

EXHIBIT D

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,

-against-

LIME GROUP LLC; LIME WIRE LLC; MARK GORTON; GREG BILDSON; and M.J.G. LIME WIRE FAMILY LIMITED PARTNERSHIP,

Defendants.

06 Civ. 05936 (KMW)
ECF CASE

DECLARATION OF ALASDAIR MCMULLAN ON BEHALF OF CAPITOL RECORDS, LLC, VIRGIN RECORDS AMERICA, INC., AND PRIORITY RECORDS LLC

I, Alasdair McMullan, hereby declare as follows:

1. I am the Executive Vice President of Legal Affairs for EMI Music North America (“EMI”). My responsibilities include working on behalf of EMI-affiliated entities such as Virgin Records America, Inc., Capitol Records, LLC, and Priority Records LLC (the “EMI Plaintiffs”).

If called and sworn as a witness, I could competently testify to the facts herein.

2. EMI is engaged in the creation, manufacture, exploitation, distribution, and sale of sound recordings. I am familiar with the practices and procedures that the EMI Plaintiffs follow to develop, exploit, and distribute sound recordings, including the costs and revenues

associated with the same. I am also familiar with the process by which EMI accounts for income and costs in connection with the sound recordings it produces, distributes and offers for sale to the public, and the manner in which EMI and its affiliates keep, maintain and account for their records with respect to such income and expenses.

3. I understand that this declaration is to be submitted to the Court in connection with requests for discovery by Defendants Lime Wire LLC, Lime Group LLC, Mark Gorton, and M.J.G. Lime Wire Family Limited Partnership (collectively “Defendants” or “Lime Wire”). In connection with this declaration and the matters set forth herein, I also understand the following:

- The present lawsuit has been pending for nearly four years, and during that time the EMI Plaintiffs have produced nearly 800,000 pages of documents;
- Plaintiffs have to date identified almost 10,000 sound recordings at issue in this case, and more than 1,000 of those sound recordings are attributable to the EMI Plaintiffs;
- Defendants seek production of documents concerning revenues and profits (such as accountings, royalty statements, and any other documents relating to revenues and profits) in connection with EMI’s exploitation of these copyrighted sound recordings that have been infringed by Lime Wire; and
- I further understand that Defendants have argued that their requests are reasonable because they seek only those documents “sufficient to show” revenue, costs, net profits, gross profits, and other financial information for each work at issue.

4. Given the scope of Lime Wire's infringement and the number of works at issue, satisfying Lime Wire's request for documents reflecting this broad range of financial data would pose a nearly insurmountable burden. Lime Wire's requests extend to *all* costs, receipts, royalties and revenues from the exploitation of the sound recordings at issue here. EMI creates and maintains numerous different types of documentation relating to every record or album that it releases. Locating, collecting, and reviewing all such documentation for a broad range of sound recordings would require months of work, including many hundreds of hours of EMI employee time, additional time from in-house and outside attorneys to oversee the process, and would be hugely disruptive to EMI's business. The costs associated with such a production would be enormous.

5. I have reviewed paragraphs 5 and 6 of the declaration of Charles Ciongioli from Universal Music Group, which I understand is being submitted concurrently with this declaration. I agree with his description of the process followed when creating and releasing a sound recording for sale to the public. With minor exceptions, the same process is generally true for EMI. Also similarly for EMI, each stage of the process includes its own several categories of both income and expenses. And for each of those categories, there may be literally hundreds, if not thousands, of pages of individual records reflecting costs and income items associated with a particular album.

6. EMI does not maintain a centralized database of all of the cost and revenue information requested. EMI and the EMI Plaintiffs has conducted their business through several labels, including Angel, Astralwerks, Blue Note, Capitol Records, Virgin, Capitol Nashville, EMI Nashville and EMI Christian Music Group, among many others. EMI maintains offices across the country, including in New York, Los Angeles, New Jersey, Nashville, Jacksonville

and Miami. Historically, each label generally maintains its own financial records in its own finance department. While efforts have been made recently to centralize financial records on a going forward basis, the majority of the individual records Lime Wire seeks are dispersed across many different labels, departments, and offices across the country. Even our more recent centralized records require consulting several different sources and systems to confirm that the data is complete and accurate.

7. The fact that Defendants request documents “sufficient to show” net profits, gross profits, revenue, costs, etc. separately for each sound recording at issue does not change the burdensomeness of responding to these requests. Summary documents “sufficient to show” such information do not exist. By asking for documents “sufficient to show” revenue, royalties, costs, net and gross profits, etc. separately for each sound recording at issue, Defendants essentially ask EMI to create a detailed profit and loss statement for each separate track at issue in the case. Such statements are not kept or created in the ordinary course of business. In order to create such a statement, EMI would have to undergo a voluminous, burdensome and laborious collection and review of a tremendous amount of information kept in multiple different locations. Because EMI does not track such information separately on a track-by-track basis, it would have to review voluminous cost records from across a broad spectrum of its business to even begin to conduct the analysis of determining “net profits” and “gross profits” and the like for a particular track. Moreover, because EMI does not ordinarily allocate costs on a track-by-track basis, any track-based analysis would have to incorporate assumptions that EMI does not typically make in the ordinary course of business.

8. Even if the information were sought at a more general level, there is no single database that EMI could use to simply pull up and produce the information Lime Wire requests.

Different departments and labels within EMI keep track of financial information using several different systems. To compile the information on a more general level—for instance by album or project—EMI still would have to consult several different databases and departments to ensure that the information provided was accurate and complete. For recordings released more than three years ago, EMI would have to conduct an even broader search to ensure that its information was accurate and complete. Further, the documentation consulted may be kept in different formats (some paper, some electronic, some archived). Many of the documents Lime Wire requests may not even exist in a reasonably accessible form.

9. I understand Defendants have argued that EMI must have this financial information readily available because EMI must account to its artists and joint owners on a track-by-track basis. This reflects a misunderstanding of artist royalty accounting and reporting. The financial information compiled to create an artist royalty statement is not the same kind of financial information Lime Wire seeks. Artist royalty statements reflect the share the artist receives of sales revenue, and reflect certain costs that the record company may recoup against the artist's royalties. But such royalty statements do not reflect *all* of the costs of creating a record. Instead, royalty statements reflect only those costs chargeable to a particular artist, which vary depending on the terms of the artist's individual contract. Typically, recoupable costs do not include costs such as manufacturing, distribution, mechanical royalties or marketing, so those costs are rarely reflected. Furthermore, even for this subset of data, artists' royalty statements typically take months to prepare and can run in the hundreds or even thousands of pages.

10. I also understand that Lime Wire contends that complete revenue and cost information must be available on a track-by-track basis, because record companies permit artists

to audit their royalty accounts under certain contractually defined circumstances. This is wrong. Because artist's royalty statements reflect only some income and cost entries, an artist royalty audit simply does not compare to an analysis of all the costs and income items generated surrounding a particular album or track. Instead, an artist's royalty audit examines issues such as whether an artist has been paid the correct royalty rate, and whether only those specifically negotiated chargeable costs are accurately reflected in the royalty statement. The right to audit even this subset of data is specifically constrained in artist recording agreements, at least in part because an audit imposes a tremendous burden on the company.

11. Because EMI's digital distributors report revenues to EMI on a track-by-track basis, that information may be compiled separately for each sound recording at issue. Although preparing and producing that information for the in excess of a thousand tracks at issue in this case is burdensome, it can reasonably be done. Thus, EMI has offered to provide a report showing the revenue from the authorized digital distribution of the tracks at issue here.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 8th day of September, 2010, at New York, New York.


Alasdair McMullan