UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CAPITOL RECORDS, INC. et al.,	)	
	)	Civ. Act. No. 03-cv-11661-NG
Plaintiffs,	)	(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	)	
	)	
Defendant.	)	

DEFENDANT'S REPLY TO PLAINTIFFS
WITH RESPECT TO FAIR USE – Leave to File Granted May 15, 2009

Joel Tenenbaum has the right recognized by the Supreme Court in *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1980) to trial by jury of the infringement claims against him.. He will defend before the jury against the plaintiffs' charges of infringement on grounds that his use in the context of its time was fair.

Fairness borders copyright infringement. Proving that the defendant infringed entails proving that his copying was not fair. "[One] who makes a fair use of the work is not an infringer of the copyright with respect to such use," *Sony Corp. of Amer. v. Universal City Studios, Inc.,* 464 U.S. 417, 433 (1984). Whether the unfairness of a noncommercial defendant's use need be proved as part of the copyright holder's affirmative case or whether the fairness of the defendant's alleged copying must be advanced by the defendant as an affirmative defense, the issue of the fairness of the defendant's use is integral to the decision the jury must make as to whether the defendant's actions were infringements.

Fairness is a standard, not a rule. Fairness is not legally defined as a rule. No simple definition of fair use can be fashioned, no bright-line test exists. See Fisher, *Reconstructing Fair Use*, 101 Harv. L. Rev. 1661, 1662 (1988); Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1110 (1990). The fair use doctrine, which section 107 codifies, is the precipitate of a series of judicial decisions, beginning in the mid-nineteenth century, in which federal courts held that conduct seemingly proscribed by the copyright statute in force at the time did not give rise to liability. In the early cases, the question whether the defendant's conduct constituted a "fair use" was not always clearly differentiated from the question whether it infringed the plaintiff's copyright.[1] In the mid-twentieth century, however, courts began more

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(1) [1] *See, e.g.,* Folsom v. Marsh, 9 F. Cas. 342, 345, 348-49 (C.C.D. Mass. 1841) (No. 4901) (holding that some activities inconsistent with the terms of the copyright statute nevertheless constitute "fair and bona fide abridgement[s]" or "justifiable use[s]" and therefore do not give rise to liability); Lawrence v. Dana, 15 F. Cas. 26, 60 (C.C.D. Mass. 1869) (No. 8136); Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied,* 282 U.S. 902 (1931); Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir.), *cert. denied,* 298 U.S. 669 (1936); Twentieth

consistently to refer to "fair use" as a distinct legal issue — specifically, as an affirmative defense excusing putatively infringing behavior.[2] In 1976, when it overhauled the copyright law, Congress acceded to this emergent view and in section 107 acknowledged and lent its approval to the fair use defense. Congress' purpose was neither to alter nor to "freeze" the doctrine as it had been developed by the courts, but simply to legitimate it. See H.R. REP. NO. 1476, 94th Cong., 2d Sess. 66 (1976) ("The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change."); S. REP. NO. 473, 94th Cong., 1st Sess. 62 (1975).

Section 107 of the Copyright Act commands that in determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

Defendant Tenenbaum expects and plans to offer the jury evidence relating to each one of these four factors, just as they are articulated in the statute, with the jury to decide their

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Century Fox-Film Corp. v. Stonesifer, 140 F.2d 579, 582 (9th Cir. 1944).

[2] *See, e.g.,* Holdredge v. Knight Publishing Corp., 214 F. Supp. 921, 924 (S.D. Cal. 1963); Rosemont Enters. v. Random House, Inc., 366 F.2d 303, 306-07 (2d Cir. 1966), *cert. denied,* 385 U.S. 1009 (1967); Time v. Bernard Geis Assocs., 293 F. Supp. 130, 144 (S.D.N.Y. 1968); Meredith Corp. v. Harper & Row, Publishers, 378 F. Supp. 686, 689 (S.D.N.Y. 1974).

meaning as they apply to the facts of his particular case. Defendant Tenenbaum expects and plans as well to offer the jury evidence relating other factors that bear on the jury's assessment of whether the defendant's actions in their context were unfair. Such will include the copyright holder's knowledge of and assumption of risk when it published the copyrighted work that the work would be ripped and shared on p2p networks; the copyright holder's delay in providing alternatives to p2p downloading, thus creating an environment in which even the RIAA concluded that suits against p2p downloader's would be unfair until such alternatives existed; the defendant's history of buying music and of copying music from one format to another; the availability and the defendant's knowledge and understanding of the availability at the time of his alleged actions of alternatives to p2p downloading; the defendant's actual use of the copyrighted works; and the messages of the allegedly downloaded songs and artists.

It makes no difference what factual fair-use findings various courts have made in other equitable and jury waived contexts. Each case is necessarily be considered and decided on its own facts based on all the evidence in the particular case.

Respectfully submitted,
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June 5, 2009.

Counsel for Joel Tenenbaum

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 5, 2009, a copy of the foregoing DEFENDANT'S REPLY TO PLAINTIFFS WITH RESPECT TO FAIR USE was served upon the Plaintiffs via the Electronic Case Filing (ECF) system.

/s/Charles R. Nesson
Counsel for Joel Tenenbaum