

Live Nation: Cautionary Lessons for Distributors of Copyrighted Materials

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Client Advisory

November 18, 2016 by John M. Griem, Jr. and Rose Auslander

A recent Ninth Circuit decision provides useful guidance regarding the risks of damages for distributors accused of copyright infringement. In *Friedman v. Live Nation Merchandise*, the court held that a distributor of an infringing image may be liable for willful infringement if it does not have clear written standards regarding use of images acquired from others.^[1] The Ninth Circuit also confirmed that a distributor may be held liable for statutory damages owed by its retailers, if the retailers are also named defendants. In other words, a company that distributes infringing material may be held liable for multiple awards of statutory damages, even when it infringes just one copyrighted work.

Copyright Act Allows for Statutory Damages

Copyright protects original works of authorship, including photographs and other kinds of works, that are fixed in a tangible form of expression. In general, a copyright owner has the exclusive right to reproduce, distribute, display, and perform the work, and to make derivative works, or to authorize those activities.^[2] Instead of actual damages, such as recovery of profits attributable to the infringement, under certain conditions a copyright owner may choose to receive statutory damages for each infringed work involved in the action.^[3] Statutory damages for non-willful infringement range between \$750 and \$30,000 per work, at the discretion of the court. Where a plaintiff shows willful infringement, however, a plaintiff can be awarded up to \$150,000 per work.^[4] In the case of an innocent infringer, the court may reduce the award dramatically, to no less than \$200 per infringement.

Distributors May be Liable for Multiple Awards of Statutory Damages

In *Live Nation*, Glen E. Friedman, a well-known photographer, took a series of photos of hip-hop group Run-DMC. Friedman alleged that Live Nation, the defendant music merchandising company, willfully infringed on his photographs by distributing t-shirts and calendars bearing its images. Live Nation obtained the photographs directly from Run-DMC. Live Nation testified that under its unwritten “standard clearance procedures,” artists were “not supposed to” provide any photos they lacked rights to and were instead supposed to “pre-screen” the images. However, this procedure was not set forth in any standard written instruction or agreement.

The Ninth Circuit reversed the lower court’s decision to grant summary judgment against Friedman, ruling that there was a triable issue of material fact whether Live Nation willfully infringed. The court reasoned that Live Nation’s approval process never explicitly asked about copyrights and therefore, a reasonable jury could conclude that reliance on artist approval was “reckless disregard” for or “willful blindness” to Friedman’s copyright rights.

The court also considered whether Live Nation could be jointly and severally liable for the downstream infringements by Live Nation’s customer retailers who were not named in the action. In general, joint and several liability allows a plaintiff to recover all damages from any defendant, regardless of that defendant’s share of liability. The court held that, in theory, each of the 104 retailers to which Live Nation sold infringing

merchandise could be jointly and severally liable with Live Nation. However, each of the retailers must be joined as a defendant in the action in order to award damages as to that retailer's sales. Therefore, in order to recover separate damage awards on the basis of downstream infringement, a plaintiff must not only prove downstream infringement, but must also join each infringing retailer in the action.

The Total Amount of Potential Damages May Also Influence Court Decisions

The total amount of potential damages can act as an additional consideration in determining potential statutory damages. In *Arista Records v. Lime Group*, a New York district court limited statutory damages for over 11,000 infringements to a single statutory damage award per infringed work.^[5] In *Arista*, the operator of an internet peer-to-peer file-sharing service was found liable for inducing thousands of individual LimeWire users to copyright infringement. While the individual users were not sued, the plaintiffs sought an award from LimeWire for the infringement of over 11,000 sound recordings in addition to damages for infringement by each individual online user. The court limited the award to a single statutory damage award per work infringed, stating that separate statutory damages awards are "inapplicable to situations involving large numbers of infringements."^[6] Because of the large number of downstream infringers, the court held that separate awards would lead to an "absurd result"—a result that Congress could not have intended. If held jointly and severally liable with each individual direct infringer of the one work, the defendants were potentially liable for approximately \$75 trillion in damages.^[7] Ultimately, the parties agreed to settle for \$105 million and the case was dismissed, avoiding further litigation on the calculation of statutory damages.^[8]

Cautionary Lessons

Distributors of material that may be protected by copyright must implement strong, written clearance procedures before using any copyrightable material, diligently follow those procedures, and keep a record of following those precautions. If they do not, they may be liable twice — once for their own publication, and once in the form of joint and several liability with downstream retailers.

While the *Live Nation* holding provides guidance on how plaintiffs can recover damages, it also sets requirements for copyright holders seeking such damages. Copyright holders who want to recover maximum statutory damages should consider joining as defendants all downstream infringers who may be separately liable for copyright infringement. In making this assessment, copyright holders should also consider the number of downstream infringers: if that number is high or might otherwise lead to an exceptionally large damages award against an infringer, a court may, in its discretion, limit damages to a single statutory damage award per work infringed.

Copyright holders should remember that in order to be eligible for statutory damages, timing of registration is crucial. For unpublished works, statutory damages are unavailable for any infringement that occurs before the date of copyright registration. For published works, unless registration is made within three months of publication, statutory damages are unavailable for any infringement that occurs before copyright registration.^[9]

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Endnotes

^[1] 833 F.3d 1180 (9th Cir. 2016).

^[2] 17 U.S.C. §106 (2012).

[3] 17 U.S.C. §504(c)(1) (2012). To be eligible for statutory damages, copyright registration must either be made before infringement occurs, or within three months of publication of the work infringed (and registration must be before infringement of unpublished works). *Id.* §412.

[4] 17 U.S.C. §504(c)(2) (2012).

[5] See *Arista Records, LLC v. Lime Group, LLC*, 784 F.Supp.2d 313, 318 (S.D.N.Y. 2011).

[6] See *id.* at 318 (distinguishing the *Arista* situation with that of *Columbia Pictures* where only three downstream infringers were involved. *Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284 (9th Cir. 1997)).

[7] See *Arista Records, LLC* at 317 ("If Plaintiffs were able to pursue a statutory damage theory predicated on the number of direct infringers per work, Defendants' damages could reach into the *trillions.*") (emphasis in original).

[8] See Eric Hornbeck, *Lime Wire Pays \$105M To Settle With Record Cos.*, Law 360 <https://www.law360.com/articles/244902> (May 12, 2011).

[9] 17 U.S.C. §412 (2012)

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