

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

CAPITOL RECORDS, INC., et al., )  
Plaintiffs, )  
 )  
v. )  
 )  
NOOR ALAUJAN, )  
Defendant. )

Case No. 03CV11661-NG  
LEAD DOCKET NO.

SONY BMG MUSIC ENTERTAINMENT, et al., )  
Plaintiffs, )  
 )  
v. )  
 )  
JOEL TENENBAUM, )  
Defendant. )

Case No. 07CV11446-NG  
ORIGINAL DOCKET NO.

GERTNER, D.J.:

**ORDER**  
June 16, 2009

This Order addresses a number of pending discovery issues and sets a Revised Schedule for the trial of this lawsuit in July.

**I. INTRODUCTION**

From the outset, this Court has been concerned about the overwhelming disparity of resources between plaintiff record companies and the individual defendants they have sued. From the outset, this Court has attempted to conduct the litigation in a way that recognizes that disparity, ensures that these proceedings are fair, and affords every party the process due to them under the law, even if they could not afford an attorney. But Mr. Tenenbaum is now represented by counsel, backed by Harvard Law School's Berkman Center for Internet and Society and a team of volunteers. The Court's indulgence is at an end. Too often, as described below, the

important issues in this case have been overshadowed by the tactics of defense counsel: taping opposing counsel without permission (and in violation of the law), posting recordings of court communications and emails with potential experts (who have rejected the positions counsel asserts) on the internet, and now allegedly replicating the acts that are the subject of this lawsuit, namely uploading the copyrighted songs that the Defendant is accused of file-sharing. In the light of the delays already experienced, and the Defendant's record of treating the Court's deadlines liberally, to say the least, he is cautioned that failure to meet the requirements and the time-limits set in this Order may cause him to forfeit crucial elements of his case.

## **II. FAIR USE DISCOVERY**

As the Court indicated in its Order permitting the Defendant to plead a fair use defense, additional discovery on this issue is expected to be very limited. In particular, having previously represented to the Court that he would not require any depositions should the Court allow further discovery, the Defendant is barred from taking the 30(b)(6) depositions identified in his June 15, 2009 Submission (document # 849), or any other depositions. See Def. Post-Hearing Mem. at 6 (document # 843). With one exception, discovery on fair use shall be limited to interrogatories, requests for admissions, and requests for production under Fed. R. Civ. P. 33, 34, and 36, as well as the applicable Local Rules. Because the Defendant sought to add his fair use defense long after he was deposed in this case, the Plaintiffs shall be permitted to conduct a supplemental deposition of the Defendant solely on the fair use issue. The Defendant's late addition of the defense would otherwise plainly prejudice the Plaintiffs.

All written discovery on fair use must be served by **June 22, 2009**. All discovery responses must be served by **July 3, 2009**. Plaintiffs' supplemental deposition of Defendant

Tenenbaum must also occur by **July 3, 2009**. To the extent that there are challenges to this limited discovery, the Court will be available to address those disputes expeditiously.

### **III. EXPERT DISCOVERY**

The Plaintiffs' Motion to Exclude Defendant's Expert Witnesses (document # 841) is **DENIED**. Because the Court has only recently permitted the Defendant to plead a fair use defense, it declines to exclude these experts -- two of whom will address this precise issue -- at present. Nonetheless, the Court will consider excluding the Defendant's proposed experts if written reports satisfying the requirements of Fed. R. Civ. P. 26(a)(2)(B) are not provided for each expert by **June 22, 2009**. The failure to provide complete and sufficient materials describing the experts' opinions and the basis for those opinions by this date, and no later, will work a substantial prejudice on the Plaintiffs -- one which the Court will not allow.

Assuming that the Defendant provides the required disclosures, the deposition of all three experts must be completed by **July 3, 2009**. The depositions of John Perry Barlow and Johan Pouwelese may be conducted by internet video conference pursuant to Fed. R. Civ. P. 30(b)(4), but not by telephonic conference. Plaintiffs' proposed rebuttal experts, if any, must be disclosed by **July 10, 2009**.

### **IV. RECORDING**

The Defendant is permitted to record the remaining depositions in any manner consistent with the requirements of Fed. R. Civ. P. 30(b)(3). The parties are cautioned, however, that the decision to publicize any recording, on the internet or otherwise, may be regarded as an effort to taint the jury pool in advance of trial. Cf. Paisley Park Enterprises v. Uptown Productions, 54 F.

Supp. 2d 347 (S.D.N.Y. 1999) (approving protective order where defendant had repeatedly sought publicity and notoriety by publishing litigation materials online).

#### V. PLAINTIFFS' MOTION TO COMPEL

According to the Plaintiffs' account, which is not disputed by the Defendant, Counsel for the Defendant appears to have uploaded the seven songs listed in Exhibit A of the Complaint, which are the very subject of the copyright infringement claims in this lawsuit, and made them publicly accessible on the internet. See Pl. Mot. to Compel (document # 842); Decl. of Charles R. Nesson (document # 849-2). Although the songs are no longer available there, the Plaintiffs seek supplemental discovery responses concerning these activities. Counsel for the Defendant argues that the uploaded songs, though identical to those at issue here, have no relevance to this lawsuit.

The Plaintiffs' Motion to Compel is **GRANTED**. Counsel's decision to make publicly available on the internet the very same songs that Joel Tenenbaum is accused of downloading and distributing, together with a blog entry that stated, "I've consolidated our seven songs and upped them for your listening displeasure," makes these discovery requests, at a minimum, relevant to this lawsuit under Fed. R. Civ. P. 26(b). The requests involve the potential distribution, over the internet, of the exact sound recordings that form the basis for this file-sharing lawsuit -- by Defendant's counsel, via a blog that regularly discusses this litigation. Consistent with their requests, the Plaintiffs are entitled to receive all non-privileged communications, electronic records, blog entries, and the uploaded file(s) relating to these events. The Defendant is ordered to provide supplemental discovery responses by **June 26, 2009**.

#### VI. REVISED SCHEDULE

Based on the discovery rulings described above, the Court sets the following Revised Schedule. The trial of this case is expected to last no more than five days, and the Court will keep closely to that timeline.

June 22, 2009	<b>Written discovery requests on the fair use defense due. Defendant's expert reports satisfying the requirements of Fed. R. Civ. P. 26(a)(2)(B) due.</b>
June 26, 2009	<b>Defendant's supplemental discovery responses due.</b>
July 3, 2009	<b>Close of all expert and fair use discovery.</b>
July 10, 2009	<b>Summary Judgment Motions due. Disclosure of Plaintiffs' rebuttal experts due.</b>
July 17, 2009	<b>Summary Judgment Oppositions due. Pre-Trial Memoranda due, including proposed jury instructions.</b>
July 20, 2009	<b>Pre-Trial Conference (9:30 am)</b>
July 27, 2009	<b>Jury Trial begins (9:00 am)</b>

## **VII. CONCLUSION**

The Plaintiffs' Motion to Exclude Defendant's Expert Witnesses (document # 841) is **DENIED**. The Plaintiffs' Motion to Compel (document # 842) is **GRANTED**.

**SO ORDERED.**

**Date: June 16, 2009**

*/s/Nancy Gertner*  
**NANCY GERTNER, U.S.D.C.**

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**NANCY GERTNER, U.S.D.C.**