

the Court were to grant Defendants' motions, this case would be over before it began.

The Court has already heard arguments virtually identical to those raised by these two Defendants. In rejecting efforts by several interest groups to participate as *amici* in this case, the Court recognized that “[i]n order to get this case moving, Defendants must be identified.” March 1, 2004 Order at 3. Like the arguments made by *amici*, Defendants' arguments concerning joinder and personal jurisdiction are both premature and wrong.

As explained below, Plaintiffs have met the “good cause” standard for taking expedited discovery and have provided voluminous evidence supporting their claims of copyright infringement against all Defendants. Defendants' arguments about personal jurisdiction and misjoinder provide no basis for prohibiting such discovery and lack merit. Moreover, the Court cannot render any decision on personal jurisdiction or joinder until Defendants are identified. At that time, each Defendant will have a full and fair opportunity to raise such issues – if they want to – after Plaintiffs have amended their complaint to name them.

For these reasons, the Court should direct Cox Communications to disclose the identities of all Defendants and should deny the motions to quash filed by Doe Defendants #106 and #207.

BACKGROUND

The background of this case is summarized fully in Plaintiffs' Motion for Leave to Take Immediate Discovery (filed Feb. 17, 2004) ("Plaintiffs' Motion for Discovery") and Opposition to Motion of Public Citizen, *et al.*, for Leave to File **Memorandum as *Amici Curiae*** (filed Feb. 27, 2004) ("Plaintiffs' Opposition to *Amici*"). Plaintiffs are major recording companies who own copyrights in sound **recordings**. Defendants are significant copyright infringers caught disseminating copyrighted works over a peer-to-peer (P2P) network. **As such, each Defendant** participates in an on-line swap meet, disseminating hundreds of copyrighted sound recordings in exchange for the chance to copy millions more from other users. *See Declaration of Jonathan Whitehead* ¶ 17 (filed with Plaintiffs' Motion for Discovery) ("Whitehead Decl."); *Second Declaration of Jonathan Whitehead* ¶ 5 (filed with Plaintiffs' Opposition to *Amici*) ("Second Whitehead Decl.").

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. Using the

IP address, Plaintiffs determined that Cox Communications, an Internet Service Provider (ISP) headquartered in Atlanta, serves as each Defendant's ISP. Cox can match (and apparently has matched) the IP address, date, and time with the subscriber using the IP address when Plaintiffs observed the infringement. Thus, Cox – and only Cox – can identify the Defendants in this case.

Plaintiffs moved for leave to serve a subpoena on Cox to obtain basic identifying information on each Defendant. In response, several interest groups sought to participate as *amici*, raising issues such as personal jurisdiction, joinder, and the First Amendment. The Court found such arguments to be premature and held that such issues could “be resolved in the ordinary course of this litigation at an appropriate time.” March 1, 2004 Order at 3. The Court granted Plaintiffs’ motion and directed Cox to notify each Defendant of the subpoena.

Only two Defendants elected to file motions to quash. Doe Defendant #106 and Doe Defendant #207 filed identical briefs raising some of the same issues argued by *amici*. To date, Cox has refused to respond to the subpoena (even for those Defendants who have raised no objections).¹

¹ Although the return date has passed, Cox has neither sent an objection letter nor moved to quash. Rather, Cox sent a letter to the Court recycling *amici*'s arguments. Plaintiffs intend to file a motion to compel if necessary.

ARGUMENT

I. PLAINTIFFS HAVE MET THEIR BURDEN TO TAKE EXPEDITED DISCOVERY.

There Is “Good Cause” for Expedited Discovery.

Plaintiffs have shown ‘good cause’ for taking expedited discovery. *See* Plaintiffs’ Motion for Discovery at 5-8. There is no dispute that Defendants’ conduct – disseminating (uploading) and copying (downloading) copyrighted material over a P2P network violates the copyright laws. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013-14 (9th Cir. 2001); *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 1069 (2004). Plaintiffs suffer irreparable harm every day that Defendants continue to disseminate Plaintiffs’ copyrighted works without authorization. *See Georgia Television Co. v. TV News Clips of Atlanta, Inc.*, 718 F. Supp. 939, 948 (N.D. Ga. 1989) (prima facie case of infringement establishes a presumption of irreparable injury). Without discovery, they will never be able to enforce their rights.

In such circumstances, it is an abuse of discretion to deny discovery into the defendants’ identities. *See Dean v. Barber*, 951 F.2d 1210, 1215 (11th Cir. 1992); *Valentin v. Dinkins*, 121 F.3d 72, 75-76 (2d Cir. 1997). 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). Indeed, in 27 parallel cases, courts have – as this Court has – authorized expedited discovery from ISPs to identify defendants infringing copyrights over P2P networks. See *Sony Music Entertainment, Inc. v. Does 1-40* (S.D.N.Y. Jan. 26, 2004); *Warner v. Does 1-43* (S.D.N.Y. Feb. 10, 2004) (from the bench); *Capitol Records, Inc. v. 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); *UMG Recordings v. Does 1-199* (D.D.C. Mar. 10, 2004); *Virgin Records America, Inc. v. Does 1-44* (N.D. Ga. Mar. 3, 2004); *Fonovisa, Inc. v. Does 1-67* (D. Colo. Apr. 8, 2004); *Maverick Recording Co. v. Does 1-12* (D. Colo. Apr. 8, 2004); *Motown Record Co. v. Does 1-5* (D. Colo. Apr. 8, 2004); *Motown Record Co. v. Does 1-3* (D. Colo. Apr. 8, 2004); *Warner Bros. Records Inc. v. Does 1-9* (E.D. Mich. Apr. 5, 2004); *Artista Records, Inc. v. Doe* (N.D. Cal. Apr. 5, 2004); *Atlantic Recording Corp. v. Does 1-13* (E.D. Va. Apr. 2, 2004); *Fonovisa, Inc. v. Does 1-2* (E.D. Va. Apr. 2, 2004); *London-Sire Records, Inc. v. Does 1-4* (C.D. Cal. Apr. 2, 2004); *Priority Records LLC v. Doe* (S.D. Ind. Apr. 2, 2004); *Atlantic Recording Corp. v. Does 1-3* (D.D.C. Mar. 31, 2004); *BMG Music v. Does 1-3* (D.D.C. Mar. 31, 2004); *Artista Records, v. Does 1-143* (E.D. Tex. Mar. 30, 2004); *Capitol Records, Inc. v. Does 1-2*

(C.D. Cal. Mar. 30, 2004); *Warner Bros. Records Inc. v. Does 1-4* (C.D. Cal. Mar. 30, 2004); *Interscope Records v. Does 1-4* (D. Ariz. Mar. 30, 2004); *Interscope Records v. Does 1-7* (M.D. Tenn. Mar. 29, 2004); *Interscope Records v. Does 1-5* (S.D. Ind. Mar. 25, 2004); *Virgin Records America, Inc. v. Doe* (D. Md. Apr. 19, 2004); *Loud Records, LLC v. Does 1-4* (E.D. Wis. Apr. 22, 2004); *Sony Music Entertainment, Inc. v. Does 1-200* (E.D. Mo. Apr. 22, 2004).²

Doe Defendants #106 and #207 contend that “plaintiffs have not made a sufficient factual showing to warrant discovery” of their identities. Motion at 2.³ As explained in Plaintiffs’ Opposition to *Amici*, however, the Federal Rules do not require a heightened factual showing prior to seeking or obtaining disclosure of a

² Copies of these orders are provided in an appendix to this memorandum.

³ Both Defendants cite a single state defamation case for the proposition that there is a qualified privilege to anonymity on the Internet. *See Dendrite Int’l Inc. v. Doe No. 3*, 775 A.2d 756, 760-61 (N.J. App. Div. 2001). In that case, the defendant alleged that he was engaged in fully protected speech and that plaintiff had failed to allege a prima facie case of defamation. In this case, Plaintiffs have alleged a prima facie case of copyright infringement, *see Feist Publications Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 359-60 (1991) (requiring allegations of ownership of a copyright and violation of an exclusive right), and Defendants have not claimed to be engaging in protected speech. *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”). Moreover, Plaintiffs would meet the test imposed by the *Dendrite* court because they have provided voluminous evidence to support their claims. *See In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 263 n.22 (D.D.C. 2003) (finding almost identical evidence would meet the *Dendrite* test), *rev’d on other grounds*, 351 F.3d 1229 (D.C. Cir. 2003).

copyright infringer's identity. There is no "qualified privilege" to anonymity on the Internet, and the First Amendment provides no basis for quashing a subpoena for the business records of an ISP. *See* Plaintiffs' Opposition to *Amici* at 9-16. Notably, Doe Defendants #106 and #207 do not deny that they were engaging in massive copyright infringement at the time that Plaintiffs caught them disseminating hundreds of copyrighted works without authorization. The Amendment provides no protection for such conduct. *See Harper & 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).

Nonetheless, Plaintiffs supported their motion to take immediate discovery with substantial evidence. With respect to each Defendant, Plaintiffs identified the IP address, date, and time of the infringement; that information uniquely specifies a Cox 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. As explained in the two previous Whitehead Declarations, Exhibit A

the Complaint, however only small bits of the hundreds of copyrighted
software distributed by the Defendants. See Whitehead Decl ¶ 17
second Whitehead Decl ¶ 17. Plaintiffs provided complete lists of the
hundreds of software distributed by the Defendants provided
testimony that the Defendants possess virtually identical evidence for each of the
Defendants. See Whitehead Decl ¶ 7; Whitehead Decl

Plaintiffs have provided minimal evidence of infringement by
Defendants including Doe Defendants #106 and #207 and seek only limited
information indicating their rights. As this Court has already found
discovery sought by Plaintiffs is unduly tailored to satisfy the
Defendants. March 2004 Order. Plaintiffs have established the good
faith standard and are entitled to discovery of the identity of Defendant

B Both Defendants A Major Copyright Infringers

Doe Defendant #106 #207. Plaintiffs failed to identify
software specific to them in kind or quantity of their infringement. See Motion
A. Material matter that the true Plaintiff identified specific copyrighted works
that each of the Doe Defendants was infringing at specific time periods.
Exhibit A to the Complaint. Plaintiffs also uploaded Plaintiffs
that Defendants were distributing hundreds of other copyrighted works and

that Plaintiffs had actual downloads of infringing sound recordings from each Defendant. Plaintiffs did not, however, provide all of its evidence to the Court because to do so would have required the filing of literally boxes of material.

Nonetheless, Plaintiffs are providing the Court with *more* evidence about the copyright infringement committed by these two Defendants. *See* Third Declaration of Jonathan Whitehead (“Third Whitehead Decl.”).⁴ As explained in the Third Whitehead Declaration, when Plaintiffs caught each of the Doe Defendants committing copyright infringement, Plaintiffs took “screen shots” showing the copyrighted works that each Defendant was disseminating. Those screen shots show page after page of copyrighted songs being disseminated by the two Defendants. *See* Exhibits A & B to the Third Whitehead Decl. Plaintiffs also obtained “metadata” about the files Defendants were disseminating. Metadata is descriptive information that accompanies each file. In addition to the file name and other identifying information, metadata often reveals who originally copied a particular sound recording from a CD to a computer disk (a process called “ripping”) and can include a type of digital fingerprint, called a “hash,” that can show whether two users obtained a file from the same source.

⁴ Plaintiffs obtained this evidence as any P2P user could – by downloading information that the Doe Defendants chose to offer over the P2P network.

Analysis of the metadata, discussed briefly below and in more detail in the Third Whitehead Declaration, further proves that both Doe Defendants are frequent and significant participants in the illegal distribution of music on P2P networks.

1. Doe Defendant #106⁵

At the time that Plaintiffs caught Doe Defendant #106 disseminating copyrighted works, she was offering for download almost 750 files, most of which were music files which appear to be infringing. Third Whitehead Decl. ¶ 4. sound recordings included copyrighted works by popular artists such as Madonna, Bob Dylan, The Beatles, and Phil Collins. Exhibit A to the Third Whitehead Declaration is a copy of Doe Defendant #106's "share folder," showing the she was disseminating. Her share folder also included video and software files that appear to be infringing. *Id.* ¶ 4.

The metadata associated with the files that Doe Defendant #106 was offering contain innumerable telltale indicia that the files were not copied from Doe Defendant #106's CDs, but rather were downloaded from other (illegal) sources. *Id.* ¶¶ 8-11. For example, the metadata demonstrates that many of the sound recordings on her computer were ripped by many different people using different

⁵ Plaintiffs refer to Doe Defendant #106 as "she" or "her" and Doe Defendant #207 as "he" or "him" for ease of reference. Plaintiffs do not, of course, know the gender of either Defendant.

brands of ripping software. *Id.* ¶ 11(a). Some originally were downloaded from well-known websites of pirated music. *Id.* ¶ 11(b). The metadata also reveal that Doe Defendant #106 was offering a large number of copyrighted sound recordings that had been unlawfully downloaded from other users of Kazaa. *Id.* ¶ 11.

Using another piece of metadata “hash” Plaintiffs were able essentially to fingerprint files being offered by Doe Defendant #106’s computer. *Id.* ¶¶ 14-16. Using hashes, one can determine whether a music file that one user is offering ultimately derives from the same source as a music file another user is offering. *Id.* ¶ 15. By comparing the hashes from a sample of files from Doe Defendant #106’s “share” folder to the hashes in a database dating back to May of 2000, created from downloads from users on the Napster system, it is clear that the original sources of some of Doe Defendant #106’s files trace to users of Napster.⁶ *Id.* ¶ 14. That hash analysis demonstrates either that Doe Defendant #106 was a Napster user and offered the files to other users to download on both the Kazaa and Napster systems or that she downloaded copyrighted sound recordings from other users and then subsequently made these files available to others, thus propagating the pirated files. *Id.* ¶¶ 14-16. The latter, Plaintiffs would submit, is far more likely. In either case,

⁶ Napster was the most infamous P2P system and was shut down by a federal court injunction for facilitating massive copyright infringement. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

the hashes again prove that Doe Defendant #106 was an active participant in offering for download and downloading copyrighted works on the Internet. *Id.* The files on her computer may have been distributed countless times, each time causing harm to the copyright owners (Plaintiffs). *Id.*

This evidence, discussed in more detail in the Third Whitehead Declaration, demonstrates that Doe Defendant #106 is not a casual infringer. Rather, she is an active participant in the P2P network, downloading and offering for download music on a regular basis over a long period of time. *Id.* ¶ 10. Absent discovery, she will be able to continue breaking the law in the same manner.

2. Doe Defendant #207

The evidence with respect to Doe Defendant #207 is similar. Doe Defendant #207 was offering for download over 1100 files, including over 850 music files, almost all of which were infringing, as well as video, image, and software files, many of which likely are infringing. Third Whitehead Decl. ¶ 7. The sound recordings included popular copyrighted works by artists such as the Rolling Stones, The Beatles, Pink Floyd, the Grateful Dead, and Aerosmith. *Id.*

The metadata associated with the files that Doe Defendant #207 was offering also demonstrate that many of the sound recordings on his computer were ripped by different people, using different brands of ripping software. *Id.* ¶ 12(a). Once

again, a large portion of the copyrighted sound recordings that he was offering were unlawfully downloaded from other users of Kazaa or other (illegal) sources, including well-known pirate websites. *Id.* ¶ 12(b). Plaintiffs also compared the hashes from a sample of files from Doe Defendant #207’s “share” folder to the hashes in the database of downloads from users on the Napster system. That comparison indicates that the original source of a substantial number of Doe Defendant #207’s files traces to users of Napster. *Id.* ¶ 16.

This evidence shows that Doe Defendant #207 also is an active participant in offering for download and downloading copyrighted works. *Id.* ¶ 10. The files from his computer likely have been downloaded and disseminated countless times, propagating over the P2P network to others – all in violation of the copyright laws.

II. LITIGATION OVER PERSONAL JURISDICTION IS PREMATURE AND, IN ANY CASE, THIS COURT HAS JURISDICTION OVER THE DEFENDANTS.

Both Doe Defendants assert, without support, that they “ha[ve] absolutely no contacts with the state of Georgia’ and thus that the Court cannot exercise jurisdiction over them. Motion at 2. That argument is premature and provides no basis for quashing a subpoena to Cox. Defendants will have a chance to litigate personal jurisdiction at an appropriate time. In any case, Plaintiffs have made a prima facie showing of personal jurisdiction in this district.

A. Defendants' Unsupported Claims about Personal Jurisdiction Provide No Basis for Quashing the Subpoena.

Defendants argue that the Plaintiffs cannot seek discovery into their identities and geographic locations precisely because Plaintiffs do not know where the Defendants reside (and thus cannot file suit in each Defendant's home state). Through this perverse logic, Doe Defendants #106 and #207 attempt to turn their momentary anonymity into an absolute shield against copyright liability. As the Court recognized in its March 1 Order, however, this case cannot proceed in this *or any court* absent discovery to identify the Defendants, and Plaintiffs are entitled to such discovery regardless of where the Defendants reside. *See* March 1, 2004 Order at 3 ("In order to get this case moving, Defendants must be identified.").

Indeed, the Court cannot render any kind of ruling on personal jurisdiction at this time; neither Plaintiffs nor the Court know the most basic facts about the Defendants, other than the substantial evidence indicating that they are significant copyright infringers using the Internet to disguise their identities. If these two Doe Defendants raise personal jurisdiction in a motion to dismiss, the Court could evaluate that defense only 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 Georgia, beginning with the Defendants' identity and residence. The specter of a future

motion to dismiss, however, cannot serve as a basis for quashing this discovery now. Indeed, the Supreme Court has made clear that a possible lack of personal jurisdiction provides no basis for denying discovery. *See United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76-77 (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”).⁷

This Court will have ample opportunity to consider personal jurisdiction over Defendants, if any Defendant chooses to raise it in a motion to dismiss. Assuming the Court denies the motions to quash and compels Cox to comply with the subpoena, 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

⁷ Cox cannot object to or refuse to comply with the subpoena based on an assertion that the Court lacks jurisdiction over the Defendants. *See Lipofsky v. New York State Workers Comp. Bd.*, 861 F.2d 1257, 1258 (11th Cir. 1988) (holding that only a defendant has standing to raise personal jurisdiction as a defense); *Duttle v. Bandler & Kass*, No. 82 Civ. 5084, 1992 WL 162636, at *3 (S.D.N.Y. June 23, 1992) For the same reason, Doe Defendants #106 and #207 cannot raise the issue of personal jurisdiction for the other Defendants.

number of claims is desirable, *see infra*. Defendants who wish to raise personal jurisdiction (or joinder) issues can make such arguments at that time in the appropriate court. Thus, no Defendant will be prejudiced by considering personal jurisdiction in the ordinary course (*i.e.* through a motion to dismiss).

B. Plaintiffs Have Made a Prima Facie Showing of Personal Jurisdiction over the Defendants.

There is good reason to believe that this Court has jurisdiction over all Defendants. Even if many of the Defendants do not reside in this district, that does not mean that this Court has no jurisdiction over them. Each Defendant has contacts with Georgia directly related to their unlawful conduct. Each has contracted with an ISP headquartered in this district and has consented to personal jurisdiction in this district for disputes arising out of their contract for internet service with Cox. *See Cox Communications, Subscriber Agreement* ¶ 19, available at <http://www.cox.com/policy> (“[a]ll disputes arising out of or related to this Agreement and the Service must be brought in a federal or state court located in the state of Georgia.”).

In addition, the Defendants’ conduct subjects them to this Court’s jurisdiction. Each Defendant engaged in massive copyright infringement, offering 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).⁸ Although each Defendant was caught committing infringement at a particular point in time, the sheer number of works being disseminated (as well as the metadata analysis, *see* Part I.B *supra*) shows that each was engaged in a persistent course of conduct over a substantial period of time. Each transformed his or her computer into an interactive Internet site, allowing others to complete transactions (by downloading copyrighted works) over the Internet. *See Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 511-13

Cir. 2002) (holding that an interactive site allowing electronic transactions establish “continuous” and “systematic” contacts sufficient for general personal jurisdiction); *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (distinguishing passive websites which generally do not provide sufficient contacts with a forum to justify personal jurisdiction from “interactive” websites which generally do support an assertion of jurisdiction).

Commercial websites that complete transactions over the Internet may subject themselves to suit in any state where they have made a single sale through website. *See Mattel, Inc. v. Procount Business Services, Inc.*, No. 03-Civ.

⁸ A user downloading a file on a P2P network may download the same file from multiple computers at one time. *See* Second Whitehead Decl. ¶ 6. When a user in New Jersey downloads a file, he or she may receive parts of the same file from a computer in the New York, a computer in Florida, and a computer in Georgia. *Id.*

7234, 2004 WL 502190, at *2 (S.D.N.Y. Mar. 10, 2004) (a single transaction over the Internet with a forum resident is sufficient to support jurisdiction); *Hartoy, Inc. v. Thompson*, No. 02-80454-CIV, 2003 WL 21468079, at *5 (S.D. Fla. Jan. 29, 2003) (“the fact that the website allowed the placement of orders means that the site could not have only presented passive advertisement”). The fact that P2P infringers, like Defendants, trade copyrighted works rather than sell them is irrelevant to whether the websites are fully interactive. 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. *See Arista Records, Inc. v. Sakfield Holding Co.*, Civ. Act. 03-1474, 2004 WL 881851 (D.D.C. April 22, 2004) (finding personal jurisdiction based on dissemination of copyrighted music to forum residents for free).⁹

⁹ Indeed, the tort of copyright infringement is complete without a sale, and non-resident defendants are subject to jurisdiction for copyright infringement where they have disseminated or sought to disseminate infringing material. *See Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d 829, 857 (11th Cir. 1990) (jurisdiction proper where out-of-state defendants transmitted, via satellite, programs into Florida promoting the sale of copyright-violating products); *Droke House Publishers, Inc. v. Aladdin Distrib. Corp.*, 352 F. Supp. 1062, 1065 (N.D. Ga. 1972) (jurisdiction over out-of-state corporation that reprinted copyrighted works and sent them to Georgia to be resold by different company). *See also Peridyne Tech. Solutions, LLC, v. Matheson Fast Freight, Inc.*, 117 F.Supp.2d 1366, 1371 (N.D. Ga. 2000) (“defendants ‘should not be permitted to take advantage of modern technology via the Internet or other

Thus, there is a good faith basis for the exercise of personal jurisdiction. Resolution of those issues, however, is premature until Defendants are identified.¹⁰

III. JOINDER IN THIS CASE IS PROPER AND, IN THE EVENT THAT THE COURT BELIEVES SEPARATE TRIALS ARE PREFERABLE, THE COURT HAS AUTHORITY TO ORDER SUCH TRIALS WITHOUT SEVERING PLAINTIFFS' CLAIMS.

Defendants argue that the subpoena should be quashed due to misjoinder. Once again, Defendants cannot explain how an argument about joinder provides a basis for quashing a subpoena. The sole remedy for misjoinder is severance, not dismissal and not the quashing of a subpoena, *see* Fed. R. Civ. P. 21. Severing of the claims against the two Defendants, however, would not protect the “anonymity” of either Defendant. Plaintiffs would be entitled to seek their identity through a subpoena identical to the one at issue here, albeit in a separate action.

There is thus no prejudice to these two Defendants or any of the other Defendants if the Court refrains from consideration of joinder issues until after identification of the Defendants. Indeed, the Court has full authority to grant the relief that Doe Defendants #106 and #207 appear to desire without severing the claims in this case. Defendants ask the Court to “order separate trials for each of

electronic means to escape traditional notions of jurisdiction”) (quoting *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419 (9th Cir. 1997)).

¹⁰ For the same reasons, Defendants’ briefly mentioned challenge to venue is both premature and lacks merit.

the Doe Defendants.” Motion at 1. The Court can achieve that objective without severing the claims against them. If the Court determines separate trials for each Defendant are preferable, the Federal Rules expressly provide the Court with the power to keep all of the claims in a single case, but hold separate trials. Fed. R. Civ. P. 42; 4 *Moore’s Federal Practice*, § 20.09, at 20-58 (Mathew Bender 3d ed. 2004) (“Any party may move for a separate trial, or the court may order it on its own motion. The court’s discretionary authority to order separate trials eliminates all reasonable objections to the liberal joinder process of Rule 20.”).

Indeed, severance at this time would be harmful to Plaintiffs, Defendants (certainly the non-moving Defendants), and the Court. Plaintiffs would be required to file multiple virtually identical lawsuits, each followed by identical motions for immediate discovery and identical subpoenas. Many 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 lawsuits, involving many similar factual and legal issues, as well as the exact same threshold issue – discovery to identify the alleged infringers.

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). 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 Alexander v. Fulton County*, 207 F.3d 1303, 1323-24 (11th Cir. 2000); *Mosley v. General Motors Corp.*, 497 F.2d 1330, 1332 (8th Cir. 1974). Joinder is proper where 1) there is any issue of law or fact common to all parties in the action and 2) the claims arise out of the same transaction or occurrence or series of transactions or occurrences. Fed. R. Civ. P. 20; *Alexander*, 207 F.3d at 1324. The two Doe Defendants in this case argue only that Plaintiffs do not meet the second prerequisite.

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 their connection as upon their logical relationship.” *Moore v. New York Cotton Exch.*, 270 U.S. 593, 610 (1926). Indeed, this Circuit has made clear that the terms “transaction” and “occurrence” must be interpreted broadly in accord with Rule 20’s central purposes of promoting trial convenience, expediting resolution of disputes, and preventing unnecessary lawsuits. *Alexander*, 207 F.3d at 1323-24. Rule 20 ensures that “all reasonably related claims for relief by or against different

parties” may be joined. 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* 3d § 1653, at 410 (2003); *Mosley*, 497 F.2d at 1333 (allowing joinder of all “logically related claims”).

Plaintiffs’ claims arise out of a logically related series of transactions or occurrences. All of Plaintiffs’ claims against the Defendants involve common questions of copyright law and common factual questions concerning the operation of Cox’s network and the exchange of copyrighted works over a P2P network. Each Defendant 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 would have been able to commit much (if any) of the infringing activity that underlies Plaintiffs’ Complaint. Plaintiffs’ Complaint alleges 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 other Defendants computer files that contain copyrighted sound recordings. Compl. ¶ 24. *See also* Whitehead Decl. ¶¶ 7, 16. Defendants’

concerted actions as users of the P2P network provide the “logical relationship” that clearly distinguishes this case from the case on which Defendants rely.¹¹

The Doe Defendants argue that trial in this case will involve separate evidence, and different legal theories and defenses. But the fact that claims against each Defendant may involve different factual underpinnings provides no basis, without more, for severing claims. *See Puricelli v. CNA Ins. Co.*, 185 F.R.D. 139, 142-43 (N.D.N.Y. 1999). Moreover, the common factual and legal issues in this case overwhelm those that are different. Plaintiffs have alleged that each Defendant in this case has committed virtually identical conduct, violating the same laws in the same way. Almost all of the legal issues as well as the factual issues related to the operation of P2P networks are identical. For these reasons, the purposes behind Rule 20 compel joinder of all parties in this case.¹²

¹¹ *Bridgeport Music, Inc. v. IIC Music*, 202 F.R.D. 229 (M.D. Tenn. 2001), cited by Defendants, was dramatically different from this case. In that case, plaintiffs sued 770 companies occupying a wide variety of points in the chain of distribution of music (distributors, publishers, artists, etc.) in a 901-page complaint. Faced with such a wide array of allegations, the Court held that the case was unmanageable and severed it. *Id.* at 231-32. This case is a much more manageable size. All Defendants are alleged to have engaged in the same conduct using the same instrumentalities, and Plaintiffs’ short complaint presents identical issues of law relating to each Defendant.

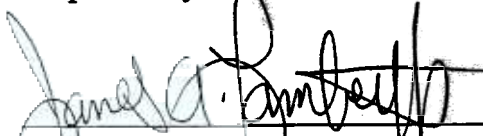
¹² In contrast to the 27 courts that have allowed Plaintiffs to take expedited discovery in parallel cases, only two courts have ordered severance of Plaintiffs’ claims. *See BMG Music v. Does 1-203* (E.D. Pa. March 5, 2004); *Interscope*

Nonetheless, it is simply premature to decide whether Plaintiffs' claims will require different evidence or involve separate legal theories until after all Defendants are identified and have an opportunity to decide how they wish to proceed. The Court will be able to re-consider the issue of joinder at that point.

CONCLUSION

For the foregoing reasons, the Court should deny Doe Defendants #106's and #207's motions to quash and order Cox to disclose the identities of all of the Defendants pursuant to the subpoena.

Respectfully submitted,



James A. Lamberth (Georgia Bar #431851)
TROUTMAN SANDERS LLP
Suite 5200
Bank of America Plaza
600 Peachtree Street, NE
Atlanta, GA 30308
(404) 885-3000

Donald B. Verrilli, Jr.
Thomas J. Perrelli
JENNER & BLOCK LLP
601 Thirteenth Street, NW
Washington, DC 20005-3823
(202) 639-6000

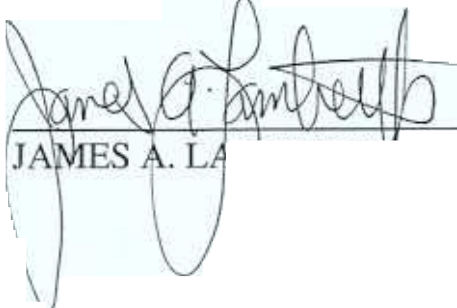
Dated: April 29, 2004

Attorney for Plaintiffs

Records, Inc. v. Does 1-25 (M.D. Fla. Apr. 28, 2004) (included in appendix). Those courts effectively required 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.

CERTIFICATE OF COMPLIANCE OF LOCAL RULE 7.1(D)

I hereby certify that the foregoing brief has been prepared in a Times New Roman 14 point font, one of the font and point selections approved by the Court in Local Rule 5.1(B).


A handwritten signature in black ink, appearing to read "James A. Lamb", is written over a light blue rectangular background. Below the signature, a horizontal line extends to the right, and the text "JAMES A. LA" is printed in a serif font, partially obscured by the signature and the line.

JAMES A. LA

3. I have reviewed the nearly identical motions to quash filed in this Court on behalf of the individuals identified as Doe 106 and Doe 207. (For ease of reference, I will refer to Doe Defendant 106 as “she” and “her,” and to Doe Defendant 207 as “he” or “his,” although I do not know the gender of either defendant at this time.) Both motions assert that Plaintiffs have failed provide direct evidence that Doe 106 or Doe 207 have engaged in copyright infringement. In Exhibit A to the Complaint, however, Plaintiffs provided a list of specific copyrighted songs that Doe 106 and Doe 207 unlawfully downloaded, distributed to the public, and/or made available for distribution to others. That list was only a small subset of the copyrighted sound recordings that these Defendants are unlawfully disseminating. Because Defendants have raised the issue, the purpose of this Declaration is to set forth in greater detail the significant evidence of Doe 106’s and Doe 207’s infringing activities.

4. Doe 106 is a user of the Kazaa system, one of the most popular forms of peer-to-peer software. Users of the Kazaa system connect to the FastTrack network, the largest current peer-to-peer network. Attached as Exhibit A to this Declaration is a true and correct copy of the entirety of Doe 106’s Kazaa “share” folder (the folder of files available for download by others). Doe 106’s “share” folder contains nearly 750 files, almost all of which are music files. The “share” file also contains some video files, image files and software files. Nearly all of the music files are infringing. For example, Doe 207’s “share” folder contains unlawful copies of copyrighted songs by such artists such as Madonna, Bob Dylan, The Beatles, Phil Collins, and Eminem. Many of the video and software files – such as a video by Weird Al Yankovic and the software “DeadAIM,” an add-on to the AOL Instant Messenger – also appear blatantly to infringe the rights of the legitimate copyright holder.

5. Exhibit A is a series of images or pictures, called “screen shots,” of Doe 106’s Kazaa “share” folder exactly as it appeared on our investigator’s computer screen, which is how it would have appeared to any other user on the FastTrack system. The notation in the bottom, right-hand corner – that says “Not sharing any files” – does not refer to Doe 106. Rather, that refers to our investigator’s computer, which was not sharing files when connected to the FastTrack network.

6. Doe 207 is a user of the iMesh system, another popular peer-to-peer file sharing service. Like users of Kazaa, iMesh users connect to the FastTrack network. Attached as Exhibit B to this Declaration is a true and correct copy of the entirety of Doe 207’s iMesh “share” folder (the folder of files available for download by others). As with Doe 106, the screen shots of Doe 207’s iMesh “share” folder show the folder exactly as it appeared on our investigator’s computer screen, and the notation “Not sharing any files” – does not refer to Doe 207, but instead refers to our investigator’s computer.

7. Doe 207’s “share” folder contains over 1100 files, over 850 of which are music files, as well as video files, image files and software files. Nearly all of the music files are infringing. For example, Doe 207’s “share” folder contains unlawful copies of copyrighted works by such major recording artists as the Rolling Stones, The Beatles, Pink Floyd, the Grateful Dead, Aerosmith, and the Red Hot Chili Peppers. Many of the video and software files, such as a video files containing episodes of the animated television series “Family Guy,” also appear blatantly to infringe the rights of the legitimate copyright holder.

8. The sheer number of files contained in both Defendants’ “share” folders shows that they are active participants in peer-to-peer file-sharing networks. Further, our independent

technical analysis of the “metadata” from the files contained in the “share” folders demonstrate that each Defendant downloaded most of the files from other users, without authorization from the copyright owner and thus in violation of the Copyright Act.

9. By way of background, many types of media files, including audio and video files, carry with them what is known as “metadata.” Metadata is essentially information associated with a file (such that when you upload or download the file the metadata travels with it), which provides descriptive information about the contents of the file. The file name is one form of metadata. For an MP3 music file, the metadata will often include the artist and the song title, and perhaps the album from which the song comes, the length of the song, the “bit rate” at which the song was encoded (a general indicator of encoding quality), and other information. Many files contain metadata indicating the brand of software that was used to extract the digital audio from a CD and copy it onto a computer (a process referred to as “ripping”) or to convert the “ripped” file into the MP3 format (a process known as “encoding”). Some files contain metadata indicating the Internet website from which the file originally was downloaded. Users also can add to the metadata, to include other information of their choosing. On peer-to-peer file sharing systems such as Kazaa and iMesh, many users include “keywords” or descriptor phrases in the metadata, so that their files will show up when another user searches for any of the specified keywords. Some users also include their online name in the metadata (a practice referred to as “tagging” the file) to announce to others that they ripped, encoded and/or uploaded the file – almost like a stamp of quality assurance or perhaps for bragging rights. In any event, metadata contains a wealth of information.

10. In response to the assertions in the motions to quash, we undertook an expedited review of the files in the “share” folders of Doe 106 and Doe 207. The metadata shows that most of the files in both Defendants’ “share” folder have been downloaded from other users without authorization, and that both Defendants have been active participants in peer-to-peer networks for a significant period of time. True and correct copies of excerpts of the metadata from the files in Doe 106’s Kazaa “share” folder are attached as Exhibits C-H. True and correct copies of excerpts of the metadata from the files in Doe 207’s iMesh “share” folder are attached as Exhibits I-N.

11. By way of partial illustration only, the metadata from the files in Doe 106’s Kazaa “share” folder reveal the following:

(a) Multiple files from Doe 106’s Kazaa “share” folder contain, in the metadata, explicit claims of having been originally ripped, encoded and/or uploaded by numerous different people. For example, Doe 106’s “share” folder contains files with the following notations: “Ripped by D-Nice” [Ex. C, pp.1, 16, 18, 19, 26], “By Prather, AG# 222CFE13” [Ex. C, p.1], “Hopkins 2005! JH-PD-BS 5/11/02” [Ex. C, p.1], “haha rip by neo!!!!” [Ex. C, p.2], “ripped by azar!” (Ex. C, p.3), “Ripped by 4HM Crew” [Ex. C, p. 4], “ripped by kboy” [Ex. C, p.6], “ripped by maisOn” [Ex. C, p.7], “renamed by Oddball66 – on #mpe” [Ex. C, p.8], “Ripped by Lobot” [Ex. C, p.9], “Ripped by tHa of [NBD]” [Ex. C, p.9], “ripp’d by ReaLi_doe [aPC]” [Ex. C, p.9], “By *SNaKe*” [Ex. C, p.9], “Tagged by DH1” [Ex. C, p.10], “by Gabber” [Ex. C, p.10], “Created, tagged by MP3-Junky” [Ex. C, p.11], “Ripped By Webman” [Ex. C, p.11], “ENCODED BY KARCUS” [Ex. C, pp.11, 19], “another one from Sonny” [Ex. C, p.12], “Ripeado Por

Sotoka!!!” [Ex. C, p.13], “Encoded by Remon” [Ex. C, p.14], “Ripped by Olga Carmigniani” [Ex. C, p.15], “Ripped by Johnny Allegro” [Ex. C, p.15], “Recorded by BID” [Ex. C, p.15], “Released by skinsuit (DMaX)” [Ex. C, p.16], “ripped by 42o” [Ex. C, p.16], “Ripped by ILuvJewel” [Ex. C, p.18], “Ripped by: ~(IO□)~” [Ex. C, p.18], “Ripped by Donnie Pickett” [Ex. C, p.20], “Ripped By The Infamous [WCR]” [Ex. C, pp.21, 24], “ripped by db poweramp R1aa sux. Enjoy!” [Ex. C, p.21], “Encoded by Borame” [Ex. C, p.22], “by Roy Anderson” [Ex. C, p.23], “Made By Sitting Chewie” [Ex. C, p.25], “Mixed by T-bone” [Ex. C, p.25], “Ripped by TyRex” [Ex. C, p.25], “by TNPG” [Ex. C, p.26]. Many other files in Doe 106’s Kazaa “share” folder have been explicitly “tagged” as having been originally ripped, encoded and/or uploaded by other users on the FastTrack network. This evidence confirms that Doe 106 has been actively engaged in copying and disseminating files from other users.

(b) Numerous files from Doe 106’s Kazaa “share” folder indicate expressly that originally they were downloaded from Internet sites – many of which are blatant pirate sites – or that they were otherwise “tagged” by the operators of those Internet sites. For example, the metadata indicates that Doe 106 files were downloaded from the following sites, among many others: www.lopo.prv.pl [Ex. D, p.1], <http://mp3.attin.com> [Ex. D, pp.1, 11], [Http://www.Yeware.com](http://www.Yeware.com) [Ex. D, p.1], www.music-madness.net [Ex. D, pp.2, 12], www.simplemp3s.com [Ex. D, pp.2, 3, 5, 7], theneptunes.20m.com [Ex. D, p.2], <http://mp3wma.spydar.com> [Ex. D, p.3], <http://supermusic.nu/> [Ex. D, pp.3, 12, 14], <http://themusiclover.com> [Ex. D, pp.3, 8, 9, 10, 11, 12, 13], <http://canna.cjb.net> [Ex. D, p.3], www.Amp3d.com [Ex. D, pp.4,5], <http://grounation.tripod.com> [Ex. D, p.4],

www.mp3ir.com [Ex. D, p.5], www.mp3-2003.com [Ex. D, pp.5, 8, 13],
<http://www.MusicInter.com> [Ex. D, p.6], <http://mp3realm.bored.org> [Ex. D, p.6],
www.KRAZYMP3Z.com [Ex. D, p.6], www.ulpunk.com [Ex. D, p.6],
www.mauopicotto.com [Ex. D, p.7], www.supermp3s.net [Ex. D, p.8],
<http://www.chatcube.net> [Ex. D, p.8], www.d182.cjb.net [Ex. D, p.9],
www.sunworks.com/Yoyo311 [Ex. D, p.9], <http://thetop40.cjb.net> [Ex. D, p.11],
www.harmonyroom.com [Ex. D, p.11], www.gangstermusic.tk [Ex. D, p.12].
<http://id3.songspy.com> [Ex. D, pp. 14, 16], www.mp3sfinder.com [Ex. D, p.15].
<http://newmusic2k.com> [Ex. D, p.15].

(c) Many files from Doe 106's "share" folder reveal that multiple different brands or versions of "ripping" software were used to make the files, suggesting strongly that the files were ripped by different people. Compare, for example, "Made with RealJukebox (tm)" [Ex. E, pp. 1, 2, 3, 4, 5, 6, 7, 8, 9], "MPecker MPEG Encoder 1.0b14" [Ex. E, p.3], "Created with Jukka Poikolain" [Ex. E, pp. 3, 6], "By TaggerMp v.2.31" [Ex. E, p.6], and "CD'n'Go! Suite 1.89.854" [Ex. E, p.8].

(d) Numerous files from Doe 106's Kazaa "share" folder also contain multiple "keywords" added into the metadata. The purpose of keywords is to help other users find the files when searching on a large network such as iMesh or Kazaa. For example, one Doe 106 file containing the song "Set It Off" by DMX has "NEW DMX!" in the keyword field [Ex. F, p 8]. An MP3 file entitled "9 Minutes of Cartman Quotes" contains the keywords "cartman, south park, comedy" [Ex. F, p.11]. The keyword field for a file containing the song "Real Slim Shady Please SHUT UP" says "eminem gets blased" [Ex.

F, p.6]. Another file containing the song “The Hero Dies in This One” by The Ataris lists the keywords “the ataris, so long astoria, punk, the hero dies in this one” [Ex. F, p.7]. Scores of other files in Doe 106’s “share” folder contain similar keywords that strongly suggest that the files were intended for mass distribution on a file-trading network.

(e) Similarly, numerous files from Doe 106’s “share” folder contain words and phrases in the description field that appear designed to help other users of the peer-to-peer network to locate certain files, or to provide additional information on the files. For example, a file of the song “Set It Off” by R. Kelly contains the description “From The Muhamed Ali Soundtrack” [Ex. F, p.1]. A file containing the song “Right Thurr” by artist Chingy contains the following alternative spellings and keywords in its description

“right there, chinky, chingy, chingie, rite their, let down your hair, STL, i like the way” [Ex. F, p.3]. A file containing the song “Dig It (Holes)” by D Tent Boys contains the description “From the movie Holes; The book is now a movie” [Ex. F, p.10]. Doe

“share” folder also contains a software file for “DeadAIM 4.0,” an add-on to AOL’s instant messenger service, with the description “Latest version of DeadAIM, You can’t download off his site unless you pay him \$4.99, you still need a working serial to get this to work though” [Ex. F, p.12].

(f) The metadata from numerous files in Doe 106’s Kazaa “share” folder also contain explicit invitations to other users to download or further “share” the files. For example, one file containing the song “The Anthem” by Good Charlotte states in the description area of the metadata: “after weeks of searching, i finally found the real song!! download it now . . . it’s an awesome song” [Ex. G, p.1]. Another for the song “Angel” by

Amanda Perez states “click on find more sources to download on the traffic screen, downloads are much faster that way!!” [Ex. G, p.1]. Another file containing a Weird Al Yankovic song states “One of those that u must download” [Ex. G, p.1].

(g) Finally, numerous files from Doe 106’s “share” folder contain other telltale metadata signs that they were intended for mass distribution to other, unknown persons, over a file-trading network such as the FastTrack system. Many of these files contain notes in the metadata for other users, telling them about the technical quality of the file or assuring them that it is the full, real or complete file. (One characteristic of pirate peer-to-peer networks is that, sometimes, files are of poor quality or incomplete or not what they purport to be. Hence, these metadata notes are fairly common.) For example, two files announce “Complete CD! Check it out” [Ex. H, pp. 2, 5]; two others tell other users “retail track off the album” [Ex. H, pp.1, 3]; another explains “Not censored unfortunately, but still got a good beat” [Ex. H, p.3]; another promises “Good Quality” [Ex. H, p.1]; another states “Cd quality, Cd Version” [Ex. H, p.2]; one advises “crappy radio rip / enjoy” [Ex. G, p.2]; another states “Very clear recording! (JLT)” [Ex. H, p.4]; another guarantees “Absolutely no skips. –Nick” [Ex. H, p.5]; and several files claim that the songs they contain are “real” and the “full” version [Ex. H, pp. 1, 2, 3, 5, 6].

12. Excerpts of the metadata from the files in Doe 207’s iMesh “share” folder reveals the following similar results for Doe 207:

(a) As with Doe 106, multiple files from Doe 207’s iMesh “share” folder contain, in the metadata, explicit claims of having been originally ripped, encoded and/or uploaded by many different people. For example, files in Doe 207’s “share” folder contain the

following notations: “Ripped by Ozzy” [Ex. I, p.1], “fixed by pablo64” [Ex. I, p.1], “Ripped by Lowrider” [Ex. I, p.2], “RiPPeD by BaM BaM of ATM” [Ex. I, p.3], “ripped by jade” [Ex. I, p.3], “ripped by Havok for HNA” [Ex. I, p.4], “Encoded by User #911” [Ex. I, p.4], “RiPPed by Fubar” [Ex. I, p.5], “Ripped by LoKuST 1997” [Ex. I, p.6], “Rip by Titus” [Ex. I, p.8], “Ripped by NRG (Poole UK)” [Ex. I, p.9], “Ripped by Lobot” [Ex. I, p.10], “By Anx” [Ex. I, p.10], “Ripped by th 0t002” [Ex. I, p.11], “Ripped By ZeUs RNS 1997” [Ex. I, p.11], “Ripped by kboy” [Ex. I, p.12], “MP3 by P4pYt0” [Ex. I, p.12], “Ripped by Roy Moore” [Ex. I, p.13], “Ripped By BouDDha_” [Ex. I, p.14], “Ripped by StHubbins” [Ex. I, p.15], “ripped by chuwy” [Ex. I, p.15], “Ripped by : Dj SoNnY d !” [Ex. I, p.15], “A Publius Rip!” [Ex. I, p.16], “Encoded by King Arne Mackan!” [Ex. I, p.16], “ripped by illusion” [Ex. I, p.16], “Ripped/Encoded By: Hydro/aPC” [Ex. I, p.18], “Ripped by T.J. aka Westwide” [Ex. I, p.18], “ripd’ n upd’ by winD” [Ex. I, p.21], “Ripped by Big-Head” [Ex. I, p.21], “ripped by AZNkId” [Ex. I, p.22], “Tagged by CPurple” [Ex. I, p.23] “upped by Cat” [Ex. I, p.24], “encoded by: Quang Tran” [Ex. I, p.24], “Ripped by Dynamix” [Ex. I, p.25], “Ripped by LA” [Ex. I, p.26], “Upped by Da Korn Addict” [Ex. I, p.27], “Encoded by Beelzebub” [Ex. I, p.30], “Ripped by omm of Team RNS” [Ex. I, p.30], “Tagged by CPurple” [Ex. I, p.30], “Ripped/Encoded by TeLiC `(:” [Ex. I, p.31] , “Soundtrk ripped by JoeFision” [Ex. I, p.32], “Ripped by [Felon] of MdG” [Ex. I, p.33], “uploaded by Ieqacy of brazy” [Ex. I, p.33], “Tagged by AudioMojo” [Ex. I, p.34], “Ripped by TyRex” [Ex. I, p.35], “Ripped by BonethuG [RnS]” [Ex. I, p.36], “Ripped By: Viper” [Ex. I, p.36], “Ripped By Doug” [Ex. I, p.41], ‘ripped by Team RNS” [Ex. I, p.44]. Numerous other files in Doe 207’s “share” folder

have been explicitly “tagged” as having been originally ripped, encoded and/or uploaded by other users on the FastTrack network.

(b) Doe 207’s “share” folder also contains files that indicate expressly that originally they were downloaded from Internet sites – many of which are blatant pirate sites – or that they were otherwise “tagged” by the operators of those Internet sites. For example, the metadata indicates that Doe 106 files were downloaded from the following sites, among many others: <http://plaza.v-wave.com/bert> [Ex. J, p.1], <http://muzic.ml.org> [Ex. J, p.1], <http://id3.songspy.com> [Ex. J, pp.2, 7, 10, 21], <http://www.supermusic.nu> [Ex. J, pp.2, 16], <http://musiclover.spydar.com> [Ex. J, p.3], <http://mp3k.tsx.org> [Ex. J, p.3], <http://3mc.spydar.com> [Ex. J, pp.4, 9], www.audioshock.com [Ex. J, p.5], www.zlurp.com [Ex. J, pp.5, 7, 15], <http://epitonic.com> [Ex. J, p.5], www.charthitz.org [Ex. J, pp.6, 9], www.21century-mp3.com [Ex. J, p.7], www.dashadyspot.com [Ex. J, p.8], <http://surf.to/powersun> [Ex. J, p.11], www.renox.com.pl [Ex. J, p.12], www.themusiclover.com [Ex. J, pp.11, 13, 16, 22, 23, 24], www.hkprmusic.com [Ex. J, p.14], <http://Flywest.cjb.net> [Ex. J, p.16], www.music-madness.net [Ex. J, p.17], <http://www.otsjoke.com> [Ex. J, p.18], www.westcoast2k.cjb.net [Ex. J, p.20], <http://www.full-albums.com> [Ex. J, p.21]; www.simplemp3s.com [Ex. J, p.21], <http://www.mp3downloader.com/> [Ex. J, p.26].

(c) Files from Doe 207’s “share” folder show that multiple brands or versions of “ripping” software were used to make the files, suggesting strongly that the files were ripped by different people. Compare, for example, “Made with RealJukebox (tm)” [Ex. K, pp. 1 - 18], “CD’n’Go! Suite 1.89.854” [Ex. K, p.1], “Created by Grip” [Ex. K, p.2].

“Created by Audio Converter” [Ex. K, pp.9, 15], “CD’n’Go! Suite 2.00.945” [Ex. K, p.10], “CD’n’Go! Suite 1.72.741” [Ex. K, p.10], and “Created by Grip in Linux” [Ex. K, p.10].

(d) As with Doe 106, numerous files from Doe 207’s “share” folder contain multiple keywords. For example, one Doe 106 file containing the song “Angel’s Son” by Sevendust contains the keywords “Lajon, Strait Up, Sevendust, Snot” [Ex. L, p.3]. Likewise, a file of the song “The Best Damn Rave Song Ever” has the keywords “trance, rave, techno” [Ex. L, p.4]. A video file containing an episode of the television show “Family Guy” contains the keywords “Family Guy Weinstein Peter Griffin Quahog Lost Episode Fox TV Banned” [Ex. L, p.9]. Another file, of the song “Rock Superstar,” contains the keywords “So You Want to be a Rap Superstar, Live LARGE, BIG house 5 Cars? You’re in Charge” [Ex. L, p.13]. And another file containing a song entitled “Beatbox vs. Scratch” by the group “The Roots” has the keywords “godfather of noise” [Ex. L, p.17]. Scores of other files in Doe 106’s “share” folder contain similar “keywords” that strongly suggest that the files were intended for mass distribution on a file-trading network.

(e) Many of the files in Doe 207’s “share” folder also contain descriptions that provide explanations and advice for other users of the peer-to-peer network. For example, a file containing a version of the song “Smells Like Teen Spirit” contains the description “Red Hot Chili Peppers w/ Kurt” [Ex. L, p.5]. Another file of the song “I Need Love” by rap artist LL Cool J indicates that it is one of the “MTV 100 Greatest Pop Songs” [Ex. L, p.6]. A file containing the song “Only God Knows Why” notes “Explicit

Content' Release" [Ex. L, p.10]. Another file of the song "Ecstasy" states "Pretty Good Club Song, worth a listen" [Ex. L, p.20]. And a file of Eminem's song "Sweet Home Alabama Freestyle" has the description "From the 8 Mile Movie" [Ex. L, p.22].

(f) The metadata from Doe 207's "share" folder also contains explicit invitations to other users to download or further "share" the files, such as one file containing the comedy track "You Stole My Crack," which states "Like This Track? Then Share" [Ex. M, p.1].

(g) Finally, numerous files from Doe 207's "share" folder contain notes in the metadata concerning the quality or completeness of the file. For example, one file states "Fresh off the radio, the first single!" [Ex. N, p.1]; another explains "No Loops" [Ex. N, p1]; one warns "Not best quality" [Ex. N, p.2]; another promises "real cd!!" [Ex. N, p.2]; and another boasts: "Finally the Real Full CD delivered fresh for everyone on Grokster and Kazaa to Enjoy! – Compliments of [dmb] ~ {DMB} ~ [dmb]" [Ex. N, p.3].

13. In addition, there are organized groups that have as their mission widely distributing sound recordings *before* those recordings are released commercially (such pre-release recordings sometimes are obtained through promotional copies sent to radio stations and/or reviewers, or by stealing them from recording studios.) These are criminal enterprises, and the ring leader of one of them, known as the Apocalypse Crew or APC, recently plead guilty to criminal copyright infringement and faces up to five years in prison. (A news article describing this guilty plea is attached hereto as Exhibit Q.) In addition, on April 22, 2004, the U.S. Department of Justice announced that it was taking aggressive action targeting organized groups, including APC, that specialize in the distribution of pirated materials online. (A copy of the DOJ press release is

attached hereto as Exhibit R). These organized groups “tag” or identify their files (through the metadata) so others can know that they were the original source of the file. Several of the files in Doe 106’s Kazaa “share” folder contain the tags of these types of groups. For example, “ripp’d by ReaLi_doe [aPC]” [Ex. O, p.1]; “Team RNS on EFNET” [Ex. O, pp.1, 2]; “Team_Osc” [Ex. O, p.2]; “Ripped By The Infamous [WCR]” [Ex. O, p.3]. Likewise, Doe 207’s iMesh “share” folder contains the tags from these groups, including: “Team aPC” [Ex. P, p.1]; “Ripped by SmokeEE for aPC 2k1” [Ex. P, p.1]; “Ripped/Encoded By: Hydro/aPC” [Ex. P, p.1]; Ripped by ZeUs RNS 1997” [Ex. P, p.2]; “Citadel Crew MP3 Division” [Ex. P, p.3]. This evidence confirms that Does 106 and 207 are active downloaders from peer-to-peer networks; that they downloaded these files – in violation of the Copyright Act – and then made them available for any of the several million other FastTrack users for further downloading.

14. We also conducted a separate analysis that demonstrates that the original source for many of the files contained in Doe 106’s and Doe 207’s “share” folders was a user on the now-defunct Napster system. As the Court is probably aware, Napster was the first large-scale pirate peer-to-peer network. Because of its facilitation of massive copyright infringement by its users, Napster ultimately was shutdown by order of a federal district court in the Northern District of California (Judge Patel), an order that was affirmed by the Ninth Circuit Court of Appeals. Our analysis reveals that Doe 106 and Doe 207 were either Napster users and previously had offered the files for distribution on the Napster system, or that they downloaded the files and that the original source of the files was a former Napster user.

15. We were able to determine this based on another piece of metadata known as a “hash.” A hash is a unique identifier of a file, a “fingerprint” of sorts. It is a computed value

based on the properties of the individual bits in a file. The hashes are used by peer-to-peer file-trading systems to locate other exact versions of a file being downloaded. For example, if User A is downloading a file from User B but User B disconnects in the middle of User A's download, the system needs a way to find the exact same version of that file from another user in order to enable User A to complete the download. FastTrack systems like iMesh and Kazaa use the hash for this purpose. Napster also used hashes.

16. To conduct our analysis, we took a sample of songs downloaded from Doe 106's and Doe 207's "share" folders and compared their hashes to the hashes in a database dating back to May of 2000, created by our investigators from downloads from users on the Napster system. Two of the ten songs we downloaded from Doe 106's "share" folder – "Learn to Fly (Unplugged)" by the Foo Fighters and "Unpretty" by TLC – have an exact match in the Napster database. We also downloaded ten files from Doe 207; of those, five files – containing the songs "Living on a Prayer" by Bon Jovi, "Digging on You" by TLC, "Points of Authority" by Linkin Park, "Check Yourself" by Ice Cube, and "My Own Worst Enemy" by Lit – have an exact match in the Napster database. Thus, the original sources of those files almost certainly trace to users of the now-defunct Napster system. Given the viral nature of distribution on peer-to-peer networks – where users who download a file automatically begin offering that file for further distribution to others – those files may have been distributed countless times between May 2000, when we downloaded them from Napster users, and the day we downloaded them from Defendants. This evidence further confirms that Doe 106 and Doe 207 have been active participants in peer-to-peer networks for a significant period of time.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated: April 29, 2003



Jonathan Whitehead