UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

PATRICK COLLINS, INC., a California Corporation, Plaintiff, vs. JOHN DOES 1 through 9, Defendants.	CASE NO. 3:12-CV-01436-H (MDD) **ORDER GRANTING DEFENDANT'S MOTION TO SEVER AND DISMISS ALL JOHN DOES OTHER THAN DOE NO. 1**

On October 5, 2012, Defendant John Doe "Y" ("Defendant") filed a motion to sever all Defendant Does other than Doe No. 1, and a motion to quash all outstanding subpoenas. (Doc. No. 12.) On October 24, 2012, the Court referred the motion to quash to the Magistrate Judge, but retained the motion to sever. (Doc. No. 16.) On October 30, 2012, Plaintiff filed its opposition to the motion to sever. (Doc. No. 17.) On November 6, 2012, Defendant filed a reply in support of the motion. (Doc. No. 20.) The Court exercised its discretion pursuant to Local Rule 7.1(d)(1) and determined that the matter of the motion to sever is appropriate for resolution without oral argument. (Doc. No. 16.) Accordingly, the Court decides the motion on the parties' papers. For the following reasons, the Court grants Defendant's motion to sever pursuant to Federal Rules of Civil Procedure 20 and 21.

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Background

This is an action for copyright infringement. Plaintiff Patrick Collins, Inc. ("Plaintiff" or "Patrick Collins") is the owner of United States Copyright Registration Number PA0001788821 (the "Registration") for the motion picture entitled "Performers of the Year 2012" (the "Work"). (Doc. No. 1 ("Compl.") at ¶ 11.) Plaintiff alleges that Defendants used a software program called BitTorrent to download and upload copies of the Work over the internet. (Id. ¶¶ 16, 29-33, 36.) Plaintiff alleges that each Defendant installed a BitTorrent Client onto his or her computer. (Id. 29-33.) The BitTorrent Client is a software program that implements the BitTorrent protocol and allows users to transmit data over the internet. (Id. ¶¶ 14-18.) BitTorrent is a peer-to-peer file sharing protocol which operates by having users simultaneously upload and download pieces of a given file. (Id. ¶¶ 29-33.) Once an individual has downloaded every piece of the sought-after file, the BitTorrent Client reassembles the pieces and the user is able to utilize the file; in this case, view the movie. (Id. ¶ 35.)[1]

An IP address is a number that is assigned by an Internet Service Provider ("ISP") to devices, such as computers, that are connected to the internet. (Id. ¶ 8.) Plaintiff claims that the ISP to which an internet user subscribes can correlate the user's IP address to the user's true identity. (Id. ¶ 9.) Plaintiff retained IPP, Limited ("IPP") to identify the IP addresses that

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[1] The BitTorrent protocol has been more thoroughly summarized as follows:

> In the BitTorrent vernacular, individual downloaders/distributors of a particular file are called "peers." The group of peers involved in downloading/distributing a particular file is called a "swarm." A server which stores a list of peers in a swarm is called a "tracker." A computer program that implements the BitTorrent protocol is called a BitTorrent "client."
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> The BitTorrent protocol operates as follows. First, a user locates a small "torrent" file. This file contains information about the files to be shared and about the tracker, the computer that coordinates the file distribution. Second, the user loads the torrent file into a BitTorrent client, which automatically attempts to connect to the tracker listed in the torrent file. Third, the tracker responds with a list of peers and the BitTorrent client connects to those peers to begin downloading data from and distributing data to the other peers in the swarm. When the download is complete, the BitTorrent client continues distributing data to the peers in the swarm until the user manually disconnects from the swarm or the BitTorrent client otherwise does the same.

Diabolic Video Prods., Inc. v. Does 1-2099, No. 10-CV-5865, 2011 WL 3100404, at *1-2 (N.D. Cal. May 31, 2011).

used BitTorrent to reproduce and distribute the Work. (Id. ¶ 36.)

On June 13, 2012, Plaintiff brought this action against the undetermined Doe users of the IP addresses identified by IPP, alleging copyright infringement and contributory infringement pursuant to 17 U.S.C. §§ 106 and 501. (Compl. ¶¶ 45-61.) Plaintiff seeks injunctive relief to prevent further unauthorized distribution as well as at least $150,000 in damages per defendant. (Compl. at 10.) Plaintiff asserts that joinder of all Defendants is proper because Defendants all participated in reproducing the same file, the Work, over BitTorrent. (Compl. ¶¶ 39-42.) Putative Defendant John Doe "Y" now moves to sever all of the John Does other than Doe No. 1, and dismiss the claims against all the other Does without prejudice. (Doc. No. 12.)

Discussion

I. Legal Standard

Under Rule 20(a)(2), permissive joinder of defendants is proper 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." Fed. R. Civ. P. 20(a)(2). Rule 20(a)(2) is designed to promote judicial economy and trial convenience. See Mosley v. Gen. Motors, 497 F.2d 1330, 1332-33 (8th Cir. 1974). "The 'same transaction' requirement of Rule 20 refers to 'similarity in the factual background of a claim; claims that arise out of a systematic pattern of events' and have a 'very definite logical relationship.'" Hubbard v. Hougland, No. 09-0939, 2010 U.S. Dist. LEXIS 46184, at *7 (E.D. Cal. Apr. 5, 2010) (quoting Bautista v. Los Angeles County, 216 F.3d 837, 842-843 (9th Cir. 2000)). In addition, "the mere fact that all [of a plaintiff's] claims arise under the same general law does not necessarily establish a common question of law or fact." Coughlin v. Rogers, 130 F.3d 1348, 1351 (9th Cir. 1997). Claims "involv[ing] different legal issues, standards and procedures" do not involve common factual or legal questions. Id.; accord Hubbard, U.S. Dist. LEXIS 46184, at *7-8.

However, "even once [the Rule 20(a)] requirements are met, a district court must

examine whether permissive joinder would 'comport with the principles of fundamental fairness' or would result in prejudice to either side." Coleman v. Quaker Oats Company, 232 F.3d 1271, 1296 (9th Cir. 2000) (citing Desert Empire Bank v. Insurance Co. of North America, 623 F.2d 1371, 1375 (9th Cir. 1980) (finding that the district court did not abuse its discretion when it severed certain plaintiff's claims without finding improper joinder)). Under Rule 20(b), the district court may sever claims or parties in order to avoid prejudice. Fed. R. Civ. P. 20(b). Courts have also exercised their discretion to sever where "[i]nstead of making the resolution of [the] case more efficient . . . joinder would instead confuse and complicate the issues for all parties involved." Wynn v. National Broadcasting Company, 234 F. Supp. 2d 1067, 1088 (C.D. Cal. 2002) (finding that even where Rule 20 requirements for joinder are satisfied, the Court may exercise its discretion "to sever for at least two reasons: (1) to prevent jury confusion and judicial inefficiency, and (2) to prevent unfair prejudice to the [defendants]") (citing Coleman, 232 F.3d at 1296).

The proper remedy for misjoinder is to sever misjoined parties and dismiss claims against them, provided that "no substantial right will be prejudiced by the severance." Coughlin, 130 F.3d at 1350.

II. Defendants Should be Severed

Defendant argues that Plaintiff improperly joined the putative defendants in this case because the alleged conduct was not part of the same transaction or occurrence and individual factual and legal issues will predominate, and, even if joinder was technically proper, concerns of judicial efficiency and fairness to the parties counsel in favor of the Court exercising its discretion to sever. The Court agrees.

Plaintiff's "swarm joinder" theory, namely that use of the same peer-to-peer network to download the same files constitutes the same "transaction or occurrence," has met with mixed results in the courts. However, the majority view among district courts within the Ninth Circuit is that allegations of swarm joinder are alone insufficient for joinder. See, e.g., Malibu Media LLC v. John Does 1-10, No. 12-CV-01642 (C.D. Cal. Oct. 10, 2012) (No. 32); Hard Drive Prods. v. Does 1-188, 809 F. Supp. 2d 1150, 1160 (N.D. Cal. 2011); Pacific Century Int'l

Ltd. v. Does 1-101, No. 11-02533, 2011 WL 2690142 (N.D. Cal. July 8, 2011); Diabolic Video Productions, Inc. v. Does 1-2099, No. 10-5865, 2011 WL 3100404 (N.D. Cal. May 31, 2011); Millennium TGA, Inc. v. Does 1-21, No. 11-2258, 2011 WL 1812786 (N.D. Cal. May 12, 2011). But see Liberty Media Holdings, LLC v. Does 1-62, No. 11-CV-575, 2012 WL 628309 (S.D. Cal. Feb. 24, 2012) (permitting joinder at early stages of litigation). Additionally, "[c]ourts around the country . . . have found that allegations that Doe defendants used the same peer-to-peer network to infringe a plaintiff's copyrighted works are insufficient for joinder of multiple defendants under Rule 20." Boy Racer, Inc. v. Does 1-60, No. 11-01738, 2011 U.S. Dist. LEXIS 92994, at *4-5 (N.D. Cal. August 19, 2011); see, e.g., Laface Records, LLC v. Does 1 - 38, No. 07-CV-298, 2008 U.S. Dist. LEXIS 14544 (E.D.N.C. Feb. 27, 2008) (ordering the severance of claims against thirty-eight defendants where plaintiff alleged each defendant used the same ISP as well as the same peer-to-peer network to commit the alleged copyright infringement, but there was no assertion that the multiple defendants acted in concert); Interscope Records v. Does 1-25, No. 04-CV-197, 2004 U.S. Dist. LEXIS 27782 (M.D. Fla. Apr. 1, 2004) (recommending sua sponte severance of multiple defendants in action where only connection between defendants was allegation that they used same ISP and peer-to-peer network to conduct copyright infringement); see also BMG Music v. Does, No. 06-01579, 2006 U.S. Dist. LEXIS 53237 (N.D. Cal. July 31, 2006) (finding improper joinder of four Doe defendants where the complaint alleged that each defendant used the same ISP to engage in distinct acts of infringement on separate dates at separate times, and there was no allegation that defendants acted in concert); Twentieth Century Fox Film Corp. v. Does 1-12, No. 04-04862 (N.D. Cal. Nov. 16, 2004) (severing twelve Doe defendants in a copyright infringement case where although defendants used the same ISP to allegedly infringe motion picture recordings, there was no allegation that the individuals acted in concert).

Moreover, while Plaintiff alleges that Doe Defendants all reproduced the same file using the same peer-to-peer network, the factual connection between their conduct ends there. Plaintiff's claims that the defendants conspired to infringe the copyrighted work are "wholly conclusory and lack any facts to support an allegation that defendants worked in concert to

violate plaintiff's copyrights." IO Group v. Does 1-19, No. 10-03851, 2010 U.S. Dist. LEXIS 133717, at *8-9 (N.D. Cal. Dec. 7, 2010). Even assuming the validity of Plaintiff's theory, the Complaint fails to allege facts demonstrating that Doe Defendants actually shared the same file with one another, even unintentionally. Indeed, the alleged infringing conduct of each Doe Defendant occurred as much as a month apart. (Doc. No. 1-2, Compl. Ex. A.) Because "a downloader may log off at any time, including before receiving all the pieces of the copyrighted work," the fact that Defendants allegedly shared the same file at different times does not satisfy the requirements for joinder absent more than a mere conclusory allegation of collusion. Malibu Media v. John Does 1-10, No. 12-CV-3623 (C.D. Cal. June 27, 2012) (No. 7); see Malibu Media LLC v. John Does 1-10, No. 12-CV-01642 (C.D. Cal. Oct. 10, 2012) (No. 32) (severing and dismissing defendants where, because alleged conduct occurred at different dates and times, "there [was] no indication that Defendants in each case had any knowledge of or direct contact with one another"); DigiProtect USA Corp. v. Doe, No. 10-CV-8760, 2011 U.S. Dist. LEXIS 109464, at *8-9 (S.D.N.Y. Sept. 26, 2011) (declining to treat Does as having conspired in part because complaint did not allege that Doe defendants accessed the peer-to-peer network at overlapping times). "To be part of the 'same transaction' requires shared, overlapping facts that give rise to each cause of action, and not just distinct, albeit coincidentally identical, facts." In re EMC Corp., Decho Corp, & Iomega Corp., 677 F.3d 1351, 1359 (Fed. Cir. 2012). Where "the only factual allegation connecting the defendants [is] the allegation that they all used the same peer-to-peer network to reproduce and distribute the plaintiff's copyrighted work[, that allegation is] insufficient for joinder of multiple defendants under Rule 20." Boy Racer, 2011 U.S. Dist. Lexis at 92994, at *6 (citing IO Group, 2010 U.S. Dist. LEXIS 133717, at *8-9 (internal quotation marks omitted)); cf. In re EMC Corp., Decho Corp, & Iomega Corp., 677 F.3d at 1357 ("[T]he mere fact that infringement of the same claims of the same patent is alleged does not support joinder, even though the claims would raise common questions of claim construction and invalidity."). Severance is proper even though the Doe Defendants allegedly used BitTorrent, a file sharing protocol with the potential to allow many users to simultaneously exchange pieces of a file as

a "swarm," rather than older peer-to-peer networks that relied on more discrete transactions. Boy Racer, 2011 U.S. Dist. Lexis at 92994, at *7-8. Doe Defendants' alleged conduct therefore lacks the type of "very definite logic relationship" required to permit joinder. Bautista, 216 F.3d at 842-843.

Moreover, at this stage of the litigation, the limited commonality between Defendants' alleged conduct indicates that individual facts and defenses as to each defendant will predominate and joinder would likely confuse and complicate the issues. See In re BitTorrent Adult Film Copyright Infringement Cases, 2012 WL 1570765, at *11-12 (E.D. N.Y. May 1, 2012). The Court concludes that the interests of avoiding undue prejudice and jury confusion, as well as judicial efficiency and fundamental fairness, are better served by severing these defendants and requiring Plaintiff to file separate cases against each defendant individually. Plaintiff may always seek to have the cases consolidated at a later stage in the litigation if it appears that consolidation is the more expedient approach. See In re EMC Corp., Decho Corp, & Iomega Corp., 677 F.3d at 1360 ("[E]ven if joinder is not permitted under Rule 20, the district court has considerable discretion to consolidate cases for discovery and for trial under Rule 42 where venue is proper and there is only 'a common question of law or fact.'"). Accordingly, the Court exercises its discretion and determines that severance is proper. See Coleman, 232 F.3d at 1296.

Conclusion

The Court grants Defendant's motion and severs all defendants except Doe Defendant at IP address 108.80.117.253 (listed as Doe No. 1 in Exhibit A to the Complaint). The Court dismisses the claims against the severed Doe Defendants without prejudice to Plaintiff refiling through separate complaints.

IT IS SO ORDERED.

Dated: November 8, 2012

MARILYN L. HUFF, District Judge
UNITED STATES DISTRICT COURT