UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ARISTA RECORDS LLC *et al.*,

Plaintiffs-Appellees,

-against-

DOE 3,

Defendant-Appellant,

-and-

DOES 1, 2 and 4-16,

Defendants.

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Case No.

DECLARATION

RICHARD A. ALTMAN declares the following as true under penalty of perjury:

1. I am a member of the bar of this Court, and the attorney for defendant-appellant Doe 3. I submit this declaration in support of this motion for a stay pending appeal (and for an interim stay pending the determination of this motion) to this Court of an order refusing to quash a subpoena directed at third-party State University of New York at Albany ("SUNY"), which requires them to disclose, by March 11, 2009, the name, address and other identifying information about Doe 3.

2. This is one of approximately 30,000 copyright infringement actions brought around the nation in the past five years by the Recording Industry Association of America ("RIAA") and its members arising from the downloading and file-sharing of recorded music over the internet. The appeal raises significant issues, some of first impression, such as:

a. The standards for the use of *ex parte* procedures for expedited discovery;

b. The scope of the First Amendment right of anonymity over the internet;
c. The scope of the distribution right in copyright law, and the pleading requirements for infringement of such right;
d. Whether a motion to quash a subpoena which challenges the validity of the underlying complaint on Rule 12(b)(6) grounds is dispositive within the meaning of F.R.Civ.P. 72 and 28 U.S.C. § 636(b)(1)(A);
e. Whether such a motion can be referred to a Magistrate Judge without consent of the parties;
f. Whether a District Judge's review of a Magistrate Judge's order determining such a motion is *de novo*, or subject to a "clearly erroneous" standard.

3. The following documents are annexed to this declaration:

Exhibit A – The Notice of Appeal, filed March 7, 2009, with the Notice of Filing.
Exhibit B – The Decision and Order of the U.S. District Court for the Northern District of New York (Hon. Glenn T. Suddaby, U.S.D.J.) entered March 5, 2009, and the text order of March 6 requiring compliance by March 11.
Exhibit C – Letter to Judge Suddaby requesting stay of compliance with the subpoena pending the determination of the motion.
Exhibit D – The Memorandum-Decision and Order of Magistrate Judge Randolph F. Treece entered February 18, 2009.
Exhibit E – The subpoena at issue.
Exhibit F – Defendants' Amended Memorandum of Law in Support of Motion to Quash and Reply Memorandum in Further Support.
Exhibit G – Order of MJ Treece entered July 22, 2008, granting *ex parte* motion for leave to take immediate discovery.

4. The issues are analyzed and discussed extensively in the defendants' memoranda (Exhibit F), and the Court is respectfully referred thereto. Briefly, this copyright infringement action was commenced on or around July 17, 2008 against Does 1-16. These defendants have nothing in common except that that they are all apparently students at SUNY, which is allegedly their Internet Service Provider. Accompanying the plaintiffs' complaint was an *ex parte* application for leave to serve a subpoena on SUNY, compelling the disclosure of the names, addresses and other identifying information about the defendants.

5. The basis for naming the Doe defendants was an investigation by a private company called MediaSentry, which searches on the internet for file sharing software, and then identifies putative defendants by their Internet Protocol ("IP") addresses, which are claimed (erroneously) to be unique identifiers of persons who are logged on to the internet at specific dates and times. Solely on the basis of the IP addresses, plaintiffs claim that these students are copyright infringers, and serve subpoenas on the universities demanding disclosure of their identifying information. Once their identities are disclosed, plaintiffs dismiss their Doe actions without prejudice, and then address demand letters to the students, who are generally forced to settle for non-negotiable sums ranging from $3000 to $5000. Those who do not settle or respond are sued. Most settle, many default, and a few decide to defend themselves against what it is not exaggeration to characterize as an abuse of the federal courts and of copyright law itself. The present defendant, Doe 3, is such a person. All of the other defendants have either settled or are in the process of attempting to do so (Does 7, 11 and 15), and all of the other Doe defendants save these four have been previously dismissed from the action.

6. It is readily admitted by the RIAA that the purpose of this flood of litigation is not recovery of damages for copyright litigation, but to send a message: "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."[1] Moreover, moneys recovered from this campaign do not seem

[1] 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).

to have made their way to creative artists, but are instead being used to continue it.[2] One may legitimately question whether the federal courts should allow themselves to be used for such purposes.

7. This procedure is uniform among the 30,000 or so cases which the RIAA members have brought in the past five years. There are also many cases against individuals other than students, which involve subpoenas against commercial Internet Service Providers ("ISP's"), but the procedure is otherwise the same: Initially proceeding against Doe defendants, once ISP's disclose the information (almost always without notice to the subscriber), the Doe actions are dismissed without prejudice, plaintiffs send demand letters to the individuals, and, if the claim is not settled on plaintiffs' non-negotiable terms, plaintiffs bring suit against them by name.

8. In this case, plaintiffs' initial application for expedited discovery was granted by Magistrate Judge Treece on July 22, 2008 (Exhibit G), and the subpoena (Exhibit E) was served on SUNY, which notified the students involved of their intention to comply. I was then retained by three of the Does to seek to quash the subpoena, and moved on their behalf for that relief on October 5, 2008 (Memo in Support is Exhibit F). Plaintiffs opposed the motion, and I filed a Reply Memorandum (also in Exhibit F) on October 22.

9. On February 18, 2009, Magistrate Judge Treece filed a Memorandum-Decision and Order denying the motion to quash in all respects (Exhibit D). Thereafter, Does 7, 11 and 15 (two individuals) decided not to proceed further, intending to seek settlement. However, Doe 3 wanted to challenge the denial by appealing to District Judge Suddaby. I brought such a motion pursuant

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[2] *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).

to F.R.Civ.P. 72, with a return date for the motion of April 2, 2009[3], and filed it on March 2, 2009. Plaintiffs' response was due on March 16. In the motion, I also requested leave to withdraw as counsel for Does 7, 11 and 15. I also filed a letter to Judge Suddaby, requesting that he extend the date for compliance with the subpoena during the pendency of the motion (Exhibit C).

10. Only three days after filing the motion, and without any response from plaintiffs, the District Judge denied the appeal entirely and ordered that SUNY comply with the subpoena by March 11, 2009 (see last page of Exhibit B)[4]. Thus, a stay of this compliance date is necessary in order to allow Doe 3 to appeal these and other issues, since without a stay, the appeal will become moot. I therefore respectfully request that the Court grant such a stay, both pending the appeal, and pending the return date of this motion.

11. There are two points of appellate procedure to be addressed, namely the issue of appellate jurisdiction, and the standards for granting a stay. As for the merits of the appeal itself, the Court is respectfully referred to the defendants' two memoranda in Exhibit F and the decisions of the District Judge and Magistrate Judge. They set out the issues in full, and there is no need to repeat the arguments here. Suffice it to say that the appeal raises meritorious and novel issues, some of which appear to be of first impression and are of considerable importance to the development of copyright law, and that without a stay, the appeal will be immediately moot.

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[3] The Local Rules of the Northern District of New York require that the appeal be brought as a regular motion [7.1(b)(2)] , with a return date at least 31 days later, as compared to the shorter time requirements of Rule 72.

[4] The portion of the motion seeking leave to withdraw from representing Does 7, 11 and 15 was granted.

12. As a preliminary matter, we address the issue of appellate jurisdiction, inasmuch as the order from which the appeal is taken is not final. It is well established that orders refusing to quash third-party subpoenas can be appealable, notwithstanding the rule of finality of 28 U.S.C. §1291. *See, e.g., Perlman v. United States*, 247 U.S. 7, 62 L. Ed. 950, 38 S. Ct. 417 (1918)(If Perlman were forced to "seek a remedy at some other time and in some other way" he would be left "powerless to avert the mischief of the order."). 247 U.S. at 13. *Perlman* created an exception to the usual rule that an order denying a motion to quash is not appealable unless and until the witness refuses to comply and is held in contempt. *See In re Two Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52, 55-56 (2d Cir.1985)(the exception "allows an immediate appeal from the denial of a motion to quash a subpoena, without at first resisting and being found in contempt, when the subpoena is directed to a third party and the one seeking to quash the subpoena claims that its enforcement will violate one or more of his constitutional rights...The reason for the Perlman doctrine is that the party seeking an immediate appeal cannot control the third party to whom the subpoena is addressed."). 769 F.2d at 55-56 (*citing In re Grand Jury Subpoena Served Upon John Doe, Esq.*, 759 F.2d 968, 971 n.1 [2d Cir. 1985])(quotation marks omitted). "Because appellant-intervenor Payden seeks to quash a third-party subpoena on the ground that its enforcement will violate his constitutional rights, we may consider his claims without requiring his attorney to suffer a contempt citation." *In re Grand Jury Subpoena Duces Tecum*, 767 F.2d 26, 29 (2d Cir.1985).

13. "The theory of immediate appealability in these cases is that the third party will not be expected to risk a contempt citation and will surrender the documents sought, thereby letting the 'cat out of the bag' and precluding effective appellate review at a later stage." *In re Katz*, 623 F.2d 122, 124 (2d Cir.1980). *See also U.S. v. Guterma*, 272 F.2d 344 (2d Cir. 1959)(order denying motion to

quash subpoena served on accountants was appealable by client); *Schwimmer v. U. S.*, 232 F.2d 855, 866 (8th Cir.1956), *cert.den.* 352 U.S. 833 (attorney could appeal to prevent disclosure of his records by third party).

14. In the present case, the subpoena is directed against SUNY, which will comply with it by March 11 unless a stay is issued. They are a disinterested non-party to this litigation, and are surely not going to risk being cited for contempt in order to protect Doe 3's rights. Only Doe 3 can protect those rights, and since one of the principal grounds for moving to quash the subpoena is that individuals have a First Amendment right and privilege to be anonymous on the internet (and that plaintiffs' claims are insufficient to overcome that right and privilege), the conclusion is that Doe 3 has a right to appeal the denial of the motion to quash, and this Court has appellate jurisdiction.

15. The second issue is the standard for granting a stay under F.R.A.P. 8. The Rule requires that an application be made to the District Court for a stay. But that application was made, at least to the extent of requesting that the time to comply with the subpoena be extended pending determination of the appeal to the District Judge from the Magistrate Judge's order. In fact, the District Judge acted before the deadline for compliance set by the Magistrate Judge, without even waiting for the April 2 return date of the motion, or for plaintiffs' opposition papers. He then denied as moot the letter request to extend the deadline. Clearly, then, an application to the District Judge now for a stay would be impracticable under Rule 8(a)(1)(A) and 8(a)(2)(A)(i), if not pointless. Having already ordered that the subpoena be complied with by March 11, the District Judge would not in all likelihood entertain a stay application.

16. "In this Circuit, four factors are considered before staying the actions of a lower court: (1) whether the movant will suffer irreparable injury absent a stay, (2) whether a party will suffer

substantial injury if a stay is issued, (3) whether the movant has demonstrated a substantial possibility, although less than a likelihood, of success on appeal, and (4) the public interests that may be affected." *Hirschfeld v. Board of Elections*, 984 F.2d 35, 39 (2d Cir.1993)(quotation marks omitted).

17. First, irreparable injury is presumed, because compliance with the subpoena would implicate Doe 3's First Amendment rights to be anonymous. *See Statharos v. New York City Taxi & Limousine Commission*, 198 F.3d 317 (2d Cir.1999); *Bery v. City of New York*, 97 F.3d 689, 694 (2d Cir. 1996). Without a stay, that defendant's identity will be disclosed, rendering the appeal moot, and making it impossible to litigate the validity of Doe 3's claim that the rights are substantial enough to warrant protection and to require the quashing of the subpoena.

18. Second, there is no harm to the plaintiffs if the stay is granted. The subpoena was originally issued in August 2008, and was returnable on September 11, 2008. However, plaintiffs agreed to delay compliance with the subpoena while Does 3, 7, 11 and 15 litigated its validity. They are no longer willing to do so, but having succeeded in previously settling with all of the defendants from this action save these three individuals, and having voluntarily dismissed their claims with respect to all of the others, plaintiffs clearly have no urgency in requiring compliance with the subpoena against Doe 3 at this point. Their counsel informed me last week that they would not agree to any further extensions. To be precise, I requested that they agree to a temporary stay during the pendency of the letter request to Judge Suddaby, but they did not respond until shortly before the decision was announced, saying that they would not consent. Now that the District Court has ruled in their favor, they certainly will not consent.

19. As for the merits of the appeal and the public interest in the issues it raises the Court is respectfully referred to the arguments made to the District Court. These RIAA actions are in many ways unprecedented, and represent a radical extension of the copyright monopoly into areas never anticipated by Congress. There is to my knowledge no authority from this Court on many of the issues raised, and, as "the nation's premier copyright court"[5], it is respectfully submitted that the issues are of significant public interest and should be addressed here.

20. I would also respectfully refer the Court to the case of *Lava Records, LLC v. Amurao*, 08-2376-cv, which has been fully briefed and is awaiting oral argument in this Court, and which addresses some of these issues in the context of a prevailing defendant's right to recover attorney's fees.[6] It goes into considerable detail about the public policy implications of these downloading and file-sharing lawsuits.

21. In conclusion, I would respectfully request that this Court grant the requested stay pending appeal, and that it further grant an interim stay pending determination of this motion, inasmuch as the subpoena will otherwise be complied with by March 11, 2009.

Dated: New York, New York
March 9, 2009

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RICHARD A. ALTMAN

[5] *Gracen v. Bradford Exch.*, 698 F.2d 300, 305 (7th Cir.1983)(Posner, CJ).

[6] I represent the appellant in this appeal.