

EXHIBIT 11

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The Honorable Kimba M. Wood
United States District Court
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Re: Arista Records LLC et al. v. Lime Wire LLC et al.,
Case No. 06 CV 5936 (KMW)

Dear Judge Wood:

Plaintiffs seek this Court's urgent review of Magistrate Judge Freeman's November 2, 2010 discovery Order. (Doc. No. 339, attached as Ex. A). The Order grants Lime Wire extraordinarily broad discovery on multiple topics that are beyond the scope of the limited discovery in this phase of the case or that have no relevance to the trial that will commence on January 18, just over 10 weeks from now. If not reversed immediately, the portions of the Order challenged herein will derail not only the November 15 discovery cut-off but the January 18 trial date. Delaying their day of reckoning would serve the tactical ends that Lime Wire and its founder Mark Gorton have pursued since Plaintiffs filed this case more than four years ago -- and with renewed fervor since this Court's Order adjudicating them liable for mass copyright infringement. But the discovery the Magistrate Judge has ordered will not lead to the production of relevant information. Because time is of the essence, we respectfully request that the Court hold a hearing on this appeal this week. We asked Lime Wire's counsel (Willkie Farr) to submit their letter brief simultaneously with this letter, but they declined to do so. We ask that the Court

order any response to be submitted within 24 hours so that this matter can be quickly addressed. I can be available anytime this week for an in-person conference with the Court.

The discovery at issue must be considered in the complete context of the case. Mr. Gorton, according to his own testimony in Court, is worth more than \$200 million. For years, Mr. Gorton and his illegal Lime Wire business thumbed their noses not only at Plaintiffs but the Copyright Act and the rule of law. They enriched themselves and grew their business on the backs of Plaintiffs' copyrights. They did not stop in the face of a unanimous Supreme Court decision that Mr. Gorton admitted would be Lime Wire's death-knell; they did not stop when Plaintiffs filed suit in 2006; and they refused to stop even after this Court's Opinion and Order adjudicating them liable in May of this year. Instead, Defendants opted for a cynical strategy of throwing up groundless defenses, counterclaims, and demands for wildly burdensome discovery. The results of Lime Wire's scorched-Earth strategy are strewn across the record of this Court: an antitrust counterclaim, dismissed with prejudice in December 2007 (Doc. No. 51), but not before Plaintiffs were forced to endure more than a year of burdensome antitrust discovery; an equally meritless defense of "copyright misuse," also dismissed, this August (Doc. No. 302 at 5-7); and a staggering production by Plaintiffs of almost *five million* pages of documents concerning virtually every aspect of their distribution of recorded music in the internet age (Doc. No. 178 ¶ 36). Despite their efforts to delay the inevitable, Defendants were held liable, and the Court set this case on a schedule for targeted discovery on an expedited schedule, and set a trial for January 18. Nearly four-and-a-half years after filing this lawsuit – and after having been forced to endure the rampant downloading of billions of copies of their works through Lime Wire – Plaintiffs are entitled, finally, to hold Mr. Gorton and Lime Wire to account for their brazen illegal conduct.

Now on their third set of lawyers, Mr. Gorton and Lime Wire have responded to this prospect by returning to their original playbook – literally. They have recycled and repackaged numerous discovery requests that consumed thousands and thousands of hours and burned through millions and millions of pages of documents. Defendants claim that they are entitled to a "do-over" of much of the massive discovery they sought and obtained between 2006 and 2008, and to conduct even more burdensome discovery into the minute profit-and-loss details of every one of more than 10,000 individual sound recordings. The Magistrate Judge – who acknowledged at the hearing underlying this Order that she had not been with the case from the outset and therefore was unfamiliar with what transpired before¹ – sustained many of Lime Wire's requests, and has refused to halt Lime Wire's request for irrelevant and burdensome profit-and-loss information on thousands of individual works.

With all due respect to the Magistrate Judge, the discovery that she has Ordered and has indicated may be forthcoming is, in addition to being incredibly burdensome, not legally required at this juncture. The premise of much of Defendants' discovery is that they are entitled to determine the precise profit-and-loss information – and to conduct discovery into the

¹ The hearing underlying the Order took place this past Monday, November 1. We have ordered an expedited transcript and will submit it as soon as it is ready.

amorphous and unbounded topic of each Plaintiff's "conduct and attitude" – with respect to every one of thousands upon thousands of sound recordings. There is no way that such information – even if produced, with tremendous time and expense – is necessary. If Defendants' theory of relevance were correct, then it would undermine completely the purpose of statutory awards in the first place – to obviate the need for such extensive, detailed proof. If, as Defendants claim, they want to provide this evidence to their experts to consolidate and present an opinion, then they do not need the song-by-song detail they claim to require. If, on the other hand, they intend to actually present this granular information at trial, what would that trial look like? The Court would have to conduct a series of mini-trials on each and every one of the thousands of individual sound recordings, delving into granular level profit-and-loss information and patiently allowing examination on the particular Plaintiff's "conduct and attitude" with respect to that work. It is inconceivable the Court will allow that type of trial. And the Copyright Act itself does not require the Court or Plaintiffs to suffer through such grinding delay in order for Plaintiffs to obtain a damages verdict on account of Defendants' extraordinary wrongdoing. It is hornbook copyright law that "the copyright owner may elect to recover statutory damages, instead of actual damages [and may] make such an election *regardless of the adequacy of the evidence offered as to his actual damages ... even if he has intentionally declined to offer such evidence, although it was available.*" 4 Nimmer on Copyright § 14.04[A], at 14-66 (2009) (emphasis added). Plaintiffs have elected to recover statutory damages for the infringement of their copyrighted works, as is their right under the statute that Congress wrote.

Lime Wire should not be given license to conduct still more fishing expeditions intended to delay the final judgment to which Plaintiffs are lawfully entitled. We respectfully submit that the portions of the Order challenged herein must be reversed. *Relevant* discovery can and should be completed by November 15, and the case can and should be tried on schedule, on January 18, 2011.² To hold that schedule, however, Plaintiffs must request the Court's immediate intervention and review of the Magistrate Judge's Order.

Plaintiffs bring this appeal to Your Honor now, because awaiting additional meet-and-confers and supplemental briefs will make Defendants' desired end-result – moving the trial date – a foregone conclusion. Because of this exigency, Plaintiffs seek review of Magistrate Judge Freeman's Orders on an urgent, expedited basis, including one order seeking supplemental briefing on the issue of actual damages' relationship to statutory damages. The fact is that this supplemental briefing is unnecessary and will serve only to drag out these proceedings even further. Plaintiffs ask this Court to clarify the narrow scope of discovery remaining so that the parties may proceed towards the January trial date expeditiously.

² Magistrate Judge Freeman ordered the parties to meet-and-confer on several issues, and to submit their proposed schedules for completing the discovery she ordered. Ex. A at 3-4. Plaintiffs will be meeting and conferring with Defendants' counsel at the same time they bring this Motion to the Court. *See* Ex. B hereto (G. Pomerantz to Mag. J. Freeman, Nov. 2, 2010).

I. BACKGROUND

Plaintiffs filed this case in August 2006. During the first two years of this litigation, Lime Wire put Plaintiffs through a discovery juggernaut. Lime Wire served over 200 individual requests for production, resulting in Plaintiffs' production of nearly five million pages of documents. The massive search and collection effort included searches of 65 custodians' documents, applying 140 search terms, and entailing the search of, *inter alia*, hundreds and hundreds of "negotiation files" between each individual Plaintiff group and multiple providers and prospective providers of legitimate commercial music services. Defendants had attempted to justify many of their requests on the grounds of relevance to an antitrust counterclaim. Judge Lynch dismissed that counterclaim in December 2007 (Doc. No. 51). Judge Lynch further established a discovery cut-off of April 18, 2008. (Doc. No. 69)

During the latter half of 2008, the parties filed extensive cross-motions for summary judgment on the issue of Defendants' liability. Those motions were not decided until this case was reassigned to Your Honor. In May of this year, the Court entered an order holding Mr. Gorton, Lime Wire and Lime Group LLC liable for intentionally inducing mass copyright infringement under the federal Copyright Act and state law analogues for pre-1972 sound recordings. (Doc. No. 223.)

After issuing that Opinion, the Court ordered the parties to submit a joint letter outlining what discovery remained to be completed in the case and proposing a trial date. (Doc. No. 218.) Plaintiffs and Defendants (then represented by Wilson Sonsini) submitted a joint letter on June 2, 2010, and appeared for a hearing on June 7. Defendants made no mention in the joint letter of needing to conduct minute discovery into the profit-and-loss data of every sound recording at issue, or a need to take extensive discovery regarding Plaintiffs' "conduct and attitude" toward the value of every one of those works. Defendants instead predicted they would need to conduct detailed discovery into the "chain of title" supporting the ownership of every one of the works at issue. Defendants also claimed they would need to "update" burdensome discovery they had taken before – then, under the guise of an antitrust claim; now, under the theory of a "copyright misuse" defense. *See* Ex. C, Joint Letter at 3, June 2, 2010.

Notwithstanding the parties' disagreements about these issues, the Court at the June 7 Status Conference (1) set a January 11 trial date; (2) established a schedule for briefing the parties' disputes; and (3) set an expedited schedule for remaining discovery, whereby Plaintiffs would complete their production of documents on ownership, evidence of direct infringement, and damages within approximately 45 days of the Court's resolution of the outstanding issues, and Defendants would have approximately 45 days after that to complete any follow-up discovery. The Court resolved the issues that the parties had identified in its August 9 Order (Doc. No. 302) – including Defendants' request to "update" the copyright misuse discovery – and soon thereafter set a fact discovery cut-off of November 15 (just over three months from the issuance of the August 9 Order). (Doc. No. 319.)

As of the point the Court issued the August 9 Order, the case could and should have proceeded to an orderly completion of depositions on remaining issues and preparation for trial. What Defendants had told the Court in the June 2 letter was that they anticipated the need to conduct extensive discovery regarding Plaintiffs' ownership documents. *See* Ex. C at 5. And, in fact, Plaintiffs produced extensive documentation of their ownership – more than 150,000 pages – all in accordance with the Court's schedule. Although Defendants assured the Court that these documents would require careful follow-up and further discovery in preparation, that in fact has not happened. Defendants in fact have not raised *any* questions regarding any of these documents. Instead, Lime Wire (once again) has replaced its counsel, and starting in September it opened up yet another front for extensive discovery. Lime Wire's new counsel unleashed a torrent of discovery requests, not only on Plaintiffs but on more than a dozen third parties whom counsel served with subpoenas for documents and depositions. Counsel then served a slew of discovery notices, demanding that more than two dozen party and non-party witnesses be deposed before November 15.

Following this Court's referral of the case to the Magistrate Judge for supervision of discovery, Plaintiffs asked the Magistrate Judge to quash the third-party subpoenas. The Magistrate Judge declined to do that, asserting that Plaintiffs lacked standing to complain about the issuance of the subpoenas. In the same order – and without Plaintiffs having been afforded any opportunity to brief the issue – the Magistrate Judge Ordered that Plaintiffs had to produce all communications with third-party digital service providers “related to” Plaintiffs' actual or prospective agreements with those providers. Ex. D (Doc. No. 329.) The Magistrate Judge noted that *Bryant v. Media Rights Prods., Inc.*, 603 F.3d 135, 144 (2d Cir. 2010), stated that “the conduct and attitude of the parties” is a factor that may be considered in determining the amount of the statutory award. The Magistrate Judge acknowledged that “*Bryant* itself provides little guidance as to the meaning or scope of the ‘attitude and conduct of the parties’ factor,” but nevertheless concluded that “it is not difficult to see how communications with licensees or potential licensees might illuminate Plaintiffs' attitudes regarding the value of [their] copyrights and show how Plaintiffs conducted themselves in dealing with others in the Internet marketplace.” Ex. D at 6.

Plaintiffs asked the Magistrate Judge to reconsider this ruling on the ground that (a) they had not been given an opportunity to brief the issue, and (b) the court's analysis was wrong as a matter of law under the Copyright Act. Defendants asked the Court to grant a broad range of discovery on previously served requests. The Magistrate Judge held an in-person hearing this past Monday. The following day, the court issued an Order (Ex. A) that grants Defendants wide-ranging discovery across a wide range of issues, directs the parties to submit still further briefing on additional discovery requests, and directs the parties to suggest a revised schedule for completing this discovery as well as suggesting “a modification of the pre-trial and trial schedule.” Ex. A ¶ 11.

The specific discovery orders challenged in this appeal are as follows:

- that Plaintiffs produce all communications relating to licensing between Plaintiffs and 15 third-party licensees from the last point in time discovery was collected
- that Plaintiffs search for and produce all communications with their licensees referring to or relating to Lime Wire
- that the parties meet and confer on search terms to capture communications with “potential licensees” – people or entities with whom Plaintiffs have no formal business relationship
- that Plaintiffs search for all documents relating or referring to Lime Wire in the internal communications of Plaintiffs’ primary negotiators of licensing agreements (who are attorneys)
- that Plaintiffs produce documents sufficient to show the royalties paid by Plaintiffs in connection with pre-1972 recordings.
- that the parties to provide additional briefing on whether information regarding Plaintiffs’ profits (as opposed to gross revenue) is relevant to statutory copyright damages
- Finally, the Order requires Plaintiffs to provide “information” gathered regarding specific instances of the recordings at issue being downloaded via the Lime Wire system sufficient to show the earliest dates that each such recording was downloaded

D.N. 339 at 1-3.

II. THE ADDITIONAL DISCOVERY ORDERED INTO PLAINTIFFS’ “RELATED COMMUNICATIONS” WITH ITS THIRD PARTY DIGITAL DISTRIBUTORS IS BOTH CLEARLY ERRONEOUS AND CONTRARY TO LAW

A. Defendants’ Arguments Regarding Plaintiffs’ Communications With Legitimate Distributors Are Simply “Copyright Misuse” Disguised as Damages

This Court has twice denied Defendants’ demands for voluminous discovery related to Plaintiffs legitimate distribution of digital music sought on the issues of antitrust liability and copyright misuse. Judge Lynch shut Defendants’ requests down in early 2008, and this Court refused it again when Defendants tried to revive the copyright misuse defense in June. Discovery related to Plaintiffs’ licensing agreements with third parties for the distribution of their digital music should be a dead issue, in light of this Court’s two conclusive rulings on the subject.

Yet now, on the eve of the discovery cut-off, when the parties are supposed to be narrowing the issues for trial, Defendants' third set of new lawyers suddenly chose to reinject this discovery issue back into this case. It was not raised until September 29, months after the parties had twice been admonished to raise all of the issues remaining on the limited discovery that had to take place. When Defendants claimed to need more discovery because of Plaintiffs' addition of more copyrighted works, Defendants were admonished to raise their remaining issues by letter in August. The purported need for licensing agreements and "related communications" was not a part of those requests, and obviously has no relationship to how many copyrighted works are in the case.

The copyright misuse defense has been dismissed, so now Defendants have asserted an alternative ground to attempt to impose these discovery demands that cannot sustain the immense burden this discovery would impose on the trial itself, the trial schedule, and on Plaintiffs to comply with the order at this stage of the litigation. Defendants insist that they must have all of Plaintiffs' licensing agreements with third-party, legitimate providers of digital music, as well as all "related communications" with those distributors, to illuminate the "conduct and the attitude of the parties," one of the six factors to be considered in setting a statutory damages award listed in Your Honor's opinion in *Bryant v. Media Right Productions, Inc.*, 603 F.3d 135, 144 (2nd Cir. 2010). Magistrate Judge Freeman agreed, and has ordered several categories of discovery that would require the extensive search, collection and review of Plaintiffs' internal and external communications relating to licensing negotiations with numerous third party licensees and potential licensees. Ostensibly, the purpose of this discovery is to develop evidence supporting Defendants' theory that Plaintiffs did not like Lime Wire, or thought Lime Wire would better suit their business interests if its massive user base could be converted to users of a legal service. In other words, Defendants seek precisely the same material they sought to demonstrate copyright misuse.

B. The "Conduct and Attitude of the Parties" Does Not Justify the Intrusive, Time Consuming Discovery Defendants Purport to Require

The case law construing the "conduct and attitude of the parties" factor makes clear that it is not meant to open a copyright plaintiffs' legitimate distribution up to the granular scrutiny of an infringer. When construing the "conduct and attitude of the parties," the cases primarily focus on what Defendant (or Defendants') conduct and attitude was relating to the copyrighted works. *Bryant* cited *N.A.S. Import, Corp. v. Chenson Enters., Inc.*, 968 F.2d 250, 252-253 (2d Cir. 1992), which stated: "In determining an award of statutory damages within the applicable limits set by the Act, a court may consider [1] the expenses saved and profits reaped by the defendants in connection with the infringements, [2] the revenues lost by the plaintiffs as a result of the defendant's conduct, and [3] *the infringers' state of mind-whether willful, knowing, or merely innocent.*" 968 F.2d at 252 (emphasis added) (quotation omitted). In the course of discussing the third of these factors – "the infringers' state of mind" – the Second Circuit in *N.A.S. Import* made clear that the infringer's "conduct" may shed light on the infringer's attitude, and specifically, whether the infringer acted willfully. *N.A.S. Imports*, 968 F.2d at 252. Where the

Defendants' innocent or willful infringement could not be proven directly, "it may be inferred from the defendants' conduct." *Id.*

N.A.S. Import is no outlier in considering the *defendant's* conduct and attitude with respect to setting the statutory award. The Second Circuit in *Warner Bros. Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120 (2d Cir. 1989), held that it is permissible to "take into account the attitude and conduct of the parties" in setting the statutory award. *Id.* at 1126. *Warner Bros.* cited earlier cases discussing the "conduct and attitude" of the parties, and these cases likewise show that the term refers to the *defendant's* conduct and attitude – and, specifically, whether the defendant's conduct or attitude demonstrated that it was willfully violating the plaintiff's copyright. *See Boz Scaggs Music v. KND Corp.*, 491 F. Supp. 908, 914 (D. Conn. 1980) ("Taken together, these incidents paint a picture of a businessman" – the *defendant* – "who believes either that he is not subject to the copyright laws of the United States or that he can ignore them with impunity."); *L & L White Metal Casting Corp. v. Cornell Metal Specialties Corp.*, 353 F. Supp. 1170, (E.D.N.Y. 1972) (considering "the relative degrees of innocence of both defendants" in setting the award) (emphasis added) (both cited in *Warner Bros.*, 877 F.2d at 1126. *See also Impulsive Music, Inc. v. Bryclear Enters., LLC*, 483 F. Supp. 2d 188, 190-91 (D. Conn. 2007) (listing "attitude and conduct of the parties" as a factor in setting the award, and finding relevant the fact that "*defendants demonstrated willfulness* in ignoring ASCAP's licensing letters) (emphasis added).

Defendants have not cited any case – and we have not found one – that says the *plaintiff's* "conduct and attitude" in its dealings with its third party, legitimate distributors may be relevant to setting a statutory award at the low end of the range. Defendants identified only three cases in which the Plaintiffs' conduct mitigated in favor of a lower award, but none of those cases examined Plaintiffs' dealings with legitimate distributors of the kind that Defendants here purport to require. Each case addressed the copyright holder's specific conduct *towards the defendant infringer* during the litigation, *Warner Bros.*, 877 F.2d at 1126, or the copyright holder's particular dealings *with the defendant infringer* immediately before filing suit. *Entral Group Intern., LLC v. YHLC Vision Corp.*, 2007 WL 4373257 at *3 (S.D.N.Y. Dec. 10, 2007); *see also Arclightz and Films Pvt. Ltd. v. Video Palace, Inc.*, 303 F. Supp. 2d 356, 363 (S.D.N.Y. 2003) (awarding low end of range in part because of plaintiffs' refusal to accept a reasonable settlement offer). Lime Wire does not need to conduct any discovery into the issue of how Plaintiffs have dealt directly with Lime Wire, because such material would necessarily already be in Lime Wire's possession. No case would entitle Defendants to the sweeping review of Plaintiffs' third party communications and documents Magistrate Judge Freeman's Order would require on the basis of the parties' "conduct and attitude."

Judge Freeman has also stated that her orders are justified by Federal Rule of Civil Procedure 26(e), which confers a duty to supplement discovery responses that are materially inaccurate or incomplete. To the extent materials such as those ordered were produced before, it was in response to claims of antitrust liability and "copyright misuse" that are no longer a part of this case. That is the basis on which Defendants purported to require an "update" of these materials in June. Without those claims, the basis for the initial discovery has evaporated;

Plaintiffs have no duty to supplement what Plaintiffs no longer have any duty to disclose in the first place. *See Hnot v. Willis Group Holdings*, 2006 WL 2381869 at *5 (S.D.N.Y. Aug. 17, 2006). Moreover, if Rule 26(e) “supplementation” were the basis for Defendants’ demands, they could have made this case in June when the parties presented the issues remaining for discovery to this Court to resolve and together devised a schedule for orderly progression to an expedited trial. Waiting until the end of the discovery period to suggest that Plaintiffs must conduct sweeping discovery efforts under the guise of “supplementation” is a tactic geared to delay, not to elicit useful discovery.

Respectfully, Judge Freeman’s unprecedented Order is both clearly erroneous because it misunderstands the posture of this case, and contrary to law.

III. THERE IS NO NEED FOR FURTHER BRIEFING ON “ACTUAL DAMAGES” PROFIT AND LOSS INFORMATION ON EACH WORK, BECAUSE SUCH DETAIL IS NOT RELEVANT AND NOT REQUIRED, AND LIME WIRE HAS REQUESTED IT SOLELY FOR PURPOSES OF DELAY

A. Relevance of “Actual Damages” to Post-1972 Recordings is Minimal at Best

Defendants served discovery requests seeking extensive information regarding profits and losses on a track-by-track basis for every individual sound recording for which Plaintiffs seek damages. Plaintiffs and Defendants filed extensive cross-briefing on these issues, which this Court referred to the Magistrate Judge. *See* Letters of August 20, 2010, September 8, 2010 and September 27, 2010. The Magistrate Judge’s Order, however, “direct[s]” the parties “to make brief supplemental submissions to the Court 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.” Ex. A at 3 ¶ 6.

With respect, there is no need for further briefing on this issue. In their briefing, Plaintiffs demonstrated that the requests for profit-and-loss information exceeded the bounds of conceivable relevance, would impose massive discovery burdens on Plaintiffs, and would make the damages trial in this action entirely unworkable. Extending the briefing at this juncture will only ensure that the trial schedule will collapse. Were the Magistrate Judge to grant the requested discovery, that would guarantee many additional months of additional document collection and production. Plaintiffs submitted declarations to the Court establishing the burden of this discovery. The burden would yield no corresponding return, however, because the requested information is not useful or necessary in the form Defendants demand.

First, one of the main reasons that Congress created the statutory damage remedy was to allow for a remedy where actual damages are difficult to calculate and prove. *See e.g., NFL v. Primetime 24 Joint Venture*, 131 F. Supp. 2d 458, 472 (S.D.N.Y. 2001). Indeed, permitting widespread discovery on a plaintiff’s profits-and-losses, courts have been careful to identify a plaintiff’s lost *revenues*, *but not its lost profits*. While the “expenses saved, and profits earned, *by the infringer*” are relevant factors in setting a statutory award, only the “*revenue lost by the copyright holder*” as a result of the infringement is relevant. *Bryant*, 603 F.3d at 144. In *Apple*

Inc. v. Psystar Corp., 673 F. Supp. 2d 926 (N.D. Cal. 2009), for example, the court explicitly rejected the defendant's argument that "Apple's profit margins" were "relevant to statutory damages for copyright infringement." *Id.* at 927. The court stated that "[n]otably, the factors include the profits reaped by defendant and the revenues lost by plaintiff, *not the plaintiff's profits*," and held that "Apple is not obliged to provide proof of its own profits when it has elected to seek statutory damages." *Id.* at 928 (emphases added). See also *Arista Records v. Usenet.com, Inc.*, 07 Civ. 8822, Magistrate Judge's Amended Report and Recommendation at *13 (S.D.N.Y. Feb. 2, 2010) (in setting statutory award noting that "Plaintiffs could have lost as much as \$20,000 in revenues per song, depending on the number of subscribers who downloaded each song" (emphasis added)); *Capitol Records Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045, 1051 (D. Minn. 2010) ("A plaintiff can recover statutory damages even though it did not submit evidence regarding actual damages, such as lost profits.").

To say that Plaintiffs' "losses" from Defendants' wrongful conduct are difficult to calculate is an understatement. Defendants have never articulated any nexus between the amount of a Plaintiff's profit (or loss) on a particular recording, and Defendants' intentional inducement of the recording. If all of the mass of information that a Plaintiff would be required to collect regarding a work showed that one recording had a "profit" of \$1 million, while another had a "loss" of \$1 million, which one would have been caused more "actual damage" by Defendants' illegal dissemination of the same recording? Would the recording that profited by \$1 million have generated more profit in the absence of illegal downloading? Would the recording that lost \$1 million have posted more profit absent Defendants' illegal conduct? Defendants have never suggested an answer to any of these questions, nor shown how they will be answered or illuminated by the massive document production they want Plaintiffs to undertake.

Second, the context of this case shows why Defendants' requests seek information that will not in any way be useful at the trial. If Defendants need to give information to their experts to consolidate it into a single opinion, the categorical aggregated data that is more readily provided should suffice. The granular level of detail Defendants purportedly require is unnecessary. Defendants cannot possibly go through the individual profit-and-loss analysis for every one of the thousands of works in question unless there are to be a series of non-stop "mini trials" that will consume months or years, not weeks of the Court's and jury's time. This is not just impractical but entirely unrealistic. Given that, what could be the conceivable basis for contemplating whether to allow a broad-ranging and highly burdensome discovery when it is never going to be used at trial? There is none.

Third, Defendants' profit-and-loss requests are not only irrelevant, but would impose a massive burden on Plaintiffs. Plaintiff do not centrally maintain or record this expansive information for all recordings at the track-by-track and even album level, so responding to Defendants' requests would impose a crushing burden. It would require the collection, review, and production of all of these underlying documents reflecting every income and expense involved in the lengthy chain of development of each of the thousands of recordings at issue. The sheer volume is staggering, and no doubt would generate hundreds if not many thousands of records for *each one* of the tracks at issue.

For all these reasons, the Court should reverse Paragraph 6 of the Order and direct that Defendants' requests for profit-and-loss information for post-1972 (*i.e.*, Copyright Act-protected) sound recordings be denied.

B. The Compelled Production of Documents "Sufficient to Show" Royalties for Pre-1972 Artists Is Clearly Erroneous and Contrary to Law

The Order further requires Plaintiffs to "produce documents and/or information sufficient to show the royalties paid by Plaintiffs in connection with" their pre-1972 sound recordings. Plaintiffs acknowledge that the pre-1972 sound recordings – which are subject to an actual, not a statutory, damage remedy under state law – are in some respects different for discovery purposes than post-1972 recordings, to which statutory damages apply. However, Plaintiffs *already* have given Defendants the information that they – at least through Wilson Sonsini – said they needed to calculate the costs – namely, the artist royalty that Plaintiffs incur when they sell an authorized copy of one of those recordings.³ Plaintiffs provided Defendants with the information that their own counsel said they needed to analyze pre-1972 damages. It is error that sanctions delay to permit new counsel to hypothesize new justifications for requiring still more burdensome discovery.

Plaintiffs existing production is more than sufficient in light of the minimal relevance of this "cost" information. Whatever Plaintiffs pay their artists does not matter here, because Lime Wire's distribution did not take that cost into account any more than it took into account a licensing or distribution fee to Plaintiffs. Plaintiffs' artists have been injured just as Plaintiffs have been by Lime Wire's massive inducement of infringement. Lime Wire offers no reason why it should be permitted to pay Plaintiffs an amount less the amount Plaintiffs would hypothetically owe in royalties from a legitimate sale, when Lime Wire has no intention to pay the artist that money itself. In any event, the Second Circuit has held that an "actual damages" analysis in an ordinary copyright suit focuses on the lost fair market value of the infringer's use of the work, not every cost the Plaintiff may incur if it had distributed the infringing work. In *On Davis v. The Gap*, the Second Circuit explained, "If a copier of protected work, instead of obtaining permission and paying the fee, proceeds without permission and without compensating the owner, it seems entirely reasonable to conclude that the owner has suffered damages *to the extent of the infringer's taking without paying what the owner was legally entitled to exact a fee for.*" 246 F. 3d 152, 166 (2d Cir. 2003) (emphasis added); *see also Rogers v. Koons*, 960 F.2d 301, 313 (2d Cir. 1992). Plaintiffs are entitled to the full amount Lime Wire would have been obligated to pay for what it stole, so any analysis of Plaintiffs "costs" is immaterial.

This makes particular sense for the pre-1972 works, because the only figure that could matter is the fee Plaintiffs lost for their exploitation. The "costs" to produce each additional

³ The other principal cost component for authorized sales – the "mechanical" royalty paid to the owner of the composition copyright – is fixed with reference to the statutory compulsory license provisions. 17 U.S.C. § 115.

download or stream are nonexistent. Overhead costs were incurred as many as 40 years ago, which entitles Plaintiffs to the full value of each lost sale. *Baldwin Cooke Co. v. Keith Clark, Inc.*, 420 F. Supp. 404, 407 (N.D. Ill. 1976). Plaintiffs are due exactly what an ordinary digital vendor would pay Plaintiffs for what Defendants simply took for themselves, and that amount is readily discerned from Plaintiffs digital agreements—which Plaintiffs are producing in full, unredacted form dating up to October 2010. Especially in view of the minimal relevance of the cost information ordered by Paragraph 5, this provision of the Order also should be reversed.

IV. THE ADDITIONAL DISCOVERY ORDERED INTO “INFORMATION” ABOUT LIME WIRE DOWNLOADS PLAINTIFFS HAVE NO INTENTION OF SUBMITTING AT TRIAL IS CLEARLY ERRONEOUS AND CONTRARY TO LAW

Finally, the Magistrate Judge clearly erred in requiring Plaintiffs to cull from any “information” they ever have “gathered” about specific downloads via Lime Wire “documents or information to show the earliest dates that each such recording was downloaded.” Ex. A at 3 ¶ 7. The information covered by the Order is irrelevant to the trial, whereas the process of collecting that information will be burdensome, expensive, and (as with every other request set forth herein) guaranteed to delay the trial.

The demanded information is simply irrelevant because Plaintiffs *have* provided Defendants with hard drives full of data evidencing direct infringements through the Lime Wire system. It is this evidence that Plaintiffs will be relying on to demonstrate the direct infringements that Lime Wire induced and for which it is secondarily liable.

Lime Wire insists that it needs to know the first date a work was infringed directly *by anyone* using the Lime Wire system. Lime Wire claims this information is necessary for Lime Wire to make an argument based on Section 412(2) of the Copyright Act with respect to any work in suit. Section 412(2) provides that statutory damages and attorneys’ fees are unavailable under the Copyright Act 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.

17 U.S.C. § 412(2). Lime Wire’s legal theory is that, if there was a single infringement of a sound recording by any Lime Wire user more than three months before the copyright owner-Plaintiff registered that work, then the Plaintiff may not seek statutory damages or attorneys’ fees for *any* later infringement through the Lime Wire system, even if that infringement commenced on or within three months of the registration.

It is ironic that Lime Wire is claiming that it needs *Plaintiffs* to come up with the dates of first infringements of their recordings through Lime Wire, given that Lime Wire could have set up a system to maintain such information, but willfully blinded itself to evidence of infringement

through its system. But Lime Wire's argument fails on levels that are even more fundamental than that.

First, Lime Wire's legal argument is just plain wrong. Lime Wire becomes secondarily liable for each act of direct infringement at the point when that particular act of infringement occurs. It is at that point – when any particular Lime Wire user directly infringes a recording – that one looks to see whether the work has been registered, and the applicability (or not) of § 412. *See, e.g., Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 144 (5th Cir. 1992) (§ 412 applied to “each work and each [infringer]”); *Jamison v. Royal Caribbean Cruises, Ltd.*, 2009 WL 559722 at *3 (S.D. Cal. Mar. 4, 2009) (refusing to strike claim for statutory damages in secondary liability case, because individual acts of direct infringers alleged to be new acts of infringement).

Second, and perhaps more important for a discovery motion, *Lime Wire does not need any discovery to press that legal argument.* If Lime Wire thinks that its legal theory has merit, it should ask the Court to resolve the issue as a matter of law.


The reason Lime Wire wants to press for discovery now – and present legal issues later – is that Lime Wire knows complying with this request will be incredibly burdensome – the equivalent of looking for needles in a haystack. Plaintiffs have been involved in multiple litigations concerning infringement through peer-to-peer networks, filing suit against thousands of individuals who have downloaded copyrighted recordings illegally. Many of these illegal downloads occurred through Lime Wire. Defendants want to force Plaintiffs to go through all of their files, to determine (1) whether the infringement was through Lime Wire, (2) whether it involved one of the in excess of 10,000 recordings, and (3) produce information showing the first infringement of the work through LimeWire.

Given this burden, the Magistrate Judge clearly erred in requiring Plaintiffs to go off on another expensive and time-consuming search without ordering Lime Wire to obtain a judicial determination whether its interpretation of Section 412(2) is legally sound. Paragraph 7 of the Order should be reversed.

V. CONCLUSION

Plaintiffs respectfully request the Court to consider and reject the additional discovery imposed by Judge Freeman so that the parties may return to the orderly procession toward trial this Court put in place in June.

Respectfully,

Glenn Pomerantz
Glenn Pomerantz 

cc: Joseph Baio (via email)
Tariq Mundiya (via email)
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