

Nos. 10-1883, 10-1947, 10-2052

IN THE
United States Court of Appeals
FOR THE FIRST CIRCUIT

SONY BMG MUSIC ENTERTAINMENT, ET AL.,

Plaintiffs-Appellants/Cross-Appellees,

v.

JOEL TENENBAUM,

Defendant-Appellee/Cross-Appellant.

*On Appeal from the United States District Court
for the District of Massachusetts*

**MOTION OF AMICUS CURIAE ELECTRONIC FRONTIER
FOUNDATION FOR LEAVE TO FILE BRIEF IN SUPPORT OF
DEFENDANT-APPELLEE AND URGING AFFIRMANCE**

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The Electronic Frontier Foundation (“EFF”) respectfully moves the Court for leave to file a brief as *amicus curiae* in support of Defendant-Appellee. EFF’s brief accompanying this motion urges the Court to affirm the District Court’s decision in this case. Counsel for Defendant-Appellee consented to the filing of this brief. Counsel for EFF sought the consent of Plaintiffs-Appellants’ counsel but have not received a response.

The Electronic Frontier Foundation is a nonprofit civil liberties organization that has worked for over 20 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its more than 14,000 dues-paying members have a strong interest in assisting the courts and policy-makers in striking the appropriate balance between copyright law and the public interest.

EFF files this brief in order to call the Court’s attention to the broader impact of the remedies at issue in this litigation. This appeal raises one of the most pressing problems in modern copyright: the tension between the range of statutory damages allowed under 17 U.S.C. § 504 and the requirements of constitutional due process. Following firm Supreme Court precedent, courts should review statutory damage awards to ensure that they meet the notice, deterrence, and punishment goals of copyright while at the same time serving its broader constitutional and policy purposes.

EFF believes its friend-of-the-court brief will assist the Court in understanding the broad impact of copyright damage awards on creators, innovators and consumers. In its brief, EFF seeks to provide the Court with examples of artists, innovators and consumers whose creativity and reasonable and prudent experimentation with copyrighted material has been stifled by the lack of predictability and excessive potential of copyright damage awards. EFF urges the Court to consider the interests of these parties when determining what role substantive due process should play in the imposition of statutory damages and to provide sound guidance so that secondary creators can adequately navigate the waters of copyright law moving forward. Amicus further urges the Court to affirm the District Court's ruling, to ensure that copyright damages bear a reasonable relationship to actual harm and reprehensibility.

This brief meets the requirements of Federal Rule of Appellate Procedure 29, and it provides the Court with an important perspective not offered by the parties to the litigation. An amicus brief should be permitted if “the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties’ briefs.” *Voices for Choices v. Illinois Bell Telephone Co.*, 339 F.3d 542, 545 (7th Cir. 2003).

For the foregoing reasons and based on the documents submitted herewith, EFF respectfully requests that the Court grant its motion for leave to file the accompanying amicus curiae brief.

Respectfully submitted,

Dated: January 3, 2011

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