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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THE SAUL ZAENTZ COMPANY,)
a corporation,)
)
Plaintiff)
)
vs.)
)
SPRINT, a corporation,)
)
Defendant.)
_____)

No. C-02-1956-SC

PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION FOR
PARTIAL SUMMARY JUDGMENT

Date: February 7, 2003
Time: 10:00 a.m.
Courtroom 1, 450 Golden Gate Ave.,
San Francisco, CA

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STATEMENT OF THE CASE

This case is, as defendant says, a suit for copyright infringement. Plaintiff produced and copyrighted the motion picture “One Flew Over the Cuckoo’s Nest”. Defendant promoted its products and services with a commercial advertisement that appropriated the film and did so without any authorization from plaintiff.¹ This motion is addressed not to the availability of statutory damages in the within action (there availability is tacitly conceded by defendant) but to the measure of statutory damages. Defendant claims “single infringer” status; in fact, however, defendant is a joint tortfeasor with an undetermined number of television stations, all of which exhibited defendant’s commercial.

Although it seems peculiar (if not downright irregular) to introduce settlement discussions into this motion, defendant has made those discussions the foundation for its motion, claiming that such “discussions have been stalled, in large part because of Plaintiff’s insistence that should the case proceed to trial, Sprint would be exposed to tens of millions of dollars in statutory damages.” Memorandum of Points and Authorities in support of Defendant’s Motion for Partial Summary Judgment on the Issue of Statutory Damages (hereafter “DM”) 2:6-7. But, as the accompanying Declaration of plaintiff’s counsel shows, plaintiff has never suggested that statutory damages would reach the magnitude of “tens of millions” or, indeed, expressed any view whatsoever on the amount of statutory damages.

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That defendant engaged in infringement, and wilfully so, does not seem a matter that is open to serious dispute. Pursuant to paragraph 10 of the Confidentiality Stipulation and Order, defendant is submitting a sealed envelope containing two one-page documents that discovery has yielded in this action. Exhibit A, it will be seen, refers expressly to plaintiff’s film, “One Flew Over the Cuckoo’s Nest”. After Exhibit B, there are no more references to the movie in the documents plaintiff has received.

There is no way for plaintiff to make such an estimate because plaintiff does not have a clue as to the number of different stations which broadcast the commercial; defendant refuses to produce that information, though one of defendant's counsel promised it to plaintiff last summer. Accordingly, in response to defendant's invitation to quote a "reasonable amount" to settle the case, plaintiff's counsel said that it would be impossible to give such an informed estimate without knowing the number of different stations that broadcast the infringing commercial advertisement. Specifically, plaintiff's attorney opined that, given the ruling of the Ninth Circuit in *Columbia Pictures Indus. Inc. v. Krypton Broadcasting of Birmingham, Inc.*, 259 F.3d 1186, 1190, 1194 (9th Cir. 2001), it would border on malpractice to settle without at least *knowing* the number of stations that broadcast the advertisement. It is defendant's attorney who introduced "tens of millions" into the discussion. That told plaintiff that there must be numerous stations involved but, as things stand, plaintiff knows no more than that. Plaintiff, indeed, has not as yet made a decision to seek statutory damages and, of course, need not make such a decision at least until the jury has returned a verdict on liability. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 347 n.5 (1998).

I

PARTIAL SUMMARY JUDGMENT IS INAPPROPRIATE
WHERE THE ISSUE IS NOT THE AVAILABILITY OF DAMAGES
BUT THE MEASURE THEREOF;
IT IS PARTICULARLY INAPPROPRIATE IN A CASE
WHERE THE ISSUE MAY NEVER ARISE

Kendall McGaw Lab. v. Community Memorial Hosp., 125 F.R.D. 420, 421 (D.N.J. 1989) holds that partial summary judgment is not available to resolve issues concerning the

measure of damages as distinguished from issues concerning the availability of damages because such a judgment goes only to a portion of a claim. The Court observed that:

“A Rule 56 movant may not ‘play leapfrog’ with his case by seeking a decision whose validity depends on one or more unresolved issues. To allow another result would ignore the chronological structure of trial practice. Just as the events which produce litigation move forward in time, so must the litigation itself.”

Id. at 422; see also *Antenor v. D & S Farms*, 39 F.Supp.2d 1372, 1375 n.4 (S.D. Fla 1999) and *City of Wichita Kansas v. U.S. Gypsum Co.*, 828 F.Supp. 851, 869 (D. Kan. 1993) as well as authorities therein collected.

It is true, as defendant points out (DM 5:23-24), that *Siddiqui v. U.S.*, 217 F.Supp.2d 985 (D.Ariz. 2002) comes to a result inconsistent with the *Kendall McGaw* holding. But whether partial summary judgment was appropriate does not appear to have been at issue. Each side was seeking summary judgment on damages issues and neither side appears to have suggested that partial summary judgment was open to question. The other case upon which defendant relies (DM 7:7-11), *Fournier v. Erickson*, 202 F.Supp.2d 290 (S.D.N.Y. 2002) does not clash with *Kendall McGaw* because *Fournier* is a holding, in a copyright case, that statutory damages are not available *at all*, thus disposing of the entire claim, rather than a portion thereof, and requiring no “leapfrog.”

II

DEFENDANT IS NOT A SINGLE INFRINGER BUT A MULTIPLE JOINT-TORTFEASOR

Defendant’s case can be fairly capsulated as follows: Sprint is a single infringer and the infringer of a single work is liable for a single statutory damages amount no matter the

number of infringements. Defendant expressly quotes the legislative history of 17 U.S.C. §504, which certainly supports the conclusion that a single infringer is responsible only for a single statutory damages amount no matter the number of infringements. See DM, 6:12-15; H.R. Rep. No. 1476 at 162; 1976 U.S. Code: Congressional and Administrative News, 5659, 5778, Vol. V, 94th Cong. 2nd Session. But defendant has omitted that portion of the legislative history providing that the single infringer rule applies only when the single infringer acted “individually.” Thus,

“Where the infringements of one work were committed by a single infringer *acting individually*, a single award of statutory damages would be made.”

1976 U.S.C.C.A.N. at 5778. (Emphasis added)

The instant case, however, does not concern an infringer who acted “individually”. Sprint did not act individually but jointly with an undetermined number of television stations. For that reason, Sprint is jointly and severally liable with each of the different stations which broadcast the infringing commercial. The very legislative history defendant quotes deals expressly with the issue of a tortfeasor, like Sprint, who has acted other than “individually”.

“ . . . where the work was infringed by two or more joint tortfeasors, the bill would make them jointly and severally liable for [the statutory amount].”

Id.

And, indeed, that is just what the statute provides:

“ . . . the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, *with respect to any one work*, for which

any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally. . .”

17 U.S.C. §504(c) (emphasis added).

Plaintiff is a joint tortfeasor with each of the television stations which broadcast its commercials.² That is precisely what the Ninth Circuit held not once, but three times, in the *Krypton* litigation. In *Krypton*, plaintiff brought suit for infringement against Elvin Feltner Jr., his Krypton International Corporation, in which he was the sole stockholder, and three television stations which were wholly owned by the Krypton International Corporation. “During the course of the litigation, Columbia dropped all causes of action except its copyright claims against Feltner.” *Columbia Pictures Television v. Krypton Broadcasting of Birmingham, Inc.*, 106 F.3d 284, 288 (9th Cir. 1997).³ The district court found that airings of the same work by a different station constituted a separate act of infringement. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998); *Columbia Pictures v. Krypton Board of Birmingham, supra*, 259 F.3d at 1190.⁴ Feltner claimed that the district court’s

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Plaintiff agrees with defendant that the number of broadcasts of its commercial advertisement on any individual station is not a proper measure of the number of infringements. See DM 6:25-26. But the stations that broadcast the infringing commercial are, themselves, infringers no matter the number of times it was broadcast and, according to the terms of the statute and the legislative history, defendant is jointly and severally liable with each of those stations for their infringing act, as long as the stations broadcast it at least once.

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See also *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 343 n.1 (1998); *Columbia Pictures, Inc. v. Krypton Broadcasting of Birmingham*, 259 F.3d 1186, 1190 (9th Cir. 2001).

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As defendant notes (DM, 7-8), the Court also held that each episode of a television series constituted a separate “work” for purposes of calculating statutory damages. That holding is not pertinent to the instant case.

ruling was error on the same ground defendant urges here, that he was a single infringer. While Feltner was in a position to argue (as Sprint cannot), that all the infringing entities were under his control and engaged in but *one* endeavor, the district court found otherwise. The district court found that Feltner was not acting alone and thus not a single infringer; to the contrary, each of the three stations independently infringed on plaintiff's copyright and were not, *as to each other*, joint tortfeasors. In other words, each station was a separate joint tortfeasor with Feltner; no station was a joint tortfeasor with another station. *Columbia Pictures Television v. Krypton Board of Birmingham, Inc.*, *supra*, 106 F.3d at 294 including n.7. Accordingly, Feltner was deemed a joint and several infringer with each of the three television stations and there were, therefore, three separate statutory awards for infringement for each of the three different stations. *Id.*, reversed on other grounds, *Feltner v. Columbia Pictures Television, Inc.*, *supra*, 523 U.S. at 552-555. The Supreme Court reversed the Ninth Circuit's holding (106 F.3d at 293) that Feltner was not entitled to jury trial on the statutory damages issue. But Feltner's Supreme Court victory may be described, without exaggeration, as Pyrrhic. The district court statutory damages award from which Feltner appealed was in the sum of \$8,800,000.00. 106 F.3d at 288. The Ninth Circuit ruled that Feltner's success on the jury trial issue in the United States Supreme Court did not make him a prevailing party for purposes of an award of attorneys' fees, *Columbia Pictures v. Krypton Broadcasting of Birmingham*, 152 F.3d 1171 (9th Cir. 1998)⁵, and, on remand, the jury awarded statutory

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The Ninth Circuit in 1998 also noted that it had previously affirmed the district court's award of statutory damages and that the Supreme Court's opinion had in no way altered Columbia's entitlement to statutory damages. 152 F.3d 1171-1172. In its 2001 decision, the Ninth Circuit, describing "[m]ore specifically" its 1997 ruling, emphasized that it had *rejected*

damages in an amount almost four times the original award: \$31.68 million dollars. 259 F.3d at 1189.

Feltner, again, appealed the award of statutory damages. Once again Feltner claimed that he qualified as a single infringer and that it was error to deem the airing of the same work on different stations as separate acts of infringement. Again, the Ninth Circuit rejected Feltner's claim and affirmed the district court.

Feltner, as already noted, had at least a plausible argument that, because of his ownership of all the stations, he was a "single infringer" and this status also provided the plausible argument that, at the very least, all of the stations were "joint tortfeasors" so that there was only one instance of joint infringement. Again, the Ninth Circuit squarely ruled the other way:

"Feltner next argues that the district court erred by allowing two awards of statutory damages for one 'work' under Copyright Act §§504(c)(1). Specifically, Feltner asserts that he is entitled to introduce evidence that the two defendant stations that aired 'Who's the Boss?' are joint tortfeasors, and that therefore, each station's airing of the same episode should only count as one 'work.' This argument is not persuasive for two reasons. First, there is no evidence in the record to suggest that the stations are joint tortfeasors. Second, to the extent that Feltner seeks to introduce evidence to demonstrate his connection with each of the stations, that simply makes Feltner a joint tortfeasor with each station – it does not make each station a joint tortfeasor with respect to the other. *Columbia Pictures*, 106 F.3d at 294. This district court's decision on this issue is therefore affirmed." 259 F.3d at 1194.

Feltner's contention that the district court "erred in concluding that each airing of the same episode by the same station controlled by Feltner constituted a separate act of infringement . . ." 259 F.3d at 1190 n.3.

Defendant's instant motion is, therefore, premised on a theory of liability which cannot conceivably be reconciled with the *Krypton* holdings of the Ninth Circuit. Defendant is indubitably a joint tortfeasor with each television station which broadcast the infringing commercial and, as we understand it, there is no contention by defendant that these stations were acting together and thus joint tortfeasors as to each other.⁶

Defendant, in its Memorandum in support of its Motion, at no point acknowledges the Ninth Circuit's painstaking *Krypton* analyses of the joint tortfeasor rule as it applies to an infringer who broadcasts on different television stations. Except for the attempt by plaintiff to fashion a copyright infringement rule immunizing a direct infringer from its contributory infringements, there is no discussion of joint tortfeasors at all. We turn to defendant's suppositious rule immunizing direct infringers from liability.

III

THERE IS NO RULE IMMUNIZING A DIRECT INFRINGER FROM LIABILITY FOR CONTRIBUTORY INFRINGEMENTS

Defendant insists there is a rule that no direct infringer can, at the same time, be a contributory infringer. In support of that proposition, defendant cites *Self v. Fisher Controls*

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There is no tension between the *Krypton* cases and *Fournier v. Erickson*, 202 F.Supp.2d 290 (S.D.N.Y. 2002) upon which defendant's rely. *Fournier* is a case in which statutory damages were held unavailable because the infringement occurred before the copyrighted work was registered. See 17 U.S.C. §412 (1). The court's opinion pre-supposes that there was more than one infringement (see 202 F.Supp.2d at 298) but that the campaign having "commenced" before there was registration, the different discrete infringements were not within the ambit of 17 U.S.C. §504 (c).

Co. Inc., 566 F.2d 62, 64 (9th Cir. 1977) as holding that “Contributory infringement actions are limited to situations where defendant itself has not directly infringed . . .” DM, 8:24-28.

First of all, neither *Self* nor the other authority upon which defendant relies, *Suresafe Indus., Inc. v. C & R Pier Mfg.*, 850 F.Supp. 869 (S.D.Cal. 1993), is a copyright case. Both are patent cases. Secondly, there is no rule that a direct patent infringer cannot, at the same time, also be a contributory patent infringer. Taking the second point first:

Cases abound in which a direct patent infringer has also been found a contributory infringer. See, for example, *Fromson v. Advance Offset Plate, Inc.*, 720 F.2d 1565, 1567-1568 (Fed. Cir. 1983); *Procter & Gamble, Co., v. Nabisco Brands, Inc.*, 604 F.Supp. 1485, 1490 (D. Del. 1985). The narrow rule, which defendant has mistakenly expanded to conflict with *Fromson*, has to do with a definitional point of patent law which seems to arise only in cases concerning venue. 35 U.S.C. §271(c), which defines a contributory patent infringer, is, by its terms, incompatible with a direct infringement. Some have described this as the “component” rule. See, e.g., *U.S. Fidelity & Guar. v. Star Technologies*, 935 F.Supp. 1110, 1115 n.3 (D.Or. 1996). In inducement cases (see 35 U.S.C. §271(b)) it is sometimes described as the “same item” rule. The issue arises in the context of venue, where a plaintiff, for purposes of venue, pleads that the “same item” is both a direct infringement and a contributory infringement or inducement. *Procter & Gamble, Co., v. Nabisco Brands, Inc.*, *supra*, 604 F.Supp. at 1490 (D. Del. 1985); see also *Picker Intern. Inc. v. Varian Assoc. Inc.*, 661 F.Supp. 347, 350 (N.D. Ohio 1987) as well as the cases cited by defendant.

When properly pleaded, as to a single device, a claim of contributory infringement necessarily excludes a direct infringement. As Rosenberg explains it,

“By its terms, 35 U.S.C. §271(c) only applies to sales, offers to sell and importation into the United States.

A plaintiff claiming contributory infringement must allege and ultimately prove four elements:

- (1) The defendant sold a component or a material for use in practicing the patented invention;
- (2) The component or material constitutes a material part of the invention;
- (3) The defendant knew that the item it sold was especially made or adapted for use in infringing the patented invention; and
- (4) The item sold is not a staple article or commodity of commerce suitable for substantial noninfringing use.

Only the seller of such component is liable as a contributory infringer. The buyer becomes liable as a direct infringer when he uses the overall patented combination. And, additionally, direct infringement must be alleged and proven.” (Footnotes omitted)

3 Rosenberg, *Patent Law Fundamentals*, §17.02[2][b] 17-41 (2nd ed, Rev. 2001). 35 U.S.C. §271(c) does not include “the overall patented combination” except as to the buyer and thus, as to the very same item, one cannot be both a direct and contributory patent infringer. *But* where one both directly infringes, by producing an item itself, and infringes contributorily, by providing components of the same device to others, it is both a direct and contributory infringer. *Fromson v. Advance Offset Plate, Inc.*, *supra*, 720 F.2d 1567-1568 (Fed. Cir. 1983); *Procter & Gamble, Co., v. Nabisco Brands, Inc.*, *supra*, 604 F.Supp. at 1490 (D. Del. 1985).

There is, moreover, no parallel in copyright law to the statutory component rule of contributory infringement in patent law. This Court’s opinion in *FMC Corp. v. Up-Right, Inc.*, 816 F.Supp. 1455 (N.D.Cal. 1993), *aff’d*, 21 F.3d 1073 (Fed. Cir. 1994), for example,

holding that replacing parts for the heads on a grape harvester were “repairs” and not an infringing “reconstruction”, could not have any conceivable application to a copyright case.⁷

The copyright “contributory infringer” doctrine has nothing to do with the statutory contributory infringer doctrine of copyright law. The former is a judicial construct and serves simply as an analytic tool to identify infringement in its various forms. *Casella v. Morris*, 820 F.2d 362, 365 (11th Cir. 1987), a case of both direct and contributory infringement, contains the following extremely pertinent quotation from *Sony Corp. v. Universal Studios, Inc.*, 464 U.S. 417, 435 (1984):

[V]icarious liability is imposed in virtually all areas of the law, and the concept of contributory infringement is merely a species of the broader problem of identifying the circumstances in which it is just to hold one individual accountable for the actions of another . . . [T]he lines between direct infringement, contributory infringement and vicarious liability are not clearly drawn . . . The lack of clarity in this area may, in part, be

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Which is not to say, *FMC Corp.* does not have significant observations applicable generally to tort law. On the contrary, it’s statement about joint tortfeasors is certainly applicable here:

“Under federal patent law, when infringement results from the participation and combined or successive action of several parties, those parties are joint infringers, and are jointly liable. *See, e.g., Shields v. Halliburton Co.*, 493 F.Supp. 1376, 1389 (1980) (‘Infringement of a patented process or method cannot be avoided by having another perform one step of the process or method.’). The result is the same where one or more of the accused infringers is a contributory infringer:

“A contributory infringer, like any joint tortfeasor, is responsible for the full extent of the harm suffered by the plaintiff. Like any tortfeasor, defendants are liable not only for the portion of the harm they caused, but also the portion of the harm caused by the direct infringer. {Citation}.”

FMC Corp. v. Up-Right, Inc., *supra*, 816 F.Supp. at 1461.

attributed to the fact that an infringer is not merely one who uses a work without authorization by the copyright owner, but also one who authorizes the use of a copyrighted work without actual authority from the copyright owner.

Casella v. Morris, 820 F.2d 362, 365 (11th 1987) quoting from *Sony Corp. v. Universal Studios, Inc.*, 464 U.S. 47, 435 n.17 (1984); see also *Encyclopedia Britannica Educational Corp. v. Crooks*, 558 F.Supp. 1247, 1256 (W.D.N.Y. 1983).

That is this case in a nutshell. When defendant copied plaintiff's work, it invaded both plaintiff's right to reproduce and plaintiff's right to prepare derivative works. But that did not produce two infringements. It produced, so to speak, the "same item", the commercial advertisement. But when defendant arrogated to itself plaintiff's power to authorize others to use plaintiff's work, it engaged in a new and separate act of infringement. Those whom defendant "authorized" to infringe plaintiff's work themselves became infringers when they did so. And their infringement was a fresh one committed jointly with defendant. This is so whether one interprets the statutory "authorize" language (17 U.S.C. §106) as prohibiting a direct infringement or a contributory infringement. Unlike patent law, there is no bright line between the two. What we have here is what Justice Holmes, in the "Ben Hur" adaptation case, described as a general tort rule concerning the liability of aiders and abettors. *Kalem Co. v. Harper Brothers*, 222 U.S. 55 (1911). Whatever it is called, one who directly infringes a copyright engages in a new infringement whenever he authorizes another to join him in infringing and that other then infringes.

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IV

WHETHER PLAINTIFF CAN PROVE THAT DEFENDANT IS A JOINT TORTFEASOR

Defendant complains about the manner in which plaintiff has pleaded defendant's multiple infringements of plaintiff's copyright. Defendant says there should be allegations of vicarious or contributory infringement and that, further, plaintiff cannot prove that defendant participated in the infringements which occurred when the different stations broadcast defendant's commercial. DM, 8:5-21. Defendant's pleading criticisms, in sum, are that plaintiff has not pleaded legal conclusions. Had plaintiff pleaded legal conclusions, doubtless defendant would have complained about that, and with a good deal more justification. Defendant makes no claim that plaintiff has not pleaded the pertinent ultimate facts; that should end the matter. The federal rules provide for "notice pleading," *Leatherman v. Tarrant Cy. Narcotics Unit*, 507 U.S. 163, 168 (1993), and defendant does not claim that it has not received notice that plaintiff deems broadcasts on different stations as separate infringements. Indeed, as the accompanying Declaration of Paul N. Halvonik, paragraph 4 shows, defendant, in addition to the allegations of the complaint concerning multiple broadcasts over an unknown number of stations, were specifically informed that plaintiff deemed broadcasts on separate stations as separate acts of infringement over a week before defendant filed its answer to the complaint. If defendant was under any doubt that the allegations of the complaint gave notice consistent with the theory that broadcasts on separate stations were separate acts of infringement, then defendant should have moved for a more definite statement pursuant to Rule 12(e) of the Federal Rules of Civil Procedure. But defendant did not do so

and has never had such a doubt. As previously noted, the “lines between direct infringement, contributory infringement and vicarious liability are not clearly drawn . . .” *Sony Corp. v. Universal Studios, supra*, 464 U.S. at 435 n.17. Surely a plaintiff is not required, in its complaint, to draw those kinds of distinctions, especially when a defendant does not claim to be misled. Defendant has found no authority for such a proposition and it is difficult to imagine such an authority being unearthed.

Defendant’s claim that plaintiff cannot prove that defendant is a joint tortfeasor with the television stations which broadcast its advertisement is a different kettle of fish. First of all, that is a factual issue. Defendant brings this motion for partial summary judgment and it is defendant’s burden to show “that there is no genuine issue as to any material fact . . .” Rule 56(c). Defendant does not purport to show that these advertisements appeared on broadcast television through some happenstance independent of defendant. On the contrary, paragraph 5 of the Declaration of Donna D. Osborn seems, if anything, to admit Sprint’s complicity. There being no affidavit from defendant challenging the complicity of Sprint in the broadcasting of Sprint’s commercial, there would seem no need for defendant to file an affidavit disputing a claim in a Memorandum unsupported by any statement under penalty of perjury. But if plaintiff is incorrect in this assessment, then it should be said that defendant has obstructed all attempts by plaintiff to discover the identities of the television stations which broadcast Sprint’s commercial. See DM, 4-5. Accordingly, from an abundance of caution, plaintiff is submitting, with this Opposition, a Motion pursuant to Rule 56(f) asking that hearing on defendant’s Motion be postponed until plaintiff has had an opportunity to

conclude its discovery concerning the identity of the television stations and the circumstances under which they broadcast Sprint's commercial.⁸

Additionally, defendant's arguments about plaintiff's incapacity to prove Sprint's complicity in the broadcast of Sprint's own television commercial would appear to be an argument that goes to liability, not damages and, consequently, is a good reason why defendant's motion should be deemed an inappropriate "leap frog" motion for partial summary judgment as described in §I, *supra*.

CONCLUSION

Defendant's Motion for Partial Summary Judgment in this copyright case is, itself, quite a creative endeavor. It is justified on the grounds that settlement discussions have "stalled." This case could go away, says defendant, but for plaintiff's extravagant assessment of the value of the case combined with a greed that surpasseth understanding. That is not a good reason for partial summary judgment and it is also a total misconception and

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The number of stations on which the commercial appeared would be relevant to the question of statutory damages even if defendant's theory that only one infringement occurred were tenable. There is no dispute that plaintiff, at the very least, is entitled to elect statutory damages for at least one infringement. The number of stations on which the infringing commercial appeared would clearly be information to which the court would be entitled in deciding how much statutory damages should be awarded. 17 U.S.C. §504(c) sets minimum and maximum amounts and, within those ranges, the court has near unfettered discretion to decide the amount to be awarded (see, e.g., *Playboy Enterprises, Inc., v. Webbworld, Inc.*, 991 F.Supp. 543 (N.D. Tex. 1997 *aff'd* 168 F3d 486) and is entitled to any evidence pertinent to whether the award should tilt toward the smaller or larger figure. See, e.g., *Columbia Pictures Industries, Inc. v. T & F Enterprises, Inc.*, 68 F.Supp.2d 833 (E.D. Mich 1999). Indeed, defendant's adamant refusal to furnish this information is, itself, a factor the court will be entitled to consider when imposing statutory damages. *Segrets, Inc. v. Gillman Knitwear Co., Inc.*, 42 F.Supp.2d 58, 70 n. 25 (D.Mass. 1998); *Video Café, Inc. v. De Tall*, 961 F.Supp.23, 26 (D.P.R. 1997).

misrepresentation of plaintiff's position. Plaintiff has yet to set a value on this case. See Halvonik Declaration, paragraphs 5 and 6. But plaintiff does want to know the number of stations upon which the infringing commercial ran, information plaintiff would be entitled to even if defendant's claim to be a single infringer, rather than a joint tortfeasor, had some foundation. See footnote 8, *supra*.

Although defendant has labeled its motion as one concerning the availability of statutory damages, that is not a correct characterization of what it seeks. Rather than dispute plaintiff's entitlement to statutory damages, plaintiff seeks a determination concerning a *measure* of statutory damages. Partial summary judgment should not be available for such a "leapfrog". Furthermore, defendant's claim to be a "single infringer" is also mischaracterization. Defendant is a joint tortfeasor with every television station which it authorized to use its infringing product. There is nothing ambiguous about the Ninth Circuit's *Krypton* rulings on that point.

Finally, to the extent defendant asserts that plaintiff is unable to prove that defendant is responsible for the running of defendant's own commercial on an unknown number of television stations, then it must be said that the fault lies with defendant, who has obstructed and continues to obstruct all discovery on the matter.

For the reasons mentioned, plaintiff respectfully urges that defendant's Motion for Partial Summary Judgment be denied.

Dated: February 14, 2003.

Respectfully submitted,

PAUL N. HALVONIK
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THE SAUL ZAENTZ COMPANY

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