

Randall J. Cadenhead
(404) 269-6761
randy.cadenhead@cox.com

April 19, 2004

Judge Willis B. Hunt, Jr.
1788 Richard B. Russell Federal Building
and United States Courthouse
75 Spring Street, S.W.
Atlanta, GA 30303-3309

Re: Motown Record Company, L.P., et al. v. Does 1-252
No. 1:04-CV-0439
Response to Plaintiffs' Subpoena

Dear Judge Hunt:

Cox Communications, Inc. ("Cox") was served on March 17, 2004 with a subpoena in the above case, issued pursuant to your order of March 1, 2004. As explained below, Cox mailed notices to its affected customers as called for in your order. Two such customers have, to date, filed motions challenging the subpoena and the underlying action upon which the subpoena is based. Cox believes that the issues raised by these parties, Does 106 and 207, are representative of all the Doe Defendants and requests you to determine whether resolution of the pending motions of these parties should apply equally to all 252 Defendants.

Cox has collected the information responsive to the subpoena and thus submits that none will be lost and no prejudice will come to Plaintiffs' by delay of Cox's response pending resolution of the motions before you. The remaining 250 Defendants would be materially prejudiced, however, if their personal information is disclosed before you resolve the pending motions and determine their broader applicability. Accordingly, and as detailed below, Cox respectfully asks that it not be required to respond to Plaintiffs' subpoena until such time. Cox will preserve its responsive information pending your decision. However, to resolve any question as to the continued availability of the subpoenaed information, Cox is willing to provide the same to you for *in camera* inspection and retention upon your request.

COMPLIANCE WITH NOTICE

Upon receipt of the above subpoena, Cox undertook a diligent search of its records to attempt to identify the requested customer name, address, phone number, email address and

Cable Modem Media Access Control (“CM MAC”) address for each of the Internet Protocol (“IP”) Addresses listed by Plaintiffs on the date and time specified for each.

Although not a named party to this action, Cox, in the interest of its subscribers, the judicial process and the law, undertook a diligent effort to comply with the notice which was appropriately called for in your discovery order. Written notice of the subpoena and the specific customer data found was sent by First Class U.S. Mail to the address contained in our customer records for each of the affected subscribers. With four exceptions, those notices returned as undeliverable were later provided to the customers via express delivery service. The four notices that could not be delivered were to Does 21, 100, 160 and 209.

SOURCE OF DATA PROVIDED

Cox has used its best efforts to obtain the most responsive information from its records. Cox does not, however, maintain its records for the purpose of identifying Doe defendants in actions such as brought by Plaintiffs in this case. As such, Cox cannot represent with certainty that the subscriber information found necessarily reflect the subscribers actually assigned specific Doe defendants’ IP Addresses on the noted dates and times.

Further, the subscriber information from an account, even if correctly associated with an IP Address, does not necessarily identify the specific individual who may have been engaged in the alleged acts of copyright infringement described by Plaintiffs. Circumstances affecting such accuracy include the possibility of shared accounts or computers, unauthorized access to a computer or modem, and various kinds of computer hacking. Accordingly, Cox makes no representation as to whether the subscribers actually engaged in the conduct alleged by Plaintiffs.

SUBSEQUENT RELEVANT RULINGS

In your discovery order, you deemed certain issues raised by the Amici to be premature. Among these were the questions of proper joinder of the 252 Doe Defendants and personal jurisdiction of the Court over each Defendant. For the benefit of the Court, Cox notes that none of the subscribers identified is shown as residing in the Northern District of Georgia. Further, Cox advises the Court that, to the best of its knowledge and belief, Cox has no customers for whom service is provided within the Northern District. In fact, the customers that Cox has been able to identify come from a total of 15 different states. Only two reside in the state of Georgia, and both reside outside the Northern District.

Since the entry of your March 1 discovery order, Cox has learned of orders entered by courts in two other districts which reached conclusions contrary to your determination that joinder and jurisdiction were premature. See Order in *BMG Music, et al. v. Does 1-203*, U.S. District Court, Eastern District of Pennsylvania, Civil Action No. 04-650, April 5, 2004, referencing its prior Order of March 5 in the same action; and Order in *Interscope Records, et al. v. Does 1-25*, U.S. District Court, Middle District of Florida, Case No. 6:04-cv-197-Orl-22 DAB, April 1, 2004, copies of which are attached. In light of the facts above and herein, Cox submits that these issues are now ripe for your consideration as to all the Defendants.

PREVIOUSLY PREMATURE ISSUES

While not a party to this case, Cox is far from uninterested, both as to the rights of its customers and the administration of justice. As an interested non-party, Cox believes it has a right and responsibility to suggest that you consider the issues in the motions before you to be applicable to all 252 Defendants. See Memorandum Opinion in *Recording Industry Association of America v. Verizon Internet Services, Inc.*, U.S. District Court, District of Columbia, Civil Action No. 03-MS-0040 (JDB), April 24, 2003, a copy of which is attached; reversed on other grounds, U.S. Court of Appeals, D.C. Circuit, December 19, 2003. Further, the personal information of each Defendant is equally private and protected by law from disclosure, except under specific and limited circumstances. 47 U.S.C.A. §551(c). As the provider of these statutorily protected services, Cox asks that you weigh as to all Defendants the pending motions before allowing Plaintiffs to obtain the benefit of discovery that might not otherwise be allowed.

COMMONALITY OF DEFENSES

In its present posture, this action is brought against 252 individuals, identified only by numbers. They have two things in common: being Defendants in this suit and customers of Cox. Two courts have directly considered the issues raised by Does 106 and 207 and each has ordered dismissal as to all but the first numbered defendant before them. Further, each has permitted a subpoena to issue only as to that one remaining defendant. Plaintiffs have access to other orders which they assert reach contrary substantive decisions, but none of which Cox is aware have ruled as to some defendants and not others.

Cox suggests that you consider the orders in the *BMG* and *Interscope* cases and determine their applicability to all 252 Defendants before Cox must answer Plaintiffs' subpoena. Under Rule 21 of the F.R.C.P, you have the authority on your own motion to dismiss any and all mis-joined Defendants. The personal information of these Defendants should not be prematurely disclosed before that decision.

In an action where the defendants are unnamed numbered parties, have not been served and are not present locally, they should not be expected or required to all come to this jurisdiction to defend themselves when motions raised by two apply to all. Cox submits that you give due consideration to the injustice that would be caused by requiring 252 Defendants to travel to this jurisdiction to raise for themselves the lack of personal jurisdiction in order to protect the statutorily established privacy of their personal information.

EQUITABLE CONSIDERATIONS

In fairness to Plaintiffs and in candor to you, Cox acknowledges that it recommended to counsel for Plaintiffs that they obtain subpoenas from this District for information concerning Cox customers so as to eliminate any issues concerning service of process on the company. This discussion, however, did not, and could not, extend to a waiver of defenses belonging to the Defendants or to the jurisdiction of this Court over their persons.

Plaintiffs may argue that they cannot know the location of Defendants without the results of their discovery. In some of the cases brought elsewhere this may be true. However, the information already captured by Plaintiffs in their investigation not only

identifies that the target is a Cox customer, but the city or local area where Cox provides service to the customer. In such cases, Plaintiffs can readily bring their suits in the districts where the individuals reside.

The individual Defendants amassed by Plaintiffs in this action are more than merely numbers 1 through 252. They have individual names, come from unrelated places, have allegedly copied different works and probably have never had direct contact with each other. While they are all alleged to have copied one or more of Plaintiffs' works, each has copied different works and is likely to have personally unique arguments or defenses to Plaintiffs' individual claims. What they do have in common are the defenses raised by Does 106 and 207.

CONCLUSION

For these reasons, to protect the privacy of the personal information of all the Doe Defendants, and to render consideration by the Court meaningful to all the Defendants, Cox respectfully suggests that you apply your motion rulings to all Doe Defendants and that you do so before any decision requiring compliance with Plaintiffs' subpoena. Should you require, Cox is willing to provide for your inspection the information it has collected in order to assess the applicability of your rulings as to all Defendants.

Should you require compliance with the subpoena, Cox further asks you determine whether information concerning Does 21, 100, 160 and 209 should be provided in the absence of notice to the individuals. Finally, Cox requests that any issue as to Cox's expenses for compliance be addressed as proposed above.

Respectfully submitted,

Randall J. Cadenhead
1400 Lake Hearn Drive
Atlanta, GA 30319
Telephone: (404) 269-6761
Facsimile: (404) 269-1476
Attorney for Cox Communications, Inc.
Georgia Bar Number 101625

cc: Counsel for Parties of Record
Encl.

CERTIFICATE OF SERVICE

I hereby certify that, on this 19th day of April, 2004, I caused copies of the foregoing Response to Plaintiffs' Subpoena to be served by Federal Express Overnight Delivery on counsel for Plaintiffs as follows:

James A. Lamberth
Troutman Sanders, LLP
Suite 5200, Bank of America Plaza
600 Peachtree Street, NE
Atlanta, GA. 30308-2216

Neville J. Bedford
148 Narrows Road
Bristol, RI 02809-4417

Robert S. Salter
Salter & Michaelson
321 South Maine Street
Providence, RI 02903-7128

Cindy A. Cohn
Wendy Seltzer
454 Shotwell Street
San Francisco, CA 94110

Paul Alan Levy
Charlotte Garden
Public Citizen Litigation Group
1600 – 20th Street, NW
Washington, DC 20009

Randall J. Cadenhead
1400 Lake Hearn Drive
Atlanta, GA 30319
Telephone: (404) 269-6761
Facsimile: (404) 269-1479

Attorney for Cox Communications, Inc.