EXHIBIT 1

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VIA HAND DELIVERY

The Honorable Kimba M. Wood
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: *Arista Records LLC et al. v. Lime Wire LLC et al.*, No. 06 Civ. 5936 (KMW)

Dear Judge Wood:

In accordance with Rule 2(A) of Your Honor's Individual Practices, I write on behalf of Defendants in the above-referenced matter to request a pre-motion conference regarding Defendants' motion for partial judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). Defendants' motion concerns two legal issues regarding the scope of plaintiffs' statutory damages claims that are ripe for determination and will assist in narrowing the parties' dispute, streamlining discovery and focusing the issues remaining to be tried in January.

First, on September 16, 2010, Plaintiffs submitted a revised amended Exhibit A to their Amended Complaint containing the "final list of sound recordings" for which they seek statutory damages under the Copyright Act.[1] Plaintiffs' new Exhibit A lists 10,011 songs, or "works," for which they seek statutory damages, the majority of which are part of "compilations," in the form of CDs or albums, that comprise a single "work" subject to only one statutory damages award under Section 504(c)(1) of the Copyright Act. *See Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 140 (2d Cir. 2010). When the purportedly separate "works" on Plaintiffs' list are properly included as parts of compilations, the number of works for which Plaintiffs may seek statutory damages at trial is substantially reduced, from 10,011 to 2,533. Accordingly, Defendants seek permission to make a motion for a ruling that will limit the number of works at issue to that reduced figure.

Second, as the Court has noted in its summary judgment ruling, Plaintiffs have already obtained judgments against more than 700 LimeWire users and settled claims against almost 4,000 LimeWire users. *See* Amended Opinion and Order at 26 n.20 (citing Declaration of Katheryn Coggon, dated

[1] Plaintiffs also revised the Schedule B attached to their First Amended Complaint and now list 1,591 pre-1972 songs for which they are seeking damages under New York tort law.

Sept. 8, 2008, ¶ 4.) To the extent that Plaintiffs have already secured judgments and stipulated recoveries from direct copyright infringers predicated on particular copyrighted works as to which LimeWire is allegedly jointly and severally liable as a secondary infringer, Plaintiffs are, again, limited to a single statutory award and cannot separately recover from LimeWire.

I. Plaintiffs Cannot Recover for Separate Works Included as Part of Compilations.

The Copyright Act of 1976 limits a copyright holder to one statutory damages award "for all infringements involved in the action with respect to **any one work**" on which it holds a copyright. *See* 17 U.S.C. § 504(c)(1) (emphasis added). Further, it expressly states that "**all parts** of a compilation or derivative work constitute one work" for statutory damages purposes. Applying this statutory language, the Second Circuit recently held in *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 140 (2d Cir. 2010) that an album constitutes a "compilation" within the meaning of the Act, and that therefore, "[b]ased on a plain reading of the statute, . . . infringement of an album should result in only one statutory damage award." *Id.* at 141. As such, the plaintiffs in *Bryant* – who chose to issue their works as compilations – were only entitled to one statutory award for each copyrighted album at issue, regardless of whether the songs on the album were separately copyrighted. *Id.* at 140-41 & n.4; *see also UMG Recordings, Inc. v. MP3.COM, Inc.*, 109 F. Supp. 2d 223, 224-25 (S.D.N.Y. 2000) (for purposes of statutory damages, an entire compact disc, not individual songs therein, is the relevant work).

The same analysis applies here. Although Plaintiffs' "final list" of sound recordings contains 10,011 purportedly separate works, that number is greatly reduced when the works are grouped into CD or album compilations. For example, Plaintiffs' final list includes eight songs from Michael Jackson's album "Bad" – an album or compilation bearing a single copyright registration number 84-256. Under the Copyright Act, and *Bryant,* each of those eight songs is part of a single work, for which Plaintiffs can seek a single statutory damages award. Defendants will show as part of their motion that the number of separate works for which Plaintiffs can seek statutory damages is actually 2,533. Defendants therefore request the Court's permission to make this motion, the grant of which will substantially reduce and simplify the matters to be tried.

II. Plaintiffs May Not Seek Statutory Damages for any Works Upon Which They Have Already Obtained Recoveries from LimeWire Users.

Section 504(c)(1) provides that a copyright owner is limited to a single award of statutory damages per work "for all infringements involved in the action . . . **for which any two or more infringers are liable jointly and severally.**" 17 U.S.C. § 504(c)(1) (emphasis added). Here, Plaintiffs' infringement claims against LimeWire "are based on theories of secondary liability," Amended Opinion and Order at 25, as a result of which LimeWire's alleged liability is joint and several. *See Arista Records LLC v. Doe 3*, 604 F.3d 110, 117-18 (2d Cir. 2010) ("[I]t is well-established, based on the 'common-law doctrine that one who knowingly participates or furthers a tortious act is jointly and severally liable with the prime tortfeasor,' that one who with knowledge of the infringing activity, *induces…the infringing conduct of another*, may be held liable as a 'contributory infringer.'") (emphasis in original); *see also Gershwin Publ'g v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d. Cir. 1971) (joint and several liability for vicarious infringers).

As the Court has noted, and Plaintiffs have admitted, they have already secured statutory awards for many works by way of judgments against at least 726 individual LimeWire users, and nearly 4,000 settlements (*see* Declaration of Katheryn Coggon, dated Sept. 8, 2008, ¶¶ 4-5). Plaintiffs are now precluded from seeking additional statutory recoveries against Defendants for any of the same works for which Plaintiffs have already obtained recoveries, and for which Defendants are allegedly jointly and severally liable. That Plaintiffs have chosen to sue LimeWire separately does not alter this conclusion. *See* 4-14 NIMMER ON COPYRIGHT § 14.04[E] ("[e]ven if such persons are sued in separate actions, satisfaction of the judgments in the first action should constitute a defense to the second and succeeding actions"); TERRENCE P. ROSS, INTELLECTUAL PROPERTY LAW: DAMAGES AND REMEDIES § 2.02[3] (2010) ("Even if the infringers are sued in separate actions, a satisfaction of the judgment in the first action will constitute a defense to any succeeding actions."). *See also Bouchat v. Champion Prods., Inc.*, 327 F. Supp. 2d 537, 552 n.21 (D. Md. 2003) (rejecting approach whereby "a Plaintiff could multiply statutory damages awards through the device of filing separate actions against joint infringers"), *aff'd on other grounds*, 506 F.3d 315, 332 (4th Cir. 2007). Applying these principles, Defendants will show in their motion that the list of 2,533 works for which Plaintiffs may seek statutory damages should be further reduced by hundreds of works (if not more) as a result of Plaintiffs' previous recoveries from alleged direct infringers. Accordingly, Defendants request the Court's permission to make a motion on this basis as well.

Respectfully submitted,

Joseph T. Baio

cc: Glenn D. Pomerantz, Esq. (via facsimile and electronic mail)

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