

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SONY BMG MUSIC ENTERTAINMENT,)
 et al.)
)
 Plaintiffs,)
)
 v.)
)
 DENISE CLOUD,)
)
 Defendant.)

Case No. 2:08 CV 01200 WY

FILED 10 2009

**UNITED STATES OF AMERICA'S ACKNOWLEDGMENT OF CHALLENGE TO THE
 CONSTITUTIONALITY OF AN ACT OF CONGRESS
 AND
 MOTION FOR TIME TO DETERMINE IF INTERVENTION IS APPROPRIATE**

The United States of America hereby submits this Acknowledgment of Challenge to the Constitutionality of an Act of Congress and Motion for Time to Determine if Intervention Is Appropriate, and moves the Court to grant it time to determine if intervention is appropriate, and in support thereof, states as follows:

1. On or about October 29, 2008, Defendant filed a motion to dismiss Plaintiff's complaint in the above-captioned case for failure to state a claim upon which relief can be granted. In the brief submitted in support of that motion, Defendant challenged the constitutionality of 17 U.S.C. § 504(c), the statutory damages provision of the Copyright Act. Dkt. No. 28 at 5-7. Specifically, Defendant asserted that the statute authorizes statutory damages that exceed any actual damages suffered to a degree that violates the Due Process Clause of the Fifth Amendment and the Excessive Fines Clause of the Eighth Amendment to the U.S. Constitution. *Id.*

2. Federal Rule of Civil Procedure 5.1(a) establishes that a party challenging the constitutionality of a federal statute must notify the Court and the United States of such a challenge. See Fed. R. Civ. P. 5.1(a) (“A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal or state statute must promptly (1) file a notice of constitutional question stating the question and identifying the paper that raises it . . . and (2) serve the notice and paper on the Attorney General of the United States if a federal statute is challenged.”).

3. Under Federal Rule of Civil Procedure 5.1(c), “[u]nless the court sets a later time, the attorney general may intervene within 60 days after the notice [of constitutional question] is filed or after the court certifies the challenge, whichever is earlier.” To date, there has been neither a filing of a notice of constitutional question by Defendant with the Court nor a certification to the Attorney General by the Court. Therefore, the time within which the United States can intervene in this action has not yet begun to elapse.

4. The United States is currently in the process of determining whether to intervene in this matter to defend the constitutionality of the statutory damages provision of the Copyright Act. See 28 U.S.C. § 2403 (authorizing the United States to intervene in any federal court action in which the constitutionality of an Act of Congress is drawn into question). Under Department of Justice regulations, the approval of the Solicitor General is required for the United States to intervene to defend the constitutionality of a federal statute. See 28 C.F.R. § 0.21 (“The Solicitor General may in consultation with each agency or official concerned, authorize intervention by the Government in cases involving the constitutionality of acts of Congress.”). The process of obtaining approval to intervene generally takes several weeks. In this instance the press of

business on government counsel in other litigation and the assumption of office of a new Solicitor General necessitate additional time to complete the approval process.

5. Accordingly, the United States respectfully moves that it be allowed until March 25, 2009 to file a motion to intervene and to file a brief regarding the constitutionality of 17 U.S.C. § 504(c). If the United States decides not to intervene or participate before March 25, 2009, it will notify the Court promptly.

6. The United States understands that this Court may reach a final decision on the pending motion without reaching the merits of the constitutional questions. The United States also understands that Federal Rule of Civil Procedure 5.1(c) states that “[b]efore the time to intervene expires, the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional.” Should this Court reach a final decision on the pending motion without reaching the merits of the constitutional questions or should it uphold the statute’s constitutionality before the United States has made a decision on whether it will intervene, it will become unnecessary for the United States to intervene.

7. Counsel for Plaintiffs and Defendant have been informed of this motion. Counsel for both parties do not oppose the motion.

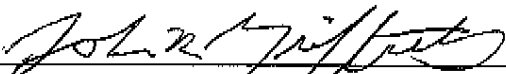
Dated: February 13, 2009

Respectfully submitted,

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Counsel for the United States of America

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2009, a true and correct copy of the foregoing United States of America's Acknowledgment of Challenge to the Constitutionality of an Act of Congress and Motion for Time to Determine if Intervention Is Appropriate was served via Federal Express on the following:

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JOHN GRIFFITHS

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ORDER

This matter is before the Court for consideration of United States of America's Motion for Time to Determine if Intervention Is Appropriate. In consideration thereof, the Motion is GRANTED, and it is hereby

ORDERED that the United States may intervene in this action until March 25, 2009.

The Honorable William H. Yohn, Jr.
 United States District Court Judge