IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 09-1090

IN RE: SONY BMG MUSIC ENTERTAINMENT; WARNER BROS. RECORDS, INC.; ATLANTIC RECORDING CORPORATION; ARISTA RECORDS, LLC; AND UMG RECORDINGS, INC.,
Petitioners.

ON PETITION FOR EXTRAORDINARY WRIT TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

District Court Case No. 07-CV-11446-NG (D. Mass.)
(Consolidated with
District Court Case No. 03-CV-11661-NG (D. Mass.))
Hon. Nancy Gertner, United States District Judge, presiding

SUPPLEMENTAL BRIEF OF RESPONDENT JOEL TENENBAUM ADDRESSING THE LEGAL EFFECT OF THE RESOLUTION OF THE JUDICIAL COUNCIL OF THE FIRST CIRCUIT DATED JUNE 12, 1996

Charles R. Nesson*
1525 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4609
FAX (617) 495-4299
nesson@law.harvard.edu

Counsel for the Respondent

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* Assisted by Jennifer L. Dawson, Aaron Dulles, Isaac Meister, James E. Richardson, Matthew C. Sanchez, Anna V. Volftsun, and Stephanie R. Weiner.

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

THE RESOLUTION OF THE JUDICIAL COUNCIL OF THE FIRST CIRCUIT DATED JUNE 12, 1996 DOES NOT REQUIRE REVERSAL OF JUDGE GERTNER'S ORDER ALLOWING INTERNET ACCESS TO HER COURTROOM.

The 1996 Resolution of the Judicial Council of the First Circuit does not constrain Judge Gertner's power to admit Internet to and from her courtroom.[1] To give such constraining effect to the resolution would interpret the resolution beyond its facial and temporal scope. The resolution predated, and did not contemplate the advent of, the open Internet as a viable communications medium. By its terms, the resolution extends only to still photographs, radio and television. Giving effect to the resolution to deny all discretion to the trial judge to permit Internet access to and from her courtroom would burden the Defendant Tenenbaum's right to an open trial in the federal courts.

The right to an open public trial has always been fundamental to our legal system. The Supreme Court observed in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 567 (1980): "We have found nothing to suggest that the presumptive openness of the trial, which English courts were later to call 'one of the essential qualities of a court of justice,' was not also an

[1] Defendant-Respondent Tenenbaum adopts the arguments made by *amicus curiae* Courtroom View Network in their supplemental brief similarly filed in response to the Court's invitation.

attribute of the judicial systems of colonial America." The Court further notes that, prior to the American Revolution,

> "[i]n some instances, the openness of trials was explicitly recognized as part of the fundamental law of the Colony. The 1677 Concessions and Agreements of West New Jersey, for example, provided: 'That in all publick courts of justice for tryals of causes, civil or criminal, any person or persons, inhabitants of the said Province may freely come into, and attend the said courts, and hear and be present ...' Reprinted in Sources of Our Liberties 188 (R. Perry ed. 1959). See also 1 B. Schwartz, The Bill of Rights: A Documentary History 129 (1971). The Pennsylvania Frame of Government of 1682 also provided '[t]hat all courts shall be open ... ,' Sources of Our Liberties, supra, at 217; 1 Schwartz, supra, at 140, and this declaration was reaffirmed in § 26 of the Constitution adopted by Pennsylvania in 1776. See 1 Schwartz, supra, at 271. See also §§ 12 and 76 of the Massachusetts Body of Liberties, 1641, reprinted in 1 Schwartz, supra, at 73, 80."

Id. at 567-578. The Supreme Court observes that the jury itself was a concession to the difficulty of holding "town meeting" forms of trials as towns became larger. Id. at 572.

While the right to a public trial is generally associated with the Sixth Amendment right of criminal defendants to a "speedy and public trial," it extends further to the parties in civil actions and to the rights of the public in general. The right to an open public trial is grounded not only in the Sixth Amendment but in the due process guarantees and retained liberties of the Fifth and Ninth Amendments. "[W]hile the right to a 'public trial' is explicitly guaranteed by the Sixth Amendment only for 'criminal prosecutions,' that provision is a reflection of the notion, deeply rooted in the common law, that

'justice must satisfy the appearance of justice.' ... [D]ue process demands appropriate regard for the requirements of a public proceeding in cases of criminal contempt ... as it does for all adjudications through the exercise of the judicial power, barring narrowly limited categories of exceptions ... ." Id. at 574, quoting Levine v. United States, 362 U.S. 610, 616 (1960).

A defendant's right to an open trial is derived from principles held sacrosanct at our nation's founding. This right is protected and served by Internet. Internet enables gavel-to-gavel coverage, free of intermediation by commercially interested media companies. Internet thus permits restoration and extension of the ideal of public trial that existed at our nation's founding. The restriction of physical size and location of the courtroom, and the need to rely on the editorial discretion of commercial media to supply context, no longer obtain. Internet makes it possible to recapture "small town" access to the workings of our justice system, without the distorting drawbacks associated with radio and television broadcasts.

While in some cases the interests of parties and media may differ — see, e.g., Nebraska Press Assn. v. Stuart, 427 U.S. 539, 547 (1976) (issues of conflict between right of defendant to a fair trial and right of press to cover trials "are almost

as old as the Republic") – here the interests of the parties and media are aligned. See Motion on Behalf of News Organizations and Associations For Leave to File Amicus Curiae Brief at 2, *et seq.*, denied. This trial was initiated by the recording industry Plaintiffs for the declared purpose of educating the Internet generation as to its rights and responsibilities under our system of copyright. Defendant Tenenbaum likewise seeks an open airing of the issues implicated by his alleged file-sharing activity and the recording industry's claim for punitive statutory damages against him to prevent it. The recording industry has prosecuted over thirty thousand such cases in a litigation assault on a whole generation of Internet users. The very best, fullest and fairest means of educating the Internet file-sharing generation about these issues will be to stream the proceedings of this case to the entire public through the Internet.

The resolution of the Judicial Council gives no reason to depart from the Supreme Court's observation that "freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice." Pennekamp v. State of Florida, 328 U.S. 331, 347 (1946). Internet technology has made it possible to honor the foundational ideal of openness and public civic involvement in the administration of justice.

In the age of Internet, Joel Tenenbaum is constitutionally entitled to a truly open public trial. The resolution of the Judicial Council should not be allowed to deny it.

Dated: March 11, 2009

Respectfully submitted,

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Charles R. Nesson
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4609 (tel)
(617) 495-4299 (fax)
nesson@gmail.com
Counsel for the Respondent

CERTIFICATE OF SERVICE

I, Charles R. Nesson, hereby certify that on March 11, 2009, I caused the foregoing document, viz., the **SUPPLEMENTAL BRIEF OF RESPONDENT JOEL TENENBAUM ADDRESSING THE LEGAL EFFECT OF THE RESOLUTION OF THE JUDICIAL COUNCIL OF THE FIRST CIRCUIT DATED JUNE 12, 1996**, to be served on:

Daniel J. Cloherty
Victoria L. Steinberg
DWYER & COLLORA, LLP
600 Atlantic Ave., 12th Floor
Boston, MA 02210

Eve G. Burton
Timothy M. Reynolds
HOLME, ROBERTS & OWEN, LLP
17 Lincoln, Suite 4100
Denver, CO 80203

The Honorable Nancy Gertner
U.S. District Court
John Joseph Moakley U.S. Courthouse
One Courthouse Way, Suite 2300
Boston, MA 02210

by Federal Express. All of the abovementioned parties have been served with electronic copies of the foregoing documents.

Dated: March 11, 2009

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Charles R. Nesson
1525 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4609 (tel)
(617) 495-4299 (fax)
nesson@gmail.com
Counsel for the Respondent