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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERSCOPE RECORDS, a California general partnership,
et al.,

Plaintiffs,

-against-

DOES 1 - 100,

Defendants.

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X

Civil Action No. 05CV7667
(RJH) (DFE)

Filed Electronically

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION
TO JANE DOE'S MOTION TO QUASH THE SUBPOENA**

Plaintiffs respectfully file this opposition to Defendant Jane Doe's ("Doe" or "Defendant") motion to quash a subpoena issued by Plaintiffs to Time Warner Cable ("Time Warner"). For the reasons discussed below, Defendant's motion should be denied.

Defendant's motion to quash asks this Court to immunize her from liability for violating Plaintiffs' copyrights. Plaintiffs have gathered substantial evidence showing that each of the Doe defendants in this case are significant copyright infringers, but cannot pursue their claims—in this or any court—until they know who the Doe defendants are and where they reside. The discovery that this Court has expressly authorized (*see* Order Granting Plaintiffs' *Ex Parte* Application to Take Immediate Discovery, dated September 6, 2005) is directed toward identifying the defendants so that Plaintiffs' claims can proceed. If the Court were to grant Defendant's motion, this case would be over before it began.

Defendant raises one argument in support of her motion to quash, but this argument lacks merit. Defendant asserts that Plaintiffs cannot seek information about his or her

identity and place of residence because “the underlying Complaint is subject to dismissal.” Mtn. at 2. This argument, however, is not a proper basis on which to quash a subpoena under Fed. R. Civ. P. 45(c)(3). Indeed, this Court has rejected this very argument in an identical case. *See Loud Records, LLC, et al. v. Does 1-74*, Case No. 04-CV-9881-RWS (See Appendix, Sec. A). Furthermore, even if this were a basis on which to quash Plaintiffs’ subpoena—which it is not—Plaintiffs’ Complaint more than meets the liberal pleading requirements of Rule 8. *See, e.g., Sony Music Entertainment Inc. v. Does 1-40*, 326 F.Supp.2d 556, 565 (S.D.N.Y. 2004) (in rejecting a similar motion to quash the Court noted that “Plaintiffs have made a concrete showing of a prima facie claim of copyright infringement”).

For these reasons, the Court should deny the Defendant’s motion.

BACKGROUND

The Court is familiar with the background of this case. Plaintiffs are major recording companies who own copyrights in sound recordings. Collectively, they face a massive problem of digital piracy over the Internet. Every month, copyright infringers unlawfully disseminate billions of perfect digital copies of Plaintiffs’ copyrighted sound recordings over peer-to-peer (“P2P”) networks. *See Lev Grossman, It’s All Free*, Time, May 5, 2003. A P2P network is an online media distribution system that allows users to transform their computers into interactive Internet sites, disseminating files for other users to copy. The most infamous P2P network was the Napster system, which was enjoined by a federal court. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001). Other P2P networks have, however, arisen in Napster’s wake and the Supreme Court has held that these P2P networks are liable for the infringement of Plaintiffs’ copyrighted works. *See, e.g., Metro-Goldwyn-Mayer Studios, Inc., et al. v. Grokster Ltd., et al.*, 125 S. Ct. 2764 (2005). As a direct result of piracy on P2P networks,

Plaintiffs have and continue to sustain substantial financial losses.

P2P users who disseminate (upload) and copy (download) copyrighted material violate the copyright laws. *See id.* at 2770-72 (noting that users of peer to peer networks share copyrighted music and video files on an enormous scale and as such even the providers of those networks "concede infringement" by the individual users); *In re Aimster Copyright Litigation*, 334 F.3d 643 (7th Cir. 2003), *cert. denied*, 124 S. Ct. 1069 (2004). Copyright infringement over P2P networks is widespread, however, because users can conceal their identities by means of an alias. Copyright owners can observe infringement occurring on P2P networks, but cannot (without assistance) identify the true names and locations of the infringers.

The Defendant in this case is an active participant on a P2P network. As such, Defendant offers copyrighted sound recordings stored on her computer for others to download and downloads copyrighted sound recordings from other users of the P2P network. Plaintiffs discovered Defendant openly disseminating sound recordings whose copyrights are owned by Plaintiffs. By logging onto the P2P network, Plaintiffs viewed the files that Defendant was offering to other users. The Defendant in this case is a significant infringer:¹ she has chosen to make available from her computer hundreds of sound recordings whose copyrights are owned by several of the Plaintiffs. In conjunction with the complaint filed in this case, Plaintiffs listed a sample of the songs that the defendants were disseminating without authorization (*see* Exhibit A to the Complaint). Furthermore, and as alleged in the Complaint, on information and belief, each Defendant downloaded (reproduced) the sound recordings without the permission of the Plaintiffs. *See* Complaint, ¶ 23.

¹ Plaintiffs' discovered Defendant with 1,864 sound recordings on her computer, many of which are owned by Plaintiffs. Defendant was offering these sound recordings freely for distribution to the millions of people who use similar P2P networks. On information and belief, Defendant downloaded (copied) all or many of these 1,864 sound recordings without permission of the record company copyright owners.

As has previously been explained to the Court in the Whitehead Declaration filed with the original *Ex Parte* Motion to Take Immediate Discovery, upon finding Defendant disseminating large numbers of copyrighted works, Plaintiffs gathered substantial evidence of Defendant's illegal conduct. Nonetheless, Plaintiffs could not ascertain her name, address, or any other contact information. Whitehead Decl. ¶¶ 16, 21. Plaintiffs could, however, identify the Internet Protocol ("IP") address from which the Defendant was unlawfully disseminating Plaintiffs' copyrighted works. Using the IP address, Plaintiffs determined that Defendant was using Time Warner's service to disseminate copyrighted works unlawfully. *Id.* Time Warner maintains logs that match IP addresses with their users' computers. *Id.* ¶ 14. By looking at its IP address logs, Time Warner can match the IP address, date, and time with the computer that was using the IP address when Plaintiffs observed the infringement. Thus, Time Warner—and only Time Warner—can identify the Defendant in this case.

Defendant has now moved to quash the subpoena to Time Warner on the baseless ground that "the underlying complaint fails to state a claim upon which relief can be granted." Mot. at 3. Notably, Defendant does not dispute her liability for copyright infringement. Nor does she dispute that Plaintiffs are entitled to bring suit against individuals disseminating copyrighted works over peer-to-peer ("P2P") networks. Indeed, there is no credible argument to the contrary. Uploading and downloading copyrighted works over a P2P network clearly violates federal law. *See Grokster*, 125 S.Ct. at 2770-72 (noting that users of peer to peer networks share copyrighted music and video files on an enormous scale and as such even the providers of those networks "concede infringement" by the individual users); *Napster, Inc.*, 239 F.3d 1004, 1013-14 (9th Cir. 2001). *See e.g., In re Aimster Copyright Litigation*, 334 F.3d 643, 645 (7th Cir. 2003) ("swap[ping] computer files containing popular music . . . infringes

copyright”); *Sony Music Corp., et al. v. James Scott*, No. 03-Civ.-6886-BSJ (Feb. 18, 2005 S.D.N.Y.) (finding “no genuine issue of material fact as to Defendant’s liability for infringing Plaintiffs’ copyrights.”) (See Appendix Sec. B); *BMG Music v. Gonzalez*, 2005 WL 106592, 2005 Copr. L. Dec. P 28,933 (N.D. Ill. January 7, 2005) (“Numerous courts have held that downloading music from the internet . . . constitutes ‘direct infringement.’”); *Elektra Entertainment Group, Inc. v. Bryant*, 2004 WL 783123, at * 4 (C.D. Cal. Feb. 13, 2004) (“Plaintiffs allege that Defendant has used an online media distribution system to download, meaning copy, Plaintiffs’ copyrighted sound recordings and to distribute those recordings to other users of the system. These facts constitute direct copyright infringement.”). For the reasons listed below, Defendant’s motion must be denied.

ARGUMENT

I. DEFENDANT’S ARGUMENT IS NOT A PROPER BASIS ON WHICH TO QUASH PLAINTIFFS’ RULE 45 SUBPOENA.

Rule 45(c)(3) specifies four specific grounds on which a subpoena may be quashed. Specifically, a subpoena may be quashed if: (1) it fails to allow reasonable time for compliance; (2) requires a person who is not a party to travel to a place more than 100 miles from the place where that person resides; (3) requires disclosure of privileged or other protected matter; or (4) subjects a person to undue burden. Fed. R. Civ. P. 45(c)(3).

Defendant fails to identify any basis under Rule 45(c)(3) on which she is moving to quash the subpoena. Plaintiffs’ failure to identify such a basis is not coincidental. The sufficiency of a complaint is not a basis on which to quash a subpoena. *See Fed. R. Civ. P. 45(c)(3)*; *see also Loud Records, LLC, et al. v. Does 1-74*, No. 04-CV-9881-RWS (See Appendix Sec. A). In *Loud Records*, this Court denied a nearly identical motion to quash “for failure to

establish grounds under Rule 45.”² *Id.* Defendant’s current motion fails to cure this deficiency and must be denied.

Defendant erroneously relies on *Columbia Ins. Co. v. Seescandy.com*, 185 F.R.D. 573 (N.D.Cal. 1999) and *Highfields Capital Management L.P. v. Doe*, 2005 WL 2065142 (N.D.Cal. Jan. 18, 2005) (citing *Dendrite Int’l, Inc. v. Does No. 3*, 342 N.J.Super 134 (N.J. App. 2001)). Those cases address the situation where a plaintiff is seeking leave to conduct expedited discovery, not a motion to quash a subpoena based on failure to state a claim. Those cases do not address the present situation in which the Court has already found good cause exists for conducting limited immediate discovery. Defendant cites no authority for the proposition that a Rule 45 subpoena may be quashed because the underlying complaint is subject to dismissal. Indeed, such a conclusion is directly contrary to the law. *See Loud Records*, No. 04-CV-9881-RWS (See Appendix Sec. A); Fed. R. Civ. P. 45(c)(3).

II. DEFENDANT’S ARGUMENT ON THE MERITS DOES NOT PROVIDE A BASIS ON WHICH TO QUASH PLAINTIFFS’ SUBPOENA.

Defendant’s motion to quash is based on the faulty presumption that she is not liable for making 1,864 copyrighted sound recordings available for download because this “does not violate the copyright owner’s right of distribution.” Mot. at 6. That argument is a red herring. To permit Defendant to resist such discovery by arguing her view of the merits would effectively prohibit Plaintiffs from ever being able to vindicate their legal rights. In any event, Plaintiffs have gathered substantial evidence that defendants have unlawfully disseminated hundreds of Plaintiffs’ copyrighted works, and have attached to the application for expedited discovery a sampling of screenshots showing these works. *See Whitehead Decl. Ex. A.* This argument also fails because Plaintiffs’ Complaint also alleges that Defendant illegally downloaded (reproduced)

² As Defendant’s counsel was counsel of record in *Loud Records*, they are aware that this is not a proper basis on which to quash a Rule 45 subpoena.

Plaintiffs copyrighted sound recordings. Plaintiffs have provided more than sufficient information to establish a prima facie case of copyright infringement, and certainly enough to warrant the discovery sought.³

Even if Defendant's argument were true—which it is not—it would provide no basis for quashing the subpoena. A motion to quash a Rule 45 subpoena is not the place for contesting the merits of the underlying action; if it were, a full-blown trial would be required every time a party sought to resist discovery. Plaintiffs only seek discovery so that their claims may proceed, not judgment against the Defendant. In the event that the parties do not reach a resolution after Defendant has been identified, Defendant will have every opportunity to respond to the merits of the Complaint and to raise any appropriate defenses.

Plaintiffs have already presented substantial evidence that Defendant was disseminating hundreds of copyrighted sound recordings without authorization and had previously illegally downloaded hundreds of copyrighted sound recordings. Plaintiffs easily meet the “good cause” standard for expedited discovery. Indeed, it was for these reasons that this Court—like over 370 other courts across the country that relied on precisely the same kind of evidence in parallel cases—granted Plaintiffs leave to serve the subpoena seeking the defendants' identifying information. Notwithstanding Defendant's request, Plaintiffs thus have made an evidentiary showing more than sufficient for the limited discovery they seek.

III. DEFENDANT'S ARGUMENT THAT PLAINTIFFS' COMPLAINT IS SUBJECT TO DISMISSAL IS UNAVAILING

At this stage of the proceedings, Plaintiffs' burden is not to rebut factual defenses that might be raised or rebut arguments as to the sufficiency of their Complaint. Such arguments do not constitute sufficient grounds on which to quash Plaintiffs' subpoena. *See Loud Records,*

³ Indeed, the Court has already determined that Plaintiffs are entitled to the discovery they seek. *See Order Granting Plaintiffs' Ex Parte Application to Take Immediate Discovery.*

No. 04-CV-9881-RWS (See Appendix Sec. A); Fed. R. Civ. P. 45(c)(3). Nonetheless, Plaintiffs will respond to Defendant's factually and legally incorrect argument that the Complaint "fails to state a claim upon which relief can be granted and does not satisfy the pleading requirements applicable to copyright infringement claims." Mot. at 3.

A. Defendant's Arguments Regarding the Sufficiency of Plaintiffs' Complaint Have Been Rejected.

As an initial matter, the very same arguments Defendant advances to quash Plaintiffs' subpoena has been rejected by this Court. *See Loud Records*, No. 04-CV-9881-RWS (See Appendix Sec. A). In that case, counsel for Defendant was counsel of record and made the very same arguments regarding the sufficiency of Plaintiffs' Complaint. This Court rejected those arguments and denied the motion to quash finding "[t]he time of the identification of Doe is determined to be the date of filing the complaint and thereafter." *Id.* Inexplicably, counsel for Defendant is again advancing the very same arguments that have been rejected by this Court. This case is no different and Defendant's arguments should be rejected.

In addition, similar arguments were also rejected by the District Court for the Southern District of Texas in a parallel case. In that case, a defendant moved to dismiss a similar complaint on nearly identical grounds to those set forth by Defendant in the current case. (See Appendix Sec. C), Motion to Dismiss, *BMG Music, et al. v. Jacob Conklin*, No. H-05-1482 (Sept. 16, 2005). The plaintiffs in *Conklin* opposed the motion to dismiss on the same grounds as those set forth below in Sections III. B, C and E. (See Appendix Sec. D), Opposition to Motion to Dismiss, *Conklin*, No. H-05-1482. The *Conklin* Court found no merit in the defendant's arguments denied the motion to dismiss. (See Appendix Sec. E), Order, *Conklin*, No. H-05-1482. This case is no different and the Court should deny Defendant's motion to quash.

B. Plaintiffs' Complaint Complies with the Liberal Notice Pleading Policies of Rule 8

To properly state a claim of copyright infringement, Plaintiffs must only allege: (1) that they own valid copyrights; and (2) that Defendant violated one or more of the exclusive rights in 17 U.S.C. § 106 by, for example, copying or distributing Plaintiffs' copyrighted works. *See Susan Wakeen Doll Co., Inc. v. Ashton Drake Galleries*, 272 F.3d 441, 450 (7th Cir. 2001). *See also, e.g., Feist Pub., Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991) ("To establish copyright infringement, two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original."); 4 M. & D. NIMMER, NIMMER ON COPYRIGHT § 13.01, at 13-5 & n.4 (2002) ("Reduced to most fundamental terms, there are only two elements necessary to the plaintiff's case in an infringement action: ownership of the copyright by the plaintiff and copying [or public distribution or public display] by the defendant.").

Moreover, Rule 8 (a) requires, in pertinent part, that Plaintiffs' Complaint include "(1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks." FED. R. CIV. P. 8(a). Defendant suggests only that the Complaint is deficient with respect to the acts by which the copyrighted works were infringed and/or the time frame during which the infringement took place. These arguments are without merit, and the Motion to Quash should be denied.

C. Plaintiffs have Adequately Alleged the Acts by Which the Defendant Infringed the Copyrighted Works.

Defendant's assertion that "[t]he Complaint makes no attempt to describe the specific acts of infringement" is simply incorrect. Mot. at 4. In support of this contention,

Defendant cites to *Marvullo v. Gruner & Jahr*, 105 F. Supp. 2d 225, 230 (S.D.N.Y. 2000), for the proposition that Plaintiffs must “set out the ‘particular infringing acts . . . with some specificity.’” Mot. at 3. The acts the *Marvullo* Court instructed must be specifically pleaded are the acts “by which [the] defendant directly or contributorily violated plaintiff’s copyright.” *Marvullo*, 105 F. Supp. 2d at 230. Plaintiffs submit they have set forth the acts of infringement with far more than “some” specificity; their allegations are hardly the “[b]road, sweeping allegations of infringement” against which the *Marvullo* Court warned. *Id.* at 230.

At its heart, Defendant’s argument ignores the plain language of Plaintiffs’

Complaint, which states:

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. Exhibit A identifies on a Defendant-by-Defendant basis (one Defendant per page) a list of copyrighted recordings that each Defendant has, without permission or consent of Plaintiffs, downloaded, distributed to the public, and/or made available for distribution to others. In doing so, each Defendant has violated Plaintiffs’ exclusive rights of reproduction and distribution. Each Defendant’s actions constitute infringement of Plaintiffs’ copyrights and/or exclusive rights under copyright.

Complaint ¶ 23. Plaintiffs have therefore alleged the specific acts by which copyright infringement took place: the reproduction and distribution of the Copyrighted Recordings using an online media distribution system. Moreover, Plaintiffs have gone beyond mere allegations, detailing the evidence that Plaintiffs have gathered with a sworn declaration provided as part of their motion for expedited discovery. *See* Whitehead Decl. ¶¶ 16, 17 (explaining that Plaintiffs possess information concerning the hundreds of files being shared by Defendant). Notably, Plaintiffs are *not* required to allege each individual act of copyright infringement in their Complaint. *See Carell v. Shubert Organization, Inc.*, 104 F. Supp. 2d 236, 251 (S.D.N.Y. 2000)

(“Plaintiff’s Complaint narrows the infringing acts to the publication of the [copyrights at issue], and their illegal use in certain commercial products These allegations are sufficiently specific for the purposes of Rule 8, despite the fact that each individual infringement was not specified.”).⁴

This Court has found that the actions described in Plaintiffs’ Complaint unquestionably qualify as actionable copyright infringement. See *Sony Music Entertainment Inc.*, 326 F.Supp.2d at 565 (“Plaintiffs have made a concrete showing of a prima facie claim of copyright infringement.”); *Sony Music Corp., et al. v. James Scott*, No. 03-Civ.-6886-BSJ (Feb. 18, 2005 S.D.N.Y.) (finding “no genuine issue of material fact as to Defendant’s liability for infringing Plaintiffs’ copyrights.”) (See Appendix Sec. B). See also *Grokster*, 125 S.Ct. at 2770-72 (noting that users of peer to peer networks share copyrighted music and video files on an enormous scale and as such even the providers of those networks “concede infringement” by the individual users); *In re Aimster Copyright Litigation*, 334 F.3d 643, 645 (7th Cir. 2003) (“transmitting a digital copy of [copyrighted] music . . . infringes copyright”); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001) (“Napster users who upload file names to the search index for others to copy violate Plaintiffs’ distribution rights.”); *Hotaling v. Church Of Jesus Christ Of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997) (placing unauthorized copy of copyrighted work in library’s collection, listing work in library’s index or catalog system, and making work available to borrowing or browsing public was distribution of work within meaning of Copyright Act).

Defendant’s citations to legal authority are unavailing. In *Marvullo*, the plaintiff alleged that his photograph “was published by the Defendants beyond the scope and authority of

⁴ Plaintiffs could hardly be expected to do so: such infringement has been taking place for as long as the sound recordings have been available on Defendant’s computer.

the limited license” sold by the plaintiff to the defendants and “contributorily infringed said copyright by alternatively acquiring, publishing, using and placing upon the general market . . . a photographic image which was copied largely from plaintiff’s copyrighted photographic image.” *See Marvullo*, 105 F. Supp. 2d at 228-29. But the Court found that the plaintiff’s allegations were far too “vague and conclusory” and held that “[a]side from the specific allegation that defendant . . . violated plaintiff’s copyright by unauthorizedly cropping the . . . photograph, [the plaintiff] fails to allege with specificity any acts by which either defendant directly or contributorily violated plaintiff’s copyright.” *Id.* at 230-31. Here, however, Plaintiffs have pled the precise acts “by which [the] defendant directly . . . violated plaintiff’s copyright”: the reproduction and distribution of the Copyrighted Recordings using an online media distribution system.

Defendant similarly cites *Brought to Life Music, Inc. v. MCA Records, Inc.*, 2003 WL 296561, *1 (S.D.N.Y. Feb. 11, 2003), for the proposition that “a complaint must therefore allege . . . ‘by what acts during what time the defendant infringed the copyright.’” *Mot.* at 3. But in *Brought to Life*, the plaintiff literally included no allegation in its complaint that the defendant had “violated any of its alleged exclusive rights in its works. Specifically, “[the defendant] is not alleged to have (i) reproduced plaintiff’s work; (ii) prepared derivative works based on plaintiff’s work; (iii) distributed copies of plaintiff’s work to the public for sale; or (iv) performed plaintiff’s work publicly by means of digital audio transmission.” *Brought to Life Music, Inc.*, 2003 WL 296561 at *1. Here, as demonstrated above, Plaintiffs have alleged that Defendant violated Plaintiffs’ exclusive rights of reproduction and distribution through her use of an online media distribution system—precisely the sort of allegations missing from the complaint in *Brought to Life*.

Because Plaintiffs have more than adequately described the acts by which Defendant infringed Plaintiffs' copyrights, Defendant's Motion to Quash on this point should be denied.

D. Defendant's "Made Available for Download" Argument is Irrelevant

Defendant argues that "that merely making copyrighted works *available* for downloading by others does not violate the copyright owner's right of distribution." Mtn. at 6. Defendant asserts in her Motion that this as an additional basis for dismissing Plaintiffs' Complaint. Defendant's "made available for download" theory, however, is unavailing.

Plaintiffs' Complaint alleges conduct by Defendant that goes far beyond the "mere listing" of works available for download. In fact, Plaintiffs allege that Defendant downloaded (copied) and actually distributed Plaintiffs' copyrighted sound recordings. *See* Complaint, ¶ 23. Plaintiffs have gathered substantial evidence supporting these allegations. *See* Whitehead Decl. Ex. A. Plaintiffs' Complaint properly alleges a cause of action based on this evidence. *See* Complaint, ¶ 23.

Finally, Defendant cites a number of cases that purportedly support the proposition that making files available for download does not violate the copyright owner's right of distribution. These cases, however, are irrelevant because (1) they do not provide a basis on which to quash the subpoena; and (2) they simply fail to address the conduct that is alleged in Plaintiffs' Complaint.⁵ Should the Court wish to address Defendant's "available for download" theory, Plaintiffs are prepared to provide additional briefing on this issue.⁶

⁵ Specifically, Plaintiffs' pled that Defendant illegally downloaded (copied) Plaintiffs' copyrighted sound recordings as well as making such files available for download.

⁶ *See, e.g., A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001) ("Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights."); *In re Aimster*, 252 F.Supp.2d 634, 648 (N.D.Ill. 2002), *aff'd*, 334 F.3d 643 (7th Cir. 2003) (holding defendant liable for copyright infringement and citing evidence of "hundreds of works found to be available through the Aimster

E. Plaintiffs have adequately alleged the time frame in which Defendant infringed the copyrighted works.

Plaintiffs also have adequately specified the time frame during which copyright infringement took place. Defendant cites to the decisions in *Plunket v. Doyle*, 2001 WL 175252, at *4-6 (S.D.N.Y. Feb. 22, 2001), *Marvullo*, and *Brought to Life* to support her argument that the Complaint should be dismissed because it does not “describe the time period during which the infringing acts occurred.” Mot. at 4. These cases are inapposite and do not support the dismissal of Plaintiffs’ Complaint.

In *Plunket*, the plaintiff claimed only that the defendants “entered into, or have offered, licenses purporting to grant third parties the right to exploit the [copyrighted works] in various media.” *Plunkett*, 2001 WL 175252 at *5. The Court found that this allegation did not include any description of the time period during which the infringement took place. *See id.* Similarly, the Court in *Marvullo* premised its dismissal on the plaintiff’s failure to describe the acts of infringement; the only reference in that decision to “time of infringement” was in a passing reference to the principle of law that the time of infringement must be described. *See Marvullo*, 105 F. Supp. 2d at 230-31. And in *Brought to Life*, the Court found that the plaintiff had failed to make any effort to describe the time of infringement. *See Brought to Life*, 2003 WL 296561, at *1 (“Plaintiff has not attempted to describe ‘by what acts and during what time’ [the defendant] infringed the copyright.”).

Notably, the *Plunket*, *Marvullo*, and *Brought to Life* decisions make no mention of any allegation of continuing infringement. In this case, however, Plaintiffs have alleged that as of December 16, 2004—the date the Complaint was filed—Defendant “has used, and

system”); *Hotaling v. Church of Jesus-Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997) (“When a public library adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the borrowing or browsing public, it has completed all the steps necessary for distribution to the public.”).

continues to use an online media distribution system” to infringe Plaintiffs’ copyrights. Complaint ¶ 23. Courts in this District have previously recognized that an allegation of ongoing and continuous infringement satisfies the requirement that the Complaint specify the time period during which the subject copyright infringement occurred. For example, in *Franklin Electronic Publishers v. Unisonic Prod. Corp.*, 763 F. Supp. 1, 4 (S.D.N.Y. 1991), the Court considered a motion to dismiss a copyright infringement count for failure to state the time of infringement. The Court held that by alleging continuous infringement, the plaintiff in that case had sufficiently pleaded the time of infringement and, therefore, denied the motion to dismiss. *See id.* at 4. (“[W]hile plaintiff has not alleged the date defendants allegedly commenced their infringing activities, plaintiff has alleged that defendant continues to infringe.”); *Sony Music Entertainment Inc.*, 326 F.Supp.2d at 565 (“Plaintiffs have made a concrete showing of a prima facie claim of copyright infringement.”). Indeed, in a parallel case brought by the recording company plaintiffs, this Court examined the complaint and found “[t]he time of identification of Doe is determined to be the date of filing the complaint and thereafter.” *Loud Records*, No. 04-CV-9881-RWS. Similarly, in *Home & Nature Inc. v. Sherman Specialty Co.*, 322 F. Supp. 2d 260 (E.D.N.Y. 2004), the Court found that the plaintiff’s allegation that the defendant “continues to infringe ‘one or more’ of [the plaintiff’s] copyrights by ‘importing, causing to be manufactured, selling and/or offering for sale unauthorized tattoo-like jewelry items’” was sufficient to give notice under Rule 8 “during which times the acts have allegedly taken place.” *Id.* at 266-67.⁷

⁷ By its very nature, copyright infringement occurring through online media distribution systems is ongoing and continuous. This is illustrated here by the massive number of music files (1,864) detected in Defendant’s shared folder—files which, upon information and belief, were both downloaded and/or made available for distribution over an extended period of time. Plaintiffs cannot possibly know how long Defendant has been infringing their copyrights.

Here, as in *Franklin and Home & Nature*, Plaintiffs have alleged an ongoing and continuous infringement by Defendant. Plaintiffs' Complaint unquestionably satisfies the requirement that it show the time frame in which Defendant infringed the copyrighted works.

IV. CONCLUSION

The Court should deny the motion to quash and order Time Warner to comply with the subpoena.

Dated: New York, New York
October 20, 2005

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