EXHIBIT 2

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Doc. No. 09-2600-cv

Anne Bryant, Ellen Bernfeld and Gloryvision, Ltd.,

Plaintiffs-Counter-Defendants-Appellants,

v.

Media Right Productions, Inc.,

Defendant-Counter-Claimant-Appellee,

Douglas Maxwell, and Orchard Enterprises, Inc.,

Defendants-Appellees,

Europadisk, Ltd., Very Cool Media, Inc., and Russell J. Palladino

Defendants

BRIEF FOR PLAINTIFFS – APPELLANTS

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if the damages awarded are nominal or nothing. 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright, §14.10[B] Nimmer (2008) *citing* Wall Data Inc. v. Los Angeles County Sheriff's Dept., 447 F.3d 769, 787 (9th Cir. 2006) (Treatise quoted); *see also* Shapiro, Bernstein & Co. v. 4636 S. Vermont Ave., Inc., 367 F.2d 236 (9th Cir. 1966). The only parties deterred here will be the Plaintiffs the next time they are similarly victimized.

POINT IV

THE COURT ERRONEOUSLY AWARDED DAMAGES FOR ONLY TWO WORKS WHEN THERE WERE AT LEAST TWENTY WORKS NOT INCLUDING THE COVER ART OR BOOK INSERT WHICH WERE INFRINGED BY DEFENDANTS

The District Court found that only two "works" were infringed citing 17 U.S.C. 504(c)(2) regarding "compilations." (A-21-22). The District Court lumped together multiple media – text, art, lyrics, and music- and found two "compilations" despite finding individual registrations as to each of those works. (A-22). According to the Second Circuit, "the total number of awards of statutory damages that a Plaintiff may recover in a given action depends on the number of works that are infringed and the number of individually liable infringers, regardless of the number of infringements of those works. WB Music Corp. v. RTC Commc'n Group., Inc. 445 F.3d 538, 540 (2nd Cir. 2006). While the Court addressed this issue in its April 15, 2009 Memorandum and Order, the Court, relying on two Southern District Court cases (Country Road and UMG) found that

there were only two (2) works at issue, "Songs For Cats" and "Songs for Dogs." *See* Country Road Music, Inc., v. MP3.Com, Inc., 279 F. Supp. 2d 325, 332 (S.D.N.Y. 2003); UMG Recordings, Inc., v. MP3.com, Inc., 109 F. Supp. 2d 223, 224-25 (S.D.N.Y.). However, the foregoing cases and their analyses of 17 U.S.C. 504(c)(1) are readily distinguishable from the facts of the instant case and as such, should not be dispositive of the question regarding how many works are at issue. Leaving aside the artwork, the text and the images, there were separate and distinct recorded copyrighted musical compositions at issue as found by the District Court. (A-10, A-11, A-57 and A-58).

The Songs Were Independently Economically Viable Defendants Prove The Case

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 cases where the Defendant combines the songs into a compilation. The *Defendants* sold the songs individually. By selling the individual tracks, listed above, an end user was able to purchase one or more of each track, "burn" one or more of the tracks to their own tangible C.D. compilations, or in some cases, allow an Orchard partner, such as Rhapsody.com, to make a custom compilations on their behalf for "mixing and burning" including one or more of the

twenty copyrighted musical recordings listed above. (A-125). Thus, Defendants, by severing the copyrighted recordings, cover art, lyrics and inserts, created at least twenty (20) independent stand-alone copyrighted "works" that were sold individually by the Orchard and its digital download partners and acknowledged that there were at least twenty separate "works" that could be sold, independently, not including the cover art, lyrics and insert.[7] Defendants proved Plaintiffs' case for "independent economic viability."

While there is no direct case on point, it is easy to confuse the analysis of the facts in this case, with the facts of Country Road and the UMG cases, cited above, and relied upon by the District Court. In Country Road, the Defendant, Mp3.com uploaded the contents of Plaintiffs' Copyrighted CDs to its servers for streaming and asserted a fair use defense to Copyright infringement by arguing that certain performing rights societies had given it licenses to publicly perform these works. In a finding that there was copyright infringement, the District Court held that damages would be calculated on a per CD basis rather than per composition. Country Road, 279 F. Supp. 2d 325, 332 (S.D.N.Y. 2003). Country Road is distinguishable on the facts to the instant case. In Country Road, the Defendant

[7] The Orchard's spreadsheet showed at least 4,000 downloads, contained a store by store and track by track accounting and did not reflect album by album downloads of "Songs for Cats" and "Songs for Dogs." (A-471).

maintained the integrity of the album in operation of its My.MP3.com service.[8] Thus, the only function of Defendant MP3.COM was digital storage and streaming of an exact digital copy of the copyrighted physical CD. The tracks were not severed and sold. *See* FN-12, below; *see also* Country Road Music, 279 F. Supp. 2d 325 (S.D.N.Y. 2003)

The UMG case is likewise. While the facts of the UMG case are identical to the Country Road case, also against MP3.COM for the same reasons, the Southern District in the UMG Court made a slightly more in depth analysis of what constitutes a work for purposes of the UMG case. *See* UMG, 109 F. Supp. 2d 223, 224-25 (S.D.N.Y. 2000) and while the Court suggested an "independent economic value" test, it failed to perform said analysis because of "plaintiff's own assertion that what the defendant actually copied were the complete CDs."[9] *Id.*

District Court Judge Denny Chin in 2006 discussed the stand-alone concept citing the leading authority: "[T]o qualify for a separate minimum award, the work that is the subject of a separate copyright would have to in itself musically, dramatically, or otherwise be viable, even if not presented in conjunction with the other work in which it is incorporated." Pavlica v. Research Foundation of State University of N.Y., 2006 U.S. Dist. Lexis 38710 at 5-6 *citing* 4 Melville B.

[8] "On January 12, 2000, MP3.com launched the "My.MP3.com" service which enabled users to securely register their personal CDs and then stream digital copies online from the My. MP3.com service." Source: http://en.wikipedia.org/wiki/Mp3.com.

[9] The UMG Court also held the Second Circuit has never adopted the "independent economic value test."

Nimmer & David Nimmer, Nimmer on Copyright, §§14.04[E][1] at 14-93 Nimmer 2008. Here the Defendants proved that independent viability by selling the songs individually.

In Pavlica, Judge Chin analyzed decisions in this Circuit and others dealing with a definition of "works," holding that "works" "live their own copyright life," saying:

> "The courts have defined 'works' for these purposes to mean items that 'live their own copyright life.' *See, e.g., MCA Television Ltd. v. Feltner,* 89 F.3d 766, 769 (11th Cir. 1996); *Gamma Audio & Video, Inc. v. Ean-Chea,* 11 F.3d 1106, 1116 (1st Cir. 1993); *Robert Stigwood Group, Ltd. v. O'Reilly,* 530 F.2d 1096, 1105 (2d Cir. 1976). The question is "whether each expression has an independent economic value and is, in itself, viable." *MCA Television,* 89 F.3d at 769; *accord Gamma,* 11 F.3d at 1116-17." Pavlica, 2006 U.S. Dist. Lexis 38710 at 5-6. *See also* Walt Disney Co. v. Powell, 283 U.S. App. D.C. 111, 897 F.2d 565, 569; *see also* 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright, §§14.04[E] at 14-64 Nimmer 2008.

Given the 4000-5000 downloads and sales of individual tracks by third parties through Media Right and The Orchard, it is obvious that the "works" each had a viable independent economic value and copyright life.

The First Circuit addressed this very issue in Gamma Audio & Video, Inc. v. Ean-Chea, 11 F.3d 1106 (1st Cir. 1993), holding that individual episodes of a TV series even while not separately copyrighted still constituted several "works" for purposes of calculating statutory damages. "Under the regulations promulgated by the Copyright Office, the copyrights in multiple works may be registered on a

single form, and thus considered one work for the purposes of registration, see 37 C.F.R. 202.3(b)(4)(i)(A), while still qualifying as separate "works" for purposes of awarding statutory damages." *see also* U2 Home Entertainment, Inc., v. Hong Wei Int'l Trading, *et al*, 2008 U.S. Dist. Lexis 64297, 16 (S.D.N.Y. 2008). The Gamma Court (First Circuit), found it irrelevant that the infringed TV series episodes had been sold as a boxed set compilation and concluded that each episode had an independent economic value and was in itself, viable. *Id. citing* Gamma, 11 F.3d at 1116-17. The same result should be found here.

Thus, the District Court's reliance on UMG Recordings and Country Roads is misplaced. The "Songs For Dogs" and "Songs For Cats" CDs were picked apart and dismembered and sold individually and track by track by Defendants qualifying each copyrighted song, image and accompanying text to act as a "work" for purposes of calculating statutory damages. 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.