

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ATLANTIC RECORDING CORPORATION, et al.,

No. 05 CV 9111 (LTS)(DFE)

Plaintiffs,

-against-

DOES 1-25,

AFFIDAVIT

Defendants.

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STATE OF NEW YORK)

) ss.:

COUNTY OF NEW YORK)

MORLAN TY ROGERS, being duly sworn, deposes and says:

1. I am a member of the bar of this Court and an associate of Beldock Levine & Hoffman LLP, attorneys for defendant “John Doe” a/k/a Doe No. 8, and respectfully submit this affidavit in support of his motion to vacate the Court’s October 27, 2005 *Ex Parte* Order which granted plaintiffs’ Application for Immediate Discovery.

2. This is an “action”¹ for copyright infringement against 25 Doe defendants, including movant, whose identities are unknown to Plaintiffs and who are referred to in the complaint by internet protocol (“IP”) addresses allegedly determined by plaintiffs’ investigators.

In the complaint, plaintiffs allege in conclusory fashion and upon information and belief:

¹This is one of dozens, if not hundreds, of “actions” brought by record companies for the *sole* purpose of obtaining *ex parte* discovery from internet service providers regarding the identity of multiple Doe defendants. Once such discovery has been obtained, the plaintiff record companies invariably discontinue the action and file separate lawsuits against the persons so identified.

that each Defendant, without 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 [owned by or licensed to Plaintiffs].

Complaint, ¶ 23 (emphasis added) (Exhibit “A” hereto).

3. On October 27, 2005, the Court granted an *ex parte* Order permitting plaintiffs to conduct immediate discovery by serving a Rule 45 subpoena on non-party internet service provider Mediacom Communications Corp. (“Mediacom”) seeking each Doe defendant’s name, address, telephone number, e-mail address, and Media Access Control addresses (the “*Ex Parte* Order”) (Exhibit “B” hereto).

4. Movant had no opportunity to oppose plaintiffs’ application, since it was *ex parte*.

5. Based on the *Ex Parte* Order, plaintiffs issued and served the subpoena upon Mediacom seeking the Doe defendants’ identities, including that of John Doe. (Exhibit “C” hereto).

6. As shown in the accompanying Memorandum of Law, an application for discovery seeking the identity of Doe defendants in a copyright infringement case may be granted only if the plaintiffs make a *concrete showing of a prima facie claim of copyright infringement* supported by *competent evidence for each fact that is essential to such a claim*.

7. As shown below, plaintiffs’ application clearly failed to make the requisite *prima facie* evidentiary showing and should therefore have been denied. Moreover, even if plaintiffs were deemed to have made such a showing, it is directly contradicted herein by the testimony of web designer, technologist, and internet consultant Zi Mei, whose affidavit follows.

8. As mentioned above, the complaint alleges three forms of activity purportedly constituting copyright infringement – (1) downloading copyrighted files, (2) distributing such files to the public, and/or (3) making such files *available* for distribution to others. However, a close review of the Declaration submitted by Jonathan Whitehead of the Recording Industry Association of America, Inc. ("RIAA") in support of plaintiffs' application (the "Whitehead Declaration") reveals that plaintiffs have no evidence at all for the first two of these categories, and that the limited evidence that plaintiffs have for the third category – making files *available* for distribution – is irrelevant and cannot support the *Ex Parte* Order because merely *offering* files or making them *available* for distribution to others does not constitute copyright infringement unless the offer is accepted, *i.e.*, a file is *actually* uploaded from the defendant's computer and transferred or distributed to another user. Again, plaintiffs have no evidence of any actual uploading or distribution.

9. In paragraph 12 of the Whitehead Declaration (Exhibit "D" hereto), plaintiffs represented that their search technique involves

logging onto a P2P network and examining what files are being *offered* by others logged onto the network. These searches generally result in the identification of specific Internet Protocol ("IP") addresses from which infringers are making unauthorized copies of sound recordings *available* to the public.

Whitehead Declaration, ¶ 12 (italics added). This paragraph refers only to files being *offered* or made *available* to the public. There is no claim that plaintiffs' searches resulted in evidence of any actual downloading (copying) of files *onto* a defendant's computer, or of any actual uploading (distribution) *from* a defendant's computer *to* another user. Likewise, paragraph 13 states that the RIAA "reviews a listing of music files that the user has *offered* for upload by others from his or her

computer.” Whitehead Declaration, ¶ 13 (italics added). Again, there is no claim that the RIAA’s searches evidence any actual instances of uploading or distribution of files from a defendant’s computer to another user.

10. Paragraph 16 merely alleges that “Defendants were *offering* files for download on various P2P networks” and that

[t]he user-defined author and title of the files *offered* for download by each Defendant suggested that many were copyrighted sound recordings being disseminated.... The RIAA downloaded and listened to a representative sample of the music files being *offered* for download by each Defendant and was able to confirm that the files each Defendant was *offering* for distribution were illegal copies of sound recordings whose copyrights are owned by RIAA members. The RIAA also recorded the time and date at which the infringing activity was observed and the IP address assigned to each defendant at the time.²

Whitehead Declaration, ¶ 16 (italics added). However, the only activity that the RIAA allegedly “observed” was the mere *offering* or *making available* of files, which does not constitute infringement absent actual distribution of such files. Again, the RIAA has no evidence of actual distribution.

11. Plaintiffs concede that the list of files attached to the Whitehead Declaration as Exhibit 1 is nothing more than a list of files allegedly “*made available* for distribution to the public.” Whitehead Declaration, ¶ 17 (italics added). There is no claim that any of the listed files were actually distributed to the public, nor has plaintiff adduced any evidence of actual distribution.

²As set forth in the accompanying Memorandum of Law, any alleged downloading of copyrighted files from defendants’ computers by *plaintiffs or their agents* does not constitute “distribution to the public” and therefore does not constitute copyright infringement.

12. Neither is there any evidence that defendants placed any unauthorized copies of copyrighted recordings onto their computers. Plaintiffs claim that “metadata accompanying each file [allegedly downloaded from defendants’ computers by the RIAA] demonstrates that the user is engaged in copyright infringement.” Whitehead Declaration, ¶ 13. However, no explanation for this assertion is even attempted. Clearly, plaintiffs have not carried their burden of substantiating their copyright infringement claim with concrete, competent evidence.

13. Moreover, as set forth in Mr. Mei’s accompanying affidavit, there is no correlation whatsoever between (a) metadata and “hash” values in the files allegedly found on defendants’ computers and (b) the origin of those files, and thus no way to determine whether those files got onto defendants’ computers legally or illegally, especially since those files could have been downloaded from an authorized online service, or copied legally from commercially purchased audio CDs. Again, plaintiffs have not made the requisite evidentiary showing.

14. Even if plaintiffs could overcome their inability to determine the origin of the files on defendants’ computers, they still have not satisfied the requirement of making a concrete showing of copyright infringement, in that their “confirmation” of these files as “illegal copies” of copyrighted recordings (Whitehead Declaration, ¶ 13) is clearly suspect. Among the tactics used by the RIAA and its agents, such as MediaSentry Inc., to minimize file-sharing is the placement on the internet of decoy or dummy files which have the *same title and file names* as copyrighted music files. In BMG Canada Inc. v. Doe, a similar case in Canada where the Canadian Recording Industry Association (“CRIA”) sought discovery from an internet service provider (“ISP”) to identify John Doe defendants, the president of MediaSentry, Gary Millin, testified about this tactic.

Q. Do I understand that this technique puts out non -- what appear to be copies of copyright work that don't work?

A. Yes.

Q. Okay. And can you assist me as to why when one of these -- I'm just going to call it a dummy file or a fake file -- when one of these is put out, why don't people just ignore it?

MR. STRATTON: Do you know the answer to the question?

THE DEPONENT: Yes. They don't know what's in the file until they listen to it.

Q. I see. So to the observer it looks as if it's a real file. Until they try and play it they don't know it doesn't have the right content?

A. Correct.

Q. And can the users not distinguish what's a real file from a dummy file? Sorry, I gather that -- I gather that what you do is you make a file that looks like the real file, and that gets spread, but it doesn't work; is that the intent of MediaDecoy?

A. The intent of MediaDecoy is to minimize the harmful impact of unauthorized files being offered. And so you make a file that looks like the real file, and to the extent people are searching for the illegitimate copies that other people are distributing, we make the non-real file available so that when people get a screen shot of results, they cannot differentiate from the people illegally or distributing the illegitimate content and our content, which appears in the same screen as the other people distributing their files.

Q. And so the only way to tell them apart is to listen to them?

A. That's right.

Transcript of Deposition of Gary Millin, pp. 33-34 (Exhibit "E" hereto).

15. As set forth in Mr. Mei's affidavit, these decoy or dummy files contain segments of an actual song but in the middle may contain noise, static, loops or other audio corruptions. For this reason, one cannot confirm that a file is a true copy of a copyrighted music file

or a decoy by listening to only a portion of the file; the only way to make this determination is to listen to the *entire* file, something that plaintiffs do not claim to have done.

16. Finally, plaintiffs claim that their investigation resulted in the identification of specific Internet Protocol ("IP") addresses for each defendant, and that from these IP addresses plaintiffs were able to determine that defendants were using Mediacom as their ISP. As set forth in Mr. Mei's affidavit, it is relatively simple to look up the relevant ISP as long as one has already identified a specific IP address. The Whitehead Declaration, however, contains no explanation of how plaintiffs or their agents came up in the first place with the IP addresses allegedly corresponding to defendants' internet accounts. This is problematic since none of the lists and Kazaa printouts attached as Exhibit 1 to the Whitehead Declaration³ contain or set forth any IP addresses, and the Kazaa software itself offers no means of identifying the IP addresses of users.

17. Clearly, plaintiffs have not made a concrete showing of a prima facie claim of copyright infringement. There is simply no evidence of any infringement in the record, and there is no justification for exposing defendants to a meritless lawsuit that will invade their privacy, destroy their anonymity and force them to incur unwarranted expenses and legal fees.

18. The Court should therefore vacate the *Ex Parte* Order.

³In an apparent attempt to "pad" the record with a seemingly impressive array of papers, plaintiffs included a 327-page log of songs, allegedly made available by Doe No. 1, in the "Exhibit 1" attached to the Whitehead Declaration. Because of its voluminous nature, we are including only the first 10 pages of this log in the "hard copy" of this motion being served on counsel and the "chambers copy" being delivered to the Court. The full version of this log will be attached to the Whitehead Declaration (Exhibit "D") in the motion papers that we are filing electronically.

WHEREFORE, it is respectfully requested that the Court grant the within motion
in all respects.

s/Morlan Ty Rogers
MORLAN TY ROGERS

Sworn to before me this
29th day of December, 2005

s/Ray Beckerman
Notary Public

RAY BECKERMAN
Notary Public, State of New York
No. 02BE5038056
Qualified in Queens County
Commission Expires January 17, 2007