

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ARISTA RECORDS LLC; ATLANTIC
RECORDING CORPORATION; ARISTA
MUSIC, fka BMG MUSIC; CAPITOL
RECORDS LLC fka 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 WIRE LLC; LIME GROUP LLC;
MARK GORTON; and M.J.G. LIME WIRE
FAMILY LIMITED PARTNERSHIP,

Defendants.

06 Civ. 05936 (KMW)
ECF CASE

PLAINTIFFS' BRIEF PURSUANT TO NOVEMBER 19 ORDER

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I. INTRODUCTION

Pursuant to the District Court’s November 19, 2010 Order, this brief addresses the following issues: (1) to what extent are each Plaintiff’s “costs” for each sound recording in issue—as distinct from Plaintiff’s revenues for the sound recording—relevant to the statutory damages inquiry; and (2) for purposes of § 412(2) of the Copyright Act, does the direct infringement of a copyrighted sound recording by a particular user of LimeWire count as the relevant “infringement,” or is every infringement of that sound recording by every LimeWire user part of a single, continuing act of infringement? *See* Doc. No. 363 at 89.

Plaintiffs’ “costs” are not a necessary part of the statutory damages analysis in this case: Plaintiffs have agreed to provide, and each either has provided or is in the process of providing, enormous amounts of documentation that will enable Defendants and their experts to analyze Plaintiffs’ lost *revenue* as a result of Defendants’ massive infringement. Defendants, however, have insisted that Plaintiffs provide extensive *cost* information as to every individual sound recording, ostensibly on the theory that Defendants want to calculate “lost profits.” That would not only impose incredible burdens on each Plaintiff to provide—as established through uncontroverted declarations¹—but also is irrelevant in this case. As the Second Circuit has made clear, in setting a statutory award the Court may consider the “expenses saved, and profits earned, by the infringer,” but only the “*revenue lost by the copyright holder.*” *Bryant v. Media Right Productions, Inc.*, 603 F.3d 135, 144 (2d Cir. 2010) (citing *N.A.S. Impor. Corp. v. Chenson Enter., Inc.*, 968 F.2d 250, 252-53 (2d Cir. 1992)) (emphasis added). There is no requirement that a *Plaintiff’s lost profits* must be factored into the statutory damages analysis, and Defendants have yet to cite a single case permitting the widespread discovery into the “profits” and “costs”

¹ For the convenience of the Court, the declarations submitted to Judge Wood on September 8, 2010 are attached hereto as Exhibits A-D.

of thousands of individual copyrighted works which they seek here. That rule would be contrary to the very reason that Congress created statutory damages. Statutory damages compensate the Plaintiff where its actual damages—*i.e.*, the profits it would have made but for the infringement—are difficult to calculate. In this case, there are three compelling reasons why Plaintiffs should not be compelled to produce “cost” information as to every individual sound recording.

First, the cost information Defendants seek has *no relationship whatsoever* to the harm to Plaintiffs. The costs Plaintiffs incurred in distributing the thousands of sound recordings at issue would have been incurred regardless of whether Defendants’ massive infringing service ever existed.

Second, the burden of gathering and producing such cost information is overwhelming in relationship to any possible claim of relevance that Defendants may attempt to offer.

Third, even if Plaintiffs were compelled to locate and assemble this information in the manner Defendants demand, it is inconceivable that this discovery is going to lead to the presentation of any evidence at trial. The Court obviously is not going to conduct thousands of “mini-trials,” delving into the individual profits and losses from each of the thousands and thousands of these sound recordings.

The “infringement” that is relevant for applying § 412(2) is the infringement by the particular direct infringer for which Defendants are secondarily liable. Your Honor’s November 2 Order requires Plaintiffs to produce all evidence of downloads gathered in investigating claims against individual LimeWire users in order to provide Defendants with evidence regarding the earliest date on which a LimeWire user directly infringed one of the sound recordings in issue. In the November 19 Order, Judge Wood asked this Court to decide in

the first instance a threshold question of law: whether Defendants' unprecedented theory of the applicability of § 412(2) has any merit. That resolution will determine whether Plaintiffs must collect this already-gathered evidence from these other matters in the first place.

The threshold legal issue for this Court to decide is whether the "infringement" for which statutory damages and attorney's fees may be barred by operation of § 412(2) refers to (1) the underlying act of direct infringement by any one LimeWire user for which Defendants are *secondarily* liable; or (2) Defendants' entire liability for secondary infringement with respect to that work. Defendants argue that it is the latter. Defendants contend that, if any LimeWire user anywhere directly infringed the copyright to a particular sound recording before more than three months before the effective date of the registration for that sound recording, then it does not matter if thousands or even millions of *other* LimeWire users directly infringed the same sound recording after the effective date of its registration. That manifestly unjust result is flatly contrary to the language of the statute and all applicable case law. The "infringement" *must* refer to the act of direct infringement *by the particular direct infringer for which Lime Wire is secondarily liable*.

II. DEFENDANTS ARE NOT ENTITLED TO WIDESPREAD DISCOVERY RELATING TO PLAINTIFFS' COST INFORMATION

Defendants served discovery requests seeking extensive information detailing Plaintiffs' profits and losses on a track-by-track basis for every individual sound recording for which Plaintiffs seek damages. Your Honor asked the parties for "brief supplemental submissions to the Court setting forth legal authority for their respective positions as to whether information regarding Plaintiffs' profits (as opposed to gross revenue) is relevant to statutory copyright damages," and Judge Wood affirmed Your Honor's request. Doc. No. 339 at 3 ¶ 6; *see* Doc. No. 363 (November 19, 2010 Order) at 8. As settled case law establishes, Defendants' demands for

profit-and-loss information exceed the bounds of conceivable relevance. Plaintiffs' costs have no relationship to the "actual damages" Plaintiffs have suffered here—i.e., the harm Defendants' massive infringement caused to Plaintiffs' business. Moreover, requiring discovery into Plaintiffs' cost information would impose extraordinary discovery burdens on Plaintiffs, and would make the damages trial in this action entirely unworkable.

A. Established Law Holds That Plaintiffs' Revenues – Not Costs – May Be Considered In Calculating Statutory Awards

Congress created the statutory damage remedy in part to allow for a remedy where actual damages are difficult to calculate and prove. *See, e.g., NFL v. Primetime 24 Joint Venture*, 131 F. Supp. 2d 458, 472 (S.D.N.Y. 2001). And for that very reason the Second Circuit and other courts have made clear that a copyright plaintiff's *revenues* may be considered in a statutory damages analysis—not a plaintiff's costs or "lost profits." As the Second Circuit has held, in "determining the amount of statutory damages to award for copyright infringement," the Court may consider the "expenses saved, and profits earned, by the infringer," but only the "*revenue lost by the copyright holder.*" *Bryant*, 603 F.3d at 144 (emphasis added). To hold otherwise would require the plaintiffs to prove their actual lost profits, no matter how difficult or impossible the task may be.

Thus, in *Arista Records LLC v. Usenet.com, Inc.*, 2010 WL 3629688 (S.D.N.Y. Feb. 2, 2010) (Amended Report and Recommendation), the major record companies obtained summary judgment against the defendants for the widespread infringement of their copyrights through the defendants' "USENET" network of computers. In setting the statutory award, Magistrate Judge Katz considered only the plaintiffs' "lost revenues," emphasizing that "[a]s an initial matter, Plaintiffs are not required to prove any actual damages upon electing to receive statutory damages. *See* 17 U.S.C. § 504(c)(1)." *Id.* at *5. As Magistrate Judge Katz noted, Plaintiffs

“managed to uncover 878 songs that Defendants made freely available to their subscribers. Had those subscribers who downloaded these songs purchased the same through legitimate channels of commerce, Plaintiffs would have certainly *received revenues*. . . . Thus, while each song may have cost only \$1.29 on iTunes, Plaintiffs could have lost as much as \$20,000 *in revenues per song*, depending on the number of subscribers who downloaded each song.” *Id.* (emphases added). In affirming Magistrate Judge Katz’s award, Judge Baer emphasized that in calculating statutory damages, the “proper measure” would be plaintiffs’ “*lost revenues, not lost profits*.” *Arista Records LLC v. Usenet.com, Inc.*, 2010 WL 3629587, at *5 n.12 (S.D.N.Y. Sept. 16, 2010) (emphasis added).

Similarly, in *Apple Inc. v. Psystar Corp.*, 673 F. Supp. 2d 926 (N.D. Cal. 2009), the court explicitly rejected the defendant’s argument that “Apple’s profit margins” were “relevant to statutory damages for copyright infringement.” *Id.* at 927. Reciting the same factors in determining statutory awards that the Second Circuit has adopted, the court stated that “[n]otably, the factors include the profits reaped by defendant and the revenues lost by plaintiff, *not the plaintiff’s profits*,” and held that “Apple is not obliged to provide proof of its own profits when it has elected to seek statutory damages.” *Id.* at 928 (emphases added).

The Second Circuit, the Northern District of California and Judges Katz and Baer are not alone. Numerous other courts similarly have focused solely on a plaintiff’s lost revenues, not its lost profits, in setting a statutory award. *See Microsoft Corp. v. AGA Solutions, Inc.*, 2010 WL 1049219, at *1 (E.D.N.Y. Mar. 22, 2010) (award of statutory damages supported by “revenues lost by the plaintiff as a result of defendant’s conduct” and noting that “[w]hile the exact amount of revenues lost by plaintiff is undeterminable, a raid on Defendants’ business yielded 2,569 units of counterfeit or infringing products with an estimated retail value of \$1,078,722”); *Boisson*

v. Banian Ltd., 280 F. Supp. 2d 10, 18 (E.D.N.Y. 2003) (“In addition to profits reaped by the defendant, the court can look at plaintiff’s lost revenue as a result of the infringement. . . . While Plaintiff need not prove lost revenue for statutory damages, the court still has complete discretion in considering any lost revenue to make a final determination of statutory damages.”); *Ontel Products Corp. v. Amico Int’l Corp.*, 2008 WL 4200164, at *3 (S.D.N.Y. Aug. 19, 2008) (noting that “because [defendant] has failed to respond, the Court has no information concerning the profits it reaped, and [plaintiff] cannot estimate with any degree of certainty the revenues it has lost”); *Universal City Studios, Inc. v. Ahmed*, 1994 WL 185622, at *3 (E.D. Pa. May 13, 1994) (noting that court may consider the “revenues lost by the plaintiffs” in “determining the appropriate measure of statutory damages” and that “[a]lthough statutory damages ‘should bear some relation to actual damages,’ . . . the court may award statutory damages even if there is no evidence whatsoever before the court as to the . . . plaintiff’s lost profits”).² The same result should apply here.

² In their briefing to Judge Wood, Defendants cited four cases where the courts purportedly considered a copyright holder’s “profits in assessing statutory damages.” Nov. 5, 2010 Letter at 9. To the extent these cases considered the plaintiff’s lost profits in setting a statutory award, they are inconsistent with *Bryant* and the more recent authorities noted above. Moreover, these cases do not involve situations remotely close to the present action, where thousands of copyrighted works are at issue, and they do not, in any event, support widespread discovery of “costs” and “profits” from a plaintiff seeking statutory damages. Indeed, in none of these cases was there any evidence offered of the plaintiff’s lost profits. See *Warner Bros., Inc. v. Dae Rim Trading, Inc.*, 677 F. Supp. 740, 747 (S.D.N.Y. 1988) (“It should be noted that Warner expresses the financial success of Gremlins in terms of ‘gross,’ ‘revenue,’ and the like. The actual profit to Warner has not been given, so far as we have found.”); *U.S. Media Corp. v. Edde Entertainment Corp.*, 1998 WL 401532, at *20 (S.D.N.Y. July 17, 1998) (“We have no information on which to base a reliable determination as to which, if any, of the five infringed films would have earned profits for plaintiff in the home video market if they had not been infringed.”); *Fitzgerald Publ’g Co., Inc. v. Baylor Pub. Co., Inc.*, 670 F. Supp. 1133, 1141 (E.D.N.Y. 1987) (“It is understood that this method of calculation is not entirely accurate. Fitzgerald’s probable distribution costs should be deducted, but the Court heard no evidence on this point. The Court’s conservative estimate of Fitzgerald’s potential revenues adequately cancels out this discrepancy.”); *Eastern America Trio Products, Inc. v. Tang Electronic Corp.*, 97 F. Supp. 2d 395, 419 (S.D.N.Y. 2000)

B. This Case Proves The Wisdom of This Established Law

Indeed, this case provides a textbook example of why the focus in a statutory damages analysis should be on the copyright owner's lost revenues rather than the copyright owner's revenues-less-costs, or lost "profits." Plaintiffs' costs in this case have no relationship to the losses caused by Defendants' conduct. As detailed at length in the declarations of Wade Leak, Alasdair McMullen, Jon Pedersen, and Charles Ciongoli submitted to the Court on September 8, Plaintiffs incur hundreds if not thousands of costs in bringing an artist's sound recording to the marketplace. *See* Ciongoli Decl., ¶¶ 5-6; Pedersen Decl., ¶ 5; Leak Decl., ¶ 6; McMullen Decl., ¶ 5. Plaintiffs would incur all of these costs *whether Defendants existed or not*. Defendants' massive infringing engine has no effect on Plaintiffs' costs in signing their artists, creating their albums, marketing the albums, promoting their artists' singles, distributing their records, etc. Plaintiffs would incur all of these same costs regardless of whether Defendants ever distributed a single copy of the LimeWire client. The overwhelming majority of Plaintiffs' costs thus have no relationship to the harm that Plaintiffs have suffered at Defendants' hands.

Only one category of Plaintiffs' costs increase depending on how many copies of their records are sold or otherwise digitally distributed. Each time Plaintiffs distribute a record, the artists and songwriters who created the work share in the proceeds. Costs Plaintiffs incur in paying artists and songwriters differ depending on each Plaintiff's agreement with each individual artist (for recording artists) and on the applicable statutory rate set in the Copyright Act (for songwriters). Here, those costs still have no relationship to the injury Plaintiffs have suffered at Defendants' hands *because those costs have yet to be incurred or paid*. Neither Plaintiffs nor their recording artists have been compensated for the millions of infringing records

(noting "paucity of evidence presented to the Court" and that plaintiff "has not demonstrated any lost profits as a result of the infringement.").

Defendants have distributed. Lime Wire has never paid an artist a royalty for any song distributed through their unauthorized service, and they certainly are not suggesting now that they need the artists' royalty information so they can pay the royalties themselves. Once there is a judgment, the amount to be paid to account to artists and songwriters for their loss is a matter to be determined between each Plaintiff and its respective artists and songwriters. Allowing Defendants to deduct artist and songwriter royalties from any award before judgment would grant to Defendants a wholly unjustifiable windfall at artists' and songwriters' expense.

This case is an ideal example of why Congress created the statutory remedy in the first place. To say Plaintiffs' "losses" from Defendants' wrongful conduct are difficult to calculate is an understatement, and Defendants have never articulated any nexus between the amount of a Plaintiff's profit (or loss) on a particular recording, and Defendants' intentional inducement of the recording. For example, even if a particular sound recording has generated a substantial profit, who is to say that those profits would not have been doubled or tripled *in the absence* of Defendants' inducement of illegal downloading? Similarly, even if a particular sound recording had a "loss," who is to say that that sound recording might not have generated a substantial profit *in the absence* of Defendants' conduct? Defendants have never suggested an answer to any of these questions, nor shown how they will be answered or illuminated by the massive document production they want Plaintiffs to undertake.

C. The Requested Cost Information Would Impose A Nearly-Insurmountable Burden on Plaintiffs to Produce

Defendants' profit-and-loss requests are not only entirely irrelevant, but would impose an extraordinary burden on Plaintiffs. Plaintiffs specifically detailed the significant burden in the four declarations submitted initially September 8, 2010. *See* Ciongoli Decl., ¶¶5-12; Pedersen Decl., ¶¶4-13; Leak Decl., ¶¶5-13; McMullan Decl., ¶¶4-10. Responding to Defendants'

requests would impose a crushing burden. Plaintiffs do not centrally maintain or record their expansive cost information for all recordings at the track-by-track level. Defendants' requests would require the collection, review, and production of all of the underlying documents reflecting every income and expense involved in the lengthy chain of development of each of the thousands of recordings at issue. The sheer volume is staggering, and no doubt would generate hundreds if not many thousands of records for *each one* of the tracks at issue.

D. The Burdensome Cost Discovery that Defendants Request Is Not Going to Be Useful at Trial: A Track-By-Track Profit-And-Loss Exercise Would Make a Trial Entirely Unworkable

Finally, the context of this case shows why Defendants' requests seek information that will not in any way be useful at the trial, and instead would clog the proceedings with unnecessary detail without any corresponding benefit to the jury. Defendants cannot possibly go through the individual profit-and-loss analysis for every one of the thousands of works in question unless there are to be a series of non-stop "mini trials" that will consume months or years, not weeks of the Court's and jury's time. This is not just impractical but entirely unrealistic. Given that, what could be the conceivable basis for contemplating whether to allow a broad-ranging and highly burdensome discovery when it is never going to be used at trial? There is none.

III. THE "INFRINGEMENT" THAT COUNTS FOR PURPOSES OF ANY PLAINTIFF'S ENTITLEMENT TO STATUTORY DAMAGES AND ATTORNEYS' FEES UNDER § 412(2) IS THE DIRECT INFRINGEMENT FOR WHICH DEFENDANTS ARE SECONDARILY LIABLE

The second issue that Judge Wood ordered the parties to address is the application of § 412(2) of the Copyright Act in this case: specifically, whether 17 U.S.C. § 412(2) bars Defendants' entire liability for statutory damages with respect to a work where a single underlying act of direct infringement by a LimeWire user occurred prior to the effective date of

registration. Defendants contend that, if any LimeWire user anywhere directly infringed the copyright to a particular sound recording before more than three months before the effective date of the registration for that sound recording, then it does not matter if hundreds, thousands, or even millions of *other* LimeWire users commenced a new direct infringement of the same sound recording after the effective date of its registration. Defendants' contention is incorrect: it rests upon an untenable reading of § 412(2) and is irreconcilable with established precedent regarding statutory damages and secondary liability as a whole. The words "any infringement" in § 412(2) refer not to any infringement in history, but to the act of direct infringement by a particular direct infringer for which Defendants are secondarily liable.

A. "Any Infringement" Under § 412(2) Refers To The Particular Direct Infringement For Which Defendants Are Liable

Section 412(2) provides:

[N]o award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for ... *any infringement* of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

17 U.S.C. § 412(2) (emphasis added).

The legal question here is whether "any infringement" means any particular direct infringement that gives rise to the Plaintiff's claim for relief, or instead means every direct infringement for which Defendants are secondarily liable, regardless whether any of those infringements occurred within or without the time frame of § 412(2). The only textually supportable reading of the statute is the first one: An "infringement" does not "commence[]" until an actual direct infringer violates one of the exclusive rights of a copyright owner under § 106. If Defendants' interpretation of § 412(2) were correct, then the statute would not refer an infringement having commenced; it would instead read that statutory damages and attorney's

fees are not available unless the work is registered on or within three months of the *first* infringement of that work by anyone. That is not what the statute says, however, and it cannot possibly mean that.

Cases assessing the availability of damages under § 412(2) universally look only to the circumstances surrounding the single direct infringer at issue in the case: comparing the date of that direct infringer's first infringement to the date of plaintiff's effective registration. For example, in *Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 144 (5th Cir. 1992), the Fifth Circuit analyzed the timing of the infringements and registrations for 233 maps at issue in the case. The court, “[a]s to each work and each defendant,” determined that the “alleged acts of infringement that could give rise to an award of statutory damages had commenced prior to registration” of 232 of the 233 maps. *Id.* Accordingly, the court held that no statutory damages would be available for the alleged direct infringements of those works. Other cases are in accord, looking always to the particular circumstances— “[a]s to each work and each defendant”—of registration and infringements at issue in the case. *Id.*; *see, e.g., CA, Inc. v. Rocket Software, Inc.*, 579 F. Supp. 2d 355, 363–64 (E.D.N.Y. 2008) (assessing circumstances of particular direct infringements alleged); *Shady Records, Inc. v. Source Enters., Inc.*, 2005 WL 14920, at *20 (S.D.N.Y. Jan. 3, 2005) (comparing dates of first direct infringements by defendant to dates of registration of relevant works); *U2 Home Ent'ment Inc. v. Hong Wei Int'l Trading, Inc.*, 2008 WL 3906889, at *14 (S.D.N.Y. Aug. 21, 2008) (accord). The cases do not analyze evidence of *other unrelated* infringers' pre-registration infringement. No case ever has suggested the extreme rule that § 412(2) bars a statutory damage claim against any infringer simply because some other infringer may have infringed the same work outside the time limits of the statute.

B. The Fact That Defendants Are Secondarily Liable For Numerous Direct Infringements Does Not Convert All Of Those Separate Direct Infringements Into One Continuing Infringement For Purposes of § 412(2)

Defendants' liability for inducing millions upon millions of users of the LimeWire system to infringe Plaintiffs' works does not change the § 412(2) analysis. Defendants' damages liability is derivative—Defendants are liable for such damages only because there is an underlying direct infringement. If Defendants built a system to induce third parties to infringe, but no one actually used that system to infringe a single work, Defendants would be the first people to say that they had no liability for statutory damages under the Copyright Act. Defendants become liable in damages at the point at which the direct infringer commences her or his infringing conduct—that is what it means for a defendant to have secondary liability. *See generally Sygma Photo News, Inc. v. High Soc. Magazine*, 778 F.2d 89 (2d Cir. 1985); *Engel v. Wild Oats*, 644 F. Supp. 1089, 1092 (S.D.N.Y. 1986). As the Supreme Court has held: “[O]ne who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, *is liable for the resulting acts of infringement by third parties.*” *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 545 U.S. 913, 918 (2005) (emphasis added).

Defendants' liability as inducers has no effect on the calculation of damages available for the direct infringements at issue in the case. The Ninth Circuit has squarely addressed and rejected contrary arguments. In *Columbia Pictures Television v. Krypton Broadcasting of Birmingham, Inc.*, 106 F.3d 284, 294 (9th Cir. 1997), *rev'd on other grounds sub nom Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998), a defendant found jointly and severally liable for copyright infringement by three different television stations (each of them direct infringers) argued that he should not be liable for duplicative damage awards. The Ninth Circuit rejected his argument:

Feltner's . . . argument on this issue—that the [damages] finding was erroneous because Feltner was jointly and severally liable with all three stations—is . . . meritless. Because the stations were not jointly and severally liable with each other, Feltner's liability vis-à-vis the stations merely renders him jointly and severally liable for each station's infringements—it does not convert the stations' separate infringements into one.

Id. at 294 n.7. Thus, the defendant's status as a joint tortfeasor with each station “does not make each station a joint tortfeasor with respect to the other.” *Columbia Pictures Television v.*

Krypton Broadcasting of Birmingham, Inc., 259 F.3d 1186, 1194 (9th Cir. 2001). *See generally* Nimmer on Copyright § 14.04[E][2][d] (discussing this rule).

Similarly, here, Defendants' secondary liability means they are liable for *each direct infringer's infringements* and the damages associated therewith. However, that Defendants are liable for each direct infringer's infringements does not “convert” those separate infringements into one. *Columbia Pictures Tel.*, 106 F.3d at 294 & n.7. Each underlying direct infringement supports an independent award of statutory damages, *see id.*, and is assessed independently for purposes of determining the availability of statutory damages under § 412(2).

C. The Cases Cited by Defendants—Addressing Individual, Direct Infringers Under § 412(2)—Are Inapposite

Cases cited by Defendants in their previous briefing of this issue—cases in which courts have declared that statutory damages are unavailable for a continuing series of infringements by a single direct infringer (or group of direct infringers acting in concert)—are inapposite. *See U2*, 2008 WL 3906889, at *14–15; *EZ-Tixz v. Hit-Tix, Inc.*, 919 F. Supp. 728 (S.D.N.Y. 1996). In each of these cases, a court has held that, under § 412(2), statutory damages are not available against a *single defendant* who initially infringes a plaintiff's copyright prior to registration, even if infringing conduct continues after infringement. In *U2*, for example, the court addressed the availability of statutory damages in a suit brought by a Chinese-language film and television producer against a video-rental store alleged to have engaged in unlawful duplication of some 70

programs. *See U2*, 2008 WL 3906889, at *1, *5. The defendant, Hong Wei, submitted a schedule of eighteen titles that had been first rented (and, necessarily, illegally copied) before the titles were registered with the copyright office. *Id.* at *14. The court agreed that, notwithstanding Hong Wei's continued illegal copying after registration of the titles, statutory damages were barred for those titles under § 412(2). *Id.* at *15. Similarly, in *EZ-Tixz*, the court held that statutory damages were unavailable under § 412(2) against a group of jointly-acting defendants alleged to have illegally copied a plaintiff's software beginning before that software's registration, even though that illegal use continued after registration. 919 F. Supp. at 734-35.

What these cases do not hold—and, consistently with the language of § 412 and the other statutory damages provisions of the Copyright Act, could not hold—is that a single defendant's pre-registration infringement of a copyright extinguishes statutory damages for future, totally unrelated direct infringers. In neither case did the court have opportunity to do so. Rather, each is about a single direct infringer (or, as in *EZ-Tixz*, group of corporately affiliated direct infringers) who continued to infringe the same works. *See U2*, 2008 WL 3906889, at *1; *EZ-Tixz*, 919 F. Supp. at 734-35. Neither case involves separate direct infringers with distinct dates of first infringement. Likewise, neither stands remotely for the proposition that a secondary infringer is continually liable for a single infringement of the same work by millions of distinct and unrelated infringers

Indeed, courts even have recognized that even an individual direct infringer may reset the clock for purposes of § 412(2) if his post-registration infringement is sufficiently distinct—in time or character—from pre-registration infringement. *See, e.g., Troll Co. v. Uneeda Doll Co.*, 483 F.3d 150, 158–59 (2d. Cir. 2007); *CA, Inc.*, 579 F. Supp. 2d at 363–64; *see also Jamison v. Royal Caribbean Cruises, Ltd.*, 2009 WL 559722, at *3 (S.D. Cal. Mar. 4, 2009). These cases

hold that “new” or “distinct” acts of infringement occurring after registration—even by the same infringer—may permit statutory damages to be awarded despite an infringer’s acts of infringement prior to registration. In *EZ-Tixz*, for instance, this court recognized that “new acts of infringement” occurring after registration, rather than merely the “continuation of the infringement that commenced prior to registration,” could permit statutory damages to be awarded notwithstanding § 412(2). *Id.* at 736. If a plaintiff can demonstrate that an individual’s infringement before and following registration are “*two separate infringements*, rather than merely a series of ongoing discrete infringements,” statutory damages remain available for the post-registration acts. *Shady Records*, 2005 WL 14920, at *21.

Because these cases all deal with individual direct infringers, their holdings offer little guidance in the case at present. However, they do indicate that pre-registration infringement does not bar statutory damages for “separate infringement” occurring after registration. *See id.* at *21 (holding that the language of § 412(2) reveals “Congress’ intent that statutory damages be denied . . . *for all of the defendant’s* infringements of a work if one of those infringements commenced prior to registration.”). Infringement by a whole new direct infringer clearly qualifies as “separate infringement.” for purposes of calculation of statutory damages generally. *See Mason*, 967 F.2d at 143–44 (noting that 17 U.S.C. § 504(c) “include[s] all of *one defendant’s* infringements of one work within ‘an award of statutory damages’”). Thus, these cases indicate that pre-registration infringement by one direct infringer cannot bar statutory damages available against another, later infringer. As outlined above, Defendants’ liability as inducers does not modify this rule.

* * *

Defendants’ reading of § 412(2) is based on an untenable collection of false premises, it is unsupported by precedent, and irreconcilable with the language of the Copyright Act.

