UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MALIBU MEDIA, LLC,
a California limited liability company,
Plaintiff,
vs.

JOHN DOES 1-30,
Defendants.

Civil Action No. 2:12-cv-13312

District Judge Denise Page Hood
Magistrate Judge Michael Hluchaniuk

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PUTATIVE JOHN DOE X'S MOTION TO SEVER

PUTATIVE DEFENDANT JOHN DOE X ("Doe X" or "Movant"), by and through his attorneys, respectfully requests that this Honorable Court sever and dismiss without prejudice the claims against all John Doe defendants other than John Doe No. 1, pursuant to Fed. R. Civ. Proc. 20 and Fed. R. Civ. Proc. 21, on the following grounds:

1. As a matter of the Court's discretion, per Fed. R. Civ. Proc. 20(b) and Fed. R. Civ. Proc. 21, even though some Courts in this District have previously found "swarm joinder" to be appropriate at this stage of litigation, because: (a) although there are a few common questions of

law or fact such that the second prong of joinder test is technically satisfied (Fed. R. Civ. Proc. 20(a)(2)(B)), the different factual circumstances (*e.g.*, who had access to the wireless network?) and legal defenses as between the different John Doe defendants will predominate; (b) allowing "swarm joinder" results in this Court missing out on substantial sums in statutorily-required filing fees; (c) in view of the "abusive litigation tactics" employed by Malibu Media and its lawyers in similar cases nationwide; (d) the Court should review the prior record of the plaintiff's cases in this district and sever the Does to discourage forum shopping, given that this district is quickly becoming a preferred forum for these kinds of coercive lawsuits; (e) an equally efficient yet more just way to handle these cases, rather than joinder of multiple Does into a single action, would be to sever the Does, but then relate and consolidate the single-Doe actions for certain purposes (such as pre-service discovery, motions to quash, etc.), as appropriate.

2. Joinder is impermissible under Rule 20(a)(2)(A) because plaintiff has not met its burden of showing that there is a "logical relationship" between the defendants that is sufficiently definite and direct to support joinder. *See, e.g., Patrick Collins, Inc. v. John Does, et al.*, C.D. Cal. Case No. 12-cv-5267-JVS-RNB, ECF No. 21, 11/5/12 (holding that on the Ninth Circuit there must be a "very definite logical relationship" to support joinder under Rule 20 so Doe defendants in BitTorrent case must be severed); *Patrick Collins, Inc. v. John Does 1 through 9*, S.D. Cal. Case No. 12-cv-1436-H-MDD, ECF No. 23, 11/8/12 ("the majority view among district courts within the Ninth Circuit is that allegations of swarm joinder are alone insufficient for joinder". . . "Doe Defendants' alleged conduct therefore lacks the type of 'very definite logic relationship' required to permit joinder."); *quoting Bautista v. Los Angeles County*, 216 F.3d 837, 842-843 (9th Cir. 2000); *Hubbard v. Hougland*, No. 09-0939, 2010 U.S. Dist. LEXIS 46184, at *7 (E.D. Cal. Apr. 5,2010) (quoting *Bautista); Union Paving Co. v. Downer Corp.*, 276 F.2d 468, 470 (9th Cir. 1960) (origin of "very definite logical relationship" standard on Ninth Circuit that was later applied in *Bautista*); *Patrick Collins, Inc. v. John Does 1-23*, E.D. Mi. Case No. 11-cv-15231-GCS-RSW, EC No. 8, 3/26/12 (Steeh, J.) (severing Does as improperly joined) *cf. Third Degree Films v. John Does 1-36,* E.D. Mi. Case No. 11-cv-15200-SJM-LJM, ECF No. 17, 5/29/12 (Michelson, M.J.) (finding joinder appropriate, in a close decision, but noting that "the Court agrees with Defendant

that it is unlikely that any defendant in this case *directly* shared a piece of the work with another defendant").

3. If the Court severs the Does, then the outstanding subpoenas seeking to identify all Does other than Does No. 1 should be quashed, in order to give effect to the Court's severance order. *In re: BitTorrent Adult Film Copyright Infringement Cases*, 2012 U.S. Dist. LEXIS 61447 (E.D.N.Y. May 1, 2012) Case No. CV-11-3995-DRH-GRB, ECF No. 39, pp. 23-25; *Digital Sins, Inc. v. John Does 1-245*, S.D.N.Y. Case No. 11-cv-8170, ECF No. 18, 5/15/12, p. 7 ("Because I have severed and dismissed all of the claims against the defendants, I hereby, sua sponte, quash any subpoena that may be outstanding to any Internet service provider seeking information about the identity of any John Doe other than John Doe 1. Plaintiff is directed to send a copy of this order within 24 hours of its issuance to any and every internet service provider who has been served with a subpoena for any information concerning any other John Doe defendant."). To do otherwise would only encourage plaintiffs to try and avoid paying statutorily required filing fees by misjoining as many Does as possible, and then forcing the Does to file, and the Court to hear, motions for severance.

4. Movant relies on this Notice of Motion, the concurrently filed Memorandum of Points and Authorities, the Declaration of Morgan E. Pietz; the pleadings and records on file herein; and on such further evidence as the Court may admit at any hearing on this matter.

Respectfully submitted,

DATED: January 4, 2012

/s/ Morgan Pietz
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CERTIFICATE OF SERVICE

I hereby certify that on this day, I electronically filed the foregoing paper with the Clerk of the Court using ECF, which will send notification of such filing to all attorneys of record.

/s/Hattem Beydoun_
Dated: January 4, 2012 Hattem A. Beydoun

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MEMORANDUM IN SUPPORT OF PUTATIVE JOHN DOE X'S MOTION TO SEVER

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I. INTRODUCTION AND SUMMARY

Plaintiff Malibu Media, LLC's cases in this District are part of the "nationwide blizzard of civil actions brought by purveyors of pornographic films alleging copyright infringement by individuals utilizing a computer protocol known as BitTorrent." *In re: BitTorrent Adult Film Copyright Infringement Cases,* 2012 U.S. Dist. LEXIS 61447 E.D.N.Y. May 1, 2012) Case No. CV-11-3995-DRH-GRB, ECF No. 39 ("*In re: Adult Film Cases*"). Courts across the country are growing increasingly skeptical of these cases; Judge Wright of the Central District of California, while presiding over a Malibu Media case, recently described this kind of litigation as "essentially an extortion scheme." *Malibu Media v. John Does 1-10*, C.D. Cal. Case No. 12-cv-3623-ODW-PJW, docket no. 7, 6/27/12, p. 6 (emphasis added). Exactly how this "extortion scheme" works is detailed in the next section.

At issue here is so-called "swarm joinder," which is the foundation for Malibu Media's new business model. Movant is aware that Judge Hood previously accepted the detailed report and recommendation of Magistrate Judge Randon in *Patrick Collins, Inc. v. John Does 1-21*, E.D. Mi. Case No. 11-cv-15232-DPH-MJR ("*Patrick Collins*"), but is ***respectfully asking Judge Hood to revisit the "swarm joinder" issue,*** while considering some new arguments.

Most significantly, even if this Court finds joinder to be technically proper, Movant believes there are still several very good reasons to order discretionary severance. In *Patrick Collins*, arguments on discretionary severance did not figure into Judge Hood's final order, but Movant believes this should be a dispositive issue. Recently, several courts have followed this approach, including Judge Whittemore's recent order out of the Middle District of Florida, which is another forum that had, until recently, been a preferred forum for these kinds of lawsuits. *Malibu Media, LLC v. John Does 1-28*, M.D. Fl. Case No. 8:12-cv-1667, ECF No. 22, 12/6/12. Similarly, Judge Young of Massachusetts—who had issued an earlier decision finding swarm joinder appropriate—also recently revisited the issue and changed course, ordering severance as a matter of the court's discretion, even if joinder was technically permissible. *Third Degree Films v. Does 1-47*, ___ F. Supp. 2d ___, D. Mass. Case No. 12-10761, ECF No. 31, 10/2/12, 2012 WL 4498911.[1]

[1] Copies of Judge Whittemore's and Judge Young's orders are attached as Exhibits D and E.

Consistent with the orders of Judges Whittemore and Young, Movant believes there are at least five good reasons to order discretionary severance: (i) the Does will all have different factual circumstances and legal defenses, particularly with respect to who had access to their home Internet networks, and whether these networks were encrypted; (ii) if Malibu Media wants to avail itself of the court's subpoena power to run a national copyright infringement "settlement" mill, it should factor ***full*** payment of statutorily required filing fees into the business model; (iii) Malibu Media is infamous for its "abusive litigation tactics" designed to pressure ISP subscribers—who may or may not have actually downloaded Malibu Media's movies—to enter into quick settlements; (iv) the Court should take notice of its own docket and sever the Does in order to discourage the kind of forum shopping currently making this a preferred forum for these pornographic infringement lawsuits; and (v) by relating single-Doe cases to a single Judge, but then consolidating the cases for certain purposes (*e.g.*, with respect to any pre-service motions to quash, or to adjudicate the validity of the copyrights) per Rule 42, the Court can ensure judicial economy and ease the administrative burden of these cases in a way that is more fair.

The focus on discretionary severance is not a concession that "swarm joinder" is appropriate. To the contrary, Movant believes joinder of the Does is not actually permissible, for three reasons: (i) Movant disputes the previously unchallenged factual predicate upon which Judge Randon justifies his departure from prior precedent. Specifically, Movant disagrees with the assumption that BitTorrent is somehow materially different from prior P2P file sharing protocols that were the subject of prior litigation in which joinder was routinely denied; (ii) When considering whether a right for relief asserted against multiple defendants arises out of the same "series of transactions or occurrences" courts generally apply the so-called "logical relatedness" test, but this test should be read to require direct, or at least ***definite***, interaction between defendants; and (iii) Even if "swarm joinder" were good law, the temporal gap of 1-3 months between the alleged infringement here takes the concept too far afield.

Courts are split on "swarm joinder," but it is not an equal split. On a national scale, and particularly in 2012, it is fair to say that the majority position has been to side with the Does. The Eastern District of Michigan, however, is one of two or three districts nationwide that represent an

exception to the national rule; here, the decisions siding with the plaintiffs on joinder[2] have outnumbered the decisions siding with the Does[3]. As a result, the Eastern District of Michigan has become a hotbed for this kind of pornographic copyright reverse class action litigation. *See* Declaration of Morgan E. Pietz ¶ 31.

Judge Randon's Report and Recommendation in *Patrick Collins* has essentially become the lead case for pornographic mass infringement plaintiffs; Malibu Media, Patrick Collins and similar plaintiffs hardly file a brief anywhere that does not feature *Patrick Collins* prominently.

Movant is respectfully asking this Court to consider the millions of dollars in lost revenue to the courts, the prejudice to the thousands of Does forced to retain counsel in order to contest cases like this, among all of the other discretionary factors noted herein, and to change course on a close, but very important issue. This Court's decision on this motion not only affects the 633 Internet users who are residents of this judicial district currently being threatened with suit by the lawyers for Malibu Media, but would also be seen as an important case nationally.

II. FACTUAL BACKGROUND: MALIBU MEDIA'S "SETTLEMENT" BUSINESS

Plaintiff is a pornographer that has recently gotten into a new line of business: coercing copyright infringement "settlements." In these lawsuits, Plaintiff alleges that unknown individuals used certain I.P. addresses to access the Internet, and then used an application called BitTorrent to illegally download Plaintiff's pornographic movies. After filing a complaint, Plaintiff generally seeks leave of court to conduct early discovery and issue subpoenas to Internet Service Providers demanding that the ISPs disclose the account details of the I.P. addresses used to download plaintiff's movies. In order to obtain Court authorization to issue subpoenas—the single key legal

[2] *Patrick Collins, Inc. v. John Does 1-21*, E.D. Mi. Case No. 11-cv-15232-DPH-MJR (Report and Recommendation of Randon, M.J., at ECF No. 13, 4/5/12) (*adopted by* Hood, J., at ECF No. 26, 9/28/12); *Third Degree Films v. John Does 1-36*, E.D. Mi. Case No. 11-cv-15200-SJM-LJM, ECF No. 17, 5/29/12 (Michelson, M.J.) (no objection filed); *Nucorp Inc. v. Does 1*-24, E.D. Mi. Case No. 11-15222, (Report and Recommendation of Komives, M.J. finding joinder appropriate at ECF No. 35, 10/18/12) (*adopted by* Friedman, J. at ECF No. 42, 11/14/12); *Malibu Media, LLC v. John Does 1-28*, E.D. Mi. Case No. 12-cv-12598-GAD-LJM, ECF No. 17, 10/31/12 (Michelson, M.J.) (Doe's objection to Drain, J. pending).

[3] *Patrick Collins, Inc. v. John Does 1-23,* E.D. Mi. Case No. 11-cv-15231-GCS-RSW, ECF No. 8, 3/26/12 (Steeh, J.) (granting motion to quash in part and severing Does 2-23); *Patrick Collins Inc. v. John Does 1-21*, E.D. Mi. Case No. 12-cv-12596-AJT-RSW, ECF No. 8, 8/28/12 (Tarnow, J.) (order severing and dismissing all Does other than Doe No. 1 at the early discovery stage).

issue driving Plaintiff's business model—Plaintiff generally makes several material misrepresentations to the Court. Notably, Plaintiff claimed, incorrectly, that courts are "unanimous" in granting early discovery in cases like this. Particularly since Plaintiff's early discovery requests are always unopposed, many Courts grant them.

However, really, this is all a sham. Plaintiff pretends it is interested in "identifying" and "serving" actual defendants. But that is simply not true. As has been shown district by district, in hundreds of cases, what plaintiff is really interested in is using this Court's subpoena power, and the stigma associated with pornography, to leverage improper "settlements" from Internet subscribers who may ***or may not*** have actually downloaded plaintiff's movies. Generally, after it receives a list of names from the ISPs, Plaintiff turns these names over to its notorious, third-party "settlement negotiators" who begin calling ISP subscribers and pressuring them to settle.

One key problem with this scheme—which was not addressed in Plaintiff's moving papers seeking authorization to issue subpoenas—is that many of the subscribers whose information will be turned over by the ISPs are not actually the people who downloaded plaintiff's pornographic movies. The unfortunate people sucked into this morass are, by definition, always the people who happen to pay the Internet/cable bill. In an age when most homes have routers and wireless networks and multiple computers share a single I.P. address, the actual infringer could be a teenage son with a laptop, an invitee, a hacker, or any neighbor using an unencrypted wireless signal. Thus, "there is a reasonable likelihood that the [the Does] may have had no involvement in the alleged illegal downloading that has been linked to his or her IP address." *Malibu Media, LLC v. John Does 1-11*, 2012 U.S. Dist. LEXIS 94648 (D.D.C. April 11, 2012). Indeed, as one judge observed in another of these cases, "***Plaintiff's counsel estimated that 30% of the names turned over to the ISP's are not those of the individuals who actually downloaded or shared copyrighted material.***" *Digital Sins, Inc. v. Does 1-176,* -- F.R.D. --, 2012 WL 263491, at *3 (S.D.N.Y. Jan. 30, 2012).

This inconvenient fact, however, generally does not stop the plaintiff from demanding that a subscriber (i.e., whomever happens to pay the bill) should fork over several thousand dollars to settle the case, upon threat of being publicly accused of illegally downloading explicit pornography. That threat is essentially the heart of this business: pay up, or else plaintiff will

publicly shame you as someone accused of watching pornography. Many subscribers, even if they are innocent, simply pay the ransom rather than face the expense, uncertainty and potential embarrassment of defending themselves. Generally, in communicating with ISP subscribers, the plaintiff simply ***assumes*** they are the John Doe defendants and then threatens them accordingly.

Plaintiff files hundreds of these cases nationwide, against thousands of Does, knowing full well that none of the Does will ever be served, or even named, except perhaps for a token few, to make a show of it. When seeking leave to issue subpoenas prior to the 26(f) conference, plaintiff's counsel typically represents, and he reiterated it again here, that the discovery sought "will enable Plaintiff to serve process on Defendants." Memo i/s/o P's Motion for Leave to Serve Subpoenas, p. 6 (ECF No. 2-1). While the subpoenas requested by plaintiff in these cases might *theoretically* "enable" identification of and service upon actual defendants, in *actuality*, based on plaintiff's past track record, the subpoenas *seldom, if ever* do. Dec'l. of Morgan E. Pietz, ¶ 27.[4]

However, the issuance of subpoenas *almost always* results in the consummation of "settlements," many of which are paid by people who did not actually download plaintiff's movies, but do not wish to incur the expense, uncertainty and potential embarrassment of defending themselves. As Judge Wright, who was previously assigned one of Malibu Media cases in Central District noted, "The federal courts are not cogs in a plaintiff's copyright-enforcement business model. ***The Court will not idly watch what is essentially an extortion scheme, for a case that plaintiff has no intention of bringing to trial***." *Malibu Media v. John Does 1-10*, C.D. Cal. Case No. 12-cv-3623-ODW-PJW, docket no. 7, 6/27/12, p. 6. (Emphasis added).

Some plaintiff's lawyers in these cases have taken a step in the right direction by admitting that actually naming and serving someone with a complaint in these cases, based on nothing more than the fact that they were identified by the ISP as the person who pays the bill, would likely violate Rule 11. *E.g., Discount Video Center, Inc. v. Does 1-29*, D. Mass. Case No. 12-cv-10805, ECF No. 40, 8/24/12, p. 3 (Doe Mtn. to dismiss). However, Malibu Media does not seem prepared

[4] In reply papers filed in the Central District of California in September, Malibu Media points to the fact that it has apparently *named* individual defendants in 18 cases nationwide, out of a total of nearly 300 cases filed against nearly 5,000 Does, as conclusive proof that it is serious about "litigating" these cases. A closer look at the docket in each of these 18 cases, however, revealed that as of the fall of 2012, Malibu Media had *served* precisely 4 defendants, in 2 cases, for a national service average of approximately 0.04%. *See* Dec'l. of Morgan E. Pietz, ¶¶ 25–27.

to make such a concession. Instead, in its request for early discovery, Malibu Media simply equates ISP subscriber with defendant, representing to the Court that "Defendants' IP addresses were assigned to the Defendants by their respective ISPs. Accordingly, the ISPs can use the IP addresses to identify the Defendants." Memo i/s/o P's Motion for Leave to Serve Subpoenas, p. 3 (ECF No. 2-1). There is a step missing here; plaintiff simply assumes, incorrectly, that whomever pays the bill for the Internet is necessarily the Defendant that committed the allegedly infringing acts. While it is possible that the person who pays the bill is also the actual infringer, the actual infringer could also be a teenage neighbor, etc., and the plaintiff has yet to ever propose a plan to take a list of ISP subscribers and use it to then identify actual John Doe defendants.

Finally, if plaintiff's past history is any guide, after requesting as many extensions as it can get of the Rule 4(m) service deadline—to allow its "settlement negotiators" time to work the phones for as long as possible—Plaintiff will simply dismiss the cases, or most if not all Does, without prejudice. Dec'l. of Morgan E. Pietz, ¶¶ 24, 27. Once Malibu Media obtains subpoena returns identifying ISP subscribers, it has succeeded in getting all it really wanted in the first place: grist for the national "settlement" mill. The pending Court action is no longer a priority. Plaintiff's usual *M.O.* is to dismiss most of the Does, but keep the case on life support (usually as against any Does who objected to the subpoenas, to discourage such insolence) for as long as possible, until the case is eventually dismissed, either at Malibu Media's request, or for failure to serve or prosecute. Every once and a while, Malibu Media does actually serve some people, to try and make a show of it, and maybe obtain a default. But with the possible exception of a few actions in Pennsylvania's Eastern District pending before Judge Baylson, who has ordered an accelerated "bellwether trial," and warned Malibu Media that if it dismisses the bellwether cases he will draw an adverse inference about the merits of these kinds of cases, Malibu Media does not seem particularly interested in actually litigating *any* of these cases through to the merits.

III. LEGAL STANDARD FOR JOINDER

Federal Rule 20(a)(2) provides that defendants "may be joined" if: "(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law

or fact common to all defendants will arise in the action." Fed. R. Civ. Proc. 20(a)(2)(emphasis added). On the Ninth Circuit, "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*, 2010 U.S. Dist. LEXIS 46184 (E.D. Cal. Apr. 5, 2010) (emphasis added); *citing Bautista v. Los Angeles County*, 216 F.3d 837, 842-843 (9th Cir. 2000). Further, "***even if the test is satisfied, district courts have the discretion to refuse joinder*** in the interest of avoiding prejudice and delay, ensuring judicial economy, or safeguarding principles of fundamental fairness." *Acevedo v. Allsup's Convenience Stores, Inc.*, 600 F.3d 516, 521-522 (5th Cir. 2010) (internal citations omitted).

IV. THE COURT SHOULD GRANT DISCRETIONARY SEVERANCE

Movant is aware that Judge Hood has previously accepted Magistrate Judge Randon's view that plaintiff's so-called "swarm joinder" theory is sufficient to establish permissive joinder at this stage of litigation. For the reasons explained in the next section, Movant respectfully disagrees with this conclusion, and urges this Court to follow the Ninth Circuit Court of Appeals, as well Judges Steeh and Tarnow of this District in requiring that permissive joinder be allowed only if there is some kind of ***definite*** logical relationship between the defendants. Nonetheless, even assuming, *arguendo*, that joinder is technically proper under Rule 20, Movant would still argue that there are several compelling reasons why the Court should grant discretionary severance.

(a) This Court is Respectfully Urged to Follow Judge Whittemore of Florida and Judge Young of Massachusetts, Both of Whom Recently Found Joinder Technically Proper, But Nevertheless Severed the Does on a Discretionary Basis

Many courts have found "swarm joinder" impermissible and then added that they believed that discretionary severance was also warranted (*e.g.*, the Judges handling all the Malibu Media and Patrick Collins cases in the Central District of California, Southern District of California, and Eastern District of California).[5] However, some other courts have taken a different route to the same result, finding that "swarm joinder" passes muster, but then severing the Does as a matter of the court's discretion. *E.g.*, *Malibu Media, LLC v. John Does 1-28*, M.D. Fl. Case No. 8:12-cv-1667, ECF No. 22, 12/6/12; *Third Degree Films v. Does 1-47*, ___ F. Supp. 2d ___, D. Mass. Case

[5] Copies of some of these decisions were filed by the undersigned at ECF Nos. 9-4, 9-5, 9-6, and 9-7, 11/29/12.

No. 12-10761, ECF No. 31, 10/2/12, 2012 WL 4498911, at *6; *Next Phase Distribution, Inc. v. John Does 1-27*, ___ F.R.D. ___, 2012 WL 3117182, at *4-5 (S.D.N.Y. July 31, 2012); *SBO Pictures, Inc. v. Does 1-20*, No. 12 Civ. 3925(SAS), 2012 WL 2304253, at *2 (S.D.N.Y. June 18, 2012); *Hard Drive Prods., Inc. v. Does 1-188*, 809 F. Supp. 2d 1150, 1165, 2011 U.S. Dist. LEXIS 94319, at *38-39 (N.D. Cal. Aug. 23, 2011).

Most recently, Judge James Whittemore of the Middle District of Florida addressed this issue in highly persuasive fashion in *Malibu Media, LLC v. John Does 1-28*, M.D. Fl. Case No. 8:12-cv-1667, ECF No. 22, 12/6/12. This decision is particularly notable for one important reason: like the Eastern District of Michigan, the Middle District of Florida had, until recently, been a preferred forum for these kinds of lawsuits. As here, in the Middle District of Florida, there had been a few decisions buying in to plaintiff's "swarm joinder" theory (indeed, many of these decisions cite to Judge Randon's order in *Patrick Collins*) which resulted in a proliferation of these kinds of cases there. ***Movant respectfully suggests that this Court should look carefully at Judge Whittemore's orde***r, since all of the points he makes are equally applicable to the Malibu Media cases (and similar cases filed by Patrick Collins, Third Degree Films, and others) pending here.

Equally worthy of close review is Judge Young's October 2, 2012 order in *Third Degree Films v. Does 1-47*, ___ F. Supp. 2d ___, D. Mass. Case No. 12-10761, ECF No. 31, 10/2/12, 2012 WL 4498911. Judge Young's order is noteworthy because, like Judge Hood, Judge Young had previously denied a John Doe motion for severance, finding "swarm joinder" to be appropriate at an early stage of litigation. Judge Young explained the change of course as follows,

> "Since its decision was issued in Liberty Media, this Court has entertained a profusion of filings in the mass copyright infringement cases on its docket. Upon further reflection and a deeper understanding of the policy concerns at play, the Court now revisits and amends its holding in Liberty Media. The Court continues to maintain that joinder is technically proper under Rule 20(a). The Court now holds, however, that in light of its serious concerns regarding prejudice to the defendants as a result of joinder, it ought exercise the broad discretion granted it under Rule 20(b) and sever the Doe defendants in this action and in similar actions before this Court." *Third Degree Films, supra,* at ECF No. 31, p. 10.

Essentially, and for all of the same reasons, Movant here is asking Judge Hood to similarly revisit

the Court's decision in *Patrick Collins*.

(b) The Different Factual and Legal Circumstances Applicable to Each Doe—*e.g.*, Was the WiFi Network Encrypted and Who Had Access to It?—Will Differ Greatly, Which Weighs Heavily in Favor of Discretionary Severance

An obvious point noted by almost all of the Courts that have considered discretionary severance is that each of the individual Doe defendants in these cases is likely to present completely different factual circumstances, which result in a variety of different legal defenses. *E.g., In re: Adult Film Cases*, at p. 20 (noting the "panoply" of different legal defenses raised by a "half-dozen moving defendants, even at this preliminary stage"). Most notably, each Doe is going to have completely different circumstances and potential defenses on whether or not his or her home wireless network was unsecured, and depending on who may have had access to that network. Thus, even though there will admittedly be at least one common question of law or fact as between the Does, on a macro level, the differences between the facts and legal claims applicable to a given Doe outweigh any potential similarities insofar as joinder is concerned. *Id.*; *see also Patrick Collins v. John Does 1-10,* C.D. Cal. Case No. 12-cv-5267, ECF No. 21, 11/5/12, * 10 ("even if the requirements for permissive joinder were met, this Court would exercise its discretion to sever the claims against John Does 2 through 10. . ***.the Court notes its agreement with cases that observe individualized facts and defenses weigh in favor of the exercise of discretionary severance***. *See, e.g., Third Degree Films, Inc. v. Does 1-131*, 280 F.R.D. 493, 498 (D. Ariz. 2012)") (additional citations omitted).

(c) If Malibu Media Wishes to Use the Court's Subpoena Power as Part of a National Copyright Infringement "Settlement" Mill, it Should Factor the Full Payment of Statutorily Required Filing Fees into the Business Model

Between them, Malibu Media and Patrick Collins (which are represented by the same lawyers, who use the same cookie-cutter pleadings and expert declarations) have filed 653 total copyright infringement actions, against approximately 10,578 John Doe defendants, all since 2011. Dec'l. of Morgan E. Pietz ¶ 5.

Consider what these numbers mean to the courts in filing fees. Together, Malibu Media and Patrick Collins (or, perhaps more accurately, their lawyers) have paid $228,550 in filing fees in these 653 actions. If the plaintiffs were not relying on the tenuous "swarm joinder" theory to

minimize the payment filing fees, the cost to sue each of the 10,578 John Doe defendants separately would have been $3,702,300. Subtracting the latter sum from the former works out to a ***net loss to the Judicial Branch of a staggering $3,473,750 in filing fees, nationwide.***

In this district, the net loss in filing is slightly less astronomical—but sure to grow rapidly, unless this Court changes course and starts severing John Does from these cases. Here, the numbers are as follows: Malibu Media, 13 cases, 312 Does; Patrick Collins, 6 cases, 123 Does; Third Degree Films, 3 cases, 128 Does; Nucorp Ltd., 4 cases, 70 Does; for a grand total of 26 cases against 633 Does. [6] Thus, this one particular group of plaintiffs has paid the Courts of this District only $9,100 in actual filing fees, as compared to $221,550 in filing fees to sue the Does individually, for ***a net loss to this Court of $212,450 in filing fees***, over the last two years.

As Judge Gary Brown of the Eastern District of New York commented, "If the reported estimates that hundreds of thousands of [John Doe] defendants [in mass infringement cases] have been sued nationwide, plaintiffs in similar actions may be evading millions of dollars in filing fees annually. ***Nationwide, these plaintiffs have availed themselves of the resources of the court system on a scale rarely seen. It seems improper that they should profit without paying statutorily required fees***." *In re: Adult Film Cases, supra*, p. 23.

Judge Whittemore also picked up on this thread, noting the legal basis for the requirement that filing fees be paid, and that "Regardless of the economic impact on Malibu, severing these Doe Defendants and requiring filing fees commensurate with the impact on the docket imposes no greater harm on Malibu than that imposed on any other plaintiff in the federal courts." *Malibu Media, LLC v. John Does 1-28*, M.D. Fl. Case No. 8:12-cv-1667, ECF No. 22, 12/6/12, pp. 11-13.

(d) Malibu Media's Demonstrated "Abusive Litigation Tactics," and the High Risk of Unjust "Settlements" Also Militate in Favor of Discretionary Severance

Plaintiff has a long track record of "abusive litigation tactics." Specifically, the plaintiff is: (i) using the same notorious, professional third-party "settlement negotiators" as other copyright trolls; (ii) using subpoena information to collect on claims that go beyond the scope of the

[6] Numbers for Malibu Media as of December 26, 2012, Patrick Collins as of November 8, 2012, Third Degree Films and Nucorp as of September 23, 2012.

complaint;[7] (iii) willfully violating courts' notice of related case rules to try and fly under the radar; (iv) seeking John Doe phone numbers and email addresses despite a court order telling Plaintiff not to do so; (v) misrepresenting the range of potential damages. Dec'l. of Morgan E. Pietz, ¶¶ 6–27. Simply put, there is no shortage of cases ***specifically addressing Malibu Media's*** bad faith litigation conduct, *e.g.*, *In re: BitTorrent Adult Film Copyright Infringement Cases,* E.D.N.Y. Case No. 12-cv-1147-JS-GRB, ECF No. 9, 7/31/12 (*In re: Adult Film Cases II*).

(e) Discretionary Severance Would Also Discourage the Kind of Forum Shopping that is Currently Making this Judicial District a Hotbed of Mass-Doe Pornographic Infringement Litigation

In considering the issue of discretionary severance, the Court is urged to take a close look at its own docket. Particularly since *Patrick Collins*, these kinds of cases have proliferated in this District. The Miami law firm of Lipscomb, Eisenberg & Baker ("LE&B") steers much this litigation nationally. LE&B files cases (through local counsel) on behalf of at least seven different pornographers: including Malibu Media, LLC, Patrick Collins, Inc., Third Degree Films, and Nucorp Ltd. All of the cases filed on behalf of these entities are similar: they utilize the same cookie cutter pleadings; the same "technical expert" is used to log IP addresses; the same notorious third-party "settlement negotiators" call up the John Does to apply pressure to settle; and, in any given judicial district, it is generally the same "local counsel" (here, Mr. Paul Nicoletti, who took over some of the older cases from Mr. John Hone) who actually appears on the pleadings.

A close look at the docket for the cases filed by these entities in this District shows a clear pattern. As Judge Selna of the Central District of California explained after looking carefully at the Court's docket there,

> In 2011, Patrick Collins Inc. filed eight lawsuits in the Central District, all alleging copyright infringement against 8 to 10 Doe Defendants, or 78 Doe Defendants in total. All of these cases followed this pattern: Court-authorized early discovery of subscriber information was sought from ISPs; with one exception, Plaintiff sought at least one extension of the time in which to serve Defendants; and Plaintiff voluntarily dismissed the action without serving a single Defendant with process. [fn 10] From this record, a

[7] This tactic, which has been repeated in multiple cases in various districts, is particularly troubling, in light of the condition imposed by many courts that Malibu Media may only use subpoenas to vindicate its rights, as alleged in its complaints. S*ee* Dec'l. of Morgan E. Pietz ¶¶ 14–19 and Exhibit B.

> pattern has emerged that is both consistent with defense counsel's "anecdotal evidence" and that weighs in favor of discretionary severance in the above-captioned actions.

The *Patrick Collins* case here is a perfect example. After winning on the severance issue, plaintiff eventually dismissed most of the Does without prejudice (12-cv-15232-DPH-MAR, ECF No. 20, 6/26/12), except those who had contested the subpoenas (out of spite?) and then filed four motions to extend the Rule 4(m) deadline to the remaining defendants. More than one year after the initial complaint was filed and still nobody has been served. The outcome of the other cases filed by Malibu Media, and the other related cases filed by the same lawyers, are all consistent with this pattern. To facilitate this Court's ability to look carefully at the record of plaintiff's counsel, the docket reports for all of the Malibu Media, Patrick Collins, Third Degree Films and Nucorp cases filed in this district have been attached as Appendix 1.

The LE&B gang is not the only group of so-called "copyright trolls" that have taken notice of the Eastern District of Michigan's pro-plaintiff policy with respect to "swarm joinder." When Prenda Law, Inc. files cases on behalf of *AF Holdings, LLC* in California, it sues John Does one at a time and pays the filings fees for each case. Here, by contrast, Prenda Law pays to file a single lawsuit, but then seeks discovery as to multiple co-conspirators on a "swarm" theory. *Compare, e.g., AF Holdings, LLC v. John Doe,* C.D. Cal. Case No. 12-cv-5709-ODW *with AF Holdings, LLC v. Matthew Ciccone*, E.D. Mi. Case No. 12-cv-14442-GAD.

In sum, the Court is respectfully urged to take a careful look at its docket, and to sever the Does as a matter of discretion, in order to discourage the kind of forum shopping that is currently making this district an increasingly popular forum for this kind of litigation.

(f) There is a Practical Alternative to Joinder That is Both More Fair, and Which Also Minimizes the Administrative Burden on the Courts: Relating Single Doe Cases to a Single Judge, and Consolidating the Cases for Certain Purposes

Plaintiff often argues that filing individual lawsuits against single John Does, one at a time, would be an administrative hassle, resulting in extra paperwork—but this does not have to be so.

First, although Malibu Media routinely violates courts' related case rules (Dec'l. of Morgan E. Pietz ¶ 6), preferring to try and parcel its cases out to as many different Judges as possible, in the hopes that at least some of them will bite on "swarm joinder," the companion case rule (L.R.

83.11(b)(7)) could be used to maximize judicial economy. It would undoubtedly be more efficient to have a single Judge and/or Magistrate Judge of this district handling all of the highly similar Malibu Media, Patrick Collins, and similar cases that were all filed using the same cookie-cutter pleadings. The Judge handling all the related cases could then ensure consistency.

Second, the more fair way to minimize the administrative burden of these cases would be to *consolidate* the single-Doe related cases for certain purposes, per Fed. R. Civ. Proc. 42 or L.R. 83.11(b)(3). For example, after each of the severed, single-Doe companion cases are assigned to the same Judge, the Judge could order that all of the cases be consolidated for all issues relating to *pre-service* litigation. This would mean that any motions to quash or motions for a protective order filed by the ISP Subscribers accused of being John Does prior to service could be handled and heard in a single, unified proceeding with coordinated briefing. Similarly, if Malibu Media does pick a few folks to try and make an example out of, such that it follows through and actually serves someone (subject of course to the Rule 11 requirement that it have a good faith basis for alleging that the ISP subscriber is actually the John Doe defendant), those cases could be consolidated for certain purposes post-service. For example, the validity of the copyrights at issue, as well any challenges to plaintiff's standing to sue, or the admissibility of testimony from plaintiff's purported expert, could all be resolved in the consolidated proceeding. Finally, the consolidated proceeding could be assigned its own case title and number, like *In re: Adult Film Copyright Cases****Error! Bookmark not defined.***, with filings made on that docket, which would solve the problem of making identical filings in multiple cases. *See In re: EMC Corp., Decho Corp, & Iomega Corp.,* 677 F.3d 1351, 13560 (Fed. Cir. 2012) ("'[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.'").

V. JOINDER IS NOT PERMISSIBLE

(a) Magistrate Judge Randon's Departure from Past Precedent in *Patrick Collins* was Based on a Faulty Assumption About How BitTorrent Supposedly Differed from Other File Sharing Protocols That Were the Subject of Earlier Litigation

Deciding whether the "swarm joinder" theory is sufficient to support permissive joinder

under Rule 20 necessarily entails an understanding of how BitTorrent works. Judge Randon's report and recommendation in *Patrick Collins* should be commended and is routinely cited by courts around the country as offering perhaps the single best and most detailed judicial explanation for how BitTorrent works. *As to how **BitTorrent** works*, Movant does not dispute the facts as explained by Judge Randon.

Respectfully though, Movant would challenge one aspect of the *Patrick Collins* decision. Specifically, where Judge Randon arguably went wrong, is in finding that BitTorrent is somehow fundamentally different from certain other second generation P2P file sharing protocols, which were the subject of prior cases were joinder was routinely denied. In other words, *Patrick Collins* is accurate as to how BitTorrent works, but the decision justifies a departure from considerable prior precedent denying joinder, based on a false distinction that BitTorrent is somehow fundamentally different from other P2P protocols that were the subject of prior litigation.

Magistrate Judge Randon explained that he disagreed with Judge Steeh because Judge Steeh,

> "found that—for joinder purposes—BitTorrent was indistinguishable from prior methods of internet file sharing, and then followed a line of cases holding that joinder was improper in the context of those other methods of file sharing. This Magistrate Judge respectfully disagrees with that conclusion, and instead ***finds that the technology underlying BitTorrent does make it different from other file sharing methods***, for joinder purposes. Joinder is proper in this case." *Patrick Collins, Inc. v. John Does 1-21*, E.D. Mi. Case No. 11-cv-15232-DPH-MJR, ECF No. 13, 4/5/12, *15–16 (Randon, M.J.) (emphasis added).

Unfortunately, Judge Randon's Report and Recommendation does not clearly specify the particular feature(s) of BitTorrent that the Court viewed as revolutionary, for joinder purposes, as compared to prior peer-to-peer ("P2P") file transfer protocols.

Generally speaking though, the argument plaintiffs make about why BitTorrent is supposedly different is that BitTorrent spreads a download out among more sources than prior P2P protocols. However, in comparing BitTorent to prior P2P protocols, this is, at best, a difference in degree, not a material difference of type or kind. Every major P2P file sharing application since at least 2002 has utilized so-called "multi-source," or "swarming" or "segmented" downloads,

including KaZaA, eDonkey, and most Gnutella clients (like Limewire), which are all prior P2P file transfer protocols.[8] All of the terminology in quotes means the same thing: when a person (or "peer") downloads a file, parts of the file come in from multiple sources at once, rather than downloading the whole file from a single location. However, in reality, "multi-source" downloads, etc., are not new to BitTorrent; highly similar "multi-source" download technology was used by defendants in prior P2P file sharing cases (mainly cases brought by RIAA-member record companies) where joinder was routinely denied. In short, Judge Randon has broken from years of precedent based in large part on questionable (but heretofore unchallenged) factual assumptions about the way BitTorrent supposedly differs from prior P2P protocols, many of which also involved "multi-source" downloading.

It might be fair to make a distinction between more modern file sharing protocols like BitTorrent, eDonkey, KaZaA and later versions of Guntella, as compared to the first generation P2P protocols like Napster, which facilitated downloads from single peers. This seems to be the point Judge Randon was making when he wrote, "In several earlier cases, courts grappled with other peer-to-peer protocols [fn 11] that are functionally distinct from the BitTorrent protocol. [fn 11: Such as Gnutella, Grokster and Napster.]" *Patrick Collins, supra,* at. p. 12. Napster and Grokster did not enable multi-source downloading, so admittedly, there is a reasonable argument that the joinder issue could be decided differently in a BitTorrent case than as was decided in Napster and Grokster cases, given the later advent of multi-source downloads.

But from a technical perspective, Judge Randon's Report and Recommendation overlooks the body of precedent where courts denied joinder in actions alleging that the John Does downloaded files using file sharing protocols like KaZaA, eDonkey and Gnutella,[9] which have a "mutli-source" architecture that is functionally equivalent to BitTorrent. In addressing exactly this point, Judge Grewall of the Northern District of California "***t[ook] notice of the fact that the***

[8] *See, e.g.,* Mauri, J. Lloret, et al. "Analysis and Characterization of Peer-To-Peer Filesharing Networks." *WSEAS Transactions on Systems* 7 (2004): 2574-2579 (Dec'l. of Morgan E. Pietz, Exhibit F); *see also* Dec'l. of Morgan E. Pietz, Exhibit G.

[9] Gnutella clients evolved over time, and when they started out, they were for single-source downloading. However, most later clients utilizing the Gnutella protocol allowed Gnutella users to achieve multi-source downloads.

protocols at issues in those earlier cases, like the BitTorrent protocol here, were of precisely the same peer-to-peer architecture." *Diabolic Video Prods. v. Does 1-2099*, 2011 U.S. Dist. LEXIS 58351, 12-13 (N.D. Cal. May 31, 2011). It is important to point out that the specific cases Judge Grewall was referring to, as involving the same peer-to-peer architecture as BitTorrent, were *cases involving multi-source downloading*. For example, *Laface Records, LLC v. Does 1 - 38*, 2008 U.S. Dist. LEXIS 14544 (E.D.N.C. Feb. 27, 2008) was a Gnutella case and *Interscope Records v. Does 1-25*, 2004 U.S. Dist. LEXIS 27782 (M.D. Fla. Apr. 1, 2004) was a KaZaA/FastTrack case. *See also, e.g., IO Group v. Does 1-435,* Case No. 10-4382, 2011 WL 445043 (N.D. Cal. Feb. 3, 2011) (Illston, J.) (severing Does who used eDonkey protocol). Plaintiff tries to paint these cases as distinguishable, but they really are not; there is no fundamental difference between BitTorrent as compared to other second generation P2P protocols that also use multisource downloads.

At best, it could perhaps be argued that BitTorrent may enable the possibility that any given downloader can receive pieces of the file from a greater number of users than might be true of prior multisource P2P protocols. But the specifics of whether even that is true of course depend on the number of available sources for a given file download.

As Judge Huff of the Southern District of California recently explained,

> "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 [Inc. v. Does 1-60]*, 2011 U.S. Dist. Lexis 92994, at *7-8." *Patrick Collins, Inc. v. John Does 1 through 9*, S.D. Cal. Case No. 3-12-cv-1436-H, ECF No. 23, 11/8/12, p. 6.

In sum, in KaZaA cases, Gnutella cases, and eDonkey cases, courts routinely held that multi-source downloading, by itself, was not sufficient to support joinder. Accordingly, to the extent Judge Randon's position on this issue is based on the questionable assertion that BitTorrent is somehow fundamentally different than these other P2P services, Movant respectfully disagrees and believes a departure from earlier file sharing cases denying joinder is not justified.

(b) This Court Should Adopt the Ninth Circuit Court of Appeals' Rule That Only a "Very Definite Logical Relationship" Can Support Joinder, and Sever the Does

Setting aside the issue of whether a break was warranted from older P2P cases where joinder was routinely denied, Movant turns now to the merits of the swarm "swarm joinder" theory itself, as it is currently argued. At the outset, Movant concedes that some courts, including Judge Hood in *Patrick Collins*, have accepted the "swarm joinder" theory, at least at this initial stage of litigation, and that there is no binding authority on this Circuit that compels an answer on this issue one way or another. Movant believes that although it is fair to say that siding with the plaintiffs on "swarm joinder" is now the minority position nationally,[10] there is also no shortage of other Courts that have followed Judge Randon's approach in *Patrick Collins*.

On the Ninth Circuit, however, there ***is*** Court of Appeals authority which defeats "swarm joinder," at least as alleged here. Specifically, the Ninth Circuit Court of Appeals has held that only a "very definite logical relationship" can support permissive joinder. *Union Paving Co. v. Downer Corp.*, 276 F.2d 468, 470 (9th Cir. 1960) (origin of "very definite logical relationship" standard on Ninth Circuit); *Bautista v. Los Angeles County*, 216 F.3d 837, 842-843 (9th Cir. 2000) (Reinhardt, J., concurring) ("claims that have 'very definite logical relationship' arise out of same transaction and occurrence"); *quoted in Hubbard v. Hougland*, No. 09-0939, 2010 U.S. Dist. LEXIS 46184, at *7 (E.D. Cal. Apr. 5,2010) ("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.') (quoting *Bautista*).

Recently, at least two district courts in California have picked up on this argument and severed the Does in cases where the plaintiff made identical joinder allegations to those here at issue.[11] *Patrick Collins, Inc. v. John Does, et al.*, C.D. Cal. Case No. 12-cv-5267-JVS-RNB, ECF No. 21, 11/5/12 (holding that on the Ninth Circuit there must be a "very definite logical relationship" to support joinder under Rule 20 so Doe defendants in BitTorrent case must be

[10] Although by no means a definitive measure, comparing the Lexis Shepard's reports for *Call of the Wild Movie, LLC v. Does 1-1,062*, 770 F. Supp. 2d 332 (D.D.C. 2011) (another lead case finding swarm joinder appropriate) with *Hard Drive Prods. v. Does 1-188*, 809 F. Supp. 2d 1150 (N.D. Cal. 2011) (a lead case severing does) shows how the tide has turned. As of January 3, 2013, *Call of the Wild* was "followed" 4 times in 2011 and 6 times in 2012. By contrast, *Hard Drive Prod's.*, which found for the Does, was "followed" 11 times in 2011 and 26 times in 2012.

[11] The allegations at issue in the California Patrick Collins cases are identical to the allegations here because Malibu Media and Patrick Collins have the same lawyers in Miami overseeing this litigation nationally, and they use the same cookie cutter complaints

severed) (citing *Union Paving Co., supra,* and *Bautista*, *supra*); *Patrick Collins, Inc. v. John Does 1 through 9*, S.D. Cal. Case No. 12-cv-1436-H-MDD, ECF No. 23, 11/8/12 ("the majority view among district courts within the Ninth Circuit is that allegations of swarm joinder are alone insufficient for joinder". . . "Doe Defendants' alleged conduct therefore lacks the type of 'very definite logic relationship' required to permit joinder.") (*quoting Bautista, supra*).

The requirement that a logical relationship be "very definite" in order to support permissive joinder goes straight to the heart of the key flaw in the "swarm joinder" theory. As explained by Judge Randon, the idea behind the "swarm joinder" theory is that because of the way BitTorrent works, with people sharing the *exact same file* with one another, and the file necessarily originating from a single 'initial seeder,' participation in a BitTorrent download necessarily satisfied the "logical relationship" test because each peer downloading a given file can, as a matter of pure logic, somehow be linked back to that single initial seeder. *See Patrick Collins, Inc. v. John Does 1-21*, 2012 WL 1190840, at *4-5 (E.D. Mich. Apr. 5, 2012). More specifically, Judge Randon reasoned, "in the universe of possible transactions, at some point, each Defendant downloaded a piece of the Movie, which had been transferred through a series of uploads and downloads from the Initial Seeder, through other users or directly, to each Defendant, and finally to IPP."[12] *Id*. The idea is that somehow, some way, through an ***indeterminate*** number of intermediary connections to other peers, each of whom may or may not be another Doe Defendant, each Doe Defendant can be linked back to the Initial Seeder. And as a result of the fact that every Doe Defendant in the swarm may be linked to the Initial Seeder, it therefore follows that every Doe Defendant can somehow be linked to every other Doe Defendant.

The main problem with "swarm joinder" is that the specifics of any given connection between two John Doe defendants are unknown in all key respects; the number of intermediary downloaders between Doe defendant and the initial seeder, the IP addresses of the intermediary downloaders, and whether any of the intermediary downloaders are other Doe defendants in this case (as opposed to unidentified third parties) are all facts which are unknown to the plaintiff. Or,

[12] IPP is the name of the company that currently provides the services of Malibu Media's and Patrick Collins's technical expert, Tobias Fieser.

to put that another way, the only connection between the Does the plaintiff can allege is an inherently ***indefinite*** relationship; plaintiff does not know what exactly the connection is, or how many steps it consists of. It may be true, as a matter of pure logic, that any Doe can theoretically be linked to any other Doe downloading the same file using BitTorrent. But such a loose standard clearly leaves much to be desired when it comes to the practical task of deciding whether different individuals, with different factual circumstances, may properly be joined into the same lawsuit.

Aside from general Supreme Court guidance to apply joinder rules "liberally" in furtherance of the goals of judicial economy and fairness to the parties, there really does not seem to be *any* good reason whatsoever to allow *indefinite* logical relationships to suffice for Rule 20 purposes. Moreover, as argued in Section IV, *supra*, it is doubtful these goals are truly being well-served by allowing "swarm joinder" in pornographic mass infringement. Further, as one commentator suggested in an informative analysis, cases like this "weaken intellectual property norms by undermining the social, moral and legal legitimacy of intellectual property law. ***Courts therefore should apply the rules of joinder strictly in intellectual property cases against consumers*** and manage discovery and settlement negotiations so as to minimize, as much as possible, the negative aspects of such litigation." 20 Berkeley Tech. L.J. 1685 (2005), Opderbeck, David W., "Peer-to-Peer Networks, Technological Evolution, and Intellectual Property Reverse Private Attorney General Litigation"

Simply put, requiring that joinder only be allowed when there is a "very definite" or even just "definite" logical relationship is a sensible rule for cases like this, and this Court is urged to follow the Ninth Circuit approach, even though it is not bound to do so.

(c) John Does Using BitTorrent to Download Different Movies Months Apart from One Another Are Not Part of the Same Swarm and Not Part of Same Transaction or Occurrence

Even if the "swarm joinder" theory were good law, the Does should still be severed, because as alleged in the complaints at issue here, the Doe defendants here were not really part of the "same swarm." In all of the cases Patrick Collins and Malibu Media have filed in this District, there is a substantial temporal gap, generally of 1–3 months, between the time of the alleged infringing downloads. A review of Exhibit "A" to any of plaintiff's complaints bears this out

At least one Court has gone so far as to hold that the "transactional relatedness" test is only satisfied in online download cases when parties are downloading a file *at the same time.* *DigiProtect USA Corp. v. Doe*, 2011 U.S. Dist. LEXIS 109464, 8-9 (S.D.N.Y. Sept. 26, 2011) (***for defendants to be part of same "swarm," a user must have "downloaded the movie from the same website during overlapping times" with another member of the swarm***); *see also Raw Films, Inc. v. Does 1-32,* 2011 WL 6840590, at *2 (N.D. Ga. Dec. 29, 2011) ("Downloading a work as part of a swarm does not constitute 'acting in concert' with one another, particularly when the transactions happen over a long period of time;" time span of 4 months); *Liberty Media Holdings, LLC*, 2011 WL 5190106, at *3 (S.D. Fla. Nov. 1, 2011) (same; ***time span of two months***); *Liberty Media Holdings, LLC v. BitTorrent Swarm,* 2011 WL 5190048, at *2–4 (S.D. Fla. Nov. 1 2011) (same; ***time span of two months***). Here, plaintiff has not alleged that Does were downloading files *at the same time* so there really is no "swarm," and therefore no basis for "swarm joinder."

In sum, plaintiff's complaint completely undermines its argument that the Does are part of the "same swarm" because the complaint shows that the Does did not download files at the same time, but rather downloaded files a month and a half apart from one another. Even if "swarm joinder" were good law, this, surely, would take the concept too far afield.

VI. CONCLUSION

For all of the foregoing reasons, Movant respectfully requests that this Court sever and dismiss the claims against all putative John Does other than putative John Doe No. 1.

Respectfully submitted,

DATED: January 4, 2013

/s/ Morgan Pietz

/s/ Hattem Beydoun

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing paper with the Clerk of the Court using ECF, which will send notification of such filing to all attorneys of record.

/s/Hattem Beydoun_____
Dated: January 4, 2013 Hattem A. Beydoun