



Holme Roberts & Owen LLP
Attorneys at Law

February 27, 2008

DENVER

BY ECF AND FIRST-CLASS MAIL

Hon. Robert M. Levy
United States Magistrate Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

BOULDER

COLORADO SPRINGS

Re: UMG Recordings, Inc., et al. v. Marie Lindor,
No. 05CV1095-DGT-RML

Dear Magistrate Judge Levy:

LONDON

Pursuant to Fed. R. Civ. P. 26(c) and this Court's individual practices, Plaintiffs respectfully submit this opposition to defendant's motion to compel and cross-motion for a protective order in connection with the November 14, 2007 subpoena served by defendant on SafeNet (a copy of which, without its voluminous exhibits, is attached as Exhibit A). Notwithstanding defendant's suggestion to the contrary, plaintiffs have already produced hundreds and hundreds of pages of documents, reflecting all of the data and information collected by SafeNet in connection with defendant. This information includes, but is not limited to, system logs, user logs, trace routes, digital audio files, and voluminous metadata, which is the information that plaintiffs are relying on in this case. As such, the information that defendant is seeking from SafeNet is duplicative of information already produced by plaintiffs. In addition, as more fully set forth below, much of the information sought in the SafeNet subpoena is not relevant to any issue in this case and is not reasonably calculated to lead to the discovery of admissible evidence. Rather, defendant's counsel appears to be engaged in a fishing expedition that this Court has already found to be improper. Specifically, much of the information that defendant seeks is precisely the same information that she unsuccessfully sought when this Court denied her motion to compel (Doc. No. 62) and granted plaintiffs' motion for protective order (Doc. No. 75) on March 30, 2007 ("March 30, 2007 Order"). Defendant cannot obtain through the back door what she was unable to obtain through the front door. Third, the documents sought involve highly proprietary and confidential information, including but not limited to confidential pricing information and detailed instructions and parameters regarding what SafeNet searches for on behalf of the record companies, how it does so, and where it searches, and including further a description of highly proprietary processes known and used by SafeNet to its significant commercial advantage. Finally, much of the information sought is protected by the

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attorney-client and work-product privileges, because much of the information sought reflects decisions made by and between the RIAA's anti-piracy team, including counsel, and SafeNet as to the proper means to investigate potential infringement, and because all of this information was specifically created in anticipation of litigation.

With respect to those document requests that are not duplicative and that are at issue, Doc Req. Nos. 1-3, 6-12, 14-18, 21-22, and 26-27 are not reasonably calculated to lead to the discovery of admissible evidence, and defendant has not even attempted to demonstrate otherwise. To the contrary, in these requests, defendant appears to be engaged in a fishing expedition for information that this Court has already determined to be irrelevant to any possible issue in this case or that relates to the recording industry's anti-piracy efforts generally, but not to this case. Such requests are improper.

Second, the Court's March 30, 2007 Order denied defendant's request for the same information that defendant is now seeking from SafeNet in her Doc. Req. Nos. 2, 6, and 15-17. In the briefing on plaintiffs' prior motion for protective order, defendant argued that she was entitled to obtain, among other things, SafeNet's compensation, as well as a wide array of information that defendant contended would show the alleged "shoddiness" of SafeNet's investigation. Defendant further contended that she required all of this information to allow her to cross-examine SafeNet witnesses. Plaintiffs responded that these arguments were baseless and that defendant was provided every single piece of paper and every electronic file that plaintiffs had with respect to SafeNet's investigation into the infringement at issue in this case. The Court granted plaintiffs' motion for protective order and denied defendant's motion to compel. For the very same reasons, defendant's effort to get at the very same documents and information from SafeNet should be rejected.

Third, Doc. Req. Nos. 2, 6-12, 14-18, and 21-22 seek highly proprietary information, including but not limited to confidential pricing information and detailed search parameters regarding SafeNet's investigation of infringement on behalf of the record companies, the manner and location of the searches, and copies of highly proprietary computer programs and processes used by SafeNet to its significant commercial advantage. As described in a declaration previously provided to this Court (Doc. No. 78), which plaintiffs incorporate by reference herein, both SafeNet and the recording industry have taken substantial steps to guard the secrecy of this information. Indeed, this information has never been publicly disclosed, and few people within SafeNet and the recording industry have had access to it. Moreover, release of this information would not only allow other investigative companies to usurp SafeNet's commercial advantage, but also it would provide would-be infringers with a road map for avoiding detection by the record companies and would

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Attorneys at Law

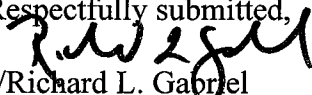
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exacerbate the already massive problem of infringement on the Internet. On these facts, plaintiffs respectfully submit that the entry of a protective order is warranted and appropriate. *See Four Star Capital Corp. v. Nynex Corp.*, 183 F.R.D. 91, 110 (S.D.N.Y. 1997) (noting required elements for protective order).

Finally, Doc. Req. Nos. 2, 3, 5-6, 11-12, 15-22, and 26-28 seek information that is protected by both the attorney-client and work product privileges. Specifically, the information that defendant requests reflects the decisions made by and between, and legal advice communicated during strategy sessions involving, the record companies' anti-piracy team, including counsel, and SafeNet, as to the proper means to investigate potential infringement. Such information is subject to the attorney-client privilege. *See United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989) (expanding attorney-client privilege to agents "hired to assist in the rendition of legal services"). The requested information also reflects communications between the record companies' counsel and SafeNet as to how to proceed in the potential litigation and directly reflect the mental impressions of counsel in connection with such strategic decisions, thereby warranting protection under the work-product privilege. *See United States v. Adlman*, 134 F.3d 1194, 1197 (2d Cir. 1998) (noting strong public policy in favor of core work product).

For all of these reasons, plaintiffs respectfully request that this Court deny defendant's motion and enter a protective order prohibiting defendant from seeking documents from SafeNet beyond the documents that have already been produced to her and limiting the scope of inquiry at any SafeNet deposition to preclude inquiry as to information that is (1) not reasonably calculated to lead to the discovery of admissible evidence, (2) covered by this Court's March 30, 2007 Order, (3) proprietary to SafeNet or the record companies, and/or (4) protected by the attorney-client and/or work-product privileges. Simply stated, the information sought by defendant appears to relate to defense counsel's effort to develop information that would allow him to challenge the recording industry's anti-piracy efforts generally, which is the principal focus of his web blog. This Court should not condone the use of the discovery process for such purposes.

Respectfully submitted,


s/Richard L. Gabriel
Attorney for Plaintiffs

Enclosure

cc: Ray Beckerman, Esq. (by ECF and e-mail; w/encl.)
Tom Mullaney, Esq. (by ECF and e-mail; w/encl.)
Victor Kao, Esq. (by ECF and e-mail; w/encl.)