

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARISTA RECORDS LLC; ATLANTIC
RECORDING CORPORATION; ARISTA
MUSIC, fka BMG MUSIC; CAPITOL
RECORDS, INC.; ELEKTRA
ENTERTAINMENT GROUP INC.;
INTERSCOPE RECORDS; LAFACE
RECORDS LLC; MOTOWN RECORD
COMPANY, L.P.; PRIORITY RECORDS LLC;
SONY MUSIC ENTERTAINMENT, fka SONY
BMG MUSIC ENTERTAINMENT; UMG
Recordings, INC.; VIRGIN RECORDS
AMERICA, INC.; and WARNER BROS.
RECORDS INC.,

Plaintiffs,

v.

LIME GROUP LLC; LIME WIRE LLC; MARK
GORTON; GREG BILDSON; and M.J.G. LIME
WIRE FAMILY LIMITED PARTNERSHIP,

Defendants.

ECF Case

06 CV 5936 (KMW)(DF)

**DEFENDANTS' REPLY MEMORANDUM OF LAW IN
SUPPORT OF THEIR MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS**

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Defendants Lime Group LLC, Lime Wire LLC, Mark Gorton, and M.J.G. Lime Wire Family Limited Partnership (collectively, “Defendants”) respectfully submit this reply memorandum of law in support of their motion for partial judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c).

INTRODUCTION

Plaintiffs’ opposition brief (“Pl. Op.”) is nothing more than an attempt to reargue the Second Circuit’s decision in *Bryant v. Media Right Productions, Inc.*, 603 F.3d 135 (2d Cir. 2010) (Wood, J.). In *Bryant*, the Court unambiguously held that where, as here, *the copyright holders themselves* issue their sound recording works as “compilations,” in the form of albums or CDs, they are limited to a single statutory damages award for any infringements of the works included on the album or CD. It is thus irrelevant here, just as it was in *Bryant*, whether or to what extent Plaintiffs’ individual sound recordings may have been separately copyrighted.¹ It is likewise irrelevant that in this case, there were individual digital downloads of Plaintiffs’ songs; the same was true in *Bryant*, but the Court held that this did not matter, given the plain language of the Copyright Act stating that all the “parts” of a compilation must be treated as “one work” for purposes of calculating statutory damages.² And Plaintiffs concede, as they must, that it is irrelevant whether Plaintiffs’ individual songs can be said to have “independent economic value,” as that test was flatly rejected by the Second Circuit in *Bryant*.³

¹ See 603 F.3d at 138, 140 n.4, 141 (although plaintiffs “separately registered at least some of the twenty songs on the [A]lbums,” and the Court “assume[d] that each song on the Albums was copyrighted separately,” the “fact that each song may have received a separate copyright is irrelevant to [the] analysis”).

² *Id.* at 142; see 17 U.S.C. § 504(c)(1).

³ See Pl. Op. at 6 n.4; *Bryant*, 603 F.3d at 141-42.

Recognizing that *Bryant* controls the outcome of this motion, Plaintiffs attempt to distinguish it on the basis that in that case, the copyright owner distributed its songs “exclusively in album form,” whereas here, Plaintiffs “market and distribute” many of their songs as single tracks, “as well as” on an album basis. Pl. Op. at 6, 2. This purported factual distinction finds no support in *Bryant* or any other case in this Circuit. Nor is it of any consequence under the Copyright Act, which limits statutory damages based on how the works are *copyrighted* (whether in compilation form or otherwise), not on how they are “marketed and distributed.” Plaintiffs’ “marketing and distribution” test is simply another name for the “independent economic value” test rejected in *Bryant*. Tellingly, the same argument, by these same Plaintiffs, was rejected by Judge Rakoff, in the seminal *UMG Recordings* case,⁴ where the record labels argued that they were entitled to separate statutory damages awards for each song on their CDs because, among other reasons, the labels themselves “commonly sold” their individual titles as “singles” and marketed them “electronically” on a “per-song basis.”⁵

Because it is irrelevant whether Plaintiffs “marketed and distributed” their individual works on a “per-song” basis, the “factual issue” that Plaintiffs claim precludes judgment on the pleadings – whether and how many of the sound recordings on Plaintiffs’ final list have been “marketed and distributed on a stand-alone basis” (Pl. Op. at 9) – is not a material factual issue at all. The only relevant fact under *Bryant* and the Copyright Act is how many separate “works,” for purposes of statutory damages, appear on Plaintiffs’ “Final List” of sound

⁴ *UMG Recordings, Inc. v. MP3.COM, Inc.*, 109 F. Supp. 2d 223 (S.D.N.Y. 2000).

⁵ See Memorandum of Plaintiffs UMG Recordings, Inc., Sony Music Entertainment, Inc., Capitol Records, Inc. and Interscope Records in Support of Their Motion for Partial Summary Judgment as to the Assessment of Statutory Damages Per Song Infringed, 2000 WL 34475036, at 7-8 (“UMG Brief”) (attached as Exhibit 1 to the Supplemental Declaration of John R. Oller) (“Oller Decl.”).

recordings for which they are seeking damages in this litigation (Schedule A to the Amended Complaint). Plaintiffs do not dispute that when the works on their Final List are grouped into compilations, the total number of works is reduced from approximately 10,000 to 2,533.⁶ There is no issue of fact; the motion can be decided purely as a matter of law based on the pleadings and the materials properly considered as part of them.

Lacking case support for their position, Plaintiffs advance what they appear to consider a policy argument based on the “deterrence rationale” of Section 504(c) of the Copyright Act. Plaintiffs contend that “deterrence” will somehow be undermined if they are “limited” to a claim of 2,500 works times the statutory maximum of \$150,000 per work (or potentially \$375 million), as opposed to 10,000 times \$150,000, or the patently absurd figure of \$1.5 billion. But it is Plaintiffs, not Defendants, who have elected to seek statutory damages, including both the benefits and limitations that go with that choice. Plaintiffs could have avoided any “per compilation” rule by electing to put on a case of actual damages. Unable to prove any such damages, they seek a statutory damages award of \$150,000 per work that would provide them a windfall, wholly out of proportion to any actual loss for songs that sell for 99 cents on iTunes, and which the labels give away for free, or virtually free, to sites like Google and YouTube.⁷ The “per work” and compilation language added by Congress to the 1976 Copyright Act was a conscious attempt to prevent plaintiffs from obtaining excessive statutory awards simply by multiplying separate copyrights and separate infringements. The Second Circuit in

⁶ See Declaration of Todd G. Cosenza, ¶ 6, Ex. 4 (Doc. No. 332, filed with Defendants’ Opening Brief).

⁷ The facts in this regard are being and will continue to be developed through discovery which, contrary to Plaintiffs’ protests, the Magistrate Judge has said is appropriate and not the “delay” tactic Plaintiffs claim. See Nov. 2, 2010 Discovery Order (Doc. No. 339).

Bryant, and a consistent line of District Court cases dealing specifically with music recordings, have appropriately applied the plain language of the Copyright Act to reject the same arguments advanced by Plaintiffs here. This Court should do likewise.

ARGUMENT

A. Plaintiffs Are Limited To A Single Statutory Damages Award Per Compilation.

Under the Copyright Act, a copyright owner who has elected to pursue statutory damages is limited to a single award for “all infringements involved in the action, with respect to any one work.” 17 U.S.C. § 504(c)(1). For the purpose of determining statutory damages, “*all the parts* of a compilation or derivative work constitute *one work*.” *Id.* (emphasis added). The term “compilation” includes “collective works,” which are works “in which a number of contributions, *constituting separate and independent works in themselves*, are assembled into a collective whole.” 17 U.S.C. § 101 (2006) (emphasis added). Thus, because the Copyright Act “specifically states that all parts of a compilation must be treated as one work for the purpose of calculating statutory damages,” the infringement of such a “compilation,” or any part thereof, is an infringement of a single work subject to a single statutory award. *See Bryant*, 603 F.3d at 142.

Under *Bryant*, the only question to be answered, in determining whether the “one statutory damage award per compilation” rule applies, is whether the copyright holder has issued its works as compilations. 603 F.3d at 141. If it has, then it does not matter whether the works have *also* been issued as separate copyrighted works. *Id.* (“[T]he fact that each song may have received a separate copyright is irrelevant”). *See also id.* at 142 (“The one-award restriction applies even if the parts of the compilation are ‘regarded as independent works for other purposes.’”).

“An album falls within the Act’s expansive definition of compilation” as it is “a collection of preexisting materials – songs – that are selected and arranged by the author in a way that results in an original work of authorship – the album.” *Bryant*, 603 F.3d at 140-41.

Plaintiffs do not dispute – nor can they – that they chose to collect, assemble, and issue the vast majority of the songs or “Tracks” listed in Schedule A in the form of album compilations. *See* Pl. Op. at 3 (“Plaintiffs have marketed and distributed the vast majority of the sound recordings in issue on both a per-track and *per album* basis”) (emphasis added). The face of the pleadings further bears this out in that Plaintiffs’ “Final List” of sound recordings consists almost entirely of album registration numbers that subsume multiple individual songs.

In some cases (less than 400 out of the 10,000-plus total), Plaintiffs list individual songs that are not otherwise included in compilations on Schedule A,⁸ and Defendants have counted these songs individually in calculating the 2,533 total number of separate works. But these exceptions prove the rule – that the vast majority of works appearing on the Final List are compilations, the infringement of all or part of which gives rise to a single statutory award.

Plaintiffs make a number of arguments, none having any merit, in an effort to avoid the unequivocal holding of *Bryant* and the plain text of the Copyright Act. For example, Plaintiffs assert that *Twin Peaks Productions v. Publications International*, 996 F.2d 1366 (2d Cir. 1993), and *WB Music Corp. v. RTV Communication Group, Inc.*, 445 F.3d 538 (2d Cir.

⁸ For example, Schedule A lists Bruce Springsteen’s “Dancing in the Dark” under the individual sound recording’s copyright registration number 55-658, rather than under the “Born In the U.S.A.” album’s compilation registration number of 55-647. By contrast, the songs “Bobby Jean,” “Cover Me,” “Darlington County,” “Downbound Train,” “Glory Days,” “I’m Goin’ Down,” “I’m On Fire,” “My Hometown,” and “No Surrender,” all part of the “Born In the U.S.A.” album, are listed under the same registration number as that album (55-647). If Plaintiffs had other individual songs with their own copyright registration, separate and apart from any compilation copyright, they did not include them on their “Final List,” despite having every opportunity to do so.

2006), stand for the proposition that if parts of a compilation are distributed as a “stand-alone work,” they may each support a separate statutory award. Pl. Op. at 5. But those cases are inapposite because they did not involve any compilations created and authorized by the *copyright holders*. The Second Circuit confirmed this in *WB Music*, where it explained that the issue in *Twin Peaks* was whether a compilation “created *without the authorization of the infringed copyrights’ owners* constitutes ‘one work.’” 445 F.3d at 540 (emphasis added). The Court answered this question in the negative, finding that “[a]s in *Twin Peaks*, there is no evidence here that any of the separately copyrighted works were included in a compilation *authorized by the copyright owners. Rather, the compilations were created by the defendants.*” *Id.* at 541 (emphasis added).

In *Bryant*, the Court expressly distinguished *WB Music* and *Twin Peaks* on this basis, because in *Bryant*, it was “*the copyright holders* who issued their works as ‘compilations’; they chose to issue Albums.” 603 F.3d at 141. That is true here as well. Thus, the “plain language of the Copyright Act” limits Plaintiffs to one statutory award for any infringements of the songs appearing on their albums. *Id.*

Plaintiffs do not and cannot meaningfully distinguish *Bryant*, or any of the cases it cited with approval that reached the same conclusion. *See id.* at 141 n.6. In fact, each of the arguments advanced by Plaintiffs here has already been rejected by the courts that have specifically found album and CD compilations to constitute a single work. For example, Plaintiffs here argue that the downloads of their works were not on an “album-only” basis because “users could copy and distribute those sound recordings without limit on a *per track* basis.” Pl. Op. at 1 (emphasis in original). As Plaintiffs argue, LimeWire facilitated searches for

“particular sound recordings,” and facilitated infringement of Plaintiffs’ works “on a per-track basis.” Pl. Op. at 3. The plaintiffs in *Bryant* made the exact same argument:

The individual songs were *specifically* sold by The Orchard through its download partners such as iTunes, eMusic, MSN Music, RealNetworks (Rhapsody.com) and were individual digital downloads of the digital copies of the aforementioned songs. This represents the splitting up of the Plaintiffs’ works or the converse of the case where the Defendant combines the songs into a compilation. The *Defendants* sold the songs individually.

See Appellants’ Brief in *Bryant*, at pp. 33-34, relevant portions attached as Oller Decl. Ex. 2 (emphasis in original).

The Second Circuit rejected this argument, stating that separate statutory awards could not be justified by the fact that “music is increasingly available in digital form, which has made it easier for infringers to break apart albums and sell the album’s songs individually. . . . We cannot disregard the statutory language *simply because digital music has made it easier for infringers to make parts of an album available separately.*” 603 F.3d at 142 (emphasis added).

In fact, the Plaintiffs in this case (UMG Recordings, Sony Music and Capitol Records) made the very same argument in *UMG Recordings, Inc. v. MP3.COM, Inc.*, 109 F. Supp. 2d 223 (S.D.N.Y. 2000). There, the record labels argued that their copyrighted works were “copied to and stored on defendant’s servers by song-title,” that “[e]ach track on the CD is represented as a unique file,” that the defendant’s internet service “lists individual songs and encourages users to create their own playlists without regard to album,” that “users may choose the order in which they listen to multiple artists’ songs . . . by song-title, not by CD,” that users could search for MP3 music by song “but not by CD or album,” and that the defendant MP3.com’s “own website is designed for users to download MP3 versions of individual songs,

not entire albums.”⁹ Judge Rakoff nonetheless expressly declined to grant an award per song because the songs were registered as compilations. 109 F. Supp. 2d at 225 (stating that to award damages on a per-song basis would “make a total mockery of Congress’ express mandate that all parts of a compilation must be treated as a single ‘work’ for purposes of computing statutory damages”). *See also Country Road Music v. MP3.com, Inc.*, 279 F. Supp. 2d 325, 332 (S.D.N.Y. 2003) (“the Copyright Act unambiguously provides that a ‘compilation,’ although composed of ‘separate and independent works,’ ‘constitute[s] one work’ for purposes of calculating statutory damages” and holding that “each CD that defendant copied to its servers constitutes one work”) (internal citations omitted).¹⁰

Plaintiffs also seek to distinguish *Bryant* on the grounds that they “market and distribute” many of their copyrighted works as individual tracks, not just on albums, through both traditional means and digital distribution channels such as Apple’s iTunes. Pl. Op. at 1-3, 6, 9 (observing that individual tracks on Michael Jackson’s “Bad” Album are also “available for download purchase on iTunes” as “stand-alone tracks”). The fact has no legal relevance. Nothing in *Bryant* suggests or even hints that such a distinction makes any difference to the question of whether compilations issued by the copyright holder can support multiple statutory awards. The copyright holders in *Bryant* chose to issue their works as compilations; that is true here as well. That the record companies here have “also” made their songs available

⁹ *See* UMG Brief, *supra* n. 5, at 7-8 (Oller Decl. Ex. 1).

¹⁰ Plaintiffs seek to distinguish *UMG* and *Country Road* on the grounds that “the only infringement at issue was copying or marketing of the complete CDs.” Pl. Op. at 6 n3. But in neither case was the holding limited to “infringements of complete CDs.” *See also King Records, Inc. v. Bennett*, 438 F. Supp. 2d 812, 840-43, 864-66 (M.D. Tenn. 2006) (plaintiff record companies were limited to one statutory damages award per compilation even where some songs were individually copied and infringed by the defendant).

individually, electronically or otherwise, does not alter the fact that under Section 504(c)(1) of the Copyright Act, “all parts of a compilation” are treated as a single work. This is true even where components “constituting separate and independent works in themselves” are included in the compilation or collective work. *See* 17 U.S.C. § 101 (*emphasis added*). The Copyright Act says nothing about the manner in which the works are “marketed and distributed” and nothing about statutory damages turns on that fact.

Again, this very argument by these Plaintiffs has already been rejected. In the *UMG Recordings* case, the same record companies contended that they were entitled to separate statutory damages awards for each song on their CDs because “[i]ndividual titles from plaintiffs’ albums are often released and purchased as singles” and because, “to the extent the plaintiffs have been offering music electronically, it has been on a per-song basis.”¹¹ The court nonetheless applied the per-compilation limitation to the record companies’ statutory damages claims. 109 F. Supp. 2d at 225.

Likewise, in *Jett v. Ficara*, No. 04 Civ. 9466, 2007 WL 2197834 (S.D.N.Y. June 29, 2007), decided well after advent of the digital, iTunes era, Judge Berman applied the per compilation limitation to plaintiffs’ statutory damages claims for defendants’ infringement of two albums of Joan Jett songs. The first album contained 12 musical compositions that were independently registered with the U.S. Copyright Office, and the second contained 10 independently registered compositions. *Id.* at *3-4. As alleged in plaintiffs’ complaint and demonstrated in plaintiffs’ Proposed Findings of Fact and Conclusions of Law, a number of the individual songs appeared on different albums and, in some instances, had been sold and

¹¹ *See* UMG Brief, *supra* n. 5, at 7-8 (Oller Decl. Ex. 1).

marketed separately by plaintiffs as singles.¹² *Id.* at *3-5. The district court held that “only two ‘works’ were infringed [by defendants] – the albums . . . – and that plaintiffs are, therefore, entitled to statutory damages for the infringement of two works only.” *Id.* at *8.

In arguing that their “marketing and distribution” of individual songs entitles them to separate statutory awards for each song, Plaintiffs are simply attempting to resurrect the “independent economic value” test that was rejected in *Bryant*. See 603 F. 3d at 142 (the statutory language “provides no exception for a part of a compilation that has independent economic value, and the Court will not create such an exception”); *UMG Recordings*, 109 F. Supp. 2d at 225. *Bryant* and other courts have made clear that digitalization of music does not support application of the “independent economic value” test. Plaintiffs’ attempt to revive that test, in a different guise, should be rejected.¹³

Finally, Plaintiffs claim that what they call “Defendants’ proposed rule” (in reality, the rule of *Bryant*), “turns the deterrence rationale of Section 504(c) on its head” because it allows copyright defendants to commit multiple acts of infringement of multiple individual songs on an album while exposing themselves to only a single statutory award. Pl. Op. at 7. The same argument was made by appellants in *Bryant*:

¹² Copies of the Complaint and Proposed Findings of Fact and Conclusions of Law in *Jett* are attached as Exhibits 3 and 4, respectively, to the Oller Declaration.

¹³ Even one of Plaintiffs’ own cases undermines their “marketing” argument. In *Cormack v. Sunshine Food Stores, Inc.*, 675 F. Supp. 374 (E.D. Mich. 1987), the court stated that “Marketing, however, is not a part of authorship. The ultimate issue, therefore – whether there are one or two works of authorship – does not depend on the marketing strategies adopted by the copyright owner.” *Id.* at 378. The case is in any event inapposite because it found no compilation in that case (there was no “potential ‘compilation’ to worry about for the purposes of 17 U.S.C. § 504(c)(1)”) and its discussion of various compilation infringement scenarios was *dicta*. *Id.*

To value multiple independently copyrighted works in a compilation as “one work” for purposes of calculation of statutory damages is counter to deterrence. Online download infringers could claim that the infringement of digital downloading of thousands or even millions of all of Led Zeppelin’s Definitive Collection Complete Box Set (each containing 100 Led Zeppelin compositions) would amount to the infringement of only one work. Such a result was clearly not the intent of Congress in framing the Copyright statute or its subsequent amendments.

See Oller Decl. Ex. 2, at 37.

In fact, Congress amended the 1976 Copyright Act to change the focus of damages from a “per infringement” to a “per work” precisely to *lessen* the risk of excessive damage awards.¹⁴ Deterrence is at most one of only several factors courts consider in determining statutory damages awards, including plaintiffs’ alleged lost profits and the “conduct and attitude of the parties.” *Bryant*, 603 F.3d at 144; *see also Warner Bros. Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120, 1126 (2d Cir. 1989) (“In making a statutory award, the court may consider the likelihood of profits and losses [of the copyright owner] and may take into account the attitude and conduct of the parties.”). To the extent relevant, the deterrence rationale does not in this case, any more than in *Bryant*, justify ignoring the per work, per compilation limitation found in the text of the Copyright Act.

¹⁴ See Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 Wm. & Mary L. Rev. 439, 453 (2009) (“The legislative history of the 1976 Act reveals that Congress was persuaded that the ‘per infringement’ standard had sometimes resulted in excessive awards. The change to a ‘per infringed work’ standard was intended to lessen this risk.”). The authors point out that notwithstanding this intent, “Congress did not anticipate many circumstances in which a per work rule would lead to excessive liability, as it has in recent p2p filesharing cases.” *Id.* at 455. *See also* J. Cam Barker, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 Tex. L. Rev. 525, 526 (2004) (even the minimum statutory damage award, “when massively aggregated in the file-sharing scenario . . . imposes an unconstitutional grossly excessive penalty”).

It bears emphasis, too, that Plaintiffs had it within their power to avoid any such limitations by electing to prove actual damages, if any, for any and all individual songs and any and all of the infringements they claim. *See* 17 U.S.C. § 504(a) (providing for election between seeking actual damages and statutory damages). The record labels have opted for statutory damages in this case, perhaps because they know they did not suffer any actual damage.

The point is that Plaintiffs cannot be heard to complain, on “policy” grounds, that their potential statutory damages award is “only” several hundred million as opposed to more than a billion dollars. Plaintiffs benefit from the statutory damages provision in the Copyright Act by removing the obligation to prove actual damages and profits. They also benefit in that, under the definition of “compilation,” an infringement of any part of the compilation (such as one song on an album), is an infringement of the entire compilation work, and gives them a claim for statutory damages, even if they failed or neglected to separately copyright the infringed song.¹⁵ But with the benefits come the burdens, including the “one work, one award” limitation on statutory damages for infringement of a compilation, or any part thereof.¹⁶ By their own choice, Plaintiffs are bound to the statutory language. As the *UMG Recordings* court stated: “When, as here, Congress’ statement is clear, to disregard that message would be nothing less than an unconstitutional arrogation of power by the judiciary.” 109 F. Supp. 2d at 225. The Court should “declin[e] plaintiffs’ invitation to tread that treacherous path.” *Id.*

B. Judgment On The Pleadings Is Appropriate Here.

Plaintiffs’ contention that “fact questions” preclude granting of Defendants’ Rule 12(c) motion (Pl. Op. at 8-10) is wrong. The only alleged “factual question” Plaintiffs identify is

¹⁵ *See King Records*, 438 F. Supp. 2d at 840-43.

¹⁶ *See id.* at 864-66.

“whether (and how many of) the sound recordings contained on Plaintiffs’ final list have been marketed and distributed on a stand-alone basis.” Pl. Op. at 9. As discussed above, that question is not relevant to the compilation issue presented by this motion. That individual tracks on Michael Jackson’s “Bad” Album are also “available for download purchase on iTunes” as “stand-alone tracks” (Pl. Op. at 9), does not change the fact that they are parts of a compilation issued by Plaintiffs and listed as such on Schedule A. Plaintiffs’ claim that there are “factual questions that will have to be presented at trial” on the number of works (Pl. Op. at 8) rests entirely on their flawed “marketing and distribution” argument, and poses no barrier to the relief sought here.

For the same reason, Plaintiffs miss the point with their assertion that under Copyright Office regulations “a common SR number does not mean that there is only one ‘work.’” (Pl. Op. at 8). For this proposition Plaintiffs cite *U2 Home Entertainment, Inc. v. Hong Wei International Trading, Inc.*, No .04 Civ. 6189, 2008 WL 3906889 (S.D.N.Y. Aug. 21, 2008), a case decided prior to *Bryant*. *Hong Wei* is of a piece with *Twin Peaks*, as it involved defendants’ unlawful reproduction and distribution of individual television episodes in a packaged “video compact disc” format not issued by plaintiffs. Applying the “independent economic value” test previously adopted by the First Circuit¹⁷ and later rejected in *Bryant*, the court in *Hong Wei* held that plaintiffs were entitled to separate statutory damages awards for each episode, notwithstanding their failure to separately copyright each episode. 2008 WL 3906889, at * 13-14. Significantly, the court noted that there was “no contention that each of the [episodes] is a ‘compilation,’” unlike in *UMG Recordings*, which the *Hong Wei* court

¹⁷ See *Hong Wei*, 2008 WL 3906889, at *12 (citing *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106 (1st Cir. 1993)).

emphasized had involved “separate musical composition embodied on a compact disc, not separate television programs.” *Id.* at *13. As the *Hong Wei* court acknowledged, the fact that “the separate musical compositions in *UMG Recordings* comprised a ‘compilation’” within the meaning of section 504(c) of the Copyright Act “essentially foreclosed the plaintiff’s argument that the constituent songs were each separate works for purposes of computing statutory damages.” *Id.* at *13. Thus, while factually and legally inapposite, *Hong Wei* actually supports Defendants’ position on this motion.¹⁸

Finally, Plaintiffs’ contention that Rule 12(c) is a procedurally improper vehicle for partial adjudications (Pl. Op. at 8) is unsupported. Rule 12(c) is routinely used to dispose of fewer than all claims, and parts of claims, as in a copyright case recently decided within this Circuit. *See RBC Nice Bearings, Inc. v. Peer Bearing Co.*, No. 3:06-cv-1380 (VLB), 2009 WL 3642769 (D. Conn. Oct. 27, 2009) (granting partial judgment on the pleadings under Rule 12(c) and dismissing plaintiff’s copyright claim “to the extent it relies upon allegations concerning works that were not registered . . . at the time they filed this action”). *See also Wallis v. Centennial Ins. Co.*, 2009 U.S. Dist. LEXIS 7377, *4-5 (E.D. Cal. Feb. 3, 2009) (“Judgment on the pleadings may be granted as to fewer than all of the claims or as to part of a claim.”) (citations omitted). Rule 12(c) relief is particularly appropriate where, as here, it will resolve a central and clearly-defined issue in the case, namely the number of works at issue. *See McLaughlin Transp. Sys., Inc. v. Rubinstein*, 390 F. Supp. 2d 50, 57 (D. Mass. 2005) (resolving

¹⁸ Furthermore, Plaintiffs acknowledge that the Copyright Office regulations referred to in *Hong Wei*, as they currently read, are completely consistent with the “one award per compilation” rule of *Bryant*. *See* Pl. Op. at 8 n.5 (“the following shall be considered a *single work*: (A) In the case of published works: all copyrightable elements that are otherwise recognizable as self-contained works, that are included in a single unit of publication, and in which the copyright claimant is the same”) (quoting 37 C.F.R. § 202.3(b)(4)(i) (emphasis added)).

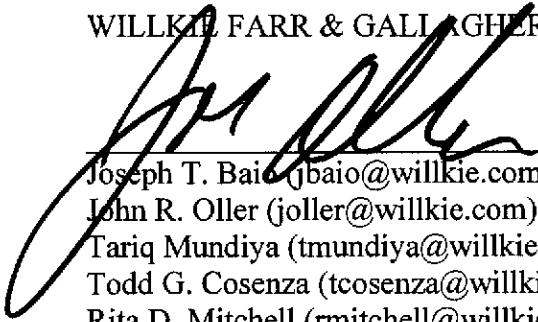
“narrow issue” on motion for partial judgment on the pleadings because it was “central” to the dispute).¹⁹

CONCLUSION

For the foregoing reasons, Defendants respectfully request a ruling pursuant to Rule 12(c) that based on the now-closed pleadings, Plaintiffs may only seek one award of statutory damages for each copyrighted album contained on the Final List.

Respectfully Submitted,

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¹⁹ Plaintiffs’ reliance on *SEC v. Thrasher*, 152 F. Supp. 2d 291 (S.D.N.Y. 2001) is misplaced, as it involved Rule 56(c), not Rule 12(c).