IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF WEST VIRGINIA

Third World Media LLC	)	
	)	
v.	)	No. 3:10-cv-0090
	)	
Does 1-1,243	)	
	)	

MOTION OF THE ELECTRONIC FRONTIER FOUNDATION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF THIRD PARTY TIME WARNER CABLE'S MOTION TO QUASH OR MODIFY SUBPOENAS

The Electronic Frontier Foundation hereby moves to file an *amicus curiae* brief in the above-captioned actions in support of Time Warner Cable's ("TWC") motion of November 15, 2010, to quash Plaintiffs'[1] subpoenas for identifying information related to 1,213 TWC subscribers. (Proposed Brief is attached as Exhibit 1.)

STATEMENT OF INTEREST

The Electronic Frontier Foundation ("EFF") is a non-profit, member-supported digital civil liberties organization. As part of its mission, EFF has served as counsel or *amicus* in key cases addressing user rights to free speech, privacy, and innovation as applied to the Internet and other new technologies. With more than 14,000 dues-paying members, EFF represents the interests of technology users in both court cases and in broader policy debates surrounding the application of law in the digital age and publishes a comprehensive archive of digital civil liberties information at one of the most linked-to web sites in the world, www.eff.org. This case squarely impacts the interests of EFF members and the interests of anonymous speakers who we seek to protect. In its brief, EFF identifies critical First Amendment and due process requirements that must be taken into account before Plaintiffs are permitted to intrude upon the rights of anonymous Defendants.

ARGUMENT

Amicus seeks to file the attached brief because we are deeply concerned that mass copyright litigation against thousands of individual Internet users risks serious problems of fairness, due process, and individual justice. We are seeking to file a brief in support of TWC's motion to quash subpoenas seeking identity information in the above-captioned cases in which the same law firm (the "Adult Copyright Company") filed copyright claims on behalf of Plaintiffs against thousands of anonymous, independent John Doe Defendants from all over the country.[2]

---

[1] The arguments made is *Amicus*'s Motion and Memorandum are equally applicable to the identical cases filed in this Court and identified as Case Nos. 3:10-cv-0091 through 0096 but will not be repeated separately in those actions for the sake of judicial economy.

[2] As of November 1, 2010, by an informal count, over 50,000 people have been sued in similar

The federal courts have safeguards, both procedural and substantive, to protect the rights of individual defendants and to ensure that each person sued has his or her defenses evaluated individually. Those safeguards apply in all litigation, regardless of the legal claims made. Certainly, copyright infringement is a legitimate basis for suit and if many people engage in copyright infringement, many people may be sued. But regardless of the legitimacy of the litigation, the general safeguards developed by federal courts to ensure that all civil defendants get a fair chance to present their defenses should always apply.

Notwithstanding their allegations of copyright infringement, Plaintiffs do not appear to have demonstrated entitlement to discovery of the identities of the Doe Defendants. Moreover, while TWC flagged these problems in their capacity and from their perspective as an Internet service provider, *amicus* have identified other Constitutional shortcomings and are better positioned to discuss how Plaintiffs' efforts negatively impact the public interest.

In the attached brief, *amicus* discusses a series of problems with Plaintiffs' attempt to first sue and then subpoena the identities of thousands of anonymous Internet users. First, a federal court cannot consider a case unless it has personal jurisdiction over the Defendants. According to TWC, by analyzing the IP addresses provided by Plaintiffs, all of the Defendants associated with TWC Internet access appear to be located outside this Court's jurisdiction and have no known connection with the state. *See* Affidavit of Craig Goldberg in Support of Time Warner Cable Inc.'s Motion to Quash Subpoenas ("Goldberg Affidavit") at ¶ 13. As a result, the Court has no basis to enforce Plaintiffs' subpoenas or to exercise jurisdiction over the Defendants generally.

Second, Plaintiffs have joined hundreds and even thousands of Defendants in single

---

(in some cases nearly identical) Complaints arising from the alleged infringement of a single pornographic movie each. This includes 8,700 individuals sued in the Northern District of Texas alone in nine separate lawsuits. In addition, mass copyright complaints based on non-pornographic movies have also been brought against over 13,500 people in the District of Columbia. Attached as Exhibit 2 to this Motion is a chart summarizing these mass copyright infringement cases. A version of this chart is also available at http://w2.eff.org/files/copyright_troll_lawsuit.htm.

actions, improperly increasing the burdens of defense while decreasing the costs of prosecution. Joinder is permitted when each of the defendants is alleged to be engaged in a single conspiracy or joint course of conduct (*see, e.g., Ashworth v. Albers Medical, Inc.*, 395 F. Supp. 2d 395, 411 (S.D.W.Va.2005)) but courts have not allowed it where the only allegation is that defendants used the same ISP and/or Internet protocol to conduct copyright infringement, as in these cases. *See, e.g., Interscope Records v. Does 1-25*, 2004 U.S. Dist. LEXIS 27782 at *19 (M.D.Fla. Apr. 1, 2004) (magistrate recommended *sua sponte* severance of multiple defendants in action where only connection between them was allegation they used same ISP and P2P network to conduct copyright infringement); *BMG Music v. Does 1-203*, 2004 WL 953888 at *2, *4 (E.D. Pa. Apr. 2, 2004) (on motion for reconsideration, affirming order to sever 202 of 203 defendants in file-sharing litigation; noting that, *inter alia*, claims not only involved different properties, but different defenses: "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. ... Wholesale litigation of these claims is inappropriate, at least with respect to a vast majority (if not all) of Defendants.").

Finally, because the essence of discovery sought here is the identity of individuals engaged in anonymous online communication, the First Amendment applies and Plaintiffs must demonstrate their legitimate need for the information before being able to overcome the right to engage in anonymous speech. As explained (for example) last year in *Sinclair v. TubeSockTedD,* 596 F. Supp. 2d 128 (D.D.C. 2009), individuals engaged in anonymous online communication may be identified only if a plaintiff meets a multi-factor test designed to balance the right to seek redress for legitimate claims against the fundamental right to communicate anonymously. In particular, each Defendant must be given notice and opportunity to quash,[3] and

[3] Attached as Exhibit 3 to this Motion is a draft notice modeled on the procedures issued by the District Court for the Eastern District of Pennsylvania for mass copyright cases several years ago

each Plaintiff must come forward with *prima facie* evidence that each particular defendant infringed the Plaintiff's rights before a Defendant's identity is disclosed.

The litigation approach that Plaintiffs and their counsel have taken in this and the other similar pending lawsuits raises serious concerns over procedural fairness that this Court should address at the outset. *Amicus* are well positioned to address these issues. Given the potential impact of this Court's discovery decisions on literally thousands of individuals, many of whom are likely to be unfamiliar with legal process, physically located outside of this Court's jurisdiction, and unable to afford the expense of retaining an attorney to litigate their rights in this District when the individual can likely settle the case with the Plaintiffs for far less than legal fees would cost, *Amicus* respectfully ask the Court to allow the proposed brief so that these Constitutional issues may be given full consideration.

Dated: November 23, 2010

Respectfully submitted,

/s_Charles J. Kaiser, Jr._____
WV State Bar N0. 1946
Philips, Gardill, Kaiser & Altmeyer, PLLC.
61 Fourteenth Street
Wheeling, WV 26003
T: (304) 232-6810
F: (304) 232-4918
e-mail: cjkaiser@pgka.com
Local Counsel for the Electronic Frontier Foundation

/s_Matthew Zimmerman_____
Matthew Zimmerman (*pro hac vice* application pending)
mattz@eff.org
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
T: (415) 436-9333
F: (415) 436-9993
www.eff.org

---

and by the District Court for the District of Columbia for the cases currently pending there. *See* Exhibits C and D to *Amicus*'s Request for Judicial Notice ("RJN").

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

THIRD WORLD MEDIA LLC	)	
	)	
v.	)	**No. 3:10-cv-0090**
	)	
DOES 1-1,243	)	**Hon. John Preston Bailey**

CERTIFICATE OF SERVICE

I, Charles J. Kaiser, Jr., hereby certify that on the 23rd day of November, 2010, I electronically filed the foregoing **MOTION OF THE ELECTRONIC FRONTIER FOUNDATION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF THIRD PARTY TIME WARNER CABLE'S MOTION TO QUASH OR MODIFY SUBPOENAS**, with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following, and I hereby certify that I have mailed the foregoing document, by first-class U.S. Mail, to the following:

Susan R. Snowden, Esq.
MARTIN & SEIBERT, L.C.
1453 Winchester Avenue
P.O. Box 1286
Martinsburg, WV 25402-1286
Co-Counsel for Time Warner Cable, Inc.

Alexander Maltas, Esq.
LATHAN & WATKINS LLP
555 11th St. NW
Suite 1000
Washington, DC 20004
Co-Counsel for Time Warner Cable, Inc.

Kenneth J. Ford
Adult Copyright Company
322 W. Washington Street
Suite 8
Charles Town, WV 25414

/s/ Charles J. Kaiser, Jr.
Of Counsel

Charles J. Kaiser, Jr.
(WV State Bar No. 1946)
PHILLIPS GARDILL KAISER & ALTMEYER, PLLC
61 Fourteenth Street
Wheeling, West Virginia 26003
T: (304) 232-6810
F: (304) 232-4918
e-mail: cjkaiser@pgka.com
Local Counsel for the Electronic Frontier
Foundation
-and-
Matthew Zimmerman (*pro hac vice* application pending)
mattz@eff.org
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
T: (415) 436-9333
F: (415) 436-9993
www.eff.org

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF WEST VIRGINIA

Third World Media LLC	)	
	)	
v.	)	No. 3:10-cv-0090
	)	
Does 1-1,243	)	
	)	

MEMORANDUM OF *AMICUS CURIAE* ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF THIRD PARTY TIME WARNER CABLE'S MOTION TO QUASH OR MODIFY SUBPOENA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Legislative Authorities

Rules

INTRODUCTION

Plaintiffs'[1] subpoenas for the identities of thousands of anonymous Internet users should be evaluated in the context in which they were issued. These cases, along with a growing number of other mass copyright cases that are being filed across the country, raise serious problems of fairness, due process, and individual justice. In these cases different plaintiffs, represented by a few attorneys just recently converted to practicing copyright law, have sued thousands of anonymous, independent John Doe defendants from all over the country, each case alleging a single act of copyright infringement of a pornographic movie.[2]

The cases are not filed with the intention of litigating them. Instead, the plaintiffs' lawyers hope to take advantage of the threat of an award of statutory damages, as well as the stigma that is associated with downloading pornographic movies, to induce the Doe Defendants into settling their cases for payment that have frequently ranged from $1,500 to $2,500 dollars each. This amount is carefully chosen to be less than a defendant would likely have to spend just to hire a lawyer to defend the case. And strong defenses exist for many of the defendants. For example, it appears that, in these cases as elsewhere, Plaintiffs would be hard-pressed to prove either actual or statutory damages caused by any particular Defendant's activities.

The federal courts have safeguards, both procedural and substantive, to protect the rights of individual defendants and to ensure that each person sued has his or her defenses evaluated individually. Most importantly for these cases, given the pornographic subject matter of the film at issue, those safeguards include a process for determining whether the anonymity of an online

---

[1] The arguments made is *Amicus*'s Motion and Memorandum are equally applicable to the identical cases filed in this Court and identified as Case Nos. 3:10-cv-0091 through 0096 but will not be repeated separately in those actions for the sake of judicial economy.

[2] As of November 1, 2010, by an informal count, over 50,000 people have been sued in similar (in some cases nearly identical) Complaints arising from the alleged infringement of a single pornographic movie each. This includes 8,700 individuals sued in the Northern District of Texas alone in nine separate lawsuits. In addition, mass copyright complaints based on non-pornographic movies have also been brought against over 13,500 people in the District of Columbia. Attached as Exhibit 2 to *Amicus curiae*'s Motion for Leave to File is a chart summarizing these mass copyright infringement cases. A version of this chart is also available at http://w2.eff.org/files/copyright_troll_lawsuit.htm.

speaker must be abridged. Those safeguards apply in all litigation, regardless of the legal claims made. Certainly, copyright infringement is a legitimate basis for suit and if many people engage in copyright infringement, many people may be sued. But regardless of the legitimacy of the legal claims, the general rules developed by federal courts to ensure that all civil defendants get a fair chance to present their defenses should always apply.

First, based on Plaintiffs' own factual allegations, almost all of the Doe Defendants appear to be located outside this court's jurisdiction and do not appear to have sufficient contacts in West Virginia to support being haled into court here. Second, Plaintiffs have improperly joined hundreds and even thousands of unrelated Defendants in a single case, jeopardizing their right to an individual evaluation of their actions and defenses. Third, Plaintiffs have failed to identify the proper First Amendment legal test for the discovery the identity of persons who have communicated anonymously online, much less meet that test. As explained in (for example) last year in *Sinclair v. TubeSockTedD,* 596 F. Supp. 2d 128 (D.D.C. 2009), individuals who communicate anonymously online may be identified only if a plaintiff meets a multi-factor test designed to balance the right to seek redress for legitimate claims against the fundamental right to communicate anonymously. As discussed below, Plaintiffs are likely unable to meet that standard.

For any of these three reasons, Plaintiffs' subpoenas should be quashed and Plaintiffs should be instructed to:

1) re-file any action against each defendant individually,
2) bring suit against the individual Defendants in courts which appear likely to be able to properly exercise personal jurisdiction over the individual Defendants; and
3) meet the heightened First Amendment discovery standard prior to making any attempt to unmask the anonymous Defendants.

In addition, this Court should require that any future subpoenas in these cases seeking the identities of anonymous Defendants be accompanied by cover notices ordering the Internet service providers in question to:

1) notify, within seven days of service of the subpoena, any person whose information has been sought that such information may be disclosed and to briefly describe that person's rights and options for protecting such information; and
2) provide sufficient time and opportunity for the persons whose information has been sought to exercise those rights, such as by moving to quash. (Plaintiff should further be required to compensate the ISP for additional costs, if any, associated with providing notice.)

To assist the Court, we attach hereto a draft notice modeled on the procedures issued by the District Court for the Eastern District of Pennsylvania for mass copyright cases several years ago and by the District Court for the District of Columbia for the cases currently pending there. *See* Exhibit 3 to *Amicus*'s Motion for Leave to File; Exhibits C and D to *Amicus*'s Request for Judicial Notice ("RJN"). The notice has been further updated based on counsel's experience assisting individuals identified in these cases to better explain the situation and address common questions. Such procedures will help ensure that Plaintiffs, Defendants, and the ISPs involved all have a fair opportunity to represent their interests.

STATEMENT OF INTEREST

The Electronic Frontier Foundation ("EFF") is a non-profit, member-supported digital civil liberties organization. As part of its mission, EFF has served as counsel or *amicus* in key cases addressing user rights to free speech, privacy, and innovation as applied to the Internet and other new technologies, including several of the mass copyright infringement cases discussed herein. With more than 14,000 dues-paying members, EFF represents the interests of technology users in both court cases and in broader policy debates surrounding the application of law in the digital age, and publishes a comprehensive archive of digital civil liberties information at one of the most linked-to web sites in the world, www.eff.org.

This case squarely impacts the interests of *Amicus*'s members and the interests of anonymous Internet users. In this brief, *Amicus* identifies critical due process and First

Amendment requirements that must be taken into account before Plaintiffs are permitted to intrude upon the rights of the anonymous Doe Defendants.

ARGUMENT

I. Plaintiff Has Apparently Not Established That the Court Has Personal Jurisdiction Over at Least the Vast Majority of the Defendants.

At the outset, as TWC has noted in its Motion to Quash, Plaintiffs have not established that this Court has personal jurisdiction over any of the Defendants associated with TWC Internet accounts ("TWC Defendants") and for that matter will be further unlikely to do so for the vast majority of the Defendants associated with any other Internet service providers.[3] Consequently, the Court may not authorize or enforce any discovery Plaintiff seeks about or directed at those Defendants. *See, e.g., Enterprise Int'l v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 470-471 (5th Cir. 1985) (no authority to issue preliminary relief without personal jurisdiction). *Accord, United Elec., Radio and Mach. Workers of America v. 163 Pleasant Street Corp.*, 960 F.2d 1080, 1084 (1st Cir. 1982) (same).

The Constitution imposes on every plaintiff the burden of establishing personal jurisdiction as a fundamental matter of fairness, recognizing that no defendant should be forced to have his rights and obligations determined in a jurisdiction with which he has had no contact. These requirements "give[ ] a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that

[3] *Amicus* notes that the Court has apparently *sua sponte* restricted access to the public docket for all of the above cases. Such a decision, even if motivated by a desire to provide some level of privacy protection for the Defendants accused of downloading pornographic films, may ironically do the opposite by increasing the burden on Defendants who wish to understand the allegations against them so that they can determine how to respond. Moroever, limiting public access to court documents shields Plaintiffs' litigation campaign from public scrutiny. *See, e.g., In re Knight Publishing Co.*, 743 F.2d 231 (4th Cir.1984) (holding that a court must first give the public notice of a request to seal and a reasonable opportunity to challenge it "reasonably in advance of deciding the issue."; the court must also consider less drastic alternatives to sealing and, if it decides to seal documents, must "state the reasons for its decision to seal supported by specific findings, and the reasons for rejecting alternatives to sealing in order to provide an adequate record for review."); *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 203 F.3d 291, 303 (4th Cir. 2000) ("Publicity of such records, of course, is necessary in the long run so that the public can judge the product of the courts in a given case."). *Amicus* urges the Court to permit public access to the dockets in the above-captioned cases.

conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980). Accordingly, the Plaintiffs bear the burden of pleading specific facts sufficient to support the Court's exercise of personal jurisdiction over the Defendants. Simply reciting personal jurisdiction requirements is not enough, nor are the assertions of naked legal conclusions; rather, Plaintiffs must assert the factual basis underlying their claims. *See, e.g., McLaughlin v. McPhail,* 707 F.2d 800, 806-07 (4th Cir. 1983) (plaintiff must allege specific facts connecting the defendant with the forum to make a *prima facie* showing of personal jurisdiction and "the bare allegations of conspiracy or agency is insufficient to establish personal jurisdiction."); *Wince v. Easterbrooke Cellular Corp.*, 681 F. Supp. 2d 688, 691 (N.D. W.Va. 2010) (Judge Bailey) ("[T]he plaintiff bears the burden of producing facts that support the existence of jurisdiction.") (*citing Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc.*, 334 F.3d 390, 396 (4th Cir. 2003) ("When personal jurisdiction is properly challenged under Rule 12(b)(2), the jurisdictional question is to be resolved by the judge, with the burden on the plaintiff.")).

Plaintiffs cannot make a *prima facie* showing that this Court has personal jurisdiction over the Defendants, be it under a theory of domicile or "minimum contacts." *See Milliken v. Meyer*, 311 U.S. 457, 463-64 (1940), *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). As demonstrated in the Affidavit of Craig Goldberg in Support of Time Warner Cable Inc.'s Motion to Quash Subpoenas ("Goldberg Affidavit") at ¶ 13, *none of the IP addresses identified in Plaintiffs' subpoenas to TWC corresponds to a West Virginia subscriber.* This is a fact that Plaintiffs could readily have discerned through publicly available information at the time of the filing of their complaints. *See* [TWC's] Memorandum in Support of Non-Party Time Warner Cable Inc.'s Motion to Quash Subpoenas at p. 11. Without any *prima facie* evidence to support the claim that the alleged infringement took place within the state, Plaintiffs cannot establish minimum contacts and therefore the Court cannot exercise personal jurisdiction over the Defendants in question. Given that the Plaintiffs (represented by the same counsel) undoubtedly

followed the same procedures to identify the IP addresses, it is highly likely that the same will be true of the Does who subscribe to other ISPs.

To the extent that Plaintiffs are suggesting a more expansive theory of personal jurisdiction based on the cross-border accessibility of information on the Internet, that argument too must fail on the basis of insufficient contacts. The mere fact that the Internet permits access to information by residents of every state as well as other countries does not mean that the person engaged in that activity can be sued anywhere in the United States. As the Fourth Circuit explained in *ALS Scan v. Digital Service Consultants*, 293 F.3d 707 (4th Cir. 2002):

> The argument could . . . be made that the Internet's electronic signals are surrogates for the person and that Internet users conceptually enter a State to the extent that they send their electronic signals into the State, establishing those minimum contacts sufficient to subject the sending person to personal jurisdiction in the State where the signals are received. Under this argument, the electronic transmissions symbolize those activities ... within the state which courts will deem to be sufficient to satisfy the demands of due process. But if that broad interpretation of minimum contacts were adopted, State jurisdiction over persons would be universal, and notions of limited State sovereignty and personal jurisdiction would be eviscerated.
>
> In view of the traditional relationship among the States and their relationship to a national government with its nationwide judicial authority, it would be difficult to accept a structural arrangement in which each State has unlimited judicial power over every citizen in each other State who uses the Internet. . . . That thought certainly would have been considered outrageous in the past when interconnections were made only by telephones. . . . But now, even though the medium is still often a telephone wire, the breadth and frequency of electronic contacts through computers has resulted in billions of interstate connections and millions of interstate transactions entered into solely through the vehicle of the Internet.

Id. at 712-713 (citations omitted).

Accordingly, the Fourth Circuit limited the exercise of personal jurisdiction based on Internet usage to situations the defendant "(1) directs electronic activity into the State, (2) with the manifested intent of engaging in business or other interactions within the State, and (3) that activity creates, in a person within the State, a potential cause of action cognizable in the State's courts. Under this standard, a person who simply places information on the Internet does not subject himself to jurisdiction in each State into which the electronic signal is transmitted and received." *Id.* at 714.

In the immediate case, even assuming that each of the Defendants knew that they were infringing one of Plaintiffs' copyrights, there is no evidence that Plaintiffs have any connection to West Virginia. And even more significantly, Plaintiffs have made no *prima facie* showing that any of the Defendants had any idea that the Plaintiffs would suffer any harm in West Virginia or indeed was even aware of any connection between the Plaintiffs and West Virginia at all.[4]

Indeed, requiring individuals from across the country to litigate in this District creates exactly the sort of hardship and unfairness that the personal jurisdiction requirements exist to prevent. It requires that the individuals urgently secure counsel far from home where they are unlikely to have contacts. In this particular instance, the hardship is very clear. When the underlying claim is a single count of copyright infringement, the cost of securing counsel even to move to quash a subpoena is likely more than the cost of settlement and possibly even more than the cost of judgment if the Defendant lost in the litigation entirely.

Plaintiffs' failure to meet their jurisdictional burden is to be determined before discovery is issued, not after. To the extent that Plaintiffs argue that they must be able seek discovery so that it can discover facts to support its jurisdictional allegations, this effort too must fail.

While some courts have permitted limited jurisdictional discovery where a plaintiff has alleged incomplete jurisdictional facts, no basis exists to allow such discovery here. As this Court noted earlier this year:

> As the Fourth Circuit has explained, "[w]hen a plaintiff offers only speculation or conclusory assertions about contacts with a forum state, a court is within its discretion in denying jurisdictional discovery." *Carefirst of Md., Inc.* [v. *Carefirst Pregnancy Ctrs., Inc.*], 334 F.3d [390,] 402 [(4th Cir. 2003)]. Likewise, if "the plaintiff simply wants to conduct a fishing expedition in the hopes of discovering some basis of jurisdiction," a court may deny a request for discovery. *Base Metal*

[4] In *Amicus*'s experience, among the defendants often swept into mass copyright infringement suits such as this one are individuals who did not themselves download the song or movie in question, but simply made the mistake of maintaining an unsecured wireless network that allowed neighbors to obtain Internet access. Whether or not such individuals can be sued for copyright infringement, at the very least those individuals did not knowingly direct tortious activity at West Virginia.

Trading, Ltd. v. OJSC Novokuznetsky Aluminum Factory, 283 F.3d 208, 216, n. 3 (4th Cir. 2002).

Wince, 681 F. Supp. 2d at 691. Where, as here, the Plaintiffs' own factual allegations regarding IP addresses plainly serve only to demonstrate the absence of proper jurisdiction, the Court should decline to extend this case further.

II. The Joinder of Hundreds of Individual Defendants Who Engaged in Entirely Disparate Alleged Acts in Single Actions is Improper Under Federal Rule 20.

There is little doubt that Plaintiffs' joinder of hundreds of Defendants per action is improper and runs the tremendous risk of creating unfairness and denying individual justice to those sued. Mass joinder of individuals has been disapproved by federal courts in copyright infringement cases based on computer downloads before. As one court noted:

> 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. . . . Wholesale litigation of these claims is inappropriate, at least with respect to a vast majority (if not all) of Defendants.

BMG Music v. Does 1-203, No. Civ.A. 04-650, 2004 WL 953888, at *1 (E.D. Pa. Apr. 2, 2004) (severing lawsuit involving 203 defendants).

Rule 20 requires that, for parties to be joined in the same lawsuit, the claims against them must arise from a single transaction or a series of closely related transactions. Specifically:

> Persons . . . may be joined in one action as defendants if: (A) any right to relief is asserted against them jointly, severally or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all defendants will arise in the action.

FED. R. CIV. P. 20. Thus, multiple defendants may be joined in a single lawsuit only when three conditions are met: (1) the right to relief must be "asserted against them jointly, severally or in the alternative"; (2) the claim must "aris[e] out of the same transaction, occurrence, or series of transactions or occurrences"; and (3) there must be a common question of fact or law common to all the defendants. *Id.*

Joinder based on separate but allegedly similar behavior by individuals using the Internet to commit copyright infringement has been rejected by courts across the country. In *LaFace Records, LLC v. Does 1-38*, No. 5:07-CV-298-BR, 2008 WL 544992 (E.D.N.C. Feb. 27, 2008), the court ordered severance of lawsuit against thirty-eight defendants where each defendant used the same ISP as well as some of the same peer-to-peer ("P2P") networks to commit the exact same violation of the law in exactly the same way. The court explained: "[M]erely committing the same type of violation in the same way does not link defendants together for purposes of joinder." *LaFace Records*, 2008 WL 544992, at *2. In *BMG Music v. Does 1-4*, No. 3:06-cv-01579-MHP, 2006 U.S. Dist. LEXIS 53237, at *5-6 (N.D. Cal. July 31, 2006), the court *sua sponte* severed multiple defendants in action where the only connection between them was allegation they used same ISP to conduct copyright infringement. *See also, e.g., Interscope Records v. Does 1-25*, No. 6:04-cv-197-Orl-22DAB, 2004 U.S. Dist. LEXIS 27782 (M.D. Fla. Apr. 1, 2004) (magistrate recommended *sua sponte* severance of multiple defendants in action where only connection between them was allegation they used same ISP and P2P network to conduct copyright infringement); *BMG Music*, No. Civ. A. 04-650, 2004 WL 953888, at *1 (severing lawsuit involving 203 defendants); General Order, *In re Cases Filed by Recording Companies*, filed in *Fonovisa, Inc. et al. v. Does 1-41* (No. A-04-CA-550 LY), *Atlantic Recording Corporation, et al. v. Does 1-151* (No. A-04-CA-636 SS), *Elektra Entertainment Group, Inc. et al. v. Does 1-11* (No. A-04-CA-703 LY); and *UMG Recordings, Inc., et al. v. Does 1-51* (No. A-04-CA-704 LY) (W.D. Tex. Nov. 17, 2004), (Exhibit A to RJN) (dismissing without prejudice all but first defendant in each of four lawsuits against a total of 254 defendants accused of unauthorized music file-sharing); Order Granting in Part and Denying in Part Plaintiffs' Miscellaneous Administrative Request for Leave to Take Discovery Prior to Rule 26 Conference, *Twentieth Century Fox Film Corp., et al., v. Does 1-12*, No. C-04-04862 (N.D. Cal Nov. 16, 2004) (in copyright infringement action against twelve defendants, permitting discovery

as to first Doe defendant but staying case as to remaining Does until plaintiff could demonstrate proper joinder) (Exhibit B to RJN).[5]

Allegations that the Defendants in the immediate cases used (for example) the same type of software to infringe Plaintiffs' copyrights do not establish meet the requirements of Rule 20. *See*, e.g., *Nassau County Ass'n of Ins. Agents, Inc., v. Aetna Life & Cas. Co.*, 497 F.2d 1151, 1154 (2d Cir. 1974) (refusing to allow 164 insurance companies to be joined in a single action on the basis that they allegedly used the same methods to cheat agents, describing that attempted joinder as "a gross abuse of procedure."). Neither do allegations that Defendants downloaded the same movie. Whether the alleged infringement concerns a single copyrighted work or many, it was committed by unrelated Defendants, at different times and locations, sometimes using different services, and perhaps subject to different defenses. Such an attenuated relationship is not sufficient for joinder. *See BMG Music v. Does 1-203*, 2004 WL 953888, at *1.

Even if the requirements for permissive joinder under Rule 20(a)(2) are met, the district court has broad discretion to refuse joinder or to sever the case under Rule 21 in the interest of avoiding prejudice and delay, ensuring judicial economy, or safeguarding principles of fundamental fairness. *See, e.g., Acevedo v. Allsup's Convenience Stores*, 600 F.3d 516, 521 (5th Cir. 2010) (citing *Applewhite v. Reichhold Chems.*, 67 F.3d 571, 574 (5th Cir. 1995), *Morris v. Northrop Grumman*, 37 F.Supp.2d 556, 581 (E.D.N.Y.1999), and *Coleman v. Quaker Oats*, 232 F.3d 1271, 1296 (9th Cir. 2000)). The Court should at minimum exercise that discretion here. Joining thousands of unrelated Defendants in one lawsuit here may make litigation less expensive for Plaintiffs by enabling them to avoid the separate filing fees required for individual cases and by enabling its counsel to avoid travel, but that does not mean these well-established

[5] *Amicus* recognizes the judicial analysis was not universal. *See, e.g., Motown Records v. Does 1-252*, No. 1:04-CV-439-WBH (N.D.Ga. Aug. 16, 2004) (denying motion to quash); *Virgin Records Am. v. Does 1-44*, No. 1:04-CV-0438-CC (N.D. Ga. 2004) (granting leave to take expedited discovery); *Sony Music Entm't, Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 564 (S.D.N.Y. 2004) (applying First Amendment balancing test but denying as premature motion to quash as to misjoinder and lack of personal jurisdiction).

joinder principles need not be followed.[6] Because the improper joining of hundreds or even thousands of Doe Defendants into single lawsuits raises serious questions of individual fairness and individual justice, the Court should sever all but the first Doe Defendant from the case. *See* FED. R. CIV. P. 21.

III. Plaintiffs Have Not Satisfied the Requirements Imposed by the First Amendment On Litigants Seeking to Unmask Anonymous Speakers.

Plaintiffs' dragnet litigation strategy raises other serious Constitutional issues beyond those related to jurisdiction and joinder, namely the heightened First Amendment requirements of civil litigants prior to the discovery of the identities of anonymous speakers. Especially given the number of Doe Defendants affected, it is crucial that the Court apply the correct procedure here and set an example of what appropriate procedures must be followed before individuals' identities can be disclosed.

A. The Right to Engage in Anonymous Speech is Protected by the First Amendment.

The United States Supreme Court has consistently defended the right to anonymous speech in a variety of contexts, noting that "[a]nonymity is a shield from the tyranny of the majority . . . [that] exemplifies the purpose [of the First Amendment] to protect unpopular individuals from retaliation . . . and at the hand of an intolerant society." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995); *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 192 (1999); *Talley v. California*, 362 U.S. 60, 64 (1960). This fundamental right enjoys the same protections whether the context for speech and association is an anonymous political leaflet, an Internet message board or a video-sharing site. *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (there is "no basis for qualifying the level of First Amendment scrutiny that should be applied to" the Internet). *See also, e.g., Doe v. 2themart.com*, 140 F. Supp. 2d 1088, 1092 (W.D.

[6] Several courts that have considered joinder in mass infringement cases have also noted that by filing a single lawsuit, the plaintiffs have avoided paying multiple filing fees. *See, e.g.*, General Order, *In re: cases filed by Recording Companies* (Exhibit A to RJN) (ordering severance of 254 defendants sued in four cases before it, and noting that: "[t]he filing fees for the recent four cases totaled $600, whereas the filing fees for 254 separate cases would have been $38,100.").

Wash. 2001) (stating that the Internet promotes the "free exchange of ideas" because people can easily engage in such exchanges anonymously); *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999) ("People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity.").

First Amendment protection extends to the anonymous publication of expressive works on the Internet, even if the publication is alleged to infringe copyrights. *See Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 564 (S.D.N.Y. 2004) ("Sony") ("The use of P2P file copying networks to download, distribute or make sound recordings available qualifies as speech entitled to First Amendment protection."). *See also, e.g., In re Verizon Internet Servs. Inc.*, 257 F. Supp. 2d 244, 260 (D.D.C.), *rev'd on other grounds*, 351 F.3d 1229 (D.C. Cir. 2003); *Interscope Records v. Does*, 558 F. Supp. 2d 1176, 1178 (D. Kan. 2008); *UMG Recordings, Inc. v. Does 1-4*, No. 06-0652 , 2006 WL 1343597, at *2 (N.D. Ca. Mar. 6, 2006). In *Sony*, for example, the court concluded that a file sharer is "making a statement" by downloading a work without charge or license. *Sony*, 326 F. Supp. 2d at 564. In addition, a file sharer is expressing himself through the selection of content and by making it available to others. *Id.* While sharing creative content is not "political expression" entitled to the "broadest protection," a file sharer is still entitled to "some level of First Amendment protection." *Id.*

Because the First Amendment protects anonymous speech and association, efforts to use the power of the courts to pierce anonymity are subject to a qualified privilege.[7] Courts must "be vigilant . . . [and] guard against undue hindrances to . . . the exchange of ideas." *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 192 (1999). Just as in other cases in which litigants seek information that may be privileged, courts must consider the privilege before authorizing discovery. *See, e.g., Sony*, 326 F. Supp. at 565 ("Against the backdrop of First Amendment

[7] A court order, even if granted to a private party, is state action and hence subject to constitutional limitations. *See, e.g., New York Times v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948).

protection for anonymous speech, courts have held that civil subpoenas seeking information regarding anonymous individuals raise First Amendment concerns."); *Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987) (*citing Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977)) ("[W]hen the subject of a discovery order claims a First Amendment privilege not to disclose certain information, the trial court must conduct a balancing test before ordering disclosure.").

The Constitutional privilege to remain anonymous is not absolute. Plaintiffs may properly seek information necessary to pursue meritorious litigation. *See, e.g., Doe v. Cahill*, 884 A.2d 451, 456 (Del. 2005) ("Certain classes of speech, including defamatory and libelous speech, are entitled to no constitutional protection."). However, litigants may not use the discovery power to uncover the identities of people without an appropriate basis. Accordingly, courts evaluating attempts to unmask anonymous speakers in cases similar to the one at hand have adopted standards that balance one person's right to speak anonymously with a litigant's legitimate need to pursue a claim.

To properly balance the First Amendment interests of defendants with the rights of plaintiffs to pursue meritorious litigation in the online context, courts have long relied on the seminal case of *Dendrite Int'l, Inc. v. Doe No. 3* in which the New Jersey Appellate Division adopted a four-prong test for protecting anonymous speakers.[8] *See generally Dendrite*, 775 A.2d

[8] Examples of state courts applying a heightened standard such as the one provided in *Dendrite* include: *Mobilisa, Inc. v. Doe*, 170 P.3d 712, 720 (Ariz. Ct. App. 2007) (holding that a motion to dismiss standard "set[s] the bar too low, chilling potential speakers from speaking anonymously on the internet" and that requiring a plaintiff to put forth all elements of a prima facie case instead of merely a short and plain statement showing the plaintiff is entitled to relief ensures "redress [for] legitimate misuses of speech rather than . . . a means to retaliate against or chill legitimate uses of speech."); *Doe v. Cahill*, 884 A.2d 451, 460 (Del. 2005) ("We conclude that the summary judgment standard is the appropriate test by which to strike the balance between a defamation plaintiff's right to protect his reputation and a defendant's right to exercise free speech anonymously."); *Krinsky v. Doe 6*, 159 Cal. App. 4th 1154 (Cal. App. 6 Dist. 2008); *Independent Newspapers v. Brodie*, 407 Md. 415, 966 A.2d 432 (2009); *Solers, Inc. v. Doe*, 977 A.2d 941 (DC 2009); and *Mortgage Specialists v. Implode-Explode Heavy Industries*, 999 A.2d 184 (N.H. 2010). Federal courts applying such tests include *Highfields Capital Mgmt, L.P. v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2005); *Doe I and Doe II v. Individuals whose true names are unknown*, 561 F. Supp. 2d 249 (D. Conn. 2008); *Best Western Int'l v Doe*, 2006 WL 2091695 (D. Ariz. Jul. 25 2006); *Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128 (D.D.C. 2009);

756 (N.J. App. 2001). Under *Dendrite*, a plaintiff must:

1) make reasonable efforts to notify the accused Internet user of the pendency of the identification proceeding and explain how to present a defense;

2) set forth the exact actions of each Doe defendant that constitute actionable cause;

3) allege all elements of the cause of action and introduce prima facie evidence for each Doe defendant sufficient to survive a motion for summary judgment; and

4) "[a]ssuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed."

Dendrite, 775 A.2d at 760-61. The *Dendrite* test most accurately and cogently outlines the important First Amendment interests of the Doe defendants and should be applied here.

B. As Plaintiffs' Subpoenas Cannot Survive the Scrutiny Required by the First Amendment, They Must Be Quashed.

The Plaintiffs fail the *Dendrite* test and their subpoenas should be quashed.

1. Plaintiffs Must Make an Individualized *Prima Facie* Showing as to Each Defendant.

In order to meet their burden under the First Amendment, Plaintiffs must make individualized *prima facie* allegations as to each Defendant and support each of those allegations with competent evidence. To begin with, the production of an IP address and date and time associated with each alleged act of infringement are insufficient as they merely amount to conclusory allegations. Similarly insufficient would be allegations based on the purported use of "proprietary" methods to ascertain those times an IP addresses, a common strategy in previous mass copyright lawsuits. Instead of conclusory, generalized showings, Plaintiffs must instead present *specific* evidence resulting from the investigation and such evidence must be submitted for *each* Defendant.

USA Technologies, Inc. v. Doe, 713 F. Supp. 2d 901 (N.D. Cal. 2010); and *Salehoo v. Doe*, 2010 WL 2773801 (W.D. Wash. July 12, 2010).

At minimum, each Plaintiff must document the investigative process actually used to obtain their proffered allegations about each and every Defendant, as well as competent evidence that would permit Defendants (and the Court) to evaluate any utilized technology's reliability and completeness. Without such evidence the Court must simply take Plaintiffs' word for it that methods are in any way reliable, that it indeed downloaded the copyrighted movie in question from each Defendant, and that the IP addresses it provided are the IP addresses collected during this investigation, to ensure that no one is being falsely accused of downloading these pornographic movies. Such a requirement would be reasonable and consistent with the requirements set forth by other courts in similar filing sharing cases which have found the *prima facie* burden met with the submission of screen shots showing the IP addresses of each Defendant so the court can see that the addresses submitted to the court match those discovered during the investigation, copies or real-time capture of the activities of the "licensed technologies" used, proof that the downloaded movie was the same as the Plaintiffs' original film, and shots of the P2P server logs to which the Plaintiff claims to have had access. *See, e.g., Elektra Ent. Group, Inc. v. Does 1-9*, No. 04 Civ. 2289, 2004 WL 2095581, at *4 (S.D.N.Y. 2004). Such evidence is already available to the Plaintiffs prior to discovery and should be provided as part of a *prima facie* showing. *See Dendrite*, 775 A.2d at 154-55 (presenting allegations of a link between Defendant's posts and stock prices without proof of causation was not sufficient to survive the heightened discovery standard provided by the First Amendment).

2. Given Plaintiffs' Meager Factual Showing and the Immense Harm to Defendants That Would Occur If Plaintiffs' Subpoenas Were Enforced, Defendants' First Amendment Interests Strongly Outweigh Plaintiffs' "Need" for Their Identities.

Even if Plaintiffs could marginally satisfy the other steps of the Doe standard required by the First Amendment as set forth in *Dendrite* et al., the Court must still "balance the defendant's First Amendment right of anonymous free speech against the strength of the *prima facie* case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed." *Dendrite*, 775 A.2d at 760-61. To be sure, creators of

pornography have the same protections as other copyright holders, but given the pornographic nature of the material the Plaintiffs allege has been improperly downloaded, the risk of reputational harm resulting from a mistaken identification is quite high. And especially given the Plaintiffs' improper joinder of over hundreds and possibly thousands of Defendants over whom the Court cannot exercise personal jurisdiction, as well as the lack of transparency as to the means by which the Plaintiff generated its list of "infringers," the Court should exercise great caution and prevent Plaintiffs from bypassing procedural protections and take shortcuts to achieve their ends.

While Plaintiffs may not have fully elaborated on their motives in bringing suit, the invasive, sweeping manner in which it was brought indicates that they hope to leverage the risk of public embarrassment to convince Defendants to quickly capitulate, whether or not they did anything wrong. A plaintiff's lawyer in a recent similar mass porn downloading case has not been shy about telling the press that he expects defendants there to promptly settle precisely because many people who are accused of downloading pornography are unwilling to risk being publicly identified as having done so. For example, he recently told the *Texas Lawyer*: "You have people that might be OK purchasing music off iTunes, but they're not OK letting their wife know that they are purchasing pornography... Most people just call in to settle. We have a 45 percent settlement rate." John Council, *Adult Film Company's Suit Shows Texas Is Good for Copyright Cases*, TEXAS LAWYER, Oct. 4, 2010, available at http://www.law.com/jsp/tx/PubArticleTX.jsp?id=1202472786304&slreturn=1&hbxlogin=1.

Indeed, Plaintiffs' lawsuits are consistent with a coordinated strategy of porn industry representatives who have clearly indicated that the coercive threat of public disclosure motivates the recent increase in dragnet copyright cases brought by porn publishers. Discussing this new litigation strategy, a representative of production company Pink Visual, which recently "rall[ied] dozens of adult entertainment studio operators at an unprecedented Content Protection Retreat in Arizona in October to train in ways to combat piracy and defend intellectual property," stated in an interview with Agence France Presse:

> "It seems like it will be quite embarrassing for whichever user ends up in a lawsuit about using a popular shemale title," Vivas said, using a term that refers to a person who has female features but male genitalia.
>
> "When it comes to private sexual fantasies and fetishes, going public is probably not worth the risk that these torrent and peer-to-peer users are taking."

Porn Titans Come Together to Expose Pirates, THE INDEPENDENT, September 27, 2010, available at http://www.independent.co.uk/arts-entertainment/films/porn-titans-come-together-to-expose-pirates-2090786.html.

Moreover, the proffered settlement amounts in such cases appear to be carefully selected to be less than most defendants would have to spend to hire a lawyer to defend themselves, even though it is significantly more than the plaintiffs stand to gain from an award of actual damages. Plaintiffs' lawyers in this area are able to demand settlements in the four-figure range because they can threaten both public exposure and the terrifying spectre of a statutory damages award. Such relief, however, appears to be unavailable in at least two of the above captioned cases ("Pornstar Superheroes," Plaintiff Patrick Collins, Inc., Case No. 3:10-CV-91; "Massive Asses 5," Plaintiff Patrick Collins, Inc., Case No. 3:10-CV-92) for some or all of the IP-address-identified Defendants because the movies in question were not timely registered.[9] *See* 17 U.S.C. § 412 (infringement suit for statutory fees and/or attorney's may only be brought if work in question is registered prior to the alleged act of infringement or within three months after publication). Plaintiff Patrick Collins, Inc.'s quest for identifying information in this case, therefore, appears to be largely an effort to use the judicial process to extract settlements on a mass scale.

---

[9] Neither movie was registered within the three month window set forth in 17 U.S.C. § 412; consequently, Plaintiff Patrick Collins, Inc., could only bring suit for statutory and attorney's fees for infringement that took place after the date of registration. Both "Pornstar Superheroes" and "Massive Asses 5" were registered on August 6, 2010. The following Defendants (identified by the "Doe" number provided in the respective subpoena) allegedly infringed the work in question before the date of registration (*i.e.*, during a period in which statutory damages are not available to the Plaintiff):

- Pornstar Superheroes: Does No. 1-281 (*i.e.*, 100% of Defendants).
- Massive Asses 5: Does No. 7-19, 62-64, 81-87, 100-105 (*i.e.*, 23% of Defendants).

The success or failure of Plaintiffs' lawsuits should ultimately rest on the merits of its case, not upon the risk of targeting through an insufficiently pled and improperly joined "name and shame" campaign. The Court should at minimum require that Plaintiffs resolve the serious shortcomings in their evidentiary showing before the Court authorizes any discovery to proceed.

3. Plaintiff Must Notify Defendants of Its Pending Claim and Its Efforts to Unmask Them.

In addition to the substantive requirements identified by *Dendrite* and its progeny, the First Amendment also requires that the anonymous Defendants be given adequate notice of the pending action and of Plaintiff's attempts to unmask them. *Dendrite*, 775 A.2d at 760-61. Plaintiffs must be required to make such efforts so that Defendants can fully explore defenses available to them. While TWC and *Amicus* have flagged some of the handful of serious problems with Plaintiffs' campaign, unique Defendants may have unique defenses separate from those discussed here that by definition cannot be raised prior to the point that Defendants are aware that the litigation even exists.

Accordingly, in the event that it permits discovery to go forward, this Court should require that any subpoena in this case issued by a Plaintiff to an Internet Service Providers (ISP) seeking the identity of anonymous Internet users must be accompanied by a cover notice ordering the ISP:

> (a) to notify, within seven days of service of the subpoena, any person whose information has been sought that such information may be disclosed, and briefly describe their rights and options for protecting such information; and
>
> (b) to provide sufficient opportunity for the subscriber to exercise those rights, such as by moving to quash. (Plaintiff may be required to compensate the ISP for additional costs, if any, associated with providing notice.)

To assist the Court, *Amicus* has attached as Exhibit 3 to its Motion for Leave File a draft notice modeled on the procedures issued by the District Court for the Eastern District of Pennsylvania in mass copyright cases brought before it several years ago and by the District Court for the District of Columbia for cases currently pending there. *See* Exhibits C and D to RJN. The notice has been further updated based on counsel's experience assisting individuals

identified in these cases to better explain the situation and address common questions. Such procedures will help ensure that Plaintiffs, Defendants, and the ISPs involved all have a fair opportunity to represent their interests.

CONCLUSION

Plaintiffs have the right to seek legal redress for alleged copyright infringement, but they must follow the basic procedures and due process requirements applicable to all civil litigation. Failure to abide by these procedures is not only contrary to law, it puts anonymous Defendants at a disadvantage where they will first lose their Constitutionally protected anonymity, and then find settlement economically more feasible than litigation in a foreign jurisdiction, even though they may have committed no unlawful act or may otherwise have meritorious defenses.

Amicus therefore respectfully urges this Court to grant TWC's motion to quash Plaintiffs' subpoenas request for early discovery on the grounds that (a) it lacks personal jurisdiction over the Defendants, (b) the Defendants were improperly joined together in these mass actions, and (c) that Plaintiffs cannot meet the requirements of the First Amendment designed to protect anonymous speech. Morevoer, given the unavoidable jurisdictional and joinder deficiencies inherent in Plaintiffs' Complaints, *Amicus* suggest that the Court dismiss the action *sua sponte* and require that Plaintiffs refile individual cases against individual Defendants in courts that can properly exercise jurisdiction.

Dated: November 23, 2010

Respectfully submitted,

/s Charles J. Kaiser, Jr.
WV State Bar N0. 1946
Philips, Gardill, Kaiser & Altmeyer, PLLC.
61 Fourteenth Street
Wheeling, WV 26003
T: (304) 232-6810
F: (304) 232-4918
e-mail: cjkaiser@pgka.com
Local Counsel for the Electronic Frontier Foundation

/s Matthew Zimmerman
Matthew Zimmerman (*pro hac vice* application pending)
mattz@eff.org
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
T: (415) 436-9333
F: (415) 436-9993
www.eff.org

EXHIBIT 2

Recent Mass Copyright Lawsuits Against Anonymous Defendants

Case Name	Case No.	Lawfirm	Location	Date Filed	# of Doe Defendants	Adult?
"Neither ACS nor Gallant Macmillan have taken one of the copyright infringement cases to court."		ACS:Law & Gallant Macmillan	UK	not clear	over 10,000 demand letters	Yes
G2 Productions LLC v. Does 1-83	10-cv-00041	US Copyright Group (Dunlap, Grubb and Weaver, PLLC)	D.D.C.	8-Jan-10	83	No
Worldwide Film Entertainment LLC v. Does 1-749	10-cv-00038	US Copyright Group (Dunlap, Grubb and Weaver, PLLC)	D.D.C.	8-Jan-10	749	No
Achete/Neunte Boll Kino Beteilingungs GMBH & CO KG v. Does 1-4,577	10-cv-00453	US Copyright Group (Dunlap, Grubb and Weaver, PLLC)	D.D.C.	18-Mar-10	4,577	No
Call of the Wild Movie, LLC v. Does 1-358	10-cv-00455	US Copyright Group (Dunlap, Grubb and Weaver, PLLC)	D.D.C.	19-Mar-10	358	No
West Bay One v. Does 1-2,000	10-cv-00481	US Copyright Group (Dunlap, Grubb and Weaver, PLLC)	D.D.C.	23-Mar-10	2,000	No
Maverick Entertainment Group, Inc. v. Does 1-1000	10-cv-00569	US Copyright Group (Dunlap, Grubb and Weaver, PLLC)	D.D.C.	8-Apr-10	1,000	No
Voltage Pictures v. Does 1-5,000	10-cv-00873	US Copyright Group (Dunlap, Grubb and Weaver, PLLC)	D.D.C.	24-May-10	5,000	No
On the Cheap, LLC v. Does 1-5,011	10-cv-04472	Law Offices of Ira M. Siegel	N.D. Cal.	4-Oct-10	5,011	Yes
Third World Media, LLC v. Does 1-1,568	10-cv-04470	Law Offices of Ira M. Siegel	N.D. Cal.	4-Oct-10	1,568	Yes
Patrick Collins, Inc. v. Does 1-1,219	10-cv-04468	Law Offices of Ira M. Siegel	N.D. Cal.	4-Oct-10	1,219	Yes

Media Products Inc. v. Does 1-1,257	10-cv-04471	Law Offices of Ira M. Siegel	N.D. Cal.	4-Oct-10	1,257	Yes
Hard Drive Productions, Inc. v. Does 1-100	10-cv-05606	Media Copyright Group (Steele Law Firm LLC)	N.D. Ill.	2-Sep-10	100	Yes
Lightspeed Media Corporation v. Does 1-100	10-cv-05604	Media Copyright Group (Steele Law Firm LLC)	N.D. Ill.	2-Sep-10	100	Yes
Millenium TGA, Inc. v. Does 1-100	10-cv-05603	Media Copyright Group (Steele Law Firm LLC)	N.D. Ill.	2-Sep-10	100	Yes
CP Productions, Inc. v. Does 1-300	10-cv-06255	Steele Law Firm LLC	N.D. Ill.	29-Sep-10	300	Yes
Future Blue, Inc. v. Does 1-300	10-cv-06256	Steele Law Firm LLC	N.D. Ill.	29-Sep-10	300	Yes
First Time Videos LLC v. Does 1-500	10-cv-06254	Steele Law Firm LLC	N.D. Ill.	29-Sep-10	500	Yes
Flava Works, Inc. v. Marques Rondale Gunter, myVidster.com, SalsaIndy, LLC and John Does 1 through 26	10-cv-06517	Huon Law Firm	N.D. Ill.	12-Oct-10	26	Yes
MCGIP, LLC vs. Does 1-316	10-cv-06677	Steele Law Firm LLC	N.D. Ill.	15-Oct-10	316	Yes
Lucas Entertainment Inc. v. Does 1-65	10-cv-01407	Law Offices of Evan Stone	N.D. Tex.	17-Jul-10	65	Yes
Lucas Entertainment Inc. v. Does 1-53	10-cv-01537	Law Offices of Evan Stone	N.D. Tex.	9-Aug-10	53	Yes
VCX Ltd., Inc. v. Does 1-113	10-cv-01702	Law Offices of Evan Stone	N.D. Tex.	27-Aug-10	113	Yes
LFP, Inc. v. Does 1-635	10-cv-01863	Law Offices of Evan Stone	N.D. Tex.	17-Sep-10	635	Yes
Mick Haig Productions, e.K. v. Does 1-670	10-cv-01900	Law Offices of Evan Stone	N.D. Tex.	21-Sep-10	670	Yes
LFP Internet Group, LLC vs. Does 1-319	10-cv-02094	Law Offices of Evan Stone	N.D. Tex.	15-Oct-10	319	Yes
LFP Internet Group, LLC v. Does 1-3,120	10-cv-02095	Law Offices of Evan Stone	N.D. Tex.	17-Oct-10	3,120	Yes
LFP Internet Group LLC v. Does 1-1,106	10-cv-02096	Law Offices of Evan Stone	N.D. Tex.	18-Oct-10	1,106	Yes
LFP Internet Group LLC v. DOES 1 - 2,619	10-cv-02139	Law Offices of Evan Stone	N.D. Tex.	22-Oct-10	2,619	Yes
West Coast Productions, Inc. v. Does 1-535	10-cv-00094	Law Offices of Paul G. Taylor	N.D. W. Va.	24-Sep-10	535	Yes

West Coast Productions, Inc. v. Does 1-2010	10-cv-00093	Law Offices of Paul G. Taylor	N.D. W. Va.	24-Sep-10	2,010	Yes
Combat Zone, Inc. v. Does 1-1,037	10-cv-00095	Law Offices of Paul G. Taylor	N.D. W. Va.	24-Sep-10	1,037	Yes
Combat Zone, Inc. v. Does 1-245	10-cv-00096	Law Offices of Paul G. Taylor	N.D. W. Va.	24-Sep-10	245	Yes
Patrick Collins, Inc. v. Does 1-118	10-cv-00092	Law Offices of Paul G. Taylor	N.D. W. Va.	24-Sep-10	118	Yes
Patrick Collins, Inc. v. Does 1-281	10-cv-00091	Law Offices of Paul G. Taylor	N.D. W. Va.	24-Sep-10	281	Yes
Third World Media, LLC v. Does 1-1,243	10-cv-00090	Law Offices of Paul G. Taylor	N.D. W. Va.	24-Sep-10	1,243	Yes
Axel Braun Productions v. Does 1-7,098	10-cv-00112	Law Office of Kenneth J. Ford	N.D. W. Va.	29-Oct-10	7,098	Yes
West Coast Productions, Inc. v. Does 1-9,729	10-cv-00114	Law Office of Kenneth J. Ford	N.D. W. Va.	4-Nov-10	9,729	Yes

EXHIBIT 3

READ AT ONCE

COURT-DIRECTED NOTICE
REGARDING ISSUANCE OF SUBPOENA
SEEKING DISCLOSURE OF YOUR IDENTITY

A legal document called a subpoena has been sent to your Internet Service Provider, _____, requiring the disclosure of your name, address and other information to a company that has sued you.[1]

The company that sued you, called the "Plaintiff," claims that various people have infringed its copyrights by illegally downloading and/or distributing its movie entitled, "_____." However, the Plaintiff does not know the actual names or addresses of these people – only the Internet Protocol address ("IP address") of the computer associated with the alleged activity. That is why the Plaintiff's legal filing simply identifies the Defendants as "Does."

In order to determine the identities of the people associated with the IP addresses it has collected, Plaintiff now has issued subpoenas to various Internet Service Providers and asked them to provide identifying information associated with those IP addresses. If you are receiving this notice, that means the Plaintiff has asked your Internet Service Provider to disclose your identifying identification information to Plaintiff, including your name, current (and permanent) addresses, and your email address and Media Access Control number. Enclosed is a copy of the subpoena seeking your information and the exhibit page containing the IP address that has been associated with your computer and showing the date and time you are alleged to have used the Internet to download or upload the movie.

This is a civil lawsuit, not a criminal case. You have not been charged with any crime. The Plaintiff wants the court to order you to pay it thousands of dollars for uploading or downloading its movie without permission. If the Plaintiff receives your information from your Internet Service Provider, you may be added as a named Defendant to the lawsuit.

---

[1] The lawsuit is pending in the United States District Court for the Northern District of West Virginia. The case is entitled _____, case number _____.

INFORMATION ABOUT YOU HAS NOT YET BEEN DISCLOSED, BUT IT WILL BE DISCLOSED IN 30 DAYS IF YOU DO NOT TAKE ACTION

Your identifying information has not yet been disclosed to the Plaintiff.

This notice is intended to inform you of some of your rights and options. It does not provide legal advice. We cannot advise you about what grounds exist, if any, to challenge this subpoena. If you would like legal advice you should consult an attorney who can discuss your particular situation. Below you will find a list of resources that may help you locate an attorney and decide how to respond to the subpoena or lawsuit.

If you want to prevent being identified, you have 30 days from the date of this notice to ask the court to block the subpoena or to dismiss the case against you. You can do this by filing a legal document called a "motion," but you should take care not to reveal your identity in the motion. You must also notify your ISP that you have asked the court to block your identity from being released. If you need more than 30 days to file such a motion or find a lawyer to assist you, you can file a motion asking for an extension of time; you should also notify your ISP if you file a motion asking for more time.

Your ISP cannot file these documents for you. You must file them directly with the Court in the Northern District of West Virginia.

If you file a motion to quash the subpoena or a motion to dismiss, your identity will not be disclosed until the court makes a decision on your motion. If you do nothing, then after 30 days your ISP will send the Plaintiff your name, address, email address, telephone number, and your modem's Media Access Control number.

You may wish to obtain an attorney to advise you on these issues or to help you take action. Three ways to help you find lawyers are:

- The American Bar Association's attorney locator can be found on the Internet at http://www.abanet.org/lawyerlocator/searchlawyer.html
- The State Bar of West Virginia has a Lawyer Referral Service that can be reached at (304) 558-7991.
- The Electronic Frontier Foundation is an organization that seeks to protect the rights of Internet users. They have created a website that lists attorneys who have volunteered to consult with people in your situation and contains further information about the lawsuit that has been filed against you as well as similar lawsuits:
    - https://www.eff.org/issues/file-sharing/subpoena-defense

To assist you or your lawyer in evaluating your rights and options, enclosed is a copy of the subpoena seeking your information, the exhibit page containing the IP address that has been associated with your computer, and Plaintiff's Complaint.

The Plaintiff has created a website where it has posted copies of the Complaint filed in the case; the Motion for Early Discovery, which it filed to explain why it needs this information; Motions to Quash and/or to Dismiss that have been filed by other Defendants, as well as Plaintiff's responses to those motions; and answers to Frequently Asked Questions:

www._____.com

If you file a motion and the Plaintiff opposes it, you will be able to find a copy of the Plaintiff's response there.

OTHER INFORMATION ABOUT THE LAWSUIT AGAINST YOU

The subpoena was issued as a result of a court order issued by the United States District Court for the Northern District of West Virginia in a case entitled _____, case number _____.

To maintain a lawsuit against you in the District Court for the Northern District of West Virginia, the court must have personal jurisdiction over you. If you do not live in the Northern District of West Virginia or otherwise have contacts with the District, you may be able to challenge the District Court for the Northern District of West Virginia's personal jurisdiction over you and have the case dismissed against you in the Northern District of West Virginia. However, please note that even if your challenge is successful, the Plaintiff can still file against you in another location, such as in a state in which a court has personal jurisdiction over you.

You may also be able to challenge the subpoena on a number of other grounds, including that it was improper to add you into the lawsuit with others (called "joinder"), or that the First Amendment requirements for revealing your name and address have not been met. A "friend of the court" brief on those issues was filed in another court by the Electronic Frontier Foundation, the American Civil Liberties Union, and Public Citizen, Inc., and is available here:

https://www.eff.org/files/filenode/uscg_v_people/Achte-Neunte_Final-Brief.pdf

You may also be able to challenge the subpoena or the lawsuit on other grounds depending on your particular situation. For example, the Plaintiff in this case seeks statutory damages. Statutory damages are amounts (or a range of amounts) set by law as compensation where a person has been found liable and calculating a correct sum for compensation may be difficult. They are often substantially higher than any actual damage. In this case, the Plaintiff may not be able to recover statutory damages from you

because it may not have met the legal requirements to do so. This should be discussed with an attorney.

If you are interested in discussing this matter with the Plaintiff's attorneys, you may contact them by telephone at _____. Please understand that these lawyers represent the company that sued you. They can speak with you about settling the lawsuit if you wish to consider that. You should be aware that they are not your attorneys and are adverse to you. You should also be aware that if you contact them they may learn your identity and that anything you say to them can later be used against you in court.

You should not call the Court.

Again, you may wish to retain an attorney to discuss these issues and your options.

Motions

3:10-cv-00090-JPB -JES Third World Media, LLC v. Does 1 - 1243

U.S. District Court

Northern District of West Virginia

Notice of Electronic Filing

The following transaction was entered by Kaiser, Charles on 11/23/2010 at 4:45 PM EST and filed on 11/23/2010

Case Name: Third World Media, LLC v. Does 1 - 1243
Case Number: 3:10-cv-00090-JPB -JES
Filer: Electronic Frontier Foundation
Document Number: 34

Docket Text:
MOTION for Leave to File *(Motion of the Electronic Frontier Foundation for Leave to File an Amicus Curiae Brief in Support of Third Party Time Warner Cable's Motion to Quash or Modify Subpoenas))* by Electronic Frontier Foundation. (Attachments: # (1) Exhibit 1, # (2) Exhibit 2, # (3) Exhibit 3)(Kaiser, Charles)

3:10-cv-00090-JPB -JES Notice has been electronically mailed to:

Charles J. Kaiser , Jr cjkaiser@pgka.com

Kenneth J. Ford fordkennethj@aol.com, kford@adultcopyrightcompany.com

Susan R. Snowden srsnowden@martinandseibert.com, sfsimpson@martinandseibert.com

3:10-cv-00090-JPB -JES Notice must be delivered by other means to:

Gary Graham
480 Crystal Springs Road
Grants Pass, OR 97527

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1079362125 [Date=11/23/2010] [FileNumber=931916-0
] [15a979af8b0b5ee0a6275238142126c15a6ea31275ecc18446f7fbbd3eb929e9676894dfdcbfeb876091f4f4aabfad958844f4312bbb587ed4d5a8cef53c1a4a]]
Document description: Exhibit 1
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1079362125 [Date=11/23/2010] [FileNumber=931916-1
] [120bde2f6228fcd0e6136ce1922e3796c3038f2c18587c31fb692c76d032ffc450901eb21a5cb9a3968b485953efcbdd8050f0087ba81749d4b94d2734c4959e]]
Document description: Exhibit 2
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1079362125 [Date=11/23/2010] [FileNumber=931916-2
] [535cab44693fefc3ae13bd67ed2a27bdacd0c4da43354d585c4eb26e7ea6230cab79af96d1b0592cdba6e91de23e89b8c06722dfc57eb80177f1b3931fce109e]]
Document description: Exhibit 3
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1079362125 [Date=11/23/2010] [FileNumber=931916-3
]
[4693540582761eecc44543fa604010948070c6c26931111969d562688257cff9b822b136248b360a5b53f0685b2cfe92862f1df427284f0fdc661f08665d8144]]