

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 09-1090

IN RE: SONY BMG MUSIC ENTERTAINMENT; WARNER BROS.
RECORDS, INC.; ATLANTIC RECORDING CORPORATION; ARISTA
RECORDS, LLC; AND UMG RECORDINGS, INC.

Petitioners.

ON PETITION FOR EXTRAORDINARY WRIT TO THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

District Court Case No. 07-CV-11446-NG (D. Mass.)
(Consolidated with District Court Case No. 03-CV-11661-NG (D. Mass.))
Hon. Nancy Gertner, United States District Judge, presiding

BRIEF OF RESPONDENT JOEL TENENBAUM

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SUMMARY OF ARGUMENT

“And all Israel heard of the judgment of Solomon; and they feared the king: for they saw that the wisdom of God was in him, to do judgment.”

(1 Kings 3:16)

Respondent Joel Tenenbaum is the defendant in litigation brought by Plaintiff-Petitioners, the “big four” corporations of the music business, acting in concert with their trade association, the Recording Industry Association of America (RIAA). The suit claims willful copyright infringement of seven popular rock songs that Joel downloaded as MP3 files from a global open peer-to-peer digital network. See Complaint. (Addendum at 2) With statutory damages of \$150,000 for each willful infringement, the total threat exceeds a million dollars. Joel’s case is one of more than one hundred such cases in this district alone, all consolidated before Judge Gertner. It is one of thousands of cases filed in federal courts across the country against noncommercial users like Joel. Almost all of the defendants in these cases are unrepresented by counsel. They either settle out of court or suffer default judgment. Joel appeared *pro se* until, at Judge Gertner’s suggestion and with her facilitation, he obtained representation from the undersigned counsel *pro bono*.

Joel counterclaimed against the Plaintiffs for abuse of federal process. (Addendum at 7) Plaintiffs moved to dismiss. Judge Gertner ordered that the hearing on the motion to dismiss be open to the Internet.

QUESTION PRESENTED

Should this Court override the judgment of the trial judge to admit open Internet to her courtroom?

ARGUMENT

Respondent appreciates, acknowledges and adopts the three briefs *amicus curiae* offered by (1) the Electronic Frontier Foundation, Public.Resource.Org, Inc., Media Access Project, Internet Archive, Free Press, California First Amendment Coalition, and Ben Sheffner; (2) Courtroom View Network; and (3) The Associated Press, Courtroom Television Network LLC, Dow Jones & Co., Inc., The Hearst Corporation, Incisive Media LLC, National Public Radio, Inc., NBC Universal, Inc., The New York Times Company, Radio-Television News Directors Association, The Reporters Committee for Freedom of the Press, E.W. Scripps Company, Tribune Company and Washington Post Digital.

Petitioners contend that the trial judge lacks the authority to open her court to an Internet audience. Yet Local Rule 83 in the District of Massachusetts explicitly permits public media access "by order of the court." *Amici curiae* extensively discuss the Petitioners' construction of the rule, and Joel accepts their arguments as his own. See *amicus curiae* Electronic Frontier Foundation *et al.* at 5-6; *amicus curiae* Courtroom View Network at 1-3, 6-14; and *amicus curiae* The Associated Press *et al.*, at 13 *et seq.*

Nor has the trial judge exceeded or abused her authority. Indeed, she is using it to teach respect for law and to educate the public about an issue of great interest and concern.

There is a potentially huge and relevant Internet audience for this case. Joel's peers, the Internet generation, increasingly face copyright's threat to the open net. There is an additional significant audience of students of law eager to learn whether federal court process can be used

to serve industry purposes by overwhelming unrepresented individuals who have caused little or no damage.

Public access to the courtroom is a power and responsibility of the law. The plaintiffs and the RIAA cower before it. The industry plaintiffs in this case claim to fear that public access to this hearing on the abusive nature of their litigation campaign will “highlight selectively the arguments of a single counsel in a limited part of a single case.” (Petition at 27) But this is not so. The trial judge ordered open access to the whole proceeding, gavel to gavel. Any “highlights” on which public media will focus — and they will focus selectively whether the Internet is admitted or not — will depend upon the relative strength of counsels’ argument. The process will be open for all to see.

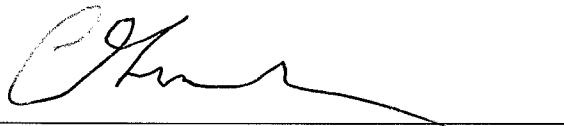
Petitioners also raise question as to “how” the hearing will be aired to the net. Such question is well within the purview of the trial judge. Judge Gertner’s stay order (Addendum at 12) makes clear that distribution will be non-exclusive and open to all.

CONCLUSION

The trial judge’s order opening her courtroom to Internet responds to the needs of both parties, and to the court’s need to retain and extend respect for law and the fairness of judicial process. Wherefore, this Court should deny the petition for prohibition and affirm Judge Gertner’s order.

Dated: January 29, 2009

Respectfully submitted,



CERTIFICATE OF SERVICE

I, Charles R. Nesson, hereby certify that on January 29, 2009, I caused the foregoing documents, viz., the **BRIEF OF RESPONDENT JOEL TENENBAUM** and its attached **ADDENDUM**, to be served on:

Daniel J. Cloherty
Victoria L. Steinberg
DWYER & COLLORA, LLP
600 Atlantic Ave., 12th Floor
Boston, MA 02210

The Honorable Nancy Gertner
U.S. District Court
John Joseph Moakley U.S. Courthouse
One Courthouse Way, Suite 2300
Boston, MA 02210

by hand delivery, and on:

Eve G. Burton
Timothy M. Reynolds
HOLME, ROBERTS & OWEN, LLP
17 Lincoln, Suite 4100
Denver, CO 80203

by Federal Express. All of the abovementioned parties have been served with electronic copies of the foregoing documents.

Dated: January 29, 2009



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ADDENDUM

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SONY BMG MUSIC ENTERTAINMENT, a Delaware general partnership; WARNER BROS. RECORDS INC., a Delaware corporation; ATLANTIC RECORDING CORPORATION, a Delaware corporation; ARISTA RECORDS LLC, a Delaware limited liability company; and UMG RECORDINGS, INC., a Delaware corporation,) CIVIL ACTION No.
Plaintiffs,	
v.	
JOEL TENENBAUM	
Defendant.	

COMPLAINT FOR COPYRIGHT INFRINGEMENT

Plaintiffs assert the following claims against Defendant.

JURISDICTION AND VENUE

1. This is a civil action seeking damages and injunctive relief for copyright infringement under the copyright laws of the United States (17 U.S.C. §101, *et seq.*).
2. This Court has jurisdiction under 17 U.S.C. § 101, *et seq.*; 28 U.S.C. §1331 (federal question); and 28 U.S.C. §1338(a) (copyright).
3. This Court has personal jurisdiction over the Defendant, and venue in this District is proper under 28 U.S.C. § 1391(b) and 28 U.S.C. § 1400(a), in that the Defendant resides in this District, and the acts of infringement complained of herein occurred in this District.

PARTIES

4. Plaintiff SONY BMG MUSIC ENTERTAINMENT is a Delaware general partnership, with its principal place of business in the State of New York.

5. Plaintiff Warner Bros. Records Inc. is a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business in the State of California.

6. Plaintiff Atlantic Recording Corporation is a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business in the State of New York.

7. Plaintiff Arista Records LLC is a limited liability company duly organized and existing under the laws of the State of Delaware, with its principal place of business in the State of New York.

8. Plaintiff UMG Recordings, Inc. is a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business in the State of California.

9. Plaintiffs are informed and believe that Defendant is an individual residing in this District.

COUNT I

INFRINGEMENT OF COPYRIGHTS

10. Plaintiffs incorporate herein by this reference each and every allegation contained in each paragraph above.

11. Plaintiffs are, and at all relevant times have been, the copyright owners or licensees of exclusive rights under United States copyright with respect to certain copyrighted sound recordings (the "Copyrighted Recordings"). The Copyrighted Recordings include but are not limited to each of the copyrighted sound recordings identified in Exhibit A attached hereto, each of which is the subject of a valid Certificate of Copyright Registration issued by the

Register of Copyrights. In addition to the sound recordings listed on Exhibit A, Copyrighted Recordings also include certain of the sound recordings listed on Exhibit B which are owned by or exclusively licensed to one or more of the Plaintiffs or Plaintiffs' affiliate record labels, and which are subject to valid Certificates of Copyright Registration issued by the Register of Copyrights.

12. Among the exclusive rights granted to each Plaintiff under the Copyright Act are the exclusive rights to reproduce the Copyrighted Recordings and to distribute the Copyrighted Recordings to the public.

13. Plaintiffs are informed and believe that Defendant, without the permission or consent of Plaintiffs, has used, and continues to use, an online media distribution system to download the Copyrighted Recordings, to distribute the Copyrighted Recordings to the public, and/or to make the Copyrighted Recordings available for distribution to others. In doing so, Defendant has violated Plaintiffs' exclusive rights of reproduction and distribution. Defendant's actions constitute infringement of Plaintiffs' copyrights and exclusive rights under copyright.

14. Plaintiffs have placed proper notices of copyright pursuant to 17 U.S.C. § 401 on each respective album cover of each of the sound recordings identified in Exhibit A. These notices of copyright appeared on published copies of each of the sound recordings identified in Exhibit A. These published copies were widely available, and each of the published copies of the sound recordings identified in Exhibit A were accessible by Defendant.

15. Plaintiffs are informed and believe that the foregoing acts of infringement have been willful and intentional, in disregard of and with indifference to the rights of Plaintiffs.

16. As a result of Defendant's infringement of Plaintiffs' copyrights and exclusive rights under copyright, Plaintiffs are entitled to statutory damages pursuant to 17 U.S.C. § 504(c)

for Defendant's infringement of each of the Copyrighted Recordings. Plaintiffs further are entitled to their attorneys' fees and costs pursuant to 17 U.S.C. § 505.

17. The conduct of Defendant is causing and, unless enjoined and restrained by this Court, will continue to cause Plaintiffs great and irreparable injury that cannot fully be compensated or measured in money. Plaintiffs have no adequate remedy at law. Pursuant to 17 U.S.C. §§ 502 and 503, Plaintiffs are entitled to injunctive relief prohibiting Defendant from further infringing Plaintiffs' copyrights, and ordering Defendant to destroy all copies of sound recordings made in violation of Plaintiffs' exclusive rights.

WHEREFORE, Plaintiffs pray for judgment against Defendant as follows:

1. For an injunction providing:

"Defendant shall be and hereby is enjoined from directly or indirectly infringing Plaintiffs' rights under federal or state law in the Copyrighted Recordings and any sound recording, whether now in existence or later created, that is owned or controlled by Plaintiffs (or any parent, subsidiary, or affiliate record label of Plaintiffs) ("Plaintiffs' Recordings"), including without limitation by using the Internet or any online media distribution system to reproduce (*i.e.*, download) any of Plaintiffs' Recordings, to distribute (*i.e.*, upload) any of Plaintiffs' Recordings, or to make any of Plaintiffs' Recordings available for distribution to the public, except pursuant to a lawful license or with the express authority of Plaintiffs. Defendant also shall destroy all copies of Plaintiffs' Recordings that Defendant has downloaded onto any computer hard drive or server without Plaintiffs' authorization and shall destroy all copies of those downloaded recordings transferred onto any physical medium or device in Defendant's possession, custody, or control."

2. For statutory damages for each infringement of each Copyrighted Recording pursuant to 17 U.S.C. Section 504.
3. For Plaintiffs' costs in this action.
4. For Plaintiffs' reasonable attorneys' fees incurred herein.

5. For such other and further relief, either at law or in equity, general or special, to which they may be entitled.

SONY BMG MUSIC ENTERTAINMENT;
WARNER BROS. RECORDS INC.;
ATLANTIC RECORDING CORPORATION;
ARISTA RECORDS LLC; and UMG
RECORDINGS, INC.

By their attorneys,

Dated: August 7, 2007

By: 

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

FILED
IN CLERKS OFFICE

2008 NOV -5 A 10: 22

CAPITOL RECORDS, INC. et al.,
Plaintiffs,

v.

NOOR ALAUJAN,
Defendant.

U.S. DISTRICT COURT
DISTRICT OF MASS.
Civ. Act. No. 07-cv-11446-NG
(LEAD DOCKET NUMBER)

SONY BMG MUSIC ENTERTAINMENT, et al.
Plaintiffs,

v.

JOEL TENENBAUM
Defendant.

Civ. Act. No. 07-cv-11446-NG
(ORIGINAL DOCKET NUMBER)

DEFENDANT'S AMENDED COUNTERCLAIM

Pursuant to Fed. R. Civ. P. 13, Defendant Joel Tenenbaum submits the following amended counterclaim against all Plaintiffs of record in this case. Defendant is currently attempting to join Recording Industry Association of America ("RIAA") as a counterclaim defendant under Local Rule 15.1 with Motion under Fed. R. Civ. P. 19 and 20 to follow. Defendant intends the following counterclaim to be asserted against RIAA as well.

JURISDICTION AND VENUE

1. This is a federal counterclaim seeking actual damages and such punitive damages as the Court sees fit for abuse of federal process.

2. This Court has jurisdiction to allow redress to Defendant for such abuse under its inherent authority. *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 764-765; *Nationwide Charters and Conventions, Inc. v. Garber*, 254 F.Supp 85 (D. C. Mass. 1966).

3. Defendant alternatively asserts a counterclaim against Plaintiffs under state law for abuse of process. *Am. Mgmt. Servs. v. George S. May Int'l*, 933 F. Supp. 64, 68 (D. Mass. 1996).

4. This Court has supplemental jurisdiction for the state counterclaim. 28 U.S.C. § 1367.

PARTIES

5. Defendant and counterclaim Plaintiff Joel Tenenbaum is a Massachusetts resident with his primary residence in Massachusetts.

6. Plaintiffs and counterclaim Defendants Sony BMG Music Entertainment, Warner Bros. Records Inc., Atlantic Recording Corporation, Arista Records LLC, and UMG Recordings are corporations or partnerships organized under the laws of Delaware, each with respective principal places of business identified in Plaintiffs' Complaint (Case # 1:07-cv-11446-NG; Doc. No. 1).

7. On information and belief, counterclaim Defendant RIAA is a trade association headquartered in Washington D.C. and controlled by the five above-identified counterclaim Defendants. The Plaintiffs of record and RIAA will collectively be referred to herein as "Plaintiffs."

COUNT 1: ABUSE OF FEDERAL PROCESS

8. Plaintiffs filed a civil action on September 8, 2003, seeking damages and injunctive relief for copyright infringement under the copyright laws of the United States (17 U.S.C §101 et seq.). Plaintiffs alleged that Joel Tenenbaum violated their rights of reproduction and distribution by using

an online media distribution system to download Copyrighted Recordings. Plaintiffs specified the seven recordings alleged to have been downloaded by Defendant in Exhibit A of the Complaint.

9. The suit against Defendant was one part of a larger mass-litigation campaign. Plaintiffs have threatened or initiated legal action against at least 30,000 similar suits against other individuals throughout the country.
10. Plaintiffs have worked in concert to conduct this mass-litigation campaign.
11. Plaintiffs did not file this suit primarily to seek redress against Defendant for harm that he allegedly caused nor for the primary purpose of deterring him from further copyright infringement.
12. Plaintiffs filed this suit primarily to advance illegitimate ulterior purposes identified below. None of these ulterior purposes are properly involved in this proceeding and, individually and collectively, constitute an abuse of process.
13. Plaintiffs' illegitimate ulterior purposes include unlawfully sacrificing Defendant to intimidate other Internet users into altering the norms of Internet usage. Plaintiffs intimidate others by seeking damages grossly disproportionate to what restitution or deterrence could justify.
14. Plaintiffs' illegitimate ulterior purposes include unlawfully sacrificing Defendant to intimidate other accused infringers into settling without exercising their constitutional right to have their defenses heard in court. Plaintiffs do this by seeking damages grossly disproportionate to what restitution or deterrence could justify and by harassing Defendant and invading his privacy to a degree that will intimidate others into settling. In order for the tactic to have credibility, they are making Defendant suffer an unduly protracted litigation battle and excessive damages.
15. Plaintiffs' illegitimate ulterior purposes include intimidating and coercing Internet Service Providers ("ISPs") into installing Internet content filters.

16. By flooding ISPs with subpoenas demanding the release of customer names, or student names in the case of University ISPs, Plaintiffs hope that ISPs will install filters to stop the harassment of the subpoenas, protect their customers or students, and/or ensure that Plaintiffs do not sue the ISPs themselves.

17. Plaintiffs seek to continue the onslaught of lawsuits to convince Congress that it must require ISPs to install filters as a way to put an end to the litigation campaign.

18. In their attempts to advance their ulterior purposes, Plaintiffs abuse prosecutorial discretion unconstitutionally conferred upon them by Congress and abuse a statutory scheme providing for unconstitutional damages.

19. Defendant reserves the right to further identify other ulterior purposes after conducting discovery.

20. The conduct against Defendant has caused and is causing actual harm to Defendant and his family. Because Plaintiffs' use of federal process against Defendant is an unlawful abuse, Defendant seeks restitution and any punitive damages the Court sees fit for all of the costs and non-pecuniary harm he incurred from this proceeding. This includes, but is not limited to:

- a) Harm from Plaintiffs' attempt to strip Defendant of all digital privacy.
- b) Being subjected to numerous harassing, intimidating, and at times insulting telephone communications from opposing counsel.
- c) Spending money preparing court filings, traveling to and from court, traveling to and from depositions, traveling to and from meetings with counsel, and other expenses;
- d) Devoting countless hours to proceeding *pro se* during the initial stages of this litigation;
- e) Being submitted to extensive depositions, discovery requests, and interrogatory requests;


- f) Being forced to miss school and work;
- g) Being subjected to the stigma of being a defendant in a federal lawsuit.

21. Defendant prays for judgment against Plaintiffs for:

- a) actual damages incurred;
- b) such punitive damages as the Court, through judge or jury, sees fit; and
- c) to such other and further relief, at law or in equity, general or special, to which Defendant may be entitled.

Dated: November 4, 2008

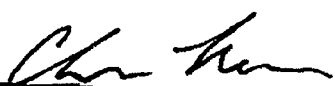
Respectfully submitted,

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ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I, Charles Nesson, hereby certify that on November 4, 2008, a true copy of the above document will be served electronically on counsel for Plaintiffs.

/s/ Charles R. Nesson 
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ATTORNEY FOR DEFENDANT

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

<u>CAPITOL RECORDS, INC., et al.,</u>)	
Plaintiffs,)	
)	
v.)	Civ. Action No. 03CV11661-NG
)	LEAD DOCKET NO.
<u>NOOR ALAUJAN,</u>)	
Defendant.)	

<u>SONY BMG MUSIC ENTERTAINMENT, et al.,</u>)	
Plaintiffs,)	
)	
v.)	Civ. Action No. 07CV11446-NG
)	ORIGINAL DOCKET NO.
<u>JOEL TENENBAUM,</u>)	
Defendant.)	

GERTNER, D.J.:

ORDER RE: MOTION TO STAY
January 20, 2009

The Plaintiffs' Motion to Stay (document # 733) is **GRANTED in part and DENIED in part.** The motion is denied to the extent that it seeks an unlimited stay of the hearing scheduled for January 22, 2009. The Court, however, will postpone the hearing until **February 24, 2009** for the reasons stated below.

The Court grants a limited continuance, first and foremost, because there is no emergency related to the hearing originally slated for January 22, 2009. The motions set for argument at the hearing raise legal issues which can be properly addressed at a later date. Just as importantly, postponing the hearing will allow the First Circuit an opportunity to fully consider the petition before it, particularly because a number of claims presented in the petition for mandamus were never raised in their current form in the district

court. Indeed, several of the Plaintiffs' claims involve questions of "how" the recording will be made and distributed and not "whether" the hearing can be recorded under Local Rule 83.3:

1. With respect to the Plaintiffs' objections about who will record the proceedings, these matters can be readily addressed. The Court's Order permitted the Courtroom View Network ("CVN") to provide audio-visual coverage of a single upcoming hearing. CVN is a private company that regularly records courtroom proceedings for various subscribers; it is not a party in this case. See Decl. of John Shin at ¶ 4 (document # 719) (stating that CVN has covered more than 200 proceedings in courtrooms around the country); see, e.g., In re Zyprexa Products Liability Litigation, 2008 WL 1809659 (E.D.N.Y. Mar. 4, 2008); E*Trade Financial Corp. v. Deutsche Bank AG, 582 F.Supp.2d 528 (S.D.N.Y. Oct 14, 2008); Nov. 26, 2007 Order, GVA Market Neutral Master Limited v. Veras Capital Partners, No. 07-cv-00519 (S.D.N.Y.). Neither the Plaintiffs nor the Defendant specifically proposed another entity -- either non-profit or for-profit -- to record the proceedings. As a result, the Court authorized only CVN, making clear that its Order did not permit any and all recordings, but only the recording specifically presented for the Court's approval.
2. The question of where and how CVN's recording is made available on the internet is a separate but related issue. Because CVN

offers a "narrowcast" service, its recordings are generally only available to subscribers -- i.e., those who pay for access to CVN's recording. Because of this ability to limit viewers, CVN audiences vary according to the explicit directions of the presiding judge. In this case, the Court has sought to ensure that the audio-visual recording is publicly available for all non-commercial uses. In response, the Defendant proposed that the Berkman Center for Internet and Society would act as a subscriber to the CVN recording and would make that recording publicly available on its website. In the absence of a counterproposal from the Plaintiffs, the Court accepted this arrangement, allowing to Berkman Center to host the video recording so long as it was not edited and provided gavel-to-gavel coverage.

3. The Order, however, did not limit the availability of the recording to the Berkman Center's website. The Plaintiffs are also free to subscribe to the CVN recording and to make it available to the public at a website of their choosing, subject to the same conditions.
4. If there are further issues with respect to the way in which the Berkman Center presents the video recording, those concerns can surely be addressed. They do not go to the question of "whether"

a recording of this hearing should be made available to the public, but "how."

SO ORDERED.

Date: January 20, 2009

/s/ Nancy Gertner
NANCY GERTNER, U.S.D.C.