

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
CORPUS CHRISTI DIVISION**

ATLANTIC RECORDING CORP., <i>et al.</i> ,	:	
	:	
Plaintiffs	:	
	:	
v.	:	Civil Action No. 2:06-cv-00482
	:	
MICHAEL BOGGS,	:	<b>UNOPPOSED</b>
	:	
Defendant	:	

**UNITED STATES OF AMERICA’S ACKNOWLEDGMENT OF  
CHALLENGE TO THE CONSTITUTIONALITY OF  
AN ACT OF CONGRESS  
AND  
MOTION FOR TIME TO DETERMINE IF  
INTERVENTION IS APPROPRIATE**

The United States of America hereby submits this Acknowledgment of Challenge to the Constitutionality of an Act of Congress and Motion for Time to Determine if Intervention is Appropriate, and moves the Court to grant it time to determine if intervention is appropriate, and in support thereof, states as follows:

1. On or about March 10, 2007, defendant filed an answer to plaintiff’s complaint that challenged the constitutionality of the application of a provision of the Copyright Act, 17 U.S.C. § 504(c) [D.E. 15]. Plaintiff also brought a counterclaim against defendant seeking a declaratory judgment that the application of 17 U.S.C. § 504(c) is unconstitutional.

2. On or about March 10, 2007, defendant also filed a Notice of Challenge to Constitutionality of a Federal Statute under Fed R. Civ. P. 24(c) [D.E. 17]. The requirement to notify the Court of a challenge to the constitutionality of a federal statute in Federal Rule of Civil Procedure 24(c) has now been replaced by Federal Rule of Civil Procedure 5.1.

3. The United States has not yet received any notice pursuant to Federal Rule of Civil Procedure 5.1(a) (“A party that files a pleading, written motion, or other paper drawing into question the constitutionality of a federal or state statute must promptly (1) file a notice of constitutional question stating the question and identifying the paper that raises it . . . and (2) serve the notice and paper on the Attorney General of the United States if a federal statute is challenged”).

4. On or about March 30, 2007, plaintiffs brought a motion to dismiss, *inter alia*, defendant’s counterclaim seeking a declaratory judgment that the statutory damages of 17 U.S.C. § 504(c) sought by plaintiff is unconstitutional [D.E. 18]. Defendant filed an Opposition on or about April 26, 2007 [D.E. 22], and plaintiffs filed a Reply on or about May 21, 2007 [D.E. 26].

5. Counsel for the United States respectfully advises the Court that the United States is in the process of deciding whether to intervene in this action to defend the constitutionality of the provision of the Copyright Act. The United States is authorized to intervene in any federal court action in which the constitutionality of an Act of Congress is drawn into question. 28 U.S.C. § 2403(a). Under Department of Justice regulations, the approval of the Solicitor General is required for the United States to intervene to defend the constitutionality of a federal statute. See 28 C.F.R. § 0.21 (“The Solicitor General may in consultation with each agency or official concerned, authorize intervention by the Government in cases involving the constitutionality of acts of Congress.”).

6. The process of obtaining approval to intervene from the Solicitor General generally takes several weeks. The process may take a longer time in this case because the United States has not previously had to intervene to defend this particular statutory provision and because of the procedural posture of this potential challenge to the statute’s constitutionality. Federal Rule of Civil Procedure 5.1(a) states that “the attorney general may intervene within 60 days after the notice of

the constitutional question is filed or after the court certifies the challenge, whichever is earlier.” Federal Rule of Civil Procedure 5.1(c) adds that “[b]efore the time to intervene expires, the court may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional.” Because the United States has not received notice, it respectfully requests the Court for 60 days from this Acknowledgment to decide whether to intervene. The United States is aware that a Pretrial Conference is set for October 1, 2007, but does not intend to disrupt the schedule the Court has set for this case. “Pretrial activities may continue without interruption during the intervention period.” See Advisory Committee Notes (2006), Fed. R. Civ. P. 5.1(c).

7. Given the procedural posture of this case, specifically a motion to dismiss defendant’s counterclaim, and the parties’ briefing on the motion, the United States understands that the Court may be able to reach a decision on plaintiff’s motion to dismiss the counterclaim without implicating the constitutionality of 17 U.S.C. § 504(c). Should that occur, the United States would expect to be able to defer any intervention until such time as this Court would deem it proper to address the constitutionality of the Copyright Act’s damages provision.

8. Accordingly, the United States respectfully moves that it be allowed until September 17, 2007, the Monday following 60 days from this Acknowledgment, to notify the Court whether it intends to file a motion to intervene and to file a brief regarding plaintiffs’ motion to dismiss the counterclaim. If the United States decides not to intervene before that date, it will notify the Court promptly.

Dated: June 17, 2007

Respectfully submitted,

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United States Attorney

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/s/ Adam D. Kirschner

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/s/ Charles Wendlandt

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CERTIFICATE OF CONSULTATION

Counsel for the United States spoke with counsel for plaintiffs and defendant regarding this motion. Plaintiffs' counsel does not oppose this motion. Defendant's counsel indicated that

defendant does not oppose the motion but has noted that the United States would be filing its brief, if it decides to intervene, after the dispositive motion deadline, which would include any possible further motion on the constitutionality of the damages provision of the Copyright Act. The United States would not oppose either party filing a response to the brief it would file in this case should the United States intervene.

/s/ Adam D. Kirschner  
ADAM D. KIRSCHNER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to the following attorneys on July 17, 2007:

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