Arista Records LLC et al v. Lime Wire LLC et al Doc. 517 Att. 8

Exhibit H

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January 14, 2011

VIA HAND DELIVERY

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

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

Dear Judge Freeman:

Defendants Lime Group LLC, Lime Wire LLC, Mark Gorton, and M.J.G. Lime Wire Family Limited Partnership (collectively "Defendants") respectfully submit this letter in response to a request from Your Honor's chambers that Defendants address the impact of Plaintiffs' production on Defendants' subpoenas duces tecum to non-parties, specifically, whether Plaintiffs' production of communications with certain non-party licensees obviates the need for those licensees to produce their communications with Plaintiffs. For the reasons that follow, Plaintiffs' production of selected communications with non-party licensees in response to the orders of Your Honor and Judge Wood has not reduced Defendants' need for those non-parties to produce the relevant communications.

As an initial matter, we note that neither the Federal Rules of Civil Procedure nor the relevant case law precludes a party from obtaining discovery from a non-party where the information sought is likely to be available from the requesting party's adversary. *See In re Honeywell Int'l, Inc. Sec. Litig.*, 230 F.R.D. 293, 301 (S.D.N.Y. 2003) (holding a non-party must produce documents in response to a subpoena even though they were seemingly duplicative of discovery requests served on the other party). Indeed, "there is no general rule that plaintiffs cannot seek nonparty discovery of documents likely to be in defendants' possession." *Viacom Int'l, Inc. v. YouTube, Inc.*, No. C 08-80129, 2008 WL 3876142, at *3 (N.D. Cal. Aug. 18, 2008). In accord with this well-settled principle, this Court has already permitted Defendants to take document discovery from non-party licensees even though those same documents were called for by Defendants' document requests to Plaintiffs. (*See* 11/23/10 Order (Dkt. 367) (the "VEVO Order").) Notably, this Court issued that Order, which required VEVO to produce certain communications with Plaintiffs, at a time when Plaintiffs were under a preexisting obligation to produce those same communications with VEVO. (*See id.* at 2.) VEVO has already

produced numerous such communications in accordance with that Order. Other non-parties (to whom we provided copies of the VEVO Order) have agreed to produce the same categories of documents and are in the process of doing so.

Of course, the justification for compelling a non-party to produce documents that a party might have is particularly compelling where "the files of the third party may contain different versions of documents, additional material, or perhaps, significant omissions." *Viacom Int'l,* 2008 WL 3876142, at *3 (internal quotations and citation omitted). That is demonstrably the case here, for at least the following four reasons.

First, the reality of present day records retention and retrieval makes it very unlikely that the productions from Plaintiffs and the subpoenaed non-parties will necessarily be coextensive. For one thing, Plaintiffs and the non-parties may not have the same policies regarding document and email retention, leading to potential disparities in the data set that would be searched for responsive documents. For example, it could very well be that one or more Plaintiffs implemented an auto-delete feature on their email system, such that emails older than a specified period are automatically deleted, or a feature requiring the deletion of emails once a given custodian's mailbox reaches a certain size. It could also very well be that one or more of the non-parties has no deletion feature based on either aging or mailbox size, but rather automatically archives all such emails, such as through a Zantaz or similar system. If the retention practices of Plaintiffs and the non-parties differ, as is commonly the case for different business entities, particularly in an unregulated business like the music industry, the universe of documents to be searched would not necessarily be the same, and the results of that search would differ. *See, e.g., Viacom Int'l,* 2008 WL 3876142, at *3 ("Defendant YouTube's poor initial record keeping raises questions about the completeness of its files, and neither YouTube nor respondents have provided the Court with reason to believe that YouTube retained all communications and documents shared with respondents").

By the same token, even if Plaintiffs' and the non-parties' retention systems were such that they do have in their possession the same set of communications, there is no basis to assume the productions would be duplicative unless Plaintiffs and the non-parties all went about collecting and reviewing potentially responsive communications in exactly the same fashion. For that to happen, Plaintiffs and the non-parties would presumably have to use the same set of custodians, apply the same search terms, and use the same date filter. Significantly, although the non-parties here bear the burden of proof with respect to the objections they have interposed, including the assertion that Defendants have sought documents from them that are duplicative of what may be obtained from Plaintiffs[1], none of those non-parties has attempted to make any showing that (i) its document retention policies are similar to Plaintiffs', or (ii) it followed the same review and production protocol as Plaintiffs.[2] Plaintiffs have likewise failed to make any showing on either point. As a result, it is entirely reasonable to believe

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1 *See In re Ramaekers*, 33 F. Supp. 2d 312, 314 (S.D.N.Y. 1999) ("The burden of persuasion is borne by the party opposing the subpoena.").

2 This is so even though many of those non-parties have communicated with Plaintiffs regarding Defendants' subpoenas. Several non-parties have attached those communications as exhibits to their opposition to Defendants' motions to compel. (*See, e.g.,* 1/6/11 Letter from M. Ingber to Hon. D. Freeman, Ex. B.)

that the non-parties whom Defendants have subpoenaed may well possess emails and other communications that Plaintiffs either no longer retain and, therefore, cannot produce, or that Plaintiffs have retained but have failed to produce because they were not identified through their search efforts. And, that has been the case here. For example, VEVO's production contains relevant correspondence between Plaintiffs and VEVO that Defendants only received because VEVO produced it.

Second, the nature of the documents to be produced do not constitute a well-defined set such that their complete production can easily be verified. The point is perhaps best illustrated by contrast. If, for example, the request were for copies of all corporate minutes, a corporate director might legitimately protest that such documents could be sought from the corporation itself and that the completeness of the corporation's production could be confirmed easily. Here, by contrast, the set of documents at issue are email communications "relating to licensing." That such emails may not be so easily identified is a point that was evidently not lost on Plaintiffs, who apparently elected to review their emails for production without the use of search terms. Whatever the wisdom of that approach, it strongly suggests that reasonable people may disagree over what constitutes a communication "relating to licensing" and therefore that the complete universe of such communications is not subject to reliable verification. Where, as here, a party "request[s] a set of documents that is not well-defined," looking at an opposing party's production alone is not sufficient to determine whether all documents have been produced, making it "appropriate" to require the production of such documents from a non-party, "even though the documents are likely to be in the possession of [a party]." *Viacom Int'l*, 2008 WL 3876142, at *3 ("Viacom and other plaintiffs request a set of documents that is not well-defined; there is no way to determine if all communications between YouTube and respondents have been produced simply by looking at YouTube's production"); *see also Software Rights Archive, LLC v. Google, Inc.*, Misc. No. 09-017-JJF, 2009 WL 1438249, at *3 (D. Del. May 21, 2009) (compelling non-party to produce documents relating to, *inter alia*, its relationship with Software Rights Archive, plaintiff in the underlying action, because those documents "do not constitute a well-defined set that Software Rights Archive can verifiably provide in full").

Third, the differences between the requests in the subpoenas (as upheld in the VEVO Order) and the terms of the Order requiring Plaintiffs to supplement their production are such that there can never be complete overlap between the non-party productions and Plaintiffs' production. For instance:

- Plaintiffs' production is limited to certain communications from 2007 on. The non-party subpoenas served by Defendants, by contrast, call for communications from January 1, 2005 through the present. Multiple non-parties either have produced or have undertaken to produce responsive documents within that period. As such, it is quite possible that the non-parties will have responsive documents during that time gap that Plaintiffs never looked for and will never produce.

- Plaintiffs' production is limited to communications with 15 licensees whom Defendants had subpoenaed last September. Since then, however, Defendants have timely served additional licensees with subpoenas calling for the same categories of documents, including Escape Media Group, Best Buy Co., Wal-Mart Stores, and Rhapsody International. When we asked Plaintiffs to include those subsequently subpoenaed licensees, they refused. Accordingly, Plaintiffs'

production will indisputably exclude any communications with the additional licensees, all of whom were properly served under Rule 45.

- Plaintiffs' production is limited to communications located in the mailboxes of certain custodians they unilaterally selected, without Defendants' input and over our objections. Inexplicably, those custodians do not include individuals who have been noticed for deposition and/or are identified as knowledgeable witnesses on Plaintiffs' initial disclosures. Nevertheless, Plaintiffs have refused to look for responsive emails from these custodians' mailboxes.[3] In the VEVO Order, however, Your Honor ordered VEVO to produce responsive communications it had with some of those very custodians *e.g.*, Zach Horowitz and Charles Ciongoli (CEO and CFO, respectively, of Plaintiff Universal Music Group). (*Compare* 11/23/10 Order (Dkt. 367) at 2 *with* Ex. A (Plaintiffs' custodian list).) Unless Plaintiffs are ordered to search the mailboxes of those other custodians, it is very likely that the only source of such documents will be the non-parties.

Fourth, the productions made as of January 10, 2011, already demonstrate that communications produced by non-parties are not duplicative of the documents produced by Plaintiffs, contrary to the assertion that various non-parties have made to Your Honor.[4] For example:

- Plaintiffs' production includes slightly more than 1,000 communications with VEVO. By contrast, VEVO's production contains in excess of 2,500 communications with one or more Plaintiffs. This is so even though Plaintiffs searched for communications involving more of its employees than VEVO did and despite the fact that Plaintiffs claimed to have used the same search terms VEVO used.

- Sworn testimony submitted by MySpace, Inc. ("MySpace") suggests that Plaintiffs' production appears to be incomplete. In a Declaration filed in the Central District of California in opposition to a motion to compel the production of communications responsive to Defendants' subpoena, counsel for MySpace stated that the search parameters that this Court ordered VEVO to use to locate potentially responsive communications would "likely to generate thousands, if not tens or hundreds of thousands, of 'hits.'" (Ex. B ¶ 18.) By contrast, in Plaintiffs' production, fewer than 1,500 documents even reference MySpace, of which only approximately 600 represent communications between MySpace and any Plaintiff, and a number of those communications are duplicates. While not all of those "tens or hundreds of thousands of hits" in MySpace's files (*id.*) may be responsive to the Subpoena, it is certainly reasonable to believe that they will generate substantially more responsive documents than the under-600 communications with MySpace that Plaintiffs have produced.

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[3] That dispute is among the topics addressed in Defendants' motion to compel, which has now been fully briefed. *See* 1/5/11 Letter from M. Eaton to Hon. D. Freeman; 1/10/11 Letter from M. LeMoine to Hon. D. Freeman; 1/13/11 Letter from T. Mundiya to Hon. D. Freeman.

[4] *See, e.g.*, 1/6/11 Letter from M. Ingber to Hon. D. Freeman at 3 ("the very communications sought by Defendants have already been produced"); 12/21/10 Letter from J. Weingart to Hon. D. Freeman ("[the] Court has already directed Plaintiffs to produce the discovery Defendants now seek from iMesh").

Given all of this, there is every "reason to believe" that Plaintiffs' production of communications with the non-party licensees whom Defendants have subpoenaed is not complete.

While Defendants have consistently offered to work with the non-parties to reduce any burden compliance with the subpoenas might impose (such as through the use of search terms and limiting custodians) and will continue to do so (*see, e.g.*, 12/10/10 Letter from M. Eaton to Hon. D. Freeman at 2), there is no basis for denying Defendants the opportunity to take this discovery outright. Defendants are therefore entitled to obtain communications from those non-parties, in order to ensure that Defendants have the most complete set of documents available. *See Viacom Int'l*, 2008 WL 3876142, at *3 (where a non-party "has already produced relevant documents not found in the more than one million pages produced by defendants ... the circumstances ... are appropriate to require document production from third parties, even though the documents are likely to be in [a party's] possession").[5]

* * *

For all of the foregoing reasons and for those stated in Defendants' letter briefs to Your Honor in support of their applications to compel various non-parties to comply with Defendants' subpoenas, Defendants respectfully request that this Court grant those applications and direct those non-parties to produce communications with Plaintiffs and other responsive documents that they have unreasonably withheld from production, in a manner consistent with Your Honor's Order compelling the production of documents by VEVO.

We remain available at Your Honor's convenience to discuss this issue further.

Respectfully submitted,

M. Eaton.

Mary Eaton

Attachments

cc (via email): Glenn D. Pomerantz, Esq.
Matthew D. Ingber, Esq.
Jonathan Gottlieb, Esq.
Sara Marston, Esq.
Vanessa Soriano Power, Esq.
Robert C. Turner, Esq.
Jeffrey Weingart, Esq.

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[5] The fact that Plaintiffs may produce additional documents in the future is irrelevant, as Defendants are not required to wait for Plaintiffs to complete their production before compelling non-parties to produce their relevant communications with Plaintiffs. *See Viacom Int'l*, 2008 WL 3876142, at *4 (where the documents requested consist of communications or any other "set of documents that is not well-defined" a party "may request discovery from nonparties without first exhausting [party] discovery").

EXHIBIT A

Arista et al v Limewire et al
Custodian List
December 3, 2010

WMG-01	Bryan, Stephan	WMG	
WMG-02	Hrivnak, Tamara	WMG	
WMG-03	Kadakia, Payal	WMG	
WMG-04	Lockhart, Virgina	WMG	
WMG-05	Mcardy, Tucker	WMG	
WMG-06	Nash, Michael	WMG	
WMG-07	Peters, Elliott	WMG	
WMG-08	Rehrig, Paul	WMG	
WMG-09	Singer, Howie	WMG	
WMG-10	White, George	WMG	
WMG-11	Wilcox, Ron	WMG	
EMI-01	Abbattista, Michael	EMI	
EMI-02	Dimecelli, John	EMI	
EMI-03	Lauren, Amy	EMI	
EMI-04	Piibe, Mark	EMI	
EMI-05	Shah, Pat	EMI	
EMI-06	Spears, Dareelle	EMI	
UMG-01	Besnoy, Craig	UMG	
UMG-02	Campbell, Bill	UMG	
UMG-03	Doshi, Sachin	UMG	
UMG-04	Lee, Julie	UMG	
UMG-05	Mulein, Mark	UMG	
UMG-06	Nguyen, Kathleen	UMG	
UMG-07	Nussbaum, Wendy	UMG	
UMG-08	Sealey, Jaunique	UMG	
UMG-09	Stern, Eric	UMG	
UMG-10	Stone, Bryan	UMG	
UMG-11	Weinberg, David	UMG	
SONY-01	Blinder, Seth B.	SONY	
SONY-02	Bonavia, Christopher P.	SONY	
SONY-03	Christi, Coleen	SONY	
SONY-04	Hanser, Jennifer A.	SONY	
SONY-05	Howard, Whitney W.	SONY	
SONY-06	Kanusher, Lawrence A.	SONY	
SONY-07	Margulies, Natalie	SONY	
SONY-08	Papaleo, Christopher D.	SONY	
SONY-09	Paull, Michael D.	SONY	
SONY-10	Roberson, Michael	SONY	
SONY-11	Ross, Andrew	SONY	
SONY-12	Sherman, Robert	SONY	
SONY-13	Smith Jr., Stanley O. (Neil)	SONY	
SONY-14	Valero, Maria E.	SONY	
SONY-15	Walker, Jeff	SONY	

EXHIBIT B

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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.)

I, Jonathan Gottlieb, declare as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

January 6, 2011, in Los Angeles, California.

/s/ Jonathan Gottlieb
Jonathan Gottlieb

EXHIBIT 23

FOX GROUP
A UNIT OF NEWS CORPORATION

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Jonathan Gottlieb
Senior Vice President, Litigation
Fox Group Legal

VIA REGULAR MAIL

December 20, 2010

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

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

Dear Mr. Kozusko:

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

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

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

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

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

Very truly yours,

Jonathan Gottlieb

cc: Daniel Cooper

Enclosures: MySpace 1-5

EXHIBIT 24

FOX GROUP
A UNIT OF NEWS CORPORATION

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

Jonathan Gottlieb
Senior Vice President, Litigation
Fox Group Legal

VIA REGULAR MAIL

December 23, 2010

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

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

Dear Mr. Kozusko:

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

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

Very truly yours,

Jonathan Gottlieb

cc: Daniel Cooper (w/o enclosures)

Enclosures: DVD with MySpace 0006-0399

EXHIBIT 25

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 10-9438-GW (PJWx)	Date	December 22, 2010
Title	*Arista Records LLC, et al., v. Lime Wire LLC, et al.*		

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

Rose Petrossians	CS 12/22/10
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Non-Party:	Attorneys Present for Defendants:
Linda M. Burrow	Michael S. Blanton Dan Kozusko

Proceedings: Defendants' Petition to Enforce Subpoena to MediaDefender

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

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

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

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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

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

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

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

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

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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

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

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

: 30

Initials of Preparer rp

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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

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

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

PROOF OF SERVICE

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

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

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

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

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

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

Attorneys for Non-Party Respondent MySpace, Inc.

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

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

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

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

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

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

/s/ Melissa L. Gonzalez