

Indeed, in two parallel cases, federal courts in New York have rejected efforts by these same *amici* to litigate issues in advance of notice to the Defendants and prior to issuance of a subpoena to the ISP. *See* Order, *Sony Music Entm't, Inc. v. John Does 1-40* (S.D.N.Y. Feb. 3, 2004) (Chin, J.) (attached as Exhibit A); Order, *Warner Bros. v. John Does 1-43* (S.D.N.Y. Feb. 10, 2004) (Sprizzo, J.) (ruling from the bench). In those courts, as well as the third case that parallels this one,² judges have granted Plaintiffs' motion for expedited discovery and deferred litigation of all of the issues raised by *amici* until after Defendants have been notified and/or identified. This Court should follow that course.

As set forth in Part II of this brief, all the issues raised by *amici* can be resolved in the ordinary course of this litigation – if any Defendant wants to raise them – in a way that balances Plaintiffs' need to vindicate their rights under federal law and to stop the ongoing irreparable harm caused by Defendants' copyright infringement with Defendants' interest in having a full and fair opportunity to litigate relevant issues at the appropriate time. The first step in that process, however, is issuance of a subpoena to Verizon (the ISP serving all of the Defendants), which cannot occur until the Court grants Plaintiffs' motion for expedited discovery. Plaintiffs therefore request that the Court grant that motion as quickly as possible and deny *amici*'s motion.

BACKGROUND

Amici concede, as they must, that Plaintiffs are entitled to bring suit against individuals disseminating copyrighted works over peer-to-peer (“P2P”) networks. *Amici* Br. at 1. Indeed, there is no credible argument to the contrary. Uploading and downloading copyrighted works over a P2P network clearly violates federal law. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013-14 (9th Cir. 2001). Moreover, widespread dissemination of Plaintiffs'

² In the third case, *Arista Records, Inc. v. John Does 1-250* (S.D.N.Y. Jan. 26, 2004) (Kaplan, J.), *amici* have not sought leave to participate.

copyrighted sound recordings over P2P networks devastates the music industry every day that it persists.

Each of the Defendants in this case is an active participant in a P2P network. Each of the Defendants thus participates in an online swap meet, offering copyrighted sound recordings for download to each other and downloading copyrighted sound recordings from each other. Each Defendant has chosen to make available from his or her computer hundreds or thousands of copyrighted sound recordings unlawfully (in exchange for the chance to copy millions of files illegally copied and disseminated by others). *See* Declaration of Jonathan Whitehead in Support of Plaintiffs' Motion for Leave to Take Immediate Discovery ¶ 17 ("Whitehead Decl."); Second Declaration of Jonathan Whitehead ¶ 5 ("Second Whitehead Decl.") (attached as Exhibit B).

Although the merits are not germane at this stage of the proceedings, Plaintiffs have already provided significant evidence supporting their claims. With respect to each Defendant, Plaintiffs have provided a list of several copyrighted sound recordings that Defendants disseminated without authorization. *See* Exhibit A to the Complaint. For each Defendant, Plaintiffs downloaded both a list of the files and a sample of those files to confirm that Plaintiffs owned the copyrights of the sound recordings. *See* Whitehead Decl. ¶ 16. Plaintiffs have provided sworn testimony that each of the named Defendants offered the copyrighted works listed in the Complaint and (based on evaluation of the names and file types) appeared to be offering hundreds of additional copyrighted sound recordings without authorization. *See* Whitehead Decl. ¶ 17; Second Whitehead Decl. ¶ 5. Finally, Plaintiffs have provided to the Court, as an example, detailed lists of the hundreds of files being distributed by three of the Defendants. *See* Exhibit 1 to Whitehead Decl. Plaintiffs have also provided testimony under

oath that they possess virtually identical evidence for each of the other Defendants. *See* Whitehead Decl. ¶ 17; Second Whitehead Decl. ¶ 5.

There is no dispute that a John Doe lawsuit is a proper means of bringing suit against unknown Internet infringers and that immediate discovery from the Defendants' ISP is the only way for Plaintiffs to obtain the information needed for the suit to proceed.³ Unless and until Verizon discloses the identities of the infringers, Plaintiffs have no remedy for the past and ongoing infringement committed by the Defendants.

ARGUMENT

I. AMICI HAVE NO RIGHT TO PARTICIPATE IN THIS CASE NOW.

This Court has great discretion in determining “the fact, extent, and manner of participation by the amicus.” *New York v. Microsoft Corp.*, No. 98cv1233 CKK, 2002 WL 31628215, *1 (D.D.C. Nov. 14, 2002). *Amici's* motion and brief are simply premature.

Plaintiffs' motion for leave to take immediate discovery seeks only the right to serve discovery on Verizon to identify the Internet users who are unlawfully infringing Plaintiffs' copyrights. Plaintiffs have satisfied the “good cause” standard required to take such expedited discovery. *See* Plaintiffs' Motion for Leave to Take Immediate Discovery at 5-8 (discussing the “good cause” standard). Moreover, Plaintiffs' motion expressly contemplates that Verizon will notify the Defendants so that each Defendant has the opportunity to be heard if he or she wishes, prior to the disclosure. If and when Defendants file any objections to subpoenas, the Court will be able resolve them.

³ Indeed, in the *Verizon* litigation, both *amici* and Verizon argued that the Court of Appeals should limit the scope of 17 U.S.C. § 512(h), the special subpoena authority under the Digital Millennium Copyright Act, because John Doe lawsuits (such as this one) were an available remedy for copyright owners. *See In re Verizon Internet Servs., Inc.*, 240 F. Supp. 2d 24, 39-40 (D.D.C. 2003), *rev'd*, 351 F.3d 1229 (D.C. Cir. 2003); *Amici Br.* at 3.

Amici suggest that Plaintiffs litigate a number of issues in the abstract – prior to issuance of a subpoena and notification to the Defendants, and without any Defendant’s seeking to raise those issues. That suggestion is flawed for three reasons. First, *amici* cannot inject into this case any issues not raised by a party. See *McCleskey*, 499 U.S. at 523 n.10 (“It is well established . . . that this Court will not consider an argument advanced by *amicus* when that argument was not raised or passed on below and was not advanced in this Court by the party on whose behalf the argument is being raised.”). The “role of *amici* is limited to illuminating the issues before the Court.” *United States v. Hinckley*, 725 F. Supp. 616, 625 (D.D.C. 1989).

Second, because no party has raised any of the issues mentioned by *amici*, the issues are not ripe for judicial review. It is axiomatic that legal issues should not be resolved in the abstract. See *Foundation on Econ. Trends v. Thomas*, 661 F. Supp. 713, 719 (D.D.C. 1986). Any resolution of legal arguments raised by *amici* at this point would amount to nothing more than an advisory opinion based on arguments that a party to the litigation may never raise. *Id.* In the absence of a concrete controversy raised by a party, this Court should not rule on the merits of the issues raised by *amici*. If and when a party raises any of the arguments now advanced by *amici*, the parties will have a full and fair opportunity to present their positions, and this Court will be able to resolve the issues then, in the context of a live, concrete dispute.

Third, if some Defendants do raise arguments similar to those in the brief *amici* seek to file, this Court will, in all likelihood, have to entertain those arguments twice – once when presented by *amici* in the abstract, and a second time when presented by individual Defendants in opposition to the requested discovery. Such duplicative litigation is a waste of judicial resources.

Notably, *amici*’s approach does not provide additional protection for Defendants beyond that described in Part II of this brief. Rather, *amici*’s approach maximizes the burden on

copyright owners so that they will be less likely to enforce their rights. Imposing cumbersome, yet pointless burdens on Plaintiffs cannot be squared with the Copyright Act or the policies underlying it. Plaintiffs are the injured parties here; as a result of the conduct of Defendants, Plaintiffs suffer enormous losses, and that harm increases with every passing day. *See Health Ins. Ass'n of Am. v. Novelli*, 211 F. Supp. 2d 23, 28 (D.D.C. 2002) (“A copyright holder [is] presumed to suffer irreparable harm as a matter of law when his right to the exclusive use of copyrighted material is invaded.”). Plaintiffs need to identify Defendants expeditiously so that Plaintiffs can vindicate their rights.

Until each Defendant has been notified and given the opportunity to determine what arguments (if any) he or she wishes to raise, the three arguments noted by *amici* – the First Amendment/Due Process, personal jurisdiction, and joinder – are not ripe for review. Accordingly, Plaintiffs discuss each argument only briefly below.⁴ Only the First Amendment argument, however, is in any way tied to the interest in anonymity that *amici* claim to advance. That interest is fully satisfied if Defendants have the opportunity to raise and litigate that issue prior to disclosure of their identities. Personal jurisdiction and joinder, however, are traditional personal defenses that Defendants can raise at an appropriate point after they have been identified. There is no need to litigate such issues prior to disclosure of their identities.

First Amendment/Due Process. *Amici*'s suggestion that Defendants have a First Amendment interest when disseminating copyrighted works over a P2P network is both dubious and impossible to litigate absent participation by the Defendants.

Defendants have no right to engage in copyright infringement, anonymously or otherwise. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555-60 (1985);

⁴ In the event the Court grants *amici*'s motion, Plaintiffs intend to file a full response on the merits.

Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 574-78 (1977). Plaintiffs have alleged a prima facie case of copyright infringement and have gathered evidence specific to each Defendant. If a Defendant desires to raise a First Amendment “anonymity” claim (or a due process challenge based on an interest in anonymity),⁵ it is incumbent on him or her to identify the constitutionally protected conduct in which he or she was engaged. Experience has taught Plaintiffs that few individuals disseminating copyrighted files on a P2P network even attempt to make this showing because they know they have been caught red-handed. In any case, the Court cannot address a First Amendment argument until a Defendant comes forward and claims a First Amendment interest. As discussed below in Part II, each Defendant will have the opportunity to raise such an argument (in the form of a motion to quash) prior to disclosure.

Amici preview the First Amendment arguments that Defendants might make. *See Amici* Br. at 3-8. In so doing, they demonstrate how weak those claims are. Judge Bates rejected virtually identical arguments in the *Verizon* case, finding that disclosure of an infringer’s identity pursuant to a DMCA subpoena was fully consistent with the First Amendment. *See In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 257, 260-67 (D.D.C. 2003), *rev’d on other grounds*, 351 F.3d 1229 (D.C. Cir. 2003). Despite *amici*’s effort to create a “qualified privilege” to anonymity on the Internet, there is no such principle of law. *See American Fed’n of Gov’t Employees v. HUD*, 118 F.3d 786, 791 (D.C. Cir. 1997) (expressing “grave doubts as to the existence of a constitutional right of privacy in the nondisclosure of personal information”). Individuals have no expectation of privacy (under the First, Fourth, or Fifth Amendments) that prevents disclosure of the business records of third parties, such as telephone companies or ISPs.

⁵ Plaintiffs refer here to *amici*’s argument (which Plaintiffs vigorously dispute) that there is a First Amendment right to anonymity on the Internet. To the extent that a Defendant seeks to litigate the merits of Plaintiffs’ claims of copyright infringement, such as through a fair use defense, such litigation should occur only after the Defendant has been identified.

The Supreme Court and this Circuit have repeatedly rejected claims that First Amendment interests require a heightened level of scrutiny prior to issuance of a subpoena or other judicial process. *See University of Pa. v. EEOC*, 493 U.S. 182, 199-200 (1990); *Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 192-93 (1946); *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979) (“[A] person has no legitimate expectation of privacy in information he voluntarily turns over to third parties”); *Reporters Comm. for Freedom of the Press v. American Tel. & Tel. Co.*, 593 F.2d 1030, 1050 n.67 (D.C. Cir. 1978) (rejecting requirement that journalists receive notification prior to issuance of subpoenas to phone companies for toll calling records); *Guest v. Leis*, 255 F.3d 325, 335-36 (6th Cir. 2001); *United States v. Hambrick*, 55 F. Supp. 2d 504, 507-09 (D. W. Va. 1999), *aff'd*, 225 F.3d 656 (4th Cir. 2000) (unpublished table decision).⁶

Moreover, even if one applies the standards *amici* propose, Plaintiffs have satisfied them. Plaintiffs have alleged a prima facie case of copyright infringement. *See Feist Publ'ns Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (requiring allegations of ownership of a copyright and violation of one of the exclusive rights).⁷ Indeed, by submitting the Internet Protocol (“IP”) address assigned to each Defendant, the date and time at which the infringing activity was observed, and the titles of some of the illegally disseminated copyrighted sound recordings and the copyright owners of those sound recordings, Plaintiffs have provided specific evidence of infringement for all Defendants. *See* Exhibit A to the Complaint. Plaintiffs have also provided complete lists of the hundreds of files that three of the Defendants made available to the public,

⁶ The subpoena Plaintiffs propose to serve would seek only information to identify the Defendants, not information concerning the content of any communication they may have made over the Internet.

⁷ *Amici*'s only complaint appears to be that Plaintiffs have provided the Court with a sample, rather than the entirety, of their evidence of infringement by each Defendant. Plaintiffs provided only a sample because there is no sound reason for requiring submission of literally boxes of documents to support good cause for a subpoena. Plaintiffs have provided sworn testimony that they have evidence with respect to *all* of the Defendants that mirrors the samples provided. *See* Whitehead Decl. ¶ 17; Second Whitehead Decl. ¶ 5. Moreover, as discussed in Part II of this brief, Plaintiffs can provide the detailed evidence with respect to any Defendant who claims a First Amendment interest and moves to quash.

and sworn testimony that Plaintiffs possess identical evidence for all other Defendants. *See* Whitehead Decl. ¶ 17; Second Whitehead Decl. ¶ 5. That evidence demonstrates that all of the Defendants in this case are active participants on a P2P network and serious copyright infringers.

As Judge Bates recognized, such a showing more than satisfies the standards in any of the cases cited by *amici*. *See Verizon*, 257 F. Supp. 2d at 263 n.22. Indeed, Public Citizen conceded in the D.C. Circuit that evidence identical to that which Plaintiffs have put forward meets the test *amici* propose in their brief. *See* Brief *Amicus Curiae* of Public Citizen in *RIAA v. Verizon*, Nos. 03-7015 & 03-7053, at 14-15 (filed May 16, 2003).

Personal Jurisdiction. This Court cannot render a determination on personal jurisdiction without reference to actual defendants. Indeed, only a defendant has standing to raise personal jurisdiction, and that defense can be (and regularly is) waived. The parties cannot litigate any aspect of personal jurisdiction until the Defendants have been identified, and all parties know who they are.

Plaintiffs concede that many of the Defendants likely do not reside in the District, but that does not mean that this Court has no jurisdiction over them. By logging onto a P2P network, each Defendant transformed his or her computer into an interactive Internet site, allowing others to complete transactions (by downloading copyrighted works) over the Internet. Each Defendant was disseminating copyrighted works to anyone that wanted them (including residents of this jurisdiction) and was downloading copyrighted works from others who offered them (including residents of this jurisdiction).⁸ Under this Circuit's decision in *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506 (D.C. Cir. 2002), defendants (wherever they reside) may subject themselves

⁸ A user downloading a file on a P2P network such as KaZaA may download the same file from multiple computers at one time. *See* Second Whitehead Decl. ¶ 6. Thus, when a user in New Jersey downloads a file, he or she may be receiving parts of the same file, at the same time, from a computer in the District, a computer in California, and a computer in Florida. *Id.*

to general jurisdiction in the District by completing “electronic transactions” through “the use of e-mail or interactive websites.” *Id.* at 511-13. Engaging in such electronic transactions with residents of the District provides the sort of “continuous” and “systematic” contacts with the District that support the exercise of this Court’s jurisdiction. *Id.*; *see also Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (distinguishing between passive website which generally do not provide sufficient contacts with a forum to justify an assertion of jurisdiction with “interactive” websites which generally do support an assertion of jurisdiction).⁹

In any case, the Court cannot complete an analysis of the Defendants’ contacts with the District until everyone, including the Plaintiffs, knows who the Defendants are. According to *amici*, Plaintiffs should use the admittedly imprecise methods discussed in their declaration¹⁰ to guess the district in which each infringer resides and then file suit in that district. Plaintiffs would then have to come to this Court for subpoenas to Verizon, exactly as Plaintiffs have done here. This Court would then resolve any subpoena enforcement proceeding and/or motion to quash against Verizon and the as-yet anonymous defendants. Once individuals were identified, Plaintiffs would, a substantial percentage of the time, then have to re-file in yet a third federal

⁹ The fact that P2P infringers barter for copyrighted works rather than sell them is irrelevant to whether the websites are fully interactive. *Amici* Br. at 9. The law of jurisdiction does not distinguish between illegal acts committed in exchange for money and illegal acts committed in exchange for bartered (and illegal) goods.

¹⁰ *Amici*’s declaration is highly misleading in suggesting that copyright owners can pinpoint the location of Internet infringers by means of tools such as www.samspace.org. *See* Seltzer Decl. ¶ 4. None of these tools provides the sort of accuracy of information that *amici* imply. First, much of *amici*’s analysis depends on its assertion that ISPs use airport codes or other geographic information to identify the equipment (routers) that transmits messages to users. ISPs, however, have complete control over how they identify their routers. Many ISPs do not use geographic codes at all. It is virtually impossible to determine where such ISPs’ subscribers reside based on the tools proposed by *amici* (or any others known to Plaintiffs). *See* Second Whitehead Decl. ¶ 8. Second, even for an ISP that does use some form of geocoding to identify its routers, Plaintiffs’ and their trade association’s experience is that such codes accurately identify the region in which the infringer lives significantly less than 100% of the time. *Id.* Where such codes are inaccurate, they can be wildly inaccurate. *Id.* Third, even if the trace route leads to a metropolitan area, such as New York, such information may not accurately identify the judicial district or even the state where the infringer resides. *Id.*

court. As a matter of judicial efficiency and fairness to the Defendants, such a merry-go-round of courts makes little sense. Its primary effect would be to place additional burden on the Plaintiffs.

As discussed below, any Defendant who wants to raise personal jurisdiction issues will have the opportunity to do so.

Joinder. Litigation of joinder is also premature. In most cases, joinder is an issue raised by defendants, based on their assessment of whether litigation without co-defendants is preferable. Indeed, a court considering a challenge to joinder must determine whether severance will prejudice any party or result in undue delay of the litigation. *See Mosley v. General Motors Corp.*, 497 F.2d 1330, 1333 (8th Cir. 1974) (noting that joinder is a fact-intensive inquiry that requires case-by-case adjudication). Until the Defendants are identified, the Court cannot make that assessment. Moreover, because the sole remedy for misjoinder is severance, not dismissal, *see* Fed. R. Civ. P. 21, litigation of joinder at this point serves no purpose, other than to delay proceedings. The result of a finding of misjoinder would be the division of this case into 199 lawsuits, followed by 199 subpoenas to Verizon, followed by litigation in the identical manner as here, except with far more paper. Such a result would not provide additional fairness to Defendants, nor would it promote judicial economy.

In any event, *amici*'s arguments ultimately fail. The Federal Rules direct "the broadest possible scope of action consistent with fairness to the parties [because] joinder of claims, parties and remedies is strongly encouraged." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966). The Court thus has wide discretion in determining whether joinder is appropriate and, if it is not, at what stage of the proceedings severance should be compelled. *See M.K. v. Tenet*, 216

F.R.D. 133, 137 (D.D.C. 2002) (permitting joinder in litigation against, among others, Doe defendants).

Amici's sole argument is that Plaintiffs do not meet the second of two prerequisites for joinder: that the Complaint alleges a right to relief relating to or arising out of the same transaction or occurrence or series of transactions or occurrences.¹¹ *See M.K. v. Tenet*, 216 F.R.D. at 141-42. The terms "transaction" and "occurrence" are interpreted broadly in accord with Rule's 20 purposes of promoting trial convenience, expediting final resolution of disputes, and preventing multiple lawsuits, extra expenses, and the parties' and the Court's unnecessary loss of time. *See, e.g., id.* at 137-38; *In re Vitamins Antitrust Litig.*, No. Misc. 99-197 (TFH), 2000 WL 1475705, at *18 (D.D.C. May 9, 2000). Therefore, plaintiffs may join "[a]ll reasonably related claims for relief by or against different parties" in a single action as long as plaintiffs allege that the multiple defendants have engaged in a "common scheme" or "pattern of behavior." *In re Vitamins Antitrust Litig.*, 2000 WL 1475705, at *17-*18.

Plaintiffs' claims satisfy that test. The crux of Plaintiffs' Complaint is that Defendants and others have participated in a common pattern of behavior, without which no individual Defendant would have been able to commit much (if any) of the infringing activity that underlies Plaintiffs' Complaint. Plaintiffs' Complaint alleges that each Defendant uses an online media distribution system (the P2P network) to offer to other users of the same system – including the other Defendants – computer files that contain copyrighted sound recordings. Compl. ¶ 24. *See*

¹¹ *Amici*'s attempt to create a third requisite for joinder, *see Amici Br.* at 10, conflicts with the holdings of other courts in this jurisdiction. *See M.K. v. Tenet*, 216 F.R.D. at 137-38; *In re Vitamins Antitrust Litig.*, 2000 WL 1475705, at *18.

also Whitehead Decl. ¶¶ 7, 16.¹² This case is thus not like the cases cited by *amici* in which there was no relationship whatsoever among the individual defendants' actions. *See Amici Br.* at 11 & n.5. In this case, there is a "logical relationship" among the Defendants, who acted in concert as users of the P2P network. This argument for joinder is thus far stronger than the satellite TV theft cases that *amici* cite. Notably, the courts have split on whether joinder was appropriate in those cases, even though they lack the concerted action and interaction presented here. *See, e.g., DIRECTV, Inc. v. Hosey*, 289 F. Supp. 2d 1259, 1262 (D. Kan. 2003) (allowing joinder); *DIRECTV, Inc. v. Adkins*, No. 1:03CV00064, 2003 WL 23096482, at *1-*2 (W.D. Va. Dec. 29, 2003) (same); *In re Monon Tel. Co.*, 218 F.R.D. 614 (N.D. Ind. 2003) (same).

II. GRANTING PLAINTIFFS' MOTION WILL ENSURE AN OPPORTUNITY FOR ALL PARTIES TO BE HEARD IN AN ORDERLY FASHION.

There is no need for the burdensome approach *amici* advocate. Instead, by granting Plaintiffs' Motion for Leave to Take Immediate Discovery, this Court can achieve orderly resolution of any arguments raised by the Defendants (and *amici*, if permitted by the Court):

1. If this Court grants Plaintiffs' motion, Plaintiffs will issue a subpoena to Verizon with a return date 15 business days from the date of service. A return date of 15 business days – effectively 21 calendar days – is equal to the time that *amici* proposed. *See Amici Br.* at 13.

Verizon has already indicated to Plaintiffs that it could respond within this period of time.

2. Verizon has agreed that it will notify all of the Defendants so that each Defendant has an opportunity to file a motion to quash.¹³ Plaintiffs have no objection with the Court

¹² Of the 532 Defendants sued in the four parallel suits (the instant suit in D.C., and the three in New York discussed above), over 99% are trading copyrighted works over the so-called FastTrack network, the largest current P2P network. *See Second Whitehead Decl.* ¶ 4 .

¹³ Many of the Defendants in this case were previously the subject of DMCA subpoenas issued by this Court prior to the D.C. Circuit's decision in *RIAA v. Verizon Internet Services, Inc.*, 351 F.3d 1229 (D.C.

directing Verizon to provide notice within 7 days of service of the subpoena. *Amici* concede that 15 business days from the date of service on Verizon is a reasonable time for a Defendant to file a motion to quash. Past experience indicates that some number of Defendants, once notified of the allegations, will contact Plaintiffs and seek a speedy resolution of Plaintiffs' claims.

3. For Defendants who do not move to quash (assuming Verizon raises no objections or its objections are resolved), Verizon can produce the information requested at the close of business on the return date of the subpoena. The filing of a motion to quash by one Defendant will not prevent the disclosure of the identities of those Defendants who do not move to quash.

4. For Defendants who do move to quash prior to the return date, the Court can resolve their objections. In a motion to quash, Defendants can raise the types of First Amendment and Due Process "anonymity" arguments suggested by *amici* in their papers (with Plaintiffs reserving their rights to raise any and all arguments in response). In response to such a motion to quash, Plaintiffs can provide the same kind of detailed evidence that they have provided for the three infringers whose conduct has already been documented for the Court. *See* Whitehead Decl. ¶ 17 and Exhibit 1; Second Whitehead Decl. ¶ 5.

5. For Defendants whose identities are revealed to Plaintiffs, Plaintiffs believe that because of the strength of Plaintiffs' evidence, substantial numbers of the Defendants may elect to settle matters without further litigation.

6. For Defendants whose litigation proceeds without settlement, Plaintiffs can determine whether it is proper to continue in this jurisdiction, or whether to transfer to another forum. Any Defendants who wish to raise personal jurisdiction or joinder issues can make such arguments at that time in the appropriate court.

Cir. 2003). Verizon likely has already notified many of the Defendants of Plaintiffs' claims of infringement.

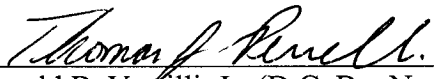
Plaintiffs' need to vindicate their rights quickly will be balanced with Defendants' interest in having a full opportunity to raise arguments and defenses. Moreover, the Court will avoid duplicative litigation over issues that can and should be resolved once in a concrete setting.

CONCLUSION

For the foregoing reasons, *amici's* motion should be denied, and Plaintiffs' Motion for Leave to Take Immediate Discovery should be granted.

Respectfully submitted,

Dated: February 13, 2004


Donald B. Verrilli, Jr. (D.C. Bar No. 420454)
Thomas J. Perrelli (D.C. Bar No. 438929)
James A. Trilling (D.C. Bar No. 467273)
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005-3823
(202) 639-6000
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February, 2004, I caused copies of the foregoing (1) Plaintiffs' Response to Motion of Public Citizen, et al., for Leave to File Memorandum as Amici Curiae Addressing Motion for Expedited Discovery, (2) Second Declaration of Jonathan Whitehead, and (3) Proposed Order, to be served via First Class Mail on the following:

Paul Alan Levy
Charlotte Garden
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009

Cindy A. Cohn
Wendy Seltzer
Electronic Frontier Foundation
454 Shotwell Street
San Francisco, CA 94110

Christopher A. Hansen
Aden J. Fine
ACLU
18th Floor
125 Broad Street,
New York, NY 10004


Thomas J. Berrelli