

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

PATRICK COLLINS, INC.	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 12-cv-3507-BSJ
	)	
DOES 1 – 45	)	
	)	
Defendants.	)	

**MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION OF THE
MOTION TO SEVER AND QUASH SUBPOENA BY JOHN DOE 41 [Document 8]**

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 or about July 23, 2012, John Doe 41 filed a Motion to "Sever and Dismiss Action as to Defendants Doe 2 Through 45 and Quash Subpoenas."

Since John Doe 41 is not the spokesperson for all John Does, this Court should consider John Doe 41's Motion a Motion to sever ONLY John Doe 41. Plaintiff will gladly stipulate to John Doe 41 being severed and pursue a separate action against John Doe 41, especially since more than one copyright infringement has been traced to the IP address of John Doe 41.

In a recent case in Massachusetts, a John Doe filed a similar Motion. Another John Doe filed a Partial Opposition, opposing the severance of the John Does and moving the Court to only sever the John Doe who filed the Motion to sever. See *Media Products, Inc. v. Does 1-120*, 3:12-cv-30100-KPN (D. Massachusetts, Partial Opposition of John Doe 30, filed 07/26/12, ECF Document 18]. *Attached as Exhibit 1.*

John Doe 41 also makes many gratuitous allegations that are not important as to the substance of the matter, but should nevertheless be responded to. Most importantly, John Doe 41

claims that “Plaintiff is one ... who ‘ha[s] employed abusive litigation practices ...’” (*Motion, page 6 of 26*). As John Doe 41’s attorney knows well because he has dealt with this attorney on several occasions, Plaintiff is a large studio that has contracted with various different law firms all over the U.S. In this case, Plaintiff is represented by an independent attorney who does not have anything to do with any other law firm that may have employed abusive litigation practices. This attorney personally deals with all John Does and their attorneys, does not initiate contact with John Does by telephone or through a call center, and does not employ abusive practices. It is disturbing that John Doe 41 makes these statements in light of the fact that his attorney knows better.

1. John Doe 41 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 41 lacks standing.

2. John Doe 41’s Allegation that Someone Else May Have Committed the Infringement is Irrelevant at this Stage

John Doe 41 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.

Plaintiff notes that more than one copyright infringement was traced to John Doe 41's IP address.

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. The John Doe Defendants Are Properly Joined at This Stage of the Proceeding.

John Doe 41 argues that the John Doe defendants are not properly joined because Plaintiff does not show a connection among the various John Does. John Doe 41 then cites cases in the Southern and Eastern Districts of New York where judges have severed the John Does. Plaintiff notes that several judges in the Southern District of New York have upheld joinder, at least at this stage of the proceedings. See *Third Degree Films, Inc. v. John Does 1-217*, 1:11-cv-07564-KBF; *Digital Sin v Does 176*, 1:12-cv-00126-AJN; *Combat Zone v. Does 63*, 1:11-cv-09688-PKC; *Media Products v. Does 1-40*, 12-cv-03630-HB; *Combat Zone v. Does 1-33*, 12-cv-04132-KMW.

Further, the Southern District of New York has routinely maintained cases with multiple John Does that appear weak in comparison. In *Arista Records, LLC v. Does 1-33*, 08-CV-03048-CM, the Court granted an early discovery order in a case (a) with multiple *Plaintiffs*, (b) claiming infringement of multiple works and multiple different files, (c) by multiple John Does, and (d) where the John Does may not even be State residents. The Complaint is devoid of any explanation of the underlying technology. In *Pearson Education, Inc. v. Mehrotra and Does 1-5*, 10-CV-02825-CM, the Court approved an early discovery order in a case (a) involving several *Plaintiffs*, (b) claiming infringement of multiple works and multiple different files, (c) by several John Does, (d) where the John Does may not even be State residents. The Complaint is devoid of any explanation of the underlying technology. For a more detailed discussion, see *Media Products, Inc. v. Does 1-59*, 12cv125-CM, [Plaintiff's] Response to Order to Show Case, Document 11 (*precedent in the SDNY for joinder of John Does*).

In the Southern District of New York, the publishing company John Wiley & Sons, Inc. has filed a large number of copyright infringement cases against unknown infringers, and the

Courts have directly or indirectly upheld joinder even though those cases have weaknesses not found in the case at bar. *See e.g., John Wiley & Sons, Inc. v. John Does Nos. 1-35*, 12-CV-0540-LTS (infringements by multiple John Does who are State residents of *multiple* works/files; no Technology Declaration); *John Wiley & Sons, Inc. v. John Does Nos. 1-24*, 12-CV-1352-GBD (infringements by multiple John Does who are State residents of single work, *but not necessarily identical file*, from possibly different sources; no Technology Declaration); *John Wiley & Sons, Inc. v. John Does Nos. 1-27*, 11 Civ. 7627 (WHP), 2012 U.S. Dist. LEXIS 13667 (February 3, 2012) (“Doe No. 7’s request to be severed from the other defendants is also premature. This action is in its infancy, and each defendant will have ample time to challenge his inclusion in this litigation ...”).

A recent in-depth analysis of the BitTorrent protocol and the cases involving joinder appears in *Patrick Collins, Inc. v. John Does 1-21*, No. 11-15232, 2012 WL 1190840 (E.D. Mich. Apr. 5, 2012) (Report and Recommendation), attached. There, with the assistance of a computer-literate law clerk, the Magistrate Judge analyzed the underlying technology and demonstrates that the series of transactions are in fact related. That view was confirmed by a subsequent Order in *Third Degree Films, Inc. v. John Does 1-36*, 2:11-cv-15200-SJM-LJM (Doc. 17) (E.D. Mich. May 29, 2012), attached.

What the E.D. Michigan courts have recognized (as have others that recognize joinder) is that *there is no temporal requirement in Rule 20*. A court that requires that all John Does must have been sharing concurrently disregards the relationship (traceable back to a specific initial seed) that exists among all users in the same swarm. Rule 20 does not require a temporal overlap; it is enough that the alleged BitTorrent infringers participated in the same series of uploads and downloads. *See also New Sensations, Inc. v. Does 1-1474*, 2011 U.S. Dist. LEXIS 94909 at *17

(N.D. Cal. Aug. 24, 2011) (*finding joinder proper for infringers who all participated in the same swarm over a nine-month period*).

4. Other John Does May Oppose John Doe 41's Motion As Applied to All John Does

In a recent Massachusetts cases, a John Doe [John Doe 120] filed a Motion similar to the one at bar. Then another John Doe [John Doe 30] filed a Partial Opposition, opposing the severance of the John Does and moving the Court to only sever the John Doe who filed the Motion to sever. See *Media Products, Inc. v. Does 1-120*, 3:12-cv-30100-KPN (D. Massachusetts, Partial Opposition of John Doe 30, filed 07/26/12, ECF Document 18]. *Attached as Exhibit 1:*

Usually, it is an opponent, not an ally, who seeks to divide and conquer. John Doe 120 likely has his reasons for desiring severance, but at this point, a win on this minor point will be pyrrhic. Accordingly, JD30 [John Doe 30] takes the position that joinder is interests of judicial economy, and it is in the interest of all other Defendants to remain unified. If John Doe 120 can afford an individual defense or has other reasons for seeking severance, then he may stand alone if he likes. But, his motion speaks only for John Doe 120.

Joinder is appropriate in order to prevent multiple identical lawsuits, extra expense to the parties, and loss of time to the court and the litigants. See *Call of the Wild Movie, LLC v. Does 1-1,062*, 770 F. Supp. 2d 332, 344 (D.D.C. 2011). In considering the propriety of joinder under Rule 20, courts tend to take a positive view of it as a mechanism of judicial economy. “[C]onsistent with fairness to parties; joinder of claims, parties, remedies is strongly encouraged.” *United Mine Workers v. Gibbs*, 383 U.S. 715, 724 (1966). In a joined case, Courts should not sever without considering how the act will affect all litigants and the judicial process. See *Stanely Works v. Haeger Potteries, Inc.*, 35 F.R.D. 551, 554 (N.D. Ill. 1964); see also *United Mine Workers*, 383 U.S. at 724.

Under this analysis, the Defendants should remain joined. Severance will negatively impact JD30, all other Defendants, and the Court as well. As another Court remarked, severance of such cases by fracturing them into dozens of identical actions before the same court “does not exactly resonate with practicality.” *Arista Records LLC v. Does 1-27*, 584 F. Supp. 2d 240, 51 (D.Me. 2008). If John Doe 120's motion is granted as to him only, this one case will become only two. On the other hand, if the Court grants the motion as to all 120 defendants, this case will splinter into 120 individual lawsuits.

JD30 has theories about possible flaws in the Plaintiff's case, which present an opportunity for dismissal or summary judgment. However, JD30 questions his individual ability to afford to

effectively mount a complete defense. If John Doe 120's motion is granted, he will have condemned JD30 to respond to litigation that will be far more costly, resource-intensive, and burdensome than the instant joined action. On the other hand, 120 defendants banded together (or 119, as it may be), are in a better position to present a coordinated defense, with multiple Defendants pooling their resources (should other Defendants wish to do so) and creating an economy of scale for their defense. Joinder will reduce the litigation cost burden on joined defendants, will encourage the free flow of information among them, and will promote judicial economy. In addition to potentially saving defendants money in both legal fees and aggregate liability for a joint-and-several award of damages, in the event that the Plaintiff prevails, joinder will further the purpose of the Copyright Act in minimizing awards for duplicative claims over the same film.

A. Joinder is desirable for JD30, because it prevents undue delay, is better for judicial economy, and allows for similar claims to be brought simultaneously.

"[T]he two prongs of Rule 20(a) are to be liberally construed in the interest of convenience and judicial economy [...] in a manner that will secure the just, speedy, and inexpensive determination of the action." *Davidson v. District of Columbia*, 736 F.Supp.2d 115, 119 (D.D.C.2010). The purpose of Rule 20 is to promote judicial economy and speed up the resolution of disputes, resulting in the elimination of unnecessary lawsuits. See *Mosley v. General Motors Corp.*, 497 F.2d 1330, 1332 (8th Cir. 1974). It seems that John Doe 120 seeks the opposite effect, and complete severance will result in scores of lawsuits and slower justice for all. Given the "strength in numbers" theory, if the Court were to grant complete severance and JD30 was then sued individually, he would move for the cases to be consolidated. By all rights, they should be – which would land all 120 Defendants right back where they are today – in a joined action.

B. The Righthaven Litigation Provides Valuable Practical Guidance.

The Righthaven cases filed in the U.S. District Courts for Nevada, Colorado, and South Carolina exemplify what happens if defendants are not joined together, and a Plaintiff simply monopolizes a docket. Rather than filing one Complaint joining the many defendants with causes of action based on virtually indistinguishable facts and law, Righthaven filed hundreds of similar infringement claims against numerous individual defendants, claiming that the defendants unlawfully copied hundreds of articles from various newspapers on websites throughout the country. In many of these suits, the only difference was the identity of the defendant. Many of Righthaven's defendants chose to settle rather than come up with the high costs of individualized litigation. As a result, many of the cases were not challenged in court, despite Righthaven's later-demonstrated lack of standing. [...]

Media Products, Inc. v. Does 1-120, Opposition by John Doe 30, pages 3 of 11 to 5 of 11,

attached as Exhibit 1.

5. This Court Should Exercise Discretionary Severance Only As to John Doe 41

John Doe 41 then argues that the Court should apply its discretion to sever the various John Does because the John Does may eventually present different defenses.

Plaintiff agrees that John Does might assert different defenses that eventually should be dealt with separately. However, for the initial stages of such cases, it is more efficient to keep the John Does together in one lawsuit. It requires the Court to only maintain one file instead of multiple files. There will come a time when John Does must be named separately, and then separate Complaints must be filed (and additional filing fees will be paid as appropriate).

Plaintiff's counsel does in fact pursue individual lawsuits. This is a list of Plaintiff's counsel's individual lawsuits with named defendants as of July 29, 2012:

State	Caption
NY	Third Degree Films, Inc. v. John Doe 199, 1:11-cv-07564-KBF
NY	SBO Pictures, Inc. v. Martinez, 11-cv-07999-KBF
NY	Third Degree Films v. Yi, 11-cv-9618-KBF
NY	Zero Tolerance v. Private One, 1:11-cv-09703-KBF
NY	Exquisite v. Bottari, 1:11-cv-09689-KBF
NY	Next Phase Distribution v. Clark, 1:11-cv-09706-KBF
MD	Metro Media Entertainment v. Steinruck, 12-cv-347
MD	Third Degree v. Barr, 12-cv-349
NY	Third Degree v. Scheer Over, 1:12-cv-01077-KBF
NY	SBO Pictures v. Taylor, 12-cv-1169-KBF

In this context, John Doe 41 again distorts cases and facts, and claims that the Fifth Circuit imposed “sanctions against the plaintiff’s attorney in another BitTorrent case against multiple Doe defendants.” (*Motion, page 22 of 25*). John Doe 41 fails to mention that the sanctions were imposed because the attorney in that case issued subpoenas to ISPs without permission of the court. See *Mick Haig Productions v. Does 1-670*, 2012 WL 2849378 (5th Cir. July 12, 2012).

CONCLUSION

Based on the above-stated reasons, Plaintiff respectfully requests this Court to partially grant the John Doe 41's motion and sever him from this case. Plaintiff will then pursue a separate case against John Doe 41.

Respectfully submitted this 29th day of July 2012.

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EXHIBITS:

- (1) Media Products, Inc. v. Does 1-120, 3:12-cv-30100-KPN (D. Massachusetts, Partial Opposition of John Doe 30, filed 07/26/12, ECF Document 18].
- (2) *Patrick Collins, Inc. v. John Does 1-21*, Civil Action No. 11-15232, 2012 U.S. Dist. LEXIS 57962 (Report and Recommendation of April 5, 2012) (provides a detailed, in-depth technical review of the BitTorrent protocol and how it relates to Rule 20(a)(2) [joinder]).
- (3) *Third Degree Films, Inc. v. John Does 1-36*, 2:11-cv-15200-SJM-LJM (Doc. 17) (E.D. Mich. May 29, 2012).

CERTIFICATE OF SERVICE

I hereby certify that on 29 July 2012, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system.

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