

EXHIBIT 4

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 10-9438-GW (PJWx) Date January 19, 2011

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

Present: The PATRICK J. WALSH, UNITED STATES MAGISTRATE JUDGE
Honorable

Celia Anglon-Reed

None

Deputy Clerk

Court Reporter / Recorder

Attorneys Present for Non-Party MySpace:

Attorneys Present for Defendants
Lime Wire, et al.:

None

None

Proceedings: Order Transferring Discovery Motion to Compel MySpace to Produce
Discovery to the U.S. District Court for the Southern District of New York

Before the Court is a motion by Defendants Lime Wire, to compel non-party MySpace to produce discovery in response to a subpoena issued from this district. The subpoena relates to an action now pending in the Southern District of New York, which is set to go to trial in April 2011.

In the course of discovery, Defendants have served numerous subpoenas on third parties. The district judge in New York has referred the many discovery disputes that have stemmed from those subpoenas to Magistrate Judge Debra Freeman. Over the past year, Judge Freeman has resolved numerous discovery disputes between Defendants and parties and non-parties alike. A fair reading of the motion now before the Court suggests that Judge Freeman has, in fact, decided the issues now raised in the instant motion. Further, according to MySpace, Defendants have already obtained the evidence they seek from MySpace from Plaintiffs.

All this being so, the Court took it upon itself to contact Judge Freeman to see if she would be willing to resolve the current dispute between Defendants and MySpace. Judge Freeman has agreed to do so. As a result, the Court now transfers this motion to Judge Freeman in the U.S. District Court for the Southern District of New York with the Court's gratitude.

Initials of Preparer

EXHIBIT 5

Jonathan Gottlieb (SB# 194432)
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FOX GROUP LEGAL
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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.)

1 I, Jonathan Gottlieb, declare as follows:

2 1. I am a member of the bar of the State of California and of this
3 Court. I serve as Senior Vice President, Litigation, of Fox Group Legal. My
4 duties in that role include handling litigation for MySpace, Inc., including
5 responses to certain subpoenas.
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7 2. Except where specifically stated otherwise, I have personal
8 knowledge of the facts set forth below. I submit this Declaration in support of
9 Non-Party MySpace, Inc.'s ("My Space's") Contentions in the Joint Stipulation
10 Opposing Enforcement of the Subpoena served on it by Defendants Lime Group et
11 al. ("Defendants").
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14 3. I first became aware that Defendants sought discovery from
15 MySpace on or around September 23, 2010, when Defendants' 462 page subpoena
16 was sent to me. That subpoena (the "Subpoena"), attached to the Declaration of
17 Dan Kozusko as Exhibit 1, purported to call for extremely broad production of
18 documents, plus a personal appearance of a witness, on less than ten days' notice.
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21 4. On October 1, 2010, I sent a letter to Defendants' counsel,
22 noting the impropriety of their subpoena in terms of its breadth and scope, and
23 stating objections. Those objections are included as Exhibit 2 to the Kozusko
24 Declaration. MySpace advised in that letter that "many of the documents sought
25 by your subpoena are equally within the possession, custody, and control of one of
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1 the parties to the lawsuit” and that if Defendants proceeded to attempt to enforce
2 their subpoena, MySpace would seek recovery of its costs and attorneys’ fees.

3 5. Although I cannot recall the precise date, sometime after I
4 served the objections, I spoke with Mary Eaton, counsel for Defendants. I advised
5 Ms. Eaton that MySpace could not be treated as a “back door” to discovery that
6 could equally be obtained by party discovery, and that we viewed their subpoena
7 as unreasonably broad. I advised her that if there were reasonably specific and
8 non-duplicative documents they were seeking from MySpace, we would be willing
9 to discuss production.
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12 6. I did not hear further from Defendants until October 17, when I
13 received an e-mail from Dan Kozusko. A copy of that e-mail is attached as Exhibit
14 4 to the Kozusko declaration, Mr. Kozusko and I spoke on October 22, 2010.
15 During that conversation, I requested that he summarize the documents that
16 Defendants sought from MySpace so that I could determine whether they sought
17 anything discoverable and non-cumulative. Mr. Kozusko’s e-mail outlining those
18 categories is included as Exhibit 6 to the Kozusko Declaration. Mr. Kozusko did
19 not include any reference to documents mentioning “Lime Wire” – i.e., documents
20 that would be responsive to Document Request 6. In that conversation, I asked Mr.
21 Kozusko to explain the relevance of MySpace producing documents that were
22 equally obtainable from their adversary in the litigation. I do not recall whether he
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1 had any response to my question regarding relevance, but he asserted that nothing
2 precluded Defendants from seeking duplicative discovery from MySpace.

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

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

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

14 10. In that telephone conference on December 17, 2010, Mr.
15 Kozusko and I, along with a colleague of mine from MySpace, were able to reach
16 agreement with regard to the first and third categories set out in Mr. Kozusko's
17 October 22, 2010 e-mail. Even though the documents requested were duplicative,
18 because we could assemble them with only hours (as opposed to hundreds of
19 hours) of effort, we agreed to provide an index of contracts with Plaintiffs and
20 certain financials that we understood Plaintiffs had already been ordered to
21 produce. With regard to "communications," however, Mr. Kozusko was in my
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1 view unable to articulate a theory of relevance that would justify MySpace
2 undertaking any burden, much less the substantial burden required to image,
3 search, and review the documents of potentially dozens of custodians. It became
4 clear to me during that conversation that Defendants were hoping to find a
5 document somehow helpful to their defense, as opposed to having a specific idea
6 of the content of documents that existed (which might make search terms useful to
7 finding such a document). I explained the process of searching electronic
8 document to Mr. Kozusko and advised him that we believed the discovery sought
9 was not relevant and was cumulative and unduly burdensome. In that
10 conversation, I also advised him that I found it to be misleading that he continued
11 to cite to Magistrate Judge Freeman's order for the proposition that
12 communications were "relevant," without citing to Judge Wood's order on appeal,
13 in which she found the relevance "potentially tenuous." Mr. Kozusko stated he
14 was aware of Judge Wood's order and said, in effect, "it is what it is." I also
15 advised him that his treatment of Magistrate Judge Freeman's order regarding
16 Vevo was misleading insofar as it failed to acknowledge that the Order merely
17 ratified a compromise proposed by Vevo over his client's objection. I cautioned
18 him not to proceed with a Joint Stipulation on these grounds and with those
19 misrepresentations, but he reserved the right to do so.

26 11. On December 20, 2010, MySpace produced the index it agreed
27 to produce to satisfy Plaintiff's requests under the first category of documents
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1 specified in Mr. Kozusko's October 22, 2010 e-mail. A true and correct cover
2 letter to that production, without its enclosures, is attached as Exhibit 23.

3 12. On December 23, 2010, MySpace produced a DVD containing
4 the financial documents it agreed to produce, satisfying Plaintiff's requests under
5 the third category of documents specified in Mr. Kozusko's October 22, 2010 e-
6 mail. A true and correct cover letter to that production, without its enclosures, is
7 attached as Exhibit 24.
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10 13. I was not aware that Defendants sought to serve me with their
11 portions of a Joint Stipulation until December 28, 2010. Defendants apparently
12 sent a revised joint stipulation by e-mail on December 20, but it was not received
13 because of the large size of the e-mail's attachments. I did not receive all portions
14 of Defendants' portion of the current Joint Stipulation until December 29, 2010.
15 Mr. Kozusko and I were able to negotiate a mutually acceptable schedule.
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18 14. In the course of preparing my opposition to this Joint
19 Stipulation, I learned that Defendants have filed Motions to Compel against
20 various third-party recipients in multiple jurisdictions around the country. I have
21 spoken with counsel for Amazon, Yahoo!, Google, and MediaDefender, all of
22 whom are currently litigating or who have litigated the same issues against
23 Defendants. None of these third-party companies voluntarily agreed to undertake
24 the burden to search for "communications" in response to Defendants' subpoenas.
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1 15. My research also revealed an order entered by this Court on
2 December 22, 2010, denying Defendants' motion to compel against
3 MediaDefender. A true and correct copy of that order is attached as Exhibit 24.
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5 16. As part of my defense of MySpace in litigation, I am generally
6 familiar with its business and business practices. MySpace Music, which was
7 formed as a separate division in early 2008, currently has about 70 full-time
8 employees. The best estimate provided is that 22-30 of those employees
9 communicated with representatives of the major labels – i.e., a representative of
10 one of the 13 Plaintiffs – on a weekly or more frequent basis, often several times a
11 day. In addition, I am aware that many other employees and agents of MySpace,
12 including those not technically within MySpace Music, from time-to-time assist on
13 projects involving one or more of the major record companies.
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16 17. As a litigator at Fox Group Legal, I am required to be familiar
17 with the process for collection, processing, and review of electronic documents.
18 That process requires, first, imaging and upload of the custodian's repositories of
19 electronically stored information. Depending on the nature of those repositories
20 and their size, capture may take anywhere from one to five hours per custodian of
21 specialized personnel's time. Once the data are captured, they are typically
22 uploaded and processed into searchable format. This process, again depending on
23 size of the data, may take another one to two hours of specialized personnel's time,
24 plus additional hours of computer processing time, during which the computers are
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1 unavailable to perform other tasks. Once the data are loaded, it is possible to run
2 search terms to cull down the data to documents that contain a term or terms. After
3 search terms are run, manual review by an attorney or paralegal is necessary to
4 determine whether the search terms "hit" responsive documents or whether they
5 obtained false positives, as is common with general search terms. Manual review
6 is also necessary to determine whether a document is protected by attorney-client
7 privilege or other protections. Depending on the size of the data set, manual
8 review of documents can take hundreds or thousands of work-hours.

11 18. In the course of my duties, I have frequently reviewed
12 electronically captured documents, and I am familiar with the use of search terms
13 and manual review resulting therefrom. Defendants' request for
14 "communications" would have necessitated capture and review of dozens of
15 custodians' electronically stored information. The capture, by itself, would have
16 taken hundreds of hours and prevented the specialized technical personnel from
17 performing their other essential duties, which includes assisting in the defense of
18 cases brought against MySpace as a party. Even after uploading these data and
19 running search terms, I or a paralegal would have to find time to manually review
20 the search results, which could run into the hundreds of hours. The generic search
21 terms that Plaintiffs propose – including words like "license," "contract," and
22 "agreement," based on my experience, are likely to generate thousands, if not tens
23 or hundreds of thousands, of "hits."
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1 19. From the date that Defendants forwarded their Joint Stipulation,
2 I began keeping contemporaneous records of my time, intending to seek to collect
3 compensation in the event that Defendants proceeded with their Motion. I have
4 spent well in excess of 25 hours corresponding with Defendants, speaking with
5 their counsel on the phone, and researching and preparing this Opposition to the
6 Joint Stipulation. This estimate does not include the time of any other individuals
7 who assisted me in, for example, preparing production of documents that we
8 produced to Defendants.
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11 20. Prior to joining Fox Group Legal, I was an associate and
12 Counsel at Akin Gump Strauss Hauer & Feld in Los Angeles in the litigation and
13 law & strategy groups. I joined Akin Gump in Los Angeles following a clerkship
14 for the Honorable Roger J. Miner of the United States Court of Appeals for the
15 Second Circuit. I obtained my J.D. in 1997 from The George Washington
16 University Law School with highest honors, where I served as Editor-in-Chief of
17 the Law Review and as a member of the Moot Court Board. At the time I left Akin
18 Gump in 2004, my standard billing rate was well in excess of \$350 per hour.
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22 21. As part of my job at Fox Group Legal, I hire outside counsel
23 and review their bills. As a result, I am very familiar with the rate structure for law
24 firms of all sizes in Los Angeles. At a major international law firm, the billing
25 rates for attorneys with backgrounds, seniority, and skills similar to mine typically
26 exceed \$500 per hour. Based on my knowledge of the Los Angeles legal market, I
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1 am confident that I could command at least \$500 an hour for work on cases similar
2 to the *Arista Records* matter. It is extremely likely that the rates for attorneys of
3 comparable seniority at Willkie Farr, Defendants' law firm, are considerably
4 higher than \$500 an hour.
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6 22. Using \$500 an hour as an applicable rate, and estimating
7 conservatively that I spent 25 total hours addressing Defendants' Joint Stipulation,
8 MySpace requests recovery of no less than \$12,500 as compensation and as a
9 sanction for Defendants' misconduct.
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11 I declare under penalty of perjury that the foregoing statements are true and
12 correct to the best of my knowledge and belief.
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14 January 6, 2011, in Los Angeles, California.

15 /s/ Jonathan Gottlieb

16 Jonathan Gottlieb
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EXHIBIT 23



FOX GROUP
A UNIT OF NEWS CORPORATION

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Jonathan Gordlieb
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).

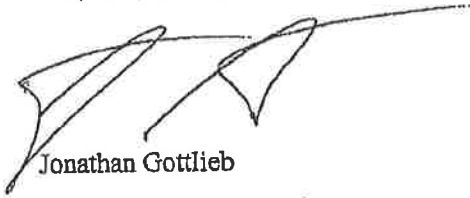
Also pursuant to our oral agreement on Friday, MySpace gave notice to the labels today that it intended to produce summaries showing total payments under agreements between MySpace Music and the Plaintiffs. MySpace requested that any Plaintiff who objected to this production notify me on or before 5:00 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,

A handwritten signature in black ink, appearing to read "Jonathan Gottlieb", with a long horizontal line extending to the right.

Jonathan Gottlieb

cc: Daniel Cooper

Enclosures: MySpace 1-5

EXHIBIT 24



FOX GROUP
A UNIT OF NEWS CORPORATION

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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.*

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PROOF OF SERVICE

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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.

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.

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 6

USDS SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 11/19/10

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)

OPINION AND 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

On May 11, 2010, 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. In the Court’s Opinion and Order (as amended on May 25, 2010), the Court detailed this case’s procedural and factual background (Dkt. No. 223), familiarity with which is assumed.

The litigation is now in the damages phase. The instant dispute concerns the scope of damage-related discovery to which Defendants are entitled. Plaintiffs have filed an objection to

Magistrate Judge Freeman's Order of November 2, 2010 (Dkt. No. 339) (hereinafter, the "November 2 Order"). Magistrate Judge Freeman issued the November 2 Order issued after a lengthy hearing held on November 1, 2010. The November 2 Order granted, in part, Plaintiffs' Motion for Reconsideration of Magistrate Judge Freeman's Order of October 15, 2010 (Dkt. No. 329) (hereinafter, the "October 15 Order"). The October 15 Order ordered Plaintiffs to supplement its prior productions of certain categories of material, and ordered production of further materials related to damages.

Specifically, Plaintiffs object to the following provisions of the November 2 Order:

1. That Plaintiffs produce all communications, relating to licensing, between Defendants and the 15 third-party licensees recently subpoenaed by Defendants, except for draft license agreements, from the last point in time discovery was collected;
2. That Plaintiffs produce all communications with other licensees referring or relating to LimeWire;
3. That the parties meet and confer regarding the parameters of an appropriate search for Plaintiffs' communications with their potential (as opposed to actual) licensees;
4. That Plaintiffs search for and produce internal emails regarding LimeWire contained in the email accounts of those employees of Plaintiffs who have been primarily responsible for negotiating licensing agreements with the 15 third-party licensees recently subpoenaed by Defendants;
5. With respect to recordings that were issued after 1972, as to which Plaintiffs are seeking statutory damages, that the parties submit supplemental briefing setting forth legal authority for their respective positions as to whether information regarding Plaintiffs' profits (as opposed to gross revenue) is relevant to statutory copyright damages;
6. With respect to recordings that were issued before 1972, as to which Plaintiffs are seeking common-law actual damages, that Plaintiffs produce documents and/or information sufficient to show the royalties paid by Plaintiffs in connection with those recordings;
7. To the extent Plaintiffs have gathered information regarding specific instances of the recordings at issue in this case being downloaded via the LimeWire system,

that Plaintiffs provide Defendants with documents or information sufficient to show the earliest dates that each such recording was downloaded.

These disputed discovery orders (collectively “Orders 1-7”) can be roughly broken into three categories. Orders 1-4 pertain to discovery regarding Plaintiffs’ communication with licensees and potential licensees. Orders 5 and 6 pertain to discovery regarding Plaintiffs’ profits and costs related to the infringed works. Order 7 pertains to the date of that each work was first infringed. The Court will address each category in turn.

For the reasons stated below, Judge Freeman’s November 2 Order is AFFIRMED as to Orders 1, 5 and 6, and this Court holds in abeyance its review of Orders 2-4 and 7.

II. Standard of Review

Pursuant to Rule 72 of the Federal Rules of Civil Procedure and its enabling statute, the Federal Magistrates Act, 28 U.S.C. § 636(b)(1), for non-dispositive matters, including discovery disputes, a district court shall reverse a magistrate’s order only where it has been shown that the order is “clearly erroneous or contrary to law.” 28 U.S.C. § 636(b)(1)(A) (2002); *see also* Fed. R. Civ. P. 72(a); *Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 900 F.2d 522, 525 (2d Cir. 1990). Courts in this Circuit have held that a magistrate’s ruling on a discovery dispute should only be overturned for an abuse of discretion. *Edmonds v. Seavey*, No.08 Civ. 5646, 2009 WL 2150971, *2 (S.D.N.Y. July 20, 2009) (noting that the fact that “reasonable minds may differ on the wisdom of granting [a party’s] motion is not sufficient to overturn a magistrate judge’s decision”).

III. Plaintiff’s Objections

A. Orders 1-4: Licensee Communications

Plaintiffs argue that Judge Freeman committed clear error in ordering supplemental discovery as to Plaintiffs' communications and negotiation with licensees of its recordings, as well as internal communications regarding such license agreements.

In the October 15 Order, Judge Freeman explains that these communications would be relevant to the calculation of Plaintiffs' statutory damages under the six-factor test outlined most recently in *Bryant v. Media Rights Prods., Inc.*, 603 F.2d 135, 144 (2d Cir. 2010). There, the Second Circuit explained that, in calculating appropriate statutory damages for copyright infringement, courts should consider

(1) the infringer's state of mind; (2) the expenses saved, and profits earned, by the infringer; (3) the revenue lost by the copyright holder; (4) the deterrent effect on the infringer and third parties; (5) the infringer's cooperation in providing evidence concerning the value of the infringing material; and (6) the conduct and attitude of the parties.

Id. (citing *N.A.S. Impor. Corp. v. Chenson Enter., Inc.*, 968 F.2d 250, 252-53 (2d Cir.1992)).

Judge Freeman reasoned that communication between Plaintiffs and actual or potential licensees, particularly communication that directly discussed LimeWire, could potentially shed light on "(3) revenue lost by the copyright holder" and "(6) the conduct and attitude of the parties." *Bryant*, 603 F.2d at 144. In particular, communications regarding licensing could illuminate Plaintiffs' "conduct and attitude" about its copyrights, licensing, and internet companies generally. Further, given that Plaintiffs had previously provided discovery of this type at an earlier stage in the litigation, Plaintiffs were required under Fed. R. Civ. P. 26(e) to supplement and update their production. October 15 Order at 5-6.

Plaintiffs argue that producing this material will be highly burdensome, and that this material is, in any event, not relevant to any viable claim or defense at this stage of the litigation. Although Plaintiffs previously did provide discovery of this type earlier in the litigation,

Plaintiffs contend that those productions were in response to requests pertaining solely to Defendants' antitrust counterclaims, and copyright misuse defenses, all of which have now been dismissed. Plaintiffs' Letter of November 2, 2010 (hereinafter "Pl. Letter") at 8-9. Therefore, Plaintiffs argue, they are no longer under any duty to supplement those productions. Further, Plaintiffs argue that, to the extent that *Bryant* instructs courts to look at the "conduct and attitude" of the Plaintiffs at all, only Plaintiffs' conduct in the litigation itself, or conduct *vis à vis* the Defendants themselves, is relevant. Pl. Letter at 8. Plaintiff contends that there is no authority for the position that this inquiry looks to a plaintiff's communication with third party, legitimate distributors of its works. *Id.*

Defendants argue that this communication would illuminate plaintiffs' attitudes regarding the value of its copyrights and would show how Plaintiffs conducted themselves in dealing with others in the Internet marketplace. In particular, Defendants point to an email from Plaintiffs' prior productions that, Defendants argue, shows that Plaintiffs "sought to exert pressure on LimeWire to make a commercial deal on Plaintiffs' terms." Defendants' Letter of November 5, 2010 (hereinafter "Def. Letter") at 5. Defendants also argue that decisions in this Circuit do look to the attitude and conduct of the plaintiff in setting statutory damage awards. *Id.* (citing *Warner Brothers, Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120, 1126 (2d Cir. 1989); *Entral Group Int'l, LLC v. YHLC vision Corp.*, No. 05 Civ. 1912, 2007 WL 4373257, at *3 (E.D.N.Y. Dec. 10, 2007); *Arclight & Films Pvt. Ltd. v. Video Palace Inc.*, 303 F. Supp. 2d 356, 363 (S.D.N.Y. 2003)). Moreover, Defendants point out, no decision has held that a Plaintiff's conduct towards third parties cannot be relevant to its "conduct and attitude" under *Bryant*. Finally, Defendants argue that the earlier discovery requests of this type of material were not exclusively related to the antitrust and copyright misuse arguments, and therefore Rule 26(e) obligates Plaintiffs to

supplement their production. *See also* October 15 Order at 3-4 (“The parties did not brief, and the Court did not address, the relevance of any of Defendants’ specific document requests to other issues, including damages.”).

In response to Plaintiffs’ Motion for Reconsideration, Judge Freeman modified her original ruling to limit the required production. *See* November 2 Order. Specifically, the November 2 Order limited the production of Plaintiffs’ “communications related to licensing” to Plaintiffs’ communications with only 15 third-party licensees, previously identified by Defendants as being of particular interest to their damages analysis. Judge Freeman further limited this production to exclude draft license agreements, based on Defendants’ concession that they were not pressing for such production. As to any other of Plaintiffs’ licensees, Judge Freeman limited the required production to the license agreements themselves, and to communications referring specifically to LimeWire.

The Court is mindful of the potentially burdensome nature of this discovery, but acknowledges Defendants’ right to seek discovery relevant to a potential defense. Case law interpreting the *Bryant* factors is limited, but no decision holds that a plaintiff’s communications with third parties can never be relevant to its “conduct and attitude” in setting statutory damages. Moreover, while Plaintiffs’ prior productions of this material may have been particularly relevant to Defendants’ antitrust claims and copyright misuses, Plaintiffs have not established that that discovery was *exclusively* sought for those now-dismissed arguments. Accordingly, the Court cannot rule that Judge Freeman committed clear error in ordering Plaintiffs to supplement their prior productions of material falling under this category.

Given the potentially burdensome nature and broad scope of the discovery, as well as the potentially tenuous connection of the evidence sought to the damages inquiry at issue, this Court

AFFIRMS Order 1. Defendants will be permitted to seek discovery regarding communications relating to licensing between Plaintiffs and the 15 third-party licensees recently subpoenaed by Defendants. With respect to Orders 2-4, this Court holds in abeyance its decision, to give Defendants the opportunity to make a presentation of evidence to Judge Freeman to demonstrate that the discovery pursuant to Order 1 has yielded relevant evidence, and that further discovery pursuant to Orders 2-4 is necessary. The Parties shall meet and confer in good faith regarding when production of evidence pursuant to Order 1 may be made, and when the Parties will be prepared to appear before Judge Freeman to address the need for discovery pursuant to Orders 2-4.

B. Orders 5 and 6: Profits Information

Plaintiffs argue that Judge Freeman committed clear error in ordering discovery as to the royalties it paid on recordings issued before 1972, and in ordering further briefing from the parties on the relevance of Plaintiffs' profits to the calculation of statutory damages for infringement of recordings issued after 1972.

While it is hornbook copyright law that statutory copyright damages need not be based on evidence of actual damages, 4-14 Nimmer on Copyright § 14.04[A] (2010), it is well-settled that the amount of actual damages is one factor that courts take into account when setting statutory damages. *Bryant*, 603 F.2d at 144; *see also* Order of Aug. 9, 2010 (Dkt. No. 302) at 5 n.2 (noting that "Defendants are entitled to some discovery relating to the actual damages suffered by Plaintiffs as a result of Defendants' infringing conduct . . . [because] the Court may consider actual damages in determining the appropriate statutory damage award" (citing *Wartner Bros. Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120, 1126 (2d Cir. 1989)). In any event, Judge Freeman certainly did not commit clear error in asking the parties for additional briefing on a

disputed legal question. Order 5, ordering the parties to provide supplemental briefing on the relevance of Plaintiffs' profits to the calculation of statutory damages, is thus AFFIRMED.

The Parties shall provide this briefing in accordance with the new schedule set forth *infra* Section IV.

As to pre-1972 works, for which Plaintiffs are seeking actual damages, the Court finds that it was not clearly erroneous for Judge Freeman to issue Order 6, ordering production of royalty information. Both revenue and expense information related to online music sales are relevant to the actual damages Plaintiffs purportedly suffered as a result of Defendants' infringement, and it was not clear error to order production of material sufficient to show this information. Moreover, the order is not overly burdensome given that it does not order production of all royalty-related information for these works, but rather, orders production of information or material "sufficient to show the royalties paid by Plaintiffs in connection with those recordings." November 2 Order at 3.

C. Order 7: Earliest Date of Infringement

Plaintiffs argue that Judge Freeman committed clear error in ordering production of any information or documents possessed by Plaintiffs that are sufficient to show the earliest date that each of the recordings was first downloaded through the LimeWire service.

Defendants have sought this information on the theory that if any recording was infringed prior to the registration of that work's copyright, Plaintiffs then would be barred from recovering statutory damages for that work. *See* 15 U.S.C. § 412(2) (barring statutory damages for "any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work"). Plaintiffs argue that, even if the first date a recording was downloaded

through the LimeWire service was prior to the work's registration, later downloads taking place after the work's registration would be subject to statutory damages. Pl. Letter at 13. Defendants respond that, as a matter of law, later downloads are merely "part of an ongoing series of infringing acts." Def. Letter at 11 (quoting *U2 Home Entm't, Inc. v. Hong Wei Int'l Trading, Inc.*, No. 04 Civ. 6189, 2008 WL 3906889, at *15 (S.D.N.Y. Aug. 21, 2008)). Defendants cite case law holding that, where the first infringement in an "ongoing series" occurred prior to registration, then a plaintiff cannot seek statutory damages for later post-registration infringements of the work that are part of the same "ongoing series." *Id.* (citing *U2 Home Entm't*, 2008 WL 3906889, at *15; *Ez-Tixz, Inc. v. Hit-Tix, Inc.*, 919 F. Supp. 728, 726 (S.D.N.Y. 1996)). This question has not been firmly resolved by the courts in the context of the secondary liability of a peer-to-peer file-sharing service for downloads by different users. Plaintiffs argue that Defendants are not entitled to discovery on this issue until they resolve this issue as a matter of law.

The Court holds in abeyance its decision on this Order, to permit Judge Freeman to decide the threshold legal question of whether subsequent downloads by a peer-to-peer service users qualify as new infringements, or rather are part of an ongoing series of infringements. Both parties shall submit briefing to Judge Freeman on this legal issue in accordance with the schedule set forth *infra*, unless Judge Freeman modifies that schedule. Depending on the resolution of that legal issue, the Court may order discovery related to this issue.

IV. New Schedule

Judge Freeman's November 2 Order, and this Order, as well as the recent filing of a potentially dispositive motion by Defendants (Dkt. No. 330), necessitates a shift in the trial schedule. The new schedule is as follows:

Simultaneous Briefing on Legal Issues Outlined in this Order, at Sections III.B and III.C <i>supra</i>	Mon. Nov. 29, 2010
Responses to that Briefing	Mon. Dec. 6, 2010
Completion of Document Production	Wed. Dec. 29, 2010
Last Day to file Dispositive Motions	Fri. Jan. 7, 2011
Defendants' Expert Reports Due	Fri. Jan. 14, 2011
Last day for fact depositions	Mon. Jan 30, 2011
Last day for expert depositions	Mon. Feb. 14, 2011
Exchange trial exhibits, witness lists, deposition designations	Mon. Feb. 28, 2011
Motions in Limine and objections to trial exhibits, witness lists, deposition designations	Fri. March 11, 2011
Replies to objections to trial exhibits, witness lists, deposition designations	Fri. March 28, 2011
Pretrial Order	Fri. March 25, 2011
Oppositions to Motions in Limine	Wed. March 30, 2011
Replies to Motions in Limine	Fri. April 8, 2011
Trial	Mon. April 25, 2011

V. Conclusion

The November 2 Order is AFFIRMED, with the exception that the Court holds in abeyance ruling on Orders 2-4 and 7, as set forth above.

Discovery and briefing shall proceed, as consistent with this Order, at the direction of Judge Freeman.

SO ORDERED.

Dated: New York, New York
November 18, 2010



Kimba M. Wood
Kimba M. Wood
United States District Judge