

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

FIRST TIME VIDEOS, LLC,)	CASE NO. 1:11-cv-3831
)	
Plaintiff,)	Judge: Hon. Elaine E. Bucklo
)	Magistrate Judge: Hon. Michael T. Mason
v.)	
)	OMNIBUS RESPONSE OF PLAINTIFF
DOES 1 – 76,)	FIRST TIME VIDEOS, LLC, IN
)	OPPOSITION TO MOTIONS TO
Defendants.)	QUASH SUBPOENA, TO DISMISS
)	MOVANTS FOR IMPROPER JOINDER,
)	AND FOR FEES AND COSTS

An anonymous individual claiming to be associated with Internet Protocol (“IP”) address 71.239.21.116 (“Movant 1”) filed a motion to quash an outstanding subpoena issued to Comcast Cable Holdings, LLC, by and through his attorney, Jay R. Hoffman.¹ Mr. Hoffman later filed a separate motion with “the same content” on behalf of another anonymous individual claiming to be associated with IP address 24.15.217.102 (“Movant 2”).² Because these motions are substantively identical and suffer from the same flaws and errors, Plaintiff addresses the arguments of Movant 1 and Movant 2 (collectively “Movants”) together in this omnibus response. Movants argue that Plaintiff has not sufficiently alleged personal jurisdiction and that the exercise of personal jurisdiction by the Court would be improper (*see* Mot. to Quash #13 at 1–2; Mot. to Quash #20 at 2), that Movants are improperly joined (*see* Mot. to Quash #13 at 2–6; Mot. to Quash #20 at 3–6), and that the subpoena violates Movants’ First Amendment right to free speech. (*See* Mot. to Quash #13 at 6–7; Mot. to Quash #20 at 6–7.)

ARGUMENT

This brief consists of six parts: Part I argues that Movants cannot be preemptively dismissed from an action to which they are not yet parties. Part II argues that Movants should not

¹ Mot. of Doe 71.239.21.116 to Quash Subpoena, Dismiss This Def. for Improper Joinder, and Recover Att’y’s Fees & Costs, July 22, 2011 [hereinafter Mot. to Quash #13], ECF No. 13.

² Mot. of Doe 24.15.217.102 to Quash Subpoena, Dismiss This Def. for Improper Joinder, and Recover Att’y’s Fees & Costs 1, July 25, 2011 [hereinafter Mot. to Quash #20], ECF No. 20.

be allowed to proceed anonymously. Part III identifies multiple fatal flaws in Movants' personal jurisdiction arguments. Part IV argues that Movants' misjoinder arguments are premature at this stage of the litigation. Part V argues that the First Amendment does not provide a shield for anonymous copyright infringement. Part VI argues that Movants are not entitled to fees or costs.

I. MOVANTS ARE NOT PARTIES TO THIS ACTION, AND NONPARTIES CANNOT BE PREEMPTIVELY DISMISSED FROM AN ACTION

Movants repeatedly ask to be dismissed from this action. (Mot. to Quash #13 at 1, 6–8; Mot. to Quash #20 at 1, 6–8.) Movants are not yet parties, and nonparties cannot be dismissed from an action. At this time, Movants are merely third parties who are on notice of their potential status as party defendants. Courts agree that unserved defendants are not yet “parties” to an action. *Sampson v. Village Discount Outlet, Inc.*, No. 93-3296, 1994 WL 709278, at *2 (7th Cir. Dec. 16, 1994); *accord Arista Records, LLC v. Doe 3*, 604 F.3d 110, 115 (2d Cir. 2010) (affirming the district court order adopting the magistrate judge’s recommendation to deny the motion to dismiss because the “defendants, not having been served with process, were not yet parties”) (internal quotation marks omitted); *Flex Homes, Inc. v. Ritz-Craft Corp of Michigan, Inc.*, No. 07-cv-1005, 2008 WL 746669, at *1 n.2 (N.D. Ohio Mar. 18, 2008) (unserved defendant is “not a party to th[e] motion to dismiss”); *c.f. F.T.C. v. Compagnie De Saint-Gobain-Pont-a-Mousson*, 636 F.2d 1300, 1310–11 (D.C. Cir. 1980) (describing the entity about whom the information was sought by subpoena as neither “an accused in a criminal action nor . . . a defendant in a civil action” but as “merely a third-party witness on notice of its potential status as a party defendant”). As a result, unserved defendants may not properly move to dismiss. *Chandler v. McKee Foods Corp.*, No. 5:08-CV-00062, 2009 WL 210858, at *2 (W.D. Va. Jan. 28, 2009) (taking unserved defendant’s motion under advisement until he has been served).

There are several reasons why Movants’ implied request to be treated as parties to this action is improper. The first is the constitutional requirement of standing. Standing is “an essential and unchanging part of the case-or-controversy requirement of Article III.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *see also* U.S. Const. art III. The closest

Movants come to being an adversary is the speculative concern that they *may* be added as parties once Comcast responds to Plaintiff’s subpoena. This speculation about what Plaintiff *may* do falls far short of the high constitutional bar for concrete adverseness. *Spencer v. Kemna*, 523 U.S. 1, 11 (1998) (stating that it is the “burden of the party who seeks the exercise of jurisdiction in his favor clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.”) (internal quotation marks omitted). Second, the prudential limitations on the exercise of federal court jurisdiction also prevent Movants from asserting the rights of unnamed defendants. *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *Winkler v. Gates*, 481 F.3d 977, 979 (7th Cir. 2007). Prior to the completion of discovery from nonparty ISPs such as Comcast, neither Plaintiff nor this Court should assume, based solely on the word of anonymous Movants, that any Movant is the same as a Doe Defendant, or that a Movant can speak for any Doe Defendant.

The danger of allowing Movants to stand in the shoes of Doe Defendants at this stage of the litigation becomes especially apparent when examined in the context of the Federal Rules of Civil Procedure (“FRCP”). Movants argue against the sufficiency of Plaintiff’s pleadings and against personal jurisdiction, each of which could conceivably be construed as a defense raised in a pre-answer motion under FRCP 12(b), if Movants were considered parties. However, the FRCP require a proper 12(b) motion to be made by a party who has been named and served with process. FRCP 12(h)(1)(A) specifies that any defense listed in FRCP 12(b)(2)–(5) is waived if omitted from a pre-answer motion. The defenses subject to waiver include, *inter alia*, “insufficient process” and “insufficient service of process.” Fed R. Civ. P. 12(b)(4)–(5). Movants *could not possibly raise these defenses* at this stage of the litigation, when there is no service of process to challenge. Yet, the rules dictate that if Movants’ motions are treated as including proper defenses under FRCP 12(b), the 12(b)(2)–(5) defenses not raised are nevertheless waived. While waiver of certain defenses may be a defensible legal strategy, it is not defensible for the Court to allow anonymous individuals, who may or may not be Doe Defendants, to waive

defenses on behalf of unidentified Doe Defendants. The Court should not indulge in the legal fiction of treating Movants as parties to this action.

II. MOVANTS SHOULD NOT BE ALLOWED TO PROCEED ANONYMOUSLY

By bringing their motions anonymously, Movants improperly attempt to circumvent the presumptive openness of judicial proceedings. The Court should deny Movants' attempt to proceed anonymously because they fail to meet or discuss their burden to justify doing so. "[P]arties to a lawsuit must typically openly identify themselves in their pleadings to 'protect[] the public's legitimate interest in knowing all of the facts involved, including the identities of the parties.'" *United States v. Microsoft Corp.*, 56 F.3d 1448, 1463 (D.C. Cir. 1995) (citing *Doe v. Frank*, 951 F.2d 320, 322 (11th Cir. 1992)); *see also Qualls v. Rumsfeld*, 228 F.R.D. 8, 10 (D.D.C. 2005). Even so, it is within the discretion of the district court to grant the "rare dispensation" of anonymity. *Microsoft Corp.*, 56 F.3d at 1464 (quoting *James v. Jacobson*, 6 F.3d 233, 238 (4th Cir. 1993)).

Pseudonymous litigation has been permitted where the issues are "matters of a sensitive and highly personal nature such as birth control, abortion, homosexuality or the welfare rights of illegitimate children or abandoned families." *Southern Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 712–13 (5th Cir. 1979). The district court has a duty to consider the impact of a party's anonymity on both the public interest in open proceedings and on fairness to the opposing party. *Microsoft Corp.*, 56 F.3d at 1464. In conducting this balance, the court must weigh a plaintiff's "privacy concerns against the presumption of openness of judicial proceedings." *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981). Factors for the court to consider include:

- (1) whether the justification asserted by the requesting party is merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a matter of sensitive and highly personal nature;
- (2) whether identification poses a risk of retaliatory physical or mental harm to the requesting party or even more critically, to innocent nonparties;
- (3) the ages of the persons whose privacy interests are sought to be protected;

- (4) whether the action is against a governmental or private party; and
- (5) the risk of unfairness to the opposing party from allowing an action against it to proceed anonymously.

James v. Jacobson, 6 F.3d at 238. Because, as will be discussed further, *infra* Part IV, the Doe Defendants in this case have no cognizable claim of privacy in their subscriber information, they should not be permitted to proceed anonymously. Moreover, as discussed above, *supra* Part I, it is improper to allow anonymous nonparty Movants to raise—or even waive—the legal rights of Doe Defendants. At least one other federal court came to the same conclusion and ordered John Does who filed pleadings to also file a notice indicating their identity by name, address, phone number, and email address. Order Denying Implied Request to Proceed Anonymously 3, *Achte/Neunte Boll Kino Beteiligungs GMBH & CO. KG, v. Does 1–4,577*, No. 10-453 (RMC) (D.D.C., Sept. 16, 2010). This Court should do the same, and deny John Does the ability to proceed anonymously.

III. MOVANTS’ PERSONAL JURISDICTION CHALLENGE MUST FAIL

Movants argue that they should be dismissed for lack of personal jurisdiction, but their motions must be denied for several independent reasons. First, Movants’ challenge is premature. Second, plaintiffs are not required to plead personal jurisdiction in the complaint. Third, Plaintiff has nevertheless made a *prima facie* showing of personal jurisdiction.

A. Movants’ Personal Jurisdiction Challenge Is Premature

Movants’ challenge to personal jurisdiction is premature at this stage of the litigation, when the Court has limited means to evaluate Movants’ specific connections with this forum. *E.g., MGCIP [sic] v. Does 1–316*, No. 10-C-6677, 2011 WL 2292958, at*2 (N.D. Ill. June 9, 2011) [hereinafter *Kendall June 9 Decision*] (Kendall, J.) (denying multiple motions to dismiss for lack of personal jurisdiction as “premature” in a similar factual and procedural context); *Virgin Records Am., Inc. v. Does 1–35*, No. 05-1918, 2006 WL 1028956, at *3 (D.D.C. Apr. 18, 2006); *see also London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 180–81 (D. Mass 2008) (finding it “premature to adjudicate personal jurisdiction” on the available record). A court cannot properly assess a defendant’s contacts with a forum until the defendant has at least been

identified. *Virgin Records*, 2006 WL 1028956, at *3; *see also Sony Music Entm't, Inc. v. Does 1–40*, 326 F. Supp. 2d 556, 567 (S.D.N.Y. 2004) (holding that “without identifying information sought by plaintiffs in the [ISP] subpoena, it would be difficult to assess properly the existence of personal jurisdiction over the Doe defendants”).

Movants do not directly deny that they have any significant contacts with this jurisdiction sufficient for general or specific jurisdiction. (*See generally* Mot. to Quash #13; Mot. to Quash #20.) Even if Movants had done so, however, the Court currently has limited information to assess whether their jurisdictional defenses are valid and to evaluate possible alternate bases to establish jurisdiction. *Kendall June 9 Decision*, 2011 WL 2292958, at *2; *Voltage Pictures, LLC v. Does 1–5,000*, No. 10-0873, 2011 WL 1807438, at *9 (D.D.C. May 12, 2011); *see also, e.g., London-Sire Records*, 542 F. Supp. 2d at 181 (“Even taking all of the facts in [movant’s] application as true, it is possible that the Court properly has personal jurisdiction.”). Movants cite three cases in support of their personal jurisdiction arguments (Mot. to Quash #13 at 2; Mot. to Quash #20 at 2), but each of these cases is distinguishable as involving defendants who had already been identified, named, and served with process, not anonymous and unidentified Does. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 288–90 (1980); *Clemens v. McNamee*, 615 F.3d 374, 377–78 (5th Cir. 2010); *Enterprise Intern. Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 466–70 (5th Cir. 1985).

Plaintiff will be able to proceed only against named defendants over whom this court has personal jurisdiction. *Call of the Wild Movie v. Does 1–1,062*, No. 10-455, 2011 WL 996786, at *9 (D.D.C. Mar. 22, 2011). After the defendants are named and served, they will have an opportunity to file appropriate motions challenging this Court’s jurisdiction and that will be the appropriate time for the resolution of this issue. *Kendall June 9 Decision*, 2011 WL 2292958, at *2; *Call of the Wild Movie*, 2011 WL 996786, at *9; *see also Virgin Records*, 2006 WL 1028956, at *3. Until that time, however, Movants’ personal jurisdiction arguments are premature.

B. Plaintiff Is Not Required to Plead Personal Jurisdiction In the Complaint

Movants are under the mistaken belief that “Plaintiff bears the burden of pleading specific facts sufficient to support the Court’s exercise of personal jurisdiction” in its Complaint. (Mot. to Quash #13 at 2; Mot. to Quash #20 at 2.) Movants unsurprisingly cite no direct authority for this proposition. On the contrary, it is well-established in all federal courts that personal jurisdiction does not have to be pled. *Wendt v. Handler, Thayer & Duggan, LLC*, 613 F. Supp. 2d 1021, 1027 (N.D. Ill. 2009) (Castillo, J.) (“[A] plaintiff need not anticipate a personal jurisdiction challenge in its complaint”); *Blackmore v. Lacosse*, No. 85 C 6325, 1985 WL 5052, at *2 (N.D. Ill. Dec. 17, 1985) (“Although some states, including Illinois, require plaintiffs to allege in their complaints facts sufficient to support personal jurisdiction over the defendants . . . such allegations are unnecessary in the federal courts.”). Federal Rule of Civil Procedure 8 sets forth the general rules of pleading, requiring a “short and plain statement of the grounds for the court’s jurisdiction.” Fed. R. Civ. P. 8(a)(1). Courts across jurisdictions interpret this rule to refer to subject-matter jurisdiction and not personal jurisdiction. *See, e.g.*, 5 Wright & Miller, Fed. Prac. & Proc. Civ. § 1206 (3d ed.) (collecting cases).

In general, a plaintiff is obligated to make a *prima facie* showing of personal jurisdiction only after a proper challenge in a Rule 12(b)(2) motion or when a personal jurisdiction defense is asserted in the answer. *See, e.g., Labtest Intern., Inc. v. Centre Testing Intern. Corp.*, No. 10-CV-02897, 2011 WL 382879, at *3 (N.D. Ill. Feb. 1, 2011). This is not the case here, as Movants are not parties and cannot yet properly bring Rule 12(b)(2) motions. *See supra* Part I. Nevertheless, Plaintiff alleged sufficient facts in its complaint to make a *prima facie* showing of personal jurisdiction.

C. Plaintiff Has Made a *Prima Facie* Showing of Personal Jurisdiction

Even if the Court concludes that a discussion of personal jurisdiction is not premature, it should still deny Movants’ motions because Plaintiff has made a *prima facie* showing of personal jurisdiction. Plaintiff alleged that it used geolocation technology to trace the IP address of each Doe Defendant to a point of origin within Illinois. (Compl. ¶ 6.) Although geolocation is not a

litmus test for personal jurisdiction, its use for the purpose of preliminary screening has been championed even by pro-piracy groups. *See* Decl. of Seth Schoen ¶¶ 2, 4, 15–22, *OpenMind Solutions, Inc. v. Does 1–1,295*, No. 3:11-cv-00092-GPM-SCW (S.D. Ill. Mar. 22, 2011), ECF No. 15-2. Use of the same geolocation technology described in Mr. Schoen’s declaration predicted the physical location of the Doe Defendant associated with IP address 71.239.21.116 to be the Village of Round Lake, Illinois. *See IP Details for 71.239.21.116*, What Is My IP Address, <http://whatismyipaddress.com/ip/71.239.21.116> (last visited July 26, 2011). Similarly, the physical location of the Doe Defendant associated with IP address 24.15.217.102 is predicted to be the City of Chicago. *See IP Details for 24.15.217.102*, What Is My IP Address, <http://whatismyipaddress.com/ip/24.15.217.102> (last visited July 26, 2011). Physical presence establishes personal jurisdiction. *E.g., Burnham v. Superior Court of Cal., Cnty. of Marin*, 495 U.S. 604, 619 (1990) (“The short of the matter is that jurisdiction based on physical presence alone constitutes due process . . .”).

Even absent the use of geolocation technology, Plaintiff has made a sufficient *prima facie* showing of personal jurisdiction at this stage of the litigation. A federal court deciding a case on similar facts found that plaintiffs had made a *prima facie* showing of personal jurisdiction over an anonymous downloader of copyrighted music. *Virgin Records*, 2006 WL 1028956, at *4. Plaintiffs alleged that the defendant, without the permission or consent of plaintiffs, offered to the public—including persons within the court’s jurisdiction—plaintiffs’ copyrighted sound recordings; in exchange, defendant was able to download recordings made available by others, including persons within the Court’s jurisdiction. *Id.* The court in *Virgin Records* found these allegations sufficient for a *prima facie* showing. These allegations are virtually identical to the allegations in Plaintiff’s Complaint. (*See* Compl. ¶¶ 6, 11, 13–15, 23–24.) The defendants offered to the public—including persons in Illinois—Plaintiff’s copyrighted Video via BitTorrent software; in exchange, defendants were able to download files made available by others, including persons in Illinois. This infringing activity is enough to establish specific personal jurisdiction under the Illinois long-arm statute. *See* 735 ILCS 5/2-209(a)(2).

Although Movants' personal jurisdiction challenge is premature at this stage of the litigation and Movants are wholly mistaken in believing that Plaintiff must plead any basis for personal jurisdiction, Plaintiff has nevertheless exhaustively established a *prima facie* showing of personal jurisdiction. Further, Plaintiff has acted in good faith by taking precautions to name only Doe Defendants that reside in the State of Illinois. Movants' personal jurisdiction challenge should therefore be denied.

IV. MOVANTS' MISJOINDER CHALLENGE IS PREMATURE

Movants' challenge to joinder is premature at this early juncture of the litigation. Movants claim that by joining seventy-six Doe Defendants in one action, Plaintiff has created a situation of misjoinder. (*See* Mot. to Quash #13 at 2–6; Mot. to Quash #20 at 3–6.) However, courts considering other cases with nearly-identical facts have decided that such issues are premature at this stage in the litigation, regardless of whether Movants' arguments eventually prove to have merit. *Kendall June 9 Decision*, 2011 WL 2292958, at *2 (citing *Donkeyball Movie, LLC v. Does 1–18*, No. 10-1520, 2011 WL 1807452, at *4 (D.D.C. May 12, 2011)); *MCGIP, LLC v. Does 1–18*, No. 11-1495, 2011 WL 2181620, at *1 (N.D. Cal. June 2, 2011) (Chen, J.) (citing *Voltage Pictures*, 2011 WL 1807438, at *4) (finding joinder “proper” at early stage of litigation, even where movant's assertion of misjoinder “may be meritorious”).

At this stage in the litigation, where discovery is underway only to learn identifying facts necessary to permit service on Doe Defendants, joinder is plainly proper. *Kendall June 9 Decision*, 2011 WL 2292958, at *2. Plaintiff has alleged that Doe Defendants have infringed Plaintiff's copyrighted Video through the same file-sharing protocol—BitTorrent—that operates through simultaneous and sequential computer connections and data transfers among the users, including Defendants. (*See* Compl. ¶¶ 4, 8, 11–13, 15, 22–24.) Such allegations have been held sufficient to sustain joinder while discovery of Doe Defendants' identities is underway. *MCGIP*, 2011 WL 2181620, at *4 (holding such allegations were sufficient at same early stage of litigation and postponing joinder discussion); *Voltage Pictures*, 2011 WL 1807438, at *4 (same); *see also Call of the Wild Movie*, 2011 WL 996786, at *4–5 (finding plaintiffs' allegations that

the Doe defendants used BitTorrent, that BitTorrent “makes every downloader also an uploader,” and that any peer who has completed a download “is automatically a source for the subsequent peer” were sufficient to make claims against defendants “logically related”).

Movants would have the Court misinterpret Plaintiff’s pleadings as alleging that Doe Defendants merely “use[d] the same ISP and P2P networks” or “merely . . . infringed the same [copyright,] patent or trademark” in order to analogize this lawsuit to distinguishable authority, including authority based on fundamentally different P2P file-sharing technologies. (Mot. to Quash #13 at 3; Mot. to Quash #20 at 3–4.) In fact, as a brief review of Plaintiff’s pleadings shows, Plaintiff’s allegations go much further. Plaintiff not only alleged that all Doe Defendants used the same BitTorrent P2P technology and infringed upon the same copyrighted Video, but also that all Doe Defendants joined the torrent swarm particular to Plaintiff’s Video to accomplish their illegal activities, and that all Doe Defendants intentionally engaged in concerted action with other Doe Defendants and third parties to perpetuate the illegal reproduction and distribution of Plaintiff’s Video, and that this amounted to a civil conspiracy to infringe Plaintiff’s Video. (See Compl. ¶¶ 3, 8, 23, 24, 33–37.) For good reason, courts typically will not sever cases involving civil conspiracy claims. See *In re High Fructose Corn Syrup Antitrust Litigation*, 293 F. Supp. 2d 854, 863 (C.D. Ill. 2003) (Mihm, J.) (“[D]iligent research by both the parties and the Court has uncovered no case in which a Rule 21 severance has been granted in a civil conspiracy case.”).

Movants also make vague claims that the Court should order severance for reasons of avoiding prejudice and delay, ensuring judicial economy, and safeguarding principles of fundamental fairness. (Mot. to Quash #13 at 5; Mot. to Quash #20 at 5.) These discretionary concerns were thoroughly examined in a highly similar factual and procedural context by Judge Howell of the United States District Court for the District of Columbia—but on each point Judge Howell reached an opposite conclusion. *Call of the Wild Movie*, 2011 WL 996786, at *4–7. “Joinder will avoid prejudice and needless delay for the only party currently in the case, namely the plaintiff, and promote judicial economy.” *Id.* at *4. Furthermore, “[t]he putative defendants

are not prejudiced but likely benefited by joinder, and severance would debilitate the plaintiffs' efforts to protect their copyrighted materials and seek redress" As Judge Howell reasoned, and as Plaintiff's counsel has learned through experience, severance would be especially contrary to the interests of any individuals who have been named as Doe Defendants multiple times in the same suit for multiple observed instances of infringing activity, a possibility that is a consequence of the dynamic reassignment of many consumer IP addresses:

[S]ome IP addresses may relate to the same person, who is engaged in the allegedly infringing activity claimed by plaintiffs. Severance of the putative defendants associated with different IP addresses may subject the same Time Warner customer to multiple suits for different instances of allegedly infringing activity and, thus, would not be in the interests of the putative defendants.

Call of the Wild Movie, 2011 WL 996786, at *6. The same logic applies to Comcast in Illinois, and thus all discretionary factors weigh against severance at this stage of the litigation.

At a later point in this litigation, after Doe Defendants have been named and served, they may re-raise joinder issues under Fed. R. Civ. P. 20 and move to sever under Fed. R. Civ. P. 21, and that will be the appropriate time for the Court to evaluate the merits of such arguments.

Kendall June 9 Decision, 2011 WL 2292958, at*2; *Voltage Pictures*, 2011 WL 1807438, at *8; *see also MCGIP*, 2011 WL 2181620, at *1. The Court should deny the instant motions because Movants' joinder challenge is premature.

V. THE FIRST AMENDMENT IS NOT A SHIELD FOR COPYRIGHT INFRINGERS

Movants argue that the release of their identifying information would violate their right to anonymous speech under the First Amendment. (*See* Mot. to Quash #13 at 6–7; Mot. to Quash #20 at 6–7.) This argument is unavailing because the First Amendment is not a shield for copyright infringers. The Supreme Court, accordingly, has rejected First Amendment defenses to copyright infringement actions. *See, e.g., Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555–56, 569 (1985).

Movants argue that “courts must consider” the issues of privacy and First Amendment anonymous speech “before authorizing discovery.” (Mot. to Quash #13 at 7; Mot. to Quash #20 at 7.) Movants will be glad to learn, then, that the Court was indeed presented with these issues prior to granting discovery. (See Mem. of Law In Supp. of Pl.’s Mot. for Leave to Take Disc. Prior to the Rule 26(f) Conference 6–9, June 6, 2011, ECF No. 5-1.) Movants cite *Sony Music Entertainment Inc. v. Does 1–40* in support of their argument, but ironically, the *Sony Music* court ultimately denied an analogous motion to quash. 326 F. Supp. 2d 556, 558 (S.D.N.Y. 2004) (“[D]efendants’ First Amendment right to remain anonymous must give way to plaintiffs’ right to use the judicial process to pursue what appear to be meritorious copyright infringement claims.”). Likewise, courts across the nation have repeatedly held that a person who uses the Internet to download or distribute copyrighted works without permission is engaging in the exercise of speech, but only to a very limited extent, and the First Amendment does not protect that person’s identity from disclosure. See, e.g., *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 118–19 (2d Cir. 2010) (concluding that plaintiff’s need for discovery of alleged infringer’s identity outweighed defendant’s First Amendment right to anonymity); *Arista Records, LLC v. Does 1–19*, 551 F. Supp. 2d 1, 8 (D.D.C. 2008) (“[C]ourts have routinely held that a defendant’s First Amendment privacy interests are exceedingly small where the ‘speech’ is the alleged infringement of copyrights.”); *UMG Recordings, Inc. v. Does 1–4*, No. 06-0652, 2006 WL 1343597, at *2 (N.D. Cal. Mar. 6, 2006) (Chen, J.) (applying the *Sony Music* factors and allowing discovery of Doe defendants’ identities).

The *Sony Music* court found that the plaintiffs had made a *prima facie* showing of copyright infringement by alleging (1) ownership of the copyrights or exclusive rights of copyrighted sound recordings at issue; and (2) that “each defendant, without plaintiffs’ consent, used, and continue[d] to use an online media distribution system to download, distribute to the public, and/or make available for distribution to others certain” copyrighted recordings. 326 F. Supp. 2d at 565. Here, Plaintiff has made a *prima facie* showing of copyright infringement. First, it alleged ownership of the copyrights of the creative Video at issue in this case. (See

Compl. ¶¶ 2, 18–20, 26.) Second, it also alleged supporting facts, identifying the copyrighted Video and describing how it was reproduced and distributed by Doe Defendants using BitTorrent. (*See* Compl. ¶¶ 3, 22–24, Ex. A.) Thus, the limited protection afforded by the First Amendment must give way to Plaintiff’s need to enforce its rights.

Movants cannot cloak their identities in the First Amendment when their infringing activities are not private: “[I]t is difficult to say that Doe had a strong expectation of privacy because he or she either opened his or her computer to others through file sharing or allowed another person to do so.” *MCGIP, LLC v. Does 1–18*, No. 11-1495, 2011 WL 2181620, at *1 (N.D. Cal. June 2, 2011) (Chen, J.); *see also Voltage Pictures, LLC v. Does 1–5,000*, No. 10-0873, 2011 WL 1807438, at *4 (D.D.C. May 12, 2011) (finding movants’ rights to anonymity to be minimal); *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 267 (D.D.C. 2003) (“[I]f an individual subscriber opens his computer to permit others, through peer-to-peer file-sharing, to download materials from that computer, it is hard to understand just what privacy expectation he or she has after essentially opening the computer to the world.”), *rev’d on other grounds sub nom, Recording Indus. Ass’n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003). Because the First Amendment is not a shield for copyright infringement, the Court should deny Movants’ motions.

VI. MOVANTS ARE NOT ENTITLED TO FEES AND COSTS BECAUSE THEY ARE NOT PARTIES AND CANNOT PREVAIL

Movants seek an award of attorney’s fees and costs if their motions are granted. (Mot. to Quash #13 at 7; Mot. to Quash #20 at 7–8.) The standard for awarding attorney fees and costs in copyright infringement cases is well-established. 17 U.S.C. § 505 states: “In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party [T]he court may also award a reasonable attorney’s fee to the prevailing party as part of the costs.” 17 U.S.C. § 505 (1994). The plain language of the statute directs that prevailing plaintiffs and defendants are to be treated alike, “but attorney’s fees are to be awarded to prevailing parties only as a matter of the court’s discretion.” *Fogerty v. Fantasy, Inc.*, 510 U.S.

517, 533 (1994). Movants merely cite the statutory provision and state, without arguing, that each of them “will be the prevailing party” if the Court grants their motions in part or full. (Mot. to Quash #13 at 7; Mot. to Quash #20 at 8.)

The Seventh Circuit has pointed out that the “Supreme Court has adopted a generous formulation of the term prevailing party; parties are said to have prevailed in litigation for attorney’s fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.” *King v. Illinois State Bd. of Elections*, 410 F.3d 404, 411 (7th Cir. 2005) (footnotes and quotation marks omitted) (quoting in part *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). The Seventh Circuit has also stated that “[a]t a minimum, to be considered a prevailing party . . . [a party] must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant.” *Id.*

Movants cannot meet even this generous standard—they have not been named and served, and thus, are not parties. Courts agree that unserved defendants are not yet “parties” to an action. *See supra* Part I. Movants appear only because they received letters from their ISPs, and are at this time merely third parties on notice of their potential status as party defendants. Movants fail to cite, and Plaintiff’s counsel has not found, any authority for awarding prevailing party fees and costs before a defendant is even named to a lawsuit or served with process.

Furthermore, even if the court grants their motions, Movants will not be able to point to any appreciable change in the legal relationship between Plaintiff and themselves. Plaintiff’s subpoenas are not directed at Movants but at nonparty ISPs. Movants do not yet have any obligation to appear or otherwise litigate in this district. Movants do not even ask for any relief which could be dispositive; the proper remedy for misjoinder, for example, is severance. Fed. R. Civ. P. 21. Because Movants have not discussed the standard for awarding fees and costs under 17 U.S.C. § 505, much less argued why the Court should exercise its discretion in their favor, because Movants are not parties to this case, and because Movants cannot explain how the outcome of their motions would change the legal relationship between Movants and Plaintiff, the Court should deny Movants’ requests for fees and costs.

CONCLUSION

The Court should deny Movants' motions. Movants cannot be preemptively dismissed from an action to which they are not yet parties; Movants should not be allowed to proceed anonymously; Movants' challenge to personal jurisdiction suffers multiple fatal flaws; Movants' misjoinder arguments are premature at this stage of the litigation; the First Amendment does not provide a shield for anonymous copyright infringement; and Movants are not entitled to fees or costs.

Respectfully submitted,

FIRST TIME VIDEOS, LLC

DATED: July 26, 2011

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 26, 2011, all counsel of record who are deemed to have consented to electronic service are being served a true and correct copy of the foregoing document using the Court's CM/ECF system, in compliance with Local Rule 5.2(a).

/s/ John Steele
JOHN STEELE