominance and superiority requirements for actions to recover money damages.<sup>113</sup> The purposes of collective suits are, for the

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No. C 11-02834 LHK (PSG), 2011 U.S. Dist. LEXIS 86746, at \*8-9 (N.D. Cal. Aug. 5, 2011) ("[T]he nearly six-week span covering the activity associated with each of the addresses calls into question whether there was ever common activity linking the 51 addresses in this case."). See Karunaratne, *supra* note 105, for an in-depth discussion of joinder- and misjoinder-related issues and related holdings in Rule 20 swarm infringement cases.

107. See *supra* note 16 and accompanying text.

108. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 808-09 (1985).

109. Absent class members are parties that are not directly involved in the litigation process, but who will nonetheless be bound by the court's decision.

110. WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS §§ 1:6, 1:10(2) (5th ed. 2013).

111. *Id.*

112. FED. R. CIV. P. 23(a) (emphasis added).

113. Tilley v. TJX Cos., 345 F.3d 34, 37 (1st Cir. 2003).

## DEFENDANT CLASS ACTIONS AND MASS BITTORRENT COPYRIGHT LITIGATION

most part, also applicable to both plaintiff and defendant class actions: “(i) access to justice; (ii) deterrence or policing behaviors; (iii) equilibrium of the parties in litigation; (iv) judicial and process resources economy; and (v) avoidance of incompatible adjudication.”<sup>114</sup>

Absent individuals in any class action proceeding face the possibility of an adverse judgment without any participation. While Rule 23 itself treats defendant and plaintiff classes similarly, courts are more solicitous of the due process rights of a defendant class,<sup>115</sup> whose members face all of the consequences, costs, and potential losses of an adverse judgment entered against them should the representative class members fail to protect their interests (not to mention they may be required to appear, to participate in discovery, and will be subjected to the law of a forum with which they had no minimum contacts).<sup>116</sup> Plaintiff classes typically only lose their right to sue for recovery, a loss that courts have generally held to be less substantial than that of an absent defendant, especially in light of a plaintiff’s ability to “opt out” of certain class actions in order to bring suit on his or her own.<sup>117</sup> Courts therefore treat defendant classes with “special solicitude” based on this risk of loss, and are particularly sensitive to any certification issues that might develop.<sup>118</sup>

### C. Rule 23 Class Action Prerequisites

#### 1. The Implicit Requirement of Definiteness

A proposed class must be “definite enough that the class can be ascertained.”<sup>119</sup> If a court cannot ascertain whether an individual is a member of the proposed class from the definition without conducting a mini-trial for each class member, the class is not sufficiently “definite” to support certification.<sup>120</sup> Indeed, a question of certification that overlaps with the merits would contravene Rule 23 by allowing a

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114. Nelson R. Netto, *The Optimal Law Enforcement with Mandatory Defendant Class Action*, 33 U. DAYTON L. REV. 59, 87 (2007).

115. *Pabst Brewing Co. v. Corrao*, 161 F.3d 434, 439 (7th Cir. 1998); *see also Tilley*, 345 F.3d at 37; *Flying Tiger Line, Inc. v. Cent. States Sw. & Se. Areas Pension Fund*, No. 8–304 CMW, 1986 WL 13366, at \*4 (D. Del. Nov. 20, 1986).

116. Elizabeth B. Brandt, *Fairness to the Absent Members of a Defendant Class: A Proposed Revision of Rule 23*, 1990 BYU L. REV. 909, 913–14 (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808–12 (1985)); NEWBERG ON CLASS ACTIONS, *supra* note 110, §§ 1:6, 1:10(2).

117. *Phillips Petroleum*, 472 U.S. at 808–12.

118. *Pabst Brewing*, 161 F.3d at 439; *see also Tilley*, 345 F.3d at 37; *Flying Tiger Line*, 1986 WL 13366, at \*4.

119. *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006) (citing *Alliance to End Repression v. Rochford*, 565 F.2d 975, 977 (7th Cir. 1977)). This is one of the “implicit requirements” of class certification, in that it is not explicitly laid out in Rule 23 but is necessary for a class action to proceed. NEWBERG ON CLASS ACTIONS, *supra* note 110, § 3:1; *see also* J. Russell Jackson, *The Touchstone of Class Certification: The Class Definition*, CADS REP., Winter 2011, at 3, *available at* [http://blog.wexlerwallace.com/wp-content/uploads/2011/10/CADS\\_Report\\_Winter\\_2011-00203107.pdf](http://blog.wexlerwallace.com/wp-content/uploads/2011/10/CADS_Report_Winter_2011-00203107.pdf).

120. *Romberio v. Unumprovident Corp.*, 385 F. App’x 423, 430–31, 445 (6th Cir. 2009); *Jackson v. Se. Pa. Transp. Auth.*, 260 F.R.D. 168, 182 (E.D. Pa. 2009) (citing *Mueller v. CBS, Inc.*, 200 F.R.D. 441, 445 (E.D. Pa. 1995)).

plaintiff “to secure the benefits of a class action without first satisfying the requirements. He [would] thereby [be] allowed to obtain a determination on the merits of the claims advanced on behalf of the class without any assurance that a class action may be maintained.”<sup>121</sup>

This poses a problem for plaintiffs in swarm infringement suits, as it is difficult to craft a class definition that can apply to individuals beyond the plaintiff’s list of IP addresses. So far, plaintiffs have attempted to define a relevant class to include not just the thousands of John Does “named” in the suit, but *all* individuals who “engaged in copyright infringement activity via BitTorrent . . . against Plaintiff’s copyrighted works.”<sup>122</sup> Such a definition is actually indefinite and requires a determination, on the merits, that each defendant has “engaged in copyright infringement activity” before the class can be certified. As a result, this kind of class is uncertifiable on definiteness grounds, even before reaching the other Rule 23 requirements.

## 2. *The Numerosity Requirement*

The numerosity requirement checks whether there are so many putative class members that “joinder of all members is impracticable”;<sup>123</sup> it also ensures that a class action is the best way to proceed.<sup>124</sup> While there is no strict numerosity threshold, federal courts have held that a putative class consisting of forty or more members is presumptively sufficient to satisfy this requirement.<sup>125</sup> This is hardly a concern with regard to swarm infringement suits, as plaintiffs in these cases have shown that they are willing to sue hundreds or thousands of defendants at once.<sup>126</sup> As a result, the question of numerosity is one of the only class action requirements that swarm infringement plaintiffs can easily meet.

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121. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177–78 (1974).

122. Complaint, *OpenMind Solutions*, *supra* note 16, ¶ 32.

123. FED. R. CIV. P. 23(a)(1). In the context of swarm infringement precedent, however, it may be possible to argue that joinder may be “practicable,” thus making a class action proceeding inappropriate even in situations where the putative defendant class would be very large. After all, courts in previous swarm infringement suits have allowed the Rule 20 joinder of as many as 23,322 individual defendants. *Nu Image, Inc. v. Does 1–23322*, 799 F. Supp. 2d 34 (D.D.C. 2011). Other courts, however, have found joinder to be completely inappropriate in swarm infringement cases. *See, e.g., Digital Sin, Inc. v. Does 1–176*, 279 F.R.D. 239 (S.D.N.Y. 2012).

124. When available and practical, joinder is generally preferable to class action treatment. In a joinder case, all parties are before the court, and therefore there is less need to worry about the due process concerns of absent defendants.

125. *See* NEWBERG ON CLASS ACTIONS, *supra* note 110, at § 3:12 n.9 (collecting cases in the U.S. Courts of Appeals for the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits that presume the 23(a)(1) numerosity requirement is met when the putative class has at least forty members).

126. In *OpenMind Solutions v. Does 1–2925*, the plaintiffs certainly erred on the conservative side when it came to the numerosity requirement, identifying 2,925 potential Doe defendants and setting forth a defendant class definition that could have included even more. Complaint, *OpenMind Solutions*, *supra* note 16, ¶ 32.

### 3. *The Commonality Requirement*

The commonality requirement asks whether “there are questions of law or fact common to the class.”<sup>127</sup> The commonality requirement will generally be met if there is at least one “common question which is at the heart of the case.”<sup>128</sup> Such a common question must be a “subject or point open to controversy,” not merely a rhetorical question.<sup>129</sup> As recently interpreted by the Supreme Court, “What matters to class certification . . . is not the raising of common ‘questions’ . . . but rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.”<sup>130</sup>

Commonality can be difficult to prove in swarm infringement cases because there tend to be relatively few common questions that could generate “common answers.” For instance, a plaintiff cannot rely on a common question of whether “copying” occurred within the meaning of the Copyright Act, as “[i]t is very likely that each John Doe will assert different defenses, thereby adding factual and legal questions that are not common among all the defendants.”<sup>131</sup> Each of these claims raises different questions of fact and requires different types of proof.<sup>132</sup>

While commonality can be difficult to prove in these cases, the requirement could be satisfied because whether the plaintiff owns the work(s) at issue may suffice as a single “common question” of law or fact.<sup>133</sup> A plaintiff must prove ownership over a work to establish a *prima facie* case of infringement.<sup>134</sup> Although courts loathe

127. FED. R. CIV. P. 23(a)(2).

128. *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992).

129. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2562 (2011) (Ginsburg, J., concurring in part and dissenting in part).

130. *Id.* at 2551 (majority opinion) (citing Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

131. *Next Phase Distrib., Inc. v. Does 1–27*, 284 F.R.D. 165, 169–70 (S.D.N.Y. 2012). One commentator has argued that commonality is relatively simple to meet because “the main defenses available to class members will be fair use and copyright misuse . . . [which] will be relying on the same underlying works . . . .” Brian Noh, *Fair Copyright Litigation: The Reverse Class Action Lawsuit*, 9 HASTINGS BUS. L.J. 123, 131–32 (2012). This argument entirely misses the numerous and varied factual arguments that defendants raise in these actions to show that they may not have been the individual committing the allegedly infringing conduct at all.

132. For instance, individuals who claimed that their IP addresses were misidentified would have to present different factual proof (such as an affidavit from an ISP) than individuals who argued that someone else had downloaded the file in question (perhaps by a showing that their wireless routers were unsecured and near a public area).

133. *See Rosario*, 963 F.2d at 1018.

134. *Ingenuity 13 LLC v. John Doe*, No. 2:12-cv-08333, 2013 WL 765102, at \*9 (C.D. Cal. Feb. 7, 2013) (indicating that the validity of the copyright assignments that transferred ownership of the films to plaintiffs was in question); *see also* Motion to Dismiss Plaintiff’s Amended Complaint Under Fed. R. Civ. P. 12(b)(1) and 12(b)(7) and Motion to Strike Paragraph 53 of Plaintiff’s Amended Complaint Under Fed. R. Civ. P. 12(f) at ¶ 1, *Malibu Media, LLC v. Does 1–16*, 902 F. Supp. 2d 690 (E.D. Pa. 2012) (No. 12-cv-02088-MMB), ECF No. 55-1.

certifying classes based on time-consuming questions of intellectual property ownership,<sup>135</sup> if only a few works are at issue a court might reasonably find that a common question of ownership fulfills the commonality requirement.

Even if it is possible that a swarm infringement defendant class could fulfill the commonality requirement, the proposed class must still fulfill the typicality, adequacy, predominance, and superiority requirements to obtain class action certification. These other requirements are extremely difficult (if not impossible) for plaintiffs to overcome in swarm litigation.

#### 4. *The Typicality Requirement*

This requirement protects the due process rights of absent class members by ensuring the class representatives' interests are "typical of the claims or defenses of the class," and, therefore, that the class representatives' goals are aligned with those of the absent class members.<sup>136</sup> This requirement is particularly troublesome for courts when dealing with a defendant class, as the plaintiff seeking class certification chooses the defendant class's representative parties.<sup>137</sup> The onus falls on the court to ensure that the selected class representatives have "claims or defenses" that are "typical" of the other members of the proposed class.<sup>138</sup>

Courts have found that defendant classes "are more likely than plaintiff classes to include members whose interests diverge from those of the named representatives,"<sup>139</sup> and that "[r]isks of diverging interests are particularly high in actions seeking monetary remedies," as each individual's risk tolerance, goals, and preferred litigation strategy are different.<sup>140</sup> Mass infringement joinder cases under Rule 20 follow this trend, with some individuals willing to fight much harder than others.<sup>141</sup>

Further, in order to meet the typicality requirement there must be a "typical" class member in the defendant class. In these swarm cases, no such typical member exists. Members of a putative swarm infringement defendant class often raise a wide range of

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135. *Vulcan Golf, LLC v. Google, Inc.*, 254 F.R.D. 521, 528 (N.D. Ill. 2010) (denying certification of a plaintiff class on predominance grounds due to the unmanageability of determining ownership of intellectual property on a classwide level for an enormous plaintiff class).

136. FED. R. CIV. P. 23(a)(3).

137. Assaf Hamdani & Alon Klement, *The Class Defense*, 93 CAL. L. REV. 685, 710 (2005). This differs from a typical plaintiff class action in that a plaintiff class typically gets to select its own representative parties.

138. FED. R. CIV. P. 23(a)(3).

139. *Ameritech Benefit Plan Comm. v. Comm'n Workers of Am.*, 220 F.3d 814, 820 (7th Cir. 2000).

140. *Id.* Some individuals might be solely focused on dealing with the claims against them as cheaply as possible; others may seek to avoid humiliation and clear their names; still others might be willing to litigate to a certain point and settle if the case becomes too expensive; and others may seek to challenge the entire swarm litigation strategy.

141. *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 83–84 (E.D.N.Y. 2012) (showing that some individuals settled, some contested on factual grounds, and others hired counsel).

individually fact-specific defenses.<sup>142</sup> Evaluating each of these factual defenses requires discovery and adjudication based on each defendant's unique factual circumstances—an inherently individualized inquiry, and one that does not support a finding of typicality.<sup>143</sup> Because of this, a class representative whose claims or defenses would be “typical” to those of the other alleged infringers in the class would not exist. This weighs heavily against finding typicality in the swarm infringement litigation context.

### 5. *The Adequacy Requirement*

One of the most important and complex requirements for certification of a class action is that the “representative parties [must] fairly and adequately protect the interests of the class.”<sup>144</sup> The adequacy requirement is a reflection of the fundamental due process issue that can arise as a result of a class action: individuals who are not in court and who are not directly involved in the suit will have their rights or property affected by a verdict.<sup>145</sup> The adequacy requirement ensures that the class representatives and their counsel can handle the complex litigation at hand.<sup>146</sup>

For plaintiff class actions, obtaining and paying for counsel capable of adequately representing the interests of a plaintiff class is generally a simple proposition. Plaintiff classes nominate their own representatives, and plaintiffs' attorneys are typically compensated out of the settlement or a common fund generated by their efforts.<sup>147</sup> For cases seeking injunctive or declarative relief, plaintiffs' attorneys' fees can be requested under Rule 23(h).<sup>148</sup>

A defendant class representative, however, cannot rely on similar fee incentives. The defendant class is litigating not for monetary gain, but to protect the status quo; if they win, “the defendants owe nothing to the plaintiff—no money changes hands.”<sup>149</sup> “Consequently, the defendant representative must be prepared to assume

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142. *See id.* (noting that the vastly different factual defenses include “I was at work at the time of the infringement” and “I am morally opposed to pornography, but my wireless network was hacked”).

143. While courts have the discretion to divide classes into subclasses, the factual defenses raised by defendants in these cases require individualized findings that are simply not amenable to aggregate adjudication. Even ignoring the factual defenses, if every defendant asserting a fair use defense to infringement were to be aggregated into a subclass as argued in Noh, *supra* note 131, at 133, the fact-specific nature of the fair use inquiry would require individualized discovery, hearings, and determinations for each defendant.

144. FED. R. CIV. P. 23(a)(4).

145. *See* ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1770 (3d ed. 1998).

146. *See* FED. R. CIV. P. 23(g)(1).

147. *E.g.*, Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980) (“[A] litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole.”); *see also, e.g.*, Maley v. Del Global Techs. Corp., 186 F. Supp. 2d 358, 369 (S.D.N.Y. 2002) (“[C]lass counsel who create a settlement fund for the benefit of a class are entitled to be compensated for their services from that settlement fund.”); Sternberg v. Citicorp Credit Servs., Inc., 442 N.Y.S.2d 1017 (Sup. Ct. Nassau Cnty. 1981) (“[T]he judgment fund and its accrued interest is the appropriate source for the payment of the attorney fees.”).

148. FED. R. CIV. P. 23(h).

149. Hamdani & Klement, *supra* note 137, at 691.

some, if not all, of the economic burden of the litigation.”<sup>150</sup> In a defendant class action, it often falls to the plaintiffs (as the parties moving for class certification) to determine which defendant or defendants to select as class representatives. This creates the risk that the plaintiff, wanting to win the case, may not pick the “best” representative party.<sup>151</sup> In swarm infringement cases, close judicial review is necessary because “no single defendant is in a position to serve as a representative for the entire class.”<sup>152</sup> Further, defendants typically do not want to be named as class representatives. “The major reason for their opposition presumably is a desire to avoid a possible increase in litigation expenses if they represent a class, in light of the fact that no [other] source of funds is available to pay for any additional costs.”<sup>153</sup> If a defendant class is certified, the class representative must retain and pay for adequate counsel, with no guarantee that any other defendant will help bear the heavy financial burden associated with defending and coordinating a complex class action.<sup>154</sup>

Concerns about adequate representation are heightened in swarm infringement defendant class actions. It is more difficult to find and finance adequate class counsel when the class consists primarily of average people who lack the deep pockets necessary to pay for defending an expensive and time-consuming class action suit. The court must take additional care to ensure that counsel is both adequate and adequately financed in these situations, and that the named representatives will sufficiently represent the interests of the class.

This is difficult, as there are several possible ways of paying for counsel, but none are satisfactory. One option is for defendants to voluntarily contribute as much as they want to the defense, but there is little incentive for any of the nonrepresentative class members to do so, creating a “free rider” problem.<sup>155</sup> Another option is for defendants to pay as much as they would need to defend themselves individually; however, individuals would likely be unwilling to pay more than it would cost to settle. This would be suboptimal, since mounting a defense would be less certain than simply paying the settlement costs to the plaintiffs and avoiding the time, effort, and risk of litigation entirely. Finally, the representative defendants could try to require codefendants to contribute a fair share, but there is no authority to enforce such a provision and they would have to sue their codefendants for contribution. For these reasons, funding adequate counsel in defendant class actions continues to stymie courts and commentators alike.<sup>156</sup>

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150. Brandt, *supra* note 116, at 920.

151. See Francis X. Shen, *The Overlooked Utility of the Defendant Class Action*, 88 DENV. U. L. REV. 73, 116–17 (2010).

152. *Id.* at 118.

153. Note, *Defendant Class Actions*, 91 HARV. L. REV. 630, 648 (1978).

154. See Shen, *supra* note 151, at 85–86.

155. *Id.* at 86.

156. *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 237–38 (9th Cir. 1974) (Duniway, J., concurring) (indicating that there is no definitive rule for distribution of attorneys’ fees in class actions); see also Brandt, *supra* note 116, at 919. Several commentators argue for fee-shifting reforms to fix this flawed

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### 6. *Other Rule 23 Considerations*

For a class action to be maintained, not only do the prerequisites laid out in Rule 23(a) have to be met, but the case must also fall into one of the categories identified in Rule 23(b). Currently, only Rule 23(b)(3) supports any sort of swarm infringement copyright action, as courts have found 23(b)(1)(A),<sup>157</sup> 23(b)(1)(B),<sup>158</sup> and 23(b)(2)<sup>159</sup> class actions uncertifiable in similar contexts. As a result, any swarm infringement defendant class must also satisfy the additional 23(b)(3) predominance and superiority requirements, which ensure that a class action can be adjudicated in an efficient and workable manner.

#### a. *Predominance*

Courts have held that the predominance requirement is essentially a “more demanding” version of the commonality requirement because it not only requires common issues that link class members together, but also that these common issues

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system. *See* Hamdani & Klement, *supra* note 137, at 715–18; Netto, *supra* note 114, at 113–16; Shen, *supra* note 151, at 122–25. One commentator who advocates strongly for the use of defendant classes notes that the adequacy requirement would bar certification in a copyright infringement litigation against a class of anonymous defendants:

In this hard case [involving mass copyright infringement alleged against a class of anonymous defendants] . . . the court [would] incur tremendous costs and essentially fund a legal team for the defendant class. The great majority of the defendant class remains anonymous, and thus would not contribute to a pool to fund the legal fees. Given these prohibitive costs . . . here, defendant class actions will not be an optimal legal tool.

Shen, *supra* note 151, at 118–19. Commentators argue that there are cases when a defendant class would benefit as a whole from pooling funds to defend against the plaintiff’s claims. This might well be true in situations where the defendants are more sophisticated, better organized, and have an incentive to cooperate. However, here, where most defendants are unsophisticated, anonymous, and just want to get out with as little money spent as possible, there is little incentive for them to contribute money to the class defense.

157. Tilley v. TJX Cos., 345 F.3d 34, 37 (1st Cir. 2003); Brief of Amicus Curiae Electronic Frontier Foundation Regarding Proceeding as a Class Action at 2 n.2, *OpenMind Solutions v. Does 1–2925*, No. 3:11–cv–00092 (S.D. Ill. Apr. 25, 2011), ECF No. 33 [hereinafter EFF Amicus Brief, *OpenMind Solutions*]. Rule 23(b)(1)(A) allows class actions in cases where there is a risk of imposing “incompatible standards of conduct for the party opposing the class.” FED. R. CIV. P. 23(b)(1)(A). This cannot apply to a swarm infringement suit because the party opposing the class in a defendant class action is a plaintiff, and an infringement verdict sets a standard of conduct for a defendant. *See, e.g.,* *Winder Licensing, Inc. v. King Instrument Corp.*, 130 F.R.D. 392 (N.D. Ill. 1990) (refusing to certify a Rule 23(b)(1)(A) defendant class in a patent infringement case for this reason).
158. FED. R. CIV. P. 23(b)(1)(B) supports a class action where “adjudications with respect to individual class members . . . would be dispositive of the interests of the other [absent class] members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.” *Id.* There is no such situation here, as an individualized adjudication against one defendant would not affect the absent class members’ interests. EFF Amicus Brief, *OpenMind Solutions*, *supra* note 157, at 2 n.2 (citing *Nat’l Union Fire Ins. Co. of Pittsburgh, Pa. v. Midland Bancor Inc.*, 158 F.R.D. 681, 687 (D. Kan. 1994)); *see also In re Dennis Greenman Sec. Litig.*, 829 F.2d 1539, 1545–46 (11th Cir. 1987).
159. *Henson v. E. Lincoln Twp.*, 814 F.2d 410, 414 (7th Cir. 1987) (holding that defendant class actions under Rule 23(b)(2) are barred because “[a]lways it is the alleged wrongdoer, the defendant—never the plaintiff . . . who will have ‘acted or refused to act on grounds generally applicable to the class’”).

“predominate” over individual, uncommon ones.<sup>160</sup> “Class-wide issues predominate if resolution of some of the legal or factual questions that qualify each class member’s case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof.”<sup>161</sup>

In swarm infringement cases, commonality is already an uphill battle due to the difficulty inherent in finding questions of law or fact common to the class when each defendant can raise distinct claims and affirmative defenses against a charge of infringement.<sup>162</sup> The predominance requirement is, therefore, far more difficult to meet.

The wide range of claims and defenses<sup>163</sup> that can be raised by defendants would necessitate dozens or hundreds of individual depositions, discovery requests, subpoenas, evidentiary hearings, and mini-trials to effectively adjudicate each claim or defense, which would “add another layer to an already fact-specific inquiry that the court must delve into.”<sup>164</sup> Thus, these “uncommon” issues would likely predominate over any common questions of law or fact that could be adjudicated en masse, thereby defeating the predominance requirement and preventing class certification.

#### *b. Superiority*

This requirement seeks to ensure that class action litigation is the proper vehicle to adjudicate the parties’ claims.<sup>165</sup> If “class certification only serves to give rise to hundreds or thousands of individual proceedings requiring individually tailored remedies, it is hard to see how . . . a class action would be the superior means to adjudicate the claims.”<sup>166</sup>

Because each Rule 23 requirement (excluding numerosity) will require individual hearings, proceedings, and mini-trials to determine whether the class should be

160. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623–34 (1997).

161. *UFCW Local 1776 v. Eli Lilly & Co.*, 620 F.3d 121, 131 (2d Cir. 2010). Identical or similar definitions exist in other circuits. *See, e.g., Randleman v. Fid. Nat’l Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011); *Weisfeld v. Sun Chem. Corp.*, 84 F. App’x 257, 261 (3d Cir. 2004); *Kerr v. City of W. Palm Beach*, 875 F.2d 1546, 1557–58 (11th Cir. 1989).

162. *Gene & Gene LLC v. BioPay LLC*, 541 F.3d 318, 327 (5th Cir. 2008) (“An affirmative defense is not per se irrelevant to the predominance inquiry, as the parties seem to believe. We have noted that the ‘predominance of individual issues necessary to decide an affirmative defense may preclude class certification.’”); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 438 (4th Cir. 2003) (“[L]ike other considerations, affirmative defenses must be factored into the calculus of whether common issues predominate.”); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 295 (1st Cir. 2000) (“[A]ffirmative defenses should be considered in making class certification decisions.”). *See supra* Part IV.C.iii.

163. *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 91 (E.D.N.Y. 2012) (noting that defendants can “raise[] a panoply of individual defenses, including age, religious convictions, and technological savvy; misidentification of ISP accounts; the kinds of WiFi equipment and security software utilized; and the location of defendant’s router. The individualized determinations required far outweigh the common questions in terms of discovery, evidence, and effort required”).

164. *Vulcan Golf, LLC v. Google, Inc.*, 254 F.R.D. 521, 531 (N.D. Ill. 2008).

165. FED. R. CIV. P. 23(b)(3).

166. *Andrews v. Chevy Chase Bank*, 545 F.3d 570, 577 (7th Cir. 2008).

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certified, a swarm infringement defendant class runs afoul of this superiority requirement at almost every stage of the certification process. If the class were to be certified, it would require further individualized discovery, hearings, and determinations as to liability and other affirmative defenses that cannot be easily dealt with by dividing a class into subclasses. In fact, some courts have severed Rule 20 joinder cases on similar grounds, noting that it would be impossible to manage the discovery of so many different defendants, all of whom would need individual depositions and many of whom would raise different or incompatible defenses.<sup>167</sup>

By putting so many individualized issues together in a single case, any efficiency gains that might otherwise accrue through the use of a class action are lost—in fact, procedural complexity is added by requiring the plaintiffs to undergo the certification process. As a result, a class action proceeding is not “superior” to other methods of adjudicating these claims. Additionally, because swarm litigation cases require a large number of individual factual adjudications, the discovery and hearings associated with these individualized concerns would slow the proceedings dramatically for everyone involved.<sup>168</sup> This makes the entire process significantly longer for everyone involved than individually adjudicating cases in parallel.

Rule 23 also instructs courts to consider “the likely difficulties in managing a class action” in making the superiority determination.<sup>169</sup> In doing so, courts examine their interests in trial management and judicial efficiency. While a typical joinder case can be time-consuming due to the number of defendants involved, the class action process is even more procedurally complex, with multiple requirements for certification and the possibility for related interlocutory appeals. The court is responsible for finding, appointing, and ensuring funding for appropriate class counsel, and approving class representatives; it is generally far more involved in the class action process than it would be in a joinder case.<sup>170</sup> Further, the sheer size of a defendant class increases the potential time spent dealing with discovery-related issues and adjudicating the individualized issues that arise out of the putative swarm infringement class action. These factors make swarm infringement class actions difficult to manage and inefficient, which weighs in favor of denying defendant class certification in these cases.

### *c. Rule 23 Opt-Out Provisions*

Defendant class actions certified under Rule 23 allow class members to opt out of the litigation once the class has been certified, forcing the plaintiffs to pursue

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167. *See, e.g.,* *Next Phase Distrib., Inc. v. Does 1–27*, 284 F.R.D. 165, 169–70 (S.D.N.Y. 2012); *see also* *SBO Pictures v. Does 1–20*, No. 12. Civ. 3925 (SAS), 2012 WL 2304253, at \*1 (2d Cir. June 18, 2012) (holding that “there [were] no litigation economies to be gained” from joining together what essentially amounted to twenty different cases).

168. Discovery and any individualized pretrial hearings must be completed before the case can move forward, forcing the entire case to proceed in series. As a result, each defendant must wait for every other defendant’s pretrial proceedings to be completed before moving to trial, which slows down the proceedings dramatically.

169. FED. R. CIV. P. 23(b)(3)(A)–(D).

170. *See* FED. R. CIV. P. 23.

them individually. Under Rule 23(b)(3), opt-outs are allowed because participation in such actions for monetary relief is not mandatory.<sup>171</sup> This gives class members freedom to decide whether they would benefit from pooling resources to create an effective offense or defense.<sup>172</sup> In practice, however, in a defendant class action “no one wants to be a defendant, so . . . defendant class members who have an opportunity to opt-out can be expected to do so.”<sup>173</sup>

The ability for class members to opt out could completely eviscerate a defendant class action.<sup>174</sup> Indeed, this may counsel against bringing a swarm infringement defendant class action at all. In such a case, after surviving the interminable certification process, defendant class members could opt out en masse, destroying any efficiency and consistency benefits that would otherwise be gained.<sup>175</sup> Thus, the Rule 23 opt-out provision in and of itself presents a reason why a defendant class action might not be a “superior” way to adjudicate these claims under Rule 23.

A swarm infringement defendant class is effectively uncertifiable, as plaintiffs’ attorneys face significant hurdles satisfying most of Rule 23’s requirements. Further, even if a defendant class is certified, there is a risk that defendants will opt out of the class wholesale, defeating the purpose of the certification process while squandering precious judicial resources. Thus, the defendant class action is not a proper vehicle for adjudicating swarm litigation.

## V. POLICY ISSUES RAISED BY SWARM LITIGATION

While swarm litigation’s settlement-centered strategy may not be inherently problematic, courts and commentators alike have expressed concerns about the coercive and unfair nature of such tactics.<sup>176</sup> Swarm infringement litigation has been subject to significant criticism on policy and fairness grounds. Many of these same critiques apply to defendant class actions under Rule 23 as well. This Part analyzes the most serious

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171. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810–11 (1985).

172. *E.g.*, Netto, *supra* note 114, at 98.

173. *Williams v. State Bd. of Elections*, 696 F. Supp. 1574, 1577 (N.D. Ill. 1988) (citing Angelo N. Ancheta, *Defendant Class Actions and Federal Civil Rights Litigation*, 33 UCLA L. REV. 283, 306–07 (1985)).

174. Robert R. Simpson & Craig Lyle Perra, *Defendant Class Actions*, 32 CONN. L. REV. 1319, 1334 (2000). For this reason, some commentators discuss reasons for the removal of the Rule 23(b)(3) opt-out provisions in defendant class actions. However, this would require amending Rule 23, and as such is beyond the scope of this note. *See* Robert E. Holo, *Defendant Class Actions: The Failure of Rule 23 and a Proposed Solution*, 38 UCLA L. REV. 223, 266 (1990).

175. One commentator recommends an “aggressive litigation strategy” against defendants who opt out as a solution to this problem. Noh, *supra* note 131, at 138. However, we have already seen from the example that the RIAA has set that such a strategy is incredibly costly and contrary to the plaintiffs’ goals of running a profitable and sustainable litigation campaign. *See supra* Part III.B.ii.

176. *See, e.g.*, *Malibu Media, LLC v. Does 1–10*, No. 2:12-cv-3623-ODW(PJW), 2012 WL 5382304, at \*4 (C.D. Cal. June 27, 2012) (describing swarm infringement litigation as an “extortion scheme”); *Digital Sins, Inc. v. Does 1–245*, No. 11 Civ. 8170(CM), 2012 WL 1744838, at \*8 (S.D.N.Y. May 15, 2012) (“I am second to none in my dismay at the theft of copyrighted material that occurs every day on the internet [sic]. However, there is a right way and a wrong way to litigate, and so far this way strikes me as the wrong way.”).

criticisms leveled against swarm infringement litigation under Rule 20 and explains how these issues are implicated in a defendant class action proceeding under Rule 23.

*A. The High Rate of Defendant Misidentification*

The use of BitTorrent monitoring software to gather IP addresses presents a significant risk of defendant misidentification.<sup>177</sup> As one judge noted, “It is no more likely that the subscriber to an IP address carried out a particular computer function . . . than to say an individual who pays the telephone bill made a specific telephone call.”<sup>178</sup> “By defining Doe Defendants as ISP subscribers who were assigned certain IP addresses, instead of the actual Internet users who allegedly engaged in infringing activity, [plaintiffs] . . . ha[ve] the potential to draw numerous innocent Internet users into the litigation.”<sup>179</sup> This inaccuracy produces the unfair results often associated with swarm infringement cases, especially because the litigation strategy incentivizes extracting settlements even from innocent individuals. Further, while defendant misidentification is problematic in Rule 20 joinder cases, this risk is even greater in a Rule 23 defendant class action. A defendant class can include a much larger group than even the largest Rule 20 joinder cases, which only increases the likelihood that innocent individuals will be caught in plaintiffs’ dragnets.<sup>180</sup>

*B. Defending a Charge of Infringement Is Cost Prohibitive and Risks Public Humiliation*

Swarm infringement suits carry a particularly high risk of convincing innocent defendants to settle because the settlement amounts are far cheaper than actually

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177. *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 91 (E.D.N.Y. 2012); *see also* *Digital Sin, Inc. v. Does 1–176*, 279 F.R.D. 239, 242 (S.D.N.Y. 2013) (noting that *plaintiff’s* counsel estimated “that 30% of the names turned over by ISPs are not those of individuals who actually downloaded or shared copyrighted material”); CHOTHIA ET AL., *supra* note 27, at 3, 11 (arguing that monitoring software fails to provide “conclusive evidence of copyright infringement”); Nate Anderson, *Hurt by The Hurt Locker: Why IP Addresses Aren’t Enough to Find File-Swappers*, ARSTECHNICA (Aug. 26, 2011, 1:37 PM EDT), <http://arstechnica.com/tech-policy/2011/08/why-ip-addresses-cant-always-find-file-swappers/>. *But see* *Malibu Media, LLC v. Does 1, 6, 13, 14*, 950 F. Supp. 2d 779, 782 (E.D. Pa. 2013) (finding that the combination of IP address location methods alongside other investigative steps used to identify defendants required “considerable effort and expense . . . and that the technology employed by [the plaintiff’s] consultants . . . was valid”).

178. *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. at 84.

179. *SBO Pictures, Inc. v. Does 1–3036*, No. 11–4220 SC, 2011 WL 6002620, at \*3 (N.D. Cal. Nov. 30, 2011). Some judges have found that this lack of certainty fails the specificity requirement for discovery requests, finding that it is not “sufficiently specific to establish a reasonable likelihood that the discovery request would lead to identifying information that would make possible service upon particular defendants who could be sued in federal court.” *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. at 88 (quoting *Sony Music Entm’t Inc. v. Does 1–40*, 326 F. Supp. 2d 556, 566 (S.D.N.Y. 2004)). *But see* *Call of the Wild Movie, LLC v. Smith*, 274 F.R.D. 334 (D.D.C. 2011); *Call of the Wild Movie, LLC v. Does 1–1062*, 770 F. Supp. 2d 332 (D.D.C. 2011).

180. FED. R. CIV. P. 23(a)(1) (providing that a class action is only warranted when “the class is so numerous that joinder of all members is impracticable”).

defending a claim, and because “[w]ithout a substantial investment, plaintiffs can inflate each defendant’s litigation costs, thereby transforming an otherwise viable defense into one with a negative expected value.”<sup>181</sup> Indeed, one court has held that

a plaintiff’s desire to enforce its copyright in what it asserts is a cost-effective manner does not justify perverting the joinder rules to first create . . . management and logistical problems . . . and then offer to settle with Doe defendants so that they can avoid digging themselves out of the morass plaintiff is creating.<sup>182</sup>

Attempting to certify a defendant class action with all its inherent complexity creates a more expensive and time-consuming procedural morass than even the largest of joinder suits. Settlement becomes the only cost-effective option for avoiding potential liability, no matter how strong the evidence of a defendant’s innocence.

Plaintiffs can also wield significant leverage against defendants in swarm infringement suits, leading one judge to describe such cases as “an extortion scheme.”<sup>183</sup> The fact that these swarm infringement suits generally involve adult entertainment heightens these concerns, as plaintiffs often play on fears of public humiliation to leverage settlements.<sup>184</sup> The threat of enormous statutory damages under the Copyright Act is similarly intimidating, as a finding of liability for willful infringement can result in damages of up to \$150,000 per infringement.<sup>185</sup> As a result, when faced with the choice between a few thousand dollars in settlement costs or an expensive, protracted, embarrassing, and potentially ruinous lawsuit, many otherwise innocent defendants choose to settle.<sup>186</sup>

### C. Burden on the Courts

Courts have been particularly worried about the impact swarm litigation cases have on judicial resources.<sup>187</sup> In any civil action in federal court, plaintiffs must pay a

181. Hamdani & Klement, *supra* note 137, at 698.

182. On The Cheap, LLC v. Does 1–5011, 280 F.R.D. 500, 505 (N.D. Cal. 2011); *accord In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. at 80. *But see, e.g.*, AF Holdings LLC v. Does 1–1058, 286 F.R.D. 39 (D.D.C. 2012); W. Coast Prods. v. Does 1–5829, 275 F.R.D. 9 (D.D.C. 2011).

183. Malibu Media, LLC v. Does 1–10, No. 2:12-cv-3623-ODW(PJWx), 2012 WL 5382304, at \*4 (C.D. Cal. June 27, 2012); *see also, e.g.*, Digital Sins, Inc. v. Does 1–245, No. 11 Civ. 8170(CM), 2012 WL 1744838, at \*1 (S.D.N.Y. May 15, 2012); *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. at 80.

184. Malibu Media LLC v. John Doe Subscriber Assigned IP Address 24.183.51.58, No. 13-cv-205-wmc, 2013 WL 4821911, at \*1 (W.D. Wis. Sept. 10, 2013); *see, e.g.*, Michaels, *supra* note 76; Bill Torpy, *BitTorrent’s Popularity Leads to Mass Litigation*, ARIZ. DAILY SUN (July 15, 2012, 5:00 AM), <http://bit.ly/NxmK8q> (quoting Robin Mason, a defendant named in a suit by an adult film company, as stating “They said it’ll be in the newspaper. They said the whole community would know.”).

185. 17 U.S.C. § 504(c) (2012).

186. This strategy does have the potential to backfire. *See Wong v. Hard Drive Prods., Inc.*, No. 12-CV-469-YGR, 2012 WL 1252710, at \*1–2 (N.D. Cal. Apr. 13, 2012).

187. *See, e.g.*, Pac. Century Int’l v. Does 1–37, 282 F.R.D. 189, 195 (N.D. Ill. 2012); *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. at 91; IO Grp., Inc. v. Does 1–435, No. C 10–04382 SI, 2011 WL 445043, at \*6 (N.D. Cal. Feb. 3, 2011).

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filing fee of \$350, which acts as a modest “threshold barrier . . . against the filing of frivolous or otherwise meritless lawsuits”<sup>188</sup> and generates revenue that maintains the court system.<sup>189</sup>

These swarm infringement cases exist “as a strong tool for leveraging settlements . . . whose efficiency is largely derived from the plaintiffs’ success in avoiding the filing fees for multiple suits . . .”<sup>190</sup> By pursuing the maximum number of defendants in court under one filing, swarm infringement plaintiffs improperly avoid paying filing fees, which deprives the courts of millions of dollars of revenue.<sup>191</sup> This is particularly worrisome in a defendant class action because the procedural complexity of class certification consumes significant judicial resources.<sup>192</sup>

### VI. CONCLUSION

The use of defendant class actions for prosecuting BitTorrent infringers individually through swarm infringement suits raises significant due process and fairness concerns. Swarm infringement defendant classes are almost certainly uncertifiable under Rule 23. Even if such a class were to be certified, there is a significant danger that defendants will opt out of the class en masse, rendering the judicial resources spent on the certification process unnecessary.

Moreover, the swarm infringement litigation strategy creates a substantial risk of coercing innocent individuals into paying settlement fees for infringements that they did not commit. This is simply antithetical to a legal system founded on due process.

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188. 28 U.S.C. § 1914(a) (2012); *In re Diet Drugs v. Wyeth*, 325 F. Supp. 2d 540, 541 (E.D. Pa. 2004).

189. 28 U.S.C. § 1931(a) (2012) (“Of the amounts paid to the clerk of court as a fee . . . \$190 shall be deposited into a special fund of the Treasury to be available to offset funds appropriated for the operation and maintenance of the courts of the United States.”).

190. *MCGIP, LLC v. Does 1–149*, No. C 11–02331 LB, 2011 WL 4352110, at \*4 n.5 (N.D. Cal. Sept. 16, 2011); see also *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. at 92; *Pac. Century Int’l*, 282 F.R.D. at 193; Allan Gregory, *The Economics of (Killing) Mass-BitTorrent Lawsuits*, TORRENTFREAK (Sept. 18, 2011), <http://torrentfreak.com/the-economics-of-killing-mass-bittorrent-lawsuits-110918/>.

191. Certainly, the argument can be made that plaintiffs here are simply taking advantage of Rule 23’s design goals of efficiency and economics in litigation. See FED. R. CIV. P. 1. However, both Rule 20’s permissive joinder and Rule 23’s class action rules grant judges significant leeway to consider policy and trial management issues when determining whether to proceed via joinder or class actions. Rule 21 allows courts to “sever any claim against a party,” and Rule 23(b)(3)(C) and (D) allow courts to consider issues of trial management when certifying classes under Rule 23(b)(3). In swarm infringement cases, as several judges have noted, “the potential for coercing unjust settlements from innocent defendants trumps [the plaintiff’s] interest in maintaining low litigation costs.” *K-Beech v. Does 1–41*, No. V–11–46, 2012 WL 773683, at \*5 (S.D. Tex. Mar. 8, 2012); see also *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. at 80. But see *AF Holdings LLC v. Does 1–1058*, 286 F.R.D. 39, 45 (D.D.C. 2012); *Malibu Media, LLC v. Does 1–5*, 285 F.R.D. 273, 276–77 (S.D.N.Y. 2012); *Patrick Collins, Inc. v. Does 1–21*, 282 F.R.D. 161 (E.D. Mich. 2012) (finding swarm joinder to be permissible).

192. See, e.g., *Media Prods., Inc. v. Does 1–26*, No. 12 Civ. 3719(HB), 2012 WL 3866492, at \*3 n.2 (S.D.N.Y. Sept. 4, 2012) (noting that “[i]t is difficult to even imagine the extraordinary amount of time federal judges have spent on these cases” and listing a “sample” of thirty swarm infringement cases across multiple districts).

These cases also burden the court system, depriving it of necessary revenue while at the same time contributing dramatically to its workload. Certifying defendant class actions in this context would only exacerbate these policy concerns. For these reasons, courts should refuse to certify classes of swarm defendants.