

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

Defendants.

ECF Case

06 CV 5936 (KMW)(DF)

Dockets.Justia.com

**DEFENDANTS' MEMORANDUM OF LAW IN
SUPPORT OF THEIR MOTION FOR PARTIAL JUDGMENT ON THE ISSUE OF
PRIOR JUDGMENTS AGAINST DIRECT INFRINGERS**

WILLKIE FARR & GALLAGHER LLP

787 Seventh Avenue
New York, NY 10019
Phone: (212) 728-8000

Attorneys for Defendants

PRELIMINARY STATEMENT

Recognizing that statutory damages are an extraordinary remedy, the Copyright Act makes clear that a plaintiff may not take two bites out of the same statutory damages apple against jointly and severally liable infringers. Plaintiffs here allege that Lime Wire is jointly and severally liable with each direct infringer who used the Lime Wire system to download Plaintiffs' sound recordings. Plaintiffs, with the assistance of the Recording Industry Association of America ("RIAA"), have already pursued direct infringement claims against over 10,000 Lime Wire users (the "direct infringers"), and as of August 2008 had obtained at least 726 satisfied judgments and stipulated recoveries (as well as nearly 4,000 settlements) from direct infringers who used Lime Wire.¹

Under the Copyright Act, Plaintiffs are now precluded from obtaining additional statutory recoveries from Defendants with respect to any of the sound recordings for which they already obtained judgments from such direct infringers. Based on Defendants' review, the judgments previously obtained cover some 1,355 of the 9,715 post-1972 songs subject to statutory damages that appear on revised Schedule A to the Complaint, the final list of sound recordings for which Plaintiffs will seek damages in this lawsuit. The issue is therefore significant to the overall damages claim in this action, and Defendants seek a ruling precluding Plaintiffs from recovering from Defendants for those 1,355 songs.

¹ See Amended Opinion and Order, Docket No. 223 (May 25, 2010), at 26 n.20 (citing Declaration of Katheryn Coggon, dated Sept. 8, 2008, ¶¶ 4-5). The Coggon Declaration is attached as Exhibit 1 to the Declaration of Rita D. Mitchell ("Mitchell Decl.") submitted herewith.

Despite the 726 figure included in the Coggon Declaration, Plaintiffs claim that the 678 judgments the RIAA has produced to Defendants in this action constitute all the judgments obtained against Lime Wire users. See Mitchell Decl. ¶ 10 and Ex. 6 thereto. Plaintiffs have not explained the discrepancy between the 726 figure and the 678 figure. Moreover, as several of the judgments in the RIAA production post-date the Coggon Declaration, the discrepancy is likely even higher.

In their October 22, 2010 Motion for Partial Judgment on the Pleadings Pursuant to Rule 12(c) concerning “songs versus album compilations,” Defendants indicated that they would defer their further Rule 12(c) motion with regard to the “prior judgments” issue until after receiving those judgments and related pleadings in discovery.² Plaintiffs made their final production of these documents on January 31, 2011, and Defendants now submit their Rule 12(c) motion regarding prior judgments pursuant to the briefing schedule established by the Court at the February 18, 2011 hearing.

ARGUMENT

PLAINTIFFS MAY NOT SEEK STATUTORY DAMAGES AGAINST LIME WIRE FOR ANY SOUND RECORDINGS FOR WHICH THEY HAVE ALREADY OBTAINED JUDGMENTS FROM LIME WIRE USERS.

The Copyright Act provides that “a copyright owner may elect” to 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). As Plaintiffs have alleged, “LimeWire is jointly and severally liable with *each* direct infringer.”³ Consequently, with respect to any given work, there can be but a single statutory award against Lime Wire and direct infringers with whom Lime Wire is jointly and severally liable.

It makes no difference that Plaintiffs chose to sue the direct infringers and Lime Wire in separate actions, since the infringements alleged in the prior actions against individuals are also alleged against Lime Wire in this action, and thus all of those earlier infringements are

² See Defendants’ Memorandum of Law In Support Of Their Motion For Partial Judgment On The Pleadings, Docket No. 331 (Oct. 22, 2010), at 8 n.2.

³ See Plaintiffs’ Reply in Support of Objection to Magistrate Judge Freeman’s Report and Recommendation Concerning 17 U.S.C. § 412(2), at 11 (emphasis added) (Dkt. No. 461 Feb. 7, 2011).

“involved in [this] action” as well. *See Bouchat v. Champion Prods., Inc.*, 327 F. Supp. 2d 537, 552 n.21 (D. Md. 2003) (concluding that for statutory damages purposes “the action” includes all claims that could have been brought in a single case, because otherwise “a Plaintiff could multiply statutory damages awards through the device of filing separate actions against joint infringers”), *aff’ on other grounds*, 506 F.3d 315, 329 (4th Cir. 2007); Melville B. Nimmer and David Nimmer, 4-14 Nimmer On Copyright § 14.04[E][2][e] (2010) (“[e]ven if [jointly and severally liable infringers] are sued in separate actions, satisfaction of the judgment 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 [joint] infringers are sued in separate actions, a satisfaction of the judgment in the first action will constitute a defense to any succeeding actions.”).

Nor does it matter whether the direct infringers are jointly and severally liable with *each other*. In *Bouchat*, for example, the National Football League’s merchandising division (“NFLP”), used the plaintiff’s drawing to create an infringing “Baltimore Ravens” logo and then licensed the team logo to hundreds, if not thousands, of downstream business entities that used the logo in the course of their businesses. None of the 350 individual downstream retailers who were alleged to be jointly and severally liable with NFLP were alleged to be jointly and severally liable with each other. But the plaintiff’s recovery was limited to a “single statutory award for which the primary infringer NFLP would be jointly liable with the derivative infringers.” 327 F. Supp. 2d at 553. The “absence of joint liability among the Downstream Defendants themselves [did not] entitle[] Bouchat to multiple statutory damage awards where each infringement was a joint infringement with the NFLP.” *Id. See also United States Media Corp. v. Edde Entm’t Corp.*, No. 94 Civ. 4849, 1998 WL 401532, * 20 (S.D.N.Y. July 17, 1998)

(allowing only one statutory award of damages with respect to multiple infringements of a single work where distributor was jointly and severally liable with each of the downstream direct infringer defendants, who were not jointly and severally liable with each other); *McClatchey v. Associated Press*, No. 3:05-cv-145, 2007 WL 1630261, at *4 (W.D. Pa. June 4, 2007) (even though “there [was] not complete joint and several liability amongst all potential infringers,” in such cases “where the only Defendant is jointly and severally liable with all other alleged downstream infringers, Plaintiff is entitled to only a single statutory damages award.”).

In sum, Plaintiffs are precluded from obtaining statutory damages from Lime Wire with respect to the sound recordings for which Plaintiffs have already obtained judgments against Lime Wire users. Based on the judgments produced by Plaintiffs in this action, the total reduction is at least 1,355 from Plaintiffs’ Schedule A list of sound recordings.⁴

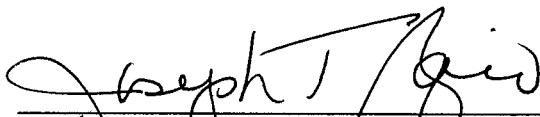
⁴ The numerical reduction based on the prior judgments may overlap with other reductions that are the subject of other issues before the Court, including the “songs versus albums” issue currently being briefed and the Section 412 registration issue as to which Magistrate Judge Freeman has issued her Report & Recommendation. The present motion addresses only the independent impact of the prior judgments.

CONCLUSION

Defendants respectfully request that the Court issue an order limiting Plaintiffs' statutory damages claims for the sound recordings on Schedule A to those premised on sound recordings for which Plaintiffs have not previously recovered from direct infringers.

Dated: New York, New York
February 23, 2011

Respectfully Submitted,
WILLKIE FARR & GALLAGHER LLP



Joseph T. Baio (jbaio@willkie.com)
John R. Oller (joller@willkie.com)
Tariq Mundiya (tmundiya@willkie.com)
Todd G. Cosenza (tcosenza@willkie.com)
Rita D. Mitchell (rmitchell@willkie.com)
787 Seventh Avenue
New York, New York 10019
Phone: (212) 728-8000
Fax: (212) 728-8111