

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CAPITOL RECORDS, INC., *et al.*,)
Plaintiffs,)
v.) Civ. Act. No. 03-CV-11661-NG
NOOR ALAUJAN,) (LEAD DOCKET NUMBER)
Defendant.)

SONY BMG MUSIC ENTERTAINMENT,)
et al.)
Plaintiffs,)
v.) Civ. Act. No. 1:07-cv-11446-
JOEL TENENBAUM) NG
Defendant.) (ORIGINAL DOCKET NUMBER)

**DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION TO DISMISS
COUNTERCLAIMS**

I. Introduction and Summary of Argument

The Recording Industry Association of America (RIAA) is in the process of bringing to bear upon the defendant, Joel Tenenbaum, the full might of its lobbying influence and litigating power. Joel Tenenbaum was a teenager at the time of

the alleged copyright infringements, in every way representative of his born-digital generation. The plaintiffs and the RIAA are seeking to punish him beyond any rational measure of the damage he allegedly caused. They do this, not for the purpose of recovering compensation for actual damage caused by Joel's individual action, nor for the primary purpose of deterring him from further copyright infringement, but for the ulterior purpose of creating an urban legend so frightening to children using computers, and so frightening to parents and teachers of students using computers, that they will somehow reverse the tide of the digital future. See, John Perry Barlow, *The Economy of Ideas*.¹

The plaintiffs and the RIAA are abusing law and this court's civil process. Because Joel Tenenbaum allegedly downloaded seven songs from a file-sharing network comprised of millions of his peers doing likewise, the plaintiffs have already imposed upon him process filling a docket sheet running back over years. Representing himself *pro se* with help from his mother he has responded with constitutional defenses and a counterclaim (which he requests leave of court to amend) against the plaintiffs and against the RIAA (see motion for joinder) for their abuse of law and this court's civil process.

¹ http://www.wired.com/wired/archive/2.03/economy.ideas_pr.html

Joel challenges the constitutionality of the process and statute being wielded against him. The "Digital Theft Deterrence ... Act of 1999" is essentially a criminal statute, punitively deterrent in its every substantive aspect, from which it follows that:

1. A defendant prosecuted pursuant to this act is entitled to the process protections of the criminal law, including the rules and constitutional law of criminal procedure and the right to trial by jury empowered to act by general verdict.
2. Congress has exceeded its power by placing the executive function of prosecuting an essentially criminal statute in private hands.
3. Congress has violated constitutional separation of powers by requiring the judicial branch to try cases pursuant to their essentially criminal mandate by inappropriate civil process.
4. Congress has exceeded the limits of substantive due process of the Fifth and Eighth Amendments to the Constitution by mandating grossly excessive statutory damage awards.

Joel counterclaims for abuse of process. He seeks damages to compensate for the actual damage RIAA has done to him and his family. He claims the right to trial by jury including the right to offer proof and argument to the jury about what is right and what is wrong on both sides of this case. In the face of the onslaught the plaintiffs have imposed and are continuing to impose upon him he seeks justice from both judge and jury. At core his defenses and counterclaim raise a profoundly conceptual question: Is the law just the grind of a statutory machine to be

carried out by judge and jury as cogs in the machine, or do judge and jury claim the right and duty and power of constitution and conscience to do justice.

II. The Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Now Title 17 504(c), Is Essentially a Criminal Statute: As Such It And Its Enforcement Through Federal Civil Process Is Unconstitutional.

The mandatory statutory fines here threatening Joel entitle him to the process protections of the criminal law, including the rules and constitutional law of criminal procedure and the right to trial by a jury empowered to act by general verdict. As stated by the Supreme Court in *Int'l Union v. Bagwell*, 512 U.S. 821 (1994), distinguishing criminal from civil contempt, a "flat, unconditional fine" totaling even as little as \$50.00 announced after a finding of contempt is criminal if the contemnor has no subsequent opportunity to reduce or avoid the fine." *Id.*, at 829.

a. Congress has exceeded its power by placing the executive power to prosecute an essentially criminal statute in private hands.

The statutory scheme that Plaintiffs are wielding against Joel and thousands of others like him empowers the plaintiffs to initiate and prosecute massive numbers of punitive actions. The

statutory scheme gives their association, the RIAA, unbridled discretion to sue millions of individuals like the Defendant, and to threaten expensive time-consuming process and a bankrupting verdict against anyone with the effrontery and stamina to resist. This is an unconstitutional delegation by Congress of executive prosecutorial powers to private hands. A statutory scheme such as this one is "legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body," *Carter v. Carter Coal*, 298 U.S. 238 (1936). Delegation of such power to private persons represents "legislative delegation in its most obnoxious form." *Id.* at 311. Imagine a statute which, in the name of deterrence, provides for a \$750 fine for each mile-per-hour that a driver exceeds the speed limit, with the fine escalating to \$150,000 per mile over the limit if the driver knew he or she was speeding. Imagine that the fines are not publicized, and most drivers do not know they exist. Imagine that enforcement of the fines is put in the hands of a private, self-interested police force, that has no political accountability, that can pursue any defendant it chooses at its own whim, that can accept or reject payoffs in exchange for not prosecuting the tickets, and that pockets for itself all payoffs and fines. Imagine that a significant percentage of these fines were never contested, regardless of whether they had merit, because the individuals

being fined have limited financial resources and little idea of whether they can prevail in front of an objective judicial body. To members of the born-digital generation, for whom sharing music on the Internet is as commonplace and innocuous as driving 60 in a 55 mph zone, the prosecution of Joel Tenenbaum and others like him is wholly analogous to this hypothetical. Congress lacks the constitutional power to delegate such a prosecutorial function to a private police, which is the role that the recording companies and its industry organization, the RIAA, is embodying.

It is this Court's responsibility to disallow such conscripting of federal civil judicial process, resources and credibility. See *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (stating that "the Federal Judiciary was ... designed by the Framers to stand independent of the Executive and Legislature - to maintain the checks and balances of the constitutional structure, and also to guarantee that the process of adjudication itself remained impartial.") This Court must prevent such a legislative scheme from impinging upon the legal rights of the Defendant in this case and tens of thousands of similar defendants in cases across the country. A statute such as this one, which is essentially criminal in nature, should not be placed in private hands, and this Court has the responsibility to disallow it.

b. Congress has violated constitutional separation of powers by purporting to require the judicial branch to use its civil process to try an essentially criminal case.

Because the Digital Theft Deterrence Act of 1999 places prosecutorial power in private hands in the nature of a criminal proceeding, the judicial branch has been placed in a position of having to use its civil process to try criminal cases. This is a violation of the constitutional separation of powers, enabling Congress to abrogate its constitutional authority. Courts are not prepared to try criminal cases without the necessary procedures embodied in the Federal Rules of Criminal Procedure, and defendants are deprived of their rights when they are forced to solely utilize the protections of civil courts in criminal cases. Defendants are ill-prepared to bring adequate defenses in these cases, because they cannot adequately summon the required legal mechanisms. Congress has therefore violated its authority, and courts need not stand idly by in the face of such an abrogation.

c. Congress has exceeded the limits of substantive due process of the Fifth and Eighth Amendments to the Constitution by mandating grossly excessive statutory damage awards.

Congress originally provided for minimum statutory damages for restitution where actual damages were not provable. "The phraseology of the [statutory damages] section was adopted to

avoid the strictness of construction incident to a law imposing penalties, and to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits." *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935). Given that actual damages are not always provable in copyright infringement cases, minimum compensatory damages are a substitute, or proxy, for actual damages. They enable the plaintiff to receive compensation for lost profits and deny the defendant benefit gained from infringement.

Over time deterrence has evolved as a secondary role for minimum statutory damages, seeking to avoid the "strictness of construction incident to a law imposing penalties" simply by calling them civil. In *Cass County Music Co v. C.H.L.R., Inc.*, 88 F.3d 635, 643 (1996), the court stated that "it is plain that another role has emerged for statutory damages in copyright infringement cases: that of a punitive sanction on infringers." This concept was established by the Supreme Court in *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952), where the court stated that "even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy." This intention comprises the second component of minimum statutory damages, and the one

which Plaintiffs use to justify such an award.

However, this component of minimum statutory civil damages has been recognized by courts only in narrow circumstances. The court in *Parker v. Time Warner Entertainment Co., LP.*, 331 F.3d 13,22 (2003) cautioned against combining minimum statutory damages with a class action mechanism, stating that doing so “may expand the potential statutory damages so far beyond the actual damages suffered that the statutory damages come to resemble punitive damages.” The court in *Cass* emphasized the role of fact-finding in setting the range of damages, and also that a party “should be entitled to have a jury make factual findings relevant to determining the amount of damages to be assessed, whether they are actual damages or statutory damages.” *Id.* at 644.

Furthermore, and most importantly, courts have traditionally awarded minimum statutory damages in cases where the defendant attempted to generate commercial gain through infringement. In *Cass*, the owners of a comedy club played copyrighted music to paying customers before and after comedy shows, despite being advised by ASCAP that a license was required for ASCAP songs to be played. In *Capitol Records, Inc. v. Thomas*, F.Supp.2d 17 (2008 LEXIS 84145, WL 4405282), the only case previous to this in which an RIAA music-downloading case such as this has gone to trial, Chief Judge Michael Davis, in

setting aside the jury's verdict against defendant Thomas, declared the statutory damage award the jury had given to be "unprecedented and oppressive" and urged Congress to modify the minimum statutory damages provision of §504(c), observing that all precedents cited by plaintiffs involved "corporate or business defendants and seek to deter future illegal commercial conduct. The parties point to no case in which large statutory damages were applied to a party who did not infringe in search of commercial gain." (See Opinion attached hereto as Exhibit A.)

Joel Tenenbaum sought only to enjoy music, not to profit from it. Even if some component of deterrence can be included in a minimum statutorily mandated civil damage award, it should be limited to cases where the defendants have sought commercial gain through alleged infringement.

The Due Process Clause allows damage awards which are "reasonably necessary" to vindicate "legitimate interests in punishment and deterrence;" however, a damage award that is "grossly excessive" in relation to those interests violates the Due Process Clause of the 14th Amendment. *BMW v. Gore*, supra, 517 U.S. 559, 568. While punitive civil damage awards and minimum statutory damages awards differ in that juries make civil damage awards only after hearing evidence in a particular case under judicial instruction and supervision, and minimum statutory civil damage awards are made by a legislature moved by

industry lobbyists, the two kinds of awards are similar enough in type to enable the judicial tests for constitutionality of punitive awards to be highly relevant for assessing mandatory statutory awards. The differences between the two should, if anything, require greater strictness in judging the constitutional due process limits of the blunderbuss legislative mandate.

"The most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." *BMW v. Gore*, supra, 517 U.S. 559, 580. In determining whether an award of punitive damages in a suit against an automaker which had sold refurbished cars as new violated due process, the Supreme Court assessed three important factors in making its determination. Two of these factors are relevant to copyright infringement cases. The first is the degree of reprehensibility of the defendant's conduct. Citing established precedents, including *Day v. Woodworth*, 13. How. 363 (1852) and *Browning Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), the court stated that certain wrongs are "more blameworthy than others." Important criteria to be taken into account in determining the degree of reprehensibility were whether the crime was a violent one; whether it involved trickery or deceit vs. mere negligence; and whether there was indication of malice.

The reprehensibility of Joel's alleged acts of downloading seven songs does not rise to a level which would justify civil punitive damages. The Defendant did not engage in a violent act; there was no malice involved; and the Defendant did not attempt to make a profit from his alleged acts.

The second criterion cited in *Gore* was the ratio of the punitive damages award to the actual harm inflicted upon the plaintiff. *BMW v. Gore*, supra 517 U.S. 559, 580, indicating that a ratio in the single digits to low double digits would likely be reasonable. "[W]hen the ratio is a breathtaking 500 to 1, the award must surely 'raise a suspicious eyebrow.'" *Id.* at 581. The ratio of minimum statutory damages to actual damages exceeds the ratio in *Gore*.

Other courts have recognized a similar claim of due process violation in file-sharing cases. In *UMG Recordings, Inc. v. Lindor*, Slip Copy, 2006 WL 3335048 (E.D.N.Y.), where the defendant moved to amend her answer to include an affirmative defense of due process violation, the court granted her request, stating that "plaintiffs can cite to no case foreclosing the applicability of the due process clause to the aggregation of minimum statutory damages proscribed under the Copyright Act." Further, the defendant was able to "cite to case law and to law review articles suggesting that, in a proper case, a court may extend its current due process jurisprudence prohibiting grossly

excessive punitive jury awards to prohibit the award of statutory damages mandated under the Copyright Act if they are grossly in excess of the actual damages suffered." Based on this dual justification, the court allowed the defendant to amend her answer.

Aggregation and multiplication of punitive statutory damage awards exacerbates their gross excessiveness. In this case, allowing the award of minimum damages for the Defendant's alleged infringement of seven songs would result in minimum damages of \$5,250, a crippling amount for a defendant with limited financial resources. If Joel Tenenbaum's alleged acts are found to be willful, the statutory damage award could be \$1,050,000.

III. The Plaintiffs' Abuse of Law and Legal Process Presents a Sufficient Question to Go to a Jury on What Compensation Should in Justice be Paid and to Whom as Between the Parties

a. This Court has inherent authority to redress Joel Tenenbaum for Plaintiffs' abuse of law and process.

This Court has broad inherent powers to hold Plaintiffs accountable for their misuse of the federal courts.² The Supreme

² This is contrary to Plaintiffs' unstated assumption in their motion to dismiss, which implied that this Court is bound to a strict application of Massachusetts state law. Nonetheless, as will be shown below, Plaintiffs' motion to dismiss should be rejected even if this Court chooses to apply Massachusetts state law.

Court has long held that federal courts have the inherent power to do what is necessary to preserve their integrity. *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 764-765. Among their inherent powers is the authority to "sanction parties for abusive litigation practices." *Ibid.* When necessary to protect a court's integrity, this power can be far-reaching: "exercise of judicial power by entry of orders not expressly sanctioned by rule or statute in order to correct the legal process or avert its malfunction has been approved in varied circumstances." *Carlisle v. U.S.*, 517 U.S. 416, 439 (1996).

This inherent power extends to adjudication of claims asserting abuse of federal process. In *Nationwide Charters and Conventions, Inc. v. Garber*, 254 F.Supp 85 (D. C. Mass. 1966), the Court stated that abuse of process claims deal with "the essential concern of the federal courts with the integrity of their process, and there is no question that they have broad inherent powers to prevent and redress the abuse of that process." *Id.*, at 87. See also *Automated Solutions Corp. v. Paragon Data Systems, Inc.*, 2006 WL 5803366, at *13 (N. D. Ohio 2006) (stating that "to allow state law to determine what constitutes an abuse of federal judicial process would be to give the states a veto over what uses of process are allowable in federal court").

This Court should exercise its inherent power to allow

redress to Joel Tenenbaum for Plaintiffs' abuse of law and federal civil court process. As detailed throughout this brief, Plaintiffs are using any and all available avenues of federal process to pursue grossly disproportionate - and unconstitutional - punitive damages in the name of making an example of him to an entire generation of students.

The case at hand warrants the use of inherent federal power not just because of what Plaintiffs are doing to Joel Tenenbaum in this Court, but because of the manner in which Plaintiffs are abusing the federal courts all across the country. Plaintiffs have pursued over 30,000 individuals in the same way they have pursued Joel. See Kravets, "*File Sharing Lawsuits at a Crossroads After 5 years of RIAA Litigation*".³ For these 30,000 individuals, Plaintiffs have wielded federal process as a bludgeon, threatening legal action to such an extent that settlement remains the only viable option. Joel Tenenbaum is unique in his insistence, in the face of it all, on having his day in court. The federal courts have an inherent interest in deciding whether they will continue being used as the bludgeon in RIAA's campaign of sacrificing individuals in this way.

³ Available at <http://www.eff.org/wp/riaa-v-people-years-later> (last visited October 23, 2008).

b. Plaintiffs are abusing federal process by filing suit against Joel Tenenbaum for the ulterior purpose of intimidating the Internet community into altering norms of Internet-usage and for intimidating other accused file-sharers into settling without being heard in court.

.....

Abuse of process consists of a "perversion of lawfully initiated process to illegitimate ends." *Heck v. Humphrey*, 512 U.S. 477, 486 n. 5 (1994) (citations omitted). "One who uses a legal process ... against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process." Restatement (2nd) of Torts § 682. Plaintiffs are abusing the federal process because their suit against Joel Tenenbaum has nothing whatsoever to do with seeking redress for losses he may have caused. Their ulterior goal is to sacrifice him in the name of "deterrence" - deterrence of all Internet users from engaging in the widely accepted norms that govern Internet-usage, and deterrence of other accused file sharers from having their day in court.

For abuse of process claims, it is immaterial that the process "was obtained in the course of proceedings that were brought with probable cause and for a proper purpose." Restatement 2d Torts § 682, comment a. Instead, the key inquiry is whether there was an alternative purpose that was the "primary" goal. *Id.*, at comment b. The RIAA has conceded time and time again that the primary purpose of their mass-litigation campaign is to "deter" an entire generation from participating in file sharing, not to seek redress from individual litigants. See, e.g., Bangeman, "RIAA Launches Propaganda, Lawsuit Offensive Against College Students,"⁴ (citing RIAA literature that describes the litigation effort as one of "deterrence"); *RIAA's Piracy: Online and on the Street*⁵ (RIAA website billing their legal actions as "deterrence" and a method to alter "attitudes, practices, [and] cultural norms"). In fact, Plaintiffs appear to concede that the suit against Joel Tenenbaum has nothing whatsoever to do with recouping losses that he allegedly caused. (See Pl.'s Mot. to Dismiss, at 17-18) (Plaintiffs acknowledging that the damages they seek are wholly unrelated to actual damages). In analyzing the abuse of process claim, this Court

⁴ Available at <http://arstechnica.com/news.ars/post/20070301-8953.html> (last visited October 23, 2008).

⁵ Available at http://www.riaa.com/physicalpiracy.php?content_selector=piracy_details_online (last visited October 23, 2008).

must focus only on Plaintiffs' admitted *primary* purpose of sacrificing Joel Tenenbaum in the name of "deterrence."

The extent of Plaintiffs' actions in the name of "deterrence" constitutes an abuse of process because it seeks to intimidate others. See *Hutchins v. Cardiac Science, Inc.*, 491 F.Supp.2d 136, 141 (D. Mass. 2007) (intimidation constitutes a basis for abuse of process).⁶ Plaintiffs seek damages so astronomical that they will be sure to make headlines and scare Internet users from engaging in file-sharing. See, e.g., RIAA's "*Piracy: Online and on the Street*"⁷ (RIAA website trumpeting extreme penalties, including \$150,000-per-song in civil damages and \$250,000 criminal fines; asking readers: "Don't you have a better way to spend five years and \$250,000?"). In doing so, Plaintiffs hope to alter the fundamental norms of Internet usage. See, e.g., RIAA's *Piracy: Online and on the Street*⁸ (RIAA website billing their legal actions as a method to alter "attitudes, practices, [and] cultural norms"). The ends that Plaintiffs seek - social engineering - are simply of a different scope than the means they are employing - lawsuits against individual students for some allegedly unlawful mouse-clicks on a computer screen. This Court should find that Plaintiffs' goal is simply so far-reaching that it is not "properly involved in the proceeding" against Joel Tenenbaum and is therefore an abuse of process. *Broadway Management Services Ltd. v. Cullinet Software, Inc.*, 652 F.Supp. 1501, 1503 (D. Mass. 1987).

Plaintiffs further abuse federal process by holding Joel out as an example to strong-arm other accused file-sharers into settling. See *Crackel v. Allstate Ins. Co.*, 208 Ariz. 252, 260 (Ariz. App. Div. 2004) (finding that a corporation's "use of the prospect of sustained and expensive litigation as a 'club' in an attempt to coerce [the party asserting abuse], and other similarly situated [parties], to surrender [their legal claims]" constitutes an abuse of process). Plaintiffs have already used

⁶ It is irrelevant that the party asserting abuse is different from the individual(s) against whom the ulterior motive is directed. *Cady v. Marcella*, 729 N.E.2d 1125, 1132 (Mass. App. Ct. 2000) (who the ulterior motive is directed at "does not change the analysis"); *Board of Ed. of Farmingdale Union Free School Dist. v. Farmingdale Classroom*, 38 N.Y.2d 397, 404 (N.Y. 1975) (holding that the ulterior motive for abuse of process claims need not be directed at the recipient of that process).

⁷ Available at http://www.riaa.com/physicalpiracy.php?content_selector=piracy_online_the_law (last visited October 23 2008).

⁸ Available at http://www.riaa.com/physicalpiracy.php?content_selector=piracy_details_online (last visited October 23, 2008).

intimidating tactics during the course of this litigation. This Court has seen Plaintiffs' attempt to strip Defendant of any semblance of digital privacy by having an investigator take all of his computer files from all of his computers, complete with his photographs, journal, letters, and research. (See Def.'s Mot. for Protective Order, Doc. No. 672); *Simmons v. Benjamin*, 156 N.Y.S.2d 118 (N.Y. Mun. Ct. 1956) (abuse of process inquiry includes whether "it was an invasion of [Defendant's] privacy and an affront to [his] personal rights and dignity.") Plaintiffs have subpoenaed Joel and his entire family for extensive depositions while perpetually accusing them of acting in bad-faith with no basis for those allegations. (See Pl.'s Letter to Court, Doc. No. 648.) But above all, the chief intimidation is the specter of wholly disproportionate and excessive damages.

In essence, Plaintiffs are using the prosecution of Joel Tenenbaum to extort other accused infringers: the accused are told to either pay the settlement, or else be exposed to the protracted litigation and potentially astronomical damages that Joel now faces. See *Milford Power Ltd. Partnership by Milford Power Associates Inc. v. New England*, 918 F.Supp. 471 (D. Mass. 1996) (holding that "the essence of the tort of abuse of process is the use of process as a threat to coerce or extort some collateral advantage not properly involved in the proceeding"). The intimidation tactics are working: of the 30,000 accusations the RIAA has leveled against individuals, only a *single defendant* has made her case in front of a judge and jury. See Kravets, David. "File Sharing Lawsuits at a Crossroads, After 5 years of RIAA Litigation,"⁹ (that sole defendant is now awaiting a new trial).

The RIAA intimidates and steamrolls accused infringers into settling before they have their day in court and before the courts can weigh the merits of their defenses. The inherent dangers in allowing a single interest group, desperate in the face of technological change, led by a voracious, cohesive, extraordinarily well-funded and deeply experienced legal team doing battle with *pro se* defendants, armed with a statute written by them and lobbied and quietly passed through a compliant congress, to march defendants through the federal courts to make examples out of them should lead this Court to say "stop."

The assertions above state a cognizable basis for asserting abuse of process sufficient to permit further development of a

⁹ Available at <http://www.eff.org/wp/riaa-v-people-years-later> (last visited October 23, 2008).

factual record in discovery and trial and an ultimate determination by the jury.

c. Plaintiffs are liable for abuse of process even if this court strictly adheres to Massachusetts state law.

As Plaintiffs correctly state, under Massachusetts law a plaintiff stating a claim for abuse of process must allege that "(1) 'process' was used; (2) for an ulterior or illegitimate purpose; (3) resulting in damage." *Am. Mgmt. Servs. v. George S. May Int'l*, 933 F. Supp. 64, 68 (D. Mass. 1996). In this case, there is no question that a "process" was used; Plaintiffs misstate the law with respect to this prong. Massachusetts maintains a low standard for what constitutes process: it includes "the mere institution of a civil action to achieve a collateral purpose other than winning the lawsuit." See *American Management Services, Inc. v. George S. May Intern. Co.*, 933 F. Supp. 64, 69 (D. Mass. 1996). See also *Jones v. Brockton Public Markets, Inc.*, 369 Mass. 387, 390 (Mass. 1975) (holding that "in context of action for abuse of process, 'process' refers to papers issued by court to bring party or property within its jurisdiction"). Plaintiffs reliance on *Simon v. Navon*, 71 F.3d 9 (1st Cir. 1995) is misplaced; this case follows Maine law. Plaintiffs also cite *Philip Alan, Inc. v. Sarcia*, 2007 WL 738484, at *11 (Mass. Super. 2007). In that case, the Court dismissed an abuse of process claim not because a "process" wasn't used, but because a process for "an ulterior or

illegitimate purpose" wasn't used. *Id.*, at *11. Plaintiffs' interpretation of this case conflates the separate prongs of analysis

Regarding the "ulterior purpose" prong of analysis, as detailed above, Plaintiffs filed this lawsuit for the ulterior purposes of intimidating other Internet users and other alleged file-sharers. These motives are "outside the interests properly pursued in the proceeding" against Joel Tenenbaum. *Broadway Management Services Ltd. v. Cullinet Software, Inc.*, 652 F.Supp. 1501, (D. Mass. 1987).

Regarding the "damage" prong, there is no question that Defendant has suffered both pecuniary and non-pecuniary harm as a result of this suit. At the very least, this proceeding has forced him and his family to take time off of work to attend courtroom proceedings and depositions, and forced Defendant to spend extensive time proceeding *pro se* during the initial stages of this case because he could not afford a lawyer. Even if the Court decides to apply Massachusetts state law, the assertions of this motion state a cognizable basis for asserting abuse of process sufficient to permit further development of a factual record at trial and an ultimate determination by the jury. Plaintiffs' motion to dismiss should be denied.

CONCLUSION

The Defendant asks this court to deny Plaintiffs' motion to dismiss and to allow the defendant's counterclaim to proceed to discovery and proof.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Charles Nesson, hereby certify that on October 27, 2008, a true copy of the above document will be served electronically on counsel for Plaintiffs.

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