Arista Records LLC et al v. Lime Wire LLC et al Doc. 475 Att. 7

EXHIBIT 13

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ARISTA RECORDS LLC, et al., Plaintiffs, v. LIME GROUP LLC, et al., Defendants.	CASE NO. 2:10-CV-02074-MJP ORDER ON MOTION TO COMPEL

This matter comes before the Court on Defendants' motion to compel. (Dkt. No. 1.) Having reviewed the motion, the response (Dkt. No. 5), the reply (Dkt. No. 8), the supplemental declaration of Paul W. Horan (Dkt. No. 9) and all related papers, the Court DENIES Defendants' motion.

Background

Defendants Lime Group LLC, Lime Wire LLC, Mark Gorton, and M.J.G. Lime Wire Family Limited Partnership (collectively, "Defendants") are engaged in a case (No. 06-cv-5936 (KMW)) pending in the Southern District of New York. (Decl. of Paul W. Horan (Dkt No. 1-2) at ¶ 3.) In that case, the amount of damages Defendants owe Plaintiffs (thirteen record labels)

for copyright infringement is at issue. (Id. at ¶ 3.) Defendants served a subpoena on non-party Amazon.com, Inc. ("Amazon") on September 24, 2010, in connection to that case. (Id. at ¶ 5.) Defendants contend the subpoenaed records are relevant to evaluating Plaintiffs' lost profits—and thus damages owed by Defendants—in the Southern District of New York case.

On October 22, 2010, Amazon objected on grounds that the documents requested were obtainable from Plaintiffs directly, and that the requests were overbroad, burdensome, and irrelevant. (Id. at ¶ 9.) Amazon contends that seeking responsive documents from its more than 1,000 employees, and producing sales figures for more than 11,000 songs, would entail significant expense. (Decl. of Andrew DeVore (Dkt. No.4) at ¶ 6–10.) Amazon had raised similar objections in 2007, when Defendants previously subpoenaed them in connection to the same case. (Id. at ¶ 8.) Though Defendants had not sought to enforce the 2007 subpoena, on December 16, 2010, they filed this motion to compel. (Dkt. No. 1.) The court in the underlying action ordered VEVO, LLC ("VEVO"), a non-party, to comply with a subpoena similar to the one at issue.

Analysis

The Federal Rules of Civil Procedure require this Court to limit discovery it determines is "unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive," or when "the burden or expense of the proposed discovery outweighs its likely benefits." Fed. R. Civ. P. 26(b)(2)(C)(i), (iii). Restrictions may be broader when discovery burdens a non-party. See Dart Indus. Co. v. Westwood Chemical Co., 649 F.2d 646, 649 (9th Cir. 1980). A party should not be permitted to seek information from a non-party that they can obtain or have obtained from the opposing party, and that is not relevant to the underlying case. Instituform Technologies, Inc. v. Cat.

Contracting, Inc., 914 F. Supp. 286, 287 (N.D. Ill. 1996). Because the documents requested from Amazon can better be obtained from Plaintiffs or have little relevance to the Southern District of New York case, Defendants' need to enforce the subpoena is outweighed by the burden to Amazon.

A. Necessity of Obtaining Documents from Amazon

Defendants seek documents including (1) licenses and agreements between Amazon and Plaintiffs, (2) communications regarding those documents, and (3) documents regarding payment by Amazon to Plaintiffs pursuant to those licenses. Defendants argue that licensing agreements and communications between Amazon and Plaintiffs will be probative of lost revenue, and that Amazon internal communications will be probative of Plaintiffs' conduct and attitude. "Lost revenues" and "the conduct and attitude of the parties" will be two factors used in determining Plaintiffs' damages in the Southern District of New York case. Bryant v. Media Rights Prods., Inc., 603 F.2d 135, 144 (2d Cir. 2010) (citing N.A.S. Import, Corp. v. Chenson Enter., Inc., 968 F.2d 250, 250–53 (2d Cir. 1992)).

1. Agreements and communications between Amazon and Plaintiffs

Documents requested from Amazon are obtainable from Plaintiffs. When an opposing party and non-party both possess documents, the documents should be sought from the party to the case. Nidec Corp. v. Victor Co. of Japan, 249 F.R.D. 575, 577 (N.D. Cal. 2007) ("There is simply no reason to burden nonparties when the documents sought are in possession of the party defendant."); Moon v. SCP Pool Corp., 232 F.R.D. 633, 637–38 (C.D. Cal. 2005). (documents pertaining to defendant could more easily and inexpensively be obtained from defendant than non-party).

Here, documents requested from Amazon regarding agreements or communications with Plaintiffs are also obtainable from Plaintiffs directly. See Instituform Techs. at 287 (information about license between party and non-party equally obtainable from party). Indeed, Plaintiffs have already provided or been ordered to provide to Defendants much of the information requested from Amazon. (Powers Decl. at ¶ 6.) Defendants rely on In re Honeywell Int'l, Inc. Sec. Litig., 230 F.R.D. 293, 301 (S.D.N.Y. 2003) and the November 3 VEVO order in this case to argue that non-parties may be subpoenaed for documents obtainable from parties. Both are distinguishable. The subpoenaed non-party in the Honeywell was defendant's financial auditor during portions of that case's class period. 230 F.R.D. at 296. VEVO, though a non-party, is a joint venture of two Plaintiffs, and actually volunteered to produce documents. (Ex. 2 to Decl. of Vanessa Powers (Dkt. No. 6).)Thus, both those non-parties possessed greater ties to the litigants than does Amazon to these litigants. Because information contained in the licensing agreements and associated communications are available from Plaintiffs directly, the requests to Amazon are duplicative.

2. Amazon internal documents

Requested internal Amazon documents have little relevance to the underlying case. Defendant argues that the Southern District of New York court determined internal non-party communications are probative of parties conduct and attitude, relying on the VEVO order. But, again, because VEVO is a joint venture between Plaintiffs, it cannot be wholly deemed a non-party. The probative value of VEVO's internal communications to Plaintiffs' attitude and conduct is much greater than that of Amazon's. Accordingly, requests for Amazon's internal communications are not relevant to the case.

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B. Undue Burden on Amazon

"An evaluation of undue burden requires the court to weigh the burden to the subpoenaed party against the value of the information to the serving party." Moon at 637 (quoting Travellers Indem. Co. v. Metropolitan Life Ins. Co., 228 F.R.D. 111, 113 (D.Conn. 2005)). The need of the serving party, breadth of the request, and the time period covered by it, are also factors. See Bridgeport Music, Inc. v. UMG Recordings, Inc., No. 05 Civ. 6430, 2007 WL 4410405, at *2 (S.D.N.Y. Dec. 17, 2007). In Bridgeport, the court held a subpoena which might require going through "hundreds" of files generated over two years not unduly burdensome. Bridgeport at *2, 4. The court distinguished the subpoena from that considered in Concord Boat Corp. v. Brunswick Corp., 169 F.R.D. 44 (S.D.N.Y. 1996). Bridgeport at *2. The subpoena in Concord Boat Corp. "effectively encompass[ed] documents relating to every transaction undertaken by [the party subject to the subpoena] for [the defendant] during the last ten years." Bridgeport at *2 (quoting Concord Boat Corp. at 50).

Here, the subpoena among other things requests daily sales information for 11,000 individual songs over a five year period, and essentially all documents or communications concerning dealings between Amazon and the thirteen Plaintiffs. The burden is similar to the burden imposed by the broad subpoena in Concord Boat Corp.. Balanced against this burden, Defendants' need for duplicative or irrelevant documents from Amazon weighs very little. Because the hardship to Amazon in producing the requested documents outweighs their benefit to Defendants, the subpoena is unduly burdensome.

Conclusion

The Court DENIES Defendants' motion to compel. The Court is not bound by Magistrate Judge Freeman's January 31, 2011 Order relating to the obligations of others to

produce documents relating to their licenses. Defendants should seek relevant documents from Plaintiffs before burdening non-party Amazon. Because documents related to Amazon's internal communications are irrelevant, the significant burden placed on Amazon in complying with Defendants' subpoena outweighs the value of the documents to Defendants. Defendants' motion to compel is hereby DENIED.

The clerk is ordered to provide copies of this order to all counsel.

Dated this 9th day of February, 2011.

Marsha J. Pechman
United States District Judge

EXHIBIT 14

MAYER·BROWN

Mayer Brown LLP
1675 Broadway
New York, New York 10019-5820

Main Tel +1 212 506 2500
Main Fax +1 212 262 1910
www.mayerbrown.com

Matthew D. Ingber
Direct Tel +1 212 506 2373
Direct Fax +1 212 849 5973
mingber@mayerbrown.com

January 21, 2011

VIA HAND DELIVERY

The Honorable Debra C. Freeman
United States Magistrate Judge
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007-1312

Re: *Arista Records LLC, et al. v. Lime Wire LLC, et al.*,
No. 06 CV 5936 (KMW) (DCF)

Dear Judge Freeman:

On behalf of non-party Google Inc. ("Google"), we respectfully submit this response to Defendants' January 14, 2011 letter. Although we disagree with the entirety of Defendants' letter, we are compelled to respond specifically to the following points:

First, Defendants claim that Google is asking for the impossible – namely, for Defendants to identify gaps in Plaintiffs' production where the reality of retention and retrieval processes makes it "unlikely" that productions will be coextensive. This is far from impossible. Defendants can start by *asking* Plaintiffs what their retention and retrieval processes are. They can seek to understand where any gaps might be based on flaws in those processes. They can demand that Plaintiffs identify the parties with whom they communicated about licensing (a basic Rule 26 requirement) and seek communications specifically with those parties. And, most of all, if Defendants want to avoid gaps in productions, they can ask Plaintiffs for documents from the entire date range in which relevant communications took place. Of all the misguided arguments in Defendants' letter, the notion that Google needs to produce documents because Defendants' request to Google covers a *broader* date range than their request to Plaintiffs, is easily the most baffling. Plaintiffs "never looked for" these documents because they were never asked to look, and Google should not now be subject to burdensome discovery because "there is no time left" as a result of Defendants' own strategic decision not to request those documents from the actual parties to the litigation.

Second, Defendants' argument that there must be gaps in Plaintiffs' production of Google communications, based on a separate VEVO production and MySpace's comments about its own burden of production, is completely speculative. Defendants assume Plaintiffs' production of Google documents might be deficient because VEVO produced 2,500 communications and Plaintiffs only 1,000. Defendants ignore that Plaintiffs' and VEVO's productions involved mismatched custodians (and likely different search terms), because Plaintiffs "unilaterally selected" the custodians and Defendants had no input in the process. But that is an issue

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and Hong Kong partnership (and its associated entities in Asia) and is associated with Tauil & Chequer Advogados, a Brazilian law partnership.

Defendants need to address with Plaintiffs, and not through non-party subpoenas.[1] *See Visto Corp. v. Smartner Information Systems, Ltd.*, No. 06-80339 MISC RMW (RS), 06-80352 MISC RMW (RS), 2007 WL 218771, at *3 (N.D. Cal. Jan. 29, 2007) (observing, where defendant sought production from third party as a "check" on plaintiff's production, that to the extent any questions remained as to the completeness of plaintiff's production, defendant could file a motion to compel against plaintiff); *Nidec Corp. v. Victor Co. of Japan*, 249 F.R.D. 575, 577 (N.D. Cal. 2007) ("There is simply no reason to burden nonparties when the documents sought are in possession of the party defendant.").

Defendants also speculate that Plaintiffs' production of Google communications must be deficient because Plaintiffs' production of MySpace communications might be incomplete. But that is based exclusively on statements by MySpace's counsel relating only to the *initial phase* of the collection process, and not the actual production. In short, Defendants' argument is baseless and the cases they rely upon are inapposite. *Cf. Viacom International, Inc. v. YouTube, Inc.*, No. C 08-80129 SI, 2008 WL 3876142, at *3 (N.D. Cal. Aug. 18, 2008) (citing defendant's poor initial record keeping); *Software Rights Archive, LLC v. Google Inc.*, C.A. Nos. 2:07-CV-511 (CE), CV08-03172RMW, 2009 WL 1438249, at *2-3 (D. Del. May 21, 2009) (requiring production by a third party that was related to the plaintiff and had an interest in the underlying litigation).

Most of all, Defendants' arguments about possible gaps in Plaintiffs' production of Google documents should be rejected because Defendants say nothing about Plaintiffs' production of *Google* documents. They never suggest that Plaintiffs refused to produce communications with Google. They never identify a shortage of communications between Plaintiffs and Google. And they never complain that the custodians "unilaterally selected" by Plaintiffs were not involved in communications with Google.

Third, Defendants completely miss the point that even if disparities might exist between the productions, the marginal relevance of Google's production does not justify the cost and burden of that production. Defendants continue to insist that the Court has already ruled on these issues, but that is false. Your Honor never weighed the relevance of VEVO's communications against the burden on VEVO of producing those communications (the Court instead adopted VEVO's own proposal). Judge Wood, in ordering *Plaintiffs* to produce external communications, noted the "potentially tenuous" relevance of external communications. And no Court has ruled that *internal* communications are relevant. In fact, they are not. *See Visto Corp.*, 2007 WL 218771, at *4 (denying motion to compel a third party venture capital firm's internal documents because documents reflected firm's own opinions and analysis about the financial data relevant to reasonable royalty damages). Matched against the obvious burden of collecting, reviewing and producing communications since 2005 between Google and 13

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[1] According to Defendants, that is one purpose of Defendants' motion to compel against Plaintiffs, which is currently pending before the Court. That is the proper means of curing discovery deficiencies; using non-party discovery to police parties' discovery obligations is not.

different plaintiffs – even if Defendants agreed to limit the number of custodians – the marginal relevance of the documents cannot justify the burden.[2] *See Fears v. Wilhelmina Model Agency, Inc.*, No. 02 Civ. 4911, 2004 U.S. Dist. LEXIS 5575, at *2 (S.D.N.Y. April 1, 2004) ("[T]he Court should be particularly sensitive to weighing the probative value of the information sought against the burden of production on [a] nonparty.")

Finally, there is nothing "offensive" about Google's requests for costs, and Defendants' arguments about the propriety of cost-shifting seem entirely made up. Cost-shifting is mandatory under these circumstances (*see In re Law Firms of McCourts and McGrigor Donald,* No. M. 19-96 (JSM), 2001 WL 345233, at *1 (S.D.N.Y. April 9, 2001); *Linder v. Calero-Portocarrero,* 251 F.3d 178, 182-183 (D.C. Cir. 2001)).

For these reasons, and those discussed in our January 6 letter, we respectfully request that the Court deny Defendants' motion to compel or, in the alternative, that the Court order Defendants to bear the costs of any production.

Respectfully submitted,

Matthew D. Ingber

cc: Mary Eaton, Esq. (via email)

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[2] Defendants argue that Google should be put to the task of collecting the documents, applying search terms, and determining the number of "hits" before assessing the burden of production. This cannot be correct. A significant part of the burden and cost is in collecting, processing and searching Google's emails over a several-year period. That burden should not be imposed on a non-party where the documents are equally available from a party to the litigation, and their relevance is minimal, at best.

EXHIBIT 15

Jonathan Gottlieb (SB# 194432)
Jonathan.Gottlieb@fox.com
FOX GROUP LEGAL
P.O. Box 900
Beverly Hills, CA 90213-0900
Telephone: (310) 369-3271
Facsimile: (310) 969-0144

Attorneys for Non-Party Respondent MySpace, Inc.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

Arista Records LLC; Atlantic Recording Corporation; BMG Music; Capitol Records, Inc.; Elektra Entertainment Group Inc.; Interscope Records; Laface Records LLC; Motown Record Company, L.P.; Priority Records LLC; Sony BMG Music Entertainment; UMG Recordings, Inc.; Virgin Records America, Inc.; and Warner Bros. Records Inc.,

Plaintiff,

v.

Lime Wire LLC; Lime Group LLC; Mark Gorton; and M.J.G. Lime Wire Family Limited Partnership,

Defendants.

CASE NO.: 10-9438 GW (PJW)
Honorable Patrick J. Walsh

DECLARATION OF JONATHAN GOTTLIEB IN SUPPORT OF NON-PARTY MYSPACE, INC.'S CONTENTIONS IN JOINT STIPULATION OPPOSING ENFORCEMENT OF SUBPOENA

(United States District Court For the Southern District Of New York, Civil Action No.: 06 CV 5936 (KMW), Honorable Kimba M. Wood, U.S.D.J.)

I, Jonathan Gottlieb, declare as follows:

1. I am a member of the bar of the State of California and of this Court. I serve as Senior Vice President, Litigation, of Fox Group Legal. My duties in that role include handling litigation for MySpace, Inc., including responses to certain subpoenas.

2. Except where specifically stated otherwise, I have personal knowledge of the facts set forth below. I submit this Declaration in support of Non-Party MySpace, Inc.'s ("My Space's") Contentions in the Joint Stipulation Opposing Enforcement of the Subpoena served on it by Defendants Lime Group et al. ("Defendants").

3. I first became aware that Defendants sought discovery from MySpace on or around September 23, 2010, when Defendants' 462 page subpoena was sent to me. That subpoena (the "Subpoena"), attached to the Declaration of Dan Kozusko as Exhibit 1, purported to call for extremely broad production of documents, plus a personal appearance of a witness, on less than ten days' notice.

4. On October 1, 2010, I sent a letter to Defendants' counsel, noting the impropriety of their subpoena in terms of its breadth and scope, and stating objections. Those objections are included as Exhibit 2 to the Kozusko Declaration. MySpace advised in that letter that "many of the documents sought by your subpoena are equally within the possession, custody, and control of one of

the parties to the lawsuit" and that if Defendants proceeded to attempt to enforce their subpoena, MySpace would seek recovery of its costs and attorneys' fees.

5. Although I cannot recall the precise date, sometime after I served the objections, I spoke with Mary Eaton, counsel for Defendants. I advised Ms. Eaton that MySpace could not be treated as a "back door" to discovery that could equally be obtained by party discovery, and that we viewed their subpoena as unreasonably broad. I advised her that if there were reasonably specific and non-duplicative documents they were seeking from MySpace, we would be willing to discuss production.

6. I did not hear further from Defendants until October 17, when I received an e-mail from Dan Kozusko. A copy of that e-mail is attached as Exhibit 4 to the Kozusko declaration, Mr. Kozusko and I spoke on October 22, 2010. During that conversation, I requested that he summarize the documents that Defendants sought from MySpace so that I could determine whether they sought anything discoverable and non-cumulative. Mr. Kosuzsko's e-mail outlining those categories is included as Exhibit 6 to the Kozusko Declaration. Mr. Kozusko did not include any reference to documents mentioning "Lime Wire" – i.e., documents that would be responsive to Document Request 6. In that conversation, I asked Mr. Kozusko to explain the relevance of MySpace producing documents that were equally obtainable from their adversary in the litigation. I do not recall whether he

had any response to my question regarding relevance, but he asserted that nothing precluded Defendants from seeking duplicative discovery from MySpace.

7. On November 2, 2010, I responded to Mr. Kosuzko's e-mail, having learned that Plaintiffs had produced certain categories of documents requested by Defendants from MySpace and were contesting the discoverability of others. That e-mail is attached to the Kozusko Declaration as Exhibit 8. I advised Mr. Kozusko that I saw no need to re-produce identical copies of the documents they had already received, and if the Court ruled other categories non-discoverable, such documents would be equally non-discoverable from third parties. I suggested that our conversations might be more productive after the Southern District offered more guidance but offered to speak with Mr. Kozusko immediately if he preferred not to wait.

8. I did not hear further from Mr. Kozusko until more than a month later, on the afternoon of Friday, December 10, when he forwarded me an order that Magistrate Judge Freeman entered almost two weeks earlier. In that same e-mail, Mr. Kosuzko for the first time proposed a slight narrowing of the production of documents demanded under the Subpoena. With regard to "communications," Mr. Kosuzko proposed "running search terms on the relevant custodians to find potentially responsive documents," although he still did not offer any theory of what documents would be relevant and did not propose any search terms. Mr. Kosuzko's e-mail is attached to his declaration as Exhibit 12.

9. Less than two business days later, on Tuesday December 14, I received an out-of-the-blue e-mail from Ian Christy, who is apparently a colleague of Mr. Kozusko's at Willkie Farr in New York. Mr. Christy's e-mail attached Defendants' portion of a Joint Stipulation and purported to trigger the process to file a motion to compel under Local Rule 37-2. I responded later that evening, advising Mr. Kosuzko and his colleague that they had not complied with the prerequisites to forwarding a Joint Stipulation. Although Mr. Kozusko purported to disagree, he asserted that "Defendants [would] deem, the Joint Stipulation [sent on December 14] to be the letter required by Local Rule 37[-]1." I did not agree with this proposal and reserved all objections, but arranged to speak with Mr. Kozusko on December 17. The complete e-mail thread of this correspondence leading up to our December 17 conference is attached to the Kozusko declaration as Exhibit 20.

10. In that telephone conference on December 17, 2010, Mr. Kozusko and I, along with a colleague of mine from MySpace, were able to reach agreement with regard to the first and third categories set out in Mr. Kozusko's October 22, 2010 e-mail. Even though the documents requested were duplicative, because we could assemble them with only hours (as opposed to hundreds of hours) of effort, we agreed to provide an index of contracts with Plaintiffs and certain financials that we understood Plaintiffs had already been ordered to produce. With regard to "communications," however, Mr. Kozusko was in my

view unable to articulate a theory of relevance that would justify MySpace undertaking any burden, much less the substantial burden required to image, search, and review the documents of potentially dozens of custodians. It became clear to me during that conversation that Defendants were hoping to find a document somehow helpful to their defense, as opposed to having a specific idea of the content of documents that existed (which might make search terms useful to finding such a document). I explained the process of searching electronic document to Mr. Kozusko and advised him that we believed the discovery sought was not relevant and was cumulative and unduly burdensome. In that conversation, I also advised him that I found it to be misleading that he continued to cite to Magistrate Judge Freeman's order for the proposition that communications were "relevant," without citing to Judge Wood's order on appeal, in which she found the relevance "potentially tenuous." Mr. Kozusko stated he was aware of Judge Wood's order and said, in effect, "it is what it is." I also advised him that his treatment of Magistrate Judge Freeman's order regarding Vevo was misleading insofar as it failed to acknowledge that the Order merely ratified a compromise proposed by Vevo over his client's objection. I cautioned him not to proceed with a Joint Stipulation on these grounds and with those misrepresentations, but he reserved the right to do so.

11. On December 20, 2010, MySpace produced the index it agreed to produce to satisfy Plaintiff's requests under the first category of documents

specified in Mr. Kozusko's October 22, 2010 e-mail. A true and correct cover letter to that production, without its enclosures, is attached as Exhibit 23.

12. On December 23, 2010, MySpace produced a DVD containing the financial documents it agreed to produce, satisfying Plaintiff's requests under the third category of documents specified in Mr. Kozusko's October 22, 2010 e-mail. A true and correct cover letter to that production, without its enclosures, is attached as Exhibit 24.

13. I was not aware that Defendants sought to serve me with their portions of a Joint Stipulation until December 28, 2010. Defendants apparently sent a revised joint stipulation by e-mail on December 20, but it was not received because of the large size of the e-mail's attachments. I did not receive all portions of Defendants' portion of the current Joint Stipulation until December 29, 2010. Mr. Kozusko and I were able to negotiate a mutually acceptable schedule.

14. In the course of preparing my opposition to this Joint Stipulation, I learned that Defendants have filed Motions to Compel against various third-party recipients in multiple jurisdictions around the country. I have spoken with counsel for Amazon, Yahoo!, Google, and MediaDefender, all of whom are currently litigating or who have litigated the same issues against Defendants. None of these third-party companies voluntarily agreed to undertake the burden to search for "communications" in response to Defendants' subpoenas.

15. My research also revealed an order entered by this Court on December 22, 2010, denying Defendants' motion to compel against MediaDefender. A true and correct copy of that order is attached as Exhibit 24.

16. As part of my defense of MySpace in litigation, I am generally familiar with its business and business practices. MySpace Music, which was formed as a separate division in early 2008, currently has about 70 full-time employees. The best estimate provided is that 22-30 of those employees communicated with representatives of the major labels – i.e., a representative of one of the 13 Plaintiffs – on a weekly or more frequent basis, often several times a day. In addition, I am aware that many other employees and agents of MySpace, including those not technically within MySpace Music, from time-to-time assist on projects involving one or more of the major record companies.

17. As a litigator at Fox Group Legal, I am required to be familiar with the process for collection, processing, and review of electronic documents. That process requires, first, imaging and upload of the custodian's repositories of electronically stored information. Depending on the nature of those repositories and their size, capture may take anywhere from one to five hours per custodian of specialized personnel's time. Once the data are captured, they are typically uploaded and processed into searchable format. This process, again depending on size of the data, may take another one to two hours of specialized personnel's time, plus additional hours of computer processing time, during which the computers are

unavailable to perform other tasks. Once the data are loaded, it is possible to run search terms to cull down the data to documents that contain a term or terms. After search terms are run, manual review by an attorney or paralegal is necessary to determine whether the search terms "hit" responsive documents or whether they obtained false positives, as is common with general search terms. Manual review is also necessary to determine whether a document is protected by attorney-client privilege or other protections. Depending on the size of the data set, manual review of documents can take hundreds or thousands of work-hours.

18. In the course of my duties, I have frequently reviewed electronically captured documents, and I am familiar with the use of search terms and manual review resulting therefrom. Defendants' request for "communications" would have necessitated capture and review of dozens of custodians' electronically stored information. The capture, by itself, would have taken hundreds of hours and prevented the specialized technical personnel from performing their other essential duties, which includes assisting in the defense of cases brought against MySpace as a party. Even after uploading these data and running search terms, I or a paralegal would have to find time to manually review the search results, which could run into the hundreds of hours. The generic search terms that Plaintiffs propose – including words like "license," "contract," and "agreement," based on my experience, are likely to generate thousands, if not tens or hundreds of thousands, of "hits."

19. From the date that Defendants forwarded their Joint Stipulation, I began keeping contemporaneous records of my time, intending to seek to collect compensation in the event that Defendants proceeded with their Motion. I have spent well in excess of 25 hours corresponding with Defendants, speaking with their counsel on the phone, and researching and preparing this Opposition to the Joint Stipulation. This estimate does not include the time of any other individuals who assisted me in, for example, preparing production of documents that we produced to Defendants.

20. Prior to joining Fox Group Legal, I was an associate and Counsel at Akin Gump Strauss Hauer & Feld in Los Angeles in the litigation and law & strategy groups. I joined Akin Gump in Los Angeles following a clerkship for the Honorable Roger J. Miner of the United States Court of Appeals for the Second Circuit. I obtained my J.D. in 1997 from The George Washington University Law School with highest honors, where I served as Editor-in-Chief of the Law Review and as a member of the Moot Court Board. At the time I left Akin Gump in 2004, my standard billing rate was well in excess of $350 per hour.

21. As part of my job at Fox Group Legal, I hire outside counsel and review their bills. As a result, I am very familiar with the rate structure for law firms of all sizes in Los Angeles. At a major international law firm, the billing rates for attorneys with backgrounds, seniority, and skills similar to mine typically exceed $500 per hour. Based on my knowledge of the Los Angeles legal market, I

am confident that I could command at least $500 an hour for work on cases similar to the *Arista Records* matter. It is extremely likely that the rates for attorneys of comparable seniority at Willkie Farr, Defendants' law firm, are considerably higher than $500 an hour.

22. Using $500 an hour as an applicable rate, and estimating conservatively that I spent 25 total hours addressing Defendants' Joint Stipulation, MySpace requests recovery of no less than $12,500 as compensation and as a sanction for Defendants' misconduct.

I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge and belief.

January 6, 2011, in Los Angeles, California.

/s/ Jonathan Gottlieb

Jonathan Gottlieb

EXHIBIT 23

FOX GROUP
A UNIT OF NEWS CORPORATION

P.O. Box 900
Beverly Hills, California 90213-0900
Phone 310 369 3271 • Fax 310 969 0144
e-mail: jonathan.gottlieb@fox.com

Jonathan Gottlieb
Senior Vice President, Litigation
Fox Group Legal

VIA REGULAR MAIL

December 20, 2010

Dan Kozusko, Esq.
Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York, NY 10019

RE: Subpoena propounded on MySpace, Inc. in *Arista Records LLC et al. v. Lime Group, LLC*, No 06 CV 5936 (KMW) (SDNY)

Dear Mr. Kozusko:

Pursuant to the agreement we reached on Friday, December 17 with regard to the above-mentioned subpoena, please find enclosed an index of agreements between MySpace, on the one hand, and any Plaintiff, on the other. MySpace created this index based on a reasonably diligent search of agreements in its possession, custody or control. We understand that, by production of this Index, MySpace satisfies its responsibilities under the subpoena with regard to document requests calling for production of agreements (*i.e.* category #1 listed in your October 22, 2010 e-mail).

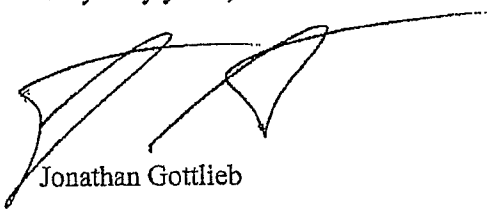
Also pursuant to our oral agreement on Friday, MySpace gave notice to the labels today that it intended to produce summaries showing total payments under agreements between MySpace Music and the Plaintiffs. MySpace requested that any Plaintiff who objected to this production notify me on or before 5:00 p.m. Pacific Time on Thursday, December 23. In the absence of an objection from one of the Plaintiffs, we intend to produce these documents to you on Friday, December 24. We understand that, by production of those summaries, MySpace satisfies its responsibilities under the subpoena with regard to document requests calling for financial information (*i.e.* category #3 listed in your October 22, 2010 e-mail).

MySpace produces all documents in this matter "Restricted Confidential--Outside Attorneys' Eyes Only."

We also discussed your request for communications between MySpace and any Plaintiff (*i.e.*, category #2 listed in your October 22, 2010 e-mail). We explained the burden associated with collecting, searching, and producing this material, which potentially involves "scores" of custodians over multiple years and is not amenable to reasonably narrowed search terms. We further discussed our view that forcing a third party to undertake this burden in light of the "tangential relevance" associated with these documents is not consistent with Rule 45. While we

were unable to reach agreement with regard to category #2 "communications" documents, we expect that the compromises we were able to reach are sufficient to avoid court intervention on this matter.

Very truly yours,



Jonathan Gottlieb

cc: Daniel Cooper

Enclosures: MySpace 1-5

EXHIBIT 24

FOX GROUP
A UNIT OF NEWS CORPORATION

P.O. Box 900
Beverly Hills, California 90213-0900
Phone 310 369 3271 • Fax 310 969 0144
e-mail: jonathan.gottlieb@fox.com

Jonathan Gottlieb
Senior Vice President, Litigation
Fox Group Legal

VIA REGULAR MAIL

December 23, 2010

Dan Kozusko, Esq.
Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York, NY 10019

RE: Subpoena propounded on MySpace, Inc. in *Arista Records LLC et al. v. Lime Group, LLC*, No 06 CV 5936 (KMW) (SDNY)

Dear Mr. Kozusko:

Pursuant to the oral agreement we reached on Friday, December 17, and further to my letter of December 20, please find enclosed a DVD including .tiff images of documents numbered MySpace 0006-0399. Those documents are summaries showing total payments under agreements between MySpace Music and the Plaintiffs. By production of these documents, MySpace has satisfied the obligations to which it agreed under the subpoena.

MySpace produces all documents in this matter "Restricted Confidential--Outside Attorneys' Eyes Only."

Very truly yours,

Jonathan Gottlieb

cc: Daniel Cooper (w/o enclosures)

Enclosures: DVD with MySpace 0006-0399

EXHIBIT 25

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 10-9438-GW (PJWx) Date December 22, 2010

Title *Arista Records LLC, et al., v. Lime Wire LLC, et al.*

Present: The Honorable	PATRICK J. WALSH, UNITED STATES MAGISTRATE JUDGE
Rose Petrossians	CS 12/22/10
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Non-Party:	Attorneys Present for Defendants:
Linda M. Burrow	Michael S. Blanton Dan Kozusko

Proceedings: Defendants' Petition to Enforce Subpoena to MediaDefender

After a hearing on Defendants' Petition to enforce a subpoena against non-party MediaDefender, the Court denied the Petition for the reasons set forth below.

Plaintiffs, record companies, sued Defendants, a peer-to-peer file sharing service, in the district court in New York, alleging that Defendants were responsible for infringing on their copyrights and inducing others to do the same. The district court agreed and issued a permanent injunction against Defendants. The only issue remaining for trial is the issue of damages.

Defendants have served a number of subpoenas on various non-parties, ostensibly seeking discovery of information relating to the issue of damages. These subpoenas are directed, almost exclusively, to non-party licensees and seek information about Plaintiffs' licensing of their copyrighted works. (See Exh. 10 to Kozusko Dec., Judge Wood's Nov. 19, 2010 Order at pp. 2, 7.) One of the non-parties Defendants subpoenaed was MediaDefender, Inc. MediaDefender provides anti-piracy software to Plaintiffs and others that is designed to prevent, or at least minimize, the infringement of copyrighted works. It does not license works. MediaDefender has resisted the subpoena on the grounds that the documents Defendants seek do not fall within the subpoena's request and, even if they did, they are not relevant to the damages issues. MediaDefender argues further that any documents that might be relevant are confidential and entitled to protection, which cannot be insured under the current protective order.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 10-9438-GW (PJWx) Date December 22, 2010

Title *Arista Records LLC, et al., v. Lime Wire LLC, et al.*

Defendants disagree. They contend that the documents they seek from MediaDefender fall within the subpoena requests and that MediaDefender's argument to the contrary has been waived since it did not raise the issue earlier. Defendants also argue that the documents they seek are relevant to show the conduct and attitude of Plaintiffs and the extent of the infringement, which are relevant in determining damages. Defendants argue further that these documents will show when Plaintiffs' works were first infringed, another important issue in the damages calculation. Defendants contend that the protective order now in place is sufficient to protect MediaDefender's proprietary information.

The Court sides with MediaDefender. It seems obvious to the Court that Defendants served the wrong non-party, or, at least, served the wrong subpoena on it. The subpoena is clearly directed at a licensee of Plaintiffs' music. MediaDefender does not license music. Thus, MediaDefender's argument that the documents they possess do not fall within the subpoena is persuasive. The fact that MediaDefender did not raise the issue earlier, when it was proceeding without counsel in negotiations with Defendants, is not controlling. Defendants, too, have failed to follow the letter of the law in connection with this subpoena. Among other things, they waited from November 4, 2010 to December 3, 2010 to respond to MediaDefender's challenges to the subpoena, creating an emergency which required the Court and MediaDefender to drop what they were doing to address this motion.

Further, even if the documents were responsive to the subpoena, the Court would still deny Defendants' motion to compel production because they are not the least bit relevant to the issue of damages. Plaintiffs' interaction with MediaDefender will not establish what Plaintiffs' attitudes were during the relevant period. Plaintiffs consist of a number of record companies who, presumably, work independently of each other through various employees at these companies. There is nothing in this record to suggest that these numerous companies and their numerous employees have an attitude that can be gleaned by reading their contracts with MediaDefender or deposing an employee of MediaDefender. Though the documents and deposition may provide insight into MediaDefender's attitude, MediaDefender is not a party to this action and its attitude is irrelevant.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 10-9438-GW (PJWx) Date December 22, 2010

Title *Arista Records LLC, et al., v. Lime Wire LLC, et al.*

Nor have Defendants convinced the Court that obtaining documents from MediaDefender will allow Defendants to establish the extent of the infringement or when the infringement began. As MediaDefender points out, the district court has already determined that 98.8% of the downloads by LimeWire users were for unauthorized files. And LimeWire knows when it started operating the software and, apparently, how many downloads took place, i.e., more than 3 billion each month as of 2005. (*See* Opp. at 3.) Thus, Defendants do not have to go far to understand the extent of the damages suffered by Plaintiffs. Obtaining documents from MediaDefender will not advance that process measurably and, as a non-party to this action, the Court is not inclined to require it to produce anything in these circumstances. For this reason, Defendants' Petition to compel production from MediaDefender and require an employee from MediaDefender to attend a deposition is denied.

: 30

Initials of Preparer rp

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 10-9438-GW (PJWx) Date December 22, 2010

Title *Arista Records LLC, et al., v. Lime Wire LLC, et al.*

S:\PJW\Cases-X\Arista\MO_enforce subpoena.wpd

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss:
CITY AND COUNTY OF LOS ANGELES)

I am employed in the City and County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is Roberts, Raspe & Blanton LLP, Union Bank Plaza, 445 South Figueroa Street, Suite 3200, Los Angeles, California 90071.

On January 7, 2011, I caused the foregoing document(s) to be served:

DECLARATION OF JONATHAN GOTTLIEB IN SUPPORT OF NON-PARTY MYSPACE, INC.'S CONTENTIONS IN JOINT STIPULATION OPPOSING ENFORCEMENT OF SUBPOENA

on the interested parties, by placing a true and correct copy thereof in a sealed envelope(s) addressed as follows:

Jonathan Gottlieb, Esq.
Fox Group Legal
2121 Avenue of the Starts, Suite 700
Los Angeles, California 90067

Attorneys for Non-Party Respondent MySpace, Inc.

[X] **VIA PERSONAL DELIVERY:**
At the address listed above.

Glenn D. Pomerantz
Munger, Tolles & Olson LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071

Attorneys for Plaintiffs Arista Records LLC; Atlantic Recording Corp.; BMG Music; Capitol Records, Inc.; Elektra Entertainment Group Inc.; Interscope Records; Laface Records LLC; Motown record Company, L.P.; Priority Records LLC; Sony BMG Music Entertainment; UMG Recordings, Inc.; Virgin records America, Inc.; and Warner Bros. Records Inc.

[X] **VIA OVERNIGHT MAIL:**
VIA Federal Express: By delivering such documents to an overnight mail service or an authorized courier in an envelope or package designated by the express service courier addressed to the person(s) on whom it is to be served.

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

Executed on January 7, 2011, at Los Angeles, California.

/s/ Melissa L. Gonzalez

EXHIBIT 16

Jonathan Gottlieb

From: Kozusko, Dan [dkozusko@willkie.com]
Sent: Friday, February 04, 2011 6:01 AM
To: Jonathan Gottlieb; Christy, Ian
Cc: Eaton, Mary; Daniel Cooper; mblanton@rrbllp.com
Subject: RE: Arista Records LLC v. Lime Group LLC
Attachments: MySpace List.DOC

In response to your request that Defendants identify the custodians whose files will be searched, I would call your attention to footnote 3 of Judge Freeman's order, in which the Court directs MySpace and the other licensees "to use their own judgment as to the best means of locating the communications covered by this Order." That places the obligation on MySpace, not Defendants, to propose a list of custodians. Of course, we are willing to discuss any list you do propose and the reasons for including or excluding particular custodians.

Moreover, the approach ordered by Judge Freeman makes perfect sense because, as I explained to you on our December 17, 2010 meet-and-confer call, MySpace has superior knowledge of which custodians are most likely to have responsive communications. Unfortunately, we cannot simply look to Plaintiffs' production to identify an exhaustive list of custodians whose files will be searched because (among other reasons) Plaintiffs' production of such communications was not complete. That said, in response to your e-mail, we have reviewed the documents produced by Plaintiffs and have been able to discern that the individuals at MySpace on the attached list communicated with Plaintiffs. As you can see, in some cases, the communication only listed an email address, but no name. This non-exhaustive list can provide a good starting point for arriving at a universe of custodians whose files will be searched.

With regard to search terms, we think using that those set forth in the VEVO Order makes sense, but again Judge Freeman's recent Order places the burden on MySpace to come up with "the best means for locating the communications covered by this Order." Like always, we are happy to discuss any suggestions MySpace might make here.

As mentioned previously, MySpace's production of the documents ordered by Judge Freeman needs to commence without further delay. Accordingly, please let us know when that production will begin.

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, February 03, 2011 1:24 PM
To: Christy, Ian
Cc: Eaton, Mary; Kozusko, Dan; Daniel Cooper
Subject: RE: Arista Records LLC v. Lime Group LLC

I was not aware of the Order until your e-mail. We respectfully disagree with Magistrate Judge Freeman's resolution of the matter and are evaluating our options.

To assist in this evaluation, could you please provide the names of selected MySpace Music custodians you believe would have relevant information and search terms that you believe are likely to yield responsive documents? I assume you have the names of custodians in mind, since these likely would have appeared in communications produced by the Plaintiffs.

Thanks.

From: Christy, Ian [mailto:IChristy@willkie.com]
Sent: Wednesday, February 02, 2011 2:07 PM
To: Jonathan Gottlieb
Cc: Eaton, Mary; Kozusko, Dan
Subject: Arista Records LLC v. Lime Group LLC

Dear Mr. Gottlieb:

As you know, Judge Freeman entered the attached order yesterday, requiring MySpace to produce certain communications in response to Defendants' subpoena in the above-referenced action. Specifically, MySpace must produce communications, both internal and with Plaintiffs, relating to its 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.

We need to receive the documents MySpace has now been ordered to produce without further delay. Please let us know when we can expect to receive the documents. Also, as you know, the Court's order requires MySpace to identify the "best means of locating the communications covered by" the Order. Please let us know how MySpace intends to search for the communications to be produced.

Very truly yours,

Ian M. Christy
Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York, NY 10019
212-728-8659 (Phone)
212-728-9659 (Fax)
ichristy@willkie.com

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sbang@myspace.com
aLamba@myspace.com
asomers@myspace.com
ajames@myspace.com
Meg@myspacemusic.com
SWick@myspace-inc.com
kRolla@myspacemusic.com
Frank Hajdu [frank@myspacemusic.com]
Mari Bower [mbower@myspace.com]
Matt Hergert [mhergert@myspace.com]
Kevin Hershey [kHershey@myspace.com]
Roberto Fisher [rfisher@myspace.com]
Lisette Paulson Ipaulson@myspacemusic.com
Meg Hansen [mhansen@myspace.com]
Steve Clark [stevecl@myspace.com]
Josh Brooks [jbrooks@myspace.com
Roslynn Cobarrubias
Lee Brenner
Brianne Pins
Trevor Kelley [tkelley@myspace.com]
nate@myspace.com
Mlke Praw [mallto:mpraw@myspace.com]
Amit Kapur: 'akapur@myspace.com', 'amit@myspace.com'
'fhajdu@myspace.com'
Amit Kapur (amit@myspace.com)
Ari Somers [mailto:asomers@myspace.com]
Adam Cooper, acooper@myspace.com
Hector Gray [hgray@myspace.com]
Seung Bang
Alyse Bobb [ABobb@myspace-inc.com]; 'Alyse.Bobb@fox.com';
Karen Flores [kFlores@myspace.com]
Chris Zachos, czachos@myspace.com
Alex Winck, awinck@myspace.com
[copyrightagent@support.myspace.com]
copyrightagent@myspace.com
Michelle Hu [mhu@myspace.com]
help@support.myspace.com
Aaron Gorrell [mailto:aaron@myspacemusic.com], Aaron Gorrell [agorrell@myspace.com]
Sarah Kaleel
Anthony Lanier
Hadiss DeWitt [hdewitt@myspace.com]
Daniel Cooper
Angela Saldivar
Erdem Ay
Micah Miller [mailto:mmiller@myspace.com]
Nancy Taylor [mailto:Nancy.Taylor@myspace-inc.com]

Courtney Holt [cholt@myspace-inc.com]; Courtney Holt; 'cholt@myspace.com
Charles Gough [cgough@myspace.com]
Lee Brenner [lbrenner@myspace.com]
Dean Faustman [dfaustman@myspace.com]
Taylor Hayes [mailto:thayes@myspace.com]
Elise Feuerbacher [efeuerbacher@myspace.com]
Rita Ravindra [rravindra@myspace.com]
Brandon Lucas [blucas@myspace.com]
David Cho; dcho@myspace.com
Dian Oved; doved@myspace.com
Howie Singer
Christopher Maxcy
Marina Bonanni [mbonanni@myspace.com]
cheather@MySpace.com
jduffetsmith@myspace.com
joberfest@myspace.com
chris@myspace.com
Chris Dewolfe [cdewolfe@myspace.com]
Corinne Almirol [calmirol@myspace.com]
Dani Dudeck [mailto:ddudeck@myspace.com]
Karuna Karmarkar [kkarmarkar@myspace.com]
Judy Martin
Dan Goshin [dgoshin@myspace.com]
Micah Miller [mmiller@myspace.com]
Makoto Fujino [mfujino@myspace.com]
Ryan Meuse [rmeuse@myspace.com]
Denys Zaslavets dzaslavets@myspace.com
Clmsta Stelzmuller <cstelzmuller@myspace.com>
David Hendi dhendi@myspace.com
Chris Blandy cblandy@myspace.com
Hala A1-Adwan hala@myspace.com
Julie Conserva jconserva@myspace.com
Enterprise Media enterprisemedia@myspace.com
Nicholas Cummins [ncummins@myspace.com]
Steve Busch <sbusch@myspace.com>
Dave Buck [dbuck@myspace.com]
Take Down Tool [mailto:takedowntool@myspace.com]
Melinda Demsky [Melinda.Demsky@fox.com]
'Mike.Lang@fox.com
'Lin.Cherry@fox.com
'jack.kennedy@fox.com'
'Lucian.Onlga@fox.com'
'trisha.husson@fox.com'
Daniel.cooper@fox.com;

EXHIBIT 17

Ingber, Matthew D.

From: Horan, Paul [phoran@willkie.com]
Sent: Monday, February 07, 2011 11:11 AM
To: Ingber, Matthew D.
Cc: Eaton, Mary
Subject: RE: Arista Records LLC v. Lime Group LLC
Attachments: 6354467_1.doc

Matt:

In response to your question, footnote 3 of Judge Freeman's order directs Google and the other licensees "to use their own judgment as to the best means of locating the communications covered by this Order." That places the obligation on Google, not Defendants, to propose a list of custodians. Of course, we are willing to discuss any list you do propose and the reasons for including or excluding particular custodians.

The approach ordered by Judge Freeman makes perfect sense because Google has superior knowledge of which custodians are more likely to have responsive communications. Unfortunately, we cannot simply look to Plaintiffs' production to identify an exhaustive list of custodians because (among other reasons) Plaintiffs' production of such communications was not complete. That said, in response to your email, we have reviewed the documents produced by Plaintiffs and have been able to discern that the individuals at Google on the attached list communicated with Plaintiffs. As you can see, in some cases, the communication only listed an email address, but no name. This non-exhaustive list can provide a good starting point for arriving at a universe of custodians whose files would be searched.

As mentioned previously, Google's production of documents ordered by Judge Freeman needs to commence without further delay. Accordingly, please let us know when that production will begin.

Very truly yours,

Paul W. Horan
Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York NY 10019
(212) 728-8614 (phone)
(212) 728-8111 (fax)

From: Ingber, Matthew D. [mailto:MIngber@mayerbrown.com]
Sent: Friday, February 04, 2011 9:16 AM
To: Horan, Paul
Cc: Eaton, Mary
Subject: RE: Arista Records LLC v. Lime Group LLC

Paul – Thanks for sending us the order; I hadn't received it before your email. I do not read the order as "requiring" us to "identify" anything, but we are happy to discuss process once we've decided on our next steps.

In the meantime, as we think about our options in light of Judge Freeman's order, it would be helpful to know what you view as the best means of locating the communications. In particular, do you have any Google/YouTube custodians in mind based on your review of plaintiffs' communications with them?

Thanks,

Matt

From: Horan, Paul [mailto:phoran@willkie.com]
Sent: Wednesday, February 02, 2011 4:32 PM
To: Ingber, Matthew D.
Cc: Eaton, Mary
Subject: Arista Records LLC v. Lime Group LLC

Dear Matthew:

As you know, Judge Freeman entered the attached order yesterday, requiring your client to produce certain communications in response to Defendants' subpoena in the above-referenced action. Specifically, your client must produce communications, both internal and with Plaintiffs, relating to its 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.

We need to receive the documents your client has now been ordered to produce without further delay. Please let us know when we can expect to receive the documents. Also, as you know, the Court's order requires your client to identify the "best means of locating the communications covered by" the Order. Please let us know how your client intends to search for the communications to be produced.

Very truly yours,

Paul W. Horan
Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York NY 10019
(212) 728-8614 (phone)
(212) 728-8111 (fax)

****

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klebeau@google.com on behalf of Kelsey LeBeau [kelsey@youtube.com]
Yenie Ra <yenie@google.com>
jmdruesne@google.com]
Sara McCleskey [mccleskey@google.com]
Misty Ewing-Davis [mailto:mistye@google.com
heather gillette < heather@youtube.com>,
micahs@google.com on behalf of Micah Schaffer [micah@youtube.com]
Elizabeth Ojeda [eojeda@google.com]
Je Carr 'jecarr@google.com'
Christian Weitenberner [weitenberner@google.com]
Sunil Daluvoy <sunild@google.com
Zahavah Levine [zahavah@google.com; zlevine@google.com'
Elizabeth Moody" emoodv@google.com
Glenn Brown [gbrown@google.com], gbrown@youtube.com
Ali [mailto:aliza@google.com], aliza@youtube.com
Phoebe McDowell <pmcdowell@youtube.com
Sara Mustin smustin@google.com
prangel@google.com
YouTube_Partner AdOps@google.com
Christopher LaRosa clarosa@google.com
Lana Aref Harel [lana@google.com]
chris@youtube.com
chad@youtube.com;
nikesh@google.com;
henriquedc@google.com
salar@google.com
partner@youtube.com
Kristen Bowen [kbowen@google.com]
Copyright Service [copyright@youtube.com]
Chris Maxcy maxcy@google. com
jenny@youtube. Com
cliff@google.com;
clairehart@google.com
Kevin Montler [kevingm@google.com]
Carola Vasquez [mailto:carola@google.com
Cliff Samaniego [csamaniego@google.com], cliff@youtube. Com
craigm@google.com
dgking@google.com
Larissa Fontaine [mailto:larissa@google.com]
Conway Chen [mailto:conway@google.com]
mattghering@google.com
Rachel Payne [rpayne@google.com]
Holly Thai [nlaillo:hthai@google.com
Georges Haddad [ghaddad@google.com]
danavetter@google.com
jbyrne@google.com;
mflannery@google.com
Theo Luke <theol@google.com
Adrian Fernandez [adrianf@google.com]
Andy Stack [astack@google.com]

Claire Goldstein [claireeg@google.com]
Eric Holck [ericholck@youtube.com], ericholck@google.com
jeben@google.com;
emh@google.com
Greg Funk [gfunk@google.com]
'dumbunny@google.com'
'jhmin@google.com'
Eric Mauskopf [mauskopf@google.com]
David Bussin [mailto:dbussin@google.com]
marita@google.com
Alene Latimer [mailto:alene@google.com]
Benjamin Brassington [bbrassington@google.com]
Sandy Wilheim <swilheim@google. com
Laura Lee [lauralee@google.com]; lauralee@youtube.com
karai@google.com
kenji@youtube.com
chandhok@google.com
brucedaisley@google.com
pjwalker@google.com'
edleung@google.com
Claire Goldstein [claireeg@google.com]
Andy Rubin <arubin@google.com>
'timq@google.com'
jeffn@google.com,
bling@google.com
Eric Chu <ericchu@google.com>
Julie Martin [juliemartin@google.com]
chi@google.com
mwiseman@google.com
'ghaddad@google.com
matthew@youtube.com
Craig McFadden [craigm@google.com]
Tracy Patrick Chan tracyc@google.com,
dzhuo@google.com
nishad [mailto:nishad@google.com]
Bonnie Han [bhan@google.com]
Harry Smith hsmith@google.com
service@youtube.com]
[partner-support@youtube.com]
Erik [e.brown@youtube.com]
frey@youtube.com
Becky Chappell - beckyc@google.com
Jennifer Nielsen (jnielsen@google.com)
mflannery@google.com
Jennie Ebbitt [jtebbitt@google.com]
David Eun [deun@google.com]
pittman@google.com
ladawn@google.com
Iorin@google.com
Ramanan [ramanan@google.com]
Marcel Becker [marcelbecker@google.com]

arbix@google.com
dclancy@google.com
Mike Dudas [mdudas@google.com]
amlegal@google.com
Sarah Wagman [swagman@google.com]
David Sha [davidsha@google.com]
Janee Poore [janee@google.com]
jakkad@google.com
gsalem@google.com
cherylpon@youtube.com
Suzie Reider <STR@youtube.com
Ronny Conway [ronny@google.com]
Jamie Rosenberg (jamiero@google.com)
'etseng@google.com'
Elizabeth Gaubeka [elizabethg@google.com]
jhavens@youtube.com