

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARISTA RECORDS LLC; ATLANTIC
RECORDING CORPORATION; ARISTA
MUSIC, fka BMG MUSIC; CAPITOL
RECORDS LLC fka 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; and M.J.G. LIME WIRE
FAMILY LIMITED PARTNERSHIP,

Defendants.

06 Civ. 05936 (KMW)
ECF CASE

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS'
MOTION FOR EXPEDITED APPOINTMENT OF RECEIVER TO ENSURE
COMPLIANCE WITH 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

Date: November 18, 2010

TABLE OF CONTENTS

	Page
I. INTRODUCTION AND SUMMARY OF ARGUMENT	1
II. FACTUAL BACKGROUND.....	3
A. The Permanent Injunction Requires Lime Wire To Use Its “Best Efforts” “To Prevent And Inhibit Future Infringement Of The Copyrighted Works By Legacy Users”	3
■ [REDACTED]	
■ [REDACTED]	
■ [REDACTED]	
■ [REDACTED]	
■ [REDACTED]	
III. ARGUMENT	13
A. The Court Should Appoint a Receiver to Ensure Defendants’ Compliance with the Court’s Permanent Injunction	13
1. Defendants Have Demonstrated That They Are Either Unable or Unwilling to Comply with the Court’s Permanent Injunction.....	14
2. Plaintiffs Have Suffered, and Will Continue to Suffer, Irreparable Harm Without the Appointment of a Receiver	19
B. The Receiver’s Duties Are Narrowly Drawn and Not Will Impose Any Significant Burdens upon Defendants	20

TABLE OF AUTHORITIES

	Page
FEDERAL CASES	
<i>Arista Records LLC v. Usenet.com, Inc.</i> , No. 07-civ-8822 (HB).....	18
<i>Dixon v. Barry</i> , 967 F. Supp. 535 (D.D.C. 1997).....	15
<i>Ernest Lawrence Group, Inc. v. Government Careers Center of Oakland, California</i> , 2000 WL 1655234 (S.D.N.Y. Nov. 3, 2000).....	14, 18
<i>Ferguson v. Tabah</i> , 288 F.2d 665 (2d Cir. 1961).....	18
<i>Marshall v. Snyder</i> , 572 F.2d 894 (2d Cir. 1978).....	2, 14
<i>Plata v. Schwarzenegger</i> , 603 F.3d 1088 (9th Cir. 2010)	15
<i>Rosen v. Siegel</i> , 106 F.3d 28 (2d Cir. 1997).....	14
<i>S.E.C. v. Universal Express, Inc.</i> , 2007 WL 2469452 (S.D.N.Y. Aug. 31, 2007).....	2, 3, 14, 15
<i>SEC v. G. L. Equities Corp.</i> , 1972 WL 346 (S.D.N.Y. Oct. 2, 1972).....	13
<i>SEC v. Koenig</i> , 1972 WL 329 (S.D.N.Y. June 20, 1972)	14, 15
<i>Sheet Metal Workers' Local 7, Zone 1 Pension Fund v. Essex Mechanical, LLC</i> , 2009 WL 3246959 (W.D. Mich. Oct. 6, 2009).....	15
<i>Varsames v. Palazzolo</i> , 96 F. Supp. 2d 361 (S.D.N.Y. 2000).....	13, 14
STATUTES AND RULES	
Fed. R. Civ. P. 66.....	13

I. INTRODUCTION AND SUMMARY OF ARGUMENT

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Defendants' disdain for Plaintiffs' copyrights and for the copyright laws has been and continues to be both palpable and dangerous. This Court has already held that Defendants purposely designed a mass infringement system that they claimed could not be controlled. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Defendants

have demonstrated in no uncertain terms that they either will not or cannot do what the Injunction commands. [REDACTED]

¹ [REDACTED]

[REDACTED]

[REDACTED]

Accordingly, Plaintiffs have no choice but to seek the appointment of a Receiver.² [REDACTED]

[REDACTED]

[REDACTED] The Injunction requires Lime Wire to use its “best efforts” to employ “all reasonable technological means to immediately cease and desist the current infringement of the Copyrighted Works by Legacy Users.” [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Plaintiffs’ request for a Receiver is not new or novel. This Court has ample authority to appoint a Receiver “to arrest ... continuing conduct violative” of the Court’s Injunction.

Marshall v. Snyder, 572 F.2d 894, 901 (2d Cir. 1978). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

² A Proposed Order appointing the Receiver is attached to this Memorandum as Attachment A.

³ The Permanent Injunction requires Defendants to do much more than simply stop distributing new copies of Lime Wire software. The Injunction also requires Defendants, among other things, “[u]sing its best efforts [to] use all reasonable technological means to immediately cease and desist the current infringement of the Copyrighted Works by Legacy Users through the LimeWire System and Software, and to prevent and inhibit future infringement of the Copyrighted Works by Legacy Users.” Declaration of Kelly M. Klaus (“Klaus Decl.”), Ex. A at ¶ II.B.3.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] a Receiver appointed by and answerable to the Court is the only way to ensure that the Injunction will be respected and implemented. This Motion should be granted.

II. FACTUAL BACKGROUND

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

A. The Permanent Injunction Requires Lime Wire To Use Its “Best Efforts” “To Prevent And Inhibit Future Infringement Of The Copyrighted Works By Legacy Users”

On October 26, 2010, this Court, with the consent of all parties, entered a Permanent Injunction. Declaration of Kelly Klaus (“Klaus Decl.”), Ex. A. Based on the Court’s conclusions regarding Defendants’ illegal conduct and the parties’ agreed finding that the continued operation of Lime Wire causes Plaintiffs irreparable harm, the Injunction requires Defendants immediately to cease distributing and operating the Lime Wire service, through which Defendants intentionally induced mass infringement of Plaintiffs’ copyrighted works for the better part of the last decade. *Id.* at 6-8.

The Injunction contains two primary sections that provide what Lime Wire must do to stop the distribution and operation of the LimeWire service. *Id.* at ¶¶ II.B.2-3. First, Lime Wire must stop disseminating its tool of mass infringement, and so is precluded from further distributing the LimeWire software. *Id.* at ¶¶ II.B.2.(a)-(d).⁴ Second, the Injunction addresses what Lime Wire must do to stop the ongoing harm to Plaintiffs caused by the hundreds of millions of versions of LimeWire software already installed and running on user’s computers. *Id.* at 4. The Injunction recognizes that merely stopping the distribution of additional LimeWire software has no effect on these existing, installed versions, or Legacy Software. For that reason, the Injunction further commands all Defendants – as well as anyone working for in concert with them – to affirmatively take steps to stop the ongoing infringement through Legacy Software in use by “Legacy Users.” *Id.* at ¶¶ II.B.3(a)-(f). Specifically:

Using its best efforts, Lime Wire shall use all reasonable technological means to immediately cease and desist the current infringement of the Copyrighted Works by Legacy Users through the LimeWire System and Software, and to prevent and inhibit future infringement of the Copyrighted Works by Legacy Users.

Id. at ¶ II.B.3. Paragraph Three then provides a non-exclusive list of steps that Lime Wire must take, including “disabling the searching, downloading, uploading, file trading and/or file distribution functionality, and/or all functionality, of the Legacy Software.” *Id.* at ¶ II.B.3(a). Lime Wire also must establish “default settings in the Legacy Software that block the sharing of unauthorized media files.” *Id.* at ¶ II.B.3(b).

⁴ The Injunction imposes its obligations on a broad swath of individuals affiliated with each Defendant — including all of each Defendant’s employees, agents, officers, salespersons, independent contractors, directors, servants, parents, subsidiaries, affiliates, successors, assigns, and anyone else in active concert or participation with any of them and who has notice of the Injunction. Klaus Decl., Ex. A at ¶ II.A(a).

1000

[illegible]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

A horizontal bar chart consisting of 15 black bars. The bars are arranged vertically, with the longest bar in the center and the shortest bars at the top and bottom. The lengths of the bars vary, creating a symmetrical, bell-shaped distribution. The bars are solid black and have no labels or titles.

[REDACTED]

Bar Index	Percentage
1	75%
2	95%
3	100%
4	90%
5	85%
6	92%
7	98%
8	40%

A horizontal bar chart consisting of 15 solid black bars. The bars are arranged vertically, with their lengths varying. The second bar from the top is the longest, extending across most of the width of the image. The top and bottom bars are the shortest. The lengths of the bars generally decrease from the second bar towards the top and bottom, with a slight increase in length for the bars in the middle of the set.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

action may be granted”). A “decision to appoint or not to appoint a receiver is committed to the sound discretion of the trial court.” *Varsames*, 96 F. Supp. 2d at 365 (citing *Rosen v. Siegel*, 106 F.3d 28, 34 (2d Cir. 1997)).

Plaintiffs seek the appointment of a Receiver here for the limited purpose of ensuring Defendants’ compliance with the Injunction. *See, e.g., SEC v. Koenig*, 1972 WL 329, at *9 (S.D.N.Y. June 20, 1972) (appointing receiver with “limited powers” and listing specific tasks). Although “[a]ppointing a receiver is an extraordinary remedy,” this “is an extraordinary situation.” *Universal Express*, 2007 WL 2469452, at *12. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In
circumstances such as these, when a party has so plainly demonstrated either the inability or the unwillingness to implement an Injunction, the appointment of a Receiver is the only effective means of bringing Defendants into compliance with the Court’s order [REDACTED]

[REDACTED]

1. Defendants Have Demonstrated That They Are Either Unable or Unwilling to Comply with the Court’s Permanent Injunction

Lime Wire’s intent does not matter here. The “appointment of a receiver” is “appropriate to arrest . . . continuing conduct violative” of a court “order.” *Marshall*, 572 F.2d at 901. *See*

also *Ernest Lawrence Group, Inc. v. Government Careers Center of Oakland, California*, 2000 WL 1655234, at *2 (S.D.N.Y. Nov. 3, 2000) (holding that “circumstances warrant the appointment of a receiver” where defendant “has refused to comply with the Court’s orders” and defendant’s “failures” to comply “demonstrate a disregard for the judicial process”). The appointment of a Receiver does not depend upon the defendant willfully violating the Court’s orders. A Receiver may be appointed where defendants “have demonstrated *either their inability or unwillingness*” to comply with the Court’s orders and the Court has “little confidence in [their] ability” to comply. *Universal Express*, 2007 WL 2469452, at *12 (emphasis added).⁵

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

The Permanent Injunction covers not only Defendants Lime Wire LLC, Lime Group LLC and Mark Gorton, but also their “officers, agents, directors, servants, employees, salespersons,

⁵ See also *Koenig*, 1972 WL 329, at *9 (holding that “receiver is therefore necessary” where “the Court concludes that it cannot rely on the defendants to implement the directions of the Court”); *Plata v. Schwarzenegger*, 603 F.3d 1088, 1097 (9th Cir. 2010) (receiver proper given state’s “inability to comply with consent orders intended to remedy the constitutional violations in its prisons”); *Sheet Metal Workers' Local 7, Zone 1 Pension Fund v. Essex Mechanical, LLC*, 2009 WL 3246959, at *1 (W.D. Mich. Oct. 6, 2009) (“receivership” is “appropriate” where there party fails to “compl[y] with a court’s orders, whether through intransigence or incompetence”); *Dixon v. Barry*, 967 F. Supp. 535, 550 (D.D.C. 1997) (same).

[illegible]

⁶ “LimeWire System and Software” is defined in the permanent injunction as “[a]ny and all versions of the software program that Lime Wire has distributed under the names ‘LimeWire,’ ‘LimeWire BASIC,’ ‘LimeWire Extended PRO’ or ‘LimeWire PRO’ or any other program of comparable functionality regardless of the trade name under which Lime Wire has distributed.”

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

No. 07-civ-8822 (HB) (Doc. No. 256) at 1-2 (S.D.N.Y, Aug. 28, 2009) (appointing receiver following summary judgment for infringement of copyrights through Defendants' "USENET" network of computers given "Defendant's prior conduct in attempting to transfer the domain name usenet.com, his failure to provide current contact information, and his disregard for the other provisions" of the Court's order); *Ferguson v. Tabah*, 288 F.2d 665, 675 (2d Cir. 1961) (receivership warranted given "arrest of virtually all high [defendant] officials in connection with alleged violations of the Securities Act and mail fraud provisions of the United States Code," and while "this was not new 'evidence' of misdeeds, it did present a situation where there was a possible complete breakdown of the [defendant's] high command."); *Ernest Lawrence*, 2000 WL 1655234, at *2 (Defendant's "failures to respond to the default judgment motion, the discovery orders, and the instant motion for appointment of a receiver demonstrate a disregard for the judicial process. Under these circumstances, no other remedy would seem to be effective in enforcing the plaintiff's judgment.").

2. Plaintiffs Have Suffered, and Will Continue to Suffer, Irreparable Harm Without the Appointment of a Receiver

In entering the Permanent Injunction, the Court held that “Plaintiff’s have suffered – and will continue to suffer – irreparable harm from Lime Wire’s inducement of widespread infringement of their works.” Klaus Decl., Ex. A at 5. As the Court noted, “[e]ach time an illegal copy of one of Plaintiffs’ copyrighted works is downloaded through the LimeWire software, that copy may then be used to spawn countless derivative infringing copies. This inflicts exponential harm on Plaintiffs’ exclusive rights.” *Id.* at 7. As the Court held in its summary judgment order, Plaintiffs’ uncontroverted evidence has proven “that LW intended to encourage infringement by distributing LimeWire” given in part “LW’s awareness of substantial infringement by users”; “that LW knew that LimeWire users were committing copyright infringement”; and that “[t]he massive scale of infringement committed by LimeWire users, and LW’s knowledge of that infringement, supports a finding that LW intended to induce infringement.” Dkt. No. 223, Amended Opinion & Order, at 31-33.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

B. The Receiver's Duties Are Narrowly Drawn and Not Will Impose Any Significant Burdens upon Defendants

[REDACTED] the burdens of Defendants will be narrow to non-existent. This Motion does not seek the appointment of a Receiver who will entirely take control of Defendants' businesses and assets. Indeed, LimeWire's business itself has been adjudged illegal, and from public accounts, the company is significantly downsizing as it searches for a legal stream of revenue.

Rather, Plaintiffs' simply seek the appointment of a Receiver to implement the Court's Permanent Injunction. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Dated: November 18, 2010

Respectfully submitted

/s/ Kelly M. Klaus
Kelly M. Klaus

Attorney for Plaintiffs
Munger, Tolles & Olson LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560
(213) 683-9100
(213) 687-3702 (Fax)