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**PLAINTIFFS' OPPOSITION TO JANE DOE'S MOTION TO QUASH AND RESPONSE TO THE MEMORANDUM OF *AMICI CURIAE* PUBLIC CITIZEN, *ET AL.***

Plaintiffs respectfully file this opposition to the letter motion filed by "Jane Doe" seeking to quash Plaintiffs' subpoena to Cablevision and in response to the Memorandum of *Amici Curiae* Public Citizen, American Civil Liberties Union, and Electronic Frontier Foundation.

Jane Doe's letter motion must be denied for two reasons. First, the motion is moot. There is no live controversy for the Court to resolve because Cablevision has complied with the subpoena. The Court thus need not rule on any of the issues raised by Jane Doe.

Second, even if the Court entertained Jane Doe's letter motion, it provides no basis for retroactively quashing the subpoena. Plaintiffs have shown good cause to justify discovery from Cablevision. Plaintiffs have alleged a prima facie case of copyright infringement against all of the Defendants and cannot pursue their claims without the identifying information provided by Cablevision. Moreover, Plaintiffs suffer irreparable harm every day that Jane Doe and the other Defendants continue to disseminate Plaintiffs' works unlawfully.

Nor does the First Amendment provide any basis for quashing the subpoena. Jane Doe has no right to engage in copyright infringement and has never asserted that she was engaging in constitutionally protected speech when Plaintiffs caught her disseminating copyrighted works over the Internet. Plaintiffs have submitted to the Court sworn testimony describing the evidence that Plaintiffs have gathered concerning the infringement of all Defendants, including Jane Doe. That evidence demonstrates that Jane Doe is a significant copyright infringer who is disseminating hundreds of Plaintiffs' works without their authorization.

Finally, the Court must reject the personal jurisdiction and joinder issues that *amici* seek to inject into this case. No Defendant has raised those issues, nor do the arguments that *amici*

raise provide any basis for quashing a subpoena in this case. Jane Doe will have a full and fair opportunity to raise such issues – if she wants to – after Plaintiffs have amended their complaint to name her. In any case, *amici's* arguments about jurisdiction and joinder lack merit.

For all of these reasons, the Court should deny Jane Doe's letter motion and reject the arguments made by *amici*.

## BACKGROUND

### *Plaintiffs' Claims*

Plaintiffs in this case are major recording companies who own copyrights in sound recordings. Collectively, they face a massive problem of digital piracy over the Internet. Every month, copyright infringers unlawfully disseminate billions of perfect digital copies of Plaintiffs' copyrighted sound recordings over peer-to-peer ("P2P") networks. *See Lev Grossman, It's All Free*, TIME, May 5, 2003. A P2P network is an online media distribution system that allows users to transform their computers into an interactive Internet site, disseminating files for other users to copy. The most infamous P2P network was the Napster system, which was enjoined by a federal court. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). Other P2P networks have, however, arisen in Napster's wake. As a direct result, Plaintiffs have sustained devastating financial losses. *See* <http://www.riaa.com/pdf/2002yrendshipments.pdf> (detailing retail sales declines of 7% in 2000, 10% in 2001, and 11% in 2002).

P2P users who disseminate (upload) and copy (download) copyrighted material violate the copyright laws. *See A&M Records, Inc.*, 239 F.3d at 1013-14; *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 1069 (2004). Copyright infringement over P2P networks is widespread, however, because users can conceal their

identities by means of an alias. Copyright owners can observe infringement occurring on P2P networks, but cannot (without assistance) identify the true names and locations of the infringers.

The Defendants in this case are active participants in the Fast Track network, the largest current P2P network.<sup>1</sup> Second Declaration of Jonathan Whitehead ¶ 4 ("Second Whitehead Decl.") (filed together with this Memorandum). As such, each Defendant offers copyrighted sound recordings stored on his or her computer for others to download and downloads copyrighted sound recordings from other users of the P2P network. Plaintiffs caught each of the Defendants in this case openly disseminating sound recordings whose copyrights are owned by Plaintiffs. By logging onto the P2P network, Plaintiffs viewed the files that each Defendant was offering to other users of the network. Each Defendant in this case is a significant infringer: each has chosen to make available from his or her computer hundreds or thousands of sound recordings, whose copyrights are owned by various of the Plaintiffs. *See* Declaration of Jonathan Whitehead in Support of Plaintiffs' *Ex Parte* Application to Take Immediate Discovery ¶ 17 ("Whitehead Decl."); Second Whitehead Decl. ¶ 5.

As discussed in the Whitehead Declarations and summarized below, *see infra* pp. 9-10, upon finding each Defendant disseminating large numbers of copyrighted works, Plaintiffs gathered substantial evidence of each Defendant's illegal conduct. Nonetheless, Plaintiffs could not ascertain the name, address, or any other contact information for any of the Defendants. Whitehead Decl. ¶¶ 16, 21. Plaintiffs could, however, identify the Internet Protocol ("IP") address from which each Defendant was unlawfully disseminating Plaintiffs' copyrighted works.

An IP address is a 10-digit number, such as 12.34.255.255, that specifically identifies a

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<sup>1</sup> The only Defendant who used a different P2P network has already contacted Plaintiffs (as a result of the notice sent by Cablevision) and has agreed to a settlement with the Plaintiffs. Once all of the paperwork is complete, Plaintiffs intend to dismiss that Defendant.

particular computer using the Internet. Second Whitehead Decl. ¶ 7. Using the IP address, Plaintiffs determined that Cablevision, an ISP headquartered in New York City with a large part of its subscriber base in the New York metropolitan area, serves as each Defendant's ISP. Cablevision maintains logs that match IP addresses with subscribers. *Id.* By looking at its IP address logs, Cablevision can (and, in this case, did) match the IP address, date, and time with the subscriber who was using the IP address when Plaintiffs observed the infringement. Thus, Cablevision – and only Cablevision – could identify the Defendants in this case.

#### *Procedural History*

After filing the Complaint, Plaintiffs sought leave to issue limited discovery to Cablevision to ascertain the identities of the Defendants. *See Plaintiffs' Ex Parte Application to Take Expedited Discovery* (Jan. 26, 2004). The Court granted that motion, *see Jan. 26, 2004 Order*, and Plaintiffs served the subpoena on February 2, 2004. On February 3, 2004, the Court issued a second order re-affirming that its "January 26, 2004 order remains in effect" and establishing a process for the resolution of any motions to quash. *See Feb. 3, 2004 Order*. The Court directed Cablevision to notify Defendants of the subpoena within five business days. *Id.* It further ordered that if any of the "defendants wished to move to quash the subpoena, they shall do so before the return date of the subpoena," which was February 23, 2004. *Id.* at 2.

Cablevision sent the required notice to the Defendants. *See Memorandum of CSC Holdings Inc. in Response to the Court's February 27, 2004 Order Concerning Plaintiffs' Subpoena to Cablevision ("Cablevision Mem.")*. On February 19, 2004, Jane Doe (through her attorney, Mr. Hanko) sent a letter to this Court and a separate letter to Cablevision to demand that Cablevision file a motion to quash. *See Letter from Kenneth Hanko to Alfred Kiefer, Feb. 19, 2004; Letter from Kenneth Hanko to the Honorable Denny Chin, Feb. 19, 2004*. Jane Doe did not, however, file a motion. On February 20, Mr. Kiefer from Cablevision spoke with

Mr. Hanco and informed him that Jane Doe needed to file a motion to quash in order to stop Cablevision from responding to the subpoena. Mr. Hanco did not indicate that he would be filing such a motion and made no suggestion that he intended his letter to the Court to be such a motion.<sup>2</sup> See Declaration of Alfred G. Kiefer Jr. ¶¶ 5-7 (attached to Cablevision Mem.). Because no subscriber moved to quash prior to the return date and Cablevision had no valid objection to the subpoena, it produced the information to Plaintiffs on February 23, 2004.

On February 27, 2004, the Court entered an order construing Mr. Hanco's letter as a motion to quash and directing Cablevision to notify the other Defendants that they could file a motion to quash by March 19, 2004. See Feb. 27, 2004 Order. Both Plaintiffs and Cablevision notified the Court that Cablevision had already complied with the subpoena, and Plaintiffs informed the Court that they believed Mr. Hanco's letter motion was moot. See Letter from Christopher Jensen to the Honorable Denny Chin, March 2, 2004; Cablevision Mem. at 5. The Court later extended the deadline for motions to quash until April 8. See March 25, 2004 Order.

On April 7, 2004, Jane Doe sent a short letter to the Court indicating her intention to rely on her counsel's February 19, 2004, letter as her "formal motion to quash." See Letter from Jane Doe to the Honorable Denny Chin, April 7, 2004. No other Defendant filed a motion to quash. Jane Doe's letter refers to two grounds for quashing the subpoena: 1) Plaintiffs made an inadequate factual showing in support of the subpoena, and 2) Cablevision's disclosure of information compromised her "First Amendment right to anonymity." *Id.*<sup>3</sup> On April 8, 2004,

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<sup>2</sup> Plaintiffs received a copy of Mr. Hanco's letter after Cablevision had responded to the subpoena. See Letter from Christopher Jensen to the Honorable Denny Chin, March 2, 2004.

<sup>3</sup> Neither Mr. Hanco's letter nor Jane Doe's letter mentions personal jurisdiction or joinder. Rather, they focus only on the claim that Plaintiffs "have not made a sufficient factual showing to warrant discovery concerning the unnamed defendants." Letter from Kenneth Hanco to the Honorable Denny Chin, Feb. 19, 2004 ("On February 2, 2004, the Electronic Frontier Foundation, Public Citizen and the American Civil Liberties Union submitted a letter to the

*amici* filed a memorandum in support of any motions to quash, arguing the right to anonymity, as well as several other issues.

## ARGUMENT

### I. THE ISSUES RAISED BY JANE DOE AND AMICI ARE MOOT.

Cablevision's compliance with the subpoena renders Jane Doe's motion to quash moot. Because Cablevision has already produced the information sought by the subpoena, there is no longer a live controversy. *See United States v. Deak-Perera Int'l Banking Corp.*, 610 F.2d 89, 89 (2d Cir. 1979) (dismissing case as "moot" once party complied with discovery request). As the Second Circuit held in a case in which one party sought discovery of information about another party from the government: "[n]o live controversy regarding the propriety of disclosure exists in this case because the government already has disclosed the documents in question pursuant to the district court order." *S.R. Mercantile Corp. v. Maloney*, 909 F.2d 79, 81 (2d Cir. 1990); *see also In re Subpoena Issued to Friedman*, 350 F.3d 65, 67 (2d Cir. 2003) (holding that appeal was moot once party had agreed to comply with discovery request); *In re Subpoenas Served Upon Wood*, 430 F. Supp. 41, 44 (S.D.N.Y. 1977) (noting that once party had "fully complied with subpoena," the court "denied as moot a motion to quash"); *Office of Thrift Supervision v. Dobbs*, 931 F.2d 956, 957 (D.C. Cir. 1991).

*Amici* make a half-hearted attempt to rescue Jane Doe's motion from mootness, but their arguments lack merit. First, *amici* cite the criminal law's exclusionary rule, which bars the use of illegally obtained evidence. *Amici Mem.* at 16. The Second Circuit has made clear, however, that the exclusionary rule does not extend to non-criminal contexts. *See Townes v. City of*

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Court pointing out that plaintiff have not made a sufficient factual showing to warrant discovery concerning the unnamed defendants. On behalf of my client, I join in the arguments set forth in the February 2, 2004, letter.”).

*New York*, 176 F.3d 138, 145-46 (2d Cir. 1999). In any case, Plaintiffs did not obtain the information illegally and thus the exclusionary rule could not apply. Second, *amici* note that courts sometimes order the return of privileged material that is inadvertently disclosed during discovery. *Amici Mem.* at 16. That has absolutely no bearing on this case. The information that Cablevision supplied is not privileged, and Cablevision did not produce it inadvertently. Moreover, courts do not require return of material inadvertently produced where, as here, such material is otherwise discoverable. *See, e.g., Carrion v. City of New York*, 2002 WL 31093620, at \*4 (S.D.N.Y. Sept. 18, 2002) (limiting use of privileged information improperly obtained, but permitting use of information improperly obtained that was otherwise discoverable).

Because Cablevision has complied with the subpoena, Plaintiffs have the information they need to pursue this lawsuit. The Court should thus deny Jane Doe's motion as moot.

## **II. PLAINTIFFS MET THE GOOD CAUSE STANDARD FOR EXPEDITED DISCOVERY.**

Even if this Court considers the merits of Jane Doe's arguments, the Court must still deny the motion. Plaintiffs have satisfied the "good cause" standard required to take expedited discovery. *See* Plaintiffs' Mem. of Law in Support of Plaintiffs' *Ex Parte* Application to Take Immediate Discovery ("Plaintiffs' App.") at 5-8.

Indeed, it is an abuse of discretion to deny discovery where a plaintiff can show such discovery is likely to reveal the Doe defendants' identities. *See Dean v. Barber*, 951 F.2d 1210, 1215 (11th Cir. 1992); *Valentin v. Dinkins*, 121 F.3d 72 (2d Cir. 1997); *see also* Plaintiffs' App. at 4. Courts regularly authorize discovery from ISPs to identify defendants using the Internet to break the law. *See, e.g., United Parcel Serv. of Am., Inc. v. John Does One Through Ten*, No. 03cv1639, 2003 WL 21715365, \*1 (N.D. Ga. June 13, 2003) (authorizing expedited discovery from ISPs to determine the identity of defendants). In 25 parallel cases, courts have – as this

Court did – authorized expedited discovery from ISPs to identify defendants infringing copyrights over P2P networks. See Order, *Warner Bros. v. John Does 1-43* (S.D.N.Y. Feb. 10, 2004); *Capitol Records, Inc. v. John Does 1-250* (S.D.N.Y. Jan. 26, 2004); *Elektra Entertainment Group, Inc. v. Does 1-7*, No. 3:04-CV-00607 (D.N.J. Feb. 17, 2004); Memorandum Opinion, *UMG Recordings v. Does 1-199* (D.D.C. Mar. 10, 2004); *Motown Record Co., L.P. v. Does 1-252* (N.D. Ga. Mar. 1, 2004); *Virgin Records America, Inc. v. Does 1-44* (N.D. Ga. Mar. 3, 2004); Order, *Fonovisa, Inc. v. Does 1-67* (D. Col. Apr. 8, 2004); Order, *Maverick Recording Co. v. Does 1-12* (D. Col. Apr. 8, 2004); Order, *Motown Record Co. v. Does 1-5* (D. Col. Apr. 8, 2004); Order, *Motown Record Co. v. Does 1-3* (D. Col. Apr. 8, 2004); Order, *Warner Bros. Records Inc. v. Does 1-9* (E.D. Mich. Apr. 5, 2004); Order, *Arista Records, Inc. v. Doe* (N.D. Cal. Apr. 5, 2004); Order, *Atlantic Recording Corp. v. Does 1-13* (E.D. Va. Apr. 2, 2004); Order, *Fonovisa, Inc. v. Does 1-2* (E.D. Va. Apr. 2, 2004); Order, *London-Sire Records, Inc. v. Does 1-4* (C.D. Cal. Apr. 2, 2004); Order, *Priority Records LLC v. Doe* (S.D. Ind. Apr. 2, 2004); Order, *Atlantic Recording Corp. v. Does 1-3* (D.D.C. Mar. 31, 2004); Order, *BMG Music v. Does 1-3* (D.D.C. Mar. 31, 2004); Order, *Arista Records, Inc. v. Does 1-143* (E.D. Tex. Mar. 30, 2004); Order, *Capitol Records, Inc. v. Does 1-2* (C.D. Cal. Mar. 30, 2004); Order, *Warner Bros. Records Inc. v. Does 1-4* (C.D. Cal. Mar. 30, 2004); Order, *Interscope Records v. Does 1-4* (D. Ariz. Mar. 30, 2004); Order, *Interscope Records v. Does 1-7* (M.D. Tenn. Mar. 29, 2004); Order, *Interscope Records v. Does 1-5* (S.D. Ind. Mar. 25, 2004); Order, *Virgin Records America, Inc. v. Doe* (D. Md. Apr. 19, 2004).<sup>4</sup>

In all of these cases, plaintiffs do not know who the defendants are or where they reside. Without discovery, plaintiffs injured by conduct over the Internet will never be able to enforce

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<sup>4</sup> Plaintiffs are providing these orders to the Court in an appendix.

their rights. Such discovery is particularly critical here because Plaintiffs suffer irreparable harm every day that Defendants continue to disseminate Plaintiffs' copyrighted works without authorization. *See Merkos L'inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94, 96 (2d Cir. 2002) (a prima facie case of copyright infringement generally is irreparable harm).

Jane Doe contends that "plaintiffs have not made a sufficient factual showing to justify production of my personal information." Letter from Jane Doe to the Honorable Denny Chin, April 7, 2004. Plaintiffs, however, do not need to provide additional evidence in order to *receive* a response to a subpoena they lawfully served. Nonetheless, Plaintiffs supported their motion to take immediate discovery with substantial evidence. With respect to each Defendant, Plaintiffs specified the IP address, date, and time of the infringement; that information uniquely specified a Cablevision subscriber as the source of the infringement. Whitehead Decl. ¶ 16. Plaintiffs downloaded a list of the files disseminated by each Defendant and downloaded several files being disseminated by each Defendant to confirm that Plaintiffs owned the copyrights of the sound recordings. *Id.* ¶¶ 16, 17. For each Defendant, Plaintiffs provided a list of several copyrighted sound recordings that the Defendant disseminated without authorization. *See* Exhibit A to the Complaint. That list, however, is only a small subset of the copyrighted sound recordings that each Defendant is unlawfully disseminating. As explained in the two Whitehead Declarations, each Defendant was offering hundreds of additional copyrighted sound recordings owned by various of the Plaintiffs without authorization. *See* Whitehead Decl. ¶ 17; Second Whitehead Decl. ¶ 5.

Finally, Plaintiffs provided the Court, as an example, detailed lists of the hundreds of files being distributed by three of the Defendants; these lists are "screen shots" showing precisely what copyrighted works each Defendant was disseminating to other users. *See* Exhibit 1 to

Whitehead Decl. Plaintiffs also submitted a sworn declaration that they possess virtually identical evidence for each of the other Defendants, including Jane Doe. *See* Whitehead Decl. ¶ 17; Second Whitehead Decl. ¶ 5.

Plaintiffs thus have provided voluminous evidence of infringement by Defendants, including Jane Doe, and seek only limited information to vindicate their rights. Plaintiffs have satisfied the "good cause" standard required to take expedited discovery to uncover her identity.

### **III. THERE IS NO RIGHT TO ENGAGE IN ANONYMOUS COPYRIGHT INFRINGEMENT.**

Jane Doe's only other argument is that Cablevision's compliance with the subpoena "compromise[ed] my First Amendment right to anonymity." Letter from Jane Doe to the Honorable Denny Chin, April 7, 2004. As with her first argument, Jane Doe offers no explanation or legal citation to support her claim, although *amici* try to fill the void.

Jane Doe has no right to engage in copyright infringement, anonymously or otherwise. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555-60 (1985); *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 574-78 (1977). Jane Doe does not deny that she is committing massive copyright infringement and makes no claim that she was engaging in constitutionally protected expression when Plaintiffs caught her disseminating their copyrighted works. Absent such an assertion, there is no First Amendment right at issue in this case.

Because Jane Doe was not engaging in constitutionally protected expression, *amici* attempt to create a generalized "qualified privilege" in anonymity on the Internet, *see Amici Mem.* at 4, but there is no such principle of law. Individuals have no expectation of privacy (under the First, Fourth, or Fifth Amendments) that prevents disclosure of the business records of third parties, such as ISPs. "[A] person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979);

*United States v. Miller*, 425 U.S. 435, 442-45 (1976). Just as telephone users forfeit the expectation that the telephone company will conceal records of their calls, *see Smith*, 442 U.S. at 742, ISP subscribers have no legitimate expectation that ISPs will conceal their identities in response to legal process. *See Guest v. Leis*, 255 F.3d 325, 335-36 (6th Cir. 2001) ("[C]omputer users do not have a legitimate expectation of privacy in their subscriber information because they have conveyed it to another person – the system operator."); *United States v. Hambrick*, 55 F. Supp. 2d 504, 507-09 (D. W. Va. 1999), *aff'd*, 225 F.3d 656 (4th Cir. 2000) (table); *M.K. v. U.S. Department of Justice*, 1996 WL 509724, at \*3 (S.D.N.Y. 1996) ("A telephone user has no expectation of privacy in the billing records maintained by the telephone company, even though these records concern calls made from his own telephone line."); *United States v. Cox*, 190 F. Supp. 2d 330, 332 (N.D.N.Y. 2002) (no right to privacy in subscriber information given to ISP).

This is especially true here. Each of the Defendants in this case chose to log onto a P2P network and to make available the contents of his or her computer to millions of other people. As one court explained in rejecting the arguments *amici* make here, given that an ISP subscriber "opens his computer to permit others, through peer-to-peer filesharing, to download materials from that computer, it is hard to understand just what privacy expectation he or she has after essentially opening the computer to the world." *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 267 (D.D.C. 2003), *rev'd on other grounds*, 351 F.3d 1229 (D.C. Cir. 2003); *see also United States v. Kennedy*, 81 F. Supp. 2d 1103, 1110 (D. Kan. 2000) (activation of file sharing mechanism shows no expectation of privacy).

Moreover, Defendants cannot reasonably expect Cablevision to preserve their anonymity because Cablevision informs them, in no uncertain terms, that copyright infringement is forbidden and that it will disclose their names in response to legal requests. *See Cablevision*

Mem. at 2 (citing Cablevision's terms of service informing users that it will "disclose any information as necessary to satisfy any law, regulation, or other governmental request"). Thus, although *amici* wish to protect the Defendants' anonymity, Defendants have already forfeited it.<sup>5</sup>

*Amici* try to distinguish this well-established body of case law as "irrelevant," by arguing that the cases consider privacy interests under the Fourth Amendment, not the First Amendment. *Amici* Mem. at 7. That analysis is flawed because it presupposes that the Defendants have a First Amendment interest in anonymously violating the copyright laws. As discussed above, they do not. Moreover, the Supreme Court has repeatedly rejected claims that an assertion of First Amendment interests compels a heightened level of scrutiny prior to issuance of (or response to) a subpoena or other judicial process. See *University of Pa. v. EEOC*, 493 U.S. 182, 199-200 (1990); *Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 192-93 (1946); *Reporters Comm. for Freedom of the Press v. American Tel. & Tel. Co.*, 593 F.2d 1030, 1050 n.67 (D.C. Cir. 1978) (rejecting requirement that journalists receive notice prior to issuance of subpoenas for toll calling records).

*Amici* further discuss several cases in which courts have engaged in a balancing test before ordering the disclosure of an anonymous speaker's identity. *Amici* Mem. at 5-7. *Amici* ask the court to "draw[] by analogy" from cases involving subpoenas to identify journalistic sources. *Amici* Mem. at 5. Those cases rest on far more significant First Amendment interests

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<sup>5</sup> *Amici* claim that a pamphleteer does not give up his right to anonymity if he is recognized on the street by a passer-by. *Amici* Br. at 8-9. But that claim has no relevance here. While the government may be limited in its ability to require pamphleteers to disclose their identities prior to and as a condition on speaking, the First Amendment imposes no limit on the authority of a subpoena or other legal process to command the passer-by to provide information in his or her possession – the identity of the pamphleteer. It is the latter situation we have here. See also *Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 197-200 (1999) (contrasting invalid requirement that petitioners wear an identification badge while petitioning with valid requirement that petitioners sign an affidavit attesting to signatures obtained after petitioning).

than *amici* can muster here. *Cf. Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) (the First Amendment "bears less heavily when speakers assert the right to make other people's speeches"). Even if, however, the Court were to apply the same standard here, Plaintiffs would easily satisfy it. To obtain the identity of a journalistic source, a plaintiff need show only that the information is relevant, the information cannot be obtained by another means, and there is a compelling interest for providing the information. *See Carey v. Hume*, 492 F.2d 631, 632 (D.C. Cir. 1974); *Baker v. F&F Investment*, 470 F.2d 778, 783 (2d Cir. 1972). Notably, *Carey* does not require the court to examine the merits of a plaintiff's claims. Rather, a plaintiff must show that the information is sought in good faith, is unavailable from any other source, and is central to the plaintiff's claim. 492 F.2d at 632. Plaintiffs in this case have alleged a prima facie case of copyright infringement, *see Feist Publ'ns Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991) (requiring allegations of ownership of a copyright and violation of an exclusive right), and there is no dispute that the limited information sought is unavailable from any other source and central to Plaintiffs' claims.

*Amici*, citing other "balancing" cases, nonetheless argue that the Court should look at the merits of Plaintiffs' claims to determine whether Plaintiffs have evidence to support their cause of action. *Amici* Br. at 6-7. The merits of Plaintiffs' claims, however, are not germane at this stage of the proceedings. Even if they were, however, Plaintiffs have exceeded the standards in any of the cases cited by *amici*. As discussed above, Plaintiffs have already provided sworn testimony concerning the evidence supporting their claims, including downloads of copyrighted songs actually being disseminated and lists of hundreds of other sound recordings being unlawfully disseminated by each Defendant, including Jane Doe. *See supra* pp. 9-10; Second

Whitehead Decl. ¶ 5.6 As the District Court for the District of Columbia held in examining virtually identical facts in the *Verizon* case, such evidence more than satisfies the standards in any of the cases cited by *amici*. See *Verizon*, 257 F. Supp. 2d at 263 n.22.7

**IV. THE COURT SHOULD NOT DECIDE THE ADDITIONAL ARGUMENTS RAISED BY AMICI AND, IN ANY CASE, THOSE ARGUMENTS ARE MERITLESS.**

*Amici* raise two issues – personal jurisdiction and joinder – that neither Jane Doe nor any other Defendant has raised. It is well settled that "*amicus* cannot raise or implicate new issues that have not been presented by the parties." *Russell v. Board of Plumbing Examiners*, 74 F. Supp. 2d 349, 351 (S.D.N.Y. 1999), *aff'd*, 2001 WL 15628 (2d Cir. Jan. 5, 2001). See also *McCleskey v. Zant*, 499 U.S. 467, 523 n.10 (1991) ("It is well established . . . that this Court will not consider an argument 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 Court should thus decline to consider *amici's* arguments. *Concerned Area Residents for the Environment v. Southview Farm*, 834 F. Supp. 1410, 1413 (W.D.N.Y. 1993).

Moreover, given that no party has raised any of the issues mentioned by *amici*, the issues are not ripe for judicial review. It is axiomatic that legal issues should not be resolved in the abstract. See *Abele v. Markle*, 452 F.2d 1121, 1124 (2d Cir. 1971). The federal courts "resolve real issues between genuine adversaries" and do not "give advisory opinions with respect to

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6 *Amici's* principal complaint is that Plaintiffs provided a sample, rather than the entirety, of their evidence. *Amici* Mem. at 9. Plaintiffs provided a sample because there is no sound reason for requiring the submission of boxes of documents to support good cause for a subpoena. Plaintiffs have provided sworn testimony that they have evidence with respect to *all* Defendants that mirrors the samples provided. See Whitehead Decl. ¶ 17; Second Whitehead Decl. ¶ 5. Plaintiffs cannot provide more detailed evidence of Jane Doe's unlawful acts because they do not know which Defendant she is.

7 Public Citizen conceded in the D.C. Circuit that evidence identical to that which Plaintiffs have put forward meets the test *amici* propose in their brief. See Brief *Amicus Curiae* of Public Citizen in *RIAA v. Verizon*, Nos. 03-7015 & 03-7053, at 14-15 (filed May 16, 2003).

abstract or theoretical questions." *Id.* Resolution of the legal arguments raised by *amici* would amount to just such an improper advisory opinion. *Id.*

In any event, *amici*'s personal jurisdiction and joinder arguments fail on their merits.

**A. Personal Jurisdiction**

This Court is in no position to issue a ruling of any kind on personal jurisdiction; indeed, to do so would be reversible error. Only a defendant has standing to raise personal jurisdiction. Moreover, the defense of personal jurisdiction can be (and regularly is) waived. *See, e.g., Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.*, 166 F.3d 65, 75 (2d Cir. 1999). There may be many reasons why the Defendants, regardless of where they reside, may wish to litigate in New York. Issuing a ruling now on personal jurisdiction would effectively deny Defendants that choice.

For these reasons, it is settled law that this Court cannot raise the issue of personal jurisdiction *sua sponte*, and *amici* are in no position to raise or litigate it on behalf of the Defendants. *See Kapara v. Kuwait Airways Corp.*, 845 F.2d 1100, 1105 (D.C. Cir. 1988); *Zelson v. Thomforde*, 412 F.2d 56, 59 (3d Cir. 1969). Nor is a possible lack of personal jurisdiction a basis for denying discovery (or, in this case, requiring discovery already disclosed to be returned). *See United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988) ("even if it were ultimately determined that [the court lacked personal jurisdiction], the order or process it issued in the conduct of the litigation would still be valid"). Plaintiffs sought the subpoena in good faith in order to determine the identities or geographic locations of the Defendants so that this case could proceed. Cablevision responded in good faith and could not itself have raised personal jurisdiction as a grounds for refusing to comply. *See Duttie v. Bandler & Kass*, 1992 WL 162636, at \*3 (S.D.N.Y. June 23, 1992). Plaintiffs thus are entitled to use the information obtained to amend their complaint and proceed in this case (possibly

facing motions to dismiss on personal jurisdiction grounds) or in another federal court, if that forum is more appropriate.

Indeed, if any Defendant ever decides to raise personal jurisdiction in a motion to dismiss, this Court could only evaluate that defense by cataloguing Defendants' contacts with the district, a process that cannot begin until the Defendants are identified. The Court would almost certainly authorize discovery into the Defendants' contacts with this District, beginning with the Defendants' identity and residence. The specter of such a motion in the future cannot possibly serve as a basis for quashing that very discovery now.

In any case, there is good reason to believe that this Court has jurisdiction over all Defendants. To be sure, the information produced by Cablevision indicates that most of the Defendants have addresses outside this judicial district; all Defendants appear, however, to live in New York, Connecticut or New Jersey. That fact, however, does not mean that this Court lacks jurisdiction over them. Each Defendant has contacts with New York directly related to the conduct in this case. Each has contracted with an ISP headquartered in New York and has agreed to abide by New York law arising out of its contract for Internet service with Cablevision. *See* Cablevision's Optimum Online Terms of Service at ¶ 30, available for review at <http://www.optimumonline.com/index.jhtml>. Moreover, Plaintiffs have evidence that each Defendant engaged in massive copyright infringement disseminating hundreds of copyrighted works to anyone that wanted them (including residents of this jurisdiction) and downloading copyrighted works from others who offered them (including residents of this jurisdiction).<sup>8</sup> Although each Defendant was caught committing infringement at a particular point in time, the

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<sup>8</sup> A user downloading a file on a P2P network such as KaZaA may download the same file from multiple computers at one time. *See* Second Whitehead Decl. ¶ 6. Thus, when a user in New Jersey downloads a file, he or she may be receiving parts of the same file, at the same time, from a computer in the New York, a computer in California, and a computer in Florida. *Id.*

sheer number of works being disseminated demonstrates that each was engaged in a persistent course of conduct over a substantial period of time. Each had effectively transformed his or her computer into an interactive Internet site, allowing others to complete transactions (by downloading copyrighted works) over the Internet. It is clear that commercial websites that complete transactions over the Internet may subject themselves to jurisdiction based on even a single sale. *See Mattel, Inc. v. Procount Business Services, Inc.*, No. 03-Civ. 7234(RWS), 2004 WL 502190, at \*2 (S.D.N.Y. Mar. 10, 2004) (holding that a single transaction over the Internet with a forum state resident is sufficient to support an exercise of jurisdiction).<sup>9</sup> The fact that P2P infringers, like Defendant, trade copyrighted works rather than sell them is irrelevant to whether the websites are fully interactive. *Amici Mem.* at 11. The law of jurisdiction does not distinguish between illegal acts committed in exchange for money and illegal acts committed in exchange for bartered (and illegal) goods.<sup>10</sup>

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<sup>9</sup> *See also Hsin Ten Enter. USA, Inc. v. Clark Enters.*, 138 F. Supp. 2d 449, 454, 456 (S.D.N.Y. 2000) (“Generally, an interactive website supports a finding of personal jurisdiction over the defendant.”); *see generally Marsalis v. Schachner*, 2002 WL 1268006, at \*3-4 (S.D.N.Y. June 6, 2002) (“active” site that allows transactions with residents of New York sufficient to confer jurisdiction); *see also Alpha Int’l, Inc. v. T-Reproductions, Inc.*, 2003 WL 21511957, at \*3 (S.D.N.Y. July 1, 2003) (“Websites that permit information exchange between the defendant and viewers are deemed ‘interactive,’ and generally support a finding of personal jurisdiction over the defendant.”).

<sup>10</sup> Jurisdiction may also be proper because the brunt of the harm in this case (at least as to several of the Plaintiffs) is felt in this forum. Where a defendant knowingly causes harm to a forum state resident, such as an owner of intellectual property, the defendant may subject itself to suit where the plaintiff resides. *See Calder v. Jones*, 465 U.S. 783 (1984) (discussing “effects test” for personal jurisdiction); *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club, Ltd.*, 34 F.3d 410 (7th Cir. 1994) (action for infringement of Indianapolis Colts’ trademark proper in Indiana); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 243 F. Supp. 2d 1073, 1088-89 (C.D. Cal. 2003) (action for infringement by movie studios proper in California). In this case, New York is home to many of the Plaintiffs and is one of the epicenters of the music industry. Defendants clearly knew or should have known that the theft of intellectual property from the major recording companies would have serious effects in New York.

Thus, there is a good faith basis to believe there is jurisdiction over Defendants in this case. But that issue is not before the Court at this time. The only question is whether *amici's* concerns about personal jurisdiction provide a basis for compelling the Plaintiffs to return information lawfully obtained in discovery. Clearly they do not. This Court will, however, have ample opportunity to consider personal jurisdiction over Defendants, if any Defendant chooses to raise it. Assuming the Court denies Jane Doe's motion to quash and rejects *amici's* arguments, Plaintiffs will contact the Defendants and discuss possible settlement with them. It has been Plaintiffs' experience that, once confronted with the substantial evidence Plaintiffs have gathered, many Defendants will elect to settle. For Defendants whose litigation proceeds without settlement, Plaintiffs and Defendants can determine whether it is proper to continue in this jurisdiction, whether transfer to another forum is preferable, and whether severance of some number of claims is desirable, *see infra*. Any Defendants who wish to raise personal jurisdiction (or joinder) issues can make such arguments at that time in the appropriate court.

Finally, *amici's* proposal for how this case should proceed makes no sense whatsoever. *Amici* Br. at 11-12. They appear to concede that Plaintiffs are entitled to obtain the identities of the Defendants, provided Plaintiffs guess the correct court in which to file suit, using the admittedly imprecise methods discussed in *amici's* declaration.<sup>11</sup> Under *amici's* plan, Plaintiffs

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<sup>11</sup> *Amici's* declaration is misleading in suggesting that copyright owners can determine the location of Internet infringers by means of various tools. *See* Schoen Decl. These tools do not provide the sort of accuracy of information that *amici* imply. First, *amici* refer to the use of geographical codes, *id.* at 7, 14, but those codes can be misleading. ISPs have complete control over the codes they use to describe the routers in their network. Some use geographical codes, but others do not. Second Whitehead Decl. ¶ 9. Plaintiffs' and their trade association's experience is that such codes accurately identify the region in which the infringer lives significantly less than 100% of the time. *Id.* Where such codes are inaccurate, they can be very inaccurate. *Id.* Second, as *amici's* own Declaration shows, such tools reveal – *at most* – a major metropolitan area or state through which Internet traffic to the subscriber must pass. Schoen Decl. ¶¶ 9, 10. Such information may not accurately identify the judicial district or even the

would often have to burden three different federal courts to commence a lawsuit. Plaintiffs would have to guess the district in which each Defendant resides, and then file suit in that district. They would then have to issue subpoenas to Cablevision from this Court. Thus, regardless of where the lawsuit is filed, this Court would have to resolve any subpoena enforcement proceedings and/or motions to quash (as it is doing now). Finally, once the Defendants are identified and their locations revealed, Plaintiffs would, in many cases, have to re-file in yet a third federal court. As a matter of judicial efficiency and fairness to the Defendants, such a merry-go-round of courts makes little sense. Its primary effect is to place additional burden on the Plaintiffs without providing Defendants with any additional protection.

**B. Joinder**

*Amici* provide no rationale for litigating joinder prior to the identification of the Defendants. Because the sole remedy for misjoinder is severance, not dismissal and not the quashing of a subpoena, *see* Fed. R. Civ. P. 21, litigation of joinder at this point serves no purpose, other than to delay proceedings. Joinder is unrelated to the "anonymity" that *amici* seek to protect, and *amici* can explain no benefits that severance at this time would provide.

Indeed, severance at this time would be harmful to Plaintiffs, Defendants, and the Court. Plaintiffs would be required to file multiple virtually identical lawsuits, followed by virtually identical motions for immediate discovery in each case, followed by virtually identical subpoenas to Cablevision. Defendants may prefer to litigate together, given the commonality of issues among them and the potential economic benefits of litigating together, but would be denied that choice. Finally, the Court would face the additional burden of numerous identical

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state where the infringer resides. Second Whitehead Decl. ¶ 9. As even *amici* themselves are forced to concede, they can only determine that the Defendants "appear" to be located "in or near" certain cities. Schoen Decl. ¶ 10.

lawsuits, involving many similar factual and legal issues, as well as the exact same threshold issue – discovery to identify the alleged infringers.<sup>12</sup>

In any event, joinder is proper in this case. The Federal Rules direct "the broadest possible scope of action consistent with fairness to the parties [because] joinder of claims, parties and remedies is strongly encouraged." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966). "Rule 20 is to promote trial convenience and to expedite the resolution of disputes, thereby preventing multiple lawsuits." *Blesedell v. Mobil Oil Co.*, 708 F. Supp. 1408, 1421 (S.D.N.Y. 1989). The Court thus has wide discretion in determining whether joinder is appropriate and, if it is not, at what stage of the proceedings severance should be compelled. *See Mosley v. General Motors Corp.*, 497 F.2d 1330, 1332 (8th Cir. 1974).

*Amici's* sole argument is that Plaintiffs do not meet the second of two prerequisites for joinder: that the Complaint alleges a right to relief relating to or arising out of the same transaction or occurrence or series of transactions or occurrences.<sup>13</sup> As the Supreme Court has explained, the terms "transaction" and "occurrence" are "word[s] of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of

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<sup>12</sup> *Amici* cite one case in which a district court in Pennsylvania required severance in a parallel case and another case in which a magistrate judge has recommended severance. *Amici* Mem. at 13-14. They ignore, however, the 25 other courts that have authorized Plaintiffs to take expedited discovery without requiring severance. Several of those courts have expressly addressed the arguments made by *amici* and have found that consideration of issues related to joinder is premature. *See, e.g., UMG Recordings v. Does 1-199* at 2 (D.D.C. Mar. 10, 2004) ("[i]t is clear to the Court that Defendants must be identified before this suit can progress further" and ruling that it is "premature" to consider joinder); *Motown Record Co., L.P. v. Does 1-252* at 3 (N.D. Ga. Mar. 1, 2004) (concluding that joinder and other issues should be deferred so that they "can be resolved in the ordinary course of this litigation at the appropriate time") (available for review in the appendix filed in conjunction with this Memorandum).

<sup>13</sup> *Amici's* attempt to create a third requisite for joinder, *see Amici* Br. at 13-14 & n.4, conflicts squarely with the law in this Circuit. *See, e.g., Abraham v. Volkswagen of America, Inc.*, 795 F.2d 238 (2d Cir. 1986). *Amici* appear to concede, as they must, that Plaintiffs' claims satisfy the first requisite for joinder – they share common (indeed almost identical) issues of law and fact.

their connection as upon their logical relationship." *Moore v. New York Cotton Exch.*, 270 U.S. 593, 610 (1926); *Blesedell*, 708 F. Supp. at 1422.

Rule 20 thus permits all "'logically related claims' by or against different parties to be tried in the same proceeding." *Blesedell*, 708 F. Supp. at 1421; *Mosley*, 497 F.2d at 1333; 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* 3d § 1653, at 410 (2003) (Rule 20 ensures that "all reasonably related claims for relief by or against different parties" may be joined). The fact that claims against each Defendant may involve "different factual underpinnings" provides no basis, without more, for severing claims. *Puricelli v. CAN Insur. Co.*, 185 F.R.D. 139, 142 (N.D.N.Y. 1999). If the Court determines that it is preferable to hold separate trials for each Defendant, the Federal Rules expressly provide the Court with such power, ensuring that claims can be litigated efficiently, but tried separately. Fed. R. Civ. P. 42.

Plaintiffs' claims in this case satisfy the requirements of Rule 20 because they arise out of a logically related series of transactions or occurrences.<sup>14</sup> All of Plaintiffs' claims against the Defendants involve common questions of copyright law and common factual questions concerning the operation of Cablevision's network and the Fast Track P2P network. Each Defendant in this case was using the same instrumentalities to commit the exact same violation of law. Moreover, the crux of Plaintiffs' Complaint is that Defendants and others have participated in a common scheme or pattern of behavior, without which no individual Defendant

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<sup>14</sup> The two courts cited by *amici* that have ordered or recommended severance of Plaintiffs' claims each erred by effectively requiring Plaintiffs to allege that all of Plaintiffs' claim arose from the *same* transaction or occurrence, rather than a logically related *series* of transactions or occurrences, as Rule 20 permits. *See Amici Mem. Ex. 1* (decision of judge in Eastern District of Pennsylvania severing cases because the claims "did not result of the same incident or incidents"); *Amici Mem. Ex. 3* (recommendation of magistrate in the Middle District of Florida because Fed. R. Civ. P. "refers to the *same* transaction and or occurrence not to *similar* transactions or occurrences").

would have been able to commit much (if any) of the infringing activity that underlies Plaintiffs' Complaint. Plaintiffs' Complaint alleges explicitly that each Defendant uses an online media distribution system (the P2P network) to *distribute to and to download from* other users of the same system – including the other Defendants – computer files that contain copyrighted sound recordings. Compl. ¶ 24. *See also* Whitehead Decl. ¶¶ 7, 16. Thus, *amici* are wrong to assert that Defendants are connected only by their common use of the Internet. Defendants' concerted actions as users of the Fast Track network provide the "logical relationship" that clearly distinguishes this case from the hypotheticals and the misjoinder cases upon which *amici* rely.

#### CONCLUSION

For the foregoing reasons, the Court should deny Jane Doe's letter motion to quash and reject the arguments raised by *amici*.

Respectfully submitted,

Dated: New York, New York

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Attorneys for Plaintiffs

By: 

J. Christopher Jensen (JJ-1864)  
Jason D. Sanders (JS-2219)  
COWAN, LIEBOWITZ & LATMAN, P.C.  
1133 Avenue of the Americas  
New York, New York 10036-6799  
Phone: (212) 790-9200  
Fax: (212) 575-0671

Thomas J. Perrelli (admitted *pro hac vice*)  
JENNER & BLOCK LLP  
601 Thirteenth Street, WN  
Suite 1200 South  
Washington, DC 20005  
Phone: (202) 639-6000  
Fax: (202) 639-6066