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Mr. Richard C. Donovan  
Clerk, United States Court of Appeals  
for the First Circuit  
1 Courthouse Way, Suite 2500  
Boston, Massachusetts 02210

Re: Sony BMG, etc., et al. v. Tenenbaum. Nos. 10-1883, 10-1947, 10-2052.

Dear Mr. Donovan:

This case is scheduled for oral argument on April 4, 2011. Pursuant to FRAP 28(j), the United States respectfully directs the Court's attention to supplemental authority refuting plaintiffs-appellants' contention that the Copyright Act divests district courts of their long-established, common law power to remit excessive damage awards. Plaintiffs argue that because the statute, construed in light of *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998), generally empowers the jury to enter any damage award that is "just," the trial court has been stripped of its traditional common law remittitur power to review and set aside an excessive jury verdict. *See* Plaintiffs-Appellants' Response/Reply Brief at 26-29.

In *United States v. Texas*, 507 U.S. 529, 534 (1993), however, the Supreme Court held that Congress is presumed to intend common law principles to be retained absent clear evidence to the contrary, and that "[i]n order to invade a common law principle, the statute must 'speak directly' to the question addressed by the common law." Here, neither the statute nor its legislative history makes any express reference to extinguishing the trial court's powers of remittitur. Contrary to plaintiffs' contentions, the mere fact that the jury is now empowered to enter a "just" award is not sufficient to overcome the presumption that Congress intends the trial court to retain its long-established power to review that award under common law standards of excessiveness.

Moreover, the Federal Rules of Civil Procedure provide (1) that the court may grant a new trial for any of the reasons recognized at common law (*see* FRCP59 (a)(1)(A)), and (2) that

these and other provisions of the rules “govern the procedure in all civil actions and proceedings” in district courts, except as expressly stated in FRCP 81. *See* FRCP 1. Taken together, these rules expressly incorporate the court’s prior, common law power of remittitur and make remittitur available in *all* civil actions unless a statute explicitly provides otherwise. Nothing in the Copyright Act purports to limit the application of these rules in actions for statutory damages.

Sincerely,

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