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' OBJECTION TO MAGISTRATE JUDGE FREEMAN'S REPORT & RECOMMENDATION CONCERNING 17 U.S.C. § 412(2)

Glenn D. Pomerantz *(pro hac vice)*
Kelly M. Klaus *(pro hac vice)*
Melinda E. LeMoine
Jonathan H. Blavin *(pro hac vice)*
Munger, Tolles & Olson LLP
355 South Grand Avenue
Los Angeles, CA 90071
(213) 683-9100

Attorneys for Plaintiffs

Date: January 18, 2010

12753102.3

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES AND RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

I. INTRODUCTION

Plaintiffs respectfully request that the Court overrule Magistrate Judge Freeman's Report and Recommendation concerning 17 U.S.C. § 412(2) (Doc. No. 398, Dec. 29, 2010) ("Report").[1] The Report recommends that the Court answer "the threshold legal question" posed in this Court's November 19, 2010 Order (Doc. No. 363 at 9) by holding that, for purposes of § 412(2), every single direct infringement of the same copyrighted work by hundreds of thousands or even millions of disparate LimeWire users is part of one single ongoing infringement. Report at 2. This interpretation of § 412(2) is wrong as a matter of law, contrary to Congressional intent, and would bestow an unjustified windfall on the most culpable inducers of massive online infringement. The Report would hold that, so long as any one LimeWire user directly infringed a work prior to registration outside the § 412(2) window (*i.e.*, where such registration was more than three months after publication), Defendants would face absolutely *no* statutory damages liability even if millions of other LimeWire users directly infringed the work after registration. As Congress has explicitly recognized, technologies such as Defendants' ensure that Plaintiffs' works are *regularly* infringed at or even before the moment they are first released to the public. The Report's construction of § 412(2) contradicts Congress's intent in enacting § 412(2), runs directly against Congress's more recent efforts to curb piracy, and provides perverse incentives to the Lime Wires of the future to promote early infringement in order to immunize themselves from statutory damages. Neither Lime Wire nor its successors should be subject to *less* liability

[1] The Report was signed and date-stamped December 28. The Report was entered on the docket and served on the parties via the ECF system on December 29. *See* S.D.N.Y. Electronic Case Filing Rules & Instructions §§ 9, 19.1. Because the Order was served by ECF, three Court days are added to the 14 days from the date of service that Plaintiffs have to file this Objection. *See* Fed. R. Civ. P. 6(d). This Objection is timely filed under the provisions of 28 U.S.C. § 636 and Fed. R. Civ. P. 72 on January 18, 2011. The Court's order entered January 10, 2011 (Doc. No. 402) expressly provides that Plaintiffs have until January 18, 2011 to file this Objection.

based on *more* inducement—let alone for inducing as much infringement as early as possible. The Report must be overruled.

The legal issue presented here should not even be a close call: Section 412(2) provides a specific rule regarding the availability of statutory damages and attorneys' fees *for a particular direct infringement of a particular copyrighted work that is the basis for a plaintiff's infringement claim*. It provides that:

> In any action under this title . . . no 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).[2] Notably, section 412(2) does *not* provide that statutory damages and attorneys' fees are unavailable if *anyone*—whether the particular direct infringer at issue or someone else—infringed the copyright prior to registration outside of the three-month window. Had Congress intended that rule, Congress could and would have said that on the face of the statute. Congress did not say that. Instead, § 412(2) applies only with reference to commencement of the particular direct infringement that is the basis for the plaintiff's claim. Numerous cases have so held. *See infra*, pp. 10–11.

The Defendants (collectively "Lime Wire") are *not* the direct infringers of Plaintiffs' copyright. Lime Wire's liability is *secondary* and arises from inducing others—the LimeWire users—to directly infringe Plaintiffs' copyrighted works.[3] *See* Opinion and Order (Doc. No. 216, May 11, 2010) at 26 ("To establish their secondary liability claims, Plaintiffs must first

---

[2] Section 412(1) applies to unpublished works, does not have a three-month window, and is inapplicable in this case (which involves published sound recordings). *See* 17 U.S.C. § 412(1).

[3] Plaintiffs' vicarious liability claim against Lime Wire remains for trial. Vicarious liability likewise is a form of secondary copyright liability. *See, e.g.*, *Shapiro, Bernstein & Co. v. H. L. Green Co.*, 316 F.2d 304, 307–08 (2d Cir. 1963).

establish that LimeWire users directly infringed Plaintiffs' copyrights."). Under § 412(2), it is the commencement of infringement *by the particular direct infringer—i.e., a particular LimeWire user*—that must be measured against the registration date of the work to determine whether statutory damages are available for that particular infringement. That is necessarily so: absent an underlying direct infringement, by definition there can be no statutory damages award.

The Report tries to avoid this result by concluding that all direct infringements of a copyrighted work on LimeWire constitute part of the same "ongoing series of infringing acts." Report at 4–5 (quoting *Troll Co. v. Uneeda Doll Co.*, 483 F.3d 150, 158 (2d. Cir. 2007)). That conclusion is wrong as a matter of law. The "ongoing series of infringing acts" standard provides that, where the *same direct infringer* infringes the work repeatedly—*e.g.*, where the same direct infringer copies the same work 100 times—infringement commences for purposes § 412(2) with the making of the first copy. This standard does not mean—as the Report erroneously concludes it does—that if multiple direct infringers each separately infringe the same work, and this separate infringement goes on "continuously," then infringement "commences" under § 412(2) the with the first direct infringement by any of those infringing users. Such an interpretation would upend the well-established rule that § 412(2) applies only with reference to the particular direct infringement that is the basis for the particular claim for statutory damages.

Such an interpretation likewise disregards the plain language of the statutory damages provision, 17 U.S.C. § 504(c), to which § 412(2) expressly relates. Section 504(c) provides that a plaintiff is entitled to "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)(1)

(emphasis added). In other words, statutory damages are awarded per work based on the specific unit of actors responsible for the infringement: if one actor individually, then one statutory award per work; if multiple actors independently (or in individual groups of joint and several liability), then one statutory award *per work per individual actor* or individual jointly-liable unit of actors. The "commencement" of the infringement under § 412(2), in turn, necessarily corresponds to the particular unit for which a plaintiff seeks a statutory award. *Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 144 (5th Cir. 1992). In this case, each combination of a different direct infringer with Lime Wire constitutes such a distinct unit of joint and several liability, supporting a separate award of statutory damages for each infringed work.

The Report acknowledges Plaintiffs' argument concerning the relevance of § 504(c) to the interpretation of § 412(2), but then dismisses it on the purported ground that Plaintiffs "have elected to view downloads of a recording by multiple Lime Wire users together for purposes of statutory damages[, and] seek one award of statutory damages per recording, regardless of the number of times the recording was downloaded." Report at 7. That characterization of Plaintiffs' position is simply wrong, directly contradicted by numerous statements in the record. Plaintiffs unambiguously stated:

> Plaintiffs intend to seek a separate statutory award for each act of direct infringement for which Defendants are jointly and severally liable with separate infringing actors.

Ex. 1 (Sept. 23, 2010 Letter from Glenn D. Pomerantz to Judge Wood).[4] Judge Freeman previously observed that Plaintiffs "are looking for a calculation of damages based on some number of individual infringements of individual works." Ex. 2 (Nov. 1, 2010 Hr'g Tr. at 140:3–5). The Report thus clearly errs in characterizing Plaintiffs' damages theory. In all

[4] All Exhibit cites herein are to the accompanying Declaration of Kelly M. Klaus.

events, an incorrect statement of the record provides no support for the Report's erroneous rejection of Plaintiffs' argument. The Report, we respectfully submit, must be overruled.

II. PROCEDURAL BACKGROUND

A. Defendants' Underlying Discovery Requests

The Report has a lengthy procedural history, arising from Defendants' August 9, 2010 discovery requests. Those requests sought documents and information concerning the date on which a LimeWire user first used the LimeWire system to infringe each work in suit. These requests are part of Lime Wire's ongoing strategy to forestall the damages trial by seeking minute evidence on irrelevant topics. This specific manifestation of that strategy is particularly cynical: Had Lime Wire wanted to retain the dates of first infringement by its users, it could have designed its system to record such information. Of course, Lime Wire designed its infringement-inducing system *not to retain* any such evidence of infringement, so that Lime Wire one day could claim (ostrich-like) plausible deniability about what its users were doing.

Plaintiffs made clear they would produce all evidence on which they would rely to establish direct infringement by LimeWire users, including evidence sufficient to show the dates on which those acts of infringements occurred. Lime Wire nevertheless moved to compel, arguing that it needed information regarding the date of the *first* infringement of each work by *any* LimeWire user *ever* in order to make out a defense to statutory damages under 17 U.S.C. § 412(2). *See* Lime Wire's Aug. 26 Ltr. Br. at 3.

B. The Court's November 2 and November 19, 2010 Orders

By Order entered November 2, 2010 (Doc. No. 339), Judge Freeman granted *in part* Lime Wire's motion on its so-called § 412(2) requests. In particular, Judge Freeman held: "To the extent Plaintiffs have gathered information regarding specific instances of the recordings at

issue in this case being downloaded via the LimeWire system, Plaintiffs shall provide Defendants with documents or information sufficient to show the earliest dates that each such recording was downloaded." *Id.* ¶ 7.

Plaintiffs immediately sought review of this aspect (and others) of the November 2 Order. *See* Nov. 3, 2010 Ltr. from Glenn D. Pomerantz to Judge Wood. Plaintiffs argued that this portion of the November 2 Order had not stated the legal relevance of system-wide, first-infringement information to the claimed § 412(2) defense. Plaintiffs further argued that the requested information in fact was irrelevant to that defense, because Lime Wire became secondarily liable for "each act of direct infringement at the point when that particular act of infringement occur[red]." *See id*. at 13.

This Court resolved Plaintiffs' objection to the November 2 Order in its Opinion and Order entered November 19 (Doc. No. 363). The Court recognized that the parties had a fundamental legal disagreement concerning the interpretation of § 412(2), and that the resolution of this legal disagreement could determine the relevance of system-wide first-infringement information. *Id*. at 8–9. Accordingly, the Court held the portion of Judge Freeman's November 2 Order compelling the production of such evidence in abeyance, asking "Judge Freeman to decide the threshold legal question of whether subsequent downloads by a peer-to-peer service['s] users qualify as new infringements" under § 412(2). *Id*. at 9. The Court ordered the parties to brief this issue to Judge Freeman, and noted that, "[d]epending on the resolution of that legal issue, the Court may order discovery related to this issue." *Id*.

C. Judge Freeman's December 29 Report And Recommendation

Following supplemental briefing, Judge Freeman entered her Report and Recommendation on December 29. The Report concludes that, under § 412(2), "where an

individual downloaded a recording on the LimeWire system for the first time prior to the registration of the copyright for that work, statutory damages would not be available with respect to that recording, unless registration was made within three months after the first publication of that work . . . ." Report at 2. Adopting Lime Wire's proposed interpretation, the Report concludes that § 412(2) bars statutory damages based on all subsequent infringements of a particular work by *different* Lime Wire users—including those who commence their infringement after registration—so long as at least one user infringed the same work using the LimeWire system prior to late registration of that work. Based on this interpretation of § 412(2), the Report concludes that Plaintiffs should be required to produce the discovery set forth in Judge Freeman's November 2 Order. *Id*. at 9–10.

III. STANDARD OF REVIEW

Under Rule 72(a) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1), the Court must set aside a Magistrate Judge's recommendation on a pretrial ruling that does not dispose of a claim or defense where the recommendation is "clearly erroneous or contrary to law." Because the Report addresses a pure question of law, this Court reviews it de novo, without according any deference to the Magistrate Judge's legal determinations. *See PowerShare, Inc. v. Syntel, Inc.*, 597 F.3d 10, 15 (1st Cir. 2010) ("When, as in this case, review of a non-dispositive motion by a district judge turns on a pure question of law, that review is plenary under the 'contrary to law' branch of the Rule 72(a) standard.") (collecting cases).

IV. ARGUMENT

The Report's interpretation of § 412(2) is contrary to law. It is irreconcilable with the language and structure of the Copyright Act, including both § 412(2) and § 504. It is contrary to longstanding precedent. And it would greatly limit the liability of the most culpable inducers of

mass infringement, thus in fact encouraging such inducers; this is not a result that Congress could have intended.

A. Section 412(2) On Its Face And As Construed Measures The Commencement Of Each Direct Infringer's Infringement Against The Date of Registration of the Particular Work Infringed

At the outset, it is important to review what the parties do *not* dispute about the interpretation of § 412(2). Specifically, it is common ground—and well-established under the law—that § 412(2) determines the availability of statutory damages by measuring the commencement of the particular infringement at issue against the registration date of the work, if the work was registered more than three months after first publication. In practical terms, that means that if Defendant A commenced a direct infringement of a Plaintiff's published copyrighted work prior to registration, and such registration did not occur until more than three months after publication, then the Plaintiff would not be able to recover statutory damages against Defendant A based on that infringement of that work. However, if someone else—Defendant B—separately commenced infringing the same copyrighted work *after* its registration, then the same Plaintiff *would* be able to recover statutory damages against Defendant B. The rule, in short, is that the "infringement" that counts under § 412(2) for determining the availability of statutory damages is the particular infringement that forms the basis for copyright liability.

Lime Wire has *never* argued that § 412(2) bars statutory damages against all subsequent infringers, so long as someone anywhere (not even using LimeWire) infringed the work prior to late registration. Lime Wire could not make such a contention in light of the statute's text and structure, the cases interpreting it, and its legislative history. All of these sources of statutory

construction, however, remain relevant to the arguments that Lime Wire did advance, and that the Report erroneously accepts. We therefore discuss each point briefly:

Text and Structure: By its plain text, § 412(2) does not bar all statutory damages if a work is not registered on or within three months of its first publication. If Congress had meant that to be the rule, it would have been easy for Congress to say that expressly—providing, simply, that "no award of statutory damages or attorneys' fees may be made for any infringement of a work that was registered more than three months after publication." It also would have been easy for Congress to say that statutory damages are forever unavailable if anyone (whether before the Court or not) ever infringed a work prior to its late registration—providing that "no statutory damages or attorneys' fees may be awarded for infringements of a work that was first infringed before the effective date of its registration, unless such registration is made within three months after the first publication of the work." The statute does not say that either.

The statute instead focuses on the particular instance(s) of direct infringement before the Court. The statute begins by making clear that it applies "[i]n any action under this title"—*i.e.*, that it is case specific. The focus on the particular action before the Court is entirely consistent with the immediately preceding statutory section—§ 411—which makes compliance with the registration requirements a statutory prerequisite to filing the particular suit in federal court. *See Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010).

Legislative History and Purpose: As discussed below, the Report places great weight on its belief that Congress's overriding purpose in enacting § 412(2) was to provide a strong incentive to copyright holders to register their works promptly. *See* Report at 4, 8–9. But encouraging early registration was not Congress's only purpose. If that had been Congress's only purpose, Congress would have said that statutory damages are unavailable—period—unless

the copyright owner registers on or within three months of first publication. Congress did not impose that blanket rule because it was not concerned about registration for its own sake, but rather for the sake of, *inter alia*, providing notice and registration information "for persons who wish to use copyright[ed] materials."[5] Once a work is registered, any subsequent user—including a possible infringer—could have no cause to complain on this score, because the user could find registration information in the Copyright Office. The legislative history behind § 412(2) makes it clear that Congress, the Register of Copyrights, and commenters understood that once a copyright owner registers its work, "*all remedies would be available for an infringement that commenced after the registration had been made*[.]"[6]

Case Law: Decades of precedent interpreting § 412(2) adopts exactly this rule. For example, in *Mason*, the Fifth Circuit analyzed the timing of infringements by each of three different direct infringers of each of the works at issue in the case. As the court in that case put it, § 412(2) must be analyzed "*[a]s to each work and each defendant*[.]" 967 F.2d at 144 (emphasis added). Numerous cases are in accord. *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.*, No. 03 Civ. 9944 (GEL), 2005 WL 14920, at *20 (S.D.N.Y. Jan. 3, 2005) (comparing dates of first direct infringements by defendant to dates of registration); *U2 Home Ent'mt, Inc. v. Hong Wei Int'l Trading, Inc.*, No. 04 Civ. 6189 (JFK), 2008 WL 3906889, at *14 (S.D.N.Y. Aug. 21, 2008) (same).

---

[5] *Copyright Law Revision, Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, 87th Cong. at 72 (1961) ("1961 Report") (Ex. 3).

[6] *Copyright Law Revision, Part 2, Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, 88th Cong., at 134 (1963) ("1963 Comments") (Ex. 4).

B. The Report's Conclusion That Lime Wire's Secondary Liability And Its Disparate Users' Separate Infringing Conduct Are All One "Ongoing Series Of Infringing Acts" Is Contrary To Law

The Report does not explicitly address the well-established case law holding that § 412(2) looks to the commencement of the particular direct infringement by the particular direct infringer that gives rise to the copyright liability. The Report instead starts from the fact that courts have "consistently held that statutory damages are barred under Section 412 where the first act in an 'ongoing series of infringing acts' occurred before registration." Report at 2–3. The Report frames the issue as whether Lime Wire's and all of its users' liability are part of one course of continuing infringement, and thus subject to the "ongoing series of infringing acts" standard. The Report concludes that they are, ostensibly "considering the intent of section 412, prior cases interpreting Section 412 . . . , and the specific facts of this case[.]" *Id*. at 5. The Report's analysis of all of three of these points—precedent, the facts concerning Lime Wire, and Congress's intent—is demonstrably wrong. We address each of these issues in turn.

1. The Report's Reliance On The "Ongoing Series Of Infringing Acts" Doctrine Was Misplaced—And The Report's Distinction Of Apposite Case Law Misreads The Record

The Report's analysis of case law is flawed in two respects. First, the Report relies on the "ongoing series of infringing acts" cases, even though those cases (with one non-binding, and non-persuasive, exception) are limited to ongoing infringements *by the same direct infringer*. Second, the Report disregards a case that is perhaps most analogous to this one based on a plain misreading of Plaintiffs' contentions in this case.

a. The "Ongoing Series Of Infringing Acts" Doctrine Refers To Ongoing Infringement *By The Same Direct Infringer*

The Report relies heavily on the fact that case law has consistently held that "infringement 'commences' for purposes of § 412 when the first act in a series of acts

constituting infringement occurs." *Johnson v. Jones*, 149 F.3d 494, 506 (6th Cir. 1998) (quoted in Report at 3). The Second Circuit applied this same rule in *Troll*, 483 F.3d at 158 (using the term "ongoing series of infringing acts"). The Report latches on to the adjectives "continuing" and "ongoing" and unmoors those words entirely from their context, overlooking the fact that when cases talk about an "ongoing" or "continuing" series of infringing acts, they are talking about the same infringement being done *by the same direct infringer*, over and over again. Prior cases stand for the unremarkable—and completely inapposite—proposition that *the particular direct infringer's* infringement "commences" under § 412(2) with his first infringing act. These cases do *not* stand for the proposition that an individual direct infringer's infringement is a continuation of *someone else's* direct infringement. The Report's contrary use of the "continuing infringement" test is unprincipled and wrong.

For example, in *U2 Home Entertainment*, 2008 WL 3906889, 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. *Id*. 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. Likewise, in *EZ-Tixz v. Hit-Tix, Inc.*, 919 F. Supp. 728 (S.D.N.Y. 1996), cited in the Report at page 3, 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.

These cases have nothing to do with whether *separate* acts of infringement by *different* users of a peer-to-peer system also should be deemed to be part of a "continuing course of infringement." In fact, the "ongoing series of infringing acts" cases expressly recognize that the infringing defendant may restart the § 412(2) clock—*i.e.*, have his infringement deemed to "commence" anew—if his post-registration infringement is sufficiently distinct, in time or character, from pre-registration infringement. *See, e.g.*, *Troll Co.*, 483 F.3d at 158–59; *CA, Inc.*, 579 F. Supp. 2d at 363–64; *Jamison v. Royal Caribbean Cruises, Ltd.*, No. 08-CV-1513 (WQH), 2009 WL 559722, at *3 (S.D. Cal. Mar. 4, 2009). If a plaintiff can demonstrate that an individual's infringements 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. Direct infringement by a *separate direct infringer* is a "separate infringement" under these precedents.

The Report further relies on *Love v. City of New York*, No. 88 CIV. 7562 (MBM), 1989 WL 140578 (S.D.N.Y. 1989), and *Bouchat v. Bon-Ton Dep't Stores, Inc.*, 506 F.3d 315 (4th Cir. 2007), for the proposition that "infringements by multiple actors should be considered an ongoing series of infringing acts . . . for purposes of Section 412." Report at 5–6. These cases do not support such a conclusion. In *Love*, one defendant (Kwitny) distributed a book with infringing quotations from plaintiff's work pre- and post-registration, and an unrelated defendant (the City of New York) infringed plaintiff's work by distributing Kwitny's (infringing) book post-registration. With almost no analysis of the issue, the court held that § 412(2) barred a statutory damages claim against both defendants because "[i]t was the same infringement—distribution of [Kwitny's infringing book]—that commenced before registration, and is no different conceptually from sale of an infringing book by one book store before registration and

sale of the same book by another one after registration." *Love*, 1989 WL 140578, at *2. Respectfully, that conclusion is wrong under the well-established case law, discussed above, that holds that when infringement "commences" under § 412(2) is assessed separately as to each separately liable direct infringer. *Love*'s erroneous reading of the law means that the case is not persuasive authority.

The *Bouchat* case—which the Report also cites—is inapposite by its own terms. The Fourth Circuit there addressed the liability of three groups of defendants: the Baltimore Ravens football team, the National Football League's licensing arm ("NFLP"), and numerous "downstream" licensees. NFLP infringed the plaintiff's copyright directly by licensing it (without authorization) to the numerous licensees. *See* 506 F.3d at 324–25. The NFLP first infringed pre-registration, but plaintiff argued that statutory damages nevertheless should be available against individual licensees post-registration. *Id.* at 330. The Fourth Circuit disagreed because the NFLP was *itself* a direct infringer along with each of the licensees, and its course of infringement commenced prior to registration. *Id.* However, the court limited its holding to the particular facts of licensor-licensee joint and several liability:

> Once NFLP designed and licensed the Flying B logo that infringed [plaintiff's] copyright, the liability of all of NFLP's licensees became a foregone conclusion. Thus, we hold that a copyright owner may not obtain statutory damages from a licensee liable jointly and severally with a licensor when the licensor's first infringing act occurred before registration and was part of the same line of related infringements that included the licensee's offending act.

Id. at 331; *see also Bouchat v. Champion Prods, Inc.*, 327 F. Supp. 2d 537, 553 n.22 (D. Md. 2003) (district court decision, stating that the case did "*not* present a situation in which each of many infringers acted independently and not derivatively from a common primary infringer.") (emphasis added). *Bouchat* thus stands for the proposition that, where a licensor and its licensee are *both* direct infringers whose joint licensing activities constitute one and the same act of direct

infringement, then if statutory damages are unavailable under § 412(2) against the licensor, those damages likewise will be unavailable against the licensee even if it infringed post-registration.

Bouchat is plainly inapposite. Lime Wire—unlike the NFLP—is not a "primary infringer." *Bouchat*, 327 F. Supp. 2d at 553 n.22. Lime Wire's users are the primary infringers, and the only direct infringers at issue in this case. Lime Wire's liability derives from those *users'* infringements. *See* Opinion and Order (Doc. No. 216, May 11, 2010) at 26 ("To establish their secondary liability claims, Plaintiffs must first establish that Lime Wire users directly infringed Plaintiffs' copyrights.").

b. The Report Disregards Relevant Authority Based On A Mischaracterization Of Plaintiffs' Requested Relief

In contrast to *Bouchat*, this case involves a central secondary infringer whose liability derives from—and thus who is *separately* joint and several with—each of numerous individual LimeWire users. In this case, Lime Wire is liable for a separate statutory award as to each copyrighted work with each LimeWire user with whom it is distinctly jointly and severally liable. This calculus is clear from the text of § 504(c)(1), which provides that a plaintiff may seek "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)(1) (emphasis added). As Professor Nimmer explains, if a defendant (D) is secondarily liable for copyright infringement with three separate direct infringers (A, B, and C), D will be jointly and severally liable for damages with *each* of those direct infringers, and thus "three sets of statutory damages may be awarded, as to each of which D will be jointly liable . . . ." 4 M. NIMMER & D. NIMMER, COPYRIGHT § 14.04[E][2][d] (2002).

Section 412(2) applies separately to each individual instance of infringement as to which Lime Wire may be responsible for a separate statutory award. *Mason*, 967 F.2d at 144. Hence, the relevant infringement date under § 412(2) is the date of *each* LimeWire user's first direct infringement of a work in suit.

Plaintiffs' theory of Lime Wire's statutory damages liability is not novel. Rather, the Ninth Circuit squarely adopted it in *Columbia Pictures Television v. Krypton Broadcasting of Birmingham, Inc.*, 106 F.3d 284 (9th Cir. 1997), *rev'd on other grounds sub nom Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998). In that case, the court found the defendant (Feltner) liable as a secondary infringer, based on vicarious and contributory liability for copyright infringement. *Id.* at 288. Feltner was thus found jointly and severally liable for infringement committed directly by each of three different television stations. Feltner argued that under § 504(c)(1), he should pay just one statutory award for each work, notwithstanding that the statute expressly provides that a defendant is subject to a separate statutory award (even for the same work) with respect to each instance of infringement for which she or he is separately jointly and severally liable. The Ninth Circuit rejected Feltner's 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-a-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 Court held that Feltner must pay *three separate* statutory awards for each work infringed. The defendant's status as a joint tortfeasor with each separate station, the court explained, does not make each station a joint tortfeasor with respect to the other. *Id*.

The Report asserts that Plaintiffs' reliance on the joint-and-several liability prong of § 504(c)(1) and *Columbia Pictures* was unwarranted, purportedly because "Plaintiffs seek one

award of statutory damages per recording, regardless of the number of times the recording was downloaded." Report at 7. Lime Wire never raised this argument (and Plaintiffs thus never had an opportunity to address it), and for good reason: *It is not true.*

Plaintiffs have consistently, repeatedly, and unambiguously stated that they seek "a separate statutory award for each act of direct infringement for which Defendants are jointly and severally liable with separate infringing actors." *See* Ex. 1 at 2 (Sept. 23, 2010 Letter from Glenn D. Pomerantz to Judge Wood). *See also* Pltfs' Memo. of Law in Support of Mot. for Preliminary Injunction to Freeze Assets at 7 (Doc. No. 243, June 7, 2010) ("For *each act of infringement* the Court may award statutory damages") (emphasis added); Pltfs' Memo. of Law in Support of Mot. for Permanent Injunction at 2 (Doc. No. 235, June 4, 2010) ("Lime Wire acted willfully, which increases the upper ceiling of the statutory range to $150,000 *per work per infringer*.") (emphasis added); Pltfs' Br. Pursuant to Nov. 19 Order at 13 (Doc. No. 379, Nov. 29, 2010) ("Defendants' secondary liability means they are liable for *each direct infringer's infringements* and the damages associated therewith . . . . Each underlying direct infringement supports an independent award of statutory damages . . . .") (citation omitted) (emphasis added); Pltfs' Dec. 6, 2010 Ltr. Br. to Judge Freeman at 11 ("[A]s an inducer of infringement, Lime Wire stands in the shoes of each direct infringer it induced. Under § 504(c) of the Copyright Act, Plaintiffs are entitled to recover for 'all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually.' Thus, statutory damages are analyzed separately for each 'one infringer.'") (internal citations omitted); Ex. 2 (Tr. of Hr'g before Judge Freeman, Nov. 1, 2010) at 139:10–13 ("Mr. Pomerantz: When user number two downloads the recording that is a separate act of infringement under the copyright law. . . . And Lime Wire is jointly and severally liable with *each user that downloaded a particular*

recording[.]") (emphasis added). Judge Freeman correctly stated Plaintiffs' actual theory under § 504(c)(1) at the November 1 conference. *See* Ex. 2 (Tr. of Hr'g Before Judge Freeman, Nov. 1, 2010) at 140:3–6 ("The Court: So, you are looking for a calculation of damages based on some number of individual infringements of individual works . . . . Mr. Pomerantz: Correct.").

The Report did not cite any of the foregoing portions of the record. Instead, the Report purports to find Plaintiffs' position in a statement in their Complaint, filed in 2007. *See* Report at 7 (citing, but not quoting, First Am. Compl. (Doc. No. 45, July 26, 2007) at 33). The cited page of Plaintiffs' complaint states that they seek statutory damages of up to "$150,000 per work with respect to each and every timely registered sound recording owned by Plaintiffs." First Am. Compl. at 33. But the Complaint also states: "Each violation of each of Plaintiffs rights in and to each copyrighted sound recording constitutes a *separate and distinct act of copyright infringement*." *Id.* ¶¶ 71, 84, 96 (emphasis added).[7]

The Report does not correctly characterize Plaintiffs' theory of statutory damages, either in the Complaint or in Plaintiffs' numerous other statements to this Court and to Judge Freeman. Plaintiffs plainly and unambiguously have stated that they seek, with respect to each work, a separate statutory award as to each act of direct infringement for which Lime Wire is jointly and severally liable with a directly infringing LimeWire user.[8] Under the well-established case law

[7] Plaintiffs do not believe that any amendment of their Complaint is necessary, as the Complaint already conforms to Plaintiffs' request for statutory damages as to each direct infringer's infringement of a work. However, if the Court disagrees, Plaintiffs request leave to amend.

[8] The Report states in a footnote that, based on the Report's characterization of Plaintiffs' damages theory, the Report "need not determine whether Plaintiffs would be entitled to multiple damages awards per recording regardless of the number of Lime Wire users that downloaded that recording." Report at 8 n.2. This Court did not ask Judge Freeman to make a recommended ruling on whether Plaintiffs are entitled to multiple damages awards per recording under § 504(c)(1).

that guides the proper interpretation of § 412(2), it is the date that each such direct infringement commenced that determines the statute's application.

2. The Report Incorrectly Characterizes The Infringement At Issue In The Case

The Report purported to apply "ongoing infringement" precedents to Lime Wire because, it reasoned, "[b]oth the acts relied on by the Court in finding inducement (*e.g.*, "creat[ing] and distribut[ing] LimeWire, which users employ[ed] to commit a substantial amount of infringement") and the acts of direct infringement (*i.e.*, the downloading of particular recordings by LimeWire users) were of an ongoing and substantially similar nature." Report at 6. The Report further stated that "based on the nature of the LimeWire system . . . it is not clear whether direct infringement of a recording by LimeWire users should be considered separate acts." *Id.* at 7. The Report erred as to both points.

First, Lime Wire is not a direct infringer—it is secondarily liable for direct infringements committed by others. The purportedly "continuing" nature of Lime Wire's activity has no relevance to the calculation of damages, under either § 412(2) (which looks to when each "*infringement*" commences) or § 504(c) (which, likewise, provides for an award of damages for "all infringements involved in the action, with respect to any one work, for which *any one infringer* is liable individually . . ."). The Supreme Court has made clear that the liability of an entity like Lime Wire derives from each of its users' separate infringements: "[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, 919 (2005) (emphasis added). This Court made the same point in its summary judgment order. *See* Opinion and Order (Doc. No. 216, May 11, 2010) at 26. Thus, Lime Wire's

responsibility for a statutory damage award derives entirely from of the existence of an underlying direct infringement.

Second, the Report also errs in its statement that LimeWire users needed one another to infringe, and that resulting infringements using a shared tool thus should not be considered as "separate." Report at 7. That is both factually and legally incorrect, and misreads the summary judgment Opinion and Order. *See* Report at 7 (citing Opinion and Order at 4–5). In that Order, the Court correctly identified that LimeWire permitted users to "share digital files via an Internet-based network known as the 'Gnutella network,'" through which LimeWire users could "download any files that LimeWire locates." Opinion and Order (Doc. 216, May 11, 2010) at 4, 5. However, such files were *not* limited to files on other LimeWire users' hard drives: rather, LimeWire interoperated with other file-sharing clients that implemented the Gnutella protocol, allowing users to search for files on the computers of—and download from—users of third-party software. *See* Pltf.'s Statement of Undisputed Material Facts ¶ 51 (July 18, 2008); Def.'s Response to Pltf.'s Statement of Undisputed Material Facts ¶ 51 (Doc. No. 152, Sept. 26 2008). Thus, it is demonstrably *not* the case, as the Report states, that each infringement by a LimeWire user required "another user" of LimeWire also to infringe. Report at 7.

The Report's conclusion that every one of the millions of Lime Wire users who have uploaded and downloaded a copy of the same sound recording is part of one group of jointly and severally liable actors also is contrary to law. Report at 7. Tortfeasors become "joint" actors *only* where their conduct "is a legal cause of a *single and indivisible harm* to the injured party," RESTATEMENT (SECOND) OF TORTS § 875 (1979) (emphasis added). Where tortfeasors act separately to produce separate harms, their liability is "successive and independent." *See generally Cayuga Indian Nation of N.Y. v. Pataki*, 79 F. Supp. 2d 66, 73 (N.D.N.Y. 1999). Here,

each of the direct infringers of the works in suit indisputably caused a separate direct harm to Plaintiffs' rights: each independently caused a *separate* violation of a right reserved to Plaintiffs under 17 U.S.C. § 106—downloaders to the right of reproduction, uploaders to the right of distribution. The Report's consideration of all direct infringers as one group of jointly and severally liable actors on the ground that they merely used the same *tool* to infringe is thus unsupportable.

3. Extinguishing Statutory Damages Available Against Post-Registration Infringers is Contrary to the Policies and Legislative History of § 412(2)

Finally, the Report erroneously concludes that adopting Lime Wire's interpretation of § 412(2) will further what the Report describes as Congress's purpose of "encourag[ing] early registration." Report at 8. The Report finds that "[t]here would be little motivation to register early in the face of massive induced infringement, if the copyright owner could maintain statutory damages against an inducer so long as the copyright was registered prior to any one act of direct infringement, regardless of how long the owner delayed in registration from the date when the inducer began distribution of an infringement-enabling product or service." *Id*.

The policies underpinning the registration-inducing provisions of the Copyright Act are *not* merely to "encourage early registration" at all costs, as Magistrate Judge Freeman assumed. Report at 4, 8. That paints an entirely incomplete picture. Congress indeed intended § 412 to "encourage registration." Ex. 4 (1963 Comments) at 133. Congress plainly did not deem registration important as an end to itself, however. Rather, Congress recognized that registration had importance to both owners and users of copyrighted works. And the legislative history makes clear that once an owner has registered—and the users of the copyrighted work are in a

position to benefit from registration—§ 412(2)'s penalty need not, and does not, apply to subsequent post-registration users. *Id.* at 134.

The complete Legislative History behind § 412(2)—which the Report does not discuss—sheds critical light on this issue. That history makes it clear that, when § 412 was being considered, Congress considered registration an important goal for both owners and users. To owners, registration provided a beneficial official record of a copyright claim and proof of the existence of a work at a particular time. *See* Ex. 3 (1961 Report) at 72. However, the Register of Copyrights in hearings on what ultimately became § 412 emphasized that "perhaps even more important" were the benefits of registration to *users*:

> Registration serves other purposes, *perhaps even more important*, for persons who wish to use copyright materials. It provides accessible official records from which they can obtain information regarding the existence and basis of a copyright claim, the extent of the claim (e.g., in a new version of a preexisting work), its duration, and its initial ownership. In conjunction with the records of assignments and other transfers of ownership, it enables users to trace title to the copyright.

Id.

The legislative history demonstrates that Congress did not intend for § 412(2)'s penalties to post-date the registration that Congress sought to incentivize, or to "entail forfeiture" of copyright protection. *Id.* at 73. Thus, the Register of Copyrights explained that, even "[w]here registration is delayed" beyond the grace-period, "*all the remedies would still be available for an infringement commenced after registration*." *Id.* at 74; *see also* Ex. 4 (1963 Comments) at 355 ("if [registration is] untimely, certain remedies are to be denied . . . against any infringement undertaken prior to a registration (which registration can of course be made at any time during the copyright life)").

These policies comport with the well-established interpretation of § 412(2), namely, that it eliminates statutory damages as an available remedy *against a particular direct infringer* if her or his direct infringement commenced prior to registration of a late-registered work. Where the direct infringer's actions commence *after* registration, however, statutory damages remain available no matter how late the registration; they are not forever extinguished.

Such policies likewise comport with more recent Congressional acts taken to protect copyright owners from digital piracy. Congress has recognized the "rampant piracy problem" created by "[n]ew technologies [that] have made theft and duplication of copyrighted works easier than ever before," and permitted "mass distribution" of such works immediately upon (or even prior to) publication. *See* 151 Cong. Rec. H2114-01 (daily ed. Apr. 19, 2005) (comments of Rep. Sensenbrenner on the Family Entertainment and Copyright Act of 2005). Specifically, Congress has recognized that new technologies permit swift distribution of works as soon as—or, even before—they are released. Noting the widespread harm created by such distribution, Congress has taken drastic efforts to combat it. *See id.* (statement of Rep. Berman, discussing ultimately-enacted additional criminal penalties for those who contribute to the online distribution of "leaked" pre-release materials: "[p]irates have taken over the ship of distribution and now provide users with sound recordings before they are released . . . ."); *see* 17 U.S.C. § 506(c) (codifying such criminal penalties). The Report's interpretation of § 412(2)—which would absolve the active *inducers* of piracy of statutory damages so long as they encouraged users to infringe *immediately* following publication—cannot be squared with Congress's demonstrated intent to curb such piracy in exactly these circumstances. Rather, that interpretation would create precisely the "forfeiture" of protection based on late registration that the enactors of § 412(2) sought to avoid. *See* Ex. 3 (1961 Report) at 73.

* * *

In sum, *none* of the rationales the Report offers for its recommended interpretation of § 412(2) withstands scrutiny. The case law does not support that interpretation; the nature of Lime Wire's responsibility for its users' infringement does not support it; and the text of the statute and its legislative history do not support it. Section 412(2) should be interpreted in this case as it always has: the date on which infringement "commences" is the date on which the *direct* infringer whose conduct gives rise to the infringement claim commenced his infringement.

C. Plaintiffs Have Produced All Relevant Evidence In Their Possession, Custody And Control That Is Relevant To A Defense Under § 412(2), Properly Construed

Plaintiffs have provided Lime Wire with the evidence they possess that potentially could be relevant to a § 412(2) defense under this proper construction of that statute, under which the date on which infringement "commences" is the date on which each direct infringer whose conduct gives rise to the infringement claim commenced his infringement. *First*, Plaintiffs have produced the registration certificates for the copyrighted works in suit. Lime Wire thus knows the date of each of those certificates. *Second*, Plaintiffs have produced to Lime Wire the evidence in Plaintiffs' possession, custody or control that shows the direct infringement of each of those works by LimeWire users. As to some of the works, Plaintiffs have provided copies of actual files that were uploaded without authorization by LimeWire users. As to others, Plaintiffs have provided data gathered based on a significant sampling of infringements by LimeWire users. All of this evidence is accompanied by date information sufficient to determine *when* the particular alleged direct infringement occurred. In the case of the copies of files unlawfully distributed by LimeWire users, each file has a metadata file associated with it that has the precise

time when the file was uploaded.[9] And in the case of the statistical-sample data used by experts, Plaintiffs have produced month-by-month information regarding the infringements of particular works. Lime Wire can compare the date of the underlying direct infringements with the dates on the registration certificates, and Lime Wire can determine whether it has a § 412(2) defense to liability based on that infringement. Lime Wire is not entitled to more from Plaintiffs.

V. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully submit that the December 29 Report and Recommendation must be overruled in its entirety.

Dated: January 18, 2011

Respectfully submitted

/s/ Kelly M. Klaus
Kelly M. Klaus

Attorney for Plaintiffs
Munger, Tolles & Olson LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560
(213) 683-9100
(213) 687-3702 (Fax)

[9] To the best of Plaintiffs' knowledge based on detailed review, every single one of these more than 10,000 relevant files was downloaded *after* the date of the relevant registration. Thus, § 412(2) is inapplicable to these proven direct infringements.