

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

ARISTA RECORDS LLC, a Delaware limited liability company; ATLANTIC RECORDING CORPORATION, a Delaware corporation; BMG MUSIC, a New York general partnership; CAPITOL RECORDS, LLC, a Delaware limited liability company; ELEKTRA ENTERTAINMENT GROUP INC., a Delaware corporation; INTERSCOPE RECORDS, a California general partnership; MAVERICK RECORDING COMPANY, a California joint venture; MOTOWN RECORD COMPANY, L.P., a California limited partnership; SONY BMG MUSIC ENTERTAINMENT, a Delaware general partnership; UMG RECORDINGS, INC., a Delaware corporation; VIRGIN RECORDS AMERICA, INC., a California corporation; WARNER BROS. RECORDS INC., a Delaware corporation; and ZOMBA RECORDING LLC, a Delaware limited liability company,

Civil Action No.: 1:08-cv-00765

Plaintiffs,

v.

DOES 1 - 16,

Defendants.

PLAINTIFFS' OPPOSITION TO MOTION TO QUASH OF DOES #3, #7, #11 AND #15

Plaintiffs respectfully file this opposition to Defendant Does #3, #7, #11 and #15 ("Defendants") Motion to Quash a subpoena issued by Plaintiffs to the State University of New York at Albany ("SUNY"). For the reasons discussed below, Defendants' Motion should be denied.

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INTRODUCTION

Defendants' motion to quash asks this Court to immunize them from liability for violating Plaintiffs' copyrights. Plaintiffs have gathered substantial evidence showing that the Defendants are significant copyright infringers. However, Plaintiffs cannot pursue their claims – in this or any court – until they know who the Defendants are and where they reside. The discovery that this Court has expressly authorized is directed toward identifying the Defendants so that Plaintiffs' claims can proceed. If the Court were to grant Defendants' Motion, this case would be over before it began. Defendants' Motion raises several arguments, none of which have any merit.¹

First, Defendants argue that their privacy is protected by the First Amendment. Defendants are wrong because the First Amendment does not protect copyright infringement. Additionally, even if Defendants had some minimal First Amendment interest, it is substantially outweighed by Plaintiffs' interest in pursuing copyright infringement.

Second, Defendants assert that Plaintiffs cannot seek information about their identities and places of residence because it is unclear whether this Court has jurisdiction over Defendants. That argument has been repeatedly rejected by courts across the country in cases parallel to this one. Those courts have held that where Plaintiffs seek the identities of a defendant using the Internet to infringe Plaintiffs' copyrighted sound recordings, a claimed lack of personal jurisdiction provides no basis for quashing a subpoena to identify the defendant. *See e.g. Elektra Entm't Group, Inc. v. Does 1-9*, No. 04 Civ. 2289 (RWS), 2004 WL 2095581, at *5 (S.D.N.Y.

¹ In support of their arguments, Defendants repeatedly cite and reference the work of Ray Beckerman, implying that Mr. Beckerman offers scholarly and dispassionate guidance regarding the issues that Defendants raise. In fact, Mr. Beckerman runs a blog entitled "RIAA vs. The People." Additionally, Mr. Beckerman has acted as defense counsel in several infringement cases. Defendants rely on the same arguments Mr. Beckerman has raised and lost in other cases.

Sept. 8, 2004); *Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 567-68 (S.D.N.Y. 2004); *UMG Recordings v. Does 1-199*, No. 1:04-CV-0093-CKK (D.D.C. Mar. 10, 2004).

Order attached as Exhibit 1. Defendants' argument is also premature because litigation about personal jurisdiction cannot occur before the identity of the defendant is known to all parties and the Court. A contrary rule that required proof of personal jurisdiction prior to obtaining discovery to identify an Internet infringer would effectively immunize such infringers from liability for violating Plaintiffs' copyrights.

Third, Defendants erroneously assert that Plaintiffs' subpoena should be quashed because it is based on illegally obtained evidence. Specifically, Defendants seek to exclude evidence obtained by MediaSentry because MediaSentry allegedly failed to register as a private investigator in New York. This argument fails because (i) MediaSentry does not need a license to conduct the type of work it performs for Plaintiffs and is not in violation of Article 7 of the New York General Business Law ("Article 7"); (ii) MediaSentry's work retrieved only information that Defendants placed into the public domain and, thus, cannot be considered intrusive; (iii) Defendants do not have standing to seek relief under Article 7; and (iv) Defendants have provided no support to his contention that a violation of Article 7 would preclude the use of relevant evidence.

Fourth, Defendants claim that joinder of the Defendants is not proper in this case. Defendants are wrong for several reasons. In this case, joinder is appropriate under the standards articulated in the Federal Rules of Civil Procedure and also best serves the goals of efficiency and judicial economy. Joinder allows the Court to address issues common to the parties in one proceeding. Joinder also allows Defendants a cost-effective way to assert their common defenses and allows the Internet Service Provider ("ISP") a cost-effective way to respond to a

single subpoena. This issue has been considered in hundreds of cases throughout the country. A substantial majority of these cases throughout the country, including a court within this District, have found joinder to be proper. *Lava Records LLC, et al. v. Does 1-16*, No. 5:07-cv-520 (N.D.N.Y. May 19, 2007). Order attached as Exhibit 2. Plaintiffs respectfully request this Court to adopt the majority approach regarding joinder.

Finally, Defendants claim that they are entitled to attorney's fees because Plaintiffs' claims are based upon an illegal investigation and an inadequate factual basis. Defendants' claims have no basis in fact or law. Courts throughout the country have held that Plaintiffs' purposes and methods are legitimate. Plaintiffs brought this suit and hundreds of others to protect their copyrights from infringement.

BACKGROUND

As Plaintiffs discussed in their Application for Leave to Take Immediate Discovery ("Discovery Motion"), every month, copyright infringers like Defendants unlawfully distribute billions of perfect digital copies of Plaintiffs' copyrighted sound recordings over P2P networks. *See Lev Grossman, It's All Free*, Time, May 5, 2003. As a direct result, Plaintiffs have and continue to sustain substantial financial losses.

P2P users who distribute (upload) and copy (download) copyrighted material violate the copyright laws. *See, e.g., Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 545 U.S. 913, 918-923 (2005) (noting that users of P2P networks share copyrighted music and video files on an enormous scale, and, as such, even the providers of those networks "concede infringement" by the individual users); *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003). Despite the clear violation of copyright laws, copyright infringement over P2P networks is widespread because users can conceal their identities. Thus, copyright owners can often observe

infringement occurring on P2P networks but cannot (without assistance from the courts) identify the true names and locations of the infringers.

Plaintiffs gathered substantial evidence of Defendants' illegal conduct. Plaintiffs could not ascertain Defendants' name, address, or any other contact information, but they could identify the Internet Protocol ("IP") address from which Defendants were unlawfully distributing Plaintiffs' copyrighted works. *See* Linares Decl. ¶ 18.² Using the IP addresses, Plaintiffs determined that Defendants were using the internet service of SUNY to distribute copyrighted works unlawfully. *Id.* SUNY maintains logs that match IP addresses with their users' computer hardware. *Id.* ¶ 12. Thus, SUNY can match the IP addresses, dates, and times with the computers that were using the IP addresses when Plaintiffs observed the infringement by looking at its IP address logs. SUNY can then match the computers with individuals who were responsible for them on the University network. As such, SUNY—and only SUNY—can identify the Defendants in this case.

Defendants are active participants on the Gnutella and Ares P2P networks distributing copyrighted sound recordings stored on their computers to, and downloading copyrighted sound recordings from, the millions of other users of the Gnutella and Ares P2P networks. MediaSentry discovered Defendants openly distributing sound recordings whose copyrights are owned by Plaintiffs by logging onto the P2P networks and viewing the files that Defendants were distributing to other users. In conjunction with the Complaint filed in this case, Plaintiffs listed a sample of the sound recordings that Defendants were distributing without authorization.

² The Linares Declaration was submitted in support of Plaintiffs' Discovery Motion. Mr. Linares is an attorney who serves as Vice President, Anti-Piracy Legal Affairs for RIAA. (Linares Decl at ¶ 2). In this capacity, he works entirely on behalf of the Plaintiff record companies, supervising inquiries into copyright infringement, including the work of MediaSentry in this case. *Id.* The statements in the Linares Declaration are based upon personal knowledge. *Id.*

(See Exhibit A to the Complaint.) Defendants are significant infringers who were caught collectively distributing as many as 2,039 audio files from their computers, whose copyrights are by and large owned by the Plaintiffs. (See *id.*).

ARGUMENTS

I. THE FIRST AMENDMENT DOES NOT PROTECT COPYRIGHT INFRINGEMENT.

A. Plaintiffs' subpoena does not implicate defendants' first amendment rights, and plaintiffs have substantial evidence of defendants' infringement in this case.

Defendants argue that their identities are protected by the First Amendment and that Plaintiffs must meet a heightened standard of review in order to serve the expedited discovery they seek. Defendants' arguments fail for two reasons. First, distributing copyrighted material is not speech protected by the First Amendment. Second, even if Defendants' actions constitute protected speech, Plaintiffs' allegations meet the heightened scrutiny required for expedited discovery, and Plaintiffs' interest in protecting their copyrights outweighs Defendants' limited privacy interest.

Defendants argue that sharing copyrighted files over the Internet is protected speech and is subject to qualified immunity under the First Amendment. This argument is baseless. "The 'Supreme Court . . . has made it unmistakably clear that the First Amendment does not shield copyright infringement.'" *In re Verizon Wireless Internet Services, Inc.*, 257 F. Supp. 2d 244, 260 (D.D.C. 2003) (quoting *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211, 220 (S.D.N.Y. 2000) and citing *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 568 (1985)), *rev'd on other grounds, Recording Indus. Ass'n of America, Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003). Defendants did not engage in protected speech, they used P2P networks to unlawfully download and distribute Plaintiffs' copyrighted sound

recordings. The law does not allow Defendants to invoke the First Amendment to shield such wrongdoing. *See A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1028 (9th Cir 2001) (holding that the First Amendment does not protect use of a P2P file sharing network that constitutes copyright infringement); *Arista Records LLC v. Does 1-11*, CIV-07-568-R, slip op. at 2 (W.D. Okla. November 14, 2007) (stating that similarly situated defendants' First Amendment rights were "not implicated because the information sought by the subpoena [did] not infringe [defendants'] rights to engage in protected speech), attached as Exhibit 3; *Arista Records LLC v. John Does 1-19*, Civ. Action No. 07-cv-1649, Slip Op. at 11 (D.D.C. April 28, 2008) (declining to apply heightened pleading requirements set forth in cases involving actual speech to a copyright infringement case such as here). Order attached as Exhibit 4.

Defendants argue that Plaintiffs should be held to a more stringent standard because of Defendants' alleged free speech interests. Defendants are wrong as a matter of law. All of the cases that Defendants cite invoking a higher discovery standard involve defamation claims or significant free speech concerns. For example, in *Dendrite International, Inc. v. Doe No. 3*, 775 A.2d 756, 760 (N.J. App. 2001), the Court addressed free speech concerns in the context of a defamation claim. *Dendrite* holds that the First Amendment may not be used to "shield copyright infringement." *Id.*

Similarly, in *Columbia Insurance Co v. Seescandy.com.*, 185 F.R.D. 573, 577 (N.D. Cal. 1999) plaintiff attempted to learn the identity of an anonymous trademark infringer. The Columbia court noted that discovery of infringer's identity from the ISP is appropriate when plaintiff could (1) identify the party with sufficient specificity to demonstrate that the defendant is a real person; (2) identify all previous steps to locate the defendant; and, (3) establish that plaintiff's suit could withstand a motion to dismiss. Even if this were the standard, Plaintiffs

have easily satisfied it in this case. *See also Doe v. 2themaart.com Inc.*, 140 F. Supp. 1088 (W.D. Wash. 2001) (the company attempted to learn the identity of persons who posted messages that were often critical of the company and its management).³

B. Even if Defendants have a minimal First Amendment interest, it is substantially outweighed by Plaintiffs' interest in pursuing copyright infringement claims.

Moreover, even if the Court were to find that sharing copyrighted files implicates the First Amendment, Plaintiffs meet the limited increase in the standard of pleading. In truth, the First Amendment protection Defendants seek will at most entitle them to minimal protection because their actions constitute copyright infringement. *See Arista Records LLC v. John Does 1-19*, Civ. Action No. 07-cv-1649 (D.D.C. April 28, 2008), slip op. at 11 (“[C]ourts have routinely held that a defendant’s First Amendment privacy interests are small where the “speech” is the alleged infringement of copyrights.”), attached as Exhibit 4; *In re Verizon Wireless Internet Services*, 257 F. Supp. 2d at 260 (stating that the degree of protection to be afforded to anonymous expression on the internet is minimal where alleged copyright infringement is at issue).

Similarly, in *Sony Music Entertainment, Inc. v. Does 1-40*, 326 F. Supp. 2d 556 (S.D.N.Y. 2004), a case very similar to this one, the court denied the defendants’ motion to quash and held that the plaintiff copyright owners were entitled to discovery. *Id.* at 568. The court stated that plaintiffs had “made a concrete showing of a prima facie claim of copyright infringement.” *Id.* at 565. When determining the extent of defendant file-sharers’ First

³ Defendants also rely upon *Capital Records Inc., v. Does 1-16*, No 07-485, 2007 WL 189603 (D.N.M. May 24, 2007). The *Capital Records* court, however, did not apply an irreparable harm standard. Instead, the court directed Plaintiffs to develop a stipulated discovery plan with the university. Subsequently, Plaintiffs and the university entered into a stipulated discovery plan that provides for discovery of all of the information Plaintiffs sought in the initial subpoena.

Amendment protection, the court balanced the magnitude of harm with the defendants' interest in free speech and privacy and held the "defendants' First Amendment right to remain anonymous must give way to plaintiffs' right to use the judicial process to pursue what appear to be meritorious copyright infringement claims." *Id.* at 567.

The *Sony Music* Court also noted that:

In contrast to many cases involving First Amendment rights on the Internet, a person who engages in P2P file sharing is not engaging in true expression. . . . Such an individual is not seeking to communicate a thought or convey an idea. Instead, the individual's real purpose is to obtain music for free.

Id. at 564.

As this Court has already found, Plaintiffs have met the good cause standard for expedited discovery. Indeed, Plaintiffs' showing of good cause is supported by substantial evidence of Defendants' infringement, including the date and time of Defendants' infringement, the IP addresses assigned to Defendants at the time of infringement, and a list of the copyrighted recordings that Defendants were distributing at the time Plaintiffs caught them doing so.⁴ (Compl., Doc. No. 1, at ¶¶ 20 and 25; Exhibit A to Compl.; Linares Decl., Exhibit A). The same holds true here. Plaintiffs have sufficiently pled a prima facie case of copyright infringement and made a concrete showing of harm, as discussed above. *See LaFace Records, LLC v. Does 1-5*, 2008 U.S. Dist. LEXIS 13638, *17-18 (W.D. Mich. Feb. 22, 2008) (finding

⁴ Defendants also argue that Plaintiffs' Complaint fails to meet the Rule 12(b)(6) pleading requirements as set out in *Twombly*. In fact, every court to have ruled on a motion to dismiss similar complaints brought by the record companies in other cases has found Plaintiffs' complaint to be sufficient. *See e.g., Arista Records LLC v. John Does 1-19*, Case No. 1:07-cv-01649 (D.D.C. April 28, 2008), attached as Exhibit 4; *LaFace Records, LLC v. Does 1-38*, Case No. 5:07-cv-00298-BR, slip op. at 3 (E.D.N.C. Feb. 27, 2008) ("Plaintiffs have . . . sufficiently stated a claim and supplied a factual basis for copyright infringement."), attached as Exhibit 5; *LaFace Records, LLC v. Does 1-5*, Case No. 2:07-cv-187, slip op. at 12 (W.D. Mich. Feb. 22, 2008) (denying defendant's motion to dismiss, finding "[u]nder the standard recently established by the United States Supreme Court, the complaint alleges sufficient facts to raise the right to relief above the speculative level."), attached as Exhibit 6.

that plaintiffs had pled a prima facie claim in a substantially identical case and denying defendant's motion to quash based on similar First Amendment grounds). In addition, Plaintiffs' interests in obtaining discovery outweigh Defendant's interest in protecting his anonymity. Without expedited discovery Plaintiffs would not be able to determine the identity of Defendants and move their case forward. Defendant has "little to no expectation of privacy because [he is] broadcasting his identifying information to everyone in the [P2P network]." *Columbia Pictures, Inc. v. Bunnell*, 245 F.R.D. 443, 452 (C.D. Cal. 2007). What limited privacy interest Defendants do have is offset by the Court's Order limiting the scope and use of the information to be obtained.

Therefore, to the extent the requested discovery implicates Defendants' First Amendment rights, their Motion to Quash fails because Plaintiffs have sufficiently pled their complaint and their interest in discovering identifying information to protect their copyrights outweighs Defendants' limited privacy interest.

II. LITIGATION OVER PERSONAL JURISDICTION IS PREMATURE AND, IN ANY CASE, THIS COURT HAS JURISDICTION OVER DEFENDANTS.

A. Consideration of Personal Jurisdiction Is Premature.

Plaintiffs have, as this Court already determined in granting Plaintiffs' application for immediate discovery, met the "good cause" standard required for such discovery. The information Plaintiffs seek is indisputably material to this action and essential to allowing Plaintiffs to discuss the possibility of settlement with Defendants or to move forward with their suit. Defendants do not dispute the relevance and materiality of the information sought by Plaintiffs. Rather, the essence of Defendants' argument is that Plaintiffs should not be permitted to obtain that basic information precisely because Plaintiffs do not yet know such information (and thus cannot know whether they filed suit in their home states). By that perverse logic,

Defendants attempt to turn their momentary anonymity into an absolute shield against copyright liability because this case could not proceed in this *or any court* absent the Plaintiffs' ability to prove *now* where Defendants live.

As discussed below, there is substantial evidence that this Court has jurisdiction over Defendants, regardless of their place of residence. Nonetheless, it is premature to consider the question of personal jurisdiction in the context of a subpoena to identify the Defendants. Indeed, in numerous cases around the country, defendants (and *amici*, such as the ACLU, EFF, and Public Citizen) have raised the same personal jurisdiction argument that Defendants do here. In each case, courts have squarely held that resolving the question of personal jurisdiction is "premature," even where Defendants assert that they live outside the court's jurisdiction. *See Elektra Entm'tt Group, Inc. v. Does 1-9*, No. 04 Civ. 2289 (RWS), 2004 WL 2095581, at *5 (S.D.N.Y. Sept. 8, 2004); *Motown Record Co., L.P. v. Does 1-252*, No. 1:04-CV-439-WBH, at 3 (N.D. Ga. Aug. 16, 2004), attached as Exhibit 7; *Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 567-68 (S.D.N.Y. 2004); *UMG Recordings v. Does 1-199*, No. 1:04-CV-0093-CKK, at 2 (D.D.C. Mar. 10, 2004), attached as Exhibit 1.

The Court cannot render any kind of ruling on personal jurisdiction or catalog Defendants' contacts with the Northern District of New York before Defendants have been named. *See Sony Music Entertainment Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 567-68 (S.D.N.Y. 2004) (holding that "without the identifying information sought by plaintiffs in the [ISP] subpoena, it would be difficult to assess properly the existence of personal jurisdiction over the Doe defendants"). The parties cannot litigate any aspect of personal jurisdiction until Defendants have been identified. It is precisely for this reason that every court to have considered Defendants' argument has rejected it. Indeed, courts routinely permit plaintiffs to

serve discovery in response to a motion to dismiss on personal jurisdiction grounds before issuing a ruling on the motion. *See El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 676 (D.C. Cir. 1996) (“A plaintiff faced with a motion to dismiss for lack of personal jurisdiction is entitled to reasonable discovery, lest the defendant defeat the jurisdiction of a federal court by withholding information on its contacts with the forum.”). Given that general rule – which applies even when a plaintiff knows a defendant’s identity – it would make no sense to deny Plaintiffs the opportunity to obtain the most basic identifying information they seek in their subpoena to SUNY.

This Court will have ample opportunity to consider issues of personal jurisdiction if Defendants choose to file a motion to dismiss on personal jurisdiction grounds. In the meantime, Defendants’ assertion that this Court may not have personal jurisdiction is not a bar to Plaintiffs’ right to discover their identities through the pending subpoena to SUNY. The Supreme Court has made clear that a possible lack of personal jurisdiction provides no basis for denying discovery. *See United States Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76-77 (1988) (“[E]ven if it were ultimately determined that the court [lacked personal jurisdiction], the order or process it issued in the conduct of the litigation would still be valid.”).

Finally, denial of the motion will not prejudice the Defendants. Assuming the Court denies the motion to quash, Plaintiffs ultimately will contact the Defendants (or their counsel as appropriate) and discuss possible settlement with them. It has been Plaintiffs’ experience in parallel cases that, once confronted with Plaintiffs’ substantial evidence of copyright infringement, many defendants elect to settle. For those defendants who elect to litigate, Plaintiffs, defendants, and the Court can determine whether it is proper to continue in this jurisdiction or whether transfer to another forum is preferable. In parallel cases across the

country, however, upon receipt of a defendant's name and address, Plaintiffs have, after attempting to effect a settlement, elected to re-file suit in the jurisdiction where the defendant resides. Thus, if this case proceeds in any significant way, it will almost certainly occur in a jurisdiction acceptable to the Defendants.

B. Plaintiffs Have Made a Prima Facie Showing of Personal Jurisdiction over Defendants.

If the Court nonetheless were to consider the issue now, there is good reason to believe the Court has jurisdiction over Defendants. First, Defendants have contracted with a New York-based ISP and used SUNY's facilities within the District to commit copyright infringement.

Additionally, regardless of their places of residence, Defendants have undertaken tortious activity within New York. Defendants, without the permission or consent of the Plaintiffs, have offered to the public, including persons in this jurisdiction, Plaintiffs' copyrighted recordings; in exchange, they are able to download recordings made available by others, including persons in this jurisdiction. *See Excelsior College v. Frye*, 306 F. Supp. 226 (N.D.N.Y.) (personal jurisdiction exists in an infringement action, based on transacting business within the district, where the student was within the district and the ISP was outside the district); *Arista Records, Inc. v. Sakfield Holding Co. S.L.*, 314 F. Supp. 2d 27, 31-33 (D.D.C. 2004), (“[t]he download of music files by [defendant] constitutes transacting business in the District” and is sufficient to establish personal jurisdiction.”). In addition, courts across the nation have found that when the defendant “engage[s] in unabashedly malignant actions directed at or felt in this forum,” the forum may exercise personal jurisdiction. *GTE New Media Services Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1349 (D.C. Cir. 2000); *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 510, (D.C. Cir. 2002) (noting that over “the last century, for example, courts held that, depending upon the circumstances, transactions by mail and telephone could be the basis for personal

jurisdiction notwithstanding the defendant's lack of physical presence in the forum. There is no logical reason why the same should not be true of transactions accomplished through the use of e-mail or interactive websites."); *Overseas Partners, Inc. v. PROGEN Musavirlik ve Yonetim Hizmetleri, Ltd. Sikerti*, 15 F. Supp. 2d 47 (D.D.C. 1998) (holding that contractual activities that cause a consequence in the District are sufficient to constitute "transacting any business" for purposes of personal jurisdiction).

Engaging in such electronic transactions with residents of the District provides the sort of "continuous" and "systematic" contacts with the District that support the exercise of this Court's jurisdiction. *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (distinguishing between passive websites which generally do not provide sufficient contacts with a forum to justify an assertion of jurisdiction with "interactive" websites which generally do support an assertion of jurisdiction).

In any case, the Court cannot complete an analysis of Defendants' contacts with the District until everyone, including the Plaintiffs, knows who Defendants are. As discussed above, any defendant who wants to raise personal jurisdiction issues will have the opportunity to do so.

III. DEFENDANTS' MOTION TO EXCLUDE THE EVIDENCE PROVIDED BY MEDIASENTRY FAILS AS A MATTER OF LAW.

Defendants argue that Plaintiffs' subpoena should be quashed because it is based upon the work of MediaSentry, who allegedly is not a licensed private investigator under Article 7 of the New York General Business Law. Defendants' Motion fails and should be denied for at least four reasons.

First, the work performed by Media Sentry does not fall under the umbrella of Article 7. Section 70 of the New York General Business Law states:

No person, firm, company, partnership, limited liability company or corporation shall engage in the business of private investigator,

business of bail enforcement agents or the business of watch, guard or patrol agency, or advertise his, their or its business to be that of private investigator, bail enforcement agent or watch, guard or patrol agency, notwithstanding the name or title used in describing such agency or notwithstanding the fact that other functions and services may also be performed for fee, hire or reward, without having first obtained from the department of state a license so to do

...

N.Y. Gen. Bus. Law § 70(3). However, the New York Attorney General has stated that one who devotes himself exclusively to making investigations for patent attorneys in connection with litigations for infringements does not require a license. Op Atty Gen, 21 St Dept Rep 495 (1919), attached as Exhibit 8; *see also* N.Y. Gen. Bus. Law § 70 (annotated case notes No. 3). A direct parallel can be drawn from the patent infringement investigation described by the Attorney General and the copyright infringement investigation performed by MediaSentry. Here, as described above, MediaSentry uses various P2P networks to search for potential infringers in a manner that any other user of P2P networks could. MediaSentry's goal is to find individuals infringing in an effort to aid Plaintiffs in stopping the wide spread illegal distribution and reproduction of their copyrighted works. As described in the opinion of the Attorney General of New York, investigations "in connection with litigations for infringements [do] not require a license." *Id.* For this reason alone, Defendants' argument that MediaSentry is somehow in violation of Article 7 fails as a matter of law.

Second, Article 7, Section 70, of the New York General Business Law is aimed at those entities that engage in intrusive investigations into private facts. Op Atty Gen, 21 St Dept Rep at 503 (the attorney general opined that Article 7 concerns "detection" and that "[d]etect, the act, is thus seen to mean the finding out and bringing to light that which is concealed and covered up"). Here, as a matter of law, the information that MediaSentry gathered was placed out on the Internet from Defendants' computers, through Defendants' internet accounts, for any P2P user to

see, and neither Defendants nor anyone else using the network has any expectation of privacy with respect to such information. *See In re Verizon Internet Services, Inc.*, 257 F. Supp. 2d 244, 257, 267 (D.D.C. 2003) (when an ISP subscriber “opens his computer to permit others, through peer-to-peer file sharing, to download materials from that computer, it is hard to understand just what privacy expectation he or she has after essentially opening the computer to the world.”), *rev’d on other grounds*, 351 F.3d 1229 (D.C. Cir. 2003); *United States v. Kennedy*, 81 F. Supp. 2d 1103, 1110 (D. Kan. 2000) (activation of file-sharing mechanism shows no expectation of privacy); *Elektra Entm’t Group, Inc. v. Does 1-9*, 2004 LEXIS 23560, at *13 (S.D.N.Y. Sept. 7, 2004) (holding Defendant has “minimal expectation of privacy in downloading and distributing copyrighted songs without permission”) (citations omitted). MediaSentry’s work, therefore, cannot be considered intrusive in any manner. For this reason, too, Defendants’ allegations that MediaSentry has violated N.Y. Gen. Bus. Law § 70 fail.

Third, Defendants do not have standing to assert claims under Article 7. Rather, such power resides exclusively with the New York Secretary of State. N.Y. Gen. Bus. Law § 73(1) (“[T]he secretary of state shall have the power to enforce the provisions of this article . . .”). Defendants accuse MediaSentry of violating Article 7 and are asking this Court to make a determination on a claim that Defendants cannot bring themselves. At best, Defendants possibly could seek to bring their accusations before the Secretary of the State of New York to initiate an investigation. However, any enforcement of Article 7 is a power strictly held by the New York Secretary of State, *id.*, and Defendants should not be allowed to circumvent the clearly written law, which needs no interpretation, *see McCluskey v. Cromwell* 11 NY 593, 601-602 (N.Y. App. Ct. 1854) (“[In] the construction, both of statutes and contracts, the intent of the framers and parties is to be sought, first of all, in the words and language employed, and if the words are free

from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation.”). For this reason, Defendants do not have standing to bring a claim under Article 7, and the Court should deny their Motion.

Fourth, Defendants do not and could not cite any authority for the proposition that a violation of Article 7, if one even occurred, would provide a basis to exclude testimony or evidence in a civil litigation. To begin with, Article 7, Section 70 of the New York General Business Law is designed to protect consumers of private investigative services, not those who are themselves engaged in illegal activity. *Op Atty Gen, 21 St Dept Rep at 499* (stating that the law “is enacted in the interest of the detective’s clients and those with whom he has a relation of trust, rather than in the interest of detectives”), attached as Exhibit 8. Moreover, the New York Attorney General has determined that Section 70 was not designed to protect those who are “detected”; rather, “[t]he criminal law and right of action protect the members of the public whom the detective may investigate or pursue illegally.” *Op Atty Gen, 21 St Dept Rep at 500*, attached as Exhibit 8. Therefore, Article 7 does not serve the purpose for which Defendants would have the Court use it.

Additionally, Plaintiffs are not aware of a single case where evidence has been excluded because of a violation of any portion of Article 7, and no provision of Article 7 supports Defendants’ position. Defendants’ reliance on *One 1958 Plymouth Sedan v. Pa.*, 380 U.S. 693 (1965), is misplaced. *One 1958 Plymouth Sedan* is a forfeiture case, which, because of its “quasi-criminal nature” invokes the protections of the Fourth Amendment of the U.S. Constitution. *Id.* at 700. Moreover, this Court has specifically held that “the Fourth Amendment’s exclusionary rule does not apply in civil actions *other than civil forfeiture*

proceedings.” *Mejia v. City of New York*, 119 F. Supp. 2d 232, 254 (S.D.N.Y. 2000) (citing *Pennsylvania Bd. of Probation & Parole v. Scott*, 524 U.S. 357, 363 (1998)) (emphasis added).

As this is not a civil forfeiture proceeding, the exclusionary rule has no application here.

For these reasons, Defendants’ Motion to Quash Plaintiffs’ Subpoena should be denied.

IV. PLAINTIFFS’ INFRINGEMENT CLAIMS AGAINST DEFENDANTS ARE PROPERLY JOINED .

The court should not address joinder at this stage in the proceedings. Consideration of the joinder issue is premature because the Defendants have not been identified and formal service has not been effected. As most of the courts that have considered this question have agreed, issues of joinder can and should properly be considered after all parties are before the Court. *See Loud Records, LLC, et al. v. Does 1-251*, No. C-05-1202-WHA (N.D. Cal. April 18, 2005) (allowing case to proceed as filed after requesting supplemental briefing on the propriety of joinder), attached as Exhibit 9; *Sony Music Entertainment v. Does 1-40*, 326 F. Supp. 2d at 567-68; *Motown Record Co., L.P. v. Does 1-252*, Civil Action File No. 1:04-CV-439-WBH (N.D. Ga. March 1, 2004), attached as Exhibit 7; *UMG Recordings v. Does 1-199*, 1:04-CV-0931 (D.D.C. March 10, 2004) (“[i]t is clear to the Court that Defendants must be identified before this suit can progress further” and ruling that it is “premature” to consider joinder), attached as Exhibit 1; *Priority Records LLC, et al. v. Does 1-8*, Case No. C-04-1136 SC (N.D. Cal. July 13, 2004) (rejecting arguments that joinder was improper and granting Motion for Leave to Take Immediate Discovery as to all Doe Defendants), attached as Exhibit 10.

If the Court, however, were inclined to consider joinder at this stage of the proceeding, it should find that joinder is appropriate under the standards articulated in the Federal Rules of Civil Procedure and also best serves the goals of efficiency and judicial economy. Joinder allows the Court to address issues common to the parties in one proceeding. Joinder also allows

the Defendants a cost-effective way to assert their common defenses and allows the Internet Service Provider (“ISP”) a cost-effective way to respond to a single subpoena.

Defendants argue that joinder in this case is improper. In support of this argument, Defendants cite a handful of cases that have severed Plaintiffs’ claims. Defendants ignore the fact that courts within this jurisdiction have allowed expedited discovery in similar Doe cases. See Order, *Lava Records LLC, et al. v. Does 1-16*, No. 5:07-cv-520 (N.D.N.Y. May 19, 2007), attached as Exhibit 2; *Elektra Entertainment Group Inc., et al. v. Does 1-2*, Civ. Action No. 1:04-cv-1257 (N.D.N.Y. Nov. 29, 2004), attached as Exhibit 11; *Interscope Records, et al. v. Does 1-2*, Civil Action No. 05-CV-0102 (N.D.N.Y. Jan. 31, 2005), attached as Exhibit 12; *Maverick Recording Company, et al. v. Does 1-2*, Civil Action No. 05-cv-252 (N.D.N.Y. March 22, 2005), attached as Exhibit 13; *Arista Records, LLC, et al. v. Does 1-7*, No. 5:07-cv-627 (FJS) (N.D.N.Y. June 14, 2007), attached as Exhibit 14; *Arista Records LLC, et al. v. Does 1-19*, No. 1:07-cv-00975-LEK-DRH (N.D.N.Y. Sept. 20, 2007), attached as Exhibit 15; *Arista Records LLC, et al. v. Does 1-33*, No. 5:07-cv-00977-DNH-DEP (N.D.N.Y. Sept. 20, 2007), attached as Exhibit 16.

Defendants also ignore the fact that a substantial majority of courts throughout the country have also allowed Plaintiffs to proceed with expedited discovery in cases that joined multiple defendants. *See e.g. Arista Records v. Does 1-11*, 1:07-cv-2828 at 7-8 (N.D. OH Sept. 8, 2008). Order attached as Exhibit 17. Plaintiffs respectfully submit that this approach to joinder is a sounder way of managing cases of this type and ask the Court to continue to apply the majority approach in this case.

A. Plaintiffs Satisfy Each of the Joinder Requirements.

Joinder is appropriate when (1) there is any issue of law or fact common to all parties in the action, and (2) there is asserted against them any right to relief arising out of the same

transaction or occurrence or *series* of transactions or occurrences. Fed. R. Civ. P. 20(a); *League to Save Lake Tahoe v. Tahoe Regional Planning Agency*, 558 F.2d 914, 917 (9th Cir. 1977). Plaintiffs have satisfied both of these requirements. The Federal Rules direct “the broadest possible scope of action consistent with fairness to the parties [because] joinder of claims, parties and remedies is strongly encouraged.” *United Mine Worker v. Gibbs*, 383 U.S. 715, 724 (1966). The rule “regarding permissive joinder is to be construed liberally in order to promote trial convenience and to expedite the final determination of disputes, thereby preventing multiple lawsuits.” *League to Save Lake Tahoe*, 558 F.2d at 917.5 Joinder of appropriate parties is encouraged to address common issues in a single action. *Roe v. City of New York*, 151 F. Supp. 2d 495, 509 (S.D.N.Y. 2001).

To establish the propriety of permissive joinder of defendants, “[a]ll that a plaintiff must show is that there is some systematic pattern or logical relationship connecting the tortious conduct of each defendant.” *Stone Age Foods, Inc. v. Exchange Bank*, No. C 96-048585, 1997 WL 123248, at *2 (N.D. Cal. Mar. 4, 1997) (citing *Mosley v. General Motors Corp.*, 497 F.2d 1330, 1333 (8th Cir. 1974)); 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* 3d § 1653, at 410 (2003) (Rule 20 ensures that “all reasonably related claims for relief by or against different parties” may be joined). Importantly, “[t]he second prong of that test does not require precise congruence of all factual and legal issues; indeed, joinder may be permissible if there is but one question of law or fact common to the parties.” *Morris v. Paul Revere Ins. Group*, 986 F. Supp. 872, 885 (D.N.J. 1997) (internal citations omitted).

5 This liberal application of permissive joinder is not surprising given that Fed. R. Civ. P. 1 states the rules “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.”

As the Supreme Court has explained, the terms “transaction” and “occurrence” are “word[s] of flexible meaning.” *Moore v. New York Cotton Exch.*, 270 U.S. 593, 610 (1926). Joinder “may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship.” *Id.*

This case involves common questions of fact and copyright law because each of the Defendants is engaging in copyright infringement on the internet and all engaged in uploading and downloading copyrighted sound recordings using P2P networks. Indeed, each of the Doe Defendants used P2P networks, and all were accessing the P2P networks to try and maintain anonymity through a common ISP – the University. Finally, some of the Defendants were infringing the same copyrighted sound recording or different copyrighted sound recordings from the same artist (See Complaint, Ex. A).

Plaintiffs’ claims against all of the Defendants also arise out of a logically-related series of transactions or occurrences. *See Stone Age Foods*, 1997 WL 123248 at *2. All of the Defendants in this case are active participants in what can only be described as an on-line music swap meet, unlawfully copying copyrighted works from other users and distributing such works to other users. Defendants and others have participated in a common scheme or pattern of behavior, without which no individual Defendants would have been able to commit much (if any) of the infringing activity that underlies Plaintiffs’ Complaint. It is this concerted action by Defendants and others that allow the distribution of billions of digital copies of Plaintiffs’ copyrighted sound recordings. In fact, the Defendants’ brief shows that one or more of the Defendants in this case were caught infringing Plaintiffs’ copyrighted materials on multiple occasions. *See Defendants’ Motion at 1 fn 2.* Until Plaintiffs receive SUNY’s response, they will not know how many of the individual Does actually involve multiple acts of infringement by

the same person. Severance is improper under these circumstances. The actions of these Defendants provide a textbook example of a “logistically-related series of transactions or occurrences.”

For these reasons, the great majority of courts have held, on identical facts, that Plaintiffs’ joinder of Defendants is proper.

B. Joining the Defendants in One Doe Action Imposes a Minimum Burden on All Parties Involved and Promotes Judicial Efficiency.

Doe lawsuits such as this one serve the goals of efficiency and judicial economy. In pursuing a nationwide enforcement program against massive copyright infringement, Plaintiffs must balance the need to stop the infringement as quickly as possible with the most efficient manner in which to enforce their rights. To this end, Plaintiffs generally accumulate multiple instances of infringement involving individuals sharing the same ISP before filing a Doe lawsuit.

Doe lawsuits like this one permit a threshold issue identical to all of the suits of this nature - discovery from a particular ISP - to be litigated in a single case, rather than hundreds of times in hundreds of different cases. Bringing suit in this manner is far more efficient for the Court and all parties involved rather than bringing hundreds of individual cases. In a Doe case such as this one, the Court receives only one case involving multiple subscribers of the same ISP and can decide the identical threshold issue, including any motions to quash by the ISP or by its subscribers, only once.

Similarly, after the Court authorizes the discovery, the ISP receives only one subpoena, rather than hundreds issued on different dates from different cases. As noted above, the federal courts have regularly granted Plaintiffs’ motions for discovery in such cases, thereby lessening the burden on all concerned.

Finally, even if the Court were inclined to address joinder at this stage of the proceedings and were leaning toward severance, the Court should adopt a consolidated plan for discovery. This approach promotes efficient discovery and has been followed by most of the cases in which the court severed the Defendants. For example, Judge Lenihan, in the Western District of Pennsylvania, requires all cases filed in that jurisdiction be assigned to her and entered a standing order permitting expedited discovery by Plaintiffs in copyright cases before that court. Order attached as Exhibit 18.

V. PLAINTIFFS' BROUGHT THIS ACTION TO PURSUE VALID COPYRIGHT INFRINGEMENT CLAIMS

Defendants seek attorneys fees associated with bringing their motion. Defendants allege that Plaintiffs' Complaint contains inadequate and unsupported allegations. As explained in the preceding sections, Defendants' allegations are simply not true. Additionally, this Court has rejected this argument by finding that Plaintiffs have shown good cause for expedited discovery. As such it is not possible that Defendants' allegations could be true.⁶

Plaintiffs brought this suit and hundreds of others throughout the country to protect their copyrights from infringement. Courts throughout the country have held that Plaintiffs' purposes and methods are legitimate. For example, in *Atlantic Records v. Heslep*, 2007 U.S. Dist. LEXIS 35824 (N.D. Tex. May 16, 2007), the Court concluded that the record company plaintiffs "brought this lawsuit not for the purposes of harassment or to extort [Defendant] as she contends, but, rather, to protect their . . . copyrights from infringement and to help . . . deter future infringement." *Id.* at *15; *see also Virgin Records America, Inc. v. Thompson*, 2008 U.S. App.

⁶ Defendants ask the court for the very serious sanctions of attorneys fees. Plaintiffs do not respond in detail to Defendants' unfound allegations because no sanctions are appropriate here. However, Plaintiffs respectfully request an opportunity to fully brief the attorney fee issues if the court finds any merit to Defendants' Motion.

LEXIS 128, *4-7 (5th Cir. Jan. 4, 2008) (affirming district court's determination that the plaintiffs' lawsuit was neither frivolous nor prosecuted with malevolent intent because the plaintiffs had discovered "substantial copyright infringement of its songs by a file-sharing program attached to an internet account registered to [Defendant]"); *BMG Music v. Gonzalez*, 430 F.3d 888, 891 (7th Cir. 2005) (affirming summary judgment against Defendant and holding that "downloading full copies of copyrighted materials without compensation to authors cannot be deemed 'fair use.'"); *cf. Metro-Goldwyn-Mayer Studios v. Grokster*, 545 U.S. 913, 922 (2005) (characterizing online piracy as "infringement on a gigantic scale").

Plaintiffs' Subpoena easily satisfies the Rule 45 subpoena requirements because it is narrowly tailored and seeks relevant—in fact essential—information. In contrast, the cases Defendants cite involve overly broad subpoenas served for an improper purpose. *Mattel Inc. v. Walking Mountain Productions*, 353 F.3d 792, 814 (9th Cir. 2003) (sanctions justified because the "subpoena was overly burdensome and served for an improper purpose."); *Theofel v. Farey-Jones*, 341 F.3d 978, 982 (9th Cir. 2003) (affirming trial court's finding that "the subpoena, on its face, was massively overbroad" and "patently unlawful," that it "transparently and egregiously" violated the Federal Rules, and that defendants "acted in bad faith" and showed "at least gross negligence in the crafting of the subpoena.").

In summary, Defendants' claim for attorney fees has no basis in law or fact, and, accordingly, should be denied.

CONCLUSION

For all of the reason set forth above, Defendants' Motion to Quash should be denied.

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