

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____) CAPITOL RECORDS, INC. et al.,)) Plaintiffs,))) Civ. Act. No. 03-cv-11661-NG v.)) (LEAD DOCKET NUMBER))) NOOR ALAUJAN,))) Defendant.)) _____)	
_____) SONY BMG MUSIC ENTERTAINMENT) et al.,) Plaintiffs,)) Civ. Act. No 07-cv-11446-NG)) (ORIGINAL DOCKET NUMBER) v.)) JOEL TENENBAUM,))) Defendants.)) _____)	

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION IN LIMINE RE ACCESS TO INTERNET DURING TRIAL

Plaintiffs are in favor of all counsel having access to the Internet in the courtroom. Defendant's motion (Doc. No. 877), however, suggests that he intends to use the Internet access to show websites or computer programs to the jury. Defendant has never disclosed to Plaintiffs any urls or computer programs that he intends to show to the jury, as he was required to do under Rule 26(a)(1). Not only was there no disclosure during the course of discovery, but there has been no disclosure in the exchange of pre-trial materials or in the motion that was just filed. Nor has Defendant disclosed how these websites and/or programs would be displayed, who would testify about them or how they are relevant to the case. Defendant's failure to provide any disclosure likely precludes Defendant from showing websites and programs to the jury. And,

while Plaintiffs might agree to accede to Defendant's request, they cannot do so without adequate disclosure. For these reasons, Plaintiffs oppose Defendant's motion.

"Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. "Evidence which is not relevant is not admissible." Fed. R. Evid. 402. In addition, even relevant evidence may be excluded where its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Fed. R. Evid. 403.

Here, Plaintiffs are unable to evaluate the admissibility of the webpages and/or programs Defendant may use because Defendant has not specified which webpages and/or programs he intends to show the jury. Defendant must provide, at a minimum, the "url" or screenshots for each specific webpage (as opposed to simply "iTunes," for example) that he intends to show the jury. At that time, Plaintiffs will be able to consider and determine whether and what objections might be appropriate under Rule 402, Rule 403, or other rules of evidence. The web pages that Defendant seeks to show the jury may be highly prejudicial, contain hearsay, or simply be irrelevant to the issues the jury must decide. In addition, without notice of what Defendant intends to offer, Plaintiffs also have no opportunity to prepare for cross examination or rebuttal. Plaintiffs reserve all of their rights to object once Defendant has disclosed exactly what he intends to show the jury.

Aside from questions of admissibility, Defendant has also failed to disclose this information to Plaintiffs, as he was required to do under Rule 26(a)(2). Rule 37 prohibits a party from using evidence it has not disclosed unless the failure to disclose was substantially justified or is harmless. Fed. R. Civ. P. 37(c)(1). Fact discovery closed on May 30, 2009 (Doc. 759), and

this “evidence” was never disclosed by Defendant during discovery has still has not been disclosed. Now, just 10 days before trial, Plaintiffs are left guessing what it is that Defendant intends to show the jury. Therefore, Defendant should be precluded from introducing this evidence under Rule 37.

For all of these reasons, Defendant’s Motion in Limine should be denied. In the alternative, should the Court be inclined to allow Defendant’s late disclosure, Plaintiffs respectfully request that Defendant be ordered to specifically disclose the websites and/or programs, including specific pages, screenshots, or urls, he intends to present at trial. Once this information is provided, Plaintiffs will submit substantive objections, if any, to the evidence. Plaintiffs reserve all objections regarding this proffer.

Respectfully submitted this 17th day of July, 2009.

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

By their attorneys,

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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 July 17, 2009.

s/ Eve G. Burton _____