

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

SONY BMG MUSIC ENTERTAINMENT, a Delaware General Partnership;
WARNER BROS. RECORDS, INC., a Delaware Corporation; ARISTA
RECORDS, LLC, a Delaware Limited Liability Company; UMG RECORDINGS,
INC., a Delaware Corporation; UNITED STATES,

Plaintiffs-Appellants/Cross-Appellees,

ATLANTIC RECORDING CORPORATION, a Delaware Corporation,

Plaintiff,

v.

JOEL TENENBAUM,

Defendant-Appellee/Cross-Appellant.

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

**AMICUS CURIAE ELECTRONIC FRONTIER
FOUNDATION'S MOTION FOR
INDEPENDENT ORAL ARGUMENT**

The Electronic Frontier Foundation (“EFF”), respectfully moves this Court for fifteen minutes of independent oral argument as *amicus curiae* on the following grounds:

1. This case presents important constitutional questions about the scope of due process review that applies to statutory damage awards under the Copyright

Act. The answers to these questions affect a wide array of individuals and organizations, whose speech and expression rights are often chilled by the threat of large statutory damage awards bearing little or no relation to any real economic harm, coupled with the tremendous cost of defending an infringement action. The EFF chose to participate in this case as *amicus curiae* in order to represent those interests, and urge this Court to affirm the District Court's holding and its application of established due process protections.

2. The EFF is a nonprofit civil liberties organization that has worked for over 20 years to protect innovation and free expression in the digital world. The EFF's 14,000 dues-paying members include innovators, educators, archivists, researchers, and content creators whose expressive activities are frequently chilled by the threat of large statutory damage awards for alleged copyright infringement, even though such an award may bear no relation to any actual harm the alleged infringement might plausibly cause, which comes on top of the substantial costs of defending the claim in the first place. EFF is therefore in a unique position to advocate important public interests, which go well beyond those of the parties to this dispute and should be considered in determining the appropriate scope of due process review.

3. The statutory damages provision of the Copyright Act, 17 U.S.C. § 504(c), addresses an important problem. In some circumstances, the amount of

damage caused by a defendant's infringement may be difficult to quantify with precision. In that situation, the copyright owner may elect to recover statutory damages to compensate the copyright owner and deter future infringement. But in solving one problem, section 504(c) creates another. A wide array of creative or expressive conduct may or may not infringe a given copyright, and even if it does, it may cause little or no plausible damage to the copyright owner. *See, e.g., Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008) (YouTube user posted home video of baby dancing to Prince's *Let's Go Crazy*); *Lennon v. Premise Media, Inc.*, 556 F. Supp. 2d 310, 327 (S.D.N.Y. 2008) (observing there was no evidence that "permitting defendants to use a fifteen-second portion of [a John Lennon] song for a transformative purpose will usurp the market for licensing the song for traditional uses"). Nonetheless, the creator has to concern herself with the possibility of an out-sized damage award of up to \$150,000 per infringed work. *See* 17 U.S.C. § 504(c). Copyright owners often use this uncertainty and the cost of defending an infringement claim as leverage to force creators to abandon their work, or pay exorbitant license fees – even where infringement is unclear or unlikely. Similarly, defendants found liable for infringement may be subjected to statutory damage awards that vastly exceed any plausible economic harm caused by their conduct. These threats and awards fuel the cycle of fear and self-censorship, as content creators decide to "play it safe." In this way, the availability

of statutory damage awards that are not tethered in some respect to the actual harm caused by a defendant's conduct stunt creativity and chill legitimate speech.

4. The impact of this phenomenon is substantial, and goes well beyond the world of peer-to-peer file sharing, or digital "piracy." It affects innovators, educators, filmmakers, archivists, researchers, politicians, commentators, news organizations, and bloggers. The EFF seeks leave to participate in the argument of this case to make sure this wide range of interests is accounted for, explain why due process scrutiny of statutory damage awards is both necessary and appropriate, and why remittitur does not provide adequate protection.

5. In asking this Court to exempt statutory damage awards from any due process scrutiny, Appellants ignore the purpose due process protection serves and the wide array of public interests it implicates. The Due Process clause requires that exemplary damages bear a reasonable relationship to actual harm and reprehensibility. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003). Exemplary damage awards provide an appropriate level of punishment and deterrence against future illegal acts only if they are imposed "wisely and with restraint." *See id.* (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 42 (1991)). Due process therefore prohibits exemplary damage awards that are grossly excessive, because such awards do not serve any legitimate government interests and create "a devastating potential for harm." *See id.* Appellants acknowledge

statutory damages are awarded to punish and deter unlawful infringement, yet suggest there is no constitutional limit on the amount of punishment or deterrence that is permitted. That flies in the face of the Supreme Court's decisions holding exemplary damage awards must comport with substantive due process limitations. *See, e.g., State Farm*, 538 U.S. at 426; *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 576 (1996). The fact an award is within the statutory range should not immunize it from due process scrutiny. An exemplary damage award that is grossly excessive relative to the severity of the offense and the actual harm defendant caused does not become any less excessive just because Congress may have authorized it.

6. The United States, as intervenor, urges the Court to avoid the constitutional question on the theory remittitur is sufficient to address the problems caused by excessive statutory damage awards. On the contrary, remittitur makes the problems *worse*, not better. Upon remittitur, a plaintiff has the option of rejecting the remitted award and demanding a new trial on damages. That imposes still greater costs on a defendant, but leaves the plaintiff free to pursue a similarly excessive award. Experience shows this cycle may repeat; one file-sharing defendant has recently completed her third trial against several of the plaintiffs in this action, yet the trial court in that case still declines to reach the constitutional issue. *See Capitol Records, Inc. v. Thomas-Rasset*, No. 06-1497, 2010 WL 4286325, (D. Minn. Oct. 22, 2010). The specter of multiple trials and the expense

that follows can only enhance the chilling effect excessive statutory damage awards impose.

7. In light of the importance of these issues and the wider public interests EFF represents, EFF respectfully requests the Court allot it 15 minutes of argument time, independent of any time allotted to Plaintiffs-Appellants or Defendant-Appellee in order to address the proper scope of due process review, and to refute the government's suggestion that the constitutional question should be avoided.

8. Counsel for EFF contacted counsel of record for all parties by email on March 17, 2011, requesting consent to EFF's request for argument. Plaintiff-Appellants oppose EFF's motion. Defendant-Appellee consents to it. Counsel for the United States takes no position regarding the request.

CONCLUSION

The EFF's motion for independent argument time should be granted, and the EFF should be allotted 15 minutes of oral argument time independent of any time allotted to the parties.

Respectfully Submitted,

Dated: March 18, 2011

By: /s/ Michael Barclay

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CERTIFICATE OF SERVICE

I certify that on March 18, 2011, I caused the foregoing Motion for Independent Argument to be electronically filed with the Court. As all counsel are registered with the Court's Electronic Case Filing System, the electronic filing of these documents constitutes service upon them under the Court's Administrative Order Regarding Electronic Case Filing (September 14, 2009).

Dated: March 18, 2011

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