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COMMENT

SHUTTING DOWN THE *EX PARTE* PARTY: HOW TO KEEP BITTORRENT COPYRIGHT TROLLS FROM ABUSING THE FEDERAL COURT'S DISCOVERY SYSTEM

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I. INTRODUCTION

In May 2011, a woman in Seattle found a very surprising letter in her mailbox.[1] The letter was addressed to her husband, and it accused him of illegally downloading a pornographic movie at 6:03am on January 27, 2011.[2] Why was this letter so surprising? Was it because she was shocked that her husband downloaded pornography? No. It was shocking because her husband is legally blind and considers himself incapable of watching any movie.[3]

Letters such as this are becoming more commonplace.[4] Thousands of cases have been filed in federal courts since 2010 against hundreds of

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1. Keegan Hamilton, *Porn, Piracy, & BitTorrent*, SEATTLE WKLY. (Aug. 9, 2011, 12:00 AM), http://www.seattleweekly.com/2011-08-10/news/porn-piracy-bittorrent/.

2. *Id*.

3. *Id*.

4. It has been estimated that over 200,000 IP addresses have been targeted by this kind of litigation between January 2010 and August 2011. Ernesto, *200,000 BitTorrent Users Sued in the United States*, TORRENTFREAK (Aug. 8, 2011), http://torrentfreak.com/200000-bittorrent-users-sued-in-the-united-states-110808.

thousands of John Doe defendants alleging copyright infringement stemming from downloading protected content via BitTorrent.[5] Why has this type of litigation become so prolific? It is profitable.[6] This type of litigation is troublesome because its business model is designed to elicit settlements out of Does, regardless of their guilt or innocence, by calculating settlement amounts just under the cost of defending the suit.[7]

This Article will examine how the United States federal court system can get rid of these trolling, predatory lawsuits once and for all. Section I will explore how the BitTorrent protocol operates, the various methods of BitTorrent monitoring, the business model for BitTorrent John Doe litigation, and the various tests federal courts have used to determine whether *ex parte* expedited discovery is warranted to uncover the names of the defendants.

Section II will examine whether a technology hurdle prevents judges in the federal court system from properly applying the tests used in evaluating whether expedited *ex parte* discovery is warranted. This examination will show that these tests are frequently misapplied, resulting in discovery being granted to plaintiffs who provide little more than conclusory pleadings. Given the predatory nature of these lawsuits, courts should use great caution in granting discovery. This section will propose guidelines for courts to use in evaluating these discovery requests.

II. BACKGROUND

PART A: COPYRIGHT INFRINGEMENT

The U.S. Constitution gives Congress the power "[t]o promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[8] Currently, the Copyright Act of 1976 governs copyright law in the United States.[9] The Act protects artistic works, not

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5. Au, LLC keeps a partial list of cases organized by plaintiff at: *Bit Torrent Lawsuits*, AU, LLC, http://www.torrentlitigation.com/libraryc.html (last visited Sept. 15, 2013).

6. In a 2012 interview with *Forbes*, an attorney estimated he has collected just under $15 million in settlements from these types of cases. 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://www.forbes.com/sites/kashmirhill/2012/10/15/how-porn-copyright-lawyer-john-steele-justifies-his-pursuit-of-sometimes-innocent-porn-pirates/#more-16339.

7. Order Issuing Sanctions, Ingenuity 13 LLC v. John Doe, No. 2:12-cv-8333-ODW (JCx), 2013 WL 1898633, at *1 (C.D. Cal. May 6, 2013).

8. U.S. CONST. art. I, § 8, cl. 8.

9. 17 U.S.C. §§ 101-810 (2012).

ideas.[10] It also grants copyright owners exclusive rights, including the right to reproduce and distribute their work.[11]

If these exclusive rights are violated, copyright owners may bring suit in federal court for copyright infringement.[12] Copyright infringement must be proven through a two-element test: (1) whether the plaintiff owns the copyright, and (2) whether the defendant copied the work.[13] Copying may be proven with either direct evidence, which is rare, or indirect evidence.[14] Copying may be proven indirectly by proving the infringer had access to the work, and the copied work bears a substantial similarity to the original.[15] Substantial similarity is evaluated using the ordinary observer test, in which the plaintiff must show that what the defendants copied was so similar that an ordinary reasonable person, upon viewing both works, would conclude that the defendant copied from the plaintiff.[16]

Not every instance of copying is actionable copyright infringement. Reproduction for "criticism, comment, news reporting, teaching[], scholarship, or research" purposes does not constitute copyright infringement.[17] Copying can also be considered *de minimis*,[18] which is copying "so meager and fragmentary that the average audience would not recognize the appropriation."[19]

PART B: THE BITTORRENT PROTOCOL

BitTorrent is a peer-to-peer (P2P) file sharing protocol[20] developed by Bram Cohen in 2001.[21] It has since become the dominant P2P file

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10. 17 U.S.C. § 102 (2012) (defining what can be copyrighted).

11. 17 U.S.C. § 106 (2012) (defining the basic rights of copyright holders).

12. 17 U.S.C. §§ 501-513 (2012).

13. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 361 (1991).

14. Boisson v. Banian, Ltd, 273 F.3d 262, 267 (2d Cir. 2001).

15. *Id.*

16. *See* Concrete Mach. Co., Inc. v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 607 (1st Cir. 1988) ("The test is whether the accused work is so similar to the plaintiff's work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff's protectible [sic] expression by taking material of substance and value.").

17. 17 U.S.C. § 107 (2012) (defining fair use).

18. Abbreviated from *de minimis non curat lex*, BLACK'S LAW DICTIONARY 443 (7th ed. 1999) ("The law does not concern itself with trifles.").

19. Fisher v. Dees, 794 F.2d 432, 434 n.2 (9th Cir. 1986).

20. *P2P (Peer to Peer) Definition*, TECHTERMS.COM, http://www.techterms.com/definition/p2p (last visited Nov. 8, 2013) (highlighting the differences between a traditional computer/server network and this type of network, which has no central server).

21. Susan Berfield, *BitTorrent's Bram Cohen Isn't Limited by Asperger's*, BLOOMBERG BUS. WK. (Oct. 15, 2008), http://www.businessweek.com/stories/2008-10-

sharing protocol.[22] While the BitTorrent protocol is an efficient way of downloading pirated works, it does have other legitimate uses.[23] A popular video game company uses BitTorrent to distribute games and updates.[24] Open Office, a free alternative to Microsoft Office, uses BitTorrent to distribute its software.[25] The BitTorrent protocol is so appealing because it is an extremely effective and efficient means of distributing data.[26]

The first step to downloading something via BitTorrent is finding the desired content's associated torrent file.[27] The torrent file contains information such as a description of the breakdown of the pieces the content has been split into, information on how to find the "peers" currently downloading and uploading the pieces, and the torrent's "infohash,"[28] which uniquely identifies the pieces.[29] What these files do not contain is any of the actual content.[30] Torrent files can be found using indexing websites such as The Pirate Bay and Mininova.[31] Once the

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15/bittorrents-bram-cohen-isnt-limited-by-aspergers.

22. Matt Hartley, *BitTorrent Turns Ten*, FIN. POST (Jan. 7, 2011), http://business.financialpost.com/2011/07/01/bittorrent-turns-ten/?__lsa=0cbd-5927 (finding BitTorrent comprises 94% of all North American P2P traffic).

23. Chris Hoffman, *8 Legal Uses for BitTorrent: You'd Be Surprised*, MAKEUSEOF (Aug. 16, 2013), http://www.makeuseof.com/tag/8-legal-uses-for-bittorrent-youd-be-surprised/.

24. James Messer, *Under the Surface of Azeroth: A Network Baseline and Security Analysis of Blizzard's World of Warcraft*, NETWORK UPTIME, http://www.networkuptime.com/wow/page02-08.html (last visited Sept. 25, 2013) (reporting that Blizzard distributes through a proprietary client that uses the BitTorrent protocol).

25. *Legacy OpenOffice.org P2P Downloads*, OPENOFFICE, http://www.openoffice.org/distribution/p2p/ (last visited Sept. 25, 2013).

26. *A Beginner's Guide To BitTorrent*, BitTorrent, http://www.bittorrent.com/help/guides/beginners-guide (last visited Nov. 8, 2013).

27. *Id.*

28. Defining infobash as:

> The infohash is a key foundation of BitTorrent – referring to content by digital fingerprint rather than just a file name is a powerful way of referring to something. It's [sic] like referring to a person by referencing their fingerprints rather than just their name. There are many people in the world called "Simon Morris," but my fingerprints are unique.

smorris, *New To Apps: Torrent Discussions With Torrent Tweet*, BITTORRENT BLOG (Aug. 5, 2010), http://blog.bittorrent.com/tag/torrent-tweet).

29. Tom Chothia et al., *The Unbearable Lightness of Monitoring: Direct Monitoring in BitTorrent*, 106 SEC. & PRIVACY COMM. NETWORKS 185 5 (Angelos D. Keromytis & Roberto Di Pietro eds., 2013), *available at* http://www.cs.bham.ac.uk/~tpc/Papers/P2PSecComm2012.pdf.

30. Ezra & TitaniaEzwa, *How to Download Files Using BitTorrent*, BUBBLENEWS (Aug. 17, 2013), http://www.bubblews.com/news/961168-tut-how-to-download-files-using-bittorrent.

31. Torrent indexing websites are like search engines for .torrent files. *See Getting*

torrent file has been located, the torrent file must be opened in a software client in order to begin downloading the pieces.[32] This is analogous to web browsing, where HTTP is the protocol and the client is the browser, such as Mozilla Firefox or Safari.[33]

Once a user, or "peer," begins downloading the pieces, he joins the torrent's "swarm."[34] "Swarms" are comprised of "seeders" and "leechers."[35] "Seeders" have the entire file and are distributing the pieces to "leechers."[36] "Leechers" not only download pieces from "seeders" and other "leechers," they are also uploading pieces they have, making BitTorrent very efficient and very different from previous types of P2P file sharing methods.[37] The downloading of the individual pieces occurs out of sequence,[38] and the media being downloaded is not usable until the file is fully complete.[39] Part C: BitTorrent Monitoring Methods

There are two different monitoring approaches people can use to obtain IP addresses that are participating in BitTorrent swarms: indi-

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Started With Torrents, INDIETORRENT, https://indietorrent.org/help/getting-started-with-torrents/ (last visited Nov. 8, 2013); PIRATE BAY, http://www.thepiratebay.se (last visited Sept. 15, 2013); MININOVA, http://www.mininova.org (last visited Sept. 25, 2013).

32. Popular BitTorrent clients include µTORRENT, http://www.utorrent.com (last visited Sept. 25, 2013); TRANSMISSION, http://www.transmissionbt.com (last visited Sept. 25, 2013); and VUZE, http://www.vuze.com (last visited Sept. 25, 2013).

33. *A Beginner's Guide To BitTorrent*, *supra* note 26.

34. *Concepts*, BITTORRENT, http://www.bittorrent.com/help/faq/concepts (last visited Sept. 29, 2013).

35. *Id.*

36. *Id.*

37. Previous P2P systems had problems with the "free-riding phenomenon[sic]," where users downloaded without contributing any files of their own. Georgiana Ifrim, *Incentives for Sharing in Peer-to-Peer Networks*, PROCEEDINGS OF THE 3RD CONFERENCE ON ELECTRONIC COMMERCE 1 (2001), *available at* http://www.mpi-inf.mpg.de/departments/d5/teaching/ws03_04/p2p-data/01-27-writeup2.pdf. BitTorrent is able to avoid this by employing a tit-for-tat algorithm that ensures users are also uploading pieces as well as downloading, and slows the download speeds of users who do not upload. *See generally*, Bram Cohen, *Incentives Build Robustness,* BITTORRENT (May 22, 2013), *available at* http://www.ittc.ku.edu/~niehaus/classes/750-s06/documents/BT-description.pdf.

38. Pieces are downloaded according to a "rarest first algorithm," as opposed to in sequence, to maximize the efficiency of the download. Philippe Golle, Kevin Leyton-Brown, Ilya Mironov, & Mark Likkibridge, *Incentives for Sharing in Peer-to-Peer Networks*, WELCOM'01 (2001), *available at* http://www.cs.ubc.ca/~kevinlb/pub.php?u=welcom01.pdf.

39. A BitTorrent client reassembles pieces into a usable file after all of the pieces are downloaded. *Tech Tip: Download Files More Quickly Using BitTorrent*, TECHREPUBLIC (July 28, 2004, 12:14 PM), http://www.techrepublic.com/article/tech-tip-download-files-more-quickly-using-bittorrent/.

rect and direct detection.[40] Indirect detection obtains the IP addresses from the torrent's tracker.[41] In this situation, the monitor does not actually interact with any of the peers, just the tracker.[42] This is the cheapest, easiest way for IP addresses to be collected.[43] However, it is also the most unreliable for two reasons. First, the monitor lacks proof that the IP addresses collected were actually participating in the swarm, and second, this method has been proven to produce false positives.[44]

Direct monitoring requires much more bandwidth and computer processing power because the monitor actually joins the swarm and establishes connections with peers to confirm that the peers are actually participating in the swarm.[45] True direct monitoring only fetches the bitfield, or the list of available "pieces" peers have available.[46] The monitors do not actually engage in uploading or downloading any of the actual pieces.[47] Through analyzing the bitfield, the monitor can determine who is "seeding" and who is "leeching."[48]

PART D: THE TROLL BUSINESS MODEL

Hundreds of cases have been filed in recent years in federal courts against alleged copyright infringers for downloading protected media (movies, music, pornography, etc…) from the Internet.[49] The cases gen-

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40. Michael Piatek et al., *Challenges and Directions for Monitoring P2P File Sharing Networks, or Why My Printer Received a DMCA Takedown Notice*, in PROCEEDINGS OF THE 3RD CONFERENCE ON HOT TOPICS SECURITY 2-3 (2008), *available at* http://dmca.cs.washington.edu/dmca_hotsec08.pdf.

41. *Id*.; *see also* Concepts, *supra* note 34 ("[Torrent] tracker: a server that keeps track of the peers and seeds in a swarm. A tracker does not have a copy of the file itself, but it helps manage the file transfer process.").

42. Michael Piatek, *supra* note 40, at 2.

43. *Id*. at 5.

44. *Id*. at 6-7.

45. Tom Chothia, *supra* note 29, at 6-7.

46. *Id*. at 6 ("The bitfield is a bit mask representation of the pieces that the sender claims to be holding; e.g., in a 10- piece torrent, the bitfield 1001010010 indicates that the peer holds pieces 0, 3, 5 and 8.").

47. *Id*. at 12.

48. *Id*. at 6.

49. Jason Koebler, *Porn Companies File Mass Piracy Lawsuits: Are You at Risk?*, US NEWS (Feb. 2, 2012, 10:20 AM), http://www.usnews.com/news/articles/2012/02/02/porn-companies-file-mass-piracy-lawsuits-are-you-at-risk; *see also In re*: BitTorrent Adult Film Copyright Infringement Cases, 296 F.R.D. 80, 82 (E.D.N.Y. 2012) *report and recommendation adopted sub nom*. Patrick Collins, Inc. v. Doe 1, 288 F.R.D. 233 (E.D.N.Y. 2012) ("These actions are part of a nationwide blizzard of civil actions brought by purveyors of pornographic films alleging copyright infringement by individuals utilizing a computer protocol known as BitTorrent.").

erally begin the same way. First, the copyright owner either hires a torrent monitoring firm to collect IP addresses or the copyright owner collects IP addresses themselves.[50] Armed with a list of IP addresses, the copyright owner files suit in federal court claiming copyright infringement against multiple John Doe defendants.[51] Next, the plaintiff applies for *ex parte* discovery in order to identify the defendants by their IP address.[52] If granted, the plaintiff will subpoena[53] Internet Service Providers (ISPs) to disclose identifying information such as the subscriber's name, street address, telephone number, and media access control (MAC) address.[54] Once the plaintiff has the subscriber's identity, very few subscribers are actually litigated against.[55] Instead, the plaintiff sends out settlement letters to the subscribers offering to settle for just under the amount it would cost to defend the suit.[56] Plaintiffs in these cases appear to be more interested in getting settlements than

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50. Tom Chothia, *supra* note 29, at 1 ("The task of policing BitTorrent is often outsourced to specialist copyright enforcement agencies."); *see, e.g.,* Guardaley, http://www.guardaley.com (last visited Nov. 9, 2013) (a BitTorrent monitoring firm).

51. This is a major cost-saving method for plaintiffs. It costs $350 to file suit in federal court. 28 U.S.C. § 1914 (2012). For example, the Plaintiffs in *Voltage Pictures, LLC v. Does 1-5,000*, 818 F. Supp. 2d 28 (D.D.C. 2011), saved $1,749,650 in filing fees by joining defendants in one suit.

52. Memorandum Re: Outstanding Motions, Expedited Discovery, And Bellwether Trial at 6, Malibu Media, LLC v. John Does 1-22, No. 5:12-CV-02088-MMB (E.D. Pa. Oct. 3, 2012). *Ex parte* discovery is for "one side or party only." *Ex Parte*, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/ex parte (last visited Nov. 20, 2013).

53. *Subpoena*, BLACK'S LAW DICTIONARY 1563 (9th ed. 2009) ("A writ or order commanding a person to appear before a court or other tribunal, subject to a penalty for failing to comply.").

54. Memorandum Re: Outstanding Motions, Expedited Discovery, And Bellwether Trial at 6, Malibu Media, LLC v. John Does 1-22, No. 5:12-CV-02088-MMB; *MAC Address Definition*, TECHTERMS.COM, http://www.techterms.com/definition/macaddress (last visited Nov. 9, 2013) (explaining that this is a unique identification number that cannot be changed).

55. For Example, as discussed in the *Malibu Media* case:

> If the John Doe defendant who receives the letter agrees to pay, Plaintiff dismisses the complaint against that defendant with prejudice and without any further court proceedings, thus avoiding the public disclosure of the defendant's identity. If the John Doe defendant refuses to settle, or Plaintiff has been unable to serve the complaint within the 120 days required under Rule 4(m) of the Federal Rules of Civil Procedure, subject to any extension granted by the court, with whatever information is provided by the ISP, Plaintiff dismisses the complaint against that defendant without prejudice to Plaintiff's ability to commence a subsequent action against that defendant. In this fashion, Plaintiff has initiated hundreds of lawsuits in various district courts throughout the country, but has not yet proceeded to trial in any case.

Memorandum Re: Outstanding Motions, Expedited Discovery, And Bellwether Trial at 7, Malibu Media, LLC v. John Does 1-22, No. 5:12-CV-02088-MMB.

56. Kashmir Hill, *supra* note 6 (finding settlement amounts to generally be around $3000).

actually litigating the case,[57] and very few Does are ever formally named.[58] This method has been incredibly successful in cases involving pornography because the letters suggest that unless settlement is reached, the subscriber will be officially named in the lawsuit. Thus the subscriber's name will be officially associated with a pornographic film.[59]

PART E: *EX PARTE* DISCOVERY STANDARDS

In lawsuits with a named defendant, discovery would not begin until after both parties meet for a Rule 26(f) conference.[60] However, with BitTorrent litigation, the plaintiff does not know the identity of the defendants, so the plaintiff must apply for a Rule 26(d) exception for *ex parte* expedited discovery in order to discover the identities of the defendants.[61] The Federal Rules of Civil Procedure are silent as to the standard to be used in determining whether expedited *ex parte* discovery is warranted. Appellate courts give district courts broad discretion in managing discovery, and will only overturn the district court if there is an abuse of discretion.[62] This broad discretion has resulted in a

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57. To date, only one case has actually gone to trial, and that was because the judge ordered a bellwether trial. Malibu Media, LLC v. John Does 1-22, No. 5:12-cv-02088-MMB (E.D. Pa. filed Apr. 19, 2012). It has received considerable criticism for not adequately trying the merits of the case. John Whitaker, *Bellwether Trial: Why It Was A Bust*, COPYRIGHT INFRINGEMENT ADVISOR (June 13, 2013), http://copyright.infringementadvisor.com/2013/06/bellwether-trial-why-it-was-bust.html.

58. However, at least one firm decided to publicly name and file suits against some Does, and then published the names of the cases on its website. I would assume that this was to serve as a warning for Does that they mean business. *Sample Cases*, ANTI-PIRACY LAW GROUP (May 13, 2013, 9:43 AM), http://web.archive.org/web/20130513094332/http://wefightpiracy.org.previewdns.com/sample-cases.

59. It should be noted that pornography is not the only industry utilizing this method. It is also used for copyright infringement of independent films, books, and other media. *See, e.g.*, Dana Kerr, *'Hurt Locker' Makers File New Suit Against Downloaders*, CNET (Apr. 23, 2012, 6:43 PM), http://news.cnet.com/8301-1023_3-57419579-93/hurt-locker-makers-file-new-suit-against-downloaders (reporting law suit filed against 24,583 Does); Will Shanklin, *BitTorrent for Dummies Readers Follow Directions, Get Sued*, GEEK.COM (Nov. 1, 2011, 1:34 PM) http://www.geek.com/news/bittorrent-for-dummies-readers-follow-directions-get-sued-1436243 (noting that while the complaint listed several titles in the popular "for Dummies" series, *BitTorrent for Dummies* was not actually one of them).

60. Fed. R. Civ. P. 26(d)(1). "A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order." *Id.*

61. *See id.*

62. Heidelberg Americas, Inc. v. Tokyo Kikai Seisakusho, Ltd., 333 F.3d 38, 41 (1st Cir. 2003) (citing Brandt v. Wand Partners, 242 F.3d 6, 18 (1st Cir. 2001)).

number of different tests: the *Notoro* standard, the *Seescandy.com* standard, and the *Semitool* "good cause" standard.[63] District courts have routinely rejected the *Notoro* standard for this type of case,[64] thus discussion will be limited to the *Semitool* "good cause" standard and the *Seescandy.com* standard.

The *Semitool* "good cause" standard grants requests for expedited discovery when "the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party."[65] This is a weak standard because it is very easy to satisfy and risks converting expedited discovery under Rule 26(d)(1) into the norm rather than the exception intended.[66]

The *Seescandy.com* standard, or the motion to dismiss standard, is more stringent than the "good cause" standard, and it was developed specifically for identifying anonymous defendants.[67] The analysis is broken down into the following four element test: (1) the plaintiff must identify the John Doe party with sufficient specificity that the court can determine that the defendant is a real person or entity who could be sued in federal court; (2) the plaintiff must show that all previous attempts to identify the Does have failed; (3) the plaintiff must show the complaint can survive a motion to dismiss; and (4) the plaintiff must demonstrate that narrowly tailored third party subpoenas will identify the John Doe parties, so service of process will be possible.[68] The Northern District of California in *Seescandy.com* required the complaint be able to withstand a motion to dismiss because it recognized that *ex parte* discovery is an "extraordinary application of the discovery process,"[69] and to ensure that the process is not misused to invade the privacy of those who did not commit the civil wrong in question.[70]

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63. Notaro v. Koch, 95 F.R.D. 403, 405 (S.D.N.Y. 1982); Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D. Cal. 1999); Semitool, Inc. v. Tokyo Electron Am., Inc., 208 F.R.D. 273, 275 (N.D. Cal. 2002).

64. Digital Sin, Inc. v. Does 1-27, No. 12-CIV-3873-JMF, 2012 WL 2036035, at *3-4 (S.D.N.Y. June 6, 2012) (rejecting Notaro standard and applying "good cause" standard); Vision Films, Inc. v. John Does 1-24, No. 12-CIV-1746-LPS, 2013 WL 1163988, at *2-3 (D. Del. Mar. 20, 2013) (rejecting Notaro standard and applying "good cause" standard). The Notaro standard uses factors similar to those found in granting preliminary injunctions. Notaro, 95 F.R.D. at 405 n. 4.

65. *Semitool, Inc.*, 208 F.R.D. at 276.

66. Jesse N. Panoff, *Rescuing Expedited Discovery from Courts & Returning It to FRCP 26(d)(1): Using a Doctrine's Forgotten History to Achieve Legitimacy*, 64 ARK. L. REV. 651, 670 (2011); see also Ahanchian v. Xenon Pictures, Inc., 624 F.3d 1253, 1259 (9th Cir. 2010) ("'Good cause' is a non-rigorous standard that has been construed broadly across procedural and statutory contexts."); Venegas-Hernandez v. Sonolux Records, 370 F.3d 183, 187 (1st Cir. 2004) ("There is no precise formula for the 'good cause' analysis.").

67. *Seescandy.com*, 185 F.R.D. at 578.

68. *Id.* at 578-80.

69. *Id.* at 579.

70. *Id.* at 579-80.

A proper application of the *Seescandy.com* standard would also include an analysis of whether the plaintiff's complaint states a plausible claim under *Bell Altlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Under *Twombly*, a complaint must contain sufficient factual matter "to state a claim to relief that is plausible on its face."[71] The U.S. Supreme Court clarified this standard somewhat in *Iqbal* by requiring courts examining complaints to first identify any conclusory statements in the complaint.[72] These statements are not entitled to an assumption of truth.[73] Second, there must be enough factual allegations remaining, taken as true, to support a plausible claim.[74] A claim for copyright infringement must show that: (1) the plaintiff owns the copyright; and (2) the defendant copied the work.[75]

III. ANALYSIS

BitTorrent litigation has distorted the U.S. federal court system into something that was never intended: an accessory to an extortion machine that does not even care about the guilt or innocence of its targets. One Plaintiff estimated that 30% of John Does are not even guilty of copyright infringement.[76] These trolling lawsuits create a distorted scheme in which it is not financially viable for innocent defendants to fight the suit because it is cheaper to settle then to fight the suit.[77]

Once BitTorrent plaintiffs receive the identifying information from the ISPs, some plaintiffs have notoriously used the personal contact information to harass Does into settlement by using tactics akin to those used by debt collectors.[78] These tactics can include up to three phone calls a day, either from actual people or automated "robo-calls."[79] Settlement letters have threatened to contact friends, neighbors, and relatives of Does to inquire if they know anything about the pornography that the Doe has been accused of downloading.[80] Given these high-

71. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 547 (2007).

72. Ashcroft v. Iqbal, 556 U.S. 662, 664 (2009).

73. *Id.*

74. *Id.*

75. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 361 (1991).

76. Digital Sin, Inc. v. Does 1-176, 279 F.R.D. 239, 242 (S.D.N.Y. 2012).

77. Order Issuing Sanctions, Ingenuity 13 LLC v. John Doe, No. 2:12-cv-8333-ODW (JCx), 2013 WL 1898633, at *1 (C.D. Cal. May 6, 2013).

78. Memorandum in Opposition to Motion to Disqualify Judge Hon. Otis D. Wright, II, Exhibit A: Declaration of Morgan E. Pietz RE: Prenda Law, Inc. at ¶ 14, Ingenuity 13 LLC v. John Doe, No. 2:12-cv-8333-ODW (JCx) (C.D. Cal. Jan. 14, 2013).

79. *Id. at* ¶¶16-17.

80. Mike Masnick, *Team Prenda Not Only Still Shaking Down People, But Also Threatening to Tell Their Neighbors About Porn Habits*, TECHDIRT (May 13, 2013, 1:53pm), http://www.techdirt.com/articles/20130513/12345223063/team-prenda-not-only-

pressure tactics, many targeted Does choose to settle just to make the plaintiffs stop contacting them.[81] One plaintiff lawyer bragged to a legal journal that his firm has a 45% settlement rate.[82]

In addition to harassing Does into settlement agreements regardless of whether they have actually infringed, there has also been a case where a plaintiff was accused of being the BitTorrent user that originally uploaded his own work and created the torrent.[83] The BitTorrent monitor hired by defense counsel, "the monitor," was able to track the identity of a seeder using the Pirate Bay username "sharkmp4" and to determine the methodologies for BitTorrent monitoring used by Plaintiff BitTorrent monitor 6881 Forensics.[84] The monitor suggested, "6881 Forensics is not merely collecting logs, but actively sharing the copyrighted works in question."[85] First, the monitor was able to identify the 6881 Forensics monitor by finding four IP addresses participating in "swarms" of the copyrighted works in question.[86] These four IP addresses all used the same rare software version and behaved similarly in the swarms.[87] The monitor then compared the four IP addresses with the IP addresses used to make changes to both the website of the Plaintiff's counsel and the website for 6881 Forensics, and found them to most likely be related because they were all from the same ISPs.[88]

In response to the monitor's declaration, The Pirate Bay decrypted its user logs for "sharkmp4," and found an IP address in common with the "sharkmp4" seeder and the IP addresses used to make changes to

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still-shaking-down-people-also-threatening-to-tell-their-neighbors-about-porn-habits.shtml.

81. Order Issuing Sanctions, Ingenuity 13 LLC v. John Doe, No. 2:12-cv-8333-ODW (JCx), 2013 WL 1898633, at *1 ("For these individuals, resistance is futile; most reluctantly pay rather than have their names associated with illegally downloading porn.").

82. John Council, Adult Film Company's Suit Shows Texas Is Good for Copyright Cases, TEX. LAW. (Oct. 4, 2010), http://www.law.com/jsp/tx/PubArticleTX.jsp?id=1202472786304. This same attorney in this same case was later fined $10,000 for issuing 670 subpoenas before the court heard the Plaintiff's application for expedited discovery. Mick Haig Prods. E.K. v. Does 1-670, 687 F.3d 649, 652 (5th Cir. 2012) (affirming sanctions issued by trial court).

83. Ernesto, *The Pirate Bay Helps to Expose Copyright Troll Honeypot*, TORRENTFREAK (June 4, 2013), http://torrentfreak.com/the-pirate-bay-helps-to-expose-copyright-troll-honeypot-130604; *see also* Tom Worstall, *Quite Amazing, Prenda Law Was Seeding the Torrent Sites Then It Sues People for Downloading From*, FORBES (Aug. 21, 2013 10:10 AM), http://www.forbes.com/sites/timworstall/2013/08/21/quite-amazing-prenda-law-was-seeding-the-torrent-sites-it-then-sues-people-for-downloading-from.

84. Defendant Paul Oppold's Objection to Report & Recommendation of Magistrate, Exhibit K: Declaration of Delvan Neville at ¶ 16, First Time Videos, LLC. v. Oppold, No. 6:12-cv-01493 (M.D. Fla. June 3, 2013).

85. *Id.* at ¶ 5.

86. *Id.* at ¶ 16.

87. *Id.* at ¶ 16.

88. *Id.* at ¶ 37.

the Plaintiff's counsel's website.[89] This strongly suggests that the Plaintiff's counsel seeded its own works in order to obtain IP addresses of infringers, also known as creating a "honeypot."[90] Defense counsel in another case issued a subpoena for that same IP address identified by The Pirate Bay, and ISP Comcast confirmed that the IP address did belong to the Plaintiff's counsel.[91]

PART A: HOW SHOULD THE PROBLEM BE ADDRESSED?

Given the fact that settling these cases is cheaper than defending them, there have been relatively few challenges to the cases as compared to the total number of Does targeted.[92] However, Does have successfully attacked the joinder of the multiple Does and have succeeded in getting all but the first Doe severed from the case.[93] Does are usually able to bring motions to quash and motions to dismiss for improper joinder while preserving their anonymity.[94]

While this method of combatting BitTorrent litigation has been moderately successful, it is not the ideal way to combat these predatory lawsuits. This method relies on Does bringing motions to quash and judges granting them. Even when judges recognize that these lawsuits are predatory in nature and implement protective orders restricting the scope of discovery, things can sometimes go very wrong. In *Malibu Media, LLC v. John Doe*, the Federal District Court for the Eastern District of New York approved a subpoena to the Doe's ISP under the condition that the Doe's information be sent directly to the court and

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89. Ernesto, *supra* note 83.

90. *Id*.

91. *Id*.

92. *See* Order Issuing Sanctions, Ingenuity 13 LLC v. John Doe, No. 2:12-cv-8333-ODW (JCx), 2013 WL 1898633, at *1 (C.D. Cal. May 6, 2013) ("Then they offer to settle-for a sum calculated to be just below the cost of a bare-bones defense. For these individuals, resistance is futile; most reluctantly pay rather than have their names associated with illegally downloading porn.").

93. *See, e.g.*, Hard Drive Prods., Inc. v. Does 1-188, 809 F. Supp. 2d 1150, 1151 (N.D. Cal. 2011) (granting Doe motion to quash and severs all but first Doe from the case for improper joinder); Bubble Gum Prods., LLC v. Does 1-80, No. 12-20367-CIV, 2012 WL 2953309 (S.D. Fla. July 19, 2012) (same); Malibu Media, LLC v. Doe, 923 F. Supp. 2d 1339, 1346 (M.D. Fla. 2013) (same); Third Degree Films v. Does 1-47, 286 F.R.D. 188, 199 (D. Mass. 2012) (same). ISPs notify Does that they have been subpoenaed to release their subscriber information. 47 U.S.C. § 551 (2012).

94. *See* Sunlust Pictures, LLC v. Does 1-75, No. 12-C-1546, 2012 WL 3717768 (N.D. Ill. Aug. 27, 2012) (allowing Doe to proceed anonymously); *but see* Liberty Media Holdings, LLC v. Swarm Sharing Hash File, 821 F. Supp. 2d 444, 453 (D. Mass. 2011) ("[T]he potential embarrassment or social stigma that Does 1–38 may face once their identities are released in connection with this lawsuit is not grounds for allowing them to proceed anonymously.").

protected under seal.[95] Plaintiff's counsel violated the order and issued a subpoena that directed the ISP to send the Doe's information directly to the Plaintiff's counsel.[96] Therefore, the best method of keeping identifying information out of the plaintiff's hands in these predatory lawsuits is for judges to weed out predatory lawsuits at the earliest stage possible, that is, when the judge is evaluating the plaintiff's application for *ex parte* discovery.

Currently, there is no standard for federal judges to apply when evaluating a plaintiff's application for expedited *ex parte* discovery.[97] While the *Seescandy.com* test and the *Semitool* "good cause" standard are the most frequently used tests by federal district court judges when evaluating discovery applications in BitTorrent litigation cases,[98] there are over twenty different tests in existence for this purpose.[99]

The lack of a uniform standard for evaluating expedited *ex parte* discovery "frustrates one of the Federal Rules of Civil Procedure's primary goals--uniformity."[100] Similarly, the *Semitool* "good cause" standard also frustrates the goal of uniformity because it leaves too much to the judge's discretion.[101] This is particularly problematic when a magistrate judge hears these discovery requests, as a magistrate judge is more likely to be permissive in granting discovery requests.[102] A uniform application of the *Seescandy.com* test will ensure that trolling

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95. Order at 3, *In re*: Bittorrent Adult Film Copyright Infringement Cases, No. 12-1147 (JS) (GRB) (E.D. N.Y. July 31, 2012).

96. *Id.*

97. *See supra* notes 62 - 63 and accompanying text.

98. Digital Sin, Inc. v. Does 1-27, No. 12-CIV-3873-JMF, 2012 WL 2036035, at *3 (S.D.N.Y. June 6, 2012) (rejecting Notaro standard and applying "good cause" standard); Vision Films, Inc. v. John Does 1-24, No. 12-CIV-1746-LPS, 2013 WL 1163988, at *2-3 (D. Del. Mar. 20, 2013) (rejecting Notaro standard and applying "good cause" standard). The Notaro standard uses factors similar those found in granting preliminary injunctions. Notaro v. Koch, 95 F.R.D. 403, 405 n. 4 (S.D.N.Y. 1982).

99. Panoff, *supra* note 66, at 651.

100. *Id*. at 652; *see also* Lumbermen's Mut. Cas. Co. v. Wright, 322 F.2d 759, 764 (5th Cir. 1963) ("One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts by getting away from local rules."); United States v. Schine Chain Theatres, 1 F.R.D. 205, 207 (W.D.N.Y. 1940) ("The purpose in the adoption of the new Rules of Civil Procedure was to unify and simplify the procedure in District Courts in civil actions.").

101. *See supra* notes 65 - 66 and accompanying text.

102. Swanson v. Citibank, N.A., 614 F.3d 400, 411-12 (7th Cir. 2010) (Posner, J., dissenting).

> In busy districts, which is where complex litigation is concentrated, the judges tend to delegate that authority to magistrate judges. And because the magistrate judge to whom a case is delegated for discovery only is not responsible for the trial or the decision and can have only an imperfect sense of how widely the district judge would want the factual inquiry in the case to roam to enable him to decide it, the magistrate judge is likely to err on the permissive side.

Id.

plaintiffs will either perform an adequate investigation before filing suit or face dismissal.[103] The uniform applications of this test will not only further the broad goal of uniformity under the Federal Rules, but it will also ensure that plaintiffs conform to the Federal Rule of Civil Procedure Rule Eleven's duty to investigate.[104]

PART B: ARE THE COURTS USING THE *SEESCANDY.COM* TEST PROPERLY?

Federal district courts need to closely examine whether complaints in these cases meet the plausibility standard set forth in *Twombly* and *Iqbal* when applying the *Seescandy.com* test for granting expedited discovery. Recall that for a plaintiff to be granted expedited discovery under the *Seescandy.com* test, the plaintiff must: (1) identify the John Doe party with sufficient specificity that the court can determine that the defendant is a real person or entity who could be sued in federal court; (2) show that all previous attempts to identify the Does have failed; (3) show the complaint can survive a motion to dismiss; and (4) demonstrate that narrowly tailored third party subpoenas will identify the John Doe parties so service of process would be possible.[105] Plaintiffs, in *Pink Lotus Entertainment, LLC v. Does 1-46*, were granted expedited discovery under the *Seescandy.com* test.[106] Was this decision correct? Recall that under the *Seescandy.com* test, a plaintiff seeking expedited discovery to identify Doe defendants must show her complaint can withstand a motion to dismiss.[107] Would the complaint filed in this case survive a motion to dismiss for failure to state a claim for willful copyright infringement?[108] The complaint would have to plausibly allege that the plaintiff has a valid copyright, and that the defendant copied

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103. *See* Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 578-80 (N.D. Cal. 1999).

104. Fed. R. Civ. P. 11(b)(3) ("[T]he factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.").

105. *Seescandy.com*, 185 F.R.D. at 578-805.

106. Order Granting Plaintiff's Ex Parte Application for leave to Take Limited Expedited Discovery, Pink Lotus Entm't, LLC v. Does 1-46, No. C-11-02263 HRL (N.D. Cal. May 6, 2011). This article will frequently reference this case as an example. Using one case as an example in this context is a very effective way to illustrate how things work in this type of litigation because the complaints are boilerplate. *See, e.g.*, Malibu Media, LLC v. Does 1-11 (In re: BitTorrent Adult Film Copyright Infringement Cases), No. CIV.A. 11-3995 DRH (E.D.N.Y. July 24, 2012) ("The four complaints that are subject to this Order are nearly identical."); Order Issuing Sanctions, Ingenuity 13 LLC v. John Doe, No. 2:12-cv-8333-ODW (JCx), 2013 WL 1898633 (C.D. Cal. May 6, 2013) ("But Plaintiffs' filing of cases using the same boilerplate complaint against dozens of defendants raised the Court's alert.").

107. *Seescandy.com*, 185 F.R.D. at 579.

108. Fed. R. Civ. P. 12(b)(6).

the protected work.[109] The complaint must also plausibly allege that the elements of a work that has been copied are protected expressions and of such importance that the copying is actionable.[110]

i. Valid Copyright

The Plaintiff in *Pink Lotus* failed the most basic element of copyright infringement: owning a valid copyright.[111] Merely having an application pending for a copyright does not allege a *prima facie* case for copyright infringement in jurisdictions that use the "registration approach."[112] Unregistered works are expressly allowed only in certain situations under the U.S. Copyright Act, none of which the Plaintiff alleged.[113]

ii. Copying

Curiously, the fourteen-page complaint in *Pink Lotus* contained only half of a page of allegations relating to the actual copying of the work and a list of forty-six IP addresses accompanied with time stamps.[114] Copying can be shown either through direct evidence,[115] or by indirect evidence that shows the defendant had access and the copy is "substantially similar" to the protected work.[116] The Plaintiff in *Pink Lotus* did

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109. *See* Kelly v. Arriba Soft Corp., 336 F.3d 811,817 (9th Cir. 2001) ("[T]he plaintiff must show ownership of the copyright and copying by the defendant.").

110. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 361 (1991) ("The mere fact that a work is copyrighted does not mean that every element of the work may be protected.").

111. Complaint at ¶ 20, *Pink Lotus Entm't, LLC*, No. C-11-02263 HRL. Recall this case is being used as an example, *supra* note 106.

112. *See*, *e.g.*, Patrick Collins, Inc. v. Does 1-26, 843 F. Supp. 2d 565, 568 (E.D. Pa. 2011) ("[O]ne cannot bring a copyright infringement action until the copyright is registered."); Telebrands Corp. v. Exceptional Prods. Inc., No. 11-CV-2252, 2011 WL 6029402, at *3 (D.N.J. Dec. 5, 2011) ("EPI is correct that a party may not state a prima facie case of copyright infringement where the party does not hold a registered copyright in accordance with 17 U.S.C. § 411(a) (2012)."); N.J. Media Grp. Inc. v. Sasson, No. CIV. 2:12-3568 WJM, 2013 WL 74237, at *3 (D.N.J. Jan. 4, 2013) ("until NJMG holds a certificate of copyright registration … NJMG cannot state a prima facie claim of copyright infringement").

113. 17 U.S.C. § 411(a) (2012); *see also* Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 165 (2010) ("First, and most significantly, § 411(a) expressly *allows* courts to adjudicate infringement claims involving unregistered works in three circumstances: where the work is not a U.S. work, where the infringement claim concerns rights of attribution and integrity under § 106A, or where the holder attempted to register the work and registration was refused.").

114. Complaint at ¶¶ 22-24, Exhibit A, *Pink Lotus Entm't, LLC*, No. C-11-02263 HRL. Recall this case is being used as an example*, supra* note 106.

115. "The word 'copying' is shorthand for the infringing of any of the copyright owner's five exclusive rights, described at 17 U.S.C. § 106." S.O.S., Inc., v. Payday, Inc., 883 F.2d 1081, 1085 n.3 (9th Cir. 1989).

116. Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 701 (2d Cir. 1992).

not allege direct copying because the Plaintiff's work was only available to subscribers of the Plaintiff's website, and the Plaintiff alleged that Defendants did not obtain the work through the website.[117] Therefore, the Plaintiff must have plausibly alleged indirect copying.

iii. Access

The Plaintiff in *Pink Lotus* alleged that the Defendants obtained the work by having "intentionally downloaded a torrent file particular to the Plaintiff's work, purposefully loaded that torrent file into their BitTorrent clients, entered a BitTorrent swarm particular to the Plaintiff's work, and reproduced and distributed the Work to numerous third parties."[118] The Plaintiff further alleged the Defendants were observed in swarms of the Plaintiff's work using "proprietary P2P network forensic software."[119] Taking these allegations as true, did this plausibly allege the defendants had access to the Plaintiff's work?

A strong argument can be made that this did not plausibly suggest the Defendants had access. Torrent files themselves do not contain any copyrightable information, only metadata.[120] Recently, a study found that 30% of torrent files are fake and direct users to download files that do not contain the desired content.[121] Thus, downloading a torrent file and joining that swarm does not necessarily mean the user obtained the work.

There are also other factors to consider with regards to access such as torrents with few seeders. When participating in swarms with relatively few seeders, downloads can be very slow.[122] Downloads can become so slow that users downloading get frustrated and terminate the download. Furthermore, downloading can stop altogether if those few seeders leave the swarm.[123] Therefore, it is questionable whether these Defendants joined a valid swarm that contained the Plaintiff's work,

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117. Complaint at ¶ 21, *Pink Lotus Entm't, LLC*, No. C-11-02263 HRL.

118. *Id.* at ¶ 23. Recall this case is being used as an example*, supra* note 106.

119. Complaint at ¶ 22, *Pink Lotus Entm't, LLC*, No. C-11-02263 HRL.

120. *Metadata Definition*, TECHTERMS.COM, http://www.techterms.com/definition/metadata (last visited Nov. 10, 2013) ("Metadata describes other data."); *see also Torrent File*, FILEINFO.COM, http://www.fileinfo.com/extension/torrent (last visited Nov. 10, 2013) ("[C]ontains data about the file to be downloaded, but not the file data itself.").

121. Ruben Cuevas, et al., *Is Content Publishing in BitTorrent Altruistic or Profit-Driven?*, ACM CONext 5 (2010), http://conferences.sigcomm.org/co-next/2010/CoNEXT_papers/11-Cuevas.pdf (finding "fake publishers are responsible for around 25% of the usernames, 30% of the published content, and 25% of the downloads.").

122. Achromasia, et al., *How to Download and Open Torrent Files*, WIKIHOW, http://www.wikihow.com/Download-and-Open-Torrent-Files (last visited Oct. 12, 2013).

123. *BitTorrent FAQ*, WHIRLPOOL, http://whirlpool.net.au/wiki/torrent (last visited Oct. 12, 2013) ("This is why sharing the data is so important. If no-one shared the data, the torrent would die.").

and it is unknown whether the swarms were viable enough to allow a download to complete.[124]

iv. Substantially Similar

In addition to access, the Plaintiff in *Pink Lotus* must have also plausibly alleged in its complaint that what the Defendants copied bares substantial similarity to the Plaintiff's work.[125] Using the ordinary observer test, the Plaintiff would have to show that what the Defendants copied was so similar that an ordinary reasonable person, upon viewing both works, would conclude that the Defendants copied from the Plaintiff.[126] The Plaintiff did not allege it had been able to observe what the Defendants downloaded. It merely alleged the Defendants entered and participated in a swarm.[127]

Most importantly, the complaint failed to allege that the Defendants downloaded a usable copy of the Plaintiff's work. Rather it alleged the Defendants entered and participated in a swarm.[128] Recall that content downloaded via the BitTorrent protocol is not downloaded sequentially.[129] The content is not usable until the entire file is complete, before that, all the user has is just a bunch of data.[130] Applying the ordinary observer test, a reasonable observer could hardly find a bunch of "ones and zeros" to be substantially similar to a video.

v. Actionable

Finally, the Plaintiff in *Pink Lotus* must allege in its complaint that the work copied by the Defendants is actionable.[131] Elements of a work that are not protectable cannot serve as a basis of liability for copyright

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124. Two possibilities for a torrent not completing are the peer disconnects because he is frustrated with the slow download speed, or the seeders leave the swarm, making it impossible for the download to complete. *See id*. ("This is why sharing the data is so important. If no-one shared the data, the torrent would die."); Achromasia, et al., *supra* note 121.

125. *See* Computer Assocs. Int'l, Inc. v. Altai, Inc., 982 F.2d 693, 701 (2d Cir. 1992).

126. *See* Concrete Mach. Co., Inc. v. Classic Lawn Ornaments, Inc., 843 F.2d 600, 607 (1st Cir. 1988) ("The test is whether the accused work is so similar to the plaintiff's work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff's protectible [sic] expression by taking material of substance and value.").

127. Complaint at ¶ 23, Pink Lotus Entm't, LLC v. Does 1-46, No. C-11-02263 HRL (N.D. Cal. filed May 6, 2011).

128. *Id*.

129. *See* Legout et al., *supra* note 38, at 1.

130. *See supra* note 39 and accompanying text.

131. *See* Feist Publ'ns, Inc.v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 361 (1991) ("The mere fact that a work is copyrighted does not mean that every element of the work may be protected.").

infringement.[132] Even if someone could view each "piece" of a torrent, the pieces would be so short that it would constitute *de minimis* copyright infringement, and would not be actionable.[133] Take the work from *Pink Lotus*, for example.[134] The movie length is 99 minutes, and description of a torrent file lists the total file size of the completed work to be roughly 700mb.[135] Based on the torrent file size,[136] the corresponding piece size is 256kB, and it would take 2,800 pieces to constitute a complete file of the work.[137] If the court found those pieces to still be copyrighted,[138] each piece would only contain two seconds of video.[139]

Courts use a number of factors in evaluating whether an infringement is *de minimis*, including how observable the material is, whether it constitutes a substantial portion, and whether the infringer was intent on profiting.[140] In *Pink Lotus*, the pieces were not observable at all unless the entire file is completed, each piece is only two seconds,[141] or 0.0003% of the film, and the swarm participants are not profiting from the transaction.[142] Surely, if the Plaintiff could prove that the Does downloaded the entire work, *de minimis* copyright infringement would not be an issue. However, due to the technology the Plaintiff is using to capture IP addresses, these IP "snapshots" do not plausibly suggest an-

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132. Gates Rubber Co. v. Bando Chem. Indus., Ltd., 9 F.3d 823, 833 (10th Cir. 1993) ("Liability for copyright infringement will only attach where *protected elements* of a copyrighted work are copied.").

133. *See* Sandoval v. New Line Cinema Corp., 147 F.3d 215, 217 (2d Cir. 1998) (finding that the use of copyrighted photographs on screen for six seconds *de minimis*).

134. Complaint at ¶ 7, Pink Lotus Entm't, LLC v. Does 1-46, No. C-11-02263 HRL (N.D. Cal. filed May 6, 2011).

135. According to a search for *Dexxxter* on The Pirate Bay. Note, the torrent was not downloaded, and the upload date for this particular torrent is after the date of the complaint, so the completed file size may have been different in torrents available prior to filing. *Dexxxter XXX Parody*, THE PIRATE BAY (Dec. 31, 2012, 11:09 AM), http://thepiratebay.se/torrent/5248942/Dexxxter.XXX.Parody; *see also Dexxxter*, IMDB, http://www.imdb.com/title/tt2134056/ (last visited Oct. 13, 2013) (verifying runtime of 99 minutes and production company Pink Lotus Entertainment).

136. *Torrent Piece Size*, VUZE, http://wiki.vuze.com/w/Torrent_Piece_Size (last visited Oct. 13, 2013) ("The size of the torrent file itself is proportional to the number of pieces.").

137. The actual piece size of the torrent was not obtained. The piece size is estimated from VUZE. *id.*, and the 61kB torrent file is indexed at *Dexxxter XXX Parody*, *supra* note 135.

138. Recall the work in question was not copyrighted at the time of complaint; it was pending copyright. Complaint at ¶ 20, *Pink Lotus Entm't, LLC*, No. C-11-02263 HRL.

139. 99 minutes = 5940 seconds/2800 pieces = 2.1 seconds/piece.

140. Lee S. Brenner & Allison S. Rohrer, *The De Minimis Doctrine: How Much Copying Is Too Much?*, 24 COMM. L. 9, 15 (2006).

141. *See supra* note 139.

142. There is nothing in the complaint alleging that any of the Does were making a profit or intended to make a profit. Complaint, *Pink Lotus Entm't, LLC*, No. C-11-02263 HRL.

ything.[143] Assuming *arguendo*, that a judge decides this method of capturing IP addresses can plausibly suggest that a Doe was participating in a swarm,[144] even without showing the entire work was completed and the Doe has a full copy of the work, then each Doe is only swapping pieces that are two seconds long. Participating in swapping such small pieces of the work that are unobservable could not plausibly suggest actionable copyright infringement.[145]

What can be learned from analyzing this one complaint? One conclusion should be fairly obvious: the *Pink Lotus* court could not have come to the conclusion to grant *ex parte* discovery if the *Seescandy.com* test had been properly applied. Sadly, this misapplication is very common.[146] A search for cases in which a court applied *Twombly* or *Iqbal* in its application of the *Seescandy.com* test evaluating plaintiff's requests for *ex parte* discovery yielded only one case. That case applied *Iqbal* to plausibly stating a claim for civil conspiracy, not copyright infringement.[147]

It is important that courts thoroughly evaluate plaintiff applications for expedited *ex parte* discovery in BitTorrent litigation because plaintiffs are requesting an "extraordinary application of the discovery process."[148] Plaintiffs in these types of cases are notorious for abusing

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143. This methodology of collecting IP addresses is far too inaccurate. *See supra* notes 120 - 124 and accompanying text. For a more in-depth analysis regarding the inaccuracy of indirect monitoring occurs, *see infra* notes 159 - 167 and accompanying text.

144. This situation would more than likely occur when a plaintiff captures IP addresses using direct monitoring, rather than indirect monitoring because direct monitoring would be able to show that individual IP addresses were participating in the swarm, rather than being reported in a tracker. *See supra* notes 45 - 48 and accompanying text.

145. Pieces are downloaded according to a "rarest first algorithm," as opposed to in sequence, to maximize the efficiency of the download. Legout et al., *supra* note 38, at 1. A BitTorrent client reassembles pieces into a usable file after all of the pieces are downloaded. *Tech Tip: Download Files More Quickly Using BitTorrent*, *supra* note 39.

146. *See*, *e.g.*, Ingenuity13, LLC v. Doe, No. 12-CV-2318-LAB JMA, 2012 WL 5077637, at *4 (S.D. Cal. Oct. 18, 2012) (granting in part Plaintiff's request for *ex parte* discovery using *Seescandy.com* test); Malibu Media, LLC v. John Does 1 through 6, No. 12-CV-1355-LAB DHB, 2012 WL 4471538, at *4 (S.D. Cal. Sept. 26, 2012) (granting in part Plaintiff's request for *ex parte* discovery using *Seescandy.com* test); 808 Holdings, LLC v. Collective of December 29, 2011 Sharing Hash E37917C8EEB4585E6421358FF32F29C D63C23C91, No. 12-CV-00186 MMA RBB, 2012 WL 1648838, at *5 (S.D. Cal. May 4, 2012) (Perhaps the most egregious misapplication of the Seescandy.com test because the court does not even evaluate whether plaintiffs have stated a claim upon which relief can be granted. "According to *808 Holdings*, it has adequately alleged that Defendants engaged in the unauthorized reproduction and distribution of its motion picture, and that Plaintiff owns the registered copyrights for the motion picture.").

147. Millennium TGA, Inc. v. Doe, No. 11-2258 SC, 2011 WL 1812786, at *2 (N.D. Cal. May 12, 2011).

148. Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 579 (N.D. Cal. 1999).

this process.[149] *Seescandy.com* reasoned expedited *ex parte* discovery used to unmask Does was akin to requiring probable cause to obtain warrants.[150] A court would not likely grant a warrant for theft based solely upon a single photo of a person in a store touching a piece of merchandise,[151] so why are courts repeatedly granting discovery to plaintiffs in BitTorrent litigation based on a single snapshot of IP addresses in a swarm?

PART C: THE TECHNOLOGY HURDLE

Courts are granting discovery because plaintiffs are taking advantage of the courts' lack of expertise in this particular technological area. If the presiding judge is not particularly computer savvy, he is relying on the information the plaintiff provides in the complaint to understand BitTorrent. In our *Pink Lotus* example, the complaint dedicated only two pages to explaining the BitTorrent protocol.[152] It explained the basics, but it left out facts that are important to fully grasping the technology.[153] The complaint generally alleged that BitTorrent downloads are comprised of pieces,[154] but neglected to mention how many pieces the torrent was broken down into. This is a very important fact to omit because a judge evaluating the complaint may get the impression that there were relatively few pieces. Even if a judge believes the file was broken into 100 pieces, the argument for actionability changes radically.[155] Compounded with the fact that the complaint conveniently neglects to mention that the individual pieces are useless and unplayable until a download is complete, it is almost certain that a judge relying on this explanation of the BitTorrent protocol would be-

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149. *See supra* notes 78 - 82 and accompanying text.

150. *Seescandy.com*, 185 F.R.D. at 579.

151. *See* Order To Show Cause Re Sanctions For Rule 11 and Local Rule 83-3 Violations at 4, Ingenuity 13, LLC v. John Doe, No. 2:12-cv-8333-ODW (JCx) (C.D. Cal. filed Sept. 27, 2012); *see also* Baptiste v. J.C. Penney Co., 147 F.3d 1252, 1257 (10th Cir. 1998) (finding that a videotape of a woman removing a ring from her purse, examining a ring at the store, then putting the first ring back in her purse did not provide probable cause for arrest for shoplifting).

152. Complaint at ¶¶ 9-17, Pink Lotus Entm't, LLC v. Does 1-46, No. C-11-02263 HRL (N.D. Cal. filed May 6, 2011).

153. In a normal lawsuit with named defendants, this would not be an issue because the defendant(s) could respond with either an answer disputing the facts or a motion to dismiss. However, because there are only unknown Does at this point in the litigation, those options are not available to the defendants. Thus, it is up to the judge to appropriately evaluate the plaintiff's application for ex-parte discovery. *See* Fed. R. Civ. P. 26(d).

154. Complaint at ¶ 11, *Pink Lotus Entm't, LLC*, No. C-11-02263 HRL.

155. For example, in *Pink Lotus*, if the judge were to believe the file was broken into 100 pieces, each piece would contain a minute of footage - very different from the two seconds of footage the pieces contained. *See supra* notes 134-139 and accompanying text for calculation of the torrent piece size in *Pink Lotus*.

lieve that a *prima facie* case for copyright infringement has been made.[156]

The Plaintiff's wording of the observed copying is also misleading. It alleges the Does "intentionally downloaded a torrent file particular to the Plaintiff's work, purposefully loaded that torrent file into their BitTorrent clients, entered a BitTorrent swarm particular to the Plaintiff's work, and reproduced and distributed the work to numerous third parties."[157] The Plaintiff further alleges the Does were observed in swarms of the Plaintiff's work using "proprietary P2P network forensic software."[158] This misleads the judge into believing the Plaintiff has investigated more than he actually has.

Based off the exhibit listing the IP addresses the Plaintiff attached to the complaint,[159] the Plaintiff obtained these IP addresses through indirect monitoring, meaning the observation was merely listing the IP addresses found in the tracker.[160] The IP addresses listed in trackers are unreliable. Not only can BitTorrent users implicate other IP addresses when connecting to a tracker,[161] people who have never even heard of BitTorrent can implicate themselves merely through clicking a link in a web browser.[162] Furthermore, the trackers themselves are designed to give both real and fake IP addresses when asked for IP lists, a feature purposefully added to require copyright enforcers to require real evidence instead of the tracker IP lists.[163] If one of those fake IP addresses happens to match the IP address an ISP had assigned to an innocent person, or if any of the other methods for inserting IP addresses into a tracker were used, the innocent person will have real problems when a judge allows the plaintiff to obtain that person's contact infor-

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156. A claim for copyright infringement must show that: (1) the plaintiff owns the copyright; and (2) the defendant copied the work. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 361 (1991).

157. Complaint at ¶ 23, *Pink Lotus Entm't, LLC*, No. C-11-02263 HRL.

158. *Id.* at ¶ 22.

159. *Id.* at Exhibit A.

160. Michael Piatek et al., *supra* note 40, at 2.

161. This is a process known as "spoofing." *Spoofing*, TECHTERMS.COM, http://www.techterms.com/definition/spoofing (last updated Nov. 13, 2007). For details on how to spoof an IP address to a BitTorrent Tracker, *see* Michael Piatek, et al., *supra* note 40, at 3.

162. Ben Maurer, *Big Media DMCA Notices: Guilty Until Proven Innocent*, EXPLORING (Feb. 7, 2007), http://bmaurer.blogspot.com/2007/02/big-media-dmca-notices-guilty-until.html ("One easy way to make somebody look like a [sic] bittorrenter would be to get them to go to a website with the code . They'd be on the tracker, and BayTSP would see their IP address, and might send them an infringement notice.").

163. Erdgeist, *Perfect Deniability*, STORIES FROM OPENTRACKER (Feb. 12, 2007), http://opentracker.blog.h3q.com/2007/02/12/perfect-deniability/.

mation.[164]

As you can see, there are numerous ways in which IP addresses can be inserted into a BitTorrent tracker. Therefore, the allegations that the Does "intentionally downloaded a torrent file particular to Plaintiff's Work, purposefully loaded that torrent file into their BitTorrent clients, entered a BitTorrent swarm particular to Plaintiff's Work, and reproduced and distributed the Work to numerous third parties"[165] were never actually observed. The only thing the Plaintiff observed was the appearance of the IP addresses listed in Exhibit A in a BitTorrent Tracker.[166] Equating this evidence to purposefully downloading the entire usable work is "like getting arrested [for doing drugs] because [a man] was hanging out with some dealers, but they never saw [him] using, buying, or selling any drugs."[167] These allegations are conclusory, and should not be entitled to the assumption of truth.[168]

PART D: PROPOSAL

What should judges look for in a complaint when addressing a plaintiff's motion for expedited discovery to unmask Does? Judges should evaluate it using the *Seescandy.com* standard that, among other elements, requires judges to examine whether the complaint would survive a motion to dismiss.[169] A thorough evaluation of whether the complaint would survive a motion to dismiss for failure to state a claim upon which relief may be granted is necessary.[170]

First, a judge should look for a complete description of the torrent involved. The description should include the file size of the torrent, the file size of the corresponding work, the number of pieces the corresponding work was broken into, the size of the pieces, and an estimate of how many seconds of video each piece would contain, if playable. This would allow judges to better analyze whether the alleged acts were actionable.

The complaint should also allege that the work corresponding to the torrent file was verified to be the plaintiff's work. This can be done through joining the swarm and completing the download, while not allowing the BitTorrent client to upload pieces to other peers.[171] This

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164. *See supra* notes 78-82 and accompanying text.

165. Complaint at ¶ 23, Pink Lotus Entm't, LLC v. Does 1-46, No. C-11-02263 HRL (N.D. Cal. filed May 6, 2011).

166. *Id.* at Exhibit A; *see also* Michael Piatek et al., *supra* note 40, at 2-3.

167. Ben Maurer, *supra* note 162.

168. *See* Ashcroft v. Iqbal, 556 U.S. 662, 664 (2009).

169. *See supra* note 69 and accompanying text.

170. A motion to dismiss for failure to state a claim is one of the seven possible motions to dismiss under the federal rules. Fed R. Civ. P. 12(b).

171. Mark D. Adams, *How To Disable Upload on BitTorrent*, BITSECURE (Sept. 12, 2010), http://www.bitsecure.com/how-to-disable-upload-on-bittorrent/.

step is important to verify that users were participating in a swarm of the plaintiff's work and not a fake torrent.[172]

Next, the complaint should explain how the IP addresses were obtained. Alleging that indirect monitoring was used to obtain the addresses is insufficient, as it is unreliable.[173] IP addresses obtained via indirect monitoring are taken directly from the BitTorrent tracker.[174] The IP addresses are not observed participating in any file swapping transactions.[175] Alleging the use of proprietary software to obtain the addresses is also insufficient because it is too easy to use indirect monitoring and disguise it as proprietary software.[176] Direct monitoring provides better evidence because the monitor actually connects with peers in a swarm to determine whether the peers are actually participating.[177]

However, judges should be cautious even when a complaint alleges direct monitoring was used. Direct monitoring is much more costly and resource-intensive than indirect monitoring.[178] It is questionable whether direct monitoring is actually used in complaints alleging that direct monitoring was used because the list of IP addresses is indistinguishable from lists obtained by indirect monitoring.[179]

In order to ensure direct monitoring was employed to obtain the IP addresses and to ensure that Does did obtain a usable file, complaints should include the bitfield response each Doe IP address transmitted to the plaintiff monitor. Judges should require complete bitfields, showing the Doe IP addresses obtained 100% of the pieces.[180] This will dramatically reduce the possibility of innocent IP addresses ending up in a

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172. Ruben Cuevas, et al., *supra* note 121, at 5 (finding "fake publishers are responsible for around 25% of the usernames, 30% of the published content, and 25% of the downloads.").

173. *See supra* notes 159-167 and accompanying text.

174. Michael Piatek et al., *supra* note 40, at 2.

175. *See id.*

176. Complaint at ¶ 22, Pink Lotus Entm't, LLC v. Does 1-46, No. C-11-02263 HRL (N.D. Cal. filed May 6, 2011).

177. Tom Chothia et al., *supra* note 29, at 2.

178. *Id*.

179. *Compare* Exhibit A: Declaration of Tobias Feiser, at 3, Malibu Media, LLC v. John Does 1-5, No. 1:12-cv-02954 (S.D.N.Y. filed May 8, 2012) (describing direct monitoring); Complaint, Exhibit A, Malibu Media, LLC v. John Does 1-5, No. 1:12-cv-02954 (S.D.N.Y. filed Apr. 13, 2012) (reporting IP addresses allegedly obtained via direct monitoring); *with Ex Parte* Application For, and Memorandum of Law in Support of, Leave to Take Discovery Prior to Rule 26(f) Conference, Exhibit A: Declaration of Peter Hansmeier at ¶ 15, AF Holdings LLC v. Does, No. 3:11-cv-03335 (N.D. Cal. filed Jul. 11, 2011) (describing indirect monitoring); Complaint, Exhibit A, AF Holdings LLC v. Does, No. 3:11-cv-03335 (N.D. Cal. Jul. 07, 2011) (reporting IP addresses allegedly obtained via indirect monitoring).

180. Thus proving the Doe went from leecher to seeder. For definitions of leecher and seeder, *see Concepts*, *supra* note 34.

plaintiff's complaint.[181]

PART E: ARGUMENTS AGAINST PROPOSAL

Plaintiffs may argue that these proposed requirements for complaints are unnecessary, too difficult, too expensive, or unfairly require a heightened pleading standard. However, these requirements merely bring these complaints up to the standards already in place. This proposed checklist for judges would ensure that plaintiffs plead enough facts to plausibly state a claim for copyright infringement. Overly conclusory complaints such as the complaint in Pink Lotus are far too common.[182]

Plaintiffs may also say that requiring them to fully investigate infringers to ensure each IP address they implicate for copyright infringement has a full bitfield, thus having a fully playable copy of the work, is too difficult and allows copyright infringement to go on unchecked. There are a number of technological hurdles to fulfilling this requirement.

First, there are blocklists.[183] Once an anti-piracy monitor is suspected, its IP address is added to a blocklist that is commonly distributed throughout the BitTorrent community.[184] Thus, plaintiffs have a difficult time utilizing direct monitoring to connect to potential infringers because the potential infringers will refuse to connect.[185] While establishing a direct connection may be difficult, it is not impossible because plaintiffs may be able to get better results from using a wider range of IP addresses to help obscure them from algorithms used to detect moni-

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181. Although this does not eliminate the possibility that the subscriber's identified by the ISP was not the infringer. *See generally* Adam Langston, Comment, *Return of the John Doe: Protecting Anonymous Defendants in Copyright Infringement Actions*, 41 STETSON L. REV. 875, 903-07 (2012) (arguing the IP subscriber identified is not plausibly the infringer).

182. Complaints in this type of litigation have become boilerplate. Compare these nearly identical complaints. Complaint, AF Holdings LLC v. John Doe, No. 12-cv-2405 (N.D. Cal. filed May 10, 2012); Complaint, Bait Prods. Pty Ltd. v. Does 1-42, No. 12-cv-1205 (M.D. Fla. filed Nov. 1 2012); Complaint, Digital Sin v. Does 1-44, No. 12-cv-1038 (D. Mass. filed Mar. 23, 2012); Complaint, Hard Drive Prods., Inc. v. Does 1-21, No. 11-cv-0059 (S.D. In. filed May 20, 2011); Complaint, Malibu Media v. Does 1-4, No. 12-cv-1493 (C.D. Ill. filed Nov. 29, 2012).

183. Blocklists are lists of suspicious peers. Tom Chothia et al., *supra* note 29, at 3.

184. Rahul Potharaj et al., *Omnify: Investigating the Visibility and Effectiveness of Copyright Monitors, in* PROCEEDINGS OF THE 12TH INT'L CONF. ON PASSIVE AND ACTIVE MEASUREMENT 6 (Neil Spring & George F. Riley eds., 2011), *available at* http://pam2011.gatech.edu/papers/pam2011--Potharaju.pdf (using empirical data to generate a blacklist containing 5,719 IP addresses highly likely to be copyright monitors).

185. Tom Chothia et al., *supra* note 29, at 4 ("The blocklist approach only prevents direct monitoring…").

tors.[186]

Second, plaintiffs may encounter difficulty getting peers to report a complete bitfield once a direct connection is finally established. Either the peer is genuinely still a leecher,[187] or the peer is misreporting its bitfield. The latter is a known as a lazy bitfield.[188] Lazy bitfields are now a feature included in µTorrent and Vuze, two of the most popular BitTorrent clients.[189] Obtaining evidence that the alleged infringer did obtain a complete file will surely be more difficult than the indirect monitoring methods currently used by plaintiffs, but it is not impossible.[190]

PART F: POLICY

BitTorrent may not be such a bad thing after all. The creator of the television show *Breaking Bad* credited BitTorrent pirating with helping to create brand awareness for his show.[191] The CEO of Time Warner, parent of premium cable channel HBO, has hailed BitTorrent piracy of its hit television show *Game of Thrones*, saying the piracy has increased subscription rates, and topping the most pirated list of shows is "better than an Emmy."[192] The director of the show credits BitTorrent with creating a much-needed social buzz necessary for the show's popularity.[193]

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186. One author proposes this method and two other methods to help copyright monitors improve their stealth and efficacy. Rahul Potharaj et al., *supra* note 184, at 9.

187. Thus, the peer is still actively trying to finish its download while sharing the pieces it has.

188. Lazy bitfields disguise seeders by sending incomplete bitfields. The client then sends a subsequent message indicating it has the missing pieces. *Optimize BitTorrent to Outwit Traffic Shaping ISPs*, WIRED HOW-TO WIKI, http://howto.wired.com/wiki/Optimize_BitTorrent_To_Outwit_Traffic_Shaping_ISPs (last updated Mar. 30, 2009).

189. *Id*.

190. This evidence is currently required in the United States District Court for the Central District of California. Order To Show Cause Re Sanctions For Rule 11 and Local Rule 83-3 Violations at 4, Ingenuity 13, LLC v. John Doe, No. 2:12-cv-8333-ODW (JCx) (C.D. Cal. filed Sept. 27, 2012).

191. Illegal downloads for the series finale of Breaking Bad have clocked in at 3 million as of Oct. 18, 2013. Andy, *Breaking Bad Creator: Illegal Downloading Raised Brand Awareness*, TORRENTFREAK (Oct. 18, 2013), http://torrentfreak.com/breaking-bad-creator-illegal-downloading-raised-brand-awareness-131018/.

192. Ernesto, *Game of Thrones Piracy "Better Than An Emmy," Time Warner CEO Says*, TORRENTFREAK (Aug. 8, 2013), http://torrentfreak.com/game-of-thrones-piracy-better-than-an-emmy-time-warner-ceo-says-130808/.

193. BitTorrent downloads of Game of Thrones episodes for 2012 were estimated at 4.3 million downloads per episode. Ernesto, *Piracy Doesn't Heart Game of Thrones, Director Says*, TORRENTFREAK (Feb. 27, 2013), http://torrentfreak.com/piracy-doesnt-hurt-game-of-thrones-director-says-130227/. Game of Thrones is on track to become HBO's most watched series of all time. There was a 20% increase in viewership between seasons

Are there real economic losses related to piracy? Perhaps, but estimates vary wildly[194] and the real amount is unknown because there are too many factors to consider.[195] Is it really a lost sale if someone downloads a movie to watch that they would have never considered purchasing to begin with? What if while watching the movie, the viewer likes a song in the soundtrack so much they purchase it on iTunes? Data shows that BitTorrent users legitimately buy a third more DVDs and albums than the average person.[196] Pro-copyright analysts are quick to assign large numbers to economic losses due to BitTorrent,[197] and these numbers help feed the trolling BitTorrent litigation plaintiff machine.[198] Is this type of litigation doing anything to help combat the alleged lost profits? No, because plaintiff counsel works for the copyright owner on a reverse contingency fee schedule, with as little as ten percent of the settlement proceeds going to the copyright owner.[199] Unfortunately, the only positive thing coming out of these suits are the plaintiff counsel's bank ledgers.[200]

IV. CONCLUSION

Are predatory litigation tactics and shaking down Does for settlements, regardless of whether they are actually guilty, the way to combat piracy? If a copyright owner decides that litigation is the best method, they had better be sure that they have conducted a full investigation and can show more than mere conclusory allegations. These lawsuits prey on judges who are not technologically savvy. Our federal judiciary holds the keys to discovery in their hands, and technological

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2 and 3. *Game of Thrones' Audience Continues To Grow, Eclipses 14 Million Viewers,* WINTER IS COMING (Aug. 7, 2013), http://winteriscoming.net/2013/08/game-of-thrones-audience-continues-to-grow-eclipses-14-million-viewers/ (reporting an average of 13.6 million viewers per episode in season 2 and 14.2 million viewers per episode in season 3).

194. Estimates have ranged from $58 to $250 billion per year. Kal Raustiala & Chris Springman, *How Much Do Music And Movie Piracy Really Hurt The U.S. Economy?*, FREAKONOMICS (Jan. 12, 2012 3:09pm), http://freakonomics.com/2012/01/12/how-much-do-music-and-movie-piracy-really-hurt-the-u-s-economy/.

195. *Id.* (Actual economic effects of piracy are difficult to measure. "Unlike stealing a car, copying a song doesn't necessarily inflict a tangible loss on another.").

196. Claire Suddath, *Can BitTorrent Be Good For Hollywood?*, BLOOMBERG BUS. WK. (Apr. 23, 2013), http://www.businessweek.com/articles/2013-04-23/colin-firths-new-movie-is-on-bittorrent-on-purpose.

197. *See* Kal Raustiala & Chris Springman, *supra* note 194.

198. *See* Complaint at ¶ 29, Pink Lotus Entm't, LLC v. Does 1-46, No. C-11-02263 HRL (N.D. Cal. filed May 6, 2011).

199. *Episode 409: "Head Lag"*, NO AGENDA (May 17, 2012), transcript *available at* http://409.readnoagenda.com ("And then they contact these people and then they, essentially pressure them, like Mob into settling. The owner of the content gets 10%!").

200. In a 2012 interview with *Forbes*, an attorney estimated he has collected just under $15 million in settlements from these types of cases. Kashmir Hill, *supra* note 6.

education is the best method to protect innocent citizens from being intimidated into settling. To recap, here is the proposed checklist for judges:

- Use the *Seescandy.com* standard for evaluating whether a plaintiff should be granted expedited ex-party discovery to identify Does.
- When evaluating whether the complaint can survive a motion to dismiss for failure to state a claim, complaints should:
  - Give a complete description of the torrent of the work involved, including:
    - file size of the torrent,
    - the file size of the corresponding work,
    - the number and corresponding size of the pieces the corresponding work was broken into,
    - an estimate of how many seconds of video each piece would contain, if playable, and
    - verification that the work corresponding to the torrent file was indeed the plaintiff's work
  - A complete description of how the IP addresses were obtained
  - Verification that each IP address was seeding a complete file.

These guidelines will ensure that courts will properly dismiss claims of troll plaintiffs who are looking to abuse discovery to extort Does into settlement. BitTorrent is still a relatively new technology and educating our federal judges will help ensure that plaintiffs conduct an adequate investigation before filing.