UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

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)

PLAINTIFFS' OPPOSITION TO FREE SOFTWARE FOUNDATION'S MOTION TO FILE REVISED AMICUS BRIEF

Plaintiffs respectfully submit this response in opposition to the Free Software Foundation's ("FSF") Motion to File Revised Amicus Brief ("Motion").

INTRODUCTION

FSF offers no explanation for filing a Proposed Revised Brief ("Brief"), and it appears that it has no justification, as its Brief adds nothing new or novel to the briefing and serves no purpose other than underscoring FSF's disagreement with Plaintiffs and the United States of America concerning the constitutionality of statutory damages under the Copyright Act. Indeed, FSF's Brief contains little more than a reworking of its original analysis, apparently in reaction

to the flaws in its original Brief, which were highlighted by Plaintiffs' Response.[1] FSF's Brief is replete with misrepresentations of material fact, conclusory allegations, and unsupported personal opinion. For this reason alone, the Court should deny FSF's Motion.

Allowing an amicus to file a revised brief as soon as the flaws in its arguments are revealed undermines the traditional role of amicus curiae – to inform the court on issues of law. *See In re BALDWIN-UNITED CORP.*, 607 F. Supp. 1312, 1327 (S.D.N.Y. 1985). Additionally, allowing FSF to refile an amicus brief which contains no additional authority, but which contains misrepresentations of material facts, will do nothing but needlessly further complicate and increase the costs of this litigation.

Finally, FSF's latest brief demonstrates even more strikingly the deep animus FSF and its counsel hold for Plaintiffs, their counsel, and the recording industry. Such a biased organization cannot properly assist the court in providing neutral information and analysis. *See id.* at 1321 (attorney generals' political and economic interests "call into question their neutral status as amici"). Moreover, the Court should not allow counsel for FSF to use this case and this Court as a forum to broadcast his vitriol for Plaintiffs, their counsel, and the recording industry. Accordingly, the Court should reject the FSF's Brief.

ARGUMENT

I. FSF's Brief Contains Misrepresentations Of Material Fact.

FSF's Brief should not be accepted because it contains misrepresentations of material facts. For example, it baldly asserts that "in 40,000 cases and counting, these plaintiffs have never been able to find or prove any such 'distribution.'" Brief at 2. To the contrary, recording

[1] FSF cites a "working paper" not included in original brief. However, FSF has already sought, and was granted, leave to supplement its original Brief to include this unpublished paper. Accordingly, its Brief offers no new authority.

industry plaintiffs, including many of the Plaintiffs in this case, have proven distribution in many P2P filesharing cases. *See, e.g.*, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd*., 545 U.S. 913, 2782 (2005) (finding the propagators of P2P file-sharing software secondarily liable for the direct infringement of their users, in part, by concluding that the electronic transmission of copyrighted material violated the distribution right.); *A&M Records, Inc. v. Napster, Inc*., 239 F.3d 1004, 1013 (9th Cir. 2001) ("Napster users who upload file names to the search index for others to copy violate plaintiffs' distribution rights"); *BMG Music v. Gonzalez*, 430 F.3d 888, 890 (7th Cir. 2005) ("The files that Gonzalez obtained [. . .] were posted in violation of copyright law"); *Atlantic Recording Corp. v. Anderson*, 2008 U.S. Dist LEXIS 53654, at *20 (S.D. Tex. Mar. 12, 2008) ("Defendant's actions in placing Plaintiffs' Copyrighted Recordings in a shared folder accessible to numerous other persons on KaZaA constituted a "distribution" for the purposes of Plaintiffs' copyright infringement claim against Defendant"); *Maverick Recording Co. et al. v. Harper,* No. 5:07-cv-027-XR, slip. op. at 10-11 (W.D. Tex. Aug. 7, 2008) (Attached as Exhibit A) (finding that defendant downloaded and distributed plaintiffs' copyrighted sound recordings and granting summary judgment); *MGM Studios Inc. v. Grokster Inc*., 259 F. Supp. 2d. 1029, 1034-35 (C.D. Cal. 2001) (users who upload copyrighted music violate copyright owner's exclusive distribution right).

Similarly, FSF's Brief incorrectly asserts that Plaintiffs seek statutory damages up to $150,000 for each .mp3 file. Brief at 2. To the contrary, Plaintiffs have not made a jury demand, have never sought $150,000 per sound recording in any P2P filesharing case against an individual, and it has been widely reported that they were, and remain, willing to settle this case for significantly less than the *minimum* statutory damages. FSF then uses this misrepresentation to argue that Plaintiffs seek statutory damages up to 425,000 times the actual damage. Brief at 2.

Again, FSF does not – nor could it – cite any support for this patently false representation and should not be allowed to bootstrap its constitutional argument with incorrect factual assumptions and misrepresentations.

FSF offers these misstatements regarding Plaintiffs' actual damages resulting from Defendant's downloading and distribution of Plaintiffs' copyrighted sound recordings versus the damages Plaintiffs are seeking in order to support its conclusory calculation– based on absolutely no evidence in the record– that the ratio between Plaintiffs' actual damages and statutory damages under the Copyright Act is unconstitutionally excessive. FSF then repeats this conclusory calculation throughout its Brief in an attempt to distinguish relevant case law holding that the *Gore/State Farm* test for punitive damages is not properly applied to statutory damages. FSF's calculations, based on nothing more than its anti-recording industry hype, have no basis in fact and no place in these proceedings.

Moreover, as a purported amici, whose role is to assist the court in analyzing legal issues before it, FSF should refrain from making factual arguments, even in cases where the factual assertions are correct. *Sony Corp. of Am. v. Universal City Studios, Inc.,* 464 U.S. 417, 434 (U.S. 1984*)* ("The stated desires of amici concerning the outcome of this or any litigation [. . .] are not evidence in the case, and do not influence our decision; we examine an amicus curiae brief solely for whatever aid it provides in analyzing the legal questions before us); *In re BALDWIN-UNITED CORP.*, 607 F. Supp. at 1327. Accordingly, the Court should reject FSF's Brief.

II. FSF's Brief Is A Remix Of Previously Cited Legal Authority And Adds Nothing Of Value.

An amicus curiae brief is only proper where it brings to the attention of the Court relevant matter not already brought to its attention by the parties. *See* Supreme Court Rule 37. As FSF's Brief does not add any new, relevant legal authority, but simply criticizes Plaintiffs and the

United States of America for disagreeing with its flawed arguments, it should not be allowed. Indeed, FSF continues to argue that two student notes, an unpublished paper, a district court's *sua sponte* denial of default judgment without briefing by any party, and a handful of cases *pondering* the effect of aggregating statutory damages in the class action context somehow constitute a body of legal authority sufficient to overlook binding Supreme Court precedent. *See* Brief at 4 -7.

Similarly, FSF's arguments that *Gore* applies to statutory damages because such damages include a punitive element and that, even under the *Williams* test, statutory damages are unconstitutional, are likewise without merit. Contrary to FSF's assertions, *Gore* does not limit an award of statutory damages under the Copyright Act because statutory damages and punitive damages, while overlapping to the extent that they both serve to punish and deter unlawful conduct, are fundamentally different. Indeed, FSF continues to ignore the legislative intent behind statutory damages under the Copyright Act. Statutory damages serve several purposes—they compensate a plaintiff for the infringement of its copyrights and it encourages vigorous enforcement of the law by copyright holders, as well as punishing and deterring unlawful conduct. *See F. W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952); *Yurman Design, Inc. v. PAJ, Inc.,* 262 F.3d 101, 113-14 (2d Cir. 2001); *Los Angeles News Serv. v. Reuters Tele., Ltd.*, 149 F.3d 987, 996 (9th Cir. 1998); *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 886 F.2d 1545, 1554 (9th Cir. 1989). Moreover, statutory damages represent a carefully crafted congressional scheme and do not implicate the *Gore* Court's concern with a jury awarding unfettered damages for which a tortfeasor has no notice.

Similarly, FSF repeats its fundamental misunderstanding of *Williams*, as well as the nature of Defendant's infringement.[2] First, in its Brief, FSF again overlooks the fact that the proper inquiry under *Williams* requires examining the statutory damages awarded 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." *Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919).

Here, as demonstrated in Plaintiffs' Response, 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. The FSF's disagreement with the value and importance Congress places on protecting copyright from infringement is of no moment.

Moreover, FSF not only misapprehends the nature of Defendant's infringement and of the harm Plaintiffs have suffered, but goes so far as to make material misrepresentations in its Brief in order to try to minimize the harm Defendant has caused. *See* supra, Section I. As explained in Plaintiffs' Response, Defendant has not only infringed Plaintiffs' works through downloading, he has also distributed Plaintiffs' works for years to potentially millions of other file sharers. Defendant even admitted seeing other KaZaA users downloading the files from his

[2] Similarly, in their Response, Plaintiffs demonstrated that courts have consistently rejected FSF's proportionality argument. *See* Response at 6-8. (Doc. 817).

shared folder. Tr. of Sept. 24, 2008 Depo. of Joel Tenenbaum, at 157:10-12 (Attached as Exhibit B). As Defendant admitting using several different P2P networks over the course of many years, the harm he has caused Plaintiffs through his downloading and distribution of Plaintiffs' copyrighted sound recordings is literally incalculable. Indeed, FSF's suggestion that Plaintiffs have not – or could – prove distribution is without merit and further demonstrates that its Brief would not play the role of a neutral amici who helps the Court analyze legal issues. Accordingly, the Court should reject FSF's Brief.

CONCLUSION

For all of these reasons, the Court should deny FSF's Motion to File Revised Amicus Brief.

Dated: May 13, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 13, 2009, the foregoing **PLAINTIFFS' OPPOSITION TO FREE SOFTWARE FOUNDATION'S MOTION TO FILE REVISED AMICUS BRIEF** was filed through the ECF system and will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF). A copy of the foregoing was also served by United States Mail on the following:

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