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UNITED STATES DISTRICT COURT

9

EASTERN DISTRICT OF CALIFORNIA

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11 MALIBU MEDIA, LLC, a California
limited liability company,

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Plaintiff,

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v.

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JOHN DOES 1 through 13,

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Defendants.

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Case No. 12-1260-MCE-JFM

**OPPOSITION TO OMNIBUS
MOTION THAT THE COURT: (1)
RECONSIDER AND VACATE ITS
ORDER GRANTING EARLY
DISCOVERY; (2) SEVER AND
DISMISS ALL DOES OTHER
THAN DOES NO. 1; (3) ENTER A
PROTECTIVE ORDER FILED BY
DOES 2 AND 5**

Date: September 27, 2012

Time: 11:00 a.m.

Place: Ctrm 26

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1 **I. INTRODUCTION**

2 Defendants John Does 2 and 5 (“Defendants”) have not articulated any valid
3 basis for this Court to reconsider its motion for early discovery, and the motion is
4 merely an attempt to divert the Court’s attention from their digital theft by casting
5 Plaintiff in a negative light because of Plaintiff’s effort to protect its copyright
6 through this and other similar lawsuits. At this stage of the litigation, Plaintiff has no
7 option but to file suit against the owners of IP addresses to obtain the infringers’
8 identities. Indeed, as a practical matter, “copyright owners cannot deter unlawful
9 peer-to-peer file transfers unless they can learn the identities of persons engaged in
10 that activity.” *Charter Communications, Inc., Subpoena Enforcement Matter*, 393
11 F.3d 771, 775 n. 3 (8th Cir. 2005).¹ “By filing this lawsuit against unknown putative
12 defendants and using the subpoena power to learn the identity of internet service
13 customers who infringe, copyright owners are able to take steps to protect their
14 interests, seek compensation for their misappropriated property, and stop
15 infringement.” *Malibu Media, LLC v. John Does 1-14*, Civ. Action No. 12-00764
16 (BAH), Docket 14 (D.D.C. July 25, 2012).

17 To quash Plaintiff’s subpoena pursuant to the instant motion would effectively
18 leave Plaintiff with no recourse against the mass copyright infringement it suffers on

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20 ¹ The Court of Appeals for the Eighth Circuit reversed the lower court’s allowance
21 of a subpoena issued under section 512(h) of the Digital Millennium Copyright Act
22 (DMCA) to a cable operator that provided conduit service used by its subscribers to
23 download copyrighted material over peer-to-peer networks, finding that such
24 subpoena authority only applied when the ISP stored the infringing material on its
25 network (rather than on the customer’s computer). *Accord Recording Indus. Ass’n of
26 Am. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229, 1232 (D.C. Cir. 2003). The
27 Eighth Circuit acknowledged that without this DMCA subpoena tool to discover the
28 identity of the alleged infringer, “organizations . . . can also employ alternative
avenues to seek this information, such as ‘John Doe’ lawsuits. In such lawsuits,
many of which are now pending in district courts across the country, organizations .
. . . can file a John Doe suit, along with a motion for third-party discovery of the
identity of the otherwise anonymous ‘John Doe’ defendant.” *In re Charter
Communications, Inc., Subpoena Enforcement Matter*, 393 F.3d at 775 n.3.

1 a daily basis. Any such holding is contrary to existing law and the express policy of
2 Congress. In 1999, Congress intentionally amended the Copyright Act to deter
3 individuals from online infringement by increasing statutory remedies:

4 Congress did contemplate that suits like this [against individuals] were
5 within the Act. Congress last amended the Copyright Act in 1999 *to*
6 *increase the minimum and maximum awards available under § 504(c).*
7 *See Digital Theft Deterrence and Copyright Damages Improvement*
8 *Act of 1999, Pub. L. No. 106-160, 113 Stat. 1774. At the time,*
9 *Congress specifically acknowledged that consumer-based,*
10 *noncommercial use of copyrighted materials constituted actionable*
11 *copyright infringement. Congress found that ‘copyright piracy of*
12 *intellectual property flourishes, assisted in large part by today’s world*
13 *of advanced technologies,’ and cautioned that ‘the potential for this*
14 *problem to worsen is great.’*

15 *Sony v. Tenenbaum*, 660 F.3d 487, 500-01 (1st Cir. 2011) (emphasis added) (noting
16 that the legislative history of the Copyright Act addresses the concern of online
17 piracy). As discussed in more detail below, Defendants’ Motion does not provide
18 the Court with any sufficient basis to reconsider the Court’s order authorizing early
19 discovery, to sever the case, or to enter a protective order.

17 **II. PLAINTIFF’S MOTION TO RECONSIDER SHOULD BE DENIED**

18 Although Rule 59(e) of the Federal Rules of Civil Procedure permits a district
19 court to reconsider and amend a previous order, reconsideration is an “extraordinary
20 remedy, to be used sparingly . . .” *Kona Enterprises, Inc. v. Estate of Bishop*, 229
21 F.3d 877, 890 (9th Cir. 2000); *see also, Carroll v. Nakatani*, 342 F.3d 934, 945 (9th
22 Cir. 2003). Thus, absent highly unusual circumstances, a motion for reconsideration
23 should not be granted “unless the district court is presented with *newly discovered*
24 *evidence, committed clear error, or if there is an intervening change in the*
25 *controlling law.*” *Id.* (emphasis added; internal quotes omitted). Here, Defendants
26 have not presented the Court with any new *facts* or *evidence* that merit a
27 reconsideration of the Court’s order granting early discovery. Instead, Defendants’
28

1 argument is based on the unsupported and fantastical notion that Plaintiff is engaged
2 in coercive tactics. As discussed below, it is not. Plaintiff addresses below each of
3 Defendants' arguments.

4 **A. The Doe Defendants Do Not Have a First Amendment Right to**
5 **Proceed Anonymously**

6 Defendants contend that the First Amendment affords them the right to
7 proceed anonymously in this action. To the contrary, "First Amendment privacy
8 interests are exceedingly small where the 'speech' is the alleged infringement of
9 copyrights." *Arista Records LLC v. Does 1-19*, 551 F. Supp. 2d 1, 8 (D.D.C. 2008);
10 *see also Achte/Neunte Boll Kino Beteiligungs GMBH & Co, KG v. Does 1-4*, 577,
11 2010 U.S. Dist. LEXIS 94594, at *10 n.2 (D.D.C. Sept. 10, 2010) ("the protection
12 afforded to such speech is limited and gives way in the face of a *prima facie* showing
13 of copyright infringement"); *West Bay One, Inc. v. Does 1-1653*, 270 F.R.D. 13, 16
14 n.4 (D.D.C. July 2, 2010) (same); *Sony Music Entertainment v. Does 1-40*, 326 F.
15 Supp. 2d 556, 567 (S.D.N.Y. 2004) (First Amendment right of alleged file-sharers to
16 remain anonymous "must give way to the plaintiffs' right to use the judicial process
17 to pursue what appear to be meritorious copyright infringement claims."); *Elektra*
18 *Entm't Group, Inc. v. Does 1-9*, No. 04-2289, 2004 WL 2095581, at *4-5 (S.D.N.Y.
19 Sept. 8, 2004) (finding that First Amendment right to anonymity overridden by
20 plaintiff's right to protect copyright).

21 Judge Howell of the District Court for the District of Columbia recently denied
22 a motion filed by Defendants' counsel (Morgan Pietz) containing virtually identical
23 arguments, and held that the Doe defendants could not proceed anonymously: "The
24 use of anonymity as a shield from copyright liability is not a motivation that warrants
25 protection from the Court. To the extent that the putative defendant has a First
26 Amendment interest at stake, that interest is small. ***The First Amendment does not***
27 ***protect copyright infringement.***" *Malibu Media, LLC v. John Does 1-14*, Case No.

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1 12-00764 (BAH), Docket no. 14 at pp. 6-7 (emphasis added); *see also*, *Harper &*
2 *Row Publishers, Inc. v. Nat'l Enters.*, 471 U.S. 539, 560 (1985); *A&M Records v.*
3 *Napster, Inc.*, 239 F.3d 1004, 1028 (9th Cir. 2001) (holding that the First Amendment
4 does not protect use of peer-to-peer file sharing network that constitutes copyright
5 infringement); *Columbia Pictures, Inc. v. Bunnell*, 245 F.R.D. 443, 451-52 (C.D.Cal.
6 2007) (“To the extent the users are engaged in copyright infringement, the First
7 Amendment affords them no protection whatsoever.”). Even if the users are engaged
8 in legal file sharing, “they have little to no expectation of privacy because they are
9 broadcasting their identifying information to everyone in the BitTorrent ‘swarm’ as
10 they download the file.” *Columbia Pictures*, 245 F.R.D. 443 at 452.

11 Moreover, numerous courts have found that copyright infringers have no
12 legitimate expectation of privacy in the subscriber information they provide to ISPs.
13 *Doe v. S.E.C.*, 2011 WL 4593181 at *3 (N.D.Cal. Oct. 4, 2011) (“Internet subscribers
14 do not have a reasonable expectation of privacy in subscriber information they have
15 already conveyed to their [Internet Service Providers].”); *see also*, *Guest v. Leis*, 255
16 F.3d 325, 226 (6th Cir. 2001) (holding that “computer users do not have a legitimate
17 expectation of privacy in their subscriber information because they have conveyed it
18 to another person – the system operator”); *U.S. v. Hambrick*, Civ. No. 99-4793, 2000
19 WL 1062039 at *4 (4th Cir. Aug. 3, 2000) (a person does not have a privacy interest
20 in the account information given to the ISP in order to establish an email account);
21 *Achte/Neinte Boll Kino Beteiligungs GmbH & Co. v. Does 1-4*, 577, 736 F.Supp.2d
22 212, 215 (D.D.C. 2010) (same); *U.S. v. Kennedy*, 81 F.Supp.2d 1103, 1110 (D.Kan.
23 2000) (defendant’s right to privacy was not violated when an ISP turned over his
24 subscriber information because there is no expectation of privacy in information
25 provided to third parties).

26 **B. The Subpoena Seeks Relevant Information That Is Likely To**
27 **Identify The Infringer**

1 Defendants argue that the Court should reconsider its Order authorizing early
2 discovery because the subpoena is not likely to reveal the identities of the Doe
3 defendants. But even if Defendants are not the actual infringers, the information
4 sought is still relevant and discoverable. Indeed, Rule 26 of the Federal Rules of
5 Civil Procedure defines the scope of discovery as including “any nonprivileged
6 matter that is relevant to any party’s claim or defense – including the existence,
7 description, nature, custody, condition, and location of any documents or other
8 tangible things *and the identity of the location or persons who know of any*
9 *discoverable matter.*” Fed. R. Civ. P. 26(b)(1) (emphasis added). Relevant
10 information for discovery purposes includes any information “reasonably calculated
11 to lead to the discovery of admissible evidence.” *Id.*

12 The information sought by Plaintiff – namely, information sufficient to
13 identify the Doe defendants – falls squarely within the broad scope of discovery and
14 is therefore warranted in this matter. Indeed, the identity of the IP address holder is
15 “reasonably calculated” to lead to the identity of the infringer, whether it is the IP
16 address holder or some other individual (*e.g.*, an individual residing in Defendants’
17 home). Thus, any concern about identifying a potentially innocent ISP customer,
18 who happens to fall within the Plaintiff’s discovery requests upon the ISPs, is
19 minimal and not an issue that should warrant the Court to minimize or even prohibit
20 the otherwise legitimate, relevant, and probative discovery.

21 Defendants rely heavily on Judge Brown’s opinion in *In re BitTorrent Adult*
22 *Film Copyright Infringement Cases*, 2012 WL 1570765, *14 (E.D.N.Y. May 1,
23 2012), where Judge Brown questioned the likelihood that the infringer was the
24 owner of the IP address. However, recent technological advances make it more
25 likely that a wireless account will be secured and can easily be traced to a household
26 where the subscriber either is the infringer or knows the infringer. Recently, PC
27 Magazine published an article stating: “These days, you are lucky to find one in 100
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1 Wi-Fi connections that are not protected by passwords of some sort.”² “The reason
2 for the change is simple: the router manufacturers decided to make users employ
3 security with the set-up software. As people upgrade to newer, faster routers, the
4 wide-open WiFi golden era came to an end.”³ This article, published on March 26,
5 2012, runs contrary to Judge Brown’s assertions and supports the idea that most
6 households do have closed, protected wireless.

7 The information sought by Plaintiff is relevant under Rule 26 and falls squarely
8 within the broad scope of discovery, and is therefore warranted in this matter.

9 **C. Plaintiff Has Every Intention of Litigating This Case**

10 Defendants erroneously suggest that Plaintiff has no intention of actually
11 litigating the case and that “no defendant has ever been served in one of these mass
12 copyright cases.” Motion, p.10. Defendants are wrong. Plaintiff has sued and
13 served numerous individual defendants for copyright infringement in courts
14 throughout the country, and has every intention of litigating this case as well.⁴

15

16 ² See *Free Wi-Fi is Gone Forever*, www.pcmag.com/article2/0,2817,2402137,00.asp

17 ³ *Id.*

18 ⁴ See, e.g., *Malibu Media, LLC v. Creado*, CV12-7759-RGK-SS (C.D.Cal.); *Malibu Media, LLC v. Creado*, CV12-7759-RGK-SS (C.D.Cal.); *Malibu Media LLC v. Hicks*, EDCV12-1550 VAP (SPx) (C.D.Cal.); *Malibu Media, LLC v. Abrahamzadez*, 1:12-cv-01200-ESH (D.D.C.); *Malibu Media LLC v. Bochnak*, 1:12-cv-07030 (N.D.Ill.); *Malibu Media LLC v. Siembida*, 1:12-cv-07031 (N.D.Ill.); *Malibu Media LLC v. Vancamp*, 2:12-cv-13887-PDB-DRG (E.D.Mich.); *Malibu Media LLC v. Fantalis*, 1:12-cv-00886-MEH (D.Colo.); *Malibu Media LLC v. Xu*, 1:12-cv-1866-MSK-MEH (D.Colo.); *Malibu Media LLC v. Allison*, 1:12-cv-1867-MSK-MEH (D.Colo.); *Malibu Media LLC v. Ramsey*, 1:12-cv-1868-MSK-MEH (D.Colo.); *Malibu Media LLC v. Tipton*, 1:12-cv-1869-MSK-MEH (D.Colo.); *Malibu Media LLC v. Kahrs*, 1:12-cv-1870-MSK-MEH (D.Colo.); *Malibu Media LLC v. Domindo*, 1:12-cv-1871-MSK-MEH (D.Colo.); *Malibu Media LLC v. Peng*, 1:12-cv-1872-MSK-MEH (D.Colo.); *Malibu Media LLC v. Maness*, 1:12-cv-1873-MSK-MEH (D.Colo.); *Malibu Media LLC v. Nelson*, 1:12-cv-1875-MSK-MEH (D.Colo.); *Malibu Media LLC v. Geary*, 1:12-cv-1876-MSK-MEH (D.Colo.); *Malibu Media LLC v. Detweiler*, 2:12-cv-4253-ER (E.D.Pa.); *Malibu Media LLC v. Johnston*, 2:12-cv-4200-JHS (E.D.Pa.); *Malibu Media, LLC v. Sohail Abrahamzadez*, 1:12-cv-01200-ESH (D.D.C.).

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D. Plaintiff Has Not Engaged In Abusive Litigation Tactics

1. Plaintiff Is Not Engaged In Improper Settlement Tactics

Without any factual support whatsoever, Defendants contend that Plaintiff is engaged in abusive litigation tactics to coerce settlements. Defendants are attempting to influence this Court into making a decision based on accusations in other cases involving other counsel and other plaintiffs. Indeed, Defendants cite to cases that can only refer to vague, anecdotal accusations of improper settlement tactics. These erroneous conclusions are propagated by anti-copyright blogs (including Mr. Pietz’s blog) as a suggested defense strategy. While Defendants go to substantial effort to decry Plaintiff’s purpose and settlement attempts, Defendants have not – and cannot – provide one specific example of Plaintiff improperly holding a defendant to account.

The District of Arizona aptly concluded in a case similar to this that “[t]he likelihood that [Defendant] will be subject to such tactics is minimal here; the Court will not conclude based on the tactics of other lawsuits in other districts that this suit was brought for a purely improper purpose.” *Patrick Collins, Inc. v. Does 1-54*, 2012 WL 911432 (D.Ariz. Mar. 19, 2012); *see also, Third Degree Films v. Does 1-36*, 2012 WL 2522151 (E.D.Mich. May 29, 2012) (“Defendant has offered no case-specific facts supporting this claim [of coercive settlement tactics]. Rather, Defendant relies on the conduct of adult-film companies in other cases. *This guilt-by-association argument does not justify quashing the subpoena that this Plaintiff, Third Degree Films, served on Defendant’s ISP* pursuant to an Order entered by Judge Murphy allowing this discovery.” (emphasis added)).

Defendants’ criticism of Plaintiff’s attempt to settle its disputes with the do defendants prior to naming and serving them with process is unfounded and unsupported. Indeed, such settlement demands are routinely made by most – if not all – plaintiffs prior to the filing of a lawsuit, and are in line with the well-

1 established public policy favoring resolution through settlements. *Marek v. Chesny*,
2 473 U.S. 1, 11 (1985) (“Rule 68’s policy of encouraging settlements is neutral,
3 favoring neither plaintiffs nor defendants; it expresses a clear policy of favoring
4 settlement of all lawsuits.”). Moreover, Plaintiff has a First Amendment right under
5 the petition clause to make a settlement demand. *See Sosa v. DirectTV*, 437 F. 3d
6 923, 937 (9th Cir. 2006) (holding “the protections of the Petition Clause extend to
7 settlement demands as a class,” including those made during and prior to a suit.).
8 The only difference between this case and the countless others filed every day by
9 other plaintiffs in a broad array of civil litigation is that the Plaintiff does not have
10 the ability to identify the defendants before the suit is filed.

11 2. Defendants’ Counsel Was *Not* Subjected to Any Abusive Tactics

12 The declaration submitted by Mr. Pietz in support of the Motion, which was
13 initially filed in another case pending in the Central District of California, *Malibu*
14 *Media v. Does 1-10*, Case No. CV12-3615-RGK-SSx (“Central District Case”), is
15 fraught with hearsay statements that Mr. Pietz has no personal knowledge of, and
16 fails entirely to identify a single “abusive” litigation tactic employed by Plaintiff.

17 As an initial matter, the defendant in that case was clearly represented by
18 counsel (Mr. Pietz), and neither Plaintiff’s counsel nor Plaintiff had any
19 communication whatsoever with the defendant. It was simply without merit for Mr.
20 Pietz to claim that a “shake down” occurred. *Malibu Media, LLC v. John Does 1-9*,
21 Case No. 8:12-cv-00669-SDM-AEP, Docket no. 25 at p. 7 (M.D.Fla. July 6, 2012).
22 Plaintiff will address each of the five purported “tactics” addressed in the Pietz
23 declaration, which, even if true, do not identify any wrongful conduct by Plaintiff.

24 First, Mr. Pietz criticizes Plaintiff for employing an individual to discuss
25 settlements or potential settlements with defendants. This is no different than a
26 company employing a paralegal or litigation support team, and that fact alone does
27 not lend itself to the conclusion that the individual conducted a “shake down.”

28

1 Indeed, in the case referred to by Mr. Pietz in his declaration, ***it was Mr. Pietz who***
2 ***contacted Plaintiff to discuss settlement.*** Plaintiff did not initiate the discussions.

3 Second, Mr. Pietz incredulously contended that in serving subpoenas,
4 Plaintiff violated an order issued by Magistrate Judge Brown in another case in the
5 Eastern District of New York. *See In re BitTorrent Adult Film Copyright*
6 *Infringement Cases*, 2012 WL 1570765. Plaintiff’s subpoenas, however, were in
7 direct compliance with Judge King’s and Judge Eick’s orders in the Central District
8 Case authorizing Plaintiff to “take any necessary action” to ascertain the identities of
9 the Doe defendants. Moreover, Judge Brown’s decision was not binding precedent
10 on Central District, and his decision has been rejected by Judge E. Thomas Boyle of
11 the Eastern District of New York, who not only authorized subpoenas in a similar
12 case but also denied a motion to quash finding that joinder was proper. *Malibu*
13 *Media, LLC v. John Does 1-13*, 2012 WL 2325588 (E.D.N.Y. June 19, 2012).

14 Fourth, Mr. Pietz contends that the statutory damages range was
15 misrepresented to him. This is a blatant misrepresentation. Indeed, the statutory
16 minimum for copyright infringement is not \$200 per infringement. Section 504(c)(1)
17 of the Copyright Act specifically prescribes statutory damages “in a sum of not less
18 than \$750 or more than \$30,000 as the court considers just,” and allows the Court to
19 increase the award to \$150,000 where willful infringement is found. 17 U.S.C.
20 504(c)(1)-(2). The statute does not provide an alternative minimum, but rather gives
21 the court discretion to lower the award to an amount of not less than \$200 where
22 innocent infringement occurred. Here, and in the Central District Case, Plaintiff
23 alleged in its Complaint that the Defendants’ acts of copyright infringement were
24 committed willfully, and Defendants’ pattern of illegal downloading is evidence of
25 their willful infringement. [Docket no. 1 (Complaint), ¶¶ 52, 62.]

26 Fifth, it defies logic that Plaintiff’s use and choice of a technical expert can be
27 considered an abusive tactic.

1 In sum, Defendants have not offered any proof – because there is none – that
2 Plaintiff (or its counsel) has engaged in any abusive litigation tactics.

3 **III. JOINDER IS PROPER**

4 Joinder in BitTorrent copyright infringement cases has been thoroughly
5 analyzed in many opinions and has been permitted where, as here: (a) the complaint
6 clearly explains how BitTorrent works through a series of transactions, (b) all of the
7 defendants live in the district (eliminating personal jurisdiction and venue issues), (c)
8 all of the defendants were part of the same exact swarm of peer infringers as
9 evidenced by a unique cryptographic hash value, and (d) Plaintiff pled that the
10 Defendants are contributorily liable for each other’s infringement. *See First Time*
11 *Videos, LLC v. Does 1-76*, 2011 WL 3586245 (N.D. Ill. 2011) (stating that “the
12 overwhelming majority of courts have denied as premature motions to sever prior to
13 discovery”). Numerous courts in California have held that joinder is proper in similar
14 BitTorrent copyright infringement cases. *See, e.g., Third Degree Films, Inc. v. Does*
15 *1-178*, Case No. C12-3858 MEJ, 2012 WL 3763649 (N.D.Cal. Aug. 29, 2012);
16 *Malibu Media, LLC v. John Does 1-10*, Case No. CV12-1647 JAK, Docket No. 22
17 (C.D.Cal. June 4, 2012); *Patrick Collins, Inc. v. John Does 34-51*, 2012 WL 871269
18 at * 1 (S.D.Cal. March 14, 2012) (rejecting the argument that joinder is improper on
19 the grounds that “[b]y its terms, Rule 45(c)(3) does not provide authority for a court
20 to modify or quash a subpoena on the grounds of misjoinder.”); *Liberty Media*
21 *Holdings, LLC v. Does 1-62*, 2012 WL 628309 (S.D.Cal. Feb. 24, 2012); *OpenMind*
22 *Solutions, Inc. v. Does 1-39*, 2011 WL 4715200 (N.D.Cal. Oct. 7, 2011) (finding that
23 Plaintiff met the permissive joinder requirements and under Rule 20(a)(2)).

24 **A. Plaintiff Has Met Rule 20’s Requirements for Permissive Joinder.**

25 Under Rule 20, defendants may be joined in one action when claims arise from
26 the same transaction or occurrence or series of transactions or occurrences, and any
27 question of law or fact in the action is common to all defendants. Fed. R. Civ. P.

1 20(a)(2). The permissive joinder rule “is to be construed liberally in order to promote
2 trial convenience and to expedite the final determination of disputes, thereby
3 preventing multiple lawsuits.” *League to Save Lake Tahoe v. Tahoe Reg’l Planning*
4 *Agency*, 558 F.2d 914, 917 (9th Cir. 1997). The purpose of Rule 20(a) is to address
5 the “broadest possible scope of action consistent with fairness to the parties; joinder
6 of claims, parties and remedies is strongly encouraged.” *United Mine Workers of Am.*
7 *v. Gibbs*, 383 U.S. 715, 724, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966); *Mosley v. Gen.*
8 *Motors Corp.*, 497 F.2d 1330, 1332 (8th Cir. 1974); *Liberty Media Holdings*, 2012
9 WL 628309 at *7 (“Rule 20(a) is designed to promote judicial economy and trial
10 convenience.”).

11 Rule 20(a) imposes two specific requisites to the joinder of parties: (1) a right
12 to relief must be asserted by, or against, each plaintiff or defendant relating to or
13 arising out of the same transaction or occurrence, and (2) some question of law or
14 fact common to all the parties must arise in the action. Fed. R. Civ. P. 20(a)(2). As
15 discussed below, this case meets both requirements.

16 **1. Same Transaction, Occurrence or Series of Transactions.**

17 a. Logical relationship test.

18 “The Ninth Circuit has interpreted the phrase ‘same transaction, occurrence, or
19 series of transactions or occurrences’ to require a degree of factual commonality
20 underlying the claims.” *Bravado Int’l Group Merch. Servs. v. Cha*, 2010 WL
21 2650432 at *4 (C.D.Cal. June 30, 2010) (citing *Coughlin v. Rogers*, 130 F.3d 1348,
22 1350 (9th Cir. 1997)). Typically, this means that a party “must assert rights...that
23 arise from related activities – a transaction or an occurrence or a series thereof.” *Id.*
24 (citation omitted). Courts across the country use the “logical relationship” test to
25 ascertain whether the right to relief arises out of the same transaction of series of
26 transactions:

27 “‘Transaction’ is a word of flexible meaning. *It may comprehend a*

1 *series of many occurrences, depending not so much upon the*
2 *immediateness of their connection as upon their logical relationship.”*
3 *Moore v. New York Cotton Exchange*, 270 U.S. 593, 610, 46 S.Ct.
4 367, 371 (1926). Accordingly, all ‘logically related’ events entitling a
5 person to institute a legal action against another generally are regarded
6 as comprising a transaction or occurrence. [Citation.] The analogous
7 interpretation of the terms as used in Rule 20 would permit all
8 reasonably related claims for relief by or against different parties to be
9 tried in a single proceeding. *Absolute identity of all events is*
10 *unnecessary.*

11 *Mosley*, 497 F.2d 1330. The logical relationship test has been consistently used in
12 decisions concerning BitTorrent copyright infringement in suits across the country,
13 and courts have routinely held that joinder is proper in BitTorrent actions because
14 of the unique nature of BitTorrent technology. *See, e.g., Patrick Collins, Inc. v.*
15 *John Does 1-2590*, 2011 WL 4407172 at *6 (N.D.Cal. 2011); *OpenMind Solutions,*
16 *Inc.*, 2011 WL 4715200, *6; *Call of the Wild Movie v. Does 1-1062*, 770 F.Supp.2d
17 332, 343 (D.D.C. 2011).

18 As the Southern District of California recently held:

19 Cases involving BitTorrent technology raise a new and distinct method
20 of alleged copyright infringement that was not possible with the earlier
21 P2P technology, mainly that BitTorrent users collectively share the
22 same exact file by each contributing a small piece of the file to the user
23 downloading the file. Furthermore, unlike the earlier P2P technology,
24 the BitTorrent file-sharing protocol makes every downloader also an
25 uploader of the illegally transferred file. This distinguishes BitTorrent
26 cases from the earlier P2P cases. Given this unique theory of
27 copyright infringement, it is possible that BitTorrent users identified
28 with the alleged illegal sharing of the same file are ‘logically related’
and are ‘acting in concert.’

Liberty Media Holdings, 2012 WL 628309 at *7.

Recently, Judge Randon in the Eastern District of Michigan properly analyzed
the facts in a near-identical case, expanding substantial effort to understand the
allegations in the complaint and the applicable law:

1 Plaintiff alleges that its investigator (“IPP”) was able to download at
2 least one piece of the copyrighted Movie from each Defendant
3 [Citation]. It is important to understand the implications of this
4 allegation before determining whether joinder is proper. If IPP
5 downloaded a piece of Plaintiff’s copyrighted Movie from each
6 Defendant (and, conversely, each Defendant uploaded at least one piece
7 of the Movie to IPP) then each Defendant had at least one piece of the
8 Movie—traceable via Hash Identifier to the same Initial Seeder—on his
9 or her computer and allowed other peers to download pieces of the
10 Movie.

8 By way of illustration: IPP’s computer connected with a tracker, got the
9 IP address of each of Defendants’ computers, connected with each
10 Defendants’ computer, and downloaded at least one piece of the Movie
11 from each Defendants’ computer. During this transaction, IPP’s
12 computer verified that each Defendants’ piece of the Movie had the
13 expected Hash; otherwise, the download would not have occurred.

12 *Patrick Collins, Inc. v. John Does 1-21*, 2012 WL 1190840, at *4-5 (E.D. Mich.
13 Apr. 5, 2012). Judge Randon then explained through the force of clear deductive
14 logic that each Defendant obtained the piece of Plaintiff’s movie in one of four
15 ways, all of which relate directly back to one individual seed.

16 If Plaintiffs’ allegations are true, each Defendant must have downloaded
17 the piece(s) each had on his or her computer in one, or more, of the
18 following four ways:

- 19 1) the Defendant connected to and transferred a piece of the
20 Movie **from the initial seeder**; or
- 21 2) the Defendant connected to and transferred a piece of the
22 Movie **from a seeder** who downloaded the completed file from the
23 initial seeder or from other peers; or
- 24 3) the Defendant connected to and transferred a piece of the
25 Movie **from other Defendants** who downloaded from the initial
26 seeder or from other peers; or
- 27 4) the Defendant connected to and transferred a piece of the
28 Movie **from other peers** who downloaded from other Defendants,
other peers, other Seeders, or the Initial Seeder.

27 In other words, in the universe of possible transactions, at some point,

1 each Defendant downloaded a piece of the Movie, which had been
2 transferred through a series of uploads and downloads from the Initial
3 Seeder, through other users or directly, to each Defendant, and finally
to IPP.

4 *Id.* Having limited the universe to four possibilities the court correctly
5 concluded the transaction was logically related:

6 Therefore, each Defendant is logically related to every other Defendant
7 because they were all part of a series of transactions linked to a unique
8 Initial Seeder and to each other. This relatedness arises not merely
9 because of their common use of the BitTorrent protocol, but because
10 each Defendant affirmatively chose to download the same Torrent file
11 that was created by the same initial seeder, intending to: 1) utilize other
users' computers to download pieces of the same Movie, and 2) allow
his or her own computer to be used in the infringement by other peers
and Defendants in the same swarm.

12 *Id.* In other words, by causing *all* users to distribute the file, BitTorrent ensures that
13 all peers in a swarm materially aid every other peer. This critical fact makes
14 BitTorrent different than every other peer-to-peer network, and is one important
15 distinguishing factor that renders joinder proper herein.

16 b. Plaintiff properly pled a series of transactions.

17 With respect to the particular swarm at issue here, the hash (an alphanumeric
18 representation of a digital file) associated with the copied file's torrent file remained
19 the same within the swarm. Complaint, ¶¶ 40-44. Further, the alleged infringers all
20 participated in the same exact swarm and downloaded the same exact copyrighted
21 file. Declaration of Tobias Fieser in Support of Plaintiff's Motion for Leave to
22 Serve a Subpoena Prior to a Rule 26(f) Conference [Dkt No. 11-2], ¶¶ 19-20. Even
23 after a Doe defendant disconnects from the swarm, the parts of the file that he or
24 she downloaded and uploaded will continue to be transferred to the other Doe
25 defendants remaining in the swarm. *See OpenMind Solutions*, 2011 WL 4715200
26 at*6 (finding that Plaintiff provided enough specificity to make a preliminary
27 determination that the doe defendants were part of the same swarm and holding that
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1 “Plaintiff’s claims against Defendants appear logically related”).

2 Simply, here, each putative Defendant is a possible source for Plaintiff’s
3 copyrighted work, and is responsible for distributing the work to the other putative
4 defendants, who are also using the same BitTorrent technology to copy the identical
5 copyrighted material. *See Disparte v. Corp. Exec. Bd.*, 223 F.R.D. 7, 10 (D.D.C.
6 2004) (to satisfy Rule 20(a)(2)(A) claims must be “logically related” and this test is
7 “flexible.”). While Defendants may be able to rebut these allegations later, Plaintiff
8 has sufficiently alleged that its claims against Defendants stem from the same
9 transaction or occurrence, and are logically related. *See Arista Records, LLC v.*
10 *Does 1-19*, 551 F.Supp.2d 1, 11 (“While the Court notes that the remedy for
11 improper joinder is severance and not dismissal, ... the Court also finds that this
12 inquiry is premature without first knowing Defendants’ identities and the actual
13 facts and circumstances associated with Defendants’ conduct.”). Indeed, Exhibit A
14 to the Complaint reflects that each of the Doe defendants herein were present in the
15 same swarm on BitTorrent and shared pieces of the same seed files.

16 Moreover, while the logical relationship test does not require it, should this
17 matter go trial, Plaintiff will prove that the Defendants’ infringement was committed
18 through the same transaction or through a series of transactions with mathematical
19 certainty by demonstrating, *inter alia*, that the algorithm used by BitTorrent
20 Trackers would have caused the entire series of transactions to be different *but for*
21 each of the Defendants’ infringements.

22 c. It is not necessary for the Defendants to know each other.

23 The contention that all defendants must have a direct connection to the other
24 is a rigid approach to joinder and contrary to Supreme Court precedent. “Under the
25 Rules, the impulse is toward entertaining the broadest possible scope of action
26 consistent with fairness to the parties; joinder of claims, parties and remedies is
27 strongly encouraged.” *United Mine Workers*, 383 U.S. at 724. “The touchstone of
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1 Rule 20 joinder/severance analysis is whether the interests of efficiency and judicial
2 economy would be advanced by allowing the claims to travel together, and whether
3 any party would be prejudiced if they did.” *Acciard v. Whitney*, 2008 WL 5120820
4 (M.D. Fla. Dec. 4, 2008). In *United States v. Mississippi*, 380 U.S. 128 (1965), the
5 Supreme Court found that the joinder of six defendants, election registrars of six
6 different counties, was proper because the allegations were all based on the same
7 state-wide system designed to enforce the voter registration laws in a way that
8 would deprive African Americans of the right to vote. Although the complaint did
9 not allege that the registrars acted in concert with each other, or even that they knew
10 of each other’s actions, or that each other’s actions directly affected each other in
11 any way, the Supreme Court interpreted Rule 20 to hold a right to relief severally
12 because the series of transactions were related and contained a common issue of law
13 and fact. *Id.* at 142-143.

14 [T]he complaint charged that the registrars had acted and were
15 continuing to act as part of a state-wide system designed to enforce the
16 registration laws in a way that would inevitably deprive colored people
17 of the right to vote solely because of their color. On such an allegation
18 the joinder of all the registrars as defendants in a single suit is
19 authorized by Rule 20(a) of the Federal Rules of Civil Procedure.

20 *Id.* at 142. Indeed, the Supreme Court held all of the defendants were properly
21 joined because they were all acting on the basis of the same system, which created a
22 transactional relatedness.

23 Likewise, here, it is not necessary for each of the defendants to have directly
24 interacted with each other defendant, or have shared a piece of the file with each and
25 every defendant when downloading the movie. The defendants are properly joined
26 because their actions directly relate back to the same initial seed of the swarm, and
27 their alleged infringement further advances the series of infringements that began
28 with that initial seed and continued through other infringers. In doing so, the

1 Defendants all acted under the same exact system.

2 The Honorable Mary McLaughlin from the Eastern District of Pennsylvania, ,
3 recently addressed this exact issue in a similar BitTorrent copyright infringement
4 action. Judge McLaughlin held joinder was proper even if the Doe defendants did
5 not transmit the pieces directly to each other because the claims arise out of the same
6 series of transactions:

7 [E]ven if no Doe defendant directly transmitted a piece of the Work to
8 another Doe defendant, the Court is satisfied at this stage of the
9 litigation the claims against each Doe defendant appear to arise out of
10 the same series of transactions or occurrences, namely, the transmission
of pieces of the same copy of the Work to the same investigative
server.

11 *Raw Films v. John Does 1-15*, 2012 WL 1019067 at *4 (E.D.Pa. Mar. 26, 2012).

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1 **2. There Are Common Issues of Fact and Law.**

2 The second requirement for permissive joinder under Rule 20(a)(2) requires
3 Plaintiff’s claims to contain a common question of law or fact. Fed. R. Civ. P.
4 20(a)(2)(B). This requirement is clearly met. Here, Plaintiff will have to establish
5 the same legal claims concerning the validity of its copyrights and the infringement
6 of the exclusive rights reserved to Plaintiff as copyright holder. Furthermore, Plaintiff
7 must prove that each individual named as a defendant used the same BitTorrent file-
8 sharing protocol to illegally distribute and download its copyrights and, consequently,
9 factual issues related to how BitTorrent works and the methods used by Plaintiff to
10 investigate, uncover, and collect evidence about the infringing activity will be
11 essentially identical for each Defendant. *See Call of the Wild*, 770 F.Supp.2d 332 at
12 343 (“In each case, the plaintiff will have to establish against each putative defendant
13 the same legal claims concerning the validity of the copyrights in the movies at issue
14 and the infringement of the exclusive rights reserved to the plaintiffs as copyright
15 holders.”). The commonality in facts and legal claims support joinder under Rule
16 20(a)(2)(B).

17 **3. The Time Lapse Is Irrelevant.**

18 The nature of the BitTorrent protocol provides for continuous seeding and
19 distributing of the movie long after it has downloaded. If, as in this case, a
20 Bittorrent user does not physically remove automatic seeding, an alleged infringer
21 will likely seed and distribute a movie for months at a time. As the Eastern District
22 of Michigan explained:

23 [I]t is not that an infringer would wait six weeks to receive the Movie,
24 it is that the infringer receives the Movie in a few hours and then leaves
25 his or her computer on with the Client Program uploading the Movie to
26 other peers for six weeks. Because the Client Program's default setting
27 (unless disabled) is to begin uploading a piece as soon as it is received
28 and verified against the expected Hash, it is not difficult to believe that
a Defendant who downloaded the Movie on day one, would have
uploaded the Movie to another Defendant or peer six weeks later. This
consideration, however, is irrelevant since concerted action is not

1 required for joinder.

2 *Patrick Collins*, 2012 WL 1190840 at *9.

3 The court went on to explain why time constraints should not impact the
4 determination that the infringements occurred through a series of transactions:

5 “[T]he law of joinder does not have as a precondition that there be temporal distance
6 or temporal overlap; it is enough that the alleged BitTorrent infringers participated
7 in the same series of uploads and downloads in the same swarm.” *Id.*

8 In *Alexander v. Fulton County, Ga.*, 207 F.3d 1303 (11th Cir. 2000) *overruled*
9 *on other grounds by Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003), the Eleventh
10 Circuit found that a lapse of a year between the events at issue is a “short time
11 frame” for joinder purposes:

12 As for the first requirement, all of the Plaintiffs' claims stem from *the*
13 *same core allegation that they were subject to a systemic pattern or*
14 *practice of race-based discrimination against white law enforcement*
15 *officers by Sheriff Barrett in her first year in office.* Plaintiffs all seek
16 relief based on the same series of discriminatory transactions by the
17 same decision-maker in the same department during the same short
18 time frame.

19 *Id.* at 1324 (emphasis added). Here, all of the defendants engaged in the same
20 systematic pattern of infringement. And the time frame between the defendants on
21 Exhibit A of the Complaint spans only a two-month period from the first hit date to
22 the last hit date. *See AF Holdings LLC v. Does 1-1,058*, -- F.Supp.2d --, 2012 WL
23 3204917 at *13 (D.D.C. August 6, 2012) (“Although some IP addresses in the
24 Complaint are identified as infringing the plaintiff’s copyright four months apart, at
25 this stage there is no basis to rebut plaintiff’s claims that the Listed IP Addresses
26 were, at least potentially, part of the same swarm and provided or shared pieces of
27 the plaintiff’s copyrighted work.”).

28 The Northern District of California is in accord: “While this period might
seem protracted, such time periods can be somewhat arbitrary in BitTorrent-based
cases as long as the alleged defendants participate in the same swarm, downloading

1 and uploading the same file.” *First Time Videos v. Does 1-95*, 2011 WL 4724882 at
2 *6 (N.D.Cal. Oct. 7, 2011); *OpenMind Solutions*, 2011 WL 4715200 at*6 (same).
3 “[E]ven after a Doe Defendant disconnects from the swarm, the parts of the file that
4 he downloaded and uploaded will continue to be transferred to other Doe
5 Defendants remaining in the swarm.” *First Time Videos*, 2011 WL 4724882 at *6.

6 Other courts, when ruling on the issue of joinder have held that even when
7 conduct occurs over a lengthy period of time, defendants may still be properly
8 joined as long as the conduct is reasonably related. *See Kedra v. City of*
9 *Philadelphia*, 454 F. Supp. 652, 662 (E.D. Pa. 1978) (holding joinder is proper when
10 claims against police officers including unlawful searches, detentions, beatings and
11 similar occurrences of multiple plaintiffs took place over a period of time).

12 There is no logical reason why the systematic conduct alleged could not
13 extend *over a lengthy time period* and, on the face of these allegations,
14 there is nothing about the extended time span that attenuates the factual
15 relationship among all of these events. The claims against the
16 defendants “aris(e) out of the same transaction, occurrence, or series of
17 transactions or occurrences” for purposes of Rule 20(a), and therefore
18 joinder of defendants in this case is proper.

19 *Id.* (emphasis added). Similarly, in this case, while the actions of each of the
20 defendants may have taken place over a period of time, the actions all arose from
21 one initial seed and all display the same, related systematic conduct.

22 **B. Joinder Is Proper Because Each Defendant Is Jointly and Severally**
23 **Liable.**

24 Joinder is also proper because Plaintiff pled that each defendant is jointly and
25 severally liable for each of the other defendant’s infringement. “It is, today, a given
26 that ‘one who, with knowledge of the infringing activity, induces, causes or
27 materially contributes to the infringing conduct of another, may be held liable as a
28 ‘contributory infringer.’” *Costar Group, Inc. v. Loopnet, Inc.*, 164 F. Supp.2d 688,
696 (M.D. 2001). Here, Plaintiff properly pled contributory infringement

1 (Complaint, ¶¶ 54-63), and will prove that there was one initial seeder that uploaded
2 the subject torrent file identified by the unique hash value, and that when a
3 Defendant receives a piece from a downstream infringer (*i.e.*, an infringer who
4 already had that piece), then that Defendant will automatically begin distributing the
5 piece it received from the downstream infringer to others. Plaintiff will thereby
6 prove that said Defendant materially assists the downstream infringer’s direct
7 infringement of Plaintiff’s exclusive right to “redistribute . . . the Work. . . .” in
8 violation of 17 U.S.C. § 106(3) and 17 U.S.C. §501. Similarly, Plaintiff will prove
9 that when a Defendant provides a piece of Plaintiff’s copyrighted work to an
10 upstream infringer, the upstream infringer both sends that piece to other infringers
11 and will also assemble the entire Work. Accordingly, by delivering a piece to an
12 upstream infringer, the Defendant is contributorily liable for materially assisting the
13 upstream infringer to redistribute, perform and display the Work in violation of 17
14 U.S.C. § 106(3)-(5) and 17 U.S.C. § 501.

15 Since one of the grounds for permissive joinder is joint and several liability,
16 should the Court hold that joinder is not permitted, then any such holding would
17 effectively summarily adjudicate Plaintiff’s claim for contributory infringement.
18 Such a holding would be erroneous because contributory infringement is “a question
19 of fact for trial.” *Adobe Systems, Inc. v. Canus Productions, Inc.*, 173 F.Supp.2d
20 1044, 1055 (C.D. Cal. 2001); *Marobie-FL, Inc. v. National Ass’n of Fire Equipment*
21 *Distributors*, 983 F. Supp. 1167 (N.D. IL 1997) (“fact questions precluded summary
22 judgment with respect to providers’ liability for contributory infringement”).
23 Moreover, since BitTorrent works through the cooperative exchange among peers in
24 a swarm, claims for contributory infringement must be permitted or the law would
25 be inconsistent with the very nature of BitTorrent.

26 **C. Joinder Promotes Judicial Efficiency And Is Not Prejudicial**

27 At this stage in the proceedings, joinder “is the single, most efficient
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1 mechanism available for the plaintiff to obtain information to identify those illegally
2 downloading and distributing its movie.” *AF Holdings LLC*, -- F.Supp.2d --, 2012
3 WL 3204917 at *13. Indeed, “[j]oinder in a single case of putative defendants who
4 allegedly infringed the same copyrighted material promotes judicial efficiency and,
5 in fact, is beneficial to the putative defendants.” *Open Mind Solutions*, 2011 WL
6 4715200 at *7; *see also*, *Call of the Wild*, 770 F.Supp.2d at 344 (same).

7 Here, Plaintiff seeks to obtain identifying information from ISPs so that it can
8 properly name and serve Defendants. If the Court were to consider severance at this
9 juncture, Plaintiff would face significant obstacles in its efforts to protect its
10 copyright from illegal file-sharers, and this would only needlessly delay the case.
11 Plaintiff would be forced to file 59 separate lawsuits, in which it would then move to
12 issue separate subpoenas to ISPs for each defendant’s identifying information.
13 Plaintiff would additionally be forced to pay the Court separate filing fees in each of
14 these cases, which would further limit its ability to protect its legal rights. “This
15 burden for the plaintiff – not to mention the judicial system – would significantly
16 frustrate the plaintiff’s efforts to identify and seek a remedy from those engaging in
17 the alleged infringing activity.” *AF Holdings LLC*, *supra*, 2012 WL 3204917 at
18 *13; *see also* *Call of the Wild*, 770 F.Supp.2d at 334 (“This would certainly not be in
19 the ‘interests of convenience and judicial economy,’ or ‘secure a just, speedy, and
20 inexpensive determination of the action.’” (citation omitted)).

21 Furthermore, the unknown Doe defendants are not prejudiced by joinder at
22 this stage in the litigation:

23 The unknown individuals alleged to have infringed the plaintiff’s
24 copyright are not prejudiced by joinder. These individuals are
25 identified only by the IP address assigned to the computers found by
26 the plaintiff being used for allegedly infringing activity, and they are
27 not named as defendants in this case. Given that the plaintiff has not
28 named or asserted claims against the individuals associated with the
Listed IP Addresses, these unknown individuals have no obligation to
respond to the Complaint or assert a defense. If the plaintiff chooses to
name as a defendant any of these unknown individuals – after obtaining

1 their information and evaluating the viability of a lawsuit – the
2 defendants may then be able to demonstrate prejudice by joinder with
3 others accused of similar activity. *Until that time, these individuals can*
4 *demonstrate no legally cognizable harm by virtue of the plaintiff filing*
5 *a lawsuit against ‘John Does.’*

6 *AF Holdings LLC*, 2012 WL 3204917 at *13; *see also Call of the Wild*, 770
7 F.Supp.2d at 334 (declining to sever defendants where parties joined promotes more
8 efficient case management and discovery and no party prejudiced by joinder). The
9 Court went on to find that “joinder at this stage in the proceedings is the single, most
10 efficient mechanism available for the plaintiff to obtain information to identify those
11 allegedly illegally downloading and distributing its movie.” *AF Holdings LLC*,
12 2012 WL 3204917 at *13.

13 Put simply, the putative defendants are not prejudiced but likely benefitted by
14 joinder, and severance would debilitate Plaintiff’s efforts to protect its copyrighted
15 material and seek redress from Defendants, who have allegedly engaged in
16 infringing activity. At this preliminary stage, Plaintiff has met the requirements of
17 permissive joinder under Rule 20(a)(2), and, thus Defendants’ motion to quash
18 should be denied.

19 **D. This Court Has Already Ruled That Joinder Is Proper**

20 The “law of the case” doctrine “posits that when a court decides upon a rule
21 of law, that decision should continue to govern the same issues in subsequent stages
22 in the same case.” *Murdoch v. Castro*, 489 F.3d 1063, 1067-68 (9th Cir. 2007)
23 (citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988)). This
24 rule of practice promotes the finality and efficiency of the judicial process by
25 protecting against the agitation of settled issues. *Id.* “For the doctrine to apply, the
26 issue in question must have been ‘decided explicitly or by necessary implication in
27 [the] previous disposition.’” *Milgard Tempering v. Selas Corp. of Am.*, 902 F.2d
28 703, 715 (9th Cir. 1990).

Here, the Court has already found that joinder is proper when ruling on

1 Plaintiff's Motion for Leave to Serve Third Party Subpoenas. *See* Docket No. 13, p.
2 6. The Court's finding was made without prejudice to Defendants' ability to raise
3 the issue after the disclosure of the Doe Defendants' identities. *Id.* Plaintiff
4 respectfully requests that the Court not deviate from its previous finding.

5 **E. California Courts Agree That Joinder Is Proper.**

6 All three districts in California that have adjudicated joinder in BitTorrent
7 copyright infringement cases have held that joinder is proper. Most recently, the
8 Northern District of California in *Third Degree Films, Inc.*, 2012 WL 3763649,
9 held:

10 This Court is also cognizant of the logistical and administrative
11 challenges of managing a case with numerous putative defendants, a
12 number of whom may seek to file papers pro se. However, severing the
13 putative defendants at this early stage is no solution to ease the
14 administrative burden of the cases. As the case progresses, the Court
15 may conclude that it is unmanageable, depending on the number of
defendants served and appearing, or that, in fact, the claims do not
arise from the same transaction and occurrence. At this time, however,
the Court is not persuaded that Plaintiff could not withstand a motion
to dismiss for improper joinder. The Court therefore declines to sever
the Doe Defendants at this time.

16 *See also, Berlin Media Art E.K. v. Does 1-144*, 2011 WL 4056167 (E.D. CA. 2011)
17 (permitting discovery in joined case); *Malibu Media, LLC v. Does 1-25*, 2012 WL
18 2367555 at *3 (S.D.Cal. June 21, 2012); *Liberty Media Holdings, LLC*, 2011 WL
19 1869923 at *5; *Patrick Collins v. Does 1-2590*, 2011 WL 4407172; *New Sensations,*
20 *Inc. v. Does 1-1,474*, 2011 WL 4407222, (N.D.Cal. 2011) (same); *accord Hard*
21 *Drive Productions, Inc. v. Does 1-46*, 2011 U.S. Dist. LEXIS 67314 (N.D. Cal.
22 2011) (same); *New Sensations, Inc. v. Does 1745*, 2011 WL 2837610 (N.D. Cal.
23 2011) (same, and opining "Judge Howell of the D.C. Circuit has repeatedly held that
24 [joinder is proper] in infringement actions" and "[h]is analysis makes sense.").

25 **IV. A PROTECTIVE ORDER SHOULD NOT BE ISSUED**

26 Rule 26(c) allows the Court to issue a protective order to limit discovery and
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1 make any order which justice requires to protect a party or person from annoyance,
2 embarrassment, oppression, or undue burden or expense. A protective order should
3 be entered only when the movant makes a particularized showing of “good cause”
4 and specific demonstration of fact by affidavit or testimony of a witness with
5 personal knowledge, of the specific harm that would result from disclosure or loss of
6 confidentiality; generalities, conclusory statements and unsupported contentions do
7 not suffice. *Gulf Oil Company v. Bernard*, 452 U.S.89, 102 n.16, 101 S. Ct. 2193, 68
8 L. Ed. 2d 693 (1981); *Twin City Fire Ins. Co. v. Employers Ins. of Wausau*, 124
9 F.R.D. 652, 653 (D.Nev. 1989) (“the burden is on the party seeking relief to show
10 some plainly adequate reason for the order.”).

11 Plaintiff has no intention of using the Doe defendants’ identities for any reason
12 other than for litigation purposes. Indeed, the Court’s Order Granting Plaintiff Leave
13 to Serve Third Party Subpoenas specifically provides that Plaintiff “may only use the
14 information disclosed for the sole purpose of protecting its rights in pursuing this
15 litigation.” [Docket no. 13, p.7, ¶ 6(B)]. Moreover, as discussed above, a “putative
16 defendant’s First Amendment right to anonymity in the context of [their] BitTorrent
17 activity is minimal and outweighed by the plaintiff’s need for putative defendants’
18 identifying information in order to protect its copyrights.” *Donkeyball Movie, LLC v.*
19 *Does*, 810 F. Supp. 2d 20, 26 (D.D.C. 2011); *Arista Records LLC v. Does 1-19*, 551
20 F.Supp.2d 1at 8 (“First Amendment privacy interests are exceedingly small where the
21 ‘speech’ is the infringement of copyrights”). Furthermore, “[i]nternet subscribers do
22 not have an expectation of privacy in their [identifying information] as they have
23 already conveyed such information to their Internet Service Providers.”
24 *Achte/Neunte Boll Kino Beteiligungs GMBH & Co. Kg. v. Does 1-4*, 577, 736 F.
25 Supp. 2d 212 at 216.

26 **V. CONCLUSION**

27 For all of the foregoing reasons, Plaintiff respectfully requests that the Court
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1 deny Defendants' motion to quash in its entirety.

2 DATED: September 13, 2012

KUSHNER LAW GROUP

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By: /s/ Leemore L. Kushner
Leemore L. Kushner
Attorneys for Plaintiff Malibu Media, LLC

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CERTIFICATE OF SERVICE

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the Electronic Service List for this Case.

Dated: September 13, 2012 KUSHNER LAW GROUP

By: /s/ Leemore Kushner
Leemore Kushner
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