UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTIC RECORDING CORP., *et al.*,	)	
Plaintiffs,	)	
v.	)	No. 1:05-cv-00235-WBH
DOES 1-125,	)	
Defendants.	)	

MEMORANDUM OF DOE #35 IN SUPPORT OF MOTION TO QUASH SUBPOENA

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INTRODUCTION

Plaintiffs, sixteen music companies, have sued 125 anonymous, unrelated, and geographically disparate individuals in a single action in this District, solely because their Internet Service Provider ("ISP"), Cox Communications, Inc. ("Cox") is located in Georgia. Plaintiffs allege that each defendant each made available to the general public files from his or her personal computer containing different copyrighted musical performances. Plaintiffs have subpoenaed Cox, seeking the defendants' names, addresses, telephone numbers, email addresses, and MAC addresses to serve summons or settlement offers. John Doe #35 ("Doe") challenges the discovery subpoena on grounds of personal jurisdiction and improper joinder. His arguments apply to every defendant.

STATEMENT OF FACTS

Exhibit A to the Complaint specifies the Internet Protocol ("IP") address that each Doe allegedly used for posting music files on different dates in May 2004, August 2004, December 2004, and January 2005 and identifies between five and eleven files for each defendant. Plaintiffs filed in this Georgia district, alleging that the Court has personal jurisdiction because Doe's Internet postings can be downloaded in Georgia and because Cox is located in Georgia. *See* Complaint ¶ 3. However, strong evidence suggests that 119 of the 123 defendants remaining in this

litigation[1] reside outside of Georgia in states such as Arizona, California, Texas, and Oklahoma. *See* Exhibit A, Arkush Decl. Doe #35 appears to reside in Gainesville, Florida. *Id*.

Plaintiffs seek to impose liability on each of the 123 defendants individually. Plaintiffs do not allege joint or several liability or claims for relief in the alternative against any defendant. They also do not claim that the alleged infringers acted pursuant to any common plan or conspiracy or that their liability arises out of a common transaction or occurrence. At most, plaintiffs allege that each individual defendant has used Cox's services to display his or her respective files on the Internet.

ARGUMENT

Plaintiffs have failed to show need for Doe's identity sufficient to justify breaching his right to anonymous speech. Therefore, the subpoena should be quashed. This brief discusses the procedures that the Court should require to protect anonymous exercise of First Amendment rights and explains how Plaintiffs have fallen short of fulfilling their burden. Then, it argues that this action should be severed because the Complaint alleges that each defendant acted alone.

[1] Plaintiffs dismissed Does 68 and 110 on June 27, 2005 and April 22, 2005, respectively.

I. Plaintiffs Have Not Shown a Need for Disclosure Sufficient to Breach Doe's Right to Anonymous Speech.

A. The First Amendment Protects Doe's Right to Post Music on the Internet Anonymously.

The First Amendment protects Doe's right to engage in expressive activity anonymously—including speaking, publishing, broadcasting, associating with others, and receiving information. *See, e.g.*, *Watchtower Bible & Tract Soc. of N.Y. v. Vill. of Stratton*, 536 U.S. 150, 166-167 (2002) (invalidating permit requirement for door-to-door canvassing in part on anonymity grounds); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 199-200 (1999) (invalidating requirement that petition signature collectors wear name badges); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 357 (1995) (invalidating restriction on anonymous political leafleting); *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (affirming "right to satisfy [one's] intellectual and emotional needs in the privacy of [one's] own home" and "right to be free from state inquiry into the contents of [one's] library"); *Talley v. California*, 362 U.S. 60, 64-65 (1960) (invalidating restriction on all anonymous leafleting); *Bates v. City of Little Rock*, 361 U.S. 516, 523-25 (1960) (invalidating requirement that organization disclose its membership list); *Shelton v. Tucker*, 364 U.S. 479, 487-88 (1960) (invalidating requirement that teachers disclose names and addresses of all organizations with which they were affiliated within past five years); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-63 (1958) (reversing order of the Arkansas Supreme Court

requiring NAACP to disclose its membership list). People choose to speak, publish, associate, or receive information anonymously for many reasons. They may want to prevent certain assumptions about their opinions or associations. They may simply desire privacy. Or they may fear harassment, threats, frivolous litigation, or social stigma. For these reasons, disclosing of the identities of anonymous individuals inherently chills their exercise of First Amendment rights.

The anonymous publication of musical works, like other forms of performance, is speech protected by the First Amendment. 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).[2] "Every court that has addressed the issue has

[2] Although the court in *Sony v. Does 1-40* recognized that the First Amendment protects defendants in a file-sharing case, it reasoned that the defendants receive a low *level* of First Amendment protection because they are charged with copyright infringement and are not engaged in "political expression." *Id*. There, the court was mistaken. First, constitutional protection for speech has never been limited to political expression, and the record evidence here establishes no more than that Doe displayed a selected handful of files containing portions of songs, which is a fair use protected by the First Amendment. *Eldred v. Ashcroft*, 537 U.S. 186, 219-21 (2003); *Harper & Row Pub. v. Nation Enters.*, 471 U.S. 539, 560 (1985). Second, Doe does not receive less First Amendment protection merely because he is *charged* with copyright

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).

B. The Court Should Require Plaintiffs to Satisfy a Five-Part Test Before Breaching Doe's Anonymity.

To protect Doe's First Amendment rights, this Court should require Plaintiffs to satisfy a five-factor test. First, the Court should require Plaintiffs to (1) provide notice to the defendants; (2) state a *prima facie* claim; (3) provide evidence to support the claim; and (4) show that all information sought is central to the claim and not available from other sources. If those factors are met, then the Court should require Plaintiffs to (5) show that the need for disclosure outweighs the First Amendment rights of parties whose identities are sought. If a party does not satisfy the first four factors, then it need not conduct the balancing analysis embodied by the fifth. That is the case here, where Plaintiffs have failed to show that this Court has jurisdiction over Doe and failed to show that they need the information requested.

The test Doe urges was best articulated in *Dendrite v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001), where a corporation sued four individuals who had made a variety of remarks about it on a bulletin board maintained by Yahoo!. The New

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infringement. The First Amendment allows Doe to contest the *bona fides* and merits of allegations *before* his anonymity is permanently lost.

Jersey appellate court required plaintiffs to (1) notify the accused of the pendency of the identification proceeding and to explain how to present a defense; (2) quote verbatim the allegedly actionable statements; (3) allege all elements of the cause of action; (4) present evidence supporting the claim of violation, and (5) show that, on balance and in the particulars of the case, the right to identify the speaker outweighs the First Amendment right to anonymous speech. *Id*. at 760-61. The test is similar to the standard that some federal courts, including the Eleventh Circuit, use to protect anonymous news sources. *See, e.g.*, *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986). The *Dendrite* court explained that the test "strik[es] a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendants." *Id*. at 760.

Doe urges this Court to follow numerous other courts in adopting a similar standard. For example, in *Melvin v. Doe*, 49 Pa. D.&C. 4th 449 (Pa. 2000), the trial court ordered disclosure only after finding that the "information (1) is material, relevant, and necessary, (2) it cannot be obtained by alternative means, and (3) it is crucial to plaintiff's case." *Id*. at 477. Despite the lower court's careful analysis, the

Pennsylvania Supreme Court vacated and remanded for an additional determination whether the First Amendment required a *prima facie* showing of actual economic harm before permitting disclosure. 836 A.2d 42, 50 (Pa. 2003). Similarly, in *Doe v. 2TheMart.Com*, 140 F. Supp. 2d 1088 (W.D. Wash 2001), the court adopted a four-part test inquiring whether "(1) the subpoena seeking the information was issued in good faith and not for any improper purpose, (2) the information sought relates to a core claim or defense, (3) the identifying information is directly and materially relevant to that claim or defense, and (4) information sufficient to establish or to disprove that claim or defense is unavailable from any other source." *Id*. at 1095. *See also La Societe Metro Cash & Carry France v. Time Warner Cable*, 2003 WL 22962857, *2-3, 6-7, 36 Conn. L. Rptr. 170 (Conn. Super. 2003) (reviewing evidence of defamation and harm it caused, and requiring plaintiff to show that the information was necessary and unavailable by other means); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 579-80 (N.D. Cal. 1999) (requiring plaintiff to demonstrate by specific evidence that it had viable trademark claims against anonymous defendants before disclosure could be compelled); *In re Subpoena Duces Tecum to Am. Online*, 52 Va. Cir. 26, 34, 2000 WL 1210372, at *7 (Va. Cir. Fairfax Cy. 2000), *rev'd on other grounds*, 542 S.E.2d 377 (Va. 2001) (requiring plaintiff to submit

communications on which defamation claim was based to show "good faith basis to contend that it may be the victim of conduct actionable in the jurisdiction where suit was filed" and that "identity information is centrally needed to advance that claim").[3]

Finally, one court has adopted a *Dendrite*-like test on facts similar to those of this case. *See Sony*, 326 F. Supp. 2d at 564. *Sony* required (1) a concrete showing of a *prima facie* claim of actionable harm; (2) specificity in the discovery request; (3) an absence of alternative means to obtain the subpoenaed information; (4) a central need for the subpoenaed information to advance the claim; and (5) an inquiry into the defendants' expectation of privacy. *Id*. at 564-65. As Doe argues below, that court erred in determining that the plaintiffs met their burden, *id*. at 566, and that the defendants' personal jurisdiction arguments were premature. *Id*. at 567.

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[3] Commentators have also received *Dendrite* favorably. *See, e.g.*, O'Brien, *Putting a Face to a Screen Name: The First Amendment Implications of Compelling ISP's to Reveal the Identities of Anonymous Internet Speakers in Online Defamation Cases*, 70 Fordham L.Rev. 745 (2002); Reder & O'Brien, *Corporate Cybersmear: Employers File John Doe Defamation Lawsuits Seeking the Identity of Anonymous Employee Internet Posters*, 8 Mich. Telecomm. & Tech. L. Rev. 195 (2001); Furman, *Cybersmear or Cyberslapp: Analyzing Defamation Suits Against Online John Does as Strategic Lawsuits Against Public Participation*, 25 Seattle U. L. Rev. 213 (2001); Spencer, *Cyberslapp Suits and John Doe Subpoenas: Balancing Anonymity and Accountability in Cyberspace*, 19 J. Marshall J. Computer & Info. L. 493 (2001).

Each of the above analyses is similar to that used to evaluate requests for preliminary injunctions in that it requires consideration of the likelihood of success and a balancing of equities. Such a standard is particularly appropriate here for two reasons. First, a disclosure order would effectively constitute a permanent injunction causing irreparable harm—the loss of constitutionally protected anonymity. *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976). Second, plaintiffs suing Internet defendants frequently do not intend to pursue their claims. They seek only the identities of defendants and either lack serious claims or do not care to pursue them. Internet users would be seriously chilled in the exercise of their First Amendment rights if they knew they could be identified by anyone who simply files a facially valid complaint against them.[4] Indeed, Plaintiffs' representatives have repeatedly told the press that

[4] *See 2theMart.com*, 140 F. Supp. 2d at 1093 ("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."); *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*, 775 A.2d at 771 (requiring strict procedural safeguards "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").

they do not necessarily want to pursue litigation against all anonymous file sharers whose identities they obtain.[5]

C. Plaintiffs Fail Under *Dendrite* Because This Court Lacks Jurisdiction.

This Court lacks personal jurisdiction over Doe #35 and nearly every other defendant. Publicly available information indicates that only 4 of the 123 Does reside in Georgia. Those who do not live in Georgia, including Doe #35, lack sufficient contact with the state to give rise to jurisdiction.

In the absence of personal jurisdiction, Plaintiffs' subpoena falters under prongs 4 and 5 of the *Dendrite* standard—requirements that the information be necessary to litigation and unavailable elsewhere, and that Plaintiffs' need for the information outweighs potential First Amendment harm to the Defendants. First, Plaintiffs do not need the identities and addresses of defendants whom they cannot sue in this Court. Nor do they need the information to ascertain the proper jurisdictions in which to file. Free, publicly available tools enable Plaintiffs to determine where the Does are likely located based on their IP addresses. If the Court deems those resources insufficient,

[5]Before the DC Circuit ruled that the DMCA subpoena procedure was unavailable, the RIAA had subpoenaed about 2500 filesharers, *see* http://www.eff.org/IP/P2P/ riaasubpoenas/, but only sued or settled with approximately 600 persons. *See* http://www.washingtonpost.com/wp-dyn/ articles/A35281-2004Jan21.html>.

then Plaintiffs still need nothing more than for Cox to specify the state in which each Doe resides. Second, while Plaintiffs cannot show need for disclosure in this Court, Defendants can show serious constitutional harm from disclosure—and even from merely being required to challenge the subpoena here. Disclosure would permanently deprive the Does of their First Amendment right to anonymity. Requiring the Does to defend their anonymity in this jurisdiction would violate their Due Process rights as much as requiring them to litigate the merits of Plaintiffs' underlying claims would. This Court should therefore quash the subpoena.

1. This Court Lacks Personal Jurisdiction.

For this Court to assert personal jurisdiction, the Due Process Clause of the Fourteenth Amendment requires Doe to have "certain minimum contacts with [Georgia] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citations omitted). The minimum contacts test requires "in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). A defendant's connection with the state must be such that "it should reasonably anticipate being haled into

court" in the state in the event of a dispute. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295-96 (1980). Even if a defendant has minimum contacts that establish purposeful availment of the forum's laws, the court cannot exercise jurisdiction when doing so would be unreasonable or unfair. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-78 (1985) (quoting *Int'l Shoe*, 326 U.S. at 310) ("[M]inimum requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of jurisdiction even if the defendant has purposefully engaged in forum activities.")); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114-15, 116, 121-22 (1987) (California jurisdiction unreasonable and unfair in dispute between Japanese and Taiwanese corporations). The burden is on the plaintiff to plead facts establishing jurisdiction. *Future Tech. Today, Inc. v. OSF Healthcare Sys*., 218 F.3d 1247, 1249 (11th Cir. 2000). Plaintiffs have failed that burden. Doe lacks minimum contacts with Georgia. Even if he had sufficient contacts, the exercise of jurisdiction would be unreasonable and unfair.

a. Doe Lacks Minimum Contacts with Georgia.

Plaintiffs assert "specific" jurisdiction deriving from Doe's alleged dissemination of copyrighted works and Doe's subscription to a Georgia ISP.

Complaint ¶ 3. Specific jurisdiction derives from contacts related to the controversy underlying litigation. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984).[6] Plaintiffs assert that specific jurisdiction exists everywhere in the United States because the alleged dissemination of copyrighted music "occurred in every jurisdiction in the United States" and that Georgia has jurisdiction because Doe used Cox, an ISP headquartered in Georgia. *Id*. Plaintiffs are mistaken. Making files available on the Internet does not subjesct a poster to suit everywhere the files are visible, and Doe's use of a Georgia ISP is neither sufficiently related to Plaintiffs' cause of action nor a sufficient amount of contact with Georgia to give rise to jurisdiction. Indeed, this Court has already expressed doubt about its jurisdiction over defendants in nearly identical cases. *See Arista Records, Inc., et al. v. Does 1-100*, No. 1:04-CV-2495-BBM, Slip Op. at 7 n.4 (N.D. Ga. Feb. 1, 2005) ("At first glance . . . the court is doubtful that it can exercise personal jurisdiction over the Doe Defendants on this basis.") (citing *Alternate Energy Corp. v. Redstone*, 328 F. Supp. 2d 1379, 1382 (S.D. Fla. 2004)).

[6] Plaintiffs do not assert "general" jurisdiction, which would arise from "continuous and systematic" contacts with Georgia. *Id*. at 415 n.9. This is only appropriate, given that the vast bulk of the defendants, including Doe #35, do not reside in Georgia. *See* Exhibit A, Arkush Decl.

Courts examining jurisdiction over Internet users apply a sliding-scale analysis announced in *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F. Supp. 1119 (W.D. Pa. 1997). Under the *Zippo* sliding scale, passively posting files on the Internet for others to examine or copy does not give rise to jurisdiction, but maintaining a commercially interactive site (in the sense of being used to engage in business transactions) gives rise to jurisdiction in any state in which a substantial number of business transactions occur. The greater the degree of commercial interactivity in a jurisdiction, the greater susceptibility to suit in that jurisdiction. The *Zippo* test has been widely and unanimously adopted among the circuits. *See ALS Scan v. Digital Serv. Consultants*, 293 F.3d 707 (4th Cir. 2002); *Neogen Corp. v. Neo Gen Screening*, 282 F.3d 883 (6th Cir. 2002); *Mink v. AAAA Dev.*, 190 F.3d 333 (5th Cir. 1999); *Soma Medical Int'l v. Standard Chartered Bank*, 196 F.3d 1292, 1296 (10th Cir. 1999); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419 (9th Cir. 1997). Although the Eleventh Circuit has not yet addressed the issue, district courts in Georgia, Florida, and Alabama, including this Court, have adopted the test. *See Barton S. Co., Inc. v. Manhole Barrier Sys., Inc.*, 318 F. Supp. 2d 1174, 1177-78 (N.D. Ga. 2004) (website on which users could fill out order forms did not give rise to jurisdiction in Georgia without because there was no evidence that it was aimed at Georgia residents and no evidence of Georgia

users); *Alternate Energy Corp.*, 328 F. Supp. 2d at 1382-83 (posting allegedly defamatory information on subscription website insufficient to create Florida jurisdiction even where some Florida residents subscribed to the website); *Miller v. Berman*, 289 F. Supp. 2d 1327, 1335-36 (M.D. Fla. 2003) (passive informational website did not give rise to jurisdiction); *Bustler v. Beer Across America*, 83 F. Supp. 2d 1261, 1267-68 (N.D. Ala. 2000) (Alabama lacked jurisdiction over action arising out of sale by Illinois company of beer to Alabama minor over the Internet where seller had not targeted Alabama residents and had no ongoing relationship with them).

To the extent that courts have found fault with *Zippo*, they urge extra caution in protecting defendants. Based on the Supreme Court's decision in *Calder v. Jones*, 465 U.S. 783 (1984), which found jurisdiction over a defamation action where the forum state was the "focal point both of the [speech] and of the harm suffered," *id*. at 789, courts emphasize that even a fully interactive website cannot give rise to jurisdiction unless it is aimed at the forum state or causes substantial harm to a plaintiff in the forum state. *See, e.g., Carefirst of Md. v. Carefirst Pregnancy Ctrs.*, 334 F.3d 390, 400-01 (4th Cir. 2003) (finding no personal jurisdiction where the information on the defendant's semi-interactive website was not targeted at individuals in the forum state); *see also Barton*, 318 F. Supp. 2d at 1177-78; *Bustler*, 83 F. Supp. 2d at 1267-

68. This conclusion also follows from the Supreme Court's decisions in *World-Wide Volkswagen*, 444 U.S. 286, and *Asahi*, 480 U.S. 102. In *World-Wide Volkswagen*, the Court held that the forum state could not base jurisdiction on a consumer's unilateral act of bringing goods into the forum state, even where the goods themselves were mobile and the consumer's act was foreseeable. 444 U.S. at 295-96. In *Asahi*, four Justices rejected jurisdiction based on the knowing placement of goods in a "stream of commerce" that leads to the forum state, 480 U.S. at 112 (1987) (O'Connor, J.) (plurality op.), and four more wrote that placement in the "stream of commerce" would suffice *so long as the manufacturer knows that the goods will be shipped to, and marketed in, the forum state*. *Id*. at 117 (Brennan, J., concurring in part). These cases show that a court lacks jurisdiction over even an interactive, commercial website if the owner did not intentionally interact with residents of the forum state.

Doe's activity—which can hardly be called *activity* at all—falls at the far non-jurisdictional end of the *Zippo* spectrum. Plaintiffs only allege that Doe's computer files were accessible to others—a wholly passive "act." There is no evidence that Doe intended anyone to download files from the computer, much less that Doe targeted or solicited Georgia residents. *Asahi*, 480 U.S. at 112, 117; *Carefirst*, 334 F.3d at 400-01; *Barton*, 318 F. Supp. 2d at 1177-78. Indeed, there is no evidence that any Georgia

resident actually downloaded any of Doe's files. Moreover, if one did, there is no evidence that Doe foresaw the action. *Asahi*, 480 U.S. at 112, 117. And even if Doe could have foreseen the downloading, it was a unilateral act by the downloader and, as such, cannot give rise to jurisdiction. *World-Wide Volkswagen*, 444 U.S. at 295-96. Finally, Plaintiffs do not contend that Doe charged for the files. In sum, Doe's having left files on his computer accessible to others was wholly passive, wholly noncommercial, and evinces no intent to interact with anyone in Georgia—much less that he purposefully availed himself of the benefits and protections of Georgia law.

Plaintiffs are also mistaken in alleging jurisdiction based on Doe's relationship with Cox. Plaintiffs' claims do not arise out of Doe's contacts with Cox. They arise out of an alleged relationship between Doe and third parties. Granting Georgia jurisdiction based the location of Cox's headquarters would be similar to granting Tennessee jurisdiction over a personal injury action arising from a product shipped from Vermont to New Hampshire, merely because the shipper used FedEx, which is based in Memphis.

Additionally, even if Doe's relationship with Cox *were* related to the cause of action—for example if *Cox* were suing Doe over their contract with one another—the relationship still entails insufficient contact with Georgia to give rise to jurisdiction.

CompuServe, Inc. v. Patterson, 89 F.3d 1257 (6th Cir. 1996), is distinguishable. In that case, the defendant contracted with CompuServe to distribute software products, marketed the products on CompuServe's network, transmitted the products to CompuServe's servers, regularly communicated with CompuServe about the products, and eventually threatened CompuServe with litigation that could have cost it millions of dollars. *Id*. at 1264-65. The defendant's relationship with CompuServe was not incidental to the cause of action; it was the very basis of the cause of action. Moreover, *CompuServe* expressly distinguished situations such as the present case, where the defendant is a mere purchaser of services and therefore lacks sufficient contacts to give rise to jurisdiction in the service provider's state. *Id*. at 1264.

b. Even If Doe Had Minimum Contacts with Georgia, the Exercise of This Court's Jurisdiction Would Be Unreasonable and Unfair.

Even if Plaintiffs had alleged minimum contacts, the exercise of Georgia jurisdiction would be unreasonable and unfair. Courts consider several factors in assessing the reasonableness of jurisdiction: (1) the burden on the defendant; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in

obtaining convenient and effective relief when that interest is not adequately protected by the plaintiff's power to choose the forum; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; (5) and the shared interest of the several States in furthering fundamental substantive social policies. *World-Wide Volkswagen*, 444 U.S. at 292; *Burger King*, 471 U.S. at 476-77; *see also Future Tech.*, 218 F.3d at 1251. These factors weigh decidedly against the reasonableness of jurisdiction.

Foremost, requiring the Does to litigate in Georgia would be highly burdensome. Only four appear to reside in Georgia. It hardly needs stating that litigating in a foreign jurisdiction over a controversy that has nothing to do with that jurisdiction is heavily burdensome for an individual defendant—and that may be why Plaintiffs did not bother to file in the proper jurisdictions. It is hard to imagine another reason why Plaintiffs, eight of whom are California residents, chose to sue twenty-four other Californians in Georgia. *See* Complaint ¶¶ 5, 6, 10, 12, 13, 16, 18, 19; Exhibit A, Arkush Decl.

Second, Georgia has no interest in litigation between nonresidents that concerns neither Georgia's law nor its citizens. The Eleventh Circuit has sometimes found that a forum state lacks sufficient interest in litigation even when the state's own citizens

were harmed by an out-of-state defendant. *See Future Tech*., 218 F.3d at 1251-52 (citing *Borg-Warner Acceptance Corp. v. Lovett & Tharpe, Inc*., 786 F.2d 1055 (11th Cir. 1986) (collecting cases where the court lacked personal jurisdiction over nonresidents for one-time transactions)). Surely, then, the Court lacks an interest in a controversy between nonresidents. *See Asahi*, 480 U.S. at 114-15; *OMI Holdings, Inc. v. Royal Ins. Co. of Canada*, 149 F.3d 1086, 1096 (10th Cir. 1998) (dismissing for lack of Kansas jurisdiction where neither party was a Kansas resident, the litigation did not implicate Kansas residents, and Kansas law did not apply); *Paccar Intern., Inc. v. Commercial Bank of Kuwait, S.A.K.*, 757 F.2d 1058 (9th Cir. 1985) ("California has no special interest in regulating banks that are not chartered under California law."); *see also Amoco Egypt Oil Co. v. Leonis Nav. Co., Inc*., 1 F.3d 848 (9th Cir. 1993) (Washington's generalized interest in maritime law did not justify jurisdiction where parties were non-residents, the claims did not arise under the state's law, and the litigation did not impact state residents).

Third, Plaintiffs' interest in obtaining convenient and effective relief would not be impaired by their filing in another jurisdiction. This factor concerns the availability of evidence and has fallen out of favor in light of modern communications and transportation. *See, e.g., Panavision Int'l, LP v. Toeppen*, 141 F.3d 1316, 1323-24

(9th Cir. 1998). The circumstances of this case only amplify the justifications for ignoring this factor. This case concerns conduct on the Internet, and the bulk of relevant evidence is in electronic form.

Finally, requiring Plaintiffs to file elsewhere would neither impair the interstate judicial system's interest in efficiency nor frustrate any substantive policy. Plaintiffs can pursue their claims in other jurisdictions as well as they could in this Court.

This Court lacks personal jurisdiction over 119 defendants in this litigation.

2. This Court Should Not Order the Disclosure of the Identities of People Over Whom the Court Lacks Personal Jurisdiction.

Under *Dendrite*, the Court's lack of jurisdiction is fatal to the Plaintiffs' subpoena. First, Plaintiffs cannot show any need in this Court for the Does' identifying information. They do not need the information to serve summons because they must first file in proper jurisdictions. And they can ascertain the proper jurisdiction for each Doe from publicly available information. *See* Arkush Decl. At most, if this Court finds that publicly available information insufficient, it should narrow the subpoena to permit disclosure only of the state in which each Doe resides.

Second, Plaintiffs' attempt to identify the Does is essentially a request for substantive relief. In many cases, plaintiffs *only* seek defendants' identities. Although

the plaintiffs lack viable claims or do not seriously wish to pursue claims, obtaining the defendants' identities enables them to take extra-legal action against the defendants or embroil the defendants in expensive, frivolous litigation. From the defendant's perspective, compelled disclosure of a defendant's identity is substantive unlike ordinary discovery in that it permanently deprives the defendant of constitutionally protected anonymity and may result in ostracism or retaliation. *Elrod*, 427 U.S. at 473-74 ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *NAACP*, 357 U.S. at 462-63 (private retaliation following the disclosure of identities is constitutional harm). If the Does cannot be forced to defend the merits of this litigation in this Court, they should not lose their First Amendment rights here either.[7]

The five-factor *Dendrite* standard guards precisely against this type of situation, directing courts to quash a subpoena seeking identifying information when the Plaintiffs cannot demonstrate a need for the information sufficient to justify infringing

[7] Cox should be commended for voluntarily notifying the defendants of Plaintiffs' request for their identities, but that notice cannot remedy the jurisdictional defects of Plaintiffs' subpoena. The notice does not inform defendants that they may have jurisdictional arguments against enforcement of the subpoena, and it informs them neither that there are time constraints on their responses nor that they will hear nothing more about the case until after they have lost their anonymity.

constitutional rights. At most, any subpoena should require Cox to disclose only the state in which each Doe resides so that the Plaintiffs can file in the proper jurisdictions.

II. The Court Should Sever This Action.

Plaintiffs have also improperly joined all 123 defendants in a single action. Federal Rule of Civil Procedure 20(a) states, in relevant 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. In this case, there is no claim for relief jointly or severally or in the alternative. Moreover, there is no common transaction or occurrence or "series of transactions or occurrences." The Does have no connection with one another. They are accused of sharing different files and using

different file-sharing software, at different places throughout the country.[8] Further, Plaintiffs do not allege that all of the 16 plaintiffs have claims against each of the 123 defendants.

The cases require that, for parties to be joined in the same lawsuit, they must be related *to each other*. Thus, for example, this Court has 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. *See Turpeau v. Fidelity Fin. 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. *See Moore v.*

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[8]In *Pergo v. Alloc*, 262 F. Supp. 2d 122, 127 (S.D.N.Y. 2003), the court characterized prongs (1) and (2) 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

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, because loans were issued as part of the same series of transactions).[9]

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 Litigation*, 2000 WL 1475705, *18 (D.D.C. 2000), in which each defendant was alleged to be engaged in a single global antitrust conspiracy, there is nothing inherently unlawful about using software to make files available through the Internet. That each Doe 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 uses the mail or the telephone to deny hundreds of employment applications could be joined in

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tall it has no glaciers.

[9] *Accord Pergo*, 262 F. Supp. 2d 122 (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 plaintiffs' 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).

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).

Courts in other districts facing similar record company lawsuits against multiple unrelated Doe defendants have ordered the defendants severed before discovery could proceed. *See In re Cases Filed by Recording Cos.*, General Order (W.D. Tex. Nov. 17, 2004); *Elektra Entm't Group v. Does 1-6*, Civil Action No. 1241 (E.D. Pa. Oct. 13, 2004); *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). This Court has already noted in nearly identical cases that joinder was likely improper but deferred decisions on severance until after discovery or after individual Does came forward, such as Doe #35 here. *Motown Record Co., L.P., v. Does 1-252*, No. 1:04-CV-439-WBH, Slip Op. at 3, (N.D. Ga. August 16, 2004) ("Defendants [] argue that they have been misjoined, and the Court is inclined to agree."); *Arista Records, Inc.*, No. 1:04-CV-2495-BBM, Slip Op. at 7-8 ("The court finds the question [of misjoinder] 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.").

CONCLUSION

This Court should quash the subpoena and sever this action.

Respectfully submitted,

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