UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

CAPITOL RECORDS, INC., et al., Plaintiffs, v. NOOR ALAUJAN, Defendant.	)	Civ. Act. No. 03-cv-11661-NG (LEAD DOCKET NUMBER)

SONY BMG MUSIC ENTERTAINMENT, et al., Plaintiffs, v. JOEL TENENBAUM, Defendant.	)	Civ. Act. No. 07-cv-11446-NG (ORIGINAL DOCKET NUMBER)

PLAINTIFFS' MOTION TO COMPEL DISCOVERY RESPONSES

In late March 2009, Plaintiffs' counsel learned that Defendant, through his counsel, posted and was distributing the very sound recordings at issue in this case through a blog that Defendant's counsel has used to discuss this case. The sound recordings were distributed with an image of Defendant's counsel, and the statement "Destroy Capitalism – Support Piracy!" *See* Exhibit A hereto.

Indeed, the sound recordings and image were posted as part of a message from Defendant's legal counsel on his website on March 17, 2009:

> I was listening to old Genesis tunes played backwards (a definite improvement), but they still didn't seem to be worth $150,000 each. So for those of you who don't yet know what this case is really about, I've consolidated our seven songs and upped them for your listening displeasure. They can be found here:
>
> http://tinyurl.com/dfooeg <http://tinyurl.com/dfooeg>
>
> pass: hahaowow

> I think the real lesson to be learned from all of this is clear. Kids, if you're going to pirate music, make sure you pirate GOOD music.
>
> Hopefully no one disapproves of my brazen, willful and illegal activity. We'll just say that it's part of wide-ranging discovery.
>
> R.
>
> [Substantial non-infringing use? I don't think so]

http://blogs.law.harvard.edu/nesson/2009/03/17/been-workin-too-hard. This website is Defendant's counsel's blog, which he has used to comment on this case.

Upon learning of the posting, Plaintiffs first downloaded the .MP3 files and verified that they were an exact match to the sound recordings listed on Exhibit A to the Complaint. Plaintiffs' counsel then immediately contacted Defendant's counsel and met and conferred to determine whether a temporary restraining order was necessary to prevent the further unauthorized distribution of the Exhibit A recordings. Defendant's counsel confirmed that "joel's seven songs" had been posted, agreed to immediately remove the infringing material, and agreed to preserve all documents and files related to this infringement. April 3, 2009 email from Charles Nesson to Daniel Cloherty, Exhibit B.

Plaintiffs have sought discovery regarding the posting of the Exhibit A recordings and the pro-piracy propaganda to Defendant's counsel's blog. This information is relevant to the central issue in this case – Defendant's willful, continuous infringement of Plaintiffs' copyrighted sound recordings. Indeed, Defendant's counsel confirmed that "joel's seven songs" were posted without authorization on Defendant's counsel's blog and distributed to the "wider world." *Id*.; April 25, 2009 email from Charles Nesson to Eve Burton, Exhibit C. Further, the information sought regarding the brazen infringement of the Exhibit A recordings and the pro-piracy propaganda is reasonably calculated to elucidate key issues, including willfulness, continuing infringement, actual distribution (or substantial evidence thereof), and the defenses

Defendant intends to assert, including fair use, "fairness," and whether Defendant's infringement is commercial in nature. Accordingly, discovery into these matters is directly relevant to Plaintiffs' claims, as well as Defendant's intended defenses.

On April 24, 2009, Plaintiffs' counsel requested that Defendant immediately supplement his discovery responses to produce documents and electronic files related to the posting, distribution, and subsequent removal of Plaintiffs' Exhibit A recordings from Defendant's counsel's blog. April 24, 2009 Letter from Eve Burton to Charles Nesson, Exhibit D. Plaintiffs' counsel pointed out that the requested information falls within Requests for Production 1, 8, 9, 10, 13, and 14. *Id.* (These requests are reproduced as Exhibit E).

Defendant's counsel responded via email, forwarding a discussion in which members of Defendant's legal team acknowledged the posting and claimed some sort of privilege or license to distribute the Exhibit A recordings as part of the litigation. April 25, 2009 email from Charles Nesson to Eve Burton. Exhibit C."). This purported claim of litigation privilege is consistent with Defendant's counsel's original claim that the sound recordings were posted as part of the litigation. *See* blog posting above ("Hopefully no one disapproves of my brazen, willful and illegal activity. We'll just say that it's part of wide-ranging discovery"); *see also* April 3, 2009 email from Charles Nesson to Daniel Cloherty, Exhibit B ("I would have thought that [posting the recordings] would qualify as authorized given the fact that the other side has presumably disclosed the songs to Joel as part of early disclosures").

In an effort to expedite production, Plaintiffs' counsel responded, offering clarification of exactly what files and documents Plaintiffs seek. April 26, 2009 email from Eve Burton to Charles Nesson, Exhibit F. On or about April 27, 2009, Defendant's counsel agreed to ask his legal team if they had documents responsive to the requests and to provide those materials to Plaintiffs. When Defendant did not respond by May 19, 2009, Plaintiffs' counsel reminded

Defendant's counsel of his previous commitment to seek responsive documents. May 19, 2009 email exchange between Eve Burton and Charles Nesson, Exhibit G. Defendant's counsel responded with a one sentence email baldly saying that he made inquiry and determined that the uploaded files have nothing to do with this case. *Id.*

As Defendant's counsel had consistently claimed that the Exhibit A recordings were posted as part of the litigation, then recently claimed that they had nothing to do with the litigation, there exists, at the very least, significant controversy regarding relevance. Plaintiffs contend that the distribution of "joel's seven songs," the Exhibit A recordings, to "the wider world," by Defendant through his legal counsel goes to the heart of this matter and is directly relevant to their claims of willful and continuous infringement. Accordingly, the Court should grant Plaintiffs' Motion and compel production.

ARGUMENT

PLAINTIFFS' DISCOVERY REQUESTS ARE NARROWLY TAILORED AND DIRECTLY RELEVANT.

The Federal Rules of Civil Procedure provide for liberal discovery, in the interest of a just and complete resolution of disputes. *See Katz v. Batavia Marine & Sporting Supplies, Inc.*, 984 F.2d 422 (Fed. Cir. 1993). The prevailing standard for proper discovery is contained in Fed. R. Civ. P. 26(b), which allows for the discovery of relevant information, with relevance defined broadly to include requests for information that are "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b). Rule 26(b) is to be broadly construed. *See Katz*, 984 F.2d at 424.

While Plaintiffs recognize that the Court has expressed concern that discovery not exceed the scope of existing claims (*see* May 13, 2009 minute order), it is crystal clear in this instance that the discovery sought is narrowly tailored and directly relevant to the claims at issue. Indeed,

this Court has previously noted that "this suit and relevant discovery are limited to the infringement of specific songs whose copyrights are owned or licensed by the Plaintiffs and which were identified [on] Exhibits A or B to their Complaint." *Id.* Similarly, the Court noted that Plaintiffs' request to produce burned CDs containing the Exhibit A or B recordings "is relevant to the duplication and potential transmission of the copyrighted works at issue in this lawsuit, particularly where the Defendant has argued that his file-sharing was minimal." *Id.* Thus, the Court has already determined that the infringement of the Exhibit A recordings is relevant and information directly related to the infringement of those recordings is subject to discovery.

Here, Plaintiffs seek documents and files concerning the posting, distribution, and subsequent removal of the Exhibit A recordings from Defendant's counsel's blog. The Court has already determined that the infringement of the Exhibit A recordings is relevant to Plaintiffs' claims, and the circumstances at issue make this infringement no less relevant. Not only were the very sound recording at issue in this case openly infringed, but the unauthorized distribution was done with the assistance of counsel and through a blog Defendant's counsel uses to discuss this case. Further, the blog post makes clear that this was "brazen, willful infringement" of the Exhibit A recordings. Indeed, the requested information appears reasonably calculated to go to willfulness, continuing infringement, actual distribution (or substantial evidence thereof), and the defenses Defendant intends to assert, including fair use, "fairness," and whether Defendant's infringement is commercial in nature.

Further, Plaintiffs' requests are narrowly tailored and seek only information directly relevant to the posting, distribution, and removal of the Exhibit A recordings. *See* April 24, 2009 letter from Eve Burton to Charles Nesson, Exhibit D. As Plaintiffs' discovery requests satisfy the Rules, Defendant should be compelled to respond to these requests.

While Defendant's counsel now claims that the renewed instance of infringement has nothing to do with the case at bar, the blog post and at least two underlying emails make clear that that is not the case. *See* blog posting above ("Hopefully no one disapproves of my brazen, willful and illegal activity. We'll just say that it's part of wide-ranging discovery"); April 25, 2009 email from Charles Nesson to Eve Burton. Exhibit C (Suggesting that the sound recordings were distributed for purposes of preparing a defense and asking "So what is the problem with us having access to [the Exhibit A recordings]? Given their relevance in the case, we must have some temporary, limited license to the songs themselves") (emphasis deleted); April 3, 2009 email from Charles Nesson to Daniel Cloherty, Exhibit B ("I would have thought that [posting the recordings] would qualify as authorized given the fact that the other side has presumably disclosed the songs to Joel as part of early disclosures").

Plaintiffs do not have to rely on Defendant's counsel's bald assertion that the infringement has nothing to do with the case at bar. This is particularly so where there is substantial evidence to the contrary. Moreover, Defendant's counsel's opinion as to the relevance of the infringement should be discounted because it appears that he, at the very least, facilitated this infringement. Accordingly, Plaintiffs have a right to inspect the relevant documents and electronic files to determine whether or not they are admissible and if so on what grounds. While the Court will make any ultimate determinations of admissibility, Plaintiffs are entitled to the discovery of this evidence.

CERTIFICATE OF CONFERENCE

In addition to the attempts to resolve this matter outlined above, on June 4, 2009, Plaintiffs' counsel telephoned Defendant's counsel regarding his position on the Motion to Compel. On June 5, 2009, Defendant's counsel stated that he opposes the present Motion.

CONCLUSION

WHEREFORE Plaintiffs respectfully request that the Court to compel Defendant to supplement his responses to Plaintiffs' Requests for Production to include information relating to the posting and distribution of Plaintiffs' Exhibit A sound recordings through http://blogs.law.harvard.edu/nesson/2009/03/17/been-workin-too-hard within ten days of the Court's Order.

Respectfully submitted this 5th day of June, 2009.

SONY BMG MUSIC ENTERTAINMENT;
WARNER BROS. RECORDS INC.;
ATLANTIC RECORDING CORPORATION;
ARISTA RECORDS LLC; and UMG
RECORDINGS, INC.

By their attorneys,

By: s/ Eve G. Burton

Timothy M. Reynolds (pro hac vice)
Eve G. Burton (pro hac vice)
Laurie J. Rust (pro have vice)
HOLME ROBERTS & OWEN LLP
1700 Lincoln, Suite 4100
Denver, Colorado 80203
Telephone: (303) 861-7000
Facsimile: (303) 866-0200
Email: eve.burton@hro.com

Daniel J. Cloherty
DWYER & COLLORA, LLP
600 Atlantic Avenue - 12th Floor
Boston, MA 02210-2211
Telephone: (617) 371-1000
Facsimile: (617) 371-1037
dcloherty@dwyercollora.com

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on June 5, 2009.

s/ Eve G. Burton