

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.

-----X

**REPLY 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**

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ARGUMENT

POINT I

A PLAINTIFF SEEKING *EX PARTE* DISCOVERY TO OBTAIN THE IDENTITY OF A JOHN DOE DEFENDANT MUST MAKE A CONCRETE EVIDENTIARY SHOWING OF A PRIMA FACIE CLAIM

As set forth in our moving memorandum of law, a plaintiff who seeks *ex parte* discovery to uncover the identity of an unknown “John Doe” defendant must make a concrete evidentiary showing of a prima facie claim, with competent evidence that supports a finding of *each fact* that the plaintiff must prove to prevail on the claim.

Lacking any evidence of infringement, plaintiffs attempt to confuse the Court by importing the “good cause” standard which would otherwise be applicable in cases where the identity of an unknown “John Doe” defendant is not the subject of the expedited discovery requested. The critical aspect of plaintiffs’ discovery application, however, is not its *timing* – to which we have no objection – but its *content*. What matters is not that plaintiffs sought “immediate discovery” but that they sought such discovery on an *ex parte* basis in a John Doe case for the purpose of obtaining the identities of the defendants in that case. Plaintiffs cite *no* caselaw where the “good cause” standard that they advocate was applied under these circumstances.¹

¹ Even though plaintiffs have no evidence of copyright infringement and cannot satisfy the requisite showing for the discovery they seek, they cite several cases of this Court -- Interscope Records v. Does 1-100, 05 Civ. 7667 (S.D.N.Y. 2006); Loud Records, LLC v. Does 1-74, 04 Civ. 9881 (S.D.N.Y. 2005), appeal dismissed, No. 05-5559 (2d Cir. Nov. 28, 2005); and Atlantic Recording Corp. v. Does 1-25, 05 Civ. 9111 (S.D.N.Y. 2005) -- as supposed authority in their favor. Not one of those cases, however, involved a motion to vacate an *ex parte* discovery order on the ground that the party who obtained the order had not made a concrete evidentiary showing in support of its claim. The motions to quash subpoenas in those cases were addressed solely to the *pleading insufficiency* of the complaint rather than, as here, to the *lack of evidence* for the claim, and while one of the defendants in Atlantic Recording also made a motion to vacate the *ex parte* order in that case based on lack of evidence, that motion is still pending and has not yet been decided.

Incredibly, plaintiffs rely upon Ayyash v. Bank Al-Madina, 233 F.R.D. 325 (S.D.N.Y. Jul. 12, 2005), a case which actually supports the strong evidentiary showing required before obtaining discovery on an *ex parte* basis. In Ayyash, this Court applied “particularly careful scrutiny” to the plaintiff’s request for expedited discovery “since plaintiff not only s[ought] expedition, but also move[d] on an ex parte basis.” Ayyash, *supra*, 233 F.R.D. at 327 (emphasis added). The Court granted the motion because, *inter alia*, the plaintiff had “made a *strong evidentiary showing* of the substantiality of his claims.” Ayyash, *supra*, 233 F.R.D. at 327 (italics added).²

Plaintiffs’ reliance on Quest Communications Int’l, Inc. v. Worldquest Networks, Inc., 213 F.R.D. 418 (D. Colo. 2003) is unwarranted since that case was *not a John Doe case* and the motion for discovery was *denied*. Equally puzzling is plaintiffs’ citation to Arista Records LLC v. Does 1-20, 2005 U.S. Dist. LEXIS 30552 (D. Colo. 2005) and Interscope Records v. Does 1-12, 2005 U.S. Dist. LEXIS 30554 (D. Colo. 2005). Both those cases, decided by the same judge, (1) were decided *ex parte*, and (2) relied on the Quest Communications decision.³

Plaintiffs attempt to distinguish Dendrite International, Inc. v. Doe No. 3, 342 N.J.Super. 134, 775 A.2d 756 (N.J. App. 2001), cited in our moving papers, by claiming that

² Plaintiffs frivolously observe that this Court has already found that their underlying discovery application was reasonable under a “good cause” standard. Plaintiffs’ Opposition, p. 6. Since that application was *ex parte*, defendants in the instant case did not have an opportunity to litigate this issue, let alone the applicable legal standard, when the application was originally made. *See, e.g.*, D. Sobel, The Process that “John Doe” is Due: Addressing the Legal Challenge to Internet Anonymity, 5 Va. J. L. & Tech. 3 at *15 (2000) (“In the absence of adversarial proceedings to determine a plaintiff’s entitlement to the identity of an anonymous Internet poster, the civil discovery process is open to potential abuse”).

³ Plaintiffs also set forth in Appendix D to their opposing brief a list of 234 cases in which “expedited discovery” was allegedly granted. Since plaintiffs did not submit copies of these apparently unpublished decisions, the legal bases for them cannot be discerned. Even if plaintiffs accurately described them, these decisions are without precedential authority since they too undoubtedly resulted from the plaintiffs’ *ex parte* applications.

that case “addressed free speech concerns not present here, because ... the First Amendment does not protect copyright infringement.” Plaintiffs’ Opposition, pp. 6-7, n.2. This is doubletalk. We are not talking about the merits of plaintiff’s supposed copyright claim. We are talking about an internet user’s interest in privacy,⁴ which is why the Dendrite court held that the plaintiff “must produce *sufficient evidence supporting each element of its cause of action*, on a prima facie basis,” before compelling an ISP to disclose the identity of one of its customers. Dendrite, supra, 342 N.J.Super. at 141, 775 A.2d at 760 (italics added). The same concerns require the same protections and same result here.

Plaintiffs also assert that Highfields Capital Management L.P. v. Doe, 385 F.Supp.2d 969 (N.D.Cal. 2005) is distinguishable but make no attempt to explain how. The same First Amendment privacy and anonymity concerns that are present here also existed there. Highfields Capital, supra, 385 F.Supp.2d at 974-75.

Plaintiffs are ultimately reduced to arguing that, while Sony Music Entertainment Inc. v. Does 1-40, 326 F.Supp.2d 556, 564-65 (S.D.N.Y. 2004) applied the concrete evidentiary showing of a *prima facie* case standard, the disposition of the motion in that case supports their position here, since they admittedly used the same kind of evidence in Sony. If, as plaintiffs claim, the evidence was the same, then it is clear that the Sony Court misunderstood the nature of the “evidence”, since no evidence of *actual* uploading or downloading was ever presented to that Court or this Court.⁵

⁴ See, e.g., Sony Music Entertainment Inc. v. Does 1-40, 326 F.Supp.2d 556, 564 (S.D.N.Y. 2004) (holding that use of P2P networks qualifies as speech entitled to First Amendment protection).

⁵ Plaintiffs also attempt to distinguish Columbia Insurance Co. v. Seescandy.com, 185 F.R.D. 573 (N.D.Cal.1999), on the ground that the court there found that the plaintiff had made the requisite showing. Plaintiffs’ Opposition, p. 6, n. 2. This in no way detracts from the fact that the Columbia court required the plaintiff to present *evidence* “showing that an act giving rise to civil liability *actually occurred*” before permitting discovery to obtain the defendant’s identity. Columbia Insurance, supra, 185 F.R.D. at 580 (italics added).

POINT II

PLAINTIFFS HAVE NOT PROFFERED ANY COMPETENT EVIDENCE OF COPYRIGHT INFRINGEMENT

Plaintiff's *ex parte* application does not evidence a prima facie case of copyright infringement by any of the defendants. The declaration of Jonathan Whitehead (the "Declaration") is based on hearsay and sets forth no basis for attributing technological expertise in the P2P field to Mr. Whitehead, a senior executive at the RIAA. Moreover, neither the Declaration nor the exhibits annexed to it contain evidence of any instances of downloading of files *onto* a defendant's computer, or uploading *from* a defendant's computer *to* another P2P user. See Affidavit of Morlan Ty Rogers, ¶¶ 8-12.

Plaintiffs' opposing papers challenge none of these points, instead arguing nonsensically that screenshots attached to the Declaration as Exhibit 1 are "substantial evidence that defendants to this lawsuit have unlawfully disseminated" copyrighted works. See Plaintiffs' Opposition, p. 7. All these screenshots purport to reflect, however, is that certain allegedly copyrighted recordings were *available* to a would be infringer. These passive screenshots are merely an index of file names and other text notations regarding files allegedly contained in one or more shared folders of computers connected to the internet; they do not reflect or otherwise evidence any instances of actual transfers of such files either *to* or *from* those computers. The screenshots do not even set forth the IP address allegedly associated with each defendant, nor is any explanation given as to how these IP addresses were determined. Since the screenshots do not show any transfers, it is not surprising that they also do not indicate the date and time of any alleged transfers. Moreover, plaintiffs admit that *none* of those screenshots even relate to the moving defendants. Since plaintiffs' *own* submissions fail to evidence the existence of a prima facie case of infringement against defendants, it is clear

that the *Ex Parte* Order that was based on them should be vacated, and the subpoena issued pursuant thereto quashed.

Plaintiffs' "case" is smoke and mirrors. Plaintiffs conclusorily claim that "Defendants *authorized* distribution by placing Plaintiffs' copyrighted works in their shared directories, where they were available to other P2P network users." See Plaintiffs' Opposition, pp. 8-9 (*italics added*). Plaintiffs have no basis for making this allegation. In comments filed with the Federal Trade Commission less than two years ago, the RIAA itself acknowledged that most P2P users have no idea that files on their *own* computers may become available to others.

As an initial matter, P2P software may, upon installation, automatically search a user's *entire* hard drive for content. Files that users have no intention of sharing may end up being offered to the entire P2P network. Continued sharing of personal information is hard to avoid and is facilitated by confusing and complicated instructions for designating shared items. A study by Nathaniel S. Good and Aaron Krekelberg at HP Laboratories showed that "the majority of the users...were unable to tell what files they were sharing, and sometimes incorrectly assumed they were not sharing any files when in fact they were sharing all files on their hard drive."

See Peer-to-Peer File-Sharing Technology: Consumer Protection and Competition Issues; P2P File-Sharing Workshop – Comment, P034517; Comments of The Recording Industry Association of America (RIAA), November 15, 2004, pp. 8-9 (Appendix "A" hereto).

Moreover, the testimony of defendant's expert, Zi Mei – who demonstrated in his affidavit that plaintiffs' "investigation" of alleged infringement was inherently unreliable and unscientific – stands unrefuted and provides further support for vacating the *Ex Parte* Order and quashing the subpoena.⁶

⁶ Asserting without any basis that Mr. Mei's testimony is "not relevant and should not be considered," plaintiffs chose not to submit any opposing affidavits with their opposing brief, yet now request an opportunity to put in opposing evidence. See Plaintiffs' Opposition, p. 7, n.3. No reason is given why such evidence, if it exists, could not have been timely submitted.

POINT III

MERELY MAKING COPYRIGHTED WORKS AVAILABLE TO OTHERS IS NOT AN INFRINGING DISTRIBUTION

It is a cardinal rule of copyright law that “[i]nfringement of the distribution right requires an actual dissemination of ... copies.” Arista Records, Inc. v. MP3Board, Inc., 00 Civ. 4660, 2002 U.S. Dist. LEXIS 16165 at *14 (S.D.N.Y. Aug. 29, 2002) (emphasis added). For this reason, the mere making of copyrighted files *available* to others simply does not state a legally viable claim of copyright infringement. See, e.g., In re Napster, Inc., 377 F.Supp.2d 796 (N.D.Cal. May 31, 2005) (making copyrighted works *available* for downloading by others does not violate the copyright owner’s right of distribution since infringement requires actual dissemination of copies).

Nevertheless, plaintiffs advance a “making available” theory that would not require them to present any evidence whatsoever of *actual* unauthorized transfers of music files between users of peer-to-peer (“P2P”) networks. Plaintiffs’ position is that the mere identification and listing of works available for copying constitutes unauthorized distribution without any further requirement on plaintiffs’ part to demonstrate that even a single music file was actually copied or transferred. Adoption of this theory would effectively rewrite the Copyright Act by expanding the exclusive rights of copyright owners in an insupportable manner. Any act of arguably “attempted” distribution of unauthorized copyrighted materials, without more, would become actionable. It would mean that a user who logged onto a P2P network momentarily, and whose file *names* (not the files themselves) were uploaded and listed on the ephemeral P2P index for such time period, would be liable for copyright infringement even if he or she logged off before any actual file uploads or downloads could have occurred. It

would mean that a P2P user could be found liable for copyright infringement even for uploading a file name corresponding to a spoofed or otherwise corrupted or unusable file.

The implications of plaintiffs' theory are breathtaking. Without so much as proving a single act of unauthorized copying of their works, plaintiffs would have this Court impose crushing, confiscatory penalties⁷ upon users of P2P networks, many of whom have little or no understanding of copyright law. Fortunately, there is no basis in the Copyright Act for plaintiffs' "making available" theory of infringement.

Section 106(3) of the Copyright Act provides the copyright owner with the exclusive right to "distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." 17 U.S.C. § 106(3). This statutory language explicitly delineates and limits the exclusive right of distribution and unambiguously requires that there be a "sale or other transfer" of a "cop[y] or phonorecord[]" of the copyrighted work" in order for there to be an infringement of the copyright owner's distribution right. A simple *offer* to make files *available* through a P2P network does not fit within the plain language of section 106(3).

Plaintiffs attempt to confuse the Court by confusing the statutory definition of "publication" – which is defined in section 101 to include "offering to distribute" a copy – with the copyright owners' exclusive right of "distribution," the delineation of which in section 106(3) does *not* include "offering to distribute." Publication and distribution are distinct concepts under the copyright law; the very fact that the definition of "publication" in section 101 of the Act includes an "offer[] to distribute," while the delineation of the distribution right

⁷ Plaintiffs allege that 774 music files were made available for distribution from defendant Doe No. 37's computer and that 1,047 music files were made available from defendant Doe No. 61's computer. Plaintiffs' Opposition, p. 4. At a statutory minimum of \$750 per infringement (17 U.S.C. § 504(c)(1)), this would amount to **\$580,500** and **\$785,250**, respectively.

in section 106(3) does not, is telling. Had Congress intended to define the scope of the section 106(3) distribution right to include “offering to distribute,” it would have done so. It did not. See Barnhart v. Sigmon Coal Co., 534 U.S. 438, 452 (2002) (“it is a general principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acted intentionally and purposely in the disparate inclusion or exclusion”). See also In re Napster, supra, 377 F.Supp.2d at 804 (“If Congress wanted to make clear that the distribution right was broad enough to encompass making a work available to the public without proof of actual distribution, it was perfectly capable of doing so”).

Plaintiffs seize upon one sentence in the legislative history which suggests that section 106(3) establishes an exclusive right of “publication.” See Plaintiffs’ Opposition, p. 9. Read in context, however, that sentence merely acknowledges that section 106(3) protects, inter alia, a copyright owner’s right of first publication – i.e., his ability to decide when and if his work will be disseminated to the public for the *first* time – a right plainly not relevant to this case. That this is what the House Judiciary Committee had in mind is apparent from a second sentence in the House Report, conveniently omitted from Plaintiffs’ Opposition: “Under this provision the copyright owner would have the right to control the first public distribution of an authorized copy . . . of his work.” H.R. Rep. No. 94-1476, at 62 (1976) (emphasis added) (quoted in Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 552 (1985)).⁸

⁸ Plaintiffs seek to create the impression that the Second Circuit in Agee v. Paramount Communications, Inc., 59 F.3d 317, 325 (2d Cir. 1995) found that the “distribution” and “publication” rights are synonymous. Plaintiffs’ Opposition, p. 9. In Agee, the Second Circuit merely noted in passing and without any analysis that the Third Circuit in Ford Motor Co. v. Summit Motor Products, Inc., 930 F.2d 277, 299 (3d Cir. 1991) had so concluded. The Third Circuit, however, only did this in the context of crafting a definition for the term “public”, a term which is not defined anywhere in the Copyright Act. Id. It did not equate an “offering to distribute”, defined as “publication” in section 101, with the exclusive distribution right of section 106(3).

This legislative history is consistent with the well-established principle, clearly reflected in the statutory language, that publication and distribution are distinct concepts. “[T]he mere offering to sell copies of a novel to bookstores for subsequent sale to customers constitutes publication, but without actual distribution of copies of the novel, it would not violate the distribution right.” 11 William F. Patry, Copyright Law and Practice 171 (Supp. 2000). “The language of section 106(3) intentionally tracks the first sentence of the Act’s definition of ‘publication’ in section 101.... [It] does not, however, follow the second sentence of the definition.” Paul Goldstein, 2 Copyright § 5.5.1 n. 16 (2d ed. 1996). Congress made clear that a mere “offer” to distribute, such as by making a file available for copying, does not in and of itself constitute a violation of a copyright owner’s exclusive right of distribution.

The cases cited by plaintiffs do not alter this conclusion. Plaintiffs place great reliance on Hotaling v. Church of Jesus Christ of Latter-Day Saints, 118 F.3d 199, 203 (4th Cir. 1997). Hotaling, however, is clearly distinguishable. In Hotaling, the defendant did not simply list a copyrighted work in its library catalogue and make it available for distribution to the public. As plaintiffs acknowledge on page 10 of their opposition, the defendant placed *actual, multiple unauthorized copies* of the copyrighted work throughout its library branches. Here, on the other hand, plaintiffs have no evidence of even *one* actual instance of unauthorized copying of plaintiffs’ recordings.⁹ Hotaling also relied upon defendants’ failure to maintain circulation records, and refused to reward defendant libraries for their sloppy record-keeping. The dissent in Hotaling (Hall, J.) observed that “none of” the acts of distribution identified in section 106(3) had been implicated by the conduct in suit, as “[t]he [defendant] did not sell or give an infringing copy to anyone.” Hotaling, *supra*, 118 F.3d at 205.

⁹ The Court in In re Napster, *supra*, distinguished Hotaling on the ground that the defendant in Hotaling “had made *actual, unauthorized copies* of the copyrighted genealogical material available to borrowers at its branch libraries.” In re Napster, *supra*, 377 F.Supp.2d at 803 (italics added).

In the other cases cited by plaintiffs, infringing material was uploaded by a user of a bulletin board service (BBS) or other online service to the defendants' servers – an act of *actual* distribution. See, e.g., Marobie-FL, Inc. v. Nat'l Ass'n of Fire Equip. Distribs. and Northwest Nexus, Inc., 983 F. Supp. 1167 (N.D. Ill. 1997) (copyrighted clip art files *placed* on a website); Getaped.com, Inc. v. Cangemi, 188 F.Supp.2d 398, 400 (S.D.N.Y. 2002) (copyrighted source code *copied and posted* to website). By contrast, the only thing uploaded in connection with making files available through P2P networks is an index of the names of the files and certain other textual information; the files themselves remain on the users' computers.

On page 11 of their opposing brief, plaintiffs quote dictum from an earlier appellate decision on a preliminary injunction motion in A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001) to the effect that “Napster users who upload file names to the search index for others to copy violate Plaintiffs' distribution rights.” A&M Records, supra, 239 F.3d at 1014. The district court had preliminarily found that Napster had been used to upload and download copyrighted music; the district court did not base its injunction on such music merely being made available. A&M Records, Inc. v. Napster, Inc., Nos. 99-5183, 00-0074, 2000 WL 1009483, at *1 (N.D. Cal. July 26, 2000). On appeal, the Ninth Circuit necessarily relied upon the record created at the district court level and made no fact findings of its own. Because the defendant *did not dispute that an infringement had in fact occurred*, the Ninth Circuit did not need to review that aspect of the district court's ruling, which rendered the quoted sentence mere dictum. In a subsequent proceeding in the same case in the district court, plaintiffs argued to Judge Patel that this dictum meant that the mere “making available” of copyrighted works violated section 106(3) even in the absence of actual copying or transfer of the works. The district court rejected this argument, distinguishing the ‘uploading’ and ‘downloading’ charges

from those of ‘making available’, and held that there could be no infringement without *actual* copying or transfer. In re Napster, *supra*, 377 F.Supp.2d at 802 (“There is no dispute that merely listing a copyrighted musical composition or sound recording in an index of available files falls short of satisfying these ‘actual dissemination’ or ‘actual transfer’ standards”).¹⁰

Plaintiffs shockingly argue that this Court should defer to their view that the current Copyright Office’s interpretation of distribution includes the “making available” of works, as supposedly reflected in correspondence with a member of Congress. Not only is such an interpretation at odds with the statutory language, but the Second Circuit has ruled that opinions of the Copyright Office, especially on issues of first impression like the instant case, are not entitled to such deference. See Bartok v. Boosey & Hawkes, Inc., 523 F.2d 941, 946-47 (1975) (“the Copyright Office has no authority to give opinions or define legal terms and its interpretation on an issue never before decided should not be given controlling weight”).

Finally, there is no merit to plaintiffs’ outlandish contention that the WIPO Copyright Treaty grants them a right, enforceable by this Court, to prohibit the mere offering or making available of a copyrighted work in the absence of actual dissemination or transfer of a copy of the work. “International treaties are not presumed to create rights that are privately enforceable.” Goldstar (Panama) S.A. v. United States, 967 F.2d 965, 968 (4th Cir. 1992). Only if a treaty “evidences an intent to provide a private right of action” will the courts find it to be self-executing and privately enforceable in the absence of implementing legislation from Congress. Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003); Dreyfus v. Von Finck, 534 F.2d

¹⁰ Incredibly, plaintiffs claim that after rejecting such an indexing theory, the Napster court “went on to hold ... that it was an act of distribution if the name of the work was put in the index *and if that work was made available through that index.*” See Plaintiffs’ Opposition, p. 11 (italics in original). This assertion is a pure fabrication. The rest of the court’s discussion of infringement concerned “uploading” and “downloading” files, not the making available of files through an index. In re Napster, *supra*, 377 F.Supp.2d at 805-06.

24, 30 (2d Cir. 1976) (“It is only when a treaty is self-executing, when it prescribes rules by which private rights may be determined, that it may be relied upon for the enforcement of such rights”); Guaylupo-Moya v. Gonzales, 423 F.3d 121, 133 (2d Cir. 2005) (“when a treaty is not self-executing, the treaty does not provide independent, privately enforceable rights”). The WIPO Copyright Treaty is not self executing and is dependent on implementing legislation since it sets forth no rules for determining private rights and, in fact, is dependent upon the contracting parties to “undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.” WIPO Copyright Treaty, art. 14(1); Universal City Studios, Inc. v. Corley, 273 F.3d 429, 440 (2d Cir. 2001) (noting that Congress enacted the Digital Millennium Copyright Act (the “DMCA”) in 1998 to implement the WIPO Copyright Treaty).

Where, as here, “a treaty is not self-executing it is not the treaty but the implementing legislation that is effectively ‘law of the land.’” Hopson v. Kreps, 622 F.2d 1375, 1380 (9th Cir. 1980) (emphasis added). By plaintiffs’ admission, the legislation that Congress adopted to implement the WIPO Copyright Treaty (i.e., the DMCA) *did not* amend section 106 of the Copyright Law. See Plaintiffs’ Opposition, p. 13.¹¹ As already discussed, section 106 does not make actionable the mere offering or making available of a copyrighted work. Thus, plaintiffs’ reliance upon the WIPO Copyright Treaty is completely unwarranted.¹² The Court should therefore vacate the *Ex Parte* Order and quash the subpoena.

¹¹ Plaintiffs’ argument that section 106, although unamended, should be reinterpreted in light of subsequent congressional implementation of the WIPO Copyright Treaty is also unwarranted. The plaintiffs in *Napster*, *supra*, made a similar argument, contending that the Artists’ Rights and Theft Prevention Act of 2005 called for a reinterpretation of section 106. Judge Patel expressly rejected this argument, holding that the only legislative history and intent that mattered, for purposes of construing section 106, were those of the Congress that passed that section in 1976. In re Napster, *supra*, 377 F.Supp.2d at 805.

¹² Even if the “making available” right in the WIPO Copyright Treaty was enforceable, its meaning and scope have never been litigated and are subject to dispute. One commentator has argued that the term is

POINT IV

PLAINTIFFS' ARGUMENTS AGAINST SEVERANCE AND DISMISSAL ARE FRIVOLOUS

Plaintiffs argue that the other defendants' interests would best be served by perpetuating misjoinder of defendants, claiming that the other defendants may prefer to litigate jointly and that by severing the case now they "would be deprived of the opportunity even to take a position on joinder." Plaintiffs' Opposition, p. 21. Plaintiffs have no standing to speculate as to the preferences or interests of those whom they are suing; it clearly serves the financial and strategic interests of the record companies, not the defendants, for this case to proceed as a misjoined one. See BMG Music v. Does 1-203, 04 Civ. 0650, pp. 1-2 (E.D. Pa. Apr. 2004) ("Although it would be convenient and economical (for Plaintiffs) to have this Court preside over Plaintiffs' expedited discovery request, the Court simply cannot overcome its finding that the Defendants are not properly joined parties"); 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); In re Cases Filed By Recording Companies, General Order (W.D. Tex. Nov. 17, 2004) (Appendix "B" hereto) (dismissing all Doe defendants other than Doe No. 1, and ordering plaintiffs to file any future cases of this nature against one Doe defendant at a time, and not to join defendants for plaintiffs' convenience).

Plaintiffs cite Sony Music Entertainment v. Does 1-40, *supra*, and several unreported cases from other courts for the argument that ordering severance now would be premature. There is no merit whatsoever to this contention. In Sony, the movants *sought only to quash the*

meant to reach those who use bulletin board services (BBS) to make files available on the internet. See David L. Hayes, Advanced Copyright Issues on the Internet, 7 Tex. Intell. Prop. L.J. 1, 37-38 (1998). Such a use necessarily involves an initial upload (distribution) of files from a user's computer to a BBS, from which files may be downloaded by others, something which is not at issue here.

subpoena and raised the issue of misjoinder as one of the bases for quashing it. The Court recognized that the movants had “raise[d] a fair issue as to whether all these claims against forty apparently unrelated individuals should be joined in one lawsuit” but held that the posture of the case made consideration of misjoinder premature. Sony, supra, 326 F.Supp.2d at 568. The reason for this, however, was that the issue of misjoinder was germane not to a motion to quash but to a motion for severance, and the movants had moved only to quash the subpoena and *had not sought severance*. Sony, supra, 326 F.Supp.2d at 568. Here, defendant has expressly moved to sever and dismiss as to the misjoined defendants. In this context, Sony actually supports the relief sought here by defendant. Moreover, the courts in BMG Music v. Does 1-203, supra, and Interscope Records v. Does 1-25 (cited in our moving brief) also considered plaintiffs’ “prematurity” argument, and expressly rejected it.

Likewise, plaintiffs’ reliance on Loud Records, LLC v. Does 1-251, 05 Civ. 1202 (N.D. Cal. April 18, 2005), Atlantic Recording Corp. v. Does 1-25, 05 Civ. 9111 (S.D.N.Y. Jan. 3, 2006), and Virgin Records America, Inc. v. Does 1-8, 05 Civ. 1872 (S.D. Cal. Feb. 7, 2006), is unwarranted. In each of those cases, the courts recognized that joinder *requires* that the claims arise out of the *same* transaction or occurrence. These courts, however, appear to have been under the incorrect impression that they would have the opportunity to revisit the joinder issue later in the case, unaware that it was the RIAA’s intention all along to discontinue immediately after receiving the *ex parte* discovery. In two other cases – UMG Recordings v. Does 1-199, 04 Civ. 0931 (D.D.C. Mar. 10, 2004), and Priority Records LLC v. Does 1-8, 04 Civ. 113 (N.D. Cal. July 13, 2004) – there is no indication that the issue of joinder was even before those courts.

Plaintiffs’ attorneys now claim for the first time that defendants “participated in a common scheme or pattern of behavior” and in a “concerted action.” Plaintiffs’ Opposition, p. 23-24. The Complaint, however, does not allege any of this. On the contrary, paragraph 24 of the Complaint refers separately to the purported activity of “each Defendant”; not once does it refer to the defendants in the plural, let alone jointly or collectively. Moreover, courts ruling on complaints containing allegations identical to those here have held that the claims asserted against the various Doe defendants were not logically related to each other and had to be severed. Interscope Records v. Does 1-25, 04 Civ. 197, 2004 U.S. Dist. LEXIS 27782 at *6 (M.D. Fla. April 1, 2004), report and recomm. adopted, 04 Civ. 197, 2004 U.S. Dist. LEXIS 27778 (M.D. Fla. April 27, 2004); BMG Music v. Does 1-203, supra, 04 Civ. 0650, pp. 2-3.¹³

Based on the foregoing, it is clear that plaintiffs’ joinder of the 149 defendants in this case was improper. The Court should therefore sever and dismiss from the case all defendants other than the first defendant (Doe no. 1).

CONCLUSION

The Court should grant the within motion in all respects.

Respectfully submitted,

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¹³ What is more, since plaintiffs’ new averment is an obvious fabrication, the Court should consider ordering plaintiffs to show cause why sanctions should not be assessed against them, pursuant to Fed. R. Civ. P. 11(c)(1)(B).