

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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PATRICK COLLINS, INC.  
DBA ELEGANT ANGEL  
8015 Deering Ave  
Canoga Park, CA 91304,

No. 12-cv-3507 (BSJ)

Plaintiff,

-against-

DOES 1-45,

Defendants.

-----X

**DEFENDANT DOE NO. 41'S MEMORANDUM OF LAW IN  
SUPPORT OF MOTION TO SEVER AND DISMISS ACTION AS TO  
DEFENDANTS DOE 2 THROUGH 45 AND QUASH SUBPOENAS**

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## **PRELIMINARY STATEMENT**

Defendant Doe No. 41 (“Doe 41”), by his attorneys Ray Beckerman, P.C., respectfully moves for an Order (a) pursuant to Rules 20(a) and 21 of the Federal Rules of Civil Procedure, severing and dismissing the action as to defendants Doe Nos. 2 through 45 on the ground that plaintiff Patrick Collins, Inc. dba Elegant Angel (“Plaintiff”) improperly joined said defendants in this action, (b) pursuant to Rule 45(c)(3) of the Federal Rules of Civil Procedure, quashing the subpoenas issued under the Court’s May 16, 2012 *ex parte* discovery order seeking disclosure of the identities of defendants Doe Nos. 2 through 45, and (c) granting such other and further relief as may be just and proper.

This action is “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 Order & Copyright Infringement Cases, 2012 WL 1570765 at \*1 (E.D.N.Y. May 1, 2012). Indeed, Plaintiff is one of several such purveyors who “have employed abusive litigation tactics to extract settlements from Doe defendants.” Id. at \*9. These tactics include initiating sham legal proceedings based on tenuous allegations against anonymous defendants who deny any wrongdoing, in the hopes of extracting quick and easy settlements from the defendants.

The complaints assert that the defendants—identified only by IP address—were the individuals who downloaded the subject “work” and participated in the BitTorrent swarm. However, the assumption that the person who pays for Internet access at a given location is the same individual who allegedly downloaded a single sexually explicit film is tenuous, and one that has grown more so over time. An IP address provides only the location at which one of any number of computer devices may be deployed, much like a telephone number can be used for any number of telephones.... [I]t is no more likely that the subscriber to an IP address carried out a particular computer function—here the purported illegal

downloading of a single pornographic film—than to say an individual who pays the telephone bill made a specific telephone call.

\* \* \*

Most, if not all, of the IP addresses will actually reflect a wireless router or other networking device, meaning that while the ISPs will provide the name of its subscriber, the alleged infringer could be the subscriber, a member of his or her family, an employee, invitee, neighbor or interloper.

In re Bittorrent, *supra*, 2012 WL 1570765 at \*3, 5.

After the suit is filed, the plaintiff moves *ex parte* for leave to take early discovery from internet service providers (“ISPs”) seeking the identities of the internet account subscribers who were assigned the IP addresses listed in the plaintiff’s complaint. Many of the names and addresses produced by an ISP in response to the plaintiff’s subpoena will *not* in fact be those of the individuals who downloaded the plaintiff’s pornographic movie. In another recent BitTorrent case, the plaintiff’s attorney -- the *same attorney* now representing Plaintiff here –

estimated that 30% of the names turned over by ISPs are not those of individuals who actually downloaded or shared copyrighted material. Counsel stated that the true offender is often the “teenaged son ... or the boyfriend if it's a lady.” (1/17/12 Tr. at 16). Alternatively, the perpetrator might turn out to be a neighbor in an apartment building that uses shared IP addresses or a dormitory that uses shared wireless networks.

Digital Sin, Inc. v. Does 1-176, 279 F.R.D. 239, 2012 WL 263491 at \*3 (S.D.N.Y. Jan. 30, 2012).

Once the plaintiff obtains the identities of the IP subscribers through early discovery, the plaintiff’s attorney or collection agent contacts the subscribers and demands several thousand dollars from each of them to settle the lawsuit. Subscribers who do not cave in

to these demands face the prospects of an uncertain legal battle where the cost of defending the lawsuit will greatly exceed the settlement demand.

To avoid legal fees and the embarrassment of having one's name publicly sullied with accusations of downloading pornography, a defendant will almost always cough up the money and settle the lawsuit *even if the defendant engaged in no wrongdoing*. See, e.g., Pacific Century Int'l, Ltd. v. Does 1-37, \_\_ F.Supp.2d \_\_, \_\_, 2012 WL 1072312 at \*3 (N.D.Ill. Mar. 30, 2012) (“the subscribers, often embarrassed about the prospect of being named in a suit involving pornographic movies, settle”); In re Bittorrent, *supra*, 2012 WL 1570765 at \*10 (“This concern, and its potential impact on social and economic relationships, could compel a defendant entirely innocent of the alleged conduct to enter an extortionate settlement”); SBO Pictures, Inc. v. Does 1-3036, 2011 WL 6002620 (N.D.Cal. Nov. 30, 2011) (a defendant – “whether guilty of copyright infringement or not -- would then have to decide whether to pay money to retain legal assistance to fight the claim that he or she illegally downloaded sexually explicit materials, or pay the money demanded. This creates great potential for a coercive and unjust ‘settlement’”); Third Degree Films, Inc. v. Does 1-108, 2012 WL 1514807 at \*4 (D.Md. Apr. 27, 2012) (“the practical reality of these types of cases—which, as noted, have proliferated across the country—is that *almost all end in settlement* and few, if any, are resolved on their merits”) (italics added).

These mass copyright infringement cases “have emerged as a strong tool for leveraging settlements—a tool whose efficiency is largely derived from the plaintiffs' success in avoiding the filing fees for multiple suits and gaining early access en masse to the identities of alleged infringers.” Pacific Century Intern., Ltd. v. Does 1-37, *supra*, \_\_ F.Supp.2d at \_\_, 2012 WL 1072312 at \*3. This scheme by Plaintiff and other purveyors of pornographic content to reduce their cost of coercing settlement payments from defendants in these cases has led to

massive abuse of the joinder rules in the federal courts, and has improperly deprived the federal treasury of court filing fees mandated by statute.

### **PROCEDURAL HISTORY**

Plaintiff filed this instant action against 45 unidentified defendants with a tenuous assertion that over a period of 65 days, those defendants allegedly shared a hardcore pornographic film via the internet -- “Big Wet Brazilian Asses 7” -- utilizing the BitTorrent protocol.

On May 16, 2012, an order was issued *ex parte* by this Court on Plaintiff’s unopposed motion, which allowed Plaintiff to serve subpoenas on the defendants’ ISPs seeking defendants’ identities. On May 30, 2012, Plaintiff issued a subpoena to Verizon Internet Services. By letter dated June 30, 2012, Verizon Internet Services notified Doe 41 that his personal information had been subpoenaed by Plaintiff. This motion follows.

### **ARGUMENT**

#### **POINT I**

#### **PLAINTIFF IMPROPERLY JOINED THE FIVE DOE DEFENDANTS**

Pursuant to Rule 20(a)(2) of the Federal Rules of Civil Procedure, permissive joinder of defendants is proper in a case where “(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of related transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action.” Fed.R.Civ.P. 20(a)(2). Both of these criteria must be met for joinder to be proper, and Plaintiff bears the burden of demonstrating the propriety of joinder. Deskovic v. City of Peekskill, 673 F.Supp.2d 154, 159 (S.D.N.Y. 2009); Pergo, Inc. v. Alloc, Inc., 262 F.Supp.2d 122, 128 (S.D.N.Y.2003).

Misjoinder of defendants occurs where a plaintiff fails to show a connection between the allegations leveled against the persons named as defendants in one action. See Nassau County Association of Insurance Agents, Inc. v. Aetna Life & Cas. Co., 497 F.2d 1151, 1154 (2d Cir. 1974) (finding misjoinder under Rule 20(a)(2) where the plaintiff failed to allege a connection between the allegedly unlawful “practices engaged in by *each* of the 164 defendants”) (italics added); Digital Sins, Inc. v. Does 1-245, 2012 WL 1744838 (S.D.N.Y. May 15, 2012) (“In this Circuit, the fact that a large number of people use the same method to violate the law does not authorize them to be joined as defendants in a single lawsuit.”) (citing Nassau County, supra). This rule has “never [been] overturned, despite advances in technology,” and applies in BitTorrent cases. Combat Zone Corp. v. Does 1-34, 12 Civ. 4133 (S.D.N.Y. Jun. 18, 2012) (McMahon, J.); SBO Pictures, Inc. v. Does 1-20, 12 Civ. 3925 (S.D.N.Y. Jun. 4, 2012) (Scheindlin, J.) (“Most importantly, in this Circuit, the allegation that defendants have merely committed the same violation in the same way does not satisfy the standard for permissive joinder because there are ‘no litigation economies to be gained from trying what are in essence [twenty] different cases together’ and there is no evidence that the Doe defendants conspired or coordinated their activities in any way”) (citations omitted).

Thus, courts in this Circuit, as well as those around the country, have repeatedly severed and dismissed multi-defendant BitTorrent cases like the instant case *as to all Doe defendants other than the first Doe*. See Digital Sins, Inc. v. Does 1-245, supra, 2012 WL 1744838 (McMahon, J.); Combat Zone Corp. v. Does 1-34, supra, 12 Civ. 4133 (Scheindlin, J.) (McMahon, J.); SBO Pictures, Inc. v. Does 1-20, 12 Civ. 3925 (S.D.N.Y. Jun. 4, 2012) (Scheindlin, J.); Zero Tolerance Entertainment, Inc. v. Does 1-45, 2012 WL 2044593 (S.D.N.Y. Jun. 6, 2012) (Scheindlin, J.); Malibu Media, LLC v. Does 1-14, 12 Civ. 4136 (S.D.N.Y. Jun. 12,

2012) (Stanton, J.); Malibu Media, LLC v. Does 1-7, 12 Civ. 2952 (S.D.N.Y. Jun. 15, 2012) (Cote, J.); In re Bittorrent Adult Film Order & Copyright Infringement Cases, 2012 WL 1570765 (E.D.N.Y. May 1, 2012) (Brown, M.J.); Patrick Collins, Inc. v. Does 1-11, 12 Civ. 1153 at \*1 (E.D.N.Y. May 31, 2012) (Lindsay, M.J.) (report and recommendation adopted by Patrick Collins, Inc. v. Does 1-11, 12 Civ. 1153 (E.D.N.Y. Jul. 12, 2012) (Bianco, J.)). The papers filed by Plaintiff in this case provide no reason for a different result here.

The Complaint in this case alleges conclusorily that each Doe defendant in this case “acted in cooperation with the other Defendants by agreeing to provide, and actually providing, on a P2P network an infringing reproduction of at least substantial portions of Plaintiff’s copyrighted Motion Picture, in anticipation of the other Defendants doing likewise with respect to that work and/or other works.” Complaint ¶ 22. Notably, there is no claim in the Complaint or in the declaration of Plaintiff’s investigator that the defendants in the instant case actually provided or transferred any pieces of the copyrighted work (or “blocks” in Plaintiff’s lingo) to *each another*. This is significant since “[u]nder the BitTorrent Protocol, it is not necessary that each of the Does ... participated in or contributed to the downloading of each other's copies of the work at issue—or even participated in or contributed to the downloading by any of the Does .... Any ‘pieces’ of the work copied or uploaded by any individual Doe may have gone to any other Doe *or to any of the potentially thousands who participated in a given swarm*” *who are not parties to the lawsuit*. Hard Drive Productions, Inc. v. Does 1-188, 809 F.Supp.2d 1150, 1163 (N.D. Cal. 2011) (italics added). See also Patrick Collins, Inc. v. Does 1-44, 2012 WL 1144854 at \*6 (D.Md. Apr. 4, 2012) (“While each alleged infringer may have received pieces of plaintiff’s copyrighted work from various other swarm members, there is no evidence of any connection between the alleged infringers”). Indeed, plaintiff’s investigator

acknowledges that the number of participants can range into the “tens of thousands”. See Declaration of Jon Nicolini (“Nicolini Dec.”), ¶ 18 (ECF Document 1-1).

For this reason, conclusory allegations of cooperation or concerted action are insufficient to support joinder. Instead, a plaintiff “seek[ing] to join several defendants in an action based on filesharing activity ... must *allege facts* that permit the court at least to infer some *actual*, concerted exchange of data *between those defendants*.” Malibu Media, LLC v. Does 1-23, 2012 WL 1999430 at \*3 (E.D.Va. Apr. 3, 2012) (italics added) (report and recommendation adopted by Malibu Media, LLC v. Does 1-23, 2012 WL 1999640 (E.D.Va. May 30, 2012)); Patrick Collins, Inc. v. Does 1-54, 2012 WL 911432 at \*5 (D.Ariz. Mar. 19, 2012) (severing and dismissing BitTorrent case as to all but the first Doe defendant; complaint alleged that Doe defendants ‘participat[ed] in the BitTorrent swarm with other infringers’ but does not claim that [one defendant] provided data to [another defendant] or vice versa.... *Plaintiff alleges no facts that these two particular Defendants shared data with each other, and provides data instead that they were logged on to BitTorrent weeks apart*”) (italics added).

Not only does the Complaint here fail to allege any nonconclusory facts that would permit such an inference but the nature of the BitTorrent protocol precludes the possibility of concerted activity and renders any such allegation implausible and legally insufficient. Patrick Collins, Inc. v. Does 1-23, 2012 WL 1019034 at \*4 (E.D.Mich. Mar. 26, 2012) (“The absence of information concerning the number of total users in the swarm, coupled with the BitTorrent protocol’s ability to quickly share files further demonstrates that it is *implausible* that any of the Doe defendants were simultaneously sharing pieces of plaintiff’s Work”) (italics added). See, e.g. Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937 (2009)) (“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a

claim to relief that is plausible on its face”), quoted in Jabbar v. Fischer, 683 F.3d 54, 2012 WL 2359639 at \*1 (2d Cir. Jun. 21, 2012). One commentator described the workings of the BitTorrent protocol as follows:

[T]he torrent sharing process is much more dynamic than any copyright plaintiff would like the courts to believe. For example, when a user connects to the torrent network to download a file, *she is connected only to a subset of the available swarm, not the whole swarm*. The members of this subset are chosen at random and are constantly changing. Plaintiffs currently have no way of showing who was connected to whom when each instance of infringement occurred. In addition, a user can only connect to peers that are on the network at the same time, further limiting connectivity. Furthermore, the intrinsic limit on the number of connections that a user can establish, described above, means that even within a subset not all peers online at the same time will actually be connected. As all of these dynamics accumulate, *it becomes nearly impossible to claim that any one defendant would be connected to any other defendant simultaneously*.

\* \* \*

[W]hen the dynamic nature of sharing in these networks is considered—particularly, as noted above, that it is virtually impossible that any two defendants (let alone all of them) were connected with each other simultaneously—any claim that defendants were acting in concert begins to fall apart. All plaintiffs can plausibly claim is that defendants were engaged in *identical* transactions, and courts have held repeatedly that this is an insufficient basis upon which to sustain joinder.

Jason R. LaFond, *Personal Jurisdiction and Joinder in Mass Copyright Troll Litigation*, 71 Md. L. Rev. Endnotes 51, 57, 59 (2012) (footnotes omitted). Consistent with this explanation, counsel for a pornographic movie owner in another BitTorrent case “admitted at the hearing that plaintiff could not truthfully allege that any of the Doe defendants actually transferred pieces of the copyrighted work to or from *one another*.” Hard Drive Productions, Inc. v. Does 1-90, 2012 WL 1094653 at \*6 (N.D.Cal. Mar. 30, 2012) (italics in original). See also Liberty Media

Holdings, LLC v. BitTorrent Swarm, 277 F.R.D. 669, 671-72 (S.D.Fla. 2011) (given the decentralized operation of BitTorrent, even the fact that two defendants were using BitTorrent at the same time does not create an inference that they participated in or contributed to the downloading of each other's copies of the work at issue).

In an attempt to satisfy the “same transaction or series of transactions” requirement, Plaintiff resorts to alleging that the 45 Does “traded exactly the same file of the copyrighted work as shown by the identical hash mark.” Complaint ¶ 5. This allegation, however, is insufficient for joinder. “[T]he distributed nature of the BitTorrent network means that at least some of the Doe Defendants *likely obtained the seed piece at issue from users not named in the Complaint.*” Malibu Media, LLC v. Does 1-34, 2012 WL 1792979 at \*2 (D.Md. May 15, 2012) (italics added); Patrick Collins, Inc. v. Does 1-44, supra, 2012 WL 1144854 at \*6 (“plaintiff’s ‘hash identifier’ argument still failed to demonstrate that the defendants ‘shared data with each other’”) (quoting Patrick Collins, Inc. v. Does 1–54, supra, 2012 WL 911432 at \*5); Malibu Media, LLC v. Does 1-23, supra, 2012 WL 1999430 at \*3 (“what plaintiffs have alleged is that defendants (or others using or spoofing defendants’ IP addresses) have shared pieces of the same digital copy of plaintiffs’ works with others using the BitTorrent protocol. There is nothing suggesting with any specificity that any defendant shared those pieces with another defendant”).

Indeed, the conclusory allegations that each Doe defendant in this case “acted in cooperation with the other Defendants” (Complaint, ¶ 22) are belied by the automated and anonymous nature of the BitTorrent protocol.

Highly questionable factual assumptions underlie plaintiffs’ contention that these cases satisfy the Rule 20 requisites for joinder. By way of example, Plaintiffs assert that the John Does were “acting in concert with each other,” “working together”, and “directly interacted and communicated with other members of that

swarm.” See, e.g., *Malibu 26*, Compl. ¶¶ 10, 33, 34. Much of the BitTorrent protocol operates invisibly to the user—after downloading a file, subsequent uploading takes place automatically if the user fails to close the program. Exhibit D to the complaints, which allegedly documents the “interactions” between defendants, is a page of machine instructions which clearly demonstrate that the user plays no role in these interactions.

In re BitTorrent, supra, 2012 WL 1570765 at \*11.<sup>1</sup> Any contention that BitTorrent users act in cooperation or in concert with each other is further undercut by the fact that “BitTorrent users remain anonymous to other BitTorrent users.” Pacific Century Intern., Ltd. v. Does 1-37, supra, \_\_\_ F.Supp.2d at \_\_\_, 2012 WL 1072312 at \*4; Patrick Collins, Inc. v. Does 1-54, supra, 2012 WL 911432 at \*1 (“the people operating [computers participating in a BitTorrent swarm] do not necessarily know who the other members of the swarm are”).

Likewise, the timespan of the “observations” alleged in the complaint (January 21, 2012 through March 25, 2012) further undermines any claim that the 45 Does were acting in concert with each other. As previously discussed, the decentralized operation of BitTorrent precludes any inference that two or more defendants simultaneously using BitTorrent participated in or contributed to the downloading of each other's copies of the work at issue. Liberty Media, supra, 277 F.R.D. at 671-72. Here, the activity alleged in the complaint not only did not take place simultaneously with each other, but took place at 45 discrete times involving a single defendant over a 65 day period. See K–Beech, Inc. v. Does 1-41, 2012 WL 773683 at \*4 (S.D.Tex. Mar. 8, 2012) (“While [plaintiff] provides the precise date, hour, minute and second at which it alleges that each Doe Defendant was observed to be sharing the torrent of the

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<sup>1</sup> The reasoning of Magistrate Judge Brown in In re Bittorrent has been endorsed and followed by numerous Judges in this District as well as the Eastern District of New York, see Digital Sins, Inc. v. Does 1-245, 2012 WL 1744838 at \*2 (S.D.N.Y. May 15, 2012) (McMahon, J.); SBO Pictures, Inc. v. Does 1-20, 12 Civ. 3925 (S.D.N.Y. Jun. 4, 2012) (Scheidlin, J.); Zero Tolerance Entertainment, Inc. v. Does 1-45, 2012 WL 2044593 (S.D.N.Y. Jun. 6, 2012) (Scheidlin, J.); Patrick Collins, Inc. v. Does 1-11, 12 Civ. 1153 at \*1 (E.D.N.Y. May 31, 2012) (Lindsay, M.J.) (report and recommendation adopted by Patrick Collins, Inc. v. Does 1-11, 12 Civ. 1153 (E.D.N.Y. Jul. 12, 2012) (Bianco, J.).

copyrighted work, [plaintiff] does not indicate how long each Doe Defendant was in the swarm or if any of the Doe Defendants were part of the swarm contemporaneously”). Plaintiff’s investigator’s speculation that each defendant “may have been infringing” at times other than those he allegedly observed (see Nicolini Dec., ¶ 18) cannot satisfy Plaintiff’s burden of establishing the propriety of joinder under Rule 20. See Deskovic, supra, 673 F.Supp.2d at 159 (plaintiff bears the burden of demonstrating the propriety of joinder); Pergo, supra, 262 F.Supp.2d at 128.

As Judge McMahon wrote last month in another BitTorrent case:

Nothing in the complaint negates the inference that the downloads by the various defendants were discrete and separate acts that took place at different times; indeed, the complaint alleges that separate defendants shared access to a file containing a pornographic film in *separate and isolated incidents over the course of 59 days*. In other words, what we have here is 245 separate and discrete transactions in which 245 individuals used the same method to access a file via the Internet—no concerted action whatever, and no series of related occurrences—at least, not related in any way except the method that was allegedly used to violate the law.

Digital Sins, Inc. v. Does 1-245, supra, 2012 WL 1744838 at \*2 (italics added).

The likelihood of concerted action among BitTorrent users hours, days or weeks apart from one another is even more remote given that

BitTorrent's appeal stems from the speed with which peers can download complete files, so it is extremely unlikely that one Doe would remain in the swarm long enough to have direct contact with another Doe who entered hours later. Plaintiff has not shown that the defendants acted in concert simply by appearing the same swarm at completely different times. Therefore, the court cannot find that “a single transaction or series of closely related transactions” connects these 90 Does and makes joinder proper.

Hard Drive Productions, Inc. v. Does 1-90, *supra*, 2012 WL 1094653 at \*6. See also Hard Drive Productions, Inc. v. Does 1-188, *supra*, 809 F.Supp.2d at 1163 (“In this age of instant digital gratification, it is difficult to imagine, let alone believe, that an alleged infringer of the copyrighted work would patiently wait six weeks to collect the bits of the work necessary to watch the work as a whole”).

Based on the foregoing, it is clear that Plaintiff has failed to satisfy its burden of establishing the prerequisites for permissive joinder under Rule 20(a)(2). While an entire action may not be dismissed for misjoinder, a court may, on motion or *sua sponte*, sever the misjoined parties and drop or dismiss them from the action. See Fed.R.Civ.P. 21; Hard Drive Productions, Inc. v. Does 1-188, *supra*, 809 F.Supp.2d at 1156; Digital Sins, Inc. v. Does 1-245, *supra*, 2012 WL 1744838 at \*2-3 (severing and dismissing as to all defendants other than the first Doe defendant). The Court should therefore sever and dismiss this action as to Does 2 through 45.

## POINT II

### **DISCRETIONARY SEVERANCE OF DOES 2 THROUGH 45 IS WARRANTED**

Even if all the requirements of Rule 20(a)(2) are met, joinder remains discretionary. “Regardless, however, of whether the transactions satisfy the prerequisites of Rule 20, ‘[a] determination on the question of joinder of parties lies within the discretion of the district court.’ Joinder is *permissive*—a pragmatic tool meant to help courts and parties conduct litigation in a way that is efficient, practical, and fair.” SBO Pictures, Inc. v. Does 1-20, 2012 WL 2304253 at \*2 (S.D.N.Y. June 18, 2012) (italics in original) (citations omitted); Travelers Indem. Co. of Connecticut v. Losco Group, Inc., 150 F.Supp.2d 556, 565 (S.D.N.Y. 2001)

(“Fulfillment of the specific requirements of Rule 20, however, is not enough” for permissive joinder; the Court must still determine whether joinder “will comport with the principles of fundamental fairness”); In re BitTorrent, supra, 2012 WL 1570765 at \*12 (“In addition to the Rule 20(a)(2) criteria, the court has a parallel duty to ensure that permissive joinder ‘would comport with the principles of fundamental fairness or would [not] result in prejudice to either side’”).

In determining whether joinder or severance is warranted, courts “may also consider factors such as the motives of the party seeking joinder and whether joinder would confuse and complicate the issues for the parties involved.” In re BitTorrent, supra, 2012 WL 1570765 at \*11 (quoting SBO Pictures, Inc. v. Does 1–3036, supra, 2011 WL 6002620 at \*3).

In this case, as in the hundreds (if not thousands) of other BitTorrent cases brought across the country to coerce defendants into extortionate settlements, permissive joinder does not comport with “notions of fundamental fairness,” and will assuredly inflict severe and unnecessary prejudice upon the Doe defendants.

As with cases involving older P2P protocols, the nature of BitTorrent infringement cases “inevitably produces varying defenses that require severance.” Patrick Collins, Inc. v. Does 1-23, supra, 2012 WL 1019034 at \*6. The factual defenses raised in these cases are “vastly different and highly individualized.” In re Bittorrent, supra, 2012 WL 1570765 at \*12. For instance, “[s]ubscriber 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.” Id.; K-Beech, Inc. v. Does 1-41, supra, 2012 WL 773683 at \*4 (same). Other defenses include internet accounts compromised by hackers and unsecured

wireless routers through which unknown interlopers accessed the subscribers' internet accounts. In re Bittorrent, *supra*, 2012 WL 1570765 at \*12.

“[T]he unique defenses that are likely to be advanced by each individual Defendant [lead to] mini-trials involving different evidence and testimony.” Hard Drive Productions, Inc. v. Does 1-188, *supra*, 809 F.Supp.2d at 1164; Digital Sins, Inc. v. Does 1-245, *supra*, 2012 WL 1744838 at \*3 (“Each defendant's situation, which is unique to him or her, will have to be proved separately and independently”); CineTel Films, Inc. v. Does 1-1,052, \_\_\_ F.Supp.2d at \_\_\_, 2012 WL 1142272 at \*8 (D.Md. Apr. 4, 2012) (“To maintain any sense of fairness, each individual defendant would have to receive a mini-trial, involving different evidence and testimony”). This, of course, negates the very purpose of permissive joinder in the first place. Another court described the prejudice and inefficiency resulting from litigating these cases with multiple defendants as follows.

The joinder would result in numerous hurdles that would prejudice the defendants. For example, even though they may be separated by many miles and have nothing in common other than the use of BitTorrent, each defendant must serve each other with all pleadings—a significant burden when, as here, many of the defendants will be appearing *pro se* and may not be e-filers. Each defendant would have the right to be at each other defendant's deposition—creating a thoroughly unmanageable situation. The courtroom proceedings would be unworkable—with each of the ... Does having the opportunity to be present and address the court at each case management conference or other event. Finally, each defendant's defense would, in effect, require a mini-trial. These burdens completely defeat any supposed benefit from the joinder of all Does in this case, and would substantially prejudice defendants and the administration of justice.

Hard Drive Productions, Inc. v. Does 1-188, *supra*, 809 F.Supp.2d at 1164.

Just last month in another BitTorrent case, Judge Scheindlin of this Court reaffirmed her earlier order severing and dismissing all but the first Doe defendant from the case on the ground that joinder of multiple Doe defendants would neither promote trial convenience nor expedite the resolution of the lawsuit.

Joinder would not be helpful here. There is no allegation in the Complaint that the Does shared the file with one another (as opposed to with other members of the same very large swarm) or that they communicated or conspired with each other about their transactions. As a practical matter, therefore, there are very few facts connecting these Does. Each Doe who denies the allegations is likely to assert entirely independent factual defenses. *The disputed facts will not be the ones common to all cases* (i.e., that [plaintiff] owns a copyright and that an infringing file was shared in a BitTorrent swarm) *but rather the ones that are unique to each case* (i.e., whether each individual Doe unlawfully shared the file). Joinder is permissive and at the discretion of the Court and because few or no disputed questions are common to multiple defendants, I find that it is inappropriate for this case.

SBO Pictures, Inc. v. Does 1-20, supra, 2012 WL 2304253 at \*2 (italics added).

Neither the Doe defendants nor this Court derive any benefit from the joinder foisted upon them in this case. The only party to benefit is Plaintiff, whose motive for abusing the joinder rules is clear – keeping its litigation costs artificially low at the expense of the judicial system by paying a single filing fee for claims against multiple defendants rather than a separate filing fee for each defendant.

The only economy that litigating these cases as a single action would achieve is an economy to plaintiff—the economy of not having to pay a separate filing fee for each action brought. However, the desire to avoid paying statutorily mandated filing fees affords no basis for joinder. In these BitTorrent cases, where numerous courts have already chronicled abusive litigation practices—again, I refer to the reader to Magistrate Judge Brown's Report and Recommendation—forcing plaintiff to bring separate

actions against separate infringers, and to pay a filing fee for each action, is the single best way to forestall further abuse. This is particularly important because the nature of the alleged copyright infringement—the downloading of an admittedly pornographic movie—has the potential for forcing coercive settlements, due to the potential for embarrassing the defendants, who face the possibility that plaintiff's thus-far-unsubstantiated and perhaps erroneous allegation will be made public.

Digital Sins, Inc. v. Does 1-245, *supra*, 2012 WL 1744838 at \*3.

Furthermore, the Court should not close its eyes to the significant risk that people innocent of any copyright infringement are being falsely identified as “Defendants” and swept up in these lawsuits. The experience one New York homeowner had last year in the context of a criminal investigation is no less relevant to BitTorrent litigation.

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

\* \* \*

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

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

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

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

\* \* \*

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

\* \* \*

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

See Carolyn Thompson, *Bizarre pornography raid underscores Wi-Fi privacy risks*, NBC NEWS.com, Apr. 24, 2011, available at [http://www.nbcnews.com/id/42740201/ns/technology\\_and\\_science-wireless](http://www.nbcnews.com/id/42740201/ns/technology_and_science-wireless), cited in VPR Internationale v. Does 1 – 1017, 2011 WL 8179128 at \*1 (C.D. Ill. Apr. 29, 2012).

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

Just this month, the Fifth Circuit affirmed an award of sanctions against the plaintiff's attorney in another BitTorrent case against multiple Doe defendants. The attorney had employed a "strategy of suing anonymous internet users for allegedly downloading pornography illegally using the powers of the court to find their identity, then shaming or intimidating them into settling for thousands of dollars - a tactic that he has employed all across the state and that

has been replicated by others across the country.” Mick Haig Productions v. Does 1-670, \_\_\_ F.3d \_\_\_, \_\_\_, 2012 WL 2849378 at \*3 (5<sup>th</sup> Cir. Jul. 12, 2012).

These Bittorrent movie download cases are a champertous, attorney-driven waste of precious judicial resources, premised on a frivolous litigation theory.

In each case the plaintiff film distributor has been damaged in the amount of \$5 or \$10 at best, and even that lofty sum can be arrived at only by making the unwarranted assumption that each unauthorized download represents a lost sale, which it clearly does not (see U.S. v. Dove, 585 F.Supp.2d 865 (W.D.Va. 2008)).

The plaintiff has no evidence of who committed the alleged copyright infringement, or intentionally encouraged or induced an infringement, but merely believes it can identify the internet access account used, and proceeds -- frivolously -- to sue the person or entity who pays the bill for that internet access account.

The cost savings achieved in these cases through joinder is one that inures solely to the benefit of the plaintiff, and makes the cases even more onerous for the defendants than they would otherwise be (see generally Ray Beckerman, *Large Recording Companies vs The Defenseless*, ABA Judges Journal, August 2008). Moreover, it deprives the federal judicial system of the revenue to which it is entitled.

Not all defendants whom a plaintiff seeks to sue are destined to be joined together in a single action, especially where, as here, Plaintiff cannot satisfy the prerequisites for permissive joinder under Rule 20. But even if Plaintiff could satisfy those prerequisites, there is ample reason for the Court to order severance as a matter of discretion.

We think it self-evident that the Court should not exercise its discretion in a manner that would encourage more such steamroller litigation. There is important work that the federal judicial system that needs to do, and which our society needs it to do.

Helping pornographers sue a lot of people, many or even most of them innocent of any copyright infringement, based upon a flawed legal theory, in a manner that creates enormous procedural inequality, is not one of them.

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

For all of these reasons, Does 2 through 45 should be severed and dismissed from this case.

### **POINT III**

#### **THE SUBPOENAS SHOULD BE QUASHED**

Upon severance and dismissal as to Does 2 through 45, the Court should quash the subpoenas seeking the identity of those defendants. See Patrick Collins, Inc. v. Does 1-23, supra, 2012 WL 1019034 at \*6 (“the court quashes the subpoenas served upon Doe defendants 2–23s' ISPs as those defendants are no longer in this action”). In connection therewith, Plaintiff should be directed to serve immediately a copy of the Court's order quashing those subpoenas upon each ISP whom Plaintiff served subpoenas under the *Ex Parte* Order. Digital Sins, Inc. v. Does 1-245, supra, 2012 WL 1744838 at \*6. The Court should also issue a protective order providing that, in the event of inadvertent or other disclosure by the ISPs of documents setting forth the identities of the severed defendants, Plaintiff shall destroy such documents and keep such information confidential and not use it for any purpose.

**CONCLUSION**

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

Respectfully submitted,

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