

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

LOUD RECORDS, LLC, et al.,

No. 04 CV 9881 (RWS)

Plaintiffs,

-against-

DOES 1-74,

ELECTRONICALLY FILED

Defendants.

-----X

**REPLY MEMORANDUM OF LAW OF
DEFENDANT “JANE DOE” IN SUPPORT OF
HER MOTION TO QUASH THE SUBPOENA**

Preliminary Statement

Defendant “Jane Doe”, by her attorneys Beldock Levine & Hoffman LLP, respectfully submits this reply memorandum of law in support of her motion for an Order, pursuant to Rule 45(c)(3) of the Federal Rules of Civil Procedure, quashing the subpoena issued by plaintiffs’ attorneys to CSC Holdings, Inc. (“Cablevision”) to the extent that it seeks information identifying her as the person purportedly associated with Internet Protocol (“IP”) address 24.44.206.181 @ 2004-01-26 04:10:07 EDT.

ARGUMENT

POINT I

THE SUBPOENA MUST BE QUASHED BECAUSE THE UNDERLYING COMPLAINT IS SUBJECT TO DISMISSAL

In our moving memorandum of law, we showed that a subpoena seeking the identity of a Jane Doe defendant must be quashed where the underlying complaint is subject to dismissal. Columbia Insurance Co. v. Seescandy.com, 185 F.R.D. 573, 579 (N.D.Cal.1999); Sony Music Entertainment Inc. v. Does 1-40, 326 F.Supp.2d 556, 564-65 (S.D.N.Y. 2004). See also Eubanks v. Shaklee Corp., 89 Civ. 8864, 1990 WL 186579 at *1 (N.D.Ill. Oct 30, 1990) (granting motion to quash subpoenas where underlying complaint failed to state a claim) and Dendrite International, Inc. v. Doe No. 3, 342 N.J.Super. 134, 141, 775 A.2d 756, 760 (N.J. App. 2001) (refusing to enforce subpoena where underlying complaint was subject to dismissal for failure to state a claim upon which relief can be granted), cited in Highfields Capital Management L.P. v. Doe, ___ F.Supp.2d ___, 2005 WL 2065142 (N.D. Cal. Jan. 18, 2005). Plaintiffs' opposing memorandum does not cite any legal authority to the contrary.¹

¹Instead, plaintiffs argue that granting the motion would mean that "a full-blown trial would be required every time a party sought to resist discovery." Opposing Memorandum of Law, p. 6. This is a frivolous argument. The instant motion does not require any factfinding since the question of the Complaint's sufficiency and its ability to withstand a dismissal motion is a legal issue for the Court to decide. Nor would this kind of motion be useful or necessary outside of the present context of an *unidentified* and *unserved* Jane Doe defendant. A defendant who was actually named and served would have no reason to challenge a subpoena on the ground that the complaint was subject to dismissal; such a defendant would simply make a motion to dismiss that complaint.

POINT II

THE UNDERLYING COMPLAINT DOES NOT PLEAD ANY SPECIFIC ACTS OF COPYRIGHT INFRINGEMENT

Plaintiffs concede that a complaint alleging copyright infringement case must “plead with specificity the acts by which a defendant has committed copyright infringement.” Marvullo v. Gruner & Jahr, 105 F.Supp.2d 225, 230 (S.D.N.Y. 2000); DiMaggio v. International Sports Ltd., 97 Civ. 7767, 1998 WL 549690 at *2 (S.D.N.Y. Aug. 31, 1998); Stampone v. Stahl, 05 Civ. 1921, 2005 WL 1694073 at *2 (D.N.J. July 19, 2005) (dismissing copyright claim pursuant to Rule 12(b)(6) where complaint failed “to set out *particular* infringing acts *with some specificity*”) (italics added). In their opposing papers, plaintiffs contend that their Complaint satisfies this specificity requirement. See Opposing Memorandum of Law, pp. 8-9. All the Complaint does, however, is allege in conclusory fashion and upon information and belief in a single paragraph that defendant used an online media distribution system to download and distribute certain copyrighted recordings.

Plaintiffs are *informed and believe* that each Defendant, without the permission or consent of Plaintiffs, has used, and continues to use, an online media distribution system to download, distribute to the public, and/or make available for distribution to others, certain of the Copyrighted Recordings.

Complaint, ¶ 23 (italics added). In cases where particularization in pleading is required, as here, factual allegations which are pleaded on information and belief must indicate the source of such information and the reason for such belief. Trans World Corp. v. Odyssey Partners, 561 F.Supp. 1315, 1323 (S.D.N.Y. 1983).

Generally, pleading on "information and belief" is appropriate. That general rule, however, is modified where more specific pleading requirements are imposed. In that situation, pleading upon information and belief is permissible so long as the allegations are accompanied by a statement of facts upon which the belief is founded.

Fountain v. Talley, 104 F.Supp.2d 1345, 1355 (M.D.Ala. 2000) (emphasis added) (granting motion to dismiss because critical element of claim was pleaded upon information and belief without alleging facts showing the basis for such belief).

The Complaint makes no attempt to set forth any specific evidentiary facts upon which plaintiffs' purported "information and belief" is based. By this silence, plaintiffs acknowledge that their omission of specific acts of copyright infringement was not merely procedural but substantive. In fact, they have no knowledge of any infringement.²

Plaintiff's opposing papers do not cure this fatal defect. The Opposing Memorandum of Law simply repeats that "[o]n information and belief, Defendant downloaded (copied) all or many of [the music files on her computer] without permission of the record company copyright owners." Opposing Memorandum, p. 3, n.1. Since the music files allegedly "detected in Defendant's shared folder" (Opposing Memorandum, p. 14, n.7) could just as well have been copied legally from compact discs, it is pure speculation for plaintiffs to claim – without setting forth a basis for their "information and belief" – that such files were illegally downloaded into that folder through the internet. Such unwarranted speculation cannot defeat a motion to dismiss. Harris v. New York State Dept. of Health, 202 F.Supp.2d 143, 175 (S.D.N.Y. 2002); Gmurzynska v. Hutton, 257 F.Supp.2d 621, 631 (S.D.N.Y. 2003). See also Yorktown Square Associates v. Union Dime Savings Bank, 79 A.D.2d 1040, 1041, 435 N.Y.S.2d 343, 344 (2d Dep't 1981) (mere speculation by plaintiff cannot defeat a motion to dismiss).

²In their opposing memorandum of law, plaintiffs assert that they logged into the P2P network and viewed certain music files that defendant was *offering* to other users. Opposing Memorandum, p. 3. Plaintiffs, however, do not claim that they observed any of these files *actually being downloaded or uploaded*. Nor do they allege any specific facts showing that actual downloading or uploading took place.

Similarly, the Complaint does not allege any specific acts of “distribution” of music files “to the public.” Instead, the Complaint merely alleges on information and belief, that defendant “has used, and continues to use, an online media distribution system ... to distribute to the public, and/or make available for distribution to others, certain of the Copyrighted Recordings.” Complaint, ¶ 23. This conclusory allegation does not set forth the requisite basis for such “information and belief, nor does it allege any specific instances of copies of such recordings, supposedly residing on defendant’s computer, actually being disseminated through the internet and actually received by members of the public.³

Plaintiffs attempt to buttress their conclusory allegations of downloading and uploading (which are legally insufficient for lack of specificity and for failure to disclose the basis for information and belief) with an allegation that defendant made certain music files *available* for downloading by others through an internet account. This latter allegation, while purportedly evidenced by a list of songs attached as Exhibit A to the Complaint,⁴ still fails to state a legally

³As noted above, plaintiffs allege that they logged into the P2P network and viewed certain music files that defendant was *offering* to other users. Opposing Memorandum, p. 3. Plaintiffs however do not, and cannot, claim that such alleged downloading by themselves constitutes distribution or dissemination “to the public.” U.S. Naval Institute v. Charter Communications, Inc., 936 F.2d 692, 695 (2d Cir. 1991) (“It is elementary that the lawful owner of a copyright is incapable of infringing a copyright interest that is owned by him”); RSO Records v. Peri, 79 Civ. 5098, 1980 WL 1164 at *3 (S.D.N.Y. Sep. 5, 1980) (complaint alleging that plaintiffs participated in reproduction and distribution of infringing copies failed to state valid infringement claim against defendants; “a copyright owner cannot infringe his own copyright”); Higgins v. Detroit Education Television Foundation, 4 F.Supp.2d 701, 705 (E.D.Mich. 1998) (“[a] plaintiff may not claim to have been damaged by reason of a defendant’s sale of alleged infringing copies if the copies were sold to plaintiff’s agent because such a sale prevents the distribution of such copies to the general public”).

⁴Plaintiffs admit that this exhibit is not on the ECF/Pacer system used for filing documents with the Court. Opposing Memorandum, p. 3, n.2. While plaintiffs attached to their opposing papers a copy of an e-mail purportedly evidencing the filing of this exhibit, they did not attach a copy of the exhibit itself. Plaintiffs thus have not satisfied their burden of making out “a concrete showing of a prima facie claim of copyright infringement.” Sony Music Entertainment, supra, 326 F.Supp.2d at 564-65.

viable claim of copyright infringement. See e.g., In re Napster, Inc., 377 F.Supp.2d 796, 802, 805 (N.D.Cal. May 31, 2005) (making copyrighted works *available* for downloading by others does not, by itself, violate the copyright owner's right of distribution since infringement requires actual dissemination of copies). Arista Records, Inc. v. MP3Board, Inc., 00 Civ. 4660, 2002 WL 1997918 at *4 (S.D.N.Y. Aug. 29, 2002) (posting on MP3Board website of links leading to infringing audio files does not establish unlawful dissemination of copies of such files to the public); Obolensky v. G.P. Putnam's Sons, 628 F.Supp. 1552, 1555-56 (S.D.N.Y.) (publisher did not infringe on copyright owner's right of distribution of copyrighted book by listing the book in a trade publication as belonging to publisher where publisher neither copied the book nor sold any copies of the book; "there is no violation of the right to vend copyrighted works ... where the defendant offers to sell copyrighted materials but does not consummate a sale"), aff'd, 795 F.2d 1005 (2d Cir. 1986); SBK Catalogue Partnership v. Orion Pictures Corp., 723 F.Supp. 1053, 1064 (D.N.J. 1989) (merely "authorizing" a third party to distribute copyrighted works without proof that the third party actually did so does not constitute copyright infringement); CACI Intern., Inc. v. Pentagen Technologies Intern., 93 Civ. 1631, 1994 WL 1752376 at *4 (E.D.Va. Jun. 16, 1994) (marketing of software package without actually distributing it does not constitute copyright infringement).

Plaintiffs argue, at pages 11-12 of their Opposing Memorandum, that this principle of copyright law is "irrelevant", yet it is they who (a) made the "making available" allegation in their Complaint, and (b) repeated it in their opposing papers, claiming that the alleged infringement "has been taking place for as long as the sound recordings have been *available* on Defendant's computer." Opposing Memorandum, p. 10, n.4 (emphasis added). Plaintiffs cannot have it both ways.

The case of Hotaling v. Church of Jesus Christ of Latter-Day Saints, 118 F.3d 199, 203 (4th Cir. 1997), cited by plaintiffs, is clearly distinguishable and lends no support to their claims against defendant. In Hotaling, the defendant did not simply list the copyrighted work in its library catalogue and make it available for distribution to the public. As plaintiffs acknowledge on page 5 of their opposing memorandum, the defendant also placed an unauthorized copy of the copyrighted work in its library collection. Here, on the other hand, the Complaint does not specify even *one* actual instance of unauthorized copying of plaintiffs' recordings.⁵

Plaintiffs' reliance on Carell v. Shubert Organization, Inc., 104 F.Supp.2d 236 (S.D.N.Y. 2000) is likewise misplaced. While a complaint need not plead "each individual infringement," a plaintiff cannot escape the requirement of pleading some actual act of infringement with specificity, something the Complaint here does not do. In contrast, the complaint in Carell satisfied this requirement by identifying certain copyrighted works (makeup designs created for the cast of the Broadway musical Cats) which were *actually* infringed and by identifying specific national and international stage productions, videos and commercial products in which these makeup designs were *actually* published and used. Carell, supra, 104 F.Supp.2d at 251.

Plaintiffs' citation to Elektra Entertainment Group Inc. v. Bryant, 03 Civ. 6381, 2004 WL 783123 (C.D. Cal. Feb. 13, 2004) is equally unavailing. That case, like so many other "downloading" cases brought by record companies against individuals, involved an application for a default judgment. Since the defendant defaulted, the complaint's conclusory allegations of "using

⁵The Court in In re Napster, Inc., supra, also distinguished the Hotaling case, finding it significant that the defendant in Hotaling "had made *actual, unauthorized copies* of the copyrighted genealogical material available to borrowers at its branch libraries." In re Napster, Inc., supra, __ F.Supp.2d at __, 2005 WL 1688374 at *6 (italics added).

the online media distribution system ‘Kazaa’ to distribute Plaintiffs’ copyrighted recordings to the public and/or to make the copyrighted works available for distribution to others” were simply accepted as fact and their legal sufficiency was not litigated.

Plaintiffs also rely on BMG Music et al. v. Conklin, Case No. H-05-1482. This case involved a pro se defendant who made a motion to dismiss but did not submit reply papers or even a brief. The United States District Court for the Southern District of Texas denied the motion in a one sentence order that made no attempt to explain the basis for its order. It goes without saying that this decision by the court in Houston is not controlling on this Court and – having been rendered without any explanation of the Court’s rationale, and without that Court’s having had the benefit of a full and balanced presentation of applicable legal authorities – is without persuasive authority.

Two other cases cited by plaintiffs, BMG Music v. Gonzalez, 03 C 6276, 2005 WL 106592 (N.D.Ill. Jan. 7, 2005) and Sony Music Corp. v. Scott, 03 Civ. 6886 (S.D.N.Y. Feb. 18, 2005) are also inapposite. In both of those cases, the courts granted the plaintiffs’ *summary judgment motions* based upon each defendant’s admission of copyright infringement. (In Scott, the pro se defendant denied liability but the court later deemed him to have admitted liability because he did not timely respond to a discovery request.) Unlike here, the legal sufficiency of the complaint was not at issue in either Gonzalez or Scott.

Since the Complaint fails to allege *any* specific acts of copyright infringement by defendant, the Complaint is subject to dismissal. Marvullo, supra, 105 F.Supp.2d at 230; Stampone, supra, 05 Civ. 1921, 2005 WL 1694073 at *2; DiMaggio, supra, 97 Civ. 7767, 1998 WL 549690 at *2 & n.3 (dismissing copyright claim for lack of specificity; complaint referred to “nebulous multiple images” and did not specify what specific images were infringed). The subpoena should

therefore be quashed. Columbia Insurance, *supra*, 185 F.R.D. at 579; Sony Music Entertainment, *supra*, 326 F.Supp.2d at 564-65; Eubanks, *supra*, 89 Civ. 8864, 1990 WL 186579 at *1; Dendrite International, *supra*, 342 N.J.Super. at 141, 775 A.2d at 760.

POINT III

THE COMPLAINT DOES NOT PLEAD THE TIME OF ANY ALLEGED INFRINGEMENT

The Complaint should also be dismissed because it does not allege “during what time” the alleged infringement took place. Marvullo, *supra*, 105 F.Supp.2d at 230; Brought to Life Music, Inc. v. MCA Records, Inc., 2003 WL 296561 at *1 (S.D.N.Y. Feb. 11, 2003); Plunket v. Doyle, 2001 WL 175252 at *4-6 (S.D.N.Y. Feb. 22, 2001). Plaintiffs concede that the complaints in these cases were dismissed because they “did not include any description of the time period during which the infringement took place.” Opposing Memorandum of Law, pp. 9-10. Here too, the Complaint does not mention any time period at all during which the alleged infringement by defendant took place. That is because plaintiffs do not know the time period, which is because they do not know of a single infringement that took place.

Incredibly, plaintiffs argue that the date on which the Complaint was filed – December 16, 2004 – should be “read into” the Complaint to “satisf[y] the requirement that the Complaint specify the time period” of the alleged infringement. Opposing Memorandum of Law, p. 13. This argument is, of course, frivolous.

Finally, plaintiffs claim that they satisfied the requirement of pleading the time of infringement by alleging a “continuing infringement” such as those found in Franklin Electronic Publishers v. Unisonic Prod. Corp., 763 F.Supp. 1 (S.D.N.Y. 1991), and Home & Nature Inc. v. Sherman Specialty Co., 322 F.Supp.2d 260 (E.D.N.Y. 2004). Opposing Memorandum of Law, pp.

13-14. This argument, however, suffers from the same pleading deficiencies described above, in that the allegation of continuing infringement in paragraph 23 of the Complaint is conclusorily pleaded upon information and belief without setting forth a factual basis for such information and belief. Since the Complaint does not allege even one instance of actual infringement, there is no basis for claiming that it sufficiently alleges a continuing one. Plaintiffs' attempt to hide behind a "continuing infringement" allegation, since they do not know of any infringements, is gamesmanship.

It is clear that the Complaint does not make out "a concrete showing of a prima facie claim of copyright infringement." Sony Music Entertainment Inc., supra, 326 F.Supp.2d at 564-65. Indeed, plaintiffs had no business filing the Complaint against defendant in the first place. Since the Complaint is subject to dismissal, the subpoena must be quashed accordingly.

CONCLUSION

The Court should grant the within motion in all respects.

Respectfully submitted,

BELDOCK LEVINE & HOFFMAN LLP
Attorneys for defendant "Jane Doe"

By: s/Morlan Ty Rogers
Morlan Ty Rogers (MR 3818)
99 Park Avenue
New York, NY 10016
(212) 490-0400

Of Counsel:
Ray Beckerman
Morlan Ty Rogers
Daniel A. Singer