



or not the alleged acts of infringement complained of occurred in this District.

**PARTIES**

4. Defendant has no personal knowledge of whether or not Plaintiff SONY BMG MUSIC ENTERTAINMENT is a Delaware general partnership with its principal place of business in the State of New York.

5. Defendant has no personal knowledge of whether or not Plaintiff WARNER BROS. RECORDS INC., is a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business in the State of California.

6. Defendant has no personal knowledge of whether or not Plaintiff ATLANTIC RECORDING CORPORATION, is a corporation duly organized and existing under the laws of the State of Delaware with its principal place of business in the State of New York.

7. Defendant has no personal knowledge of whether or not Plaintiff ARISTA RECORDS LLC is a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business in the State of New York.

8. Defendant has no personal knowledge of whether or not Plaintiff UMG RECORDINGS, INC., is a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business in the State of California.

9. Defendant admits he is an individual residing in this

District.

**COUNT I**

**INFRINGEMENT OF COPYRIGHTS**

10. Defendant admits that the Plaintiffs incorporate herein by this reference each and every allegation contained in each paragraph above.

11. Defendant has no knowledge of whether or not Plaintiffs are, or at all relevant times have been, the copyright owners or licensees of exclusive rights under United States copyright with respect to certain copyrighted sound recordings (the "Copyrighted Recordings"). The Defendant further has no knowledge of what is included in the Copyright Recordings as are identified in Exhibit A attached to the Summons and Complaint, and which is allegedly the subject of a valid Certificate of Copyright Registration issued by the Register of Copyrights. Defendant further has no knowledge of whether the sound recordings listed in Exhibit B which is attached to the Summons and Complaint are owned by or exclusively licensed to one or more of the Plaintiffs' or Plaintiffs' affiliate record labels, and which are subject to valid Certificates of Copyright Registration issued by the Register of Copyrights.

12. Defendant has no knowledge of whether among the exclusive rights granted to each Plaintiff under the Copyright

Act are the exclusive rights to reproduce the Copyrighted Recordings and to distribute the Copyrighted Recordings to the public.

13. Defendant denies that he used or continued to use an online media distribution system to download the Copyrighted Recordings, to distribute the Copyrighted Recordings to the public, and/or made Copyrighted Recordings available for distribution. Defendant has no knowledge or belief that any of his actions constituted infringements of Plaintiffs' copyrights and exclusive rights under copyright.

14. Defendant has no recollection of whether or not any properly placed notices of copyrights pursuant to 17 U.S.C. Section 401 appeared on album covers of the sound recordings identified in Exhibit A. Defendant denies having seen many or most of the sound recordings identified in Exhibit A.

15. Defendant denies that any actions on his part which allegedly amounted to acts of infringements were willful or intentional, nor were any of his actions in disregard of and with indifference to the rights of Plaintiffs.

16. Defendant denies that any actions on his part resulted in damages pursuant to 17 U.S.C. Section 504 subsection c. Therefore, defendant would also deny that his actions on his part entitle Plaintiffs to their attorneys' fees and costs pursuant to 17 U.S.C. Section 505.

17. Defendant denies that his conduct has caused, continues to cause, or will continue to cause any great or irreparable injury.

WHEREFORE, Defendant prays for this matter against him to be dismissed and for such other and further relief as this court deems just and equitable.

**AFFIRMATIVE DEFENSE**

1. The alleged acts complained of by Plaintiffs constitute fair use.

**COUNTERCLAIM**

**JURISDICTION AND VENUE**

1. This is a federal counterclaim seeking actual damages and such punitive damages as the Court sees fit for abuse of federal process.

2. This Court has jurisdiction to allow redress to Defendant for such abuse under its inherent authority. *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 764-765; *Nationwide Charters and Conventions, Inc. v. Garber*, 254 F.Supp 85 (D. C. Mass. 1966).

3. Defendant alternatively asserts a counterclaim against Plaintiffs under state law for abuse of process. *Am. Mgmt. Servs. v. George S. May Int'l*, 933 F. Supp. 64, 68 (D. Mass. 1996).

4. This Court has supplemental jurisdiction for the state

counterclaim. 28 U.S.C. § 1367.

**PARTIES**

5. Defendant and counterclaim Plaintiff Joel Tenenbaum is a Massachusetts resident with his primary residence in Massachusetts.

6. Plaintiffs and counterclaim Defendants Sony BMG Music Entertainment, Warner Bros. Records Inc., Atlantic Recording Corporation, Arista Records LLC, and UMG Recordings are corporations or partnerships organized under the laws of Delaware, each with respective principal places of business identified in Plaintiffs' Complaint (Case # 1:07-cv-11446-NG; Doc. No. 1).

7. On information and belief, counterclaim Defendant RIAA is a trade association headquartered in Washington D.C. and controlled by the five above-identified counterclaim Defendants. The Plaintiffs of record and RIAA will collectively be referred to herein as "Plaintiffs."

**COUNT I**

**ABUSE OF FEDERAL PROCESS**

8. Plaintiffs filed a civil action on August 7, 2007, seeking damages and injunctive relief for copyright infringement under the copyright laws of the United States (17 U.S.C §101 et seq.). Plaintiffs alleged that Joel Tenenbaum violated their rights of reproduction and distribution by using an online media distribution system to download Copyrighted Recordings.

Plaintiffs specified the seven recordings alleged to have been downloaded by Defendant in Exhibit A of the Complaint.

9. The suit against Defendant was one part of a larger mass-litigation campaign. Plaintiffs have threatened or initiated legal action against at least 30,000 similar suits against other individuals throughout the country.

10. Plaintiffs have worked in concert to conduct this mass-litigation campaign.

11. Plaintiffs did not file this suit primarily to seek redress against Defendant for harm that he allegedly caused nor for the primary purpose of deterring him from further copyright infringement.

12. Plaintiffs filed this suit primarily to advance illegitimate ulterior purposes identified below. None of these ulterior purposes are properly involved in this proceeding and, individually and collectively, constitute an abuse of process.

13. Plaintiffs' illegitimate ulterior purposes include unlawfully sacrificing Defendant to intimidate other Internet users into altering the norms of Internet usage. Plaintiffs intimidate others by seeking damages grossly disproportionate to what restitution or deterrence could justify.

14. Plaintiffs' illegitimate ulterior purposes include unlawfully sacrificing Defendant to intimidate other accused infringers into settling without exercising their constitutional

right to have their defenses heard in court. Plaintiffs do this by seeking damages grossly disproportionate to what restitution or deterrence could justify and by harassing Defendant and invading his privacy to a degree that will intimidate others into settling. In order for the tactic to have credibility, they are making Defendant suffer an unduly protracted litigation battle and excessive damages.

15. Plaintiffs' illegitimate ulterior purposes include intimidating and coercing Internet Service Providers ("ISPs") into installing Internet content filters.

16. By flooding ISPs with subpoenas demanding the release of customer names, or student names in the case of University ISPs, Plaintiffs hope that ISPs will install filters to stop the harassment of the subpoenas, protect their customers or students, and/or ensure that Plaintiffs do not sue the ISPs themselves.

17. Plaintiffs seek to continue the onslaught of lawsuits to convince Congress that it must require ISPs to install filters as a way to put an end to the litigation campaign.

18. In their attempts to advance their ulterior purposes, Plaintiffs abuse prosecutorial discretion unconstitutionally conferred upon them by Congress and abuse a statutory scheme providing for unconstitutional damages.

19. Defendant reserves the right to further identify other ulterior purposes after conducting discovery.



20. The conduct against Defendant has caused and is causing actual harm to Defendant and his family. Because Plaintiffs' use of federal process against Defendant is an unlawful abuse, Defendant seeks restitution and any punitive damages the Court sees fit for all of the costs and non-pecuniary harm he incurred from this proceeding. This includes, but is not limited to:

- a) Harm from Plaintiffs' attempt to strip Defendant of all digital privacy.
- b) Being subjected to numerous harassing, intimidating, and at times insulting telephone communications from opposing counsel.
- c) Spending money preparing court filings, traveling to and from court, traveling to and from depositions, traveling to and from meetings with counsel, and other expenses;
- d) Devoting countless hours to proceeding *pro se* during the initial stages of this litigation;
- e) Being submitted to extensive depositions, discovery requests, and interrogatory requests;
- f) Being forced to miss school and work;
- g) Being subjected to the stigma of being a defendant in a federal lawsuit.

21. Defendant prays for judgment against Plaintiffs for:

- a) actual damages incurred;
- b) such punitive damages as the Court, through judge or jury,

sees fit; and

c) to such other and further relief, at law or in equity, general or special, to which Defendant may be entitled.

## **COUNT II**

### **STATE ABUSE OF PROCESS**

1. Defendant asserts a Counterclaim against the Plaintiffs for Abuse of Process under Mass. R. Civ. P. 12(b)(6) and Mass. Gen. Laws, Ch. 23 I Section 6(f).

2. The facts of this case demonstrate that the process by which Plaintiffs have conducted their illegal, flawed, and negligent investigations in pursuit of this and similar lawsuits, was not used for legitimate, honorable purposes.

3. This litigation was filed by Plaintiffs in August 2007. However, for three years prior to filing, Plaintiffs' attorneys consistently harassed and intimidated the Defendant, all without regard for this proceeding, but rather with the illegitimate, ulterior purpose of making an example of Defendant to intimidate other accused infringers into settling without exercising their constitutional right to have their defenses heard in court.

3. Defendant and his family have been harassed, inconvenienced, and suffered emotional distress as a result of the malicious, unnecessary, punitive nature of this litigation.

4. The extraordinary number of hours required to respond to the menacing, intimidating, harassing use of state process

against the Defendant and the resulting emotional distress have caused Defendant and his family financial hardship and loss of income totaling thousands of dollars due to an inability to work. The resulting disruption of Defendant's mother's business in particular has caused an extraordinary loss of income to her.

6. Defendant seeks damages for the irreparable injuries he and his family have suffered as a result of this abusive litigation. The time, materials, and costs required to defend against this illegitimate suit have caused damages and injuries to Defendant and his family far in excess of any actual damages that any or all of the Plaintiffs have suffered. Moreover, it is the Defendant who continues to be damaged both monetarily and emotionally by the ongoing, continuous nature of this litigation

7. In advancing their ulterior purpose, Plaintiffs seek grossly excessive punitive damages far in excess of the actual damages suffered. Any award of statutory damages that would approach the amount of damages that RIAA alleges that it is entitled to under the Copyright Law, would clearly be unconstitutional and excessive.

9. Because Plaintiffs' use of state process against Defendant is an unlawful abuse, Defendant seeks restitution and any punitive damages the Court sees fit for all of the costs and non-pecuniary harm he incurred from this proceeding.

JOEL TENENBAUM.

Dated: April 15, 2009

By his attorneys,

/s/Charles R. Nesson

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**CERTIFICATE OF SERVICE**

I, the undersigned hereby certify that on April 15, 2009, I caused a copy of the foregoing **DEFENDANT'S SECOND AMENDED ANSWER AND COUNTERCLAIM** to be served upon the Plaintiffs via the Electronic Case Filing (ECF) system; first-class mail, postage pre-paid; and electronic mail (where available); at the following addresses:

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