

EXHIBIT 2

7C7ARIC Conference
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARISTA RECORDS, et al.,
Plaintiffs,

v.

06 CV 5936 (GEL)

LIME WIRE LLC, et al.,
Defendants.

New York, N.Y.
December 7, 2007
5:00 p.m.

Before:

HON. GERARD E. LYNCH,

District Judge

APPEARANCES

CRAVATH, SWAINE & MOORE
Attorneys for Plaintiffs
BY: KATHERINE B. FORREST
TEENA-ANN V. SANKOORIKAL
JOANNE M. GENTILE

PORTER & HEDGES
Attorneys for Defendants
BY: CHARLES S. BAKER
JOSEPH D. COHEN

7C7ARIC Conference

(In open court)
THE DEPUTY CLERK: Arista Records v. Limewire LLC.
MS. FORREST: Katherine Forrest with Cravath, Swaine &
Moore for plaintiffs.
MS. SANKOORIKAL: Teena-Ann Sankoorikal from Cravath
for plaintiffs.
MS. GENTILE: Joanne Gentile for plaintiffs.
MR. BAKER: Your Honor, Charles Baker on behalf of the
defendants.
THE COURT: Good afternoon, Mr. Baker.
MR. COHEN: Joe Cohen from Porter & Hedges in Houston,
also for the defendants.
THE COURT: Mr. Cohen, good afternoon. It probably
wasn't the wisest thing to schedule this so late in the day

15 that had four sentencings in the afternoon. But that's where
16 we are.

17 Fortunately, the parties have submitted a very
18 thorough joint letter that set forth the various issues that
19 divide them on discovery, and I've carefully reviewed that and
20 so I'm able to rule on most of these issues.

21 Now, since that letter was written, the circumstances
22 have changed in that I've dismissed the antitrust counterclaims
23 that underlay some of these discovery issues. Though as I
24 trace through it, that may make less difference than I might
25 have thought. Partly because the defendants have other

3

7C7ARIC Conference

1 arguments as to why they need the discovery that they seek, and
2 partly because some of what they seek I wouldn't have granted
3 even if the antitrust counterclaims were there.

4 So I am going to try and just go through these and
5 make rulings, and I've asked the court reporter to stay around
6 so that everyone wouldn't have to be quite so frantically
7 taking notes, and we'll have a record of what I actually
8 ordered.

9 First, there is an issue with respect to the proof of
10 copyright ownership and what discovery needs to be provided on
11 that front. It seems to me that the sensible resolution here
12 is the plaintiffs' alternative suggestion, that we simply take
13 some subset of copyrighted works and sever the claims as to
14 those for the initial purpose of deciding whether there is
15 liability or not.

16 There is not likely to be a serious dispute about
17 whether the plaintiffs own the copyrights to at least some of
18 the material that is at issue here. That's not what this case
19 is about. But of course, if we ever get there and there is a
20 damages assessment, the extent of whatever the alleged
21 infringement might be, might be relevant to that, and it might
22 be necessary to figure out what of the material here really is
23 copyrighted.

24 But, it's not necessary to have more than a single
25 item, as far as I'm concerned, in order to address the basic

4

7C7ARIC Conference

1 liability issues that are what the case is about. And since
2 you never do anything with a single item because you need at
3 least a belt and suspenders and probably a rope and a couple of
4 other things to avoid errors and things becoming moot and
5 unforeseen events, a relatively small subset of copyrighted
6 items will suffice.

7 And if the plaintiffs provide the discovery as to
8 those, we can worry about the others if, as and when we get to
9 damages phase, or if, as and when it becomes necessary or
10 appropriate to address the rest of the copyrighted materials.

11 Second, there is an issue as to whether EMI and UMG,
12 two of the plaintiffs, are required to search for documents
13 prior to February 2006. Notwithstanding that they take the
14 position that all documents relevant to the case that existed
15 prior to February 2006 were produced in prior antitrust
16 government investigations and lawsuits, and therefore, have
17 been produced to the defendants in this case.

18 Now, I note two things about this. Number one, the
19 antitrust claims have been dismissed. And while it is true
20 that the plaintiffs maintain that the antitrust counterclaims
21 are simply some species of copyright abuse and therefore

22 necessary for the defense of the plaintiffs' claims, the
23 contingency of whether there really is an abusive copyright
24 defense in this circuit and what exactly it would consist of
25 and the fact that at any rate it is not congruent completely

5

7C7ARIC Conference

1 with the alleged antitrust violations, and the fact that the
2 principal antitrust violation that can be at issue here has to
3 do with the refusal to provide hashes, which seems to have
4 occurred in 2006 and not before it, suggests that so long as
5 the parties are looking for documents post-February 2006, and
6 given that they've produced, as I understand it, the materials
7 that had been produced in prior antitrust matters, the only
8 thing that I will order here is that the plaintiffs provide the
9 defendants with information regarding what the specific
10 document requests were that led to these productions in the
11 prior matters which may enable the defendants to focus on what,
12 if anything, they specifically need for the defenses that are
13 still in the case that might not be covered by the prior
14 productions. And if there is such a thing, then they can seek
15 it. And if there is still an issue, that can come before the
16 Court at some future point.

17 Given the status of the case, it is hard for me to
18 believe that greater discovery on that front will be ordered.

19 Next there is a question of whether the record labels
20 themselves, the so-called subsidiaries, shall be required to
21 produce responsive documents for certain requests with respect
22 to communications about Limewire. And it seems to me that
23 since those are the actual defendants, and they may have
24 material that is relevant to the copyright misuse defense, that
25 they should have to produce, and not simply inherent companies.

6

7C7ARIC Conference

1 Next there is a issue with respect to custodial lists,
2 organizational charts. I think the only issue here as far as I
3 can figure out that is of any interest is whether the custodial
4 lists are sufficient. It seem to me the plaintiffs are correct
5 that those lists include the persons most likely to possess
6 documents related to the claims or defenses of the parties.
7 And I am not going to direct that any further discovery be
8 provided as to the process by which the plaintiffs selected
9 these custodians.

10 In the joint letter I couldn't find anything that gave
11 me any reason to think that the plaintiffs had not identified
12 the right people, and as those people are -- any of those
13 people are deposed or as further discovery proceeds, if the
14 defendants have some actual reason to think there is some
15 deficiency, maybe that could be raised at some future point.
16 But I don't think there is a need, given the volume of
17 discovery that has been made and its limited relevance to the
18 core issues in the case, that we need to have some further
19 inquiry into the process by which the discovery was made.

20 Next, there is an issue of communications related to
21 digital distribution licensing agreements. And it seems to me
22 that the plaintiffs' representation that they've agreed to
23 provide the licensing agreements related to digital downloading
24 and the negotiation files associated with those agreements is
25 adequate to deal with that issue.

7

7C7ARIC Conference
Page 3

1 Next, there is a question of communications with
2 respect to peer-to-peer companies. Here again it seems to me
3 that the plaintiffs are responsible for producing materials
4 that are called for by the document request. But there needs
5 to be some reasonable balancing, again taking into account the
6 absence at the moment of the antitrust counterclaims, and
7 taking into account what is a reasonable burden on the
8 plaintiffs to make an appropriate search.

9 And it seems to me that the methodology used by the
10 plaintiffs to identify the potential entities that are involved
11 here, and then produce what records exist in their files that
12 are turned up by such a search, seems to me to be adequate.

13 Next, the defendants' request for settlement
14 agreements and correspondences related to the settlement of
15 previous litigation is just denied. And nice try, but no.

16 Next comes the issue of the plaintiffs disclosing
17 ownership interests in unaffiliated companies involved in
18 online distribution. Defendants have requested communications
19 related to the plaintiffs' actual or contemplated investments
20 in such companies.

21 It seems to me, the actual and the contemplated are
22 two different things. With respect to actual investments,
23 these may be far-flung empires, but it is hard to believe they
24 don't know what they've invested in.

25 So, with respect to actual investments, it seems to me

8

7C7ARIC Conference

1 the plaintiffs are responsible at whatever peril exists in the
2 discovery process to make a genuine accounting of what they
3 have actually invested in.

4 With respect to contemplated investments, on the other
5 hand, it seems to me that some process of search is the right
6 way to go here. The search terms that have been utilized in
7 attempting to find documents related to the far-flung problems
8 of what they may have contemplated at some time are sufficient.
9 And so, I think it would be highly burdensome to require the
10 plaintiffs to go interviewing anybody and everybody who might
11 have some knowledge of something that they ever thought of
12 once. And the search is sufficient as to that.

13 But, I can't believe that a sort of computerized
14 search for documents is the most sensible way to find out what
15 the plaintiffs actually own. And they should do whatever is
16 necessary to find out whatever investments they currently have
17 in these online distribution entities.

18 The question of documents related to Internet business
19 models, that seems to me to be the thing that is closest to
20 just an antitrust matter that is no longer in the case, so it's
21 moot. And I probably would've said no anyway, even with the
22 antitrust claims in the case. Because this seems to be both a
23 very vague one and one that also probes to the heart of what
24 might be highly confidential material. One way or the other,
25 that's denied.

9

7C7ARIC Conference

1 Next is an issue about agreements and plans relating
2 to providing music over the Internet. Once again, I'm
3 satisfied with the plaintiffs' representation that they've
4 agreed to provide the licensing agreements and negotiation
5 files that are relevant to that subject.

6 With respect to documents relating to communications,
7 meetings and agreements among the plaintiffs regarding prices

8 and terms of service, the plaintiffs say they have provided the
9 relevant custodians and supplied the relevant search terms. I
10 am satisfied with that, except the custodian list does not, as
11 far as I can see, include anybody from RIAA. And that seems to
12 me to be an organization that in principle could have very
13 significant information to impart. And it seems to me someone
14 should identify some possible custodian who is the right person
15 whose files should be searched on that issue.

16 Last, on the defendants' list, there is a question
17 relating to the plaintiffs' restriction of answers in
18 interrogatories to the current employees who have the most
19 knowledge. I'm satisfied with the most knowledge part. I
20 think it would be burdensome and would yield little benefit to
21 expand the category to anybody who has any knowledge or
22 something like that, or try to figure out who out of all these
23 employees may have been involved in something relevant.

24 But, I do think that given that the allegations in
25 this copyright misuse claim go back as far as 2000, the

10

7C7ARIC Conference

1 plaintiffs should also identify the most relevant former
2 employees who might be served with interrogatories for
3 third-party discovery, and that restricting the answers to
4 interrogatories to current employees is not likely adequate.

5 All right. Now turning to the plaintiffs' laundry
6 list. The request for protective order I think is denied,
7 except to the extent that I have made these various rulings and
8 that seems to deal with the problem and be the way of dealing
9 with these issues.

10 The plaintiffs move to compel production of documents
11 from David Ruth and Amy Gordon who are close relatives, indeed
12 nuclear family members, of Mr. Mark Gordon, who is the CEO of
13 Limewire. The fact that they're family members doesn't seem to
14 me to make them different from shareholders to the extent of
15 the likelihood of producing any -- of having any relevant
16 information. And the fact that they're family members tends to
17 increase the risk that serving them with discovery documents is
18 just harassment, so that will be denied.

19 Next there is a question of bifurcation. I think I've
20 essentially dealt with that by separating out the test case
21 copyrights. I think that's a more sensible way to do it than
22 simply bifurcating damages issues, or at least maybe that means
23 I am bifurcating at least damages issues to the extent they go
24 to how many copyrights or something like that.

25 But I'm not -- I think I'd rather not phrase it as no

11

7C7ARIC Conference

1 discovery with respect to damages issues. Because that's the
2 kind of order that tends to produce more trouble than it's
3 worth, as the parties then fight over whether a given demand is
4 or isn't in which half of the bifurcation.

5 I think I've made clear the way to proceed here with
6 respect to what I think is the principal issue or problem,
7 which is the disclosure of copyright ownership issues, is just
8 to proceed with a small subset of those in the first instance.

9 Finally, I think it's finally, the plaintiff seeks
10 some additional deadlines and the defendants seek various
11 extensions. Now, some of this has been mooted or changed or
12 affected just by the process of events. I'm sorry that it took
13 so long to deal with the motion, but that's life in the big
14 city. There are a lot of other motions on the list. This was

15 a somewhat demanding one, it resulted in a lengthy opinion, it
16 took me a while to get to it.

17 But having taken that time, the plaintiffs' proposed
18 discovery deadline is now past. And it seems to me that based
19 on all of the things that I've covered today from the parties'
20 joint request, it is just not realistic to think that this work
21 is not going to get done -- I'm sorry -- is going to get done
22 in a very short period of time, particularly with the holidays
23 intervening.

24 It does seem to me, on the other hand, appropriate to
25 require that document discovery be substantially complete by

12

7C7ARIC Conference

1 January 31; that fact depositions be done in February and March
2 and be completed by March 31; that expert reports be provided
3 by I guess basically the same time, the end of March; rebuttal
4 reports by the end of April; expert depositions then to be
5 conducted in May and be finished by May 31.

6 And I think that's enough deadlines to keep everybody
7 occupied, and we can think about summary judgment motions at a
8 conference to be held after that process is done.

9 It seems to me, though, it would be productive to
10 schedule a conference for the very beginning of April. Just to
11 find out, get some progress report on the completion of fact
12 discovery, and see whether progress is sufficiently being made
13 and give the parties a deadline that is a real hearing in court
14 deadline to concentrate the mind on what needs to be done in
15 the interim.

16 So that is what I thought after reading the joint
17 letter. Is there anything really huge that I've missed, any
18 major topic heading that I haven't addressed that the parties
19 need guidance on? Or anything that you think from the point of
20 view of your client I've gotten grotesquely wrong in these
21 rulings? And basically, you've each got about one, and if it's
22 not terribly wrong, if you can't persuade me on one, then your
23 second best is not going to be heard.

24 Do you have one or are people content to live with
25 this for now?

13

7C7ARIC Conference

1 MS. FORREST: Your Honor, I just have a couple of very
2 brief points. One is on a couple of the rulings that your
3 Honor has stated today, they do rely upon the copyright misuse
4 affirmative defense still being in the case.

5 If we could, your Honor, let me just ask if Limewire
6 could define for us what the parameters of that copyright
7 misuse defense are, because we have seen it both in its letter
8 briefs and in its filings before the Court in various places
9 change. It's gone from both being overlapping with the
10 antitrust case, to now in the most recent November 16 letter
11 brief, having some bearing on ownership issues.

12 Your Honor, I would also suggest that if copyright
13 misuse is only in the case or was only in the case for
14 antitrust, if the counterclaims are truly gone, your Honor,
15 then I would ask how is it that that discovery is still
16 relevant here. If the rulings, your Honor, relating to misuse
17 are for some other purpose, we'd like to have the parameters of
18 that spelled out.

19 That relates to the couple of the rulings, the label
20 level searching, the actual investments, the prices in terms of
21 service.

22 I have a couple of other questions of clarification,
23 but perhaps it's best to stop there and let Limewire address
24 that or your Honor.

25 THE COURT: You want to address that?

14

7C7ARIC Conference

1 MR. BAKER: Yes, your Honor. We're happy to provide
2 the Court with a statement or a position on the copyright
3 misuse as well as the unclean hands, that for some reason has
4 been not mentioned today by plaintiffs' counsel, but we have --
5 those are our two main defenses we have in the case.

6 The point I would like to make is to the extent, and
7 this could be shown in our briefing that the courts, the
8 circuits that have dealt with this issue do not limit it to you
9 have to prove an antitrust violation. You don't have to meet
10 all the standards under the antitrust laws. You just have to
11 show anticompetitive conduct that affects the public interest.
12 They are extending their monopolies beyond what the law allows
13 them to do.

14 Their position, because you've dismissed our antitrust
15 claims, which I would like to say also that you still gave us
16 that opening that if we found facts that we could come back to
17 the Court and ask to replead them. That by no means does it
18 mean our copyright misuse case is over with. That's what they
19 want to tell third parties who we've subpoenaed who are now
20 calling and saying you guys just got your antitrust claim
21 dismissed, we are not going to produce any documents to you, go
22 pound sand. So, that's the problem we are facing right now.

23 THE COURT: They can come and litigate these things.
24 Let me say where I think we're going here. It has been my
25 reading of this joint letter that this discovery process is

15

7C7ARIC Conference

1 well underway. And that what we are dealing with here is clean
2 up. That it is not that the plaintiffs have refused to provide
3 anything pending the ruling, but that they've provided a lot of
4 stuff.

5 Now to the extent that I gave the defendants the
6 opportunity to replead, that was based not on the prospect that
7 they would engage in indefinite fishing expeditions and maybe
8 turn up something someday in the future. That was based on the
9 assumption they had already seen a lot of documents, and if
10 they had something, they would be able to tell us what they
11 had. So, that is my reaction to the repleading issue.

12 with respect to the scope of the defense, I frankly
13 have very little idea what the scope of the defense is going to
14 be, if any, in this circuit. But it has been my view that it
15 would be appropriate for the defendants to have the opportunity
16 to do discovery with respect to alleged anticompetitive
17 activity. And that would put us in a position to decide
18 whether there is any issue in the case.

19 Once the defendants can say this is what we think they
20 did and this is why we think it constitutes a valid defense, it
21 seems to me better to address that in a concrete context rather
22 than an abstract context.

23 while I realize there is an expense and a burden here
24 on the plaintiffs, after all, the plaintiffs are trying to put
25 the defendant out of business. The plaintiffs are just going

16

7C7ARIC Conference
Page 7

1 out of business because they are a dead industry and not
2 because of anything the defendants are doing to them. And they
3 still have a lot of money and a lot of power. And I don't
4 think that the burden is so extreme that, as limited by these
5 rulings, they shouldn't have to provide what I've said they
6 have to provide.

7 Now, I also recognize that having dismissed the
8 antitrust claims, it does put things in a slightly different
9 posture. And if the plaintiffs want to take another shot at
10 some of these things in writing, have another letter that
11 identifies exactly why there is no possible way this stuff
12 could be relevant, or put some real cost figures and try to
13 identify why there is some extraordinary burden to doing these
14 things, I'm prepared to hear it.

15 Now, I guess the other thing is, Mr. Baker, I can see
16 how a copyright misuse defense would be different. Less
17 technical. Maybe even broader than a simple antitrust
18 violation. But as you've just described it, it sounds like it
19 could be anything that you don't like. Anything anybody
20 doesn't like. Anything that a Court thinks maybe isn't a very
21 good idea.

22 I don't know what anticompetitive behavior is. And it
23 is certainly my expectation that if this defense is going to
24 survive into a trial phase of the case, it is going to survive
25 summary judgment, there is going to have to be a very specific

17

7C7ARIC Conference

1 delineation, both what we think the legal test is, and here is
2 why we think we can meet it.

3 Finally, one other thing. You guys are either Napster
4 or you're not, it seems to me. And I would've thought that
5 there are at least colorable and quite interesting arguments as
6 to why the kind of thing that your clients are doing is not the
7 same sort of thing that has been condemned previously.

8 Now, those are interesting issues. And the more that
9 the defendants appear to be distracting attention from those
10 issues, the more I begin to wonder why the defendants have any
11 real confidence in that position.

12 And, you know, I am just an amateur in antitrust law,
13 and I am an amateur in technology. And judges have to be
14 guided sometimes by their instincts. And you're channeling my
15 instincts in the wrong direction, it seems to me, by making it
16 look like the plaintiffs are right, that this is all a
17 distraction and a way of bogging down this litigation.

18 Now, it is my view that the discovery process should
19 continue, and I've tried to give you some leeway here. I think
20 I'm still doing that, and the plaintiffs are probably not
21 thrilled with it. But the time is going to have to come when
22 this gets laid out in black and white as this is what we think
23 they're doing, and this is why we think this deprives them of
24 their ability to protect their copyrights.

25 But it still seems to me that the real story here is

18

7C7ARIC Conference

1 are you doing something that infringes? And if you are, well,
2 it is going to have to be something pretty dramatic to say in
3 effect that in effect invalidate copyrights. If you're not,
4 then you win, and we don't have to go through all of this.

5 MS. FORREST: Your Honor, three very quick points on
6 this topic. One is we would be happy to write, to put forward
7 with the Court something --

8 THE COURT: I'm sure you would.
9 MS. FORREST: -- something that would spell out the
10 burden on this. We would ask, as Mr. Baker suggested he would
11 be willing to do, that defendants lay out the parameters of the
12 misuse defense so we know what the target is we are shooting
13 at.
14 On that point, your Honor, as your Honor acknowledged
15 in your opinion of last week, there is no evidence that
16 Limewire ever sought to license the copyrights from the record
17 companies. As a result, your Honor, it would be unlike any
18 other copyright misuse claim ever known in any court across
19 this land where there is no copyright which was even being
20 sought, number one. Number two, it would be quite unusual,
21 your Honor, and how this plays out if a copyright misuse
22 defense with no factual allegations really around it with
23 counterclaims dismissed could do what Twombly had said was not
24 supposed to be done, which is to have burdensome antitrust
25 discovery proceed.

19

7C7ARIC Conference

1 THE COURT: But the difference in Twombly is those
2 folks were going about their business and somebody came and
3 attacked them in court and said we've got claims here. And
4 even though he can't tell you anything about the claims, we are
5 going to go and inflict a lot of financial damage on you.
6 You are going after them, and they've said we have
7 certain defenses here. That is separate from the counterclaim
8 issue. I think they are entitled to defend themselves. And
9 that is a different matter than if they had just walked in the
10 door and said we want damages from you.
11 You are trying to shut down their entire business.
12 And maybe you are entitled to do that. But, it seems me that
13 puts the shoe on a very different foot in terms of their
14 ability to flesh out this defense.
15 I hear what you are saying. The thing that is
16 difficult from my standpoint in terms what is sensible judicial
17 administration is what you're trying to back me into is a
18 situation which I have to rule in the guise of a discovery
19 ruling on some proposition of law. Some articulation of, in
20 the abstract, what are these copyright misuse claims going to
21 be and which of them are valid and which of them aren't. In a
22 way, that I think is fairly difficult.
23 Now, again, where I'm coming from here, is I had
24 thought that the plaintiffs, while the counterclaims were
25 pending, were in good faith providing discovery since I had not

20

7C7ARIC Conference

1 stayed discovery. And therefore, that what remains here is not
2 the same thing as the plaintiffs suddenly having to confront
3 these massive claims, but is a relatively limited -- further
4 limited by the rulings that I've made today -- clean up of the
5 fringes of discovery that rightly or wrongly has already
6 happened.
7 That's why I say I'm interested a little bit in the
8 burden story. To the extent that a showing can be made that in
9 light of what the defendants are claiming, these burdens are
10 excessive.
11 Last thing. We want to get to the end of this process
12 someday. You want to get to the end of the process someday
13 because you've got the claims that they're doing something
14 that's a threat to your business that warrants shooting them

15 down. And it seems to me that you are abetting any strategy,
16 if there is one, to bog this thing down, to the extent that you
17 involve me in having to do elaborate research and elaborate
18 thinking about this or the other thing, and spend a lot of time
19 resolving something, and first spend a lot of time with you
20 briefing it, and then spending a lot of time with me deciding
21 it. And at the end of a period of what is it going to be,
22 right, it's Christmas, you are not going to get me another big
23 joint letter until sometime in January. What if I rule against
24 you and then we're not going to get the document discovery by
25 the end of January. Then we are going to be put back another

21

7C7ARIC Conference

1 couple of months by the same process that has delayed us here.
2 It's your ballgame. That's your choice to make.
3 MS. FORREST: Your Honor, let me just address that.
4 when I talk about what is the place of the discovery for
5 copyright misuse, I am not really talking, frankly -- except
6 for label level searching, which I want some clarification
7 on -- I am not talking about the documents. Your Honor is
8 correct. We have produced the documents, but for some clean up
9 items here.

10 That, however, does not address entirely the burden.
11 what will happen, your Honor, is we will have a deposition
12 program here, and we will have expert discovery that will occur
13 that will be enormously expensive and burdensome. Based upon a
14 case that will look somewhat like the counterclaims might be
15 sort of in the case if we proceed.

16 So it's not just about the documents, your Honor. It
17 is about the deposition program here being actually not just
18 twice the size as it would otherwise be, but three or four
19 times the size. Going into the issues about digital licensing,
20 going into all of the arrangements that the record companies
21 might have had, and the hashes and everything else. That is
22 going to take lots more depositions than a copyright case.

23 THE COURT: That is a good point. That also tells me
24 how to resolve it, doesn't it. First, it takes the time
25 pressure off, to a limited degree. We are not talking about

22

7C7ARIC Conference

1 what is going to happen with the documents. And second, it
2 means that we can talk about a concrete deposition program
3 based on some concrete allegations from the defense. Because
4 if they have the documents, they can describe exactly what it
5 is they want to explore based on exactly what they have found.
6 And then we're in a position where any limitation on what is
7 going to happen will be based on the defendants having had a
8 fair chance to review these documents and tell me whether
9 they've got something, and what it is they think they've got,
10 and what it is that has to be explored with individuals based
11 on what has been found in the documents.

12 Now, again, that said, I am not suggesting that we
13 don't have any depositions until there has been some elaborate
14 process of the depositions and what the deposed people are
15 going to talk about. It seems to me there are clearly lots of
16 depositions and lots of witnesses who can be started on while
17 we go down this road.

18 But it seems to me that if the document discovery is
19 well on the road to being completed, it is not unrealistic to
20 think that by the end of January there could be some
21 submissions to the court that explains what the defendants

22 propose to explore in depositions related to the copyright
 23 misuse defense, and what basis in the documentary record there
 24 is for formulating some concrete, this is what we think the
 25 plaintiffs did, this is what evidence we've already got that

23

7C7ARIC Conference

1 suggests they did it, here is why as a matter of law that is a
 2 defense, and here is who we're going to have to talk to, to
 3 develop this further.

4 MR. BAKER: If I may speak to that point. You may
 5 have wondered why I have this stack of documents here. This is
 6 the privilege logs that they have produced. They produced to
 7 us a month -- about six weeks ago. Just on the prior antitrust
 8 productions. I've got another box over here of a privilege log
 9 from the RIAA. They haven't given us the most recent
 10 production on the privilege log. This is going to take a long,
 11 long time to go through. They have claimed a lot of material
 12 as privileged.

13 THE COURT: That's because a lot of material is
 14 probably privileged. You can make -- you know, take your shot.
 15 Do what you need to do. But we are not going to be doing this
 16 forever. If there is some plausible objection you have to
 17 these assertions of privilege, we'll deal with that. But we're
 18 moving forward. I told you what I think this case is about.
 19 I've given you a lot of leeway. Don't push it. The leeway is
 20 you're getting these documents on claims that have been
 21 dismissed as counterclaims based on a pretty amorphous defense
 22 that may not even exist in this circuit. The idea is you are
 23 getting a lot of material. It may not be everything you want.
 24 If there is something they're withholding that they're
 25 improperly withholding, we can litigate that. But you've had

24

7C7ARIC Conference

1 your fun. You've had months of pursuing this stuff. By the
 2 end of January, if there is something that you've got, I expect
 3 to know what it is.

4 That's all I am saying. We are going to be moving
 5 forward into that process. We are going to be doing
 6 depositions. We are going to get to the end of this someday.
 7 And the heart of this story still is whether there is something
 8 about this peer-to-peer system that escapes from the
 9 plaintiffs' contention that it is a violation of copyright.

10 I don't know much, so I don't have any real opinion
 11 about that at this point. But it certainly doesn't seem to me
 12 to be a foregone conclusion that the way to defend this case
 13 has to be to somehow avoid a straightforward adjudication that
 14 you are doing something wrong. It seems to me there is -- my
 15 mind is completely open to the possibility you haven't done
 16 anything wrong at all. That is one piece of this. That's the
 17 big piece of this, in my view.

18 Because I am not that sympathetic, frankly, to the
 19 idea that -- if you were just stealing their intellectual
 20 property, I don't know what this copyright misuse thing is all
 21 about. It wouldn't have a lot of traction.

22 Anyway, enough said. I think I've ruled on the things
 23 I ruled on. If we are going to have something more, bring it
 24 on. Don't expect it is going to lead to a lot of delay, and
 25 don't expect we are going to be getting special masters, and

25

7C7ARIC Conference
 Page 11

1 don't expect we are going to just consume our lives with this.
2 I am going to shoot from the hip. Do it from horseback. Try
3 to get this case to someplace where it gets litigated. And
4 that's what we are doing here.
5 I don't feel obliged to review every document in these
6 files and decide whether it's privileged. That's not a good
7 use of my time. Given the nature of the case, I don't think it
8 is a good use of any judicial officer's time. And I am going
9 to take responsibility. I am going to do it at the level I
10 think I can devote to it that's going to get the case moving.
11 Anything else? Or can we all go home, especially the
12 court reporter.
13 MS. FORREST: I have one final issue, if I might, your
14 Honor, to raise. Which is we had previewed in our letter
15 brief, the joint letter brief of November 16, that we would be
16 adding some additional tracks into our schedule A, which is at
17 the back of the complaint. This does not change a single word
18 of any substantive allegation in the complaint. As we said in
19 paragraph 74 of our complaint originally, we would be spending
20 some time during the discovery period trying to solidify what
21 the list of tracks were that we were going to be suing upon.
22 We have that ready. We understand from Limewire that
23 they object to our putting that forward, so we raise it with
24 the Court, though we didn't actually think this was something
25 that needed to be raised to the level of any kind of judicial

26

7C7ARIC Conference
1 intervention.

2 THE COURT: I wouldn't have thought so. Maybe I'm
3 just not getting it, but isn't this related to this bifurcation
4 or carving up business?
5 MS. FORREST: It is, your Honor. It is going to add
6 some sound recording registrations to the schedule at the back
7 of complaint. So that now is going to be bifurcated, we'll
8 give that list to Limewire now, but the issue should be sort of
9 off the table, if you will.
10 THE COURT: I would think so. I don't see any reason,
11 particularly given that discovery hasn't progressed on this
12 front and now isn't going to progress on this front, why there
13 is any prejudice to amending the complaint to in effect add
14 more allegedly copyrighted materials. That is because we have
15 plenty of time if, as and when we get there to do that
16 discovery and go through it all. But we are not going to add
17 that at this point.
18 MR. BAKER: After today's ruling, your Honor, that's
19 fine with us. If they would just supply -- one of the reasons
20 I've tried to ask why are you doing this, so we would have some
21 justification to our client to allow this to happen.
22 THE COURT: Okay. I think we're done for today.
23 Thank you very much. Again, I'm sorry not to have had more
24 time to discuss this with you all. But other people have other
25 business, some of which involves their liberty. See you next

27

7C7ARIC Conference
1 time I see you.

2 Tom will work out with you a date for some next
3 conference just to be on the calendar in early April, but it
4 may be that we'll be seeing more of each other between now and
5 then anyway.
6 Thank you. Happy holidays to everybody.

7

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

□