

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CALL OF THE WILD MOVIE LLC, Plaintiff, v. DOES 1 – 1,062 Defendants.))))))))))	Case No. 1:10-cv-00455-BAH
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**AMICI CURIAE ELECTRONIC FRONTIER FOUNDATION,
PUBLIC CITIZEN, AND
AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND AMERICAN
CIVIL LIBERTIES UNION OF THE NATION’S CAPITAL’S
REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF REPLY**

Pursuant to Federal Rule of Evidence 201 and the authorities cited below, *amici curiae* Electronic Frontier Foundation, Public Citizen, American Civil Liberties Union and ACLU of the Nation’s Capital, (“*amici*”) hereby request that this Court take judicial notice of the following materials:

- Court Directed Notice, *Achte/Neunte Boll Kino Beteiligungs GMBH & Co v. Does 1-4577*, Case No. 1:10-cv-00453-RMC, (D. D.C.), Dkt. # 36, attached hereto as Exhibit A.
- Order, *West Coast Productions v. Does 1-2010*, Case No. 3:10-CV-93 (N.D. W.Va., Dec. 16, 2010), Dkt. # 44, attached hereto as Exhibit B.
- Order, *Io Group, Inc. v. Does 1-435*, Case No. 3:10-04832 SI (N.D. Cal., January 10, 2011), Dkt. # 31, attached hereto as Exhibit C.
- Order, *Io Group, Inc. v. Does 1-19*, Case No. 3:10-03851 SI (N.D. Cal., January 10, 2011), Dkt. # 23, attached hereto as Exhibit D.

This supplemental request is made in connection with *amici*'s Motion for Leave to Respond, and the Reply Memorandum attached thereto, in the above-captioned matter.

A district court may take judicial notice of facts that are "not subject to reasonable dispute in that [they are] either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); *see also Weinstein v. Islamic Republic of Iran*, 175 F. Supp. 2d 13, 16 (D.D.C. 2001) (quoting Rule 201 of the Federal Rules of Evidence). Furthermore, the Federal Rules of Evidence *require* a court to take judicial notice of a matter "if requested by a party and supplied with the necessary information." Fed. R. Evid. 201(d); *see also In re Ravisent Technologies, Inc. Sec. Litig.*, No. 00-CV-1014, 2004 U.S. Dist. LEXIS 13255, at * 2 (E.D. Pa. July 12, 2004).

Exhibits A-D are a Court-directed Notice and three Orders issued by United States Federal District Courts. It is well established that a court may take judicial notice of matters of public record. *Covad Comms. Co. v. Bell Atlantic Corp.*, 407 F.3d 1220, 1222 (D.C. Cir. 2005) (courts may take judicial notice of matters of public record) (citing *Marshall County Health Care Auth. v. Shalala*, 988 F.2d 1221, 1228 (D.C. Cir. 1993)); *Jones v. Lieber*, 579 F. Supp. 2d 175, 177 (D.D.C. 2008) (citing *Covad*, 407 F.3d at 1222). Specifically, federal courts may take judicial notice of proceedings in other courts, both within and outside of the federal judicial system, if those proceedings have a direct relation to matters at issue. *Covad*, 407 F.3d at 1222; *Jones v. Lieber*, 579 F. Supp. 2d at 177.

These documents are offered to show how courts around the nation have handled

issues of jurisdiction, joinder and free speech rights in analogous cases. Thus, they are appropriate subject for judicial notice pursuant to Federal Rule of Evidence 201(b)(2).

For the foregoing reasons, the Court may properly consider these exhibits.

Dated: February 4, 2011

Respectfully submitted,

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EXHIBIT A

READ AT ONCE

**COURT-DIRECTED NOTICE
REGARDING ISSUANCE OF SUBPOENA
SEEKING DISCLOSURE OF YOUR IDENTITY**

A legal document called a subpoena has been sent to your Internet Service Provider, _____, requiring the disclosure of your name, address and other information. The subpoena was issued pursuant to a Court Order in one of two lawsuits pending in the United States District Court for the District of Columbia.

Plaintiffs have filed two lawsuits alleging that various people have infringed their copyrights by illegally downloading and/or distributing one of these two movies: “Far Cry” or the “The Steam Experiment” (a/k/a “The Chaos Experiment”). However, the Plaintiffs do not know the actual names or addresses of these people – only the Internet Protocol address (“IP address”) of the computer associated with the illegal activity.

Accordingly Plaintiffs have filed their lawsuits against anonymous “John Doe” defendants and issued subpoenas to various Internet Service Providers to determine the identity of these people. If you are receiving this notice, that means the Plaintiffs have asked your Internet Service Provider to disclose your identification information to them, including your name, current (and permanent) addresses, and your email address and Media Access Control number. Enclosed is a copy of the subpoena seeking your information and the exhibit page containing the IP address that has been associated with your computer and showing the date and time you are alleged to have used the Internet to download or upload the particular movie.

This is a civil lawsuit, not a criminal case. You have not been charged with any crime. If the Plaintiffs receive your information from your Internet Service Provider, you will likely be added as a named defendant to one and/or the other of the two lawsuits.

**INFORMATION ABOUT YOU HAS NOT YET BEEN DISCLOSED,
BUT IT WILL BE DISCLOSED IN 30 DAYS IF YOU DO NOT
CHALLENGE THE SUBPOENA.**

Your identifying information has not yet been disclosed to the Plaintiffs.

This notice is intended to inform you of some of your rights and options. It does not provide legal advice. We cannot advise you about what grounds exist, if any, to challenge this subpoena. If you would like legal advice you should consult an attorney. On the following pages of this notice you will find a list of resources that may help you locate an attorney and decide how to respond to the subpoena or lawsuit

If you want to prevent being identified, you have 30 days from the date of this notice to file a motion to quash or vacate the subpoena. You must also notify your ISP. If you need more than 30 days to file such a motion or find a lawyer to assist you, you can file a motion asking for an extension of time; you should notify your ISP if you file a motion asking for more time.

If you file a motion to quash the subpoena, your identity will not be disclosed until the court makes a decision on your motion. If you do nothing, then after 30 days your ISP will be compelled to send the Plaintiff your name, address, email address, telephone number, and your modem's Media Access Control number.

You may wish to obtain an attorney to advise you on these issues or to help you take action.

To help you find a lawyer, the American Bar Association's attorney locator can be found on the Internet at <http://www.abanet.org/lawyerlocator/searchlawyer.html>

The Bar Association of the District of Columbia has a Lawyer Referral Service that can be reached at 202-296-7845.

The Electronic Frontier Foundation is an organization that seeks to protect the rights of Internet users. They have created a website that lists attorneys who have volunteered to consult with people in your situation and contains further information about the lawsuit that has been filed against you as well as similar lawsuits:

<https://www EFF.org/issues/file-sharing/subpoena-defense>

OTHER ISSUES REGARDING THE LAWSUIT AGAINST YOU

To maintain a lawsuit against you in the District Court for the District of Columbia, the court must have personal jurisdiction over you. You may be able to challenge the District Court for the District of Columbia's personal jurisdiction over you. However, please note that even if your challenge is successful, the Plaintiff can still file against you in the state in which a court has personal jurisdiction over you.

If you are interested in discussing this matter with the Plaintiff's attorneys, you may contact them by telephone at (877) 223-7212, by fax at (866) 874-5101 or by email at subpoena@dgwlegal.com. Please understand that these lawyers represent the company that sued you. They can speak with you about settling the lawsuit, if you wish to consider that. You should be aware that if you contact them they may learn your identity, and that anything you say to them can later be used against you in court.

You should not call the Court.

Again, you may wish to retain an attorney to discuss these issues and your options.

EXHIBIT B

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG**

WEST COAST PRODUCTIONS, INC.,

Plaintiff,

v.

**CIVIL ACTION NO. 3:10-CV-93
(BAILEY)**

DOES 1-2010,

Defendants.

ORDER

Plaintiff West Coast Productions, Inc. is the alleged owner of the copyright of the hardcore pornographic film "Bomb Ass White Booty 14." The plaintiff brought this suit for copyright infringement against John Does 1-2010, individuals who allegedly illegally downloaded and distributed "Bomb Ass White Booty 14." When the suit was filed, the plaintiff did not know the names of the alleged infringers, but had identified the Internet Protocol ("IP") addresses of the computers associated with the infringement. To discover the actual names of the Doe defendants in this case, the plaintiff subpoenaed the Internet Service Providers ("ISPs") who provide service to the identified IP addresses, and the ISPs gave notice to their customers of the subpoena.

Upon inspection of the Complaint [Doc. 1] in the above-captioned case, however, this Court now finds that the Doe defendants have been improperly joined. For the reasons outlined below, the Court finds that all defendants except Doe 1 should be **SEVERED** from this action.

DISCUSSION

I. Applicable Joinder

Federal Rule 20(a)(2) of Civil Procedure allows a plaintiff to join multiple defendants in one action if:

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

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

To remedy improperly joined parties, the court should not dismiss the action outright, but “the court may at any time, on just terms, add or drop a party.” Fed. R. Civ. P. 21. The court may act upon motion by a party or *sua sponte*. *Id.*

II. Analysis

In its Complaint, the plaintiff appears to allege that joinder is based upon the Does’ use of some of the same ISPs and some of the same peer-to-peer (“P2P”) networks to infringe the same copyright. (See [Doc. 1] at ¶¶ 3-5). “However, merely committing the same type of violation in the same way does not link defendants together for purposes of joinder.” *Laface Records, LLC, v. Does 1-38*, 2008 WL 544992, *2 (E.D. N.C. Feb. 27, 2008).

Moreover, several courts agree that where there is no allegation that multiple defendants have acted in concert, joinder is improper. See *BMG Music v. Does 1-4*, 2006 U.S. Dist. LEXIS 53237, *5-6 (N.D. Cal. July 31, 2006) (*sua sponte* severing multiple defendant in action where only connection between them was allegation they used same ISP to conduct copyright infringement); *Interscope Records v. Does 1-25*, 2004 U.S. Dist.

LEXIS 27782, *19 (M.D. Fla. Apr. 1, 2004 (magistrate judge recommended *sua sponte* severance of multiple defendants in action where only connection between them was allegation they used same ISP and P2P network to conduct copyright infringement). Accordingly, this Court finds that the defendants' alleged use of some of the same ISPs and P2P networks to commit copyright infringement is, without more, insufficient for permissive joinder under Rule 20.¹

Further evidence of misjoinder is found in the undeniable fact that each defendant will also likely have a different defense. One district court finding improper joinder explained it this way:

Comcast subscriber John Doe 1 could be an innocent parent whose internet access was abused by her minor child, while John Doe 2 might share a computer with a roommate who infringed Plaintiffs' works. John Does 3 through 203 could be thieves, just as Plaintiffs believe, inexcusably pilfering Plaintiffs' property and depriving them, and their artists, of the royalties they are rightly owed.

BMG Music v. Does 1-203, 2004 WL 953888, *1 (E.D. Pa. Apr. 2, 2004).

For this reason also, the Court finds joinder in this case improper. However, insofar as Rule 21 states that misjoinder of parties is not a ground for dismissing an action, this Court will not dismiss the Doe defendants. Instead, following Rule 21, this Court chooses the route of severance. In fact, this Court will sever all Doe defendants except Doe 1. See ***BMG Music v. Does 1-203***, 2004 WL 953888 (E.D. Pa. Apr. 2, 2004) (upon motion for reconsideration, court upheld its *sua sponte* order of severance of all but one Doe defendant). Because all claims except Doe 1, whose ISP is AT&T WorldNet Services, will

¹In fact, in this case the plaintiff alleges that nineteen (19) ISPs were used. (See [Doc. 1-1]. This allegation makes the propriety of joinder even more tenuous.

be severed from this action, the subpoenas served in this action pertaining to any other Doe defendant are no longer valid.

CONCLUSION

For the foregoing reasons, the Court finds that:

1. All defendants except Doe 1 are hereby **SEVERED** from this action;
2. The subpoenas served on AT&T WorldNet Services, Charter Communications, Clearwire Corporation, Comcast Cable, Cox Communications, EarthLink, Frontier Communications, Insight Communications Company, Optimum Online, Qwest Communications, RCN Corporation, Road Runner, Road Runner Business, Sprint, Sprint PCS, Time Warner Telecom, Verizon Internet Services, WideOpenWest, and Windstream Communications are hereby **QUASHED** as to the severed defendants, Does 2-2010. In this regard, the plaintiff **SHALL NOTIFY** the recipients of these subpoenas that said subpoenas have been quashed.
3. Plaintiff West Coast Productions, Inc. **MAY**, within thirty (30) days, file individual amended complaints² and submit filing fees for those defendants against whom they wish to proceed;
4. Upon election to proceed, Plaintiff's Counsel **SHALL SUBMIT** to the Clerk of the

²These amended complaints shall proceed only against Does with IP addresses of computers located within the State of West Virginia. According to testimony presented to the Court, there is a publicly-available website that allows the plaintiff to determine the physical location of each Doe's computer at the time of the alleged copyright infringements. Specifically, Craig Goldberg, who supervises Time Warner Cable, Inc.'s subpoena compliance team, testified that the physical location of any IP address can be determined from a simple Google search. (Nov. 30, 2010, Hearing Transcript, at 21-26). Moreover, it appears to the Court that the search for Does from West Virginia can be narrowed by eliminating the Does with ISPs that do not provide internet service within the State.

Court filing fees for each of the amended complaints against John Does 2-2010, which cases shall be assigned separate civil action numbers;

5. Civil Action No. 3:10-CV-93 **SHALL BE** assigned to John Doe No. 1 as an individual defendant. The actions against all other defendants will be deemed to have been filed as of September 24, 2010, the date of the filing of the original Complaint; and
6. The pending motion [**Doc. 7**], as well as any filings that can be construed as motions, in Civil Action No. 3:10-CV-93 are hereby **DENIED AS MOOT**.

It is so **ORDERED**.

The Clerk is hereby directed to transmit copies of this Order to counsel of record and mail a certified copy to each interested party of record.

DATED: December 16, 2010.

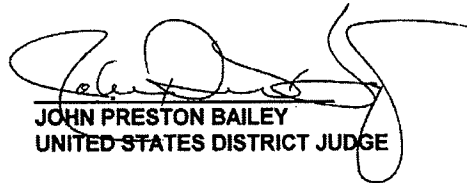

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IO GROUP, INC.,

No. C 10-04382 SI

Plaintiff,

**ORDER SEVERING DOE 1 AND
DISMISSING CLAIMS AGAINST DOES 2
- 435 WITHOUT PREJUDICE;
MODIFYING DISCOVERY ORDER**

v.

DOES 1 - 435,

Defendant.

Plaintiff filed this copyright infringement case on September 28, 2010, alleging that 435 “Doe” defendants illegally reproduced, distributed and publicly shared copies of plaintiff’s copyright protected works on a peer-to-peer network, “eDonkey 2000.” Complaint ¶ 1. Plaintiff identified the IP addresses associated with each of the Does, as well as the particular registered work or works each Doe defendant allegedly reproduced on eDonkey2000 and the date of that reproduction. *Id.*, ¶¶ 22 - 456. On October 8, 2010, plaintiff moved the Court for permission to take early discovery, specifically to issue a subpoena to internet service provider Comcast Internet in order to identify the name, address, e-mail address and telephone number of the subscribers associated with the identified IP addresses. On October 15, 2010, Magistrate Judge Ryu granted the motion for early discovery, but required Comcast to provide each subscriber identified with notice of the subpoena and sufficient time to object to the discovery and/or move to quash the subpoena before releasing the information to plaintiff. Docket No. 9.

After a subscriber, J.W., moved to quash the subpoena,¹ Judge Ryu severed J.W.’s claims from

¹ J.W. also moved for a protective order and to dismiss the claims for lack of personal jurisdiction. *See* docket Nos. 11-13.

1 this case.² In light of the high likelihood that at least one of the hundreds of other Doe defendants will
 2 decline to consent to the jurisdiction of a magistrate judge, Judge Ryu ordered that this action – the
 3 claims against the remaining Doe defendants – be reassigned to an Article III judge. Docket No. 28.
 4 At that time, Judge Ryu also denied plaintiff’s motion to extend the deadline for service on the Doe
 5 defendants due to Comcast’s inability to identify all of the Doe defendants before May 31, 2011.

6 This case was subsequently reassigned to the undersigned Judge. The complaint presents similar
 7 allegations to another case presently before this Judge, *IO Group, Inc. v. Does 1 - 19*, Case No. 10-3851.
 8 That case also asserted copyright infringement claims against 19 Doe defendants who allegedly
 9 reproduced one or more of plaintiff’s works on eDonkey2000. After this Court granted plaintiff leave
 10 to serve early discovery in *Earthlink, Inc.*, this Court considered a motion to quash filed by a subscriber,
 11 “Doe Defendant 4.” See Case No. 10-3851, Docket No. 23. In ruling on that motion, the Court found
 12 that plaintiff had improperly joined Does 1 through 19. December 7, 2010 Order at 4-6. The Court held
 13 that the complaint lacked any specific factual allegations to support plaintiff’s claims that the Doe
 14 defendants conspired or otherwise acted in concert. *Id.* at 5. Instead, the only specific factual allegations
 15 were that the Doe defendants used the same peer-to-peer network to reproduce plaintiff’s works on
 16 different dates. Those allegations, however, were insufficient as a matter of law to support joinder and
 17 allow plaintiff to benefit from filing one, as opposed to many, lawsuits. *Id.* at 5. In so ruling, the Court
 18 relied on other cases where courts, faced with similarly deficient allegations, *sua sponte* severed the
 19 claims of the misjoined defendants and dismissed the severed defendants. *Id.* at 5 (citing *Laface*
 20 *Records, LLC v. Does 1 - 38*, 2008 U.S. Dist. LEXIS 14544 (E.D.N.C. Feb. 27, 2008); *Interscope*
 21 *Records v. Does 1-25*, 2004 U.S. Dist. LEXIS 27782 (M.D. Fla. Apr. 1, 2004); *BMG Music v. Does*,
 22 2006 U.S. Dist. LEXIS 53237, No. 06-01579 (Patel, J.) (N.D. Cal. July 31, 2006); *Twentieth Century*
 23 *Fox Film Corp. v. Does 1-12*, No. C 04-04862 WHA (N.D. Cal. Nov. 16, 2004) (Alsup, J.)).

24 This complaint suffers from the same defects the Court identified in *IO Group, Inc. v. Does 1-*
 25 *19*. There are no facts to support the assertion that defendants conspired with each other to reproduce
 26 plaintiff’s works on eDonkey 2000 and the allegations that defendants simply used the same peer-to-
 27

28 ² The claims against J.W will proceed before Judge Ryu as No. C 10-5821 DMR.

1 peer network to download plaintiff's works – on many different days at many different times – is
2 insufficient to allow plaintiff to litigate against hundreds of different Doe defendants in one action.

3 As such, the Court HEREBY Orders that Does 2 through 435 are SEVERED and DISMISSED
4 from this action. Plaintiff can refile separate complaints against Doe defendants 2 through 435 within
5 twenty (20) days from the date of this Order. If plaintiff files new complaints within twenty (20) days,
6 such actions shall be deemed a continuation of the original action for purposes of the statute of
7 limitations.

8 In light of the severance and dismissal, the Order authorizing early discovery and the issuance
9 of a subpoena on Comcast is now overbroad. Docket No. 9. As such, the Court's October 15, 2010
10 Order is HEREBY modified to allow discovery only as to Doe 1 (*see* Complaint ¶ 22), and is stayed in
11 all other respects. Plaintiff is hereby ORDERED to serve a copy of this Order on Comcast within two
12 days of its issuance. After such service, Comcast shall not disclose any further information regarding
13 Does 2 through 435 absent further order of this Court. This Order is without prejudice to plaintiff
14 seeking discovery to identify each severed Doe, if and when plaintiff files new complaints against the
15 individual Does. Relatedly, this Order does not prevent plaintiff from using the information already
16 disclosed by Comcast, for example, to file new lawsuits identifying former Doe defendants by name or
17 other identifying information.

18
19 **IT IS SO ORDERED.**

20
21 Dated: January 10, 2011


22 
23 SUSAN ILLSTON
24 United States District Judge
25
26
27
28

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IO GROUP, INC,

No. C 10-03851 SI

Plaintiff,

v.

DOES 1-19,

Defendant.

**ORDER DENYING MOTION TO
QUASH; GRANTING A LIMITED
PROTECTIVE ORDER; DENYING
MOTION TO DISMISS FOR LACK OF
JURISDICTION; AND GRANTING
MOTION TO SEVER**

Currently before the Court are Doe Defendant 4's Motion to Quash and Motion to Dismiss. Pursuant to Civil Local Rule 7-1(b), the Court finds these matters appropriate for resolution without oral argument and hereby VACATES the hearing. Having considered the papers submitted, and for good cause shown, the Court orders as follows.

BACKGROUND

Plaintiff filed this copyright infringement case on August 27, 2010, alleging that nineteen "Doe" defendants illegally copied and shared plaintiff's copyright protected materials on a peer-to-peer network. Plaintiff identified IP addresses associated with each of the nineteen Does and moved this Court for permission to take early discovery, specifically to issue a subpoena to ISP Earthlink, Inc. in order to identify the name, address, e-mail address and telephone number of the subscribers associated with the identified IP addresses. On September 23, 2010, the Court granted plaintiff's request for leave to take the specified discovery, requiring that Earthlink notify the subscribers of the subpoena so that they have the opportunity to object and/or move to quash prior to the disclosure of the information sought. The subpoena to Earthlink was, apparently, issued from the Northern District of Georgia.

On October 18, 2010, “Doe Defendant 4” filed a motion to quash the subpoena, and a motion to dismiss for lack of jurisdiction and misjoinder. Doe 4 admits that his IP address is the same IP address that plaintiff alleges was used to illegally reproduce one of plaintiff’s copyrighted works. *See* Motion at 9; *see also* Complaint ¶ 25 (“Defendant Doe 4, without authorization, reproduced Plaintiff’s registered work Campus Pizza (U.S. registration No. PA 1-597-987) and distributed it on June 7, 2010 from the IP address 24.206.70.218.”).

DISCUSSION

1. Motion to Quash

Doe 4 asks the Court to quash the subpoena as to the release of his information because disclosure of his identity would invade his privacy – by publicly associating him with the download of homosexual pornography – and because the Court lacks personal jurisdiction over him. However, a motion to quash must be filed in the Court where the subpoena issued. *See* Fed. R. Civ. Proc. 45(c)(3)(A) (“On timely motion, the issuing court must quash or modify a subpoena that. . .”); *see also In re Sealed Case*, 141 F.3d 337, 341 (D.C. Cir. 1998) (“only the issuing court has the power to act on its subpoenas.”). The subpoena which is the subject of this motion issued from the Northern District of Georgia.

Plaintiff recognizes that there is a split of authority as to whether the Court which issued a subpoena can *transfer* a motion to quash to the Court with underlying jurisdiction over the case. *See, e.g., United States v. Star Sci.*, 205 F. Supp. 2d 482, 485 n.4 (D. Md. 2002) (noting that courts in the Eighth and Tenth Circuits have supported such transfers, while courts in the Seventh and D.C. Circuits have found transfer of discovery disputes inappropriate). However, Doe 4 has not followed the normal procedure – asking the issuing Court to transfer his motion to quash to this Court – but instead has filed the motion with this Court in the first instance. *See id.* at n.3 (“Obviously, a court issuing a subpoena also has a strong interest in the enforcement of its subpoenas. Thus, a nonparty could never seek transfer of a discovery dispute as a matter of right, over the objection of the court that issued the subpoena.”).

Doe 4 has offered no authority to support his attempt to have this Court rule on the motion to quash. Instead, Doe 4 argues that it would be unfair to require him to move to quash in Georgia or ask

1 the Georgia Court to transfer the issue here. At least one court in this district, however, has cured a
2 similar procedural defect by treating a motion to quash as a motion for a protective order, which this
3 Court can properly address. *See Wells v. GC Servs., LP*, 2007 U.S. Dist. LEXIS 29447 (N.D. Cal. Apr.
4 10, 2007) (not for citation).

5 For purposes of judicial economy, and in light of Doe 4's consent to this forum – at least for
6 purposes of determining his pending motions – the Court will consider Doe 4's motion as one for a
7 protective order. As noted in the Order granting plaintiff leave to take early discovery (Docket No. 12),
8 plaintiff has made a *prima facie* showing of copyright infringement against the Doe defendants and that
9 showing outweighs the limited expectation of privacy each Doe has in the information sought by
10 plaintiff. *Id.* at 4. Therefore, the Court finds as follows: To the extent Doe 4 seeks to prevent Earthlink
11 from disclosing his identifying information to plaintiff, the motion is DENIED. However, the Court will
12 GRANT a protective order to the limited extent that any information regarding Doe 4 released to
13 plaintiff by Earthlink shall be treated as confidential for a limited duration. Specifically, plaintiff shall
14 not publicly disclose that information until Doe 4 has the opportunity to file a motion with this Court
15 to be allowed to proceed in this litigation anonymously and that motion is ruled on by the Court.¹ If Doe
16 4 fails to file a motion for leave to proceed anonymously within 30 days after his information is
17 disclosed to plaintiff's counsel, this limited protective order will expire.

18 19 **2. Motion to Dismiss for Lack of Personal Jurisdiction**

20 Doe 4 also moves to dismiss the case for lack of personal jurisdiction. Doe 4 asserts that
21 publicly available IP lookup tools show that the IP address plaintiff alleges was used by Doe 4 is located
22 in Austin, Texas. Motion at 9. Doe 4 also submits an affidavit explaining that he was notified of the
23 subpoena by his ISP; that he is a resident of Austin, Texas; that he was not in California on June 7,
24

25 ¹ The Court notes that the standard a litigant must meet to be allowed to proceed anonymously
26 is a high one. *See Doe v. Advanced Textile Corp.*, 214 F.3d 1058, 1068-1069 (9th Cir. 2000).
27
28

2010; and that he is not engaged in any business in California and generally lacks any contact with California. *Id.* at 15-16.²

Plaintiff responds that Doe 4's motion to dismiss for lack of personal jurisdiction is premature, as Earthlink has not released the information regarding the IP address associated with Doe 4 and, therefore, Doe 4 has not been identified. *Oppo.* at 5. Plaintiff also argues that the individual appearing here as Doe 4 may not actually be Doe 4. *Id.* at 5-6. The complaint identifies Doe 4 as someone who "used" the identified IP address to illegally reproduce plaintiff's work. Complaint ¶ 25. Plaintiff raises the possibility that the IP address at issue may have been used by someone other than movant to engage in the illegal conduct. *Oppo.* at 5-6.

The Court agrees that this motion is premature, and denies the motion to dismiss for lack of jurisdiction without prejudice. The Court, and plaintiff, cannot adequately determine if personal jurisdiction exists until Doe 4 either identifies himself to the Court and plaintiff's counsel or he is identified by Earthlink. Therefore, in order to rule on the motion to dismiss for lack of jurisdiction, Doe 4 must submit a declaration identifying himself, identifying his residence, and identifying his connections, or lack thereof, with California. That declaration may be filed under seal and the plaintiff and the Court shall treat the information as confidential until such time as the Court rules on Doe 4's motion for leave to proceed anonymously. A renewed motion to dismiss for lack of jurisdiction may be filed contemporaneously with the declaration identifying Doe 4.

3. Misjoinder

Finally, Doe 4 argues that he should be dismissed from this case as each of the Doe defendants has been misjoined. Generally, Federal Rule of Civil Procedure 20 provides that parties may be joined in a lawsuit where the claims against them arise from a single transaction or a series of closely related

² Plaintiff objects and moves to strike various portions of the Doe 4's brief, including portions of Doe 4's affidavit. *See* Docket No. 17. The Court has reviewed the portions of the brief and affidavit objected to and while recognizing that some of the purported factual assertions could have been better substantiated and/or presented in a declaration, as the Court does not rely on the factual assertions in Doe 4's brief or the legal conclusion in Doe 4's affidavit in ruling on the pending motions, plaintiff's objections and requests to strike are DENIED. Likewise, Doe 4's objection that plaintiff violated amended Local Rule 7-3(a) by failing to make the objections in his brief and request that the Court ignore them is recognized and DENIED

1 transactions. If misjoinder is apparent, under Rule 21, the Court is authorized to “drop” or “sever” a
2 misjoined party from the case.

3 Here, the complaint alleges that nineteen different defendants reproduced eighteen different
4 copyrighted films on fifteen different days. Complaint ¶¶ 21-40. The complaint does allege that the
5 defendants “conspired” with each other to provide infringing reproductions of various copyright
6 protected works, but those allegations are wholly conclusory and lack any facts to support an allegation
7 that defendants worked in concert to violate plaintiff’s copyrights in any of the protected works. *See*
8 Complaint ¶ 5 (each defendant was acting as the “agent and representative” of the other defendants);
9 ¶ 11 (unspecified defendants conspired “with other individuals, including the other DOE Defendants,
10 to reproduce and distribute Plaintiff’s copyrighted works”); *see also* ¶¶ 52-54.

11 The only factual allegation connecting the defendants is the allegation that they all used the
12 “eDonkey 2000” peer-to-peer network to reproduce and distribute plaintiff’s copyrighted works. *Id.*, ¶¶
13 11, 21. Allegations that defendants used the same peer-to-peer network to infringe a plaintiff’s
14 copyrighted works, however, have been held to be insufficient for joinder of multiple defendants under
15 Rule 20. *See, e.g., Laface Records, LLC v. Does 1 - 38*, 2008 U.S. Dist. LEXIS 14544 (E.D.N.C. Feb.
16 27, 2008) (ordering the severance of claims against thirty-eight defendants where plaintiff alleged each
17 defendant used the same ISP as well as the same peer-to-peer network to commit the alleged copyright
18 infringement, but there was no assertion that the multiple defendants acted in concert); *Interscope*
19 *Records v. Does 1-25*, 2004 U.S. Dist. LEXIS 27782 (M.D. Fla. Apr. 1, 2004) (magistrate recommended
20 *sua sponte* severance of multiple defendants in action where only connection between defendants was
21 allegation that they used same ISP and P2P network to conduct copyright infringement); *see also BMG*
22 *Music v. Does*, 2006 U.S. Dist. LEXIS 53237, No. 06-01579 (Patel, J.) (N.D. Cal. July 31, 2006)
23 (finding improper joinder of four Doe defendants where the complaint alleged that each defendant used
24 the same ISP to engage in distinct acts of infringement on separate dates at separate times, and there was
25 no allegation that defendants acted in concert); *Twentieth Century Fox Film Corp. v. Does 1-12*, No.
26 C 04-04862 WHA (N.D. Cal. Nov. 16, 2004) (Alsup, J.) (severing twelve Doe defendants in a copyright
27 infringement case where although defendants used the same ISP to allegedly infringe motion picture
28 recordings, there was no allegation that the individuals acted in concert); *cf. In the Matter of DIRECTV*,

1 INC. 2004 U.S. Dist. LEXIS 24263, No. 02-5912 (Ware, J.) (N.D. Cal. July 26, 2004) (severing and
2 dismissing hundreds of defendants in a case alleging that defendants purchased and used modified
3 access cards and other pirate access devices to permit view plaintiff's programming without
4 authorization).


5 Plaintiff does not respond to the misjoinder argument raised by Doe 4. The Court agrees with
6 Doe 4 that based on the allegations in the complaint, joinder of all nineteen Doe defendants is
7 inappropriate. However, as Doe 4 has appeared in this case to contest personal jurisdiction, the Court
8 will not "drop" Doe 4 from this case. Instead, the Court orders that Doe defendants 1-3 and 5-19 are
9 SEVERED and DISMISSED from this action. Plaintiff can refile separate complaints against Doe
10 defendants 1-3 and 5-19 within twenty (20) days from the date of this Order. If plaintiff files new
11 complaints within twenty (20) days, such actions shall be deemed a continuation of the original action
12 for purposes of the statute of limitations.

13 14 CONCLUSION

15 For the foregoing reasons, the Court considers Doe 4's motion to quash as a motion for a
16 protective order and grants it in limited part, preventing plaintiff from publicly disclosing the
17 information from the Earthlink subpoena regarding Doe 4 until Doe 4 files a motion to proceed
18 anonymously in this litigation. Defendant's motion to dismiss for lack of jurisdiction is DENIED
19 without prejudice and may be renewed upon the filing of the declaration identified above. Finally,
20 Plaintiff's motion to sever the defendants in this case is GRANTED, and Doe defendants 1-3 and 5-19
21 are SEVERED and DISMISSED from this case.

22
23
24 **IT IS SO ORDERED.**

25
26 Dated: December 7, 2010

27 
28 _____
SUSAN ILLSTON
United States District Judge