

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 - - - - -

4 August Term, 2009

5 (Argued: November 20, 2009 Decided: April 29, 2010)

6 Docket No. 09-0905-cv

7

8 ARISTA RECORDS LLC, a Delaware limited liability
9 company; ATLANTIC RECORDING CORPORATION, a Delaware
10 Corporation; BMG MUSIC, a New York general
11 partnership; CAPITOL RECORDS, LLC, a Delaware limited
12 liability company; ELEKTRA ENTERTAINMENT GROUP INC.,
13 a Delaware corporation; INTERSCOPE RECORDS, a
14 California general partnership; MAVERICK RECORDING
15 COMPANY, a California joint venture; MOTOWN RECORD
16 COMPANY, L.P., a California limited partnership; SONY
17 BMG MUSIC ENTERTAINMENT, a Delaware general
18 partnership; UMG RECORDINGS, INC., a Delaware
19 corporation; VIRGIN RECORDS AMERICA, INC., a
20 California corporation; WARNER BROS. RECORDS INC., a
21 Delaware corporation; and ZOMBA RECORDING LLC, a
22 Delaware limited liability company,

23 Plaintiffs-Appellees,

24 - v. -

25 DOE 3,

26 Defendant-Appellant,

27 DOES 1-2 and DOES 4-16,

28 Defendants.

29

30 Before: KEARSE, KATZMANN, and LIVINGSTON, Circuit Judges.

31

Appeal from an order of the United States District Court

32

for the Northern District of New York, Glenn T. Suddaby, Judge,

1 rejecting anonymous defendant-appellant's objections to magistrate
2 judge's denial of motion to quash subpoena served on Internet
3 service provider for disclosure of identities of Internet users
4 allegedly downloading and/or distributing music online in
5 violation of plaintiffs' copyrights.

6 Affirmed.

7 TIMOTHY M. REYNOLDS, Denver, Colorado
8 (Katheryn J. Coggon, Thomas M. Kerr,
9 Holme Roberts & Owen, Denver,
10 Colorado, on the brief), for
11 Plaintiffs-Appellees.

12 RICHARD A. ALTMAN, New York, New York, for
13 Defendant-Appellant.

14 KEARSE, Circuit Judge:

15 Defendant "Doe 3," whose identity is not known to
16 plaintiffs Arista Records LLC et al., appeals from an order of the
17 United States District Court for the Northern District of New
18 York, Glenn T. Suddaby, Judge, rejecting Doe 3's objections to
19 the denial by United States Magistrate Judge Randolph F. Treece of
20 Doe 3's motion (originally brought by other anonymous defendants)
21 to quash a subpoena served on his Internet service provider to
22 obtain information sufficient to disclose his identity. The
23 magistrate judge ruled that defendants' qualified First Amendment
24 right of anonymity was outweighed by, inter alia, plaintiffs'
25 allegations that defendants were downloading and/or distributing
26 music over the Internet in violation of plaintiffs' copyrights and
27 plaintiffs' need for the information in order to enforce their

1 rights. On appeal, Doe 3 contends principally that the
2 allegations in the Complaint are not sufficient to overcome his
3 First Amendment right of anonymity; in addition, he contends that
4 the reference of his motion to the magistrate judge and the
5 district judge's review of the magistrate judge's decision were
6 procedurally flawed. Finding no merit in Doe 3's contentions, we
7 affirm.

8 I. BACKGROUND

9 Plaintiffs are recording companies that commenced the
10 present action in July 2008, alleging that 16 defendants--known to
11 plaintiffs at that time not by name but only by the Internet
12 Protocol ("IP") addresses assigned to them at certain specific
13 times by their Internet service provider ("ISP")--had infringed
14 plaintiffs' copyrights by, without plaintiffs' permission or
15 consent, downloading and/or distributing to the public various
16 music recordings through an online file-sharing network. (See
17 Complaint ¶¶ 18, 22.) File-sharing (or "peer-to-peer" or "P2P")
18 networks allow users to exchange files directly between their
19 computers without intermediate servers. Attached to the Complaint
20 is an "Exhibit A" listing for each "Doe" defendant, inter alia,
21 his or her IP address at a stated date and time, the name of the
22 file-sharing network used ("Gnutella" or "AresWarez"), the titles
23 of 6-10 songs downloaded from the IP address, and, for each song,
24 which plaintiff was the copyright owner. The Complaint requests,

1 inter alia, damages and injunctive relief prohibiting further
2 direct and indirect infringement of plaintiffs' copyrights.

3 In order to identify the defendants, plaintiffs sought
4 authorization to serve a subpoena on defendants' common ISP, the
5 State University of New York at Albany ("SUNYA"), for disclosure
6 of each defendant's name, current and permanent address,
7 telephone number, email address, and Media Access Control address
8 identifying the device engaged in the online communication. In
9 support of their subpoena request, plaintiffs submitted a July 8,
10 2008 declaration by Carlos Linares ("Linares Decl."), Vice
11 President for Anti-Piracy Legal Affairs, Recording Industry
12 Association of America, Inc. ("RIAA"), who was responsible for the
13 collection of facts alleged in the Complaint's Exhibit A. Linares
14 described, inter alia, the retention of a third-party investigator
15 that had proceeded to detect numerous copyrighted music files in
16 the various Doe defendants' file-sharing folders on peer-to-peer
17 networks, including the songs listed in Exhibit A, and he
18 described the RIAA's review of the investigator's evidence to
19 verify that each individual was infringing. (See Linares Decl.
20 ¶¶ 11, 14-15, 18-19.) The court issued the subpoena but required
21 SUNYA to "notify each Doe Defendant that it intends to disclose
22 the requested ISP identifying information to Plaintiffs; and . . .
23 send to each Doe Defendant a copy of the subpoena" Order
24 dated July 22, 2008, at 2.

25 Thereafter, plaintiffs voluntarily dismissed the action
26 against most of the defendants. The remaining defendants,

1 eventually including Doe 3, moved to quash the subpoena or, in the
2 alternative, to have the court order a severance requiring that
3 each defendant be sued separately. In support of the motion to
4 quash, these defendants argued that the First Amendment affords a
5 qualified right to use the Internet anonymously and that the court
6 that has issued a subpoena must quash or modify the subpoena when
7 it "requires disclosure of privileged or other protected matter,
8 if no exception or waiver applies," Fed. R. Civ. P.
9 45(c)(3)(A)(iii). While acknowledging that "[t]he First Amendment
10 right to communicate anonymously is, of course, not a license to
11 . . . infringe copyrights," the moving defendants argued
12 principally that their privilege "can only be overcome by a
13 substantial and particularized showing," sufficient to "plead a
14 prima facie case of copyright infringement." (Amended Memorandum
15 of Law of Doe Defendants 3, 7, 11, and 15 in Support of Motion To
16 Quash ("Does' Amended Memorandum") at 10 (internal quotation marks
17 omitted).) They argued that the Complaint "fall[s] far short of
18 that showing." (Id.)

19 The moving defendants argued that--in accordance with what
20 they characterized as "the heightened pleading standards imposed
21 since . . . Bell Atlantic [Corp.] v. Twombly, [550 U.S. 544]
22 (2007)" (Does' Amended Memorandum at 15)--in order to overcome the
23 First Amendment privilege, "plaintiffs must state, on personal
24 knowledge, a specific claim for copyright infringement against
25 each and every Doe defendant" (id. at 13-14). The moving
26 defendants contended that plaintiffs were required

1 to present specific evidence, including a declaration
2 from whoever examined the files available for
3 download from each defendant's computer, listened to
4 the files, verified that they were copyrighted songs,
5 determined that the copyrights were registered (and
6 to which plaintiffs), to list the songs that a
7 particular defendant made available for download, and
8 to annex corresponding copyright registration
9 certificates for the songs.

10 (Id. at 14.) They also argued that the Complaint "fails to allege
11 any actual distribution of song files to the public" and hence
12 "does not state a claim upon which relief can be granted," id. at
13 17; and that "[i]n addition to establishing that [plaintiffs']
14 action can withstand a motion to dismiss for failure to state a
15 claim," plaintiffs, in order to secure disclosure of the Doe
16 defendants' identities, "must produce sufficient evidence
17 supporting each element of" their claims, id. at 12 (emphasis and
18 internal quotation marks omitted).

19 As amended, defendants' notice of motion stated that the
20 motion to quash would be returnable before District Judge Suddaby.
21 However, the motion was referred to Magistrate Judge Treece.

22 A. The Magistrate Judge's Denial of Defendants' Motion To Quash

23 In a Memorandum Decision and Order dated February 18,
24 2009, see Arista Records LLC v. Does 1-16, No. 1:08-CV-
25 765(GTS/RFT), 2009 WL 414060 (N.D.N.Y. Feb. 18, 2009)
26 ("Arista I"), the magistrate judge denied the motion to quash the
27 subpoena. Noting the need to balance "the modest First Amendment
28 right to remain anonymous" against "a copyright owner's right to
29 disclosure of the identity of a possible trespasser of its

1 intellectual property interest," Arista I, 2009 WL 414060, at *3,
2 the magistrate judge looked to the five-factor test set out by
3 then-District Judge Denny Chin in Sony Music Entertainment Inc. v.
4 Does 1-40, 326 F.Supp.2d 556 (S.D.N.Y. 2004) ("Sony Music"), and
5 evaluated the defendants' expectation of privacy, the prima facie
6 strength of plaintiffs' claims of injury, the specificity of the
7 discovery request, plaintiffs' need for the information, and its
8 availability through other means.

9 The magistrate judge found that all five factors
10 counseled against quashing the subpoena. He noted that plaintiffs
11 had sufficiently pleaded copyright infringement claims, alleging
12 ownership of the copyrights, copying, and distribution of the
13 protected works by the Doe defendants without the consent of the
14 owners. See Arista I, 2009 WL 414060, at *1, *5. The court also
15 noted that plaintiffs' allegations of distribution were supported
16 by Exhibit A to the Complaint, specifying their investigator's
17 "sampl[ing of] some of the downloads from shared folders," id.
18 at *5. The magistrate judge also found that the disclosure
19 request was reasonable in scope, that identification of the
20 alleged infringers was indispensable for the vindication of
21 plaintiffs' copyright rights, and that the identifying information
22 was unavailable through alternative means.

23 The magistrate judge found that these factors were not
24 outweighed by the First Amendment rights of the Doe defendants.
25 He stated that the "Doe Defendants have a minimal expectation of
26 privacy, especially when they allegedly engaged in P2P network

1 sharing" because "the notion of allowing others to have access to
2 one's database by virtue of the Internet in order to pluck from a
3 computer information and data that the computer owner or user
4 wishes to share renders void any pretext of privacy." Id. at *6.
5 Accordingly, the magistrate judge denied the motion to quash.

6 B. The District Court's Review of the Magistrate Judge's Order

7 Pursuant to Fed. R. Civ. P. 72, Doe 3 objected to the
8 magistrate judge's denial of the motion to quash, and sought "de
9 novo review," "reversing" and "overruling" that order. As a
10 threshold procedural matter, Doe 3 argued that the motion to quash
11 had been referred to the magistrate judge "without the consent of
12 either party, and without an actual order of referral from the
13 District Judge" (Supporting Declaration of Richard A. Altman dated
14 March 2, 2009, ¶ 3). He also argued that the motion should not
15 have been referred to a magistrate judge for decision because
16 "[t]he motion, while styled as one to quash a subpoena, actually
17 challenged the legal sufficiency of the complaint in the nature of
18 a motion under F.R.Civ.P. 12(b)(6). As such it is dispositive"
19 because "the motion to quash would for practical purposes be
20 determinative of the outcome of the present litigation"
21 (Doe 3's Objections to Magistrate Judge's Memorandum Decision and
22 Order at 1, 2). Doe 3 argued that the magistrate judge thus
23 lacked jurisdiction to decide the motion to quash and that Doe 3
24 was entitled to have the district judge review the magistrate
25 judge's decision de novo. As to substance, Doe 3 contended, to

1 the extent pertinent to this appeal, that the magistrate judge's
2 order erred in "its conclusion that the complaint states a legally
3 cognizable claim, and that 'making available' music files is
4 automatically copyright infringement." (Id. at 5.)

5 In a Decision and Order dated March 5, 2009 ("Arista II"),
6 District Judge Suddaby rejected Doe 3's objections. The court
7 first rejected Doe 3's contention that his motion--which had
8 requested the quashing of the subpoena or the severance of the
9 claims against the various defendants--was a dispositive motion.
10 See, e.g., Arista II at 2 ("generally a motion to quash a subpoena
11 is a non-dispositive matter"); id. at 3 (a "motion for severance
12 of claims . . . is also properly viewed as a non-dispositive
13 matter since the practical effect of the motion, if granted, would
14 not be to terminate Plaintiff's claims against Defendants (nor
15 would it be to necessarily terminate the current action)"). The
16 court rejected the proposition that the motion to quash was in
17 essence a motion to dismiss under Rule 12(b)(6) and hence was a
18 dispositive motion, noting that that Rule, by its terms, confers
19 the right to move for dismissal for failure to state a claim on
20 "'a party.'" Id. at 2. The defendants, not having been served
21 with process, were "not yet 'parties'" and thus could "not
22 properly move for dismissal for failure to state a claim." Id. at
23 2-3. Given that the motion to quash or sever was a nondispositive
24 motion, the court implicitly rejected Doe 3's contention that the
25 magistrate judge lacked authority to rule on it.

1 Further, because the motion to quash or sever was a
2 nondispositive motion, the district judge concluded that the
3 proper standard for reviewing the magistrate judge's order was
4 "clear error, not de novo." Id. at 3. The court found no clear
5 error in the magistrate judge's order. It also determined that it
6 would reach the same conclusion "even [upon] de novo review." Id.

7 This appeal followed. The order is appealable under the
8 collateral order doctrine, as the subpoena at issue "'is directed
9 against a third party who is unlikely to risk being held in
10 contempt to vindicate someone else's rights.'" In re Grand Jury
11 Subpoena Duces Tecum Dated May 29, 1987, 834 F.2d 1128, 1130 (2d
12 Cir. 1987) (quoting In re Katz, 623 F.2d 122, 124 (2d Cir. 1980)
13 (brackets in In re Grand Jury omitted)). On motion of Doe 3, this
14 Court stayed SUNYA's compliance with the subpoena with respect to
15 information pertaining to Doe 3 pending resolution of the appeal.

16 II. DISCUSSION

17 On appeal, Doe 3 principally argues that the Complaint
18 does not state a claim sufficient to overcome his First Amendment
19 privilege of anonymity. He also pursues his contentions that his
20 motion to quash was improperly referred to the magistrate judge
21 and that the district court thus erred by not reviewing the
22 magistrate judge's decision de novo. We find no merit in Doe 3's
23 contentions.

1 A. The Procedural Challenge

2 The district court may designate a magistrate judge to
3 hear and decide a pretrial matter that is "not dispositive of a
4 party's claim or defense." Fed. R. Civ. P. 72(a); see 28 U.S.C.
5 § 636(b)(1)(A). Dispositive matters may be referred to a
6 magistrate judge only for recommendation, not for decision; such
7 matters principally include motions for injunctive relief and
8 motions for dismissal. See 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ.
9 P. 72(b). "Matters concerning discovery generally are considered
10 'nondispositive' of the litigation." Thomas E. Hoar, Inc. v. Sara
11 Lee Corp., 900 F.2d 522, 525 (2d Cir.), cert. denied, 498 U.S. 846
12 (1990). Like most discovery requests directed to opposing
13 parties, subpoenas to nonparties are designed to elicit
14 information. A motion to quash a subpoena in an action seeking
15 relief other than production of the subpoenaed information is not
16 normally a dispositive motion.

17 As to a nondispositive matter, "[t]he district judge in
18 the case must consider timely objections and modify or set aside
19 any part of the [magistrate judge's] order that is clearly
20 erroneous or is contrary to law." Fed. R. Civ. P. 72(a). As to a
21 dispositive matter, any part of the magistrate judge's
22 recommendation that has been properly objected to must be reviewed
23 by the district judge de novo. See id. 72(b).

24 In the present case, the Doe defendants' motion to quash
25 plaintiffs' subpoena to SUNYA was not a dispositive motion.
26 Although Doe 3 contends to the contrary, arguing that the

1 magistrate judge "necessarily had to decide whether the complaint
2 stated a claim or not" (Doe 3 brief on appeal at 45), that
3 argument ignores, inter alia, all factors other than the viability
4 of the Complaint. Applying the five-factor Sony Music test, the
5 magistrate judge could have granted the motion to quash despite
6 the sufficiency of the Complaint if it had found, for example,
7 that the subpoena was unduly broad or that plaintiffs had easy
8 access to the Doe defendants' identities through other means.
9 Quashing the subpoena on such a basis plainly would not have ended
10 the action.

11 In addition, Doe 3's contention that the motion to quash
12 was the equivalent of a motion to dismiss for failure to state a
13 claim ignores arguments he made to the magistrate judge. He
14 argued that in order to overcome the qualified privilege, a
15 plaintiff must produce evidence supporting each element of its
16 claim "[i]n addition to establishing that its action can withstand
17 a motion to dismiss for failure to state a claim." (Doe's Amended
18 Memorandum at 12 (internal quotation marks omitted) (emphasis in
19 Memorandum).)

20 Finally, even if Doe 3 were correct in characterizing the
21 motion to quash as a dispositive matter, the only consequence
22 would have been that review by the district judge should have been
23 de novo. Given that the district judge stated that he would
24 conclude that the motion should be denied even if he reviewed the
25 matter de novo, Doe 3's procedural contention provides no basis
26 for reversal. See generally Fed. R. Civ. P. 61 ("At every stage

1 of the proceeding, the court must disregard all errors and defects
2 that do not affect any party's substantial rights.").

3 B. The Substantive Challenge

4 A district court's ruling on a motion to quash a subpoena
5 is reviewable for abuse of discretion. See, e.g., In re: Subpoena
6 Issued to Dennis Friedman, 350 F.3d 65, 68 (2d Cir. 2003). A
7 court abuses its discretion when its decision rests on an error of
8 law or on a clearly erroneous factual finding, see, e.g., Cooter &
9 Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990); In re Fitch,
10 Inc., 330 F.3d 104, 108 (2d Cir. 2003), "or [when] its decision--
11 though not necessarily the product of a legal error or a clearly
12 erroneous factual finding--cannot be located within the range of
13 permissible decisions," id. (internal quotation marks omitted);
14 see, e.g., Zervos v. Verizon New York, Inc., 252 F.3d 163, 169 (2d
15 Cir. 2001). We see no abuse of discretion in the refusal to quash
16 the subpoena in the present case.

17 The fundamental copyright principles are clear. The owner
18 of a copyright has the exclusive right to--or to license others
19 to--reproduce, perform publicly, display publicly, prepare
20 derivative works of, and distribute copies of, his copyrighted
21 work. See 17 U.S.C. § 106. To establish infringement of
22 copyright, "two elements must be proven: (1) ownership of a
23 valid copyright, and (2) copying of constituent elements of the
24 work that are original." Feist Publications, Inc. v. Rural
25 Telephone Service Co., 499 U.S. 340, 361 (1991); see, e.g., Harper

1 & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 548
2 (1985). "The word 'copying' is shorthand for the infringing of
3 any of the copyright owner's five exclusive rights" described in
4 § 106. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1013
5 (9th Cir. 2001) ("Napster") (internal quotation marks omitted).

6 Further, "[a]lthough '[t]he Copyright Act does not
7 expressly render anyone liable for infringement committed by
8 another,'" Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545
9 U.S. 913, 930 (2005) ("Grokster") (quoting Sony Corp. v. Universal
10 City Studios, 464 U.S. 417, 434 (1984)), it is well established,
11 based on "the common-law doctrine that one who knowingly
12 participates or furthers a tortious act is jointly and severally
13 liable with the prime tortfeasor," that "one who, with knowledge
14 of the infringing activity, induces, causes or materially
15 contributes to the infringing conduct of another, may be held
16 liable as a 'contributory' infringer," Gershwin Publishing Corp.
17 v. Columbia Artists Management, Inc., 443 F.2d 1159, 1162 (2d Cir.
18 1971) ("Gershwin") (internal quotation marks and footnote
19 omitted) (emphases ours); see, e.g., Grokster, 545 U.S. at 930.
20 The knowledge standard is an objective one; contributory
21 infringement liability is imposed on persons who "know or have
22 reason to know" of the direct infringement, Napster, 239 F.3d
23 at 1020 (emphasis added); see, e.g., In re: Aimster Copyright
24 Litigation, 334 F.3d 643, 650 (7th Cir. 2003) ("[w]illful
25 blindness is knowledge"), cert. denied, 540 U.S. 1107 (2004);
26 Cable/Home Communication Corp. v. Network Productions, Inc., 902

1 F.2d 829, 845 (11th Cir. 1990) ("Cable/Home"); Gershwin, 443 F.2d
2 at 1162. Such "liability exists if the defendant engages in
3 'personal conduct that encourages or assists the infringement,'" Napster,
4 239 F.3d at 1019 (quoting Matthew Bender & Co. v. West
5 Publishing Co., 158 F.3d 693, 706 (2d Cir. 1998)). The
6 "'resolution of the issue . . . depends upon a determination of
7 the function that [the alleged infringer] plays in the total
8 [reproduction] process.'" Gershwin, 443 F.2d at 1162 n.8 (quoting
9 Fortnightly Corp. v. United Artists Television, Inc., 392 U.S.
10 390, 396-397 (1968) (alterations in Gershwin)).

11 The relevant First Amendment principles are also well
12 established. The Supreme Court has recognized that the First
13 Amendment provides protection for anonymous speech. See, e.g.,
14 Buckley v. American Constitutional Law Foundation, Inc., 525 U.S.
15 182, 199-200 (1999); McIntyre v. Ohio Elections Commission, 514
16 U.S. 334, 341-342 (1995); see also NAACP v. Alabama, 357 U.S. 449,
17 462, 466 (1958) (compelled disclosure of membership list would
18 impinge on First Amendment right of association). In the context
19 of political speech, the Supreme Court has recognized that
20 "[a]nonymity is a shield from the tyranny of the majority,"
21 McIntyre, 514 U.S. at 357. The Court has also recognized that the
22 Internet is a valuable forum for the exchange of ideas. See,
23 e.g., Reno v. ACLU, 521 U.S. 844, 870 (1997) ("Through the use of
24 chat rooms, any person with a phone line can become a town crier
25 with a voice that resonates farther than it could from any
26 soapbox."). To the extent that anonymity is protected by the

1 First Amendment, a court should quash or modify a subpoena
2 designed to breach anonymity. See Fed. R. Civ. P. 45(c)(3)(A)
3 (the "issuing court must quash or modify a subpoena" when it
4 "requires disclosure of privileged or other protected matter, if
5 no exception or waiver applies").

6 The First Amendment does not, however, provide a license
7 for copyright infringement. See, e.g., Harper & Row, Publishers,
8 471 U.S. at 555-57, 569; Cable/Home, 902 F.2d at 849 ("[w]ith
9 respect to copyright protection, '[t]he first amendment is not a
10 license to trammel on legally recognized rights in intellectual
11 property'" (quoting Dallas Cowboys Cheerleaders, Inc. v.
12 Scoreboard Posters, Inc., 600 F.2d 1184, 1188 (5th Cir. 1979)));
13 Sony Music, 326 F.Supp.2d at 563 ("Parties may not use the First
14 Amendment to encroach upon the intellectual property rights of
15 others."). Thus, to the extent that anonymity is used to mask
16 copyright infringement or to facilitate such infringement by other
17 persons, it is unprotected by the First Amendment.

18 As indicated in Part I.A. above, the legal standard
19 applied by the district court in the present case in denying the
20 moving Doe defendants' motion to quash plaintiffs' subpoena to
21 SUNYA was the standard adopted by the court in Sony Music, 326
22 F.Supp.2d 556. In Sony Music, after discussing the above
23 principles, as well as several cases that had dealt with the
24 tension between First Amendment rights and copyright rights,
25 then-District Judge Chin concluded that in the analysis of whether

1 the qualified privilege requires that the subpoena be quashed, the
2 principal factors include

3 (1) [the] concrete[ness of the plaintiff's] showing
4 of a prima facie claim of actionable harm, . . . (2)
5 [the] specificity of the discovery request, . . . (3)
6 the absence of alternative means to obtain the
7 subpoenaed information, . . . (4) [the] need for the
8 subpoenaed information to advance the claim, . . .
9 and (5) the [objecting] party's expectation of
10 privacy.

11 Sony Music, 326 F.Supp.2d at 564-65. We agree that this
12 constitutes an appropriate general standard for determining
13 whether a motion to quash, to preserve the objecting party's
14 anonymity, should be granted.

15 On this appeal, Doe 3 does not contend that the Sony Music
16 standard used by the district court here was an erroneous legal
17 standard. Although he asserts that "downloading, distributing,
18 or making music available constitutes protected First Amendment
19 speech" (Doe 3 brief on appeal at 20), he expressly acknowledges
20 that "[t]he First Amendment right to communicate anonymously is,
21 of course, not a license to . . . infringe copyrights. . . . Nor
22 is it an absolute bar against disclosure of one's identity in a
23 proper case" (id.).

24 Nor does Doe 3 articulate any challenge to the court's
25 evaluation of most of the five factors of the Sony Music standard,
26 i.e., the specificity of the information request, the plaintiffs'
27 need for and the limited availability of the information
28 requested, and the anonymous person's expectation of privacy.
29 Rather, Doe 3 contends that the court should have found that
30 plaintiffs did not make a "particularized showing" (Doe 3 brief

1 on appeal at 20) sufficient to overcome his qualified privilege.
2 In support of his position, Doe 3 contends that the Supreme
3 Court's recent decisions in Bell Atlantic Corp. v. Twombly, 550
4 U.S. 544 (2007) ("Twombly"), and Ashcroft v. Iqbal, 129 S. Ct.
5 1937 (2009) ("Iqbal"), imposed "heightened pleading standards"
6 (e.g., Doe 3 brief on appeal at 18, 28-29) such that plaintiffs
7 were required

8 to present specific evidence, including a declaration
9 on personal knowledge from the person who examined
10 the files available for download from each
11 defendant's computer, listened to the files, verified
12 that they were copyrighted songs, determined that the
13 copyrights were registered (and to which plaintiffs),
14 and determined what songs a particular defendant
15 downloaded

16 (id. at 28). Neither Doe 3's reliance on Twombly/Iqbal nor his
17 contention that plaintiffs' allegations are insufficiently
18 specific has merit.

19 First, the notion that Twombly imposed a heightened
20 standard that requires a complaint to include specific evidence,
21 factual allegations in addition to those required by Rule 8, and
22 declarations from the persons who collected the evidence is belied
23 by the Twombly opinion itself. The Court noted that Rule 8(a)(2)
24 of the Federal Rules of Civil Procedure "requires only 'a short
25 and plain statement of the claim showing that the pleader is
26 entitled to relief,' in order to give the defendant fair notice of
27 what the . . . claim is and the grounds upon which it rests,"
28 Twombly, 550 U.S. at 555 (other internal quotation marks omitted);
29 see also Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508, 512
30 (2002) (holding that, at the pleading stage, an employment

1 discrimination plaintiff who alleges facts that provide fair
2 notice of his claim need not also allege "specific facts
3 establishing a prima facie case," for such a "heightened pleading
4 standard . . . conflicts with Federal Rule of Civil Procedure
5 8(a)(2)". The Twombly Court stated that "a complaint attacked by
6 a Rule 12(b)(6) motion to dismiss does not need detailed factual
7 allegations," but mere "labels and conclusions" or "formulaic
8 recitation[s] of the elements of a cause of action will not do";
9 rather, the complaint's "[f]actual allegations must be enough to
10 raise a right to relief above the speculative level," Twombly, 550
11 U.S. at 555 (emphasis added), i.e., enough to make the claim
12 "plausible," id. at 570. Applying these standards to the
13 complaint before it, which claimed violations of § 1 of the
14 Sherman Act, 15 U.S.C. § 1 (prohibiting contracts, combinations,
15 and conspiracies in restraint of trade), the Twombly Court
16 concluded that "stating such a claim requires a complaint with
17 enough factual matter (taken as true) to suggest that an agreement
18 was made." 550 U.S. at 556 (emphasis added). Because the Twombly
19 complaint's factual allegations described only actions that were
20 parallel, and were doctrinally consistent with lawful conduct, the
21 conclusory allegation on information and belief that the observed
22 conduct was the product of an unlawful agreement was insufficient
23 to make the claim plausible. See id. at 556-57, 564-66. The
24 Twombly plausibility standard, which applies to all civil actions,
25 see Iqbal, 129 S. Ct. at 1953, does not prevent a plaintiff from
26 "pleading facts alleged 'upon information and belief'" where the

1 facts are peculiarly within the possession and control of the
2 defendant, see, e.g., Boykin v. KeyCorp, 521 F.3d 202, 215 (2d
3 Cir. 2008), or where the belief is based on factual information
4 that makes the inference of culpability plausible, see Iqbal, 129
5 S. Ct. at 1949 ("A claim has facial plausibility when the
6 plaintiff pleads factual content that allows the court to draw the
7 reasonable inference that the defendant is liable for the
8 misconduct alleged."). The Twombly Court stated that "[a]sking
9 for plausible grounds to infer an agreement does not impose a
10 probability requirement at the pleading stage; it simply calls for
11 enough fact to raise a reasonable expectation that discovery will
12 reveal evidence of illegal[ity]." 550 U.S. at 556.

13 Concluding that the complaint before it failed to state a
14 plausible claim, the Twombly Court stated that "[i]n reaching this
15 conclusion, we do not apply any 'heightened' pleading standard,"
16 id. at 569 n.14 (emphasis added). Rather, it emphasized that its
17 holding was consistent with its ruling in Swierkiewicz that "a
18 heightened pleading requirement," requiring the pleading of
19 "'specific facts' beyond those necessary to state [a] claim and
20 the grounds showing entitlement to relief," was "impermissibl[e],"
21 Twombly, 550 U.S. at 570. "Here," the Twombly Court stated, "we
22 do not require heightened fact pleading of specifics, but only
23 enough facts to state a claim to relief that is plausible on its
24 face." Id. (emphasis added).

25 Nor did Iqbal heighten the pleading requirements. Rather,
26 it reiterated much of the discussion in Twombly and rejected as

1 insufficient a pleading that the Iqbal Court regarded as entirely
2 conclusory. Accordingly, although Twombly and Iqbal require
3 "'factual amplification [where] needed to render a claim
4 plausible,'" Turkmen v. Ashcroft, 589 F.3d 542, 546 (2d Cir. 2009)
5 (quoting Ross v. Bank of America, N.A (USA), 524 F.3d 217, 225 (2d
6 Cir. 2008)), we reject Doe 3's contention that Twombly and Iqbal
7 require the pleading of specific evidence or extra facts beyond
8 what is needed to make the claim plausible.

9 Even less meritorious is Doe 3's contention that
10 plaintiffs' showing in the present case was vague and conclusory.
11 Doe 3 states that

12 [t]he central allegations in the complaint in
13 this case are that:

14 Plaintiffs are informed and believe that each
15 Defendant, without the permission or consent of
16 Plaintiffs, has used, and continues to use, an
17 online media distribution system to download
18 and/or distribute certain of the Copyrighted
19 Recordings[.] . . . Through his or her
20 continuous and ongoing acts of downloading
21 and/or distributing to the public the
22 Copyrighted Recordings, each Defendant has
23 violated Plaintiffs' exclusive rights of
24 reproduction and distribution. . . . Plaintiffs
25 are informed and believe that each Defendant
26 has, without the permission or consent of
27 Plaintiffs, continuously downloaded and/or
28 distributed to the public additional sound
29 recordings owned by or exclusively licensed to
30 Plaintiffs or Plaintiffs' affiliate record
31 labels, and Plaintiffs believe that such acts of
32 infringement are ongoing.

33 (Doe 3 brief on appeal at 31 (quoting portions of the Complaint
34 ¶ 22) (alterations in Doe 3 brief).) Doe 3 criticizes "[t]hese
35 [as] vague allegations, devoid of both direct knowledge and
36 specific facts." (Doe 3 brief on appeal at 32.)

1 To characterize this criticism by Doe 3 as unfair would be
2 extremely charitable, for the above ellipses in the Doe 3 brief's
3 quotation from ¶ 22 of the Complaint represent deletions of that
4 paragraph's references to Complaint Exhibit A--in which plaintiffs
5 provide ample detail. For example, the first ellipsis omits the
6 allegation that "Exhibit A identifies on a Defendant-by-Defendant
7 basis (one Defendant per page) the IP address with the date and
8 time of capture and a list of copyrighted recordings that each
9 Defendant has, without the permission or consent of Plaintiffs,
10 downloaded and/or distributed to the public" (Complaint ¶ 22
11 (emphasis added)). The second ellipsis similarly omits the
12 Complaint's reference to "the sound recordings listed for each
13 Defendant on Exhibit A" (Complaint ¶ 22).

14 To the extent that ¶ 22's allegations are made on
15 information and belief, virtually all of them are supported by
16 factual assertions in Exhibit A. For example, the allegation that
17 each Doe defendant "has used" file-sharing networks to download
18 and distribute plaintiffs' music is supported by Exhibit A's lists
19 of specific songs found in the respective Doe defendants' file-
20 sharing folders, on the date shown, at the time indicated, on the
21 specified online, peer-to-peer, file-sharing network. The
22 allegation that there was "continue[d]" use is supported by, inter
23 alia, the utter improbability that the songs observed by
24 plaintiffs' investigators in a given Doe defendant's file-sharing
25 folder at a particular time were there only at the precise instant
26 at which they were observed, and not before and not afterwards;

1 the inference of continued use is also supported by the facts that
2 Exhibit A lists each of the "Doe" defendants as engaging in such
3 file-sharing on a different date and that defendants' attorney has
4 represented that some of the "Doe" defendants are in fact the same
5 person (see, e.g., Doe 3 brief on appeal at 16 n.13; Amended
6 Supporting Declaration of Richard A. Altman dated October 6, 2008,
7 at 1 n.1). The principal assertion made only on information-and-
8 belief is that defendants' copying and/or distribution of
9 plaintiffs' music were without permission. But no more definitive
10 assertion as to lack of permission seems possible when the users
11 remain anonymous.

12 The Complaint's Exhibit A itself is never mentioned in
13 Doe 3's brief. Page 3 of that Exhibit makes assertions as to
14 Doe 3 and could hardly be more specific. It specifies that at
15 "**IP Address**[] 169.226.226.24" at 2:15:57 a.m. on April 12, 2007,
16 the "**P2P Network**[] AresWarez" was in use (emphases in original);
17 that a total of 236 audio files were present in a file-sharing
18 folder at that IP address at that time; and that among those files
19 were the following songs, whose respective copyrights were owned
20 by the plaintiffs indicated:

	<u>Copyright Owner</u>	<u>Artist</u>	<u>Recording Title</u>	<u>Album Title</u>
1 2	UMG Recordings, Inc.	Beastie Boys	Girls	Licensed To Ill
3 4	UMG Recordings, Inc.	Jodeci	Come and Talk to Me	Forever My Lady
5 6	Motown Record Company L.P.	Lionel Richie	Hello	Can't Slow Down
7 8	Interscope Records	Eminem	Superman	Eminem Show
9 10 11 12	Capitol Records, LLC	Poison	Every rose has its thorn	Open Up & Say....Ahh!
13 14 15	SONY BMG MUSIC ENTERTAINMENT	Good Charlotte	Lifestyles of of the Rich and Famous	The Young and the Hopeless

16 (Complaint Exhibit A, at 3.) The Complaint alleges that notice of
17 copyright pursuant to 17 U.S.C. § 401 had been placed on each such
18 album cover and on the published copies of each of the sound
19 recordings identified in Exhibit A. (Complaint ¶ 23.) Given the
20 factual detail in the Complaint and its Exhibit, plaintiffs'
21 pleading plainly states copyright infringement claims that are
22 plausible. See generally Grokster, 545 U.S. at 920 (individual
23 "users of peer-to-peer networks . . . have prominently employed
24 those networks in sharing copyrighted music and video files
25 without authorization"); In re: Aimster Copyright Litigation, 334
26 F.3d at 645 ("Teenagers and young adults who have access to the
27 Internet like to swap computer files containing popular music. If
28 the music is copyrighted, such swapping, which involves making and
29 transmitting a digital copy of the music, infringes copyright.
30 The swappers, who are ignorant or more commonly disdainful of

1 copyright and in any event discount the likelihood of being sued
2 or prosecuted for copyright infringement, are the direct
3 infringers.").

4 In addition, the Linares declaration submitted in support
5 of plaintiffs' subpoena request pointed out that Exhibit A lists
6 only samples of the numerous "audio files that were being shared
7 by [the Doe d]efendants at the time that the RIAA's agent . . .
8 observed the infringing activity" (Linares Decl. ¶ 19; see
9 Complaint Exhibit A, stating that as many as 1,143 audio files
10 were found in some of the Doe defendants' file-sharing folders),
11 and that complete lists would be provided to the court upon
12 request (Linares Decl. ¶ 19). No greater specificity in the
13 Complaint or in plaintiffs' submissions in support of their
14 request for the subpoena to SUNYA was required.

15 Doe 3 argues that the Complaint does not adequately allege
16 copyright infringement because, he argues, merely "making . . .
17 available" a work on a peer-to-peer network does not violate a
18 copyright holder's distribution right absent proof of actual
19 distribution (Doe 3 brief on appeal at 5). We need not address
20 the question of whether copyright infringement occurs when a work
21 is simply made available, however, because the Complaint alleges
22 not that defendants merely made songs available on the network but
23 that defendants both actually downloaded plaintiffs' copyrighted
24 works and distributed them. (Complaint ¶ 22 ("Exhibit A includes
25 the currently-known total number of audio files being distributed
26 by each Defendant.")) The Complaint thus alleges violations of

1 the copyright holders' reproduction and distribution rights under
2 17 U.S.C. §§ 106(1) and (3). See, e.g., London-Sire Records, Inc.
3 v. Doe 1, 542 F.Supp.2d 153, 166 & n.16, 169 (D. Mass. 2008)
4 (violations of copyright owner's reproduction and distribution
5 rights were adequately alleged by complaint stating that the
6 defendants used a peer-to-peer network to download copyrighted
7 works without permission and to distribute them to the public).
8 For the reasons stated above, the facts asserted in the Complaint
9 are adequate to support these allegations. See id. at 169 ("The
10 Court can draw from the [c]omplaint and the current record a
11 reasonable inference in the plaintiffs' favor--that where the
12 defendant has completed all the necessary steps for a public
13 distribution, a reasonable fact-finder may infer that the
14 distribution actually took place." (emphasis omitted)).

15 We need not decide whether the requirement we endorse
16 today, that a plaintiff seeking to subpoena an anonymous Internet
17 defendant's identifying information must make a "concrete showing
18 of a prima facie claim of actionable harm," would be satisfied by
19 a well-pleaded complaint unaccompanied by any evidentiary showing.
20 Here, plaintiffs' Complaint, attached exhibit, and supporting
21 declaration are clearly sufficient to meet that standard.

22 We note that Doe 3 disparages the contents of the Linares
23 declaration, arguing that it is "fatally short on averments on
24 personal knowledge about the supposed infringements by Doe 3"
25 (Doe 3 brief on appeal at 28 (emphasis in original)). On the face
26 of the record--even assuming that such a summary-judgment-level or

1 trial-level standard were applicable--that criticism is
2 unjustified. Linares stated in his declaration, "under penalty of
3 perjury," that he "ha[d] personal knowledge of the facts stated
4 [therein]" (Linares Decl. introductory paragraph), that he had
5 provided "oversight over the review of the lists contained in
6 Exhibit A to the Complaint," and that he "attest[ed] to the
7 veracity of those lists" (id. ¶ 15). He stated: "this
8 Declaration is based on my personal knowledge, and if called upon
9 to do so, I would be prepared to testify as to its truth and
10 accuracy." (Id. ¶ 2.) Further, even if Linares did not himself
11 view the contents of defendants' file-sharing folders, his
12 testimony may well be sufficient to have the results of the
13 investigation he commissioned admitted in evidence at trial. See,
14 e.g., Keith v. Volpe, 858 F.2d 467, 481 (9th Cir. 1988) (testimony
15 by a witness who "functioned as the survey director, even though
16 he contracted with another firm to provide interviewers" for the
17 survey, "is sufficient to establish a foundation" for
18 admissibility of the survey at trial), cert. denied, 493 U.S. 813
19 (1989); Piper Aircraft Corp. v. Wag-Aero, Inc., 741 F.2d 925, 931
20 (7th Cir. 1984) ("We agree with the suggestion in McCarthy's
21 treatise that the testimony of a survey director alone can
22 establish the foundation for the admission of survey results."
23 (citing 2 J.T. McCarthy, Trademarks and Unfair Competition § 32:53
24 (1973))). No greater proof was required in opposition to the
25 motion to quash the subpoena seeking the identities of the persons
26 who downloaded and/or distributed plaintiffs' copyrighted works.

1 Finally, we note that Doe 3 several times mentions the
2 copyright doctrine of "fair use," stating, for example, that "the
3 right to make a personal copy of copyrighted material may be
4 protected as fair use" (Doe 3 brief on appeal at 5), and that
5 "some downloading may be permissible as fair use" (id. at 25).
6 Whether or not these and other statements are intended to suggest
7 that Doe 3 has a fair-use defense to plaintiffs' claims of
8 copyright infringement, we reject the proposition that these
9 arguments are sufficient to warrant quashing plaintiffs' subpoena.
10 "Fair use" is an equitable doctrine, the applicability of which
11 presents mixed questions of law and fact. See, e.g., Harper &
12 Row, Publishers, 471 U.S. at 560. "Fair use presupposes good
13 faith and fair dealing," and one pertinent consideration is
14 "whether the user stands to profit from exploitation of the
15 copyrighted material without paying the customary price." Id.
16 at 562 (internal quotation marks omitted).

17 [E]specially relevant in determining whether [a
18 given] use was fair are: (1) the purpose and
19 character of the use; (2) the nature of the
20 copyrighted work; (3) the substantiality of the
21 portion used in relation to the copyrighted work as a
22 whole; [and] (4) the effect on the potential market
23 for or value of the copyrighted work.

24 Id. at 560-61. Here, the second, third, and fourth elements are
25 clear. The works at issue are original musical compositions,
26 present in the respective Doe defendants' file-sharing folders in
27 their entirety; and, assuming lack of the copyright owners'
28 consent, the likely detrimental effect of file-sharing on the
29 value of copyrighted compositions is well documented, see, e.g.,

1 Grokster, 545 U.S. at 923 (anecdotal and statistical evidence
2 "gives reason to think that the vast majority of users' downloads
3 are acts of infringement, and because well over 100 million copies
4 of the software in question are known to have been downloaded, and
5 billions of files are shared across the FastTrack and Gnutella
6 networks each month, the probable scope of copyright infringement
7 is staggering"). And although Doe 3 indicates that he "may" have
8 had a permissible purpose for copying and sharing the music found
9 in his file-sharing folder, any assertion of such a purpose raises
10 questions of credibility and plausibility that cannot be resolved
11 while Doe 3 avoids suit by hiding behind a shield of anonymity.

12 We note that we are skeptical of the magistrate judge's
13 view that "any pretext of privacy" on the part of a computer
14 owner is "render[ed] void" simply by "the notion [that he]
15 allow[s] others to have access to [his] database by virtue of the
16 Internet in order to pluck from a computer information and data
17 that the computer owner or user wishes to share," Arista I, 2009
18 WL 414060, at *6. The privacy claimed here is not for the
19 information that the computer owner or user wishes to share but
20 rather for his or her identity. Instead, we regard Doe 3's
21 expectation of privacy for sharing copyrighted music through an
22 online file-sharing network as simply insufficient to permit him
23 to avoid having to defend against a claim of copyright
24 infringement.

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CONCLUSION

We have considered all of Doe 3's contentions on this appeal and have found them to be without merit. The order of the district court denying the motion to quash the subpoena is affirmed.

The stay of SUNYA's compliance with so much of the subpoena as sought information pertaining to Doe 3, previously granted by this Court pending resolution of the appeal, is hereby lifted.