

Exhibit A

December 10, 2010

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"), submit this letter brief in support of their application for an Order, pursuant to Federal Rule of Civil Procedure 45(c)(2)(B)(i), overruling discovery objections asserted by non-party Yahoo! Inc. ("Yahoo") and directing Yahoo to produce documents in response to a Southern District of New York subpoena served on Yahoo by Defendants (the "Subpoena").

Yahoo is an entity that provides access to digital music over the internet with the express blessing (pursuant to contract) of Plaintiffs and the major record labels. Yahoo has agreements with some or all of the major record companies that allow Yahoo users to listen to copyrighted music and to view copyrighted music videos on the internet in exchange for a percentage of advertising and other revenue generated from those activities. Defendants seek discovery from Yahoo because, like several other non-parties Defendants have subpoenaed -- such as VEVO, LLC ("VEVO") -- Defendants believe they have information relevant to the issues to be tried in early 2011.

In fact, the Subpoena at issue seeks from Yahoo the same categories of information sought by Defendants' subpoena to VEVO, a digital music provider which licenses content from the Plaintiff record labels. As Your Honor may recall, Defendants were forced to move to compel VEVO to comply with the subpoena, which motion was granted in part. In an order dated November 23, 2010, this Court ordered VEVO to produce three categories of documents (the "VEVO Order"):

1. All signed contracts, licenses, or other agreements between VEVO and any plaintiff in this case, concerning the use, publication, display, or broadcast of any material to which any plaintiff owns, holds, claims, or otherwise maintains a copyright.
2. All reports submitted by VEVO to any plaintiff showing amounts paid by VEVO pursuant to any such contract, agreement, or license.
3. All documents contained in the files of certain specified VEVO custodians, to be located through an electronic search based on search terms identified in the VEVO Order.

Notwithstanding the VEVO Order, Yahoo has agreed to produce the first and second categories of documents (provided that Plaintiffs' counsel is prohibited from disclosing attorneys' eyes only information regarding one record company to in-house counsel for other, unaffiliated Plaintiff record companies), but refuses to search for or produce the third category. We respectfully submit that Yahoo should be compelled to produce those documents for the same reasons that the Court ordered VEVO to produce them. The motion should therefore be granted.

Background and Overview

On September 24, 2010, Defendants served the Subpoena on Yahoo, requesting that Yahoo produce certain documents and appear for a deposition.¹ (Ex. 1.) The Subpoena requests production of, *inter alia*, three principal types of documents (collectively, the "Documents"): (1) licenses or agreements between Yahoo and any Plaintiffs in this action "concerning the use, publication, display, or broadcast of any material" to which any Plaintiff holds the copyright; (2) communications between Yahoo and any Plaintiff regarding those licenses or agreements, including the negotiation thereof; and (3) documents reflecting amounts paid by Yahoo to any Plaintiff pursuant to those agreements or licenses, *e.g.*, annually or on a song-by-song basis, together with figures relating to the total aggregate number of times that each of Plaintiffs' copyrighted songs (collectively, the "Songs") was accessed or viewed by Yahoo users. (*See id.*, Request Nos. 1, 2, 4, 5, 11.) The Subpoena contains substantially the same requests as the subpoena to VEVO and other non-party digital music providers whom Defendants know or believe to have licensing or distribution agreements with the major record companies.

On September 29, 2010, Plaintiffs moved to quash the subpoenas Defendants had served on Yahoo and others. Defendants agreed to adjourn the return dates of the Subpoenas until after the Court ruled on Plaintiffs' motion to quash. On October 1, 2010, Yahoo's counsel, Robert Turner of Winston & Strawn LLP, served a letter containing Yahoo's objections to the Subpoena (the "Yahoo Objections"). (Ex. 2.) The objections asserted by Yahoo include: (1) the Subpoena seeks information that Defendants can obtain from Plaintiffs; (2) the Subpoena is overbroad and unduly burdensome; and (3) the documents responsive to the Subpoena are confidential. (*See id.*)

¹ Defendants intend to depose Yahoo. But such a deposition cannot take place until Yahoo produces its documents.

In an Order dated October 15, 2010, the Court denied Plaintiffs' motion to quash in its entirety and also ruled, in response to a request by Defendants, that Plaintiffs supplement their prior production, that licensing agreements between Plaintiffs and non-parties, together with communications regarding those licensing agreements, were relevant to the amount of Plaintiffs' lost revenues from copyright infringement and the conduct and attitude of the parties, both of which are factors that the Court must take into account in determining the amount of damages to award to plaintiffs. (10/15/10 Order, Dkt. 329, at 5-6.)

Promptly after the Court issued the October 15 Order, Defendants sent a copy to Yahoo and stated their willingness to work with Yahoo to make complying with the Subpoena as minimally burdensome as possible. (Ex. 3.) In a meet and confer meeting held by telephone on October 22, Defendants' counsel informed Yahoo's counsel that Defendants were most interested in receiving from Yahoo agreements between Yahoo and any Plaintiffs, together with related communications and revenue information, and proposed that Yahoo produce those categories of documents in the first instance. Yahoo's counsel said it would take Defendants' proposal under advisement.

On October 28, 2010, Yahoo's counsel informed Defendants' counsel that Yahoo would produce the agreements later that week or the following week and that the revenue information would be forthcoming thereafter as it would take a couple of weeks to gather. Yahoo's counsel also stated that Yahoo would neither search for nor produce any communications requested by the Subpoena, citing (i) the purported burden of such an undertaking on a non-party, and (ii) Yahoo's alleged inability to gather that information prior to then-November 15, 2010 deadline to conclude fact discovery. Yahoo's counsel did not interpose any other objection to the production of such information.

The following week, Yahoo's counsel asked Defendants' counsel whether, under the terms of the Court's protective order, Plaintiffs would be permitted to share agreements between Yahoo and a record company Plaintiff, such as Sony, that are produced on an attorneys' eyes only basis with in-house counsel for other, unaffiliated Plaintiff record labels, *e.g.*, UMG or EMI. After Defendants' counsel confirmed that the protective order contained no such prohibition, Yahoo's counsel stated it would not produce those agreements or any revenue information, absent an agreement by Plaintiffs' counsel that attorneys' eyes only documents concerning a particular record company would not be shared with in-house counsel for other, unaffiliated record company Plaintiffs. Defendants' counsel had no objection to that condition of production, but explained to Yahoo's counsel that, apart from the protective order, it lacked the ability to control what Plaintiffs' counsel did with any documents that are provided to them by Yahoo. In order to satisfy Yahoo's legitimate confidentiality concerns, Defendants' counsel e-mailed Plaintiffs' counsel, asking them to agree to such a condition, and copying Yahoo's counsel on that communication. (Ex. 4.) Plaintiffs' counsel never responded to that e-mail.²

² On December 7, 2010, counsel for Plaintiffs sent counsel for Defendants proposed revisions to the existing Protective Order to address such confidentiality concerns. (Ex. 5) Defendants agreed to those proposed revisions. (Ex. 6.)

On November 9, 2010, Defendants' counsel inquired whether Yahoo would be willing to run a mutually-agreed-upon set of search terms on the files of selected custodians in order to locate communications that are potentially responsive to the Subpoena. On November 22, 2010, having received no response from Yahoo's counsel, Defendants' counsel e-mailed Yahoo's counsel to inform him that Judge Wood has just recently extended the close of fact discovery until the end of January 2011, which should alleviate any concern on Yahoo's part that it would lack sufficient time to run those search terms and produce responsive documents that they uncovered. (*See Ex. 7.*)

Yahoo's counsel responded on November 29, 2010, and stated once again that Yahoo would not agree to search for or produce any communications responsive to the Subpoena, including running search terms on the files of selected Yahoo custodians likely to have relevant documents. Defendants' counsel then e-mailed Yahoo's counsel a copy of the VEVO Order, observing that the searches that the Court required VEVO to run in order to locate potentially responsive communications were same "types of searches that your client will not agree to run here" and informed Yahoo's counsel that if the two sides "continue[d] to remain at an impasse on this issue, we will not have any other choice but to make a similar application to Judge Freeman." (*Ex. 8.*) Yahoo's counsel has never responded to that e-mail, nor has Yahoo produced so much as a single document.

As demonstrated below, the Subpoena seeks the production of documents that this Court has already held to be relevant and that can properly be sought from non-parties, and is limited enough in scope not to be unduly burdensome, especially in light of the accommodations Defendants' counsel offered to Yahoo. Accordingly, the Court should enter an order overruling the Yahoo Objections and directing Yahoo to comply with the Subpoena forthwith by producing the documents.

I. *THE SUBPOENA SEEKS THE PRODUCTION OF DOCUMENTS THAT THIS COURT HAS REPEATEDLY HELD TO BE RELEVANT TO THE DAMAGES ISSUES TO BE TRIED BEFORE JUDGE WOOD.*

Plaintiffs' licensing agreements with non-parties and related communications and financial information are directly relevant both to common-law damages for pre-1972 recordings and to statutory damages under the Copyright Act. For common-law copyright infringement, the required showing of actual damages can be measured by lost profits. *See Pret-A-Printee, Ltd. v. Allton Knitting Mills, Inc.*, No. 81 Civ. 3770, 1982 WL 1788, at *7 (S.D.N.Y. 1982). As this Court noted in its October 15, 2010 Order, "Plaintiffs' actual and potential licensing arrangements might shed light on the amount of profits that Plaintiffs would have made, had Defendants' customers downloaded Plaintiffs' copyrighted works from a source authorized by Plaintiffs." (10/15/10 Order, Dkt. 329, at 5.) Therefore, the Documents requested by the Subpoena are relevant to showing the amount, if any, of profits Plaintiffs would have made if Plaintiffs' copyrighted works had been accessed through Yahoo. Internal communications describing the negotiations with the record labels will be relevant in determining the conduct and attitude of the parties as well. The Court reiterated its finding that the documents in question are relevant to the damages issues to be tried when it ordered VEVO to produce its documents on November 23, 2010.

Under *Bryant v. Media Right Productions, Inc.*, 603 F.3d 135, 144 (2d Cir. 2010), Plaintiffs' lost revenues and the conduct and attitude of the parties are relevant factors in the statutory damages analysis. Documents showing the terms of Plaintiffs' license agreements with Yahoo, the revenues actually paid by Yahoo pursuant to those contracts, and the negotiations surrounding those contracts are relevant to the amount of revenues allegedly lost by Plaintiffs here.

In order to determine how the Plaintiffs truly valued the Songs at issue, it is crucial to know the terms and prices the Plaintiffs agreed to with other companies, such as Yahoo, in exchange for allowing them to make those Songs available online. Indeed, in that regard, this Court has already recognized explicitly the relevance of those documents: "it is not difficult to see how communications with licensees or potential licensee[s] might illuminate Plaintiffs' attitudes regarding the value of its copyrights and show how Plaintiffs conducted themselves in dealing with others in the Internet marketplace." (10/15/10 Order, Dkt. 329, at 6.)

Yahoo's refusal to produce anything but their agreements with Plaintiffs and unspecified, related financial information should therefore be overruled. Yahoo should be compelled to complete its production of those agreements and to produce any additional documents, including documents concerning the negotiations of those agreements, documents reflecting payments made under those agreements, and documents reflecting the bases for those payments (*i.e.*, reports required by the agreements showing the number of instances individual songs were accessed through Yahoo).

Moreover, given Yahoo's legitimate interest in the confidentiality of that information, this Court should approve the revisions to the Protective Order that Plaintiffs recently proposed to protect such interests or, alternatively, order Plaintiffs' counsel not to disclose any documents concerning Yahoo's relationship with one Plaintiff that is designated attorneys' eyes only to in-house counsel for any other Plaintiffs who are not affiliated with that entity. In either event, Plaintiffs' delay in addressing this issue should not further delay the production of these necessary documents.

II. *YAHOO'S OBJECTION THAT THE SUBPOENA SEEKS DOCUMENTS THAT DEFENDANTS CAN OBTAIN FROM PLAINTIFFS IS WITHOUT MERIT.*

Yahoo has also objected to the Subpoena on the grounds that "the Requests call for the production of documents evidencing communications and/or correspondence between Yahoo! and Plaintiffs. Such documents, to the extent they exist, are more properly requested from Plaintiffs." (*See Ex. 2*, at 3.) That objection is wrong on both the facts and the law.

Defendants served the Subpoena, in part, because Plaintiffs have failed to produce all documents concerning their relationship with Yahoo, and in part to gain access to documents that, regardless, would not be in Plaintiffs' possession. For one thing, Defendants have no way to confirm that the agreements produced by Plaintiffs represent all such agreements. For another, the Subpoena requires production of documents that would not be in Plaintiffs' possession, such as internal Yahoo communications regarding licensing agreements or negotiations with any Plaintiffs concerning agreements, including notes of meetings between representatives of Yahoo and Plaintiffs.

Even if the Plaintiffs ultimately did provide Defendants with their versions of certain documents requested by the Subpoena, there is nothing in the Federal Rules of Civil Procedure preventing Defendants from seeking Yahoo's versions and collections of those documents at this juncture. *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 because "[t]he documents in [the non-party's] possession may differ slightly from [the other party's] copies" and the non-party's "copies could include handwritten notes, and the fact that [the non-party] has copies of documents itself can be relevant."); *Composition Roofers Union Local 30 Welfare Trust Fund v. Graveley Roofing Enters., Inc.*, 160 F.R.D. 70, 71-72 (E.D. Pa. 1995) (denying a motion to quash a non-party subpoena from the Plaintiffs because although the Defendant had been ordered to produce the same documents, the Defendant failed to produce them and therefore "the information Plaintiffs requested cannot be more easily obtained from Defendant" due to the defendant's refusal to provide the documents).

III. THE SUBPOENA IS NOT UNDULY BURDENSOME TO YAHOO.

In order to evaluate undue burden, courts conduct a weighing of the burden to the subpoenaed party against the value of the information to the serving party. *Bridgeport Music, Inc. v. UMG Recordings, Inc.*, No. 05 Civ. 6430, 2007 WL 4410405, at *2 (S.D.N.Y. Dec. 17, 2007). *Bridgeport* explains that "[w]hether a subpoena imposes an 'undue burden' depends upon 'such factors as relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described and the burden imposed.'" *Id.* (quoting *Travelers Indem. Co. v. Metro. Life Ins. Co.*, 228 F.R.D. 111, 113 (D. Conn. 2005)).

In *Bridgeport*, plaintiffs alleged copyright infringement of musical compositions by defendants, and defendants served plaintiffs' former attorney, a non-party, with a subpoena for documents, including various licensing agreements he had drafted. *Id.* at *1. The court held that the request did not impose an undue burden on the non-party attorney because the request was "relatively narrow." *Id.* at *2. The court contrasted this request with a subpoena issued in *Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44, 50 (S.D.N.Y. 1996), "in which the subpoena at issue 'effectively encompass[ed] documents relating to every transaction undertaken by [the party subject to the subpoena] for [the defendant] during the last ten years.'" *Bridgeport*, 2007 WL 4410405, at *2 (quoting *Concord Boat Corp.*, 169 F.R.D. at 50).

In *Bridgeport*, the plaintiffs contended that because the non-party lawyer's files were not indexed by date, and because he did not recall which files contained relevant agreements, the subpoena would "require him to go through 'hundreds of files' that are now in storage to determine which might contain relevant information" and "then require additional review to determine whether he had drafted or negotiated the agreement in question and whether the material was privileged," which could take "weeks[,] if not months." *Id.* The court was not persuaded that this qualified as an undue burden, however, when the subpoenaed documents were relevant and the request was "relatively narrow," with a limited time frame. *Id.*

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Here, the Subpoena requested agreements (and documents and financial information relating to those agreements) with only the 13 specific Plaintiffs in this case and, as shown above, seeks Documents that are clearly relevant to the factors applicable to statutory damages. It is therefore not overbroad. Further, Defendants have offered to work with Yahoo to minimize the burden on Yahoo by pinpointing the documents that are most relevant to the issues to be tried. Yahoo, however, rebuffed those offers and refused to produce any documents in response to the Subpoena other than the agreements themselves and unspecified, related financial information. That should not be permitted, especially where the Court has already ordered another non-party to produce such documents.

* * *

For all of the foregoing reasons, Defendants respectfully request that this Court issue an order pursuant to Federal Rule of Civil Procedure 45(c)(2)(B)(i), compelling Yahoo to produce the Documents, as required by the Subpoena, and grant Defendants such further relief as the Court deems just and proper.

We are available at Your Honor's convenience for a hearing on this application.

Respectfully submitted,

M. Eaton

Mary Eaton

cc: Glenn D. Pomerantz, Esq. (via email)
Robert Turner, Esq. (via email)

EXHIBIT 1



UNITED STATES DISTRICT COURT

for the

Southern District of New York

Arista Records LLC, et al.

Plaintiff

v.

Lime Group LLC, et al.

Defendant

Civil Action No. 06 CV 5936 (KMW)

(If the action is pending in another district, state where:

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Yahoo!, Inc.
C/O C T CORPORATION SYSTEM, 111 EIGHTH AVENUE, New York, NY 10011

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action.

Table with 2 columns: Place (Willkie Farr & Gallagher LLP, 787 Seventh Avenue, New York, NY 10019) and Date and Time (10/07/2010 9:30 am)

The deposition will be recorded by this method: Stenographic and videographic

Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material:

See Schedule A; Documents must be produced by 10/01/2010, 9:30 a.m.

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 9-24-10

CLERK OF COURT

OR

M. Eaton

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing (name of party) Defendants Lime Group LLC, Lime Wire LLC, Mark Gorton, and M.J.G. Lime Wire Family L.P., who issues or requests this subpoena, are:

Mary Eaton, Paul Horan
Willkie Farr & Gallagher LLP, 787 Seventh Avenue, New York, NY 10019
(212) 728-8000, meaton@willkie.com, phoran@willkie.com

Civil Action No. 06 CV 5936 (KMW)

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

This subpoena for *(name of individual and title, if any)* Yahoo! Inc.
was received by me on *(date)* _____.

I served the subpoena by delivering a copy to the named individual as follows: _____
_____ on *(date)* _____; or

I returned the subpoena unexecuted because: _____
_____.

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ 45.00.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)

(c) Protecting a Person Subject to a Subpoena.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

SCHEDULE A

Defendants Lime Group LLC, Lime Wire LLC, Mark Gorton, and M.J.G. Lime Wire Family Limited Partnership (“Defendants”) hereby request that Yahoo!, Inc. produce the following documents in its possession, custody or control, in accordance with terms of the attached subpoena.

DEFINITIONS

1. The term “document” shall be accorded its broadest possible meaning and includes, but is not limited to, all paper, film, tape or other material upon which appears any verbal, graphic or pictorial information or image that is written, printed, typed, drawn, punched, produced or reproduced in any fashion, including but not limited to all correspondence, memoranda, interoffice and intra-office communications and notes, agreements, contracts, charts, quotations, accounting records, audit work papers, work sheets, cost sheets, ledgers, price quotations, proposals, bids, receipts, manuals, lists, tables, financial analyses, spreadsheets, diagrams, leases, sales records, requisitions, vouchers, envelopes, acknowledgements, purchase orders, invoices, canceled or uncanceled checks or drafts, studies, records, minutes, photographs, drawings, sketches, brochures, schedules, calendars, diaries, video or audio tape recordings, photocopies and computer-sorted or computer-retrievable information, computer print-outs, discs of any kind (including hard discs, optical discs and CDs), tapes of any kind (including audio, video or data tapes), electronic mail and programs or other data compilations from which information can be obtained or translated into usable form. This definition encompasses not only the original version but also any copy containing or having attached thereto any alterations, notes, comments or other material not appearing on the original, and shall also include drafts, revisions of drafts and any other preliminary or preparatory materials, from whatever source, underlying, supporting or used in preparation of any document. This definition

also includes any removable “post-it” notes or other attachments or exhibits affixed to any of the foregoing.

2. The term “identify” means: (a) in the case of a natural person, to state the full name, current or last known job title and position, current or last known full address, and current or last known work telephone numbers of the individual; (b) in the case of an entity other than a natural person, to state its full name, address, principal place of business, and, if applicable, place of incorporation; (c) in the case of a document, to identify the author(s), addressees and copyees, and to state the title, subject matter, date, and source of the document and the locations where the document can presently be found; and (d) in the case of an oral communication, to give a complete description of such communication by (i) identifying the speaker(s) and actual and intended recipient(s) of the communication, (ii) stating the date of the communication and (iii) fully describing the substance of the communication.

3. “Person” or “persons” mean any individual, firm, corporation, partnership, unincorporated association, organization, trust, natural person or any business, legal or governmental entity or association.

4. “Concerning” means relating to, discussing, referring to, describing, evidencing, constituting, supporting or containing a reference to.

5. “And” and “or” shall be construed either disjunctively or constructively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

6. “Any” means any and all.

7. “You” means Yahoo!, Inc., and its predecessors, subsidiaries, parents, affiliates, directors, officers, agents, representatives, attorneys, investigators, consultants, employees and shareholders, whether past or present, including but not limited to Yahoo! Music,

and its predecessors, subsidiaries, parents, affiliates, directors, officers, agents, representatives, attorneys, investigators, consultants, employees and shareholders, whether past or present.

8. "Plaintiffs" shall mean 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. and each of their respective predecessors, subsidiaries, parents, affiliates, directors, officers, agents, representatives, attorneys, investigators, consultants, employees and shareholders, whether past or present.

9. "Defendants" shall mean Lime Wire LLC, Lime Group LLC, Mark Gorton, Greg Bildson and M.J.G. Lime Wire Family Limited Partnership and each of their respective predecessors, subsidiaries, parents, affiliates, directors, officers, agents, representatives, attorneys, investigators, consultants, employees and shareholders, whether past or present.

10. The "Grokster Litigation" shall mean the lawsuit captioned *MGM Studios, Inc., et al. v. Grokster, Ltd., et al.*, Case Nos. CV 01-08541 SVW, 01-9923 SVW, in the United States District Court, Central District of California.

11. "Songs" means the sound recordings identified on Exhibit 1 hereto.

INSTRUCTIONS

1. In responding to this request, the responding party shall produce all documents in its possession, custody or control, including documents and materials in the possession of its employees, agents, servants and/or representatives. This request shall not call for documents that may already have been produced in this litigation.

2. If a document responsive to a request has been transferred to the possession, custody or control of another entity, the name, address and principal officer or officers of such other entity should be provided.

3. Each request for a document or documents shall be deemed to call for the production of the original document or documents. In addition, each request should be considered to include all copies and, to the extent applicable, preliminary drafts of documents which, as to content, differ in any respect from the original or final draft, or from each other (for example, by reason of handwritten notes or comments having been added to one copy of a document but not on the original or other copies thereto.)

4. Documents shall be produced as they are kept in the usual course of business.

5. Documents shall be produced in their original state, for example, in their original file folders in the exact order as found, without removal or rearrangement of anything contained therein.

6. If copies of documents are produced, they shall be produced together with a photocopy of the file, binder, box or other container in which the original document was found, so as to disclose the title or label of such container.

7. Whenever a document has not been produced in its entirety, fully state the reason or reasons it has not been produced in its entirety and describe to the best of your knowledge, information and belief, and with as much particularity as possible, those portions of the document that have not been produced.

8. Whenever a document has been withheld because the request is objected to on grounds of privilege, work product or confidentiality or any other grounds: (a) identify the

document; (b) describe the nature of the document (for example, letter, chart or memorandum); (c) identify the privilege and any statute, rule or decision upon which you rely in withholding the document, and state the factual basis supporting the privilege claimed; (d) set forth each request to which each such document is responsive; (e) state the date of the document; (f) describe the subject matter of the document; (g) identify the authors(s), the recipient(s) and all person(s) who received copies of the document; and (h) identify all persons who participated in its preparation, and all persons to whom it was disclosed and, where not apparent, their relationships to one another.

9. Each demand herein is continuing and requires prompt supplementary responses if further responsive documents are subsequently obtained or discovered or otherwise come into your possession, custody or control.

10. Whenever necessary to bring within the scope of these requests documents or information which might otherwise be construed to be outside the scope of these requests: (a) the use of a verb in any tense shall be construed as the use of that verb in all other tenses; (b) the use of a word in its singular form shall be deemed to include within it use the plural form as well; and (c) the use of a word in its plural form shall be deemed to include within its use the singular form as well.

11. Unless otherwise specified, all requests constitute a request for any document which refers to or was created during the period from January 1, 2005 through present.

12. All terms defined in paragraphs 1 through 11 above shall have the meanings set forth therein, whether capitalized in the requests or not.

REQUESTS FOR PRODUCTION OF DOCUMENTS

1. All contracts, licenses, or other agreements (including all drafts thereof and any supplements or modifications thereto) between and among You, on the one hand, and any Plaintiff, on the other hand, concerning the use, publication, display, or broadcast of any material to which any such Plaintiff owns, holds, claims, or otherwise maintains a copyright.
2. All communications (including emails) concerning any contract, license, or agreement between and among You, on the one hand, and any Plaintiff, on the other hand, concerning the use, publication, display, or broadcast of any material to which any Plaintiff owns, holds, claims, or otherwise maintains a copyright.
3. All documents concerning any contract, license, or agreement between and among You, on the one hand, and any Plaintiff, on the other hand, concerning the use, publication, display, or broadcast of any material to which any Plaintiff owns, holds, claims, or otherwise maintains a copyright.
4. Documents sufficient to show the amounts paid by You to any Plaintiff pursuant to any contract, license, or agreement between and among You, on the one hand, and any Plaintiff, on the other hand, concerning the use, publication, display, or broadcast of any material to which any Plaintiff owns, holds, claims, or otherwise maintains a copyright.
5. All documents sufficient to show the amounts paid by You annually to any Plaintiff for any Song on Exhibit 1.
6. All documents concerning Defendants and/or the LimeWire software application.
7. All documents concerning any communication (including emails) between You and any person regarding any actual or potential license for the use, publication, display, or

broadcast of any material to which any Plaintiff owns, holds, claims, or otherwise maintains a copyright.

8. All documents produced in the Grokster Litigation.

9. All documents concerning any claims, suits, actions, complaints, or other legal proceedings (whether commenced or threatened to be commenced) against, or any cease and desist letters issued to, You by any Plaintiff concerning the use, publication, display, or broadcast of any material to which any such Plaintiff owns, holds, claims, or otherwise maintains a copyright.

10. All documents You produced, provided or made available to, or otherwise shared with, any Plaintiff in connection with any claims, suits, actions, complaints, or other legal proceedings (whether commenced or threatened to be commenced) against You by any Plaintiff concerning the use, publication, display, or broadcast of any material to which any such Plaintiff owns, holds, claims, or otherwise maintains a copyright.

11. For each of the Songs, documents sufficient to show the total aggregate number of upload views since the Song was made available for upload viewing by You, as well as the total aggregate number of upload views on a daily, weekly, monthly, and yearly basis.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

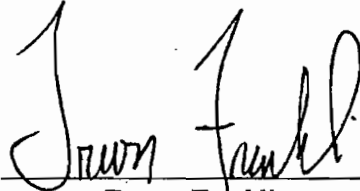
-----X		
ARISTA RECORDS LLC, et al.	:	
	:	
Plaintiff,	:	Civil Action No. 06 CV 5936
	:	
LIME GROUP LLC, et al.	:	<u>AFFIDAVIT OF SERVICE</u>
	:	
Defendant.	:	
-----X		

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

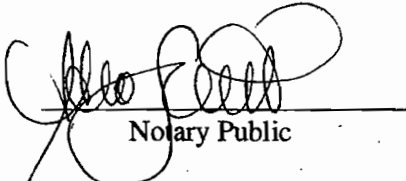
Trevor Franklin being duly sworn, deposes and states that he is not a party to the within action, is over the age of 18 years and resides in Queens County, New York.

On the 24th Day of September, 2010, at 111 Eighth Avenue at approximately 3:00 PM deponent made personal service of the attached Subpoena to Testify at a Deposition in a Civil Action upon Yahoo!, Inc., by personally delivering and leaving a true copy with Jane Doe, who stated to deponent she was an Office Manager employed by CT Corporation and was authorized to accept the Subpoena on behalf of Yahoo!, Inc. At the time of service deponent tendered statutory witness fees.

Deponent describes Jane Doe as a female, approximately 52 years of age, standing approximately 5'4 inches tall, weighing approximately 135 lbs, with black hair, and brown eyes.


Trevor Franklin
License Number 1283601

Sworn to before me this
21st day of September, 2010


Notary Public

ASHLEE JANELL SCOTT
Notary Public, State of New York
No. 01SC6221839
Qualified in New York County
Commission Expires May 10, 2014

EXHIBIT 2

WINSTON & STRAWN LLP

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October 1, 2010

ROBERT C. TURNER
(212) 294-3538
rturner@winston.com

VIA FEDEX AND EMAIL

Mary Eaton, Esq.
Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York, NY 10019

Re: Arista Records LLC, et al., v. Lime Group LLC, et al.
United States District Court for the Southern District of New York
Case No. 06 CV 5936 (KMW)
Third Party Subpoena Directed to Yahoo! Inc.

Dear Ms. Eaton:

This firm represents Yahoo! Inc. ("Yahoo!") in connection with the above-referenced subpoena (the "Subpoena"), and I am writing to formally set forth Yahoo!'s objections to the Subpoena.

As an initial matter Yahoo! strenuously objects to the wholly unreasonable notice provided by the Subpoena. The Subpoena was served upon Yahoo! on September 27, 2010, yet calls for production of responsive documents on or before October 1, 2010, allowing only *four* business days for a response to eleven extraordinarily overbroad topics.

Yahoo! further objects to the Subpoena as it is improperly issued from the Southern District of New York. Pursuant to the Federal Rules, a subpoena must be issued from the district court of the district where the deposition is to be taken. Fed. R. Civ. P. 45(a)(2). As a corporation with its principal place of business in California, any deposition of Yahoo! in this matter must be taken in California. Moreover, any corporate witness offered by Yahoo! will, in all likelihood, reside and conduct business in California. Even were the Subpoena jurisdictionally appropriate, Yahoo! objects to the Subpoena because it purports to require Yahoo! to produce documents and witnesses for deposition in New York, New York, nearly 3,000 miles from Yahoo!'s primary place of business. Fed. R. Civ. P. 45(c)(3)(A)(ii). Any non-party is entitled to the protection of Rule 45(c)(3)(A)(ii), and as such, Yahoo!, a corporate entity with its principle place of business in Sunnyvale, California, cannot be compelled to produce documents and/or appear at a deposition scheduled in a judicial district clear across the country.

Yahoo! also objects to the Subpoena to the extent it purports to require that Yahoo! produce a corporate witness to testify on Yahoo!'s behalf. Pursuant to Fed. Rule Civ. P. 30, a subpoenaing party "must describe with reasonable particularity the matters for examination." See Fed. R. Civ. P. 30(b)(6). The Subpoena commands that Yahoo! "designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on [Yahoo!'s] behalf about the following matters, or those set forth in an attachment." The Subpoena contains no such attachment, nor any schedule of the topics about which a Yahoo! corporate deponent is expected to testify. With respect to any demand for a deposition, the Subpoena is facially invalid as it fails to provide notice about the topics or areas to be testified to by the deponent.

In addition to Yahoo!'s foregoing procedural and structural objections, Yahoo! objects to the requests in the Subpoena on the following additional bases:

1. Yahoo! objects to the Subpoena to the extent it seeks the production of materials not in Yahoo!'s possession, custody, or control, including, but not limited to, documents that are in the possession of third parties. Yahoo! also objects to the requests in the Subpoena to the extent that they fail to describe the documents or information requested with reasonable particularity and are, therefore, overly broad, unreasonably vague, and unduly burdensome. Fed. R. Civ. P. 45(c)(3)(A)(iv).
2. Yahoo! objects to the requests in the Subpoena to the extent they seek information and/or documents protected from disclosure by the attorney-client privilege, the attorney work product doctrine, or any other applicable privilege, doctrine, law or rule. Yahoo! will not produce documents protected by any applicable privilege.
3. Yahoo! objects to the requests in the Subpoena to the extent they seek to impose obligations different from, or in excess of, those created by the Federal Rules of Civil Procedure.
4. Yahoo! objects to the requests in the Subpoena to the extent they seek confidential and private information, or information protected by any confidentiality or other agreement with a third party. Yahoo! will not produce any responsive documents unless and until an appropriate agreement or order is entered with the Court, and unless and until Yahoo! can comply with any applicable confidentiality agreements.
5. Yahoo! objects to the Subpoena to the extent it fails to limit the documents and information requested. As drafted, the Subpoena is overbroad and unduly burdensome and will require an inordinate and unacceptable investment of time and effort spent searching for responsive, non-privileged documents and compiling information from data which is not readily accessible. As such, Defendants have failed to establish that they have taken "reasonable steps to avoid imposing undue burden or expense on" Yahoo!. Fed. R. Civ. P. 45(c)(1).
6. Yahoo! objects to the requests to the extent they purport to demand that Yahoo! produce documents or data contained on backup tapes or any other computer storage mechanism which is not readily accessible. See Fed. R. Civ. P. 45(d)(1)(D).

7. Yahoo! objects to the definition of "Document" to the extent it purports to require Yahoo! to produce the same electronically stored information in more than one form. *See* Fed. R. Civ. P. 45(d)(1)(C).

8. Yahoo! objects to the Subpoena to the extent it requires Yahoo! to pay for the requested search of its documents and records. Yahoo! will not produce responsive documents until the defendants have agreed to pay the reasonable cost incurred in connection with the assembly, copying, and production of the responsive documents.

9. Yahoo! objects to the Subpoena because it provides no reasonable temporal limit on the documents and information demanded by Defendants. The Subpoena is overbroad and burdensome as it calls for the production of documents created on or after January 1, 2005 to the present, a period of nearly six years. Without further temporal limitation, Yahoo! will restrict any search to those documents that are readily accessible.

10. Yahoo! objects to Requests Nos. 1-3 as overbroad and unduly burdensome. These Requests call for the production of documents evidencing communications and/or correspondence between Yahoo! and Plaintiffs. Such documents, to the extent they exist, are more properly requested from Plaintiffs. Again, it is clear that Defendants have not taken "reasonable steps to avoid imposing undue burden or expense on" Yahoo!. Fed. R. Civ. P. 45(c)(1). Yahoo! further objects to these individual Requests to the extent they seek to impose a burden on Yahoo! to determine whether a Plaintiff "owns, holds, claims, or otherwise maintains a copyright" with respect to any particular material. Yahoo! has no basis for making any legal conclusions with regard to the parties to this action. Furthermore, the Requests are overbroad in that they call for production of documents for a period of nearly six years, are not limited to reasonably accessible data, and are largely not relevant or reasonably calculated to lead to the discovery of admissible evidence.

11. Yahoo! objects to Request No. 4 as overbroad and unduly burdensome, in that it calls for the production of confidential information, and is not reasonably calculated to lead to the discovery of admissible evidence.

12. Yahoo! objects to Request No. 5 to the extent it is duplicative of Request No. 4. Yahoo! also objects to Request No. 5 to the extent that it requires Yahoo! to review 414 pages, listing 11,602 songs, in order to determine on a song-by-song basis, the revenue associated with each entry. Yahoo! further objects to Request No. 5 to the extent it purports to require Yahoo! to create documents that do not exist, or are not created, in the normal course of business.

13. Yahoo! objects to Request No. 6 as vague and ambiguous. Request No. 6 requires Yahoo! to determine whether any particular document relates to "Defendants," however, the definition of "Defendants" includes unnamed "predecessors, subsidiaries, parents, affiliates, directors, officers, agents, representatives, attorneys, investigators, consultants, employees and shareholders, whether past or present." Yahoo! has no basis to make any such determination. Furthermore, in light of Yahoo!'s operation of numerous businesses, including businesses involved in the distribution of news, advertisements, and entertainment, Yahoo! further objects to

Request No. 6 as overbroad, unduly burdensome, vague and ambiguous, and seeking the production of documents from Yahoo! that are in no way relevant to any claim or defense held by Defendants in this action.

14. Yahoo! objects to Request No. 7 to the extent it is duplicative of Request Nos. 1-3. Furthermore, the Request is overbroad in that it calls for the production of documents for a period extending nearly six years, is not limited to reasonably accessible data, and is largely not relevant or reasonably calculated to lead to the discovery of admissible evidence.

15. Yahoo! objects to Request No. 8 as unduly burdensome. Request No. 8 calls for the production of "all documents produced in the Grokster Litigation." Yahoo! was not a party to this litigation, and Defendants may properly request this information from the actual parties to the Grokster Litigation.

16. Yahoo! objects to Requests No. 9 and 10 as overbroad and unduly burdensome. The Requests call for information that is far beyond the scope of the action and are not reasonably calculated to lead to admissible evidence. Further, any documents responsive to Requests No. 9 and 10 are within the possession, custody, or control of Plaintiffs.

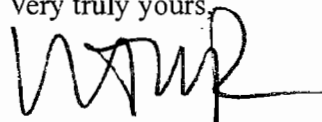
17. Yahoo! objects to Request No. 11 as overly broad and unduly burdensome. Yahoo! also objects to this Request in that it purports to require Yahoo! to review 414 pages, listing 11,602 songs, in order to determine on a song-by-song basis, the "upload views" associated with each entry. Furthermore, Yahoo! objects to Request No. 11 as vague and ambiguous based on its use of the undefined term "upload views." Yahoo! further objects to Request No. 11 to the extent it purports to require Yahoo! to create documents that do not exist, or are not created in, the ordinary course of business to show "upload views" on daily, weekly, monthly, and yearly bases.

18. Yahoo! objects to the requests in the Subpoena to the extent they seek information that is confidential, proprietary, competitively sensitive, and/or a trade secret of Yahoo!.

While Yahoo! has attempted to examine the Subpoena in detail, given the limited time provided for Yahoo! to assert its objections, Yahoo! reserves its rights to present additional objections should defendants choose to proceed with this Subpoena and/or file a motion to compel. Nothing contained herein shall constitute a waiver of any right, claim, or defense held maintained Yahoo!, whether at equity or at law, all of which are expressly reserved.

In sum, your Subpoena is invalid, overbroad, burdensome, and ambiguous, among other faults. Should you wish to discuss the Subpoena's infirmities, please contact me.

Very truly yours,



Robert C. Turner

EXHIBIT 3

From: Kozusko, Dan [mailto:dkozusko@willkie.com]
Sent: Sunday, October 17, 2010 7:07 PM
To: Turner, Robert C.
Cc: Eaton, Mary
Subject: Arista Records LLC v. Lime Group LLC, et al.

Dear Mr. Turner:

I write concerning the subpoena that defendants recently served on Yahoo! Inc. in connection with the above-captioned matter. By letter, dated October 1, 2010, to my colleague, Mary Eaton, you set forth certain objections to that subpoena on behalf of Yahoo! Inc. Attached is a decision issued by the Court on Friday afternoon upholding the subpoenas in their entirety, including the one to your client. Accordingly, we would like to discuss with you as soon as possible the timing of your document production. Of course, we are willing to discuss the scope of that production so as to minimize any undue burden on your client, while ensuring that defendants receive the requested documents and information expeditiously, so that we can avoid any costly motion practice.

Please let us know when you are available to discuss this issue. Thank you.

Very truly yours,
Dan Kozusko

<<Discovery Order.pdf>>

Dan C. Kozusko
Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York, New York 10019
(212) 728-8694 (phone)
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dkozusko@willkie.com

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DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 10/15/10

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARISTA RECORDS LLS, et al.,

Plaintiffs,

06 Civ. 5936 (KMW)(DF)

-against-

ORDER

LIME GROUP LLC, et al.,

Defendants.

X

DEBRA FREEMAN, United States Magistrate Judge:

Currently pending before the Court is Plaintiffs' motion to quash a number of third-party document subpoenas recently served by Defendants. (See Letter to the Court from Glenn D. Pomerantz, Esq., dated Sept. 27, 2010 ("9/27/10 Pomerantz Ltr.") (Dkt. 327).) In addition, during a telephone conference with the Court on September 29, 2010, the parties raised an issue as to whether the types of documents in question would be a proper subject of party discovery at this juncture.

For the reasons set forth below, Plaintiffs' motion to quash the subpoenas is denied. As to the appropriate scope of party discovery, the Court finds that Defendants' requests to Plaintiffs for the documents being sought – i.e., Plaintiffs' recent license agreements and communications regarding licensing – were reasonably made during this phase of discovery, that the requested discovery is relevant to Plaintiffs' damages claims, and that Plaintiffs should update their prior production of such information so as to make that production current.

DISCUSSION

During the initial phase of fact discovery in this litigation (a phase which closed on April 18, 2008 (*see* Order, dated Dec. 10, 2007 (Dkt. 52); Order, dated April 1, 2008 (Dkt. 69))), Defendants requested and received from Plaintiffs copies of Plaintiffs' license agreements and related communications with third parties. (9/27/10 Pomerantz Ltr. at 4-5.) Defendants have now served similar discovery requests, directed both to Plaintiffs and third parties, seeking primarily to supplement Plaintiffs' earlier production with information generated after the initial production date. Plaintiffs have moved to quash the third-party subpoenas, on the principal ground that the Court has already purportedly ruled that the types of documents requested need not be produced at this time. (*Id.*) More specifically, Plaintiffs appear to argue that the Court has already determined that these types of documents would not be relevant to any matters (including aspects of Plaintiffs' claimed damages) that are the subject of the current phase of discovery. For the same reason, Plaintiffs appear to argue that they should not be required to update their own prior production of license agreements and related materials.

A. Standing To Challenge the Subpoenas

As a threshold matter, Plaintiffs have not demonstrated that they have standing to challenge the subpoenas in question. Generally, a party will not have standing to object to a subpoena directed to a third-party in the absence of a claim of privilege. *Langford v. Chrysler Motors Corp.*, 513 F.2d 1121, 1126 (2d Cir.1975); *see also* 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2459 (3d ed. 2008) ("Ordinarily a party has no standing to seek to quash a subpoena issued to someone who is not a party to the action, unless the

objecting party claims some personal right or privilege with regard to the documents sought.”) (footnote omitted).

Here, Plaintiffs do not assert any privilege or personal right with regard to the documents sought by Defendants’ subpoenas. Rather, in the September 29, 2010 telephonic conference before the Court, Plaintiffs argued that they have standing to move to quash the subpoenas because, in their view, Defendants’ service of those subpoenas effectively violated the Court’s prior Order of August 9, 2010 (“8/9/10 Order”) (Dkt. 302). According to Plaintiffs, the Court held, in that Order, that Defendants were not entitled to discovery of license agreements and related communications during the current phase of discovery.

Yet even assuming that Plaintiffs are correct that a party may have standing to quash a third-party subpoena when it exceeds limits on discovery set by the Court in a prior order (a proposition for which Plaintiffs have cited no authority), they appear to be incorrect that such a situation exists in this case, as the Court has never actually addressed the right of Defendants to seek license agreements and related documents, to the extent those documents might be relevant to Plaintiffs’ damages claims.

In the Court’s August 9, 2010 Order, the type of documents now at issue were addressed by the Court – to the extent they were addressed at all – only in the context of whether Defendants would be permitted to “obtain further discovery related to the copyright misuse defense.” (8/9/10 Order, at 2.) Finding that “Defendants’ assertion of a copyright misuse defense [did] not bar any remedy in favor of Plaintiffs in this litigation” (*id.* at 7), the Court merely held that Defendants were “not entitled to discovery that relates *exclusively* to the asserted copyright misuse defense” (*id.* (emphasis added)). The parties did not brief, and the

Court did not address, the relevance of any of Defendants' specific document requests to other issues, including damages. Indeed, in its August 9 Order, the Court held that it was, at that time, "premature" to address "[w]hether Defendants may obtain discovery related to 'actual damages' suffered by Plaintiffs as a result of Defendants' infringing conduct." (*Id.* at 2, 5; *but see also id.* at 5 n.5 (noting that Defendants would at least be entitled to "some discovery" relating Plaintiffs' claimed actual and statutory damages).) Thus, the Court did not actually decide whether Defendants should be permitted to obtain Plaintiffs' license agreements and related communications during this discovery period, and this Court cannot find that Defendants' service of the subpoenas was violative of a Court order.

Consequently, Plaintiffs have offered no viable argument as to why they have standing to challenge the subpoenas. On that basis, their motion to quash the subpoenas is denied.

B. Potential Party Discovery of Plaintiffs' Licenses and Related Communications

On the question of whether Plaintiffs should be required to update their own prior production of their license agreements and communications with third-party licensees or potential licensees, Plaintiffs first argue that this type of discovery should have been – and was – properly conducted during the initial phase of discovery, which ended in April 2008. Yet, to the extent that Plaintiffs seek damages for alleged infringements occurring after that April 2008 date, it is fair and reasonable for Defendants to seek current information related to those claimed damages. Indeed, Plaintiffs seek substantial damages for Defendants' conduct over the past two years, and Defendants cannot be faulted for failing to demand information at a previous time, when that information did not yet exist. Thus, provided the license information is relevant to Plaintiffs' asserted damages, Plaintiffs should update their prior production.

On the issue of relevance, Defendants argue persuasively that Plaintiffs' actual or potential licensing arrangements would be relevant to their claim for common law damages. Lost profits are an appropriate measure of actual damages for common law copyright infringement. See *Pret-A-Printee, Ltd. v. Allton Knitting Mills, Inc.*, No. 81 Civ. 3770, 1982 WL 1788, at *7 (S.D.N.Y. Sept. 16, 1982). Here, Plaintiffs' actual and potential licensing arrangements might shed light on the amount of profits that Plaintiffs would have made, had Defendants' customers downloaded Plaintiffs' copyrighted works from a source authorized by Plaintiffs.

Further, with respect to the relevance of the license information to Plaintiffs' claim of statutory damages, Defendants appropriately cite to *Bryant v. Media Rights Prods., Inc.*, 603 F.3d 135, 144 (2d Cir. 2010), in which the Second Circuit noted that,

[w]hen determining the amount of statutory damages to award for copyright infringement, courts consider: (1) the infringer's state of mind; (2) the expenses saved, and profits earned, by the infringer; (3) the revenue lost by the copyright holder; (4) the deterrent effect on the infringer and third parties; (5) the infringer's cooperation in providing evidence concerning the value of the infringing material; and (6) the conduct and attitude of the parties.

Id. In this case, Defendants argue that Plaintiffs' various licensing arrangements would be directly relevant to the third factor set out in *Bryant* – *i.e.*, the revenue Plaintiffs may have lost as a result of the claimed infringements. (See Letter to the Court from Mary Eaton, Esq., dated Sept. 29, 2010 (Dkt. 328) at 3.) Defendants also argue that both the licenses themselves and Plaintiffs' communications with licensees and potential licensees on the subject of licensing would be relevant to understanding Plaintiffs' "conduct and attitude" (the sixth factor enumerated in *Bryant*) regarding licensing, including their attitude toward Internet companies

which, for various reasons, may have sought to deviate from seemingly standard licensing rates and terms. *Bryant* itself provides little guidance as to the meaning or scope of the “attitude and conduct of the parties” factor, *see Bryant*, 603 F.3d at 144, and the parties have not elaborated on this point. Nonetheless, it is not difficult to see how communications with licensees or potential licensee might illuminate Plaintiffs’ attitudes regarding the value of its copyrights and show how Plaintiffs conducted themselves in dealing with others in the Internet marketplace.

Finally, in considering whether the requested discovery should be produced by Plaintiffs, the Court takes two other facts into account: (1) that Plaintiffs did produce the same type of material earlier, and thus are hard-pressed to argue that such material bears no relevance to their claims, and (2) that, as noted above, the amount of damages being sought by Plaintiff – including damages for alleged acts of infringement over the last two years – is *substantial*, which weighs in favor of requiring Plaintiffs to make full production of evidence related to damages, even if burdensome.

CONCLUSION

For the foregoing reasons, Plaintiffs’ motion to quash the third-party subpoenas (Dkt. 327) is denied, and, in addition, Plaintiffs are directed to produce in discovery their license agreements and related communications with third-party licensees, for the period from April 18, 2008 to the present.

To the extent that, after good faith conference, the parties still need judicial resolution of any other discovery disputes, they are directed to submit a joint letter to the Court, no later than one week from the date of this Order, identifying each dispute that remains extant.

Dated: New York, New York
October 15, 2010

SO ORDERED



DEBRA FREEMAN
United States Magistrate Judge

Copies to:

all parties (via ECF)

EXHIBIT 4

From: Kozusko, Dan
Sent: Friday, November 05, 2010 6:51 PM
To: Glenn.Pomerantz@mta.com; rturner@winston.com
Cc: Eaton, Mary
Subject: Arista v. LimeWire

Dear Glenn:

Counsel for Yahoo! Inc., one of the non-parties that Defendants subpoenaed, raised an issue with regard to the protective order in this case. Specifically, Rob Turner of Winston & Strawn (copied on this e-mail) expressed concern that the protective order allows documents designated as "Confidential" or "Attorneys' eyes only" to be disclosed to in-house counsel for the parties. Yahoo! is ready to produce agreements between it and Plaintiffs that are responsive to Defendants' Subpoena, but does not want copies of its agreements with one Plaintiff, e.g., Sony, being shared with in-house counsel for other Plaintiffs not affiliated with Sony.

In our view, that is a legitimate concern. To ameliorate that concern and enable Yahoo! to produce documents pursuant to the Subpoena, we wanted to see if you would be willing to enter into a Stipulation stating that you will not share copies of agreements between Yahoo! and any plaintiff with in-house counsel for other plaintiffs. We can work on exact language later, but I wanted to check first whether that concept were acceptable to you and your clients? Please let us know your views as quickly as possible so that we may facilitate the production of documents by Yahoo! here. Many thanks.

Rob: please chime in if I have misstated your client's position in any way.

Regards,
Dan

Dan C. Kozusko
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New York, New York 10019
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(212) 728-9694 (fax)
dkozusko@willkie.com

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EXHIBIT 5

PrintCenter

From: LeMoine, Melinda [Melinda.LeMoine@mto.com]
Sent: Tuesday, December 07, 2010 7:00 PM
To: Eaton, Mary; Mundiya, Tariq; Cosenza, Todd
Cc: Pomerantz, Glenn; Klaus, Kelly; Aull, Ashley; Blavin, Jonathan; Boyd, Susan
Subject: LimeWire - Amended Stipulated Protective Order

Counsel:

As I mentioned during our meet and confer and in my email of last week, two nonparties have concerns that the present protective order does not prohibit sharing amongst plaintiffs' in-house counsel of competitively sensitive information such as the terms of their distribution agreements. It has been and will continue to be our practice not to share such information amongst the plaintiffs. However, this proposed amendment makes that a formal requirement of the protective order.

The proposed changes (other than cosmetic changes to update the caption) are in red. Please let me know if you will stipulate to these changes so that I can produce to you all outstanding agreements.

Thank you,

Mindy LeMoine

<<Amended Stipulated Protective Order---V3.DOC>>

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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.,

Plaintiffs/Counterclaim Defendants,

v.

LIME GROUP LLC; MARK GORTON; and GREG BILDSON,

Defendants,

and

LIME WIRE LLC,

Defendant/Counterclaim Plaintiff.

**AMENDED STIPULATION
AND PROTECTIVE
ORDER**

06 Civ. 05936 (KMW)

[ECF CASE]

Good cause appearing, and in conformance with the parties' agreement:

IT IS HEREBY ORDERED that this Protective Order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure be, and is hereby, entered.

1. This Protective Order shall be applicable to and govern all depositions, documents produced in response to requests for production of documents, answers to interrogatories, responses to requests for admission, and all other discovery taken pursuant to the Federal Rules of Civil Procedure, and other information hereafter furnished, directly or indirectly, by or on behalf of any party or nonparty in connection with this action which that party or nonparty designates as "Confidential" and which that party or nonparty in good faith believes comprise or

reflect proprietary information used by it in, or pertaining to, its business, which is not generally known and which the party would normally not reveal to third parties or would cause third parties to maintain in confidence, including, without limitation, trade secrets, financial data, contracts and agreements, current and future business plans, and marketing documents. A party may also designate discovery materials provided in this litigation as “Confidential-Attorneys’ Eyes Only” when that party has a good faith belief that such materials are particularly sensitive and therefore require a heightened level of protection. A Plaintiff/Counterclaim Defendant (as referenced above, hereinafter “Plaintiff”) or nonparty may also designate discovery materials provided in this litigation as “Restricted Confidential--Outside Attorneys’ Eyes Only” when that Plaintiff or nonparty in good faith believes that such materials are both competitively sensitive and would cause commercial harm if disclosed to another Plaintiff.¹

1. Any documents produced in this action that were previously produced in a litigation, investigation or other proceeding shall be treated as “Confidential” if such documents were labeled in that litigation, investigation or other proceeding as “Confidential”, “FOIA Confidential Treatment Requested”, “Restricted”, “Subject to Protective Order” or bear any other designation indicating that their confidentiality should be preserved.

2. Material governed by this Protective Order shall be used by any recipients solely for the purpose of conducting this litigation, and not for any other purpose whatsoever, and such information shall not be disclosed to anyone except as provided herein.

¹ This Protective Order does not apply to hearings before the Magistrate Judge or hearings or trial before the District Court. The parties, any party in interest, and/or the witnesses, can move the Court to seal any court proceeding for reasons consistent with this Protective Order.

3. Any information or materials produced by any party or nonparty as part of discovery in this action may be designated by such party or nonparty pursuant to Paragraphs 5 through 8 of this Protective Order.

4. The designation of information or material for purposes of this Protective Order shall be made in the following manner by the party or nonparty seeking protection:

a. in the case of documents, exhibits, briefs, memoranda, interrogatory responses, responses to requests for admission, or other materials (apart from depositions or other pretrial or trial testimony): by affixing a plainly visible confidentiality designation legend to: (i) each page containing any confidential information or material; or (ii) physically on the outside of any media for storing electronic documents, at the time such documents are produced or such information is disclosed, or as soon thereafter as the party or nonparty seeking protection becomes aware of the confidential nature of the information or material disclosed and sought to be protected hereunder. The term “document,” as used in this Order, shall have the broadest meaning permissible under the Federal Rules of Civil Procedure and shall include, without limitation, all “writings,” “recordings” and “photographs” as defined in Rule 1001 of the Federal Rules of Evidence, and any information stored in or through any computer system or other electronic or optical data storage device.

b. In the case of depositions or other pretrial or trial testimony: (i) by a statement on the record, by counsel, during such deposition or other pretrial or trial proceeding that the entire transcript or a portion thereof shall be designated hereunder; or (ii) by written notice of such designation sent by counsel to all parties within ten (10) days after the mailing (via next business day delivery) to counsel by the court reporter of the transcript of the deposition. At or before a deposition, the deponent or his counsel, or any other counsel of

record, acting in good faith, may invoke the provisions of this Protective Order in a timely manner, giving adequate warning to counsel for the party or nonparty that testimony about to be given is deemed protected under this Order. The parties shall treat all deposition and other pretrial and trial testimony as protected to the fullest extent under this Order until the expiration of ten (10) days after the mailing (via next business day delivery) to counsel of the transcript of the deposition. Unless designated as confidential pursuant to this Order, any confidentiality is waived after the expiration of the 10-day period unless otherwise stipulated or ordered. The parties may modify this procedure for any particular deposition or proceeding through agreement on the record at such deposition or proceeding or otherwise by written stipulation, without approval of the Court. If any document or information designated under this Order is used during the course of a deposition, that portion of the deposition record reflecting such confidential information shall also be treated with the same confidential protection as that document or information.

c. A party or nonparty furnishing documents and things to another party shall have the option to require that all or batches of documents and things be treated as confidential during inspection and to make its designations of particular documents and things at the time copies of documents and things are produced or furnished.

5. Information or Material designated as “Confidential” under this Order, or copies or extracts therefrom and compilations thereof, may be disclosed, described, characterized, or otherwise communicated or made available in whole or in part only to the following persons:

a. Outside counsel of record in this litigation and staff and supporting personnel of such attorneys, such as paralegals, secretaries, stenographic and clerical employees and contractors, and outside copying, imaging and presentation services, who are working on this

litigation under the direction of such attorneys and to whom it is necessary that the materials be disclosed for purposes of this litigation;

b. In-house counsel for the parties herein who are necessary for the furtherance of this litigation and staff and supporting personnel of such attorneys;

c. Counsel employed in the litigation department of the Recording Industry Association of America (“RIAA”) who are necessary for the furtherance of this litigation and staff and supporting personnel of such attorneys;

d. The parties to this litigation;

e. Subject to Paragraphs 10 and 12 herein, persons who are expressly retained or sought to be retained by a party as consultants or testifying experts, such as accountants, statisticians, economists, industry or technical experts; provided that the disclosure of such material to any persons under this subparagraph shall only be to the extent necessary to perform their work in connection with this litigation.

f. Subject to Paragraph 12 herein, any other persons who are designated to receive material designated “Confidential” by order of this Court after notice to the parties, or by written stipulation of the parties.

g. Subject to Paragraphs 11 and 12, any person from whom testimony is taken in this action;

h. The Court and Court personnel.

i. Subject to Paragraph 12, court reporters, interpreters and videographers employed in connection with this action.

6. Information or Material designated as “Confidential-Attorneys’ Eyes Only” under this Order, or copies or extracts therefrom and compilations thereof, may be disclosed, described,

characterized, or otherwise communicated or made available in whole or in part only to the following persons:

a. Outside counsel of record in this litigation and staff and supporting personnel of such attorneys, such as paralegals, secretaries, stenographic and clerical employees and contractors, and outside copying, imaging and presentation services, who are working on this litigation under the direction of such attorneys and to whom it is necessary that the materials be disclosed for purposes of this litigation;

b. In-house counsel for the parties herein who are necessary for the furtherance of this litigation and staff and supporting personnel of such attorneys;

c. Counsel employed in the litigation department of the RIAA who are necessary for the furtherance of this litigation and staff and supporting personnel of such attorneys;

d. Subject to Paragraphs 10 and 12 herein, persons who are expressly retained or sought to be retained by a party as consultants or testifying experts, such as accountants, statisticians, economists, industry or technical experts; provided that the disclosure of “Confidential-Attorneys’ Eyes Only” material to any persons under this subparagraph shall only be to the extent necessary to perform their work on this litigation.

e. Subject to Paragraph 12 herein, any other persons who are designated to receive material designated “Confidential-Attorneys’ Eyes Only” by order of this Court after notice to the parties, or by written stipulation of the parties.

f. Subject to Paragraphs 11 and 12, any person from whom testimony is taken in this action;

g. The Court and Court personnel.

h. Subject to Paragraph 12, court reporters, interpreters and videographers employed in connection with this action.

7. Information or Material designated as “Restricted Confidential--Outside Attorneys’ Eyes Only” under this Order, or copies or extracts therefrom and compilations thereof, may be disclosed, described, characterized, or otherwise communicated or made available in whole or in part only to the following persons:

a. Outside counsel of record in this litigation and staff and supporting personnel of such attorneys, such as paralegals, secretaries, stenographic and clerical employees and contractors, and outside copying, imaging and presentation services, who are working on this litigation under the direction of such attorneys and to whom it is necessary that the materials be disclosed for purposes of this litigation;

b. In-house counsel for the Defendant or Defendants/Counterclaim Plaintiff (as referenced above) who are necessary for the furtherance of this litigation and staff and supporting personnel of such attorneys;

c. In-house counsel for the Plaintiff as to whom the material relates who are necessary for the furtherance of this litigation and staff and supporting personnel of such attorneys;¹

d. Subject to Paragraphs 10 and 12 herein, persons who are expressly retained or sought to be retained by a party as consultants or testifying experts, such as accountants, statisticians, economists, industry or technical experts; provided that the disclosure

¹ In the event “Restricted Confidential--Outside Attorneys’ Eyes Only” material relates to more than one Plaintiff, it may be shared with one Plaintiff to whom it relates only if material relating to any other Plaintiff is appropriately redacted.

of “Restricted Confidential--Outside Attorneys’ Eyes Only” material to any persons under this subparagraph shall only be to the extent necessary to perform their work on this litigation.

e. Subject to Paragraph 12 herein, any other persons who are designated to receive material designated “Restricted Confidential--Outside Attorneys’ Eyes Only” by order of this Court after notice to the parties, or by written stipulation of the parties.

f. Subject to Paragraphs 11 and 12, any person from whom testimony is taken in this action;

g. The Court and Court personnel.

h. Subject to Paragraph 12, court reporters, interpreters and videographers employed in connection with this action.

8. The parties retain the right to apply to the Court for an order restricting certain individuals from access to certain information. To accomplish this, counsel for a party wishing to restrict access to information shall produce the information (i.e. document) to all counsel for which there is no objection, with a request that the information not be disseminated to other individuals involved in this litigation pending further order of the Court. The moving party shall, thereafter, within 7 days, file the information under seal with the Magistrate Judge or the District Judge and identify the person (by name and title) who the moving party objects to seeing the information and why the moving party believes the information should not be received by this person(s). If the Court is inclined to grant the order, it will notify the aggrieved party and invite briefing before issuing an order.

9. For the purposes of this Order, a consultant shall be restricted to a person who is retained or employed as a bona fide consultant or expert for purposes of this litigation, whether full or part time, by or at the direction of counsel for a party. The name, business address,

curriculum vitae (“CV”) and affiliation of each such consultant or testifying expert must be disclosed to the producing party at least five (5) court days prior to such person’s review of material designated under this Order. The CV shall contain a list of all present employers/clients as well as all past employers/clients for the 36 months preceding the date of employment in this case. During that five-day period, counsel for the designating party shall have the opportunity to oppose the proposed disclosure. Any party opposing disclosure shall within such five (5) day period provide the other party with a written objection, setting forth in reasonable detail the specific grounds for such opposition. If no written objection is received by 5:00 p.m., Eastern time, on the fifth day following the date of disclosure of the identity of the proposed consultant or testifying expert, then the party seeking to disclose may do so and failure to object shall constitute waiver of the specific objection. However, after the five-day period has expired without objection, a party may still move the Magistrate Judge or the District Judge to allow it to object to an expert if it can show: a) there is new, material information relating to the expert, which was not available to the moving party within the five-day objection period; and b) had the moving party been aware of the information at the time, the moving party would have objected to the expert. In the event that an objection is received, the objecting party shall, within two (2) court days send to the other party by facsimile or next business day delivery its portion of a joint discovery dispute letter. Within three (3) court days of receipt of such portion of the joint letter, the party seeking to disclose shall send its portion of the joint letter to the objecting party by facsimile or next business day delivery. Within one (1) court day of receipt of both portions of the joint letter, the objecting party shall submit the joint letter to the Court and a bearing shall be scheduled at the Court’s earliest convenience. In the event such resolution by the Court is

necessary, the material at issue shall not be disclosed to the consultant or testifying expert pending resolution of the issue by the Court.

10. Each person set forth in Paragraphs 6, 7, and 8 to be examined as a witness, may be so examined at trial or during a deposition concerning any information or material designated under this Order which that person had lawfully received or authored prior to and apart from this action. During examination, any such witness may be shown information or material designated under this Order by a party which appears on its face or from other documents or testimony to have been received or authored by that witness from, or communicated to that witness by, that same party provided that the examining party makes a reasonable effort to obtain the witness' compliance with Paragraph 12.

11. Each person set forth in Paragraphs 6, 7, and 8 who is not (i) outside or inside counsel to a party to this litigation or counsel in the litigation department of the RIAA; or (ii) the Court or Court personnel to whom material designated under this Order is to be disclosed, shall, prior to receiving such material, be furnished with a copy of this Protective Order, a copy of the Court's Notification of Protective Order, which the witness shall read and sign (Attached as Exhibit A). Counsel for the party seeking to disclose material designated under this Order to any such person pursuant to this paragraph shall be responsible for retaining the executed originals of all such Notifications. Copies of any such Notification shall be provided to counsel for the other parties or affected nonparties upon request.

12. All information and material designated under this Order shall be kept in secure facilities in a manner intended to preserve confidentiality. Access to those facilities shall be permitted only to those persons set forth in Paragraphs 6, 7, and 8 above as persons properly having access thereto. The recipient of any material designated under this Order shall use its

best efforts, but at no time less than reasonable efforts under the circumstances, to maintain the confidentiality of such information.

13. Nothing contained in this Order shall affect the right of any party to make any objection, claim any privilege, or otherwise contest any request for production of documents, interrogatory, request for admission, subpoena, or question at a deposition or to seek further relief or protective order from the Court as permitted by the Federal Rules of Civil Procedure. Nothing in this Order shall constitute an admission or waiver of any claim or defense by any party.

14. In the event that any material designated under this Order is used, described, characterized, excerpted or referenced in, or attached to, any court proceeding or submission in connection with this litigation: (i) it shall not lose its confidential status through such use; (ii) the parties shall take all steps reasonably required to protect its confidentiality during such proceedings; and (iii) the party shall file such material under seal, except that upon the default of the filing party to so designate, any party may do so. Envelopes used to seal such material shall carry the notation: "SUBJECT TO PROTECTIVE ORDER – FILED UNDER SEAL" and shall comply with all requirements of the Court for filing material under seal. Envelopes so marked shall be delivered sealed to the Clerk of the Court and the contents thereof shall not be made available for public inspection. Counsel for the designating party shall have the opportunity to oppose any request for public inspection.

15. Any documents and information produced by nonparties, pursuant to subpoena or otherwise, may be designated pursuant to the terms of this Order by any party or nonparty.

16. A party shall not be obligated to challenge the propriety of the confidentiality designation of any material under this Order at the time the designation is made, and failure to do

so shall not preclude a subsequent challenge thereto. In the event that any party to this litigation disagrees at any state of these proceedings with a particular confidentiality designation, such party shall provide to the designating party or nonparty a letter stating its objection to the designation and basis of that objection. The designating person or entity shall respond by letter within three (3) court days to such letter. If not resolved, the objecting party shall, within three (3) court days of the designating person or entity's letter response (or the lapse of the time period for such response) send to the designating person or entity by facsimile or next business day delivery its portion of a joint discovery dispute letter. Within three (3) court days of receipt of such portion of the joint letter, the designating person or entity shall send its portion of the joint letter to the objecting party by fax or next business day delivery. Within one (1) court day of receipt of both portions of the joint letter, the objecting party shall submit the joint letter to the Court and a hearing shall be scheduled at the Court's earliest convenience. The burden of proving that information has been properly designated under this Order is on the person or entity making such designation.

17. Nothing in this Order shall preclude any party to the lawsuit or its counsel: (a) from showing a document designated under this Order to an individual who either prepared or reviewed the document prior to the filing of this action; or (b) from disclosing or using, in any manner or for any purpose, any information or documents from the party's own files which the party itself has designated under this Order.

18. Nothing in this Order shall prevent disclosure beyond the terms of this Order if the party designating material consents in writing to such disclosure, or if a court orders such disclosure. A party requested to disclose material designated under this Order to a nonparty pursuant to a validly served subpoena, civil investigative demand, discovery procedure permitted

under the Federal Rules of Civil Procedure, or other formal discovery request shall object to its production to the extent permitted by applicable law and notify the requesting nonparty of the existence of this Order and that the material requested by the nonparty has been designated under this Order, and shall further give notice of such request, by facsimile and next business day delivery, upon the party which designated the material as soon as is reasonably possible, but in all instances reasonably prior to the date on which such confidential material is to be produced to the nonparty.

19. If a party inadvertently fails to designate material and/or information, when producing or otherwise disclosing such material and/or information, it shall not be deemed a waiver in whole or in part of a party's claim of confidentiality, either as to the specific information disclosed or as to any other information relating thereto or on the same or related subject matter. As soon as the receiving party is informed by the producing party that it is designating previously produced material as "Confidential," "Confidential--Attorneys' Eyes Only," or "Restricted Confidential--Outside Attorneys' Eyes Only," the information must be treated as if it had been timely designated under this Protective Order, and the receiving party must endeavor in good faith to obtain all copies of the document which it distributed or disclosed to persons not authorized to access such information by Paragraphs 6, 7, or 8 above, as well as any copies made by such persons. As of the date of this Order, all material previously produced by nonparties or Plaintiffs comprising (1) artist recording agreements and (2) agreements to distribute or disseminate music through digital means shall be treated as "Restricted Confidential--Outside Attorneys' Eyes Only."

20. All counsel for the parties who have access to information or material designated under this Order acknowledge they are bound by this Order and submit to the jurisdiction of this Court for purposes of enforcing this Order.

21. Entering into, agreeing to, and/or producing or receiving information or material designated under this Order, or otherwise complying with the terms of this Order shall not:

a. operate as an admission by any party that any particular information or material designated under this Order contains or reflects trade secrets, proprietary or commercially sensitive information, or any other type of confidential information;

b. operate as an admission by any party that the restrictions and procedures set forth herein constitute or do not constitute adequate protection for any particular information designated under this Order;

c. prejudice in any way the rights of any party to object to the production of documents they consider not subject to discovery;

d. prejudice in any way the rights of any party to object to the authenticity or admissibility into evidence of any document, testimony or other evidence subject to this Order;

e. prejudice in any way the rights of any party to seek a determination by the Court whether any information or material should be subject to the terms of this Order;

f. prejudice in any way the rights of any party to petition the Court for a further protective order relating to any purportedly confidential information; or

g. prevent the parties to this Order from agreeing in writing or on the record during a deposition or hearing in this action to alter or waive the provisions or protections provided for herein with respect to any particular information or material with written or on the record consent of the party disclosing such information.

22. This Order shall not be construed to apply to any information that: (a) is available to the public other than through a breach of this Order or other duty of confidentiality; (b) a receiving party can demonstrate was already known to the receiving party at the time of disclosure and was not subject to conditions of confidentiality; or (c) a receiving party can demonstrate was developed by that receiving party independently of any disclosure by a designating party or nonparty.

23. In the event that information in the possession or control of a person or entity involves the confidentiality rights of a non-party or its disclosure would violate a protective order issued in another action, the party with possession or control of the information will promptly attempt to obtain the consent of the non-party to disclose the information under this Order. If the consent of the non-party is refused or otherwise cannot be obtained, the party will promptly thereafter notify the party seeking discovery by the written response due date for such discovery of: (a) the existence and description (to the extent disclosable) of the information without producing such information; and (b) the identity of the non-party (provided, however, that such disclosure of the identity of the non-party does not violate any confidentiality obligations). The party seeking discovery may then make further application to the non-party or seek an order compelling discovery.

24. Within sixty (60) days after the final termination of litigation between the parties, all material designated under this Order and all copies thereof (including summaries and excerpts) shall be either returned to the party that produced it or destroyed and a certification of destruction supplied to the producing party; provided, however, that for each party, counsel who is entitled access to such designated material under Paragraphs 6, 7, or 8 may retain one complete and unredacted set of its work product that contains designated material as well as

pleadings and papers filed with the Court or served on the other party solely for reference in the event of, and only in the event of, further proceedings or litigation between the parties to this action, a dispute over such counsel's performance or a dispute over the use or dissemination of material designated under this Order. Such retained copy of pleadings and papers shall be maintained in a file accessible only by properly authorized counsel under the provisions of, and bound by, this Order. This Order shall survive the final termination of this litigation with respect to any such retained confidential material.

25. If information or documents subject to a claim of attorney-client privilege, attorney work product or any other legal privilege protecting information from discovery is inadvertently produced to a party or parties, such production shall in no way prejudice or otherwise constitute a waiver of, or estoppel as to, any claim of privilege, work product or other ground for withholding production to which the producing party or other person would otherwise be entitled. In the event information or documents subject to a claim of attorney-client privilege, attorney work product or any other legal privilege protecting information from discovery is inadvertently produced, upon request of the producing party, the documents, together with all copies thereof and any notes made therefrom shall promptly (and no later than ten days after receipt of such request) be returned forthwith to the party claiming privilege and/or attorney work product protection without the need to show the production was inadvertent. Nothing in this paragraph shall prejudice the right of any party to seek discovery of communications, documents and things as to which a claim of privilege has been made.

Dated: _____

Respectfully submitted,

WILKIE FARR & GALLAGHER LLP

By: _____

Attorneys for Defendants/Counterclaim Plaintiffs

MUNGER, TOLLES & OLSON LLP

By: _____

Attorneys for Plaintiffs/Counterclaim Defendants

IT IS SO ORDERED:

DATED: _____

Hon. Debra C. Freeman

Exhibit A

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK.**

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.,

Plaintiffs/Counterclaim Defendants,

v.

06 Civ. 05936 (KMW)

LIME GROUP LLC; MARK GORTON; and GREG BILDSON,

Defendants,

and

LIME WIRE LLC,

Defendant/Counterclaim Plaintiff.

NOTIFICATION OF PROTECTIVE ORDER

The undersigned hereby acknowledges that he or she has read the Stipulation and Protective Order in the above-referenced case; that he or she understands the terms thereof; and that he or she agrees to be bound by its terms.

Dated: _____, 20__

Signature

Print Name and Address:

EXHIBIT 6

PrintCenter

From: Eaton, Mary
Sent: Thursday, December 09, 2010 6:53 PM
To: 'LeMoine, Melinda'; Mundiya, Tariq; Cosenza, Todd
Cc: 'Pomerantz, Glenn'; 'Klaus, Kelly'; 'Blavin, Jonathan'; 'Boyd, Susan'; 'Aull, Ashley'; 'Song, Jillian'; 'Nickels, Phillip'
Subject: RE: LimeWire - protective order

Its fine

From: LeMoine, Melinda [mailto:Melinda.LeMoine@mto.com]
Sent: Thursday, December 09, 2010 2:45 PM
To: LeMoine, Melinda; Eaton, Mary; Mundiya, Tariq; Cosenza, Todd
Cc: Pomerantz, Glenn; Klaus, Kelly; Blavin, Jonathan; Boyd, Susan; Aull, Ashley; Song, Jillian; Nickels, Phillip
Subject: RE: LimeWire - protective order

Mary:

Can you also respond to this email?

Thank you,

Mindy

Melinda Eades LeMoine | Munger, Tolles & Olson LLP
(t) 213.683.9171 | (f) 213.683.4071 | melinda.lemoine@mto.com

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From: LeMoine, Melinda
Sent: Thursday, December 09, 2010 9:15 AM
To: Eaton, Mary; Mundiya, Tariq; 'Cosenza, Todd'
Cc: Pomerantz, Glenn; Klaus, Kelly; Blavin, Jonathan; Boyd, Susan; Aull, Ashley; Song, Jillian; Nickels, Phillip
Subject: LimeWire - protective order

Counsel:

12/10/2010

I have documents I would like to produce to you today. However, I would like to produce them Restricted Confidential - Outside Attorney's Eyes Only pursuant to the protective order revision I sent to you days ago. Can you please advise me as to whether you agree to that amendment? If not, why not?

Thank you,

Mindy LeMoine

Melinda Eades LeMoine | Munger, Tolles & Olson LLP
(t) 213.683.9171 | (f) 213.683.4071 | melinda.lemoine@mto.com

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EXHIBIT 7

PrintCenter

From: Kozusko, Dan
Sent: Monday, November 22, 2010 10:29 AM
To: 'Turner, Robert C.'
Subject: RE: Arista v. LimeWire

Rob,

I wanted to follow up on our conversation of last week regarding the search term and custodian issues we discussed. Also, I wanted to let you know that Judge Wood has extended the fact discovery cutoff until the end of January, which I hope will alleviate the time pressure issues you had mentioned previously.

Thanks,
Dan

Dan C. Kozusko
Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York, New York 10019
(212) 728-8694 (phone)
(212) 728-9694 (fax)
dkozusko@willkie.com

-----Original Message-----

From: Turner, Robert C. [mailto:RTurner@winston.com]
Sent: Monday, November 08, 2010 4:14 PM
To: Kozusko, Dan
Subject: RE: Arista v. LimeWire

Sure. I should be around any time after 5.

Robert Turner
D: +1 (212) 294-3538
www.winston.com
WINSTON
& STRAWN
LLP

From: Kozusko, Dan [mailto:dkozusko@willkie.com]
Sent: Monday, November 08, 2010 4:13 PM
To: Turner, Robert C.
Subject: FW: Arista v. LimeWire

Rob,

I wanted to follow up on an items that we had discussed previously concerning the subpoena whose resolution is not dependent on how plaintiffs' counsel responds to my e-mail below. Do you have time for a call sometime today to discuss?

Thanks,

Dan

Dan C. Kozusko
Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York, New York 10019
(212) 728-8694 (phone)
(212) 728-9694 (fax)
dkozusko@willkie.com

-----Original Message-----

From: Kozusko, Dan
Sent: Friday, November 05, 2010 6:51 PM
To: Glenn.Pomerantz@mto.com; rturner@winston.com
Cc: Eaton, Mary
Subject: Arista v. LimeWire

Dear Glenn:

Counsel for Yahoo! Inc., one of the non-parties that Defendants subpoenaed, raised an issue with regard to the protective order in this case. Specifically, Rob Turner of Winston & Strawn (copied on this e-mail) expressed concern that the protective order allows documents designated as "Confidential" or "Attorneys' eyes only" to be disclosed to in-house counsel for the parties. Yahoo! is ready to produce agreements between it and Plaintiffs that are responsive to Defendants' Subpoena, but does not want copies of its agreements with one Plaintiff, *e.g.*, Sony, being shared with in-house counsel for other Plaintiffs not affiliated with Sony.

In our view, that is a legitimate concern. To ameliorate that concern and enable Yahoo! to produce documents pursuant to the Subpoena, we wanted to see if you would be willing to enter into a Stipulation stating that you will not share copies of agreements between Yahoo! and any plaintiff with in-house counsel for other plaintiffs. We can work on exact language later, but I wanted to check first whether that concept were acceptable to you and your clients? Please let us know your views as quickly as possible so that we may facilitate the production of documents by Yahoo! here. Many thanks.

Rob: please chime in if I have misstated your client's position in any way.

Regards,
Dan

Dan C. Kozusko
Willkie Farr & Gallagher LLP
787 Seventh Avenue
New York, New York 10019
(212) 728-8694 (phone)
(212) 728-9694 (fax)
dkozusko@willkie.com

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Any tax advice contained in this email was not intended to be used, and cannot be used, by you (or any other taxpayer) to avoid penalties under the Internal Revenue Code of 1986, as amended.

EXHIBIT 8

Kozusko, Dan

From: Kozusko, Dan
Sent: Wednesday, December 01, 2010 2:51 PM
To: 'Turner, Robert C.'
Subject: RE: Arista v. LimeWire

OK. Thanks. On the communication issue we discussed yesterday, I did want to make you aware of a recent order of Judge Freeman compelling Vevo, another non-party subpoena recipient, to run certain search terms on selected custodians in order to identify emails and other communications that may be responsive to the subpoena. (A copy of Judge Freeman's order is attached.) These are the types of searches that your client will not agree to run here. If we continue to remain at an impasse on this issue, we will not have any other choice but to make a similar application to Judge Freeman.

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dkozusko@willkie.com

-----Original Message-----

From: Turner, Robert C. [mailto:RTurner@winston.com]
Sent: Tuesday, November 30, 2010 5:40 PM
To: Kozusko, Dan
Subject: RE: Arista v. LimeWire

We are still planning on producing it, but I have not yet received the data from the client. Pending a review on our end, however, it will go out after the protective order issue is dealt with.

Rob Turner

Robert Turner
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**WINSTON
& STRAWN**
LLP

From: Kozusko, Dan [mailto:dkozusko@willkie.com]
Sent: Tuesday, November 30, 2010 5:21 PM
To: Turner, Robert C.
Subject: RE: Arista v. LimeWire

I just realized we did not get a chance to discuss the revenue information, download/streaming stats, etc. that your client had previously agreed to produce (but which you said would take longer than the agreements to gather). I recognize that the protective order issue applies here as well, but in the event that we can get that ironed out, is that information ready to be produced along with the agreements?

Thanks,
Dan

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-----Original Message-----

From: Kozusko, Dan
Sent: Monday, November 22, 2010 10:29 AM
To: 'Turner, Robert C.'
Subject: RE: Arista v. LimeWire

Rob,

I wanted to follow up on our conversation of last week regarding the search term and custodian issues we discussed. Also, I wanted to let you know that Judge Wood has extended the fact discovery cutoff until the end of January, which I hope will alleviate the time pressure issues you had mentioned previously.

Thanks,
Dan

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-----Original Message-----

From: Turner, Robert C. [mailto:RTurner@winston.com]
Sent: Monday, November 08, 2010 4:14 PM
To: Kozusko, Dan
Subject: RE: Arista v. LimeWire

Sure. I should be around any time after 5.

Robert Turner
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LLP**

From: Kozusko, Dan [mailto:dkozusko@willkie.com]
Sent: Monday, November 08, 2010 4:13 PM
To: Turner, Robert C.
Subject: FW: Arista v. LimeWire

Rob,

I wanted to follow up on an items that we had discussed previously concerning the subpoena whose resolution is not dependent on how plaintiffs' counsel responds to my e-mail below. Do you have time for a call sometime today to discuss?

Thanks,
Dan

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-----Original Message-----

From: Kozusko, Dan
Sent: Friday, November 05, 2010 6:51 PM
To: Glenn.Pomerantz@mto.com; rtturner@winston.com
Cc: Eaton, Mary
Subject: Arista v. UmeWire

Dear Glenn:

Counsel for Yahoo! Inc., one of the non-parties that Defendants subpoenaed, raised an issue with regard to the protective order in this case. Specifically, Rob Turner of Winston & Strawn (copied on this e-mail) expressed concern that the protective order allows documents designated as "Confidential" or "Attorneys' eyes only" to be disclosed to in-house counsel for the parties. Yahoo! is ready to produce agreements between it and Plaintiffs that are responsive to Defendants' Subpoena, but does not want copies of its agreements with one Plaintiff, e.g., Sony, being shared with in-house counsel for other Plaintiffs not

affiliated with Sony.

In our view, that is a legitimate concern. To ameliorate that concern and enable Yahoo! to produce documents pursuant to the Subpoena, we wanted to see if you would be willing to enter into a Stipulation stating that you will not share copies of agreements between Yahoo! and any plaintiff with in-house counsel for other plaintiffs. We can work on exact language later, but I wanted to check first whether that concept were acceptable to you and your clients? Please let us know your views as quickly as possible so that we may facilitate the production of documents by Yahoo! here. Many thanks.

Rob: please chime in if I have misstated your client's position in any way.

Regards,
Dan

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3. All documents contained in the files of (1) Rio Caraeff, (2) Fred Santarpia, (3) Alan Price, (4) Julie Lee, and (5) Alexander Kisch (collectively, the "Custodians"):
 - a. referring to "LimeWire"; or
 - b. consisting of communications with the following individuals: David Weinberg, Jaunique Sealy, Michael Mulein, Wendy Nussbaum, Zach Horowitz, Charles Ciongoli, David Ring, Mark Eisenberg, Michael Paul, Jeff Walker, Chris Bonavia, Jonathan Glass, Bobby Sherman, Dennis Kooker, Thomas Hesse, Amy Lauren, Mark Pilbe, Elio Leoni-Sceti, Chris Kennedy, and Enrico Del Prete, and containing any of the following terms: licens*, royalt*, agreement, contract, "label fees," and "revenue share."

Dated: New York, New York
November 23, 2010

SO ORDERED



DEBRA FREEMAN
United States Magistrate Judge

Copies to:

all parties (via ECF)

Cynthia Richman, Esq.
Gibson, Dunn & Crutcher LLP
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Washington, DC 20063-5304