UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CAPITOL RECORDS, INC., *et al.*,	)	
Plaintiffs,	)	Civ. Act. No. 03-CV-11661-NG
v.	)	(LEAD DOCKET NUMBER)
NOOR ALAUJAN,	)	
Defendant.	)	
SONY BMG MUSIC ENTERTAINMENT, *et al.*,	)	
Plaintiffs,	)	Civ. Act. No. 07-CV-11446-NG
v.	)	(ORIGINAL DOCKET NUMBER)
JOEL TENENBAUM,	)	
Defendant.	)	

DEFENDANT JOEL TENENBAUM'S MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION AND REAFFIRMANCE OF THE COURT'S JANUARY 14, 2009 ORDER AND FOR LATE FILING

This Court should reconsider its Order of January 14, 2009 in light of the recently discovered 1996 Resolution of the Judicial Council of the First Circuit and, having reconsidered, should reaffirm its order. The Resolution should be given no effect because it was not lawfully promulgated and, even if it had been, it neither established any rule forbidding Internet in

federal court in Massachusetts, nor abrogated or modified Local Rule 83.3 of the District of Massachusetts. In addition, Defendant Tenenbaum asserts a Constitutional right to public hearing consonant with the technology of the Internet Age, the resolution of the Judicial Council notwithstanding.

I. THE RESOLUTION OF THE JUDICIAL CONFERENCE DOES NOT BAR INTERNET ACCESS.

Under 28 U.S.C. § 332(d)(1), the Judicial Council of the First Circuit "shall make all necessary and appropriate orders for the effective and expeditious administration of justice within [the] circuit." In vesting the councils with this authority, Congress required that "[a]ny general order relating to practice and procedure shall be made or amended *only after giving appropriate public notice and an opportunity for comment*," and such order shall be made "*available to the public*." 28 U.S.C. § 332(d)(1) (emphasis added). Furthermore, under 28 U.S.C. § 2071(c)(1), councils are to "periodically review" local district court rules to determine their consistency with the Federal Rules of Civil Procedure, and "[e]ach council may modify or abrogate any [local] rule found

inconsistent in the course of such review." 28 U.S.C. § 2071(c)(1).[1]

But the Resolution was not authorized by — nor could it have been promulgated pursuant to — either of these provisions. First, the Resolution was not promulgated in accordance with the Judiciary Code's notice and comment requirements. After learning about its existence (in the Briefing Order, attached hereto as Exhibit B), CVN — *amicus curiae* in Plaintiffs' mandamus petition in the First Circuit (No. 09-1090) — sought from the Circuit Executive's office information about its enactment and promulgation. On March 9, 2009, a representative of the Circuit Executive's office stated that there is no record of the Resolution ever having been disseminated to the public, or having been the subject of notice and comment as required under 28 U.S.C. § 332(d)(1). (Kawamoto Decl. ¶¶ 3-4, attached hereto as Exhibit C.)

Absent compliance with the statutorily-required notice and comment period, the Resolution has no legal effect. See D. Siegel, Commentary on 1988 Revision (reproduced in legislative

[1] These were the only two Judiciary Code provisions referenced in the Conference Statement as a basis upon which councils were urged to act. The councils also have the authority to evaluate the statistics of individual courts and judges and to review judicial disability or misconduct complaints. See Office of the Circuit Executive, First Circuit Annual Report (2006) at 85 (summarizing responsibilities of the Judicial Council of the First Circuit), attached hereto as Exhibit A.

history of 28 U.S.C.A. § 332). The Resolution is unquestionably a general order "relating to practice and procedure." 28 U.S.C. § 332(d)(1). It deals with a subject that the Federal Rules of Criminal *Procedure* themselves expressly address. See Fed. R. Crim. P. 53 — the permissibility of transmitting or recording public judicial proceedings.

Nor does the Resolution purport to "modify or abrogate" any rule. On its face, it "*continue[s] to bar* the taking of photographs and radio and television coverage of proceedings in the United States district courts ..." (Exhibit B at 3, emphasis added)[2]. So far as we can tell, no judicial council responded to the Conference Statement by modifying or abrogating any local rule relating to or permitting cameras or recording of non-ceremonial proceedings. See Brief *Amicus Curiae* of CVN at 5 n.6, attached hereto as Exhibit D.

It is of course true that the Resolution assumes that all of the rules in the First Circuit district courts — including D. Mass. Local Rule 83.3, which was promulgated before 1996 — permit camera coverage only of "ceremonial occasions." But this assumption is built on a reading of Rule 83.3 that is just as incorrect as the one advanced by Petitioners. The *text* of the Rule controls, and the only reading of the Rule's text that

[2] The Circuit Executive is unaware of the existence of any enactment history of the Resolution. (Kawamoto Decl. ¶ 3, attached hereto as Exhibit C.)

makes sense of all of its parts is the one that embraces judicial discretion. (Indeed, the Resolution not only misreads D. Mass. Local Rule 83.3; it is inconsistent with the 1996 Local Rules of other districts as well.[3])

II. THE RESOLUTION CANNOT OVERRIDE DEFENDANT TENENBAUM'S CONSTITUTIONAL RIGHT TO A PUBLIC HEARING.

The 1996 Resolution of the Judicial Council of the First Circuit does not constrain the power of a trial judge to permit Internet to and from her courtroom. 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 medium for opening judicial proceedings to the public. 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.

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[3] For example, the Resolution assumes that the rules of the First Circuit district courts ban cameras in all cases other than for "ceremonial occasions." But D.N.H. R. 83.7(a) provides a broader exception — or "authorized personnel in the discharge of their official duties" — and D. Me. R. 83.8 allows a judge to permit "the use of electronic or photographic means for the presentation of evidence or the perpetuation of a record." (See Local Rules, attached hereto as Exhibit E.)

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 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.

JOEL TENENBAUM.

By his attorneys,

Dated: March 13, 2009

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on March 13, 2009, I caused a copy of the foregoing **DEFENDANT JOEL TENENBAUM'S MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION AND REAFFIRMANCE OF THE COURT'S JANUARY 14, 2009 ORDER AND FOR LATE FILING** 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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