

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

INTERSCOPE RECORDS, *et al.*,)
)
 Plaintiffs,)
)
 v.) No. 6:04-CV-197-Orl-22DAB
)
 DOES 1-25,)
)
 Defendants.)

**MEMORANDUM OF AMICI CURIAE
PUBLIC CITIZEN, AMERICAN CIVIL LIBERTIES UNION,
ELECTRONIC FRONTIER FOUNDATION,
AND ACLU OF FLORIDA
IN RESPONSE TO MOTION FOR EXPEDITED DISCOVERY**

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In this action for copyright infringement, sixteen music companies seek injunctive relief, damages, and fees and costs against 25 anonymous and unrelated individuals. Plaintiffs allege that defendants have displayed certain data files, which contain copyrighted musical performances, on their personal computers in a manner that enables the public to download those files to their own computers over the Internet. 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 persons who have communicated anonymously over the Internet, including a showing that there is personal jurisdiction over each of the 25 defendants. Moreover, these cases pose serious concerns about whether all 25 defendants are properly joined in one action, particularly given the fact that, in justifying discovery, plaintiffs made a factual showing with respect to only three defendants but presented no evidence to support identification of the other 22 individuals. Finally, we argue that, in the event some discovery is to be allowed, certain additional conditions should be imposed.

STATEMENT

Exhibit A to the Complaint specifies the Internet Protocol (“IP”) address that each Doe allegedly used for posting songs on particular dates (ranging from June through December 2003), identifying between five and ten songs for each defendant. Plaintiffs seek to impose liability on each of the 25 Does individually. C the complaint makes no allegations of joint or several liability and no claims for relief in the alternative against any of them. The complaint also makes no claim that the infringers acted pursuant to any common plan or conspiracy, or that their liability arises out of a common transaction or occurrence. At most, it alleges that, in a series of instances, each individual defendant has used the facilities of a single Internet Service Provider (“ISP”), Bright House Networks (“Bright House”), to display their respective data files on the Internet. Plaintiffs do not

allege that Bright House itself is liable for the infringements. Plaintiffs allege generally that all defendants can be found in Florida, 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 Florida, and that their ISP, Bright House, can be found in Florida as well.

Plaintiffs now seek to identify the anonymous defendants so that they can be served with summons. In support of this motion, plaintiffs submit an affidavit from Jonathan Whitehead, Vice-President of the Recording Industry Association of America ("RIAA"), a trade association to which the plaintiffs belong, that explains to the Court the serious economic problem posed for plaintiffs by the extensive use of the Internet to enable music piracy, while accusing the ISPs, who are not named as defendants, of deliberately profiting from the use of their facilities for piracy. The affidavit further explains the manner in which the RIAA investigates file-sharing systems and how, as a general matter, its staff members attempt to verify that particular anonymous individuals have made copyrighted songs available for download. The affidavit asserts that Complaint Exhibit A is a listing of songs identified by the RIAA as being offered for download. Although the affidavit is made on personal knowledge, it contains no statement that the affiant himself listened to each song listed or verified the existence of copyright registrations for the songs. A complete listing of songs offered for download by three of the 25 defendants has been filed with the Court.

Plaintiffs argue that identification of Doe defendants is commonly permitted, and that unless 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 ISP's may discard their "logs" showing which users were given access through which

IP addresses within weeks or even days.

ARGUMENT

The Complaint alleges serious violations of the law with potentially serious consequences for plaintiffs' economic welfare. In the recently completed litigation, where 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), all amici here 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 plaintiffs deserve credit.

However, as in the DMCA case, this "test case" will set standards for the application of Rule 45 for subpoenas to identify alleged copyright infringers, and 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 supporting 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.

1. Balancing the Right to Anonymous Speech Against the Need for Disclosure.

Plaintiffs are correct that plaintiffs are commonly 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 cases plaintiffs cite on pages 5-6 of their brief, in which prisoners or arrestees sought to identify the prison or police officers who allegedly beat or otherwise mistreated them. 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. *See infra* pp. 3—8. 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 plaintiffs who simply allege wrongdoing, without necessarily having any intention of carrying through with actual litigation. Indeed, plaintiffs’ representatives have repeatedly told the press that they do not necessarily want to pursue litigation against all the anonymous file sharers whose identities they obtain.¹ Moreover, the anonymous publication of musical works, like other forms of performance, is speech protected by the First Amendment. *In re Verizon Internet Svces*, 257 F. Supp.2d 244, 260 (D.D.C. 2003), *rev’d on other grounds*, 351 F.3d 1229 (D.C. Cir.).²

¹Before 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?nav=hptop_ts.

²Judge Bates opined that First Amendment protection for file sharing defendants was minimal because they are charged with copyright infringement and because they are not engaged in core political speech. The first reason begs the question. The First Amendment does not protect libel or revelation of trade secrets or any of the other wrongs that are commonly alleged in the Doe

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); *Black Panther Party v. Smith*, 661 F.2d 1243, 1266 (D.C. Cir. 1981). Accordingly, 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 A2d 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

lawsuits for which the courts have developed procedures, any more than it protects copyright infringement. However, at the initial stage of the lawsuit, no court has determined that anyone 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 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 B and the evidence goes no further than that as to most of the defendants C 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).

right to identify the speaker outweighs the First Amendment right of anonymity.

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. 836 A.2d at 47-50.

Similarly, in *La Societe Metro Cash & Carry France v. Time Warner Cable*, 2003 WL 22962857 (Conn. Super.), 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 Insurance 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 Va.Cir. 26, 34 (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.”³

Moreover, the Doe defendants’ disclosure of their identities to their ISP’s does not 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’ names on the ground that compelled identification violated the members’ right to remain anonymous. Similarly, under plaintiffs’ theory, *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995), and *Talley v. California*, 362 U.S. 60 (1960), would be 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, every *ex parte* request to identify every Internet speaker would have to be granted, because every Internet user is identified to his or her ISP.

³The argument for a balancing test is more fully developed at <http://www.citizen.org/>

Indeed, speech is rarely anonymous to all persons at all times. If such 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.

In this case, of course, where the plaintiffs are respectable companies and their counsel are highly respected lawyers, it is difficult to consider the possibility that the filing of the Complaint might not have been preceded by a meticulous investigation. On the other hand, it is not difficult for plaintiffs to present solid evidence, including an affidavit by the individual who examined the files available for download from each defendant's computer, listened to the files, verified that they were copyrighted songs, and checked to be sure that those copyrights were registered and are owned by plaintiffs, and to list in an affidavit the songs that the Doe made available for download. The Whitehead affidavit in this case is long on social policy and very short on first person averments about the individual defendants in this case. Because this case will set a standard for all plaintiffs who seek to identify anonymous internet speakers based on claims of copyright infringement, including those who are less scrupulous and ethical than these plaintiffs, the Court should not authorize a subpoena until such individualized evidence is presented about each Doe.

2. Personal Jurisdiction. One of the showings that plaintiffs have failed to make with respect to most of the defendants is that the Court has personal jurisdiction over each of the 25 defendants. The federal courts have generally applied a sliding scale analysis to determine

whether a defendant who has posted information on the Internet that other persons can examine and download to computers located throughout the world is subject to personal jurisdiction, to ensure that persons using the Internet are not automatically subject to suit anywhere in the world. Under the sliding scale or “Zippo” analysis, *see 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 they use their sites 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, district courts within the circuit, including this court, 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 that 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 have opened a section of their personal computers to the Internet in a manner that permits other persons with personal computers to obtain files stored on those computers and download them. There is no contention that the “music pirates” 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 Florida is not a sufficient basis for subjecting them to suit here.

3. Joinder. There is also substantial reason to question whether plaintiffs have properly joined all 25 defendants in a single action. Rule 20 permits multiple defendants to 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, and we question whether there exists a “series of transactions or occurrences.” The individuals sued have no connection with each other: They are claimed to have shared different music using different filesharing software at different places throughout the country.⁴

⁴ Courts have characterized prongs (1) and (2) as requirements in the alternative. *see Pergo*

The cases require that, for defendants to be joined in the same lawsuit, their courses of conduct must be related. Thus, for example, 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 because loans were issued as part of the same series of transactions).⁵

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.), in which each of the defendants 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. It is the provision of hundreds or thousands of copyrighted

v. Alloc, 262 F.Supp.2d 122, 127 (S.D.N.Y. 2003). 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. 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.

⁵ *Accord Pergo, Inc. v. Alloc, Inc.*, 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 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).

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 Orlando 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. *Ross v. Meagan*, 638 F.2d 646, 650 (3rd Cir. 1981) (although plaintiffs “claim relief for similar but entirely distinct and separate transactions or series of transactions. . . . [a] coincidental similarity in the underlying facts will not permit appellants to proceed jointly.”); *Cf. Nassau County. 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 hundreds of pages concerning the music files made available by three of the 25 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.

In a highly analogous context, several district courts have refused to allow a company that

distributed television programs through satellite systems to sue hundreds of otherwise unrelated individuals for using “pirate access boxes” to obtain satellite signals without paying for them.⁶ Stealing satellite signals is at least as reprehensible as making music files available for download, but these district judges 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.

4. Procedure for Subpoenas. Even assuming that the Court concludes that it should allow some or all of the discovery requested by plaintiffs, we have a modest suggestion about the terms of that discovery to better ensure that the Does have a realistic opportunity to object if they choose to do so. We applaud plaintiffs for recognizing that Bright House should be allowed sufficient time to respond to the subpoenas to allow Bright House to notify its subscribers that their identifies are at issue, so that, if they choose, the Does can offer evidence or argument in defense of their anonymity under the *Dendrite* standard. Pl. Mem. at 7 n4. We question, however, whether fifteen days from the date of the subpoena is a sufficient amount of time to allow each defendant to receive the requisite notice from Bright House, to allow that defendant to obtain an attorney who is licensed to practice in this state, and to allow that attorney to prepare a motion to quash if one can be justified. Amici suggest that the Court address this issue by directing Bright House to provide notice within seven days of its receipt of the subpoena to each person whom its records reflect as having used the indicated IP addresses at the indicated times, to allow the defendants fourteen days from the time notice was received to file a motion to quash, and to refrain from disclosure pending the disposition

⁶The cases are collected at the web page <http://www.directvdefense.org/files/> (see caption “Severance”).

of any motion to quash.

In urging such additional time, we are not insensitive to plaintiffs' concerns about the need for immediate action lest information contained in Bright House's electronic records, showing which of its customers used which IP numbers at which times, be destroyed. We have suggested to plaintiffs' counsel that they ask Bright House for a commitment to preserve that information pending this Court's ruling on whether it may pursue discovery, and, if a subpoena is served, pending disposition of any timely filed motion to quash. We urge the Court to address that issue in its order.

CONCLUSION

The motion for expedited discovery should be considered and resolved in accordance with the principles set forth above.

Respectfully submitted,

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March 30, 2004