

EXHIBIT 4

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September 8, 2010

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BY HAND DELIVERY

The Honorable Kimba M. Wood
United States District Court
Southern District of New York
500 Pearl Street
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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:

Pursuant to the Court's August 31, 2010 Order, this letter (a) responds to Defendants' August 26 letter regarding disputes about remaining discovery (pp. 1-11 below), and (b) sets forth Plaintiffs' position regarding disputed pretrial deadlines (pp. 11-13 below).

I. PLAINTIFFS' RESPONSE TO DEFENDANTS' AUGUST 26 LETTER BRIEF
A. Defendants' New Discovery Requests

Before turning to Defendants' specific arguments in support of their requests, it is important to recount a few undisputed points that put the scope of Defendants' requests in context. This lawsuit has been pending for four years. Plaintiffs produced more than six million pages of documents while discovery was open from 2006 through 2008. This Court resolved multiple motions for summary judgment in an exhaustive 58-page opinion and order. Since June of this year, Plaintiffs have produced more than 150,000 additional pages of documents relating

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to their ownership of more than ten thousand sound recordings whose infringement Defendants intentionally induced. As of next Wednesday, September 16, Plaintiffs will have produced their final list of sound recordings for trial, as well as large volumes of electronic and documentary data that provide evidence of the direct infringement of their protected works through Lime Wire.

Notwithstanding the countless hours of party and Court resources expended getting to this point – and not to mention the millions of dollars of expense and cost this case has eaten up – Defendants have the audacity to argue that “this *is* just the beginning” of the case with respect to everything except the 30 sound recordings whose ownership and direct infringement were uncontroverted at summary judgment. Defts’ Aug. 26 Ltr. Br. at 2. That is absurd. Merits discovery closed back in 2008. Rewinding the clock and forcing Plaintiffs to spend more money and waste more time looking for irrelevant documents – and requiring the Court to revisit summary judgment motions for Defendants’ secondary liability on a work-by-work basis – undoubtedly would serve Defendants’ tactical ends of driving up Plaintiffs’ costs and delaying both the trial and Defendants’ ultimate day of legal reckoning. Neither the law nor the facts, however, support Defendants’ extreme positions.¹

1. **Requests Regarding Defendants’ “It’s Plaintiffs’ Fault” Affirmative Defenses (Document Requests 3-7 and Interrogatories 3-4, 6-8)**

Plaintiffs demonstrated in their opening letter brief that these requests – which seek documents regarding Plaintiffs’ filtering or educational efforts, distribution of recordings with or without digital rights management (“DRM”), etc. – would impose tremendous discovery burdens and would not be relevant to any remaining issues in the case. Defendants cannot, and so do not, dispute Plaintiffs’ burden objection. Defendants recognize that these requests would simply repeat much of the discovery that their former counsel pursued before summary judgment, *see* Pltfs’ Aug. 20 Ltr. Ex. 5 at 35-37, and that required the enormous document production through 2008.

Defendants argue instead that this massive “do over” is justified because the requested information purportedly goes to Defendants’ affirmative defenses to liability. Defendants insist that, notwithstanding this Court’s granting of summary judgment of their inducement liability, all of their defenses remain “fully preserved for discovery and trial” because Plaintiffs did not move on these defenses. Defts’ Aug. 26 Ltr. Br. at 7.

¹ It also bears repeating Defendants did *not* alert the Court or Plaintiffs to the type or magnitude of discovery that Defendants proposed to undertake at or prior to the June 7 Status Conference to discuss remaining discovery; in the July 2 or July 9 letter briefs regarding remaining discovery; or at the July 29 hearing, when the Court released its tentative ruling on the remaining discovery issues and set January 18 as the trial date. These requests, and the manner in which Defendants have unveiled them, are purely tactical.

Defendants have the law exactly backwards on this issue. As the party opposing summary judgment of their liability, Defendants had the burden – upon Plaintiffs’ showing that there were no disputes of material fact and they were entitled to judgment as a matter of law – to point to specific facts showing a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986); Fed. R. Civ. P. 56. If Defendants believed that there were specific facts supporting their affirmative defenses to liability, Defendants were obligated to raise those defenses affirmatively and to demonstrate how the facts supported them. Defendants’ failure to make this showing means that their defenses to liability do not remain for trial. *See, e.g., Harper v. Delaware Valley Broadcasters, Inc.*, 743 F. Supp. 1076, 1090-91 (D. Del. 1990) (in seeking to defeat plaintiff’s summary judgment motion, “defendants should have come forward with evidence to support their affirmative defenses”); *Insurance Co. of N. Am. v. Misch*, No. 88-3669, 1989 WL 73702, at *3 (E.D. Pa. July 5, 1989) (“Defendant has not provided this Court with any factual support for the affirmative defenses to plaintiff’s complaint. Therefore, plaintiff’s motion for summary judgment is granted.”).²

Even if Defendants were correct that their affirmative defenses to liability survived summary judgment – and they are not – Defendants still fail to show how any of the requested discovery would relate to any affirmative defense. Defendants insist that the requested discovery relates to Plaintiffs’ purportedly “well-known stealth marketing efforts, online advertising campaigns, and promotional give-aways.” Defts’ Aug. 26 Ltr. Br. at 8. What do any of those issues have to do with any affirmative defense to liability? Defendants never explain. As we

² Defendants try to avoid the straightforward application of Rule 56 to their affirmative defenses by asserting that Second Circuit and other courts hold that affirmative defenses necessarily survive summary judgment unless the plaintiff moves against them. *See* Defts’ Aug. 26 Ltr. Br. at 7 & n.7. The cases that Defendants cite announce no such rule. They instead stand for the unremarkable proposition that, where under Rule 56 the Court adjudicates *an issue* (or issues) rather than an entire claim for liability, affirmative defenses to that claim of liability *may* survive the Court’s order. Take, for example, Defendants’ lead case, *City of New York v. Exxon Corp.*, 932 F.2d 1020 (2d Cir. 1991). With a parenthetical, Defendants suggest that the Second Circuit in that case announced a rule “that summary judgment on liability left ‘damages and [defendant’s] affirmative defenses still to be considered.’” Defts’ Aug. 26 Ltr. Br. at 7. That is a highly misleading description of the case. What left the defendant’s affirmative defenses “to be considered” was not that the plaintiff’s motion did not move against them. Rather, as the district court explained, it “ha[d] no basis on the record before us on which to apportion damages,” and thus could not “enter a judgment in favor of the City in a particular amount.” *City of New York v. Exxon Corp.*, 112 B.R. 540, 554 (S.D.N.Y. 1990). The district court in fact pointed out that it was *defendant’s*, and not plaintiff’s, responsibility “to assert and address [its own] affirmative defenses[,]” and that, “[i]f any party has acted ‘unconscionably’ in the papers before us, it is [defendant].” *Id.* This case and the other summary adjudication cases that Defendants cite are inapposite, because Plaintiffs moved for, and were granted, judgment on their *claims* for Defendants’ liability for inducing infringement and common law copyright infringement and unfair competition.

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pointed out in our August 20 letter – and as Defendants do not dispute – the standards for abandonment and estoppel against a copyright holder are properly demanding, and require, for example, evidence that a plaintiff intended to *surrender* its rights in a purportedly abandoned work. *Paramount Pictures Corp. v. Carol Publ'g Group*, 11 F. Supp. 2d 329, 337 (S.D.N.Y. 1998). Defendants insist that Plaintiffs already have produced documents showing “a general practice of making digital music files available for free distribution on the Internet and/or P2P sites.” Defts’ Aug. 26 Ltr. Br. at 8. The handful of documents that Defendants cite do not show what Defendants say they do.³ But even if they did, that would avail Defendants nothing. Plaintiffs are the owners of their copyrights. Each Plaintiff has the right to decide whether and how to exploit the works that they own, whether that means charging directly for their content or receiving some other form of value for the work’s *authorized* exploitation. None of that provides any excuse of justification for Defendants’ intentionally inducing the infringement of those copyrighted works.

In sum, Defendants’ “affirmative defenses” requests seek information without any legal or factual relevance, and compliance would impose an extreme burden on Plaintiffs. The Court should order that Plaintiffs do not have to respond to these requests.

2. **Requests For “Lost Profits” Information (Document Requests 8-10 and Interrogatory 9)**

Plaintiffs explained at length why these requests would impose tremendous discovery burdens with little to no relevant information being produced to show for it. Pltfs’ Aug. 20 Ltr.

³ We pointed out that if Defendants’ “It’s Plaintiffs’ fault” requests sought relevant discovery, Defendants should be able to explain that relevance by pointing to some of the more than six million pages of documents Plaintiffs already produced in this case. Defendants respond by citing and characterizing – but not submitting to the Court – *three* documents from that production. We are submitting these documents as Exhibits A-C to this letter brief. Contrary to Defendants’ hyperbole, these documents do not reflect Plaintiffs’ “practice of giving away music for free.” Defts’ Aug. 26 Ltr. Br. at 8. The first document (Ex. A hereto) is an editorial in the *Financial Times* by EMI’s former Chairman, who actually wrote: “Wildly giving away music so that we cannot make a return for shareholders or artists is simply not an option. Solid copyright law, together with digital rights management, are the tools that we need to be able to give away some music safely while building healthy new business models.” *Id.* at 2. The second document (Ex. B) is a random proposal that a third party sent to one of the record company plaintiffs for a “Compression Algorithm Engine.” The third document (Ex. C) is not a record company document “discussing agreement to allow free distribution on P2P sites of concert clip,” as Defendants claim it is. Defts’ Aug. 26 Ltr. Br. at 8. The document is a copy of a story in the *Wall Street Journal*, reporting that an artist had agreed to allow live footage from one of his concerts (*not* a sound recording owned by a record company) to appear on peer-to-peer sites. The fact that Defendants resort to mischaracterizing documents that they claim supports the relevance of their (non-existent) defenses only underscores the inappropriateness of a whole new discovery expedition.

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Br. at 7-15. Plaintiffs also pointed out that, to the extent the Court thought that Defendants were entitled to any profit or loss discovery at all, there were far less burdensome means for Defendants to obtain such information, namely, copies of artist recording agreements with royalty information unredacted for pre-1972 sound recordings, and an interrogatory response from each Plaintiff describing the general range of royalties it pays on the sale of downloads.

Defendants do not address either of these proposed alternatives, much less explain why they would be inadequate for any legitimate discovery purpose of this case. Defendants instead argue that Plaintiffs' burden claims are unsubstantiated, and that all of the requested financial information is relevant to Defendants' anticipated argument that the jury's statutory damages award must be subject to the Supreme Court's punitive damages jurisprudence. Defendants are wrong on both counts.

a. **Compliance With Defendants' "Lost Profits" Requests Would Impose Tremendous Discovery Burdens**

Defendants assert that Plaintiffs' arguments about the burden of producing profit and loss information on a track-by-track or album-by-album basis are based on "overblown rhetoric," unsupported by declarations from company witnesses. Defts' Aug. 26 Ltr. Br. at 4 and 1-2 n.1. The fact that Plaintiffs were unable to submit declarations with their August 20 letter brief was entirely a result of Defendants waiting until August 9 to serve their overbroad discovery requests. In any event, Plaintiffs are lodging with this letter brief declarations from each of the four Plaintiff groups attesting to the burdens that Plaintiffs' August 20 letter described in detail.⁴ Among other things, the declarations establish that there are tremendous numbers of costs that go into the creation of sound recordings; that no Plaintiff maintains this cost information in readily accessible repositories on a track-by-track or even album-by-album basis; and that the burdens of complying with Defendants' requests would require many hours *per individual sound recording* to obtain all of the requested information. See Ex. D (Ciongoli Decl.) ¶¶ 4-9; Ex. E (Pedersen Decl.) ¶¶ 4-11; Ex. F (Leak Decl.) ¶¶ 5-10; Ex. G (McMullan Decl.) ¶¶ 4-8.

Defendants blithely respond that the requested information must be easily accessible because (a) Plaintiffs' artist agreements have contractual rights to audit their artist royalty accounts and (b) Plaintiffs report their *overall* revenue and expense information for their companies in public reports. Defts' Aug. 26 Ltr. Br. at 6. Neither of these points is well-taken. As each declarant explains, artist royalty audits do not review the broad categories of information that Defendants' requests seek; in any event, the opportunities for artist audits are usually limited by contract to minimize precisely the tremendous expense and burden that Defendants seek to impose on Plaintiffs. As for financial reporting, the corporate parents who file public reports do *not* report revenue and expense information on a track-by-track, album-by-album or even label-by-label basis. See Ex. D (Ciongoli Decl.) ¶¶ 10-11; Ex. E (Pedersen Decl.)

⁴ These declarations are attached as Exhibits D-G, and come from Charles Ciongoli, on behalf of the UMG Plaintiffs; Jon D. Pedersen, Sr., on behalf of the WMG Plaintiffs; Wade Leak, on behalf of the Sony Music Plaintiffs; and Alasdair McMullan, on behalf of the EMI Plaintiffs.

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¶¶ 11-13; Ex. F (Leak Decl.) ¶¶ 11-13; Ex. G (McMullan Decl.) ¶¶ 9-10. Defendants' assertion that Plaintiffs "must" easily be able to produce the requested information cannot be squared with the facts.

Finally, as to burden, Defendants point to an order by a Magistrate Judge in another case (*UMG Recordings, Inc. v. DivX, Inc.*), in another District, granting a motion to compel one Plaintiff group (UMG) to produce lost profit information in response to requests served by Wilson Sonsini. Defts' Aug. 26 Ltr. Br. at 5-6. Defendants do not tell the Court that the Magistrate Judge's discovery order contained absolutely no reasoning. The Magistrate Judge simply wrote "granted" under every line corresponding to Wilson Sonsini's proposed discovery order. *See id.* Ex. B at 1. That order can hardly be considered precedent (much less reasoned precedent) for the expansive order Defendants ask this Court to grant. And, as explained in the accompanying Declaration of Charoles Ciongoli on behalf of the UMG Plaintiffs, the information that UMG produced in *DivX* regarding sound recordings are the revenue reports that Plaintiffs have said they will provide Defendants here. *See* Ex. D (Ciongoli Decl.) ¶ 12.

In sum, Defendants' "lost profit" requests would impose extraordinary burdens on Plaintiffs and drive up the costs and burdens of this litigation.

b. Defendants' "Lost Profits" Requests Seek Information Of Minimal Or No Relevance

In comparison to the massive burdens that Defendants' requests would impose, the relevance of the requested information is minimal to non-existent. Plaintiffs explained at length in their opening letter brief why this information has little if any relevance to the issues that remain to be tried in this case. Pltfs' Aug. 20 Ltr. Br. at 10-15. Defendants ignore all of these arguments. Defendants instead stake their entire claim of relevance to the contention that they need lost profits information in order to construct an argument against the damages award in this case based on the Supreme Court's jurisprudence regarding due process limitations on punitive damages. Most notably, Defendants claim that "[c]ourts around the country, including the Second Circuit, view statutory damages to be ... constrained by actual damages, and many increasingly rely on *State Farm [Mutual Auto. Ins. Co. v. Campbell]*, 538 U.S. 408 (2003)] as setting constitutional limits on the amount of statutory damages that may be awarded in copyright cases in relation to the size of any actual damages." Defts' Aug. 26 Ltr. Br. at 4.

Defendants' contention about the speculative relevance of the burdensome discovery they have requested to a *State Farm* challenge does not stand up to scrutiny, and it ignores the fact that the more limited discovery Plaintiffs have proposed as an alternative provides Defendants more than enough information to make whatever type of *State Farm* argument they want to make. For purposes of assessing Defendants' relevance argument – the only one they make – it is important to divide the discussion into post-1972 sound recordings (which are governed by copyright) and pre-1972 sound recordings (governed by state law).

(1) **Works Protected By Federal Copyright And Subject To Statutory Damages**

Defendants assert that “[c]ourts around the country, including the Second Circuit,” are applying *State Farm* and the Supreme Court’s other punitive damages cases to statutory damages. That is not correct. The Second Circuit case that Defendants cite for this proposition – *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135 (Apr. 27, 2010) – was authored by Your Honor, and it does not discuss *State Farm* or any punitive damages cases at all.⁵

Defendants are simply wrong that the Supreme Court’s punitive damages jurisprudence applies to statutory damages. The reasons for this are clear. Punitive damages exist to punish. Statutory damages, in contrast, serve principally to provide compensation to victims of copyright infringement, and to deter future infringements, where actual damages are difficult to calculate and prove. As the Supreme Court explained more than a half-century ago, statutory damages “give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits.” *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 231 (1952) (quotations omitted). In addition, the Supreme Court has created “guideposts” for the award of punitive damages because of the lack of fair notice to defendants and the effectively unbridled discretion that punitive damage awards place in the hands of jurors. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). These concerns are absent in the case of statutory damages, where the statutory award is fixed within a range set and carefully adjusted from time to time by the United States Congress. 17 U.S.C. § 504(c). And, in fact, the Supreme Court has expressly held that awards within a statutory range are subject to review only to determine if they are “so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable” by considering whether Congress has given “due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to [the law].” *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919).

⁵ While Defendants selectively edit the opinion in *Bryant* to make it appear that “the revenue lost by the copyright holder” must be factored into the statutory damages calculation, Defts’ Aug. 26 Ltr. Br. at 4 n.3, the opinion actually cited a list of factors that the Second Circuit has said may factor into the statutory damages analysis. *Bryant*, 603 F.3d at 144. As Judge Pauley recognized in the *MP3 Tunes* case, “no authority requires a showing of actual damages” in order to calculate statutory damages. *Capitol Records, Inc. v. MP3 Tunes LLC*, No. 07-9931 (WHP) (FM) (S.D.N.Y. Apr. 12, 2010) at 4 (emphasis added) (Ex. 6 to Pltfs’ Aug. 20 Ltr. Br.). A principal reason that Congress created the statutory damages remedy is “because of the difficulties in proving – and providing compensation for – actual harm in copyright infringement actions.” *Lowry’s Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 460. *Accord, 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.”). *See* Pltfs’ Aug. 20 Ltr. Br. at 11-13.

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Unsurprisingly, therefore, courts around the country have *rejected* Defendants' argument that the Supreme Court's cases dealing with due process limits on punitive damages apply to statutory damage awards. The wealth of authority on this point is recounted in the opinion that Defendants principally rely upon:

Zomba Enters., Inc. v. Panorama Records, Inc., 491 F.3d 574, 587 (6th Cir. 2007) (reviewing a total statutory damages award of \$806,000 for the infringement of twenty-six copyrighted works under *Williams* after noting that *BMW* and *State Farm*'s applicability to statutory damages was questionable); *Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.*, No. C 07-03952 JW, slip op. at 25 n.25 (N.D. Cal. Mar. 19, 2010) (holding that defendants' reliance on *BMW* in challenging a statutory damages award was "misplaced"); *Verizon Cal. Inc. v. Onlinenic, Inc.*, No. C 08-2832 JF (RS), 2009 WL 2706393, at *6-*9 (N.D. Cal. Aug. 25, 2009) (concluding that "it is highly doubtful" that *BMW* and *State Farm* "apply to statutory damages awards" but admitting that certain principles announced in the Supreme Court's recent punitive damages cases, such as the principle that a defendant should not be punished "for wrongful acts other than ... those committed against the plaintiff," might apply in statutory damages cases); *DirectTV, Inc. v. Cantu*, No. SA-04-cv-136-RF, 2004 WL 2623932, at *4-*5 (W.D. Tex. Sept. 29, 2004) (refusing to apply the *BMW* guideposts to a state statutory damages remedy since the civil penalties the defendant might face were capped by statute and thus did not implicate *BMW*'s "fair notice" concerns); *Accounting Outsourcing, LLC v. Verizon Wireless Pers. Commc'ns, L.P.*, 329 F. Supp. 2d 789, 808-09 (M.D. La. 2004) (refusing to apply *BMW* and *State Farm* in reviewing the constitutionality of statutes providing statutory damages for plaintiffs who have received junk faxes because the statutes' provision of damages ranges obviated *BMW* and *State Farm*'s "fair notice" concerns); and *Lowry's Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 460 (D. Md. 2004) (refusing to apply the *BMW* guideposts in evaluating the constitutionality of a statutory damages award in a copyright infringement case)

Sony BMG Music Entertainment v. Tenenbaum, No. 07-CV-11446-NG, 2010 WL 2705499, at *13 n.10 (D. Mass. July 9, 2010).

Defendants, predictably, cite the district court's decision in *Tenenbaum* as support for the proposition that the Supreme Court's punitive damages cases do apply to statutory damage awards under the Copyright Act. That decision is on appeal to the First Circuit, and it therefore does not represent the last word on this issue, even within that case. Moreover, the case by its own terms provides no refuge for these Defendants. The court's articulated concern in that case was with the level of the statutory damage award against one *user* of a peer-to-peer network. *See id.* *15-21. Those concerns, of course, are entirely inapplicable to these Defendants, who created and operated a peer-to-peer network with the adjudicated intent to induce the mass infringement of Plaintiffs' works by millions upon millions of individual users.

The Court does not have to resolve the debate reflected in *Tenenbaum* and the numerous other cases that go the other way on this issue in order to resolve Defendants' requests for "lost profits" discovery. The important point is that the only relevance argument that Defendants make to support these burdensome requests rests on extraordinarily shaky legal ground. If Defendants intend to press their punitive damages argument at a later juncture of the case, then the less-burdensome discovery that Plaintiffs have suggested the Court may order as an alternative provides Defendants with more than enough information. Plaintiffs have offered to provide detailed reports of revenue received from distributing downloads of sound recordings through legitimate, authorized online retailers. On the expense side, Plaintiffs have noted that they each of them could provide an interrogatory response that sets forth the general range of royalties that that Plaintiff pays for the sale of records in permanent download configuration. Pltfs' Aug. 20 Ltr. Br. at 13 n.7. Defendants do not explain at all why this information would be inadequate for discovery purposes. In comparison to the massive burdens that Defendants' requests would impose, these alternatives are more than adequate for discovery purposes.

(2) Plaintiffs' Pre-1972 Sound Recordings Subject To Punitive Damages

Plaintiffs recognize that their damages claims for pre-1972 sound recordings do seek punitive damages. However, Plaintiffs have agreed to provide Defendants with revenue and cost information that suffices for purposes of discovery. On the revenue side, Plaintiffs will produce their digital revenue information for these works. The major cost components for the distribution through digital downloads of these works are the mechanical royalties paid to the owner of the underlying musical composition (that is generally fixed by statute at 9.1 cents per download, 17 U.S.C. § 115(c)(3)-(4)) and the artist royalty. Plaintiffs are producing their artist agreements for these recordings with the applicable royalty rates unredacted (though still subject to the protective order).⁶ All of this information is more than adequate for providing Defendants revenue and expense information for these works.

3. Requests For Direct Infringement Information (Document Requests 1-2 and Interrogatories 1-2)

With one exception, discussed in the next paragraph, Defendants' arguments on "Discovery on Direct Infringement" are not arguments about what Plaintiffs should have to produce. The arguments instead are Defendants' disagreements with the substantive law

⁶ Royalty rate information in artist recording agreements for more recent sound recordings remains highly competitively sensitive information, and Plaintiffs should not have to produce that information – particularly when an interrogatory response on the general range of royalty rates will provide comparable information in the aggregate. In addition, requiring Plaintiffs to produce their agreements for post-1972 recordings without royalty information redacted would require a tremendous duplication of effort for producing these documents. Plaintiffs already have produced more than 8,300 such agreements, totaling more than 126,000 pages of documents.

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concerning what constitutes evidence of direct infringement by Lime Wire users. *See* Defts' Aug. 26 Ltr. Br. at 2-3. Plaintiffs have produced or will produce by September 16 the evidence that they will rely on to establish direct infringement by Lime Wire users. Defendants' arguments as to why Plaintiffs' evidence is insufficient proof of direct infringement was rejected at summary judgment. *See* May 25, 2010 Opinion and Order (Doc. 223) at 27-28. Defendants' should not be permitted to reargue decided issues about the application of the law of the case simply because there is more evidence of direct infringement by Lime Wire users. In any event, none of Defendants' points about what does or does not constitute evidence of direct infringement goes to a discovery issue. Plaintiffs are producing their evidence of direct infringement, and Defendants can examine it through the end of the follow-up discovery period.

One point that remains an open discovery issue is Defendants' request, in Interrogatories 1 and 5, that Plaintiffs provide the date on which the first infringement of each work occurred through the Lime Wire system. Defts' Aug. 26 Ltr. Br. at 3. Plaintiffs, of course, have no way of knowing the first time that any one of the millions of acts of copyright infringement took place through Lime Wire. That is a direct result of the Defendants' admitted failure to keep such evidence – something that was part and parcel of Defendants' illicit efforts to try to evade liability for their intentional wrongdoing.⁷ Plaintiffs explained in detail why these Interrogatories are based on a legally erroneous view of § 412(2). Pltfs' Aug. 20 Ltr. Br. at 16-17. Defendants do not have any response to Plaintiffs' arguments, so they ignore them. These Interrogatories are objectionable for other reasons as well (including that they exceed the Interrogatories that the Federal Rules and Judge Lynch allowed Defendants to serve without Court Order, *see* Section 5, *infra*), but they also seek irrelevant information, as Plaintiffs have demonstrated. The Court should order that Plaintiffs do not have to answer them.

4. Requests for Causation Information (Document Requests 13-15 and Interrogatory 10)

Defendants' only argument on these requests is that the Court's summary judgment opinion is limited to just 30 recordings, and that Defendants remain free to contest their liability for inducing the infringement on a recording-by-recording basis, over thousands of recordings. Defts' Aug. 26 Ltr. Br. at 3. Neither the Supreme Court's *Grokster* opinion nor any other case supports such a result. The undisputed evidence did not show that Defendants tried to induce infringement of just 30 works, or even 300 or 3,000 works. Defendants induced the infringement of Plaintiffs' *entire* catalogues because that was the point of Defendants' business: to have everything that users possibly could want available for the taking on Lime Wire. Plaintiffs will produce the evidence they will rely on demonstrating direct infringement by end users, but no

⁷ Defendants blandly claim that they “do not have access to information regarding use by users [they] simply suppl[y] software to users.” Defts' Aug. 26 Ltr. Br. at 3. Of course, the summary judgment evidence was uncontroverted that Defendants' efforts were all geared toward intentionally maximizing the infringing conduct on Lime Wire while deliberately refraining from doing anything to stop it. *See* May 25, 2010 Opinion and Order (Doc. 223) at 31-41.

additional discovery is warranted or necessary on the causal link between Defendants' inducing conduct and those acts of direct infringement.

5. **Plaintiffs' Written Responses To Defendants' Discovery**

Defendants are wrong that Plaintiffs have abandoned their contention that Defendants' written discovery requests were unauthorized. In fact, *all* of the interrogatories that Defendants served were unauthorized. Judge Lynch's December 16, 2006 Civil Case Management Plan authorized the service of Interrogatories pursuant to Local Rule 33.3(a), but said that "*[n]o other interrogatories are permitted except upon prior express permission from the Court.*" (Doc. No. 7, ¶ 4(b) (emphasis added)). Defendants thereafter served 25 interrogatories on each Plaintiff – the maximum allowed under Fed. R. Civ. P. 33 without prior Court Order. Defendants *never* obtained the Court's prior express permission before serving these nine new interrogatories, many containing multiple sub-parts.

Plaintiffs will serve written objections to Defendants' written discovery. The Court obviously has the power to limit or quash the requests.

B. The Net Worth Discovery The Court Has Ordered Defendants To Produce

Defendants tacitly concede there is absolutely no burden to producing net worth discovery for the past three years. Their sole objection is that any net worth documents more than a year old cannot be relevant, because only Defendants' current net worth is relevant to punitive damages. Defts' Aug. 26 Ltr. Br. at 8-9. Plaintiffs are entitled to obtain non-burdensome discovery concerning the past three years of Defendants' net worth so they can have a complete and accurate valuation of Defendants' multiple assets. If, at the time of trial, Defendants believe that certain of these documents are irrelevant or should be excluded, they can move *in limine* to exclude them. The issue here is one of discovery. Given the lack of burden, the Court should order Defendants to produce the relevant documents for the past three years.

II. PLAINTIFFS' POSITION REGARDING DISPUTED PRETRIAL DEADLINES

Plaintiffs disagree with Defendants regarding the following pretrial deadlines:

A. Deadline for Producing Discovery From The Court's Order On The August 20, 2010 Letter Briefing

Both sides agree that any discovery the Court orders from the disputed issues discussed above should *start* within seven days of the Court's Order. The disagreement concerns the date the parties should *complete* that discovery. Defendants want the Order to provide that Plaintiffs should complete their production within 14 days of the Court's Order. Plaintiffs do not have a problem with that timetable *unless* the Court orders Plaintiffs to respond to any of Defendants' "affirmative defenses" or "lost profits" discovery. As discussed and demonstrated, compliance with those requests would impose an extraordinary burden on Plaintiffs. A 14-day time fuse for

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producing information responsive to those requests would impose substantial hardship and could well lead to further disputes about whether to continue the trial date if one or more Plaintiffs does not complete its production within 14 days.

Plaintiffs respectfully submit that the time for them to produce any discovery in response to Defendants' "affirmative defense" and "lost profits" requests should depend upon the scope of what, if anything, the Court orders Plaintiffs to produce. If the Court orders Plaintiffs to produce the revenue reports and interrogatory responses describing the general royalty-rate range for post-1972 recording agreements, Plaintiffs will be able to produce the interrogatory responses within two weeks, and to produce the revenue reports on a rolling basis, with the production of those reports complete in 30 days or less. Assuming the Court enters its order within the next week or two, that still would give Defendants several weeks (or more), even under Plaintiffs' proposed schedule for follow-up discovery (discussed below), to take depositions regarding the aforementioned interrogatory responses and revenue reports. If the Court orders a broader production in response to the "affirmative defense" or "lost profits" requests, Plaintiffs respectfully request that they have the opportunity to review the Court's Order and report back on a timeframe for completing production.

B. Deadline For Parties To Complete Follow-Up Discovery, And Documents That Defendants May Produce

The parties dispute two issues regarding the "follow-up" phase of discovery.

First, the parties dispute the time-frame for completing the follow-up discovery. Plaintiffs propose that this period run through November 8, which is 53 days after the parties' September 16 productions. Defendants want this period to extend for more than two weeks beyond that, to November 23, which is 68 days after the September 16 productions. Defendants' proposal is unworkable because it backs up the time for disclosing rebuttal experts – all or almost all of which will be Defendants' experts – and leaves minimal time for deposing them before the crunch of pretrial submissions, including *in limine* motions to strike expert testimony (due December 29).

Defendants should not even be pushing this issue, given that the time-table for the follow-up discovery period has been discussed and agreed to by Defendants. Plaintiffs proposed two 45-day periods – one for the initial production following the Court's resolution of disputed issues, and the other for each side to take follow-up discovery, in the June 2, 2010 Letter to the Court (page 6). At the July 29, 2010 hearing, the Court set the trial date for January 18, 2011, and the Court and parties engaged in the following colloquy regarding the time for remaining discovery:

Mr. Pomerantz: I think that[] the only other date[] that we need to establish is the September 9 date, which we are okay with. It's in your order, proposed order. *And if they could have 45 days from September 9 to complete whatever discovery they have.*

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The Court: *Mr. Sommer?*

Mr. Sommer: *That seems fine.*

Tr. of Hr'g, July 29, 2010 at 153:16-23 (emphasis added).

Plaintiffs' proposal of November 8 would give Defendants even more than the 45 days that Defendants, through Mr. Sommer, agreed to. That is more than ample time for follow-up discovery, and pushing the schedule back even further jeopardizes expert discovery and the trial date. Defendants apparently are in the process of replacing their counsel again, this time with new lawyers from Willkie Farr. Defendants are free to do that, of course, but their new counsel cannot go back on agreements that Wilson Sonsini made on the schedule.

Second, the parties dispute whether Defendants may produce new documents during the follow-up discovery period. Defendants take the position that they have until the end of this period to produce all documents they will rely on at trial. Defendants, however, should have produced the documents they will rely on before the close of document discovery – which ended January 31, 2008. (Doc. No. 52). The purpose of the follow-up discovery period at this juncture is for each side to take discovery of documents the other is producing on September 16 – not to produce a whole slew of never before disclosed documents. Defendants' proposal would allow them to wait until the last day of the follow-up discovery period to produce new documents, on which Plaintiffs would have no ability to take follow-up discovery. Defendants' proposal is unfair, unworkable and prejudicial. Defendants should not be allowed to produce new documents that they are intending to rely on at trial.

C. Deadlines For Disclosing Rebuttal Experts And For Completing Rebuttal Expert Discovery

The timing for rebuttal expert disclosures and depositions is closely related to the cut-off date for follow-up discovery: the longer the follow-up period lasts, the less time for disclosing rebuttal experts, deposing them, and filing any motions *in limine* to strike all or parts of their testimony. Because all or most of the rebuttal experts will be Defendants' experts, the shorter time-frame for disclosure and discovery jeopardizes Plaintiffs' opportunity to depose the rebuttal experts and, where appropriate, to seek to exclude them.

Plaintiffs' proposed cut-off dates of November 24 for disclosure and December 20 for depositions provides more than adequate time for Defendants' rebuttal experts to integrate the results of follow-up discovery into their reports. This effectively leaves a three-week period for depositions, because of the intervening Thanksgiving holiday. Defendants' proposal, in contrast, would have reports served December 13, and require that all depositions of rebuttal experts be completed within just 10 days, by December 23. Given that motions *in limine* must be filed a mere six days after that, Defendants' proposal is an obvious attempt to prejudice Plaintiffs' ability to take discovery from and move on Defendants' experts.

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* * *

We thank the Court for the opportunity to submit this letter, and for its consideration of these matters.

Respectfully,


Glenn D. Pomerantz

cc: Joseph Baio, Willkie Farr (counsel for Defendants)
Tariq Mundiya, Willkie Farr (counsel for Defendants)
Michael Sommer, Wilson Sonsini (counsel for Defendants)
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