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)

DEFENDANT'S REPLY TO THE UNITED STATES OF AMERICA'S MEMORANDUM IN RESPONSE TO DEFENDANT'S MOTION TO DISMISS AND IN DEFENSE OF THE CONSTITUTIONALITY OF THE STATUTORY DAMAGE PROVISION OF THE COPYRIGHT ACT, 17 U.S.C. § 504(c)

"THIS COURT SHOULD FIRST DETERMINE WHETHER
THE CONSTITUTIONAL QUESTIONS RAISED BY DEFENDANT
CAN BE AVOIDED."

The Copyright Act § 504 statutory damage provision should be interpreted so as not to apply to noncommercial users. It is not only reasonable to interpret the Copyright Act so as to apply its statutory damage provisions only to commercial infringers, it is constitutionally compelled.

Commercial copying without permission is the clear target of the Copyright Act -- not the noncommercial user. This was brought home to the copyright industry by the decision of this Court in *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994), holding that the Copyright Act did not extend criminal copyright violation to a noncommercial user. The *LaMacchia* decision was promptly followed by a congressional amendment to the Copyright Act specifically to extend the reach of the act to the particular form of noncommercial user *LaMacchia* represented, those who purposely diffuse copyrighted work in massive quantity for the specific purpose of frustrating copyright law.[1] The point as it bears here is that the Copyright act did not extend to noncommercial infringers prior to the *LaMacchia* amendment, and by implication, neither did the statutory damage provision meant to pay recompense to copyright holders who have been victimized by copyright crime.

Interpreting the Copyright Act so that its statutory damage provision does not apply to noncommercial users is more than reasonable. The Government effectively acknowledges the good policy sense of this limiting interpretation by totally disregarding it, resting its position instead on the assertion that: "Regardless of whether this argument would have merit as a matter of policy" (Government brief at 9), the limiting interpretation cannot be supported by the language of the copyright act itself. In making this assertion, the Government not only ignores the role of policy and good sense in interpreting statutes but also ignores the title of the very statute being interpreted, the "Digital Theft Deterrence" act. "Theft"[2] and "deterrence[3]" are both criminal law concepts

[1] The Supreme Court's *Grokster* decision, *MGM Studios Inc. v. Grokster, Ltd.,* 545 U.S. 913 (2005), drew a similar line in distinguishing Grokster's infringing activity from the non-infringing activity at issue in *Sony.*

[2] Theft, specifically "the felonious taking and removing of personal property with intent to deprive the rightful owner of it; Merriam-Webster Online Dictionary

that surely give reason for reading the statutory damage provisions as meant only to provide damages for the victims of copyright crimes, which necessarily means commercial infringers.

But most significantly, the Government ignores the structure of the statutory damage provision itself. Section 504(a) of the statute provides that:

> Except as otherwise provided by this title, an infringer of copyright is liable for either—
>
> (1) the copyright owner's actual damages and any additional profits of the infringer …; or
>
> (2) statutory damages ….

Although the Government is correct to stress the fact that these remedies are exclusive, and thus to a certain extent independent of one another, a plaintiff seeking damages in a copyright suit must elect to receive *either* actual damages *or* statutory damages: it is not possible to receive both remedies in the same suit. From this proposition, the Government draws the conclusion that the presence or absence of any actual damages that could be received under 17 U.S.C. § 504(b) has absolutely no bearing on the availability of statutory damages under § 504(c).

Yet this interpretation ignores the obvious relationship between §§ 504(a)(i) and (ii). A copyright holder is entitled receive either actual damages or statutory damages precisely because those two remedies are presumed to be equivalent to one another. It would be a bizarre statute indeed that offered two completely unrelated remedies within the same section: we imagine, for example, that the Court would be baffled by a statute that granted a plaintiff the choice between two remedies, one of which granted actual damages and lost profits, and the other of which granted plaintiffs the right to drive a

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[3] Deterrence, "the inhibition of criminal behavior by fear especially of punishment." Merriam-Webster Online Dictionary

flock of sheep across federal property on the third day of each month. By including the remedies side by side in the Copyright Act, there is a strong textual suggestion that they are to a certain extent comparable to one another; that in some way they provide the same remedy for plaintiffs. Indeed, the precise reason that Congress authorized statutory damages in cases of copyright infringement was that the damages associated with infringement are generally extremely difficult to prove in court: commercial infringers rarely keep records of their business activities, and it may therefore be difficult for copyright holders to prove the profits of those infringers. See *Brady v. Daly*, 175 U.S. 148, 154 (1899); *Douglas v. Cunningham,* 294 U.S. 207, 209 (1935); *Nimmer on Copyright*, § 14.04 Statutory Damages.

Given the implicit equivalence between the actual damage clause and the statutory damage clause of § 504, any interpretation of the applicability of the two clauses should take into consideration their relationship to one another. In cases involving commercial infringement of copyright, there is a strong presumption of actual harm to copyright holders even though difficult to prove: therefore copyright holders should be entitled to sue commercial defendants under the statutory damage provision as a substitute for those actual damages. However, this equivalence between actual and statutory damages breaks down when the defendant is a noncommercial infringer. In cases involving noncommercial use of copyright, there is a presumption of fair use in favor of the noncommercial user. *Sony Corp. of America v. Universal City Studios Inc.,* 464 U.S. 417, 448 (1984). Individual noncommercial copying results in no provable actual harm to the copyright holder, and thus enforcement of the actual damage clause of § 504 against an individual would produce a monetary judgment of zero dollars. In this

context, it would be unreasonable to consider the $150,000 per infringement authorized by § 504(a)(2) as an appropriate substitute for the zero actual damages available under § 504(a)(1).

An interpretation of § 504 that limits statutory damages to commercial infringers dovetails elegantly with the presumption of fair use established by the Supreme Court in *Sony*: a noncommercial use of copyrighted material is presumptively fair and therefore not an infringement. Allowing lawsuits threatening huge statutory damages against noncommercial users utterly destroys that presumption, which means the statute should not be interpreted to permit such result. The argument heading for this reply memorandum is quoted from the brief of the United States to which it is replying: "This Court Should First Determine Whether the Constitutional Questions Raised by Defendant Can Be Avoided." We fully agree with its principle and ask the Court to apply it. Clearly, the constitutional challenges to the statute can be avoided by interpreting § 504 to apply only to commercial infringers.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, the undersigned hereby certify that on May 15, 2009, I caused a copy of the foregoing **DEFENDANT'S REPLY TO THE UNITED STATES OF AMERICA'S MEMORANDUM IN RESPONSE TO DEFENDANT'S MOTION TO DISMISS AND IN DEFENSE OF THE CONSTITUTIONALITY OF THE STATUTORY DAMAGE PROVISION OF THE COPYRIGHT ACT, 17 U.S.C. § 504(c)** to be served upon the Plaintiffs via the Electronic Case Filing (ECF) system at the following addresses:

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