UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ARISTA RECORDS LLC, et al.,

Plaintiffs,

v. 06 Civ. 5936 KMW

LIME WIRE LLC, et al.,

Defendants.

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January 5, 2011
2:06 p.m.

Before:

HON. KIMBA M. WOOD,

District Judge

APPEARANCES

MUNGER, TOLLES & OLSON, LLP
Attorneys for plaintiffs
BY: KELLY M. KLAUS, Esq.
JENNIFER PARISER, Esq.
SCOTT ZEBRAK, Esq.
Of counsel

WILLKIE, FARR & GALLAGHER, LLP
Attorneys for defendants
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TARIQ MUNDIYA, Esq.
TODD G. COSENZA, Esq.
ROGER NETZER, Esq.
Of counsel

MR. BAIO: Thank you, your Honor.

THE COURT: And any reply is due March 7th. All right. Is there anything else you would like to take up now?

MR. KLAUS: Your Honor, yes, there are a couple of additional points. One is just on the direct infringement motion, would it also be the case that we would file our 56.1 statement simultaneously with that?

THE COURT: Yes.

MR. KLAUS: Thank you. There are three other matters related to scheduling, your Honor, that I would like to take up, if I could.

One of them has to do with, as your Honor knows, shortly before the Christmas holiday we had a telephone conference with your Honor regarding a motion to disqualify defendants' counsel. I have been in New York this week taking depositions related to that motion.

Our motion is due on Friday, your Honor, and within the last -- on Monday evening of this week and then this morning, in the middle of two depositions we have been provided some additional documents. The additional documents show that in February -- sorry -- in October of 2008, the law firm Willkie Farr was approached by the Lime Wire defendants, asked to represent the Lime Wire defendants in connection with this litigation which was then pending before Judge Lynch.

A former Cravath associate, now Willkie partner who

had worked on the case raised the issue in internal e-mails about a potential conflict. We don't know from the documents we have so far how that issue was resolved and how that may impact the motion. We don't know whether we will need some additional depositions or how to incorporate that into our briefing.

I had asked Mr. Netzer, who is here from the Willkie Farr firm handling this issue, whether there would be an objection to our having one additional week from this Friday to file our motions so we can consider whether to take any additional discovery or whether and how to incorporate the documents into our motion. I believe they have no objection to that.

THE COURT: Let me ask Mr. Baio, how is it that this document or documents were provided so late?

MR. BAIO: Your Honor, may I turn this over to Mr. Netzer? He is the one handling that aspect of this matter.

THE COURT: Yes.

MR. BAIO: This is my partner, Roger Netzer.

THE COURT: Thank you.

MR. NETZER: Your Honor, since the time that we spoke on phone, Willkie has produced responsive documents and, indeed, made extensive document productions, but in the course of preparing for the depositions which were originally scheduled for two weeks ago, Mr. Klaus, certainly through no

fault of his own, had to adjourn those depositions and we rescheduled them for this week.

In the course of diligencing our production, have made several supplemental productions. The document that we produced the night before last is the only document that was responsive to any of the document requests. The additional documents we produced this morning were produced in response to a document request made yesterday evening.

THE COURT: Okay. Let's just have an answer to my question, and then you can expand as you like.

MR. NETZER: Why we didn't produce them?

THE COURT: Why was that one document produced so late?

MR. NETZER: The reason it was produced so late, your Honor, I only became aware of it approximately an hour before I e-mailed it to Mr. Klaus.

THE COURT: How did that happen?

MR. NETZER: That reason that happened, as we renewed our preparation of the witnesses, one of them said something that caused me to think there might be such a document, and we conducted another search for it.

THE COURT: This sounds so important with respect to the conflict of interest, it seems close to inconceivable that this would have come to light so late.

MR. NETZER: The reason -- I don't believe it is

important, but I appreciate your Honor's concern that it would be -- the reason it came to light so late, your Honor, is while Mr. Klaus may be correct about some aspect of the conclusion, what did not happen at the time in October of 2008 is counsel hasn't changed.

Indeed, counsel changed subsequently almost two years later to Wilson Sonsini. None of the persons, your Honor, who are working on the Lime Wire case today were aware of this and, indeed, Mr. Klaus has inquired about that at the deposition in the last two days. This was not a matter that was undertaken and --

THE COURT: Wait. The person, the name of the man --

MR. NETZER: Jeffrey Korn, your Honor.

THE COURT: All right. One would think that your firm would have spoken to Mr. Korn right away and that he would have said well, I've raised the issue or -- no?

MR. NETZER: Yes, your Honor. Indeed, he did raise the issue many times. We produced those documents. What we did not produce was this, the fact that he responded to an e-mail back in 2008. Your Honor, he did not possess that e-mail.

We researched his e-mails, and we have found it by an idea I had the day before yesterday, and it wasn't until preparing Mr. Korn, in the course of his deposition preparation, I believe it was three days ago or two days ago,

that I realized that he was referring, that he was mentioning some additional time when he had raised the issue in 2008.

That document, your Honor, he did not possess. None of the custodians we searched possessed it. We went and did another kind of search. That is what happened, your Honor.

THE COURT: I understand. Yes, one more week from this Friday is fine.

I have a concern that counsel expect more of a federal court than is possible, and by saying that, I mean to focus you on your 56.1 statements. Mr. Klaus mentioned that you will be potentially giving the court CDs to look at, other information to look at presumably for the court to ferret out whether a material fact is in dispute or not. This is quite likely a function for a special master rather than a judge if that is what you have in mind.

MR. KLAUS: Just to be absolutely clear on the 56.1 statement, we think this would be very akin to what was placed in evidence at the summary judgment stage with respect to the 30 sound recordings. The CDs that would contain the packets, the digital packets showing the filed --

THE COURT: The court, of course, has reviewed the 30. You're now talking about thousands?

MR. KLAUS: We think there would be, your Honor, no dispute about the overwhelming majority of the thousands.

THE COURT: If there is a material fact in dispute, I

expect counsel to find it. You should not expect a court to go through CDs in order to try to figure it out.

MR. KLAUS: We wouldn't file it if we thought there was a material issue of fact in dispute. If the defendants believe there is a material issue of fact in dispute with respect to any of those, we think it is their burden, as the party opposing summary judgment, to bring those to the court's attention.

THE COURT: Let's have a Plan B. I don't like Plan A.

The plan I'd like to have you follow is this: When you file your 56.1 statement, three weeks later I want the lawyers who worked on that to meet with the lawyers at Willkie Farr who will be working on the response and go through each one of them, show one another your hand, your documents, your CDs, whatever, and come to some resolution that you agree upon.

If you don't agree, then I'd be prepared to put lawyers on the stand, look at CDs and so forth, but I don't want a situation where lawyers fail to attempt to work things out reasonably among themselves before sending it to the court.

MR. KLAUS: That is fine with us, your Honor.

THE COURT: Good! Okay.

MR. BAIO: Us as well.

MR. KLAUS: That is now Plan A will be three weeks.

THE COURT: Good. Thank you. All right. I have nothing else to raise.

MR. KLAUS: I have two other issues, your Honor. They both relate, your Honor, to orders that were entered by Magistrate Judge Freeman on December 29th, which was a week ago Wednesday.

One of them is just an issue with respect to the timing of our objection. Your Honor had referred an issue to Judge Freeman regarding the proposed interpretation of a section of the Copyright Act that deals with the availability of statutory damages called Section 412.

On December 29th Judge Freeman, the ECF system sent out an order that she had signed the preceding day that adopted the defendants' interpretation, and that provided that we had the opportunity to file an objection in accordance with Rule 72. The issue arises, the only reason I bring this issue up, we do intend to file an objection with your Honor. The ECF and the docket show that the objection is due January 14th, 2011. That is two weeks from the date the judge signed the order plus the three days that are added under Rule 6 (d) for service.

We just, because of the importance of the timing issues, we actually think because the order was entered on the docket and served on us on December 29th, the timing calculations take the date for our response to Tuesday, January the 18th. I have conferred with counsel for the other side. They, without agreeing to our calculation, don't object to the time for our objection to be filed on January 18th.