UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FIRST TIME VIDEOS, LLC,	)	
	)	
Plaintiff,	)	Case No. 11 C 3831
	)	
v.	)	Judge Elaine E. Bucklo
	)	
DOES 1-76,	)	
	)	
Defendants.	)	

MOTION OF DOE 24.15.217.102 TO QUASH SUBPOENA, DISMISS THIS DEFENDANT FOR IMPROPER JOINDER, AND RECOVER ATTORNEY'S FEES AND COSTS

Defendant Doe identified with Internet Protocol Address No. 24.15.217.102 ("Doe 24.15.217.102") by his attorney, respectfully asks this Court to quash the portion of the subpoena served on Comcast Cable Holdings, LLC ("Comcast") and dated June 16, 2011, directing Comcast to information about the person(s) associated with Doe 24.15.217.102's IP address ("the Subpoena"); to dismiss Doe 24.15.217.102 on account of improper joinder; and to award Doe 24.15.217.102 the attorney's fees and costs associated with this case pursuant to 17 U.S.C. § 505.

The Complaint of Plaintiff First Time Videos, LLC ("Plaintiff") is an artifice designed to avoid the payment of filing fees, and to avoid the legal work associated with litigating separately the hundreds of claims, in this and in a related action, involving a variety of individual facts and circumstances. There are several legal reasons why this artifice should be rejected.

In the interests of judicial economy, we note for the Court that this motion has the same content as the motion that undersigned counsel filed on behalf of Doe 71.239.21.116 (Doc. 13).

Argument

I. Plaintiff's Allegations Of Personal Jurisdiction Are Insufficient.

Plaintiff has not met its burden to establish that this Court has personal jurisdiction over the vast majority of the putative defendants, even before issuing discovery. Consequently, the Court should reject any discovery Plaintiff seeks about or directed at those defendants. *See, e.g., Enterprise Intl v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 470-471 (5th Cir. 1985) (no preliminary relief without personal jurisdiction).

Plaintiff has the constitutionally imposed burden of establishing personal jurisdiction as a fundamental matter of fairness, recognizing that no defendant should be forced to have his rights and obligations determined in a jurisdiction with which he has had no contact. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Accordingly, Plaintiff bears the burden of pleading specific facts sufficient to support the Court's exercise of personal jurisdiction over Doe 24.15.217.102. Simply reciting personal jurisdiction requirements is not enough, nor are the assertions of naked legal conclusions; rather, Plaintiff must assert the factual basis underlying its claims. *See, e.g., Clemens v. McNamee*, 615 F.3d 374, 378 (5th Cir. 2010).

In this action, the only jurisdictional fact identified by the Plaintiff (*i.e.*, the IP addresses it associates with each defendant) give no indication that the alleged copyright infringement actually occurred in this state. Without any prima facie evidence to support the claim that the alleged infringement took place within the state, Plaintiff has not established minimum contacts and therefore this Court cannot exercise personal jurisdiction over the defendants. The Subpoena should be quashed.

II. Doe 24.15.217.102 Is Improperly Joined As A Defendant.

Plaintiff improperly joined its claim against Doe 24.15.217.102 with its claims against the other defendants in this action in violation of Rules 20(a)(2) and 21 of the Federal Rules of Civil Procedure.

Rule 20(a)(2) provides that multiple defendants may be joined if "(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 transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action."

In the Complaint, Plaintiff describes the BitTorrent protocol, including the groups of peers (individual users), called swarms, which allegedly allows users to download files. Complaint (Doc. 1) ¶ 8. Plaintiff then alleges that "Defendants intentionally engaged in this concerted action with other Defendants by entering the torrent swarm." *Id.*

Plaintiff's own Complaint, however, contradicts this allegation of "concerted action." Exhibit A to the Complaint (Doc. 1, Attachment 1), lists several dozen IP addresses with multiple carriers and alleged download dates and times stretching over a three-month period. And this list is on top of the earlier, identical case that Plaintiff brought against dozens of other Does, involving alleged download dates throughout 2010, in Case No. 10 C 6254 (Castillo, J.) Thus, the Complaint, taken as a whole, fails to properly allege that the allegedly infringing acts are part of the same transaction, occurrence or series of transactions, or occurrences. *See Lightspeed v. Does 1–1000,* 10 C 5604, Doc. 53, 2011 LEXIS 35392 at *4 (N.D. Ill. Mar. 31, 2011) (Manning, J.) ("defendants' use of the same ISP and P2P networks to allegedly commit copyright infringement is, without more, insufficient for permissive joinder under Rule 20."); *ThermaPure, Inc. v. Temp Air, Inc*., 10 C 4724, 2010 WL 5419090 at *4 (N.D. Ill. 2002)

("Courts in this district ... have consistently held that Rule 20(a)'s requirement for a common transaction or occurrence is not satisfied where multiple defendants are merely alleged to have infringed the same patent or trademark.").

Indeed, the Complaint anticipates the obvious problem with its allegations that Defendants, like a mass of bees, were part of a BitTorrent swarm – namely, the alleged bee attacks took place over a period of years and in different places. The Complaint alleges, "The Defendants are properly joined even if they were not engaged in the swarm contemporaneously because they contributed to the chain of distribution." Complaint (Doc. 1) ¶ 8. This conclusory allegation does not meet the standards set forth in Rule 20(a)(2) for joinder, and conversely, really admits the problem with this attempt at joinder. A plaintiff can have two auto accidents with two different drivers at the same intersection three months apart, but that does not transform these separate occurrences into a "chain of events" requiring the joinder of the plaintiff's two personal injury claims.

Plaintiff tries by bolster its attempt at joinder by claiming that its claims against the many putative defendants share common legal questions:

> Defendants also share the same questions of law with respect to copyright infringement, including but not limited to:
> (A) Whether the Plaintiff is the owner of the copyrighted works at issue;
> (B) Whether "copying" has occurred within the meaning of the Copyright Act;
> (C) Whether entering a torrent swarm constitutes a willful act of infringement;
> (D) Whether entering a torrent swarm constitutes a civil conspiracy; and
> (E) Whether and to what extent Plaintiff has been damaged by the Defendant's conduct.

Complaint (Doc. 1) ¶ 8. However, these actually are not legal issues, and are at best issues of mixed law and fact. Whether the Plaintiff owns the copyrighted works is an issue in every copyright case that Plaintiff files at any time or in any place; this broad assertion cannot constitute a common question of law allowing joinder of diverse defendants under Rule 20(a)(2).

Furthermore, whether copying occurred is a conclusion based on the facts associated with each individual defendant, as is the amount of alleged damages and the allegedly willful or conspiratorial nature of each individual's conduct.

Note that Plaintiff does not claim that there are questions of fact common to all defendants. The reality, based on the allegations in the Complaint, is that there will be many factual differences among defendants, such as network configurations, differences in levels of internet security, differences between encrypted and unencrypted wireless access points, and differences in levels of encryption, each of which will require a different defense to be mounted by each defendant. This undermines a key basis for joinder: judicial economy.

Even if the requirements for permissive joinder under Rule 20(a)(2) had been met, this Court still has broad discretion to refuse joinder, or to sever the case, under Rule 21 in the interest of avoiding prejudice and delay, ensuring judicial economy, or safeguarding principles of fundamental fairness. *See, e.g., Acevedo v. Allsups Convenience Stores*, 600 F.3d 516, 521 (5th Cir. 2010) (citing *Applewhite v. Reichhold Chems.*, 67 F.3d 571, 574 (5th Cir. 1995)), *Morris v. Northrop Grumman*, 37 F. Supp. 2d 556, 581 (E.D.N.Y.1999); *Coleman v. Quaker Oats*, 232 F.3d 1271, 1296 (9th Cir.2000)).

In a case of misjoinder, "[t]he proper remedy is a timely motion to drop the improper party ...." *Celanese Corp. of Am. v. Vandalia Warehouse Corp.*, 424 F.2d 1176, 1179 (7th Cir. 1970).

Accordingly, we respectfully ask the Court to exercise its discretion here and drop Doe 24.15.217.102 from this action. Joining hundreds of unrelated defendants in two lawsuits may make litigation less expensive for Plaintiff by enabling it to avoid the separate filing fees required for individual cases, by enabling its counsel to avoid travel, and by allowing Plaintiff to

attempt to leverage settlements from a mass of defendants without having to properly litigate each of their individual defenses. But these considerations do not outweigh the principles of individual fairness and justice that underlie well-established standards for joinder.

It is true that this Court does not have to rule on the objections to joinder in order to decide whether or not to quash the subpoenas. However, in these types of cases, some Judges in this District have taken up the question of misjoinder immediately. *Future Blue, Inc. v. Does 1-300*, Case No. 10 C 6256, Doc. 65 (N.D. Ill. June 8, 2011) (Conlon, J.) ("Does 2 through 300 are severed and dismissed without prejudice as misjoined under Rules 20(a)(2) and 21."); *Lightspeed v. Does 1–1000,* 10 C 5604, Doc. 53, 2011 LEXIS 35392 at *4 (N.D. Ill. Mar. 31, 2011) (Manning, J.); *Millennium TGA, Inc. v. Does 1–800,* 10 C 5603, Doc. 55 (N.D. Ill. Mar. 31, 2011) (Manning, J.). On the other hand, at least one District Judge held that an argument about joinder was "premature." *MGCIP v. Does 1-316*, 10 C 6677, 2011 WL 2292958 (N.D. Ill. June 9, 2011) (Kendall, J.).

Given the vast inequality of resources between the parties, the plainly deficient nature of Plaintiff's joinder allegations, and the potential harm to reputation that this action could cause to a perfectly innocent defendant, Doe 24.15.217.102 respectfully asks this Court to rule on joinder immediately and dismiss Doe 24.15.217.102 from this action.

III. The Subpoena Violates The First Amendment's Right To Free Speech.

The U.S. Supreme Court has upheld the right to anonymous speech in a variety of contexts. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995); *Buckley v. American Constitutional Law Found*., 525 U.S. 182, 192 (1999); *Talley v. California*, 362 U.S. 60, 64 (1960). This fundamental right enjoys the same protections whether the context for speech and association is an anonymous political leaflet, an Internet message board or a video-sharing site.

Reno v. ACLU, 521 U.S. 844, 870 (1997) (there is no basis for qualifying the level of First Amendment scrutiny that should be applied to the Internet). First Amendment protection extends to the anonymous publication of expressive works on the Internet, even if the publication is alleged to infringe copyrights. See *Sony Music Ent. v. Does*, 326 F. Supp. 2d 556, 564 (S.D.N.Y. 2004) (The use of P2P file copying networks to download, distribute or make sound recordings available qualifies as speech entitled to First Amendment protection).

Because the First Amendment protects anonymous speech and association, efforts to use the power of the courts to pierce anonymity are subject to a qualified privilege. Just as in other cases in which litigants seek information that may be privileged, courts must consider the privilege before authorizing discovery. *Sony*, 326 F. Supp. 2d at 565.

Litigants like Plaintiff may not use subpoenas to uncover the identities of people without an appropriate basis. Accordingly, courts evaluating attempts to unmask anonymous speakers in cases similar to the one at hand have adopted standards that balance one person's right to speak anonymously with a litigant's legitimate need to pursue a claim. In this case, Plaintiff merely provides a log of IP addresses and alleges that they correspond to a vaguely defined swarm stretching over a period of months – and if you include the other case that Plaintiff filed, over years. Plaintiff fails to present any information specific to Doe 24.15.217.102 that warrants the invasion of privacy and potential for unjust embarrassment that this case, and the Subpoena, represent.

IV. Doe 24.15.217.102 Is Entitled To Attorney's Fees and Costs As A Prevailing Party.

17 U.S.C. § 505 provides, "In any civil action under this title [copyright law], the court in its discretion may allow the recovery of full costs by or against any party other than the United

States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs."

In the event this Court grants this motion to quash the Subpoena, and/or dismisses Doe 24.15.217.102 for improper joinder, Doe 24.15.217.102 will be the prevailing party. Given the improper nature of Plaintiff's proceeding, as discussed above, Doe 24.15.217.102 is entitled to recover costs and reasonable attorney's fees incurred in connection with this action.

Conclusion

For the reasons set forth above, Doe 24.15.217.102 is entitled to an order quashing the portion of the subpoena served on Comcast and dated June 16, 2011, directing Comcast to information about the person(s) associated with Doe 24.15.217.102's IP address; dismissing Doe 24.15.217.102 for improper joinder; and awarding Doe 24.15.217.102 the attorney's fees and costs associated with this case pursuant to 17 U.S.C. § 505.

Respectfully submitted,

Doe 24.15.217.102

By /s/ Jay R. Hoffman
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CERTIFICATE OF SERVICE

Jay R. Hoffman, an attorney, certifies that on July 25, 2011, he caused the foregoing pleading to be filed with the Clerk of the Court using the ECF system, and thereby served on all counsel of record.

/s/ Jay R. Hoffman