

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

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CAPITOL RECORDS, INC., et al,

03-CV-11661-NG

(Lead Docket Number)

Plaintiffs,

-against-

NOOR ALAUJAN,

Defendant.

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SONY BMG MUSIC ENTERTAINMENT,
et al,

07-CV-11446-NG

(Original Docket Number)

Plaintiffs,

-against-

JOEL TENENBAUM,

Defendant.

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**AMICUS BRIEF OF FREE SOFTWARE FOUNDATION IN CONNECTION WITH
DEFENDANT'S MOTION TO DISMISS ON GROUNDS OF UNCONSTITUTIONALITY
OF COPYRIGHT ACT STATUTORY DAMAGES AS APPLIED
TO INFRINGEMENT OF SINGLE MP3 FILES**

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The Free Software Foundation (FSF), founded in 1985, is dedicated to promoting computer users' rights to use, study, copy, modify, and redistribute computer programs. The FSF promotes the development and use of free (as in freedom) software -- particularly the GNU operating system and its GNU/Linux variants. The FSF also publishes the GNU General Public License (GNU GPL), the most popular free software license. As an organization dedicated to the rights of computer users and their interaction with copyrighted works, we are concerned with the RIAA's attempt to redefine copyright law through legal proceedings against individuals who are generally unable to defend themselves.

We are submitting this brief to bring to the Court's attention some of the growing body of authority suggesting that the *State Farm/Gore* due process test applicable to punitive damage awards is likewise applicable to statutory damages, and in particular bars the suggestion that each infringement of an MP3 file having a retail value of 99 cents or less may be punishable by statutory damages of from \$750 to \$150,000 -- or from 2,100 to 425,000 times the actual damages.¹

In Parker v. Time Warner, 331 F.3d 13 (2d Cir. 2003), it was held that the interplay between two statutes "may expand the potential statutory damages so far beyond the actual damages suffered that the statutory damages come to resemble punitive damages....[S]uch a distortion could create a potentially enormous aggregate recovery for plaintiffs, and thus an in terrorem effect on defendants, which may induce unfair settlements. And it may be that in a sufficiently serious case the due process clause might be invoked... to nullify that effect and reduce the aggregate damage award."

¹ We estimate that the lost profits per song file are in the neighborhood of 35 cents, although this will vary based on variations in wholesale price, or in expenses, especially royalties payable.

We are aware of three (3) district court cases, and two law review articles, which applied the reasoning of the Second Circuit in Parker to Copyright Act statutory damages as applied to peer to peer file sharing of mp3 files.

In In re Napster, 2005 US DIST Lexis 11498, 2005 WL 1287611 (N.D. California 1005)(Patel, J.), it was held that "large awards of statutory damages can raise due process concerns. Extending the reasoning of Gore and its progeny, a number of courts have recognized that an award of statutory damages may violate due process if the amount of the award is "out of all reasonable proportion" to the actual harm caused by a defendant's conduct.[T]hese cases are doubtlessly correct to note that a punitive and grossly excessive statutory damages award violates the Due Process Clause....."

In UMG Recordings v. Lindor, 2006 U.S. Dist. LEXIS 83486, 2006 WL 3335048 (E.D.N.Y. 2006)(Trager, J.), a case very like the instant one, brought by more or less the same group of recording companies against an individual accused of having infringed their sound recording copyrights by having used Kazaa, defendant sought leave to amend her answer to assert a defense of the unconstitutionality of plaintiffs' claim for statutory damages, on due process grounds, due to the excessiveness of the minimum statutory damages of \$750. These same plaintiffs opposed the amendment on the ground that it was "futile". The court granted defendants' motion: "[P]laintiffs 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. On the other hand, Lindor cites 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....."

In Atlantic Recording Corp. v. Brennan, 534 F. Supp. 2d 278 (D. Connecticut 2008)(Arterton, J.), another RIAA case just like the instant one, the Court rejected the plaintiffs' motion for default judgment, holding that "[t]he defenses which have possible merit include... whether the amount of statutory damages available under the Copyright Act, measured against the actual money damages suffered, is unconstitutionally excessive..."

The two law review articles of which we are aware on the subject, both meriting the Court's attention, are "Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement" by J. Cam Barker, 83 Texas L. Rev. 525 (2004)(online at <http://ssrn.com/abstract=660601>) and "Due Process in Statutory Damages", 3 Geo. J.L. & Pub. Pol'y 601, 627-28 (2005).

In addition to the foregoing authorities specifically dealing with application of the *State Farm/Gore* test to Copyright Act statutory damages, we would also like to briefly mention some other authorities which we feel the Court should take into account.

As we were reminded recently in Yurman Studio, Inc. v. Castaneda, 2009 U.S. Dist. LEXIS 1386907 (S.D.N.Y. November 19, 2008)(Scheidlin, J.), it is a well settled principle in copyright law that "'statutory damages should bear some relation to actual damages suffered' [citing RSO Records v. Peri, 596 F.Supp. 849,862 (SDNY 1984); New Line Cinema Corp. v. Russ Berrie & Co., 161 F.Supp.2d 293,303 (SDNY 2001); 4 Nimmer Sec. 14.04[E][1] at 14-90(2005)] and 'cannot be divorced entirely from economic reality'". The RIAA's lost profits in

the case of an mp3 file are approximately 35 cents. Statutory damages of \$750 to \$150,000 are obviously divorced from economic reality, and totally out of proportion to actual damages suffered.

Also, the Court would do well to note that in common law copyright cases, where punitive damages are still recoverable, it is well settled that the *State Farm/Gore* test bars recoveries which do not bear such a relationship. In fact, relatively recently, one of the record companies which is a plaintiff in the instant case, when in the position of being a defendant, argued, and prevailed in convincing the Sixth Circuit Court of Appeals, that punitive damages which bore a 10:1 ratio to actual damages were unconstitutional, in Bridgeport Music v. Justin Combs Pub., 507 F.3d 570 (6th Cir.), *cert. denied*, 2008 U.S. LEXIS 6770 (2008) : "The disparity between compensatory and punitive damages in this case further supports the conclusion that the punitive damages award is unconstitutional Although the Supreme Court has repeatedly rejected the use of bright-line rules, it has cautioned that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," *State Farm*, 538 U.S. at 425, and it has noted that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *Id.* (citing Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23-24 (1991)); see also Clark, 436 F.3d at 606..... Here, defendants' conduct, although willful, was not highly reprehensible [A] ratio of closer to 1:1 or 2:1 is all that due process can tolerate in this case"

And in Capitol v. Thomas, 579 F. Supp. 2d 1210 (September 24, 2008)(Davis, J.)(dictum), an RIAA case against an individual, where an outsized jury verdict was returned,

and ultimately set aside on other grounds, the Court reaffirmed the concept of proportionality: "The Court would be remiss if it did not take this opportunity to implore Congress to amend the Copyright Act to address liability and damages in peer to peer network cases.... The defendant is an individual, a consumer. She is not a business. She sought no profit from her acts..... [T]he damages awarded in this case are wholly disproportionate to the damages suffered by Plaintiffs."

It is indeed logical that the *State Farm/Gore* test be applied to statutory damages, since the primary means used by the Supreme Court in formulating that test was to exhaustively analyze a large number of statutes authorizing statutory damages, to distill from them the fair range of penalties, and then to apply that range to punitive damages. It is unimaginable that the Court would not apply the same test to the very source of its rationale.

We take no position on whether at this early stage in the case the Court can do anything other than uphold the legal sufficiency of the defense, as it is our understanding that there is no factual record in place from which the Court could determine the plaintiffs' lost profits, or the degree of reprehensibility of the defendants' conduct, and other factors which might be necessary to determine whether in fact the remedy sought is excessively disproportionate.

Neither do we take any position on whether there is a way for the Court to avoid the constitutional question altogether, by, for example, construing the complaint as alleging a single copyright infringement, or by finding it insufficient to make out a case for statutory damages in any event.

Respectfully submitted,

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