UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

MEDIA PRODUCTS, INC.,	)	
	)	
Plaintiff,	)	
v.	)	
	)	Docket No. 12-CV-30100
DOES 1 – 120,	)	
	)	
Defendants.	)	
	)	

MOTION OF DOE 83 TO SEVER AND DISMISS COMPLAINT AND TO QUASH SUBPOENA OR, IN THE ALTERNATIVE, FOR A PROTECTIVE ORDER WITH SUPPORTING MEMORANDUM OF LAW

Pursuant to Fed. R. Civ. P. Rules 20(a) and 21, the defendant identified as Doe 83 on Plaintiff's Exhibit A attached to the Complaint ("Doe 83"), seeks an Order severing and dismissing the action as to defendants Does 2-120, on the grounds that plaintiff Media Products Inc. ("Plaintiff") improperly joined said defendants in this action or, even if properly joined, the Court should exercise its discretion and sever the matters. Pursuant to Fed. R. Civ. Rule 45(c)(3), Doe 83 further seeks an order quashing the subpoenas issued under the Court's June 5, 2012 ex parte discovery order, which seeks disclosure of the identities of defendants Does 2-120.

Finally, if the Court does not grant the requested relief above, pursuant to 47 U.S.C. § 551 and Fed. R. Civ. P. Rule 26(c)(1), Doe 83 seeks a protective order authorizing Doe 83 to proceed anonymously in this action and further limiting Plaintiff's use of the information disclosed pursuant to the subpoena. As grounds for this motion, Doe 83 submits the following supporting memorandum and exhibits.

WHEREFORE, Doe 83 respectfully requests that the Court grant the within motion and sever and dismiss the action or, in the alternative, grant a protective order.

MEMORANDUM OF LAW

INTRODUCTION

This action is part of Plaintiff's nationwide business scheme to use the tools of the legal system as a blunderbuss, designed to maximize Plaintiff's profit at the expense of entirely innocent non-infringing subscribers. The collateral damage caused by Plaintiff's scheme is significant. By the account of a related plaintiff in a virtually identical New York case, an estimated 30% of the names turned over by ISPs are not those of individuals who actually downloaded or shared copyrighted material. *Digital Sin, Inc. v. Does 1-176*, 279 F.R.D. 239, 242 (S.D.N.Y. 2012) ("The Court is concerned about the possibility that many of the names and addresses produced in response to Plaintiff's discovery request will not in fact be those of the individuals who downloaded "My Little Panties # 2." The risk is not purely speculative; Plaintiff's counsel estimated that 30% of the names turned over by ISPs are not those of individuals who actually downloaded or shared copyrighted material.").

Despite that Plaintiff's counsel appears to concede that not all subscribers are defendants,[1] Plaintiff directed this Court to issue a notice indicating that all subscribers "**have been sued** in the United States District Court for the District of Massachusetts in Boston, Massachusetts" for allegedly downloading, "OMG! I Fucked My Daughter's BFF! 2" (emphasis supplied). *See* Appendix A - Notice, attached herewith as Exhibit 2. Such statement was sent to each and every subscriber even though Plaintiff knew that many subscribers would fall within the unfortunate 30% who are subject to extreme

[1] *See* July 30, 2012 transcript of hearing in the matter of *Discount Video Center, Inc., v. Does 1-20*, Docket No. 12-cv-10805, p. 15 lns. 11-16, attached herewith as Exhibit 1.

embarrassment by the disclosure of their personal information, despite having done nothing wrong.

The purpose of this proposed notice is obvious – to cast a wide net and make significant threats,[2] with the hopes of settling with as many people as possible to maximize profit. Plaintiff's plan is to improperly use the United States District Court as the enforcement tool to further its copyright business model, while saving significant federal court filing fees by joining hundreds of Does. *See Malibu Media, LLC v. John Does 1–10*, Case No. 2:12–cv–3623–ODW (C.D. Cal. June 27, 2012) ("The federal courts are not cogs in plaintiff's copyright-enforcement business model. The Court will not idly watch what is essentially an extortion scheme, for a case that plaintiff has no intention of bringing to trial."); *In re BitTorrent Adult Film Copyright Litigation*, 2012 WL 1570765, *10 (E.D.N.Y. May 1, 2012) ("Our federal court system provides litigants with some of the finest tools available to assist in resolving disputes; the courts should not, however, permit those tools to be used as a bludgeon.").

The Court should take a skeptical look at Plaintiff's blunderbuss approach in this action and grant dismissal and severance under the circumstances.

FACTUAL BACKGROUND

Plaintiff's Litigation Business Model

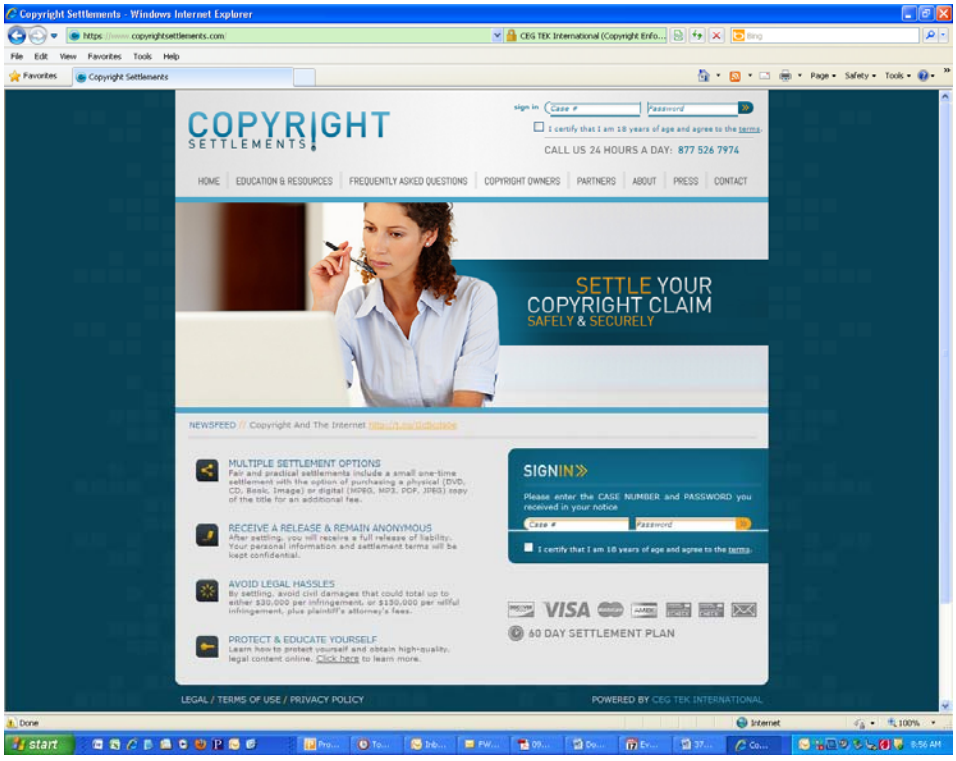
Plaintiff, a pornographer, has recently filed nearly two dozen virtually identical cases throughout the country, including this one. *See* Pacer Report, Exhibit 4. Plaintiff's counsel, in turn, has filed thirty-four virtually identical cases in Massachusetts on behalf

[2]*See* Exhibit 3 – example of a letter sent by Plaintiff's counsel to another Doe Defendant in this case threatening to name the subscriber.

of Plaintiff and several other pornographers this year, naming approximately 1500 Doe Defendants. *See* Pacer Report, Exhibit 5.

These actions are part of a "nationwide blizzard of civil actions brought by purveyors of pornographic films alleging copyright infringement by individuals utilizing a computer protocol known as BitTorrent." *In re BitTorrent Adult Film Copyright Infringement Cases*, 2012 WL 1570765, *5 (E.D.N.Y. 2012). Plaintiff and its counsel are engaging in scheme "to use the offices of the Court as an inexpensive means to gain the Doe defendants' personal information and coerce payment from them." *Id*.

Indeed, Plaintiff's counsel is part of the Copyright Enforcement Group ("CEG"), which has a built a business based on extracting quick settlements from a large volume of alleged infringers. *See* https://www.copyrightsettlements.com/partners.html. CEG or its affiliates have set up a commercial interactive settlement website touting a "60 Day Settlement Plan", which turns settlement into an online shopping experience as follows:



Based on prior cases, it is obvious that Plaintiff's plan is to: (1) successfully defeat motions to quash, etc., (2) obtain the identities of the subscribers and threaten to name them individually if they do not settle (*see* Exhibit 3), and (3) then voluntarily dismiss the action or seek to name a few token individuals without proceeding further in order to give teeth to its threats in future actions. *See e.g.*, *Media Products, Inc., v. Does 1-31*, Civil Action No. 11-2299 (BAH) (D.C. Dist. Columbia 2012); *Media Products, Inc. v. Does 1-36*, Civil Action No. 11-2299, 12-cv-00129 (S.D.N.Y. 2012).

ARGUMENT

I. Doe 83 Incorporates the Dismissal, Quash and Severance Arguments From Other Does

Because of the flurry of filings by Plaintiff's counsel in Massachusetts, the arguments in favor of dismissal, quash and severance are well trodden. Rather than repeat those arguments herein, Doe 83 hereby incorporates the arguments for dismissal, quash and severance set forth in the following memoranda of other Doe Defendants:

a) Doe 103's Motion To Quash Subpoena – Document No. 21;

b) Consolidated Motion & Memorandum To Quash Subpoena Pursuant To Fed. R. Civ. P. 45 Or In The Alternative To Sever Pursuant To Fed. R. Civ. P. 21 – Document No. 23; and

c) Doe No. 22's Motion To Dismiss And Supporting Memorandum, *Discount Video Center, Inc., v. Does 1-29*, Docket No.: 12-CV-10805-NMG (Document No. 40) (attached herewith as Exhibit 6).

II. The Court Should Use Its Discretion and Grant Severance

There is a growing trend among federal district courts in many districts to exercise discretion and grant severance in cases like this. *See Next Phase Distribution,*

Inc. v. John Does 1-27, 2012 WL 3117182, *3 (S.D.N.Y. July 31, 2012) (discussing split among courts and determining that discretionary severance is appropriate). The cogent analysis by Judge Marrero in *Next Phase Distribution, Inc., supra,* sets for the practical considerations warranting discretionary severance.

First, there is a significant likelihood that various identified Does will assert completely different defenses thereby adding factual and legal questions that are not common among all the defendants. *Id., citing In re BitTorrent Adult Film Copyright Infringement Cases*, 2012 WL 1570765, * 12 (E.D.N.Y. 2012) (noting that "half-dozen" defendants have already raised "a panoply of individual defenses ... [which] far outweigh the common questions in terms of discovery, evidence, and effort required."); *Digital Sins, Inc. v. John Does 1-245*, 2012 WL 1744838, *3 (S.D.N.Y. 2012) (explaining that "John Doe 1 could be an innocent parent whose internet access was abused by her minor child, while John Doe 2 might share a computer with a roommate who infringed Plaintiffs' works" [citation and internal quotation marks omitted]). To evaluate these defenses, the Court would have to adjudicate separate motions and discovery disputes and make decisions based on evidence not common to all defendants. *Next Phase Distribution, Inc., supra, citing Pacific Century Int'l, Ltd. v. Does 1–101*, No. 11 Civ. 2533, 2011 WL 5117424, at *3 (N.D.Cal. Oct. 27, 2011) (severing Does 2–101 when Does' individual defenses "would require the court to cope with separate discovery disputes and dispositive motions, and to hold separate trials, each based on different evidence"). This would burden case management and the litigation process for the individual Doe Defendants and overly complicate the management of the case by the Court. *Id.*

Compounding this problem is the concession by Plaintiff's counsel that many of the subscribers subject to the subpoenas are not infringers and Plaintiff's counsel has indicated that he may assert novel theories of contributory negligence. *See* Exhibit 1, p. 15, lns. 11-16 (Attorney Cable discussing that claims like vicarious liability, contributory liability or "unfair enrichment" or "any sort of claims like that" are foreseeable) and p. 22, lns. 15-23 (Attorney Cable discussing that he would "think about a negligence claim" naming an innocent subscriber). To the extent that Plaintiff seeks to bring a baseless claim against these subscribers predicated upon some type of novel negligence or secondary liability claim,[3] such claim is factually and legally distinct from the alleged direct infringing Does and therefore presents a compelling reason for the Court to grant discretionary severance.

Second, joining all 120 defendants would raise several procedural and logistical issues. For example, "each Doe Defendant would have the right to be present at every other Defendant's depositions - a thoroughly unmanageable and expensive ordeal. Similarly, pro se Defendants, who most likely would not e-file, would be required to serve every other Defendant with a copy of their pleadings and other submissions throughout the pendency of the action at substantial cost." *Id*.

[3]The notion that liability may be based solely on the allegation that a subscriber maintained an unsecured wireless network is frivolous. Any negligence count is preempted under the Copyright Act. *Liberty Media Holdings, LLC v. Tabora*, 2012 WL 2711381, *2 (S.D.N.Y. 2012); 17 U.S.C. § 301. Plaintiff could not possibly establish a claim for contributory infringement based solely on a person maintaining an unsecured network. A defendant may be liable for contributory copyright infringement only if "with knowledge of the infringing activity, the defendant induces, causes, or materially contributes to the infringing conduct of another. To satisfy the materially contributes requirement, Plaintiff must in this case show that [defendant] (1) had actual or constructive knowledge that [infringer] was infringing Plaintiff's copyright, and (2) encouraged or assisted [infringer's] infringement, or provided machinery or goods that facilitate the infringement (except where the equipment is 'capable of substantial noninfringing uses, which of course an Internet connection is." (Internal quotation marks omitted.) *Id.* Here, Plaintiff could never assert, in good faith, a basis for liability for contributory copyright infringement against mere subscribers.

Third, because many of the named Doe Defendants are mere subscribers and not infringers, the scheme of joinder may compel entirely innocent subscribers "to settle the lawsuit confidentially in order to avoid the embarrassment of being named as a defendant in a case about the alleged illegal trading of a pornographic film." *Id*., *citing Digital Sin* 176, 279 F.R.D. at 242 ("This risk of false positives gives rise to the potential for coercing unjust settlements from innocent defendants such as individuals who want to avoid the embarrassment of having their names publicly associated with allegations of illegally downloading pornography." [citation and internal quotation marks omitted]); *MCGIP, LLC v. Does 1–149*, No. 11 Civ. 2331, 2011 WL 4352110, at *4 n. 5 (N.D.Cal. Sept. 16, 2011) ("[T]he subscribers, often embarrassed about the prospect of being named in a suit involving pornographic movies, settle.").

Indeed, despite that Plaintiff's counsel on July 30, 2012, admitted that without further discovery he would have no good faith basis under Fed. R. Civ. P. Rule 11 to proceed against the subscribers – *see* Exhibit 1, p. 16, lns. 2-7 – Plaintiff nevertheless sent a letter to a subscriber in this case on August 16, 2012, threatening to name the subscriber in this lawsuit. *See* Exhibit 3. "[F]iling one mass action in order to identify ... doe defendants through pre-service discovery and [to] facilitate mass settlement is not what the joinder rules were established for." (citation and internal quotation marks omitted) *In re BitTorrent Adult Film*, 2012 WL 1570765, at *10.

Fourth, severance is appropriate because if the motion picture is considered obscene, it may not be eligible for copyright protection. *Next Phase Distribution, Inc., supra, citing Liberty Media Holdings, LLC v. Swarm Sharing Hash File and Does 1–38*, 821 F.Supp.2d 444, 447 n. 2 (D.Mass. 2011) (noting it is "unsettled in many circuits,

whether pornography is in fact entitled to protection against copyright infringement"); *Discount Video Center, Inc. v. Does 1-29,* 2012 WL 3308997, 8, n. 4 (D.Mass. 2012) ("The Court notes, however, that there is some question as to whether pornography is entitled to copyright protection").

Finally, by pursuing this action *en masse*, Plaintiff is improperly avoiding payment of Court filing fees. As a Court in a virtually identical case explained:

> In the four cases before this Court, plaintiffs have improperly avoided more than $25,000 in filing fees by employing its swarm joinder theory. Considering all the cases filed by just these three plaintiffs in this district, more than $100,000 in filing fees have been evaded. If the reported estimates that hundreds of thousands of such defendants have been sued nationwide, plaintiffs in similar actions may be evading millions of dollars in filing fees annually. Nationwide, these plaintiffs have availed themselves of the resources of the court system on a scale rarely seen. It seems improper that they should profit without paying statutorily required fees. *In re BitTorrent Adult Film Copyright Infringement Cases*, *supra*, 2012 WL 1570765 at *13.

Based on the above, the Court should use its discretion and enter an order severing and dismissing the action as to defendants Does 2- 120.

III. In the Alternative, the Court Should Enter a Protective Order Allowing Doe 83 to Proceed Anonymously

"Pursuant to Rule 26(c)(1) of the Federal Rules of Civil Procedure, a district court has authority to issue a protective order, based upon good cause, to protect parties from 'annoyance, embarrassment, oppression, or undue burden or expense[.]'" *Digital Sin, Inc. v. Does 1-27*, 2012 WL 2036035, *4 (S.D.N.Y. 2012). 47 U.S.C. § 551 is also established to protect the privacy of individual subscribers.

Here, because of: (1) the high risk of false positives, (2) Plaintiff's strong arm settlement practices, and (3) the nature of the copyrighted work in this case, a protective order is necessary to protect the identity of Doe 83. *See Digital Sin, Inc. v. Does 1-*

27, 2012 WL 2036035 at *4. Accordingly, if the Court does not sever and dismiss Plaintiff's claim against Doe 83 and denies the motion to quash, then Doe 83 respectfully requests that the Court issue a protective Order that precludes Plaintiff from amending its Complaint to identify Doe 83 by name unless and until discovery is conducted by the plaintiff that provides evidence supporting the plaintiff's allegation that Doe 83 infringed upon the plaintiff's copyright.

Doe 83 further request that the protective order bar Plaintiff from using any information ultimately disclosed to plaintiff in response to a Rule 45 subpoena for any purpose other than protecting plaintiff's rights as set forth in its complaint.

CONCLUSION

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

REQUEST FOR ORAL ARGUMENT

Respectfully submitted,

DOE NUMBER 83

By Its Attorneys,

COHEN KINNE VALICENTI & COOK LLP

By: */s/ Christopher Hennessey*

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Date: September 5, 2012

LOCAL RULE 7.1 CERTIFICATE

Counsel for the parties conferred on September 4, 2012 regarding the subject of this Motion in order to attempt to narrow or resolve the issue in good faith.

/s/ Christopher Hennessey
Christopher Hennessey (BBO# 654680)

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on September 5, 2012.

/s/ Christopher M. Hennessey
Christopher Hennessey