09-0905-cv

United States Court of Appeals
for the Second Circuit

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.

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

DEFENDANT-APPELLANT'S REPLY BRIEF

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DEFENDANT-APPELLANT'S REPLY BRIEF

Defendant-appellant Doe 3 respectfully submits this reply brief in response to the brief of plaintiffs-appellees, and in further support of this appeal.

PRELIMINARY STATEMENT

This appeal represents, to appellant's knowledge, the first Circuit Court review of the RIAA's litigation strategy, and appellees do not suggest otherwise. The fundamental questions presented to this Court are whether appellees have stated a claim for copyright infringement: (1) given the strict requirements and precise language of 17 U.S.C. § 106, and the interpretation of the rights created therein; (2) given the near-universal refusal of courts to expand the scope of those rights by judicial interpretation, despite the enormous technological changes in the more than thirty years since their enactment; (3) under the heightened pleading standards established by *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S___, 129 S.Ct. 1937 (2009); and (4) whether the language in the RIAA's boilerplate complaint, and the claims it purports to state, are sufficiently strong to overcome Doe 3's First Amendment qualified privilege to be anonymous.

The appellees understandably wish to limit the scope of this Court's review to one simple question: whether the District Court abused its discretion in upholding the subpoena. But the question cannot be answered without a close examination of the

underlying basis for the subpoena, and that requires a close analysis of the claims in the complaint, and in turn an analysis of the claims requires a close analysis of the nature of the rights supposedly infringed. The RIAA's litigation campaign, amounting to some 30,000 cases to date, is based upon a serious and dangerous distortion of copyright law, and the repeated assertion of rights which do not exist. District courts around the nation have struggled with these issues, with mixed results and scant appellate authority. That is why this case is anything but simple.

And even if the case be considered a simple one involving only an abuse of discretion, if the District Court committed errors of law, that is an abuse of discretion by definition. "Motions to...quash a subpoena are...entrusted to the sound discretion of the district court...A district court abuses its discretion when (1) its decision rests on an error of law...or a clearly erroneous factual finding, or (2) its decision--though not necessarily the product of a legal error or a clearly erroneous factual finding--cannot be located within the range of permissible decisions." *Am. Sav. Bank, FSB v. UBS PaineWebber, Inc.*, 330 F.3d 104, 108 (2d Cir.2003)(quotation marks and citations omitted).

Appellees argue essentially as follows:

1. File-sharing over the internet has had a devastating effect on the record industry.

2. Doe 3 is an infringer, and that status is conclusive and indisputable, solely because a private company, using unproven and proprietary technology (which the RIAA has refused to disclose, and which independent experts have strongly criticized), says so, based upon nothing more than an Internet Protocol ("IP") address, which is not a unique identifier of anything.

3. Appellee's complaint states a prima facie claim for copyright infringement under *Twombly*, although appellees ignore the effect of *Ashcroft v. Iqbal* on its claims, merely noting, incorrectly, that the latter case "merely adopts the *Twombly* standard." Appellees Br. at 28 n.4.

4. Attempted distribution of copyrighted song files is an infringement, regardless of whether there is evidence of actual distribution. This has been addressed at length in Doe 3's brief (Point II at 33-35) and there is no need to further support the legal errors in appellees' argument here. "Making available" and "attempted distribution" are not infringements of the distribution right and thus the complaint fails to state a claim.

5. The claims are sufficient to overcome Doe 3's qualified privilege.

6. The Magistrate Judge and District Judge both correctly exercised their discretion in refusing to quash the subpoena, and the motion to quash was properly

referred to the Magistrate Judge in the first instance. Moreover, Doe 3 was not entitled to *de novo* review, although the result would have been the same.

7. The request for attorney's fees is premature, although appellees acknowledge that if the subpoena is quashed, the case against Doe 3 will effectively be over, and they will be unable to proceed, thus rendering Doe 3 the prevailing party.

ARGUMENT

1. The effect of filesharing on the recording industry is not an issue in this case.

The first argument, that filesharing has had a devastating effect on the recording industry, may be disposed of in one sentence: It may or may not be so (and there is reason for skepticism, see Appellants Br. at 7 n. 3), but it is utterly irrelevant to this Court's concerns. If, as we demonstrate in our main brief, existing copyright law does not provide remedies for filesharing, attempted distribution, and making available, and do not deem it infringement, then suits against individuals who engage in it cannot be maintained, regardless of the consequences. For a century, new technologies have provided challenges to copyright owners, but those challenges have been met through creative business models, licensing schemes, and by Congressional enactments. "The Court would be remiss if it did not take this opportunity to implore Congress to amend the Copyright Act to address liability and damages in peer-to-peer network cases such as the one currently before this Court."

Capitol Records, Inc. v. Thomas, 579 F. Supp. 2d 1210, 1227 (D.Minn.2008). Surely, if existing law were sufficient, there would be no need for such a request.

A mass litigation campaign resolves nothing, has failed to advance the RIAA's goals, and has had seriously detrimental effects on the development of copyright law.

2. The RIAA's methodology is too unreliable and error-prone to justify invasion of Doe 3's First Amendment privilege.

The second point is that the connection between the RIAA's technology in identifying putative defendants, and actual downloading and distribution, is far too tenuous and error-prone to justify invasion of Doe 3's First Amendment privilege. Doe 3 has never claimed that the privilege shields copyright infringement, or defamation, or any other wrongful, tortious or criminal conduct, as appellees suggest. But the privilege is real and cannot be overcome by the RIAA's conclusory claim that everyone with file-sharing software and an IP address is an infringer. The RIAA's blithe and offensive admission that "when you fish with a net, you sometimes are going to catch a few dolphin" (Appellants Br. at 10 n. 7), and their extensive record of doing exactly that by suing hundreds of innocent people, would seem to settle the question. The privilege is real, and not to be overcome by mere suspicion.

An individual who is connected to the internet at a given IP address at a given time and date is not automatically someone who did anything, and may be completely

innocent. In all these RIAA cases, people are sued solely on the basis that they are the persons who paid for the internet service, or, as here, that they used the University's servers. But people have children, guests and visitors who may use their internet connections, and in any event, an IP address is *not* a unique personal identifier. As in *Lava Records, LLC v. Amurao*, No. 08-2376-cv (pending in this Court), the person sued may be nothing more than the person who pays for the Internet Service Provider. And as that case argues, such an innocent person should almost automatically be entitled to attorney's fees when the case against him is voluntarily dismissed by the plaintiffs.

Any legal regime which permits and even encourages suits against innocent people with nothing more than a suspected connection to any actual copying, with no way to prove actual distribution, which invades their privacy by *ex parte* applications, based upon the vague hope that something will turn up in discovery, and which makes automatic assumptions based upon flawed technology, is indefensible as a matter of due process and simple fairness. Moreover, it is arguably a violation of the pre-filing investigation required by Rule 11. It should not be acceptable.

3. Under *Twombly* and *Ashcroft*, the RIAA form complaint is insufficient.

Third, the effect of *Twombly* and *Ashcroft* on the RIAA's form complaint is more serious than appellees would have it. In particular, appellees only mention

Ashcroft in passing, and ignore its great significance to all civil pleadings. Notwithstanding the factual allegations about IP addresses, names of song files, and dates and times, the complaint is nonetheless fatally insufficient, because it is couched in legally conclusory terms, and because it fails to allege a single example of actual distribution of copyrighted material. As *Ashcroft* (which appellees do not address) holds, "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." 129 S.Ct. 1937, 1951. The form complaint here is replete with conclusory allegations of copyright infringement, and the factual details in the exhibits cannot save it. It simply fails to state a legally sufficient claim.

As for the argument that the claims are sufficient to overcome Doe 3's qualified privilege, without at least a sufficient complaint, the privilege cannot be overcome. Since the complaint is invalid, the subpoena must be quashed.

4. The District Judge erred by referring the motion to the Magistrate Judge.

The appellees' next point is that the Magistrate Judge properly decided the motion to quash, that it was not dispositive, and that Doe 3 waived the right to object to the referral by not objecting. Furthermore, they argue, the District Judge actually afforded Doe 3 a *de novo* review of the Magistrate Judge's decision, even though it

was not required, and that, since Doe 3 was not served at the time, s/he would have lacked standing to move to dismiss.

The answer to this is that since the practical effect of the motion to quash is to determine the outcome of this litigation (as appellees readily admit), it falls outside the scope of 28 U.S.C. § 636(b)(1)(A), a statute which is to be construed narrowly, *Williams v. Beemiller, Inc.*, 527 F.3d 259 (2d Cir. 2008), in order to avoid Article III concerns.

As for the argument that Doe 3 waived any objections to the referral to the Magistrate Judge, the statute does not require the consent of the parties for those matters within its scope. Parties can consent to a Magistrate Judge deciding anything of a substantive nature, up to and including the trial, 28 U.S.C. § 636(c)(1), but that has nothing to do with the scope of a referral under § 636(b)(1)(A), which is done without consent. Thus, Doe 3's objection to the referral would have been pointless, and in any event failing to object to the referral is not the same as consenting to it.

Finally, the District Judge said that Doe 3 had no right to move to dismiss the complaint, because s/he had not been served. Appellees agree with this proposition, but ignore that if that were so, Doe 3 would have no way to protect anonymity, since s/he must first be identified in order to be served with process. This is admittedly a minor and possibly academic procedural point, but it is respectfully submitted that it

would be helpful for this Court to address the issue and establish the rights of unserved defendants to be able to protect their anonymity in similar situations.

5. Doe 3 is entitled to an attorney's fee if this appeal is successful.

Finally, appellees contend that Doe 3's request for an award of a reasonable attorney's fee is premature. But the request for fees is not solely based upon the quashing of the subpoena, but upon appellees' acknowledgment that "[p]laintiffs have no way to identify Doe 3 without the ability to access identifying information from SUNY." Appellees Br. at 39. Thus, if the subpoena is quashed, this case will effectively be over, with Doe 3 being a prevailing party. The practical effect will be the same as a judgment in favor of Doe 3, by appellees' own admission. Since appellees admit that the quashing of the subpoena is the end of this action, Doe 3 should be entitled to a reasonable attorney's fee in that event, and this Court should remand the issue to the District Court for a determination of the reasonable amount of that fee. In addition, there is authority for the granting of an attorney's fee to the subject of a subpoena who successfully moves to quash, see Appellant's Br. at 48-50.

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, and grant such other relief as may be just.

Dated: New York, New York
July 17, 2009

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