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; and M.J.G. LIME WIRE FAMILY LIMITED PARTNERSHIP; Defendants.	ECF Case 06 Civ. 5936 (KMW)

DEFENDANTS' BRIEF REGARDING PLAINTIFFS' "PER INFRINGEMENT" DAMAGES THEORY

PRELIMINARY STATEMENT

Under earlier versions of the Copyright Act, statutory damages were awarded for "each infringement which was separate."[1] But as the Second Circuit has explained, under the current statute, "the unit of damages inquiry" shifts "from the number of infringements to the number of works [infringed]."[2] That is, Section 504(c)(1) "disassociates the award of statutory damages from the number of infringements by stating that 'an award' (singular tense) of statutory damages is available for 'all infringements involved in the action' regarding any one work."[3]

Consistent with that proposition, which has been repeatedly followed by courts within this Circuit,[4] the Complaint in this action has asserted since its filing over four years ago that Plaintiffs are seeking "$150,000 with respect to each timely-registered work that was infringed"[5] and has included 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."[6] As recently as the Consent Injunction so ordered by the Court on

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1 *Twin Peaks Prods. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1381 (2d Cir. 1993) (citing *Robert Stigwood Group v. O'Reilly*, 530 F.2d 1096) (2d Cir. 1976).

2 *Id.*

3 *WB Music Corp v. RTV Commc'n Grp., Inc.*, 445 F.3d 538, 540 (2d Cir. 2006).

4 *See, e.g., UMG Recordings, Inc. v. MP3.Com, Inc.*, 109 F. Supp. 2d 223, 224 (S.D.N.Y. 2000) ("for the purpose of computing statutory damages, the relevant unit is not the number of infringements but the number of infringed 'works.'"); *Tips Exps., Inc. v. Music Mahal, Inc.*, No. 01-cv-5412, 2007 WL 952036, at *6 (E.D.N.Y. March. 27, 2007) ("In calculating statutory damages, the focus is on the number of works infringed, not the number of copies or the number of acts of infringement.").

5 First Am. Compl. at ¶¶ 74, 87, 99 (Dkt. No. 45) (emphasis added).

6 *Id.* at 33.

October 26, 2010, Plaintiffs reaffirmed those same paragraph allegations of the Complaint and noted the potential for a massive award if the $150,000 figure were "[m]ultiplied by the many thousands of *works at issue – the other component* in a calculation of statutory damages . . ." Consent Inj. at 6 (Dkt. No. 334, Oct. 26, 2010) (emphasis added); *see also* Pltfs' Mem. 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.") (emphasis added).

Even on a per-work basis, the potential damage award against Defendants in this case is truly staggering. As noted in Plaintiffs' asset freeze brief, "the amount of statutory damages awarded in this case easily could be in the hundreds of millions of dollars (if not over a billion dollars)." Plfs'. Mem. of Law in Support of Prelim. Inj. Freezing Defendants' Assets at 8 (Dkt. No. 243, June 7, 2010). Not content, however, with a potential maximum award of $1.5 billion ($150,000 times approximately 10,000 post-1972 works subject to statutory damages),[7] Plaintiffs now pursue a statutory damages theory predicated on the total number of *infringements* by LimeWire users. According to Plaintiffs, they are entitled to a separate statutory award against Defendants ranging from $750 to $150,000 for each of what Plaintiffs claim to be more than 500 million downloads of the post-1972 works using LimeWire. Under that theory, Plaintiffs claim a potential award of some ***75 trillion dollars*** — more than double the *combined* gross domestic product and national debt of the United States, and infinitely more money than the entire music recording industry has made since Edison's invention of the phonograph in

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[7] The actual number of post-1972 works currently claimed by Plaintiffs on Schedule A to the Complaint is 9,715. As the Court is aware, Defendants have challenged that figure on various grounds, including the "songs versus albums" compilation issue, the registration requirement under Section 412 of the Copyright Act, and the fact that Plaintiffs have already obtained judgments from Lime Wire users for more than 1,000 of the songs on Schedule A, precluding a further statutory award as to those songs.

1877. Perhaps more significantly, under Plaintiffs' theory Defendants are liable for a *minimum* of ***400 billion dollars*** before they even walk into court for trial.

As shown below, neither the law nor logic supports this absurd result. The Court should preclude Plaintiffs from advancing this damages "theory" at trial.[8]

ARGUMENT

I. Section 504(c) Explicitly Limits Plaintiffs To One Award Where, As Here, Any Two Or More Infringers Are Jointly and Severally Liable.

Section 504(c)(1) provides in pertinent part that a copyright owner may elect:

> *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) (2010) (emphasis added). Thus, although the statute supports separate awards against "individually liable infringers," *see WB Music Corp. v. RTV Commc'n Grp., Inc.*, 445 F.3d 538, 540 (2d Cir. 2006), *there are no individually liable infringers in this case* that would allow for separate awards. That is because, as Plaintiffs concede, they allege that "LimeWire is jointly and severally liable with *each* direct infringer."[9] The converse is necessarily true: each direct infringer is jointly and severally liable with Lime Wire.[10] In short, neither Lime Wire, nor any LimeWire user, is "individually liable." And because the only

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8 Try as they may, Plaintiffs' February 22, 2011 letter to the Court utterly fails to identify anywhere in the record where Plaintiffs' predecessor counsel (Cravath, Swaine & Moore LLP) advanced this extravagant "theory."

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

10 *See Fitzgerald Publ'g. Co. v. Baylor Publ'g. Co.*, 807 F.2d 1110, 1116 (2d Cir. 1986); *Warner Bros., Inc. v. Dae Rim Trading, Inc.*, 677 F. Supp. 740, 769 (S.D.N.Y. 1988) ("Where two or more persons join in or contribute to a single infringement, they are all jointly and severally liable"), *aff'd in part, rev'd on other grounds*, 877 F.2d 1120 (2d Cir. 1989).

alleged liability between Lime Wire and its users is joint and several, the statute mandates a single statutory award per work infringed, not per infringement.

II. "Complete" Joint and Several Liability Among All Infringers Is Not Required For The One Award Limit To Apply.

Plaintiffs' "per infringement" damage theory is based on the contention that because LimeWire users are not jointly and severally liable with *each other,* the per work limitation does not apply. *See* Pltfs.' Reply in Support of Objection to Magistrate Judge Freeman's Report and Recommendations Concerning 17 U.S.C. § 412(2) at 12 (Dkt. No. 461, Feb. 7, 2011) ("R&R Reply") ("Thousands (or even millions) of uploads and downloads occurred across disparate users whose liability is not joint and several with one another"). Plaintiffs purport to derive support for this argument from a hypothetical from the Nimmer copyright treatise and a Ninth Circuit case, *Columbia Pictures Television v. Krypton Broad. of Birmingham,* 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). But subsequent courts have dismissed Nimmer's hypothetical or termed it inapplicable in circumstances involving mass infringements, and have found *Columbia Pictures* to be similarly inapposite.

In *McClatchey v. Associated Press*, No. 3:05-cv-145, 2007 WL 1630261, at *4 (W.D. Pa. June 4, 2007), the Associated Press ("AP"), under false pretenses, took an image of the plaintiff's copyrighted photograph of the United Flight 93 crash site in Shanksville, Pennsylvania, and without authorization gave it to AOL and other downstream users who published the image. The plaintiff sued only the AP, but claimed entitlement to multiple, separate statutory awards because AP was "jointly and severally liable with multiple parties who are not jointly and severally liable with each other," citing the Nimmer hypothetical for this

proposition.[11] The court held that the plaintiff was limited to one statutory recovery for infringement against the AP with respect to the work at issue, reasoning as follows:

> The Court does not agree with McClatchey's strained, albeit creative, proposed interpretation of the statute. *The statute simply does not require full and complete joint and several liability amongst all alleged infringers.* As McClatchey acknowledges, there is partial joint and several liability in this case because each downstream user (AOL, The Progress, Newsday) is jointly and severally liable with AP. Thus, none of the downstream users can be an "individually liable infringer" for the purpose of triggering a distinct statutory damages award. Instead, this is a case in which "any two or more infringers are liable jointly and severally." McClatchey's proposed interpretation would render the word "any" superfluous, or alternatively, would rewrite the statute to impose a single award only where "all infringers are liable jointly and severally." *In sum, the Court concludes that the most plausible interpretation of the statute authorizes a single award when there is any joint and several liability, even if there is not complete joint and several liability amongst all potential infringers.*

Id. at *4 (emphasis added). The court went on to state that it was "not necessary to reject the Nimmer hypothetical in all circumstances," but that "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." *Id.* That is true here as well: The Lime Wire defendants, the only defendants in the case, are jointly and severally liable with all other alleged downstream infringers. There can be only one award per work.

As support for its holding the *McClatchey* court relied on the "quite analogous" factual situation in *Bouchat v. Champion Prods., Inc.*, 327 F. Supp. 2d 537, 552 (D. Md. 2003), *aff'd on other grounds*, 506 F.3d 315, 332 (4th Cir. 2007). In *Bouchat*, the National Football League's merchandising division (NFLP), used plaintiff's drawing to create an infringing "Flying B" Baltimore Ravens logo and then licensed the team logo to hundreds, if not thousands,

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[11] As the court noted, "Under the hypothetical, if D (a movie distributor), sent the infringing work to A, B, and C (three unrelated theaters who were not jointly and severally liable with each other), there should be three sets of statutory damages awards." 2007 WL 1630261, at *3 n.1 (citing 4 *Nimmer on Copyright* § 14.04(E)(2)(d).)

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 the NFL were alleged to be jointly and severally liable with each other. Nonetheless, as the court in *McClatchey* observed, the *Bouchat* court "flatly rejected the Nimmer hypothetical, at least in the context of coordinated mass marketing operations, characterizing the result as 'absurd.'" 2007 WL 1630261 at *4 (citing 327 F. Supp. 2d at 553). In the words of the *Bouchat* court:

> While it may well be possible to distinguish the Nimmer example from the situation present in the instant cases, the Court will not engage in the academic exercise. It suffices to state that the Court would not follow the professor's conclusion to reward Bouchat with more than 350 separate statutory damage awards. The professor did not address, and doubtlessly did not consider, a coordinated mass marketing operation such as NFLP's business. It might be interesting to see how the professor would deal with a hypothetical presenting the facts of the instant case. Nevertheless, faced with the issue in a courtroom rather than a classroom, the Court will not follow Professor Nimmer to reach the absurd result that Bouchat seeks.

Bouchat, 327 F. Supp. 2d at 553. In fact, there is good reason to believe that Professor Nimmer would take a dim view of Plaintiffs' trillion-dollar damages theory here, given his criticism of the $53 million award in another Internet music piracy case. *See* Melville B. Nimmer and David Nimmer, 4-14 *Nimmer on Copyright* § 14.04[E][1][a] (2010) ("That amount beggars all previous awards . . . the result is to introduce randomness or worse into the litigation calculus . . . it is hard to know what policy rationale justifies such a high multiplier.").

The *Bouchat* court went on to reject the plaintiffs' reliance on *Columbia Pictures,* in which the Ninth Circuit held that because two separate television stations owned by the same person had each infringed the Plaintiff's copyright by separately broadcasting episodes of a television program, and were not jointly separately liable with each other, multiple awards were

permissible. "This holding does not persuade the Court that the absence of joint liability among the Downstream Defendants themselves entitles Bouchat to multiple statutory damage awards where each infringement was a joint infringement with NFLP." 327 F. Supp. 2d at 553.[12]

Plaintiffs have sought to distinguish *Bouchat* (and may seek to distinguish *McClatchey*) on the grounds that the downstream users in those cases were acting derivatively from a common primary infringer who was a direct infringer, as opposed to a secondary infringer such as Lime Wire. *See* R&R Reply at 10. That distinction is one without a difference: the holding and rationale of these cases stems from the fact that the common inducing infringer was *jointly and severally liable* with all the downstream direct infringers, none of whom were jointly and severally liable with each other. *See McClatchey*, 2007 WL 1630261 at *4 ("Here, 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.") (emphasis added); *Bouchat*, 506 F.3d at 330-31 ("When a licensee copied the Flying B onto Ravens merchandise, the licensee became an infringer. NFLP gave each license permission to copy, so NFLP was also responsible for the licensee's acts of copying, making NFLP jointly and severally liable for the infringing acts of each licensee."); *compare id.* at 331 ("it is appropriate to treat the earliest date of infringement by *any* participant in a line of related copyright violations as the date of commencement.") (emphasis in original). Whether downstream users are induced to infringe by

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12 As Magistrate Judge Freeman ruled in her R&R on the Section 412(2) issue, *Columbia Pictures* is also distinguishable factually because unlike the movie theaters who acted independently in that case, here, "by nature of the peer-to-peer file-share system, Lime Wire users did not act independently." *See* Report and Recommendation of Magistrate Judge Freeman at 7 (Dkt. No. 398, Dec. 28, 2010). "For 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.*

another direct infringer or by a secondarily liable infringer, their joint liability with the inducer limits the award to a single one.

That is clear as well from the decision in *United States Media Corp. v. Edde Entertainment Corp.*, No. 94 Civ. 4849, 1998 WL 401532 at * 20 (S.D.N.Y. July 17, 1998). There, the court granted only a single award of statutory damages against a video distribution company and five retailers to whom it had distributed the video at issue. The court found that each of the retailers themselves separately and directly infringed copyright by selling or renting copies of the video to the public, and the distribution company was contributorily (*i.e.*, secondarily) liable for each of those infringements. *Id.* at *16-17, 20. There was no finding that each of the retailers was jointly and severally liable for the infringing acts committed by the other retailers. Nevertheless, the court held that: "Since Edde impermissibly distributed the film to some of the retailers [i.e., the five mentioned above], which in turn distributed them to the public, Edde and those retailers that handled the film would be jointly and severally liable for any statutory damage award." *Id.* at *20. Accordingly, and contrary to Plaintiffs' theory, the court granted only a single statutory damage award with respect to multiple infringements of a single work where the secondarily liable distributor was jointly and severally liable with each of the downstream direct infringer defendants, but none of the downstream defendants contributed to infringements committed by the others. The result should be no different here.

CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the Court preclude Plaintiffs' "per infringement" statutory damages theory in this action.

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