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

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| SONY BMG MUSIC ENTERTAINMENT, a Delaware general partnership; ARISTA RECORDS LLC, a Delaware limited liability company; UMG RECORDINGS, INC., a Delaware corporation; and BMG MUSIC, a New York general partnership,<br><br>Plaintiffs,<br><br>vs.<br><br>DENISE CLOUD,<br><br>Defendant. | CIVIL ACTION NO. 2:08-cv-01200-WY |

**PLAINTIFFS' RESPONSE TO AMICUS BRIEF OF FREE SOFTWARE FOUNDATION**

Plaintiffs respectfully submit this response to the brief ("Brief") filed by the Free Software Foundation ("FSF") in support of Defendant's Motion to Dismiss.

## INTRODUCTION

The FSF is not a neutral friend of the Court. Rather, FSF is an organization dedicated to eliminating restrictions on copying, redistribution, and modifying computer programs, classic intellectual property, much like the sound recordings at issue in this case. *See* http://ww.fsf.org. To that end, FSF opposes the recording industry's enforcement efforts.[1] Thus, it is no surprise that FSF retained as its "of counsel" an attorney who runs a blog entitled "Recording Industry vs. The People" and who is currently subject to a pending sanctions motion for his conduct in

[1] *See, e.g.*, http://www.fsf.org/campaigns; http://recordingindustryvspeople.blogspot.com/2007/11/expert-witness-defense-fund-for-riaa.html.

representing a defendant in one of the Plaintiffs' enforcement cases.[2] The FSF's baseless contention that the recording industry is attempting to "redefine" copyright laws through lawsuits against individuals "generally unable to defend themselves" (FSF Br. at 1) is just one example of FSF's blatant bias against Plaintiffs. Because the FSF has an open and virulent bias against copyrights in general, and against the recording industry in particular, it does not—and indeed cannot—play the traditional role of amicus curiae, which is to provide a neutral source of information or legal analysis to aid the court. *See In re Baldwin-United Corp.*, 607 F. Supp. 1312, 1327 (S.D.N.Y. 1985).

In furtherance of its anti-copyright, anti-recording industry bias, the FSF's Brief relies on legal authority that has no application to this case, factual arguments that misconstrue the nature of Defendant's infringement, and misrepresentations of material fact, conclusory allegations, and unsupported personal opinion. Specifically, FSF's assertion of a "growing body of authority" suggesting that the Supreme Court's *State Farm/Gore* due process analysis for awards of *punitive damages* by juries should also apply to awards of *statutory damages* set by Congress is simply wrong. As demonstrated below and in Plaintiffs' Opposition to Defendant's Motion to Dismiss (Doc. 30), no such "body of authority" exists and the cases upon which FSF relies have nothing to do with the circumstances of this case. FSF does not—and could not—cite a single authority to support its argument that *State Farm/Gore* should apply here, and its brief completely misconstrues the Supreme Court's decision in *Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919), which case demonstrates the constitutionality of statutory damages under the Copyright Act.

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[2] *see generally* http://recordingindustryvspeople.blogspot.com/ (an anti-recording industry web site hosted by the FSF's of counsel attorney).

## ARGUMENT

### I. FSF's Brief Contains Misrepresentations of Material Fact.

FSF's Brief contains misrepresentations of material facts. For example, it baldly asserts that "in 40,000 cases and counting, these plaintiffs have never been able to find or prove any such 'distribution.'" (FSF Br. at 2.) To the contrary, recording industry plaintiffs, including many of the Plaintiffs in this case, have proven distribution in many P2P filesharing cases. *See, e.g.*, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 2782 (2005) (finding the propagators of P2P file-sharing software secondarily liable for the direct infringement of their users, in part, by concluding that the electronic transmission of copyrighted material violated the distribution right.); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001) ("Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights"); *BMG Music v. Gonzalez*, 430 F.3d 888, 890 (7th Cir. 2005) ("The files that Gonzalez obtained [ . . . ] were posted in violation of copyright law"); *Atlantic Recording Corp. v. Anderson*, 2008 U.S. Dist LEXIS 53654, at *20 (S.D. Tex. Mar. 12, 2008) ("Defendant's actions in placing Plaintiffs' Copyrighted Recordings in a shared folder accessible to numerous other persons on KaZaA constituted a "distribution" for the purposes of Plaintiffs' copyright infringement claim against Defendant"); *Maverick Recording Co. et al. v. Harper,* No. 5:07-cv-027-XR, slip. op. at 10-11 (W.D. Tex. Aug. 7, 2008) (Attached as Exhibit A) (finding that defendant downloaded and distributed plaintiffs' copyrighted sound recordings and granting summary judgment); *MGM Studios Inc. v. Grokster Inc.*, 259 F. Supp. 2d. 1029, 1034-35 (C.D. Cal. 2001) (users who upload copyrighted music violate copyright owner's exclusive distribution right).

Similarly, FSF's Brief incorrectly asserts that Plaintiffs seek statutory damages up to $150,000 for each .mp3 file. (FSF Br. at 2.) To the contrary, Plaintiffs have not made a jury demand, have never sought $150,000 per sound recording in any P2P filesharing case against an individual, and Plaintiffs remain willing to settle this case for significantly less than the *minimum* statutory damages. FSF then uses this misrepresentation to argue that Plaintiffs seek statutory damages up to 425,000 times the actual damage (*Id.*). Again, FSF does not – nor could it – cite any support for this patently false representation and should not be allowed to bootstrap its constitutional argument with incorrect factual assumptions and misrepresentations.

FSF offers these misstatements regarding Plaintiffs' actual damages resulting from Defendant's downloading and distribution of Plaintiffs' copyrighted sound recordings versus the damages Plaintiffs are seeking in order to support its conclusory calculation– based on absolutely no evidence in the record– that the ratio between Plaintiffs' actual damages and statutory damages under the Copyright Act is unconstitutionally excessive. FSF then repeats this conclusory calculation throughout its Brief in an attempt to distinguish relevant case law holding that the *Gore/State Farm* test for punitive damages is not properly applied to statutory damages. FSF's calculations, based on nothing more than its anti-recording industry hype, have no basis in fact and no place in these proceedings.

Moreover, as a purported amici, whose role is to assist the court in analyzing legal issues before it, FSF should refrain from making factual arguments, even in cases where the factual assertions are correct. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 434 (U.S. 1984) ("The stated desires of amici concerning the outcome of this or any litigation [ . . .] are not evidence in the case, and do not influence our decision; we examine an amicus curiae brief solely

for whatever aid it provides in analyzing the legal questions before us); *In re Baldwin-United Corp.*, 607 F. Supp. at 1327.

## II. The Cases Upon Which FSF Relies Do Not Support FSF's Argument And Have No Application Here.

FSF argues that two student notes, an unpublished paper, a district court's *sua sponte* denial of default judgment without briefing by any party, and a handful of cases *pondering* the effect of aggregating statutory damages in the class action context somehow constitute a "body of legal authority" sufficient to overlook binding Supreme Court precedent. *(See* FSF Br. at 4 -7.) As demonstrated below, none of these cases supports FSF's contention that the *State Farm/Gore* due process test for punitive damages should apply to the statutory damages at issue here. Contrary to FSF's assertions, *Gore* does not limit an award of statutory damages under the Copyright Act because statutory damages and punitive damages, while overlapping to the extent that they both serve to punish and deter unlawful conduct, are fundamentally different.

First, *Parker v. Time Warner*, 331 F.3d at 13 (2d Cir. 2003), had nothing to do with copyrights or the issue of statutory damages for victims of infringement under the Copyright Act. *Parker* was a putative class action by cable television subscribers alleging that a cable provider had violated the subscriber privacy provisions of the Cable Communications Policy Act ("Cable Act"). *Parker*, 331 F.3d at 15. In reviewing the district court's decision not to certify a class of potentially millions of cable subscribers, the court reflected on the tension between the statutory provisions for minimum damages under the Cable Act and the provisions for class certification under Fed. R. Civ. P. 23. *Id.* at 22. In that context, the court *mused* that the purposes of both statutory damages and class actions could potentially be distorted were the court to mechanically apply the minimum statutory damages provision of the Cable Act to potentially millions of

subscribers and putative class members. *Id.* *Parker*, however, acknowledged that such concern was purely "hypothetical" even in the context of that case, and expressly refused to "consider what limits the due process clause may impose." *Id.* at 22.

Defendant's reliance on *Napster* fares no better. *Napster*, like *Parker*, focused on whether to certify a class. *In re Napster*, 2005 U.S. Dist. LEXIS 11498, *4-5 (N. D. Cal. 2005). In rejecting the defendants' arguments against class certification, the court specifically rejected the argument that "the availability of statutory damages under the Copyright Act precludes certification of a class." *Id.* at *42. The court made no finding as to whether statutory damages raised due process concerns in the case before it. Rather, as in *Parker*, the court specifically observed that any inquiry at the class certification stage as to the propriety of statutory damages "would almost inevitably be speculative." *Id.* at *41.

Similarly, the unpublished decision in *Lindor* does not support the FSF's argument. The *Lindor* decision merely allowed the defendant in that case to assert a defense of unconstitutionality. *UMG Recordings, Inc. v. Lindor*, 2006 U.S. Dist. LEXIS 83486, *17 (E.D.N.Y. Nov. 9, 2006). The court made no decision to apply the *Gore/State Farm* line of cases and held only that *Gore/State Farm* might apply "in a proper case." *Id.* at *8. As demonstrated in Plaintiffs' Opposition to Defendant's Motion to Dismiss (Doc. 30), this is not a proper case for applying the *Gore/State Farm* analysis for *punitive damages*. *See, e.g.*, *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 456-57 (1993) (In light of the "safeguards in the legislative process," there is a "significant[] differen[ce]"—a constitutional difference—between "review of a jury's award for arbitrariness and the review of legislation."). Rather, any due process challenge to statutory damages under the Copyright Act must be considered under the test set forth by the Supreme Court in *Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919). *See*

*Zomba Enters. v. Panorama Records, Inc.*, 491 F.3d 574, 587 (6th Cir. 2007); *see also Kenro, Inc. v. Fax Daily*, 962 F. Supp. 1162, 1167 (S.D. Ind. 1997) (applying *Williams* and noting that punitive damages jurisprudence is inapplicable to statutory damages); *Arrez v. Kelly Servs., Inc.*, 522 F. Supp. 2d 997, 1008 (N.D. Ill. 2007) (applying *Williams* and upholding statutory damages under the IDTLSA); *Directv, Inc. v. Cantu*, 2004 U.S. Dist. LEXIS 22715 (W.D. Tex. Sept. 29, 2004) (applying *Williams* to statutory damages under Texas state law).

For similar reasons, FSF's reliance on the *Bridgeport Music*, *Brennan*, and *Thomas* cases is also unhelpful to its argument. In *Bridgeport Music, Inc. v. Justin Combs Publ'g.*, 507 F.3d 470 (6th Cir. 2007), the Sixth Circuit reviewed a jury's award of *punitive damages* in a claim of infringement brought under New York common law (for which no statutory damages are available), which is admittedly a "proper case" for consideration of the *Gore/State Farm* factors. *Bridgeport Music*, 507 F.3d at 477, 486-90. The court made no suggestion at all that *Gore/State Farm* might apply to an award of statutory damages. In *Brennan*, the court nowhere held that the *Gore/State Farm* factors should apply to statutory damages as FSF seems to suggest. Rather, without briefing from any party on the issue, the court *sua sponte* raised a mere "possib[ility]" of a defense concerning the constitutionality of statutory damages. *Atlantic Recording Corp. v. Brennan*, 534 F. Supp. 278, 282 (D. Ct. 2008). Finally, the *Thomas* decision, like the *Brennan* and *Bridgeport Music* decisions, nowhere suggests that the *Gore/State Farm* analysis should apply to statutory damages. *Capitol Records Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1227 (D. Minn. 2008).

Moreover, in none of the cases described above is it apparent that the parties or the government ever fully briefed as a ripe issue the question of whether the *Gore/State Farm* should

apply to statutory damages. As such, FSF's contention of a growing body of authority applying *Gore/State Farm* to statutory damages is without support.

## III. FSF's "Proportionality" Argument Misconstrues The Nature Of This Case, Has Been Consistently Rejected, And Ignores The Supreme Court's Holding In *Williams*.

A primary theme of FSF's argument is its contention that statutory damages are not proportionate to Plaintiffs' actual damages in this case. (FSF Br. at 12-14.) This argument both misconstrues the nature of the harm to Plaintiffs in this case and has been consistently rejected by the courts.

To support its proportionality argument, FSF contends that Plaintiffs' lost profits in the case should be based on a per/download loss of "approximately 35 cents." (FSF Br. at 2.) Apart from the fact that the argument relies on "facts" not in the record in this case, the contention ignores the nature of Defendant's infringement. Defendant has not only infringed Plaintiffs' works through downloading, she has also distributed Plaintiffs' works for years to potentially millions of other file sharers. The harm to Plaintiffs from such massive distribution over a period of many years is incalculable – and undeniably worth exponentially more than 35 cents. Indeed, the cost of an unrestricted license to distribute Plaintiffs' copyrighted works for free on the Internet would be astronomical. Thus, Defendant's suggestion that Plaintiffs' lost profits total 35 cents per download misconstrues the nature of Defendant's infringement and should be rejected.

Moreover, courts have consistently rejected FSF's proportionality argument. Indeed, statutory damages are awarded even in the absence of proof of actual damages to the copyright victim or of profit to the infringer. *See F.W. Woolworth Co. v. Contemp. Arts, Inc.*, 344 U.S. 228, 233 (1952) (statutory damages allow victims of infringement to obtain recovery where proof of actual damages is "difficult or impossible"); *Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d

1010, 1016 (7th Cir. 1991) ("We believe the statutory damage provisions of the Copyright Act were intended to relieve the aggrieved copyright owner of the task of proving its actual damages . . ."); *Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co.*, 74 F.3d 488, 496 (4th Cir. 1996) (rejecting argument that damages within statutory range were "excessive," did not "bear some reasonable relationship to the amount of actual damages" and would give the plaintiff a "windfall"); *Los Angeles News Serv. v. Reuters Tele., Ltd.*, 149 F.3d 987, 996 (9th Cir. 1998) ("a plaintiff may recover statutory damages whether or not there is adequate evidence of the actual damages suffered by plaintiff or of the profits reaped by defendant, in order to sanction and vindicate the statutory policy of discouraging infringement"); *see also Douglas v. Cunningham*, 294 U.S. 207, 210 (1935) (affirming award of $250 in statutory damages under the Copyright Act where damages were $1).

In *SESAC, Inc. v. WPNY*, 327 F. Supp. 2d 531 (W.D. Pa. 2003), the district court sustained a $1.26 million verdict where actual damages (the cost of a license) were $6,000. Specifically rejecting the defendant's proportionality argument, made by FSF here, the court concluded its opinion with an observation that applies equally here:

> [I]t is Congress' prerogative to pass laws intended to protect copyrights and to prescribe the range of punishment Congress believes is appropriate to accomplish the statutory goal. The Court should not interfere lightly with a carefully crafted statutory scheme by substituting its judgment for that of the legislature. In essence, that is what the defendants ask us to do.

*Id.* at 532.

FSF also ignores well established law holding that statutory damages under the Copyright Act were not designed solely to compensate each private injury caused by infringement, but also to punish the infringer, to deter wrongful conduct, and to encourage enforcement of copyright laws. *F. W. Woolworth Co.*, 344 U.S. at 233 (The statutory rule, formulated after long

experience, not merely compels restitution of profit and reparation for injury but also is designed to discourage wrongful conduct); *Yurman Design, Inc. v. PAJ, Inc.*, 93 F. Supp. 2d 449, 462 (S.D.N.Y. 2000) ("Statutory damages have been made available to plaintiffs in infringement actions precisely because of the difficulties inherent in proving actual damages and profits, as well as to encourage vigorous enforcement of the copyright laws."); *Mourning v. Family Pubs. Serv., Inc.*, 411 U.S. 356, 376 (1973) (the Supreme Court has noted that statutory damages "serve to liquidate uncertain actual damages and to encourage victims to bring suit to redress violations"). In this regard, FSF's Brief ignores completely the significant cost associated with bringing enforcement actions like this one, which include the costs of detecting and collecting evidence of the infringement, identifying the infringer, and pursuing a lawsuit. *See* Staff of House Comm. on the Judiciary, 87th Cong., Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 103 (Comm. Print 1961) (reproduced in APPENDIX 14 Nimmer & D. Nimmer, Nimmer on Copyright 2008, at 102). Indeed, the Copyright Office has explained that the need for a special remedy of statutory damages "arises from the acknowledged inadequacy of actual damages and profits in many cases" including that "[t]he actual damages capable of proof are often less than the cost to the copyright owner of detecting and investigating infringements." *Id.*

Indeed, FSF continues to ignore the legislative intent behind statutory damages under the Copyright Act. Statutory damages serve several purposes—they compensate a plaintiff for the infringement of its copyrights and it encourages vigorous enforcement of the law by copyright holders, as well as punishing and deterring unlawful conduct. *See F. W. Woolworth Co.*, 344 U.S. at 233; *Yurman Design, Inc.*, 262 F.3d at 113-14; *Los Angeles News Serv.*, 149 F.3d at 996; *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 886 F.2d 1545, 1554 (9th Cir. 1989).

Moreover, statutory damages represent a carefully crafted congressional scheme and do not implicate the *Gore* Court's concern with a jury awarding unfettered damages for which a tortfeasor has no notice.

In *Williams*, the Supreme Court specifically rejected the argument that a statutory remedy set by Congress must be proportional to the plaintiff's own injury. As the Court explained, "When the penalty is contrasted with the [actual damages] in any instance it of course seems large, but, as we have said, its validity is not to be tested in that way." *Williams*, 251 U.S. at 64. Rather, the proper test under *Williams* is to examine the statutory damages in the context of **the conduct Congress seeks to discourage**, and to uphold Congress' decision absent proof that the amount Congress set is "so severe and oppressive as to be wholly disproportioned" to Defendant's offense and "obviously unreasonable." *Id.* at 66-67.

Here, as demonstrated in Plaintiffs' Opposition to Defendant's Motion to Dismiss, the statutory damages set by Congress are consistent with and proportionate to the infringement Congress sought to discourage. Congress considered several factors in setting the current range of statutory damages in section 504, including specifically the harm to the public caused by rampant online copyright infringement, the unlimited opportunities for millions of Internet users to engage in online infringement, and the need to secure uniform compliance with copyright laws. *See* House Report at 2-6; *see also* Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, 113 Stat. 1774; 17 U.S.C. § 504. Indeed, the House Report explained that the 1999 increases were needed to achieve "*more stringent deterrents* to copyright infringement and *stronger enforcement of the laws*." House Report at 2. Defendant has not shown, and could not show, that the statutory damages set by Congress are in any way "disproportioned" to his offense.

Finally, both *Williams* and the cases applying *Williams* in contexts similar to this one demonstrate that Congress exercises broad discretion to impose a range of damages in order to encourage compliance with the law in the face of rampant violation. *See, e.g.*, *Zomba Enters.*, 491 F.3d at 587 (6th Cir. 2007) (applying *Williams* to statutory damages awarded under section 504 of the Copyright Act); *Arrez.*, 522 F. Supp. 2d at 1008 (applying *Williams*, upholding statutory damages under the IDTLSA, and holding that there is no "proportionality inquiry"); *Kenro, Inc. v. Fax Daily*, 962 F. Supp. 1162, 1167 (S.D. Ind. 1997) (applying *Williams* and upholding award of statutory damages under the TCPA even assuming actual damages were 2.5 cents and minimum damages $500); *Directv, Inc. v. Cantu*, 2004 U.S. Dist. LEXIS 22715 (W.D. Tex. Sept. 29, 2004) (applying *Williams* and upholding statutory damages under Texas state law); *Franklin v. First Money*, 427 F. Supp. 66, 72 (E.D. La. 1976) (noting that Congress has not flinched, in other areas of the law, from exacting damages which do not necessarily reflect actual damages).

**CONCLUSION**

For all of these reasons, the Court should reject the arguments offered in FSF's Brief and deny Defendant's Motion to Dismiss.

Dated: May 14, 2009

By: s/ Geoffrey L. Beauchamp

Geoffrey L. Beauchamp, Esq. (No. 40380)
Geoffrey L. Beauchamp, P.C.
1015 York Road
Willow Grove, PA 19090
Telephone: (267) 781-0615
Facsimile: (215) 706-0895
E-mail: GLBLaw@comcast.net

Attorneys for Plaintiffs

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 14, 2009, a copy of the foregoing

**PLAINTIFFS' RESPONSE TO AMICUS BRIEF OF FREE SOFTWARE FOUNDATION**

was served upon the Defendant via United States Mail at the following address:

Lawrence E. Feldman, Esq.
Lawrence E. Feldman & Associates
432 Tulphocken Avenue
Elkins Park, PA 19027

George M. Kontos, Esq.
Elizabeth Farina, Esq.
Swensen Perer & Kontos
One Oxford Centre, Suite 2501
Pittsburgh, PA 15219

Ray Beckerman, Esq.
Ray Beckerman, P.C.
108-18 Queens Boulevard, 4th Floor
Forest Hills, NY 11375

- ☐ U.S. Mail, postage prepaid
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- ☐ Overnight courier
- ☒ Electronically via CM/ECF

s/ Geoffrey L. Beauchamp
Geoffrey L. Beauchamp, Esq. (No. 40380)
Geoffrey L. Beauchamp, P.C.
1015 York Road
Willow Grove, PA 19090
Telephone: (267) 781-0615
Facsimile: (215) 706-0895
E-mail: GLBLaw@comcast.net

Attorneys for Plaintiffs