February 13, 2009

Mr. Edwin Kneedler
Acting Solicitor General
Office of the Solicitor General
950 Pennsylvania Ave., NW
Washington, D.C. 20530-0001

Dear Mr. Kneedler,

I write on behalf of Joel Tenenbaum, a Massachusetts graduate student who is challenging the constitutionality of Title 17, Section 504(c), of the United States Code as applied in music file-sharing litigation. Joel is alleged to have downloaded and shared seven copyrighted songs, and is being sued by the recording industry for willful copyright infringement. The industry companies claim entitlement to statutory damages under Section 504(c). For willful infringement Section 504(c) authorizes damages of up $150,000 per infringement, and Joel faces a litigation threat of seven times the limit, over a million dollars.

We ask you to intervene in Joel's case on behalf of the people of the United States of America to save the constitutionality of Section 504(c) by interpreting its damage provision for willful infringement to apply only to commercial infringers. If applied to an individual such as Joel, who has made no commercial use of plaintiffs' copyrights, the statute violates the Constitution.

Beginning in 2002, the recording industry, acting through the Recording Industry Association of America (RIAA), implemented a litigation campaign with the conscious design of using the expense of litigation as a weapon against individuals. Title 17, Section 504(c), mis-interpreted by the plaintiffs to apply to noncommercial individuals, is the cornerstone of the RIAA's campaign. Prosecuted individuals like Joel, who have downloaded music for their own enjoyment and not for commercial gain, face the threat of bankrupting damages — the same statutory damages faced by commercial companies that willfully infringe copyrights in order to make a profit. The individual defendants — primarily college and graduate students and others of modest means — have been forced into settlement or default by the overwhelming cost and threat of litigation. Individual consumers simply cannot defend themselves against the combined resources of the recording industry.

Judge Nancy Gertner, presiding over more than 100 cases against individual, noncommercial defendants consolidated in the District of Massachusetts, criticized in

open court the injustice wreaked by the Plaintiffs' litigation campaign:

> The record companies are represented by large law firms with substantial resources. The law is also overwhelmingly on their side. They bring cases against individuals, individuals who don't have lawyers and don't have access to lawyers and who don't understand their legal rights. ...
>
> [C]ounsel representing the record companies have an ethical obligation to fully understand that they are fighting people without lawyers, to fully understand that...the formalities of this are basically bankrupting people, and it's terribly critical that you stop it. ...
>
> Motion Hearing, June 17, 2008 at 8-11.
> Dkt. No. 614, Civ. Act. No. 07-cv-11661-NG (D.Mass.)

Interpreting Title 17, Section 504(c), to apply to tens of thousands of noncommercial individuals like Joel creates multiple constitutional infirmities.

First, Congress exceeds the limits of substantive due process of the Fifth and Eighth Amendments to the Constitution by mandating grossly excessive statutory damage awards against a noncommercial individual in the absence of any proof whatever of actual damage or intent to copy for commercial gain.

Second, Congress exceeds its power by placing the executive function of prosecuting an effectively criminal statute in private hands. The enforcing body here is not an arm of the government but the RIAA — a private party — which exercises sole prosecutorial discretion to inflict punitive process and sanction.

These constitutional infirmities can be avoided by interpreting the statutory damage provisions to apply only to commercial infringers. Section 506 criminalizes willful infringement "for purposes of commercial advantage or private financial gain." This is the willful infringement to which Section 504(c) should be limited.

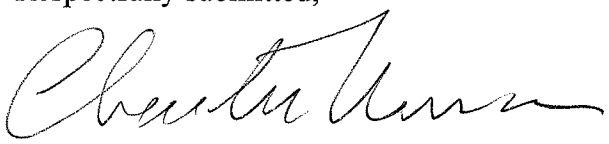
The Internet has led to dramatic changes in the medium of information sharing which has led to an equally dramatic change in the culture of information sharing. In this transformed landscape, the old copyright paradigm is not only outdated, but also impedes progress by punishing desirable behaviors that harm no one.

A law which threatens millions of ordinary people with effectively criminal penalties for such minor behaviors raises serious constitutional questions. The law does not act to "promote the Progress of Science and useful Arts"; instead it furthers a policy of grasping onto the strictures and structures of the past, benefiting entrenched wealth at the expense of entrepreneurial spirit and innovation. An activity which so many people participate in, and which is widely perceived as socially acceptable, should not be

punishable by large fines bordering on criminal penalties.

Rather than needlessly ascribe to Congress an intent to authorize abuse of the federal courts and individual defendants, this interpretation would eliminate draconian application of the statute to individuals and take a step toward re-establishing the trust of the born-digital generation of the American people in the ideal and fair rule of law.

Respectfully submitted,



Charles R. Nesson, for Joel Tenenbaum
Assisted by students from my winter
Evidence class