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)

DEFENDANT'S MOTION FOR PROTECTIVE ORDER
PURSUANT TO FED. R. CIV. P. 26(c)

Pursuant to Fed. R. Civ. P. 26(c), Defendant hereby in good faith moves this Court for a protective order to ensure that Defendant's confidential, privileged, and non-relevant digital information is protected from search by Plaintiffs.

The Plaintiffs' Request for Inspection pursuant to Fed. R. Civ. P. 34(b (atttached hereto as Exhibit A) would require Defendant Joel Tebebaum to permit a computer forensics technician working for the Plaintiff to make two verified bit-images of each of the hard drives or other digital storage devices of the Gateway desktop computer and Toshiba laptop computer owned by Defendant. As detailed below, Plaintiff's attempt to gain access to every shred of data and

information on Defendant's computers, some of which is confidential or privileged and most of which has no relevance at all to the issues in this case, is grossly overbroad, unwarranted and improper under the Federal Rules. Accordingly, Defendant respectfully requests that the Court enter a protective order

In response to the Request for Production pursuant to Fed. R. Civ. P. 34(b), Defendant hereby states as follows:

INTRODUCTION

Plaintiffs filed a civil action on September 8, 2003, seeking damages and injunctive relief for copyright infringement under the copyright laws of the United States (17 U.S.C §101 et seq.). Plaintiffs, duly organized corporations, alleged that Defendant had violated the Plaintiffs' rights of reproduction and distribution by using an online media distribution system to download Copyrighted Recordings. The Plaintiffs specified the seven recordings alleged to have been downloaded by the Defendant in Exhibit A of the Complaint.

From the date of the filing of the civil action to the present date, Defendant has in good faith made best efforts to comply with Plaintiffs' requests. Defendant's actions have included, but have not been limited to:

- i) providing all available information regarding the computer that Plaintiffs allege was used to download Copyrighted Recordings, which is no longer owned by Defendant;
- ii) providing all available information regarding activities by Defendant and all other users with regard to the use of such computer; and

- iii) providing nine hours of sworn testimony in a deposition regarding Defendants' and all other users' activities with regard to said computer.

Plaintiffs now seek to obtain mirror images of the hard drives of two additional computers, which have no relevance to the action filed by the Plaintiffs. These computers were purchased by the Defendant after the downloading of Copyrighted Recordings is alleged to have occurred. These computers in fact have no connection with the activities alleged by Plaintiffs. Plaintiffs have articulated no reason why these computers are at all relevant to the present litigation. Plaintiffs have also not articulated why any information alleged to be contained on these computers has not already been obtained, or cannot be obtained by other means which are less burdensome to the Defendant. Furthermore, the computers contain the confidential information of the Defendant and other users of the computer, including but not limited to: confidential medical records; confidential names and grades of Defendants' students; confidential unpublished research; and additional confidential information. Allowing imaging of the entirety of the contents of Defendant's computers, including vast amounts of data having no possible relevance to anything in this case and based upon no link between the present action and such computers other than their use by the Defendant, would open the Defendant's entire digital history to access and perusal by Plaintiffs and destroy any semblance of digital privacy which the Defendant may still have. It would be the digital equivalent of allowing the Plaintiff's lawyers and expert to rummage through every nook, cranny, drawer, book, photo album and more in Defendant's house on a vast fishing expedition for possibly relevant information.

Defendant contacted Plaintiffs on October 1, 2008, expressing concern regarding the proposed imaging procedure, and notifying Plaintiffs that the computers contain confidential, personal, and otherwise wholly non-relevant information. Defendant, however, also expressed his willingness to, in good faith, make his best efforts to reach a solution that would provide Plaintiffs

with access to all potentially relevant information while preserving Defendants' privacy as to all other, irrelevant materials. These proposed efforts included, but were not limited to, allowing imaging of specific portions of the hard drive which would permit the production of all relevant, appropriate information within the scope of the present litigation.

Plaintiffs declined. Plaintiffs instead proposed a protective order (Exhibit B) which would allow a computer imaging expert – hired, retained, and controlled by Plaintiffs – full and unrestricted access to Defendant's hard drives. The solution proposed by Plaintiffs in no way addressed the concerns made by Defendant or proposed any way to alleviate such concerns. In addition to allowing the imaging expert full access to Defendant's hard drives, the proposed order would permit the same level of access to additional individuals designated by the computer expert. Further, the proposed protective order would impose a financial burden on Defendant by requiring him to pay the costs of producing a copy of the mirror image of the hard drive and hash code signature.

Plaintiffs' proposed protective order does not address Defendant's expressed concerns and objections as to relevancy, privilege, undue burden, and privacy. Defendant therefore objects to the discovery request in its entirety and requests that any production of documents at this time should be stayed by the court.

Pursuant to Fed. R. Civ. P. 26(c), Defendant hereby certifies that he has conferred in good faith with counsel for Plaintiffs regarding this motion in order to resolve the dispute without court action. Because the parties have not been able to resolve the instant dispute, the Defendant hereby moves for a Protective Order pursuant to Fed. R. Civ. P. 26(c).

GENERAL OBJECTIONS

1. Defendant objects to the discovery request in its entirety to the extent that it seeks production of documents outside of the scope of discovery permitted under Fed. R. Civ. P. 26(b). Defendant specifically objects based on the fact that the discovery request seeks production of information and documents that are neither relevant to any party's claim or defense nor reasonably calculated to lead to discovery of admissible evidence. Specifically pursuant to Fed. R. Civ. P. 26(b)(2)(B), Defendant identifies requested information as not reasonably accessible because of undue burden and expense. Defendant submits that any production of documents should be stayed by the court in order to protect Defendant from undue burden and expense.

2. Defendant objects to the discovery request in its entirety to the extent that it seeks information which is either protected by attorney-client privilege; which was prepared in anticipation of litigation; or which is attorney work product. Defendant asserts privilege regarding all such information pursuant to Fed. R. Civ. P. 26(b)(5).

3. Any inadvertent production of any document shall not be deemed to constitute a waiver of any privilege or right of Defendant, who reserves the right to demand that Plaintiff return any such documents and all copies thereof.

4. Defendant reserves the right to amend or supplement such aforementioned objections.

SPECIFIC OBJECTIONS

REQUEST NO. 1: Plaintiffs request inspection and copying of the Gateway desktop computer owned by Defendant.

ANSWER: Defendant objects to this Request on the grounds that it seeks information which is not relevant to Plaintiffs' claims, and which is not reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects to this Request on the grounds that it is

overly broad and unduly burdensome. Defendant further objects to this Request on the ground that it will not provide information not already provided by Defendant or which cannot be provided through less burdensome means. Defendant finally objects to this Request on the grounds that it requires production of information and documents which are protected by attorney-client privilege and / or the work product doctrine.

REQUEST NO. 2: Plaintiffs request inspection and copying of the Toshiba laptop computer owned by Defendant.

ANSWER: Defendant objects to this Request on the grounds that it seeks information which is not relevant to Plaintiffs' claims, and which is not reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects to this Request on the grounds that it is overly broad and unduly burdensome. Defendant further objects to this Request on the ground that it will not provide information not already provided by Defendant or which cannot be provided through less burdensome means. Defendant finally objects to this Request on the grounds that it requires production of information and documents which are protected by attorney-client privilege and / or the work product doctrine.

ARGUMENT

I. Plaintiff's Request for Hard Drive Images Seeks Information Which is Not Relevant to Plaintiff's Claims and Which Is Not Reasonably Calculated to Lead To Discovery of Admissible Evidence.

Plaintiffs seek access to hard drive images of computers that Defendant did not own at the time that Plaintiffs' alleged copyright infringement occurred. Furthermore, these computers have no connection to the copyright infringement alleged by Plaintiffs. Fed. R. Civ. P. 26(b)(1) provides that: "Parties may obtain discovery regarding any non-privileged matter that is relevant to any

party's claim or defense . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Plaintiffs have made no claim or showing as to why the content of the hard drives of these computers has any relevance whatsoever to the infringement alleged to have occurred over five years ago. Moreover, even if they had done so, their request seeks not just relevant data stored on the computers, but access to every bit of data – every document, email, photo, record, program and other file – stored on these two computers, no matter how completely unrelated from any issue remotely connected to this case.

"Discovery is not a fishing expedition." Milazzo v. Sentry Ins., 856 F.2d 321, 322 (1st Cir. 1988) (internal quotation marks omitted). The personal files and information presently stored on Defendant's computers have no connection with the claims of alleged copyright infringement asserted by the Plaintiffs. Further, the Plaintiffs have made no indication that any information believed to be contained by such computers has not already been provided by Defendant, either in his deposition or via other means. As such, permitting a mirror image search of the computers is unduly burdensome and inappropriate. Cf. Hedenburg v. Aramark American Food Services, 2007 WL 162716, at *2 (W.D.Wash. 2007) (noting that in such case where an adverse party is simply "hoping blindly to find something useful in its impeachment" of the other party that the allowance of a mirror image search of the hard drive is inappropriate).

II. Plaintiffs' Request for Hard Drive Images Is Inappropriate Because Plaintiffs Have Presented No Evidence That Defendant Has Failed To Properly Discharge His Discovery Obligations.

Wholesale imaging of the Defendant's private computer hard drives is an invasive, burdensome and overbroad procedure which must not be undertaken unless warranted. The Defendant is required to provide full access to confidential and private information which he has not intended for the world to see. Courts have routinely denied requests for productions of a mirror

image of a hard drive in light of the intrusive nature of this search. See, e.g., Williams v. Massachusetts Mut. Life Ins. Co., 226 F.R.D. 144, 146 (D.Mass. 2005) (noting that before permitting an "intrusion into an opposing party's information system . . . the inquiring party must present at least some reliable information that the opposing party's representations are misleading or substantively inaccurate"); Menke v. Broward County School Bd., 916 So.2d 8, 12 (Fla.App. 4 Dist. 2005) (denying inspection of hard drive as there was "no evidence of any destruction of evidence or thwarting of discovery," and noting that in absence of such evidence, "searching should first be done by defendant so as to protect confidential information"); BG Real Estate Services v. American Equity Ins. Co., 2005 WL 1309048 at *5 (E.D.La. 2005) (finding "request for the entire 'computer hard drive' . . . overly broad and seek[ing] much that is irrelevant and not likely to lead to the discovery of admissible evidence," and concluding that the hard drive "need not be produced"); Bethea v. Comcast, 218 F.R.D. 328, 330 (D.D.C. 2003) (denying motion to compel inspection of computer hard drive where "plaintiff has made no showing that the documents she seeks actually exist or that the defendants have unlawfully failed to produce them," and where "plaintiff has not alleged that the defendants failed to make a search of adequate scope or duration"); Dikeman v. Mary A. Stearns, P.C., 560 S.E.2d 115, 117 (Ga. App. 2002) (affirming trial court's finding that requests to produce, inter alia, "a full and complete copy of the hard drive" were "overbroad, oppressive, and annoying and to require undue burden and expense"); In re Ford Motor Company, 345 F.3d 1315, 1316-1317 (11th Cir. 2003) (reversing trial court's grant of a Rule 34 motion because the court had made no finding that defendant had failed to comply with discovery requests and because the search failed to contain search terms to structure the search and allow opponent to object to disclosure of non-relevant or privileged data).

The circumstances in which courts have agreed to allow production of mirror images of hard drives have therefore been specific and limited. See, e.g., Simon Property Group L.P. v. mySimon, Inc., 194 F.R.D. 639, 641 (S.D.Ind. 2000) (allowing inspection of defendant's computers where plaintiff "has shown in its motion papers some troubling discrepancies with respect to defendant's document production"); Playboy Enterprises, Inc. v. Welles, 60 F.Supp. 2d 1050, 1053-54 (S.D.Cal. 1999) (allowing inspection of defendant's computer where plaintiff demonstrated that defendant failed to take steps to preserve electronic information at issue); Leviton Mfg. Co., Inc. v. Nicor, Inc., 2006 WL 1305036, at *3-4 (D.N.M. 2006) (allowing inspection where documents produced by parties suggested defendant had not produced all responsive documents and defendant offered no excuse for not producing them). Courts have allowed inspections only where there is a clear logical relationship between plaintiff's claims and the information requested, and the burden is carried by the plaintiff to show such a relationship.

Applied to this case, production of mirror images of the two computers at issue should not be permitted unless the Plaintiffs can demonstrate that Defendant has failed to properly respond to Plaintiffs' discovery requests; failed to preserve relevant electronic information; or otherwise failed to properly discharge his obligations under the discovery rules of the Federal Rules of Civil Procedure. The burden is upon the Plaintiffs to make such showing in order to justify the Request for Production. Because Plaintiffs have not attempted to make such a showing, Plaintiffs' Request for Production should be denied.

III. Some of the Information Requested Is Protected By The Attorney-Client Privilege And/Or Work-Product Privilege.

Fed. R. Civ. P. 26(b)(1) excludes privileged matter from the scope of discovery. The attorney-client privilege "extends to all communications made to an attorney or counselor, duly qualified and authorized as such, and applied to by the party in that capacity, with a view to

obtain his advice and opinions in matters of law, in relation to his legal rights, duties, and obligations." *U.S. v. Windsor Capital Corp., 524 F.Supp.2d 74, 81 (D.Mass. 2007) (citing F.D.I.C. v. Ogden Corp., 202 F.3d 454, 461 (1st Cir.2000))*. The computers for which the Plaintiffs have sought discovery contain information protected under attorney-client privilege, including but not limited to communications between Defendant and his legal counsel, and information relating to Defendant's case and his defense Imaging of the hard drives of the computers at issue would make this information available to Plaintiffs and would violate attorney-client privilege. Such access should therefore be denied.

IV. Plaintiff's Previously Proposed Protective Order Would Do Nothing to Prevent the Discovery of Wholly Irrelevant Information

At the very least, Plaintiff's proposed protective order, while preventing disclosure to the world, opens all of Defendant's digital environment to the Plaintiff's expert and perhaps to plaintiff's attorneys. No one should see the Defendant's private information absent the sort of showing of need described above.

Respectfully submitted,

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