

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-NPM-RFT

-against-

SUPPORTING DECLARATION

DOES 1-16,

ECF CASE

Defendants.

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RICHARD A. ALTMAN declares the following as true under penalty of perjury, pursuant to 28 U.S.C. § 1746:

1. I am a member of the bar of this Court and represent defendants Does 3, 7, 11 and 15 in this action for copyright infringement. I submit this declaration in support of this Rule 72 motion, brought solely on behalf of Doe No. 3, presenting objections to the Memorandum-Decision and Order of Hon. Randolph W. Treece, dated February 18, 2009, which order denied these defendants' motion to quash a subpoena served upon non-party State University of New York at Albany ("SUNY"), seeking to discover the identities of these defendants. A copy is annexed as Exhibit A.

2. I am further seeking permission to withdraw as counsel for Does 7, 11 and 15, on the ground that they have either failed to comply with an agreement with me regarding fees (Doe Nos. 11 and 15), or have informed me that they do not desire that I presently continue to represent them, and that they intend to attempt to settle (Doe No. 7). I have, however, informed Doe No. 7 that I will continue to represent him/her if they are unable to do so, and would in that event withdraw that

portion of my motion. I have provided for service of these papers directly upon them, and for such response as they care to make.

3. This motion is made pursuant to F.R.Civ.P. 72, which permits the filing of objections to a Magistrate Judge's order following referral of a pretrial matter, and requires the District Judge to conduct a *de novo* review of the Order. Defendants originally moved in September 2008 to quash the subpoena. The motion was submitted to the Magistrate Judge without the consent of either party, and without an actual order of referral from the District Judge, so far as I am aware.

4. This is one of approximately 30,000 cases brought by these plaintiffs, and their trade association, the Recording Industry Association of America ("RIAA") in an attempt to prevent the downloading of music files by means of so-called peer-to-peer software over the internet. The plaintiffs' use of *ex parte* discovery motions and subpoenas issued to internet service providers raises important questions of First Amendment privilege, personal jurisdiction and joinder. As originally brought, twelve unrelated plaintiffs seek to ascertain the identities of nine unrelated defendants to sue them for copyright infringement. It appears that all of the other defendants have settled, or at least that the action has been dismissed as to them.

5. The arguments are essentially as follows. The subpoena must be quashed as an infringement of defendants' Doe No. 7's First Amendment rights.¹ Moreover, joinder of all defendants in a single action is improper, and in direct violation of a district court order forbidding the RIAA from doing so. Most significantly, plaintiffs' complaint is not sufficient to state a claim,

¹ The act of downloading, distributing, or making music available constitutes protected First Amendment speech. *Sony Music Ent. v. Does 1-40*, 326 F. Supp. 2d 556, 564 (S.D.N.Y. 2004); *Fonovisa, Inc. v. Does 1-9*, 2008 U.S. Dist. LEXIS 27170 at *29 (W.D.Pa. April 3, 2008).

and since there is no other basis for the discovery sought, the subpoena should be quashed and Doe No. 3 should be awarded a reasonable attorney's fee. In the alternative, if the subpoena is not quashed, the Court should order the plaintiffs to commence separate actions against the remaining defendants individually.

6. The accompanying Objections set forth some of the arguments as to the errors in the Order, and the authority supporting *de novo* review by the District Judge. However, the correct standard of review is *de novo*, thus requiring the District Court to consider the original arguments advanced by the defendants in its prior motion, regardless of the rulings and findings in the Order. I therefore respectfully request that the Court grant this motion, that it review the issues *de novo*, and that upon that review, this motion be granted in all respects.

Dated: New York, New York
March 2, 2009

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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-NPM-RFT

-against-

**OBJECTIONS TO MAGISTRATE JUDGE’S
MEMORANDUM DECISION AND ORDER
ECF CASE**

DOES 1-16,

Defendants.

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Defendant Doe No. 3, by his/her attorney Richard A. Altman, pursuant to F.R.Civ.P. 72(a), presents the following objections to the Memorandum-Decision and Order of Hon. Randolph F. Treece, U.S.M.J. dated February 18, 2007 (“the Order”), which denied a motion to quash a subpoena, and for other relief.

PROCEDURAL OBJECTION

1. As a threshold matter, defendants are entitled to *de novo* review of the Order by the District Judge, and their motion to quash should not have been referred to the Magistrate Judge initially. The motion, while styled as one to quash a subpoena, actually challenged the legal sufficiency of the complaint in the nature of a motion under F.R.Civ.P. 12(b)(6). As such it is dispositive, and a party is entitled to *de novo* review of such an order:

Plaintiffs characterize Defendants' Motions to Dismiss as "non-dispositive" and advocate a "clearly erroneous or contrary to law" standard of review by the Court...Plaintiffs misread 28 U.S.C. § 636(b)(1), which excepts a motion to dismiss from the clearly erroneous or contrary to law standard, and expressly provides for de novo review of objections to recommended decisions on motions so excepted. 28 U.S.C. § 636(b)(1)(A)-(C).

Arista Records LLC v. Doe, 584 F. Supp. 2d 240, 242 n. 5 (D.Me.2008). *See also Williams v. Beemiller, Inc.*, 527 F.3d 259 (2d Cir.2008)(list of pretrial matters which cannot be referred to a magistrate judge in § 636(b)(1)(A) is not exhaustive; issue is "the practical effect" on the litigation, and the statute should be construed narrowly to avoid "the possible constitutional implications of delegating Article III judges' duties to magistrate judges" [264]).

Inasmuch as the motion to quash would for practical purposes be determinative of the outcome of the present litigation, because among other things it argues that the complaint fails to state a claim upon which relief can be granted, it falls within the exceptions listed in § 636(b)(1), and is essentially dispositive of this action. Thus the Magistrate Judge lacked jurisdiction to determine this motion, and defendants are entitled to *de novo* review of all of the issues raised by that motion. A copy of the defendants' original supporting memorandum of law is annexed as Exhibit B, the defendants' reply memorandum is annexed as Exhibit C, and the District Court is respectfully referred thereto.

SUBSTANTIVE OBJECTIONS

1. The Order contains an error of technical fact. On page 3, in describing the process by which the RIAA identifies putative defendants, it says, "MediaSentry is able to identify by IP address, which are unique in and of themselves, a user of P2P networks who is distributing or

sharing music files over the network.” Exh. A at 3. First, IP addresses are not unique identifiers of individuals, like, *e.g.*, Social Security numbers. Rather, they are numerical strings which can (but do not always) identify computers which are on a network, and do not necessarily identify individuals. An IP address is a “number that uniquely identifies each computer on the Internet. A computer’s IP address may be permanently assigned or supplied each time that it connects to the Internet by an Internet service provider.” <http://www.answers.com/topic/ip-address> (accessed on March 2, 2009). This is not merely a technological point, but has legal consequences. *See Pacific Bell Internet Servs. v. Recording Indus. Association of America*, 2003 U.S. Dist. LEXIS 21659 at *7 n.3 (N.D.Cal. November 26, 2003)(citations omitted; emphasis added):

An IP address, or “internet protocol” address, is a numerical identifier assigned to an internet subscriber by that subscriber’s ISP. PBIS alleges that “in most cases, the assigned IP addresses are ‘dynamic,’ which means that subscribers are not assigned a fixed IP address, but are assigned a different IP address each time they ‘connect’ to the internet.” Defendants here can determine what IP address was allegedly used to transfer copyrighted material over the internet, and at what time the transfer occurred. However, *they cannot determine the identity of the person assigned to that particular IP address at that particular date and time.*

Given these limitations, the issuance of an *ex parte* subpoena was improper, and is an additional basis upon which it should be quashed, inasmuch as the plaintiffs’ chosen procedure cannot guarantee that the person whose identity is sought is the correct one. No one should be subject to a potentially invasive subpoena and disclosure of personal information unless it is absolutely certain that such person is an actual defendant against whom a plaintiff has a claim.

2. Furthermore, the Order errs in stating that a user of P2P networks “is distributing or sharing music files over the network....[and that] RIAA has collected from each Doe Defendant a list of files that each Defendant was distributing to the public.” Order at 3-4. All that can be

determined from the plaintiffs' evidence is that certain files may reside on computer hard drives, and that they *are available* for such distribution and sharing, not that it is actually occurring. This assumption is at the central flaw in the plaintiffs' theory, because it assumes a fact which must be proven as part of plaintiffs' prima facie case for copyright infringement, namely the actual distribution and sharing of files. The Order is thus clearly erroneous in stating as a fact that which must be proven, and must further have factual support at the pleading stage.

3. The Order demonstrates a disturbing pattern of stating as fact what has only been alleged, and bias against the defendants. For example, the Order says that "by placing recordings into a shared file for the entire world to visit and capture, without the permission of the rightful owners the Doe Defendants are hardly in a position to claim trespass, force or fraud by MediaSentry." (14). There is no proof whatsoever that these defendants have done anything at all other than being tentatively identified as having downloaded song files, which may or may not be the property of the plaintiffs, and whose ownership is certainly not admitted, despite the Order stating at 5, without any basis, that "apparently the ownership element is not being contested."

The Order also says "[d]iscovery is narrowly tailored and without it, Plaintiffs could not proceed with their prosecution of these alleged copyright infringements" (17), and that without the subpoena, "[p]laintiffs would be forever stymied in their efforts to protect their property rights" (12). However, the Court is not supposed to make decisions based upon whether it facilitates any litigant's ability to proceed with its claims. These are not considerations which are the concern of this Court, and referring to students at the State University as "culprit[s] of copyright infringement [that] may be traced" (12) is to convict them without a trial.

4. The core of the objection to the Order is its conclusion that the complaint states a legally cognizable claim, and that “making available” music files is automatically copyright infringement. The Order correctly notes that there are conflicts in the cases regarding whether such allegations are sufficient, but then incorrectly goes against the weight of authority and the commentators who have strongly criticized the RIAA’s ongoing campaign seeking the expansion of copyright law to cover the fact patterns in these cases. These lines of authority are discussed in the Does’s original memorandum of law, Exhibit B at 2-6.

In particular, the Order ignores the careful and thorough analysis of *Capitol Records v. Thomas*, No. 06-1497 (D.Minn. Sept. 24, 2008), the only one of these cases actually to go to trial, in which the district judge *sua sponte* vacated a substantial money judgment and ordered a new trial, upon determining that the jury instruction permitting a finding of infringement in the absence of actual distribution was clear error. See Reply Memorandum, Exhibit C at 3. The complaint fails to state a cause of action, and without a facially valid complaint (and irrespective of plaintiffs’ right to amend it, see Order at 11 n. 9), there can be no subpoena.

The Order states that “the Doe Defendants are indirectly, and maybe prematurely, seeking a motion to dismiss the Complaint, pursuant to Fed. R.Civ.P. 12(b)(6), without being first designated an actual party to this litigation. The Court does not know of any procedure which would allow prospective parties the right to move to dismiss a complaint that has not been officially served upon them.” (Order at 5-6). This is erroneous. Defendants are seeking to preserve their First Amendment right of anonymity, and a plaintiff who would overcome that right must demonstrate a proper claim at the outset. Second, a putative defendant can come into court at any time, and challenge a

complaint, whether being served or not. There is nothing premature about defendants' challenge to the complaint, since if there is no valid complaint, the subpoena must be quashed.

5. The Order is further erroneous in that it upholds the illegal investigation of MediaSentry, an unlicensed investigator whose actions constitute a crime in this State. The issue should be addressed now, because the company does not deny that it is engaged as a private investigator, without a license to do so.

6. Finally, the Order denied defendants' motion for a severance. While this portion of the motion may become moot if there is only one defendant, Doe No. 7 has reserved his/her right to defend this action if settlement is not achieved, and thus the severance aspect must be addressed.

CONCLUSION

Defendant Doe No. 3 is entitled to *de novo* review of the Order, and upon such review, this Court should vacate it in its entirety, and grant the motion to quash on the arguments initially presented, as supplemented by the present objections.

Dated: New York, New York
March 2, 2009

/S/

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