

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

----- X
ARISTA RECORDS LLC, a Delaware limited liability company; ATLANTIC RECORDING CORPORATION, a Delaware corporation; BMG MUSIC, a New York general partnership; CAPITOL RECORDS, LLC, a Delaware limited liability company; ELEKTRA ENTERTAINMENT GROUP INC., a Delaware corporation; INTERSCOPE RECORDS, a California general partnership; MAVERICK RECORDING COMPANY, a California joint venture; MOTOWN RECORD COMPANY, L.P., a California limited partnership; SONY BMG MUSIC ENTERTAINMENT, a Delaware general partnership; UMG RECORDINGS, INC., a Delaware corporation; VIRGIN RECORDS AMERICA, INC., a California corporation; WARNER BROS. RECORDS INC., a Delaware corporation; and ZOMBA RECORDING LLC, a Delaware limited liability company,

 Plaintiffs-Appellees,
v.
DOE 3,

 Defendant-Appellant.
----- X

Case No.: 09-0905-cv

**PLAINTIFF/APPELLEES'
MEMORANDUM OF LAW IN
OPPOSITION TO
DEFENDANT/APPELLANT'S
MOTION FOR STAY OF
DISTRICT COURT'S ORDER
DENYING DEFENDANT'S
MOTION TO QUASH SUBPOENA
DUCES TECUM**

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CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record provides the following statement under Fed. R. App. P. 26.1(b): Each Plaintiff-Appellee identifies its parent corporations and lists any publicly held company that owns 10% or more of its stock:

Plaintiff Appellee ARISTA RECORDS LLC is a limited liability company owned by BMG Music, a New York general partnership, which is not publicly traded.

Plaintiff Appellee ATLANTIC RECORDING CORPORATION's ultimate parent corporation is Warner Music Group Corp., which is publicly traded in the U.S.

Plaintiff Appellee BMG MUSIC is a general partnership owned by SONY BMG MUSIC ENTERTAINMENT and Ariola Eurodisc LLC, neither of which is publicly traded.

Plaintiff CAPITOL RECORDS, LLC's Appellee ultimate parent is Maltby Capital Limited, which is not publicly traded.

Plaintiff Appellee ELEKTRA ENTERTAINMENT GROUP INC.'s ultimate parent corporation is Warner Music Group Corp., which is publicly traded in the U.S.

Plaintiff Appellee INTERSCOPE RECORDS is a subsidiary of Vivendi S.A., a publicly held French company.

Plaintiff Appellee MAVERICK RECORDING COMPANY is a joint venture between SR/MDM Venture Inc., whose ultimate parent corporation is Warner Music Group Corp., which is publicly traded in the U.S., and Maverick Records LLC, which is not publicly traded.

Plaintiff Appellee MOTOWN RECORD COMPANY, L.P.'s parent company is Vivendi S.A., a publicly held French company.

Plaintiff Appellee SONY BMG MUSIC ENTERTAINMENT is a Delaware general partnership owned by USCO Holdings Inc., BeSo Holding LLC, Arista Holding, Inc., and

Zomba US Holdings, Inc., none of which is publicly traded. Its ultimate parents are Bertelsmann AG and Sony Corporation, the latter of which is publicly traded in the United States.

Plaintiff Appellee UMG RECORDINGS, INC.'s ultimate parent corporation is Vivendi S.A., a publicly held French company.

Plaintiff Appellee VIRGIN RECORDS AMERICA, INC.'s ultimate parent is Maltby Capital Limited, which is not publicly traded.

Plaintiff Appellee WARNER BROS. RECORDS INC.'s ultimate parent corporation is Warner Music Group Corp., which is publicly traded in the U.S.

Plaintiff Appellee ZOMBA RECORDING LLC is a subsidiary of SONY BMG MUSIC ENTERTAINMENT, whose ultimate parents are Bertelsmann AG and Sony Corporation, the latter of which is publicly traded in the United States.

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PRELIMINARY STATEMENT

This case arose out of the substantial copyright infringement that took place through Defendant's Internet account. Specifically, Plaintiffs allege that Defendant used an online file-sharing program to download and distribute Plaintiffs' copyrighted sound recordings over the Internet without authorization. At the time Plaintiffs detected Defendant's infringement, Plaintiffs were able to determine that Defendant connected to the Internet from a specific Internet Protocol ("IP") address administered by the State University of New York at Albany ("SUNY"), but were not otherwise able to determine Defendant's identify.

After attempting unsuccessfully to resolve this matter with Defendant on an anonymous basis, Plaintiffs filed this lawsuit against Defendant for copyright infringement.¹ Plaintiffs cannot, however, pursue their claim against Defendant without knowing Defendant's identity. To determine Defendant's identify, Plaintiffs sought leave to serve a subpoena on SUNY. The District Court granted Plaintiffs' motion and twice rejected Defendant's attempts to have the subpoena quashed. In doing so, the District Court relied on well settled law to determine that any minimal First Amendment right Defendant may claim to be anonymous on the Internet is far outweighed by Plaintiffs' right to discover Defendant's identity so that they may proceed with this lawsuit to protect their copyrights. Simply put, Defendant has no First Amendment right to engage in copyright infringement.

¹ Before filing this lawsuit in the District Court, Plaintiffs asked SUNY to forward a letter to Defendant advising Defendant of Plaintiffs' allegations and offering to discuss the matter, including a possible anonymous settlement, where Plaintiffs would agree not to pursue claims against the Infringer associated with the particular IP address detected by Plaintiffs. (*See* Reynolds Decl. ¶ 2.)

Defendant now files this appeal and asks this Court to stay the District Court's order denying Defendant's motion to quash the subpoena. Defendant's motion is both procedurally and substantively deficient and should be denied.

Procedurally, Defendant failed first to seek a stay in the District Court as required by Rule 8(a)(1) and cannot demonstrate that moving in the District Court would have been impracticable. Substantively, the standard in this Circuit for a stay pending appeal is a demanding one that Defendant has not met in this case.

First, Defendant cannot establish irreparable injury absent a stay. Defendant argues that irreparable injury should be "presumed," but has not cited, and could not cite, a single authority to support this argument. Indeed, Defendant's Motion does nothing more than incorporate the same arguments that Defendant made in the District Court, arguments that the District Court twice rejected and that have been rejected by every court to consider them. Indeed, every court to address the issue has ruled that defendants have no First Amendment right to anonymity when engaging in copyright infringement on the Internet, and that any minimal right to anonymity that a defendant might claim is far outweighed by Plaintiffs' need for disclosure of the defendant's identity to protect their copyrights.

Second, Plaintiffs will suffer substantial injury to their ability to protect their copyrights if a stay is issued. The risk of losing critical evidence, such as computer data relating to Defendant's file sharing, only increases with the passage of time. This case has already been delayed by two unsuccessful motions by Defendant in the District Court and any additional delay pending appeal will only further harm Plaintiffs' ability to obtain critical evidence.

Third, Defendant has demonstrated no "substantial possibility" of success on the merits. Defendant has not cited, and could not cite, a single authority that would support quashing

Plaintiffs' subpoena, which seeks only limited information that is critical to Plaintiffs' ability to protect their copyrights. Every court to consider Defendant's arguments, of which there have been many, has rejected them, and Defendant's Motion offers no reason to believe the same arguments have any chance of success in this Court.

Finally, as explained below the public interest would be significantly and negatively affected if a stay were granted.

STATEMENT OF FACTS

I. The Unauthorized Sharing Of Digital Music Files Over The Internet Constitutes Copyright Infringement And Has Had Devastating Effects On Copyright Owners.

Plaintiffs are recording companies who own or control exclusive copyrights in sound recordings. (Compl. ¶ 20, Exhibit A hereto.) Collectively, Plaintiffs face a massive problem of digital piracy over the Internet. Every month, copyright infringers unlawfully disseminate billions of perfect digital copies of Plaintiffs' copyrighted sound recordings over peer-to-peer ("P2P") networks. See Lev Grossman, *It's All Free*, Time, May 5, 2003. The Supreme Court has characterized the magnitude of online piracy as "infringement on a gigantic scale." *Metro-Goldwyn-Mayer Studios, Inc., v. Grokster Ltd.*, 545 U.S. 913, 940 (2005).

By downloading P2P software, and logging onto a P2P network, an individual can upload (distribute) and download (copy), without authorization, countless copyrighted music and video files to or from any other Internet user worldwide. See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 331 (S.D.N.Y. 2000) (describing a viral system, in which each user copying a file also becomes a distributor of that file). As a direct result of piracy over P2P networks, Plaintiffs have sustained devastating financial losses. The Department of Justice has concluded that online media distribution systems are "one of the greatest emerging threats to intellectual property ownership," estimating that "millions of users access P2P networks," the "vast

majority” of whom “illegally distribute copyrighted materials through the networks.” Report of the Department of Justice’s Task Force on Intellectual Property at 39 (Oct. 2004) (“Task Force Report”).² As the Seventh Circuit held, “Music downloaded for free from the Internet is a close substitute for purchased music; many people are bound to keep the downloaded files without buying the originals.” *BMG Music v. Gonzalez*, 430 F.3d 888, 890 (7th Cir. 2005).

Plaintiffs’ losses from online music piracy have resulted in layoffs of thousands of employees in the music industry. Unfortunately, infringing users of P2P systems are often “disdainful of copyright and in any event discount the likelihood of being sued or prosecuted for copyright infringement,” rendering the problem of online infringement even more difficult for copyright owners to combat. *In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003).

P2P users who disseminate (upload) and copy (download) copyrighted material violate the Copyright Act. *See Grokster*, 545 U.S. at 918-924 (noting that users of P2P networks share copyrighted music and video files on an enormous scale, and that even the providers of those networks “concede infringement” by the individual users); *Gonzalez*, 430 F.3d at 889 (“[P]eople who post or download music files are primary infringers.”); *Aimster*, 334 F.3d at 645 (observing that those who “swap” music files over the Internet “are the direct infringers”). “A copy downloaded, played, and retained on one’s hard drive for future use is a direct substitute for a purchased copy” *Gonzalez*, 430 F.3d at 890.

II. Plaintiffs Identified Defendant As An Infringer Of Plaintiffs’ Copyrights And Require Information Concerning Defendants’ Identity To Pursue Their Claim.

Copyright infringement over P2P networks is rampant and widespread largely because users believe they can conceal their identities. *See* Task Force Report at 39-40. Copyright owners are able to detect infringement occurring on P2P networks, but can only identify the

² Available at <http://www.cybercrime.gov/IPTaskForceReport.pdf>.

names and locations of the infringers with the court-ordered assistance of the infringer's Internet Service Provider. *See id.*

In this case, on April 12, 2007 at approximately 2:15 a.m. EDT, a company retained by Plaintiffs, MediaSentry, observed a P2P infringer (Defendant) using the "Ares" file-sharing program on the "AresWares" file sharing network. (*See* Compl. ¶ 22 and Exhibit A to Compl. at 3, Exhibit A hereto.) MediaSentry detected Defendant's infringement by logging onto the P2P network in the same fashion as any Internet user would and by viewing the files that Defendant was distributing to other users for free over the Internet. (*See* Application for Leave to Take Immediate Disc., Exhibit A Linares Decl. ¶¶ 11-15, Exhibit B hereto.) Defendant was openly distributing 236 digital audio files—many of them Plaintiffs' copyrighted sound recordings—from an Ares shared folder to potentially millions of other P2P users on the AresWares network. (*See* Compl. ¶ 22 and Exhibit A to Compl. at 3, Exhibit A hereto.) In conjunction with the Complaint filed in this case, Plaintiffs listed a sample of the sound recordings that Defendant was distributing without authorization. (*See id.*)

MediaSentry determined that Defendant connected to the Internet at IP address 169.226.226.24, which belonged to an Internet account being serviced by SUNY. (*See* Linares Decl. ¶¶ 18-19, Exhibit B hereto; Exhibit A to Compl. at 3, Exhibit A hereto.) Like most Internet Service Providers, SUNY maintains logs that match IP addresses with their users' computer hardware. (*See* Linares Decl. ¶¶ 16-17, Exhibit B hereto.) Thus, SUNY can match the IP address, date, and time with the computer that was using the IP address when Plaintiffs observed the infringement by looking at its IP address logs. (*Id.*) SUNY can then match the computer with the individual who was responsible for it on the SUNY network. (*Id.*)

III. The District Court Granted Plaintiffs' Motion To Subpoena SUNY For Information Sufficient To Identify Defendant So That Plaintiffs Could Pursue Their Claim.

Plaintiffs filed their Complaint on July 17, 2008, in the United States District Court for the Northern District of New York against Does 1-16 for illegally downloading and distributing Plaintiffs' copyrighted music. (*See* Compl., Exhibit A.) Plaintiffs simultaneously filed a motion for leave to take immediate discovery in order to identify the Doe defendants. (*See* Application and Memo. of Law, Exhibits B and C hereto.) The District Court granted Plaintiffs' motion and gave Plaintiffs permission to serve a Rule 45 subpoena on SUNY Albany, seeking information sufficient to identify each Doe defendant. (*See* Order of July 22, 2008, Exhibit D hereto.)

Plaintiffs served their subpoena on SUNY on August 12, 2008, requesting a response on or before September 11, 2008. (*See* Subpoena, Exhibit E hereto.) After seeking two extensions to which Plaintiffs did not object, Does 7, 11, and 15 filed a motion to quash Plaintiffs' subpoena. Doe 3 joined the motion on October 6, 2008. Plaintiffs filed their opposition on October 14, 2008. (*Resp. in Opp.*, Exhibit F hereto.) After full briefing by both parties, the Magistrate Judge issued a detailed 18-page opinion denying Defendants' motion to quash and ordering SUNY to respond to Plaintiffs' subpoena within 20 days—*i.e.*, by March 10, 2009. (*See* Order of Feb. 18, 2009, Exhibit G hereto.)

In his order, the Magistrate Judge ruled that Defendant's minimal First Amendment right to remain anonymous must yield to Plaintiffs' right to use limited discovery to protect their copyrights from infringement. (*See id.* at 6-13.) In this regard, the Magistrate Judge specifically found that (i) Plaintiffs' Complaint states a claim for relief that satisfies *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and that Plaintiffs have made a concrete showing of a *prima facie* case of copyright infringement against Defendant (*id.* at 8-12); (ii) the limited discovery Plaintiffs seek is "specific and reasonable" (*id.* at 12); (iii) Plaintiffs have no other means to

obtain the subpoenaed information (*id.*); (iv) the information sought concerning Defendant's identity is "central and critical" to Plaintiffs' ability to protect their copyrights (*id.*); and (v) Defendant has "minimal expectation of privacy," especially when allegedly engaged in P2P file sharing that allows any other user on the file sharing network to view the contents of Defendant's shared folder and download any files they wish (*id.*).

Defendant then appealed the Magistrate Judge's decision to the District Court Judge and sought a stay of compliance with the subpoena pending the outcome of that appeal. After carefully reviewing the record, the District Court denied Defendant's appeal, finding both that the Magistrate Judge's Decision and Order contained no "clear error" and that the Magistrate Judge's "Decision and Order would survive even a *de novo* review" in any event. (*See* Order of March 5, 2009, Exhibit H hereto.) The District Court then denied as moot Defendant's motion to stay pending appeal of the Magistrate Judge's order. (*See* Civil Docket for Case 08-cv-0765 – GTS-RFT, Text Order of March 6, 2009, Exhibit I hereto.)

Defendant then filed this appeal challenging the District Court's order denying the motion to quash and now seeks a stay of the order pending appeal.

ARGUMENT

I. Defendant's Motion Should Be Denied For Failure To Comply With Rule 8.

A party seeking a stay of a district court order pending appeal "must ordinarily move first in the District Court." Fed. R. App. P. 8(a)(1)(A). If no such motion is filed, the party must demonstrate "that moving first in the district court would be impracticable." Fed. R. App. P. 8(a)(2)(A). Where a party files for stay in the Court of Appeals without complying with Rule 8, the motion should be denied. *Hirschfeld v. Board of Elections*, 984 F.2d 35, 38 (2d Cir. 1993) (denying motion to stay for failure to comply with Rule 8).

Here, Defendant failed to seek a stay of the District Court's order in the District Court and has failed to demonstrate that moving in the District Court would be impracticable. Defendant argues that, because the District Court denied Defendant's motion to stay *the Magistrate Judge's order*, the District Court is likely to deny Defendant's motion to stay *pending this appeal*. (See Altman Decl. ¶ 15.) Of course, the two motions are fundamentally different and Defendant offers no basis for this assumption. Moreover, Defendant offers no authority to suggest that the mere likelihood that the District Court would deny Defendant's motion makes filing in the District Court impracticable. Therefore, Defendant's motion should be denied for failure to comply with Rule 8.³

II. Defendant Has Failed To Demonstrate A Sufficient Basis For A Stay.

A party seeking a stay on appeal "bears a difficult burden." *United States v. Private Sanitation Indus. Ass'n*, 44 F.3d 1082, 1084 (2d Cir. 1995). The standard for such a stay is a demanding one that requires consideration of four factors:

(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, 984 F.2d at 39 (citation omitted). "Because the burden of meeting this standard is a heavy one, more commonly stay requests will not meet this standard and will be denied." 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2904 (1995); see also *Gordon v. United States*, 58 F.3d 855, 856 (2d Cir. 1995) (stay denied where harm to movant would be irreparable absent a stay, but government movant failed to show that other three factors weighed in its favor).

³ Defendant's Motion also fails to comply with this Court's Local Rule 27(a) in that, among other things, Defendant failed to include a memorandum of law setting forth Defendant's arguments and the basis therefore.

A. Defendant Has Failed To Show Any Irreparable Injury.

Defendant first argues in conclusory fashion that “irreparable injury is presumed” because compliance with the subpoena would “implicate Doe 3’s First Amendment rights to be anonymous.” (Altman Decl. ¶ 17.) This argument, however, rests on a fundamentally flawed premise and is without merit.

Specifically, Defendant ignores binding Supreme Court precedent making it “unmistakably clear that the First Amendment does not shield copyright infringement.” *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211, 220 (S.D.N.Y. 2000) (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555-560 (1985)); *see also A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1028 (9th Cir. 2001) (First Amendment does not protect use of a peer-to-peer file sharing network that constitutes copyright infringement); *In re Verizon Wireless Internet Servs.*, 257 F. Supp. 2d 244, 260 (D.D.C. 2003) (“[T]he First Amendment does not shield copyright infringement.”) (quoting *Reimerdes*); *Columbia Pictures, Inc. v. Bunnell*, 245 F.R.D. 443, 452 (C.D. Cal. 2007) (“To the extent the users are engaged in copyright infringement, the First Amendment affords them no protection whatsoever.”); *Arista Records LLC v. Does 1-11*, CIV-07-568-R, slip op. at 2 (W.D. Okla. Nov. 14, 2007) (Exhibit J hereto) (holding that a similarly situated defendants’ First Amendment rights were “not implicated” because the information sought by the subpoena infringed no protected speech).

Here, Defendant did not engage in any type of protected speech that would support a claim of First Amendment right to be anonymous; rather, Defendant is alleged to have used a P2P network to download and distribute Plaintiffs’ copyrighted sound recordings in violation of the Copyright Act. This is not a case where Defendant is alleged to have created his/her own sound recordings or to have created some new derivative work; all Defendant is alleged to have done is copy and distribute, in their entirety, the copyrighted sound recordings of others. As

explained above, the law does not allow Defendant to invoke the First Amendment as a shield for such wrongdoing.

Defendant relies on *Statharos v. New York City Taxi & Limousine Comm'n*, 198 F.3d 317 (2d Cir. 1996) and *Bery v. City of New York*, 97 F.3d 689 (2d Cir. 1996) to support a claim of irreparable harm. Presumably, Defendant relies on these cases for the proposition that, “when an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable harm is necessary.” *Stratharos*, 198 F.3d at 322; *Bery*, 97 F.3d at 695. While this may be a correct statement of the law in the context of *Stratharos* and *Bery*, it has no application here.

In *Bery*, two artists sought an injunction challenging enforcement of a law that barred visual artists from exhibiting or selling their work for sale in public places without a license. *Bery*, 97 F.3d at 691. The artists argued that the license requirement violated their First Amendment right to free expression. *Id.* at 693. This Court agreed and held that that the license requirement was an unconstitutional infringement of the artists’ First Amendment rights. *Id.* at 698. Here, unlike the artists in *Bery* who were exercising freedom of expression through their creation of original works of art, Defendant claims a right to anonymity on the Internet for the act of engaging in copyright infringement. The First Amendment, however, “does not shield copyright infringement.” *In re Verizon*, 257 F. Supp. 2d at 260. Thus, Defendant cannot rely on *Bery* to support her claim of irreparable harm.

In *Statharos*, cab companies sought an injunction challenging on privacy grounds a financial disclosure rule that required corporations owning taxi medallions to disclose financial information. *Statharos*, 198 F.3d at 322-23. The Court recognized the existence of a protected interest in the privacy of personal information, but also noted that such interest is “not absolute”

and that, in light of substantial government interests at stake, the cab companies had “failed to demonstrate a likelihood of success on the merits.” *Id.* at 325-26. Here again, unlike *Statharos*, which involved protection of private financial information, Defendant claims a non-existent right to anonymity on the Internet for the act of engaging in copyright infringement. Thus, *Statharos* is easily distinguished on its facts. Moreover, to the extent *Statharos* applies at all, the case shows that not all First Amendment protections are “absolute,” and that some must give way to broader interests in some cases. That is precisely the case here, where any minimal privacy rights claimed by Defendant must give way to the substantial interest in protecting copyrights.

B. Plaintiffs Will Suffer Substantial Injury If A Stay Is Issued.

Defendant next argues that that no injury will befall Plaintiffs if the stay is granted pending this appeal because Plaintiffs previously agreed not to oppose Defendant’s requests for limited extensions of time in the District Court. (Altman Decl. ¶ 18.) This argument is wrong.

Plaintiffs’ good faith cooperation with Defendant concerning limited extensions in the District Court says nothing about the harm Plaintiffs will suffer if prevented from prosecuting this case pending appeal. On the contrary, because Plaintiffs have made a showing of a *prima facie* case of copyright infringement, they are entitled to a presumption of irreparable harm. *See American Metro. Enters. v. Warner Bros. Records, Inc.*, 389 F.2d 903, 905 (2d Cir. 1968) (“A copyright holder in the ordinary case may be presumed to suffer irreparable harm when his right to the exclusive use of the copyrighted material is invaded.”). As far as Plaintiffs know, Defendants infringement is continuing.

In addition, some of the most important evidence in this copyright infringement action necessarily resides on Defendant’s computer and on SUNY’s computer system. *See Arista Records, LLC v. Tschirhart*, 241 F.R.D. 462, 465 (W.D. Tex. 2006) (“The best proof of whether [the defendant engaged in infringement] would be to examine her computer’s hard drive”);

Arista Records Inc. v. Musemecci, No. 03-CV-4465, 2007 U.S. Dist. LEXIS 81630, at *13-14 (E.D.N.Y. Sept. 19, 2007) (finding in a similar infringement case that the passage of time harms the plaintiffs' ability to prosecute their claim); *Atlantic Recording Corp. v. Rodriguez*, No. SA-06-CA-748-OLG, slip op. at 2 (W.D. Tex. Sept. 12, 2007) (Exhibit K hereto) ("critical evidence from defendant's computer hard drive could have been altered, removed, or simply written over in the course of time").

Plaintiffs' experience with similar actions argues in favor of quick action to pursue the infringers because, by their very nature, the information and data stored on computer systems that are still being used are subject to being overwritten and lost. Defendant makes no promise to preserve computer data in its current state so that the data may be retrieved during discovery. Defendant cannot promise that the data logs on which SUNY must rely to make the connection between the IP address and Defendant or related electronic files will not be overwritten or lost. The passage of time also means that witnesses with material information may become difficult or impossible to locate, especially in the context of a University setting, where people tend to move quite frequently both during school and upon graduation.

C. Defendant Has Shown No Substantial Possibility Of Success.

A decision granting or denying a motion to quash or to modify a subpoena is subject to review only for abuse of discretion. *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.D.C. 1984). The abuse of discretion standard is one of the most "highly deferential" standards of review. *Alderman v. Pan Am World Airways*, 169 F.3d 99, 102 (2d Cir. 1999); *Matthew Bender & Co. v. West Publ'g Co.*, 240 F.3d 116, 121 (2d Cir. 2001).

Defendant's Motion asserts two primary issues on appeal: (1) whether Defendant has a First Amendment right to remain anonymous in this case and (2) whether Plaintiffs satisfied the necessary pleading requirements for a claim of copyright infringement, including a sub-issue

regarding the scope of the distribution right under the Copyright Act, 17 U.S.C. § 106(3).

(Altman Decl. ¶ 2.) Defendant cannot demonstrate a possibility of success on either issue.⁴

1. Defendant's First Amendment argument has no chance of success.

Defendant's First Amendment argument is doomed to fail because, as discussed above, distributing copyrighted material over the Internet is not speech protected by the First Amendment. *See Napster*, 239 F.3d at 1028; *Columbia Pictures*, 245 F.R.D. at 451-52; *In re Verizon*, 257 F. Supp. 2d at 260; *Reimerdes*, 82 F. Supp. 2d at 220. Moreover, to the extent that sharing copyrighted files implicates the First Amendment at all, every court to consider the issue has held that Plaintiffs' need for discovery to protect their copyrights far outweighs any minimal protection Defendant might claim.⁵

Does 1-40 provides a good explanation as to why Defendant's appeal here cannot succeed. In *Does 1-40*, the court held that the plaintiffs, on evidence similar to that submitted here, had "made a concrete showing of a *prima facie* claim of copyright infringement."

326 F. Supp. 2d at 565. When determining the extent of the defendant file-sharers' First

⁴ Defendant's Motion also purports to assert arguments concerning standards for expedited discovery and the assignment of the motion to quash to the Magistrate Judge. (*Id.*) Defendant, however, knew that the motion had been referred to the Magistrate Judge and made no objection. (*See* Letter of R. Altman to Hon. Randolph F. Treece dated Oct. 14, 2008, Exhibit L hereto). Moreover, any argument concerning the appropriate standard is irrelevant since the District Court reviewed the record and held that the Magistrate Judge's ruling would satisfy even a *de novo* review. (*See* Order of March 5, 2009 at 3, Exhibit H.)

⁵ *See, e.g., Sony Music Entm't, Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 566 (S.D.N.Y. 2004) (denying motion to quash and rejecting the same First Amendment argument that Defendant makes here); *In re Verizon*, 257 F. Supp. 2d at 260 (same); *LaFace Records, LLC v. Does 1-5*, No. 2:07-cv-187, 2008 U.S. Dist. LEXIS 13638 at *17-18 (W.D. Mich. Feb. 22, 2008) (same); *Arista Records LLC v. Does 1-19*, Civ. Action No. 07-cv-1649, slip op. at 11 (D.D.C. Apr. 28, 2008) (Exhibit M hereto) (same); *Arista Records LLC v. Does 1-11*, slip op. at 2-3 (Exhibit J) (same). This is just a sample of the *many* decisions denying motions to quash similar to that brought by Defendant here. Plaintiffs would be happy to provide additional citation should the Court desire it.

Amendment protection, the court balanced the magnitude of harm with the defendants' interest in free speech and privacy and held the "defendants' First Amendment right to remain anonymous must give way to plaintiffs' right to use the judicial process to pursue what appear to be meritorious copyright infringement claims." *Id.* at 567.

The same is true here. Plaintiffs have made a concrete showing of a *prima facie* case of actionable harm stemming from Defendant's infringement of Plaintiffs' copyrights. Without expedited discovery, Plaintiffs are not able to determine Defendant's identity and move their case forward. Having broadcasted identifying information to everyone on the AresWares P2P network, Defendant has "little to no expectation of privacy." *See In re Verizon*, 257 F. Supp. 2d at 267 (where "an individual subscriber opens his computer to permit others . . . to download materials from that computer, it is hard to understand just what privacy expectation he or she has after essentially opening the computer to the world"); *Columbia Pictures*, 245 F.R.D. at 452 (because file sharers "openly disclose their IP addresses as part of the [file sharing] process," any privacy concerns are minimal and outweighed by the interest in protecting copyrights). Any limited privacy interest Defendant might claim here is offset by the District Court's Order limiting the scope and use of the information to be obtained. (*See* Order of July 22, 2008 at 2, Exhibit D.) Defendant cites no authority to support the idea that any right to anonymity Defendant might claim could trump Plaintiffs' need for limited discovery in order to protect their copyrights. Accordingly, Defendant has demonstrated no chance of success on this issue.

2. Defendant's "sufficiency of the complaint" argument has no chance of success.

Defendant's argument that Plaintiffs have failed to state a claim also has no chance of success on appeal. To begin with, Defendant has not been served and has no standing to bring a

motion to dismiss. (See Order of March 5, 2009 at 2-3, Exhibit H.) Moreover, Plaintiffs' Complaint more than adequately states a claim.

To state a claim for copyright infringement, Plaintiffs need only allege: (1) that they own valid copyrights and (2) that Defendant violated one or more of the exclusive rights in 17 U.S.C. § 106 by, for example, copying or distributing Plaintiffs' copyrighted works. See *Susan Wakeen Doll Co., Inc. v. Ashton Drake Galleries*, 272 F.3d 441, 450 (7th Cir. 2001); see also *Feist Pub., Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991).

Here, Plaintiffs have alleged that they own or control exclusive rights to the copyrights in at least the six copyrighted sound recordings identified in Exhibit A to the Complaint. (Compl. ¶ 20, Exhibit A to Compl. at 3, Exhibit A hereto.) Plaintiffs have further alleged that Defendant "without the permission or consent of Plaintiffs, has continuously used, and continues to use, an online media distribution system to download and/or distribute to the public" the identified sound recordings. (Compl. ¶ 22.) Exhibit A to the Complaint lists the six specific sound recordings at issue, the IP address used by Defendant ("169.226.226.24"), and the specific date and time that Defendant was caught distributing Plaintiffs' copyrighted works ("2007-04-12 02:15:57 EDT"). (Exhibit A to Compl. at 3.) The Complaint also alleges that Defendant's infringement has been continuous and that Plaintiffs believe the infringement is ongoing. (Compl. ¶ 22.) Under any standard, these allegations provide more than adequate notice to

Defendant and easily state a valid claim for copyright infringement, and every court to consider the issue has so held.⁶

Defendant's Motion also indicates Defendant's intention to challenge the "scope of the distribution right" under 17 U.S.C. § 106(3). (Altman Decl. ¶ 2.c.) In the District Court, Defendant argued that Plaintiffs' Complaint fails to state a claim because, according to Defendant, it alleges only that Defendant made copies "available" without alleging that Defendant "actually distributed" Plaintiffs' copyrighted works, and that making copyrighted recordings available to others for download on P2P network without authorization does not violate Plaintiffs' right of distribution under 17 U.S.C. § 106(3). (See Order of Feb. 18, 2009 at 3, 9-11.) This argument, however, ignores the plain language of Plaintiffs' Complaint, which specifically alleges that "Defendant has, without the permission or consent of Plaintiffs, downloaded and/or distributed to the public" copies of Plaintiffs' copyrighted works. (Compl. ¶ 22, Exhibit A, emphasis added.)

The act of downloading copyrighted sound recordings on a P2P network without authorization constitutes a violation of the copyright holder's reproduction right under 17 U.S.C. § 106(1). *BMG Music v. Gonzalez*, 430 F.3d 888, 890 (7th Cir. 2005) (affirming summary judgment against the defendant who had used the KaZaA file sharing program to download copyrighted sound recordings); *Aimster*, 334 F.3d at 645 ("[M]aking . . . a digital copy of

⁶ See, e.g., *Arista Records, LLC v. Does 1-27*, 584 F. Supp. 2d 240, 248 (D. Me. 2008) (finding the plaintiffs' complaint sufficient under *Twombly*); *Elektra Entm't Group, Inc. v. Schwartz*, No. CV-66-3533 (DGT), 2008 U.S. Dist. LEXIS 26183 at *10 (E.D.N.Y. Apr. 1, 2008) ("as required by *Twombly*, the complaint alleges enough facts to constitute a plausible, and not just a conceivable, claim of infringement"); *Atlantic Recording Corp. v. Serrano*, No. 07-cv-1824 W (JMA), 2007 U.S. Dist. LEXIS 95203 at *10 (S.D. Cal. Dec. 28, 2007) ("Plaintiffs' Complaint alleges facts with sufficient particularity to establish a copyright infringement claim"). This is just a small sample of the *many* decisions rejecting Rule 12 motions similar to the one Defendant purports to assert here.

[copyrighted] music . . . infringes copyright.”); *Napster*, 239 F.3d at 1014 (“Napster users who download files containing copyrighted music violate plaintiffs’ reproduction rights.”). Likewise, a person violates a copyright holder’s distribution right under 17 U.S.C. § 106(3) by making an actual, unauthorized dissemination of a copyrighted work. *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 718 (9th Cir. 2007) (unauthorized “actual dissemination” of copyrighted work violates the distribution right in section 106(3)); *Aimster*, 334 F.3d at 647 (unauthorized “transfer” of copyrighted work violates distribution right). Because Plaintiffs have alleged both unlawful copying in violation of section 106(1), and unlawful distribution to the public in violation of section 106(3), their Complaint states a claim for relief, and Defendant’s “making available” argument has no relevance to this appeal.⁷

⁷ Defendant’s making available argument is also wrong. The overwhelming weight of authority holds that a person violates a copyright holder’s distribution right by making copyrighted sound recordings available for download by others on a P2P network without authorization. *See, e.g., Perfect 10*, 487 F.3d at 718-19 (confirming that a defendant who makes actual files available for distribution, not just links to files, “distributes” them); *Napster*, 239 F.3d at 1014 (“Napster users who upload file names to the search index for others to copy violate plaintiffs’ distribution rights.”); *Atlantic Recording Corp. v. Anderson*, No. H-06-3578, 2008 U.S. Dist. LEXIS 53654 at *19 (S.D. Tex. Mar. 12, 2008) (“[M]aking copyrighted works available for download via a peer-to-peer network contemplates ‘further distribution,’ and thus constitutes a violation of the copyright owner’s exclusive ‘distribution’ right under 17 U.S.C. § 106(3).”); *Virgin Records Am., Inc. v. Trinidad*, No. 06-5914 (WHW), 2007 U.S. Dist. LEXIS 88386 at *10 (D.N.J. Dec. 3, 2007) (“By placing the sound recordings in a share folder on an online media distribution system for others to copy, Defendant has infringed Plaintiffs’ copyright”); *Motown Record Co. v. DePietro*, No. 04-cv-2246, 2007 U.S. Dist. LEXIS 11626, *12-13, n.38 (E.D. Pa. 2007) (“A plaintiff claiming infringement . . . can establish infringement by . . . proof that the defendant ‘made available’ the copyrighted work.”); *see also New York Times Co. v. Tasini*, 533 U.S. 483, 487-88, 520 (2001) (finding publishers liable for distribution by placing copyrighted works in an online database where they were “retrievable” by the public without any allegation or proof of an actual dissemination of a work); *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997) (holding that making unauthorized copies of works available for distribution to others violates the copyright holder’s distribution right); *Advance Magazine Publishers, Inc. v. Leach*, 466 F. Supp. 2d 628, 637-38 (D. Md. 2006) (relying on *Tasini* and holding that an online publisher violated a copyright owner’s distribution right “by making available unauthorized copies of Plaintiff’s publications” online).

For all of these reasons, Defendant's arguments concerning the sufficiency of Plaintiffs' complaint have no chance of success on appeal.

D. Significant Public Interests Would Be Affected By A Stay.

Finally, a stay would adversely affect the interests of the public. The philosophy behind the Copyright Clause "is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" *Mazer v. Stein*, 347 U.S. 201, 219 (1954). Congress' decision to grant individual authors "the limited monopoly of copyright is predicated upon the dual premises that the public benefits from the creative activities of authors, and that the copyright monopoly is a necessary condition to the full realization of such creative activities." 1-1 *Nimmer on Copyright* § 1.03[A] (2008). Lawsuits like this one, therefore, involve more than just the vindication of private property rights, they promote the very purpose of the Copyright Clause. Indeed, if the Copyright Act were not enforced by private suits like this one, "the incentives Congress established to encourage authorship would have little effect." *Quinto v. Legal Times of Washington, Inc.*, 511 F. Supp. 579, 581 (D.D.C. 1981).

By preventing Plaintiffs from prosecuting this action while this case is on appeal, Defendant's proposed stay harms not only Plaintiffs' ability to protect their copyrights but also the public's interest in ensuring compliance with copyright laws and promoting the purpose of the Copyright Clause. By contrast, the public obtains no benefit from allowing Defendant to remain anonymous pending this appeal, which has no chance of success.

CONCLUSION

For these reasons, Plaintiffs respectfully request that this Court deny Defendant's Motion to stay the District Court's order pending appeal.

Dated: March 23, 2009



s/ Timothy M. Reynolds

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ANTI-VIRUS CERTIFICATION FORM

See Second Circuit Interim Local Rule 25(a)6

CASE NAME: Arista Records LLC v. Does 1-16

DOCKET NUMBER: 09-0905-cv

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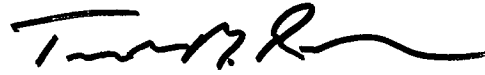
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