

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

SONY BMG MUSIC ENTERTAINMENT, *et al.*,)
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)
 Plaintiffs,) Civ. Act. No.
) 07-CV-11446-NG
 v.) (ORIGINAL DOCKET NUMBER)
)
)
 JOEL TENENBAUM,)
)
)
 Defendant.)
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**MEMORANDUM IN SUPPORT OF DEFENDANT JOEL TENENBAUM'S MOTION TO
DISMISS**

Punitive damages for infringement authorized by the Copyright Act, 17 U.S.C. § 504(c), represent an unconstitutional abrogation of due process when enforced against a noncommercial defendant. The damages prescribed by the statute bear no reasonable relation to actual harms resulting from Joel Tenenbaum's individual alleged infringement.

I. IF 17 U.S.C. 504(c) IS INTERPRETED AS IN THE PLAINTIFFS' COMPLAINT, THEN CONGRESS HAS EXCEEDED ITS AUTHORITY BY DELEGATING TO PRIVATE INDUSTRY THE PROSECUTION OF PUNITIVE ACTIONS AGAINST NONCOMMERCIAL INDIVIDUALS.

(a) The Plaintiffs' interpretation of section 504 makes the statute an unconstitutional violation of due process.

The statutory scheme that Plaintiffs wield against Joel, and have already wielded against thousands of others like him who were forced to settle without challenging the Plaintiffs in court, is premised on the assumption that Congress has empowered the recording industry to prosecute noncommercial individuals with actions so oppressive and punitive that all but Joel and Jammie Thomas have been forced to settle out of court. See Capitol Records, Inc. v. Thomas, 579 F.Supp.2d 1210, 1227 (D.Minn. 2008). At the trial of our counterclaim we will offer evidence of just how oppressive the recording industry's litigation campaign has been. Thousands of individuals like Joel have been threatened with expensive, time-consuming, frightening, and potentially bankrupting legal process. By vesting in Plaintiffs and their industry association the authority to bring complaints against noncommercial individuals for millions of dollars in statutory damages, Congress would have delegated to a private industry the authority to abuse the

law.

Deterrent objectives, if they are to be achieved at all, should be undertaken most carefully by public entities acting under public authority and subject to due process in courts of law. By contrast, this statute, if it delegates executive prosecutorial power to private enforcers, is "legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse." Carter v. Carter Coal, 298 U.S. 238, 311 (1936). Such a delegation is particularly offensive when private enforcers are able to extract private benefits through its selective enforcement of the law: "For an interested party to make decisions utilizing governmental authority is anathema to due process." Suss v. American Soc'y for the Prevention of Cruelty to Animals, 823 F. Supp. 181, 188 (S.D.N.Y. 1993) (surveying instances of state and federal delegation of coercive governmental authority to private parties).

One might imagine a statute that, in the name of deterrence, provides for a \$750 fine for each mile per hour by which a driver exceeds the speed limit, with the fine escalating to \$150,000 per mile per hour over the limit if the driver knew she was speeding. One might imagine further that enforcement of

the fines is put in the hands of a private, self-interested police force – one that has no political accountability, that can pursue any defendant it chooses at its own whim, that can accept or reject “settlements” in exchange for not prosecuting the tickets, and that pockets for itself all payoffs and fines. Plaintiffs and the RIAA exercise precisely this kind of self-interested enforcement power when they prosecute noncommercial defendants for violations of the Copyright Act, and simultaneously reap the private benefits from such litigation. See Bennett v. Cottingham, 290 F.Supp. 759, 763 (N.D. Ala. 1968), aff’d, 393 U.S. 317 (1969), and Callahan v. Wallace, 466 F.2d 59 (5th Cir. 1972) (litigation by black motorists against ticketing system in which the enforcing justice of the peace was paid for guilty verdicts).

By threatening noncommercial defendants like Joel with the maximum statutory damages for willful infringement, the recording industry impedes his Constitutional guarantee to due process of law. St. Louis, I.M. & S. Ry. Co. v. Williams, 251 U.S. 63, at 63 (due process of law contravened when penalty is so severe as to deprive the defendant of the right to resort to the courts to test validity (dicta)); see also Ex parte Young, 209 U.S. 123, 148 (1908) (“to impose upon a party interested the burden of obtaining a judicial decision of such a question (no

prior hearing having ever been given) only upon the condition that if unsuccessful he must suffer imprisonment and pay fines as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid."); Life & Casualty Ins. Co. of Tenn. v. McCray, 291 U.S. 566, 574-75 (1934) (stating that if an unfair penalty that can be obtained in court is too high, a party will choose not to litigate because the "price of error may be so heavy as to erect an unfair barrier against the endeavor of an honest litigant to obtain the judgment of a court. In that event, the Constitution intervenes and keeps the court room open"). Faced with astronomical statutory damages, noncommercial defendants have no realistic option to defend themselves and so are forced into out-of-court settlements that can't be refused. David Kravets, File Sharing Lawsuits at a Crossroads, After 5 years of RIAA Litigation, *Wired.com*, <http://blog.wired.com/27bstroke6/2008/09/proving-file-sh.html> (last visited March 9, 2009).

17 U.S.C. § 504(c), as interpreted and implemented by the recording industry, excludes the federal judiciary from overseeing and resolving the vast majority of copyright disputes involving noncommercial litigants, who settle out of court for

fear of such high damages. Instead, it establishes the Plaintiffs and the RIAA as judge, jury, and executioner in such cases. This *de facto* limitation on access to courts constitutes a violation of the due process rights of all those who have been sued by the recording industry in its litigation campaign against noncommercial users, and reason itself to dismiss the claim of willful infringement against Joel.

(b) To avoid constitutional infirmity Section 504(c) should be interpreted so as not apply statutory damages for willful infringement to noncommercial individuals.

Rather than needlessly ascribe to Congress an intent to authorize abuse of the process of law and of the federal courts by authorizing draconian punishment of individual noncommercial persons, this court should interpret 17 U.S.C. § 504(c) so as not to apply to noncommercial users.

Interpreting 17 U.S.C § 504(c) to apply to noncommercial individuals such as Joel and the thousands like him creates multiple constitutional infirmities. Congress should not be taken to have exceeded the limits of substantive due process by having mandated grossly excessive statutory damage awards against noncommercial individuals. Congress should not be taken to have delegated punitive prosecutorial power to a private industry, enabling it to exercise sole prosecutorial discretion

to inflict punitive process and sanction.

Instead, the copyright statutes should be interpreted to define three kinds of infringers: (1) the unaware infringer – an infringer who was “not aware and had no reason to believe that his or her acts constituted an infringement of copyright”; for this infringer the statute specifies minimum statutory damages of \$200; (2) the merely aware infringer – an infringer who is aware but not willful in seeking commercial gain; for this infringer the statute specifies minimum statutory damages of \$750; punitive damages against noncommercial users in this category up to a maximum of \$30,000 are as vulnerable to attack for gross excessiveness as are the even greater maximum damages in category three; (3) the willful infringer – an infringer who intentionally and knowingly infringes for commercial gain; for this infringer the statute authorizes maximum damages per infringement of \$150,000.

II. IF 17 U.S.C. § 504(c) APPLIES, THEN IT FURTHER VIOLATES DUE PROCESS BECAUSE THE DAMAGES WITH WHICH IT THREATENS THE DEFENDANT ARE WHOLLY DISPROPORTIONATE TO HIS ALLEGED OFFENSE.

Statutory damages violate the constitutional guarantee of due process if they are “so severe and oppressive as to be wholly disproportioned to the offense and obviously

unreasonable." See St. Louis, I.M. & S. Ry. Co. v. Williams, 251 U.S. 63, 67-8 (1919); Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 277 (1989). Courts applying Williams have focused on whether statutory damages are reasonable in light of the harm caused. See, e.g., United States v. Citrin, 972 F.2d 1044, 1051 (9th Cir. 1992) (applying Williams but finding that the statutory damages at issue were not unreasonable). The damages prescribed by 17 U.S.C. § 504(c) here are "wholly disproportionate" to the offense with which Joel is charged.

The statutory damages provided in 17 U.S.C. § 504(c) violate due process under Williams by threatening a noncommercial person like Joel, who caused at most *de minimis* injury to the Plaintiffs, with the maximum punitive damages recoverable from a willful commercial infringer. Under any reading of Williams, it is "wholly disproportionate" to threaten Joel with \$1,050,000 in damages.

At least one court facing a similar case has echoed Williams, suggesting that, given the noncommercial nature of individual file-sharing, the Copyright Act's statutory damages provision violates due process as applied to such defendants. Capitol Records, Inc. v. Thomas, 579 F.Supp.2d, at 1227. In Thomas, the only individual file-sharing case ever to reach a

damages award, the jury awarded \$222,000 in statutory damages against defendant Jammie Thomas for downloading 24 songs and placing them into her KaZaA "share folder." In granting the defendant's request for a new trial, Chief Judge Michael Davis described the damages as "wholly disproportionate to the damages" suffered by Plaintiffs. Id. at 1227 ("[Defendant's] status as a consumer who was not seeking to harm her competitors or make a profit does not excuse her behavior. But it does make the award of hundreds of thousands of dollars in damages unprecedented and oppressive."). The court relied in part on Plaintiffs' failure to provide any support for a damage award of that magnitude against a noncommercial, individual user. Id. ("All of [Plaintiffs'] cited cases involve 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.").

The Supreme Court has particularized the Williams standard in the context of excessive punitive damage jury awards. See, e.g., BMW of North America, Inc. v. Gore, 517 U.S. 559, 574-575 (1996); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) (applying Gore test and finding punitive damages of 145 times the actual damages violated due process). It

remains unclear whether courts will apply the particularized Gore analysis to constraining congressional power to create punitive statutory damages. See Zomba Enterprises, Inc. v. Panorama Records, Inc., 491 F.3d 574, 587 (6th Cir. 2007) ("The Supreme Court has not indicated whether *Gore* and *Campbell* apply to awards of *statutory* damages") (italics in the original) (citing cases that have suggested Gore could apply to statutory damages). This Court need not resolve this uncertainty. As applied to noncommercial defendants such as Jammie Thomas and Joel, the statutory damage authorization is grossly excessive under the due process articulations of both Williams and Gore.

CONCLUSION

Because the Plaintiffs have failed to allege and cannot prove that Joel acted for commercial gain, their claim against him for statutory damages for willful infringement should be dismissed for failure to state a claim on which relief can be granted.

JOEL TENENBAUM.

By his attorneys,

Dated: March 9, 2009

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on March 9, 2009, I caused a copy of the foregoing **DEFENDANT JOEL TENENBAUM'S MOTION TO DISMISS** to be served upon the Plaintiffs via the Electronic Case Filing (ECF) system; first-class mail, postage pre-paid; and electronic mail, at the following addresses:

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