

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ARISTA RECORDS LLC *et al.*,

Plaintiffs-Appellees,

Case No. 09-09050-cv

-against-

DOE 3,

Defendant-Appellant,

-and-

DOES 1, 2 and 4-16,

Defendants.

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**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT
OF MOTION FOR STAY PENDING APPEAL**

RICHARD A. ALTMAN
Law Office of Richard A. Altman
Attorney for Doe 3
285 West Fourth Street
New York, New York 10014
212.633.0123
altmanlaw@earthlink.net

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PRELIMINARY STATEMENT

Richard A. Altman, the attorney for Doe 3, submits this reply memorandum of law in response to the opposition papers of the plaintiffs-appellees, and in further support of this motion for a stay of enforcement of a subpoena pending appeal.

This is a motion for a stay pending appeal, not the appeal itself¹. Despite the bulk and complexity of plaintiffs-appellees' papers, this motion raises only two relatively simple issues: (1) Is there appellate jurisdiction? and (2) Has appellant Doe 3 satisfied the standards for granting a stay pending appeal? Plaintiffs-appellees' voluminous submission is unhelpful in answering these questions. This is neither the time nor place to review the many district decisions which are exhibits to appellees' papers. That will be done as part of the appeal process if the stay is granted.

The main shortcoming of appellees' papers is that they do not address the concerns of an appellate court, which are not the same as those of the district courts which have been inundated with these file-sharing lawsuits. This case raises many matters of first impression at the appellate level in general, and in this Court in particular. The district court precedents are not controlling, and there are many well-reasoned cases whose holdings directly contradict those cited by the appellees.

The fact remains that of these numerous *ex parte* (and litigated) applications, there is little appellate guidance (and apparently none from this Court) as to how this unprecedented flood of copyright litigation should be handled by the district courts. In trying to interpret statutes enacted in the pre-internet age, district courts are essentially improvising in many respects. Given the technical issues and the significant imbalance in the resources between the RIAA and these

¹ The Court is respectfully advised that Scheduling Order # 1 has ordered that appellant's brief and joint appendix be filed by May 6, 2009.

individual defendants, there needs to be such guidance. As observed by District Judge Nancy Gertner in open court, “counsel representing the record companies have an ethical obligation to fully understand that they are fighting people without lawyers, to fully understand that, more than just how we serve them, but just to understand that the formalities of this are basically bankrupting people and it’s terribly critical that you stop it.”²

Any time there is a substantial imbalance between the wealth of the litigants, where few defendants have lawyers, and where the stated purpose is not recovery of damages but the sending of a message to the public, there should be cause for concern, and there should be a strict requirement that every punctilio of the Federal Rules of Civil Procedure and copyright law be observed. It is an understatement to say that this has not happened.

POINT I

THIS COURT HAS APPELLATE JURISDICTION.

Appellees’ papers address at length why Doe 3 should not have a stay and why the appeal has no merit. But they do not say a word about the threshold issue of appellate jurisdiction, and it should be clearly established. The cases make clear that this Court has appellate jurisdiction. They all rest on the premise that where the subject of the subpoena has a constitutional right which could possibly be violated if the subpoena is complied with, to wait until compliance before permitting an appeal is to preclude appellate review altogether. Thus, orders refusing to quash such subpoenas are appealable. *See In re Grand Jury Subpoena Served upon Doe*, 759 F.2d 968 at 971 n. 1 (2d Cir.1985), *rev’d en banc on the merits*, 781 F.2d 238 (2d Cir.1986), *cert den.* 475 U.S. 1108 (1986).

² *Capitol Records v. Alaujan*, No. 03-11661-NG (D.Mass.), Mot. Hearing Transcr.11:1-7 (Jun. 17, 2008).

While the cases generally arise in the context of criminal proceedings, the right to appeal applies in civil matters as well, *Maness v. Meyers*, 419 U.S. 449 (1975). The case which established the appealability of such orders, *Perlman v. U.S.*, 247 U.S. 7 (1918), itself arose from a patent infringement case, and despite its age is still good law. In Judge Friendly's words, the "predictions of Perlman's demise would have been as exaggerated as those of Mark Twain's." *National Super Spuds, Inc. v. New York Mercantile Exchange*, 591 F.2d 174 (2d Cir.1979).

In *Cobbledick v. U.S.*, 309 U.S. 323, 328-29 (1940), the Supreme Court said:

To have denied him opportunity for review on the theory that the district court's order was interlocutory would have made the doctrine of finality a means of denying Perlman any appellate review of his constitutional claim. Due regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statutes. (footnote omitted).

Most recently, in *Del Carmen Montan v. American Airlines, Inc.*, 490 F.3d 99 (2d Cir. 2007), this Court affirmed that *Perlman* applied to civil matters as well. *See also Stolt-Nielsen Transp. Group, Inc. v. Celanese AG*, 430 F.3d 567, 575 (2d Cir.2005)("Where a subpoenaed third-party witness does not object to testifying, but someone else does-often on the grounds of privilege-a district court's refusal to quash the subpoena is immediately appealable by the objecting party."). Accordingly, this Court has jurisdiction of the appeal.

POINT II

DOE 3 HAS SATISFIED THE REQUIREMENTS FOR A STAY PENDING APPEAL.

The second issue is whether Doe 3 has satisfied the standards for a stay pending appeal. In *Mohammed v. Reno*, 309 F.3d 95, 100 (2d Cir.2002), which examined the range of possible standards, this Court said:

Four criteria are relevant in considering whether to issue a stay of an order of a district court or an administrative agency pending appeal: the likelihood of success on the merits, irreparable injury if a stay is denied, substantial injury to the party opposing a stay if one is issued, and the public interest.

With respect to the likelihood of success, this Court cited with approval the D.C. Circuit Court, which had said:

The necessary level or degree of possibility of success will vary according to the court's assessment of the other [stay] factors...An order maintaining the status quo is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. There is substantial equity, and need for judicial protection, whether or not movant has shown a mathematical probability of success.

Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 182 U.S. App. D.C. 220-21, 559 F.2d 841, 843-44 (D.C. Cir. 1977)(quotation marks omitted).

In other words, there is an inverse relation between the degree of irreparable injury to the appellant absent the stay on the one hand, and the probability of success on the other. It is difficult to assess the probability of success on this appeal, simply because so many of the issues which it raises are of first impression (some of the important ones are noted in the moving papers, at 1-2), and the district courts are in conflict. However, what can be said is first, that the harm to Doe 3 if the stay is denied is irreparable, and will destroy the appealability of the issues entirely, and second, that the public interest in the issues and the impact of this appeal on a large number of cases is enormous. Both of these are strong arguments in favor of granting a stay.

Conversely the extent of the stay sought here is minimal, and of little impact upon the appellees. Doe 3 merely asks that compliance with the subpoena be stayed pending the determination of this appeal. The recipient of the subpoena, SUNY Albany, is a disinterested party and presumably will preserve the identifying information for Doe 3 and make it available at any time.

Appellees' argument that they will be irreparably harmed if a stay is granted should be rejected. As pointed out in the motion papers, the subpoena was originally returnable in September 2008. While the motion to quash was pending in the district court, appellees voluntarily agreed not to seek to enforce it against those Does, and did not force them to seek a stay from the district court. They only refused a further request for a stay after the motion was denied three months later. If there truly were irreparable harm, they would not have agreed to a stay voluntarily. Moreover, all of the defendants in this action, save Doe 3, have either settled or said that they intend to do so. There is absolutely no harm to appellees if there is a stay of compliance with the subpoena pending appeal.

As for the fact that Doe 3 did not initially seek a stay in the district court, when a district judge summarily upholds a magistrate judge's ruling only three days after the filing of a motion to challenge it, without awaiting opposition papers, orders compliance with a subpoena within five days, and then denies as moot Doe 3's request for a stay while that motion is pending, it is reasonable to conclude that that district judge is not going to stay his ruling pending appeal. The circumstances here demonstrate that it would have been impracticable to seek such a stay, as F.R.A.P. 8(a)(2)(A)(1) says, and that is sufficient.

As to the merits of the appeal, the issues are serious and substantial. The principal issue, which appears to be one of first impression in this Court, is the standard which a complaint must meet in order to defeat the First Amendment privilege of anonymity. There is no doubt of the existence of such a privilege. The First Amendment is fully applicable to the internet. In *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), the Supreme Court referred to "the vast democratic fora of the Internet" (521 U.S. at 868), saying:

this dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue...As the District Court found, the content on the Internet is as diverse as human thought. We agree with its conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium. 521 U.S. at 870 (citation and quotation marks omitted).

The First Amendment privilege of anonymity is not absolute, and can be overcome by a plaintiff with a valid claim, but the issue is how valid the claim must appear to be. There is a line of cases which address the scope of the privilege with respect to defamation cases and copyright infringement cases. In both, a plaintiff who would discover the identities of anonymous persons must demonstrate the existence of a valid, specific claim, supported by real evidence.

The standard which the claim must satisfy varies. Some cases say that a plaintiff must simply demonstrate a good faith basis for a claim, while others say that the claim should be specific enough to withstand a motion to dismiss. The Delaware Supreme Court has held that a claim must be good enough to support a summary judgment motion. *John Doe No. 1 v. Cahill*, 884 A.2d 451, 461 (Del. Supr.2005). And see *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 opinion). See generally *Doe v. Individuals*, 561 F. Supp.2d 249, 255 (D.Conn.2008).

There is thus a threshold question of what the standard should be for a complaint which seeks to defeat the First Amendment privilege of anonymity in a copyright infringement case. We would argue that given the power of copyright proprietors like the RIAA—far greater than that of the typical defamation plaintiff—the pleading standards should be even more stringent than in defamation cases.

The justification for a more stringent standard is that in defamation cases, the court always has the objected-to language before it, and can easily determine the facial validity of the claim, and

whether it is strong enough to prevail over the First Amendment privilege. Here, by contrast, appellees simply assert in standard language, used in almost every case, that they have a claim for copyright infringement, and that they have identified the right defendant. Essentially they ask the courts to simply trust them. This however will not do; there is every reason *not* to trust them. The central allegation in the complaint here is that:

Plaintiffs 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.”
(Reynolds decl., Exh. A, ¶ 22 at 5-6).

This vague allegation, devoid of both direct knowledge and specific facts, does not satisfy the heightened pleading requirements imposed by *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) and *ATSI Communs., Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87 (2d Cir.2007). The allegation that “each Defendant...has used, and continues to use, an online media distribution system to download and/or distribute certain of the Copyrighted Recordings” is mere boilerplate, nothing more than a “formulaic recitation,” devoid of any specific facts. *Bell Atlantic, supra*, 550 U.S. at 555.

Moreover, it has been held many times to fail to state a cause of action. In the only one of these cases to go to trial, *Capitol Records, Inc. v. Thomas*, 579 F.Supp.2d 1210 (D.Minn.2008), the district judge *sua sponte* vacated a jury verdict of \$222,000 against the defendant and ordered a new trial. In a thorough and scholarly opinion, the court said that merely making available files for distribution, without evidence of *actual* distribution, is *not* copyright infringement, and that its jury

instruction to the contrary had been erroneous. There are many other cases which have reached the same conclusion.³

The fallacy in appellees' argument is their claim that *all* downloading of their members' music files over the internet is copyright infringement *per se*. But some music files may not be copyrighted. Some downloading may be permissible as fair use. Some downloading may be done in connection with creation of derivative works. And there are good grounds for concluding that their method of identifying putative defendants is deeply flawed. Any innocent defendant whose identity has been disclosed is a defendant whose constitutional rights have been violated.

In effect, appellees' argument just serves to advance the *in terrorem* effect of these cases. The strict liability tort nature of copyright infringement (*see Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304 [2d Cir.1963]), is a chilling effect on free speech here, because it can discourage perfectly legal activities. A good faith belief that material is not copyrighted, or even a notice on a website that downloading from it is legal, would not be defenses to an infringement claim. The

³ *Capitol Records v. Thomas* cited as controlling *National Car Rental System, Inc. v. Computer Associates International, Inc.*, 991 F.2d 426, 434 (8th Cir. 1993), which held that “[i]nfringement of [the distribution right] requires an actual dissemination of either copies or phonorecords.” *See also London-Sire Records, Inc. v. Doe I*, 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(quotations marks omitted).

potential for punishing innocent downloaders is significant, and people will refrain from using their rights for fear of being caught in this dragnet. Of course, that is precisely why the RIAA has brought some 30,000 cases. But in the First Amendment context, such a chilling effect is irreparable harm and it is an unacceptable burden on free speech. One cannot simply conclude, as appellees would have it, that Doe 3 is just a college student looking for free music, because that begs the question and convicts Doe 3, who may be entirely the wrong person, without a trial.

As for the argument that extending such protections would effectively prevent the RIAA from bringing any actions at all, that is not relevant here. The tensions and conflicts between copyright law and the inevitable and socially beneficial advancement of computer technology and the internet raise difficult problems of law and public policy. But the proper place for the resolution of these conflicts is Congress, where the interested parties can present their arguments, not *ex parte* proceedings and default judgments in the federal district courts. Suing thousands of people who seldom have lawyers or the ability to defend themselves, and extorting settlements, is not the way to resolve it either, and it is seriously detrimental to the sound development of copyright law.

Moreover, the methods and technology used by the RIAA are highly questionable. Recently, some defendants have retained their own expert witness to challenge the RIAA's expert, and that witness's findings point out serious flaws in the process.⁴ Moreover, even apart from battles of experts, when a technology is so flawed that it results in suits against homeless and dead people,⁵

⁴ See the report of Professor Yongdae Kim of the Department of Computer Science of the University of Minnesota, submitted in the *Thomas* case, available at http://recordingindustry-vspeople.blogspot.com/2009_03_01_archive.html#1082514775121526971 (accessed March 29, 2009).

⁵ <http://arstechnica.com/news.ars/post/20080418-riaa-escapes-sanctions-drops-case->
(continued...)

or people without computers, or even a takedown notice directed to a laser printer⁶, something is seriously wrong. The RIAA has frequently sued admittedly innocent persons⁷ and is quite cavalier about the burden they impose on the legal process and the federal judiciary, and the effects of such frivolous suits on their victims.⁸ Under such circumstances, a blanket rule automatically allowing the invasion of First Amendment rights in these RIAA cases would be seriously detrimental to the rights of Doe 3 and to the public interest. All of these issues justify the granting of a stay so that they can be thoroughly presented to this Court.

CONCLUSION

This Court has jurisdiction of this appeal and this motion for a stay should be granted.

Dated: New York, New York
March 30, 2009

RICHARD A. ALTMAN
Law Office of Richard A. Altman
Attorney for Doe 3
285 West Fourth Street
New York, New York 10014
212.633.0123
altmanlaw@earthlink.net

⁵(...continued)
against-homeless-man.html (accessed May 31, 2008).

⁶ See <http://www.boingboing.net/2008/06/05/entertainment-indust-1.html>; Stone, The Inexact Science Behind D.M.C.A. Takedown Notices, <http://bits.blogs.nytimes.com/2008/06/05/the-inexact-science-behind-dmca-takedown-notices/index.html> (accessed July 31, 2008)(a *laser printer* was literally accused of downloading the latest Indiana Jones movie).

⁷ The case of *Lava Records, LLC v. Amurao*, 08-2376-cv, pending in this Court, involves the right of an innocent defendant to recover attorney's fees following a voluntary dismissal with prejudice (Doe 3's counsel represents the appellant in this case).

⁸ “‘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).