

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ARISTA RECORDS, INC.,
et al.,

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)

Plaintiffs,

)
)

v.

)
)

No. 04-CV-2495-BBM

DOES 1-100,

)
)

Defendants.

)
)

**MEMORANDUM OF AMICI CURIAE
PUBLIC CITIZEN, AMERICAN CIVIL LIBERTIES UNION,
ELECTRONIC FRONTIER FOUNDATION,
AND ACLU OF GEORGIA
IN SUPPORT OF MOTION TO QUASH SUBPOENA**

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I. INTRODUCTION

Plaintiffs, fifteen music companies, have named one hundred anonymous, unrelated, and geographically disparate individuals in a single suit in this District, solely because their Internet Service Provider, Cox Communications, Inc. (“Cox”) is located in Georgia. Cox now challenges the discovery subpoena served upon it for the name, address, telephone number, email address, and MAC address of each defendant. *Amici* file this brief in support of Cox’s motion for the limited purpose of protecting the anonymity and due process rights of these hundred “Doe” defendants, rights that should be taken into account before their identities are revealed to the Plaintiff record companies.

Plaintiffs allege that defendants have each separately made available files on their personal computers, containing different copyrighted musical performances, to the general public over the Internet, in a manner that enables the public to download those files to their own computers. *Amici* file this brief to argue that, notwithstanding the serious violations of law alleged in the complaint, plaintiffs have not made a sufficient factual showing to warrant discovery into the identities of these persons who have communicated anonymously over the Internet, including a showing that there is personal jurisdiction over any of the 100 defendants. Moreover, *amici* have serious concerns about whether all 100 defendants are properly joined in one action, particularly in light of the fact that, in justifying discovery, plaintiffs have made a factual showing with respect to only three defendants and present no evidence to support identification of the other 97 individuals. Finally, in the event some discovery is to be allowed, *amici* believe that certain additional conditions should be imposed to assure these defendants the protections of procedural due process.

II. STATEMENT OF FACTS

Exhibit A to the Complaint specifies the Internet Protocol (“IP”) address that

each Doe allegedly used for posting songs on different dates in June and July 2004, identifying between five and eleven songs for each defendant. Plaintiffs seek to impose liability on each of the 100 individuals individually – there are no allegations of joint or several liability and no claims for relief in the alternative against any of them. There is also no claim that the infringers acted pursuant to any common plan or conspiracy, nor that their liability arises out of a common transaction or occurrence. At most, it is alleged that there have been a series of instances in which each individual defendant has used the facilities of a single Internet Service Provider (“ISP”), Cox, to display their respective data files on the Internet. There is no allegation that Cox itself is liable for the infringements. Plaintiffs allege generally that all defendants can be found in Georgia, but their allegation of personal jurisdiction is based on the facts that the Does’ Internet postings can be downloaded in every jurisdiction in the United States, including Georgia, and that their ISP, Cox, can be found in Georgia as well. In fact, as the declaration submitted by Cox’s counsel demonstrates, Cox does not provide Internet service to *any* customers located in the Northern District of Georgia.

Plaintiffs now seek to identify the anonymous defendants so that they can serve summons. Plaintiffs argue that the identification of Doe defendants is commonly permitted, and that unless the defendants are identified plaintiffs will be unable to move forward with their suit. Plaintiffs also place substantial weight on the harm that the social phenomenon of music piracy is causing to their industry, and stress their need for immediate relief, with particular reference to the danger that ISPs may discard their “logs” showing which users were given access through which IP addresses within weeks or even days.

Plaintiffs list several cases in which their discovery requests were granted. Plaintiffs’ Memorandum of Law pp. 8-10. In several other cases, which Plaintiffs

relegate to a footnote, their requests were granted only with modifications including amplified notice to defendants and severance of the individual cases. *Id.* p. 10n4 (mentioning, but not citing, *Interscope Records v. Does 1-25*, Case No. 6:04-cv-197-Orl-22DAB (M.D. Fla. April 27, 2004) (ordering severance into 25 separate suits); *BMG Music v. Does 1-203*, Civil Action No. 04-650 (E.D. Pa. March 5, 2004) (*reconsideration denied* April 5, 2004) (ordering severance)). Finally, after Plaintiffs filed their Motion, the Eastern District of Pennsylvania imposed detailed notice requirements on discovery subpoenas issued in that district, requiring the notices to include a “Court Directed Notice Regarding Issuance of Subpoena” that makes specific reference to jurisdictional concerns, to give Doe defendants in that district the opportunity to file their own motions to quash before their names are exposed. *Elektra Entertainment Group v. Does 1-6*, Civil Action No. 1241 (E.D. Pa. October 13, 2004) (attached hereto as Exhibit A).

III. ARGUMENT

The Complaint alleges serious violations of the law with potentially serious consequences for plaintiffs’ economic welfare. Moreover, in an earlier related litigation, in which the D.C. Circuit held that the subpoena procedure of the Digital Millennium Copyright Act (“DMCA”) did not apply to the identification of subscribers who merely used an ISP’s facilities to gain access to the Internet, *see RIAA v. Verizon Internet Services*, 351 F.3d 1229 (D.C. Cir. 2003) (*cert. denied*), many of *amici* filed briefs urging that First Amendment principles be applied under Rule 45 to protect the right of anonymity. That plaintiffs here are now invoking Rule 45 and attempting to satisfy its standards represents an enormous step forward for which they deserve credit.

However, as in the DMCA case, it is important that Due Process and the First Amendment be scrupulously protected. Reluctantly, *amici* have concluded that there is

serious reason to question whether plaintiffs' documentation for their discovery request meets those standards. Accordingly, we file this brief to describe to the Court the procedures that we believe should be followed, and the ways in which plaintiffs' showings to date fall short.

A. The Court Should Balance the Right to Anonymous Speech Against the Need for Disclosure Before Permitting The Disclosure of Defendants' Identities.

Plaintiffs are correct that it is commonplace in certain circumstances for plaintiffs to be allowed discovery at the outset of a lawsuit to identify otherwise unknown persons alleged to have committed a legal wrong. But there is a significant difference between this case and the various offline cases plaintiffs cite on pages 7-8 of their brief, where prisoners or arrestees sought to identify the prison or police officers who allegedly beat or otherwise mistreated them. The defendants here are accused of having engaged in wrongful but anonymous speech on the Internet. Because the First Amendment protects the right to speak anonymously, a subpoena for their names and addresses is subject to a qualified privilege. Just as in other cases where discovery seeks information that may be privileged, the Court must consider the privilege before authorizing discovery.

The tension between this important qualified privilege and the interest of a plaintiff who has alleged wrongdoing in obtaining information needed to pursue litigation over alleged wrongdoing has been considered by a number of federal and state courts over the past several years. These courts have wrestled with the fact that, at the outset of the litigation, the plaintiff has done no more than allege wrongdoing, and a privilege is generally not considered to be overcome by mere allegations. They have further recognized that a serious chilling effect on anonymous speech would result if Internet speakers knew they could be identified by persons who merely allege wrongdoing, without necessarily having any intention of carrying through with actual

litigation.¹ Indeed, plaintiffs' representatives have repeatedly told the press that they do not necessarily want to pursue litigation against all anonymous file sharers whose identities they obtain.² Moreover, "[e]very court that has addressed the issue has held that individual internet subscribers have a right to engage in anonymous internet speech." *Doe v. Ashcroft*, 334 F.Supp.2d 471, 508 (S.D.N.Y. 2004). Thus in another Doe suit, the Southern District of New York recognized that "the use of P2P file copying networks to download, distribute, or make sound recordings available qualifies as speech entitled to First Amendment protection. *Sony Music Entertainment Inc. v. Does 1-40*, 326 F.Supp.2d 556, 564 (S.D.N.Y., 2004).³ _

¹ See, e.g., *Doe v. 2theMart.com*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001) ("If Internet users could be stripped of that anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic First Amendment Rights."); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999) ("People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity."); *Dendrite, Int'l, Inc. v. Doe No. 3*, 775 A.2d 756, 771 (N.J. Super. A.D. 2001) (strict procedural safeguards must be imposed "as a means of ensuring that plaintiffs do not use discovery procedures to ascertain the identities of unknown defendants in order to harass, intimidate or silence critics in the public forum opportunities presented by the Internet.")

² Before the DC Circuit ruled that the DMCA subpoena procedure was unavailable, the RIAA had subpoenaed about 2500 filesharers, <<http://www.eff.org/IP/P2P/riaasubpoenas/>>, but only brought suit against or reached private settlements with approximately 600 persons. <<http://www.washingtonpost.com/wp-dyn/articles/A35281-2004Jan21.html>>.

³ The court in *Sony v. Does 1-40* held that the *level* of First Amendment protection for file-sharing defendants was low because they are charged with copyright infringement and because they are not engaged in "political expression." *Id.* The first reason begs the question. The First Amendment does not protect libel or revelation of trade secrets or any of the variety of other wrongs that are commonly alleged in the lawsuits for which the courts have developed John Doe proceedings, any more than it protects copyright infringement. However, at the initial stage of the lawsuit, no court has determined that the defendant has committed any such wrongs. The very point of the multi-part balancing test is to give the anonymous speaker an opportunity to contest the bona fides and merits of allegations of wrongdoing before

In order to balance these interests, the courts have drawn by analogy from the balancing test that many courts have adopted in deciding whether to compel the disclosure of anonymous sources or donors. *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974); *Cervantes v. Time*, 464 F.2d 986 (8th Cir. 1972); *Baker v. F&F Investment*, 470 F.2d 778, 783 (2d Cir.1972). *See also UAW v. National Right to Work*, 590 F.2d 1139, 1152 (D.C. Cir. 1978); *Ealy v. Littlejohn*, 569 F.2d 219, 229 (5th Cir. 1978). Relying on those principles, the courts that have considered this question have adopted a several-part balancing test to decide whether to compel the identification of an anonymous Internet speaker so that he may be served with process.

This test was most fully articulated in *Dendrite v. Doe*, 775 A.2d 756 (N.J.App. 2001), which remains the only appellate opinion in the country to face the question squarely. *Dendrite* requires the would-be plaintiff to: (1) use the Internet to notify the accused of the pendency of the identification proceeding and to explain how to present a defense; (2) quote verbatim the statements allegedly actionable; (3) allege all elements of the cause of action; (4) present evidence supporting the claim of violation; and (5) show the court that, on balance and in the particulars of the case, the right to identify the speaker outweighs the First Amendment right of anonymous speech. *Id.* at 760-61.

the right of anonymity is permanently breached. The second reason is simply wrong – the Supreme Court’s decisions on anonymous speech emphasize the right of writers and other artists to publish creative works under pseudonyms. Moreover, if the defendants were simply individuals who displayed a carefully selected handful of files containing portions of songs - and the evidence goes no further than that as to most of the defendants - any fair use defense that they might mount could have First Amendment underpinnings inasmuch as the Supreme Court has held that “fair use” itself embodies First Amendment values. *Eldred v. Ashcroft*, 123 S.Ct. 769, 789-790 (2003); *Harper & Row Pub. v. Nation Enterprises*, 471 U.S. 539, 560 (1985).

So long as the quantum of evidence demanded of the plaintiff to meet this test does not exceed information that a plaintiff can reasonably obtain before undertaking discovery, this test fairly balances the interest in pursuing wrongdoing against the First Amendment right to speak anonymously. And, the final “balancing” part of the test enables courts to give extra protection to the speaker where, for example, the danger of retaliation is greater, or the speech at issue is core political speech about public officials, or to give extra weight to the plaintiff where the Court deems the speech at issue to be of only marginal value.

Several other courts have similarly set forth requirements of notice, review of the complaint, and presentation of argument and evidence before an ISP will be compelled to identify an Internet speaker. For example, in *Melvin v. Doe*, 49 Pa.D.&C.4th 449 (2000), *appeal quashed*, 789 A.2d 696, 2001 Pa.Super. 330 (2001), *appeal reinstated*, 836 A.2d 42 (Pa. 2003), the trial court allowed an anonymous defendant to present evidence and seek summary judgment, ordering disclosure only after finding genuine issues of material fact requiring trial. In reversing the denial of the defendant’s interlocutory appeal, the Pennsylvania Supreme Court discussed at length the conflict between the right to speak anonymously and the plaintiff’s right to identify a potential defendant, and remanded for consideration of whether evidence of actual damage had to be presented before the right of anonymous speech could be disregarded. *Melvin*, 836 A.2d at 47-50.

Similarly, in *La Societe Metro Cash & Carry France v. Time Warner Cable*, 2003 WL 22962857 (Conn. Super. 2003), the court applied a balancing test and considered evidence that allegedly defamatory statements were false and caused injury before deciding to allow discovery concerning the identity of the speaker. In *Columbia Ins. Co. v. Seescandy.com*, 185 FRD 573 (N.D.Cal. 1999), the court required the plaintiff to make a good faith effort to communicate with the anonymous

defendants and provide them with notice that the suit had been filed against them, thus assuring them an opportunity to defend their anonymity, and also compelled the plaintiff to demonstrate that it had viable claims against such defendants. *Id.* at 579. And in *Re Subpoena to America Online*, 52 VaCir 26, 34 (Fairfax 2000), *rev'd on other grounds*, 542 S.E.2d 377 (Va. 2001), the court required introduction of the allegedly actionable Internet posting, and required that the court be “satisfied by the pleadings or evidence supplied” that the subpoenaing party had a legitimate basis to contend that it was the victim of actionable conduct, “and . . . the subpoenaed identity information [must be] centrally needed to advance that claim.”⁴

Nor does the fact that the Doe defendants have disclosed their identities to their ISPs constitute a “waiver” of their qualified First Amendment right to communicate anonymously. If that were true, then *NAACP v. Alabama*, 357 U.S. 449 (1958), and *Bates v. City of Little Rock*, 361 U.S. 516 (1960), were both wrongly decided. In those cases, the Supreme Court overturned penalties imposed on the NAACP and its officers for refusing to comply with orders to identify members, whose names the NAACP of course knew, on the ground that compelled identification violated the members’ right to remain anonymous. Similarly, *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995), and *Talley v. California*, 362 U.S. 60 (1960), were wrongly decided, because the authors of the unsigned leaflets identified themselves to their printers, and the distributors revealed their faces to the persons to whom they handed the leaflets. Indeed, if plaintiffs correctly state the law, there could be no anonymous Internet communication, because every Internet user is identified to his or her ISP. Hence, every *ex parte* request to identify every Internet speaker would have to be granted.

Speech is rarely literally anonymous to all persons at all times; if such

⁴The argument for a balancing test is more fully developed at <<http://www.citizen.org/documents/Melvin%202.pdf>>.

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

B. Plaintiffs Should Be Required To Establish The Existence of Personal Jurisdiction Before Disclosure Is Permitted.

One of the showings that plaintiffs have failed to make with respect to any of the defendants is that the Court has personal jurisdiction over each of the 100 Does. The federal courts have generally applied a sliding scale analysis to determine when courts will have jurisdiction over a defendant who has posted information on the Internet that other persons can examine and download to computers worldwide, to ensure that persons using the Internet are not automatically subject to suit anywhere in the world. Under the sliding scale or “Zippo” analysis, after *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F.Supp. 1119 (W.D. Pa. 1997), defendants who passively post information on the Internet for others to examine and copy are not subject to personal jurisdiction based on their Internet postings, while defendants whose Internet sites are commercially “interactive,” in the sense that the sites are used to engage in business transactions, are subject to being sued in any state in which a substantial number of business transactions occur. Along this continuum, the greater the degree of commercial interactivity, the greater the liability for suit in a foreign jurisdiction. *E.g.*, *ALS Scan v. Digital Service Consultants*, 293 F.3d 707 (4th Cir. 2002); *Neogen Corp. v. Neo Gen Screening*, 282 F.3d 883 (6th Cir. 2002); *Mink v. AAAA Development*, 190 F.3d 333 (5th Cir. 1999). Although the Eleventh Circuit has not yet had occasion to address the issue, various district courts within the Circuit have recognized the *Zippo* continuum. *Miller v. Berman*, 289 F.Supp.2d 1327 (M.D.Fla. 2003) (no personal

jurisdiction when plaintiff emailed defendant after viewing defendant's passive website); *Miami Breakers Soccer Club, Inc. v. Women's Utd. Soccer Ass'n*, 140 F.Supp.2d 1325 (S.D.Fla. 2001) (no personal jurisdiction in trademark infringement case based on passive web site); *Bustler v. Beer Across America*, 83 F.Supp.2d 1261 (N.D.Ala. 2000) (no personal jurisdiction over company whose only contact with Alabama was website through which residents could order beer); *Chemtall, Inc. v. Citi-Chem, Inc.*, 992 F.Supp. 1390 (S.D.Ga. 1998) (citing *Zippo*); *See also Cable/Home Comm. Corp. v. Network Productions, Inc.*, 902 F.2d 829 (11th Cir. 1990) (court had personal jurisdiction over cable company based on repeated broadcast into state which resulted in state residents purchasing illegal cable boxes).

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

Moreover, although the Complaint alleges that the numerical IP address from which each of the defendants is alleged to have posted infringing material can be traced to an ISP, Cox, which "can be found" in Georgia, the publicly available information about those IP addresses and the declaration of Cox's counsel reveal a very different picture. Cox is not a small, local ISP whose customers are all clustered in Georgia. In fact, Cox has *no* customers in the Atlanta area. As the declaration from Cox indicates, the first three Does' IP addresses are located in Florida, Oklahoma, and

Texas. It is very likely that customers who connect to the Internet through those remote locations reside in those areas, and, more to the point, not in Georgia. Indeed, in their brief requesting expedited discovery, Plaintiffs implicitly acknowledge that the Court lacks personal jurisdiction over many defendants. Plaintiffs' Motion at 4.

Accordingly, as Cox demonstrates, *none* of the defendants resides in Georgia. Allowing Plaintiffs to bring this action against them in Georgia, then creates a tremendous practical hardship to the defendants. If they wish to protect their anonymity, they must locate and hire counsel in this District, and do so within the very limited time period between when they learned of the action from Cox and the subpoena's return date. Cox should be commended for voluntarily notifying defendants of the requests for their identities, but that notice cannot remedy the timing or jurisdictional defects of Plaintiffs' subpoena. Accordingly, if any subpoenas are to be issued to Cox, they should only require Cox to specify the states in which each defendant resides, so that the appropriate Plaintiffs can refile this action against such individuals in the proper jurisdictions.

C. Plaintiffs Should Have to Justify Joinder of Defendants Before Disclosure Is Permitted.

There is also substantial reason to question whether plaintiffs have properly joined all 100 defendants in a single action. Federal Rules of Civil Procedure Rule 20 reads, in pertinent part:

All persons . . . may be joined in one action as defendants if there is asserted against them jointly, severally or in the alternative, any right of relief in respect of arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

Under this Rule, multiple defendants may be joined in a single lawsuit when three conditions are met: (1) the right to relief must be "asserted against them jointly, severally or in the alternative"; (2) the claim must "aris[e] out of the same transaction,

occurrence, or series of transactions or occurrences”; *and* (3) there must be a common question of fact or law common to all the defendants. Fed.R.Civ.Proc. 20(a). In this case, there is no claim for relief jointly or severally or in the alternative. Moreover, there is no common transaction or occurrence; nor is there the proper “series of transactions or occurrences.” The individuals sued have no connection with one another: they are claimed to have shared different music using different filesharing software at different places throughout the country.⁵ Further, it is never alleged that all of the 15 plaintiffs have claims against each of the 100 defendants.

The cases require that, for parties to be joined in the same lawsuit, they must be related *to each other*. Thus, for example, a court in this District held that lenders and life insurers could not be joined in a class action suit alleging that each defendant had violated similar lending provisions when the suit was based on individual transactions that bore no relationship to each other except a similar course of action. *Turpeau v. Fidelity Financial Servs.*, 936 F.Supp. 975, 978 (N.D.Ga. 1996). By contrast, when a party has acted according to a unifying scheme, joinder can be proper. *Moore v. Comfed Savings Bank*, 908 F.2d 834 (11th Cir. 1990) (group of secondary lenders who bought similar usurious loans from same bank were properly joined as defendants,

⁵In *Pergo v. Alloc*, 262 F.Supp.2d 122, 127 (S.D.N.Y. 2003), the court characterized prongs (1) and (2) in the joinder analysis as requirements in the alternative, deeming prong (1) to include only “joint and several” liability, and the language “or in the alternative” to begin prong (2). Although other cases have described the rule that way as well, that is not the natural reading of the language. Prongs (1) and (2) both modify the term “request for relief,” and are not stated in the alternative. Under the *Pergo* reading, prong (1) consists of the words “jointly, severally,” with no conjunction between the adverbs, which would not be grammatically correct. The words “or in the alternative” are plainly part of the same series as “jointly, severally,” and that series is either an adverbial clause modifying the verb “asserted” or an adjectival clause modifying the phrase “request for relief,” just as prong (2) (beginning with the words “in respect of”) modifies that same phrase. Accordingly, the literal meaning of the language would require the request for relief to satisfy both criteria, just as the phrase “tall mountain covered with glaciers” would not properly describe Mount Fuji, because although it is tall it has no glaciers.

because loans were issued as part of the same series of transactions).⁶

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

Our concern that corners might be cut if hundreds of otherwise unrelated defendants are joined in a single action is heightened by the manner in which plaintiffs have sought leave to pursue discovery in this case. Plaintiffs' affidavit attaches

⁶ *Accord Pergo, Inc. v. Alloc, Inc.*, *supra* (denying joinder when only connection between defendants is that they may have infringed the same patent); *Tele-Media Co. of Western CT v. Antidormi*, 179 F.R.D. 75 (D.Conn. 1998) (denying joinder of 100 defendants who each used similar technology to infringe plaintiff's pay-per-view programming because defendants did not act in concert); *Movie Systems v. Abel*, 99 F.R.D. 129 (D. Minn. 1983) (denying joinder of 1,798 defendants who had allegedly all infringed the same television distributor's broadcasts because, "although there were common practices and perhaps common questions of law," the independent defendants had not acted jointly).

hundreds of pages concerning the music files made available by three of the 100 defendants and tells the Court that although comparable evidence could be made available with respect to each of the other defendants, it would be too burdensome to do so. However, although the courts exist to implement broad and important public policies, they do so by meting out individual justice. To be sure, it is more convenient to present evidence about only a few of the accused before obtaining discovery about all of them, but if it is important enough to sue all of them, it should be important enough to present sufficient evidence to justify discovery identifying each one of them.

Two courts in other districts facing similar record company lawsuits against multiple unrelated Doe defendants have ordered the defendants severed before discovery could proceed. *See Interscope Records v. Does 1-25*, Case No. 6:04-cv-197-Orl-22DAB (M.D. Fla. April 27, 2004); *BMG Music v. Does 1-203*, Civil Action No. 04-650 (E.D. Pa. March 5, 2004) (*reconsideration denied* April 5, 2004). Another court in this District noted that joinder was likely improper (“Defendants [] argue that they have been misjoined, and the Court is inclined to agree.”), but deferred a decision on severance until after the initial discovery of identities. *Motown Record Co., L.P., v. Does 1-252*, No. 1:04-CV-439-WBH (N.D. Ga. August 16, 2004) (slip op. at 3).⁷

Finally, in a highly analogous context, this district has Ordered that a company that distributed television programs through satellite systems must bring separate actions against otherwise unrelated individuals for using “pirate access boxes” to obtain satellite signals without paying for them.⁸ Stealing satellite signals is at least as reprehensible as making music files available for download, but this District, like

⁷ Attached as Exhibits B, C, and D.

⁸ The relevant Order is attached as Exhibit E. Other cases requiring the same from across the country are collected at the web page <http://www.directvdefense.org/files/> (*see* caption “Severance”).

courts in many other districts, refused to be stampeded by claims of convenience and need for immediate action into allowing all defendants to be joined in one action for the administration of mass justice. The same principle applies to the accused copyright infringers in this case.

D. Further Notice Must Be Provided To the Subpoena Targets.

Amici join Cox in asking the Court to quash the discovery subpoena. Yet even if the Court concludes that it should permit the discovery requested by Plaintiffs in this case, *amici* have a modest suggestion for modifying the terms of that discovery to better ensure that the Does have a realistic opportunity to object if they choose to do so. *Amici* recommend that the Court adopt the Notice issued by Judge Rufe of the Eastern District of Pennsylvania for all cases brought in that district, and order that served upon each Doe defendant. *See* Exhibit A. While Cox has already given defendants notice, a court order and extension of time to respond can make the process intelligible to non-lawyers and give them time to find local counsel. The notice in *Elektra*, which was put together by Judge Rufe after substantial discussions and negotiations between record company plaintiffs and *amici*, represents an even-handed and well-thought approach to balancing the plaintiffs' need to enforce their copyrights with the constitutional rights of the individuals accused of infringing on those rights. As in that notice and order, *amici* are willing to be listed as resources, along with the RIAA, Plaintiffs' representative, in any similar notice that issues from this Court.

IV. CONCLUSION

The Motion to Quash should be considered and granted in accordance with the principles set forth above.

Respectfully submitted,

Gerald Weber (GA Bar No. 744878)

70 Fairlie Street, Suite 340
Atlanta, GA 30303

Attorneys for ACLU of Georgia

Cindy A. Cohn
Wendy Seltzer

454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333
Facsimile: (415) 436-9993

Attorneys for Electronic Frontier Foundation

Paul Alan Levy

Public Citizen Litigation Group
1600 - 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Attorneys for Public Citizen

Christopher A. Hansen
Aden J. Fine

18th floor
125 Broad Street
New York, New York 10004

Attorneys for American Civil Liberties
Union

November __, 2004

CERTIFICATE OF SERVICE

I hereby certify that, on this __ day of November, 2004, I caused copies of the foregoing Memorandum of Amici Curiae Public Citizen, American Civil Liberties Union, Electronic Frontier Foundation, and ACLU of Georgia in Response to Motion for Expedited Discovery to be served by facsimile and first-class mail, postage prepaid, on counsel for plaintiffs as follows:

James A. Lamberth
Troutman Sanders, LLP
Suite 5200, Bank of America Plaza
600 Peachtree Street, N.E.
Atlanta, GA 30308-2216
(404) 885-3000 - telephone
(404) 885-3995 - facsimile

Gerald Weber (GA Bar No. 744878)

70 Fairlie Street, Suite 340
Atlanta, GA 30303

Attorneys for ACLU of Georgia

November __, 2004