THE CLASS DEFENSE: WHY DISPERSED INTELLECTUAL PROPERTY DEFENDANTS NEED PROCEDURAL PROTECTIONS

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ABSTRACT

"The concern of this Court is that in these lawsuits, potentially meritorious legal and factual defenses are not being litigated, and instead, the federal judiciary is being used as a hammer by a small group of plaintiffs to pound settlements out of unrepresented defendants." –Judge S. James Otero[2]

Current procedural rules have failed to keep up with trends in intellectual property litigation. The rise of digital media, the use of the Internet for mass distribution, and the increasing vigor with which copyright proprietors protect their legal interests has led to an increase in litigation on behalf of corporate plaintiffs against dispersed, non-commercial defendants. These cases take advantage of a procedural oversight, one which affords plaintiffs the ability to aggregate their cases against dispersed defendants who are unable to utilize a common defense. A class defense would level the playing field between plaintiffs and defendants, avoid default judgments, and protect defendants with valid defenses from settling negative expected value suits.

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[2] Decision and Order to Show Cause, Elektra Entertainment Group, Inc. v. O'Brien, No. 06-5289 (C.D.Cal. March 2, 2007) (ordering RIAA plaintiffs to show cause why case should not be dismissed as to defendant).

INTRODUCTION

¶1 The Digital Age and the rise of the Internet ushered many changes to American life. Among them is an increasingly common litigation paradigm: powerful commercial plaintiffs sue many dispersed, noncommercial defendants. While substantive law struggles to keep up with changes in technology,[3] procedural law is even more deficient in coping with this new paradigm.

¶2 Part I of this iBrief discusses the peculiar structure which the recording industry's litigation against end-users has taken: where plaintiffs are concentrated and defendants are dispersed. Part II explains how the recording industry has developed a litigation strategy which replicates a private mass tort adjudication system. Part III touches on the economic ramifications of an individual defendant choosing to defend a lawsuit. Parts IV and V introduce the class defense and briefly explain how it may be employed by defense counsel to aggregate the claims of noncommercial defendants.

I. CONCENTRATED PLAINTIFFS, DISPERSED DEFENDANTS

¶3 Many corporations measure their wealth not by how many assembly lines or natural resources they own, but rather by how much intellectual property they possess. The rise of digital media and the Internet is a double-edged sword for these companies. The Internet presents an opportunity to lower the costs of distribution. However, it also increasingly exposes electronic media to copyright infringement, which diminishes the value of their capital goods.

¶4 In September 2003, ten corporations, including the six largest film studios and the four largest recording studios, launched the most expansive litigation campaign ever, acting as plaintiffs against tens of thousands of unidentified

[3] *See, e.g.*, Ponder v. Pfizer, Inc., 522 F.Supp.2d 793, 797 (M.D. La. 2007) ("Given the rate at which Internet technologies evolve, the ability of computer hackers to stay two-steps ahead of the latest in online security, and the comparatively slow speed at which the law responds to cyber-security threats, neither Louisiana courts nor the Fifth Circuit have confronted the issue before us.").

defendants.[4] They alleged that thousands of individuals violated the Copyright Act by trading digital copies on peer-to-peer online networks.

¶5 Initially, the plaintiffs were successful in their litigation strategy against non-commercial, and often unrepresented, defendants. Most of these individual defendants lacked the resources to litigate potentially valid claims.[5] Many of these actions were *ex parte* proceedings.[6] These cases represent a unique form of litigation: one plaintiff initiates litigation against a large number of defendants for a small sum in each suit. The plaintiff is a sophisticated corporate entity and the dispersed defendants are typically individual, non-commercial users.

¶6 The typical end-user lawsuits were filed against Doe defendants in districts where an Internet Service Provider (ISP) had a server.[7] Often 200 or more individual cases were aggregated into a single action.[8] The filing was usually followed by a motion for immediate discovery and subpoenas served on the ISPs, which allowed the Recording Industry Association of America (RIAA), an industry trade group to which the plaintiffs belong, to convert IP addresses into file-sharer identities. The average, non-negotiable settlement, standardized by the RIAA, was approximately $3,000.[9]

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

[5] *See, e.g.*, Capitol Records, Inc. v. Thomas, 579 F.Supp.2d 1210 (D. Minn. 2008) (represented *pro bono*).

[6] *See, e.g.*, Interscope Records v. Does 1-14, 558 F.Supp.2d 1176 (D. Kan. 2008); Atlantic Recording Corp. v. Does 1-3, 371 F.Supp.2d 377 (W.D. N.Y. 2005).

[7] David Opderbeck, *Peer-To-Peer Networks, Technological Evolution, and Intellectual Property Reverse Private Attorney General Litigation*, 20 BERKELEY TECH. L. J. 1685, 1705 (2005).

[8] *Id*. at 1704; s*ee also* Press Release, RIAA, RIAA Brings New Round of Lawsuits Against 751 Online Music Thieves (Dec. 15, 2005), *available at* http://riaa.org/newsitem.php?news_month_filter=&news_year_filter=2005&resultpage=&id=2E9599A7-91FB-739F-CACB-77EE7118AF1C.

[9] *See* Transcript of Q&A with RIAA President Cary Sherman, DAILY TEXAN, March 25, 2004, *available at*

¶7 These suits were never intended for trial. They were intended to deter future file-sharing more than they were intended to obtain money damages.[10] According to one attorney, in 40,000 RIAA cases against end-users, the RIAA's investigator was never deposed and only once was the RIAA's expert deposed.[11] In that deposition, the RIAA expert admitted that neither he nor the investigator could withstand a *Daubert* hearing for admissibility if these cases were to go to trial.[12]

¶8 Most file sharing actions ended in a take-it-or-leave-it settlement agreement, unreviewed by any court.[13] Most content actions, typically aimed at non-commercial users of YouTube and MySpace, have been resolved with Digital Millennium Copyright Act (DMCA) take-down notices. This resulted in material being removed from the Internet which under existing copyright law created no liability for the defendant.[14] Commentators noted that "RIAA end-user litigation appears to be nearly the opposite of mass tort litigation. . . . [And the] structure of the litigation is inverted. [While] mass torts typically involve numerous consumers suing big business, [sic] the RIAA litigation involves big business suing numerous consumers."[15]

¶9 The RIAA's end-user litigation strategy highlights the lack of procedural protections afforded to dispersed defendants. These defendants face the same collective action and economic disincentives to litigate as typical class plaintiffs. However, dispersed defendants are not afforded the same procedural protections as dispersed plaintiffs, even when they meet the common criteria that bind a plaintiff

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http://www.dailytexanonline.com/media/paper410/news/2004/03/25/Focus/Transcript.Of.Qa.With.Riaa.President.Car-641217.shtml.

[10] Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 962–63 (Breyer, J., concurring); *see also* Press Release, RIAA, RIAA Continues Enforcement of Rights With New Lawsuits Against 784 Illegal File Sharers (June 29, 2005), *available at* http://www.riaa.com/news/newsletter/062905.asp.

[11] Ray Beckerman, *Content Holders v. The Web: 2008 US Copyright Law Victories Point to Robust Internet*, 12 No. 7 J. INTERNET L. 16, 20, 2009.

[12] *Id.* at 20.

[13] Opderbeck, *supra* note 7, at 1689.

[14] *Id.* at 1705.

[15] *Id.* at 1702–03.

class. As a result, some defendants have valid defenses, but choose to settle because litigation would be cost prohibitive. While the factual situation of end-user litigation can be thought of as the opposite of a mass tort, the judicial system's handling of the problem is radically different. The remedy would be a method of aggregating defense claims.

II. THE RIAA'S PRIVATE MASS TORT SYSTEM

¶10 End-user litigation is, in many ways, the opposite of traditional mass tort litigation. Both situations present a single party adverse to many small, dispersed parties. Also, the single party has an advantage of scale and avoids the collective action problem.[16] This imbalance provides a disincentive for dispersed parties to litigate, and may lead to unfavorable settlements or to neglecting valid legal claims.

¶11 In fact, the RIAA's litigation strategy can be characterized as a mass tort action and resolution system: the recording industry plaintiff files large bundled claims, obtains all of the relevant discovery in one judicial forum, and then settles individual claims on standardized terms. By contrast, in a conventional mass tort, the plaintiffs band together with the power of a class action and often negotiate a settlement with the defendant. Settling defendants are typically released of all past and future claims, and in some instances the global settlements allow them to avoid regulatory shut-down or bankruptcy.[17] In contrast, the end-user copyright defendant pays $3000 to receive a "promise" instead of a legally binding release from future lawsuits for activity prior to the settlement.

¶12 By permitting claims against non-residents of the forum state[18] and issuing discovery orders,[19] most district

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[16] *See*, ¶15, *infra.*

[17] *See* Joseph Rice & Nancy Davis, *The Future of Mass Tort Claims: Comparison of Settlement Class Action to Bankruptcy Treatment of Mass Tort Claims*, 50 S.C. L. REV. 405 (1999); *see, e.g.*, Master Settlement Agreement, November 1998, *available at* http://www.naag.org/backpages/naag/tobacco/msa (settling tort claims between four cigarette producers and Attorneys General from forty six states); Ortiz v. Fibreboard Corp., 527 U.S. 815, 883 (1999) (proposing settlement to avoid defendant's bankruptcy).

[18] *See, e.g.*, Sony Music Entm't, Inc. v. Does 1-40, 326 F.Supp.2d 556, 567 (S.D.N.Y. 2004) (stating it is likely that Doe defendants were not residents,

courts have tacitly endorsed this litigation strategy. Some courts, however, have issued orders severing these cases for improper joinder of claims.[20] Of the severing courts, some have noted in the accompanying order that the RIAA may have consciously attempted to avoid paying separate filing fees.[21] Judges who have severed cases usually cite Rule 20(a)(2)(A), which requires the right to relief to arise "out of the same transaction, occurrence, or series of transactions or occurrences."[22] Since there was no allegation that the Doe defendants were acting together or in a series of transactions, these courts reasoned that joinder was inappropriate.[23]

¶13 End-user litigation will likely increase as content providers become increasingly concerned about piracy of their products.[24] If so, the procedural asymmetry between plaintiffs and defendants will continue to be exacerbated by the lack of procedural structures addressing the imbalance between a single, powerful plaintiff and dispersed, non-commercial defendants.

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however personal jurisdiction arguments were premature). Due to the cost of filing a 12(b)(2) motion to dismiss for lack of personal jurisdiction or a motion for *forum non conveniens*, most claims are settled rather than litigated.

[19] *See, e.g.*, Elektra Entm't Group, Inc. v. Does 1-6, No. 04-1241, 2004 U.S. Dist. LEXIS 22673 (E.D. Pa. Oct. 12, 2004) (authorizing expedited discovery to "all current and future cases filed in the Eastern District of Pennsylvania" related to the above-captioned case).

[20] *See, e.g.*, Order, Interscope Records v. Does 1-25, No. 6:04-cv-197-Orl-22DAB (M.D. Fla. Apr. 27, 2004); Order, BMG Music v. Does 1-203, No. 04-650 (E.D. Pa. Mar. 5, 2004); Order at 3, Motown Record Co., L.P. v. Does 1-252, No. 1:04-CV-439-WBH (N.D. Ga. Aug. 16, 2004); Order at 8-9, Arista v. Does 1-100, No. 1:04-CV-2495-BBM (N.D. Ga. Feb. 1, 2005).

[21] *See e.g.*, *In re* Cases Filed By Recording Companies http://w2.eff.org/IP/P2P/RIAA_v_ThePeople/20041117_austin_severance_order.pdf (stating "The filing fees for the recent four cases totaled $600, whereas the filing fees of 254 separate cases would have been $38,100. That is a significant loss of revenue to the public coffers," before dismissing charges against 250 of the defendants *sua sponte*.). *See also* Arista Records, LLC v. Does 1-11, No. 1:07-2828, 2008 WL 4823160 (N.D. Ohio 2008) (under Rule 21 a judge may *sua sponte* rule on the joinder issue before any other, and that postponing a ruling on joinder results in lost revenue approaching a million dollars and encourages music industry plaintiffs to continue misjoining defendants).

[22] *See id.*

[23] *See id.*

[24] Opderbeck, *supra* note 7 at 1689.

¶14 Consolidation or aggregation of the dispersed claims would level the playing field between plaintiffs and defendants. Currently, however, only plaintiffs have a functional aggregation device.[25] Because of the lack of procedural protection for dispersed defendants, the judicial system has inadvertently established a near-absolute liability regime. All that a commercial plaintiff must do is threaten to sue dispersed end-users and then collect settlement payments.

III. CLASS ACTIONS AND THE ECONOMIC INCENTIVE TO LITIGATE

¶15 Dispersed plaintiffs use class actions to overcome the collective action problem faced by numerous individuals who have all suffered a similar harm perpetrated by a common defendant. In many instances these individual harms are too small to make litigation a viable option, either because the economic value of each claim is low or because the plaintiffs are seeking injunctive relief instead of monetary compensation. The aggregation provided by the class action device, embodied in Rule 23 of the Federal Rules of Civil Procedure, allows plaintiffs to bring suits with low individual economic value.[26] A multitude of low-value claims may be aggregated to make litigation economically worthwhile. One court explained that without a plaintiffs' class action, a powerful corporate defendant could knowingly overcharge each customer by a small amount, "fully aware that relatively few, if any, customers will seek legal remedies," that those remedies will not have a collateral estoppel effect, and that "[t]he potential for millions of customers to be overcharged small amounts without an effective method of redress cannot be ignored."[27]

¶16 Defendants in traditional class actions are also able to reduce their cost of litigation through economies of scale when multiple lawsuits share common questions of law or

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[25] *See* Assaf Hamdani & Alon Klement, *The Class Defense*, 93 CAL. L. REV. 685, 689, 696-708 (2005) (hypotheticals and case studies which "vividly demonstrate the failure of the existing legal regime to adequately protect dispersed defendants.").

[26] *See, e.g.*, Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 338-39 (1980) (recognizing that the class device enables plaintiffs "to bring cases that for economic reasons would not be brought").

[27] Discover Bank v. Superior Court, 113 P.3d 1100, 1108 (Cal. 2005).

fact. For example, defendants can pay once and then reuse much of the same research, memoranda, and experts when there are common questions between claims. This allows the defendant to spread its litigation costs across multiple lawsuits.

¶17 This aggregative effect allows a plaintiff class of Davids to form their own litigation Goliath. Thousands of small claims against a common defendant are litigated in one action, creating economies of scale for the plaintiffs and converting negative expected value claims into positive expected value ones.

¶18 However, the contrary paradigm has garnered relatively scant academic attention.[28] In end-user litigation, multiple dispersed defendants have allegedly all wronged a single plaintiff in the same way, with common questions of law pervading each tortious action. Why have dispersed defendants not been allowed to pool their litigation resources as well?

IV. POSSIBLE SOLUTIONS TO REMEDY THE DISPARITY

¶19 End-users may have a variety of valid defenses, such as actual innocence or fair use; however, it is economically unfeasible for them to litigate as defendants. Once they enter into the form settlement agreement offered by the RIAA, they are prevented from later suing as plaintiffs. This contrasts with a class plaintiff who can choose to pay an overcharge and decide to sue for recovery later.

¶20 The modern class action has become a vital part of complex civil litigation, addressing problems that involve fewer than twenty-five[29] plaintiffs to tens of millions.[30] Not only does it level the playing field between dispersed plaintiffs and powerful defendants by remedying the collective action problem and making litigation economically

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[28] *See, e.g.*, Hamdani & Klement, *supra* note 25, at 689 (recognizing that both academics and policymakers have focused on the collective action problems of plaintiffs more than defendants).

[29] *See, e.g.*, Kilgo v. Bowman Transp., Inc., 87 F.R.D. 26, 29–30 (N.D. Ga. 1980) (twenty-three class members sufficient).

[30] *See, e.g.*, Castano v. American Tobacco Co., 160 F.R.D. 544 (E.D. La. 1995) (estimated plaintiff class of fifty million).

attractive, it also allows the rapid resolution of large numbers of claims at one time.[31] Without a class action to aggregate dispersed plaintiffs, defendants are effectively immunized from suit. In the case of end-user litigation, the lack of an aggregation device effectively immunizes the plaintiff from actual litigation and instead approaches an absolute fault system.

A. Some defendants are not liable

¶21 Plaintiffs would not be able to establish liability in some of the lawsuits filed if a procedural solution allowed defendants with legitimate defense to litigate for reasonable costs. As a result of this deficiency, defendants end up settling even though they may have a valid defense under present law.

¶22 For example, the RIAA has misidentified the user and sued a parent, when the infringing download was actually committed by an adult child using the same computer.[32] The defendant may have already bought the copyrighted materials in another form, such as a CD or DVD. In another case of mistaken identity, the RIAA sued a deceased grandmother.[33] In other cases, the defendant may have a valid fair-use defense; such as access to the same materials at a school library, which were ultimately incorporated into a project or teaching aid.[34] Another plausible defense is that the statutory damages available under the Copyright Act, intended for commercial infringement, are unconstitutionally excessive when compared to the actual damages suffered by the plaintiff.[35] A defendant could also raise the affirmative

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[31] *See, e.g.*, Deborah Hensler & Thomas Rowe, *Beyond "It Just Ain't Worth It": Alternative Strategies for Damage Class Action Reform*, 64 LAW & CONTEMP. PROBS. 137 (2001).

[32] Capitol Records Inc. v. Foster, No. Civ. 04-1569-W., 2007 WL 1028532 (W.D. Ok. Feb. 6, 2007) (awarding reasonable attorney's fees to misidentified parent).

[33] *See* Toby Coleman, *Deceased Woman Named in File-sharing Suit*, CHARLESTON GAZETTE, Feb. 4, 2005, at P1A.

[34] *See* 17 U.S.C. §§ 107, 110 (2006). Fair use is a judicial doctrine which has been codified and includes whether the use is commercial and the effect of the use on the potential market for the work.

[35] *See* Atlantic Recording Corp. v. Brennan, 534 F.Supp.2d 278, 282 (D. Conn. 2008) ("The defenses which have possible merit include: (1) whether the

defense that the coordinated behavior of the plaintiffs amounts to copyright misuse.[36] Nevertheless, it is rare that these issues are ever litigated because the economies of scale tip so favorably towards the copyright proprietor plaintiff. The result is that scholars have little reliable information regarding the facts of each case or statistics regarding how many defendants may have succeeded on the merits. Accordingly, only the most blatant cases of mistaken identity have come to light.

¶23 One proposed solution to remedy this procedural asymmetry between plaintiffs and defendants is the class defense. This would act as a parallel device to the plaintiffs' class action, but instead would allow a lead defendant to step forward, argue for certification of a class, and consolidate defendants' claims. As the Supreme Court has stated, "[o]ne great advantage of class action treatment of mass tort cases is the opportunity to save the enormous transaction costs of piecemeal litigation."[37] Consolidation also benefits the court system. By converting defendants' negative expected value suits into ones that may have a positive expected value, the court system may resolve these cases without resulting to mass default judgments.

¶24 The text of Federal Rule of Civil Procedure 23, which governs class actions, does not preclude a defendant class. It plainly states that members of a class "may sue or be sued as

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amount of statutory damages available under the Copyright Act, measured against the actual money damages suffered, is unconstitutionally excessive."); *see also* UMG Recordings, Inc. v. Lindor, No. CV-05-1095(DGT), 2006 WL 3335048 (E.D.N.Y. Nov. 9, 2006) (recognizing that plaintiff sought damages of $750.00 per song; over 1,000 times more the economic actual damages suffered); *In re* Napster, Inc. Copyright Litigation, No. 04-1671 MHP, 2005 WL 1287611, at *11 (N.D. Cal. June 1, 2005) ("[L]arge awards of statutory damages can raise due process concerns. . . . Extending the reasoning of *Gore* and its progeny, a number of courts have recognized that an award of statutory damages may violate due process if the amount of the award is 'out of all reasonable proportion' to the actual harm caused by a defendant's conduct.").

[36] *See, e.g.*, Assessment Techs. of WI, LLC v. WIREdata, Inc., 350 F.3d 640, 647 (7th Cir. 2003) ("The doctrine of misuse 'prevents copyright holders from leveraging their limited monopoly to allow them control of areas outside the monopoly.'") (citation omitted).

[37] Ortiz v. Fibreboard Corp., 527 U.S. 815, 860 (1999).

representative parties on behalf of all members."[38] If defendants are able to be sued together, what prevents them from being able to defend together?

¶25 Under Rule 23 there are four prerequisites that govern all class cases:

- the class is so numerous that joinder of all members is impracticable
- there are questions of law or fact common to the class
- the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- the representative parties will fairly and adequately protect the interests of the class

¶26 The first prong, numerosity, is clearly met. In many instances, RIAA plaintiffs have attempted to join hundreds of defendants into the same suit.[39] Instead of joining defendants and facing severability,[40] the cases could remain bundled together if certified as a class.[41]

¶27 The second prong of the test requires common issues of law or fact to be present among the class. All class members would share at least one question of law, such as whether the "making available" theory[42] pursued by the RIAA was a copyright infringement, or whether an actual upload to another user on a peer-to-peer network was required to violate the distribution right. Some class members would share common affirmative defenses; some may be innocent of

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[38] FED. R. CIV. P. 23(a).
[39] *See, e.g.,* Sony Music Entm't, Inc. v. Does 1-40, 326 F.Supp.2d 556, 567 (S.D.N.Y. 2004).
[40] *See id*.
[41] *See, e.g.,* Armstead v. Pingree, 629 F.Supp. 273, 278–79 (M.D. Fla. 1986) (under the numerosity prong "[t]he primary focus is whether joinder of the proposed class members is impracticable.").
[42] 'Making available' was a theory of copyright infringement based on infringing the exclusive distribution right of the copyright owner. *See* Elektra v. Barker, (2008 WL 857527) (rejecting RIAA's "making available" theory); *see also* RIAA "Making Available" Theory Rejected, SLASHDOT, April 1, 2008, *available at* http://news.slashdot.org/article.pl?sid=08/04/01/1822246.

any infringement, some may have various fair-use defenses, and all could raise a common defense of copyright misuse.[43]

¶28 The third prong, requiring that the defenses be typical among class members, could be resolved with the use of defendant subclasses. Rule 23(c)(5) explicitly states that a class may be subdivided into separate subclasses, each treated as its own class. One subclass could be raised for each fair-use defense, and all members could join in a subclass raising copyright misuse, unconstitutionality of the statutory damages when applied to noncommercial users, and the legal viability of the 'making available' theory, among others.

¶29 The forth prong, adequacy of representation, would probably require each subclass to have separate representation; thus ensuring that subclass counsel were not conflicted.[44] With separate subclass counsel, a class defense should easily satisfy this requirement.

¶30 Finally, a court should prefer certification of the defendant class because, without class status, dispersed defendants will prefer default judgments or adhesion settlements instead of protecting their legal rights.[45] Cases will still be manageable through redefining the class and subclasses.[46]

B. Why has a Class Defense not been Employed?

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[43] *See, e.g.,* 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 'may appropriately withhold their aid where the 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))).

[44] *See* 5 J. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.25(5)(e), at 23–149 (3d ed. 1998) (plaintiff subclass attorney may not serve as class counsel for all subclasses).

[45] *See* Section III, *supra*.

[46] Bryant Garth, *Conflict and Dissent in Class Actions: A Suggested Prospective*, 77 NW. U. L. REV. 492, 527 (1982) ("Courts should prefer certification . . . when an accountable legal rights entity represents the class, the class is too diffuse to enforce its rights by any other means, or the court can manage dissent through such mechanisms as subclassing, redefining the class, permitting the intervention, and structuring the remedy.").

¶31 Two major stumbling blocks to the class defense have been identified: due process concerns for absentee defendants, and incentives for class attorneys.[47]

1. Due Process Concerns for Absentee Defendants.

¶32 The landmark Supreme Court decision in *Hansberry v. Lee* has informed our class action jurisprudence for almost seventy years.[48] The Court outlined the general principal that a party not properly before the adjudicative body is not bound by a judgment from that body.[49] However, the Court recognized an exception to the rule in a class action where the absentee members had their interest adequately represented by the class.[50] The Court, recognizing that aggregation was an accepted part of a court's equity powers, stated that the Fifth and Fourteenth Amendments would only be offended "in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are bound by it."[51] Thus, the absence of a class member, who cannot voice an opinion in court, is not the relevant inquiry. Under *Hansberry*, the inquiry is whether the processes employed fairly protect the interests of the absent party.[52] Expanding on *Hansberry*, the Supreme Court later stated that, for a money judgment to bind absentees, the process must include notice, an opportunity to be heard, the right to opt out, and adequate representation.[53] The process must be "so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue."[54] The class defendants do not have to be present. However, they must be afforded the

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[47] *See* Hamdani & Klement, *supra* note 25, at 710.
[48] *See* William Katt, *Res Judicata and Rule 19*, 103 NW. U. L. REV. 401, 423–24 (2009).
[49] Hansberry v. Lee, 311 U.S. 32, 40 (1940) ("It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.").
[50] *Id*. at 43.
[51] *Id*. at 42.
[52] *See, e.g.*, Richards v. Jefferson County, Ala., 517 U.S. 793, 800-02 (1996).
[53] Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 812 (1985).
[54] *Hansberry*, 311 U.S. at 43.

opportunity to be present, and ensured that if they remain absent, their interests will be adequately represented.

¶33 The opt-out mechanism, required by *Phillips Petroleum*, mollifies due process concerns in plaintiff class actions, but would need to be slightly adjusted for the class defense. An opt-out process similar to a plaintiff class action would unreasonably burden defendants by requiring them to disclose their identities. This positive act would identify them to the plaintiff and invite a personal lawsuit. However, confidential opt-out lists would prevent the disclosure of members who wish to remain anonymous.[55] Opt-outs could be filed and remain under seal.

¶34 Due process would also require notice, reasonably tailored, be given to current and potential defendants. [56] Since future defendants lack any incentive to step forward and acknowledge that they may have illegally infringed a copyright, overlapping layers of directed notice and public notice would be preferred. For example, notice could be given, through email, to all registered members of YouTube, MySpace, or all Internet users at a particular university. After notice, reasonably tailored to reach the defendant class is delivered, a court could proceed to accept confidential opt-outs under seal, provide the right to be heard to those seeking it, and then proceed to judgment.

¶35 Still, the stakes for losing a lawsuit are qualitatively different for plaintiffs than defendants. A class plaintiff is losing a hypothetical benefit, which, without the class action, would never have inured to them. The class defendant, however, may suffer being bound to a monetary judgment without knowledge of, much less participation in, the litigation process. While there is a logical economic argument that the potential gain to a class plaintiff is little different than a potential loss to a class defendant,[57] many judges may be uncomfortable entering a judgment that would require absent parties to pay substantial out-of-pocket expenses as soon as the plaintiff identifies them.

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[55] *See* Hamdani & Klement, *supra* note 25, at 725.
[56] *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).
[57] *See* Hamdani & Klement, *supra* note 25, at 719.

¶36 The qualitative difference in a hypothetical benefit and an unexpected monetary judgment may seem, alone, to be an insurmountable obstacle to the class defense. However, at least as early as 1853, the Supreme Court authorized the division of a common church pension, and stated it was "well established" that a bill in equity could be maintained against absentee defendants, so long as they were represented.[58] The Court later reaffirmed this principle; that the equity powers extend to bind the property of absent defendants.[59] While the reduction of funds in a pension is not the same as a judgment seeking payment, *Swormstedt* and *Brusselback* infer that plaintiffs can receive funds from absent defendants. Indeed, this was a not-uncommon power exercised under the Federal Equity Rules.

2. Compensating class counsel

¶37 Another stumbling block for the class defense is that a successful defense, in a suit for money damages, results in no money changing hands at all. Thus, class attorneys would not be able to work on a contingency fee basis as plaintiffs' class counsel often do. One option would be to create a one-sided fee shifting rule. Prevailing defendants would be entitled to the award of attorneys' fees, but not prevailing plaintiffs. Such a measure, however, would have to be created legislatively or judicially imposed.[60] Conveniently, many federal statutes, including the Copyright Act, already contain fee-shifting provisions.[61]

V. THE NEXT STEP: PUTTING THE CLASS DEFENSE INTO PRACTICE

¶38 The application of Rule 13 Counterclaims and Rule 24(c)(5) subclasses to the class defense makes the device

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[58] *See* Smith v. Swormstedt, 57 U.S. 288, 300-304 (1853).

[59] *See* Christopher v. Brusselback, 302 U.S. 500, 505 (1938) ("The omission from [Equity] Rule 48 . . . of the phrase '. . . the decree shall be without prejudice to the rights and claims of all absent parties,' preserved unimpaired the jurisdiction of federal courts of equity in a class suit to render a decree binding upon absent defendants affecting their interest in property within the jurisdiction of the court.").

[60] *See* Hamdani & Klement, *supra* note 25, at 714-17.

[61] *See, e.g.*, 17 U.S.C. § 505 (2006).

more palatable. A counterclaim effectively puts the defendant into the shoes, or the posture, of a plaintiff.[62] Counterclaims seeking declaratory judgments would also alleviate many of the problems raised as potential hurdles to the class defense.

¶39 RIAA end-user litigation, as well as many other potential end-user litigation situations, is based on the Copyright Act. Section 101 of the Copyright Act, codified at 17 U.S.C. § 505, provides that the prevailing party in copyright litigation may be awarded attorney's fees, as well as costs. Compared to many fee-shifting statutes, § 505 treats both plaintiffs and defendants equally and allows for awards in either direction; it does not require a showing of frivolousness for an award to a prevailing defendant.[63] Thus, concerns about class compensation are mollified, at least to the extent that non-liable copyright defendants are concerned. Defendants would not need to show that they did not infringe, but rather that they were not liable because a valid affirmative defense was available.

¶40 Counterclaims also resolve some of the due process issues raised. Since only a declaratory judgment would sometimes be sought, ascertaining the absolute size of each defendant subclass would not be required.[64] Instead of binding the entire defendant class to a settlement or judgment, the use of counterclaims to launch declaratory judgments against the common plaintiff would reverse the procedural posture, allowing defendants to opt-in to a counterclaim instead of requiring them to opt-out of a class defense. Subclass affirmative defenses could be raised based on specific factual situations of lead defendants, with any future

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[62] *See, e.g.*, *In re* Dato, 99 F.2d 703, 705 (7th Cir. 1938) ("'in legal effect, the defendant becomes plaintiff, and the plaintiff becomes defendant.'" (quoting Stewart v. Gorham, 122 Iowa 669, 676 (1904))).

[63] *See, e.g.*, Riviera Distribs., Inc. v. Jones, 2008 WL 441762 (7th Cir. 2008). The Seventh Circuit has also held that the prevailing party is presumptively entitled to attorney's fees. Woodhaven Homes & Realty, Inc. v. Hotz, 396 F.3d 822, 824 (7th Cir. 2005).

[64] *See, e.g.*, Doe v. Charleston Area Med. Ctr., 529 F.2d 638, 645 (4th Cir. 1975) (stating that speculative or conclusory representations as to the size of a class may suffice when money damages are not sought).

class members who have the same facts then being able to resolve their cases based on these prior judgments.[65] However, certain defenses, such as copyright misuse, are only affirmative defenses and could not be the basis for affirmative relief.[66] These could not be counterclaims even if styled as a declaratory judgment.

CONCLUSION

¶41 On February 28, 2007, the RIAA began a new end-user strategy. Instead of filing John Doe complaints, hundreds of "pre-litigation" letters were distributed each month to the physical address corresponding with the IP addresses of accused infringers.[67] The settlement terms offered are consistent with those offered during the John Doe litigation: a form settlement for a non-negotiable amount, typically around $3,000.[68] With this method, the RIAA saves the cost of filing complaints, avoids oversight of federal judges, and achieves nearly the same result. In the first year, the RIAA sent more than 5,400 letters and allegedly collected millions of dollars in settlement monies, outside the federal court system.[69] Recipients of these letters could, of course, forgo settlement and choose to litigate. However, many of them had negative expected value suits, and would thus choose to settle outside the court system even if they had a valid defense.

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[65] Defendant class counsel would administer this system, and be able to collect administration fees from the RIAA plaintiffs each time the plaintiff brought a case which was based on similar facts to a situation already adjudged to be protected by an affirmative defense.

[66] Maverick Recording Co. v. Chowdhury, No. CV-07-640(DGT), 2008 WL 3884350, at *4 (E.D.N.Y. Aug. 19, 2008) ("[C]opyright misuse is not a basis for affirmative relief.").

[67] Eliot Van Buskirk, *A Poison Pen from the RIAA*, WIRED, Feb. 28, 2007, *available at* http://www.wired.com/politics/onlinerights/news/2007/02/72834; Thomas Mennecke, *RIAA Announces New Campus Lawsuit Strategy*, SLYCK, Feb. 28, 2007, http://www.slyck.com/story1422.html.

[68] Ken Fisher, *Students largely ignore RIAA instant settlement offers*, ARS TECHNICA, March 26, 2007, http://arstechnica.com/tech-policy/news/2007/03/students-largely-ignore-riaa-instant-settlement-offers.ars.

[69] *RIAA v. The People: Five Years Later*, Whitepaper, Electronic Frontier Foundation, http://www.eff.org/wp/riaa-v-people-years-later#footnote75_wr833h5.

¶42 Finally, at the end of 2008, the RIAA announced it would not bring any new end-user cases, although the cases currently filed will continue forward.[70] Whether this marks the end of RIAA litigation, similar litigation patterns will likely continue in the future with intellectual property proprietors suing masses of dispersed defendants, and many valid claims will be settled on unjust terms unless defendants are permitted an aggregation device such as a class defense.

[70] Thomas Mennecke, *RIAA Drops Lawsuit Campaign – Mostly*, SLYCK, December 19, 2008, *available at* http://www.slyck.com/story1812_RIAA_Drops_Lawsuit_Campaign_Mostly.