

**REDACTED VERSION
-COMPLETE VERSION FILED UNDER SEAL**

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 MUSIC ENTERTAINMENT, fka 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.

06 Civ. 05936 (KMW)
ECF CASE

**REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR
PERMANENT INJUNCTION**

Glenn D. Pomerantz (*pro hac vice*)
Kelly M. Klaus (*pro hac vice*)
Melinda E. LeMoine
Jonathan H. Blavin (*pro hac vice*)
Munger, Tolles & Olson, LLP
355 South Grand Avenue
Los Angeles, CA 90071
(213) 683-9100

Attorneys for Plaintiffs

June 28, 2010

TABLE OF CONTENTS

I. THE INJUNCTION MUST REMEDY LIME WIRE’S INTENTIONAL INDUCEMENT OF THE INFRINGEMENT OF ALL OF PLAINTIFFS’ WORKS..... 1

II. LIME WIRE’S PLEA FOR A BURDENSOME “NOTICE AND TAKEDOWN” REGIME IGNORES THE BASIS FOR LIME WIRE’S LIABILITY 2

III. THE *EBAY* FACTORS WEIGH DECISIVELY FOR PLAINTIFFS 3

 A. Plaintiffs Face Irreparable Harm Absent An Injunction..... 3

 B. The Injunction Will Serve The Public Interest; Rewarding Lime Wire’s Contempt For The Copyright Laws And Supreme Court Precedent Will Not 6

 C. The Balance Of Equities Overwhelmingly Favors An Injunction..... 7

IV. THE PROPOSED INJUNCTION MEETS THE SPECIFICITY AND NOTICE REQUIREMENTS OF FED. R. CIV. PROC. 65 7

 A. The Proposed Injunction’s Specific Terms Are Necessary To Stop The Continued Irreparable Harm To Plaintiffs’ Exclusive Rights 7

■ [REDACTED]

V. LIME WIRE’S “MISUSE” DEFENSE IS NO BAR TO INJUNCTIVE RELIEF 9

VI. CONCLUSION..... 10

TABLE OF AUTHORITIES

CASES

A&M Records, Inc. v. Napster, Inc.,
239 F.3d 1004 (9th Cir. 2001) 2

Arista Records LLC v. Lime Group LLC,
532 F. Supp. 2d 556 (S.D.N.Y. 2007)..... 9

Capitol Records, Inc. v. Galindo,
2007 WL 2509711, at *3 (W.D.N.Y. Aug. 30, 2007) 1

Concrete Mach. Co. v. Classic Lawn Ornaments,
843 F.2d 600 (1st Cir. 1988)..... 8

DeSilvis v. National Railroad Passenger Corp.,
97 F. Supp. 2d 459 (S.D.N.Y. 2000)..... 10

Johnson & Johnson-Merck Consumer Pharmaceuticals Co. v. Procter & Gamble Co.,
285 F. Supp. 2d 389 (S.D.N.Y. 2003)..... 9

Kepner-Tregoe, Inc. v. Vroom,
186 F.3d 283 (2d Cir. 1999)..... 4

MGM v. Grokster (Remand),
518 F. Supp. 2d 1197 (C.D. Cal. 2007) passim

MGM v. Grokster,
380 F.3d 1154 (9th Cir. 2004) 2

MGM v. Grokster,
545 U.S. 913, 933-35 & n. 10 (2005) 3, 5

In re Napster, Inc. Copyright Litig.,
2006 U.S. Dist. LEXIS 30338, at *22-23 (N.D. Cal. May 17, 2006)..... 3

Napster, Inc. Copyright Litig.,
191 F. Supp. 2d 1087, 1102 (N.D. Cal. 2002) 9

Nat’l Football League v. Primetime 24 Joint Venture,
1999 WL 760130, at *4 (S.D.N.Y. Sept. 27, 1999)..... 4

Olan Mills, Inc. v. Linn Photo Co.,
23 F.3d 1345 (8th Cir. 1994) 1

<i>Pacific & S. Co. v. Duncan</i> , 744 F.2d 1490 (11th Cir. 1984)	1
<i>Paramount Pictures Corp. v. Carol Publ'g Group</i> , 11 F. Supp. 2d 329 (S.D.N.Y. 1998).....	4
<i>Salinger v. Colting</i> , 2010 WL 1729126, at *11 (2d Cir. Apr. 30, 2010)	6
<i>Simon & Schuster, Inc. v. Putnam Berkley Group, Inc.</i> , 1994 WL 689058, at *3 (S.D.N.Y. Dec. 8, 1994)	8
<i>Triad Sys. Corp. v. Se. Express Co.</i> , 64 F.3d 1330 (9th Cir. 1995)	8
<i>Twin Peaks Prod., Inc. v. Publications Int'l, Ltd.</i> , 996 F.2d 1366 (2d Cir. 1993).....	3
<i>UMG Recordings, Inc. v. Green</i> , 2009 WL 1310457, at *3 (N.D.N.Y. May 7, 2009).....	1
<i>Walt Disney Co. v. Powell</i> , 897 F.2d 565 (D.C. Cir. 1990).....	1

RULES

Fed. R. Civ. Proc. 65.....	7
----------------------------	---

TABLE OF ABBREVIATIONS

Berlin Tr.	Transcript from the Deposition of Samuel A. Berlin on March 6, 2008 (attached to Volume VI of the Declaration of Katherine B. Forrest dated July 18, 2008, and the Declaration of Melinda LeMoine dated June 28, 2010)
Ex. 239, 287, 288, 289, 290	Exhibits attached to Volume IV of the Declaration of Katherine B. Forrest, dated July 18, 2008
Gribble Decl.	Declaration of Dr. Steven Gribble in Support of Defendants' Motions for Summary Judgment, dated July 18, 2008
Gribble Tr.	Transcript from the Deposition of Steven Gribble on June 11, 2008 (attached to Volume VII of the Declaration of Katherine B. Forrest, dated July 18, 2008)
Horowitz Report	Expert Report of Professor Ellis Horowitz, dated April 18, 2008 (attached as Exhibit A to the Declaration of Professor Ellis Horowitz in Support of Plaintiffs' Motion for a Permanent Injunction, dated June 4, 2010)
Horowitz Reply Decl.	Reply Declaration of Professor Ellis Horowitz in Support of Plaintiffs' Motion for a Permanent Injunction, dated June 28, 2010
Klaus Decl.	Declaration of Kelly M. Klaus in Support of Plaintiffs' Motion for Permanent Injunction, filed June 4, 2010
Klausner Exhibit 1	Exhibit 1 attached to the Declaration of Tonia Ouellette Klausner, dated June 21, 2010
LeMoine Decl.	Declaration of Melinda E. LeMoine in Support of Plaintiff's Motion for Permanent Injunction, filed June 28, 2010
Mendonca Decl.	Declaration of Brian G. Mendonca in Support of Defendants' Opposition to Motion for Permanent Injunction, dated June 19, 2010
Mot.	Memorandum of Law in Support of Plaintiffs' Motion for Permanent Injunction, filed June 4, 2010

Nicponski Tr.	Transcript from the Deposition of David Nicponski on March 29, 2008 (attached to Volume VII of the Declaration of Katherine B. Forrest, dated July 18, 2008)
Opp.	Defendants Lime Wire LLC, Lime Group LLC, and Mark Gorton's Opposition to Plaintiffs' Motion for Permanent Injunction, dated June 21, 2010
Order	Amended Opinion & Order, filed May 25, 2010
Pavley Decl.	Declaration of John Pavley, dated June 19, 2010
Song Reply Decl.	Declaration of Jillian Song in Support of Reply to Plaintiff's Motion for a Permanent Injunction, dated June 28, 2010
SUF	Plaintiffs' Statement of Undisputed Material Facts Pursuant to Local Civil Rule 56.1, dated July 18, 2008

Lime Wire spent most of the last decade designing and distributing software that was intended to cause – and that has caused – the mass infringement of Plaintiffs’ copyrighted works.

[REDACTED]

[REDACTED]

[REDACTED] Lime Wire insists the Court is powerless to stop it from distributing its infringing tool or to do anything to stop the rampant infringement of thousands upon thousands of Plaintiffs’ works through the LimeWire service. Lime Wire is wrong on every count, and its opposition is just further confirmation that Lime Wire will not behave lawfully unless and until the Court orders it to do so.

I. THE INJUNCTION MUST REMEDY LIME WIRE’S INTENTIONAL INDUCEMENT OF THE INFRINGEMENT OF ALL OF PLAINTIFFS’ WORKS

Lime Wire argues the injunction must be limited solely to stopping the infringement of 30 Recordings as to which Plaintiffs, for summary judgment, proved ownership and direct infringement. Lime Wire is wrong. The Court has the full power to enter a permanent injunction where, as here, “liability has been determined adversely to the infringer, there has been a history of continuing infringement and a significant threat of future infringement remains.” *Walt Disney Co. v. Powell*, 897 F.2d 565, 568 (D.C. Cir. 1990).¹ Lime Wire also ignores the reason summary judgment was resolved based on a subset of Plaintiffs’ thousands of copyrighted works: because Judge Lynch directed it. This allowed the Court to “address the basic liability issues that are what the case is about,” and to defer burdensome discovery on the full number of works for a *damages* award until after summary judgment. Klaus Decl., Ex. 11 at 3-4. Lime Wire’s inducing conduct is exactly the same for the 30 Recordings as it is for all of Plaintiffs’ works. Lime Wire points to no evidence saying, “let’s only induce the infringement of these 30 Recordings”; as the evidence made clear, Lime Wire intended to induce

¹ Numerous cases are in accord. *See, e.g., Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1349 (8th Cir. 1994); *Pacific & S. Co. v. Duncan*, 744 F.2d 1490, 1499 n.17 (11th Cir. 1984); *UMG Recordings, Inc. v. Green*, 2009 WL 1310457, at *3 (N.D.N.Y. May 7, 2009); *Capitol Records, Inc. v. Galindo*, 2007 WL 2509711, at *3 (W.D.N.Y. Aug. 30, 2007).

indiscriminate infringements of Plaintiffs' works on a massive scale. Plaintiffs do not have to wait for the full extent of damages to be counted before seeking and obtaining an injunction.

II. LIME WIRE'S PLEA FOR A BURDENSOME "NOTICE AND TAKEDOWN" REGIME IGNORES THE BASIS FOR LIME WIRE'S LIABILITY

As anticipated, Lime Wire argues that Plaintiffs should have to provide it with notice where each particular work of theirs may be found on its system before Lime Wire has any injunctive obligation to stop the infringement. Opp. at 2, 4-5, 18. Given the massive proliferation of infringements that Lime Wire intentionally induced, the "notice-and-takedown" Lime Wire proposes is designed to burden Plaintiffs with an ineffective and inefficient game of "Whac-a-Mole." In secondary liability, "notice-and-takedown" applies only where defendants' knowledge is imputed; it has no application where Defendants intentionally induce infringement.

As set forth in our Motion, at 18-21, the opinion Lime Wire relies on, Judge Wilson's injunction in the *Grokster* remand, was wrong on this issue. Judge Wilson held that notice-and-takedown was mandated by the Ninth Circuit's *Napster* decision. *MGM v. Grokster (Remand)*, 518 F. Supp. 2d 1197, 1237-39 (C.D. Cal. 2007). The Ninth Circuit required notice-and-takedown because to hold otherwise would impute to Napster knowledge of infringing conduct, even though Napster could be used for some non-infringing purposes. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1020-21, 1027 (9th Cir. 2001). The same court in *Grokster* likewise held that plaintiffs had to provide notice of specific infringing files, so as not to trench upon non-infringing uses. *MGM v. Grokster*, 380 F.3d 1154, 1161 (9th Cir. 2004). Lime Wire appeals to the same type of reasoning, arguing that requiring it to stop distributing the software threatens anecdotal instances of claimed non-infringing uses. Opp. at 4-5.

The flaw in Lime Wire's argument (as well as Judge Wilson's form of injunction) is that it ignores the Supreme Court's decision in *Grokster*. The Court made it clear that the defense of "substantial non-infringing uses" – the predicate for the "notice-and-takedown" requirement in *Napster* (and the cases following it) – is irrelevant where the defendant's mental state is proved by actual intent rather than imputed knowledge. *MGM v. Grokster*,

545 U.S. 913 (2005).² Lime Wire is liable based on its *intentional* inducement of infringement, not on imputed knowledge. Lime Wire has no defense of “substantial non-infringing uses” to its intentional conduct, nor is notice from Plaintiffs required to trigger Lime Wire’s obligations.³

III. THE EBAY FACTORS WEIGH DECISIVELY FOR PLAINTIFFS

A. Plaintiffs Face Irreparable Harm Absent An Injunction

1. Lime Wire Will Not Be Able To Pay The Likely Damages Award: Lime Wire first says that damages will be low because “*only* thirty works” are in issue. Opp. at 10. Given the Court’s holding that Lime Wire intentionally induced the mass infringement of all of Plaintiffs’ copyrighted works – which total many thousands⁴ – this obviously is makeweight.

Lime Wire next contends that the damages range for each infringement for which it is responsible will not reach the \$150,000 limit because Lime Wire’s conduct was not “willful.” Lime Wire is wrong. “Willfulness” means knowledge or reckless disregard of one’s conduct constituting infringement. *Twin Peaks Prod., Inc. v. Publications Int’l, Ltd.*, 996 F.2d 1366, 1382 (2d Cir. 1993). The overwhelming evidence of Lime Wire’s intentional inducement of mass infringement demonstrates Lime Wire’s willfulness. *See Grokster (Remand)*, 518 F. Supp. 2d at 1217. Lime Wire claims it thought its conduct was completely legal prior to June 2005,

² Judge Patel recognized exactly this point in her post-*Grokster* opinion. *See* Mot. at 20-21. Lime Wire claims that Judge Patel said that “an injunction ... may be narrower than the outer limits of Napster’s liability.” Opp. at 19. That is misleading. The quoted language is from Judge Patel’s summary of the Ninth Circuit’s *Napster* decision. *In re Napster, Inc. Copyright Litig.*, 2006 U.S. Dist. LEXIS 30338, at *22-23 (N.D. Cal. May 17, 2006). Judge Patel went on to say that *Grokster* relied on evidence of inducement akin to that which supported her “original, more sweeping *Napster* injunction,” *i.e.*, an injunction *without* notice-and-takedown. *Id.* at *30.

³ Judge Wilson’s more recent permanent injunction in *Fung* does not impose the same onerous “notice-and-takedown” as in the *Grokster* remand. Judge Wilson held that the *Fung* plaintiffs needed to provide defendants only with a list of titles that plaintiffs in good faith believe they own. Klaus Decl., Ex. 2 at 15-16.

⁴ Plaintiffs are not limited to seeking damages for the more than 3,000 works identified in the First Amended Complaint. Judge Lynch made it clear (in a transcript from which Lime Wire selectively quotes) that Plaintiffs could add more works in a damages phase. *See* LeMoine Decl., Ex. 2 at 25:13-26:17 (12/7/07 Hrg. Tr.). Plaintiffs will address this issue more fully in the July 2 briefing but the salient point now is that, however many thousands of works ultimately are the basis for damages, the award against Lime Wire is likely to be enormous.

when the Supreme Court decided *Grokster*. Opp. at 11. In fact, there is abundant evidence that Lime Wire knew it was inducing mass infringement long before *Grokster*. See e.g., SUF ¶¶ 150-177, 204, 212-222; Order at 31, 34. In any event, it is now June 2010, five years after the Supreme Court decision that Mark Gorton admitted spelled the end of his company's illegal business. Lime Wire clearly spent the intervening half-decade continuing to operate its business illegally. What is more, Lime Wire *continues* to do so, even after the Court's Summary Judgment Order. As Plaintiffs demonstrated – and Lime Wire ignores – Lime Wire today is used to upload and download every popular recording as it is released, Mot. at 7, not to mention thousands of others. Lime Wire's continued infringing conduct after summary judgment by definition is willful. See *Kepner-Tregoe, Inc. v. Vroom*, 186 F.3d 283, 288-89 (2d Cir. 1999).⁵

2. Plaintiffs' Exclusive Rights To Control The Reproduction And Distribution Of Their Works Has Been (And Will Continue To Be) Irreparably Damaged By Lime Wire. Lime Wire completely ignores this basis for irreparable harm, even though the continued violation of exclusive rights under copyright law has been recognized in countless cases as warranting injunctive relief. See *Grokster (Remand)*, 518 F. Supp. 2d at 1218-19.⁶ Far from countering this basis for irreparable harm, Lime Wire admits that it continues to distribute a product that deprives Plaintiffs of their exclusive rights by facilitating the rampant copying and dissemination of Plaintiffs' works. Opp. at 11-12.

⁵ Contrary to Lime Wire's contention, the *Usenet.com* statutory damages award does not provide a benchmark for Lime Wire's liability. Opp. at 11. When the Court determined damages, Usenet.com had long since been shuttered and its corporate owners in bankruptcy. See Mendonca Decl., Ex. A at 3 n.3. Usenet.com's user base never approached the millions of Lime Wire users. At its peak, Usenet.com claimed just over 16,000 subscribers. *Id.* at 9. Even then, the court set the award level at \$7,500. Lime Wire, which is larger and more profitable than Usenet.com, and which induced far more infringements, likely faces a far higher award.

⁶ See also *Nat'l Football League v. Primetime 24 Joint Venture*, 1999 WL 760130, at *4 (S.D.N.Y. Sept. 27, 1999); *Paramount Pictures Corp. v. Carol Publ'g Group*, 11 F. Supp. 2d 329, 338 (S.D.N.Y. 1998).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Lime Wire cannot so easily wash away its responsibility for the consequences of its intentional conduct. The *Grokster* defendants likewise claimed they had changed their inducing ways, but the courts rejected this gambit. As *Grokster*'s author put it at oral argument:

JUSTICE SOUTER: I don't ... understand how you can separate the past from the present in that fashion. One, I suppose, could say, "Well, I'm going to make inducing remarks Monday through Thursday, and I'm going to stop, Thursday night." The sales of the product on Friday are still going to be sales which are the result of the inducing remarks Monday through Wednesday.

LeMoine Decl., Ex. 3 at 30. This point was carried through in the Court's opinion, which confirms that "inducement liability goes beyond" particular instances of infringing conduct, and a defendant is "culpable" for "distribution of the tool intended for infringing use." *Grokster*, 545 U.S. at 940 n.13. Lime Wire remains liable for infringing conduct through the software it intended to be used for infringement. As Judge Wilson put it in the *Grokster (Remand)* Order: "The bell simply cannot be unring." 518 F. Supp. 2d at 1234-35.

What is more, Lime Wire's Opposition reveals it has *not* stopped the conduct that the Court found constituted inducement. The Court relied extensively on Defendants' failure to "utilize existing technology to create meaningful barriers against infringement." Order at 40.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

3. Lime Wire Continues To Disregard The Law. Lime Wire’s only response to this showing of irreparable harm is that users already expected to be able to copy sound recordings for free by the time Lime Wire came on the scene. Opp. at 13. That is absurd and ignores not only that Lime Wire actively contributed to such contempt for copyright, but did so for years after a Supreme Court decision that made clear Lime Wire was behaving illegally.

B. The Injunction Will Serve The Public Interest; Rewarding Lime Wire’s Contempt For The Copyright Laws And Supreme Court Precedent Will Not

Injunctions that protect copyrights further the public interest. *See Salinger v. Colting*, 2010 WL 1729126, at *11 (2d Cir. Apr. 30, 2010) (“the public’s interest may well be already accounted for by the plaintiff’s interest”). Denying an injunction would reward Lime Wire for its disregard of established law; that does not serve the public interest. Lime Wire asserts the injunction will deprive the public of being able to use its client software to obtain non-infringing content. Opp. at 6, 13. Not true. Every non-infringing work Lime Wire says is available with its software is generally available with an ordinary web browser. Song Reply Decl. ¶¶ 3-6. The proposed injunction will not deprive the public of access to any of these materials.

[REDACTED]

C. The Balance Of Equities Overwhelmingly Favors An Injunction

Lime Wire’s argument on this factor rests primarily on the specious proposition that “there are only thirty works at issue.” Opp. at 14. As already demonstrated, Lime Wire was found liable for intentionally inducing mass infringement of all of Plaintiffs’ works. The continuing infringement of those works through software that Lime Wire built and distributed with intent to achieve that illicit end tilts the equitable balance decisively in Plaintiffs’ favor.

[REDACTED]

IV. THE PROPOSED INJUNCTION MEETS THE SPECIFICITY AND NOTICE REQUIREMENTS OF FED. R. CIV. PROC. 65

A. The Proposed Injunction’s Specific Terms Are Necessary To Stop The Continued Irreparable Harm To Plaintiffs’ Exclusive Rights

Lime Wire’s complaints about the purported vagueness and overbreadth of the Proposed Injunction’s terms are meritless. The Proposed Injunction requires Lime Wire only to do what is necessary to stop the continued infringement of Plaintiffs’ copyrights: (1) stop distributing new copies of the LimeWire Client until it incorporates an effective, verified filtering mechanism; (2) use “all technologically possible means” to stop infringement through the existing installed software versions; and (3) report back to the Court and to Plaintiffs on its progress. There is nothing vague about these requirements, each of which is aimed at correcting Lime Wire’s past inducement. Lime Wire’s complaints to the contrary are baseless.

[REDACTED]

⁸ Lime Wire’s litany of complaints about the Proposed Injunction are addressed point by point in Plaintiffs’ Response to Defendants’ “Revised” Injunction, attached as Exhibit 1 to the LeMoine Declaration.

[REDACTED]

- [REDACTED]

[REDACTED]

