

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

**DEFENDANT'S SUBMISSION IN RESPONSE TO THE
COURT'S SCHEDULING ORDER OF MAY 28, 2009**

Counsel for the parties have constructively conferred by telephone and have reached agreement on a number of scheduling matters, but Plaintiffs' counsel is unable today to complete a joint filing. Defendant Tenenbaum herewith responds to the Court's scheduling order with his objections and with statement of what has been agreed with opposing counsel, and will consolidate this response with Plaintiffs' response in a joint filing as soon as counsel are able to complete it.

Defendant Joel Tenenbaum objects to the Court's proposed schedule because it will moot Supreme Court review of the issues he is raising relating to public internet access to further public proceedings in this case. Accordingly, Defendant Tenenbaum, by separate filing, is requesting a stay of all further public proceedings in this case pending Supreme Court review.

Defendant Tenenbaum objects to the Court's suggestion that his constitutional challenge to Plaintiffs' quest for statutory damages can be deferred until or after trial if, by this suggestion, the Court means to defer determination of whether 17 U.S.C. Section 504's statutory provision even applies to a noncommercial defendant. Defendant's motion to dismiss (doc no. 779) at base calls for a simple interpretation of the supposedly applicable statute: Section 504's provision of statutory damages applies only to commercial defendants (doc. nos. 780 and 829). If indeed statutory damages are not available to Plaintiffs in a suit against a noncommercial defendant, then, because Plaintiffs here offer neither allegation nor proof of actual damages, Defendant Tenenbaum will be entitled to summary judgment or directed verdict before trial. This issue of statutory interpretation cannot be deferred. If the Court interprets Section 504 to apply to noncommercial defendants, then and only then do the constitutional issues arise.

With respect to presently outstanding discovery matters:

(1) Defendant Tenenbaum has sent to plaintiffs supplementary disclosures regarding two expert witnesses and will send the third by June 5.

(2) Defendant Tenenbaum will comply today with the court's order of May 13, 2009, to produce CD's and documents on June 1, as previously agreed with opposing counsel.

(3) Defendant Tenenbaum will produce John Palfrey, who resides in Cambridge, for deposition within this district as requested by June 26, 2009. With respect to Johan Pouwelse and John Perry Barlow, both of whom live beyond the district, Defendant Tenenbaum lacks the funds to fly them here. Defendant Tenenbaum has requested pursuant to Fed. R. Civ. P. 30(b)(4) that plaintiffs stipulate to deposition by telephone with a stenographer present on the same terms as previously ordered by the Court with regard to another deposition, and is awaiting Plaintiffs' response to this request.

Respectfully submitted,

JOEL TENENBAUM

By his attorneys,

/s/ Charles R. Nesson

Charles R. Nesson, Esq.

1575 Massachusetts Ave.

Cambridge, MA 02138

617-495-4609

Matthew H. Feinberg, Esq.

Feinberg & Kamholtz

125 Summer St., 6th Floor

Boston, MA 02110

617-526-0700

Attorneys for Defendant

Dated: June 1, 2009

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on June 1, 2009.

/s/ Charles R. Nesson