

# 09-0905-cv

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## United States Court of Appeals for the Second Circuit

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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, ZOMBA RECORDING LLC, a Delaware limited liability company,

*Plaintiffs-Appellees,*

-against-

DOE 3,

*Defendant-Appellant.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

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DEFENDANT-APPELLANT'S BRIEF

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## **APPELLANT'S BRIEF**

Defendant-appellant Doe 3 respectfully submits this brief in support of this appeal from an order of the U.S. District Court for the Northern District of New York (Hon. Glenn T. Suddaby, U.S.D.J.), which denied Doe 3's motion to quash a subpoena issued by plaintiffs-appellees. The subpoena was directed to non-party State University of New York at Albany ("SUNY"), and sought disclosure of the name, address and other identifying information about Doe 3 in order to commence an action against Doe 3 for copyright infringement. As will be argued herein, the District Court erred in refusing to quash the subpoena. It should be quashed, and Doe 3 should be awarded a reasonable attorney's fee.

## **JURISDICTIONAL STATEMENT**

This is an action for copyright infringement, pursuant to 17 U.S.C. § 101 *et seq.* The district court had jurisdiction pursuant to 28 U.S.C. § 1331. Jurisdiction in this Court is based upon 28 U.S.C. § 1292, the collateral order doctrine and a line of cases which specifically permit appeals from denials of motions to quash subpoenas directed to third parties, where the target of the subpoena has a constitutional right which could be violated if it were enforced.

The earliest case found to so hold is *Perlman v. U.S.*, 247 U.S. 7 (1918), a patent infringement case, which 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, 179 (2d Cir.1979).

Citing *Perlman*, 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).

While the issue generally arises in criminal proceedings, the right to appeal exists in civil matters as well, *Maness v. Meyers*, 419 U.S. 449 (1975); *Del Carmen Montan v. American Airlines, Inc.*, 490 F.3d 99 (2d Cir.2007); *Stolt-Nielsen Transp. Group, Inc. v. Celanese AG*, 430 F.3d 567, 575 (2d Cir.2005). “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). Accordingly, this Court has jurisdiction of this appeal.

The District Court order was entered on March 5, 2009 (A-4, 121)<sup>1</sup>, and the notice of appeal was filed on March 7 (A-4, 122). This appeal is thus timely, F.R.A.P. 4(a)(1)(A).

### **ISSUES PRESENTED FOR REVIEW**

1. Does the qualified First Amendment privilege to be anonymous on the internet protect a defendant against a complaint for copyright infringement which alleges, solely on information and belief, that a defendant “has continuously used, and continues to use, an online media distribution system to download and/or distribute to the public” copyrighted recordings, without any allegations of actual distribution?

2. Does a Magistrate Judge have authority to determine a motion to quash a subpoena where the validity of the underlying complaint is challenged, and is the District Judge required to review the matter *de novo*?

3. Is the subject of a subpoena directed to a third party entitled to a reasonable attorney’s fee if the subpoena is quashed?

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<sup>1</sup> References herein to “A” refer to pages in the Joint Appendix.

## STATEMENT OF THE CASE

### 1. The Nature and Theory of the Case

This is one of an estimated 30,000 cases brought since 2003 in federal district courts around the nation by members of the Recording Industry Association of America (“RIAA”), alleging copyright infringement by the downloading and file-sharing of recorded music over the internet. Although the cases are always brought in the names of record company plaintiffs who allege that they are the owners or proprietors of the copyrights involved, it is undisputed that the RIAA is the real party in interest, and that it controls and determines the course and strategy of the litigation, and references to the RIAA herein should be understood in this light.

This flood of litigation has been brought supposedly to stem the detrimental effect on sales of compact disks caused by the availability of recorded music on the internet, although the extent of that effect has been vigorously disputed by disinterested scholars, *see infra* at 7 n. 3. This appeal appears to raise issues of first impression in the Second Circuit arising from this campaign.

The RIAA’s theory in these cases is that anyone who downloads song files from the internet and makes them available to anyone by way of so-called peer-to-peer software (which enables users to exchange files directly between their computers without intermediate servers) has violated both the copyright owner’s right to make

copies, contained in 17 U.S.C. § 106(1), and the distribution right of § 106(3). Its position, moreover, is that the distribution right is violated whether or not any copies have actually been distributed, and that merely making song files available to others is an infringement of that right.

However, the right to make a personal copy of copyrighted material may be protected as fair use, 17 U.S.C. § 107; *Sony Corp. of America, Inc. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984). Moreover, as will be shown, infringement of the distribution right requires the *actual distribution of copies*, and merely making copies available without more does *not* violate the distribution right. In other words, the *attempted* distribution of copyrighted material—which is all that plaintiffs-appellees allege—is not infringement and is not actionable.

This nationwide litigation campaign has been seriously detrimental to the fair administration of justice and the public policy importance of establishing clear boundaries to copyright law, and has imposed enormous burdens on the federal courts. The RIAA has used questionable investigations, unsupported and erroneous legal theories, *ex parte* applications and communications with court personnel, violations of the rules against joinder of unrelated defendants, and abusive litigation tactics against individuals, many of whom are completely innocent, and none of



whom should reasonably expect to find themselves forced to defend their personal use of computers in federal courts.

District Judges and commentators have often criticized the RIAA's tactics and the legal theories behind them<sup>2</sup>, but the litigation continues, with seemingly little

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<sup>2</sup> "The concern of this Court is that in these lawsuits, potentially meritorious legal and factual defenses are not being litigated, and instead, the federal judiciary is being used as a hammer by a small group of plaintiffs to pound settlements out of unrepresented defendants." *Elektra v. O'Brien* (C.D.Calif., March 2, 2007)(copies of this and all unpublished cases cited herein are in the appendix to this brief, in the order that they are cited).

*See Arista v. Does 1-27*, 2008 U.S.Dist.LEXIS 6241 at \*21 (D.Me.Jan. 25, 2008)(magistrate judge's ruling):

Rule 11(b)(3) requires that a representation in a pleading have evidentiary support and one wonders if the Plaintiffs are intentionally flouting that requirement in order to make their discovery efforts more convenient or to avoid paying the proper filing fees. In my view, the Court would be well within its power to direct the Plaintiffs to show cause why they have not violated Rule 11(b) with their allegations respecting joinder. [I]t is difficult to ignore the kind of gamesmanship that is going on here.....These plaintiffs have devised a clever scheme... to obtain court-authorized discovery prior to the service of complaints, but it troubles me that they do so with impunity and at the expense of the requirements of Rule 11(b)(3) because they have no good faith evidentiary basis to believe the cases should be joined.

*See Patry, Atlantic Recording Corp. v. Howell*, available at <http://williampatry.blogspot.com/2008/04/atlantic-recording-corp-v-howell.html> (April 30, 2008) (accessed on July 29, 2008):

From the beginning of copyright law, copyright owners have had the burden of proving their case, and rightly so. What we are seeing now in the making available cases and in other areas is not only an attempted

(continued...)

effect on the public's unflagging desire and intention to download music from the internet.<sup>3</sup>

## **2. How the Litigation Process Works.**

The RIAA's investigation consists of identifying song files which are available on individuals' computers by means of peer-to-peer software, and obtaining Internet Protocol ("IP") addresses which may (but do not necessarily) identify a particular

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<sup>2</sup>(...continued)

reversal of centuries of copyright law, but of civil procedure as well...I do not condone infringement of copyright whether by P2P or any other means, and believe that copyright owners have every right to bring litigation against those who have infringed their rights (and here I mean infringed an actual section 106 right, not fabricated rights like attempted distribution). But I do believe that copyright owners must prove their case the old fashioned way.

<sup>3</sup> See Fisher, Download Uproar: Record Industry Goes After Personal Use, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/28/AR2007122800693.html> (December 30, 2007)(accessed July 29, 2008)("Despite more than 20,000 lawsuits filed against music fans in the years since they started finding free tunes online rather than buying CDs from record companies, the recording industry has utterly failed to halt the decline of the record album or the rise of digital music sharing." See also Holt, *The Effect of Recording Industry Lawsuits on the Market for Recorded Music*, 1 Vanderbilt Undergraduate Research Journal 1 (2005)(available at [ejournals.library.vanderbilt.edu/vurj/include/getdoc.php?id=112&article=14&mode=pdf](http://ejournals.library.vanderbilt.edu/vurj/include/getdoc.php?id=112&article=14&mode=pdf) - (accessed July 29, 2008)("the recording industry ought to place more confidence in the findings of the academic community and acknowledge that file sharing, although an interesting phenomenon that may have important future consequences throughout all sectors of business, does not appear to be directly related to serendipitous decline in sales that marked the early twenty-first century...it would seem prudent for the recording industry to adapt to and discover the benefits intrinsic to this new technology, not attack it").

individual who accessed the internet on a particular date and time. The investigations are done by a private company named MediaSentry, a part of a company called SafeNet, using proprietary software.<sup>4</sup> This company's activities have been challenged in many cases, because they are considered to be a private investigator, and many states have statutes requiring such investigators to be licensed, which MediaSentry is not. In New York, a private investigator must have a license, and operating without one is a misdemeanor, Gen. Bus. L. §§ 70 subds. 2 & 4, 71 subd. 1. Thus the collection of evidence is arguably illegal.

Following the investigation, RIAA companies then bring a single action against numerous Doe defendants in the district where the Internet Service Provider ("ISP")(frequently a college or university) is located. This has been held to violate the joinder rules of F.R.Civ.P. 20 and 21, because the Doe defendants have no connection to each other.<sup>5</sup> Moreover, at this point the companies have no idea whether the Does are actually subject to personal jurisdiction in the district, since

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<sup>4</sup> Apparently, as of this year the RIAA no longer uses MediaSentry, *see* <http://www.p2pnet.net/story/18050>; Changing Tack, RIAA Ditches MediaSentry, <http://online.wsj.com/article/SB123109364085551895.html> (accessed May 23, 2009). However, the investigation in this case was done by MediaSentry.

<sup>5</sup> In fact, the RIAA cases against multiple defendants are arguably in contempt of a subsisting 2004 *sua sponte* district court order barring such joinder and requiring all such future cases to be brought individually. *See In re Cases Filed by Recording Companies* (W.D.Tex. Nov. 17, 2004).

there is no basis to assume that an internet subscriber need be anywhere near the ISP. The only purpose of these Doe suits is to provide a vehicle to issue a subpoena to the ISP to force them to disclose the identities of the subscribers (or students) who actually pay for or use the internet connection. The ISPs then disclose the information to the plaintiffs, often without affording the subscriber or student notice and an opportunity to move to quash the subpoena (*see* F.R.Civ.P. 45(c)(3)(A)(iii)). The plaintiffs then dismiss the Doe suit and proceed directly against the individuals.

The underlying assumption is that the putative defendant infringer and the subscriber are one and the same. But parents have children who use their internet connection, or people have friends and visitors who might use their computers, or they have wireless routers which can permit anyone to access their internet service from a distance. It is thus objectively unreasonable to assume that the subscriber is always a proper defendant without further investigation, and yet that is the sole basis upon which the RIAA plaintiffs proceed in general, and proceeded in this case.

Once identified, defendants' choices are to pay the RIAA's non-negotiable pre-litigation, arguably extortionate settlement demands (usually between \$3000 and \$5000), to default, or to defend themselves once sued, either *pro se* or with counsel, if they can afford it. Few can. The RIAA has sued mostly working-class individuals, students, children, the disabled, the homeless, people who do not own computers, and

even the dead.<sup>6</sup> They have frequently sued entirely innocent persons and are quite cavalier about the burden they impose on the legal process and the federal judiciary, and the effects of such suits on their defendants.<sup>7</sup>

For a detailed discussion of the process and the issues, *see* Beckerman, *How the RIAA Litigation Process Works*, [http://info.riaalawsuits.us/howriaa\\_printable.htm](http://info.riaalawsuits.us/howriaa_printable.htm) (accessed July 29, 2008). For a recent article with recommendations for the federal judiciary as to how they should seek to level the playing field in these cases, *see* Beckerman, *Large Recording Companies v. The Defenseless: Some Common Sense Solutions to the Challenges of the RIAA Litigations*, 47 ABA Judges' Journal, Summer 2008.

### **3. The RIAA's Inequitable Conduct Should Bar Them from Relief.**

These RIAA cases are replete with bad faith, unclean hands and sharp practices by counsel. The RIAA readily admits that the purpose of this flood of litigation is not to recover damages for copyright infringement, but to send a message: "the RIAA—the

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<sup>6</sup> <http://arstechnica.com/news.ars/post/20080418-riaa-escapes-sanctions-drops-case-against-homeless-man.html> (accessed May 31, 2008).

<sup>7</sup> "'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).

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.”<sup>8</sup> Moreover, moneys recovered from this campaign do not seem to have made their way to creative artists, but are instead being used to continue it.<sup>9</sup>

But the federal courts do not exist to further the RIAA's business model and they surely should not assist anyone in creating a climate of fear. The campaign certainly does nothing to advance the sole purpose of the copyright monopoly; if anything, it hinders it. “The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.” *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932). After all, there is surely no evidence that the RIAA's campaign has encouraged musicians to benefit

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<sup>8</sup> 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).

<sup>9</sup> 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).

our society by writing any new music. And the campaign has surely fostered disrespect for the rule of law.<sup>10</sup>

The RIAA has recently lied to Congress about its intentions. On December 23, 2008, Mr. Mitch Bainwol, the Chairman and CEO of the RIAA, wrote to the Senate and House Judiciary and Commerce Committees, stating that “we discontinued initiating new lawsuits in August.” *See* <http://recordingindustryvspeople.blogspot.com/2009/02/mitch-bainwol-letter-to-congressional.html> (accessed on May 19,

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<sup>10</sup> This war must end. It is time we recognize that we can't kill this creativity. We can only criminalize it. We can't stop our kids from using these tools to create, or make them passive. We can only drive it underground, or make them “pirates.” And the question we as a society must focus on is whether this is any good. Our kids live in an age of prohibition, where more and more of what seems to them to be ordinary behavior is against the law. They recognize it as against the law. They see themselves as “criminals.” They begin to get used to the idea. That recognition is corrosive. It is corrupting of the very idea of the rule of law. And when we reckon the cost of this corruption, any losses of the content industry pale in comparison...The war on peer-to-peer file-sharing is a failure. After a decade of fighting, the law has neither slowed file sharing, nor compensated artists. We should sue not kids, but for peace, and build upon a host of proposals that would assure that artists get paid for their work, without trying to stop “sharing.”

Lawrence Lessig, *In Defense of Piracy*, Wall Street Journal, Oct. 11, 2008, *available at* <http://online.wsj.com/article/SB122367645363324303.html> (accessed October 16, 2008).

2009). This representation was reported in the press at the time, *see* Music Industry to Abandon Mass Suits, Wall Street Journal, Dec. 19, 2008, *available at* <http://online.wsj.com/article/SB122966038836021137.html> (accessed on May 19, 2009). However, since then RIAA members have commenced at least several hundred more cases, including dozens the same month as Mr. Bainwol's letter, and at least 62 in the month of April 2009. *See* [http://recordingindustryvspeople.blogspot.com/2008\\_12\\_01\\_archive.html#1104859189661357526](http://recordingindustryvspeople.blogspot.com/2008_12_01_archive.html#1104859189661357526); <http://www.p2pnet.net/story/21353> (accessed May 19, 2009).

#### **4. The Need for Appellate Review**

One may legitimately question whether the federal courts should allow themselves to be used for such purposes, and to continue to uphold the unprecedented expansion of intellectual property rights for such plaintiffs as these. Because of the procedural posture of this case, this appeal brings up for review the entire legal basis of appellees' litigation strategy, and represents, to appellant's knowledge, the first serious challenge to this entire campaign. It presents the Court with the opportunity to correct this egregious distortion of civil procedure and copyright law, and to alleviate the abuses which it represents.

Despite the thousands of *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. Because few cases are actually defended with counsel, let alone vigorously litigated, the issues are being muddied, not clarified. Moreover, in trying to interpret statutes enacted in the pre-internet age, District Courts are necessarily improvising in many respects, leading to inconsistent and irreconcilable results.

Given the technical issues and the significant imbalance in the resources between the RIAA and their 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.”<sup>11</sup>

Any time there is a substantial imbalance between the wealth of the litigants, where few defendants have lawyers, and where the stated purpose of the litigation 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

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

Federal Rules of Civil Procedure and copyright law be observed. It is an understatement to say that this has not happened.

### **PRIOR PROCEEDINGS**

This action was commenced on or around July 17, 2008 against sixteen unrelated Doe defendants<sup>12</sup> by filing a complaint in the U.S. District Court for the Northern District of New York (A-6-49). These defendants had nothing in common except that they were all apparently students at SUNY, which is allegedly their Internet Service Provider (“ISP”). Accompanying the complaint was an *ex parte* application for immediate discovery, requesting leave to serve a subpoena on SUNY, compelling the disclosure of the names, addresses and other identifying information about the defendants (A-50-52). The application was supported by a declaration of one Carlos Linares, who is an attorney and the Vice President, Anti-Piracy Legal Affairs, for the RIAA (A-53-62).

The application for expedited discovery was granted by Magistrate Judge Randolph F. Treece on July 22, 2008 (A-73-75). Plaintiffs-appellees then served the subpoena (A-80-86) on SUNY, which notified the students involved of SUNY’s intention to comply, and afforded them time to consult with counsel. In response,

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<sup>12</sup> All of the Does have settled with appellees except for Doe 3.

three of the Does, identified as Does 3, 7, 11 and 15<sup>13</sup>, retained counsel, who filed a motion to quash the subpoena on October 6, 2008<sup>14</sup> (A-76-79). The next day, Magistrate Judge Treece signed an order, *sua sponte*, assigning the motion to himself, without the consent of either party or apparently by direction of the District Judge (A-3, Text Order dated 10/07/08). Appellees then filed a memorandum of law opposing the motion (A-3, No. 27), the Does filed a reply memorandum on October 22 (A-3, No. 32), appellees filed a surreply (A-3, No. 33), and the motion was submitted without oral argument.

On February 18, 2009, the Magistrate Judge filed a Memorandum-Decision and Order denying the motion to quash in all respects and ordering SUNY to comply with the subpoena (A-87-104). Thereafter, Does 7, 11 and 15 (two individuals) decided not to proceed further and entered into settlement discussions on their own. The appellees later filed voluntary dismissals against these Does, indicating that the claims against them were settled (A-5, No. 47).

However, Doe 3 challenged the denial of the motion by filing objections with the District Judge, pursuant to F.R.Civ.P. 72. The objections were filed as a motion

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<sup>13</sup> One of the individual Does was named twice.

<sup>14</sup> Two of the three Does moved to quash originally. A third one came forward to join the motion shortly thereafter and the motion was amended to include that defendant.

on March 2, 2009, with a return date of April 2, 2009<sup>15</sup>, and appellees' response due on March 16. In the motion, Doe 3's counsel also requested leave to withdraw as counsel for Does 7, 11 and 15, in part because they had informed him that they intended to seek to settle the claims against them. Counsel also sent a letter to District Judge Suddaby, requesting an extension of the date for compliance with the subpoena during the pendency of the motion (A-116).

On March 5, only three days after Doe 3 filed the motion, and weeks before plaintiffs' response was due to be filed, the District Judge denied the appeal entirely and directed SUNY to comply with the subpoena by March 11, 2009 (A-117-21)<sup>16</sup>. He denied the request to extend the date for compliance as moot.

On March 7, Doe 3 filed a notice of appeal in the District Court (A-4, 122), and on March 9 filed a motion in this Court for a stay pending the determination of the appeal. The following day, Circuit Judge Livingston granted an interim stay, pending the submission of the motion to a three-judge panel. Appellees opposed the motion and on April 21, it was submitted to the panel, which granted the stay the next day.

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<sup>15</sup> The Local Rules of the Northern District of New York require that an appeal from a Magistrate Judge's ruling 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 limits of Rule 72.

<sup>16</sup> The portion of the motion seeking leave for counsel to withdraw from representing Does 7, 11 and 15 was granted.

## **SUMMARY OF ARGUMENTS**

1. Doe 3 has a qualified First Amendment privilege to be anonymous on the internet, and the complaint is insufficient to overcome that privilege. It fails to contain sufficient factual allegations to make out a *prima facie* claim for copyright infringement under the heightened pleading standards set forth in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. \_\_\_ (2009), and is legally deficient in other respects. Without a valid complaint, Doe 3's privilege prevails and the subpoena must be quashed.

2. Doe 3's constitutional right to an Article III judge was violated by the unconsented referral to a Magistrate Judge in the first instance, and by the District Court's refusal to conduct a *de novo* review of the Magistrate Judge's decision.

3. If this appeal results in the quashing of the subpoena, Doe 3 is entitled to a reasonable attorney's fee, both for prevailing on the motion, and because in practical terms Doe 3 will be the prevailing party in a copyright infringement case.

## **STANDARD OF REVIEW**

Because this appeal is from denial of a motion to quash a subpoena, the standard of review is generally abuse of discretion. *U.S. v. Sanders*, 211 F.3d 711, 720 (2d Cir.2000). However, because the motion to quash the subpoena here raises a question of constitutional privilege and the validity of the underlying complaint, the

standard of review is *de novo*. *Staehr v. Hartford Fin. Servs. Group*, 547 F.3d 406, 424 (2d Cir.2008). Moreover, the District Court’s conclusions of law are subject to the same *de novo* standard, *id.*

## ARGUMENT

### POINT I

#### **DOE 3 HAS A QUALIFIED FIRST AMENDMENT PRIVILEGE TO ENGAGE IN ANONYMOUS SPEECH ON THE INTERNET, AND THE COMPLAINT IS INSUFFICIENT TO DEFEAT THE PRIVILEGE.**

##### **1. There is a Qualified First Amendment Privilege of Anonymity.**

It is well established that the First Amendment protects the right to speak anonymously. *See, e.g., Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002); *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 197-99 (1999); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 341-42 (1995); *NAACP v. Alabama*, 357 U.S. 449, 461 (1958). Some of these cases have noted approvingly the important role played by anonymous or pseudonymous writings over the course of history, from the literary efforts of Shakespeare and Mark Twain to the authors of the Federalist Papers. “Anonymous speech is a great tradition that is woven into the fabric of this nation’s history.” *Doe v. 2TheMart.com Inc.*, 140 F.Supp.2d 1088, 1092 (W.D.Wash.2001).

The right is fully applicable to speech on the internet. The Supreme Court has stated that the internet is a public forum of preeminent importance, which permits any individual who wants to express her views the opportunity, at least in theory, to reach anyone anywhere in the world at virtually no cost, and has held that First Amendment rights are fully applicable to communications over the internet. *See generally Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997). Furthermore, 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).

The First Amendment right to communicate anonymously is, of course, not a license to defame, disclose trade secrets, commit crimes or infringe copyrights. *In re Verizon Internet Services*, 257 F.Supp.2d 244, 260 (D.D.C.2003), *rev'd on other grounds sub nom. RIAA v. Verizon Internet Services*, 351 F.3d 1229 (D.C.Cir.2003). Nor is it an absolute bar against disclosure of one's identity in a proper case. It is rather a qualified privilege which can only be overcome by a substantial and particularized showing of a valid claim by a plaintiff who would do so: "[I]n order to obtain a subpoena, the copyright owner must, in effect, plead a prima facie case of copyright infringement." *Id.*, 257 F.Supp.2d at 263.

## **2. A Plaintiff Who Would Overcome the Privilege Must Demonstrate a Prima Facie Claim, if Not More.**

The tension between this essential constitutional privilege and the interest of a plaintiff in obtaining information needed to pursue litigation has been considered by several federal and state courts in the internet context. These courts have recognized that, at the outset of the litigation, the plaintiff has done no more than allege wrongdoing, and have held that the privilege is not defeated by bare allegations and legal conclusions in the guise of factual assertions. They have further recognized that a serious chilling effect on anonymous speech would result if internet users could be identified by persons who merely allege wrongdoing, without necessarily intending to litigate their claims to a conclusion.

In *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal.1999), the Court said:

In such cases the traditional reluctance for permitting filings against John Doe defendants or fictitious names and the traditional enforcement of strict compliance with service requirements should be tempered by the need to provide injured parties with a forum in which they may seek redress for grievances. However, this need must be balanced against the legitimate and valuable right to participate in online forums anonymously or pseudonymously. People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law. This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate. Furthermore, it permits persons to obtain information relevant to a sensitive or intimate



condition without fear of embarrassment. People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identity.

The Court then said that a plaintiff seeking discovery to identify unknown defendants would need to satisfy three requirements:

First, the plaintiff should identify the missing party with sufficient specificity such that the Court can determine that defendant is a real person or entity who could be sued in federal court...Second, the party should identify all previous steps taken to locate the elusive defendant...Third, plaintiff should establish to the Court's satisfaction that plaintiff's suit against defendant could withstand a motion to dismiss. *A conclusory pleading will never be sufficient to satisfy this element.* Pre-service discovery is akin to the process used during criminal investigations to obtain warrants. The requirement that the government show probable cause is, in part, a protection against the misuse of ex parte procedures to invade the privacy of one who has done no wrong. A similar requirement is necessary here to prevent abuse of this extraordinary application of the discovery process and to ensure that plaintiff has standing to pursue an action against defendant. Thus, plaintiff must make some showing that an act giving rise to civil liability actually occurred and that the discovery is aimed at revealing specific identifying features of the person or entity who committed that act. 185 F.R.D. at 578-80 (citations omitted, emphasis added).

In *Dendrite International, Inc. v Doe, No. 3*, 775 A.2d 756, 342 N.J.Super. 134 (N.J.2001), the Court quashed a subpoena by which a public company had sought the identity of a person who had allegedly defamed it on an Internet bulletin board:

We offer the following guidelines to trial courts when faced with an application by a plaintiff for expedited discovery seeking an order compelling an ISP to honor a subpoena and disclose the identity of

anonymous Internet posters who are sued for allegedly violating the rights of individuals, corporations or businesses. The trial court must consider and decide those applications by striking a balance between the well-established First Amendment right to speak anonymously, and the right of the plaintiff to protect its proprietary interests and reputation through the assertion of recognizable claims based on the actionable conduct of the anonymous, fictitiously-named defendants.

We hold that when such an application is made, the trial court should first require the plaintiff to undertake efforts to notify the anonymous posters that they are the subject of a subpoena or application for an order of disclosure, and withhold action to afford the fictitiously-named defendants a reasonable opportunity to file and serve opposition to the application. These notification efforts should include posting a message of notification of the identity discovery request to the anonymous user on the ISP's pertinent message board...

The complaint and all information provided to the court should be carefully reviewed to determine whether plaintiff has set forth a prima facie cause of action against the fictitiously-named anonymous defendants. *In addition to establishing that its action can withstand a motion to dismiss for failure to state a claim upon which relief can be granted...the plaintiff must produce sufficient evidence supporting each element of its cause of action, on a prima facie basis, prior to a court ordering the disclosure of the identity of the unnamed defendant.*

Finally, assuming the court concludes that the plaintiff has presented a prima facie cause of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.

775 A.2d at 760-61 (emphasis added).

Other courts have similarly required notice, judicial scrutiny of the claim and presentation of argument and evidence before an ISP will be compelled to identify an

internet user. See *Melvin v. Doe*, 49 Pa.D.&C.4th 449 (2000), *appeal quashed*, 789 A.2d 696, 2001 Pa.Super. 330 (2001), *appeal reinstated*, 836 A.2d 42 (Pa.2003). In *In Re Subpoena to America Online*, 2000 WL 1210372, at \*6, 52 Va.Cir. 26, 34, *rev'd on other grds. sub. nom. America Online, Inc. v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va.2001), the Court required that it be “satisfied by the pleadings or evidence supplied” that the plaintiff had a legitimate basis to contend that it was the victim of actionable conduct, “and...the subpoenaed identity information [must be] centrally needed to advance that claim.” See also *Lost Sheep Inc. v. Abrams*, 930 F.2d 178, 184 (2d Cir.1991), *cert.den.* 502 U.S. 866; *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 by First Amendment as opinion).

In another RIAA case, the Court said:

Plaintiffs contend that unless the Court allows ex parte immediate discovery, they will be irreparably harmed. While the Court does not dispute that infringement of a copyright results in harm, it requires a Coleridgean “suspension of disbelief” to accept that the harm is irreparable, especially when monetary damages can cure any alleged violation. On the other hand, the harm related to disclosure of confidential information in a student or faculty member’s Internet files can be equally harmful....Moreover, ex parte proceedings should be the exception, not the rule.”

*Capitol v. Does 1-16*, 2007 WL 1893603 (D.N.Mex. May 24, 2007).

The fallacy in appellees' argument is their claim that *all* downloading of song files over the internet is copyright infringement *per se*. But some music files may not be copyrighted. Or some downloading may be permissible as fair use, or may be done in connection with creation of derivative works. Or, as has happened many times, they may have simply identified the wrong person. There is ample evidence that their method of identifying putative defendants is deeply flawed. Any innocent defendant whose identity has been disclosed without sufficient cause is a defendant whose constitutional rights have been violated, and subpoenas seeking disclosure under such circumstances as exist here should not be enforced.

In effect, appellees' argument just serves to advance the *in terrorem* effect of these cases. The strict tort liability 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 music from it is legal, would not be defenses to a proper infringement claim. The 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 (and some courts) 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 innocent, without a trial.

### **3. Pleading Standards Have Recently Been Significantly Raised.**

The central issue in overcoming the First Amendment privilege is the strength and facial validity of a plaintiff's claim. The standards for evaluating that claim have been raised significantly very recently, and the Court is obliged to evaluate the complaint in this case in the light of those heightened standards. On May 19, 2009, the Supreme Court issued its decision in *Ashcroft v. Iqbal*, 556 U.S. \_\_\_, No. 07-1015, 2009 U.S. LEXIS 3472 (2009). In the decision, the Court had occasion to revisit its holding in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), regarding the sufficiency of factual allegations in a complaint.

As a result of *Ashcroft*, plaintiffs now face even more of a challenge in making factual assertions in their complaints which are sufficient to survive a Rule 12(b)(6) motion. Bare conclusions of law are no longer entitled to be assumed true on a motion to dismiss. In *Ashcroft*, the Court said:

Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of

the elements of a cause of action, supported by mere conclusory statements, do not suffice...[and] we are not bound to accept as true a legal conclusion couched as a factual allegation... Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense....But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not “show[n]”—“that the pleader is entitled to relief.” Fed. Rule Civ. Proc. 8(a)(2).

In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. *While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations.* When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. Slip op. at 14-15 (citations and quotation marks omitted; emphasis added).

Because of this heightened pleading standard, even before *Ashcroft* the complaint here could not survive a motion to dismiss. It certainly cannot survive now. It therefore cannot suffice to overcome Doe 3’s privilege.

#### **4. The Appellees’ Complaint Does Not State a Claim Sufficient to Overcome the Privilege.**

In order to overcome the privilege asserted here, the appellee record companies must state, on personal knowledge, a specific claim for copyright infringement

against each and every Doe defendant. *In re Verizon Internet Services, supra*. They have not done so. Nor have they alleged any actions taken to identify any of the Does before serving the subpoena, as required by *Columbia Insurance Co. v. Seescandy.com, supra*. Rather, all that they have done is serve a boilerplate complaint, which has been uniformly used in nearly all of these cases, devoid of specific and particularized factual allegations against any of the Does.

In this case, for example, it would not have been overly burdensome for the appellees to present specific evidence, including a declaration on personal knowledge from the person who examined the files available for download from each defendant's computer, listened to the files, verified that they were copyrighted songs, determined that the copyrights were registered (and to which plaintiffs), and determined what songs a particular defendant downloaded.

But here, the sole evidence in support of the subpoena is Mr. Linares's declaration (A-53-62), used generically in these cases. It is long on social policy and the supposedly severe economic impact of file-sharing on the record industry, but fatally short on averments *on personal knowledge* about the supposed infringements by Doe 3. To state a facially valid infringement claim, a plaintiff must make allegations with clarity, specificity and on personal knowledge in order to satisfy the

heightened pleading standards imposed by *Bell Atlantic* and *Ashcroft, supra*. This one does not.

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 in a defamation case 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). See generally *Doe v. Individuals*, 561 F.Supp.2d 249, 255 (D.Conn.2008), which analyzes the standards in different contexts. Those standards in a copyright infringement claim should now be re-examined in light of *Ashcroft*.

Given the power of copyright proprietors like the members of 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. And that privilege is real and must not be minimized:

There are some creative aspects of downloading music or making it available to others to copy: the value judgment of what is worthy of being copied; the association of one recording with another by placing



them together in the same library; the self-expressive act of identification with a particular recording; the affirmation of joining others listening to the same recording or expressing the same idea. Thus, while the aspect of a file-sharer's act that is infringing is not entitled to First Amendment protection, other aspects of it are. *London-Sire Records, Inc. v. Doe 1*, 542 F.Supp.2d 153, 163 (D.Mass. 2008)(citations omitted).

Here, by contrast, appellees simply assert in standard, conclusory language, used in almost every case, that, on information and belief, they have a claim for copyright infringement, that they have identified the right defendant, and that their technology in identifying those defendants is infallible. Essentially they ask the courts to simply trust them. This however will not do; there is every reason *not* to trust them.

As stated in *Columbia Insurance Co., supra*, “plaintiff should establish to the Court’s satisfaction that plaintiff’s suit against defendant could withstand a motion to dismiss. *A conclusory pleading will never be sufficient to satisfy this element.*” (emphasis added). There are many precedents dismissing conclusory complaints for copyright infringement. *See, e.g., Mintel Learning Tech., Inc. v. Beijing Kaidi Educ. & Tech. Dev. Co.*, 2007 WL 2288329 at \*9 (N.D. Cal. Aug. 9, 2007)(dismissing reproduction infringement claim “because it does not specifically allege any conduct of ‘copying’”); *Sun Micro Medical Tech. Corp. v. Passport Health Communications, Inc.*, 2006 WL 500702 at \*12 (S.D.N.Y. Dec. 4, 2006)(dismissing complaint; “general

allegations as to acts of infringement are insufficient at the pleading stage...a plaintiff must allege by what acts during what time the defendant infringed the copyright” (citations and quotation marks omitted); *Marshall v. McConnell*, 2006 WL 740081 (N.D. Tex. Mar. 23, 2006); *Stampone v. Stahl*, 2005 WL 1694073 at \*2 (D.N.J. July 19, 2005)(pleading standards “require the complaint to set out particular infringing acts with some specificity,” and “plaintiff’s Complaint, which fails to allege with any specificity acts of copyright infringement, fails to state a copyright claim”); *U2 Home Entertainment, Inc. v. Kylin TV, Inc.*, 2007 WL 2028108 at \*5 (E.D.N.Y. July 11, 2007)(complaint not sufficient without “a description of the specific acts, including time frame, allegedly committed by the defendant that infringed on the copyright.”).

The central allegations in the complaint in this case are 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....Plaintiffs are informed and believe that each Defendant has, without the permission or consent of Plaintiffs, continuously downloaded and/or distributed to the public additional sound recordings owned by or exclusively licensed to Plaintiffs or Plaintiffs’ affiliate record labels, and Plaintiffs believe that such acts of infringement are ongoing.

(A-10-11).

These vague allegations, devoid of both direct knowledge and specific facts, do not satisfy the heightened pleading requirements imposed by *Ashcroft* and *Bell Atlantic, supra*, nor this Court's holding in *ATSI Communs., Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87 (2d Cir.2007)(*Bell Atlantic* applies generally to pleadings, not just in the antitrust context of that case).

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” of the elements of copyright infringement, devoid of any specific facts. *Bell Atlantic, supra*, 550 U.S. at 555. It is therefore not entitled to the usual presumption of truth on a Rule 12(b)(6) motion: “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice...[and] we are not bound to accept as true a legal conclusion couched as a factual allegation.” *Ashcroft, supra*, slip op. at 14.

*See Interscope Records v. Rodriguez*, 2007 U.S. Dist. LEXIS 60903 at \*3-4 (S.D.Cal. Aug. 17, 2007):

[O]ther than the bare conclusory statement that on “information and belief” Defendant has downloaded, distributed and/or made available for distribution to the public copyrighted works, Plaintiffs have presented no facts that would indicate that this allegation is anything more than speculation. The complaint is simply a boilerplate listing of the

elements of copyright infringement without any facts pertaining specifically to the instant Defendant. The Court therefore finds that the complaint fails to sufficiently state a claim upon which relief can be granted and entry of default judgment is not warranted.

It is not sufficient that the claim is merely plausible. As the Supreme Court said in *Ashcroft, supra*, “To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical...It is the conclusory nature of respondent’s allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.” Slip op. at 17.

Accordingly, the complaint fails to state a claim, and without a valid claim, Doe 3’s First Amendment privilege prevails and the subpoena should be quashed.

**5. “Making Available” Song Files is Not Infringement in the Absence of Proof of Actual Distribution.**

The complaint is further deficient in that merely “making available” copyrighted material does not violate the distribution right, absent proof of actual distribution of copies. There is ample authority to support this proposition. In the only one of these file-sharing 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 and judgment of \$222,000 against the defendant, and ordered a new trial. In a thorough and scholarly opinion, with the aid of many submissions by *amici curiae*, 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:

[T]he plain meaning of the term ‘distribution’ does not including [sic] making available and, instead, requires actual dissemination... Plaintiffs’ interpretation of the distribution right is simply not reasonable.... Liability for violation of the exclusive distribution right found in § 106(3) requires actual dissemination. Jury Instruction No. 15 was erroneous and that error substantially prejudiced Thomas’s rights. 579 F.Supp.2d at 1218-19, 1226-27.

The District Court then cited as controlling *National Car Rental System, Inc. v. Computer Associates International, Inc.*, 991 F.2d 426 (8th Cir.1993), which held that “[i]nfringement of [the distribution right] requires an actual dissemination of either copies or phonorecords,” 991 F.2d at 434 (citation and quotation marks omitted), and noted that it had been “relied upon by numerous district courts in the peer-to-peer network downloading context.” 579 F.Supp.2d at 1223 (citing cases).

There are other cases which have reached the same conclusion.<sup>17</sup> Thus, since the

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<sup>17</sup> See *London-Sire Records, Inc. v. Doe 1*, 542 F.Supp.2d 153, 169 (D.Mass.2008)(quashing subpoenas; “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 *Bell Atlantic*; “[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  
(continued...)”)

complaint in this action fails to state a claim upon which relief can be granted, Doe 3's First Amendment privilege prevails and the subpoena must be quashed.

## **6. The Decisions Under Review Misstated the Majority View on "Making Available."**

In the two decisions under review, both the Magistrate Judge and the District Judge examined the issue of whether "making available" song files violates the distribution right. The Magistrate Judge said (A-96):

"[w]e acknowledge that there has been considerable debate amongst the district courts as to whether actual distribution must be pled, or, conversely, whether employing the phrase "making available" in its stead does not constitute sufficient pleading. We are persuaded by the majority of cases and the school of thought that Plaintiffs have adequately pled that Defendants distributed Plaintiffs' copyrighted work, by merely stating, within the four corners of the Complaint, the distribution allegation alone."

In upholding this conclusion, the District Judge said that *Bell Atlantic* "merely clarified the proper pleading standard, which requires only factual allegations plausibly suggesting an actionable claim." (A-119), and completely ignored the "making available" issue, thus depriving Doe 3 of the *de novo* analysis required (see Point II, *infra*).

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<sup>17</sup>(...continued)  
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).

Leaving aside the erroneous conclusion that this is the majority view, and ignoring the cogent and thorough analysis of the only District Court actually to try one of these cases (including the fact that the District Judge there *sua sponte*, and courageously, reversed himself, acknowledged his error and vacated a jury verdict, saying “the plain meaning of the term ‘distribution’ does not including making available and, instead, requires actual dissemination” (539 F.Supp.2d at 1219), and of prominent commentators<sup>18</sup>, these conclusions still cannot be sustained.

Whether or not the complaint might have been sufficient before *Ashcroft*, it certainly is no longer. Thus, because the complaint here fails to state a claim upon which relief may be granted under the heightened pleading standards of *Bell Atlantic* and *Ashcroft*, the plaintiffs have not and cannot meet their burden to overcome the First Amendment privilege of Doe 3. The subpoena should be quashed.

#### **7. The RIAA’s Technology is Too Flawed and Unreliable to Justify Enforcement of Subpoenas in These Cases.**

The methods and technology used by the RIAA in these cases are highly questionable. The RIAA refuses to disclose the methods used by MediaSentry, claiming that they are proprietary. But recently, the defendant in the *Thomas* case has retained her own expert witness to challenge the RIAA’s expert, and that witness’s

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<sup>18</sup> See Nimmer on Copyright, § 8.11[A] (2008); 4 William F. Patry, Patry on Copyright, § 13.11.50 (2008).

findings point out serious flaws in the process.<sup>19</sup> But even apart from battles of experts, when a technology is so flawed that it results in suits against homeless and dead people,<sup>20</sup> or people without computers, or even a takedown notice directed to a laser printer<sup>21</sup>, something is seriously and obviously wrong. The RIAA has frequently sued admittedly innocent persons<sup>22</sup> and is quite cavalier about the burden they impose on the legal process and the judiciary, and the effects of such frivolous suits on their victims.<sup>23</sup> Under such circumstances, a blanket rule automatically allowing the

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<sup>19</sup> 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://recordingindustryvspeople.blogspot.com/2009\\_03\\_01\\_archive.html#1082514775121526971](http://recordingindustryvspeople.blogspot.com/2009_03_01_archive.html#1082514775121526971) (accessed March 29, 2009). The case is scheduled to be retried on June 15, 2009.

<sup>20</sup> <http://arstechnica.com/news.ars/post/20080418-riaa-escapes-sanctions-drops-case-against-homeless-man.html> (accessed May 31, 2008).

<sup>21</sup> 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).

<sup>22</sup> *Lava Records, LLC v. Amurao*, 08-2376-cv (2d Cir., filed July 31, 2008) 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 appellant Amurao).

<sup>23</sup> “‘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).



invasion of First Amendment rights in these RIAA cases would be seriously detrimental to the rights of Doe 3 and to the public interest.

#### **8. The Practical Effect of Quashing the Subpoena is Not Before This Court.**

One of the appellees' arguments for upholding the subpoena was that quashing it would effectively prevent them from bringing any actions at all (A-98). The Magistrate Judge agreed, saying, "[p]laintiffs would be forever stymied in their efforts to protect their property rights and to bring an action against these alleged wrongdoers...ascertaining the identities of the Doe Defendants is pivotal and indispensable in their efforts."

Apart from begging the question by assuming that the complained-of action is infringement, and even assuming that plaintiffs would be "forever stymied," this judicial solicitude is unwarranted. The record companies' technological difficulties are not a relevant consideration here, and their many egregious past failures in identifying proper defendants should lead to judicial skepticism, not sympathy.

The tensions and conflicts between the copyright monopoly and the inevitable and socially beneficial advancement of technology, including the internet, raise difficult problems of law and public policy. But they have raised those problems for a century. The invention of player piano rolls, the broadcasting of music over the radio, the copying of television programs on VCRs, have all presented technological

problems for the content industries, and they all resulted in litigation, but were ultimately either resolved by Congress or by establishing licensing schemes.<sup>24</sup> That has certainly been responsible for the success of iTunes, for example, whereby songs are licensed, usually for 99 cents per download, *see* <http://en.wikipedia.org/wiki/iTunes> (accessed May 23, 2009), thereby enabling people to have the music they want and providing compensation for the music's creators.

The point is that Congress is the proper place for the resolution of these problems, and not *ex parte* proceedings and default judgments in the federal District Courts. *See Sony Corp. of America, Inc., supra*, 464 U.S. at 430-31 (footnotes, citations and quotation marks omitted; emphasis supplied):

From its beginning, the law of copyright has developed in response to significant changes in technology. Indeed, it was the invention of a new form of copying equipment--the printing press--that gave rise to the original need for copyright protection. Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary...*The remedies for infringement are only those prescribed by Congress.* The judiciary's reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurring theme. Sound policy, as well as history, supports our consistent deference to Congress

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<sup>24</sup> *See, e.g., Wite-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908)(player piano rolls are not "copies" and are not infringing; limited by Congress the next year); *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191 (1931)(radio broadcasts of music constitute infringing performances; leading to the creation of ASCAP and BMI); *Sony Corp., supra* at 5 (recording of television programs on video cassette recorders for time-shifting purposes is fair use)

when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology.

Suing thousands of people who don't have lawyers or the ability to defend themselves, extorting settlements from them, and generating publicity and a climate of fear is not the way to resolve these conflicts either. Suing one's customers would not appear to be a sustainable business model. Many scholars have noted the distortion of copyright law, and its detrimental effect on the advancement of new technologies, occasioned by the aggressive pursuit of infringement claims into areas never contemplated by Congress. *See generally* Gillespie, *Wired Shut: Copyright and the Shape of Digital Culture* (2007)(arguing that the enforcement of copyright law in the digital age has shifted from regulating copying to regulating the design of technology); and Patry, *supra* n.2 at 6.

The extent of the problem is overstated in any event. "Plaintiffs are free to employ circumstantial evidence to attempt to prove actual dissemination. Overall, it is apparent that implementation of Congress's intent through a plain meaning interpretation of § 106(3) will not leave copyright holders without recourse when infringement occurs over a peer-to-peer network." *Capitol Records, supra*, 579 F.Supp.2d at 1225.

Thus, if merely “making available” copies in the absence of actual distribution is to be deemed copyright infringement, then Congress, not the federal courts, should say so. Recently, the RIAA has been notably successful in having six of its counsels installed in senior positions in the Obama administration’s Department of Justice, *see* <http://www.p2pnet.net/story/20263>; <http://recordingindustryvspeople.blogspot.com/2009/04/another-riaa-lawyer-goes-to-doj.html> (accessed May 21, 2009). Given that success, the RIAA should have no difficulty in making its concerns known to the administration and Congress, and in seeking legislative solutions to these issues. There is no good reason to accept the RIAA’s arguments at face value, especially not here. The content industry has been known for hyperbole before<sup>25</sup>, and there is even more reason for skepticism now.

Accordingly, the motion to quash should have been granted, and the District Court’s ruling should be reversed.

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<sup>25</sup> “During the late 1970s and early 1980s, [Jack]Valenti [then the head of the Motion Picture Association of America] became notorious for his colorful attacks on the Sony Betamax Video Cassette Recorder (VCR), which the MPAA feared would devastate the movie industry. He famously told a congressional panel in 1982, ‘I say to you that the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone.’ Despite Valenti’s prediction, the home video market ultimately came to be the mainstay of movie studio revenues throughout the 1980s and into the 1990s, until the DVD displaced the VCR in the American living room.” [http://en.wikipedia.org/wiki/Jack\\_Valenti#Valenti\\_on\\_new\\_technologies](http://en.wikipedia.org/wiki/Jack_Valenti#Valenti_on_new_technologies) (accessed May 24, 2009).

## POINT II

### **THE LOWER COURT ERRED BY NOT REFERRING THE MOTION TO QUASH TO THE MAGISTRATE JUDGE, AND BY NOT REVIEWING THE DECISION DE NOVO.**

The procedure chosen by the District Court was erroneous and violated Doe 3's right to an Article III judge. First, although the motion to quash was made returnable before the District Judge (A-2, No. 12), the Magistrate Judge apparently unilaterally assigned the motion to himself, entering a text order which read, "The Amended Motion to Quash Subpoena (dkt #24) returnable before Judge Suddaby on 10/29/08 at 10:00 a.m. will be handled by Magistrate Judge Randolph Treece...this motion is ON SUBMIT, no appearances are required; Signed by Magistrate Judge Randolph Treece on 10/07/2008." (A-3; capital letters in original)<sup>26</sup>. None of the parties consented to this assignment.

Pursuant to the pertinent part of 28 U.S.C. § 636(b)(1)(A), "a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion...to dismiss for failure to state a claim upon which relief can be granted...A judge of the court may reconsider any pretrial matter under this

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<sup>26</sup> When filed, the case was initially assigned to Senior District Judge Neal P. McCurn but was then reassigned to District Judge Glenn T. Suddaby on Sept. 17, 2008 (A-2; No. 19). There is, however, no order in the docket reflecting a referral by either District Judge to the Magistrate Judge.

subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.”

F.R.Civ.P. 72 implements the statute and requires that the matter actually be referred by the District Judge, whether the matter be characterized as nondispositive or dispositive. Rule 72(a) says that “[a] magistrate judge to whom a pretrial matter not dispositive of a claim ...*is referred* to hear and determine shall promptly conduct such proceedings as are required....” Rule 72(b) says that “A magistrate judge *assigned without consent of the parties* to hear a pretrial matter dispositive of a claim...shall promptly conduct such proceedings as are required...” (emphasis added).

Thus, without an order by a District Judge referring the matter, the Magistrate Judge lacks jurisdiction. *See Parks v. Collins*, 761 F.2d 1101, 1106 (5<sup>th</sup> Cir.1985) (“fatal to the magistrate’s exercise of authority is the lack of any order of reference from the district judge.”).

Second, even if the Magistrate Judge had jurisdiction to decide the motion, Doe 3 was entitled to a *de novo* review of the decision by the District Judge. The motion, while styled as one to quash a subpoena, actually was, because of the privilege issue, a direct challenge to the legal sufficiency of the complaint, in the nature of a motion to dismiss under F.R.Civ.P. 12(b)(6), and it was considered to be such by all parties,

and the Court as well. As such it was dispositive, and a party is entitled to *de novo* review of such an order:

Plaintiffs characterize Defendants' Motions to Dismiss as "nondispositive" 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).

In *Williams v. Beemiller, Inc.*, 527 F.3d 259 (2d Cir.2008), this Court said that the list of pretrial matters in § 636(b)(1)(A) which cannot be referred to a Magistrate Judge is not exhaustive, and that the issue is "the practical effect" on the litigation. The statute should be construed narrowly to avoid "the possible constitutional implications of delegating Article III judges' duties to magistrate judges." *Id.* at 264.

Because the motion to quash was for practical purposes determinative of the outcome of the litigation, it falls within the exceptions listed in § 636(b)(1), and is essentially dispositive. Thus the Magistrate Judge lacked jurisdiction in the first instance to determine this motion, and Doe 3 was in any event entitled to the District Court's *de novo* review of all of the issues raised by the motion.

The District Court said:

As a result, the proper standard of review of Magistrate Judge Treece's Decision and Order is clear error, not *de novo*. After carefully reviewing

the papers in this action, the Court finds that [sic] no clear error in Judge Treece's thorough Decision and Order. Indeed, the Court finds that his Decision and Order would survive even a *de novo* review. The Court makes this finding for the reasons set forth in Judge Treece's Decision and Order.

This was error. Doe 3 was entitled to *de novo* review of the arguments made in the motion to quash, notwithstanding the District Judge's dictum that the Magistrate Judge was correct even under that higher standard. As for the motion being essentially dispositive, the District Judge rejected this argument, saying, "a movant may not convert a motion to quash into a dispositive matter simply by arguing that one of the reasons that the motion to quash should be granted is that the plaintiff's complaint fails to state a claim." (A-118). As authority for this proposition, the District Judge cited several District Court cases (A-119), but did not cite or follow *Williams v. Beemiller, Inc., supra* from this Court, which would appear to be controlling, and to the contrary.

It was not Doe 3's argument that the complaint failed to state a claim which rendered the motion dispositive, but the fact that in deciding the motion to quash, the Magistrate Judge necessarily had to decide whether the complaint stated a claim or not. Once that became the central issue, the Magistrate Judge had no authority to decide it and, upon timely challenge, the District Judge was obliged to review the matter *de novo*



The District Judge also said that the practical effect of granting the motion would not necessarily terminate the action, presumably suggesting that the quashing of the subpoena would not bar plaintiffs from amending their complaint, either with leave granted in the dismissal, or by bringing another action. But plaintiffs did not request leave to amend their complaint if it were found insufficient, and it would be idle for the District Court to grant leave anyway, given the nature of these cases, and the impossibility of pleading a proper infringement claim. Moreover, the District Court affirmed the decision with scant discussion of the issues, acting only three days after Doe 3 appealed from the Magistrate Judge’s Decision, without waiting for any papers from appellees, thereby evincing an unseemly haste to confirm the ruling and have the subpoena enforced.

The District Judge then said that Doe 3 had no right to bring what was in effect a Rule 12(b)(6) motion, because Doe 3 had not yet been served, and “[u]nserved defendants...may not properly move for dismissal for failure to state a claim.” (A-118-19). In support of this proposition the Court cited one Circuit Court case and two District Court cases, none of which so holds.<sup>27</sup> The Magistrate Judge, citing no

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<sup>27</sup> *Sampson v. Village Discount Outlet, Inc.*, 1994 WL 709278 (7<sup>th</sup> Cir.1994) holds only that the existence of unserved defendants does not bar finality for appeal purposes as to the served ones. In *Chandler v. McKee Foods Corp.*, 2009 WL 210858 (W.D.Va.2009), the defendant had initially moved to dismiss for lack of  
(continued...)

authority, said, “[t]he 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.” (A-92).

In addition to being unsupported by any authority, this proposition makes no sense. There is no rule which bars a defendant from voluntarily appearing once he learns that an action has been commenced against him, but before being served with process, and challenging the sufficiency of the complaint. Defendants are not required to wait for the process server to show up before they can protect their rights. The action has been commenced against Doe 3 solely because it was filed, F.R.Civ.P. 3, and that suffices. In effect, Doe 3 has appeared for a limited purpose, but reserving all other rights if the subpoena is ultimately enforced and the complaint served on a person no longer anonymous.

By the District Court’s logic, there would be no conceivable way for Doe 3 to protect his/her anonymity, since the only way for Doe 3 to be actually served would be for SUNY to comply with the subpoena and disclose Doe 3’s name and address,

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<sup>27</sup>(...continued)

proper service because it had been served with a summons but not a complaint. Only after being served with the complaint did the defendant move under Rule 12(b)(6). *Flex Homes, Inc. v. Ritz-Craft Corp. of Mich.*, 2008 WL 746669 (N.D. Oh. 2008) says only that an unserved defendant cannot join in a removal petition. None preclude a defendant from voluntarily appearing to move to dismiss a filed but unserved complaint.

thus rendering the issue of anonymity moot forever. Thus Doe 3 has an absolute right to bring a motion to quash, and to raise the legal sufficiency of the underlying complaint despite not having been served.

In any event, the illogic of the argument is proven by the fact that, despite saying that Doe 3 had no right to challenge the complaint, both the Magistrate Judge and the District Judge went on to evaluate it, instead of refusing to do so at all, as would follow if Doe 3 had no right to challenge it.

Accordingly, the District Court erred in refusing to evaluate the motion to quash *de novo* upon Doe 3's timely appeal from the Decision and Order of the Magistrate Judge.

### **POINT III**

#### **DOE 3 SHOULD BE AWARDED A REASONABLE ATTORNEY'S FEE.**

If Doe 3 prevails on this appeal and quashes the subpoena, the Court should award a reasonable attorney's fee, and remand to the District Court for a determination of the amount. Whether Doe 3 be characterized as a prevailing defendant in a copyright action, or as a party who successfully asserted a privilege to quash a subpoena, a fee would be appropriate. In *Mattel Inc. v. Walking Mountain Productions*, 353 F.3d 792, 813 (9<sup>th</sup> Cir.2003), the Court awarded a fee to a nonparty who quashed a subpoena in a copyright and trademark infringement case. In *Theofel*

*v. Farey-Jones*, 359 F.3d 1066 (9<sup>th</sup> Cir.2003), the Court awarded a \$9000 fee for an abusive subpoena:

The subpoena power is a substantial delegation of authority to private parties, and those who invoke it have a grave responsibility to ensure it is not abused. Informing the person served of his right to object is a good start, *see* Fed. R. Civ. P. 45(a)(1)(D), but it is no substitute for the exercise of independent judgment about the subpoena's reasonableness. Fighting a subpoena in court is not cheap, and many may be cowed into compliance with even overbroad subpoenas, especially if they are not represented by counsel or have no personal interest at stake. 359 F.3d at 1074-75.

If this appeal is granted and the subpoena quashed, Doe 3 will in a very real sense become the prevailing party as well, because appellees have claimed that they will be unable to proceed further with the case. As they have done hundreds, if not thousands of times in these RIAA cases, the plaintiffs frequently simply drop them when challenged, and will probably do so here. So whether based upon 17 U.S.C. § 505, authorizing fee awards to prevailing parties in copyright cases generally, or pursuant to Rules 45(c)(1) or 45(c)(3)(A)(iii), Doe 3 should be awarded a reasonable fee.

Given the gross imbalance in the economic status of the parties, the vague and conclusory boilerplate pleading, the court decisions squarely against the "making available" theory, the complete lack of specific allegations or evidence to support the claims here, the illegality of plaintiffs' investigation, and the procedural impropriety

of joining sixteen unrelated defendants in one action, a fee award would serve an important and salutary purpose.

### **CONCLUSION**

Based upon the foregoing, this Court should reverse the district court's denial of the motion to quash the subpoena, and should award Doe 3 a reasonable attorney's fee, with such other relief as may be just.

Dated: New York, New York  
May 26, 2009

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