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## INTRODUCTION

Amicus Electronic Frontier Foundation urges this Court to grant John Doe 173.19.225.14's and John Doe 24.18.103.161's motions to quash. The subpoenas in question, and the complaint upon which they are based should be evaluated in the context in which this case was brought. This case is one of a growing number of other mass copyright lawsuits that are being filed across the country, which have to date affected over 75,000 people<sup>1</sup> nationwide, raise serious problems of fairness, due process, and individual justice. In these cases, different plaintiffs have sued John Doe defendants from all over the country, alleging copyright infringement of pornographic works.

The cases do not, however, appear to be filed with the intention of litigating them. Instead, it seems that the plaintiffs' lawyers hope to take advantage of the threat of an award of statutory damages and attorney's fees, the ignorance of those sued about their potential defenses, as well as the stigma that is associated with downloading pornographic movies, to induce the anonymous defendants into settling the case for a payment of roughly \$1,500 to \$2,500 dollars. This amount seems 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 sued: for example, it appears that Plaintiff would be hard-pressed to prove actual damages caused by any particular Defendant and, as described further below, there is a reasonable chance that Plaintiff does not have any basis for seeking statutory damages. Thus, this ruling on whether Plaintiff will be able to obtain the identities of the Defendants may be the last chance that the Court has to ensure that the Defendants are treated justly – and that they will not be induced to settle by the fear of embarrassment or humiliation, with Plaintiff's counsel taking advantage of unrepresented Does' misunderstanding of the complexities of copyright law.

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<sup>1</sup> As of January 14, 2011, by an informal count, well 75,000 people have been sued in similar (in some cases nearly identical) complaints arising from the alleged infringement of pornographic movies. This includes 4507 individuals sued in the Northern District of Illinois 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.



The federal courts have safeguards, both procedural and substantive, to protect the rights of individual defendants. Those safeguards apply in all litigation regardless of the legal claims made and should be applied here as well. Certainly, copyright infringement is a legitimate basis for suit, and if many people engage in copyright infringement, many people may be sued. But the general safeguards developed by federal courts to ensure that all civil defendants get a fair chance to present their defenses always apply and, in a case such as this, have special importance.

Unfortunately, the Plaintiff in this mass copyright case has not complied with these safeguards. The first of those safeguards is personal jurisdiction. Plaintiff's own factual allegations show that almost all of the Doe Defendants are located outside this Court's jurisdiction and do not appear to have sufficient contacts with the Northern District of Illinois to support being haled into court here. The second safeguard is joinder. Plaintiff has improperly joined 500 unrelated Defendants into this single action, jeopardizing their right to an individual evaluation of their actions and defenses. As explained by a West Virginia federal court in response to a strikingly similar set of facts, "merely committing the same type of violation in the same way does not link defendants together for purposes of joinder." *West Coast Productions v. Does 1-2010*, Case No. 3:10-CV-93 (N.D. W.Va., Dec. 16, 2010) (Exhibit A to Defendants' Request for Judicial Notice ("RJN")) (quoting *LaFace Records v. Does 1-38*, 2008 WL 544992, \*2 (E.D.N.C. Feb 27, 2008)). Finally, Plaintiff has not met the First Amendment protective legal test for the discovery the identity of persons who have communicated anonymously online – indeed, it has failed even to articulate the correct test. As explained (for example) last year in *Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128, 131-33 (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 demonstrated below, Plaintiff has not met that standard.

For these reasons, the instant subpoena and all other outstanding subpoenas should be quashed and Plaintiff should be instructed to:

- 1) bring suit against the individual Defendants in courts which appear likely to be able to properly exercise personal jurisdiction over the individual Defendants;
- 2) re-file this action against each defendant individually; 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 subpoena in this case seeking the identity of anonymous Defendants be accompanied by a cover notice ordering the Internet service provider 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 cases brought by recording companies several years ago and by the District Court for the District of Columbia for the cases currently pending there. *See* Exhibit 1. *See also Elektra Ent. Group, Inc. v. Does 1-9*, No. 04 Civ. 2289, 2004 WL 2095581 (S.D.N.Y. Sept. 8, 2004) (RJN Exhibit D); *BMG Music v. Does 1-203*, No. Civ.A. 04-650, 2004 WL 953888 (E.D. Pa. Apr. 2, 2004). 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 a notice would help ensure that Defendants 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 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](http://www.eff.org).

## ARGUMENT

### **I. Plaintiffs Have Not Established that the Court Has Personal Jurisdiction Over the Vast Majority of the Defendants.**

As a threshold matter, Plaintiff has not met its burden to establish that this Court has personal jurisdiction over the vast majority of the Defendants. Absent such jurisdiction or, at the absolute minimum, a prima facie case for personal jurisdiction, the Court may not authorize or enforce any discovery. *Cent. States, Se. and Sw. Areas Pension Fund v. Phencorp Reinsurance Co., Inc.*, 440 F.3d 870, 877 (7th Cir. 2006) (holding a prima facie case for personal jurisdiction must be made, before discovery is allowed); *see also, e.g., Enterprise Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 470-71 (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. 1992) (same). Therefore, and contrary to Plaintiff's suggestion, *Opp.* at 2, 5-6, the jurisdictional question is a live issue that the Court can and should consider.

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 conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v.*

*Woodson*, 444 U.S. 286, 297 (1980). Accordingly, the Plaintiff bears 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, Plaintiff must assert the factual basis underlying its claims. *See, e.g., uBID, Inc. v. The GoDaddy Grp., Inc.*, 623 F.3d 423, 423 (7th Cir. 2010) (stating that plaintiff bears the burden of making a *prima facie* case for personal jurisdiction).

Plaintiff has offered two theories for the Court's exercise of personal jurisdiction over the Defendants: first, that "each Defendant may be found in this District" and second (in the alternative) that "a substantial part of the acts of infringement complained of herein occurred in this District" because the acts "occurred in every jurisdiction in the United States, including this one." Complaint ¶ 7. Plaintiff has not made a *prima facie* showing for either allegation for the vast majority of the Defendants, including Movants. Consequently, the motions to quash should be granted.

**A. Plaintiff Has Not Made a *Prima Facie* Showing that the Court Has Personal Jurisdiction Over the Defendants Based on the Domicile of the Defendants.**

Federal courts may exercise personal jurisdiction over individuals whose domicile is within the jurisdiction. *See, e.g., Milliken v. Meyer*, 311 U.S. 457, 463-65 (1940); *Heartstation, Inc. v. J.L. Indus.*, No. 02 C 5994, 2003 U.S. Dist. LEXIS 5659, \*7 (N.D. Illinois April 3, 2003) (holding "[a] defendant domiciled in a forum state or who has activities that are "substantial" or "continuous and systematic" is subject to the general jurisdiction of that state") (citing *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414-15 (1984)). For the vast majority of the Defendants, Plaintiff plainly has not made a *prima facie* showing to support this purported basis for jurisdiction. The only jurisdictional facts alleged by Plaintiff are "a log of IP address [sic] identifying each Defendant, as well as the corresponding torrent file swarm/copyrighted work in which Defendant was participating and the date and time of Defendant's activity" that it includes as Exhibit A to its Complaint. Complaint at ¶ 19. In fact, the IP addresses that Plaintiff included in its Exhibit A not only do not provide any indication

that the majority of the Defendants' are likely to be residents of Illinois, they suggest that the Defendants were outside of Illinois when the allegedly infringing activity took place.

Plaintiff misleadingly suggests that the Court cannot determine whether there is a basis for personal jurisdiction until the Does' identities and residences are revealed. Opp. at 6. In fact, the Court (and Plaintiff) *can* determine, based on IP addresses collected, the likely location of the computers associated with those addresses. As explained in the accompanying declaration prepared by EFF Senior Staff Technologist Seth Schoen, many tools freely available to the public help reveal where a person using a particular IP address is likely to be physically located. Declaration of Seth Schoen ("Schoen Decl.") at ¶¶ 4, 5, 7, 12, 15. Two such techniques are reverse domain name service lookup or "reverse DNS" and access to the public database operated by the American Registry for Internet Numbers ("ARIN database"). *Id.* at ¶¶ 5, 12.

Mr. Schoen used these tools to determine where Defendants are likely to be located. *Id.* at ¶¶ 9, 11, 14. Mr. Schoen concluded that the IP addresses and related records indicated that the Does were likely located all over the country, from Hawaii to Florida. *Id.* at ¶¶ 7, 11, 14, 24. Just 4% appear to be located in Illinois. *Id.* at ¶23.

Thus, the available evidence – which was in Plaintiff's possession before it filed its Complaint – strongly suggests that the Plaintiff had no business invoking this Court's jurisdiction and using that invocation to obtain a discovery order. With no evidence supporting the claim that Defendants are "residents" of Illinois, and with the only proffered allegations supporting the opposite conclusion, the Court could not exercise personal jurisdiction over Defendants.

**B. Plaintiff Has Not Made a *Prima Facie* Showing that the Court Has Personal Jurisdiction Over the Defendants Based on Alleged Acts of Copyright Infringement Occurring in "Every Jurisdiction, Including This One."**

Plaintiff alternatively argues that the Court has personal jurisdiction over the Defendants because the alleged acts of copyright infringement "occurred in every jurisdiction in the United States, including this one." Complaint at ¶ 7. Plaintiff has not met its *prima facie* burden supporting this jurisdictional argument either.

In order for a court to exercise personal jurisdiction over a non-consenting, non-resident defendant, suit in the forum at issue must be consistent with the requirements of the Due Process Clause. The Illinois long-arm statute has become co-extensive with the due process requirements under the federal and Illinois constitutions. *Keller v. Henderson*, 359 Ill. App. 3d 605, 611-612, 834 N.E.2d 930, 936 (Ill. App. 2005). Moreover, although Illinois due process requirements theoretically could diverge at some point from federal due process requirements, courts have held that “because Illinois courts have not elucidated any ‘operative difference between the limits imposed by the Illinois Constitution and the federal limitations on personal jurisdiction,’ the two constitutional analyses collapse into one.” *Allied Van Lines, Inc. v. Gulf Shores Moving & Storage, Inc.*, No. 04-C-6900, 2005 U.S. Dist. LEXIS 6244, slip op. at 5 (N.D. Illinois February 23, 2005) (quoting *Hyatt Int’l Corp. v. Coco*, 302 F.3d 707, 715 (7th Cir. 2002)). That being said, “[d]ue process under the Illinois Constitution requires that it be ‘fair, just, and reasonable to require a nonresident defendant to defend an action in Illinois, considering the quality and nature of the defendant’s acts which occur in Illinois or which affect interests located in Illinois.’” *Keller*, 359 Ill. App. 3d at 619, 834 N.E.2d at 942 (quoting *Rollins v. Ellwood*, 141 Ill.2d 244, 275, 565 N.E.2d 1302 (Ill. 1990)). Accordingly, a plaintiff must demonstrate that: (1) the non-resident has “minimum contacts” with the forum and that (2) requiring the defendant to defend its interests in that state “does not offend ‘traditional notions of fair play and substantial justice.’” *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457 at 463). Plaintiff has not met this burden.

As discussed above, the only jurisdictional facts identified by the Plaintiff (i.e., the IP addresses it associates with each Defendant) give no indication that the copyright infringement occurred in this state. Plaintiff provides no additional evidence.<sup>2</sup> Without any *prima facie* evidence to support the claim that the alleged infringement took place within the state, Plaintiff

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<sup>2</sup> Plaintiff itself appears to be located in Nevada, and the only real contact with Illinois appears to be the location of its counsel. But even if Plaintiff were in Illinois, that would not establish where the act of infringement occurred.

has not established minimum contacts and therefore this Court cannot exercise personal jurisdiction over the Doe Defendants.

To the extent that Plaintiff is suggesting a more expansive theory of personal jurisdiction based on the accessibility of information on the Internet as a whole, that argument too must fail. Courts have long since rejected the claim that the mere fact that the Internet permits access to information by residents of every state as well as other countries means that the person engaged in that activity can be sued anywhere in the United States. As the Fourth Circuit explained in *ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 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 where 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.

The Seventh Circuit has similarly rejected theories of “national jurisdiction” based on Internet usage. *See generally Jennings v. AC Hydraulic A/S*, 383 F.3d 546, 550 (7th Cir. 2004) (“Premising personal jurisdiction on the maintenance of a website, without requiring some level of ‘interactivity’ between the defendant and consumers in the forum state, would create almost universal personal jurisdiction because of the virtually unlimited accessibility of websites across the country.”). In *uBID, Inc.*, 623 F.3d at 423, for example, the court considered whether it had jurisdiction over a cyber-squatting claim brought by an Illinois-based auctioneer against an Arizona domain name registration corporation, based on the corporation’s alleged intentional registration of domain names that were confusingly similar to auctioneer's trademarks and domain names. The court noted that while “physical geographical nexus is simply less important in cases where the alleged harm occurred over the Internet,”

The plaintiff must still prove that the defendant had constitutionally sufficient contacts with the forum and that the defendant's contacts were temporally and substantively related to the lawsuit. Without that showing, the mere fact that the defendant allegedly caused harm by conducting business or advertising over the Internet is not adequate to establish jurisdiction in the plaintiff's chosen forum state.

*Id.* at 431 (citing *GTE New Media Services Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1350 (D.C. Cir. 2000); *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir.1997)).

The court went on to find jurisdiction because there was an intimate substantive and temporal relationship between the contacts alleged in uBID's complaint and the wrongs alleged in uBID's complaint such that “GoDaddy cannot reasonably have been surprised to find itself sued in Illinois”:

The relationship between GoDaddy's Illinois contacts and uBID's claims is close enough to make the relatedness *quid pro quo* balanced and reasonable. GoDaddy has reached hundreds of thousands of people in Illinois with its advertising, which we know because it has made hundreds of thousands of sales in Illinois. How has GoDaddy advertised and made these sales? Based on the allegations in uBID's complaint, it has done so “by offering ‘free parking’ of a registrant's domain name.” Complaint ¶ 20. Looking to the forum state's side of the bargain, what does the plaintiff charge GoDaddy with doing? The greatest part of uBID's complaint is devoted to allegations that, as the licensee of its registrants, GoDaddy “used and trafficked in” the free parked pages with bad-faith intent to profit from uBID's marks. Complaint ¶¶ 20-22; Ex. A.



*Id.* at 430-31.

Plaintiff has submitted no evidence of a comparable relationship here. Rather, it has offered a mere allegation that because the alleged distribution took place over the Internet, it occurred in every jurisdiction. Following *uBid*, that cannot suffice to establish this Court's jurisdiction.

Additional guidance may be found in *Tamburo v. Dworkin*, 601 F.3d 693 (7th Cir. 2010). In that case, the Defendants were alleged to have published false and defamatory statements about Tamburo; such messages included Tamburo's Illinois address and readers were urged to contact and harass him, and boycott his services. *Id.* at 698. The complaint also alleged that one defendant personally contacted Tamburo by email. *Id.* at 706. Thus, the allegations suggested that Defendants knew Tamburo lived in Illinois and operated his business here. Thus, although they acted from points outside the forum state, these defendants were alleged to have specifically aimed their tortious conduct at Tamburo and his business in Illinois with the knowledge that he lived, worked, and would suffer the "brunt of the injury" there. *Id.*

In the immediate case, even assuming that each of the Defendants knew that they were infringing Plaintiff's copyright, there is no evidence that Plaintiff has any connection to Illinois, or even more significant, that the Does were aware of such a connection. Consequently, Plaintiff has made no *prima facie* showing that any of the Defendants had any idea that Plaintiff would suffer any harm in Illinois.

Requiring individuals from across the country to litigate in this District – beginning with a motion to quash a subpoena for their identifying information -- creates exactly the sort of hardship and unfairness that the personal jurisdiction requirements exist to prevent. It requires the individuals urgently to secure counsel far from home, where they are unlikely to have contacts. In this particular instance the hardship is very clear, as the cost of securing counsel even to defend a Defendant's identity 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.

When the absence of personal jurisdiction is this apparent, the Court could and should

properly issue a *sua sponte* order quashing every subpoena issued in this case and ordering Plaintiff to re-file its Complaint in the jurisdiction only where the available evidence suggests an IP address is associated with a computer located in this district. And in any event, the instant motion to quash should be granted given Plaintiff's failure to meet the Due Process requirements set forth in *International Shoe* and its progeny.

**C. Plaintiff Cannot Undertake Discovery to Find Jurisdictional Facts.**

Plaintiff's failure to meet its jurisdictional burden is to be determined before discovery is issued, not after. Plaintiff argues that it should be granted leave to seek discovery in support of its jurisdictional allegations. Opp. at 6-7. This effort, too, must fail.

When seeking discovery on personal jurisdiction, a plaintiff is required to make a prima facie showing of jurisdiction *before* she is entitled to discovery. See, e.g., *Cent. States*, 440 F.3d at 877 (“We therefore must determine if Central States made out a prima facie case for personal jurisdiction, which is required before it is allowed to conduct discovery.”); *Fielding v. Hubert Burda Media*, 415 F.3d 419, 429 (5th Cir. 2005) (citing *Toys “R” Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 456 (3d Cir. 2003) (stating that a plaintiff's discovery request should be granted if the “plaintiff presents factual allegations that suggest with reasonable particularity the possible existence of the requisite contacts”). However, it is well within the district court's discretion to deny discovery requests where the plaintiff “offers only speculation” of jurisdiction; “fishing expeditions” into jurisdictional facts are strongly disfavored. See, e.g., *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.*, 334 F.3d 390, 402 (4th Cir. 2003); *Base Metal Trading, Ltd. v. OJSC “Novokuznetsky Aluminum Factory”*, 283 F.3d 208, 216 n.3 (4th Cir. 2002) (holding that a court can deny a discovery request if “the plaintiff simply wants to conduct a fishing expedition in the hopes of discovering some basis of jurisdiction”). Where, as here, the Plaintiff's own factual allegations plainly serve only to demonstrate the absence of jurisdiction, the Court should decline to extend this case further.<sup>3</sup>

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<sup>3</sup> In addition, amici note that on October 1, 2010, this Court dismissed Plaintiff's underlying Complaint, albeit with leave to amend. Order of October 1, 2010 (Docket No. 10). Absent a live

**II. Plaintiff Has Improperly Joined Thousands of Individual Defendants Based on Entirely Disparate Alleged Acts.**

There is little doubt that Plaintiff's joinder of 500 Defendants in this single 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*, 2004 WL 953888, at \*1 (severing lawsuit involving 203 defendants).

The language above was quoted with approval just last month in an Order issued December 16, 2010, by the United States District Court for the Northern District of West Virginia. *See West Coast Productions, Inc., v. Does 1-535*, No. 3:10-cv-00094-JPB -JES (N.D. W. Va. Dec. 16, 2010), ECF No. 45, RJN Ex. A (quoting *BMG Music v. Does 1-203*, 2004 WL 953888, at \*1). In that case, an ISP, Time Warner Cable, moved to quash a subpoenas seeking identifying information for numerous Doe defendants. (EFF filed a supporting amicus brief.) As here, the complaint alleged that all of the Does had used BitTorrent to commit copyright infringement (although in that case the Defendants were all alleged to have uploaded and downloaded a single copyrighted work). The court held that all defendants but Doe 1 were

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complaint, however, any such order may exceed the authority granted to federal courts under the Federal Rules of Civil Procedure. *See, e.g.*, Rule 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.") (emphasis added); Rule 45(a)(1)(A)(ii) (requiring that any discovery subpoena state "the title of the action, the court in which it is pending, and its civil-action number."). *See also, e.g.*, Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. MICH. J.L. REFORM 217, 235-36 (2007) (discussing the limited number of states – and contrary to the Federal Rules – that authorize pre-complaint discovery into the identity of defendants). Accordingly, the discovery order – issued without an operative complaint, and thus not in furtherance of any claim or defense – must fail if the Court lacked the authority to issue it, and subpoenas are equally defective.

improperly joined, severed those defendants from the action, and quashed subpoenas seeking identifying information for those defendants. The Order stressed that any new actions against the severed Does may proceed only against Does with IP addresses of computers located within that court's jurisdiction. *Id.* at 4 n.2. Virtually identical Orders were issued in seven additional cases. *See Combat Zone, Inc., v. Does I-1037*, No. 3:10-cv-00095-JPB -JES (N.D. W. Va. Dec. 16, 2010), ECF No. 71; *see also Combat Zone, Inc., v. Does I-245*, No. 3:10-cv-00096-JPB -JES (N.D. W. Va. Dec. 16, 2010), ECF No. 28; *Patrick Collins, Inc., v. Does I-118*, No. 3:10-cv-00092-JPB -JES (N.D. W. Va. Dec. 16, 2010), ECF No. 42; *Patrick Collins, Inc., v. Does I-281*, No. 3:10-cv-00091-JPB -JES (N.D. W. Va. Dec. 16, 2010), ECF No. 42; *Third World Media, LLC, v. Does I-1243*, No. 3:10-cv-00090-JPB -JES (N.D. W. Va. Dec. 16, 2010), ECF No. 66; *West Coast Productions, Inc., v. Does I-2010*, No. 3:10-cv-00093-JPB -JES (N.D. W. Va. Dec. 16, 2010), ECF No. 44.

As these courts recognize, Rule 20 requires that parties should not be joined in the same lawsuit unless the claims against them 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.*

District courts within the Circuit have declined to find joinder based solely on infringement of the same intellectual property. In *ThermaPure, Inc. v. Temp Air, Inc.*, No. 10-CV-4724, 2010 WL 5419090, at \*4 (N.D. Ill. Dec. 22, 2002), for example, the District Court for

the Northern District of Illinois firmly rejected infringement of the same patent as a basis for joinder. *Id.* (“Courts in this district . . . have consistently held that Rule 20(a)'s requirement for a common transaction or occurrence is not satisfied where multiple defendants are merely alleged to have infringed the same patent or trademark.”) (collecting cases).

By the same token, the allegation of a similar method for committing the alleged illegal activity cannot create a basis for joinder. *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”).

Thus, 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 addition to the above-cited Orders, the District Court for the Western District of Texas denied efforts by recording industry plaintiffs to join 254 defendants accused of infringing their copyrights by illegally downloading music, stating:

The claim is against each defendant is individual, based on individual acts of each defendant, and if proven, will result in unique damage claims. The defendants are not properly joined under Rule 20.

*UMG Recordings, Inc., et al. v. Does 1-51*, No. A-04-CA-704 LY (W.D. Tex. Nov. 17, 2004), (RJN Exhibit B) (dismissing without prejudice all but the first of 254 defendants accused of unauthorized music file-sharing). Similarly, 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.” *Id.* 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 district 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); 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. v. Does 1-12*, No. C-04-04862 (N.D. Cal. Nov. 16, 2004) (permitting discovery in copyright infringement action against twelve defendants to identify first Doe defendant but staying case against remaining Does until plaintiff could demonstrate proper joinder) (RJN Exhibit C).<sup>4</sup>

Indeed, the Does here are not even alleged to have infringed the same movie; they apparently used different machines to allegedly access different works. *See* Complaint, Ex. A. The only thing they all are alleged to share in common is using the same internet protocol. *See Androphy v. Smith & Nephew, Inc.*, 31 F. Supp. 2d 620, 623 (N.D. Ill. 1998) (“[C]laims of infringement against unrelated defendants, involving different machines, should be tried separately against each defendant.”) (quoting *New Jersey Mach. Inc. v. Alford Indus. Inc.*, Civ. A. No. 89-1879(JCL), 1991 WL 340196, at \*2 (D.N.J. Oct. 7, 1991). Put simply, the alleged wrongful acts were committed by unrelated Defendants, at different times and locations, sometimes using different services, and perhaps subject to different defenses. This kind of attenuated relationship is not sufficient for joinder. *See, e.g., BMG Music v. Does 1-203*, 2004 WL 953888, at \*1.

Even if the requirements for permissive joinder under Rule 20(a)(2) had been met, this Court would have broad discretion to refuse joinder under Rule 21 in the interest of avoiding prejudice and delay, ensuring judicial economy, or safeguarding principles of fundamental

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<sup>4</sup> Defendants recognize that such judicial analysis has not been 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. March 3, 2004) (granting leave to take expedited discovery); *Sony Music Entm't, Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 568 (S.D.N.Y. 2004) (applying First Amendment balancing test but denying as premature motion to quash based on misjoinder and lack of personal jurisdiction).

fairness. *See, e.g., Intercon Research Assocs., Ltd. v. Dresser Indus, Inc.*, 696 F.2d 53, 57-58 (7th Cir. 1982) (citing *Desert Empire Bank v. Ins. Co. of N. Am.*, 623 F.2d 1371, 1375 (9th Cir. 1980)) (“[A] trial court must . . . determine whether the permissive joinder of a party will comport with the principles of fundamental fairness.”); *see also Acevedo v. Allsup’s Convenience Stores*, 600 F.3d 516, 521 (5th Cir. 2010); *Morris v. Northrop Grumman Corp.*, 37 F. Supp. 2d 556, 580-81 (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 in this case. Joining hundred of unrelated defendants in one lawsuit here may make litigation less expensive for Plaintiff by enabling it 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 joinder principles need not be followed.<sup>5</sup>

Amicus notes that the Court has cautioned Plaintiff to re-file against Defendant jointly only where there is “joint activity by similar defendants to name said defendants in one lawsuit.” Minute Order, *First Time Videos LLC v. Does 1-500*, No. 1:10-cv-06254 (N.D. Ill. Oct. 1, 2010), ECF No. 10. Amicus urges the Court take the additional step of requiring Plaintiff to file against Defendants individually.

### **III. Plaintiff Has Not Satisfied the Requirements Imposed by the First Amendment On Litigants Seeking to Unmask Anonymous Speakers.**

Plaintiffs are often allowed discovery at the outset of a lawsuit to identify otherwise unknown persons alleged to have committed a legal wrong. However, in its motion for leave to seek early discovery, Plaintiff failed to properly apprise the Court of the appropriate discovery standard in cases where, as here, Defendants allegedly were engaging in anonymous communication and Plaintiff’s claims arise from those alleged activities. Especially given the

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<sup>5</sup> 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, UMG Recordings, Inc., et al. v. Does 1-51*, No. A-04-CA-704 LY (W.D. Tex. Nov. 17, 2004, (RJN Exhibit B) (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.”).

number of Doe Defendants affected and the pornographic nature of the works in question, it is crucial that the Court apply the correct procedure here and require Plaintiffs to follow the appropriate procedures before individuals' identities are disclosed.

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

Plaintiff entirely misunderstands the applicable test that must be applied before a Doe's identifying information is revealed. Plaintiff's hyperbole notwithstanding, no one has claimed that the First Amendment provides "a license for copyright infringement." Opp. at 10. However, the United States Supreme Court has consistently upheld 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 . . . at the hand of an intolerant society." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995); *see also Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 199 (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, 1093 (W.D. Wash. 2001) (stating that the Internet promotes the "free exchange of ideas" because people can easily engage in such exchanges anonymously).

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) ("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. Cal. Mar. 6, 2006). In *Sony*, 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.* Although 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.* (quoting *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 at 346).

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.<sup>6</sup> Courts must “be vigilant . . . [and] guard against undue hindrances to . . . the exchange of ideas.” *Buckley*, 525 U.S. at 192. 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 563 (“Against the backdrop of First Amendment 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.”).

Only a compelling government interest can overcome such First Amendment rights, and the mere filing of a lawsuit does not make the identification of a defendant a compelling interest unless there is good reason to believe that the suit has a realistic chance of being successful. The identification of an anonymous speaker is a form of relief to the plaintiff (because it can enable extra-judicial self-help such as that seen in these mass lawsuits), and it harms the anonymous defendant, because once the right of anonymous expression is taken away, it cannot be

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<sup>6</sup> 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).

recovered. Relief – an order that benefits the plaintiff and hurts the defendant – is not customarily given without some proof of wrongdoing. Finally, if the courts allow anonymous speakers to be identified any time someone is willing to pay the filing fee for a lawsuit, we risk creating a significant chilling effect for anonymous speakers who are worried about the improper consequences of having their identities revealed.

On the other hand, the protection of anonymity should not be so great that plaintiffs with meritorious legal claims are unable to obtain redress of their grievances. If the rules make it too difficult to identify anonymous speakers, even when their speech abused the rights of others, the rules will unduly encourage irresponsible online speech. The need, therefore, is for the preservation of a legal and procedural standard that balances the rights of the anonymous speaker who claims to have done no wrong and the rights of the allegedly wronged speaker.

Thus, put in constitutional terms, 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.

In its motion for early discovery, Plaintiff relied on a qualified privilege test found in *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999). Plaintiff’s Memorandum of Law in Support of Ex Parte Motion for Leave to Take Discovery Prior to Rule 26(f) Conference (“Plaintiff’s Motion”) at 7. However, this test has long since been superceded in the same district in which it originated as insufficiently protective of the First Amendment interests of Internet speakers. *See generally Highfields Capital Mgmt, L.P. v. Doe*, 385 F. Supp.

2d 969 (N.D. Cal. 2005); *USA Technologies, Inc. v. Doe*, 713 F. Supp. 2d 901 (N.D. Cal. 2010).<sup>7</sup> Instead, courts rely on the seminal case of *Dendrite Int'l, Inc. v. Doe No. 3*, 775 A.2d 756 (N.J. App. 2001), in which the New Jersey Appellate Division adopted a four-prong test for protecting anonymous speakers. Texas is among the many states across the country, several of which are cited in footnote 11 below, where courts have followed *Dendrite*. See, e.g., *In re Does 1-10*, 242 S.W.3d 805 (Tex. Ct. App. 2007).

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.

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<sup>7</sup> For examples of state appellate courts that have also applied tests far more stringent than *Seescandy.com*, see, e.g., *Mobilisa, Inc. v. Doe*, 170 P.3d 712, 720 (Ariz. Ct. App. 2007), holding that the *Seescandy.com* 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”; *Cahill*, 884 A.2d at 460, stating “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*, 72 Cal. Rptr. 3d 231 (Cal. Ct. App. 2008); *Independent Newspapers v. Brodie*, 966 A.2d 432 (Md. 2009), *Solers, Inc. v. Doe*, 977 A.2d 941 (D.C. 2009); and *Mortgage Specialists v. Implode-Explode Heavy Industries*, 999 A.2d 184 (N.H. 2010). Federal courts applying such tests include *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*, No. CV-06-1537-PHX-DGC, 2006 WL 2091695 (D. Ariz. Jul. 25 2006); *Sinclair*, 596 F. Supp. 2d 128; and *Salehoo v. Doe*, No. C10-0671JLR, 2010 WL 2773801 (W.D. Wash. July 12, 2010).

**B. Because Plaintiff's Proposed Discovery Cannot as Proposed Survive the Scrutiny Required by the First Amendment, Plaintiff's Motion Must Be Denied.**

The Plaintiff fails the *Dendrite* test demanded of litigants seeking the disclosure of the identities of anonymous speakers; consequently, Plaintiff's request for the issuance of early discovery should be denied.

**1. Plaintiff Has Not Made the Requisite *Prima Facie* Case for Each Defendant.**

Critically, Plaintiff has not provided sufficient *prima facie* evidence that any Defendant infringed Plaintiff's exclusive right to reproduce and distribute its copyrighted work. Plaintiff contends that each Defendant "participated and continues to participate in a BitTorrent swarm to reproduce and distribute to the public Plaintiff's copyrighted content." Complaint at ¶ 24. However, in support of this contention, Plaintiff proffers only the following factual allegations: (1) that by means of an undisclosed "proprietary techniques," Plaintiff's agent "locat[ed] swarms where peers are distributing Plaintiff's copyrighted creative works" and (2) then used the undisclosed proprietary technology to generate an attached list of 500 IP addresses that allegedly correspond to copyright infringing Defendants, as well as the date and time of the alleged infringing activity. Declaration of Paul Hansmeier in Support of Plaintiff's Motion for Leave to Take Discovery Prior to Rule 26(f) Conference ("Hansmeier Decl.") at ¶¶ 4, 6, 7. Plaintiff does not meet its *prima facie* burden with this meager showing.

Instead of the conclusory, generalized showing made to date, Plaintiff must instead present *specific* evidence resulting from the investigation, for *each* Defendant. At minimum, Plaintiff must present "competent evidence" regarding what the technology upon which it relies actually did in this case. It must document the investigative process actually used to obtain Plaintiff's proffered allegations about each and every Defendant, as well as competent evidence that would permit Defendants (and the Court) to evaluate the undisclosed technology's reliability and completeness. Without such evidence, the Court must simply take Plaintiff's word for it that its "proprietary" technology functions in a way that confirms actual copyright infringement, for instance that it functioned properly in this instance, how the technology collected the IP

addresses and linked them to an actual infringement of the movie, 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. *See* Schoen Declaration at ¶ 25.

Such a requirement would be reasonable and consistent with the requirements set forth by other courts in similar file sharing cases. Those courts 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 submitted IP addresses 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 Plaintiff’s 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*, 2004 WL 2095581, at \*4. Such evidence is already available to the Plaintiff prior to discovery and must be provided as part of its *prima facie* showing. *See Dendrite*, 775 A.2d at 769-70 (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). *See also* Schoen Decl. at ¶¶ 25-26.

Moreover, the allegations of the Complaint do not establish that Plaintiff has any right to sue for statutory damages or attorney fees. The Complaint alleges that Plaintiff has applied for registration of its copyrights in the works in question, but does not disclose the *date* on which the applications were filed. The fact that Plaintiff alleges application rather than completed registration implies that the application was filed not long before the Complaint was filed. And under 17 U.S.C. § 412, a plaintiff cannot sue for statutory damages or attorney fees unless the infringement “commenced after first publication of the work and before the effective date of its registration, unless the registration is made within three months after the first publication of the work.” Plaintiff should be required, perhaps in response to an order to show cause, to introduce evidence creating a *prima facie* case of entitlement to sue *these* anonymous Defendants for statutory damages and attorney fees. If it cannot, we urge the Court to consider exercising its inherent powers and strike the claims for statutory damages and attorney fees.

**2. Given Plaintiff's Meager Factual Showing and the Immense Harm to Defendants that Would Occur if Plaintiff's Motion Was Granted, Defendants' First Amendment Interests Strongly Outweigh Plaintiff's "Need" for Their Identities.**

Even if Plaintiff 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 the pornographic nature of the material that Plaintiff alleges has been improperly downloaded creates a very serious risk of reputational harm resulting from a mistaken identification. And especially given the Plaintiff's improper joinder of over 500 Defendants over whom the Court cannot exercise personal jurisdiction, as well as the lack of transparency about the means by which the Plaintiff generated its list of "infringers," the Court should exercise great caution and prevent Plaintiff from bypassing procedural protections and taking shortcuts to achieve its end.

Although Plaintiff has not elaborated on its motives in bringing suit, the invasive, sweeping manner in which it was brought indicates that it hopes to leverage the risk of public embarrassment to convince Defendants to quickly capitulate, whether or not they did anything wrong. Moreover, plaintiffs' lawyers in this area are also able to demand settlements because they can threaten to sue for statutory damages and attorney fees. Such relief, however, may be unavailable in this case because (as discussed above at page 22), unless the copyrights in the works in questions were timely registered. Plaintiff's quest for identifying information in this case, therefore, appears to be nothing more than an effort to use the judicial process to extract settlements on a mass scale, before the flaws in its case can be exposed.

Indeed, Plaintiff's lawsuit is 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, 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 (Sept. 27, 2010)

<http://www.independent.co.uk/arts-entertainment/films/porn-titans-come-together-to-expose-pirates-2090786.html>. Other copyright lawyers have concurred that the threat of exposure as downloaders of pornography is well calculated to induce the Doe defendants to settle quickly.

John Council, *Adult Film Company’s Suit Shows Texas Is Good for Copyright Cases*, TEXAS LAWYER, Oct. 4, 2010 (“I would suppose that most people would want to settle rather than being named in a lawsuit of this nature.”).

The success or failure of Plaintiff’s lawsuit should rest on the merits of its claim against each individual Doe, not upon the risk of targeting through an insufficiently pleaded and improperly joined “name and shame” campaign. The Court should at minimum require that Plaintiff resolve the serious shortcomings in its evidentiary showing before the Court authorizes any discovery to proceed.

**3. Plaintiff Must Ensure that Defendants Receive Notice 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. Plaintiff must be required to make such efforts so that Defendants can fully explore defenses available to them.

Accordingly, in the event that the Court permits discovery to go forward, this Court should require that any subpoena in this case by Plaintiff to Internet Service Providers (ISPs)

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, counsel has attached hereto a draft notice modeled on the procedures issued by other courts hearing similar cases. *See* Exhibit 1. 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 Plaintiff, Defendants, and the ISPs involved all have a fair opportunity to represent their interests.

### CONCLUSION

Plaintiff has the right to seek legal redress for alleged copyright infringement, but it 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 the 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.

Defendants therefore respectfully urge this Court to grant the instant motions to quash on the grounds that (a) it lacks personal jurisdiction over the majority of the 500 Defendants, (b) all 500 Defendants were improperly joined in this single action, and (c) Plaintiff cannot meet the requirements of the First Amendment designed to protect anonymous speech. Moreover, given the unavoidable jurisdictional and joinder deficiencies inherent in Plaintiff's Complaint, and the serious concern about the availability of statutory damages, Defendants also urge the Court to *sua sponte* quash all outstanding subpoenas, and require that Plaintiff re-file individual cases against individual Defendants in courts that can properly exercise jurisdiction. If the cases are



re-filed with claims for statutory damages and attorney fees, Plaintiff should be required to show that such relief is available.

Dated: January 14, 2011

Respectfully submitted,

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# **EXHIBIT 1**

**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.<sup>1</sup>

The company that sued you, called the “Plaintiff,” claims that various people have infringed its copyrights by illegally downloading and/or distributing its copyrighted works. 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.

**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

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<sup>1</sup> The lawsuit is pending in the United States District Court for the Northern District of Illinois. The case is entitled *First Time Videos LLC v. Does 1-500*, case number 1:10-cv-06254.

challenge this subpoena. If you would like legal advice you should consult an attorney who can discuss your particular situation. On the following pages of this notice 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 Illinois.

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 a lawyer are:

- The American Bar Association’s attorney locator can be found on the Internet at <http://www.abanet.org/lawyerlocator/searchlawyer.html>
- The Illinois State Bar Association has a lawyer referral service that can be reached at (800) 922-8757, or can be found on the Internet at <http://illinoislawyerfinder.com/>
- 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 Illinois in a case called *First Time Videos LLC v. Does 1-500*, case number 1:10-cv-06254.

To maintain a lawsuit against you in the District Court for the Northern District of Illinois, the court must have personal jurisdiction over you. If you do not live in the Northern District of Illinois or otherwise have contacts with the District, you may be able to challenge the District Court for the Northern District of Illinois' personal jurisdiction over you and have the case dismissed against you in the Northern District of Illinois. 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\\_does/Achte-NeunteFinalBrief.pdf](https://www.eff.org/files/filenode/uscg_does/Achte-NeunteFinalBrief.pdf).

You may also be able to challenge the subpoena or the lawsuit on other grounds depending on your particular situation. 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.