

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

Case No.: 6:04-cv-197-Orl-22DAB

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

Plaintiffs,

v.

DOES 1 - 25,

Defendants.

**PLAINTIFFS' RESPONSE TO ORDER TO SHOW CAUSE  
DATED MARCH 5, 2004, AND MEMORANDUM OF LAW IN SUPPORT THEREOF**

Plaintiffs hereby file their Response to this Court's March 5, 2004 Order to show cause "why this case should not be dismissed for improper joinder of Plaintiffs and Defendants and for an inadequate showing that this Court has personal jurisdiction over the Defendants and that

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venue is proper.” For the reasons set forth below, the Court should reserve judgment on those issues until such time as all Defendants have been identified and are before the Court. In any event, personal jurisdiction and venue are proper in this Court, and this case should not be dismissed for improper joinder.

## **BACKGROUND**

Plaintiffs in this case are major recording companies who own copyrights in sound recordings. The as-yet unnamed Defendants in this case are individuals who have disseminated (and likely are continuing to disseminate) Plaintiffs’ copyrighted works unlawfully over a peer-to-peer (“P2P”) network. A P2P network is an online media distribution system that allows users to transform their computers into an interactive Internet site, disseminating files for other users to copy. P2P users who disseminate (upload) copyrighted material and who copy (download) such material violate the copyright laws. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013-14 (9th Cir. 2001); *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 1069 (2004).

Each of the Defendants in this case is an active participant in the Fast Track network, the largest current P2P network. Second Declaration of Jonathan Whitehead ¶ 4 (“Second Whitehead Decl.”) (attached as Exhibit A). As such, each Defendant 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 Whitehead Decl. ¶ 5.

As explained in the Memorandum of Law in Support of Plaintiffs' *Ex Parte* Motion for Leave to Take Immediate Discovery, Plaintiffs discovered each of the Defendants in this case openly disseminating copyrighted works on the Fast Track network. Plaintiffs could identify the Internet Protocol ("IP") address from which each Defendant was unlawfully disseminating Plaintiffs' copyrighted works, but could not ascertain the name, address, or any other contact information for each of the Defendants.<sup>1</sup> Whitehead Decl. ¶¶ 16, 21. Using the IP address, Plaintiffs determined that Bright House Networks ("Bright House"), an Internet Service Provider ("ISP") with the majority of its subscribers located in Central Florida, serves as each Defendant's ISP. Only Bright House, which has complete control over which IP addresses are assigned to which subscribers and which maintains logs that match IP addresses with subscribers, possesses that information. Second Whitehead Decl. ¶ 7.

Plaintiffs have substantial evidence to support their claims. With respect to each Defendant, Plaintiffs have specified the IP address, date, and time of the infringement; that information uniquely specifies a Bright House subscriber as the source of the infringement. As explained in more detail in the first Whitehead Declaration, Plaintiffs downloaded a list of the files disseminated by each Defendant and downloaded several files being disseminated by each Defendant to confirm that Plaintiffs owned the copyrights of the sound recordings. *See* Whitehead Decl. ¶¶ 16, 17. For each Defendant, Plaintiffs have provided a list of several copyrighted sound recordings that the Defendant disseminated without authorization. *See* Exhibit A to the Complaint. That list, however, is only a small subset of the copyrighted sound

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<sup>1</sup> An IP address is a 10-digit number, such as 12.34.255.255. IP addresses are allotted in blocks to ISPs. Second Whitehead Decl. ¶ 7. Only an ISP can determine which subscriber was using a particular IP address allotted to the ISP at a given date and time. ISPs have complete control over the assignment of IP addresses to subscribers. There is no requirement that ISPs assign IP addresses according to where a subscriber resides. *Id.*

recordings that each Defendant is unlawfully disseminating. As explained in the two Whitehead Declarations, each Defendant appears (based on evaluation of the names and file types) to be offering hundreds of additional copyrighted sound recordings without authorization. See Whitehead Decl. ¶ 17; Second Whitehead Decl. ¶ 5.<sup>2</sup>

Unless and until Bright House discloses the identities of the infringers, Plaintiffs have no remedy for the past and ongoing infringement committed by the Defendants.

### ARGUMENT

**I. THE ISSUES RAISED BY THE COURT ARE PREMATURE AND SHOULD BE CONSIDERED ONLY AFTER DEFENDANTS HAVE BEEN IDENTIFIED AND NOTIFIED.**

Plaintiffs' motion for leave to take immediate discovery seeks only the right to serve discovery on Bright House 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 Memorandum of Law in Support of Plaintiffs' *Ex Parte* Motion for Leave to Take Immediate Discovery at 6-9 (discussing the "good cause" standard). Plaintiffs cannot vindicate their rights unless and until Bright House identifies its infringing subscribers. Moreover, Plaintiffs are suffering irreparable harm each day that Defendants continue to infringe their copyrights. See *CBS, Inc. v. PrimeTime Joint Venture*, 9 F. Supp. 2d 1333, 1344 (S.D. Fla. 1998) ("The majority of Circuits that have considered this issue have held that once a plaintiff establishes a prima facie case of copyright infringement, irreparable injury is presumed.").

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<sup>2</sup> 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.

Denial of Plaintiffs' motion for discovery and/or dismissal of this action is tantamount to a decision that Plaintiffs can never obtain any remedy for a clear violation of their rights. For that reason, this Circuit has held that it is an abuse of discretion to deny a motion to join Doe defendants in a suit where their identities can be uncovered through discovery. *See Dean v. Barber*, 951 F.2d 1210, 1215 (11th Cir. 1992); *Valentin v. Dinkins*, 121 F.3d 72, 75-76 (2d Cir. 1997); *see also* Memorandum of Law in Support of Plaintiffs' *Ex Parte* Motion for Leave to Take Immediate Discovery at 5-6. Courts thus regularly authorize discovery from ISPs to identify the defendants using the Internet to break the law. *See, e.g., United Parcel Serv. of Am., Inc. v. John Does One Through Ten*, No. 03cv1639, 2003 WL 21715365, \*1 (N.D. Ga. June 13, 2003) (authorizing expedited discovery from ISPs in order to determine the identity of defendants). Indeed, in several similar copyright infringement cases brought by Plaintiffs, courts have authorized the same discovery that Plaintiffs seek here. *See infra* pages 7-8 (citing Exhibits B-G). In all such cases, the plaintiffs do not know who the defendants are or where they reside.

In its Order to Show Cause, the Court raised concerns about personal jurisdiction, venue and joinder. Those issues, however, cannot be resolved before the Defendants have been notified and identified. Any resolution of these issues without all parties before the Court would amount to an advisory opinion based on arguments that a party to the litigation may never raise. *See R.T. Vanderbilt Co. v. Occupational Safety & Health Review Comm'n*, 708 F.2d 570, 574 (11th Cir. 1983). Personal jurisdiction and venue are each personal defenses that may be raised or waived by a defendant. *See Lipofsky v. New York State Workers Comp. Bd.*, 861 F.2d 1257, 1258 (11th Cir. 1988). Even if one or more Defendants chooses to raise jurisdiction or venue as a defense, resolution of those defenses turns on a host of facts specific to each Defendant. The

Court cannot complete an analysis of the Defendants' contacts with this forum until everyone, including the Plaintiffs, knows who the Defendants are.<sup>3</sup>

Consideration of joinder is similarly premature. In most cases, joinder is raised by defendants, based on their assessment of whether litigation without co-defendants is preferable. 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, even if the parties were not properly joined in this case, "[m]isjoinder of parties is not ground for dismissal of an action." Fed. R. Civ. P. 21. The appropriate remedy is severance. *Id.*

Reserving the issues of jurisdiction, venue, and joinder will not prejudice any Defendant in this case. Plaintiffs' motion for immediate discovery seeks only to obtain the identity of the individuals so that they may be served. That motion expressly contemplates that Bright House will notify each Defendant of Plaintiffs' lawsuit and the subpoena. Thus, each Defendant will have the opportunity to file a motion to quash if that Defendant so desires. Moreover, after each Defendant is identified, he or she will have the opportunity to raise jurisdiction, venue or joinder. At such time, this Court will be able to resolve the issues in the context of a live, concrete dispute.

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<sup>3</sup> The Federal Rules do not require that personal jurisdiction be pled in the complaint. *See* 5 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1206, at 96 (2d ed. 1990) ("the complaint need not allege . . . the basis for jurisdiction over the defendant's person."); 5A *Federal Practice and Procedure* § 1363, at 458 ("[T]here is no requirement that personal jurisdiction be alleged."); *Burger King Corp. v. Holder*, 844 F. Supp. 1528, 1531 (S.D. Fla. 1993) (holding that Federal Rules do not require a plaintiff to plead the basis for personal jurisdiction). Thus, when Fed. R. Civ. P. 8 requires a statement as to "jurisdiction," that refers only to subject matter jurisdiction. *See* 2 James W. Moore, *Moore's Federal Practice* § 8.03[1], at 8-9 (3d ed. 2003).

In contrast, denial of Plaintiffs' motion and/or dismissal of this lawsuit will cause tremendous harm to the Plaintiffs. Absent disclosure of the identities of Defendants, Plaintiffs cannot pursue their rights against those who are openly (albeit hidden by an Internet alias) violating their rights. As discussed above, Plaintiffs have volumes of evidence to support their claims: what they lack is the identification of the Defendants in order to proceed.

This case is one of nine similar copyright infringement cases brought by the Plaintiffs against Doe defendants infringing Plaintiffs' copyrights over P2P networks. Plaintiffs brought each case in a jurisdiction where the particular Doe Defendants' ISP can be found.<sup>4</sup> In each case, Plaintiffs sought immediate discovery and explained to the Court that, after Defendants are identified, the parties and the Court can determine whether the case should go forward in that jurisdiction, whether Plaintiffs should pursue some or all Defendants in another forum, and whether the Court should sever some claims

In seven of the eight other cases, the courts granted Plaintiffs' motions for expedited discovery and deferred litigation of other issues. *See Order, Sony Music Entm't, Inc. v. John Does 1-40* (S.D.N.Y. Feb. 3, 2004) (attached as Ex. B); *Order, Warner Bros. v. John Does 1-43*, No. 1:04-cv-00476-JES (S.D.N.Y. Feb. 10, 2004) (Sprizzo, J.) (ruling from the bench); *Capitol Records, Inc. v. John Does 1-250* (S.D.N.Y. Jan 27, 2004) (attached as Ex. C); *Elektra Entm't*

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<sup>4</sup> The jurisdiction where the ISP is found is the fairest and most practical forum for several reasons. First, the customer base of many ISPs resides in the area around where the ISP is headquartered. Second, an ISP's subscribers generally enter into a contract with the ISP requiring consent to jurisdiction in the courts of the state where the ISP is headquartered. *See, e.g.,* Bright House Networks Central Florida Terms and Conditions of Use, <http://www.cfl.mybriighthouse.com/useragreement.shtml>. Third, even if Plaintiffs brought suit in another forum, they would nonetheless have to issue the subpoena from the forum in which the ISP is located. Bright House has indicated to Plaintiffs that subpoenas for information about their subscribers should be served on their Maitland, Florida office. Regardless of where the complaint is filed, this Court will be the forum to resolve disputes arising out of subpoenas to Bright House.

*Group, Inc. v. Does 1-7* (D.N.J. Feb. 17, 2004) (attached as Ex. D); Memorandum Opinion and Order, *UMG Recordings v. John Does 1-199* (D.D.C. Mar. 10, 2004) (attached as Ex. E); Order, *Motown Record Co., L.P. v. Does 1-252* at 3 (N.D. Ga. Mar. 1, 2004) (holding that “procedural issues identified by *amici* [including joinder] can be resolved in the ordinary course of this litigation at the appropriate time”) (attached as Ex. F); Order, *Virgin Records Am., Inc. v. Does 1-44* at 2-3 (N.D. Ga. Mar. 3, 2004) (holding that “the issues raised by *amici* [including joinder] are premature,” and “may be resolved in the ordinary course of this litigation if and when such issues are raised by any Defendant”) (attached as Ex. G).<sup>5</sup>

As the District Court for the District of Columbia recently held, “[i]t is clear to the Court that Defendants must be identified before this suit can progress further.” Ex. E at 2. Accordingly, that court concluded that it was “premature[.]” to consider jurisdiction and other issues, and instead granted Plaintiffs’ motion to take immediate discovery. *Id.* Similarly, a judge in the Northern District of Georgia concluded that issues of jurisdiction and joinder should be deferred so that they “can be resolved in the ordinary course of this litigation at the appropriate time.” *See* Ex. F at 3.

This Court should follow the well-reasoned decisions of these seven courts. By granting Plaintiffs’ motion for immediate discovery, the Court will ensure that Plaintiffs can vindicate their rights and that each Defendant has the opportunity to raise jurisdiction, venue, and joinder at an appropriate time.

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<sup>5</sup> The only court to deviate from this course severed the case into separate actions, but nonetheless granted Plaintiffs’ motion for immediate discovery with respect to the one Defendant in the action that remained before the judge. *See* Order, *BMG Music v. Does 1-203*, Civ. Act. No. 04-650 (E.D. Pa. Mar. 5, 2004). That decision is currently the subject of a motion for reconsideration.

## **II. PERSONAL JURISDICTION AND VENUE ARE PROPER IN THIS DISTRICT.**

### **A. Plaintiffs Need Only Show That They Have Reasonably Sought to Identify the Defendants to Meet Their Burden at This Stage.**

Courts regularly authorize discovery into jurisdictional facts whenever such discovery is likely to lead to evidence relevant to jurisdiction. *See Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727, 729-31 & n.7 (11th Cir. 1982) (holding that district court's dismissal for lack of jurisdiction was "premature" and that "Plaintiff must be given an opportunity to develop facts sufficient to support a determination on the issue of jurisdiction"). Where plaintiffs sue unnamed defendants, plaintiffs satisfy any obligation to allege personal jurisdiction by showing "that they have engaged in a reasonably diligent search to identify the unknown defendants," and by taking steps to "provide these individuals with constructive notice." *Plant v. Does*, 19 F. Supp. 2d 1316, 1320 (S.D. Fla. 1998) (internal quotations and citations omitted). This standard recognizes that dismissal for lack of personal jurisdiction or venue prior to identifying the Defendants would preclude Plaintiffs from ever being able to bring legal action, even if the Defendants live down the street from the court house.

Plaintiffs have satisfied that standard here. First, Plaintiffs have demonstrated that they do not know Defendants' identities or geographic locations and have no way of serving them. *See Memorandum of Law in Support of Plaintiffs' Ex Parte Motion for Leave to Take Immediate Discovery* at 2-3; *Whitehead Decl.* ¶¶ 11, 17, 22. Moreover, Plaintiffs have undertaken substantial efforts to identify each Defendant by a unique Internet Protocol address assigned at the date and time of the Defendant's infringing activity. *See Memorandum of Law in Support of Plaintiffs' Ex Parte Motion for Leave to Take Immediate Discovery* at 2-3; *Whitehead Decl.* ¶¶ 13, 17. Absent discovery from Bright House, however, Plaintiffs will never know more about the Defendants' identities than they do now.

Second, although Plaintiffs cannot at this time provide Defendants with notice of this lawsuit, Defendants will receive notice once Plaintiffs' subpoena is served on Bright House, because Bright House will be able to notify each Defendant to inform them of the lawsuit. See Memorandum of Law in Support of Plaintiffs' *Ex Parte* Motion for Leave to Take Immediate Discovery at 10. Defendants will then have the opportunity to raise any objections before this Court in the form of a motion to quash. *Id.* For these reasons, Plaintiffs have made a sufficient showing at this stage to survive dismissal.

**B. Jurisdiction and Venue Are Proper in This Court.**

Even in the absence of the identity and geographic location of the Defendants, Plaintiffs can proffer sufficient facts to support personal jurisdiction and venue in this case. Plaintiffs acknowledge the possibility that one or more Defendants may not reside in this district. That possibility does not, however, mean that this Court has no jurisdiction over them. In this case, all of the Defendants are significant users of the same P2P network. As such, each Defendant transformed his or her computer into an interactive Internet site, allowing others to complete electronic transactions (by downloading copyrighted works) over the Internet. Each Defendant disseminated copyrighted works to anyone that wanted them (including residents of this jurisdiction) and downloaded copyrighted works from others who offered them (including residents of this jurisdiction).<sup>6</sup> See *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 511-13 (D.C. Cir. 2002) (holding that an interactive Internet site allowing electronic transactions may establish "continuous" and "systematic" contacts sufficient for general personal jurisdiction).

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<sup>6</sup> A user downloading a music 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 Georgia, a computer in California, and a computer in Florida. *Id.*

Thus, this case involves Defendants who have transformed their computers into highly interactive sites. *See Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (distinguishing passive websites which generally do not provide sufficient contacts from a forum to justify an assertion of jurisdiction with “interactive” websites which generally do support an assertion of jurisdiction); *Hartoy Inc. v. Thompson*, No. 02-80454-CIV, 2003 WL 21468079, at \*5 (S.D. Fla. Jan. 29, 2003) (“the fact that the website allowed the placement of orders means that the site could not have only presented passive advertisement”).<sup>7</sup>

By offering copyrighted works to residents of this forum and engaging in electronic transactions with residents of this forum, each of the Defendants has purposefully directed activity into this district. For that reason, each Defendant, regardless of where he or she resides, is subject to the jurisdiction of this Court.

There is, however, strong evidence that many, if not all, of the Defendants in this case actually reside in Florida. As discussed above, each Defendant is a subscriber of Bright House Networks. Bright House has 2.1 million subscribers, a majority of whom reside in central Florida. *See* [http://www.cfl.mybriighthouse.com/customercare/FAQ/faq\\_briighthouse.shtml](http://www.cfl.mybriighthouse.com/customercare/FAQ/faq_briighthouse.shtml). Of that number, most reside in counties within this judicial district (in central Florida: Brevard, Flagler, Lake, Marion, Orange, Osceola, Seminole, Sumter, and Volusia counties; in the Tampa Bay area: Citrus, Hernando, Hillsborough, Manatee, Pasco, Pinellas and Polk counties). *See* <http://www.mybriighthouse.com> (listing counties under the “Where” pull-down tab).

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<sup>7</sup> The fact that P2P infringers trade copyrighted works rather than sell them is irrelevant to whether the websites are fully interactive. The key issue is whether the sites are interactive. 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.

Finally, the same facts support a finding that venue in this jurisdiction is proper. Under 28 U.S.C. §1391(b), venue is proper in “a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred.” As discussed above, by offering copyrighted materials over a P2P system to residents of this district and engaging in electronic transactions (uploading and downloading) with other P2P users, Defendants committed copyright infringement in this district. Moreover, as discussed above, Plaintiffs have a good faith belief that a substantial number of the Defendants reside within this judicial district. *See* 28 U.S.C. § 1400(a) (venue is proper in “the district in which the defendant or his agent resides or may be found”).

**C. If This Court Does Not Have Jurisdiction Over One or More Defendants in This Case, the Problem Can Be Cured at a Later Time.**

Even if this Court remains concerned about personal jurisdiction, the proper course is to defer the issue until such time as the Defendants are actually before the Court. After Bright House discloses the identities and locations of the Defendants, all parties will be in a position to ascertain whether this or another forum is appropriate. Moreover, each Defendant will have the opportunity to raise jurisdictional objections.

**III. JOINDER IS PROPER IN THIS CASE.**

The allegations in Plaintiffs’ Complaint demonstrate that joinder of Plaintiffs and Defendants is appropriate under Federal Rule of Civil Procedure 20 and Eleventh Circuit law.

As the Supreme Court has made clear, the Federal Rules of Civil Procedure require courts to “entertain[] the broadest possible scope of action consistent with fairness to the parties,” and “strongly encourage” the “joinder of claims, parties and remedies.” *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966). Thus, federal courts must “employ a liberal

approach to permissive joinder of claims *and* parties in the interest of judicial economy.”

*Alexander v. Fulton County*, 207 F.3d 1303, 1323 (11th Cir. 2000).

Accordingly, this Court 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 id.* at 1324-25. Indeed, severance at such an early stage in the proceedings is disfavored because the Court has ample authority to order severance or to require separate trials at any time such an order is in the interest of justice and efficiency. *See, e.g.*, 4 James W. Moore, *Moore’s Federal Practice* § 20.09, at 20-58 (3d ed. 2003) (“Any party may move for a separate trial, or the court may order it on its own motion. The court’s discretionary authority to order separate trials eliminates all reasonable objections to the liberal joinder provisions of Rule 20.”).

To satisfy the joinder requirements of Federal Rule of Civil Procedure 20, a party must show “1) a right to relief arising out of the same transaction or occurrence, or series of transactions or occurrences, and 2) some question of law or fact common to all persons seeking to be joined.” *Alexander*, 207 F.3d at 1323. The Supreme Court has instructed courts to interpret the terms “transaction” and “occurrence” broadly in accord with Rule 20’s central purposes of promoting trial convenience, expediting the resolution of disputes, and preventing unnecessary lawsuits. *See id.* at 1323. Indeed, Eleventh Circuit law holds that a complaint satisfies the transaction or occurrence requirement when it alleges that the defendants engaged in a common scheme or pattern of behavior. *See Moore v. Comfed Sav. Bank*, 908 F.2d 834, 839 (11th Cir. 1990)

The allegations in Plaintiffs’ Complaint easily satisfy these standards. The crux of Plaintiffs’ Complaint is that Defendants and others have participated in a common scheme or 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 explicitly that each Defendant uses an online media distribution system (the P2P network) to distribute to and to download from other users of the same system – including the other Defendants – computer files that contain copyrighted sound recordings. Compl. ¶ 24; Second Whitehead Decl. ¶ 4; *see also* Whitehead Decl. ¶¶ 7, 16. Plaintiffs set forth a sample of the sound recordings that each Defendant is disseminating in Exhibit A to the Complaint, but each Defendant is also disseminating hundreds of other copyrighted sound recordings owned by others of the Plaintiffs. *See* Exhibit A to the Complaint. Plaintiffs have detailed lists of the sound recordings offered by each Defendant, but have submitted only a sample so as not to overwhelm the court with paper. *See* Second Whitehead Decl. ¶ 5.

Plaintiffs' right to relief from each of the Defendants thus arises out of the same series of transactions (the Defendants' unlawful downloading and dissemination of Plaintiffs' sound recordings using the same P2P network) and involves common questions of law (violation of the copyright laws). Indeed, this case presents a quintessential example of the benefits of joinder. As the Eleventh Circuit has held, "Plainly, the central purpose of Rule 20 is to promote trial convenience and expedite the resolution of disputes, thereby eliminating unnecessary lawsuits." *Alexander*, 207 F.3d at 1323. Here, if the Defendants were not joined in a single lawsuit, the result would be the division of this case into 25 lawsuits and 25 motions for leave to issue 25 virtually identical subpoenas to Bright House. Thus, the litigation would proceed exactly as here, except with a far greater burden on Plaintiffs, Bright House, and the Court.<sup>6</sup> Severance

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<sup>6</sup> If the Plaintiffs were not joined in a single lawsuit, the burden would be far greater. Each of the seventeen Plaintiffs would have to file separate lawsuits against each of the Defendants infringing their copyrights. That could result in as many as 425 separate lawsuits (17 Plaintiffs each filing 25 lawsuits).

would impose significant burdens on the judges of this Court (25 lawsuits with 25 motions) and thus would represent precisely the kind of inefficient and cumbersome litigation that Rule 20 is designed to avoid.

Finally, severance now would not provide any additional fairness to Defendants. Defendants may prefer to litigate together, rather than separately, given the commonality of issues among them. Severance at this stage denies them that choice. Defendants will, however, have the opportunity to raise joinder after they have been identified, and this Court will be able to re-consider the issue at a later date. Indeed, by reserving the question of joinder until a later stage in the litigation, this Court can resolve the question with the benefit of knowing the identities and geographic locations of the Defendants and the views of the Defendants concerning whether the claims should proceed separately or in a single lawsuit.

#### IV. CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' *Ex Parte* Motion For Leave to Take Immediate Discovery and enter an Order substantially in the form of Proposed Order submitted with that motion.

DATED: 3/16/2004

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ATTORNEYS FOR PLAINTIFFS

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

INTERSCOPE RECORDS, a California  
general partnership; CAROLINE  
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MAVERICK RECORDING  
COMPANY, a California joint venture;  
WARNER BROS. RECORDS INC., a  
Delaware corporation; LONDON-SIRE  
RECORDS INC., a Delaware  
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INC., a Delaware corporation; SONY  
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Delaware corporation; MOTOWN  
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California corporation; BMG MUSIC, a  
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ATLANTIC RECORDING  
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corporation; ELEKTRA  
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liability company; and VIRGIN  
RECORDS AMERICA, INC., a  
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Case No.: 6:04-CV-197-Orl-22DAB

Plaintiffs,

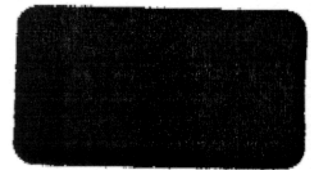
v.

DOES 1 - 25,

Defendants.

SECOND DECLARATION OF JONATHAN WHITEHEAD

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.

2. I previously submitted a declaration in support of Plaintiffs' *Ex Parte* Motion for Leave to Take Immediate Discovery in this case. I submit this declaration in support of Plaintiffs' Response to this Court's Order to Show Cause.

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

#### **The Defendants Use the Same FastTrack Network**

4. RIAA members have filed nine so-called "John Doe" lawsuits in United States District Courts, including the instant case. These nine lawsuits include a total of more than 1000 Doe Defendants, approximately 99% of whom are using the so-called "FastTrack" network to trade copyrighted works, including all 25 Defendants in this case. FastTrack is the largest current peer-to-peer network.

5. Based on the steps described in paragraph 16 of the declaration I previously submitted in this case, RIAA was able to determine that each Defendant in this case has offered hundreds or thousands of copyrighted sound recordings unlawfully on P2P networks. As described in paragraphs 16 and 17 of that declaration, RIAA has collected a list of the files that each Doe Defendant in this case has made available to the public. Exhibit 1 to that declaration contains such lists for three of the Defendants. The same detailed information of the lists of files that the other Defendants have made available to the public can be provided to this Court, if necessary.

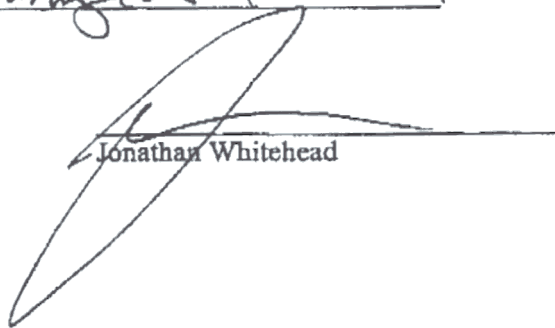
### **Geographic Issues Relating to P2P Users**

6. As I explained in my previous declaration in this case, much of the unlawful distribution of copyrighted sound recordings over the Internet occurs via “peer-to-peer” (“P2P”) file copying networks. Examples of P2P networks include KaZaA, iMesh, Grokster and Gnutella. When a user downloads a file on a P2P network, the user may download the same file from multiple computers at one time. For example, when a user in New Jersey downloads a file using a P2P network, he or she may receive parts of the same file, at the same time, from computers in multiple geographical locations, e.g., from a computer in the Georgia, a computer in California, and a computer in Florida.

7. As discussed in my declaration in support of Plaintiffs’ *Ex Parte* Motion for Leave to Take Immediate Discovery in this case, copyright owners cannot know the exact location of users disseminating copyrighted works over P2P networks. They can, however, identify the Internet Protocol (“IP”) addresses of infringers. An IP address is a 10-digit number, such as 12.34.255.255. IP addresses are allotted to Internet Service Providers (“ISPs”) in blocks or ranges (such 12.34.1.1 to 12.34.255.255). Only the ISP, however, can determine which subscriber was using a particular IP address at a given date and time. ISPs have complete control over the assignment of IP addresses to subscribers. In addition, there is no requirement that ISPs assign IP addresses according to where a subscriber resides.

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

Executed on March 15, 2004 in Washington DC.



Jonathan Whitehead