Adult film industry stymied in 'troll' lawsuits

Legal hurdles begin to thwart easy wins in piracy cases against illegal downloaders

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An easy way to pocket money from people who potentially illegally downloaded a pornographic film is getting a bit harder, at least in the Northern District of California and perhaps statewide.

Over the past three years, companies in the adult film industry have filed hundreds of lawsuits that look similar — a battle of trolls versus pirates.

The film companies, known to their opponents as trolls, find the Internet Protocol address of pirates, or people who illegally downloaded one of their copyrighted films through a file sharing program called BitTorrent. They have filed complaints against the unnamed people associated with the IP addresses, with "John Doe" defendants numbering from one to sometimes thousands.

The film companies immediately request early discovery to subpoena the Internet provider to find out the names and addresses of the accused. When the names are recovered, the plaintiff asks the defendant for a settlement, often between $1,000 and $4,000.

But the adult film companies are starting to come up against major legal barriers in federal courts across the country, and the Northern District of California was the site of some of the most unfavorable decisions in the past year.

Running up against issues of improper joinder, personal jurisdiction and the disclosure of identity of Internet users, no large-scale lawsuit appears to have been filed in the district this year, with companies either heading elsewhere or bringing complaints against one John Doe at a time.

Los Angeles lawyer Morgan E. Pietz, who currently represents about 20 John Doe defendants in different suits, said he believes the tide is turning.

"More and more, judges are paying closer attention to plaintiffs' unopposed early discovery requests, refusing to issue subpoenas in cases where multiple Does are impermissibly joined, and generally seeking to curb some of the abuses that have been noted by various courts across the country," Pietz said.

Nicholas Ranallo, an independent attorney based in Monterey who specializes in these cases, said U.S. Magistrate Judge Paul S. Grewal ruled that joinder was inappropriate and severed all the John Does the first one. *Boy Racer Inc. v. Does 1-52*, CV 11-2329 (N.D. Cal., filed May 11, 2011).

"He wrote the first really good order that I'm familiar with that lays out what's going on here," Ranallo said.

In another decision, U.S. District Judge Lucy H. Koh noticed that none of the more than 100 defendants were actually served in the time period allotted and dismissed the case. *AF Holdings LLC v. Does 1-135*, CV 11-03336 (N.D. Cal., filed July 7, 2011).

Attorneys for the plaintiffs in these cases generally claim all the defendants can be joined because the nature of the downloading software is such that multiple people have to download pieces of the file for it to work. But usually those defendants are not near each other and do not know each other.

Pietz and Ranallo say most settle, guilty or not.

"There's tremendous incentive to want to settle even if you didn't do it," Pietz said. "I pay a few thousand dollars to make this go away forever, or face the uncertainty and expense of litigation and the threat of having my name tied to a lawsuit accusing me of illegally downloading pornography."

Tyler Ochoa, professor at Santa Clara School of Law, said suing individuals is not economical.

"In order to make it pay they want to sue a lot of people at once," Ochoa said.

> 'In order to make it pay [the adult film companies] want to sue a lot of people at once.'
>
> — *Tyler Ochoa*

John Steele, Mill Valley-based of counsel for Prenda Law, one of the most prominent law firms representing the adult film industry, said his clients lose most of their profit because of illegal downloading. His most recent hurdle in these lawsuits is the refusal of certain Internet providers, like Comcast and AT&T, to respond to subpoenas in some cases.

Comcast's attorneys won its argument this summer in the Northern District of Illinois that the "subpoenas are overbroad and exceed bounds of fair discovery" and that plaintiffs are only interested in a shakedown. *AF Holdings LLC vs. Comcast Cable Communications*, 12-3516 (E.D. Ill., filed June 1, 2012).

Steele claims the Internet companies are making a business decision because copyright infringers make them money.

Steele, who is involved in lawsuits across the country for the adult film industry, said he has orders come down on his clients' side multiple times a day.

"I think we've decreased piracy," he said.

But not all courts agree that's what Prenda Law and other firms are doing. And harsh words in a ruling in the Central District of California could make that district another unfriendly place for plaintiffs in California.

"The federal courts are not cogs in a plaintiff's copyright-enforcement business model," wrote U.S. District Judge Otis D. Wright II. "The court will not idly watch what is essentially an extortion scheme, for a case that plaintiff has no intention of bringing to trial." *Malibu Media LLC v. John Does 1-10*, CV 12-3623 (C.D. Cal. filed June 27, 2012).

Pietz is hoping to push these lawsuits out of California for good. He said Malibu Media, whom he is battling in court, has filed nearly 300 cases nationwide, with the Central District of California being one of its most popular venues. But Pietz reported of 52 lawsuits filed by Malibu in August, none were in California.

"I've tried to help circle the wagons and provide a mechanism for Does sued in California to test the case and represent their rights," he said.

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