

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
Civil Action No. 1:08-CV-00128-BO

CAPITAL RECORDS, LLC. <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	
vs.)	<u>BRIEF IN SUPPORT OF DEFENDANT’S</u>
)	<u>MOTION TO DISMISS THE COMPLAINT,</u>
JOHN DOE,)	<u>STRIKE THE PLAINTIFFS’</u>
)	<u>DECLARATION, AND QUASH THE</u>
Defendant.)	<u>SUBPOENA</u>

I. INTRODUCTION

Defendant submits the following memorandum of law, pursuant to Local Rule 7.2, (E.D.N.C.) in support of the motion to dismiss the Complaint for failure to state a claim upon which relief can be granted (Fed. R. Civ. P., Rule 12(b)(6)), to strike the Plaintiffs’ declaration [docket no. 4-1] (Fed. R. Civ. P., Rule 12(f)), and to quash the subpoena, (Fed. R. Civ. P., Rule 45(c)(3)(A)(iii)). Further, the Defendant respectfully requests that the Court stay enforcement of the subpoena addressed to North Carolina State University (“NCSU”) pending further orders.

Plaintiffs have not caused any summons to be issued by the Clerk of Court and have not served Defendant with the Complaint and summons as reflected in the Court’s record. Defendant makes an appearance for the limited purpose of these consolidated motions. Defendant reserves all rights to challenge the Complaint, jurisdiction, and venue; and to assert any and all defenses available to him in accordance with the Federal Rules of Civil Procedure.

On the 2nd day of July, 2008, the Honorable Louise W. Flanagan, Chief Judge EDNC, entered Orders in two near identical actions calling for a “fresh look” at all of Defendant’s motions in file numbers 08-CV-115 and 08-CV-116. Judge Flanagan noted that no motion to strike a second-hand declaration and no arguments concerning illegal activity by Plaintiffs’ agent were before the Honorable Earl Britt when he rendered his February 27, 2008 Order.¹ In this predecessor action, Judge Britt denied Defendants’ motion to dismiss, but granted Defendants’ motion to sever [file number 5:07-CV-298].

Plaintiffs claim to own the copyrights in a number of sound recordings made by artists who no longer control the copyrights at issue. Over the last several years, these Plaintiffs, and other record labels in cooperation with them, have sued tens of thousands of individuals, perhaps as many as fifty thousand, alleging that these individuals have “uploaded,” “downloaded,” and “made available” sound recordings, although Plaintiffs rarely, if ever, have actual knowledge of any copying or dissemination of the recordings themselves.

The Defendants, facing the resources of an industry that generates billions of dollars in revenue annually, do not have the means to contest the claims. At this stage of the proceedings, the Defendant’s identity is unknown, and no evidence has been introduced to demonstrate that Plaintiffs have targeted the correct individual or that their suit has any merit whatsoever. Plaintiffs rely solely and exclusively upon the sworn statement of a Vice-president for Legal Affairs at the Recording Industry Association of America (“RIAA”) with no first hand knowledge of the copying alleged. [Linares decl. docket no. 4-1 ¶1]. Further, the investigative company deployed by the RIAA, MediaSentry, engages in the investigative profession for the purpose of ascertaining the

¹ *Electra et al v. John Doe*, 5:08-CV-115 (EDNC, July 2, 2008) (Appendix 1).

identity, habits, conduct, activity, and transactions of private individuals for the stated purpose of securing evidence to be used before a court. [Linares decl. docket no. 4-1 ¶¶13-14]. MediaSentry is not licensed to conduct such investigations as required by North Carolina General Statutes Chapter 74C, the North Carolina Private Protective Services Act.

The purpose of these John Doe suits is not, as it should be, to engage in a legitimate determination of Plaintiffs' rights under the Copyright Act. Instead, these actions are solely for purposes of discovering the identities and other private personal information of individual account holders with a particular Internet Service Provider ("ISP"), in this case, NCSU. Plaintiffs were granted the extraordinary *ex parte* order for expedited discovery they sought, a subpoena issued, and, upon information and belief, it was served upon NCSU.

II. **QUESTIONS PRESENTED**

1. Do Plaintiffs satisfy both that they own the copyrights at issue, *and* that they have sufficiently alleged a copyright infringement such that the Complaint should not be dismissed?

2. Does Defendant's First Amendment right as an anonymous speaker require that the Court quash a subpoena seeking his identity?

III. **ARGUMENT**

A. **Plaintiffs Fail to State a Claim Upon Which Relief Can be Granted Under *Twombly* and the Plain Language of § 106(3); Plaintiffs Fail to Make Specific Factual Allegations that Actual Disseminations of Their Works Took Place.**

To support their claim for copyright infringement, Plaintiffs must allege two elements: (1) that a copyright subsists in the allegedly infringed material, and (2) that the

alleged infringer violated at least one of the six exclusive rights granted to copyright owners under 17 U.S.C. § 106.² Even assuming that one of the Plaintiffs can show that it owned the copyright to a sound recording alleged to reside on Defendant's computer, Plaintiffs have failed to allege infringement of any of the exclusive rights.

The Copyright Act does not give a copyright owner exclusive control over every possible use of his or her work. Rather, the Copyright Act limits a copyright owner's control to the six exclusive rights specifically enumerated in § 106: (1) to reproduce, (2) to prepare derivative works, (3) to distribute copies of, (4) to perform publicly literary, musical, dramatic, and choreographic works; pantomimes, motion pictures, and other audiovisual works, (5) to display publicly; and (6) to perform publicly sound recordings.

The Complaint alleges, upon information and belief, that each Doe, without the permission of the Plaintiffs "... has continuously used, and continues to use, an online media distribution system to download and/or distribute to the public certain of the Copyrighted Recordings to the public." [docket no. 1, Complaint ¶13]. The only right that could conceivably be implicated by the act described in the Complaint is § 106(3). To determine if Plaintiffs have alleged an infringement, the Court must preliminarily evaluate the merits of Plaintiffs' copyright infringement claims. In doing so, the Court should consider Plaintiffs' distribution claims.

The "distribution right" is defined in § 106(3) of the Copyright Act, granting to a copyright owner the exclusive right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease,

² See 17 U.S.C. § 501(a) - infringement occurs when alleged infringer engages in activity listed in Section 106.

or lending.” 17 U.S.C. § 106(3).³ Plaintiffs’ Complaint here appears to be premised on allegations that the Defendants have infringed the distribution right merely by making music files available to others over the Internet. To the extent this is the gravamen of their distribution claim, the claim must fail because § 106(3) requires an actual dissemination of a copy; merely “making available” is at most a non-actionable attempt at infringement. Plaintiffs have not made factual allegations sufficient to support their claim for relief.⁴

Section 106(3) bestows on the owner of a copyright the exclusive right “to distribute copies or phonorecords of the copyrighted work....” 17 U.S.C. § 106(3). The language of § 106(3) does not include any prohibitory language pertaining to offers to distribute, attempts to distribute, or the “making available” of copyrighted works. In

³ As this language makes clear, the exclusive right granted by § 106(3) is infringed only by the completed distribution of certain things (“copies or phonorecords of the copyrighted work”), to certain people (“the public”), in certain ways (“by sale or other transfer of ownership, or by rental, lease, or lending”).

⁴ *Bell Atl. Corp. v. Twombly*, 547 U.S. ---, 127 S. Ct. 1955, 1965 (2007). See also *Temple v. Circuit City Stores, Inc.*, Nos. 06-cv-5303, 06-cv-5304, 2007 WL 2790154, at *7 (E.D.N.Y. Sept. 25, 2007) (using *Twombly* to support a dismissal of Sherman Act claims because plaintiffs “mention[ed] no facts to support the claim that such an agreement or conspiracy existed, and the ‘naked assertion of conspiracy,’ however often repeated, does not do the trick”) (quoting *Twombly*, 127 S. Ct. at 1966); *Savokinas v. Pittston Twp.*, No. 3:06-cv-00121, 2007 WL 2688729, at *4-5 (M.D. Pa. Sept. 11, 2007) (dismissing free speech claims where plaintiff “does not allege when the speech occurred, the forum where the speech occurred, the recipients of the speech, or the content of the speech”); *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2nd Cir. 2007) (affirming dismissal of complaint because plaintiffs’ claims were vague and general and did not provide “plausible grounds to infer an agreement” as required under *Twombly*); *Pancotti v. Boehringer Ingelheim Pharms., Inc.*, No. 3:06cv1674 (PCD), 2007 WL 2071624, at *2, *4, *7 (D. Conn. July 17, 2007) (citing *Twombly* to dismiss ERISA claims for failure to plead facts sufficient to support an essential element of the claims); *Ass’n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 548 (6th Cir. 2007), (affirming grant of defendant’s motion to dismiss where plaintiffs failed to bring allegations that raised a right to relief “above the speculative level” as required by *Twombly*); *Burke v. APT Found.*, 509 F.Supp.2d 169, 173-74 (D. Conn. 2007) (applying the *Twombly* standard to dismiss a Section 1983 claim for failure to allege facts sufficient to support an element of the claim).

short, the statute makes the completed act of distribution the dividing line that separates lawful from unlawful conduct.

1. The Fourth Circuit Holding in *Hotaling v. Church of Jesus Christ of Latter-Day Saints*,⁵ Runs Contrary to the Language of the Statute and Other Circuit Authorities.

In *Hotaling*, a copyright owner sued a number of libraries that had made infringing copies of a microfiche work. The plaintiff's reproduction claims were time-barred, leaving her with only a distribution claim.

Because the libraries had no records of loans to patrons, the plaintiff was also unable to prove any actual loans to the public. The Fourth Circuit nevertheless found that the plaintiff could proceed with her distribution claim, reasoning that "a library distributes a published work ... when it places an unauthorized copy of the work in its collection, includes the copy in its catalog or index system, and makes the copy available to the public."⁶ This outcome, perhaps motivated by sympathy for the plaintiff,⁷ cannot be squared with the statutory language of § 106(3) or with the authorities discussed below. The opinion has also drawn the criticism of commentators.⁸ This Court should decline to follow *Hotaling*, choosing instead to rely on the statutory language and on the authorities from other circuits.

2. The Leading Authorities Agree that Distribution Requires Actual Dissemination of a Copy.

Plaintiffs' effort to rewrite § 106(3) to reach mere attempts at dissemination was soundly rejected by the First Circuit in *London-Sire Records, Inc. v. Doe 1 et al.*⁹ The

⁵ *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997).

⁶ *Id.* at 201.

⁷ see *id.* at 205 (Hall, J., dissenting).

⁸ See 4 PATRY ON COPYRIGHT § 13:9.

⁹ *London-Sire Records, Inc. v. Doe 1 et al.*, 542 F.Supp.2d 153 (D.Mass. 2008).

plaintiffs argued that the facts in *London-Sire*, nearly identical to those in this case, were analogous to *Hotaling*. Rejecting the analogy, the Court pointed out the obvious gap in reasoning where “[m]erely because the defendant has ‘completed all the steps necessary for distribution’ does not necessarily mean that a distribution has actually occurred. It is a ‘distribution’ that the statute plainly requires.”¹⁰

In *Latin Amer. Music Co. v. Archdiocese of San Juan*, 499 F.3d 32 (1st Cir. 2007), the First Circuit held that:

Mere authorization of an infringing act is an insufficient basis for copyright infringement. Infringement depends upon whether an infringing act, such as copying or performing, has occurred. Therefore, to prove infringement, a claimant must show “an infringing act after the authorization.”¹¹

The facts at issue in *Latin American Music v. Archdiocese* are telling. In that case, the First Circuit found that listing a song in a catalog, issuing licenses for its performance, and offering songs on a website were not enough to establish infringement in the absence of evidence beyond mere “authorization.”¹² In other words, infringement of the distribution right depends upon whether an actual distribution has occurred. Relevant authorities agree with the First Circuit. In *Perfect 10 v. Amazon.com*, the Ninth Circuit concluded that “distribution requires an ‘actual dissemination’ of a copy.”¹³ The copyright owner sought a preliminary injunction against Google, arguing (among other things) that Google directly infringed its distribution rights by indexing and linking to infringing photographs posted on the Internet by third parties. The district court

¹⁰ *Id.* 2008 WL 887491, *9.

¹¹ *Latin Amer. Music Co. v. Archdiocese of San Juan*, 499 F.3d 32, 46 (1st Cir. 2007), citing *Venegas-Hernandez v. ACEMLA*, 424 F.3d 50, 57-59 (1st Cir. 2005).

¹² *Accord Resnick v. Copyright Clearance Center, Inc.*, 422 F.Supp.2d 252, 259 (D. Mass. 2006) (“Where there is no direct proof of an infringing act after the authorization, no infringement has occurred.”) (internal quotes omitted).

¹³ *Perfect 10 v. Amazon.com*, 508 F.3d at 1162, affirming in relevant part, *Perfect 10, Inc. v. Google Inc.*, 416 F.Supp.2d 828, 844 (C.D. Cal. 2006).

disagreed, holding that: “A distribution of a copyrighted work requires an ‘actual dissemination’ of copies.”¹⁴ On appeal, the Ninth Circuit affirmed the district court on this point:

The district court reasoned that distribution requires an “actual dissemination” of a copy. Because Google did not communicate the full-sized images to the user’s computer, Google did not distribute these images. Again, the district court’s conclusion on this point is consistent with the language of the Copyright Act.¹⁵

Other courts that have addressed this issue are in accord with the First and Ninth Circuits.¹⁶ The leading copyright law commentators also unanimously agree that “an actual transfer must take place; a mere offer for sale will not infringe the right.”¹⁷ These authorities make it plain that, in order to prevail on their distribution claims, Plaintiffs will have to come forward with evidence sufficient to demonstrate that actual distributions to third parties took place. To permit a finding of distribution liability on anything less would be to transform § 106(3) into an unbounded form of civil attempt liability, where the mere possibility of a dissemination would trigger infringement liability, even where no copies had ever been distributed and thus no harm had ever been inflicted on the copyright owner.

¹⁴ *Perfect 10 v. Google*, 416 F.Supp.2d at 844 (citing *In re Napster, Inc. Copyright Litig.*, 377 F.Supp.2d 796, 802-04 (N.D. Cal. 2005)).

¹⁵ *Perfect 10 v. Amazon.com*, 508 F.3d at 1162 (internal citations omitted).

¹⁶ See *National Car Rental Sys., Inc. v. Computer Assoc. Int’l*, 991 F.2d 426, 434 (8th Cir. 1993); *In re Napster*, 377 F.Supp.2d at 802 (N.D. Cal. 2005) (collecting authorities); *Arista Records, Inc. v. Mp3Board.com, Inc.*, No. 00-Civ.-4660-SHS, 2002 WL 1997918 at *4 (S.D.N.Y. Aug. 29, 2002).

¹⁷ Paul Goldstein, 2 GOLDSTEIN ON COPYRIGHT § 7.5.1 (3d ed. 2007); accord Melville B. Nimmer & David Nimmer, 2 NIMMER ON COPYRIGHT § 8.11[A] (2007); William F. Patry, 4 PATRY ON COPYRIGHT § 13:9 (2007) (“[W]ithout actual distribution of copies..., there is no violation of the distribution right.”).

3. A Declaration, By a Person Once Removed from Plaintiffs' Own Unlicensed Investigators, Alleging Downloads Should be Stricken.

The only evidence before the Court to justify the distribution claim is the sworn declaration of Carlos Linares. Although he states that he has “personal knowledge of the facts alleged,” [Linares decl. docket no. 4-1, page 1] he does not. The proffered evidence in Exhibit A to the Complaint was acquired not by Mr. Linares, but by some unnamed person or persons working for MediaSentry [Linares decl. docket no. 4-1, ¶¶11-15]. Looking at a near identical declaration in a near identical case, the *London-Sire* Court held that the Linares “evidence supports an inference that the defendants participated in the peer-to-peer network precisely to share copyrighted files. The evidence and allegations, *taken together*, are sufficient to allow a statistically reasonable inference that at least one copyrighted work was downloaded at least once”¹⁸ (emphasis added).

MediaSentry is required to have a license to operate in the State of North Carolina as they are a private firm engaged in the private protective services profession.¹⁹ According to Terry Wright, Director (the “Director”) of Protective Services (the North Carolina Board responsible for private investigator licensing), MediaSentry’s activities appear to be in violation of the Private Protective Services Act.²⁰ Violation of the Private Protective Services Act is a Class 1 misdemeanor.²¹

Defendant draws the Court’s attention to page 2 of the letter to the Director [Exhibit A to Robertson Affidavit] and the reference to the attachment of the Declaration of

¹⁸ *London-Sire Records, Inc. v. Doe 1 et al.*, 542 F.Supp.2d 153, 176.

¹⁹ See N.C. Gen. Stat. §74C-2(a) license required, §74C-3(8)(b) and (e).

²⁰ Affidavit of Stephen E. Robertson, filed contemporaneously with this brief, including letters to and from Terry Wright Director of the North Carolina Private Protection Services Board (Exhibit A to Affidavit).

²¹ N.C. Gen. Stat. §74C-17(b).

Carlos Linares. Plaintiffs may claim that Robertson misrepresented the nature of MediaSentry's activities. Defendant notes, however, that the entire Linares Declaration was provided to the Director. Far from trying to misrepresent Plaintiffs' investigative activities, Defendant provided the Plaintiffs' entire story to the Director, as told from the Plaintiffs' point of view in the Linares Declaration.

The Director, in his response, invited Defendants in these various cases to make formal complaints. Although this Defendant has not yet made a formal Complaint, several other Doe Defendants in similar cases have.²² The Director responded by scheduling hearings before the Grievance Committee of the NCPPSB on the 10th day of December, 2008 at 1:00 PM in Raleigh, North Carolina to examine the allegations specified in the complaint.²³ The Commonwealth of Massachusetts and the State of Maine have issued letters in the nature of cease and desist orders to MediaSentry based upon similar concerns to those set out in Defendant's formal Complaint.²⁴

Plaintiffs aver that MediaSentry operates “[j]ust as any other user of these peer-to-peer networks ...” [Linares decl. docket no. 4-1, ¶ 13]. Peer-to-peer networks, as the name implies, involve intrusion into one end of the connected computers by the other. Plaintiffs would have the Court believe that they access this information in the vast and nebulous world of the Internet. But, data can only reside on endpoint computers, or on intermediary servers. Peer-to-peer networks have no intermediary servers where Plaintiffs can access the information they take. Plaintiffs take the information they seek from Defendants' computers. And, the difference between MediaSentry and all other

²² Five Complaints addressed to the Director of North Carolina Protective Services, in near identical actions, are attached to Robertson Affidavit (Exhibit C to Affidavit).

²³ Notice of Hearing is attached to the Robertson Affidavit (Exhibit C to Affidavit).

²⁴ Letters from the Massachusetts State Police and the Maine State Police to MediaSentry (and Safenet dba MediaSentry) are attached to Robertson Affidavit (Exhibit D to Affidavit).

users is that MediaSentry is engaged in the private investigation profession for the purpose of securing evidence to be used before a court. MediaSentry's intrusion into an endpoint computer, unless they are licensed to investigate, is unlawful. Further, other users do not "gather additional evidence" including metadata [Linares decl. docket no. 4-1, ¶ 14].

Defendant attaches hereto the Declaration of Elizabeth Hardwick in *Atlantic Recording et al., v. Pamela and Jeffrey Howell*, 2:06-cv-02076-PHX-NVW (U.S. Dist. Ct. AZ) (Appendix 2). In this affidavit, executed approximately one year ago in a case nearly identical to this one, MediaSentry's representative states: "[o]nce connected to the user's computer ..." (Hardwick Aff. ¶ 6), "... MediaSentry captures as a text file all of the contents of the user's shared directory ..." And, "MediaSentry does nothing to create this text file; it exists on the user's **hard drive**." (Hardwick Aff. ¶ 7, emphasis added). In short, the Hardwick Declaration makes clear that MediaSentry accesses the user's hard drive to, among other things, take "text files" from it. Plaintiffs are likely to argue that MediaSentry does not access the hard drives of private citizens, but that contention rings hollow when so clearly contradicted by the Hardwick Declaration. Plaintiffs are also likely to contend that committing a misdemeanor is not grounds to exclude evidence in a civil case, but many courts have excluded evidence for less egregious conduct.²⁵

²⁵ *Gallagher v. Van Lott, Inc.*, 2006 WL 3254464 (D.S.C., slip op., 2006) (Investigator, agent of defense counsel improperly represented himself in communicating with Plaintiff to get audiotape, audiotape excluded); *Rickenbaker v. Rickenbaker*, 290 N.C. 373, 226 S.E. 2d 347 (N.C. 1976) (Defendant's installation of recording device solely for purpose of obtaining evidence of adulterous relationship prohibited by federal law and excluded from evidence in divorce trial); *State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W.Va. 155, 451 S.E.2d 721 (W.Va. 1994) (Evidence illegally obtained by private investigator was within discretion of trial court to exclude); *Midwest Motor Sports, Inc., v. Arctic Cat Sales, Inc.*, 144 F. Supp. 1147 (D.S.D., 2001) (Defense counsel directed investigator to make *ex parte* contact with represented parties bringing about numerous evidentiary sanctions).

These Plaintiffs expect the Courts throughout the country to favor them with the extraordinary relief of *ex parte* discovery based upon their criminal conduct. Rule 12(f) allows for the striking of a pleading that is impertinent or scandalous. The criminal conduct of Plaintiffs' agent certainly qualifies as both impertinent and scandalous and the second-hand Linares Declaration and Plaintiffs' Exhibit 1 that it supports, should be stricken.

The Fourth Circuit has long held to the maxim that "he who seeks equity must do equity... must come with clean hands Its object is in general to exact of the complainant fair dealing with his adversary...."²⁶

The remaining bare allegations are not enough to survive the *Twombly* standard. In *Interscope v. Rodriguez*, the Plaintiff record companies' uncontested motion for default judgment was denied, *sua sponte*, on a near identical Complaint.²⁷ The Southern California District Court characterized the Complaint as "a boilerplate listing of the elements of copyright infringement without any facts pertaining specifically to the instant Defendant,"²⁸ and the pertinent allegation as a "conclusory statement" on information and belief.²⁹

B. Defendant's First Amendment Right as an Anonymous Speaker, Requires that the Court Quash a Subpoena Seeking His Identity.

²⁶ *McMullen v. Lewis*, 32 F.2d 481, 486 (C.A. 4, 1929).

²⁷ *Interscope Records v. Rodriguez*, WL 2408484, (S.D.Cal. 2007). (Appendix 3). The Court relied on the *Twombly* "plausibility standard." "[A] plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, --- U.S. ---, 127 S. Ct. 1955 (2007).

²⁸ *Id.* at *2.

²⁹ *Id.* at *3.

Plaintiffs must not merely satisfy their obligations under the liberal pleading standard of Fed. R. Civ. P. 8(a), or simply plead a *prima facie* claim, or satisfy a “flexible good cause” standard to overcome Defendant’s right to anonymous speech. Rather, where litigants attempt to unmask anonymous speakers, the First Amendment requires that they (among other things) submit competent evidence to support each element of their claim sufficient to raise a genuine fact issue—a summary judgment standard—and demonstrate that the necessity of obtaining the identifying information outweighs the speaker’s First Amendment anonymity interests. By failing to introduce any evidence pertaining to Defendant, and choosing instead to stand on the allegations in their unverified Complaint; and their second hand verified affidavit of a download by an unlicensed investigator operating illegally, Plaintiffs have (at least thus far) failed to meet these constitutional requirements.

1. Anonymous Expression Enjoys a Qualified Privilege Under the First Amendment That Requires the Evaluation of Multiple Factors Prior to Subpoena Enforcement.

The Supreme Court has consistently defended the right to anonymous speech in a variety of contexts, noting that a speaker’s “decision to remain anonymous ... is an aspect of the freedom of speech protected by the First Amendment.”³⁰ These anonymity interests apply equally to paper leaflets and Internet communications.³¹ Courts have

³⁰ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342 (1995).

³¹ See *Reno v. ACLU*, 521 U.S. 844, 870 (1997) (there is “no basis for qualifying the level of First Amendment protection that should be applied to” the Internet); *McMann v. Doe*, 460 F.Supp.2d 259, 266 (D. Mass. 2006) (“Speech on the internet receives First Amendment protection. First Amendment protection includes protection of anonymous speech.”).

concluded that these protections for anonymity extend to individuals using P2P file sharing software.³²

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. Just as in other cases in which litigants seek information that may be privileged, courts must consider the privilege before permitting discovery of a defendant's identity.³³

The constitutional privilege to remain anonymous is not absolute. Plaintiffs may properly seek information necessary to pursue reasonable and meritorious litigation.³⁴ Accordingly, courts evaluating attempts to unmask anonymous speakers have adopted standards that balance an individual's right to engage in anonymous expression against a litigant's legitimate need to pursue a claim. These courts have recognized that "setting the standard too low w[ould] chill potential posters from exercising their First Amendment right to speak anonymously," and have therefore required plaintiffs to demonstrate that

³² See, e.g., *Sony Music Ent. Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 564 (S.D.N.Y. 2004) ("Arguably ... a file sharer is making a statement by downloading and making available to others copyrighted music without charge and without license to do so. Alternatively, the file sharer may be expressing himself or herself through the music selected and made available to others."); *In re Verizon Internet Servs., Inc.*, 257 F.Supp.2d 244, 260 (D.D.C. 2003) (holding that the use of peer-to-peer file sharing networks is entitled to some level of First Amendment protection), rev'd on other grounds, *Recording Indus. Ass'n of America, Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003).

³³ See *McMann v. Doe*, 460 F.Supp.2d at 266 ("Courts must adopt an appropriate standard such that aggrieved parties can obtain remedies, but can not demand the court system unmask every insolent, disagreeable, or fiery anonymous online figure."); see also *Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987); *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."); *Doe v. 2theMart.com*, 140 F. Supp. 2d 1088, 1093 (W.D. Wash. 2001) ("[D]iscovery requests seeking to identify anonymous Internet users must be subject to careful scrutiny by the courts.").

³⁴ See *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573, 578 (N.D. Cal. 1999) (First Amendment does not protect anonymous Internet users from liability for tortious acts such as defamation); *Doe v. Cahill*, 884 A.2d at 456 ("Certain classes of speech, including defamatory and libelous speech, are entitled to no constitutional protection.").

their claims are valid and that they have suffered a legally cognizable harm before the court will allow disclosure of the speaker's identity.³⁵

The opinion in *Dendrite*³⁶ remains the leading precedent regarding “the appropriate procedures to be followed and the standards to be applied by courts in evaluating applications for discovery of the identity.”³⁷ The court in *Dendrite* described those procedures as follows:

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. quote verbatim the allegedly actionable online speech [if the underlying claim is defamation];
3. allege all elements of the cause of action;
4. present evidence supporting the claim of violation; and,
5. “[f]inally, assuming 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

³⁵ *Doe v. Cahill*, 884 A.2d at 457; see also *Dendrite Int'l v. Doe No. 3*, 342 N.J.Super. 134, 141-42 (App. Div. 2001); *Highfields Capital Mgmt.L.P. v. Doe*, 385 F. Supp.2d 969 (N.D. Cal. 2004).

³⁶ *Dendrite Int'l v. Doe No. 3*, 342 N.J.Super. 134 (App. Div. 2001). The *Dendrite* test has been endorsed and applied by other state and federal courts. See, e.g., *Mobilisa, Inc. v. John Doe 1*, 170 P.3d 712, 719-21 (Ariz. Ct. App. 2007); *Greenbaum v. Google, Inc.*, 845 N.Y.S.2d 695, 698 (N.Y.Sup. 2007); *Doe v. Cahill*, 884 A.2d at 459-60 (applying a modified *Dendrite* test); *Highfields Capital Mgmt. L.P. v. Doe*, 385 F. Supp. 2d at 974-76.

³⁷ *Id.* at 140.

proceed.”³⁸

The *Dendrite* standard protects anonymous speech while ensuring that the First Amendment is not used to “shield copyright infringement” (as some plaintiffs have complained).³⁹ Where the identity of an anonymous speaker is at issue, the First Amendment simply requires that litigants demonstrate that their claims are more than a pretext for censorship or other improper purpose. That requirement applies whether the claims involve defamation (which does not enjoy First Amendment protections),⁴⁰ or intellectual property rights. Indeed, if this Court were to adopt the relaxed pleading standard, as Plaintiffs are likely to argue, copyright infringement would be the sole speech-related tort immunized from *Dendrite* scrutiny. This would only serve to encourage unscrupulous copyright owners to use pretextual copyright infringement claims to unmask anonymous critics, parodists, commentators, and others who are lawfully entitled to make unauthorized fair use of copyrighted works. Only if copyright owners are required to meet this heightened First Amendment standard will anonymous speakers have an opportunity to challenge such pretextual copyright claims before their anonymity is compromised.

2. Plaintiffs Have Failed to Shoulder Their Burden Under the First Amendment.

While it appears that Plaintiffs have satisfied the first three prongs of the *Dendrite* standard, they have yet to come forward with particularized evidence as required by the

³⁸ *Id.* at 141-42.

³⁹ *Sony Music v. Does 1-40*, 326 F.Supp. 2d at 562-63.

⁴⁰ see *Doe v. Cahill*, 884 A.2d at 456.

fourth prong.⁴¹ Specifically, Plaintiffs must “introduce evidence creating a genuine issue of material fact for all elements” to the extent such evidence is within their control.⁴² Even if not stricken, as Defendant asks, Plaintiffs’ affidavit is hearsay evidence barred by Federal Rules of Evidence 802.

Furthermore, once Plaintiffs have met that evidentiary burden, the Court must then balance the respective interests of the parties and evaluate the “necessity for the disclosure of the anonymous defendant’s identity.”⁴³ Plaintiffs’ subpoena is, at best, premature. Absent evidence supporting each element of their claims (such as a first-person declaration from a *licensed* private investigator regarding the date, time, and titles of its alleged downloads from Defendant), Plaintiffs’ subpoena must be quashed.

IV. CONCLUSION

For the reasons set forth, Defendant respectfully asks that the Plaintiffs’ declaration be stricken and the Complaint be dismissed. Alternatively, the subpoena should be quashed.

Respectfully submitted, this 9th day of July, 2008.

By: /s/ Stephen E. Robertson
Stephen E. Robertson
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⁴¹ Compare *Sony Music v. Does 1-40*, 326 F.Supp. 2d at 565 (“Plaintiffs have submitted supporting evidence listing the copyrighted songs downloaded or distributed by defendants using P2P systems.”)

⁴² *Doe v. Cahill*, 884 A.2d at 463; accord *Mobilisa v. Doe*, 170 P.3d at 720 (requiring the “requesting party to demonstrate it would survive a motion for summary judgment filed by Doe on all of the elements within the requesting party’s control...”) *Dendrite*, 342 N.J.Super. at 141 (“plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant.”).

⁴³ *Dendrite*, 342 N.J.Super. at 142; accord *Mobilisa v. Doe*, 170 P.3d at 720 (“[R]equiring the court to balance the parties’ competing interests is necessary to achieve appropriate rulings in the vast array of factually distinct cases likely to involve anonymous speech.”).

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of July, 2008, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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And I hereby certify that I will serve the document by e-mail to the following non-party:

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By: /s/ Stephen E. Robertson
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