

FILED  
IN CLERKS OFFICE

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

2008 JAN 22 P 12:54

U.S. DISTRICT COURT  
DISTRICT OF MASS.

SONY BMG MUSIC  
ENTERTAINMENT, ET AL,

LEAD CASE NUMBER

Plaintiffs,

03CV11661NG

JOEL TENENBAUM,

ORIGINAL CASE NUMBR

Defendant,

03CV11446NG

**DEFENDANT'S RESPONSE TO PLAINTIFFS' RESPONSE TO  
DEFENDANT'S MOTION FOR LEAVE  
TO AMEND ANSWER**

Defendant respectfully submits this Response in opposition to Plaintiffs' Response to Defendant's Motion for Leave to Amend Answer ("Motion for Leave"). As explained in Defendant's Motion for Leave to Amend Answer, Defendant's only concern at the time he filed his Answer was to make sure that that Answer was filed in a timely manner. However, since filing that Answer, Defendant is now aware that he can, with permission liberally granted to him, file an Amended Answer. Defendant also wishes to file counterclaims and /or affirmative defenses. Defendant could not find anywhere in the Federal Rules of Civil Procedure where it so states that Defendant must attached a proposed Amended Answer outlining his purposed new Answer as Plaintiffs' attorney states in her Response to Defendant's Motion for Leave to Amend Answer.

**INTRODUCTION**

Defendant filed his Answer on August 18, 2007. On November 23, 2007, Defendant moved for leave to amend his Answer to assert, *inter alia*, that he wishes to file an Amended Answer to include a counterclaim and affirmative defenses. Defendant specifically stated an affirmative defense for the unconstitutionality of statutory damages. Defendant did not attach a proposed Amended Answer to his Motion for an Amended Answer Defendant did not believe that he was required nor that it was logical to include a proposed Amended Answer unless and until the Court granted permission to file an Amended

Answer. Defendant's assertion that statutory damages under the Copyright Act are unconstitutional, with no further explanation, was merely an effort on Defendant's part to state as part of his Motion for Leave to File Amended Answer that he did, in fact, have a legal basis on which he intended to file the Amended Answer and had intended, inter alia, to include the unconstitutionality of the statutory damages as an Affirmative Defense and/or a Counterclaim.

## ARGUMENT

### L. Legal Standards for Motion for Leave to Amend Pleadings.

Although leave to amend under Federal Rule of Civil Procedure 15(a) should "be freely given when justice so requires.", where amendment would be futile, leave to amend should be denied.. See *Foman v. Davis* 371 U.S. 178, 182, (1962)(leave to amend shall not be granted where amendments would be futile). In the instant case, an amendment would not be futile. Defendant has done extensive research since filing his initial answer, and he is well aware that many, many litigants have been granted permission to amend under similar circumstances. Marie Lindor. It can hardly be argued that including the unconstitutionality of the statutory damages of the Copyright Act, a matter that could be appealed, if necessary, to the United States Supreme Court as a reason necessitating the grating by the Court of Defendant's Motion for Leave to Amend Answer., is an "futile amendment."

In this instant case, Leave to Amend should be freely given, if nothing else, based on the unconstitutionality of the statutory amount because one of Plaintiffs' attorney's arguments in her miscellaneous court papers, especially those stating that Defendant 's earlier request to settle all of these matters for \$3,000 is an amount far less that the currently stated statutory amount Therefore, Defendant, is being told by Plaintiffs' attorney that even the \$4,000 early settlement amount proposed by the Plaintiffs is far less that the possible amount that Plaintiffs' could arguably receive under this law should their lawsuit against Defendant prove successful. If, however, this Copyright Law's statutorily stated damage amounts are ruled unconstitutional then it is entirely conceivable that even if Defendant is found liable for Copyright Infringement under this Copyright Infringement Law, then the actual amount of damages could likely/would likely be significantly less that the current law allows. For example, if the current "rate" of paying for a song to legally put onto one's IPOD is \$1.00 a song, then Defendant would be responsible for far less than \$3,000 or \$4,000.

If Defendant is granted Leave to Amend his Answer by this Court, then within the sultrily allotted time, Defendant will file an Amended Answer that will statutorily comport with any and all requirements of the Federal Rules of Civil Procedure Rules for filing an Answer, and it will have a legal basis for each and every affirmative defense, and counterclaim.

I

**II. Defendant's Motion for Leave Should Not be Denied Because He Failed to Attached a Proposed Amended Answer.**

No where in the Federal Rules of Civil Procedure as available in a Law Library, do the Rules state that a party seeking leave to amend an answer by filing a Motion for Leave to Amend the Answer must attach a proposed amended pleading. The only portion of the Federal Rules of Civil Procedure that specified any rules for filing Motion for Leave to Amend merely stated that leave to amend under Federal Rule of Civil Procedure 15(a) should be freely given when justice so requires", and that leave to amend should be freely given when no harm will come to Plaintiffs because of the granting of the Leave to Amend.

**III. Defendant's Motion for Leave Should be Allowed Because Plaintiffs' Offer no Proof that the Proposed Amendment Would be Futile.**

The sole basis offered in support of Defendant's Motion for Leave to Amend is not his contention that statutory damages under the Copyright Act are "unconstitutionally excessive," as is stated in Plaintiffs' Response to Defendant's Motion for Leave to Amend Answer.

When Defendant filed his Motion for Leave to Amend his Answer, he was merely giving the above-stated reason as one example, though not the only one he would plead in his Amended Answer, as proof that his Motion for Leave to Amend was based on non-futile amendments. It is his intention, if his Motion for Leave to Amend is granted, to file a detailed Amended Answer that would fully comport to the Legal Standards for an Amended Answer; his Amended Answer would not be based on "empty formalities" or "futile amendments."

In Plaintiffs' Response to Defendant's Motion for Leave to Amend Answer, Plaintiff has taken on the role of "Judge, Jury and Judiciary" by stating in her reason for denying the Defendant's Motion for leave to Amend Answer, spends pages of her Response outlining the Copyright Act, and whether or not the

Statutory damages under the Act are unconstitutional. On the one hand, Plaintiffs' attorney argues that there is no basis for allowing Defendant Leave to Amend his Answer stating that this would be futile, that there is no legal basis for the Court to Allow the Motion, etc., and yet, Plaintiffs' attorney spends seven of her ten page Response to Defendant's Motion for Leave to Amend Answer discussing and interpreting this very law that she has used, in part, to state that Defendant's Motion for Leave to Amend Answer would be "futile" ..

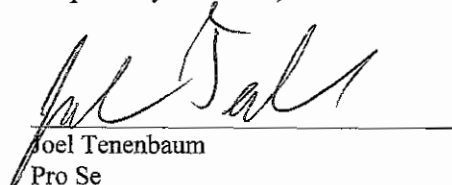
#### CONCLUSION

An interpretation of this Copyright Law and its' statutory damages provision is a central element in modern copyright law, and a central element to the possible financial outcome and Defendant's long-term financial consequences. If the stated purpose of the law, according to Plaintiffs' attorney is to compensate the plaintiff for the infringement of its copyrights, and serve to punishes and deter the unlawful conduct of defendants, then , if Plaintiffs' are allowed to file litigation alleging that they have been harmed and need to be compensated for that harm, then our judicial system must allow the Defendant to have an ample opportunity in every way to defend himself against the allegations, AND to show that Defendant has been harmed. This will be accomplished by granting Defendant's Motion for Leave to Amend his Answer

. Finally, it is respectfully stated that Defendant believes that his Motion for Leave to Amend his Answer should be allowed because Plaintiffs' Attorney filed her Response to Defendant's Motion for Leave to Amend his Answer in an untimely manner, nearly one week after the Plaintiffs' Response was due.

For all of the above reasons, Defendant respectfully requests that the Court allow his Motion for Leave to Amend his Answer in its entirety.

Respectfully submitted,



Joel Tenenbaum  
Pro Se  
1666 Commonwealth Avenue  
Brighton, MA 02135

Dated: January 17, 2008

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing instrument has been mailed to all Attorneys of Record on the 19 of January, 2008, addressed as follows:

JOHN R. BAUER  
Robinson and Cole LLP  
One Boston Place  
Boston, MA 02108

  
\_\_\_\_\_  
JOEL TENENBAUM