

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

-----X		:
MALIBU MEDIA, LLC,		:
		:
	Plaintiff,	:
		:
	vs.	:
		:
JOHN DOES 1-5,		:
		:
	Defendants.	:
		:
-----X		:

Civil Action No. 12-cv-02954-NRB

**PLAINTIFF’S MEMORANDUM IN OPPOSITION TO DEFENDANT JOHN DOE NO.
4’S MOTION TO SEVER AND DISMISS ACTION AS TO DEFENDANTS JOHN DOE 2
THROUGH 5 AND QUASH SUBPOENAS**

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I. INTRODUCTION

Plaintiff respectfully requests this Court deny Defendant's Motion because joinder is proper and Plaintiff has a valid purpose for bringing this lawsuit. "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.

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 heightened 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.

Plaintiff has intentionally limited the number of Doe Defendants in this case to a manageable number to facilitate litigation. Defendant is clearly aware of the difficulty Plaintiff would incur if this Court severed the present suit. Defendant's intention is that Plaintiff will be

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>

delayed and suffer needless litigation costs while trying to obtain the identity of the Doe Defendants, who may not be identifiable by the time Plaintiff files each suit individually.

Recently, this Court examined these issues and held joinder is proper in copyright BitTorrent infringement cases, concluding:

[I]t is difficult to see how the sharing and downloading activity alleged in the Complaint—a series of individuals connecting either directly with each other or as part of a chain or “swarm” of connectivity designed to illegally copy and share the exact same copyrighted file—could *not* constitute a ‘series of transactions or occurrences’ for purposes of Rule 20(a).

Digital Sin, Inc. v. Does 1-176, 2012 WL 263491 (S.D.N.Y. 2012); see also Patrick Collins, Inc. v. John Does 1-33, 2012 WL 415424 (D. Colo. 2012).

Both Congress and the United States Copyright Office have made it clear that the suits Plaintiff brings against individual infringers are proper. In 1999 Congress intentionally amended the Copyright Act to deter individuals from infringing copyrights on the internet by increasing the statutory remedies:

Congress did contemplate that suits like this [against individuals] were within the Act. Congress last amended the Copyright Act in 1999 to increase the minimum and maximum awards available under § 504(c). See Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, 113 Stat. 1774. At the time, Congress specifically acknowledged that consumer-based, noncommercial use of copyrighted materials constituted actionable copyright infringement. Congress found that “copyright piracy of intellectual property flourishes, assisted in large part by today's world of advanced technologies,” and cautioned that “the potential for this problem to worsen is great.”

Sony v. Tennenbaum, 2011 WL 4133920 at *11 (1st Cir. 2011) (emphasis added).

During her time as Register of Copyrights, Mary Beth Peters gave a statement to the Senate Judiciary Committee on exactly the type of copyright infringement claims that are before this Court, highlighting the necessity for copyright holders to bring these actions.

[F]or some users of peer-to-peer technology, even knowledge that what they are doing is illegal will not be a sufficient disincentive to engage in such conduct. But whether or not these infringers know or care that it is against the law, the knowledge that such conduct may lead to expensive and burdensome litigation and a potentially large judgment should have a healthy deterrent effect. ... For many people, the best form of education about copyright in the internet world is the threat of litigation. In short, if you break the law, you should be prepared to accept the consequences. Copyright owners have every right to enforce their rights in court, whether they are taking action against providers of peer-to-peer services designed to profit from copyright infringement or against the persons engaging in individual acts of infringement using such services.² (Emphasis added.)

She further continued that Copyright owners should “offer no apologies” in bringing these actions before the Court:

While copyright owners have expressed regret that they have felt compelled to take this step, they need offer no apologies. As I have already said, people who use peer-to-peer technology for the unauthorized reproduction or distribution of copyrighted works are breaking the law. Surprisingly, many people do not appear to realize this. I have long advocated more public education about copyright. In a perfect world, this could be done in classrooms and with billboards. But ours is not a perfect world, and public education can also be accomplished through enforcement of copyright. (Emphasis added.)³

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. 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. JOINDER IS PROPER

Defendant, in his motion, would require Plaintiff to allege a direct Defendant-to-Defendant computer interaction in order to permit joinder and satisfy the “acted in concert” test.

² 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>

³ Id.

“Plaintiff alleges no facts that these two particular Defendants shared data with each other.” (Def’s Mem. at 7.) This requirement is erroneous because Fed.R.Civ.P. 20(a) permits joinder when: (1) there is the “same transaction or occurrence” or (2) a “series of transactions or occurrences” or (3) claims upon which the Defendant asserts the right to relief jointly or “severally” against the Defendants. A direct defendant-to-defendant data exchange is the “same transaction or occurrence.” Rule 20(a) not only permits permissive joinder when there is the same transaction or occurrence, it also permits joinder when a Plaintiff has pled (a) “series of transactions or occurrences” or (b) joint or several liability. Plaintiff has done both here.

This Court, consistent with this analysis, has found proper joinder in copyright BitTorrent actions where the pleadings are “based on specific allegations connecting the defendants to the same specific swarming transaction, or series of transactions, to support their joinder.” Digital Sin v. Does 1-176, 12-CV-00126 AJN, 2012 WL 263491, at *5 (S.D.N.Y. Jan. 30, 2012) (citing DigiProtect USA Corp v. Does, 10 CIV. 8760 PAC, 2011 WL 4444666 (S.D.N.Y. Sept. 26, 2011)). Here, all of the defendants participated in the same BitTorrent swarm.

A. The Infringement Occurred Through a Series of Transactions

For the word “series” to have any meaning in Rule 20(a), the rule must permit joinder to be proper when there is something other than a direct transaction. “Series” has been interpreted by Circuit Courts to mean a “logically related” fact pattern.

[A]ll ‘logically related’ events entitling a person to institute a legal action against another generally are regarded as comprising a transaction or occurrence. The analogous interpretation of the terms as used in Rule 20 would permit all reasonably related claims for relief by or against different parties to be tried in a single proceeding. Absolute identity of all events is unnecessary.

Mosley v. Gen. Motors Corp., 497 F.2d 1330, 1333 (8th Cir. 1974).

While the logical relationship test does not require it, should this matter go to trial, Plaintiff will prove that the Defendants' infringement was committed through the same transaction or through a series of transactions with mathematical certainty by demonstrating, *inter alia*, 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.

i. All of the Defendants Downloaded and Uploaded Plaintiff's Movie

"BitTorrent is one of several peer-to-peer file sharing protocols that address the inefficiencies in the client-server model by making those who download a file another source for the file." Third Degree Films v. Does 1-36, 11-CV-15200, 2012 WL 2522151, *1 (E.D. Mich. May 29, 2012). To explain, the ingenuity of the BitTorrent protocol is that users simultaneously download and upload a piece of the movie. "That is, sharing is among "peers." Users of the BitTorrent communication protocol do not have to download an entire file before uploading parts of the file to others. This is because BitTorrent downloads a file in pieces, and by default, begins sharing pieces with other peers almost immediately." Id.

BitTorrent is a protocol for distributing files. It identifies content by URL and is designed to integrate seamlessly with the web. Its advantage over plain HTTP is that when multiple downloads of the same file happen concurrently, the downloaders upload to each other, making it possible for the file source to support very large numbers of downloaders with only a modest increase in its load.

Patrick Collins, Inc. v. John Does 1-21, CIV.A. 11-15232, 2012 WL 1190840 (E.D. Mich. Apr. 5, 2012).

Plaintiff's investigator, IPP Limited, determined that each IP address participated in the swarm when its International IPTracker v. 1.2.1 software entered the BitTorrent swarm and each Defendant directly connected to its server. "Through each of the transactions, the computers using the IP addresses identified on Exhibit B connected to the Investigative server in order to transmit a full copy, or a portion thereof, of a digital media file identified by the hash value set

forth on Exhibit B.” Dec. of Tobias Feiser Doc. 7 ¶18. The International IP Tracker software directly connected with each of the Defendant’s computers and downloaded a piece of Plaintiff’s movie sent from each Defendant. In order to receive the movie, and verify that Defendant sent the movie, Defendant first needed to upload the movie to Plaintiff’s investigative software. Plaintiff’s supplemental material regarding the software, attached as Ex. A to its declaration states, “[a] direct and continuous connection between the IPTracker-server and the uploader of the file is established and exists at least 10 seconds before, during and at least 10 seconds after the capture sequence i.e. during the whole download process.” (Doc. 7-1 at 4).

Technology exists to use the BitTorrent protocol without uploading pieces of the file.⁴ Indeed, the IPTracker used by Plaintiff’s investigator does not upload the pieces it receives by defendants to other members of the swarm. See Doc. 7-1 at 6. Further, users may disable their BitTorrent software to prevent or reduce uploading.⁵ This is rare and wildly discouraged amongst BitTorrent users because it goes against the principles of BitTorrent, which is for the peers to share with each other. If no one uploaded, then the BitTorrent protocol would be essentially useless. In order to encourage users to upload, the BitTorrent protocol offers incentives. “One reason why BitTorrent is successful is because of its built-in tit-for-tat incentive strategy. Fundamentally, BitTorrent’s incentive principle is as follows: a user will get the file faster if it contributes more upload bandwidth to the torrent. This incentivizes users to upgrade their ISP access and/or increase the maximum upload rates (typically configurable) in their BitTorrent clients.”⁶ Here, Plaintiff is absolutely certain the defendants in this case

⁴⁴ As an example see BitThief – A Free Riding BitTorrent Client <http://bitthief.ethz.ch/>

⁵ Zhengye Liu, Prithula Dhungel, Di Wu, Chao Zhang, Keith W. Ross, *Understand and Improving Incentives in Private P2P Communities*, [available at cis.poly.edu/~ross/papers/private_incentive.pdf](http://cis.poly.edu/~ross/papers/private_incentive.pdf)

⁶ Id.

uploaded because Plaintiff's investigative software received a piece of the movie from each of the defendants.

ii. Series of Transactions Explained By the Michigan Court

Recently, two separate judges in the Eastern District of Michigan released well reasoned and thoughtful opinions regarding the BitTorrent protocol after expanding substantial resources to understand the technology. The Honorable Judge Randon summarized the plaintiff's allegation asserting that each Defendant copied the same piece of the same file as follows:

Plaintiff alleges that its investigator ("IPP") was able to download at least one piece of the copyrighted Movie from each Defendant (Dkt. No. 1 at 8–10). It is important to understand the implications of this allegation before determining whether joinder is proper. If IPP downloaded a piece of Plaintiff's copyrighted Movie from each Defendant (and, conversely, each Defendant uploaded at least one piece of the Movie to IPP) then each Defendant had at least one piece of the Movie—traceable via Hash Identifier to the same Initial Seeder—on his or her computer and allowed other peers to download pieces of the Movie.

By way of illustration: IPP's computer connected with a tracker, got the IP address of each of Defendants' computers, connected with each Defendants' computer, and downloaded at least one piece of the Movie from each Defendants' computer. During this transaction, IPP's computer verified that each Defendants' piece of the Movie had the expected Hash; otherwise, the download would not have occurred.

Patrick Collins, Inc. v. John Does 1-21, CIV.A. 11-15232, 2012 WL 1190840, at *4-5 (E.D. Mich. Apr. 5, 2012). Significantly, Judge Randon then explained through the force of clear deductive logic that each Defendant obtained the piece of plaintiff's movie in one of four ways all of which relate directly back to one individual seed.

If Plaintiffs allegations are true, each Defendant must have downloaded the piece(s) each had on his or her computer in one, or more, of the following four ways:

- 1) the Defendant connected to and transferred a piece of the Movie **from the initial seeder**; or
- 2) the Defendant connected to and transferred a piece of the Movie **from a seeder** who downloaded the completed file from the initial seeder or from other peers; or
- 3) the Defendant connected to and transferred a piece of the Movie **from other Defendants** who downloaded from the initial seeder or from other peers; or

4) the Defendant connected to and transferred a piece of the Movie **from other peers** who downloaded from other Defendants, other peers, other Seeders, or the Initial Seeder.

In other words, in the universe of possible transactions, at some point, each Defendant downloaded a piece of the Movie, which had been transferred through a series of uploads and downloads from the Initial Seeder, through other users or directly, to each Defendant, and finally to IPP.

Id. Having limited the universe to four possibilities the court correctly concluded the transaction was logically related.

Therefore, each Defendant is logically related to every other Defendant because they were all part of a series of transactions linked to a unique Initial Seeder and to each other. This relatedness arises not merely because of their common use of the BitTorrent protocol, but because each Defendant affirmatively chose to download the same Torrent file that was created by the same initial seeder, intending to: 1) utilize other users' computers to download pieces of the same Movie, and 2) allow his or her own computer to be used in the infringement by other peers and Defendants in the same swarm.

Id.

The Honorable Judge Michelson also expanded on this principle, identifying that each of the defendants, through generations of other members in the swarm, helped pass on the files to other defendants.

For example, it is not implausible that John Doe No. 10, who apparently participated in the swarm on July 18, 2011, shared pieces of the Work with peers that in turn, helped propagate the Work to later joining peers. Therefore, Doe No. 10 plausibly *indirectly* uploaded pieces of the work to, say, Doe No. 25 who participated in the swarm four days later. Indeed, it is beyond dispute that the initial seeder indirectly uploaded pieces of the Work to every peer in the swarm—no matter when they joined.

Third Degree Films v. Does 1-36, 11-CV-15200, 2012 WL 2522151 (E.D. Mich. May 29, 2012).

iii. The Time Period For Infringement is Irrelevant

The nature of the BitTorrent protocol provides for continuous seeding and distributing of the movie long after it has downloaded. As stated above, once a file is downloaded it is possible

to manually stop the program by disabling uploading, but without stopping the program by physically un-checking the automatic seeding, an alleged infringer likely will seed and distribute a movie for months at a time. As Judge Randon explained the technology, it is not that a Defendant would wait weeks to download a movie, but that a Defendant would continue to distribute the movie for weeks after having received the download.

[I]t is not that an infringer would wait six weeks to receive the Movie, it is that the infringer receives the Movie in a few hours and then leaves his or her computer on with the Client Program uploading the Movie to other peers for six weeks. Because the Client Program's default setting (unless disabled) is to begin uploading a piece as soon as it is received and verified against the expected Hash, it is not difficult to believe that a Defendant who downloaded the Movie on day one, would have uploaded the Movie to another Defendant or peer six weeks later. This consideration, however, is irrelevant since concerted action is not required for joinder.

Patrick Collins, Inc. v. John Does 1-21, 2012 WL 1190840 (E.D. Mich. Apr. 5, 2012).

The Michigan Court properly explained that time constraints should not impact that the infringements occurred through a series of transactions. “[T]he law of joinder does not have as a precondition that there be temporal distance or temporal overlap; it is enough that the alleged BitTorrent infringers participated in the same series of uploads and downloads in the same swarm.” Patrick Collins, Inc. v. John Does 1-21, 2012 WL 1190840 (E.D. Mich. Apr. 5, 2012.)

The Northern District of California also explained why the time gap in BitTorrent infringement cases is arbitrary and does not impact the basic principles of joinder. “While this period might seem protracted, such time periods can be somewhat arbitrary in BitTorrent-based cases as long as the alleged defendants participate in the same swarm, downloading and uploading the same file.” First Time Videos, LLC v. Does 1-95, C 11-3822 MEJ, 2011 WL 4724882 (N.D. Cal. Oct. 7, 2011). “[E]ven after a Doe Defendant disconnects from the swarm,

the parts of the file that he downloaded and uploaded will continue to be transferred to other Doe Defendants remaining in the swarm.” Id..

iv. It Is Not Necessary that the Defendants Shared the Infringing Movie With Each Other

Defendant’s requirement of a direct defendant to defendant connection is a rigid approach to joinder, contrary to Supreme Court precedent. “Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.” United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 724 (1966).

a. This Test Was Directly Criticized by Recent Courts

The Honorable Mary McLaughlin from the Eastern District of Pennsylvania, former Chief Counsel to the US Senate for the Subcommittee on Terrorism, Technology, and Government, recently addressed this exact issue in a similar BitTorrent copyright infringement action. Judge McLaughlin held joinder was proper even if the Doe defendants did not transmit the pieces directly to each other because the claims arise out of the same series of transactions. Raw Films v. John Does 1-15, 2012 WL 1019067, at *4 (E.D. Pa. March 26, 2012).

[E]ven if no Doe defendant directly transmitted a piece of the Work to another Doe defendant, the Court is satisfied at this stage of the litigation the claims against each Doe defendant appear to arise out of the same series of transactions or occurrences, namely, the transmission of pieces of the same copy of the Work to the same investigative server.

Id.

b. The Supreme Court Allows Joinder When There is No One to One Transaction

In United States v. Mississippi, 380 U.S. 128 (1965) the Supreme Court found that the joinder of six defendants, election registrars of six different counties, was proper because the allegations were all based on the same state-wide system designed to enforce the voter

registration laws in a way that would deprive African Americans of the right to vote. Although the complaint did not allege that the registrars directly interacted with each other, or even that they knew of each other's actions, or that each other's actions directly affected each other in any way, the Supreme Court interpreted Rule 20 to hold a right to relief severally because the series of transactions were related and contained a common law and fact. Id. at 142-143.

[T]he complaint charged that the registrars had acted and were continuing to act as part of a state-wide system designed to enforce the registration laws in a way that would inevitably deprive colored people of the right to vote solely because of their color. On such an allegation the joinder of all the registrars as defendants in a single suit is authorized by Rule 20(a) of the Federal Rules of Civil Procedure.

Id. at 142. Indeed, the Supreme Court held all of the defendants were joined properly because they were all acting on the basis of the same system which created a transactional relatedness.

Likewise, in the case at hand, it is not necessary for each of the defendants to have directly interacted with each other defendant, or have shared a piece of the file with each and every defendant when downloading the movie. The defendants are properly joined because their actions directly relate back to the same initial seed of the swarm, and their alleged infringement further advances the series of infringements that began with that initial seed and continued through other infringers. In doing so, the Defendants all acted under the same exact system. Just as it was not alleged in United States v. Mississippi that the registrars shared with each other their efforts to prevent African Americans from voting, it is not necessary for the defendants to have shared the pieces of the movie with each other. It is sufficient that the defendants shared pieces that originated from the same exact file, and opened their computer to allow others to connect and receive these pieces.

B. Joinder is Proper Because Plaintiff Properly Pled Defendants Were Jointly and Severally Liable

The tests in the cases cited by Defendant requiring the defendants to directly send each other a piece of the movie further contradicts joinder principles because joinder is proper when a plaintiff pleads joint and several liability. See Genetic Technologies Ltd. v. Agilent Technologies, Inc., 11-CV-01389-WJM-KLM, 2012 WL 1060040 (D. Colo. Mar. 28, 2012) (“It is uncontested that Plaintiff does not assert joint or several liability here, which would be a separate basis for joinder.”)

Rule 20(a) provides for “any right to relief jointly, severally, or in the alternative”. In this case Plaintiff pled both joint and several liability.

Relief May be Sought “Jointly, Severally, or in the Alternative”: It is *not* necessary that each plaintiff or defendant be involved in every claim set forth in the complaint. Thus, for example, if there are several plaintiffs (e.g., driver and passenger in auto accident), each may seek *separate* relief. Likewise, if there are several defendants, relief may be sought against each of them separately, or against all of them jointly. [FRCP 20(a); *Dougherty v. Mieczkowski* (D DE 1987) 661 F.Supp. 267, 278]

Cal. Prac. Guide Fed. Civ. Pro. Before Trial Ch. 7-D. “[C]oncert of action, *i.e.*, a right to relief jointly, is not a precondition of joinder. Plaintiff asserts a right to relief jointly against Defendants *and* severally. Therefore, the first clause of Rule 20(a)(2)(A) is satisfied by the assertion of a right severally.” Patrick Collins, Inc. v. John Does 1-21, CIV.A. 11-15232, 2012 WL 1190840, at *8 (E.D. Mich. Apr. 5, 2012).

By requiring defendants to directly interact with each other, the Court would require the defendants to be jointly liable with each other. Because Rule 20 provides that a party may be joined if the claims against them are either jointly or severally liable, the requirement that defendants directly shared pieces of the movie with each other contradicts the language of Rule 20.

A right to relief against defendants jointly requires concerted action by two or more parties. A right to relief severally against defendants means that each right to relief is separate and distinct from defendant to defendant and no interaction among the defendants is required. An ‘alternative’ right to relief may be asserted when plaintiff knows one of the defendants is liable, but does not know which one. 4 Moore's Federal Practice § 20.03. Plaintiff asserts a right to relief against Defendants jointly and a right to relief severally; however, a right to relief against the Defendants severally alone is sufficient to satisfy the first clause of Rule 20.

Id. (Emphasis added).

C. There Are Common Issues of Fact and Law

Rule 20(a)(2)(B) requires the plaintiffs' claims against the putative defendants to contain a common question of law or fact. “The Plaintiff meets this requirement. In each case, the Plaintiff will have to establish against each putative defendant the same legal claims concerning the validity of the copyrights in the movies at issue and the infringement of the exclusive rights reserved to the plaintiffs as copyright holders.” Nu Image, Inc. v. Does 1-3, 932, 2:11-CV-545-FTM-29, 2012 WL 1255189 (M.D. Fla. Apr. 12, 2012). The “factual issues related to how BitTorrent works and the methods used by plaintiffs to investigate, uncover and collect evidence about the infringing activity will be essentially identical for each putative defendant.” Call of the Wild Movie v. Does 1-1,062, 770 F. Supp. 2d 332, 344-345 (D.D.C. 2011).

D. Joinder Promotes Judicial Efficiency and Doe Defendants Cannot Demonstrate Prejudice At This Stage

Defendant incorrectly argues that this Court should use its discretionary powers to sever the defendant, arguing joinder is not judicially efficient in this instance. This argument flies in the face of reason. In this case, only five defendants are joined, and none are yet identified. From Plaintiff's experience, it is likely that the ISP will be unable to identify about 10-15% of the IP Addresses due to data retention issues. Further, once the identities are revealed, Plaintiff may choose not to proceed against some of the defendants for a variety of reasons. This includes

if a defendant is active duty military, a company with open Wi-Fi for patrons, or other circumstances that present themselves. In this case, Plaintiff may only actually proceed against one or two of the defendants. But if the Court were to sever, Plaintiff would have to file five separate actions, decided by five different judges, all of whom would have to put forth effort to review Plaintiff's Motion for Leave and any later objections by a defendant. This would consume significant needless judicial resources.

Joinder of the defendants creates judicial efficiency, particularly at this stage of the litigation process. "The Court finds that joinder, at this stage of the litigation, will not prejudice any party and will promote judicial efficiency." Patrick Collins, Inc. v. John Does 1-33, 11-CV-02163-CMA-MJW, 2012 WL 415424 (D. Colo. Feb. 8, 2012). In support of severance, Defendant cites cases containing a much larger number of joined defendants, which creates problems that do not exist in this case. See Def's Mem. 13-14.

This Court has addressed this issue in the past stating, "courts have opined that requiring aggrieved parties to file hundreds or even thousands of separate copyright infringement actions would neither be cost efficient for the plaintiffs nor promote convenience or judicial economy for the courts." Digital Sin v. Does 1-176, 12-CV-00126 AJN, 2012 WL 263491, at FN 6 (S.D.N.Y. Jan. 30, 2012).

E. Plaintiff's Suits Are Not Frivolous

This Court granted Plaintiff limited discovery to serve a subpoena on Defendant's ISP because Plaintiff has no other way to identify the Defendants and proceed with its copyright infringement case against them. The Eastern District of Pennsylvania court 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." Raw Films v. John Does 1-15, 2012 WL 1019067, at *14 (E.D. Pa. March 26, 2012). 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.

Plaintiff believes that the infringer is almost always either the subscriber, or a person who resides in the subscriber’s home. 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.”⁷ 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 wide-open WiFi golden era came to an end.”⁸ This article, published on March 26, 2012, supports the idea that most households do have closed, protected wireless routers 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 discussed 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.⁹

As the Eastern District of Pennsylvania noted, while the IP address may not guarantee the subscriber was the infringer, “[t]he subpoena is specific enough to give rise to a reasonable

⁷ See Free Wi-Fi is Gone Forever www.pcmag.com/article2/0,2817,2402137,00.asp

⁸ Id.

⁹ Statement of Deputy Assistant Attorney General Jason Weinstein Before the Senate Judiciary Subcommittee on Privacy, Technology and the Law available at www.justice.gov.

likelihood that information facilitating service upon proper defendants will be disclosed if the ISPs comply.” Id.

Defendant relies heavily on In re BitTorrent Adult Film Copyright Infringement Cases, 2012 WL 1570765n (E.D.N.Y. May 1, 2012) in an effort to distort Plaintiff’s purpose. Just one month after the Honorable Judge Brown issued his opinion therein, the Honorable Judge Boyle of the same Court in the Eastern District of New York, reached the opposite result in Malibu Media, LLC v. John Does 1-13, CV12-1156, 2012 WL 2325588 (E.D.N.Y. June 19, 2012), finding in a case similar to this that joinder is proper, and denying a Doe defendant’s motion to quash the subpoena. Significantly, Judge Brown’s decision in In re BitTorrent was decided *ex parte* and without a hearing whereas Judge Boyle’s decision in Malibu Media was made following an hour-long hearing discussing all of the issues currently presented.

F. Plaintiff’s Settlements are Proper

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 is an attempt at coercion and improper embarrassment. 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 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.)

Just last week the Eastern District of Michigan addressed this issue, noting that a Defendant had provided no specific facts to support its claim that Plaintiff's purpose was to scare up settlements. See Third Degree Films v. Does 1-36, 11-CV-15200 (E.D. Mich. May 29, 2012).

To the extent that it is independent, the Court notes that while Defendant claims that this suit was brought only to scare up settlements (Def.'s Mot. to Sever at 2, 11), Defendant has offered no case-specific facts supporting this claim. Rather, Defendant relies on the conduct of adult-film companies in other cases. This guilt-by-association argument does not justify quashing the subpoena that this Plaintiff, Third Degree Films, served on Defendant's ISP pursuant to an Order entered by Judge Murphy allowing this discovery.

Id. (Emphasis added). Just as in Third Degree, Defendant is attempting to influence this Court to make a decision based on accusations in other cases involving other counsel and other plaintiffs. Indeed, Defendant cites to cases that can only refer to vague, anecdotal accusations of improper settlement tactics.

While Defendant goes to substantial effort to decry Plaintiff's purpose and settlement attempts, Defendant cannot provide one specific example of improperly holding a defendant to account. These arguments are further unconvincing when Defendant is represented by counsel who should adequately be capable of preventing Defendant from any alleged hypothetical coercion.

Defendant asserts that it is not within this Court's realm to ensure equal protection of constitutionally protected rights. Plaintiff has initiated litigation against the most egregious offenders, yet Defendant claims the volume of this litigation is already too much and the court must "discourage" it. The recourse Defendant seeks is with the legislature to change a law, the

United States Copyright Act, which he does not agree with. His recourse is not with the Courts where he is seeking to have Plaintiff's rights diluted due to political disagreement with the law as it stands.

III. CONCLUSION

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

Dated: July 6, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 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