

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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ARISTA RECORDS LLC et al.,

Plaintiffs,

Case No. 1:08-cv-00765-GTS-RFT

-against-

DOES 1-16,

ECF CASE

Defendants.

-----X

**AMENDED MEMORANDUM OF LAW IN SUPPORT OF MOTION TO QUASH**

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## **AMENDED MEMORANDUM OF LAW IN SUPPORT OF MOTION TO QUASH**

Richard A. Altman, the attorney for three individuals, identified as Does Nos. 3, 7, 11 and 15<sup>1</sup>, submits this amended memorandum of law in support of this motion, pursuant to F.R.Civ.P. 45(c)(3)(A)(iii), to quash a subpoena served upon the State University of New York at Albany (“SUNY”) and award them attorney’s fees, and in the alternative, pursuant to F.R.Civ.P. 20 and 21, to sever these individuals from the action and to require the plaintiffs to proceed separately against them. These three defendants appear solely to challenge the subpoena as it relates to them, and are not waiving any defenses they may have if the motion is denied, their identities disclosed and actions commenced against them.

### **PRELIMINARY STATEMENT**

In this copyright infringement action, thirteen unrelated music companies seek damages, a permanent injunction, attorneys’ fees and costs against a number<sup>2</sup> of anonymous individuals whose only connection with each other is that they all allegedly use SUNY as their Internet Service Provider (“ISP”). Plaintiffs allege that the defendants have made files on their personal computers, containing copyrighted songs, generally available over the Internet so that anyone can download those files to their own computers, and that the defendants’ actions constitute an infringement of plaintiffs’ copyrights in those songs. The complaint alleges no specific examples of such

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<sup>1</sup> Because this motion raises, among other things, issues of these defendants’ First Amendment right to anonymity, their identities will not be voluntarily disclosed. “NoGuano has moved anonymously to quash the subpoena. At oral argument, counsel for all parties agreed that NoGuano was entitled to appear before this Court anonymously on the motion to quash. When an individual wishes to protect their First Amendment right to speak anonymously, he or she must be entitled to vindicate that right without disclosing their identity. Accordingly, this Court grants NoGuano’s request to proceed under a pseudonym for the purposes of this motion.” *Doe v. 2TheMart.com Inc.*, 140 F.Supp.2d 1088 at 1091 n.2 (W.D.Wash.2001).

<sup>2</sup> There are sixteen Does, but the number of individual defendants is fewer than sixteen, because several of them have more than one Internet Protocol (“IP”) address as identifiers.

This is one of an estimated 30,000 cases brought since 2003 in federal district courts around the nation by members of the Recording Industry Association of America (“RIAA”), alleging copyright infringement by the downloading and filesharing of recorded music over the internet. This flood of litigation has been brought supposedly to stem the detrimental effect on sales of compact disks caused by the free availability of recorded music on the internet, although the extent of that effect has been disputed by disinterested scholars. Moreover, “the RIAA—the lobbying group for the world’s big four music companies, Sony BMG, Universal Music, EMI and Warner Music—admits that the lawsuits are largely a public relations effort, aimed at striking fear into the hearts of would-be downloaders.” Kravets, *File Sharing Lawsuits at a Crossroads, After 5 Years of RIAA Litigation*, <http://blog.wired.com/27bstroke6/2008/09/proving-file-sh.html> (accessed September 12, 2008).

The vast majority of these actions have resulted in either settlements, default judgments or voluntary dismissals by the plaintiffs, and one may question whether the federal courts should permit themselves to be used to assist anyone’s public relations efforts to create a climate of fear, as opposed to resolving actual cases and controversies properly before them. Because few of the cases are actually litigated by defendants represented by counsel, and most are settled, “[t]he quick settlements have left largely unexamined some basic legal questions, such as the legality of the RIAA’s investigative tactics, and the question of what proof should be required to hold a defendant liable for peer-to-peer copyright infringement.” *Id.* The present motion raises these and other issues.

Essentially, the RIAA’s theory is that someone who downloads song files from the internet, and makes them available to anyone by way of so-called peer-to-peer software (which enables users to exchange files directly between their computer without intermediate servers) has violated both

the copyright owner's right to make copies, 17 U.S.C. § 106(1), and the distribution right, 17 U.S.C. § 106(3). Its position, moreover, is that the distribution right is violated whether or not any copies have actually been distributed, and that merely making song files available to others is an infringement.

Both of these propositions have been questioned, and are contrary to precedent. The right to make a single personal copy of copyrighted material may be protected as fair use, 17 U.S.C. § 107. Moreover, it has been frequently held that the distribution right requires the *actual distribution of copies*, and that merely making copies available does *not* violate the distribution right, in the absence of actual distribution of copies to the public. *See generally* Patry, *infra*, *Atlantic Recording Corp. v. Howell* at 5 n. 5; Patry, *The recent making available cases*, <http://williampatry.blogspot.com/2008/04/recent-making-available-cases.html> (both are available at <http://recordingindustryvspeople.blogspot.com/2008/08/patry-copyright-blog-shuts-down.html>). *See infra* at 16-17.

In *Capitol Records v. Thomas*, No. 06-1497 (D.Minn.) the only one of these cases believed to have gone to trial, shortly after a jury verdict in plaintiffs' favor the district judge *sua sponte* said that he may have committed a "manifest error of law" by giving the jurors an incorrect jury instruction which accepted the RIAA's "making available" theory (copies of this and all unreported cases are exhibits to this memorandum, in the order in which they are cited). The judge recently granted the motion for a new trial, in a significant decision which undermines plaintiffs' theories in these cases, if it does not destroy them completely (see *infra* at 16-17 for a full discussion of this case).

This litigation campaign has been seriously detrimental to the administration of justice and the public policy need to establish clear boundaries to copyright law. Repeatedly, the RIAA has



used questionable and illegal investigations, unsupported and erroneous legal theories, and hardball and abusive litigation tactics against individuals who, it may safely be assumed, do not normally find themselves forced to defend their personal use of computers in federal courts. These individuals have the choices of paying the RIAA's non-negotiable pre-litigation settlement demand (usually between \$3000 and \$5000), or defaulting, or defending themselves, either *pro se* or with counsel, if they can afford it. Few can. The RIAA has sued mostly working-class individuals, students, children, the disabled, the homeless and even the dead.<sup>3</sup> They have frequently sued entirely innocent persons and are quite cavalier about the burden they impose on the legal process and the federal judiciary, and the effects of such frivolous suits on their defendants.<sup>4</sup> Moreover, they are apparently in contempt of a district court's order forbidding them from bringing actions against unrelated individuals, contrary to the joinder provisions of F.R.Civ.P. 20 and 21. *See In re Cases Filed by Recording Companies*" ILRWeb (P&F) 3053 (W.D.Tex. Nov. 17, 2004)("Plaintiffs are ordered to file any future cases of this nature against one defendant at a time, and may not join defendants for their convenience."). Yet they have done precisely that, hundreds if not thousands of times.

District judges and commentators have criticized the RIAA's tactics and the legal theories behind them<sup>5</sup>, but the litigation continues, with seemingly little effect on the public's unflagging

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<sup>3</sup> <http://arstechnica.com/news.ars/post/20080418-riaa-escapes-sanctions-drops-case-against-homeless-man.html> (accessed May 31, 2008).

<sup>4</sup> "“When you fish with a net, you sometimes are going to catch a few dolphin,” [RIAA spokeswoman Amy] Weiss helpfully explained to me.” Roddy, *The Song Remains the Same*, Pittsburgh Post-Gazette, Sept. 14, 2003, available at <http://www.post-gazette.com/columnists/20030914edroddy0914p1.asp> (last visited February 14, 2008).

<sup>5</sup> “The concern of this Court is that in these lawsuits, potentially meritorious legal and factual defenses are not being litigated, and instead, the federal judiciary is being used as a hammer by a small group of plaintiffs to pound settlements out of unrepresented defendants.” *Elektra v. O'Brien* (C.D.Calif., March 2, 2007).

desire and intention to download music from the internet.<sup>6</sup> For a general discussion of the process and the issues, *see* Beckerman, *How the RIAA Litigation Process Works*, [http://info.riaalawsuits.us/howriaa\\_printable.htm](http://info.riaalawsuits.us/howriaa_printable.htm) (accessed September 12, 2008). For a recent article with recommendations for the federal judiciary as to how they should seek to level the playing field in these cases, *see*

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*See Arista v. Does 1-27*, 2008 U.S. Dist. LEXIS 6241 at \*21 (D.Me. Jan. 25, 2008) (magistrate judge's ruling):

Rule 11(b)(3) requires that a representation in a pleading have evidentiary support and one wonders if the Plaintiffs are intentionally flouting that requirement in order to make their discovery efforts more convenient or to avoid paying the proper filing fees. In my view, the Court would be well within its power to direct the Plaintiffs to show cause why they have not violated Rule 11(b) with their allegations respecting joinder. [I]t is difficult to ignore the kind of gamesmanship that is going on here.....These plaintiffs have devised a clever scheme... to obtain court-authorized discovery prior to the service of complaints, but it troubles me that they do so with impunity and at the expense of the requirements of Rule 11(b)(3) because they have no good faith evidentiary basis to believe the cases should be joined.

*See* Patry, *Atlantic Recording Corp. v. Howell*, available at <http://williampatry.blogspot.com/2008/04/atlantic-recording-corp-v-howell.html> (April 30, 2008) (accessed on July 29, 2008):

From the beginning of copyright law, copyright owners have had the burden of proving their case, and rightly so. What we are seeing now in the making available cases and in other areas is not only an attempted reversal of centuries of copyright law, but of civil procedure as well...I do not condone infringement of copyright whether by P2P or any other means, and believe that copyright owners have every right to bring litigation against those who have infringed their rights (and here I mean infringed an actual section 106 right, not fabricated rights like attempted distribution). But I do believe that copyright owners must prove their case the old fashioned way.

<sup>6</sup> *See* Fisher, *Download Uproar: Record Industry Goes After Personal Use*, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/28/AR2007122800693.html> (December 30, 2007) (accessed July 29, 2008) (“Despite more than 20,000 lawsuits filed against music fans in the years since they started finding free tunes online rather than buying CDs from record companies, the recording industry has utterly failed to halt the decline of the record album or the rise of digital music sharing.” *See also* Holt, *The Effect of Recording Industry Lawsuits on the Market for Recorded Music*, 1 *Vanderbilt Undergraduate Research Journal* 1 (2005) (available at [ejournals.library.vanderbilt.edu/vurj/include/getdoc.php?id=112&article=14&mode=pdf](http://ejournals.library.vanderbilt.edu/vurj/include/getdoc.php?id=112&article=14&mode=pdf) - (accessed July 29, 2008) (“the recording industry ought to place more confidence in the findings of the academic community and acknowledge that file sharing, although an interesting phenomenon that may have important future consequences throughout all sectors of business, does not appear to be directly related to serendipitous decline in sales that marked the early twenty-first century...it would seem prudent for the recording industry to adapt to and discover the benefits intrinsic to this new technology, not attack it”).

Beckerman, *Large Recording Companies v. The Defenseless: Some Common Sense Solutions to the Challenges of the RIAA Litigations*, 47 ABA Judges' Journal, Summer 2008.

The complaint in this action alleges that “[p]laintiffs are informed and believe that each Defendant 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...Through his or her continuous and ongoing acts of downloading and/or distributing to the public the Copyrighted Recordings, each Defendant has violated Plaintiffs’ exclusive right of reproduction and distribution.” Complaint, ¶ 22 at 5. Exhibit A to the complaint lists, by IP address, the songs whose copyrights each of the Does is alleged to have infringed and the particular plaintiffs who allegedly are the owners or licensees of those copyrights.

Shortly after commencing this action, plaintiffs obtained an *ex parte* order for immediate discovery, permitting them to serve a subpoena upon SUNY seeking the disclosure of the identities of the defendants, who are only known to the plaintiffs by their IP addresses, which are supposedly assigned by SUNY’s servers. Plaintiffs assert that they intend to serve summonses upon the defendants once they learn their names and addresses. Once they obtain the identifying information from SUNY, this action will be dismissed. Thus, this action is being used solely as a vehicle to discover the names of defendants, and plaintiffs have no intention of prosecuting it.

Plaintiffs have not made a sufficient showing to warrant disclosure of the identities of defendants Does 3, 7, 11 and 15, by alleging specific facts to demonstrate that any of the plaintiffs have claims against them, and which plaintiffs have which claims. Plaintiffs have not shown that this Court has personal jurisdiction over these two defendants nor that they should properly be joined in one action under F.R.Civ.P. 20. Plaintiffs have used illegally obtained evidence to investigate their claims. Most important for purposes of this motion to quash, they have not alleged

facts sufficient to overcome the qualified privilege which these defendants possess under the First Amendment. Accordingly, the subpoena should be quashed.<sup>7</sup>

In support of their *ex parte* application, plaintiffs submitted a declaration of one Carlos Linares, who identifies himself as “an attorney and Vice President, Anti-Piracy Legal Affairs for the Recording Industry Association of America.” Linares Decl., ¶ 1 at 2. The declaration describes Internet-enabled copyright infringement as a serious economic problem for plaintiffs, and describes the operation of peer-to-peer (“P2P”) networks. He then states that “the RIAA retained a third-party investigator, MediaSentry, Inc. (‘MediaSentry’), to conduct searches of the Internet” and describes how MediaSentry downloads music files offered to other users of the P2P networks. *Id.*, ¶ 11 at 4-5. He then explains how MediaSentry’s staff members attempt to verify that particular anonymous individuals have made copyrighted songs available for download, by observing the author and title listed for each file and listening to some of the files (*Id.*, ¶¶ 13-15 at 6).

However, although Mr. Linares claims to speak on personal knowledge, he was not the person or persons who actually listened to each song listed, determined that any files had actually been downloaded or shared with others, knows whether the copyrights to the songs belong to any of the plaintiffs (and if so, which ones belong to which plaintiff), or verified the existence of copyright registrations for the songs. He does not identify any of these persons, and none has submitted any declarations based on personal knowledge. In short, Mr. Linares is not competent to testify on personal knowledge that any of the Does in this action is a copyright infringer, and his

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<sup>7</sup> It should be noted that the defendants have standing to object to a subpoena directed at a nonparty, because compliance with the subpoena would violate a personal right or privilege of theirs. *Langford v. Chrysler Motors Corp.*, 513 F.2d 1121,1126 (2d Cir.1975); *Minnesota School Boards Assoc. Ins. Trust v. Employers Ins. Co. of Wasau*, 183 F.R.D. 627 (N.D.Ill.1999). The standard on this motion is “entrusted to the sound discretion of the district court.” *In re Fitch, Inc.*, 330 F.3d 104, 108 (2d Cir.2003).

entire declaration is inadmissible hearsay. There is thus no admissible evidence to support plaintiffs' *ex parte* application, and it is respectfully submitted that the motion should not have been granted, and should be vacated.

Until 2003, under § 512(h) of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512(h), a copyright owner could obtain an *ex parte* order for disclosure without commencing an action, and without providing notice to any affected party. All that was required was a submission to the Clerk of the Court, together with a supporting declaration. *Id.* However, this practice was stopped, and subpoenas served pursuant to this provision were quashed in *RIAA v. Verizon Internet Services*, 351 F.3d 1229 (D.C.Cir.2003):

We conclude from both the terms of § 512(h) and the overall structure of § 512 that, as Verizon contends, a subpoena may be issued only to an ISP engaged in storing on its servers material that is infringing or the subject of infringing activity...§ 512(h) does not authorize the issuance of a subpoena to an ISP acting as a mere conduit for the transmission of information sent by others...[C]ontrary to the RIAA's claim, nothing in the legislative history supports the issuance of a § 512(h) subpoena to an ISP acting as a conduit for P2P file sharing. 351 F.3d at 1233-38, *passim*.

As a result of that decision, the RIAA has now chosen to proceed by bringing actions against groups of anonymous defendants whose only connection is that they use the same ISP. While it is preferable that subpoenas not issue unless an action has been commenced, and that affected parties have due process rights of notice and an opportunity to be heard, the same constitutional and procedural infirmities nonetheless remain.

Finally, Mr. Linares alleges that each of the defendants in this case was identified as having distributed files to others on P2P networks, and asks that the Court grant the plaintiffs' *ex parte* motion for expedited discovery. Magistrate Judge Treece granted this motion by order dated July 22, 2008. The subpoena was issued to SUNY on August 12, 2008 and SUNY notified the

individuals of its issuance and of their right to contest it. Three of them have determined to do so and now move this Court to quash the subpoena.

## POINT I

### **DOES 3, 7, 11 AND 15 HAVE THE RIGHT TO ANONYMOUS SPEECH, AND PLAINTIFFS' COMPLAINT IS INSUFFICIENT TO DEFEAT THEIR FIRST AMENDMENT PRIVILEGE TO BE ANONYMOUS.**

Plaintiffs argue that it is common to have discovery upon commencement of an action to identify unknown persons alleged to have committed a legal wrong, and that is generally correct. However, there is a crucial difference between this case and the cases plaintiffs cited in support of their motion for expedited discovery. Essentially, plaintiffs accuse defendants of having engaged in anonymous but wrongful and tortious speech on the Internet. But because the First Amendment protects the right to speak (and to use the Internet) anonymously, these Does have a qualified privilege. The Court must therefore find that the privilege has been overcome before permitting plaintiffs to invade that right. "Under New York law, a subpoena will be quashed if compliance will unduly infringe upon fundamental rights such as those guaranteed by the First Amendment." *Lost Sheep Inc. v. Abrams*, 930 F.2d 178, 184 (2d Cir.1991), *cert.den.* 502 U.S. 866; *Greenbaum v. Google, Inc.*, 18 Misc.3d 185; 845 N.Y.S.2d 69 (Sup.Ct.N.Y.Co.2007)(denying pre-action disclosure of bloggers' identities where complained-of speech was protected by First Amendment as opinion).

It is well established that the First Amendment protects the right to speak anonymously. *See, e.g., Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002); *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 197-99 (1999); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 341-42 (1995); *Talley v. California*, 362 U.S. 60 (1960); *NAACP v. Alabama*, 357 U.S. 449, 461 (1958). Some of these cases have noted

approvingly the important role played by anonymous or pseudonymous writings over the course of history, from the literary efforts of Shakespeare and Mark Twain to the authors of the Federalist Papers. “Anonymous speech is a great tradition that is woven into the fabric of this nation’s history.” *Doe v. 2TheMart.com Inc.*, 140 F.Supp.2d 1088, 1092 (W.D.Wash.2001).

These rights are fully applicable to speech on the internet. The Supreme Court has stated that the internet is a public forum of preeminent importance, which permits any individual who wants to express her views the opportunity, at least in theory, to reach anyone anywhere in the world at virtually no cost, and has held that First Amendment rights are fully applicable to communications over the internet. *See generally Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

The First Amendment right to communicate anonymously is, of course, not a license to defame, disclose trade secrets or infringe copyrights, and we do not argue that it is. *In re Verizon Internet Services*, 257 F.Supp.2d 244, 260 (D.D.C.2003), *rev’d on other grounds sub nom. RIAA v. Verizon Internet Services*, 351 F.3d 1229 (D.C.Cir.2003). Nor is it an absolute bar against disclosure of one’s identity. It is, however, a qualified privilege which can only be overcome by a substantial and particularized showing: “[I]n order to obtain a subpoena, the copyright owner must, in effect, plead a prima facie case of copyright infringement.” *Id.*, 257 F.Supp.2d at 263 . The plaintiffs in this case fall far short of that showing.

The tension between this essential constitutional privilege and the interest of a plaintiff who has alleged wrongdoing in obtaining information needed to pursue litigation has been considered by several federal and state courts in the internet context. These courts have recognized that, at the outset of the litigation, the plaintiff has done no more than allege wrongdoing, and have held that the privilege is not defeated by bare allegations. They have further recognized that a serious chilling

effect on anonymous speech would result if internet users could be identified by persons who merely allege wrongdoing, without necessarily intending to litigate their claims to a conclusion.

In *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal.1999), the Court said:

In such cases the traditional reluctance for permitting filings against John Doe defendants or fictitious names and the traditional enforcement of strict compliance with service requirements should be tempered by the need to provide injured parties with a forum in which they may seek redress for grievances. However, this need must be balanced against the legitimate and valuable right to participate in online forums anonymously or pseudonymously. People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law. This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate. Furthermore, it permits persons to obtain information relevant to a sensitive or intimate condition without fear of embarrassment. People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity.

The Court then said that a plaintiff seeking discovery to identify unknown defendants would need to satisfy three requirements:

First, the plaintiff should identify the missing party with sufficient specificity such that the Court can determine that defendant is a real person or entity who could be sued in federal court...Second, the party should identify all previous steps taken to locate the elusive defendant...Third, plaintiff should establish to the Court's satisfaction that plaintiff's suit against defendant could withstand a motion to dismiss. *A conclusory pleading will never be sufficient to satisfy this element.* Pre-service discovery is akin to the process used during criminal investigations to obtain warrants. The requirement that the government show probable cause is, in part, a protection against the misuse of ex parte procedures to invade the privacy of one who has done no wrong. A similar requirement is necessary here to prevent abuse of this extraordinary application of the discovery process and to ensure that plaintiff has standing to pursue an action against defendant. Thus, plaintiff must make some showing that an act giving rise to civil liability actually occurred and that the discovery is aimed at revealing specific identifying features of the person or entity who committed that act.

185 F.R.D. at 578-80 (citations omitted, emphasis added).



In *Dendrite International, Inc. v Doe, No. 3*, 775 A.2d 756, 342 N.J.Super. 134 (N.J.2001), the Court quashed a subpoena by which a public company had sought to learn the identity of a person who had allegedly defamed it on an Internet bulletin board:

We offer the following guidelines to trial courts when faced with an application by a plaintiff for expedited discovery seeking an order compelling an ISP to honor a subpoena and disclose the identity of anonymous Internet posters who are sued for allegedly violating the rights of individuals, corporations or businesses. The trial court must consider and decide those applications by striking a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendants.

We hold that when such an application is made, the trial court should first require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application. These notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the ISP's pertinent message board...

The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a prima facie cause of action against the fictitiously-named anonymous defendants. *In addition to establishing that its action can withstand a motion to dismiss for failure to state a claim upon which relief can be granted...the 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.*

Finally, 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 proceed.

775 A.2d at 760-61 (emphasis added).

Other courts have similarly required notice, review of the claim and presentation of argument and evidence before an ISP will be compelled to identify an internet user. For example, in *Melvin v. Doe*, 49 Pa.D.&C.4th 449 (2000), *appeal quashed*, 789 A.2d 696, 2001 Pa.Super. 330 (2001),

*appeal reinstated*, 836 A.2d 42 (Pa. 2003), the trial court allowed an anonymous defendant to present evidence and seek summary judgment, ordering disclosure only after finding genuine issues of material fact requiring trial. The Pennsylvania Supreme Court discussed the conflict between the right to speak anonymously and the plaintiff's right to identify a potential defendant, and remanded for consideration of whether evidence of actual damage had to be presented before the right of anonymous speech could be disregarded. 836 A.2d at 47-50.

In *In Re Subpoena to America Online*, 2000 WL 1210372, 6, 52 Va.Cir. 26, 34, *rev'd on other grds. sub. nom. America Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001), the Court required introduction of the allegedly actionable internet posting, and required that the Court be "satisfied by the pleadings or evidence supplied" that the subpoenaing party had a legitimate basis to contend that it was the victim of actionable conduct, "and...the subpoenaed identity information [must be] centrally needed to advance that claim." In *Doe v. 2TheMart.com Inc.*, *supra*, the Court quashed a subpoena seeking to identify persons who had posted anonymous defamatory comments about a company on an internet bulletin board.

In their memorandum of law in support of the subpoena, plaintiffs cite a number of cases which supposedly "routinely allow discovery to identify 'Doe' defendants." Pl. Memo. at 5. However, these cases are not on point, because the First Amendment right of anonymity is not implicated in any of them. There is no First Amendment right of anonymity for tortfeasors generally, outside of the context of free speech or press, the right of association, or other similar highly favored rights, and so cases which arise in any other context are not on point.

The cases plaintiffs cite for the proposition that a claim of copyright infringement is good cause for expedited discovery (Pl. Memo. at 7) are not on point either. Copyright infringement can indeed amount to irreparable harm, but to invade the privilege asserted here, plaintiffs must state,

on personal knowledge, a specific claim for copyright infringement against each and every Doe defendant. *In re Verizon Internet Services, supra*. They have not done so. Nor have they alleged any actions taken to identify any of the Does before serving the subpoena, as required by *Columbia Insurance Co. v. Seescandy.com, supra*.

In short, the Court should *sua sponte* reverse its order granting discovery. In another RIAA case, the Court said, “[p]laintiffs contend that unless the Court allows *ex parte* immediate discovery, they will be irreparably harmed. While the Court does not dispute that infringement of a copyright results in harm, it requires a Coleridgian ‘suspension of disbelief’ to accept that the harm is irreparable, especially when monetary damages can cure any alleged violation. On the other hand, the harm related to disclosure of confidential information in a student or faculty member’s Internet files can be equally harmful....Moreover, *ex parte* proceedings should be the exception, not the rule.” *Capitol v. Does 1-16*, 2007 WL 1893603 (D.N.Mex. May 24, 2007).

Decisions such as *Dendrite* and *Columbia* require a specific evidentiary showing before plaintiffs may compel disclosure of the identity of Doe defendants sued for online communications, and this Court should follow their analysis and quash the subpoena. In this case, it would not have been overly burdensome for the plaintiffs to present specific evidence, including a declaration from whoever examined the files available for download from each defendant’s computer, listened to the files, verified that they were copyrighted songs, determined that the copyrights were registered (and to which plaintiffs), to list the songs that a particular defendant made available for download, and to annex corresponding copyright registration certificates for the songs. Mr. Linares’s declaration is long on social policy and the supposedly severe economic impact of file-sharing on the record industry, but fatally short on averments on personal knowledge about the supposed infringements by any of the individual defendants in this case.

This Court does not exist to adopt and enforce the RIAA's view of the business interests of its members. The RIAA is not a party to this action, twelve unrelated record companies are. If any or all of these companies consider that they have copyright infringement claims against Does 3, 7, 11 and 15, they are obliged to state those claims with clarity, specificity and on personal knowledge in order to satisfy the heightened pleading standards imposed since the Supreme Court's holding in *Bell Atlantic v. Twombly*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 1955 (2007). As stated in *Columbia Insurance Co., supra*, "plaintiff should establish to the Court's satisfaction that plaintiff's suit against defendant could withstand a motion to dismiss. *A conclusory pleading will never be sufficient to satisfy this element.*" (emphasis added). Plaintiff's complaint is conclusory, and, just as the declaration in support of the subpoena, not based on personal knowledge. See complaint, ¶¶ 22 and 25 at 5. Therefore a motion to dismiss would be granted, and the subpoena must be quashed.

There are many precedents dismissing conclusory complaints of infringement. *See, e.g., Intel Learning Tech., Inc. v. Beijing Kaidi Educ. & Tech. Dev. Co.*, 2007 WL 2288329 at \*9 (N.D. Cal. Aug. 9, 2007)(dismissing reproduction infringement claim "because it does not specifically allege any conduct of 'copying'"); *Sun Micro Medical Tech. Corp. v. Passport Health Communications, Inc.*, 2006 WL 500702 at \*12 (S.D.N.Y. Dec. 4, 2006)(dismissing complaint; "general allegations as to acts of infringement are insufficient at the pleading stage...a plaintiff must allege by what acts during what time the defendant infringed the copyright" (citations and quotation marks omitted); *Marshall v. McConnell*, 2006 WL 740081 (N.D. Tex. Mar. 23, 2006); *Stampone v. Stahl*, 2005 WL 1694073 at \*2 (D.N.J. July 19, 2005)(pleading standards "require the complaint to set out particular infringing acts with some specificity," and "plaintiff's Complaint, which fails to allege with any specificity acts of copyright infringement, fails to state a copyright claim"); *U2 Home Entertainment, Inc. v. Kylin TV, Inc.*, 2007 WL 2028108 at \*5 (E.D.N.Y. July 11, 2007)(complaint

not sufficient under Rule 8 unless it contains “a description of the specific acts, including time frame, allegedly committed by the defendant that infringed on the copyright”).

Moreover, there are specific precedents which hold that the RIAA’s form complaint, used in every case, including this one, does not satisfy the standards of *Twombly*, *supra*. Essentially, the complaint alleges that defendants are infringers because they are “making available” copyrighted song files, but without any evidence of actual distribution of those files to the public. This fails to state a claim. *See, e.g., Atlantic v. Brennan*, 534 F. Supp.2d 278 (D.Conn.2008)(refusing to enter a default judgment because allegations of complaint insufficient under *Twombly*; “[W]ithout actual distribution of copies.... there is no violation [of] the distribution right.”); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1162 (9th Cir. 2007); *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976 at 981 (D.Ariz.2008), in which the district court collected the cases on the issue of the scope of the distribution right, and denied plaintiffs’ motion for summary judgment:

The general rule, supported by the great weight of authority, is that infringement of [the distribution right] requires an actual dissemination of either copies or phonorecords....The court agrees with the great weight of authority that § 106(3) is not violated unless the defendant has actually distributed an unauthorized copy of the work to a member of the public.

554 F. Supp. 2d at 981(quotation marks omitted).

Most recently, and most significantly, the district judge in the only one of these cases to go to trial reversed the jury’s verdict and ordered a new trial. In *Capitol Records v. Thomas*, No. 06-1497 (D.Minn. Sept. 24, 2008), the Court had *sua sponte* informed the parties after the verdict that it might have erred in a crucial jury instruction regarding the scope of the distribution right, and asked for submissions from the parties. There was also significant briefing from *amici curiae* on both sides of the issue. In its thorough and detailed decision, the Court said, “the plain meaning of the term ‘distribution’ does not including making available and, instead, requires actual

dissemination... Plaintiffs' interpretation of the distribution right is simply not reasonable....Liability for violation of the exclusive distribution right found in § 106(3) requires actual dissemination. Jury Instruction No. 15 was erroneous and that error substantially prejudiced Thomas's rights." Slip op. at 19 and 40. The court then cited as controlling authority *National Car Rental System, Inc. v. Computer Associates International, Inc.*, 991 F.2d 426 (8th Cir.1993), which held that "[i]nfringement of [the distribution right] requires an actual dissemination of either copies or phonorecords," 991 F.2d at 434 (citation and quotation marks omitted), and noted that it had been "relied upon by numerous district courts in the peer-to-peer network downloading context." Slip op. at 32 (citing cases). Given the central significance of the issue in this case, and the thorough briefing it received, this decision should be deemed the last word on the issue at this time.

Thus, inasmuch as the complaint in this action fails to allege any actual distribution of song files to the public, it does not state a claim upon which relief can be granted, pursuant to F.R.Civ.P. 12(b)(6). Without a facially valid claim, the subpoena cannot be enforced. Furthermore, the generic language of the complaint, with its complete lack of particulars, has also been held insufficient irrespective of the distribution right issue. *Interscope Records v. Rodriguez*, 2007 U.S. Dist. LEXIS 60903 at \*3-4 (S.D.Cal. Aug. 17, 2007)("other than the bare conclusory statement that on 'information and belief' Defendant has downloaded, distributed and/or made available for distribution to the public copyrighted works, Plaintiffs have presented no facts that would indicate that this allegation is anything more than speculation. The complaint is simply a boilerplate listing of the elements of copyright infringement without any facts pertaining specifically to the instant Defendant. The Court therefore finds that the complaint fails to sufficiently state a claim upon which relief can be granted and entry of default judgment is not warranted.").

Finally, a significant precedent for quashing the subpoena is *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153 (D.Mass.2008), a lengthy opinion which analyzed the principles of these cases in detail, and quashed two subpoenas served on Boston University. Thus, because the complaint here fails to state a claim upon which relief may be granted under the heightened standards of *Twombly*, the plaintiffs have not and cannot meet their burden to overcome the First Amendment privilege of Does 3, 7, 11 and 15 and the subpoena must be quashed.

## POINT II

### **PLAINTIFFS HAVE FAILED TO DEMONSTRATE THAT THIS COURT HAS PERSONAL JURISDICTION OVER DEFENDANTS DOES 3, 7, 11 AND 15.**

In order to proceed against Does 3, 7, 11 and 15, plaintiffs must demonstrate that this Court has personal jurisdiction over them. This burden cannot be met merely by alleging use of the internet in New York. The federal courts have generally applied a sliding scale analysis to determine whether there is jurisdiction over a defendant who has posted information on the Internet, to ensure that such persons are not automatically subject to suit anywhere in the world. Under the so-called “*Zippo*” analysis, named after *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F.Supp. 1119 (W.D.Pa.1997), defendants who merely upload files to the internet for others to examine and copy are not subject to personal jurisdiction on that basis, while defendants whose internet sites are commercially interactive, in the sense that they use their sites to engage in business transactions, are subject to being sued in any state in which a substantial number of business transactions occur. Along this continuum, the greater the degree of commercial interactivity, the greater the liability for suit in a foreign jurisdiction. *See, e.g., ALS Scan v. Digital Service Consultants*, 293 F.3d 707 (4th Cir.2002); *Neogen Corp. v. Neo Gen Screening*, 282 F.3d 883 (6th Cir.2002); *Mink v. AAAA Development*, 190 F.3d 333 (5th Cir.1999); *Citigroup Inc. v. City Holding Co.*, 97 F.Supp.2d 549,

570-71 (S.D.N.Y. 2000). The Second Circuit has not expressly adopted this sliding scale analyses, *see Bensusan Restaurant Corp. v. King*, 126 F.3d 25 (2d Cir.1997), but several subsequent district court decisions have done so.<sup>8</sup> Plaintiffs claim that Does 3, 7, 11 and 15, who do not maintain websites, use their computers like one, because they allegedly have permitted other persons with personal computers to obtain music files stored on their computers and download them. However, plaintiffs do not claim that they are charging for the downloading they are supposedly permitting. Thus Does 3, 7, 11 and 15 are not at the “commercially interactive” end of the *Zippo* scale. The mere fact that the data on their computers can be accessed by others and downloaded in New York is not a sufficient basis for jurisdiction.

Moreover, although the complaint alleges and Mr. Linares avers that the IP address that each of the defendants is alleged to have used to offer infringing material can be traced to SUNY as an ISP, that does not automatically mean that the *defendants* can be found in New York. Plaintiffs always have the burden of demonstrating that personal jurisdiction exists, and that burden is not satisfied without a showing that purposeful economic activity occurred in this district, or that the defendants reside or can be found here, F.R.Civ.P. 4(e)(1); N.Y. CPLR 302 subd. 3. Without such allegations the complaint cannot be sustained, and without a valid complaint, the subpoenas must be quashed.

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<sup>8</sup> *In re Ski Train Fire*, 2003 WL 22909153 (S.D.N.Y. 2003) (“It is well settled that a court must examine the nature and quality of a defendant’s activity on its website to determine whether jurisdiction is appropriate in New York.”); *K.C.P.L., Inc. v. Nash*, 1998 WL 823657 (S.D.N.Y. 1998)(endorsing *Zippo* continuum and declining to find personal jurisdiction over defendant who merely owned domain name Reaction.com).



### POINT III

#### **THE COMPLAINT IS SOLELY PREDICATED ON ILLEGALLY OBTAINED EVIDENCE.**

Plaintiffs' private investigator, MediaSentry, does not have a license from the New York Department of State. Its operating as private investigator without one is a crime, and the evidence obtained from its investigations, and any testimony based thereon, should be excluded.

New York General Business Law § 70 subd. 2 reads in pertinent part as follows:

No person, firm, company, partnership, limited liability company or corporation shall engage in the business of private investigator...without having first obtained from the department of state a license so to do, as hereinafter provided, for each bureau, agency, sub-agency, office and branch office to be owned, conducted, managed or maintained by such person, firm, company, partnership, limited liability company or corporation for the conduct of such business.

G.B.L. § 71 subd. 1 reads in pertinent part as follows:

1. "Private investigator" shall mean and include the business of private investigator and shall also mean and include, separately or collectively, the making for hire, reward or for any consideration whatsoever, of any investigation, or investigations for the purpose of obtaining information with reference to any of the following matters, notwithstanding the fact that other functions and services may also be performed for fee, hire or reward...the identity, habits, conduct, movements, whereabouts, affiliations, associations, transactions, reputation or character of any person, group of persons, association, organization, society, other groups of persons, firm or corporation; the credibility of witnesses or other persons...*or the securing of evidence to be used...in the trial of civil or criminal cases.* (emphasis added).

A private investigator who operates without a license is guilty of a Class B misdemeanor.

G.B.L. § 70 subd. 4. *Cf. Madden v. Creative Services*, 84 N.Y.2d 738, 747, 622 N.Y.S.2d 478, 482-83 (1995)("Those who attempt an unlawful intrusion by fraud, trespass or force, and those in complicity with them, may face criminal penalties; private investigators are additionally subject to license revocation or, if unlicensed, criminal sanctions").

There is an exemption from the licensing requirement for attorneys and their full-time employees, but the exemption does *not* extend to private investigators who work for attorneys as contractors. Section 83 reads in pertinent part:

Nothing in this article...contained [shall] be construed to affect in any way attorneys or counselors at law in the regular practice of their profession, but such exemption shall not enure to the benefit of any employee or representative of such attorney or counselor at law who is not employed solely, exclusively and regularly by such attorney or counselor at law.

Mr. Linares states in his declaration that “the RIAA retained a third-party investigator, MediaSentry, Inc. to conduct searches of the Internet, as well as file-copying services, for infringing copies of sound recordings whose copyrights are owned by RIAA members.” Linares Decl. , ¶ 11 at 4-5. This is clearly “the securing of evidence to be used...in the trial of civil...cases,” in the words of G.B.L. § 71 subd. 1. Accordingly, the activities of Media Sentry violate New York State law, and therefore no testimony or evidence gathered in the course of their investigation should be admissible. Illegally obtained evidence is not admissible in a civil case, *cf. One 1958 Plymouth Sedan v. Pa.*, 380 U.S. 693 (1965)(exclusionary rule applies in civil forfeiture proceedings), and it should not be admissible here. Since all of the evidence underlying plaintiffs’ complaint has been illegally obtained, plaintiffs will be unable to prove their case, and the subpoena should be quashed.

MediaSentry and its investigations in these cases are the subject of challenges in other jurisdictions with statutes similar to New York’s. *See, e.g.*, Beckerman, “Fur continues to fly in Michigan over illegal MediaSentry investigations,” <http://recordingindustryvspeople.blogspot.com/2008/09/fur-continues-to-fly-in-michigan-over.html> (accessed September 14, 2008); “Plaintiffs accused of conspiracy, computer fraud, unlicensed investigation in Kansas case, move to dismiss counterclaims,” <http://recordingindustryvspeople.blogspot.com/2008/09/plaintiffs-accused-of-conspiracy.html> (accessed September 14, 2008); MediaSentry: have you checked your state?,

<http://www.p2pnet.net/story/15391> (accessed March 26, 2008)(“The Massachusetts State police have banned the company, it’s been accused of operating without a licence in Oregon, Florida, Texas and New York, and similar charges have been levelled at it in Michigan.”). To uphold the subpoena in this case would be tantamount to permitting a plaintiff to proceed solely on the basis of illegally obtained evidence, and that illegality is additional grounds for quashing the subpoena.

#### **POINT IV**

##### **THE JOINDER OF ALL DEFENDANTS IN ONE ACTION IS IMPROPER.**

F.R.Civ.P. 20 reads in pertinent part that “All persons...may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right of relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action.” Thus, multiple defendants may be joined 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 question of law or fact common to all defendants.”

Not one of these three conditions is met here. The claim does not allege that the defendants have acted in concert, or are co-conspirators, or that they all committed the same infringement. Rather each Doe is alleged to have copied different songs belonging to different plaintiffs. There is no claim for relief against them jointly, severally or in the alternative. Moreover, there is no common transaction or occurrence, or series of them. The defendants have no connection with each other, except for the sole fact that SUNY is their ISP. All that is alleged is that they have shared different songs belonging to different plaintiffs. It is obviously convenient for plaintiffs to bring a

single action, because doing so permits them to serve a single subpoena on a single ISP, while paying but one filing fee. However, plaintiffs' convenience is not a sufficient basis for joinder or for abuse of procedural rules. Moreover, and most significantly, the RIAA plaintiffs have been ordered by a district court to cease doing so, and they have contemptuously ignored the court's order. See *supra* at 4.

In the Second Circuit, as elsewhere, for parties to be joined in the same lawsuit, they must be related *to each other*. Otherwise unrelated individuals cannot be joined in a single action solely because they are alleged to have violated the same law in the same way. See *Nassau County Assoc. of Insurance Agents, Inc. v. Aetna Life & Casualty Co.*, 497 F.2d 1151, 1154 (2d Cir.1974)(antitrust suit against 164 insurance companies, calling the suit a "gross abuse of procedure" because plaintiffs had not alleged conspiracy or action in concert.)

The bare allegation that the defendants all used the Internet to make copyrighted music available does not make their joinder proper. There is nothing inherently unlawful about using software to make files available through the Internet. The fact that each Doe is alleged to have committed the same wrong against some or all of the same plaintiffs with the same file-sharing software does not make it appropriate to join them all in the same case. See *Pergo, Inc. v. Alloc, Inc.*, 262 F.Supp.2d 122 (S.D.N.Y.2003); *Kevin v. Newburger, Loeb & Co.*, 37 F.R.D. 473, 475 (S.D.N.Y.1965); *Tele-Media Co. of Western Connecticut v. Antidormi*, 179 F.R.D. 75 (D.Conn.1998)(denying joinder of 104 defendants who each used similar technology to infringe plaintiff's pay-per-view programming, because defendants did not act in concert); *Movie Systems, Inc. v. Abel*, 99 F.R.D. 129, 130 (D. Minn.1983).

If the subpoena is not quashed, and the action proceeds, the Court should deny joinder and should sever Does 3, 7, 11 and 15 from this action, and order the plaintiffs to commence separate actions against each defendant.

## **POINT V**

### **THE COURT SHOULD AWARD AN ATTORNEY'S FEE TO DOES 3, 7, 11 AND 15.**

There is precedent for the award of a reasonable attorney's fee to these defendants on this motion. In *Mattel Inc. v. Walking Mountain Productions*, 353 F.3d 792, 813 (9<sup>th</sup> Cir.2003), the Court awarded a fee to a nonparty who quashed a subpoena in a copyright and trademark infringement case. In *Theofel v. Farey-Jones*, 359 F3d 1066 (9<sup>th</sup> Cir.2003), the Court awarded a \$9000 fee for an abusive subpoena:

The subpoena power is a substantial delegation of authority to private parties, and those who invoke it have a grave responsibility to ensure it is not abused. Informing the person served of his right to object is a good start, *see* Fed. R. Civ. P. 45(a)(1)(D), but it is no substitute for the exercise of independent judgment about the subpoena's reasonableness. Fighting a subpoena in court is not cheap, and many may be cowed into compliance with even overbroad subpoenas, especially if they are not represented by counsel or have no personal interest at stake.

359 F.3d at 1074-75.

Given the gross imbalance in the economic status of the parties, the vague and conclusory boilerplate pleading, the court decisions squarely against plaintiffs' "making available" theory, the complete lack of specific allegations or evidence to support plaintiffs' claims, the illegality of plaintiffs' investigation, and the procedural improprieties in joining sixteen unrelated defendants in one action, a fee award would serve an important and salutary purpose in this and other cases.

## CONCLUSION

The Court should order the subpoena quashed with respect to Does 3, 7, 11 and 15. It should further dismiss the action against these defendants for failure to allege facts supporting the existence of personal jurisdiction, and should award these Does a reasonable attorney's fee. In the alternative, the Court should sever this action into separate actions, one for each Doe defendant.

Dated: New York, New York  
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