IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
Civil Action No. 5:07-CV-00298-BR

LAFACE RECORDS, LLC, *et al*,	)	
	)	
Plaintiffs,	)	**BRIEF IN SUPPORT OF MOTION BY**
	)	**DEFENDANT DOES #1, #18, #19, #26,**
vs.	)	**#31, #35 and #38 TO VACATE THE**
	)	**ORDER GRANTING EXPEDITED**
DOES 1 – 38,	)	**DISCOVERY, TO DISMISS THE**
	)	**COMPLAINT, TO QUASH THE**
Defendants.	)	**SUBPOENA, AND TO DISMISS FOR**
	)	**IMPROPER JOINDER**

I. INTRODUCTION

Defendant, Does #1, #18, #19, #26, #31, #35, and #38, by and through counsel, submit the following memorandum with supporting evidence, pursuant to Local Rule 7.2, (E.D.N.C.) in support of the motion to vacate the Order granting expedited discovery to Plaintiffs, [docket entry #5] ("Order") pursuant to 17 U.S.C. §§ 512(a), (c)(3)(A), (h), and (k)(1)(A); to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b)(6), to quash the subpoena issued by Plaintiffs' counsel to non-party North Carolina State University (sometimes referred to as "NC State") [affidavit filed at docket entry #6] pursuant to 20 U.S.C. § 1232g, 17 U.S.C. § 512(h), and Fed. R. Civ. P. 45(c)(3); and, to dismiss the claims against Doe #31 for improper joinder under Rule 20 Fed. R. Civ. P..

Plaintiffs have not caused any summons to be issued by the Clerk of Court and have not served any of the Does with the Complaint and summons as reflected in the Court's record. Defendant Does make an appearance for the limited purpose of this motion. Does #1, #18, #19,

#26, #31, #35, and #38 reserve all rights to challenge the Complaint, jurisdiction, venue, and to assert any and all defenses available to them in accordance with the Federal Rules of Civil Procedure.

Plaintiffs claim to own the copyrights in a number of sound recordings made by artists who no longer control the copyrights at issue. Over the last several years, these Plaintiffs, and other record labels in cooperation with them, have sued tens of thousands of individuals, perhaps as many as fifty thousand, alleging that these individuals have “uploaded,” “downloaded,” and “made available” sound recordings, although Plaintiffs rarely, if ever, have actual knowledge of any copying or dissemination of the recordings themselves.

These Defendants, facing the resources of an industry that generates billions of dollars in revenue annually, seldom have the means to contest the claims. Many who do contest the claims against them conclusively show that the Plaintiffs have misidentified their targets. Spokespersons for these Plaintiffs have compared their suits against innocent Defendants to “catching dolphins” while “fishing with a driftnet.”

As part of their campaign against digital downloading, Plaintiffs frequently file mass actions against numerous so-called “John Does.” The purpose of these John Doe suits is not, as it should be, to engage in a legitimate determination of Plaintiffs’ rights under the Copyright Act. Instead, these actions are solely for purposes of discovering the identities and other private personal information of individual account holders with a particular Internet Service Provider (“ISP”), in this case a public university, whose records are protected by federal privacy laws. 20 U.S.C. § 1232g prohibits disclosure of student information by recipients of federal education funds, including universities.

The Doe defendants are the targets of the immediate *ex parte* discovery, by way of subpoena addressed to NC State. All Plaintiffs are member companies of the Recording Industry Association of America. Four other subpoenas addressed to universities are being challenged as of the date of filing this motion and brief.[1]

These John Doe discovery expeditions typically lump dozens of different anonymous Defendants together, although there is no common nexus of facts that would provide a basis to sue them *en masse*. The dates, times, and recordings at issue for each of the Does are different and mostly unique. The Does rarely know each other, unless by coincidence, and there is no allegation of coordinated action among them. To make matters worse, a plain reading of the Complaint in this case shows that many of the so-called "Plaintiffs" have no valid claims against several of the thirty-eight Does lumped into the instant suit. Combining these Defendants into a single suit causes confusion, prejudices the Defendants, harms the administration of justice, disproportionately consumes the Court's resources, and lacks any justification from the facts alleged.

The lawsuit at issue is based on unsworn and unsubstantiated claims that each Doe used an online media distribution system to download and/or distribute copyrighted recordings. The Plaintiffs do not make any specific allegation that there has been unauthorized copying of music or that music was not lawfully acquired by the Does.[2]

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[1] The four other John Doe lawsuits are: *Arista Records, LLC, et al v.Does 1-21*, 07-CV-10834, U.S.D.C., District of Massachusetts; *Arista Records, LLC, et al v. Does 1-11*, 07-CV-568, U.S.D.C. Western District, Oklahoma; *Interscope et al v. Does 1-40*, 07-CV-1008, U.S.D.C. Middle District, Florida; and, *Virgin Records America, Inc., et al v. Does 1-33*, 07-CV-235, U.S.D.C. Eastern District, Tennessee.

[2] Plaintiffs allege: "… Defendant[s]… disseminated over the internet copyrighted works…" Complaint ¶3, and "Plaintiffs are informed and believe that each Defendant, without the permission or consent of Plaintiffs, has continuously used, and continues to use, an online media distribution system to download and/or distribute to the public certain of the Copyrighted Recordings." Complaint ¶24.

Earlier this year, in the identical case where the College of William & Mary faced the same subpoena as the industry served on NC State, the Court denied Plaintiffs' motion for expedited discovery.[3] Dismissing the Plaintiffs' reliance on the Cable Communications Act of 1984 out of hand, the Court laid out, *sua sponte*, the argument that only the Digital Millennium Copyright Act ("DMCA") expressly provides subpoena authority for internet related copyright infringement cases.[4] The Virginia District Court chose to follow the DC Circuit, the Eighth Circuit and the Middle District of North Carolina in holding that the DMCA does not extend to an ISP who acts as a mere transmitter of data that is not cached, stored or located by the ISP.[5] Plaintiffs are left with no specific authority by which they can intrude upon an Internet users' fundamental right to privacy and anonymity in their online communications.

In *Theofel v. Farey Jones*[6], the Ninth Circuit had occasion to review the propriety of a private subpoena for electronic records. The Court stated:

> The subpoena power is a substantial delegation of authority to private parties, and those who invoke it have a grave responsibility to insure it is not abused. Informing the person served of his right to object is a good start, see Fed. R. Civ. P. 45(a)(1)(D), but it is no substitute for the exercise of independent judgment about the subpoena's reasonableness. Fighting a subpoena in court is not cheap, and many may be cowed into compliance with even overbroad subpoenas, especially if they are not represented by counsel or have no personal interest at stake.

NC State has decided it has no interest at stake. It stands ready to do as the Court instructs without argument either way. The Does are college students very likely without the resources to meet a billion dollar industry on equal footing in this Court. Plaintiffs' request for

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[3] *Interscope et al v. Does 1-7*, 494 F.Supp. 2d 388 (E.D. Va. 2007).
[4] 17 U.S.C.A. §§ 512(a), 512(c)(3)(A), 512(h) and 512(k)(1)(A).
[5] *Recording Indus. Ass'n Am. v. Verizon Internet Servs*., 351 F.3d, 1229 (D.C. Cir. 2003), In *re Charter Commc'ns., Inc., Subpoena Enforcement Matter*, 393 F.3d 771 (8th Cir. 2005) and *Recording Indus. Ass'n Am. v. Univ. of N.C. at Chapel Hill,* 367 F.Supp.2d 945 (M.D.N.C. 2005).
[6] 359 F.3d 1066, 1074-1075 (9th Cir. 2004), *cert. denied* 543 U.S. 813, 125 S.Ct. 48 (2004).

expedited discovery largely relies on several unpublished cases, likely uncontested, where the industry was able to avail itself of the extraordinary process it espouses.

Out of fairness and in recognition of the competing interests, the Court has stayed compliance by NC State pending resolution of the instant motion. This Court should look to the two Circuit Courts of Appeal cases, *Verizon* and *Charter*, the *UNC Chapel Hill* case and the *Interscope et al v. Does 1-7* case from its Fourth Circuit sister court in Eastern Virginia, to also hold that no authority exists for the *ex parte* subpoena Plaintiffs seek. The subpoena should be quashed.

II. ARGUMENT

On the facts alleged, expedited discovery is not warranted according to Rule 26, Fed. R. Civ. P., Rule 45, Fed. R. Civ. P., and applicable case law. Plaintiffs have not made a concrete *prima facie* showing of copyright infringement. In the alternative, the claims against Does #1, #18, #19, #26, #31, #35, and #38 should be dismissed for improper joinder under Rule 20, Fed. R. Civ. P..

A. THE ORDER SHOULD BE SET ASIDE AND THE COMPLAINT DISMISSED AS PLAINTIFFS COMPLAINT FAILS TO EVEN STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

No actual copyright infringement on the part of individual users of NC State's internet services whose identities are sought has been alleged. Plaintiffs have not alleged that the individual users invited anyone to copy their music files or were aware that anyone had copied their music files. Plaintiffs have not alleged that the individual users were even aware that their music files could be copied by third parties, and Plaintiffs have not alleged that individual users have a duty to protect their music files from copying by third parties over the Internet.

In *Interscope v. Rodriguez*, the Plaintiff record companies' uncontested motion for default judgment was denied, *sua sponte*, on a near identical Complaint.[7] The Southern California District Court characterized the Complaint as "a boilerplate listing of the elements of copyright infringement without any facts pertaining specifically to the instant Defendant,"[8] and the pertinent allegation as a "conclusory statement" on information and belief.[9]

B. THE ORDER SHOULD BE VACATED AS PLAINTIFFS HAVE NOT MADE A CONCRETE PRIMA FACIE SHOWING OF COPYRIGHT INFRINGEMENT

A prima facie claim of copyright infringement includes at least two elements: (1) that a copyright subsists in the allegedly infringed material, and (2) that the alleged infringer violated at least one of the six exclusive rights granted to copyright owners under 17 U.S.C. § 106.[10] Even assuming that one of the Plaintiffs can show that it owned the copyright to a sound recording alleged to reside on one of the thirty-eight Doe computers, Plaintiffs have failed to allege any of the exclusive rights.

The copyright Act does not give a copyright owner exclusive control over every possible use of his or her work. Rather, the Copyright Act limits a copyright owner's control to the six exclusive rights specifically enumerated in Section 106: (1) to reproduce, (2) to prepare derivative works, (3) to distribute copies of, (4) to perform publicly literary, musical, dramatic,

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[7] *Interscope Records v. Rodriguez*, Slip Copy, 2007 WL 2408484, (S.D.Cal. 2007). (Exhibit A to Appendix). The Court relied on the "plausibility standard" recently set out by the United States Supreme Court: "[A] plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombley*, --- U.S. ---,127 S. Ct. 1955 (2007).
[8] *Ibid*. at *2.
[9] *Ibid*. at *3.
[10] See 17 U.S.C. 501(a) - infringement occurs when alleged infringer engages in activity listed in Section 106.

and choreographic works; pantomimes, motion pictures, and other audiovisual works, (5) to display publicly; and (6) to perform publicly sound recordings.

The Complaint alleges, upon information and belief, that each Doe, without the permission of the Plaintiffs "… has continuously used, and continues to use, an online media distribution system to download and/or distribute to the public certain of the Copyrighted Recordings to the public." Complaint ¶24. The only right that could conceivably be implicated by the act described in the Complaint is Section 106(3), which reserves to the copyright owner the authority "to distribute copies or phonorecords of the copyrighted work to the public…." The general rule on this point, as stated by the two leading copyright treatises, could not be more clear: [i]nfringement of [the distribution] right requires an actual dissemination of either copies or phonorecords," not a mere offering.[11]

The theory advanced by Plaintiffs, that storing copyrighted files on a computer in a place where Plaintiffs' agent was able to make copies is an illegal "distribution," is incorrect under the law. A copyright owner's exclusive right to distribution prohibits a person in possession of a copy of a computer program or phonorecord from disposing of possession by rental, lease, or lending (collectively referred to as "distributing") "for the purposes of direct or indirect commercial advantage."[12] Nothing in the Complaint or any memoranda of law from Plaintiffs alleges that any Doe received a commercial advantage, even if third parties copied their music files from their computers.

Plaintiffs' theory of copyright infringement has been consistently rejected by a range of circuit and district court decisions. In *Nat'l Car Rental Sys., Inc. v. Computer Assocs., Int'l, Inc.*, the Eighth Circuit held no distribution occurred when the defendant, without the copyright

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[11] NIMMER ON COPYRIGHT, § 8.11[a]. at 9-137; and Goldstein, 2 Copyright § 5.5.1 at 5:102.
[12] Section 109(b)(4).

owner's permission, permitted third parties to use a copyrighted computer program.[13] Summary judgment was denied to the record company where the defendant's website in *Arista Records, Inc. v. MP3Board, Inc.* [14] permitted internet file sharing and copying of computer-stored version of plaintiff's recordings, and not copying from any commercially available source.

Similarly, in *Paramount Pictures Corp. v. Labus*, a district court held that an offer to distribute videotapes to members of the public did not constitute infringement – copyright infringement occurs only upon an actual rental of the videotapes;[15] in *Oblensky v. G. P. Putnam's Sons*, a district court in New York held no infringement occurs where "defendant offers to sell copyrighted materials but does not consummate a sale; equally, there is no infringement of the [distribution] right where there is copying, but no sale of the material copied."[16]

Federal courts have long disfavored the use of unidentified "John Doe" defendants in complaints,[17] and have also disfavored expedited discovery obtained on an *ex parte* basis. As a general rule, discovery may only take place after a defendant has been served.[18] A plaintiff in a copyright infringement case who seeks expedited discovery to uncover the identity of an unknown "John Doe" defendant must therefore make "a concrete showing of a *prima facie* claim of copyright infringement."[19] To obtain discovery as to the identity of a John Doe defendant, a plaintiff must make an evidentiary showing "that an act giving rise to civil liability *actually*

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[13] 991 F.2d 426, 434, (8th Cir. 1993), *cert. denied* 510 U.S. 861, 114 S.Ct. 176 (1993).
[14] 2002 WL 1997918, (S.D.N.Y. 2002). (Exhibit B to Appendix).
[15] 16 U.S.P.Q.2d (BNA) 1142 (W.D. Wis. 1990) (Exhibit C to Appendix).
[16] *Oblensky v. G.P. Putnam's Sons*, 628 F.Supp. 1552, 1555-56 (S.D.N.Y.), aff'd 795 F.2d 1005 (2d Cir. 1986).
[17] *Petway v. City of New York*, 02 Civ. 2715, 2005 WL 2137805 at 4 (E.D.N.Y. Sept. 2, 2005); *In re Ticketplanet.com*, 313 B.R. 46, 55 n.4 (Bankr. S.D.N.Y. 2004); *Strauss v. City of Chicago*, 760 F.2d 765, 770 n.6 (7th Cir. 1985).
[18] *Columbia Insuraance Co., v. Seescandy.com,* 185 F.R.D. 573, 577 (N.D.Cal. 1999).
[19] *Sony Music Entertainment Inc., v. Does 1-40*, F.Supp. 2d, 556, 564-565 (S.D.N.Y. 2004).

occurred and that the discovery is aimed at revealing specific identifying features of the person or entity who committed the act."[20] (emphasis added) In *Doe v. 2themaart.com Inc.*, the court explained the interests at stake:

> If Internet users could be stripped of [the ability to communicate anonymously on the internet] 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. Therefore, discovery requests seeking to identify anonymous Internet users must be subjected to careful scrutiny by the courts.[21]

Further, Defendant Does refute the statement from Exhibit A of Plaintiffs' *ex parte* Motion to Take Expedited Discovery that the method of identification referred to as quick and easy. Plaintiffs method is not at all reliable.[22] Simply put, many opportunities exist to inject a communication stream behind an individual's ISP account. Any, or all, of the NC State Does could have been the target of an individual pirating the ISP.[23]

To protect against an unjustified invasion of a John Doe defendant's right to privacy and anonymity, a plaintiff seeking discovery to identify such a defendant must therefore demonstrate "a real evidentiary basis … that the defendant has engaged in wrongful conduct."[24] This means that the plaintiff:

> Must adduce *competent evidence* – and the evidence plaintiff adduces must address *all* of the inferences of fact that plaintiff would need to prove in order to prevail under at least one of the causes of action plaintiff asserts. In other words, the evidence that plaintiff adduces must, if unrebutted, tend to support

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[20] *Columbia Insurance Co., supra*, 140 F.Supp.2d at 1093.

[21] 140 F.Supp. 1088 (W.D. Wash. 2001).

[22] Declaration of Carlos Linares in Support of ex parte Application for Leave to Take Immediate Discovery, ¶16.

[23] Declaration of Tom Swanton in Support of Brief in Support of Motion by Defendant Does #1, #18, #19, #26, #31, #35 and #38 to Vacate the Order Granting Expedited Discovery, to Dismiss the Complaint, to Quash the Subpoena, and to Dismiss for Improper Joinder. (Exhibit D of Appendix).

[24] *Highfields CapitalManagement, L.P. v. Doe*, 385 F.Supp. 2d 969, 970 (N.D. Cal. 2005).

> a finding of *each* fact that is essential to a given cause of action.[25] (emphasis in original).

In its Memorandum in Support of *Ex Parte* Application for Leave to Take Immediate Discovery [docket no. 4], Plaintiffs proffer the "good cause standard" as the test for the Court to determine whether expedited discovery should be allowed. There is, in fact, a split as to whether the test should be based more upon preliminary injunction factors, or the good cause standard.[26] In either event, *Dimension Data* and *Quest Communs. Int'l, Inc., v. Worldquest Networks, Inc.*[27] favor Defendants position. The Court denied Plaintiff's request for expedited discovery of documents because Plaintiff did not seek a preliminary injunction. That is exactly the same procedural context as the instant case, except the Plaintiffs here seek the issuance of a subpoena demanding personal, private information. In *Quest*, they sought less potentially insidious discovery, corporate documents that might show trademark infringement. Plaintiffs in the instant case have asked for permanent injunctive relief, but not for a preliminary injunction. The unpublished case, *Benham Jewelry Corp v. Aron Basha Corp.*,[28] decides a motion for preliminary injunction, not expedited discovery, by applying the test that: "[i]njunctive relief against a putative infringer should be granted when the moving party shows: (1) either (a) likelihood of success on the merits, or (b) sufficiently serious questions on the merits and a balance of hardships tipping decidedly in plaintiff's favor; and (2) likelihood of irreparable injury."[29] But, temporary restraining orders granted on an *ex parte* basis pursuant to Fed. R. Civ.

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[25] *Ibid*. at 975-76; *see also: Dendrite International, Inc. v. Doe No. 3*, 342 N.J. Super. 134, 141, 157-159, 775 A.2d 756, 760, 771-72 (N.J. App. 2001) affirming denial of plaintiff's motion for expedited discovery to obtain identity of John Doe defendant; plaintiff failed to make evidentiary showing supporting each element of its prima facie case.

[26] *See Dimension Data North America, Inc., v. Netstar-1, Inc.*, 226 F.R.D. 528 (E.D.N.C. 2005) for a comparison.

[27] 213 F.R.D. 418 (D. Colo. 2003).

[28] 1997 WL 639037 (S.D.N.Y.1997). (Exhibit E of Appendix).

[29] *Ibid*. at 8.

P. 65, are only for a limited period of time and upon sufficient bond. The Plaintiffs here do not need and do not seek a preliminary injunction. As the District Court of New Mexico stated in denying an identical request to issue a subpoena for information from the University of New Mexico, "Plaintiffs contend that unless the Court allows *ex parte* immediate discovery, they will be irreparably harmed. While the Court does not dispute that infringement of a copyright results in harm, it requires a Coleridgian "suspension of disbelief" to accept that the harm is irreparable, especially when monetary damages can cure any alleged violation.[30] Plaintiffs rely on cases involving document discovery and depositions in the preliminary injunction context. Plaintiffs cite no authority for expedited subpoena issuance according to Rule 45 without a prayer for preliminary injunctive relief.

C. <u>THE SUBPOENA *DUCES TECUM* IS OVERBROAD AND WILL RESULT IN IMPROPER DICLOSURE OF CONFIDENTIAL STUDENT INFORMATION TO OTHER STUDENTS.</u>

The subpoena itself requests information related to the Internet usage of each student Doe, collectively. The collective response to the subpoena will expose each student Doe's student records, protected under 20 U.S.C. §1232g, to each other Doe who has been joined in the matter, even though the information is completely irrelevant to the claims against any other Doe. Accordingly, until such time as each Doe is sued individually, the subpoena response will result in the improper disclosure of federally-protected confidential information.

The New Mexico Court was concerned that the disclosure of University of New Mexico Doe subscriber log files may contain highly confidential and sensitive files, disclosure of which could well be violative of the subscribers' privacy rights. Access to a subscriber's Internet information may include a wealth of information including name, address, social security

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[30] *Capital Records, Inc. et al v. Does 1-16*, No 07-485, 2007 WL 1893603 (D.N.M. May 24, 2007). (Exhibit F of Appendix).

numbers, credit card information, purchase histories, a road map of the subscribers' Internet activities, and perhaps disclosure of their private e-mail communications.[31] This Court should quash the subpoena based upon these statutory student privacy protections.

D. THE COURT SHOULD DISMISS ALL CLAIMS AGAINST Does #1, #18, #19, #26, #31, #35 and #38 FOR IMPROPER JOINDER.

a. In order to join the Doe defendants, Plaintiff must allege a right to relief arising out of the same transaction, occurrence, or series of transactions.

Rule 20, Fed. R. Civ. P., provides in pertinent part:

(a) Permissive Joinder.

> …All persons (and any vessel, cargo or other property subject to admiralty process in rem) may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action…

If the plaintiff's fail to allege that their claims arise from the same "transaction, occurrence, or series of transactions," then they fail to meet the requirements of Rule 20 allowing joinder. *Alexander v. Fulton County*, 207 F.3d 1303 1323 (11th Cir. 2000). The Court should then dismiss the improperly-joined Does from the action. Rule 20 (b), Fed. R. Civ. P. (granting the Court discretion to make such orders necessary to effectuate the purpose of the Rule.)

i. Plaintiff's have failed to show a common "transaction, occurrence, or series of transactions" where the defendants did not act in concert, the alleged infringements occurred on separate times and dates, the copyrighted works at issue are unique to each defendant, and different plaintiff's raise claims against different defendants.

Plaintiff's Complaint sets out a conclusory basis for joinder in paragraph 20:

> Although Plaintiff's do not know the true names of Defendants, each Defendant is alleged to have committed violations of the same law (e.g., copyright law), by committing the same acts, (e.g. the downloading and distributions of sound recordings owned by Plaintiffs), and by using the same means (e.g. a file-sharing

[31] *Ibid* at *1.

> network) that each Defendant accessed using the same ISP. Accordingly, Plaintiffs' right to relief arises out of the same series of transactions or occurrences, and there are questions of law or fact common to all Defendants such that joinder is warranted and appropriate here.

This allegation does not meet the requirements of the Rule, and its conclusory factual allegations cannot even withstand the examination of the exhibits incorporated in the Complaint. Mere allegations of similar acts violating a single law, even if those acts use a common infrastructure such as the Internet or a particular network, do not create the common nexus of facts required to meet the transactional test set forth in the Rule. A set of individual drunk drivers, committing the same act on the same infrastructure (public roadways) in violation of a single law, could not be joined as co-defendants if they injured different plaintiffs on different dates and times. But the result urged by Plaintiffs would be a virtually identical action.

There is no bright-line rule to determine whether the transactional test has been met, but courts will instead apply a case-by-case analysis.[32] In cases where copyright holders sue multiple independent defendants, courts generally will require either concerted action or some other direct connection between the Defendants beyond the infrastructure they use and the fact that they all happened to be accused of a similar act.

ii. <u>Joinder requires the same transaction, not a similar transaction.</u>

Judges in various districts have already recognized this requirement in other, nearly identical, cases brought by these very same Plaintiffs. For example, the Eastern District of Pennsylvania found that different defendants will require separate trials[33] and, in 2004, the Middle District in Florida severed and dismissed claims against twenty-five unrelated "Doe" defendants, holding that the independent individuals accused of copyright violations by record

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[32] *Mosley v. General Motors Corp.*, 497F.2d 1330, 1333 (8th Cir. 1974).
[33] *BMG Music v. Does 1-203*, 04-CV-650 (E.D. Pa. March 5, 2004). (Exhibit G of Appendix).

companies lacked the factual connection required for joinder.[34] The Court adopted the magistrate's "well-reasoned memorandum opinion"; severing all defendants, except the first, and requiring record-company plaintiffs to initiate individual actions against each defendant.[35]

Interscope Records v. Does 1-25 is virtually identical to this case. The same record-company plaintiffs tried to bring copyright claims against twenty-five John Doe defendants allegedly copying and distributing copyrighted sound recordings via peer-to-peer file-sharing networks. The magistrate judge in *Interscope Records v. Does 1-25* examined the complaint - again, virtually identical to the complaint in this case - and found that the allegations did not meet the transactional test. That court found only two factual connections among the defendants – first, that they all accessed the Internet through a single common service provider (in that case Bright House) and used the same peer-to-peer network to share files ("Fast Track.").[36] In particular, the *Interscope Records v. Does 1-25* report and recommendation noted that, like this case, "[n]one of the Defendants disseminated the same copyrighted material or songs belonging to the same Plaintiffs," and that each defendant "offered for download a unique set of copyrighted songs owned by an unique set of owner-Plaintiffs."[37] The Court then concluded, "[v]iewing this scenario as satisfying the same transaction or occurrence standard effectively nullifies that test."[38] Furthermore, the court held that the clear meaning of Fed. R. Civ. P. 20 "refers to the same transaction or occurrence not to similar transactions or occurrences," and

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[34] *Interscope Records v. Does 1-25,* 06:04-CV-197-ACC-DAB, (M.D. Fla. April 1, 2004), report and recommendation adopted, 06:04-CV-197-ACC-DAB, (M.D. Fla. April 27, 2004). (Exhibit H of Appendix).

[35] Because John Doe #1 is among the specific Defendants bringing this Motion, movants ask that, should the Court dismiss according to *Interscope Records v. Does 1-25,* that Doe #2 be the surviving defendant in the suit.

[36] *Id.* Report and Recommendation at *6.

[37] *Id.*.

[38] *Id.*.

concluded that the allegations against the Does, virtually identical to those in this case, were not the same transactions or occurrence.[39]

In this case, Plaintiffs are attempting to join even more unnamed defendants – thirty-eight in all, as compared to the twenty-five in *Interscope v. Does 1-25* – who, as in *Interscope v. Does 1-25,* are each allegedly sharing a unique set of songs belonging to a unique set of owner-plaintiffs. Review of the complaint show the complete lack of connection among the various Doe defendants. For example, comparing Does number 30 and 31, there is no commonality of song titles, only 3 of the named Plaintiffs are common to both, and the date of Plaintiffs' intrusion into the alleged Does' respective systems was 2 months apart.

There is no allegation of common action or communication between the Does, or that any Doe obtained songs from any other. At a minimum, then, these two Does should be severed from each other, into their own individual cases, regardless of the position of the other Does.

Similar cases alleging copyright infringement also weigh against joinder. In *Bridgeport Music, Inc. v. 11C Music*,[40] owner-Plaintiffs sued a number of alleged "samplers" of copyrighted music. The "sampling" was done by different defendants at different times, and using different copyrighted works. Likewise, in *Rappaport v. Steven Spielberg, Inc.*,[41] where the court severed claims against a number of defendants who allegedly infringed on copyrights for a number of separate audiovisual works.

These individual defendants have been improperly joined, because there is no common transaction or occurrence (or series of them) to tie the defendants together for Rule 20 purposes. This Court should sever the claims against all defendants and require Plaintiffs to file individual actions against each defendant. If any suit is permitted to survive, then the designated defendant

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[39] *Id.*. Report and Recommendation, p. 6-7.
[40] 202 F.R.D.229, 231 (M.D. Tenn. 2001),
[41] 16 F.Supp.2d 481, 496-97 (D.N.J. 1998).

should be Doe #2, as Doe #1 is a party to the this motion and should be entitled to any relief granted.

iii. <u>This improper joinder is unfair to defendants and impedes the administration of justice.</u>

This court also has discretion under Rule 20 (b), Fed. R. Civ. P., to "order separate trials or make other orders to prevent delay or prejudice." In this case, the confusion resulting from the improper joinder of 38 unrelated defendants has two effects: it prejudices the defendants, and it impedes the effective and efficient administration of justice.

b. <u>Improper joinder prejudices these Defendants by increasing expenses for each defendant, by opening the door to jury confusion as to the allegations against each defendant, and by leading to improper disclosure of confidential student information to other defendants.</u>

The pernicious effects of gang-pleading against numerous unrelated Does include having sixteen plaintiffs, with hundreds of separate claims, against thirty-eight different defendants. Each defendant will be subjected to an overwhelming onslaught of materials and information unrelated to the specific claims against them – all of which they are required to pay their attorneys to review.

In a case like this one, where the plaintiffs are billion-dollar companies with virtually unlimited litigation resources, and defendants are individual college students with the limited resources one would expect, imposing such a burden on defendants would be singularly unfair. In addition, each defendant who has been wrongfully identified – as has happened in several of these record-company lawsuits – would suffer the prejudice at trial of being lumped in with every other defendant, and hoping that the jury can keep straight which IP address belonged to which defendants.

The onslaught of information presents another unique peril: illegal disclosure of the defendants' confidential information to each other. While plaintiffs with legitimate claims might show an entitlement to that information, there is no legitimate need for any defendant to obtain information relating to any other defendant. As long as these defendants are improperly joined, such disclosure is inevitable. The only way to prevent this improper disclosure is to sever each student defendant and proceed against each individually.

c. Improper joinder hinders this Court's administration of justice by disproportionately weighing on its resources without paying the accompanying filing fees and by skewing the court's tracking of case dispositions.

The *Interscope v. Does 1-25* court also noticed that the indiscriminate lumping of unrelated defendants in a single action hinders the administration of justice. Such an action causes a "great inconvenience to the Court" and "imposes a significant burden on the Clerk's office," due to the increased complexity involved in coordination and service of multiple defendants.[42] Courts would have difficulty holding hearings or conferences where the parties and their attorneys might not even fit in the courtroom. Notably, when faced with four separate record company Doe suits, the Western District of Texas hinted that the improper joinder is merely an attempt by the plaintiffs to avoid filing the proper fees for each party.[43] Allowing plaintiffs to dodge the filing fee requirements strains the court's resources. Similarly, the North Carolina courts have faced, and may continue to face, multiple waves of cases, repeated *en masse.* These record company John Doe filings threaten to increase the costs for other litigants who pay their fair share.

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[42] *Interscope v. Does 1-25.* Report and Recommendation, p. 10.
[43] *In re: Cases Filed By Recording Companies*, 5:07-CV-568-R (W.D. Texas, August 6, 2007) (Exhibit I of Appendix) .

Further, the Texas Court noted that improper joinder also skews the court's ability to track its docket, saying, "[m]oreover, the closing of one 151-defendant case is treated as a single case for statistical purposes, when in fact each defendant should be treated as a single case for such purposes, given that the claim against each defendant is separate."[44]

If multiple cases involving improperly-joined defendants are allowed to clog this court's docket, the successful resolution of some or even most of them will not be reflected in the court's own records, skewing its tracking and hindering its efforts to serve justice efficiently and fairly for all those who approach.

III. CONCLUSION

The federal courts today are dealing with an onslaught of litigation by an industry facing a paradigm shift. In 2000, the 107th Congress, sympathetic to consumers, visited the issue of song downloading and the legislation (the DMCA) designed to deal with it. According to Judiciary Committee Chair, Orrin Hatch, "it was believed that a stable, predictable legal environment would encourage the deployment of business models which would make properly licensed content more widely available. Sadly, this has not yet occurred to any great extent in the music industry, and the DMCA is now nearly two years old."[45] The DMCA is now nine years old, song downloading, both legal and illegal, is still prevalent.[46] In an October, 2007 announcement, coffee giant Starbucks said it will give away 1.5 million songs every day for a total of more than 50 million free songs, as a major promotion to push its iTunes Wi-Fi Music

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[44] *Id*. at *2.
[45] Statement of Senator Orrin Hatch, *Senate Judiciary Committee Hearing on "The Future of Digital Music: Is There an Upside to Downloading?* July 11, 2000. (Exhibit J of Appendix).
[46] One industry estimate has 1 billion tracks exchanged illegally per month vs. Apple's iTunes service, which has sold just over 2 billion songs since it launched back in 2003. *http://www.afterdawn.com/news/archive/8623.cfm*, February 7, 2007. (Exhibit K of Appendix).

Store in Starbucks locations.[47] YouTube and MySpace have emerged as other ubiquitous means by which consumers enjoy music for free. Consumers are confused as to what is and is not allowed. Congress, not the courts is the proper forum to "decide whether to rewrite the DMCA."[48] Until it does, neither statute, nor the Federal Rules of Civil Procedure support Plaintiffs application for expedited discovery in the form of a subpoena to NC State. The Court should vacate the Order granting expedited discovery to Plaintiffs and dismiss the Complaint, or, in the alternative, quash the subpoena to NC State, or, in the alternative, dismiss the claims against Does #1, #18, #19, #26, #31, #35, and #38 for improper joinder.

Respectfully submitted,

This the 16th day of October, 2007.

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[47] *http://www.msnbc.msn.com/id/20944937,* AP, Sept. 24, 2007. (Exhibit L of Appendix)
[48] *Recording Indus. Ass'n Am. v. Verizon Internet Servs., supra,* 351 F.3d, 1229, at 1238.

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of October, 2007, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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And I hereby certify that I will serve the document by e-mail and U.S. Mail to the following non-party:

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