

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
SOUTHERN DIVISION**

VIRGIN RECORDS AMERICA, INC., a	)	Case No.
California corporation; MOTOWN	)	
RECORD COMPANY, L.P., a California	)	
limited partnership; ATLANTIC	)	
RECORDING CORPORATION, a Delaware	)	
corporation; SONY MUSIC	)	
ENTERTAINMENT INC., a Delaware	)	
corporation; ARISTA RECORDS, INC., a	)	
Delaware corporation; and WARNER	)	
BROS. RECORDS INC., a Delaware	)	
corporation,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
JOHN DOE,	)	
	)	
Defendant.	)	

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO  
TAKE IMMEDIATE 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 identity of the Doe Defendant, who is being sued for direct copyright infringement. Without such discovery, Plaintiffs cannot

identify the Doe Defendant, and thus cannot pursue their lawsuit to protect their copyrighted works from repetitive, rampant infringement.<sup>1</sup>

As alleged in the complaint, the Doe Defendant, without authorization, used an online media distribution system (*e.g.*, a peer-to-peer or “P2P” 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 (“Whitehead Decl.”), ¶ 16 and Ex. 1. Although Plaintiffs do not know the true name of the Defendant,<sup>2</sup> Plaintiffs have identified Defendant by a unique Internet Protocol (“IP”) address assigned to him or her on the date and at the time of the Defendant’s infringing activity. Id. Additionally, Plaintiffs have gathered evidence of the infringing activity. Id. ¶¶ 16-17. Plaintiffs have made copies of several sound recordings Defendant illegally distributed or made available for distribution, and have obtained copies of a more complete list of files that Defendant has made available to the public for distribution. Id. and Ex. 1.

Plaintiffs have identified the ISP that provided Internet access to Defendant by using a publicly available database to trace the IP address for Defendant. Id. ¶¶ 12, 16. Here, the ISP is the University of Maryland (“U of MD”). 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 a Doe Defendant (*i.e.*, the ISP’s subscriber) because that information is contained in

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<sup>1</sup> Because Plaintiffs do not currently know the identity of Defendant, Plaintiffs cannot ascertain Defendant’s position on this Motion.

<sup>2</sup> When using a P2P system (*e.g.*, KaZaA, iMesh, Grokster, or Gnutella), Defendants typically use monikers, or user names, and not their true names. Whitehead Decl., ¶ 7. Plaintiffs have no ability to determine Defendant’s true name other than by seeking the information from the ISP. Id. ¶¶ 11, 16-17.

the ISP's subscriber activity log files. Id. ¶ 14.<sup>3</sup> Plaintiffs' experience is that ISPs typically 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 U of MD to identify Defendant. Plaintiffs intend to serve a Rule 45 subpoena on U of MD seeking Defendant's true name, address, telephone number, e-mail address, and Media Access Control ("MAC") addresses. Once Plaintiffs learn Defendant's identifying information, Plaintiffs will contact the Defendant and attempt to resolve the dispute. If the dispute is not resolved and it is determined that it would be more appropriate to litigate the copyright infringement claims in another jurisdiction, Plaintiffs will dismiss Defendant from the present lawsuit and re-file in another jurisdiction. Without the ability to obtain the Defendant's identifying information, however, 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 sought in this Motion is critical.

## II. BACKGROUND

The Internet and P2P networks have spawned an illegal trade in copyrighted works. By downloading P2P software, and logging onto a P2P network, an individual can upload (distribute) or download (copy), without authorization, countless copyrighted music and

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<sup>3</sup> 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 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.

video files to or from any other Internet user worldwide. 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, 124 S. Ct. 1069 (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., 351 F.3d 1229 (D.C. Cir. 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).

Indeed, in similar copyright infringement cases brought by the Plaintiffs, and/or other record companies, against Doe defendants infringing copyrights over P2P networks, courts have granted plaintiffs' motions for leave to take expedited discovery. See Memorandum Opinion and Order, UMG Recordings v. John Does 1-199, Civ. Action No. 04-0093 (CKK) (D.D.C. Mar. 10, 2004) (attached hereto at Tab 1); Order, Virgin Records Am., Inc. v. Does 1-44, No. 1:04-CV-438-CC (N.D. Ga. Mar. 3, 2004) (attached hereto at Tab 2); Order, Motown Record Co., L.P. v. Does 1-252, No. 1:04-CV-439-WBH (N.D. Ga. Mar. 1, 2004) (attached hereto at Tab 3); Order, Elektra Entm't Group, Inc. v. Does 1-7, Civ. Act. No. 04-607 (GFB) (D.N.J. Feb. 17, 2004) (attached hereto at Tab 4); Order, Warner Bros. v. John Does 1-43, No. 1:04-cv-00476-JES (S.D.N.Y. Feb. 10, 2004) (ruling from the bench); Order, Sony Music Entm't, Inc. v. John Does 1-40, No. 04 Civ. 473 (DC) (S.D.N.Y. Feb. 3, 2004) (attached hereto

at Tab 5); Order, Capitol Records, Inc. v. John Does 1-250, No. 04 CV 472 (LAK) (S.D.N.Y. Jan 27, 2004) (attached hereto at Tab 6).<sup>4</sup> This Court should follow the well-reasoned decisions of these courts.

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; finding that, absent extraordinary circumstances, “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

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<sup>4</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. One other district court, in the Middle District of Florida, has issued a show cause order to Plaintiffs, and has yet to rule on whether to grant Plaintiffs’ motion for leave to take immediate discovery.

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 Defendant, 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 Defendant. 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 Defendant; information that may be erased very soon. Plaintiffs (who continue to be harmed by Defendant’s copyright infringement, Whitehead Decl., ¶ 9), cannot wait until after the Rule 26(f) conference (ordinarily a prerequisite before propounding discovery) because there is no known Defendant with whom to confer (and thus, no conference is possible). There is no prejudice to the Defendant because Plaintiffs merely seek information to identify the Defendant and to serve him or her, and Plaintiffs agree to use the information disclosed pursuant to their subpoena only for the purpose of protecting their rights under the copyright laws.

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 Defendant without discovery from the ISP. As shown by the Declaration of Jonathan Whitehead, Plaintiffs already have developed a substantial case on the merits against the Defendant. Plaintiffs’ complaint alleges a *prima facie* claim for direct copyright infringement. Plaintiffs have alleged that they own and have registered the copyrights in the works at issue, and that Defendant 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 Tel. Serv. Co., 499 U.S. 340, 361 (1991). In addition, Plaintiffs have copies of a sample of the sound recordings Defendant illegally distributed or made available for distribution, and have made a copy of a more complete list of files Defendant has made available

for distribution to the public. See Complaint Ex. A; Whitehead Decl., ¶¶ 16-17 and Ex. 1. This more complete list shows almost a thousand 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.

#### IV. CONCLUSION

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

Respectfully submitted,



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Dated: 3/23/04

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UMG RECORDINGS, *et al.*,

Plaintiffs,

v.

JOHN DOES 1-199,

Defendants.

Civil Action No. 04-093 (CKK)

MEMORANDUM OPINION

(March 10, 2004)

Before the Court is Plaintiffs' motion for leave to take expedited discovery. Plaintiffs are record companies suing a series of John Doe Defendants for copyright infringement. Plaintiffs request permission to serve limited, immediate discovery on Verizon, a third party internet service provider ("ISP"), in the form of a Rule 45 subpoena. Plaintiffs seek the true identities of Defendants, including each Defendant's true name, address, telephone number, email address, and Media Access Control address.

According to Plaintiffs' complaint, each Defendant uses an online media distribution system to download Plaintiffs' copyrighted works, distribute these works to the public, and/or make copyrighted works available for distribution to others. Pls' Mot. at 2. Although Plaintiffs do not know Defendants names, Plaintiffs have identified each Defendant by a unique internet protocol ("IP") address assigned to that Defendant on the date and at the time of the allegedly infringing activity. *Id.* Through the use of a publicly available database, Plaintiffs have traced the IP address for each Defendant and determined that it belongs to Verizon. *Id.*

Public Citizen, the American Civil Liberties Union (“ACLU”), the Electronic Frontier Foundation, and the ACLU of the National Capitol Area have collectively requested leave to file a memorandum as *amici curiae* addressing Plaintiffs’ motion. *See Amici Mot.* Plaintiffs oppose this motion, stating that the issues raised by *amici* are premature. Plaintiffs point out that no party has raised the issues *amici* raises in its memorandum, and that it is well established that *amici* cannot inject issues into a case which have yet to be raised by a party. Pls’ Opp. to *Amici Mot.* at 1, 5; *see McCleskey v. Zant*, 499 U.S. 467, 523 n.10 (1991). While Plaintiffs are correct that *amici* raise issues prematurely, the constitutional and procedural issues identified by *amici* can be resolved in the ordinary course of this litigation at the appropriate time. Accordingly, the Court shall Grant *amici*’s motion for leave to file.

It is clear to the Court that Defendants must be identified before this suit can progress further. The Court shall grant Plaintiffs’ request for expedited discovery, with certain limitations outlined herein. Plaintiffs will be allowed to serve immediate discovery on Verizon to obtain the identity of each John Doe Defendant by serving a Rule 45 subpoena that seeks information sufficient to identify each Defendant, including name, address, telephone number, email address, and Media Access Control address. The disclosure of this information is ordered pursuant to 47 U.S.C. § 551(c)(2)(B), which authorizes cable operators to disclose personally identifiable information when the cable operators are ordered to do so by a court. Any information disclosed to Plaintiffs in response to the Rule 45 subpoena may be used by Plaintiffs solely for the purpose of protecting Plaintiffs’ rights as set forth in the Complaint.

If and when Verizon is served with a subpoena, Verizon shall give written notice, which may include email notice, to the subscribers in question within five business days. If Verizon



UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

UMG RECORDINGS, *et al.*,

Plaintiffs,

v.

JOHN DOES 1-199,

Defendants.

Civil Action No. 04-093 (CKK)

**ORDER**  
(March 10, 2004)

In keeping with the accompanying Memorandum Opinion, it is this 10<sup>th</sup> day of March, 2004, hereby

ORDERED that Plaintiffs' Motion for Leave to Take Immediate Discovery [5] is GRANTED. Plaintiffs will be allowed to serve immediate discovery on Verizon to obtain the identity of each John Doe Defendant by serving a Rule 45 subpoena that seeks information sufficient to identify each Defendant, including name, address, telephone number, email address, and Media Access Control address. Any information disclosed to Plaintiffs in response to the Rule 45 subpoena may be used by Plaintiffs solely for the purpose of protecting Plaintiffs' rights as set forth in the Complaint. If and when Verizon is served with a subpoena, Verizon shall give written notice, which can include use of email, to the subscribers in question within five business days. If Verizon and/or any Defendant want to move to quash the subpoena, the party must do so before the return date of the subpoena, which shall be 25 days from the date of service. Verizon shall preserve any subpoenaed information pending the resolution of any timely filed motion to quash. It is further



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

FILED IN CLERK'S OFFICE  
U.S.D.C. - Atlanta

MAR 3 2004

LUTHER D. THOMAS, Clerk  
By: *[Signature]*  
Deputy Clerk

VIRGIN RECORDS AMERICA, INC., :  
et al., :

Plaintiffs, :

v. :

DOES 1 - 44, :

Defendants. :

CIVIL ACTION NO.

1:04-CV-0438-CC

**ORDER**

Currently pending before the Court is Plaintiffs' Motion for Leave to Take Expedited Discovery. Plaintiffs, record companies who own copyrights in various sound recordings, seek leave of Court to serve limited, immediate discovery on Earthlink, Inc. ("Earthlink"), a third party Internet Service Provider ("ISP"), in order to determine the true identities of the Doe Defendants.

According to Plaintiffs' Complaint, the Doe Defendants used an online media distribution system to download Plaintiffs' copyrighted works to the public, and/or make copyrighted works available for distribution to others. Although Plaintiffs do not know the true names of the Defendants, Plaintiffs have identified each Defendant by a unique Internet Protocol ("IP") address assigned to that Defendant on the date and at the time of the Defendants' allegedly infringing activity. Through the use of a publicly available database, Plaintiffs have traced the IP address for each Defendant, and have determined that the ISP is Earthlink.<sup>1</sup> In their motion for expedited discovery, Plaintiffs ask the Court for permission to serve a Rule 45

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<sup>1</sup> Plaintiffs have submitted the declaration of Jonathan Whitehead, Vice President and Counsel for Online Copyright Protection for the Recording Industry Association of America, Inc., in support of their motion for expedited discovery.

subpoena on Earthlink that seeks information sufficient to identify each Doe Defendant, including the name, address, telephone number, e-mail address, and Media Access Control addresses for each Defendant.

Public Citizen, the American Civil Liberties Union, The Electronic Frontier Foundation, and the ACLU of Georgia (collectively referred to as "*amici*") have moved the Court for leave to file a memorandum as *amici curiae* addressing Plaintiffs' motion for expedited discovery. In their memorandum, *amici* argue that Plaintiffs have not made a sufficient factual showing to warrant discovery into the identities of persons who have communicated anonymously over the Internet, or made a sufficient showing that this Court has personal jurisdiction over each Defendant. In addition, *amici* argue that there are also serious concerns whether all 44 Doe Defendants are properly joined in one action. Lastly, *amici* argue that if the Court does allow some discovery, the Court should enlarge the period of time which Earthlink has to respond so that the individual defendants will have a meaningful opportunity to object to the subpoena if they so choose. Plaintiffs' oppose *amici's* motion, arguing that *amici's* effort to inject themselves into this case is premature.

As an initial matter, *amici's* motion for leave to file their memorandum is GRANTED.<sup>2</sup> However, after consideration of *amici's* brief, the Court agrees with Plaintiffs that the issues raised by *amici* are premature. In this regard, no party to this action has raised any of the issues addressed in *amici's* memorandum, and *amici* may not inject issues into the case which have not been raised by a party. See McCleskey v. Zant, 499 U.S. 467, 523 n.10, 111 S.Ct. 1454, 1485 n.10, 113 L.Ed.2d 517 (1991) ("It is well established . . . that this Court will not consider an argument

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<sup>2</sup> See DeJulio v. Georgia, 127 F.Supp.2d 1274, 1284 (N.D. Ga. 2001) (decision to allow a non-party to participate as *amicus curiae* is solely within the broad discretion of the Court).

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 issues addressed by *amici* may be resolved in the ordinary course of this litigation if and when such issues are raised by any Defendant.

Turning to Plaintiffs’ request for expedited discovery, upon consideration of Plaintiffs’ motion and supporting brief, as well as the declaration of Mr. Whitehead, the Court finds that Plaintiffs have established good cause for the expedited discovery they request. Where the Complaint alleges a *prima facie* case of copyright infringement, and where the lawsuit cannot proceed until Defendants are properly identified, Plaintiffs’ motion for limited, immediate discovery in order to identify the Doe Defendants is due to be GRANTED.

ACCORDINGLY, IT IS HEREBY ORDERED:

Plaintiffs may serve immediate discovery upon Earthlink to obtain the identity of each Doe Defendant by serving a Rule 45 subpoena that seeks information sufficient to identify each Doe Defendant, including the name, address, telephone number, e-mail address, and Media Access Control address for each Defendant.

Any information disclosed to Plaintiffs in response to the Rule 45 subpoena may be used by Plaintiffs solely for the purpose of protecting Plaintiffs’ rights under the Copyright Act as set forth in the Complaint.

If and when Earthlink is served with a subpoena, within five (5) business days thereof it shall give notice to the subscribers in question of the subpoena. If Earthlink and/or any Defendant wishes to move to quash the subpoena, they shall do so before the return date of the subpoena, which shall be twenty-five (25) days from the date of service.

If and when Earthlink is served with a subpoena, Earthlink shall preserve the

subpoenaed information in question pending resolution of any timely filed motion to quash.

Counsel for Plaintiffs shall provide a copy of this Order to Earthlink when the subpoena is served.

CONCLUSION

For the reasons set forth above, Plaintiffs' Motion for Leave to Take Expedited Discovery [2-1] is GRANTED. *Amici's* Motion for Leave to File Memorandum as *Amici Curiae* [5-1] is also GRANTED.

SO ORDERED this 3<sup>rd</sup> day of March, 2004.

  
CLARENCE COOPER  
UNITED STATES DISTRICT JUDGE

MAR 01 2004

LUTHER D. THOMAS, Clerk  
By: *Aue Carlson*  
Deputy Clerk

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

MOTOWN RECORD COMPANY, L.P.,  
a California limited partnership, et al.,

Plaintiffs,

v.

DOES 1-252,

Defendants.

CIVIL ACTION FILE

NO. 1:04-CV-439-WBH

ORDER

Before the Court is Plaintiffs' motion for leave to take expedited discovery [3] in which Plaintiffs request Court permission to serve limited, immediate discovery on third party Internet Service Provider ("ISP") Cox Communications ("Cox") to determine the true identities of the Defendants. According to the Complaint, each Defendant 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. Although Plaintiffs do not know the true names of the Defendants, Plaintiffs have identified each Defendant by a unique Internet Protocol ("IP") address assigned to that Defendant on the date and at the time of the allegedly infringing activity. Through the use of a publicly available database, Plaintiffs have traced the IP address for each Defendant and determined that it is Cox.<sup>1</sup>

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<sup>1</sup> On the same day that they filed this action, Plaintiffs filed a nearly identical complaint in this district against unidentified defendants who allegedly used Earthlink as their ISP. See Virgin Records America, Inc., et al. v. Does 1-44, 1:04-CV-0438-CC (N.D. Ga.). Plaintiffs have recently filed similar cases in other parts of the country as well.

In their motion, Plaintiffs ask the Court for permission to serve a Rule 45 subpoena on Cox seeking each Defendant's true name, address, telephone number, e-mail address, and Media Access Control address. Plaintiffs state that if the Court grants their motion, they will serve a subpoena on Cox and give Cox 15 business days to either comply with it or file a motion to quash. Plaintiffs believe that upon receiving the subpoena, Cox will notify its subscribers that this information is being sought, thus providing the individual Defendants with a narrow window of time during which they may move to quash the subpoena.

Public Citizen, the ACLU, and the Electronic Frontier Foundation (collectively "amici") have filed a memorandum as amici curiae addressing this motion.<sup>2</sup> In their memorandum, amici claim that Plaintiffs have failed to make a showing sufficient to warrant discovery into the identities of persons who have communicated anonymously over the Internet, arguing that the First Amendment right to anonymous speech must be protected. Amici also argue that this case presents significant issues related to personal jurisdiction and joinder. Finally, amici argue that if the Court allows the discovery, the Court should enlarge the period of time during which Cox must respond to the subpoena so that the individual defendants will have a meaningful opportunity to voice their objections, if any, to the subpoena.

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<sup>2</sup> Plaintiffs take the position that the Court should deny amici's motion to file their memorandum. While the Court is not inclined to follow all the recommendations raised by amici – at least at this point – the Court nevertheless found amici's memorandum helpful and insightful. For that reason, amici's motion for leave to file their memorandum is granted. See DeJulio v. Georgia, 127 F. Supp. 2d 1274, 1284 (N.D. Ga. 2001) (noting that there is no rule governing the filing of an amicus brief in district court and stating that the decision whether to allow a non-party to participate as an amicus curiae is solely within the broad discretion of the Court).

Plaintiffs respond, and the Court agrees, that the issues raised by amici are premature. As Plaintiffs point out, no party to this action has raised any of the issues addressed in amici's memorandum, and it is well established that amici cannot inject issues into a case which have not been raised by a party. See McCleskey v. Zant, 499 U.S. 467, 523 n.10 (1991). The constitutional as well as the procedural issues identified by amici can be resolved in the ordinary course of this litigation at the appropriate time.

In order to get this case moving, Defendants must be identified, and Plaintiffs' request for expedited discovery is reasonably tailored to achieve this goal. The Court agrees with amici, however, that Cox should be given a slightly longer period during which it may respond to the subpoenas.

Accordingly, IT IS HEREBY ORDERED THAT:

Plaintiffs may serve immediate discovery on Cox to obtain the identity of each Doe Defendant by serving a Rule 45 subpoena that seeks information sufficient to identify each Doe Defendant, including the name, address, telephone number, e-mail address, and Media Access Control address for each Defendant.

The disclosure of this information is ordered pursuant to 47 U.S.C. § 551(c)(2)(B), which authorizes cable operators to disclose personally identifiable information when the cable operators are ordered to do so by a court;

Any information disclosed to Plaintiffs in response to the Rule 45 subpoena may be used by Plaintiffs solely for the purpose of protecting Plaintiffs' rights as set forth in the Complaint;

If and when Cox is served with a subpoena, within five business days thereof, it shall give notice to the subscribers in question of the subpoena. If Cox and/or any Defendant wishes to move to quash the subpoena, the party must do so before the return date of the subpoena, which will be 25 business days from the date of service;

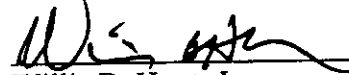
If and when Cox is served with a subpoena, Cox shall preserve the subpoenaed information in question pending resolution of any timely filed motion to quash; and

Counsel for Plaintiffs shall provide a copy of this Order to Cox along with the subpoena.

**CONCLUSION**

For the reasons set forth above, Plaintiffs' motion for leave to take expedited discovery [3] is GRANTED. Amici's motion for leave to file memorandum [5] is GRANTED.

It is so ORDERED this 1 day of March, 2004.

  
\_\_\_\_\_  
Willis B. Hunt, Jr.  
Judge, United States District Court

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UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

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

Plaintiffs,

v.

DOES 1 - 7,

Defendants.

CIVIL ACTION

Case No.: ~~04-607~~ 04-607 (GFB)

~~PROPOSED~~ ORDER GRANTING  
EX PARTE RELIEF PERMITTING  
PLAINTIFFS TO CONDUCT  
LIMITED EXPEDITED  
DISCOVERY UPON RCN  
CORPORATION


Upon Plaintiffs' application for an Order to Show Cause granting Plaintiffs *ex parte* relief permitting them to conduct limited expedited discovery, the supporting memorandum of law, the declaration of Jonathan Whitehead and exhibit thereto, and the declaration of Karen A. Confoy, it is hereby:

ORDERED that Plaintiffs may serve immediate discovery on RCN to obtain the identity of each Doe Defendant by serving a Rule 45 subpoena that seeks information sufficient to identify each Doe Defendant, including the name, address, telephone number, e-mail address, and Media Access Control addresses for each Defendant.

IT IS FURTHER ORDERED THAT any information disclosed to Plaintiffs in response to the Rule 45 subpoena may be used by Plaintiffs solely for the purpose of protecting Plaintiffs' rights under the Copyright Act.

Dated: \_\_\_\_\_

2/12/04

  
\_\_\_\_\_  
United States District Judge

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

-against-

DOES 1 - 40,

Defendants.

Civil Action No.: 04 CV 473 (DC)(DCF)

~~PROPOSED~~ **ORDER GRANTING PLAINTIFFS' EX PARTE APPLICATION TO  
TAKE IMMEDIATE DISCOVERY**

Upon the *ex parte* application of Plaintiffs to take immediate discovery, the annexed  
declaration of Jonathan Whitehead and the exhibit thereto, the annexed declaration of J.  
Christopher Jensen, Esq., and the accompanying Memorandum of Law, it is hereby:

PC

ORDERED that Plaintiffs may serve immediate discovery on Cablevision to obtain the identity <sup>of</sup> each Doe Defendant by requesting the name, address, telephone number, e-mail address, and Media Access Control addresses for each Defendant. The disclosure of this information is ordered pursuant to 47 U.S.C. § 551(c)(2)(B).

PC

IT IS FURTHER ORDERED THAT any information disclosed to Plaintiffs in response to the discovery requests <sup>shall</sup> ~~may~~ be used by Plaintiffs solely for the purpose of protecting Plaintiffs' rights under the Copyright Act.

Dated: 1/26/04

  
United States District Judge

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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

Plaintiffs,

-against-

DOES 1 - 250,

Defendants.

Civil Action No.: 04 CV 472 (LAK)(HBP)

**~~PROPOSED~~ ORDER GRANTING PLAINTIFFS' EX PARTE APPLICATION TO TAKE IMMEDIATE DISCOVERY**


Upon the *ex parte* application of Plaintiffs to take immediate discovery, the annexed declaration of Jonathan Whitehead and the exhibit thereto, the annexed declaration of J.

Christopher Jensen, Esq., and the accompanying Memorandum of Law, it is hereby:

ORDERED that Plaintiffs may serve immediate discovery on Time Warner Cable to obtain the identity each Doe Defendant by requesting the name, address, telephone number, e-mail address, and Media Access Control addresses for each Defendant. ~~The disclosure of this information is ordered pursuant to 47 U.S.C. § 551(e)(2)(B).~~

IT IS FURTHER ORDERED THAT any information disclosed to Plaintiffs in response to the discovery requests may be used by Plaintiffs solely for the purpose of protecting Plaintiffs' rights under the Copyright Act.

Dated: 1/26/04

  
United States District Judge