

JOINDER AND EARLY DISCOVERY IN BITTORRENT COPYRIGHT INFRINGEMENT LAWSUITS[♦]

STEFAN MENTZER & MICHAEL LA MARCA*

INTRODUCTION	89
I. THE PROBLEM OF THE JOHN DOE DEFENDANT	91
II. JOINDER	94
A. <i>The Legal Standard for Joinder</i>	94
B. <i>The District Court Split</i>	95
C. <i>An Appellate Court Weighs In</i>	104
III. EARLY DISCOVERY AND MOTIONS TO QUASH UNDER RULE 45(D)(3)	107
A. <i>Legal Standard for Early Discovery of Third Parties</i>	107
B. <i>Discussion</i>	108
CONCLUSION	114
Appendix	116
Selected BitTorrent Cases	116

INTRODUCTION

A “nationwide blizzard” of copyright infringement lawsuits against users of the peer-to-peer (“P2P”) file sharing protocol BitTorrent has swept the courts in the past few years.¹ Hundreds of

[♦] Permission is hereby granted for noncommercial reproduction of this Article in whole or in part for education or research purposes, including the making of multiple copies for classroom use, subject only to the condition that the name of the author, a complete citation, and this copyright notice and grant of permission be included in all copies.

* Stefan Mentzer is a Partner and Mike La Marca is an Associate in the New York office of White & Case LLP and are members of the firm’s Global Competition Group. This Article contains the views and opinions of Mr. Mentzer and Mr. La Marca only and does not reflect those of White & Case or its clients.

¹ *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 82, *report and recommendation adopted sub nom.* Patrick Collins, Inc. v. Doe 1, 288 F.R.D. 233 (E.D.N.Y. 2012); *see also* Malibu Media, LLC v. John Does 1–54, 2012 WL 3030302, at *1 (D. Colo. July 25, 2012) (noting “an outbreak of similar litigation ... around the country”) (quoting Raw Films, Inc. v. Does 1–32, 2011 WL 6840590, at *1 (N.D. Ga. Dec.29, 2011)); Digital Sin, Inc. v. Does 1–176, 279 F.R.D. 239, 240 (S.D.N.Y. 2012) (noting that “litigation of this nature . . . is proliferating in this district and throughout the country.”).

thousands of individuals have been sued in these cases mostly by adult entertainment companies seeking to crack down on illegal downloads of their films.² What several courts have referred to as an “outbreak of litigation” follows on the heels of the surging popularity in BitTorrent itself. By some measures the leading P2P company has 170 million monthly users, more than Pinterest and Spotify.³

While litigation involving P2P file sharing technology is nothing new,⁴ BitTorrent’s unique protocol has created new analytical challenges for litigants and courts. Much like other P2P networks, BitTorrent links users together and enables them to download, and make available for download, large files. Unlike earlier P2P file sharing protocols like Napster, BitTorrent does not require the user to connect to a centralized server or to only one other peer.⁵ Instead, BitTorrent allows users to download data from a number of other users simultaneously or sequentially.⁶ When a user downloads a file through BitTorrent, the file is broken down into a series of smaller distributable pieces, each of which is assigned a unique identifier known as a “hash.”⁷ Files are transferred in a “piecemeal” fashion, whereby different parts of the file are received from multiple peer members who already have downloaded the file.⁸ Individual users may “only download small pieces of the file at a time and it may take several days or even weeks for” a user to download an entire file.⁹ The BitTorrent client then reassembles the content file on the requesting computer into a coherent whole once the download is complete.¹⁰

Importantly, once a user receives a piece of a computer file, the user also starts transmitting that piece to other peers, so long as that user

² See Jason Koebler, *Porn Companies File Mass Piracy Lawsuits: Are You At Risk?*, U.S. NEWS & WORLD REPORT (Feb. 2, 2012), <http://www.usnews.com/news/articles/2012/02/02/porn-companies-file-mass-piracy-lawsuits-are-you-at-risk>.

³ Erik Oster, *BitTorrent Woos Advertisers and Publishers Filesharing company fights association with piracy*, Adweek (Sept. 3, 2014), <http://www.adweek.com/news/advertising-branding/bittorrent-woos-advertisers-and-publishers-159860>.

⁴ See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1027 (9th Cir. 2001) (affirming an injunction that prevented Napster from distributing content); *In re Aimster Copyright Litig.*, 334 F.3d 643, 653 (7th Cir. 2003) (shutting down Aimster); *Arista Records L.L.C. v. Lime Group L.L.C.*, 715 F. Supp. 2d 481, 511 (S.D.N.Y. 2010) (holding that LimeWire induced copyright infringement).

⁵ *Patrick Collins, Inc. v. John Does 1–15*, 2012 WL 415436, at *1 (D. Colo. Feb. 8, 2012).

⁶ *Voltage Pictures, LLC v. Does 1–5,000*, 818 F. Supp. 2d 28 40–41 (D.D.C. 2011) (citing *Columbia Pictures Indus. v. Fung*, 2009 WL 6355911, at *2 (C.D. Cal. Dec. 21, 2009); *MCGIP, LLC v. Does 1–18*, 2011 WL 2181620, at *1 (N.D. Cal. June 2, 2011)).

⁷ *Columbia Pictures Indus. v. Fung.*, 2009 WL 6355911, at *2 (C.D. Cal. Dec. 21, 2009).

⁸ *AF Holdings LLC v. Does 1–1,058*, 286 F.R.D. 39, 54 (D.D.C. 2012) *vacated*, 752 F.3d 990 (D.C. Cir. 2014); *Call of the Wild Movie, LLC v. Does 1–1,062*, 770 F. Supp. 2d 332, 339 (D.D.C. 2011).

⁹ *Digital Sin, Inc. v. Does 1–176*, 279 F.R.D. 239, 241 (S.D.N.Y. 2012).

¹⁰ *Columbia Pictures Indus.*, 2009 WL 6355911, at *2.

is online at the time the subsequent peer starts to download a file.¹¹ Once the download of a piece is complete, “each peer in a swarm transforms from a pure downloader (a ‘leecher’ in BitTorrent vernacular) to a peer that is simultaneously downloading and distributing pieces of a file.”¹² Thus, courts have noted that the nature of the BitTorrent file-sharing technology makes every downloader also an uploader of the illegally transferred files.¹³ This group of peers involved in downloading or uploading a particular file is known as a “swarm,” and each swarm is unique to that particular file.¹⁴ BitTorrent also uses a “tracker,” which keeps a record of users in a swarm (users who are connected to the network and are transferring or requesting a particular file).¹⁵ The tracker facilitates direct connections between users by relaying the addresses of these connected peers.¹⁶ Unlike previous P2P protocols, however, there is no centralized tracker server that hosts actual source information; instead, any user can set up a tracker that logs a list of peers in a swarm.¹⁷ Through this tracker, individuals participating in a swarm expose the IP addresses they use to download or share a file.¹⁸

This article considers the unique nature of the BitTorrent protocol and two of the legal issues that have arisen in the BitTorrent copyright litigations: the joinder of multiple defendants and motions to quash subpoenas served to learn the identities of “John Doe” defendants. The many courts that have considered these issues often have reached different conclusions.

I. THE PROBLEM OF THE JOHN DOE DEFENDANT

In the case law predating BitTorrent and addressing copyright infringement using P2P technologies, courts found that the alleged use of the same P2P network by a group of John Doe defendants to commit

¹¹ *Malibu Media, LLC v. Does 1–11*, 286 F.R.D. 113, 115 (D.D.C. 2012); *AF Holdings*, 286 F.R.D. at 54.

¹² *Boy Racer v. John Does 2–52*, 2011 WL 3652521, at *3 (N.D. Cal. Aug. 19, 2011).

¹³ *Patrick Collins, Inc.*, 2012 WL 415436, at *2; *Call of the Wild Movie*, 770 F. Supp. 2d at 339. It should be noted that BitTorrent users may elect to disable this feature so that downloaded materials are not accessible to, and cannot be downloaded by, other peers. In this regard, the contention that each BitTorrent user is both a downloader and an uploader of a file has been called into doubt. *Malibu Media*, 286 F.R.D. at 115, n.2.

¹⁴ *Hard Drive Prods., Inc. v. Does 1–188*, 809 F. Supp. 2d 1150, 1152 (N.D. Cal. 2011); *First Time Videos, LLC v. Does 1–76*, 276 F.R.D. 254, 255 (N.D. Ill. 2011).

¹⁵ Matthew Helton, *Secondary Liability for Copyright Infringement: BitTorrent As A Vehicle for Establishing A New Copyright Definition for Staple Articles of Commerce*, 40 COLUM. J.L. & SOC. PROBS. 1, 19–20 (2006).

¹⁶ *Id.*

¹⁷ *Id.* at 17.

¹⁸ *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 83 (E.D.N.Y. 2012); *Digital Sin, Inc. v. Does 1–176*, 279 F.R.D. 239, 241 (S.D.N.Y. 2012).

copyright infringement was an insufficient basis to join multiple defendants into one suit.¹⁹ As noted above, these P2P technologies like Napster operated through use of a centralized server.²⁰ When one Napster user downloaded a file from other Napster users, the users connected directly to Napster’s central servers, which maintained an index of all files shared throughout the network. Information obtained from Napster’s servers permitted the user to create a P2P connection with another member.²¹ Napster’s central database was thus integral to the P2P distribution of files. Napster’s direct involvement in file sharing through its central server is precisely what led to its demise. Specifically, in 2000, after holding that Napster could be held liable for contributory and vicarious infringement, a district court enjoined Napster from distributing content, which shut down the service.²²

BitTorrent presents new challenges to copyright owners who wish to enforce their rights. Because of BitTorrent’s decentralized system, there is no primary server to enjoin for facilitating the illegal copying of copyrighted works, making imposition of secondary liability for copyright infringement difficult if not impossible.²³ Moreover, Internet Service Providers (“ISPs”) are generally protected from liability

¹⁹ See, e.g., *IO Grp., Inc. v. Does 1–19*, 2010 WL 5071605, at *3–4 (N.D. Cal. Dec. 7, 2010) (holding that joinder of all nineteen Doe defendants was inappropriate because the allegation that they all used the same peer-to-peer network to reproduce and distribute plaintiff’s copyrighted works was insufficient under Rule 20); *Fonovisa, Inc. v. Does 1–9*, 2008 WL 919701, at *1, 6 (W.D. Pa. Apr. 3, 2008) (finding joinder to be improper under Rule 20(a) (2) because, “given the different factual contexts of the alleged infringement for each [d]efendant and the absence of any evidence showing joint action by [d]efendants, other than their use of the same peer-to-peer network to access the copyright recordings and the same ISP,” plaintiffs had “failed to allege any facts tending to show that one or more of the [d]efendants ha[d] actually downloaded songs from another [d]efendant, which could conceivably link the [d]efendants or show they acted in concert”); *Laface Records, LLC v. Does 1–38*, 2008 U.S. Dist. LEXIS 14544, 2008 WL 544992 (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); *Elektra Entertainment Grp., Inc. v. Does 1–9*, 2004 WL 2095581, at *6–7 (S.D.N.Y. Sept. 8, 2004) (finding that the mere use of the same P2P protocol was insufficient to establish that plaintiff’s copyright infringement claims were logically related for the purposes of a Rule 20(a) (2) joinder); *Interscope Records v. Does 1–25*, 2004 U.S. Dist. LEXIS 27782 (M.D. Fla. Apr. 1, 2004) (magistrate recommended severance of multiple defendants in action where only connection between defendants was allegation that they used same ISP and P2P network to conduct copyright infringement).

²⁰ *Patrick Collins, Inc. v. John Does 1–15*, 2012 WL 415436, at *1 (D. Colo. Feb. 8, 2012) (citing *First Time Videos, LLC v. Does 1–76*, 276 F.R.D. 254, 255 (N.D. Ill. 2011)).

²¹ Helton, *supra* note 14, at 17.

²² *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896 (N.D. Cal. 2000) *aff’d in part, rev’d in part*, 239 F.3d 1004 (9th Cir. 2001).

²³ *Diabolic Video Prods., Inc. v. Does 1–2099*, 2011 WL 3100404, at *2 (N.D. Cal. May 31, 2011) (“Because there are no central servers to enjoin from unlawfully distributing copyrighted content, there is no primary target on which to focus anti-piracy efforts. Indeed, the same decentralization that makes the BitTorrent protocol an extremely robust and efficient means of transferring enormous quantities of data also acts to insulate it from anti-piracy measures.”).

associated with the infringing activity of their customers under the Online Copyright Infringement Liability Limitation Act (“OCILLA”).²⁴ Consequently, plaintiff copyright owners have had no recourse other than to target BitTorrent end users who participated in the transfer of copyrighted materials. Because BitTorrent users can share files anonymously, these defendants are only identifiable by the Internet Protocol (“IP”) addresses²⁵ assigned to the computers that accessed the protected work, as well as the date and time of the allegedly infringing activity.²⁶ While Section 512(h)(1) of OCILLA authorizes copyright owners to subpoena ISPs for the identities of their customers allegedly engaging in infringement, courts have concluded that Section 512(h)(1) does not allow a copyright holder to subpoena “conduit” ISPs that merely facilitate data transfers between internet users rather than store copyrighted materials on its servers.²⁷ Thus, copyright holders attempting to identify BitTorrent end users cannot use this subpoena provision to obtain identifying information from ISPs.²⁸

Without a defendant’s name and address, copyright owners lack the information necessary to serve a summons. Plaintiffs instead must initiate “John Doe” lawsuits against unknown defendants.²⁹ In the BitTorrent context, plaintiffs have attempted to aggregate their infringement claims against multiple defendants by joining the defendants, identified only by their IP addresses, into a single lawsuit under Federal Rule of Civil Procedure (“Rule”) 20³⁰ After suing a group of John Does, the plaintiffs then file a motion under Rule 45 seeking authorization from the court to perform early discovery and subpoena third-party ISPs to learn the identities of the subscribers who correspond to the IP addresses.³¹

Both John Doe defendants and third-party ISPs in BitTorrent cases

²⁴ 17 U.S.C. § 512 (2010).

²⁵ “An IP address is a number that is assigned by an [ISP] to devices . . . that are connected to the Internet.” *Raw Films, Inc. v. Does 1–32*, 2011 WL 6840590, at *1, n.1 (N.D. Ga. Dec.29, 2011).

²⁶ *Pac. Century Int’l, Ltd. v. Does 1–37*, 282 F.R.D. 189, 192 (N.D. Ill. 2012); *Diabolic Video Prods., Inc.*, 2011 WL 3100404, at *2.

²⁷ *In re Charter Commc’ns, Inc.*, Subpoena Enforcement Matter, 393 F.3d 771, 776 (8th Cir. 2005); *see also* *Recording Indus. Ass’n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1231, 1233 (D.C. Cir. 2003).

²⁸ *In re Charter Communc’ns*, 393 F.3d at 782 (Murphy, J., dissenting).

²⁹ *Diabolic Video Prods., Inc.*, 2011 WL 3100404, at *2.

³⁰ *See, e.g.*, *AF Holdings v. Does 1–1,058*, 286 F.R.D. 43, 52-56 (D.D.C. 2012) *vacated*, 752 F.3d 990 (D.C. Cir. 2014)..

³¹ *Voltage Pictures v. Does*, 818 F. Supp. 2d 28 (D.D.C. 2011). It should be noted that Doe defendants are not without recourse: under 47 U.S.C. § 551(c) (2) (B), ISPs who qualify as “cable providers” may not divulge a subscriber’s personally identifiable information in response to a court order unless the ISP notifies the subscriber of the order. *See e.g., Id.* at 32 (“Prior to providing the plaintiff with a putative defendant’s identifying information, however, the ISPs sent notices to the putative defendants informing them of their right to challenge release of their information in this Court.”).

typically respond in two ways: (1) moving to sever the parties under Rule 21 on the basis that joinder is improper; and (2) moving to quash the third-party subpoena under Rule 45(d)(3) on the basis that it creates an undue burden. This Article will explore the current legal landscape with respect to both of these questions³².

II. JOINDER

A. *The Legal Standard for Joinder*

Pursuant to Rule 20(a), multiple defendants may be joined in a single action if “any right to relief is asserted against them . . . with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences,” and “any question of law or fact common to all defendants will arise in the action.”³³ The purpose of the rule “is to promote trial convenience and expedite the final determination of disputes, thereby preventing multiple lawsuits.”³⁴ The Supreme Court has articulated that, under the Rules, “the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.”³⁵ Courts thus construe the permissive joinder rule liberally in the interest of judicial economy.³⁶

If the requirements of Rule 20(a) are not met, the remedy for misjoinder is not dismissal, but rather severance of the parties into separate actions under Rule 21.³⁷ Because joinder and severance are related, courts have also “read Rule 21 in conjunction with Rule 42(b), which allows a court to sever claims in order to avoid prejudice to any party.”³⁸ Thus, in addition to the two requirements set out in Rule 20(a), courts also consider whether joinder would prejudice any party or result

³² See, e.g., *First Time Videos*, 276 F.R.D. at 256-58.

³³ FED. R. CIV. P. 20(a) (2). Pursuant to Federal Rule of Civil Procedure 20, defendants may be joined in a single action 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.”

³⁴ *Digital Sin Inc. v. Does*, 279 F.R.D. 239, 243 (S.D.N.Y. 2012) (quoting 7 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1652 (3d ed. 2011)); see also *Hard Drive Prods. v. Does*, 809 F. Supp. 2d 1151, 1156 (N.D. Cal. 2011) (“Rule 20(a) (2) is designed to promote judicial economy and trial convenience.”).

³⁵ *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966).

³⁶ *AF Holdings v. Does* 1–1,058, 286 F.R.D. 43, 52 (D.D.C. 2012); *Patrick Collins, Inc. v. Does* 1–15, 2012 WL 415436, at *2 (D. Colo. Feb. 8, 2012)

³⁷ *Patrick Collins, Inc.*, 2012 WL 415436, at *2; see also *Malibu Media v. Does* 1–11, 286 F.R.D. 114, 115 (D.D.C. 2012).

³⁸ *AF Holdings*, 286 F.R.D. at 53; see also FED. R. CIV. P. 42(b) (“For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims.”).

in needless delay.³⁹

B. *The District Court Split*

District courts are split on whether John Doe defendants may be joined under Rule 20 based solely on their participation in the same BitTorrent swarm, and until May 2014, no court of appeals had spoken on the issue.⁴⁰ While differences exist with respect to each of the joinder requirements, “[t]he heart of this debate centers on whether a swarm of users downloading a file with the same hash identifier qualifies as ‘the same transaction, occurrence, or series of transactions or occurrences’ under Rule 20(a)(2)(A).”⁴¹ Some courts have endorsed the swarm joinder theory, holding that participation in the same BitTorrent swarm in order to download a copyrighted work is enough to constitute the same “series of transactions or occurrences.”⁴² Other courts, however, have rejected the theory as insufficient to support joinder.⁴³

In each of these cases, plaintiffs adopt slight variations of what is essentially the same argument: because users in a swarm simultaneously download and upload pieces of a single file among multiple peer

³⁹ *First Time Videos v. Does 1-76*, 276 F.R.D. 254, 257 (N.D. Ill. 2011); *Call of the Wild Movie, LLC v. Does 1-1,062*, 770 F. Supp. 2d 332, 342 (D.D.C. 2011); *see also Malibu Media, LLC v. John Does 1-54*, 2012 WL 3030302, at *3 (D. Colo. July 25, 2012) (“Even when the specific requirements of Rule 20 are satisfied, the Court must consider whether permissive joinder will comport with the principles of fundamental fairness” or cause undue prejudice to any party) (internal quotations and citations omitted).

⁴⁰ For cases recognizing that district courts across the country are split on the issue *see reFX Audio Software Inc. v. Does 1-85*, 2014 WL 1293816, at *4 (N.D. Ill. Mar. 24, 2014); *Malibu Media*, 2012 WL 3030302, at *2; *Digital Sin, Inc. v. Does 1-176*, 279 F.R.D. 239, 240 (S.D.N.Y. 2012). *See also Malibu Media, LLC v. John Does 1-16*, 902 F. Supp. 2d 690, 699 (E.D. Pa. 2012) (“Currently, in similar cases throughout the country, there is a split among district judges as to whether joinder of multiple John Doe defendants is proper. There is even a split among district courts within this District itself on this issue.”) (internal citations omitted).

⁴¹ *reFX Audio Software Inc.*, 2014 WL 1293816, at *4; *see also Malibu Media, LLC v. John Does 1-6*, 291 F.R.D. 191, 203 (N.D. Ill. 2013) (“[T]he Court recognizes that district courts across the Country are split on whether a BitTorrent swarm constitutes a ‘transaction, occurrence, or series of transactions or occurrences’ under Rule 20.”).

⁴² *See, Malibu Media, LLC*, 291 F.R.D. at 203-04; *see also AF Holdings*, 286 F.R.D., at 54; *Pac. Century Int’l v. Does 1-31*, 2012 WL 2129003, at *2 (N.D. Ill. June 12, 2012); *Patrick Collins, Inc.*, 2012 WL 415436, at *2-4; *Digital Sin, Inc.*, 279 F.R.D. at 244; *First Time Videos*, 276 F.R.D. at 258; *MGCIP v. Does 1-316*, 2011 WL 2292958, at *2 (N.D. Ill. June 9, 2011); *MCGIP v. Does 1-18*, 2011 WL 2181620, at *1 (N.D. Cal. June 2, 2011); *Voltage Pictures, LLC v. Does 1-5,000*, 818 F. Supp. 2d 28, 38-43 (D.D.C. 2011); *Call of the Wild*, 770 F. Supp. 2d at 342-43.

⁴³ *reFX Audio Software Inc.*, 2014 WL 1293816, at *5-7; *Malibu Media LLC v. Does 1-11*, 286 F.R.D. 113, 116 (D.D.C. 2012); *Malibu Media*, 2012 WL 3030302, at *2; *In re BitTorrent Adult Film Copyright Infringement Cases v. John Does 1-37*, 296 F.R.D. 80, 90-92 (E.D.N.Y. 2012); *Raw Films, Inc. v. Does 1-32*, 2011 WL 6840590, at *2 (N.D. Ga. Dec. 29, 2011); *SBO Pictures, Inc. v. Does 1-3,036*, 2011 WL 6002620, at *3 (N.D. Cal. Nov. 30, 2011); *Liberty Media Holdings, LLC v. BitTorrent Swarm*, 277 F.R.D. 669, 672 (S.D. Fla.2011); *Hard Drive Prods., Inc. v. Does 1-30*, 2011 WL 4915551, at *4 (E.D. Va. Oct. 17, 2011); *DigiProtect USA Corp. v. Does 1-240*, 2011 WL 4444666, at *24 (S.D.N.Y. Sept. 26, 2011); *Hard Drive Prods. v. Does 1-188*, 809 F. Supp. 2d 1150, 1163-64 (N.D. Cal. 2011).

members, any peer user in a swarm that has already downloaded a piece of a file prior to the time a subsequent peer begins downloading is a possible source of the infringement.⁴⁴ Moreover, any piece shared by a user will be distributed among peers numerous times, even after that initial user leaves a swarm.⁴⁵ The unique nature of BitTorrent's protocol means that every peer in a swarm is simultaneously receiving and distributing copyrighted material through "digital handshakes," across time and around the country.⁴⁶ Through this mechanism, plaintiffs argue, that each peer collaborates with others in a swarm through "series of closely-related transactions" to complete the distribution of a file as a whole, making joinder appropriate under Rule 20(a).⁴⁷

Many of the courts that have accepted this swarm joinder theory have done so on the basis that plaintiffs' claims against multiple John Doe defendants that participated in a swarm are "logically related."⁴⁸ According to these courts, the "same transaction or occurrence" requirement is "flexible, contemplating a series of many occurrences, depending not so much on the immediateness of their connection as on their logical relationship."⁴⁹ Because each swarm is unique to a particular file, and each unknown individual within that swarm is necessarily a possible source of distribution to all the other unknown individuals that are receiving identical copyrighted material, there is no basis to rebut a plaintiff's allegations that its claims against the listed IP addresses are logically related.⁵⁰ As one court noted, "it is difficult to see how the sharing and downloading activity alleged in the Complaint—a series of individuals connecting either directly with each other or as part of a chain or 'swarm' of connectivity designed to illegally copy and share the exact same copyrighted file—could *not* constitute a 'series of transactions or occurrences' for purposes of Rule 20(a)."⁵¹

⁴⁴ *AF Holdings*, 286 F.R.D. at 54; *Call of the Wild*, 770 F. Supp. 2d at 343.

⁴⁵ *AF Holdings*, 286 F.R.D. at 54.

⁴⁶ *Boy Racer, Inc. v. Does 1–60*, 2011 WL 3652521, at *3 (N.D. Cal. Aug. 19, 2011); *Malibu Media*, 286 F.R.D. at 115 (noting plaintiff's allegation that each peer member that participated in a swarm "directly interacted and communicated with other members of that swarm through digital handshakes, the passing along of computer instructions, uploading and downloading, and by other types of transmissions.").

⁴⁷ *Boy Racer*, 2011 WL 3652521, at * 3.

⁴⁸ *See, e.g., AF Holdings*, 286 F.R.D. at 54.

⁴⁹ *Patrick Collins, Inc. v. John Does 1–15*, 2012 WL 415436, at *2 (D. Colo. Feb. 8, 2012); *see also Call of the Wild*, 770 F. Supp. 2d at 342 (internal citations omitted).

⁵⁰ *AF Holdings*, 286 F.R.D. at 54.

⁵¹ *Digital Sin, Inc. v. Does 1–176*, 279 F.R.D. 239,244 (S.D.N.Y. 2012); *see also MGCIP v. Does 1–316*, 2011 WL 2292958, at *2 (N.D.Ill. June 9, 2011) ("[G]iven the decentralized nature of BitTorrent's file-sharing protocol—where individual users distribute the same work's data directly to one another without going through a central server—the Court finds that sufficient facts have been plead to support the joinder of the putative defendants at this time."); *Malibu*

Inherent in this analysis is a belief among many courts that consideration of joinder, prior to early discovery, is premature, particularly without first learning the defendants' identities and the facts associated with the defendants' conduct.⁵² Some courts also find that severance would cause needless delay while significantly prejudicing the plaintiffs. In *AF Holdings LLC v. Does 1–1,058*, for example, the District Court for the District of Columbia noted that severance of the John Doe defendants:

would essentially require the plaintiff to file 1,058 separate cases, pay separate filing fees, and obtain 1,058 separate subpoenas for each of the Listed IP Addresses. This burden for the plaintiff—not to mention the judicial system—would significantly frustrate the plaintiff's efforts to identify and seek a remedy from those engaging in the alleged infringing activity.⁵³

As a result, these courts have endorsed joinder as a way to promote judicial economy and efficiency.⁵⁴ Further, there is a concern that severance would render it impossible for plaintiffs to protect their copyrighted works, given “the administrative burden of simply obtaining sufficient identifying information to properly name and serve alleged infringers,” as well as the cost of paying hundreds or thousands of separate filing fees.⁵⁵ The same courts have noted that the possible prejudice to the defendants from joinder, at least at an early stage, is minimal; given that the John Doe defendants are identified only by their

Media, 291 F.R.D. at 204 (“It suffices for joinder that defendants indirectly interact with one another through participation in the same BitTorrent swarm.”).

⁵² See, e.g., *MCGIP, LLC v. Does 1–18*, 2011 WL 2181620, at *1 (N.D. Cal. 2011) (“[A]ssertion of improper joinder may be meritorious but, at this stage in the litigation, when discovery is underway only to learn identifying facts necessary to permit service on Doe defendants, joinder of unknown parties identified only by IP addresses is proper. . . .”) (internal quotation omitted). Multiple courts have concluded that “at this nascent stage of the case, the plaintiffs have sufficiently alleged that the infringing activity at issue in each of the cases may involve multiple computers, based in various jurisdictions, which are using the BitTorrent protocol to make available for sharing the same copyrighted content.” *Call of the Wild*, 770 F. Supp. 2d at 343; accord *AF Holdings*, 286 F.R.D. at 55–56; *Voltage Pictures, LLC v. Does 1–5,000*, 818 F. Supp. 2d 28, 40 (D.D.C. 2011); *Patrick Collins, Inc.*, 2012 WL 415436, at *3–4. See also *First Time Videos LLC v. Does 1–76*, 276 F.R.D. 254, 258 (N.D. Ill. 2011) (“The overwhelming majority of courts have denied as premature motions to sever prior to discovery.”); *Digital Sin, Inc.*, 279 F.R.D. at 244 (declining to sever the case at the pleading stage).

⁵³ *AF Holdings*, 286 F.R.D. at 55.

⁵⁴ *Id.* See also *Call of the Wild*, 770 F. Supp. 2d at 344.

⁵⁵ *Call of the Wild*, 770 F. Supp. 2d at 345; see also *Patrick Collins, Inc.*, 2012 WL 415436 at *3 (“If the Court were to sever the Doe Defendants at this juncture, Plaintiff would face significant obstacles in its efforts to protect the Work from copyright infringement, which would only needlessly delay the suit. Furthermore, Plaintiff would need to file individual cases, which would require Plaintiff to pay the Court separate filing fees in each case, further limiting its ability to protect its legal rights.”); *Arista Records LLC v. Does 1–27*, 584 F. Supp. 2d 240, 252 (D. Me. 2008) (“Under the law, the Plaintiffs are entitled to protect their copyrighted material. . . . Not to act would be to allow those who would take what is not theirs to remain hidden behind their ISPs and to diminish and even destroy the intrinsic value of the Plaintiffs’ legal interests.”).

IP addresses and are not yet named parties, they are not compelled to respond to the allegations or assert a defense.⁵⁶ The District Court for the District of Columbia has thus emphasized on multiple occasions that while defendants may be able to demonstrate prejudice from joinder once the plaintiffs identify them, they cannot demonstrate any cognizable harm before that time by virtue of a lawsuit filed against “John Does.”⁵⁷

Other courts, particularly in the Northern District of California, have rejected the swarm joinder theory, finding that use of BitTorrent technology does not satisfy the requirements for permissive joinder.⁵⁸ One of the leading decisions standing for this proposition is *Hard Drive Productions, Inc. v. Does 1–188*, which prohibited an adult entertainment company from joining 188 John Doe defendants into a single infringement case.⁵⁹ In what has become a heavily cited passage, Judge Spero explained his rationale for rejecting the argument that individuals who participate in the same swarm are engaging in a single transaction or a series of similar transactions under Rule 20(a):

Under the BitTorrent Protocol, it is not necessary that each of the Does 1–188 participated in or contributed to the downloading of each other’s copies of the work at issue—or even participated in or contributed to the downloading by any of the Does 1–188. Any “pieces” of the work copied or uploaded by any individual Doe may have gone to any other Doe *or to any of the potentially thousands who participated in a given swarm*. The bare fact that a Doe clicked on a command to participate in the BitTorrent Protocol does not mean that they were part of the downloading by unknown hundreds or thousands of individuals across the country or across the world.⁶⁰

Central to this argument is a concern that plaintiffs in the BitTorrent cases are attempting to join multiple Doe defendants for merely engaging in similar types of behavior, rather than *acting in concert* with one another.⁶¹ These courts have expressed skepticism

⁵⁶ See *Call of the Wild*, 770 F. Supp. 2d at 344; *Patrick Collins, Inc.*, 2012 WL 415436 at *4.

⁵⁷ See *AF Holdings*, 286 F.R.D. at 55; *Voltage Pictures*, 818 F. Supp. 2d at 41; see also *MCGIP*, 2011 WL 2181620 at *1 (noting that Doe defendants may raise the joinder issue at a later point in the litigation if the plaintiff maintained the action against him or her).

⁵⁸ *Patrick Collins, Inc.*, 2012 WL 415436 at *3, n.4 (noting that “some courts, almost exclusively in the Northern District of California, have found misjoinder in analogous [BitTorrent] cases”); *Patrick Collins, Inc. v. Does 1–23*, 2012 WL 1144918, at *6 (D. Md. Apr. 4, 2012) (“The Northern District of California, where many of these mass copyright infringement cases are tried, provides an excellent explanation of why the BitTorrent protocol does not meet Rule 20’s transactional requirement.”).

⁵⁹ *Hard Drive Prods., Inc. v. Does 1–188*, 809 F. Supp. 2d 1150, 1163–65 (N.D. Cal. 2011).

⁶⁰ *Id.* at 1163.

⁶¹ *Id.* at 1164 (finding “unpersuasive the allegation that the Does acted in concert”); *Malibu Media*, 286 F.R.D. at 115 (noting that a plaintiff “cannot join defendants who simply engaged in similar types of behavior, but who are otherwise unrelated; *some allegation of concerted action*”).

over the assumption that users of BitTorrent should be treated differently from users of earlier P2P networks on the basis that those in the same swarm simultaneously download and distribute pieces of an identical copyrighted file among each other. Rather, the technical architecture of BitTorrent is no different from those of earlier file-sharing protocols where the nature of the protocol was held by courts to be insufficient to justify joinder of dozens of otherwise unrelated defendants in a single action.⁶²

Even if individual defendants participate in the same swarm, they do not necessarily share information directly with one another, and thus, do not automatically participate in the same transaction or series of transactions.⁶³ Specifically, because users in a swarm download and upload a file in a piecemeal fashion, a flood of users can conceivably participate within a swarm over several days, weeks, or even months.

As a result, many courts have found joinder improper absent a showing that the Doe defendants were present in the same swarm *at the same time or in close temporal proximity*.⁶⁴ In *Hard Drive*, for example,

between defendants is required.”) (internal quotations omitted); *accord* Malibu Media, LLC v. John Does 1–23, 878 F. Supp. 2d 628, 632 (E.D. Va. 2012) (holding that a plaintiff in a BitTorrent case “must allege facts that permit the court at least to infer some actual, concerted exchange of data between those defendants”); *Digital Sins, Inc. v. John Does 1–245*, 2012 WL 1744838, *2 (S.D.N.Y. May 15, 2012) (finding no concerted action between defendants that only utilized the same computer protocol to download a file); *Raw Films*, 2011 WL 6840590 at *2 (“Downloading a work as part of a swarm does not constitute ‘acting in concert’ with one another.”) (internal citations omitted).

⁶² See *Raw Films*, 2011 WL 6840590 at *2 (rejecting the swarm joinder theory and noting that “[d]ownloading 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”); *Hard Drive Prods., Inc.*, 809 F. Supp. 2d at 1160 (noting that several judges in the Northern District of California have held that, like earlier P2P technologies, use of BitTorrent does not satisfy the joinder requirements, and adopting this approach).

⁶³ See, e.g., *Sunlust Pictures, LLC v. Does 1–75*, 2012 WL 3717768, at *4 (N.D. Ill. Aug. 27, 2012) (noting that “[t]he courts that have denied joinder in the BitTorrent context have generally done so because the plaintiff failed to allege that the defendants simultaneously participated in a single swarm or that the defendants distributed files directly among themselves.”); *Liberty Media Holdings*, 277 F.R.D. at 671–72 (holding that “[m]erely participating in a BitTorrent swarm does not equate to participating in the same ‘transaction, occurrence, or series of transactions or occurrences’” and noting that “due to the decentralized operation of BitTorrent, this fact alone does not imply that Defendants ‘participated in or contributed to the downloading of each other’s copies of the work at issue’”) (internal citations omitted).

⁶⁴ See *Malibu Media, LLC v. Reynolds*, 2013 WL 870618, at *10 (N.D. Ill. Mar. 7, 2013) (requiring plaintiff to establish that defendants were simultaneously present in the same swarm or that they accessed the swarm in close temporal proximity); *Zambezia Film (Pty) Ltd. v. Does 1–33*, 2013 WL 1181587, at *2 (N.D. Ill. Mar. 20, 2013) (“[J]udges should require plaintiffs to plead facts sufficient to show that the defendants were not only part of the same swarm, but that they were part of the same swarm *at the same time as one another*.”) (internal citation omitted); *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 91 (E.D.N.Y. 2012) (finding that plaintiff’s assertion that defendants were acting in concert “rests on a thin reed” where the alleged dates of downloading were weeks or months apart); *Third Degree Films, Inc. v. Does 1–131*, 280 F.R.D. 493, 496–97 (D. Ariz. 2012) (holding that joinder of a swarm that lasted over several months was improper because some participants may have never

the court emphasized, in ruling that joinder was improper, that even if the IP addresses at issue all came from a single swarm the timeframe of the alleged activity made it difficult if not impossible to discern whether each of the addresses acted in concert with all of the others:

In fact, the nearly six-week span covering the activity associated with each of the addresses calls into question whether there was ever common activity linking the 51 addresses in this case. In this age of instant digital gratification, it is difficult to imagine, let alone believe, that an alleged infringer of the copyrighted work would patiently wait six weeks to collect the bits of the work necessary to watch the work as a whole.⁶⁵

Likewise, the court in *Malibu Media, LLC v. Reynolds* noted that “the only nonconjectural link between [d]efendants who access a swarm at different times is their mutual reliance on the Initial Seeder’s upload of the file; they do not rely on each other, nor do they necessarily pave the way for later participants to obtain the file.”⁶⁶ The court went on to note the following hypothetical:

If Doe 15 connected to the swarm on June 11, 2012 and downloaded a piece of the Works from other peers who downloaded from other [d]efendants, Doe 15 would have been engaged in a series of transactions—downloads and uploads—with peers, other [d]efendants, and seeders who were simultaneously present in the swarm. He could not fairly be said to have engaged in a transaction or series of transactions with peers who entered the swarm and left days, weeks, or months before his arrival. Furthermore, without showing that Doe 15 remained in the swarm after his June 11 “hit date,” Malibu Media cannot maintain that Doe 15 acted in concert with [d]efendants that arrived subsequently by contributing to the chain of data distribution.

overlapped with one another); *Raw Films*, 2011 WL 6840590 at *2 (noting that some Doe defendants were alleged to have participated in the swarm over four months apart, and finding that the “differing dates and times of each Defendant’s alleged sharing do not allow for an inference that the Defendants were acting in concert.”). *But see Malibu Media*, 291 F.R.D. at 203–04 (“Those courts that require plaintiffs to establish that defendants were in the swarm at the same time or in close temporal proximity so as to join them in a single suit ignore that permissive joinder under Rule 20(a) does not require that defendants act in concert with each other.”).

⁶⁵ *Hard Drive Prods., Inc.*, 809 F. Supp. 2d at 1163.

⁶⁶ *Malibu Media*, 2013 WL 870618 at *2. (“A swarm is composed of two types of peers: ‘leechers’ and ‘seeds.’ ‘A leecher is a peer in the process of acquiring a file. A seed is a peer that already has a complete copy of the file and that remains in the torrent to serve the leechers. Every torrent requires at least one seed.’ When a seed user decides to distribute a new file, he or she uses the Client Program to create a “torrent descriptor file.” The Client Program then takes the target computer file, also known as the “Initial Seed,” and divides it into segments called “pieces.” Once the initial seed is divided into pieces, the Client Program assigns each piece a unique alphanumeric identifier (a “hash identifier”)...After the Initial Seed is created and uploaded to a torrent site, other peers may begin to download and upload pieces of the computer file to which the torrent is linked.”) (quoting Annemarie Bridy, *Is Online Copyright Enforcement Scaleable?*, 13 VAND. J. ENT. & TECH. L. 695, 700 (2011)).

Once a BitTorrent user disconnects from a swarm, any subsequent activity in that swarm is independent of the activity that took place during his presence.⁶⁷

Other courts have gone further, holding that joinder is inappropriate unless the plaintiff can actually show that the defendants within a swarm shared files *directly with each other*.⁶⁸ In *reFX Audio Software Inc. v. Does 1–85*, for example, the court concluded that plaintiff’s swarm joinder theory defined transactions “at too high a level of generality” by joining defendants that “have no direct connection with one another (that is, they did not download or upload to one another) and, worse . . . have only the most tenuous of *indirect* connections to one another.”⁶⁹ The result, according to the court, is that plaintiffs sweep in Doe defendants “who are multiple (maybe even hundreds or thousands of) levels away from Doe 1,” the original source of the copyrighted file.⁷⁰ Thus,

[a] plaintiff may only join as defendants those swarm members who have directly exchanged a part of a copyrighted work (identified by the same unique hash identifier) with one particular individual. In other words, a plaintiff can join with any one alleged infringer all the other alleged infringers who downloaded content directly from or uploaded content directly to that same infringer.⁷¹

The court explained that “[t]his rule—requiring the actual exchange of data—takes into account both the factual and legal bases of the claim because proving the actual exchange of data is a requirement for the underlying substantive copyright-infringement claim itself.”⁷²

Many of the courts that have rejected the swarm joinder theory under Rule 20(a)’s “transaction, occurrence, or series of transactions” test also have indicated that, even if the requirements of Rule 20(a) were met, they would nonetheless exercise their discretion to sever the parties in order to avoid prejudice to the defendants and needless delay.⁷³ In

⁶⁷ *Id.*

⁶⁸ See *SBO Pictures, Inc. v. Does 1–57*, 2012 WL 1415523, at *2 (D. Md. Apr. 20, 2012) (denying joinder and stating that “the better-reasoned decisions have held that where a plaintiff has not plead that any defendant shared file pieces directly with one another, the first prong of permissive joinder is not satisfied.”); *MCGIP, LLC v. Does 1–149*, 2011 WL 4352110, at *3 (N.D. Cal. Sept. 16, 2011) (misjoinder where plaintiff “failed to show that any of the 149 Doe defendants actually exchanged any piece of the seed file with one another.”); *Boy Racer, Inc. v. Does 1–60*, 2011 WL 3652521, at *4 (N.D. Cal. Aug. 19, 2011) (severing defendants where “[p]laintiff [did] not plead facts showing that any particular defendant illegally shared plaintiff’s work with any other particular defendant. . .”).

⁶⁹ *reFX Audio Software Inc.*, 2014 WL 1293816, at *5 (N.D. Ill. Mar. 24, 2014).

⁷⁰ *Id.*

⁷¹ *Id.* at *6.

⁷² *Id.*

⁷³ See, e.g., *Hard Drive Prods., Inc.*, 809 F. Supp. 2d at 1164 (“Even if joinder of the Doe Defendants in this action met the requirements of Rule 20(a) . . . the Court finds it is appropriate to

terms of judicial economy, courts have expressed concern that permitting joinder would force them to address the unique defenses advanced by each of the hundreds, if not thousands of defendants, “creating scores of mini-trials involving different evidence and testimony.”⁷⁴ In *Malibu Media, LLC v. John Does 1–54*, for example, the Magistrate Judge initially assigned to the case noted that “defendants are coming forward with a multitude of different defenses. Some are businesses alleging that a patron was the unlawful downloader. Others are elderly grandparents that do not even know what BitTorrent is or how to download a file from the internet.”⁷⁵ Consequently, the district court concluded that, because “[t]he fact-intensive nature of these individualized defenses would require that the Court give individualized attention to each claim against each Defendant,” there was “little, if any, judicial economy in allowing the claims to proceed together.”⁷⁶

These courts have also maintained that the Doe defendants likely would be significantly prejudiced by having to proceed in a single action. Even though the locations of the ISPs typically are scattered across a jurisdiction, the Doe defendants would still be required to serve each other with all pleadings, inflicting a significant burden on each defendant, most of whom proceed *pro se*.⁷⁷ The proceedings themselves also would be “unmanageable” and “unworkable,” since each of the defendants would have the right to be at every other defendant’s deposition, and have the opportunity to be present and address the court at every case management conference or other event.⁷⁸ This concern over prejudice to the defendants stands in sharp contrast to the position taken by pro-joinder courts. These courts assert that it is the *plaintiffs*,

exercise its discretion to sever and dismiss all but one Doe Defendant to avoid causing prejudice and unfairness to Defendants, and in the interest of justice.”

⁷⁴ *Hard Drive Prods., Inc.*, 809 F. Supp. 2d at 1164; *see also Malibu Media*, 2012 WL 3030302 at *3 (noting that, though the nature of the alleged actions of each defendant is similar, the defendants are likely to present very different defenses to these claims based on their individual circumstances); *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 91–92 (E.D.N.Y. 2012) (noting that case management at trial would be “inefficient, chaotic, and expensive. Joining Defendants to resolve what at least superficially appears to be a relatively straightforward case would in fact transform it into a cumbersome procedural albatross”).

⁷⁵ *Malibu Media v. Does 1–54*, 2012 WL 3030302, at *3 (D. Colo. July 25, 2012); *see also In re BitTorrent*, 296 F.R.D. at 91 (“By contrast, the half-dozen moving defendants, even at this preliminary stage, have raised a panoply of individual defenses, including age, religious convictions, and technological savvy; misidentification of ISP accounts; the kinds of WiFi equipment and security software utilized; and the location of defendant’s router.”).

⁷⁶ *Id.* at *4 (citing *Digital Sin*, 2012 WL 1744838 at *3) (“There are no litigation economies to be gained from trying what are in essence 245 different cases together, because each of the John Does is likely to have some individual defense to assert. Each defendant’s situation, which is unique to him or her, will have to be proved separately and independently.”).

⁷⁷ *Malibu Media*, 2012 WL 3030302 at *4 (citing *Hard Drive Prods., Inc.*, 809 F. Supp. 2d at 1164).

⁷⁸ *Hard Drive Prods., Inc.*, 809 F. Supp. 2d at 1164.

and not the defendants, that are likely to be prejudiced by the administrative burden of having to pay individual filing fees and obtain separate subpoenas in an effort to identify and seek a remedy from the hundreds or thousands of BitTorrent users allegedly infringing their works. According to courts that have rejected joinder, however, any prejudice the plaintiffs might face as a result of being forced to pay separate filing fees and pursue individual infringement actions still pales in comparison to the harm the defendants would suffer as a result of being joined into a single suit.⁷⁹

Notably, a number of courts have highlighted the unfair and even abusive litigation tactics adopted by so-called “copyright trolls”—plaintiffs that do not produce copyrighted works but rather merely acquire and assert rights, often to adult films, in order to bring lawsuits and extract settlement payments from alleged infringers.⁸⁰ Specifically, courts have charged that, through the swarm joinder model for copyright litigation, plaintiffs have coerced scores of defendants into unjust settlements by exploiting their concerns about public exposure and embarrassment for downloading pornography.⁸¹ Defendants, whether liable for infringement or not, must decide whether to pay money “to fight the claim that he or she illegally downloaded sexually explicit materials, or pay the money demanded,” creating an incentive to agree to an unjust settlement.⁸²

In a heavily cited passage, the court in *MCGIP, LLC v. Does 1–149* described these litigation tactics as follows:

- (1) [A] plaintiff sues anywhere from a few to thousands of Doe defendants for copyright infringement in one action;
- (2) the plaintiff seeks leave to take early discovery;
- (3) once the plaintiff obtains the

⁷⁹ *Id.* at 1165 (rejecting Plaintiff’s assertion that severing the Doe Defendants would prevent copyright holder plaintiffs from being able to protect their material and noting that severance does not preclude Plaintiff from filing individual copyright infringement actions against each Doe Defendant); *Malibu Media*, 2012 WL 3030302 at *4 (“The only possible prejudice to Plaintiff is the cost of litigating each of these cases individually. However, requiring Plaintiff to pay a separate filing fee for each action is not undue prejudice.”).

⁸⁰ *Malibu Media, LLC v. John Does 1, 6, 13, 14*, 950 F. Supp. 2d 779–80 (E.D. Pa. 2013).

⁸¹ *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 90 (E.D.N.Y. 2012) (“It would be unrealistic to ignore the nature of plaintiffs’ allegations—to wit: the theft of pornographic films—which distinguish these cases from garden variety copyright actions.”); *see also Hard Drive Prods., Inc. v. Does 1-130*, 2011 WL 5573960, at *3 (N.D. Cal. Nov. 16, 2011) (“In addition, the court shares the concern that these cases potentially open the door to abusive settlement tactics. Nothing currently prevents Plaintiff from sending a settlement demand to the individual that the ISP identifies as the IP subscriber. That individual—whether guilty of copyright infringement or not—would then have to decide whether to pay money to retain legal assistance to fight the claim that he or she illegally downloaded sexually explicit materials, or pay the money demanded. This creates great potential for a coercive and unjust ‘settlement.’”).

⁸² *SBO Pictures v. Does 1–3,036*, 2011 WL 6002620, at *3 (D. Md. Apr. 20, 2012) (internal quotations and citations omitted).

identities of the IP subscribers through early discovery, it serves the subscribers with a settlement demand; (4) the subscribers, often embarrassed about the prospect of being named in a suit involving pornographic movies, settle.⁸³

Other courts have noted that these companies have abused the court system “as an inexpensive means to gain the Doe defendants’ personal information and coerce payment from them. The plaintiffs seemingly have no interest in actually litigating the cases, but rather simply have used the Court and its subpoena powers to obtain sufficient information to shake down the John Does.”⁸⁴ As a result, many courts have cited this “common arc” of abusive litigation tactics, and the resulting prejudice to defendants, as a chief reason for severing the claims into individual suits.⁸⁵

Courts are thus deeply divided over the propriety of joining multiple John Doe Defendants in a single case on the basis that they participated in the same swarm. At the heart of the matter is a fundamental disagreement over whether users of the BitTorrent protocol are transactionally related. Courts are equally at odds over concerns of judicial economy and potential prejudice.

C. An Appellate Court Weighs In

In May 2014, the U.S. Court of Appeals for the District of Columbia became the first court of appeals to directly address the propriety of the swarm joinder theory.⁸⁶ Plaintiff AF Holdings had brought suit against 1,058 John Doe defendants, alleging that they had all used BitTorrent to illegally download and share the adult entertainment film *Popular on Demand*.⁸⁷ These defendants were

⁸³ 2011 WL 4352110, at *4, n.5 (citing *IO Grp. v. Does 1–435*, 2011 WL 445043, at *6).

⁸⁴ In re *BitTorrent*, 296 F.R.D. at 86 (quoting *Raw Films v. Does 1–32*, 2011 WL 6182025, at *2 (E.D. Va. Oct. 5, 2011)); see also *Malibu Media*, 2012 WL 3030302 at *5 (noting that “[c]ourts across the country have observed that Plaintiff (and other companies involved in this type of litigation) do not seem interested in actually litigating their copyright claims. Rather, they appear to be using the federal courts only to obtain identifying information for the ISP owners and then attempting to negotiate a quick settlement.”) (internal citations omitted); *Malibu Media v. Does 1–23*, 878 F. Supp. 2d 628, 632 (E.D. Va. 2012) (noting that concerns of judicial efficiency were outweighed by the risk of “coercing unjust settlements from innocent defendants” and inflation of copyright value by enhancement of settlement leverage) (internal quotations and citations omitted).

⁸⁵ *MCGIP*, 2011 WL 4352110 at *4, n.5; see also *Malibu Media*, 2012 WL 3030302 at *5 (“The Court will not idly watch what is essentially an extortion scheme, for a case that plaintiff has no intention of bringing to trial.”) (internal quotations and citations omitted); In re *BitTorrent*, 2012 WL 1570765 at *10 (“Our federal court system provides litigants with some of the finest tools available to assist in resolving disputes; the courts should not, however, permit those tools to be used as a bludgeon.”).

⁸⁶ See generally *AF Holdings, LLC v. Does 1–1,058*, 752 F.3d 990 (D.C. Cir. 2014).

⁸⁷ *Id.* at 993.

identified only by the IP addresses used to share the film, along with the specific date and time the alleged infringing activity took place.⁸⁸ AF Holdings moved for leave to take early discovery, seeking to serve subpoenas on the ISPs linked to the 1,058 IP addresses.⁸⁹ The district court granted the request, authorizing the issuance of subpoenas that compelled the ISPs to provide identifying information of the underlying subscribers.⁹⁰ The ISPs refused to comply, however, arguing that the subpoenas were unduly burdensome because joinder of the 1,058 John Doe defendants was improper and personal jurisdiction over most of these defendants was lacking.⁹¹ Citing its own precedent, the district court rejected the ISP's arguments, holding that these considerations were premature when discovery is sought before the plaintiff has named a defendant and the discovery is targeted to identify unknown individuals associated with the IP addresses.⁹² However, the court also acknowledged "a substantial ground for difference of opinion" among district courts on these issues and, conceding that grounds existed for such a difference of opinion, certified its order for immediate appeal.⁹³

On appeal, the Court of Appeals vacated and remanded the district court's decision. The Court took to task the plaintiff's law firm, Prenda Law, branding it as a "porno-trolling collective" made up of "attorneys with shattered law practices who, seeking easy money . . . acquired several copyrights to pornographic movies and then initiated massive John Doe infringement lawsuits."⁹⁴ According to the Court, this case was a "quintessential example of Prenda Law's modus operandi."⁹⁵ They identified:

[U]nknown persons whose IP addresses were used to download pornographic films, sue them in gigantic multi-defendant suits that minimized filing fees, discover the identities of the persons to whom

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 993-94.

⁹² *AF Holdings v. Does 1-1,058*, 286 F.R.D. 43, 45 (D.D.C. 2012) *vacated*, 752 F.3d 990 (D.C. Cir. 2014); *see also* *Arista Records LLC v. Does 1-19*, 551 F. Supp. 2d 1, 11 (D.D.C. 2008) ("While the Court notes that the remedy for improper joinder is severance and not dismissal, ... the Court also finds that this inquiry is premature without first knowing Defendants' identities and the actual facts and circumstances associated with Defendants' conduct."); *Call of the Wild Movie, LLC v. Does 1-1,062*, 770 F. Supp. 2d 332, 343 (D.D.C. 2011) (consolidated opinion denying motions to quash and modify subpoenas, and concluding that "at this nascent stage of the case, the plaintiffs have sufficiently alleged that the infringing activity at issue in each of the cases may involve multiple computers, based in various jurisdictions, which are using the BitTorrent protocol to make available for sharing the same copyrighted content.").

⁹³ *AF Holdings*, 286 F.R.D. at 63-64.

⁹⁴ *AF Holdings*, 752 F.3d at 992 (quoting *Ingenuity 13 LLC v. John Doe*, 2013 WL 1898633, at *2 (C.D. Cal. 2013) (internal quotations omitted)).

⁹⁵ *Id.* at 993.

these IP address were assigned by serving subpoenas on the Internet service providers to which the addresses pertained, then negotiate settlements with the underlying subscribers.⁹⁶

This strategy was highly successful because of the statutory damages for copyright infringement, the high cost of litigation, and the potential embarrassment of being associated with pornographic subject matter.⁹⁷ Moreover, in observing that Prenda Law had no intention of actually litigating, the Court pointed to the fact that it had made \$15 million on these cases in less than three years despite plaintiff's own admission that, of the more than one hundred cases that it had initiated, none had reached a trial or resulted in a judgment other than by default.⁹⁸ From the outset, the Court made it clear that this case was primarily about the need to "put a stop to . . . one litigant's attempt" to "manipulate judicial procedures to serve [its] own improper ends."⁹⁹

Turning to the question of joinder, the Court was unconvinced by the logic of the swarm joinder model, namely that BitTorrent users that participate in the same swarm are necessarily part of the same series of transactions within the meaning of Rule 20(a)(2).¹⁰⁰ Echoing the approach of some other district courts that found joinder to be improper, the Court stated that, "for purposes of this case," it may be assumed that two individuals are part of the same series of transactions only when they "participate in the same swarm *at the same time.*"¹⁰¹ This requirement reflects a concern expressed by many district courts, including that of Judge Spero in *Hard Drive Productions, Inc.*, that, because users in a swarm distribute files in piecemeal fashion over a prolonged span of time, users that participate in the same swarm are not necessarily sharing information directly with one another. As the Court explained, "two BitTorrent users who download the same file months apart are like two individuals who play at the same blackjack table at different times. They may have won the same amount of money, employed the same strategy, and perhaps even played with the same dealer, but they have still engaged in entirely separate transactions. And

⁹⁶ *Id.* at 992.

⁹⁷ *Id.* (citing *Ingenuity 13*, 2013 WL 1898633, at *2) See also Claire Suddath, *Prenda Law, the Porn Copyright Trolls*, BUSINESSWEEK (May 30, 2013), <http://www.businessweek.com/articles/2013-05-30/prenda-law-the-porn-copyright-trolls> (recounting Prenda Law's history and litigation tactics).

⁹⁸ *AF Holdings*, 752 F.3d at 993.

⁹⁹ *Id.* at 992. Despite averring that it had no effect on its decision the Court also took explicit note of other courts' conclusions that there was at least one forged signature on the assignment agreement through which AF Holdings claimed to have acquired the copyright to *Popular Demand*. *Id.* at 993 (citing *Ingenuity 13 LLC v. John Doe*, 2013 WL 1898633, at *3 (C.D. Cal. May 6, 2013); *AF Holdings LLC v. Navasca*, 2013 WL 3815677, at *1 (N.D. Cal. 2013)).

¹⁰⁰ *AF Holdings*, 752 F.3d at 998.

¹⁰¹ *Id.* See also cases cited *supra* notes 61–64.

simply committing the same type of violation in the same way does not link defendants together for the purposes of joinder.”¹⁰²

As noted earlier, this approach is less stringent than that of some other courts, which hold that joinder is inappropriate absent an actual showing that the defendants within a swarm distributed a part of a copyrighted work directly among each other.¹⁰³ Unlike the latter approach, which requires the actual exchange of data among the defendants, courts adopting the DC Circuit’s test may assume that, when defendants participate in a swarm at the same time, there is at least a reasonable basis for believing that these individuals are transactionally linked for the purposes of satisfying the requirements for joinder.

Here, however, the plaintiff “provided no reason to think that the Doe defendants it named in this lawsuit were ever participating in the same swarm at the same time.”¹⁰⁴ Rather, it merely provided “snapshots” of moments across a span of nearly five months in which each of the 1,058 John Doe defendants allegedly shared the copyrighted work.¹⁰⁵ According to the Court, “[t]wo individuals who downloaded the same file five months apart are exceedingly unlikely to have had any interaction with one another whatsoever. Their only relationship is that they used the same protocol to access the same work.”¹⁰⁶

Despite the unique factual circumstances of the case, and the Court’s sharp criticism of the plaintiff’s litigation tactics, the Court’s adoption of the temporal standard requiring defendants to be present in the swarm at the same time for joinder to be proper is an explicit rejection of the swarm joinder theory.

II. EARLY DISCOVERY AND MOTIONS TO QUASH UNDER RULE 45(D)(3)

A. *Legal Standard for Early Discovery of Third Parties*

While Rule 26(d)(1) generally precludes parties from initiating discovery before satisfying the meet and confer requirement of Rule 26(f), courts are willing to grant early discovery in limited circumstances, particularly to enable a plaintiff to ascertain the identifying information necessary to effect service of process on a

¹⁰² *Id.* (quoting *Hard Drive Prods., Inc. v. Does* 1–30, 2011 WL 4915551, at *3 (E.D. Va. Oct. 17, 2011) (internal quotations omitted)).

¹⁰³ See *reFX Audio Software Inc.,* 2014 WL 1293816, at *5 (N.D. Ill. Mar. 24, 2014); *SBO Pictures, Inc. v. Does* 1–57, 2012 WL 1415523, at *2 (D. Md. Apr. 20, 2012); *MCGIP, LLC v. Does* 1–149, 2011 WL 4352110, at *3 (N.D. Cal. Sept. 16, 2011); *Boy Racer, Inc. v. Does* 1–60, 2011 WL 3652521, at *4 (N.D. Cal. Aug. 19, 2011).

¹⁰⁴ *AF Holdings*, 752 F.3d at 998.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

defendant.¹⁰⁷ Courts typically require a showing of good cause in determining whether to grant a party's request for early discovery.¹⁰⁸ Plaintiffs in BitTorrent cases typically seek leave to serve non-party ISPs in order to determine the true identities and addresses of the various John Doe defendants.

Assuming a court permits early discovery, a plaintiff may serve a subpoena on the non-party ISP requesting information in its custody.¹⁰⁹ However, a court must quash a subpoena if it subjects a nonparty to an undue burden or expense.¹¹⁰ When determining if an undue burden exists, courts ask whether the burden of compliance with the subpoena would exceed the benefit to the plaintiff of producing the material sought by it.¹¹¹ This inquiry generally requires balancing the burden and costs the recipient of the subpoena faces, the relevance of the information sought, the scope of the discovery request, and the party's need for the information.¹¹²

B. Discussion

Courts in BitTorrent infringement cases have considered whether a subpoena served on ISPs prior to discovery creates an undue burden on the part of either the ISPs or the defendants.¹¹³ In some cases, after the plaintiffs received authorization from the court to seek early discovery, the ISPs have moved to quash subpoenas under Rule 45(c)(3)(A)(iv) on

¹⁰⁷ *Diabolic Video Prod., Inc. v. Does 1–2,099*, 2011 WL 3100404, at *1 (N.D. Cal. May 31, 2011); *Digital Sin, Inc., v. Does 1–176*, 279 F.R.D. 239, 241–42 (S.D.N.Y. 2012).

¹⁰⁸ *Nu Image, Inc. v. Does 1-23,322*, 799 F. Supp. 2d 34, 36 (D.D.C. 2011); *Digital Sin, Inc., 279 F.R.D. at 241*.

¹⁰⁹ *AF Holdings*, 286 F.R.D. at 46.

¹¹⁰ Fed. R. Civ. P. 45(d) (3) (A) (iv).

¹¹¹ *Pac. Century Int'l, Ltd. v. Does 1–37*, 282 F.R.D. 189, 193 (N.D. Ill. 2012); *Call of the Wild Movie, LLC v. Does 1–1,062*, 770 F. Supp. 2d, 332, 355–59 (D.D.C. 2011).

¹¹² *AF Holdings*, 286 F.R.D. at 46; *see also Hard Drive Prods., Inc. v. Does 1–188*, 809 F. Supp. 2d 1150, 1155–56 (N.D. Cal. 2011) (noting that the court must determine that “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of discovery in resolving the issues.”).

¹¹³ It should be noted that, in addition to arguing that the third party subpoenas create an undue burden on the part of the ISPs, defendants and ISPs have moved to quash the subpoenas issued to ISPs on alternative grounds, namely that Rule 45(d) (3) (A) (iii) requires a court to quash a subpoena if it “requires disclosure of privilege or other protected matter.” This defense, however, has typically been rejected by courts. *MGCIP v. Does 1–316*, 2011 WL 2292958 *2 (N.D. Ill. June 9, 2011) (denying the putative defendants’ motion to quash plaintiff’s subpoena and holding that the subpoena requests were not outweighed by the putative defendants’ privacy interests or First Amendment rights, nor did the subpoenas issued the disclosure of privileged matter or create an undue burden on the putative defendants); *Voltage Pictures, LLC v. Does 1–5,000*, 818 F. Supp. 2d 28, 36 (D.D.C. 2011) (“The Court recognizes that the putative defendants’ First Amendment right to anonymous speech is implicated by disclosure of their identifying information...Nevertheless, whatever asserted First Amendment right to anonymity the putative defendants may have in this context does not shield them from allegations of copyright infringement.”).

the grounds that compliance would impose an undue burden on them in terms of costs and resources expended.¹¹⁴ Likewise, defendants have also moved to quash the subpoenas directed at the ISPs, typically citing the “annoyance, embarrassment, oppression, or undue burden or expense” that the subpoenas would impose.¹¹⁵

Most courts that have weighed in on the issue have endorsed early discovery to subpoena the ISPs, emphasizing that plaintiffs “cannot salvage the value of its copyright without assistance from the ISPs,” since there is no other way to identify the unknown individuals.¹¹⁶ As one court has found, “[a]bsent a Court-ordered subpoena, many of the ISPs, who qualify as ‘cable operators’ for purposes of 47 U.S.C. § 522(5), are effectively prohibited by 47 U.S.C. § 551(c) from disclosing the identities of the putative defendants” to plaintiffs; the Court emphasized that “in all of the opinions and rulings in similar cases around the country, the Court has found no indication that the plaintiffs have any reasonable alternative to these subpoenas to obtain the identities of the alleged infringers.”¹¹⁷ Moreover, plaintiffs have argued that early discovery is necessary to prevent the requested data from being erased by ISPs and thus lost forever.¹¹⁸ Most consumer IP addresses are “dynamic” rather than “static”: while static IP addresses remain fixed for a specific user, dynamic IP addresses are randomly assigned to internet users on a temporary basis and are frequently reassigned to many different computers over short periods of time.¹¹⁹ In order to link a dynamic IP address to a specific consumer, ISPs must maintain detailed records and use software to correlate the IP address assigned to a computer at a specific moment with the subscriber’s identifying account information.¹²⁰ Without early intervention from the

¹¹⁴ See, e.g., *Call of the Wild*, 770 F. Supp. 2d at 338 (involving an ISP filing a motion to quash the subpoena because of the undue burden it faces with compliance).

¹¹⁵ See FED. R. CIV. P. 26(c) (1).

¹¹⁶ *AF Holdings*, 286 F.R.D. at 50; see also *Malibu Media, LLC v. Does 1–16*, 902 F. Supp. 2d 690, 698 (E.D. Pa. 2012) (“The Court finds good cause for ordering such discovery because Plaintiff has demonstrated that a subpoena seeking the subscriber information associated with allegedly infringing IP addresses is possibly the only way for Plaintiff to identify the proper defendants in these cases and proceed with its claims against them.”).

¹¹⁷ *Digital Sin, Inc. v. Does 1–176*, 279 F.R.D. 239, 241–42 (S.D.N.Y. 2012); see also *Malibu Media*, 902 F. Supp. 2d at 698 (“The ISPs have not objected to the subpoenas, nor would any objection by them have much chance of success because, as Plaintiff correctly observes, federal law requires an ISP to provide information as to the identity of a subscriber upon proper legal process.”).

¹¹⁸ See, e.g., *Digital Sin, Inc.*, 279 F.R.D. at 241; *Call of the Wild*, 770 F. Supp. 2d at 356–57; see also *Malibu Media, LLC v. Doe*, 2014 WL 3565764 (S.D. Ohio July 18, 2014) (noting that, because ISPs maintain records that associate an IP address with a particular subscriber for short period of time before deleting them, this factor weighed in favor of granting plaintiff’s motion for leave to sever a third party subpoena).

¹¹⁹ *Call of the Wild*, 770 F. Supp. 2d at 356.

¹²⁰ *Id.* at 357.

ISPs, which typically perform these tasks for their own internal business purposes, discovering the identity of a particular infringer that uses a dynamic IP address can be very difficult.¹²¹

In rejecting the undue burden defense, courts have emphasized the tools at their disposal to protect both ISPs and defendants, including costs arrangements, protective orders, and “Bellwether” trials. In *Call of the Wild Movie, LLC v. Does 1–1,062*, the court rejected Time Warner’s argument that, “due to the large number of its customers allegedly engaging in online infringing activities, it would ‘suffer significant harms’ and ‘incur significant costs’ because compliance with requests for identifying information about those customers would ‘overwhelm’ its capacity and ‘completely absorb the resources for many months.’”¹²² The court found the cost argument unavailing because, when granting the plaintiffs leave to subpoena the ISPs, it had already ordered the plaintiffs to cover the costs of producing the requested information.¹²³ Additionally, Time Warner conceded that in order to pursue its motions to quash it had already completed fifty percent or more of the work necessary to isolate and preserve customer identifying information, further undermining its claim of hardship.¹²⁴ Similarly, in *Malibu Media, LLC v. John Does 1–16*, despite finding that early discovery was necessary to determine the factual basis for plaintiff’s theory of liability, the court held that good cause existed to issue a protective order requiring all parties to refer to the defendants by his or her John Doe numbers in any matters filed of record. The identity of any particular John Doe could be disclosed as necessary to other parties in discovery as part of *in camera* submissions to the court.¹²⁵ The court also implemented a “Bellwether” trial, with plaintiff proceeding solely against the limited number of moving John Does, while staying all proceedings against the remaining Does until further notice. According to the court, the Bellwether trial provided the “fairest and most efficient

¹²¹ *Id.* at 356–57.

¹²² *Id.* at 355.

¹²³ *Id.* at 358; *see also Digital Sin, Inc.*, 279 F.R.D. at 245 (ordering plaintiff to cover costs of the ISPs compliance with subpoenas).

¹²⁴ *Id.* *See also AF Holdings*, 286 F.R.D. at 52 (noting that, by the movant ISPs own sworn admissions, the information requested in the subpoenas had already been collected and concluding that the administrative burden incurred by the ISPs in responding to the subpoenas was minimal).

¹²⁵ 902 F. Supp. 2d at 701–02; *see also Digital Sin, Inc.*, 279 F.R.D. at 242–43 (authorizing discovery but issuing a protective order preventing the ISPs from disclosing the John Does’ telephone numbers, and ordering the ISPs to withhold the identifying information as confidential until the Doe Defendants had an opportunity to be heard in the matter. The court expressed concern that because many of the names turned over by the ISPs would ultimately not be the individuals who actually shared the copyrighted material, this risk gave rise to “the potential for coercing unjust settlements from innocent defendants who want to avoid the embarrassment of having their names publicly associated with allegations of illegally downloading [adult films].”) (internal quotations omitted).

means” of “testing the viability of Plaintiff’s claims, as well as Plaintiff’s sincerity in pursuing them.”¹²⁶ Moreover, in the event that Plaintiff’s allegations could not be supported, the moving John Does would have adequate remedies to recover most, if not all, of their litigation expenses, as well as damages from the Plaintiff.¹²⁷

Several courts have also rejected wholesale the contentions by Doe defendants that a subpoena served on their ISPs could somehow create an undue burden on the defendants. According to these courts, because it is the ISP that must respond to a subpoena for identifying information, and not the defendants, the defendants cannot complain of an undue burden when no action is required of them.¹²⁸ Under this line of reasoning, a motion to quash is an avenue reserved solely to ISPs, since they are required to produce the information requested.¹²⁹

It should be noted that in many instances courts analyze joinder and motion to quash issues together.¹³⁰ Because the issue of joinder is dispositive, courts that reject the application of joinder often have no need to consider a defendant’s motion to quash.¹³¹ One court noted that it was unaware of any judge in its district that quashed a third-party subpoena because it created an undue burden on the defendants and/or violated their rights to privacy; instead, the judges in the district who had quashed subpoenas had “done so simply to facilitate the severance of John Doe defendants without ruling on the merits of the motions to

¹²⁶ *Malibu Media*, 902 F. Supp. 2d at 702 .

¹²⁷ *Id.* at 702–03 (noting the avenues available to defendants, including a Rule 54 motion for costs, a lawsuit for abuse of civil process, a Rule 11 motion for sanctions, a motion to recover excessive costs under 28 USC § 1927 and, because this was a copyright case, an award of attorney’s fees under 17 USC § 505).

¹²⁸ *See Id.* at 698 (rejecting the assertion that the third-party subpoenas served on the ISPs would subject the John Does to an undue burden, reasoning that the subpoenas are addressed to third parties—the ISPs, not the John Does); *Sunlust Pictures*, 2012 WL 3717768at *2 (“The subpoena does not impose an undue burden on Doe because he is not the party directed to respond to it.”); *Hard Drive Productions, Inc. v. Does 1–48*, 2012 WL 2196038, at *3 (N.D. Ill. 2012) (“[T]he subpoenas do not burden [the anonymous defendant] because they do not require any action of [him].”).

¹²⁹ *See, e.g.*, *First Time Videos, LLC v. Does 1–500*, 276 F.R.D. 241, at 250 (N.D. Ill. 2011) (“The subpoenas served on Doe Defendants’ ISPs do not subject the Doe Defendant to an undue burden; if anyone may move to quash these subpoenas on the basis of an undue burden, it is the ISPs themselves, as they are compelled to produce information under the subpoena.”); *MGCIP v. Does 1–316*, 2011 WL 2292958, at *2 (N.D. Ill. June 9, 2011); *see also* *Liberty Media Holdings, LLC v. Swarm Sharing Hash File*, 821 F. Supp. 2d 444, 451, n.4 (D. Mass. 2011).

¹³⁰ *See, e.g.*, *Hard Drive Prods., Inc.*, 809 F. Supp. 2d at 1156–57 (“Although Doe 24.5.180.56 has not brought a motion to sever or a motion to dismiss, in order to rule on Doe 24.5.180.56’s Motion to Quash, the Court must address the questions of whether Rule 20(a) (2) joinder of Doe Defendants in this action is proper.”).

¹³¹ *See, e.g.*, *Malibu Media*, 286 F.R.D. at 117, n.5 (noting that because the Court had decided to sever the parties, it did not need to reach Doe 7’s arguments for quashing the subpoena issued to his ISP or for a protective order); *Patrick Collins, Inc. v. John Does 1–34*, 2013 WL 1660673 at *4 (S.D. Cal. Apr. 16, 2013) (noting that, because the court had ordered severance of all but one Doe defendant, there was no longer a need for early discovery subpoenas).

quash.”¹³²

In rejecting the joinder of 1,058 John Doe defendants in its recent decision, the Court of Appeals for the District of Columbia also ruled on the ISP’s argument that subpoenas were unduly burdensome because personal jurisdiction over the defendants was lacking.¹³³ While the district court had held that an evaluation of personal jurisdiction at the pleading stage was premature,¹³⁴ the Court of Appeals disagreed, holding that “a plaintiff pursuing discovery of the sort AF Holdings seeks regarding unknown defendants must ‘have at least a good faith belief that such discovery will enable it to show that the court has personal jurisdiction over the defendant[s].’”¹³⁵ According to the Court, “[t]he identify of prospective defendants who cannot properly be sued in this district can be of little use in a lawsuit brought in this district.”¹³⁶ If a subpoena compels an ISP to disclose information that is not properly discoverable, “then the burden it imposes, however slight, is necessarily undue.”¹³⁷ Thus, in denying discovery when no good faith belief that personal jurisdiction over the defendants exists, the Court would not be making a premature and impermissible conclusive determination on the merits of the personal jurisdiction question, but instead, would be satisfying its “Rule 26 obligation to ensure that the scope of discovery is limited to issues actually relevant to the litigation.”¹³⁸

As noted earlier, the Court of Appeals was concerned about Prenda Law’s abusive litigation tactics. The Court found that the plaintiff failed to take even minimal steps to limit its suit to defendants who might live, or at least downloaded the copyrighted work at issue, in the district.¹³⁹ In particular, the Court emphasized that the plaintiff never bothered to use geolocation services that estimate the location of Internet users based on their IP addresses.¹⁴⁰ Perhaps more egregious, the plaintiff had sought to subpoena ISPs that provided “no service at all

¹³² *Malibu Media*, 902 F. Supp. 2d at 697.

¹³³ *AF Holdings LLC v. Does 1–1,058*, 752 F.3d 990, 994 (D.C. Cir. 2014).

¹³⁴ *AF Holdings LLC v. Does 1–1,058*, 286 F.R.D. 39, 56–57 (D.D.C. 2012).

¹³⁵ *AF Holdings*, 752 F.3d at 995 (quoting *Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1090 (D.C. Cir.1998)).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 995–96.

¹³⁹ *Id.* at 996.

¹⁴⁰ *Id. Compare with, Malibu Media, LLC v. Doe*, 2014 WL 3973480, at *2 (D.D.C. 2014)(holding that plaintiff had established a good faith basis for believing the putative defendant may be a District of Columbia resident and emphasizing that plaintiff had used geolocation technology which has consistently worked in similar cases to ensure that the Defendant’s acts occurred using an IP address traced to a physical address located within this District).

in the District.”¹⁴¹ The plaintiff thus failed to demonstrate a good faith belief that it could successfully sue the overwhelming majority of the 1,058 unnamed defendants about whom it sought discovery. To the Court, the plaintiff’s refusal to limit its lawsuit and discovery created an undue burden on the part of the ISPs, and thus, an independent basis for vacating the district court’s order denying the ISPs motion to quash.¹⁴²

The Court of Appeals for the District of Columbia decision in *AF Holdings* stands in sharp contrast to decisions of other district courts that have shied away from finding undue burden on the ISPs. The courts that have granted motions to quash have mainly done so because of the “annoyance, embarrassment, oppression, or undue burden or expense” imposed on defendants, not the ISPs.¹⁴³ Courts have questioned the assumption that a person paying for Internet access at a given location is necessarily the same individual that engaged in illegal file sharing.¹⁴⁴ Because of the prevalence of wireless routers, which enable shared access to a single Internet connection, a single IP address usually supports multiple computer devices in a home. As a result, different family members, or even visitors, can download or upload using the same IP address. Further, “[u]nless the wireless router has been appropriately secured (and in some cases, even if it has been secured), neighbors or passersby could access the Internet using the IP address assigned to a particular subscriber” and download copyrighted works.¹⁴⁵ This analysis, of course, does not account for the IP addresses that belong to businesses or entities that provide access to employees, customers, and even members of the public.¹⁴⁶ As one court noted, “it is no more likely that the subscriber to an IP address carried out a particular computer function . . . than to say an individual who pays the telephone bill made a specific telephone call.”¹⁴⁷ Thus, some courts are concerned that “[b]y defining Doe Defendants as ISP subscribers who were assigned certain IP addresses, instead of the actual Internet users who allegedly engaged in infringing activity, Plaintiff’s sought-after discovery” may “draw numerous innocent internet users into the litigation, placing a burden upon them that weighs against allowing the discovery as designed.”¹⁴⁸ Other courts, however, have rejected these

¹⁴¹ *Id.*

¹⁴² *Id.* at 997.

¹⁴³ See, e.g., *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 90 (E.D.N.Y. 2012); *Combat Zone, Inc. v. Does 1–84*, 2013 WL 1092132, at *6–7 (D. Mass. 2013) *report and recommendation adopted*, 2013 WL 1092458 (D. Mass. 2013).

¹⁴⁴ *In re BitTorrent*, 296 F.R.D. at 84–85.

¹⁴⁵ *Id.* at 84.

¹⁴⁶ *Id.* at 85.

¹⁴⁷ *Id.* at 84.

¹⁴⁸ *SBO Pictures, Inc. v. Does 1–3,036*, 2011 WL 6002620, at *3 (N.D. Cal. Nov. 30, 2011) (quoting *Hard Drive Prods., Inc. v. Does 1–130*, 2011 WL 5573960, at *2) (N.D. Cal. Nov. 16,

concerns, noting that while “the information provided by the ISPs in response to the subpoenas will not necessarily reveal the identifies of the actual infringers, [they] may, with other discovery, lead to the infringers’ identities.”¹⁴⁹ In other words, “it may be that a third party used that subscriber’s IP address to commit the infringement alleged, but this possibility is not a cognizable basis on which to quash an otherwise proper subpoena.”¹⁵⁰

Overall, because of the court split on the issue of joinder, individual defendants have been far more successful at challenging their inclusion in these mass John Doe lawsuits by arguing that participation in the same BitTorrent swarm is insufficient to sustain permissive joinder. While motions to quash are often treated concurrently with the issue of joinder, they are often granted only after the application for joinder has been rejected and the parties have been severed.

CONCLUSION

It remains to be seen whether the *AF Holding* decision will turn the tide against plaintiffs in BitTorrent lawsuits. Courts remain split on whether it is appropriate to join multiple BitTorrent users in a single action, the ability to pursue early discovery in such cases, and, more generally, the appropriateness of such mass infringement lawsuits. While some courts have endorsed these lawsuits as protecting the rights of copyright holders and promoting judicial efficiency, others have criticized their proliferation for allowing plaintiffs to engage in abusive litigation tactics that strong-arm defendants into settlement. This divide ultimately reflects a struggle over how best to balance the interests of copyright owners in stopping widespread online infringement against, on the other hand, the due process rights of defendants.

The Court of Appeals for the District of Columbia’s approach is a step toward balancing these interests. With respect to joinder, the Court’s test embraced a compromise between the alternatives often advocated by plaintiffs and defendants: while it rejected the copyright owners’ argument that, because of the unique nature of BitTorrent, users who participate in the same swarm necessarily take part in the same series of transactions for purposes of Rule 20(a)(2), it also declined to adopt the standard commonly advanced by defendants that would require plaintiffs to show that the John Doe defendants all distributed parts of a copyrighted work directly among each other. Instead, by requiring the unnamed defendants to be present in the swarm at the same time, while also sparing plaintiffs the burden of

2011) (internal quotations omitted).

¹⁴⁹ *Malibu Media, LLC v. Does 1–16*, 902 F. Supp. 2d 690, 698 (E.D. Pa. Oct. 3, 2012).

¹⁵⁰ *Id.* (internal quotations omitted).

proving the actual exchange of data at the pleading stage, the Court attempted to safeguard the rights of both parties. Moreover, the Court’s emphasis on geolocation services for identifying IP addresses is a viable method for ensuring that plaintiffs can gain identifying information about unknown infringers without abusing early discovery procedures to “serve their own improper ends.”¹⁵¹

There may be no perfect, one-size-fits-all solution to the vexing questions of joinder and early discovery in BitTorrent cases. Fortunately, district courts have considerable discretion to fashion procedures tailored to the specific circumstances of each case that will protect both plaintiffs and defendants. District judges can issue protective orders and hold Bellwether trials to give litigants their day in court while encouraging fair and efficient proceedings. Reasonable, middle-ground approaches such as these ultimately may be the most effective way for district courts to strike the right balance in this evolving area of internet law.

¹⁵¹ AF Holdings, LLC v. Does 1–1,058, 752 F.3d 990, 992 (D.C. Cir. 2014).

Appendix

Selected BitTorrent Cases

District of Arizona	<i>Third Degree Films, Inc. v. Does 1-131</i> , 280 F.R.D. 493 (D. Ariz. 2012)	Denying joinder.
Northern District of California	<i>Diabolic Video Prods., Inc. v. Does 1-2099</i> , 2011 WL 3100404 (N.D. Cal. May 31, 2011)	Denying joinder
Northern District of California	<i>MCGIP, LLC v. Does 1-18</i> , 2011 WL 2181620 (N.D. Cal. June 2, 2011)	Allowing joinder, denying severance as premature.
Northern District of California	<i>Pac. Century Int'l Ltd. v. Does 1-101</i> , 2011 WL 2690142 (N.D. Cal. July 8, 2011)	Denying joinder.
Northern District of California	<i>Boy Racer v. John Does 2-52</i> , 2011 WL 3652521 (N.D. Cal. Aug. 19, 2011)	Denying joinder.
Northern District of California	<i>Hard Drive Prods., Inc. v. Does 1-188</i> , 809 F. Supp. 2d 1150, 1152 (N.D. Cal. 2011)	Denying joinder.
Northern District of California	<i>Hard Drive Prods., Inc. v. Does 1-130</i> , 2011 WL 5573960 (N.D. Cal. Nov. 16, 2011)	Denying joinder.

Northern District of California	<i>OpenMind Solutions, Inc. v. Does 1-39</i> , 2011 WL 4715200 (N.D. Cal. Oct. 7, 2011)	Allowing joinder, denying severance as premature.
Northern District of California	<i>SBO Pictures, Inc. v. Does 1-3036</i> , 2011 WL 6002620 (N.D. Cal. Nov. 30, 2011).	Denying joinder.
Southern District of California	<i>Patrick Collins, Inc. v. John Does 1 through 34</i> , 2013 WL 1660673 (S.D. Cal. Apr. 16, 2013)	Denying joinder.
District of Colorado	<i>Patrick Collins, Inc. v. John Does 1-15</i> , 2012 WL 415436 (D. Colo. Feb. 8, 2012)	Allowing joinder, denying severance as premature.
District of Colorado	<i>Malibu Media, LLC v. John Does 1-54</i> , 2012 WL 3030302 (D. Colo. July 25, 2012)	Denying joinder.
District of Columbia	<i>Call of the Wild Movie, LLC. v. Does 1-1,062</i> , 770 F. Supp. 2d 332 (D.D.C. 2011)	Allowing joinder, denying severance as premature.
District of Columbia	<i>Voltage Pictures, LLC v. Does 1-5,000</i> , 818 F. Supp. 2d 28 (D.D.C. 2011)	Allowing joinder, denying severance as premature.
District of Columbia	<i>Donkeyball Movie, LLC v. Does 1-171</i> , 810 F. Supp. 2d 20 (D.D.C. May 12, 2011)	Allowing joinder, denying severance as premature.

District of Columbia	<i>W. Coast Prods., Inc. v. Does 1-5829</i> , 275 F.R.D. 9 (D.D.C. 2011)	Allowing joinder, denying severance as premature.
District of Columbia	<i>AF Holdings LLC v. Does 1-1,058</i> , 286 F.R.D. 39 (D.D.C. 2012) <i>vacated</i> , 752 F.3d 990 (D.C. Cir. 2014)	Allowing joinder, denying severance as premature.
District of Columbia	<i>Malibu Media, LLC v. Does 1-11</i> , 286 F.R.D. 113 (D.D.C. 2012)	Denying joinder.
Middle District of Florida	<i>K-Beech Inc. v. Does 1-57</i> , 2011 WL 5597303 (M.D. Fla. Nov. 1, 2011)	Allowing joinder, denying severance as premature.
Middle District of Florida	<i>Nu Image, Inc. v. Does 1-3,932</i> , 2012 WL 646070 (M.D. Fla. Feb. 28, 2012) <i>report and recommendation adopted</i> , 2012 WL 1890632 (M.D. Fla. May 23, 2012)	Allowing joinder, denying severance as premature.
Southern District of Florida	<i>Liberty Media Holdings, LLC v. BitTorrent Swarm</i> , 277 F.R.D. 669 (S.D. Fla. 2011)	Denying joinder.
Northern District of Georgia	<i>Raw Films, Inc. v. Does 1-32</i> , 2011 WL 6840590 (N.D. Ga. Dec. 29, 2011)	Denying joinder.
Northern District of Illinois	<i>CP Productions, Inc. v. Does 1-300</i> , 2011	Denying joinder.

	WL 737761 (N.D. Ill. Feb. 24, 2011)	
Northern District of Illinois	<i>MGCIP v. Does 1-316</i> , 2011 WL 2292958 (N.D. Ill. June 9, 2011)	Allowing joinder, denying severance as premature.
Northern District of Illinois	<i>First Time Videos, LLC v. Does 1-500</i> , 276 F.R.D. 241 (N.D. Ill. 2011)	Allowing joinder, denying severance as premature.
Northern District of Illinois	<i>First Time Videos, LLC v. Does 1-76</i> , 276 F.R.D. 254 (N.D. Ill. 2011)	Allowing joinder, denying severance as premature.
Northern District of Illinois	<i>Hard Drive Prods., Inc. v. Does 1-55</i> , 2011 WL 4889094 (N.D. Ill. Oct. 12, 2011)	Allowing joinder, denying severance as premature.
Northern District of Illinois	<i>Pac. Century Int'l v. Does 1-31</i> , 2012 WL 2129003, at *2 (N.D. Ill. June 12, 2012)	Allowing joinder, denying severance as premature.
Northern District of Illinois	<i>Sunlust Pictures, LLC v. Does 1-75</i> , 2012 WL 3717768 (N.D. Ill. Aug. 27, 2012)	Allowing joinder, denying severance as premature, but ordering plaintiff not to reveal Doe's identity in any public communication or filing absent court authorization.
Northern District of Illinois	<i>Malibu Media, LLC v. Reynolds</i> , 2013 WL 870618 (N.D. Ill. Mar.	Denying joinder.

	7, 2013)	
Northern District of Illinois	<i>Malibu Media, LLC v. John Does 1-6</i> , 291 F.R.D. 191 (N.D. Ill. 2013)	Allowing joinder, denying severance as premature.
Northern District of Illinois	<i>reFX Audio Software Inc. v. Does 1-85</i> , 2014 WL 1293816 (N.D. Ill. Mar. 24, 2014)	Denying joinder
District of Maryland	<i>Patrick Collins, Inc. v. Does 1-23</i> , 2012 WL 1144918 (D. Md. Apr. 4, 2012)	Denying joinder.
District of Maryland	<i>Cinetel Films, Inc. v. Does 1-1</i> , 052, 2012 WL 1142272 (D. Md. Apr. 4, 2012)	Denying joinder.
District of Maryland	<i>SBO Pictures, Inc. v. Does 1-57</i> , 2012 WL 1415523 (D. Md. Apr. 20, 2012)	Denying joinder.
District of Massachusetts	<i>Liberty Media Holdings, LLC v. Swarm Sharing Hash File</i> , 821 F. Supp. 2d 444 (D. Mass. 2011)	Allowing joinder, denying severance as premature.
District of Massachusetts	<i>Combat Zone, Inc. v. Does 1-84</i> , 2013 WL 1092132 (D. Mass. Feb. 20, 2013) <i>report and recommendation adopted</i> , 2013 WL 1092458 (D. Mass.	Denying joinder.

	Mar. 14, 2013)	
Eastern District of Michigan	<i>Patrick Collins, Inc. v. John Does 1–23</i> , 2012 WL 1019034 (E.D. Mich. Mar. 26, 2012)	Denying joinder.
Eastern District of Michigan	<i>Patrick Collins, Inc. v. John Does 1-21</i> , 282 F.R.D. 161, 169 report and recommendation adopted, 286 F.R.D. 319 (E.D. Mich. 2012)	Allowing joinder.
Eastern District of New York	<i>In re BitTorrent Adult Film Copyright Infringement Cases</i> , 296 F.R.D. 80 report and recommendation adopted sub nom. <i>Patrick Collins, Inc. v. Doe 1</i> , 288 F.R.D. 233 (E.D.N.Y. 2012)	Denying joinder.
Southern District of New York	<i>DigiProtect USA Corp. v. Does 1–240</i> , 2011 WL 4444666 (S.D.N.Y. Sept. 26, 2011)	Denying joinder.
Southern District of New York	<i>Digital Sin, Inc. v. Does 1-176</i> , 279 F.R.D. 239 (S.D.N.Y. 2012)	Allowing joinder pursuant to a protective order, denying severance as premature.
Southern District of New York	<i>Digital Sins, Inc. v. John Does 1–245</i> , 2012 WL 1744838 (S.D.N.Y. May 15, 2012)	Denying joinder.

Eastern District of Pennsylvania	<i>K-Beech, Inc. v. John Does 1-78</i> , No. 11-cv-5060 (E.D. Pa. Oct. 3, 2011)	Denying joinder.
Eastern District of Pennsylvania	<i>K-Beech, Inc. v. John Does 1-36</i> , 2011 WL 10730965 (E.D. Pa. Oct. 21, 2011)	Denying joinder.
Eastern District of Pennsylvania	<i>Raw Films, Ltd. v. John Does 1-15</i> , 2012 WL 1019067 (E.D. Pa. Mar. 26, 2012)	Allowing joinder, denying severance as premature.
Eastern District of Pennsylvania	<i>Malibu Media, LLC v. John Does 1-22</i> , No. 12-cv-3139 (E.D. Pa. Aug. 28, 2012)	Denying joinder.
Eastern District of Pennsylvania	<i>Malibu Media, LLC v. John Does 1-16</i> , 902 F. Supp. 2d 690 (E.D. Pa. 2012)	Ordering Bellwether trial.
Eastern District of Pennsylvania	<i>Patrick Collins, Inc. v. John Does 1-11</i> , 2013 WL 395497 (E.D. Pa. Jan. 31, 2013)	Allowing joinder, denying severance as premature.
Eastern District of Pennsylvania	<i>Patrick Collins, Inc. v. John Does 1-30</i> , 2013 WL 1157840 (E.D. Pa. March 21, 2013)	Denying joinder.
Eastern District of Pennsylvania	<i>Malibu Media, LLC v. John Does 1, 6, 13, 14</i> , 950 F. Supp. 2d 779 (E.D. Pa. 2013)	Report on Bellwether trial, noting that joinder “is neither necessary nor appropriate.”

Eastern District of Virginia	<i>Hard Drive Prods., Inc. v. Does 1–30</i> , 2011 WL 4915551 (E.D. Va. Oct. 17, 2011)	Denying joinder.
Eastern District of Virginia	<i>Malibu Media, LLC v. John Does 1–23</i> , 2012 WL 1999640 (E.D. Va. May 30, 2012)	Denying joinder.