

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

COMBAT ZONE, INC.,

Plaintiff,

v.

DOES 1 – 84,

Defendants.

Civil Action No.: 3:12-cv-30085

**Opposition to (ECF. 15) Doe's
Motion to Quash**

Plaintiff hereby opposes the Doe's Motion to Quash or Modify Subpoena. For reasons stated below, Plaintiff respectfully requests that the Court deny Doe's Motion, or strike the Motion from the docket.

1. Doe lacks standing to challenge subpoena.

Doe lacks standing to challenge subpoena to third parties. See Fed. R. Civ. P. 45(c) (3) (B); *Liberty Media Holdings v. Swarm*, 2011 U.S. Dist. LEXIS 125512 (D. Mass. 2011); *United States Bank Nat'l Ass'n v. James*, 264 F.R.D. 17, 18-19 (D. Me. 2010) ("The general rule is that a party has no standing to quash a subpoena served upon a third party, except as to claims of privilege relating to the documents being sought." (citing *Windsor v. Martindale*, 175 F.R.D. 665, 668 (D. Colo. 1997))); *Armor Screen Corp. v. Storm Catcher, Inc.*, 2008 WL 5049277, at *2 (S.D. Fla. Nov. 25, 2008). As a Court in this district noted in *Liberty Media Holdings*, a party has no standing to challenge a subpoena issued to third parties unless it could assert some privilege to the requested document. See 2011 U.S. Dist. LEXIS 125512 (D. Mass. 2011), 13 n. 3 (noting that defendants could not viably assert privacy interest in subscriber information as they are already disclosed to the ISPs).

Doe cites *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, (2008), to suggest Doe has a personal right in the information sought – to remain anonymous – as a reason to have standing to quash subpoena:

“[a]nonymity is a shield from the tyranny of the majority. It ... exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation — and their ideas from suppression — at the hand of an intolerant society.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995)

But, Doe uses this quote out of context. For this Court’s better understanding, here is the rest of the quote:

Still, the anonymous activity that is being protected must be “speech.” . . . Copyright infringement, per se, is clearly not speech entitled to First Amendment protection. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555-57, 560, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985) (discussing the First Amendment and copyright, and examining whether fair use doctrine applied to alleged act of copyright infringement).

Doe also claims that because in *London-Sire Records* motions to quash were considered on their merits there must be standing here, since both *London-Sire Records* has similar facts to the case at bar. But, this is plainly not true. That Court considered the motions to quash because there might be a personal right in the information sought as per the Terms of Service for each Doe’s ISP.

2. There is no exception or waiver that applies to quash subpoena.

As is relevant here, Rule 45(c) (3) (iii) provides that a court may quash a subpoena if it “requires disclosure of privileged or other protected matter, if no exception or waiver applies.” Fed.R.Civ.P. 45(c) (3) (iii). Pursuant to Rule 45(d) (2), when subpoenaed information is withheld based on a claim of privilege, the claim of privilege must “describe the nature of the withheld [information] in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.” Fed.R.Civ.P.

45(d) (2).

Assuming *arguendo* that Doe has standing, an exception for claims of privilege does not apply here, as the moving defendant did not viably assert any claim of privilege relating to the requested information. Importantly, Internet subscribers do not have a proprietary interest or an expectation of privacy in their subscriber information because they have already conveyed such information to their Internet Service Providers (“ISPs”). Yet, courts have held that Internet subscribers do not have an expectation of privacy in their subscriber information - including names, addresses, phone numbers, and e-mail address - as they already have conveyed such information to their ISPs. *See e.g., Liberty Media Holdings*, 2011 U.S. Dist. LEXIS 125512 (D. Mass. 2011); *United States v. Simons*, 206 F.3d 392 (4th Cir., 2000); *Guest v. Leis*, 255 F.3d 325, 335-36 (6th Cir.2001) (“Individuals generally lose a reasonable expectation of privacy in their information once they reveal it to third parties.”); *U.S. v. Hambrick*, Civ. No. 99-4793, 2000 WL 1062039, at *4 (4th Cir. Aug. 3, 2000) (a person does not have a privacy interest in the account information given to the ISP in order to establish an email account); *First Time Videos, LLC v. Does 1-500*, No. 10 C 6254, 2011 WL 3498227, at *5 (N.D. Ill. Aug. 9, 2011) (“[i]nternet subscribers do not have a reasonable expectation of privacy in their subscriber information - including name, address, phone number, and email address - as they have already conveyed such information to theirs ISPs.”); *Third Degree Films, Inc. v. Does 1 - 2010*, Civil No. 4:11 MC 2, 2011 WL 4759283, at *3 (N.D. Ind. Oct. 6, 2011) (citing *First Time Videos*, 2011 WL 3498227, at *4) (holding that because “[i]nternet subscribers share their information to set up their internet accounts,” the subscribers “cannot proceed to assert a privacy interest over the same information they chose to disclose.”); *U.S. v. Kennedy*, 81 F.Supp.2d 1103, 1110 (D.Kan.2000) (defendant’s Fourth Amendment rights were not violated when an ISP turned over his subscriber information, as there is no

expectation of privacy in information provided to third parties); *Achte/Neunte Boll Kino Beteiligungs GmbH & Co. KG v. Doe*, 736 F. Supp. 2d 212 (D.D.C. 2010) (collecting cases, including *U.S. v. Kennedy*, Civ. No. 99-4793, 2000 WL 1062039, at *4 (4th Cir. Aug. 3, 2000)).

The only information sought through the Subpoena at issue is the Doe defendants' contact information. This information has already been shared by the Doe with his respective ISP. Thus, in lieu of *supra* and *infra*, there is no expectation of privacy nor exception that applies to quash subpoena.

Further, Doe exposed his IP address to the public by sharing the Motion Picture at issue. The torrent software exposes the IP address of the infringer, as explained in the Compl. and the Decl. of Jon Nicolini.

Therefore, assuming *arguendo* Doe has standing, his Motion fails because it does not provide sufficient facts regarding subpoenaed information being privileged or otherwise protected matter, and does not provide an exception or waiver that would apply to satisfy Rule 45(c) (3) (iii).

Doe cites Verizon's privacy policy, but does not properly authenticate it.

3. The IP address is relevant to the infringer's identity.

The allegation is the somewhat familiar refrain that the IP address alone is insufficient identify the actual infringer, as it only identifies the account holder or subscriber of that IP address.

It is true that Plaintiff only knows the IP address where the infringement occurred and the sought subscriber information will only reveal the identity of the subscriber of that IP address. The inference drawn from that information, however, i.e. – that the subscriber of the IP address is the one who downloaded the infringing material, is not in bad faith. In

fact, the same type of inference was drawn by the Fifth Circuit in upholding probable cause for a search warrant. *See United States v. Perez*, 484 F.3d 735, 740 & fn. 2 (5th Cir. 2007). In *Perez*, law enforcement obtained a search warrant based on affidavit that there was child pornography transmitted to a particular IP address and that IP address was assigned to the defendant. *See id.* at 740. Defendant in *Perez* argued “that the association of an IP address with a physical address does not give rise to probable cause to search that address.” *Id.* The *Perez* Defendant went on to argue “that if he ‘used an unsecure wireless connection, then neighbors would have been able to easily use [Perez’s] internet access to make the transmissions.’” *Id.* Fifth Circuit rejected the argument, holding that “though it was possible that the transmissions originated outside of the residence to which the IP address was assigned, it remained likely that the source of the transmissions was inside that residence.” *See id.* Fifth Circuit went on to hold that there was a fair probability that the owner of the IP address was responsible for the download. *See* 484 F.3d at 740 & n. 2 (citing *United States v. Grant*, 218 F.3d 72, 73 (1st Cir. 2000)). It is not bad faith to infer, especially in this early stage of litigation, that owner of the IP address was the person responsible for downloads occurring at that IP address. *See Perez*, 484 F.3d at 740 & n. 2.

The issue is not whether infringement stemming from an IP address alone gives Plaintiff proof beyond doubt, but whether it gives Plaintiff a good faith basis to believe that the owner of the IP address committed the infringement. As the *Perez* Court held, evidence of download at an IP address is sufficient evidence to support the suspicion against the owner of that IP address. *See id.*; *see also United States v. Vosburgh*, 602 F.3d 512 (3d Cir. Pa. 2010) (“We agree with the reasoning in *Perez*. As many courts have recognized, IP addresses are *fairly* “unique” identifiers. *See, e.g., United States v. Forrester*, 512 F.3d 500, 510 n.5 (9th Cir. 2008) (stating that “every computer or server connected to the Internet has a unique IP address”); *Perrine*, 518 F.3d at 1199 n.2 (noting

that an IP address “is unique to a specific computer”); *Peterson v. Nat'l Telecomm. & Inform. Admin.*, 478 F.3d 626, 629 (4th Cir. 2007) (explaining that “[e]ach computer connected to the Internet is assigned a unique numerical [IP] address”); *White Buffalo Ventures, LLC v. Univ. of Texas at Austin*, 420 F.3d 366, 370 n.6 (5th Cir. 2005) (describing an IP address as “a unique 32-bit numeric address” that essentially “identifies a single computer”)) (emphasis added: *fairly*).

4. Plaintiff needs information to proceed.

The case cannot proceed without identifying the defendant, and the defendant cannot be identified until the requested information is subpoenaed from the defendant’s ISPs. As numerous prior courts have agreed, early discovery is the only way to gain the information necessary to move the case forward. *Se, e.g., London-Sire Records, Inc. v. Doe 1*, 542 F.Supp.2d at 179 (D. Mass. 2008) (“Without the names and address [of the John Doe defendants], the plaintiff cannot serve process and the litigation can never progress.”); *Sony Music Enter. Inc. v. Does 1–40*, 326 F.Supp.2d at 566 (S.D.N.Y. 2004).

Plaintiff is aware of no alternative method of identifying the defendants other than by serving a subpoena on their ISPs. Thus, Plaintiff’s only recourse is to serve a subpoena to the ISPs who have the required information.

5. Plaintiff satisfies London-Sire’s five part balancing test.

These factors are addressed in the Plaintiff’s Memorandum for early discovery. (ECF 5.) Therefore, Plaintiff will not restate points already made in ECF 5 and already made in this opposition elsewhere. Instead, Plaintiff will address select issues.

CEG does not download the entire file from the IP address which it has logged. CEG downloads a portion of the file from each IP address which it has logged, and downloads

enough to confirm that the IP address is in fact an active member of the swarm. There is actual distribution of the file.

Doe admits that Verizon's privacy policy states that it is bound by law to comply with legal processes, like the current subpoena.

6. Conclusion

Based on the above-stated reasons, Plaintiff respectfully requests this Court to deny or strike the Motion to Quash submitted by Doe.

* * *

Respectfully submitted on July 12, 2012,

FOR THE PLAINTIFF:



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CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2012, the foregoing document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing, and paper copies will be served via first-class mail to those indicated as non-registered participants.

A handwritten signature in black ink, appearing to read "Marvin Cable". The signature is written in a cursive style with a large initial "M" and a long, sweeping underline.

Marvin Cable, Esq.

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