

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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WARNER BROS. RECORDS INC., et al.,

No. 05 CV 8365 (RO)

Plaintiffs,

-against-

DOES 1-149,

Defendants.

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**MEMORANDUM OF LAW OF DEFENDANTS JOHN DOE NOS. 37 AND 61  
IN SUPPORT OF THEIR MOTION TO (i) VACATE *EX PARTE* ORDER, (ii) QUASH  
SUBPOENA AND (iii) SEVER AND DISMISS ACTION AS TO DOE DEFENDANTS 2-149**

**Preliminary Statement**

Defendants John Doe Nos. 37 and 61, by their attorneys Beldock Levine & Hoffman LLP, respectfully submits this memorandum of law in support of their motion for an Order (a) vacating the Court's January 20, 2006 *ex parte* discovery order (the "*Ex Parte* Order"), which granted plaintiffs leave to subpoena Time Warner Cable ("Time Warner") for the identities of the 149 Doe defendants, (b) quashing all subpoenas issued under the *Ex Parte* Order, and (c) severing and dismissing the action as to Doe defendants numbered 2 through 149 on the ground that said defendants were improperly joined in this action. The relevant facts are set forth in the accompanying affidavits of Morlan Ty Rogers and Zi Mei.

## **ARGUMENT**

### **POINT I**

#### **THE EX PARTE ORDER SHOULD BE VACATED AND THE SUBPOENA QUASHED BECAUSE PLAINTIFFS HAVE NOT MADE A CONCRETE EVIDENTIARY SHOWING OF A PRIMA FACIE CLAIM OF COPYRIGHT INFRINGEMENT**

Federal courts have long disfavored the use of unidentified “John Doe” defendants in complaints. 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 (7<sup>th</sup> Cir. 1985). Moreover, as a general rule, discovery may take place only after a defendant has been served. Columbia Insurance Co. v. Seescandy.com, 185 F.R.D. 573, 577 (N.D.Cal.1999). A plaintiff in a copyright infringement case who seeks 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.” Sony Music Entertainment Inc. v. Does 1-40, 326 F.Supp.2d 556, 564-65 (S.D.N.Y. 2004). See Columbia Insurance Co., *supra*, 185 F.R.D. at 580 (to obtain discovery as to identity of John Doe defendant, plaintiff must make an evidentiary showing “that an act giving rise to civil liability *actually occurred* and that the discovery is aimed at revealing specific identifying features of the person or entity who committed that act”) (italics added).

In Doe v. 2themart.com Inc., 140 F.Supp.2d 1088 (W.D. Wash. 2001), 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.

Doe v. 2themart.com Inc., *supra*, 140 F.Supp.2d at 1093 (emphasis added). 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 for believing that the defendant has engaged in wrongful conduct.” Highfields Capital Management L.P. v. Doe, 385 F.Supp.2d 969, 970 (N.D. Cal. 2005). 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 a finding of *each* fact that is essential to a given cause of action.

Highfields Capital Management, *supra*, 385 F.Supp.2d at 975-76 (italics in original); Dendrite International, Inc. v. Doe No. 3, 342 N.J.Super. 134, 141, 157-59, 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).

Here, the *Ex Parte* Order should be vacated since plaintiffs’ application for expedited discovery clearly failed to make the requisite *prima facie* evidentiary showing. The Complaint in this action<sup>1</sup> alleges in conclusory fashion three forms of activity purportedly constituting copyright

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<sup>1</sup>A copy of the Complaint is annexed as Exhibit “A” to the accompanying affidavit of Morlan Ty Rogers (the “Rogers Affidavit”).

infringement – (1) downloading copyrighted files, (2) distributing such files to the public, and/or (3) making such files *available* for distribution to others. However, a close review of the Declaration submitted by Jonathan Whitehead of the Recording Industry Association of America, Inc. ("RIAA") in support of plaintiffs' application (the "Declaration") reveals that plaintiffs have no evidence at all for the first two of these categories. Neither the Declaration nor the exhibits annexed thereto set forth evidence of any actual instances of illegal downloading of copyrighted files onto anyone's computers, nor do they demonstrate any instances of actual uploading, *i.e.*, distribution of copyrighted files from anyone's computers to the public.<sup>2</sup>

Moreover, the limited evidence that plaintiffs have for the third category – that someone allegedly made files *available* for distribution – is irrelevant and cannot support the *Ex Parte* Order because merely *offering* files or making them *available* for distribution to others is not a copyright infringement. In re Napster, Inc., 377 F.Supp.2d 796, 802, 805 (N.D.Cal. May 31, 2005) (granting summary judgment; although the copyrighted work was made available for distribution, there was no proof that copies of it were "actually disseminated" to members of the public); Arista

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<sup>2</sup>To the extent that plaintiffs claim that they themselves (or their agents) viewed or downloaded actual copies of copyrighted recordings from defendants' computers, such activity still would not involve distribution or dissemination "to the public" and thus would not constitute copyright infringement. U.S. Naval Institute v. Charter Communications, Inc., 936 F.2d 692, 695 (2d Cir. 1991) ("It is elementary that the lawful owner of a copyright is incapable of infringing a copyright interest that is owned by him"); RSO Records v. Peri, 79 Civ. 5098, 1980 U.S. Dist. LEXIS 13490 at \*8 (S.D.N.Y. Sep. 5, 1980) (Appendix 1) (complaint alleging that plaintiffs participated in reproduction and distribution of infringing copies failed to state valid infringement claim against defendants; "a copyright owner cannot infringe his own copyright"); Higgins v. Detroit Education Television Foundation, 4 F.Supp.2d 701, 705 (E.D.Mich. 1998) ("[a] plaintiff may not claim to have been damaged by reason of a defendant's sale of alleged infringing copies if the copies were sold to plaintiff's agent because such a sale prevents the distribution of such copies to the general public").

Records, Inc. v. MP3Board, Inc., 00 Civ. 4660, 2002 U.S. Dist. LEXIS 16165 at \*13-14 (S.D.N.Y. Aug. 29, 2002) (Appendix 2) (posting on MP3Board website of links leading to infringing audio files does not establish unlawful dissemination of copies of such files to the public; “[i]nfringement of the distribution right requires an *actual dissemination* of ... copies”) (italics added). See also Obolensky v. G.P. Putnam’s Sons, 628 F.Supp. 1552, 1555-56 (S.D.N.Y.) (publisher did not infringe on copyright owner’s right of distribution of copyrighted book by listing the book in a trade publication as belonging to publisher where publisher neither copied the book nor sold any copies of the book; “there is no violation of the right to vend copyrighted works ... where the defendant offers to sell copyrighted materials but does not consummate a sale”), aff’d, 795 F.2d 1005 (2d Cir. 1986); National Car Rental System, Inc. v. Computer Associates International, Inc., 991 F.2d 426, 434 (8<sup>th</sup> Cir. 1993) (“[i]nfringement of [the distribution right] requires an *actual dissemination* of either copies or phonorecords”) (italics added) (citing 2 Nimmer on Copyright § 8.11[A], at 8-124); 2 Paul Goldstein, Copyright § 5.5.1, at 5:102 to 5-102-1 (2d ed. 2000 & Supp. 2005) (“an actual transfer must take place; a *mere offer for sale will not violate the right*”) (italics added); SBK Catalogue Partnership v. Orion Pictures Corp., 723 F.Supp. 1053, 1064 (D.N.J. 1989) (merely “authorizing” a third party to distribute copyrighted works without proof that the third party actually did so does not constitute copyright infringement); CACI Intern., Inc. v. Pentagen Technologies Intern., 93 Civ. 1631, 1994 U.S. Dist. LEXIS 21457 at \*12 (E.D.Va. Jun. 16, 1994) (Appendix 3) (marketing of software package without actually distributing it does not constitute copyright infringement). Compare Hotaling v. Church of Jesus Christ of Latter-Day Saints, 118 F.3d 199 (4<sup>th</sup> Cir. 1997), where it was held that making *unauthorized* copies available for distribution could

constitute an infringement. Here, however, the Declaration is bereft of evidence that the copies of music files allegedly on the computers were unauthorized.

Clearly, plaintiffs have not made “a concrete showing of a prima facie claim of copyright infringement.” Indeed, there is no evidence at all in the record of any infringement.

Accordingly, there is no justification for exposing defendants to a meritless lawsuit that will invade their privacy, destroy their anonymity and force them to incur unwarranted expenses and legal fees. The Court should therefore vacate the *Ex Parte* Order and, since the subpoena to Time Warner was issued on the basis of that order, quash that subpoena in its entirety.

## **POINT II**

### **THE SUBPOENA MUST ALSO BE QUASHED BECAUSE THE UNDERLYING COMPLAINT IS SUBJECT TO DISMISSAL**

Additional reason for quashing the subpoena may be found in the insufficiency of the *allegations* in the Complaint. A plaintiff seeking discovery to uncover the identity of an unknown “John Doe” defendant must “establish to the Court's satisfaction that plaintiff's suit against defendant *could withstand a motion to dismiss*. A conclusory pleading will never be sufficient to satisfy this element.” Columbia Insurance Co., *supra*, 185 F.R.D. at 579 (italics added). See also Dendrite International, Inc., *supra*, 342 N.J.Super. at 141, 775 A.2d at 760 (refusing to enforce subpoena where underlying complaint was subject to dismissal for failure to state a claim upon which relief can be granted). As shown below, the conclusory allegations in the Complaint fail to state a legally viable claim of copyright infringement and could not withstand a motion to dismiss.

It is well established that even under notice pleading a complaint alleging copyright infringement must “plead with specificity the acts by which a defendant has committed copyright infringement.” Marvullo v. Gruner & Jahr, 105 F.Supp.2d 225, 230 (S.D.N.Y. 2000); DiMaggio

v. International Sports Ltd., 97 Civ. 7767, 1998 U.S. Dist. LEXIS 13468 at \*4-5 (S.D.N.Y. Aug. 31, 1998) (Appendix 4). The complaint must at least inform the defendant “by what acts during what time the defendant infringed the copyright.” Marvullo, supra, 105 F.Supp.2d at 230 (italics added); Brought to Life Music, Inc. v. MCA Records, Inc., 02 Civ. 1164, 2003 U.S. Dist. LEXIS 1967 at \*3 (S.D.N.Y. Feb. 11, 2003) (Appendix 5) (granting Rule 12(b)(6) motion where “[p]laintiff ha[d] not attempted to describe ‘by what acts and during what time’ [the defendant] infringed the copyright”); Lindsay v. The Wrecked and Abandoned Vessel R.M.S. Titanic, 97 Civ. 9248, 1999 U.S. Dist. LEXIS 15837 at \*8, 12 (S.D.N.Y. Oct. 13, 1999) (Appendix 6) (dismissing copyright infringement claim pursuant to Rule 12(b)(6); vague and conclusory allegations of infringement pleaded using “and/or” do not satisfy requirement of pleading particular infringing acts with specificity); Stampone v. Stahl, 05 Civ. 1921 at \*3, 2005 WL 1694073 at \*2 (D.N.J. July 19, 2005) (Appendix 7) (dismissing copyright claim pursuant to Rule 12(b)(6) where complaint failed “to set out *particular* infringing acts *with some specificity*”) (italics added).

Here, the Complaint’s sole allegation of copyright infringement – that the Doe Defendants used “an online media distribution system to download, distribute to the public, *and/or* make available for distribution to others” certain copyrighted recordings, Complaint, ¶ 24 (italics added) – is made in the most conclusory manner. The Complaint makes no attempt to describe the specific acts of infringement or the dates and times on which they allegedly occurred.<sup>3</sup> Indeed, the Complaint does not allege any actual instances of downloading or distribution (which is not

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<sup>3</sup>That the three types of activities supposedly constituting copyright infringement are connected by the term “and/or” further demonstrates that plaintiffs do not know of any specific instances of actual infringement and have no basis for claiming any. See Lindsay, supra, 97 Civ. 9248, 1999 U.S. Dist. LEXIS 15837 at \*8.

surprising since plaintiffs' application for the *Ex Parte* Order did not contain any evidence of such acts). The Complaint is therefore subject to dismissal for failure to state a claim. Marvullo, supra, 105 F.Supp.2d at 230; Brought to Life Music, Inc., supra, 02 Civ. 1164, 2003 U.S. Dist. LEXIS 1967 at \*3; Lindsay, supra, 97 Civ. 9248, 1999 U.S. Dist. LEXIS 15837 at \*8, 12; Stampone, supra, 2005 WL 1694073 at \*2.<sup>4</sup>

The lists annexed as Exhibit A to the Complaint do not make up for the lack of specificity in alleging copying (downloading)<sup>5</sup> or distribution to the public (uploading). According to the Complaint, Exhibit A consists of lists of recordings purportedly infringed by each Doe Defendant. (Complaint, ¶¶ 22, 24). However, nowhere in those lists is there a representation or indication that even one of these recordings was *actually* copied (downloaded) or distributed (uploaded), nor do those lists attempt to specify the time of an actual instance of copying,

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<sup>4</sup>We call to the Court's attention that in two very recent *nisi primus* decisions, Elektra Entertainment Group Inc. v. Santangelo, 05 Civ. 2414, 2005 U.S. Dist. LEXIS 30388 (S.D.N.Y. Nov. 28, 2005) (Appendix 8) and Atlantic Recording Corp. v. Does 1-25, 05 Civ. 9111 (S.D.N.Y. Jan. 3, 2006) (Appendix 9), contrary decisions were reached with respect to the sufficiency of the RIAA's identical boilerplate complaint. Neither decision is appealable. We respectfully submit that both are against (1) the great weight of authority, (2) common sense, and (3) sound judicial administration, and that this Court should decline to follow them on the pleading issue.

<sup>5</sup>Since the music files allegedly on defendants' computers could just as well have been copied legally from compact discs, it is pure speculation for plaintiffs to claim that such files had been illegally downloaded onto that computer (and thus were themselves unauthorized copies). Such unwarranted speculation could not defeat a motion to dismiss. Harris v. New York State Dept. of Health, 202 F.Supp.2d 143, 175 (S.D.N.Y. 2002); Gmurzynska v. Hutton, 257 F.Supp.2d 621, 631 (S.D.N.Y. 2003). See also Yorktown Square Associates v. Union Dime Savings Bank, 79 A.D.2d 1040, 1041, 435 N.Y.S.2d 343, 344 (2d Dep't 1981) (mere speculation by plaintiff cannot defeat a motion to dismiss).

downloading, uploading or distributing.<sup>6</sup> (And indeed we know from plaintiffs' application for the *Ex Parte* Order that they have no evidence of any such acts.)

To the extent that these lists purport to identify sound recordings that were made *available* for downloading, such allegations simply fail to state a cognizable claim of copyright infringement since, as discussed in Point I supra, copyright infringement liability cannot be predicated upon merely making the works *available* to others.

### **POINT III**

#### **THE INSTANT CASE SHOULD BE SEVERED AND DISMISSED AS TO ALL DEFENDANTS OTHER THAN DOE NO. 1 BECAUSE THE CONDITIONS FOR PERMISSIVE JOINDER ARE NOT PRESENT**

Rule 20(a) of the Federal Rules of Civil Procedure ("FRCP") provides:

All persons. . . may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.

FRCP 20(a) (emphasis added).

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<sup>6</sup>The dates and times of the IP addresses purportedly relating to Doe No. 37 (i.e., 24.193.216.248 @ 9/6/2005 00:32:05 EDT) and Doe No. 61 (i.e., 24.28.123.231 @ 9/12/2005 00:19:47 EDT) (see Complaint, Exhibit 1) reflect not the time of any purported instance of actual copying, downloading, uploading or distribution of these recordings, but merely the time that plaintiffs purportedly viewed the filenames of recordings purportedly residing on their computers. Such activity, however, "does not result in the actual transfer of a copy of the work and thus does not violate the copyright owner's distribution right." In re Napster, Inc., supra, 377 F.Supp.2d at 802. Moreover, even if plaintiffs themselves (or their agents) did download actual copies of these recordings, such activity still would not involve distribution or dissemination "to the public" and thus would not constitute copyright infringement. See footnote 2, supra.

The Complaint purports to name 149 “Does” as defendants, each of whom is identified by an Internet Protocol address in separate lists annexed to the Complaint and collectively marked as “Exhibit A”. In paragraph 23 of the Complaint, plaintiff alleges on information and belief that

each Defendant, without the permission or consent of Plaintiffs, has used, and continues to use, an online media distribution system to download, distribute to the public, and/or make available for distribution to others, certain of the Copyrighted Recordings. Exhibit A identifies on a Defendant-by-Defendant basis (one Defendant per page) a list of copyrighted recordings that each Defendant has, without the permission or consent of Plaintiffs, downloaded, distributed to the public, and/or made available for distribution to others.

Complaint, ¶ 24 (emphasis added).

Plaintiffs do not allege a common “right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences.” FRCP 20(a).

Indeed, the Complaint recognizes the separateness and uniqueness of the alleged infringements by listing them “on a Defendant-by-Defendant basis.” Complaint, ¶ 24.

The Complaint does not allege that the 149 Doe defendants conspired or acted jointly, nor does it claim that they are jointly and/or severally liable for each other’s alleged infringement.

In other, identical copyright infringement cases brought by the record industry, the courts have held that the plaintiffs’ joinder of multiple Doe defendants in a single action was improper. In Interscope Records v. Does 1-25, 04 Civ. 197, 2004 U.S. Dist. LEXIS 27782 (M.D. Fla. April 1, 2004) (Appendix 10), report and recommendation adopted, 04 Civ. 197, 2004 U.S. Dist. LEXIS 27778 (M.D. Fla. April 27, 2004) (Appendix 11), several of the same record companies which are plaintiffs in the instant case filed a single lawsuit against 25 unidentified “John Doe” who

allegedly used the Fast Track peer-to-peer network to offer music to other Fast Track users. As here, those plaintiffs sought *ex parte* discovery from a non-party Internet Service Provider to determine the identities of the Doe defendants. The court denied the plaintiff's discovery motion and, after ordering plaintiffs to show cause why the case should not be dismissed for improper joinder, severed the case as to all defendants except Doe No. 1.

Sixteen unrelated Plaintiffs have joined twenty-five unrelated Defendants who independently copied different songs owned by different Plaintiffs. Plaintiffs have failed to show the infringing activity arises from the same transaction or occurrence or series of transactions and occurrences. The only similarity is that Defendants apparently used the Fast Track network to make the songs available.

Interscope Records v. Does 1-25, *supra*, 04 Civ. 197, 2004 U.S. Dist. LEXIS 27782 at \*15 (Appendix 10). Thus, the claims against the 25 defendants did not arise out of the same transaction, occurrence, or series of transactions or occurrences as required for permissive joinder. Interscope Records v. Does 1-25, *supra*, 04 Civ. 197, 2004 U.S. Dist. LEXIS 27782 at \*10 (Appendix 10). The Court further ordered that the claims against the defendants other than Doe No. 1 would be dismissed unless the plaintiffs commenced a separate action with a separate complaint and filing fee against each of those 24 defendants. Interscope Records v. Does 1-25, *supra*, 04 Civ. 197, 2004 U.S. Dist. LEXIS 27778 at \* 3 (M.D. Fla. April 27, 2004) (Appendix 11).

In a similar case brought by record companies against hundreds of John Doe defendants, BMG Music v. Does 1-203, 04 Civ. 0650 (E.D. Pa. Mar. 5, 2004) (Appendix 12), it was held that:

1. The Plaintiffs in the above-captioned case have filed one joint civil action against two-hundred and three Defendants,
2. Nothing in the Complaint indicates that the alleged claims are the result of the same incident or incidents; and

3. The claims against the different Defendants will require separate trials as they may involve separate witnesses, different evidence, and different legal theories and defenses, which could lead to confusion of the jury. United States v. 1,071.08 Acres of Land, Yuma & Mohave Counties, Arizona, 564 F.2d 1350 (9<sup>th</sup> Cir. 1977); Fed. R. Civ. Pro. 21; Fed. R. Civ. Pro. 42(b). Moreover, the Court finds that there will almost certainly be separate issues of fact with respect to each Defendant. Fed. R. Civ. Pro. 20.

Accordingly, it is hereby ORDERED as follows:

4. Pursuant to Fed. R. Civ. Pro. 21 and 42 (b), the claims set forth in the above-captioned Complaint shall be SEVERED, as nothing in the Complaint indicates that the Plaintiffs suffered their alleged injuries as a result of the same transaction or occurrence;

5. Counsel shall submit for filing, within thirty (30) days of the date of this Order, two-hundred and three (203) new Amended Complaints, one for each Defendant.

6. Plaintiff's Counsel shall submit to the Clerk of Court filing fees for the Amended Complaints against John Does 2-203, which cases shall be assigned separate civil action numbers and assigned at random to other judges of this Court; and

7. Civil Action No. 04-650 is to be assigned to John Doe No. 1 as an individual Defendant. The actions against all other Defendants will be deemed to have been filed as of February 17, 2004.

8. The Clerk shall not treat the Amended Complaints as related pursuant to Loc. R. Civ. Pro. 40.1(b)(3).

BMG Music v. Does 1-203, *supra*, 04 Civ. 0650, pp. 1-2 (Appendix 12).

Upon the plaintiffs' motion for reconsideration, the court adhered to its earlier decision, holding that "the Court simply cannot overcome its finding that the Defendants are not properly joined parties." BMG Music v. Does 1-203, 04 Civ. 0650, p. 2 (E.D. Pa. Apr. 2004)

(Appendix 13). The court illustrated its point:

This Court's Order of March 5, 2004, was entered after inspection of Plaintiffs' Complaint revealed that Plaintiffs are attempting to bring over two-hundred factually distinct actions in one lawsuit. Each claim

involves different property, facts, and defenses. John Doe 104, for example, is alleged to have infringed nine works held by five Plaintiffs. John Doe 113 is alleged to have infringed ten works owned by a different (sometimes overlapping) group of Plaintiffs, with only one copyright identical to John Doe 104 ("Guilty Conscience," by the popular rap lyricist Eminem). John Doe 199, meanwhile, is alleged to have infringed seven works, none of them the same as John Doe 58. Plaintiffs' Complaint, Exh. A. In other words, in addition to the individual acts of infringement encompassing separate transactions and occurrences, the actual property at issue is different for each Defendant. Each Defendant will also likely have a different defense. Comcast subscriber John Doe 1 could be an innocent parent whose internet access was abused by her minor child, while John Doe 2 might share a computer with a roommate who infringed Plaintiffs' works. John Does 3 through 203 could be thieves, just as Plaintiffs believe, inexcusably pilfering Plaintiffs' property and depriving them, and their artists, of the royalties they are rightly owed. Given this panoply of facts, law, and defenses, the Court does not see any reason to vacate its March 5, 2004, Order. Wholesale litigation of these claims is inappropriate, at least with respect to a vast majority (if not all) of Defendants. Joinder is improper. Defendants 2 through 203 shall be severed.

BMG Music v. Does 1-203, *supra*, 04 Civ. 0650, p. 2-3 (Appendix 13). See also United States ex rel. Grynberg v. Alaska Pipeline Co., 95 Civ. 725, 1997 U.S. Dist. LEXIS 5221 at \*4 (D.D.C. Mar. 27, 1997) ("Plaintiff cannot join defendants who simply engaged in similar types of behavior, but who are otherwise unrelated; some allegation of concerted action between defendants is required") (Appendix 14); Mobile Systems, Inc. v. Abel, 99 F.R.D. 129 (D. Minn. 1983) (dismissing and severing 18 "shotgun actions" each filed against approximately 100 defendants; permissive joinder requires that claims arose from the *same* transactions, not merely similar transactions).

As in Interscope Records v. Does 1-25 and BMG Music v. Does 1-203, *supra*, the claims asserted against the 149 Doe defendants in the instant case do not arise out of the same transaction, occurrence, or series of transactions or occurrences, and there is no basis for holding them jointly or severally liable. Since one of the prerequisite conditions for permissive joinder is

not present, the Court must sever and dismiss the case pursuant to FRCP 20(a) and 21 as to all defendants other than the first named defendant (Doe no. 1).

**CONCLUSION**

The Court should grant the within motion in all respects.

Respectfully submitted,

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