IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MALIBU MEDIA, LLC, Plaintiff, v. JOHN DOE subscriber assigned IP address 24.183.51.58, Defendant.	Civil Action No. 3:13-CV-00205-WMC
MALIBU MEDIA, LLC, Plaintiff, v. JOHN DOE subscriber assigned IP address 71.13.250.95, Defendant.	Civil Action No. 3:13-CV-00207-WMC
MALIBU MEDIA, LLC, Plaintiff, v. JOHN DOE subscriber assigned IP address 71.87.100.125, Defendant.	Civil Action No. 3:13-CV-00208-WMC
MALIBU MEDIA, LLC, Plaintiff, v. JOHN DOE subscriber assigned IP address 98.125.121.178, Defendant.	Civil Action No. 3:13-CV-00209-WMC
MALIBU MEDIA, LLC, Plaintiff, v. JOHN DOE subscriber assigned IP address 24.177.123.74, Defendant.	Civil Action No. 3:13-CV-00315-WMC
MALIBU MEDIA, LLC, Plaintiff, v. JOHN DOE subscriber assigned IP address 24.183.92.115, Defendant.	Civil Action No. 3:13-CV-00317-WMC

MALIBU MEDIA, LLC, Plaintiff, v. JOHN DOE subscriber assigned IP address 24.196.90.111, Defendant.	Civil Action No. 3:13-CV-00318-WMC
MALIBU MEDIA, LLC, Plaintiff, v. JOHN DOE subscriber assigned IP address 66.168.17.59, Defendant.	Civil Action No. 3:13-CV-00319-WMC
MALIBU MEDIA, LLC, Plaintiff, v. JOHN DOE subscriber assigned IP address 71.10.117.251, Defendant.	Civil Action No. 3:13-CV-00320-WMC
MALIBU MEDIA, LLC, Plaintiff, v. JOHN DOE subscriber assigned IP address 71.90.19.244, Defendant.	Civil Action No. 3:13-CV-00321-WMC
MALIBU MEDIA, LLC, Plaintiff, v. JOHN DOE subscriber assigned IP address 97.86.116.18, Defendant.	Civil Action No. 3:13-CV-00322-WMC

BRIEF AMICUS CURIAE OF THE ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF SANCTIONS

TABLE OF CONTENTS

I. INTRODUCTION

In these actions and many others, Malibu Media LLC ("Malibu") attaches to its complaints a list of files that it says the defendants downloaded illegally.[1] Many of the files appear to be pornographic films with very lewd and embarrassing titles. Malibu makes no copyright infringement claim, indeed no claim at all, with respect to these files. In its Order to Show Cause of May 28, 2013 (the "OSC"), the Court surmised that these titles were included with the complaints in order to "increase the pressure on a subsequently identified Doe defendant to settle before s/he is publicly linked to hardcore/deviant titles that are completely irrelevant to plaintiff's actual claims in the lawsuit."

Amicus curiae Electronic Frontier Foundation ("EFF") respectfully submits that the Court's surmise is correct: the salacious but irrelevant titles on Malibu's "Exhibit C" serve no legitimate purpose in a complaint. Their only purpose is to coerce defendants to settle, based not on the merits of the case but on the reputational harm of being publicly associated with hardcore pornography – a purpose of harassment and embarrassment forbidden by Fed. R. Civ. P. 11(b)(2).

As explained in detail below, Malibu's response makes three critical legal errors. First, it incorrectly asserts that its purported subjective beliefs are sufficient. To the contrary, Rule 11 requires both objective and subjective reasonableness. If subjective intent were the only standard, it would only encourage attorneys to cross the line and then baldly assert good faith when challenged, relying on the difficulties of proving intent.

Second, Malibu asserts that the proffer of evidence in Exhibit C is a necessary and proper part of a complaint. Yet, despite its length, Malibu's response to the OSC gives no valid reason for filing "Exhibit C" on the public docket *with its complaints*. There is no need to reach the

[1] Since this Court issued its Order to Show Cause on May 28 (and while Malibu sought multiple extensions of time to respond), Malibu has filed at least 60 new copyright complaints, each including an "Exhibit C."

question of whether the information in Exhibit C would be appropriate in a confidential letter to the defendant or as part of an evidentiary proffer at summary judgment or trial.

Third, Malibu errs when it asserts that Exhibit C could be properly introduced as evidence under the Federal Rules of Evidence. Even if a complaint were the proper place to proffer evidence, the lewd movie titles that caught the Court's eye are no more probative of the defendant's identity or liability than the movie titles that are the actual focus of Malibu's claims. They are, in fact, intended as forbidden "propensity" evidence, designed to paint a picture of the defendant as a habitual user of hard-core and deviant pornography. Fed. R. Evid. 404. Malibu's response admits this improper purpose. Malibu Resp. 30-31.

Malibu's litigation tactics also show that the purpose of including the salacious titles is solely to harass. Numerous courts have expressed concern over the potential for unjust, coercive settlements in Malibu's cases, with one describing them as "essentially an extortion scheme." *Malibu Media, LLC v. John Does 1-10*, No. 2:12–cv–3623–ODW(PJWx), 2012 WL 5382304, at *4 (C.D. Cal. Jun. 27, 2012); *accord Malibu Media, LLC v. John Does 1-13*, No. 2:12–cv–01513 JAM DAD, 2012 WL 4956167, at *2 n.2 (E.D. Cal. Oct. 15, 2012).. Malibu's response to the OSC states that it abdicates any responsibility for removing unnecessary and unfairly prejudicial material from its complaint – instead relying on the courts to do so in every case it files. Malibu's response and other conduct strongly suggest that it pursues and harasses the person whose name is on the Internet subscription that Malibu identifies, regardless of that person's liability – aided of course by Exhibit C's threat of public humiliation.

While a copyright holder has the right to enforce its copyrights, including through a campaign of lawsuits against members of the public, these circumstances demand the utmost regard for the due process rights of the targets of this campaign. Because Malibu's stated reasons for including the salacious titles with its complaints – or even proffering them as evidence at a later date – ring hollow, and because Malibu's own response and other conduct show a clear purpose to use them to coerce nuisance value settlements, Malibu has violated Rule 11.

II. INTEREST OF AMICUS

EFF is a member-supported, nonprofit public interest organization dedicated to protecting civil liberties and free expression in the digital world. EFF seeks to protect the rights of Internet users to communicate, learn, and engage in daily life online. EFF has participated in many cases where a copyright owner seeks damages for alleged infringement of creative works on the Internet using the BitTorrent protocol.[2] In 2010, Judge Godbey of the Northern District of Texas appointed an EFF staff attorney to serve as *ad litem* counsel for 670 John Doe defendants in a copyright case, like the instant cases, involving alleged infringing downloads.[3]

In the seminal case of *AF Holdings, LLC v. Does 1-1,058*, No. 1:12–cv–48 (D.D.C. Aug 6, 2012), which is currently pending before the Court of Appeals for the D.C. Circuit (No. 12-7135), EFF presented *amicus* briefing and expert testimony on the operation of BitTorrent, on the accuracy of plaintiffs' pre-suit investigations, and on the evidentiary value of Internet Protocol addresses to establish personal jurisdiction.[4] EFF's interest in these cases is to assure that due process, and the careful balance of public and private rights embodied in U.S. copyright law, are preserved regardless of the merits of each infringement claim.

III. RULE 11 FORBIDS FILING MATERIAL WITH NO PURPOSE EXCEPT TO HUMILIATE.

"Parties [or] their attorneys violate Rule 11 when they bring legal action for any improper purpose, such as to harass or needlessly increase the cost of litigation." *Burda v. M. Ecker Co.*, 2 F.3d 769, 773 (7th Cir. 1993); *see also Golden Eagle Distrib. Corp. v. Burroughs Corp.*, 801

---

[2] *See, e.g.*, *Hard Drive Prods., Inc. v. Does 1 – 1,495*, No. 1:11-cv-1741 (D.D.C. Jan. 30, 2012); *Millennium TGA Inc. v. Does 1 – 800*, No. 1:10-cv-05603 (N.D. Ill. Mar. 31, 2011); *OpenMind Solutions, Inc. v. Does 1 – 2,925*, No. 3:11-cv-00092 (S.D. Ill. Mar. 15, 2011); *First Time Videos, LLC v. Does 1 – 500*, No. 1:10-cv-06254 (N.D. Ill. Jan. 14, 2011); *Call of the Wild Movie LLC v. Does 1 – 1,062*, No. 1:10-cv-0455 (D.D.C. Jan. 3, 2011); *Third World Media LLC v. Does 1 – 1,243*, No. 3:10-cv-0090 (N.D.W.Va. Nov. 23, 2010).

[3] *Mick Haig Prods. v. Does 1 – 670*, No. 3:10-cv-01900-N (N.D. Tex. Sept. 9, 2011).

[4] *AF Holdings, LLC v. Does 1 – 1,058*, No. 12-7135 (D.C. Cir. filed May 14, 2013) (appeal from No. 1:12-cv-00048-BAH (D.D.C. Aug. 6, 2012)).

F.2d 1531, 1537 (9th Cir. 1986) (Rule 11 was intended to curb "misusing judicial procedures as a weapon for personal or economic harassment.").

Filing a document to embarrass a party is sanctionable under Rule 11(b). *Whitehead v. FoodMax of Mississippi, Inc*., 332 F.3d 796 (5th Cir. 2003) (finding "no meaningful distinction" between a purpose to harass and a purpose to embarrass). Filing a document solely for the "purpose of getting paid to go away" is also sanctionable. *Vollmer v. Selden*, 350 F.3d 656 (7th Cir. 2003). Rule 11 applies to every "paper" presented to a court, "whether by signing, filing, submitting, or later advocating it." Fed. R. Civ. P. 11(b); *see also Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1077 (7th Cir. 1987) ("Rule 11 is designed to discourage unnecessary complaints and other filings."). The rule does *not* require that an entire complaint lack legitimate purpose; that *part* of a complaint violates the rule is sufficient for sanctions. *Hudson v. Moore Bus. Forms, Inc.*, 836 F.2d 1156, 1163 (9th Cir. 1987) (frivolous damages claim was sanctionable even though merits claim was colorable).

There is no question that the material at issue here is embarrassing and coercive. Courts have recognized the "risk of receiving coercive phone calls threatening public filings that link them to alleged illegal copying and distribution of pornographic films, if a settlement fee is not forthcoming." *Malibu Media, LLC v. Does 1-5*, 2012 WL 2001968, at *2 (S.D.N.Y. June 01, 2012). "The risk of a shake-down is compounded when the claims involve allegations that a defendant downloaded and distributed sexually explicit material." *Id*. at *1. "[T]he potential for abuse is very high. The infringed work is a pornographic film. To save himself from embarrassment, even if he is not the infringer, the subscriber will very likely pay the settlement price." *Malibu Media v. Does 1-10*, No. 2:12 –cv-3623-ODW(PJWx), 2012 WL 5382304, at *2 (C.D. Cal. June 27, 2012).

The test for violation of Rule 11(b) is primarily an objective test: whether the conduct at issue was reasonable under the circumstances. *Dreis & Krump Mfg. Co. v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 8*, 802 F.2d 247, 255 (7th Cir. 1986); *Hrubec v. Nat'l R.R. Passenger Corp.*, 829 F. Supp. 1502, 1507 (N.D. Ill. 1993); *see also Golden Eagle*,

801 F.2d at 1536 (Rule 11's "objective standard" was intended to be "more stringent than the original good faith formula"). The filer's subjective intent is relevant as a secondary matter, allowing sanctions for improper subjective purposes, even if the party can concoct an objective basis. *Szabo*, 823 F.2d at 1083 ("[A]n objectively sufficient basis for its claim . . . is not enough.. . . Rule 11 has a subjective component as well.").

Malibu argues that a plaintiff's subjective good faith shields it from Rule 11 liability. Malibu Resp. 26.[5] This is a misreading of *Szabo* and *Brown v. Federation of State Medical Boards of the U.S.*, 830 F.2d 1429 (7th Cir. 1987). In *Szabo*, the Seventh Circuit held that if the plaintiff had "an objectively sufficient basis" for its complaint, the district court should still consider the plaintiff's subjective intent as a potential grounds for Rule 11 sanctions. 823 F.2d at 1083. The Court did *not* hold, as Malibu misleadingly suggests, that a party's self-serving declaration of subjective good faith excuses an objectively improper filing. Likewise *Brown*, which held that the 1983 revision to Rule 11 was intended to *increase* the scope of conduct forbidden by the rule by focusing on objective reasonableness. 830 F.2d at 1435.[6]

Thus, the Court should look not to the protestations of Malibu's counsel that their motives are pure, but to Malibu's stated reasons for including the lascivious titles with its complaints, the actual, probable effects of that tactic, and Malibu's *conduct* evincing an intent to coerce settlements based on fear, embarrassment, and nuisance.

IV. MALIBU HAS NO LEGITIMATE REASON TO INCLUDE UNRELATED, HUMILIATING MOVIE TITLES WITH ITS COMPLAINT.

All of Malibu's stated reasons for filing embarrassing but irrelevant movie titles with its complaints crumble under scrutiny.

---

[5] Malibu's opposition to EFF's Motion for Leave to File expounds on this misstatement of the law, arguing that only a "trained psychologist" could possibly demonstrate Malibu's Rule 11 violation. In fact, Malibu's cases hold that bad faith can condemn an objectively valid filing, not that good faith excuses an objectively frivolous one.

[6] *Brown*, moreover, is no longer good law. *See Mars Steel Corp. v. Cont'l Bank N.A.*, 880 F.2d 928 (7th Cir. 1989).

A. The Lewd Titles Are Not Necessary To State a Claim of Copyright Infringement.

No law, rule, practice, or legitimate strategy compels Malibu to include highly explicit movie titles with its complaints without making any claim for infringement of those titles. "The purpose of a complaint is to put the defendant on notice of the claim that is being asserted against him, her, or it . . . ." *Dominguez v. Hendley*, 545 F.3d 585, 590 (7th Cir. 2008) (noting that material not in a pleading may still be used at trial). Copyright infringement has only two elements: ownership of a valid copyright and infringement by the defendant of one or more exclusive rights of the copyright holder. *Feist Publications, Inc. v. Rural Telephone Service Co., Inc*., 499 U.S. 340, 361 (1991). Including "a plethora of information about the defendant beyond their merely having downloaded Malibu Media's movies" does not make either element of the claim more plausible. Malibu Response 19.

Exhibit C alleges, in effect, that someone using the defendant's Internet connection downloaded other files in which Malibu does not hold copyright. That allegation, taken as true, will not help Malibu win a motion to dismiss. Likewise, even if Malibu proves the defendant downloaded every work on Exhibit C, but fails to prove copying of its own works, its lawsuit will still fail.

Malibu's Fed. R. Civ. P. 10(c) argument is meritless. *See* Malibu Response 27-29. Rule 10(c) incorporates legally operative "written instrument[s]" such as contracts and promissory notes into a complaint, but offers nothing to show that explicit movie titles are appropriate for incorporation. Indeed, the case upon which Malibu relies, *Rosenblum v. Travelbyus.com Ltd.*, states that Rule 10(c) is "aimed at cases interpreting, for example, a contract." 299 F.3d 657, 661 (7th Cir. 2002) (internal quotation marks omitted) (quoting *Levenstein v. Salafsky,* 164 F.3d 345, 347 (7th Cir. 1998)). This fails to support Malibu's argument because Exhibit C is not a contract or other "written instrument." In any event, Malibu's argument is a *non sequitur*, because papers filed pursuant to Rule 10(c) are fully subject to Rule 11, which covers "every pleading . . . and other paper" presented to the Court.

Nor do Rules 11 or 12(b)(6) require Malibu to include the salacious titles. *See* Malibu Response 28-29. In *Ingenuity 13, LLC v. Doe*, the court ordered the plaintiff to show cause why it should not be sanctioned for serving a complaint on an Internet user based only on "an [Internet Protocol] address, the name of the Bittorrent client used, the alleged time of download," and a "hunch" that the infringer is a pubescent male. No. 12-cv-8333-ODW (C.D. Cal. issued Feb. 7, 2013) (ECF No. 48) ("Ingenuity Show Cause Order") at 5-6. The sanctions were based on the plaintiff's attorneys' "blatant lie" to the court about the thoroughness of their pre-suit investigation, not on the quantum of allegations in the complaint. Order Issuing Sanctions at 6 (ECF No. 130), *id.* ("[T]he Court is not as troubled by their lack of reasonable investigation as by their cover-up."). Although Judge Wright suggested in dicta that "Plaintiff can compile its tracking data to determine whether other copyrighted videos were downloaded under the same IP address," Ingenuity Show Cause Order 6-7, nothing in his opinion remotely suggests that naming all such copyrighted videos in its complaint, including those likely to embarrass and to coerce an unjust settlement, is "necessary for a plaintiff to comply with" Rule 11. Malibu Response 19.

The remainder of Malibu's stated reasons for including the lewd titles in Exhibit C fail to distinguish between a pleading and a proffer of evidence. Malibu asserts that "the electronic evidence associated with defendants' connections to all or some of the content on Exhibit C paints a picture of a person," and that "because Plaintiff attached Exhibit C to the Complaint, the defendant will be less likely to deny the infringement because he knows Malibu Media can associate him with those things." Malibu Response 14-15. But even if "some of the content on Exhibit C" were actually probative of a defendant's identity and liability – and as discussed below, most of it is not – Malibu gives no reason why Exhibit C in all its salacious glory need be filed publicly with the complaint. Sending the same information in a confidential letter to the

defendant accomplishes Malibu's stated goal of showing the defendant the strength of Malibu's claim, without creating a Sword of Damocles of public humiliation.[7]

If Malibu is put to its proof at summary judgment or trial, it *cannot* rely on exhibits to its complaint, but must introduce the information on Exhibit C as part of the sworn testimony of an expert witness or other admissible evidence. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (a motion for summary judgment "requires the nonmoving party to go beyond the pleadings"). Including Exhibit C *in the complaints* cannot "assist Plaintiff in proving that a defendant is a BitTorrent user," "that the infringer resides in the subscriber's house," "that a defendant had knowledge of the infringement," or any other fact, because a complaint is not evidence. Malibu Response 17.

Malibu also asserts that "Exhibit C is attached to complaints for the purpose of allowing an innocent subscriber to review it and identify the infringer." Malibu Response 16. Even assuming that an innocent subscriber would be so familiar with other people's taste in adult entertainment to identify who downloaded what, Malibu fails to explain why a confidential letter to the subscriber would not accomplish the same purpose.

Malibu claims that Exhibit C may be used to impeach the defendant, or otherwise disprove a defendant's factual assertions. Malibu Response 21. As the Seventh Circuit has noted in *Corley v. Rosewood Care Center, Inc. of Peoria*, "[t]he focus in Rule 11 sanctions is on what counsel knew at the time the complaint was filed, not what subsequently was revealed in discovery." 388 F.3d 990, 1014 (7th Cir. 2004) (citing *Beverly Gravel, Inc. v. DiDomenico*, 908 F.2d 223, 226 (7th Cir. 1990)). Likewise, the proper focus of this Court's inquiry is whether Exhibit C was designed to harass and embarrass at the time Exhibit C was filed, not whether it would be proper to introduce the information subsequently to impeach a witness.

[7] Malibu apparently used this information confidentially prior to 2013, as it claims to have begun using its "Cross Reference Tool" in July 2012, but only began using the Exhibit C tactic in 2013. *See* Malibu Response 12-13.

B. The Lewd Titles Are Not Relevant to Defendant's Identity or Any Other Element of Malibu's Claims, and Are Unduly Prejudicial.

As Exhibit C is not evidence, its admissibility under the Federal Rules of Evidence is not before the Court. Nonetheless, the salacious titles in Exhibit C are likely *not* admissible as evidence, and Malibu will likely *not* be able to use those titles to prove a defendant's identity or any other of Malibu's stated purposes. The inadmissibility of those titles is further proof that Malibu has no legitimate reason for including them with its complaints.

The Seventh Circuit's test for admissibility of prior acts has four parts:

> (1) the evidence must be directed toward establishing something at issue other than a party's propensity to commit the act charged; (2) the other act must be similar enough and close enough in time to be relevant to the matter at issue; (3) the evidence must be such that the jury could find that the act occurred and the party in question committed it; and (4) the prejudicial effect of the evidence must not substantially outweigh its probative value.

Mathis v. Phillips Chevrolet, Inc., 269 F.3d 771, 775-76 (7th Cir. 2001) (citation omitted). Throughout its response, Malibu attempts to confuse the issue by discussing *other* material it includes or hypothetically might include in Exhibit C. But the focus of the Court's OSC is the pornographic titles, and those titles fail the Seventh Circuit's test.

The lewd titles are directed at showing a defendant's propensity to infringe copyright, a purpose forbidden by the Rules of Evidence. "According to Rule 404(b), evidence of other acts cannot be introduced to establish the defendant's bad character or to show his propensity to commit the act in question simply because he committed a similar act in the past." *United States v. Chaimson*, 760 F.2d 798, 804 (7th Cir. 1985); *see also Ginter v. Northwestern Mut. Life Ins. Co.*, 576 F. Supp. 627, 630 (E.D. Ky. 1984) ("It seems beyond peradventure of doubt that the drafters of F.R. Evid. 404(a) explicitly intended that all character evidence, except where 'character is at issue,' was to be excluded [in civil cases]"). Yet Malibu admits the forbidden propensity purpose explicitly in its response: "Just as where a person who is obsessed with violence is more likely to commit murder, a person who uses BitTorrent every day to steal content from other intellectual property holders is more likely to steal Plaintiff's content through BitTorrent." Malibu Resp. 30.

In a hearing on a similar case in the Northern District of Illinois, Judge Durkin asked Malibu's counsel about this Court's OSC:

> THE COURT: Well, what's the point of naming basically porno movies as an attachment to a complaint other than to put undue pressure on a defendant?
>
> MS. SCHULZ: Your Honor, I can answer that. And we are responding to Judge Crocker's rule to show cause. The – in some cases the expanded discovery includes 25 pages of downloads which are not concerned – we're not looking for adult entertainment subjects in there. And, actually, those are of little relevance to us. *What we're looking at is the propensity to download.*

Malibu Media v. Does 1-23, No. 12-CV-7579, Transcript of Proceedings Before the Honorable Thomas M. Durkin 9-10 (N.D. Ill. June 25, 2013) (emphasis added).

Regarding the third factor, the marginal probative value of the pornographic titles on Exhibit C is slight, at best. An IP address identifies, at most, an Internet subscription that can be used by multiple people. "The fact that a copyrighted work was illegally downloaded from a certain IP address does not necessarily mean that the owner of that IP address was the infringer." *Malibu Media, LLC v. Does 1-5*, No. 12 Civ. 2950(JPO), 2012 WL 2001968, at *1 (S.D.N.Y. June 01, 2012).

Thus, the question is whether the other downloads to the same IP address are relevant to identify the person who downloaded Malibu's film. But not everything that is or could be listed in Exhibit C is equally probative of a downloader's identity. It's easy to construct a hypothetical, as Malibu does, in which observing a highly distinctive download such as "occupational software called SolarWinds," or having used a particular screen name in an online game, could help identify who was using an IP address.[8] Malibu Resp. 15, 19.

[8] However, if there were multiple users of the subscriber's wireless Internet connection, the fact that one user used a particular screen name would say little about whether that user or another user downloaded the film at issue. Malibu's arguments are based on the false premise that identifying one actor on an IP address identifies all others. To the contrary, in a multi-user household, one person might use the computer to play World of Warcraft, while another checks the stock market, and a third visits ESPN's website.

In contrast, the pornographic films listed on Exhibit C do no more to prove the downloader's identity than the Malibu film on which the claim of copyright infringement is based. The only inference that Malibu claims to draw from these films (other than the defendant's "propensity to download") is that the downloader "is a heterosexual man," an inference that could be drawn equally from the downloading of Malibu's own film.[9] Malibu Response 15. Moreover, if Malibu does have evidence of downloads that suggest distinctive traits or identifying characteristics, any additional probative value of the lewdly titled films shrinks to insignificance.

Malibu makes passing reference to a few other, hypothetical evidentiary purposes for Exhibit C: defendant's "knowledge of the infringement" and "intent." Malibu Resp. 17, 32. It does not explain why downloading an item from the Exhibit C list would show knowledge or intent about the separate copyrighted work. In any event, direct copyright infringement is a strict liability tort and neither knowledge nor intent are required elements; Malibu has no need to prove them. *Feist*, 499 U.S. at 361; *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*, 907 F. Supp. 1361, 1370 (N.D. Cal. 1995).

Under the fourth factor, a court would look to whether the danger of unfair prejudice substantially outweighs the probative value of the salacious titles. As discussed above, the marginal probative value of those titles is slight. On the other hand, the effect on a defendant's reputation, family, personal and professional relationships, and even his or her livelihood that flows from being publicly accused of illegally downloading hard-core and deviant pornography is potentially devastating. The effects of that accusation are an obvious example of unfair prejudice, far outweighing any minimal probative value those titles might hold. *See United States v. Loughry*, 660 F.3d 965, 974 (7th Cir. 2011) (holding that district judge abused discretion by admitting "hard-core" child pornography images that were not part of the crime charged; finding

[9] The "hunch" that a "pubescent male" must be the infringer of pornographic films is the very leap of logic that Judge Wright found insufficient to justify a complaint. Ingenuity Show Cause Order 5-6.

that such images "have a strong tendency to produce intense disgust" and "made [the defendant] appear more despicable to the jury" than the crime charged).

Here, prejudicial effect substantially outweighs probative value, especially given that the titles are minimally probative. The propensity inference ("once an infringer, always an infringer") is a form of prejudicial effect, as is damage to reputation. Given the obvious danger of unfair prejudice, claiming that the titles might conceivably be used to show identity does not make them admissible, especially when alternative, less inflammatory information relating to, e.g., fly-fishing and the White Sox is available. Malibu Resp. 15.

Finally, Malibu suggests that because its complaints request permanent injunctions, using the salacious titles to prove "a likelihood of future conduct" becomes important enough to overcome the unfair prejudice those titles cause. Malibu Resp. 31. Not so. Including a request for injunctive relief in a complaint does not give the plaintiff a free pass to introduce propensity evidence and unfairly prejudicial material.

Exhibit C is not evidence, and its admissibility has not been challenged. But should Malibu attempt to proffer the salacious but irrelevant titles in Exhibit C as evidence at summary judgment or trial, their obvious purpose as propensity evidence and their inflammatory and prejudicial nature would likely bar their use. This is further evidence that Malibu includes them with its complaints for an improper purpose.

V. MALIBU'S ARGUMENTS AND CONDUCT SUGGEST THE TRUE PURPOSE OF INCLUDING THE LASCIVIOUS TITLES.

In the absence of any legitimate reason for including irrelevant but embarrassing titles in an attachment to Malibu's complaints, the true purpose of that tactic becomes obvious – to coerce defendants to pay Malibu a cash settlement to avoid public humiliation, regardless of their actual liability for copyright infringement. This purpose is evident in Malibu's conduct of its litigation campaign, in its tacit admission that the lewd titles can be stricken under Federal Rule of Civil Procedure 12(f), and in its attempt to lay the burden of protecting Malibu's targets from harassment on the Court.

Numerous courts have recognized the danger of coercive settlements created by BitTorrent infringement cases concerning pornographic films – including cases brought by Malibu. Magistrate Judge Brown of the Eastern District of New York described why these cases are different from other copyright infringement actions:

> It would be unrealistic to ignore the nature of plaintiffs' allegations –to wit: the theft of pornographic films –which distinguish these cases from garden variety copyright actions. Concern with being publicly charged with downloading pornographic films is, understandably, a common theme among the moving defendants. As one woman noted in *K–Beech*, "having my name or identifying or personal information further associated with the work is embarrassing, damaging to my reputation in the community at large and in my religious community." Mtn. to Quash, ¶ 5, DE [7]. Many courts evaluating similar cases have shared this concern. *See, e.g.*, *Pacific Century Int'l, Ltd. v. Does 1-37*, ---F.Supp.2d ----, 2012 WL 1072312, at *3 (N.D. Ill. Mar. 30, 2012) ("the subscribers, often embarrassed about the prospect of being named in a suit involving pornographic movies, settle"); *Digital Sin*, 2012 WL 263491, at *3 ("This concern, and its potential impact on social and economic relationships, could compel a defendant entirely innocent of the alleged conduct to enter an extortionate settlement") *SBO Pictures*, 2011 WL 6002620, at *3 (defendants "whether guilty of copyright infringement or not-would then have to decide whether to pay money to retain legal assistance to fight the claim that he or she illegally downloaded sexually explicit materials, or pay the money demanded. This creates great potential for a coercive and unjust 'settlement'"). This consideration is not present in infringement actions involving, for example, popular music downloads.

In re BitTorrent Adult Film Copyright Infringement Cases, Nos. 11-3995(DRH)(GRB), 12-1147(JS)(GRB), 12-1150(LDW)(GRB), 12-1154(ADS)(GRB), 2012 WL 1570765, at *10 (E.D.N.Y. May 1, 2012), *report and recommendation adopted sub nom. Patrick Collins, Inc. v. Doe 1*, 288 F.R.D. 233, 236 (E.D.N.Y. 2012); *see also Malibu Media, LLC v. Does 1-10*, No. 2:12–cv–3623–ODW(PJWx), 2012 WL 5382304, at *2 (C.D. Cal. June 27, 2012) ("[T]he potential for abuse is very high. The infringed work is a pornographic film. To save himself from embarrassment, even if he is not the infringer, the subscriber will very likely pay the settlement price."); *Malibu Media, LLC v. Does 1-23*, 878 F. Supp. 2d 628, 632 (E.D. Va. 2012) (recognizing the danger of "coercing unjust settlements from innocent defendants") (internal quotation marks omitted); *Malibu Media, LLC v. Doe*, No. 3:12-cv-575-J-34TEM, 2013 WL 525352, at *4 (M.D. Fla. Feb. 13, 2013) (noting that "judges in this and other districts who have exercised their discretion to sever John Doe defendants . . . have generally done so for practical

reasons, including . . . the likelihood that joinder will facilitate coercive settlements among the John Doe defendants") (citation omitted); *Malibu Media, LLC v. Reynolds*, No. 12 C 6672, 2013 WL 870618, at *7 (N.D. Ill. Mar. 7, 2013) (noting that public accusations of pornography use "may be used to shame defendants into settlement agreements where they may otherwise have a meritorious defense").

Malibu has used, and continues to use, other tactics in conjunction with the Exhibit C filings to coerce settlements. Malibu files with its complaints an unsigned, non-binding but official-looking discovery request that it calls an "Exculpatory Evidence Request Form" ("Exhibit D"), along with the "Exhibit C" list. *See* Malibu Resp. 16. As with Exhibit C, Malibu gives no legitimate reason for filing an informal discovery request with a complaint. Its likely reason for doing so – rather than sending such a request to defendants confidentially – is to give these non-binding discovery requests the imprimatur of an official court document, leading a frightened and legally unsophisticated Internet subscriber to believe she faces some penalty for refusing to volunteer information to Malibu.[10]

Malibu claims that "[N]o phone calls or letters have ever been sent to doe defendants soliciting a settlement *in an individual suit*." Malibu Resp. 24-25 (emphasis added). Of course, Malibu does contact all defendants and potential defendants at least once – to provide them with a copy of the complaint, accompanied by the salacious Exhibit C and the official-looking "Exculpatory Evidence" form. Malibu has simply replaced one form of improper coercion with another. The difference between its current and prior practice is the difference between brandishing a weapon and simply saying "That's a nice house you have. Shame if something were to happen to it."

Finally, Malibu's improper purpose for including the salacious titles with its complaints is evident from its disclaimer of any responsibility to avoid including "immaterial, impertinent,

[10] *Amicus* respectfully suggests that filing the coercive "exculpatory evidence" form is an independent basis for an order to show cause regarding Rule 11(b).

or scandalous matter" in its complaints. Malibu Resp. 36; Fed. R. Civ. P. 12(f). Malibu contends that because hypothetical third parties might "suggest[] that this or that file should have also been deleted," Malibu is justified in including unquestionably incendiary and irrelevant material with its complaints and tasking the courts with striking such material *sua sponte* in each case. Malibu Resp. 36-37. Given that Malibu is filing complaints at a rate of about 700 per year,[11] Malibu's proposed rule would put an incredible burden on the federal courts, and is inconsistent with the principle of judicial economy.

Of course, the Court's discretion to strike material from pleadings does not alter a party's duties under Rule 11. And even if it did, once Malibu's complaint is filed and the potential defendant is contacted, the damage has been done. *See Szabo*, 823 F.2d at 1077 ("The violation of Rule 11 is complete when the paper is filed.").

In summary, Malibu's tactics, the explanations it provides for those tactics, and the observations of many federal courts about similar tactics all suggest that the true purpose behind Exhibit C is exactly what the Court surmised in its OSC.

VI. CONCLUSION: THE COURT CAN JUSTIFIABLY CONCLUDE THAT MALIBU INCLUDES EXHIBIT C IN ITS COMPLAINTS TO HARASS AND COERCE SETTLEMENT.

All of Malibu's stated reasons for including a list of irrelevant lewd titles with its complaints fail – there is simply no legitimate reason to attach such matters to a complaint for copyright infringement. Malibu's explanations, and its conduct of litigation, strongly suggest a purpose to harass, embarrass, and obtain quick cash settlements regardless of merit. While copyright owners have a right to enforce their copyrights, they must follow the same rules and observe the same standards of conduct as all other federal litigants. Malibu has transgressed those rules and standards, and should be sanctioned under Federal Rule of Civil Procedure 11(b).

[11] As shown by a federal court PACER search for Malibu Media, LLC as plaintiff.

Dated: July 15, 2013

Respectfully submitted,

/s/ Erin K. Russell
Erin K. Russell
The Russell Firm
233 South Wacker Drive, 84th Floor
Chicago, IL 60607
T: (312) 994-2424
F: (312) 706-9766
erin@russellfirmchicago.com
ARDC # 6287255

Mitchell L. Stoltz (admitted *pro hac vice*)
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Tel: (415) 436-9333
Fax: (415) 436-9993
Email: mitch@eff.org

Attorneys for Amicus Curiae Electronic Frontier Foundation

CERTIFICATE OF SERVICE

I, Erin K. Russell, hereby certify that on July 15, 2013, I caused a true copy of the foregoing to be served on all parties via the Court's ECF system.

Dated: July 15, 2013

Respectfully submitted,

/s/ Erin K. Russell
Erin K. Russell