

EXHIBIT C

PART 2

Exhibit E

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7C7ARIC Conference
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-----X
ARISTA RECORDS, et al.,
Plaintiffs,
v. 06 CV 5936 (GEL)
LIME WIRE LLC, et al.,
Defendants.
-----X
New York, N.Y.
December 7, 2007
5:00 p.m.

Before:
HON. GERARD E. LYNCH,
District Judge

APPEARANCES

CRAVATH, SWAINE & MOORE
Attorneys for Plaintiffs
BY: KATHERINE B. FORREST
TEENA-ANN V. SANKOORIKAL
JOANNE M. GENTILE
PORTER & HEDGES
Attorneys for Defendants
BY: CHARLES S. BAKER
JOSEPH D. COHEN

7C7ARIC Conference
(In open court)
THE DEPUTY CLERK: Arista Records v. Limewire LLC.
MS. FORREST: Katherine Forrest with Cravath, Swaine &
Moore for plaintiffs.
MS. SANKOORIKAL: Teena-Ann Sankoorikal from Cravath
for plaintiffs.
MS. GENTILE: Joanne Gentile for plaintiffs.
MR. BAKER: Your Honor, Charles Baker on behalf of the
defendants.
THE COURT: Good afternoon, Mr. Baker.
MR. COHEN: Joe Cohen from Porter & Hedges in Houston,
also for the defendants.
THE COURT: Mr. Cohen, good afternoon. It probably
wasn't the wisest thing to schedule this so late in the day

8 and terms of service, the plaintiffs say they have provided the
9 relevant custodians and supplied the relevant search terms. I
10 am satisfied with that, except the custodian list does not, as
11 far as I can see, include anybody from RIAA. And that seems to
12 me to be an organization that in principle could have very
13 significant information to impart. And it seems to me someone
14 should identify some possible custodian who is the right person
15 whose files should be searched on that issue.

16 Last, on the defendants' list, there is a question
17 relating to the plaintiffs' restriction of answers in
18 interrogatories to the current employees who have the most
19 knowledge. I'm satisfied with the most knowledge part. I
20 think it would be burdensome and would yield little benefit to
21 expand the category to anybody who has any knowledge or
22 something like that, or try to figure out who out of all these
23 employees may have been involved in something relevant.

24 But, I do think that given that the allegations in
25 this copyright misuse claim go back as far as 2000, the

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1 plaintiffs should also identify the most relevant former
2 employees who might be served with interrogatories for
3 third-party discovery, and that restricting the answers to
4 interrogatories to current employees is not likely adequate.

5 All right. Now turning to the plaintiffs' laundry
6 list. The request for protective order I think is denied,
7 except to the extent that I have made these various rulings and
8 that seems to deal with the problem and be the way of dealing
9 with these issues.

10 The plaintiffs move to compel production of documents
11 from David Ruth and Amy Gordon who are close relatives, indeed
12 nuclear family members, of Mr. Mark Gordon, who is the CEO of
13 Limewire. The fact that they're family members doesn't seem to
14 me to make them different from shareholders to the extent of
15 the likelihood of producing any -- of having any relevant
16 information. And the fact that they're family members tends to
17 increase the risk that serving them with discovery documents is
18 just harassment, so that will be denied.

19 Next there is a question of bifurcation. I think I've
20 essentially dealt with that by separating out the test case
21 copyrights. I think that's a more sensible way to do it than
22 simply bifurcating damages issues, or at least maybe that means
23 I am bifurcating at least damages issues to the extent they go
24 to how many copyrights or something like that.

25 But I'm not -- I think I'd rather not phrase it as no

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1 discovery with respect to damages issues. Because that's the
2 kind of order that tends to produce more trouble than it's
3 worth, as the parties then fight over whether a given demand is
4 or isn't in which half of the bifurcation.

5 I think I've made clear the way to proceed here with
6 respect to what I think is the principal issue or problem,
7 which is the disclosure of copyright ownership issues, is just
8 to proceed with a small subset of those in the first instance.

9 Finally, I think it's finally, the plaintiff seeks
10 some additional deadlines and the defendants seek various
11 extensions. Now, some of this has been mooted or changed or
12 affected just by the process of events. I'm sorry that it took
13 so long to deal with the motion, but that's life in the big
14 city. There are a lot of other motions on the list. This was

15 a somewhat demanding one, it resulted in a lengthy opinion, it
16 took me a while to get to it.

17 But having taken that time, the plaintiffs' proposed
18 discovery deadline is now past. And it seems to me that based
19 on all of the things that I've covered today from the parties'
20 joint request, it is just not realistic to think that this work
21 is not going to get done -- I'm sorry -- is going to get done
22 in a very short period of time, particularly with the holidays
23 intervening.

24 It does seem to me, on the other hand, appropriate to
25 require that document discovery be substantially complete by

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1 January 31; that fact depositions be done in February and March
2 and be completed by March 31; that expert reports be provided
3 by I guess basically the same time, the end of March; rebuttal
4 reports by the end of April; expert depositions then to be
5 conducted in May and be finished by May 31.

6 And I think that's enough deadlines to keep everybody
7 occupied, and we can think about summary judgment motions at a
8 conference to be held after that process is done.

9 It seems to me, though, it would be productive to
10 schedule a conference for the very beginning of April. Just to
11 find out, get some progress report on the completion of fact
12 discovery, and see whether progress is sufficiently being made
13 and give the parties a deadline that is a real hearing in court
14 deadline to concentrate the mind on what needs to be done in
15 the interim.

16 So that is what I thought after reading the joint
17 letter. Is there anything really huge that I've missed, any
18 major topic heading that I haven't addressed that the parties
19 need guidance on? Or anything that you think from the point of
20 view of your client I've gotten grotesquely wrong in these
21 rulings? And basically, you've each got about one, and if it's
22 not terribly wrong, if you can't persuade me on one, then your
23 second best is not going to be heard.

24 Do you have one or are people content to live with
25 this for now?

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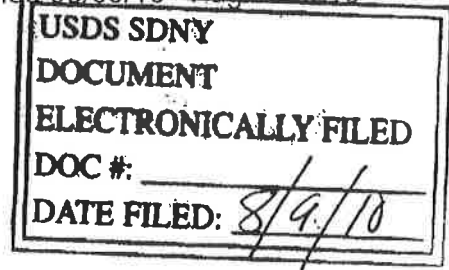
1 MS. FORREST: Your Honor, I just have a couple of very
2 brief points. One is on a couple of the rulings that your
3 Honor has stated today, they do rely upon the copyright misuse
4 affirmative defense still being in the case.

5 If we could, your Honor, let me just ask if Limewire
6 could define for us what the parameters of that copyright
7 misuse defense are, because we have seen it both in its letter
8 briefs and in its filings before the Court in various places
9 change. It's gone from both being overlapping with the
10 antitrust case, to now in the most recent November 16 letter
11 brief, having some bearing on ownership issues.

12 Your Honor, I would also suggest that if copyright
13 misuse is only in the case or was only in the case for
14 antitrust, if the counterclaims are truly gone, your Honor,
15 then I would ask how is it that that discovery is still
16 relevant here. If the rulings, your Honor, relating to misuse
17 are for some other purpose, we'd like to have the parameters of
18 that spelled out.

19 That relates to the couple of the rulings, the label
20 level searching, the actual investments, the prices in terms of
21 service.

Exhibit F



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
ARISTA RECORDS LLC; ATLANTIC RECORDING CORPORATION; ARISTA MUSIC, fka BMG MUSIC; CAPITOL RECORDS, INC; ELEKTRA ENTERTAINMENT GROUP INC; INTERSCOPE RECORDS; LAFACE RECORDS LLC; MOTOWN RECORD COMPANY, L.P.; PRIORITY RECORDS LLC; SONY MUSIC ENTERTAINMENT, fka SONY BMG MUSIC ENTERTAINMENT; UMG RECORDINGS, INC; VIRGIN RECORDS AMERICA, INC.; and WARNER BROS. RECORDS INC.,

06 CV 5936 (KMW)

ORDER

Plaintiffs,

-against-

LIME GROUP LLC; LIME WIRE LLC; MARK GORTON; GREG BILDSON; and M.J.G. LIME WIRE FAMILY LIMITED PARTNERSHIP,

Defendants.

-----x
KIMBA M. WOOD, U.S.D.J.:

I. Introduction

In its Opinion and Order (as amended on May 25, 2010) (hereinafter, the "May 25, 2010, Order"), this Court granted summary judgment in favor of Plaintiffs on their claims against Defendants Lime Wire LLC ("LW"), Lime Group LLC ("Lime Group"), and Mark Gorton (collectively, "Defendants") for secondary copyright infringement. The Court found that Defendants induced users of the LimeWire file-sharing program ("LimeWire") to infringe Plaintiffs' copyrights.

This litigation now proceeds to the damages phase, requiring the parties to complete additional discovery on certain matters. The parties have identified specific disputes as to the

scope of discovery and other matters relating to the pending issues in the case. Specifically, the parties have briefed the following issues for the Court:

- 1) Whether Plaintiffs may add to the list of sound recordings, attached to the First Amended Complaint, for which they claim to own the copyright and now seek damages.
- 2) Whether Plaintiffs may offer additional evidence of LimeWire users' direct infringement of their copyrighted sound recordings.
- 3) Whether Defendants may obtain discovery related to "actual damages" suffered by Plaintiffs as a result of Defendants' infringing conduct.
- 4) Whether Defendants may obtain further discovery related to the copyright misuse defense.
- 5) Whether Plaintiffs may obtain further discovery related to Defendants' current net worth.

The Court has reviewed the parties' briefs and responses. It addresses each dispute in turn.

II. Analysis of Disputed Issues

A. Plaintiffs' Final List of Sound Recordings

At the June 7, 2010 hearing, Plaintiffs stated that they intend to add to the list of sound recordings for which they own the copyright, and for which they will seek damages. (Hr'g Tr. at 7, Jun. 7, 2010.) Plaintiffs allege that LimeWire users have infringed the copyrights for these additional sound recordings, and that Defendants are thus liable for infringement as to those sound recordings. Defendants argue that Plaintiffs should be precluded from updating their list of sound recordings at this stage of the litigation. Based on the record in this case, the Court will permit Plaintiffs to provide a final revised list of sound recordings for which they seek damages.

Plaintiffs listed 3,189 sound recordings in attachments to the First Amended Complaint. (See First Am. Compl., Att. A & B.) In the First Amended Complaint, Plaintiffs noted that the attachments provided a "non-exhaustive, exemplary list" of sound recordings that they claim had been infringed as a result of Defendants' conduct. (First Am. Compl. ¶¶ 26-27.)

At a hearing on December 7, 2007, Judge Lynch made clear that, for purposes of adjudication of Defendants' liability for secondary copyright infringement, the Court would consider a subset of sound recordings. (Hr'g Tr. at 3-4, Dec. 7, 2007.) Accordingly, Plaintiffs identified a subset of thirty sound recordings, for which they were required to establish: (1) ownership of an exclusive right under federal or New York State law; and (2) that LimeWire users had directly infringed those copyrights – that is, that they shared and downloaded unauthorized digital copies of those sound recordings through LimeWire. Use of a small subset of sound recordings for the liability stage of this litigation considerably simplified discovery leading up to the parties' motions for summary judgment.

However, the record demonstrates that Judge Lynch at no time limited Plaintiffs' ability to supplement their list of sound recordings for purposes of seeking damages. On January 31, 2008, Judge Lynch permitted Plaintiffs to supplement the list of sound recordings that was attached to the First Amended Complaint. Judge Lynch noted that Defendants would not be unfairly prejudiced by Plaintiffs' expansion of their list of sound recordings; he also stated that discovery as to Plaintiffs' sound recordings not included in the thirty song subset would be completed later in the course of the litigation. (Hr'g Tr. at 26, Dec. 7, 2007.) With the Court's permission, Plaintiffs then provided Defendants with a revised list containing approximately 6,614 sound recordings. (Pl. Ex. 4, Letter, Jan. 31, 2008.)¹

Because Defendants' liability for secondary copyright infringement has been established, Plaintiffs are now entitled to supplement their list of sound recordings for which they seek monetary damages. This stage of the litigation is the proper time for Plaintiffs to identify all

¹ Defendants state that they did not receive this revised list in January 2008. Plaintiffs present evidence suggesting that the list was timely provided to Defendants. The Court need not address this issue, given that there is no basis for precluding Plaintiffs from now providing a final revised list of sound recordings, including the 6,614 songs on the January 2008 list.

such sound recordings, and for the parties to complete related discovery as necessary. See Arista Records LLC v. Media Services LLC, No. 06 Civ. 15319, 2008 WL 563470, at *3 (S.D.N.Y. Feb. 25, 2008) (finding that, where Plaintiffs provide an exemplary list of copyright-protected works in their complaint, the “allegations of infringement are not limited to the specified works,” and noting that plaintiffs would be required to identify, at a later date, the other copyright-protected works for which they seek monetary damages); cf. Perfect 10, Inc. v. Cybernet Ventures, Inc., 167 F. Supp. 2d 1114, 1120 (C.D. Cal. 2001) (holding that, where the number of incidents of infringement can “vacillate hour-to-hour, day-to-day,” plaintiffs are not required to “specify each and every alleged violation of copyright law in their complaint”).

The Court recognizes that trial on the remaining issues in this litigation, including calculation of monetary damages, is scheduled for January 2011. To provide Defendants sufficient time to review Plaintiffs’ final list of sound recordings for which they intend to seek damages, Plaintiffs shall produce that list to Defendants and the Court no later than September 9, 2010.

B. Additional Evidence of Direct Infringement

Defendants argue that Plaintiffs should be precluded from submitting further evidence in support of their claims that LimeWire users directly infringed Plaintiffs’ copyrights. Defendants argue that discovery should, at this stage of the litigation, be limited to the issue of Plaintiffs’ claims of copyright ownership. Defendants’ argument makes no sense and must be rejected.

Plaintiffs must have the opportunity to present evidence as to both copyright ownership and direct infringement for all songs for which they seek monetary damages. As noted above, Plaintiffs complied with Judge Lynch’s order to identify a subset of thirty sound recordings, and to prove both (1) ownership of an exclusive right, and (2) direct infringement by LimeWire

users. Plaintiffs successfully established both of these elements with respect to the thirty song subset, which resulted in the Court's May 25, 2010, Order granting summary judgment in Plaintiffs' favor. At this stage, with Defendants' liability for secondary copyright infringement established, Plaintiffs now have the burden to establish both elements with respect to all sound recordings for which they seek damages. It is clear that Judge Lynch intended for additional discovery, including on the issues of copyright ownership and direct infringement, to be completed after the liability phase of this litigation. The Court therefore will permit Plaintiffs to complete appropriate discovery, and to submit additional evidence, as to direct infringement.

C. Discovery on "Actual Damages"

Defendants argue that they are entitled to discovery relating to "actual damages" caused to Plaintiffs as a result of Defendants' infringing conduct. Plaintiffs agree that Defendants may seek such discovery, but reserve their right to object to Defendants' discovery requests that may impose a significant burden or are otherwise inappropriate.

The Court finds that it is premature to rule on this matter. If Defendants seek discovery relating to "actual damages," and Plaintiffs object to any specific discovery requests, the parties shall promptly bring the matter to the Court's attention.²

D. Copyright Misuse Defense

Defendants seek additional discovery in support of the copyright misuse defense that they have asserted. Because the Court finds that this defense is without merit, it finds that any such discovery would be irrelevant and not reasonably calculated to lead to the discovery of

² The Court notes that Defendants are entitled to some discovery relating to the actual damages suffered by Plaintiffs as a result of Defendants' infringing conduct. Although Plaintiffs have opted for statutory damages under federal copyright law for all post-1972 sound recordings, the Court may consider actual damages in determining the appropriate statutory damage award. See Warner Bros. Inc. v. Dae Rim Trading, Inc., 877 F.2d 1120, 1126 (2d Cir. 1989).

admissible evidence. See Fed. R. Civ. P. 26(b)(1). For the reasons discussed below, the Court grants Plaintiffs' request to preclude discovery as to Defendants' copyright misuse defense.

Defendants have asserted a copyright misuse defense, arguing that Plaintiffs have wrongly used their copyrights to control and restrict business activities "far beyond the expression protected by their copyrights." (Def. Opp. at 24.) In support of this defense, Defendants submit several of Plaintiffs' licensing agreements – which Plaintiffs entered into with other corporate entities – that place limitations on those entities' right to conduct business with particular companies. Plaintiffs assert that they believe that those corporate entities companies distribute, or are otherwise involved in the distribution of, Plaintiffs' sound recordings without authorization. In some cases, such contractual provisions explicitly identify LW as a company with which Plaintiffs' licensees cannot conduct normal business relations. Defendants argue that Plaintiffs have thus misused their copyrights, a fact that should preclude any remedy in this case.

The Court finds that Defendants' assertion of copyright abuse as an affirmative defense does not preclude the award of a remedy in Plaintiffs' favor. First, the Court notes that the Second Circuit has yet to establish "copyright misuse" as a valid defense. See, e.g., Arista Records LLC v. Lime Group LLC, 532 F. Supp. 2d 556, 584 n.37 (S.D.N.Y. 2007) (noting that "misuse or abuse of copyright is not firmly established as . . . an affirmative defense" in this circuit) (citing Shady Records, Inc. v. Source Enters., Inc., No. 03-9944, 2005 WL 14920, at *15 (S.D.N.Y. Jan. 3, 2005)); Reliability Research, Inc. v. Computer Assocs. Int'l, Inc., 793 F. Supp. 68, 69 (E.D.N.Y. 1992) ("Neither the Supreme Court nor the Second Circuit has addressed the issue of the existence and extent of a misuse of copyright defense.")³

³ It appears that some other circuits have recognized the copyright abuse defense as a valid affirmative defense. See, e.g., Video Pipeline, Inc. v. Buena Vista Home Entm't, 342 F.3d 191, 206 (3d Cir. 2003); Practice Mgmt. Info. Corp. v. Am. Med. Ass'n, 121 F.3d 516, 521 (9th Cir.

Second, even if the copyright misuse defense is available in this circuit, there is no factual basis for Defendants' argument that Plaintiffs have committed copyright misuse. Defendants rely on the licensing agreements into which Plaintiffs have entered with other corporate entities. In these licensing agreements, Plaintiffs have sought to minimize their exposure to copyright infringement that is facilitated by companies that are enabling or encouraging online users to infringe. Plaintiffs' actions in this regard are reasonable and appropriate; they cannot be considered a misuse of copyright that would preclude a remedy in this case. There is no evidence that Plaintiffs have sought to use their "copyrights to indirectly gain commercial control over products [they do] not have copyrighted," Alcatel, 166 F.3d at 793, or that would "interfere significantly with copyright policy," Video Pipeline, Inc., 342 F.3d at 206. The Court also finds no basis for permitting further discovery on the matter at this late stage of the litigation.

The Court therefore finds that Defendants' assertion of a copyright misuse defense does not bar any remedy in favor of Plaintiffs in this litigation.⁴ Defendants are not entitled to discovery that relates exclusively to the asserted copyright misuse defense.

E. Discovery as to Defendants' Current Net Worth

1997); Alcatel USA, Inc. v. DGI Techs., Inc., 166 F.3d 772, 793 (5th Cir. 1999); Lasercomb America, Inc. v. Reynolds, 911 F.2d 970, 979-80 (4th Cir. 1990).

⁴ Plaintiffs also argue that Defendants have previously conceded that the copyright misuse defense is not available in this case, based on a comment made by former Defendants' counsel at a hearing before Judge Lynch. Defendants' counsel appears to have agreed with Judge Lynch that, if Defendants were found liable for secondary copyright infringement, the copyright misuse defense would get "shoved aside." Based on the record, it is not clear what counsel meant by this comment. In any event, the Court need not rely on this alleged concession in rejecting Defendants' copyright misuse defense.

Plaintiffs seek discovery on Defendants' current net worth. Plaintiffs argue that such discovery is relevant to their claim for an award of punitive damages, which is available in light of Defendants' liability for common law copyright infringement and unfair competition under New York State law.⁵ Plaintiffs seek to obtain the following discovery: (1) tax records for the last three years for LW, Lime Group, and Gorton; (2) audited financial statements for the last three years for both LW and Lime Group; (3) statements for the last three years for all accounts in which Defendants have assets; and (4) deposition testimony related to these documents.

The Court finds that discovery on Defendants' current net worth is warranted. See Roy Export Co. v. CBS, Inc., 672 F.2d 1095, 1106 (2d Cir. 1982) (holding that New York law clearly permits punitive damages for common law copyright infringement and unfair competition where defendant's misconduct is "aggravated by recklessness or willfulness"); Softel, Inc. v. Dragon Med. & Sci. Commc'ns Ltd., 891 F. Supp. 935, 945 (S.D.N.Y. 1995) ("Because the object of punitive damages is to punish the defendant, it is appropriate for the trier of fact to consider the defendant's financial circumstances in determining the amount of punitive damages.") (applying New York law). Such discovery is appropriate at this stage of the litigation. See Hamm v. Potamkin, No. 98 Civ. 7425, 1999 WL 249721, at *2 (S.D.N.Y. Apr. 28, 1999) (finding pretrial financial discovery appropriate in case involving a punitive damages claim); Hazeldine v. Beverage Media, Ltd., No. 94 Civ. 3466, 1997 WL 362229, at *3 (S.D.N.Y. Jun. 27, 1997) (same); Mid-Continent Cabinetry, Inc. v. George Koch Sons, Inc., 130 F.R.D. 149, 151 (D. Kan. 1990) ("When a punitive damages claim has been asserted by the plaintiff, a majority of federal courts permit pretrial discovery of financial information of the defendant.").

⁵ Defendants were found liable for common law copyright infringement and unfair competition with respect to pre-1972 sound recordings for which Plaintiffs' own an exclusive right (under state law) that LimeWire users have infringed through LimeWire. (See May 25, 2010, Order at 49-52.)

Although Plaintiffs are entitled to net worth discovery, their specific discovery requests are overbroad, particularly with respect to the request for Defendants' tax records for the past three years. To obtain discovery of tax returns, whether corporate or personal, the requesting party must satisfy a two-prong test: "(1) the tax returns must be relevant to the subject matter of the action; and (2) a compelling need must exist because the information is not readily obtainable from a less intrusive source." Sadofsky v. Fiesta Products, LLC, 252 F.R.D. 143, 149 (E.D.N.Y. 2008) (citing Hamm); see also Ellis v. City of New York, 243 F.R.D. 109, 111-112 (S.D.N.Y. 2007) (applying two-prong test); Trudeau v. New York State Consumer Prot. Bd., 237 F.R.D. 325, 331 (N.D.N.Y. 2006) (same). Here, Plaintiffs have failed to establish a "compelling need" for Defendants' tax returns. There are in fact less intrusive, and readily available, alternative sources for the information. Plaintiffs may, for example, request that Defendants provide (1) a financial affidavit providing a balance sheet stating Defendants' net worth, income, assets, and liabilities, Hamm, 1999 WL 249721, at *2; Hazeldine, 1997 WL 36229, at *4; or (2) deposition testimony as to Defendants' net worth, Trudeau, 237 F.R.D. at 331-32. Such discovery should provide Plaintiffs with sufficient information on Defendants' current net worth for purposes of this litigation.⁶ If, after the completion of such discovery, Plaintiffs consider the information they receive to be inadequate, they may apply for appropriate relief from this Court.

III. Conclusion

Plaintiffs shall produce their final list of sound recordings for which they intend to seek monetary damages no later than September 9, 2010. The parties shall proceed with discovery as

⁶ Defendants note that they have provided some information as to Defendants' net worth in various declarations submitted in opposition to Plaintiffs' Motion for a Preliminary Injunction Freezing Defendants' Assets. The information in these documents is incomplete and insufficient. Plaintiffs are entitled to more complete and precise information. Plaintiffs may therefore properly request specific discovery as to Defendants' current net worth, as consistent with the instant Order.

consistent with the instant Order. If any additional disputes arise with respect to discovery, the parties shall promptly notify the Court, providing factual and legal support for their respective positions.

SO ORDERED.

Dated: New York, New York
August 6, 2010

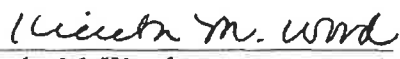

Kimba M. Wood
United States District Judge

Exhibit G

July 2, 2010

VIA HAND DELIVERY

The Honorable Kimba M. Wood
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007

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

Dear Judge Wood:

Defendants Lime Wire LLC, Lime Group LLC, Mark Gorton, and M.J.G. Lime Wire Family Limited Partnership (collectively, "Lime Wire") submit this letter brief concerning certain disputes identified in the June 2, 2010 joint letter to the Court. Ex. A at 3. In particular, the parties agreed to address in simultaneous letter briefing the following issues:

- (i) identity of sound recording copyrights for which Plaintiffs will seek to prove infringement and damages, and whether Plaintiffs can seek damages for allegedly infringed copyrights not previously at issue in this action;
- (ii) whether Plaintiffs will be permitted to introduce new evidence over two years after the discovery cutoff to try to prove direct infringement and damages;
- (iii) Defendants' copyright misuse defense and whether they are entitled to updated discovery related thereto; and
- (iv) whether Defendants should be required to provide updated net worth discovery.

Defendants address each of these issues below.

I. The Court Should Limit the Copyrights at Issue to Those Identified in the Operative Complaint

Four years after filing suit, and with only six months remaining before their requested January 2011 trial date, Plaintiffs now seek to add an unknown "thousands" of works to the operative First Amended Complaint ("Complaint") (Docket No. 45). Plaintiffs' timing is no coincidence. Having secured a favorable ruling as to a limited set of thirty copyrights, Plaintiffs

Honorable Kimba M. Wood
July 2, 2010
Page 2

seek to exponentially expand the case to recover for “thousands and thousands” of additional copyrights never previously at issue or subject to discovery. 6/7/10 Hrg. Tr. at 7:6-16. Plaintiffs have waited too long. Given the short time remaining for limited discovery, Plaintiffs’ inexplicable failure to add these copyrights in the previous four years, and the incurable prejudice to Defendants that would result, the Court should deny Plaintiffs’ eleventh-hour request.

A. It Is Too Late for Plaintiffs to Expand the Copyright Claims

On August 4, 2006, Plaintiffs filed their Complaint claiming infringement of 3195 sound recording copyrights. Docket No. 1 at Exs. A & B. Document discovery ensued as to those claimed copyrights (and closed on January 31, 2008).¹ Docket No. 52. On September 20, 2007, Plaintiffs filed their First Amended Complaint, which reduced the number of copyright claims to 3189. Docket No. 45 at Exs. A & B. On November 16, 2007, in a joint discovery letter to the Court, Plaintiffs stated their intent to add more copyrights to the case at some point in the future and expressed their entirely unsupported “belie[f] th[at] amendment of Exhibit A c[ould] be effected by letter to the Court, copied to defendants.” Ex. B at 24 n.15. Plaintiffs notably did not reveal to the Court that they sought to more than double the number of copyright claims at the close of the discovery period or otherwise indicate the scope of their proposed “amendment.” Defendants objected to Plaintiffs’ request on the grounds of prejudice, and in the same joint letter, Defendants also noted the correct procedure for Plaintiffs to seek to expand the copyright claims at issue: “If Plaintiffs intend to amend their complaint to enlarge their claims against Defendants, they must first file a motion seeking leave from this Court to amend. *See* FED. R. Civ. P. 15(a).” *Id.* at 47 n.31.

During the subsequent Status Conference on December 7, 2007, Plaintiffs’ counsel affirmed Plaintiffs’ intention to “give” Defendants an amended list of copyrights, which Plaintiffs’ counsel believed would take the amendment issue “off the table.” 12/7/07 Hrg. Tr. at 26:8-9. Plaintiffs were wrong. Judge Lynch correctly recognized the question was one concerning the propriety of a request to “amend[] the complaint,” and expressly declined to allow Plaintiffs’ proposed letter amendment, stating: “[W]e are not going to add that at this point.” *Id.* at 26:13-17.

During the same conference, the Court addressed the parties’ dispute concerning the scope of documents to be produced by Plaintiffs pertaining to their claimed ownership of the copyrights-in-suit. Rather than directly decide that issue, the Court postponed ownership discovery in favor of first having the parties address liability issues with respect to a small subset

¹ Fact depositions closed on April 18, 2008, and expert depositions on June 18, 2008. Docket No. 69.

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Page 3

of copyrights. *Id.* at 11:5-8. The Court was clear that it was only postponing discovery regarding ownership, and not any other copyright-specific discovery (such as damages):

First, there is an issue with respect to the proof of copyright ownership and what discovery needs to be provided on that front. It seems to me that the sensible resolution here is the plaintiffs' alternative suggestion, that we simply take some subset of copyrighted works and sever the claims as to those for the initial purpose of deciding whether there is liability or not.

* * *

Next there is a question of bifurcation. I think I've essentially dealt with that by separating out the test case copyrights. I think that's a more sensible way to do it than simply bifurcating damages issues, or at least maybe that means I am bifurcating at least damages issues to the extent they go to how many copyrights or something like that. But I'm not – I think I'd rather not phrase it as no discovery with respect to damages issues. Because that's the kind of order that tends to produce more trouble than it's worth, as the parties then fight over whether a given demand is or isn't in which half of the bifurcation.

Id. at 3:9-15; 10:19-11:4.

Although the Court rejected Plaintiffs' proposal to add copyright claims to the case by way of letter to Defendants, Plaintiffs nevertheless sought to employ that very means to expand the claims. On the last day of document discovery (January 31, 2008), Plaintiffs sent a letter to Defendants' then-counsel Porter & Hedges purporting to "amend" their Complaint to include over 3000 additional copyrights. *See* Ex. C at 2 ("[A]ttached is an amended version of plaintiffs' Schedule A reflecting the additional tracks that Katherine raised during the December 7th hearing."). Plaintiffs claim to have attached a 330-page enclosure to their January 31, 2008 letter, identifying the more than 3000 additional copyrights, thereby seeking to bring the total number of copyrights at issue in the case to 6614. But Defendants appear to have never received the attachment.²

² While Defendants have the original January 30, 2008 cover letter, they do not have the 330-page attachment or any other evidence that the attachment was ever sent. Both current and former counsel for Defendants have scoured their files seeking evidence of the attachment, to no avail. Defendants therefore believe that Plaintiffs failed to include the attachment. Defendants now have a copy of the 330-page attachment, only because Plaintiffs recently submitted it as an exhibit to their motion for permanent injunction. Docket No. 237 at Ex. 12.

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Plaintiffs are apparently not content to stop there. At the recent Status Conference on June 7, 2010, Plaintiffs revealed that they wish to add thousands more copyright claims. Notably, even at this late date – *years* after the close of discovery – Plaintiffs’ counsel still could not even begin to quantify how many additional copyrights they would seek to add. 6/7/10 Hrg. Tr. at 7:13-16 (“At this point I don’t even have an estimate as to the number, but we are talking about thousands and thousands of recordings that we would be seeking damages on.”).

While the parties dispute whether the 3000+ additional copyrights from the January 2008 letter are at issue in the case, there is no dispute that Plaintiffs have not provided discovery specific to those 3000+ additional copyrights or the “thousands” more copyrights they seek to add but have yet to identify.³ *Id.* at 3:12-17. Plaintiffs may try to minimize the scope of such discovery or the time needed to undertake it, but that would be sleight of hand. A review of the copyright-specific requests served on Plaintiffs during fact discovery with respect to copyrights actually at issue illustrates the enormous volume of discovery that would need to be exchanged with respect to any additional copyrights added to the case at this late date (*see* Ex. D):

- Claimed direct infringement of copyrighted recordings (Req. Nos. 9-14, 50, 58, 61, 67, 70-72, 75, 90, 129, 130, 136, and 140-142)
- Claimed damages from alleged infringement of copyrighted recordings (Req. Nos. 27, 30, 66, 153-156, 238, and 244-246)
- Distribution of claimed infringements (Req. Nos. 17, 18, 21, 25, 67, 70-72, 74, 75, 80, 81, 83, 84-87, 89, 90, 137, 167, 168, 213-217, 235, 236, 241, 249, 251, 253, and 256)
- Potential misuse of copyrights (Req. Nos. 24, 25, 80, 81, 83, 84, 86, 87, 89, 115, 145-152, 205, 223-225, 235, 254, 255, 257-260, and 262-264)
- Plaintiffs’ first awareness of alleged infringement of copyrighted recordings (Req. Nos. 12 and 129)

³ Pursuant to the scheduling order in this case, the deadline for Plaintiffs to have provided such discovery has long passed. The only discovery postponed for a second phase of the case was ownership discovery; all other discovery was to have been completed by the fact discovery cutoff. 12/7/08 Hrg. Tr. at 3:9-15; 10:19-11:4. As discussed *infra* at Section I.B, Plaintiffs’ failure to have produced documents during the discovery period relevant to their proposed additional copyright claims provides yet another reason why these copyrights should not be added to the case at this late date.

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- Plaintiffs' first awareness of availability of copyrighted recordings on peer-to-peer network (Req. Nos. 9 and 128)
- Measures taken to reduce alleged infringement of copyrighted recordings (Req. Nos. 95-100, 102, 103, 126-128, 140-142, 157-160, 226, and 261)
- Waiver/estoppel/acquiescence/authorization (Req. Nos. 17, 87, 102, 103, 125-128, 137, 167, 168, 213, 216, 236, and 253)

B. Plaintiffs Unduly Delayed Amending Their Complaint, and Defendants Will Be Prejudiced by Allowing Amendment Now

It is black letter law that proposed amendments after expiration of the deadline for amending pleading are disfavored and require a showing of good cause. Fed. R. Civ. P. 16(b)(4); see *Sokol Holdings, Inc. v. BMB Munai, Inc.*, No. 05 CV 3749 (KMW) (DCF), 2009 WL 3467756, at *2 (S.D.N.Y. Oct. 28, 2009) (“Where a scheduling order fixes a deadline for asserting additional claims, a party seeking leave to amend its pleadings after the deadline must show ‘good cause’ for modification of the scheduling order.”) (citing *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 339-40 (2d Cir. 2000)). Scheduling orders and the deadlines they impose “serve an important function in ensuring fairness, certainty, and expedition of litigation.” *Id.* at *6. Allowing the parties to freely amend at any time would “undermine the court’s ability to control its docket, disrupt the agreed-upon course of the litigation, and reward the indolent and cavalier.” *Id.* Accordingly, a motion to amend should be denied where the proposed amendment is based on facts known to plaintiff long before the proposed amendment or where plaintiff has failed to justify the delay. See *Krumme v. WestPoint Stevens, Inc.*, 143 F.3d 71, 87-88 (2d Cir. 1998) (affirming district court’s order denying motion to amend).

Even if a party were able to show good cause for a belated amendment, the motion should be denied, where the amendment would prejudice the non-moving party. See *Ansam Assocs., Inc. v. Cola Petroleum, Ltd.*, 760 F.2d 442, 446 (2d Cir. 1985) (court is “required to take into account any prejudice that result to the party opposing the amendment”). The Second Circuit has recognized that an amendment is especially prejudicial when proposed after the discovery cutoff, after submission of summary judgment papers, or close to trial. *Id.* The rationale is that it would be unjust to the nonmoving party to “forc[e] it to proceed to trial, post-discovery, on a new complaint,” modify its defense strategy, and incur additional costs, when the party has litigated for years believing that the case would be of a different, more limited nature, and when Plaintiffs could have sought leave to amend earlier. See *id.*; see also *Roberts v. Ground Handling Inc.*, No. 04 Civ. 4955 (WCC), 2007 WL 2753862, at *5 (S.D.N.Y. Sept. 20, 2007) (“To require defendant to incur additional costs and to change its strategy on the eve of

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trial because plaintiff has concocted a new theory three years into the litigation would, in a real sense, unduly prejudice defendant.”).

Both of Plaintiffs’ efforts to add new copyright claims to this case fall well past the March 9, 2007 deadline for amending the Complaint and should be rejected as unduly delayed and prejudicial. Docket No. 7. *First*, Plaintiffs improperly seek to rely on their January 31, 2008 letter as adding 3000+ copyrights to the case. But even if a letter could ever effect an amendment to the complaint – which it cannot⁴ – it was far too late to do so here: nearly a year after the Court-ordered deadline to amend the Complaint and on the very last day of document discovery, thereby foreclosing any meaningful discovery on the additional 3000+ claims.

Second, Plaintiffs’ recent revelation that they will seek to supplement the copyright claims with an unknown thousands of additional copyrights at some unknown future date is even more inappropriate. 6/7/10 Hrg. Tr. at 7:14-16. It is now more than 3 years after the amendment deadline and 2 years after the close of discovery. Plaintiffs have provided no justification for their failure to have previously moved the Court to add new claims, and there is none. Plaintiffs are uniquely in possession of documents to determine the copyrights they claim to own and that are allegedly infringed through use of the LimeWire software. Indeed, Plaintiffs have retained “investigators” since 2004 dedicated to collecting evidence “for use in anti-piracy litigation.” Docket No. 191 at ¶ 2. Plaintiffs have had more than ample opportunity to seek to amend their complaint to add copyright claims within the time permitted, but simply chose not to. This Court has rejected requests for leave to amend for precisely this type of inexcusable inaction. *See Sokol Holdings, Inc.*, 2009 WL 3467756, at *3 (denial of leave to amend is proper where “Plaintiffs could have asserted their new claims at the outset of this case and at other points during this litigation;” “parties engaged in extensive legal briefing and substantial discovery;” and “Plaintiffs never requested that the Court extend its scheduling deadlines and waited for more than a year after the stated deadline had passed”). The same reasoning and result should obtain here.

⁴ It is well-established in this District that amendments to complaints cannot be made in informal papers. *See, e.g., Fellows v. CitiMortgage, Inc.*, No. 07 Civ. 2261 (DLC), ___ F. Supp. 2d ___, 2010 WL 1857243, at *16, n.33 (S.D.N.Y. May 11, 2010) (refusing to consider claims asserted in brief but not set forth in pleading) (citing *Wright v. Ernst & Young LLP*, 152 F.3d 169, 178 (2d Cir. 1998)). There is certainly no authority allowing amendments to the pleadings to be effected by letter. Here, the circumstances requiring rejection of Plaintiffs’ claimed letter “amendment” are particularly compelling: (1) the Court already *rejected* Plaintiffs’ request to amend the complaint in that manner, and (2) Plaintiffs failed to send to Defendants the purported attachment to the letter identifying the additional copyright claims.

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Given Plaintiffs' failure to demonstrate good cause for allowing a belated amendment, the amendment must be rejected, even in the absence of prejudice to Defendants. *Id.* But here, the prejudice to Defendants would be overwhelming. Defendants have already combed through the documents, taken and received written discovery, provided their witnesses for deposition, taken the depositions of Plaintiffs' witnesses, prepared their expert reports, developed their legal theories, and opposed summary judgment. They should not be required to start from scratch with respect to thousands of additional copyrights long known to Plaintiffs, but which Plaintiffs simply did not bother to assert. It took over two years to complete discovery on 30 copyrights. While some portion of discovery would not need to be repeated for the remaining works, there is substantial, copyright-specific discovery that would be required relating to ownership, alleged infringement, defenses thereto (including waiver, estoppel, license, acquiescence, misuse, and authorization), entitlement to damages, and Plaintiffs' failure to mitigate damages, among other things. *See supra* at I.A. Such discovery cannot meaningfully be completed on "thousands and thousands" of new copyrights (where potential "thousands" are *still* unidentified) in time for a trial in January. *See Roberts*, 2007 WL 2753862, at *3-5 (precluding new damages theory because defendant would be severely prejudiced without sufficient time to conduct appropriate discovery).

II. There Are No "Exceptional Circumstances" Justifying Reopening Discovery on Direct Infringement and Damages

The only issue that properly remains for discovery is ownership of the copyrights asserted in Plaintiffs' Complaint filed on September 20, 2007. 12/7/07 Hrg. Tr. at 10:19-11:8. All other discovery should now be completed.

Plaintiffs, however, seek to transform this limited discovery into an opportunity to (1) supplement their document production with additional evidence to address deficiencies in their purported proof of direct infringement and damages, 6/7/10 Hrg. Tr. at 3:12-17, and (2) start afresh with respect to untold "thousands" of additional, as-yet unidentified copyrights. But general discovery has been closed for nearly two years. Courts in this District expect and demand a party's compliance with discovery deadlines. "Such compliance is necessary to the integrity of our judicial process. A party who flouts such orders does so at his peril." *Lyondell-Citgo Refining, LP v. Petroleos De Venezuela, S.A.*, No. 02 Civ. 0795 (CBM), 2005 WL 551092, at *2-3 (S.D.N.Y. Mar. 9, 2005); *Miltope Corp. v. Hartford Cas. Ins. Co.*, 163 F.R.D. 191, 192 (S.D.N.Y. 1995) (imposing sanctions because plaintiff's delay made it impossible for defendant to conduct necessary discovery before discovery cutoff).

When a discovery deadline has passed, the standard for reopening discovery is high, and Plaintiffs must demonstrate good cause. Fed. R. Civ. P. 16(b)(4); *see Gray v. Town of Darien*, 927 F.2d 69, 74 (2d Cir. 1991) (denying plaintiff's request for further discovery where plaintiff

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had ample time to conduct discovery and failed to show good cause for why discovery should be reopened or extended); *King v. Friend of Farmer, Inc.*, No. 97 Civ. 9264 (BSJ) (RLE), 2000 WL 290355, at *1 (S.D.N.Y. Mar. 21, 2000) (“[a]bsent some explanation for defendants’ delay,” there is no good cause to reopen discovery). Consistent with the law of this Circuit, when Judge Lynch entered his Case Management Plan, the Court stated that the discovery deadline “shall not be adjourned except upon a showing of extraordinary circumstances.” Docket No. 7. There are no extraordinary circumstances here which merit reopening discovery on direct infringement or damages. *Burlington Coat Factory Warehouse Corp. v. Esprit De Corp.*, 769 F.2d 919, 928 (2nd Cir. 1985) (“A party who both fails to use the time available and takes no steps to seek more time . . . need not be allowed more time for discovery absent a strong showing of need.”).

1. Works at Issue in the Complaint

As to each and every work identified in Plaintiffs’ Complaint filed on September 20, 2007, no reason exists why Plaintiffs could not or should not have produced all of the evidence on which they intended to rely to support their claims during the discovery period, including purported evidence of direct infringement by LimeWire users and evidence that Plaintiffs were harmed therefrom. Documents relating to direct infringement and damages should be the very first documents collected and evaluated by Plaintiffs *prior* to asserting them as works at issue in their Complaint. And, indeed, the parties explored these issues since the very beginning of the discovery period. *See* Exs. D (Defendants’ First Request for Production of Documents served on October 31, 2006) & E (Plaintiffs’ First Request for Production of Documents served on October 31, 2006).

2. Potential New Works

As already discussed in Section I.B, Defendants would require copious copyright-specific discovery for any new works added to the case at this late date. For instance, with respect to direct infringement and damages alone, Plaintiffs will have to supplement over 84 discovery requests.⁵ Defendants must be allowed time to complete the required follow-on discovery. *See*

⁵ Even if Plaintiffs were to elect statutory damages, they would still be required to produce documents relating to actual damages. *See Warner Bros. Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120, 1126 (2d Cir. 1989) (“In making a statutory award, the court may consider the likelihood of profits and losses . . .”); *Peer Int’l Corp. v. Luna Records, Inc.*, 887 F. Supp. 560, 568 (S.D.N.Y. 1995) (“Courts have used a variety of factors to fix the amount of statutory damages, including ‘fair market value of the rights infringed, revenue lost by the plaintiff and profits gained by the defendant[.]’”). Due process requires that statutory damages awards bear a reasonable relationship to actual damages. *See UMG Recordings, Inc. v. MySpace, Inc.*, No. 06-

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Point Prods. A.G. v. Sony Entm't, Inc., No. 93 Civ. 4001 (NRB), 2002 WL 31856951, at *4 (S.D.N.Y. Dec. 19, 2002) (court acknowledging that defendants would need significant additional time, preparation, and analysis to conduct discovery on new damages theory). At the June 7, 2010 hearing, the Court stated its unwillingness to schedule the trial past January 2011. 6/7/10 Hrg. Tr. at 28:14-16 (“[S]o I’m intending to keep to a January date; I’m not intending to have it go off until April.”). Given the amount of time it has taken to complete discovery on the works at issue in the Complaint, it seems nearly impossible that requisite discovery on the thousands of works that Plaintiffs still seek to add can be completed – without prejudice to Defendants – before Plaintiffs’ requested trial date.

III. Copyright Misuse Remains a Viable Defense

Plaintiffs contend that Defendants cannot assert a copyright misuse defense. During the parties’ meet-and-confer in advance of this letter briefing, at the June 7, 2010 conference, and in Plaintiffs’ Reply Memorandum in Support of Its Motion for Permanent Injunction, Plaintiffs rehashed the same tired arguments as to why Defendants supposedly cannot assert their copyright misuse defense. The Court should finally reject those arguments now.

First, Plaintiffs claim that that misuse is not established as a defense in the Second Circuit. Although the Second Circuit has not yet explicitly adopted the copyright misuse defense, the doctrine has been accepted and applied in many other circuits and recognized as a viable defense by district courts in the Second Circuit. *See Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191, 204-05 (3d Cir. 2003) (applying doctrine); *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 978 (4th Cir. 1990) (applying doctrine); *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 793-94 (5th Cir. 1999) (applying doctrine); *Coleman v. ESPN, Inc.*, 764 F. Supp. 290, 295 (S.D.N.Y. 1991) (noting that recent case law holds that “copyright misuse is a cognizable defense”). Further, the Second Circuit’s silence on the defense dictates in favor of preserving the defense here. *See Reliability Research Inc. v. Computer Assocs. Int’l, Inc.*, 793 F. Supp. 68, 69 (E.D.N.Y. 1992) (declining to dismiss copyright misuse because “[n]either the

CV-7361 AHM (AJWx), slip op. at 2 (C.D. Cal. Mar. 17, 2008) (compelling discovery relating to profits, even where Plaintiff sought statutory damages, because “there is a possibility that an enormous disparity between a statutory award and a copyright owner’s actual damages could violate due process.”); *see also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 410 (2003) (“[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”). The failure to provide actual damages discovery severely undermines arguments for a large statutory damages award. *See Warner Bros., Inc. v. Dae Rim Trading, Inc.*, 677 F. Supp. 740, 769 (S.D.N.Y. 1988).

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Supreme Court nor the Second Circuit has addressed the issue of the existence and extent of a misuse of copyright defense”).

Second, Plaintiffs claim Judge Lynch’s dismissal of the antitrust counterclaims requires dismissal of the copyright misuse defense. But Judge Lynch expressly declined to make any rulings on copyright misuse, noting that “it is not clear whether, if at all, the factual bases underlying that defense will overlap with the factual allegations that form the basis of Lime Wire’s state law counterclaims.” *Arista Records LLC et al. v. Lime Group LLC et al.*, 532 F. Supp. 2d 556, 584 n.37 (S.D.N.Y. 2007). Further, the fact that Defendants’ misuse allegations may not amount to an antitrust violation does not justify dismissal of the defense. *See Lasercomb Am., Inc.*, 911 F.2d at 978 (“a misuse need not be a violation of antitrust law in order to comprise an equitable defense to an infringement action”).

Finally, Plaintiffs claim that Defendants cannot assert a defense of copyright misuse if they have been found liable for infringement. Plaintiffs have never identified any authority for this proposition except Judge Lynch’s hypothetical question during the March 12, 2008 hearing and the off-the-cuff response of Defendants’ former counsel.⁶ In fact, the law is to the contrary: where the copyright holder is misusing his copyright, he cannot recover even if his copyright has in fact been infringed. *See id.* at 978-79. Defendants’ counsel confirmed as much during the hearing. 3/12/08 Hrg. Tr. at 5:22-6:6.

Thus, Plaintiffs have no viable argument that Defendants’ copyright misuse defense has been waived or lost. Further, if the Court reopens discovery for Plaintiffs’ benefit (as discussed

⁶ Plaintiffs also argue that Defendants lost the ability to assert the defense based on statement by its former counsel at a status conference, claiming that defense counsel “agreed” that the defense would be ineffective if Defendants were found liable. Docket No. 273 at 10. Plaintiffs’ argument not only mischaracterizes the statements by defense counsel, but also demonstrates a misunderstanding of judicial admissions, which pertain only to statements of *fact* rather than legal arguments. *See N. Y. State Nat’l. Org. for Women v. Terry*, 159 F.3d 86, 97 n.7 (2d Cir. 1998) (declining to bind plaintiffs based on their attorneys’ “legal arguments” made during hearing); 30B Michael H. Graham, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 7026 (1st ed. 2010) (“The scope of a judicial admission by counsel is restricted to unequivocal statements as to matters of fact which otherwise would require evidentiary proof; it does not extend to counsel’s statement of his conception of the legal theory of a case, *i.e.*, legal opinion or conclusion.”). Former counsel’s discussion of the theoretical reach of the misuse defense does not constitute a binding judicial admission, and cannot bar Defendants from properly asserting the defense.

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above), Defendants respectfully request that Plaintiffs be required to supplement their document production with current license agreements and communications related thereto.⁷

IV. No Updated Net Worth Discovery Is Necessary

No updated net worth discovery is merited. Defendants recently provided a comprehensive profit and loss statement for Lime Wire LLC from inception through April 30, 2010, balance sheet totals through May 31, 2010, and fixed assets valuation through May 31, 2010. *See* 6/30/10 sealed Declaration of George Searle. Defendants also provided information relating to Mark Gorton's assets and investments. *See* 6/30/10 sealed Declaration of Mark Gorton. Defendants further provided information about disbursements made by Lime Wire LLC to related Lime entities for which Defendants may hold interest. *See* 6/30/10 sealed Declaration of Anthony M. Lendez. In sum, Defendants' opposition to Plaintiffs' motion for preliminary injunction to freeze assets provides a complete picture of the current financial circumstances of the Lime entities, and no further information is merited, especially where Defendants do not currently intend to rely on any other information relating to their net worth besides what has been provided to Plaintiffs. In combination with the abundant information already provided, including valuation of Lime Wire LLC, income statements, general ledgers, balance sheets, debt and equity financing, cash flows, tax statements, *etc.*, Plaintiffs should not lack any information relating to Defendants' financial circumstances.

To the extent there is specific net-worth discovery Plaintiffs believe remain deficient, Plaintiffs must specifically identify the discovery, and the requests to which the discovery pertains, so that Defendants can evaluate what Plaintiffs are seeking and whether any further supplementation is appropriate.

Respectfully submitted,

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⁷ *See* Ex. D at Req. Nos. 24, 25, 80, 81, 83, 84, 86, 87, 89, 115, 145-152, 205, 223-225, 235, 254, 255, 257-260, and 262-264.

Exhibit H

See 2/16/2011

Jeffrey P. Weingart
Declaration Exhibit D

EXHIBIT B

See 2/16/2011

Jeffrey P. Weingart
Declaration Exhibit E

EXHIBIT C

See 2/16/2011

Jeffrey P. Weingart
Declaration Exhibit E

EXHIBIT D

See 2/16/2011

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Declaration Exhibit F