UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UMG RECORDINGS, INC., et al, 05 CV 1095 (DGT) (RML)

Plaintiffs,

-against-

MARIE LINDOR,

Defendant.

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DEFENDANT'S REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO FILE SECOND AMENDED ANSWER

Incredibly, plaintiffs assert, without citing any authority, that "by definition, statutory damages are not punitive." See Opposing Brief, p. 4. In the very next sentence, however, plaintiffs admit that one of the goals for which statutory damages are intended to achieve is "punish[ment] for improper conduct." Id. See also Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co., Inc., 74 F.3d 488, 496 (4th Cir. 1996) (purposes for copyright statutory damages are "compensation *and* punishment") (italics added); Unicity Music, Inc. v. Omni Communications, Inc., 844 F. Supp. 504, 510 (E.D. Ark. 1994) (noting that an award of statutory damages under copyright law is intended to *both* compensate the plaintiff and punish the defendant); see also Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 352 (1998) ("[S]tatutory damages may serve purposes traditionally associated with legal relief, such as compensation and punishment.").

In arguing that statutory damages are not subject to review for unconstitutional excessiveness, plaintiffs further assert, again without citing any authority, that it is not possible to determine what portion of a statutory award is punitive. Id. Such agnosticism has been rejected by the highest Court in the land. See United States v . Halper, 490 U.S. 435, 446, 449 (1989) (although there are many situations where "rough remedial justice" is required because "damages are difficult to quantify," there is a point "at which a civil sanction has accomplished its remedial purpose of making the Government whole, [and] beyond which the sanction takes on the quality of punishment"). Damages in a copyright case are no less susceptible to measurement than damages in any other kind of civil lawsuit - including such difficult-to-quantify items as injury to reputation in a defamation case, pain and suffering in a personal injury case, and emotional distress in an insurance bad faith case. Yet the law is crystal clear that punitive awards in such cases must be reviewed for excessiveness. This holds true for statutory damages in copyright cases.

> [E]ven if harm is difficult to calculate precisely, *it is clear that some portion of the damage award, at least in copyright cases, is punitive*…. [A]lthough a statutory award may not expressly embody a punitive element, it should be considered partially punitive anytime it exceeds the actual amount of harm caused.

Due Process in Statutory Damages, 3 Geo. J.L. & Pub. Pol'y 601, 627-28 (2005) (italics added). See also Grossly Excessive Penalties In The Battle Against Illegal File-Sharing: The Troubling Effects Of Aggregating Minimum Statutory Damages For Copyright Infringement, 83 Tex. L. Rev. 525, 527 (2004) ("a statutory damage award can be divided into compensatory and punitive components. While distinguishing between the two may seem antithetical to one traditional justification for statutory damages -- to

provide compensation when the harm caused is hard to determine -- *for file-sharing at least, a rough dichotomy can still be drawn….* [T]he punitive component of even the minimum statutory damage award [in file-sharing cases] turns out to be quite large") (italics added).

Moreover, whatever difficulties might be entailed in ascertaining the amount of harm caused are easily addressed within the excessiveness inquiry articulated in BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct. 1589 (1996),[1] and refined in State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513 (2003). As the Supreme Court explained in State Farm, "a higher ratio [of punitive to compensatory damages] *might* be necessary where the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." State Farm, supra, 538 U.S. at 425 (italics in original; internal quotation marks omitted). So too in the case of statutory damages: If, after evidence is presented, the Court is concerned that the actual harm caused by an infringement is understated by that evidence, that may be cause for allowing a statutory award based on a higher ratio to account for that circumstance. But that fear provides no basis for refusing to conduct an excessiveness inquiry at all in such a case, let alone in other cases in which, as here, there is no similar

[1] In a footnote, plaintiffs argue that the excessiveness inquiry required by BMW v. Gore is limited to cases where "the defendant had received no notice of the severity of the penalty that was ultimately imposed." Opposing Brief, p. 6, n.1. On the contrary, "[BMW v. Gore]'s guideposts are applicable even when the defendant has adequate notice of the amount at issue." VF Corp. v. Wrexham Aviation Corp., 112 Md. App. 703, 731 (Md. Ct. Spec. App. 1997), aff'd in part and rev'd in part on other grounds, 715 A.2d 188 (Md. 1998). See Erwin Chemerinsky, Constitutional Law: Principles and Policies 523, 524 (2d ed. 2002) (distinguishing between procedural and substantive due process and noting that "regardless of the procedures followed," substantive due process imposes limits on punitive damage awards); BMW of North America, Inc. v. Gore: Due Process Protection Against Excessive Punitive Damages Awards, 32 New Eng. L. Rev. 157, 194 (1997) (finding that even if the defendant had notice of disproportionately large punitive damages, the award would still be reviewed for gross excessiveness); Grossly Excessive Penalties In The Battle Against Illegal File-Sharing: The Troubling Effects Of Aggregating Minimum Statutory Damages For Copyright Infringement, 83 Tex. L. Rev. 525, 542 (2004) ("A grossly excessive penalty does not satisfy substantive due process merely because the defendant can see it coming").

reason for concern. The proposed amendment merely preserves defendant's right to have such an inquiry at the appropriate time.

Plaintiff also argues that Parker v. Timer Warner Entertainment Co., 331 F.3d 13, 22 (2d Cir. 2003), cited in our moving memorandum of law, "had nothing to do with copyrights." See Opposing Brief, p. 4. While the statutory damages in that case were sought under a statute other than the Copyright Act, the same concern raised by that case -- that the aggregation of many minimum statutory damage awards "may expand the potential statutory damages so far beyond the actual damages suffered" that "the due process clause might be invoked … to nullify that effect and reduce the aggregate damage award" Parker, supra, 331 F.3d at 22 -- is no less a concern in cases involving aggregation of multiple statutory damages claims pursued under the Copyright Act. See Due Process in Statutory Damages, 3 Geo. J.L. & Pub. Pol'y 601, 618 (2005) (the Parker case "evidences an openness on the part of the Second Circuit to apply the due process concerns of [BMW v.] Gore and State Farm to statutory damages").

Plaintiffs also assert that the proposed amendment has no factual basis and raises a "hypothetical" and "abstract" issue that the Court should not be concerned with. On the contrary, defendant has submitted evidence that plaintiffs' actual damages are only about 70 cents per recording. Plaintiffs did not submit any evidence to the contrary. Given that the minimum statutory damages awarded under 17 U.S.C. § 504(c) are $750 per recording, the amount that plaintiffs seek per recording is 1,071 times any actual damages they may have sustained.

Plaintiffs' attorneys claim in their unsworn opposing brief that the aggregate statutory damages for the 38 recordings at issue in this case are not

unreasonable compared with the value of a license to distribute those recordings. See Opposing Brief, p. 8. Plaintiffs have not submitted any evidence for this assertion. Nor have they submitted evidence of any actual acts of distribution that might implicate such a license, or might give rise to any damage.

Plaintiffs have alternatively alleged that defendant downloaded these recordings. We are aware that this averment was made without any evidence whatsoever for it, in violation of Fed. R. Civ. P. 11, but unless and until plaintiffs withdraw the allegation, the amount of plaintiffs' actual damages from such alleged downloading is clearly germane. Given the undisputed affidavit we have submitted that plaintiffs' damages are approximately 70 cents per song, the issue is neither hypothetical nor abstract.

Finally, plaintiffs frivolously assert that defendant was under an obligation to notify the Attorney General of the United States regarding the proposed amendment. Neither 28 U.S.C. § 2403 nor Fed. R. Civ. P. 24(c), cited by plaintiffs, requires *a litigant* to notify the Attorney General when the constitutionality of a federal statute affecting the public interest is drawn into question in a case. In the first place, it is the Court that is required to provide such notification under these provisions.[2] Secondly, it is a stretch to argue that defendant is challenging the constitutionality of the statute itself. Rather, defendant is merely challenging the absurd manner in which plaintiffs are asking this Court to interpret the statute, since were the Court to follow plaintiffs' bidding, its ruling

[2] Local Rule 24.1 requires that a party notify the Court in writing if the party draws into question the constitutionality of a federal statute. This rule, however, does not require the party to notify the Attorney General. Even in the unlikely event that the Court were to conclude that the rule applies to the circumstances of the instant case, the April 25, 2006 and June 22, 2006 letters of defendant's counsel to the Court (see Reply Affidavit, Exhibits "B" and "C", respectively) clearly satisfied the rule's requirement of notice to the Court.

might be unconstitutional. Third, plaintiffs cite no authority for their contention that 17 U.S.C. §504(c) – which creates a private right of action for the holder of a copyright – is even a statute "affecting the public interest".

CONCLUSION

The within motion should be granted in all respects.

Respectfully submitted,

VANDENBERG & FELIU, LLP
Attorneys for defendant Marie Lindor

By:____s/Morlan Ty Rogers____
Morlan Ty Rogers (MR 3818)
110 East 42nd Street, Suite 1502
New York, NY 10017
(212) 763-6800

Of Counsel:
Ray Beckerman
Morlan Ty Rogers