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Fair Copyright Litigation: The Reverse Class Action Lawsuit

Brian Noh*

By some estimates, more than 40 billion songs were downloaded illegally in 2008. In recent years, some copyright holders seeking to curtail copyright infringement have filed thousands of claims against individual end-users and peer-to-peer network operators. The resulting scenario, in some instances, has required plaintiffs to prepare settlement strategies against thousands of individual defendants who are often ill equipped to deal with such suits. This note addresses the inability of the copyright law regime to resolve such scenario, one of the growing problems of the information age. Specifically, the author proposes that the solution to these problems is found in Rule 23 of the Federal Rules of Civil Procedure, through what is described in this note as the reverse class action mechanism. By combining individual defendants in one suit, consumers can make litigation more economically feasible by combining their resources, simultaneously saving both plaintiffs and courts significant litigation related costs. Importantly, plaintiffs will be able to obtain court judgments against a bigger pool of individuals, potentially deterring more users down the line.

* J.D., Candidate, 2013, University of California, Hastings College of the Law. I am indebted to Professor Ben Depoorter for the inspiration on this timely issue and his editorial guidance. Professor Depoorter has recently co-authored a publication regarding a similar issue. See Ben Depoorter, Alain Van Hiel & Sven Vanneste, *Copyright Backlash*, 84 S. CAL. L. REV. 1251 (2011) (describing litigation tactics of RIAA and providing empirical evidence of normative response by P2P users). Thanks also to Professor David Takacs for guiding me through the first crucial steps of the writing process. I thank my family for their unending support and encouragement, and, above else, Him Eternal, without whom none of this would have been possible.

I. INTRODUCTION

In recent years, the Recording Industry Association of America (“RIAA”) and its members filed thousands of lawsuits against a combination of individual end-users and peer-to-peer (henceforth “P2P”) network operators with the purpose of controlling “the tide of rampant copyright infringement” caused by users of peer-to-peer file sharing networks.¹ The RIAA’s goal is to enforce and defend the rights of record labels, musicians, songwriters, and others in the music community from theft.² Cary Sherman, former RIAA president and current chairman and CEO,³ characterized the situation as one involving principles of “right and . . . wrong – [sic] what is legal and what is illegal.”⁴ The statement comes as no surprise, as the RIAA has every incentive to ensure that it prevails on these suits.⁵

On a similar note, in February of 2011, OpenMind Solutions, a producer of adult films, filed suit against multiple John Doe defendants “engaged in copyright infringement activity via BitTorrent file sharing protocol” of its films.⁶ OpenMind argued that it was entitled to bring in multiple individual defendants for this suit under Rule 23 of the Federal Rules of Civil Procedure (“Rule 23”).⁷ The rationale behind this novel theory was as follows:

Defendant’s actual names are unknown to Plaintiff. Instead, each Defendant is known to Plaintiff only by an Internet Protocol address (hereinafter “IP address”) . . . Plaintiff believes that the Defendants’ true identities will be revealed in discovery, at which time Plaintiff will seek leave of the Court to amend this Complaint to identify Defendants and name class representatives.⁸

1. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 963 (2005) (citing Evangelista, File Sharing; Downloading Music and Movie Files is as Popular as Ever, San Francisco Chronicle, Mar. 28, 2005, p E1).

2. RIAA Continues Enforcement of Rights with New Lawsuits Against 784 Illegal File Sharers, RIAA, (June 29, 2005), http://www.riaa.com/newsitem.php?news_year_filter=&resultpage=22&id=8B83713E-4BD3-F311-29FB-AE9100E49FF1.

3. Executive Bios, RIAA, http://www.riaa.com/aboutus.php?content_selector=about_us_exec_bios (September 25, 2012).

4. RIAA Continues Enforcement of Rights with New Lawsuits Against 784 Illegal File Sharers, *supra* note 2.

5. David McGuire, *Recording Industry Sues File Swappers*, WASH. POST (Sept. 8, 2003), <http://www.washingtonpost.com/ac2/wp-dyn/A42637-2003Sep8?language=printer> (noting that the music industry lost over \$700 million in 2002 alone from the sixty million people using P2P file sharing networks).

6. Openmind Solutions, Inc. v. Does 1-2925, No. 3:11-cv-00092-WDS -SCW (S.D. Ill. filed Feb. 2, 2011), available at http://www.wired.com/images_blogs/threatlevel/2011/03/openmind.pdf.

7. *Id.*

8. *Id.*

Taken together, the facts suggest an imbalance in the copyright law regime. On one hand, copyright holders are permitted to file claims against both P2P networks, such as Grokster, and individuals.⁹ On the other hand, individuals facing lawsuits against major entities like the RIAA face these claims as end-user consumers.¹⁰ An individual facing a copyright infringement suit will frequently be confronted with the option of either settling (most often in the range of \$2,000 to \$3,000) or organizing a trial strategy.¹¹ Most end users seem ill-equipped to deal with such scenario, given that many such individuals usually seek to settle, rather than face trial.¹² This scenario, in turn, makes it more likely that many of these suits will never be disposed on their merits.¹³ The recent congressional effort to bolster remedies available to copyright owners seems to have been equally unavailing, failing to address this particular imbalance in copyright law.¹⁴

The solution that I propose to these issues is found in Rule 23 of the Federal Rules of Civil Procedure. Although used rarely, the United States Supreme Court and Circuit Courts have previously certified defendant classes in a variety of contexts.¹⁵ In the area of copyright law, defendant classes have not been common.¹⁶ All the while, current related laws, such as the Digital Millennium Copyright Act (henceforth “DMCA” or the “Act”), bolstering copyright holders’ remedies seem to have focused upon third party liability,¹⁷ instead of enhancing

9. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. at 920–21 (2005).

10. Robert MacMillan, *New RIAA Chief Seeks a Hit Single*, WASH. POST (Sept. 5, 2003), <http://www.washingtonpost.com/ac2/wp-dyn/A29504-2003Sep5>.

11. Ted Bridis, *Music Group Files 80 More Lawsuits Against Downloaders*, USA TODAY (Oct. 30, 2003), http://www.usatoday.com/tech/news/2003-10-30-riaa-80-more_x.htm (stating that defendants have settled for amounts ranging from \$2,500 to \$7,500).

12. *Id.*

13. See McGuire, *supra* note 5.

14. See, e.g., Stop Online Piracy Act (“SOPA”), H.R. 3261, 112th Cong. (1st Sess. 2011) (a recent Congressional proposal that would have authorized the Attorney General to seek injunctive relief against web sites facilitating copyright infringement, and expanding criminal infringement to include “the distribution of copyrighted work through digital transmission for financial gain and the distribution or public performance of a work being prepared for commercial dissemination by making the work available on a computer network.” Notably, SOPA attempts to strengthen pre-existing copyright laws by targeting third party providers and websites that facilitate infringement, not individual defendants.)

15. See, e.g., *Asarco Inc. v. Kadish*, 490 U.S. 605, 610 (1989) (observing certification of a defendant class action); *Broad. Music, Inc. v. Columbia Broad Sys., Inc.*, 441 U.S. 1, 4 n.1 (1979) (noting district court’s certification of defendant class); *In re Integra Realty Res., Inc.*, 354 F.3d 1246, 1264 (10th Cir. 2004) (affirming certification of case where plaintiff trustee sued multiple defendants under Rule 23).

16. Jonathan Reich, Note, *Class Defense: Why Dispersed Intellectual Property Defendants Need Procedural Protections*, 10 DUKE L. & TECH. REV. 9 (2010) (One proposed solution to remedy this procedural asymmetry between plaintiffs and defendants is the class defense) (emphasis added).

17. *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 929-930 (U.S. 2005) (“When a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being

punishments against individual defendants.¹⁸ The DMCA criminalizes the production and distribution of technology, devices, or services aimed at circumventing control measures restricting access to copyrighted works.¹⁹ The DMCA protects service providers so long as they meet the safe harbor requirements.²⁰

In this Note, I seek to set out the blueprint of a defendant class action suit from an objective perspective. The theory is embodied in Rule 23 of the Federal Rules of Civil Procedure, which unambiguously contemplates defendant classes.²¹ In part II of my Note, I will address the advantages of having a defendant class. Part III will briefly describe the elements of Rule 23 and the way in which a reviewing court may resolve most of the unique representation issues arising in the defendant class action context. Part IV will conclude with a brief summary of the continuing relevance of this solution in the modern information age.

II. THE NEED FOR DEFENDANT CLASS ACTIONS IN COPYRIGHT LAW

Problems exist on both sides of litigation under the current copyright law regime. On the individual defendants' side, the imbalance stems primarily from what some commentators have labeled as the "collective action problem."²² The copyright holders, largely through the RIAA, bring multiple suits against a combination of indirect infringers such as P2P networks and individual defendants, often numbering in the hundreds, if not thousands.²³ The individual defendant caught in this complex web will likely be unable to determine the identity of other similarly situated defendants and will likely face the suit alone.²⁴ They are frequently ill-equipped to deal with complex copyright infringement problems and likely do not have the resources to organize an effective trial strategy on their own.²⁵

to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement (citing *In re Aimster Copyright Litigation*, 334 F.3d 643, 645-646 (7th Cir. 2003).").

18. 17 U.S.C. § 1201 (2012).

19. *Id.*

20. 17 U.S.C. § 512 (2012).

21. See FED. R. CIV. P. 23(a) ("One or more members of a class may sue or *be sued* as representative parties on behalf of all members") (emphasis added).

22. Reich, *supra* note 16, at 10.

23. See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 920-21, 962-63 (2005).

24. See Reich, *supra* note 16.

25. *Id.*

On the plaintiff's side, the litigation strategy costs significant time and resources.²⁶ A single plaintiff dealing with hundreds of individual lawsuits will seek to minimize costs by settling as many claims as possible early on. In the process of negotiating a suitable settlement amount, the plaintiff will need to consider all the possible defenses that the defendants could raise individually. Indeed, the costly nature of these suits, coupled with the RIAA's previous statement on the matter, is indicative of a litigation strategy aimed primarily at *detering* users, rather than financial gain.²⁷

Rule 23 offers a solution to the above issues. By combining dispersed defendants together in one suit, end-user consumers can pool their resources and make litigation economically feasible and worthwhile.²⁸ In *Thillens, Inc.*, for example, a plaintiff check cashing service sought certification of a defendant class in an action against, *inter alia*, seventeen named individual defendants and approximately 500 unnamed members of the currency exchange association.²⁹ The court rejected the argument that class members might seek to "opt out" and certified the class under Rule 23(b)(3).³⁰ A defendant class was superior to separate joinder proceedings because the costs would be diffused among a bigger pool of defendants and therefore "no individual defendant w[ould] have to carry the whole cost of this litigation."³¹ Each defendant's proportionate share of the total litigation costs would be far smaller than the cost of an individual action.³²

Under a class action suit, plaintiffs like OpenMind Solutions and the RIAA would be able to minimize litigation related costs and better enforce court judgments. Specifically, plaintiffs can seek injunctive relief against class members, which would in turn allow the plaintiff to file civil contempt proceedings against continuing violators.³³ Civil contempt proceedings would signal to class and non-class members

26. See Reich, *supra* note 16 ("These suits were never intended for trial. They were intended to deter future file-sharing more than they were intended to obtain money damages." (citing *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 962-63 (Breyer, J., concurring))); see also *RIAA Continues Enforcement of Rights with New Lawsuits Against 784 Illegal File Sharers*, *supra* note 2.

27. *Metro-Goldwyn-Mayer Studios Inc.*, 545 U.S. at 963 (stating the RIAA's opinion that the "campaign of lawsuits and public education has at least contained the problem").

28. *Thillens, Inc. v. Community Currency Exch. Ass'n of Ill., Inc.*, 97 F.R.D. 668, 673 (N.D. Ill. 1983).

29. *Id.* at 672.

30. *Thillens, Inc.*, 97 F.R.D at 682-83.

31. *Id.* at 682.

32. *Id.*

33. Randy Clarke, *A defendant class action lawsuit: one option for the recording industry in the face of threats to copyrights posed by Internet based file-sharing systems*, (2001), <http://www.kentlaw.edu/honorsscholars/2001students/writings/clarke.html>.

the plaintiff's willingness to continue monitoring infringing conduct. Therefore, plaintiffs would be deterring both class members and the public-at-large.

The defendant class action suit would also likely help the courts save significant time and resources.³⁴ One court reasoned that if all named individuals were sued separately, "an already busy docket would be further taxed."³⁵ Accordingly, the class action resolution was superior to other forms of adjudication.³⁶

In the related area of patent law, defendant class action suits have also been found to be efficient solutions to complex litigation issues.³⁷ In *Technograph*, the plaintiff brought multiple patent infringement claims as a single class action suit.³⁸ The court found that, a class action under Rule 23 would achieve the objectives enumerated in the Notes of the Advisory Committee namely: '* * * economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.' (39 F.R.D. 73, 102-103 (1966).)³⁹

The California Supreme Court's observation of the same type of collective action problems in the arbitration context is nearly indistinguishable from copyright infringement cases.⁴⁰ In *Discover*, the court criticized a class action waiver clause in a contract for credit card accounts.⁴¹ The court noted that "few customers w[ould] go to the time and trouble of suing in small claims court," and that consequently the clause was "not only harsh and unfair to Discover customers who might be owed a relatively small sum of money, but [] also serve[d] as a disincentive for Discover to avoid the type of conduct that might lead to a class action litigation in the first place."⁴² Individual defendants sued under copyright law are just as likely to lack the time and resources to pursue individual copyright claims, and, consequently, plaintiffs are likely to pursue aggressive litigation tactics against such defendants to recover the maximum amount of damages.⁴³

34. Clarke, *supra* note 33.

35. *Thillens, Inc.*, 97 F.R.D. at 682.

36. *Id.*

37. See, e.g., *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059, 1060 n.1 (7th Cir. 1970) (noting district court's certification of defendant class); *Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc.*, 285 F. Supp. 714, 724-25. (N.D. Ill. 1968); *Dale Electronics, Inc. v. R. C. L. Electronics, Inc.*, 53 F.R.D. 531, 534 (certifying a class of thirteen defendants in patent infringement case) (D.N.H. 1971).

38. *Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc.*, 484 F.2d 905, 906-07 (7th Cir. 1973).

39. *Technograph*, 285 F. Supp. at 725.

40. *Discover Bank v. Superior Court*, 113 P.3d 1110, 1107 (Cal. 2005).

41. *Id.* at 1107-08.

42. *Id.* at 1108.

43. See generally Reich, *supra* note 16; Phillip Stuller, *How the RIAA Can Stop Worrying and*

Ultimately, a defendant class action suit seems likely to reduce the cost of negotiation and settlement for both plaintiffs and defendants. Indeed, a defendant class action suit proceeding under Rule 23(b)(3) achieves “economies of time, effort, and expense, and promote[s] uniformity of decision to performs similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.”⁴⁴

III. THE DEFENDANT CLASS MECHANISM: A PROPOSAL

Although commonly associated with plaintiffs, rather than defendants, the logic behind plaintiff classes seems just as applicable to individual defendants. Indeed, as stated in *Technograph*, a defendant class action suit would satisfy the very “objectives enumerated in the Notes of the Advisory Committee.”⁴⁵ A surface-level application of these rules to the facts of the RIAA and OpenMind Solutions cases support this connection.

Under Rule 23, “one or more members of a class may sue or be sued as representative parties on behalf of all members.” To be certified, a class must first meet the elements of Rule 23(a). Thereafter, a plaintiff may maintain a class action if the class falls under one of three categories defined in Rule 23(b). Rule 23(c) lays out a few additional requirements, including the representation of class counsel and the option to opt-out. Lastly, Rule 23(g) requires that a class counsel be appointed if the respective class is certified.

A trial court reviewing the facts of a case such as the OpenMind Solutions one described above will likely scrutinize the fair and adequate protection prong of Rule 23(a), the appointment of class counsel, and the opt-out requirement most closely.⁴⁶ Although compensation for counsel may be perceived to be an issue, alternate fee arrangement provisions can be drawn pursuant to 17 U.S.C. § 505 (2012). Each element of Rule 23 is discussed in turn.

Learn to Love the RICO Act: Exploiting Civil RICO to Battle Peer-to-Peer Copyright Infringement, 24 LOY. L.A. ENT. L. REV. 521, 521–22 (2004).

44. *Technograph*, 285 F. Supp. at 725.

45. *Id.*

46. See generally Clarke, *supra* note 33.

A. RULE 23(A)

Rule 23(a) requires four distinct elements:

- A. The class is so numerous that joinder of all members is impracticable;
- B. There are questions of law or fact common to the class;
- C. The claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- D. The representative parties will fairly and adequately protect the interests of the class.

1. Numerosity

The first element will be easy to meet in most copyright infringement cases. Numerosity does not focus on numbers alone, but “whether or not the numbers make joinder impracticable.”⁴⁷ Accordingly, a reviewing court is likely defer to the trial court’s discretion determining whether a class is so numerous as to warrant certification.⁴⁸ For example, in *Research Corp. v. Pfister Associated Growers, Inc.*, the trial court held that the numerosity requirement was met in an antitrust case that could potentially involve “several hundred firms and individuals,” stating that joinder would be impractical.⁴⁹

As mentioned above, the RIAA plaintiffs have previously attempted to sue hundreds of defendants together, including P2P network operators and individuals.⁵⁰ Likewise, OpenMind Solutions, has also sued multiple John Doe defendants, attempting to join them together in one suit.⁵¹ Here, like in *Pfister Associated Growers*, the copyright infringement cases brought by the RIAA and OpenMind Solutions have the potential to involve hundreds of individuals. Indeed, in one instance, the RIAA pursued an aggressive litigation strategy against 204 individuals.⁵² Because of the sheer volume of the defendants brought together in this type of copyright infringement suit, a court will likely hold that this first requirement is met.

2. Commonality

The second element requires all class members to share at least one question of law or fact. This requirement, however, does not

47. *Dale Electronics, Inc. v. R. C. L. Electronics, Inc.*, 53 F.R.D. 531, 534 (D.N.H. 1971)

48. *See, e.g., Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc.*, 484 F.2d 905, 909 (7th Cir. 1973).

49. *Research Corp. v. Pfister Associated Growers, Inc.*, 301 F. Supp. 497, 501 (N.D. Ill. 1969).

50. *See Recording Industry Begins Suing File Sharers Who Illegally Offer Copyrighted Music Online*, RIAA (Sept. 8, 2003), http://www.riaa.com/newsitem.php?news_month_filter=9&news_year_filter=2003&resultpage=2&id=85183A9C-28F4-19CE-BDE6-F48E206CE8A1.

51. *See McGuire, supra* note 5.

52. *See Birdis, supra* note 11.

mandate a high level of similarity among all legal and factual questions.⁵³ In *Trucking Employers, Inc.*, the district court noted that “the substantive issues involved in an action on behalf of a class will rarely, if ever, be totally identical.”⁵⁴ Therefore, “where the claims or defenses raised by the named parties are typical of those of the class, differences in the factual patterns underlying the claims or defenses of individual class members will not defeat the action.”⁵⁵ In accordance with this low threshold, some courts have certified classes in cases even where the only issue linking the defendants together was whether an antitrust conspiracy existed.⁵⁶

For example, in *Julian Ford v. Chartone, Inc.*, the court illustrated the low threshold for commonality when it reversed a lower court decision to reject certification of a plaintiff class.⁵⁷ The court held that the plaintiff consumer met all requirements of Rule 23(b)(3) in an action alleging that the provider of medical records charged its customers unconscionably high fees.⁵⁸ Importantly, the court found that despite all the possible price-cost differences between the class members, the commonality requirement was met since all claims were predicated on common proof: medical transactions.⁵⁹ As such, the individual cost variations cited by the trial court were immaterial, and certification should have been granted at the lower court level.⁶⁰

In our scenario, the commonality element will be easy to meet. All individual defendants pursued by the RIAA will generally be sued under copyright infringement claims.⁶¹ Under that theory, the RIAA must demonstrate that the copyright holders owned a valid copyright, fixed in a tangible medium of expression, and that the individual defendants copied the protected elements of the work.⁶² Assuming that all infringement claims will be predicated on legitimate creative works protected by the Copyright Act,⁶³ the main defenses available to class members will be fair use and copyright misuse.⁶⁴ Unlike the

53. *United States v. Trucking Employers, Inc.*, 75 F.R.D. 682, 688 (D.D.C. 1977).

54. *Id.*

55. *Id.*

56. *Sebo v. Rubenstein*, 188 F.R.D. 310, 318–319 (N.D. 1999).

57. *Ford v. Chartone*, 908 A.2d 72, 77 (D.C. 2006).

58. *Chartone*, 908 A.2d at 77 (D.C. 2006).

59. *Id.* at 91.

60. *Ford*, 908 A.2d at 91.

61. *See Executive Bios*, *supra* note 3.

62. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 355, 361 (1991).

63. *RIAA About Us*, RIAA, http://riaa.com/aboutus.php?content_selector=about-who-we-are-riaa (last visited March 2, 2012) (defining the RIAA as a trade organization creating, manufacturing, and/or distributing approximately eighty five percent of all legitimate recorded music produced and sold in the United States).

64. *See* 17 U.S.C. § 107 (2006); *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191, 204 (3d Cir. 2003) (“The misuse doctrine extends from the equitable principle that courts

price-cost variation claims in *Chartone, Inc.*, the copyright claims will be far more straight-forward. In a RIAA litigation context, virtually all parties will be basing their claims on legitimate works of authorship. As such, even the affirmative defenses of fair use and copyright misuse will be relying on the same underlying works of musical artists and other members of this trade organization.

3. Typicality

The third element requires that the defenses be typical among class members. This issue may be complicated by the fact that defendants facing copyright infringement suits have several affirmative defenses available, including fair use, copyright misuse, and even constitutional arguments regarding statutory damages.⁶⁵ Congress resolved this potential issue by providing trial courts with the discretion to divide a class into multiple subclasses, each subclass addressing particular issues.⁶⁶

The procedure of dividing classes can be observed in *Chisolm v. TranSouth Financial Corporation*,⁶⁷ where the plaintiffs alleged that the defendant sold vehicles to customers, financed the purchases, and assigned secured interests in the vehicles to TranSouth.⁶⁸ Plaintiffs alleged that through a complex scheme of repossessing and transferring the vehicles, the defendants transferred ownership of the vehicles to the defendants if a borrower missed a payment.⁶⁹ Plaintiffs alleged that they were improperly notified regarding consumer redemption fights, and further, that these notices violated statutory standards.⁷⁰ Defendants alleged that the complexity of these allegations rendered the case unmanageable and therefore that the plaintiff case should not be certified.⁷¹ The court rejected the argument, holding that “the determination of a class certification motion may involve some consideration of the factual and legal issues that comprise the plaintiff’s cause of action.”⁷² Accordingly, a trial

‘may appropriately withhold their aid when plaintiff is using the right asserted contrary to the public interest.’” (quoting *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488, 492 (1942)); *Harper & Row, Publs. v. Nation Enters.*, 471 U.S. 539, 560-561 (1985) (“The four factors identified by Congress as especially relevant in determining whether the use was fair are: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the substantiality of the portion used in relation to the copyrighted work as a whole; (4) the effect on the potential market for or value of the copyrighted work.”)

65. See *Sebo v. Rubenstein*, 188 F.R.D. 310 (N.D. Ill. 1999); see also 17 U.S.C. § 504(c) (2006).

66. FED. R. CIV. P. 23(c)(4)–(c)(5).

67. 194 F.R.D. 538, 557–58 (E.d. Va. 2000).

68. *Id.* at 543.

69. *Id.*

70. *Id.*

71. *Id.* at 544.

72. *Id.*

court will consider the pleadings, the claims, defenses, relevant facts, and applicable substantive law together to determine the manageability of a given case under Rule 23.⁷³ To address the issues of the case, the court created three subclasses in accordance with Rule 23(c)(4).⁷⁴ Specifically, subclass A was to consist of individuals who suffered repossession, were assessed a deficiency judgment, and made subsequent payments towards the judgment.⁷⁵ Subclass B included the plaintiffs whose cars were repossessed and sold for a surplus, but who never received said surplus.⁷⁶ Subclass C represented the remaining class of plaintiffs or “balance of [plaintiffs] encompassed by the [state trial court’s] March 1999 class definition.”⁷⁷ The court did not sever any subclass or decertify the class, instead finding that the class action suit beset served the interests of judicial economy.⁷⁸

In the copyright context, opposing parties will likely raise the same type of arguments that the court heard in *Chisolm*. Namely, a plaintiff entity is likely to contest certification on the basis that there are too many defendants involved in the suit. Consequently, the plaintiff may argue that defendants’ claims will be far too different between each other, having but an ounce of typicality. In the case we are contemplating, however, this is not the case because all copyright defenses can be easily managed and divided by the trial court into subclasses. Since all copyright claims will flow from the same essential set of facts—ownership of valid copyright, which we can assume for our scenario and copying of the protected elements of those copyrights—the affirmative defenses are all that is left to divide.⁷⁹ Unlike the complex scheme outlined in *Chisolm*, our fact pattern will be far more manageable because each claim and defense is founded upon the same set of facts. Similar to *Chisolm*, a court reviewing the facts of the OpenMind dispute can divide the defendant class into one subclass for copyright misuse issues, another subclass for fair use defenses, and yet another for possible constitutional challenges.

4. Adequacy

The fourth element requires that the representative parties of the class members adequately represent the defendants. Under Rule 23(a)(4), each defendant class (or subclass) would need to have separate representation and need to ensure that the subclass counsels

73. 194 F.R.D. at 545.

74. *Id.* at 557–58.

75. *Id.* at 558.

76. *Id.*

77. *Id.*

78. *Id.* at 569.

79. *See Sebo v. Rubenstein*, 188 F.R.D. 310, 318–19 (N.D. Ill. 1999).

are not conflicted. The test for adequacy of representation in a defendant class action is similar to that of plaintiff classes.⁸⁰ The representative parties must be aided by qualified counsel and must have common interests with, and not be antagonistic towards, their fellow class members.⁸¹ A party is antagonistic against the class if it has a conflict with the defendants that goes “to the heart of the controversy.”⁸² Only such a conflict will defeat a claim of representative status.⁸³ Thus, “where the court can fairly conclude that by pursuing their own interests vigorously the named representatives will *necessarily* raise all claims or defenses common to the class, representatives will be satisfied.”⁸⁴

In *Trucking Employers*, one of the arguments that the court considered was that the interests of the representative parties of the defendant class did not correspond to those of the other class members.⁸⁵ The named defendants were alleged to have refused to file various motions on behalf of the class, for example, refused to decertify the class to stay discovery proceedings.⁸⁶ Moreover, the opposition argued that the disparities in the size, operations, and locations of the defendants “render[ed] effective representation of their interests impracticable in a class action context.”⁸⁷ The court disagreed with these arguments and held instead that certification was proper because “[p]laintiffs’ essential contention [was] quite simple. They allege[d] that a pattern of discriminatory employment practices exist[] in the trucking industry . . . common to all members of the defendant class.”⁸⁸ As such, “*the court* [would] decide what degree of statistical imbalance constitute[d] a *prima facie* case of unlawful discrimination . . . and what defenses (i.e. nonracial explanations of the imbalance), if any, suffice[d] as a matter of law to overcome such a case.”⁸⁹ The court thus remained satisfied that the defendant class representatives, by acting in furtherance of their own interests, also adequately represented the class and were likely to raise any and all defenses common to the class.⁹⁰

In the copyright context, the fourth prong is met because the

80. See 7A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1770 (1st ed. 1972).

81. *United States v. Trucking Employers, Inc.*, 75 F.R.D. 682, 687 (D.D.C. 1977).

82. *Id.* at 688.

83. *Id.*

84. *Id.* (citing *Rosando v. Wyman*, 322 F. Supp. 1173, 1193 (S.D.N.Y. 1970)).

85. *Trucking Employers*, 75 F.R.D. at 687.

86. *Id.*

87. *Trucking Employers*, 75 F.R.D. at 687.

88. *Id.* at 689.

89. *Id.*

90. *Id.*

defendant subclass representatives will not likely be antagonistic toward fellow class members. Similar to *Trucking*, the plaintiffs' claims are straight-forward: they will allege a pattern of downloading and distributing copyrighted works that the trade organization's members had the exclusive right to reproduce and distribute.⁹¹ The affirmative defenses likely to be raised by the defendants are not likely going to conflict the defendants' counsel either because they are not founded upon the same statute and do not require different types of evidence.⁹² Moreover, even if some of the infringement defenses rely upon common proof, the court maintains the exclusive discretion to divide the defendant class to manage the issues more effectively.⁹³ Because copyright infringement suits are not likely to raise more complications than cases such as *Chisolm*, where a class was certified under Rule 23, the representation element is also likely going to be met.

5. Compensation for Representation

An issue closely related to the Rule 23(a)(4) "adequacy" element is the question of how counsel will be compensated for legal services. Because an attorney is not likely to represent multiple defendants in a mass tort litigation issue on a *pro bono* basis, compensation often remains a sticky issue for defendant class action suits. A few commentators have noted that when the defendant class wins, "the defendants owe nothing to the plaintiff—no money changes hands."⁹⁴ Given the fact that the majority of copyright infringement defendants are not deep pocket entities, the defendant class members will not have any money remaining to pay counsel.

There is a solution for this problem in copyright law, however. RIAA and OpenMind Solution litigation is based on section 101 of the Copyright Act, which provides that the prevailing party may be awarded attorney's fees and costs.⁹⁵ Under section 505, a prevailing party may constitute either plaintiffs or defendants.⁹⁶ Moreover, the statute does not require the prevailing defendant to make a showing of frivolousness.⁹⁷ In effect, then, the defendants would not have to pay any fees or costs in the case that a trial judge chooses to award the pertinent attorneys' fees and costs to the prevailing parties. The statute may also make it more likely for the parties to agree to award

91. See 17 U.S.C. §§ 501(a) 106(1), 106(3) (2012).

92. Copyright misuse is a doctrine found in equity. *Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191, 204 (3d Cir. 2003). By contrast, fair use is a statutory affirmative defense. See 17 U.S.C. § 107 (2012).

93. See FED. R. CIV. P. 23(c)(4)–(c)(5); *Trucking Employers*, 75 F.R.D. at 689.

94. Assaf Hamdani & Alon Klement, *The Class Defense*, 93 CALIF. L. REV. 685, 691 (2005).

95. 17 U.S.C. § 505 (2012).

96. *Id.*

97. *Id.*

the prevailing members fees and nontaxable costs.⁹⁸

Taking a step back, it is important to remember that the issue of compensation need not defeat the entire certification process. This is because, as stated above, the defendant class can be maintained even with respect to just the common claims and defenses. With respect to these common claims and defenses, a court can establish subclasses addressing different issues under Rule 23(c)(4). As in *Chisolm*, a reviewing court can permit the representative class member to continue litigating, as if he or she were facing an individual suit. To the extent that the other class members' defenses remain the same, the court can certify the class to adjudicate a narrow range of issues.⁹⁹ Regardless of the outcome, it would still be saving judicial time and resources.

B. RULE 23(B)(3)

Once the prerequisite elements provided by Rule 23(a) are met, the defendant class must show that its action is maintainable under Rule 23(b). At issue in this context is whether the defendant class meets the elements of Rule 23(b)(3).¹⁰⁰

As a preliminary matter, notice is required under Rule 23(c)(2)(B) for (b)(3) classes. For this to happen, the plaintiff entity in a RIAA type of end-user litigation would have to first identify the IP addresses of the infringing defendants and, thereafter, request their personal information from the ISP providers. Since the DMCA already requires ISPs to provide such information, the plaintiff entity will not likely face much push-back during this information-gathering stage.¹⁰¹

To qualify for Rule 23(b)(3) certification, a class must meet two additional requirements beyond the Rule 23(a) prerequisites: (1)

98. See generally FED. R. CIV. P. 23(h).

99. FED. R. CIV. P. 23(c)(4).

100. Class actions under Rule 23(b)(1) are designed to eliminate the risk of inconsistent adjudications arising from different cases. 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.41 (3d ed. 2000). It does not apply to the facts of our cases because in the context of defendant class actions, the plaintiff would not face the risk of "inconsistent or varying adjudications . . . that would establish incompatible standards of conduct for the [plaintiff]" or "adjudications . . . that . . . would be dispositive of the interests of the other members not parties to the individual adjudications." *Id.* If each case was pursued as a "separate action[]," each settlement would be binding against the individual offender, rather than the class of individuals. *Id.* As such, the plaintiff would not have to face "inconsistent or varying adjudications" and "other members not parties to the individual adjudications" would also not be bound to the settlement/judgment. *Id.* Similarly, Rule 23(b)(2) does not apply to our case because that rule applies to cases in which the party opposing the class—the plaintiff in our case—acts or refuses to act on grounds generally applicable to the class as a whole. Because in our case the defendants, and therefore not the "party opposing the class," have affirmatively acted against the single plaintiff, the rule is not relevant.

101. See 17 U.S.C. § 512(h)(1) (2006).

common questions must “predominate over any questions affecting only individual members” and (2) class resolution must be “superior to other available methods for the fair and efficient resolution of the controversy.”¹⁰² In adding the “predominance” and “superiority” elements, the Advisory Committee sought to cover cases in which a class action would achieve economies of time, effort, and expense.¹⁰³ Nonetheless, the Reporter for the 1966 amendments cautioned that “the competing tugs of individual autonomy” counseled courts to take a “close look at the case before it is accepted as a class action.”¹⁰⁴

In our case, the superiority of the Rule 23(b)(3) form of adjudication is evident from both the types of defendants involved in end-user litigation and the high level of similarity between the copyright infringement suits. First, as stated above, the defendants involved in this mass-scale litigation strategy are lack the resources to pay for legal fees and prepare for trial. Second, copyright infringement suits in RIAA and OpenMind litigation are all predicated on the same set of facts: a (presumably) valid copyright that has been reproduced, without authorization, by the end-user consumer.¹⁰⁵ Defendants facing suit are not likely to ever contest the charges against them and will settle at the first available opportunity if they face the civil actions as individuals.¹⁰⁶ Accordingly, often times the *only* way that any of these suits against individual defendants will be adjudicated on their merits will be through certification of defendant classes under Rule 23(b)(3). This is consistent with the Advisory Committee’s goal of covering cases where the class action would “achieve economies of time, effort, and expense.”¹⁰⁷ Therefore, the superiority and predominance elements of Rule 23(b)(3) are met.

C. RESOLVING THE OPT-OUT DILEMMA

Individual defendant members of a class must have the option to opt-out.¹⁰⁸ This raises a unique challenge for defendant class members. A defendant may have no reason to fear the consequences of backing out of the lawsuit. The court in *Thillens* noted this potential hardship, stating that “the risk in certifying a defendant class under 23(b)(3) is that all or many class members will “jump ship.”¹⁰⁹

102. FED. R. CIV. P. 23(b)(3); *Amchem Prods. v. Windsor*, 521 U.S. 591, 615 (1997).

103. FED. R. CIV. P. 23(b)(3) advisory committee’s note.

104. *Windsor*, 521 U.S. at 613.

105. *See Sebo v. Rubenstein*, 188 F.R.D. at 318–19; *see also infra* III.C.

106. *See RIAA Continues Enforcement of Rights with New Lawsuits Against 784 Illegal File Sharers*, *supra* note 2.

107. *Windsor*, 52 U.S. at 615.

108. FED. R. CIV. P. 23(c)(2)(B)(v).

109. *Thillens, Inc. v. Community Currency Exch. Ass’n of Ill., Inc.*, 97 F.R.D. 668, 682 (N.D. Ill. 1983).

However, this risk is minimized from the fact that “opting-out defendants are at risk of ‘losing’ the effect of a favorable decision in the event that this action is determined against [the single plaintiff].”¹¹⁰ In effect, by opting out, defendants would forego a potential victory against the plaintiff, or a very favorable settlement.¹¹¹

Defendants at this stage of the proceeding should consider two additional measures that plaintiffs have at their disposal against them: (1) aggressive litigation tactics against *individual* defendants, (2) backed by contempt proceedings. Put simply, once the individual defendant is on the hook and the respective IP addresses identified, the plaintiff has every incentive to obtain as many favorable judgments as possible.

First, the plaintiff can – and in the RIAA scenario above seems likely to—signal an aggressive litigation strategy to any defendant who chooses to opt-out of the class. The RIAA’s existing reputation should counsel defendants against opting out. The RIAA has already brought suit against 80 separate defendants.¹¹² Those 80 people were among 204 who had been threatened with lawsuits a few weeks earlier by the RIAA.¹¹³ The RIAA stated that approximately 124 people approached music industry lawyers about settling their claims.¹¹⁴ According to Cary Sherman, then-RIAA president, the “overwhelming majority of those who received the notification letter contacted [the trade organization] and were eager to resolve the claims.”¹¹⁵ Still, the RIAA issued a statement promising that “hundreds or even thousands” more lawsuits and subpoenas would be filed against individual defendants and against Internet Providers to identify suspected copyrighted infringers for illegally distributing music online.¹¹⁶

Second the plaintiff may seek injunctive relief, instead of monetary damages, to improve the likelihood that the defendants will not opt-out. Procedurally, the plaintiff can seek to commit the defendant class to contempt proceedings if they refuse to obey the final judgment and continue downloading copyrighted works illegally.¹¹⁷ A court enforcing a final judgment is “securing to suitors the rights which it has adjudged them entitled to.”¹¹⁸

As a closing matter, it should be observed that 23(b)(3) class

110. *Thillens, Inc.*, 97 F.R.D. at 682.

111. *Id.*

112. *See Birdis, supra* note 11.

113. *Id.*

114. *See Birdis, supra* note 11.

115. *Id.*

116. *Id.*

117. *See In re Nevitt*, 117 F. 448, 453 (8th Cir. 1902) (“The power to punish for contempts is inherent in all courts.”).

118. *Id.* at 454.

action suits may pose some privacy issues. An opt-out process similar those in plaintiff class action suits would require defendants to disclose their identities.¹¹⁹ In the OpenMind Solutions case described above, this would amount to the publication of personal names and addresses of individuals who were caught downloading or otherwise distributing adult film material. One commentator suggests filing and keeping opt-outs under seal.¹²⁰ By doing so, the plaintiff entity will not be able to use blackmail tactics to coerce individual defendants to stay in the class and the end-users' privacy rights will be preserved.

IV. CONCLUSION

As recently as 2009, estimates suggested that 95% of all downloads of music in 2008 were illegal.¹²¹ To combat this trend, the RIAA, along with several other copyright holders such as OpenMind Solutions, began filing a significant number of claims against both P2P network operators and individual defendants.¹²² Many of these defendants were left without much of a solution. As stated above, most end-user consumers seem ill-equipped to deal with complex legal issues. Current laws, such as the DMCA have failed to address this situation, focusing on the liability of website operators, rather than individual defendants.¹²³ This chain of events created an imbalance in copyright law: plaintiff entities suing dispersed defendants who are unable to comprehend or adequately address the charges against them. The same plaintiffs may also remain empty-handed as many individual defendants do not seem to have much in the way of assets or financial resources.¹²⁴

The reverse class action suit solution seeks to address much of this imbalance. By certifying defendants as a class, courts may deal with multiple suits much more expeditiously and uniformly. Plaintiffs will be capable of better enforcing copyrights, without fearing the usual toothless judgments accompanying infringement claims. Defendants, similarly, will have a greater opportunity to contest the claims against them, having greater incentives to stay in the class, rather than opting out. The empirical data supports this

119. Hamdani & Klement, *supra* note 94, at 722.

120. *Id.* at 725.

121. Sean Adams, *95% of Music Downloads in 2008 Were Illegal - DiS Reacts and Suggests Two Solutions*, DROWNED IN SOUND, <http://drownedinsound.com/news/4136081> (last visited March 2, 2012).

122. *See* Bridis, *supra* note 11.

123. 17 U.S.C. § 1201 (2012).

124. *See* Bridis, *supra* note 11.

proposition.¹²⁵ One commentator was able to find only three U.S. cases in which opt-out rates were even discernible.¹²⁶ In one case, three defendants opted out of a class of 90 members, and no one opted out of a second defendant class in another.¹²⁷

The similarity of copyright infringement claims, the limited number of available defenses, the statutory awards available for attorneys' fees, and profitability of consolidated claims all make the reverse class action vehicle ideal in this context. The sooner trial court judges and pertinent litigation parties realize this tool, the faster we may begin to understand and resolve the inequities underlying the current copyright law regime.

125. Francis X. Shen, *The Overlooked Utility of the Defendant Class Action*, 88 DENV. U.L. REV. 73, 89 (2010).

126. Vince Morabito, *Defendant Class Actions and the Right to Opt Out: Lessons for Canada from the United States*, 14 DUKE J. COMP. & INT'L L. 197, 226 (2004).

127. *Id.*