

**UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

UNITED STATES OF AMERICA)	
)	
v.)	
)	CASE NO. 2:07CR00015
DANIEL DOVE,)	
)	
Defendant)	

**UNITED STATES' OBJECTIONS, PURSUANT TO FED. R. CR. P. 59(a) TO
UNITED STATES MAGISTRATE JUDGE PAMELA MEADE SARGENT'S
MARCH 26, 2008 ORDER GRANTING MOTION FOR SUBPOENA
DUCES TECUM AS TO DANIEL DOVE**

On March 25, 2008, the Defendant moved this court for permission to issue a pre-trial subpoena duces tecum, pursuant to Federal Rule of Criminal Procedure Rule 17(c), to the Motion Picture Association of America (MPAA), a trade association representing victims in this matter. The next day, before the Government had filed a response, United States Magistrate Judge Pamela Meade Sargent granted Defendant's motion and directed the Defendant to submit an appropriate subpoena to the Court Clerk.

Pursuant to Federal Rule of Criminal Procedure 59(a) the Government hereby files its Objections to the Magistrate Judge's March 26 Order. As is evident from the face of the document requests listed in Defendant's Motion, the subpoena calls for an extraordinary search and production of documents, spanning nearly four years, broken down into 11 categories. (See Motion, at 1-2; Proposed Order). Moreover, despite the fact the referral letter that forms the basis of Defendant's motion was produced to him more than three months ago, Defendant now seeks leave to force a third party to respond to a broad document subpoena in approximately two

weeks. Put simply, Defendant's proposed subpoena is an abusive discovery "fishing expedition." Accordingly, the Government respectfully requests that this Court set aside Magistrate Judge Sargent's Order in full as both clearly erroneous and contrary to law and deny Defendant's motion.

II. Background

Defendant Daniel Dove was charged in an August 28, 2007 Indictment with one count of committing conspiracy to commit criminal copyright, in violation of 18 U.S.C. 371, and one count of criminal copyright infringement, in violation of 18 U.S.C. 2319(b)(1) and 17 U.S.C. 506(a)(1)(A), and aiding and abetting the same, in violation of 18 U.S.C. 2. As set forth in the Indictment, Defendant is accused of participating in and helping to administer an Internet piracy organization known as Elite Torrents. Specifically, the Indictment charges the Defendant with conspiring with other members of Elite Torrents to distribute and reproduce thousands of infringing copyrighted works, including movies, many of which were still in theaters, software programs, and video games. In addition to distributing infringing copyrighted works to other members of the Elite Torrents organization, Defendant is alleged to have acted as an administrator of the Elite Torrents organization, who, among other things, directed co-conspirators to supply infringing copyrighted content to other members of the organization. Furthermore, Defendant is accused of operating a high-speed Internet accessible computer server, which co-conspirators used, with Defendant's permission and encouragement, to provide infringing copyrighted files to other members of the conspiracy.

Pursuant to Fed. R. Cr. P. 16, the Government produced to the Defendant relevant and material documents and things it received from the MPAA in the course of its investigation.

This includes the referral letter, attached to Defendant's Motion as Exhibit A, which Defendant has had in its possession since at least December 21, 2008, more than three months before it filed this motion. Most importantly, Defendant has been provided with electronic copies of the remotely accessible computer server that he is alleged to have operated, the computer hard drives seized from his residence, and the Elite Torrents web server and file transfer logs, which he now claims he needs from a third party victim, the MPAA. In short, Defendant has been provided with more than ample discovery, and his requested subpoena is nothing more than a fishing expedition that will be used to harass a third party victim.

III. The Law Relating To Rule 17(c) Subpoenas

Rule 17(c) of the Federal Rules of Criminal Procedure governs the issuance of subpoenas duces tecum in federal criminal proceedings. "[R]ule 17(c) is designed as an aid for obtaining relevant evidentiary material that the moving party may use at trial." United States v. Cuthbertson, 630 F.2d 139, 144 (2d Cir. 1980). "The test for enforcement is whether the subpoena constitutes a good faith effort to obtain identified evidence rather than a general 'fishing expedition' that attempts to use the rule as a discovery device." Id.

In United States v. Nixon, 418 U.S. 683 (1974), the Supreme Court set the standards for ordering production of documents prior to trial. The Court held that the moving party must show that (1) the documents are both evidentiary and relevant, that is, admissible; (2) the documents are not otherwise procurable before trial through reasonable diligence, (3) the party cannot properly prepare for trial without early production; and (4) the application is not intended as a general fishing expedition. The Supreme Court further stated that "the need for evidence to impeach witnesses is insufficient to require its production in advance of trial." Id., at 701.

Subsequent to Nixon, courts have interpreted the admissibility standard of Rule 17(c) to preclude production of materials whose evidentiary use is limited to impeachment. United States v. Hardy, 224 F.3d 752, 755-56 (8th Cir. 2000); United States v. Hughes, 895 F.2d 1135, 1145-46 (6th Cir. 1990).

In the Fourth Circuit the law regarding the issuance of Rule 17(c) subpoenas is best articulated in United States v. Fowler, 932 F.2d 306, 311-12 (4th Cir. 1991) and in the unpublished United States v. Sobral, 149 F.3d 1172, 1998 WL 276263 (4th Cir. 1998). In Fowler the defendant, a Department of Defense civilian employee, was charged with conversion and the unauthorized conveyance of classified documents (to Boeing). The defendant sought to subpoena the Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, and the Army Inspector General. Among the documents sought were Defense Investigative Service's audits of other contractors, materials relating to governmental investigations, studies of the classified document system, and materials reflecting the acquisition and possession of budgetary documents by other defense contractors. Both the district court and court of appeals concluded that the defendant's subpoena requests were no different from his discovery request made on the government and that he had failed to meet "the [Nixon] requirements of relevancy, admissibility, and specificity." Fowler, *supra*, at 311. *See also*, Sobral, *supra*, at **1 (the court, citing Nixon, concluded that the defendant, charged with defrauding various investors, "had not adequately explained the relevancy of the requested records").

Defendant's reference to this Court's unpublished opinion in United States v. Modi, 2002 WL 188327 (W.D.Va. Feb. 6, 2008) does not aid his position. First, this Court did not rule in Modi, as suggested by Defendant, that the Nixon test would not apply in a situation where the

requested subpoena would be directed to a third party witness. See id. Instead, this Court recognized that “no court has so held.” Id. This Court’s suggestion in dicta that a more lenient standard than that set forth in Nixon might apply in some future case does not warrant such a departure here, where Defendant seeks to issue an expansive subpoena to a victim, seeking evidence that are immaterial to both the Government’s investigation and the charges he faces.

Second, the Defendant neglects to mention that this Court denied a motion to issue pre-trial Rule 17(c) subpoenas to the Government’s expert witnesses in Modi. There, this Court recognized that “[t]he court must supervise the process so that Rule 17(c) does not become a means of conducting general discovery, which is not permitted in criminal cases.” Id. at *2, citing United States v. Tomison, 969 F.Supp. 587, 595-96 (E.D. Cal. 1997). In exercising its supervisory role in Modi, this Court held that the defendants’ document requests, “relating to a series of broad subjects, with the hope of uncovering something useful to their defense” was nothing more than the type of fishing expedition that is prohibited in criminal cases. Id. The Government submits that the Court should reach the same conclusion here.

IV. The Government’s Objections

Given the facts of this case, and the quantity of discovery provided to Defendant pursuant to Fed. R. Cr. P. 16, Defendant’s requested subpoena should be denied as an attempt to take general discovery and harass a victim. Indeed, Defendant’s motion does not articulate any theory of relevance or how the requested categories are necessary for his preparation for trial. Instead, Defendant appears to assume that because the MPAA referred a criminal matter to federal law enforcement for criminal investigation, it is entitled to browse through the MPAA’s

files, in the hopes of finding something interesting. That is not the law as articulated in Nixon, and as applied in Modi and Fowler.

Defendant has already been provided with the materials that are both relevant and necessary for his preparation for trial – the evidence in the possession of the Government that will be used at trial. Defendant's requested subpoena if issued in its current form would cast a wide net on a third party with the hope of finding something relating to this case. That is general discovery, and that is what Rule 17(c) does not allow.

Accordingly, the United States respectfully requests that the Court set aside Magistrate Judge Sargent's March 26 Order and deny Defendant's motion for the issuance of a Rule 17(c) subpoena to be served on the MPAA.

Respectfully submitted,

/s/ Tyler G. Newby
TYLER G. NEWBY
Trial Attorney
Computer Crime and Intellectual Property Section
U.S. Department of Justice
1301 New York Ave., NW, Suite 600
Washington, DC 20005

RANDY RAMSEYER
Assistant United States Attorney
VSB No. 33837
180 West Main Street
Abingdon, Virginia 24210
(276) 628-4161

JAY V. PRABHU
Assistant United States Attorney
Eastern District of Virginia

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of March, 2008, I will electronically file the foregoing with the Clerk of Court using the CM/ECF, which will then send a notification of such filing (NEF) to the following:

Michael B. Gunlicks, Esq.
VSB No. 39375
Gunlicks Law, L.C.
604 N. Boulevard
Richmond, Virginia 23220
(804) 355-9700
(804) 355-4933 (fax)
michael@gunlickslaw.com

Counsel for Daniel Dove

/s/ Tyler G. Newby
TYLER G. NEWBY
Trial Attorney
Computer Crime and Intellectual Property Section
U.S. Department of Justice
1301 New York Ave., NW, Suite 600
Washington, DC 20005