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The strong-arm of the law

Adult video companies use the legal system to bully payments out of computer owners, but the days of easy money may be ending

By: Sharon McCloskey July 27, 2012

Just a little under a year ago, Patrick Collins Inc., a California-based film company, sued 44 people for copyright infringement in federal court in Raleigh, accusing each of illegally downloading its movie, "Cuties 2." The defendants, whose identities were unknown, all were listed as "John Doe."

Five months later, without serving a single summons, the company dismissed the case against 42 of the defendants, some of whom presumably agreed to pay a settlement. At this point, only one defendant remains: a grandmother in her 60s who hasn't a clue about downloading files on her computer.

"My client doesn't want to pay anything for something she didn't do," said her attorney Michael A. Kornbluth of Durham. "She'll dig in."

The Raleigh case is just one of many cookie-cutter actions against thousands of John Does across the country. Companies like Patrick Collins Inc., K-Beech Inc., Malibu Media and others, claiming to own the copyrights to movies like "Gang Bang Virgins" or "Cuties 2," file infringement lawsuits in federal court against people who at the time are known only by the Internet protocol addresses for computers allegedly used to pirate the movies.

The companies accuse the Does of downloading the videos through BitTorrent, a widely used file-sharing system. The companies subpoena Internet service providers to get the names and addresses associated with the IP addresses, and then send out demand letters inviting the Does to settle for a few thousand dollars — or defend their predilection for porn in court. Embarrassed, most pay rather than fight, even if they're innocent.

Critics say the porn purveyors make more money from defendants than they'd ever make on their movies. Attorneys believe the companies are gaming the system. One federal judge called the scheme a "shakedown," while another referred to it as "extortion."

But that hasn't stopped the porn plaintiffs. They've fashioned a slick litigation model that preys on people's fear of embarrassment and pushes the limits of the judicial process.

"I am just appalled at how these people have used the court system as part of a business model to shake others down," said attorney Kenneth J. Henry of Louisville, Ky., who has filed a class action complaint against the five companies who are the principal plaintiffs in many of the infringement actions. "It's beyond believability, and yet it's happening to so many people."

But Miami attorney Keith Lipscomb, who has represented several adult film companies in infringement actions, says his clients are just acting more quickly than larger studios in combating a piracy problem that costs the entire film industry hundreds of millions of dollars a year.

Other mainstream media companies have sued to stop BitTorrent infringement, Lipscomb said. Among them is Voltage Pictures, the producer of "The Hurt Locker," which according to media reports sued close to 50,000 people in 2011 for alleged piracy of the film. The court dismissed that case later in the year after the Internet service providers delayed responding to subpoenas, forcing Voltage to ask for one too many extensions of time.

John Wiley and Sons, the publisher of the "For Dummies" books, likewise has filed about a dozen cases against hundreds of defendants in New York.

"But the adult entertainment industry jumped into this first because its primary channel of distribution is the Internet," Lipscomb said. "Others have brick-and-mortar outlets. Internet infringement has affected this industry more because of the nature of the content that it is and how it is distributed. It's hurting them more, on a measurable basis."

An IP address is not a person

For a time, courts accepted the companies' claims that IP addresses would lead to the downloaders and routinely

granted subpoena requests. But as the la t the underlying technology and caught wind of some questionable liti sily.

In a May decision affecting several cases pending in the Eastern District of New York, U.S. Magistrate Judge Gary R. Brown found that an IP address is simply that – an address, not a person. Brown noted that the advent of home networks and wireless connectivity made tracking an IP address to a specific individual problematic, and cited an estimate by counsel for one company that at least 30 percent of the time the name linked to the IP address is not the actual downloader.

"It is no more likely that the subscriber to an IP address carried out a particular computer function … than to say an individual who pays the telephone bill made a specific telephone call," Brown wrote.

And in late June, U.S. District Judge Harold Baker likewise denied a subpoena request in a case filed in the Central District of Illinois by Malibu Media. "The infringer might be someone in the subscriber's household, a visitor with a laptop or iPhone, a neighbor, or someone parked on the street at any given moment," Baker wrote.

But Lipscomb says the film companies meet their burden by identifying the IP address and then tracking down the subscriber; it is then up to that subscriber to come forward and identify the downloader.

"For example, when you lend out your car to someone, and that car runs a red light, gets into an accident, and speeds away, there's a camera at that light that takes a picture of that car," he said. "The government then sends you as the registered owner of that car a ticket. You can say 'No, I lent out my car.' But that's a defense, and you have to come forward."

Not your grandmother's file-sharing

Because BitTorrent enables mass downloading through "swarms" of computers, the plaintiffs have responded with mass lawsuits – sometimes naming thousands of John Does in one action. In March 2011, for instance, Los Angeles-based film company Camelot Distribution Group sued 5,865 Does for the alleged downloading of its film "Nude Nuns With Big Guns." That tactic has made the litigation cheap, since the plaintiffs only had to pay one filing fee; and made it fast, since many defendants settled. But the courts are catching on to that as well.

In the New York cases, Judge Brown found that because the companies had insufficient evidence that all of the alleged downloaders participated in the same swarm, they could not join them in the same suit. Rather, they would have to sue each Doe separately.

And in late June, in a case filed by Malibu Media in the Central District of California, U.S. District Judge Otis D. Wright II was more blunt: "The federal courts are not cogs in a plaintiff's copyright-enforcement business model. The Court will not idly watch what is essentially an extortion scheme for a case that plaintiff has no intention of bringing to trial. By requiring Malibu to file separate lawsuits for each of the Doe defendants, Malibu will have to expend additional resources to obtain a nuisance-value settlement – making this type of litigation less profitable. If Malibu desires to vindicate its copyrights, it must do so the old-fashioned way and earn it."

Wright also raised, but didn't rule on, another issue which may pose problems in any action that actually gets to the merits: whether someone can be liable for infringement if they've only downloaded a single piece of the movie, and not the entire work.

Liability may also be challenged given the fact that downloaders are often surfing on someone else's network, making it tough to establish contributory infringement. "I don't see how someone could be held contributorily," Ken Henry said. "If that were the case, the federal court house could be found liable if someone just sat in the lobby and downloaded this stuff. Or a hotel, or Starbucks."

Plaintiffs band togetherIn Florida, several plaintiff companies have banded together to take advantage of the state's bill of discovery process, which allows them to file suit just to obtain names and other information associated with IP addresses from around the country. They then use that information to coerce settlements, even though no underlying infringement lawsuit has yet been filed.

That's the allegation Kentucky resident Jennifer Barker makes in a civil racketeering class action complaint Henry filed in federal court there in early July. According to Barker, a woman called her in late May, said she was associated with a law firm and was calling to settle a lawsuit that had been filed against Barker. The woman told her that she had been accused of illegally downloading several pornographic movies; that a case was pending in Dade County; and that she could settle then for a few thousand dollars or defend herself and risk both embarrassment and a judgment for several hundred thousands of dollars. In fact, no lawsuit for damages had been filed against Barker.

The class action complaint names Patrick Collins Inc., Malibu Media LLC, Raw Films Ltd., K-Beech Inc. and Third

Degree Films as defendants, and seeks damages and punitive damages on behalf of those individuals who have been subjected to defendants' "unlawful extortion attempts" – estimated at more than 200,000 people.

Henry said he anticipates filing an amended complaint by the end of July to name an additional lead plaintiff and add additional counts for fraud, on the grounds that the copyrights are invalid, and for unfair debt collection practices.

But Lipscomb, who represents the defendants in the class action, is confident that his client has a solid case against Barker and that the companies together have acted well within the bounds of the law. He added that his client tracked Barker's computer for four months as it was used to steal 12 different movies.

"I am going to serve a Rule 11 motion [for sanctions] because the complaint is entirely frivolous, and not one count in his complaint is sustainable," he said. "He did not even plead one iota of legally cognizable damages."

The profit motive

Anthony Biller of Coats and Bennett in Cary has represented people caught up in similar lawsuits filed in North Carolina. He says that if the porn studios were serious about protecting their movies, they'd go after the sites that are hosting them.

"If you Google the name of one of these movies, you'll find thousands of hits," he said. "How did they get out there so pervasively? The porn studios have to be making more money off these illegal downloads than they are from selling the movies. At least the recording industry went after the big file-sharing sites and shut them down. That's not happening here."

According to Lipscomb, the adult film companies have looked into going after file-sharing sites like piratebay.org or extratorrent.com. But most of them are overseas, he said, so jurisdiction is an issue. Also, although studies have shown that 99 percent of what's on BitTorrent is infringing material, the sites might have a legitimate, non-infringing use defense, he added. "And these sites are a dime a dozen. If you knock one down, another one will pop right up."

But Biller is also suspicious of the timing. In one case, the company suing his client filed its copyright application and then alleged that infringement began two days later.

"It's the same thing in these cases. Someone comes in, there's an allegation of a movie [infringement], there's dozens of John Does sued, you go and research that movie and it's everywhere on the Internet," he said. "It appears to be on thousand of websites, but they're not going after the hosts, and in this case it appears the infringement starts days after they filed the copyright application. Sure doesn't look right."

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