UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

DECLARATION OF CHARLES NESSON IN RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE

With respect for the legitimate authority of the Court, I have felt it necessary to approach (but hopefully not cross) the boundary of the Court's authority to circumscribe the liberty of my client (and me on his behalf) to record the history of the process to which he is forced to submit. At no point have I crossed that boundary and I am certain that I have never been surreptitious.

Plaintiffs claim that, at the first Joel Tenenbaum deposition held in fall 2008, I surreptitiously recorded their counsels' conversations. This is completely false. They knew then, and they know now, that I had my recorder on at that deposition. The recorder was placed openly in the middle of the conference table and its red light was on (indicating that it was recording). My recording was not secret.

More recently, upon my request to use digital means for recording depositions, the Court ruled on June 16, 2009, that "the Defendant is permitted to record the remaining depositions in any manner consistent with the requirements of Fed. R. Civ. P. 30(b)(3)," which states that "testimony may be recorded by audio, audiovisual, or stenographic means."

Pursuant to the Court's order, I recorded John Palfrey's deposition (July 1, 2009) and Joel Tenenbaum's second deposition (July 8, 2009) with an Olympus digital voice recorder. I recorded Johan Pouwelse's deposition (July 2-3, 2009) using XMeeting, which is open source Internet videoconferencing software for Macintosh computers agreed to by opposing counsel that enables audio-visual exchange and near costless digital recording.

Plaintiffs now claim that I violated the Court's order by (1) failing to give advance notice that I intended to record these depositions and (2) posting a part of the Palfrey

deposition to the web. They ask for sanctions. There is no factual basis for their claims.

First, the Plaintiffs were unquestionably on notice that I would record these depositions. The point of my oral argument on June 29 was to obtain the Court's approval for taking and recording the depositions of Barlow and Pouwelse through the Internet, and the Court ordered that such recording would be permitted. Plaintffs' counsel and I spoke more than once prior to Dr. Pouwelse's deposition as to the type of recording that would be done. To require notice beyond this would be make-work and to raise this issue now as a ground for sanctions is to compound it.

Nor did I violate the Court's order not to post the depositions to the net. The Court's order states: "The parties are cautioned, however, that the decision to publicize any recording, on the internet or otherwise, may be regarded as an effort to taint the jury pool in advance of trial." I take this admonition seriously and have not acted in violation of it. I have not posted the recordings of the Pouwelse and second Tenenbaum depositions. I have not posted any of the substance of the Palfrey deposition nor any of his sworn testimony. My only posting is approximately six minutes of Plaintiffs' counsel's remarks to me and to the witness seeking to limit the extent to which Professor Palfrey and I can write about the event on the

net in twitter and blog. Plaintiffs counsel's attempts to restrict the witness and myself from expressing ourselves this way is, I hope, outside the letter and scope of the Court's order. My internet posting of my objections relates only to the issues of free speech and public access. What is posted is not testimony from the deposition and was neither intended to nor capable of tainting the jury pool.

Plaintiffs also assert (and the Court in its show cause order repeats) that the postings were to "the Berkman Center's website". This is incorrect. The URL to which RIAA directs the Court, http://cyber.law.harvard.edu/~nesson/, is webspace I use for file storage that is neither reviewed nor endorsed by the Berkman Center; the files therein are not linked to on the Berkman Center website. The same is true of my blog at http://blogs.law.harvard.edu/nesson/, an independent website hosted by, but not curated, reviewed, or endorsed by the Berkman Center.

Plaintiffs' motion should be seen for what it is: a tactic to distract and sap the energy, and resources and reputations of those they oppose. It should be denied.

Respectfully submitted,

Dated: July 9, 2009

/s/Charles R. Nesson
Charles R. Nesson
Counsel for Joel Tenenbaum

CERTIFICATE OF SERVICE

I, the undersigned hereby certify that on July 9, 2009, I caused a copy of the foregoing DECLARATION OF CHARLES NESSON IN RESPONSE TO THE COURT'S ORDER TO SHOW CAUSE to be served upon the Plaintiffs via the Electronic Case Filing (ECF) system.

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