

09-0905-cv

United States Court Of Appeals For The Second Circuit

ARISTA RECORDS LLC, ATLANTIC RECORDING CORPORATION, BMG MUSIC,
CAPITOL RECORDS, LLC, ELEKTRA ENTERTAINMENT GROUP INC., INTERSCOPE
RECORDS, MAVERICK RECORDING COMPANY, MOTOWN RECORD COMPANY, L.P.,
SONY BMG MUSIC ENTERTAINMENT, UMG RECORDINGS, INC., VIRGIN RECORDS
AMERICA, INC., WARNER BROS. RECORDS INC.,
and, ZOMBA RECORDING LLC

Plaintiffs – Appellees,

-against-

DOE 3,

Defendant – Appellant.

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

BRIEF OF PLAINTIFFS - APPELLEES

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CORPORATE DISCLOSURE STATEMENT

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

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

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

Plaintiff-Appellee BMG MUSIC is a general partnership owned by Sony Music Entertainment and Ariola Eurodisc LLC, neither of which is publicly traded.

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

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

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

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

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

Plaintiff-Appellee SONY BMG MUSIC ENTERTAINMENT is now called Sony Music Entertainment. Sony Music Entertainment is a Delaware general partnership owned by Sony Music Holdings Inc. and USCO Sub LLC, neither of which is publicly traded. Its ultimate parent is Sony Corporation which is publicly traded in the United States.

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

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

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

Plaintiff-Appellee ZOMBA RECORDING LLC is a limited liability company, owned by Sony Music Entertainment, a Delaware general partnership, which is not publicly traded. Its ultimate parent is Sony Corporation, which is publicly traded in the United States.

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STATEMENT OF ISSUES

1. Whether the District Court exercised proper discretion in denying a motion to quash a subpoena seeking only identifying information of a doe defendant, where Plaintiffs established a *prima facie* case of copyright infringement, showed that they had no alternative means to discover the doe defendant's identity and that the doe defendant had no expectation of privacy, and where the doe defendant had, at most, a minimal First Amendment privilege to remain anonymous.

2. Whether a Magistrate Judge properly ruled on a nondispositive discovery motion pursuant to Federal Rule of Civil Procedure 72 and Northern District of New York Local Rules, and whether the District Court thereafter applied the appropriate standard of review in ruling on an appeal of the Magistrate Judge's Order, where the District Court applied a "clearly erroneous" standard and also reviewed the motion *de novo*.

STATEMENT OF THE CASE

This appeal concerns only one narrow issue – whether a party can obtain identifying information about the user responsible for an Internet account from which copyright infringement activity occurred on a specific date and time. Doe 3 goes to great lengths in his opening brief ("Appellant's Brief") to discuss matters that are entirely irrelevant to this appeal. Contrary to Doe 3's unsupported and overreaching accusations, this appeal is not a review of "the entire legal basis of [Plaintiffs'] litigation strategy." (Appellant's Brief at 13.) Plaintiffs, in this case and others like it,

are simply attempting to protect their rights with respect to their copyrighted sound recordings, and numerous courts have validated Plaintiffs' right to do so. Indeed, hundreds of similar requests to identify infringers of Plaintiffs' copyrighted works have been granted. While obvious that Doe 3 would like to litigate the validity of Plaintiffs' approach in this and similar cases, that desire is insufficient to transform this appeal, which concerns nothing more than a motion to quash, into an all-encompassing evaluation of copyright infringement litigation concerning the Internet, the conduct of the Recording Industry Association of America (not even a party to this action), or the reaction of the Internet blogosphere to the lawsuits.

This case arose out of the substantial copyright infringement of Plaintiffs' copyrighted sound recordings by Doe 3 and each of the other Defendants originally named in this action. Prior to filing this lawsuit, Plaintiffs gathered considerable evidence of Defendants' illegal conduct. Specifically, Plaintiffs gathered evidence that Defendants had infringed Plaintiffs' copyrighted sound recordings by uploading and downloading Plaintiffs' copyrighted works in their entirety. Defendants did so without any comment, criticism, or other speech – they simply infringed Plaintiffs' copyrighted sound recordings, in their entirety.

Plaintiffs could not ascertain Defendants' names, addresses, or any other contact information, but they could identify the Internet Protocol ("IP") addresses from which Defendants were unlawfully distributing Plaintiffs' copyrighted works. (A-60, ¶18.) Using the IP addresses, Plaintiffs determined that Defendants were using

the Internet service of State University of New York at Albany (“SUNY”) to distribute copyrighted works unlawfully. (A-60, ¶18.) SUNY maintains logs that match IP addresses with their users’ computer hardware. (A-57, ¶12.) Thus, SUNY can match the IP addresses, dates, and times with the computers that were using the IP addresses when Plaintiffs observed the infringement by looking at its IP address logs. (A-57-58, ¶12.) SUNY can then match the computers with individuals who were responsible for them. (A-57-58, ¶12.) As such, SUNY - and only SUNY - can identify Doe 3 in this case. (A-57-58, ¶12.)

Plaintiffs first attempted to resolve this matter with Doe 3 and the other Doe Defendants on an anonymous basis. When those efforts were unsuccessful, Plaintiffs filed their Complaint for copyright infringement against Doe 3 and other Doe Defendants on July 17, 2008, and the case was assigned to Senior District Court Judge Neal P. McCurn and Magistrate Judge Randolph F. Treece. (A-6-49; A-1, Doc. No. 3.) Because Plaintiffs cannot pursue their claim against Doe 3 or the other Does without knowing their identities, Plaintiffs contacted SUNY before filing the Complaint regarding the identifications they would be seeking. Then, along with their Complaint, Plaintiffs filed a motion for leave to take expedited discovery, requesting that the District Court permit Plaintiffs to serve SUNY with limited discovery in order to determine the identities of Defendants. (A-50-72.) Shortly thereafter, on July 22, 2008, Magistrate Judge Treece granted Plaintiffs’ motion, ordering that Plaintiffs could immediately serve a Rule 45 subpoena on SUNY for the purpose of

identifying each of the Doe Defendants and setting deadlines for SUNY to notify the Doe Defendants and for the Doe Defendants to file motions to quash the subpoena.

(A-73-75.)

Next, on September 15, 2008, after requesting two extensions, Doe Defendants 7, 11, and 15 filed a motion to quash Plaintiffs' subpoena to SUNY, noticing the motion for October 28, 2008. (A-2. Doc. No 12.) On September 17, 2008, the District Court case was reassigned from Senior District Court Judge Neal P. McCurn to District Court Judge Glenn T. Suddaby, but the assignment to Magistrate Judge Treece remained unchanged. (A-2, Doc. No 19.) On October 6, 2008, the motion to quash was amended to add Doe 3, the Appellant here. (A-76.) On October 7, 2008, Magistrate Judge Treece issued a Text Order, confirming that the motion would be ruled on without appearances by the Magistrate Judge – since it was a nondispositive discovery motion – with a new return date of October 30, 2008. (A-3.)

Plaintiffs filed their opposition to the motion to quash on October 14, 2008. (A-3, Doc. No. 27.) Thereafter, Does 3, 7, 11, and 15 requested Magistrate Judge Treece's permission to file a reply memorandum, which the Court granted; Does 3, 7, 11, and 15 filed their reply on October 22, 2008. (A-3, Doc. No. 29, 32.) On October 23, 2008, Plaintiffs requested permission to file a sur-reply, which the Court granted, and Plaintiffs filed their sur-reply on October 29, 2008. (A-3-4, Doc. No. 33, 37.)

Magistrate Judge Treece issued a detailed Memorandum Decision and Order on February 18, 2009, denying the Doe Defendants' motion to quash in all respects. (A-87-104.) In so holding, the District Court expressly found that Plaintiffs had jurisdiction over the Doe Defendants, that joinder was proper, that Plaintiffs' investigation was proper and not illegal, that the Doe Defendants were not entitled to First Amendment protection to such a degree to warrant preventing disclosure of their identities, and that Plaintiffs' Complaint is sufficient to withstand a motion to dismiss. (A-92-103.) The District Court also found that, to the extent the Doe Defendants' motion was meant to be a motion to dismiss the Complaint, such a motion was premature, since only served parties, and not unnamed and unserved Does, may seek to dismiss a complaint, but that such a motion would fail in any event, since Plaintiffs had established a *prima facie* claim. (A-91-92.)

On March 2, 2009, the Doe Defendants filed an appeal of the Magistrate Judge's decision pursuant to Federal Rule of Civil Procedure 72. (A-105-106.) Counsel also requested to withdraw as counsel for Does 7, 11, and 15. (A-105-106.) District Court Judge Suddaby promptly affirmed the decision of Magistrate Judge Treece on March 5, 2009, in a thorough opinion, finding that Magistrate Judge Treece had not been in clear error in denying the motion to quash, and that in fact, the motion failed under a *de novo* review as well. (A-117-121.) District Judge Suddaby also confirmed that the Doe Defendants could not properly move to dismiss the Complaint before they were named and served parties to the action. (A-118-119.)

Last, the District Court granted counsel's request to withdraw as counsel for Does 7, 11, and 15. (A-120.)

Counsel for Doe 3 filed a notice of appeal on March 7, 2009, followed by a motion in this Court for stay of enforcement of the subpoena, pending the appeal. (A-122.) On March 10, 2009, this Court granted an interim stay until a decision was made on the motion. Plaintiffs filed their opposition to the motion for stay on March 24, 2009, and Doe 3 filed a reply memorandum on March 30, 2009. This Court granted Doe 3's motion for stay on April 22, 2009.

STATEMENT OF FACTS

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

Plaintiffs are recording companies who own or control exclusive copyrights in sound recordings. (A-10, ¶ 20.) Collectively, Plaintiffs face a massive problem of digital piracy over the Internet. Every month, copyright infringers unlawfully disseminate billions of perfect digital copies of Plaintiffs' copyrighted sound recordings over peer-to-peer ("P2P") networks. (*See, e.g., Lev Grossman, It's All Free, Time, May 5, 2003*) (attached as Exhibit A). Indeed, the Supreme Court has characterized the magnitude of online piracy as "infringement on a gigantic scale." *See Metro-Goldwyn-Mayer Studios, Inc., v. Grokster Ltd.*, 545 U.S. 913, 940 (2005).

As a direct result of piracy over P2P networks, Plaintiffs have sustained devastating financial losses. The Department of Justice concluded that online media

distribution systems are “one of the greatest emerging threats to intellectual property ownership,” estimated that “millions of users access P2P networks,” and determined that “the vast majority” of those users “illegally distribute copyrighted materials through the networks.” Report of the Department of Justice’s Task Force on Intellectual Property at 39 (Oct. 2004) (“Task Force Report”) (attached as Exhibit B).¹ As the Seventh Circuit held, “[m]usic downloaded for free from the Internet is a close substitute for purchased music; many people are bound to keep the downloaded files without buying the originals.” *BMG Music v. Gonzalez*, 430 F.3d 888, 890 (7th Cir. 2005). In addition, downloads from P2P networks compete with licensed broadcasts and undermine the income available to authors. *Id.* at 891. Plaintiffs’ losses from online music piracy have resulted in layoffs of thousands of employees in the music industry. Unfortunately, infringing users of P2P systems are often “disdainful of copyright and in any event discount the likelihood of being sued or prosecuted for copyright infringement,” rendering the problem of online infringement even more difficult for copyright owners to combat. *In re Aimster Copyright Litigation*, 334 F.3d 643, 645 (7th Cir. 2003).

P2P users who disseminate (upload) and copy (download) copyrighted material violate the Copyright Act. *See Grokster*, 545 U.S. at 918-924 (noting that users of P2P networks share copyrighted music and video files on an enormous scale, and, as such,

¹ Full report available at <http://www.cybercrime.gov/IPTaskForceReport.pdf>

even the providers of those networks “concede infringement” by the individual users); *Gonzalez*, 430 F.3d at 889 (“[P]eople who post or download music files are primary infringers.”); *Aimster*, 334 F.3d at 645 (observing that those who “swap” music files over the Internet “are the direct infringers”). “A copy downloaded, played, and retained on one’s hard drive for future use is a direct substitute for a purchased copy” *Gonzalez*, 430 F.3d at 890.

Copyright infringement over P2P networks is rampant and widespread largely because users can conceal their identities. *See* Task Force Report at 39-40. Copyright owners are able to detect infringement occurring on P2P networks but can only identify the names and locations of the infringers with the court-ordered assistance of the infringer’s Internet Service Provider (“ISP”). *See id.*

II. Doe 3 Was Identified As An Infringer Of Plaintiffs’ Copyrighted Sound Recordings, And the District Court Found That Plaintiffs Are Entitled To Information Regarding His Identity.

Despite Doe 3’s attempts to divert the Court’s attention with hyperbolic accusations and irrelevant suppositions, the motion at issue is quite narrow and relates only to Plaintiffs’ subpoena to an ISP to identify an infringer of Plaintiffs’ copyrighted sound recordings. Plaintiffs and other record companies have sought leave to serve similar subpoenas regarding thousands of similar infringers of Plaintiffs’ copyrighted sounds recordings, and ultimately *no court* has denied on the merits Plaintiffs’ requests that identifying information be provided by the infringer’s ISP.

On April 12, 2007, a company retained by Plaintiffs, MediaSentry, located a P2P infringer using the Ares file-sharing program. (A-6-13, A-16, A-58.)

MediaSentry detected the infringement by logging onto the P2P network in the same fashion as any Internet user would and by viewing the files that this individual was distributing to other users for free over the Internet, on the P2P network. (A-58, ¶13.) This infringer was openly distributing 236 digital audio files from a shared folder - many of them Plaintiffs' copyrighted sound recordings - to potentially millions of other P2P users. (A-16.) For example, Doe 3 was found distributing Lionel Richie's "Hello," Beastie Boys' "Girls," and Poison's "Every Rose Has Its Thorn," each in their entire original copyrighted form, on the Ares P2P network. (A-16.)

MediaSentry determined that this individual connected to the Internet at IP address 169.226.226.24, which belonged to an Internet account being serviced by SUNY. (A-57-58, ¶¶ 12-13.) As explained above, despite being able to detect the substantial copyright infringement by Doe 3, Plaintiffs can obtain Doe 3's identity only from SUNY because only a user's ISP can match a user's IP address with his or her identity.

Accordingly, Plaintiffs filed their claim for copyright infringement on July 17, 2008. In their Complaint, Plaintiffs describe at great length how Doe 3 infringed their copyrights, including facts demonstrating continuous use of an online media distribution system or P2P network by Doe 3 (in this case, Ares), the date and time at

which Plaintiffs discovered Doe 3's infringing behavior, the IP address assigned to Doe 3 at the time of infringement, and a list of copyrighted sounds recordings that Doe 3 was distributing at the time Plaintiffs caught Doe 3 doing so. (A-6-49.) After contacting SUNY to discuss Plaintiffs' efforts to identify Doe 3, Plaintiffs sought leave to subpoena SUNY to determine this individual's identity. (A-50-72.) Magistrate Judge Treece granted Plaintiffs' request on July 22, 2008, finding "a sufficient showing of entitlement to this expedited discovery has been made." (A-73-74.) Shortly thereafter, Plaintiffs served SUNY with a subpoena seeking the identity of Doe 3 as well as the other Doe Defendants originally named in the lawsuit. (A-81.)

III. The District Court Has Twice Denied Doe 3's Attempts To Conceal His Identity, Rejecting The Claim That A Copyright Infringer Has A Privilege To Remain Anonymous And Recognizing That Plaintiffs Have A Right To Pursue The Infringer Of Their Copyrighted Sound Recordings.

Plaintiffs served their subpoena on SUNY on August 12, 2008, requesting a response on or before September 11, 2008. (A-81.) After seeking two extensions to which Plaintiffs did not object, Does 7, 11, and 15 filed a motion to quash Plaintiffs' subpoena. (A-2, Doc. No. 12.) Doe 3 joined the motion on October 6, 2008. (A-3, Doc. No. 24.) Plaintiffs filed their opposition on October 14, 2008. (A-3, Doc. No. 27.) After full briefing by both parties, Magistrate Judge Treece issued a detailed 18-page opinion denying Defendants' motion to quash and ordering SUNY to respond to Plaintiffs' subpoena within 20 days - i.e., by March 10, 2009. (A-87-104.)

In his order, Magistrate Judge Treece ruled that the Doe Defendants' minimal First Amendment right to remain anonymous must yield to Plaintiffs' right to use limited discovery to protect their copyrights from infringement. (A-98-99.) In this regard, Magistrate Judge Treece specifically found that (i) Plaintiffs' Complaint states a claim for relief that satisfies *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and that Plaintiffs have made a concrete showing of a *prima facie* case of copyright infringement against Defendant (A-94-98); (ii) the limited discovery Plaintiffs seek is "specific and reasonable" (A-98); (iii) Plaintiffs have no other means to obtain the subpoenaed information (A-98); (iv) the information sought concerning Defendants' identities is "central and critical" to Plaintiffs' ability to protect their copyrights (A-98); and (v) the Doe Defendants have "minimal expectation of privacy," especially when allegedly engaged in P2P file sharing that allows any other user on the file sharing network to view the contents of Defendants' shared folders and download any files they wish (A-98). In denying the motion to quash, Magistrate Judge Treece also held that the Doe Defendants could not characterize the motion as a motion to dismiss, since the unserved doe defendants would have no standing to file a motion to dismiss, but that such a motion would fail in any event, since Plaintiffs had made out a *prima facie* case of copyright infringement. (A-91-92.)

The Doe Defendants then appealed the Magistrate Judge's decision to District Court Judge Suddaby, and sought a stay of compliance with the subpoena pending the outcome of that appeal. (A-105; A-116.) After carefully reviewing the record, the

District Court Judge denied the appeal, finding “no clear error.” (A-119.) Judge Suddaby also conducted a *de novo* review, finding that the motion to quash would also be denied were that the appropriate standard. (A-119.)

Counsel for Doe 3 filed a notice of appeal on March 7, 2009, as well as a motion to stay enforcement of the subpoena pending appeal. (A-122.) This Court granted Doe 3’s motion for stay on April 22, 2009.

SUMMARY OF THE ARGUMENT

This Defendant is trying to excuse his infringing conduct by hiding behind the cloak of the First Amendment. Courts have repeatedly held that the First Amendment provides no shield for the kind of activity – copyright infringement – alleged in this case because it is not speech. Even if some limited privilege exists, the District Court properly exercised its discretion in denying Doe 3’s motion to quash the subpoena Plaintiffs served on SUNY.

First, Doe 3 has no First Amendment privilege to infringe Plaintiffs’ copyrighted sound recordings, and therefore he has no basis to prevent SUNY from disclosing his identity to Plaintiffs. Plaintiffs allege that Doe 3 engaged in infringement by uploading and downloading entire copies of Plaintiffs’ copyrighted sound recordings, without any comment or criticism. These acts of infringement do not constitute speech. A limited First Amendment privilege to anonymity has been recognized only in cases involving core First Amendment political and religious speech; a copyright infringer may not remain anonymous based on such a privilege.

Second, the District Court properly exercised its discretion in finding that even if Doe 3 has a limited First Amendment privilege to remain anonymous, the privilege in a case such as this is “quite confined” and “exceedingly small.” In order to overcome the privilege, the District Court found that that it must address a five-factor test, and subsequently weigh the privilege to remain anonymous with a plaintiff’s right to seek redress for the harm suffered. Applying the test established in *Sony Music Entertainment, Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 564-565 (S.D.N.Y. 2004), the District Court ultimately found that the balance of interests clearly favored Plaintiffs and therefore denied the motion to quash. In so holding, the District Court correctly found that Plaintiffs allege a *prima facie* claim of copyright infringement. Specifically, the District Court found that Plaintiffs properly allege that Doe 3 copied and distributed Plaintiffs’ copyrighted sounds recordings and thereby satisfied the pleading standard of *Twombly*, 550 U.S. 544. The District Court also properly rejected Doe 3’s argument that Plaintiffs supposedly have not made out a *prima facie* case of copyright infringement because Doe 3 alleges that “making available” copyrighted works does not violate the copyright distribution right.

Finally, Doe 3’s remaining arguments lack merit, and the District Court properly exercised its discretion. Doe 3 argues that the initial ruling by Magistrate Judge Treece on the motion to quash was improper and that District Judge Suddaby applied the wrong standard of review as to the Magistrate Judge’s Order. However, because the motion at issue is a nondispositive discovery motion, it was properly ruled

upon by Magistrate Judge Treece. Next, District Judge Suddaby correctly applied a “clearly erroneous” standard of review. In so doing, District Judge Suddaby recognized that the motion should not be reviewed *de novo* simply because the sufficiency of the Complaint was arguably at issue as a result of Doe 3 raising the issue of a First Amendment privilege. Regardless, District Judge Suddaby also reviewed the motion *de novo*, properly exercising his discretion in holding that the motion should be denied by that standard as well.

Doe 3’s argument that he is entitled to attorneys’ fees also fails. Given that the District Court has denied Doe 3’s motion to quash, such a request is premature and not properly before this Court.

For the foregoing reasons, explained in detail below, the District Court did not abuse its discretion in denying Doe 3’s motion to quash, and this Court should affirm the District Court’s ruling.

ARGUMENT

I. Standard Of Review

This Court reviews the denial of a motion to quash for abuse of discretion. *In re Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 68 (2d Cir. 2003); *Estate of Ungar v. Palestinian Auth.*, 2009 U.S. App. LEXIS 10181, at *3 (2d Cir. May 12, 2009) (“We review a district court’s quashing of a subpoena for a clear abuse of discretion”). The abuse of discretion standard is one of the most “highly deferential” standards of review. *Alderman v. Pan Am World Airways*, 169 F.3d 99, 102 (2d Cir. 1999); *see also*

Matthew Bender & Co. v. West Publ'g Co., 240 F.3d 116, 121 (2d Cir. 2001) (“Abuse of discretion is one of the most deferential standards of review”). “[B]ecause [the district] court is in the best position to assess the credibility and motives of the moving party,” an order granting or denying relief will not be disturbed on appeal “unless the decision was clearly wrong.” *In re Chalasani*, 92 F.3d 1300, 1307 (2d Cir. 1996); *Davis v. Musler*, 713 F.2d 907, 912 (2d Cir. 1983) (“A reviewing court will defer to the decision below unless it is ‘clearly wrong’”).

There is no merit to Doe 3’s claim that review of the motion to quash at issue warrants *de novo* review rather than abuse of discretion. Doe 3 cites only one case, *Staehr v. Hartford Fin. Servs. Group*, 547 F.3d 406, 424 (2d Cir. 2008), for the proposition that *de novo* review is warranted where the motion to quash a subpoena “raises a question of constitutional privilege and the validity of the underlying complaint.” (Appellant’s Brief at 18.) To the contrary, *Staehr* does not so much as mention any constitutional privilege and instead merely recites that review of a Rule 12(b)(6) motion to dismiss – which is not at issue here - is *de novo*. 547 F.3d at 424. *Staehr* makes no mention of the standard of review for a motion to quash where one party claims that sufficiency of the complaint is at issue. Magistrate Judge Treece and Judge Suddaby explicitly rejected Doe 3’s arguments that an unserved doe defendant may file a Rule 12(b)(6) motion to dismiss or that the motion should be treated as anything other than a standard motion to quash. (A-92, A-118-119.) Doe 3 has also

cited no law, and Plaintiffs know of none, that supports a *de novo* standard of review for a motion to quash involving a “constitutional privilege.”

This Court reviews questions of law *de novo*. *Bah v. Mukasey*, 529 F.3d 99, 110 (2d Cir. 2008).

II. The District Court Did Not Abuse Its Discretion In Denying Doe 3’s Motion To Quash.

The First Amendment provides no protection for alleged copyright infringers. Contrary to Doe 3’s claims, while there may be a limited First Amendment privilege to anonymity on the Internet, there is no First Amendment privilege to infringe copyrights. Indeed, permission to serve similar subpoenas has been requested hundreds of times by Plaintiffs and other record companies, and *no court* has denied such a request on the merits. To the extent a limited privilege exists, it is overcome by a showing of a *prima facie* case of copyright infringement, and Plaintiffs have made such a showing in this case, including providing the District Court with substantial evidence of Doe 3’s infringement. Doe 3’s motion to quash was properly denied.

A. There Is No First Amendment Privilege To Infringe Plaintiffs’ Copyrighted Sound Recordings.

Doe 3’s entire argument on appeal is premised on the idea that an alleged copyright infringer is entitled to the protection of the First Amendment. To the contrary, however, “[t]he ‘Supreme Court . . . has made it unmistakably clear that the First Amendment does not shield copyright infringement.’” *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211, 220 (S.D.N.Y. 2000) (citing *Harper & Row Publishers*,

Inc. v. Nation Enterprises, 471 U.S. 539, 555-560 (1985)); *see also S.A.R.L. Louis Feraud Int'l v. Viewfinder, Inc.*, 489 F.3d 474, 480-83 (2d Cir. 2007) (“absent extraordinary circumstances, ‘the fair use doctrine encompasses all claims of first amendment in the copyright field.’”) (citing *Twin Peaks Prods. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1378 (2d Cir. 1993); *Universal City Studios v. Corley*, 273 F.3d 429, 458 (2d Cir. 2001); *In re Verizon Wireless Internet Services, Inc.*, 257 F. Supp. 2d 244, 260 (D.D.C. 2003), *rev'd on other grounds*, *Recording Indus. Ass'n of America, Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003).

Many courts have held that the act of infringing copyrights by downloading and distributing copyrighted works over a P2P network is not speech warranting First Amendment protection. In *In re Verizon*, the court found that a First Amendment right to anonymity exists only “in cases involving *core* First Amendment expression,” and that “the degree of protection is minimal where alleged copyright infringement is the expression at issue.” 257 F. Supp. 2d at 260 (emphasis added); *see also A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1028 (9th Cir. 2001) (holding that the First Amendment does not protect use of a P2P file sharing network that constitutes copyright infringement); *Arista Records LLC v. Does 1-11*, CIV-07-568-R, slip op. at 2 (W.D. Okla. November 14, 2007) (stating that similarly situated defendants’ First Amendment rights were “not implicated because the information sought by the subpoena [did] not infringe [defendants’] rights to engage in protected speech”), (attached as Exhibit C); *Arista Records LLC v. John Does 1-19*, Civ. Action No. 07-cv-

1649, slip op. at 11 (D.D.C. April 28, 2008) (declining to apply heightened pleading requirements set forth in cases involving actual speech to a copyright infringement case such as here) (attached as Exhibit D).

The very cases Doe 3 cites to support the existence of a First Amendment right in this case involve core First Amendment expression, including political and religious speech, and refute the idea that sharing copyrighted sound recordings can ever be protected by the First Amendment. For example, in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995), the Supreme Court found that a state statute prohibiting distribution of anonymous campaign literature involved “a limitation on political expression,” and that “the category of speech regulated by the Ohio statute occupies the core of the protection afforded by the First Amendment.” See also *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 187 (1999) (striking down state rule requiring badges for circulators of petitions as “‘core political speech’ involving ‘communication concerning political change’”). Similarly, in *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 153, 166-167 (2002), the Supreme Court struck down an ordinance requiring permits for door-to-door canvassing, finding that its application to “religious proselytizing” and “anonymous political speech” might prevent such persons from canvassing.

Federal circuit courts have rejected claims to a First Amendment privilege in numerous other settings where such core First Amendment expression is not at issue. In *California v. FCC*, 75 F.3d 1350, 1362 (9th Cir. 1996), the Ninth Circuit rejected the

claim that disclosure of a subscriber's telephone number could be protected under the First Amendment, recognizing that the cases establishing such a right involve "core political or religious speech." *See also Peterson v. Nat'l Telcoms. & Info. Admin.*, 478 F.3d 626, 632 (4th Cir. 2007) (rejecting appellant's attempts to invoke First Amendment privilege to prevent disclosure of identifying information as an Internet domain name host); *London v. Does 1-4*, 279 Fed. Appx. 513, 515 (9th Cir. 2008) (affirming denial of motion to quash subpoena seeking identifying information related to email accounts used in connection with adultery and holding that "exposure of some identifying information does not implicate the First Amendment" and therefore "a legal privilege was not implicated").

Here, Plaintiffs allege that Doe 3 downloaded and distributed Plaintiffs' copyrighted sound recordings, in their entirety, adding no comment, criticism, or other content. These acts of infringement are not speech, and therefore do not warrant the protection of the First Amendment. Accordingly, the District Court's decision denying the motion to quash should be affirmed.

B. Any Minimal First Amendment Qualified Privilege Is Overcome By A Showing Of A *Prima Facie* Claim For Copyright Infringement.

Based on the alleged conduct at issue in this case, Doe 3 is entitled to no protection from the First Amendment. Still, even if a qualified First Amendment privilege is found to exist here, that privilege is, as the District Court noted, "quite confined" and "exceedingly small." (A-93.) Doe 3's reliance on the First Amendment

fails in any event, since even if his actions somehow warrant the protection of a qualified privilege, that privilege is extremely limited and overcome primarily by a showing of a *prima facie* case of copyright infringement, which undoubtedly exists in this case.

As Magistrate Judge Treece detailed in his Memorandum-Decision and Order, which was adopted in full by District Court Judge Suddaby, the First Amendment privilege Doe 3 seeks will at most entitle him to minimal protection because Doe 3's alleged actions constitute copyright infringement. (A-93); *see also Arista Records LLC v. John Does 1-19*, Civ. Action No. 07-cv-1649, slip op. at 11 (D.D.C. April 28, 2008) (“courts have routinely held that a defendant’s First Amendment privacy interests are small where the ‘speech’ is the alleged infringement of copyrights”); *In re Verizon Wireless Internet Services*, 257 F. Supp. 2d at 260.

Similarly, in *Sony Music*, 326 F. Supp. 2d 556, a case very similar to this one, the court denied defendants’ motion to quash and held that the plaintiff copyright owners were entitled to discovery. *Id.* at 568. In evaluating the level of First Amendment protection, the Court recognized that:

[i]n contrast to many cases involving First Amendment rights on the Internet, a person who engages in P2P file sharing is not engaging in true expression. . . . Such an individual is not seeking to communicate a thought or convey an idea. Instead, the individual’s real purpose is to obtain music for free.

Id. at 564. While such an individual may be entitled to “some level of First Amendment protection . . . this is not ‘political expression’ entitled to the ‘broadest protection’ of the First Amendment.” *Id.* When determining the extent of the defendant file-sharers’ First Amendment protection, the *Sony Music* court balanced the magnitude of harm with the defendants’ interest in free speech and privacy and held that the “defendants’ First Amendment right to remain anonymous must give way to plaintiffs’ right to use the judicial process to pursue what appear to be meritorious copyright infringement claims.” *Id.* at 567.

To balance these interests, the *Sony Music* court devised a five-factor test, which was also adopted by the District Court in this case and by several other courts addressing this issue. Under the *Sony Music* test, courts look at: (1) whether plaintiffs have made a concrete showing of a *prima facie* claim of actionable harm; (2) the specificity of the discovery request; (3) the absence of alternative means to obtain the subpoenaed information; (4) a central need to obtain the subpoenaed information; and (5) the party’s expectation of privacy. *Id.* at 564-565 (A-94); *see also Virgin Records Am., Inc. v. Doe*, 2009 U.S. Dist. LEXIS 21701, at *5-6 (E.D.N.C. March 16, 2009) (applying *Sony Music* to similar motion to quash and holding that factors “weigh heavily in favor of requiring enforcement of the subpoena”); *Elektra Entm’t Group, Inc. v. Does 1-9*, 2004 U.S. Dist. LEXIS 23560, at *10-13 (S.D.N.Y. September 7, 2004) (same); *Fonovisa, Inc. v. Does 1-9*, 2008 U.S. Dist. LEXIS 27170, at *30-31 (W.D.Pa. April 3, 2008) (same).

Doe 3 cites primarily two cases regarding the standard a court should apply where a limited First Amendment privilege exists: *Columbia Insurance Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D. Cal. 1999) and *Dendrite International, Inc. v. Doe No. 3*, 775 A.2d 756, 760 (N.J. App. 2001). Both of those cases involved claims where the protected speech was intended to be anonymous, thus the courts were concerned about permitting a subpoena that might unveil true First Amendment speech. For example, in *Columbia Insurance*, the plaintiff attempted to learn the identity of an anonymous trademark infringer. The court noted that discovery of infringer's identity from the ISP is appropriate when plaintiff could (1) identify the party with sufficient specificity to demonstrate that the defendant is a real person; (2) identify all previous steps to locate the defendant; and, (3) establish that plaintiff's suit could withstand a motion to dismiss. *Columbia Insurance*, 185 F.R.D. at 577. In *Dendrite*, the court addressed free speech concerns in the context of a defamation claim. The court provided a slightly different test: (1) plaintiff's efforts to notify the anonymous person, (2) whether plaintiff had set forth a *prima facie* claim, and (3) assuming a *prima facie* claim was established, the court should conduct a balancing of the privilege against the *prima facie* case. *Dendrite International*, 775 A.2d at 760. These courts applied somewhat more stringent tests to the question of First Amendment anonymity than the test applied by the District Court and the *Sony Music* court in a P2P sharing context where there is no or very limited speech. But even under the heightened

standards of *Columbia Insurance* or *Dendrite*, the subpoena in this case would not have been quashed.

Finally, Doe 3 cites *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 163 (D. Mass. 2008), apparently for the purpose of arguing that this case warrants a heightened standard, but the court in that case found “persuasive the approach of the Southern District of New York in *Sony Music*,” and applied the same five-part test the District Court used in this case.² Plaintiffs’ Complaint easily satisfies each of these standards here.

C. Plaintiffs’ Complaint Establishes A *Prima Facie* Claim For Copyright Infringement.

The first factor the District Court addressed, using the *Sony Music* test, is “whether plaintiffs have made an actionable showing of a *prima facie* claim of actionable harm.” The District Court properly exercised its discretion in finding that Plaintiffs have done so.

1. The Complaint Properly Pleads A Claim For Copyright Infringement.

² Doe 3 also relies upon *Capitol Records, Inc., v. Does 1-16*, 2007 WL 1893603 (D.N.M. May 24, 2007), seemingly for the purpose of showing that an anonymous individual can be harmed by disclosure of his identifying information, and thus the Court should weigh this in its balancing. (Appellant’s Brief at 24.) The *Capitol Records* court, however, simply directed plaintiffs to develop a stipulated discovery plan with the university that would give ISP users an opportunity to object. Subsequently, plaintiffs and the university entered into a stipulated discovery plan that provides for discovery of all of the information plaintiffs sought in the initial subpoena.

As the District Court recognized, to state a claim for copyright infringement, Plaintiffs need only allege: (1) that they own valid copyrights and (2) that Doe 3 violated one or more of the exclusive rights in 17 U.S.C. § 106 by, for example, copying or distributing Plaintiffs' copyrighted works. (A-97.) See *Susan Wakeen Doll Co., Inc. v. Ashton Drake Galleries*, 272 F.3d 441, 450 (7th Cir. 2001); see also *Feist Pub., Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991) ("To establish copyright infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original."); 4 M. Nimmer & D. Nimmer, *Nimmer On Copyright* § 13.01, at 13-5 & n.4 (2002) ("Reduced to most fundamental terms, there are only two elements necessary to the plaintiff's case in an infringement action: ownership of the copyright by the plaintiff and copying [or public distribution] by the defendant").

Plaintiffs are not required to allege each individual act of copyright infringement in their Complaint. See *Carell v. The Shubert Organization, Inc.*, 104 F. Supp. 2d 236, 251 (S.D.N.Y. 2000) ("Plaintiff's Complaint narrows the infringing acts to the publication of the [copyrights at issue], and their illegal use in certain commercial products These allegations are sufficiently specific for the purposes of Rule 8, despite the fact that each individual infringement was not specified"). Nor are copyright plaintiffs required to specify the dates or times on which the infringement occurred, particularly where, as here, the plaintiffs have alleged continuous and ongoing acts of infringement. See *Franklin Elec. Publishers v. Unisonic*

Prods. Corp., 763 F. Supp. 1, 4 (S.D.N.Y. 1991) (holding that the assertion of continuous and ongoing infringement satisfies the pleading requirements applicable to claims for copyright infringement); *Elektra Entertainment Group, Inc. v. Santangelo*, 2005 U.S. Dist. LEXIS 30388, at *8 (S.D.N.Y. Nov. 28, 2005) (same).

Indeed, it makes no sense generally in copyright suits to require a plaintiff to allege with specificity when and how an infringement occurred since such actions are not typically done in plain sight of the copyright holder. On the contrary, “piracy typically takes place behind closed doors and beyond the watchful eyes of a copyright holder.” *Warner Bros. Records, Inc. v. Payne*, 2006 U.S. Dist. LEXIS 65765, at *10 (W.D. Tex. July 17, 2006). Here, the infringement was taking place for as long as the sound recordings were available on Doe 3’s computer - information that is clearly not in Plaintiffs’ control.

Doe 3 also incorrectly argues that in order for Plaintiffs to plead a *prima facie* case, they must make their claim based on personal knowledge. This circuit recently rejected exactly this contention. In *Boykin v. KeyCorp*, 521 F.3d 202, 215 (2d Cir. 2008), this Court vacated the District Court’s conclusion that the plaintiff’s complaint was insufficient under Rule 8(a), finding that “the district court improperly faulted [plaintiff] for pleading facts alleged ‘upon information and belief,’” and finding that even after *Twombly*, discussed in greater detail below, “[s]pecific facts are not necessary.” See also *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1057 (2d Cir. 1993) (even under heightened pleading standard required for fraud, “allegations

may be based on information and belief when facts are peculiarly within the opposing party's knowledge"); O'Connor's Federal Rules, Civil Trials, 2009, at 8 ("F.R.C.P. 11(b) permits pleading based on information and belief. A complaint in this form is appropriate when the matters are peculiarly within the knowledge of the defendant"). The *Boykin* Court also noted that "pleading on information and belief is a desirable and essential expedient when matters that are necessary to complete the statement of a claim are not within the knowledge of the plaintiff." 521 F.3d at 215 (citation omitted).

Here, because copyright infringement takes place behind closed doors and beyond the watchful eye of the copyright holder, additional facts of Doe 3's infringement are peculiarly within the knowledge of Doe 3, and Plaintiffs' allegations are appropriate and sufficient. *See Payne*, 2006 U.S. Dist. LEXIS 65765, at * 10.

Notwithstanding the fact that there is no heightened requirement of specificity or knowledge as Doe 3 suggests, in this case Plaintiffs have included such specific allegations. Plaintiffs have alleged that they own and properly registered valid copyrights or the exclusive rights to the copyrights in the copyrighted sound recordings identified in Exhibit A to the Complaint. (A-10, ¶ 20.) Plaintiffs have further alleged that Defendant "has continuously used" and "continues to use" an online media distribution system "to download," and/or "distribute" the copyrighted sound recordings on the P2P network in violation of Plaintiffs' copyrights and exclusive rights under copyright. (A-10, ¶ 22.) Plaintiffs also have the support of

substantial evidence, including the date and time Plaintiffs caught Doe 3 distributing copyrighted recordings, the IP address assigned to Doe 3 at the time of infringement, and a list of copyrighted recordings that were being distributed at the time Plaintiffs caught Doe 3 doing so. (A-16.)

For the reasons set forth above, these allegations suffice to establish a copyright claim. Plaintiffs have established ownership of valid copyrights in clearly specified works as well as providing substantial evidence of infringement in support of the Complaint, including that at 2:15 a.m. Eastern Daylight Time on April 12, 2007, the user of IP address 169.226.226.24 was sharing 236 files on the Ares P2P network, including numerous of Plaintiffs' copyrighted sound recordings, such as Lionel Richie's "Hello," Beastie Boys' "Girls," and Poison's "Every Rose Has It's Thorn," to name a few. Thus, the District Court did not abuse its discretion in finding Plaintiffs' Complaint sufficient.³

³ Virtually every court that has addressed this issue has likewise found that substantially identical complaints filed by record companies like Plaintiffs were sufficient to state viable claims for copyright infringement. *See, e.g., Maverick Recording Co. v. Goldshteyn*, 2006 U.S. Dist. LEXIS 52422, at *14 (E.D.N.Y. Jul. 31, 2006); *Loud Records, LLC v. Does 1-74*, No. 04-CV-9881-RWS, slip op. at 1 (S.D.N.Y. Oct. 12, 2005) (attached as E); *Atlantic Recording Corp. v. Does 1-25*, No. 05-CV-9111-LTS, slip op. at 2 (S.D.N.Y. June 5, 2006) (attached as Exhibit F); *Motown Records v. Does 1-99*, No. 05 CV-9112 (NRB), slip op. at 1-2 (S.D.N.Y. July 14, 2006) (attached as Exhibit G); *Warner Bros. Records Inc. v. Does 1-149*, No. 05-CV-8365-RO, slip op. at 1 (S.D.N.Y. Jun. 7, 2006) (attached as Exhibit H); *Interscope Records v. Does 1-100*, No. 05-CV-7667-RJH, slip op. at 1 (S.D.N.Y. Apr. 6, 2006) (attached as Exhibit I); *Sony Music Entm't Inc. v. Does 1-40*, 326 F. Supp. 2d 556, 565 (S.D.N.Y. 2004) (holding that the plaintiffs' complaint had "made a concrete showing of a prima facie claim of copyright infringement"); *Warner Bros. Records Inc. v. Duarte*, No. SA-06-CV-615, slip op. at 2

2. Plaintiffs' Complaint Meets The *Twombly* Standard.

In determining that Plaintiffs had established a *prima facie* case for copyright infringement, the District Court also did not abuse its discretion in finding that Plaintiffs' complaint meets the standard set forth in *Twombly*. (A-94-99, A-119-120.) Additionally, as the District Court Judge noted in his Decision and Order adopting the Magistrate Judge's denial of Doe 3's motion to quash,

Bell Atlantic v. Twombly did not impose a heightened pleading standard, as Defendants argue, but merely clarified the proper pleading standard, which requires only factual allegations plausibly suggesting an actionable claim. *Bell Atlantic v. Twombly*, 127 S. Ct. 1955, 1965-74 (2007). The simplified fair-notice pleading standard of Fed. R. Civ. P. 8(a)(2) still governs, and all complaints must still be liberally construed so as to do justice under Fed. R. Civ. P. 8(e).

(A-119-120.)

Plaintiffs' Complaint easily meets the *Twombly* standard. In *Twombly*, the Supreme Court held that the allegations of a complaint "must be enough to raise a right to relief above the speculative level."⁴ 550 U.S. at 555. Thus, a plaintiff must

(W.D. Tex. May 2, 2007) (attached as Exhibit J); *Fonovisa, Inc. v. Alvarez*, No. 1:06-CV-0011-C, slip op. at 6-7 (N.D. Tex. July 24, 2006) (attached as Exhibit K); *Payne*, 2006 U.S. Dist. LEXIS 65765, at * 4-11; *Interscope Records v. Duty*, 2006 U.S. Dist. LEXIS 20214, at *3-6 (D. Ariz. Apr. 14, 2006); *Arista Records LLC v. Greubel*, 453 F. Supp. 2d 961, 967 (N.D. Tex. 2006); *BMG Music v. Conklin*, No. H-05-1482, slip op. at 1 (S.D. Tex. Sept. 16, 2005) (attached as Exhibit L); *see also* discussion *infra* p. 30.

⁴ Doe 3 claims that *Ashcroft v. Iqbal*, 556 U.S. ___, 2009 U.S. LEXIS 3472 (2009), imposes a heightened pleading standard from *Twombly*. In fact, as evidenced in the quote from *Iqbal* cited by Doe 3, *Iqbal* merely adopts the *Twombly* standard, making clear that the reach of *Twombly* is not limited to the antitrust context. *See* 2009 U.S. LEXIS 3472, at *28-34.

plead “enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [her claim].” *Id.* at 556. The Supreme Court further held that a court should not dismiss a complaint for failure to state a claim unless the complaint fails to include “plausible grounds” for relief. *Id.*

Here, as a matter of law, Plaintiffs’ allegations are far from speculative and provide more than plausible grounds for relief. As noted above, Plaintiffs have alleged the specific works at issue, that they own or control exclusive rights to valid copyrights for each of these works, and that they validly registered each of these works. (A-10, ¶ 20.) Moreover, Plaintiffs have specifically alleged that Doe 3 violated their exclusive rights of reproduction and distribution with respect to the copyrighted recordings at issue by downloading (*i.e.*, copying) and/or distributing such recordings through the use of an unauthorized P2P network. (A-10-11, ¶ 22.) Finally, Plaintiffs have not only made specific allegations as to these facts, but they also attached to their Complaint (and incorporated therein) substantial evidence in support of such claims, namely, the date and time Plaintiffs caught Doe 3 distributing copyrighted recordings, the IP address assigned to Doe 3 at the time of infringement, and a list of copyrighted recordings that were being distributed at the time Plaintiffs caught Doe 3 doing so. (A-16.) This additional evidence shows, among other things, the manner by which Doe 3 infringed Plaintiffs’ copyrights and substantial information regarding the audio files that Doe 3 was distributing.

Such allegations and evidence more than satisfy the “plausibility” standard set forth in *Twombly*, and every court to address a Rule 12(b)(6) motion for almost identical complaints has held exactly that. See *Loud Records LLC v. Minervini*, No. 08-cv-551-bbc, slip op. at 7 (W.D.Wisc. June 3, 2009) (finding the plaintiffs’ complaint sufficient under *Twombly*) (attached as Exhibit M); *Sony Music Entertainment v. Cloud*, No. 08-CV-01200, slip op. at 6-7 (E.D. Pa. May 29, 2009) (same) (attached as Exhibit N); *Arista Records, LLC v. Does 1-27*, 584 F. Supp. 2d 240, 248 (D. Me. 2008) (same); *Elektra Entm’t Group, Inc. v. Schwartz*, 2008 U.S. Dist. LEXIS 26183, at *10 (E.D.N.Y. Apr. 1, 2008) (“as required by *Twombly*, the complaint alleges enough facts to constitute a plausible, and not just a conceivable, claim of infringement”); *Atlantic Recording Corp. v. Serrano*, 2007 U.S. Dist. LEXIS 95203, at *10 (S.D. Cal. Dec. 28, 2007) (“Plaintiffs’ Complaint alleges facts with sufficient particularity to establish a copyright infringement claim”).

The cases Doe 3 cites in support of his *Twombly* claim are easily distinguished from this case. Doe 3 relies on *Interscope Records v. Rodriguez*, 2007 WL 2408484 (S.D. Cal. Aug. 17, 2007), to invalidate all of the cases discussed above which found the plaintiff record companies’ complaints to be sufficient. *Rodriguez* did not involve a Rule 12(b)(6) motion. Rather, in denying the plaintiffs’ motion for default judgment, the court in *Rodriguez sua sponte* raised the issue of whether the plaintiffs’ complaint satisfied the standards set forth in *Twombly*. Notably, the court did not give the plaintiffs the opportunity to brief or argue this issue, nor did the court have the

benefit of any briefing on the issue whatsoever. Indeed, *Rodriguez* stands alone against every other court to have addressed the sufficiency of complaints like the one at issue here, and as such, Plaintiffs respectfully submit that *Rodriguez* was wrongly decided.

The facts of the other cases cited by Doe 3 distinguish those cases from the case at hand. In *Mintel Learning Tech., Inc. v. Beijing Kaidi Educ. & Tech. Dev. Co.*, 2007 U.S. Dist. LEXIS 59946, at *25-26 (N.D. Cal., August 9, 2007), the court found a “copying” allegation in the complaint was insufficient where the plaintiff alleged only that defendants took part in a conspiracy to copy. In *Sun Micro Med. Techs. Corp. v. Passport Health Communications*, 2006 U.S. Dist. LEXIS 87772, at *37 (S.D.N.Y. December 4, 2006), the court dismissed copyright claims where there was no specificity regarding the time of the infringement and no allegation that individual defendants participated in the infringement. In *Marshall v. McConnell*, 2006 U.S. Dist. LEXIS 12319, at *15 (W.D. Tex. March 23, 2006), the court dismissed the copyright claim because the complaint failed to give defendants adequate notice of the documents they allegedly infringed. In *Stampone v. Stabl*, 2005 WL 1694073, at *2 (D.N.J. July 19, 2005), the court dismissed a copyright claim where copying was done “at the insistence of plaintiff,” and where “plaintiff does not allege that [defendants] copied any of plaintiff’s work without authorization.” Finally, in *U2 Home Entm’t, Inc. v. Kylin TV, Inc.*, 2007 U.S. Dist. LEXIS 50131, at *14-17 (N.D.N.Y. July 11, 2007), contrary to Doe 3’s assertion, the court actually denied a motion to dismiss, finding

that the complaint met all the requirements of Rule 8 and contained sufficient allegations to survive a motion to dismiss.

Plaintiffs' Complaint thus easily meets the *Twombly* standard, and the District Court did not abuse its discretion in finding that Plaintiffs have made a *prima facie* claim of copyright infringement.

3. Doe 3's "Making Available" Argument Is Irrelevant To Whether Plaintiffs Have Pled A *Prima Facie* Claim And Fails On The Merits As Well.

Doe 3 dedicates several pages of his brief arguing that making copyrighted files available to others for download on a P2P network does not violate the copyright distribution right. Doe 3 argues, therefore, that Plaintiffs have not made out a *prima facie* case. As the District Court recognized, Doe 3's argument fails because Plaintiffs' Complaint alleges that Doe 3 used the Internet illegally to download and/or distribute Copyrighted Recordings, and therefore Plaintiffs' *prima facie* claim does not depend on whether Doe 3 also made available Plaintiffs' Copyrighted Recordings. (A-96.) Further, even if Plaintiffs' Complaint did rely on Doe 3 having made available Copyright Recordings, Doe 3's argument fails on the merits, and Plaintiffs would still have a *prima facie* claim for copyright infringement. Accordingly, Doe 3's reliance on "making available" is misplaced and the District Court did not abuse its discretion in denying the motion to quash.

The act of downloading copyrighted sound recordings on a peer-to-peer network without authorization of the copyright holder constitutes a violation of the

holder's reproduction right under 17 U.S.C. § 106(1). *Gonzalez*, 430 F.3d at 890 (affirming summary judgment against the defendant who had used KaZaA to download copyrighted sound recordings); *In re Aimster*, 334 F.3d at 645 (“[M]aking . . . a digital copy of [copyrighted] music . . . infringes copyright.”); *Napster*, 239 F.3d at 1014 (“Napster users who download files containing copyrighted music violate plaintiffs’ reproduction rights.”); *Metro-Goldwyn-Mayer Studios, Inc v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1034-35 (C.D. Cal. 2003) (users who download copyrighted music violate the copyright owner’s exclusive reproduction right).

Likewise, a person violates a copyright holder’s distribution right under section 106(3) by making an unauthorized distribution of a copyrighted work. *Island Software & Computer Serv. v. Microsoft Corp.*, 413 F.3d 257, 261 (2d Cir. 2005); *see also Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 718 (9th Cir. 2007) (unauthorized “actual dissemination” of copyrighted work violates the distribution right in section 106(3)); *In re Aimster*, 334 F.3d at 647 (unauthorized “transfer” of copyrighted work violates distribution right).

Here, because Plaintiffs’ Complaint alleged both copying and distribution, both of which state claims for relief, neither the District Court nor this Court need address Doe 3’s “making available” argument in order to find that Plaintiffs’ Complaint states a *prima facie* claim of copyright infringement. In his Memorandum-Decision and Order, Magistrate Judge Treece recognized that Plaintiffs “have, in fact, alleged that the Doe Defendants did distribute Plaintiffs’ protected intellectual property”, and that

“Plaintiffs have adequately pled that Defendants distributed Plaintiffs’ copyrighted works, by merely stating, within the four corners of the Complaint, the distribution allegation alone.” (A-96.)

To the extent this Court is nonetheless inclined to address Doe 3’s making available argument, the overwhelming weight of authority holds that a person violates a copyright holder’s distribution right by making copyrighted sound recordings available for download by others on a P2P network without authorization from the copyright holder. *See Napster*, 239 F.3d at 1014 (“Napster users who upload file names to the search index for others to copy violate plaintiffs’ distribution rights.”); *Perfect 10*, 487 F.3d at 718-19 (affirming *Napster* and confirming that a defendant who makes actual files available for distribution, not just links to files, “distributes” them); *Gonzalez*, 430 F.3d at 889 (“people who post or download music files are primary infringers”); *Sony Pictures Home Entm’t, Inc. v. Lott*, 471 F. Supp. 2d 716, 721-722 (N.D. Tex. 2007) (granting summary judgment to plaintiff motion picture companies based on evidence that copyrighted motion pictures were made available for download); *Atlantic Recording Corp. v. Anderson*, 2008 U.S. Dist. LEXIS 53654, at *19 (S.D. Tex. Mar. 12, 2008) (“making copyrighted works available for download via a peer-to-peer network contemplates ‘further distribution,’ and thus constitutes a violation of the copyright owner’s exclusive ‘distribution’ right under 17 U.S.C. § 106(3)”); *Maverick Recording Co. v. Harper*, No. 5:07-cv-026-XR, slip op. at 10 (W.D. Tex. Aug. 7, 2008) (attached as Exhibit O) (“The fact that the Recordings were available for download is

sufficient to violate Plaintiffs' exclusive rights of reproduction and distribution. It is not necessary to prove that all of the Recordings were actually downloaded; Plaintiffs need only prove that the Recordings were available for download due to Defendant's actions."); *Virgin Records Am., Inc. v. Trinidad*, 2007 U.S. Dist. LEXIS 88386, at *10 (D.N.J. Dec. 3, 2007) ("By placing the sound recordings in a share folder on an online media distribution system for others to copy, Defendant has infringed Plaintiffs' copyright"); *Motown Record Co. v. DePietro*, 2007 U.S. Dist. LEXIS 11626, *12-13, n.38 (E.D. Pa. 2007) ("A plaintiff claiming infringement . . . can establish infringement by . . . proof that the defendant 'made available' the copyrighted work.").

Outside the context of P2P sharing, the Fourth Circuit held in the context of a library that making unauthorized copies of works available for distribution to others violates the copyright holder's distribution right. *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997).

By definition, a person who possesses the exclusive right to distribute works also possesses the exclusive right to make works available for download by others. This is precisely what the Supreme Court held in *New York Times Co. v. Tasini*, 533 U.S. 483, 488 (2001). In *Tasini*, several "Authors" sued "Print Publishers" (newspapers) and "Electronic Publishers" (including NEXIS) for making the Authors' copyrighted articles available for download on online databases like NEXIS. *Id.* at 487. The Print Publishers had a license to "reproduce or distribute" the articles only as part of a compilation. *Id.* at 498. There was no allegation or proof of any

actual transfer of files to the public in *Tasini*; rather, the Authors alleged only that the Publishers had “placed copies of the [articles] . . . into three databases” where they were “retrievable” by the public, and that the Authors’ distribution right had been infringed “by the inclusion of their articles in the databases.” *Id.* at 487. The Supreme Court agreed, and held that “the Electronic Publishers infringed the Authors’ copyrights by reproducing and distributing the Articles in a manner not authorized by the Authors . . . [and] that the Print Publishers infringed the Authors’ copyrights by authorizing the Electronic Publishers to place the Articles in the Databases” *Id.* at 506; see also *Advance Magazine Publishers, Inc. v. Leach*, 466 F. Supp. 2d 628, 637-38 (D. Md. 2006) (relying on *Tasini* and holding that an online publisher violated a copyright owner’s distribution right “by making available unauthorized copies of Plaintiff’s publications” online).⁵

Against the weight of this authority, Doe 3 relies principally on two cases – *Capitol Records v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008) and *National Car Rental System, Inc. v. Computer Associates Int’l, Inc.*, 991 F.2d 426 (8th Cir. 1993) – to argue that making copyrighted recordings available does not constitute infringement. The

⁵ Citing the Supreme Court’s *Tasini* decision and the Ninth Circuit’s *Napster* decision, the Register of Copyrights has concluded that “making [a work] available for other users of a peer to peer network to download’ constitutes an infringement of the exclusive distribution right, as well as of the reproduction right.” See Letter of Sept. 25, 2002 from Marybeth Peters to Rep. Howard L. Berman, *reprinted in* Piracy of Intellectual Property on Peer-to-Peer Networks, Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the Judiciary, 107th Cong. 114-15 (2002) (attached as Exhibit P).

Thomas court based its ruling on *National Car Rental System, Inc.*, which does not hold, or even imply, that a plaintiff must prove an actual completed transfer in order to prove infringement.⁶ Indeed, the *National Car Rental* decision has nothing to do with the issues presented here.

In *National Car Rental*, the plaintiff licensed data-processing software to National Car Rental (“National”) and its vendor for internal operations only. *Id.* at 427-28. After discovering that National had used the software to process transactions for third parties in violation of the license, the plaintiff brought a contract claim, alleging that National exceeded the scope of its license. *Id.* Copyright law was relevant only because National asserted that the Copyright Act preempted the plaintiff’s common law claim. *Id.* at 430-31 (contending that using software for the benefit of third parties was a “distribution” under 17 U.S.C. § 106).

The court concluded that such *use* was not a distribution, and that the contract suit was not preempted. *Id.* at 432-33. The court rejected the defendant’s novel theory that *using* software to process third-party data should be treated as the equivalent of actually transferring that software to the third parties because the third parties could take advantage of the software’s function. *Id.* at 434. The court emphasized that “copyright protection in computer software does not extend to the

⁶ The *Thomas* case is still pending, and the court’s decision regarding making available may be appealed.

software’s *function*,” *id.* at 434 (emphasis added), but protects “only the right to distribute *copies*,” *id.* (emphasis in original).

That holding is irrelevant to the question before this Court. The defendant in *National Car Rental* was not making a work available for copying by third parties; it was merely using copyrighted software beyond the scope of its license. The Eighth Circuit never considered whether the right to distribution is violated by the unauthorized “making available” of copies, or whether an actual transfer of a copy must occur. The Eighth Circuit’s decision simply does not address *what it means* to “distribute” under the Copyright Act. The question in *National Car Rental* was only *what had to be distributed*: copies or functionality.

For all of these reasons, Doe 3’s “making available” argument is irrelevant to this appeal and also fails on the merits, and the District Court correctly exercised its discretion in denying Doe 3’s motion to quash.

D. The District Court Correctly Exercised Its Discretion In Finding That Plaintiffs Satisfied The Remaining Factors Of The *Sony Music* Test.

In addition to determining that Plaintiffs’ Complaint satisfies the *prima facie* requirement, the District Court correctly found that Plaintiffs met the remaining criteria from the *Sony Music* test, and ultimately that the balance favored Plaintiffs’ right to pursue their copyright claim over Doe 3’s minimal First Amendment privilege.

First, addressing the specificity of Plaintiffs' discovery request, Magistrate Judge Treece found that "[t]he discovery information sought by the Plaintiffs is specific and reasonable." (A-98.) Indeed, the subpoena is extremely limited and seeks only necessary information, including Doe 3's name, address, telephone number, email address, and Media Access Control ("MAC") address. As the District Court correctly found, "[a]ll of this information will reasonably facilitate Plaintiffs' efforts to serve process upon the alleged offenders in order to bring suit against them for their alleged conduct." (A-98.) Ultimately, the District Court exercised proper discretion in concluding that "this is another element that tips in Plaintiffs' favor." (A-98.)

Second, the District Court recognized the absence of alternative means to obtain the information Plaintiffs' seek. The District Court reasoned that "it is plainly obvious that they lack the capacity to identify each Doe Defendant solely by possessing the IP addresses." (A-98.) Indeed, Plaintiffs have no way to identify Doe 3 without the ability to access identifying information from SUNY. As Magistrate Judge Treece recognized, "[w]ithout [SUNY] making available its list of allocated IP addresses to individual students so that a culprit of copyright infringement may be traced, Plaintiffs would forever be stymied in their efforts to protect their property rights and to bring an action against those alleged wrongdoers." (A-98.) Accordingly, the next factor - a central need to obtain the subpoenaed information - also weighs heavily in favor of Plaintiffs, as the District Court found: "there is a central and critical need for this information in order for Plaintiffs to advance their claims and

ascertaining the identities of the Doe Defendants is pivotal and indispensable in their effort.” (A-98.)

Last, the District Court did not abuse its discretion in finding that Doe 3 has a minimal expectation of privacy, and thus that the final factor also weighs in Plaintiffs’ favor. The District Court correctly found that:

[A]s precedents have advised us, the Doe Defendants have a minimal expectation of privacy, especially when they allegedly engaged in P2P network sharing. Conceptually, the notion of allowing others to have access to one’s database by virtue of the Internet in order to pluck from a computer information and data that the computer owner or user wishes to share renders void any pretext of privacy.

(A-98.) Indeed, other courts that have addressed this issue have recognized that similar defendants have a minimal expectation of privacy. *See, e.g. Sony Music*, 326 F. Supp. 2d at 566; *In re Verizon*, 257 F. Supp. 2d at 267 (peer-to-peer file sharing network user who allows others to download materials from that computer has “essentially open[ed] the computer to the world”); *Virgin Records America, supra*, 2009 U.S. Dist LEXIS 21701, at *7 (E.D.N.C. March 16, 2009).

Accordingly, the District Court properly exercised its discretion in finding that Plaintiffs easily satisfy the five-part *Sony Music* test and that Plaintiffs’ interests far outweigh any minimal First Amendment privilege enjoyed by Doe 3. The District Court did not abuse its discretion in denying Doe 3’s motion to quash.

E. Doe 3's Additional Arguments Fail Because They Were Not Raised In The Court Below, They Are Irrelevant To The Narrow Issue Of This Appeal, And They Fail On The Merits.

Because his appeal fails on the merits, Doe 3's opening brief devolves into a series of accusations and unsupported allegations about Plaintiffs. These arguments each fail on the merits, since Plaintiffs have substantial evidence of copyright infringement and a valid basis to discovery regarding Doe 3's identity. Additionally, none of these other arguments have any bearing on the narrow issue of whether the District Court abused its discretion in denying Doe 3's motion to quash. The arguments were largely not raised in the District Court below, are not supported by evidence, are untrue, and consist almost entirely of unsupported opinions about the value of Plaintiffs' litigation efforts. Ultimately, these new arguments only serve to confuse the narrow issue on this appeal, and, accordingly, should be rejected.

For example, Doe 3 argues that Plaintiffs' technology is flawed, and therefore that the motion to quash should be granted. (Appellant's Brief at 36.) First, this argument should be rejected outright because Doe 3 never raised the issue in the District Court. *See United States v. Harrell*, 268 F.3d 141, 146 (2d Cir. 2001) ("An issue is reviewable on appeal only if it was 'pressed or passed upon below'") (quoting *United States v. Williams*, 504 U.S. 36, 41 (1992)); *see also United States v. Braunnig*, 553 F.2d 777, 780 (2d Cir. 1977) ("where a party has shifted his position on appeal and advances arguments available but not pressed below, . . . and where that party has had ample opportunity to make the point in the trial court in a timely manner, . . . waiver will bar

raising the issue on appeal”) (citations omitted). Second, to support his argument, Doe 3 cites to sources such as Internet blogs and news stories that were never admitted below, which would likely never be admissible in any event, and which, most importantly, are unreliable and inaccurate. Third, Doe 3 fails to explain how this argument has anything to do with the factors the Court must address when ruling on a motion to quash. As detailed above, Plaintiffs’ have established a *prima facie* claim for copyright infringement and met the other elements of the applicable test. Moreover, as discussed above, numerous courts have found Plaintiffs’ Complaint valid, effectively rejecting Doe 3’s erroneous claims regarding alleged flaws in Plaintiffs’ technology. Finally, Doe 3’s argument is premature and not properly addressed on a motion to quash. Rule 45 authorizes a court to quash a subpoena only if the subpoena (1) does not allow a reasonable time for compliance, (2) requires a person who is not a party to the action to travel more than 100 miles, (3) requires disclosure of privileged or other protected matter and no exception or waiver applies, or (4) subjects a person to undue burden. Fed. R. Civ. P. 45(c)(3)(A)(i-iv). None of those bases are implicated here by Doe 3’s extraneous arguments.

Next, Doe 3 argues that the effect of quashing the subpoena is not before the Court, and thus the District Court improperly denied the motion to quash. (Appellant’s Brief at 38.) Doe 3 quotes Magistrate Judge Treece, who evaluated the third *Sony Music* factor – whether there are alternative means to obtain the subpoenaed information - and found that “Plaintiffs would be forever stymied in their efforts to

protect property rights and to bring an action against these alleged wrongdoers.” (A-98.) Doe 3 takes issue with the District Court’s acknowledgement that Plaintiffs have no other means to access Doe 3’s identity, but he offers no alternative, undoubtedly because there is none. Finally, contrary to Doe 3’s assertion, as the District Court properly found, there is evidence in the record that Plaintiffs have no alternative means to identify Doe 3. (A-57-61, ¶¶ 12, 23.) Nor does this argument, as with the prior argument, present a valid basis to quash a subpoena under Rule 45.

Doe 3 makes various other intemperate and unsupported accusations in his argument regarding the effect of quashing the subpoena, including claiming that Plaintiffs are guilty of extortion, bad faith, unclean hands, and raising an issue regarding Plaintiffs’ interest in recent appointments to the Obama administration. (Appellant’s Brief at 41.) None of these arguments are supported by evidence raised in the District Court below, nor do they have any relevance to this appeal nor basis in fact. The Court should, accordingly, reject them.

III. Magistrate Judge Treece Properly Ruled On The Motion to Quash And The District Court Made Clear That The Motion Would Be Denied Even Under A *De Novo* Review.

Doe 3 now argues that the motion to quash should not have been ruled on by Magistrate Judge Treece, and that the District Court Judge then erred in applying a clearly erroneous standard of review to evaluate the Magistrate Judge’s decision. Doe 3’s arguments fail for several reasons. First, the matter was properly referred to the Magistrate Judge, and Doe 3 never contested the assignment. Second, the District

Court Judge properly reviewed the Magistrate Judge's order for clear error, and found that the motion also failed a *de novo* review.

A. The Motion To Quash Was Properly Referred To The Magistrate Judge.

Doe 3's argument that the motion to quash was not properly referred to the Magistrate Judge for review is without merit. Northern District of New York Local Rule 7.1 provides that nondispositive motions, including discovery motions, are automatically referred to the magistrate judge assigned to the case. *See* N.D.N.Y. L.R. 7.1(b)(2); 7.1(d); *see also* Fed. R. Civ. Proc. 72(a)(1) (permitting magistrate judges to hear and decide nondispositive matters.) Motions to quash a subpoena such as the one at issue are nondispositive discovery motions. *See* 28 U.S.C. § 636(b)(1)(A) (listing motions which district judge may not refer to magistrate judge, which list does not include motions to quash a subpoena); *Holt v. Welch Allyn*, 1997 U.S. Dist. LEXIS 5896 at *20 (N.D.N.Y. April 15, 1997) (“[a] pretrial request to quash a deposition subpoena is a nondispositive matter.”); *see also* *Tsabbar v. Eason*, 305 Fed. Appx. 680, 682 (2d Cir. 2008) (citing *In re DG Acquisition Corp.*, 151 F.3d 75 at 79 (2d Cir. 1998) (“a district court, whether or not presided over by a district judge or a magistrate judge, is given ‘wide discretion in its handling of pre-trial discovery’”). Accordingly, contrary to Doe 3's claims, a motion to quash such as the one at issue here is properly heard by a magistrate judge pursuant to federal and local rules.

Here, the case was referred to Magistrate Judge Treece at its inception. (A-1, Doc. No. 3.) Accordingly, pursuant to local rules, discovery motions and other nondispositive matters were properly heard by Magistrate Judge Treece. Indeed, Plaintiffs' request for expedited discovery was granted by Magistrate Judge Treece (A-73-75), and counsel for Doe 3 addressed the Magistrate Judge directly on numerous occasions leading up to the motion to quash, including for example, his requests for extensions to file such a motion. (A-1-2, Doc. Nos. 8, 10.) Doe 3 then erroneously noticed the motion to quash as a dispositive motion before the District Court Judge, which the Court corrected in its text Order of October 7, 2008, in which it made clear that Magistrate Judge Treece would rule on the nondispositive motion to quash. (A-3). Doe 3 apparently had no objection to this, specifically addressing his request to file a reply memorandum with Magistrate Judge Treece, and later filing that reply before the Magistrate. (A-3, Doc. Nos. 29, 32.) Accordingly, the motion to quash was properly ruled upon by Magistrate Judge Treece.

B. The District Court Properly Exercised Its Discretion In Reviewing The Magistrate's Order For Clear Error, And Found That The Motion Fails Even A *De Novo* Review.

Doe 3 also fails in his argument that the wrong standard of review was used when District Judge Suddaby rejected Doe 3's appeal of the Magistrate Judge's decision. As explained above, despite Doe 3's insistence to the contrary, Doe 3's motion to quash was a nondispositive motion, properly referred to Magistrate Judge Treece. Accordingly the District Court Judge reviews such rulings for clear error,

which the Court did here. However, the District Court also conducted a *de novo* review and found that the motion fails by that standard as well, leaving no doubt as to the propriety of the District Court's decision.

As explained above, the motion to quash is a nondispositive matter, and does not become dispositive simply because Doe 3 argues that the sufficiency of the Complaint is at issue. As District Judge Suddaby properly reasoned, "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) (citing *Interscope Records v. Does 1-12*, 2008 WL 4939105, at *1 (N.D. Ind. 2008). Further "if a movant could do so, every motion to quash in a First Amendment 'right of anonymity' case would be elevated to a dispositive motion... because one of the factors to be considered on such a motion is whether plaintiffs have made a concrete showing of a *prima facie* claim." Appeals of nondispositive rulings by a magistrate judge are properly reviewed for clear error. Fed. R. Civ. P. 72(a).

Both Magistrate Judge Treece and District Judge Suddaby also confirmed that, were there any doubt about whether the motion to quash was dispositive, only "parties" to an action may file a motion to dismiss, and that the unserved Doe Defendants "may not properly move for dismissal for failure to state a claim." (A-119.) Accordingly, if Doe 3 had, in fact, been attempting to file a dispositive motion to dismiss, he would have lacked standing to do so.

In any event, the District Court Judge not only properly found that Magistrate Judge Treece had committed no clear error in denying the motion to quash, but the District Court *actually conducted a de novo review*, which is exactly what Doe 3 seeks here. (A-119.) Accordingly, Doe 3's argument has no merit since the District Court Judge already found, upon *de novo* review, that the motion to quash fails.

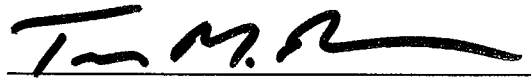
IV. Doe 3's Request For Attorneys' Fees Is Premature.

Finally, Doe 3's request that he be awarded attorneys' fees should not be considered in this appeal. Given that his motion to quash was denied by the District Court, and that "in view of our conclusions above, Doe Defendant's application for attorney fees is denied," this issue is premature for the Court to decide. (A-102-103.) In any event, given that the District Court has twice denied Doe 3's motion to quash, it is doubtful Doe 3's basis for this relief could ever meet the level necessary to recover attorneys' fees. Notwithstanding the unlikely event that Doe 3 ultimately prevails on his motion to quash, however, only at that time would it be appropriate to request attorneys' fees, and only before the District Court. This Court need not make a ruling on this request at this stage of the proceedings.

CONCLUSION

For all of these reasons, this Court should affirm the District Court's denial of Doe 3's motion to quash.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "T.M.R.", is written above a horizontal line.

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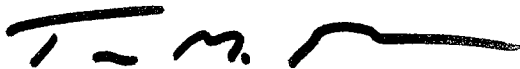
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Attorney for: Plaintiffs-Appellees

Dated: June 25, 2009

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See Second Circuit Interim Local Rule 25(a)6

CASE NAME: Arista Records LLC. et al. v. Doe 3

DOCKET NUMBER: 09-0905-cv

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