

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

----- :
SONY MUSIC ENTERTAINMENT, :
INC. et al., : Case No. 04-cv-00473
 :
Plaintiffs, :
 :
- against - :
 :
DOES 1 - 40, :
 :
Defendants. :
----- :

MEMORANDUM OF AMICI CURIAE
PUBLIC CITIZEN, AMERICAN CIVIL LIBERTIES UNION AND
ELECTRONIC FRONTIER FOUNDATION
IN SUPPORT OF MOTIONS TO QUASH

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This is an action for copyright infringement in which 17 music companies seek injunctive relief, damages and fees and costs against 40 anonymous and completely unrelated individuals. Plaintiffs allege that the Doe defendants have made certain data files on their personal computers, containing copyrighted musical performances, available to the general public over the Internet in a manner that enables the public to download those files to their own computers. *Amici* argue that notwithstanding the serious violations of law alleged in the complaint, plaintiffs have not made sufficient factual showing to warrant discovery into the identities of persons who have communicated anonymously over the Internet, nor have they shown that there is personal jurisdiction over each of the 40 defendants, nor further, that all 40 defendants are properly joined in one action. As soon as we learned of this suit, *amici* filed a letter with the Court requesting an opportunity to brief these issues more fully. Although the Court scheduled a hearing on motions to quash and ordered briefing by *amici*, the ISP turned over the names before the hearing. Accordingly, we request that the Court remedy this improper disclosure by ordering the names returned or destroyed, while the motions to quash are heard, and that at a minimum, procedural safeguards be imposed before discovery is allowed.

I. STATEMENT

Exhibit A to the Complaint lists, by Internet Protocol (“IP”) address and five to ten songs apiece, 40 Does alleged to have posted songs on particular dates in November and December 2003. Plaintiffs seek to impose liability on each of the 40 individuals 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 Does 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 instances in which each individual defendant has used the facilities of a

single Internet Service Provider (“ISP”), Cablevision, to display his or her respective data files on the Internet. There is no allegation that Cablevision itself is liable for the infringements. Plaintiffs allege generally that all defendants can be found in New York, but their allegation of personal jurisdiction is based on the facts that the Does’ Internet postings can be downloaded in every jurisdiction in the United States, including New York, and that their ISP, Cablevision, can be found in New York as well.

Plaintiffs assert that they plan to use the identities of the anonymous defendants so that they can serve summons upon them. In support of this motion, plaintiffs submitted 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 piracy. The affidavit further explains the manner in which the RIAA 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 listing of songs identified by the RIAA as being offered for download; although the affidavit is made on personal knowledge, there is no statement that the affiant himself listened to each song listed or verified the existence of copyright registrations for the songs. A complete listing of songs offered for download by only three of the 40 defendants has been filed with the Court.

II. ARGUMENT

The Complaint alleges serious violations of the law with potentially serious

consequences for plaintiffs' economic welfare. In the recently completed litigation where the D.C. Circuit held the subpoena procedure of the Digital Millennium Copyright Act ("DMCA") inapplicable to the identification of subscribers who merely used an ISP's facilities to gain access to the Internet, *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 of anonymity. That plaintiffs here are now invoking Rule 45 and attempting to satisfy its standards represents an enormous step forward, for which they deserve credit. That names were nonetheless disclosed before a court-ordered hearing, however, suggests that the public still faces serious hurdles to protecting online anonymity and privacy rights.

Reluctantly, *amici* concluded that there was serious reason to question whether plaintiffs' documentation for their discovery request met the standards of Rule 45 and the First Amendment, and filed a letter with the Court February 2 to highlight our concerns. *Amici* do not believe our concerns have been mooted, even if the Does' identities have already been disclosed to Plaintiffs' agents, because this Court retains the power to compel the suppression or return of evidence improperly obtained. Such an order would still protect the rights of Doe defendants here, as well as establishing appropriate procedures to safeguard against premature disclosure in the future. We therefore expand upon the arguments from our letter of February 2, 2004, then address the current posture of this case.

A. Balancing the Right to Anonymous Speech Against the Need for Disclosure.

While Plaintiffs are correct that it is commonplace 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 page 5 of their brief, where prisoners or arrestees

sought to identify the prison or police officers who allegedly beat or otherwise mistreated them. Plaintiffs accuse defendants here of having engaged in wrongful but anonymous speech on the Internet. Because the First Amendment protects the right to speak anonymously, a subpoena for these Does' 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. Indeed, plaintiffs' representatives have repeatedly told the press that they do not necessarily want to pursue litigation against all anonymous file sharers whose identities they obtain.¹ Moreover, the anonymous publication of musical works, like other forms of performance, is speech protected by the First Amendment. *In re Verizon Internet Svces*, 257 F.Supp.2d 244, 260 (D.D.C. 2003), *rev'd on other grounds*, 351 F.3d 1229 (D.C. Cir.).²

¹Before 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>.

²Judge Bates opined that First Amendment protection for file sharing defendants was minimal because they are charged with copyright infringement and

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. *Baker v. F&F Investment*, 470 F.2d 778, 783 (2d Cir. 1972); *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). 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). Accordingly, the courts that have considered this question have adopted a several-part balancing test to decide whether to compel the identification of an anonymous Internet speaker so that he may be served with process.

This test was most fully articulated in *Dendrite v. Doe*, 775 A.2d 756 (N.J.App. 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 statements allegedly actionable; (3) allege all

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

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 anonymity.

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 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 Pa.Super. 330 (2001), *appeal reinstated*, 836 A.2d 42 (Pa. 2003), the trial court allowed an anonymous defendant to present evidence and 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 right to speak anonymously and the plaintiff’s right to identify a potential defendant, and remanded for consideration of whether evidence of actual damage had to be presented before the right of anonymous speech could be disregarded. 836 A.2d at 47-50.

Similarly, in *La Societe Metro Cash & Carry France v. Time Warner Cable*, 2003 WL 22962857 (Conn. Super.), the court applied a balancing test and considered

Enterprises, 471 U.S. 539, 560 (1985).

evidence that allegedly defamatory statements were false and caused injury before deciding to allow discovery concerning the identity of the speaker. In *Columbia Ins. Co. v. Seescandy.com*, 185 FRD 573 (N.D.Cal. 1999), the court required the plaintiff to make a good faith effort to communicate with the anonymous defendants and 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. And in *Re Subpoena to America Online*, 52 VaCir 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 posting, and required 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.”³

In opposition to this argument in a similar case pending in the District of Columbia, *UMG Recordings v. Doe*, plaintiffs have 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.” P. Mem. at 8. However, most of the cases plaintiffs cited for this proposition are irrelevant because they consider only whether a particular demand for personal information violates a generalized right of privacy under the Fourth Amendment, not the First Amendment. *Smith v. Maryland*, 442 U.S. 735 (1979); *Guest v. Leis*, 255 F.3d 325 (6th Cir. 2001); *United States v. Hambrick*, 55 F.Supp.2d 504 (D.W.Va. 1999), *aff'd mem*, 225 F.3d 656 (4th Cir. 2000). *See also AFGE v. HUD*, 351 F.3d 1229 (D.C. Cir. 1997) (cited by P. Mem. at 7). And two Supreme Court cases that plaintiffs cite involve First

³The argument for a balancing test is more fully developed at <<http://www.citizen.org/documents/Melvin%202.pdf>>.

Amendment issues not present here in *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990), the issue was whether to extend the right of academic freedom to recognize a privilege against disclosure of peer review materials, and in *Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186 (1946), the Supreme Court refused to hold that the First Amendment bars the application of the Fair Labor Standards Act to news companies.

The only support plaintiffs 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 and indeed of other kinds of information. *Black Panther Party v. Smith*, 661 F.2d 1243, 1266 (D.C. Cir. 1981). *See also AFL-CIO v. FEC*, 333 F.3d 168 (D.C. Cir. 2003); *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 qualified First Amendment right to communicate anonymously. If that were true, then *NAACP v. Alabama*, 357 U.S. 449 (1958), and *Bates v. City of Little Rock*, 361 U.S. 516 (1960), were both wrongly decided. In those cases, the Supreme Court overturned penalties imposed on the NAACP and its officers for refusing to comply with orders to identify members, whose names the NAACP of course knew, on the ground that compelled identification violated the members' right to remain anonymous. Similarly, *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995), and *Talley v. California*, 362 U.S. 60 (1960), were wrongly

decided, because the authors of the unsigned leaflets identified themselves to their printers, and the distributors revealed their faces to the persons to whom they handed the leaflets. Indeed, if plaintiffs correctly state the law, there could be no anonymous Internet communication, because every Internet user is identified to his or her ISP. Hence, every *ex parte* request to identify every Internet speaker would have to be granted.

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

In this case, of course, where the plaintiffs are respectable companies and their counsel are highly respected lawyers, it is difficult even to consider the possibility that the filing of the Complaint might not have been preceded by a meticulous investigation. On the other hand, it is not difficult for the plaintiffs to present solid 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 are owned by the plaintiffs, and to list in the affidavit or in an affidavit attachment the songs that the Doe made 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. Because this case will set a standard for all plaintiffs who seek to identify anonymous internet speakers based on claims of copyright infringement, including those who are less scrupulous and ethical than these plaintiffs, the Court should not authorize a subpoena until such individualized

evidence is presented about each Doe.

B. Personal Jurisdiction.

One of the showings that plaintiffs have failed to make with respect to most of the defendants is that the Court has personal jurisdiction over each of the 40 defendants. The federal courts have generally applied a sliding scale analysis to determine whether a defendant who has posted information on the Internet that other persons can examine and download to computers located throughout the world, to ensure that persons using the Internet are not automatically subject to suit anywhere in the world. Under the sliding scale or “Zippo” analysis, named after *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F.Supp. 1119 (W.D. Pa. 1997), defendants who passively post information on the Internet for others to examine and copy are not subject to personal jurisdiction based on their Internet postings, while defendants whose Internet sites are commercially “interactive,” in the sense that they use their sites to engage in business transactions, are subject to being sued in any state in which a substantial number of business transactions occur. Along this continuum, the greater the degree of commercial interactivity, the greater the liability for suit in a foreign jurisdiction. *E.g.*, *ALS Scan v. Digital Service Consultants*, 293 F.3d 707 (4th Cir. 2002); *Neogen Corp. v. Neo Gen Screening*, 282 F.3d 883 (6th Cir. 2002); *Mink v. AAAA Development*, 190 F.3d 333 (5th Cir. 1999). The Second Circuit has never expressly adopted this sliding scale analyses, but several decisions in this District have adopted it.⁴ Moreover, in *Bensusan Restaurant Corp. v. King*, 126 F.3d 25 (2d Cir. 1997), the

⁴ *In re Ski Train Fire*, 2003 WL 22909153 (S.D.N.Y. 2003) (“It is well settled that a court must examine the nature and quality of a defendant’s activity on its website to determine whether jurisdiction is appropriate in New York.”); *Citigroup v. City Holding Co.*, 97 F.Supp.2d 549 (S.D.N.Y. 2000) (endorsing *Zippo* continuum and finding personal jurisdiction base don highly interactive, commercial website on which New York customers could apply for loans and chat with a lending representative); *K.C.P.L., Inc. v. Nash*, 1998 WL 823657 (S.D.N.Y 1998) (endorsing *Zippo* continuum and declining to find personal jurisdiction over

appeals court refused to find that a website that infringed the trademark of a New York café owner constituted tortious action in New York under the state long-arm statute.

The defendants in this case do not have websites, but it is alleged that their computers are functioning in a manner comparable to a website, because they have opened a section of their personal computers to the Internet in a manner that permits other persons with personal computers to obtain files stored on those computers and download them. There is no contention that the “music pirates” are charging for the information that is being made available. Therefore, defendants cannot be found at the “commercially interactive” end of the sliding scale, and the mere fact that the data on their computers can be accessed by others and downloaded in New York is not a sufficient basis for subjecting them to suit here.

Moreover, although the Complaint alleges and the Whitehead Affidavit avers that the IP address that each of the defendants is alleged to have used to offer infringing material can be traced to an ISP, Cablevision, which “can be found” in New York, the attached declaration of Seth Schoen reveals a different picture. Mr. Schoen demonstrates that, by employing a more meticulous analysis than the one described by Mr. Whitehead, the various IP numbers set forth in Complaint Exhibit A can be attributed to locations outside New York. It is very likely that customers who connect to the Internet through those remote locations reside in those areas, and, more to the point, not in New York. As Mr. Schoen’s declaration shows, the technique and databases he used to obtain this information were readily accessible to plaintiffs before they filed this action. Indeed, at page 7 n4, plaintiffs implicitly acknowledge that the Court lacks personal jurisdiction over many defendants.

Accordingly, on the face of the complaint, it appears that the great majority, if

defendant who merely owned domain name Reaction.com).

not all, of the defendants are not New York residents. Additionally, as Mr. Schoen demonstrates, the record companies could have brought these actions in the correct jurisdictions by doing simple investigation using publicly-available information. Of course, Cablevision has address information for each of its customers, but there is no basis for this Court to compel Cablevision to identify defendants over whom the Court does not have personal jurisdiction. Moreover, it would be a substantial hardship for individual defendants residing out of state, who wish to protect their right to communicate anonymously on the Internet, to hire counsel to defend their rights in New York. Accordingly, if any subpoenas are to be issued to Cablevision, they should only require Cablevision to specify the states in which each defendant resides, so that Cablevision can refile this action against such individuals in the proper jurisdictions.

C. Joinder.

There is also substantial reason to question whether plaintiffs have properly joined all 40 defendants in a single action. Rule 20 reads as follows, 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 when 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, and we question whether there is 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 places throughout the country.⁵

Judge Newcomer of the Eastern District of Pennsylvania recognized these concerns in ordering severance of a similar suit against 203 Does into 203 separate lawsuits. *BMG Music et al. v. Does 1-203*, Civil Action no. 04-650 (E.D. Pa. March 5, 2005).

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.2s 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 (*reconsidered and affirmed*, Order of April 5, 2004) (Exhs. 1 and 2 to attached Declaration of Wendy Seltzer).

The U.S. District Court for the Middle District of Florida similarly ordered severance in *Interscope Records v. Does 1-25*, Case No. 6:04-cv-197-Orl-22DAB (M.D.Fla. April 1, 2004) (Exh. 3 to Seltzer Decl.). That court ordered both plaintiffs and defendants be severed because the allegations against various Defendants were

⁵In *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.

not “logically related to each other” or part of the same transaction or occurrence. *Id.*, *slip op.* at 3,⁶ *Amici* submit that the *BMG Music* and *Interscope* courts analyzed the Rule 20 requirements more carefully than those courts that granted expedited discovery without first considering the impropriety of joinder.⁷

In the Second Circuit, as elsewhere, the cases require that, for parties to be joined in the same lawsuit, they must be related **to each other**. The Second Circuit has rejected attempts to join unrelated individuals in a single action simply because they are alleged to have violated the same law in the same way. Thus, for example, in *Nassau County Assoc. of Insurance Agents, Inc. v. Aetna Life & Casualty Co.*, 497 F.2d 1151 (2d Cir. 1974), the court affirmed dismissal of 164 insurance companies from a suit claiming antitrust violations, calling the suit a “gross abuse of procedure” because plaintiffs had not alleged conspiracy or action in concert.⁸

⁶ As in *Interscope*, it appears from the face of the Complaint that not every one of the forty Defendants here “made available” songs from every Plaintiff. For example, Doe #6 is alleged to have made available 10 songs from only three plaintiffs (Capitol Records, Inc., UMG Recordings, Inc., and Sony Music Entertainment, Inc.); Doe #9 five songs from four plaintiffs (BMG Music, Arista Records, Inc., UMG, and Sony); and Doe #22 nine songs from four plaintiffs (BMG, Atlantic Recording Corp., Priority Records LLC, and UMG).

⁷ *Cf.*, e.g., *UMG Recordings v. Does 1-199*, Civil Action No. 04-093 (D.D.C. March 10, 2004) (ordering a Rule 45 subpoena issued to the ISP, written notice to the Does, and an interval of 25 days from service for the filing of motions to quash).

⁸ *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); *Kevin v. Newburger, Loeb & Co.*, 37 F.R.D. 473 (S.D.N.Y.1965) (defendant stockholders misjoined where, although “wrongdoing of each defendant was identical, the loans and securities involved and the dates on which the transactions were entered into differed ... plaintiffs had alleged unrelated acts which happened to involve violations of the same ... duty”); *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

Moreover, the allegation that the defendants all used the internet to make copyrighted music available does not make their joinder proper. Unlike, for example, *In re Vitamins Antitrust Litig.*, 2000 WL 1475705, *18 (D.D.C.), in which each of the defendants was alleged to be engaged in a single global antitrust conspiracy that was alleged in the complaint to be unlawful, there is nothing inherently unlawful about using software to make files available through the Internet. It is the provision of hundreds or thousands of copyrighted performances that is the wrongdoing alleged in this case, and the fact that each of the Doe defendants is alleged to have committed the same wrong against some or all of the same plaintiffs via the same medium does not make it appropriate to join them all in the same case, any more than every employer in Atlanta who used the mail or the telephone to deny hundreds of employment applications could be joined in the same Title VII proceeding, simply because they used the same method to communicate allegedly discriminatory decisions. *Cf. Nassau Cy. Ass'n of Ins. Agents v. Aetna Life & Cas. Co.*, 497 F.2d 1151 (2d Cir. 1974) (refusing to allow 164 insurance companies to be joined in a single action just because they allegedly cheated hundreds of agents in the same way).

Our concern that corners might be cut if hundreds of 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 hundreds of pages concerning the music files made available by three of the 40 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. However, 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

common practices and perhaps common questions of law," the independent defendants had not acted jointly).

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.

D. Suppression or Return of Disclosed Identity Information

The Court has discretion to order suppression or return of the identities that have already been disclosed to Plaintiffs. *Amici* do not know the full circumstances of the disclosure, but it was plainly at odds with the Court's order of February 3, 2004, that Defendants and *Amici* should have the opportunity to be heard on timely motions to quash, at least one of which was filed before the subpoena's return date, and the Court's subsequent hearing schedule set February 27, 2003. The Court can and should correct that erroneous disclosure by ordering that the identities mistakenly obtained not be used for any purpose.

Courts have a longstanding exclusionary rule that bars the use of evidence obtained by faulty search warrants. Indeed, this Court has ordered the exclusion of evidence obtained pursuant to an inadequate warrant, even when that exclusion denied prosecution its only identifying link to the charged defendant. *United States v. Perez*, 247 F.Supp.2d 459 (S.D.N.Y., 2003). Courts also routinely order the return of privileged material inadvertently produced, holding that the inadvertent disclosure does not waive the privilege. *See e.g., Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985).

The suppression *amici* propose here is far less onerous than exclusion. *Amici* do not seek to bar suits against copyright infringers. Rather, if the Court orders return of the improperly obtained identity information, Plaintiffs remain free to determine these Does' identities by proper means – *i.e.* by filing individual lawsuits with adequate evidence describing the infringing conduct of the individual defendant. The

Court can ensure that Plaintiffs will suffer no loss of evidence, if they re-file adequate complaints, by ordering Cablevision to retain whatever identifying information it has logged regarding these Does (including, of course, what it has already disclosed). Such an order would not prejudice Plaintiffs, therefore, while granting Defendants the proper procedural protections for important privacy and speech rights.

III. CONCLUSION

The Court should order the subpoenas quashed and the suppression of Defendants' disclosed identities in accordance with the principles set forth above.

Respectfully submitted,

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April 7, 2004

CERTIFICATE OF SERVICE

I hereby certify that, on this 7th day of April, 2004, I caused copies of the foregoing MEMORANDUM OF AMICI CURIAE PUBLIC CITIZEN, AMERICAN CIVIL LIBERTIES UNION AND ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF MOTIONS TO QUASH to be served by facsimile and first-class mail, postage prepaid, on counsel for plaintiffs as follows:

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