

HOW DO YOU KNOW IT WAS ME? A CASE COMMENT
ON *COBBLER NEVADA, LLC V. GONZALES*

David T. Frankel[†]

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[†] Benjamin N. Cardozo School of Law, J.D. 2021; Rutgers Business School, MBA 2015; Certified Public Accountant in New York State. I am extremely thankful to Professor Charles Yablon for his feedback on this Comment and to the editors of the *Cardozo Law Review* for their edits. I thank my wife, Leah Frankel, the world’s best litigator, for her constant encouragement, overwhelming support, and critical legal analysis. I thank my daughter who cannot yet read but has kept me smiling since the day she was born. I thank my parents, Stuart and Hadassah Weinberger, for mentoring me and supporting all my professional endeavors. I thank my in-laws, Robert and Annette Goodman, for their continued support throughout the process of writing this Comment.

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INTRODUCTION

A company discovers that a user downloaded its copyrighted movie using BitTorrent.¹ The company cannot identify the user but, luckily, it does have the user's Internet Protocol address (IPA).² Seeking to defend its copyright, the company sues for copyright infringement, listing a John Doe and his IPA as the defendant.³ The company then moves for expedited discovery to subpoena the user's internet service provider (ISP) to identify the internet subscriber.⁴ Armed with the user's identity, the company offers to settle. Some defendants agree to settle, perhaps because they were caught red-handed and are being offered an olive branch, or perhaps because they are innocent but fear protracted litigation.⁵

If the defendant chooses not to settle, the company amends its complaint to name the defendant.⁶ The defendant files a motion to

¹ See *infra* Section I.A for a discussion of the BitTorrent protocol.

² An IPA is "a unique number used by a computer to access the internet. In order to interact with other computers attached to the internet, a computer must be assigned an internet protocol or [IPA]. An [IPA] is a string of up to twelve numbers separated by dots . . ." *Strike 3 Holdings, LLC v. Doe*, Civil No. 18-2674 (JHR/JS), 2019 U.S. Dist. LEXIS 184513, at *7-8 (D.N.J. Oct. 24, 2019), *rev'd on other grounds*, No. 1:18-cv-2674-NLH-JS, 2020 U.S. Dist. LEXIS 114598 (D.N.J. June 30, 2020). An IPA is specific to a network connection and can be used to locate the network on the internet at a particular time. See *Patrick Collins, Inc. v. Doe*, 288 F.R.D. 233, 235 (E.D.N.Y. 2012) (citing *Media Prods., Inc. v. Doe*, No. 12 Civ. 3719(HB), 2012 U.S. Dist. LEXIS 125366, at *1-2 (S.D.N.Y. Sept. 4, 2012).

³ See, e.g., *infra* note 67 and accompanying text.

⁴ An ISP is an Internet Service Provider. See *infra* notes 67-73 and accompanying text for a discussion on ISP subpoenas and expedited discovery.

⁵ See *infra* notes 80-90 and accompanying text for a discussion on BitTorrent settlements.

⁶ See *infra* note 91 and accompanying text.

dismiss, arguing that the company did not state a plausible claim for copyright infringement against him. How can the company know that *he* was the downloader? All the company knows is that the defendant's IPA was associated with infringement. Anyone using the internet connection could be responsible, as anyone using the connection could have downloaded the movie, not just the internet subscriber.⁷

This is typical of BitTorrent litigation and illustrates the unique procedural problems raised by such lawsuits. At the pleadings stage of a lawsuit, a plaintiff is not entitled to discovery and, to survive a motion to dismiss, the complaint must allege facts that state a plausible claim for relief from the defendant.⁸ Does a complaint that only alleges that the defendant is the subscriber of an IPA associated with copyright infringement satisfy this standard?

In 2018, the Ninth Circuit Court of Appeals decided *Cobbler Nevada, LLC v. Gonzales*,⁹ a seminal case in the world of BitTorrent litigation.¹⁰ *Cobbler* answered this question in the negative, creating a rule that heightens pleading requirements for BitTorrent plaintiffs in the Ninth Circuit.¹¹ This rule has been followed by district courts throughout the country,¹² which, before *Cobbler*, were split on this question.¹³

⁷ See *infra* notes 92, 110–21 and accompanying text for an explanation of the BitTorrent plausibility pleading argument.

⁸ See *infra* Section I.D for an explanation of the plausibility pleading standard articulated by the Supreme Court.

⁹ *Cobbler Nev., LLC v. Gonzales*, 901 F.3d 1142 (9th Cir. 2018).

¹⁰ *Cobbler* is a seminal case in the world of BitTorrent litigation because it created a broad rule heightening the pleading standard in BitTorrent copyright infringement cases. *Id.* at 1144. See *infra* Part I for an extensive discussion of BitTorrent technology and the copyright infringement litigation surrounding BitTorrent. See *infra* Section II.C for *Cobbler's* holding.

¹¹ *Cobbler*, 901 F.3d at 1144 (“[W]e consider whether a bare allegation that a defendant is the registered subscriber of an [IPA] associated with infringing activity is sufficient to state a claim for direct or contributory infringement. We conclude that it is not.”).

¹² Some district courts, both in the Ninth Circuit and outside it, have followed *Cobbler's* rule. See, e.g., *Malibu Media v. Park*, No. 17-12107 (JMV) (MF), 2019 U.S. Dist. LEXIS 113434 (D.N.J. July 9, 2019); *Venice PI, LLC v. Huseby*, No. C17-1160 TSZ, 2019 U.S. Dist. LEXIS 62856 (W.D. Wash. Apr. 11, 2019).

¹³ See *infra* Section I.E. This is not to say that courts are not still split on the issue, as not all district courts have accepted *Cobbler*. See, e.g., *Malibu Media, LLC v. Palella*, No. 18 C 3041, 2019 U.S. Dist. LEXIS 62974, at *5–6 (N.D. Ill. Apr. 12, 2019).

BitTorrent lawsuits may be used by companies to protect their copyrights, but they can also be used as a predatory method to monetize infringement and force frightened defendants into settlements, irrespective of whether the defendants actually infringed.¹⁴ *Cobbler* helped remedy this problem by providing extra protection for defendants—a complaint that merely alleges a connection between the subscriber of an IPA and copyright infringement associated with his IPA cannot survive a motion to dismiss.¹⁵ In so doing, *Cobbler* also created a significant obstacle for plaintiffs, requiring them to allege additional facts connecting the defendant to an instance of infringement.¹⁶ If these additional facts are pleaded, a complaint may survive a motion to dismiss, allowing plaintiffs to vindicate their rights against infringers.¹⁷

This Comment argues that the Ninth Circuit's creation of a heightened pleading requirement in BitTorrent lawsuits was correct and based on an accurate interpretation of the plausibility pleading standard, and that *Cobbler's* holding should be adopted by district courts throughout the United States.¹⁸ In reaching this conclusion, this Comment will explore the intersection between the plausibility pleading standard, BitTorrent technology, and copyright law.¹⁹

Part I of this Comment provides a background on BitTorrent technology, how BitTorrent is used for copyright infringement, BitTorrent lawsuits, and how the plausibility pleading standard was applied in BitTorrent cases before *Cobbler*.²⁰ Part II proceeds by

¹⁴ This Comment does not take the position that it is wrong to enforce one's copyright against BitTorrent infringers. However, the methods used to identify infringers may be indiscriminate, causing non-infringers to be targeted as well. See *infra* notes 80–90 and accompanying text for a discussion on BitTorrent lawsuit monetization.

¹⁵ See *Malibu Media, LLC v. Doe*, No. 18 C 450, 2018 U.S. Dist. LEXIS 207655, at *6–8 (N.D. Ill. Dec. 10, 2018).

¹⁶ See *Malibu Media, LLC v. Doe*, No. 18 C 450, 2019 U.S. Dist. LEXIS 94433 (N.D. Ill. June 5, 2019). This information may be publicly available and accessible without formal discovery. *Id.* at *1–3. See *infra* notes 197–200 and accompanying text for a discussion on why using IPAs is an unreliable method for successfully identifying copyright infringers.

¹⁷ See generally *Malibu Media*, 2019 U.S. Dist. LEXIS 94433.

¹⁸ See *infra* Section I.D for an explanation of the plausibility pleading standard.

¹⁹ See *infra* Part III.

²⁰ See *infra* Part I.

reviewing the facts, procedural history, and holding of *Cobbler*.²¹ Part III argues that the Ninth Circuit’s creation of a rule that heightens pleading requirements in BitTorrent lawsuits was correct and based on an accurate interpretation of the plausibility pleading standard.²² Part IV examines how *Cobbler* has affected subsequent BitTorrent cases, both in the contexts of motions to dismiss and expedited discovery motions, and how *Cobbler* should be applied in future BitTorrent lawsuits.²³

I. BACKGROUND

A. *A Bit(Torrent) of History and an Explanation of BitTorrent Protocol*

When an internet user downloads a file from a website, the user typically uses the “traditional client-server downloading” method.²⁴ With the traditional method, a user clicks on a link to download a file, and the client tells the server to transfer a copy of the file to the user’s computer.²⁵ The traditional method is affected by variables that may slow download speeds, such as the numbers of users accessing the server and computers attempting to download the file.²⁶ Alternatively, a user may download a file using peer-to-peer (P2P) file sharing, where the user does not download the file from a server, but from other internet users using ordinary computers.²⁷

²¹ See *infra* Part II.

²² See *infra* Part III.

²³ See *infra* Part IV.

²⁴ Carmen Carmack, *How BitTorrent Works*, HOWSTUFFWORKS 1 (Mar. 26, 2005), <https://computer.howstuffworks.com/bittorrent.htm> [<https://perma.cc/ZC8K-ZKVV>]. This Comment will refer to this method as the “traditional method.”

²⁵ *Id.*; see JAMES GRIMMELMANN, INTERNET LAW: CASES AND PROBLEMS 30–31 (2019). “A server is a computer that has a particular resource or that does a particular job,” such as storing a webpage. *Id.* A “client is a computer that connects to a server to get information or have the server do something for it.” *Id.*

²⁶ See Carmack, *supra* note 24.

²⁷ See *id.* at 2. For P2P sharing, one uses a program to find other computers that have the desired file, and, because these other computers are ordinary users, as opposed to servers, they are called peers. *Id.* A user runs a file-sharing program and sends out a request for the desired

BitTorrent is a decentralized P2P technology designed for efficiently transferring large files.²⁸ When an internet user downloads a file using BitTorrent, the user downloads a “.torrent” file²⁹ from a website known as an “indexer” or “tracker.”³⁰ A .torrent file is opened with BitTorrent client software, which communicates with the tracker to find other computers that have the complete file or portions of the file.³¹ The desired file is not being downloaded from the tracker itself, but from other BitTorrent users.³² The tracker helps the BitTorrent client trade pieces of the file with other computers downloading the file.³³ Collectively, this group of computers is known as a “swarm.”³⁴ The BitTorrent client downloads portions of the desired file in small pieces and starts to upload those portions to other downloaders in the swarm.³⁵ Thus, everyone

file. *Id.* The software finds other computers running the file-sharing software, and, when it finds the desired file on another computer, “the download begins.” *Id.*

²⁸ See Jennifer L. Hunter, Note, *Shutting Down the Ex Parte Party: How to Keep BitTorrent Copyright Trolls from Abusing the Federal Court’s Discovery System*, 31 J. MARSHALL J. COMPUTER & INFO. L. 104, 107–08 (2014). An example of a P2P technology that is not BitTorrent is Gnutella. See Marshall Brain, *How Gnutella Works*, HOWSTUFFWORKS (July 23, 2002), <https://computer.howstuffworks.com/file-sharing.htm> [<https://perma.cc/LRB9-GCHY>].

²⁹ A .torrent file itself is not the desired file that the BitTorrent user is trying to download but is a list of instructions for the tracker that will be used to download the desired file. See Tim Fisher, *What Are Torrents & How Do They Work*, LIFEWIRE, <https://www.lifewire.com/how-torrent-downloading-works-2483513> (last updated June 22, 2020) [<https://perma.cc/JE4E-RW84>].

³⁰ See Yatri Trivedi, *BitTorrent for Beginners: How to Get Started Downloading Torrents*, HOW-TO GEEK, <https://www.howtogeek.com/howto/31846/bittorrent-for-beginners-how-get-started-downloading-torrents> (last updated Apr. 4, 2018, 10:35 PM) [<https://perma.cc/6QKM-BZKF>]. “A ‘tracker’ is a server that assists in directing peers, initiated downloads, and maintaining statistics.” *Id.* Users are likely to download a BitTorrent file using an “indexer,” which “is a site that compiles a list of torrents and descriptions” of .torrent files. *Id.* Most indexers have their own trackers, so indexers are also commonly referred to as trackers. *Id.* Computers that have the complete BitTorrent file are “seed computers,” and those with a portion of the file are “peers.” *Id.*

³¹ See *id.*

³² Chris Hoffman, *How Does BitTorrent Work?*, HOW-TO GEEK, <https://www.howtogeek.com/141257/htg-explains-how-does-bittorrent-work> (last updated Apr. 13, 2018, 9:45 PM) [<https://perma.cc/KT56-PSTT>].

³³ See GRIMMELMANN, *supra* note 25, at 36.

³⁴ See *id.*

³⁵ See Carmack, *supra* note 24; Hoffman, *supra* note 32.

downloading from the swarm is also uploading and distributing parts of the file to the swarm.³⁶

When all the pieces of the file are downloaded by the BitTorrent client, they are reassembled into a complete file, allowing the downloader to access the file.³⁷ The decentralized nature of the BitTorrent protocol can be advantageous for downloading large files because it avoids overloading a server, which can occur with the traditional method.³⁸ Furthermore, with BitTorrent, the more people who are downloading the file, the faster the download speeds.³⁹ Because BitTorrent allows for large files to be downloaded quickly, it can be a useful tool for downloading movies, music albums, video games, or computer software.⁴⁰ However, because these media files may be copyrighted works, users may infringe on others' copyrights when downloading and uploading these files, thus exposing themselves to potential copyright infringement suits.⁴¹

B. *Copyright Infringement Through BitTorrent*

The “Patent and Copyright Clause” of the United States Constitution gives Congress the power to secure for authors and

³⁶ See GRIMMELMANN, *supra* note 25, at 36.

³⁷ See *Tech Tip: Download Files More Quickly Using BitTorrent*, TECHREPUBLIC (July 28, 2004, 12:14 PM), <https://www.techrepublic.com/article/tech-tip-download-files-more-quickly-using-bittorrent> [<https://perma.cc/JHQ2-J9ZV>].

³⁸ See Trivedi, *supra* note 30 (“BitTorrent is one of the most commonly used protocols for transferring very large files because it doesn’t overload web servers that provide downloads—since everybody is both sending and receiving, it’s much more efficient than everybody downloading from a single server.”).

³⁹ See *Tech Tip: Download Files More Quickly Using BitTorrent*, *supra* note 37.

⁴⁰ See Jaliz Maldonado, *An Overview of the BitTorrent Lawsuits in 2018*, NAT’L L. REV. (Feb. 11, 2019), <https://www.natlawreview.com/article/overview-bittorrent-lawsuits-2018> [<https://perma.cc/8WY8-F43Z>]. Copyright infringement through BitTorrent is often known as “piracy.” See Sean B. Karunaratne, Note, *The Case Against Combating BitTorrent Piracy through Mass John Doe Copyright Infringement Lawsuits*, 111 MICH. L. REV. 283, 283–84 (2012). This Comment will occasionally use the word “pirate” to refer to a BitTorrent infringer.

⁴¹ See Trivedi, *supra* note 30. A plaintiff may allege that a defendant used BitTorrent to download and illegally distribute the plaintiff’s copyrighted work. See, e.g., *Voltage Pictures, LLC v. Doe*, 818 F. Supp. 2d 28, 31 (D.D.C. 2011). See *infra* Section I.B for a discussion of how copyright infringement is committed using BitTorrent.

inventors the exclusive right to their writings and discoveries.⁴² Congress exercised this power by passing the Copyright Act, giving copyright owners the exclusive right to reproduce and distribute their copyrighted works and authorize others to do so.⁴³ If a copyright is violated, the legal or beneficial owner of the copyright may sue the infringer in federal court.⁴⁴ In order to succeed in a copyright infringement claim, a copyright owner must establish (1) ownership of a valid copyright and (2) that the defendant violated the copyright owner's exclusive rights under the Copyright Act.⁴⁵ Courts may award a copyright owner statutory damages ranging from \$750 to \$150,000 for each infringed work.⁴⁶

When a BitTorrent user downloads a copyrighted work, they are copying the file on their computer and sharing the work with other BitTorrent users.⁴⁷ As a result, they are violating the copyright owner's

⁴² See U.S. CONST. art. I, § 8, cl. 8 ("To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]").

⁴³ See 17 U.S.C. § 106(1)–(3). The United States Copyright Office website "explains that "[t]he United States copyright law is contained in chapters 1 through 8 and 10 through 12 of Title 17 of the *United States Code*. The Copyright Act of 1976 . . . provides the basic framework for the current copyright law . . ." See U.S. COPYRIGHT OFF., COPYRIGHT LAW OF THE UNITED STATES vii (2016), <https://www.copyright.gov/title17/title17.pdf> [<https://perma.cc/WP8X-VG2Y>].

⁴⁴ See 17 U.S.C. § 501(a)–(b) ("Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright . . . [and t]he legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement . . ."). Federal courts have jurisdiction over copyright disputes. See 28 U.S.C. § 1331 (giving district courts original jurisdiction over "civil actions arising under the Constitution, laws, or treaties of the United States"); 28 U.S.C. § 1338(a) (giving district courts original jurisdiction over civil actions "arising under any Act of Congress relating to . . . copyrights and trademarks").

⁴⁵ *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004).

⁴⁶ 17 U.S.C. §§ 501(a)–(b), 504(c)(1)–(2); see John C. Heinbockel, *The Undiscovered Country: Fixing Copyright by Re-Thinking Pretrial Litigation*, 5 AM. U. INTELL. PROP. BRIEF 152, 173 (2014) ("Statutory damages are set at a range of \$750 to \$30,000 per infringed work, giving courts discretion in calculating damages. If the plaintiff can prove 'willful' infringement, those damages can go up to \$150,000."). The \$750 to \$150,000 range refers to statutory damages for copyright infringement. A "copyright owner is entitled to recover the *actual damages* suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages." 17 U.S.C. § 504(b) (emphasis added).

⁴⁷ See Carmack, *supra* note 24 (explaining that when one downloads a file, they are transferring a copy of the file); Trivedi, *supra* note 30 ("[A]s you download chunks of files, you

exclusive rights to reproduce and distribute their copyrighted works under the Copyright Act.⁴⁸ A copyright owner may choose to sue a BitTorrent user and, in the complaint, allege that the user downloaded and illegally distributed the plaintiff's copyrighted work.⁴⁹ In typical BitTorrent cases, the copyright owner asserts that the defendant participated in the BitTorrent swarm and, therefore, illegally copied and distributed the work.⁵⁰ In the first half of 2018, more than 3,300 cases were filed against BitTorrent users, and most of them were filed by two companies.⁵¹

BitTorrent is widely used for illegal file sharing, but can also be legitimately used to distribute free data to the public and confidential data to trusted sources.⁵² For example, Blizzard Entertainment, the company behind the popular video games *World of Warcraft* and *Overwatch*, has used its own BitTorrent client to distribute its games to purchasers.⁵³

also upload them to other people who have different chunks of the file, and because everybody's sharing with each other while downloading, it tends to zip along quickly.”).

⁴⁸ See 17 U.S.C. §§ 106(1)–(3), 501(a)–(b); see, e.g., *Cobbler Nev., LLC v. Gonzales*, No. 3:15-cv-00866-SB, 2016 U.S. Dist. LEXIS 75298, at *1 (D. Or. Mar. 18, 2016). In contrast to BitTorrent, a streaming service, such as Netflix, can distribute content to users through streaming because it acquires permission to stream from content providers, distributors, producers, and creators. See *How Does Netflix License TV Shows and Movies?*, NETFLIX, <https://help.netflix.com/en/node/4976> [<https://perma.cc/6N5B-W52F>].

⁴⁹ See, e.g., *Voltage Pictures, LLC v. Doe*, 818 F. Supp. 2d 28, 31 (D.D.C. 2011).

⁵⁰ Matthew Sag & Jake Haskell, *Defense Against the Dark Arts of Copyright Trolling*, 103 IOWA L. REV. 571, 581 (2018) (“In the typical case, the plaintiff asserts that it has evidence the defendant participated in something called a BitTorrent swarm, thereby illegally copying the plaintiff's copyrighted work.”); see Karunaratne, *supra* note 40, at 283–84 (“While BitTorrent itself is not illegal, many of its users unlawfully distribute copyrighted works.”).

⁵¹ See Ernesto Van der Sar, *US Online Piracy Lawsuits Hit a Record High Last Year*, TORRENTFREAK (Jan. 4, 2019), <https://torrentfreak.com/us-online-piracy-lawsuits-hit-a-record-high-last-year-190104> [<https://perma.cc/53FW-63BX>].

⁵² See Sag & Haskell, *supra* note 50, at 582; Chris Hoffman, *8 Legal Uses for BitTorrent: You'd Be Surprised*, MAKEUSEOF (Aug. 16, 2013), <http://www.makeuseof.com/tag/8-legal-uses-for-bittorrent-you-d-be-surprised> [<https://perma.cc/VY6P-RZFH>].

⁵³ See Nicole Carpenter, *Overwatch Reaches 35 Million Players*, DOT ESPORTS (Oct. 16, 2017, 9:06 AM) <https://dotesports.com/overwatch/news/35-million-players-overwatch-18064> [<https://perma.cc/P73J-ATNH>] (showing that *Overwatch* is a hugely popular video game); *Games*, BLIZZARD ENT., <https://www.blizzard.com/en-us/games> [<https://perma.cc/7KHW-A8H2>] (showing that Blizzard Entertainment is behind *World of Warcraft* and *Overwatch*); Hoffman, *supra* note 32 (explaining that Blizzard has used a BitTorrent client for its games); Samit Sarkar, *Blizzard Reaches 100M Lifetime World of Warcraft Accounts*, POLYGON (Jan. 28, 2014, 3:49 PM),

Ubuntu, a popular free computer operating system, can be downloaded through a .torrent file on its official website.⁵⁴ Facebook has used BitTorrent to distribute large amounts of data to different internal servers.⁵⁵ Although BitTorrent is often used for piracy,⁵⁶ it is useful for quickly distributing large files to many people without requiring the distributor to pay for a server.⁵⁷

C. *How a BitTorrent Lawsuit Begins: From Anonymous Number to Identifiable Defendant*

A copyright owner who wants to protect their intellectual property rights may choose to sue a BitTorrent user who downloaded their copyrighted work without permission.⁵⁸ To find such a user, a copyright owner monitors a BitTorrent swarm and documents the IPAs of the peers trading pieces of its work.⁵⁹ An IPA is a series of numbers specific to a network connection that is used to locate an individual connection on the internet.⁶⁰ An IPA may host several devices connected to the same

<https://www.polygon.com/2014/1/28/5354856/world-of-warcraft-100m-accounts-lifetime> [<https://perma.cc/653C-776A>] (showing that *World of Warcraft* is a popular video game).

⁵⁴ See *Alternative Downloads*, CANONICAL LTD., <https://ubuntu.com/download/alternative-downloads> [<https://perma.cc/U2ZK-YVL8>] (providing download links to .torrent files for Ubuntu); *The Story of Ubuntu*, CANONICAL LTD., <https://ubuntu.com/about> [<https://perma.cc/6B7D-7EGA>] (explaining that Ubuntu is popular and free).

⁵⁵ Ryan Paul, *Exclusive: A Behind-the-Scenes Look at Facebook Release Engineering*, ARS TECHNICA (Apr. 5, 2012, 11:30 AM), <https://arstechnica.com/information-technology/2012/04/exclusive-a-behind-the-scenes-look-at-facebook-release-engineering> [<https://perma.cc/AZ6S-UQNR>].

⁵⁶ See *supra* note 40 and accompanying text.

⁵⁷ See Hoffman, *supra* note 32.

⁵⁸ See, e.g., *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80 (E.D.N.Y. 2012).

⁵⁹ See Hunter, *supra* note 28, at 110–11 (explaining that a copyright owner may hire a BitTorrent monitoring firm to monitor BitTorrent swarms); *Tracked Downloading Torrents*, BITTORRENT VPN, <https://www.bittorrentvpn.com/exposed-downloading-torrents> (last updated Nov. 19, 2020) [<https://perma.cc/JSB7-QUJQ>] (explaining that IPAs are visible to those monitoring the swarm).

⁶⁰ See *Patrick Collins, Inc. v. Doe*, 288 F.R.D. 233, 235 (E.D.N.Y. 2012) (citing *Media Prods., Inc. v. Doe*, No. 12 Civ. 3719 (HB), 2012 WL 3866492, at *1 (S.D.N.Y. Sep. 4, 2012)); *Your IP Address Can Change Without Notice. Should You Be Concerned?*, WHAT IS MY IP ADDRESS,

network, so the IPA may be associated with multiple devices operated and owned by different people on the same network.⁶¹ This IPA is a public IPA, which is assigned to an internet connection by an ISP.⁶² In contrast, devices connected to the network are assigned private IPAs by an internet router and the private IPAs are not reachable from the internet.⁶³ Geolocation technology can be used to find the approximate physical location of an IPA, but not its exact location.⁶⁴ To avoid being found, a prudent pirate can use a virtual private network (VPN) to replace his IPA

<https://whatismyipaddress.com/dynamic-static> [<https://perma.cc/2G3R-J8WP>] (explaining that most IPAs are “dynamic,” which means they change, but some IPAs are “static,” which means they do not change).

⁶¹ See *Patrick Collins, Inc.*, 288 F.R.D. at 235 (“[A] single [IPA] may host one or more devices operated or owned by multiple users (for example, a computer or handheld tablet), each communicating on the same network, such as with a wireless router or a business intranet.” (quoting *Media Prods.*, 2012 WL 2866429, at *1)).

⁶² A public IPA is a single IPA assigned to a network by an ISP, which a router connected to the internet shares with the devices connected to the router. See Chris Hoffman, *How and Why All Devices in Your Home Share One IP Address*, HOW-TO GEEK, <https://www.howtogeek.com/148664/how-and-why-all-devices-in-your-home-share-one-ip-address> (last updated July 12, 2017, 12:05 PM) [<https://perma.cc/U4N3-GCRJ>]; Chris Hoffman, *How to Find Your Private and Public IP Addresses*, HOW-TO GEEK, <https://www.howtogeek.com/117371/how-to-find-your-computers-private-public-ip-addresses> (last updated July 3, 2017, 12:22 PM) [<https://perma.cc/XB6M-G249>]. When I write “IPA” in the context of identifying internet subscribers for BitTorrent lawsuits, I am referring to public IPAs that are assigned by ISPs.

⁶³ See Tim Fisher, *What Is a Private IP Address?*, LIFEWIRE, <https://www.lifewire.com/what-is-a-private-ip-address-2625970> (last updated June 12, 2020) [<https://perma.cc/2ZAY-83SA>] (explaining the nature of private IPAs and that “[s]ometimes a private IP address is also referred to as a local IP address”); Hoffman, *How and Why All Devices in Your Home Share One IP Address*, *supra* note 62 (“[L]ocal [IPAs] aren’t reachable from the Internet. In other words, your public [IPA] might be something like 23.24.35.63. Anyone on the Internet can try to connect to this address, and they’d reach your router. Your computer’s private [IPA] might be something like 192.168.1.100. When someone on the Internet tries to connect to this address, their computer will look for the address 192.168.1.100 on their local network.”).

⁶⁴ See, e.g., *Locate and Identify Website Visitors by IP Address*, IPSTACK, <https://ipstack.com> [<https://perma.cc/9XBQ-CSY9>]. Geolocation services are not 100% accurate, but they can be used to place a user close to the actual user’s location. *AF Holdings, LLC v. Doe*, 752 F.3d 990, 996 (2014). With geolocation services, one may be able to find the user’s general location, but not the user’s name, address, phone number, or email address. See *Lookup IP Address Location*, WHATISMYIPADDRESS.COM, <https://whatismyipaddress.com/ip-lookup> [<https://perma.cc/9LMU-4HF4>]. The ISP, however, does have this information about the user. See Hunter, *supra* note 28, at 111.

with one in a different location.⁶⁵ Once a copyright owner has the IPAs of those participating in the swarm, the owner may decide to sue.⁶⁶

The copyright owner starts by filing a complaint in federal court alleging copyright infringement against a “John Doe” defendant, using the defendant’s IPA.⁶⁷ This complaint contains the downloader’s IPA and the copyrighted works they are alleged to have downloaded, but not the defendant’s name, because the plaintiff does not know the defendant’s identity.⁶⁸ The plaintiff then files an *ex parte*⁶⁹ motion for expedited discovery to subpoena the ISP associated with the IPA to provide identifying information about the internet subscriber.⁷⁰ Often, an ISP will inform the subscriber before responding to a plaintiff’s subpoena, allowing the subscriber of the IPA to file a motion to quash the subpoena.⁷¹ This type of expedited discovery is atypical, as a party usually cannot move for discovery before a Rule 26(f) discovery conference.⁷²

⁶⁵ A VPN is a “virtual private network.” See, e.g., *Hide My IP Address*, EXPRESSVPN, <https://www.expressvpn.com/what-is-my-ip/hide-my-ip> [https://perma.cc/4H6Y-YDJQ] (“ExpressVPN lets you replace your [IPA] with a secure VPN [IPA] in any of 160 locations in 94 countries around the world, putting you back in control.”).

⁶⁶ See Sag & Haskell, *supra* note 50, at 605.

⁶⁷ See Hunter, *supra* note 28, at 111. The complaint in *Cobbler* is a great example. See generally *Complaint, Cobbler Nev., LLC v. Gonzales*, No. 3:15-cv-00866-SB, 2016 U.S. Dist. LEXIS 75298 (D. Or. Mar. 18, 2016) [hereinafter *Complaint*].

⁶⁸ See Sag & Haskell, *supra* note 50, at 606 (“The complaints are boilerplate and contain almost no specifics other than a list of copyrighted works and IP addresses. At this stage, the complaint is primarily a pretext to obtain third-party discovery orders to compel various ISP’s to disgorge the account details of their subscribers.”).

⁶⁹ *Ex Parte*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“Done or made at the instance and for the benefit of one party only, and without notice to, or argument by, anyone having an adverse interest; of, relating to, or involving court action taken or received by one party without notice to the other . . . for temporary or emergency relief.”).

⁷⁰ See *Patrick Collins, Inc. v. Doe*, 288 F.R.D. 233, 235 (E.D.N.Y. 2012) (explaining that a plaintiff can move for immediate discovery, pursuant to FED. R. CIV. P. 45, to subpoena a non-party ISP to obtain identifying information about the subscriber for the IP address associated with infringing activity, in order to identify anonymous John Doe defendants); Heinbockel, *supra* note 46, at 154.

⁷¹ See Sag & Haskell, *supra* note 50, at 606 (“Defense attorneys . . . may wish . . . to quash the plaintiff’s subpoena, pursuant to [FED. R. CIV. P. 45(d)(3)(A)].”).

⁷² See FED. R. CIV. P. 26(d)(1) (“A party may not seek discovery from any source before the parties have conferred as required by [FED. R. CIV. P. 26(f)], except in a proceeding exempted from initial disclosure under [FED. R. CIV. P. 26(a)(1)(B)], or when authorized by these rules, by stipulation or by court order.”).

However, courts may allow for expedited discovery when the defendant's identity is unknown, to allow the plaintiff to obtain identifying facts necessary to permit service on the defendant.⁷³

In the Ninth Circuit, courts may find good cause for granting early discovery motions to determine a defendant's identity unless it is clear that early discovery would not allow the plaintiff to identify the defendant, or that the complaint would be dismissed on other grounds.⁷⁴ District courts in the Ninth Circuit apply a three-factor test when considering these motions: whether (1) the plaintiff identified the missing party with enough specificity for the court to determine that the defendant is a person or entity who can be sued in federal court; (2) the movant described all the steps taken to locate the defendant to ensure that the plaintiff has made a good faith effort to identify and serve the defendant; and (3) the plaintiff has established that the complaint could survive a motion to dismiss.⁷⁵

District courts in the Ninth Circuit have wrestled with whether an IPA, by itself, is sufficient to satisfy the first factor; some have held it is satisfied with the Doe's IPA on the date of the alleged infringement and the Doe's approximate location,⁷⁶ while others have determined that merely providing the Doe's IPA on the date of the alleged infringement is

⁷³ See Heinbockel, *supra* note 46, at 154, n. 10 (“[T]he Federal Rules of Civil Procedure require that discovery not occur until the parties have held a discovery conference. FED. R. CIV. P. 26(f). Because defendants in John Doe copyright suits are initially anonymous IP addresses, plaintiffs move for the court to order discovery under FED. R. CIV. P. 26(d) (1) in order to identify the persons behind the IP addresses.”); Hunter, *supra* note 28, at 112 (“[W]ith BitTorrent litigation, the plaintiff does not know the identity of the defendants, so the plaintiff must apply for a Rule 26(d) exception for *ex parte* expedited discovery in order to discover the identities of the defendants.”); Malibu Media, LLC v. Doe, No. 12CV1049-LAB (BGS), 2012 U.S. Dist. LEXIS 82000, at *3–4 (S.D. Cal. June 12, 2012) (“[I]n rare cases, courts have made exceptions, permitting limited discovery to ensue after filing of the complaint to permit the plaintiff to learn the identifying facts necessary to permit service on the defendant.” (quoting Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 577 (N.D. Cal. 1999))).

⁷⁴ Malibu Media, LLC, 2012 U.S. Dist. LEXIS 82000, at *3–5.

⁷⁵ *Id.* (citing Columbia Ins. Co., 185 F.R.D. at 578–80).

⁷⁶ *E.g., id.* at *6–7 (citing Openmind Solutions, Inc. v. Doe, No. C-11-33-11 MEJ, 2011 U.S. Dist. LEXIS 116552, at *5–6 (N.D. Cal. Oct. 7, 2011); Pink Lotus Entm't v. Doe, No. C-11-02263 HRL, 2011 U.S. Dist. LEXIS 65614, at *6–7 (N.D. Cal. June 21, 2011)). The Doe's approximate location is found using geolocation technology. *Id.* at *6.

sufficient.⁷⁷ The second factor is simpler for plaintiffs to satisfy and, at this stage of the lawsuit, there is not much else the plaintiff can do to identify the Doe except subpoena the ISP.⁷⁸ The third factor is directly affected by the *Cobbler* decision because BitTorrent plaintiffs in the Ninth Circuit now cannot survive a motion to dismiss when all that ties the defendant to the alleged infringement is an IPA.⁷⁹

If a court grants an expedited discovery motion, the plaintiff will subpoena the ISP for information identifying the subscriber of the IPA, which includes their name, address, telephone number, and media access control (MAC) address.⁸⁰ With this information, a plaintiff can send a settlement letter to the subscriber.⁸¹ These letters typically warn the subscriber of the potential statutory damages⁸² and offer to drop the lawsuit if the defendant settles.⁸³

⁷⁷ *Malibu Media, LLC*, 2012 U.S. Dist. LEXIS 82000, at *7 (citing *MCGIP, LLC v. Doe*, No. C-11-02331 LB, 2011 U.S. Dist. LEXIS 85363, at *4-5 (N.D. Cal. Aug. 15, 2011); *First Time Videos LLC v. Doe*, No. C-11-01675 LB, 2011 U.S. Dist. LEXIS 42376, at *5 (N.D. Cal. April 14, 2011)).

⁷⁸ See, e.g., *id.* at *8-9. Plaintiff states that “there is no other way to obtain Defendants’ identities, except by serving a subpoena on Defendants’ ISPs. . . . [O]nly the ISP to whom a particular IP address has been assigned for use by its subscriber can correlate the IP address to a real person, the subscriber of the internet service. . . . Accordingly, Plaintiff appears to have investigated and obtained the data pertaining to the alleged infringements in a good faith effort to locate each Doe Defendant.” *Id.* (citing *Dig. Sin, Inc. v. Doe*, No. C-11-04397 LB, 2011 U.S. Dist. LEXIS 128033, at *5 (N.D. Cal. Nov. 4, 2011); *Openmind Solutions*, 2011 U.S. Dist. LEXIS 116552, at *5; *Pink Lotus Entm’t*, 2011 U.S. Dist. LEXIS 65614, at *7; *MCGIP*, 2011 U.S. Dist. LEXIS 85363, at *5.

⁷⁹ See *Cobbler Nev., LLC v. Gonzales*, 901 F.3d 1142, 1144 (9th Cir. 2018). A New Jersey district court judge found that it would be anomalous to authorize early discovery in a BitTorrent lawsuit when the suit would eventually be dismissed under FED. R. CIV. P. 12(b)(6). See *Strike 3 Holdings, LLC v. Doe*, Civil No. 18-2674 (JHR/JS), 2019 U.S. Dist. LEXIS 184513, at *18-19 (D.N.J. Oct. 24, 2019), *rev’d on other grounds*, No. 1:18-cv-2674-NLH-JS, 2020 U.S. Dist. LEXIS 114598 (D.N.J. June 30, 2020).

⁸⁰ See Hunter, *supra* note 28, at 110-11. “A MAC address is the unique identifier that is assigned by [a] manufacturer to a piece of network hardware . . . and each identifier is intended to be unique to a particular device.” *What Is a MAC Address?*, GNOME PROJECT, <https://help.gnome.org/users/gnome-help/stable/net-macaddress.html.en> [https://perma.cc/3BAF-AA5X].

⁸¹ See Hunter, *supra* note 28, at 110-11.

⁸² See Heinbockel, *supra* note 46, at 173 (explaining that statutory damages range from \$750 to \$150,000 for each infringed work).

⁸³ See *id.* at 155. The settlement amount offered is likely to be less than the cost of litigating the case. See Hunter, *supra* note 28, at 111-12.

These settlement letters can be enticing; they promise to release all legal claims while scaring defendants by informing them of the maximum statutory damages.⁸⁴ The letters encourage quick settlements by giving defendants the option to settle for a few thousand dollars now, rather than possibly having to spend hundreds of thousands of dollars later.⁸⁵ For infringers, this is a generous bargain, allowing them to avoid federal litigation and steep statutory damages.

However, some argue that these settlement letters are predatory; BitTorrent plaintiffs can use their ownership of intellectual property to coerce large settlements from frightened defendants as part of a strategy to monetize infringement.⁸⁶ For infringers, a settlement letter is an olive branch. However, noninfringers are often misidentified as infringers and coerced into settlements.⁸⁷ Plaintiffs' use of a strategy that monetizes infringement and indiscriminately targets defendants has led some to call these plaintiffs "copyright trolls."⁸⁸ This strategy is especially effective

⁸⁴ See Sag & Haskell, *supra* note 50, at 611 ("The letter then continues that the plaintiff will seek the \$30,000 maximum in statutory damages for non-willful infringement and attorneys' fees and that the plaintiff will attempt to establish willful infringement and thereby seek the maximum statutory damages of \$150,000.").

⁸⁵ *Id.* at 611.

⁸⁶ See Heinbockel, *supra* note 46, at 162–63; Hunter, *supra* note 28, at 111 ("[T]he plaintiff sends out settlement letters to the subscribers offering to settle . . . Plaintiffs in [BitTorrent] cases appear to be more interested in getting settlements than actually litigating the case."); Sag & Haskell, *supra* note 50, at 573–78.

⁸⁷ See Sag & Haskell, *supra* note 50, at 573–74. Professor Sag and Jake Haskell explain that "our discussions with numerous defense lawyers over the past three years suggest that these cases settle from anywhere between \$1,000 and \$8,000 and that these lawyers believe that as many as one-third of their clients are innocent." *Id.* at 580. "Even when the infringement has not occurred or where the infringer has been misidentified, a combination of the threat of statutory damages—up to \$150,000 for a single download—tough talk, and technological doublespeak are usually enough to intimidate even innocent defendants into settling." *Id.* at 573. See also *infra* notes 191–200 and accompanying text for an explanation about how innocent people may be misidentified as infringers.

⁸⁸ See Heinbockel, *supra* note 46, at 163 ("Intellectual property trolls use their ownership of intellectual property to extract large . . . legal settlements instead of using them as productive assets."); Sag & Haskell, *supra* note 50, at 573, 578 ("[W]e regard these suits as a kind of trolling because the plaintiffs' claims of infringement rely on poorly substantiated form pleadings and are *targeted indiscriminately at noninfringers as well as infringers* . . . [O]ur best estimate is that the number of U.S. households who have received a settlement demand letter from the plaintiffs we regard as copyright trolls is in the hundreds of thousands." (emphasis added)); see also James DeBriyn, Note, *Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in*

when a defendant is accused of downloading pornography because—if the lawsuit proceeds—their name will be forever associated with pornography.⁸⁹ In sum, the high cost of federal litigation and the threat of damages may compel a settlement, even if the defendant did not download the plaintiff's work.⁹⁰

If the defendant refuses to settle, the plaintiff may move forward with the lawsuit and amend the original complaint to include the defendant's name.⁹¹

D. *The Plausibility Pleading Standard: A BitTorrent Defendant's Best Friend*

A defendant may choose to respond to a complaint with a motion to dismiss for failure to state a claim (a Rule 12(b)(6) motion).⁹² The Federal Rules of Civil Procedure require that a complaint contain a short and plain statement of the claim that shows that the plaintiff is entitled to relief.⁹³ In 1957, the Supreme Court decided *Conley v. Gibson*,⁹⁴ which only required that a complaint give fair notice of what the plaintiff's claim

the Age of Statutory Damages, 19 UCLA ENT. L. REV. 79, 86 (2012) (“A copyright troll is a plaintiff who seeks damages for infringement upon a copyright it owns, not to be made whole, but rather as a primary or supplemental revenue stream.”). This Comment does not take a position on whether any plaintiffs are copyright trolls.

⁸⁹ See Hunter, *supra* note 28, at 112; see also, e.g., Strike 3 Holdings, LLC v. Doe, 351 F. Supp. 3d 160, 162 (D.D.C. 2018) (“[O]nce the ISP outs the subscriber, permitting them to be served as the defendant, any future Google search of their name will turn-up associations with the [pornographic] websites.”); *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 82–83 (E.D.N.Y. 2012) (listing the pornographic films defendants are alleged to have downloaded).

⁹⁰ See Sag & Haskell, *supra* note 50, at 574. These settlements are usually for thousands of dollars. *Id.* at 580; see DeBriyn, *supra* note 88, at 81.

⁹¹ See Sag & Haskell, *supra* note 50, at 610–11.

⁹² FED. R. CIV. P. 12(b)(6).

⁹³ FED. R. CIV. P. 8(a)(2); see *How Courts Work*, AM. BAR ASS'N (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/pleadings [<https://perma.cc/GX7P-H43F>] (explaining that a complaint is a part of the pleadings stage of a lawsuit).

⁹⁴ *Conley v. Gibson*, 355 U.S. 41 (1957).

is and the grounds upon which the complaint rests.⁹⁵ However, two more recent decisions, *Bell Atlantic Corp. v. Twombly*⁹⁶ and *Ashcroft v. Iqbal*,⁹⁷ heightened the pleading requirements.⁹⁸

In those cases, the Supreme Court explained that for a complaint to survive a Rule 12(b)(6) motion, it must state a plausible claim to relief, which requires alleging sufficient factual matter, accepted as true, to permit a court to draw a reasonable inference that the defendant is liable.⁹⁹ The facts cannot merely be *consistent* with a defendant's liability and must raise the plaintiff's right to relief above a speculative level.¹⁰⁰ This is not a probability requirement, but requires more than just the *possibility* that a defendant acted unlawfully.¹⁰¹ A complaint cannot simply contain mere legal conclusions or a recitation of the elements of a cause of action supported only by conclusory allegations.¹⁰² Unlike factual allegations, legal conclusions are not entitled to an assumption of truth.¹⁰³ Through these decisions, the Supreme Court sought to prevent groundless claims from wasting resources and to expose deficient claims when it would be least expensive for the parties.¹⁰⁴

⁹⁵ *Id.* at 47 (“[A]ll the Rules require is ‘a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” (quoting FED. R. CIV. P. 8(a)(2))). This standard is referred to as “notice pleading.” See William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. CHI. L. REV. 693, 695 (2016) (“As originally envisioned by the drafters of the FRCP, and as affirmed in the seminal case *Conley v. Gibson*, the gatekeeping function of federal judges was minimal: they used a standard of notice pleading, which required only that a pleading give the defendant notice of the plaintiff’s grievance.”).

⁹⁶ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

⁹⁷ *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

⁹⁸ Some scholars refer to *Twombly* and *Iqbal* as “*Twiqbal*.” See, e.g., David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1204 (2013).

⁹⁹ *Iqbal*, 556 U.S. at 678 (“[A] complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is *plausible* on its face.’” (emphasis added) (quoting *Twombly*, 550 U.S. at 570)).

¹⁰⁰ *Id.* (citing *Twombly*, 550 U.S. at 556); *Twombly*, 550 U.S. at 555.

¹⁰¹ *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556–557).

¹⁰² *Id.* (citing *Twombly*, 550 U.S. at 555).

¹⁰³ *Id.* at 679 (citing *Twombly*, 550 U.S. at 555).

¹⁰⁴ *Twombly*, 550 U.S. at 557–58; see Jun Zheng, Note, *A New Era for Patent Infringement Pleading: Twombly, Iqbal, and the Demise of Form 18*, 24 TEX. INTELL. PROP. L.J. 15, 19 (2016)

In sum, only a complaint that pleads facts creating a plausible claim for relief can survive a motion to dismiss, and a plaintiff armed with nothing more than legal conclusions is not entitled to discovery.¹⁰⁵ A claim that merely creates a *possible* claim for relief will not suffice and, without a plausible claim for relief, the complaint will be dismissed.¹⁰⁶ This is known as the “plausibility pleading” standard.¹⁰⁷ District courts have taken different approaches in interpreting the standard,¹⁰⁸ and the standard’s effect on litigation has been the subject of much legal scholarship.¹⁰⁹

(“The main concern of *Twombly* was discovery abuse. Throughout the opinion, the Supreme Court expressed its concerns about the ‘enormous expense’ of antitrust discovery and the possibility of discovery abuse by a plaintiff’s meritless claim.”). However, the plausibility pleading standard may lead to information asymmetries between the parties, leading to district courts dismissing potentially plausible complaints: “[A] criticism of . . . [the] plausibility [pleading] standard reflects widespread concern over parties’ unequal access to the information necessary to satisfy the plausibility standard The standard is criticized for creating a ‘Catch-22’ in cases in which the defendant controls the information necessary for stating a plausible claim; the plaintiffs in such cases cannot state a claim without access to critical information in the control of defendants, and they cannot proceed to discovery without stating a claim.” Anne E. Ralph, *Not the Same Old Story: Using Narrative Theory to Understand and Overcome the Plausibility Pleading Standard*, 26 YALE J.L. & HUMAN. 1, 14 (2014) (citing Charles B. Campbell, *Elementary Pleading*, 73 LA. L. REV. 325, 346 (2013)).

¹⁰⁵ *Iqbal*, 556 U.S. at 678–79 (citations omitted).

¹⁰⁶ *Id.* (citing *Twombly*, 550 U.S. at 570).

¹⁰⁷ See Hubbard, *supra* note 95, at 693–95. The Ninth Circuit explained: “When faced with two possible explanations, only one of which can be true and only one of which results in liability, plaintiffs cannot offer allegations that are ‘merely consistent with’ their favored explanation but are also consistent with the alternative explanation. . . . Something more is needed, such as facts tending to exclude the possibility that the alternative explanation is true . . . to render plaintiffs’ allegations plausible within the meaning of *Iqbal* and *Twombly*.” *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013).

¹⁰⁸ See, e.g., Alex Reinert, *Pleading as Information-Forcing*, 75 L. & CONTEMP. PROBS. 1, 16 (2012) (“Courts have taken varying approaches to plausibility analysis.”); see also Ralph, *supra* note 104, at 11–12 (“[M]any lower court characterizations of plausibility have been less helpful; among other things, courts have wrestled with the definition of ‘plausibility’ and with the question of how judicial experience and common sense should be used in evaluating a complaint. Courts have variously described the plausibility standard as ‘confusing,’ ‘opaque,’ ‘relative,’ and ‘malleable.’”) (citations omitted). The standard has also been criticized for allowing judges to apply their “judicial experience and common sense,” which are both “highly subjective concepts,” and as being “impractically open-ended, conferring broad discretion on judges to enforce a slippery standard.” *Id.* at 17–18 (quoting *Iqbal*, 556 U.S. at 679).

¹⁰⁹ See, e.g., Freeman Engstrom, *supra* note 98, at 1204 n.7 (“Some twenty published and unpublished studies now offer systematic empirical analysis of *Twombly*’s impact.”); Lonny

A BitTorrent defendant may argue that the complaint failed to satisfy the plausibility pleading standard because it did not contain facts sufficient to state a plausible claim for relief from the named defendant.¹¹⁰ This argument relies on the use of IPAs to identify infringers.¹¹¹ In a BitTorrent case, a plaintiff is entitled to relief only if the defendant participated in a copyright-infringing BitTorrent swarm and, under the plausibility pleading standard, the complaint must plead facts suggesting the defendant actually participated.¹¹² However, BitTorrent defendants are found by identifying an IPA participating in a BitTorrent swarm and then inferring that, because an internet subscriber's IPA was seen in the swarm, the subscriber himself participated.¹¹³ Therefore, since the complaint only contains facts suggesting that the defendant's IPA participated in the swarm, but not that the defendant himself participated, the complaint should be dismissed.¹¹⁴

The BitTorrent plausibility pleading argument is persuasive because an IPA is associated with an internet connection, not a specific person or computer.¹¹⁵ If multiple people are using the same internet connection,

Hoffman, *Plausible Theory, Implausible Conclusions*, 83 U. CHI. L. REV. ONLINE 143, 145–55 (2016) (estimating *Twombly* and *Iqbal*'s effects and responding to Hubbard, *supra* note 95); Hubbard, *supra* note 95, at 756–57 (“In sum, while most cases are unaffected by plausibility pleading standards, we can identify several limited sets of plaintiffs that may be affected. . . . [W]hile plausibility pleading may have little or no net effect on the volume of litigation or the rate of dismissals, it may slightly shift the composition of cases that reach discovery.”); Arthur R. Miller, *Widening the Lens: Refocusing the Litigation Cost-and-Delay Narrative*, 40 CARDOZO L. REV. 57, 72–80 (2018) (explaining the effect *Twombly* and *Iqbal* have had on civil litigation).

¹¹⁰ See Sag & Haskell, *supra* note 50, at 614–16.

¹¹¹ *Id.*

¹¹² *Id.* at 615. “In the typical case, the plaintiff asserts that it has evidence the defendant participated in something called a BitTorrent swarm, thereby illegally copying the plaintiff's copyrighted work.” *Id.* at 581. Participating in the swarm means that the downloader both downloaded and uploaded parts of the file, creating copies of the uploaded parts. See *supra* notes 33–36 and accompanying text for an explanation of BitTorrent swarms.

¹¹³ See Sag & Haskell, *supra* note 50, at 615 (“The typical complaint alleges only that an unknown device used the defendant's IP address to participate in a file-sharing swarm and that this swarm unlawfully reproduced and distributed the plaintiff's copyrighted work.”).

¹¹⁴ This Comment refers to this argument as the “BitTorrent plausibility pleading argument.”

¹¹⁵ See *Media Prods., Inc. v. Doe*, No. 12-CV-3719 (HB), 2012 U.S. Dist. LEXIS 125366, at *1–2 (S.D.N.Y. Sept. 4, 2012). I am referring to a public IPA. See *supra* notes 62–63 and accompanying text for a discussion on public IPAs and local IPAs.

any of those people could be the infringer and, with the advent of Wi-Fi,¹¹⁶ many people can wirelessly connect to one internet connection.¹¹⁷ Though it is *possible* that the named defendant is the infringer, the pleaded facts do not create a *plausible* claim that the named defendant is the infringer.¹¹⁸ Mere possibility does not satisfy the plausibility pleading standard.¹¹⁹ Therefore, the defendant may argue that, because the complaint does not state a plausible claim for relief, it should be dismissed for failure to state a claim.¹²⁰

In sum, a BitTorrent complaint, simply alleging that a defendant's IPA was identified in an infringing swarm, arguably does not state facts creating a plausible claim the plaintiff is entitled to relief from the alleged infringer.¹²¹

E. *The BitTorrent Plausibility Pleading Argument Before Cobbler*

Before *Cobbler*, district courts reached disparate conclusions when faced with the BitTorrent plausibility pleading argument.¹²² The

¹¹⁶ Kaiti Norton, *WiFi Definition & Meaning*, WEBOPEDIA, <https://www.webopedia.com/definitions/wi-fi> (last visited Dec. 27, 2020) [<https://perma.cc/F53G-B55T>] (“Wi-Fi is a wireless networking technology that uses radio waves to provide wireless high-speed Internet access.”).

¹¹⁷ See *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 84 (E.D.N.Y. 2012).

¹¹⁸ See *Sag & Haskell*, *supra* note 50, at 615 (explaining that “[b]are possibility clearly falls well below modern pleading standards” and a complaint must contain facts to make a *plausible* claim, rather than merely a *possible* claim).

¹¹⁹ See *id.*

¹²⁰ See FED. R. CIV. P. 12(b)(6).

¹²¹ See *Cobbler Nev., LLC v. Gonzales*, 901 F.3d 1142, 1144 (9th Cir. 2018) (concluding that the “bare allegation that a defendant is the registered subscriber of an [IPA] associated with infringing activity is [not] sufficient to state a claim for direct or contributory infringement”).

¹²² Compare *Elf-Man, LLC v. Cariveau*, No. C13-0507RSL, 2014 U.S. Dist. LEXIS 6453, at *7 (W.D. Wash. Jan. 17, 2014) (“[S]imply identifying the account holder associated with an [IPA] tells us very little about who actually downloaded [the movie] using that [IPA].”) with *Countryman Nev., LLC v. Pitts*, No. 6:14-cv-493-Orl-40GJK, 2014 U.S. Dist. LEXIS 173549, at *5-6 (M.D. Fla. Dec. 16, 2014) (aggregating a list of numerous cases where the plausibility pleading argument failed); see also *Malibu Media, LLC v. Doe*, No. 18 C 450, 2018 U.S. Dist. LEXIS 207655, at *6-9 (N.D. Ill. Dec. 10, 2018) (explaining the *Cobbler* holding: “[a] defendant’s ‘status as the registered subscriber of an infringing [IPA], standing alone, does not create a reasonable inference that he is also the infringer.’”) (citing *Cobbler*, 901 F.3d at 1145). *Cobbler*

argument was sometimes successful, as in *Elf-Man, LLC v. Cariveau*,¹²³ where 152 defendants, identified through their IPAs, were accused of downloading the movie *Elf-Man*.¹²⁴ The court granted the plaintiff's early discovery motion, and four of the defendants filed a motion to dismiss.¹²⁵ The District Court for the Western District of Washington granted the defendants' motion, holding that, though it was possible that one or more of the named defendants downloaded *Elf-Man*, it also was possible that it was a third-party interloper.¹²⁶ An IPA, by itself, was insufficient to implicate any particular person in copyright infringement.¹²⁷

However, the BitTorrent plausibility pleading argument was often rejected.¹²⁸ In *Countryman Nevada, LLC v. Pitts*,¹²⁹ Pitts was accused of downloading the movie *The Necessary Death of Charlie Countryman* and

has been adopted by district court judges outside of the Ninth Circuit, including one in the Northern District of Illinois, Eastern Division. *Id.* at *6–8. *Cobbler* has not, however, been unanimously accepted by district courts throughout the United States. See *Malibu Media, LLC v. Palella*, No. 18 C 3041, 2019 U.S. Dist. LEXIS 62974, at *5–6 (N.D. Ill. Apr. 12, 2019) (“[T]his Court respectfully declines to follow the approach taken in [*Cobbler*].”).

¹²³ *Elf-Man, LLC*, 2014 U.S. Dist. LEXIS 6453.

¹²⁴ *Id.* at *2–3. The defendants do not seem to be connected to each other, aside from their love of *Elf-Man*, as they are from different parts of Washington. *Id.* at *1. *Elf-Man* is a poorly reviewed movie about an elf that was left behind by Santa to save a father who was kidnapped by a bumbling gang of thieves. See *Elf-Man*, ROTTEN TOMATOES, https://rottentomatoes.com/m/elf_man_2012 [<https://perma.cc/V66A-GLNC>].

¹²⁵ *Elf-Man, LLC*, 2014 U.S. Dist. LEXIS 6453, at *3–4.

¹²⁶ *Id.* at *3–4, *7–8 (“While it is possible that the subscriber is the one who participated in the BitTorrent swarm, it is also possible that a family member, guest, or freeloader engaged in the infringing conduct.”).

¹²⁷ See Mike Masnick, *Court Dismisses Copyright Lawsuit, Noting IP Address Is Not Enough Evidence for Infringement*, TECHDIRT (Jan. 22, 2014, 1:58 PM), <https://www.techdirt.com/articles/20140122/07375025953/court-dismisses-copyright-lawsuit-noting-ip-address-is-not-enough-evidence-infringement.shtml> [<https://perma.cc/KWS8-BYTX>] (“Judge Robert Lansik noted that the producers of the movie *Elf Man* failed to state a claim for relief, since the only evidence they had was an IP address—which wasn’t enough to actually implicate any particular person in copyright infringement.”).

¹²⁸ See *Countryman Nev., LLC v. Pitts*, No. 6:14-cv-493-Orl-40GJK, 2014 U.S. Dist. LEXIS 173549, at *5–6 (M.D. Fla. Dec. 16, 2014) (aggregating a list of numerous cases where the plausibility pleading argument failed).

¹²⁹ *Id.* This case was decided approximately five years after *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). See generally *id.*

was identified through her IPA.¹³⁰ She filed a Rule 12(b)(6) motion, asserting the BitTorrent plausibility pleading argument.¹³¹ The District Court for the Middle District of Florida rejected the argument and aggregated cases from district courts for support.¹³² The *Countryman* court entertained the possibility that Pitts was not the downloader because identifying a BitTorrent defendant through an IPA can be unreliable.¹³³ Nevertheless, the court distinguished *Countryman* from *Elf-Man* because the complaint directly alleged that Pitts herself was the downloader, which raised the identity of the infringer above a speculative level and allowed the court to draw the reasonable inference that Pitts was the infringer.¹³⁴ The *Countryman* court had ample precedent to confidently reject the BitTorrent plausibility pleading argument.¹³⁵

¹³⁰ *Countryman*, 2014 U.S. Dist. LEXIS 173549, at *1–2. The plaintiff learned the defendant’s identity after serving a subpoena on her ISP. *Id.* at *2 n.3. The movie is titled *Charlie Countryman* on RottenTomatoes.com and, despite it starring Shia LaBeouf, it was panned by critics. See *Charlie Countryman*, ROTTEN TOMATOES, https://www.rottentomatoes.com/m/charlie_countryman [<https://perma.cc/BCG9-BY9N>].

¹³¹ *Countryman*, 2014 U.S. Dist. LEXIS 173549, at *4–5 (“Pitts challenges the Amended Complaint for failing to allege sufficient factual material to state a plausible claim that she is the person responsible for the direct and contributory infringement of Countryman’s copyright. . . . Pitts states that Countryman’s identification of her through an IP address only shows that she holds the account of the IP address through which the infringing conduct occurred and is not necessarily the individual who downloaded or uploaded the Motion Picture[,] . . . [and that] it is impossible for Countryman to make the logical leap from account holder to downloader, as anyone else could have accessed her IP address to download and distribute the Motion Picture.”).

¹³² *Id.* at *5–6. The district courts cited were located in the Middle District of Florida, Tampa Division; the District of Colorado; the Northern District of Indiana; the Southern District of Indiana, Indianapolis Division; and the Southern District of Florida. *Id.* The *Pitts* court found that “district courts that have been presented with the same facts and circumstances . . . are nearly unanimous in concluding that such factual allegations are sufficient to survive a Rule 12(b)(6) motion to dismiss.” *Id.* at *5.

¹³³ *Id.* at *8.

¹³⁴ *Id.* at *8–9. In *Elf-Man, LLC v. Cariveau*, No. C13-0507RSL, 2014 U.S. Dist. LEXIS 6453, at *2 (W.D. Wash. Jan. 17, 2014), the plaintiff only alleged that the IPA assigned to each defendant’s internet account “was observed infringing Plaintiff’s motion picture.” *Id.* at *6–7 (internal citation and quotation omitted). In *Elf-Man*, the complaint was dismissed “for failing to allege sufficient factual material to identify the defendants as the infringers.” *Id.* at 6. In *Pitts*, however, the plaintiff “directly allege[d] that *Pitts* . . . downloaded and then subsequently distributed the [file] to others via BitTorrent.” *Id.* at *8 (emphasis added).

¹³⁵ See *Countryman*, 2014 U.S. Dist. LEXIS 173549, at *5–6 (citing numerous cases where the argument was rejected). Recently, however, in *Malibu Media LLC v. Duncan*, No. 4:19-cv-02314,

In 2018, the BitTorrent plausibility pleading argument was heard by the Ninth Circuit in *Cobbler*,¹³⁶ which addressed the question of whether a complaint that merely alleges that a defendant is the subscriber of an IPA associated with copyright infringement, without additional facts connecting the defendant to the infringement, can survive a motion to dismiss.¹³⁷

II. THE FACTS, PROCEDURAL HISTORY, AND HOLDING OF *COBBLER*

A. *The Facts*

On May 20, 2015, Cobbler Nevada, LLC (Cobbler), filed a complaint against a Doe defendant using the Doe's IPA, alleging both direct and indirect copyright infringement of its movie, *The Cobbler*.¹³⁸ Cobbler's investigators observed Doe's IPA distributing *The Cobbler* without

2020 U.S. Dist. LEXIS 20905 (S.D. Tex. Feb. 4, 2020), the District Court for the Southern District of Texas, Houston Division, explained that *Countryman* and the eight cases it cites in support typically agree “that subscriber identity does not always correspond with infringer identity. . . . But they nonetheless conclude that the admitted difficulty for [the] plaintiff to later prove that the accused defendant was actually the one engaging in infringing conduct is a question of ultimate merits inappropriate to resolution on motion to dismiss. . . . In so concluding, these cases appear to improperly shift the burden in the first instance to the defendant, where the very question is the plausibility of the connection to liability, not its mere possibility, and where conclusory allegations of that liability are insufficient.” *Id.* at *11–12 (internal citations and quotations omitted).

¹³⁶ *Cobbler Nev., LLC v. Gonzales*, 901 F.3d 1142 (9th Cir. 2018).

¹³⁷ *Id.* at 1144–45.

¹³⁸ *Cobbler Nev., LLC v. Gonzales*, No. 3:15-cv-00866-SB, 2016 U.S. Dist. LEXIS 75298, at *1–2 (D. Or. Mar. 18, 2016) (“This is an action for violation of the Copyright Act, 17 U.S.C. §§ 101 *et seq.*, based on the alleged unlawful downloading and distribution of Plaintiff’s copyrighted motion picture, *The Cobbler*, using peer-to-peer file sharing software referred to as BitTorrent.”). *The Cobbler* is a poorly reviewed movie about a cobbler, played by Adam Sandler, who finds a magical heirloom that allows him to step into the lives of his customers. *See The Cobbler*, ROTTEN TOMATOES, https://www.rottentomatoes.com/m/the_cobbler_2015 [<https://perma.cc/8MPH-CZGL>]. It is described as “a slight step up from Adam Sandler’s recent comedies,” but “it still isn’t terribly compelling.” *Id.* At the time, the defendant was only known by their IPA, which was observed as distributing Cobbler’s motion picture multiple times through BitTorrent. *See also* Complaint, *supra* note 67, at 3.

permission¹³⁹ using BitTorrent.¹⁴⁰ Cobbler filed a motion to expedite discovery and subpoenaed Comcast, the ISP associated with the IPA, to identify the IPA's subscriber.¹⁴¹ The motion was granted, and the Doe was identified as Thomas Gonzales,¹⁴² with the IPA being linked to the adult foster care home that he operated.¹⁴³

Cobbler attempted, and initially failed, to contact Gonzales, and then filed a motion seeking leave to issue a Rule 45 subpoena to depose Gonzales, which was granted.¹⁴⁴ Cobbler's attorney eventually had the opportunity to speak with Gonzales over the phone and, from both the phone conversation and the deposition, learned that the home's internet connection was accessible to residents and visitors at the home.¹⁴⁵ Cobbler's attorney concluded that Gonzales was unlikely to be the infringer,¹⁴⁶ but Gonzales had refused to provide Cobbler with

¹³⁹ *Cobbler*, 2016 U.S. Dist. LEXIS 75298, at *2–3.

¹⁴⁰ *Cobbler Nev., LLC v. Gonzales*, No. 3:15-cv-00866-SB, 2016 U.S. Dist. LEXIS 181064, at *1 (D. Or. Dec. 2, 2016).

¹⁴¹ *Cobbler*, 2016 U.S. Dist. LEXIS 75298, at *2; Plaintiff's Ex Parte Motion to Expedite Discovery at 1–2, *Cobbler Nev., LLC v. Gonzales*, No. 3:15-cv-00866-SB, 2016 U.S. Dist. LEXIS 75298 (D. Or. Mar. 18, 2016) (“Plaintiff does not know the identity of the defendant, and as such is unable to confer. . . . Plaintiff respectfully requests the Court grant its *Ex Parte* Motion for leave to take discovery prior to the Rule 26 conference and enter an Order allowing plaintiff to subpoena records from Comcast for the identity of the subscriber and account holder assigned the IP address used by the defendant, and for such further information as may be needed to specifically identify the Doe defendant.”). See *supra* notes 67–73 and accompanying text for a discussion on ISP subpoenas and expedited discovery.

¹⁴² *Cobbler*, 2016 U.S. Dist. LEXIS 75298, at *2.

¹⁴³ *Cobbler Nev., LLC v. Gonzales*, 901 F.3d 1142, 1145 (9th Cir. 2018).

¹⁴⁴ *Cobbler*, 2016 U.S. Dist. LEXIS 75298, at *2 (“Plaintiff attempted to serve Gonzales. Following several failed attempts to serve Gonzales personally, the Court granted Plaintiff's request for alternate or mail service.”); see FED. R. CIV. P. 45.

¹⁴⁵ *Cobbler*, 901 F.3d at 1145. Interestingly, Gonzales himself did not live in the home. Appellee's Answering Brief at 2, *Cobbler Nev., LLC v. Gonzales*, 901 F.3d 1142 (9th Cir. 2018) (No. 17-35041) [hereinafter *Appellee's Answer*]. Cobbler explained that, “[s]everal times Appellee Gonzales claims he did not live at the residence where the infringing activity took place, but this is a question of fact and the record reflects that when pressed, the best answer available from Gonzales as to where he lived was, ‘I don't live anywhere right now.’” Reply Brief for Appellant at *5, *Cobbler Nev., LLC v. Gonzales*, 901 F.3d 1142 (9th Cir. 2018) (No. 17-35041).

¹⁴⁶ *Cobbler Nev., LLC v. Gonzales*, No. 3:15-cv-00866-SB, 2016 U.S. Dist. LEXIS 181064, at *2–3 (D. Or. Dec. 2, 2016) (“Plaintiff deposed Gonzales, and concluded, ‘it does not appear that he is a regular occupant of the residence or the likely infringer.’” (citation omitted)).

information about the adult care home's residents, citing confidentiality concerns.¹⁴⁷

B. *The Procedural History*

Despite Cobbler's attorney acknowledging that Gonzales was unlikely to be the infringer,¹⁴⁸ Cobbler filed its First Amended Complaint (FAC), naming Gonzales as the defendant.¹⁴⁹ In the FAC, Cobbler alleged direct infringement—that Gonzales was the IPA subscriber, and that he copied and distributed *The Cobbler* through a BitTorrent network in violation of the plaintiff's rights under the Copyright Act.¹⁵⁰ Cobbler alternatively alleged that, if Gonzales did not download *The Cobbler* himself, Gonzales committed indirect infringement by failing to secure his internet connection, thereby permitting and facilitating the use of his internet subscription for infringement.¹⁵¹ Cobbler also alleged that Gonzales had been sent over 400 notices of the infringing activity but did

¹⁴⁷ *Id.* at *3.

¹⁴⁸ *Id.*

¹⁴⁹ *Cobbler*, 2016 U.S. Dist. LEXIS 75298, at *2–3. Cobbler amended its initial complaint to include Gonzales as the named defendant. *Id.* at *1–3; First Amended Complaint at 2, *Cobbler Nev., LLC v. Gonzales*, No. 3:15-cv-00866-SB, 2016 U.S. Dist. LEXIS 75298 (D. Or. Mar. 18, 2016) [hereinafter *FAC*] (“The defendant was originally identified as DOE-24.21.136.125 and is now identified as THOMAS GONZALES of Portland, Oregon.”).

¹⁵⁰ *Cobbler*, 2016 U.S. Dist. LEXIS 75298, at *2–3; *FAC*, *supra* note 149, at 5–6. The magistrate judge referred to this cause of action as “Direct Infringement.” *Cobbler*, 2016 U.S. Dist. LEXIS 75298, at *9.

¹⁵¹ *Cobbler*, 2016 U.S. Dist. LEXIS 75298, at *2–3; *FAC*, *supra* note 149, at 6–7. The Magistrate Judge referred to this cause of action as “Indirect Infringement.” *Cobbler*, 2016 U.S. Dist. LEXIS 75298, at *4. The Ninth Circuit, however, addressed this cause of action as “Contributory Infringement.” *Gonzales*, 901 F.3d at 1146–49.

not take any action to prevent it.¹⁵² Gonzales filed a Rule 12(b)(6) motion to dismiss the indirect infringement allegation.¹⁵³

A magistrate judge for the District of Oregon¹⁵⁴ recommended that the district court grant Gonzales's motion to dismiss for the indirect infringement claim and dismiss Cobbler's direct infringement claim *sua sponte*.¹⁵⁵ The judge recommended dismissing the indirect infringement claim because Cobbler did not allege that Gonzales knowingly, or with willful disregard, facilitated and promoted others to use his internet connection to infringe on Cobbler's copyright.¹⁵⁶ The magistrate judge recommended dismissing the direct infringement claim because the only facts that supported Cobbler's allegation were that Gonzales was the subscriber of the IPA used to distribute the movie and that he was sent

¹⁵² *Cobbler*, 901 F.3d at 1146; *FAC*, *supra* note 149, at 2 (“The defendant has been sent over 400 notices of infringing activity from Rightscorp, Inc. and others, yet failed and refused to take any action whatsoever and either continued to infringe by using BitTorrent to download and distribute copyrighted content or continued to allow infringing activity after such notices.”). Cobbler never alleged that Gonzales actually received the notices, and Gonzales then argued that the facts alleged do not even give Gonzales knowledge of others' infringing activity. Defendant Gonzales's Motion to Dismiss Plaintiff's Second Claim for Relief Pursuant to Rule 12(b)(6) and Memorandum in Support Thereof at 5–6, *Cobbler Nev., LLC v. Gonzales*, No. 3:15-cv-00866-SB, 2016 U.S. Dist. LEXIS 75298 (D. Or. Mar. 18, 2016) [hereinafter *Motion to Dismiss*].

¹⁵³ *Cobbler*, 2016 U.S. Dist. LEXIS 75298, at *1; *Motion to Dismiss*, *supra* note 152, at 2–3, 9 (“Plaintiff's First Amended Complaint is utterly devoid of factual allegations bearing on many essential elements of an indirect copyright-infringement claim, under any of the theories by which such liability could be imposed.”). Gonzales also argued that “[E]ven if [Gonzales] *did* know of the alleged infringement, he had no duty to do anything about it.” Defendant's Response to Plaintiff's Objections to Magistrate's Findings & Recommendation at 3, *Cobbler Nev., LLC v. Gonzales*, No. 3:15-CV-00866-SB, 2016 U.S. Dist. LEXIS 74598, at *4 (D. Or. June 8, 2016) (emphasis added).

¹⁵⁴ The Magistrate Judge was Stacie F. Beckerman. *Cobbler*, 2016 U.S. Dist. LEXIS 75298, at *1.

¹⁵⁵ *Id.* The Ninth Circuit later referred to Cobbler's indirect infringement claim as “Contributory Infringement.” *Cobbler*, 901 F.3d at 1147. “*Sua sponte*” is Latin for “of one's own accord; voluntarily” and is used here to indicate that the district court dismiss Cobbler's direct infringement claim without a Rule 12(b)(6) motion from Gonzales. *Sua Sponte*, BLACK'S LAW DICTIONARY (11th ed. 2019).

¹⁵⁶ *Cobbler*, 2016 U.S. Dist. LEXIS 75298, at *5–9 (“Plaintiff has not alleged that Gonzales promoted, encouraged, enticed, persuaded, or induced another to infringe any copyright . . . [T]his court declines to extend contributory infringement liability to an individual who has not actively encouraged nor materially contributed to any infringing activity.”).

notices about the infringing activity, to which he did not respond.¹⁵⁷ The magistrate judge held that these facts alone were insufficient to survive a motion to dismiss; though it is *possible* that Gonzales was the infringer, it could have been another person, as Cobbler did not allege specific facts tying Gonzales to the infringement.¹⁵⁸ The magistrate judge noted that discovery cannot be used to confirm a guess about the identity of the liable party.¹⁵⁹ The district court adopted the magistrate judge's recommendations, granting Gonzales's motion to dismiss for indirect infringement with prejudice and direct infringement without prejudice.¹⁶⁰

Cobbler filed a notice of voluntary dismissal for the FAC against Gonzales.¹⁶¹ Cobbler then filed a Second Amended Complaint (SAC) naming the Doe IPA as the defendant.¹⁶² Cobbler later filed a notice of voluntary dismissal for the SAC, and Gonzales filed a motion for an award of costs and attorney's fees.¹⁶³ The same magistrate judge then held that Cobbler's claims were objectively unreasonable and recommended that the district court award Gonzales his court reporting fee and attorney's fees,¹⁶⁴ which the district court then awarded.¹⁶⁵ Cobbler

¹⁵⁷ *Id.* at *9–10.

¹⁵⁸ *Id.* at *10–13.

¹⁵⁹ *Id.* at *13 (“*Twombly* and *Iqbal* do not allow [a p]laintiff to guess at who is liable and attempt to confirm liability through discovery.”).

¹⁶⁰ *Cobbler Nev., LLC v. Gonzales*, No. 3:15-CV-00866-SB, 2016 U.S. Dist. LEXIS 74598, at *4 (D. Or. June 8, 2016). The United States district judge was Anna J. Brown. *Id.*

¹⁶¹ *Cobbler Nev., LLC v. Gonzales*, No. 3:15-cv-00866-SB, 2016 U.S. Dist. LEXIS 181064, at *1 (D. Or. Dec. 2, 2016), *report and recommendation adopted in part*, 2017 U.S. Dist. LEXIS 892 (D. Or. Jan. 4, 2017), *aff'd*, 901 F.3d 1142 (9th Cir. 2018).

¹⁶² *Id.* at *4; Second Amended Complaint at 1–2, *Cobbler Nev., LLC v. Gonzales*, No. 3:15-cv-00866-SB, 2016 U.S. Dist. LEXIS 181064 (D. Or. Dec. 2, 2016).

¹⁶³ *Cobbler*, 2016 U.S. Dist. LEXIS 181064, at *4; Plaintiff's Notice of Voluntary Dismissal, *Cobbler Nev., LLC v. Gonzales*, No. 3:15-cv-00866-SB, 2016 U.S. Dist. LEXIS 181064 (D. Or. Dec. 2, 2016); Motion for Award of Costs and Attorney Fees to Prevailing Party at 2, *Cobbler Nev., LLC v. Gonzales*, No. 3:15-cv-00866-SB, 2016 U.S. Dist. LEXIS 181064 (D. Or. Dec. 2, 2016).

¹⁶⁴ *Cobbler*, 2016 U.S. Dist. LEXIS 181064, at *18–20. The attorney's fees were \$17,222.40, and the court reporting fee was \$252.20. *Id.* at *18. The magistrate judge was Stacie F. Beckerman. *Id.* at *1.

¹⁶⁵ *Cobbler Nev., LLC v. Gonzales*, No. 3:15-cv-866-SB, 2017 U.S. Dist. LEXIS 892, at *5–6 (D. Or. Jan. 4, 2017), *aff'd*, 901 F.3d 1142 (9th Cir. 2018). The United States district judge was Michael H. Simon. *Id.* at *6.

appealed the award of Gonzales's costs and fees, together with the orders finding Gonzales a prevailing party and dismissing Cobbler's claims.¹⁶⁶

C. *Holding*

The Ninth Circuit affirmed the district court's decision and issued a broad ruling: "In this copyright action, we consider whether a bare allegation that a defendant is the registered subscriber of an [IPA] associated with infringing activity is sufficient to state a claim for direct or contributory infringement. We conclude that it is *not*."¹⁶⁷

To succeed on a direct infringement claim, a plaintiff must allege *something more* than an IPA associated with the defendant's internet subscription to create a reasonable inference that the defendant is the infringer, because multiple devices and individuals can connect to one IPA.¹⁶⁸ Cobbler alleged that Gonzales was the subscriber of his IPA, but this allegation did not create the reasonable inference that Gonzales was the infringer.¹⁶⁹ The court acknowledged that, though this holding will create a major obstacle for plaintiffs, it is nevertheless the plaintiff's burden to create the reasonable inference.¹⁷⁰ Cobbler pleaded facts

¹⁶⁶ Brief of Appellant at 7, *Cobbler Nev., LLC v. Gonzales*, 901 F.3d 1142 (9th Cir. 2018) (No. 17-35041) [hereinafter *Appellant's Brief*].

¹⁶⁷ *Cobbler*, 901 F.3d at 1144 (emphasis added).

¹⁶⁸ *Id.* at 1144–45. ("The direct infringement claim fails because Gonzales's status as the registered subscriber of an infringing IP address, standing alone, does not create a reasonable inference that he is also the infringer. . . . A plaintiff must allege *something more* to create a reasonable inference that a subscriber is also an infringer." (emphasis added)). "To establish a claim of copyright infringement, Cobbler . . . must show that [it] owns the copyright and that the *defendant himself* violated one or more of the plaintiff's exclusive rights under the Copyright Act." *Id.* at 1147 (alteration in original) (emphasis added) (quoting *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004)). As mentioned previously in this Comment, in this context, I am referring to a defendant's public IPA, assigned by their ISP. See *supra* notes 62–63 and accompanying text for a discussion on public IPAs and local IPAs.

¹⁶⁹ *Cobbler*, 901 F.3d at 1144–45.

¹⁷⁰ *Id.* at 1146–47 ("Identifying an infringer becomes even more difficult in instances like this one, where numerous people live in and visit a facility that uses the same internet service. While we recognize this obstacle to naming the correct defendant, this complication does not change the plaintiff's burden to plead factual allegations that create a reasonable inference that the defendant is the infringer.").

consistent with Gonzales’s liability, but not facts that would *plausibly* entitle Cobbler to relief.¹⁷¹

The Ninth Circuit identified two strands of possible contributory infringement liability: (1) actively encouraging or inducing infringement through specific actions or (2) distributing a product incapable of substantial or commercially significant noninfringing uses that is then used for infringement.¹⁷² For the first strand, a plaintiff must allege that the defendant knew of the infringing activity and induced, encouraged, caused, or materially contributed to the infringement.¹⁷³ Cobbler’s contributory infringement claim is based on its allegation that Gonzales failed to police his internet service, which does not meet this standard because Gonzales did not encourage, induce, cause, or materially contribute to the infringement, as Gonzales made no clear expression or took any affirmative steps to foster the infringement.¹⁷⁴ For the second

¹⁷¹ *Id.* at 1147 (“This is a situation ‘[w]here a complaint pleads facts that are merely consistent with a defendant’s liability, . . . stop[ping] short of the line between possibility and plausibility of entitlement to relief.’” (alteration in original) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009))).

¹⁷² *Id.* at 1148 (identifying two strands of contributory infringement liability: “actively encouraging (or inducing) infringement through specific acts’ or ‘distributing a product distributees use to infringe copyrights, if the product is not capable of ‘substantial’ or ‘commercially significant’ noninfringing uses.” (quoting *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1170 (9th Cir. 2007))). The second strand holds true even if the defendant knew that the product was capable of infringing uses. *Id.*

¹⁷³ *Id.* at 1145 (“[W]ithout allegations of intentional encouragement or inducement of infringement, an individual’s failure to take affirmative steps to police his internet connection is insufficient to state a claim.”). “A claim for contributory infringement requires allegations that the defendant is one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.” *Id.* at 1147 (citations and internal quotation marks omitted). Cobbler argued that a “material contribution [was] plead and supported” and that “Gonzales had repeated notice of specific instances of infringing activity and took no action for years other than to continue to pay the monthly bill and willfully provide the Internet service used to infringe the rights of Cobbler and countless others.” *Appellant’s Brief*, *supra* note 166, at 17, 21. Gonzales responded that “the dismissal with prejudice of the contributory copyright infringement claim can be affirmed by a determination that paying the bill for Internet service, standing alone, is not a material contribution.” *Appellee’s Answer*, *supra* note 145, at 9.

¹⁷⁴ *Cobbler*, 901 F.3d at 1147–49. (“No allegations suggest that Gonzales made any ‘clear expression’ or took ‘affirmative steps’ to foster the infringement—Gonzales’s only action was his failure to secure, police and protect the connection. . . . Because a failure to take affirmative steps to prevent infringement alone cannot trigger liability, . . . Cobbler Nevada failed to state a claim to relief that is plausible on its face”) (citations and internal quotation marks omitted).

strand, the court explained that providing internet access is not distributing a product or service incapable of substantial or commercially significant non-infringing uses.¹⁷⁵ Therefore, Gonzales could not be held liable for contributory infringement.¹⁷⁶ The Ninth Circuit also refused to create an affirmative duty to police one's internet connection for infringement.¹⁷⁷

The *Cobbler* court also held that the district court did not abuse its discretion by awarding attorney's fees.¹⁷⁸ Under the Copyright Act, district courts may award reasonable attorney's fees to a prevailing party for copyright infringement claims.¹⁷⁹ Gonzales is a prevailing party because *Cobbler's* contributory infringement claim was dismissed with prejudice.¹⁸⁰ The Ninth Circuit uses a list of factors to consider in making a fee determination, known as the "Fogerty factors."¹⁸¹ The district court focused on the unreasonableness of *Cobbler's* litigating position, and reasoned that the fee award would act to deter *Cobbler* from over-

¹⁷⁵ *Id.* at 1149 (explaining tersely that, "[p]roviding internet access can hardly be said to be distributing a product or service that is not capable of substantial or commercially significant noninfringing uses" (internal quotation marks omitted)). The Ninth Circuit did not provide a detailed explanation of this finding, but it is likely that the *Cobbler* court was implying that it was obvious that internet access has substantial and commercially significant non-infringing uses. *Id.*; *Appellee's Answer*, *supra* note 145, at 9 ("The 'device,' in the present situation, would be access to the Internet, which unquestionably has substantial noninfringing uses.").

¹⁷⁶ *Cobbler*, 901 F.3d at 1149.

¹⁷⁷ *Id.* "We note that *Cobbler Nevada's* theory both strays from precedent and effectively creates an affirmative duty for private internet subscribers to actively monitor their internet service for infringement. Imposing such a duty would put at risk any purchaser of internet service who shares access with a family member or roommate, or who is not technologically savvy enough to secure the connection to block access by a frugal neighbor. This situation hardly seems to be one of the circumstances in which it is just to hold one individual accountable for the actions of another." *Id.* (citations and internal quotation marks omitted).

¹⁷⁸ *Id.* at 1149. For the district court's holding on attorney's fees, see *Cobbler Nev., LLC v. Gonzales*, No. 3:15-cv-866-SB, 2017 U.S. Dist. LEXIS 892, at *5-6 (D. Or. Jan. 4, 2017), *aff'd*, 901 F.3d 1142 (9th Cir. 2018).

¹⁷⁹ *Cobbler*, 901 F.3d at 1149 (citing 17 U.S.C. § 505).

¹⁸⁰ *Id.* ("[A] defendant is a prevailing party following dismissal of a claim if the plaintiff is judicially precluded from refileing the claim against the defendant in federal court." (alteration in original) (quoting *Cadkin v. Loose*, 569 F.3d 1142, 1150 (9th Cir. 2009))); see 17 U.S.C. § 505 ("[T]he court in its discretion may allow the recovery of full costs by or against any party . . .").

¹⁸¹ *Cobbler*, 901 F.3d at 1149. These factors are based on the United States Supreme Court decision, *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994).

aggressively pursuing alleged infringers without a reasonable basis.¹⁸² The Ninth Circuit upheld the fee determination.¹⁸³

III. ANALYSIS—WHY THE *COBBLER* RULE IS CORRECT

The *Cobbler* court created a rule that heightens pleading requirements in BitTorrent cases, and the Ninth Circuit did not attempt to limit its holding to cases with analogous facts.¹⁸⁴ District courts have subsequently interpreted the rule broadly, applying it to cases where the complaint merely alleges that a specific person is the subscriber of an IPA associated with infringing activity.¹⁸⁵ The holding was simple: “[W]e consider whether a bare allegation that a defendant is the registered subscriber of an [IPA] associated with infringing activity is sufficient to state a claim for direct or contributory infringement. We conclude that it is not.”¹⁸⁶ The *Cobbler* rule correctly interprets the plausibility pleading standard in the BitTorrent context and should be adopted by district courts throughout the United States.

A. *Plausibility Pleading and Direct Infringement*

In *Cobbler*, it was clear that Gonzales was unlikely to be the infringer, and the facts in the complaint did not create a plausible claim for direct infringement against Gonzales.¹⁸⁷ Therefore, dismissing *Cobbler*’s direct

¹⁸² *Cobbler*, 901 F.3d at 1149.

¹⁸³ *Id.* at 1149–50.

¹⁸⁴ *Id.* at 1144–45.

¹⁸⁵ See, e.g., *Malibu Media, LLC v. Peled*, No. 2:18-cv-00141-KSH-CLW, 2020 U.S. Dist. LEXIS 28768, at *12–13 (D.N.J. Feb. 20, 2020); *Malibu Media, LLC v. Doe*, No. 18 C 450, 2018 U.S. Dist. LEXIS 207655, at *7–8 (N.D. Ill. Dec. 10, 2018) (“[The plaintiff] argues that *Cobbler Nevada* is distinguishable because the facts there indicated the IP address serviced an adult care home and both residents and visitors could access the IP address. . . . But the Ninth Circuit did not confine its analysis to those facts nor does the Court believe such a narrowing appropriate.” (citing *Cobbler*, 901 F.3d at 1145)).

¹⁸⁶ *Cobbler*, 901 F.3d at 1144.

¹⁸⁷ *Id.* at 1144–45. Gonzales was unlikely to be the infringer because his internet connection was accessible to residents and visitors of the adult care home and *Cobbler*’s lawyer had

infringement claim was appropriate. However, the facts in other cases may not be as favorable to the defendant. Therefore, to determine whether the *Cobbler* rule for direct infringement should be applied broadly, the plausibility pleading standard must be applied to the typical BitTorrent case.¹⁸⁸

The difficulty in satisfying the plausibility pleading standard for a direct infringement claim is pleading facts that create a plausible claim that the subscriber himself was the infringer. At the pleadings stage of a BitTorrent lawsuit, a plaintiff may only have the IPA associated with infringing activity and the subscriber's information.¹⁸⁹ A plaintiff who claims direct copyright infringement must show that he owns a valid copyright and that the defendant violated the copyright owner's rights under the Copyright Act.¹⁹⁰

However, other than paying the internet bill, there is little connection between a subscriber and a specific instance of infringement associated with his IPA. An IPA does not identify an individual user; it is simply an electronic destination for internet traffic assigned by an ISP to

concluded that Gonzales was unlikely to be the infringer. *Id.* A direct infringement claim requires that the defendant himself violated the plaintiff's copyright. *Id.* at 1147.

¹⁸⁸ See *supra* Section I.D for a discussion on the plausibility pleading standard. It is also important to note that the rule in *Cobbler* is satisfied when there is "something more" to create a reasonable inference that the subscriber is also the infringer. See *Cobbler*, 901 F.3d at 1145 (9th Cir. 2018). The rule applies when the complaint merely alleges that the defendant is the registered subscriber of an IP address associated with infringing activity, but the facts pleaded do not create a reasonable inference that the subscriber himself was the infringer. *Id.* at 1144–45.

¹⁸⁹ These limited allegations are common in BitTorrent complaints. See *Sag & Haskell*, *supra* note 50, at 615–16. "The typical complaint alleges only that an unknown device used the defendant's [IPA] to participate in a file-sharing swarm and that this swarm unlawfully reproduced and distributed the plaintiff's copyrighted work. That falls far short of suggesting any facts upon which one could conclude that someone using the defendant's [IPA] made a substantial copy of the copyrighted work or that the named defendant was that person." *Id.*

¹⁹⁰ *Cobbler*, 901 F.3d at 1147 (citing *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004)). This is the commonly articulated rule in the Ninth Circuit for direct infringement. See, e.g., *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001); *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1085 (9th Cir. 1989). The United States Supreme Court explained that "[t]here are two types of liability for copyright infringement: direct and secondary. As its name suggests, the former applies when an actor personally engages in infringing conduct." *ABC, Inc. v. Aereo, Inc.*, 573 U.S. 431, 452 (2014) (Scalia, J., dissenting) (citation omitted).

a customer at a specific time.¹⁹¹ Though it may seem intuitive that the internet subscriber is likely to be the person using the internet connection at a given time, this intuition is flawed: many people may share an internet connection and, therefore, a single public IPA; wireless routers may not be secured and, if secured, the router passwords may be shared with numerous people; and unsecured guest accounts may be created and forgotten about, allowing guest access to anyone within range of the wireless router.¹⁹² Because numerous people on various network-capable devices may share a single public IPA, the subscriber of the IPA associated with infringement is just one of many people that may be responsible for a specific instance of infringement.

Identifying an infringer by using an IPA is analogous to assuming that the person listed on a house-phone bill made a specific phone call.¹⁹³ Similar to how a house-phone number can be shared with multiple phones in a single household, a single internet connection can be shared with numerous devices.¹⁹⁴ Therefore, it is no more likely that an internet subscriber is responsible for a specific use of his internet connection than

¹⁹¹ See *United States v. Yu*, 411 Fed. Appx. 559, 560 n.1 (4th Cir. 2010) (“Each computer connected to the Internet is assigned a unique numerical address, otherwise known as an Internet protocol or [IPA], to identify itself and facilitate the orderly flow of electronic traffic.” (citation omitted)); *Strike 3 Holdings, LLC v. Doe*, No. 18-2674 (JHR/JS), 2019 U.S. Dist. LEXIS 184513, at *34–35, *38 (D.N.J. Oct. 24, 2019) (“An IP address is not really an ‘address’ or physical ‘place’ in the usual sense of the words, and therefore the term can be quite misleading. In fact, it is only an electronic ‘route’ to the Internet assigned by a Provider to a customer on a given date and hour to provide access to the internet.”), *rev’d on other grounds*, No. 1:18-cv-2674-NLH-JS, 2020 U.S. Dist. LEXIS 114598 (D.N.J. June 30, 2020). However, an IPA may be better explained as an electronic destination for sending and receiving data, rather than as a route. See Tim Fisher, *What Is an IP Address*, LIFEWIRE, <https://www.lifewire.com/what-is-an-ip-address-2625920> (last updated Mar. 9, 2020) [<https://perma.cc/2534-FDGK>] ; Chris Pollette & Stephanie Crawford, *What Is an IP Address?*, HOWSTUFFWORKS, <https://computer.howstuffworks.com/internet/basics/what-is-an-ip-address.htm> (last updated July 15, 2020) [<https://perma.cc/9TES-T7ME>].

¹⁹² See *Strike 3 Holdings*, 2019 U.S. Dist. LEXIS 184513, at *34–35, *38; Hoffman, *How and Why All Devices in Your Home Share One IP Address*, *supra* note 62.

¹⁹³ See *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 84–85 (E.D.N.Y. 2012). I confine the telephone analogy used in this case to house phones because the inference that the person associated with a cell phone number made a specific call is, in my opinion, fairly reasonable.

¹⁹⁴ *Id.* at 84. Unlike a phone number, however, an internet connection can be used by multiple individuals on multiple devices simultaneously, adding a complexity to identifying a specific user at a specific time that does not exist with traditional telephones. *Id.*

a house-phone subscriber is for a specific phone call made from his number.¹⁹⁵ In fact, it may be less likely because wireless networks are ubiquitous and, if a network is unsecured, it may be accessible to people outside the home.¹⁹⁶

Another complicating factor is that BitTorrent was not designed to be used to reliably track IPAs.¹⁹⁷ Internet users have the ability to mask their IPAs with other users' IPAs¹⁹⁸ and, as a result, a participant in a BitTorrent swarm can display another person's IPA and an observer will

¹⁹⁵ Judge Lamberth of the United States District Court for the District of Columbia has explained that “inferring the person who pays the cable bill illegally downloaded a specific file is even less trustworthy than inferring they watched a specific TV show.” See *Malibu Media, LLC v. Peled*, No. 2:18-cv-00141-KSH-CLW, 2020 U.S. Dist. LEXIS 28768, at *7–9 (D.N.J. Feb. 20, 2020) (citing *Strike 3 Holdings, LLC v. Doe*, 351 F. Supp. 3d 160, 162 (D.D.C. 2018), *rev'd*, 964 F.3d 1203 (D.C. Cir. 2020)). Judge Rao of the United States Court of Appeals for the District of Columbia Circuit, in reversing Judge Lamberth's opinion, seems to interpret *Cobbler's* holding narrowly, explaining that “[v]iewing the allegations in the light most favorable to Strike 3, we think it at least plausible that the registered [IPA] subscriber ‘actually did the infringing[.]’” and “under [the circumstances in *Cobbler*], the Ninth Circuit found, the defendant's ‘status as the registered subscriber of an infringing [IPA], standing alone, does not create a reasonable inference that he is also the infringer.’” *Strike 3 Holdings, LLC*, 964 F.3d at 1211–12 (citations omitted). This Comment argues that *Cobbler's* holding should not be applied this narrowly. See *supra* notes 184–94 and accompanying text; *infra* notes 201–03 and accompanying text; *infra* Section IV.C. However, Judge Rao also explains that, at the expedited discovery stage, “we cannot know what [the plaintiff's] subpoena will uncover. The mere fact that discovery *may* demonstrate that the subscriber is not the proper defendant is no basis to close the courthouse doors before [the plaintiff] can step inside.” See *Strike 3 Holdings, LLC*, 964 F.3d at 1212. This Comment agrees that plaintiffs, under these circumstances, should be granted expedited discovery. See *infra* Sections IV.BC.

¹⁹⁶ See *Elf-Man, LLC v. Cariveau*, No. C13-0507RSL, 2014 U.S. Dist. LEXIS 6453, at *3 (W.D. Wash. Jan. 17, 2014).

¹⁹⁷ See *Strike 3 Holdings, LLC v. Doe*, No. 18-2674 (JHR/JS), 2019 U.S. Dist. LEXIS 184513, at *38 (D.N.J. Oct. 24, 2019), *rev'd on other grounds*, No. 1:18-cv-2674-NLH-JS, 2020 U.S. Dist. LEXIS 114598 (D.N.J. June 30, 2020).

¹⁹⁸ *Id.* at *38–39 (citing Sag & Haskell, *supra* note 50, at 591) (explaining that the BitTorrent protocol does not perform source IP address validation, which allows a user to mask their IP address with someone else's); see Lucian Constantin, *BitTorrent Programs Can Be Abused to Supercharge Denial-of-Service Attacks*, PCWORLD (Aug. 17, 2015, 8:56 AM), <https://www.pcwORLD.com/article/2971892/bittorrent-programs-can-be-abused-to-amplify-distributed-denialofservice-attacks.html> [<https://perma.cc/WC3L-64MA>] (“BitTorrent applications used by hundreds of millions of users around the world could be tricked into participating in distributed denial-of-service (DDoS) attacks . . . [A]n attacker can send a [data] packet with a forged header that specifies someone else's IP address as the source, causing the service to send the response to that address.”).

be unaware.¹⁹⁹ Furthermore, sites coordinating BitTorrent swarms may inject random IPAs into their swarm list results.²⁰⁰ Thus, an IPA that did not participate in a swarm may appear, and the internet subscriber associated with the IPA may be misidentified as an infringer and sued.

Despite the possibility that the subscriber may be the infringer, there are numerous alternative possibilities.²⁰¹ Therefore, pleading that an IPA is associated with infringement does not state a plausible claim for direct infringement against the subscriber.²⁰² Because of the numerous alternative possibilities, without pleading additional facts, the allegation that the subscriber is also the infringer is an unsubstantiated conclusion, and the complaint fails to state a plausible claim for relief from the subscriber himself.²⁰³

Thus, the Ninth Circuit was correct in establishing a rule limiting the grounds for pleading direct infringement, and the rule should be adopted by district courts throughout the country.

B. *Plausibility Pleading and Contributory Infringement*

If a plaintiff cannot succeed in a direct infringement claim, a contributory infringement claim is a useful alternative that does not require pleading that the subscriber-defendant is the infringer.²⁰⁴ In *Cobbler*, the Ninth Circuit affirmed the district court's dismissal of Cobbler's contributory infringement claim with prejudice because Gonzales's failure to police his internet connection did not subject him to contributory infringement liability.²⁰⁵ In so doing, the Ninth Circuit established a rule that the bare allegation that the defendant is the

¹⁹⁹ *Strike 3 Holdings*, 2019 U.S. Dist. LEXIS 184513, at *38–39.

²⁰⁰ *Id.*

²⁰¹ See *generally* *Countryman Nev., LLC v. Pitts*, No. 6:14-cv-493-Orl-40GJK, 2014 U.S. Dist. LEXIS 173549 (M.D. Fla. Dec. 16, 2014).

²⁰² See *Elf-Man, LLC v. Cariveau*, No. C13-0507RSL, 2014 U.S. Dist. LEXIS 6453, at *3–4, *7–8 (W.D. Wash. Jan. 17, 2014).

²⁰³ Legal conclusions are not entitled to the assumption of truth. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

²⁰⁴ See *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264 (9th Cir. 1996).

²⁰⁵ *Cobbler Nev., LLC v. Gonzales*, 901 F.3d 1142, 1145 (9th Cir. 2018).

subscriber of an IPA associated with infringing activity is insufficient to state a claim for contributory infringement.²⁰⁶

Contributory infringement is the tort law concept that one who directly contributes to another's infringement should be held accountable.²⁰⁷ There are two types of contributory infringement liability: (1) actively encouraging or inducing direct infringement through specific acts, or (2) distributing a product incapable of substantial or commercially significant noninfringing uses that a third party uses to infringe.²⁰⁸ Contributory liability may attach when one knows of another's infringing activity and actively induces, encourages, or materially contributes to the infringement.²⁰⁹ However, one is not subject to liability simply because he distributes a product capable of substantial noninfringing uses and another person uses the product to infringe, unless the distributor promoted the infringement.²¹⁰ If one did not distribute the product with the object of promoting its use for copyright infringement, there is no duty to affirmatively prevent the

²⁰⁶ *Id.* at 1144.

²⁰⁷ *Fonovisa Inc.*, 76 F.3d at 264 (citations omitted). A state-law claim of negligence when a defendant knows someone is using his internet connection to pirate copyrighted works is preempted by the Copyright Act. *See* *Liberty Media Holdings, LLC v. Tabora*, 2012 U.S. Dist. LEXIS 94751, at *3 (S.D.N.Y. July 9, 2012); 17 U.S.C. § 301.

²⁰⁸ *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1170 (9th Cir. 2007). “[T]he Court has defined two categories of contributory liability: ‘Liability under our jurisprudence may be predicated on actively encouraging (or inducing) infringement through specific acts (as the Court’s opinion develops) or on distributing a product distributees use to infringe copyrights, if the product is not capable of ‘substantial’ or ‘commercially significant’ noninfringing uses.’” *Id.* (quoting *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984)).

²⁰⁹ *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (citing *Gershwin Publ’g Corp. v. Columbia Artists Mgmt.*, 443 F.2d 1159, 1162 (2d Cir. 1971)); *Fonovisa, Inc.*, 76 F.3d at 264.

²¹⁰ *MGM Studios Inc.*, 545 U.S. at 934–35 (explaining the holding in *Sony*, 464 U.S. at 442). “*Sony*’s rule limits imputing culpable intent as a matter of law from the characteristics or uses of a distributed product. . . . [However,] where evidence goes beyond a product’s characteristics or the knowledge that it may be put to infringing uses, and shows statements or actions directed to promoting infringement, *Sony*’s staple-article rule will not preclude liability.” *Id.* “[O]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties.” *Id.* at 936–37. “[M]ere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability.” *Id.* at 937.

infringement.²¹¹ If a person did not take any affirmative actions to foster infringement, mere knowledge of the infringing potential of a product does not subject him to contributory infringement liability.²¹²

In the context of a BitTorrent lawsuit, the product being used for infringement is an internet connection. An IPA can identify an internet subscriber, but the distribution of the internet connection does not subject the subscriber to contributory infringement liability, even if the subscriber knows of the connection's infringing potential; this is true because the internet has substantial and commercially significant noninfringing uses and was not distributed with the object of promoting copyright infringement.²¹³ Therefore, to state a plausible claim for contributory infringement, a complaint must plead that the subscriber actively encouraged, induced, or materially contributed to another person's direct infringement.²¹⁴ Failing to reasonably police one's internet connection fails to satisfy the plausibility pleading standard because the subscriber did not take affirmative steps to foster the infringement.²¹⁵

²¹¹ *MGM Studios Inc.*, 545 U.S. at 936–37, 939 n.12. The case of distributing one's internet that is later used by another for copyright infringement is different than what had occurred in *MGM*. In *MGM*, the Supreme Court explained that “from the moment [the defendants] began to distribute their free software, each one clearly voiced the objective that recipients use it to download copyrighted works, and each took active steps to encourage infringement.” *Id.* at 923–924. The defendants' failure to develop filtering tools to diminish copyright infringement from the use of their software was evidence that the defendants facilitated infringement. *Id.* at 939. Therefore, there was “substantial evidence . . . of inducement” and the *Sony* rule was inapplicable. *Id.* at 941.

²¹² *Id.* at 936–37.

²¹³ *Id.* at 937, 939 n.12. An example of a noninfringing use of an internet connection is downloading or viewing this Comment using a web browser.

²¹⁴ *Id.* at 936–37, 939 n.12; *Fonovisa, Inc.*, 76 F.3d at 264. The second of the two defined categories of contributory infringement liability is unavailable here, because an internet connection has substantial or commercially significant noninfringing uses. See *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1170 (9th Cir. 2007).

²¹⁵ *Cobbler* pleaded that Gonzales “‘facilitated and promoted the use of the internet for the infringing of [its] exclusive rights under the Copyright Act’ by failing to ‘reasonably secure, police and protect’ the use of his internet service.” *Cobbler Nev., LLC v. Gonzales*, 901 F.3d 1142, 1145–46 (9th Cir. 2018) (citation omitted). The Ninth Circuit held that a “failure to take affirmative steps to prevent infringement alone cannot trigger liability,” and therefore, “*Cobbler* . . . failed to “state a claim to relief that is plausible on its face.” *Id.* at 1148–49 (citations and internal quotation marks omitted).

Thus, the Ninth Circuit was correct in establishing a broad rule limiting the grounds for pleading contributory infringement in BitTorrent cases: the bare allegation that a defendant is the subscriber of an IPA associated with infringing activity is insufficient to state a claim for contributory infringement.²¹⁶ A subscriber cannot be liable for another's infringement using his internet connection without actively encouraging, inducing, or materially contributing to the infringement himself.²¹⁷

C. *How Cobbler May Result in Infringing Defendants Escaping Liability*

This Comment argues that the Ninth Circuit correctly interpreted the plausibility pleading standard in a BitTorrent litigation context. However, one of *Cobbler's* detriments is that it will likely result in some infringing defendants escaping liability, as a heightened pleading standard increases the chances of dismissal without formal discovery.²¹⁸

In BitTorrent suits, the primary method of finding infringers is through IPAs and ISP subpoenas.²¹⁹ After the subpoena, the plaintiff may only have the IPA associated with the infringement and the internet subscriber's information.²²⁰ A plaintiff can use the formal discovery process to obtain information proving that the subscriber-defendant infringed its copyright, which cannot practically be obtained through other means.²²¹ However, the *Cobbler* rule may preclude plaintiffs from

²¹⁶ *Id.* at 1144.

²¹⁷ See *MGM Studios Inc.*, 545 U.S. at 936–37, 939 n.12; *Fonovisa, Inc.*, 76 F.3d at 264.

²¹⁸ See Hubbard, *supra* note 95, at 695–96 (explaining that the plausibility pleading standard has created a “restrictive ethos” that “eschews discovery and trial in favor of dispositions at the pleading stage,” and contrasting the plausibility pleading standard with the notice pleading standard, which was less restrictive (citation omitted)). It follows that heightening pleading standards in BitTorrent lawsuits will result in discovery and trial being eschewed in favor of dispositions at the pleading stage.

²¹⁹ See *supra* notes 58–73, 80 and accompanying text for a discussion of the process used to identify potential infringers.

²²⁰ See Sag & Haskell, *supra* note 50, at 615.

²²¹ See *Discovery*, USLEGAL, <https://civilprocedure.uslegal.com/discovery> [<https://perma.cc/E6QS-UUQ3>].

reaching the discovery stage and obtaining the evidence necessary to prove infringement. For example, if a BitTorrent suit is dismissed before discovery, the plaintiff is precluded from deposing the defendant or obtaining his hard drive, both of which could prove infringement.²²² This limitation may prove fatal to a BitTorrent lawsuit.

Therefore, *Cobbler* creates a substantial burden for plaintiffs by requiring them to plead “something more” than an IPA to connect the subscriber to the infringement.²²³ Because *Cobbler* is binding in the Ninth Circuit and has been accepted by district courts outside the circuit as well, its holding has had a major impact on BitTorrent litigation.²²⁴ Though the *Cobbler* rule correctly interprets the plausibility pleading standard and should be applied broadly, it undoubtedly increases a plaintiff’s burden and will likely result in some infringing defendants escaping liability.

IV. COBBLER’S EFFECT ON SUBSEQUENT BITTORRENT LAWSUITS

The *Cobbler* rule has resulted in dismissal of complaints against identified defendants,²²⁵ but it has been less helpful for Doe defendants hoping to avoid identification altogether.²²⁶ This Part will explore how

²²² See *infra* Section IV.C.

²²³ *Cobbler Nev., LLC v. Gonzales*, 901 F.3d 1142, 1144–45 (9th Cir. 2018). The Ninth Circuit recognized the obstacle that it was creating. *Id.* at 1146–47. The “something more” standard created by *Cobbler* has been satisfied in other cases, and the requisite information may be publicly available and accessible without formal discovery. See, e.g., *Malibu Media, LLC v. Doe*, No. 18 C 450, 2019 U.S. Dist. LEXIS 94433, at *6–7 (N.D. Ill. June 5, 2019).

²²⁴ See, e.g., *Malibu Media v. Park*, Civil Action No. 17-12107 (JMV) (MF), 2019 U.S. Dist. LEXIS 113434, at *10–14 (D.N.J. July 9, 2019); *Venice PI, LLC v. Huseby*, No. C17-1160 TSZ, 2019 U.S. Dist. LEXIS 62856 (W.D. Wash. Apr. 11, 2019).

²²⁵ See, e.g., *Malibu Media, LLC v. Doe*, No. 18 C 450, 2018 U.S. Dist. LEXIS 207655, at *6-7 (N.D. Ill. Dec. 10, 2018) (adopting *Cobbler* and granting the defendant’s motion to dismiss); *Cobbler Nev., LLC v. James*, No. C15-1430 TSZ, 2018 U.S. Dist. LEXIS 180082, at *2–4 (W.D. Wash. Oct. 19, 2018) (ordering plaintiff to show cause why the default judgment should not be vacated and why the plaintiff’s claims should not be dismissed with prejudice in light of the *Cobbler* decision).

²²⁶ See, e.g., *Strike 3 Holdings, LLC v. Doe*, No. 18-CV-2648 (VEC), 2019 U.S. Dist. LEXIS 587, at *5, *8–9 (S.D.N.Y. Jan. 2, 2019) (denying a defendant’s motion to quash a subpoena on defendant’s ISP, explaining that the *Cobbler* holding was in the context of a motion to dismiss); *Strike 3 Holdings, LLC v. Doe*, No. 18-cv-02019-YGR (EDL), 2018 U.S. Dist. LEXIS 218242, at

Cobbler has affected subsequent BitTorrent cases, both in the contexts of motions to dismiss and expedited discovery motions for ISP subpoenas.

A. *Motions to Dismiss*

Under the *Cobbler* rule, simply pleading that a defendant is the subscriber of an IPA associated with infringing activity is insufficient to survive a motion to dismiss for a copyright infringement claim.²²⁷ Courts that adopt the *Cobbler* rule require that a plaintiff allege “something more” to satisfy the plausibility pleading standard.²²⁸

The *Cobbler* rule has been adopted by district courts outside of the Ninth Circuit.²²⁹ For example, the District Court for the Northern District of Illinois adopted the *Cobbler* rule in *Malibu Media, LLC v. Doe (Malibu I)*.²³⁰ There, the court held that Malibu Media’s infringement claim was insufficient because the only connection alleged between the

*10–12 (N.D. Cal. Sept. 14, 2018) (acknowledging *Cobbler* but denying a defendant’s motion to quash a subpoena to his ISP). See *supra* notes 67–73 and accompanying text for a discussion on how BitTorrent defendants are identified through ISP subpoenas and expedited discovery motions.

²²⁷ *Cobbler*, 901 F.3d at 1144. In light of the *Cobbler* decision, some courts have been inclined to vacate or deny default judgments against defendants. See, e.g., *Malibu Media, LLC v. Peled*, Civil No. 2:18-cv-00141-KSH-CLW, 2020 U.S. Dist. LEXIS 28768, at *12–14, *16 (D.N.J. Feb. 20, 2020); *Cook Prods., LLC v. Swanicke*, No. C16-1884 TSZ, 2018 U.S. Dist. LEXIS 180079, at *2–4 (W.D. Wash. Oct. 19, 2018); *Cobbler Nev., LLC v. James*, No. C15-1430 TSZ, 2018 U.S. Dist. LEXIS 180082, at *2–4 (W.D. Wash. Oct. 19, 2018). But see *Bodyguard Prods. v. Doe*, No. 2:18-cv-00026-TC, 2018 U.S. Dist. LEXIS 192234, at *6–9 (D. Utah Nov. 8, 2018) (refusing to apply the holding in *Cobbler* and vacate default judgments against defendants, holding that the defendants, by not appearing in court, forfeited their rights to prove that they were not infringers).

²²⁸ See, e.g., *Malibu Media*, 2018 U.S. Dist. LEXIS 207655, at *6–7 (“Instead, to cross ‘the line between possibility and plausibility to relief,’ a plaintiff ‘must allege something more to create a reasonable inference that a subscriber is also an infringer.’” (quoting *Cobbler*, 901 F.3d at 1145, 1147)).

²²⁹ See, e.g., *Malibu Media v. Park*, Civil Action No. 17-12107 (JMV) (MF), 2019 U.S. Dist. LEXIS 113434, at *13–14 (D.N.J. July 9, 2019) (adopting *Cobbler* and denying the plaintiff’s unopposed motion for default judgment. The district court was not satisfied that the plaintiff sufficiently demonstrated that the named defendant was actually the infringer.); *Malibu Media, LLC v. Doe*, No. 18 C 450, 2018 U.S. Dist. LEXIS 207655, at *6–7 (N.D. Ill. Dec. 10, 2018) (adopting *Cobbler* in the Northern District of Illinois, Eastern Division, when granting defendant’s motion to dismiss).

²³⁰ *Malibu Media*, 2018 U.S. Dist. LEXIS 207655, at *7.

defendant and the infringement was that the defendant was also the subscriber of the IPA associated with the infringement.²³¹ The court noted that courts across the country are split as to whether such a complaint is sufficient to survive a motion to dismiss, but applied the *Cobbler* rule and granted the defendant's motion to dismiss without prejudice.²³²

BitTorrent plaintiffs may survive motions to dismiss when pleading "something more" than just an internet subscriber and an IPA, such as the subscriber's age, gender, education, employment, and details about the infringing activity that occurred on the subscriber's internet connection.²³³ These additional facts about the subscriber might increase the likelihood that he is the infringer, creating a plausible claim for direct infringement.²³⁴ For example, in *Malibu Media, LLC v. Doe (Malibu II)*,²³⁵ the plaintiff amended its complaint from *Malibu I* to include additional details tying the defendant to the infringement.²³⁶ The same

²³¹ *Id.* at *6–7. The court does not specify whether this is a direct or contributory infringement claim, but the court treats the claim as a direct infringement claim because it alleges that the defendant "violated the Copyright Act by using the BitTorrent file distribution network to illegally copy and distribute Malibu Media's copyrighted movies." *Id.* at *1. This complaint was an amended complaint. *Id.* at *1–2.

²³² *Id.* at *6–7, *9.

²³³ *Malibu Media, LLC v. Doe*, No. 18 C 450, 2019 U.S. Dist. LEXIS 94433, at *2–3, *5–6 (N.D. Ill. June 5, 2019). The second amended complaint in this case did not specify how some of these additional facts about the defendant were discovered. *See* Second Amended Complaint at 3–4, *Malibu Media, LLC v. Doe*, No. 18 C 450, 2019 U.S. Dist. LEXIS 94433 (N.D. Ill. June 5, 2019) (stating that "[p]laintiff is informed and believes that Defendant . . ." before several of the allegations against the Defendant).

²³⁴ *Malibu Media*, 2019 U.S. Dist. LEXIS 94433, at *2–6.

²³⁵ *Id.*

²³⁶ *Id.* at *1–2. Malibu Media filed a second amended complaint, including the following additional allegations: "Doe, a male in his mid-forties, has lived at his residence since July 2014. Doe has a Bachelor of Science degree in computer science and has training and employment experience in computer programming, software development, and mobile applications. His experience translates to knowledge of internet security, including password protecting internet routers. Doe was the only male at his residence during the period of recorded infringement, between March 12, 2015, and November 7, 2017. Malibu Media's investigator downloaded one or more pieces of the sixteen Malibu Media copyrighted works at issue on approximately 300 occasions during this period. Doe also downloaded, copied, and distributed at least 240 other works, including the television series Mr. Robot, The 100, and Vikings; the movie The Bourne Supremacy; and over 200 adult theme films from other creators. Malibu Media has not discovered any use of BitTorrent after Doe received the subpoena issued to his ISP provider." *Id.* at *2–3;

district court judge from *Malibu I* refused to dismiss the amended complaint in *Malibu II*, holding that the additional allegations in the complaint set forth a plausible claim connecting the defendant to the infringement.²³⁷

After *Cobbler*, simply alleging a connection between an internet subscriber and infringement associated with his IPA is insufficient to state a claim for copyright infringement, but a complaint that pleads additional details connecting the subscriber to the infringement may survive a motion to dismiss.²³⁸ If a BitTorrent plaintiff can, without formal discovery, plead these additional facts, the complaint can survive a motion to dismiss.

Acceptance of the *Cobbler* rule has not been unanimous.²³⁹ For example, another judge in the Northern District of Illinois, Eastern Division, refused to adopt the *Cobbler* rule.²⁴⁰ In *Malibu Media, LLC v. Palella*, John Palella, a pro se defendant, moved to dismiss Malibu's complaint because Malibu had done nothing more than simply identify him as the subscriber of an IPA associated with infringement, while others may have had access to his internet connection.²⁴¹ The *Palella* court declined to follow *Cobbler*, explaining that the plaintiff's burden at the pleadings stage of a lawsuit is minimal, and that the plaintiff had conducted a reasonable pre-suit investigation.²⁴²

Second Amended Complaint at 3–6, *Malibu Media, LLC v. Doe*, No. 18 C 450, 2019 U.S. Dist. LEXIS 94433 (N.D. Ill. June 5, 2019).

²³⁷ *Malibu Media*, 2019 U.S. Dist. LEXIS 94433, at *1, *5–7.

²³⁸ *Id.* at *2, *7.

²³⁹ See, e.g., *Malibu Media, LLC v. Palella*, No. 18 C 3041, 2019 U.S. Dist. LEXIS 62974 (N.D. Ill. Apr. 12, 2019). *Palella* was decided in the same district as both *Malibu I* and *Malibu II*, and the *Malibu II* court acknowledged that “another court in this District has disagreed with *Cobbler* . . . and found that allegations of the defendant’s status as the registered [IPA] subscriber suffice at the pleading stage to tie a defendant to the infringing conduct.” *Malibu Media*, 2019 U.S. Dist. LEXIS 94433, at *2 n.2.

²⁴⁰ *Palella*, 2019 U.S. Dist. LEXIS 62974, at *5–6.

²⁴¹ *Id.* at *4.

²⁴² *Id.* at *56 (“But this Court respectfully declines to follow the approach taken in [*Cobbler*]. At the pleading stage, the plaintiff’s burden is minimal. . . . The plaintiff need allege only those facts that are necessary to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests, as well as to raise a plausible inference that the defendant may, in fact, be found liable upon further investigation.” (citations and internal quotation marks omitted)).

Though the *Palella* court declined to follow the *Cobbler* rule, many district courts outside of the Ninth Circuit have adopted the rule. In jurisdictions that follow *Cobbler*, a BitTorrent plaintiff can survive motions to dismiss by furnishing more detailed factual allegations in their complaints.²⁴³

B. *Expedited Discovery to Subpoena ISPs and Identify Defendants*

The *Cobbler* rule has resulted in district courts dismissing complaints against identified defendants, but it has been less helpful for Doe defendants seeking to avoid identification.²⁴⁴ District courts often choose to limit *Cobbler* to cases where the defendant has already been identified and will not use *Cobbler* to deny expedited discovery motions to subpoena ISPs.²⁴⁵ However, Judge Schneider, a magistrate judge for the

²⁴³ See *Malibu Media v. Park*, Civil Action No. 17-12107 (JMV) (MF), 2019 U.S. Dist. LEXIS 113434, at *13–14 (D.N.J. July 9, 2019) (adopting *Cobbler*); *Malibu Media*, 2019 U.S. Dist. LEXIS 94433, at *1–2, *5–7 (finding that additional allegations in a complaint may set forth a plausible claim tying a subscriber of an IP address to infringing activity); *Malibu Media*, 2018 U.S. Dist. LEXIS 207655, at *6–7 (adopting *Cobbler*).

²⁴⁴ See, e.g., *Strike 3 Holdings, LLC v. Doe*, No. 20cv67-LAB-LL, 2020 U.S. Dist. LEXIS 42316, at *11–15 (S.D. Cal. Mar. 9, 2020); *Strike 3 Holdings, LLC v. Doe*, No. 19-cv-00723-JCS, 2019 U.S. Dist. LEXIS 113919, at *8 (N.D. Cal. July 9, 2019) (refusing a defendant’s motion to quash the plaintiff’s subpoena on its ISP, explaining that *Cobbler* does not stand for the proposition that subpoenas may not be used to determine a subscriber’s name); *Strike 3 Holdings, LLC v. Doe*, 2:18-cv-01856-KJD-VCF, 2018 U.S. Dist. LEXIS 179351 (D. Nev. Oct. 17, 2018) (granting a plaintiff’s motion to serve a subpoena on the defendant’s ISP, explaining that *Cobbler* does not raise the pleading standard prior to identifying the defendant, as *Cobbler* dealt with a motion to dismiss after discovery occurred). See *supra* notes 67–73 and accompanying text for a discussion on ISP subpoenas and expedited discovery.

²⁴⁵ See, e.g., *Strike 3 Holdings, LLC v. Doe*, No. 19-cv-08239-VKD, 2020 U.S. Dist. LEXIS 9852, at *1–2 (N.D. Cal. Jan. 21, 2020); *Strike 3 Holdings*, 2018 U.S. Dist. LEXIS 179351, at *3 (“Interpreting *Cobbler* to require plaintiffs to identify defendants without allowing plaintiffs the tools to do so would not serve the interests of justice.”). *Strike 3* has attempted to circumvent federal court by filing an action in equity for a bill of discovery in Florida state court, arguing that, because the plaintiff’s servers are in Florida, the infringers are subject to specific personal jurisdiction in Florida. See, e.g., *Strike 3 Holdings, LLC v. Doe*, No. CV 19-10677-TJH (SP), 2020 U.S. Dist. LEXIS 90945, at *2–3 (C.D. Cal. Apr. 23, 2020); *Strike 3 Holdings, LLC v. Doe*, No. 19-cv-08239-VKD, 2020 U.S. Dist. LEXIS 64453, at *2 (N.D. Cal. Apr. 13, 2020). In both of these cases, the Florida state court granted the motions for leave to serve a subpoena on the ISPs, the Does moved to quash arguing that *Strike 3* should have brought the copyright infringement action in federal court, and *Strike 3* dismissed the Florida actions and agreed to litigate in federal

District Court for the District of New Jersey, Camden Vicinage, recently bucked this trend, though his dispositive opinion was reversed by District Court Judge Hillman.²⁴⁶

In *Strike 3 Holdings, LLC v. Doe*,²⁴⁷ Magistrate Judge Schneider denied an expedited discovery motion to subpoena the defendant's ISP because, after the Doe defendant would be identified, the complaint would not survive a motion to dismiss.²⁴⁸ Judge Schneider explained that it would be anomalous to permitting a plaintiff to obtain discovery based on a futile complaint,²⁴⁹ acknowledging that *Cobbler* was the only circuit court decision that supported its holding, and that some decisions limit *Cobbler* to motions to dismiss.²⁵⁰ District Court Judge Hillman reversed this decision, and the plaintiff was permitted to subpoena the defendants' ISPs.²⁵¹

This Comment does not recommend applying the *Cobbler* rule to expedited discovery motions and disagrees with Magistrate Judge

court instead. *Strike 3 Holdings*, 2020 U.S. Dist. LEXIS 90945, at *2–3; *Strike 3 Holdings*, 2020 U.S. Dist. LEXIS 64453, at *2.

²⁴⁶ See *Strike 3 Holdings, LLC v. Doe*, No. 18-2674 (JHR/JS), 2019 U.S. Dist. LEXIS 184513, at *1–2, *24–26 (D.N.J. Oct. 24, 2019), *rev'd*, No. 1:18-cv-2674-NLH-JS, 2020 U.S. Dist. LEXIS 114598 (D.N.J. June 30, 2020). Though “[p]retrial discovery determinations are routinely treated as non-dispositive matters[,]” District Court Judge Hillman explained that “[t]he thoughtful and comprehensive ruling of the Magistrate Judge on the issues joined by these appeals are dispositive in practical effect. Under the circumstances, the Court finds the safest path forward requires it to review the Magistrate Judge’s decision *de novo*.” *Strike 3 Holdings, LLC*, 2020 U.S. Dist. LEXIS 114598, at *7–8. This Section will later argue district courts should not use *Cobbler* to deny expedited discovery motions. See *infra* Section IV.C.

²⁴⁷ *Strike 3 Holdings, LLC*, 2020 U.S. Dist. LEXIS 114598, at *78.

²⁴⁸ *Id.* at *1–2, *18–19 (“The most fundamental reason the Court denies Strike 3’s request for expedited discovery, and why the Court concludes its discovery requests are not reasonable, is that Strike 3 does not plead a cognizable claim in its complaints. It would be anomalous to authorize discovery based on a John Doe complaint that does not pass muster under FED. R. CIV. P. 12(b)(6), in order to permit Strike 3 to name an individual subscriber who then files a meritorious motion to dismiss.”).

²⁴⁹ *Id.* at *25.

²⁵⁰ *Id.* at *21–22, *25–26 (explaining that, like the complaint in *Cobbler*, the only connection between the Doe defendant and the infringement is that the defendant is the IPA subscriber and that “[t]he Court is aware of authority that limits *Cobbler* to the motion to dismiss context. In other words, some decisions hold that *Cobbler* only applies after the plaintiff has an opportunity to obtain discovery to identify a subscriber. . . . However, the Court respectfully disagrees that *Cobbler* should be given a narrow reading.”).

²⁵¹ See generally *Strike 3 Holdings, LLC*, 2020 U.S. Dist. LEXIS 114598.

Schneider's holding. Extending *Cobbler* to expedited discovery motions will lead to insurmountable information asymmetries.²⁵² After *Cobbler*, to survive a motion to dismiss the plaintiff must plead additional facts, other than an IPA, connecting the subscriber to the infringement.²⁵³ If plaintiffs are denied expedited discovery, they will be unable to identify the subscriber and, subsequently, the opportunity to ever discover these additional facts. It is circular to argue that expedited discovery motions to identify the defendant should be denied because plaintiff's complaint will fail, as the success of a complaint relies on identifying the subscriber and learning more information tying the defendant to the infringement.

District courts should not extend *Cobbler* to expedited discovery motions because it will result in BitTorrent plaintiffs being almost universally unable to vindicate their rights.

C. *How Courts Should, and Should Not, Apply Cobbler*

There is little doubt that *Cobbler* was correctly decided on its facts, and the court did not attempt to limit its holding to analogous cases.²⁵⁴ The *Cobbler* rule correctly interprets the plausibility pleading standard in a BitTorrent context, and district courts should apply the rule broadly,²⁵⁵ as it will protect innocent BitTorrent defendants from a costly and invasive discovery process, while allowing plausible claims to survive a motion to dismiss.²⁵⁶ However, a detrimental consequence of the rule is

²⁵² See Ralph, *supra* note 104, at 14 (explaining information asymmetries in the context of civil litigation and the plausibility pleading standard).

²⁵³ See, e.g., *Malibu Media, LLC v. Doe*, Civil No. 18-2674 (JHR/JS), 2019 U.S. Dist. LEXIS 94433, at *1, *5-7 (N.D. Ill. Apr. 11, 2019).

²⁵⁴ *Cobbler Nevada, LLC v. Gonzales*, 901 F.3d 1142, 1144-46, 1150 (9th Cir. 2018). Gonzales was unlikely to be the infringer because his internet connection was accessible to both residents and visitors of the adult care home and *Cobbler's* lawyer had concluded that Gonzales was unlikely to be the infringer. *Id.*

²⁵⁵ District courts have already applied the *Cobbler* holding broadly. See *Malibu Media, LLC v. Doe*, No. 18 C 450, 2018 U.S. Dist. LEXIS 207655, at *6-8 (N.D. Ill. Dec. 10, 2018).

²⁵⁶ Courts can deny motions to dismiss when a plaintiff alleges additional facts about the defendant, which may be learned through public information and without formal discovery, tying the subscriber to the infringement. See, e.g., *Malibu Media*, 2019 U.S. Dist. LEXIS 94433, at *2-3.

that it may help infringing defendants escape liability because plaintiffs may be unable to learn additional facts to support a plausible claim for infringement without formal discovery.

The *Cobbler* rule should not be applied to expedited discovery motions. Extending *Cobbler* to deny ISP subpoenas would deny BitTorrent plaintiffs the opportunity to identify Doe defendants.²⁵⁷ This would preclude plaintiffs from learning additional facts about the defendant that could connect him to the infringement, preventing copyright owners from surviving motions to dismiss altogether. Applying *Cobbler* to expedited discovery motions would permit even the most persistent pirates to infringe with impunity.

CONCLUSION

Cobbler was a landmark decision in the world of BitTorrent litigation,²⁵⁸ creating a rule correctly interpreting the plausibility pleading standard that has been accepted by district courts throughout the United States.²⁵⁹ This Comment recommends that all district courts adopt the *Cobbler* rule for motions to dismiss. This will ensure that BitTorrent cases with merit—those where the plaintiff can plead facts creating a plausible claim for direct infringement—can succeed, while ensuring that meritless cases are dismissed before discovery.

²⁵⁷ See *supra* Section IV.B.

²⁵⁸ *Cobbler* is a seminal case in the world of BitTorrent litigation because it created a broad rule heightening the pleading standards in BitTorrent copyright infringement cases. *Cobbler*, 901 F.3d at 1144. See *supra* Part I for an extensive discussion of BitTorrent technology and the copyright infringement litigation surrounding BitTorrent.

²⁵⁹ District courts throughout the United States have accepted the *Cobbler* decision. See, e.g., *Malibu Media v. Park*, Civil Action No. 17-12107 (JMV) (MF), 2019 U.S. Dist. LEXIS 113434 (D.N.J. July 9, 2019); *Venice PI, LLC v. Huseby*, C17-1160 TSZ, 2019 U.S. Dist. LEXIS 62856 (W.D. Wash. Apr. 11, 2019).