UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARISTA RECORDS LLC; ATLANTIC RECORDING CORPORATION; BMG MUSIC; CAPITOL RECORDS, INC.; ELEKTRA ENTERTAINMENT GROUP INC.; INTERSCOPE RECORDS; LAFACE RECORDS LLC; MOTOWN RECORD COMPANY, L.P.; PRIORITY RECORDS LLC; SONY BMG MUSIC ENTERTAINMENT; UMG RECORDINGS, INC.; VIRGIN RECORDS AMERICA, INC.; and WARNER BROS. RECORDS INC., Plaintiffs, v. LIME WIRE LLC; LIME GROUP LLC; MARK GORTON; GREG BILDSON; and M.J.G. LIME WIRE FAMILY LIMITED PARTNERSHIP, Defendants.	Case No. 06 CV 5936 (KMW) ECF Case

DEFENDANTS LIME GROUP LLC'S AND MARK GORTON'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO RECONSIDER MAY 11, 2010 ORDER AS AMENDED ON MAY 25, 2010

Michael S. Sommer
Tonia Ouellette Klausner
WILSON SONSINI GOODRICH & ROSATI, P.C.
1301 Avenue of the Americas, 40th Floor
New York, New York 10019
Tel: (212) 999-5800
Fax: (212) 999-5899
msommer@wsgr.com; tklausner@wsgr.com

Colleen Bal *(pro hac vice)*
WILSON SONSINI GOODRICH & ROSATI, P.C.
One Market Plaza
Spear Tower, Suite 3300
San Francisco, California 94105
Tel: (415) 947-2000
Fax: (415) 947-2099
cbal@wsgr.com

Attorneys for Defendants Lime Group LLC and Mark Gorton

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

I. INTRODUCTION

Recognizing that this Court misapplied the Second Circuit's two-pronged test for joint and several liability of officers and company owners for infringement committed by their companies, Plaintiffs oppose Lime Group and Gorton's request for reconsideration by reiterating the arguments they made for holding Gorton and Lime Group directly liable for personally committing acts that induced infringement. But the Court did not find Lime Group and Gorton liable for personally participating in the conduct the Court found to induce infringement; it held them liable solely for LW's conduct:

> As a result of the actions and benefits described above, Lime Group and Gorton ***are liable for LW's inducement*** of infringement.

Am. Order at 54 (emphasis added). There simply is no finding in the Order that Lime Group and Gorton are liable for personally inducing users to infringe. Thus, the bulk of Plaintiffs' arguments—addressed at participation in the conduct found to induce infringement—are misplaced. Plaintiffs' lengthy discussion of Gorton's purported control over the conduct the Court found to induce infringement also entirely misses the mark. In the reconsideration motion, Gorton did not challenge the Court's finding that Gorton had the right and ability to supervise the conduct that the Court found to induce infringement (he challenged the finding that he received a direct financial benefit from the adjudicated infringement solely due to his indirect ownership of LW).[1] Stripped of these inapplicable arguments, Plaintiffs' opposition brief ("Pl. Opp.") is left with nothing but conclusory assertions that do nothing to rebut Lime Group and Gorton's showing that: (1) the Court's Order overlooked controlling authority and misapplied the legal standard for joint and several liability in copyright infringement cases; and (2) the Court failed to adhere to well-established evidentiary standards in deciding this matter on summary judgment.

[1] Gorton reserves the right to challenge this finding on appeal.

II. ARGUMENT

As a preliminary matter, Plaintiffs are wrong that Lime Group and Gorton are merely rearguing matters considered and previously rejected by the Court. Plaintiffs did not move for summary judgment against Lime Group and Gorton on the grounds of their purported ability to supervise and direct financial benefit, so neither party previously argued the standard for this theory in connection with Plaintiffs' Motion for Summary Judgment. Moreover, Lime Group and Gorton's motion for reconsideration is based primarily on the Court's having overlooked controlling authority (*Shapiro, Bernstein* & *Co. v. H.L. Green Co.*, 316 F.2d 304, 307 (2d Cir. 1963); *Matthew Bender* & *Co., Inc. v. West Publ'g Co.*, 158 F.3d 693, 707 n.22 (2d Cir. 1998); *Softel, Inc. v. Dragon Med. & Scientific Commc'ns, Inc.*, 118 F.3d 955, 971-72 (2d Cir. 1997)), a legal ground that even Plaintiffs concede is appropriate for reconsideration. Furthermore, and contrary to Plaintiffs' assertion, reconsideration is permissible where a court misapplied the law, *see, e.g., Rose* v. *Barnhart*, No. 01 Civ 1645 (KMW) (RLE), 2007 WL 549419, at *****1 (S.D.N.Y. Feb. 16, 2007) (M.J. Ellis) (quoting *Badian v. Brandaid Commc'ns Corp.*, No. 03 Civ. 2424 (DC), 2005 WL 1083807, at *2 (S.D.N.Y. May 9, 2005)), and where a court overlooked factual matters that, if considered, might have altered the result, *see, e.g., In re Currency Conversion Antitrust Litig.*, 361 F. Supp. 2d 237, 246 (S.D.N.Y. 2005).

Because here the Court overlooked controlling authorities, misapplied the law, and overlooked factual matters that if considered would have altered the Court's findings, reconsideration is entirely appropriate.

A. The Court Did Not Find Lime Group or Gorton Liable Based on Personal Participation in Allegedly Inducing Activity

Plaintiffs' primary argument that the Court held Lime Group and Gorton liable because they "participated in Lime Wire's tortious activity," *see* Pl. Opp. at 5-8, is easily refuted. The plain language of the Order clearly relied on the test of control and financial benefit to find Defendants personally liable, not the test of personal participation. *See* Am. Order at 54 ("As a result of the actions and benefits described above, Lime Group and Gorton ***are liable for LW's***

inducement of infringement.") (emphasis added); Am. Order at 52-53 ("The Court has already found that LW is liable for inducement of infringement, common law copyright infringement, and unfair competition. The evidence establishes that Gorton ***directed*** and ***benefited*** from many of the activities that gave rise to LW's liability.") (emphasis added). The Order does not even attempt to go through each aspect of LW's conduct that the Court found to induce infringement to determine whether Lime Group or Gorton participated in such conduct, as would be required for a determination of liability based on participation. Instead, the Order specifically addresses direct financial benefit, an analysis which would be unnecessary if the Court had been determining Lime Group's and Gorton's liability based on direct participation in the infringing conduct.[2]

B. The Court Overlooked The Second Circuit Requirements Under the Two-Pronged Theory of Joint and Several Liability and Therefore Misapplied The Theory That it Invoked

As set forth in detail in Lime Group and Gorton's Memorandum in Support of Motion to Reconsider ("Lime Group Reconsideration Brief" or "L.G. Rec. Br."), the Order misapplied the Second Circuit's requirements for liability based on ability to supervise and direct financial benefit because (1) the evidence cited by the Court did not establish that Lime Group had the right and ability to supervise or actually exercised control over the conduct of LW that the Court found to induce infringement by LW users, and (2) the Court found that Lime Group and Gorton received a direct financial benefit from LW's infringing activity based solely on Lime Group's majority ownership of LW and Gorton's ownership of Lime Group. *See* L.G. Rec. Br. at 3-7.

[2] Even if the Court had considered whether Lime Group and Gorton could be liable based on participation in conduct that induced infringement, a finding of liability on this ground would not have been warranted because there was no unrefuted evidence that either Lime Group or Gorton themselves participated in the conduct that the Court concluded collectively induced LW users to infringe. *See* Defendants' Mark Gorton and Lime Group LLC's Response to Plaintiffs' Motion for Partial Summary Judgment at 6-10 (Docket No. 137).

Plaintiffs respond by proposing a test for "ability to control" and "financial benefit" that is contrary to the law in this District, and that would always lead to officer and owner liability for the infringing conduct of the company. This would fly in the face of well-established Second Circuit law and would significantly chill willingness to invest in and/or serve as officers of a company.

Under the ability to control prong, Plaintiffs make the bald assertion that Lime Group had the "practical right and ability to control the conduct that gives rise to liability." Pl. Opp. at 10. But the Order did not even address, let alone determine, that Lime Group had the right and ability to control the specific LW conduct that the Order concluded induced infringement, which is required by the Second Circuit for a finding of right and ability to supervise. *Matthew Bender & Co.*, 158 F.3d at 707 n.22 (interpreting *Shapiro* as requiring "that defendant possess the right and ability to supervise the infringing conduct"). *See also Dauman v. Hallmark Card, Inc.*, No. 96 Civ. 3608 (JFK), 1998 WL 54633, at *6 (S.D.N.Y. Feb. 9, 1998) ("a parent corporation can be liable only if there is a substantial continuing involvement by the parent specifically with the respect to the allegedly infringing activity of the subsidiary"). Thus, even if Lime Group had been "intimately involved" in LW's *general* operations (a factual finding that we dispute), that would be insufficient for a finding that Lime Group had the ability to supervise or control the LW conduct that the Court found to induce infringement—efforts by LW to attract users who were known infringers, the optimization of LW's features to ensure users can download digital recordings, the provision by LW of assistance to its users in committing infringement, or LW's decisions with respect to filtering. *See* Am. Order at 33-41.

Plaintiffs' reliance upon *Gershwin Publ'g Co. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159 (2d Cir. 1971), and the other "swap meet" cases (Pl. Opp. at 10-12), is misplaced. Lime

Group does not contend that the only way to satisfy the ability to supervise prong of the *Shapiro* test is through a formal legal right to control the conduct amounting to infringement, although such a legal right does satisfy this requirement. *Shapiro*, 316 F.2d at 306 (finding department store had right and ability to supervise the sale of infringing records by concessionaire based on lease that gave defendant authority to promulgate rules concessionaire was legally obligated to follow). Rather, it is Defendants' position that the test for the ability to supervise is met only if the entity at issue has the ability to supervise *the conduct found to be infringing.* This is plainly the law in this Circuit. *Matthew Bender & Co.*, 158 F.3d at 707 n.22. Plaintiffs assert that Lime Group had the ability to control the conduct this Court found to induce infringement. Pl. Opp. at 11. But Plaintiffs' proof boils down to a showing only that Lime Group was a majority owner of Lime Wire and was involved with aspects of its operations unrelated to the conduct found to be infringing. *See* L.G. Rec. Br. at 5-6 (shared offices, computer services, support staff and provision of support services such as handling employee benefits and system support). This is simply not enough to hold Lime Group liable for any infringing conduct of Lime Wire. *See, e.g.*, *Broadvision Inc., v. General Elec. Co.*, No. 08 Civ 1478 (WHP), 2009 WL 1392059, at *4 (S.D.N.Y. May 5, 2009) (to hold parent company vicariously liable for the actions of its subsidiary, parent must have continuing connection with subsidiary "in regard to the infringing activity") (internal quotation omitted); *accord. Dauman*, 1998 WL 54633, at *6; *Banff Ltd. v. Limited, Inc.*, 869 F. Supp. 1103, 1110 (S.D.N.Y. 1994).

Under the financial benefit prong, Plaintiffs once again seek to re-write the Court's Order. They claim that it found a direct financial benefit in the activity found to be infringing "*Not* Based on Mere Status As Owners of Lime Wire." Pl. Opp. at 8. But the Court's finding of a direct financial benefit is unequivocally based solely on Lime Group's majority ownership of

LW and Gorton's ownership of Lime Group. The entire discussion of direct financial benefit consists of the following two sentences:

> As the majority owner of LW until 2005, Lime Group directly benefited from LW's inducement of infringement through Lime Wire, which drove the company's success. Because he owned 100% of Lime Group, Gorton indirectly owned a majority share of LW, and thus also benefited from LW's infringing conduct.

Am. Order at 54. *Softel*, 118 F.3d 955, and cases in this district addressing the direct financial benefit prong of vicarious liability in the context of officer/parent corporation liability make clear that financial benefit based merely on corporate ownership is not sufficiently "direct." *See id.* at 971-72 (evidence that defendant was president and owner of company liable for infringement insufficient "to establish a sufficiently 'direct' financial interest in the exploitation of copyrighted materials")[3]; *Broadvision*, 2009 WL 1392059, at *4 (some financial benefit to parent corporation as a result of subsidiary's infringing activity insufficient to show direct financial interest in infringing activity); *Dauman*, 1998 WL 54633, at *6 ("fact that parent company benefits financially by virtue of its ownership of the subsidiary" is insufficient benefit to state infringement claim against parent based on conduct of subsidiary).[4]

---

[3] Plaintiffs' attempt to distinguish *Softel* is unavailing. Pl. Opp. at 9. *Softel* is precisely on point because just as in that case, the only financial benefit evidence was that Lime Group held an ownership interest of LW, and Gorton held an ownership interest of Lime Group. *See* Am. Order at 54. Such evidence is insufficient to satisfy this prong of the test for vicarious liability. *Softel*, 118 F.3d at 971-72.

[4] *Gershwin* in no way eliminated the requirement from *Shapiro* of a direct financial interest in the infringing activity. In *Gershwin*, this prong was satisfied because the defendant promoter received payments directly as a result of each infringing performance, and therefore "derived substantial financial benefit from the actions of the primary infringers." 443 F.2d at 1161, 1163. Similarly in *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996), the Ninth Circuit found a direct financial benefit because the defendants were paid "admission fees, concession stand sales and parking fees, all of which flow directly from customers who want to buy the counterfeit recordings at bargain basement prices." *Id.* at 263. Here, there was no finding of direct payments to either Lime Group or Gorton by any direct infringers or directly resulting from the purported infringing conduct. Notably, neither *Gershwin*, nor the swap meet cases addressed vicarious liability of an officer or parent corporation.

C. The Court Erroneously Construed the Evidence, Overlooked Evidence Submitted by Lime Group, and Failed to Resolve All Inferences in The Light Most Favorable to Lime Group

As set forth in detail in Lime Group's Reconsideration Brief at 7-10, the Court's Order also clearly erred with respect to Lime Group because it was based on factual findings that were not supported by the record, failed to consider conflicting evidence, and failed to resolve all inferences in favor of Lime Group. By doing so, the Court failed to adhere to basic principles a court must follow in ruling on a motion for summary judgment. *See Scott v. Harris*, 550 U.S. 372, 378 (2007). Plaintiffs' response, for the most part, simply ignores Lime Group's detailed showing.

First, three of the Order's factual findings are not supported by the cited evidence: (1) the evidence cited does not reflect that "employees" moved between Lime Group and LW without changing titles or job responsibilities; (2) the evidence does not demonstrate that Lime Group performed investor relations, public relations, and customer support functions for LW; and (3) Bildson did not declare that Lime Group employees developed user guides, FAQ guides, and merchandising for LW. L.G. Rec. Br. at 8-9. Plaintiffs do not dispute that the evidence the Court relied upon does not support the second and third factual findings.[5] With respect to the first, Plaintiffs are simply wrong that paragraph 32 of the Bildson Declaration supports the finding that "employees moved between Lime Group and LW without changing titles or job responsibilities." Sharing offices is not the same moving back and forth between employers.

---

[5] Plaintiffs' assertion that Lime Group did not dispute that it performed investor relations, public relations, and customer support functions for LW is misleading. *See* Pl. Opp. at 12. Plaintiffs' "SUF ¶¶ 650-55" were set forth by Plaintiffs as part of Plaintiffs' Response to Defendants Greg Bildson, Mark Gorton, Lime Group LLC, and M.J.G. Lime Wire Family Limited Partnership's Statement of Material Facts (Dated Sept. 26, 2008; Filed Under Seal). Thus, Lime Group neither admitted nor disputed the newly asserted facts as part of the summary judgment briefing. More importantly, a finding of liability on summary judgment must be based on actual proof, and not merely plaintiffs' characterization thereof.

Second, the Order's factual findings that LW and Lime Group were operated "as a single company" failed to consider substantial record evidence to the contrary. *See* L.G. Rec. Br. at 9-10. Plaintiffs argue that the Court did consider all of this evidence. Pl. Opp. at 13-14. But the only contrary fact noted in the Order is that the companies are formally separate. Am. Order at 53. The Order fails to consider the other contrary evidence submitted by Lime Group, let alone draw all inferences in Lime Group's favor. Plaintiffs' unsupported claim that "[t]he corporate formalities Lime Group points to (such as payment for shared services, etc.) cannot create a material issue of fact as to the practical, day-to-day involvement of Lime Group in Lime Wire's business," misses the point. Lime Group put forward evidence not only of observation of corporate formalities, but also that: Lime Group had no input into LW decisions; Lime Group did not operate any servers associated with the use of the LW application; Lime Group's services to LW were generally limited to accounting, maintenance of books and records, and preparation of financial statements.[6] Had the Order drawn all inferences from this evidence in favor of Lime Group and not credited the Bildson Declaration in the face of the contrary evidence, the Court could not have properly found as undisputed fact that LW and Lime Group were operated as a single entity. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) ("'[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.'") (quoting *United States* v. *Diebold, Inc.*, 588 U.S. 654, 655 (1962)); *Chambers v. TRM Copy Ctrs. Corp*., 43 F.3d 29, 36 (2d Cir. 1994) (reversing grant of summary judgment because lower court inappropriately drew some inferences in favor of moving party and did not credit all inferences that could be drawn in

[6] *See* Statement of Material Facts Pursuant to Local Rule 56.1(a) in Support of Defendants Greg Bildson, Mark Gorton, Lime Group LLC, and M.J.G. Lime Wire Family Limited Partnership's Motion for Summary Judgment ¶¶ 35, 38, 46 (Docket No. 102).

favor of nonmoving party); *Brady v. Town of Colchester*, 863 F.2d 205, 213-14 (2d Cir. 1988) (reversing grant of summary judgment because when inference was drawn in favor of nonmoving party, it demonstrated genuine issue of material fact). Accordingly, the Court's finding amounts to clear error warranting reconsideration and reversal of summary judgment against Lime Group.

CONCLUSION

For the foregoing reasons, and the reasons described in Defendants' Memorandum in Support of Motion for Reconsideration, Lime Group LLC and Mark Gorton respectfully request that the Court grant their Motion to Reconsider, and upon reconsideration, deny summary judgment against them on Plaintiffs' claims for inducement of copyright infringement, common law copyright infringement and unfair competition.

Respectfully submitted,

Dated: June 23, 2010
New York, New York

By: s/ Michael S. Sommer
Michael S. Sommer

Michael S. Sommer
Tonia Ouellette Klausner
WILSON SONSINI GOODRICH & ROSATI, P.C.
1301 Avenue of the Americas, 40th Floor
New York, New York 10019
Tel: (212) 999-5800
Fax: (212) 999-5899
msommer@wsgr.com; tklausner@wsgr.com

Colleen Bal *(pro hac vice)*
WILSON SONSINI GOODRICH & ROSATI, P.C.
Spear Tower, Suite 3300
San Francisco, California 94105
Tel: (415) 947-2000
Fax: (415) 947-2099
cbal@wsgr.com

Attorneys for Defendants Lime Group LLC and Mark Gorton