UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

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

**[PROPOSED] PLAINTIFFS' RESPONSE TO AMICUS BRIEF OF FREE SOFTWARE FOUNDATION**

Plaintiffs respectfully submit this response to the brief ("Brief") filed by the Free Software Foundation ("FSF") in support of Defendant's Motion to Dismiss.

**INTRODUCTION**

The FSF is not a neutral friend of the Court. Rather, FSF is an organization dedicated to eliminating restrictions on copying, redistribution, and modifying computer programs, classic intellectual property, much like the sound recordings at issue in this case. *See* http://ww.fsf.org. To that end, FSF opposes the recording industry's enforcement efforts.[1] Thus, it is no surprise

[1] *See, e.g.*, http://www.fsf.org/campaigns; http://recordingindustryvspeople.blogspot.com/2007/11/expert-witness-defense-fund-for-riaa.html.

that FSF retained as its "of counsel" an attorney who runs a blog entitled "Recording Industry vs. The People" and who is currently subject to a pending sanctions motion for his conduct in representing a defendant in one of the Plaintiffs' enforcement cases.[2] The FSF's baseless contention that the recording industry is attempting to "redefine" copyright laws through lawsuits against individuals "generally unable to defend themselves" (FSF Br. at 1) is just one example of FSF's blatant bias against Plaintiffs. Because the FSF has an open and virulent bias against copyrights in general, and against the recording industry in particular, it does not—and indeed cannot—play the traditional role of amicus curiae, which is to provide a neutral source of information or legal analysis to aid the court. *See In re BALDWIN-UNITED CORP*., 607 F. Supp. 1312, 1327 (S.D.N.Y. 1985).

In furtherance of its anti-copyright, anti-recording industry bias, the FSF's Brief relies on legal authority that has no application to this case and factual arguments that misconstrue the nature of Defendant's infringement. Specifically, FSF's assertion of a "growing body of authority" suggesting that the Supreme Court's *State Farm*/*Gore* due process analysis for awards of *punitive damages* by juries should also apply to awards of *statutory damages* set by Congress is simply wrong. As demonstrated below and in Plaintiffs' Opposition to Defendant's Motion to Dismiss, no such "body of authority" exists and the cases upon which FSF relies have nothing to do with the circumstances of this case. FSF does not—and could not—cite a single authority to support its argument that *State Farm*/*Gore* should apply here, and its brief ignores completely the Supreme Court's decision in *Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919), which case demonstrates the constitutionality of statutory damages under the Copyright Act.

[2] *see generally* http://recordingindustryvspeople.blogspot.com/ (an anti-recording industry web site hosted by the FSF's of counsel attorney).

## ARGUMENT

### I. The Cases Upon Which FSF Relies Do Not Support FSF's Argument And Have No Application Here.

To support its contention of a "body of authority" suggesting that the *State Farm/Gore* due process test for punitive damages should apply to the statutory damages at issue here, FSF cites the Second Circuit's decision in *Parker v. Time Warner*, 331 F.3d 13 (2d Cir. 2003), the Sixth Circuit's decision in *Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470 (6th Cir. 2007), and a handful of published and unpublished decisions from various district courts, *In re Napster*, 2005 U.S. Dist. LEXIS 11498 (N.D. Cal. 2005); *UMG Recordings, Inc. v. Lindor*, 2006 U.S. Dist. LEXIS 83486 (E.D.N.Y Nov. 9, 2006); *Atlantic Recording Corp. v. Brennan*, 534 F. Supp. 2d 278 (D. Conn. 2008); and *Capitol Records Inc. v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008). As demonstrated below, none of these cases supports FSF's contention.

First, *Parker* had nothing to do with copyrights or the issue of statutory damages for victims of infringement under the Copyright Act. *Parker* was a putative class action by cable television subscribers alleging that a cable provider had violated the subscriber privacy provisions of the Cable Communications Policy Act ("Cable Act"). *Parker*, 331 F.3d at 15. In reviewing the district court's decision not to certify a class of potentially millions of cable subscribers, the court reflected on the tension between the statutory provisions for minimum damages under the Cable Act and the provisions for class certification under Fed. R. Civ. P. 23. *Id.* at 22. In that context, the court *mused* that the purposes of both statutory damages and class actions could potentially be distorted were the court to mechanically apply the minimum statutory damages provision of the Cable Act to potentially millions of subscribers and putative class members. *Id.* *Parker*, however, acknowledged that such concern was purely

"hypothetical" even in the context of that case, and expressly refused to "consider what limits the due process clause may impose." *Id.* at 22.

Defendant's reliance on *Napster* fares no better. *Napster*, like *Parker*, focused on whether to certify a class. *Napster*, 2005 U.S. Dist. LEXIS 11498, at *4-5. In rejecting the defendants' arguments against class certification, the court specifically rejected the argument that "the availability of statutory damages under the Copyright Act precludes certification of a class." *Id.* at *42. The court made no finding as to whether statutory damages raised due process concerns in the case before it. Rather, as in *Parker*, the court specifically observed that any inquiry at the class certification stage as to the propriety of statutory damages "would almost inevitably be speculative." *Id.* at *41.

Similarly, the unpublished decision in *Lindor* does not support the FSF's argument. The *Lindor* decision merely allowed the defendant in that case to assert a defense of unconstitutionality. *Lindor*, 2006 U.S. Dist. LEXIS 83486, at *17. The court made no decision to apply the *Gore/State Farm* line of cases and held only that *Gore/State Farm* might apply "in a proper case." *Id.* at *8. As demonstrated in Plaintiffs' Opposition to Defendant's Motion to Dismiss (Doc. No. 794 at 15-19), this is not a proper case for applying the *Gore/State Farm* analysis for *punitive damages*. *See, e.g., TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 456-57 (1993) (In light of the "safeguards in the legislative process," there is a "significant[] differen[ce]"—a constitutional difference—between "review of a jury's award for arbitrariness and the review of legislation."). Rather, any due process challenge to statutory damages under the Copyright Act must be considered under the test set forth by the Supreme Court in *Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919). *See Zomba Enters. v. Panorama Records, Inc.*, 491 F.3d 574, 587 (6th Cir. 2007); *see also Kenro, Inc. v. Fax Daily*, 962 F. Supp.

1162, 1167 (S.D. Ind. 1997) (applying *Williams* and noting that punitive damages jurisprudence is inapplicable to statutory damages); *Arrez v. Kelly Servs., Inc.*, 522 F. Supp. 2d 997, 1008 (N.D. Ill. 2007) (applying *Williams* and upholding statutory damages under the IDTLSA); *Directv, Inc. v. Cantu*, 2004 U.S. Dist. LEXIS 22715 (W.D. Tex. Sept. 29, 2004) (applying *Williams* to statutory damages under Texas state law).

For similar reasons, FSF's reliance on the *Bridgeport Music*, *Brennan*, and *Thomas* cases is also unhelpful to its argument. In *Bridgeport Music*, the Sixth Circuit reviewed a jury's award of *punitive damages* in a claim of infringement brought under New York common law (for which no statutory damages are available), which is admittedly a "proper case" for consideration of the *Gore/State Farm* factors. *Bridgeport Music*, 507 F.3d at 477, 486-90. The court made no suggestion at all that *Gore/State Farm* might apply to an award of statutory damages. In *Brennan*, the court nowhere held that the *Gore/State Farm* factors should apply to statutory damages as FSF seems to suggest. Rather, without briefing from any party on the issue, the court *sua sponte* raised a mere "possib[ility]" of a defense concerning the constitutionality of statutory damages. *Brennan*, 534 F. Supp. 2d at 282. Finally, the *Thomas* decision, like the *Brennan* and *Bridgeport Music* decisions, nowhere suggests that the *Gore/State Farm* analysis should apply to statutory damages. *Thomas*, 579 F. Supp. 2d at 1227.

Moreover, in none of the cases described above is it apparent that the parties or the government ever fully briefed as a ripe issue the question of whether the *Gore/State Farm* should apply to statutory damages. As such, FSF's contention of a growing body of authority applying *Gore/State Farm* to statutory damages is without support.

## II. FSF's "Proportionality" Argument Misconstrues The Nature Of This Case, Has Been Consistently Rejected, And Ignores The Supreme Court's Holding In *Williams*.

A primary theme of FSF's argument is its contention that statutory damages are not proportionate to Plaintiffs' actual damages in this case. (Br. at 4-5.) This argument both misconstrues the nature of the harm to Plaintiffs in this case and has been consistently rejected by the courts.

To support its proportionality argument, FSF contends that Plaintiffs' lost profits in the case should be based on a per/download loss of "approximately 35 cents." Apart from the fact that the argument relies on "facts" not in the record in this case, the contention ignores the nature of Defendant's infringement. Defendant has not only infringed Plaintiffs' works through downloading, he has also distributed Plaintiffs' works for years to potentially millions of other file sharers. The harm to Plaintiffs from such massive distribution over a period of many years is incalculable – and undeniably worth exponentially more than 35 cents. Indeed, the cost of an unrestricted license to distribute Plaintiffs' copyrighted works for free on the Internet would be astronomical. Thus, Defendant's suggestion that Plaintiffs' lost profits total 35 cents per download misconstrues the nature of Defendant's infringement and should be rejected.

Moreover, courts have consistently rejected FSF's proportionality argument. Indeed, statutory damages are awarded even in the absence of proof of actual damages to the copyright victim or of profit to the infringer. *See F.W. Woolworth Co. v. Contemp. Arts, Inc.*, 344 U.S. 228, 233 (1952) (statutory damages allow victims of infringement to obtain recovery where proof of actual damages is "difficult or impossible"); *Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1016 (7th Cir. 1991) ("We believe the statutory damage provisions of the Copyright Act were intended to relieve the aggrieved copyright owner of the task of proving its actual damages . . . "); *Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co.*, 74 F.3d 488,

496 (4th Cir. 1996) (rejecting argument that damages within statutory range were "excessive," did not "bear some reasonable relationship to the amount of actual damages" and would give the plaintiff a "windfall"); *Los Angeles News Serv. v. Reuters Tele., Ltd.*, 149 F.3d 987, 996 (9th Cir. 1998) ("a plaintiff may recover statutory damages whether or not there is adequate evidence of the actual damages suffered by plaintiff or of the profits reaped by defendant, in order to sanction and vindicate the statutory policy of discouraging infringement"); *see also Douglas v. Cunningham*, 294 U.S. 207, 210 (1935) (affirming award of $250 in statutory damages under the Copyright Act where damages were $1).

FSF ignores well established law holding that statutory damages under the Copyright Act were not designed solely to compensate each private injury caused by infringement, but also to punish the infringer, to deter wrongful conduct, and to encourage enforcement of copyright laws. *F. W. Woolworth Co.*, 344 U.S. at 233 (The statutory rule, formulated after long experience, not merely compels restitution of profit and reparation for injury but also is designed to discourage wrongful conduct); *Yurman Design, Inc. v. PAJ, Inc.*, 93 F. Supp. 2d 449, 462 (S.D.N.Y. 2000) ("Statutory damages have been made available to plaintiffs in infringement actions precisely because of the difficulties inherent in proving actual damages and profits, as well as to encourage vigorous enforcement of the copyright laws."); *Mourning v. Family Pubs. Serv., Inc.*, 411 U.S. 356, 376 (1973) (the Supreme Court has noted that statutory damages "serve to liquidate uncertain actual damages and to encourage victims to bring suit to redress violations"). In this regard, FSF's Brief ignores completely the significant cost associated with bringing enforcement actions like this one, which include the costs of detecting and collecting evidence of the infringement, identifying the infringer, and pursuing a lawsuit. *See* Staff of House Comm. on the Judiciary, 87th Cong., Report of the Register of Copyrights on the General Revision of the U.S.

Copyright Law 103 (Comm. Print 1961) (reproduced in APPENDIX 14 Nimmer & D. Nimmer, Nimmer on Copyright 2008, at 102). Indeed, the Copyright Office has explained that the need for a special remedy of statutory damages "arises from the acknowledged inadequacy of actual damages and profits in many cases" including that "[t]he actual damages capable of proof are often less than the cost to the copyright owner of detecting and investigating infringements." *Id.*

In *Williams*, the Supreme Court specifically rejected the argument that a statutory remedy set by Congress must be proportional to the plaintiff's own injury. As the Court explained, "When the penalty is contrasted with the [actual damages] in any instance it of course seems large, but, as we have said, its validity is not to be tested in that way." *Williams*, 251 U.S. at 64. Rather, the proper test under *Williams* is to examine the statutory damages in the context of the conduct Congress seeks to discourage, and to uphold Congress' decision absent proof that the amount Congress set is "so severe and oppressive as to be wholly disproportioned" to Defendant's offense and "obviously unreasonable." *Id.* at 66-67.

Here, as demonstrated in Plaintiffs' Opposition to Defendant's Motion to Dismiss, the statutory damages set by Congress are consistent with and proportionate to the infringement Congress sought to discourage. Congress considered several factors in setting the current range of statutory damages in section 504, including specifically the harm to the public caused by rampant online copyright infringement, the unlimited opportunities for millions of Internet users to engage in online infringement, and the need to secure uniform compliance with copyright laws. *See* House Report at 2-6; *see also* Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, 113 Stat. 1774; 17 U.S.C. § 504. Indeed, the House Report explained that the 1999 increases were needed to achieve "*more stringent deterrents* to copyright infringement and *stronger enforcement of the laws*." House Report at 2.

Defendant has not shown, and could not show, that the statutory damages set by Congress are in any way "disproportioned" to his offense.

Finally, both *Williams* and the cases applying *Williams* in contexts similar to this one demonstrate that Congress exercises broad discretion to impose a range of damages in order to encourage compliance with the law in the face of rampant violation. *See, e.g.*, *Zomba Enters.*, 491 F.3d at 587 (6th Cir. 2007) (applying Williams to statutory damages awarded under section 504 of the Copyright Act); *Arrez.*, 522 F. Supp. 2d at 1008 (applying *Williams*, upholding statutory damages under the IDTLSA, and holding that there is no "proportionality inquiry"); *Kenro, Inc. v. Fax Daily*, 962 F. Supp. 1162, 1167 (S.D. Ind. 1997) (applying *Williams* and upholding award of statutory damages under the TCPA even assuming actual damages were 2.5 cents and minimum damages $500); *Directv, Inc. v. Cantu*, 2004 U.S. Dist. LEXIS 22715 (W.D. Tex. Sept. 29, 2004) (applying *Williams* and upholding statutory damages under Texas state law); *Franklin v. First Money*, 427 F. Supp. 66, 72 (E.D. La. 1976) (noting that Congress has not flinched, in other areas of the law, from exacting damages which do not necessarily reflect actual damages).

**CONCLUSION**

For all of these reasons, the Court should reject the arguments offered in FSF's Brief and deny Defendant's Motion to Dismiss.

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Respectfully submitted,

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