Docket Nos. 17-35237 (L), 17-35243, 17-35249, 17-35250 and 17-35253

In the

United States Court of Appeals

For the

Ninth Circuit

LHF PRODUCTIONS INC.,

Plaintiff-Appellant,

v.

SIKOTORSKI ROMAN, agent of Doe 4, STANLEY RUGUIAN, agent of Doe 5, KIEL RAMTHUN, agent of Doe 6 and NICHOLAS ENGLISH, agent of Doe 14,

Defendants-Appellees.

Appeal from a Decision of the United States District Court for the Western District of Washington, No. 2:16-cv-00623-RSM · Honorable Ricardo S. Martinez

BRIEF OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Plaintiff-Appellant, LHF Productions, Inc. ("LHF"), states that its parent corporation is Millennium Funding, Inc.

CERTIFICATE OF INTERESTED PARTIES

Pursuant to Ninth Circuit Rule 28-2.1, the undersigned counsel for LHF certifies that LHF Productions, Inc., having at address at 318 N. Carson St., #208, Carson City, NV 89701, has a direct pecuniary interest in the outcome of the case. These representations are made to enable the Court to evaluate possible disqualification or recusal.

Respectfully submitted on August 2, 2017.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

I. STATEMENT OF JURISDICTION

(A) These five consolidated appeals are all actions for copyright infringement under the Copyright Act, 17 U.S.C. § 101, et seq., which arise "under the Constitution, laws, or treaties of the United States," and over which the District Court had jurisdiction pursuant to 17 US.C. § 101, et seq.; 28 US.C. § 1331 (federal question); and 28 US.C. § 1338(a) (copyright).

(B) This is a consolidated appeal of the District Court's orders granting-in-part LHF Productions, Inc.'s motions for default judgment, statutory damages, and attorney's fees in all five cases. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

(C) Pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A), "the notice of appeal . . . must be filed . . . within 30 days after the judgment or order appealed from is entered." The District Court entered final judgments in all five cases on February 15, 2017. ER 1, 16, 31, 46, 61. LHF Productions, Inc. filed its notices of appeal for all five cases on March 17, 2017. ER 76-90. Thus, the Notices of Appeal was timely filed and this Court may properly exercise subject matter jurisdiction.

(D) This Court granted LHF Productions, Inc.'s motion to consolidate the five appeals on July 5, 2017. Dkt. Entry 8.

II. STATEMENT OF THE ISSUES

The issues presented are as follows:

1. Whether the District Court erroneously concluded that Defendants in each respective case were ***jointly and severally*** liable for 17 U.S.C. § 504 statutory damages, in contravention of binding Ninth Circuit precedent.
2. Whether the District Court abused its discretion when it ignored evidence in the record of the prevailing rate charged by attorneys of comparable skill and experience in the relevant community in reducing Plaintiff's counsel's hourly rate.
3. Whether the District Court abused its discretion when it disregarded Plaintiff's hours as unreasonable on the basis of "block billing" entries and failed to identify excluded hours not reasonably expended.

III. STANDARD OF REVIEW

An award for statutory fees under the Copyright Act is reviewed for abuse of discretion. *See Russell v. Price*, 612 F.2d 1123, 1131-32 (9th Cir. 1979), *cert. denied* 446 U.S. 952 (1980). Likewise, a district court's decision whether to award attorney's fees under the Copyright Act is reviewed for an abuse of discretion. *Columbia Pictures Indus. v. Krypton Broad. of Birmingham, Inc*., 259 F.3d 1186, 1197 (9th Cir. 2001). In deciding whether to award fees, the district court should consider "the degree of success obtained; frivolousness; motivation; objective unreasonableness (both in the factual and legal arguments in the case); and the need in particular circumstances to advance considerations of compensation and deterrence." *Jackson v. Axton*, 25 F.3d 884, 890 (9th Cir. 1994).

"A district court's award of attorney's fees 'does not constitute an abuse of discretion unless it is based on an inaccurate view of the law or a clearly erroneous finding of fact.'" *Entm't Research Grp. v. Genesis Creative Grp*., 122 F.3d 1211, 1216–17 (9th Cir. 1997) (quoting *Fantasy, Inc. v. Fogerty*, 94 F.3d 553, 556 (9th Cir. 1996) ("*Fogerty II*").

"[E]lements of legal analysis and statutory interpretation which figure in the district court's decision are reviewable *de novo*." *Fogerty II*, 94 F.3d at 556 (quoting *Hall v. Bolger*, 768 F.2d 1148, 1150 (9th Cir. 1985)). "The district court's

interpretations of the Copyright Act are also reviewed *de novo*." *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1109 (9th Cir. 2007).

IV. SUMMARY OF THE ARGUMENT

Plaintiff-Appellant LHF Productions, Inc. ("LHF") is a developer and producer of the motion picture *London Has Fallen* for theatrical exhibition, home entertainment and other forms of distribution. The motion picture was first published March 4, 2016. *London Has Fallen* is protected by the Copyright Act in registration PAu 3-789-521, effective Oct. 7, 2014, as well as the copyright registration filed for the theatrical release of *London Has Fallen* submitted March 11, 2016 and confirmed received by the Copyright Office March 14, 2016.

Plaintiff is the proprietor of all right, title and interest in the motion picture *London Has Fallen*, including the exclusive rights to reproduce and distribute to the public as well as the right to sue for past infringement. *London Has Fallen* contains wholly original material that is copyrightable subject matter under the laws of the United States. It is an action thriller directed by Babak Najafi and stars Gerald Butler, Morgan Freeman and Aaron Eckhart, among others. It is easily discernible as a professional work as it was created using professional performers, directors, cinematographers, lighting technicians, set designers and editors and with professional-grade cameras, lighting and editing equipment.

The film has significant value and has been created, produced and lawfully distributed at considerable expense. *London Has Fallen* is currently offered for sale in commerce, playing in theaters and available for rental and/or purchase from Amazon, iTunes and Netflix, among others. Thousands of people have participated in the film's production and release, and these same people rely on the Copyright Act to ensure that the film earns revenue through lawful release and dissemination. Thus, the unlawful reproduction and dissemination amounts to stealing from these people who created this film, chilling the incentive to create more works of artistic expression. The Copyright Act's damages provisions are intended to dissuade this unlawful activity, but the courts must consistently apply them in order for them to have any meaning to potential infringers.

The defaulted Defendants each individually copied and/or distributed *London Has Fallen* through a peer-to-peer network using the "BitTorrent" protocol, explained in more detail below. When the complaints were filed, none of the defendants were known to LHF by name; however, all defendants were later identified after LHF's investigation. LHF settled its disputes with a number of the other defendants, but several refused to participate despite LHF's diligent efforts and their apparent liability. In each case, the District Court below entered orders of default judgment against several Defendants, and awarded LHF an arbitrary portion of the attorney's fees it requested.

The District Court's five rulings below are in direct contravention of fundamental precepts of copyright law. When granting statutory fees under the Copyright Act in each case, the District Court below incorrectly held that the defaulted Defendants "conspired with one another to infringe the same digital copy of LHF's motion picture." There was no such allegation in any of the cases. As a consequence of this incorrect application of 17 U.S.C. § 504(c)(1), the District Court incorrectly awarded the statutory amount of $750 ***total*** for all of the Defendants' acts of infringement in each case. This ruling is direct contravention of 17 U.S.C. § 504(c)(1) and Ninth Circuit law, which provides that a copyright holder is entitled to an award of statutory damages for infringement of each work, regardless of the number of separate infringements of that work. Despite the District Court's holdings to the contrary, there was never an allegation that each of the defaulting Defendants were "jointly and severally liable" for the separate acts of infringement committed by another party.

Next, the District Court abused its discretion when it flatly ignored evidence submitted in support of LHF's request for attorney's fees, and consequently reduced LHF's request without a justifiable basis. Specifically, the District Court ignored declarations of counsel, survey evidence, and examples of attorney's fees awards from other cases from the very same district that LHF submitted with its requests.

The District Court also abused its discretion when, without justification, it concluded that LHF's counsel's hours were based on "block billing" entries and unreasonable, disregarding entirely the time spent by the legal assistant and arbitrarily cutting LHF's attorney time by more than 60%. The District Court's conclusion overlooked a number of facts made clear in the cited legal authority and supporting documents. The District Court's rationale here again runs directly contrary to this Court's binding precedent.

Accordingly, LHF respectfully requests that this Court instruct the District Court to (1) assess the statutory award of Section 504(c)(1) statutory damages separately against ***each*** defaulted Defendant for ***each*** instance of infringement; (2) consider the reasonable hourly rate commensurate with the evidence of prevailing market rate of $450 per hour; and (3) adopt Plaintiff's hours as reasonable, or at minimum explain any reduction as mandated by Ninth Circuit law.

V. ARGUMENT

A. FACTS

The following facts were plead in LHF's Amended Complaints, which resulted in default judgments against a total of twenty-two defendants across five cases, now consolidated. *See* Amended Complaints, ER 567, 587, 607, 627, 646. As such, the following facts are presumed as true. *Geddes v. United Financial Group*, 559 F.2d 557, 560 (9th Cir. 1977).

1. Plaintiff-Appellant LHF Productions

Plaintiff-Appellant LHF Productions, Inc. ("LHF") is a developer and producer of the motion picture *London Has Fallen* for theatrical exhibition, home entertainment and other forms of distribution. The motion picture was first published March 4, 2016. ER 569, 589, 609, 629, 647 ¶ 5. London Has Fallen is protected by the Copyright Act in motion picture Registration No. PA 1-982-831, effective March 14, 2016. *Id.* ¶ 6. Before the registration issued, *London Has Fallen* was initially protected by the Copyright Act in registration PAu 3-789-521, effective Oct. 7, 2014, as well as the copyright registration filed for the theatrical release of *London Has Fallen* submitted March 11, 2016 and confirmed receipt by the Copyright Office March 14, 2016. ER 698, 714, 730 ¶ 6.

London Has Fallen contains wholly original material that is copyrightable subject matter under the laws of the United States. It is an action thriller directed by Babak Najafi and stars Gerald Butler, Morgan Freeman and Aaron Eckhart, among others. It is easily discernible as a professional work as it was created using professional performers, directors, cinematographers, lighting technicians, set designers and editors and with professional-grade cameras, lighting and editing equipment. ER 569, 589, 609, 629, 648 ¶ 8.

2. The BitTorrent Protocol and LHF's Preliminary Investigation

When LHF filed each complaint, it was unaware of the true names of the Defendants. *Id.* ¶ 10. However, each Defendant ***was*** known to Plaintiff by the Internet Protocol ("IP") address assigned by an Internet Service Provider ("ISP") and the date and at the time at which the infringing activity of each Defendant was observed. ER 569, 589, 609, 629, 648 ¶¶ 10-12.

Any digital copy of an audiovisual work may be uniquely identified by a unique, coded, string of characters called a "hash checksum" or "hash." ER 575 ¶ 34, 595 ¶ 35, 615 ¶ 35, 634 ¶ 28, 653 ¶ 29. The hash checksum facilitates the identification of computers that are used to transmit a copy or a part of a copy of a digital media file identified by a particular hash value by their IP address at a particular date and time. *Id.* Each IP address was observed and associated with significant infringing activity and associated with the exchange of other titles on peer-to-peer networks. *Id.* The volume, titles and persistent observed activity associated with each Defendant's IP address indicates that each Defendant was not a transitory or occasional guest, but was either the primary subscriber of the IP address or someone who resides with the subscriber and/or is an authorized user of the IP address. *Id.* ¶¶ 10-11.

For all relevant times ***each Defendant was the sole party responsible for and in control*** of each IP address. *Id.* ¶ 10 (emphasis added). LHF collected logs

of infringing transactions and the IP addresses of the users responsible for copying and distributing the audiovisual work, *London Has Fallen*. The IP addresses, hash value, dates and times, ISP and geolocation information attached to each Amended Complaint (ER 586, 606, 626, 645, 664) correctly reflects the subscribers using the IP addresses and that they were all part of a "swarm" of users that were reproducing, distributing, displaying or performing the copyrighted work. *Id.* ¶ 10.

The volume of the activity associated with each Defendant's IP address further indicates that anyone using or observing activity on the IP address would likely be aware of the conduct of each Defendant's. ER 570, 590, 610, 630, 649 ¶ 12. Also, the volume and titles of the activity associated with each Defendant's IP address indicates that each Defendant is not a child, but an adult, often with mature distinct tastes. *Id.* LHF conducted further diligence to cross-reference a range of data sources to ensure that each Defendant was associated with each respective IP address obtained from the IPS, including Google address mapping, social media, and mailing letters to each Defendant inviting settlement discussions. ER 571, 591, 611, 631, 650 ¶¶ 13-16.

After the District Court granted expedited discovery, the true names and addresses of each individual Defendant became known to LHF, summarized below:

Appeal No.	District Court Case No.	Defaulted Defendants and Citations to Amended Complaint
17-35249	16-cv-1015	1. Lauren Burks (ER 572 ¶ 18) 2. William Aely (*Id.* ¶ 19) 3. Tamika Greene (*Id.* ¶ 21) 4. Curtis Stout (*Id.* ¶ 22) 5. Donald Smith (ER 573 ¶ 24) 6. Lucy Gathu (*Id.* ¶ 25) 7. Douglas Cottrell (*Id.* ¶ 26) 8. David Alvarez Jr. (*Id.* ¶ 27)
17-35250	16-cv-865	9. Paul Cain (ER 592 ¶ 19) 10. Boun Bosakouonthong (*Id.* ¶ 22) 11. Samantha Smith (ER 593 ¶ 24) 12. Andrew Bradley (*Id.* ¶ 25) 13. Edward Brown (*Id.* ¶ 27)
17-35253	16-cv-623	14. Sikotorski Roman (ER 612 ¶ 20) 15. Stanley Ruguian (*Id.* ¶ 21) 16. Kiel Ramthun (*Id.* ¶ 22) 17. Nicholas English (ER 613 ¶ 28)
17-35243	16-cv-621	18. Roselen Torres (ER 632 ¶ 22) 19. Sherwin Mendoza (*Id.* ¶ 23)
17-35237	16-cv-552	20. Aaron Lightner (ER 651 ¶ 22) 21. Donald Reddish (*Id.* ¶ 23) 22. Alexander Cauthorn (*Id.* ¶ 24)

As shown in each Amended Complaint, each individual Defendant resided at different addresses during the relevant time periods, and save for the allegations for purposes of permissive joinder (*see e.g.,* ER 576-578 ¶¶ 36-42) there was never an allegation that these Defendants had conspired or colluded with one another so as

to cause one singular act of infringement. Rather, LHF sought permissive joinder to "permit a more efficient management" its claims against the several defaulted Defendants and to reduce burdens on District Court below. *See e.g.,* ER 578 ¶ 24.

3. The Defaulted Defendants

Again, after LHF learned of the identities of the Defendants, it sent letters to each address inviting each potential infringer to settle the dispute and encouraging obtaining legal representation. *See e.g.,* ER 571, 591, 611, 631, 650 ¶ 16. Some defendants were voluntarily dismissed (*see e.g.,* ER 478 Dkts. 11-13), others obtained counsel (*id.* Dkts. 9, 10), and across these five cases, twenty-two defaulted, as shown above. While the cases have certain common facts and legal issues to warrant joinder and consolidation, each case had its share of unique circumstances that warrant a remand of the District Court's arbitrary discounting of hours, and reversal of its holding of joint and several liability. As explained below, each individual Defendant required individual attention, negotiation, and motion practice.

a. Defendants from Case No. 16-cv-1015

LHF issued summonses for Defendants Burks, Aely, Greene, Stout, Smith, Gathu, Cottrell, and Alvarez, Jr. ER 749 at Dkts. 23-24. These individuals were each served during November 2016. ER 534 (Aely), ER 538 (Alvarez, Jr.), ER 540 (Burks), ER 542 (Greene). Indeed Mr. Stout (*see* ER 749. Dkts. 28, 50) and Gathu

(Dkts. 30, 51) required additional efforts to serve under alternative methods of service. *Id.; see also* ER 525 (Proof of Service for Stout) and ER 527 (Proof of Service for Gathu). Further, LHF negotiated waivers of service of process with Defendants Smith and Cottrell. ER 749 Dkts. 37, 38. These Defendants did not sign for anyone besides themselves. *See* ER 530 (Smith) and ER 531 (Cottrell). After refusing to participate in the litigation, LHF sought, and the District Court entered, entries of default for each individual Defendant. ER 749-750 Dkts. 46, 47, 60-64, 69, 70. This case proceeded against other individuals in the normal course of litigation. *See e.g.,* ER 749 Dkt. 26 (Answer and Jury Demand), ER 751 Dkt. 52 (Voluntary Dismissal).

b. Defendants from Case No. 16-cv-865

LHF issued summonses for Defendants Cain, Bosakouonthong, Smith, Bradley, and Brown. ER 759 at Dkt. 25. Save for Defendant Bradley, who waived service of process on his own accord (ER 532; ER760 Dkt. 37), these individuals were each served during October 2016. ER 544 (Cain), ER 546 (Bosakouonthong), ER 548 (Smith), ER 550 (Brown). LHF sought, and the District Court entered, entries of default for each individual Defendant. ER 761 Dkts. 53-57. Again, LHF voluntarily dismissed a number of individual defendants throughout the case (ER 760-761 Dkts. 26, 27, 28, 35, 60) and proceeded

throughout the case against other individual Defendants. *See e.g.,* ER 761 Dkt. 59 (Notice of Appearance by defense attorney).

c. Defendants from Case No. 16-cv-623

LHF issued summonses for Defendants Roman, Ruguian, Ramthun, and English. ER 768 at Dkt. 21. Each individual was served during September 2016. ER 552 (Roman), ER 554 (Ruguian), ER 556 (Ramthun). Defendant English required alternative methods of service. ER 770 Dkts. 39, 42, 53; *see also* ER 529. Again, despite LHF's efforts to ensure their participation, the District Court, on motion from LHF, entered entries of default for each individual Defendant. ER 771 at Dkts. 54 (Roman), 55 (Ruguian) 56 (Ramthun), and 70 (English). Again this case proceeded against other individuals with no effect from the defaulted Defendants. *See e.g.,* ER 769 Dkt. 23 (Answer), Dkt. 22, 26 (Notices of Appearance by defense counsel), Dkt. 24 (Stipulated Dismissal), Dkt. 25 (Scheduling Order), ER 770 Dkt. 43 (Response to Motion to Dismiss).

d. Defendants from Case No. 16-cv-621

LHF issued summonses for Defendants Torres and Mendoza. ER 778 at Dkt. 21. These individuals were each served during September 2016. ER 558 (Mendoza), ER 560 (Torres), After refusing to participate in the litigation, LHF sought, and the District Court entered, entries of default for each individual Defendant. ER 779 Dkts. 27-32. Again, the case proceeded with the collective

understanding that each Defendant was an individual infringer. *See e.g., id* Dkt. 33 (Notice of Appearance by defense attorney), Dkt. 34 (Stipulated Dismissal).

e. Defendants from Case No. 16-cv-522

LHF issued summonses for defendants Lightner, Reddish, and Cauthorn. ER 784 Dkt. 19. These individuals were each served during August 2016. ER 562 (Lightner), ER 564 (Reddish) ER 566 (Cauthorn). After refusing to participate in the litigation, LHF sought, and the District Court entered, entries of default for each individual Defendant. ER 784-785 Dkts. 29-37. Indeed, the case proceeded as if each other defendant was an individual infringer. *See e.g.,* ER 785 Dkt. 40 (Order Regarding Initial Disclosures), Dkt. 41 (Show Cause Order).

In each of the five cases, LHF and the District Court proceeded on the basis that each Defendant was individually liable for copyright infringement. However, the District Court ignored these basic facts when it incorrectly applied 17 U.S.C. § 401(c)(1), and failed to recognize the efforts of LHF's counsel in its award of attorney's fees.

B. APPLICABLE LEGAL STANDARDS

To prevail on a copyright infringement claim a plaintiff must establish (1) ownership of a valid copyright and (2) copying of constituent elements of the work that are original. *Kelly v. Arriba Soft Corp*., 336 F.3d 811, 817

(9th Cir. 2003). LHF's Amended Complaints, the allegations of which must be taken as true, establishes both of these elements.

The Copyright Act provides a plaintiff the option of electing either statutory damages or actual damages. 17 U.S.C. § 504(a). "If statutory damages are elected, 'the court has wide discretion in determining the amount of statutory damages to be awarded, ***constrained only by the specified maxima and minima***.'" *Peer Int'l Corp. v. Pausa Records, Inc*., 909 F.2d 1332, 1336 (9th Cir. 1990) (quoting *Harris v. Emus Records Corp*., 734 F.2d 1329, 1335 (9th Cir. 1984)(emphasis added). A plaintiff may recover statutory damages "whether or not there is adequate evidence of the actual damages suffered by the plaintiff or of the profits reaped by defendant." *Harris*, 734 F.2d at 1335.

Statutory damages may be increased if the defendant willfully infringed the plaintiff's copyright. 15 U.S.C. § 504(c)(2). Allegations that a defendant acted willfully are properly deemed to be true once the court enters a default. *Derek Andrew, Inc. v. Poof Apparel Corp*., 528 F.3d 696, 702 (9th Cir. 2008); *Salyer v. Hotels Com GP*, LLC, 2015 U.S. Dist. LEXIS 82171 (W.D. Wash. 2015). Here, the defaulted Defendants' willful infringements warranted enhanced statutory damage awards. However, the District Court made no findings of willfulness, and indeed included no ***mention*** of willfulness, despite it being pleaded in each

Amended Complaint. *See* ER 580 ¶ 52, ER 600 ¶ 53, ER 620 ¶ 53, ER 639 ¶ 46, ER 658 ¶ 47.

C. THE DISTRICT COURT ERRED BY FINDING THE DEFAULTED DEFENDANTS HAD COLLUDED WITH ONE ANOTHER TO INFRINGE ONE WORK

The Court's Orders Granting in Part Plaintiff's Motions for Default Judgment (ER 4, 19, 34, 49, 64) concluded that LHF established each Defendant's liability (*id.* at page 4 of each Order), that default judgment was appropriate (*id.* at p. 5), and that the minimum statutory damage award of $750 was appropriate. *Id.* at p. 6. However, the Court found each Defendant "jointly and severally" liable for a single minimum statutory damage award:

> Because the named Defendants in this action were alleged to have conspired with one another to infringe the same digital copy of LHF's motion picture, the Court will award the sum of $750 for Defendants' infringement of the same digital copy of *London Has Fallen*. Each of the Defendants is jointly and severally liable for this amount.

(*Id.*) This violates established federal statutory law and Ninth Circuit precedent.

The law is clear on this point. 17 U.S.C. § 504(c)(1) expressly provides that Plaintiff is entitled to:

> 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

(emphasis added). Thus, when statutory damages are assessed against either (1) one defendant, or (2) a group of defendants held to be jointly and severally liable, each work infringed may form the basis of only one award, regardless of the number of separate infringements of that work. *Columbia Pictures Tv v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284, 294 (9th Cir. 1997).

Here, there was no allegation or evidence that each of the defaulting Defendants was "jointly and severally" liable for the separate acts of infringement committed by any other party in this or any other case involving the same motion picture or file of that motion picture. Rather, each Defendant was separately accused of infringing at least some portion of LHF's copyrighted motion picture. Plaintiff's Amended Complaint in each case specifically alleged that:

- ***Each*** Defendant copied and distributed Plaintiff's copyrighted motion picture *London Has Fallen*. ER 569, 589, 609, 629, 648 ¶ 10.
- ***Each*** Defendant was part of a "swarm" of users that were reproducing, distributing, displaying or performing the copyrighted work. ER 576 ¶ 35, ER 596 ¶ 36, ER 616 ¶ 36, ER 634 ¶ 29, ER 653 ¶ 30.
- ***Each*** Defendant committed violations of 17 U.S.C. § 101 *et seq.* ER 576 ¶ 36, ER 596 ¶ 37, ER 616 ¶ 37, ER 635 ¶ 30, ER 654 ¶ 31.
- ***Each*** Defendant, without the permission or consent of LHF, used, and continues to use, an online media distribution system to wrongfully misappropriate, reproduce and distribute to the public, including by making available for distribution to others, *London Has Fallen*. *See e.g.,* ER 579 ¶ 46.
- ***Each*** Defendant directly, indirectly and/or contributorily violated LHF's exclusive rights of at least reproduction, preparation derivative works and distribution. ***Each*** Defendant's actions constitute infringement of LHF's exclusive rights protected under 17 US.C. § 101 et seq. *See e.g., id.* ¶ 48.

- LHF is entitled to statutory damages from each Defendant pursuant to 17 USC §504, *et seq*. *See e.g.,* ER 580 ¶ 51.

Indeed, LHF's claim for relief in each case prayed for "judgment against each Defendant" including "[p]ursuant to 17 U.S.C. § 504 or other applicable provision, for actual or statutory damages. ER 581, 601, 621, 639, 658.

In other words, while being part of the same BitTorrent "swarm" made joinder appropriate, each ***separate*** Defendant committed a ***separate*** act of copyright infringement while in that swarm, for which, because they were found liable of infringement, LHF is entitled to a ***separate*** statutory damage award under Section 504(c)(1). The District Court was also required to address the impact of the findings of willfulness with respect to each defaulted Defendant. *Derek Andrew,* 528 F.3d at 702.

The clarity of this principle is set forth in binding Ninth Circuit law. In *Columbia Pictures*, 106 F.3d at 294, the Court held that "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***." (Emphasis added), *rev'd on other grounds sub nom. Feltner v. Columbia Pictures Television Inc*., 523 U.S. 340 (1998). In *Columbia*, this Court specifically distinguished the situation—unlike in this case—where a plaintiff alleges joint and several liability against multiple defendants. *Id*.

The principle was reaffirmed recently in *Friedman v. Live Nation Merch., Inc*., 833 F.3d 1180, 1191 (9th Cir. 2016), where the Ninth Circuit clearly explained the difference between a situation where "joint and several" liability for copyright infringement is appropriate and the cases below:

> Our holding in *Columbia Pictures* was explicitly premised on the fact that each of the downstream infringers for whom the plaintiff received a separate damages award was a defendant in the case. Before the question of damages was raised, those parties had already been adjudicated liable for infringement, and jointly and severally liable with another infringer. That is not true in this case. Here, Friedman first asserted that there were 104 downstream infringers only after the question of Live Nation's liability for its own infringement had been resolved, not having named any of those downstream infringers as defendants in the case.
>
> *Columbia Pictures's* emphasis on the status of the downstream infringers as defendants is grounded in the language of the statute. Section 504(c)(1) provides for "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) (emphasis added). Any downstream infringements cannot be "involved in the action" ***unless the alleged infringers responsible for those infringements were joined as defendants in the case, and the particular alleged infringements involving them adjudicated***.
>
> This interpretation is supported by the legislative history on which *Columbia Pictures* relied, which explains that '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.' H.R. Rep. No. 94-1476, 94th Cong., 2d Sess., at 162 (emphasis added). Congress did not, therefore, intend for courts, in determining the amount of damages, to engage in an entirely separate adjudication as to the liability of a large group of people not parties to the case, with respect to separate infringing acts not involved in the action. To the contrary, the situation Congress contemplated was one like that in *Columbia Pictures*, in which each

> jointly and severally liable pair of infringers was "joined in the same action" and liable for the same infringements.

Friedman, 833 F.3d at 1190.

Accordingly, the law is clear and well settled that "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*. The precise situation in the instant case was discussed by the *Friedman* Court by citation to a prominent treatise hypothetical:

> If each *defendant* is liable for only one of the several infringements that are the subject of the lawsuit, then each *defendant* will be liable for a separate set of statutory damages (each with its own minimum). 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.

Again, here, each of the twenty-two (22) Defendants, as well as any other Defendants in any case in the country brought by LHF for copyright infringement of the same motion picture, and even the same digital file, was separately named and accused of a separate act of infringement, and is not jointly and severally liable for the infringement of others. Accordingly, LHF was, and is, entitled to a separate statutory damage award against each Defendant in each of the cases irrespective of what may have happened with any other defendant in any other case.

LHF further submits that at no time prior in the cases below or in more than ***70 default judgment awards*** in analogous BitTorrent cases in the Western District of Washington has it been suggested that multiple defendants in a case are "jointly and severally" liable and that, accordingly, should share in a single statutory damage award under Section 504(c)(1). To the contrary, in each of the other default judgments in this jurisdiction in these cases, whether issued separately or collectively as was done in this case, the Western District of Washington recognized the separate infringing act of each defendant and issued a separate statutory damage award accordingly. *See, e.g., Criminal Prods., Inc. v. Darrell Gunderman et al.*, No. 16-cv-729, Dkt. 77 (W.D. Wash. Feb. 22 2017), *Criminal Prods., Inc. v. Norman et al.,* No. 16-cv-860, Dkt. 34 (W.D. Wash. Feb. 22, 2017) *Criminal Prods., Inc. v. Romines et al.,* 16-cv-1016, Dkt. 50 (W.D. Wash. Feb. 22, 2017); *QOTD Film Investment Ltd., v Star et al.,* No. 16-cv-371, Dkts. 64-67 (W.D. Wash. Oct. 5 2016); *Cobbler Nevada, LLC v. Chapman et al.,* No. 15-cv-1614, Dkts. 52, 54 (W.D. Wash. Sept. 9, 2016); *Cobbler Nevada, LLC v. Tu, et al.,* 15-cv-1420, Dkts. 54, 56, 58, 60, 62 (W.D. Wash. Sept. 9, 2016); *Dallas Buyers Club, LLC v. Eric Nydam, et al.,* No. No. 15-cv-133, Dkt. 45 (W.D. Wash. Aug. 8 2016) (collective order for Case Nos. 14-1684RAJ; 14-1926RAJ; 15-133RAJ; C15-576RAJ; C15-579RAJ; C15-581RAJ; C15-582RAJ).

Given that LHF specifically pleaded that each Defendant was separately liable for copyright infringement, and that in each prior case in the Western District of Washington the District Court had found separate liability and awarded separate statutory damages under Section 504(c)(1) in accord with Ninth Circuit precedent, it was not correct for the District Court below to find that the defaulted Defendants in each case had somehow colluded with one another to infringe one work. Thus, this Court should reverse the District Court's Orders with instructions to assess a statutory damage award against each of the individually-named defaulted Defendants. *See*

D. THE DISTRICT COURT ERRED BY IGNORING SUBMITTED EVIDENCE OF PREVAILING RATES OF ATTORNEYS

The Ninth Circuit has a "long-standing insistence upon a proper explanation of any fee award" by a district court. *Intel Corp. v. Terabyte Int'l, Inc.*, 6 F.3d 614, 623 (9th Cir. 1993); *see also Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.,* 886 F.2d 1545, 1556 (9th Cir. 1989), *cert. denied*, 494 U.S. 1017 (1990) ("In setting a reasonable attorneys fee, the district court should make specific findings of the rate and hours it has determined to be reasonable."). In cases where there are well established public interests, which includes copyrights, "it is inappropriate for a district court to reduce a fee award below the lodestar simply because the damages are small." *Quesada v. Thomason*, 850 F.2d 537, 540 (9th Cir. 1988). In particular in the context of lesser damages, the Ninth Circuit has noted the need for

attorney fees otherwise copyright holders will not prosecute infringement actions when the amount at stake is low. *Magnuson v. Video Yesteryear,* 85 F.3d 1424, 1432 (9th Cir. 1996).

In all cases, the District Court's orders concluded that LHF should be awarded attorney's fees. *See* ER 9, 23, 39, 54, 69. In evaluating the relevant factors in determining the lodestar amount of a reasonable award as it pertains to the reasonableness of the rate requested, the District Court stated that LHF did "not present ***any*** evidence that this [$450/hr.] is the prevailing rate in this community, and similar cases in this District suggest that a lower rate is appropriate." ER 10, 25, 40, 55, 70 (emphasis added). The District Court apparently ignored the significant evidence presented confirming that this is a prevailing rate "charged by attorneys of comparable skill and experience in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984).

In each case and for each defendant, attorney David Lowe provided declarations outlining fees and costs, pre-apportioned for each defendant, outlining individualized efforts where appropriate. *See* Lowe Declarations at ER 100, 187, 203, 219, 235, 251, 268, 284, 301, 318, 335, 352, 369, 385, 402, 419, 436, 452, 468, 484, 500, and 516. Each Lowe Declaration included the identical Exhibits A, C, and D. ER 108-177. However, Exhibit B (Invoice from ISP) was particularized

to the Internet Protocol identifications for each individual case.[1] The District Court ignored declarations of counsel, survey evidence and examples from other cases in the jurisdiction:

- Declaration of David A. Lowe indicating that his usually rate for 2015 and 2016 was $510, but that he has reduced that rate to $450 for these cases. *See* representative Lowe Declaration, ER 100-106 ¶ 7.
- 2014 annual AIPLA survey (most recent available) showing that mean (average) billing rate for a private law firm partner of 15-24 years of experience was $468 per hour and the average rate for an attorney in the Seattle area ("Other West") is $411. ER 109, 110.
- June 2015 LexisNexis Enterprise Legal Management Report (most recent) showing the median partner billing rate for various legal work (including IP work) at approximately $450 per hour. ER 111, 112.
- *BWP Media USA Inc. v. Rich Kids Clothing Company LLC,* No. 13-cv-1975 (W.D. Wash 2015) ($450 per hour local rate); *Getty Images (US), Inc. v. Virtual Clinics,* 2014 U.S. Dist. LEXIS 60935 (W.D. Wash. 2014) ($465 per hour for experienced partner); *Little Genie Prods. LLC v. PHSI Inc.*, 2014 U.S. Dist. LEXIS 91089, 27-28 (W.D. Wash. 2014) ($420 per hour).

[1] For purposes of efficiency, one exemplar set of these exhibits has been included in the Excerpts of Record. LHF reserves the right to supplement the Record should this Court deem it necessary to review the ISP Invoices.

This evidence established that the requested $450 rate is a reasonable and prevailing rate "charged by attorneys of comparable skill and experience in the relevant community."[2] *See United Steelworkers of Am. v. Phelps Dodge Corp*., 896 F.2d 403, 407 (9th Cir. 1990) ("Affidavits of the plaintiffs' attorney and other attorneys regarding prevailing fees in the community, and rate determinations in other cases, particularly those setting a rate for the plaintiffs' attorney, are satisfactory evidence of the prevailing market rate."). Noteworthy is that the Ninth Circuit has specifically cautioned courts against arbitrarily setting a low rate in contravention of the evidence. *See Welch v. Metro. Life Ins. Co.*, 480 F.3d 942, 947 (9th Cir. 2007).

Accordingly, when considering the evidence submitted as a whole, LHF respectfully submits that the proper prevailing rate "charged by attorneys of comparable skill and experience in the relevant community," and one deemed reasonable for in this case, should be $450, and requests modification of its default judgment to reflect this in the lodestar calculation.

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[2] The District Court also apparently did not recognize another series of cases in the Western District of Washington where $450 was determined to be a reasonable rate: *Cobbler Nevada, LLC v. Does*, No. 15-cv-1420 (Dkts. 54, 56, 58, 60, 62); *Cobbler Nevada, LLC v. Does*, No. 15-cv-1404 (Dkts. 48, 50, 52); *Cobbler Nevada, LLC v. Does*, No. 15-cv-1406 (Dkts. 37, 39); *Cobbler Nevada, LLC v. Does*, No. 15-cv-1408 (Dkts. 45, 47); *Cobbler Nevada, LLC v. Does*, No. 15-cv-1421 (Dkts. 48, 50, 52); *Cobbler Nevada, LLC v. Does*, No. 15-cv-1443 (Dkts. 70, 72, 74, 76, 78); *Cobbler Nevada, LLC v. Does*, No. 15-cv-1614 (Dkts. 52, 54).

E. THE DISTRICT COURT ERRED BY FAILING TO JUSTIFY ITS RATIONALE CONCERNING "BLOCK BILLING" ENTRIES

"Without expressing any opinion on whether or not the fees claimed were reasonable, we must vacate the district court's fee award and remand the matter so that the district court may provide a reasoned explanation supporting the amount of fees awarded." *Columbia Pictures* 106 F.3d at 296. The District Court concluded that LHF's hours were based on "block billing" entries and therefore unreasonable (ER 11, 26, 41, 55, 70); completely cut the hours worked by the legal assistant (*id.*); and arbitrarily cut attorney time by more than 60% in each case. *See* ER 11 (cutting 5.8 hours to 2 hours), ER 26 (cutting 5.1 hours to 2 hours), ER 41 (cutting 5.3 hours to 2 hours), ER 56 (cutting 6.6 hours to 2 hours), and ER 73 (cutting 5.7 hours to 2 hours). This conclusion ignored a number of facts made clear in the cited legal authority and supporting documents. This decision alone by the District Court was "illogical, implausible, or without support in inferences that may be drawn from facts in the record" and therefore must be overturned. *See U.S. v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (*en banc*).

First, as confirmed by the Ninth Circuit in *Welch*, 480 F.3d at 948 (9th Cir. 2007), cited by the District Court, it is improper to apply an across-the-board reduction to all requested hours. The Court in *Welch* held that the district court clearly erred in applying a 20 percent reduction to all of plaintiff's hours. *Id.*

Thus, the District Court's across-the-board approximately ***60%*** reduction in the cases below is likewise inappropriate.

Second, as was the case in the cited *Welch* case, the majority of the hours submitted by Plaintiff's attorneys cannot reasonably be criticized as "block billed." Virtually all of the time entries pertained to describing work related to single, discrete tasks that are not considered "block billings." See, for example, the exemplary detailed billing information provided with respect to defaulted Defendant Cauthorn:

David A. Lowe, Esq. Billings

Date	Hours	Rate	Amount	Description
4.15.16	.5	$450	$225	Review claims and facts regarding infringement, including analysis of BitTorrent activity; Outline, research and work on new complaint
4.20.16	.2	$450	$90	Review Order granting expedited discovery; Prepare subpoena to Comcast
5.31.16	.1	$450	$45	Review Comcast data on identity of subscribers; Work on notice letter
6.20.16	.1	$450	$45	Review and finalize notice letter
6.28.16	.1	$450	$45	Review and finalize notice letter
7.13.16	.4	$450	$180	Work on motion for extension of time and accompanying declaration
7.13.16	.7	$450	$315	Work on amended complaint, Review waiver and summons
7.14.16	.5	$450	$225	Review status of Doe, Work on motion for extension of time to answer complaint, supporting documents, and proposed order;

Date	Hours	Rate	Amount	Description
				Finalize and file
8.16.16	.3	$450	$135	Review and docket service information; Communication with process server regarding same; File summons
9.22.16	.6	$450	$270	Review status of claim; Prepare and file entry of default
1.25.17	.4	$450	$180	Review and revise motion for default judgment and accompanying papers
Total:	**3.9**	**Allocated:**	**$1755.00**	

Associate Attorney Tim Billick Billings

Date	Hours	Rate	Amount	Description
1.24.17	1.3	$250	$325	Legal research regarding default judgment, copyright statutory damages and reasonable attorney's fees; Review file; Review default; Work on motion for default judgment including supporting declarations and proposed order
1.26.17	.6	$250	$150	Review, finalize, and file motion for default judgment and accompanying papers
Total:	**1.9**	**Allocated:**	**$475.00**	

Legal Assistant Billings

Date	Hours	Rate	Amount	Description
5.31.16	.1	$145	$14.50	Work on notice letter
6.20.16	.1	$145	$14.50	Work on notice letter
7.14.16	.4	$145	$58.00	Prepare, print and mail waiver, request to waive summons, and amended complaint
8.16.16	.1	$145	$14.50	Prepare summons

Date	Hours	Rate	Amount	Description
8.17.16	.3	$145	$43.50	Provide summons, amended complaint to process server
9.22.16	.5	$145	$72.50	Work on Motion for Entry, Order of Entry, and Declaration
10.12.16	1.2	$145	$174.00	Work on Default Judgment papers
10.18.16	.2	$145	$29.00	Work on Default Judgment papers
Total:	**2.9**	**Allocated:**	**$420.50**	

ER 516 ¶ 10.

Indeed, there are only two possible examples of "block billing:" .3 hours spent on 8.16.16 for "Review and docket service information; Communication with process server regarding same; File summons" and 1.3 hours spent on 1.24.17 for "Legal research regarding default judgment, copyright statutory damages and reasonable attorney's fees; Review file; Review default; Work on motion for default judgment including supporting declarations and proposed order." But even if one or both of these forms the basis for a draconian 60% across the board reduction in hours, the Court is required to "explain how or why . . . the reduction . . . fairly balance[s]" those hours that were actually billed in block format. *Sorenson v. Mink*, 239 F.3d 1140, 1146 (9th Cir. 2001).

Third, to the extent that the District Court finds appropriate to reduce time based on the "boilerplate" nature of certain of the pleadings or otherwise, it must set forth specifically the basis for its reduction for each of the claimed tasks.

Sorenson, 239 F.3d at 1146 (9th Cir. 2001) ("A district court has wide latitude in determining the number of hours that were reasonably expended by the prevailing lawyers, but it must provide enough of an explanation to allow for meaningful review of the fee award.") That was not done in any of these cases, leaving an inadequate record for appeal. To the extent that the Court below maintains its across-the-board 65% reductions, Plaintiff respectfully requests that this Court order the required explanations of those reductions.

Fourth, and finally, LHF respectfully submits that viewed in its entirety, the overall expended grand total of ***less than 6 hours*** in attorney time and ***less than three hours*** in paralegal time over ***more than seven (7) months*** prosecuting this case against each separate Defendant is a reasonable number of hours. As set forth in the above-noted example and the record, this time includes engaging in more than a dozen separately documented tasks. While it is certainly true that there is much redundancy in the overlapping factual and legal arguments made in many of the submission, it cannot be disputed that except for the original and amended complaints, the motion for expedited discovery and ISP subpoena and motion to extend time, each filing required preparation of separate documents customized to each separate Defendant—each notice letter to each subscriber, each separate request for waiver, wavier and summons, discussions with process server regarding specific Defendants, each separate motion, supporting declaration and proposed

order for default, and each motion for default judgment, supporting declaration and proposed order.

Plaintiff treated each case against each separate Defendant with careful consideration, this required significant effort to research each separate Defendant, both prior to filing the original complaint and again prior to filing the amended complaint. As explained in the supporting declarations (*see e.g.,* ER 516) and in each original complaint (*see e.g.,* ER 667 ¶ 11), LHF's counsel was required to use multiple forensic tools to review infringement data as well as observed BitTorrent activity for each separate Defendant. The requested .5 hour time spent on each separate Defendant for this due diligence cannot credibly be questioned.

Likewise, prior to filing each Amended Complaint naming subscribers, as set forth in the supporting declarations and Amended Complaints (*see e.g.,* ER 570-571 ¶¶ 12-16), Plaintiff's counsel "engaged in further due diligence in a good faith effort to confirm, on information and belief, that the identified subscriber was the person responsible for the infringing conduct or, in the alternative, that another party with access to the IP address of the subscriber was responsible." This involved careful review of the type and frequency of observed BitTorrent activity, Google address mapping and review of county records to confirm residence status, and frequently social media review. *Id*. The requested .7 hour time spent on each separate Defendant for this due diligence cannot credibly be questioned.

Just looking at these two reasonable time entries, totaling 1.2 hours, exceeds the arbitrary 1 hour awarded by the Court for lead counsel time. This award completely sets at naught the dozen other detailed activities for which very modest amounts of time were recorded.

The District Court likewise ignored the substantive tasks performed by Plaintiff's paralegal, such as "[w]ork on notice letters," "[p]repar[ing] summons," "[w]ork on Motion for Entry, Order of Entry, and Declaration," "[W]ork on Default Judgement Papers" and working with the process services, as needed, in denying any award for the approximately 3 hours worked on the case attributable to each separate Defendant.

Again, it is noteworthy is that roughly this same number of hours has been found reasonable and appropriate in the nearly 70 prior declaratory judgment cases spanning dozens of cases over the last two years. *See e.g.*, cases and docket entries cited above.

Rather than looking at the reasonableness of the time spent for each separate Defendant, or looking at each separate task and what was involved for each separate Defendant, as suggested above, the District Court expressed incredulity that Plaintiff's counsel spent in excess of 210 hours prosecuting 51 named defendants against whom default judgment was sought. *See e.g.,* ER 13. But even using the District Court's math, again, ***less than 6 hours*** in attorney time and ***less***

than three hours in paralegal time over ***more than seven (7) months*** prosecuting this case against each separate Defendant is a reasonable number of hours.

Plaintiff respectfully submits that the District Court abused its discretion arbitrarily awarding a single hour for lead counsel, a single hour for the associate, and not awarding any time for the paralegal that worked on the case, in contravention of the record and evidence submitted in this case.

VI. CONCLUSION

For all the foregoing reasons, the Court should reverse the District Court and remand the case with instructions to enter default judgment in favor of LHF, properly ascribe statutory fees based on individual violations of the Copyright Act, and consider the evidence submitted by LHF in support of attorney billing rate and hours spent for a reasonable award of attorney's fees against the defaulted Defendants.

Respectfully submitted this 2nd day of August 2017.

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VII. CERTIFICATE OF COMPLIANCE

I certify that this brief contains 7,796 words, and was written in Times New Roman with 14 pt. typeface, double-spaced, in compliance with Fed. R. App. P. 32.

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VIII. STATEMENT OF RELATED CASES

Appellant certifies that, to the best of its knowledge, only the five consolidated cases arising from U.S. District Court for the Western District of Washington are related for purposes of Rule 28-2.6:

- Appeal No. 17-35237, arising from Case No. 16-cv-552
- Appeal No. 17-35243, arising from Case No. 16-cv-621
- Appeal No. 17-35249, arising from Case No. 16-cv-1015
- Appeal No. 17-35250, arising from Case No. 16-cv-865
- Appeal No. 17-35253, arising from Case No. 16-cv-623

IX. CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Kirstin Largent