

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' REPLY MEMORANDUM REGARDING STATUTORY DAMAGES ON
A "PER TRACK" BASIS**

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I. INTRODUCTION

Defendants' Response sidesteps the inconvenient fact that both *Bryant v. Media Rights Productions, Inc.*, 603 F.3d 135 (2d Cir. 2010), and the Rule 12(c) Order apply the single-award-per-album rule where "plaintiffs issued their songs *only* in album form." Rule 12(c) Order (Doc. No. 401) at 4 (emphasis added). Defendants stubbornly insist that the *Bryant* rule must apply "regardless of *any* separate issuance of singles from the same album." Response at 4 (emphasis added). According to Defendants, a plaintiff can only obtain a single statutory award for the infringements of any or all recordings ever grouped on one album. They say this is true *regardless* whether:

- an individual recording was originally issued as a single, and not part of any album, and later was included on a "greatest hits" album;
- an individual recording was originally issued as a single before being issued as part of an album;
- an individual recording was originally issued as a stand-alone single at the same time it also was issued as part of an album (which is, as we have said, standard practice for virtually all recordings originally issued in the iTunes era¹); or
- an individual recording was originally released pre-iTunes era, but then was issued at the same time for both single and album download sales post- iTunes.

¹ Defendants accuse Plaintiffs of ducking the Court's question whether, post-iTunes, Plaintiffs issue individual tracks and albums simultaneously. Response at 1-2. Plaintiffs answered the Court's question at the hearing: "In the overwhelming majority of cases, the album and the individual tracks would be released on iTunes on the same day." Feb. 18, 2011 Hr'g Tr. at 7:20-22. The Court did not ask the parties to repeat that statement, but instead to discuss how that fact should be treated for statutory damage purposes – which we have done. To Defendants' point about Plaintiffs' brief not using the word "simultaneous": Defendants ignore the fact that Plaintiffs' brief states that "*Plaintiffs have made and continue to make new releases available to iTunes for sale on both an album and individual track basis concurrent with the release of such recordings through other outlets, including both digital and physical formats.*" Opening Br. at 5 (emphasis added). We intended "concurrent with" to mean that in general these all happen "at the same time," or "simultaneously."

Defendants insist that none of these factual scenarios makes a difference. They rest that extreme argument on *UMG Recordings, Inc. v. MP3.Com, Inc.*, 109 F. Supp. 2d 223 (S.D.N.Y. 2000), and a handful of non-binding district court decisions that uncritically apply the holding of that case (including multiple decisions by Judge Rakoff applying his same rule in cases involving the same defendant's (MP3.Com's) copying of entire CDs in follow-on cases). In any event, Judge Rakoff based his decision on the fact that "what the defendant actually copied were the complete CDs." *Id.* at 225. *MP3.Com* is neither binding nor persuasive in the completely different and entirely undisputed circumstances here, in which: (1) *Bryant* makes it clear that the issue is how Plaintiffs choose to issue their works (single tracks or albums only); (2) Plaintiffs issue virtually all of their works through iTunes as stand-alone singles; (3) the statutory awards that will apply in this case will be for infringements of stand-alone singles that, in all or almost all cases, Plaintiffs sold as such during the iTunes era; and (4) Defendants induced their massive base of infringing users to infringe recordings on a stand-alone-single basis.

II. DEFENDANTS ADVOCATE AN EXTREME RULE, IN DEFIANCE OF *BRYANT* AND THE COURT'S RULE 12(c) ORDER

Defendants ask this Court to adopt an extreme rule: They insist that regardless how a Plaintiff *ever* had issued an individual sound recording, if Plaintiff *ever* also issued that single track for sale as part of an album, then the Plaintiff is limited to a single statutory award for the infringement of *any* of the tracks that appear on that album. Under Defendants' reading of § 504(c), it does not matter that the Plaintiff issued the track for sale as a stand-alone single; according to the Defendants, if the single is or ever was part of some compilation, the Plaintiff can obtain only one statutory award for any part of that compilation.

Defendants' argument simply fails to match the myriad ways in which Plaintiffs issue sound recordings. As Plaintiffs explained, there is no one-size-fits-all rule for how they have

issued their sound recordings. Even in the pre-iTunes era, Plaintiffs originally issued some tracks as stand-alone singles; they later included some such tracks on albums; and some they never included as parts of albums. *See* Opening Br. at 2-3. Plaintiffs also issue previously released tracks for inclusion on collections of previously released recordings, as in an individual artist’s “greatest hits” albums. During the iTunes era, Plaintiffs frequently issue a single sound recording for sale as a download track, or for sale as part of one of a number of different albums.² Under Defendants’ proposed rule, it would not matter how the Plaintiff had issued the work originally, or how the Plaintiff issued it during the time for which statutory damages are available in this case: the rule would hold that it is part of a compilation, and so that work (and anything else joined on an album with it) is subject to just one statutory award.³

The rule that *Bryant, Twin Peaks Productions v. Publications International, Ltd.*, 996 F.2d 1366 (2d Cir. 1993), and *WB Music Corp. v. RTV Communication Group, Inc.*, 445 F.3d 538 (2d Cir. 2006), all point to is straightforward, sensible, and firmly grounded in law: if the Plaintiff issues its recording on a stand-alone basis, then that is “the work” for purposes of the § 504(c) statutory damages analysis. Under *Bryant*, where the plaintiff *only* issues its work in the form of a compilation, then “the work” is that compilation, even if the compilation could be broken into individual parts, and even if that is how the defendant infringes it.

² For example, the song *Come As You Are* by Nirvana was originally released on the 1991 album *Nevermind*. That same recording was subsequently included on the 2002 “best-of” compilation album, *Nirvana*. Thus, an iTunes user who purchases *Come As You Are* for download from the listing of tracks under either album will be purchasing the same issued single.

³ Defendants do not say what should happen if a Lime Wire user infringed a single sound recording that appeared on both an original album and a later “greatest hits”: can the Plaintiff claim just one statutory award for the infringement of *both* albums, since the same track appears on both? In that case, Defendants would be getting away with one statutory award for the infringement of 20 or more sound recordings separately infringed. The incoherence of Defendants’ proposed rule is an additional reason the Court should reject it.

III. MP3.COM AND THE DISTRICT COURT CASES FOLLOWING IT ARE NEITHER BINDING NOR PERSUASIVE AUTHORITY FOR THE EXTREME RULE THAT DEFENDANTS ADVOCATE

Defendants once again ground their argument in Judge Rakoff's opinion in *UMG Recordings, Inc. v. MP3.Com*. Plaintiffs have explained that that opinion is not persuasive in light of *Bryant*, and on the very different facts here. Opening Br. at 8-9. The service in that case infringed by copying entire CDs, and it was that whole-CD copying that Judge Rakoff relied on in his decision – not on the snippets that Defendants cull from the Plaintiffs' brief in that case:

[I]n their Complaint in this case, as well as in their successful motion for summary judgment on the issue of liability, plaintiffs focused on defendant's unlawful copying of plaintiffs' CDs, implying that each such CD was the relevant "work" unit for purposes of this case.

UMG v. MP3.Com, 109 F. Supp. 2d at 224. *See id.* at 225 (rejecting the plaintiffs' arguments that Defendants in this case cite at their Response at 6: "none of this is relevant in the face of the unequivocal statutory language and *plaintiffs' own assertion that what the defendant actually copied were the complete CDs.*") (emphasis added).

Bryant makes clear that the exclusive focus in *UMG v. MP3.Com* on how defendants infringe is improper. Moreover, *UMG v. MP3.Com* was *pre-iTunes*, and Plaintiffs now issue their works for download sale as singles – which is exactly how *these* Defendants induced their users' infringement.

Defendants argue that the rule in *UMG v. MP3.com* is no outlier, but instead has been adopted by numerous courts. Response at 4-10. In fact, Defendants' citation of numerous district court decisions consists of Judge Rakoff's re-affirmation of his own prior holding in a series of related cases, and a few inapposite cases that have followed that holding on facts not presented in the instant case. Two of the cases that Defendants cite are just additional opinions by Judge Rakoff involving the same defendant (MP3.com), the same practice of defendant

copying the complete CDs, and the court's adoption of the earlier (and inapposite) rule. *See Country Road Music, Inc. v. MP3.com, Inc.*, 279 F. Supp. 2d 325, 332 (S.D.N.Y. 2003); *Teevee Toons, Inc. v. MP3.com, Inc.*, 134 F. Supp. 2d 546, 548 (S.D.N.Y. 2001). A third case from this District is an opinion by a magistrate judge following a default, and it simply follows Judge Rakoff's prior holdings without analysis. *See Jett v. Ficara*, 2007 WL 2197834, at *8 (S.D.N.Y. June 29, 2007). The fourth and final case from this District, *U2 Home Entertainment, Inc. v. Hong Wei International Trading, Inc.*, 2008 WL 3906889, at *13 (S.D.N.Y. Aug. 21, 2008), discusses Judge Rakoff's analysis in the *MP3.com* cases only to distinguish it. The actual holding of *U2 Home* was that Plaintiffs were entitled to seek statutory awards on a "per episode" basis even though the individual episodes at issue were "not separately copyrighted, but, rather, [were] part of a copyrighted television series." *Id.* at 12.

The remaining cases that Defendants cite are off-point. *Arista Records, Inc. v. Flea World, Inc.*, 2006 U.S. Dist. LEXIS 14988 (D.N.J. Mar. 31, 2006), involved the sale of counterfeit CD's and cassette tapes at a flea market – a scenario far-removed from the massive infringement of individual tracks of digital sound recordings that Defendants induced. In those circumstances, the court followed Judge Rakoff's analysis of wholesale copying in the *MP3.com* cases. *Id.* at *71-72.

Finally, Defendants cite *King Records, Inc. v. Bennett*, 438 F. Supp. 2d 812, 843 (M.D. Tenn. 2006), for the proposition that one statutory award applies regardless whether "the format in which the defendant infringes a compilation is the entire album or only a portion thereof." Response at 6, n.9. In so asserting, Defendants misquote language that merely held that the Court need not grapple with the "compilation" question in instances where "only one sound recording on each [asserted compilation] has been infringed in this lawsuit" – because in those

instances the number of works is identical under either unit of counting. *See King Records*, 438 F. Supp. 2d at 866 n.20. In other words, as to most of the sound recordings at issue in the case, the question whether statutory damages should be calculated on a per track or per album basis simply was moot. To the extent that *King Records* does adopt the reasoning of the *MP3.com* decisions it is inapposite for the reasons discussed above: *Bryant* makes it clear that the relevant issue is how Plaintiffs choose to issue their works, Plaintiffs issue virtually all of their works through iTunes as stand-alone singles, and Defendants infringed those works on the same basis. Defendants' attempt to bolster their claims by corraling all the pre-*Bryant* cases that adopt the inapposite analysis of the *MP3.com* case misses the mark.

IV. DEFENDANTS ERRONEOUSLY ARGUE THAT PLAINTIFFS SHOULD “SUFFER THE CONSEQUENCES” OF NOT INTRODUCING EVIDENCE – NOTWITHSTANDING THAT THIS IS NOT A SUMMARY JUDGMENT MOTION, AND DEFENDANTS FAILED TO MOVE FOR SUMMARY JUDGMENT IN A TIMELY MANNER

Defendants repeatedly assert that Plaintiffs are at fault for not “produc[ing] the evidence” for this Court to make a work-by-work album-track ruling, and that Plaintiffs must “suffer the consequences of any failure of proof.” Response at 11. This is not a summary judgment motion, and Plaintiffs do not have to suffer any consequences of not introducing evidence.

If Defendants wanted to make this a summary judgment issue, they could and should have filed a summary judgment motion by the Court-ordered deadline: January 7, 2011. Doc. No. 363 at 10 (Nov. 19, 2010). They did not do that. If Defendants believed they needed additional discovery to make such a motion, they could and should have asked the Court to extend the time for filing such a motion. They did not do that, either. Defendants instead opted to file a Rule 12(c) motion, to try to obtain a ruling based solely on the pleadings and without reference to actual facts. The Court denied that motion, holding that “the pleadings are insufficient to establish all of the circumstances that might bear on whether any issuance of an

album should result in Plaintiffs receiving no more than one statutory damages award per album.” Rule 12(c) Order at 4. Defendants are now trying to get a second bite at the summary judgment apple, and it is far too late in the proceedings for them to do that.

Defendants cannot excuse their failure to move for summary judgment by citing yet another decision from the *MP3.com* case, this one in which Judge Rakoff noted that plaintiffs have the “burden to establish each element of their claims of statutory damages by a preponderance of the credible evidence.” *UMG Recordings, Inc. v. MP3.com, Inc.*, 2000 WL 1262568, at *1 (S.D.N.Y. Sept. 6, 2000). Plaintiffs have (or, upon the resolution of their pending summary judgment motions on ownership and direct infringement, will have) established every element necessary to show their entitlement to statutory damages for each copyrighted work in suit: that the work is registered with the Copyright Office; that a Plaintiff owns the right to enforce the copyright; that a Lime Wire user directly infringed the work; and that Defendants, who are adjudicated secondary infringers, are responsible for every statutory award within the pertinent statutory range for the infringement of the work. Nothing in that opinion requires a Plaintiff to go further and introduce evidence whether the sound recording ever was issued as part of an album. That latter “requirement” is one of Defendants’ imagining, and as explained, the law does not require it.

In all events, Defendants’ real frustration is not with the evidence submitted by Plaintiffs, but with what Defendants know the facts show. Anyone with access to the internet can go to the iTunes Store and see for themselves which tracks on Schedule A have been issued for sale as stand-alone singles. The fact that Defendants have not gone to iTunes and compared Schedule A to the tracks issued there – or that Defendants have done this, but opted not to share the results

with the Court – speaks volumes about what Defendants know the iTunes Store shows about Plaintiffs’ issuing their recordings as stand-alone singles.

V. DEFENDANTS, NOT PLAINTIFFS, APPEAL TO “POLICY” – A POLICY OF DELIBERATELY UNDERCOUNTING THE NUMBER OF STATUTORY AWARDS TO WHICH PLAINTIFFS ARE ENTITLED

Finally, Defendants accuse Plaintiffs of resorting to policy, rather than law, in arguing that where the Plaintiff issues its work as a single, and Defendants induce the work’s infringement as a single, then “the work” for purposes of § 504(c) is the single. As demonstrated, Plaintiffs have the statute and Second Circuit precedent (up to and including *Bryant*) on their side. The fact that Defendants’ proposed rule leads to absurd and unjust results – a single statutory award for all the works ever contained on any album, regardless whether any or all of those works ever were issued as singles – simply confirms that “the work” in these circumstances is the individual sound recording.

Defendants do not deny that the result they advocate greatly undermines the deterrence rationale of statutory damages. They try to explain that result away as an irrelevancy, but the effort fails. *First*, Defendants say that the *Bryant* plaintiffs advanced a similar argument, and suggest that the Second Circuit deemed the threat to deterrence irrelevant. Response at 12. Of course, the Second Circuit actually decided the case based on how the plaintiffs there chose to issue their works – as compilations – which is inapposite here.

Second, Defendants contend that Congress was not so concerned with deterrence as it was with avoiding excessive statutory awards. Citing a law review article, Defendants suggest that they and other peer-to-peer operators who induced mass infringement are the types of people Congress was concerned with protecting in § 504. Response at 12. That is specious. As reflected in the legislative history of the Copyright Act, Congress specified that statutory awards would be multiplied by both the number of “separate and independent” works infringed, as well

as the number of independent direct infringers of those works. H.R. Rep. No. 94-1476 (Sept. 3, 1976), at 162 (“[W]here 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.”). Congress clearly intended that statutory damages would act as a powerful deterrent against individuals and entities like these Defendants, who promote multiple separate infringements.

Third, Defendants accuse Plaintiffs of over-reaching by not electing actual damages. Response at 13. This argument overlooks the fact that Congress authorized statutory damages precisely to provide a remedy when actual damages are difficult to calculate and prove. *See e.g., NFL v. Primetime 24 Joint Venture*, 131 F. Supp. 2d 458, 472 (S.D.N.Y. 2001) (“Since actual damages and profits frequently are difficult to prove, the Copyright Act provides for minimum and maximum statutory damages. These damages may be elected by the copyright owner at any time before final judgment is rendered, without proof of actual damages.”) (citing 2 William F. Patry, *Copyright Law & Practice* at 1170 (1994); *Pearson Educ., Inc. v. Nugroho*, 2009 U.S. Dist. LEXIS 101600, at *17 (S.D.N.Y. Oct. 27, 2009) (Peck, M.J.) (citing 4 NIMMER ON COPYRIGHT § 14.04[A] (2009 ed.) (statutory damages meant for “circumstances in which plaintiff’s damages or defendant’s profits are not susceptible to precise evaluation.”))). Defendants no doubt would prefer a regime where Plaintiffs were forced to engage in a lengthy and complex lost profits analysis that would not fully measure proper damages for the type of mass infringement that Defendants induced. That is not the system that Congress created. Congress instead gave Plaintiffs the right to elect statutory damages, which they have.

VI. CONCLUSION

For these reasons, and those stated in our opening memorandum, Plaintiffs respectfully submit that the Court should rule that each Plaintiff is entitled to seek separate statutory damage awards with respect to each individual sound recording that such Plaintiff has issued on a per-track basis.

Dated: February 25, 2011
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Respectfully submitted

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