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.

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REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT OF MOTION TO QUASH

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Richard A. Altman, the attorney for three individuals identified as Does Nos. 3, 7, 11 and 15, submits this reply memorandum of law in response to plaintiffs' opposition memorandum, and in further 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. This reply addresses only two of the arguments: the lack of a facially valid complaint, and the illegality of the evidence obtained to support it.[1] With respect to plaintiffs' other arguments, we will rely on the arguments presented in our main memorandum.

POINT I

THE SUBPOENA MUST BE QUASHED BECAUSE PLAINTIFFS' COMPLAINT IS INSUFFICIENT ON ITS FACE.

Plaintiffs make straw man arguments and fail to engage the central point of this motion: That a facially valid complaint is absolutely necessary before there can be an enforceable subpoena, and that the one in this action fails to state a claim. Without a complaint which could be sustained on a motion to dismiss, there is no need to go further. Plaintiffs' "making available" theory, and its complaint, have been dismissed in many similar cases, and the theory has been discredited and rejected. Yet plaintiffs say absolutely nothing about the line of authorities in defendants' main memorandum establishing that there is no legally cognizable claim for "making available"

[1] As for the joinder argument, we only note that plaintiffs have completely ignored the fact that they are in contempt of a district court order that they stop the practice of joining unrelated defendants in a single action. See Does' memorandum, Point IV at 22.

copyrighted files. Since the complaint in this action fails to plead actual distribution of such files, it fails to state a claim.

As for straw men, we have never argued that the First Amendment is an absolute license to infringe copyrights. Plaintiffs object strenuously and at length to an argument defendants did not even make. See Does' memo at 10: "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." So while plaintiffs devote considerable space to arguing a point not in dispute, they completely ignore the central issue: that they have failed to plead a sufficient case, and that without one, the subpoena cannot be enforced.

Plaintiffs also point to this Court's granting of their *ex parte* request for discovery as proof of the facial validity of their claims, but this argument cannot be taken seriously. Courts act only on the basis of what is presented to them, but once an *ex parte* order is challenged, the Court is obliged to take a fresh look, now that it has both sides of the issues. Plaintiffs have no presumptions in their favor merely because their order for discovery was granted.

As was shown in the Does' memorandum, a plaintiff who would discover the identities of anonymous persons must demonstrate the existence of a valid, specific claim, supported by real evidence. The central allegation in the complaint is that "[p]laintiffs are informed and believe that each Defendant, without the permission or consent of Plaintiffs, has used, and continues to use, an online media distribution system to download and/or distribute 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 rights of reproduction and distribution." (Complaint, ¶ 22 at 5-6).

First, this vague allegation, devoid of both direct knowledge and specific facts, cannot satisfy the heightened pleading regime imposed by *Bell Atlantic v. Twombly*, ___U.S.___, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). *See ATSI Communs., Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007): "To survive dismissal, the [non-moving party] must provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'" (*quoting Bell Atlantic Corp.*, 127 S. Ct. 1955 at 1965). A viable complaint must include "enough facts to state a claim to relief that is plausible on its face." *Id.*, 127 S. Ct. at 1974. This one plainly does not.

Second, the *Thomas* decision (and many others as well[2]), which plaintiffs completely ignore (*Capitol Records v. Thomas*, No. 06-1497 (D.Minn. Sept. 24, 2008); Does' memorandum at 16-17), and which vacated the jury verdict in the only one of these cases to go to trial, held that merely making available files for distribution is *not* copyright infringement, as a matter of law. Thus the complaint fails to state a claim. That failure is sufficient reason to quash the subpoena.

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[2] *See, e.g.*, *London-Sire Records, Inc. v. Doe 1*, 542 F.Supp.2d 153, 169 (D.Mass.2008)("the defendants cannot be liable for violating the plaintiffs' distribution right unless a 'distribution' actually occurred."); *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)(collecting cases; denying 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). All of these cases were cited in the Does' main memorandum but were ignored by plaintiffs.

POINT II

THE EVIDENCE TO SUPPORT THE SUBPOENA WAS ILLEGALLY OBTAINED.

The next reason to quash the subpoena is the illegality of the process by which plaintiffs and their investigator collected their evidence. The argument in our main memorandum is that MediaSentry cannot operate without a license from the State of New York, and that its doing so here is a misdemeanor. Plaintiffs only authority to the contrary is a hoary 1919 opinion from the New York State Attorney General, and they argue that in any event defendants have no reasonable expectation of privacy under the circumstances, that defendants have no standing and that in any event there is no reason to exclude the evidence even if it is illegal.

MediaSentry's activities on behalf of the RIAA have been challenged in other states, and banned in at least one, and the plaintiffs' arguments about expectations of privacy and lack of standing have been ignored. See *North Carolina RIAA MediaSentry probe*, http://www.p2pnet.net/story/16365 (accessed October 22, 2008)("a Grievance Committee hearing, to determine the existence of probable cause, has been scheduled by North Carolina's Private Protective Services Board, in connection with the complaints that have been filed charging MediaSentry with the crime of unlicensed investigation"); "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." *MediaSentry: have you checked your state?*, at http://www.p2pnet.net/story/15391 (accessed March 26, 2008); Bangeman, *University wants cease-and-desist order for MediaSentry*, http://arstechnica.com/news.ars/post/20080805-university-wants-cease-and-desist-order-for-mediasentry.html (accessed October 22, 2008); and *see Electra Entertainment Group Inc. v. Doe*, No. 5:08-CV-115-FL (E.D.N.Car. July 2, 2008) (referring the

issues to a magistrate judge and staying enforcement of a John Doe subpoena; "a fresh look at the arguments in support of and in opposition to the motion to dismiss before the court, and attendant motion to strike, is called for.")(slip op. at 2)(Exhibit 1). In addition, its competence has been seriously questioned: MediaSentry's Dutch p2p foul-up, http://www.p2pnet.net/story/6977 (accessed October 22, 2008)("MediaSentry was in July once again found to have presented shoddy and, ultimately, extremely costly, results to one of its clients.").

These challenges to the legality and reliability of plaintiffs' evidence have far more relevance here than a 1919 non-binding advisory opinion. It is respectfully submitted that this Court should be extremely cautious before enforcing a subpoena whose sole foundation is illegally obtained evidence collected by a private company whose activities are under legal scrutiny in eight states (http://www.mediapost.com/publications/?fa=Articles.showArticleHomePage&art_aid=90181, accessed October 22, 2008), and who has been ordered to cease operating in one.

CONCLUSION

It must be acknowledged that these thousands of cases raise a host of novel issues, often without binding precedent that determines the outcome. The public policy issues are significant, and the gross imbalance between the parties' wealth, the fact that so few of them are actually litigated with counsel on both sides, and the RIAA's improper purpose in bringing these cases[3] should be a

[3]"[T]he 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). Moreover, moneys recovered from this campaign do not seem to have made their way to creative artists, but are instead being used to continue it. *See* Chasick, *RIAA Pockets Filesharing Settlement Money, Doesn't Pay Artists Whose Copyrights Were Infringed,* http://consumerist.com/368663/riaa-pockets-filesharing-settlement-money-doesnt-pay-artists-whose-copyrights-were-infringed (accessed October 17, 2008).

source of concern. The RIAA is using the nation's district courts primarily to further a public relations effort, instead of having them adjudicate cases and controversies properly before them in general, and advancing copyright law by encouraging creativity in particular. Moreover, the RIAA's campaign is imposing significant costs on universities like SUNY Albany, who are being coerced into assisting profit-making corporations in purely private disputes, thereby diverting them from their educational mission. *See* The Cost of Policing Campus Networks, http://www.insidehighered.com/news/2008/10/20/p2p (accessed October 22, 2008)(estimating the costs of complying by large research universities at $350,000 to $500,000 a year each).

A useful list of suggestions for the judiciary to consider in these cases was recently published in the ABA Judge's Journal. Beckerman, *Large Recording Companies v. The Defenseless: Some Common Sense Solutions to the Challenges of the RIAA Litigations*, 47 ABA The Judges' Journal, Summer 2008. The Court is respectfully urged to consider these suggestions.

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
October 22, 2008

/s/

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