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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

PRIORITY RECORDS LLC, et al.,

Plaintiffs,

vs.

DOES 1-8,

Defendants.

Case No. C-04-1136 SC

PLAINTIFFS' OPPOSITION TO *AMICUS* BRIEF OF ELECTRONIC FRONTIER FOUNDATION ET AL., CONCERNING PLAINTIFFS' MISCELLANEOUS ADMINISTRATIVE REQUEST FOR LEAVE TO TAKE IMMEDIATE DISCOVERY PURSUANT TO LOCAL RULE 7-10(B)

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INTRODUCTION

The Electronic Frontier Foundation, Public Citizen Litigation Group, and American Civil Liberties Union have filed their *amicus* brief on the theory that this is a "test case." *Amici* Br. at 2-3. Nothing could be further from the truth. To date, courts in 75 other cases have ruled on virtually identical motions for leave to take expedited discovery filed by the record-company Plaintiffs. In every one of those cases, including three in this District,[1] the courts have granted Plaintiffs' motions and allowed Plaintiffs to issue subpoenas to Internet Service Providers ("ISPs"). *See* Request for Judicial Notice, Exh. A (listing court orders). This case is no different, and this Court should follow the same course.

As set forth in Part III of this brief, all the issues raised by *Amici* can be resolved in the ordinary course of this litigation – if any Defendant wants to raise them – in a way that balances Plaintiffs' need to vindicate their rights under federal law with Defendants' interest in having a full and fair opportunity to litigate relevant issues at the appropriate time. Indeed, under the process Plaintiffs propose, each Defendant will be notified and given an opportunity to file a motion to quash *before* his or her identity is revealed to Plaintiffs. The first step in that process, however, is issuance of a subpoena to Covad Communications (the ISP serving all Defendants). That cannot occur until the Court grants Plaintiffs' motion for expedited discovery. Plaintiffs therefore respectfully request that the Court grant that motion as soon as possible.

BACKGROUND

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

[1] *See* Order, *BMG Music, et al. v. Does 1-4*, Case No. C-04-2021 JF (N.D. Cal. June 16, 2004); Order, *Maverick Recording Co., et al. v. Does 1-4*, Case No. C-04-1135 MMC (N.D. Cal. Apr. 28, 2004); Order, *Arista Records, Inc., et al. v. Doe*, Case No. C-04-1134 JL (N.D. Cal. Apr. 5, 2004).

users to transform their computers into interactive Internet sites, disseminating files for other users to copy. The most infamous P2P network, Napster, was enjoined by a federal court. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). Other P2P networks, such as KaZaA, have arisen in Napster's wake. As a direct result, Plaintiffs have sustained devastating financial losses. *See* http://www.riaa.com/news/marketingdata/pdf/year_end_2002.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 Litig.*, 334 F.3d 643, 655-56 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 1069 (2004). Copyright infringement over P2P networks is widespread because users can conceal their identities by means of an alias. Copyright owners can observe infringement occurring on P2P networks, but cannot (without assistance from the ISP) identify the true names and locations of the infringers.

The Defendants in this case are active participants in the FastTrack network, the largest current P2P network. Declaration of Jonathan Whitehead In Support of Plaintiffs' Opposition To Amicus Brief of Electronic Frontier Foundation Et Al**.** ¶ 4 ("Second Whitehead Decl."). Each Defendant offers copyrighted sound recordings stored on his or her computer for others to download, and each Defendant downloads copyrighted sound recordings from other users of the P2P network. Plaintiffs caught each of the Defendants 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 Plaintiffs. See Declaration of Jonathan Whitehead in Support of Plaintiffs' *Ex Parte* Application to Take Immediate Discovery ¶ 17 ("Whitehead Decl."); Second Whitehead Decl. ¶ 5.

Amici assert that Plaintiffs have failed to present sufficiently "individualized" evidence to the Court in support of discovery. *Amici* Br. at 8. The merits of Plaintiffs' claims, however, are not germane at this stage of the proceedings. Moreover, *Amici*'s assertion is demonstrably false. As discussed in the Whitehead Declarations, upon finding each Defendant disseminating large

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numbers of copyrighted works, Plaintiffs gathered substantial evidence of each Defendant's illegal conduct. Plaintiffs could identify the Internet Protocol ("IP") address from which each Defendant was unlawfully disseminating Plaintiffs' copyrighted works. An IP address is a number, such as 12.34.255.255, that specifically identifies a particular computer using the Internet. Using the IP address, Plaintiffs determined that Covad Communications, an ISP headquartered in San Jose that provides services to a large customer base in the San Francisco Bay area, serves as each Defendant's ISP.

With respect to each Defendant, Plaintiffs have specified the IP address, date, and time of the infringement. That information uniquely specifies a Covad subscriber as the source of the infringement. For each Defendant, Plaintiffs have provided a list of a representative sample of copyrighted sound recordings that the Defendant disseminated without authorization. *See* Exhibit A to the Complaint. As explained in more detail in the first Whitehead Declaration, 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. *See* Whitehead Decl. ¶¶ 16, 17. Plaintiffs have provided sworn testimony that each of the named Defendants offered the copyrighted works listed in the Complaint and (based on evaluation of the names and file types of other files they offered) appeared to be offering hundreds of additional copyrighted sound recordings without authorization. *See* Whitehead Decl. ¶ 17; Second Whitehead Decl. ¶ 5. Finally, Plaintiffs have provided to the Court, as an example, detailed lists of the hundreds of files being distributed by two of the Defendants. *See* Whitehead Decl, Exh. 1. Plaintiffs have also provided testimony under oath that they possess similar evidence for each of the other Defendants. *See* Whitehead Decl. ¶ 17; Second Whitehead Decl. ¶ 5.

But Plaintiffs cannot ascertain the name, address, or any other contact information for any of the Defendants. Whitehead Decl. ¶¶ 16, 21. Only Covad, which maintains logs that match IP addresses, dates, and times with Covad's subscribers, can identify the Defendants in this case. Unless and until Covad discloses the infringers' identities, Plaintiffs have no remedy for the past and ongoing infringement committed by the Defendants.

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ARGUMENT

I. PLAINTIFFS HAVE MET THE GOOD-CAUSE STANDARD FOR EXPEDITED DISCOVERY.

Plaintiffs have satisfied the "good cause" standard required to take expedited discovery. *See* Plaintiffs' Miscellaneous Administrative Request for Leave to Take Immediate Discovery Pursuant to Local Rule 7-10(b), at 5-8.

There is no dispute that the Federal Rules of Civil Procedure permit plaintiffs to file lawsuits against "John Doe" defendants when they do not know the defendants' identities but could uncover them with discovery. Indeed, courts in virtually every circuit have held that it is an abuse of discretion to deny such discovery. *See id*. at 5 (citing cases). Moreover, courts regularly permit such discovery where a defendant is alleged to have violated the law using an alias on the Internet because plaintiffs do not know who the defendants are or where they reside. *United Parcel Serv. of Am., Inc. v. John Does One Through Ten*, No. Civ. A. 1-03-CV-1639, 2003 WL 21715365, at *1 (N.D. Ga. June 13, 2003); *Equidyne Corp. v. Does*, 279 F. Supp. 2d 481, 483 (D. Del. 2003). Such discovery is particularly critical here because Plaintiffs suffer irreparable harm every day that Defendants continue to disseminate Plaintiffs' copyrighted works without authorization. *See Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1121 (9th Cir. 1999) ("Federal copyright law presumes irreparable harm from the infringement of a copyright.").

It is therefore not surprising that in 75 similar copyright infringement cases brought by the Plaintiffs and/or other record companies against "Doe" defendants infringing copyrights over P2P networks, courts have granted Plaintiffs' motions for leave to take expedited discovery, recognizing that without discovery from the ISP, Plaintiffs cannot enforce their rights. *See* Ex. 2 attached hereto (listing cases). Significantly, not a single court has held that the Plaintiff record companies have not met the good-cause standard, and not a single court has denied them the opportunity to serve subpoenas on the ISPs.

II. THE ARGUMENTS RAISED BY *AMICI* ARE NOT RIPE FOR REVIEW AND, IN ANY CASE, ARE MERITLESS.

It would be premature to consider the arguments *Amici* raise at this preliminary stage in the proceedings. *See* Order, *UMG Recordings v. Does 1-199*, No. 04-093 (CKK), slip op. at 2

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(D.D.C. Mar. 10, 2004) (ruling that *Amici* had raised First Amendment, jurisdiction, and joinder issues "prematurely" where subpoena had not yet issued, and that those issues could be resolved "in the ordinary course of this litigation at the appropriate time"); Order, *Motown Record Co., L.P. v. Does 1-252*, No. 1:04-CV-439-WBH (N.D. Ga. Mar. 1, 2004) (same). Plaintiffs' Miscellaneous Administrative Request for Leave to Take Immediate Discovery seeks only the right to serve discovery on Covad to identify the Internet users who are unlawfully infringing Plaintiffs' copyrights. Significantly, Plaintiffs' request expressly contemplates that Covad will notify the Defendants so that each Defendant has the opportunity to be heard if he or she wishes, *prior to the disclosure*. If and when any Defendant files a motion to quash, the Court will be able to consider any issues raised before that Defendant's identity is revealed. Until then, the issues *Amici* raise are not ripe for review.

Amici suggest instead that Plaintiffs litigate a number of issues in the abstract – prior to issuance of a subpoena and notification to the Defendants, and without any Defendant seeking to raise those issues. That suggestion is flawed for three reasons.

First, *Amici* cannot inject into this case any issues not raised by a party. *See Bell v. Wolfish*, 441 U.S. 520, 531 n.13 (1979); *Russian River Watershed Protection Comm. v. City of Santa Rosa*, 142 F.3d 1136, 1141 n.1 (9th Cir. 1998).

Second, because 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 be resolved in the context of a concrete dispute between parties, not in the abstract. *See Hillblom v. United States*, 896 F.2d 426, 430 (9th Cir. 1990). Any resolution of legal arguments raised by *Amici* at this point would amount to nothing more than an advisory opinion based on arguments that a party to the litigation may never raise. *Id.* Absent a concrete controversy raised by a party, this Court should not rule on the merits of these issues. If and when a party raises any of the arguments that *Amici* now advance, the parties will have a full and fair opportunity to present their positions, and this Court will be able to resolve the issues then, in the context of a live, concrete dispute.

Third, if some Defendants do raise arguments similar to *Amici*'s, this Court will, in all likelihood, have to entertain those arguments twice – once when presented by *Amici* in the

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abstract, and a second time when presented by individual Defendants in opposition to the requested discovery. Such duplicative litigation is a waste of judicial resources.

Notably, *Amici*'s approach does not provide additional protection for Defendants beyond that described in Part III of this brief. Rather, their approach maximizes the burden on copyright owners seeking to enforce their rights. Imposing cumbersome, yet pointless burdens on Plaintiffs cannot be squared with the Copyright Act or the policies underlying it. Plaintiffs are the injured parties here; as a result of Defendants' conduct, Plaintiffs suffer enormous losses, and that harm increases with every passing day. *See Sun Microsystems*, 188 F.3d at 1121. Plaintiffs need to identify Defendants expeditiously so that Plaintiffs can vindicate their rights.

Moreover, of the issues *Amici* highlight, only the First Amendment issue is in any way tied to the interest in anonymity that *Amici* claim to advance. That interest is fully satisfied if Defendants have the opportunity to raise and litigate that issue prior to disclosure of their identities. Personal jurisdiction and joinder, however, are traditional personal defenses that Defendants can raise at an appropriate point after they have been identified. There is no need to litigate these issues prior to disclosure of their identities. Nonetheless, even if this Court were to consider the merits of *Amici*'s arguments now, those arguments would fail.

A. First Amendment/Due Process.

Amici's suggestion that Defendants have a First Amendment interest when disseminating copyrighted works over a P2P network is both dubious and impossible to litigate absent participation by the Defendants.

Defendants have 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). Plaintiffs have alleged a prima facie case of copyright infringement and have gathered evidence specific to each Defendant. Any Defendant who wishes to raise a First Amendment "anonymity" claim (or a due-process challenge based on an interest in anonymity)[2] must identify the constitutionally protected conduct

[2] Plaintiffs refer here to *Amici*'s argument (which Plaintiffs vigorously dispute) that there is a First Amendment right to anonymity on the Internet. To the extent that a Defendant seeks to

Footnote continues next page.

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in which he or she was engaged. Experience has taught Plaintiffs that few individuals disseminating copyrighted files on a P2P network even attempt to make this showing because they know they have been caught red-handed. In any case, the Court cannot address a First Amendment argument until a Defendant comes forward and claims a First Amendment interest. As discussed below in Part III, each Defendant will have the opportunity to raise such an argument (in the form of a motion to quash) prior to disclosure.

Amici preview the First Amendment arguments that Defendants might make. *See Amici* Br. at 3-8. In so doing, they demonstrate how weak those claims are. *Amici* attempt to create a "qualified privilege" in anonymity on the Internet, *see id*. at 3, 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 telephone companies or 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); *see 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 (W.D. Va. 1999), *aff'd*, 225 F.3d 656 (4th Cir. 2000) (unpublished table decision).

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 considering precisely the arguments made by *Amici* 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

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litigate the merits of Plaintiffs' claims of copyright infringement, such as through a fair-use defense, such litigation should occur only after the Defendant has been identified.

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after essentially opening the computer to the world." *In re Verizon Internet Servs., Inc.*, 257 F. Supp. 2d 244, 257, 267 (D.D.C.), *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 filesharing mechanism shows no expectation of privacy).

Moreover, Defendants in this case cannot reasonably expect Covad to preserve their anonymity given that Covad informs its subscribers in no uncertain terms that it may disclose information about them to copyright owners. Covad's Acceptable Use Policy plainly states that its services may not be used for "storing, posting or transmitting materials . . . that would constitute an infringement upon the . . . copyrights" of others, and that Covad may "provide requested information to third parties who have provided notice to Covad stating that they have been harmed by a User's failure to abide by this Policy." http://www.covad.com/onlinesupportcenter/resources/legal/docs/Covad_AUP_111202.pdf. Thus, although *Amici* may wish to protect Defendants' anonymity, Defendants themselves have already forfeited it.[3]

Amici try to distinguish away the entire body of well-established caselaw as "irrelevant," by arguing that the cases consider privacy interests under the Fourth Amendment, not the First Amendment. *Amici* Br. at 6. That analysis is fundamentally flawed because it presupposes that the Defendants have a First Amendment interest in maintaining the privacy of their illegal copyright infringement. As discussed above, they do not. Moreover, the Supreme Court has repeatedly rejected claims that First Amendment interests require a heightened level of scrutiny prior to issuance of 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);

[3] *Amici* counter by claiming 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 6-7. 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).

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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 notification prior to issuance of subpoenas to phone companies for toll calling records).[4] *Amici* suggest that these cases are distinguishable because they involve different factual circumstances. *Amici* Br. at 6. But that makes no difference. These cases make plain that the kind of elevated scrutiny that *Amici* seek is not required by the First Amendment.

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* Br. at 4-6. *Amici* ask the court to "draw[] by analogy" from cases involving subpoenas to identify journalistic sources. *Id*. at 4. Those cases rest on far more significant First Amendment interests 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"). But even if 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 only show 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, 634-39 (D.C. Cir. 1974). Notably, *Carey* does not require any inquiry into the merits of plaintiffs' claims. Rather, a plaintiff need only show that the information is sought in good faith, is unavailable from any other source, and is central to the plaintiff's claim. *See id*.

Citing other "balancing" cases, *Amici* 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 4-5. Plaintiffs have, however, exceeded the standards in any of the cases *Amici* cite. In particular, Plaintiffs have satisfied the requirements suggested in the *Columbia Insurance* case for discovery to uncover a defendant's identity. *See Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578-80 (N.D. Cal. 1999) (holding that plaintiff must (1) identify the defendant with

[4] The subpoena Plaintiffs propose to serve would seek only information to identify the Defendants, not information concerning the content of any communication they may have made over the Internet.

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sufficient specificity to show that defendant is a real person or entity, (2) show the steps taken to locate the defendant, (3) make a showing that an act giving rise to liability occurred, and (4) file a request for discovery with reasons justifying the request). Here, Plaintiffs have identified Defendants by their IP addresses, have pinpointed the specific date and time of their infringement, as well as the particular copyrighted sound recordings they violated, and have explained that only Defendants' ISP (Covad) can identify Defendants by name. Plaintiffs have also 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 one of the exclusive rights). Indeed, by submitting the IP address assigned to each Defendant, the date and time at which the infringing activity was observed, and the titles of some of the illegally disseminated copyrighted sound recordings and the copyright owners of those sound recordings, Plaintiffs have provided specific evidence of infringement for all Defendants. *See* Exhibit A to the Complaint. Plaintiffs have also provided complete lists of the hundreds of files that two of the Defendants made available to the public, and sworn testimony that Plaintiffs possess similar evidence for all other Defendants. *See* Whitehead Decl. ¶ 17; Second Whitehead Decl. ¶ 5.[5] That evidence demonstrates that all Defendants in this case are active participants on a P2P network and serious copyright infringers. And, of course, Plaintiffs have filed a request for discovery. As Judge Bates held in examining virtually identical facts in the *Verizon* case, such evidence more than satisfies the standards in any of the cases *Amici* cite. *See Verizon*, 257 F. Supp. 2d at 263 n.22.

[5] *Amici*'s only complaint appears to be that Plaintiffs have provided the Court with a sample, rather than the entirety, of their evidence of infringement by each Defendant. Plaintiffs provided only a sample because there is no sound reason for requiring submission of literally 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. Moreover, as discussed in Part III of this brief, Plaintiffs can provide the detailed evidence with respect to any Defendant who claims a First Amendment interest and moves to quash.

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B. Personal Jurisdiction.

This Court cannot render a determination on personal jurisdiction without reference to actual defendants. Because personal jurisdiction protects an individual liberty interest, only a defendant has standing to raise personal jurisdiction. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 (1982); *Lipofsky v. New York State Workers Comp. Bd.*, 861 F.2d 1257, 1258 (11th Cir. 1988). Moreover, a personal-jurisdiction defense can be (and regularly is) waived. *See Insurance Corp.*, 456 U.S. at 703. The parties cannot litigate any aspect of personal jurisdiction until Defendants have been identified and all parties know who they are.

Even if some Defendants likely do not reside in this district, that does not mean that this Court lacks jurisdiction over them. In this case, all Defendants have significant contacts with the jurisdiction. By logging onto a P2P network, each Defendant transformed his or her computer into an interactive Internet site, allowing others to complete transactions (by downloading copyrighted works) over the Internet. Each Defendant disseminated copyrighted works to anyone who wanted them (including residents of this jurisdiction) and downloaded copyrighted works from others who offered them (including residents of this jurisdiction).[6] *See IO Group, Inc. v. Pivotal, Inc.*, No. C 03-5286 MHP, 2004 WL 838164, at *4-*6 (N.D. Cal. Apr. 19, 2004) (finding personal jurisdiction over defendant who operated an interactive website that enabled users in this district to purchase products); *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 511-13 (D.C. Cir. 2002) (holding that an interactive Internet site allowing electronic transactions may establish "continuous" and "systematic" contacts sufficient for general personal jurisdiction). Thus, unlike the *Cybersell* case that *Amici* cite, *see Amici* Br. at 8, which involved the posting of a "passive home page on the web," this case involves Defendants who have transformed their computers into highly interactive sites. *See Washington Dep't of Revenue v. www.dirtcheapcig.com*, 260 F.

[6] A user downloading a music 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 Georgia, a computer in Florida, and a computer in California. *Id*.

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Supp. 2d 1048, 1052 (W.D. Wash. 2003) (distinguishing *passive* websites which generally do not provide sufficient contacts with a forum to justify an assertion of jurisdiction from *interactive* websites which generally do support an assertion of jurisdiction); *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (same). The fact that P2P infringers trade copyrighted works rather than sell them is irrelevant to whether the websites are fully interactive. *See Amici* Br. at 12. The key issue is whether the sites are 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.*, 314 F. Supp. 2d 27, 30-31 (D.D.C. 2004) (finding personal jurisdiction based on dissemination of copyrighted music to forum residents for free).

Jurisdiction may also be proper because the brunt of the harm in this case (at least as to several 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, 788-91 (1984) (discussing "effects test" for personal jurisdiction); *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 228 F.3d 1082, 1087 (9th Cir. 2000) (declaratory-judgment action regarding rights to use Internet domain name proper in California); *Indianapolis Colts, Inc. v. Metropolitan Baltimore Football Club, Ltd.*, 34 F.3d 410, 411-12 (7th Cir. 1994) (action for infringement of Indianapolis Colts' trademark proper in Indiana); *Autodesk, Inc. v. RK Mace Eng'g, Inc.*, No. C-03-5128 VRW, 2004 WL 603382, at *4 (N.D. Cal. Mar. 11, 2004) (citing "[n]umerous cases both within and outside this circuit [that] have applied the [*Calder* effects] doctrine to actions for willful copyright infringement or other torts involving intellectual property"); *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); *see also IO Group, Inc.*, 2004 WL 838164, at *5-*6. In this case, California 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 California.

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In any case, the Court cannot complete an analysis of Defendants' contacts with this forum until everyone, including Plaintiffs, knows who the Defendants are. According to *Amici*, Plaintiffs should use the admittedly imprecise methods discussed in *Amici*'s declaration[7] to guess the district in which each infringer resides and then file suit in that district. Plaintiffs would then have to come to this Court for subpoenas to Covad, exactly as Plaintiffs have done here. This Court would then resolve any subpoena enforcement proceeding and/or motion to quash against Covad and the as-yet anonymous defendants. Once individuals were identified, Plaintiffs would, a substantial percentage of the time, then 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 would be to place additional burdens on Plaintiffs.

As discussed below, any Defendant who wants to raise personal-jurisdiction issues will have the opportunity to do so.

C. Joinder.

Litigation of joinder is also premature. In most cases, joinder is an issue raised by defendants, based on their assessment of whether litigation without co-defendants is preferable. Indeed, a court considering a challenge to joinder must determine whether severance will prejudice any party or result in undue delay of the litigation. *See Mosley v. General Motors Corp.*, 497 F.2d 1330, 1333 (8th Cir. 1974) (noting that joinder is a fact-intensive inquiry that requires case-by-case adjudication). Until Defendants are identified, the Court cannot make that assessment. Moreover, because the sole remedy for misjoinder is severance, not dismissal, *see* Fed. R. Civ. P. 21, litigation of joinder at this point serves no purpose, other than to delay

[7] *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*. ¶¶ 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 frequently misidentify the region where the infringer lives. *Id*. Where the 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 State where the infringer resides. *Id.* ¶ 9.

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proceedings. The result of a finding of misjoinder would be to divide this case into eight lawsuits, followed by eight subpoenas to Covad, followed by litigation in the identical manner as here, except with far more paper. Such a result would not provide additional fairness to Defendants, nor would it promote judicial economy.

In any event, *Amici*'s arguments ultimately fail. As the Supreme Court has made clear, the Federal Rules of Civil Procedure require courts to "entertain[] the broadest possible scope of action consistent with fairness to the parties" and "strongly encourage[]" the "joinder of claims, parties and remedies." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 724 (1966); *see League to Save Lake Tahoe v. Tahoe Reg'l Planning Agency*, 558 F.2d 914, 917 (9th Cir. 1977) (holding that the rule "regarding permissive joinder is to be construed liberally in order to promote trial convenience and to expedite the final determination of disputes, thereby preventing multiple lawsuits").

This 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. Severance at such an early stage in the proceedings is disfavored because the Court has ample authority to order severance or to require separate trials at any time such an order is in the interest of justice and efficiency. *See, e.g.*, 4 James W. Moore, *Moore's Federal Practice* § 20.09, at 20-58 (3d ed. 2003) ("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 provisions of Rule 20.").

Severance at this point would be particularly inappropriate because Defendants have not yet had the opportunity to present their positions regarding joinder. Until Defendants have been identified, notified, and given a chance to participate in these proceedings, it is impossible to know whether Defendants believe they would be prejudiced by joinder. Defendants may prefer to litigate together, rather than separately, given the commonality of issues among them and given the potential economic benefits to them of litigating the claims together. Severance at this stage would deny them that choice.

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Indeed, reserving the issue of joinder will not prejudice any Defendant in this case in any way. Plaintiffs seek only to obtain the identity of the individuals so that they may be served. Each Defendant will have the opportunity to raise joinder after being identified. Then, this Court can resolve the issues in the context of a live, concrete dispute.

Amici cite two cases brought by the record-company Plaintiffs in which courts have ordered severance of the defendants. *Amici* Br. at 10-11. Not only were those decisions wrongly decided (for the reasons set forth above), but they are also out of step with the 73 other cases allowing Plaintiffs to take expedited discovery without first ordering severance. *See* Ex. 2.

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.[8] But the Supreme Court has instructed courts to interpret the terms "transaction" and "occurrence" broadly in accord with Rule 20's central purposes of promoting trial convenience, expediting the resolution of disputes, and preventing unnecessary lawsuits. *Alexander v. Fulton County*, 207 F.3d 1303, 1323 (11th Cir. 2000). Rule 20 permits joinder so long as there is some "logical relationship" between the transactions or occurrences. *Mosley*, 497 F.2d at 1333. It thus ensures that "all reasonably related claims for relief by or against different parties" may be tried in the same proceeding. 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1653, at 410 (3d ed. 2003).

The allegations in Plaintiffs' Complaint satisfy these standards. There can be no dispute that all of Plaintiffs' claims involve common questions of copyright law and common factual questions concerning the operation of Covad's network and the FastTrack P2P network. Each Defendant in this case was using the same instrumentalities to commit the same violations 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

[8] *Amici*'s attempt to create a third requisite for joinder, *see Amici* Br. at 10 & n.4, conflicts squarely with Ninth Circuit law. *See, e.g.*, *League to Save Lake Tahoe*, 558 F.2d at 917.

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able to commit much (if any) of the infringing activity that underlies Plaintiffs' Complaint. The Complaint expressly alleges that each Defendant uses an online media distribution system (the FastTrack 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; Second Whitehead Decl. ¶ 4; *see also* Whitehead Decl. ¶¶ 7, 16. Each Defendant thus participates in the same online swap meet, exchanging pirated digital copies of Plaintiffs' copyrighted works.[9]

III. GRANTING PLAINTIFFS' MOTION WILL ENSURE AN OPPORTUNITY FOR ALL PARTIES TO BE HEARD IN AN ORDERLY FASHION.

By granting Plaintiffs' Miscellaneous Administrative Request for Leave to Take Immediate Discovery, this Court can achieve orderly resolution of any arguments raised by the Defendants (and *Amici*) in the manner set forth below. This is essentially the approach that courts in more than 70 cases have taken when faced with virtually identical requests filed by the record company Plaintiffs.

1. If this Court grants Plaintiffs' motion, they will issue a subpoena to Covad with a return date 15 business days from the date of service. A return date of 15 business days – effectively 21 calendar days – is equal to the time that *Amici* proposed. *See Amici* Br. at 12-13.

2. Plaintiffs expect that Covad will notify the Defendants once it receives the subpoena from Plaintiffs. Plaintiffs have no objection with the Court directing Covad to provide notice within 7 days of service of the subpoena. *Amici* concede that 15 business days from the date of service on Covad is a reasonable time for a Defendant to file a motion to quash. *See Amici* Br. at 12-13. Past experience indicates that some number of Defendants, once notified of the allegations, will contact Plaintiffs and seek a speedy resolution of Plaintiffs' claims.

[9] Indeed, even if there was no such concerted action, severance would not be required. For example, *Amici* fail to note that the courts have split on whether joinder was appropriate in satellite TV theft cases, even though the complaints in those cases have not alleged the concerted action and interaction presented here. *See, e.g., DIRECTV, Inc. v. Hosey*, 289 F. Supp. 2d 1259, 1262 (D. Kan. 2003) (allowing joinder); *DIRECTV, Inc. v. Adkins*, No. 1:03CV00064, 2003 WL 23096482, at *1-*2 (W.D. Va. Dec. 29, 2003) (same); *In re Monon Tel. Co.*, 218 F.R.D. 614, 616 (N.D. Ind. 2003) (same).

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3. For Defendants who do not move to quash (assuming Covad raises no objections or its objections are resolved), Covad can produce the information requested at the close of business on the return date of the subpoena. The filing of a motion to quash by one Defendant will not prevent the disclosure of the identities of those Defendants who do not move to quash.

4. For Defendants who do move to quash prior to the return date, the Court can resolve their objections. In a motion to quash, Defendants can raise the types of arguments that *Amici* have suggested (with Plaintiffs reserving their rights to raise any and all arguments in response). In response to such a motion to quash, Plaintiffs can provide the same kind of detailed evidence that they have provided for the two infringers whose conduct has already been documented for the Court. *See* Whitehead Decl. ¶ 17 and Exhibit 1; Second Whitehead Decl. ¶ 5.

5. For Defendants whose identities are revealed to Plaintiffs, Plaintiffs believe that, because of the strength of Plaintiffs' evidence, substantial numbers of the Defendants may elect to settle matters without further litigation.

6. For Defendants whose litigation proceeds without settlement, Plaintiffs can determine whether it is proper to continue in this jurisdiction or to transfer to another forum. Any Defendants who wish to raise personal-jurisdiction or joinder issues can make such arguments at that time in the appropriate court.

These procedures will balance Plaintiffs' need to vindicate their rights quickly with Defendants' interest in having a full opportunity to raise arguments and defenses. Moreover, the Court will avoid duplicative litigation over issues that can and should be resolved once in a concrete setting.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court reject *Amici*'s arguments and grant Plaintiffs' Motion for Leave to Take Immediate Discovery.

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Dated: July 2, 2004

Respectfully submitted,

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