

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
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CAPITOL RECORDS, INC. et al.,
11661-NG

U.S. DISTRICT COURT
DISTRICT OF MASS.

Act. No. 03-cv-

Plaintiffs,

(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

Defendant.

DEFENDANT'S PRETRIAL MEMORANDUM

Pursuant to this Court's Order dated September 26, 2008 (Doc. No. 663), Defendant submits this pretrial memorandum in advance of the pretrial conference currently scheduled for November 18, 2008. Defendant and Plaintiffs conferred and determined that they would file separate memoranda.

1. Names, addresses and phone numbers of trial counsel.

Counsel for Defendant: Charles Nesson
Harvard Law School
1525 Massachusetts Avenue
Griswold 501
Cambridge, MA, 02138

Counsel for Plaintiffs: Defendant understands that Plaintiffs' pretrial memorandum will include this information

2. Whether case is to be tried with or without a jury.

With jury. (See Stipulation to Jury Trial, Case No. 1:07-cv-11446-NG, Doc. No. 8.)

3. A concise summary of the positions asserted by the plaintiff, defendant and other parties, with respect to both liability and damages (including special damages, if any).

Plaintiff asserts that Defendant willfully shared seven of their copyrighted songs, entitling them to damages of \$1,050,000.

Defendant asserts:

A. The Copyright Act of 1976 and the Digital Theft Deterrence and the Copyright Damages Improvement Act of 1999 ("the Acts") are unconstitutional:

- The Acts authorize prosecutions which are civil in form but criminal in nature. Plaintiffs are

attempting to enforce them against Defendant without the criminal safeguards to which he is entitled to under the constitutional requirements of criminal procedure.

- The Acts unconstitutionally delegate prosecutorial power to private parties.
- The Acts violate constitutional separation of powers by enlisting civil courts and civil process in the prosecution of a strategy of legal extortion being pursued for ulterior purpose.
- The Acts, as applied to Defendant, violate the substantive Due Process requirements of the Fifth and Eighth Amendments to the Constitution by mandating grossly excessive minimum statutory damages and allowing grossly excessive maximum statutory damages.

B. Plaintiffs have abused and continue to abuse Joel Tenenbaum and federal process by prosecuting this suit against him for extortionately excessive damages for a purpose ulterior to anything that can be considered properly within the bounds of this federal civil proceeding.

4. The facts established by pleadings or by stipulations or by admissions of counsel. In particular, counsel shall stipulate all facts not in genuine dispute.

Defendant has yet to complete discovery and requests leave of the Court to identify admissions of Counsel in due course at a later date.

5. Contested issues of fact

Defendant has yet to complete discovery and requests leave of the Court to identify contested issues of fact at a later date.

6. Jurisdictional questions

Whether this Court has the jurisdiction to adjudicate a statute that is criminal in substance and civil only in form.

7. Issues of law, including evidentiary questions, together with supporting authority.

A. Defendant's issues of law regarding the constitutionality of the Acts are identified in item 3 above, and supporting authority is set forth in Defendant's Opposition to Plaintiffs' Motion to Dismiss (Doc. No. 676).

B. Defendant's issues of law regarding Plaintiffs' abuse of federal process are identified in item 3 above, and supporting authority is set forth in Defendant's Opposition to Plaintiffs' Motion to Dismiss (Doc. No. 676).

C. Issues of law and evidentiary questions related to the alleged copyright infringement:

- Defendant cannot be held liable for violation of the reproduction right, 17 U.S.C. § 106(1), for downloading songs absent any concrete evidence regarding how Defendant procured the song files at issue.
- Defendant cannot be held liable for violation of the distribution right, 17 U.S.C. § 106(3), absent any evidence of even a single instance of actual distribution of the accused songs by Defendant to anyone other than Plaintiffs' investigator. *London-Sire Records, Inc. v. Doe 1*, 542 F.Supp.2d 153 (D. Mass. 2008).
- Making files available over a file-sharing system does not constitute a violation of Plaintiffs' distribution right. *Id.*
- Plaintiffs' evidence is insufficient to show, with any degree of statistical certainty, if and to what extent the copyrighted recordings were actually distributed by Defendant to other individuals. *Id.*, at 176.

D. Pending before this Court is Defendant's Motion for Protective Order to prevent Plaintiffs' investigator from having unfettered access to Defendant's personal computer. (Doc. No. 672.) Defendants are also opposing, in another district court, Plaintiffs' attempt to subpoena various compact discs from Defendant's sister.

8. Any requested amendments to the pleadings.

Pending before this Court is Defendant's Motion to Amend Counterclaim (Doc. No. 686). Defendant's proposed Amended Counterclaim was appended thereto as Exhibit A.

Defendant intends to file a Motion for Joinder to add RIAA as a counterclaim defendant on November 14, 2008. RIAA and Plaintiffs' counsel were served with the proposed motion for joinder on November 4, 2008.

Defendant requests leave of Court to consider, on the issue of damages, whether to amend his pleadings to request injunctive relief that would prevent Plaintiffs from similarly abusing federal process against other accused infringers. Defendant has not yet looked into the legal issues associated with such a claim but may request leave after further investigation.

9. Any additional matters to aid in the disposition of the action.

None at the present time.

10. The probable length of the trial.

Defendant estimates that his counterclaim will require approximately 1-2 days at trial. Defendant defers to Plaintiffs'

estimate for the estimated trial length for their copyright infringement claim.

11. Voir dire procedures.

For cause challenges: There should not be any for-cause dismissal of jurors by virtue of their having participated in file sharing.

Peremptory challenges: The Court should not allow peremptory challenges against "digital natives." In the unique circumstances presented by the file-sharing suits, digital natives constitute a distinct "cognizable group." Digital natives are the only segment of the population born into the digital age of the open Internet. Plaintiffs have used the full extent of their legal resources to launch an assault against them. Allowing them to be purged from juries considering copyright infringement would allow Plaintiffs campaign to hold back the digital natives to extend into the jury box.

12. Names and addresses of witnesses who shall testify at trial, and the purpose of the testimony of each witness (including brief statement of the qualifications of such witness).

A (will call). Defendant Joel Tenenbaum, as a fact witness, to testify about the acts Plaintiffs allege he committed.

B (will call). John Palfrey, as an expert witness, to testify regarding the willfulness and reprehensibility of the alleged conduct for the purpose of informing both Judge and Jury on the propriety and constitutionality of the damages Plaintiffs seek. Mr. Palfrey will also testify to the oppressive elements to innovation that the copyright litigation campaign imposes.

John Palfrey is a Professor of Law and Vice Dean for Library and Information Resources at Harvard Law School, a co-director of Berkman Center for Internet & Society, and has done extensive research and writing on the Internet, intellectual property, and the digital generation of which Defendant is a part. Mr. Palfrey will submit a more comprehensive statement of qualifications along with his expert report (forthcoming).

John Palfrey
Harvard Law School
1563 Massachusetts Avenue
Areeda 511
Cambridge, MA, 02138

C (will call). John Perry Barlow, as an expert witness, to testify about the state of Plaintiffs' industry and explain the factors and motivations that have driven Plaintiffs to abuse federal process.

Mr. Barlow is a Fellow at Harvard's Berkman Center for Internet & Society. He was a co-founder of the Electronic Frontier Foundation, has researched and written extensively on

issues of intellectual property and the Internet, and his writings have been taught and cited in a multitude of academic circles. Mr. Barlow is a former songwriter for the Grateful Dead. Mr. Barlow will submit a more comprehensive statement of qualifications along with his expert report (forthcoming).

John Perry Barlow
442 Collingwood Street
San Francisco, CA 94114

D (may call). Johan Pouwelse, as an expert witness, to rebut the expert report and testimony of Plaintiffs' expert Dr. Doug Jacobson, and to provide other expert testimony regarding the technology of peer-to-peer networks and file-sharing.

Dr. Pouwelse holds a B.Sc. in Computer Science from Haagse Hogeschool and an M.Sc. and Ph.D. from Delft University of Technology, where he is currently a professor. He has done extensive research in the area of peer-to-peer networks. Dr. Pouwelse will submit a more comprehensive statement of qualifications along with his expert report (forthcoming).

Johan Pouwelse
Dr. Johan Pouwelse
Mekelweg 4, 9th floor
2628 CD, Delft
The Netherlands

E (will call). Wendy Seltzer, as an expert witness, to describe Plaintiffs' mass-litigation campaign, of which this action against Defendant is a part. This testimony will provide

factual background regarding the tactics of Plaintiffs that rise to the level of abuse.

Wendy Seltzer is a Fellow at the Berkman Center for Internet & Society and a visiting professor at American University. She is a graduate of Harvard College and Harvard Law School. She has engaged in research and writing on intellectual property and the Internet. Ms. Seltzer will submit a more comprehensive statement of qualifications along with her expert report (forthcoming).

Wendy Seltzer

Ms. Seltzer can be reached at wendy@seltzer.org; Defendant will supplement with Ms. Seltzer's address in due course.

F (will call). Lawrence Lessig, as an expert witness, to testify regarding the damage to the music industry caused by file sharing and the damage to free culture done by abusive articulation and enforcement of copyright.

Lawrence Lessig is a professor of law at Stanford University, a former professor of law at University of Chicago Law School, and has written extensively on constitutional law, intellectual property law, and the Internet. Mr. Lessig will submit a more comprehensive statement of qualifications along with his expert report (forthcoming).

Lawrence Lessig
559 Nathan Abbott Way
Stanford, CA 94305

G (may call). Andrew Grant, to testify as to Plaintiffs' actual damages.

Andrew Grant formerly worked in the Anti-Piracy group at Macrovision, where he ran sales and strategy for their core peer-to-peer anti-piracy product.

Mr. Grant will submit a more comprehensive statement of qualifications along with his expert report (forthcoming).

Andrew Grant
71A Chestnut Street
Boston, MA 02108

H (will call). Matthew Oppenheim, as a fact-witness, to testify regarding Plaintiffs' ulterior purposes in filing this suit; to testify regarding Plaintiffs' tactics in pursuit of their abusive mass-litigation campaign; and to testify about the extent of file-sharing and its effect on the music industry.

I (will call). Terry Fisher, as an expert witness, to testify on the viability of alternatives open to copyright holders.

Mr. Fisher is a Professor of Intellectual Property Law at Harvard Law School and a Director of Berkman Center for Internet and Society. He has engaged in extensive research on areas of intellectual property and the Internet. Mr. Fisher will submit a more comprehensive statement of qualifications along with his expert report (forthcoming).

Terry Fisher
Harvard Law School
1563 Massachusetts Avenue
Hauser 410
Cambridge, MA, 02138

J (will call). Jonathan Zittrain, as an expert witness, to testify about the state of the Internet, the future of the Internet, and the place that peer-to-peer file sharing has in the Internet as a legitimate and beneficial technology.

Mr. Zittrain is a professor of law at Harvard Law School and a Director of Berkman Center for Internet and Society. He has researched extensively in areas of intellectual property and the Internet. Mr. Zittrain will submit a more comprehensive statement of qualifications along with his expert report (forthcoming).

Jonathan Zittrain
Harvard Law School
1563 Massachusetts Avenue
Griswold 505
Cambridge, MA, 02138

K (will call). Judie Tenenbaum, as a fact-witness, to testify to the Plaintiffs' abuse of process.

Judith Tenenbaum
20 Upton Avenue
Providence, RI 02906

13. A list of proposed exhibits, indicating which exhibits may be admitted without objection, and a brief statement of the grounds for any objection.

Defendant requests leave of the Court to identify in due course exhibits upon which his witnesses and counsel may rely.

14. Proposed preliminary jury instructions.

Ladies and gentleman of the jury:

Thank you for honoring your citizen's duty by serving today on this jury. Each one of you, as a juror, is as much an agent of our government as I am. We each have our roles and responsibilities in the trial in which you will be participating.

My role as presiding judge is to direct the process of the trial of Joel Tenenbaum for copyright infringement being prosecuted by Capitol Records Incorporated, SONY BMG MUSIC, and of Joel Tenenbaum's counterclaim against these four recording companies and the RIAA, the industry association, for abuse of law and process. Each side claims to have been damaged by the other. It will be your role to determine fault and damages between them, guided by instructions I will give you.

Dated: November 13, 2008

Respectfully submitted,

/s/ Charles R. Nesson

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ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I, Charles Nesson, hereby certify that on November 13, 2008, a true copy of the above document was served via email on counsel for Plaintiffs at the addresses below.

/s/ Charles R. Nesson

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