

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

---

	)	Case No. 1:07-cv-11446-NG
	)	
SONY BMG MUSIC ENTERTAINMENT,	)	
ET AL.,	)	
	)	FURTHER SUBMISSION
v.	)	OF THE DEFENDANT
	)	
JOEL TENENBAUM,	)	
Defendant	)	
	)	
	)	

---

**AMENDED**

**FURTHER SUBMISSION OF THE DEFENDANT**

Defendant Joel Tenenbaum wishes to clarify the remedy that he recommends to this Court.

This Court is under mandate from the First Circuit to consider whether remittitur is appropriate in this case.

Step One: The Court's first step in this process should be to consider whether the \$675,000 award against a noncommercial individual for thirty songs is so high that it would be a denial of justice to permit it to stand. Defendant Tenenbaum asserts that the award is clearly excessive, whether judged by constitutional or common law standards.

Step Two: Assuming the Court so finds, and before moving on to further steps in a common law remittitur procedure entailing the determination of a new award and the offer of an option to the Plaintiffs whether to accept it, the Court should address the consequence of the finding of excessiveness. Such a

finding necessarily and immediately entails the conclusion that the trial court's instruction to the jury authorizing the excessive award was erroneous and prejudicial to the Defendant. Defendant Tenenbaum has maintained at every stage his entitlement to a properly instructed jury. The First Circuit could say that the challenged instruction was not erroneous only because it set aside Judge Gertner's ruling that \$675,000 was excessive, and did not address the issue of excessiveness itself. But once the finding of excessiveness is again established, regardless whether by constitutional ruling or as the first step in a common law remittitur procedure, the error and prejudice to the Defendant of the challenged instruction becomes undeniable, thereby entitling Defendant Tenenbaum to a new trial under proper instructions on the issue of damages.

Ordering a new trial on damages under proper instructions avoids the need to determine just what the constitutional maximum award would be in this case; it avoids the need for the Court to make a damage determination on an unfamiliar record; and it directly attacks the substance of what is wrong in the statutory damage trials against individuals that have repeatedly produced outlandish awards.

#### **CONCLUSION**

1. This Court should judge the \$675,000 award to be unlawfully excessive and set it aside.

2. Based on the determination that the award is excessive, this Court should rule that the jury instruction that authorized the excessive award was erroneous and prejudicial.

3. The Court should, therefore, order a new trial under proper instruction on the issue of damages.

Respectfully Submitted,



---

CHARLES NESSON  
*Counsel for Defendant*  
1525 Massachusetts Ave.,  
G501  
Cambridge, MA 02138  
(617) 495-4609

Date: June 5, 2012

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Motion through the ECF system, which was sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on the 5<sup>th</sup> day of June 2012.

/s/ Charles Nesson  
Charles Nesson

