UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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(LEAVE TO FILE GRANTED 5/18/09)

CAPITOL RECORDS, INC., et al,

Plaintiffs,

-against-

NOOR ALAUJAN,

Defendant.

03-CV-11661-NG
(Lead Docket Number)

--x

SONY BMG MUSIC ENTERTAINMENT, et al,

Plaintiffs,

-against-

JOEL TENENBAUM,

Defendant.

07-CV-11446-NG
(Original Docket Number)

--x

REVISED 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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Statement of interest.

The Free Software Foundation (the "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.

The alleged facts.

The plaintiffs allege "downloading" and "distribution" of MP3 files, each having a typical retail value of 99 cents or less, a wholesale value of 70 cents or less, and a *maximum*[1]

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[1] Were each unauthorized download a lost sale, the damages for the download would be lost profits in the neighborhood of 35 cents. The RIAA would have the Court believe that each unauthorized download does equate with a lost sale. This theory was argued by the RIAA, and roundly rejected by the court, in USA v. Dove, 585 F. Supp. 2d 865 (W.D. VA November 7, 2008), which, in the context of a criminal copyright case rejected the RIAA's application for an order of restitution:

> Customers who download music and movies for free would not necessarily spend money to acquire the same product..... Certainly 100% of the illegal downloads...did not result in the loss of a sale, but both Lionsgate and RIAA estimate their losses based on this faulty assumption.......Those who download movies and music for free would not necessarily purchase those movies and music at the full purchase price.....it does not necessarily follow that the downloader would have made a legitimate purchase if the recording had not been available for free......RIAA's request problematically assumes that every illegal download resulted in a lost sale......"

585 F. Supp. 2d at 870-874.

lost profit of approximately 35 cents or less per download. They seek statutory damages of from $750 to $150,000 as to each MP3 file, without regard to whether what they have proved, as to that file, is mere “downloading” -- i.e. violation of the reproduction right -- or “distribution”, i.e. violation of the distribution right.

I.e., in the case of a “download”, plaintiffs are seeking more than 2,100 to 425,000 times the actual damage.

In the case of a “distribution” -- i.e. defendant's having acted as a “distributor” and having actually disseminated actual copies to the public, by a sale or other transfer of ownership, or by a license, lease, or lending -- the actual damages would no doubt be greater than 35 cents, and the subject of further proof. Suffice it to say, however, that in 40,000 cases and counting, these plaintiffs have never been able to find or prove any such “distribution”.[2]

So while there exists a purely theoretical possibility that plaintiffs will be able to prove that Joel Tenenbaum was some sort of “distributor” of MP3 files, if all they ever prove is downloading, then they are seeking multiples of more than 2,100 to 425,000, which would clearly be unconstitutional under any standard.

<u>Preliminary statement.</u>

We take no position on whether the constitutionality issue can or should be resolved at this juncture, since (a) the constitutional question can be avoided by most scenarios, including a defendant's verdict, or plaintiffs' failure to prove the necessary components of

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[2] Plaintiffs' and the Government's arguments in this case seek to (a) blur the distinction between the distinct “download” and “distribution” concepts, and proceed to (b) make technologically impossible speculations as to the enormity of damages which *might* have flowed to them *had they been able to prove* that the defendant acted as a “distributor”. Needless to say, such speculation has no place here.

entitlement to statutory damages and an award in favor of plaintiffs for their actual damages only[3], and (b) various components of the due process test are fact-specific, requiring a factual record not yet available here.

The Government and plaintiffs concede that statutory damages are subject to a constitutional Due Process test for excessiveness, but argue that the test enunciated in the 1919 decision of the United States Supreme Court against a railroad carrier, in the fare overcharge case of St. Louis, I.M. & S. Railway Co. v. Williams, 251 U.S. 63, 67 (1919), sustaining a 75 dollar verdict as against 66 cents in damages (116:1 multiple), controls, rather than the test enunciated more recently by the Supreme Court in State Farm Mutual Automobile Ins. v. Campbell, 538 U.S. 408 (2003), following BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996).

We respectfully submit that:

(a) for obvious reasons, the RIAA's statutory damages theory does not pass constitutional muster even under Williams, and

(b) the plaintiffs' and DOJ's position that the *Gore/State Farm* test is inapplicable because of Williams is based strictly on their failure to have read Gore with any degree of care; once one has re-read Gore and reviewed (a) the method by which the High Court arrived at the multiples it discussed, which was no more and no less than an exhaustive analysis of *statutory damages* provisions, and (b) the way in which the High Court referred to Williams in Gore, the

[3] *See, e.g.* Samuelson, Pamela and Wheatland, Tara. *"Statutory Damages in Copyright Law: A Remedy in Need of Reform"*, Working Paper published April 8, 2009 (available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1375604)("Samuelson and Wheatland"), where the authors devote much of the paper to describing ways in which the Court may obviate the constitutional question.

conclusion that Gore is controlling becomes inescapable.[4]

In the within brief we respectfully (a) refer to the Court's attention six (6) post-Gore, post-State Farm authorities which plaintiffs and DOJ failed to bring to the Court's attention, together with a more recent scholarly working paper which became available only subsequent to the filing of the DOJ brief; (b) discuss, and supply the context which the plaintiffs and DOJ omitted to supply, regarding Williams, State Farm, Gore, and Zomba Enterprises, Inc. v. Panorama Records, Inc., 491 F.3d 574, 587 (6th Cir. 2007), *cert. denied*, -- U.S. -- (2008); and (c) refer to the Court's attention several additional authorities and principles which should also be taken into account on the subject of proportionality in copyright law remedies.

I.

Post-Gore/State Farm authorities suggest that Gore/State Farm is applicable to statutory damage awards.

In Parker v. Time Warner, 331 F.3d 13 (2d Cir. 2003), a case involving statutory damages under the Cable Communications Policy Act of 1984, 47 U.S.C. § 521 et seq., it was held that the interplay between two statutes in that case "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. Cf. *State Farm Mutual Auto. Ins. Co.*

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[4] The Department of Justice itself expressly acknowledged, recently, in a letter to the Senate Judiciary Committee, that "statutory damages ... are similar to punitive damages" (September 23, 2008, Appendix A), a point made forcefully by the Supreme Court itself in Gore.

v. Campbell, 538 U.S. 408, 155 L. Ed. 2d 585, 123 S. Ct. 1513, 2003 WL 1791206 at 6 (Apr. 7, 2003) ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor."); BMW of North America, Inc. v. Gore, 517 U.S. 559, 580, 134 L. Ed. 2d 809, 116 S. Ct. 1589 (1996) (noting that the "most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff.")." (emphasis supplied)

We are aware of three (3) district court cases and two (2) law review articles, all likewise omitted from the Government's brief, which applied Parker specifically 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), 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..... (emphasis supplied)

2005 US DIST Lexis 11498 at 37-39.

In UMG Recordings v. Lindor, 2006 U.S. Dist. LEXIS 83486, 2006 WL 3335048 (E.D.N.Y. 2006), 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 as an affirmative defense 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.....

2006 U.S. Dist. LEXIS 83486 at 9. The cases to which the Court alludes in Lindor are Parker v. Time Warner, *supra*, and In re Napster, *supra*. The law review articles to which he refers are those referenced below.

In Atlantic Recording Corp. v. Brennan, 534 F. Supp. 2d 278 (D. Connecticut 2008), another RIAA case just like the instant one, the Court denied 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, see UMG Recordings, Inc. v. Lindor, No. 05-1095, 2006 WL 3335048, at 3(E.D.N.Y.2006) (finding the defense non-frivolous); Zomba Enters., Inc. v. Panorama Records, Inc., 491 F.3d 574, 588 (6th Cir.2007) (rejecting the defense as to a 44:1 damages ratio); see generally Blaine Evanson, Due Process in Statutory Damages, 3 Geo. J.L. & Pub. Pol'y 601, 637 (2005)...

534 F. Supp. 2d at 282.

The two law review articles to which Judge Trager referred are Barker, J. Cam. *"Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement"*, 83 Texas L. Rev. 525

(2004)(online at http://ssrn.com/abstract=660601) and

Evanson, Blaine. *"Due Process in Statutory Damages"*, 3 Geo. J.L. & Pub. Pol'y 601, 627-28 (2005)(available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=706201).

On April 8, 2009, a scholarly "working paper" was published by Prof. Pamela Samuelson and Research Fellow Tara Wheatland, entitled "Statutory Damages in Copyright Law: A Remedy in Need of Reform"(2009)(online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1375604) ("Samuelson and Wheatland") which criticized the Zomba ruling in several respects, and argued that the *Gore* test, as opposed to the *Williams* test, ought to have been applied in Zomba.

II.

Nothing in Williams, Gore/State Farm, or Zomba supports an argument that plaintiffs' theory of statutory damages passes constitutional muster.

St. Louis, I.M. & S. Railway Co. v. Williams

The Government's and plaintiffs' reliance on Williams is misplaced.

First, Williams sustained a multiple of 116, not a multiple of 2,100 or more, which is what the RIAA seeks.

Second, it involved a 'private attorney general' statute enacted by the State of Arkansas meant to prevent fare overcharges by the railroad companies. The only possible plaintiffs were passengers; the only possible defendants were large railroad corporations; and the only possible damages sustained by any particular passenger were necessarily minuscule, in the Williams case totaling 66 cents. Obviously a substantial multiple was needed to incentivize a passenger victimized to the tune of 66 cents to commence and prosecute a litigation against a

large railroad corporation. Obviously, the Copyright Act is quite a different statute. It is neutral on its face and in its application : the alleged copyright owner might be a huge corporation or a starving author living in an attic; the alleged infringer might be a huge corporation or a single mother living on welfare; and the damages and lost profits might be enormous or, as in the instant case, virtually nonexistent. The Copyright Act's statutory damages provisions need to be fair and balanced and equitable, as opposed to tipping the scale to plaintiffs, which is what the Arkansas statute evaluated by the Williams court was intended to do.

Third, Williams did not make a blanket ruling that anything which is within a statute's bounds is acceptable, but limited its holding to the particular statute and case presented, concluding that the award of $75 could not be “said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable.” Clearly an award of more than 2100 or more times the actual damages, for infringement of an MP3 file, would be sufficiently severe and oppressive as to be wholly “disproportioned to the offense” and “obviously unreasonable”.

Perhaps the most astonishing thing about the DOJ's and plaintiffs' reliance on the 1919 decision in Williams is that Gore itself relied upon Williams:

> Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct. As the Court stated nearly 150 years ago, exemplary damages imposed on a defendant should reflect "the enormity of his offense." Day v. Woodworth, 54 U.S. 363, 13 HOW 363, 371, 14 L. Ed. 181 (1852). See also *St. Louis, I. M. & S. R. Co. v. Williams, 251 U.S. 63, 66-67, 64 L. Ed. 139, 40 S. Ct. 71 (1919) (punitive award may not be "wholly disproportioned to the offense")*....(emphasis supplied)

517 U.S. at 575. I.e., in Gore the Court treats a “punitive award” of *statutory damages* as

synonymous with a "punitive award" of *punitive damages*. The distinction the Government now seeks to draw between the two *was not drawn by the United States Supreme Court itself*. The high court unmistakably considered both kinds of "punitive awards" to be subject to due process review, and to be part of the same body of jurisprudence.

BMW of North America, Inc. v. Gore and State Farm Mutual Automobile Ins. v. Campbell

The obvious relationship between punitive damages awards and statutory damages awards, which the Government itself explicitly recognized quite recently (Appendix A) but here casually dismisses, is nowhere made clearer than it is in Gore.

First of course there is the above mentioned reference to the "punitive award" in Williams and the principle that such an award may not be wholly "disproportioned to the offense".

But even more compelling is the entire manner in which Gore arrives at its holding that punitive damage awards must be reviewed for excessiveness under the Due Process clause, and that in doing so the courts must consider "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." In arriving at the test, and in discussing the multiples which do not raise due process 'red flags', the High Court analyzes *700 years worth of statutory damages provisions* and it is on these *statutory damages* provisions that it relies.

E.g., Gore analyzes the second of the three (3) factors, the ratio of the award to actual damages, as follows:

> The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff. See TXO, 509 U.S. at 459; Haslip, 499 U.S. at 23. The principle that exemplary damages must bear a "reasonable relationship" to compensatory damages has a long pedigree. Scholars have identified a number of early English statutes authorizing the award of multiple damages for particular wrongs. Some 65 different enactments during the period between 1275 and 1753 provided for double, treble, or quadruple damages.

517 U.S. at 580-581. The Court continues:

> One English statute, for example, provides that officers arresting persons out of their jurisdiction shall pay double damages. 3 Edw., I., ch. 35. Another directs that in an action for forcible entry or detainer, the plaintiff shall recover treble damages. 8 Hen. VI, ch. 9, § 6.
>
> Present-day federal law allows or mandates imposition of multiple damages for a wide assortment of offenses, including violations of the antitrust laws, see § 4 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. § 15, and the Racketeer Influenced and Corrupt Organizations Act, see 18 U.S.C. § 1964, and certain breaches of the trademark laws, see § 35 of the Trademark Act of 1946, 60 Stat. 439, as amended, 15 U.S.C. § 1117, and the patent laws, see 66 Stat. 813, 35 U.S.C. § 284.

517 U.S. at 581 n. 33.

So the plaintiffs and the Government are, in essence, arguing to this Court -- absurdly it would appear -- that when the United States Supreme Court recognized the analogous relationship between “punitive awards” resulting from punitive damages and “punitive awards” resulting from statutory damages, it was in error. An argument such as that should be made to the Supreme Court, not here.

Although plaintiffs and the Government appear to have forgotten or overlooked the actual contents of the Gore decision, the Supreme Court has not. In its 2003 decision in State

Farm, decided seven (7) years after Gore, the High Court demonstrated quite clearly its recognition that Gore's very underpinning is the jurisprudence of *statutory damages*:

> Our jurisprudence and the principles it has now established demonstrate...that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In Haslip, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. 499 U.S., at 23-24. We cited that 4-to-1 ratio again in Gore. 517 U.S., at 581. *The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. Id., at 581, and n. 33.* While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, id., at 582, or, in this case, of 145 to 1. (emphasis supplied)

538 U.S. at 425.

Regrettably, Zomba, criticized in *Samuelson and Wheatland*, *supra*, was likewise based on a less than careful reading of Gore and State Farm, since it failed to acknowledge the Supreme Court's reliance on statutory damages jurisprudence in arriving at its conclusion, and failed to acknowledge Gore's reliance on Williams as a “punitive award”. Further eviscerating the force of the plaintif reliance on Zomba are the facts that Zomba: (a) recognized that a number of other courts had taken the position that Gore was controlling in assessing the due process implications of statutory damages; (b) could not cite to a single case concluding otherwise; (c) erroneously misinterpreted Williams as a *carte blanche* authorization of any statutory damage award having a multiple of 113:1 [sic] or less (“If the Supreme Court countenanced a 113:1 ratio in Williams, we cannot conclude that a 44:1 ratio is unacceptable here.” 491 F.3d at 588); and (d)

did not conclude that Williams took precedence over Gore, but merely assumed that it did, an assumption which a more careful reading of Gore and State Farm would have dispelled. The Zomba court ought to have recognized that Williams, Gore, and State Farm were required to be read *together*. Clearly, the Second Circuit's interpretation of applicable law in Parker rested on a much sounder footing than that of the Sixth Circuit in Zomba.

Moreover, even were we to assume that the Second Circuit was wrong, and that Zomba been correctly decided, plaintiffs' reliance on Zomba would continue to be unavailing because of the multitude of distinguishing factors present there and not present here, among them the facts that:

-the multiple in Zomba was 44:1, not the more than 2100:1, or even higher, ratio sought by plaintiffs, and defended by the Government and the plaintiffs here;

-the infringement in Zomba was found to have been wilful; and

-the infringement in Zomba was for commercial purposes.

III.

It is a fundamental tenet of copyright law that statutory damages awarded must bear a reasonable relationship to the actual damage sustained.

In addition to the foregoing authorities specifically dealing with the constitutional issue, we would also like to briefly mention some other authorities which we feel the Court should take into account on the subject of proportionality in copyright law remedies generally.

As we were reminded recently in Yurman Studio, Inc. v. Castaneda, 2008 U.S. Dist. LEXIS 99849, (S.D.N.Y. December 1, 2008), it is a well settled principle in copyright law that

> [a]t the end of the day, "statutory damages should bear some relation to actual damages suffered." SO Records v. Peri, 596 F. Supp. 849, 862 (S.D.N.Y. 1984). Accord New Line Cinema Corp. v. Russ Barrie & Co., 161 F. Supp. 2d 293, 303 (S.D.N.Y. 2001) ("[Statutory damages should be commensurate with the actual damages incurred and, thus, the proper departure points is [defendant's] stipulated gross revenue."). See generally 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 14.04 [E] [1], at 14.90 (2005) ("The point is not that statutory damages always need to fall beneath other measurements, but rather that they should be woven out of the same bolt of cloth as actual damages.").

2008 U.S. Dist. LEXIS 99849 at 5 and at 5 n. 17. *Accord,* EMI Entertainment World, Inc. v. Karen Records, Inc., 2009 US DIST Lexis 26513 (SDNY March 30, 2009). The RIAA's lost profits in the case of an mp3 file download are *at most* approximately 35 cents. Statutory damages of $750 to $150,000 for such a download would obviously not be "woven out of the same bolt of cloth" as the plaintiffs' actual damages, and would be wildly out of proportion to actual damages suffered. Accordingly, acceptance of the RIAA's manic damages theory would stand a time honored copyright law principle on its ear.

Additionally, it bears mention that in common law copyright cases, where statutory damages are inapplicable, and punitive damages still recoverable, it is well settled that the *Gore/State Farm* test bars recoveries which do not bear a reasonable relationship to the actual damages sustained. 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 succeeded 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 470 (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 ......

507 F.3d at 488-490.

Lastly, it should also be recalled that in Capitol Records v. Thomas, 579 F. Supp. 2d 1210 (September 24, 2008)(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.

579 F. Supp. 2d at 1127.

Conclusion

We have addressed ourselves only to the constitutional question, and respectfully request that, in the event the defendant's motion to dismiss the complaint is not fully granted, the Court's order otherwise disposing of that motion provide that (a) the plaintiffs' claims for statutory damages for both downloading and distributing are subject to the due process standards enunciated in Gore and State Farm, (b) to the extent plaintiffs' claims for statutory damages do

not bear a reasonable relationship to the actual damages sustained they are dismissed, and (c) to the extent plaintiffs claim to be entitled to $750 or more in statutory damages for a single download of a single MP3 file, their claim is unconstitutional as a matter of law and is dismissed to that extent.

Respectfully submitted,

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Appendix A

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530
September 23, 2008

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Arlen Specter
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: **S. 3325 – Enforcement of Intellectual Property Rights Act**

Dear Mr. Chairman and Ranking Member:

The Departments of Justice and Commerce have reviewed S.3325, the Enforcement of Intellectual Property Rights Act of 2008 ("EIPRA"), and truly appreciate the bill's intention to enhance the tools available for protecting intellectual property rights. Nevertheless, we have strong and significant concerns regarding Titles I and IV. We are deeply concerned that the proposed legislation will undermine existing intellectual property enforcement efforts by diminishing the effective use of limited criminal enforcement resources and creating unnecessary bureaucracy. It will also improperly micro-manage the internal organization of the Executive Branch. Accordingly, as outlined below, we strongly oppose S. 3325 as reported out of Committee on September 15, 2008.

We strongly oppose Title I of the bill, which not only authorizes the Attorney General to pursue civil remedies for copyright infringement, but to secure "restitution" damages and remit them to the private owners of infringed copyrights. First, civil copyright enforcement has always been the responsibility and prerogative of private copyright holders, and U.S. law already provides them with effective legal tools to protect their rights: they can obtain injunctions, 17 U.S.C. § 502; impound and destroy infringing articles, 17 U.S.C. § 503; recover their actual damages and costs, 17 U.S.C. § 504(b); obtain statutory damages, which are similar to punitive damages, 17 U.S.C. § 504(c); and obtain their costs and attorney's fees in some circumstances, 17 U.S.C. § 505. These tools also provide strong incentives for all copyright holders, including individual copyright holders and small businesses not represented by trade groups or industry organizations, to enforce their rights. *

Second, Title I's departure from the settled framework above could result in Department of Justice prosecutors serving as *pro bono* lawyers for private copyright holders regardless of their resources. In effect, taxpayer-supported Department lawyers would pursue lawsuits for copyright holders, with monetary recovery going to industry.

Third, the Department of Justice has limited resources to dedicate to particular issues, and civil enforcement actions would occur at the expense of criminal actions, which only the Department of Justice may bring. In an era of fiscal responsibility, the resources of the Department of Justice should be used for the public benefit, not on behalf of particular industries that can avail themselves of the existing civil enforcement provisions.

The Departments also strongly oppose Title IV of the EIPRA, which would move into the Executive Office of the President (EOP) from the Commerce Department the "U.S. Intellectual Property Enforcement Coordinator" (IPEC) position. This Presidentially appointed IPEC would have primary responsibility for developing and coordinating Administration policy for IP enforcement across the Executive Branch. While the Administration has been a long time supporter of strong inter-agency coordination -- and is willing to work with the Committee on this topic -- the statutory creation of an EOP coordinator with the duties described in the bill constitutes a legislative intrusion into the internal structure and composition of the President's Administration. This provision is therefore objectionable on constitutional separation of powers grounds.

The Administration has taken strong steps over the past eight years to ensure effective coordination and enforcement of intellectual property rights. The Administration put in place the Strategy for Targeting Organized Piracy (STOP!) Initiative which is currently being implemented by the National Intellectual Property Law Enforcement Coordination Council (NIPLECC) and led by the current U.S. Coordinator for Intellectual Property Enforcement. In summary, while we appreciate the need for continued coordination among Departments and agencies, the framework provided in the bill is unlikely to enhance criminal enforcement and, to the contrary, could pose significant and unnecessary challenges.

We look forward to working with the Committee to address these concerns. In the meantime, the Administration reserves judgment on the final bill. It is our hope that changes will be made so that the President's senior advisors can recommend that the President support the measure. The Office of Management and Budget has advised that there is no objection to the transmittal of this letter from the standpoint of the Administration's program

Very truly yours,

Keith B. Nelson
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U.S. Department of Justice

Lily Fu Claffee
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