

**EXHIBIT 2**

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August 20, 2010

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The Honorable Kimba M. Wood
United States District Court
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Re: Arista Records LLC et al. v. Lime Wire LLC et al.,
Case No. 06 CV 5936 (KMW)

Dear Judge Wood:

The parties last were before the Court on August 3, 2010, for a telephonic conference to argue the Court's tentative Order on the remaining discovery issues that the parties identified at the June 7, 2010 Status Conference. The Court on August 3 directed the parties to meet-and-confer on further discovery issues arising out of the Order (entered August 9, Doc. No. 302), and to submit letter briefs by this date in the event of any disagreements. The parties have disagreements that the meet-and-confer process has not resolved. This is Plaintiffs' letter brief.

I. Summary of Disputes and Plaintiffs' Positions

This letter is divided into two main sections. Section I discusses the extraordinarily overbroad discovery requests that Defendants served following the Court's August 3 telephone conference concerning the discovery order. These requests would force Plaintiffs to undertake massively burdensome discovery on numerous issues. Defendants did not raise these issues as points for further discovery at the June 7, 2010 Status Conference or in the parties' subsequent

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letter briefing on what the parties had represented would be the remaining discovery issues in the case. Defendants instead waited until after all those discovery issues were identified and settled to unveil new and burdensome discovery requests into areas that Defendants could have – and in many cases did – take discovery on back in 2006-2008. Plaintiffs already have produced in excess of 6 million pages of documents in this case. Defendants' new requests would require costly searches for, and the production of tens of thousands (or more) of additional pages. The requests in many cases seek information on issues that already have been settled, including Defendants' liability for inducing copyright infringement. The discovery is not relevant to the issues that remain in the case and it is calculated to drive up Plaintiffs' costs and delay the trial. Defendants are not free to litigate this case as if it is just beginning, simply because they changed counsel. The requests should be quashed now.

In addition to seeking documents and interrogatory responses on settled liability issues, Defendants also seek wildly burdensome discovery of financial documents and information. These requests go far beyond anything Defendants are entitled to discover on the damages issues that remain. Among other things, Defendants request highly detailed profit-and-loss data, on a track-by-track basis, for every one of the thousands of sound recordings in issue. Defendants' counsel know that Plaintiffs do not regularly maintain such profit-and-loss information for individual tracks, and that it would impose an incredible burden on Plaintiffs to collect that information. The requested cost information is irrelevant to the issue of statutory damages as well as state law damages for infringement of Plaintiffs' pre-1972 recordings. Indeed, one of the reasons that Congress provided for statutory damages was to avoid the type of inquiry that Defendants seek to force Plaintiffs to undertake. Plaintiffs have offered to provide (or have provided already) all the financial information that Defendants possibly could be entitled to in connection with damages discovery in this case. The Court should reject Defendants' request to proceed with the additional discovery seeking financial information.

Section II of this letter discusses a narrow but important dispute regarding the period for which Defendants are required to produce financial and account statements as part of discovery into their net worth. Plaintiffs need documents for the three-year period they requested – and not the one-year period Defendants have said they will provide – to obtain a proper valuation of Defendants' net worth.

## **II. Defendants' Discovery Requests**

During the August 3 conference, Defendants' counsel asked the Court to opine on Defendants' ability to serve discovery on a host of issues that Defendants had never raised before. Tr. of Hr'g, Aug. 3, 2010, at 2-5. The Court declined Defendants' invitation to opine on these issues. The Court instead directed Defendants to identify what new discovery they believed they were entitled to, and to meet-and-confer with Plaintiffs' counsel on these issues. Defendants responded by serving four sets of additional discovery requests, containing a multitude of topics for documents production and interrogatories. See Exs. 1-4 hereto.

Defendants' new discovery requests are not narrowly focused on the few issues remaining in the case. They are not within the scope of remaining discovery that the parties identified at the June 7 Status Conference or in their subsequent letter briefing. Many of the requests simply duplicate extensive discovery that Defendants *already took* before summary judgment. As noted, Plaintiffs during the many years this case has been pending have produced millions of pages of documents, as well as significant amounts of electronic data. Defendants' new discovery requests must be considered in light of the tremendous burden that Defendants already have imposed in this action.

**A. Defendants' Requests Regarding Issues Relevant, If At All, To Liability Issues The Court Already Has Decided**

Defendants have requested that Plaintiffs provide extensive and burdensome discovery on a variety of issues that – to the extent they had any relevance at all to this case – should have been *and were* the subject of Defendants' discovery requests *before* summary judgment. Indeed, some of the issues on which Defendants now want discovery – including evidence of Defendants' inducement of Plaintiffs' copyrights – *were resolved* by the Court's summary judgment Order. Defendants cannot establish the relevance of these requests to the damages issues that remain, and the requests are obviously burdensome.

The requests at issue here are one of two types. *First*, Defendants seek documents and interrogatory responses directed to *Plaintiffs'* purported shortcomings in stopping the infringement that Defendants actually induced. These requests are as follows:

Request 3: All DOCUMENTS CONCERNING YOUR efforts to identify and reduce and/or eliminate infringement of the WORKS IN SUIT on or through LIMEWIRE.

Request 4: All DOCUMENTS CONCERNING any consumer education, technological measures, filtering, or any other efforts YOU considered or undertook directly or through contractors to prevent the unauthorized downloading of the WORKS IN SUIT on or through LIMEWIRE.

Request 5: All DOCUMENTS CONCERNING YOUR efforts to assist LIMEWIRE to address alleged infringement of the WORKS IN SUIT on or through LIMEWIRE, including documents CONCERNING YOUR refusal or rejection of efforts to do so.

Request 6: All DOCUMENTS CONCERNING YOUR distributing, sharing, authorizing the sharing, or facilitating the sharing of the WORKS IN SUIT online for free or without DRM ["Digital Rights Management"].

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Request 7: All DOCUMENTS CONCERNING YOUR distributing, sharing, authorizing the sharing, or facilitating the sharing of the WORKS IN SUIT through a peer-to-peer network for free or without DRM.<sup>1</sup>

These requests (and related interrogatories) all relate to a purported defense to liability that, "It's Plaintiffs' fault that millions upon millions of people use Lime Wire to infringe."

*Second*, Defendants seek documents and interrogatory responses regarding Defendants' liability for inducing copyright infringement – the primary issue the Court resolved in its summary judgment Order:

Request 13: For each direct infringement of the Works in Suit that you contend occurred through use of or on LimeWire, all Documents relating to whether Defendants' conduct induced or encouraged such infringement.

Request 14: For each direct infringement of the Works in Suit that you contend occurred through use of or on LimeWire, all evidence upon which you intend to rely to demonstrate that Defendants' conduct induced or encouraged such infringement.<sup>2</sup>

We discuss each of these categories in turn.

#### 1. **Category One - "It's Plaintiffs' fault"**

The common theme of the documents in the first category discussed above – Requests for Production 3-7 and Interrogatories 3-4 and 6-8 – is that Plaintiffs, not Defendants, are responsible for the mass infringement of their own copyrighted works through Lime Wire. Hence, Defendants want to argue that, to the extent Plaintiffs distributed digital copies of their works without DRM, or disseminated certain works through particular authorized sites that do not charge a fee for download of some works, or did not do something to reduce infringement through Lime Wire, then Plaintiffs may not seek damages.

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<sup>1</sup> Defendants also have served parallel interrogatory requests, asking Plaintiffs to "identify all efforts" they have taken "to identify and reduce and/or eliminate infringement on or through LIMEWIRE," "to generate revenue through online distribution, download, or streaming," and the like. See Interrogatories 3-4, 6-8. These interrogatories are unwarranted for the reasons discussed in the text.

<sup>2</sup> Interrogatory No. 10 is parallel to these requests – "For each direct infringement of the Works in Suit that you contend occurred through use of or on LimeWire, identify your evidence that Defendants' conduct induced or encouraged such infringement" – and is unwarranted for the reasons stated in the text.

All of these requests seek information that is irrelevant, either at any time or at this juncture of the case. Moreover, compliance with the requests would be unduly burdensome. The Court should order that Defendants may not proceed with these requests.

***The information sought by these requests is not relevant to damages issues:***

Defendants' "It's Plaintiffs' fault" argument has no merit as a defense to liability or damages, and these requests have no relevance. In fact, Defendants pressed exactly this type of argument in opposition to the summary judgment motion – and the Court properly rejected it. Specifically, Defendants argued they should not be liable based on Mark Gorton's contention that several of the record company Plaintiffs did not provide Lime Wire "with a list of copyright-protected song recordings and their hash content. (Gorton Decl. ¶¶ 59-61.)" Am. Summ. Jmt. Opinion at 38 n.29. The Court rejected this argument: "This argument does not create a genuine issue of fact as to whether LW has taken meaningful steps to mitigate users' infringement. As discussed in this section, LW's decision to set the hash-based filter to 'off' by default and its failure to take other available action reveal an intentional course of action to preserve infringing activities among LimeWire users." *Id.* "It's Plaintiffs' fault" was not relevant at summary judgment, and it is not relevant now.

Defendants assert that the requests are work-specific, and concern their defenses of waiver, abandonment or estoppel. These arguments are meritless. Waiver, abandonment, estoppel and the like are affirmative defenses liability. Defendants' liability already has been established, so these affirmative defenses and discovery that go to them are irrelevant. *United States v. Wallace & Wallace Fuel Oil Co.*, 540 F. Supp. 419, 431-32 n.9 (S.D.N.Y. 1982) (counterclaims, which were actually affirmative defenses, were "disposed of by an entry of summary judgment" on the plaintiff's claim). In any event, the requested discovery could not meet the high standards for these affirmative defenses, even if they survived summary judgment (which they do not). To establish abandonment, Defendants would have to show, *inter alia*, an intent by the copyright holding plaintiff to *surrender* its rights in the work, as well as an overt act evidencing that intent. *Paramount Pictures Corp. v. Carol Publ'g Group*, 11 F. Supp. 2d 329, 337 (S.D.N.Y. 1998). To prove estoppel, Defendants would have to show, *inter alia*, specific conduct by a Plaintiff showing that it intended that Defendants would act on that Plaintiff's conduct to their detriment. *Lottie Joplin Tomas Trust v. Crown Publishers, Inc.*, 456 F. Supp. 531, 535 (S.D.N.Y. 1977). Defendants do not and cannot suggest how any of the discovery they seek could possibly show that Defendants meet these high standards.

***Compliance with the requests would impose a significant and undue burden:*** As is apparent from the face of the above requests, compliance with them would impose an undue burden on Plaintiffs. The requests concern, among other things, Plaintiffs' dissemination of their works without DRM technology, an immense subject concerning numerous different websites

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and technological issues. Plaintiffs already have produced millions of pages of copyright-related discovery. There is no cause to require them to produce more in response to these requests.<sup>3</sup>

If there actually were any connection between Defendants' "It's Plaintiffs' fault" argument and any remaining damages issue, Defendants should be expected to demonstrate that connection through the existing production of documents. The fact is that, while discovery remained open between 2006 and 2008, Defendants requested and Plaintiffs produced extensive discovery going to the very same "It's Plaintiffs' fault" issues that are the subject of the instant requests. Defendants' initial document request (which included well over 250 individual document requests) sought, for example, communications on a wide-range of documents that overlap with the same requests listed above. These included requests for documents concerning "Technology that prevents or substantially reduces the amount of infringements that are allegedly committed by users of peer-to-peer software," "Any effect on Your business, sales, revenues, and/or profits allegedly caused by the use of peer-to-peer technology, or the use of the LimeWire Software Application," "The digital distribution of RIAA members' copyrighted works," and numerous other overlapping topics. Ex. 5 at 35-37.<sup>4</sup> Plaintiffs have produced millions of pages of discovery concerning copyright liability. See Plfts' Motion for Summ. Jmt., Statement of Undisputed Facts, Fact No. 36. If there actually were a connection between the massive discovery that Defendants already received and a legally cognizable defense of acquiescence or estoppel, Defendants would demonstrate that connection with actual evidence, and explain why they should get more. Plaintiffs asked Defendants for examples during the meet-and-confer, and Defendants provided none. All of this simply underscores that these requests are Defendants' attempt to force Plaintiffs to the pointless production of many more thousands and thousands of pages of documents that have no relevance to the damages issues in this case. The Court should order that Plaintiffs do not have to respond to these requests.

## 2. Category Two – Additional Discovery Concerning Inducement

Defendants' requests regarding evidence of inducement – Requests for Production 13 and 14, and Interrogatory 10 – ignore the fact that Defendants' liability for inducement has been *established* through the Court's summary judgment Order. When we asked Defendants to

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<sup>3</sup> Defendants did not even identify their new proposed discovery until August 9 – nearly a week after the August 3 telephonic conference when Defendants' counsel said they wanted to serve new discovery. Because Plaintiffs' counsel dealing with these issues was on vacation the week of August 9 (a fact known to Defendants on August 3), the parties were not able to meet-and-confer on these requests until August 17. Given the short time frame between the meet-and-confer and the due date for this letter brief, Plaintiffs are not able to submit declarations from company employees regarding the burdens imposed by these and other requests. While we think the burdens are apparent and not disputed by Defendants, Plaintiffs will submit any burden declaration on this point or any of the other burden issues identified in this letter.

<sup>4</sup> Although the responses at issue in this exhibit are on behalf of one Plaintiff group, the requests were substantially the same for all Plaintiffs.

articulate the relevance of requests for evidence of inducement on a work-by-work basis, Defendants responded (as they have before) that the Court's summary judgment order is limited only to the 30 Subject Works. This contention is specious. The reason that summary judgment proceeded with ownership and direct infringement evidence limited to just 30 Subject Works was because, as Judge Lynch suggested, that was the most efficient way to determine the core liability issue that applies to all of Plaintiffs' works – namely, whether Defendants are operating another Napster/Grokster service, or whether they are the innocents they have claimed to be. Of course, the summary judgment evidence showed that Defendants operated a business that was every bit as illegal, if not more so, than their ignominious predecessors. The point of Defendants' mass infringing operation, however, was never limited to just one work or 30 works. Defendants' intention was to induce the mass infringement of *all* of Plaintiffs' copyrighted works. Defendants have not pointed and cannot point to any reason in law, fact or even common sense that would allow for a re-adjudication of their inducement liability on a work-by-work basis.

Defendants' liability for inducement has been established. Because these requests seek discovery on issues that already are established as a matter of law in this case, the Court should order that Plaintiffs do not have to respond to these requests.

#### **B. Defendants' Requests For Extensive And Burdensome Financial Information**

Defendants' remaining requests seek extensive and granular profit-and-loss, sales trend, and music consumption information on a track-by-track basis for every individual sound recording for which Plaintiffs seek damages. Defendants' requests exceed the bounds of conceivable relevance and appear aimed exclusively at making this litigation as burdensome, expensive and protracted as possible. Defendants' counsel know from their experience in prior litigation that the record companies generally do not record profit-and-loss information on a track-by-track basis, and that the process of pulling together such information for the thousands upon thousands of works infringed through Lime Wire would be a Herculean undertaking.

Plaintiffs recognize that the Court's Order states "that Defendants are entitled to *some* discovery relating to the actual damages suffered by Plaintiffs as a result of Defendants' infringing conduct." Order, Aug. 9, 2010 (Doc. No. 302) at 5 n.2 (emphasis added). To try to obviate this dispute, Plaintiffs offered to provide Defendants with detailed reports of revenue received from distributing downloads of sound recordings through legitimate, authorized online retailers. In addition, prior to summary judgment, Defendants asked for and received literally hundreds of individual agreements between individual Plaintiffs and legitimate online retailers. All of this extensive information provides more than adequate discovery for Defendants to make whatever arguments they want to make about revenue trends, the scope of harm that Plaintiffs have suffered as a result of mass infringement through Lime Wire, and the like. Defendants' request for massive amounts of additional financial information has virtually no relevance to the damages trial, and by design would impose massive discovery burdens on Plaintiffs and jeopardize the trial date.



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We divide this discussion into three sections. *First*, we describe briefly Plaintiffs' damages claims. *Second*, we explain why Defendants' requests for granular profit and loss data regarding each infringed track (a) would impose incredible and unjustified burdens and (b) have minimal or no relevance to any issues in the case. *Third*, we explain why Defendants' requests for detailed "sales trend" and consumer "consumption" data seeks irrelevant and burdensome discovery.

### 1. Plaintiffs' Claims For Damages

For damages purposes, there are two categories of works at issue in this case. *First*, for works protected by the federal copyright laws (in general, sound recordings fixed in 1972 and later), Plaintiffs have elected statutory damages under the Copyright Act. 17 U.S.C. § 504(c). Plaintiffs have provided Defendants with a list of approximately 7,500 works in this category, and Plaintiffs expect to supplement that list with additional works before the final list is submitted on September 9. Because Lime Wire's infringement has been willful, the statutory maximum will be \$150,000 for every direct infringement of a copyrighted work for which Lime Wire is liable. 17 U.S.C. § 504(c).

Plaintiffs' pre-1972 sound recordings are subject to state law remedies for common law copyright infringement and unfair competition. Plaintiffs will be entitled to a damages award based on lost profits, unjust enrichment, and punitive damages. Plaintiffs have already submitted a preliminary list of approximately 450 pre-1972 works, and expect to include well over 1,000 by the time the final list is submitted to Defendants on September 9.

### 2. Defendants' Requests for Track-by-Track Profit and Loss Information

Defendants seek financial information separately allocated to each individual sound recordings that would impose massive discovery burdens on Plaintiffs. In Document Request No. 9, Defendants ask Plaintiffs to account:

Separately for each of the WORKS IN SUIT, DOCUMENTS sufficient to show lost profits Caused by DEFENDANTS' alleged infringement, including but not limited to: a) DOCUMENTS reflecting net and gross profits for each of the WORKS IN SUIT; b) DOCUMENTS reflecting costs associated with each of the WORKS IN SUIT, including fixed costs, overhead costs, and incremental costs, including costs associated with online distribution of the WORKS IN SUIT; and c) DOCUMENTS reflecting any lost sales of any of the WORKS IN SUIT.

This request asks for individual profit and loss statements tailored to each of the thousands of sound recordings at issue. The cost information that this request seeks covers not

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only the costs for distribution of the works through digital downloads, but every single cost incurred for the life of the work. Defendants are asking for documents supporting every cost ever incurred -- from signing the artist, creating the album, post-recording marketing for the album, distribution costs, licensing fees (for compilations and motion pictures), and royalties. As discussed below, compliance with this request would impose a massive undertaking with no corresponding benefit in terms of relevance.

Defendants' other requests for financial information are of a similarly burdensome --and irrelevant -- character. Document Request No. 8 demands separate accountings of the revenue for each work in suit, for every mode of distribution imaginable -- separately broken down by sales of CDs/DVDs, digital distribution, and download and streaming. Document Request No. 10 demands documents showing the royalties associated with each sound recording, including royalty reports to artists and songwriters, as well as agreements that set royalty rates and that contain extraordinarily confidential and competitively sensitive financial information.<sup>5</sup>

a. **Defendants' Requests for Track-by-Track Profit-and-Loss Information Would Impose Massive And Unjustified Burdens On Each Plaintiff**

Defendants and their counsel are well aware that Plaintiffs generally do not maintain separate cost and profit loss information by individual sound recordings they own. Defendants' counsel know this because they have represented defendants in other copyright lawsuits, and counsel has sought this type of highly burdensome information before. The goal of these requests is not to obtain information necessary to this litigation -- but to impose crushing burdens on Plaintiffs in an attempt to force them to reduce the number of works in suit.

What Defendants are asking for is every document related to revenue, costs, or royalties--any income or expense item--generated in the exploitation of the works at issue. Essentially, they ask Plaintiffs to create a detailed profit and loss statement for each individual track at issue. To do this even for a fraction of the tracks at issue would be a tremendous burden.

The process of creating a sound recording spans nearly every aspect of each Plaintiffs' business, and every act in the course of the creation involves either income or expense -- each of which is documented and accounted for.<sup>6</sup> From finding an artist, funding the recording of a single or an album, distributing the record, marketing the record, generating licensing revenue, and paying royalties -- the creation and eventual distribution of a sound recording is a long

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<sup>5</sup> Defendants have served a corresponding Interrogatory purportedly requiring Plaintiffs to identify all of the documents they rely on to show "lost profits." Interrogatory No. 9. This Interrogatory is unwarranted for the same reasons discussed in the text.

<sup>6</sup> Again, due to the short time frame between the parties' August 17 meet and confer and the due date for this letter brief, Plaintiffs are not able to submit declarations from company employees regarding the burdens imposed by these requests. See n.3, *supra*. If the Court deems it necessary, Plaintiffs will submit any burden declaration on any point the Court would request.

process, during which thousands upon thousands of income and expense items will be generated and documented. Because no Plaintiff centrally maintains or records this expansive information for all recordings at the track-by-track level of detail that Defendants request, responding to Defendants' requests would impose a massive burden. The would require the collection, review, and production of all of these underlying documents reflecting every income and expense involved in the lengthy chain of development of each of the thousands of sound recordings at issue. The sheer volume is staggering, and no doubt would generate hundreds if not many thousands of records for *each one* of the thousands of tracks at issue. Plaintiff would have to dedicate numerous staff members full-time to this collection and review effort for months to complete the task that Defendants seek to impose upon them, incurring tremendous expense and great disruption.

The documents sought are not only voluminous, but the logistical complexities of the requests boggle the mind. Each Plaintiff has offices located all over the country – Los Angeles, New York, Miami, Nashville, etc. The creation, recording, distribution, marketing, and other activity that generates income and expense for each work at issue is not limited to just one department or even one office for each plaintiff. The collection efforts thus would have to extend to every office in every location in order to capture the records that Defendants' requests call for.

Comparable burdens of an overwhelming nature would result even if Defendants' requests were limited to seeking cost information on an album by album basis. While some Plaintiffs have cost information on an album basis for some albums, each Plaintiff generally maintains that information in multiple and disparate departments and locations. The documentation would be kept in both electronic and paper form, requiring both expensive electronic searches and labor-intensive human searches. As with the track-by-track data, even album-by-album cost data would be wildly expensive to collect and would have almost no relevance to the case.

b. **Granular Profit-and-Loss Information Has Minimal or No Relevance to Plaintiffs' Damages Claims**

**Statutory Damages Under the Copyright Act.** As the Court has noted, the extent of a Plaintiff's actual damages *may* be a factor that the fact-finder considers in setting statutory damages within the statutory range. Order, Aug. 9, 2010 (Doc. No. 302) at 5 n.2. However, it is not inexorably the case that actual damages must be relevant to the statutory damages calculation. Indeed, Congress authorized statutory damages precisely to provide a remedy when actual damages are difficult to calculate and prove. *See Warner Bros. v. Dae Rim Trading Co.*, 877 F.2d 1120, 1126 (2d Cir. 1989). *See e.g., NFL v. Primetime 24 Joint Venture*, 131 F. Supp. 2d 458, 472 (S.D.N.Y. 2001) ("Since actual damages and profits frequently are difficult to prove, the Copyright Act provides for minimum and maximum statutory damages. These damages may be elected by the copyright owner at any time before final judgment is rendered, without proof of actual damages.") (citing 2 William F. Patry, *Copyright Law & Practice* at 1170 (1994); *Pearson Educ., Inc. v. Nuroho*, 2009 U.S. Dist. LEXIS 101600 at \*17 (S.D.N.Y. Oct. 27, 2009) (Peck,

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M.J.) (citing 4 NIMMER ON COPYRIGHT § 14.04[A] (2009 ed.) (statutory damages meant for “circumstances in which plaintiff’s damages or defendant’s profits are not susceptible to precise evaluation.”)).

As a result of this underlying policy behind statutory damages, courts have repeatedly recognized that evidence of the extent of a Plaintiffs’ actual damages will not always be relevant to a statutory damages calculation. “While, in some cases, courts have considered plaintiffs’ actual damages as a ‘factor’ in the statutory damages analysis, no authority requires a showing of actual damages.” *Capitol Records, Inc. v. MP3 Tunes LLC*, No. 07-9931 (WHP) (FM) (S.D.N.Y. Apr. 12, 2010) at 4 (attached as Ex. 6). In fact, courts have held that statutory damages are “available without proof of plaintiff’s actual damages or proof of any damages.” *Pearson Education*, 2009 WL 3429610 at \*5; see also *Columbia Pictures Television, Inc. v. Krypton Broadcasting, Inc.*, 259 F.3d 1186, 1195 (“A plaintiff may elect statutory damages regardless of the adequacy of the evidence offered as to his actual damages and the amount of the defendant’s profits.”). Because the trier of fact “need not consider actual damages in determining statutory damages, the relevance of...documents [related to lost profits] is limited.” *Capitol Records, Inc. v. MP3Tunes, LLC*, No. 07 Civ. 9931 (WHP) (FM) (S.D.N.Y. Jan. 22, 2010) at 2 (attached as Ex. 7).

This is a case where the extent of actual damages has minimal to non-existent relevance to the statutory damages calculation, especially in light of the enormous burden to Plaintiffs from having to produce the type of granular level profit-and-loss information for every track in issue that Defendants’ requests seek. In the first place, Defendants have never articulated any nexus between the amount of a Plaintiff’s profit (or loss) on a particular recording, and Defendants’ intentional inducement of the recording. If all of the mass of information that a Plaintiff would be required to collect regarding a work showed that one recording had a “profit” of \$1 million, while another had a “loss” of \$1 million, which one would have been caused more “actual damage” by Defendants’ illegal dissemination of the same recording? Would the recording that profited by \$1 million have generated more profit in the absence of illegal downloading? Would the recording that lost \$1 million have posted more profit absent Defendants’ illegal conduct? Defendants never explain the nexus between the profit-and-loss information that Plaintiffs incur through legitimate distribution and Defendants’ inducing the mass infringement of the same work.

The fact is that the profit-and-loss information that Defendants seek has no connection to actual damages, as they are defined in the Copyright Act. Actual damages are not the Plaintiff’s loss (or profit). They are “the actual damages suffered by [the copyright owner] as a result of infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.” 17 U.S.C. § 504(b). Hence, it is Defendants’ profits, not Plaintiff’s, that are by statute relevant to a Plaintiff’s actual damages. In this case, the actual damage to Plaintiffs from Defendants’ intentional inducement of Plaintiffs’ copyrighted works is at least of two types. As to both, the relevance of such information is minute to non-existent, particularly when weighed against the enormous discovery burdens that Defendants’ requests would impose.

*First*, Plaintiffs have suffered actual damages by virtue of Defendants' appropriating for themselves the benefits of a non-existent and limitless grant of distribution for Plaintiffs' recordings in permanent download form to millions upon millions of Defendants' users. As Judge Leval has explained for the Second Circuit, this type of appropriation is indeed "actual damage" under the Copyright Act:

If a copier of protected work, instead of obtaining permission and paying the fee, proceeds without permission and without compensating the owner, *it seems entirely reasonable to conclude that the owner has suffered damages to the extent of the infringer's taking without paying what the owner was legally entitled to exact a fee for.*

*On Davis v. The Gap, Inc.*, 246 F.3d 152, 165 (2d Cir. 2001) (emphasis added).

Here, what Defendants have taken without paying for is a distribution agreement for the unlimited uploading and downloading of every single one of the works in issue to peer-to-peer users throughout the country and the world, each of whom can (and has) re-distributed the works millions of times over to other Lime Wire users. As Defendants know from their review of distribution agreements that Plaintiffs have produced, that unlimited right of distribution and copying (and re-distribution and re-copying) to peer-to-peer users the world over is not a right that any Plaintiff has granted to any third-party service. The price that any particular Plaintiff would charge for the right that Defendants unilaterally granted to themselves – and hence what counts as actual damages under *On Davis* – is a topic that Defendants can explore separately with a representative from each Plaintiff during depositions on damages. It requires no great economic calculation, however, to know that this measure of actual damage (for a limitless grant of right to copy and distribute without end and for free) will dwarf whatever costs any particular Plaintiff incurred for a recording. Plaintiffs' granular cost and profit-and-loss information is entirely irrelevant to this measure of actual damages.

*Second*, Plaintiffs suffer actual damages by being deprived of money they otherwise would receive legitimate, authorized transfers of permanent downloads. Defendants, of course, do not sell anything – they induce the mass infringement of Plaintiffs' works for free. If Defendants nevertheless want revenue and cost information from download sales in order to make some type of argument by comparison, then Defendants have no need for the excruciatingly minute profit-and-loss information by track that they seek.

Regarding revenues, it has been widely and publicly reported that the industry leader in downloads (Apple's iTunes) generally charges consumers 99 cents for each download that Apple sells at retail, and that Apple generally remits around 70 cents of that purchase price to the owner of the sound recording. *See, e.g.*, [www.nytimes.com/2009/02/02/business/media/02apple.html](http://www.nytimes.com/2009/02/02/business/media/02apple.html) (Feb. 1, 2009). Defendants can assess the revenue information that each Plaintiff provides to determine the specific revenue that Plaintiffs receive for such downloads.

As for costs, there are two general types that a sound recording owner pays when a download is sold. One is the mechanical royalty paid to the owner of the composition in the sound recording that is sold. The mechanical royalty for permanent downloads is generally fixed as 9.1 cents per download pursuant to the royalty provisions of Section 115 of the Copyright Act. *See* 17 U.S.C. § 115(c)(3)-(4). Defendants do not need minute cost data to know the mechanical royalty fixed pursuant to statute.

The second cost component is the royalty that the sound recording owner pays pursuant to the artist recording agreement. Defendants know that the specific royalties that a record company pays pursuant to its artist recording agreements are competitively sensitive data that each Plaintiff does not share. The *range* of royalties paid pursuant to artist recording agreements, however, is something that is reported in literature by artist representatives. According to a recent (and leading) text by an artists' lawyer, recording artists generally receive from 13% to 20% of the price of each record sold in the United States. *See* Donald Passman, *All You Need to Know About the Music Business* 87-88 (7th ed., Free Press 2009) (1991). Defendants have no need for the granular information that these requests seek to confirm the correctness of that range, and to make whatever arguments they want to make about actual damages in this case.<sup>7</sup>

***Pre-1972 recordings.*** For similar reasons, Defendants have no cause to force Plaintiffs to produce burdensome, track-by-track profit and loss information for purposes of Plaintiffs' damages claims under state law. "Actual damages" discovery is relevant to those works recorded before 1972, but the necessary discovery is similarly limited to that required in the statutory damages analysis. In unfair competition cases—the basis for the theory of common law copyright applicable to the pre-1972 works—the New York Court of Appeals has held that, "conclusive . . . proof is not required." *Michel Cosmetics v. Tsirkas*, 282 N.Y. 195, 203 (1940). "All that is necessary in order to prove actual damages is to furnish some reasonable basis or data on which to calculate them, and whenever the evidence is sufficiently definite to show the pecuniary loss suffered by the complainant, he is entitled to be reimbursed . . ." *Id.* The material Plaintiffs have agreed to produce is more than sufficient to provide a "reasonable basis or data on which to calculate" actual damages. That is especially true here because Lime Wire is a willful,

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<sup>7</sup> If, in the Court's view Defendants are entitled to some information concerning the royalties paid to artists, there are less intrusive measures that could provide Defendants with this information. With respect to pre-1972 recordings, the artist royalty information provided in artist recording agreements does not have the same level of competitive sensitivity as current artist rates. Plaintiffs could provide the artist agreements with royalty rate information unredacted for the pre-1972 recordings. With respect to later recordings, each Plaintiff could provide an interrogatory response that sets forth the general range of royalties that Plaintiff pays for the sale of records in permanent download configuration. To be clear, it is Plaintiffs' position that none of this information is relevant to Defendants' damages liability. However, this information could be provided as a compromise, in addition to the extensive revenue information that Plaintiffs have provided and have offered to produce as a compromise on these requests.

massive-scale infringer. In such a case, when “the defendants are wanton wrongdoers,” “every doubt and difficulty should be resolved against them.” *Id.* (quotation omitted).

In light of the marginal or non-existent relevance of the granular profit-and-loss data these requests seek, as well as the extraordinary burdens the requests would impose, Plaintiffs ask the Court to quash Document Requests 8-10, and corresponding Interrogatory 9.

### 3. Defendants’ Requests for “Sales Trend” and “Consumption” Data

Defendants also request detailed information about historical “sales trends” for recorded music and consumption of music by Lime Wire users. *See* Requests Nos. 11-12. Once again, these requests would impose a tremendous burden, they seek information with minimal or no relevance, and they duplicate discovery requests that Defendants served earlier in the case, when they were represented by different counsel. Moreover, much of the information that Defendants seek is readily available to Defendants – including issues about music consumption by Lime Wire users.

*First*, the requests seek irrelevant information. As another court in this District has recently held, historical sales data is largely irrelevant to computing actual damages in cases involving the music industry, due to the drastic changes over the past 10-year period (most of which has been caused by Defendants’ and other illegal services). *See Capitol Records, supra* (Ex. 6) at 2-3. Defendants did not and cannot provide any explanation of the relevance of the requested information.

*Second*, the burden of collecting the information responsive to these requests would be enormous. Analysis of sales trends for sound recordings is a tool used in evaluating marketing efforts, production schedules, and other aspects of each of Plaintiff’s businesses. Crafting a reasonable search about sales trends for the particular works at issue here would be extremely difficult, so any effort to collect responsive documents would necessarily exceed the scope of what could be conceivably relevant. The same is true for the request for any surveys of music consumption by Lime Wire users or users of other peer-to-peer services.

*Third*, the Requests that Defendants’ new counsel serve are essentially the same as those made and responded to years ago. *See* Ex. 5 (Doc. Request No. 5 & 13) (documents referring or relating to Lime Wire software; “All Documents that evidence, refer to, describe or relate to information gathered by You or on Your behalf about the users of the LimeWire Software Application”).

*Finally*, Defendants have no cause for seeking this information from Plaintiffs, rather than from other readily available sources, including Defendants themselves. If Defendants want information about how their users “consume” on Lime Wire or other peer-to-peer services,

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Defendants should look in their own files. If Defendants want general information on sales trends in the music industry, they can and should get it from widely available public sources.

These Requests are irrelevant, burdensome, and seek a do-over of discovery served long ago. The Requests should be quashed.

### C. Defendants' Requests Regarding Evidence of Direct Infringement

Several of Defendants' new document requests and interrogatories seek information concerning Plaintiffs' evidence of direct infringement by users of the Lime Wire system.<sup>8</sup>

As to several of these requests, there is no dispute about the extent of the documents and materials that Plaintiffs have produced and will produce in the near future. Plaintiffs already have produced hard drives containing copies of more than 3,000 copyrighted sound recordings at issue in this litigation that were downloaded from the files of LimeWire users, along with a declaration from Katherine Forrest that verified and explained their contents. RC 00001609; RC 00004264; RC 00004270; RC 00004271; RC 00004273; 11/07/08 Forrest Decl. ¶¶ 3-4. Moreover, Plaintiffs have informed Defendants that they will be producing additional highly detailed evidence of direct infringement by Lime Wire users, including thousands more copies of audio files of sound recordings from LimeWire users. The copies of these downloads will be accompanied by evidence relating to, *inter alia*, the location and IP address of the user from whom the download was obtained, as well as the date of that act of direct infringement. Plaintiffs also have produced and will produce empirical and statistical evidence regarding the frequency and degree of users' direct infringement on the Lime Wire. If they choose to do so, Defendants can review all of the evidence of direct infringement that Plaintiffs provide and then raise any concerns with Plaintiffs during Defendants' 45-day period for follow-up discovery after the September 9 production. Defendants also can explain at that time why they, as the parties that operate and control the Lime Wire system, are not in at least as good (if not a better) position than Plaintiffs to obtain any additional information they claim to need about the direct infringements for which they are liable.

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<sup>8</sup> See, e.g.: Request No. 1: DOCUMENTS sufficient to show the alleged direct infringement of the WORKS IN SUIT, the dates on which the alleged infringement occurred, and any information CONCERNING the location of user the alleged infringement; Request No. 2: DOCUMENTS sufficient to show each instance of unauthorized downloading of the WORKS IN SUIT that YOU allege occurred, the dates on which the alleged infringement occurred, and any information CONCERNING the location of users engaged in the alleged infringement; Request No. 15: For each direct infringement of the Works in Suit that you contend occurred through use of or on LimeWire, Documents sufficient to identify the person(s) who engaged in such direct infringement. Interrogatories 1 and 2 parallel these requests.



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There are two issues concerning the nature and scope of Defendants' interrogatories as to which the parties disagree.

***Interrogatories Seeking Information on Each Plaintiff's First Awareness of the Infringement of a Particular Work Through Lime:*** Defendants have served irrelevant and burdensome interrogatories that purport to ask each Plaintiff, as to each work in suit, for the "first date" that Plaintiff "became aware" of the work's infringement by a Lime Wire user:

Interrogatory 1: Separately for each WORK IN SUIT, identify the date YOU contend the direct infringement on or through LIMEWIRE began, ***the circumstances under which YOU first date became aware of the alleged infringement***, and YOUR evidence of the alleged infringement, including any evidence that it occurred in or between users in the United States. (Emphasis added.)

Interrogatory 5: Separately for each WORK IN SUIT, identify the date and circumstances on which YOU first learned that the WORK IN SUIT was available for downloading on or through LIMEWIRE.

It obviously would impose an extraordinary burden on Plaintiffs to comb through the records of their employees for any document that happens to mention the infringement of any of the thousands and thousands of works in issue through the Lime Wire system. Given that burden, Plaintiffs asked Defendants to explain the relevance of these interrogatories. Defendants claim that they are entitled to know the date of any awareness of any act of infringement of a particular work to assess whether Defendants have a defense to the claim for statutory damages or attorneys' fees based on 17 U.S.C. § 412. This argument is without merit.

Section 412 provides that, in general, statutory damages and attorneys' fees are unavailable under the Copyright Act for

any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

17 U.S.C. § 412(2).

Defendants want to argue that § 412 bars a Plaintiff from recovering statutory damages or attorneys' fees as to any work that was infringed by any Lime Wire user after the date of first publication but before the effective date of the work's registration. Defendants claim that it does not matter if the same work was infringed after the effective date of registration by millions of

other Lime Wire users – Defendants’ argument is that § 412’s bar forever applies to any direct infringement committed through Lime Wire.

Defendants’ legal argument is just wrong, and Defendants’ relevance argument collapses along with it. The “infringement of copyright” for which Defendants have been adjudged secondarily liable is any violation of the exclusive right of reproduction or distribution by *any* individual user Lime Wire user. Defendants’ liability for inducing a direct infringement commences each time a different direct infringer infringes one of the copyrighted works in issue. It is at that point – when any particular Lime Wire user directly infringes a recording – that one looks to see whether the work has been registered, and the applicability (or not) of § 412. *See, e.g., Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 144 (5th Cir. 1992) (§ 412 applied to “each work and each [infringer]”); *Jamison v. Royal Caribbean Cruises, Ltd.*, 2009 WL 559722 at \*3 (S.D. Cal. Mar. 4, 2009) (refusing to strike claim for statutory damages in secondary liability case, because individual acts of direct infringers alleged to be new acts of infringement). Without any significant exception, every act of direct infringement that is a basis for any Plaintiff’s claim, will be within the time-frame § 412 for which statutory damages and attorneys’ fees are available.

Whether or not Defendants’ legal argument regarding § 412 has merit – and it does not – the fact is that Defendants have no need for the information sought by the interrogatories in order to make the argument. Defendants will have Plaintiffs’ copyright registration certificates for the copyrighted works in issue. They also will have the evidence described above, including date information for the direct infringement of the download files that Plaintiffs will be producing. If Defendants want to submit evidence concerning the first time one of their users infringed one of the downloaded works through Lime Wire, Defendants can and should gather that evidence from their own records. After all, they are the individuals and entities who actually run and operate Lime Wire. Defendants have or can obtain from their own records all the evidence they need to make their legal argument under § 412. There is no cause to burden Plaintiffs with these additional interrogatories.

***Defendants’ interrogatories asking Plaintiffs to “identify” all information:***

Defendants’ interrogatories 1 and 2 ask Plaintiffs to “identify” in a written response multiple elements of information from the evidence of direct infringement that Plaintiffs will provide. The burden of culling through that information and organizing it in a written response that corresponds precisely to the text of these interrogatories would be the same for Plaintiffs as it would be for Defendants. Plaintiffs should be permitted to refer Defendants to the applicable records in accordance with Rule 33(d) of the Federal Rules of Civil Procedure and Local Civil Rule 33.1.

**III. Plaintiffs’ Discovery Requests**

The Court’s discovery Order authorized Plaintiffs to obtain net-worth discovery of Defendants’ financial statements and account statements, and to take depositions of pertinent witnesses regarding these documents. The Court denied without prejudice Plaintiffs’ requests

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for tax records pending the results of the discovery. Order, Aug. 9, 2010 (Doc. No. 302) at 8-9. Immediately after the August 3 telephonic conference, Plaintiffs asked Defendants to provide the requested documents, and to provide dates for witness depositions.

After several rounds of meet-and-confers, Defendants agreed they would provide financial statements (whether audited or not) for the entity Defendants (Lime Wire and Lime Group), and the periodic statements for whatever types of accounts or investment vehicles in which these defendants or Mark Gorton have any types of assets. Defendants also agreed to provide dates for a deposition for Mr. Gorton and designees for the entities following their production of documents on or before September 9, 2010. With respect to the statements, however, Defendants have said they will produce only those for the most current year, and not for the three-year period that Plaintiffs requested. *Id.* at 8.

Defendants' attempt to limit the production of net-worth document discovery to just the most recent year is unfounded and seeks to deprive Plaintiffs of highly relevant information. Mr. Gorton testified at the July 29 hearing on the asset-freeze motion that his net worth is in excess of \$200 million. He also testified that large components of his net worth are contained in a variety of partnerships and investment vehicles, including overseas funds, IRA accounts, family limited partnerships and deferred composition arrangements. The growth of many of these accounts has been asserted to be nothing short of phenomenal. *See* Tr. of Hr'g, July 29, 2010, at 6-25. For example, Mr. Gorton testified that his IRA has grown from around \$250,000 in 2000 to \$95 million today, with no intervening contributions of money. *Id.* at 24-25.

Plaintiffs have requested that Defendants provide three years of financial and account statements, rather than just one, so that Plaintiffs can discover the true value of the amounts included in Defendants' accounts. By Mr. Gorton's own admission, there has been tremendous movement in value within these accounts over relatively short periods of time. Plaintiffs are concerned that statements covering just the most recent year – in which the capital markets have been in turmoil – could present a misleading snapshot of Defendants' net worth at the time of trial. Having three years worth of statements will allow Plaintiffs to present a more complete picture of the true value of Defendants' assets, as reflected over the most recent three-year period. Defendants of course have the right to make contrary arguments, but the issue here is of discoverability, not the ultimate adjudication of net worth.

Defendants have not identified any burden in producing statements for a three-year period, rather than just the most recent one. Given that most if not all of these statements are maintained in a central location that is readily accessible to Mr. Gorton and the entity Defendants, there is no credible claim of burden that Defendants could make for these records.

Because the records that Plaintiffs have requested since the letter briefing following the June 7 status conference are highly relevant, and Defendants have not articulated any burden in producing such records, we respectfully request that the Court order Defendants to produce financial and account statements for the most recent three-year period.

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#### IV. Conclusion

For the foregoing reasons, Plaintiffs respectfully request that the Court enter an Order:

- Quashing Defendants' Document Requests 3-7 and 13-14 and Defendants' Interrogatories 3-4, 6-8 or 10.
- Quashing Defendants' Document Requests 8-12 and Defendants' Interrogatory 9.
- Quashing Defendants' Interrogatory 1, to the extent it seeks information about the circumstances or date of Plaintiffs' initial awareness of a work in suit by a Lime Wire user) and Interrogatory 5 (in its entirety); and providing that Plaintiffs may respond to Defendants' Interrogatories 1 and 2 with reference to documents, per Fed. Rule Civ. P. 33(d) and Local Civil Rule 33.1.
- Requiring Defendants to produce financial statements and periodic account statements covering any of their assets over the last three years.

We thank the Court for its consideration of these matters.

Respectfully,



Glenn D. Pomerantz

#### Attachments

cc: Michael Sommer, Esq.  
Colleen Bal, Esq.