UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ARISTA RECORDS LLC; ATLANTIC RECORDING CORPORATION; ARISTA MUSIC, fka BMG MUSIC; CAPITOL RECORDS LLC fka CAPITOL RECORDS, INC.; ELEKTRA ENTERTAINMENT GROUP INC.; INTERSCOPE RECORDS; LAFACE RECORDS LLC; MOTOWN RECORD COMPANY, L.P.; PRIORITY RECORDS LLC; SONY MUSIC ENTERTAINMENT, fka SONY BMG MUSIC ENTERTAINMENT; UMG RECORDINGS, INC.; VIRGIN RECORDS AMERICA, INC.; and WARNER BROS. RECORDS INC.,

Plaintiffs,

v.

LIME WIRE LLC; LIME GROUP LLC; MARK GORTON; and M.J.G. LIME WIRE FAMILY LIMITED PARTNERSHIP,

Defendants.

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06 Civ. 05936 (KMW)(DCF)
ECF CASE

MYSPACE, INC.'S REPLY IN SUPPORT OF ITS OBJECTIONS TO MAGISTRATE JUDGE FREEMAN'S ORDER COMPELLING THE PRODUCTION OF INTERNAL AND EXTERNAL COMMUNICATIONS

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MySpace, Inc. ("MySpace") respectfully submits this brief in further support of its Objections to Magistrate Judge Freeman's Order, dated January 31, 2011, compelling production of its external and internal communications concerning online licensing and LimeWire ("January 31 Order").

First, Defendants assert that this Court has "already determined" that Plaintiffs' views concerning licensing and LimeWire are "relevant to Plaintiffs' damages claims." Defendants' Response, filed February 24, 2011 ("Response") at 5. But the Court only addressed that issue in connection with *party discovery*, and even in that context deemed the relevance of external communications associated with licensing of works to be "tenuous." *See* Declaration of Matthew D. Ingber in support of MySpace's Objections to Magistrate Judge Freeman's Order Compelling Production of Internal and External Documents, dated February 18, 2011 ("Ingber Decl."), Ex. 6 (Nov. 19 Order). The Court also found the relevance of Plaintiffs' internal communications regarding LimeWire to be so minimal and the burden of producing them so high that it held such production in abeyance. *Id.*

Second, and even more to the point, the fact that hypothetical internal and external communications in MySpace's possession concerning Plaintiffs' views about licensing or LimeWire may have some theoretical probative value (a point in dispute) is not the relevant issue. Contrary to LimeWire's straw man argument, MySpace has not argued that potentially duplicative discovery is *never* available from a non-party; rather, the Court must weigh the *incremental* relevance of getting *additional* documents from non-parties (here, a fraction of already "tenuous" relevance) against the burden imposed on a non-party in collecting and producing them. Analysis of the incremental relevance of producing internal and external communications must begin with a recognition that Defendants already are in possession of the *actual agreements* pursuant to which Plaintiffs licensed their works to third parties. These agreements would seem to be some of the best

evidence of Plaintiffs' "conduct and attitude" toward licensing their works, as opposed to what MySpace might conceivably report about Plaintiffs' views on that subject. In addition to those agreements, Defendants have obtained external communications produced by the Plaintiffs, and have had the full opportunity to take deposition testimony of the Plaintiffs' licensing representatives. Given this robust discovery on issues of peripheral relevance to the damages inquiry, further discovery of internal MySpace communications reflecting Plaintiffs' views regarding licensing or is unnecessary and unjustified.[1]

When faced with Defendants' demand that Plaintiffs produce external communications associated with licensing, this Court has observed that production of such documents is "potentially burdensome." *Id.*, Ex. 6. Here, when properly weighed, the incremental relevance of producing additional internal and external communications is far outweighed by the obvious and demonstrated burden on MySpace – a non-party – of collecting, reviewing, identifying and producing such documents.[2]

Third, Defendants contend that MySpace "has not even attempted to satisfy its obligation of demonstrating why searching for and producing the communications in question would impose an undue burden" (Response at 11). Defendants ignore the sworn declaration by MySpace's counsel

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[1] And there is even less reason to seek internal MySpace communications regarding Plaintiffs' views concerning online licensing when Defendants indisputably have never sought those documents from Plaintiffs themselves.

[2] As of the time of filing we are still working with counsel for Defendants and Plaintiffs to receive an unredacted version of Defendants' Response, and therefore remain unable to address all of the arguments raised therein. If and when we receive an unredacted version of the Response, MySpace will supplement this Reply, if necessary or directed by the Court to do so. To the extent that the redacted portions relate to UMG's lawsuit against MySpace, referenced as Exhibits N and O to the Kozusko Declaration, as Defendants know, that lawsuit and settlement occurred prior to the relevant time frame here (post-April 18, 2008). In any event, it misses the point: any documents from MySpace reflecting Plaintiffs' views on licensing are certainly no more relevant than those in Plaintiffs' possession, which Defendants have already obtained, and discovery of those documents cannot be justified in light of the burden imposed on MySpace, a nonparty.

detailing the time-consuming and costly collection and review process that would be required for each individual custodian among the many identified by Defendants. *See* Ingber Decl., Ex. 5 (Gottlieb Decl.) at 7-8. If that Declaration is insufficient to demonstrate burden, it is unclear how a third party could ever demonstrate burden required to collect and produce documents. By ignoring MySpace's evidence, Defendants actually posit that MySpace must bear the significant burden of collection and production so that it could demonstrate the significant burden of collection and production. That is as absurd as it is false.[3]

Fourth, citing Magistrate Judge Freeman's November 23 order concerning non-party VEVO, Defendants assert that "[o]ther non-parties have been compelled to produce their internal communications . . . in this very case." Response, at 5. That assertion, repeated throughout these proceedings,[4] is blatantly misleading. In the November 23 order, Judge Freeman adopted non-party VEVO's *own* production proposal, and did not compel VEVO to produce anything that it had not already volunteered to produce. 11/23/10 Order, Dkt. 367. The fact that VEVO *volunteered* to produce internal communications is irrelevant to the question of whether MySpace should be *compelled* to do so. Indeed, in the two other proceedings in which Defendants sought to compel the same type of non-party communications – from Amazon and MediaDefender -- the courts denied Defendants' motion to compel, and in so doing struck the proper balance between the marginal relevance of the internal communications to Plaintiffs' "conduct and attitude" and the

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[3] To the extent that MySpace's resources bear upon the burden analysis, it is but one factor of many. *See Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 322 (S.D.N.Y. 2003). In any event, Defendants assert MySpace's vast resources as a basis to justify production in the face of press reports indicating that its business is troubled. *E.g.*, *http://articles.latimes.com/2011/jan/12/business/la-fi-ct-myspace-20110112*.

[4] MySpace has repeatedly pointed out Defendant's mischaracterization of the VEVO order, but Defendants continue to mischaracterize it. *See* Ingber Decl., Ex. 3 (Joint Stipulation) at 11, 22-23; Ex. 5 (Gottlieb Decl.) at 5.

burden to the non-parties in producing them. *See* Ingber Decl., Ex. 5 at Ex. 25 (Order, Dec. 22, 2010); Ex. 10 (Order on Motion to Compel, Feb. 9, 2011).

Fifth, Defendants lean heavily on the fact that MySpace Music was created as a joint venture involving the plaintiffs, but that assertion is beside the point. It would be one thing (though dubious) to suggest that MySpace Music's *own* "attitude and conduct" is more relevant than the attitude and conduct of other non-party, non-joint venturers. It is quite another to suggest that MySpace's internal communications reflecting *Plaintiffs'* "attitude and conduct" – the only internal communications ordered to be produced – are somehow more relevant because MySpace Music and plaintiffs chose to consummate their license relationship as a joint venture. Those communications are no more relevant from MySpace than they are from any other non-party whose documents could conceivably reflect the attitude and conduct of Plaintiffs. As is discussed in MySpace's Objections, these documents are not relevant at all.

Moreover, the Plaintiffs' interest in MySpace Music has no effect on MySpace's burden here: MySpace Music is managed entirely by non-party MySpace, which alone would have to bear the burden of compelled production and stands to gain nothing from this litigation.

Finally, Defendants assert that it is "demonstrably" the case that MySpace's files "contain different versions of documents, additional material, or perhaps, significant omissions." Response at 9. Plaintiffs have "demonstrated" nothing of the sort. They have *speculated* that Plaintiffs have produced fewer responsive documents than the number of "hits" that MySpace's counsel *estimated* might be returned in an initial search, prior to a full document review to determine privilege and responsiveness. *See id.*, Ex. 11 (Letter from M. Eaton to Hon. Debra C. Freeman, Jan. 14, 2011) at 4. This speculation based on estimation is a far cry from showing that duplicative and burdensome discovery from a non-party is warranted.

For these reasons, and those discussed in MySpace's Objections, MySpace respectfully requests that the Court overrule those portions of the January 31 Order compelling MySpace's production of documents.

Dated: February 25, 2011

Respectfully submitted,

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