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ABSTRACT

Copyright trolling has become a popular, but widely criticized tactic used by copyright holders to defend their intellectual property rights. One method involves rights holders selling their rights to infringed works to holding companies, as those companies may more easily file hundreds of suits against potential infringers at once. Another method involves rights holders themselves filing mass lawsuits against hundreds of BitTorrent users at once using their anonymous IP addresses, threatening to name the alleged infringers in a lawsuit if a settlement is not paid. However, in many recent cases, courts have shut down such tactics by invoking procedural deficiencies and severing multiple defendants from cases, as well as issuing sanctions against abusive litigators. In Mick Haig Productions E.K. v. Does 1-670*, the Court of Appeals upheld sanctions against an attorney for his use of such trolling tactics. Yet many argue that courts' current disfavor for trolling may leave copyright holders with fewer options for enforcing their copyrights in good faith against BitTorrent abusers. This Article examines how courts have discouraged trolling tactics by dismissing suits filed by copyright trolls acting in bad faith.*

* Megan Haslach, University of Washington School of Law, Class of 2014. My sincerest thanks to Professor Zahr Said of the University of Washington School of Law; Jessica Belle, student editor; and Brad Haque of Attachmate Corp. for their invaluable help and feedback.

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INTRODUCTION

As the volume of file sharing rises,[2] copyright holders are becoming more aggressive in their fight to protect their rights. Media coverage has turned popular opinion against certain copyright holders, such as the Recording Industry Association of America (RIAA) and the Motion Picture Association of America (MPAA), as suits have been filed against, e.g., a 70-year-old grandmother accused of downloading pornography.[3] As this Article will demonstrate, many courts have similarly turned against this sort of abusive copyright litigation. In several recent cases, judges invoked procedural issues and practical considerations in order to dismiss claims against alleged infringers in cases that appeared abusive. In one case, a judge imposed sanctions on an attorney who engaged in particularly abusive tactics.[4] Though presumably this could create an issue for copyright holders wishing to enforce their intellectual property rights in good faith, recent suits dismissed on the merits appear to primarily affect bad-faith copyright litigants. In addition, while such dismissals may restrain copyright holders who wish to stop illegal distribution of

[2] Sandvine, Inc., Global Internet Phenomena Report: 2H 2012 (Nov. 11, 2012) http://www.sandvine.com/news/global_broadband_trends.asp.

[3] Ernesto Van Der Sar, *70 Year-Old Grandma Threatened Over BitTorrent Download*, TORRENTFREAK (July 15, 2011) http://torrentfreak.com/70-year-old-grandma-threatened-over-bittorrent-download-110715.

[4] Mick Haig Prod. E.K. v. Does 1-670, 687 F.3d 649 (5th Cir. 2012).

their works, other enforcement methods (such as issuing takedown notices and negotiating settlements with infringers) are generally more common and more successful.

This Article will examine copyright trolling and recent judicial reactions to such tactics. It will also evaluate how judicial reactions might impact copyright holders. Section I describes the range of trolling tactics that copyright owners have invoked in recent suits. Section II will examine how courts have handled trolling tactics and will show that most suits utilizing such tactics are dismissed on procedural and practical issues rather than on the merits. Finally, Section III will examine the impact of dismissals on the future of copyright infringement litigation.

I. ENFORCEMENT TACTICS EMPLOYED BY COPYRIGHT HOLDERS IN THE ERA OF ONLINE FILE SHARING

Changes in technology often force copyright holders to employ new tactics to enforce their rights. New file sharing and discovery technology has expanded the potential for widespread infringement since the days of Napster in the early 2000s, and plaintiffs have attempted to utilize a variety of tactics to stem the tide of online copyright infringement.

A. Purchasing Rights for Individual Suits

One tactic involves rights holders selling the rights to their allegedly infringed works to holding companies who, in turn, file suit against the infringers and collect a percentage of the damages. One highly publicized example of a business employing this tactic is the now-defunct Righthaven, LLC. Founded in 2010, Righthaven entered into agreements with newspapers whose works had been reproduced on various websites without permission.[5] One year later, the company had filed approximately 255 suits against alleged infringers.[6]

[5] Debra Cassens Weiss, *'Attack Dog' Group Buys Newspaper Copyrights, Sues 86 Websites*, A.B.A. J. (Aug. 4, 2010, 5:43 AM) http://www.abajournal.com/news/article/attack_dog_group_buys_newspaper_copyrights_sues_86_websites/.

[6] *List of Righthaven Copyright Lawsuits*, IX23 (JULY 13, 2011),

However, many commentators and journalists criticized this approach.[7]

Generally, when rights holders encounter infringement, they first notify the alleged infringer(s) and attempt to negotiate a takedown or a reworking of the infringing material in exchange for a link to the owner's site.[8] This is often done to avoid filing a lawsuit. Righthaven, on the other hand, frequently filed suits against alleged infringers without notifying them first or attempting to work out any such agreement.[9] Each suit typically contained a demand for $75,000, as well as transfer of the domain name from each alleged infringer to Righthaven.[10] The monetary demands were within statutorily prescribed limits for damages for willful infringement.[11] However, the domain transfer demand was unprecedented and drew condemnation from judges and critics for having no basis in the law.[12] Ultimately, despite the large volume of suits Righthaven initiated, the company experienced multiple setbacks in court and was largely unsuccessful in its trolling tactics.[13] Some of these cases will be discussed in greater detail in Section II, *infra*.

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http://web.archive.org/web/20110713071033/http://ix23.com/righthaven-shakedown/righthaven-copyright-lawsuits.php

[7] *See, e.g.*, Steve Green, *Why We Are Writing About the R-J Copyright Lawsuits*, LAS VEGAS SUN (Sept. 1, 2010, 2:05 AM) http://www.lasvegassun.com/news/2010/sep/01/why-we-are-writing-about-r-j-copyright-lawsuits/.

[8] *Id*.

[9] *Id*.

[10] Mike Masnick, *Another Loss for Righhaven: Court Explains that its Demand for Domain Names is Silly*, TECHDIRT (April 18, 2011, 2:55 PM) http://www.techdirt.com/articles/20110417/22031413928/another-loss-righthaven-court-explains-that-its-demand-domain-names-is-silly.shtml.

[11] 17 U.S.C. §504(c)(2) (2010).

[12] *See* Masnick, supra note 9.

[13] *See* Nate Anderson, *US Marshals Turned Loose to Collect $63,720.80 from Righthaven*, ARS TECHNICA (Nov. 1, 2011, 7:39 PM) http://arstechnica.com/tech-policy/2011/11/us-marshals-turned-loose-to-collect-6372080-from-righthaven.

B. Mass Suits Against BitTorrent Users

It has also become increasingly common for copyright holders to target infringers who download protected works via BitTorrent clients. BitTorrent is a file-sharing protocol. An initial "seeder" uploads a file and shares it through a BitTorrent client application on his or her computer.[14] The file is then distributed in small pieces, allowing multiple users to download different pieces of the file from the initial seeder all at the same time.[15] Once a user has downloaded a complete piece—unless he or she has affirmatively blocked uploading capabilities—that user may then share that piece with another user connected to the initial seed. In this way, multiple users create a "swarm" from which the file may be downloaded piecemeal.[16] Users pass the various pieces simultaneously among each other within the swarm.[17] This makes file sharing faster and easier, as it does not require a centralized server to host the files for download all at once.[18] It also enables users to utilize the upload capacity of multiple other users at the same time, rather than forcing users to download directly from a single peer, as was done with earlier peer-to-peer file sharing software such as Napster.[19]

When copyright owners find their protected works being distributed via BitTorrent they can download a copy of that work, noting the IP addresses of all users from whom they downloaded any piece.[20] They can then file a lawsuit against the owners of those IP addresses, which often involves suing dozens or hundreds of users at once.[21] At this early stage of litigation, the plaintiffs do not yet know

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[14] Carmen Carmack, *How BitTorrent Works*, HOWSTUFFWORKS (Mar. 26, 2005) http://computer.howstuffworks.com/bittorrent.htm.

[15] *Id*.

[16] *Id*.

[17] *Id*.

[18] *Id*.

[19] *Id*.

[20] *See, e.g.*, In re BitTorrent Adult Film Copyright Infringement Cases, Nos. 11–3995(DRH)(GRB), 12–1147(JS)(GRB), 12–1150(LDW)(GRB), 12–1154(ADS)(GRB), 2012 WL 1570765 (E.D.N.Y. May 1, 2012).

[21] Jordan Rushie, *Talking Torrents: Frequently Asked Questions About Bittorrent Litigation*, PHILLY LAW BLOG (Sept. 30, 2012) http://phillylawblog.wordpress.com/2012/09/30/talking-torrents-frequently-asked-

the identity of the person who used each particular IP address, so defendants are initially named as numbered Does, e.g., "Does 1–37."[22] At that point, plaintiffs subpoena the numbered Does' Internet service providers (ISP) to obtain identifying information about the owners of the IP addresses.[23] The ISP then contacts the alleged infringer, informing them that they will potentially be named in the lawsuit if they do not reach a settlement agreement with the rights owners.[24] ISPs generally only turn over identifying information, which allows users to be specifically named in the suit, after this opportunity for settlement has been extended.[25] Notably, however, some ISPs refuse to turn over any identifying information at all.[26]

II. PROCEDURAL AND PRACTICAL ARGUMENTS EMPLOYED BY COURTS IN DISMISSING COPYRIGHT TROLL CASES

Many courts faced with trolling tactics have declined to decide cases on the merits, turning instead to procedural and practical arguments in dismissing them. For instance, the District Court of Nevada relied on procedural arguments to dismiss one of Righthaven's cases, one of many major legal setbacks for the company.[27] In *Righthaven LLC v. Democratic Underground, LLC*, the court examined a claim against Democratic Underground involving a comment that an external user added to a news article on their site.[28] The comment contained a quote from a news story published by the *Las Vegas Review-Journal* (owned by Stephens Media), along with a link to the original article.[29]

After examining the case, the court granted summary judgment to

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questions-about-bittorrent-litigation.

[22] *Id*.

[23] *Id*.

[24] *Id*.

[25] *Id*.

[26] *See, e.g.*, Ernesto Van Der Sar, *Verizon Sued for Defending Alleged BitTorrent Pirates*, TORRENTFREAK (Nov. 26, 2012) http://torrentfreak.com/verizon-sued-for-defending-alleged-bittorrent-pirates121126/.

[27] Righthaven LLC v. Democratic Underground, LLC, 791 F. Supp. 2d 968 (D. Nev. 2011)

[28] *Id*.

[29] *Id*.

the defendant, ruling that Righthaven did not have standing to litigate the claim at issue because the sale of rights from Stephens Media did not explicitly include the right to sue for infringement.[30] The court addressed this contractual defect in depth, concluding that the right to sue is not one of the exclusive rights conferred by the 1976 Copyright Act, and thus without the express transfer of one of those exclusive rights to Righthaven, the company did not have standing to sue. The court removed Righthaven as a plaintiff and then denied Stephens Media the opportunity to join in as a plaintiff.[31]

The court also admonished Righthaven and threatened to issue sanctions against the company for its "multiple inaccurate and likely dishonest statements to the Court."[32] Those misleading statements included not disclosing Stephens Media as an interested party in either that case or any of the 200 other cases Righthaven filed on behalf of Stephens in the same district.[33] The court implied, though it did not explicitly state, that this may have been a move to disguise the fact that the parties were positioned to split the proceeds of any successful litigation.[34] The court's reprimand appeared to provide potential fodder for others who had been sued by the company at the time.[35]

In many BitTorrent cases, judges have invoked similar reasons for dismissal. Dismissal often occurs in cases where it appears the plaintiff has "no desire to actually litigate but instead seems to be using the courts to pursue an extrajudicial business plan against possible infringers."[36] Many courts turn to procedural issues, dismissing cases for violations of the Federal Rules of Civil Procedure ("FRCP").[37] Citing FRCP 20, those judges will sever all

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[30] *Id*.
[31] *Id*.
[32] *Id*. at 978.
[33] *Id*. at 979.
[34] *Id*.
[35] Steve Green, *Ruling that Righthaven Misled Court Likely to be Felt in Other Cases*, VEGAS INC. (July 14, 2011, 5:16 PM) http://www.vegasinc.com/news/2011/jul/14/ruling-righthaven-misled-court-likely-be-felt-othe/.
[36] Hard Drive Prod. v. Does 1-90, No. C 11–03825 HRL, 2012 WL 1094653 at *7 (N.D. Cal. Mar. 30, 2012).
[37] *See, e.g., id.*

but the first named Doe and find that the remaining defendants were improperly joined.[38] Some judges reason that the act of downloading pieces of a file from the same BitTorrent swarm is not sufficient to show that the various Does acted "in concert" with each other, which would allow for permissive joinder.[39] Other judges find that simply downloading the same material does not indicate that the defendants participated in the "same transaction or occurrence."[40]

In addition to misjoinder, courts cite other practical reasons for dismissing additional defendants. One issue is that the potential for coercion by mass suit plaintiffs since a high number of cases filed against BitTorrent users involve the illegal downloading of pornographic films, which is potentially embarrassing to defendants if publicly revealed during the litigation process.[41] Because it could be embarrassing to be named in such a lawsuit, defendants are incentivized at the Doe stage to settle in order to keep the matter private.[42] Different defendants are also likely to raise different defenses, making efficient judicial disposition of the claims nearly impossible in cases where hundreds of Does are named.[43] Finally, there is also a high probability of mistake on the plaintiffs' part in these suits. Some estimates find that up to 30 percent of defendants named in such suits are named erroneously.[44] Though many of these cases were decided very recently and thus the ultimate impact on copyright trolls and similar abusive

[38] The rule states, in relevant portion: "Persons . . . may 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." Fed. R. Civ. P. 20.

[39] *See* Hard Drive Prod., 2012 WL 1094653.

[40] Bubble Gum Prod., LLC v. Does 1-80, NO. 12–20367–CIV, 2012 WL 2953309 (S.D. Fla. July 19, 2012); *but see* PACIFIC CENTURY INT'L V. DOES 1-31, No. 11 C 9064, 2012 WL 2129003 (N.D. Ill. June 12, 2012) (allowing joinder).

[41] *See, e.g.*, In re BitTorrent Adult Film Copyright Infringement Cases, Nos. 11–3995(DRH)(GRB), 12–1147(JS)(GRB), 12–1150(LDW)(GRB), 12–1154(ADS)(GRB), 2012 WL 1570765 (E.D.N.Y. May 1, 2012).

[42] *Id*.

[43] Liberty Media Holdings, LLC. v. BitTorrent Swarm, et. al., 277 F.R.D. 669 (S.D. Fla. 2011).

[44] Next Phase Distrib., Inc. v. John Does 1–27, 284 F.R.D. 165 (S.D.N.Y. 2012).

litigation is not yet known, these dismissals may mean the end of litigation for unnamed defendants. This would be highly significant, since companies are unlikely to bear the expense of filing suit against each of hundreds of defendants individually.

III. IMPACT AND OUTCOMES

Though many courts dismiss trolling cases on procedural and practical grounds without further analysis, other courts go a step further and admonish plaintiffs employing trolling tactics. As discussed previously, Righthaven faced sanctions for filing false or misleading documents in its cases.[45] Another judge threatened Rule 11 sanctions against a plaintiff in a BitTorrent case, stating that the plaintiff's harassing tactics against potential defendants indicated an attempt to use courts "as an inexpensive means to gain the Doe defendants' personal information and coerce payment from them."[46]

Further, in another recent BitTorrent case, sanctions were actually issued against a trolling plaintiff's attorney.[47] In *Mick Haig v. Does 1-670*, Evan Stone, attorney for Mick Haig Productions, was sanctioned for serving subpoenas on the ISPs for 670 Does to discover the identities of those Does without the court's permission.[48] It was also discovered that Stone had been discussing the case with some of the Does directly without the knowledge or presence of their attorneys.[49] Stone was ordered to pay attorney fees and other costs as compensation for his abusive litigation tactics, and these sanctions were upheld on appeal.[50]

In addition to issuing sanctions to help stem abusive litigation tactics, courts have modified discovery periods in BitTorrent cases in order to avoid many of the problems discussed above.[51] In *Next Phase*

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[45] Righthaven LLC v. Democratic Underground, LLC, 791 F. Supp. 2d 968 (D. Nev. 2011).

[46] Raw Films, Ltd. v. Does 1-32, C.A. No. 3:11cv532–JAG, 2011 WL 6182025 (E.D. Vir. 2011).

[47] Mick Haig Prod. E.K. v. Does 1-670, 687 F.3d 649 (5th Cir. 2012).

[48] *Id*.

[49] *Id*.

[50] *Id*.

[51] *See Next Phase Distrib.*, 284 F.R.D. 165.

Distribution V. John Does 1–27, the District Court for the Southern District of New York first severed Does 2–27.[52] Then, due to the sensitive nature of the pornographic film Doe 1 allegedly downloaded, the court granted an anonymous discovery period wherein the ISP was not to turn over the defendant's identity to the plaintiff until the defendant had an opportunity to review and respond to the subpoena. Further, the ISP was to act as an intermediary by serving the subpoena on the defendant and gathering any responsive information directly from him or her.[53] That information was to be handed over to the court, rather than to the plaintiff directly.[54] This gave the defendant the chance to get the suit dismissed prior to dealing with the potential embarrassment of being named erroneously in such a suit.[55] Other courts have allowed defendants the opportunity to remain in the suit as anonymous Does, rather than severing them entirely, in order to avoid potential embarrassment from the suit.[56]

Courts' pushback against trolling tactics also affects copyright holding companies like Righthaven. After suffering multiple setbacks in court, leading to multiple judgments against them for costly attorneys' fees, a Nevada court authorized the U.S. Marshals Service to "use reasonable force" to collect nearly $64,000 in unpaid legal debts from the company.[57] When it was discovered the company had less than $1,000 in its accounts, the court ordered Righthaven to turn over its intellectual property for auction to satisfy its debts. In January 2012, even the company's domain name was sold at auction.[58]

Despite shutting down trolling tactics, courts generally approve of alternative enforcement methods that have proven successful in infringement cases in the past. For example, filing contributory

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[52] *Id*.
[53] *Id*.
[54] *Id*.
[55] *Id*. at 172
[56] *See* Malibu Media, LLC v. John Does 1-5, 2012 WL 3641291 (S.D.N.Y. 2012) (commenting, in dicta at p. 5, that embarrassment is not a sufficient reason for dismissing an entire case as the court had always allowed defendants to appear anonymously upon a proper request to do so).
[57] Anderson, *supra* note 12.
[58] Andrew Allemann, *Righthaven.com Sells for $3,300*, DOMAIN NAME WIRE (Jan. 6, 2012), http://domainnamewire.com/2012/01/06/righthaven-com-sells-for-3300/.

infringement suits against the developers of software designed to infringe on copyrights remains as viable as ever.[59] In 2005, the U.S. Supreme Court recognized the concept of contributory infringement against "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement."[60] Though the use of the BitTorrent protocol itself does not appear to induce infringement, it may be worth a potential plaintiff's time to investigate whether any other software was used to infringe their works, as a suit may be feasible against the developer of that software.

CONCLUSION

Recent litigation shows that courts across the country are pushing back against copyright trolling tactics. Though many recent opinions show that courts prefer to dispose of abusive lawsuits through procedural and practical arguments, still others have gone a step further and threatened or issued sanctions against plaintiffs and their attorneys for engaging in such tactics. While rights holders argue these dismissals will chill legitimate uses of such tactics to protect copyright interests, there is little, if any, evidence showing this to be the case. Instead, abusive litigation in such contexts carries a high risk of chilling legitimate fair uses of copyrighted material, thus stifling creativity and free speech. The cases discussed above give defendants targeted by this type of litigation a wide arsenal of arguments with which to defend themselves against abusive suits. Further, other methods of copyright enforcement remain available to copyright holders acting in good faith, ensuring that rights can still be enforced even as file sharing technologies like BitTorrent become more popular.

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[59] John Kennedy, Mary Rasenberger, & M. Lorrane Ford, with updating by Joseph Fazio, *Contributory infringement—The rule after Grokster* in INTERNET LAW AND PRACTICE, § 12:25 (International Contributors, 2012) (explaining that contributory infringement lies where technology induces or encourages infringement)

[60] Metro-Goldwyn-Mayer Studios, Inc. V. Grokster, Ltd., 545 U.S. 913 (2005).

PRACTICE POINTERS

- When preparing a defense to a copyright infringement suit, focus on potential procedural issues. Many judges appear to want to stem trolling behavior without issuing scathing opinions against those participating (except in extreme cases).
- Determine who is the original rights holder, if any, of the alleged infringed work. If the basis for the suit allegedly stems from a sale of rights to a holding company, a defendant should carefully examine that agreement to determine whether the plaintiff actually has standing to sue.
- If defending against a mass infringement suit, consider moving for dismissal due to misjoinder of defendants under FRCP 20. This argument has been successful in many cases nationwide.
- If dismissal on a misjoinder theory proves unsuccessful, request a modified discovery period wherein the client's ISP serves as an intermediary for discovery requests. This can prevent potential embarrassment from being prematurely or erroneously named in an infringement suit while a defense is being built.