UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

ELEKTRA ENTERTAINMENT GROUP INC. et al	**)**	
Plaintiffs	**)**	**Case No. 1:08 CV 444 SSB**
	)	**Judge Beckwith**
V.		
	)	**Magistrate Judge Black.**
JOHN DOES 1-6.		
Defendants	**)**	

RESPONSE OF DAVID LICATA TO PLAINTIFFS' MOTION FOR EXPEDITED DISCOVERY

Comes now David Licata identified in plaintiffs' filings as a proposed target of expedited discovery and moves the court for orders:

(1) consolidating the within action with Case No. 2007 CV 0569 HJW

(2) reassigning this case to Senior Judge Herman J. Weber

(3) overruling plaintiffs' motion for expedited discovery

(4) dismissing this complaint as to him due to plaintiffs' failure to secure service within 120 days of the filing of this action.

This request is supported by the annexed memorandum and exhibits. A draft order is attached.

/S/ Albert T. Brown

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MEMORANDUM

I. Introduction

As is disclosed in plaintiffs' civil cover sheet and the motions before the court, this action is related to Case No. C-1:07-cv-569, presently assigned to Senior Herman J. Weber.[1] In that case, Judge Weber has scheduled oral argument on Defendant David Licata's Objections to the Memorandum and Opinion of the Magistrate Judge (Doc. 28)[2] on February 19, 2009. In those proceedings Defendant has objected to the overruling of his motion to dismiss that case with prejudice and the granting of plaintiffs' motion to dismiss without prejudice.

In this case, David Licata, the sole defendant in Case 569, is identified as a person from whom expedited discovery is sought in an effort to show cause why this action should not be dismissed. The request for expedited discovery should be denied. If Mr. Licata has been sued as a John Doe, the claim against him should be dismissed.

II. Mr. Licata Fully Responded to the Discovery Requested in Case 569

The proceedings before Senior Judge Weber can be summarized as follows (all document references are to documents filed in that case.)

Defendant, a parent and high school teacher, first became aware of the existence of a claim of copyright infringement in February 2007. (Doc. 14-1, ¶17). At that time, he was advised that on June 29, 2005, or twenty months previously, someone had used his America On Line (AOL) Internet Protocol (IP) address to download and/or share sound recordings.

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[1] Hereafter referred to as Case 569

[2] Case 569 - Doc. 33

Over two years after the alleged infringement took place, that lawsuit was filed on July 24, 2007, alleging that that:

> "Defendant, without the permission or consent of Plaintiffs, has used and continues to use, an online media distribution system to download the Copyrighted Recordings, to distribute the Copyrighted Recordings to the public, and/or to make the Copyrighted Recordings available for distribution to others". (Doc. 1, ¶12)

Through counsel, defendant informally advised plaintiffs, at the time that suit was filed, that he had not downloaded or shared any sound recordings, and that he did not know who had used his address over two years ago to download or share recordings. Rather than accepting Mr. Licata's declarations that he was not responsible and dismissing the lawsuit at that point, Plaintiffs required him to identify "the direct infringer" or settle the case by the payment of money (Doc. 19-6). This was a task that the defendant was unable to perform.

Defendant filed an answer to that lawsuit. (Doc. 7)

Defendant responded to plaintiffs' demand for settlement on September 20, 2007.

> "…he in fact has no knowledge as to who the actual infringer may be and is unable to testify as to the identity of any person who downloaded or uploaded files.
>
> He is therefore unable to identify the individuals he might believe to be responsible for the conduct you allege. He is not unwilling to do so, he is unable to do so. He is not required to speculate as to who may have done so."
> (Letter to Brian J. O'Connell, September 20, 2007 Doc. 19-7).(Exhibit A attached)

Plaintiffs' Rule 26(f) disclosures and discovery requests disclosed that the alleged infringement was accomplished through the use of "LimeWire" peer-to-peer or P2P software which resulted in the creation of a "shared folder" on Defendant's computer.

That computer had malfunctioned and had been discarded before defendant learned of the existence of plaintiffs' claim.[3]

After Rule 26(f) disclosures, defendant submitted a Rule 68 Settlement Offer which expired. Six days after the Preliminary Pretrial conference, Defendant filed his motion to dismiss (Doc-14) on January 21, 2008, appending his declaration (Doc. 14-1) (Exhibit B attached hereto) that:

> he had "no personal involvement in the distribution, or reproduction of the recordings at issue." (¶6)
>
> "I am unable to state with any degree of certainty the identity of any persons who had access to or used my 'America On Line Account' on the date of the alleged infringement."(¶8)
>
> "I have never had an account with LimeWire."(¶8)

None of his statements has been controverted by material meeting the standards of Rule 56.

In February, 2008 defendant timely served responses to plaintiffs' discovery which reiterated that Mr. Licata did not install the LimeWire peer to peer file sharing software which was allegedly used to download or share the music. And, that he did not use the that LimeWire software to download or share music. Copies of the responses to that discovery are appended to this motion. (Exhibit C Interrogatories (26), Exhibit D Requests for Admission (30), Exhibit E Requests for Production of Documents (17).

That discovery identifies the members of his household by name and birth date. They include his spouse; and, five children who in 2005 ranged from 17 to 6. (See

[3] Plaintiffs argued in Case No. 569 that they had notified Mr. Licata of the pendency of their claim in October, 2005. The unauthenticated document purportedly sent to Mr. Licata at that time was addressed to an address from which the family had moved by a law firm other than current counsel. Mr. Licata has declared that he did not receive it.

Exhibit C –Response to Interrogatory #6) Since August 2007, Mr. Licata has stated that his children and all of their friends and acquaintances had complete and unrestricted access to the computer which he then owned. (Exhibit A, Exhibit B, Exhibit C - Defendant's response to Interrogatory No. 7. Response to Interrogatory 13 (Document 19-8, in Case 569) And, that he did not exercise any direction or control over the use of the computer by his children or their friends..

No suggestion was made at any time in the course of Case 569 of the need or request to join additional parties even thought the deadline for appropriate amendment for the pleadings had not passed when Mr. Licata identified the other members of his household on February 20, 2008.[4] All except Ms. Licata were minors at the time of the alleged infringement. Counsel for defendant did advise counsel for plaintiffs that he had been advised by independent counsel that there was a potential Fifth Amendment issue if discovery was sought from the members of the household. However, plaintiffs' counsel took no step to propose a method by which unprivileged discovery could go forward.

Counsel for plaintiffs' had threatened to take depositions of all members of the Licata household as early as September 6, 2007, in the event that Mr. Licata was unable to identify "the actual infringers." In fifteen months they have not done so.

Plaintiffs' raised no formal or informal objection to the adequacy of the served discovery responses. After service by Mr. Licata of the discovery responses no further discovery was requested of him. The court's discovery in Case 569 cut off was June, 6, 2008.[5]

[4] The scheduling Order in Case 569 established March 1, 2008 as the Cut-off for amendment of the pleadings (Case No. 569 -Doc. 12)
[5] Case No. 569 Scheduling Order 1/16/2008 Doc. 12

After plaintiffs had briefed and served their 88 page opposition to Licata's Motion to Dismiss on March 3, 2008, and defendant had submitted its reply memorandum and exhibits, plaintiff conveyed some willingness to discuss dismissal of that case with prejudice but, without consideration of Mr. Licata's counsel fees. However, counsel insisted upon reserving the right to pursue Mr. Licata's spouse and five children. That proposal was conveyed within 48 hours of the publication by the Sixth Circuit of its opinion in *Bridgeport Music vs. WB Records Inc., et al.*[6] That case holds that an award of attorney fees to a successful defendant in a copyright infringement case should be the rule rather than the exception.

Plaintiffs next sought leave to dismiss Case 569 without prejudice[7] and that motion was opposed. The Report and Recommendation regarding the motions for dismissal is now under review by Judge Weber. That Memorandum and Order (Doc 28) was issued on August 25, 2008 or sixty days before plaintiffs were required to complete service in this case. No subsequent action was taken until issuance of the show cause order in this case on November 10, 2008 (Doc. 6).

III. Expedited Discovery is Duplicative and Will Not Demonstrate Good Cause for the Failure to Timely File this Time Barred Action

In the instant case, plaintiffs now seek to conduct expedited discovery of David Licata who had responded timely, fully and completely to the extent of his knowledge in February 2008, to all discovery initiated by the plaintiff in Case 569. The requested discovery appears to duplicate that which has been done in Case No. 569 or to be discovery that could have been done but was never requested.

[6] 520 F.3d 2008 (3/25/2008)
[7] Case No. 569 Doc. 19

The full text of Mr. Licata's responses to plaintiffs' twenty-six pages of discovery which were served in February, 2008, plainly and simply disclose that he did not know who was operating his computer on the night of June 29, 2005, when plaintiffs' agents allegedly observed someone using his computer in a manner which allegedly interfered with plaintiffs' copyright. This discovery was served on plaintiffs' counsel 10 months ago; ninety days before the discovery cut-off in Case 569.

The proposed order tendered also requires Mr. Licata to perform an impossible act, to wit: production for inspection of "any computer connected to the Internet through David Licata's account through AOL between January 2005 and January 2006." He has repeatedly advised counsel for plaintiffs and formally declared that the only computer which he owned in June 2005, failed and had been discarded before he became aware of the existence of this claim.[8]

IV. Plaintiff's Have Failed To Demonstrate Good Cause For The Failure To Timely Secure Service

This case was filed June 27, 2008, or two days before the third anniversary of the allegedly infringing conduct and expiration of the statue of limitations.

Plaintiffs have been aware of the minority status of several of the residents of the Licata household since September 2007. Plaintiffs have been aware of the names and dates of birth of the residents of the household since February 2008. No waiver of service was ever requested with respect to any potential adult defendant since summons was issued in this case on June 27, 2008, (Doc. 2).

[8] Responses to Request for Production ## 2, 4, 16,17 and General Objection served February 21, 2008

No step has been taken from then until now to cause the appointment of guardians ad-litem for the three minor residents of the household. They are now fifteen, twelve and nine. Appointment of a guardian ad litem is required under Federal Civil Rule 17.

> "The court must appoint a guardian ad litem –or issue another appropriate order -- to protect a minor or incompetent person who is unrepresented in an action."

Plaintiffs counsel has made some reference to, "withholding this motion in hopes of resolving this matter without additional discovery or motions practice but, to date, have been unable to reach a settlement with the original Defendant and his family."[9] Counsel's statement is not completely accurate. Counsel for plaintiffs issued a settlement proposal at 5:20 p.m. on August 15 (a Friday) when counsel was in possession of actual knowledge that counsel for Mr. Licata would be unable to respond effectively to the proposal due to the scheduling of surgery (a total knee replacement) on August 18, 2008.(Exhibit F)

The time limited proposal conveyed in such a fashion, was later withdrawn before its expiration by counsel for the plaintiffs, without notice, on August 25, 2008, within several minutes after the posting on ECF of the Magistrate Judge's report recommending the granting of plaintiffs' motion to dismiss Case No. 569 without prejudice. (Exhibit G). At the time the offer was withdrawn counsel for Mr. Licata was at home in recuperation from his surgery. At the time plaintiff unilaterally terminated settlement discussions, over two months remained during which time, plaintiff could have attempted to pursue appropriate service of summons and appointment of the required guardians-ad-litem in this case.

[9] Plaintiff's Response to Order to Show Cause, (Doc. 7. p.1)

To put it simply and plainly the maintenance of an original claim against each of the defendants Doe is time barred. Plaintiffs have failed to timely obtain service of process upon parties whose identity they knew in February, 2008.

In short, plaintiff has been unduly dilatory and the instant motions and proceedings, serve no purpose but to inflict additional counsel fees upon Mr. Licata for the purpose of forcing him into some form of settlement for conduct for which he bears no legal responsibility.

Although, the order granting plaintiffs' leave to dismiss without prejudice recited that "most or all of the discovery completed would be useful in potential litigation between Plaintiffs and Defendant's family members."[10] Plaintiffs here seek an order requiring Mr. Licata to participate in unnecessary and duplicative discovery.

It has been a characteristic of this litigation and the numerous like cases instituted by these plaintiffs and its associates that the Federal Court system has been used repeatedly to hammer settlements out of unrepresented individuals based upon questionable legal theories.

> "the concern of this court is that in these lawsuits, potentially meritorious and legal and factual defenses are not being litigated, and instead, the federal judiciary is being used as a hammer by a small group of plaintiffs to pound settlements out of unrepresented defendants" (Order 3/2/2007 *Elektra Ent. Group et al. v. O'Brien –CV 06 5289 Central Dist. California-*)

Mr. Licata tenders the declaration served and filed in Case 569 by his expert witness. (Exhibit H) That declaration confirms that the identity of the individual operating the computer at IP address 175.158.149.24 on June 29, 2005 at 8:29 PM cannot be ascertained with reasonable technical certainty.

[10] Pg. 6 Memorandum Opinion and Order Aug. 25, 2008, Doc. 28 Case No. 1:07-cv-569

In the very real sense, the computer at an IP address is not significantly different from the telephone connected to the telephone network.

Under similar circumstances, Judge Gertner of the Massachusetts District has overruled motions to conduct expedited discovery of John Doe defendants in a case involving the Boston University network.[11]

The Linares declaration appears to declare that a large number of files were contained in a shared folder accessible to the IP address. However, plaintiffs' assertion that the mere presence of files in a Lime Wire shared folder is "distributing" or making protected works "available," is contrary to the basic principles of copyright law and has been rejected in the only recording industry infringement case to go to a contested jury trial. In that case, the trial court entered an order on September 24, 2008, vacating a judgment for the plaintiffs in the amount of $222,000.00.[12] That order followed extensive briefing and argument by national counsel for these plaintiffs and *amici curiae* and was initiated by the court's own motion.

As discussed extensively in the order in the *Thomas* case the mere presence of copyrighted music in a shared folder does not amount to a violation of plaintiffs' right of distribution. The requirement of the principal Eighth Circuit authority *National Car Rental System, Inc. v. Computer Associates Int'l, Inc*[13] that actual dissemination by the defendant of copies or phonorecords was a necessary predicate of liability as a distributor

[11] Order 11/24/2008. London-Sire Records Inc., et al v. Does 1-1 (U.S.D.C. Mass. 1:04-cv-12434 (Exhibit I attached)
[12] *Capitol Records, Inc. v. Thomas,* (Memorandum of Law and Order, September 24, 2008, Civil File 06-1497, U.S.D. C. Minn. – attached as Exhibit 1-J)
[13] 991 F.2d 426, 434 (8th Cir. 1993)

was analyzed as being consistent with the only reasonable interpretation of 17 USC § 106(3).[14]

Plaintiffs' submissions in Case 569 do not establish any instance in which Mr. Licata or any user of his computer disseminated, or distributed or delivered any of their protected recordings. Mr. Licata denies his participation in or knowledge of the installation or use of the peer to peer software by which plaintiffs' complain that the recordings were "distributed" or "made available." But, that complaint is insufficient at law to establish liability. [15]

> -"Merely making a copy available does not constitute distribution....The statute provides copyright holders with the exclusive right to distribute 'copies' of their works to the public by sale or other transfer of ownership, or by rental, lease, or lending." 17 U.S.C. 106(3). "Unless a copy of the work changes hands in one of the designated ways, a 'distribution' under ...106(3) has not taken place."
> -Hon. Neil V. Wake, District Judge, District of Arizona, April 29, 2008, *Atlantic v. Howell*

The inability to respond accurately to a question is not the blanket denial and a refusal to otherwise discuss this matter as claimed by the plaintiffs.

Nor, was defendant obligated to provide any further explanation to respond to the claims that were made.

CONCLUSION

It is elementary that identification of the telephone number from which a call is made, does not without more, identify the caller. In this case, it does not appear that more information is available given that plaintiffs waited for over two years to sue the

[14] *Capitol Records, Inc. v. Thomas*, Exhibit J at p. 33
[15] 4 William F. Patry, Patry on Copyright § 13:9 (2007); see also id. N. 10 (collecting cases); Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146, 1162 (9th Cir. 2007)(affirming the district court's finding "that distribution requires an 'actual dissemination' of a copy")". *Atlantic v. Brennan*, 534 F. Supp.2d 278 (D.C. Conn. 2008). *Also*, 2 Nimmer on Copyright § 8.11[A], at 8-124.1.

owner of the telephone and a further year and two months to seek discovery from other residents of the household where the telephone was located.

The motion for expedited discovery should be overruled. It is submitted that plaintiffs have failed to demonstrate "good cause" for an extension of the time for service a proposed form of order is attached as Exhibit (K).

__/S/ Albert T. Brown Jr.
Albert T. Brown, Jr. 0015355
Attorney for David Licata

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent by ordinary mail and ECF to Brian O'Connell, Attorney for Plaintiffs, 255 E. Fifth St, Suite 1900, Cincinanti, OH 45202, on this _17th day of December, 2008.

/S/ Albert T. Brown Jr_
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