



Written by [Daniel Sayani](#) on March 25, 2011

Federal Judge Rules Against Copyright Trolls

The Electronic Frontier Foundation (EFF) has asked an Illinois judge to quash subpoenas issued in a “reverse class action” lawsuit accusing thousands of people of illegally downloading pornography, and urged the court to dismiss the case. In a friend of the court brief filed Tuesday, EFF argued that the plaintiff’s “class action” strategy is an improper attempt to sidestep the rights of the defendants.

[EFF](#) has been involved in a number of copyright troll cases where content owners and lawyers team up to try to obtain the identities of thousands of alleged file sharers at once in order to extract settlements from them. In response, judges across the country have been cracking down on such strategies. Thousands of “John Does” targeted in lawsuits filed in California, Washington D.C., Texas, and West Virginia have been exonerated, dismissing cases involving more than 40,000. These rulings may have a significant impact on this misguided business model, which relies on being able to sue thousands of Does at once with a minimum of administrative expense.



In the [case at hand](#), *OpenMind Solutions v. Does*, the plaintiff has called its complaint a “class action” lawsuit against the alleged infringers. Normally a class action is used by a group of plaintiffs with similar complaints of a single defendant — not a single plaintiff targeting thousand of defendants with no attorney in place to defend the rights of the accused. OpenMind also asked for permission to issue subpoenas seeking identifying information for the Does, which was granted without the opportunity for anyone to speak on the unknown defendants’ behalf.

OpenMind Solutions is representing porn producer Mick Haig Productions, which took 670 defendants to court, claiming they “participated, via the internet, in the unlawful reproduction and distribution of plaintiff’s copyrighted motion picture, *Der Gute Onkel* [*The Good Uncle*], by means of file transfer technology,” according to the complaint filed in September in U.S. District Judge David Godbey’s Dallas court. However, the court eventually ruled that the plaintiff was in error, due to its suing hundreds of people in one case, in the wrong jurisdiction and without meeting the constitutional standard for obtaining identifying information.

Another federal judge in Texas is considering appointing attorneys to represent the Does in five mass copyright cases also involving questions of copyright infringement. In each case, [Judge Royal Furgeson](#)



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has ordered the plaintiff to explain why the court should not appoint attorneys to represent the Does in responding to the plaintiff's request for permission to send out subpoenas for the Does' identities. In several of the above cases, the court has also vacated earlier rulings authorizing such subpoenas, which means the Does' service providers are no longer required to respond to any subpoenas they may have already received.

In his orders, Judge Furgeson notes an essential feature of mass copyright litigation: unlike the normal case, in which a defendant is notified of early case developments and can intervene to protect his or her interests (such as by opposing a plaintiff's request to send out subpoenas), the Does in these cases are unlikely to have any idea a lawsuit has been filed, much less that the plaintiff is seeking their identity. Appointing an attorney *ad litem* for limited purposes is one way to address that problem and help ensure that the Does receive the same constitutional protections that must apply to any defendant, in any litigation.

"There is a short window here, before the defendants' identities are disclosed, in which the court can ensure that these individuals are treated fairly and justly," said EFF Senior Staff Attorney Matt Zimmerman. "The class action process was never intended to be used this way. We're asking the court to call a halt to the gamesmanship from OpenMind Solutions."

"This dismissal is wonderful news for the 670 anonymous defendants in this case, but troubling questions remain about the behavior of Mick Haig Productions," added Zimmerman. "Given the extremely invasive power of subpoenas, plaintiffs have a duty to ensure that subpoenas are not misused. EFF is committed to ensuring that litigants are held accountable for taking shortcuts around the due process rights of their opponents, especially in cases such as this one where the very act of obtaining someone's identity could be improperly leveraged into pressure to settle a claim."

This is the latest victory in [EFF's battle against copyright trolls](#). Lawyers are discovering that mass copyright litigation is not lucrative. In December, federal judges in West Virginia and California recognized that it is improper to join thousands of people in one lawsuit based solely on the fact that they all allegedly used the same software protocol to share one or more copyright works. As a practical matter, this means that copyright owners in those cases must file separate lawsuits against each alleged infringer with a reasonable basis for believing that they are filing in the right court. Given the additional expense of filing and litigating these cases fairly — expenses the plaintiffs were likely hoping to avoid by ignoring due process requirements — these cases may not go much further.

"When adult film companies file predatory lawsuits, there is the added embarrassment associated with pornography, which can convince people to quickly pay what's demanded of them even if they have legitimate defenses," said EFF Intellectual Property Director Corynne McSherry. "We hope the court takes immediate steps to restore fairness to this process."

While the use of pornography is in no way morally justifiable, this case is significant due to the precedent that could have been set in the realm of online downloading of music, movies, any other material subject to copyrights and royalties. This is not a case of whether pornography is constitutionally-protected free speech. Rather, it is a case which carries very large stakes for the rights of consumers and the public within the digital arena, as EFF is primarily concerned with the freedoms and civil liberties of technology-users "in an ever-shrinking world."

EFF says that [lawyers around the country](#) are discovering that mass copyright litigation is not such a lucrative business model if you have to pursue your cases fairly. In December and early January, federal



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judges in West Virginia and California recognized that it is improper to join thousands of people in one lawsuit based solely on the fact that they all allegedly used the same software protocol to share one or more copyright works. As a practical matter, this means that copyright owners in those cases must file separate lawsuits against each alleged infringer and must have a reasonable basis for believing that they are filing in the right court. Given the additional expense of filing and litigating these cases fairly — expenses the plaintiffs were likely hoping to avoid by ignoring the court rules and due process requirements — these cases may not go much further.

“There is often a gap between when cases are filed and when judges have the opportunity to look at them closely,” said EFF Legal Director Cindy Cohn. “But that time appears to have arrived. Judges around the country are waking up to the dangers of mass copyright litigation and taking action to make sure the process is fair for the thousands of people who have been targeted in these suits.”



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