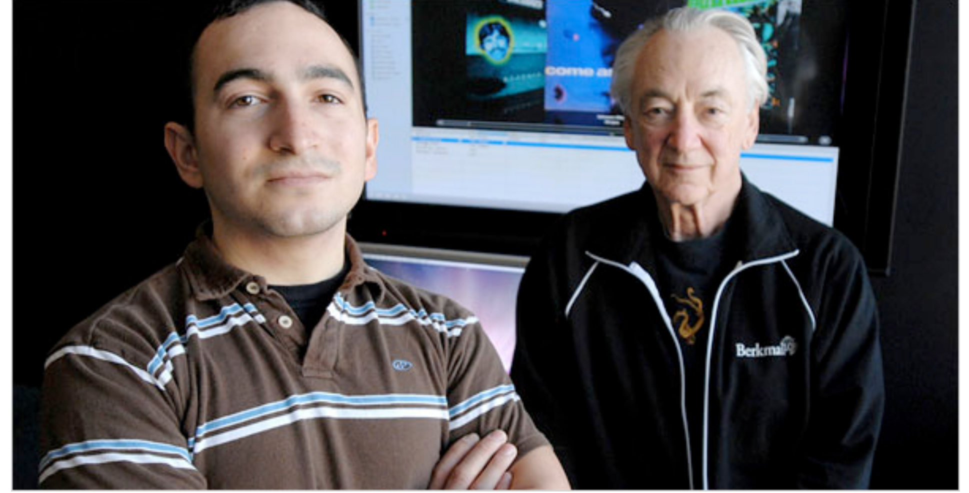
Tilting at Internet Barrier, a Stalwart Is Upended



Josh Reynolds/Associated Press

Joel Tenenbaum, left, and Prof. Charles Nesson, shown in Cambridge, Mass., challenged federal copyright law and lost.

By JOHN SCHWARTZ
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BOSTON — In the community of activists trying to break down Internet barriers that they say stifle creativity and knowledge, few figures are as revered as Charles Nesson.

As co-founder of the Berkman Center for Internet and Society at the Harvard Law School, Professor Nesson is renowned for his early interest in bridging technology, law and culture, and his ability to inspire generations of students to see the Internet as a force for positive change, not just cables and computers.

But when Professor Nesson, 70, took on the recording industry in an eagerly anticipated civil case here over sharing music online, the champion stumbled. On July 31, a jury handed down an eye-popping $675,000 judgment against Joel Tenenbaum, a Boston University graduate student who was defended by Mr. Nesson. Mr. Tenenbaum's offense was downloading and sharing 30 songs.

It was a stinging defeat for Professor Nesson, and to many in the legal community, it seemed to be a moment when an eccentric scholar's devotion to a soaring vision blinded him to the practical realities of winning a legal case. Taking on a lawsuit that his own allies warned was ill-advised, Professor Nesson acted in ways that many observers found bizarre and even harmful to the case.

But in an interview, Professor Nesson sounded a nearly evangelical tone, saying the case presented an opportunity to take on the recording industry's "assault on what I think of

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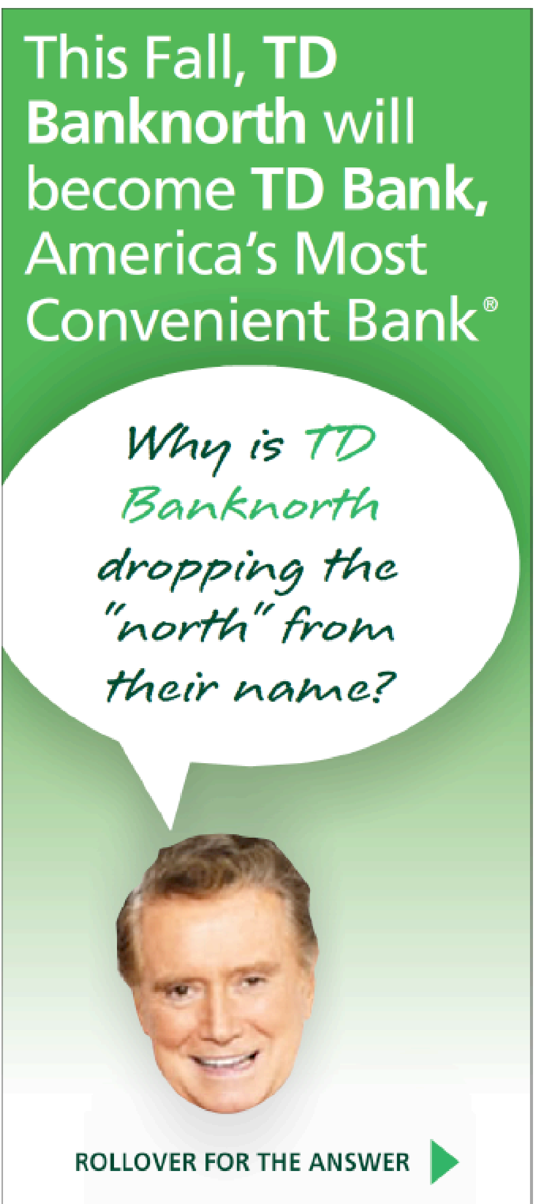

as the digital-native generation" over the industry's own failure to adapt to changing technologies. While artists deserve to be paid, he said, the solution is not to threaten and punish those who love music through a copyright regime that "produces absurd results."

In 2004, the Recording Industry Association of America contacted Mr. Tenenbaum, 25, who studies physics, and threatened to sue him over songs he had downloaded and shared without paying. Nearly all of the thousands of people confronted by the industry settle for a few thousand dollars, but Mr. Tenenbaum chose to fight.

Professor Nesson took on Mr. Tenenbaum as a client without pay last year at the encouragement of Judge Nancy Gertner of Federal District Court, who presided over the case and was uncomfortable with what she has called the "huge imbalance" between industry lawyers and the individuals they have sued.

There was excitement among advocates about the high-profile challenger. At the news site Techdirt, one commenter called Professor Nesson "my new HERO" and expected the industry to "go down in a blaze of humiliation!"

The problems for the case, however, started well before the first day of trial; Professor Nesson's court filings and tactics were decidedly informal and offbeat. As part of his almost obsessive desire for transparency and documentation, he posted a recorded telephone conference call with the judge and industry lawyers on his blog, and even posted e-mail messages from friends discussing case strategy.

In one message, Lawrence Lessig, an internationally recognized expert on copyright at Harvard Law School, expressed serious reservations about the suit and counseled against Professor Nesson's plan to argue that Mr. Tenenbaum had made "fair use" of the music. Fair use is a doctrine more commonly cited when small portions of a published work are quoted elsewhere. It would be wrong, Professor Lessig wrote, to "pretend" that "fair use excuses what he did."

"It doesn't," he added.

Even before opening statements, Professor Lessig was proved right: Judge Gertner prohibited the fair-use defense.

"To say she dealt us a stiff blow actually puts it quite lightly," Professor Nesson said.

During his opening statement, Professor Nesson held a brick of foam wrapped in plastic and compared it to the compact discs that the industry sold before the online revolution. He cut the wrapper and the foam broke into hundreds of pieces, which he compared to digital bits that spread around the world.

Ben Sheffner, a copyright lawyer who has worked for the entertainment industry and covered the trial for the Web site Ars Technica, said Professor Nesson's breezy, almost insouciant manner was more suited to the classroom than the courtroom, where "there are hundreds of rules you have to follow, and if you don't follow them, there is a judge who literally lays down the law."

The crucial blow came on the stand, when Professor Nesson encouraged Mr. Tenenbaum to admit freely that he had downloaded and shared songs, after having denied it in depositions, "because it's the truth," Professor Nesson said, stripping the case to the core issue of the law's unfairness. Judge Gertner essentially declared the case over, directing a verdict against Mr. Tenenbaum and leaving the jury to decide only the penalty.

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The $675,000 result could have been avoided by paying $4,000, the amount the industry demanded before trial. The 30 songs can be bought for less than $30.

For his part, Mr. Tenenbaum said he felt Professor Nesson did an “absolutely brilliant” job in a difficult case, and got a far smaller penalty than the maximum of $4.5 million. But, he added, “this is a bankrupting judgment, even if it’s reduced to $200,000 or increased to $2 million.”

These days, Mr. Tenenbaum said, he buys his music on iTunes.

Professor Nesson said he was counting on winning on appeal, and was preparing for a hearing to ask for a reduced penalty. While he said his filings might have lacked the formal structure of the industry lawyers’ work — he described his side as “me and my laptop” and some student helpers — they cogently argued the issues, which were “teed up beautifully for higher courts.”

He compared the case to a well-known water-contamination lawsuit he was involved with against W. R. Grace & Company that was settled for far less than the plaintiffs had originally hoped. The resulting book, “A Civil Action,” by Jonathan Harr, and the movie that followed had greater impact than the case itself, he said.

“Law in the court of public opinion is what shapes law in the courts and in the real world,” Professor Nesson said. “This could be ‘Civil Action II.’ ”

The outcome in the Tenenbaum case saddened Professor Nesson’s friends and fans. Elizabeth Stark, who teaches at Yale University, said, “He’s very much about big ideas,” adding that “if you don’t see the big picture, then you just don’t get Charlie.”

Ten years ago, Professor Lessig dedicated his first book to Professor Nesson: “For Charlie Nesson, whose every idea seems crazy — for about a year.”

Professor Lessig, who said he was chagrined to see his private e-mail message splayed across the Internet, said he still disagreed with his friend’s approach, and with his pursuit of the case at all. But, he added, “we’ll see where I am in a year.”

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