

Cowan, Liebowitz & Latman, P.C.

Law Offices

1133 Avenue of the Americas • New York, NY 10036-6799

(212) 790-9200 • www.cll.com • Fax (212) 575-0671

J. Christopher Jensen
Direct (212) 790-9204
jcj@ccl.com

May 2, 2006

By Fax (718-613 2518)

Hon. David G. Trager
United States District Judge
Eastern District of New York
U.S. Courthouse
225 Cadman Plaza East
Brooklyn, N.Y. 11201

Re: UMG Recordings, Inc. v. Marie Lindor, 05CV1095 (DGT) (RML)

Dear Judge Trager:

This firm represents the plaintiffs in the above-referenced matter. We write in response to defendant's request for a pre-motion conference in order to make a motion for leave to amend her answer to assert an affirmative defense of the unconstitutionality of statutory damages of \$750 per song and for partial summary judgment limiting plaintiffs' recovery to a maximum of \$6.30 per song. Plaintiffs have already allowed defendant to file one amended answer, without objection. The suggested motions would be frivolous, because they lack any legal or factual basis and because, for the reasons more fully set forth below, there is no conceivable set of facts that could be pled or proved that would support the type of due process defense that defendant now seeks to assert. Accordingly, plaintiffs respectfully ask that the Court refuse to allow defendant to file such motions and to amend her answer yet again.

Defendant's request has no legal basis whatsoever. The request is based on defendant's statement that "It was held by the United States Court of Appeals for the Second Circuit in *Parker v. Timer [sic] Warner Entertainment Co.*, 331 F.3d 13, 22 (2d Cir. 2003) that copyright statutory damages are subject to the due process test of *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003)." Defendant's assertion flatly misrepresents the *Parker* case.

Cowan, Liebowitz & Latman, P.C.

Hon. David G. Trager

May 2, 2006

Page 2

First, *Parker* had nothing to do with copyrights. It was a purported class action by cable television subscribers alleging that a cable provider violated the subscriber privacy provisions of the Cable Communications Policy Act. Second, the issue before the court in *Parker* has nothing to do with any issue here. In *Parker*, the court considered whether to certify a class of individuals who had alleged that their private information had been improperly released. In coming to a decision on certification, the Court addressed the tension between the statutory provisions for minimum damages under the Cable Communications Act and the Fed. R. Civ. P. 23 provisions for class actions. In that context, the court mused that the purposes of both statutory damages and class actions could potentially be distorted were the court mechanically to apply the minimum statutory damages provision to a large number of subscribers. That is not the scenario here.

Finally, the court in no way “held” that statutory damages under any statute are always subject to the due process clause, as defendant suggests. To the extent that the court addressed the issue of the constitutional limits of statutory damages at all, on its face, the court made clear that any such concern was, to use its own word, “hypothetical.” *Parker*, 331 F.3d at 22. Thus, the court pondered whether the aggregation in a class action of large numbers of statutory damages might well expand the potential statutory damages so far beyond the actual damages suffered that the statutory damages could come to resemble punitive damages. *See id.* Because no class certification motion had even been filed, and because no evidence had been presented that even raised a reasonable possibility that principles of due process might restrict an ultimate damages award, the court declined to consider any limits that due process might possibly impose. *See id.* Such a discussion falls far short of the “holding” that defendant proclaims.

In re Napster, Inc. Copyright Litigation, No. C MDL-00-1369 MHP, 2005 WL 1287611 (N.D. Cal. Jun. 1, 2005), which defendant also cites, is inapposite for the same reasons. In *Napster*, as in *Parker*, the court made no finding as to whether statutory damages raised due process concerns in the case before it. Rather, as in *Parker*, the court in *Napster* noted the hypothetical nature of the question of the excessiveness of statutory damages in the case before it and then expressly refused to reach that question “in the abstract.” In doing so, the court specifically observed that any inquiry at the class certification stage as to the propriety of any statutory damages award “would almost inevitably be speculative.” *Id.* at *11.

Because neither *Parker* nor *Napster* supports defendant’s position here, the only authority on which defendant could feasibly rely is *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003) itself. *State Farm*, however, also does not apply. In *State Farm*, the Supreme Court was concerned with whether and how the due process clause applies to constrain juries and judges from awarding unlimited damages as a punishment. *See, e.g., id.* at 417-18. Statutory damages, particularly in a context involving a single defendant, do not present this issue, because such damages are, by their very nature, limited. The statute has built-in caps or ceilings for innocent, non-willful, and willful infringement. Those caps serve to constrain and limit the potential damages any particular defendant can be assessed.

Cowan, Liebowitz & Latman, P.C.

Hon. David G. Trager

May 2, 2006

Page 3

Moreover, by definition, statutory damages are not punitive. Statutory damages are intended to achieve a variety of goals, including compensating copyright holders for actual harm that is caused, deterring the defendant and other would be infringers from infringing in the future, providing an incentive for a copyright owner to protect his/her rights and, finally, punishing for improper conduct. See *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952); *Davis v. The Gap, Inc.*, 246 F.3d 152, 172 (2d Cir. 2001); *N.A.S. Import, Corp. v. Chenson Enterprises, Inc.*, 968 F.2d 250, 252 (2d Cir. 1992); *National Football League v. PrimeTime 24 Joint Venture*, 131 F. Supp. 2d 458, 478 n. 17 (S.D.N.Y. 2001); *Kamakazi Music Corp. v. Robbins Music Corp.*, 534 F. Supp. 69, 78 (S.D.N.Y. 1982). It is not possible to break down a statutory damages award to determine what portion of it is punitive in nature, and, as such, it is not possible to consider it under *State Farm*.

For all of these reasons, as a matter of law, the motions proposed by defendant would be frivolous.

In addition, defendant's request has no factual basis. For example, defendant states, with no supporting authority whatsoever, that the total revenue to plaintiffs from the licensing of the songs at issue would have been 70¢ per song or \$6.30. Defendant's assumptions are wrong for several reasons. First, plaintiffs intend to seek damages not only for the nine songs on Exhibit A to the Complaint, but also for 29 additional songs, out of the hundreds of songs downloaded onto defendant's computer, which songs were identified in Exhibit B to the Complaint. Second, contrary to defendant's unfounded assumption that a license would cost 70¢ per song, the value of a license from the plaintiffs to distribute literally millions of copies of one of their copyrighted works (which is what occurs on peer-to-peer file-sharing networks) would, of course, far exceed the minimum statutory damages of \$750.

Finally, in light of the foregoing, even if the due process standard could theoretically apply to statutory damages, there is no conceivable state of facts that could be pled or proved here that would support a due process defense. The Supreme Court in *State Farm* did not hold that the imposition of punitive damages is unconstitutional per se. Rather, the Court held that courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered. See *State Farm*, 538 U.S. at 426. Here, unlike in a punitive damages case, the minimum statutory damages are quantifiable. Specifically, the minimum statutory damages would be \$750 for each of the 38 sound recordings at issue, or \$28,500. As a matter of law, such damages are not unreasonable when compared with the value of a license allowing the distribution of multiple copies of these recordings to millions of people. Moreover, an award of such damages does not begin to rise to the level of *State Farm* disproportionality. Nor could it ever rise to that level, because the Court itself can control the amount of statutory damages above \$750, if any, that the Court awards.

For all of the foregoing reasons, plaintiffs respectfully request that this Court deny defendant leave to assert a defense of the unconstitutionality of the statutory damages provision of the Copyright Act or to file a motion for partial summary judgment that would be based on such a defense. Should the Court permit defendant to file these motions, however, then plaintiffs

Cowan, Liebowitz & Latman, P.C.

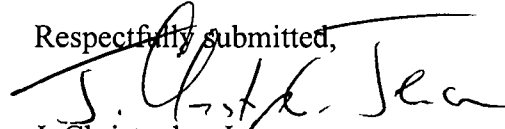
Hon. David G. Trager

May 2, 2006

Page 4

respectfully request that the Court provide the notice to the Attorney General of the United States required by 28 U.S.C. § 2403 and Fed. R. Civ. P 24(c), which mandate notice when the constitutionality of an act of Congress affecting the public interest is called into question in a case in which the United States is not a party.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Christopher Jensen". The signature is written in a cursive style with a long horizontal line extending from the end.

J. Christopher Jensen

cc: Ray Beckerman, Esq. (by fax – 212-763-6810)
Richard L. Gabriel, Esq. (by e-mail)