

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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CAPITOL RECORDS, INC. et al.,)	
	Plaintiffs,)	Civ. Act. No. 03-cv-11661-NG
)	(LEAD DOCKET NUMBER)
v.)	
NOOR ALAUJAN,)	
	Defendant.)	
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SONY BMG MUSIC ENTERTAINMENT, et al.)	
	Plaintiffs,)	Civ. Act. No. 07-cv-11446-NG
)	(ORIGINAL DOCKET NUMBER)
v.)	
JOEL TENENBAUM)	
	Defendant.)	
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**DEFENDANT'S MEMORANDUM RELATING TO VARIOUS ISSUES RAISED AT
ORAL ARGUMENT OF MOTIONS ON JUNE 5, 2009**

1. With Respect to Defendant's Federal Claim for Abuse of Process

Please, do not declare that the federal judiciary has no power to stop the RIAA's abuse. The federal court and its presiding judge need not be helpless to resist.

The key supreme court case is *Wheeldin v. Wheeler*, 373 U.S. 647 (1963), in which a federal cause of action for abuse of process was denied to a person victimized by the service upon him of an improperly issued congressional subpoena. *Wheeldin* makes clear that such a

cause of action could be recognized in a case involving greater federal interest than was presented there. Mr. Justice Brennan, joined by Chief Justice Warren and Justice Black, speak directly to the issue of the power in federal courts to create causes of action as federal common law:

Mr. Justice Brandeis' dictum: "There is no federal general common law," *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, cannot, of course, be taken at its full breadth. "Although federal judicial power to deal with common-law problems was cut down in the realm of liability or its absence governable by state law, that power remained unimpaired for dealing independently, wherever necessary or appropriate, with essentially federal matters, even though Congress has not acted affirmatively about the specific question." *United States v. Standard Oil Co.*, 332 U.S. 301, 307. "Were we bereft of the common law, our federal system would be impotent." *D'Oench, Duhme & Co. v. F. D. I. C.*, 315 U.S. 447, 470 (concurring opinion). And so in a wide variety of cases the federal courts have assumed to fashion federal common-law rights.

(Id at 663)

The federal judiciary, and your honor in particular as a judge presiding over a case in which the RIAA's abusive litigation campaign is being played out, are not impotent to protect the court's process against abuse unless your honor says so.

2. With Respect to Defendant's State Claim for Abuse of Process

The underlying proposition that threatens to lead the your honor to the conclusion that we have no state law cause of action for abuse is that the Plaintiffs are doing just what Congress intended when, in 1999, Congress raised the maximum statutory damage to \$150,000. From this it is to follow that if we have a complaint of abuse, our complaint is not to be heard by judge or jury, but must be directed instead to Congress.

Please reconsider this line of reasoning in three respects. First, it buggers reality to say that Congress authorized the RIAA litigation campaign. At the time the act was passed, Napster

and peer-to-peer music file-sharing had not yet burst upon the scene. A massive litigation campaign against noncommercial users was nowhere in congressional sights. The 1999 act slipped through Congress as a noncontroversial measure to raise statutory damage limits in order to keep up with inflation in the amount of money needed to deter commercial copyright offenders. As Congressman Berman explained the change: "Our purpose must be to provide meaningful disincentives for infringement, and to accomplish that, the cost of infringement must substantially exceed the cost of the compliance so that those who use or distribute intellectual property have incentive to comply with the law." 145 Cong. Rec. H 12994 (Nov. 18, 1999). Berman obviously is not talking about the cost of compliance for noncommercial users, which is close to nothing and had not inflated. He is speaking about a disincentive big enough to force commercial infringers who are making big money and from infringement to give it up. No mention is made of noncommercial users. There were no hearings, no committee reports, no debate, no consideration whatever from which it could be concluded that Congress authorized the RIAA's quasi-criminal prosecution campaign against American music fans.

Second, in order to construe the statute to encompass the RIAA's purpose and strategy of execution and thus eliminate our allegation of "ulterior" purpose, your honor must leap over the rules of statutory instruction counseling against expansive construction of a statute impinging upon public freedoms when being applied to new technology that Congress has not considered. "In a case like this," said the Supreme Court in *Sony*, "in which Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests." *Sony Corp. of America v. Universal City Studio*, 464 U.S. 417, 431 (1984). This caution strengthens the more general rule of construction to avoid constitutional issues, all of which taken together should lead the Court to

see that RIAA's litigation campaign and purpose has overreached the statute. To the extent its purpose overreaches the statute it is ulterior.

Third, if your honor nonetheless entertains the fiction that Congress authorized the RIAA's litigation campaign in just the form it has been and is being prosecuted against Mr. Tenenbaum, then the Court must hear our objections that such a congressional delegation of prosecutorial power to a private industry association is unconstitutional. Instead it seems the constitutional arguments we have raised are to be pushed under the rug, deferred somehow until after trial, even though ruling on them in the RIAA's favor would seem a necessary premise for dismissing our claims of abuse. To hold that we have no claim for abuse the Court implicitly rules against our constitutional arguments without having addressed them.

3. With Respect to the *Sony* Presumption of Fair use for Noncommercial Users:

The key passage in the Supreme Court's great *Sony* decision speaks directly to the situation before this court:

Even copying for noncommercial purposes may impair the copyright holder's ability to obtain the rewards that Congress intended him to have. But a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create. The prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit.

In other words, noncommercial use that causes no damage and no potential for damage is not infringing. The opinion continues:

Thus, although every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter. A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. Actual present harm need not be shown; such a requirement would leave the copyright holder with no defense against predictable damage. Nor is it

necessary to show with certainty that future harm will result. What is necessary is a showing by a preponderance of the evidence that some meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.

464 U.S. 417, 452 (1984)(emphasis added).

The relevant question, then, with respect to Mr. Tenenbaum's entitlement to this presumption, is whether his use was "for commercial gain." If it was not, and clearly it was not, then the copyright holder who is charging infringement must demonstrate by a preponderance of the evidence that some meaningful likelihood of future harm exists. This burden of proof unquestionably rests on the Plaintiffs.

Plaintiffs try to say that because Mr. Tenenbaum's use had some potential market effect, Mr. Tenenbaum should not be considered a noncommercial user. But this is completely circular where the *Sony* presumption is concerned; Plaintiffs assume potential effect of Joel's conduct on the market, yet this is precisely what *Sony* says they must prove. Plaintiffs' contention that Mr. Tenenbaum was somehow bartering illegal songs with other users through KaZaA is both irrelevant entirely unsubstantiated. According to Plaintiffs, a person who engages in file-sharing does so with the expectation of receiving copyrighted works in return and, thus, does so for financial gain. But it is undisputed that a user of KaZaA can download songs without sharing any songs in return. This is what MediaSentry claims it did. It is undisputed, too, that there is no deal between the users of KaZaA requiring reciprocal sharing.

The principle of the *Sony* presumption of fair use for noncommercial users extends to all relevant fair use factors. Fair use is the principle we the people must live by in a legal regime that makes any copying whatever of a copyrighted work an infringement for which we may be sued and threatened with huge statutory fines. It is not a concept limited to music files, but extends to

creative and consumptive uses of all the vast array of copyrighted works that fill our environment. The whole doctrine is set up so that a commercial user of a copyrighted work has to go to the time and trouble of getting permission to use the work, which typically means paying for it or risking being sued, which lawyers for commercial users advise against. This same regime applied to noncommercial users who have neither money nor lawyers would be a dreadful imposition on people's freedom without any compensating benefit. The presumption of fair use is their protection.

4. With Respect to Scheduling of Further Discovery and Trial

Defendant Tenenbaum wishes to keep the July 20, 2009, trial date, even if your honor allows us to proceed with our counterclaims and regardless of what you rule on fair use. We will use interrogatories, document requests and admissions for any further discovery, take no depositions, and be ready to go on the schedule set.

Dated: June 9, 2009.

Respectfully submitted,

/s/ Charles R. Nesson
Charles R. Nesson
1575 Massachusetts Avenue
Cambridge, MA 02138
E-mail: nesson@law.harvard.edu
Telephone: (617) 495-4609

ATTORNEY FOR DEFENDANT

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 9, 2009.

/s/ Charles R. Nesson

Charles R. Nesson
1575 Massachusetts Avenue
Cambridge, MA 02138
E-mail: nesson@law.harvard.edu
Telephone: (617) 495-4609

ATTORNEY FOR DEFENDANT

Claire E. Newton
Robinson & Cole LLP
One Boston Place
Suite 2500
Boston, MA 02108
617-557-5900
Fax: 617-557-5999
Email: cnewton@rc.com

Eve G. Burton
Holme Roberts & Owen LLP
Suite 4100
1700 Lincoln Street
Denver, CO 80203-4541
303-866-0551
Email: eve.burton@hro.com

John R. Bauer
Robinson & Cole LLP
One Boston Place, 25th Floor
Boston, MA 02108
617-557-5900
Fax: 617-557-5999
Email: jbauer@rc.com

Laurie Rust
Holme Roberts & Owen LLP
Suite 4100

1700 Lincoln Street
Denver, CO 80203-4541

Nancy M. Cremins
Robinson & Cole LLP
One Boston Place
Boston, MA 02108-4404
617-557-5971
Fax: 617-557-5999
Email: ncremins@rc.com

Timothy M. Reynolds
Holme Roberts & Owen LLP
1801 13th Street
Suite 300
Boulder, CO 80302
393-861-7000
Email: timothy.reynolds@hro.com