

I. MOVANT’S IMPLIED REQUEST TO BE TREATED AS A PARTY TO THIS ACTION SHOULD BE DENIED

Movant makes arguments that, if Movant had been named as a party and served with process, would be construed as pre-answer objections under Fed. R. Civ. P. 12(b). (Mot. to Quash #25 ¶¶ 7–10.) However, Movant is not yet a party to this action, and should not be allowed to stand in the shoes of a Doe Defendant. At this time, Movant is merely a third party who is on notice of his potential status as a party defendant. 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 make motions under Rule 12(b).

There are several reasons why Movant’s implied request to be treated as a party at this stage of the litigation 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 Movant comes to being an adversary is the speculative concern that he *may* be added as a party 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). Federal courts, both within the Northern District of Illinois and across the country, have recognized that Plaintiff retains full discretion over who it will actually name as Defendants after the conclusion of discovery from nonparty ISPs. *See* Order 2, *MCGIP, LLC v. Does 1–14*, No. 11-cv-2887 (N.D. Ill. July 26, 2011) [hereinafter Lindberg July 26 Order] (Lindberg, J.), ECF No. 19 (“The Does may raise these issues when plaintiff has named them as defendants, *if that action occurs.*”) (emphasis added); *Voltage Pictures, LLC v. Does 1–5,000*, No. 10-0873 (BAH), 2011 WL 1807438, at *2 (D.D.C. May 12, 2011) (Howell, J.) (“[T]he plaintiff may, based on its evaluation of [putative defendants’] assertions, decide not to name these individuals as parties in this lawsuit. On the other hand, the plaintiff may decide to name them as defendants in order to have an opportunity to contest the merits and veracity of their defenses . . .”). Second, the prudential limitations on the exercise of federal court jurisdiction also prevent Movant from asserting the rights of an unnamed defendant. *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 non-party ISPs such as Comcast, neither Plaintiff nor this Court should assume, based solely on the word of an anonymous Movant, that Movant is the same as a Doe Defendant, or that Movant can speak for any Doe Defendant.

The danger of allowing Movant to stand in the shoes of a Doe Defendant at this stage of the litigation becomes especially apparent when examined in the context of the Federal Rules of Civil Procedure (“FRCP”). Movant argues against the sufficiency of Plaintiff’s pleadings, which could conceivably be construed as a defense raised in a pre-answer motion under FRCP 12(b)(6), if Movant were considered a party. 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). Movant *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 Movant's motion is 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 an anonymous individual, who may or may not be a Doe Defendant, to waive defenses on behalf of an unidentified Doe Defendant. The Court should not indulge in the legal fiction of treating Movant as a party to this action.

II. MOVANT SHOULD NOT BE ALLOWED TO PROCEED ANONYMOUSLY

By bringing his motions anonymously, Movant improperly attempts to circumvent the presumptive openness of judicial proceedings. The Court should deny Movant's attempt to proceed anonymously because he fails to meet or discuss his burden for 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 non-parties;
- (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. The Doe Defendants in this case have no cognizable claim of privacy in their subscriber information. *See, e.g., MCGIP, LLC v. Does 1–18*, No. 11-1495, 2011 WL 2181620, at *1 (N.D. Cal. June 2, 2011) (Chen, J.) (“[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.”) Absent a compelling privacy interest, Movant should not be permitted to proceed anonymously. Moreover, as discussed above, *supra* Part I, it is improper to allow anonymous non-party 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. THE NONPARTY SUBPOENA ISSUED TO COMCAST BY PLAINTIFF WAS PROPERLY ISSUED UNDER FED. R. CIV. P. 45

Movant argues, without providing evidence or support, that the documents which Plaintiff’s subpoena commands Comcast to produce “are likely located in the state of New Jersey and not Illinois.” (Mot. to Quash #25 ¶ 2.) Movant further argues that the subpoena issued to Comcast “was issued by the wrong court.” (*Id.* ¶¶ 1–5.) This is an argument that could credibly be brought by Comcast, but cannot credibly be brought by Movant, who is not subject to Plaintiff’s subpoena. *See Kessel v. Cook Cnty.*, No. 00-3980, 2002 WL 398506, at *2 (N.D. Ill.

Mar. 14, 2002) (rejecting all of plaintiffs' objections to defendants' nonparty subpoenas except "the objections that are personal to the plaintiffs," namely "privacy, privilege, and harassment"). Movant purports to object "[p]ursuant to Fed. R. Civ. P. 45(c)(2)(B)" (Mot. to Quash #25 ¶ 4), but this rule only allows objections by "a person *commanded to produce* documents or tangible things or to permit inspection . . ." Fed. R. Civ. P. 45(c)(2)(B) (emphasis added). Plaintiff's subpoena is not directed at Movant, but at Comcast. Movant is not "commanded to produce" anything whatsoever, and Movant is therefore ineligible to bring this argument.

Even if the Court decides that Movant can bring this argument, the argument must still fail because Movant's argument that the subpoena was issued in violation of Rule 45 is without merit. FRCP 45 dictates that the subpoena must issue from the court for the district where the production is to be made. Fed. R. Civ. P. 45(a)(2)(C). "Production" refers to the delivery of documents, not their retrieval, and therefore "the district in which the production . . . is to be made" is not the district in which the documents are housed but the district in which the subpoenaed party is required to turn them over. *In re General Motors Corp. Dex-Cool Products*, No. 03-1562-GPM, 2007 WL 627459, at *1 (S.D. Ill. Feb. 27, 2007) (citing *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404 (3rd Cir. 2004) (Alito, J.)); *accord Stewart v. Mitchell Transport*, No. 01-2546-JWL, 2002 WL 1558210, at *2-3 (D. Kan. July 8, 2002); *see also* Fed. R. Civ. P. 45, Advisory Committee Notes, 1991 Amendment, Subdivision (a) ("Paragraph (a)(2) makes clear that the person subject to the subpoena is required to produce materials . . . whether or not the materials are located within the district or within the territory within which the subpoena can be served."); 9 James Wm. Moore et al., *Moore's Federal Practice* § 45.03 (3d ed. 2000) ("The subpoena should issue from the Court where the production of documents is to occur, regardless of where the documents are located."); 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2456, at 31 (1995 & 2003 Supp.) ("Even records kept beyond the territorial jurisdiction of the district court issuing the subpoena may be covered if they are controlled by someone subject to the court's jurisdiction.").

Here, the identity records are required to be produced at Plaintiff's counsel's office in Chicago, Illinois. (*See* Mot. to Quash #25, Ex. A.) In other words, the place of production is in Chicago, Illinois. Comcast is simply required to mail the documents, or have them delivered, to the Plaintiff's counsel's office in Chicago. Therefore, the subpoena was properly issued from this Court. Because Movant's argument that the subpoena was improperly issued—an argument made without evidence or support—cannot be properly brought by Movant and is without merit, the Court should deny the instant motion to quash the nonparty subpoena issued to Comcast.

IV. MOVANT'S PERSONAL JURISDICTION CHALLENGE MUST FAIL

Movant argues that “Plaintiff's Complaint has insufficiently pled personal jurisdiction.” (Mot. to Quash #25 ¶ 7.) This argument must fail for several reasons. First, Movant's argument is premature. Second, contrary to Movant's assertion, plaintiffs are not required to plead personal jurisdiction in the complaint. Third, Plaintiff has nevertheless made a *prima facie* showing of personal jurisdiction.

A. Movant's Personal Jurisdiction Challenge Is Premature

Movant's challenge to personal jurisdiction is premature at this stage of the litigation, when the Court has limited means to evaluate Movant's specific connections with this forum. *E.g.*, Lindberg July 26 Order 2 (“[T]he Does argue that this Court may lack personal jurisdiction over them [This] argument is premature.”); *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”).

Movant does not directly deny that he has any significant contacts with this jurisdiction sufficient for general or specific jurisdiction. Even if Movant had done so, however, the Court currently has limited information to assess whether his 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.”).

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* Lindberg July 26 Order; *Virgin Records*, 2006 WL 1028956, at *3. Until that time, however, Movant’s personal jurisdiction arguments are premature.

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

Movant is under the mistaken belief that “the plaintiff must plead specific facts showing contact with the Plaintiff’s chosen forum in order to establish [personal] jurisdiction” in its Complaint; this is the fundamental basis for Movant’s argument that “Plaintiff’s Complaint has insufficiently pled personal jurisdiction. (Mot. to Quash #25 ¶¶ 7, 9.) 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).

Movant cites *Clemens v. McNamee* in support of his argument, but this case dealt with a proper motion to dismiss for, *inter alia*, lack of personal jurisdiction under FRCP 12(b)(2) and failure to state a claim under FRCP 12(b)(6), brought by a defendant who had already been named and served. *See Clemens*, 615 F.3d 374, 377–78 (5th Cir. 2010). Indeed, 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 Movant is a nonparty and cannot yet properly bring a Rule 12(b)(2) motion. *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 Movant’s motions because Plaintiff has made a *prima facie* showing of personal jurisdiction. Plaintiff alleged that it used geolocation technology to trace Movant’s IP address to a point of origin within Illinois. (Compl. ¶ 6.) Movant argues that this allegation should be disregarded because it is a “tenuous theory” based on “software developed by Plaintiff and for the benefit of Plaintiff.” (Mot. to Quash #25 ¶¶ 9–10.) Movant errs in conflating the proprietary software used by Plaintiff to identify instances of infringing activity with the separate and publicly-available software used for geolocation of potential Doe Defendants. The geolocation software used by Plaintiff was neither developed by Plaintiff nor developed by Plaintiff’s

counsel, and is publicly available. *See GeoLite City*, MaxMind, <http://www.maxmind.com/app/geolitecity> (last visited July 27, 2011).

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 exact same geolocation technology described in Mr. Schoen’s declaration predicted the physical location of the Doe Defendant associated with IP address 98.215.224.86 to be Chicago, Illinois. *See GeoLite City/ISP/Organization Demo*, MaxMind, http://www.maxmind.com/app/lookup_city?type=geolite (enter “98.215.224.86” in text entry box; then click “Lookup IP Addresses” button) (last visited July 27, 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 . . .”). Plaintiff has thus made a good-faith effort to name only Doe Defendants over whom personal jurisdiction can be incontrovertibly established by their physical presence within the State of Illinois.

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 Movant's personal jurisdiction arguments are premature at this stage of the litigation and Movant is 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. Movant's personal jurisdiction challenge should therefore be denied.

V. MOVANT'S MISJOINDER ARGUMENTS ARE ERRONEOUS AS WELL AS PREMATURE

Movant's challenge to joinder is premature at this early juncture of the litigation. Movant claims that by joining seventy-six Doe Defendants in one action, Plaintiff has created a situation of misjoinder. (*See* Mot. to Dismiss #25 ¶¶ 11–15.) However, federal courts considering other cases with nearly-identical facts—both within this District and across the nation—have decided that such issues are premature at this stage in the litigation, regardless of whether Movant's argument eventually proves to have merit. Lindberg July 26 Order 2; *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”). Movant is, however, incorrect as well as premature.

Movant argues that “Plaintiff fails to allege that the acts of infringement are part of the same transaction, occurrence or series of transactions, or occurrences,” that “the Defendants are accused of downloading different files, with different ISPs, and at different times and days,” and that “there is very little commonality of fact or law in this case.” (Mot. to Quash #25 ¶¶ 13–14.) In fact, as a brief review of Plaintiff's pleadings shows, each of Movant's claims is demonstrably

false. Plaintiff does, in fact, allege that Doe Defendants were part of the same series of transactions, and further states a civil conspiracy claim against Doe Defendants. (Compl. ¶¶ 8, 32–37.) 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.”). While Plaintiff’s list of Doe Defendants does indeed show that many Doe Defendants used different ISPs and their infringing activity was not necessarily observed contemporaneously, Plaintiff makes clear that each Doe Defendant was observed infringing upon the same unique copyrighted Video (“FTV – Tiffany”), entered the torrent swarm particular to that Video, and contributed to the chain of data distribution which perpetuated the existence of that torrent swarm. (*See* Compl. ¶¶ 3, 8, 34.) Finally, contrary to Movant’s claim that little similarity between Doe Defendants exists, Plaintiff has identified no fewer than five questions of law that Doe Defendants share, while not disclaiming the existence of other such shared questions. (*See* Compl. ¶ 8.) Movant’s arguments are thus not only premature, but demonstrably erroneous.

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”).

Discretionary concerns also weigh against severance at this stage of the litigation. The discretionary joinder concerns—avoiding prejudice and delay, ensuring judicial economy, and safeguarding principles of fundamental fairness—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. *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” *Id.* at *7. 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.

As another Court within the Northern District of Illinois recently decided, misjoinder arguments are premature at this stage of the proceedings and would be better handled after Doe Defendants have been named and served. Lindberg July 26 Order 2 (“The Does may raise these issues when plaintiff has named them as defendants, if that action occurs.”) 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 motion because Movant’s joinder challenge is premature.

VI. MOVANT IS NOT ENTITLED TO FEES AND COSTS BECAUSE HE IS NOT A PARTY AND CANNOT PREVAIL

Movant seeks an award of attorney’s fees and costs if his motion is granted. (Mot. to Quash #25 ¶ 16.) 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). Movant merely cites the statutory provision and states, without arguing, that he “would be the prevailing party” if the Court grants his motion in part or full. (Mot. to Quash #25 ¶ 16.)

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.*

Movant cannot meet even this generous standard—he has not been named and served, and thus, is not a party. Courts agree that unserved defendants are not yet “parties” to an action. *See supra* Part I. Movant appears only because he received a letter from his ISP (*see* Mot. to

Quash #25 ¶ 1), and is at this time merely a third party on notice of his potential status as a party defendant. Movant fails 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 his motion, Movant will not be able to point to any appreciable change in the legal relationship between Plaintiff and himself. Plaintiff's subpoenas are not directed at Movant but at non-party ISPs. Movant does not yet have any obligation to appear or otherwise litigate in this district. Movant does 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 Movant has 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 his favor, because Movant is not a party to this case, and because Movant cannot explain how the outcome of his motion would change the legal relationship between Movant and Plaintiff, the Court should deny Movant's request for fees and costs.

CONCLUSION

The Court should deny Movant's motion. Movant's implied request to be treated as a party to this action should be denied; Movant should not be allowed to proceed anonymously; the nonparty subpoena issued to Comcast by Plaintiff was properly issued under Fed. R. Civ. P. 45; Movant's personal jurisdiction arguments suffer multiple fatal flaws; Movant's misjoinder arguments are premature at this stage of the litigation as well as erroneous; and Movant is not entitled to fees or costs.

Respectfully submitted,

FIRST TIME VIDEOS, LLC

DATED: July 27, 2011

By: /s/ John Steele
John Steele (Bar No. 6292158)
Steele Hansmeier PLLC
161 N. Clark St.
Suite 4700
Chicago, IL 60601
312-880-9160; Fax 312-893-5677
jlsteele@wefightpiracy.com
Attorney for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 27, 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