

Honorable Judge Robert S. Lasnik

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5 **UNITED STATES DISTRICT COURT**  
6 **WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

7 Riding Films, Inc.,  
8 Plaintiff,

9 vs.

10 Does 1- 64,  
11 Defendants.

2:13-cv-00288 RAJ-RSL

Defendant 45 Motion to Quash  
Subpoenas and Dismiss

NOTE ON MOTION CALENDAR:  
Friday June 7, 2013

12  
13 **Introductory Remarks**

14 This Motion is similar to several motions already filed in similar cases: Some of the legal  
15 arguments have been expanded and some additional facts that were not known at the time of the  
16 earlier filings are now included.

17 **I. Relief Requested**

18 Defendant Doe 06 requests any and all of the following relief

- 19 1. The Court should allow each individual John Doe to proceed anonymously.
- 20 2. This case should be severed and all but the first Doe Defendant should be dismissed for  
21 improper Joinder.
- 22 3. A Protective Order should be issues preventing the Plaintiff from obtaining personal  
23 information about the Defendants.

1 4. This case should be severed and all but the first Doe Defendant should be dismissed for  
2 failure to pay the proper filing fees.

3 5. Such other relief as this Court deems just.

## 4 **II. Statement of Facts**

5 The detailed facts are well set out in the Plaintiff's Complaint, and the Declaration of Doe and  
6 the Declaration of Gary Marshall which accompany this Motion.

## 7 **III. Statement of Issues**

8 **1. The Court should allow each Doe to proceed anonymously.**

9 **2. This case should be severed and all but the first Doe Defendant should be  
10 dismissed for improper Joinder.**

11 **3. Privacy Issues Outweigh the rights of the Plaintiff and a Protective Order  
12 should be issued.**

13 **4. This case should be severed and all but the first Doe Defendant should be  
14 dismissed for failure to pay the proper filing fees.**

15 **5. Defendant Has Standing to Bring This Motion Because It Has Been Named and  
16 It's Legal Rights are Affected.**

## 17 **IV. Evidence Relied Upon**

18 This Motion is based upon the Plaintiff's complaint, this Motion to Quash and Dismiss, the  
19 Declaration of Doe, the Declaration of Gary Marshall, and the Defendant's Request to Take Judicial  
20 Notice, which accompany this Motion.

## 21 **V. Authority**

22 **1. The Court should allow each Doe to proceed anonymously**

23 Does 45 should be permitted to file this motion anonymously It is the only way the defendant  
can file this motions without identifying itself by name. See *Doe v. 2TheMart. Com Inc.*, 140 F.  
Supp. 2d 1088 (Dist. Court, WD Washington 2001). The court concludes at 1098 that

1 The Internet is a truly democratic forum for communication. It allows  
2 for the free exchange of ideas at an unprecedented speed and scale.  
3 For this reason, the constitutional rights of Internet users, including  
the First Amendment right to speak anonymously, must be carefully  
safeguarded.

4 Although that case dealt with a subpoena to a non-party, the same principles apply here, where  
5 the Defendant is seeking to appear anonymously only in the preliminary stages of litigation to  
6 challenge the subpoena itself. Proceeding anonymously is the only method of not rendering moot  
7 these proceedings by disclosing the very same information which Plaintiff seeks to obtain through  
8 its improper subpoenas. Quashing the subpoena while requiring the defendant to proceed in its own  
9 names would entirely defeat the purpose of the motion to quash. Accordingly, Doe 45 respectfully  
10 requests that the Court permit it to proceed anonymously.

11 **2. This case should be severed and all but the first Doe Defendant should be  
12 dismissed for improper Joinder**

13 Federal Civil, Rule of Procedure 20 permits Plaintiffs to join multiple defendants in a single  
lawsuit if they meet certain criteria. The rule states in relevant part:

14 Rule 20. Permissive Joinder of Parties

15 (a) Persons Who May Join or Be Joined.

16 ...

17 (2) Defendants. Persons—as well as a vessel, cargo, or other property  
18 subject to admiralty process in rem—may be joined in one action as  
defendants if:

19 (A) any right to relief is asserted against them jointly, severally, or in  
20 the alternative with respect to or arising out of the same transaction,  
occurrence, or series of transactions or occurrences; and

21 (B) any question of law or fact common to all defendants will arise in  
22 the action.

23 (3) Extent of Relief. Neither a plaintiff nor a defendant need be  
interested in obtaining or defending against all the relief demanded.

1 The court may grant judgment to one or more plaintiffs according to  
2 their rights, and against one or more defendants according to their  
liabilities.

3 (b) Protective Measures. The court may issue orders—including an  
4 order for separate trials—to protect a party against embarrassment,  
5 delay, expense, or other prejudice that arises from including a person  
against whom the party asserts no claim and who asserts no claim  
against the party.

6 Plaintiff has filed a lawsuit against multiple defendants, asserting the defendants all took part in  
7 the same bit-torrent swarm to infringe on plaintiff's copyright rights by downloading a movie file.  
8 Plaintiff presents evidence that an IP address assigned to each defendant was part of the same  
9 swarm at some time during the swarm's several days of existence.

10 The question of whether this allegation is sufficient to merit joinder has been heavily litigated.  
11 For a good summary of some of the cases, see *Hard Drive Productions v. Does 1-188*, 809  
12 F.Supp.2d 1150 at 1153-1154 (2011). That court concluded that the allegations did not merit joinder  
13 and dismissed all but one Defendant.

14 Here, the Court finds the reasoning in *Boy Racer* and *Diabolic Video*  
15 *Productions, Pacific Century International*, and *Millennium TGA*  
16 persuasive. Does 1-188 did not participate in the same transaction or  
17 occurrence, or the same series of transactions or occurrences. Under  
18 the BitTorrent Protocol, it is not necessary that each of the Does 1-  
19 188 participated in or contributed to the downloading of each other's  
20 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.

21 Moreover, the court notes that the declaration submitted in this action,  
22 like the declaration in *Boy Racer*, appears to contradict the assertion  
23 that the Does named in this action are part of a single swarm. See  
Hansmeier Decl., ¶ 13 ("[the first step in the infringer-identification

1 process is to locate swarms where peers are distributing the  
2 copyrighted creative works."); ¶ 14 1164\*1164 ("I used all three  
3 methods to locate swarms associated with Plaintiff's exclusive  
4 license."). Further, although Hansmeier states that he "collected data  
5 on the peers in the swarm, including what activities each peer was  
6 engaging in and other important such as the date and time that each  
7 Defendant was observed by the software as engaging in infringing  
8 activity," the exhibit attached to the complaint reflects that the activity  
9 of the different IP addresses occurred on different days and times over  
10 a two-week period. *Id.* at ¶ 15. Indeed, Plaintiff concedes that while  
11 the Doe Defendants may have participated in the same swarm, "they  
12 may not have been physically present in the swarm on the exact same  
13 day and time." Application at 18; Complaint, Ex. A. As a result, the  
14 Court finds unpersuasive the allegation that the Does acted in concert.  
15 Therefore, the Court concludes that joinder of the Doe Defendants in  
16 this action does not satisfy Rule 20(a).

17  
18 In a very recent case decided on April 4, 2013, *Safety Point Products, LLC v. DOES 1-14, DOES*  
19 *15-96, DOES 97-177, & DOES 178-197, CASE NOS. 1:12-CV-2812, 1:12-CV-2820, and 1:12-CV-*  
20 *2831; 1:12-CV-2894* (US District Court, Northern District of Ohio) (a copy of which is attached to  
21 the Request for Judicial Notice as Exhibit B), the court adopted the same reasoning;

22 Plaintiffs' complaint says "every John Doe infringer, in concert with  
23 its John Doe swarm members, is allowing others to steal" and that  
24 "each John Doe acts in an interactive manner with other John Does."  
25 Despite Plaintiffs' statements, it is not at all clear that Defendants  
26 were part of the same transaction or occurrence. "Merely alleging that  
27 the Doe defendants all used the same file-sharing protocol,  
28 BitTorrent, to conduct copyright infringement of plaintiff's film  
29 without any indication that they acted in concert fails to satisfy the  
30 arising out of the . . . same series of transactions or occurrences  
31 requirement." Furthermore, a defendant's participation in a swarm  
32 does not mean that the defendant is always present and active in the  
33 swarm. Plaintiffs' IP address exhibits indicate that Defendants  
34 accessed the swarm at different times, on different days, using  
35 different BitTorrent clients. This suggests that Defendants were not  
36 wrapped up in a single factual occurrence.

37 Plaintiffs' other suits pose similar joinder problems, with some  
38 Defendants participating in the same swarm months apart from one  
39 another, using even more varied BitTorrent clients.

1 Beyond the joinder analysis, this Court is unconvinced that Plaintiff  
2 has even pleaded a prima facie case of copyright infringement .36/  
3 Here, Plaintiffs provided only an IP address snapshot, and seeks to  
4 use that information alone to justify their suit. Given the nature of  
5 BitTorrent protocols, an individual could access the swarm, download  
6 a small piece of the copyrighted material that could be useless, and  
7 then leave the swarm without ever completing the download.  
8 Consider Plaintiffs' motion for leave to take discovery, which states:  
9 "Reassembling the pieces using a specialized BitTorrent Client results  
10 in a fully playable digital motion picture. To this end, the mere  
11 indication of participation weakly supports Plaintiffs' conclusions.

12 In sum, participation in a specific swarm is too imprecise a factor  
13 absent additional information relating to the alleged copyright  
14 infringement to support joinder under Rule 20(a).

15 The court in *Hard Drive Productions v. Does 1-18*, at 1164-65 also explains why discretionary  
16 severance should also apply.

17 Even if joinder of the Doe Defendants in this action met the  
18 requirements of Rule 20(a) of the Federal Rules of Civil Procedure,  
19 the Court finds it is appropriate to exercise its discretion to sever and  
20 dismiss all but one Doe Defendant to avoid causing prejudice and  
21 unfairness to Defendants, and in the interest of justice. See Wynn, 234  
22 F.Supp.2d at 1088.

23 First, permitting joinder in this case would undermine Rule 20(a)'s  
purpose of promoting judicial economy and trial convenience because  
it would result in a logistically unmanageable case. See Bridgeport  
Music, Inc. v. IIC Music, 202 F.R.D. 229, 232-33 (M.D.Tenn.2001)  
(holding permissive joinder of 770 putative defendants would not  
promote judicial economy because the court's courtroom could not  
accommodate all of the defendants and their attorneys, and therefore  
could not hold case management conferences and could not try all of  
plaintiff's claims together). Second, permitting joinder would force  
the Court to address the unique defenses that are likely to be  
advanced by each individual Defendant, creating scores of mini-trials  
involving different evidence and testimony. In this respect, the Court  
also notes that in Exhibit A to the Complaint there are listed at least  
thirteen different internet service providers associated with Doe  
Defendants, which could also give rise to different ISP-specific  
defenses, evidence, and testimony. See Complaint, Ex. A.

1 Finally, the Court finds that permissive joinder of the Doe Defendants  
2 does not comport with the "notions of fundamental fairness," and that  
3 it will likely cause prejudice to the putative defendants. See Coleman,  
4 232 F.3d at 1296. The joinder would result in numerous hurdles that  
5 would prejudice the defendants. For example, even though they may  
6 be separated by many miles and have nothing in common other than  
7 the use of BitTorrent, each defendant must serve each other with all  
8 pleadings—a significant burden when, as here, many of the  
9 defendants will be appearing pro se and may not be e-filers. Each  
10 defendant would have the right to be at each other defendant's  
11 deposition—creating a thoroughly unmanageable situation. The  
12 courtroom proceedings would be unworkable—with each of the 188  
13 Does having the opportunity to be present and address the court at  
14 each case management conference or other event. Finally, each  
15 defendant's defense would, in effect, require a mini-trial. These  
16 burdens completely defeat any supposed benefit from the joinder of  
17 all Does in this case, and would substantially prejudice defendants  
18 and the administration of justice.

10 Moreover, the Court notes that Plaintiff's allegation that all Doe  
11 Defendants meet the Rule 20(a) joinder requirements is speculative  
12 and conclusory. For example, while Plaintiff asserts that Doe  
13 Defendants conspired with each other to download the work, Plaintiff  
14 also asserts that "each defendant is a possible source of Plaintiff's file,  
15 and may be responsible for distributing the file to the other  
16 defendants." Application at 19 (emphasis added). Plaintiff also  
17 concedes the Doe Defendants "may not have been physically present  
18 in the swarm on the exact same day and time." Application at 18;  
19 Complaint, Ex. A. In light of Plaintiff's uncertainty about the role of  
20 each particular Doe Defendant and the relationship between the Doe  
21 Defendants, the Court finds it appropriate to exercise its discretion to  
22 sever all of the Doe Defendants but one in the interest of fairness. The  
23 Court rejects Plaintiff's assertion that severing the Doe Defendants  
would "practically prevent copyright holder plaintiffs from being able  
to protect their material," as the Court's severance does not preclude  
Plaintiff from filing individual copyright infringement actions against  
each Doe Defendant. Application at 23.

20 Doe 45 has not encouraged anyone else to download movie files. They have not "acted in  
21 concert with", worked together" or "directly interacted and communicated with" any other members  
22 of any bit-torrent swarm, see Doe 45 Declaration, paragraph 6. All but one defendant should be  
23 dismissed for improper joinder.



1       **3. Privacy Issues Outweigh the rights of the Plaintiff and a Protective Order**  
2       **should be issued**

3       This case is a fishing expedition that should not be permitted. Federal Rule of Civil Procedure  
4       45(c)(3)(a) states that a court must quash a subpoena that subjects a person to an "undue burden." A  
5       court may "make any order which justice requires to protect a party or person from annoyance,  
6       embarrassment, oppression, or undue burden and expense" upon a showing of good cause. Fed. R.  
7       Civ. P. 26(c).

8                       Relevancy for the purposes of Rule 26 is broadly construed. *E.g.*,  
9                       [Micro Motion Inc., 894 F.2d at 1326, 13 USPQ2d at 1701-02.](#)  
10                      However, the potential for discovery abuse is ever-present, and courts  
11                      are authorized to limit discovery to that which is proper and  
12                      warranted in the circumstances of the case. *See* Rule 26(b)(1); [Micro](#)  
13                      [Motion Inc., 894 F.2d at 1322-23, 13 USPQ2d at 1699.](#)

14       *Katz v. Batavia Marine & Sporting Supplies, Inc.*, 984 F.2d 422, 424 (Fed. Cir. 1993).

15       Courts should balance the need for discovery against the burden imposed on the person ordered  
16       to produce documents. *Id.* An undue burden is identified by looking at factors such as relevance, the  
17       need for the documents, the breadth of the document request, the time period covered by such  
18       request, the particularity with which the documents are described, and the burden imposed. *Flatow*  
19       *v. Islamic Republic of Iran*, 196 F.R.D. 203, 206-07 (D.D.C. 2000).

20       The subpoena in the instant case will most certainly subject Defendant to an undue burden.  
21       Plaintiff only presents evidence linking the alleged download to Defendant's IP addresses. Plaintiff  
22       does not present sufficient evidence indicating the Defendant was the individual who executed the  
23       alleged illegal download of the "Work." Any individual permissibly or impermissibly using  
24       Defendant's wireless Internet service could have executed the alleged download.

25       Courts have denied a similar Plaintiff's requests for pre-service discovery, finding that  
26       "Plaintiffs sought-after discovery, as designed, has potential to draw numerous innocent internet



1 users into the litigation, placing a burden upon them that outweighs Plaintiffs need for discovery."  
2 *Pacific Century International, Ltd v. Does 1-101*, CV-11 -2533 (DMR), 2011 WL 5117424 at \*2  
3 (N.D. Cal. Oct. 27, 2011). The Pacific Century court also found that a first round of discovery might  
4 only lead to additional rounds of discovery if the owner of the IP address was not the infringer,  
5 which the Court found cut against finding good cause for the first round of discovery. That court  
6 additionally stated that this invasive discovery could lead to abusive settlement practices. "Nothing  
7 prevents Plaintiff from sending a settlement demand to the individual that the ISP identifies as the  
8 IP subscriber. That individual - whether guilty of copyright infringement or not - would then have to  
9 decide whether to pay money for legal assistance, or pay the [settlement] money demanded."  
10 *Pacific Century*.

11 It is absolutely impossible for an ISP or Plaintiff or anyone else to determine from an IP address  
12 (a) what type of device was connected to the Internet connection of Defendant on the date in issue,  
13 (b) who was using the device on that date, (c) who was aware of the use of that device on that date,  
14 or (d) the physical location of any device that was linked to that IP address on that date.

15 Does 45 has provided a plausible argument that it did not download the movie files (See  
16 Declaration of Doe 45, paragraph 5). And Gary Marshall has stated that in his experience around  
17 twenty percent of the named parties did not download the movie file. (See Declaration of Gary  
18 Marshall, paragraph 24 and 30)

19 Plaintiffs can not show that there is a strong likelihood that any of the John Does personally  
20 infringed on the Plaintiffs' copyrights. This court should issue a protective order against these  
21 subpoenas or quash the subpoenas.

1 **4. This case should be severed and all but the first John Doe Defendant should**  
2 **be dismissed for failure to pay the proper filing fees**

3 By pursuing a mass action, Plaintiff has improperly avoided payment of filing fees.

4 This legal argument is adopted from the Magistrate Ruling, In Re Bit Torrent Adult Film  
5 Copyright Infringement Cases, Order and Recommendation, Case 2:11-cv-03995-DRH-GRB,  
6 Docket # 39, a copy of which is attached to the Request for Judicial Notice as Exhibit A.

7 The payment of court filing fees is mandated by statute. Specifically, the “district court shall  
8 require the parties instituting any civil action, suit or proceeding in such court, whether by original  
9 process, removal or otherwise, to pay a filing fee of \$350.” 28 U.S.C. § 1914(a). Of that amount,  
10 “\$190 shall be deposited into a special fund of the Treasury to be available to offset funds  
11 appropriated for the operation and maintenance of the courts of the United States.” 28 U.S.C.  
12 §1931(1).

13 In multidistrict cases considering severance of cases, courts have noted that the filing fee has:

14 two salutary purposes. First, it is a revenue raising measure. . .  
15 Second, §1914(a) acts as a threshold barrier, albeit a modest one,  
16 against the filing of frivolous or otherwise meritless lawsuits. Had  
17 each plaintiff initially instituted a separate lawsuit as should have  
18 occurred here, a fee would have been collected for each one. . . .  
19 Thus, the federal fisc and more particularly the federal courts are  
20 being wrongfully deprived of their due. By misjoining claims, a  
21 lawyer or party need not balance the payment of the filing fee against  
22 the merits of the claim or claims.

23 *In re Diet Drugs*, 325 F. Supp. 2d 540, 541-42 (E.D. Pa. 2004); see also *In re Seroquel Prods.*  
*Liability Litig.*, 2007 W L 737589, at \* 2-3 (M. D. Fla. Mar. 7, 2007) (denying reduction of filing  
fees, noting the burden on the court and the “gate keeping feature of a filing fee”).

1 Several courts in similar cases involving BitTorrent protocol have also recognized the effect of a  
2 countenancing a single filing fee. One court described the “common arc of the plaintiffs’ litigating  
3 tactics” in these cases:

4           ...these mass copyright infringement cases have emerged as a strong  
5 tool for leveraging settlements—a tool whose efficacy is largely derived  
6 from the plaintiffs’ success in avoiding the filing fees for multiple suits  
7 and gaining early access en masse to the identities of alleged infringers.

8           *Pacific Century*, 2012 W L 1072312, at \* 3. Thus, the plaintiffs file a single case, and pay one  
9 filing fee, to limit their expenses as against the amount of settlements they are able to negotiate.  
10 Postponing a determination on joinder in these cases “results in lost revenue of perhaps millions of  
11 dollars (from lost filing fees) and only encourages plaintiffs in copyright actions to join (or misjoin)  
12 as many doe defendants as possible.” *K-Beech, Inc. v. John Does 1-41*, 2012 WL 773683, at \*5  
13 (S.D. Tex. 2012).

14           In the related movie download cases before this Court, plaintiff has improperly avoided paying  
15 filing fees for 2,578 defendants by employing its swarm joinder theory. That amounts to \$902,300  
16 in filing fees that have not been paid. This is by itself a significant sum of money. If the reported  
17 estimates that hundreds of thousands of such defendants have been sued nationwide are at all  
18 accurate, plaintiffs in similar actions may be evading millions of dollars in filing fees. Nationwide,  
19 these plaintiffs have availed themselves of the resources of the court system on a scale rarely seen.  
20 They should not be permitted to profit without paying statutorily required fees.

21           **5. Defendant Has Have Standing to Bring This Motion Because It Has Been  
22 Named and Its Legal Rights are Affected**

23           Plaintiffs in similar cases in response to similar motions to quash have raised the argument that  
specific defendants have no standing to raise legal issues because they have not been named as  
parties in the lawsuit. This is simply not true. The Defendant bringing this motion has been named

1 in the lawsuit as John Does with specific IP addresses. Each of these IP addresses is a reference is to  
2 a specific person who is identifiable. If that person were not identifiable there would be no point in  
3 bringing this lawsuit. The Plaintiff is merely using a synonym until it learns the individuals' legal  
4 names. It is seeking to subpoena personal information about each specific person. It should not be  
5 able to avoid due process and proceed without notice and opportunity to the defendants to be heard  
6 simply because the Plaintiff is currently using a synonym for the legal name of the defendants.

7 A party has standing to challenge a subpoena issued to the third party when the party has a  
8 personal or proprietary interest in the information sought by the subpoena.

9 "A motion to quash, or for a protective order, should generally be made by the person from  
10 whom the documents or things are requested." *Washington v. Thurgood Marshall Academy*, 230  
11 F.R.D. 18, 21 (D.D.C. 2005) (quoting 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice*  
12 & Procedure § 2459 (2d ed. 1995)). "A party generally lacks standing to challenge a subpoena  
13 issued to a third party absent a claim of privilege, propriety interest, or personal interest in the  
14 subpoenaed matter." *Id.*; accord *Windsor v. Martindale*, 175 F.R.D. 665, 668 (D. Colo. 1997)

15 The Does have a personal or proprietary interest in their address, phone number, email address,  
16 and the other identifying details sought by the Plaintiffs. Congress has recognized that ISP  
17 subscribers have a privacy interest in the personally identifying information kept by ISPs. 47  
18 U.S.C. §551 requires that an ISP subscriber be notified and given a chance to intervene before his  
19 identifying information is released to the Plaintiff.

20 47 U.S.C. §551 (c) (2) A cable operator may disclose such  
21 information if the disclosure is—

22 ...

1 (B) subject to subsection (h) of this section, made pursuant to a court  
2 order authorizing such disclosure, if the subscriber is notified of such  
order by the person to whom the order is directed;

3 This process makes no sense if a subscriber lacks standing to bring any motions to prevent the  
4 release of his information.

5 **VI. Conclusion**

6 The Internet is changing the rules by which all businesses must operate. The movie industry is  
7 no exception. But suing hundreds of thousands of possible movie downloaders and scaring them  
8 into quick settlements is not the way to adapt. For the reasons stated above, Plaintiff's Subpoenas to  
9 Various Defendant Does should be quashed and the Does should be dismissed from this case.

10 Dated this 6<sup>th</sup> day of May, 2013

12 Law Offices of Gary Marshall

13 By /s/ Gary K. Marshall  
14 Gary K. Marshall, WSBA # 15344  
15 Attorneys for Defendant  
Doe 45 with IP address 174.61.182.92

16 Certificate of Service

17 I hereby certify that on May 6 , 2013, I electronically filed this document with the Clerk, of  
18 the Court using the CM/ECF electronic filing, which will provide notice to all counsel of record  
herein.

19 /s/ Gary K. Marshall  
20 Gary K. Marshall, WSBA # 15344  
21 Attorneys for Defendant  
Doe 45 with IP address 174.61.182.92