

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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MALIBU MEDIA, LLC,

No. 12-cv-2954 (NRB)

Plaintiff,

-against-

JOHN DOES 1-5,

Defendants.

-----X

**DEFENDANT JOHN DOE NO. 4'S REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT OF MOTION TO SEVER AND DISMISS ACTION
AS TO DEFENDANTS JOHN DOE 2 THROUGH 5 AND QUASH SUBPOENAS**

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REPLY ARGUMENT

During the last month in BitTorrent cases brought by the same plaintiff and attorney as in this case, two more Judges of this District have joined the majority of their colleagues who have severed and dismissed these types of cases as to all Doe defendants other than the first Doe. See Malibu Media, LLC v. Does 1-14, 12 Civ. 4136 (S.D.N.Y. Jun. 12, 2012) (Stanton, J.) (following In re Bittorrent Adult Film Order & Copyright Infringement Cases, 2012 WL 1570765 (E.D.N.Y. May 1, 2012)); Malibu Media, LLC v. Does 1-7, 12 Civ. 2952 (S.D.N.Y. Jun. 15, 2012) (Cote, J.). The papers submitted by Plaintiff in this case provide no reason for a different result here.

Completely absent from Plaintiff's opposing memorandum is any discussion of the effect of the Second Circuit's decision in Nassau County Association of Insurance Agents, Inc. v. Aetna Life & Cas. Co., 497 F.2d 1151 (2d Cir. 1974). There, the Court held that joinder was improper under Rule 20(a)(2) because

there has been no showing of a right to relief arising from the same transaction or series of transactions. No allegation of *conspiracy or other concert of action* has been asserted. *No connection at all between the practices engaged in by each of the 164 defendants* has been alleged. Their actions as charged were separate and unrelated, with terminations occurring at *different times* for *different reasons* with regard to different agents.

Nassau County, *supra*, 497 F.2d at 1154 (italics added). As shown in our initial memorandum of law, Plaintiff's conclusory allegations of concerted action between the Doe defendants are wholly implausible given the anonymous and automated operation of the BitTorrent protocol. See, e.g., In re Bittorrent, *supra*, 2012 WL 1570765 at *11.

Although the reasoning of Magistrate Judge Brown in In re Bittorrent has been endorsed and followed by Judges in this District as well as the Eastern District of New York, see

Digital Sins, Inc. v. Does 1-245, 2012 WL 1744838 at *2 (S.D.N.Y. May 15, 2012) (McMahon, J.); SBO Pictures, Inc. v. Does 1-20, 12 Civ. 3925 (S.D.N.Y. Jun. 4, 2012) (Scheidlin, J); Zero Tolerance Entertainment, Inc. v. Does 1-45, 2012 WL 2044593 (S.D.N.Y. Jun. 6, 2012) (Scheidlin, J.); Patrick Collins, Inc. v. Does 1-11, 12 Civ. 1153 at *1 (E.D.N.Y. May 31, 2012) (Lindsay, M.J.), Plaintiff attempts to discredit it on the ground that, with respect to the action involving his client (the decision also applied to three other BitTorrent cases including one where defendants had moved to quash), the decision was issued *ex parte*. “Because *ex parte* motions only provide one side of every story, courts must examine them with particular rigor.” Millennium TGA, Inc. v. Does 1-21, 2011 WL 1812786 at *3 (N.D.Cal. May 12, 2011). It is, however, important to note which side got to tell its story to Judge Brown and which did not. Plaintiff here was one of the plaintiffs in In re Bittorrent and was represented by the *same attorney* as here. Plaintiff has no basis to complain about an *ex parte* decision that went against it when it had the full ear of the Court and the Doe defendants in that case neither submitted any opposition to Plaintiff’s *ex parte* motion nor even knew that the case was pending against them.

In his unsworn memorandum, Plaintiff’s attorney claims that his client “is absolutely certain the defendants in this case uploaded because Plaintiff’s investigative software received a piece of the movie from each of the defendants.”¹ For the reasons discussed at length in our initial memorandum of law, it is utter speculation to assert that the defendants – who are subscribers to internet accounts assigned the IP addresses at issue – are the individuals who

¹ Plaintiff relies on hearsay from an online columnist opining that less than one in 100 Wi-Fi connections are unsecured. Pl. Memo. p. 18. This is from the same columnist who predicted in 1984 that the Macintosh computer would fail because it "uses an experimental pointing device called a 'mouse'" and more recently predicted that the iPhone and iPad would not succeed either. See Wikipedia, *John C. Dvorak* (visited Jul. 12, 2012) <http://en.wikipedia.org/wiki/John_C._Dvorak> (citing OWEN W. LINZMAYER, APPLE CONFIDENTIAL 2.0: THE DEFINITIVE HISTORY OF THE WORLD'S MOST COLORFUL COMPANY 118-19 (2004), and John C. Dvorak, *Apple should pull the plug on the iPhone* (Mar. 28, 2007) <<http://www.marketwatch.com/story/apple-should-pull-the-plug-on-the-iphone>>).

engaged in such alleged activity. See Malibu Media LLC v. Does 1-5, 12 Civ. 2950 (S.D.N.Y. Jun. 1, 2012) (“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”). Indeed, Plaintiff’s own investigator does not make such a claim. In an earlier declaration referenced in Plaintiff’s opposing memorandum but not included in the record of the instant motion, Plaintiff’s investigator alleges that his own computer was connected to computers using the IP addresses at issue in this case, but never claims that any of the computers using those IP addresses exchanged any pieces of the movie with each other, let alone that “Defendants” did so with each other.

Plaintiff’s attorney also asserts the hearsay that Plaintiff will prove “with mathematical certainty ... that the algorithm used by BitTorrent Trackers would have caused the entire series of transactions to be different but for each of the Defendants’ infringements.” Whatever this means (and no explanation is given), Plaintiff has not submitted an affidavit demonstrating this from anyone, expert or otherwise, as it needed to do to have any hope of satisfying its Rule 20 burden here. Deskovic v. City of Peekskill, 673 F.Supp.2d 154, 159 (S.D.N.Y. 2009) (plaintiff bears the burden of demonstrating the propriety of joinder); Pergo, Inc. v. Alloc, Inc., 262 F.Supp.2d 122, 128 (S.D.N.Y.2003) (same).

Unable to sustain joinder here under Nassau County, supra, Plaintiff simply ignores the case and instead cites two cases from Michigan which also do not address, let alone apply, this Second Circuit controlling authority.² In Patrick Collins, Inc. v. Does 1-21, 2012 WL 1190840 (E.D. Mich. Apr. 5, 2012), Magistrate Judge Randon disregarded the substantial likelihood that pieces of the movie copied or uploaded by any individual Doe went not to the

² Plaintiff’s reliance on Arista Records LLC v. Doe 3, 604 F.3d 110 (2d Cir. 2010) is misplaced as the joinder issue was not litigated before, nor decided by, the Second Circuit. While the district court in upstate New York denied the defendant’s motion to sever based on misjoinder, the defendant abandoned the joinder issue on appeal and did not raise it in its appellate brief. See Table of Contents of Appellant’s Brief annexed hereto as Appendix A.

other Doe defendants but to one or more of the potentially thousands who participated in a given swarm *who are not parties to the lawsuit*. See Hard Drive Productions, Inc. v. Does 1-188, 809 F.Supp.2d 1150, 1163 (N.D. Cal. 2011). See also Patrick Collins, Inc. v. Does 1-44, 2012 WL 1144854 at *6 (D.Md. Apr. 4, 2012) (“While each alleged infringer may have received pieces of plaintiff’s copyrighted work from various other swarm members, there is no evidence of any connection between the alleged infringers”).

The other Michigan decision, Third Degree Films v. Does 1-36, 2012 WL 2522151 (E.D.Mich. May 29, 2012), acknowledged that the fact that there were “only 36 defendants” (a small number in relation to the thousands of others who may have participated in the swarm) and the 69 day timespan between the first and last transmissions logged by the plaintiff’s investigator made it “unlikely that contemporaneous peers involved two defendants”, Third Degree, *supra*, 2012 WL 2522151 at *6, 8, yet disregarded the significance of this in a decision clearly at odds with Second Circuit law. See Nassau County, *supra*, 497 F.2d at 1154 (“Their actions as charged were separate and unrelated, with terminations occurring at *different times* for different reasons with regard to different agents”) (italics added). The court in Third Degree also labored under the misguided view that the exchange of pieces of a movie through BitTorrent constitutes an “enterprise”, which ignores the automated and “invisible” nature of the BitTorrent protocol, where “the user plays no role” in the exchange of pieces between peers. See In re BitTorrent, *supra*, 2012 WL 1570765 at *11.

Likewise, neither of the cases from this District cited by Plaintiff -- Digital Sin, *supra*, and DigiProtect USA Corp. v. Does 1-240, 2011 WL 4444666 (S.D.N.Y. Sep. 26, 2011) -- discussed or applied the joinder standards of Nassau County. Plaintiff’s reliance on Digital Sin is further misplaced as that decision was issued *ex parte* on the plaintiff’s unopposed motion for

early discovery. Indeed, the Court stated that it remained open to reconsidering the joinder issue at a later date, i.e., a severance motion by a defendant.

Plaintiff's reliance on the Supreme Court's decision in U.S. v. Mississippi, 380 U.S. 128, 85 S.Ct. 808 (1965), is similarly unwarranted. There, the U.S. government sued the State of Mississippi and six county voter registrars who were employees of state-created government subdivisions and acting as part of a state-wide system to prevent African Americans from registering to vote. Under the Mississippi state constitution, persons seeking to vote had to prove to the voter registrar in their county that they could read and write any portion of that constitution, give "a reasonable interpretation thereof" as well as demonstrate to the registrar "a reasonable understanding of the duties and obligations of citizenship under a constitutional form of government." The complaint alleged that these provisions "lend themselves to misuse and to discriminatory administration because they leave the registrars completely at large, free to be as demanding or as lenient as they choose in judging an applicant's understanding of the state of citizenship ... [and that] the registrars ha[d] in fact applied standards which varied in difficulty according to whether an applicant was white or colored." U.S. v. Mississippi, supra, 380 U.S. at 133, 85 S.Ct. at 811. On appeal, the Supreme Court reversed the district court's severance of the case as to five of the six registrars.

The Supreme Court's brief discussion of joinder in that case merited only three paragraphs (one of which consisted of quoting Rule 20), and provides minimal guidance on the propriety of joinder in other cases. What is clear is that U.S. v. Mississippi lends no support for plaintiff's joinder argument here. To begin with, the State of Mississippi and members of the State Board of Elections were also defendants in the case, and the registrars were acting in concert with the State and the State Board of Elections, which was charged with formulating the

very rules that each of the registrars had to follow in enrolling voters. Further, nothing in the decision indicates that the registrars were not acting in concert with each other. It would be hard to believe otherwise, given that they were implementing “a long-standing, carefully prepared, and faithfully observed plan to bar Negroes from voting in the State of Mississippi.” U.S. v. Mississippi, supra, 380 U.S. at 135, 85 S.Ct. at 812. Moreover, the registrars (or their agents) knowingly and willfully engaged in the activity on which their joinder was based each time an individual sought to register to vote. In these interactions, the registrars consciously perceived the individual’s race and knowingly applied different standards based on that race in furtherance of the State’s discriminatory scheme. In contrast, BitTorrent users are not employees acting on behalf of each other or of a common entity (and certainly not one which is a co-defendant as the State of Mississippi was). Moreover, unlike the conscious and deliberate acts of the voter registrars, the transmission of pieces of a BitTorrent swarm from one peer to another – the acts upon which joinder in the instant case is based -- is automated and involves no willful or conscious effort on the part of those users. See In re BitTorrent, supra, 2012 WL 1570765 at *11 (“Much of the BitTorrent protocol operates invisibly to the user—after downloading a file, subsequent uploading takes place automatically if the user fails to close the program. Exhibit D to the complaints, which allegedly documents the “interactions” between defendants, is a page of machine instructions which clearly demonstrate that the user plays no role in these interactions”).

Based on the foregoing, Plaintiff has not shown that defendants were engaged in the “same transaction or series of transactions” prong of Rule 20(a)(2)(A). Plaintiff alternatively argues that it has satisfied Rule 20(a)(2)(A) simply by alleging that all of the Doe defendants are “jointly and severally liable” with each other. Whether or not this is so “is a legal conclusion that, unlike Plaintiff’s factual allegations, need not be accepted as true.” Deskovic, supra, 673

F.Supp.2d at 160 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009) (“[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.”)). As the opponent of a motion to sever, Plaintiff here bears the burden of satisfying Rule 20’s prerequisites for permissive joinder, Pergo, supra, 262 F.Supp.2d at 128, yet has provided no legal authority for its contention that defendants in a BitTorrent case can be held jointly and severally liable. In Millennium TGA, supra, the court rejected the plaintiff’s unsupported argument of joint and several liability in BitTorrent cases.

Plaintiff must allege a plausible theory that the Doe Defendants are jointly or severally liable (or liable in the alternative) for each respective reproduction and distribution. Plaintiff fails to make the required showing. Plaintiff suggests that by participating in BitTorrent’s decentralized system—in which each user potentially distributes pieces of a file to other users—Doe Defendants are vicariously liable. But this is a novel legal theory, and Plaintiff cites no legal support for it in its Application.

Millennium TGA, supra, 2011 WL 1812786 at *3. Here too, Plaintiff’s opposing memorandum offers no support for holding defendants jointly and severally liable.

“It is improper to join defendants who are unrelated either factually or legally.”

DirectTV, Inc. v. Armellino, 216 F.R.D. 240, 240 (E.D.N.Y. 2003). As Plaintiff has not satisfied any of the requirement of Rule 20(a)(2)(A), there is no basis for permissive joinder and the action should therefore be severed and discontinued as to Does 2-5.

Our initial memorandum of law sets forth the unfairness, prejudice and inefficiency to both the defendants and the court system caused by joining the defendants in a single action, as recognized by numerous courts, including this one. Plaintiff argues that the Court should refrain from severance and dismissal at this time since it “may only actually proceed against one or two of the defendants.” This is no reason to sustain joinder where it is improper and where the equities, fairness and judicial economy demand severance. Indeed, the

likely reason that Plaintiff may not proceed against all defendants is that most, if not all, of them will eventually cave in and settle.

The Court should not close its eyes to the significant risk that people innocent of any copyright infringement are being falsely identified as “Defendants” and swept up in these lawsuits. Plaintiff’s claim that it “uses the same process as Federal Law Enforcement to identify cyber crimes” in no way reduces these risks. The experience one New York homeowner had last year is revealing.

It was 6:20 a.m. March 7 when he and his wife were awakened by the sound of someone breaking down their rear door. He threw a robe on and walked to the top of the stairs, looking down to see seven armed people with jackets bearing the initials I-C-E, which he didn’t immediately know stood for Immigration and Customs Enforcement.

* * *

Lying on his family room floor with assault weapons trained on him, shouts of “pedophile!” and “pornographer!” stinging like his fresh cuts and bruises, the Buffalo homeowner didn’t need long to figure out the reason for the early morning wake-up call from a swarm of federal agents.

That new wireless router. He’d gotten fed up trying to set a password. Someone must have used his Internet connection, he thought.

“We know who you are! You downloaded thousands of images at 11:30 last night,” the man’s lawyer, Barry Covert, recounted the agents saying. They referred to a screen name, “Doldrum.”

“No, I didn’t,” he insisted. “Somebody else could have but I didn’t do anything like that.”

* * *

Within three days, investigators determined the homeowner had been telling the truth: If someone was downloading child pornography through his wireless signal, it wasn’t him. About a week later, agents arrested a 25-year-old neighbor and charged him with distribution of child pornography.

* * *

The homeowner later got an apology from U.S. Attorney William Hochul and Immigration and Customs Enforcement Special Agent in Charge Lev Kubiak.

See Carolyn Thompson, *N.Y. case underscores Wi-Fi privacy dangers*, USA TODAY, Apr. 25, 2011, available at <<http://www.usatoday.com/tech/news/2011-04-25-wifi-warning.htm>>.

Pornographic content owners like Plaintiff don't apologize for their mistakes. To them, there aren't any since the whole point of their litigation strategy is to extort settlement payments from subscribers of internet accounts whether or not those subscribers committed any infringement. See Zero Tolerance, supra, 2012 WL 2044593 at *1 (Scheidlin, J.) ("early discovery has been used repeatedly in cases such as this one to harass and demand of defendants quick settlement payments, regardless of their liability").

Just yesterday, the Fifth Circuit affirmed an award of sanctions against the plaintiff's attorney in another BitTorrent case against multiple Doe defendants. The attorney had employed a "strategy of suing anonymous internet users for allegedly downloading pornography illegally using the powers of the court to find their identity, then shaming or intimidating them into settling for thousands of dollars - a tactic that he has employed all across the state and that has been replicated by others across the country." Mick Haig Productions v. Does 1-670, __ F.3d __, 2012 WL 2849378 (5th Cir. Jul. 12, 2012).

The Court should not facilitate Plaintiff's abuse of the judicial system by allowing Plaintiff's improper joinder of these defendants to continue unabated.

CONCLUSION

Based on the foregoing, the Court should grant the within motion in all respects.

Respectfully submitted,

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APPENDIX A

09-0905-cv

United States Court of Appeals for the Second Circuit

ARISTA RECORDS LLC, a Delaware limited liability company, ATLANTIC RECORDING CORPORATION, a Delaware corporation, BMG MUSIC, a New York general partnership, CAPITOL RECORDS, LLC, a Delaware limited liability company, ELEKTRA ENTERTAINMENT GROUP, INC., a Delaware corporation, INTERSCOPE RECORDS, a California general partnership, MAVERICK RECORDING COMPANY, a California joint venture, MOTOWN RECORD COMPANY, L.P., a California limited partnership, SONY BMG MUSIC ENTERTAINMENT, a Delaware general partnership, UMG RECORDINGS INC., a Delaware corporation, VIRGIN RECORDS AMERICA, INC., a California corporation, WARNER BROS. RECORDS INC., a Delaware corporation, ZOMBA RECORDING LLC, a Delaware limited liability company,

Plaintiffs-Appellees,

-against-

DOE 3,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

DEFENDANT-APPELLANT'S BRIEF

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