

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UMG RECORDINGS, INC., *et al.*,)
)
 Plaintiffs,)
)
 v.) No. 04-00093 (CKK)
)
 DOES 1-199,)
)
 Defendants.)

**REPLY MEMORANDUM IN SUPPORT OF MOTION
FOR LEAVE TO FILE AS AMICI CURIAE**

1. Plaintiffs urge the Court to disregard amici’s arguments altogether, to authorize the subpoena, and to wait until individual defendants respond before considering the issues raised by amici. To the extent that this argument is based on the general rule that amici cannot introduce arguments not made by parties, the non-appearance of any parties at this stage simply underscores that plaintiffs have moved *ex parte*. However, *ex parte* motions are not automatically granted. The Court has the power and the duty to consider Due Process and First Amendment rights before imposing the substantial obligation of responding in this Court or else face an order stripping defendants of their qualified privilege to communicate anonymously through the Internet. Nor do the written and oral orders of Judges Chin and Sprizzo, in parallel cases pending in the United States District Court for the Southern District of New York, provide precedent for a refusal to consider arguments until after a subpoena is served, because there is a key procedural difference between those cases and this one. In the New York cases, both courts had **already** issued orders authorizing subpoenas before they learned that amici had concerns to express. At that juncture, rather than attempt to undo the effect of its previous orders, each court indicated that it would consider such arguments in the context of a subpoena enforcement proceeding.

2. Plaintiffs argue that the First Amendment is not implicated by a subpoena and that, in any event, they have met the test formulated in such cases as *Dendrite v. Doe*, 775 A.2d 756 (N.J.App. 2001). Neither argument is sound.

Plaintiffs provide the Court with a string citation for the proposition that “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.” P. Mem. at 8. However, most of the cases are irrelevant because they consider only whether a particular demand for personal information violates a generalized right of privacy under the Fourth Amendment, not the First Amendment. *Smith v. Maryland*, 442 U.S. 735 (1979); *Guest v. Leis*, 255 F.3d 325 (6th Cir. 2001); *United States v. Hambrick*, 55 F.Supp.2d 504 (D.W.Va. 1999), *aff’d mem*, 225 F.3d 656 (4th Cir. 2000). *See also AFGE v. HUD*, 351 F.3d 1229 (D.C. Cir.1997) (cited by P. Mem. at 7). And two Supreme Court cases that plaintiffs cite involve First Amendment issues not present here – in *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990), the issue was whether to extend the right of academic freedom to recognize a privilege against disclosure of peer review materials, and in *Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186 (1946), the Supreme Court refused to hold that the First Amendment bars the application of the Fair Labor Standards Act to news companies.

The only support plaintiffs cite that is even close to being on point is a footnote in *Reporters Comm. for Freedom of the Press v. American Tel. & Tel. Co.*, 593 F.2d 1030, 1050 n.67 (D.C. Cir. 1978), where the Court refused to enjoin the telephone company from **voluntarily** complying with Justice Department requests for toll records of reporters’ telephone calls with sources. Even assuming that this decision has any bearing on whether a court might **compel** the identification of sources, it is well established in this Circuit that the First Amendment limits the compulsory

disclosure, pursuant to subpoena and otherwise, of names and indeed of other kinds of information. *Black Panther Party v. Smith*, 661 F.2d 1243, 1266 (D.C. Cir. 1981). See also *AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003); *Wyoming v. Department of Agriculture*, 208 F.R.D. 449, 454-455 (D.D.C. 2002).

Nor does the fact that the Doe defendants have disclosed their identities to their ISP's constitute a "waiver" of their qualified First Amendment right to communicate anonymously. If that were true, then *NAACP v. Alabama*, 357 U.S. 449 (1958), and *Bates v. City of Little Rock*, 361 U.S. 516 (1960), were both wrongly decided. In those cases, the Supreme Court overturned penalties imposed on the NAACP and its officers for refusing to comply with orders to identify members, whose names the NAACP of course knew, on the ground that compelled identification violated the members' right to remain anonymous. Similarly, *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995), and *Talley v. California*, 362 U.S. 60 (1960), were wrongly decided, because the authors of the unsigned leaflets identified themselves to their printers, and the distributors revealed their faces to the persons to whom they handed the leaflets. Indeed, if plaintiffs correctly state the law, there could be no anonymous Internet communication, because every Internet user is identified to his or her ISP. Hence, every ex parte request to identify every Internet speaker would have to be granted.

Indeed, speech is rarely literally anonymous to all persons at all times; if such nondisclosure were the precondition for application of the First Amendment, there would be no right to speak anonymously as a practical matter. But that is not the law. Decisions such as *Dendrite* and *Seescandy* require an evidentiary showing before plaintiffs may serve discovery seeking to identify Doe defendants sued for online communications, and this Court should follow their analysis.

Plaintiffs have failed to make the required showing. As discussed below and in amici's

opening memorandum, plaintiffs have not shown either that the Court has personal jurisdiction over defendants or that a single complaint against 199 different defendants is proper. And, although their papers are replete with the assumption that defendants have infringed their copyrights and hence have no rights, defendants have not submitted **evidence** establishing a prima facie case of copyright infringement by each of the 199 Does. They have submitted no evidence that plaintiffs have registered the copyrights on the songs involved, as required by 17 U.S.C. § 411, *Esquire v. Ringer*, 591 F.2d 796, 806 n.28 (D.C. Cir. 1978), and they have not submitted any affidavits on personal knowledge from persons who have listened to the songs offered for download and verified that they contain copyrighted performances. Plaintiffs persist in arguing that it should suffice that they have offered hundreds of pages of evidence about the songs offered by three defendants, and that they have sworn that they have similar evidence with respect to the other 196 defendants; plaintiffs predicate their refusal to submit actual evidence with respect to the other 196 on the ground that it would be too inconvenient to do so. However, plaintiffs nowhere explain why such voluminous evidence is required to justify discovery pertaining to any individual defendant. The Court should not weaken the showing that plaintiffs must make to justify discovery simply to accommodate plaintiffs' desire to identify hundreds based on a far-more-than-adequate showing as to three.

3. Plaintiffs argue that this Court might have jurisdiction because defendants are offering copyrighted files for download in every jurisdiction in the country, including DC, and hence they meet the test for personal jurisdiction under the *Zippo* sliding scale. But *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506 (D.C. Cir. 2002), and the other courts employing the *Zippo* analysis, predicate personal jurisdiction on the degree of **commercial interactivity** of a defendant's web site. There is no contention in this case that the Does have engaged in any commercial transactions in the

District of Columbia.¹

Every web site offers information for download to computers in every part of the country and world. If that were a sufficient basis for personal jurisdiction, then future plaintiffs will be entitled to file suit in Honolulu against residents of the District of Columbia just because their computer files could be accessed through the Internet there, simply because the plaintiffs found it convenient to sue there. Indeed, a plaintiff who lacked a meritorious case but had the resources to hire a lawyer so far away would surely be tempted to sue in Hawaii, knowing that many District residents could not afford to defend themselves there. By the same token, plaintiff music companies, which have no relationship to DC except that their trade association's law firm happens to have a large office here, should not be allowed to sue the defendants here without a showing of personal jurisdiction.²

Plaintiffs also take issue with the Seltzer declaration for allegedly contending that plaintiffs could have "pinpoint[ed] the location of [alleged] Internet infringers." Nothing in the Seltzer declaration suggests that the methods that she employed provide the precise location of the users. For example, a user who connects to the Internet through a Verizon server in DC may well live in

¹In an apparent attempt to create an equivalent to commercial interactivity, plaintiffs assert in a footnote that the Does "barter for copyrighted work rather than sell them." Mem. 10 n.9. The complaint does not allege any system of barter, nor does the evidence support this assertion. The only showing is that the Does unilaterally posted files that are made available for download.

²By contrast, several plaintiffs are based in New York. Although amici do not believe that a **plaintiff's** location in the forum is a sufficient basis for personal jurisdiction over a **defendant** based on the "effects" test, that fact distinguishes this case from *Sony Music v. Does*, where Judge Chin's order postponed the issue of personal jurisdiction until subpoena enforcement proceedings. Also distinguishing this case from *Sony* is the fact that the ISP whom plaintiffs sought to subpoena was Cablevision, a **local** ISP serving the New York metropolitan area. Although many of the Does appear to live in Connecticut or New Jersey, the hardship for such defendants involved in opposing a subpoena in federal court in Manhattan would be considerably less than the hardship that would be created for persons on the West Coast or further away seeking to oppose a subpoena here in the District.

Bethesda or Arlington. Internet protocols are designed to route efficiently – it would make little sense for the local Verizon connection point to be in New York for a user based in Seattle. Thus, it is safe to assume that users whose IP addresses indicate initial connection points in Chicago or Seattle or Honolulu do not reside anywhere close to the District.

To be sure, it is more convenient for plaintiffs to file one big lawsuit and slosh together its accusations and its subpoenas to identify hundred of people who live elsewhere, but so long as the ISP is committed to preserving the identifying evidence (as Verizon has promised here) there is no reason why plaintiffs’ convenience should outweigh the Does’ constitutional right not to be subjected to court proceedings in a jurisdiction with which they lack minimum contacts. The two-step procedure suggested in our motion papers – under which plaintiffs could subpoena general location information about users (*e.g.*, Western Washington) from Verizon in this district and then refile their lawsuits in the proper jurisdiction immediately thereafter – would strike a reasonable balance between the record companies’ need to locate the defendants and the jurisdictional requirements applicable to all litigants.

4. Plaintiffs argue that 199 completely unrelated defendants are properly joined in a single proceeding because most of them are using the same file-sharing software to engage in file-sharing. However, unlike *In re Vitamins Antitrust Litig.*, 2000 WL 1475705, *18 (D.D.C.), in which each of the defendants was alleged to be engaged in a single global antitrust conspiracy that was alleged in the complaint to be unlawful, there is nothing inherently unlawful about using software to make files available through the Internet. It is the provision of hundreds or thousands of copyrighted performances that is the wrongdoing alleged in this case, and the fact that each of the Doe defendants is alleged to have committed the same wrong against some or all of the same plaintiffs via the same

medium does not make it appropriate to join them all in the same case, any more than every employer in the District of Columbia who used the mail or the telephone to deny hundreds of employment applications could be joined in the same Title VII proceeding, simply because they used the same method to communicate allegedly discriminatory decisions. *Cf. Nassau Cy. Ass'n of Ins. Agents v. Aetna Life & Cas. Co.*, 497 F.2d 1151 (2d Cir. 1974) (refusing to allow 164 insurance companies to be joined in a single action just because they allegedly cheated hundreds of agents in the same way).

Nor have plaintiffs attempted to show why they can satisfy the language of Rule 20 when they failed to allege that defendants are “liable jointly, severally or in the alternative.” Instead, they implicitly argue that this language should be treated as mere surplusage, citing a decision from this district that denied a motion to sever the claims of several different plaintiffs against a single employer and its various supervisors, without any discussion of Rule 20's “jointly, severally or in the alternative” language concerning defendants’ liability, and without stating that such liability need not be alleged. *M.K. v. Tenet*, 216 F.R.D. 133, 141-142 (D.D.C. 2002). Indeed, the other case plaintiffs cite, *In re Vitamins Antitrust Litig.*, 2000 WL 1475705, *18 (D.D.C.), found joinder appropriate, in part, because plaintiffs “expressly request judgment against all defendants, jointly and severally.” No such liability is alleged here.

CONCLUSION

The motion for leave to file as amici curiae should be granted.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 17th day of February, 2004, I caused copies of the foregoing Reply Memorandum of Amici Curiae to be served by first-class mail, postage prepaid, on counsel for plaintiffs as follows:

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