UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DIGITAL SIN, INC. 21345 Lassen St. Chatsworth, CA 91311 Plaintiff, v. DOES 1 – 27 Defendants.	)	Civil Action No. 12-cv-03873-JMF

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION OF THE MOTION TO DISMISS AND QUASH SUBPOENA BY JOHN DOE 1 [Document 11]

Plaintiff filed a Complaint against John Does who traded the identical file of Plaintiff's copyrighted work without authorization through a file-swapping network ("Peer-to-Peer" or "P2P" network). On August 17, John Doe 1 filed a Motion to Dismiss Complaint and Quash Subpoena for failure to state a claim.

John Doe 1 argues: Because the identified John Does are the internet subscribers and control the internet account at issue, they are not necessarily the persons who traded the motion picture at issue in this case (page 8 of 13 of the Motion). John Doe 1 contends that WiFi connections may be used by "unknown interlopers" (page 10 of 13 of Motion).

Apart from the fact that nowadays WiFi are by default password secured, if the Court were to grant John Doe 1's Motion, it would effectively deny any and all relief to Plaintiff. Plaintiff simply has no other way of identifying the infringers because the only trace they leave is the IP address. *See Technology Declaration attached to the Complaint*.

John Doe 1 makes accusations about abusive litigation practices. As John Doe 1's attorney knows well because he has dealt with this attorney on several occasions, Plaintiff's

counsel in this case (i) personally deals with all John Does and their attorneys, (ii) does not initiate contact with John Does by telephone or through a call center, and (iii) does not employ abusive practices. It is disturbing that John Doe 1 makes these statements in light of the fact that his attorney knows better.

To ease John Doe 1's fears of "abusive litigation practices," Plaintiff has no objection to Doe Number 1 being anonymous to the public (but not to the Court or to Plaintiff's counsel) during the initial stages. To satisfy even beyond reasonable terms John Doe 1's purported desire for privacy in this case, Plaintiff's proposed order (submitted separately) would provide confidentiality up through initial stages.

1. John Doe 1 Lacks Standing to Challenge the Subpoena

A party to a lawsuit lacks standing to object to a subpoena served on a non-party, unless the party objects to the subpoena on the grounds of privilege, proprietary interest or privacy interest in the subpoenaed matter. See Fed.R.Civ.P. 45(c)(3)(B). *See also Robertson v. Cartinhou,* 2010 U.S. District LEXIS 16058 (D. Md. 2010) (Day, MJ) (unreported).

Internet subscribers do not have a proprietary interest or an expectation of privacy in their subscriber information because they have already conveyed such information to their Internet Service Providers (ISPs). *See Guest v. Leis*, 255 F. 3d 325 (6th Cir. 2001); *United States v. Simons*, 206 F.3d 392 (4th Cir., 2000). This information has already been shared by the Doe Defendant with his respective ISP. Therefore, John Doe 1 lacks standing.

Further, just a few days ago, Judge Beryl Howell of the U.S. District Court for the District of Columbia Circuit issued a comprehensive opinion that affirms the Plaintiff's right to this type of discovery:

> In circumstances where the plaintiff knows only the IP addresses associated with computers being used allegedly to infringe its copyright, the plaintiff is entitled to

> a period of discovery to obtain information to identify the ISPs' customers who may be using those computers in order to determine whether to name those individuals as defendants.

AF Holdings LLC v. Does 1-1,058, Civil Action No. 12-0048 (BAH), page 5 of 46 [Memorandum Opinion of 08/06/2012] (denying Motions to Quash filed by Internet Service Providers). *See Attachment*.

2. <u>John Doe 1's Allegation that Someone Else May Have Committed the Infringement is Irrelevant at this Stage</u>

John Doe 1 seems to allege that someone else may have committed the alleged infringement through his IP address. That is a factual issue to be explored during discovery.

As explained by the court in *Voltage Pictures, LLC v. Does 1-5000* , D.D.C. Case No. CV 10-0873 BAH, WL 1807438 (D.D.C. May 12, 2011), at pages 6-7 (emphasis added),

> "*A general denial of engaging in copyright infringement is not a basis for quashing the plaintiff's subpoena*. It may be true that the putative defendants who filed motions and letters denying that they engaged in the alleged conduct did not illegally infringe the plaintiff's copyrighted movie, and the plaintiff may, based on its evaluation of their assertions, decide not to name these individuals as parties in this lawsuit. On the other hand, the plaintiff may decide to name them as defendants in order to have an opportunity to contest the merits and veracity of their defenses in this case. In other words, if these putative defendants are named as defendants in this case, they may deny allegations that they used BitTorrent to download and distribute illegally the plaintiff's movie, present evidence to corroborate that defense, and move to dismiss the claims against them. *A general denial of liability, however, is not a basis for quashing the plaintiff's subpoenas and preventing the plaintiff from obtaining the putative defendants' identifying information. That would deny the plaintiff access to the information critical to bringing these individuals properly into the lawsuit to address the merits of both the plaintiff's claim and their defenses. See Achte/Neunte Boll Kino Beteiligungs GMBH & Co, KG v. Does 1-4,577*, 736 F. Supp. 2d 212, 215 (D.D.C. 2010) (denying motions to quash filed by putative defendants in BitTorrent file- sharing case and stating that putative defendants' 'denial of liability may have merit, [but] the merits of this case are not relevant to the issue of whether the subpoena is valid and enforceable. In other words, they may have valid defenses to this suit, but such defenses are not at issue [before the putative defendants are named parties].'); *see also Fonovisa, Inc. v. Does 1-9*, No. 07-1515, 2008 WL 919701, at *8 (W.D. Pa. Apr. 3, 2008) (if a putative defendant 'believes that it has been improperly identified by the ISP, [the putative defendant] may raise, at the appropriate time, any and all defenses, and may seek discovery in support of its defenses.')." (emphasis added)

As other federal courts have found, individuals who use the Internet to download or distribute copyrighted works are engaged in only a limited exercise of speech and the First Amendment does not necessarily protect such persons' identities from disclosure. *See Call of the Wild Movie, LLC.*, 770 F. Supp. 2d at 349-54; *see also London-Sire Records, Inc.*, 542 F. Supp. 2d at 179 ("the alleged infringers have only a thin First Amendment protection").

Therefore, the subpoena should not be quashed.

3. **If the Court Grants John Doe 1's Motion, it will Effectively Deny Relief to Plaintiff and Any Other Copyright Holder Whose Works Are Being Infringed Through Illegal File-Sharing**

Copyright infringement occurring over the Internet is occurring rampantly throughout the country. (See Envisional -- *Technical report: An Estimate of Infringing Use of the Internet*, January 2011, at p. 3, accessed on August 21, 2012 at http://documents.envisional.com/docs/Envisional-Internet_Usage-Jan2011.pdf; Not even taking into account adult entertainment content, "In the United States, 17.53% of Internet traffic was estimated to be infringing.")

The only trace that copyright infringers who use BitTorrent leave of their illicit activity is the IP address that appears while they are trading the file. *See explanations in the Technology Declaration attached to the Complaint*.

If the Court were to grant John Doe 1's Motion, it would effectively deny Plaintiff any relief because Plaintiff could never identify the copyright infringer (who, if not actually the subscriber is more than likely known to to the subscriber.)

Furthermore, the Court would effectively grant anybody a license to freely commit copyright infringements through the internet, as Plaintiffs would have no other way of identifying the infringers.

Analogous to this situation, if an automobile is photographed by a "red light camera," the registered owner will receive a notice of the infraction even though the driver may have been his teenage son. The police have no other way of identifying the driver except by contacting the registered owner of the vehicle. The same applies here. Plaintiff has no other way of identifying the infringers.

CONCLUSION

Based on the above-stated reasons, Plaintiff respectfully requests this Court to deny John Doe 1's motion. Plaintiff does not object to Doe Number 1 being anonymous to the public (but not to the Court or to Plaintiff's counsel) during the initial stages. Plaintiff also suggests that the Court enter the attached Proposed Order to protect the purported privacy of John Doe 1.

Respectfully submitted this 22nd day of August 2012.

FOR THE PLAINTIFF:

By: /s/ Mike Meier

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EXHIBITS:

(1) *AF Holdings LLC v. Does 1-1,058*, Civil Action No. 12-0048 (BAH).

CERTIFICATE OF SERVICE

I hereby certify that on 22 August 2012, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system.

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