

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

UMG RECORDINGS, INC., a Delaware corporation; MOTOWN RECORD COMPANY, L.P., a California limited partnership; INTERSCOPE RECORDS, a California general partnership; CAPITOL RECORDS, LLC, a Delaware limited liability company; and SONY MUSIC ENTERTAINMENT, a Delaware general partnership,

Case No.: 1:08-cv-00765-GTS-RFT

Plaintiffs,

v.

KIMBERLY FRAWLEY,

Defendant.

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS COMPLAINT

Dated: November 29, 2010

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Plaintiffs respectfully submit this Opposition to Defendant's Motion to Dismiss (Doc. 63) and state as follows:

I. INTRODUCTION

After what were likely years of illegally downloading and distributing Plaintiffs' copyrighted sound recordings over the internet, Plaintiffs caught Defendant with her proverbial hand in the cookie jar. While Plaintiffs did not know her by name, they knew her IP address. Because Defendant has no defense to Plaintiffs' substantive claim, she has undertaken a scorched earth campaign of procedural obstacles to avoid litigating the copyright claims.

Defendant has been actively litigating this case for more than two year in an effort to avoid being held responsible for her infringing activities. First, Defendant tried to prevent Plaintiffs from learning her identity by seeking to quash the subpoena that Plaintiffs served on her Internet Service Provider to learn her name, as opposed to her IP address. (*See* Doc Nos. 12, 24). When that effort failed, Defendant appealed to the Second Circuit Court of Appeals (*see*

Doc. No. 44) and lost again. Having received her true name and amended the Complaint to include it, Defendant now, incredibly, claims that because the District Court and Second Circuit took so long in addressing her appeal, the statute of limitations on Plaintiffs' claims expired, thereby necessitating that the claims be dismissed. And despite the fact that she has been actively litigating this case for more than two years, she now claims that she was never properly served.

As demonstrated below, Defendant's latest effort to avoid the merits of this case must fail. Defendant has been properly served and her statute of limitations arguments are contrary to established precedent and have no merit.

First, Defendant was properly served with the summons and complaint by "nail and mail" pursuant to New York CPLR 308. At the time of service, Defendant was a student. Her permanent address was her mother's home. She received her mail there and registered her car there. Thus, the service address was both her last known residence and her "dwelling place or usual place of abode." CPLR 308.

Second, Defendant's argument that the statute of limitations ran while Defendant was unsuccessfully appealing the denial of her motion to quash is contrary to established Supreme Court precedent. In *Krupski v. Costa Crociere S.A.*, 130 S. Ct. 2485 (2010), the Supreme Court held unequivocally that "relation back under Rule 15(c)(1)(C) depends on what the party to be added knew or should have known" and that where a defendant knows that she was the party intended to be sued, the amendment relates back. *Id.* at 2490. The cases that Defendant relies on to argue the contrary have no application to the facts of this case. Moreover, were this Court to disregard Supreme Court precedent and accept Defendant's argument, it would eviscerate the

“Doe” process and create perverse incentives to file, *ad seriatim*, meritless motions and appeals in any Doe action to simply delay long enough for the statute of limitations to run.

Defendant’s Motion should be seen for what it is, another transparent attempt to delay having to face the music for her willful infringement of Plaintiffs’ copyrighted sound recordings. The Court should deny the motion.

II. PROCEDURAL HISTORY

On April 12, 2007, Plaintiffs discovered substantial infringement of their copyrighted sound recordings by an individual using the AresWarez peer-to-peer (“P2P”) file sharing network. The individual illegally distributed hundreds of Plaintiffs’ copyrighted sound recordings under the username “kim5214,” a match to Defendant’s first name. Although Plaintiffs collected substantial evidence of Defendant’s infringement, including her Internet Protocol (“IP”) address and the titles and artists of the sound recordings being infringed, they did not know the individual’s identity. Using publically available information, however, Plaintiffs were able to determine that this person’s Internet Service Provider (“ISP”) was SUNY Albany (“SUNY Albany”). SUNY Albany assigns IP addresses to computer users that connect to the internet through its service. Like all ISPs, SUNY Albany also maintains logs of which IP addresses are assigned to which users at specific dates and times.

After detecting the infringement, Plaintiffs attempted to resolve this matter on an anonymous basis. Specifically, at Plaintiffs’ request, SUNY Albany forwarded a letter to Defendant (known at that time only as Case # 152500462) written by Plaintiffs, describing the evidence of Defendant’s infringement and offering a reduced and anonymous settlement, either online or by phone, and providing information regarding Defendant’s infringement, including the

IP address, total number of files, P2P network, and a sampling of infringed sound recordings. A copy of this letter is attached hereto as Exhibit A. Defendant did not respond to this letter.

After unsuccessfully trying to resolve the matter on an anonymous basis, Plaintiffs filed their Complaint for copyright infringement against Defendant (Doe 3) and other Doe Defendants on July 17, 2008. Because Plaintiffs could not pursue their claims against Defendant without knowing her name, Plaintiffs filed a motion for leave to take expedited discovery, requesting that this Court permit Plaintiffs to serve SUNY Albany with limited discovery in order to determine the identity of Defendant and the other Does. (Doc. 4). On July 22, 2009, Magistrate Judge Treece granted Plaintiffs' Motion, ordering that Plaintiffs could immediately serve a Rule 45 subpoena on SUNY Albany for the purpose of identifying Defendant (Doe 3) and the other Doe Defendants in the case. (Doc. 5).

On September 15, 2008, after requesting two extensions, three Doe Defendants, Does 7, 11, and 15, retained counsel and moved to quash Plaintiffs' subpoena. (Doc. 12). Doe 3, now known as Defendant Kimberly Frawley, joined the motion to quash on October 6, 2008. (Doc. 24). On February 18, 2009, Magistrate Judge Treece issued a detailed Memorandum Decision and Order denying the Motion to Quash in all respects. (Doc. 40). On March 2, 2009, Defendant filed an appeal of the Magistrate Judge's decision pursuant to Federal Rule of Civil Procedure 72. (Doc. 41). The Court promptly affirmed the decision of Magistrate Judge Treece on March 5, 2009. (Doc. 43). Defendant appealed to the Second Circuit on March 7, 2009, and sought and obtained an interim stay of the decision denying her motion to quash. On May 3, 2010, the Second Circuit Court of Appeals rejected Defendant's effort to quash the subpoena.

Thereafter, on May 19, 2010, after two years of litigation, SUNY Albany finally identified Doe 3 as Defendant Kimberly Frawley and provided the address of record for

Defendant as 1320 Genessee St., Oneida, NY 13421 (“the Service Address). (See Subpoena Response, attached hereto as Exhibit B). On May 26, 2010, Plaintiffs ran a search through Smartlinx™ to confirm Defendant’s address. (See May 26, 2010 Smartlinx™ report, attached hereto as Exhibit C). The Smartlinx™ report showed Defendant’s address as the Service Address, and further showed that she had a car registered at the Service Address. *Id.* On June 28, 2010, after again attempting unsuccessfully to resolve this case with Defendant, Plaintiffs filed an amended complaint naming Kimberly Frawley as Defendant. (Doc. 53).¹

On July 16, 2010, Plaintiffs’ process server went to the only address Plaintiffs had been able to locate for Defendant, the Service Address. (Doc. 57). Defendant’s mother answered the door. *Id.* Defendant’s mother stated that Defendant was attending school. *Id.* Defendant’s mother refused to provide Defendant’s school address. *Id.* The process server then left. *Id.* The process server then conducted a postal trace that confirmed that Defendant continued to receive mail at the Service Address. *Id.*

Thereafter, on July 20, 2010, the process server left a copy of the summons and complaint on the door of the Service Address and mailed a copy of the same to her mailing address of record. *Id.* As Defendant’s mother stated in her Declaration, she received the summons and complaint both attached to the door and by U.S. Mail and mailed it to Defendant’s attorney’s office. (Doc. 63-10, at para. 4). The proof of service was filed by the process server on August 3, 2010. (Doc. 57). The following day, Plaintiffs’ counsel ran another Smartlinx™ report, which continued to show the Service Address as Defendant’s current address and that

¹ Defendant’s contention that the amended complaint constituted an entirely new action is without merit. The Court has already determined, correctly, that Plaintiffs’ June 28, 2010 filing was an amended complaint that merely substituted Defendant Kimberly Frawley for Doe Defendant 3. (July 7, 2010 Docket Entry.) Indeed, Exhibit A to the original complaint (Doc. 1) listed only five plaintiffs as asserting claims against Doe 3, and these same five plaintiffs are identified in the Amended Complaint filed against Defendant.

Defendant continued to have her car registered at the Service Address. (A copy of the August 4, 2010 Smartlinx™ report is attached hereto as Exhibit D.)

Additionally, Plaintiffs' counsel conducted research to attempt to locate an alternate address for Defendant, but all information showed Defendant's address as the Service Address. As part of this process, Plaintiffs' counsel emailed Defendant's attorney stating that she believed service was proper but asking Defendant's counsel, if he disagreed, to either accept service of process or provide Defendant's current address. (Doc. 63-6). Defendant's counsel refused to either accept service of process or provide Defendant's current address, stating that, he would "not (absent court order) provide . . . her present address." (Doc. 63-7). Defendant answered the Complaint on August 10, 2010 and then filed her motion to dismiss on November 15, 2010. (Docs. 58, 63).

III. ARGUMENT

A. Defendant Has Been Properly Served And There Is No Basis For Dismissing Plaintiffs' Amended Complaint.

1. Defendant was properly served under NY CPLR § 308.

Service is effective under NY CPLR § 308(4) by affixing the summons to the door of either the dwelling place or usual place of abode and then mailing the summons to defendant at her last known residence. NY CPLR 308(4). Here, Defendant does not contest that Plaintiffs mailed the summons and complaint to Defendant's last known address and this element is not in dispute. Instead, Defendant claims that, because she had signed a lease for an apartment in Ohio one month before service, the New York Service Address was not her dwelling place or usual place of abode on the date of service. For the reasons set forth below, Defendant is wrong.

The Second Circuit has emphasized that "in a highly mobile and affluent society, it is unrealistic to interpret Rule 4(d)(1) so that the person to be served has only one dwelling house

or usual place of abode at which process may be left.” *Nat’l Dev. Co. v. Triad Holding Corp.*, 930 F.2d 253, 257 (2d Cir. 1991); *see also Jaffe and Asher v. Van Brunt*, 158 F.R.D. 278, 280 (S.D.N.Y. 1994) (stating “[o]ur highly mobile and affluent society has relegated to history the days when an individual had but a single residence”). Thus, when assessing whether a location constitutes a dwelling house or usual place of abode, “the rule should be liberally construed so as to effectuate service at that location” where objective facts point towards a location constituting a dwelling house or usual place of abode. *Capitol Life Ins. Co. v. Rosen*, 69 F.R.D. 83, 88 (E.D. Pa. 1975). Courts tend to interpret the rule broadly in order to enforce a principle of fairness: “service of process is not intended to be a game of hide and seek or cat and mouse.” *Ali v. Mid-Atlantic Settlement Servs., Inc.*, 223 F.R.D. 32, 36 (D.D.C. 2006). Furthermore, courts view service of process fundamentally as a means of “providing a likelihood of bringing actual notice to the intended recipient.” *Id.*

Courts have also long held that a college student may be served with a complaint at the residence of her parents during the time the student is away at school. *See, e.g., Hubbard v. Brinton*, 26 F.R.D. 564, 565 (E.D. Pa. 1961) (holding that a “usual place of abode” for purposes of service of process may be a college student’s permanent home address while the student is away at school); *see also Carillo v. Hagerty*, 2006 U.S. Dist. LEXIS 52377 at *5 (D. Conn. 2006) (finding that a student at Amherst College could be served at his parents’ home in New York); *Ali*, 223 F.R.D. at 37 (allowing service of process at a parental home in Maryland for a student attending law school at the University of Pennsylvania). As the Second Circuit explained in *Grammenos v. Lemos*, 457 F.2d 1067, 1070 (2d Cir. N.Y. 1972), “[t]he standards set in Rule 4(d) for service on individuals and corporations are to be liberally construed, to further the purpose of finding personal jurisdiction in cases in which the party has received

actual notice.” “Deficiencies in the method of service are harmless error under Fed.R.Civ.P. 61 when the party asserting deficient service has actual knowledge of the action and no prejudice results from the deficiency.” *St. John Rennalls v. County of Westchester*, 159 F.R.D. 418, 420 (S.D.N.Y. 1994).

Here, it is not disputed that Defendant was a student when she was served on July 20, 2010. (Doc. 63-8 at ¶5). Nor is it disputed that Plaintiffs’ multiple investigations showed the Service Address as Defendant’s address. The Service Address was Defendant’s permanent address that she listed with SUNY Albany. (See SUNY Albany subpoena response, Ex. B). Defendant registered her car at the Service Address and a postal trace showed that Defendant continued to receive mail at the Service Address. (Exs. C, D and Doc. 57). In short, all of the objective evidence shows that Defendant’s permanent address and her “dwelling place or usual place of abode” on July 20, 2010 was the Service Address in New York. Thus, service was proper under NY CPLR § 308.

The two cases cited by Defendant to support her argument to the contrary simply do not apply here. In *Tokio Marine v. Canter*, 2009 U.S. Dist. LEXIS 70347 (S.D.N.Y. Aug. 11, 2009), the Court found that service of process was defective as to a medical student who had moved to Mexico for medical school one month earlier because the plaintiffs in that case had “not submitted any evidence to support their contention that Adam Canter’s actual dwelling place of abode at the time of service was his parent’s apartment in New York.” *Id.* at *29. And the other case cited by Defendant, *Agarwal v. Flushing Hospital & Medical Center*, 496 N.Y.S.2d 238 (N.Y. App. Div. 2d Dep’t 1985), did not even involve a student. Rather, in a one paragraph order, the Court held plaintiff failed to establish that he had properly served defendant because

the doctor had moved across the country and there was no attempt to serve defendant at her place of employment or actual dwelling place. *Id.* at 239.

Because Defendant has been properly served, her motion should be denied.

2. Alternatively, should the Court find service of process deficient, Plaintiffs should be given leave to serve Defendant under Rule 4(m).

Rule 4(m) of the Federal Rules of Civil Procedure provides for an extension of time in lieu of dismissal whenever good cause exists for the extension. Fed. R. Civ. P. 4(m) (if “plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period.”). “If the plaintiff shows ‘good cause for the failure’ to serve, the district court is required to grant an appropriate extension of time in which to serve. District courts also have discretion to enlarge the 120-day period even in the absence of good cause.” *Murray v. Pataki*, 378 Fed. Appx. 50, 52 (2d Cir. N.Y. 2010). To demonstrate good cause, a plaintiff may show that it made “a reasonable and diligent effort to effect service.” *Habib v. GMC*, 15 F.3d 72, 74 (6th Cir. Ohio 1994). See *In re Sheehan*, 253 F.3d 507, 512 (9th Cir. 2001) (“[A] plaintiff may be required to show the following factors in order to bring an excuse to the level of good cause: (a) the party to be served received actual notice of the lawsuit; (b) the defendant would suffer no prejudice, and (c) plaintiff would be severely prejudiced if his complaint were dismissed.”).

Here, there is ample good cause for a Rule 4(m) service extension. Plaintiffs have diligently prosecuted this action from its inception. Plaintiffs first sought to learn Defendant’s identity and contact information through the subpoena process. Plaintiffs then defended their subpoena before the Second Circuit, and won. And, after finally learning Defendant’s identity, Plaintiffs conducted multiple searches and investigations in an effort to serve Defendant and move this case forward. With Defendant continuing to hide from Plaintiffs, Plaintiffs believed, in good faith and based on substantial objective proof, that service was proper under NY CPLR

§ 308. If the Court finds that service was somehow defective, these circumstances constitute good cause for extending the Rule 4(m) deadline so that this case can finally move forward to the merits. *See Habib*, 15 F.3d at 75.²

In addition to the foregoing, district courts may also “exercise their discretion to grant extensions under Rule 4(m) absent a showing of good cause.” *Zapata v. City of New York*, 502 F.3d 192, 193 (2d Cir. N.Y. 2007). Courts consider the following factors to determine whether to grant an extension without a showing of good cause:

- (1) whether the applicable statute of limitations would bar the refiled action;
- (2) whether the defendant had actual notice of the claims asserted in the complaint;
- (3) whether the defendant had attempted to conceal the defect in service; and
- (4) whether the defendant would be prejudiced by granting plaintiff’s request for relief from the provision.

Kalra v. City of New York, 2009 U.S. Dist. LEXIS 28857, *3 (S.D.N.Y. Mar. 31, 2009).

In cases where the statute of limitations has run, this factor weighs strongly in favor of extending the Rule 4(m) deadline. *Beauvoir v. U.S. Secret Serv.*, 234 F.R.D. 55, 58 (E.D.N.Y. 2006). “The rationale for this principle is that dismissal under these circumstances would extinguish potentially meritorious claims without there being an opportunity to have them adjudicated on the merits.” *AIG Managed Mkt. Neutral Fund v. Askin Capital Mgmt., L.P.*, 197 F.R.D. 104, 109-10 (S.D.N.Y. 2000); *Soehl v. Dover Hospitality Serv.*, 2010 U.S. Dist. LEXIS 103156, *11 (E.D.N.Y. Aug. 23, 2010). “Indeed, this factor alone may be sufficient to justify extending the time for service.” *Beauvoir*, 234 F.R.D. at 58.

² In *Tokio Marine*, 2009 U.S. Dist. LEXIS 70349, a case that Defendant relies on, the Court stayed the dismissal for thirty days to “give plaintiffs the opportunity to properly effectuate service.” *Id.* at *30.

Here, it is not disputed that Defendant has had actual notice of the claims against her for more than two years now, and also received actual copies of the summons and complaint. (*See* Doc. 63-11 at p. 4; 63-10, Declaration at Johnna Westine at para. 4). Nor can Defendant claim that extending the Rule 4(m) deadline would prejudice Defendant in any way. On the contrary, extending the deadline would allow Plaintiffs finally to pursue their claims against Defendant on the merits. And, to the extent the Court were to accept Defendant's argument regarding the statute of limitations, which it should not for the reasons discussed below, this would weigh strongly in favor of extending the Rule 4(m) deadline. Thus, this case warrants an extension of the service deadline even without a finding of good cause.

3. At worst, there are questions of fact regarding whether service was proper and Plaintiffs should be entitled to conduct discovery regarding Defendant's permanent address at the time of service.

Finally, to the extent the Court finds both that service may not have been proper and that the service deadline should not be extended, then Plaintiffs should be entitled to conduct limited discovery on the issue of service. In *Tavoulareas v. Comnas*, 1981 U.S. Dist. LEXIS 10291 (S.D.N.Y. Jan. 8, 1981), the Court allowed limited discovery in this exact situation. Defendant filed a motion to dismiss on the basis that the apartment where defendant was served by substitute service did not constitute his dwelling house or usual place of abode. The Court allowed discovery into the four years prior to service, and including such information as car registrations, redacted income tax returns, and other documents concerning Defendant's address. *Id.* at *4.

Here, at a minimum, Plaintiffs should be allowed to depose Defendant and her mother, Johnna Westine, and serve subpoenas as necessary to determine Defendant's dwelling place or usual place of abode. This would include obtaining Defendant's redacted tax records, and also

Johnna Westine's redacted tax records to determine if she listed Defendant as a dependent, as well as information sufficient to determine whether Defendant's mother was paying for Defendant's school, insurance and/or was supporting her, how much time Defendant spent at the service address during 2010, whether Defendant returned to the service address during holidays from school, whether Defendant listed the service address as her permanent address with Lourdes College, and whether there were any other indicia that the service address was one of Defendant's dwelling places or usual places of abode. To the extent this Court believes both that there remain questions of fact regarding service of process and that a service extension cannot be provided, then Plaintiffs should be allowed this limited discovery.

IV. THE AMENDED COMPLAINT RELATES BACK TO THE ORIGINAL FILING.

Building on her meritless claim of improper service, Defendant next contends that the statute of limitations has run on Plaintiffs' claims while Defendant was appealing the denial of her motion to quash. Here again, Defendant is wrong for, at least, three reasons.

First, Plaintiffs filed this action on July 7, 2008, which is well within the three year statute of limitations. Plaintiffs discovered Defendant's infringement on April 12, 2007, and brought the claim one year later. Thus, Plaintiffs' claims were within the three year statute of limitations under the Copyright Act.

Second, Plaintiffs' amendment relates back. Defendant concedes that "[a]s a general rule, an amended complaint relates back to the filing of the original complaint, so that a statute of limitations which runs in the interim does not bar an amendment." (Motion at 10). However, she then argues that this is not the case when the amendment is to substitute a Doe for a named Defendant. All of Defendant's cases are inapposite because, here, it was Defendant herself that was the sole reason for the delay in amending. To allow Defendant to avoid liability for her

copyright infringement by seeking a stay of the Court's order denying her motion to quash and then filing an unmeritorious appeal would be a travesty of justice and create perverse incentives. Doe defendants would simply use every possible delay tactic, including filing frivolous motions, seeking repeated extensions of time, and noticing appeals to the highest possible court, with the sole intention of delaying discovery of the Doe's identity until after the statute of limitations has run. This cannot be the law.

The Supreme Court spoke on relation back on June 7, 2010 in *Krupski v. Costa Crociere S.A.*, 130 S. Ct. 2485, 2494 (2010), a case that resonates with the situation here. The Supreme Court, in allowing relation back, explained, "A prospective defendant who legitimately believed that the limitations period had passed without any attempt to sue him has a strong interest in repose. But repose would be a windfall for a prospective defendant who understood, or who should have understood, that he escaped suit during the limitations period only because the plaintiff misunderstood a crucial fact about his identity." The Court continued, "the question under Rule 15(c)(1)(C)(ii) is what the prospective defendant reasonably should have understood about the plaintiff's intent in filing the original complaint against the first defendant." The Court held that because the Defendant knew that it was the party intended to be sued, the amendment related back.

New York federal courts have applied *Krupski* to relation back in the Doe context, specifically rejecting the line of cases cited by Defendant. In *Bishop v. Best Buy, Co.*, 2010 U.S. Dist. LEXIS 110631 (S.D.N.Y. Oct. 13, 2010), the Court explained:

Krupski also disposes of the individual Best Buy Defendants' contention that Plaintiff's amendment naming them as Defendants does not relate back to the filing date of the original complaint. Plaintiff named various "John Doe" individual Best Buy Defendants in the original complaint, and amended the complaint to identify the individual Best Buy Defendants after the statute of limitations had run on most of Plaintiff's claims against them . . .

Under *Krupski*, . . . the “only question” is whether the individual Best Buy employees “knew or should have known that, absent some mistake, the action would have been brought” against them. 130 S.Ct, at 2494. Here, the individual employees plainly had notice. . . .

Id. at **11-13 (emphasis added). Similarly, in *Baez v. Jetblue Airways*, 2010 U.S. Dist. LEXIS 109895 (E.D.N.Y. Oct. 15, 2010), the Eastern District of New York analyzed *Krupski* in the context of a Doe relation back. The Court explained:

Under federal law, the “linchpin” of the relation back doctrine is notice to the defendant. “If the notice requirement is met . . . a complaint may be amended at any time to correct a formal defect such as a misnomer or misidentification,” including the omission of a defendant’s first or last name. A defendant need not have received formal notice in the form of a summons and complaint; “[i]t is sufficient that such notice occur through informal means.” The relevant inquiry is what the improperly named defendant “knew or should have known during the [relevant] period, not what the plaintiff knew or should have known at the time of filing her original complaint.”

Id. at **14-15 (emphasis added; internal citations omitted). In *Baez*, the Court held that there was insufficient evidence as to notice and ordered discovery on that limited issue. Here, the notice is indisputable, since Defendant herself has been actively litigating this case, as Doe 3, for the last two years.

Defendant’s arguments against relation back have no merit. Every case cited by Defendant, except one, is pre-*Krupski* and do not involve cases where the Doe Defendants had actual notice of the claims against them. The only post-*Krupski* case cited by Defendant, *Hill v. New York Post*, 2010 U.S. Dist. LEXIS 76447, is a pro-se prisoner case involving *Bivens* claims and does not involve a Rule 15(a) amendment or relation back and is simply inapplicable.

Defendant’s argument that she should be allowed to file a motion to quash a subpoena seeking her identity, and appeal the denial of that motion, including seeking and obtaining a stay of the subpoena, and then use that ensuing delay as a sword to argue that the claims against her are time barred is both illogical and unjust. Defendant was fully aware that she was Doe 3 and

she actively participated in the litigation as Doe 3. Thus, she had notice of the claims against her and the Amended Complaint relates back under Federal Rule of Civil Procedure 15(a).

Third, Plaintiffs' claims accrued, at the earliest, on April 12, 2007. Defendant contends that the majority of the district courts in the Second Circuit have held that an infringement claim accrues when the infringement occurs (the "injury rule"), not when a copyright holder discovers the infringement (the "discovery rule"). Defendant has misstated the law in the Second Circuit. As the Southern District of New York stated in *Auscape Int'l v. Nat'l Geographic Soc'y*, the main case relied upon by Defendant:

The Supreme Court has not determined whether the injury or discovery rule governs accrual of copyright infringement claims. Nor has the Second Circuit ruled on the issue. Those district courts within this Circuit to have considered the issue are divided, *with the majority holding that accrual is governed by a discovery rule.*

409 F. Supp. 2d 235, 242-243 (S.D.N.Y. 2004) (emphasis provided). As the Third Circuit explained in *William A. Graham Co. v. Haughey*, 568 F.3d 425 (3d Cir. Pa. 2009), every Circuit to have ruled on this question has held that the discovery rule applies to claims brought under the Copyright Act and distinguished *Auscape* as a "single district court decision." Because the Second Circuit has not decided the accrual standard, for this case and the unusual facts presented, the Court should consider any statute of limitations question under the discovery rule in line with the majority of district courts in the Second Circuit.

V. PLAINTIFFS' CLAIMS WERE EQUITABLY TOLLED DURING DEFENDANT'S APPEAL AND STAY.

First, the Court does not need to reach this issue. Assuming the Court finds that the Amended Complaint relates back to the filing of the original complaint, the finding of a stay is unnecessary and irrelevant. However, if the Court finds that there is no relation back, the Court should find that there was an equitable stay during Defendant's appeal to the Second Circuit. Contrary to Defendant's contention, the stay of the subpoena by the Second Circuit did toll the statute of limitations. As the Court explained in *Javier H. v. Garcia-Botello*, 239 F.R.D. 342, 347 (W.D.N.Y. 2006):

[T]he Court stayed discovery from September 12, 2003 through June 2, 2005. Dkt. ## 67, 74. **The statute of limitations was equitably tolled during the stay of discovery.** *Cole v. Miraflor*, 2001 U.S. Dist. LEXIS 1681, No. 99 CIV 977, 2001 WL 138765 (S.D.N.Y. Feb. 19, 2001) ; see *Selph v. Nelson, Reabe & Snyder, Inc.*, 966 F.2d 411, 413 (8th Cir. 1992) ("A stay tolls the statute of limitations . . ."), *cert. denied*, 506 U.S. 1000, 113 S. Ct. 603, 121 L. Ed. 2d 539 (1992).

Id. at 347. Here, as it was Defendant who sought the stay, and appealed the denial of her motion to quash, an equitable stay is appropriate in this case. And, if the Court finds an equitable stay during the year in which the Second Circuit stayed the subpoena response, Plaintiffs amended their complaint within the statutory limitations period.

Defendant's argument that Plaintiffs could have done *something* else to discover Defendant's identity is facially flawed. As Defendant well knows, SUNY Albany was the only one who could identify Doe 3 because it was Defendant's ISP and, as such, it was the only entity that maintained the IP logs matching the IP address being used to infringe Plaintiffs' copyrights with their user's computer hardware. See Memorandum of Law Supporting Plaintiffs' Motion for Expedited Discovery, Doc. 4-3, at 3. Contrary to Defendant's bald allegations, Plaintiffs were, in fact, prevented from pursuing every possible effort to identify Defendant, because

Defendant moved to quash and then obtained a stay of the very subpoena that would provide, and eventually did provide, her identity. As such, and in accordance with *Garcia-Botello*, the statute of limitations should be equitably tolled during Defendant's appeal and stay.

VI. CONCLUSION

Defendant's antics in attempting to avoid the merits of Plaintiffs' claims should not be countenanced. Defendant was the sole reason for the delay in obtaining her name and amending the Complaint. Defendant filed a motion to quash and then unsuccessfully appealed the denial of that Motion to the Second Circuit. Defendant has been actively litigating this case for over two years. Moreover, her attempts to avoid service of process fail, as she was properly served at her "dwelling place and usual place of abode." As such, Defendant's Motion to Dismiss should be denied and discovery should immediately proceed.

Dated: November 29, 2010

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 29, 2010, a copy of the foregoing Plaintiffs' Opposition to Motion to Dismiss Amended Complaint was served upon the Defendant via United States Mail as follows:

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Attorney for Defendant

/s/ _____
Matthew J. Oppenheim (*pro hac vice*)