UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

VIRGIN RECORDS AMERICA, INC., et al.,	)	Case No. 04-CV-01239
	)	
Plaintiffs,	)	**AMICUS BRIEF OF PUBLIC**
	)	**CITIZEN, ELECTRONIC**
v.	)	**FRONTIER FOUNDATION,**
	)	**AMERICAN CIVIL**
DOES 1-9,	)	**UNION, AND ACLU OF**
	)	**PENNSYLVANIA**
Defendants.	)	**REGARDING PLAINTIFFS'**
	)	**REQUEST FOR EXPEDITED**
	)	**DISCOVERY**

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This is an action for copyright infringement in which eleven independent and unrelated music companies seek injunctive relief, damages and fees and costs against nine anonymous and completely unrelated individuals accused of committing separate and distinct wrongs. Plaintiffs allege that defendants have each displayed certain data files on their personal computers, containing different copyrighted musical performances, to the general public over the Internet in a manner that enables the public to download those files to their own computers. *Amici* file this brief to argue that, notwithstanding the serious violations of law alleged in the complaint, plaintiffs have not made a sufficient factual showing to warrant discovery into the identities of persons who have communicated anonymously over the Internet. In addition, there are serious concerns about whether these unrelated defendants are properly joined in one action, particularly in light of the fact that, in justifying discovery, plaintiffs have made a factual showing with respect to only two of the defendants, and present no evidence to support identification of the other individuals. Finally, in the event some discovery is to be allowed, *amici* believe that certain additional conditions should be imposed to ensure that procedural due process protections are provided to these defendants.

STATEMENT

Exhibit A to the Complaint specifies the Internet Protocol ("IP") address that each defendant allegedly used for posting songs on particular dates – in December 2003 and January 2004. Exhibit A identifies between five and ten songs for each defendant. Plaintiffs seek to impose liability on each of the defendants individually – there are no allegations of joint or several liability, and no claims for relief in the alternative against any of them. There is also no claim that the alleged infringers acted pursuant to any common plan or conspiracy, or that their liability arises out of a common transaction or occurrence. At most, it is alleged that there have been a series of separate instances in which each individual defendant has used the facilities of a single Internet Service Provider ("ISP"), Villanova University

("Villanova"), to display their respective data files on the Internet. There is no allegation that Villanova itself is liable for the alleged infringements.

Plaintiffs now seek expedited discovery to identify the anonymous defendants. In support of this motion, plaintiffs submit an affidavit from Jonathan Whitehead, Vice-President of the Recording Industry Association of America ("RIAA"), a trade association to which the plaintiffs belong. The affidavit characterizes Internet-enabled copyright piracy as a serious economic problem for plaintiffs, and accuses the ISPs, who are not named as defendants, of deliberately profiting from the use of their facilities for this piracy. The affidavit further explains the manner in which RIAA generally investigates file-sharing systems, and how, as a general matter, its staff members attempt to verify that particular anonymous individuals have made copyrighted songs available for download, by observing the author and title listed for each file and listening to "a sample" of the files. The affidavit asserts that Complaint Exhibit A is a list of songs identified by RIAA as being offered for download; although the affidavit says that it is made on personal knowledge, there is no statement that the affiant himself did any of the investigation described, or that anyone listened to each song listed or verified the existence of copyright registrations for the songs. A complete list of songs allegedly offered for download by two defendants has apparently been filed with the Court; no such list has been filed with respect to the other defendants.

ARGUMENT

The Complaint alleges serious violations of the law with potentially serious consequences for plaintiffs' economic welfare. In recently completed litigation, in which the D.C. Circuit held that the subpoena procedure of the Digital Millenium Copyright Act ("DMCA") did not apply to the identification of Internet users engaged in file-sharing, *see RIAA v. Verizon Internet Services*, 351 F.3d 1229 (D.C. Cir. 2003), all *amici* here filed briefs urging that First Amendment principles be applied under Rule 45 to protect the right to engage in anonymous speech. That plaintiffs are now invoking Rule 45 and attempting to satisfy its standards represents an enormous step forward for which they deserve credit.

As in the DMCA case, however, this is a test case that will set standards for the application of Rule 45 for subpoenas to identify alleged copyright infringers using the Internet. It is critical, therefore, that Due Process and the First Amendment be scrupulously protected. Reluctantly, *amici* have concluded that there is serious reason to question whether plaintiffs' documentation for their expedited discovery request meets those standards. Accordingly, *amici* file this brief to describe to the Court the procedures that we believe should be followed, and the ways in which plaintiffs' showings to date fall short.

A. The Court Should Balance The Right to Anonymous Speech Against the Need for Disclosure.

Although plaintiffs are correct that it is commonplace in certain circumstances for plaintiffs to be allowed discovery at the outset of a lawsuit to identify otherwise unknown persons alleged to have committed a legal wrong, there is a significant difference between this case and the various cases plaintiffs cite on pages 5-6 of their brief, where prisoners or arrestees sought to identify the prison or police officers who allegedly beat or otherwise mistreated them. The defendants here are accused of having engaged in wrongful, but anonymous, speech on the Internet. Because the First Amendment protects the right to speak anonymously, a subpoena for their names and addresses is subject to a qualified privilege. Just as in other cases where discovery seeks information that may be privileged, the Court must consider the privilege before authorizing discovery.

The tension between this important qualified privilege and the interest of a plaintiff who has alleged wrongdoing in obtaining information needed to pursue litigation over alleged wrongdoing, has been considered by a number of federal and state courts over the past several years. These courts have wrestled with the fact that, at the outset of the litigation, the plaintiff has done no more than allege wrongdoing, and a privilege is generally not considered to be overcome by mere allegations. They have further recognized that a serious chilling effect on anonymous speech would result if Internet speakers knew they could be identified by persons who merely allege wrongdoing, without necessarily having

any intention of carrying through with actual litigation.[1] Indeed, plaintiffs' representatives have repeatedly told the press that they do not want to pursue litigation against all anonymous file sharers whose identities they obtain.[2] Moreover, the anonymous publication of musical works, like other forms of performance, is speech protected by the First Amendment. *In re Verizon Internet Services*, 257 F. Supp.2d 244, 260 (D.D.C. 2003), *rev'd on other grounds*, 351 F.3d 1229 (D.C. Cir. 2003).[3]

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[1] *See, e.g., Doe v. 2theMart.com*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001) ("If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment Rights."); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999) ("People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity."); *Dendrite, Int'l, Inc. v. Doe No. 3,* 775 A.2d 756, 771 (N.J. Super. A.D. 2001) (strict procedural safeguards must be imposed "as a means of ensuring that plaintiffs do not use discovery procedures to ascertain the identities of unknown defendants in order to harass, intimidate or silence critics in the public forum opportunities presented by the Internet").

[2] Before the DC Circuit ruled that the DMCA subpoena procedure was unavailable, the RIAA had subpoenaed about 2500 filesharers, http://www.eff.org/IP/P2P/riaasubpoenas/, but only brought suit against or reached private settlements with approximately 600 persons. http://www.washingtonpost.com/wp-dyn/articles/A35281-2004Jan21.html?nav=hptop_ts.

[3] Judge Bates of the District Court of the District of Columbia opined that First Amendment protection for file sharing defendants was minimal because they are charged with copyright infringement and because they are not engaged in core political speech. The first reason begs the question. The First Amendment does not protect libel or revelation of trade secrets or any of the variety of other wrongs that are commonly alleged in the lawsuits for which the courts have developed John Doe proceedings, any more than it protects copyright infringement. However, at the initial stage of the lawsuit, no court has determined that anyone has committed any such wrongs. The very point of the multi-part balancing test is to give the anonymous speaker an opportunity to contest the bona fides and merits of allegations of wrongdoing before the right of anonymity is permanently breached. The second reason is simply wrong the Supreme Court's decisions on anonymous speech emphasize the right of writers and other artists to publish creative works under pseudonyms. Moreover, if the defendants were simply individuals who displayed a carefully selected handful of files containing portions of songs and the evidence goes no further than that as to most of the defendants any fair use defense that they might mount could have First Amendment underpinnings inasmuch as the Supreme Court has held that "fair use" itself

In order to balance these interests, the courts have drawn by analogy from the balancing test that many courts have adopted in deciding whether to compel the disclosure of anonymous sources or donors. *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980); *Carey v. Hume,* 492 F.2d 631 (D.C. Cir. 1974); *Cervantes v. Time,* 464 F.2d 986 (8th Cir. 1972); *Baker v. F&F Investment*, 470 F.2d 778, 783 (2d Cir. 1972). *See also UAW v. National Right to Work*, 590 F.2d 1139, 1152 (D.C. Cir. 1978); *Ealy v. Littlejohn*, 569 F.2d 219, 229 (5th Cir. 1978). The courts that have considered this question thus, adopted a multi-part balancing test to decide whether to compel the identification of an anonymous Internet speaker so that he or she may be served with process.

This test was most fully articulated in *Dendrite v. Doe*, 775 A.2d 756 (N.J. Super. A.D. 2001), which remains the only appellate opinion in the country to face the question squarely. *Dendrite* requires the would-be plaintiff to: (1) use the Internet to notify the accused of the pendency of the identification proceeding and to explain how to present a defense; (2) quote verbatim the allegedly actionable online speech; (3) allege all elements of the cause of action; (4) present evidence supporting the claim of violation; and (5) show the court that, on balance and in the particulars of the case, the right to identify the speaker outweighs the First Amendment right of anonymous speech. *Id*. at 760-61.

So long as the quantum of evidence demanded of the plaintiff to meet this test does not exceed information that a plaintiff can reasonably obtain before undertaking discovery, this test fairly balances the interest in pursuing wrongdoing against the First Amendment right to speak anonymously. And, the final balancing part of the test enables courts to give extra protection to the speaker where, for example, the danger of retaliation is greater, or the

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embodies First Amendment values. *Eldred v. Ashcroft*, 123 S.Ct. 769, 789-790 (2003); *Harper & Row Pub. v. Nation Enterprises*, 471 U.S. 539, 560 (1985).

speech at issue is core political speech about public officials, or to give extra weight to the plaintiff where the Court deems the speech at issue to be of only marginal value.

Several other courts have similarly set forth requirements of notice, review of the complaint, and presentation of argument and evidence before an ISP will be compelled to identify an Internet speaker. For example, in *Melvin v. Doe*, 49 Pa.D.& C.4th 449 (2000), *appeal quashed*, 789 A.2d 696 (2001), *appeal reinstated*, 836 A.2d 42 (Pa. 2003), the trial court allowed an anonymous defendant to present evidence and to seek summary judgment, ordering disclosure only after finding genuine issues of material fact requiring trial. In reversing the denial of the defendant's interlocutory appeal, the Pennsylvania Supreme Court discussed at length the conflict between the important and historically valued right to speak anonymously and the plaintiff's right to identify a potential defendant, remanding the case for consideration of whether evidence of actual damage had to be presented before the right to anonymous speech could be overcome. *Melvin*, 836 A.2d at 47-50.

Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573 (N.D.Cal. 1999), was one of the first cases to address this issue. In that case, the court required the plaintiff to make a good faith effort to communicate with the anonymous defendants and to provide them with notice that the suit had been filed against them -- thus assuring them an opportunity to defend their anonymity -- and also compelled the plaintiff to demonstrate that it had viable claims against such defendants. *Id*. at 579. Similarly, in *La Societe Metro Cash & Carry France v. Time Warner Cable,* 2003 WL 22962857 (Conn. Super. 2003), the court applied a balancing test and considered evidence that allegedly defamatory statements were false and caused injury before deciding to allow discovery concerning the identity of the speaker. And, in *In Re Subpoena to America Online,* 52 Va.Cir. 26, 34 (Fairfax 2000), *rev'd on other grounds*, 542 S.E.2d 377 (Va. 2001), the court required introduction of the allegedly actionable Internet speech and that the court be "satisfied by the pleadings or evidence supplied" that the subpoenaing party had a legitimate basis to contend that it was the victim of actionable

conduct, "and . . . the subpoenaed identity information [must be] centrally needed to advance that claim.[4]

In opposition to this argument in a similar case pending in the District of Columbia, *UMG Recordings v. Doe*, plaintiffs argued that the courts have repeatedly rejected claims that First Amendment interests require a heightened level of scrutiny prior to issuance of a subpoena or other judicial process. Most of the cases plaintiffs cited, however, 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's protection of anonymous speech. *See, e.g., 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); *AFGE v. HUD*, 351 F.3d 1229 (D.C. Cir. 1997). The two Supreme Court cases that plaintiffs cite involve First Amendment issues not present here – in *University of Pennslyvania 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 cited 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 that the First Amendment limits the compulsory disclosure, pursuant to subpoena and otherwise, of names

[4] The argument for a balancing test is more fully developed at http://www.citizen.org/documents/Melvin%202.pdf.

and other kinds of information. *Black Panther Party v. Smith*, 661 F.2d 1243, 1266 (D.C. Cir. 1981); s*ee also AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003); *Ealy v. Littlejohn*, 569 F.2d at 229.

Nor does the fact that the Doe defendants have disclosed their identities to their ISPs constitute a "waiver" of their 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* demonstrate that an evidentiary showing must be required before plaintiffs may serve discovery seeking to identify Doe defendants sued for online communications, and this Court should follow their analysis.

In this case, where the plaintiffs are respectable companies and their counsel are highly respected lawyers, it is unlikely that the filing of the Complaint was not preceded by a meticulous investigation. On the other hand, it is not difficult for plaintiffs to present concrete, admissible evidence, including an affidavit by the individual who examined the

files available for download from each defendant's computer, listened to the files, verified that they were copyrighted songs, and checked to be sure that those copyrights were registered and owned by the plaintiffs, and to list in the affidavit or in an attachment the songs that each Doe defendant is accused of making available for download. The Whitehead affidavit in this case is long on social policy and very short on first person averments about the individual defendants in this case. *See, e.g., BMG Canada Inc., et al. v. John Doe, et al.*, 200 FC 488, *8-10 (Federal Court, Canada March 31, 2004) (copy attached as Exhibit D; noting the inadequacy of the affidavit submitted by the record company plaintiffs). Because this case will be among those to set a standard for all plaintiffs who seek to identify anonymous Internet speakers based on claims of online copyright infringement, including those less scrupulous and ethical than these plaintiffs, the Court should not authorize a subpoena until individualized, admissible evidence is presented about each Doe.

B. Plaintiffs Have Improperly Joined Separate And Unrelated Defendants Into One Action.

There is also substantial reason to question whether plaintiffs have properly joined these nine separate and unrelated defendants in a single action. Federal Rule of Civil Procedure 20 states, in pertinent part:

> All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally or in the alternative, any right of relief in respect of arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

Under this Rule, multiple defendants may be joined in a single lawsuit if three conditions are met: (1) the right to relief must be "asserted against them jointly, severally or in the alternative"; (2) the claim must "aris[e] out of the same transaction, occurrence, or series of transactions or occurrences"; **and** (3) there must be a common question of fact or law common to all the defendants. In this case, there is no claim for relief jointly or severally or in the alternative. Moreover, there is no common transaction or occurrence, nor is there the proper "series of transactions or occurrences." The individuals sued have no connection

with each other: they are claimed to have shared different music using different filesharing software at different times and places.[5]

Judge Newcomer of this District recently recognized these concerns in ordering severance of a similar suit brought by record company plaintiffs against 203 Does into 203 separate lawsuits. *BMG Music et al. v. Does 1-203*, Case No. CV-04-650 (E.D. Pa. March 5, 2004). A copy of this Order is attached as Exhibit A. Judge Newcomer explained that severance was appropriate because:

> Nothing in the Complaint indicates that the alleged claims are the result of the same incident or incidents; and (3) The claims against the different Defendants will require separate trials as they may involve separate witnesses, different evidence, and different legal theories and defenses, which could lead to confusion of the jury. United States v. 1,071.08 Acres of Land, Yuma & Mahave Counties, Arizona, 564 F.2d 1350 (9th Cir. 1977); Fed.R.Civ.Pro 21; Fed.R.Civ.Pro 42(b). Moreover, the Court finds that there will almost certainly [be] separate issues of fact with respect to each Defendant. Fed.R.Civ.Pro. 20.

Id., *slip op.* at 1. The plaintiff-record companies filed a motion for reconsideration of this severance order, asking the court to refrain from ruling on the misjoinder issue until after disclosure of the Doe defendants' identities. Judge Newcomer rejected this request, reiterating that, "Although it would be convenient and economical (for Plaintiffs) to have this Court preside over Plaintiffs' expedited discovery request, the Court simply cannot overcome

[5] In *Pergo v. Alloc*, 262 F. Supp.2d 122, 127 (S.D.N.Y. 2003), the court characterized prongs (1) and (2) as requirements in the alternative, deeming prong (1) to include only "joint and several" liability, and the language "or in the alternative" to begin prong (2). Although other cases have described the rule that way as well, that is not the natural reading of the language. Prongs (1) and (2) both modify the term "request for relief" and are not stated in the alternative. Under the *Pergo* reading, prong (1) consists of the words "jointly, severally," with no conjunction between the adverbs, which would not be grammatically correct. The words "or in the alternative" are plainly part of the same series as "jointly, severally," and that series is either an adverbial clause modifying the verb asserted or an adjectival clause modifying the phrase "request for relief," just as prong (2) (beginning with the words "in respect of") modifies that same phrase. Accordingly, the literal meaning of the language would require the request for relief to satisfy both criteria, just as the phrase "tall mountain covered with glaciers" would not properly describe Mount Fuji, because although it is tall, it has no glaciers.

its finding that the Defendants are not properly joined parties." April 5, 2004 Order, at 1-2. A copy of Judge Newcomer's reconsideration Order is attached as Exhibit B.

The U.S. District Court in the Middle District of Florida in *Interscope Records, et. al. v. Does 1-25*, another recent case brought by the record companies, similarly concluded that both plaintiffs and defendants should be severed, noting the "unreasonable prejudice and expense to the Defendants."[6] *Interscope Records v. Does 1-25,* Case No. 04-CV-197 (M.D. Fla. April 1, 2004). A copy of the Magistrate's Report and Recommendation is attached as Exhibit C. Although Plaintiffs cite several other cases in which discovery was ordered, those courts have not held that the joinder of unrelated defendants is proper; they have, pursuant to plaintiffs' request, simply postponed adjudicating that issue, on the ground that it can later be raised by the individual defendants.

Rule 20 requires that, for defendants to be joined in the same lawsuit, they must be related to each other. Thus, for example, another court in this District recently refused to allow plaintiffs who were overcharged for notary services by different defendants in different transactions to proceed in a single lawsuit. *See Becker v. Chicago Title Ins. Co.*, 2004 WL 228672, *2-3 (E.D. Pa. 2004). In another case, multiple defendants accused of infringing the plaintiffs' copyrights were held to have been improperly joined when the alleged infringements were done for different purposes on different occasions. *Rappoport v. Spielberg, Inc.*, 16 F.Supp.2d 481 (D. N.J. 1998). By contrast, when parties have acted according to a unifying and joint scheme, joinder can be proper. *King v. Pepsi Cola Metro. Bottling Co.*, 86 F.R.D. 4 (E.D. Pa. 1979) (the allegations of a pervasive policy of discrimination by Pepsi would bring the complaints of the individual plaintiffs under the rubric of the same series of transactions).[7]

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[6] As in *Interscope*, it appears from the face of this Complaint that not every one of the nine defendants "made available" songs owned by every Plaintiff. For example, Doe 9 is alleged to have shared files from only four of the eleven plaintiffs. For that very reason, the *Interscope* court required severance of the plaintiffs as well as the defendants.

Moreover, the allegation that the defendants all used the Internet to make copyrighted music available does not make their joinder any more appropriate. Unlike *In re Vitamins Antitrust Litig.*, 2000 WL 1475705, *18 (D.D.C. 2000), 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 separate provision of hundreds or thousands of copyrighted performances that is the wrongdoing alleged in this case. The fact that each of the Doe defendants is alleged to have committed a similar 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 Philadelphia 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. *Ross v. Meagan*, 638 F.2d 646, 650 n.5 (3rd Cir. 1981) (although plaintiffs "claim relief for similar but entirely distinct and separate transactions or series of transactions . . . A coincidental similarity in the underlying facts will not permit appellants to proceed jointly"). *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).

Amici's concern that corners might be cut if otherwise unrelated defendants are joined in a single action is heightened by the manner in which plaintiffs have sought leave to pursue discovery in this case. Plaintiffs' affidavit attaches evidence concerning the music files made

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[7] *Accord Pergo, Inc. v. Alloc, Inc.*, 262 F.Supp.2d 122 (S.D.N.Y. 2003) (denying joinder when only connection between defendants is that they may have infringed the same patent); *Tele-Media Co. of Western CT v. Antidormi*, 179 F.R.D. 75 (D.Conn. 1998) (denying joinder of 100 defendants who each used similar technology to infringe plaintiff's pay-per-view programming because defendants did not act in concert); *Movie Systems v. Abel*, 99 F.R.D. 129 (D. Minn. 1983) (denying joinder of 1,798 defendants who had allegedly all infringed the same television distributor's broadcasts because, "although there were common practices and perhaps common questions of law," the independent defendants had not acted jointly).

available by two of the nine defendants, and tells the Court that although comparable evidence could be made available with respect to each of the other defendants, it would be too burdensome to do so. Although the courts exist to implement broad and important public policies, they do so by meting out individual justice. To be sure, it is more convenient to present evidence about only a few of the accused before obtaining discovery about all of them, but if it is important enough to sue all of them, it should be important enough to present sufficient evidence to justify discovery identifying each one of them.

In a highly analogous context, several district courts have refused to allow a company that distributed television programs through satellite systems to sue hundreds of otherwise unrelated individuals for using pirated access boxes to obtain satellite signals without paying for them.[8] Stealing satellite signals is at least as reprehensible as making music files available for download, but these district judges refused to be stampeded by claims of convenience and need for immediate action into allowing separate and unrelated defendants to be joined in one action for the administration of mass justice. The same principle applies to the accused copyright infringers in this case.

C. If Discovery Is Permitted, Additional Procedural Protections Should Be Put In Place.

If the Court concludes that it should allow some or all of the discovery requested by plaintiffs, *amici* have a modest suggestion about the terms of that discovery to better ensure that the Does have a realistic opportunity to object if they choose to do so. *Amici* ask the court to allow Villanova sufficient time before its response to the subpoena is due to notify its subscribers that their identities are at issue, so that, if they choose, the Does can offer evidence or argument in defense of their anonymity under the *Dendrite* standard. *Amici* suggest that the Court address this issue in its Order, by directing Villanova to provide notice within seven days of its receipt of the subpoena to each person whom its records reflect as

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[8] The cases are collected at the web page http://www.directvdefense.org/files/ (*see* caption "Severance").

having used the indicated IP addresses at the indicated times, to allow the defendants fourteen days from the time notice was received to file a motion to quash, and to preclude any disclosure pending the disposition of any motion to quash.

In urging such additional time, *amici* are not insensitive to plaintiffs' concerns about the need for immediate action lest information contained in Villanova's electronic records, showing which of its customers used which IP numbers at which times, not be preserved. Plaintiffs' counsel can ask Villanova for a commitment to preserve that information pending this Court's ruling on whether it may pursue discovery, and, if a subpoena is served, pending disposition of any timely filed motion to quash. We urge the Court to address this issue, if necessary, in its Order.

On the other hand, according to the dates listed in Exhibit A to the Complaint, plaintiffs here are suing over material that they found on the Internet as early as December 2003. Despite having some of this information almost five months ago, plaintiffs have waited until now to file this lawsuit and to request that the Court grant its *ex parte* request for expedited discovery. Plaintiffs have not exactly sued expeditiously, and if they must wait a few more weeks to obtain the necessary information pending a ruling, to ensure that the First Amendment and Due Process rights of the alleged infringers are respected, they should not be unduly prejudiced.

CONCLUSION

For the foregoing reasons, the motion for expedited discovery should be considered and resolved in accordance with the principles set forth above.

Respectfully submitted,

April 5, 2004

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CERTIFICATE OF SERVICE

I, Aden J. Fine, herby certify that on April 5, 2004, I caused a true and correct copy of the above motion for leave to file a brief *amici curiae*, the brief *amici curiae*, and a proposed order thereto, to be served by first-class mail, postage prepaid, upon the following:

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