

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ARISTA MUSIC, ARISTA RECORDS LLC,
ATLANTIC RECORDING CORPORATION,
ELEKTRA ENTERTAINMENT GROUP INC.,
LAFACE RECORDS LLC, SONY MUSIC
ENTERTAINMENT, UMG RECORDINGS, INC.,
WARNER BROS. RECORDS INC., and ZOMBA
RECORDING LLC,

Plaintiffs,

v.

ESCAPE MEDIA GROUP INC., SAMUEL
TARANTINO, and JOSHUA GREENBERG

Defendants.

11 Civ. 8407 (TPG)

FILED UNDER SEAL

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR SANCTIONS FOR SPOILIATION OF EVIDENCE AGAINST
DEFENDANT ESCAPE MEDIA GROUP, INC.**

TABLE OF CONTENTS

	<u>Page</u>
I. BACKGROUND	3
A. The Parties	3
B. The Pervasive Infringement of Plaintiffs’ Works by Escape’s Employees including Greenberg.....	3
C. Escape’s Obligation to Preserve the Despoiled Evidence	5
D. Plaintiff UMG’s Commencement of Litigation, Preservation Demands, and Discovery Requests	6
E. Escape’s Spoliation of Greenberg’s Upload Records During the Pendency of the State Action	7
F. Escape’s Spoliation of Hundreds of Thousands of Other Uploading Records During the Pendency of the State Action.....	8
G. Escape’s Spoliation of Source Code	9
II. ARGUMENT	10
A. Standard for the Imposition of Sanctions.....	10
B. Under Prevailing Circuit Authority, Escape’s Misconduct Warrants Sanctions	11
1. Escape Had an Obligation to Preserve the Spoliated Evidence	11
2. Escape Acted with a Culpable State of Mind	12
3. The Despoiled Evidence Was Highly Relevant.....	14
C. The Court Should Impose the Evidentiary Sanctions Requested Herein to Address the Prejudice Caused by Escape’s Misconduct.....	16
1. Direct Infringement by Greenberg Should be Established	17
2. The Volume of Infringement of Each of Plaintiffs’ Works Uploaded by Greenberg Should be Established.....	19
3. Additional Direct Infringement by Escape Employees Should be Established	21
4. This Court Should Preclude Escape From Benefitting from their Spoliation of Source Code	22
D. The Court Should Award Monetary Sanctions	23
CONCLUSION.....	24

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Agence France Presse v. Morel</i> , No. 934 F. Supp. 2d 584 (S.D.N.Y. 2013).....	19
<i>Arista Records LLC v. Lime Grp. LLC</i> , 784 F. Supp. 2d 313 (S.D.N.Y. 2011).....	19
<i>Arista Records LLC v. Usenet.com, Inc.</i> , 608 F. Supp. 2d 409 (S.D.N.Y. 2009).....	16
<i>Burns v. Imagine Films Entm't</i> , 164 F.R.D. 594 (W.D.N.Y. 1996).....	17
<i>Candlehouse, Inc. v. Town of Vestral, N.Y.</i> , No. 3:11-CV-009 (DEP), 2013 WL 1867114 (N.D.N.Y. May 3, 2013)	12
<i>Capitol Records, LLC v. ReDigi Inc.</i> , 934 F. Supp. 2d 640 (S.D.N.Y. 2013).....	15
<i>Casale v. Kelly</i> , 710 F. Supp. 2d 347 (S.D.N.Y. 2010).....	24
<i>Chan v. Triple 8 Palace, Inc.</i> , 2005 WL 1925579 (S.D.N.Y. Aug. 11, 2005).....	23-24
<i>Columbia Pictures, Inc. v. Bunnell</i> , No. 2:06-cv-01093 FMC-JCx, 2007 WL 48777018 (C.D. Cal. 2007)	17
<i>Computer Assoc. Intern, Inc. v. Am. Fundware, Inc.</i> , 133 F.R.D. 166 (D. Colo. 1990)	11-12
<i>De Espana v. Am. Bureau of Shipping</i> , No. 03 Civ. 3573 (LTS) RLE, 2007 WL 1686327 (S.D.N.Y. June 6, 2007)	24
<i>Distefano v. Law Offices of Barbara H. Karsos, PC</i> , 2013 WL 1339548 (E.D.N.Y. Mar. 29, 2013).....	11
<i>DMAC LLC v. City of Peekskill</i> , No. 09 Civ. 5093(GAY), 2012 WL 4459290 (S.D.N.Y. Sept. 26, 2012).....	12
<i>Entral Group Int'l v. Sun Sports Bar, Inc.</i> , No. 05-CV-4386 (CBA), 2007 WL 2891419 (E.D.N.Y. Sept. 28, 2007)	15-16
<i>Fujitsu Ltd. v. Fed. Exp. Corp.</i> , 247 F.3d 423 (2d Cir. 2001).....	11

Google, Inc. v. Am. Blind & Wallpaper Factory, Inc.,
 No. C 03-5340 JF (RS), 2007 WL 1848665 (N.D. Cal. June 27, 2007)..... 16-17

Harkabi v. SanDisk Corp.,
 275 F.R.D. 414 (S.D.N.Y. 2010)14

In re NTL, Inc. Sec. Litig.,
 244 F.R.D. 179 (S.D.N.Y. 2007)13, 23

In re WRT Energy Sec. Litig.,
 246 F.R.D. 185 (S.D.N.Y. 2007)10, 11, 13

Kenneth Jay Lane, Inc. v. Heavenly Apparel, Inc.,
 No. 03 CV 2132 (GBD) (KNF), 2006 WL 728407 (S.D.N.Y. Mar. 21, 2006).....16

Kyoei Fire & Marine Ins. Co. v. M/V Mar. Antalya,
 248 F.R.D. 126 (S.D.N.Y. 2007)11

McConnell v. Costigan,
 No. 00CIV 4598 (SAS) (THK), 2001 WL 1456609 (S.D.N.Y. Nov. 21, 2001)17

Phoenix Four, Inc. v. Strategic Resources Corp.,
 No. 05 Civ. 4837 (HB), 2006 WL 1409413 (S.D.N.Y. May 23, 2006).....10

Residential Funding Corp. v. DeGeorge Fin. Corp.,
 306 F.3d 99 (2d Cir. 2002)..... 10-11, 13, 15, 21

Rogers v. Ecolor Studio,
 No. 11–CV–4493 (ARR)(RER), 2013 WL 752256 (E.D.N.Y. Feb. 7, 2013)..... 19-20

Rutgerswerke AG & Frendo S.p.A. v. Abex Corp.,
 No. 93 Civ. 2914, 2002 WL 1203836 (S.D.N.Y. June 4, 2002).....12

Slovin v. Target Corp.,
 No. 12 CV 863(HB), 2013 WL 840865 (S.D.N.Y. Mar. 7, 2013)14

Treppel v. Biovail Corp.,
 249 F.R.D. 111 (S.D.N.Y. 2008)12

Turner v. Hudson Transit Lines, Inc.,
 142 F.R.D. 68 (S.D.N.Y. 1991)11

West v. Goodyear Tire & Rubber Co.,
 167 F.3d 776 (2d Cir. 1999).....10, 16

WPIX, Inc. v. ivi, Inc.,
 765 F. Supp. 2d 594, 601 (S.D.N.Y. 2011).....15

Zubulake v. UBS Warburg LLC,
220 F.R.D. 212 (S.D.N.Y. 2003)11, 14

STATUTES

17 U.S.C. § 504(c)19

17 U.S.C. § 512(c)4

PRELIMINARY STATEMENT

In addition to Defendants’ undisputed liability for the rampant infringement of Plaintiffs’ copyrighted works – as detailed in Plaintiffs’ accompanying Motion for Summary Judgment – Defendant Escape Media Group, Inc. (“Escape”) should also be sanctioned for the repeated, willful spoliation of multiple categories of key evidence. Had Defendants not destroyed this evidence, it would have further demonstrated Defendants’ liability for copyright infringement and exposed them to hundreds of millions of dollars in additional damages.

First, it is an undisputed fact that Escape’s Chief Technology Officer, Joshua Greenberg (“Greenberg”), uploaded a massive volume of infringing copyrighted works to the Grooveshark service. However, despite explicit demands to preserve such evidence, Escape systematically deleted internal database records for Greenberg’s user account, *i.e.*, [REDACTED]

[REDACTED]. While Plaintiffs have nonetheless identified a number of files uploaded by Greenberg using other data and contemporaneous evidence, these files represent a fraction of his total uploading activity. Moreover, there are no apparent means to recreate the evidence destroyed by Escape. Accordingly, absent relief from this Court, Plaintiffs will suffer manifest and irreparable prejudice.

Second, while egregious enough by itself, Escape’s deletion of Greenberg’s uploading records is merely the tip of the iceberg. In February 2011, Escape produced a report of all user uploading activities in response to document requests served by Plaintiff UMG Recordings, Inc. (“UMG”) in a related infringement action (hereinafter “Upload Report”). As set forth in the declaration of Plaintiffs’ computer expert, Dr. Horowitz filed herewith, a comparison between the Upload Report and later database tables produced by Escape in this case confirms that Escape expunged over [REDACTED] records of user uploads during the pendency of litigation with

Plaintiff UMG. There is compelling evidentiary proof that: (i) Escape employees manually deleted their uploading records; (ii) Escape created a script [REDACTED] to help facilitate its purging of uploading records; and (iii) Escape failed to take the required steps to prevent the deletion of uploading records associated with disabled Grooveshark user accounts.

Escape's deletion of these records has caused irreparable prejudice to Plaintiffs. As described below, Escape encrypted all of the user identification numbers contained in the Upload Report. Tellingly, Escape never disclosed the encrypted identification numbers for hundreds of its employees' accounts including the primary account of Greenberg. And Escape has admitted that it deleted the method of encryption for the Upload Report *after the report was produced to UMG* thereby rendering it impossible for Plaintiffs to use the report to identify the uploading activities associated with hundreds of undisclosed employee accounts. In other words, Escape knowingly destroyed key evidence of the true scope and scale of its employees' infringement.

Finally, Escape despoiled certain historical source code files that would have provided corroborative evidence of how it managed the uploading of music to its servers prior to October 2008. While Plaintiffs have obtained other documents, source code and relevant testimony that definitively establish the infringement of their works by Escape employees, Escape plainly should not be permitted to seek to benefit in any manner from its spoliation of these source code files. As with Greenberg's and other users' uploading records, Escape improperly deleted these files during the pendency of related litigation *after* it received explicit preservation demands and document requests for the production of this very evidence by UMG.

Given the above, Plaintiffs respectfully request that the Court impose evidentiary and monetary sanctions on Escape. These requested sanctions are necessary to remedy the prejudice to Plaintiffs, to punish Escape for its egregious misconduct in violation of its basic discovery

obligations, and to deter others who might view Escape's bad-faith litigation tactics as a blueprint for future cases.

BACKGROUND

I. THE PARTIES

Plaintiffs are among the largest music companies in the United States and own – or have exclusive licensing rights to – the overwhelming majority of the nation's most popular sound recordings, from artists such as Michael Jackson, Prince, Beyoncé, Green Day, Elton John, the Red Hot Chili Peppers, and Justin Timberlake. *See* Plaintiffs' Motion for Summary Judgment filed herewith (hereinafter "MSJ") at 5.

Defendants own and operate Grooveshark, an "on-demand" music streaming service ("Grooveshark"), which allows users to listen to "any song in the world" for free from a library of over 15 million songs. *Id.* Although Escape's music library includes works by Plaintiffs' top commercial artists, Escape lacks licenses or other authorization to exploit any of the Plaintiffs' copyrighted sound recordings. *Id.*

II. THE PERVASIVE INFRINGEMENT OF PLAINTIFFS' WORKS BY ESCAPE'S EMPLOYEES, INCLUDING GREENBERG

As shown in Plaintiffs' Motion for Summary Judgment, Defendants engaged in a systematic, company-wide effort to infringe Plaintiffs' copyrights by requiring that their employees upload copyrighted music files to Escape's central servers as part of their job responsibilities. *Id.* at 5-16. Based on the remaining non-despoiled evidence, Escape employees uploaded over [REDACTED] to Grooveshark including thousands of infringing copies of Plaintiffs' works. *Id.* at 14-16; *see also* Decl. of Dr. Ellis Horowitz in Supp. of Pls.' Mot. for Summ. J. ("Horowitz SJ Decl.") ¶¶ 58-62.

Defendant Greenberg was one of the primary architects of Escape’s campaign of music piracy. On repeated occasions, he issued express written instructions to all of Escape’s personnel requiring them to [REDACTED]

[REDACTED] See MSJ at 8-9, 10-11.

Greenberg also personally uploaded a vast number of infringing music files to Escape’s central servers and to users of the service. For example, during his deposition, Greenberg admitted that he operated a special “seed point” from his home computer.¹ See Declaration of Gianni P. Servodidio (“Servodidio Decl.”) at Ex. 1 (Greenberg Tr. at 126:11-19, 201:13-16). This “seed point” contained a staggering volume of music – tens if not hundreds of thousands of digital music files – that Greenberg used to enhance the Grooveshark library. *Id.* at Ex. 2.

[REDACTED]
[REDACTED] *Id.* at Ex. 3.²

Moreover, when Escape responded to takedown notices served pursuant to the Digital Millennium Copyright Act (“DMCA”),³ it automatically generated a “DMCA notification letter”

¹ A “seed point” was a computer that contained a large volume of music files and that remained online and connected to the Grooveshark network to serve as a hub for the distribution of music files to Grooveshark’s central servers and to other users. Horowitz SJ Decl. ¶ 28.

² The sheer volume of Greenberg’s uploading activities is confirmed by the non-spoliated evidence produced by Escape. [REDACTED]

³ Although not applicable to the instant case which is limited to infringing uploads by Escape and its own personnel, the DMCA sets forth a procedure through which copyright owners can inform internet service providers (“ISPs”), about infringing material on their websites uploaded by users of the service. See 17 U.S.C. § 512(c). Copyright owners must send a “DMCA takedown request,” which provides, among other things, the name of the complaining party and the location of the infringing materials. *Id.* Once notice is given the ISP must remove, or disable access to, the infringing material and send the individual responsible for the allegedly infringing material a notification after removal (a “DMCA takedown notification”). *Id.*

to the user who uploaded the infringing file. Greenberg received [REDACTED]

[REDACTED]

[REDACTED] Horowitz Sanctions Decl. ¶ 17. [REDACTED]

[REDACTED] *Id.*

& Ex. B; *see also* Servodidio Ex. 6.

III. ESCAPE’S OBLIGATION TO PRESERVE THE DESPOILED EVIDENCE

Since the initial launch of Grooveshark in 2007, Defendants have been fully aware of the threat of copyright litigation, as well as the relevance of evidence reflecting the use of their service and related technical documents. For example:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Moreover, by the end of 2008, Plaintiffs’ trade association, the Recording Industry of America (the “RIAA”), forwarded infringement notices to Amazon.com – the Internet Service Provider that provided web hosting and other services to Escape – detailing the massive infringement taking place via Grooveshark. *Id.* at Ex. 11. Escape was aware of these notices and corresponded with the Amazon.com legal department about this issue on several occasions. Eventually these repeated notices resulted in the termination of Escape’s account with Amazon. *See id.* at Ex. 1 (Greenberg Tr. at 431:6-432:10).

IV. PLAINTIFF UMG'S COMMENCEMENT OF LITIGATION, PRESERVATION DEMANDS, AND DISCOVERY REQUESTS

In January 2010, Plaintiff UMG initiated an action against Escape in New York state court (the "State Court Action"), for common law copyright infringement of UMG's sound recordings that were created before 1972, and thus not subject to federal copyright law. Servodidio Decl. at Ex. 12. The complaint included allegations relating to Escape's infringement of UMG's common law copyrights in its sound recordings by virtue of the uploading, reproduction, and distribution of UMG's copyright protected works. *Id.*

In February 2010, UMG served document requests and preservation demands on Escape seeking production of: (i) "[d]ocuments reflecting use of the Grooveshark service by your employees, officers or directors"; and (ii) "all versions of all software (in all available forms, including source code, . . .) for the Grooveshark service, . . . as well as any historical versions of any such software . . ." *Id.* at Exs. 13-14 (emphasis added).⁴

Escape delayed for months before producing documents responsive to these requests. In response to several motions to compel filed by UMG, Escape finally produced the Upload Report in February 2011. *Id.* ¶ 17 & Ex.18. However, as noted above, Escape: (i) encrypted all of the user identification numbers contained in the report; (ii) never disclosed the encrypted user identification numbers for Greenberg's account or hundreds of other employee accounts; and (iii) later deleted the encryption method used for the Upload Report making it impossible to identify any employee uploads contained therein beyond those for a small number of employee accounts disclosed in 2011. *See id.* ¶¶ 24-25 & Exs. 18-19; *see also id.* Ex 1 (Greenberg Tr. at 19:20-

⁴ Source code is text files that contain instructions for a computer. Horowitz Sanctions Decl. ¶ 3 n.2. Source code files can be written in a number of different computer languages. Escape's source code files are written in several languages, including PHP and Java. *Id.*

22:14) (confirming that Escape failed to preserve the method of encryption for the Upload Report).⁵

UMG commenced the present action for copyright infringement against Defendants on November 18, 2011, asserting claims specifically addressing the systematic uploading of infringing files by Escape's officers and employees. *See* ECF No. 1. An Amended Complaint was filed on December 15, 2011, adding additional record labels owned by Sony Music Entertainment and Warner Music Group as Plaintiffs. *See* ECF No. 3.⁶

V. ESCAPE'S SPOILIATION OF GREENBERG'S UPLOAD RECORDS DURING THE PENDENCY OF THE STATE ACTION

As set forth in the declaration of Dr. Ellis Horowitz filed herewith, Escape maintained a database table [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; *see*

⁵ In September 2011 and at various points in 2013, Escape produced more complete records from its database and on multiple subsequent dates disclosed additional employee accounts. Servodidio Decl. ¶¶ 20, 24. However, as discussed herein, Escape deleted massive numbers of records of sound recordings from its database after the production of the Upload Report. *See* Part I.F, *infra*.

⁶ Following pre-Answer Motion practice, Plaintiffs served discovery requests in this action, on June 25, 2012, seeking comparable information from Defendants regarding employee uploading and source code as requested in the State Court Action. Servodidio Decl. at Ex. 17. Pursuant to an agreement between the parties, all documents produced in the State Court action were deemed to have been produced for the purposes of this case. *See* Stipulated Protective Order (ECF No. 52) at 9.

also Servodidio Decl. at Ex. 6. Thus, as Greenberg confirmed during his 30(b)(6) deposition testimony for Escape, the company necessarily [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. In

response, Defendants confirmed that no archived copies of Greenberg's records exist. *Id.*

Tellingly, Defendants have never offered any rationale or excuse for their spoliation of this critical evidence. *Id.*

VI. ESCAPE'S SPOILIATION OF HUNDREDS OF THOUSANDS OF OTHER UPLOADING RECORDS DURING THE PENDENCY OF THE STATE ACTION

As confirmed by Dr. Horowitz, the Upload Report produced by Escape reflected uploading records through January 2011. Horowitz Sanctions Decl. ¶ 25. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Remarkably, Escape also failed to preserve the method of encryption for the account numbers in the Upload Report. *See* Servodidio Decl. Ex. 1 (Greenberg Tr. at 19:20-22:14); *id.* ¶ 25.

[REDACTED]

VII. ESCAPE’S SPOILIATION OF SOURCE CODE

Finally, Escape has failed to preserve over a year and a half of historical source code, relating to the operation of Grooveshark service from its inception until October 2008. *Id.* ¶ 38. Like the spoliation of the uploading records of Greenberg and other users, Escape’s deletion of source code further evidences Escape’s fundamental disregard for its discovery obligations.

In July 2010, Escape produced a limited “snapshot” of source code stored in Escape’s Subversion (“SVN”) source code management system to UMG in the State Court Action which contained various source code “repositories.”⁷ *Id.* ¶ 38; Servodidio Decl. ¶ 18. When UMG filed a motion to compel a full production of all source code, *i.e.*, the complete repositories, *see* Servodidio Decl. at Ex. 15, Escape represented to the court that it did not have in its possession any additional historical source code, *see id.* at Ex. 16 at 18.

⁷ [REDACTED]

However, Escape’s representation to the Court was not correct. Escape later located and produced additional historical source code to Plaintiffs in this action, and yet it deleted the most critical versions of source code files from the early period of Grooveshark’s development. *Id.* ¶¶ 20-21. Escape failed to preserve these files during the pendency of the State Court action and after UMG had moved to compel these very documents. *Id.* ¶ 17; *see id.* at Ex. 1 (Greenberg Tr. at 76:10-80:13, 574:23-575:18).

While Plaintiffs have obtained other evidence that definitively establishes the massive infringement of their works by Defendants’ employees, the deleted source code files and related data would have provided additional corroborative evidence regarding the functionality and development of the Grooveshark service during 2007 and 2008. *See Horowitz Sanctions Decl.* ¶¶ 40-43.

ARGUMENT

I. STANDARD FOR THE IMPOSITION OF SANCTIONS

A court has broad “authority to impose sanctions on a party for spoliation and other discovery misconduct under its inherent power to manage its own affairs . . .” *Phoenix Four, Inc. v. Strategic Resources Corp.*, No. 05 Civ. 4837 (HB), 2006 WL 1409413, at *3 (S.D.N.Y. May 23, 2006) (citing *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 106-07 (2d Cir. 2002)); *see also West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999) (“[A] district court may impose sanctions for spoliation, exercising its inherent power to control litigation.”); *In re WRT Energy Sec. Litig.*, 246 F.R.D. 185, 194 (S.D.N.Y. 2007) (same).

Courts routinely impose sanctions where: (i) a party having control over evidence has an obligation to preserve it at the time it was destroyed; (ii) the party spoliates the evidence with a “culpable state of mind”; and (iii) the spoliated evidence is relevant to a claim or defense “such that a reasonable trier of fact could find that it would support that claim or defense.” *Residential*

Funding Corp., 306 F.3d at 107; *WRT*, 346 F.R.D. at 194 (same); *Kyoei Fire & Marine Ins. Co. v. M/V Mar. Antalya*, 248 F.R.D. 126, 144 (S.D.N.Y. 2007) (same). All of these factors readily support an award of sanctions here.

II. UNDER PREVAILING CIRCUIT AUTHORITY, ESCAPE'S MISCONDUCT WARRANTS SANCTIONS

A. Escape Had an Obligation to Preserve the Spoliated Evidence

“The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence *may be relevant to future litigation.*” *Fujitsu Ltd. v. Fed. Exp. Corp.*, 247 F.3d 423, 436 (2d Cir. 2001) (emphasis added); *see also Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217 (S.D.N.Y. 2003) (“[A]nyone who anticipates being a party to a lawsuit must not destroy unique, relevant evidence that might be useful to an adversary.”). The duty to preserve arises, not when litigation is certain, but rather when it is “reasonably anticipated.” *Zubulake*, 220 F.R.D. at 216-217 (“[t]he obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation[,]” and that this obligation may arise prior to the filing of a suit if litigation is “reasonably anticipated.”); *Distefano v. Law Offices of Barbara H. Karsos, PC*, 2013 WL 1339548, at *5 (E.D.N.Y. Mar. 29, 2013) (same).

Further, a party may not delete information that is the subject of an express document preservation demand or written discovery request. *See, e.g., Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72-73 (S.D.N.Y. 1991) (noting that a “duty to preserve arises [when] the party possessing the evidence has notice of its relevance” and further noting that “[o]f course a party is on notice once it has received a discovery request”), *aff’d*, No. 89 Civ. 454 (PKL), 1992 WL 51570 (S.D.N.Y. Mar. 9, 1992); *Computer Assoc. Intern, Inc. v. Am. Fundware, Inc.*, 133

F.R.D. 166, 169 (D. Colo. 1990) (“[a litigant] is under a duty to preserve what it knows, or reasonably should know, is . . . the subject of a pending discovery request.”).

Here, Defendants have been aware, since the launch of the Grooveshark service, that they were subject to copyright infringement claims relating to the uploading of infringing files to Grooveshark. Servodidio Decl. at Exs. 6-11; *see also* MSJ at 7, 28. Thereafter, UMG commenced litigation against Escape and sent preservation demands and document requests expressly requesting that Escape produce its records of employee uploading and historical source code. *Id.* at Exs. 13-14, 17.

Defendants therefore plainly violated their preservation obligations when they spoliated the uploading data of Greenberg’s and other users and when they deleted Escape’s historical source code after the commencement of the State Court Action. *See Rutgerswerke AG & Frendo S.p.A. v. Abex Corp.*, No. 93 Civ. 2914, 2002 WL 1203836, at *13 (S.D.N.Y. June 4, 2002) (The obligation to preserve evidence arises “where a party is on notice that litigation is likely to be commenced”) (quoting *Turner*, 142 F.R.D. at 72); *see also DMAC LLC v. City of Peekskill*, No. 09 Civ. 5093(GAY), 2012 WL 4459290, at *2 (S.D.N.Y. Sept. 26, 2012) (noting that obligation to preserve records arose upon commencement of earlier dispute between the parties, which ultimately “culminated in the instant lawsuit”); *Candlehouse, Inc. v. Town of Vestral, N.Y.*, No. 3:11-CV-009 (DEP), 2013 WL 1867114, at *25 (N.D.N.Y. May 3, 2013) (holding that defendants’ discovery obligations arose years before the pending litigation because the defendant and plaintiff had been engaged in a multi-year dispute).

B. Escape Acted with a Culpable State of Mind

There is also no doubt that Escape acted with the requisite state of mind for sanctions to be imposed. In the Second Circuit, the despoiling party exhibits a “culpable state of mind” through simple negligence. *See Treppel v. Biovail Corp.*, 249 F.R.D. 111, 121 (S.D.N.Y. 2008)

(“[i]n this circuit, a ‘culpable state of mind’ for purposes of a spoliation inference includes ordinary negligence”) (citing *Residential Funding*, 306 F.3d at 108); *WRT*, 246 F.R.D. at 195-96 (“the responsible party need not have acted intentionally or in bad faith; negligence alone is sufficient to justify the imposition of some sanction”) (citing *Residential Funding*, 306 F.3d at 108); *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179, 198-99 (S.D.N.Y. 2007) (same, collecting cases), *aff’d*, *Gordon Partners v. Blumenthal*, No. 02 Civ. 7377(LAK), 2007 WL 1518632.

In this matter, Escape’s ongoing pattern of the deletion of the uploading records of Greenberg and other users was intentional and performed after Escape had received specific notice to preserve these records. *See* Servodidio Decl. at Ex. 13-14, 17. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Moreover, as noted above, the deletion of Greenberg’s records was not an isolated occurrence. Escape systematically deleted [REDACTED] of records of other user uploading activity after the production of the Upload Report in February 2011 and before November 2013. [REDACTED]

[REDACTED]

[REDACTED] Moreover, after Escape received express preservation demands and document requests, [REDACTED]

██████████. See Servodidio Decl. at Ex. 21-22; Horowitz Sanctions Decl. ¶¶ 29-32. In short, Escape’s mass purging of uploading records during the pendency of litigation was calculated and willful.

As for the destruction of Escape’s source code, Escape also has acted with the requisite culpability. In the State Court Action, Escape produced from its source code repository only one source code version used in the early period of Grooveshark development, and Escape falsely represented to a court that it had no other code. Servodidio Decl. ¶¶ 20-21 & Ex. 16 at p. 18. After further discovery in 2013, Escape confirmed that it failed to preserve a number of relevant portions of the key source code repository. Servodidio Decl. ¶ 20. Such actions are more than sufficient to support the imposition of sanctions. See, e.g., *Zubulake*, 220 F.R.D. at 221 (defendant’s failure to preserve backup tapes from critical period after on notice of its duty to preserve was grossly negligent); *Harkabi v. SanDisk Corp.*, 275 F.R.D. 414, 419-20 (S.D.N.Y. 2010) (awarding sanctions against technology company where deletion of relevant information was a “mistake”); *Slovin v. Target Corp.*, No. 12 CV 863(HB), 2013 WL 840865, at *5 (S.D.N.Y. Mar. 7, 2013) (awarding sanctions due to “gross negligence” caused by defendant’s destruction of video tape footage that the defendant initially preserved); see also *Zubulake*, 220 F.R.D. at 220-21 (“[o]nce the duty to preserve attaches, any destruction of evidence is, at a minimum, negligent”).

C. The Despoiled Evidence Was Highly Relevant

The spoliated evidence also concerns key issues in this case. Plaintiffs have asserted claims against all Defendants for willful copyright infringement based their participation and control over the infringing conduct of their employees who seeded Grooveshark with infringing music files within the scope of their employment and for the benefit of Defendants. See MSJ at 1, 20-24. As such, Defendants all are jointly and severally liable for all employee uploads,

including Greenberg's infringing uploads, contained in the hundreds of thousands of missing user uploading records.

Moreover, Plaintiffs have asserted claims of direct copyright infringement against Greenberg personally, which require a showing that he engaged in the unauthorized reproduction, distribution, or public performance of Plaintiffs' copyright protected sound recordings. *See, e.g., Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 649-52 (S.D.N.Y. 2013) (the unauthorized uploading or transferring of copies of a digital file to another computer violates Plaintiffs' exclusive rights of distribution and reproduction); *WPIX, Inc. v. ivi, Inc.*, 765 F. Supp. 2d 594, 601 (S.D.N.Y. 2011) (the unauthorized streaming of an audio file over the Internet violates the copyright owner's exclusive right of public performance); *see also* MSJ at 33-34.

Here, there is no question that Greenberg was one of the most – if not the most – prolific infringer among all of Escape's officers and employees. Moreover, Escape's deletion of [REDACTED] uploading records coupled with its failure to produce the encrypted identification numbers for the accounts of Greenberg and hundreds of other Escape employees provides a strong evidentiary foundation for the conclusion that such records would have been highly incriminating. *See Residential Funding Corp.*, 306 F.3d at 109 (when "a party destroys evidence in bad faith, that bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party").

Indeed, given the circumstances of this case, Escape's intentional destruction of widespread evidence of uploading by its employees readily supports a determination that such underlying infringement was willful in nature. *Cf. Entral Group Int'l v. Sun Sports Bar, Inc.*,

No. 05-CV-4386 (CBA), 2007 WL 2891419, at *6 (E.D.N.Y. Sept. 28, 2007) (willfulness “can be inferred from the defendant’s conduct”); *Kenneth Jay Lane, Inc. v. Heavenly Apparel, Inc.*, No. 03 CV 2132 (GBD) (KNF), 2006 WL 728407, at *6 (S.D.N.Y. Mar. 21, 2006) (inferring willfulness from default).

The historical source code is also unquestionably relevant. As noted above, Plaintiffs have established direct infringement based on overwhelming and uncontroverted evidence. However, Escape should not be permitted to seek to exploit its spoliation of source code to attempt to manufacture unsupported technical arguments concerning the functionality of its service during any time period implicated by the missing code. As such, the requested sanction is necessary to prevent any prejudice to Plaintiffs.

III. THE COURT SHOULD IMPOSE THE EVIDENTIARY SANCTIONS REQUESTED HEREIN TO ADDRESS THE PREJUDICE CAUSED BY ESCAPE’S MISCONDUCT

When fashioning an award of sanctions, courts have broad discretion. *West*, 167 F.3d at 779. Sanctions “should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine,” and “should be designed to (1) deter parties from engaging in spoliation”; (2) shift “the risk of an erroneous judgment on the party who wrongfully created the risk”; and (3) restore “the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.” *Id.* (citation omitted).

Courts frequently award evidentiary sanctions where, as here, a litigant destroys evidence. Such sanctions deem salient facts established for the purposes of a case, in order to prevent the spoliating party from benefiting from the destruction of evidence and the abuse of the judicial process. *See, e.g., Arista Records LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409, 442-43 (S.D.N.Y. 2009) (deeming facts established as a sanction for spoliation of evidence); *Google, Inc. v. Am. Blind & Wallpaper Factory, Inc.*, No. C 03-5340 JF (RS), 2007 WL 1848665, at *6

(N.D. Cal. June 27, 2007) (same); *McConnell v. Costigan*, No. 00CIV 4598 (SAS) (THK), 2001 WL 1456609, at *5 (S.D.N.Y. Nov. 21, 2001); *see also Burns v. Imagine Films Entm't*, 164 F.R.D. 594, 598-600 (W.D.N.Y. 1996).

Indeed, in cases involving comparable spoliation of relevant data, courts have awarded terminating sanctions to prevent irreparable prejudice to the party harmed by the destruction of evidence. *Columbia Pictures, Inc. v. Bunnell*, No. 2:06-cv-01093 FMC-JCx, 2007 WL 4877701, at *6-8 (C.D. Cal. 2007) (awarding terminating sanctions establishing defendant's liability for copyright infringement due to defendant's spoliation).

Here, Plaintiffs seek evidentiary sanctions that are designed specifically to attempt to restore Plaintiffs to the same position they would have been in but for Escape's spoliation. The requested sanctions will serve as an important deterrent to prevent other defendants from engaging in similar misconduct and will send a clear signal that Escape may not unilaterally destroy key evidence without consequences.

A. Direct Infringement by Greenberg Should be Established

The non-spoliated evidence reflects that Greenberg was one of the most flagrant infringers of Plaintiffs' copyrighted works. Therefore, but for Escape's spoliation, Plaintiffs would have been able to irrefutably establish: (i) the total volume of copyrighted works uploaded by Greenberg; (ii) the specific names of each infringing file uploaded or otherwise distributed by Greenberg; (iii) the dates and times of each upload or distribution; and (iv) the ongoing distribution or exploitation of those files by Escape. Horowitz Sanctions Decl. ¶ 10.

[REDACTED]

[REDACTED] Therefore, by spoliating the evidence of Greenberg's uploading activity, Escape deprived Plaintiffs of the ability to present definitive evidence that Greenberg engaged [REDACTED] of and for

the benefit of Defendants. Moreover, as set forth above, Escape's intentional destruction of these records fully supports a sanction establishing that Greenberg's pervasive acts of infringement were willful in nature.

In order to fashion an appropriate remedy for Escape's destruction of Greenberg's uploading records, Plaintiffs therefore ask the Court to establish that Greenberg engaged in the willful infringement of at least 10,000 unique copyrighted works owned by Plaintiffs. This volume of infringement by Greenberg is fully supported by the non-spoliated data, which conclusively establishes that: (i) [REDACTED] [REDACTED] *see* Servodidio Decl. at Ex. 1 (Greenberg Tr. at 126:11-19, 201:13-16) & Ex. 2; (ii) [REDACTED] [REDACTED], *see* Horowitz Sanctions Decl. ¶¶ 18-20, Servodidio Decl. at Exs. 4-5; (iii) [REDACTED] [REDACTED], Horowitz SJ Decl. ¶ 60; and (iv) [REDACTED] [REDACTED], *see* Horowitz Sanctions Decl. ¶ 17; Servodidio Decl. at Ex. 6.

Based on the above, Plaintiffs therefore request that the court adopt the following evidentiary sanction conclusively establishing the following:

- (i) *Greenberg directly infringed at least ten thousand unique copyrighted works owned by Plaintiffs by uploading copies of these works to Grooveshark on behalf of Escape and for the benefit of Defendants.*
- (ii) *The infringement of these works by Greenberg was willful in nature.*

- (iii) *Defendants shall be precluded from raising any defenses relating to date, time or circumstances of the uploading of these files by Greenberg.*

These sanctions directly relate to Escape's flagrant violation for its discovery obligations and will prevent all the Defendants from reaping the benefit of its misconduct. Indeed, the selected sample represents a fraction of the total number of files likely uploaded by Greenberg that would have been reflected by the despoiled data, and thus is undeniably well below the total volume of Plaintiffs' copyrighted works uploaded by Greenberg. Moreover, since the spoliation of these records plainly inures to Greenberg's benefit, and since he was the Chief Technology Officer of Escape with primary responsibility for the design and functionality of Grooveshark, he cannot credibly avoid the imposition of these sanctions based on self-serving denials of knowledge of any wrongful conduct.⁸

B. The Volume of Infringement of Each of Plaintiffs' Works Uploaded by Greenberg Should be Established

The Copyright Act permits a jury to award statutory damages as low as \$750 and as high as \$150,000 (for willful infringement) for each work infringed. 17 U.S.C. § 504(c). The volume of infringement of each work is plainly a factor the jury can and should consider in determining, within the broad range allowed, the amount of statutory damages per work. *See, e.g., Arista Records LLC v. Lime Grp. LLC*, 784 F. Supp. 2d 313, 316-17 (S.D.N.Y. 2011) (holding that "the fact-finder may take into account the number of direct infringers who infringed each of Plaintiffs' copyrighted works through the [defendants' peer-to-peer service]"); *Agence France Presse v. Morel*, No. 934 F. Supp. 2d 584, 592 (S.D.N.Y. 2013); *see also Rogers v. Ecolor Studio*, No. 11-CV-4493 (ARR)(RER), 2013 WL 752256, at *7 (E.D.N.Y. Feb. 7, 2013)

⁸ While Defendants' wholesale spoliation of Greenberg's records readily supports this relief, if the Court deems it appropriate, Plaintiffs will file a supplemental brief identifying the works to be covered by this sanction based on their review of [REDACTED]

(awarding enhanced statutory damages award because defendants posted infringing work to the Internet, and therefore “made their infringing work available to a limitless customer base worldwide”).

As noted above, if Escape did not despoil Greenberg’s UsersFiles records, Plaintiffs could have conclusively identified the particular files uploaded by Greenberg that corresponded to infringing copies of Plaintiffs’ sound recordings. Moreover, for each such infringing upload, Plaintiffs could also have determined how many times Escape streamed a copy of that file to its users thereby violating Plaintiffs’ exclusive rights of performance. This evidence almost certainly would have established that the infringing works Greenberg uploaded resulted in at least hundreds of millions of acts of direct infringement by Escape of Plaintiffs’ copyrighted sound recordings. *See* MSJ at 18-20.

Accordingly, the Court should enter the following evidentiary sanction relating to the volume of infringement:

- (i) *For each file uploaded to Grooveshark by Greenberg as established above, it shall be conclusively established that Escape streamed a copy of the file at least 21,000 times to users of the Grooveshark site in the U.S. during the relevant statute of limitations period.*

These evidentiary sanctions are consistent with other contemporaneous documents and evidence. An analysis of the stream data produced by Escape confirms that other works uploaded by Escape’s [REDACTED]

[REDACTED] Horowitz SJ Decl. Ex. I. It is therefore reasonable to estimate that Escape streamed copies of the works uploaded by Greenberg a comparable number of times. Indeed, the requested sanction is particularly appropriate given that the non-despoiled evidence

demonstrates that Greenberg uploaded a number of highly popular copyright protected songs from legendary artists such as Michael Jackson, Bruce Springsteen, Elvis Presley, and Bill Joel. Horowitz Sanctions Decl. at Ex. B. And of course, Escape bears the burden of any uncertainty in the calculation of these numbers given that its willful spoliation of Greenberg's records has made a precise determination impossible. *See Residential Funding Corp.*, 306 F.3d at 108 (when awarding sanctions "the risk that the evidence would have been detrimental rather than favorable should fall on the party responsible for its loss").

C. Additional Direct Infringement by Escape Employees Should be Established

As noted above, the Upload Report contains records of [REDACTED] additional uploads, which Escape purged from its database through both a combination of automatic and manual deletion. Horowitz Sanctions Decl. ¶¶ 27-28. [REDACTED]

[REDACTED] *Id.* Due to Escape's deletion of the code used to encrypt the user identification numbers in the Upload Report, Plaintiffs cannot determine which of these records are associated with employee user accounts. *Id.* ¶ 28; Servodidio Decl. ¶¶ 24-25. As a result, Plaintiffs cannot determine the full scope and scale of Escape's piracy campaign.

As a result, Plaintiffs request that the court adopt the following evidentiary sanction conclusively establishing the following:

- (i) *Escape employees (in addition to Greenberg) directly infringed at least one hundred thousand unique copyrighted works owned by Plaintiffs by uploading copies of these works to Grooveshark on behalf of Escape and for the benefit of Defendants.*

- (ii) *The infringement of these works by Escape's employees was willful in nature.*
- (iii) *Defendants shall be precluded from raising any defenses relating to date, time, or circumstances of the uploading of these files.*

These evidentiary sanctions are proportional to Escape's spoliation. The sanctions estimate that Plaintiffs' employees uploaded less than a third of the missing uploads, a conservative number given the contemporaneous evidence of Escape's widespread piracy campaign and documents that indicate Escape deleted records from the UsersFiles table "by hand." Servodidio Decl. at Ex. 21. Moreover, Escape plainly had the greatest incentive to delete employee uploads recordings given that this information was highly incriminating and the subject of a preservation notice and discovery requests in a pending action filed by UMG. Servodidio Decl. at Exs. 12-13, 17. The proposed sanction will ensure that Escape will not benefit from its failure to preserve critical uploading records and properly places the burden of any uncertainty squarely on Defendants' shoulders.⁹

D. This Court Should Preclude Escape from Benefitting from their Spoliation of Source Code

Finally, Escape should not profit from its failure to properly preserve and maintain historical records of its source code or from any modifications that Escape made to its database records. As set forth in Plaintiffs' Motion for Summary Judgment, there are no material facts in dispute with respect to the numerous acts of direct infringement by Defendants' employees. *See* MSJ at 5-20. Nonetheless, the despoiled source code would have permitted Plaintiffs to conclusively rebut any specious and unsupported "objections" by Defendants regarding the

⁹ As noted above, if the Court deems it appropriate, Plaintiffs will file a supplemental brief identifying the works to be covered herein based on their review of the song, album and artist information [REDACTED]

manner in which Escape managed and recorded the process of uploading files to its servers. *See* Horowitz Sanctions Decl. ¶ 40-43. Accordingly, this Court should preclude Escape from benefitting in any manner from its deletion of Greenberg's or other users' uploading records by seeking to manufacture any disputes regarding the identification of the uploading users in Escape's UsersFiles table.

Accordingly, in order to prevent Defendants from profiting – or even attempting to profit – from Escape's failure to preserve source code or their manipulation and/or spoliation of database records, Plaintiffs request that the Court issue an order precluding Defendants from challenging the following facts:

- (i) *At all times, the first UsersFiles entry for a given file reflects an upload of that file to Escape's own servers; and*
- (ii) *The UsersFiles table only maintained records of uploading and of the submission of files for uploading to Grooveshark and no other user activities.*

These facts are fully consistent with all of the contemporaneous record evidence and testimony set forth above and in Plaintiffs' accompanying Motion for Summary Judgment. *See* MSJ at 14-16. As with the other requested sanctions, the proposed sanction is narrowly tailored to address Escape's misconduct and properly places the burden of any uncertainty squarely on Defendants' shoulders.

IV. THE COURT SHOULD AWARD MONETARY SANCTIONS

In addition to imposing evidentiary sanctions, the Court should also award monetary sanctions for Plaintiffs' reasonable attorneys' fees and costs, due to Escape's egregious behavior. *See, e.g., NTL*, 244 F.R.D. at 201-02 (awarding attorney's fees and costs in addition to evidentiary sanctions for spoliation); *Chan v. Triple 8 Palace, Inc.*, 2005 WL 1925579, at *10

(S.D.N.Y. Aug. 11, 2005) (same). Such awards are commonplace where, as here, a Defendant has spoliated evidence, even where the spoliation is merely negligent. *See, e.g., Casale v. Kelly*, 710 F. Supp. 2d 347, 366, 367 (S.D.N.Y. 2010); *De Espana v. Am. Bureau of Shipping*, No. 03 Civ. 3573 (LTS) RLE, 2007 WL 1686327, at *8-9 (S.D.N.Y. June 6, 2007).

Escape, in this case, has destroyed relevant pieces of evidence despite their clear preservation obligations. Due to this spoliation, Plaintiffs have expended substantial financial resources to uncover, investigate, and analyze the extent of Defendants' misconduct and its impact on the issues in this case. Plaintiffs, therefore, respectfully submit that Escape should have to bear Plaintiffs' attorneys' fees and costs and expert fees in investigating these issues and bringing this matter before the Court for resolution.¹⁰

CONCLUSION

At bottom, this case presents a clear case for the imposition of sanction. Escape has destroyed evidence of their CTO's personal uploading, has deleted [REDACTED] of uploading records associated with other users, and has deleted highly relevant historical source code, even after it received document demands and a preservation notice squarely requesting this information. In order to remedy the prejudice caused by this destruction, Plaintiffs respectfully request that the Court grant two reasonable evidentiary sanctions and award Plaintiffs' attorneys' fees and costs for the preparation of the present motion.

¹⁰ Plaintiffs request that in the event the Court grants the relief requested herein, the Court direct an inquest to determine the amount of fees and costs incurred in connection with this matter.

Dated: February 19, 2014

Respectfully submitted,

JENNER & BLOCK LLP

By: 

Andrew H. Bart (AB 6724)
Gianni P. Servodidio (GS 0713)
Aaron Wright (AW 5517)
Lindsay W. Bowen (LB8510)
919 Third Avenue
New York, NY 10022
tel. (212) 891-1600
fax (212) 891-1699

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I, Aaron Wright, hereby affirm that on this 19th day of February, 2014, I caused the foregoing Memorandum of Law in Support of Plaintiffs' Motion for Sanctions for Spoliation of Evidence Against Escape Media Group, Inc., and the accompanying Notice of Motion, Proposed Order Regarding Plaintiffs' Motion for Sanctions for Spoliation of Evidence Against Escape Media, Inc., and Declarations of Dr. Ellis Horowitz and Gianni P. Servodidio with attached exhibits to be served via this Court's Electronic Case Filing system and caused same to be served via first class mail upon Matthew H. Giger, John J. Rosenberg, and Brett T. Perala, *Attorneys for Defendants*.

Dated: New York, New York
February 19, 2014



Aaron Wright