

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

GLACIER FILMS (USA), INC.;  
GLACIER FILMS 1, LLC,  
*Plaintiffs-Appellants,*

v.

ANDREY TURCHIN, FKA Doe-  
73.164.151.227,  
*Defendant-Appellee.*

No. 16-35688

D.C. No.  
3:15-cv-01817-  
SB

OPINION

Appeal from the United States District Court  
for the District of Oregon  
Stacie F. Beckerman, Magistrate Judge, Presiding

Argued and Submitted May 15, 2018  
Portland, Oregon

Filed July 24, 2018

Before: M. Margaret McKeown and Richard A. Paez,  
Circuit Judges, and Cynthia A. Bashant,\* District Judge.

Opinion by Judge McKeown

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\* The Honorable Cynthia A. Bashant, United States District Judge  
for the Southern District of California, sitting by designation.

**SUMMARY\*\***

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**Copyright Act / Attorney's Fees**

The panel reversed the district court's order denying plaintiff's motion for attorney's fees in a copyright infringement suit.

A film production company sued a user of BitTorrent, a peer-to-peer network, who illegally downloaded and repeatedly distributed a movie. Per the parties' agreement in a stipulated consent judgment, the defendant stipulated to liability and to statutory damages, and the district court entered a permanent injunction against him.

The panel held that the district court abused its discretion by focusing on its generally unfavorable view of other BitTorrent litigation and failing to faithfully apply the "*Fogerty* factors" in deciding whether to award attorney's fees under 17 U.S.C. § 505. The panel remanded the case to the district court.

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**COUNSEL**

John Mansfield (argued), Harris Bricken, Portland, Oregon; Carl D. Crowell, Crowell Law, Salem, Oregon; for Plaintiffs-Appellants.

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\*\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

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Klaus H. Hamm (argued), Klarquist Sparkman LLP, Portland, Oregon; David H. Madden, Mersenne Law, Tigard, Oregon; for Defendant-Appellee.

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### OPINION

McKEOWN, Circuit Judge:

This appeal stems from one of the many copyright infringement lawsuits filed against individuals who unlawfully download and distribute movies online. As digital pirates increasingly use BitTorrent and other peer-to-peer networks to share media, copyright holders have pressed the courts for recourse. These suits are not without controversy: many involve “copyright trolls” who buy up copyrights to adult films and then sue masses of unknown BitTorrent users for illegally downloading pornography.<sup>1</sup> This one is different: a film production company sued a single user who illegally downloaded and distributed repeatedly *American Heist*, a Hollywood action movie.

An important remedy under the Copyright Act provides that courts “may” award attorney’s fees to a prevailing party in an infringement action. In *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), the Supreme Court laid out factors to guide discretion in whether to award fees. Because the district court did not faithfully apply the “*Fogerty* factors” in *this* meritorious BitTorrent action, we reverse and remand

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<sup>1</sup> See, e.g., *AF Holdings, LLC v. Does 1–1058*, 752 F.3d 990, 992 (D.C. Cir. 2014); *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 82 (E.D.N.Y. 2012).

for consideration of an award of reasonable attorney’s fees.<sup>2</sup> The court’s denial of fees under the present circumstances—based on a one-size-fits-all disapproval of *other* BitTorrent suits—requires a remand.

### BACKGROUND

For context, we discuss the proliferation of peer-to-peer Internet piracy suits before clicking through to the specifics of this case.

#### PEER-TO-PEER INTERNET PIRACY SUITS

Peer-to-peer networking involves a “decentralized infrastructure whereby each participant in the network . . . acts as both a supplier and consumer of information resources.” *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1024 (9th Cir. 2013). In other words, “peers” download content from fellow peers, while leaving their own folders of digital content available for others to download. One type of peer-to-peer networking involves the BitTorrent protocol, in which a file is broken up into smaller pieces from various peers and then reassembled upon completion of a download. *See AF Holdings*, 752 F.3d at 998. With BitTorrent, “each user is both downloading and uploading several different pieces of a file from and to multiple other users.” *Fung*, 710 F.3d at 1027. Peer-to-peer networks like BitTorrent are “ideally suited for sharing large files, a feature that has led to their adoption by, among others, those wanting access to pirated media, including music, movies,

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<sup>2</sup> The parties consented to a magistrate judge for all district court proceedings, including the entry of final orders. Hence, we review directly the magistrate judge’s order denying fees. We refer to the magistrate judge as “the district court” or “the court” throughout the opinion.

and television shows.” *Id.* at 1025; *see also Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919–20 (2005).

Digital piracy of copyrighted materials on peer-to-peer networks can have severe financial consequences for copyright holders. As one member of Congress put it:

Under U.S. law, stealing intellectual property is just that—stealing. It hurts artists, the music industry, the movie industry, and others involved in creative work. And it is unfortunate that the software being used—called “file sharing,” as if it were simply enabling friends to share recipes, is helping create a generation of Americans who don’t see the harm.

*Privacy and Piracy: the Paradox of Illegal File Sharing on Peer-To-Peer Networks and the Impact of Technology on the Entertainment Industry: Hearing Before the S. Comm. on Governmental Affairs*, 108th Cong. 10–14 (2003) (statement of Sen. Levin); *see also id.* at 1–2 (statement of Sen. Boxer) (asserting that “downloading copyrighted works is theft” and “is a real problem”).

To combat losses from peer-to-peer file sharing, copyright holders have filed a spate of lawsuits against infringers in federal courts across the country. *See, e.g., BMG Rights Mgmt. (US) LLC v. Cox Commc’ns, Inc.*, 881 F.3d 293, 298–99 (4th Cir. 2018); *Killer Joe Nevada, LLC v. Does 1–20*, 807 F.3d 908, 910 (8th Cir. 2015); *Dallas Buyers Club, LLC v. Madsen*, No. C14-1153RAJ, 2015 WL 6680260, at \*1 (W.D. Wash. Nov. 2, 2015) (noting that the action is “one of 13 practically identical cases filed” alleging

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