

UNITED STATES DISTRICT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

|                                |   |                   |
|--------------------------------|---|-------------------|
| ATLANTIC RECORDING             | ) |                   |
| CORPORATION <i>et al.</i> ,    | ) |                   |
|                                | ) | Civil Action No.: |
| Plaintiffs,                    | ) |                   |
|                                | ) | 1:17-cv-00431-AT  |
| v.                             | ) |                   |
|                                | ) |                   |
| SPINRILLA, LLC <i>et al.</i> , | ) |                   |
|                                | ) |                   |
| Defendants.                    | ) |                   |

**DEFENDANTS’ SUPPLEMENTAL BRIEF IN  
FURTHER SUPPORT OF MOTION FOR SANCTIONS**

Defendants file this Supplemental Brief in Further Support of their Motion for Sanctions (Dkt. 100) and state as follows:

**I. Introduction**

Since Defendants filed their Motion for Leave on October 3 (Dkt. 100), additional facts have come to light that Defendants feel the Court should be aware of. Also, as this case limps to the end of fact discovery (which fittingly closes on Halloween), the extent of harm to Defendants by Plaintiffs hiding the RIAA data has come into focus and should be described to the Court.

**II. Argument**

As noted in its Motion for Sanctions, by denying having the data they actually have, Plaintiffs just about derailed this litigation. (Dkt 98-1, p. 4). Hiding that

information caused discovery disputes and prejudiced Defendants in a number of ways. Significantly, Plaintiffs used that lie to convince the Court they should be allowed to add about 1,900 allegedly infringed sound recordings to their original list of 210. Later, Plaintiffs repeated that lie to convince the Court to give them time to add even more sound recordings to their list. Also, by forcing Defendants to try to figure out which sound recordings were allegedly infringed and where on the Spinrilla platform the allegedly infringing version was, rather than just giving Defendants that information, Plaintiffs maliciously sent Defendants down an expensive and unnecessary rabbit hole from which, as explained below, Defendants cannot recover.

Since Spinrilla filed its Motion for Leave on October 3, each of the primary Plaintiffs (Sony, Warner and UMG) served additional interrogatory responses. (Dkts. 101-1, 101-6)<sup>1</sup>. These interrogatory responses include as “Attachment A” data from the RIAA spreadsheets. On August 2, when Plaintiffs served their original

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<sup>1</sup> The amount of data in these supplemental interrogatory responses is significant. UMG’s interrogatory responses included 129 pages of details of its sounds recordings allegedly infringed; Sony’s included 96 such pages and Warner’s included 34 such pages. Just to orientate the Court, one of these 259 pages is attached hereto as Exhibit A.

responses to Spinrilla's interrogatories, that same information was in Plaintiffs' possession but was *not* included in Plaintiffs' response. Obviously, the unearthing of the RIAA spreadsheets on September 22 motivated Plaintiffs to provide that information to Defendants on October 2-4. Had the information Plaintiffs provided on October 2-4 been provided to Defendants earlier in this litigation, as it should have been, Defendants' development of the facts would be much further along and Defendants would be better prepared for the next phases of this litigation. In other words, the harm to Defendants from Plaintiffs' misconduct is real, not theoretical.

By hiding and lying about the RIAA data, Plaintiffs forced Defendants to spend precious time and money fumbling through discovery. Not knowing that Plaintiffs had the RIAA data, Defendants focused much of their discovery on trying to *identify* which sound recordings Plaintiffs allege were infringed and *where* on Spinrilla's platform the allegedly infringing versions could be found.

Had Plaintiffs not hidden the RIAA data Defendants could have instead focused on *testing, analyzing* and *understanding* how the infringement, if any, had occurred. For example, after claiming to have only what they could find through "manually hunting," it turns out the Plaintiffs have the suspect URLs not just for the original 210 allegedly infringed sound recordings but also for the 2,100 they added on to their Complaint (Dkts. 96 and 96-1) on October 2. Those URLs were provided

in Plaintiffs' October 2-4 responses to Defendants' second interrogatories, a sample of which is attached hereto as Exhibit A.

**The importance of the belatedly provided URLs cannot be understated.<sup>2</sup>**

During the time in this litigation that Plaintiffs were hiding the RIAA data (*i.e.*, from filing of the Complaint in March 2017 to the Linares deposition on September 22), Plaintiffs essentially said to Defendants, “a song on Spinrilla infringes Beyonce’s song *Single Ladies*,” (using *Single Ladies* as an example). From that Spinrilla had no way of knowing which of the more than one million songs on its platform allegedly infringed Beyonce’s *Single Ladies*. But once the jig was up, Plaintiffs had no choice but to provide the data, including the URL which tells us exactly which song on Spinrilla’s platform allegedly infringes Beyonce’s *Single Ladies*. The difference between these two scenarios -- *searching* for this information versus *analyzing* this information – is drastic, especially for 2,100 songs. Plaintiffs

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<sup>2</sup> In fact, a proper DMCA takedown notice must include “information reasonably sufficient to permit the service provider to locate the material.” (17 U.S.C. § 512(c)(3)(iii)). The typical way to convey that information is by sending the URL, as even Plaintiffs admit is their normal practice. (Linares Decl., ¶¶ 10 and 17 (Dkt. 42-3)).

benefitted dearly by having Defendants waste their time *searching* rather than *analyzing*, since that leaves Defendants less informed and less prepared.

Again, had the full data been provided to Spinrilla from the start, rather than on October 2-4, Defendants could have spent its time and resources on other issues, such as *why* sounds recordings might not have been blocked by Spinrilla's content identification vendor, which of the allegedly infringed sounds recordings did Plaintiffs *want* on Spinrilla, which sound recordings did Plaintiffs' *artists place* on Spinrilla and similar issues.<sup>3</sup> Defendants would also have had the time and resources to listen to and analyze the actual allegedly infringing audio files at those URLs . . . time it no longer has.

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<sup>3</sup> This is a complicated question that can have an array of answers depending on the particular sound recording. The possible answers include a technology failure, the song was sped up or slowed down which meant it could not be "matched," Plaintiffs neglected to provide digital fingerprints for a sound recording to the vendor, Plaintiffs provided digital fingerprints but for a business reason did not want a particular sound recording "blocked" and Plaintiffs or their artists *wanted* music on Spinrilla. Defendants have learned of instances of all of these occurring, but had they had the RIAA data, Defendants could have probed these areas in much greater depth.

Similarly, had Defendants had the RIAA spreadsheets (or at least had they known that Plaintiffs had access to the data in those spreadsheets), the 30(b)(6) deposition of Sony would have (at least in theory)<sup>4</sup> been much more productive. Not to mention the fact that some of the information Sony's designee said he did not know, is information he should have known from the RIAA spreadsheets. **Importantly, when asked what documents he reviewed in preparation for the deposition, Sony's designee never mentioned the RIAA spreadsheets. (Sony Dep. Transcript, pp. 47:16-48:22 (Dkt. 108)). This itself shows that Sony failed to satisfy its obligations under Rule 30(b)(6) to designate someone to "testify about information known or reasonably available to the organization."** Likewise, had Plaintiffs not hid the RIAA spreadsheets, Defendants would have been better prepared to depose Mr. Linares. By not having the RIAA spreadsheets

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<sup>4</sup> Spinrilla obviously was not able to question Sony about the RIAA data because at that point Defendants did not know that data existed. In addition, under Rule 37(d), a failure to appear at a deposition includes circumstances where the witness "is not knowledge about relevant facts, and the principal has failed to designate an available, knowledgeable, and readily identifiable witness." (*Consumer Financial Protection Bureau v. Universal Debt Solutions, LLC*, No. 1:15-CV-859-RWS (N.D.G.A. Aug. 25, 2017)).

and not knowing that the RIAA data even existed, Defendants were denied the opportunity to meaningfully depose Plaintiffs' key witness.

Again, the prejudice Plaintiffs caused Defendants is not hypothetical. Remedying the prejudice is impractical as it would require a complete overhaul of this case's remaining timeline. Defendants would need two or three months more of fact discovery, including leave to serve more interrogatories on Plaintiffs, to re-depose Sony and re-depose Mr. Linares. **Between the filing of this Brief and the Court's ruling on the Motion for Sanctions, more depositions will take place while Plaintiffs still have not produced non-redacted versions of the RIAA spreadsheets or provided the requested privilege log related to the RIAA spreadsheets.** If the case were to continue in a fair way, Plaintiffs should also be required to reimburse Defendants for the attorney fees and expenses they incurred doing unnecessary discovery. Without these allowances, Defendants will forever be handicapped by Plaintiffs' dishonesty.

*Plaintiffs Should Have Produced the RIAA Spreadsheets in April 2017*

It should be noted that not only should Plaintiffs have produced the RIAA spreadsheets in response to Defendants' written discovery, but Plaintiffs should have produced them in *April 2017*. The Court entered a Scheduling Order which adopted the Parties' Joint Preliminary Planning Report. (Dkts. 25 and 27). In their Joint Preliminary Planning Report, the Parties agreed, "to include with service of their

initial disclosures all documents identified in their respective disclosures if such documents are reasonably accessible to that party at that time its disclosures are served.” (Dkt. 25, p. 10). In Attachment C to their Initial Disclosures, Plaintiffs wrote, “[a]t this time, Plaintiffs identify the following relevant categories of documents, which may be obtained through counsel for Plaintiffs: B. Documents evidencing Defendants’ and their users’ infringement of Plaintiffs’ copyright sound recordings and Defendants’ knowledge thereof.” (Plaintiffs’ Initial Disclosures, 04/14/2017).

According to Plaintiffs, the data in the RIAA spreadsheets evidences copyright infringement. (See for example, Plaintiffs’ Motion for Partial Summary Judgment (Dkts. 42)). And surely those Excel spreadsheets were “reasonably accessible” to Plaintiffs in April 2017. Therefore, those spreadsheets should have been provided to Defendants when Plaintiffs’ served their Initial Disclosures on Defendants on April 14.

*Plaintiffs’ Lies Also Impacted Their Discovery to Spinrilla*

Since the revelation of the RIAA spreadsheets (and since belatedly taking the “3-hour source code” deposition of Spinrilla on October 2), Plaintiffs narrowed their request for Spinrilla’s entire database and narrowed their request for all of Spinrilla’s source code. Instead of seeking everything, Plaintiffs now seek – as they should have



from the start – a *subset* of the database and a lesser portion of the source code.<sup>5</sup> The purpose of Plaintiffs’ earlier insistence on receiving Spinrilla’s *entire* database from Spinrilla was probably to perpetuate their lie that they had nothing, so they needed it all. As a result, whether Spinrilla should have been forced to produce its entire database or produce all reports was a fight that never should have happened.

This is another way Plaintiffs’ misconduct has taken an unfair toll on this litigation.

### **III. Remedies**

As more has come to light since Defendants’ filed their Motion for Sanctions, the harm from Plaintiffs’ conduct has become clearer. It is difficult for Defendants to envision this case ever becoming a “fair fight.” Because the RIAA data and spreadsheets were hidden, Defendants are simply too far behind where they should be for this to be a level playing field.

Hiding and lying to the Court about the RIAA data and spreadsheets is the worst of Plaintiffs’ conduct, but there is plenty more. That other conduct is described in Defendants’ principal brief in support of their Motion for Sanctions but also

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<sup>5</sup> On September 29, a week after the Linares deposition, Plaintiffs served a second set of written discovery on Defendants. (Dkts. 93). Interrogatory No. 11 asks for data for a subset of songs on Spinrilla, rather than data for all songs.

includes making the 30(b)(6) deposition of Sony as mostly futile effort and Mr. Linares pretending not to understand basic questions and refusing to answer other questions based on a bad faith assertion of work product protection. Also, Plaintiffs have been deceitful in their responses to Defendants' written discovery and have purposefully handicapped Defendants. Plaintiffs failed to correct information in their Complaint which they learned was false, until Spinrilla served Plaintiffs with a Rule 11 Motion, which prompted Plaintiffs to finally remove the incorrect information. (Dkt. 91-1). Based on this pattern of misconduct, Defendants reiterate their request that the Complaint be dismissed as a sanction for Plaintiffs' misconduct.

Relatedly, the Court's Scheduling Order should be considered a discovery order under Rule 37(b)(2).<sup>6</sup> By approving the Joint Preliminary Report, Plaintiffs

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<sup>6</sup> Plaintiffs' conduct also implicates Rule 11, which the Court can raise on its own. (Rule 11(c)(3)). By denying the existence of the RIAA data and spreadsheets, Spinrilla submits that Plaintiffs violated Rule 11(b)(1), since that denial was for an improper purpose (namely, to prevent Defendants from getting that information, to persuade the Court to order Spinrilla submit to discovery that was more invasive than what was necessary and to give Plaintiffs more time to list works allegedly infringed which harms Defendants by keeping the works secret). Rule 11(b)(3) is

were under an order to produce documents relating to the alleged infringement and which were “reasonably accessible” to Plaintiffs. Rule 37(b)(2)(A)(v) permits a case to be dismissed as a sanction for failing to obey a discovery order.

Plaintiffs’ misconduct also implicates Rule 37(c), since Plaintiffs failed to provide information in response to discovery. The sanction of dismissing the Complaint is permitted for failing to provide information. (Rule 37(c)(1)(C)). Dismissal of the Complaint under Rule 37(c) is justified because of the severity of Plaintiffs’ misconduct, including lying to the Court.

And as noted in Footnote 4, above, by not being prepared to provide information that was reasonably available to it, Sony essentially failed to appear for the deposition in violation of Rule 37(d).

“When a [party] demonstrates flagrant bad faith and callous disregard of its responsibilities, the district court’s choice of the extreme sanction is not an abuse of discretion.” (*Emerick v. Fenick Indus., Inc.*, 539 F.2d 1379, 1381 (11<sup>th</sup> Cir.1976)).

Again, dismissal of the Complaint is appropriate not only because of the severity of Plaintiffs’ misconduct, but also because Defendants will not be able to

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also implicated, since Plaintiffs’ claims that they did not have and could not get the data and that Spinrilla was the “only” source of this information were both untrue.

“catch-up” to where they should be in terms of thoroughness of their discovery and preparedness for the remaining phases of the case.

**IV. Conclusion**

It is without exaggeration to say that by hiding the RIAA spreadsheets and that underlying data, Defendants have been severely prejudiced. The Complaint should be dismissed with prejudice and, if it is, Plaintiffs can only blame themselves.

Respectfully submitted this 11<sup>th</sup> day of October, 2017.

**LILENFELD PC**

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**CERTIFICATE OF SERVICE**

I certify that the foregoing DEFENDANTS’ SUPPLEMENTAL BRIEF IN FURTHER SUPPORT OF MOTION FOR SANCTIONS, on October 11, 2017 was filed with the Clerk of Court using the CM/ECF system, which automatically and contemporaneously sends electronic notification and a service copy of such filing to all counsel of record:

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October 11, 2017

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