

FILE COPY
FEB 17 2014
LUTHERA D. THOMPSON, Clerk
By: [Signature]
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MOTOWN RECORD COMPANY, L.P., a
California limited partnership;
FONOVISA, INC., a California
corporation; PRIORITY RECORDS LLC,
a California limited liability company;
LONDON-SIRE RECORDS INC., a
Delaware corporation; ATLANTIC
RECORDING CORPORATION, a
Delaware corporation; ELEKTRA
ENTERTAINMENT GROUP INC., a
Delaware corporation; WARNER BROS.
RECORDS INC., a Delaware corporation;
UMG RECORDINGS, INC., a Delaware
corporation; LOUD RECORDS, LLC, a
Delaware corporation; BMG MUSIC, a
New York general partnership; CAPITOL
RECORDS, INC., a Delaware corporation;
ARISTA RECORDS, INC., a Delaware
corporation; INTERSCOPE RECORDS, a
California general partnership;
MAVERICK RECORDING COMPANY, a
California joint venture; SONY MUSIC
ENTERTAINMENT INC., a Delaware
corporation; and VIRGIN RECORDS
AMERICA, INC., a California corporation,

Plaintiffs,

v.

DOES 1 – 252,

Defendants.

CIVIL ACTION FILE

No. _____

1:04-CV-0439

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION
FOR LEAVE TO TAKE EXPEDITED DISCOVERY**

I. INTRODUCTION

Plaintiffs, record companies who own the copyrights in the most popular sound recordings in the United States, seek leave of Court to serve limited, immediate discovery on a third party Internet Service Provider (“ISP”) to determine the true identities of Doe Defendants, who are being sued for direct copyright infringement. Without such discovery, Plaintiffs cannot identify the Doe Defendants, and thus cannot pursue their lawsuit to protect their copyrighted works from repetitive, rampant infringement.¹

As alleged in the complaint, the Doe Defendants, without authorization, used an online media distribution system to download Plaintiffs’ copyrighted works, distribute copyrighted works to the public, and/or make copyrighted works available for distribution to others. See Declaration of Jonathan Whitehead, attached hereto as Exhibit A (“Whitehead Decl.”), ¶ 16 and Ex. 1. Although Plaintiffs do not know the true names of the Defendants,² Plaintiffs have

¹ Because Plaintiffs do not currently know the identity of any of the Defendants, Plaintiffs cannot ascertain any of the Defendants' position on this Motion.

² When using an online media distribution system (*e.g.*, a peer-to-peer (“P2P”) network, Whitehead Decl., ¶ 7), Defendants typically use monikers, or user names,
(continued...)

identified each Defendant by a unique Internet Protocol (“IP”) address assigned to that Defendant on the date and at the time of the Defendants' infringing activity.

Id. Additionally, Plaintiffs have gathered evidence of the infringing activities. Id. ¶¶ 16-17. Plaintiffs have made copies of several sound recordings each Defendant illegally distributed or made available for distribution, and have obtained copies of a more complete list of files (at times numbering in the thousands) that each Defendant has made available to the public for distribution. Id. and Ex. 1.

Plaintiffs have identified the ISP that provided Internet access to each Defendant by using a publicly available database to trace the IP address for each Defendant. Id. ¶¶ 12, 16. Here, the ISP is Cox Communications (“Cox”). Id. When given a Defendant’s IP address and the date and time of infringement, an ISP quickly and easily can identify the name and address of the Doe Defendant (i.e., the ISP’s subscriber) because that information is contained in the ISP’s subscriber activity log files.³ Id. ¶ 14. Plaintiffs’ experience is that ISPs typically

(...continued)

and not their true names. Plaintiffs have no ability to determine a Defendant’s true name other than by seeking the information from the ISP. Id. ¶¶ 11, 16-17.

³ ISPs own or are assigned certain blocks or ranges of IP addresses. A subscriber gains access to the Internet through an ISP after setting up an account with the ISP. An ISP then assigns a particular IP address in its block or range to the subscriber

(continued...)

keep log files of subscriber activities for only limited periods of time – sometimes for as little as weeks or even days – before erasing the data. Id. ¶ 22.

Plaintiffs now seek leave of Court to serve limited, immediate discovery on Cox to identify each Defendant. Plaintiffs intend to serve a Rule 45 subpoena on Cox seeking each Defendant’s true name, address, telephone number, e-mail address, and Media Access Control (“MAC”) addresses. Without this information, Plaintiffs may never be able to pursue their lawsuit to protect their copyrighted works from repeated infringement. Id. ¶ 22. Thus, the need for the limited, immediate discovery is critical.

II. BACKGROUND

The Internet and peer-to-peer (“P2P”) networks have spawned an illegal trade in copyrighted works. By downloading P2P software, and logging onto a P2P network, an individual can use an online media distribution system to upload (distribute) or download (copy), without authorization, countless copyrighted music and video files to or from any other Internet user worldwide.

(...continued)

when that subscriber goes “online.” After reviewing the subscriber activity logs (which contain the assigned IP addresses), an ISP can identify its subscribers by name. Whitehead Decl., ¶ 14.

Id. ¶ 7. See Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 331 (S.D.N.Y.), aff'd sub nom., Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001) (describing a viral system, in which the number of infringing copies made available multiplies rapidly as each user copying a file also becomes a distributor of that file). Until enjoined, Napster was the most notorious online media distribution system. See A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001). Notwithstanding the Napster Court's decision, similar online media distribution systems emerged that have attempted to capitalize on the growing illegal market that Napster fostered. These include KaZaA, iMesh, Grokster, and Gnutella, among others. Whitehead Decl., ¶ 6. Despite the continued availability of such systems, there is no dispute that the uploading and downloading of copyrighted works without authorization is copyright infringement. Napster, 239 F.3d at 1014-15; In re Aimster Copyright Litig., 334 F.3d 643 (7th Cir. 2003), cert. denied, __ S. Ct. __, 2004 WL 46690 (U.S. Jan. 12, 2004). Nonetheless, at any given moment, millions of people illegally use online media distribution systems to upload or download copyrighted material.

Whitehead Decl., ¶ 6. More than 2.6 *billion* infringing music files are downloaded monthly. L. Grossman, *It's All Free*, Time, May 5, 2003, at 60-69.

The propagation of illegal digital copies over the Internet significantly harms copyright owners, and has had a particularly devastating impact on the music industry. Whitehead Decl., ¶ 9. Retail sales – the principal revenue source for most record companies – declined 7% in 2000, 10% in 2001, and 11% in 2002. Id. ¶ 9. Evidence shows that the main reason for this precipitous drop in revenues is that individuals are downloading music illegally for free, rather than buying it. See In re Aimster Copyright Litig., 334 F.3d at 645.

In an effort to stop the rampant copyright infringement over the Internet, Plaintiffs previously utilized the subpoena process codified in 17 U.S.C. § 512(h) of the Digital Millennium Copyright Act (“DMCA”) to obtain the identities of infringers. Whitehead Decl., ¶ 14. Since 1998, ISPs routinely have disclosed to Plaintiffs the true names of infringing users in response to DMCA subpoenas. Id. ¶ 15. On December 19, 2003, however, the Court of Appeals for the District of Columbia Circuit ruled that the DMCA subpoena provision could not be used in the D.C. Circuit to obtain information from ISPs performing so-called “conduit” functions. See Recording Indus. Ass’n of Am., Inc. v. Verizon Internet Servs., Inc., Nos. 03-7015 and 03-7053, 2003 WL 22970995 (D.C. Cir. Dec. 19, 2003) (“Verizon”). In Verizon, however, Verizon itself conceded that, as an alternative

to using the DMCA subpoena process, Plaintiffs could simply file “John Doe” lawsuits and issue Rule 45 subpoenas to ISPs to obtain the true identities of infringing subscribers. Whitehead Decl., ¶ 15. Accordingly, Plaintiffs are pursuing this alternative in the present case.

III. ARGUMENT

Courts routinely allow discovery to identify “Doe” defendants. See Wakefield v. Thompson, 177 F.3d 1160, 1163 (9th Cir. 1999) (error to dismiss unnamed defendants given possibility that identity could be ascertained through discovery); Valentin v. Dinkins, 121 F.3d 72, 75-76 (2d Cir. 1997) (vacating dismissal; *pro se* plaintiff should have been permitted to conduct discovery to reveal identity of defendant); Dean v. Barber, 951 F.2d 1210, 1215 (11th Cir. 1992) (error to deny plaintiff’s motion to join John Doe defendant where identity of John Doe could have been determined through discovery); Munz v. Parr, 758 F.2d 1254, 1257 (8th Cir. 1985) (error to dismiss claim merely because defendant was unnamed; “Rather than dismissing the claim, the court should have ordered disclosure of the Officer Doe’s identity”); Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980) (“where the identity of alleged defendants [are not] known prior to the filing of a complaint . . . the plaintiff should be given an opportunity through

discovery to identify the unknown defendants”); Maclin v. Paulson, 627 F.2d 83, 87 (7th Cir. 1980) (where “party is ignorant of defendants’ true identity . . . plaintiff should have been permitted to obtain their identity through limited discovery”); United Parcel Serv. of Am., Inc. v. John Does One Through Ten, No. 03cv1639, 2003 WL 21715365, at *1 (N.D. Ga. June 13, 2003) (authorizing expedited discovery to determine the identity of defendants); see also Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 389 n. 2, 91 S. Ct. 1999 (1971) (noting, without discussion, the use of unnamed defendants).

Courts allow parties to conduct expedited discovery in advance of a Rule 26(f) conference where the party establishes “good cause” for such discovery. See Semitool, Inc. v. Tokyo Electron Am., Inc., 208 F.R.D. 273, 275-76 (N.D. Cal. 2002); Qwest Comm. Int’l, Inc. v. WorldQuest Networks, Inc., 213 F.R.D. 418, 419 (D. Colo. 2003); Entertainment Tech. Corp. v. Walt Disney Imagineering, No. Civ. A. 03-3546, 2003 WL 22519440, at *4 (E.D. Pa. 2003) (applying a reasonableness standard; “a district court should decide a motion for expedited discovery on the entirety of the record to date and the reasonableness of the request in light of all of the surrounding circumstances”) (quotations omitted); Yokohama

Tire Corp. v. Dealers Tire Supply, Inc., 202 F.R.D. 612, 613-14 (D. Ariz. 2001)

(applying a good cause standard). Plaintiffs easily have met this standard.

First, good cause exists where, as here, the complaint alleges claims of infringement. See Semitool, 208 F.R.D. at 276; Qwest Comm., 213 F.R.D. at 419 (“The good cause standard may be satisfied . . . where the moving party has asserted claims of infringement and unfair competition.”); Benham Jewelry Corp. v. Aron Basha Corp., No. 97 CIV 3841, 1997 WL 639037, at *20 (S.D.N.Y. Oct. 14, 1997). This is not surprising since such claims necessarily involve irreparable harm to the plaintiff. 4 Melville B. Nimmer & David Nimmer, Nimmer On Copyright § 14.06[A], at 14-103 (2003); see also 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.”) (quotations and citations omitted); see also Taylor Corp. v. Four Seasons Greetings, LLC, 315 F.3d 1034, 1042 (8th Cir. 2003); ABKCO Music, Inc. v. Stellar Records, Inc., 96 F.3d 60, 66 (2d Cir. 1996).

Second, good cause exists here because there is very real danger the ISP will not long preserve the information that Plaintiffs seek. As discussed above, ISPs typically retain user activity logs containing the information sought for only a

limited period of time – sometimes for as little as weeks or even days – before erasing the data. Whitehead Decl., ¶ 22. If that information is erased, Plaintiffs will have no ability to identify the Defendants, and thus will be unable to pursue their lawsuit to protect their copyrighted works. Id. Where “physical evidence may be consumed or destroyed with the passage of time, thereby disadvantaging one or more parties to the litigation,” good cause for expedited discovery exists. See Qwest Comm., 213 F.R.D. at 419; Pod-Ners, LLC v. Northern Feed & Bean, 204 F.R.D. 675, 676 (D. Conn. 2002) (allowing Plaintiff expedited discovery to inspect “beans” in defendant’s possession because the beans might no longer be available for inspection if discovery proceeded in the normal course).

Third, good cause exists because the narrowly tailored discovery requests do not exceed the minimum information required to advance this lawsuit and will not prejudice Defendants. See Semitool, 208 F.R.D. at 276 (“Good cause may be found where the need for expedited discovery, in consideration of the administration of justice, outweighs the prejudice to the responding party.”). Plaintiffs seek immediate discovery to identify the Defendants; information that may be erased very soon. Plaintiffs (who continue to be harmed by Defendants' copyright infringement, Whitehead Decl., ¶ 9), cannot wait until after the Rule

26(f) conference (ordinarily a prerequisite before propounding discovery) because there are no known Defendants with whom to confer (and thus, no conference is possible). There is no prejudice to the Defendants because Plaintiffs merely seek information to identify the Defendants and to serve them, and Plaintiffs agree to use the information disclosed pursuant to their subpoenas only for the purpose of protecting their rights under the copyright laws.⁴

Fourth, courts regularly grant expedited discovery where such discovery will “substantially contribute to moving th[e] case forward.” Semitool, 208 F.R.D. at 277. Here, the present lawsuit cannot proceed without the limited, immediate discovery Plaintiffs seek because there is no other information Plaintiffs can obtain about Defendants without discovery from the ISP. As shown by the Declaration of Jonathan Whitehead, Plaintiffs already have developed a substantial case on the merits against each infringer. Plaintiffs’ complaint alleges a *prima facie* claim for direct copyright infringement. Plaintiffs have alleged that they own

⁴ Once Plaintiffs learn a Defendant’s true name, Plaintiffs will attempt to resolve the dispute without the need for further Court intervention. If the dispute is not resolved and it is determined that it would be appropriate to litigate the copyright infringement claims in another jurisdiction, Plaintiffs intend to dismiss the particular Defendant from the present lawsuit and re-file in the appropriate jurisdiction, or have the matter transferred.

and have registered the copyrights in the works at issue, and that Defendants copied or distributed those copyrighted works without Plaintiffs' authorization. See Complaint. These allegations state a claim of copyright infringement. Nimmer On Copyright § 31.01, at 31-3 to 31-7; Feist Publications, Inc. v. Rural Te. Serv. Co., 499 U.S. 340, 361 (1991). In addition, Plaintiffs have copies of a sample of the sound recordings each Defendant illegally distributed or made available for distribution, and have made a copy of a more complete list of files each Defendant has made available for distribution to the public. See Complaint Ex. A; Whitehead Decl., 16-17 and Ex. 1. These more complete lists often show thousands of files, many of them sound recordings (MP3 files) that are owned by, or exclusively licensed to, Plaintiffs. See Whitehead Decl., ¶ 17 and Ex. 1. Plaintiffs believe that virtually all of the sound recordings have been downloaded, distributed and/or offered for distribution to the public without permission or consent of the respective copyright holders. Id. ¶ 17. Absent limited, immediate discovery, Plaintiffs will be unable to obtain redress for any of this infringement.

Finally, Plaintiffs request that the Court's order make clear that Cox is authorized to respond to the subpoena pursuant to The Cable Communications Policy Act (the "Cable Act"). See 47 U.S.C. § 551(c). The Cable Act generally

prohibits disclosure of personally identifiable subscriber information possessed by cable television companies. The purpose of this provision was to ensure some level of privacy as to the cable television shows subscribers had ordered or were watching. It is not a shield to protect a user's wrongdoing and, indeed, the Cable Act expressly provides that information can be disclosed pursuant to court order. While Plaintiffs do not believe the Cable Act was contemplated to apply to cable Internet providers,⁵ cable ISPs have expressed concern about their obligations under the Cable Act, and some have taken the position that a court order is required before they will disclose subscriber information. Hence, Plaintiffs seek an appropriate order.

In general, where federal privacy statutes authorize disclosure pursuant to a court order, courts have held that a plaintiff must make no more than a showing of relevance under the traditional standards of Rule 26. See Laxalt v. McClatchy, 809 F.2d 885, 888 (D.C. Cir 1987) (court found “no basis for inferring that the statute replaces the usual discovery standards of the FRCP . . . with a different and higher standard”); accord Lynn v. Radford, 2001 WL 514360, at *3

⁵ Plaintiffs do not concede that this provision applies to Cox, but believe that a properly framed court order will make resolution of that issue unnecessary.

(E.D. Mich. 2001); Gary v. United States, 1998 WL 834853, at *4 No. 98-6964 (E.D. Tenn.); see also In re Gren, 633 F.2d 825, 828 n.3 (9th Cir. 1980) (“court order” provision of Fair Credit Reporting Act requires only “good faith showing that the consumer records sought are relevant”) (internal quotation omitted). Plaintiffs plainly have met that standard here, as the identity of Defendants is essential to Plaintiffs’ continued prosecution of this action.

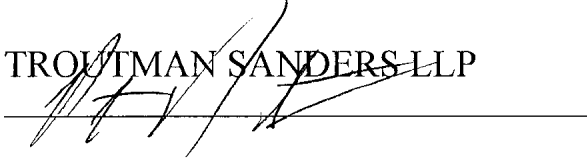
If the Court grants this Motion, Plaintiffs will serve a subpoena on Cox requesting the true names and other identification information about Defendants within 15 business days. Cox then will be able to notify its subscribers that this information is being sought, and each Defendant will be able to raise any objections before this Court in the form of a motion to quash prior to the return date of the subpoena. Thus, to the extent that any Defendant wishes to object, he or she will be able to do so.

IV. CONCLUSION

For the foregoing reasons, the Court should grant the Motion and enter an Order substantially in the form of the attached Order.

This 17th day of FEBRUARY, 2004

TROUTMAN SANDERS LLP



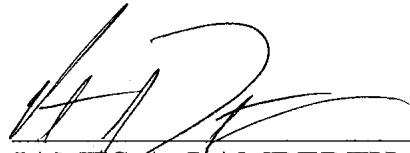
JAMES A. LAMBERTH
Georgia Bar No. 431851
PETER J. DUTSMAN
Georgia Bar No. 232305

Attorneys for Plaintiffs
MOTOWN RECORD COMPANY,
L.P.; FONO VISA, INC.; PRIORITY
RECORDS LLC; LONDON-SIRE
RECORDS INC.; ATLANTIC
RECORDING CORP.; ELEKTRA
ENTERTAINMENT GROUP INC.;
WARNER BROS. RECORDS INC.;
UMG RECORDINGS, INC.; LOUD
RECORDS, LLC; BMG MUSIC;
CAPITOL RECORDS, INC.;
ARISTA RECORDS, INC.;
INTERSCOPE RECORDS;
MAVERICK RECORDING CO.;
SONY MUSIC ENTERTAINMENT
INC.; and VIRGIN RECORDS
AMERICA, INC.

Suite 5200, Bank of America Plaza
600 Peachtree Street, N.E.
Atlanta, GA 30308-2216
(404) 885-3000 (voice)
(404) 885-3995 (facsimile)

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 5.1(B)

I hereby certify that the foregoing Memorandum of Law in Support of Plaintiffs' Motion for Leave to Take Expedited Discovery has been prepared in a Times New Roman 14 point font, one of the font and point selections approved by the Court in Local Rule 5.1(B).

A handwritten signature in black ink, appearing to read 'J.A. Lamberth', written over a horizontal line.

JAMES A. LAMBERTH
Georgia Bar No. 431851
PETER J. DUTSMAN
Georgia Bar No. 232305

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

MOTOWN RECORD COMPANY, L.P., a
California limited partnership;
FONOVISA, INC., a California
corporation; PRIORITY RECORDS LLC,
a California limited liability company;
LONDON-SIRE RECORDS INC., a
Delaware corporation; ATLANTIC
RECORDING CORPORATION, a
Delaware corporation; ELEKTRA
ENTERTAINMENT GROUP INC., a
Delaware corporation; WARNER BROS.
RECORDS INC., a Delaware corporation;
UMG RECORDINGS, INC., a Delaware
corporation; LOUD RECORDS, LLC, a
Delaware corporation; BMG MUSIC, a
New York general partnership; CAPITOL
RECORDS, INC., a Delaware corporation;
ARISTA RECORDS, INC., a Delaware
corporation; INTERSCOPE RECORDS, a
California general partnership;
MAVERICK RECORDING COMPANY, a
California joint venture; SONY MUSIC
ENTERTAINMENT INC., a Delaware
corporation; and VIRGIN RECORDS
AMERICA, INC., a California corporation,

Plaintiffs,

v.

DOES 1 – 252,

Defendants.

CIVIL ACTION FILE

No. _____

**DECLARATION OF JONATHAN WHITEHEAD IN SUPPORT OF
PLAINTIFFS' MOTION FOR LEAVE TO TAKE EXPEDITED
DISCOVERY**

I, Jonathan Whitehead, have personal knowledge of the facts stated below and, under penalty of perjury, hereby declare:

1. I am Vice President and Counsel for Online Copyright Protection for the Recording Industry Association of America, Inc. (“RIAA”), where I have been employed for over 6 years. My office is located at 1330 Connecticut Avenue, N.W., Washington, DC 20036. I submit this declaration in support of Plaintiffs' Motion for Leave to Take Expedited Discovery.

2. This declaration is based on my personal knowledge, and if called upon to do so, I would be prepared to testify as to its truth and accuracy.

**The RIAA’s Role in Protecting Its Member Recording Industry Companies
From Copyright Infringement**

3. The RIAA is a not-for-profit trade association whose member record companies create, manufacture, and/or distribute approximately ninety percent of all legitimate sound recordings produced and sold in the United States. The RIAA’s member record companies comprise the most vibrant national music industry in the world. A critical part of the RIAA’s mission is to assist its member companies in protecting their intellectual property in the United States and in

fighting against online and other forms of piracy. All of the Plaintiffs in this action are members of the RIAA.

4. The RIAA investigates the unauthorized reproduction and distribution of copyrighted sound recordings online. As Vice President and Counsel for Online Copyright Protection, I am responsible for formulating and implementing online strategies for the RIAA, including investigations into the online infringement of copyrighted sound recordings of all kinds.

The Internet and Music Piracy

5. The Internet is a vast collection of interconnected computers and computer networks that communicate with each other. It allows hundreds of millions of people around the world to communicate freely and easily and to exchange ideas and information, including academic research, literary works, financial data, music, movies, graphics, and an unending and ever-changing array of other data. Unfortunately, the Internet also has afforded opportunities for the wide-scale piracy of copyrighted sound recordings and musical compositions. Once a sound recording has been transformed into an unsecured digital format, it can be copied further and distributed an unlimited number of times over the Internet, without significant degradation in sound quality.

6. Much of the unlawful distribution of copyrighted sound recordings over the Internet occurs via “peer-to-peer” (“P2P”) file copying networks or so-called online media distribution systems. The most notorious example of such a system is Napster, which has been enjoined by a federal court. In addition, there are many other P2P networks, including KaZaA, iMesh, Grokster, and Gnutella, that continue to operate and to facilitate widespread copyright piracy. The major recording companies are currently engaged in litigation against KaZaA, Grokster, and iMesh. At any given moment, millions of people illegally use online media distributions systems to upload or download copyrighted material.

7. P2P networks, at least in their most popular form, refer to computer systems or processes that enable Internet users to: (1) make files (including audio recordings) stored on a computer available for copying by other users; (2) search for files stored on other users’ computers; and (3) transfer exact copies of files from one computer to another via the Internet. P2P networks enable users who otherwise would have no connection with, or knowledge of, each other to offer to each other for distribution and copying files off of their PCs, to provide a sophisticated search mechanism by which users can locate these files for downloading, and to provide a means of effecting downloads.

8. The major record companies generally have not authorized their copyrighted sound recordings to be copied or distributed in unsecured formats by means of P2P networks. Thus, the vast majority of the content that is copied and distributed on P2P networks is unauthorized by the copyright owner – that is, the distribution violates the copyright laws.

9. The scope of online piracy of copyrighted works cannot be underestimated. Retail sales – the principal revenue source for most record companies – declined 7% in 2000, 10% in 2001, and 11% in 2002. The RIAA member companies lose significant revenues on an annual basis due to the millions of unauthorized downloads and uploads of well-known recordings that are made available on the Internet by infringers who, in virtually all cases, have the ability to maintain their anonymity to all but the Internet Service Provider (“ISP”) they use to supply them with access to the Internet.

10. In contrast to the terrible harm to copyright owners, ISPs likely benefit from P2P networks. Those who would unlawfully upload and download copyrighted music often use large amounts of bandwidth (because music files are so large). The infringers thus tend to subscribe to services, such as DSL and cable modems, that are far more expensive than ordinary telephone services. One publication recently estimated that 50-70 percent of the bandwidth of cable

broadband network was being used for P2P file copying. See Alan Brezneck, “Service Control Vendors vie for MSO Business,” Cable Datacom News (March 1, 2003).

11. The persons who commit infringements by using the P2P networks are, by and large, anonymous to Plaintiffs. A person who logs on to a P2P network is free to use any alias (or computer name) whatsoever, without revealing his or her true identity to other users. Thus, Plaintiffs can observe the infringement occurring on the Internet, but do not know the true names or mailing addresses of those individuals who are committing the infringement.

The RIAA’s Identification of Copyright Infringers

12. In order to assist its members in combating copyright piracy, the RIAA conducts searches of the Internet, as well as file-copying services, for infringing copies of sound recordings whose copyrights are owned by RIAA members. A search can be as simple as logging onto a P2P network and examining what files are being offered by others logged onto the network. These searches generally result in the identification of specific Internet Protocol (“IP”) addresses from which infringers are making unauthorized copies of sound recordings available to the public. An IP address is a unique identifier that, along

with the date and time, specifically identifies a particular computer or server using the Internet. An IP address also allows the RIAA to use publicly available databases to ascertain, in general terms, the ISP that provides the infringer with access to the Internet.

13. The RIAA engages in a painstaking process to determine whether a person is infringing. That process relies on human review of evidence supporting the allegation of infringement. For each suspected infringer, the RIAA reviews a listing of the music files that the user has offered for upload by others from his or her computer in order to determine whether they appear to be copyrighted sound recordings. The RIAA also downloads a sample of songs from each user and listens to them in order to confirm that they are, indeed, illegal copies of sound recordings whose copyrights are owned by RIAA members. The RIAA also downloads and stores other evidence, such as metadata accompanying each file being disseminated that demonstrates that the user is engaged in copyright infringement.

14. The RIAA frequently has used the subpoena processes of Federal Rule of Civil Procedure 45 and the Digital Millennium Copyright Act (“DMCA”) to obtain the names of infringers from ISPs. (Individuals only can gain access to the Internet after setting up an account with, or subscribing to, an ISP.)

The RIAA typically has included in their subpoenas to ISPs an IP address and a date and time on which the RIAA observed use of the IP address in connection with allegedly infringing activity. In some instances, providing the IP address alone to the ISP has been enough to enable the ISP to identify the infringer. Providing the date and time further assists some ISPs in identifying infringers, especially ISPs that use “dynamic IP addressing” such that a single computer may be assigned different IP addresses at different times, including, for example, each time it logs into the Internet.⁶ Once provided with the IP address, plus the date and time of the infringing activity, the infringer's ISP quickly and easily can identify the computer from which the infringement occurred (and the name and address of the subscriber that controls that computer), sometimes within a matter of minutes.

15. Since 1998, the RIAA and others have used subpoenas thousands of times to learn the names, addresses, telephone numbers, and e-mail addresses of infringers for the purpose of bringing legal actions against those infringers. During a recent litigation with Verizon (an ISP) relating to the DMCA subpoena process, Verizon conceded that, as an alternative to the DMCA process,

⁶ ISPs own or are assigned certain blocks or ranges of IP addresses. An ISP assigns a particular IP address in its block or range to a subscriber when that subscriber goes "online."

Plaintiffs could file "John Doe" lawsuits and issue Rule 45 subpoenas to ISPs to obtain the true identities of infringing subscribers.

The RIAA's Identification of the Infringers in This Case

16. In the ordinary course of investigating online copyright infringement, the RIAA became aware that Defendants were offering files for download on various P2P networks. The user-defined author and title of the files offered for download by each Defendant suggested that many were copyrighted sound recordings being disseminated without the authorization of the copyright owners. The RIAA downloaded and listened to a sample of the music files being offered for download by each Defendant and was able to confirm that the files each Defendant was offering for distribution were illegal copies of sound recordings whose copyrights are owned by RIAA members. The RIAA also recorded the time and date at which the infringing activity was observed and the IP address assigned to each defendant at the time. See Complaint Exhibit A. The RIAA could not, however, determine the physical location of the users or their identities. The RIAA could determine that the Defendants were using Cox's service to distribute and make available for distribution the copyrighted files.

17. The RIAA also has collected for each Defendant a list of the files each Defendant has made available for distribution to the public. Exhibit 1 to this Declaration contains such lists for the first three Defendants referred to in the Complaint. These lists often show thousands of files, many of which are sound recording (MP3) files that are owned by, or exclusively licensed to, Plaintiffs. Because of the voluminous nature of the lists, and in an effort not to overburden the Court with paper, I have not attached to this Declaration the lists for all Defendants. Such lists will be made available to the Court upon request.

The Importance of Expedited Discovery in This Case

18. Obtaining the identity of copyright infringers on an expedited basis is critical to stopping the piracy of RIAA members' copyrighted works.

19. First, every day that copyrighted material is disseminated without the authorization of the copyright owner, the copyright owner is economically harmed. Prompt identification of infringers is necessary in order for copyright owners to take quick action to stop unlawful dissemination of their works and minimize their economic losses.

20. Second, infringement often occurs with respect to sound recordings that have not yet been distributed publicly. Such infringement inflicts

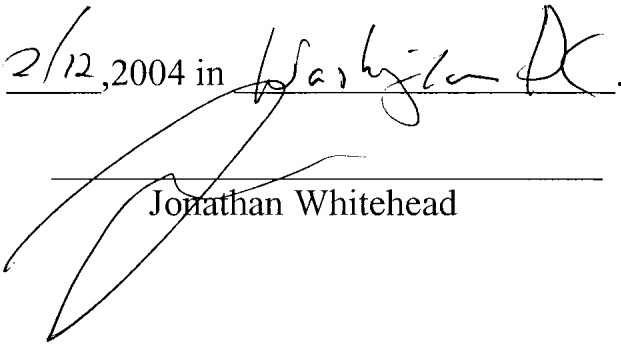
great harm on the initial market for new works. New recordings generally earn a significant portion of their revenue when they are first released, and copyright piracy during a recording's pre-release or early release period therefore deprives copyright owners of an important opportunity to reap the benefits of their labor.

21. Third, without expedited discovery Plaintiffs have no way of serving Defendants with the complaint and summons in this case. Plaintiffs do not have the Defendants' names or addresses, nor do they have an e-mail address for Defendants.

22. Fourth, and perhaps most critically, service providers have different policies pertaining to the length of time they preserve "logs" which identify their users. ISPs keep log files of their user activities for only limited periods of time – sometimes as little as weeks or even days before erasing the data they contain. If an ISP does not respond expeditiously to a discovery request, the identification information in the ISP's logs may be erased, making it impossible for the ISP to determine the identity of the infringer and eliminating the copyright owner's ability to take action to stop the infringement.

I declare under penalty of perjury under the laws of the United States that
the foregoing is true and correct.

Executed on February 2/12, 2004 in Washington DC.



Jonathan Whitehead

**EXHIBIT ONE TO
DECLARATION OF JONATHAN WHITEHEAD**

User	Filename	Artist	Size	Media Type
daniels621@kazaa	Alternative Rock.kpl	Unknown	0KB	
daniels621@kazaa	Bill Anderson - Little Band of Gold.mp3	Bill Anderson	2,560KB	Audio
daniels621@kazaa	Folk.kpl	Unknown	0KB	
daniels621@kazaa	Funk.kpl	Unknown	0KB	
daniels621@kazaa	Jazz.kpl	Unknown	0KB	
daniels621@kazaa	Pop Rock.kpl	Unknown	0KB	
daniels621@kazaa	Connie Francis- Second Hand Love.mp3	Connie Francis	508KB	Audio
daniels621@kazaa	bill anderson - Still The One.mp3	Bill Anderson	3,180KB	Audio
daniels621@kazaa	World Beat.kpl	Unknown	0KB	
daniels621@kazaa	kmd210_en.exe	Shaman Networks Ltd	3,974KB	Software
daniels621@kazaa	AlbumArt_{72175F92-1A2D-4BD7-88FA-C3B0093784D0}_...	Unknown	2KB	Image
daniels621@kazaa	AlbumArt_{13C0C145-2637-4001-A149-2A1C54793D77}_...	Unknown	1KB	Image
daniels621@kazaa	Del Vikings - Little Darlin'.mp3	Diamonds	2,478KB	Audio
daniels621@kazaa	I've Been Everywhere.kpl	Johnny Cash	0KB	
daniels621@kazaa	Charlie Walker - Who Will Buy The Wine.mp3	Charlie Walker	2,420KB	Audio
daniels621@kazaa	Must've Been Drunk.kpl	Merle Haggard_George ...	0KB	
daniels621@kazaa	AlbumArt_{5D7745AC-5257-443E-8FAF-7C01FDS839B3}_...	Unknown	9KB	Image
daniels621@kazaa	Make It A Double.kpl	Gary Stewart	0KB	
daniels621@kazaa	Andrew Sisters - In The Mood .mp3	Andrew Sisters	1,044KB	Audio
daniels621@kazaa	Battle Of New Orleans.kpl	Johnny Horton	0KB	
daniels621@kazaa	AlbumArt_{1C9AA758-CD3A-47F5-B4B4-94D1369E5070}_...	Unknown	2KB	Image
daniels621@kazaa	Ladies Love Outlaws.kpl	Waylon Jennings_Willie ...	0KB	
daniels621@kazaa	Paybacks Are Hell.kpl	Johnny Horton	0KB	
daniels621@kazaa	Bar Room Buddies.kpl	Merle Haggard/Clint East...	0KB	
daniels621@kazaa	Beatles - And I Love Her.mp3	Beatles	2,337KB	Audio
daniels621@kazaa	My Own Kind Of Hat.kpl	Merle Haggard	0KB	
daniels621@kazaa	Folsom Prison Blues.kpl	Johnny Cash	0KB	
daniels621@kazaa	Big City.kpl	Merle Haggard	0KB	