

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

ARISTA RECORDS LLC, et al.

v.

DOCKET NO. 09-0905-cv

DOES 1 - 16

**PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANT-APPELLANT'S
MOTION FOR AN EXTENSION OF THE BRIEFING SCHEDULE**

Plaintiffs/Appellees respectfully submit this opposition to Defendant/Appellant's motion to extend the briefing schedule pending the Court's determination of Defendant's motion to stay.

FACTUAL AND PROCEDURAL BACKGROUND

This case arose out of the substantial copyright infringement that took place through Defendant's Internet account. At the time Plaintiffs detected Defendant's infringement, Plaintiffs were able to determine that Defendant connected to the Internet administered by the State University of New York at Albany ("SUNY"), but were otherwise unable to determine Defendant's identity. To determine Defendant's identity, Plaintiffs sought leave to serve a subpoena on SUNY. The District Court granted Plaintiffs' subpoena request and rejected Defendant's attempts to have the subpoena quashed.

On March 6, 2009, Defendant filed this appeal and asked this Court to stay the District Court's order denying Defendant's motion to quash the subpoena. Plaintiffs filed their opposition to Defendant's motion to stay the District Court's order on March 23, 2009. Plaintiffs' opposition demonstrated that that Defendant's motion to stay is both procedurally and substantively deficient and should be denied. Procedurally, Defendant failed to seek a stay in the District Court as required by Federal Rules of Appellate Procedure 8(a)(1). Substantively,

Defendant failed to satisfy the requirements in the Second Circuit for a stay pending appeal.

Defendant filed a reply on March 30, 2009.

On March 26, 2009, Staff Counsel issued its Civil Appeal Scheduling Order #1 setting a briefing schedule for this appeal and requiring Defendant's Brief and Joint Appendix to be filed on or before May 6, 2009. Defendant now moves to extend this briefing schedule pending the Court's determination of Defendant's stay motion. Defendant's motion to extend the briefing schedule should be denied for two primary reasons. First, Defendant's motion serves only to delay this matter unnecessarily risking further undue prejudice to Plaintiffs' ability to pursue their claim. Second, Defendant's motion provides no basis for the requested extension.

ARGUMENT

I. Defendant's Motion Should be Denied as it Serves Only To Delay This Matter Unnecessarily and Will Further Prejudice Plaintiffs.

Defendant seeks an extension of the briefing schedule on the ground that "it is of course not known whether the stay [ruling] will issue" before Defendant's opening brief must be filed and that, "in any event, preparation and perfection of the appeal [brief] is not practicable until the Court grants the stay, because *if* the stay is denied, the appeal *may* become moot, and *may* be withdrawn." (*See* Altman Decl. ¶ 4, emphasis added.) In other words, Defendant argues that the Court should stay the briefing schedule in this case while Defendant decides what he/she wants to do with this appeal in the event the Court denies the stay request. Defendant is not saying the appeal will or will not be dropped or become moot, just that Defendant would like more time to decide before committing any resources to preparing a brief. The Court should not postpone the briefing schedule simply because Defendant has not yet decided what to do, especially where any further delay in the resolution of this matter would serve only to prejudice Plaintiffs' ability to pursue their claim against Defendant.

Specifically, any delay increases the risk that Plaintiffs will lose access to vital information necessary to proceed with the underlying copyright infringement case. Some of the most important evidence of Defendant's alleged infringement, for example, resides on Defendant's computer and on SUNY's computer system, and this evidence may become lost or corrupted due to the passage of time. See *Arista Records, LLC v. Tschirhart*, 241 F.R.D. 462, 465 (W.D. Tex. 2006) ("The best proof of whether [the Defendant engaged in infringement] would be to examine her computer's hard drive"); *Arista Records Inc. v. Musemeci*, No 03-CV-4465, 2007 U.S. Dist. LEXIS 81630, at *13-14 (E.D.N.Y. Sept. 19, 2007) (finding in a similar infringement case that the passage of time harms the Plaintiffs' ability to prosecute their claim); *Atlantic Recording Corp. v. Rodriguez*, No. SA-06-CA-748-OLG, slip op. at 2 (W.D. Tex. Sept. 12, 2007) ("critical evidence from Defendant's computer hard drive could have been altered, removed, or simply written over in the course of time").

Plaintiffs filed their motion for leave to take immediate discovery on July 17, 2008. The District Court granted Plaintiffs' motion for leave and gave Plaintiffs permission to serve a Rule 45 subpoena on SUNY Albany, seeking information sufficient to identify each Doe Defendant on July 22, 2008. Plaintiffs served their subpoena on SUNY on August 12, 2008, requesting a response on or before September 11, 2008. Since the September 11, 2008 subpoena response deadline, Defendant filed two motions to quash, both rejected by the District Court, and an appeal before this Court. More than seven months have passed since Plaintiffs were scheduled to receive Defendant's identifying information in order to proceed with this case. The likelihood of the critical identifying information being inadvertently destroyed, erased or harmed in some other manner increases daily. Defendant's motion, if granted, increases the risk that crucial identifying information Plaintiffs need to pursue their case may become unattainable.

II. Defendant's Motion Provides No Basis for The Relief Requested.

Defendant's motion asks the Court to grant an indefinite stay or "extension" of the briefing schedule. Defendant, however, provides no specific basis for an extension. Defendant does not suggest any conflict with other matters, any inability to prepare the brief on time, or any other reasonable basis for the relief requested. Defendant simply asserts that the appeal *may* be withdrawn and therefore an extension of the briefing schedule should be granted while Defendant makes a final determination on whether to pursue this matter. Defendant's inability to decide whether to pursue the appeal is not a valid reason for requesting an extension of time.

CONCLUSION

WHEREFORE, Plaintiffs request that the Court deny Defendant's Motion for Extension of the Briefing Schedule.

Respectfully submitted,



s/Timothy M. Reynolds

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2009, a true and correct hard copy of the PLAINTIFFS/APPELLEES' OPPOSITION TO DEFENDANT/APPELLANT'S MOTION FOR AN EXTENSION OF THE BRIEFING SCHEDULE was sent to the following persons by email and by U.S. mail, first class postage prepaid, to the addressee listed below:

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s/Timothy M. Reynolds

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See Second Circuit Interim Local Rule 25(a)6

CASE NAME: Arista Records LLC v. Does 1-16

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