

EXHIBIT 6

83craric
1 UNITED STATES DISTRICT COURT
1 SOUTHERN DISTRICT OF NEW YORK
2 -----X
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3 ARISTA RECORDS, et al.,
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4 Plaintiffs,
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5 v.
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6 LIME WIRE LLC, et al.,
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7 Defendants.
7

06 Civ. 5936 (GEL)

Conference

8 -----X
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New York, N.Y.
March 12, 2008
5:00 p.m.

10 Before:

11 HON. GERARD E. LYNCH

District Judge

14 APPEARANCES

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1 (Case called)
2 THE COURT: Good afternoon. This has been a most
3 helpful exchange. Having reviewed these materials, I find that
4 I have a great deal of trouble understanding how these
5 copyright misuse defenses are going to be a worthwhile subject
6 of discovery.
7 Lime wire's letter starts off by arguing that Lime
8 wire is not the equivalent of Napster but is a perfectly

9 legitimate software product with many legitimate uses such that
10 it should not be found liable for contributory infringement or
11 anything of the sort. Mr. Baker, if you're right about that,
12 then the copyright misuse defenses become totally irrelevant
13 and unnecessary, yes?

14 MR. BAKER: Yes, your Honor. If we win on that --

15 THE COURT: You win without getting to those.

16 MR. BAKER: That's right, your Honor.

17 THE COURT: I think we have to address the copyright
18 misuse defenses on the assumption that Lime wire is the
19 equivalent of Napster because that's the only circumstance in
20 which these defenses come into play. But if that is so, if it
21 turns out that your entire product is essentially illegal, then
22 why aren't the labels entitled to do things like insist that
23 their licensees not deal with somebody who's existing solely to
24 infringe their products?

25 MR. BAKER: Your Honor, if I may, the problem is that

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1 the license agreements were in place before there has been an
2 adjudication of it. In other words, there is already a
3 presumption that we have done something illegal.

4 THE COURT: No, there is no presumption. If you did
5 do something illegal, then what they are doing is not a
6 problem. If you didn't do anything illegal, then you win the
7 case without regard to what they do. So I don't think they
8 need an adjudication.

9 They are prepared apparently to take the risk of
10 engaging in whatever licensing arrangements they engage in on
11 the assumption that you will be found to be illegal. So
12 they're doing that. If you're illegal, then they win their
13 gamble, it seems to me, because if you are illegal, then their
14 behavior is not a misuse but is an appropriate self-defense.

15 Are you suggesting that if they see something that
16 they think is infringement, they can't defend themselves
17 against it because, what do I have to do, file a declaratory
18 judgment action and get it declared illegal before they can
19 take steps to deal with it in the marketplace?

20 MR. BAKER: No, your Honor. They have every right to
21 sue individuals or sue companies for infringement. The problem
22 is when they extend that right to more than just good faith
23 lawsuits, when they go out and they demand their licensees to
24 not do business with entities that they in their own mind
25 determine are illegal, that's the basis of what our claim is

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1 under the license agreements.

2 THE COURT: What if they're right that it's illegal?
3 You're saying that they just have to lay back and take it until
4 such time as they win a lawsuit, they can't take any action to
5 defend themselves in the marketplace by the way they license
6 their product?

7 MR. BAKER: No, your Honor, I'm not saying they are
8 not entitled to defend themselves in the marketplace. They are
9 not trying to defend themselves in the marketplace. They are
10 trying to prevent others from doing business with us. That
11 extends beyond their monopoly, their distribution rights and
12 their copyrights that are given to them by the Copyright Act.
13 We don't deny that they have those rights to enforce it. It's

14 their extending it beyond and their affecting us before a
15 lawsuit has been filed or anything else.

16 THE COURT: What you are saying, though, is that
17 assuming that you are found to be engaging in massive
18 illegality, you will be retroactively legalized and they will
19 be deprived of their copyrights because they took actions on
20 the assumption that you were doing something illegal which
21 turns out to be exactly right?

22 MR. BAKER: I agree that if the Court rules that we
23 are illegal, the misuse defense, however you want to call it,
24 whether it's the license agreements or the Imus issue or
25 anything else, those all get shoved aside. But what happens if

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1 in fact we are found legal and then they have done all these
2 other bad things? I understand the Court's point.

3 THE COURT: Then you have won your lawsuit and we
4 don't get to that and I never get to decide those issues.

5 MR. BAKER: Right.

6 THE COURT: It may be that if there were some
7 independent cause of action or some independent illegality, and
8 I realize you tried to assert that via the antitrust laws, then
9 you might be entitled to some compensation. But if there is no
10 independent wrong for which you can claim damages and the only
11 function of these defenses is as a defense, well, as I say, I
12 don't know if you need it if your principal argument is correct
13 and I don't know that you have it if it turns out to be
14 incorrect.

15 All of these alleged misuses, it seems to me, would
16 only be misuses if they are trying to shut down some legitimate
17 competition or to extend their monopoly. If instead what they
18 are doing and this is their purported motive -- and, as I say,
19 I think they are at risk to some degree if they turn out to be
20 wrong. What they say they are doing is dealing with an
21 infringer.

22 Suppose the labels said to some licensee, we are
23 giving you a license but you have to agree that you will not
24 deal with some company in China that's turning out massive
25 pirated copies of our CD's, they're doing all this bad stuff,

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1 and if you're going to have dealings with them, we don't want
2 to have dealings with you. Are you saying that would be a
3 misuse of copyright?

4 MR. BAKER: Yes, your Honor, because it extends beyond
5 their limited rights. They don't have the right to tell others
6 who to do and not to do business with. They only have the
7 right to control their own copyrights. Those are very limited
8 rights. They can control who it's sublicensed to. They can
9 control their licensees to a certain extent what they do with
10 it. But to extend it beyond that monopoly is what the courts
11 have said is wrong.

12 THE COURT: Well, no. The courts have said that very
13 specific things are wrong in very specific circumstances. I
14 don't suggest that the Second Circuit wouldn't endorse some of
15 those very same cases if those very same cases came up. But I
16 think that you are stretching this to quite an extraordinary
17 degree.

18 The copyright holder has a right to deal with who they

19 want to deal with and not deal with who they don't want to deal
20 with. They can do that, it seems to me, legitimately. They
21 can do that by refusing to deal with people who are, in their
22 view, assisting in or conducting the infringement of their
23 products.

24 I don't see why they should have to license their
25 copyrighted materials to people who are doing business with
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1 those who are systematically infringing their copyrights.
2 Again, you may not be that person. But if you're not that
3 person, we never have to reach those issues.
4 There are a few allegations here of other forms of
5 misuse that aren't directed at Lime wire. There I do think
6 that the defendant interprets these cases rather more broadly
7 than I think is justified. Even assuming that there is some
8 misconduct that's occurred somewhere by some of the plaintiffs
9 in dealing with somebody who has nothing to do with this
10 dispute, the notion that the consequence of that is that the
11 copyrights are effectively invalidated would allow, for
12 example, that very same defense to be asserted if I set up a
13 little factory across the street, went to J&R down the block,
14 bought a bunch of CD's, and started mass-producing the CD's.
15 I could make the same defense that Lime Wire is making
16 here, that once upon a time, if we search all their records,
17 we'll find something they did wrong and whammo, now we've
18 effectively put them out of business by saying everybody can
19 violate their copyrights with impunity. That doesn't seem to
20 me to be the law, and that seems to me to go far beyond the
21 rulings in the cases on which Lime wire relies.

22 Having had this extended briefing, I guess my
23 conclusion is that the likelihood that anything productive is
24 going to come of this discovery that would really affect the
25 outcome of the case that would be worth the time, expense,
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1 trouble and distraction of conducting this kind of fishing
2 expedition is so low that I'm going to deny that discovery.
3 Ms. Forrest, I think you raised a question. Is this
4 just something that now that I've said this everyone
5 understands where we stand and we're ready to go, or do you
6 think there is some more formal order that needs to be entered
7 or some other way that this need to be done?
8 MS. FORREST: Your Honor, I do not. We have a
9 transcript. The parties are clear. I think that we can
10 proceed. When we get there, we have a couple of scheduling
11 issues to raise as well.
12 THE COURT: Mr. Baker, is there something you think we
13 need to do?
14 MR. BAKER: No, your Honor. Maybe just some type of
15 an order in the record itself, whether a minute order or
16 something like that.
17 THE COURT: Ms. Forrest, why don't you submit some
18 form of order that you think will embody what this ruling is.
19 I'm cautious to try drafting something myself because it does
20 involve the extent of this discovery. Show it to Mr. Baker and
21 see if we can get something that everyone's agreed on.
22 I don't want to formulate this in some way that's
23 going to give one side or the order some advantage in obtaining

24 or resisting discovery that doesn't have anything to do with
25 this ruling. I think the parties understand what's at stake
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1 and what the ruling is better than I do in terms of what its
2 practical implications are and what's the best way of
3 formulating the order.

4 MS. Forrest, you had some scheduling concerns?
5 MS. FORREST: Yes, your Honor. We are proceeding
6 actively with the depositions and are proceeding very well in
7 that regard and expect to be able to be completed with the
8 depositions of all fact witnesses by the end of the first week
9 of April. That is about a one-week extension beyond where we
10 were, which was March 31st. Originally, the original schedule
11 was March 31st.

12 THE COURT: Remind me, what is it that's being done by
13 a week beyond March 31st, all depositions or just fact
14 depositions? Is there some other phase that's going to happen
15 after that?

16 MS. FORREST: Your Honor, a week after March 31st all
17 fact depositions, party and third-party, would be completed.
18 But that does not include experts. Our affirmative expert
19 reports would go in thereafter, and then we would have our
20 expert discovery on not the same schedule but the same time
21 frames that are set forth in the Court's current order.

22 THE COURT: Mr. Baker?

23 MR. BAKER: There are a couple of things, your Honor.
24 We have been working very hard, and we still have a lot of
25 witnesses to go. We're going to do our best. I'm hoping to
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1 hold to that schedule of April 7th. I've got a trial scheduled
2 that day in Houston on another case. I've got several people
3 helping me. I'm going to do my best to try and match that
4 date. I'm just hopeful we can. We have taken a lot, and we've
5 got another at least ten or eleven more depositions between now
6 and the end of this month.

7 THE COURT: You think it is going to take longer?

8 MR. BAKER: We had asked at one point in time that it
9 go to the end of April, to give us one month. We couldn't come
10 to an agreement on that. So I'm thinking it's going to take
11 probably two more weeks after that, which would be April 21st.
12 I'm supposed to be on spring vacation next week. I know Ms.
13 Forrest is going to take a week off with her family.

14 THE COURT: I'm the only one who doesn't.

15 MS. FORREST: No, I don't get to, unfortunately.

16 THE COURT: Is this a big deal? Can we split the
17 difference? We're talking about weeks here in a very long
18 litigation.

19 MS. FORREST: We could split the difference, your
20 Honor. The issue for us is that it is very important for us --
21 we'd like to file summary judgment before the week of July 4th,
22 because a lot of people go away. What that requires is very
23 little slippage in the schedule. If we imagine that expert
24 reports go in, say, in the middle of April --

25 THE COURT: I'm always optimistic that people can do
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1 two things at once with enough associate support. If the
2 depositions slip a couple of weeks, correct me if I'm wrong,
3 I'm not sure that the expert reports need to be delayed,
4 depending on the what the experts are, at all necessarily.
5 MS. FORREST: I'll explain to you why I think they
6 would. I want to finish this. The reason that there would
7 have to be a delay is that some of the witnesses we are talking
8 already about slipping into that first week are very technical.
9 We plan, it's no surprise, to put in as one of our expert
10 reports, our affirmative reports, a technical expert who will
11 rely directly upon those depositions.
12 Currently, the expert reports are due March 31st.
13 It's the same day that we will be taking the deposition of
14 somebody. Then a couple of days before, one of the technical
15 folks. So we do need to slip the experts unless we can commit
16 that none of the depositions that are technical would be after
17 the expert reports go in or if we had leave to amend. But
18 that's not ideal.
19 THE COURT: Are the experts that we're talking about
20 all computer type people?
21 MS. FORREST: Yes.
22 THE COURT: Technical people?
23 MS. FORREST: The ones I'm talking about, your Honor,
24 yes.
25 MR. BAKER: My response, from my experience in these
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1 cases, the experts typically rely upon the code, on their
2 interpretation of the code. And they want to depose every one
3 of our developers, just about. They don't need every one of
4 them to prepare their report.
5 THE COURT: Let me back up. It seems to me the
6 problem is that there is some, in effect, overlap between the
7 fact witnesses and the expert witnesses in that some of the
8 fact witnesses are in effect experts. Whether they function
9 that way as a matter of law or not, they are people who are
10 specialists with a great deal of technical knowledge that's
11 going to then bear on these expert reports. That's what you're
12 telling me.
13 MS. FORREST: That's correct, your Honor.
14 THE COURT: I think you have to do what you have to do
15 in this circumstance. I thought that this ruling just saved us
16 at one point there was some reference to 16 depositions.
17 MS. FORREST: Absolutely. We have a schedule in place
18 right now which, if we hold to it, we can get done by the end
19 of the first week of April. The depositions are scheduled. I
20 would urge the Court not to elongate the schedule in a way that
21 will un-schedule depositions that are currently scheduled. We
22 can get it done.
23 THE COURT: I'm not elongating anything. You're
24 asking me for an extension of time, you're saying we need to
25 limit that extension of time to one week, and you're telling me
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1 that all the depositions are already scheduled. Mr. Baker,
2 you're suggesting, I think, that maybe that's an overstatement
3 when the word "scheduled" is used?
4 MR. BAKER: Yes, your Honor. We've got witnesses from
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5 them we are still getting on the noncopyright misuse issues.
6 They've still got several of ours. There are several third
7 parties, former employees, that we are still scheduling. We
8 have had a death in the family. We've had all kinds of
9 circumstances that come up. Very graciously the plaintiffs
10 have worked with us in scheduling these things.

11 THE COURT: Put another way, when you say scheduled, I
12 think you mean noticed.

13 MS. FORREST: Your Honor, the exact number Ms.
14 Sankoorikal knows. But we are most of the way there. There
15 are some that are noticed. We believe we can get our people
16 within the time frame. There are multiple people who are
17 covering, both Mr. Baker and Mr. Cohen, as well as on our side.
18 We can do this.

19 You're right, absolutely, I'm the one standing here
20 asking for slippage in the expert schedule. But what I'd like
21 not to do is have that turn into a conversation about a
22 slippage in the schedule generally. If that's the result, I'd
23 rather stay where we are.

24 THE COURT: What we've got is something that happens
25 all the time. One party or the other, for perfectly legitimate

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1 reasons, is telling me we really need to keep to this schedule.
2 It's my general experience that if I go along with that, which
3 is often my inclination because it moves the case faster, then
4 that same party is back two weeks later saying, well, we really
5 need a little more time because we can't get the guy that we
6 need to get and please don't in the interest of rigidity of
7 schedule say we can't depose this very important witness.

8 I want the case to proceed expeditiously. I don't
9 want to lightly grant extensions and I don't want to say go to
10 the end of April or something like that, because I know that
11 that takes the heat off the parties. On the other hand,
12 there's a limit to how high you can turn the heat and actually
13 accomplish anything. I can say be done by the end of the first
14 week in April, but neither side is going to want that if it
15 turns out that this witness or that witness is off to the
16 Riviera for some reason and you can't get them in the time set
17 up.

18 Every lawyer is going to have whatever things come up
19 that will lead to a need to accommodate. What I hear is the
20 parties have been working reasonably with each other, and I
21 expect that that will continue. I don't know that it
22 necessarily facilitates that for me to set some rigid deadline.

23 I've heard let it slip one week, let it slip three
24 weeks. Why don't we split the difference as far as the Court's
25 order and call it two weeks with the following caveats on both

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1 sides. Number one, to say you have an expert witness to
2 accomplish this if you need it is not to say that I'm
3 encouraging you to do anything that isn't efficient and you
4 should try to adhere to a faster schedule if you can.

5 By the same token, I'm not saying that everybody dies
6 and goes to heaven two weeks after March 31st. If the parties
7 need more time, I have no objection to giving it to them, but
8 that's going to be because all parties think that it's in
9 everybody's interest really to do something else.

10 Finally, what I think is the way to make the time back
11 up is that the expert process should not be unduly extended.
12 what I mean by that is maybe we're moving all the dates back by
13 two weeks as the consequence of this, but if we can shave that
14 by moving the expert dates back by only one week or if we do
15 move all the dates back by two weeks and then it turns out that
16 you need another deposition or even two to go beyond April
17 15th, I trust that counsel will be able to work out a schedule
18 so that you can prioritize the people that are important for
19 the experts. And if you need some other deposition to be
20 adjourned as a consequence of that that won't hurt the experts'
21 schedule, counsel will be able to accommodate each other and
22 take a deposition or two after the date without compromising
23 the ultimate goal.

24 Once again, my project is to bring this home in some
25 reasonable amount of time. Understanding that summer is not

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1 the ideal time to have an expedited kind of motion schedule,
2 we're going to do what we have to do. We'll see what slippage
3 has to happen. You're saying you're going to make a motion by
4 July 4th?

5 MS. FORREST: Yes.

6 MR. BAKER: We as well, your Honor.

7 THE COURT: If it's in everybody's interest to do that
8 and get that first motion in by July 4th, you'll find a way to
9 do it, it seems to me, and you'll work out a mutually
10 acceptable schedule that will see to it that that gets done.

11 The first thing is I think it is reasonable to say
12 let's go two weeks rather than one into April if that's needed.
13 See what you can do about making up some of the time on the
14 experts, then see whether that works. If it doesn't work,
15 maybe the motion schedule will have to be spread out a little
16 bit. OK? This is short of, obviously, my saying here's your
17 marching orders. It hasn't sounded to me as if the parties
18 need that kind of parental control here.

19 MS. FORREST: I think, your Honor, based upon your
20 Honor's direction, we can work it out.

21 MR. BAKER: I think so, yes. I have one issue, your
22 Honor, about experts. We know they are going to have a
23 technical expert, but we are the defendant and we've got a
24 short period of time to figure out who our experts will be on
25 rebuttal and what topics. It's only essentially 30 days to get

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1 a report done and out.

2 My hope was that at one point in time we could have a
3 disclosure of who their experts are going to be so that I won't
4 be sandbagged and in 30 days have to go get a huge technical
5 expert who has to do a huge amount of work over a very short
6 period of time. I would request or ask the Court that there be
7 an exchange of disclosures as to who are the experts they
8 intend to have and a very short description of what their
9 testimony will be.

10 MS. FORREST: That's fine.

11 THE COURT: Good. Again, that might be a way of
12 expediting.

13 MR. BAKER: It would help things very much, your
14 Honor.

15 THE COURT: Good. If you can do that, work that out,
16 so. Once again, in the interests of housekeeping, if somebody
17 submits an appropriate order with new deadlines, I'll sign off
18 on that.
19 Do we have another conference scheduled?
20 MR. BAKER: We do in April, your Honor.
21 THE COURT: This doesn't sound like a good thing to
22 do.
23 MR. BAKER: I don't think we need it.
24 MS. FORREST: What we can do perhaps is when we come
25 up with an agreed-upon new schedule, perhaps your Honor can set
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1 a date after that.
2 THE COURT: Yes. Call Tom. Once you have figured out
3 the time frame of when in the process another conference will
4 be productive, I'm sure that chambers staff will be able to
5 give you a date to have it. Frankly, I'm not sure that I see
6 when another conference comes up.
7 Barring as-needed dealing with any discovery disputes,
8 and I hope we don't have any more, the next order of business
9 is to file motions. Do we have to have some scheduling for a
10 motions conference or do we really need the motions, can we
11 have a trial date?
12 Apparently everybody has agreed there are going to be
13 motions. That's been dealt with already. It doesn't sound
14 like we have parties who are thinking that the best way to
15 resolve this is to have a settlement conference. Obviously, if
16 you thought it was, probably you'd do better to go find some
17 mediator on your own. But if you wanted to have someone
18 through the court or to have a magistrate judge, all you have
19 to do is call and we can put everything on hold and go into
20 that mode.
21 The things I normally would talk about with lawyers in
22 a post-discovery conference we already know what we're doing
23 apparently. We're going to have motion practice, and all
24 you'll need to do is create a schedule for it. Or if it's
25 already created, fine. So I don't know that there is a need
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1 for a conference.
2 If you think there is some point at which a stock-
3 taking is of some value, tell us when it is and we'll schedule
4 it. Otherwise, my anticipation would be that if we need oral
5 argument on these motions, apparently sometime in the fall it's
6 looking like, New York fall, after Labor Day, we'll schedule
7 it.
8 MS. FORREST: That sounds reasonable. One last thing,
9 your Honor. Your Honor held a telephonic conference, very
10 short, on the production of the video issue.
11 THE COURT: I don't even remember.
12 MS. FORREST: We had given you a stipulation that was
13 signed by both parties. We just needed to get it so ordered.
14 We have another copy of it, your Honor.
15 THE COURT: Did we not get it or did we sign it and
16 lose it?
17 THE LAW CLERK: I thought we signed it.
18 MS. FORREST: Maybe it just hasn't turned up on the
19 docket yet.

3-12-08 Court Transcript.txt

20 THE COURT: This was a while ago, wasn't it? Yes, I
21 thought I signed it. Sometimes things get lost between
22 chambers and the clerk's office. That is signed, and we'll
23 make sure this one doesn't get lost, whatever happened to the
24 last one. Good. Thank you very much. Good afternoon.
25 (Adjourned)

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