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' OPENING BRIEF REGARDING SEPARATE STATUTORY DAMAGE AWARDS AGAINST DEFENDANTS UNDER 17 U.S.C. § 504(c)

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I. INTRODUCTION

Per the discussion at the February 18, 2011 Conference, this brief addresses the following issues regarding Plaintiffs' entitlement to multiple statutory damage awards against Defendants:

The law provides that Plaintiffs may seek multiple statutory awards for separate infringements of the same work: Section 504 of the Copyright Act plainly provides that a plaintiff may recover multiple statutory awards for infringements of the same work from defendants where, as here, defendants "are liable jointly and severally" with individual users who directly infringed the plaintiff's copyright. *See* 17 U.S.C. § 504(c)(1). The legislative history, case law construing the statute, and the leading copyright treatise all confirm what the statute clearly says: that the "total number of 'awards' of statutory damages . . . that a plaintiff may recover in any given action depends on the number of works that are infringed and the number of individually liable infringers." *Mason v. Montgomery Data*, 967 F.2d 135, 143 (5th Cir. 1992). Defendants therefore are liable for separate statutory awards for the infringements of the same works by separate Lime Wire users.

Plaintiffs' former counsel (Cravath, Swaine & Moore LLP) never waived Plaintiffs' entitlement to seek separate statutory awards in accordance with § 504(c): The complaints that Cravath filed state that Plaintiffs intend to seek "maximum statutory damages pursuant to 17 U.S.C. § 504(c)." Compl. (Doc. No. 1) at 26; First Am. Compl. (Doc. No. 45) at 33 ("FAC"). Maximum statutory damages necessarily include separate awards where, as here, Defendants are jointly and severally liable with separate individual users. The parties did not have to brief or discuss with the Court the issue of separate statutory awards pre-summary judgment, because Judge Lynch structured the case to adjudicate Defendants' liability before litigation over the extent of the damages they owe. *See* Klaus Decl. Exh. 1 (Dec. 7, 2007 Hr'g Tr. at 10:19–11:8).

Even if the complaints were deemed ambiguous on this issue, Defendants have no conceivable claim of prejudice from Plaintiffs seeking multiple awards in the damages phase: Defendants, through their former counsel (Porter & Hedges L.L.P.), obviously knew that Plaintiffs sought multiple statutory awards. *In 2006*, Defendants sought discovery into "each act of infringement by a user of the Lime Wire Software Application for which [Plaintiffs] seek damages for copyright infringement." Klaus Decl. Exh. 2 (Defts' First RFPs to Sony BMG Music Entertainment (Oct. 31, 2006), at 18). Defendants' current counsel (Willkie Farr & Gallagher LLP) knew about that request since they appeared on September 1, 2010. Defendants and their lawyers also knew—from Plaintiffs' statements beginning in at least June 2010—that Plaintiffs sought an award of statutory damages "*per work per infringer*." Pltfs' Memo. of Law in Supp. of Mot. for Permanent Inj. (Doc. No. 235), at 2 (emphasis added). And, as Defendants were initiating their massive damages-phase discovery campaign, Plaintiffs stated *numerous* times that they "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." Doc. 411-1, at 2 (Sept. 23, 2010 Letter from Glenn D. Pomerantz to Hon. Kimba M. Wood). In short, Defendants had ***seven months*** post-summary judgment to take discovery related to the multiple statutory awards that the law authorizes Plaintiffs to seek. Any cries by Defendants of "surprise," "shock," or "prejudice" are completely contrived. The Court should reject them.

These Defendants are textbook examples why Congress drafted § 504(c) to authorize multiple statutory awards for infringements of the same work: Defendants did not induce one Lime Wire user or a discrete group of users to engage in a coordinated campaign to infringe Plaintiffs' works. Defendants induced millions upon millions of *separate* users to infringe, all so that Defendants could build a business and enrich themselves on the backs of Plaintiffs'

copyrighted works. The system that Defendants intentionally designed and deployed worked beyond Defendants' wildest dreams – and to Plaintiffs' devastation. Defendants boasted that widely disparate users downloaded the Lime Wire software millions of times, and that their millions of users used that software to conduct billions of searches every month. *See* Pltfs' Statement of Undisputed Material Facts Pursuant to Local Rule 56.1 at ¶ 93 ("In a November 2007 speech at a P2P Advertising Upfront event, Lime Wire CEO George Searle was quoted as telling the audience that Lime Wire 'gets about seven million new downloads per month and its users generate a total of five billion searches per month.'"); *see also* Summary Judgment Opinion & Order (Doc. No. 223) at 36–37 ("[Lime Wire] has estimated that Lime Wire was downloaded over three million times during its first year of existence. By 2003, [Lime Wire] boasted that around two million users accessed the program every month. At the time Plaintiffs filed this action, [Lime Wire] claimed that Lime Wire had four million users per day."). These searches and downloads concentrated overwhelmingly on copyrighted content, and Plaintiffs' copyrighted sound recordings in particular. *See id.* at 7 (discussing conclusion of Dr. Richard Waterman that 43.6% of files available through Lime Wire were digital recordings with copyrights owned by Plaintiffs).

Because Defendants intentionally designed their service to avoid retaining incriminating information about their users' separate infringing acts, we will never completely know the total number of separate infringements that Defendants intentionally induced. What we do know—because a third-party research service included Lime Wire usage in a multi-year study, and because Plaintiffs' expert, Dr. Richard Waterman, has reviewed that data and performed a statistical analysis—is that, during a several-year period, separate Lime Wire users directly infringed just a subset of the copyrighted works at issue ***more than a half-billion times***.

Defendants' position that they can limit their exposure to a maximum of just *one* statutory award per work – regardless of the mass numbers of separate users they induced to infringe – flies in the face of the law Congress drafted, Congress's clear intent, common sense, and fairness.

II. THE LAW ENTITLES PLAINTIFFS TO SEPARATE STATUTORY AWARDS FOR DIFFERENT INFRINGERS' INFRINGEMENTS OF THE SAME WORKS

A. Section 504(c) Authorizes a Separate Statutory Award For Each Separate Direct Infringement For Which Defendants Are Separately Jointly And Severally Liable With A Lime Wire User

The statutory text, legislative history, precedent, and the leading commentator on copyright law all support Plaintiffs' position. The statutory damages provision of the Copyright Act, 17 U.S.C. § 504(c), provides that Plaintiffs may seek an award of statutory damages for each separately liable infringer's infringement of a work:

> (1) Except as provided by clause (2) of this subsection, the copyright owner may elect . . . to recover, instead of actual damages and profits, 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***, in a sum not less than $750 or more than $30,000 as the court considers just . . .
>
> (2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of damages to a sum of not more than $150,000.

17 U.S.C. § 504(c) (emphasis added). The language of this section is crystal clear: where more than one infringer infringes the same work, each infringer is liable for a separate statutory award. *Id.* Likewise, if two or more defendants are jointly and severally liable for the infringement of the work, then the plaintiff may recover a separate statutory award against each discrete unit of joint and several liability. *Id.* In this case, Defendants are separately jointly and severally liable

with each of their directly infringing users. Hence, Plaintiffs are entitled to multiple statutory awards.

The legislative history underlying § 504(c) is in accord. The House Report states: "an award of minimum statutory damages *may be multiplied if separate works and separately liable infringers are involved in the suit . . . .*" H.R. Rep. No. 94-1476 (Sept. 3, 1976) ("House Report"), at 162 (emphasis added). The House Report goes on to state that statutory awards must be multiplied by (a) the number of "separate and independent" works allegedly infringed, ***and*** (b) the number of independent direct infringers of those works:

> 3. Where the suit involves infringement of more than one separate and independent work, minimum statutory damages for each work must be awarded. For example, if one defendant has infringed three copyrighted works, the copyright owner is entitled to statutory damages of at least $750 and may be awarded up to $30,000 . . .
>
> 4. Where the infringements of one work were committed by a single infringer acting individually, a single award of statutory damages would be made. Similarly, where the work was infringed by two or more joint tortfeasors, the bill would make them jointly and severally liable for an amount in the $250 to $10,000 range. However, ***where separate infringements for which two or more defendants are not jointly liable are joined in the same action, separate awards of statutory damages would be appropriate.***

Id. at 162 (emphasis added).

Numerous cases read the law exactly as Congress intended. "When a plaintiff in a copyright suit elects statutory damages, the damages are calculated based on the number of copyrighted works *and the number of infringers . . . .*" *Fitzgerald v. CBS Broadcasting*, 491 F. Supp. 2d 177, 182 (D. Mass. 2007); *accord Venegas-Hernandez v. Sonolux Records*, 370 F. 3d 183, 194 (1st Cir. 2004). In *Mason v. Montgomery Data*, 967 F.2d 135 (5th Cir. 1992), the Fifth Circuit explained:

> Under this section, ***the total number of "awards" of statutory damages . . . that a plaintiff may recover in any given action depends on the number of works that are infringed and the number of individually liable infringers***, regardless of the number of infringements of those works. So if a plaintiff proves that one defendant committed five separate infringements of one copyrighted work, that plaintiff is entitled to only one award of statutory damages ranging from $500 to $20,000. And ***if a plaintiff proves that two different defendants each committed five separate infringements of five different works, the plaintiff is entitled to ten awards*** . . . .

Id. at 143–44 (emphasis added).

Case law further holds that, where (as here) a particular defendant is jointly and severally liable with *numerous* independent direct infringers, the plaintiff is entitled to multiple statutory awards. *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).[1] In *Columbia Pictures*, the court found the defendant (Feltner) liable as a contributory and vicarious infringer for copyright infringements committed by three separate television stations. *Id.* at 288. Feltner argued that under § 504(c)(1), he should pay just one statutory award for each infringed work. *Id.* The Ninth Circuit rejected this 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 (emphasis added). Thus, the Court held that Feltner had to pay *three separate* statutory awards for each work infringed: one for each separately liable infringing station. *Id.*

[1] The Supreme Court decision in this case held that the Seventh Amendment provides a right to a jury trial on statutory damages. The Court's decision has no effect on the soundness of the Court of Appeals' analysis discussed above (which itself is in accord with precedent).

Professor Nimmer's copyright treatise likewise confirms that Plaintiffs' reading of § 504 is correct:

> Suppose, for example, a single complaint alleges infringements of the public performance right in a motion picture against A, B, and C, each of whom owns and operates her own motion picture theater, and each of whom, without authority, publicly performed plaintiff's motion picture. If A, B, and C have no relationship with one another, there is no joint or several liability as between them, so that each is liable for at least a minimum $750 statutory damage award. ***Suppose, further, that D, without authority, distributed plaintiff's motion picture to A, B, and C. Although A, B, and C are not jointly or severally liable each with the other, D will be jointly and severally liable with each of the others. Therefore, three sets of statutory damages may be awarded, as to each of which D will be jointly liable for at least the minimum of $750.***

4 NIMMER ON COPYRIGHT § 14.04[E][2][d] (2002) (emphasis added).

In sum, there is no doubt that the law supports Plaintiffs' entitlement to multiple statutory awards.

B. Defendants Are Jointly And Severally Liable With Separate Directly Infringing Lime Wire Users

Defendants have tried to avoid this clear law by arguing that, even if § 504(c) authorizes multiple statutory awards, Plaintiffs still may only recover one statutory award against the totality of Defendants and every Lime Wire user who ever infringed a work, on the ground that all of them were jointly and severally liable together for all of their infringements. *See, e.g.*, Defts' Response to Pltfs' Objections to Magistrate Judge Freeman's Report & Recommendation Concerning 17 U.S.C. § 412(2) (Doc. No. 441), at 17-18. That argument stretches joint and several liability beyond all known legal bounds. For two direct infringers to be jointly and severally liable with one another, they must jointly participate in *the same infringement*. *See* RESTATEMENT (SECOND) OF TORTS § 875 (1979) (tortfeasors become joint actors where their conduct "is a legal cause of a *single and indivisible harm* to the injured party"); 4 NIMMER ON

COPYRIGHT § 14.04[E][2][d] ("[w]here two or more persons have joined in or contributed *to a single infringement of a single copyright*, they are all jointly and severally liable . . . .") (emphasis added); *Fitzgerald Pub. Co, Inc. v. Baylor Pub. Co, Inc.*, 807 F.2d 1110, 1116 (2d Cir. 1986) (imposing joint and several liability for copyright damages where "infringement flowed from [the two defendants'] joint action in reprinting the first 11 volumes of [the infringed work]."). Defendants are jointly and severally liable – separately – with each of their separate users who committed an act of direct infringement: Defendants induced the particular user to infringe, the user infringed, and Defendants therefore share in that particular direct infringer's liability. *See Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919 (2005) (inducer is "liable for the resulting acts of infringement by third parties"); *Gershwin Pub. Corp. v. Columbia Artists Mgmt, Inc.*, 443 F.2d 1159, 1163 (2d Cir. 1971) (secondarily liable defendant is "responsible for . . . the infringement by . . . primary infringers").

There is not one massive unit of joint and several liability comprised of Defendants and every single Lime Wire user who ever infringed a particular copyright. Like the television stations in *Columbia Pictures*, the separate Lime Wire users who infringed Plaintiffs' copyrighted works are not all jointly and severally liable with one another for just one single infringement; each of them is independently liable for her or his own direct infringement, and Defendants are secondarily liable for inducing that separate infringement. *Cf. Fitzgerald*, 807 F.2d at 1116 (identifying joint and several liability based on "joint action" by defendants); *Shapiro, Bernstein & Co. v. Goody*, 248 F.2d. 260, 267 (2d Cir. 1957) (finding no joint and several liability where defendants committed "separate infringement[s]"); *Ted Browne Music Co. v. Fowler*, 290 F. 751, 754 (2d Cir. 1923) ("[W]here the defendants have acted severally, and not jointly or in concert, in committing an infringement, they cannot be sued jointly."). In *Shapiro*,

the Second Circuit—analyzing liability under the 1909 Copyright Act—held that defendants were *separately* liable for damages suffered by the Plaintiff. The court held that one defendant's "unauthorized manufacture of a set of 'parts' or records is an infringement of each copyright," and that the other defendant's "unauthorized sale of some or all of that set *is a separate infringement.*" 248 F.2d at 267 (emphasis added). Likewise, here, individual Lime Wire users separately infringed Plaintiffs' exclusive rights under 17 U.S.C. § 106. While those individuals separately are jointly and severally liable with Defendants, the mass of those users are not jointly and severally liable with one another.

Accordingly, Defendants face separate statutory awards for each separate unit of joint and several liability. Any other interpretation of § 504(c) would permit Defendants to induce millions upon millions of different infringers to infringe Plaintiffs' works—and leave Defendants facing but a single statutory award regardless of the number of separate direct infringers they induced. Defendants' recently filed Rule 12(c) motion to preclude *any* statutory award against Defendants where a Plaintiff obtained a judgment against just one direct infringer vividly illustrates the extreme and illogical rule that Defendants propose. *See* Doc. Nos. 505, 506.

III. PLAINTIFFS' PRIOR COUNSEL DID NOT WAIVE PLAINTIFFS' ENTITLEMENT TO MULTIPLE STATUTORY DAMAGE AWARDS UNDER § 504(c)

In their recent briefing, Defendants have suggested that Plaintiffs during the liability phase of this case affirmatively limited themselves to a single statutory award from Defendants for each work in suit, notwithstanding the clear law discussed above. *See, e.g.*, Defts' Response to Pltfs' Objection to Magistrate Judge Freeman's Report & Recommendation Concerning 17 U.S.C. § 412(2) (Doc. No. 441), at 18-19. In particular, Defendants have latched onto language

in the Prayer for Relief filed by Plaintiffs' former counsel (Cravath) in 2006, and then again in the First Amended Complaint ("FAC") in 2007. *See id.*

Defendants are wrong that Cravath waived Plaintiffs' right to the damages that the law provides. Both the Complaint and FAC state that Plaintiffs seek "maximum statutory damages" under the statute. Compl. (Doc. No. 1) at 26; FAC (Doc. No. 45) at 33. Both the Complaint and the FAC further allege that the "scope of infringement" at issue in the case encompasses *not only* "thousands of Plaintiffs' sound recordings (including without limitation those listed on Exhibit A)," but "*millions of separate infringing acts*," for all of which Defendants are liable. Doc. No. 1 at ¶ 58; Doc No. 45 at ¶ 66.

> 66. Individuals using Lime Wire software and services have directly infringed and are directly infringing Plaintiffs' copyrights on a daily basis by, for example, creating unauthorized reproductions of Plaintiffs' copyrighted sound recordings and distributing copies of such sound recordings to the public in violation of Plaintiffs' exclusive rights under the Copyright Act, 17 U.S.C. §§ 106, 501. **The scope of infringement is massive, encompassing thousands of Plaintiffs' sound recordings (including without limitation those listed in Exhibit A) and millions of separate infringing acts.**
>
> 67. **Defendants are liable for inducing the copyright infringement of Lime Wire users** . . . .
>
> . . .
>
> 71. **Each violation of each Plaintiff's rights in and to each copyrighted sound recording constitutes a separate and distinct act of copyright infringement.**
>
> 72. Through the conduct described above, **Defendants are liable for inducing the infringement described herein.**

FAC ¶¶ 66–67, 71–72 (emphasis added); *see id.* ¶¶ 79–80, 84–85, 92–93, 96–97; Compl. ¶¶ 58–59, 63–64, 71–72, 76–77, 84–85, 88–89.

The statement in the Prayer for Relief that Plaintiffs seek "maximum statutory damages pursuant to 17 U.S.C. § 504(c), specifically, $150,000 per work with respect to each and every timely registered sound recording owned by Plaintiffs that was willfully infringed and $30,000 per work with respect to each and every other timely registered sound recording owned by Plaintiffs that was infringed, if any," does not retreat from these allegations, nor does it waive Plaintiffs' right to seek the full range of statutory damages provided for in § 504(c). FAC at 33; Compl. at 26. Furthermore, Defendants—through their prior counsel, Porter and Hedges L.L.P.—recognized the scope of Plaintiffs' damages claim, seeking discovery *in 2006* relating to "each act of infringement by a user of the Lime Wire Software Application for which [Plaintiffs] seek damages for copyright infringement." Klaus Decl. Ex. 2 (Defts' First RFPs to Sony BMG Music Entertainment (Oct. 31, 2006), at 18).

Even if Plaintiffs' Complaint failed *entirely* to request the relief to which they are entitled, it is well established that "[i]n the federal courts, the amount of damages found by a jury is not limited to that amount set forth in the complaint as the requested relief." *Violette v. Armonk Assocs., L.P.*, 849 F. Supp. 923, 930 (S.D.N.Y. 1994) (quoting *Roorda v. Am. Oil Co.*, 446 F. Supp. 938, 948 (W.D.N.Y. 1978)). Rule 54 specifies that "Every . . . final judgment should grant the relief to which each party is entitled, *even if the party has not demanded that relief in its pleadings*." Fed. R. Civ. P. 54(c) (emphasis added).

In short, Plaintiffs have never waived their right to multiple statutory damage awards under § 504(c).

IV. PLAINTIFFS HAVE MADE THEIR POSITION ON DAMAGES CLEAR THROUGHOUT THE DAMAGES PHASE, AND DEFENDANTS HAVE NO CONCEIVABLE CLAIM OF PREJUDICE

Even if Plaintiffs' initial pleadings were ambiguous – and, we submit, they are not – that would avail Defendants nothing. Plaintiffs have clearly stated their position throughout the damages phase, and Defendants have no possible grounds for arguing prejudice.

Judge Lynch structured this case so that discovery concerning damages issues concerning the number of works and the like would follow the liability determination. *See* Klaus Decl. Exh. 1 (Dec. 7, 2007 Hr'g Tr. at 10:19–11:8) (Court was "separating out the test case copyrights" to resolve the threshold issue of Defendants' liability, and discovery and development of the record regarding "how many copyrights or something like that" would follow the determination of liability). It is hardly surprising, therefore, that the subject of the number of separate awards that Defendants would face if they were found liable was not a focus prior to summary judgment.

That all changed, of course, in May 2010, when this Court held Defendants liable for intentionally inducing massive infringement by Lime Wire users. *See* Summary Judgment Opinion (Doc. No. 223). Throughout the ensuing damages phase of the case—in which Defendants have demanded and received extensive discovery—Plaintiffs have plainly articulated their damages theory. *See* 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."); 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"); Doc. 411-1 at 2 (Sept. 23, 2010 Letter from Glenn D. Pomerantz to Judge Wood); 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 . . . ."); 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); Doc. 411-2 at 139:8–11 (Tr. of Hr'g before Judge Freeman, Nov. 1, 2010) ("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[.]"); Doc. 411-2 at 140:3–6 (Tr. of Hr'g Before Judge Freeman, Nov. 1, 2010) ("The Court: So, you are looking for a calculation of damages based on some number of individual infringements of individual works . . . . Mr. Pomerantz: Correct.").

Defendants have no conceivable claim of prejudice from having the opportunity to take discovery regarding the number of statutory awards during the damages phase. Indeed, it is clear from Judge Lynch's structuring of the case that, even if Defendants had tried to take more discovery than they did concerning the separate infringers for whose infringements Defendants are separately liable, the Court would have deferred that discovery to the post-liability phase. The reality is that Defendants have had ample opportunity to pursue discovery on this and other damages issues throughout the damages phase. Since June 2010, Plaintiffs have produced nearly *one million* pages of documents, nearly 10 gigabytes of natively produced materials, and over 200 CDs containing data that Defendants have demanded in discovery. *See* Klaus Decl. Ex. 3 (Feb. 4, 2011 letter from Melinda LeMoine to Judge Freeman), at 1. Defendants deposed *a dozen*

of Plaintiffs' senior executives. Defendants also deposed Dr. Waterman (for a second time in the case), concerning his conclusions that Defendants' users infringed just a subset of the copyrighted works in issue more than 500 million different times from October 2004 forward. *See* Plaintiffs' Rule 26 Expert Disclosure for Dr. Richard Waterman (Sept. 30, 2010) ("Waterman Report"); Supplemental Report of Dr. Richard Waterman (Jan, 12, 2011). Defendants submitted reports from two putative experts (George Strong and Emin Gün Sirer) purporting to challenge Dr. Waterman's conclusions.

Defendants, in short, have had ample opportunity to conduct discovery related to Plaintiffs' unambiguous articulation of their damages theory – the same damages theory that the law plainly permits. Any claim of prejudice rings hollow.

V. CONCLUSION

Plaintiffs respectfully request that the Court hold that Plaintiffs may seek a separate statutory award for each direct infringement of a work for which Defendants are separately jointly and severally liable.

Dated: February 25, 2011

Respectfully submitted,

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