

**Sony BMG Music Entertainment, et al. v. Tenenbaum**  
U.S. District Court, D. Massachusetts (1:03-cv-11661-NG)  
Electronic order entered July 27, 2009

Judge Nancy Gertner: Electronic ORDER entered granting Motion for Partial Summary Judgment on Defendant's Fair Use Defense:

The Plaintiffs' Motion for Partial Summary Judgment is GRANTED, with a full opinion to follow.

Defendant Tenenbaum has asserted a fair use defense to the allegations of copyright infringement in this case, a question on which the Plaintiffs seek summary judgment. At summary judgment, a court considers whether sufficient facts have been established to warrant a decision as a matter of law. If material facts are in genuine dispute, the question must go to a jury; if they are not, the Court must determine the legal consequences of the uncontested facts. The Seventh Amendment does not guarantee the right to a jury trial on every issue, only those that turn on reasonably disputed facts. See *Calvi v. Knox County*, 470 F.3d 422, 427 (1st Cir. 2006). The Defendant has the burden of identifying the disputed facts, see Fed. R. Civ. P. 56(c), (e), a burden which "requires hard proof rather than spongy rhetoric." *Kearney v. Town of Wareham*, 316 F.3d 18, 22 (1st Cir. 2002). Tenenbaum has not met that burden. He proposes a fair use defense so broad that it would swallow the copyright protections that Congress has created. Indeed, the Court can discern almost no limiting principle: His rule would shield from liability any person who downloaded copyrighted songs for his or her own private enjoyment. See *Acuff-Rose*, 510 U.S. at 584 ("[T]he mere fact that a use is not for profit does not insulate it from a finding of infringement."). Likewise, his demand for a jury determination on this issue appears all but standardless; "fair use" would, in effect, be any use whatsoever that a jury deemed fair. In the end, fair use is not a referendum on fairness in the abstract, as the Defendant would have it, but an effort to measure the purpose and effects of his particular use against the incentives for artistic and literary creation that Congress established in the Copyright Act. See also Const. Art. I, Sec. 8, cl. 8. Tenenbaum makes no effort to fit his alleged file-sharing into this framework, no claim of a transformative use or public benefit sufficient to justify an exception to copyright protections. *Sony Corp.*, 464 U.S. at 429-30. To be sure, this Court can envision certain circumstances in which a defendant sued for file-sharing could assert a plausible fair use defense. Indeed, an amicus brief previously filed in this consolidated action by the Berkman Center at the Harvard Law School (on which Defendant's counsel was a signatory) outlined some of those circumstances -- for example, the defendant who "deleted the MP3 files after sampling them, or created MP3 files exclusively for space-shifting purposes from audio CDs they had previously purchased." See Berkman Center Br. at 37 (document # 177-3). The Court can also envision a fair use defense for a defendant who shared files during a period of time before the law concerning file-sharing was clear and paid outlets were readily available. The advent of the internet in the late 1990s threw a number of norms into disarray, offering sudden access to a wealth of digitized media and giving the veneer of privacy or anonymity to acts that had public consequences. At the beginning of this period, both law and technology were unsettled. A defendant who shared files online during

this interregnum but later shifted to paid outlets once the law became clear and authorized sources available would present a strong case for fair use. It might matter, too, who the defendant shared files with -- his friends, or the world -- as well as how many copyrighted works, and for how long. See *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 451 n.34 (1984). But the Defendant has offered no facts to suggest that he fits within these categories. He is accused of sharing hundreds of songs over a number of years, far beyond the infancy of this new technology or any legal uncertainty. And in his summary judgment opposition, he has contested few of the facts offered by the Plaintiffs in support of their motion. See Pl. Statement of Undisputed Facts (document # 74); Opp. to S.J. at 5-9 (document # 889). On the face of the summary judgment record -- the only record before the Court at this time -- the following details do not appear to be in genuine dispute: (1) the main purpose of Tenenbaum's file-sharing was his own private enjoyment and that of his friends, not profit-making; (2) he downloaded entire songs, but not entire albums of music; (3) he did not transform the 30 works at issue in the sense that he added "something new, with a further purpose or a different character," *Acuff-Rose*, 510 U.S. at 579; (4) his file-sharing spanned more than four years and several different software platforms, both before and after this activity was detected in August 2004; and (5) at that time, his file-sharing software made more than 800 songs available to other KazaA users to download. See Pl. Statement of Undisputed Facts at 1-4, 6. The only fair use factor on which the Defendant raises a serious factual challenge is the effect of his file-sharing on the potential market for or value of the copyrighted works, see 17 U.S.C. 107(4), in which he argues that file-sharing has not diminished the record companies' revenues nor curtailed overall artistic creation. But here again, Tenenbaum has put no facts into evidence on which the Court could rely; his opposition briefs are not accompanied by any affidavit, expert report, deposition testimony, or other evidence of the kind described by Rule 56(e). Even more, the Court is bound to look at the market for the specific works identified by Plaintiffs and as to this market, a court must consider "whether unrestricted and widespread conduct of the sort engaged in by the defendant... would result in a substantially adverse impact on the potential market for the original." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994) (quoting *Nimmer* § 13.05[A]). Plaintiffs have argued that continuous, high-volume file-sharing -- offering exact duplicates to millions of peer-to-peer users for free -- would negatively affect the market for these copyrighted works. The Defendant has offered no facts to the contrary. While the Court recognizes that not every unauthorized download would represent a lost sale, it seems clear that some portion of paying consumers would shift to free downloads if this activity were deemed a fair use. Based on this finding, the private purpose of this use, the substantiality and lack of transformation, and those additional factors the Court is entitled to consider, the Court holds that Tenenbaum's alleged infringement was not a fair use. See *Hustler Magazine, Inc. v. Moral Majority Inc.*, 796 F.2d 1148, 1151 (9th Cir. 1986); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1012-19 (2001). Accordingly, the Plaintiffs' Motion for Partial Summary Judgment on fair use is GRANTED. A full opinion by the Court shall follow. Finally, to the extent that the Defendant's fair use arguments are also relevant to any damages determination under 17 U.S.C. 504(c), he shall have the opportunity to present them to the jury at trial. (Gertner, Nancy) (Entered: 07/27/2009)