

EXHIBIT 5

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ARISTA RECORDS, LLC et al., : 06-CV-5936
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Plaintiffs, :
:
v. : November 1, 2010
:
LIME WIRE LLC, et al., : 500 Pearl Street
:
New York, New York
:
Defendants. :
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TRANSCRIPT OF CIVIL CAUSE FOR DISCOVERY DISPUTES
BEFORE THE HONORABLE DEBRA C. FREEMAN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 that category.

2 I was thinking of it in terms of communications about
3 the licensing agreements, you know, the communications that
4 would reflect the attitude of plaintiff with respect to the
5 negotiation of these licenses. And, as I said in my order,
6 communications with actual licensees or communications with
7 potential licensees might show how plaintiffs conducted
8 themselves and how they felt about the value of copyrights in
9 the internet market. You know, and I gather that plaintiffs
10 did earlier produce not just license agreements but drafts and
11 correspondence about agreements.

12 MR. POMERANTZ: Yes, Your Honor.

13 THE COURT: Okay. And you -- but you claim that you
14 did that only because it was relevant to defense or a claim
15 that's no longer in the case?

16 MR. POMERANTZ: Correct, Your Honor. Can I address a
17 couple of points, Your Honor?

18 THE COURT: Go ahead.

19 MR. POMERANTZ: Let me first go back to the issue of
20 what does -- what does Judge Wood mean in Bryant when she uses
21 the word "attitude and conduct of the parties." Your Honor
22 correctly observed --

23 THE COURT: What does -- what does Judge Wood mean --

24 MR. POMERANTZ: Well, she's the one who wrote Bryant.
25 She wrote Bryant, Your Honor. I only -- the answer --

1 THE COURT: Oh, sitting on the Second Circuit?

2 MR. POMERANTZ: Yes. Yes. The answer, Your Honor,
3 actually has been fleshed out by the parties' briefing
4 including the letter that the defendant sent to Your Honor
5 today. And what is clear is that when the -- what comes from
6 those cases that the only conduct of the plaintiffs that has
7 ever been analyzed under that factor is the conduct of the
8 plaintiffs as against that defendant or those defendants in the
9 case.

10 So, for example, in the two cases they cited to Your
11 Honor this morning the courts -- what the Court was looking at
12 was how the plaintiff behaved in settlement discussions of the
13 dispute or in the Warner case they also cited, that's about how
14 the defendant prosecuted that claim against that defendant.
15 There hasn't been a single case cited by either side where any
16 court has ever said that conduct and attitude of the parties
17 looks to how the plaintiff acted towards unrelated third
18 parties. There is not a case out there that anybody has ever
19 cited nor that we have found where they look to the plaintiffs'
20 behavior with respect to third parties.

21 So Your Honor offered two rationales for the way you
22 were looking at attitude and conduct of the parties and you
23 acknowledged that the parties hadn't briefed the issue fully
24 and the Bryant case doesn't really elaborate on what it meant
25 by that term. And Your Honor pointed to two things: the

1 plaintiffs' attitudes regarding the value of its copyrights and
2 how the plaintiffs conducted themselves in dealing with others
3 in the internet marketplace. There isn't any case cited by
4 either party in which either of those two kinds of factors has
5 ever been relied on by any court in deciding statutory awards.

6 What -- so in the cases there, for example, in the --
7 in most of these cases that they cited to in your let -- the
8 letter today where the plaintiffs' conduct was at issue, what
9 happened was the defendant was saying, I agree never to do it
10 again and I'll pay you a certain amount of money and
11 notwithstanding that, the plaintiff continued to prosecute the
12 case. And the Court relied on that kind of a factor in
13 deciding whether to -- how much to set the award for.

14 That's not what we're talking about here. If what
15 they were looking for was our conduct towards Lime Wire that
16 might have a parallel to these cases but our conduct in
17 legitimately licensing our -- or selling our content to
18 legitimate third parties is not what those cases stand for.
19 And so, Your Honor, we would ask as a threshold matter to say
20 that when the Bryant court says that the attitude and conduct
21 of the parties matters here in setting the award we have found
22 no case and they have not cited a case which looks to the
23 conduct of the plaintiff towards unrelated third parties in the
24 same marketplace.

25 So we would ask Your Honor, again, not to take what

1 THE COURT: When you were engaging in your good-faith
2 conference with plaintiffs' counsel in order to try to resolve
3 discovery disputes did you point out this sort of communication
4 and explain that if you couldn't reach a resolution on
5 production of later communications with third parties you'd be
6 raising it to the Court or is this the first that plaintiffs'
7 counsel has been hearing this particular time of argument?

8 MS. EATON: Well, I mean, certainly we've been
9 engaging in good-faith negotiations with them all along about
10 lessening the burden. We did have a conversation about their
11 so called over-breadth of Your Honor's order and we had a
12 discussion about what sorts of things we were looking for. I
13 personally told them that we were looking for things that
14 related to the defendants and the financial terms of any actual
15 or proposed agreement. I wasn't interested in, as they quoted
16 in their letter, "quotidian communications" and if there was a
17 way to get to that we were happy to discuss it.

18 It is -- I did not give them this document at the
19 time. In fact, I didn't realize that they wanted specific
20 examples until I saw their letter saying the defendants have
21 not given an example, which is why we took some effort to put
22 together some examples if it was really still in dispute. I
23 would expect they're experienced counsel. We're experienced
24 counsel. We can sit down and talk about search terms. That's
25 what our predecessor counsel did. That is the way people go

1 about working around burdensome issues, but there's no question
2 that these sorts of documents are irrelevant here and no basis
3 for them not to produce them.

4 THE COURT: Response?

5 MR. POMERANTZ: Your Honor, I believe she's totally
6 misreading that paragraph.

7 THE COURT: Well, that's an argument.

8 MR. POMERANTZ: No, no, no. But when you read it
9 correctly it has nothing to do with any of the damage factors.
10 It has nothing to do with any of the factors cited in Bryant.
11 What that is talking about is you've got this massive illegal
12 operation in Lime Wire with tens of millions of users who are
13 illegally downloading music through it. How do you get those
14 people to do it legally rather than illegally? That's what
15 this is about. It has nothing to do with any of the factors
16 there. It happens to use the word "Lime Wire" because it's
17 taking Lime Wire as another example of these illegal services.
18 And so -- and to all these documents here I'm guessing that's
19 the only one that says Lime Wire. It's the only one she's
20 directed us to. But, Your Honor, I really don't believe it has
21 anything to do with the Bryant factors. It's nothing like the
22 cases that they have brought to Your Honor's attention where
23 the plaintiff has received an accept -- what the Court views as
24 an acceptable offer from the defendant but has not then
25 accepted it and instead has engaged in what the Court believes

1 is unnecessary litigation. That's not what that paragraph goes
2 to. It looks nothing like the cases that they have cited to.

3 And so when you combine that with -- if you think
4 about the burden here, we produced six million pages. They
5 have found one page here where they have found a document that
6 is a communication with a third party -- here I believe it's
7 iMesh -- in which it mentions Lime Wire. And for us to do a
8 needle-in-the-haystack search at this point in the case for an
9 argument that is not really tied to any of the Bryant factors
10 seems unnecessary. And --

11 THE COURT: What would be a needle-in-the-haystack
12 search?

13 MR. COSENZA: How do you find -- here -- this is a
14 discussion. Here's --

15 THE COURT: Well, what if I just said skip draft
16 license agreements? That's a large volume of material. Don't
17 produce that, which would have been included in the order that
18 I last issued but reconsider and say, no, don't produce that
19 but do produce communications meaning emails, correspondence
20 with licensees and potential licensees regarding licensing.

21 MR. POMERANTZ: Could I modify it a little bit, Your
22 Honor, to see if -- because I don't think that's going to work
23 because we wouldn't have known that it attaches a draft
24 agreement till we look at it and so we're going to have to look
25 at it anyway. Here's what I think based on the arguments

1 they've made and as we've read the cases that I don't know how
2 burdensome it is to my clients but I'll put it out there. They
3 drew your attention to Exhibit 5 because it mentions Lime Wire
4 and that's consistent with the argument I made about the cases
5 they cite where what you're really looking at is in terms of
6 our conduct as our conduct vis-a-vis the defendant here, Lime
7 Wire. If we were to search the primary negotiator's fund
8 there's got to be somebody who primarily, you know, is
9 communicating with --

10 THE COURT: Who is Larry Kensle [Ph.]?

11 MR. COSENZA: Larry Kensle would be a person within
12 Universal who was obviously negotiating with iMesh. But what
13 we could do is for each third-party agreement -- let's take
14 iMesh -- we could go to our four clients and say who primarily
15 negotiated your deal with iMesh? We could search that person's
16 communications for communications with iMesh that mention Lime
17 Wire. The reason why I put all of those qualifiers in there is
18 to try to get a reasonable search that we could do within the
19 time period and it would give them what they're looking for, I
20 think, because if you go to internal communications we are just
21 going to be mired with privilege review because these are all
22 lawyers for negotiating with the other side and then
23 communicating internally.

24 THE COURT: Well, how did you do it before?

25 MR. COSENZA: There was a massive privilege review, I

1 don't agree with and we want to take them to Judge Wood so that
2 if she disagrees --

3 THE COURT: Come to me by tomorrow because I will
4 tell you that if you are looking for more time -- if you are
5 both -- I don't know if you both are or not, but if you're both
6 looking for more time to get these depositions done --

7 MR. POMERANTZ: That's not our point. Our point is
8 that this discovery shouldn't be ordered and the deposition
9 should go forward as scheduled so that we can go to trial on
10 Jan -- in mid-January and I don't think Your Honor is going to
11 be able to --

12 THE COURT: Well, whose depositions are they? Who's
13 taking them?

14 MR. POMERANTZ: Most of them are theirs.

15 MR. MUNDIYA: Your Honor, we're taking depositions of
16 the plaintiffs, the CFOs, which will --

17 THE COURT: Well, these discovery disputes were
18 brought to Judge Wood for the most part in September. It's now
19 the first of November. It is not defendants' fault that
20 they're not resolved until this conference today. So if
21 defendants brought them in September thinking that they ought
22 to be entitled to more documents and would get them prior to
23 depositions and if the Court agrees the documents are
24 appropriate to be produced, then in my view defendants should
25 probably have a little more time to take the depositions after

1 you work out a schedule for production of documents and I'm
2 fully prepared to tell Judge Wood that. Saying that they
3 should go forward because Judge Wood set a deadline, Judge Wood
4 meant that it should happen and that they shouldn't get the
5 documents first even though I'm ordering additional documents
6 be produced and even though they did raise these matters, you
7 know, a month and a half or so ago --

8 MR. POMERANTZ: That wasn't quite what I was getting
9 at, Your Honor. What I was getting at is I think we would like
10 to have an opportunity to ask Judge Wood whether the discovery
11 that you have ordered is the kind of discovery that should be
12 ordered at this point in the case. If she says yes, then we
13 have to address that issue.

14 THE COURT: Well, you can appeal --

15 MR. POMERANTZ: If she says no --

16 THE COURT: You can --

17 MR. POMERANTZ: -- then these depositions can go --
18 can go as scheduled.

19 THE COURT: You can appeal any rulings of mine that
20 you wish to appeal. That's a little different story.

21 MR. POMERANTZ: That's what I'm talking about, Your
22 Honor.

23 THE COURT: Well, but what I'm saying is defendants
24 are now potentially in -- let's assume for a moment you appeal
25 and my order is upheld. You need to go on simultaneous tracks.

1 You need to confer in good faith about a schedule for what I'm
2 ordering so that you have some say in the matter and it doesn't
3 just get ordered without your say, you know, on the potential
4 that the order is upheld.

5 MR. POMERANTZ: I agree, Your Honor.

6 THE COURT: And you need to also discuss if this
7 order is upheld what would be rational for depositions and what
8 would be rational in terms of moving any of Judge Wood's dates.

9 MR. POMERANTZ: I agree, Your Honor.

10 THE COURT: You can simultaneously appeal something,
11 but don't let it stop you from conferring.

12 MR. POMERANTZ: It -- we --

13 THE COURT: All right. And getting something back to
14 me promptly with the results of that conference, okay?

15 MR. POMERANTZ: All right. Thank you, Your Honor.

16 THE COURT: And what I intend to do just so you know
17 is to alert Judge Wood that I had this conference, that we
18 spent a long time at it, that I left open some issues of
19 deadlines to give you a chance to confer, that I think that in
20 fairness that if my rulings were to be upheld -- it's up to --
21 you don't make your arguments and she'll look at those fairly
22 but that if, in fact, this discovery is to be produced it may
23 end up pushing some deadlines which is going to be up to her to
24 agree with or not agree with.

25 MR. POMERANTZ: I understand.

1 THE COURT: All right. And just so she knows what's
2 going on I'm not going to tell her, Judge Wood you need to
3 affirm my ruling, but I will tell her that we had this
4 conference --

5 MR. POMERANTZ: I appreciate it.

6 THE COURT: -- and that there are a lot of things out
7 there that I've been trying to address and one at least I'm
8 still waiting for submissions on.

9 MR. POMERANTZ: Okay.

10 THE COURT: Okay. You can take back your binder. I
11 don't think I need to keep that.

12 MR. POMERANTZ: Thank you.

13 THE COURT: Okay. I'm going to get going and
14 hopefully I won't have a slough of new issues after this, all
15 right? Try not to do that.

16 MR. COSENZA: Thank you, Judge.

17 THE COURT: You're welcome.

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