UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ARISTA RECORDS, INC., et al.,	)	
	)	
Plaintiffs,	)	
v.	)	Case No. 04-CV-2495-BBM
	)	
DOES 1-100,	)	
	)	
Defendants.	)	
	)	

NON-PARTY COX COMMUNICATIONS INC.'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO QUASH NON-PARTY SUBPOENA

I. Introduction.

Pursuant to Fed.R.Civ.P. 45 and Local Rule 7.1(A)(1), non-party Cox Communications, Inc. ("Cox") respectfully submits this Memorandum in Support of its Motion to Quash the non-party subpoena issued it by Plaintiffs in the above-captioned action. Cox was served with the subpoena attached as Exhibit A on October 26, 2004 (hereinafter the "Subpoena"). The Subpoena seeks information on 100 distinct Cox subscribers identified by Internet Protocol ("IP") address, including the name, address, telephone number, email address and Media Access Control address of each.

As Plaintiffs are well-aware from public information about each subscriber, none of the 100 Doe Defendant/subscribers resides in this District because Cox does not provide Internet Service Provider ("ISP") service here. Indeed, the same

public information that allowed Plaintiffs to identify Cox as the Doe Defendants' ISP also provides the general location of each Doe Defendant within the United States with sufficient particularity for Plaintiffs to determine the appropriate forum in which to sue each Doe Defendant.

Moreover Cox, as a provider of cable internet services, is required by federal law (47 U.S.C. § 551 (the "Cable Communications Act" or "CCA")) to maintain the confidentiality of this information save in response to a court order. This requirement is not a mere formality, but rather permits an affected customer to raise objections to production of personal information. Plaintiffs' use of litigation in this court to seek expedited discovery circumvents this statutory protection.

As discussed below, because there is a manifest lack of personal jurisdiction over and improper joinder among these 100 non-resident Doe Defendants, Cox submits that Plaintiffs' Subpoena should be quashed.

II. Background.

This Subpoena is part of the recording industry's now-famous efforts to sue individual Internet users suspected of infringing Plaintiffs' copyrights through "file sharing." The industry's trade association (the "RIAA") and its member companies have filed omnibus "Doe" lawsuits as a means to issue subpoenas to non-parties such as Cox and other ISPs.

In this case, Plaintiffs detected 100 "file-sharing" suspects who utilize Cox's services and filed this particular "Doe" lawsuit in the Northern District solely because this is where Cox's headquarters is located.

III. Argument.

A. This Court should quash the Subpoena because the underlying litigation will be subject to dismissal and severance.

As a general rule, the use of "Doe" lawsuits is disfavored. Where the identities of alleged defendants are unknown, however, plaintiffs may sometimes be afforded the opportunity to seek their identities through discovery. A critical restriction on this leeway for early discovery is that it should not be afforded where the "complaint would be dismissed on other grounds." Gillespie v. Civiletti, 629 F.2d 637 (9th Cir. 1980); see Columbia Ins. Co. v. Seescandy.com, 185 F.R.D. 573, 579 (N.D. Cal. 1999) (plaintiff should establish that suit will withstand a motion to dismiss in order to proceed with discovery related to Doe defendants).

1. The Court lacks personal jurisdiction over the Doe Defendants.

Here, Plaintiffs Complaint will be subject to dismissal due to an obvious lack of personal jurisdiction over each of the Doe Defendants.

(a) As Plaintiffs know, not a single Doe Defendant resides in the Northern District of Georgia.

Cox provides Internet service to customers in local markets in twenty states. Declaration of Randall J. Cadenhead at ¶3 (attached as Exhibit B) (hereinafter

"Cadenhead Decl."). As Plaintiffs' counsel has previously been informed, Cox does not provide service in the Northern District of Georgia, and so has no customers within it. Cadenhead Decl. at ¶¶3-6.

Plaintiffs misleadingly contend that they know each Doe Defendant "only by the Internet Protocol ("IP") address" assigned. Complaint at ¶19. This statement, while perhaps true, ignores the fact that Plaintiffs also know the location of each Doe Defendant. Contrary to the Declaration of Jonathon Whitehead (Whitehead Decl. at ¶16), Plaintiffs are able to determine "the physical location" of the Defendants with sufficiency to know in what District each may be found.

Plaintiffs have provided an IP Address assigned to each of the Defendants for a given date and time. This address is roughly the equivalent of a temporary zip code for a given physical address. Like certain other ISPs, Cox assigns sets of IP Addresses to customers by locale. For example, for the three Does addressed in the Declaration of Jonathon Whitehead, the location of each is identifiable:

Defendant:	IP Address:	Location:
Doe #1	68.1.119.152	Pensacola, FL
Doe #2	68.97.39.84	Oklahoma
Doe #3	68.96.118.48	Lubbock/Dallas, TX

The same publicly available databases described by Mr. Whitehead in his Declaration (Whitehead Decl. at ¶ 12) as the means by which Plaintiffs identify

that Cox is an alleged infringer's ISP simultaneously provide Plaintiffs with the alleged infringers' location data. Accordingly, Plaintiffs know not only that each of these three IP Addresses belongs to Cox, but also that these particular customers do not reside in Georgia, but in Florida, Oklahoma and Texas respectively. Similar information is available for the other 97 Doe Defendants.[1] Plaintiffs thus have the ability to locate, and to sue, individual Doe Defendants in the jurisdictions where they can be found.

(b) No Doe Defendant has committed a tortious act in the Northern District of Georgia.

Since no Doe Defendants are in the Northern District of Georgia, personal jurisdiction over them must be based upon Georgia's long-arm statute, O.C.G.A. § 9-10-91. Plaintiffs make no factual allegations, however, to support any of the statutory bases for long-arm jurisdiction. Even those bare allegations that are asserted are qualified with such phrases as "and/or" and "on information and belief." Complaint ¶3. No local transaction, tortious act, or injury has been alleged by Plaintiffs. Instead, they merely assert conduct in "every jurisdiction." Complaint ¶3.

The only indicia of any connection between this litigation and the Northern District of Georgia is that Cox can be found in Georgia. There is a complete

[1] Cox has discussed this assignment process with counsel for Plaintiffs and remains willing to provide additional supporting or clarifying information Plaintiffs may desire to make use of the location information they already receive.

absence of any allegation to support personal jurisdiction and no colorable argument can be made that there is personal jurisdiction over any Doe Defendant in this lawsuit. Accordingly, even if Cox were compelled to disclose the information sought by the Subpoena that information would not advance this litigation, in fact it would doom it, subjecting Plaintiffs' Complaint to up to 100 separate Motions to Dismiss.[2]

2. Plaintiffs have misjoined the Doe Defendants.

Joinder is germane to this motion to quash because the Doe Defendants are improperly joined and this suit is thus subject to severance. Joinder of disparate defendants is prohibited by Rule 20 unless:

> there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or 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.

Fed.R.Civ.P. 20. Both factors are required, and Plaintiffs have made no effort to assert either.

Tellingly, Plaintiffs refer throughout their pleadings to "each Defendant," the separate copyrighted files each Defendant allegedly infringed, and the various

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[2] Moreover, by filing one common action in a jurisdiction remote from the Doe Defendants, Plaintiffs have deterred, if not denied, those Doe Defendants from appearing to defend their rights, even if they could afford to do so. Any judgment obtained by Plaintiffs without jurisdiction would, of course, be worthless. See generally, Hanson v. Denckla, 357 U.S. 235, 78 S. Ct. 1228 (1958).

dates, times and even networks that each independently used. There is no assertion that the Doe Defendants' action arose out the same transaction or occurrence, no assertion that the Doe Defendants are jointly and severally liable, and no assertion that there was any concerted action among any Doe Defendants.

The only thing each Doe Defendant has in common is that each copied one or more songs owned by one of the various Plaintiffs and that each is a customer of Cox. Each page of Exhibit A to the Complaint describes the separate acts of infringement asserted against a different Doe Defendant. As such, there is no more basis for joinder in this action than there is for a creditor to join 100 different actions on account.

In a prior Doe action by Plaintiffs in this District, The Hon. Willis B. Hunt addressed this specific issue: "Defendants next argue that they have been misjoined, and the Court is inclined to agree." Order of August 16, 2004, Motown Record Company, L.P. v. Does 1-252, (N.D. Ga.), Civil Action No. 1:04-CV-439-WBH (Copy attached as Exhibit C). Judge Hunt postponed ruling on the issue of severance until a later time.

Plaintiffs have filed a number of infringement cases across the country. Selectively chosen discovery orders in some of those cases have been included by Mr. Whitehead in his Declaration (Whitehead Decl. Exh. B). Except for the Order of Judge Hunt quoted above, not one of those orders addresses the issue of

misjoinder. There are, however, two District Courts that have addressed this issue (referenced in Pls. Memo. in Support at n.4.), and both ruled against Plaintiffs. Courts in the Eastern District of Pennsylvania and the Middle District of Florida have held that joinder was improper in RIAA suits brought there. In each case, expedited discovery was allowed only after correcting misjoinder. See Order of April 5, 2004 in BMG Music, et al. v. Does 1-203, (E.D. Pa.), Civil Action No. 04-650 (stating "wholesale litigation of these claims is inappropriate" and ordering severance of all Doe defendants) (attached as Exhibit D); and Order of April 1, 2004 in Interscope Records, et al. v. Does 1-25, (M.D. Fla.), Case No. 6:04-cv-197-Orl-22 DAB (adopting Magistrate Report and Recommendation that all claims be severed) (attached as Exhibits E). Here, because the Doe Defendants have been improperly joined, this case is subject to severance.

* * *

The Subpoena is invalid because the underlying suit will be unable to withstand numerous motions to dismiss and/or sever. These individual Doe Defendants may not be lumped together in one action when their conduct is individual, their physical location is diverse and each may have individual defenses and bases for challenging expedited discovery. Accordingly, the underlying litigation is manifestly flawed and the Subpoena should be quashed.

B. As the ISP charged with protecting the privacy of the Defendants, Cox has taken the extraordinary step of notifying the Defendants in advance.

While the discovery order proposed by Plaintiff (and adopted by this Court on October 14, 2004) states that it is made pursuant to 47 U.S.C. § 551 (c)(2)(B), it fails to provide adequate opportunity for the notice required by that statute. Federal law establishes a statutory right for Internet subscribers of cable companies to have their identity and personal information protected. 47 U.S.C. § 551(c) provides:

> (1) Except as provided in paragraph (2), a cable operator shall not disclose personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned and shall take such actions as are necessary to prevent unauthorized access to such information by a person other than the subscriber or cable operator.
> (2) A cable operator may disclose such information if the disclosure is—
> ... (B) ...made pursuant to a court order authorizing such disclosure, if the subscriber is notified of such order by the person to whom the order is directed;

This statutory notice requirement exists to allow the subscriber the opportunity to take action to prevent disclosure. Plaintiffs deny this right by bringing suit where not one Defendant would be aware of the suit. Such action is not permitted in proceedings where there is one defendant and simply multiplying their number compounds the harm in an effort to obscure it. In addition, the timing of Plaintiffs' discovery order affords no opportunity for Defendants to appear and

raise objections or defenses before identifying information must be turned over.

Rather than risk the prejudice to its subscribers that would arise from Plaintiffs' discovery Order, on September 22, 2004, Cox notified each Doe subscriber of this suit so that, assuming they could afford to appear in a distant and improper forum, each would have a meaningful opportunity to file objections and to raise any legal defenses upon the issuance of the Subpoena. See Letter from Randall Cadenhead to certain Cox Subscribers, attached as Exhibit F. Additionally, Cox set up a page on its Internet website (http://www.cox.net/filesharing) in order to provide subscribers with factual information relating to this suit.

Cox has taken these extraordinary steps because the procedure chosen by Plaintiffs fails to provide adequate notice to the Doe defendants.[3] Without Cox's efforts, Defendants would otherwise be prejudiced by production prior to having reasonable opportunity to appear.

IV. Costs of Compliance.

Rule 45 (c) provides for protection of a non-party from significant expense in responding to subpoenas. As stated in the Declaration of Randall Cadenhead,

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[3] In the Motown case before Judge Hunt, his Order of March 1 concerning discovery provided a schedule for notice, motions to quash and for the subpoena response. In practice, Cox found that even this schedule did not allow sufficient time to assure notice by mail to defendants, as some notices were returned by the Postal Service.

Cox has established a standard charge for compliance with subpoenas such as that issued by Plaintiffs. Cadenhead Decl. at ¶7-8. This rate is based upon the volume of subpoena activity and the cost of resources required to fulfill the same. Plaintiffs have stated an unwillingness to pay Cox's compliance costs. Cadenhead Decl. at ¶8. Cox respectfully requests that Plaintiffs be ordered to pay the sum quantified in Mr. Cadenhead's Declaration should Cox be ordered to comply with the Subpoena.

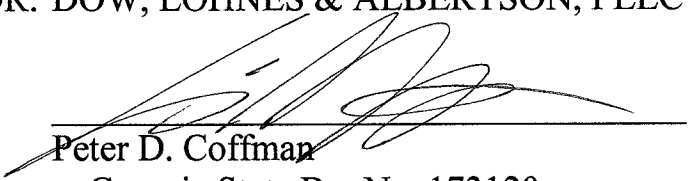
V. Conclusion.

For the reasons stated above, Cox respectfully requests that this Court quash the Subpoena. If Plaintiffs wish to pursue these 100 non-resident individuals, the proper method, consistent with the due process rights of every citizen and the requirements of the CCA, is to sue them individually in their home districts and then issue individual subpoenas to Cox pursuant to Fed.R.Civ.P. 45.

DATED this 15th day of November, 2004.

Respectfully submitted,

FOR: DOW, LOHNES & ALBERTSON, PLLC



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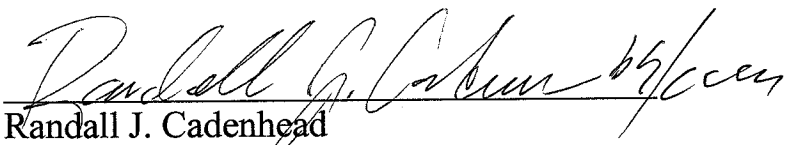

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CERTIFICATE OF SERVICE

I, Christopher Meazell, hereby certify that on November 15, 2004, I caused a true and correct copy of the Motion to Quash and the foregoing Memorandum of Law to be served by depositing the same in the United States Mail, First Class, postage prepaid, addressed to:

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