# EXHIBIT 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ARISTA RECORDS LLS, et al.,

Plaintiffs,

-against-

LIME GROUP LLC, et al.,

Defendants.

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06 Civ. 5936 (KMW)(DF)

**ORDER**

**DEBRA FREEMAN, United States Magistrate Judge:**

Currently before the Court are four applications by Defendants to enforce subpoenas served by Defendants on certain licensees of Plaintiffs, specifically, iMesh, Inc. and its subsidiary, MusicLab, LLC (together, "iMesh"), MySpace, Inc. ("MySpace"), Google, Inc. ("Google"), and Yahoo! Inc. ("Yahoo!") (collectively, the "Licensees").[1] The Licensees separately opposed. iMesh and MySpace also moved for sanctions, contending, *inter alia,* that Defendants failed to engage in adequate good faith conference before seeking enforcement and, with respect to iMesh, that the subpoena is duplicative of two prior subpoenas served on iMesh by Defendants earlier in the case. Google moved to have Defendants bear the cost of any production of custodial documents ordered by the Court. Having considered Defendants' and the Licensees' submissions, and for the reasons discussed below, the motions for sanctions made by iMesh and MySpace are denied; Google's motion to shift costs is denied; and Defendants' applications are granted in part and denied in part.

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[1] Defendants' application to enforce the subpoena to MySpace was transferred to this Court from the United States District Court for the Central District of California. Amazon.com, Inc., which is apparently defending a similar application by Defendants to enforce a subpoena currently pending in the U.S. District Court for the Western District of Washington, also joined in one of the submissions to this Court by certain of the Licensees.

## DISCUSSION

### I. ADEQUACY OF GOOD FAITH CONFERENCE

As a preliminary matter, certain of the Licensees contend that Defendants failed to properly engage in sufficient good-faith conference prior to seeking relief from the Court. Although, based on the correspondence, there is some basis for these Licensees' position that they were willing to continue conferring with Defendants, the Court is persuaded that Defendants' efforts to resolve their disputes with the Licensees were sufficient, in light of the expedited nature of discovery in this case and the fact that the disputes have not been resolved since Defendants sought relief from the Court over a month ago. Accordingly, the Court will consider the motions before it, and denies any application for sanctions based on a lack of good faith conference.

### II. EXTENT TO WHICH SUBPOENAS SHOULD BE ENFORCED

Through the Subpoenas, Defendants essentially seek three categories of documents from the Licensees:

(1) copies of license agreements between the Plaintiffs and the Licensees;

(2) reports of payments made by the Licensees to Plaintiffs pursuant to such license agreements; and

(3) the Licensees' communications (both internal and with Plaintiffs) relating to such license agreements and/or to LimeWire.

On more than one occasion in this case, the Court has held that, at least to some extent, these types of documents are relevant to Plaintiffs' damages claims. (*See* Order, dated Oct. 15, 2010 (Dkt. 329); Order, dated Nov. 2, 2010 (Dkt. 339); Opinion and Order, dated Nov. 19, 2010 (Dkt. 363).) Indeed, by Order dated November 23, 2010, the Court ordered another of Plaintiffs'

licensees, VEVO, LLC ("VEVO"), to produce copies of their license agreements, certain payment reports, and at least certain communications relating to the licenses in question and/or to LimeWire. (*See* Order, dated Nov. 23, 2010 (Dkt. 367)).

Subsequent to the Court's issuance of its Order regarding VEVO, however, Plaintiffs themselves produced a significant number of documents in the three categories at issue. Defendants contend that, notwithstanding Plaintiffs' production, they are still entitled to seek similar documents from the Licensees.[2] Defendants argue that the Licensees might produce some documents that were not produced by Plaintiffs because, *inter alia*, Plaintiffs and the Licensees could have different email retention policies and/or follow a different review and production protocol. Defendants note that the requested documents are not a well-defined set, such that complete production can be verified, and point to some evidence that productions by other non-party licensees have not been coextensive with Plaintiffs' production to date. Defendants also suggest that, as the Court previously ordered VEVO to produce documents in response to the same type of subpoena, the other Licensees should at least be directed to respond to that same extent.

For their part, the Licensees argue that Defendants' mere speculation that new documents may be produced is not sufficient to outweigh the burden of production. Further, quoting language from this Court's earlier opinion requiring Plaintiffs to produce similar documents, the Licensees argue that the documents sought are only of "tenuous" relevance to this action. (*See, e.g.*, Letter to the Court from Matthew D. Ingber, Esq., dated Jan. 21, 2011, at 2 (quoting Opinion and Order, dated Nov. 6, 2010 (Dkt. 363), at 6).) The Licensees also argue that, as non-

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[2] It appears that some of the Licensees have already produced documents from one or more of these categories.

parties, their own internal communications would not be relevant to any issues in this case, given that, at most, it is the *parties'* conduct and attitude that may be considered in calculating Plaintiffs' statutory damages.

As to the Licensees' "burden" argument, the Court notes that, except for MySpace (which has submitted an affidavit detailing the potential expense of producing the requested documents), the Licensees make only generalized and unsupported burden objections, relating to the period of time to be searched and the need for privilege review. Nonetheless, the Court agrees that, where it is likely that particular documents have already been produced by a party, it would be inappropriate to require non-parties to shoulder the burden of making an identical production. Here, Defendants have offered the Court no reason to believe that the license agreements and reports of payments under those agreements that have been produced by Plaintiffs, as licensors, would be any different from the agreements and payment reports that would be produced by the Licensees. Given the potentially slight relevance of such documents, combined with the likely duplicative nature of the production from the Licensees, the Court sees no reason to impose any burden on the Licensees with respect to the production of such documents.

On the other hand, Defendants have provided the Court with sufficient reason to believe that production by the Licensees of "communications" relating to their license agreements with Plaintiffs, or communications relating to LimeWire, may contain additional relevant material, beyond that produced by Plaintiffs, outweighing the potential burden to the Licensees. *See Viacom Intern., Inc. v. YouTube, Inc.*, 2008 WL 3876142, 3 (N.D. Cal. 2008) ("[I]n appropriate circumstances, production from a third party will be compelled in the face of an argument that the 'same' documents could be obtained from a party, because there is reason to believe that the

files of the third party may contain different versions of documents, additional material, or perhaps, significant omissions.") (internal quotation omitted). With respect to the Licensees' internal communications, although the *Licensees'* attitude and conduct towards Defendants are not relevant, such communications may reflect *Plaintiffs'* attitude and conduct towards online licensing and/or towards Defendants, and would be relevant to that extent.

Accordingly, the Licensees need not produce their license agreements with Plaintiffs or records of payments made to Plaintiffs under those agreements. The Licensees should, however, produce copies of their communications with Plaintiffs, as well as their internal communications, regarding those license agreements and/or LimeWire, to the extent such communications reflect information regarding Plaintiffs' conduct, Plaintiffs' stated positions, or Plaintiffs' views regarding online licensing arrangements in general, or regarding LimeWire in particular.[3]

Finally, as to the time frame covered by Defendants' subpoenas, the Court understands that certain of the Licensees already produced documents in response to one or more subpoenas served by Defendants earlier in this litigation, apparently during the initial phase of discovery in this case. Defendants are not entitled to discovery that they could and should have obtained during the initial phase of this litigation. Defendants are, however, entitled to discovery relating to the period subsequent to April 18, 2008 (the close of the initial phase of discovery), or, to the extent a Licensee produced documents pursuant to an earlier subpoena, for the period subsequent to the date of that prior production.

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[3] The Court declines to require the Licensees to use the same electronic search terms as were used by VEVO to locate these types of communications. To the extent the VEVO Order specified certain search terms that were to be used to locate documents responsive to the subpoena that was then at issue, the Court notes that its VEVO Order essentially found reasonable, and thus formalized, a final offer made by VEVO – a joint venture of two Plaintiffs – after it had engaged in extensive negotiations with Defendants. While the Licensees may wish to take guidance from the Court's prior Order, they should, in the end, use their own judgment as to the best means of locating the communications covered by this Order.

## III. COST OF PRODUCTION

Google, in particular, requests that Defendants bear the cost of any production of documents ordered by the Court. Under Rule 45 of the Federal Rules of Civil Procedure, an order on a motion to compel "must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance." Fed. R. Civ. P. 45(c)(2)(B)(ii). The Court has modified the scope of the requested discovery and has thereby reduced the burden on Google. Further, as noted above, Google has not made any specific, supported showing as to the cost of production. Accordingly, Google's request to shift costs is denied. *See JP Morgan Chase Bank v. Winnick*, No. 03 Civ. 8535 (GEL), 2006 WL 3164241, at *2 (S.D.N.Y. Nov. 2, 2006) (declining to shift costs of production from a non-party because, *inter alia*, the burden imposed would not be significant for an entity of that type).

## CONCLUSION

For the foregoing reasons, iMesh and MySpace's motions for sanctions are denied; Google's motion to shift costs is denied; and it is hereby ORDERED that, to the extent they have not already done so, the Licensees shall produce, for the period described above, any communications, both internal and with Plaintiffs, relating to their licenses with Plaintiffs and/or relating to LimeWire, to the extent those communications reflect information regarding Plaintiffs' conduct, positions, or views about online licensing or about LimeWire. Defendants' applications are denied in all other respects.

Dated: New York, New York
January 31, 2011

SO ORDERED

DEBRA FREEMAN
United States Magistrate Judge

Copies to:

Hon. Kimba M. Wood

all parties (via ECF)

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EXHIBIT 2

## Levine, Allison K.

**From:** Ingber, Matthew D.
**Sent:** Tuesday, January 04, 2011 6:40 PM
**To:** Eaton, Mary
**Cc:** Levine, Allison K.
**Subject:** LimeWire

Mary – Thank you for agreeing to speak with us this afternoon regarding LimeWire's subpoena to non-party Google. As we discussed today, we remain interested in reaching agreement on Google's response to the subpoena, and to that end (and as discussed) we propose the following:

1. With respect to the first category of documents identified in LimeWire's motion to compel – agreements, including license agreements, between Google and plaintiffs – we have already produced these documents. On today's call, you asked whether the agreements were pulled from a central repository. We can confirm that they were – for each individual plaintiff – and it is our understanding that all of the agreements have been produced, with the possible exception of the one identified in your motion to compel. We will search for that agreement and produce it.

2. As to the second category of documents – documents showing amounts paid by Google to plaintiffs pursuant to license agreements – we will agree to produce these documents. You had asked whether our agreement is contingent upon Defendants' willingness to compromise on category 3 below, and it is not. We are disappointed that we cannot reach agreement on the custodial data, and had hoped that our offer to produce these documents might cause you to reconsider the request for custodial data, but we will not hold up production of the payment information on that basis.

3. The third category of documents, as we understand it, is external communications between Google and plaintiffs regarding license agreements, and internal Google communications regarding LimeWire. With respect to the external communications, we understand that Judge Wood has ordered plaintiffs to produce the very same documents, and that plaintiffs have produced them. You have not identified any Google communications that have not been produced by plaintiffs. You have not identified gaps in plaintiffs' productions. And you have not articulated any reason why Google should bear the burden and cost of producing documents that are duplicative of documents already produced. Your suggestion that it is impossible to know what is missing ignores the obvious – namely, that you have the ability to (i) identify any gaps in plaintiffs' production by conducting simple searches, (ii) inquire about the process by which plaintiffs collected, reviewed and produced their documents, and (iii) determine whether there is a real – and not merely speculative – need for Google's documents. For these reasons, among others, we propose holding Defendants' final request in abeyance until such time as Defendants can articulate why they would not be duplicative of documents already produced. In the meantime, as you requested, we will provide the names of the key custodians likely to have communicated with plaintiffs regarding license agreements, to the extent that – as you suggested – it facilitates identifying gaps in plaintiffs' production.

With respect to internal Google communications, as we explained, your request is not reasonable. As we discussed, internal communications of a non-party have no bearing on the damages issues in your case; the burden of reviewing these documents is substantial; and we believe that many of the internal communications will be privileged, given the involvement of YouTube's in-house counsel. Moreover, we understand that even the plaintiffs have not been ordered to produce their own internal communications. In fact, as we understand it, before the Court will even consider such an order, Defendants have to make a showing that, based on external communications produced by plaintiffs, their internal communications are likely to be relevant. We cannot understand why a non-party, such as Google, should be compelled to produce documents that even the plaintiffs are not required to produce.

Especially in light of our agreement to produce the payment information, I hope that you will reconsider our request regarding the custodial data. I am available at your convenience to discuss.

Thanks,

Matt

Matthew D. Ingber
Mayer Brown LLP
1675 Broadway
New York, New York 10019
Tel: (212) 506-2373
Fax: (212) 262-1910
mingber@mayerbrown.com

EXHIBIT 3

## Jonathan Gottlieb

**From:** Kozusko, Dan [dkozusko@willkie.com]
**Sent:** Thursday, December 16, 2010 7:07 AM
**To:** Jonathan Gottlieb
**Cc:** Michael S. Blanton; Eaton, Mary; Daniel Cooper; Christy, Ian
**Subject:** RE: Arista Records LLC v. Lime Group LLC

I am available for a telephone conference at 10 a.m. Pacific time on Friday, December 17. We can use my dial-in number, below. I will provide you today with copies of the briefing before Judge Freeman on the Vevo motion to compel. Yes, it is acceptable for My Space to provide its portion of the Joint Stipulation on December 23, in the event that we cannot resolve our disagreements during tomorrow's call -- this was part of my proposal to you of last night. As for the various legal arguments and assertions of fact advanced in your email, we do not agree with them and likewise reserve all of our clients' rights in that regard.

Domestic Dial-in Number: (866) 854-6779

International Dial-In Number: (334) 323-2981

Meeting Number: *2127288694*

**Dan C. Kozusko**
**Willkie Farr & Gallagher LLP**
**787 Seventh Avenue**
**New York, New York 10019**
**(212) 728-8694 (phone)**
**(212) 728-9694 (fax)**
**dkozusko@willkie.com**

-----Original Message-----
**From:** Jonathan Gottlieb [mailto:Jonathan.Gottlieb@fox.com]
**Sent:** Thursday, December 16, 2010 1:39 AM
**To:** Kozusko, Dan
**Cc:** Michael S. Blanton; Eaton, Mary; Daniel Cooper; Christy, Ian
**Subject:** RE: Arista Records LLC v. Lime Group LLC

Mr. Kozusko:

Let me begin by saying that Dan Cooper and I can make ourselves available to discuss your proposal to narrow Lime Group's document requests at 10 a.m. Pacific on Friday.

The proposal you advance below, however, is not acceptable. If you choose to proceed with your Joint Stipulation, we reserve all rights and arguments, including the right to object on the basis of your willful violation of the Local Rules and to seek sanctions. As previously explained, the Rules contemplate the proponent of discovery provide a letter setting out its position, followed by up to a 10-day period to evaluate that position and attempt to negotiate a resolution, followed by a 7-day period to respond to a joint stipulation addressing matters the parties were unable to resolve. Your proposal offers only (at most) a 9-day period, commenced by the forwarding of a joint stipulation, within which you propose that MySpace attempt to work out resolution of disputed issues and simultaneously prepare a response to your joint stipulation in the event the parties are unable to reach agreement. This is no "interpretation;" it is simply the plain language of the Rules. Even between parties to a lawsuit, your proposal would be inconsistent with those Rules and unacceptable. With regard to a third party, it is unduly prejudicial to our ability to respond and well outside the bounds of fair play . *See generally* Local Rule 37-1 – 4; *see also* Fed. R. Civ. P. 45(c) ("A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.").

Furthermore, your proposal does not work procedurally. If the parties are able to come to agreement regarding certain categories or sub-categories of documents, various assertions in your Joint Stipulation will be false. (As I

previously advised you, statements in your Joint Stipulation – notably, that MySpace has "refused to produce any documents" are already demonstrably false based on the record here.) If you choose to proceed with your joint stipulation, you will therefore be filing a knowingly false pleading with the Court. *See* Fed. R. Civ. P. 11. If you modify your joint stipulation prior to filing, MySpace reserves its right under Local Rule 37-2.2 to take adequate time to modify its response appropriately.

In that same vein, in reviewing your Joint Stipulation this evening, it is apparent that you may not be correctly representing the nature of the Magistrate Judge Freeman's order regarding Vevo. As previously pointed out, it appears on the face of the order that Magistrate Judge Freeman adopted Vevo's proposed compromise over your client's objection. It does not appear that Magistrate Judge Freeman made any determination regarding any contested issue of relevance. As you have relied on this order to establish your entitlement to documents from MySpace, we request that you produce to us immediately all briefing (including letter briefs) underlying this Order so that we can fairly evaluate the import of the Order, if any, on this proceeding. We also note that there appear to be other distortions of the record in your Joint Stipulation, which we intend to point out to the Court if you proceed.

In short, we believe that it is improper for the Lime Group to proceed with its Joint Stipulation at this time.

Since you have shown that allowing us to respond on December 23 to the joint stipulation will effect no prejudice to your client, we assume it is acceptable to you that we provide our portion of the joint stipulation on that date if the parties are unable to work out a resolution and if, notwithstanding these objections, you choose to proceed. Such an extension seems only appropriate in light of our (presumably) scheduled conference on Friday.

Please confirm at your earliest convenience that you are available at 10 a.m. Pacific on Friday for a conference of counsel.

**From:** Kozusko, Dan [mailto:dkozusko@willkie.com]
**Sent:** Wednesday, December 15, 2010 4:13 PM
**To:** Jonathan Gottlieb
**Cc:** Michael S. Blanton; Eaton, Mary; Daniel Cooper; Christy, Ian
**Subject:** RE: Arista Records LLC v. Lime Group LLC

Mr. Gottlieb:

We disagree with your interpretation of Local Rule 37 and your characterization of our good-faith negotiations regarding the subpoena to My Space. As you will recall, we have had a number of communications regarding My Space's objections to the subpoena, including on October 17, 21, 22, 27, and 25, November 2, and December 10.

Nor do we agree with your insistence that continuing with those negotiations, on the one hand, and moving forward with Defendants' motion to compel, on the other hand, represent mutually exclusive courses of action. Defendants remain willing to proceed with the current motion to compel timetable (in which My Space must deliver its portion of the Joint Stipulation to Defendants' counsel by December 21, 2010), while continuing our negotiations in the hope that we will be able to reach a mutually acceptable resolution, in which case, Defendants would, depending on the date of any such agreement, either withdraw that motion or not file it at all.

Nevertheless, in an effort to resolve the objections set forth in your e-mail below, Defendants are willing to agree to the following: Defendants will deem the Joint Stipulation that we sent you yesterday to be the letter required by Local Rule 37.1, if you will agree to conduct another telephonic meet-and-confer with our office by the end of this week. To make that conference productive, My Space should be prepared to provide responses to the proposals made in my December 10 e-mail to you. If that conference does not resolve our differences, My Space will deliver its portion of the Joint Stipulation we sent you yesterday by close of business on December 23, 2010. We think this timetable is eminently reasonable, especially given that the Subpoena has been pending for months. Please let us know promptly if this proposal is acceptable to your client.

**Dan C. Kozusko**
**Willkie Farr & Gallagher LLP**
**787 Seventh Avenue**
**New York, New York 10019**
**(212) 728-8694 (phone)**

**(212) 728-9694 (fax)**
**dkozusko@willkie.com**

-----Original Message-----
**From:** Jonathan Gottlieb [mailto:Jonathan.Gottlieb@fox.com]
**Sent:** Tuesday, December 14, 2010 8:21 PM
**To:** Christy, Ian
**Cc:** Michael S. Blanton; Kozusko, Dan; Eaton, Mary; Daniel Cooper
**Subject:** RE: Arista Records LLC v. Lime Group LLC

Counsel,

I trust you are familiar with Local Rule 37.1, which requires an adequate conference of counsel prior to filing any discovery motion. That Rule requires a "good faith effort to eliminate the necessity for hearing the motion or to eliminate as many of the disputes as possible." It prescribes that the potential moving party must send a letter to the opposing party "identify[ing] each issue and/or discovery request in dispute . . . stat[ing] briefly with respect to each such issue/request the moving party's position (and provid[ing] any legal authority which the moving party believes is dispositive of the dispute as to that issue/request), and specify[ing] the terms of the discovery order to be sought." The conference of the parties should take place within 10 days of the moving party's request for such conference, as made in the letter.

You have not satisfied any of these requirements. In my last correspondence with Mr. Kozusko on November 2, 2010, I suggested that we "wait until the [Southern District of New York] Court issues an order for any further discussion" regarding the pending discovery, as any such order might shape or moot our discussions. I further offered that, if Mr. Kozusko preferred to discuss immediately on that date, we could schedule a time. Apparently Mr. Kozusko took me up on the former suggestion, as I did not hear further until December 10 – about two business days ago.

On December 10 (last Friday), Mr, Kozusko e-mailed me a copy of Magistrate Judge Freeman's order, in which Magistrate Judge Freeman entered an order ratifying the compromise proposed by third-party respondent Vevo. I cannot discern anything in that order that provides guidance on issues that might be contested between LimeWire and MySpace. That Vevo may have chosen to propose a compromise, which the Court apparently adopted over LimeWire's objection, sheds no light on the relevance of or burden associated with the documents sought from MySpace.

In any event, in the less-than-two business days since Mr. Kozusko recommenced discussions, no effort was made to address the threshold concerns that MySpace has raised in response to the subpoena. It appears that the Southern District of New York ordered Plaintiffs to produce agreements and certain correspondence with 15 key licensees designated by LimeWire (presumably including MySpace). It is entirely unclear to me what relevant information LimeWire believes it might obtain from MySpace that it has not already obtained from the Plaintiffs – the counterparties to the agreements, financial information, and correspondence requested. Nor is it clear to me why you believe that the relevance of obtaining this information outweighs the burden you seek to impose on non-party MySpace of retrieving it.

It is possible that you have answers to these questions. It is possible that you have some authority to support your position. But because you failed to comply with Local Rule 37.1, I do not know what those answers, if any, might be; nor do I know whether there is any authority to support your undisclosed theory. Without this explanation, I cannot assess your position or, assuming that production is warranted, explain to my internal business colleagues why MySpace should undertake the burden to produce documents that seemingly have already been produced by others.

As I have said before, MySpace is (and always has been) willing to participate in a good faith meet-and-confer conversation to address these issues and MySpace's other objections. As you know, the assertions in your proposed Joint Stipulation that MySpace has "refused to produce any documents" are therefore flat wrong. Assuming you have a reasonable basis for seeking documents from MySpace, we are hopeful that a resolution acceptable to both parties can be reached.

The Local Rules require that the meet-and-confer process precede a Motion. *See, e.g.,* Local Rule 37-2.2 ("Following the conference of counsel, counsel for the moving party shall personally deliver, e-mail or fax to counsel for the opposing party the moving party's portion of the stipulation . . . .") (emphasis

added). They do not contemplate that the parties participate in such a conference at the same time we would otherwise be preparing an opposition to your Motion to Compel. We decline to do so.

If you choose to proceed with your Joint Stipulation, we will oppose on the ground that you have not met-and-conferred under Rule 37.1, and we will seek sanctions under Rule 37.4. Alternatively, we stand ready to schedule a conference of counsel at the earliest mutual convenience.

Please advise how you would like to proceed.

**From:** Christy, Ian [mailto:IChristy@willkie.com]
**Sent:** Tuesday, December 14, 2010 1:35 PM
**To:** Jonathan Gottlieb
**Cc:** Michael S. Blanton; Kozusko, Dan; Eaton, Mary
**Subject:** Arista Records LLC v. Lime Group LLC

Dear Mr. Gottlieb:

Please see the attached, which is being sent pursuant to Central District Local Rule 37.2.

Very truly yours,

Ian M. Christy
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212-728-9659 (Fax)
ichristy@willkie.com

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