



Smarter Discovery™

Spinning the Spoliation Record (OR, Download MP3 Sanctions)

I watched David Boies argue the original *Napster* case on CSPAN while taking Computer and Internet Law at McGeorge, University of the Pacific. David Boies is more remembered for later representing Vice President Al Gore in the *Bush v Gore* legal saga.

Online music downloads have caused litigation with the click of the mouse since the days of Napster in the 1990s. *Arista Records LLC v. Usenet.com, Inc.*, 2009 U.S. Dist. LEXIS 5185 (S.D.N.Y. Jan. 26, 2009) continues the story of the music industry suing for copyright infringement.

Arista Records LLC v. Usenet.com, Inc. is a tale of sanctions and music downloads. The Defendants operated Usenet.com, which is network message board that predates the Internet. *Arista Records*, 4-5. The Defendants charged subscribers a monthly fee effectively for file sharing. The Plaintiff music industry claimed the Defendants provided Usenet subscribers access to music piracy groups containing copyrighted digital music files. *Arista Records*, 7. The discovery requests at issues included the Music Groups, Digital Music Files and promotion material on the Defendants' website.

The Plaintiffs claimed the Defendants deliberately destroyed evidence of the Music Groups, Digital Music Files and website information, thus claiming spoliation for the following:

- 1) "Usage Data," which Plaintiffs defined as "pre-existing records from Defendants' computer servers reflecting actual requests by Defendants' paid subscribers to download and upload digital music files using Defendants' service;"
- 2) "Digital Music Files," which Plaintiffs define as "the physical digital copies of the copyrighted sound recordings at issue in this case and related information hosted on computer servers operated by or on behalf of Defendants"; and
- 3) "Highly incriminating promotional materials previously available on the Usenet.com website." *Arista Records*, 8.

The chronologies of facts outlining Plaintiffs' claims are technical and detailed. The following outline is created from the Court's opinion:

August 2007: Plaintiffs first sent a written notice of copyright infringement.

The Defendants did not respond to the written notice.

October 12, 2007: Plaintiff sues Defendants.

January 2008: Plaintiff Rule 34 requests specifically for the Usage Data.

February to March 2008: Plaintiff attempted to acquire data through correspondence with

Defendant

March 8, 2008: Defendants agreed data was relevant and to produce "snapshots."

Arista Records, 9-10

During a period of only days in March 2008, the Defendants disabled the music groups subject to the discovery requests. The Plaintiffs challenged this action and demanded the Digital Music Files be preserved. The Defendants represented the music files had been preserved. *Arista Records*, 12-13.

The Plaintiffs claimed the Defendants reconfigured their system in order to write-over the Digital Music Files. Additionally, the Plaintiffs represented to the Court that only 78 of the 900 Music Groups had been reactivated. *Arista Records*, 13.

The Defendants went to the extreme of removing all references to "Music" and "mp3s" from a promotional webpage. The Court noted the "Defendants destroyed all copies of this webpage, and only produced the sanitized version of it to Plaintiffs during discovery." *Arista Records*, 79-80.

The Court found the Defendants' production was in bad faith and sanctioned the Defendants with an adverse inference instruction for their discovery violations. *Arista Records*, 78-80. The Court based the sanction order on the fact the Defendants had an obligation to preserve and produce the following ESI:
Usage Data and Digital Music Files. *Arista Records*, 61-62.
Images from the website. *Arista Records*, 64.
Promotional materials from the website. *Arista Records*, 79-80.

The Defendants argued that they could not preserve data on their servers because it was transitory in nature without any sort of back-up. *Arista Records*, 68. This argument was flatly rejected, because the Defendants had produced some of the "transitory" Usage Data and Digital Music Files to Plaintiffs. *Id.*

What are the lessons learned from this case? First, don't go around destroying ESI that is relevant to a lawsuit or subject to a discovery request. *Arista Records* has many examples of bad faith behavior with willful acts to remove user group information, digital music files and website information. Additionally, a party's duty to preserve and produce electronically stored information does not allow for unethical gamesmanship.

The other big lesson: Music downloads and piracy has been the subject of litigation for over a decade and will not likely cease anytime soon.