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United States District Court  
Northern District of California

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

AXEL BRAUN,

Plaintiff,

v.

PRIMARY DISTRIBUTOR DOE NUMBER  
1 AND DEFENDANT DOES 2 THROUGH  
69,

Defendants.

Case No.: 12-3690 YGR (JSC)

**ORDER GRANTING DOE Y’S MOTION  
FOR A PROTECTIVE ORDER IN PART,  
DENYING REQUEST TO VACATE  
EARLY DISCOVERY ORDER, AND  
REPORT AND RECOMMENDATION TO  
DENY DOE Y’S MOTION TO DISMISS  
(Dkt. No. 19)**

Plaintiff Axel Braun (“Braun”) sued 69 Doe Defendants for copyright infringement. Pursuant to Court order, Plaintiff served subpoenas on several Internet Service Providers (“ISPs”) seeking identifying information about certain subscribers who, according to Plaintiff’s allegations, used their Internet access to violate Plaintiff’s copyright. One of the subscribers, without identifying him, her, or itself, has filed a Motion to Dismiss for Misjoinder and/or for a Protective Order (“Motion”). (Dkt. No. 19.) For the reasons explained below, Doe Y’s Motion for a Protective Order is GRANTED in part and the Court RECOMMENDS that the Motion to Dismiss be DENIED.

**BACKGROUND**

1  
2 Plaintiff is an individual doing business as Axel Braun Productions, which produces adult  
3 entertainment products. (Dkt. No. 1 at ¶¶ 9-10.) Plaintiff is the co-producer and co-claimant of the  
4 copyright for the contested motion picture: *Star Wars XXX: A Porn Parody* (the “Motion Picture”).  
5 (Dkt. No. 1 at ¶ 32.) This film was registered by Plaintiff with the Copyright Office and assigned the  
6 registration number PA 1-787-699. (Dkt. No. 1 at ¶ 32.)

7 Plaintiff alleges that Primary Distributor Doe Number 1 and Does 2 through 69 (collectively  
8 “Defendants”) used BitTorrent, an Internet peer-to-peer (“P2P”) file sharing network, to illegally  
9 reproduce and distribute Plaintiff’s copyrighted work in violation of the Copyright Act, 17 U.S.C. §  
10 101 et seq. (Dkt. No. 1 at ¶¶ 33-34.) Plaintiff further alleges that by using the BitTorrent program to  
11 download and distribute Plaintiff’s content, Primary Distributor Doe Number 1 engaged in  
12 contributory infringement, and all Defendants are jointly and severally liable for Plaintiff’s injuries.  
13 (Dkt. No. 1 at ¶¶ 44-45.)

14 Plaintiff engaged the services of Media Protector International GmbH (“MPI”), a company  
15 specializing in P2P content detection and user identification, to locate and document the alleged  
16 infringing copies of his copyrighted Motion Picture on BitTorrent networks. (Dkt. No. 4, p. 7:4-9.)  
17 MPI was able to identify and document IP addresses from which individuals connected to the  
18 Internet, as well as the date and time the individuals used the IP addresses to share files on the P2P  
19 network. (Dkt. No. 4, p. 11:1-12.) Because the Defendants’ conduct occurred behind the mask of  
20 their anonymous IP addresses, Plaintiff could not identify the Defendants without leave to subpoena  
21 Defendants’ ISPs for the identity of the individual or entity related to each IP address. Plaintiff thus  
22 filed an *ex parte* Application for Leave to Take Early Discovery (“Application”) with this Court on  
23 July 20, 2012, pursuant to Rule 26(d). Plaintiff sought leave to serve Rule 45 third-party subpoenas  
24 on the Does 1-69’s ISPs so as to uncover the identities of the Doe Defendants. (Dkt. No. 4.)

25 This Court granted Plaintiff’s Application on August 21, 2012, finding that there was good  
26 cause in permitting early discovery to uncover the identities of the Doe Defendants (Dkt. No. 7.) The  
27 order gave the ISPs 20 days from the date of service upon it to serve Does 1-69 with a copy of the  
28 subpoena and a copy of the order. (Dkt. No. 7, p. 7:23-24.) Does 1-69 had 30 days from the date of

1 service upon him, her, or it, to file any motions in this Court contesting the subpoena. (Dkt. No. 7, p.  
2 7:27-28.) Doe Y subsequently filed the underlying motion and seeks to dismiss the case on the basis  
3 of improper joinder, as well as to prevent his, her, or its identity from being revealed until each Doe  
4 Defendant is sued individually. (Dkt. No. 19.) Plaintiff filed an Opposition, but Doe Y did not file a  
5 Reply.

### 6 LEGAL STANDARD

7 Under the Federal Rules of Civil Procedure, a party may discover any matter relevant to a  
8 claim or defense. Fed. R. Civ. P. 26(b)(1). Relevance for discovery purposes is extremely broad and  
9 “need not be admissible at the trial if the discovery appears reasonably calculated to lead to the  
10 discovery of admissible evidence.” *Id.*

11 Upon a motion for a protective order and a showing of good cause, the court may limit the  
12 scope of discovery “to protect a party or person from annoyance, embarrassment, oppression, or  
13 undue burden or expense.” Fed. R. Civ. P. 26(c). The party or person seeking to limit discovery  
14 through a protective order has the burden of showing good cause. *Blankenship v. Hearst Corp.*, 519  
15 F.2d 418, 429 (9th Cir. 1975). The burden cannot be met by conclusory statements; the moving party  
16 must show “a particular and specific need for a protective order.” *Hard Drive Productions, Inc. v.*  
17 *Does 1-118*, No. 11-01567, 2011 WL 5416193, at \*2 (N.D. Cal. Nov. 8, 2011). “Even where ‘good  
18 cause’ is established, a court should balance the interests in allowing discovery against the relative  
19 burdens that would be imposed.” *Id.*

### 20 DISCUSSION

21 Doe Y challenges Plaintiff’s subpoena on three grounds. First, Doe Y argues that the 69 Doe  
22 Defendants in this action are improperly joined because joinder is based on entirely disparate alleged  
23 acts. Second, Doe Y argues that the Court should issue a protective order to protect the identities of  
24 the Doe Defendants. Last, Doe Y requests that the Court vacate its prior order granting Plaintiff leave  
25 to take early discovery.

#### 26 A. Motion to Dismiss for Improper Joinder

27 Doe Y insists that this Court should dismiss Plaintiff’s Complaint because the 69 Doe  
28 Defendants in this action are improperly joined. However, improper joinder is not a basis for

1 dismissing an action, but rather is a ground to sever the claims and/or the parties. Fed. R. Civ. P. 21.  
2 Moreover, the Court already considered the joinder issue. In granting Plaintiff leave to take early  
3 discovery, the Court concluded that Plaintiff has made a prima facie showing that the Doe Defendants  
4 are properly joined. (Dkt. No. 7, p. 6:1-2.) The Court might find, as the case progresses, that the Doe  
5 Defendants are improperly joined; however, at this stage in the litigation, the Court declines to  
6 reconsider its determination that joinder is proper. As the motion to dismiss is based entirely on the  
7 improper joinder argument, the Court recommends that the motion to dismiss be denied.

### 8 **B. Protective Order**

9 Doe Y seeks a protective order “to protect the Doe identities until a proper suit is filed.”  
10 Although it is not entirely clear what Doe Y seeks, it appears Doe Y is asking that Doe Y’s identity  
11 be concealed from Plaintiff until Plaintiff names Doe Y as a defendant in case other defendants are  
12 not joined. As support of this argument, Doe Y relies on *Does 1 thru XXIII v. Advanced Textile Corp.*,  
13 214 F.3d 1058, 1062 (9th Cir. 2000), an action under the Fair Labor Standards Act (“FLSA”). There  
14 the plaintiffs filed their suit pseudonymously, fearing that revealing their identities would result in  
15 their termination, deportation, and subsequent arrest and imprisonment upon arrival in China. *Id.* The  
16 court held that in a collective FLSA action, the identities of the plaintiffs can be concealed if the  
17 plaintiffs can show an objectively reasonable fear of severe retaliation, at least until the trial court  
18 order notice to class members and potential class members have been given an opportunity to opt in  
19 to the lawsuit. *Id.* at 1063.

20 Here, Doe Y makes a cursory argument that the alleged illegal download of adult  
21 entertainment is a matter of a sensitive and highly personal nature which warrants a protective order  
22 to conceal the identities of the Doe Defendants. (Dkt. No. 19, p. 4.) Doe Y also asserts that a  
23 protective order is appropriate because the Doe Defendants may be innocent third-parties (notably  
24 Doe Y does not argue that he/she is in fact an innocent third-party).<sup>1</sup> Doe Y’s argument falls far short  
25 of the strong showing required of a party seeking a protective order. Moreover, if Doe Y’s identity is

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27 <sup>1</sup> Plaintiff represents that he will not name Doe Y as a defendant if Doe Y can demonstrate that he or  
28 she did not in fact infringe. (Dkt. No. 25, p. 9:3-7.) The burden, however, is on Plaintiff to prove  
infringement and under Federal Rule of Civil Procedure 11 Plaintiff and his counsel should not name  
Doe Y as a defendant if Plaintiff does not in good faith believe that he can prove Doe Y infringed.

1 ordered concealed from Plaintiff, the order will effectively end the lawsuit. In *Advanced Textile*  
2 *Corp.*, in contrast, the lawsuit could proceed without the named plaintiffs more particularly  
3 identifying themselves.

4 The Court nonetheless recognizes that given the embarrassing nature of the allegations in this  
5 case, there may be a basis for requiring Plaintiff to treat Doe Y's identity as confidential, at least  
6 initially. *See, e.g., IO Grp. v. J.W.*, No. 10-5821, 2011 WL 237673, at \*2 (N.D. Cal. Jan. 24, 2011)  
7 (finding that although the defendant did not present specific facts showing good cause for a protective  
8 order, the doe's identity should remain confidential until after he/she had the opportunity to file a  
9 motion to proceed anonymously). Courts within this District have found that an allegation that an  
10 individual illegally downloaded adult entertainment may relate to matters of a sensitive and highly  
11 personal nature, including one's sexuality. *See, e.g., Hard Drive Productions v. Does 1-33*, No. 11-  
12 3827, 2011 WL 5325530, at \*4 (N.D. Cal. Nov. 3, 2011); *Digital Sin, Inc. v. Does 1-5698*, No. 11-  
13 4397, 2011 WL 5362068, at \*4 (N.D. Cal. Nov. 4, 2011); *Third Degree Films v. Does 1-3577*, No.  
14 11-2768, 2011 WL 5374569, at \*4 (N.D. Cal. Nov. 4, 2011); *Quad Int'l, Inc. v. Doe*, 12-5433, 2012  
15 WL 5868966, at \*3 (N.D. Cal. Nov. 19, 2012).

16 Plaintiff has offered to stipulate to a court order that prevents the release of Doe Y's  
17 identifiable information unless and until Plaintiff names Doe Y as a Defendant. (Dkt. No. 25, p. 10:7-  
18 13.) This offer, however, does not alleviate the unfair leverage Plaintiff may obtain in any pre-suit  
19 settlement negotiations by threatening to name Doe Y—and thus publicly identify Doe Y—in the  
20 action. In such circumstances, even if Doe Y is innocent, Doe Y may feel coerced into a settlement to  
21 avoid being publicly associated with Plaintiff's product. Accordingly, the Court will order Plaintiff  
22 to treat Doe Y's identity as confidential until Doe Y is named as a Defendant, served with the  
23 Complaint, and has the opportunity to file a properly supported motion to be permitted to proceed in  
24 this litigation anonymously. Such motion to proceed anonymously must be filed before or  
25 simultaneously with any answer or other responsive pleading.

### 26 **C. Request to Vacate Early Discovery Order**

27 Lastly, the Court has considered Doe Y's argument that this Court should vacate the early  
28 discovery order based on improper joinder. Doe Y argues that the Court should adopt a four-factor

1 test set forth in a case from the Central District of California. (Dkt. No. 19 citing *Patrick Collins, Inc.*  
2 *v. John Does* 1-10, No. 12-052668 (C.D. Cal. 2012).) Notably, this is the very same four factor test  
3 the Court did apply in granting Plaintiff’s motion for early discovery. (Dkt. No. 7.) Accordingly, Doe  
4 Y’s request that the Court vacate the early discovery order is denied.

5 **CONCLUSION**

6 For the reasons explained above, Doe Y’s Motion for a Protective Order is GRANTED in  
7 part, Doe Y’s request to vacate the early discovery order is DENIED, and the Court RECOMMENDS  
8 that the Motion to Dismiss be DENIED. Plaintiff shall treat Doe Y’s identity as confidential until  
9 Doe Y is named as a Defendant, served with the Complaint, and has the opportunity to file a motion  
10 to be permitted to proceed in this litigation anonymously. Such motion to proceed anonymously must  
11 be filed before or simultaneously with any answer or other responsive pleading.

12 The presiding district court judge referred all discovery matters to the undersigned. (Dkt. No.  
13 5.) Because a portion of Doe Y’s motion seeks dismissal and is therefore potentially dispositive, the  
14 Court makes a report and recommendation regarding the motion to dismiss.

15 This Order disposes of Docket No. 19.

16 **IT IS SO ORDERED.**

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18 Dated: December 18, 2012

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21 JACQUELINE SCOTT CORLEY  
22 UNITED STATES MAGISTRATE JUDGE  
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United States District Court  
Northern District of California