IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

TCYK, LLC,

Plaintiff,

vs. **Case No. 2:13-cv-539**
Judge Marbley
Magistrate Judge King

JOHN DOES 1-47,

Defendants.

OPINION AND ORDER

This is a copyright action in which plaintiff alleges that defendants copied and distributed plaintiff's copyrighted work, the motion picture "The Company You Keep." *Complaint*, Doc. No. 1, ¶ 5. Defendants are otherwise identified only by IP addresses. *Exhibit B*, attached to *Complaint*. This matter is now before the Court on defendant Doe No. 19's *Motion to Quash Subpoena Served Upon Costodian* [sic] *of Records, Wide Open West, and Request for Protective Order* ("*Motion to Quash*"), Doc. No. 5. Plaintiff opposes the *Motion to Quash*. Plaintiff's Memorandum in *Opposition to Defendant Doe No. 19's Motion to Quash or Modify Subpoena* ("*Plaintiff's Response*"), Doc. No. 7. Defendant Doe No. 19 has not filed a reply. For the reasons that follow, defendant's *Motion to Quash* is **DENIED**.

I. BACKGROUND

Plaintiff TCYK, LLC, is a developer, producer, and/or distributor of motion pictures and has exclusive ownership rights over a motion picture entitled "The Company You Keep." *Complaint*, ¶¶ 5, 8, 9.

Plaintiff alleges that unidentified defendant Does 1-47 (collectively, "Doe defendants" or "unidentified defendants") copied and distributed plaintiff's copyrighted work, The Company You Keep. *Id*. at ¶ 5. According to plaintiff, Doe defendants used a peer-to-peer ("P2P") network known as "BitTorrent protocol" or "torrent." *Id*. Plaintiff alleges that individuals, such as the unidentified defendants, joined together as a "swarm" in order to use the BitTorrent protocol to illegally download copyrighted material:

> The BitTorrent protocol makes even small computers with low bandwidth capable of participating in large data transfers across a P2P network. The initial file-provider intentionally elects to share a file with a torrent network. This initial file is called a seed. Other users ("peers") connect to the network and connect to the seed file to download. As yet additional peers request the same file each additional user becomes a part of the network from where the file can be downloaded. However, unlike a traditional peer-to-peer network, each new file downloader is receiving a different piece of the data from users who have already downloaded the file that together comprises the whole. This piecemeal system with multiple pieces of data coming from peer members is usually referred to as a "swarm." The effect of this technology makes every downloader also an uploader of the illegally transferred file(s). This means that every "node" or peer user who has a copy of the infringing copyrighted material on a torrent network can also be a source of download, and thus distributor for that infringing file.

Id.

Plaintiff goes on to allege that the possibility of successfully downloading increases when more peers join the swarm:

> This distributed nature of BitTorrent leads to a rapid viral spreading of a file throughout peer users. As more peers join the swarm, the likelihood of a successful download increases. Because of the nature of a BitTorrent protocol, any seed peer that has downloaded a file prior to the time a subsequent peer downloads the same file can automatically be a source for the subsequent peer so long as that first seed peer's computer is online at the time the subsequent peer downloads a file. Essentially, because

> of the nature of the swarm downloads as described above, every infringer is stealing copyrighted material from other potential infringers in numerous jurisdictions around the world, and each is also distributing infringing material.

Id. at ¶ 6.

According to plaintiff, Doe defendants' copyright infringements permit them and others to illegally obtain and distribute plaintiff's copyrighted works at no cost. *Id*. at ¶ 8. Distributing even a portion of an unlawful copy of a copyrighted work, such as The Company You Keep, "can result in the nearly instantaneous worldwide distribution of that single copy to an unlimited number of people." *Id*.

Plaintiff filed this action on June 5, 2013, alleging that the Doe defendants' unauthorized copying, distribution, and use of plaintiff's copyrighted work violated plaintiff's exclusive rights in The Company You Keep. *Id*. at ¶¶ 12-17. Plaintiff alleges that the Doe defendants' willful, intentional, wanton and/or malicious and/or outrageous acts of copyright infringement (made with full knowledge of plaintiff's ownership copyrights of The Company You Keep) will cause plaintiff irreparable injury unless they are restrained and enjoined. *Id*. at ¶¶ 18-21. Plaintiff seeks statutory and punitive damages for each act of infringement of its copyright as well as costs and attorneys' fees. *Id*. at ¶ 22-25. Plaintiff also seeks injunctive relief prohibiting each Doe defendant from further infringing plaintiff's copyright and ordering each defendant to destroy all copies of the copyrighted The Company You Keep made in violation of plaintiff's copyrights. *Id*. at ¶ 26.

Plaintiff did not know the names of the Doe defendants at the

time the action was filed. *Id*. at ¶ 10. Instead, plaintiff knew each defendant only by (1) the internet protocol ("IP") address assigned to that defendant by his or her internet service provider ("ISP") and (2) the date and time that the infringing activity of each defendant was observed. *Id*. at ¶¶ 10, 16. Plaintiff alleges that each Doe defendant committed violations of the same law (17 U.S.C. § 101, *et seq.*) "within the same series of transactions or occurrences (e.g. downloading and distribution of the same copyrighted Motion Picture [The Company You Keep] owned by Plaintiff) and by using the same means (BitTorrent network)." *Id*. at ¶ 11. Plaintiff also alleges that "all of the infringements alleged in this lawsuit arise from the exact same unique copy of Plaintiff's movie as evidenced by the cryptographic hash value.[1] The Defendants are all part of the exact same 'swarm.'" *Id*. According to plaintiff, the Doe defendants' illegal acts occurred in the same series of transactions and the Doe Defendants conspired together to copy and/or distribute The Company You Keep:

> Defendants' acts occurred in the same series of transactions because each Defendant downloaded and/or distributed, or offered to distribute the Motion Picture [The Company You Keep] to other infringers on the network, including the Doe Defendants and/or other network users, who in turn downloaded and/or distributed the Motion Picture. Therefore, the Defendants each conspired with other infringers on the BitTorrent network to copy and/or distribute the Motion Picture, either in the same transaction or occurrence or a series of transactions or occurrences.

Id.

On the same day that the *Complaint* was filed, plaintiff also

[1] "That value acts as a 'unique digital fingerprint' that ensures a piece of data belongs in a particular torrent file." *Malibu Media, LLC v. Pelizzo*, No. 12-22768-CIV-SEITZ/SIMONTON, 2012 U.S. Dist. LEXIS 180980, at *4 (S.D. Fla. Dec. 20, 2012) (citations omitted).

filed an *ex parte* motion seeking to conduct limited, expedited discovery of non-party internet service providers in order to determine the identities of defendants. Doc. No. 3. Specifically, plaintiff sought leave to serve a subpoena pursuant to Fed. R. Civ. P. 45 on certain ISPs in order to discover the name, address(es), telephone number(s), e-mail address(es), and Media Access Control ("MAC") addresses of each Doe defendant whom plaintiff has identified to date (as well as those whom plaintiff may identify in the future). *Id*. at pp. 20-21. Plaintiff represents that it will use this information only to pursue its claims in this litigation. *Id*. at p. 21. This Court granted plaintiff's *ex parte* motion, concluding that plaintiff had established good cause because it could not meet its service obligation under Fed. R. Civ. P. 4 without the requested discovery. *Order*, Doc. No. 4, pp. 1-2.

On June 14, 2013, plaintiff issued a subpoena to WideOpenWest ("WOW"), seeking information attached to certain IP addresses ("the subpoenaed information"):

> In accordance with the attached court order, please provide all records and information sufficient to identify the people or entities whose Internet Protocol Address ("IP Address") are listed in Attachment A to this Subpoena including the following: personal and business names, any and all addresses, any and all telephone numbers, any and all e-mail addresses, and Media Access Control addresses ("MAC Addresses").

Subpoena, attached to Doc. No. 5 as *Exhibit A*. The subpoena identified a response date of July 8, 2013. *Id*.

Doe No. 19 ("the moving defendant") filed the *Motion to Quash* on July 22, 2013, seeking to quash the subpoena or, alternatively, to obtain a protective order limiting the information sought to

defendant's name and address and limiting the purpose for which plaintiff may use the information. Plaintiff opposes the motion, *Plaintiff's Response*. Defendant has not filed a reply. This matter is now ripe for consideration.

II. Standard

The Federal Rules of Civil Procedure grant parties the right to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). Relevance for discovery purposes is extremely broad. *Lewis v. ACB Bus. Servs., Inc.*, 135 F.3d 389, 402 (6th Cir. 1998). However, "district courts have discretion to limit the scope of discovery where the information sought is overly broad or would prove unduly burdensome to produce." *Surles ex rel. Johnson v. Greyhound Lines, Inc.*, 474 F.3d 288, 305 (6th Cir. 2007) (citing Fed. R. Civ. P. 26(b)(2)). In determining the proper scope of discovery, a district court balances a party's "right to discovery with the need to prevent 'fishing expeditions.'" *Conti v. Am. Axle & Mfg., Inc.*, 326 F. App'x 900, 907 (6th Cir. 2009) (quoting *Bush v. Dictaphone Corp.*, 161 F.3d 363, 367 (6th Cir. 1998)).

Under Rule 45 of the Federal Rules of Civil Procedure, parties may command a nonparty to, *inter alia*, produce documents. Fed. R. Civ. P. 45(a)(1). Rule 45 further provides that "the issuing court must quash or modify a subpoena that . . . requires disclosure of privileged or other protected matter, if no exception or waiver applies; or subjects a person to undue burden." Fed. R. Civ. P. 45(c)(3)(A)(iii), (iv). Although irrelevance or overbreadth are not

specifically listed under Rule 45 as a basis for quashing a subpoena, courts "have held that the scope of discovery under a subpoena is the same as the scope of discovery under Rule 26." *Hendricks v. Total Quality Logistics, LLC*, 275 F.R.D. 251, 253 (S.D. Ohio 2011) (citations and quotations omitted). The movant bears the burden of persuading the court that a subpoena should be quashed. *See*, *e.g.*, *Baumgardner v. La. Binding Serv., Inc.*, No. 1:11-cv-794, 2013 U.S. Dist. LEXIS 27494, at *4 (S.D. Ohio Feb. 28, 2013); *Williams v. Wellston City Sch. Dist.*, No. 2:09-cv-566, 2010 U.S. Dist. LEXIS 122796, at *21 (S.D. Ohio Nov. 2, 2010).

III. Discussion

The moving defendant argues that the subpoena should be quashed because it requires disclosure of protected information, subjects the moving defendant to an undue burden, seeks irrelevant information, and poses a risk of extortion. Each argument will be discussed in turn.

The moving defendant argues that the subpoena should be quashed because the subpoenaed information is not relevant to this action. *Motion to Quash*, pp. 1, 3, 6. Specifically, the moving defendant argues that the subpoenaed information is not relevant because the identity of the IP subscriber does not provide the "identity of the infringer" and plaintiff is unable to link the moving defendant to the alleged infringing activity. *Id*. Defendant's argument is premised on the notion that the "subpoena should not have been issued in the first place." *Id*. at p. 6. This argument is not well taken.

As noted *supra*, the Court previously concluded that plaintiff's request for expedited discovery was supported by good cause. *Order*,

Doc. No. 4 (citing *Arista Records, LLC v. Does 1-15*, No. 2:07-cv-450, 2007 WL 5254326, at *2 (S.D. Ohio May 17, 2007)). *See also Breaking Glass Pictures v. Does 1-99*, No. 2:13-cv-389, 2013 U.S. Dist. LEXIS 88090 (S.D. Ohio June 24, 2013) (finding good cause and permitting expedited discovery in a copyright infringement case in order to obtain the identity of each Doe defendant). To the extent that defendant asks the Court to revisit this conclusion, he has offered nothing to establish that the prior decision was erroneous. For example, defendant argues at length that the mere identification of the subscriber does not necessarily establish that the subscriber was the person who allegedly downloaded the copyrighted work. *See Motion to Quash*, pp. 3-6 (arguing, *inter alia*, that a hacker, open wireless network, malicious computer software, an individual spoofing an IP address, or a third party could have downloaded the copyrighted work and that "there may or may not be a correlation between the individual subscriber, the IP address, and the infringing activity"). However, nothing in Rule 45 permits a court to quash a subpoena based on "a general denial of liability." *See*, *e.g.*, *First Time Videos, LLC v. Does 1-500*, 276 F.R.D. 241, 250 (N.D. Ill. 2011). *See also* Fed. R. Civ. P. 45. Instead, arguments related to the merits of the allegations are appropriately addressed in the context of a motion to dismiss or a motion for summary judgment, rather than on a motion to quash. *See*, *e.g.*, *First Time Videos, LLC*, 276 F.R.D. at 250.

The subpoenaed information is also relevant because, as this Court previously concluded, plaintiff cannot meet its service obligation under Fed. R. Civ. P. 4 without the requested discovery.

Order, Doc. No. 4, pp. 1-2. Moreover, Rule 26 authorizes broad discovery, including discovery that "appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Therefore, even if discovery later reveals that a person other than the subscriber violated plaintiff's copyright, the subpoenaed information (the subscriber's contact information) is nevertheless reasonably calculated to lead to the discovery of admissible information, *i.e.*, the identity of the actual infringer.

The moving defendant also argues that the subpoena should be quashed "because it seeks disclosure of personal identification information considered to be confidential and over which [defendant] has personal and proprietary interests." *Motion to Quash*, pp. 2, 5. The moving defendant's conclusory argument does not, however, explain how disclosure of his or her name, address, telephone number, e-mail address, and MAC address would harm the moving defendant or otherwise invade his or her privacy. *See Breaking Glass Pictures v. Does 1-283*, No. 3:13-cv-75, 2013 U.S. Dist. LEXIS 83225, at *5 (E.D. Tenn. June 13, 2013); *Sojo Prods., Inc. v. Does 1-67*, Nos. 3:12-cv-599, 3:12-cv-600; 3:12-cv-601, 3:12-cv-602, 3:12-cv-603, 2013 U.S. Dist. LEXIS 58602, at *5-6 (E.D. Tenn. Apr. 24, 2013). In particular, the moving defendant has not articulated a reasonable expectation of privacy in light of the fact that he or she has already shared that information with the ISP in order to obtain internet service. *See Safety Point Prods., LLC, v. Does 1-57*, No. 3:12-cv-601, 2013 U.S. Dist. LEXIS 49521, at *4-5 (E.D. Tenn. Apr. 5, 2013).; *Sojo Prods., Inc.*, 2013 U.S. Dist. LEXIS 58602 at *5-6. *Cf*. *Breaking Glass Pictures*, 2013

U.S. Dist. LEXIS 83225 at *5 (concluding that requested information is neither privileged nor protected because defendants already shared the information with the ISP).

The moving defendant further argues that the subpoena subjects the moving defendant to "undue burden." *Motion to Quash*, p. 1. *See also id*. at p. 4 ("Given the nature of the allegations and the material in question, should this Court force Wide Open West to turn over the requested information, [defendant] would suffer a reputational injury."). In response, plaintiff argues that the moving defendant lacks standing in this regard because the moving defendant "was not served with [the] subpoena or required to act or produce any information." *Plaintiff's Response*, p. 7.

Rule 45 requires that the party issuing the subpoena "take reasonable steps to avoid imposing undue burden or expense *on a person subject to the subpoena*." Fed. R. Civ. P. 45(c)(1) (emphasis added). *Cf. Info-Hold, Inc. v. Sound Merch., Inc.*, 538 F.3d 448, 457 (6th Cir. 2008) ("'[D]istrict courts have discretion to limit the scope of discovery where the information sought is overly broad or would prove unduly burdensome to produce.'") (quoting *Surles ex rel. Johnson*, 474 F.3d at 305). This Court has previously held that only the entity responding to the subpoena has standing to challenge the subpoena on the basis of undue burden. *See Levitin v. Nationwide Mut. Ins. Co*., 2:12-cv-34, 2012 U.S. Dist. LEXIS 177738, at *14-15 (S.D. Ohio Dec. 14, 2012) ("Here, the subpoenas are directed to Plaintiff's prior employers. Thus, only Plaintiff's prior employers have standing to challenge the subpoenas on the ground that production of the

subpoenaed documents would pose an undue burden expense."). *See also McNaughton-McKay, Elec. Co. v. Linamar Corp.*, No. 09-cv-11165, 2010 U.S. Dist. LEXIS 59275, at *9-10 (E.D. Mich. June 15, 2010) ("Defendant [which was not the recipient of the subpoena] does not have standing to argue that Chrysler's compliance with the subpoena will cause undue burden where Chrysler has not objected to the subpoena on this ground."); *Donahoo v. Ohio Dep't of Youth Servs.*, 211 F.R.D. 303, 306 (N.D. Ohio 2002) ("The party to whom the subpoena is directed is the only party with standing to oppose it.").

In the case presently before the Court, the moving defendant is not required to respond to the subpoena; WOW is the responding party. WOW has not moved to quash the subpoena, nor has it even suggested that responding to the subpoena will impose an undue burden on it. Moreover, plaintiff's representation that WOW has already produced subpoenaed information regarding other Doe defendants is uncontroverted. *See Plaintiff's Response*, pp. 7-8 ("In fact Wide Open West has not only represented that it will respond to the subpoenas after giving its customers thirty days' notice, it has actually responded by providing the information for other "Doe" Defendants."). Under these circumstances, the moving defendant has not established that the subpoena imposes an undue burden or that the moving defendant has standing to challenge the subpoena on the basis of undue burden.

Finally, the moving defendant contends that BitTorrent copyright infringement cases such as this present a risk of extortion by the "use discovery to extort settlements from anonymous defendants who wish to avoid the embarrassment of being publicly associated with this

type of allegation." *Motion to Quash*, p. 6 (citing *VPR Internationale v. Does 1-1017*, No. 11-2068, 2011 U.S. Dist. LEXIS 64656 (C.D. Ill. Apr. 29, 2011)). However, other than these generalized fears, the moving defendant has offered no evidence (or even allegation) that the plaintiff in this action has engaged in abusive litigation tactics. On this record, this Court declines to impute such guilt to plaintiff or to preclud the pursuit of this action at this stage. *See*, *e.g.*, *Malibu Media, LLC v. John Does 1-5*, 285 F.R.D. 273, 278 (S.D. N.Y. 2012) ("[N]one of the instances of improper litigation tactics that have been brought to our attention involve plaintiff or plaintiff's counsel. We are reluctant to prevent plaintiff from proceeding with its case based only on a 'guilt-by-association' rationale."). The Court also notes that, unlike the allegations of illegal downloads in other actions addressing coercive settlements, *cf. id*, this litigation does not, apparently, involve the alleged downloading of pornography. Moreover, even if this case did present a risk of public embarrassment, the Doe defendants may take measures to protect themselves. *See*, *e.g.*, *Malibu Media, LLC v. John Does 1-14*, 902 F. Supp. 2d 690 (E.D. Penn. 2012) (granting motions to proceed anonymously). Additionally, should any Doe defendant establish that plaintiff's claims have been vexatiously pursued or are frivolous, or if any Doe defendant prevails, that party may seek sanctions and/or reimbursement for his or her costs and fees. *See* Fed. R. Civ. P. 11; 28 U.S.C. § 1927; 17 U.S.C. § 505; Fed. R. Civ. P. 54. For all these reasons, the moving defendant's argument to quash the subpoena based on a generalized fear of extortion is not well taken.

In short, the moving defendant's request to quash the subpoena lacks merit.

The moving defendant also seeks a protective order limiting the subpoena to only those documents that identify each Doe defendant by name and address and to require plaintiff "to keep this information confidential until further order of this Court, or the Plaintiff files a complaint against Doe No. 19." *Motion to Quash*, p. 7. The moving defendant argues that the other information sought by the subpoena, *i.e.*, telephone numbers, e-mail addresses, and MAC addresses, is "not relevant for the sole purposes of identifying a defendant and serving a Summons." *Id*.

Defendant's request for a protective order is essentially a request to modify a subpoena under Rule 45 based on the purported irrelevance of the information sought by the subpoena. As discussed *supra*, however, plaintiff has established the relevance of the information sought and good cause exists to issue the subpoena. Furthermore, in granting plaintiff's motion for expedited discovery, the Court ordered that "any information disclosed to plaintiff in response to the Rule 45 subpoenas . . . be used by plaintiff solely for the purpose of protecting plaintiff's rights under the Copyright Act." *Order*, Doc. No. 4, p. 2. The moving defendant has not articulated a reason to further limit plaintiff's use of the subpoenaed information, nor has the moving defendant explained why the Court's prior order is insufficient. Finally, even if the moving defendant's request is construed as a request for a protective order under Rule 26, the moving defendant has not articulated specific facts

showing a clearly defined and serious injury resulting from the discovery sought, *see Nix v. Sword*, 11 F. App'x 498, 500 (6th Cir. 2001) ("To show good cause, a movant for a protective order must articulate specific facts showing 'clearly defined and serious injury' resulting from the discovery sought and cannot rely on mere conclusory statements.") (quoting *Avirgan v. Hull*, 118 F.R.D. 252, 254 (D.D.C. 1987) (internal quotation marks omitted)), and the moving defendant has not certified that he or she "has in good faith conferred or attempted to confer with the other affected parties in an effort to resolve the dispute without court action." Fed. R. Civ. P. 26(c)(1). The moving defendant's request for a protective order is therefore without merit.

Accordingly, defendant Doe No. 19's *Motion to Quash*, Doc. No. 5, is **DENIED**.

September 9, 2013

s/Norah McCann King
Norah McCann King
United States Magistrate Judge