

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

OPENMIND SOLUTIONS, INC.,)	
)	
Plaintiff,)	
)	
v.)	
)	
DOES 1-2925)	CA. 3:11-cv-00092-GPM-SCW
)	
Defendants.)	
)	
)	
_____)	

**BRIEF OF AMICUS CURIAE ELECTRONIC FRONTIER FOUNDATION
REGARDING PROCEEDING AS A CLASS ACTION**

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INTRODUCTION

Class action litigation is a unique vehicle under the Federal Rules that allows—in certain narrow circumstances—for the representative and collective trying of a suit. Due to this representative nature, class actions raise significant due process concerns—especially in defendant class actions—where individuals’ rights will be litigated without their participation, potentially subjecting them to significant financial obligations (due either to judgment or settlement)

Here, those concerns are particularly acute. In an attempt to avoid the joinder, jurisdiction, and speech challenges inherent in mass copyright litigation,¹ Plaintiff asks this Court to entertain a class of nearly 3,000 Doe Defendants, alleged account holders at more than 130 different Internet Service Providers (“ISPs”), for infringing more than 50 distinct works. Each of these Defendants, and each of the works, will carry with it a separate and distinct set of facts and legal questions that will require this Court to make numerous individualized findings and potentially hold hundreds of hearings. If the purpose of the class action lawsuit is to promote efficiency and cost-saving measures for the parties and the Court, that purpose cannot be served in this case. What is worse, in this case the class action process will be profoundly unfair to the Defendants.

ARGUMENT

I. Defendant Class Actions Present A Unique Set Of Due Process Concerns.

Traditionally, the “due process rights of unnamed class members of a defendant class are entitled to special solicitude.” *Pabst Brewing, Inc. v. Corrao*, 161 F.3d 434, 439 (7th Cir. 1998); *see also* NEWBERG ON CLASS ACTIONS § 4.47 (“There is little doubt that a defendant class

¹ *See* Brief of *Amicus Curiae* Electronic Frontier Foundation in Support of Reconsideration of the Court’s Order Granting Early Discovery, or, in the Alternative, of Quashing Plaintiff’s Pre-Complaint Subpoenas (Docket No. 11-1).

requires closer scrutiny of Rule 23 tests to assure fairness to absent members based on long-standing due process protections for defendants in the absence of a defendant class. As a result, stricter due process considerations put greater limits on the use of defendant classes than plaintiff classes.”).

Courts should therefore exercise special caution when certifying defendant classes, as they “are more likely than plaintiff classes to include members whose interests diverge from those of the named representatives.” *Ameritech Ben. Plan Comm. v. Comm’n Workers*, 220 F.3d 814, 820 (7th Cir. 2000). These “[r]isks of diverging interests are particularly high in actions seeking monetary remedies.” *Id.*

Recognizing these inherent problems with defendant class actions, the Seventh Circuit has limited their availability to cases brought under Rule 23(b)(3),² which requires that defendants be given notice and an opportunity to opt out of the class. While an opt-out provision makes it “possible” to enter a money judgment against a defendant class, doing so should be “exceptional: and perhaps the difficulties of administering [such a] case as a defendant class action amount to a ‘compelling’ argument for relinquishing jurisdiction.” *Channell v. Citicorp Nat’l. Servs., Inc.*, 89 F.3d 379, 387 (7th Cir. 1996).

Fundamentally, courts exercise particular caution in defendant class action cases for many of the same reasons they hesitate to hale defendants into courts where jurisdiction does not exist: the purpose of the *International Shoe* “minimum contacts” inquiry is “to protect a

² Section (b)(1)(A), which allows class actions when there is a danger of imposing “incompatible standards of conduct for the party opposing the class,” Fed. R. Civ. P. 23(b)(1)(A), does not apply because an infringement verdict sets a standard of conduct for a defendant, not for a plaintiff. *See Winder Licensing Inc. v. King Instrument Corp.*, 130 F.R.D. 392 (N.D. Ill. 1990) (denying certification in patent infringement case). Section (b)(1)(B), which allows class actions when individual verdicts would in practice be dispositive of other class members’ rights, Fed. R. Civ. P. 23(b)(1)(B), does not apply because collateral estoppel would work only against a losing plaintiff, not against a defendant class member. *See Nat’l Union Fire Ins. Co. v. Midland Bancor, Inc.*, 158 F.R.D. 681, 686-87 (D. Kan. 1994). And section (b)(2), which allows class treatment when “the party opposing the class has acted or refused to act on grounds that apply generally to the class,” Fed. R. Civ. P. 23(b)(2), does not apply because in a defendant class action, it is the class members, not the “party opposing the class,” who have acted or refused to act. *See Henson v. East Lincoln Twp.*, 814 F.2d 410, 414-17 (7th Cir. 1987).

defendant from the travail of defending in a distant forum,” and that “the burdens placed by a State upon an absent class-action plaintiff are not of the same order or magnitude as those it places upon an absent defendant.” *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807-08 (1985). In contrast with a plaintiff, who risks losing only her ability to bring suit, an “out-of-state defendant summoned by a plaintiff is faced with the full powers of the forum State to render judgment *against* it.” *Id.* (emphasis in original). These concerns are particularly salient here, where the proposed class encompasses individuals whom Plaintiff’s own complaint shows are likely to be located throughout the United States. *See, e.g.*, Complaint, Exh. A at 3 (listing Universities of Alaska and North Carolina). Many of them will have few contacts with Illinois and could not even be served with process, let alone haled into court, if Plaintiff had sued them individually here. *See* Fed. R. Civ. P. 4(k)(1)(A).

II. In Exercising Its Broad Discretion To Determine *If* A Class Action May Proceed, A Court Should Consider *How* That Case Would Proceed.

Class actions under Rule 23(b)(3)—under which Plaintiff proposes to certify a class here—are permissible only when they “would achieve economies of time, effort, and expenses, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.” Fed. R. Civ. P. 23(b)(3), advisory committee’s note to 1996 Amendments. To certify a class a party must show that the proposed class definition is “definite enough that the class can be ascertained.” *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006), *citing Alliance to End Repression v. Rochford*, 565 F.2d 975, 977 (7th Cir. 1977). Where, as here, a party cannot meet either of these standards, a court has “broad discretion” in prohibiting a class action from proceeding. *Redmon v. Uncle Julio’s of Illinois, Inc.*, 249 F.R.D. 290, 293-94 (N.D. Ill. 2008). Before making that decision, “a judge should make whatever factual and legal inquiries are necessary under Rule 23.” *Szabo v. Bridgeport Mach., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001). Specifically, a “court may certify a class under Rule 23(b)(3) only if it finds that all of the prerequisites (such a numerosity) have been demonstrated, and in addition the court finds that the questions of law or fact common to

the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.” *Id.* When the considerations under Rule 23 “overlap the merits, ... then the judge must make a preliminary inquiry into the merits.” *Id.*; *see also Redmon*, 249 F.R.D. at 293-94 (“Where questions bearing on class certification and the merits of the case are intertwined, the court should make a preliminary inquiry into the merits to determine if the case is suitable for class treatment”).³

To do this, a court should “determine how the case will be tried.” Fed. R. Civ. P. 23, advisory committee’s note to 2003 Amendments. This requires the Court to take into account the four Rule 23(a) requirements and the additional requirements of Rule 23(b)(3) at the outset to determine if it could—and should—practically manage Plaintiff’s proposed class action.

Aside from the procedural errors and due process harms that individual Defendants may suffer if this class proceeds, the Court should consider the individual issues that necessarily will be caught up in Plaintiff’s proposed defendant class action and the sheer amount of discovery—nearly that which would be required to litigate the merits of this case—that it would entail. Moreover, given the predominance of individual factual and legal issues, an attempt to try this case as a class action would potentially either lead to hundreds of hearings on behalf of individual Defendants or result in many unnamed Defendants lacking adequate class representation.

First, Plaintiff alleges infringement of nearly 50 different works.⁴ Complaint, Exh. A.

³ During oral argument, Plaintiff asserted it currently faces “for all intents and purposes” a motion to dismiss and that it was due “some benefit of [its] complaint being treated as [if its] allegations are true.” Transcript of Record at 12:14-21, *OpenMind Solutions, Inc. v. Does 1-2,925*, Case No. 11-92 (S. D. Ill. April 11, 2011). Yet, for purposes of class certification at least, questions that bear on both certification and the merits “require the exercise of judgment and the application of sound discretion: they differ in kind from legal rulings under 12(b)(6).” *Szabo*, 249 F.3d at 677.

⁴ Plaintiff’s Exhibit A, attached to its Complaint, lists “torrents” rather than individual “works.” Fifty-one individual torrents are listed. Yet because torrents are created and named by users, it is conceivable that more than one torrent allows the download of a certain work, or that a single torrent includes allows the download of multiple works. Consequently, it is impossible to know exactly how many works are at issue.

With each work will come a separate set of issues for the Court to face before it can even reach questions of infringement and affirmative defenses. For example, a certificate of copyright registration serves only as a presumption of validity, which Defendants may rebut. *See, e.g., Mid Am. Title Co. v. Kirk*, 59 F.3d 719, 721 (7th Cir. 1995). A copyright may be invalid for any number of reasons, such as that the work in question was not original, its contents were in the public domain, or its ownership is in dispute. *See, e.g., Feist Publ'n, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991); *Assessment Tech. v. WIREDATA, Inc.*, 350 F.3d 640, 644 (7th Cir. 2003). Each or any of these reasons may apply to any of the works in question here, and each work would thus likely require its own hearing for a factual determination on validity.

In addition to whether the copyright is valid, questions surrounding the applications for registration will come into play. For example, Plaintiff fails to allege that it owned registrations for each work listed in its Exhibit A and in fact only states that it owns “application[s] for registration.” Complaint at ¶ 20. 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,” and under 17 U.S.C. § 411, “no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made.” Consequently, this Court will need to make an extensive series of factual determinations for each work in question: the date of its registration, the date of its first publication, the date of each act of alleged infringement, whether it is a United States or foreign work, and the status of the Copyright Office’s processing of each application. *See Reed-Elsevier, Inc. v. Muchnick*, 559 U.S. ___, 130 S. Ct. 1237, 1241, 1249 (2009) (holding that § 411 is a nonjurisdictional “precondition to filing a [copyright] claim” and leaving open the question of whether “district courts may or should enforce [§ 411] *sua sponte* by dismissing copyright infringement claims involving unregistered works”).

Second, Plaintiff has already signaled in both its briefing and in open court that it intends to pursue at least three different theories of liability: direct liability, secondary liability, and

potentially some kind of breach of contract claim. Complaint at ¶¶ 17-29; Transcript of Record at 7:22-8:18, *OpenMind Solutions, Inc. v. Does 1-2,925*, Case No. 11-92 (S. D. Ill. April 11, 2011). Each of these comes with a separate requirement of proof and potentially distinct affirmative defenses. Some Defendants may be liable under only one theory, some under all three, and some innocent of any offense at all.

These questions of validity and liability—not to mention affirmative defenses (*infra* at 13 and damages (*infra* at 10-11)—will require fact-specific inquiries that, at the outset, highlight all the potential permutations that make proceeding as a class action both inefficient and counter to the spirit of Rule 23.

III. Plaintiff Cannot Maintain A Class Action Under Rule 23(a).

In addition to the requirement that a proposed class definition be “definite enough that the class can be ascertained,” *Oshana*, 472 F.3d at 513, a party attempting to certify a class must also show that the class comports with “the four requirements of Rule 23(a)” and meets at least one of the requirements under Rule 23(b). *Williams v. Chartwell Fin. Servs., Ltd.*, 204 F.3d 748, 760 (7th Cir. 2000). Rule 23(a) states:

One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable,
- (2) there are questions of law or fact common to the class,
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). These requirements are commonly known as numerosity, commonality, typicality, and adequacy. While Plaintiff may eventually satisfy the numerosity requirement (at present, it has named nearly 3,000 Defendants), it cannot meet the remaining three requirements.

A. Commonality

While a “common nucleus of operative fact is usually enough to satisfy the commonality requirement of Rule 23(a)(2),” here Plaintiff fails to point out the required “common question which is at the heart of this case.” *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992). In *Rosario*, the Seventh Circuit found a common question “at the heart of the case” when faced with deciding whether a party “operated pursuant to an ongoing scheme to defraud and deceive” class members. *Id.* No such singular question exists here.

In its complaint, Plaintiff alleges four bases for commonality—none of which meets the commonality requirement in Rule 23(a). Complaint at ¶35. The first, whether Plaintiff is the owner of the works at issue, is not a common question, as Plaintiff will have to prove ownership of each of nearly 50 distinct works. *Supra*, at 5; accord *Vulcan Golf, LLC v. Google Inc.*, 254 F.R.D. 521, 528 (N.D. Ill. 2008)⁵ (refusing to certify a class that could require “time-consuming inquiries regarding ownership” of class members’ trademarks). The second—whether copying has occurred within the meaning of the Copyright Act—likewise is not a question common to all class members. Importantly, the listed Doe Defendants are, at this point, nothing more than alleged account holders of implicated IP addresses. One can only imagine the different questions—none of which is common to the proposed class as a whole—that may arise:

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.

BMG Music v. Does 1-203, 2004 WL 953888 *1 (E.D.Pa., April 2, 2004).

For the same reason, Plaintiff’s third basis for commonality must fail. Plaintiff posits that a common question is whether “entering a torrent swarm constitutes a willful act of

⁵ *Vulcan* is instructive. There, the Court refused to certify a class action in a trademark infringement case where the Court found no predominance of common questions of law or fact based on, among other things, issues of ownership, distinctiveness, affirmative defenses, and unjust enrichment claims. *Vulcan*, 254 F.R.D. at 527- 535.

infringement.” The phrase “entering a torrent swarm” conceals a host of factual issues by mischaracterizing them as a single legal issue. It is true that this Court will be called upon to decide whether each Defendant’s actions constitute willful infringement. But the heart of that question is what each Defendant actually did, which will involve technical details about the Defendant’s individual online activity, the Defendant’s understanding of how computer technology functions, and the Defendant’s knowledge of copyright law. Indeed, without substantial discovery and potential individual rulings from this Court, Plaintiff will not be able to show that any given Defendant class member even entered a so-called torrent swarm. Complaint at ¶35(C).

Finally, Plaintiff claims that “whether and to what extent [it] has been damaged by the Defendant’s conduct” is also a common question of law or fact. This is not the case. The Copyright Act permits an owner to collect actual damages for an infringement, which are “usually determined by the loss in the fair market value of the copyright, measured by the profits lost due to the infringement or by the value of the use of the copyrighted work to the infringer.” *McRoberts Software, Inc. v. Media 100, Inc.*, 329 F.3d 557, 566 (7th Cir. 2003). Again, Plaintiff’s claim must fail, if only based on the fact that it chose to include nearly 50 distinct works in its complaint. Presumably, each of those works has a different fair market value, depending on potentially a whole host of factors, e.g., any given work’s popularity, its release date, and its alternative availability. Plaintiff’s claim of commonality must likewise fail if the actual damages are measured by the value of the work to the user, as each user likely values the work differently.

B. Typicality

The inquiry into typicality is “closely related” to the question of commonality. *Rosario*, 963 F.3d at 1018. A claim is “typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory.” *Id.*, citing *De La Fuente v. Stokley-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983).

Plaintiff asserts two bases for typicality. The first, that “every” Defendant engaged in the same conduct (Complaint at ¶36), is belied by the fact that current Defendants are merely alleged account holders—not necessarily the parties that downloaded the works in question. *See supra* at 7, quoting *BMG Music*, 2004 WL 953888 *1. To determine if the account holders either downloaded the works in question, or had knowledge that a third party downloaded those works, the parties and this Court will have to engage in substantial discovery to even determine if typicality exists, rendering the class action unmanageable and undesirable.

Plaintiff’s other basis for typicality—its claim that “typical defenses common to all and certain to be vigorously asserted by the named Defendants include First Amendment rights to anonymous communication and rights to privacy,” (Complaint at ¶ 36)—is disingenuous. Once discovery is taken from ISPs on the identities of Defendants, the First Amendment and privacy claims will become moot. Thus, Plaintiff has structured its lawsuit so that by the time class representatives capable of asserting Defendants’ privacy rights exist, those rights will *already* have been violated. They will not then be a “typical” issue in common among the class, leaving a class lacking in the required typicality; indeed, Plaintiff admits as much, stating in its Complaint that “some defenses of noninfringement may be more tailored to an individual.” Complaint at ¶ 36.

C. Adequacy

Rule 23(a)’s final requirement is that the “representative parties fairly and adequately represent the class.” *Rosario*, 963 F.2d at 1018. The representative party must therefore “possess the same interest” as the other class members. *Uhl v. Thoroughbread Tech. & Telecomm., Inc.*, 309 F.3d 978, 985 (7th Cir. 2002) (quoting *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)). “This requires the district court to ensure that there is no inconsistency between the named parties and the class they represent.” *Id.*

Intra-class conflicts prove a common roadblock to meeting the adequacy requirement. *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 598 (7th Cir. 1993). Here, should a class be certified, a potential conflict will likely arise at the settlement stage when some class

members might face liability for statutory damages of up to \$150,000 along with costs and fees, while others might only be liable for actual damages (or not liable at all).⁶ In order for statutory damages to be in play, Plaintiff must show that the registration in question complies with 17 U.S.C. § 412 and, if so, that a Defendant willfully infringed the work at issue.

First, under 17 U.S.C. § 412, a plaintiff cannot sue for statutory damages or attorneys' 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." It seems highly unlikely that the registration for each work occurred less than three months before any of the Defendants allegedly infringed the work, especially because some of the infringements alleged by Plaintiff occurred as early as January 2010. *See, e.g.,* Complaint, Exh. A at 64.

Even if statutory damages are available, Plaintiff would still have to prove that the work was willfully infringed, which is a factual determination and thus not easily amenable to the class action process. *Wildlife Exp. Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502, 511 (7th Cir. 1994). This leaves three potential relevant groups of Defendant class members: those who allegedly infringed a work that complied with 17 U.S.C. § 412; those who allegedly infringed those works willfully; and those to whom neither of the above criterion applies. Each of these groups will likely have diverging, and even counter, interests at the settlement stage where class members may be facing a wide range of potentially liability.

The inquiry into whether a defendant class would meet the adequacy requirement raises the additional concern of whether any hypothetical named parties would have the reason or desire to invest, financially and/or personally, in a constitutionally-adequate class-wide defense. Plaintiff asserts that class members will be represented by counsel "experienced in the defense of copyright and class action litigation," Complaint at ¶ 37, but as the party proposing class treatment, Plaintiff bears the burden of establishing that this will be the case. The nature of

⁶ Likewise, some Defendants might be amenable to further reduced damages if they assert an innocent infringer defense. 17 U.S.C. § 504(c)(2).

Plaintiff's works—"adult entertainment content," Complaint at ¶ 3—and the nature of the alleged infringement—downloading and uploading those works as part of a peer-to-peer file-sharing network—make it likely that most or all of the class members will be individuals, rather than businesses with correspondingly large resources necessary to conduct large-scale class action litigation.

IV. Plaintiff Cannot Maintain A Class Action Under Rule 23(b)(3).

Plaintiff's inability to meet the four requirements of Rule 23(a) alone precludes a class action. Plaintiff also cannot show, as it must, that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

A. Predominance

The question of predominance—whether questions of law or fact common to class members predominate over any questions affecting only individual members—resembles Rule 23(a)'s commonality requirement, but meeting the predominance standard is much more demanding. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-34 (1997) ("Even if Rule 23(a)'s commonality requirement may be satisfied by that shared experience, the predominance criterion is far more demanding.").

In addition to overcoming all of the problems it faces with commonality, *supra* at 7-8, Plaintiff must show that "a conclusion as to one member" is common or determinative, "or even relevant when the question arises with respect to another member." *Halverson v. Convenient Food Mart, Inc.*, 69 F.R.D. 331, 336 (N.D. Ill. 1974). In reaching this conclusion, the court should identify "the substantive elements" of the cause of action and assess the proof necessary for a party to make its case, as well as consider "the form that trial on these issues would take." *Simer v. Rios*, 661 F.2d 655, 672 (7th Cir. 1981).

Given the sheer number of potential causes of action that Plaintiff has claimed could apply to class members, the Court would have to identify myriad elements—both questions of

fact and conclusions of law—that make a class action untenable. Specifically, Plaintiff alleges causes of action for direct infringement, secondary liability (which may encompass at least three different theories: vicarious, contributory, and inducement), and some form of liability arising from the Doe Defendants’ agreement with their ISPs.⁷ Each of these causes of action requires its own set of proof, eliminating the possibility that a conclusion as to one member of any potential defendant class would be common to and determinative of another member’s liability.

To make a case for direct infringement, Plaintiff will have to show that each of the nearly 50 works in question is covered by a valid registration and also show copying of that work by the Defendants. *Wildlife*, 18 F.3d at 507. The elements of vicarious liability include a direct financial interest in the infringement and the right and ability to supervise others. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022 (9th Cir. 2001). To show contributory liability, Plaintiff would need to prove the added elements of knowledge of direct infringement by another and that a defendant caused, induced, or materially contributed to the infringement. *Id.* at 1019. And different still is inducement, which—while likely not applicable here—has its own set of required elements: that a defendant distribute a device and promote the infringement-enabling virtues of that device. *See, e.g., Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

Finally, Plaintiff appears to believe liability will attach based on each Defendant’s “proactive guarantee” with its ISP. Transcript of Record at 8:11-18, *OpenMind Solutions, Inc. v. Does 1-2,925*, Case No. 11-92 (S. D. Ill. April 11, 2011). Any kind of claim based on these agreements will require specialized and individual questions of fact. First, Plaintiff lists more than 130 different ISPs in Exhibit A to its Complaint. Complaint, Exh. A. Second, one cannot assume that each Defendant who has an account with the same ISP signed the same agreement. And third, whether a user was provided with sufficient notice of terms of service to be bound by them may itself require detailed factual analysis under state law contract principles. *See, e.g.,*

⁷ It seems unlikely that Plaintiff would have standing to bring any breach of contract claim on behalf of ISPs.

Specht v. Netscape Commc'n Corp., 306 F.3d 17, 21-25 (2d Cir. 2002) (distinguishing actions taken by six different individuals allegedly bound by online agreement). So, to the extent any liability may attach to the Doe Defendants based on agreements with the ISPs, it appears that *at least* 130 different contractual standards of conduct exist, and that their applicability will be measured under the law of many different states. *Cf. Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300-02 (7th Cir. 1995) (class action impermissible because it would have disregarded the differences in states' negligence law).

Similarly, Plaintiff's ability to certify a class will likely fail based on the individual factual issues that predominate with regard to potential affirmative defenses, which "simply add[] another layer to an already fact-specific inquiry that the court must delve into." *Vulcan*, 254 F.R.D. at 531. The list of potential affirmative defenses is substantial. In addition to the more customary defenses—such as whether the use was licensed (implicitly or explicitly) or a fair use—the Court may face questions of copyright misuse, laches, estoppel, abandonment, acquiescence, and unclean hands, just to name a few. Each of these defenses comes with its own set of factual and legal questions and each Defendant might be amenable to any number of them, again illustrating why individual issues predominate over questions of law and fact common to the class as a whole.

The same is true with the inquiry into damages. In its Complaint, Plaintiff makes clear that it intends to seek actual damages from at least some Defendants (likely because statutory damages will not be uniformly available). Complaint, Prayer for Relief. The factual determinations into actual damages alone should preclude class treatment. *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952-53 (7th Cir. 2006) (seeking compensatory damages instead of statutory damages would preclude class certification); *see also* Fed. R. Civ. P. 23(b) advisory committee's note to 1996 Amendments ("mass accident" cases are "ordinarily not appropriate" for class treatment as they often come with "significant questions, not only of damages but of liability and defenses of liability, ... affecting the individuals in different ways.").

B. Superiority

In order for a class action to proceed, it must be superior to other methods of resolving a party's claim. However, if "the class certification only serves to give rise to hundreds or thousands of individual proceedings requiring individually tailored remedies, it is hard to see how common issues predominate or how a class action would be the superior means to adjudicate the claims." *Andrews v. Chevy Chase Bank*, 545 F.3d 570, 577 (7th Cir. 2008).

A class action is not the superior method to fairly and effectively adjudicate this controversy. Put simply, the case would be unmanageable. *Williams*, 204 F.3d at 760 ("even if common questions predominate, a class action may not be superior or, to be more exact, a feasible method of adjudication because the 'class' is simply unmanageable"). As explained throughout this brief, this Court would need to make numerous rulings on outstanding factual issues before a defendant class could be certified.⁸ Those factual issues touch on every facet of the infringement case against the Defendants—ownership and validity of the copyrights, whether the ISP account holder actually downloaded the work, whether and under what theory of liability Plaintiff could make a case to survive a Rule 12(b)(6) Motion to Dismiss, the existence and applicability of affirmative defenses such as fair use, the availability of statutory damages, and the calculation of actual damages. Engaging in the type of discovery necessary to provide the information to certify such a class would require essentially working up the entire case on the merits.

No efficiencies will be realized in trying this case as a class action. Likewise, neither the Court nor any of the parties will experience economies of time, effort, or expense. *See* Fed. R. Civ. P. 23(b)(3), advisory committee's notes to 1996 Amendments. Plaintiff's class action scheme is expensive, inappropriate and unfair.

⁸ Further complicating matters, this Court—and others—would potentially have to make additional individualized rulings *after* the case to apportion any judgment entered against a defendant class. *See* 2 NEWBERG ON CLASS ACTIONS § 4.49 (4th ed.) ("As a practical matter, any monetary judgment against defendant class members usually will have to emerge from independent collateral proceedings by the plaintiff against particular defendant class members.").

CONCLUSION

Amicus curiae The Electronic Frontier Foundation greatly appreciates the opportunity to submit this Brief Regarding Proceeding as a Class Action, and, in light of the foregoing and EFF's Brief in Support of Reconsideration of the Court's Order Granting Early Discovery or, in the Alternative, of Quashing Plaintiff's Pre-Complaint Subpoenas, again requests that this Court vacate its earlier ruling on Plaintiff's Motion for Expedited Discovery and quash any outstanding subpoenas. EFF also suggests that the Court dismiss the action *sua sponte* and require the Plaintiff re-file individual cases against individual Defendants in court that can properly exercise jurisdiction.

Respectfully submitted,

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By /s/ Julie P. Samuels

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CERTIFICATE OF SERVICE

I, Julie Samuels, do hereby certify that service of **BRIEF OF AMICUS CURIAE ELECTRONIC FRONTIER FOUNDATION REGARDING PROCEEDING AS A CLASS ACTION** was accomplished pursuant to Electronic Case Filing as to ECF Filing Users and shall be served upon all other parties listed in the attached Service List by sending said documents via postage pre-paid U.S. mail on this 25th day of April 2011.

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