UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MALIBU MEDIA, LLC,	)	
	)	
Plaintiff,	)	Civil Case No. 2:12-mc-00632-LDW
	)	
v.	)	
	)	
JOHN DOES 1-13,	)	
	)	
Defendants.	)	
	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO JOHN DOE'S MOTION TO QUASH SUBPOENA, MOTION FOR PROTECTIVE ORDER, AND MOTION TO BE SEVERED FROM THE CASE BY DEFNEDANT JOHN DOE #5 WITH IP ADDRESS 68.194.16.247 [DKT. #1]

I. Introduction

Plaintiff respectfully requests the Court deny Defendant's Motion because the Court has already recommended that the issue of joinder is premature at this stage of the litigation and Defendant has not provided a valid reason to quash the subpoena. Plaintiff is concurrently filing a notice of related cases because it is unclear as to why this motion and response have been placed in a miscellaneous case. This case stems from Malibu Media v. John Does 1 – 13, 12-cv-01156-JFB-ETB before the Honorable Judge Boyle.

"While we would like to think that everyone obeys the law simply because it is the law and out of a sense of obligation, we also know that laws without penalties may be widely ignored."[1] Plaintiff has suffered massive harm due to infringements committed by tens of thousands of residents in this District and has no option but to file these suits to prevent the further widespread theft of its copyright.

[1] [1] [1] Pornography, Technology, and Process: Problems and Solutions on Peer-to-Peer Networks Statement of Marybeth Peters The Register of Copyrights before the Committee on the Judiciary 108th Cong. (2003) available at http://www.copyright.gov/docs/regstat090903.html

The Second Circuit has approved the use of Rule 45 subpoenas in on-line infringement cases to identify anonymous Doe Defendants. In Arista Records, LLC. v. Doe 3, 604 F.3d 110 (2d Cir. 2010) the Second Circuit upheld the District Court's denial of a motion to quash and sever after Arista obtained leave "to serve a subpoena on defendants' common ISP, the State University of New York at Albany." By so holding, the Second Circuit approved the process of issuing a Rule 45 subpoena to an ISP to identify anonymous Doe Defendants. Additionally, the Second Circuit rejected Doe 3's assertion that the Supreme Court's heighted pleading standards as announced in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, 129 S.Ct. 1337 (2009) made it impossible to plead a claim of infringement against an on-line anonymous infringer. "While the period at issue may therefore appear protracted by ordinary standards, the doctrine of joinder must be able to adapt to the technologies of our time ... Here, the nature of the technology compels the conclusion that defendants' alleged transactions were part of the same "series of transactions or occurrences." Malibu Media, LLC v. John Does 1-5, 12 CIV. 2954 NRB, 2012 WL 3641291 (S.D.N.Y. 2012).

Defendant attempts to persuade this Court to sever the defendants and quash the subpoena on the grounds that Plaintiff brings these suits with an improper purpose. Although Defendant draws attention to the number of similar lawsuits filed by Plaintiff in an effort to impugn Plaintiff's purpose, "[t]he proliferation of these types of lawsuits would be expected given the alleged infringement by thousands of people. The volume of lawsuits alone does not indicate any impropriety." Patrick Collins, Inc. v. John Does 1-9, 3:12-cv-03161-RM-BGC, DKT. #7 (C.D. Ill. Sept. 18, 2012). Plaintiff's purpose is plain and simple: to deter future infringement, preserve its valuable copyright, and receive compensation for the mass theft of its property.

II. This Court Has Already Held the Issue of Joinder is Premature

Defendant's request to sever the case is in direct contradiction with the Honorable Judge Boyle's Report and Recommendation. See Malibu Media, LLC v. John Does 1-13, CV 12-1156 JFB ETB, 2012 WL 2325588 (E.D.N.Y. 2012). On June 19, 2012 Judge Boyle recommended that a defendant's motion for severance be denied without prejudice because the issue of joinder was premature. "At this point in the action, it is premature to make such a determination. Accordingly, I recommend that John Doe's motion to dismiss and or/sever for improper joinder be denied, without prejudice to renewal after service of process is complete as to any defendant." Malibu Media, LLC v. John Does 1-13, CV 12-1156 JFB ETB, 2012 WL 2325588 (E.D.N.Y. 2012).

At this point in time, Plaintiff is attempting to receive the Defendant's identifying information and defendants have not yet been served. Defendant has not provided the Court with any reason to revisit the Report and Recommendation that wasn't previously addressed when the Court first issued its Report. "As most commonly defined, the doctrine [of law of the case] posits that when a court decides upon a rule of law, that decision should [generally] continue to govern the same issues in subsequent stages in the same case." Schwartz v. Chan, 142 F. Supp. 2d 325, 329 (E.D.N.Y. 2001). "The purpose of the law of the case is 'to 'maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.'" Id. citing Devilla v. Schriver, 245 F.3d 192 (2d Cir. 2001). In this case, to maintain consistency, the Court should not revisit its Report and Recommendation until after Defendant has been served.

III. This Court Should Not Quash the Subpoena

Rule 45(c)(3) provides that a court must modify or quash a subpoena that fails to allow a reasonable time to comply; requires a non-party to travel more than 100 miles (except for trial within the state); requires disclosure of privileged materials; or, subjects a person to undue burden. See Fed. R. Civ. P. 45(c)(3)(A)(i-iv). The Rule also provides for circumstances in which a court may modify or quash a subpoena. These circumstances are when the subpoena requires disclosure of trade secrets; disclosure of certain expert opinions; or, requires a nonparty to incur substantial expense to travel more than 100 miles to attend a trial. See Fed. R. Civ. P. 45(c)(3)(B)(i-iii).

Here, Defendant's motion should be denied on the basis that he has a claim of privilege to personally identifying information. As the Southern District of New York recently noted, Cablevision subscribers agree to allow Cablevision to authorize the disclosure of information necessary to satisfy any law.

> ISP subscribers have a minimal expectation of privacy in the transmission or distribution of copyrighted material. *See, e.g., Arista Records,* 604 F.3d at 118 ("[T]o the extent that anonymity is used to mask copyright infringement or to facilitate such infringement by other persons, it is unprotected by the First Amendment."). In addition, as the *Sony Music* court observed, Cablevision subscribers agree to terms of service that prohibit the unlawful transmission of information and authorize Cablevision "to disclose any information necessary to satisfy any law, regulation or other governmental request," thereby decreasing any expectation of anonymity.

John Wiley & Sons, Inc. v. Doe Nos. 1-30, 12 CIV. 3782 LTS JLC, 2012 WL 4320448 (S.D.N.Y. 2012). Defendant agreed that his information would be handed over in an instance like the one before the Court.

"Even where a party has standing to quash a subpoena based on privilege or a personal right, he or she lacks standing to object on the basis of undue burden." Malibu Media, LLC v.

John Does 1-21, 12-CV-00835-REB-MEH, 2012 WL 3590902 (D. Colo. Aug. 21, 2012). Here, the Court should not quash the subpoena when Defendant does not have an undue burden. Defendant is a third party and not the recipient of the subpoena. Defendant's motion should be denied on this basis. Recently the Eastern District of Pennsylvania held similarly, stating that a Defendant's claim for undue burden fails for two reasons, the Defendant has no undue burden because he or she is not required to produce anything and the Defendant does not have a serious risk of injury. Malibu Media, LLC v. John Does 1-15, CIV.A. 12-2077, 2012 WL 3089383, at *8-9 (E.D. Pa. 2012).

> Defendant contends that Rule 45 mandates that the subpoena must be quashed or modified because it subjects he or she to an undue burden. This argument is incorrect for two distinct reasons. First, and fatal to this claim, Defendant is not faced with an undue burden because the subpoena is directed at the internet service provider and not the Defendant. It is the service provider that is compelled to disclose the information, and thus, its prerogative to claim an undue burden. In this case, there is no burden on Defendant to produce *any* information.
>
> Second, Defendant claims "the risk of reputational injury to an individual from public exposure and association with the Malibu allegations—even if later disproven—is too great and presents an undue burden."[3] (Def.'s Mot. to Quash at 7.) In order to establish an undue burden, Defendant must show a "clearly defined and serious injury." *City of St. Petersburg,* No. 07–191, 2008 WL 1995298, at *2 (E.D.Pa. May 5, 2004) (citing *Transcor, Inc. v. Furney Charters, Inc.,* 212 F.R.D. 588, 592–93 (D.Kans.2003)). Here, Defendant's broad claim of reputational injury fails to demonstrate a "clearly defined and serious injury." We acknowledge that "there is some social stigma attached to consuming pornography"; however, "it is the rare civil lawsuit in which a defendant is not accused of behavior of which others may disapprove."

Id. (Internal citations omitted).

Courts across the country have extensively addressed this issue in copyright BitTorrent actions and have held that third party defendants do not have standing to move to quash the subpoena on the basis of undue burden. See W. Coast Productions, Inc. v. Does 1-5829, 275 F.R.D. 9, 16 (D.D.C. 2011) ("The general rule is that a party has no standing to quash a

subpoena served upon a third party, except as to claims of privilege relating to the documents being sought."); Call of the Wild Movie, LLC v. Smith, 274 F.R.D. 334, 338 (D.D.C. 2011) ("the putative defendants face no obligation to produce any information under the subpoenas issued to their respective ISPs and cannot claim any hardship, let alone undue hardship.*");* Third Degree Films, Inc. v. Does 1-118, 11-CV-03006-AW, 2011 WL 6837774 (D. Md. 2011) ("Defendants' argument that the subpoena presents an undue burden is unavailing because the subpoena is directed toward the ISPs and not the Doe Defendants and accordingly does not require them to produce any information or otherwise respond.")

Even if Defendant did have standing to quash the subpoena on the basis of an undue burden, the information Plaintiff seeks is clearly relevant. In a near identical Bittorrent infringement case, the Eastern District of Pennsylvania concluded, "the information sought is thus highly relevant to the plaintiff's claims." Raw Films, Ltd. v. John Does 1-15, CIV.A. 11-7248, 2012 WL 1019067, at *6 (E.D. Pa. Mar. 26, 2012). The Raw Films court also noted that Fed. R. Civ. P. 26(b)(1) permits parties to obtain discovery of "the identity and location of persons who know of any discoverable matter." Id. at *14. When addressing the issue of whether the infringer is the account holder of the IP address, the Court stated "[t]hese are not grounds on which to quash a subpoena otherwise demonstrated to be proper. The moving Doe may raise these and any other nonfrivolous defenses in the course of litigating the case." Id. Here, Plaintiff is only seeking the basic identifying information of the Doe Defendants. "The information sought by Plaintiff falls squarely within this broad scope of discovery and is therefore warranted in this matter." Malibu Media, LLC v. John Does 1-9, 8:12-cv-669-T-23AEP, *4 (M.D. Fla. July 6, 2012). "[T]he Court finds that any concern about identifying a potentially innocent ISP customer, who happens to fall within the Plaintiff's discovery requests

upon the ISPs, is minimal and not an issue that would warrant the Court to exercise its inherent power to govern these discovery matters by minimizing or prohibiting the otherwise legitimate, relevant, and probative discovery." Id. at *5.

A. Defendant's IP Address Is the Only Way to Identify the Infringer

An individual using Defendant's IP Address illegally downloaded Plaintiff's copyrighted work. Even assuming it was not the Defendant, under the broad discovery provided by the Federal Rules, the subscriber's information is still highly relevant because the subscriber is the most obvious person to identify who has used his or her internet service. "[E]ven assuming *arguendo* that the subscribers' name and information is not the actual user sought, we are of the opinion that it is reasonable to believe that it will aid in finding the true identity of the infringer and, therefore, we find that it is relevant. This is especially true, as in this case, where there is no other way to identify the proper defendants and proceed with claims against them." Malibu Media, LLC v. John Does 1-15, CIV.A. 12-2077, 2012 WL 3089383 (E.D. Pa. July 30, 2012).

Plaintiff believes that recent technological advances make it more likely that a wireless account will be secured and can easily be traced to a household where the subscriber either is the infringer or knows the infringer. Further, that Defendant suggests that a subscriber of an IP address cannot identify the infringer who was using this IP address flies in the face of reason. Recently, PC Magazine published an article regarding the scarcity of open wireless signals. "These days, you are lucky to find one in 100 Wi-Fi connections that are not protected by passwords of some sort."[2] The author continues to explain why routers are now more likely to be secured. "The reason for the change is simple: the router manufacturers decided to make users employ security with the set-up software. As people upgrade to newer, faster routers, the

[2] See Free Wi-Fi is Gone Forever www.pcmag.com/article2/0,2817,2402137,00.asp.

wide-open WiFi golden era came to an end."[3] This article, published on March 26, 2012, runs contrary to Defendant's assertions and supports the idea that most households do have closed, protected wireless that are not likely to be used by a neighbor or interloper.

Further, Plaintiff uses the same process as Federal Law Enforcement to identify cyber crimes. In a Statement of Deputy Assistant Attorney General Jason Weinstein before the Senate Judiciary on Privacy, Technology and the Law, he discusses how Federal law enforcement use IP addresses to identify an individual.

> When a criminal uses a computer to commit crimes, law enforcement may be able, through lawful legal process, to identify the computer or subscriber account based on its IP address. This information is essential to identifying offenders, locating fugitives, thwarting cyber intrusions, protecting children from sexual exploitation and neutralizing terrorist threats.[4]

While, as Defendant suggests, this process may not be 100% accurate, it is the most accurate and likely way to identify the person responsible for the use of that IP address. Indeed, it is the only way.

IV. Plaintiff Object's to a Protective Order to the Extent it Prevents the Disclosure of Defendant's Identity to Plaintiff

Plaintiff does not oppose Defendant proceeding under a protective order issued by this Court to the extent it requires Plaintiff to file Defendant's information under seal. Plaintiff does not believe, however, that a protective order is warranted to prevent Plaintiff from receiving the Defendant's information. Without this information, Plaintiff will be severely prejudiced from being able to proceed with its case. Here, Defendant is represented by counsel and faces no prejudice from Plaintiff receiving his identity.

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[3] Id.

[4] Statement of Deputy Assistant Attorney General Jason Weinstein Before the Senate Judiciary Subcommittee on Privacy, Technology and the Law available at www.justice.gov.

Defendant mischaracterizes Plaintiff's purpose for engaging in settlement activities, suggesting that simply the fact that a Defendant named in litigation may be offered a settlement constitutes improper litigation tactics. This is incorrect. Prior to actually proceeding against defendants, it is proper to contact them to discuss settlement options. The only difference between this case and the countless others filed every day by other plaintiffs in a broad array of civil litigation is that the Plaintiff does not have the ability to identify the defendants before the suit is filed.

> The John Doe Defendant's argument about coercive settlements is simply without any merit in those cases where the John Doe Defendant is represented by counsel. And, second, the John Doe Defendants' argument is misguided in that this type of case creates special circumstances that would require judicial review of any motivation to settle, and the Court is not inclined to create a special proceeding to inform any particular John Doe Defendant of a right which is obviously commonly known, i.e. his or her right to defend and litigate this lawsuit.

Malibu Media, LLC v. John Does 1-9, 8:12-cv-669-T-23AEP, *7 (M.D. Fla. July 6, 2012) (emphasis added).

The Supreme Court has stated that public policy favors resolutions through settlement. "Rule 68's policy of encouraging settlements is neutral, favoring neither plaintiffs nor defendants; it expresses a clear policy of favoring settlement of all lawsuits." Marek v. Chesny 473 U.S. 1, 11 (1985). Further, Plaintiff has a First Amendment right under the petition clause to make the demand. See Sosa v. DirectTV, 437 F. 3d 923, 937 (9th Cir. 2006) (holding "the protections of the Petition Clause extend to settlement demands as a class," including those made during and prior to a suit.)

V. Conclusion

For the foregoing reasons, Plaintiff respectfully requests that the Court deny the subject motion.

Dated: October 16, 2012

Respectfully submitted,

By: /s/*Jason Kotzker*
Jason Kotzker
NY Bar No. 4286829
jason@klgip.com
KOTZKER LAW GROUP
9609 S. University Blvd. #632134
Highlands Ranch, CO 80163
Phone: 303-875-5386
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and that service was perfected on all counsel of record and interested parties through this system.

By: /s/*Jason Kotzker*