

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., ) Plaintiffs, )	Civ. Act. No 07-cv-11446-NG
) )	(ORIGINAL DOCKET NUMBER)
v. )	
) )	
JOEL TENENBAUM, )	
) )	
) Defendants. )	
_____ )	

**DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTIONS TO STRIKE  
DEFENDANT'S EXPERT WITNESSES AND TO MODIFY DISCOVERY SCHEDULE**

Defendant respectfully submits this memorandum of law in opposition to Plaintiffs' Motions:

**I. Fair Use and the Presumption of Fair Use in Favor of Defendant Tenenbaum as a Noncommercial User:**

The Federal Rules of Civil Procedure create the environment in which civil justice is to be played out in the District Courts of the United States of America. The business of the civil court is framed by the remedies it offers to those who litigate before it: injunctive relief, compensatory damages, and, rarely, a (historically and conceptually questionable) punitive award as an add-on in some cases. In contradistinction,

the Federal Rules of Criminal Procedure create the environment in which criminal justice is meted out. The business of the criminal court is punishment.

The plaintiffs in this case admit that they lose money on these lawsuits. Their stated objective, however, is not to obtain compensatory damages but to send a message through the threat and imposition of high statutory fines unrelated to any actual damage in order to convey to the digital public at large that file-sharing is illegal and wrong. They assert that this course of action has been authorized by Congress in a debate that Congress never actually had. The remedy they seek is punishment, not as add-on but as primary to their deterrent message.

The Federal Rules of Civil Procedure were not built for individual defendants with limited funds. All of the expensive and time-consuming formalities of which this Court eloquently spoke in declaring that the recording industry's lawyers' use of them to crush *pro se* defendants was objectionable were less onerous by far than those that now face the defendant herein who has chosen to exercise his constitutional right to a jury trial. The impediments to being able to put his case before a jury, imposed upon a noncommercial defendant by his commercial adversary's full-court press for punctilious conformity to rigid rules of procedure backed by court compulsion and sanction, are

only somewhat relieved by volunteer help of a professor and his students.

Plaintiffs array the formalities of the civil rules and the expense of compliance with them as weapons in their war under the aegis of the *Noerr-Pennington* doctrine, which they see as entitling them to unleash the full might of civil litigation against noncommercial users to crush them into settlement, giving them only the choice to avoid being raped by their timely consent.

With deterrent punishment the objective of the Plaintiffs' case, Joel could rightly claim to be entitled to the protections of the criminal rules of procedure. There is no precedent of a civil defendant who is not sued for any actual damage but is arbitrarily picked out of a mass of like individuals to be grievously punished. The criminal rules are built for the punishment of defendants without money: they accord a presumption of innocence, a standard of proof beyond reasonable doubt, the ability to assert the Fourth, Fifth, and Sixth Amendments in response to compulsion, a right to appointed counsel -- in short, a presumption of innocence that is more than just a matter of pleading.

But if Joel is to be tried under the civil rules, he is at least entitled to the functional equivalent of the criminal presumption of innocence in the civil context of copyright

infringement: the presumption of fair use in favor of the noncommercial user. This presumption mirrors the power relationship between the state and the individual criminal defendant in its establishment of procedural balance in the civil context between the power of the commercial power and the weakness of the individual noncommercial user. The presumption of fair use offers the noncommercial user a critical procedural defense against the massive power of the lawyers for commercial plaintiffs. It is not just a defense to be asserted at trial. It stands as a guideline that should inform the trial judge at each step of the proceedings to use all judicial discretion to assist the noncommercial user in presenting his case to the jury, including decisions respecting the imposition of the formalities of judicial process upon him.

Judge Davis is dead wrong in asserting that the Supreme Court repudiated *Sony's* judicial presumption in favor of noncommercial users. Judge Davis not only misreads *Acuff* but misses the whole point of fairness expressed in *Sony*. *Sony* is about being fair to noncommercial users, not only in the eventual resolution of the issues but also in the process of the law to get there. Each of the defaults that the Plaintiffs' lawyers point out to the Court in the punctuality and completeness of the Defendant's responses is testimony that the burden of the process being imposed is crushingly beyond the

means of noncommercial defendants. Even with a *pro bono* lawyer, his choice to go before a jury is strewn with motions to strike and threats of sanctions.

The *Sony* presumption responds to this burden. *Sony* speaks to the burden of proof on the issue of fairness, not to the question of who must plead it. *Sony* makes clear that, once fair use is raised, the burden of proof is on the copyright holder. The statute making fair use an affirmative defense does not change this. This very statute recognizes fair use as an affirmative defense and is at pains to say it means to recognize fair use as it had been judicially developed and means not to intrude upon judicial competence to continue to develop the doctrine in the future. Congress had already passed this statute when *Sony* was decided. That did not affect the Supreme Court's analysis in *Sony* and should not affect the Court's analysis here.

*Acuff* does not retrench from nor contravene *Sony*. In *Acuff*, the copyright holder was asserting a presumption against fair use. The *Sony* court had said in its preamble to its assertion of the presumption for fair use for noncommercial users, "if the intended use is for commercial gain, that likelihood [of market effect] may be presumed," then went on to the point this prelude was meant to emphasize by contrast: "But if it is for a noncommercial purpose, the likelihood must be demonstrated." In

*Acuff* the copyright holder of the song "Pretty Woman" attempted to use the preamble statement to impose a presumption of fair use *against* a commercial defendant who had parodied "Pretty Woman" in a publication sold for profit. The *Acuff* Court came to the defense of the fair use of parody by recognizing that its *Sony* dictum of presumption *against* commercial assertions of fair use was hyperbole. It is a total misuse and misreading of *Acuff* to turn it against the interests of noncommercial fair users.

Joel Tenenbaum did not choose this fight. He defends on grounds he did nothing wrong, that at the time he is alleged to have shared music, it was not unfair of him to do so. If it was fair to share in the open music of the net then it was not against the law. The act of copying a copyrighted work is not an infringement unless the act of copying it is unfair. Action that is fair in its time and place is not an infringement. Whether his actions were fair is to be determined on the facts of each case and is for the jury in this case to decide.

This is not nullification; it is built right into the law. Every Supreme Court case declares that it is the jury's responsibility to say what the fair boundary of copyright is in any given case. The Seventh Amendment guarantees Joel his right to a trial of this issue by a jury of his peers.

The jury must focus on the moments when Joel's actions took place, and to decide whether it is fair to allow the actions of

the defendant to create a right in the copyright holder to recover statutory damages from him. Relevant factors bearing on the jury's assessment of this assessment logically and legally include:

(1) the purpose and character of the use, including whether such use was of a commercial nature. Joel's use was for personal enjoyment and sharing with friends in an entirely noncommercial way.

(2) the nature of the copyrighted work, which in this case consists of songs, music that kids love to share.

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole. According to the copyright registrations offered by Plaintiffs to support their infringement claim, the whole works in question for each of the seven clicks here at issue are whole albums, whereas Joel is claimed only to have shared individual songs.

(4) the effect of deeming the actions to be fair on the potential market for or value of the copyrighted work. This may depend on the time frame in which the jury chooses to evaluate

this factor. The law is not a guarantee against business loss from progress; the music business is alive and well.

(5) the behavior of the copyright holder in relation to the defendant's action and state of mind. Did the plaintiffs assume the risk when they published; did they undertake but fail to protect their work from open proliferation; did they try to knock out the seed once their work had been ripped and posted; did they in any measure bearing on the fairness issue assume the risk of the work being ripped and proliferated; were they in any measure bearing on the fairness issue responsible for creating the risk.

(6) the availability of a fair alternative: had the plaintiffs provided fair alternatives through paid digital downloads to free sharing p2p; could they have. For example, in *Harper & Row*, the Supreme Court had indicated that a work's availability has a direct bearing on the proper scope of fair use.

(7) if Joel's actions of filesharing are deemed unfair, the effect of creation of a right in the copyright holder to collect statutory damages from him on others, including the the arbitrariness and fruitlessness of singling this defendant out for punishment.



These factors must all be considered by the jury in rendering their verdict.

**II. Defendant's Response to Plaintiffs' Motion to Strike Experts:**

Plaintiffs have moved to strike all three of the Defendant's expert witnesses for lack of conformity to the strictures of Rule 26. None of these experts is paid. Each is coming forward to assist the Court and jury as a volunteer. John Perry Barlow is an expert in the music business whose statements will bear directly on the factors of fairness relating to industry behavior. John Palfrey is the leading academic researcher on (i) the understanding of digital natives like Joel of fair use and (ii) the changes in this understanding over time. His testimony will bear directly on the reasonableness of Defendant Tenenbaum's state of mind and actions in relation to his peers. Johan Pouwelse is an expert in p2p networks and functioning. In addition to challenge the MediaSentry evidence Plaintiffs will offer to prove copying. He will also testify to the growth over time of p2p filesharing and the fruitlessness of using lawsuits to stop it.

Plaintiffs neglect to tell the Court that Defendant Tenenbaum offered to make John Palfrey available for deposition within the district on two dates which were rejected by

Plaintiffs because the dates did not suit their convenience, and that Defendant Tenenbaum continues to be perfectly willing to produce Prof. Palfrey for deposition at a mutually convenient time and place and in an environment that is digitally recorded.

Plaintiffs likewise neglect to tell the Court that Defendant Tenenbaum informed them that he cannot afford to fly Mr. Barlow from San Francisco to Boston and Johan Pouwelse from Amsterdam to Boston so that the Plaintiffs can depose them, and that Defendant Tenenbaum suggested instead that the depositions be done remotely and costlessly by internet conference, a suggestion as to which Plaintiffs' counsel said he would confer with his client and to which the client has now responded with motions to strike and compel. Counsel undersigned has this day written to each of them in light of the Court's rulings on fair use to ask each to further supplement their declarations with respect to the seven factors listed above and to supply any additional supporting data for their anticipated testimony. Defendant's counsel will file these further declarations in advance of their depositions.

Plaintiffs also neglect to mention that they have entirely ignored the Defendant's interrogatories served upon them.

**III. Defendant's Response to Plaintiffs' Motion to Amend Schedule and Further Depose Joel Tenenbaum on Fair Use**

Plaintiffs make four requests:

(1) Plaintiffs want the Defendant to produce all previously requested documents relating to his experts and make those experts available for depositions in the District of Massachusetts at the dates and locations selected by the Plaintiffs before July 3, 2009. Defendant Tenenbaum will make John Palfrey available within the District of Massachusetts on a date prior to July 3, 2009, and Mr. Barlow and Mr. Pouwelse by internet deposition prior to July 3, 2009.

(2) Plaintiffs seek leave to supplement their expert disclosures and to disclose any potential rebuttal experts on or before July 10, 2009. To this Defendant Tenenbaum has no objection.

(3) Defendants seek to further depose Joel Tenenbaum before July 3, 2009. Defendant Tenenbaum agrees to be further deposed limited to the issue of fair use. He offers dates of June 23-26, 2009. He wants it taken at a place convenient to him, and wants no complaint about it being digitally recorded.

(4) Plaintiffs seek to extend the time for the filing of any Motions for Summary Judgment to and including July 6, 2009, with any responses due on July 13, 2009. To this Defendant Tenenbaum has no objection.

**IV. Further Discovery by the Defendant on the Issue of Fair Use:**

(a) Defendant is today serving deposition notices upon the plaintiffs to produce for deposition the persons most knowledgeable about factors 4, 5, and 6 listed above. Defendant Tenenbaum requests that the Court compel the Plaintiffs to provide deponents at the noticed time and place and in any event before July 3, 2009.

(b) Defendant is also serving upon plaintiffs today a second set of interrogatories and a first set of requests for admissions bearing on these same factors.

(c) Defendant is also today filing a motion to compel plaintiffs to respond to Defendant's first set of interrogatories.

(d) Defendant requests that the Court compel the Plaintiffs to respond to his interrogatories at least one day prior to the first of the depositions described in (a) above and at the latest by July 3, 2009.

Dated: June 15, 200

Respectfully submitted,

/s/Charles R. Nesson

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**CERTIFICATE OF SERVICE**

I, the undersigned hereby certify that on June 15, 2009, I caused a copy of the foregoing DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTIONS TO STRIKE DEFENDANT'S EXPERT WITNESSES AND TO MODIFY DISCOVERY SCHEDULE to be served upon the Plaintiffs via the Electronic Case Filing (ECF) system.

/s/Charles R. Nesson  
Charles R. Nesson  
Attorney for Defendant