

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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

Plaintiffs,

– against –

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

Defendants.

ECF Case

06 Civ. 5936 (KMW)

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

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Defendants Lime Group LLC, Lime Wire LLC, Mark Gorton, and M.J.G. Lime Wire Family Limited Partnership (collectively, “Defendants”) respectfully request that the Court overrule Plaintiffs’ Objection (the “Objection”) to Magistrate Judge Freeman’s Report & Recommendation Concerning 17 U.S.C. § 412(2) (the “Report”), and adopt the Report in its entirety.

### **PRELIMINARY STATEMENT**

In accordance with Your Honor’s November 19, 2010 Order, the parties fully briefed the “threshold legal question of whether subsequent downloads by a peer-to-peer service[’s] users qualify as new infringements” so that statutory damages for a particular copyrighted recording would be barred if a user downloaded that recording prior to its registration. The Report’s recommendation that statutory damages would not be available with respect to any such recording reflects the correct and most sensible conclusion based on the statutory history of § 412 and existing case law.

Judge Freeman’s Report reflects a thoughtful and well-reasoned analysis of the legal issues. She begins by acknowledging that statutory damages are “extraordinary remedies” that are not available “where the first in an ‘ongoing series of infringing acts’ occurred before registration.” (Report at 3.) Indeed, Plaintiffs bear the burden of proof in establishing their entitlement to such “extraordinary remedies” by producing evidence of the first date of infringement. Judge Freeman determined that “[t]he infringement at issue in this case is best understood as an ongoing series of infringing acts” because both LimeWire’s inducement and the acts of direct infringement “were of an ongoing and substantially similar nature.” (Report at 6.) Judge Freeman properly grounded this conclusion in the case law, the statutory history of § 412 and the facts of this case.

Plaintiffs misleadingly claim that Judge Freeman's order would encourage "the Lime Wires of the future to promote early infringement in order to immunize themselves from statutory damages." But it is Plaintiffs' failure to timely register their copyrights that Judge Freeman properly focused on. That is, by choosing not to register certain copyrights within three months of their publication, as Congress intended to incentivize copyright holders to do by enacting § 412, Plaintiffs accepted the foreseeable risk that statutory damages may be barred for infringements commencing prior to registration. In any event, even with statutory damages unavailable, Plaintiffs are not without a remedy for infringement because actual damages are always available.

Because Judge Freeman's report is supported by well-established law, as well as the history and purpose of § 412, Defendants respectfully submit that Your Honor should adopt it in its entirety.

### **PROCEDURAL BACKGROUND**

In August of 2010, Defendants served Plaintiffs with various discovery requests related to direct infringement and damages, including Interrogatory No. 1, which sought the date of first infringement claimed by Plaintiffs and the circumstances under which they became aware of such infringement. (Defs.' Interrogatories to Pls. (No. 1-9 Aug. 9, 2010) (Eaton Decl., Ex. 1).) Because of a so-called "extraordinary burden on Plaintiffs to comb through the records of their employees," Plaintiffs requested that Defendants explain the relevance of such request. (Pls.' Aug. 20, 2010 Ltr. Br. at 16 (Eaton Decl., Ex. 2).) As Defendants, and now Magistrate Judge Freeman, have fully explained to Plaintiffs on many occasions, such evidence is highly relevant under § 412 of the Copyright Act.

After almost six months and multiple rounds of briefing, Plaintiffs continue to characterize Defendants' discovery requests as "irrelevant" in an attempt to shirk their burden of

demonstrating that they comply with the prerequisites of § 412. (*See* Objection at 5.)

Meanwhile, Plaintiffs have never denied that they do in fact maintain records of the first dates of infringement of the works. Instead, Plaintiffs have attempted to obscure this fact by highlighting LimeWire's lack of data on this point. (*Id.*) But it is Plaintiffs who bear this burden because it is they who have elected to seek statutory damages. *See Ushodaya Enters., Ltd. v. V.R.S. Int'l, Inc.*, 64 F. Supp. 2d 352, 353 (S.D.N.Y. 1999).

As of January 25, 2011, Plaintiffs have elected to seek statutory damages and attorney's fees for the alleged infringement of 9,724 copyrighted songs (or 2,497 albums), which individual LimeWire users allegedly illegally downloaded and shared using the LimeWire system. Of those songs, almost half (4721) were registered after July 3, 2001, which is when the LimeWire system first became available for use. Had Plaintiffs registered those songs in a timely fashion, § 412 would not impose a bar to the relief they seek. But Plaintiffs failed to do so, and many of those recordings were registered late. For example, Plaintiffs are seeking the extraordinary remedy of statutory damages for four individual songs off the *Silver Lining* album by Bonnie Raitt. However, Plaintiff Capitol Records LLC did not bother to register the copyright for this album until more than seven years after the album was released. (*See* Eaton Decl., Ex. 3.)

In total, Plaintiffs failed to register 1,322 songs (277 albums) within the statutory grace period under the Act -- i.e., within three months after those recordings were first published (the "Late Registered Works"). Under § 412, therefore, Plaintiffs are not entitled to an award of statutory damages for the infringement of any Late Registered Work that commenced before registration and continued thereafter. That is more than a theoretical possibility in this case,

since Plaintiffs took months (and in some cases years) to register numerous popular recordings after they were published and available for people to copy.

Despite their failure to timely register their copyrights for these recordings, Plaintiffs claim substantial damages for the Late Registered Works, now seeking a least one multiple of the statutory maximum,<sup>1</sup> which is \$150,000 for each work that was allegedly infringed. Plaintiffs' total claim for statutory damages for the Late Registered Works thus equals at least \$198.3 million on a per song basis and \$41.55 million on a per album basis.

Given the significant damages Plaintiffs seek for the Late Registered Works, Plaintiffs should be compelled to produce whatever information they have as to when the Late Registered Works were first infringed. Through the discovery process, it has become apparent that Plaintiffs, through third party investigators and research firms, have been monitoring the LimeWire network and the activities of LimeWire users for years. To date, Plaintiffs have refused to search for and produce such relevant data. Instead, Plaintiffs have attempted to meet their burden on § 412 by producing evidence of post-registration infringement and then offering LimeWire the opportunity to “compare the date of the underlying direct infringement with the date on the registration certificates, and Lime Wire can [then] determine whether it has a §412(2) defense to liability based on that infringing.” (Objection at 25.) Plaintiffs have clearly not met their burden.

On November 2, 2010, Judge Freeman issued an Order directing Plaintiffs to produce, *inter alia*, “documents or information sufficient to show the earliest dates that each . . . recording was downloaded” via the LimeWire system. (11/2/10 Order (Dkt. 339) at ¶ 7.) Plaintiffs subsequently filed an objection to Judge Freeman’s Order, culminating in a November

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<sup>1</sup> Plaintiffs now claim that they are seeking multiple statutory damages per work, on a per direct infringement basis. (Objection at 15.) As discussed below, Plaintiffs have previously and consistently stated that they were seeking one statutory award per work.



19, 2010 Order from this Court “hold[ing] in abeyance its decision on [Judge Freeman’s] Order, to permit Judge Freeman to decide the threshold legal question of whether subsequent downloads by a peer-to-peer service[’s] users qualify as new infringements, or rather are part of an ongoing series of infringements.” (11/19/10 Order (Dkt. 363) at 9.) On December 28, 2010, Judge Freeman issued the Report that is at issue here, recommending “(1) that the Court find that, 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 not available with respect to that recording, unless registration was made within three months after the first publication of that work, and (2) that . . . Plaintiffs be directed to produce the discovery relevant to this defense.” (Report at 2.) Plaintiffs have objected to the Report, and Defendants now urge this Court to overrule those objections and adopt the report in its entirety.

## ARGUMENT

### **I. Magistrate Judge Freeman Correctly Determined The Extraordinary Remedy of Statutory Damages for Copyright Infringement Is Not Available For Any Recording Downloaded Via LimeWire Prior To Registration, Unless Registration Was Made Within Three Months After the First Publication Of That Work.**

#### **A. Section 412(2) of the Act Limits the Availability of Statutory Damages To Copyright Owners Who Have Timely Registered Their Copyrights.**

Under § 504 of the Copyright Act, a copyright owner whose work has been infringed is entitled to recover “actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.” 17 U.S.C. § 504(b). Actual damages are considered among the remedies “ordinarily available in infringement cases.” *Singh v. Famous Overseas, Inc.*, 680 F. Supp. 533, 535 (E.D.N.Y. 1988). Under certain circumstances, however, a copyright owner may elect to recover an award of “statutory damages” in lieu of actual

damages or profits. 17 U.S.C. § 504(c)(1). But Congress placed an important limitation on that election, recognizing that statutory damages is an “extraordinary” remedy that should not be awarded in all cases. *See* H.R. Rep. No. 94-1476, at 158 (1976). Under § 412(2) of the Act, “no award of statutory damages or of attorney’s fees, as provided by §§ 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.” Thus, under the scheme of the Act, a copyright owner whose work has been infringed before registration, or before the three month grace period has expired, would be entitled only to the remedies ordinarily available in infringement cases, including actual damages and injunctive relief. *Singh*, 680 F. Supp. at 535-36. Section 412 denies any award of statutory damages or attorney’s fees where the infringement commenced before the holder registered its copyright. *Id.*

The plain text of § 412(2) clearly states that “no award of statutory damages or of attorney’s fees, as provided by §§ 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 . . . .” § 412(2) (emphasis added). As Magistrate Judge Freeman explained in her Report, “it would be peculiar if not inaccurate to use the word ‘commenced’ to describe a single act. That verb generally presupposes as a subject some kind of activity that begins at one time and continues or reoccurs thereafter.” (Report at 3 (citing *Singh*, 680 F. Supp. at 535.)

Numerous cases have concluded that § 412 “imposes a bright-line rule, barring the recovery of statutory damages ‘for infringement occurring after registration if that infringement is part of an ongoing series of infringing acts and the first act occurred before registration.’” *U2 Home Entm’t, Inc. v. Hong Wei Int’l Trading, Inc.*, No. 04 Civ. 6189, 2008

WL 3906889, at \*15 (S.D.N.Y. Aug. 21, 2008); *see also Johnson v. Jones*, 149 F.3d 494, 506 (6th Cir. 1998) (stating “[e]very court to consider this question has come to the same conclusion; namely, that infringement ‘commences’ for the purposes of § 412 when the first act in a series of acts constituting continuing infringement occurs.”); *Fournier v. Erickson*, 202 F. Supp. 2d 290, 298 (S.D.N.Y. 2002) (same); *Troll Co. v. Uneda Doll Co.*, 483 F.3d 150, 158-59 (2d Cir. 2007) (“Congress understood section 412 to mean a post-registration act of infringement will not be deemed to have commenced before registration if the infringing activity ceased for an appreciable period of time.”).

Congress’ intent in enacting § 412 was to permit extraordinary relief to those who timely register, and to deny that special remedy to those who do not. *See* H.R. Rep. No. 94-1476, at 158 (1976) (“section 412 would deny any award of the special or ‘extraordinary’ remedies of statutory damages or attorney’s fees where infringement of copyright in an unpublished work began before registration or where, in the case of a published work, infringement commenced after publication and before registration,” unless registration was sought within the grace period); *see also Singh*, 680 F. Supp. at 536 (section 412 is designed to encourage prompt registration of copyrights by denying “the ‘extraordinary’ remedies of statutory damages . . . where registration is not promptly made.”); *Love v. City of N.Y.*, No. 88 Civ. 7562, 1989 WL 140578, at \*2 (S.D.N.Y. Nov. 17, 1989) (“Statutory damages and attorney’s fees, however, were meant by Congress to reward prompt registration and cannot be made in violation of that intent.”) Therefore, tardy registrants are not permitted to seek the extraordinary relief of statutory damages or attorneys’ fees under § 412(2).

**B. Pursuant To § 412(2) Of The Act, Plaintiffs Are Not Entitled To Statutory Damages For The Late Registered Works.**

As statutory damages and attorney's fees under § 504 are regarded as "extraordinary" remedies, the burden of proving compliance with § 412 rests with the copyright holder. *See, e.g., Ushodaya Enters., Ltd. v. V.R.S. Int'l, Inc.*, 64 F. Supp. 2d 352, 353 (S.D.N.Y. 1999) ("Plaintiff bears the burden of demonstrating that it complies with the prerequisite of section 412."); *Data Gen. Corp v. Grumman Sys. Support Corp.*, 825 F. Supp. 361, 364 (D. Mass. 1993) (courts applying § 412 have "barred recovery unless the plaintiff has demonstrated that registration predated the infringement"). It is a "prerequisite" and there is no entitlement to such relief, otherwise. 17 U.S.C.A. § 412, note 2 (West 2010). Plaintiffs do not dispute this. Thus, Plaintiffs understand that if a copyright holder fails to satisfy § 412, it may not seek statutory damages or attorney's fees, but it is not without a remedy. The copyright holder may still seek an award of actual damages caused by the alleged infringement, or injunctive relief.

Here, of course, Plaintiffs have elected to seek statutory damages for all of their post-1972 works at issue in this case, including all 1,322 Late Registered Works. Under well-settled law, Plaintiffs are not entitled to statutory damages (or attorneys' fees) for any of those Late Registered Works unless *Plaintiffs prove* that none of those works were downloaded by LimeWire users until after those works were registered, or, alternatively, that pre-registration downloading and post-registration downloading were not part of an "ongoing series of infringing acts." Indeed, as long as "any infringement" of copyright "commenced" before registration, statutory damages for subsequent infringements are barred if they form a part of a continuous series of acts, even if those subsequent infringements violate "a different provision of the Copyright Act." *Qualey v. Caring Ctr. of Slidell*, 942 F. Supp. 1074, 1076 (E.D. La. 1996).

In this case, the predicate to the alleged infringement by individual LimeWire users was the implementation of the LimeWire system. As described by Plaintiffs, “from a bare technical standpoint,” the LimeWire system is a peer to peer file sharing program and network that “connects individual computer users via the Internet, and allows them to transfer files from one user’s hard drive to another’s.” (First Am. Compl. (Dkt. 45) ¶ 40.) But “Defendants’ design of the software” and their “development and maintenance of the network,” were allegedly “targeted to and predicated on a highly-efficient finding and copying of large volumes of Plaintiffs’ copyrighted sound recordings.” (*Id.*) The LimeWire system, moreover, was allegedly not specific to individual acts of direct infringement, but rather “[c]ontributed to . . . direct infringement” by providing the “machinery or goods that facilitate the infringement.” (Plaintiffs’ Memorandum of Law in Support of Their Motion for Partial Summary Judgment (Dkt. 125) at 33.) Indeed, Plaintiffs have taken the position that further discovery on the question of causation for inducement of infringement “on a recording-by-recording basis” was unnecessary because “Defendants induced the infringement of Plaintiffs’ *entire* catalogs because that was the point of Defendants’ business: to have everything that users possibly could want available for the taking on Lime Wire.” (9/8/10 Letter from G. Pomerantz to Hon. Kimba M. Wood (Eaton Decl., Ex. 4), at 10 (emphasis in original).) “[I]n this kind of a case,” Plaintiffs maintained, “it’s not as if it’s unique evidence of infringement of this recording versus that. You know, it’s all the same conduct that they engaged in.” (6/7/10 Hr’g Tr. (Eaton Decl., Ex. 5) at 14:1-4.)

Plaintiffs’ own theory is that the alleged illegal sharing of protected sound recordings by users of the LimeWire system (through uploading and downloading those recordings) was the natural, probable and intended outcome of a system that was developed,

designed and maintained to facilitate that sharing. There was nothing “discrete” about it. If — as Plaintiffs expressly assert — the act of developing, designing and maintaining that file sharing system was itself an act of vicarious infringement and a catalyst for the inducement of others, then the sharing that users engaged in through LimeWire was necessarily a continuing act of infringement. As such, the first act of infringement “commenced” within the meaning of § 412 when the first user of the LimeWire system uploaded a copyrighted file for another other user to download and share, which continued when still other LimeWire users copied and shared that file in precisely the way Plaintiffs contend the system was designed to be used. Having taken that position with respect to liability, Plaintiffs cannot now claim during the damages phase that the only relevant acts of infringement are those of each individual LimeWire user, taken individually.

Accordingly, Plaintiffs are not entitled to an award of statutory damages for *any* of the works in suit that were registered after the three month grace period unless they demonstrate that the first infringement of those works did not take place until after their registration became effective. Having failed to act promptly, Plaintiffs are the authors of their own alleged misfortune, and are not entitled to “extraordinary” relief available under § 504. They must instead content themselves with the relief ordinarily available to every copyright holder whose works have been infringed.

## **II. Plaintiffs’ Challenges to Magistrate Freeman’s Report Are Without Merit.**

### **A. The “Ongoing Series Of Infringing Acts” Doctrine Is Not Limited to Ongoing Infringements By The Same Direct Infringer.**

Plaintiffs contend that the Report is “flawed” because it relies on the “ongoing series of infringing acts” cases, even though those cases are “limited to ongoing infringements by the same direct infringer.” (Objection at 11.) To the extent there are cases that suggest

otherwise, Plaintiffs claim, those case are either “non-binding” or “non-persuasive.” (*Id.*) Plaintiffs are wrong.

As an initial matter, there is no support for Plaintiffs’ cabined view of the continuing act doctrine in the text of § 412. Section 412(2) speaks to “any infringement of copyright commenced after first publication....” By its plain language, it does not impose any requirement that the infringement be “direct” or limit it to single infringers, as Plaintiffs erroneously claim. Nothing in the legislative history of the provision, moreover, suggests that Congress meant to circumscribe it in the fashion Plaintiffs contend.

To be sure, there are many cases discussing or applying the continuing act doctrine that involved multiple acts of direct infringement by the same infringer. *See, e.g., Johnson v. Jones*, 149 F.3d 494, 506 (6th Cir. 1998) (stating “[e]very court to consider this question has come to the same conclusion; namely, that infringement ‘commences’ for the purposes of § 412 when the first act in a series of acts constituting continuing infringement occurs.”) But none of those cases state or imply that this is a condition for the continuing act doctrine to apply. For example, in *U2 Home Entm’t, Inc. v. Hong Wei Int’l Trading, Inc.*, defendants rented out unlawfully duplicated videos to its customers. No. 04 Civ. 6189 (JFK), 2008 WL 3906889, at \*1 (S.D.N.Y. Aug. 21, 2008). The court held that plaintiffs were precluded from obtaining statutory damages for any of the videos that were rented out to customers, even though defendants continued to rent the videos out to their customers after the videos’ copyrights were registered. *Id.* at \*16. Because the infringing acts were found to be continuing, the fact that the videos were being provided to different customers each time the videos were rented was of no moment.

Conversely, there are several cases applying the continuing act doctrine in precisely the way Plaintiffs say it does not apply—*i.e.*, to the acts of multiple infringers whose infringing acts were both derivative and direct. For instance, in *Love v. Kwitny*, 706 F. Supp. 1123 (S.D.N.Y. 1989), decided by former Chief Judge Mukasey, a former New York Times correspondent and the author of a manuscript (Kennett Love) successfully sued another author and Wall Street Journal reporter (Jonathan Kwitny) for allegedly copying passages of Love’s manuscript verbatim in Kwitny’s own book (*Endless Enemies*), one of two runners-up for a Pulitzer Prize in 1985. In a subsequent action, Love sued Kwitny and several unrelated entities, including the City of New York and the public radio station, WNYC, for distributing Kwitny’s book in Colorado and New York. *Love v. City of N.Y.*, No. 88 Civ 7562, 1989 WL 140578 (S.D.N.Y. Nov. 17, 1989). The court dismissed all claims against all defendants for statutory damages as barred by § 412, reasoning that Kwitny’s copying of Love’s manuscript occurred prior to registration and therefore both the distribution of *Endless Enemies* by Kwitny in Colorado and the distribution of the book by the unrelated New York defendants were part of the same infringement that “commenced before registration.” *Id.* at \*2. It made no “difference” that the City defendants did not begin their infringement until after registration, the court reasoned, because it was part of the “same infringement-distribution” that commenced before registration. *Id.*

The recent decision of the Court of Appeals for the Fourth Circuit in *Bouchat v. Bon-Ton Dept. Stores, Inc.*, 506 F.3d 315 (4th Cir. 2007), likewise concludes that the continuing act doctrine applies to multiple infringers so long as the other requirements of the doctrine are met. There, the holder of a copyright for a team logo sued the NFLP for infringement, as well as numerous unrelated third party licensees, who had been given “direct or indirect authorization”



from the NFLP to use the infringing work in their advertisements. 506 F.3d at 325. Like Plaintiffs here, the plaintiff in *Bouchat* argued that the “correct approach” in determining the availability of statutory damages “would have been to treat the date on which each individual licensee first violated Bouchat’s copyright.” *Id.* at 330. The Fourth Circuit disagreed, noting that the NFLP “gave each licensee permission to copy, so NFLP was also responsible for the licensee’s acts of copying, making the NFLP jointly and severally liable for the infringing acts of each licensee.” *Id.* at 330-31. Further, because a statutory damages award under § 504 covered “all infringements” involved in the action, it was “appropriate to treat the earliest date of infringement by *any* participant in a line of related copyright violations as the date of commencement.” *Id.* Since the first infringement occurred before the plaintiff registered his copyright, no claim for statutory damages against any third-party licensee would lie.

Plaintiffs argue that *Bouchat* is “inapposite” because the licensors and licensees there were all direct infringers. (Objection at 14.) Why that should make any difference to the analysis Plaintiffs do not say, and for very good reason: as courts in this District have recognized, the continuing act doctrine does apply to multiple infringers who infringe in different ways.

For instance, in *Ez-Tixz v. Hit-Tix, Inc.*, 919 F. Supp. 728 (S.D.N.Y. 1996), the creator of a computer program for theatre ticket sales brought an action for direct infringement against the program’s alleged licensee and against certain corporations and individuals associated with that licensee under a theory of contributory infringement or vicarious liability. 919 F. Supp. 728, 731-36 (S.D.N.Y. 1996). The court struck Plaintiff’s claim for statutory damages against all of the defendants because the alleged acts of infringement after registration were not “distinct.” *Id.* at 736. In their prior briefing, Plaintiffs argued that *Ez-Tixz* is

distinguishable on the ground that those defendants who were allegedly secondarily liable were related to the defendants that were allegedly directly liable. (Pls.' November 29, 2010 Br. (Dkt. 379) at 14.) Now they have abandoned that position, and argue instead that the defendants were "jointly-acting." (Objection at 12.) Neither is correct: the court's determination that statutory damages were unavailable was in no way predicated on the basis of any such relationship or joint action. Rather, the court dismissed the statutory damages claim under § 412 because the post-registration infringements constituted "a continuation of the infringement that 'commenced' prior to registration." 919 F. Supp. at 736.

Plaintiffs' entire argument ultimately rests on one case from the Ninth Circuit which they believe is somehow controlling here: *Columbia Pictures Television v. Krypton Broad. of Birmingham*, 106 F.3d 284, 294 (9th Cir. 1997). Leaving aside the fact that a decision from a different district is not binding, *Columbia Pictures* simply has no bearing here, given its distinct facts. There, a jury awarded statutory damages against an owner of two television stations for airing certain episodes of a television series in violation of a license agreement. The owner appealed the verdict, arguing that the two stations were joint tortfeasors and, as such, only one award of statutory damages was appropriate. The court disagreed, noting that, while there could be joint liability between the owner and each individual station, there was no evidence in the record to suggest that the stations were joint tortfeasors *inter se*.

According to Plaintiffs, *Columbia Pictures* demonstrates that Defendants' alleged liability for each direct infringer's infringements supports an independent award of statutory damages that cannot be converted into one. Plaintiffs argue that LimeWire should have to pay separate awards for each direct infringer's act because LimeWire users are not jointly and severally liable with one another. Yet Plaintiffs point to no authority suggesting that in cases

involving multiple infringers, joint and several liability among all infringers is a prerequisite for the continuing act doctrine to apply. Indeed, as explained above, this Court has already held otherwise in *Love v. City of New York*, where the plaintiff sought multiple statutory damage awards from different defendants who were not jointly and severally liable for their infringements. 1989 WL 140578 at \*1.

Moreover, in *Columbia Pictures Television*, there was “no evidence in the record” to support the notion that the independent stations had somehow jointly contributed to each infringement, for example by sharing television episodes between them to air on their respective stations. Here, by contrast, there has been no development of the “record,” since Plaintiffs have resisted providing any discovery whatsoever that would bear upon this issue. What is more, there is no reason to presume that each LimeWire user acted independently of one another because that is not how the LimeWire system worked. According to Plaintiffs’ own complaint, the LimeWire system was the mechanism that “connects individual computer users via the Internet, and allows them to transfer files from one user’s hard drive to another’s.” (First Am. Compl. (Dkt. 45) ¶ 40.) As this Court previously ruled, “[t]he evidence in the record establishes that LimeWire users infringed Plaintiffs’ copyrights by *sharing* unauthorized digital copies of the Recordings through LimeWire” *with one another*. (5/25/10 Order (Dkt. 223) at 25.) (emphasis added) Thus, quite unlike the independent stations in *Columbia Pictures*, LimeWire users could not have engaged in the infringements for which Plaintiffs seek relief without working together by uploading the works for sharing with one another through the file-sharing system that LimeWire provided.

**B. Barring Statutory Damages For An “Ongoing Series Of Infringing Acts” That Continues After Registration Is Consistent With The Policies And Legislative History Of § 412(2).**

Plaintiffs’ arguments relating to the legislative history of § 412(2) of the Act completely miss the mark. First, Plaintiffs’ support for their argument rests on passages relating to the value of registration, generally, in reports drafted over a decade before the enactment of § 412(2). (*See* Objection at 21-23.) The more relevant legislative history is contained in the House Report drafted at the time of § 412(2)’s enactment. The House Report explains that its purposes is to “induce[] in some practical way” copyright registration which “would no longer be compulsory.” H.R. Rep. No. 94-1476, at 158 (1976).

Second, it is true, as Plaintiffs cite in their Opposition, that “[w]here registration is delayed ‘beyond the grace-period, ‘all the remedies would still be available for an infringement commenced after registration.’” (Objection at 22 (citing 1961 Report at 74).) The key to properly understanding the reasoning of the 1961 Report is in understanding that, in the instant case, infringement was commenced by Defendants the day the first user of the LimeWire system uploaded a copyrighted file for another user to download and share. All acts of infringement thereafter were part of an “ongoing series of infringing acts” that do not restart the clock for purposes of § 412(2). The Report is not contrary to Congress’ intentions because Plaintiffs are permitted to recover statutory damages for new, unrelated infringements that first commenced after they belatedly registered their copyrights. And, of course, Plaintiffs are not prevented from recovering actual damages for the Late Registered Works.

Finally, it strains credulity that Congress’ intent from 1976 when § 412(2) was implemented could accurately be gleaned from the Congressional Record made nearly 30 years later. (*See* Objection at 23.) Nowhere in the 2005 Congressional Record cited by Plaintiffs is it recommended that the inducements for Plaintiffs to register their copyrights be lessened to

combat piracy. That would simply not make sense. Rather, the nature of file sharing, and the speed with which users can download music only amplifies the need for prompt registration. If anything, Congress' concerns about prompt registration would be even more relevant today and the incentives for prompt registration implemented by § 412(2) are all the more important. Moreover, as Plaintiffs have made clear, Congress was well aware that songs were being infringed over the internet prior to release by 2005. Yet, Congress chose not to modify § 412(2) as a result. The legislative history of § 412(2) supports the ruling from Magistrate Judge Freeman's Report.

**C. Magistrate Freeman Correctly Characterized The Infringement At Issue.**

Magistrate Judge Freeman correctly concluded that:

The infringement at issue in this case is best understood as an ongoing series of infringing acts. Both 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” (id. at 31)) 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.) In reaching this conclusion, Judge Freeman notes that “by nature of the peer-to-peer file-sharing system, LimeWire users did not act independently.” (Report at 7.) LimeWire users could not act independently because “[f]or a user to download a recording, another user first had to make that recording available; when the recording was made available by one peer user, every other user then had the opportunity to download that recording.” (*Id.*) (citing 5/11/10 Order, at 4-5.) As Your Honor previously ruled, “[t]he evidence in the record establishes that LimeWire users infringed Plaintiffs' copyrights by sharing unauthorized digital copies of the Recordings through LimeWire” with one another. (5/25/10 Order (Dkt. 223) at 25.)

However, Plaintiffs contend that Judge Freeman erred because of the hypothetical possibility that LimeWire users downloaded files from users of third party Gnutella protocol software.<sup>2</sup> (Objection at 20.) The Court need not address hypothetical possibilities. Here, Plaintiffs' only evidence of direct infringement consists of their investigator's alleged downloads of recordings from *LimeWire users*. (*Id.* at 24.) Plaintiffs have not produced .mp3 files or evidence packages for instances where LimeWire users downloaded songs from users of third party software.

Meanwhile, Plaintiffs' additional infringement evidence further supports Judge Freeman's characterization that the infringement of the LimeWire users is an ongoing series of acts. Notably, Plaintiffs conducted a sample study of the LimeWire Network: The LimeWire NetWork Search Study. Through this study, Plaintiffs claim to have found multiple copies of certain works. Based on their long held contention that it is impossible to independently create more than one copy of a file with the same SHA-1 hash, Plaintiffs' then conclude that the identical copies must have been shared between LimeWire users. Under Plaintiffs theory, all but one of the copies must be deemed infringing and must have directly or indirectly originated from the first and only ripped "original" because the infringing copies hash to the same value. Given this, Plaintiffs cannot now claim that such alleged infringements are separate, distinct and unrelated.

**D. From The Time of The Complaint, Plaintiffs Have Sought Only One Statutory Damage Per Work.**

In their objections to Judge Freeman's Report, Plaintiffs claim that they have "consistently, repeatedly, and unambiguously stated that they seek 'a separate statutory award for

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<sup>2</sup> This argument was not raised before Magistrate Freeman, and is thus untimely. *See Abu-Nassar v. Elders Futures, Inc.*, No. 88 Civ. 7906, 1994 WL 445638 (S.D.N.Y Aug. 17, 1994).

each act of direct infringement for which Defendants are jointly and severally liable with separate infringing actors.” (Objection at 17.) This is evidently news not only to Defendants, but also to Judge Freeman, who noted that Plaintiffs’ unambiguously stated otherwise in their Amended Complaint. (Report at 7.) Indeed, Plaintiffs’ Amended Complaint states not once, but *three times* that “Plaintiffs are entitled to the maximum statutory damages under 17 U.S.C. § 504(c), in the amount of \$150,000 with respect to *each timely-registered work* that was infringed.” (First Am. Compl. (Dkt. 45) ¶¶ 74, 87, 99 (emphasis added).) These statements are followed by an unambiguously worded prayer for relief requesting “\$150,000 per work with respect to each and every timely registered sound recording owned by Plaintiffs that was willfully infringed.” (*Id.* at 33.) Moreover, other statements by Plaintiffs comport with the Amended Complaint’s language. *See* Pltfs’ Memo. Of Law in Support of Mot. For Permanent Injunction at 10 (Dkt. No. 235, June 4, 2010) (“For *each work* for which Lime Wire bears liability for an act of direct infringement, Lime Wire owes Plaintiffs *a statutory award* within a Congressionally prescribed range.”).

Regardless, as Judge Freeman noted in her Report “even if Plaintiffs were seeking awards of statutory damages per LimeWire user and even if such awards would be proper, it does not follow that each download would have to be considered a separate act of infringement for purposes of Section 412.” (Report at 8.) Relying on *Love v. Kwitny*, 706 F. Supp. 1123 (S.D.N.Y. 1989), Judge Freeman explained that this Court has previously “found an ‘ongoing series’ of infringement based on acts of infringement by two or more direct infringers who were not jointly and severally liable.” (*Id.*) *See also New Name, Inc. v. The Walt Disney Co.*, No. 07-cv-5034, 2008 WL 5587487, at \*4 (C.D. Cal. July 23, 2008) (“The fact that separate completed

infringing acts occurred is of no import, for it is the commencement of a series of separate infringing acts that guides the application of § 412.”).

Finally, Plaintiffs’ current assertion that they are entitled to multiple statutory damages awards because LimeWire users allegedly infringed their works multiple times misses the mark. Plaintiffs concede that any liability by the LimeWire Defendants is “derivative” (Pls.’ November 29, 2010 Br. (Dkt. 379) at 12), which means that Defendants are jointly and severally liable with the LimeWire users who allegedly infringed Plaintiffs’ copyrights directly. *See Arista Records LLC v. Doe 3*, 604 F.3d 110, 117-18 (2d Cir. 2010); *Gershwin Publ’g v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971) (joint and several liability for vicarious infringers). Plaintiffs are thus entitled to no more than one award of statutory damages per work -- and only if they show that no infringement of any of those works pre-dated the work’s registration or, alternatively, that post-registration infringements were not part of a series of acts constituting continuing infringement that commenced prior to registration.

Plaintiffs should be well aware of this damages standard. In *Arista Records LLC v. Usenet.com, Inc.*, Magistrate Judge Katz issued an Amended Report and Recommendation on damages in a factually similar case against a file-sharing service provider. The report stated that “[s]tatutory damages under the Copyright Act are calculated based on the number of works infringed, not the number of times a defendant infringed each work.” (Amended Report and Recommendation at 5-6, *Arista Records LLC v. Usenet.com, Inc.*, No. 1:07-cv-08822-HB-THK (S.D.N.Y. Feb. 2, 2010), ECF No. 306 (Eaton Decl., Ex. 7).) The record company plaintiffs, the very same plaintiffs in this case, never filed an objection to the report, but “respectfully request[ed] that the Court adopt the Report and Recommendation in full.” (Plaintiffs’ Response to Reynolds’ Objections to the Report and Recommendation of the Magistrate Judge at 4, *Arista*



*Records LLC v. Usenet.com, Inc.*, No. 1:07-cv-08822-HB-THK (S.D.N.Y. Mar. 4, 2010), ECF No. 309 (Eaton Decl., Ex. 8).) One Plaintiff in the instant action, Sony Music Entertainment, has even expressly argued in another case in which it was a defendant that “[s]tatutory damages under the Copyright Act must be calculated based upon the number of copyrighted works found to be infringed, rather than the number of alleged infringements or the number of participating persons in the infringement.” (Memorandum of Law for Joint Pre Trial Order by Sony BMG Music Entertainment Inc, Loud Records, LLC, Wesley Weston and Lucky Publ’g Co. at 14, *Granville v. Suckafree Records, Inc.*, No. 4:03-cv-03002 (S.D. Tex. Aug. 2, 2005), ECF No. 224 (Eaton Decl., Ex. 9).) Sony’s reversal on this point underscores the disingenuousness of Plaintiffs’ present Objection.

### **CONCLUSION**

After a carefully reasoned application of § 412 of the Copyright Act to the facts of this case, Magistrate Judge Freeman recommended “(1) that the Court find that, 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 not available with respect to that recording, unless registration was made within three months after the first publication of that work, and (2) that, as set forth in this Court’s 11/2/10 Order, Plaintiffs be directed to produce the discovery relevant to this defense.” For all of the foregoing reasons, Defendants respectfully request that the Court adopt the Report and Recommendation in full.

Dated: January 31, 2011

WILLKIE FARR & GALLAGHER LLP

Dated: January 31, 2011

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