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One Work, Three Infringers: Calculating the Correct Number of Separate Awards of Statutory Damages in a Copyright Infringement Action

Timothy L. Warnock

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One Work, Three Infringers: Calculating the Correct Number of Separate Awards of Statutory Damages in a Copyright Infringement Action

*Timothy L. Warnock**

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Consider the following hypothetical: Warren owns the copyright in the musical composition “Ode to My Sheepdog.” Jim, without an appropriate license, manufactures and distributes John Johnson’s recording of “Ode.” Mark, without an appropriate license, manufactures and distributes Matt Murphy’s recording of “Ode.” Charlotte, also without an appropriate license, manufactures and distributes Cat Callie’s unauthorized recording of “Ode.” Charlotte, unlike John and Mark, began manufacturing and distribution under the mistaken but good faith belief that she had permission to exploit the composition. One Stop Records, an online and retail record store,

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stocks and sells all three versions of “Ode.” All three versions are very popular, and One Stop has sold thousands of copies of each.

Warren sues One Stop for copyright infringement and elects to recover statutory damages. Section 504 permits Warren to recover an award of damages between \$750 and \$30,000.¹ The court may increase that award to a sum of \$150,000 if the infringer committed these acts willfully, or the court may reduce the award to a sum of not less than \$200 if the infringement was innocent.² How many separate awards of damages may he recover? Section 504(c)(1) provides:

Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, 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 of not less than \$750 or more than \$30,000 as the court considers just. For the purpose of this subsection, all the parts of a compilation or derivative work constitute one work.³

Is Warren entitled only to recover one award because all three versions of “Ode” infringe Warren’s copyright in a single musical composition, or “work,” under the statute? Alternatively, is Warren entitled to recover three separate awards of statutory damages because Jim, Mark, and Charlotte are not jointly and severally liable for each other’s infringements?⁴

I. CURRENT COMPETING PRECEDENT

As set forth in greater detail below, competing precedents support both results. *Columbia Pictures Television v. Krypton Broadcasting of Birmingham, Inc.* carefully reviewed not only the plain language of Section 504 (c)(1) of the Copyright Act, but also the legislative history.⁵ The court determined that a joint tortfeasor would be liable for each infringement of separately liable infringers. The competing view—contained in *Arista Records LLC v. Lime Group LLC*⁶—held that the size of a potential award justified disregarding the same statutory language and legislative history that *Columbia*

1. 17 U.S.C. § 504(c)(1) (2006).

2. *Id.* § 504(c)(2).

3. *Id.* § 504(c)(1).

4. To the extent that two or more persons are jointly and severally liable, the Copyright Act permits only a single award of statutory damages. *Id.*

5. 106 F.3d 284 (9th Cir. 1997), *rev'd on other grounds sub nom.* Feltner v. Columbia Pictures TV, 523 U.S. 340 (1998).

6. 784 F. Supp. 2d 313 (S.D.N.Y. 2011).

Pictures analyzed.⁷ The better-reasoned view found in *Columbia Pictures*—that Warren should be entitled to recover three separate awards—furthers the policy underlying the Copyright Act that discourages infringement. That policy, embodied in the remedies available to a copyright owner against an infringer, is contained in Chapter Five of the Copyright Act.⁸

A. *Columbia Pictures is Persuasive Authority*

In *Columbia Pictures*, the US Court of Appeals for the Ninth Circuit held that three separate television stations that broadcasted the same episodes of various television programs gave rise to three separate awards of statutory damages, even though the only defendant who went to trial was the individual who owned all three stations.⁹ The appellate court affirmed the district court's finding that the owner was liable for vicarious and contributory copyright infringement.¹⁰

In *Columbia Pictures*, C. Elvin Feltner owned Krypton International Corporation, and that company owned the three television stations.¹¹ Columbia Pictures licensed a number of television shows to the stations and filed suit for, *inter alia*, copyright infringement.¹²

The court noted the plain language of section 504(c)(1), but also considered the legislative history.¹³ That legislative history provides: “where separate infringements for which two or more defendants are not jointly liable are jointed in the same action, separate awards of statutory damages would be appropriate.”¹⁴

The court of appeals noted that the district court impliedly determined that the different television stations were not joint tortfeasors with one another.¹⁵ The court concluded that the defendant failed to establish that the district court's conclusion was

7. See *id.* at 320 (“The Court thus finds that Plaintiffs are entitled to a single statutory damage award from Defendants per work infringed, regardless of how many individual users directly infringed that particular work.”).

8. See 17 U.S.C. § 501 (2006).

9. *Columbia Pictures*, 106 F.3d at 288, 294-96.

10. *Id.* at 288, 297.

11. *Id.* at 288.

12. *Id.*

13. See *id.* at 294.

14. *Id.* (quoting H.R. REP. NO. 94-1476, at 118 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5778).

15. *Id.*

erroneous.¹⁶ It therefore affirmed the district court's award of \$8.8 million in statutory damages, concluding not only that each station's conduct supported a separate award, but also that showing each episode within the various television series was a separate infringement.¹⁷

Feltner (the owner) sought further review, and the United States Supreme Court determined that he was entitled to a jury trial on all issues regarding an award of statutory damages.¹⁸ After a jury trial, the district court then awarded \$31.68 million, or \$72,000 per infringement.¹⁹

On appeal for a second time, the Ninth Circuit specifically considered whether the three defendant stations were joint tortfeasors with each other.²⁰ The court determined that they were not, noting that no evidence in the record suggested that the separate stations were joint tortfeasors and that, "to the extent that Feltner seeks to introduce evidence to demonstrate *his* connection with each of the stations, that simply makes Feltner a joint tortfeasor with each station—it does not make each station a joint tortfeasor with respect to the other."²¹

The Ninth Circuit noted in its first opinion regarding this case that "Columbia dropped all causes of action except its copyright claims against Feltner."²² Thus, whether or not a plaintiff added additional parties to the action does not appear to affect the analysis. This position is consistent with the plain language of the statute. Section 504(c)(1) addresses "all infringements involved in the action" rather than all infringers named as parties.²³

What, then, creates joint and several liability? "Multiple parties will be jointly and severally liable for infringement of a copyright when they 'participate in, exercise control over, or benefit from an infringement.'"²⁴ One Stop and Jim would have joint liability for One Stop's distribution of Jim's product, One Stop and Mark would have joint liability for One Stop's release of Mark's product, and One

16. *Id.*

17. *Id.* at 288, 295-96.

18. *Feltner v. Columbia Pictures TV*, 523 U.S. 340, 355 (1998).

19. *Columbia Pictures Indus., Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1191 (9th Cir. 2001).

20. *Id.* at 1194.

21. *Id.*

22. *Columbia Pictures TV v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284, 288 (9th Cir. 1997).

23. 17 U.S.C. § 504(c)(1) (2006).

24. *Bouchat v. Champion Prods., Inc.*, 327 F. Supp. 2d 537, 547 (D. Md. 2003) (quoting *Syigma Photo News, Inc. v. High Soc'y Magazine, Inc.*, 778 F.2d 89, 92 (2d Cir. 1985)).

Stop and Charlotte would have joint liability for One Stop's distribution of Charlotte's product. Neither Mark, nor Jim, nor Charlotte, however, would have joint liability for each other's releases.

Is this assessment of joint and several liability appropriate? If Warren files three separate lawsuits against Jim, Mark, and Charlotte, then he would certainly be entitled to a separate award of monetary damages in each case. If Warren files one suit against all three, and the result is different, then a procedural issue would be changing substantive law. The Federal Rules of Civil Procedure are not designed to affect the ultimate result under substantial federal statutes, such as the Copyright Act.

B. Lime Group is Unpersuasive Authority

Nevertheless, cases reach a different result from *Columbia Pictures*. One recent case is representative. In *Lime Group*, the United States District Court for the Southern District of New York found that the plaintiffs were "entitled to a single statutory damage award from Defendants per work infringed, regardless of how many individual users directly infringed that particular work."²⁵ In *Lime Group*, several record companies sued an online file-sharing service, LimeWire, for copyright infringement, and the district court granted summary judgment in favor of the plaintiffs on the issue of liability, finding that defendants were liable for secondary copyright infringement.²⁶

1. Framing the Issue: The Number of Separate Awards of Statutory Damages

Prior to trial to determine damages, the court identified as a threshold dispute the correct number of separate awards of statutory damages that plaintiffs were entitled to recover.²⁷ Plaintiffs claimed that they were entitled to recover a separate statutory damage award for each individual infringer of the same work "because LimeWire is jointly and severally liable with each individual direct infringer."²⁸

The court began its analysis by noting that the correct number of awards "has never been addressed in a context where the secondarily liable defendant has enabled hundreds, if not thousands, of individuals to infringe one work's copyright, as occurred here, in the

25. *Arista Records LLC v. Lime Grp. LLC*, 784 F. Supp. 2d 313, 320 (S.D.N.Y. 2011).

26. *Id.* at 314-15.

27. *Id.*

28. *Id.*

online peer-to-peer file sharing program run by LimeWire.”²⁹ The court also observed that the question was a particularly close one, but reasoned that “Congress intended for the Copyright Act to *treat jointly and severally liable infringers the same way that the statute treats individually liable infringers.*”³⁰ The court concluded that: (1) the fact-finder may consider the number of direct infringers in calculating the amount of the award (2) allowing a separate award for each separate infringer’s conduct would create an “absurd” result, and (3) *Columbia Pictures* was inapplicable “to situations involving large numbers of infringements.”³¹ Regarding the fact-finder’s ability to consider the number of direct infringers along with other factors (such as expenses saved by the infringer and profits lost by the plaintiff) in determining the size of the award, the court reasoned that “Plaintiffs are not actually being deprived of an award that takes into account the number of direct infringers per work.”³²

Simple math, however, undermines that conclusion. Under the court’s opinion, plaintiffs were entitled to one award per work, not to exceed \$150,000.³³ If the fact-finder elected to award the maximum amount of damages for each separate direct infringement, then two direct infringers of the same work would result in liability against the secondarily liable defendants for \$300,000.³⁴ If the court lowers the amount of damages that a single, secondarily liable defendant must pay simply because the total amount is too large, that rewards the defendant and deprives the plaintiff of certain damages.

The court then noted that plaintiffs’ theory could result in an award reaching trillions of dollars.³⁵ Characterizing such a result as “absurd,” the court concluded that absurdity was “one of the factors that has motivated other courts to reject [p]laintiffs’ damages theory.”³⁶ The court offered no explanation of why a high judgment, even a judgment of trillions of dollars, justified a result that would favor infringers over owners of intellectual property.

29. *Id.*

30. *Id.* at 316 (emphasis added).

31. *Id.* at 316-19.

32. *Id.* at 317.

33. See 17 U.S.C. § 504(c)(2) (2006) (providing the maximum penalty for willful infringement); *Arista Records LLC v. Lime Grp. LLC*, 784 F. Supp. 2d 313, 320 (S.D.N.Y. 2011). (concluding plaintiffs were entitled to a single statutory award per work infringed).

34. See 17 U.S.C. § 504(c)(2).

35. *Arista Records*, 784 F. Supp. 2d at 317.

36. *Id.*

Merriam Webster defines “absurd” as “ridiculously unreasonable, unsound, or incongruous.”³⁷ When an award is based on a simple multiple, it is perfectly sound. That result establishes a bright-line rule that allows potential infringers to evaluate exposure based on infringement. Any perceived unfairness is therefore avoidable at the sole discretion of the defendant. Moreover, the *Lime Group* court’s rationale prohibits any bright-line application. Is Warren’s request for three separate awards “absurd,” for example? Under *Lime Group*, Warren is entitled only to one award of statutory damages. The rationale could, in this way, lead to inconsistent decisions incapable of being reconciled with one another. The Copyright Act does not consider ability to satisfy an award as a factor in setting statutory damages. The courts should not alter the Copyright Act by exercising discretion on this point.

2. Relevant Precedent: *McClatchey*

Regarding the relevant precedent, the *Lime Group* court noted that *Columbia Pictures* and a hypothetical contained in *Nimmer on Copyright* (that suggested a result similar to the one in *Columbia Pictures*) have been “rejected outright” in cases involving a large number of infringements.³⁸ However, the *Lime Group* court cited precedent that does not support its holding, and thus *Lime Group* is less persuasive than *Columbia Pictures*. To support this point, the *Lime Group* court turned its attention first to *McClatchey v. Associated Press*.³⁹ The plaintiff in that case took a photograph of the mushroom cloud caused by the crash of United Flight 93 on September 11, 2001.⁴⁰ The defendant’s photographer allegedly took a picture of the plaintiff’s picture, and the defendant distributed that picture to its member news organizations that then displayed the picture.⁴¹ Plaintiff sued only the Associated Press (AP).⁴²

The *McClatchey* court decided, in ruling on a motion *in limine* filed by the defendant, that the plaintiff was entitled to recover only one award of statutory damages because only one work was involved

37. *Absurd*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/absurd> (last visited Nov. 7, 2011).

38. *Arista Records*, 784 F. Supp. 2d at 318.

39. *McClatchey v. Associated Press*, No. 3:05-cv-145, 2007 WL 1630261 (W.D. Pa. June 4, 2007).

40. *Id.* at *1.

41. *Id.* at *2.

42. *Id.* at *1.

in the action.⁴³ The plaintiff had argued that “she may recover multiple statutory damages awards if a party is found to be jointly and severally liable with multiple parties who are not jointly and severally liable with each other.”⁴⁴

The *McClatchey* court noted (and the plaintiff apparently agreed) that “there is partial joint and several liability . . . because each downstream user (AOL, The Progress, Newsday) is jointly and severally liable with AP.”⁴⁵ The plaintiff reasoned that “this is a case in which ‘any two or more infringers are liable jointly and severally.’”⁴⁶ Thus, the plaintiff argued, she was entitled to an award against AP for each separate downstream user that had displayed her photograph.⁴⁷

The *McClatchey* court rejected the plaintiff’s argument.⁴⁸ The court concluded that the plaintiff’s interpretation “would render the word ‘any’ superfluous” and 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.”⁴⁹

The *Lime Group* court’s reliance on *McClatchey*’s holding ignores more than just *Columbia Pictures*. *Lime Group*’s holding also ignores the legislative history upon which the *Columbia Pictures* decision rests. Proponents of limiting a plaintiff to only one award per work in any one action, rely upon one sentence from the legislative history. The legislative history provides that “[a] single infringer of a single work is liable for a single amount . . . no matter how many acts of infringement are involved in the action and regardless of whether the acts were separate, isolated, or occurred in a related series.”⁵⁰ However, the language that precedes that sentence makes it clear that multiple awards based on other works or other infringers is addressed elsewhere in the legislative history.⁵¹ And, two paragraphs later, the legislative history provides the very language upon which the *Columbia Pictures* court based its holding: “where separate infringements for which two or more defendants are not jointly liable

43. *Id.* at *3.

44. *Id.*

45. *Id.* at *4.

46. *Id.* (quoting 17 U.S.C. § 504(c)(1) (2006)).

47. *Id.* at *3-4.

48. *Id.* at *4.

49. *Id.*

50. H.R. REP. NO. 94-1476, at 117 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5778.

51. *Id.* (“Although, as explained below, an award of minimum statutory damages may be multiplied if separate works and separately liable infringers are involved in the suit, a single award in the \$250 to \$10,000 range is to be made ‘for all infringements involved in the action.’”).

are jointed in the same action, separate awards of statutory damages would be appropriate.”⁵²

3. Relevant Precedent: *Bouchat*

To further support its holding that there is only “partial” joint and several liability, the *McClatchey* court discussed *Bouchat v. Champion Products, Inc.*⁵³ In *Bouchat*, the creator of the Baltimore Ravens football team logo sued downstream licensees of the team for copyright infringement.⁵⁴ Although the district court expressly found that determining the amount of any statutory damage award was not necessary because the plaintiff was not entitled to any award of statutory damages, that court nevertheless proceeded to address the issue.⁵⁵ “Nevertheless, because this issue appears to be one of first impression and because it could potentially be addressed on appeal, the Court will discuss these matters.”⁵⁶

The *Bouchat* court purported to distinguish the Ninth Circuit’s first opinion in *Columbia Pictures*. It explained: “The instant case does not present a situation in which each of many infringers acted independently and not derivatively from a common primary infringer.”⁵⁷

However, the two fact patterns from *Bouchat* and *Columbia Pictures* are essentially the same: A single defendant supplies more than one downstream infringer with the infringing work. In one opinion, the court focuses on one supplier’s liability for supplying three downstream infringers,⁵⁸ while in the other opinion the court focuses on the downstream defendants’ liability.⁵⁹ The results in *Bouchat* and *Columbia Pictures* simply cannot be reconciled. Which should control? The analysis in *Bouchat*, by that court’s own admission, is dicta.⁶⁰ Thus, *Columbia Pictures* is the more persuasive authority. In addition, the result in *Columbia Pictures* favors the copyright owner rather than the alleged infringer, thereby furthering the Copyright Act’s prohibition against copyright infringement.

52. *Id.* at 118.

53. *Bouchat v. Champion Prods., Inc.*, 327 F. Supp. 2d 537 (D. Md. 2003).

54. *Id.* at 542.

55. *Id.* at 552.

56. *Id.*

57. *Id.* at 553 n.22.

58. *Columbia Pictures TV v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284 (9th Cir. 1997).

59. *See Bouchat*, 327 F. Supp. 2d 537.

60. *Cf. id.* at 553.

4. Relevant Precedent: *Mason*

Although not relied upon by the court, the *McClatchey* opinion cites *Mason v. Montgomery Data, Inc.*, which also analyzed the language of the copyright statute.⁶¹ In *Mason*, the plaintiffs claimed that the defendants infringed the plaintiffs' copyrights in 233 real estate ownership maps.⁶² The plaintiffs, who had registered only one of the works prior to the commencement of defendants' infringing conduct, sought an award of statutory damages for all 233 maps.⁶³ The district court held that section 412 of the Copyright Act precluded an award of statutory damages for all but one of the plaintiffs' maps based upon the failure to timely register.⁶⁴

Section 412 of the Copyright Act provides:

[N]o award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for . . . (2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.⁶⁵

The plaintiff argued that "for any infringement" reveals Congress' intent "that courts treat each of a defendant's infringing acts separately and deny statutory damages only for those specific infringing acts that commenced prior to registration."⁶⁶

The US Court of Appeals for the Fifth Circuit, affirming the trial court, analyzed not only section 412 and the legislative history regarding that section, but also looked "to section 504 for assistance in understanding section 412 because section 412 bars an award of statutory damages 'as provided by section 504.'"⁶⁷

The *Mason* court explained that the number of separate awards of statutory damages that a plaintiff in a single action can recover "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."⁶⁸ The court offered two examples:

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

61. *Mason v. Montgomery Data, Inc.*, 967 F.2d 135 (5th Cir. 1992).

62. *Id.* at 136.

63. *Id.* at 137.

64. *Id.* at 142-43.

65. 17 U.S.C. § 412 (2006) (internal citations omitted).

66. *Mason*, 967 F.2d at 143.

67. *Id.* (quoting 17 U.S.C. § 504(c)(1)).

68. *Id.*

each committed *five* separate infringements of *five* different works, the plaintiff is entitled to ten awards, not fifty.⁶⁹

Thus, *Mason* does not support an argument limiting the number of separate awards. The example supports multiple awards, taking into consideration the number of *infringers*, not the number of *defendants*. *Mason* returns the analysis to the following question: Does the result depend on the number of infringers or the number of actual defendants? Neither *Columbia Pictures* nor the Nimmer hypothetical suggests that decisions regarding joinder should play any role in the outcome.⁷⁰

The *McClatchey* court mentioned but elected not to reconsider *Mason* with the *McClatchey* court's own analysis. *Lime Group* failed even to mention *Mason*.⁷¹ That failure leaves a gap in the *Lime Group* court's analysis.

Lime Group relies on *McClatchey* to reach a different result than that of *Columbia Pictures*. As set forth above, *McClatchey*'s reasoning is flawed. Absent *McClatchey* and the cases upon which *McClatchey* relies, the result in *Lime Group* turns on whether the court considers the overall amount of damages to be absurd. Considering the possibility of an absurd result does not further the policies underlying the Copyright Act. Rather, that methodology involves rewarding infringers at the expense of copyright owners.

5. Relevant Precedent: *United States Media Corp.*

The court in *Lime Group* next reasoned that “[c]ourts within this circuit have addressed this damages issue similarly to the courts in *Bouchat* and *McClatchey*.”⁷² The court supported its assertion by relying upon *United States Media Corp. v. Edde Entm’t Corp.*⁷³ The *Lime Group* court wrote that, although the plaintiff in *United States Media Corp.* sued a distributor and five retailers, the court only granted a single statutory damages award against the distributor.⁷⁴ *United States Media Corp.* did reach that result.⁷⁵ The opinion,

69. *Id.* at 143-44.

70. *See* *Columbia Pictures TV v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284 (9th Cir. 1997); 4 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 14.04(E)(2)(d) (2011).

71. *McClatchey v. Associated Press*, No. 3:05-cv-145, 2007 WL 1630261, at *4 (W.D. Pa. June 4, 2007).

72. *Arista Records LLC v. Lime Grp. LLC*, 784 F. Supp. 2d 313, 320 (S.D.N.Y. 2011).

73. *Id.* (citing *U.S. Media Corp. v. Edde Entm’t Corp.*, No. 94 Civ. 9849, 1998 WL 401532 (S.D.N.Y. July 17, 1998)).

74. *Arista Records*, 784 F. Supp. 2d at 320 (citing *U.S. Media Corp.*, 1998 WL 401532, at *20).

75. *U.S. Media Corp.*, 1998 WL 401532, at *9, 20-21.

however, contains no analysis of the issue.⁷⁶ Nor does the opinion reflect whether the plaintiff contested that point.⁷⁷

6. Relevant Precedent: *Usenet.com*

Finally, the court in *Lime Group* relied on *Arista Records LLC v. Usenet.com, Inc.* to support its assertion that courts have rejected the *Columbia Pictures* approach.⁷⁸ The court in *Usenet.com* adopted the Magistrate Judge's Report and Recommendation, which set statutory damages based on the number of works included in the lawsuit rather than the defendant's multiple instances of infringement.⁷⁹ The opinion reflects that the plaintiffs sought statutory damages based on the number of works multiplied by the maximum award, while the defendant argued for damages to be based on the minimum amount available under the statute.⁸⁰ Thus, the parties apparently did not dispute the number of separate awards and the *Lime Group* court erroneously relied on this case as support.

II. CONCLUSION

Columbia Pictures provides the most persuasive analysis of the correct number of separate awards of statutory damages available to a plaintiff. *Lime Group* recognized that the question was a particularly close one, and the court erred in reaching the opposite result from *Columbia Pictures*. The *Lime Group* analysis is based on a fundamentally flawed earlier decision and relies, in the end, on an approach as likely to reward infringers rather than defend the rights of copyright holders: determining whether the potential result in any given case is absurd.

Regarding the hypothetical case provided at the beginning of this Essay, Warren should be entitled to sue only One Stop and recover three separate awards of statutory damages for each different recording of "Ode." Nothing in the legislative history nor the plain language of the Copyright Act suggests that a high number of awards should vary the way that a court interprets 17 U.S.C. § 504(c)(1). To the contrary, both the statute and the legislative history look to the

76. *Id.* at *20.

77. *Id.*

78. *Arista Records LLC v. Lime Grp. LLC*, 784 F. Supp. 2d 313, 320 (S.D.N.Y. 2011) (citing *Arista Records LLC v. Usenet.com, Inc.*, No. 07 Civ. 8822, 2010 WL 3629587 (S.D.N.Y. Sept. 16, 2010)).

79. *Usenet.com*, 2010 WL 3629587, at *7.

80. *Id.* at *1.

number of separately liable infringers rather than the number of infringements. In the hypothetical, three separately liable infringers infringed Warren's work. If One Shop sells all three versions, then the only rationale supporting one award rather than three is the presence or absence of other defendants, namely the three separately liable manufacturers. Nothing in the Copyright Act, however, supports either an analysis or a result based on a question of joinder. In fact, the overarching question is which result better supports the policies underlying the Copyright Act; the better view will always defend the rights of the copyright owner rather than reward an infringer.

