Electronic Frontier Foundation

February 2, 2004

Via Fax (212) 805-7906

Hon. Denny Chin
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1020
New York, New York 10007-1312

Re: 1:04-cv-00473-DC, Sony Music Entertainment, Inc. et al v. Does 1-40

Dear Judge Chin

Pursuant to our telephone discussions with chambers, Amici Public Citizen, Electronic Frontier Foundation and the American Civil Liberties Union submit this letter concerning Plaintiffs' *ex parte* application to serve discovery seeking the identity of the unnamed defendants. This is an action for copyright infringement in which multiple music companies seek injunctive relief, damages and fees and costs against 40 anonymous and completely unrelated individuals. Amici present this letter to argue that, notwithstanding the serious violations of law alleged in the complaint, plaintiffs have not made a sufficient factual showing to warrant discovery into the identities of persons who have communicated anonymously over the Internet, including a showing that there is personal jurisdiction of each of the 40 defendants and that they are properly joined together in one action. Finally, we argue that, in the event some discovery is to be allowed, certain additional conditions should be imposed.

Exhibit A to the Complaint specifies the Internet Protocol ("IP") address that each Doe allegedly used for posting songs on particular dates (ranging from June through December 2003), identifying between five and ten songs for each defendant. Plaintiffs seek to impose liability on each of the 40 individuals individually – there are no allegations of joint or several liability, and no claims for relief in the alternative against any of them. There is also no claim that the infringers acted pursuant to any common plan or conspiracy, or that their liability arises out of a common transaction or occurrence. At most, it is alleged that there have been a series of instances in which each individual defendant has used the facilities of a single Internet Service Provider ("ISP"), Cablevision, to display their respective data files on the Internet.

1. **Balancing the Right to Anonymous Speech Against the Need for Disclosure.** Plaintiffs are correct that it is commonplace for plaintiffs to be allowed discovery at the outset of a lawsuit to identify otherwise unknown persons alleged to have committed a legal wrong. But there is a significant difference between this case and the various cases plaintiffs cite on page 5 of their brief, where prisoners or arrestees sought to identify the prison or police officers who allegedly beat or otherwise mistreated them. The defendants here are accused of having engaged in wrongful but anonymous speech on the Internet, and because the First Amendment protects the right to speak anonymously, a subpoena for their names and addresses is subject to a qualified privilege. The distribution, display or performance of musical and other creative works is, of course, speech protected by the First Amendment, and the Supreme Court's rulings on anonymous speech commonly cite literary pseudonyms as an example of our strong tradition of anonymous speech. Although plaintiffs will argue that there is no First Amendment right to infringe a copyright, at this stage of the case no such infringement has been established, it is only alleged. Just as in other cases where discovery seeks information that may be privileged, the Court must consider the privilege before authorizing discovery.

The tension between this important qualified privilege and the interest of a plaintiff who has alleged wrongdoing in obtaining information needed to pursue litigation over alleged

454 Shotwell Street · San Francisco, CA 94110 USA
+1 415 436 9333 +1 415 436 9993 www.eff.org info@eff.org

wrongdoing, has been considered by a number of federal and state courts over the past several years. These courts have wrestled with the fact that, at the outset of the litigation, the plaintiff has done no more than allege wrongdoing, and a privilege is generally not considered to be overcome by mere allegations. They have further recognized that a serious chilling effect on anonymous speech would result if Internet speakers knew they could be identified by persons who merely allege wrongdoing, without necessarily having any intention of carrying through with actual litigation. Indeed, plaintiffs' representatives have repeatedly told the press that they do not necessarily want to pursue litigation against all anonymous file sharers whose identities they obtain.

In order to balance these interests, the courts have drawn by analogy from the balancing test that many courts, including the Second Circuit, have adopted in deciding whether to compel the disclosure of anonymous sources or donors. *Carey v. Hume,* 492 F.2d 631 (D.C. Cir. 1974); *Cervantes v. Time,* 464 F.2d 986 (8th Cir. 1972); *Baker v. F&F Investment*, 470 F.2d 778, 783 (2d Cir.1972). Accordingly, the courts that have considered this question have adopted a several-part balancing test to decide whether to compel the identification of an anonymous Internet speaker so that he may be served with process.

This test was most fully articulated in *Dendrite v. Doe*, 775 A.2d 756 (N.J.App. 2001), which remains the only appellate opinion in the country to face the question squarely. *Dendrite* requires the would-be plaintiff to (1) use the Internet to notify the accused of the pendency of the identification proceeding and to explain how to present a defense; (2) quote verbatim the statements allegedly actionable; (3) allege all elements of the cause of action; (4) present evidence supporting the claim of violation, and (5) show the court that, on balance and in the particulars of the case, the right to identify the speaker outweighs the First Amendment right of anonymity.

Several other courts have similarly set forth requirements of notice, review of the complaint, and presentation of argument and evidence before an ISP will be compelled to identify an Internet speaker. For example, in *Melvin v. Doe*, 49 Pa.D.&C.4th 449 (2000), *appeal quashed*, 789 A.2d 696, 2001 Pa.Super. 330 (2001), *appeal reinstated*, 836 A.2d 42 (Pa. 2003), the trial court allowed an anonymous defendant to present evidence and seek summary judgment, ordering disclosure only after finding genuine issues of material fact requiring trial. In reversing the denial of the defendant's interlocutory appeal, the Pennsylvania Supreme Court discussed at length the conflict between the right to speak anonymously and the plaintiff's right to identify a potential defendant, and remanded for consideration of whether evidence of actual damage had to be presented before the right of anonymous speech could be disregarded. 836 A.2d at 47-50.

Similarly, in *La Societe Metro Cash & Carry France v. Time Warner Cable* 2003 WL 22962857 (Conn. Super.), the court applied a balancing test and considered evidence that allegedly defamatory statements were false and caused injury before deciding to allow discovery concerning the identity of the speaker. In *Columbia Ins. Co. v. Seescandy.com*, 185 FRD 573 (N.D.Cal. 1999), the court required the plaintiff to make a good faith effort to communicate with the anonymous defendants and provide them with notice that the suit had been filed against them, thus assuring them an opportunity to defend their anonymity, and also compelled the plaintiff to demonstrate that it had viable claims against such defendants. *Id.* at 579. And in *Re Subpoena to America Online,* 52 VaCir 26, 34 (Fairfax 2000), *rev'd on other grounds*, 542 SE2d 377 (Va 2001), the court required introduction of the allegedly actionable Internet posting, and required that it be "satisfied by the pleadings or evidence supplied" that the subpoenaing party

had a legitimate basis to contend that it was the victim of actionable conduct, "and . . . the subpoenaed identity information [must be] centrally needed to advance that claim.[1]

It is difficult to consider the possibility that the filing of the Complaint by these respected parties might not have been preceded by a meticulous investigation. On the other hand, it is not difficult for the plaintiffs to present solid evidence, including an affidavit by the individual who examined the files available for download from each defendant's computer, listened to the files, verified that they were copyrighted songs, and checked to be sure that those copyrights were registered and are owned by the plaintiffs, and to list in the affidavit or in an affidavit attachment the songs that the Doe made available for download. The Whitehead affidavit in this case is long on social policy and very short on first person averments about the individual defendants in this case. Because this case will set a standard for all plaintiffs who seek to identify anonymous Internet speakers based on claims of copyright infringement, including those who are less scrupulous and ethical than these plaintiffs, the Court should not authorize a subpoena until such individualized evidence is presented about each Doe.

2. Joinder. Plaintiffs have violated Rule 20, F.R. Civ. P., by joining all 43 defendants in a single action. The Second Circuit requires that, for defendants to be joined in the same lawsuit, they must be related **to each other**. In *Nassau Cy. Ass'n of Ins. Agents v. Aetna Life & Cas.*, 497 F.2d 1151 (2d Cir. 1974), the court refused to allow a class action against 164 insurance companies accused on antitrust violations because there was "no allegation of conspiracy or other concert of action." Similarly, in *Pergo v. Alloc*, 262 F. Supp.2d 122, 127-128 (S.D.N.Y. 2003), the court refused to allow a plaintiff to join in the same action different defendants that had allegedly violated the same patents, because "there are no allegations of any cooperative or collusive relationship between the two sets of defendants." Another trial court in the Second Circuit similarly refused to allow suit against 104 defendants who used altered converters to steal television programming from plaintiff's cable boxes, "in the absence of any claim that the defendants conspired or acted jointly." *Telemedia Co. v. Antidormi*, 179 F.R.D. 75, 76 (D. Conn. 1998).

Our concern that corners might be cut if hundreds of otherwise unrelated defendants are joined in a single action is heightened by the manner in which plaintiffs have sought leave to pursue discovery in this case. Plaintiffs' affidavit attaches hundreds of pages concerning the music files made available by three of the 40 defendants and tells the Court that although comparable evidence could be made available with respect to each of the other defendants, it would be too burdensome to do so. However, although the courts exist to implement broad and important public policies, they do so by meting out individual justice. To be sure, it is more convenient to present evidence about only a few of the accused before obtaining discovery about all of them, but if it is important enough to sue all of them, it should be important enough to present sufficient evidence to justify discovery identifying each one of them.

In a highly analogous context, several district courts have refused to allow the DirecTV company to sue hundreds of otherwise unrelated individuals for using "pirate access boxes" to obtain satellite signals without paying for them.[2] Stealing satellite signals is at least as

---

[1] The argument for a balancing test is more fully developed at http://www.citizen.org/documents/Melvin%202.pdf.

[2] The cases are collected at the web page http://www.directvdefense.org/files/ (see caption "Severance"). *Accord Movie Systems v. Abel*, 99 F.R.D. 129 (D. Minn. 1983) (denying joinder of 1,798 defendants who had allegedly all infringed the same television distributor's broadcasts

reprehensible as making music files available for download, but these district judges refused to be stampeded by claims of convenience and need for immediate action into allowing all defendants to be joined in one action for the administration of mass justice. The same principle applied to the accused copyright infringers in this case.

3. Personal Jurisdiction. One of the showings that plaintiffs have failed to make with respect to most of the defendants is that the Court has personal jurisdiction of each of the 40 defendants. Under the sliding scale or "*Zippo*" analysis that has been adopted by the federal courts for Internet jurisdiction, (named after *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F. Supp. 1119 (W.D. Pa. 1997)), defendants who passively post information on the Internet for others to examine and copy are not subject to personal jurisdiction based on their Internet postings, while defendants whose Internet sites are commercially "interactive," in the sense that they use their sites to engage in business transactions, are subject to being sued in any state in which a substantial number of business transactions occur. Along this continuum, the greater the degree of commercial interactivity, the greater the liability for suit in a foreign jurisdiction. *E.g.*, *ALS Scan v. Digital Service Consultants*, 293 F.3d 707 (4th Cir. 2002); *Neogen Corp. v. Neo Gen Screening*, 282 F.3d 883 (6th Cir. 2002); *Mink v. AAAA Development*, 190 F3d 333 (5th Cir. 1999). The Second Circuit has never expressly adopted this sliding scale analysis, but several decisions in this District have adopted it.[3] Moreover, in *Bensusan Restaurant Corp. v. King*, 126 F.3d 25 (2nd Cir. 1997), the court of appeals refused to find that a website that infringed the trademark of a New York café owner constituted tortious action in New York under the state long-arm statute.

The defendants in this case do not have websites, but their computers are alleged to be functioning in a manner comparable to a website – they have opened a section of their personal computers to the Internet in a manner that permits other persons with personal computers to obtain files stored on those computers and download them without charge. Therefore, defendants cannot be found at the "commercially interactive" end of the sliding scale, and the mere fact that the data on their computers can be accessed by others and downloaded in New York is not a sufficient basis for subjecting them to suit here.

Moreover, although the Complaint alleges and the Whitehead Affidavit avers that the IP numbers that each of the defendants is alleged to have used to post infringing material can be traced to a single ISP, Cablevision, which "can be found" in New York, standard tools for tracing the Internet Protocol addresses, which were readily available to Plaintiffs before they filed suit, indicate that many of the 40 defendants do not reside in the Southern District of New York.[4] Accordingly, on the face of the complaint, it appears that many of the defendants are not

---

because, "although there were common practices and perhaps common questions of law," the independent defendants had not acted jointly).

[3] *In re Ski Train Fire*, 2003 WL 22909153 (S.D.N.Y. 2003) ("It is well settled that a court must examine the nature and quality of a defendant's activity on its website to determine whether jurisdiction is appropriate in New York."); *Citigroup v. City Holding Co.*, 97 F.Supp.2d 549 (S.D.N.Y. 2000) (endorsing *Zippo* continuum and finding personal jurisdiction based on highly interactive, commercial website on which NY customers could apply for loans and chat with a lending representative); *K.C.P.L., Inc. v. Nash*, 1998 WL 823657 (S.D.N.Y. 1998) (endorsing *Zippo* continuum and declining to find personal jurisdiction over defendant who merely owned domain name Reaction.com).

[4] Amici can present an affidavit describing these standard tracing techniques and what they reveal about the probable location of the 40 defendants at the court's request. The plaintiffs

subject to jurisdiction in New York. There is no basis for this Court to compel the ISP to identify defendants of whom the Court does not have personal jurisdiction. Accordingly, if any subpoenas are to be issued, they should only require Cablevision to specify the states in which each defendant resides, so that Plaintiffs can refile this action against such individuals in the proper jurisdictions.

4. Procedure for Subpoenas. Even assuming that the Court concludes that it should allow some or all of the discovery requested by plaintiffs, we suggest that the Court better ensure that the Does have a realistic opportunity to object if they choose to do so. While we applaud plaintiffs for recognizing that an ISP should be allowed sufficient time to notify its subscribers that their identifies are at issue, so that, if they choose, the Does can offer evidence or argument in defense of their anonymity under the *Dendrite* standard. Pl. Mem. at 7 n4. We question, however, whether fifteen days from the date of the subpoena is a sufficient amount of time to allow each defendant to receive the requisite notice from the ISP and to allow that defendant, particularly a defendant who may be located outside New York, to obtain an attorney who is licensed to practice in this District, and to allow that attorney to prepare a motion to quash if one can be justified. We suggest that the Court address this issue in its order, by directing the ISP to provide notice within seven days of its receipt of the subpoena to each person and to allow the defendants fourteen days from the time notice was received to file a motion to quash.

In urging such additional time, we are not insensitive to plaintiffs' concerns about the need for immediate action lest information contained in the ISP's electronic records, showing which of its customers used which IP numbers at which times. We suggest that the Court require the ISPs to preserve that information pending this Court's ruling on whether it may pursue discovery, and, if a subpoena is served, pending disposition of any timely filed motion to quash.

CONCLUSION

Amici respectfully request that the motion for expedited discovery be considered and resolved in accordance with the principles set forth above.

Respectfully submitted,

Wendy Seltzer, with her permission, by Zarak Khastgir

Paul Alan Levy (DC Bar No. 946400)
Charlotte Garden
Public Citizen Litigation Group
1600 - 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000
Attorneys for Public Citizen

Wendy Seltzer (WS-4188)
Cindy Cohn
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333
Facsimile: (415) 436-9993
Attorneys for Electronic Frontier Foundation

Christopher A. Hansen
Aden J. Fine
American Civil Liberties Union
125 Broad Street
New York, NY 1004-2400
(212) 549-2500
(212) 549-2651 (fax)
Attorneys for American Civil Liberties

---

themselves obliquely acknowledge that jurisdiction may not be proper for all of the 40 defendants. Pl. Motion, footnote 4.

cc: J. Christopher Jensen
Jason David Sanders
Cowan, Liebowitz & Latman, P.C
1133 Avenue of the Americas
New York, NY 10036
(212) 575-0671 (fax)

Jonathan D. Schwartz
Executive Vice President and General Counsel
Cablevision Systems Corp.
1111 Stewart Avenue
Bethpage, NY 11714-3581
(516) 803-1129 (fax)