

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

ARISTA RECORDS, INC., WARNER  
BROS. RECORDS INC., ATLANTIC  
RECORDING CORPORATION,  
INTERSCOPE RECORDS, BMG  
MUSIC, ELEKTRA ENTERTAINMENT  
GROUP INC., FONOVisA, INC.,  
LOUD RECORDS, LLC, MAVERICK  
RECORDING COMPANY, MOTOWN  
RECORD COMPANY, L.P., PRIORITY  
RECORDS LLC, SONY MUSIC  
ENTERTAINMENT INC., UMG  
RECORDINGS, INC., VIRGIN  
RECORDS AMERICA, INC., and  
CAPITOL RECORDS, INC.,

Plaintiffs,

v.

DOES 1-100,

Defendants.

CIVIL ACTION FILE

NO. 1:04-CV-2495-BBM

**ORDER**

This copyright infringement action—involving allegations of illegal file-sharing of copyrighted songs over the Internet—is currently before the court on a Motion to Quash [Doc. No. 7] a non-party subpoena issued to Cox Communications, Inc. (“Cox”). Also before the court is a Motion for Leave to File Memorandum as Amici Curiae [Doc. No. 8] in support of Cox’s Motion to Quash, filed by proposed

amici curiae Public Citizen Litigation Group, Electronic Frontier Foundation, the American Civil Liberties Union, and the American Civil Liberties Union of Georgia (collectively, “amici”).

## **I. Factual and Procedural Background**

Plaintiffs Arista Records, Inc., Warner Bros. Records Inc., Atlantic Recording Corporation, Interscope Records, BMG Music, Elektra Entertainment Group Inc., Fonovisa, Inc., Loud Records, Inc., Maverick Recording Company, Motown Record Company, L.P., Priority Records LLC, Sony Music Entertainment Inc., UMG Recordings, Inc., Virgin Records America, Inc., and Capitol Records, Inc. (collectively, “Plaintiffs”) are major recording companies who own copyrights in various sound recordings by well-known recording artists such as the Eagles, U2, Madonna, and Eminem, among others. Plaintiffs allege that each Doe Defendant engaged in the unlawful distribution of a large number of Plaintiffs’ copyrighted sound recordings over the Internet through “various” peer-to-peer (“P2P”) networks.<sup>1</sup> A P2P network is an online media distribution system that enables participating users to make available to each other (for copying) various files stored on their computers,

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<sup>1</sup> The court notes that the Plaintiffs do not contend that the Doe Defendants utilized the same P2P network (or only one P2P network) to distribute Plaintiffs’ sound recordings. See First Decl. of Jonathan Whitehead at ¶ 16.

including but not limited to sound files. Generally, when a user logs on to a P2P network, a user does so anonymously and without using his or her real name.

Plaintiffs allege that they observed each Doe Defendant disseminating Plaintiffs' copyrighted sound files on various P2P networks. Although the Doe Defendants' true identities are currently unknown to Plaintiffs, Plaintiffs do know the Doe Defendants' Internet Protocol ("IP") addresses for those dates and times on which Plaintiffs observed the Doe Defendants' allegedly illegal activity. Generally speaking, an IP address is a unique number that specifically identifies each computer connected to the Internet at a given time. Internet Service Providers ("ISPs") each have a "bank" of IP addresses from which they assign individual IP addresses to their customers when those customers connect to the Internet. According to Plaintiffs, the Doe Defendants' IP addresses from the dates in question reveal that Cox is the ISP for each of the Doe Defendants. Plaintiffs additionally maintain that Cox can determine the true identity of each Doe Defendant from their IP addresses.

Accordingly, Plaintiffs served a subpoena on Cox (pursuant to Fed. R. Civ. P. 45) seeking the Doe Defendants' identities.<sup>2</sup> Cox does not dispute that it has information responsive to Plaintiffs' subpoena; indeed, Cox has gathered the

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<sup>2</sup> Plaintiffs sought *ex parte* permission from the court to take expedited discovery for the purpose of determining the Doe Defendants' identities. The court granted the Plaintiffs' request for such limited discovery in its Order of October 14, 2004.

responsive information and even notified each Doe Defendant of the pendency of this lawsuit. Nevertheless, Cox, seeking to protect the privacy of its customers, has moved to quash Plaintiffs' subpoena on various grounds. Specifically, Cox argues that the subpoena should be quashed because (1) this court does not have personal jurisdiction over any of the Doe Defendants and (2) the Doe Defendants are improperly joined. Cox also asks that if the court ultimately orders it to comply with Plaintiffs' subpoena, the court also order Plaintiffs to pay Cox's costs of compliance pursuant to Fed. R. Civ. P. 45. Additionally, amici argue that the Doe Defendants' identities are subject to a qualified privilege because their filing-sharing constitutes anonymous Internet speech that is deserving of First Amendment protection. The court addresses each argument in turn.

## **II. Analysis**

### **A. Motion for Leave to File Memorandum as Amici Curiae**

"The decision . . . to allow a non-party to participate as an amicus curiae is solely within the broad discretion" of the district court. DeJulio v. Georgia, 127 F. Supp. 2d 1274, 1284 (N.D. Ga. 2001) (Thrash, J.). However, Plaintiffs point out that, as a general matter, amici may not place issues in a case that have not been raised by the parties. See Richardson v. Alabama State Bd. of Educ., 935 F.2d 1240, 1247 (11th Cir. 1991). Here, amici not only seek to bolster Cox's arguments on the issues of

misjoinder and personal jurisdiction, but amici also wish to argue that the Doe Defendants' First Amendment rights are endangered by Plaintiffs' subpoena.<sup>3</sup> The court GRANTS amici's Motion for Leave; however, the court will not consider the issues addressed by amici's Memorandum at this time. Despite the fact that Cox apparently notified the Doe Defendants of the pendency of this action over four months ago, none of the Doe Defendants has as of the date of this Order filed an appearance or raised any of the issues that amici seek to raise herein. The issues raised by amici may be resolved later in this litigation if and when such issues are raised by the Doe Defendants. See also Sony Music Entm't Inc. v. Does 1-40, 326 F. Supp. 2d 556, 562-67 (S.D.N.Y. 2004) (considering First Amendment argument against disclosure of Does' identities in essentially identical case but ultimately concluding that "defendants' First Amendment right to remain anonymous must give way to plaintiffs' right to . . . pursue what appear to be meritorious copyright infringement claims").

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<sup>3</sup> The court finds that Cox at least has the right to raise its arguments pursuant to Fed. R. Civ. P. 45. That Rule permits a party subject to a subpoena to file a motion to quash a subpoena if the subpoena seeks the "disclosure of privileged or other protected matter." Fed. R. Civ. P. 45(c)(3)(A)(iii).

B. Motion to Quash—Lack of Personal Jurisdiction

The first basis for Cox’s Motion to Quash is a lack of personal jurisdiction. Cox asserts, via affidavit, that it provides no services within the Northern District of Georgia and that its records affirmatively establish that none of the Doe Defendants resides in the Northern District of Georgia. Accordingly, Cox argues that the subpoena should be quashed.

Plaintiffs argue in response that the personal jurisdiction argument is premature. Specifically, they claim that the court cannot reach a determination as to the propriety of personal jurisdiction over the Doe Defendants without knowing the Doe Defendants’ identities and residences. The court agrees with Plaintiffs in this regard. Although Cox avers that no Doe Defendants reside in the Northern District of Georgia, the court has been presented with no evidence one way or the other as to where the parties do reside, and such evidence will not be available until the Doe Defendants identities are revealed by Cox. Moreover, the Plaintiffs do not actually assert in the Complaint that personal jurisdiction is proper in this action by virtue of the Defendants residing in the Northern District of Georgia. Instead, Plaintiffs assert that personal jurisdiction is proper “because each Defendant, without consent or permission of the copyright owner, disseminated over the Internet copyrighted works owned and/or controlled by the Plaintiffs,” and “such illegal dissemination occurred

in every jurisdiction in the United States, including this one.” As this specific jurisdictional contention has not been fully briefed, the court makes no finding at this time as to whether Plaintiffs’ asserted basis for personal jurisdiction over the Doe Defendants is valid<sup>4</sup> and instead chooses to defer the question of personal jurisdiction for when the Doe Defendants are identified and appear to raise the issue themselves. See also Lipofsky v. New York State Workers Comp. Bd., 861 F.2d 1257, 1259 (11th Cir. 1988) (court may sua sponte raise the issue of lack of personal jurisdiction, but court may not dismiss a case for lack of personal jurisdiction without first giving the parties the opportunity to brief the issue).

C. Motion to Quash—Misjoinder

Cox also moves to quash the subpoena on grounds of misjoinder. Specifically, Cox claims that Plaintiffs’ Complaint does not make sufficient allegations to satisfy Fed. R. Civ. P. 20 and that Plaintiffs cannot in fact satisfy the joinder requirements found in that Rule. Plaintiffs respond that this argument is premature and, regardless, joinder is proper because Fed. R. Civ. P. 20 is to be broadly construed. The

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<sup>4</sup> At first glance, however, the court is doubtful that it can exercise personal jurisdiction over the Doe Defendants on this basis. See Alternate Energy Corp. v. Redstone, 328 F. Supp. 2d 1379, 1382 (S.D. Fla. 2004) (Internet postings viewable in a given district do not constitute sufficient minimum contacts for personal jurisdiction in that district, although engaging in commercial activity over the Internet may provide sufficient minimum contacts).

court finds the question to be a close one, and indeed suspects that there may well be misjoinder in this lawsuit. However, the court will ultimately defer consideration of the argument until the Doe Defendants have been identified and appear to argue the issue themselves.

Fed. R. Civ. P. 20(a) provides that:

All persons . . . may be joined in one action as defendants if 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(a). Thus, for permissive joinder of the Doe Defendants to be proper under Fed. R. Civ. P. 20, there must be both a right to relief arising out of the same transaction(s) or occurrence(s) and a question of law or fact common to each Doe Defendant that will arise in the action. Alexander v. Fulton County, 207 F.3d 1303, 1323 (11th Cir. 2000), overruled on other grounds by Manders v. Lee, 338 F.3d 1304, 1328 n.52 (11th Cir. 2003). There is no allegation here that the Doe Defendants engaged in joint copyright infringement or conspired with each other to infringe Plaintiffs' copyrights. To the contrary, Plaintiffs allege that the Doe Defendants each engaged in separate and distinct acts of downloading or disseminating the copyrighted sound recordings, at different times on different dates. See supra note 1. Although there is some overlap between the songs at issue, even the majority of

those appear to vary from Defendant to Defendant. It appears as a consequence that separate trials, witnesses, and evidence will be necessary for each Defendant's case, and it further appears that there are no common questions of fact between the Defendants. See Motown Record Co. v. Does 1-252, No. 1:04-CV-439-WBH, at 3-4 (N.D. Ga. Aug. 16, 2004) (Hunt, J.) (questioning propriety of joinder in essentially identical case); see also Elektra Entm't Group, Inc. v. Does 1-9, No. 04-CIV-2289 (RWS), 2004 U.S. Dist. Lexis 23560, at \*14-20 (S.D.N.Y. Sept. 7, 2004) (granting severance motion of Doe defendant in essentially identical case for failure to meet requirements of Fed. R. Civ. P. 20); BMG Music v. Does 1-203, Civil Action No. 04-650, 2004 U.S. Dist. Lexis 8457, at \*1-4 (E.D. Pa. Apr. 2, 2004) (upon motion for reconsideration, affirming earlier sua sponte determination in essentially identical case that Doe defendants were improperly joined under Fed. R. Civ. P. 20 due to lack of common questions of law and fact and likely need for separate witnesses, evidence, and legal theories and defenses).

In addition to the Complaint's apparent Fed. R. Civ. P. 20 deficiencies, the court also notes that little, if any, additional relevant information pertaining to the joinder question will be gleaned from Cox's subpoena response. In contrast to the personal jurisdiction issue, where the Doe Defendants' identities are of some relevance, the court does not believe that the limited discovery sought by the subpoena will provide

information pertinent to (for instance) common questions of law or fact as between each Doe Defendant. In other words, the court fails to see how identifying the Doe Defendants will make joinder any more or less proper. Additionally, the court notes that it may sever improperly joined parties on its own motion at any time. See Fed. R. Civ. P. 21.

The court also has two administrative concerns with Plaintiffs' joinder of the Doe Defendants. First, Plaintiffs' joinder of the Doe Defendants may be an attempt to improperly avoid full payment of the per-case filing fee.<sup>5</sup> The history of Plaintiffs' litigation efforts to protect their copyrighted sound recordings from illegal download is well-documented, but the court believes it is relevant in this regard. Initially, the recording industry successfully shut down the hugely popular Internet song-sharing mechanism known as Napster. See A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001); see also In re Aimster Copyright Litig., 334 F.3d 643 (7th Cir. 2003) (enjoining a file-sharing service similar to Napster known as Aimster). Rather than having to resort to lawsuits against individual downloaders, the recording companies were able to obtain injunctions against Napster and Aimster because those companies maintained centralized computer servers that facilitated individual users'

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<sup>5</sup> See 28 U.S.C. § 1914. The court notes that effective February 7, 2005, the filing fee will increase from \$150 per case to \$250 per case.

downloads. However, in the wake of Napster and Aimster, several P2P networks that do not rely on a centralized computer server were created, and the recording companies' attempts to enjoin the distribution of the software that facilitates those decentralized networks has been, at least to this point, unsuccessful. See MGM Studios, Inc. v. Grokster, Ltd., 380 F.3d 1154 (9th Cir. 2004), cert. granted, 125 S. Ct. 686 (Dec. 10, 2004). Accordingly, the recording companies have shifted their litigation focus to individual file-sharers rather than the platforms that allow the file-sharing. Indeed, since approximately 2003, major recording companies have filed lawsuits similar to this one against thousands of individuals nationwide. See J. Cam Barker, Note, *Grossly Excessive Penalties In The Battle Against Illegal File-Sharing*, 83 Tex. L. Rev. 525, 535 (2004). As a consequence, the record industry finds itself in the rather awkward public relations position of filing lawsuits against individuals who are obviously fans of the music that Plaintiffs distribute. See Jordana Boag, Comment, *The Battle Of Piracy Versus Privacy*, 41 Cal. W. L. Rev. 241, 258-62 (2004) (detailing lawsuits brought against individual downloaders that are “‘potential minefield[s] for the music industry from a public relations standpoint’”) (citation omitted). Thus, the recording companies' nationwide joinder of Doe defendants in these lawsuits may simply be an effort to minimize both public relations costs and monetary costs. To wit, Plaintiffs may not intend to actually pursue each of their 100

claims after further details about the Doe Defendants are made available to them, because Cox's subpoena response may well reveal that certain of the Doe Defendants are not—from a public relations standpoint—ideal targets for suit. See, e.g., Motown Record Co., 1:04-CV-0439-WBH (docket reflects various dismissals with and without prejudice in the aftermath of Judge Hunt's order denying motion to quash ISP subpoena). Theoretically, Plaintiffs will then have discovered the Doe Defendants' identities at an artificially low price, having paid one filing fee rather than 100 filing fees. Plaintiffs can then choose to pursue only the claims against those Defendants that Plaintiffs believe will be most beneficial from a public relations standpoint. Simultaneously, Plaintiffs can dismiss their claims against the most sympathetic of the Defendants—without revealing their identities to the public—and avoid ever having to pay filing fees for those Defendants. See Jennifer Norman, Note, *Staying Alive: Can The Recording Industry Survive Peer-To-Peer?*, 26 Colum. J.L. & Arts 371, 395 (2003) (noting criticism that under an earlier subpoena regime, the recording companies could “serve millions of these types of subpoenas and collect subscriber names [from ISPs] and then pick out the most favorable for a lawsuit against the user community’”) (citation omitted).

The court's other administrative concern is that Plaintiffs' joinder of the Doe Defendants may upset the statutory scheme of federal court regulation found in the

Civil Justice Reform Act. See 28 U.S.C. §§ 471 et seq. Under that statute, intended to ensure just, speedy, and inexpensive resolution of federal civil disputes, careful attention is paid to each federal court's docket. The consolidation of 100 individual cases into one case, even for a short period of time, raises some concern in that regard. See In Re: Cases Filed By Recording Companies, General Order (W.D. Tex. Nov. 17, 2004) ([www.txwd.uscourts.gov/rules/stdord/austin/recording\\_111704.pdf](http://www.txwd.uscourts.gov/rules/stdord/austin/recording_111704.pdf)) (severing misjoined Doe defendants accused of illegal file-sharing in part due to the fact that "the closing of one 151-defendant case [should not be] treated as a single case for statistical purposes").

Despite all of the foregoing, the court will nevertheless deny the Motion to Quash as premature at this time. None of the Doe Defendants has appeared in this case to raise the misjoinder issue (let alone the personal jurisdiction or First Amendment questions), despite the fact that Cox notified each of the Doe Defendants of the pendency of this lawsuit in September 2004. Cf. Motown Record Co., 1:04-CV-0439-WBH, at 2-4 (N.D. Ga. Aug. 16, 2004) (two Doe Defendants appeared and raised the issues of misjoinder and personal jurisdiction but motion to quash was still denied as premature); Elektra Entm't Group, Inc., 2004 U.S. Dist. Lexis 23560 at \*14-20 (granting severance motion of Doe defendant but declining to sever Doe defendants who had not appeared); Sony Music Entm't, 326 F. Supp. 2d at 567-68 (denying as

premature individual Jane Doe's motion to quash subpoena on grounds of misjoinder). This lends some credence to Plaintiffs' (notably self-serving) argument that the Doe Defendants may actually want to be joined for purposes of this litigation.<sup>6</sup> Additionally, at this time, it may be more efficient for the court to allow Plaintiffs to discover Defendants' identities in this manner. Since it is alleged that none of the Doe Defendants resides in the Northern District of Georgia, Plaintiffs may ultimately dismiss this entire case and file suit against the individual Defendants in other jurisdictions. It would be a significant administrative burden for the court to sever this case into 100 separate cases now, only to have Plaintiffs determine the identities of the 100 separate Defendants and then subsequently dismiss each of the 100 cases. Accordingly, the Motion to Quash is DENIED. The court remains willing to address the issues raised therein at a later date, but for now, the court finds them premature. See Motown Record Co., 1:04-CV-0439-WBH (N.D. Ga. Aug. 16, 2004); Virgin Records America, Inc., 1:04-CV-0438-CC (N.D. Ga. Mar. 3, 2004); Elektra Entm't Group, Inc., 2004 U.S. Dist. Lexis 23560; Sony Music Entm't, 326 F. Supp. 2d at 567-68.

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<sup>6</sup> As indicated by the above discussion, even if this turns out to be the case, the court will still likely be inclined to sever the Defendants.

#### D. Notice

Since Cox has already notified each of the Doe Defendants of the pendency of this suit, the court believes that providing adequate notice to the Doe Defendants (so that they might challenge the subpoena and protect their anonymity) is not an issue of concern. Indeed, Cox essentially concedes this point, stating that “without Cox’s efforts, Defendants would otherwise be prejudiced.” Since the Doe Defendants are in fact not “without” Cox’s efforts, and since Cox notified the Doe Defendants of this lawsuit over four months ago, the court does not perceive there to be an issue of insufficient notice under these circumstances.

#### E. Costs of Compliance

Fed. R. Civ. P. 45(c)(2)(B) provides that a court may protect a non-party from incurring “significant expense” in responding to a subpoena. Cox states that effective July 1, 2004, it established a “standard charge” of \$40 per IP address for responding to subpoenas in cases of this nature. Apparently at some point prior to the filing of the instant Motion to Quash, Cox and the Plaintiffs discussed the possibility of Cox simply complying with Plaintiffs’ subpoena, but Plaintiffs indicated that they were unwilling to pay Cox’s “standard charge.” Since the court has now denied Cox’s Motion to Quash, Cox requests that the court order Plaintiffs to pay Cox’s “standard charge” of compliance, pursuant to Fed. R. Civ. P. 45(c)(2)(B).

Cox's Corporate Counsel, Randall J. Cadenhead ("Cadenhead") states by affidavit that the rate of \$40 per IP address was reached by calculating the average cost of researching and confirming customer information and the average cost of reporting that information. Additionally, Cadenhead's affidavit states that greater time and expense was incurred in this case than usual due to the cost of providing individual written notice to each subscriber.

Plaintiffs respond that the costs at issue are not "significant" under Fed. R. Civ. P. 45 because Cox is a Fortune 500 company and Cox generated approximately \$5.7 billion in revenue in 2003. Additionally, Plaintiffs point out that Cox's demand is inconsistent with its own "standard charge" policy, which states that \$40 is the charge for information concerning one customer, but \$25 is the charge for information about each additional customer thereafter. The court is not persuaded by the former argument but agrees with the latter.

The court does not believe that Plaintiffs—themselves some of the largest recording companies in the world—should be permitted to shift the costs of their lawsuit to Cox (a non-party) simply because Cox is a large corporation. As between two sets of large corporations, it seems to the court that the parties actually seeking the information and prosecuting the lawsuit should bear the costs of retrieval. See United States v. Columbia Broad. Sys., Inc., 666 F.2d 364, 372 (9th Cir. 1982) ("Absent

some compelling justification, even large nonparty corporations . . . should not be compelled to subsidize [the discovery costs of] other large corporations.”). Additionally, the court finds the costs at issue to be significant.

However, the court does not believe that \$40 per IP address is the proper amount of costs to impose upon Plaintiffs, in light of the fact that Cox’s own policy provides that the standard cost of gathering the information at issue is \$40 for the first individual and \$25 for each individual thereafter. Accordingly, Plaintiffs are ORDERED to pay Cox \$40 for Doe Defendant No. 1 and \$25 for each of the other 99 Doe Defendants, for a total of \$2,515. The court believes this to be a reasonable sum in light of Cadenhead’s affidavit and the fact that Cox undertook, at its own expense, the responsibility of providing notice of this lawsuit to each of the Doe Defendants.<sup>7</sup>

### **III. Summary**

Cox’s Motion to Quash [Doc. No. 7] is DENIED. Amici’s Motion for Leave to File Memorandum [Doc. No. 8] is GRANTED. Upon receipt of payment of \$2,515 for Cox’s costs of compliance, Cox is ORDERED to provide Plaintiffs with information responsive to Plaintiffs’ subpoena. Plaintiffs’ deadline for service of the Complaint

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<sup>7</sup> The court makes no findings as to the propriety of any other compliance costs sought by Cox in any other lawsuit, in this District or otherwise. The court’s decision in this regard is limited only to the circumstances of this case.

is extended until seventy-five (75) days after Cox complies with the outstanding subpoena.

IT IS SO ORDERED, this 1st day of February, 2005.

s/Beverly B. Martin  
BEVERLY B. MARTIN  
UNITED STATES DISTRICT JUDGE