

DAMAGES IN DISSONANCE: THE “SHOCKING” PENALTY FOR ILLEGAL MUSIC FILE-SHARING

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I. INTRODUCTION

Downloading music without paying for it has its benefits and risks. The obvious benefit is getting music for free. The cost, however, of illegally downloading music is anything but trivial. It might cost the average person hundreds of thousands or even millions of dollars.

Copyright is one of the pillars of intellectual property.¹ The authors of creative works, including but not limited to music, often seek copyright protection to control the destiny of their respective works.² Copyright provides authors with certain rights that allow the author to protect, license, and exploit their works.³

The Framers of the Constitution of the United States granted Congress “the Power . . . [t]o promote the Progress of Science and useful Arts, by Securing for limited Times to Authors and Inventors the exclusive Right to their Respective Writings and Discoveries.”⁴ That power is, indeed, a great power, and the federal courts have generally refused to encroach upon it.⁵ Exercising its enumerated powers, Congress enacted laws such as

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I would like the reader to pay close attention to the timing of this comment’s publication. Many of the court cases that are the subject of this comment are currently pending. However, regardless of new court decisions, the voice of this comment remains the same: the Copyright Act’s statutory damages clause is unworkable in today’s tech-driven society. Today, individuals innovate, invent, collaborate, and share things with one another using electronic communication vehicles like the internet. Congress must update the current statutory damages clause to account for these cultural and technological changes.

¹ See BLACK’S LAW DICTIONARY 824 (8th ed. 2004) (“[Intellectual property] comprises primarily trademark, copyright, and patent rights . . .”).

² See *infra* Part II.

³ See 17 U.S.C. § 106 (2006).

⁴ U.S. CONST. art. I, § 8, cl. 8.

⁵ See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 198 (2003) (discussing the Copyright Term Extension Act and holding that the “Court has been . . . deferential to the judgment of Congress in the realm of copyright”). The deference paid to Congress by the federal courts in matters of copyright legislation is discussed in Part IV.B.1 *infra*.

the Copyright Act of 1976 that provide authors with adequate remedies for copyright infringement—the unauthorized use of an author’s work.⁶ Under current copyright law in the United States, authors may commence legal action against an alleged infringer for *either* actual damages caused⁷ or statutory damages.⁸ The latter provides a predetermined range of damages that is akin to liquidated damages in contract matters.⁹

Because the digital marketplace has made policing copyrights and placing an “actual” value on injury from copyright infringement increasingly difficult, copyright owners in music-related copyright infringement lawsuits have opted for statutory damages in lieu of actual damages.¹⁰ After all, statutory damages relieve the copyright owner of the burden of proving actual damages¹¹ and permit the owner to collect a potential windfall, ranging from \$750 to \$30,000 per infringement¹² and up to \$150,000 if the infringement is “willful.”¹³ Why bother calculating the actual harm caused by a copyright infringement when the law expressly permits copyright owners to opt for the statutory formula?

In an era where downloading a song is as simple as double-clicking a mouse, individuals who download music from file-sharing networks have

⁶ 17 U.S.C. § 501 (2006); *see infra* Part II.C.

⁷ 17 U.S.C. § 504(b).

⁸ *Id.* § 504(c).

⁹ *See* ABRAHAM L. KAMINSTEIN, REGISTER OF COPYRIGHT, H. COMM. ON THE JUDICIARY, 87TH CONG., REGISTER’S REPORT ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 103 (Comm. Print 1961).

¹⁰ *See, e.g.*, TERENCE P. ROSS, INTELLECTUAL PROPERTY LAW: DAMAGES AND REMEDIES § 6.02(2)(b)(i) (2003) (arguing that calculating actual damages for copyright infringement over the internet is difficult because “the sheer scope of the infringement and corresponding injury might be impossible to determine”); J. Cam Barker, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 TEX. L. REV. 525, 545–46 (2004); *see also* La Resolana Architects, PA v. Clay Realtors Angel Fire, 416 F.3d 1195, 1199 (10th Cir. 2005) (“[W]hen actual damages are difficult to ascertain . . . statutory damages are available under 17 U.S.C. § 504.”).

¹¹ *See* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.04(A) (2010); *see also* Ariel Katz, *A Network Effects Perspective on Software Piracy*, 55 U. TORONTO L.J. 155, 205 (2005) (“[A] plaintiff might still elect to recover statutory damages instead of actual damages, avoiding the burden of proving his injury.”).

¹² 17 U.S.C. § 504(c)(1).

¹³ *Id.* § 504(c)(2).

been and continue to be subjected to severe statutory damages penalties.¹⁴ In the summer of 2009, two federal juries awarded statutory damages to music copyright owners for infringements stemming from unauthorized file-sharing.¹⁵ Both defendants—a single mother and a graduate student—were found liable for copyright infringement; at one point, both defendants owed a combined amount that exceeded \$2 million dollars.¹⁶

The defendants in these lawsuits, as well as defendants in prior copyright infringement actions, challenged the constitutionality of the Copyright Act's statutory damages system. The arguments against the statutory damages clause include assertions that such damages are excessive, and therefore, violate notions of fairness and due process of law.¹⁷ Additionally, litigants have asserted that these fines are unconstitutionally excessive in violation of the Eighth Amendment.¹⁸ Despite challenges to its validity, the federal courts have not expressed an intention to invalidate the entirety of the Copyright Act's statutory damages clause, and they seem unlikely to do so.¹⁹

Congress created the statutory damages provision of the Copyright Act pursuant to an enumerated power of the Constitution—a power to which the federal courts substantially defer.²⁰ Therefore, although arguments for reforming the statutory damages clause will probably continue to resonate in courtrooms across the country, the federal courts will almost certainly refrain from making reforms from the bench and instead defer to Congress.²¹ Moreover, it is simply not the duty of the federal courts to reform congressional acts like the Copyright Act; that task is best left to a

¹⁴ See Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, at B1. The RIAA commenced its litigation campaign against individuals in 2003. Recently, the RIAA announced that it would not commence any further lawsuits but would continue litigating pending lawsuits. *Id.*

¹⁵ See *Sony BMG Music Entm't v. Tenenbaum*, 721 F. Supp. 2d 85, 85 (D. Mass. 2010); *Capital Records Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045, 1045 (D. Minn. 2010); see also discussion *infra* Parts II.B–II.C.

¹⁶ See *Thomas-Rasset*, 680 F. Supp. 2d at 1045; *Tenenbaum*, 721 F. Supp. 2d at 85.

¹⁷ See *Thomas-Rasset*, 680 F. Supp. 2d at 1050.

¹⁸ *E.g.*, *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 586 (6th Cir. 2009).

¹⁹ See, *e.g.*, *Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1192 (9th Cir. 2001) (declining to declare unconstitutional the statutory damages provision of the Copyright Act).

²⁰ See, *e.g.*, *Eldred v. Ashcroft*, 537 U.S. 186, 198 (2003).

²¹ See *infra* Part V.A.

legislative body.²² However, recent awards of massive statutory damages for music copyright infringements have “raise[d] a judicial eyebrow,”²³ leading the federal courts to criticize Congress’ judgment. One district court judge went so far as to state that these damages awards are “simply shocking.”²⁴

Although Congress holds the constitutional power to set statutory damages for copyright infringement, Congress must renovate its statutory damages regime to reflect advancements in technology and avoid unconstitutionally excessive penalties. Part II of this article examines the definition of “copyright” and its place in intellectual property. Part II further provides an overview of the origins and the present state of the copyright law in the United States. Part III details the campaign against illegal music downloading, focusing on two 2009 federal district court cases where juries assessed massive statutory damages against two individuals. Part IV summarizes the arguments opposing and supporting statutory damages for copyright infringement. Finally, Part V concludes with predictions on the future of the statutory damages clause. These predictions include: (1) that the federal courts will not invalidate the statutory damages clause in its entirety; (2) that any reforms to the statutory damages clause must come from legislative, not judicial, action; and (3) that even though Congress holds the constitutional power to set statutory damages, recent statutory damages awards are unfair, arbitrary, and contrary to the Framers’ intention that copyright provide incentives to stimulate artistic creativity for the general public good. Part V further stresses the need for Congress to amend the copyright laws as echoed by concerned judges, litigants, and commentators. Amendments to the statutory damages system for copyright infringement must account for advancements in technology and distinguish between different types of offenders.

Although Congress—not the judiciary—holds the responsibility of making and amending laws, a cautious and wary judiciary is keeping its eyes trained on the Copyright Act’s statutory damages clause. Federal judges have responded by reducing these “shocking” and “excessive” statutory damages awards;²⁵ however, even the reductions seem inequitable

²² See *infra* Part V.B.

²³ *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 481 (1993) (O’Connor, J., dissenting).

²⁴ *Capitol Records Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045, 1054 (D. Minn. 2010).

²⁵ See, e.g., *Sony BMG Music Entm’t v. Tenenbaum*, 721 F. Supp. 2d 85, 116 (D. Mass. 2010).

and unfair, and the results in these cases suffer from the taint of a disproportionate and outdated federal statute. How many more million-dollar judgments against noncommercial individuals for downloading twenty to thirty songs must there be to get Congress' attention?

II. UNITED STATES COPYRIGHT LAW: PAST AND PRESENT

A. *What Is "Copyright"?*

Copyright simply means the right to copy.²⁶ Specifically, copyright is a right of property originating from an intangible work of authorship that the author later fixes into a tangible medium,²⁷ such as where a songwriter writes a song and later records it. To fix a "work of authorship"—a work originally created by an author—the author must capture the work in a medium other than the author's mind.²⁸ Thus, a song written by an author and subsequently transcribed to sheet music or recorded on a computer hard drive is a fixed work of authorship; a song that the author has merely thought about but not transcribed or recorded is not.²⁹ Moreover, once the author fixes the work in a tangible medium, copyright protection automatically begins; the author need not formally register his work to have copyright protection.³⁰

Copyright contains unique, protective, and collaborative characteristics; it "assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work."³¹ Even in the early days of the United States, the Framers recognized the importance of copyright as a form of property and sought to provide incentives for authors to create works that could benefit the public.³²

²⁶ BLACK'S LAW DICTIONARY 361 (8th ed. 2004).

²⁷ See U.S. COPYRIGHT OFFICE, CIRCULAR 1, at 2 (2008), available at <http://www.copyright.gov/circs/circ1.pdf>.

²⁸ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984) (quoting 17 U.S.C. § 102(a) (1982)).

²⁹ See U.S. COPYRIGHT OFFICE, *supra* note 27, at 3.

³⁰ *Id.* However, for reasons more thoroughly explained later, passing on registration with the Copyright Office strips the author of many protective advantages, including judicial remedies. See *infra* notes 48–49 and accompanying text.

³¹ *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991).

³² See *Sony Corp.*, 464 U.S. at 428–30.

B. Constitutional Authorization

The Constitution grants Congress “the Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”³³ In other words, the Framers vested Congress with the power to grant authors exclusive rights and monopolies for limited times for their original works, assuring authors exclusive control over their work for a specified time; after the limited monopoly ends, the work enters the public domain for use by all.³⁴

However, it is inaccurate to say that the primary objective of copyright is to provide monetary rewards to the author;³⁵ rather, the simple goal of copyright is to provide incentives that “stimulate artistic creativity for the general public good.”³⁶ Thus, copyright law and policy balance the needs of authors, who desire protection and incentives for producing ideas, with the interests of the public, who look to authors for inspiration and new ways to promote the arts and sciences.³⁷

C. Congressional Action

Since 1790, Congress has exercised its constitutional power to promulgate copyright laws.³⁸ Congress amended the Copyright Act of 1790 several times in the nineteenth century³⁹ but has since enacted only two revisions of copyright law: the Copyright Act of 1909⁴⁰ and the Copyright Act of 1976.⁴¹ The mandate of the Copyright Act of 1976 is to protect “original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated.”⁴² Works of authorship include literary works, musical works, sound recordings, dramatic works, graphical works, audiovisual

³³ U.S. CONST. art. I., § 8, cl. 8.

³⁴ See, e.g., *Sony Corp.*, 464 U.S. at 429.

³⁵ *Feist*, 499 U.S. at 349.

³⁶ *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

³⁷ *Sony Corp.*, 464 U.S. at 429.

³⁸ See Copyright Act of 1909, ch. 320, 35 Stat. 1075; Act of July 8, 1870, ch. 230, 16 Stat. 198; Act of Feb. 3, 1831, ch. 16, 4 Stat. 436; Act of May 31, 1790, ch. 15, 1 Stat. 124.

³⁹ Act of Mar. 3, 1891, ch. 565, 26 Stat. 1106; Act of July 8, 1870, 16 Stat. 198; Act of Feb. 3, 1831, 4 Stat. 436.

⁴⁰ Copyright Act of 1909, ch. 320, 35 Stat. 1075.

⁴¹ Act of Oct. 19, 1976, ch. 1, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–1332 (2006)).

⁴² 17 U.S.C. § 102(a).

works, and architectural designs.⁴³ Additionally, the Copyright Act vests authors with exclusive rights during the term of the copyright including the rights to reproduce, to prepare derivative works based on the copyrighted work, to distribute the copyrighted work to the public, to perform the copyrighted material publicly, to display the work publicly, and to perform the work through digital audio transmission.⁴⁴

An author secures copyright automatically at the time when the work is fixed into a tangible medium.⁴⁵ The moment after the author fixes the work into a tangible medium, the author's limited monopoly begins to run its set term.⁴⁶ Generally, an author of a creative work in a fixed medium enjoys copyright protection from the date of fixation to seventy years after the author's death.⁴⁷ Regardless of when a work is fixed, it is crucial to understand that copyright is secured automatically; copyright registration, however, is a different matter. The author has the sole discretion to pursue formal copyright registration with the United States Copyright Office—the administrative body overseeing copyright policy in the United States.⁴⁸ Registering with the Copyright Office, or at least having a registration application pending, provides essential benefits and protections for authors including the right to sue for infringement and the right to seek remedies for infringement.⁴⁹

A person who violates any of the exclusive rights of a copyright owner's work "infringes" the author's copyright.⁵⁰ A copyright owner may commence legal action against an infringer, but the owner bears the burden of proving (1) ownership of a valid copyright and (2) copying by the

⁴³ *Id.*

⁴⁴ *See id.* § 106.

⁴⁵ *See id.* §§ 101, 102(a); *see also* U.S. COPYRIGHT OFFICE, *supra* note 27, at 3.

⁴⁶ The date that the author fixed the work in a tangible medium determines whether the Copyright Act of 1976—the current law—or the Copyright Act of 1909—the 1976 Act's predecessor—applies. *See* 17 U.S.C. §§ 301–304. For a thorough analysis on the crucial differences between works created before January 1, 1978 and works created on or after January 1, 1978, *see* 3 MELVIN B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §§ 9.08 to 9.12 (2007).

⁴⁷ *See* 17 U.S.C. § 302(a).

⁴⁸ *Id.* § 408(a); *see also id.* § 401(a) ("Whenever a work protected under this title is published in the United States . . . a notice of copyright as provided by this section *may* be placed on publicly distributed copies from which the work can be visually perceived . . .") (emphasis added)).

⁴⁹ *See* 17 U.S.C. § 411 (Supp. II 2009).

⁵⁰ *See id.* § 501 (2006).

infringer.⁵¹ If the owner meets this burden, the Copyright Act generally provides two types of remedies for copyright infringement: injunction and damages.⁵²

Focusing on damages, a copyright infringer may be liable to the copyright owner for general damages or statutory damages.⁵³ General damages are comprised of two elements: actual damages and the infringer's profits.⁵⁴ The actual damages element provides compensation to the copyright owner for economic injury caused by the infringement,⁵⁵ the infringer's profits element examines circumstances where the infringer unfairly benefited from the infringement.⁵⁶ Calculating the actual damages caused by another's infringement, especially in an era where so much copyright infringement occurs over electronic channels, may be difficult or impossible.⁵⁷ In response to these difficulties, Congress provided an alternative—statutory damages.⁵⁸

At any time before a court renders final judgment, the copyright owner may elect to recover statutory damages in lieu of actual damages.⁵⁹ In the copyright context, statutory damages are a congressionally predetermined range of monetary penalties.⁶⁰ Like actual damages, statutory damages provide a remedy to the copyright owner and compensate the copyright owner for damages and losses caused by an infringement.⁶¹ However, unlike actual damages, the plaintiff need not support statutory damages

⁵¹ *E.g.*, *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 581 (6th Cir. 2007).

⁵² *See* 17 U.S.C. §§ 502, 504. Under § 502, a court may generally grant temporary and final injunction “as it may deem reasonable to prevent or restrain infringement of a copyright.” *Id.* § 502.

⁵³ *Id.* § 504(a).

⁵⁴ *See id.* § 504(b).

⁵⁵ ROBERT KASTENMEIER, COMM. ON THE JUDICIARY, COPYRIGHT LAW REVISION, H.R. REP. NO. 94-1476, at 161 (1976) (commenting on 17 U.S.C. § 504).

⁵⁶ *Id.*

⁵⁷ *E.g.*, *La Resolana Architects, PA v. Clay Realtors Angel Fire*, 416 F.3d 1195, 1199 (10th Cir. 2005); *see also* HOWARD COBLE, COMM. ON THE JUDICIARY, H.R. REP. NO. 106-216, at 2–4 (1999) (describing the purpose of statutory damages in the digital age).

⁵⁸ *See* 17 U.S.C. § 504(c); KASTENMEIER, *supra* 55, at 161–62.

⁵⁹ 17 U.S.C. § 504(c)(1).

⁶⁰ *See* Stephanie Berg, *Remedying the Statutory Damages Remedy for Secondary Infringement Liability: Balancing Copyright and Innovation in the Digital Age*, 56 J. COPYRIGHT SOC'Y U.S.A. 265, 273–74 (2009).

⁶¹ *See id.*

with adequate evidence of the economic damage.⁶² Rather, statutory damages may provide relief in instances where actual damages are difficult or impossible to prove.⁶³ Moreover, a predetermined range of damages aims to deter future infringers; if potential infringers understand that the court may order them to pay damages for their wrongful acts, then they will refrain from infringing.⁶⁴ Thus, statutory damages not only compensate the copyright owner where damages are difficult to calculate but also deter infringement by punishing infringing parties.⁶⁵

The amount of statutory damages assessed to an infringing party depends on the severity and willfulness of *each* infringement.⁶⁶ For example, if an individual owns the copyright to all the recordings on one album and another individual infringes the copyright of every recording on that album, then the copyright owner has a claim of infringement for each recording.⁶⁷ For every single infringement, a copyright owner may recover “a sum of not less than \$750 or more than \$30,000” with respect to any one work.⁶⁸ However, the maximum amount jumps to \$150,000 for any one work where the infringement is committed “willfully.”⁶⁹ “Willful” is not a mere intent to copy; rather, a “willful” infringement requires “knowledge that the defendant’s conduct constitutes copyright infringement.”⁷⁰ It logically follows that an infringement by “one who has been notified that his conduct constitutes copyright infringement, but who reasonably and in good faith believes the contrary, is not ‘willful.’”⁷¹

Originally, the deterrent purpose of statutory damages was viewed generally as incidental to its primary purpose—to compensate a copyright

⁶² See, e.g., *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (7th Cir. 1984).

⁶³ See, e.g., *KAMINSTEIN*, *supra* note 9, at 102; see also *COBLE*, *supra* note 57, at 2–4 (describing Congress’ intent for statutory damages in the digital age).

⁶⁴ See *COBLE*, *supra* note 57, at 6.

⁶⁵ *KAMINSTEIN*, *supra* note 9, at 103.

⁶⁶ Compare 17 U.S.C. § 504(c)(1) (2006) (providing the range for non-willful statutory damages), with *id.* § 504(c)(2) (providing the range for willful statutory damages).

⁶⁷ See *id.* § 504(c)(1).

⁶⁸ *Id.*

⁶⁹ *Id.* § 504(c)(2).

⁷⁰ *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1392 (6th Cir. 1996) (quoting 3 MELVIN B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 14.04(B)(3) (1996)).

⁷¹ *Id.*

owner when damages are difficult to calculate.⁷² The Congress that drafted the predecessor to the current Copyright Act stressed that statutory damages are not a penalty.⁷³ However, recent cases illustrate an unfortunate trend: deterrence has become a more prevalent purpose for awarding statutory damages, as indicated by the monstrous damages awards in recent music copyright infringement cases.⁷⁴

III. THE MUSIC INDUSTRY'S CAMPAIGN AGAINST ILLEGAL INTERNET FILE-SHARING

A. *The Recorded Music Industry's Guardian: The RIAA*

The Recording Industry Association of America (RIAA) is the trade group that represents the interests of record labels in the United States.⁷⁵ Like other industry groups, the RIAA seeks to promote the interests and well being of its music industry members; and thus, it “monitor[s] and review[s] state and federal laws, regulations and policies.”⁷⁶ In addition to conducting market research and protecting its members' intellectual property and First Amendment rights, the RIAA also certifies music sales accolades.⁷⁷ Thus, news that a particular artist recorded a “gold” record⁷⁸ or that an artist's record has “gone platinum” are achievements awarded by the RIAA after a recording artist surpasses a threshold amount of unit sales.⁷⁹ Its mission statement is clear: “[P]romote[] the creative and

⁷² See Copyright Act of 1909, ch. 302, 35 Stat. 1075, 1081 (stating that statutory damages “shall not be regarded as a penalty”); *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233–34 (1952); see also *St. Luke's Cataract & Laser Inst., P.A. v. Sanderson*, 573 F.3d 1186, 1206 (11th Cir. 2009); *E. & J. Gallo Winery v. Spider Webs Ltd.*, 286 F.3d 270, 278 (5th Cir. 2002); *F.E.L. Publ'ns, Ltd. v. Catholic Bishop of Chi.*, 754 F.2d 216, 219 (7th Cir. 1985); *infra* Part III.

⁷³ See Copyright Act of 1909, ch. 320, 35 Stat. at 1081; see also Berg, *supra* note 60, at 274.

⁷⁴ See *infra* Parts III.B–III.C.

⁷⁵ *Who We Are*, RECORDING INDUSTRY ASSOC. OF AM., <http://riaa.org/aboutus.php> (last visited Feb. 16, 2011).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ A record generally refers to a sound recording. A recording can be fixed on numerous different mediums including but not limited to cassette tape, vinyl, compact disc, and, most thriving today, digital format. See 17 U.S.C. § 101 (2006).

⁷⁹ *Who We Are*, *supra* note 75.

financial vitality” of its members.⁸⁰ The unanswered question, however, is how the RIAA accomplishes that purpose.

The advent of the internet and its widespread use by the public has only complicated the RIAA’s task of protecting its record label members.⁸¹ Since the late 1990s and the birth of Napster and other peer-to-peer networks,⁸² copyright infringement has dramatically increased while record sales have plummeted.⁸³ A peer-to-peer network is simply a group of computers that share files, disk space, or bandwidth with one another.⁸⁴ By

⁸⁰ *Id.*

⁸¹ See MATT MASON, *THE PIRATE’S DILEMMA: HOW YOUTH CULTURE IS REINVENTING CAPITALISM* 158 (2008) (discussing the music industry’s defensive response to file-sharing and stating that the RIAA “blames file-sharing for the industry’s decline”).

⁸² Napster was one of the first widespread, file-sharing networks. See, e.g., CHRIS ANDERSON, *THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE* 33 (2006) (“The combined effects of Napster and other online file trading and CD burning and trading gave rise to an underground economy of any song, anytime, for free.”); MASON, *supra* note 81, at 154 (stating that Napster is “the file-sharing community that turned the music industry on its head” and that “Napster changed music history”); DON TAPSCOTT & ANTHONY D. WILLIAMS, *WIKINOMICS: HOW MASS COLLABORATION CHANGES EVERYTHING* 52 (2006) (“Napster . . . revolutionized the distribution of music, television shows, software, and movies.”).

⁸³ See *A & M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 901–05, 908–11 (N.D. Cal. 2000), *aff’d in part and rev’d in part*, 239 F.3d 1004, 1011 (9th Cir. 2001). In *Napster*, the district court discussed at great length the widespread practice of uploading and downloading copyrighted music by Napster’s users and the fact that Napster “never obtained licenses to distribute or download . . . the music that [record label] plaintiffs owed.” *Id.* at 902–03. Moreover, the court discussed the effect of Napster on the market for the record labels’ copyright works and explicitly held that “Napster use is likely to reduce CD purchases by college students, whom [Napster] admits constitute a key demographic.” *Id.* at 909–10 (citing the record labels’ expert witness, Michael Fine).

⁸⁴ See, e.g., *Definition for: Peer-to-Peer Network*, ZDNET, <http://www.zdnet.com/topics/peer-to-peer+network> (follow “Full Definition” hyperlink) (last visited Feb. 16, 2011) (defining a “peer-to-peer” network as “[a] network of computers configured to allow certain files and folders to be shared with everyone or with selected users”). ZDNet goes on to define peer-to-peer networks in the context of music file-sharing:

Using the Internet as the world’s largest file sharing network. Originally for music files, and subsequently for videos, this type of sharing was popularized by the famous Napster service as well as Gnutella (www.gnutella.com), Grokster (www.grokster.com), KaZaA (www.kazaa.com) and others. Users upload copyrighted songs to a central server, a group of servers or to selected user computers, and

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having access to another person's files, it becomes easy to communicate and share information, including media.⁸⁵ By the time Napster emerged and achieved popularity with users of all ages, performing artists, songwriters, record labels, and the RIAA realized the effects of "free" music.⁸⁶

Music downloading through file-sharing networks caught the music industry off guard.⁸⁷ As the popularity of electronically sharing music increased, sales of music crashed.⁸⁸ This inverse relationship led record labels and other music industry stakeholders to take defensive positions against music downloading.⁸⁹ Nevertheless, as the internet became the preferred method of social and business communication, some businesses embraced the internet as a way to reach music consumers.⁹⁰ Apple Inc.'s iTunes Music Store provides an excellent example of a viable, digital music business model.⁹¹ However, it is important to emphasize that

people download the files that are available. Almost every song ever recorded has been uploaded to some music sharing venue. *Id.*

⁸⁵ Brian Leubitz, *Digital Millennium? Technological Protections for Copyright on the Internet*, 11 TEX. INTELL. PROP. L.J. 417, 421 (2003).

⁸⁶ See, e.g., *Napster*, 114 F. Supp. 2d at 909 (finding that "Napster use is likely to reduce CD purchases by college students"). Moreover, Bono, the legendary front man of the rock band U2, deemed file-sharing "reverse Robin Hooding," claiming that it has hurt "the young, fledgling songwriters who can't live off ticket and T-shirt sales" and contributed to "the lost receipts of the music business." Bono, *Ten for the Next Ten*, N.Y. TIMES, Jan. 3, 2010, at WK10.

⁸⁷ See MASON, *supra* note 81, at 156–58.

⁸⁸ See TAPSCOTT & WILLIAMS, *supra* note 82, at 58 ("By 2000 . . . tens of thousands of music files had become available for downloading over the Net—and Napster alone, record companies said, had cost them \$300 million in lost sales.").

⁸⁹ See *id.* at 26 ("[R]ather than embrace MP3 and adopt new business models, the [music] industry has adopted a defensive posture. Obsession with control, piracy, and proprietary standards on the part of large industry players has only served to further alienate and anger music listeners.").

⁹⁰ *Id.* at 1 ("[P]rofound changes in the nature of technology, demographics, and the global economy are giving rise to powerful new models of production based on community, collaboration, and self-organization Smart companies are encouraging, rather than fighting, the heaving growth of massive online communicates"); see also *id.* at 26 ("Digital music presents a huge opportunity to place artists and consumers at the center of a vast web of value creation.").

⁹¹ See Apple Inc., Annual Report (Form 10–K) 41 (Oct. 27, 2009) (reporting music download sales from the Apple iTunes Music Store and other music related products and
(continued)

although legitimate downloading services exist today, thousands of unregulated and illegitimate file-sharing networks remain.⁹² Moreover, the birth of legitimate online music services has not been enough to offset the substantial loss of physical-brick-and-mortar music sales (i.e., CDs) at retail outlets—the traditional forums where record companies earned revenue.⁹³ Even though the Apples of the legitimate music-downloading world illustrate the potential for success in selling music online, the music industry, as a whole, remains stagnant.⁹⁴

Before Napster and other file-sharing networks, the music industry was largely a products-based business.⁹⁵ The primary revenue streams came from sales of physical formats such as CDs,⁹⁶ and recording artists

services of \$4,036,000,000, \$3,340,000,000, and \$2,496,000,000 for fiscal years 2009, 2008, and 2007, respectively).

⁹² A simple Google search of “best P2Ps” clearly illustrates the widespread use and popularity of so-called illegal file-sharing.

⁹³ INT’L FED’N OF THE PHONOGRAPH INDUS., IFPI DIGITAL MUSIC REPORT 2010, at 10 (2010), available at <http://www.ifpi.org/content/library/DMR2010.pdf> (reporting that “the increase in the music industry’s digital sales is not offsetting the sharp decline in sales of physical formats”); Douglas MacMillan, *The Music Industry’s New Internet Problem: Streaming Music Sites with Freely Accessible Content Are Being Used by a Growing Number of Listeners as a Substitute for Buying Music*, BUSINESSWEEK (Mar. 6, 2009), http://www.businessweek.com/technology/content/mar2009/tc2009035_000194.htm (discussing total music sales in 2008 and noting that “[r]evenues from digital download services like Apple iTunes (AAPL) and Amazon MP3 (AMZN) are still growing strong, but they’re not generating enough revenue to make up for the sharp decline in CD sales”).

⁹⁴ Compare Apple Inc., Annual Report, *supra* note 91 (reporting *net sales* of music downloads from the Apple iTunes Music Store and other music related products and services of \$4,036,000,000, \$3,340,000,000, and \$2,496,000,000 for fiscal years 2009, 2008, and 2007, respectively) with Warner Music Grp., Annual Report (Form 10-K) 50 (Jan. 11, 2010) (reporting *total recorded music revenue*—sales of both physical and digital music, among other things—of \$2,624,000,000, \$2,895,000,000, and \$2,835,000,000 for fiscal years 2009, 2008, and 2007, respectively).

⁹⁵ Jason Feinberg, *What Will Record Labels Look Like in the Future?*, PBS (Aug. 19, 2009), <http://www.pbs.org/mediashift/2009/08/what-will-record-labels-look-like-in-the-future230.html>. See generally ANDERSON, *supra* note 82, at 97 (reflecting on the current music business models such as iTunes and commenting that “[t]he overwhelming trend of our age is to take products that were once delivered as physical goods, find ways to turn them into data, and stream them into your home”).

⁹⁶ Feinberg, *supra* note 95; see also Lynn Hirschberg, *The Music Man: Can Rick Rubin Save the Record Business?*, N.Y. TIMES, Sept. 2, 2007, § 6 (Magazine), at 29–31, available at <http://www.nytimes.com/2007/09/02/magazine/02rubin.t.html> (stating that only a few of

(continued)

typically relied on a record label's marketing and promotional prowess to ensure the monetary success of an album.⁹⁷ The internet changed everything.

The advent of the internet caused the centerpiece of the traditional music business model (the physical CD) to evolve into an intangible, digital file.⁹⁸ Moreover, the internet and other technological advancements "democratized the tools of production," substantially reducing the price to produce music and paving the way for individuals of all ages, talents, and incomes to reach audiences all around the world.⁹⁹ Today, any person can record their "next big hit" on Apple's bundled "GarageBand" software¹⁰⁰ and upload their songs on MySpace for the whole world to hear.¹⁰¹ Relying on record labels for marketing, promotion, and distribution is a thing of the past.¹⁰²

Today, the music industry has openly embraced "new media" methods to reach consumers;¹⁰³ however, the industry remains battered by the

the college interns at a particular record company "knew that record companies participate only in the profits from records").

⁹⁷ MASON, *supra* note 81, at 154–55.

⁹⁸ See ANDERSON, *supra* 82, at 96–97.

⁹⁹ *Id.* at 54 (discussing how the internet and the personal computer have "put everything from the printing press to the film and music studios in the hands of anyone"):

Millions of people now have the capacity to make a short film or album, or publish their thoughts to the world

. . . In music, for instance, the number of new albums released grew a phenomenal 36 percent in 2005, to 60,000 titles (up from 44,000 in 2004), largely due to the ease with which artists can now record and release their own music.

Id. Even more telling about how individuals need not rely solely on large intermediaries such as record labels is the fact that "the Internet has made everyone a distributor" and "has dramatically lowered the costs of reaching consumers." *Id.* at 55.

¹⁰⁰ *Id.* at 63.

¹⁰¹ *Id.* at 54.

¹⁰² See MASON, *supra* note 81, at 155.

¹⁰³ The International Federation of the Phonographic Industry, an international trade group representing the interests of the music industry, commented that the music industry has diversified and developed new business models that no longer focus solely on CD sales; a la carte downloads, streaming, music subscription-based services, bundling songs with other products, and new formats such as digital music tracks, ringtones, and videos illustrate the industry's willingness to cater to digitally savvy consumers. INT'L FED'N OF THE PHONOGRAPH INDUS., *supra* note 93, at 4–5.

overall decline in music sales, especially sales in physical CD formats.¹⁰⁴ Consequently, the music industry adopted a protectionist attitude and began a controversial campaign of policing its creative assets—its sound recordings.¹⁰⁵ The industry that once thrived by selling CDs began filing lawsuits against everyday individuals for downloading songs from file-sharing networks. Jammie Thomas-Rasset and Joel Tenenbaum are among those individuals.¹⁰⁶

B. Jammie Thomas-Rasset

1. Trial 1

Jammie Thomas-Rasset is a single mother.¹⁰⁷ In April 2006, the RIAA, on behalf of heavyweight American recording labels including Capitol Records, Sony BMG, Arista Records, Interscope Records, Warner Brothers Records, and UMG Recordings, filed a lawsuit against Ms. Thomas-Rasset.¹⁰⁸ The complaint alleged that Ms. Thomas-Rasset used internet file-sharing programs (specifically KaZaA) to download twenty-four of the record labels' copyrighted sound recordings without their consent.¹⁰⁹ The record labels relied on evidence gathered by MediaSentry,

¹⁰⁴ *See id.* at 10.

¹⁰⁵ *See supra* note 14 and accompanying text.

¹⁰⁶ During the publication of this article, a federal judge in Texas found a noncommercial party—Whitney Harper—liable for thirty-seven claims of copyright infringement for using peer-to-peer networks to download sound recordings administered by major American record labels. *Maverick Recording Co. v. Harper*, 598 F.3d 193 (5th Cir. 2010). The district court assessed \$7,400 (or \$200 per song) in money damages but did not answer the question of whether Ms. Harper was an “innocent infringer” under 17 U.S.C. § 504(c)(2) (2006), which would exempt her from the traditional range of statutory damages. *Id.* at 194–95. However, on appeal by Ms. Harper and cross-appeal by the record labels, the Fifth Circuit Court of Appeals increased Ms. Harper’s liability to \$27,750 (or \$750 per song). *Id.* at 199. On November 29, 2010, the Supreme Court denied Ms. Harper’s petition for a writ of certiorari, leaving in place the Fifth Circuit’s decision ordering Ms. Harper, who was a high school cheerleader at the time of her infringements, to pay \$27,750. *Harper v. Maverick Recording Co.*, 131 S. Ct. 590, 590 (2010); *see also* David Kravets, *Supreme Court Won’t Hear RIAA File Sharing Case*, WIREd (Nov. 29, 2010, 1:35 PM), <http://www.wired.com/threatlevel/2010/11/innocent/>.

¹⁰⁷ *Capitol Records Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045, 1052 (D. Minn. 2010).

¹⁰⁸ *Id.* at 1049.

¹⁰⁹ *Id.* Specifically, the twenty-four sound recordings at issue were (1) Richard Marx, “Now and Forever”; (2) Destiny’s Child, “Bills, Bills, Bills”; (3) Journey, “Don’t Stop
(continued)

a company that employs a sophisticated monitoring system capable of recognizing the identity of individuals who use file-sharing networks.¹¹⁰ The record labels discovered Ms. Thomas-Rasset's wrongdoings through a complex and fascinating process: first, the record labels employed MediaSentry to determine internet protocol (IP) addresses that had connected to file-sharing networks to download music; second, the record labels filed "Doe" lawsuits against the individuals linked to those IP addresses; third, using the IP addresses, the record labels subpoenaed internet service providers to release the identity of the person(s) associated with the IP address; and finally, the internet service provider identified the user linked to the particular IP address: Ms. Thomas-Rasset.¹¹¹

The record labels alleged that Ms. Thomas-Rasset willfully infringed their sound recordings "in disregard of and with indifference to [their] rights."¹¹² For remedies, the record labels elected statutory damages pursuant to the Copyright Act¹¹³ for each of the copyrighted recordings at

Believin"; (4) Journey, "Faithfully"; (5) Gloria Estefan, "Coming Out of the Dark"; (6) Gloria Estefan, "Here We Are"; (7) Gloria Estefan, "Rhythm Is Gonna Get You"; (8) Sarah McLachlan, "Building a Mystery"; (9) Sarah McLachlan, "Possession"; (10) No Doubt, "Bathwater"; (11) No Doubt, "Different People"; (12) No Doubt, "Hella Good"; (13) Goo Goo Dolls, "Iris"; (14) Green Day, "Basket Case"; (15) Linkin Park, "One Step Closer"; (16) Aerosmith, "Cryin"; (17) Bryan Adams, "Somebody"; (18) Def Leppard, "Pour Some Sugar on Me"; (19) Guns N Roses, "November Rain"; (20) Guns N Roses, "Welcome to the Jungle"; (21) Janet Jackson, "Let's Wait Awhile"; (22) Reba McEntire, "One Honest Heart"; (23) Sheryl Crow, "Run, Baby, Run"; and (24) Vanessa Williams, "Save the Best for Last." Special Verdict Form, *Thomas-Rasset*, 680 F. Supp. 2d 1045 (D. Minn. Nov. 3, 2010) (No. 06-1497), 2010 WL 4392184.

¹¹⁰ See Plaintiffs' Statement of the Case at 2, *Thomas-Rasset*, 680 F. Supp. 2d 1045 (No. 06-1497). In a nutshell, MediaSentry, a division of the information security company SafeNet, is a service that monitors traffic on internet file-sharing networks and provides "[v]aluable download metrics including total quantity of files available, time of day, geography, version, download duration and success rates enabl[ing] content owners to further assess consumer interest and content demand as well as quantify the impact of digital piracy." *SafeNet Launches MediaSentry Business Intelligence Service for Audience Measurement and Piracy Monitoring on Global Peer-to-Peer Networks*, SAFENET (June 11, 2007), <http://safenet-inc.com/news/2007/2007-06-11-safenet-launches-mediasentry-business-intelligence-service-f/>.

¹¹¹ See Plaintiffs' Statement of the Case, *supra* note 110, at 2.

¹¹² Complaint for Copyright Infringement at 4, *Thomas-Rasset*, 680 F. Supp. 2d 1045 (D. Minn. Apr. 19, 2006) (No. 06-1497), 2006 WL 1431921.

¹¹³ See 17 U.S.C. § 504(c) (2006).

issue¹¹⁴ and also sought to enjoin¹¹⁵ any further infringement and misappropriation by Ms. Thomas-Rasset.¹¹⁶ The record labels also sought court costs and attorneys' fees.¹¹⁷ Ms. Thomas-Rasset substantially denied the complaint's allegations.¹¹⁸ A jury trial commenced on October 2, 2007.¹¹⁹

In October 2007, after a short trial, the jury announced its verdict: Ms. Thomas-Rasset willfully infringed all of the twenty-four recordings and was liable for \$220,000 (or \$9,250 per recording) in statutory damages.¹²⁰

The \$222,000 verdict did not last long. United States District Court Judge Davis, while addressing both Ms. Thomas-Rasset's post-judgment motion contesting the amount of damages awarded and the record companies' motion for a permanent injunction,¹²¹ determined that he erroneously instructed the jury as to the definition of copyright infringement.¹²² At issue was the jury instruction that "[t]he act of making copyrighted sound recordings available for electronic distribution on a peer-to-peer network, without license from the copyright owners [the record labels], violates the copyright owners' exclusive right of distribution, regardless of whether actual distribution has been shown."¹²³ Judge Davis stated that this instruction conflicted with the Copyright Act's provision dealing with a copyright owner's exclusive right to distribute, which Judge Davis determined imposes liability only if one *actually* distributes a copyrighted work.¹²⁴ Because this instruction permitted the

¹¹⁴ See *supra* note 109 and accompanying text.

¹¹⁵ See 17 U.S.C. §§ 502–03 (authorizing injunctive relief for copyright owners and permitting the court to impound all copies of the articles that are the subject of the infringement action).

¹¹⁶ Complaint for Copyright Infringement, *supra* note 112, at 5–6.

¹¹⁷ *Id.* at 6; see also 17 U.S.C. § 505 (authorizing the recovery of court costs as well as the recovery of reasonable attorney's fees).

¹¹⁸ See Answer at 1–2, *Thomas-Rasset*, 680 F. Supp. 2d 1045 (D. Minn. May 30, 2006) (No. 06-1497), 2006 WL 4861956.

¹¹⁹ *Thomas-Rasset*, 680 F. Supp. 2d at 1049.

¹²⁰ *Id.*; Judgment in a Civil Case, *Thomas-Rasset*, 680 F. Supp. 2d 1045 (No. 06-1497).

¹²¹ *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1212 (D. Minn. 2008).

¹²² *Id.* at 1226–27.

¹²³ *Id.* at 1213 (quoting Jury Instruction No. 15, *Thomas-Rasset*, 680 F. Supp. 2d 1045 (No. 06-1497)).

¹²⁴ *Id.* at 1216–19 (discussing liability under 17 U.S.C. § 106(3) (2006), which enables copyright owners the exclusive right “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending”).

jury to find Ms. Thomas-Rasset liable *without* a showing of actual distribution,¹²⁵ Judge Davis threw out the verdict and ordered a new trial.¹²⁶

2. Trial 2

With the \$222,000 damages verdict vacated, a new trial commenced in June 2009.¹²⁷ Unlike the first trial, Ms. Thomas-Rasset took the witness stand in her defense.¹²⁸ On the stand, Ms. Thomas-Rasset revealed that her personal computer had the same user name as the KaZaA account name that MediaSentry linked to Ms. Thomas-Rasset.¹²⁹ Ms. Thomas-Rasset further testified that she never heard of KaZaA, despite the fact that she studied the case against Napster in college¹³⁰ and “knew that copying and sharing copyrighted music files over the Internet was illegal.”¹³¹ Most damaging to Ms. Thomas-Rasset’s defense, however, was a fatal contradiction of her previous testimony. Previously, Ms. Thomas-Rasset stated that her computer hard drive—the hard drive allegedly containing the twenty-four sound recordings at issue—was replaced in 2004 and that it had not been changed since; however, on cross-examination she contradicted herself by responding affirmatively to a question from the record labels’ counsel asking whether she swapped her hard drive before turning it over to investigators.¹³²

The record labels alleged that Ms. Thomas-Rasset’s contradiction—first stating that she had not swapped her hard drive and later admitting to swapping her hard drive before turning it over to investigators—demonstrated an attempt to conceal evidence of copyright infringement.¹³³

¹²⁵ *Id.* at 1214.

¹²⁶ *Id.* at 1228.

¹²⁷ Third Amended Date Certain Trial Notice, *Thomas-Rasset*, 680 F. Supp. 2d 1045 (D. Minn. 2010) (No. 06-1497).

¹²⁸ See Court Minutes, *Thomas-Rasset*, 680 F. Supp. 2d 1045 (No. 06-1497).

¹²⁹ Nate Anderson, *Jammie Thomas Takes the Stand, Admits to Major Misstep*, ARS TECHNICA (June 16, 2009, 11:48 PM) [hereinafter Anderson, *Jammie Thomas*], <http://arstechnica.com/tech-policy/news/2009/06/jammie-thomas-takes-the-stand-admits-to-major-misstep.ars>.

¹³⁰ *Id.*

¹³¹ Plaintiffs’ Response in Opposition to Defendant’s Motion for a New Trial, Remittitur, and to Alter or Amend the Judgment at 4, *Thomas-Rasset*, 680 F. Supp. 2d 1045 (2009) (No. 06-1497), 2009 WL 4922076.

¹³² Anderson, *Jammie Thomas*, *supra* note 129.

¹³³ Plaintiffs’ Response, *supra* note 131, at 4 (stating that Ms. Thomas-Rasset “intentionally conceal[ed] her infringement by providing Plaintiffs, her counsel, and her
(continued)

This contradiction was likely a key talking point during the jury's deliberation.¹³⁴ Unsurprisingly, the jury announced another verdict against Ms. Thomas-Rasset.¹³⁵ The amount of statutory damages assessed in the second trial, however, shockingly exceeded the first jury verdict; the jury found Ms. Thomas-Rasset liable for willfully infringing all twenty-four of the recordings at issue and assessed \$1.92 million (or \$80,000 per sound recording) in statutory damages.¹³⁶

The second trial jury award attracted substantial media attention.¹³⁷ As expected, Ms. Thomas-Rasset challenged the verdict.¹³⁸ In January 2010, the court responded by slashing the jury's \$1.92 million damages award to \$54,000, which still left a "significant and harsh" award.¹³⁹ Judge Davis used common law remittitur to reduce the award,¹⁴⁰ a device by which a judge may reduce the amount of a jury's verdict if the verdict is excessive.¹⁴¹ "Remittitur is a limited exception to the sanctity of jury fact-finding"¹⁴² and is employed by judges only when the damages awarded by

own expert with a brand new computer hard drive that she knew would have no evidence of her infringement rather than the actual drive that she used to infringe").

¹³⁴ Ms. Thomas-Rasset's counsel "suspect[ed] that the jury thought Thomas-Rasset was a liar and were 'angry about it,' thus leading to the \$80,000 per-song damages." Nate Anderson, *Thomas Verdict: Willful Infringement, \$1.92 Million Penalty*, ARS TECHNICA (June 18, 2009, 5:32 PM), <http://arstechnica.com/tech-policy/news/2009/06/jammie-thomas-retrial-verdict.ars>.

¹³⁵ *Thomas-Rasset*, 680 F. Supp. 2d at 1050; Special Verdict Form, *supra* note 109.

¹³⁶ *Thomas-Rasset*, 680 F. Supp. 2d at 1050.

¹³⁷ *E.g.*, *Download Tab: \$1.9 Million*, CHI. TRIBUNE, June 19, 2009, at 23; Dave Itzkoff, *\$1.92 Million Fine for Music Piracy*, N.Y. TIMES, June 20, 2009, at C2; *Keeping Pirates at Bay*, ECONOMIST, Sept. 3, 2009, at 70; Jon Healey, *RIAA: 2, Jammie Thomas-Rasset: 0*, L.A. TIMES (June 18, 2009, 5:09 PM), <http://latimesblogs.latimes.com/technology/2009/06/riaa-jammie-thomas-rasset-piracy-verdict-kazaa.html>. Moreover, the second trial captured so much attention that some blogs and news websites provided detailed summaries of the day-to-day trial proceedings. *E.g.*, Nate Anderson, *Jury Selected in Thomas Retrial: Shockingly Law-Abiding*, ARS TECHNICA (June 15, 2009, 3:01 PM), <http://arstechnica.com/tech-policy/news/2009/06/jury-selected-in-thomas-retrial-shockingly-law-abiding.ars>.

¹³⁸ *Thomas-Rasset*, 680 F. Supp. 2d at 1050; Motion for a New Trial, Remittitur, and to Alter or Amend the Judgment, *Thomas-Rasset*, 680 F. Supp. 2d 1045 (No. 06-1497).

¹³⁹ *Thomas-Rasset*, 680 F. Supp. 2d at 1048-49 (remitting the \$1.92 million statutory damages judgment against Ms. Thomas-Rasset to \$54,000).

¹⁴⁰ *Id.*

¹⁴¹ *E.g.*, *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

¹⁴² *Akermanis v. Sea-Land Serv., Inc.*, 688 F.2d 898, 902 (2d Cir. 1982).

the jury are excessive.¹⁴³ Judge Davis refused to reach the ultimate question of the constitutionality of the statutory damages clause.¹⁴⁴

Noting that Ms. Thomas-Rasset willfully committed copyright infringement and that in jury trials the Copyright Act assigns jurors—not the judge—with the task of deciding the proper amount of statutory damages, Judge Davis nevertheless remarked that a near multimillion dollar verdict “for stealing 24 songs for personal use is simply shocking.”¹⁴⁵ However, Judge Davis based his remittitur on stronger grounds; he invoked the “maximum recovery rule,” which states that “[w]hen a jury awards excessive damages, remittitur to the maximum amount proved is an appropriate remedy.”¹⁴⁶ Judge Davis carefully noted that the reduction was not a substitution for the jury’s judgment.¹⁴⁷ Rather, the reduced amount represented “the maximum amount sustainable by the record, so that the statutory damages award [was] no longer shocking or monstrous.”¹⁴⁸

Neither the record labels nor Ms. Thomas-Rasset were satisfied with Judge Davis’ remittitur. The record labels attempted to reach a settlement with Ms. Thomas-Rasset for \$25,000 (payable to a charity benefiting musicians) and an agreement to vacate Judge Davis’ remittitur.¹⁴⁹ Ms. Thomas-Rasset quickly rejected the settlement.¹⁵⁰ Consequently, the record labels rejected the remittitur and challenged Judge Davis’ ruling.¹⁵¹ A third jury trial was held in November 2010.¹⁵²

¹⁴³ *Id.*; *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53, 65–66 (1966).

¹⁴⁴ *Thomas-Rasset*, 680 F. Supp. 2d at 1057.

¹⁴⁵ *Id.* at 1054.

¹⁴⁶ *Id.* (quoting *Stogsdill v. Healthmark Partners, L.L.C.*, 377 F.3d 827, 834 (8th Cir. 2004)).

¹⁴⁷ *Id.* at 1055.

¹⁴⁸ *Id.*

¹⁴⁹ Nate Anderson, *Thomas-Rasset Vows to Pay Nothing, So Third Trial Inevitable*, ARS TECHNICA (Jan. 28, 2010, 7:35 PM), <http://arstechnica.com/tech-policy/news/2010/01/thomas-rasset-vows-to-pay-nothing-so-third-trial-inevitable.ars>.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Nate Anderson, *“It Is Groundhog Day”: Third Jammie Thomas P2P Trial Begins*, ARS TECHNICA (Nov. 2, 2010, 9:21 PM), <http://arstechnica.com/tech-policy/news/2010/11/third-jammie-thomas-p2p-trial-begins-it-is-groundhog-day.ars>.

3. Trial 3

The parties selected a jury for the third trial with Judge Davis presiding.¹⁵³ Again, damages remained the only issue for the new jurors.¹⁵⁴ When the third trial commenced, Judge Davis compared the saga of the *Thomas-Rasset* cases to *Groundhog Day*, the comedy motion picture starring Bill Murray.¹⁵⁵ Indeed, this third trial looked almost identical to the previous two trials: the same facts, the same law. Perhaps this time around, the new jurors would return a verdict far less than the enormous \$1.92 million verdict returned by the second jury. However, the third jury assessed statutory damages of \$1.5 million (or \$62,500 per song).¹⁵⁶

Again, Judge Davis refused to discuss the constitutionality of the statutory damages clause of the Copyright Act.¹⁵⁷ Ms. Thomas-Rasset filed her post-trial motion to reduce the damages.¹⁵⁸ The matter is still pending as of February 2011.

C. Joel Tenenbaum

Joel Tenenbaum is a graduate student at Boston University.¹⁵⁹ As in Ms. Thomas-Rasset's case, some of the largest American record labels filed a copyright infringement lawsuit alleging that Mr. Tenenbaum illegally downloaded certain copyrighted sound recordings.¹⁶⁰ Originally, Mr. Tenenbaum appeared before the court without an attorney;¹⁶¹ after pretrial conferences, however, United States District Court Judge Nancy Gertner appointed a distinguished copyright and First Amendment lawyer

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Special Verdict Form, *supra* note 109; Nate Anderson, *Third P2P Verdict for Jammie Thomas: \$1.5 Million*, ARS TECHNICA (Nov. 5, 2010), <http://arstechnica.com/tech-policy/news/2010/11/the-first-p2p-case-to.ars#>.

¹⁵⁷ Order, *Thomas-Rasset*, 680 F. Supp. 2d 1045 (D. Minn. Oct. 22, 2010) (No. 06-1497).

¹⁵⁸ Motion to Alter or Amend the Judgment and Renewed Motion for Judgment as a Matter of Law, *Thomas-Rasset*, 680 F. Supp. 2d 1045 (D. Minn. Dec. 6, 2010) (No. 06-1497).

¹⁵⁹ *Directory*, BOSTON UNIV. PHYSICS DEP'T, <http://physics.bu.edu/people/show/jesusina> (last visited Feb. 20, 2011).

¹⁶⁰ *Sony BMG Music Entm't v. Tenenbaum*, 721 F. Supp. 2d 85, 87 (D. Mass. 2010).

¹⁶¹ Nate Anderson, *Tenenbaum File-Swapping Case Gets Seriously Funky*, ARS TECHNICA (Feb. 27, 2011, 5:05 AM), <http://arstechnica.com/tech-policy/news/2009/02/while-the-bizarre-antics-and.ars>.

to Mr. Tenenbaum's defense—Harvard Law School Professor Charles Nesson.¹⁶²

The complaint filed against Mr. Tenenbaum was substantially similar to the complaint filed against Ms. Thomas-Rasset,¹⁶³ alleging that Mr. Tenenbaum used internet file-sharing programs (specifically KaZaA) to willfully download thirty of the record labels' sound recordings without permission.¹⁶⁴ The record labels gathered their primary evidence by using the complex information technology services of MediaSentry, as they did to connect Ms. Thomas-Rasset to KaZaA.¹⁶⁵ MediaSentry determined that Mr. Tenenbaum, through his KaZaA account, downloaded copyrighted sound recordings onto his parents' home computer.¹⁶⁶ For remedies, the record labels sought injunctive relief, court costs, and attorney fees, and also elected for statutory damages.¹⁶⁷

¹⁶² See Notice of Appearance, *Tenenbaum*, 721 F. Supp. 2d 85 (No. 07-11446-NG).

¹⁶³ Compare Complaint for Copyright Infringement, *supra* note 112, at 3–5, with Complaint for Copyright Infringement at 2–4, *Tenenbaum*, 721 F. Supp. 2d 85 (D. Mass. Aug. 7, 2007) (No. 07-11446-NG), 2007 WL 4581492.

¹⁶⁴ See Complaint for Copyright Infringement, *Tenenbaum*, *supra* note 163, at 3. Here, the thirty sound recordings at issue were (1) Incubus, "New Skin"; (2) Green Day, "Minority"; (3) OutKast, "Wheez of Steel"; (4) Incubus, "Pardon Me"; (5) Nirvana, "Come as You Are"; (6) Green Day, "When I Come Around"; (7) Green Day, "Nice Guys Finish Last"; (8) Nirvana, "Heart Shaped Box"; (9) Nine Inch Nails, "The Perfect Drug"; (10) Blink-182, "Adam's Song"; (11) Limp Bizkit, "Rearranged"; (12) Limp Bizkit, "Leech"; (13) Limp Bizkit, "Crawling"; (14) Deftones, "Be Quiet and Drive"; (15) The Fugees, "Killing Me Softly"; (16) Red Hot Chili Peppers, "Californication"; (17) Red Hot Chili Peppers, "By The Way"; (18) Red Hot Chili Peppers, "My Friends"; (19) Beck, "Loser"; (20) Eminem, "My Name Is"; (21) Eminem, "Drug Ballad"; (22) Eminem, "Cleaning Out My Closet"; (23) Beastie Boys, "(You Gotta) Fight For Your Right (To Party)"; (24) The Ramones, "The KKK Took My Baby Away"; (25) Monster Magnet, "Look to Your Orb for the Warning"; (26) Aerosmith, "Pink"; (27) OutKast, "Rosa Parks"; (28) Rage Against the Machine, "Guerrilla Radio"; (29) Goo Goo Dolls, "Iris"; and (30) Aerosmith, "Water Song/Janie's Got a Gun." Jury Verdict Form, *Tenenbaum*, 721 F. Supp. 2d 85 (No. 07-11446-NG).

¹⁶⁵ See *supra* note 110 and accompanying text.

¹⁶⁶ See Motion to Suppress Evidence at 1–2, *Tenenbaum*, 721 F. Supp. 2d 85 (No. 07-11446-NG).

¹⁶⁷ Complaint for Copyright Infringement, *Tenenbaum*, *supra* note 163, at 4.

Before the trial began, the defense asserted a broad “fair use” defense to the record labels’ copyright infringement allegations.¹⁶⁸ Under the fair use doctrine, what would otherwise be copyright infringement is not, on the ground that the use is, for example, educational.¹⁶⁹ The defense’s fair use argument asserted broad justifications for Mr. Tenenbaum’s music downloading activity: widespread use of peer-to-peer networks; the record labels’ inability to show actual lost revenues from Mr. Tenenbaum’s wrongdoings; and the music industry’s assumption of the risk by releasing music in an environment prone to CD-ripping, copying, and swapping.¹⁷⁰ In denying the fair use defense, Judge Gertner warned of the consequences and ramifications of such a broad definition of fair use: “Tenenbaum mounted a broadside attack that would excuse all file-sharing for private enjoyment. It is a version of fair use so broad that it would swallow the copyright protections that Congress created, defying both statute and precedent.”¹⁷¹

Trial commenced in July 2009.¹⁷² As a file-sharing case occurring in the wake of *Thomas-Rasset*, the media followed Mr. Tenenbaum’s trial in great detail.¹⁷³ A short trial ended with the evidence starkly against Mr. Tenenbaum. The damaging evidence included: (1) testimony from Mr. Tenenbaum’s father that he had warned his son of the legal risks of peer-to-peer downloading in 2002 and that Joel brushed off his father’s concern

¹⁶⁸ See Response in Opposition to Plaintiffs’ Motion for Summary Judgment and Supplemental Brief Pursuant to the Court’s Order of July 14, 2009 at 1, *Tenenbaum*, 721 F. Supp. 2d 85 (No. 07-11446-NG).

¹⁶⁹ A discussion regarding the fair use doctrine and Mr. Tenenbaum’s proposed fair use defense appears in *infra* Part IV.A.3.

¹⁷⁰ See Response in Opposition, *supra* note 168, at 7–9.

¹⁷¹ *Sony BMG Music Entm’t v. Tenenbaum*, 672 F. Supp. 2d 217, 221 (D. Mass. 2009); see also Memorandum of Law in Support of Plaintiff’s Motion for Summary Judgment Re Defendant’s Fair Use Defense, *Tenenbaum*, 721 F. Supp. 2d 85 (D. Mass. July 13, 2009) (No. 07-11446-NG), 2009 WL 2390625 (arguing that Mr. Tenenbaum’s fair use defense rests on the notions that “society benefits from increased access to music, P2P networks have a positive effect on the sale of sound recordings, and Defendant was entitled to download and distribute Plaintiffs’ copyrighted sound recordings because Plaintiffs did not employ an optimal business model at the time he was caught infringing”).

¹⁷² Ben Sheffner, *Tenenbaum Trial Begins with “Tortured” Jury Selection*, ARS TECHNICA (July 27, 2009, 10:05 PM), <http://arstechnica.com/tech-policy/news/2009/07/tenenbaum-trial-opens-following-last-minute-dismissal-of-fair-use-defense.ars>.

¹⁷³ See, e.g., *id.*; David Kravitz, *RIAA File Sharing Trial Begins—Update*, WIRED (July 27, 2009, 2:47 PM), <http://www.wired.com/threatlevel/2009/07/riaa-file-sharing-trial-starting>.

by saying: “You only get sued if you do it a lot”;¹⁷⁴ (2) evidence from MediaSentry and Mr. Tenenbaum’s internet service provider that Mr. Tenenbaum used KaZaA to illegally download the recordings at issue;¹⁷⁵ (3) a statement made by one of Mr. Tenenbaum’s attorneys, outside the presence of the jury but nevertheless admitted in the record, that Mr. Tenenbaum infringed and that the defense was essentially waiving the issue of whether Mr. Tenenbaum actually infringed upon the plaintiffs’ copyrights;¹⁷⁶ and (4) Mr. Tenenbaum’s own admission that he used file-sharing networks before and after being sued by the record labels and that he lied on prior written discovery responses.¹⁷⁷ The evidence painted a clear picture; Mr. Tenenbaum was liable for copyright infringement. The only remaining issue was the amount of damages.

The jury assessed statutory damages of \$675,000 (or \$22,500 per sound recording), finding that Mr. Tenenbaum willfully infringed the thirty recordings at issue.¹⁷⁸ Mr. Tenenbaum challenged the verdict in a post-trial motion in early January 2010,¹⁷⁹ which the record labels predictably opposed.¹⁸⁰ In July 2010, Judge Gertner responded to these post-trial arguments; she declared the jury’s damages award unconstitutionally excessive under the Due Process Clause and slashed the jury’s \$675,000 damages award to \$67,500—a 90% reduction of the jury’s verdict.¹⁸¹ However, Judge Gertner did not use common law remittitur to reduce the

¹⁷⁴ Ben Sheffner, *Tenenbaum P2P Trial Features Prophetic Warnings of Doom*, ARS TECHNICA (July 28, 2009, 9:49 PM), <http://arstechnica.com/tech-policy/news/2009/07/tenenbaum-day-two.ars>.

¹⁷⁵ *Id.*

¹⁷⁶ Ben Sheffner, *Tenenbaum Lawyer Admits Liability; Damages Now Main Issue*, ARS TECHNICA (July 29, 2009, 9:15 PM), <http://arstechnica.com/tech-policy/news/2009/07/tenenbaum-day-three.ars> (Matthew Feinberg, an attorney on the Tenenbaum team, “acknowledged . . . that Tenenbaum is essentially defenseless on the issue of whether he committed copyright infringement. During a discussion about the admissibility of the past settlement discussions between Tenenbaum and the labels . . . attorney Matthew Feinberg stated: “We’re admitting liability, your honor.”).

¹⁷⁷ Ben Sheffner, *Tenenbaum Takes the Stand: I Used P2P and Lied About It*, ARS TECHNICA (July 30, 2009, 6:30 PM), <http://arstechnica.com/tech-policy/news/2009/07/tenenbaum-takes-the-stand-i-used-p2p-and-lied-about-it.ars>.

¹⁷⁸ *Sony BMG Music Entm’t v. Tenenbaum*, 721 F. Supp. 2d 85, 91 (D. Mass. 2010).

¹⁷⁹ Defendant’s Motion and Memorandum for New Trial or Remittitur, *Tenenbaum*, 721 F. Supp. 2d 85 (No. 07-11446-NG).

¹⁸⁰ Plaintiffs’ Response in Opposition to Defendant Joel Tenenbaum’s Motion for New Trial or Remittitur, *Tenenbaum*, 721 F. Supp. 2d 85 (No. 07-11446-NG).

¹⁸¹ *Tenenbaum*, 721 F. Supp. 2d at 89.

award as Judge Davis did in *Thomas-Rasset*; rather, Judge Gertner lowered the award as a matter of constitutional law under the Due Process Clause.¹⁸²

The record labels filed a notice of appeal with the First Circuit Court of Appeals.¹⁸³ Although initial briefs and replies have been filed,¹⁸⁴ the case is still pending as of February 2011.

D. Summary

Juries found both Ms. Thomas-Rasset and Mr. Tenenbaum liable for illegally downloading and distributing copyrighted sound recordings through internet file-sharing networks and ordered them to pay massive damages to the record labels.¹⁸⁵ Both Ms. Thomas-Rasset and Mr. Tenenbaum challenged the constitutionality of the judgments against them.¹⁸⁶ The judges in their respective cases, for different reasons, slashed the damages awards far below the amount ordered by the juries.¹⁸⁷ Their arguments, as well as the corresponding counterarguments, are carefully analyzed below. Additionally presented are arguments by commentators and litigants in other cases.

IV. THE CONSTITUTIONALITY OF THE COPYRIGHT ACT'S STATUTORY DAMAGES CLAUSE

Ms. Thomas-Rasset and Mr. Tenenbaum challenged the constitutionality of the statutory damages clause of the Copyright Act.¹⁸⁸ These challenges, however, face a substantial barrier—the federal judiciary. Every litigant who has challenged the constitutionality of the statutory damages clause faces the difficult task of persuading an extremely deferential judiciary. Because the federal courts substantially

¹⁸² *Id.*

¹⁸³ Plaintiff's Notice of Appeal, *Tenenbaum*, 721 F. Supp. 2d 85 (D. Mass. July 12, 2010) (No. 07-11446-NG), available at <http://www.scribd.com/doc/34726565/Plaintiffs-Notice-of-Appeal>.

¹⁸⁴ *E.g.*, Response/Reply Brief of Plaintiffs-Appellants/Cross-Appellees, *Tenenbaum*, Nos. 10-1883, 10-1947, 10-2052 (1st Cir. Jan. 31, 2011), available at <http://blogs.law.harvard.edu/nesson/files/2011/02/PlaintiffAppellantReplyBrief.pdf>.

¹⁸⁵ *Tenenbaum*, 721 F. Supp. 2d at 87; *Capitol Records Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045, 1049–50 (D. Minn. 2010).

¹⁸⁶ *Tenenbaum*, 721 F. Supp. 2d at 91; *Thomas-Rasset*, 680 F. Supp. 2d at 1050.

¹⁸⁷ *Tenenbaum*, 721 F. Supp. 2d at 89–90; *Thomas-Rasset*, 680 F. Supp. 2d at 1048–49.

¹⁸⁸ *Tenenbaum*, 721 F. Supp. 2d at 91; *Thomas-Rasset*, 680 F. Supp. 2d at 1049–50.

defer to legislation enacted pursuant to the Copyright Clause of the Constitution, the courts largely reject these challenges.¹⁸⁹

A summary of the arguments opposing and supporting statutory damages awards under the Copyright Act follows.

A. *Arguments Opposing the Statutory Damages Award*

1. *The Excessive Fines Clause of the Eighth Amendment*

“Excessive bail shall not be required, nor *excessive fines imposed*, nor cruel and unusual punishments inflicted.”¹⁹⁰ The Framers of the United States Constitution demonstrated their concern “to prohibit all inhumane or barbaric punishments, no matter what the nature of the offense for which the punishment is imposed” by penning the Eighth Amendment.¹⁹¹ A “fine” under the Eighth Amendment is a payment to the government for some offense and is assessed in a *criminal* lawsuit, not in a private, *civil* proceeding.¹⁹² A “fine” could also be a forfeiture of assets.¹⁹³ Therefore, “fines,” as the Framers understood the term, are payments to the *government* not to *private parties*.¹⁹⁴

Zomba Enterprises, Inc. v. Panorama Records, Inc. exemplifies a copyright infringement defendant’s attempt to shield itself from statutory damages by invoking the Eighth Amendment’s Excessive Fines Clause.¹⁹⁵ In *Zomba*, a music publishing company, Zomba, sued a manufacturer and seller of karaoke compact discs, Panorama, alleging that Panorama did not have proper permission to sell copyrighted music compositions administered by Zomba.¹⁹⁶ After granting Zomba’s motion for summary judgment on the issue of copyright infringement, the court held a hearing

¹⁸⁹ *Tenenbaum*, 721 F. Supp. 2d at 89. “In reviewing the jury’s award, I must ‘accord ‘substantial deference’ to legislative judgments concerning appropriate sanctions for’ copyright infringement.” *Id.* (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 583 (1996)).

¹⁹⁰ U.S. CONST. amend. VIII (emphasis added).

¹⁹¹ *Ingraham v. Wright*, 430 U.S. 651, 685 (1977).

¹⁹² *E.g.*, *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264–65 (1989) (holding that the Excessive Fines Clause of the Eighth Amendment may not be used to challenge punitive damage awards in a civil lawsuit between private parties).

¹⁹³ *E.g.*, *Alexander v. United States*, 509 U.S. 544, 558–59 (1993) (analyzing the Eighth Amendment and the forfeiture of assets provisions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1963(a)(2) (2006)).

¹⁹⁴ *E.g.*, *Browning-Ferris*, 492 U.S. at 265.

¹⁹⁵ *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 586 (6th Cir. 2006).

¹⁹⁶ *Id.* at 579.

to determine the scope of Panorama's damages liability.¹⁹⁷ Zomba elected for statutory damages at the outset of the case.¹⁹⁸ In the end, the court held Panorama liable for twenty-six counts of copyright infringement totaling \$806,000 (or \$31,000 per infringed song).¹⁹⁹ Panorama appealed.²⁰⁰

On appeal, Panorama argued that its \$806,000 damages liability violated the Eighth Amendment's prohibition of excessive fines.²⁰¹ Panorama asserted that the Excessive Fines Clause regulates not only criminal fines imposed by the government but also civil forfeitures.²⁰² The issue, as Panorama framed it, was not "whether it was a civil or criminal procedure, but . . . *whether the forfeiture could be seen as punishment.*"²⁰³ Here, Panorama emphasized that a copyright holder "has a government granted monopoly with severe enforcement powers."²⁰⁴ Thus, when comparing the statutory damages (\$805,000) to the estimated actual damages (\$28,151.78),²⁰⁵ Panorama denounced the statutory damages award as "punishment pure and simple, the proceeds of which go to the holder of a government issued copyright in a federal court, in lieu of the sovereign."²⁰⁶ Panorama deemed Zomba "a government granted monopolist" that should be the subject to Eighth Amendment scrutiny.²⁰⁷

Like Panorama, Mr. Tenenbaum invoked the Eighth Amendment in opposition to the jury's \$675,000 statutory damages award.²⁰⁸ Although his argument did not distinguish criminal fines imposed in cases prosecuted by the government from civil sanctions sought by private parties (as Panorama argued on appeal in *Zomba*), Mr. Tenenbaum did

¹⁹⁷ *Id.* at 580.

¹⁹⁸ *Id.* at 586 n.10 (discussing the amount of Zomba's actual damages had Zomba "not elected to pursue statutory damages").

¹⁹⁹ *Id.* at 580.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 586; *see also* Final Brief of Appellant at 48, *Zomba Enters., Inc.*, 491 F.3d 574 (6th Cir. Aug. 10, 2006) (Nos. 06-5013, 06-5266), 2006 WL 4389679.

²⁰² Final Brief of Appellant, *supra* note 201, at 48.

²⁰³ *Id.* at 48–49 (emphasis in original) (citing *Austin v. United States*, 509 U.S. 602 (1993)).

²⁰⁴ *Id.* at 49.

²⁰⁵ *Zomba Enters., Inc.*, 491 F.3d at 586 n.10 ("[A]ssuming arguendo this profit figure is accurate, Zomba would have been entitled to \$28,151.78 . . .").

²⁰⁶ Final Brief of Appellant, *supra* note 201, at 50.

²⁰⁷ *Id.*

²⁰⁸ *See* Defendant's Motion, *supra* note 179, at 17.

attack the disproportionate nature of the jury's verdict.²⁰⁹ The "Eighth Amendment," Mr. Tenenbaum argued, "forces courts to take account of whether the gravity of the defendant's offense was proportional to the fine imposed even where the amount of the fine was technically authorized by statute."²¹⁰ Armed with this principle, Mr. Tenenbaum focused on the case of *United States v. Bajakajian*,²¹¹ where a trial court found the defendant guilty of failing to declare cash that he was transporting outside of the United States.²¹² There, the federal government sought to impose upon the defendant, who attempted the leave the United States without declaring \$357,144 in cash, forfeiture of the entire undeclared amount to the government as required by federal law.²¹³ Holding that the forfeiture as applied to the defendant in *Bajakajian* constituted an excessive fine in violation of the Eighth Amendment, the United States Supreme Court cautioned that the defendant "[did] not fit into the class of persons for whom the statute was principally designed: He [was] not a money launderer, a drug trafficker, or a tax evader."²¹⁴ Mr. Tenenbaum analogized to *Bajakajian* accordingly:

Likewise, it is clear from the lack of any similar cases that the Copyright Act was principally designed to deter commercial copyright infringement and not individual, noncommercial activity such as that of [Mr. Tenenbaum]. The Constitutional calculus must be applied accordingly.²¹⁵

The crux of the Eighth Amendment defense to statutory damages under the Copyright Act is the lack of proportionality; the damages are excessive.²¹⁶ Unfortunately, Eighth Amendment based challenges to statutory damages awards have had virtually no success in copyright

²⁰⁹ *Id.*

²¹⁰ *Id.* (internal quotation marks omitted) (citing *United States v. Bajakajian*, 524 U.S. 321, 337 (1998)).

²¹¹ 524 U.S. 321 (1998).

²¹² *Id.* at 325.

²¹³ *Id.* (citing 18 U.S.C. § 982(a)(1) (2006)).

²¹⁴ *Id.* at 337–38.

²¹⁵ Defendant's Motion, *supra* note 179, at 18.

²¹⁶ *See, e.g., Capitol Records, Inc. v. Alaujan*, 626 F. Supp. 2d 152, 153–54 (D. Mass. 2009) (responding to Tenenbaum's motion arguing the statutory damages available under the Copyright Act are so excessive they equate to a criminal punishment and violate both the Due Process Clause and the Eighth Amendment).

infringement cases.²¹⁷ Other constitutionally based challenges, however, provide a more promising outlook for copyright infringement defendants like Jammie Thomas-Rasset and Joel Tenenbaum.²¹⁸

2. *The Due Process Clauses of the Fifth and Fourteenth Amendments*

“No Person shall . . . be deprived of life, liberty, or property, without due process of law”²¹⁹ “Due process is that which comports with the deepest notions of what is fair and right and just.”²²⁰ The notion of providing citizens due process of law has its roots in the Magna Carta²²¹ and “arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion.”²²² Indeed, the United States Supreme Court has long recognized that due process was meant to “secure the individual from the arbitrary exercise of the powers of government.”²²³

Although many lower federal courts have discussed applying due process scrutiny to statutory damages awards under the Copyright Act,²²⁴ one federal judge—Nancy Gertner in *Tenenbaum*—has applied due process scrutiny and set a standard: “[T]here should be some nexus between the jury’s statutory damages award and the actual damages suffered by the plaintiffs and the profits, if any, obtained by the defendant.”²²⁵ Accordingly, Judge Gertner in *Tenenbaum* slashed the jury’s \$675,000 verdict and held that “an award of \$2,250 per song, three

²¹⁷ See *infra* Part IV.B.2.

²¹⁸ *Sony BMG Music Entm’t v. Tenenbaum*, 721 F. Supp. 2d 85, 89 (D. Mass. 2010) (“[T]he jury’s award of \$675,000 in statutory damages . . . is unconstitutionally excessive. . . . It cannot withstand scrutiny under the Due Process Clause.”).

²¹⁹ U.S. CONST. amend. V (guaranteeing due process of law to citizens and limiting the powers of the federal government); see also U.S. CONST. amend XIV (guaranteeing due process to citizens and limiting the powers of the States).

²²⁰ *Solebee v. Balkcom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting).

²²¹ For further information on the Magna Carta, its role in the development of the United States Constitution and full translation, see *Featured Documents: The Magna Carta*, NAT’L ARCHIVES & RECORDS ADMIN., http://www.archives.gov/exhibits/featured_documents/magna_carta/ (last visited Feb. 20, 2011).

²²² *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 587 (1996) (Breyer, J., concurring).

²²³ *Hurtado v. California*, 110 U.S. 516, 527 (1884) (quoting *Bank of Columbia v. Okely*, 17 U.S. 235, 244 (1819)).

²²⁴ See, e.g., *Capitol Records Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045, 1052 (D. Minn. 2010) (stating that statutory damages should have “some relation” to actual damages).

²²⁵ *Sony BMG Music Entm’t v. Tenenbaum*, 721 F. Supp. 2d 85, 103 (D. Mass. 2010).

times the statutory minimum, is the outer limit of what a jury could reasonably (and constitutionally) impose.”²²⁶ This amount not only supports the legal tradition of “allowing treble damages for willful misconduct”²²⁷ but also compensates copyright owners and deters infringers while simultaneously “ensuring that the total award is not grossly excessive.”²²⁸

Before *Thomas-Rasset* and *Tenenbaum*, litigants challenged the constitutionality of money damages awards on due process grounds. In response, the United States Supreme Court developed a rich jurisprudence to evaluate the constitutionality of money-damages awards. Three Supreme Court cases are illustrative: *St. Louis, Iron Mountain & Southern Railway Co. v. Williams*;²²⁹ *BMW of North America, Inc. v. Gore*;²³⁰ and *State Farm Mutual Auto Insurance Co. v. Campbell*.²³¹

In 1919, the Supreme Court decided *Williams*.²³² At issue in *Williams* was the constitutionality of an Arkansas statute that regulated railroad rates for transporting people and authorized statutory damages against noncompliant companies.²³³ The Arkansas trial court found a rail carrier in violation of the statute and ordered the carrier to pay \$75 in statutory damages, attorneys’ fees, and costs.²³⁴ (The statute permitted a penalty of “not less than fifty dollars nor more than three hundred dollars and costs of suit, including a reasonable attorney’s fee.”²³⁵) After exhausting its appeals in the Arkansas state courts, the aggrieved rail carrier appealed to the United States Supreme Court, arguing that the damages set by the statute were “repugnant to the due process clause of the Fourteenth Amendment.”²³⁶ Affirming the Arkansas state courts, the United States Supreme Court upheld the Arkansas statute²³⁷ and announced a standard of review to determine whether a statutory damages award comports with due process: statutory damages offend due process “only where the penalty

²²⁶ *Id.* at 107 (citing *Thomas-Rasset*, 680 F. Supp. 2d at 1056).

²²⁷ *Id.* (citing *Thomas-Rasset*, 680 F. Supp. 2d at 1056–57).

²²⁸ *Id.*

²²⁹ 251 U.S. 63 (1919).

²³⁰ 517 U.S. 559 (1996).

²³¹ 538 U.S. 408 (2003).

²³² *St. Louis*, 251 U.S. at 63.

²³³ *Id.* at 63–64.

²³⁴ *Id.* at 64.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.* at 67.

prescribed is so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable.”²³⁸ Moreover, the Court deferred to the judgment of the Arkansas legislature in setting the statutory damages and stated that “the states still possess a wide latitude of discretion.”²³⁹

Williams provides a very deferential standard of review. A court applying the *Williams* standard deems a statutory damages award offensive to due process only in the most arbitrary and unreasonable cases, comparable to an abuse-of-discretion review.²⁴⁰

In contrast to *statutory* damages, the Supreme Court announced a narrower due process standard of review for *punitive* damages. In 1996, the Court in *BMW of North America, Inc. v. Gore* held that \$2 million in punitive damages, added to \$4,000 in compensatory damages, was grossly excessive and violated the Due Process Clause of the Fourteenth Amendment.²⁴¹ In *Gore*, the plaintiff, a consumer, sued a car distributor in Alabama state court for allegedly selling the plaintiff a car without providing notice that the car had been repainted.²⁴² In the Alabama courts, the plaintiff prevailed in all major respects, with the exception of having the jury’s original \$4 million punitive damages award reduced by \$2 million.²⁴³ The car distributor appealed to the United States Supreme Court.²⁴⁴

The Court struck down the \$2 million punitive damages award and announced a new standard for evaluating the constitutionality of punitive damages awards.²⁴⁵ Generally, the Court held that “[t]he Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a

²³⁸ *Id.* at 66–67.

²³⁹ *Id.* at 66.

²⁴⁰ *E.g.*, *Zomba Enters., Inc. v. Panorama Records*, 491 F.3d 574, 587 (6th Cir. 2007).

²⁴¹ *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574–75 (1996). At trial, the jury initially assessed punitive damages amounting to \$4 million based on an Alabama statute proscribing “gross, oppressive, or malicious fraud.” *Id.* at 565 (quoting ALA. CODE §§ 6-11-20, 6-11-21 (1993)). On appeal, however, the Alabama Supreme Court remitted the punitive damages award to \$2 million, holding that “the jury improperly computed the amount of punitive damages” and that \$2 million was “constitutionally reasonable.” *Id.* at 567 (quoting *Yates v. BMV of N. Am., Inc.*, 646 So. 2d 619, 629 (Ala. 1994)).

²⁴² *Id.* at 563.

²⁴³ *Id.* at 565–67.

²⁴⁴ *Id.* at 568.

²⁴⁵ *Id.* at 575, 580, 583, 586.

‘grossly excessive’ punishment on a tortfeasor.”²⁴⁶ Specifically, the Court fashioned a multilayered test employing three “guideposts”: “(1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.”²⁴⁷ Each factor requires further elaboration.

The first guidepost analyzes the degree of reprehensibility. Just because “conduct is sufficiently reprehensible to give rise to tort liability . . . does not establish the high degree of culpability that warrants a substantial punitive damages award.”²⁴⁸ Before *Gore*, the Court generally accepted the view that “exemplary damages imposed on a defendant should reflect the ‘enormity of his offense.’”²⁴⁹ Justifying large punitive damages awards depends on the existence of aggravating factors²⁵⁰ such as crimes of violence or threats of violence²⁵¹ and deception.²⁵² Even with aggravating circumstances present, however, the Court cautioned that “punitive damages may not be ‘grossly out of proportion to the severity of the offense.’”²⁵³ The Court found that the car distributor’s wrongdoing was “purely economic in nature” with no aggravating circumstances that could justify a \$2 million in punitive damages judgment.²⁵⁴

The second guidepost examines the ratio of the punitive damages awarded to the actual harm inflicted on the injured party. When comparing compensatory damages and punitive damages,²⁵⁵ there must be “a

²⁴⁶ *Id.* at 562 (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 454 (1993)).

²⁴⁷ *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (citing *Gore*, 517 U.S. at 575). *Campbell* is discussed in greater detail *infra*.

²⁴⁸ *Gore*, 517 U.S. at 580.

²⁴⁹ *Id.* at 575 (quoting *Day v. Woodworth*, 54 U.S. 363, 371 (1851)).

²⁵⁰ *Id.* at 575–76 (“[S]ome wrongs are more blameworthy than others.”).

²⁵¹ *Id.* at 576. “[N]onviolent crimes are less serious than crimes marked by violence or the threat of violence.” *Id.* (quoting *Solem v. Helm*, 463 U.S. 277, 292–93 (1983)).

²⁵² *Id.* (citing *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 (1993)).

²⁵³ *Id.* (quoting *TXO Prod. Corp.*, 509 U.S. at 454).

²⁵⁴ *Id.* (conceding that certain economic injuries can justify severe penalties but that “does not convert all acts that cause economic harm into torts that are sufficiently reprehensible to justify a significant sanction in addition compensatory damages”).

²⁵⁵ *Id.* at 581 (stating that the Court’s “decisions in both *Haslip* and *TXO* endorsed the proposition that a comparison between the compensatory award and the punitive award is significant”).

reasonable relationship between the punitive damages award and *the harm likely to result* from defendant's conduct as well as the harm that has actually occurred."²⁵⁶ The Court, however, did not provide a bright line ratio to distinguish constitutional from unconstitutional punitive damages awards.²⁵⁷ The Court simply declined to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case."²⁵⁸ Rather, the Court deemed a "general concer[n] of reasonableness" as the proper "constitutional calculus."²⁵⁹ Applying the "reasonableness" approach, the Court held that the \$2 million punitive damages awarded against the car distributor far exceeded any standard of reasonableness—it was five hundred times the actual harm suffered by the plaintiff.²⁶⁰

The third guidepost analyzes the sanctions for comparable misconduct compared to the punitive damages awarded. The Court wasted no time in finding that the punitive damages imposed on the car distributor were "substantially greater" than the fines set by most state statutes.²⁶¹ In fact, Alabama's deceptive trade practices statute authorized a maximum civil penalty of only \$2,000.²⁶²

In 2003, the Court revisited the *Gore* guideposts in *State Farm Mutual Auto Insurance Co. v. Campbell*.²⁶³ In *Campbell*, the Court held that a \$145 million punitive damages award, added to a \$1 million compensatory damages award, violated due process.²⁶⁴ The Court substantially affirmed *Gore* and its guideposts but refined the "ratio" guidepost.²⁶⁵ Indeed, the Court in *Gore* refused to set a "mathematical bright line" and instead adopted "reasonableness" as the proper "constitutional calculus."²⁶⁶ The Court in *Campbell*, however, drew the line: although not abandoning

²⁵⁶ *Id.* (emphasis in original) (quoting *TXO Prod. Corp.*, 509 U.S. at 460).

²⁵⁷ *Id.* at 582–83.

²⁵⁸ *Id.* at 583 (citing *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991)).

²⁵⁹ *Id.* (citing *Haslip*, 499 U.S. at 18).

²⁶⁰ *Id.* at 582–83.

²⁶¹ *Id.* at 583–84 ("[T]he \$2 million economic sanction imposed on BMW is substantially greater than the statutory fines available in Alabama and elsewhere for similar malfeasance.").

²⁶² *Id.* at 584 (citing ALA. CODE. § 8-19-11(b) (1993)).

²⁶³ 538 U.S. 408 (2003).

²⁶⁴ *Id.* at 429.

²⁶⁵ *Id.* at 418, 425.

²⁶⁶ *Gore*, 517 U.S. at 583 (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991)).

Gore's reasonableness inquiry, the Court announced that "few awards exceeding a *single-digit ratio* between punitive and compensatory damages, to a significant degree, will satisfy due process."²⁶⁷ Because the punitive-to-compensatory ratio at issue in *Campbell* (145:1) far exceeded the Court's single-digit multiplier (maximum of 9:1),²⁶⁸ the Court declared the \$145 million punitive damages judgment unconstitutional.²⁶⁹

After a jury awarded \$1.92 million against Ms. Thomas-Rasset for willful copyright infringement, she asserted that the statutory damages clause of the Copyright Act, as applied to her, deprived her of due process of law.²⁷⁰ "An award of statutory damages of \$1.92 million for 24 songs assessed as punishment, not compensation, shocks the conscience . . ."²⁷¹ Invoking *Gore* and *Campbell*, Ms. Thomas-Rasset argued that the reprehensibility of her conduct and the ratio of statutory damages awarded to the actual harm caused by her infringements merited a sum substantially less than \$1.92 million; any harm that she may have caused "was purely economic, to the tune of \$1.29 for each of the 24 songs or \$15 for each of the 24 albums at issue."²⁷² Judge Davis agreed that the judgment against Ms. Thomas-Rasset was "shocking" but used common law remittitur—not due process—to reduce the judgment to three times the minimum range of statutory damages (\$2,250).²⁷³

Ms. Thomas-Rasset applied the *Gore* and *Campbell* guideposts to her statutory damages liability,²⁷⁴ but Judge Davis did not base his remittitur ruling on constitutional grounds.²⁷⁵ Moreover, in *Gore* and *Campbell*, the Court applied three guideposts to awards of punitive damages not statutory damages.²⁷⁶ The Supreme Court has not affirmatively stated whether the *Gore* and *Campbell* guideposts are applicable in statutory damages

²⁶⁷ *Campbell*, 538 U.S. at 425 (emphasis added).

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 425–26.

²⁷⁰ *Capitol Records Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045, 1050 (D. Minn. 2010).

²⁷¹ Motion for a New Trial, *supra* note 138, at 3.

²⁷² *Id.* at 6.

²⁷³ *Thomas-Rasset*, 680 F. Supp. 2d at 1048–49, 1054.

²⁷⁴ Motion for a New Trial, *supra* note 138, at 6.

²⁷⁵ *Thomas-Rasset*, 680 F. Supp. 2d at 1054–55 (relying instead on common law remittitur principles).

²⁷⁶ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 408–09 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996).

scrutiny.²⁷⁷ The lower federal courts, including *Thomas-Rasset*, have held that statutory damages awards are not subject to the *Gore* and *Campbell* guideposts.²⁷⁸ The *Tenenbaum* case, however, is an outlier and offers hope for copyright infringement defendants challenging the constitutionality of statutory damages awards on due process grounds.

Likewise, Mr. Tenenbaum invoked *Gore* and *Campbell* to challenge the \$675,000 verdict.²⁷⁹ Unlike Ms. Thomas-Rasset, however, Mr. Tenenbaum addressed the contention that *Gore* and *Campbell* only apply to punitive damages awards; such an implication, Mr. Tenenbaum asserted, “turns the Supreme Court’s jurisprudence upside down.”²⁸⁰ The idea that *Gore* and *Campbell* apply only to punitive damages awards conflicts with “the bedrock principle that ‘punishment should fit the crime.’”²⁸¹ Moreover, Mr. Tenenbaum addressed the fact that the Court in *Gore* relied on *Williams* and its progeny—the principal cases for reviewing the constitutionality of an award of statutory damages—in holding that “exemplary damages imposed on a defendant should reflect the enormity

²⁷⁷ However, the United States Supreme Court declined to grant certiorari to the issue of whether the Court of Appeals erred in holding that statutory damages of forty-four times the actual damages did not violate due process. *Panorama, Inc. v. Zomba Enters., Inc.*, 553 U.S. 1032 (2008) (mem. denying certiorari).

²⁷⁸ See, e.g., *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 587 (6th Cir. 2007) (holding that the court of appeals knew “of no case invalidating such an award of statutory damages under *Gore* or *Campbell*”); *Thomas-Rasset*, 680 F. Supp. 2d at 1057 (declining to reach the constitutional question of whether the jury’s \$1.92 million award violated Ms. Thomas-Rasset’s right to due process of law); *Verizon Cal. Inc. v. Onlinenic, Inc.*, No. C 08-2832 JF (RS), 2009 WL 2706393, at *6 (N.D. Cal. Aug. 25, 2009) (“[I]t is highly doubtful whether *Gore* and *Campbell* apply to statutory damages awards at all.”); *Lowry’s Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 460 (D. Md. 2004) (“The unregulated and arbitrary use of judicial power that the *Gore* guideposts remedy is not implicated in Congress’ carefully crafted and reasonably constrained statute.”). *But see* *UMG Recordings, Inc. v. Lindor*, No. CV-05-1095(DGT), 2006 WL 3335048, at *1–3 (E.D.N.Y. Nov. 9, 2006) (granting the defendant’s motion to amend her answer to include the affirmative defense that “the minimum statutory damages . . . of the Copyright Act are unconstitutionally excessive”; although the court declined to adjudicate the constitutionality of the Copyright Act’s statutory damages clause, the court seemed willing to “extend its due process jurisprudence prohibiting grossly excessive punitive jury awards to prohibit the award of statutory damages mandated under the Copyright Act if they are grossly in excess of damages suffered”).

²⁷⁹ Defendant’s Motion, *supra* note 179.

²⁸⁰ *Id.* at 14.

²⁸¹ *Id.* (quoting *Gore*, 517 U.S. at 574 n.24).

of his offense.”²⁸² The bottom line, Mr. Tenenbaum asserted, is not whether *Gore* and *Campbell* serve as the standard of review for the constitutionality of a statutory damages award; rather, the due process principles gleaned from *Gore* and *Campbell* address the overall fairness of excessive awards and could prove beneficial in analyzing statutory damages awards.²⁸³ Judge Gertner cautiously agreed with Mr. Tenenbaum.²⁸⁴

Judge Gertner adopted the same \$2,250-per-song ruling as Judge Davis did in *Thomas-Rasset*.²⁸⁵ However, Judge Gertner based her ruling on due process grounds—not common law remittitur—and announced that *Gore* and *Campbell*—not solely *Williams*—apply when a court evaluates the constitutionality of statutory damages awards for copyright infringement.²⁸⁶ Although conscious of her groundbreaking ruling and her obligation as a federal judge to defer to Congress and the jury’s verdict, Judge Gertner emphatically stated that “deference must not be slavish and unthinking” when one’s constitutional rights are at issue.²⁸⁷

Judge Gertner denounced the notions that *Gore* and *Campbell* only applied to punitive damages awards and that *Williams* was reserved for statutory damages review.²⁸⁸ Deeming *Williams* as one of the “seedlings” from which the Supreme Court’s decisions regarding the limits of punitive damages awards evolved, Judge Gertner stated that all three cases—*Williams*, *Gore*, and *Campbell*—“aim at providing defendants with some protection against arbitrary government action in the form of awards that are grossly excessive in relation to the objectives that the awards are designed to achieve.”²⁸⁹ Thus, Judge Gertner applied *Gore*’s three guideposts to determine the constitutionality of Mr. Tenenbaum’s statutory damages judgment.²⁹⁰

²⁸² *Id.* (quoting *Gore*, 517 U.S. at 574).

²⁸³ *Id.* at 15.

²⁸⁴ *Sony BMG Music Entm’t v. Tenenbaum*, 721 F. Supp. 2d 85, 88–89 (D. Mass. 2010).

²⁸⁵ *Id.* at 89, 108–09.

²⁸⁶ *Id.* at 101–02.

²⁸⁷ *Id.* at 89.

²⁸⁸ *Id.* at 101–02.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 103.

The first *Gore* guidepost is “the degree of reprehensibility of the defendant’s conduct.”²⁹¹ Judge Gertner noted that Mr. Tenenbaum’s conduct, although “one of the most blameworthy” amongst noncommercial file-sharers, was common among most file-sharers who “do not receive any direct pecuniary gain from their activity.”²⁹² The court memorialized several instances of Mr. Tenenbaum’s reprehensible online conduct but deemed file-sharing in general “low on the totem pole of reprehensible conduct.”²⁹³

The second guidepost—“the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages awarded”²⁹⁴—fell substantially in Mr. Tenenbaum’s favor.²⁹⁵ Stressing that there must be some relation between the statutory damages assessed by the jury and the record labels’ actual losses caused by Mr. Tenenbaum’s thirty infringements, Judge Gertner found it difficult to understand how Mr. Tenenbaum’s individual file-sharing activities had such a serious economic effect on the record labels’ business.²⁹⁶ Judge Gertner cited prices for which users can purchase music online (around \$0.99 on iTunes) and in traditional-brick-and-mortar outlets (\$15 for a CD),²⁹⁷ and she examined Mr. Tenenbaum’s individual conduct, the benefits and harms flowing from that conduct, and the deterrence aspect of large statutory damages awards.²⁹⁸ Even after evaluating these factors, Judge Gertner nevertheless found the jury’s verdict unconstitutionally excessive.²⁹⁹ Mr. Tenenbaum willfully infringed thirty sound recordings.³⁰⁰ Whether the record labels’ actual losses totaled \$0.70, \$1, or \$15 per song (the wholesale price of a song on iTunes, the approximate retail price of a song on iTunes, and the average retail price of a CD from a traditional-brick-and-mortar outlet,

²⁹¹ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)).

²⁹² *Tenenbaum*, 721 F. Supp. 2d at 116.

²⁹³ *Id.*

²⁹⁴ *Campbell*, 538 U.S. at 418 (citing *Gore*, 517 U.S. at 575).

²⁹⁵ *Tenenbaum*, 721 F. Supp. 2d at 115; *see also id.* at 112 (“[I]t is hard to believe that Tenenbaum’s conduct, when viewed in isolation, had a significant impact on the plaintiffs’ profits.”).

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *Id.* at 112–13.

²⁹⁹ *Id.* at 115.

³⁰⁰ *Id.* at 87.

respectively),³⁰¹ the \$675,000 statutory damages verdict far exceeded any compensation required for economic injury sustained by the record labels.³⁰² Mr. Tenenbaum's "profit" was merely "amorphous"; any benefits that Mr. Tenenbaum acquired by illegally downloading these songs were far less than the jury's \$675,000 verdict.³⁰³

The third guidepost is "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."³⁰⁴ After an exhaustive examination of the legislative history of the Copyright Act's statutory damages clause, Judge Gertner concluded that "Congress likely did not foresee that statutory damages awards would be imposed on noncommercial infringers sharing and downloading music through peer-to-peer networks."³⁰⁵

The legislative history of § 504(c)(2) strongly suggests that Congress did not intend to subject individuals like Ms. Thomas-Rasset and Mr. Tenenbaum to enormous statutory damages.³⁰⁶ Judge Gertner pointed to the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999³⁰⁷—the legislation that augmented the statutory damages range from \$500 to \$20,000 for each infringement (up to \$100,000 for each willful infringement) to the current levels of \$750 to \$30,000 for each infringement (up to \$150,000 for each willful infringement).³⁰⁸ Congress introduced this Act in May 1999, before the June 1999 launch of Napster—"the peer-to-peer network that brought file-sharing into the mainstream."³⁰⁹ Thus, Congress probably "did not have in mind the problem of consumers sharing through peer-to-peer networks when the Act was drafted."³¹⁰ Specifically, Judge Gertner examined testimony from

³⁰¹ *Id.* at 112.

³⁰² *See id.* at 115. "[T]he asymmetry between the relatively small harm suffered by plaintiffs and benefit reaped by Tenenbaum, on the one hand, and the jury's extraordinarily high award, on the other, is so extreme as to 'jar [the Court's] constitutional sensibilities.'" *Id.* (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991)).

³⁰³ *Id.* at 114.

³⁰⁴ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)).

³⁰⁵ *Tenenbaum*, 721 F. Supp. 2d at 104.

³⁰⁶ *Id.*

³⁰⁷ Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, 113 Stat. 1774 (codified as amended at 17 U.S.C. § 504(c)).

³⁰⁸ *Id.*

³⁰⁹ *Tenenbaum*, 721 F. Supp. 2d at 104.

³¹⁰ *Id.*

congressional hearings concerning the amendment to the statutory damages range.³¹¹ During one hearing, Senator Patrick Leahy commented that he had been actively engaging in his own music downloading.³¹² The “senators’ willingness to download copyrighted sound recordings through a peer-to-peer network during a committee hearing suggests, at the very least, that they did not view such downloading as particularly reprehensible.”³¹³ At a subsequent hearing with feature witness Shawn Fanning, the founder of Napster, Senator Orrin Hatch emphatically praised Shawn Fanning’s innovation and development of Napster.³¹⁴ Like Senator Leahy’s commentary, Judge Gertner interpreted Senator Hatch’s comments as evidence that Congress did not intend to have massive statutory damages awards applied against noncommercial infringers using peer-to-peer networks.³¹⁵ Weighing the legislative history and the circumstances of Mr. Tenenbaum’s conduct, Judge Gertner deemed the jury’s \$675,000 verdict “arbitrary and grossly excessive.”³¹⁶ Indeed, even if Mr. Tenenbaum’s conduct was more reprehensible and culpable than other noncommercial file-sharers, Judge Gertner thought it “absurd” to say that he was as liable as the jury deemed him—thirty times the statutory minimum of \$750 per copyrighted sound recording.³¹⁷

Judge Gertner’s post-trial opinion in *Tenenbaum* offers a new standard for reviewing the constitutionality of statutory damages awards for civil copyright infringement: review under the three *Gore/Campbell* guideposts not just the deferential *Williams* standard.³¹⁸ Although federal judges accord substantial deference to the judgment of Congress and the verdicts

³¹¹ *Id.* at 106.

³¹² *Id.* (citing *Music on the Internet: Is There an Upside to Downloading? Hearing Before the S. Comm. on the Judiciary*, 106th Cong. 7 (2000) (statement of Sen. Patrick J. Leahy, Member, S. Comm. on the Judiciary)), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_senate_hearings&docid=f:74728.pdf.

³¹³ *Id.*

³¹⁴ *Id.* at 107–08 (citing *Utah’s Digital Economy and the Future: Peer-to-Peer and Other Emerging Technologies: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. 2–3, 29, 34 (2000) (statements of Sen. Orrin G. Hatch, Chairman, S. Comm. on the Judiciary)), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_senate_hearings&docid=f:75313.pdf).

³¹⁵ *Id.* at 107.

³¹⁶ *Id.* at 111.

³¹⁷ *Id.* at 109.

³¹⁸ *Id.* at 103.

announced by juries,³¹⁹ “it makes no sense to defer to Congress” when Congress did not foresee the arbitrariness of statutory damages awards assessed to noncommercial copyright infringement defendants: “[S]ection 504(c) does not embody any such judgment.”³²⁰ Time will tell whether this standard survives appellate review and gains acceptance by the federal judiciary.

3. *The Fair Use Doctrine*

“[T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”³²¹ The fair use doctrine allows individuals to utilize a copyrighted work without the copyright owner’s consent when the use is for education, criticism, or other purposes.³²² Thus, according to the Copyright Act, fair use is not an infringement; what would otherwise constitute copyright infringement may fall under the protection of the fair use doctrine.³²³

A court analyzes four factors to determine whether one may invoke the fair use doctrine:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copy-righted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copy-righted work.³²⁴

³¹⁹ *Id.* at 89.

³²⁰ *Id.* at 107.

³²¹ 17 U.S.C. § 107 (2006).

³²² *Id.*; *see also* H.R. REP. NO. 94-1476, at 65 (1976) (“The judicial doctrine of fair use, one of the most important and well established limitations on the exclusive right of copyright owners, would be given express statutory recognition for the first time in section 107.”).

³²³ 17 U.S.C. § 107.

³²⁴ *Id.*

From the “purpose and character” factor in the fair use statute, the federal courts carved out a “transformative” factor: “[W]hether and to what extent the work is ‘transformative,’”³²⁵ i.e., altering the original work with new expressions and ideas.³²⁶ The more an innovator “transforms” another’s original work, the more likely that the “transformative” work will fall under fair use.³²⁷ The key point here is that “the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright”³²⁸

Before the *Thomas-Rasset* and *Tenenbaum* trials commenced, the courts precluded both Ms. Thomas-Rasset and Mr. Tenenbaum from asserting fair use as an affirmative defense to copyright infringement.³²⁹ In Ms. Thomas-Rasset’s case, she simply waited too long to assert fair use and effectively waived the defense.³³⁰ Conversely, the court denied Mr. Tenenbaum’s proposed defense of fair use on the ground that it was “so broad that it would swallow the copyright protections that Congress created, defying both statute and precedent.”³³¹

Mr. Tenenbaum presented a broad and visionary fair use defense.³³² Passages like “[t]here are those who saw, and still see in [the] internet a society of sharing, a new mode of relating—a commonwealth to be built by peers through connection”³³³ failed to persuade the court.³³⁴ In regards to the character of his claimed fair use, Mr. Tenenbaum argued that his purpose was plainly noncommercial; his purpose was “nonprofit education” and “to learn about the music, and share knowledge with friends.”³³⁵ Mr. Tenenbaum stated that he had not wrongfully appropriated any of the thirty copyrighted songs because those songs were “free mp3

³²⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001) (citing *Campbell*, 510 U.S. at 579).

³²⁶ *Campbell*, 510 U.S. at 579.

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Capital Records Inc. v. Thomas-Rasset*, No. 06-1497, 2009 WL 1664468, at *10 (D. Minn. June 11, 2009); *Sony BMG Music Entm’t v. Tenenbaum*, 672 F. Supp. 2d 217, 220 (D. Mass. 2009).

³³⁰ *Thomas-Rasset*, 2009 WL 1664468, at *9–10.

³³¹ *Tenenbaum*, 672 F. Supp. 2d at 221.

³³² Response in Opposition, *supra* note 168, at 5–10.

³³³ *Id.* at 2.

³³⁴ *Tenenbaum*, 672 F. Supp. 2d at 221.

³³⁵ Response in Opposition, *supra* note 168, at 5–6.

files openly available on the internet.”³³⁶ The broadest notion advanced by Mr. Tenenbaum was that the record labels assumed the risk by “releasing their copyrighted work into an environment in which they must have known and appreciated that music fans with computers would rip, mix and burn their CD’s, and hence that their music would inevitably become available to internet users in mp3 form.”³³⁷ Mr. Tenenbaum also argued that there were no sufficient alternatives to file-sharing and downloading other than buying a whole CD, thus, excusing Mr. Tenenbaum from downloading individual songs.³³⁸ It was no surprise that the court quickly rejected these arguments.³³⁹ As technology progresses, courts may be more willing to accept the expansive, Tenenbaum-style fair use defense. As it stands now, however, this argument is simply too broad.³⁴⁰

Judge Gertner entertained the idea of a narrower fair use defense for Mr. Tenenbaum and offered the following hypotheticals that *might* support a finding of fair use:

For example, file sharing for the purposes of sampling music prior to purchase or space-shifting to store purchased music more efficiently might offer a compelling case for fair use. Likewise, a defendant who used the new file-sharing networks in the technological interregnum before digital media could be purchased legally, but who later shifted to paid outlets, might also to be able to rely on the defense.³⁴¹

Mr. Tenenbaum, however, could not reconcile his expansive view of fair use with the scenarios opined by Judge Gertner.³⁴²

While Judge Gertner might excuse a person under the fair use doctrine who downloads from peer-to-peer networks before legitimate, online stores appeared,³⁴³ Tenenbaum-style fair use would excuse a person up to the

³³⁶ *Id.* at 6.

³³⁷ *Id.* at 9.

³³⁸ *Id.* at 9–10.

³³⁹ *Tenenbaum*, 672 F. Supp. 2d at 221 (“Defendant’s version of fair use is, all in all, completely elastic, utterly standardless, and wholly without support.”).

³⁴⁰ *See id.*

³⁴¹ *Id.* at 220–21.

³⁴² *Id.*

³⁴³ *Id.*; see also Nate Anderson, *How Team Tenenbaum Missed a Chance to Shape P2P Fair Use Law*, ARS TECHNICA (Dec. 7, 2009, 11:20 AM), <http://arstechnica.com/tech-policy/news/2009/12/how-team-tenenbaum-missed-a-chance-to-shape-p2p-fair-use-law.ars>.

point when the music industry removed “digital rights management” (DRM) and other restrictions on the transferability of digital music files.³⁴⁴ The chief difference between the Gertner and Tenenbaum styles of fair use is timing; they disagree on the true “interregnum” between the music industry’s traditional business model of selling CDs at brick-and-mortar outlets and electronic file-sharing.³⁴⁵

B. Arguments Supporting the Statutory Damages Award

1. Federal Courts Should Defer when Congress Acts Under Its Enumerated Powers

Congressional actions pursuant to an enumerated power receive substantial deference from the judiciary.³⁴⁶ In the context of the Copyright Clause of the Constitution, the United States Supreme Court reconfirmed this notion in *Eldred v. Ashcroft*.³⁴⁷ At issue in *Eldred* was Congress’ authority, pursuant to the Copyright Clause of the Constitution, to extend the duration of copyright protection from fifty years after the author’s death to seventy years.³⁴⁸ By a seven-to-two margin, the Court held that

³⁴⁴ Defendant’s Motion, *supra* note 179, at 3–4; *see also* Jared Moya, *Convicted File-Sharer: DRM-Free Tracks on KaZaA to Blame*, ZEROPAID (Jan. 7, 2010), <http://www.zeropaid.com/news/87606/convicted-file-sharer-drm-free-tracks-on-kazaa-to-blame/>.

³⁴⁵ *Compare Tenenbaum*, 672 F. Supp. 2d at 220–21 (“[A] defendant who used the new file-sharing networks in the technological interregnum before digital media could be purchased legally, but who later shifted to paid outlets, might also be able to rely on the defense.”), *with* Defendant’s Motion, *supra* note 179, at 3–4 (“[T]he Court’s recognition of a fair-use interregnum period . . . is a step that . . . should be seen as encompassing Tenenbaum’s file sharing in 2004. The end-point of the interregnum comes logically and clearly in 2007 when the industry finally offered a choice unquestionably equivalent to what was available to music consumers online through the peer-to-peer networks.”).

³⁴⁶ *See Eldred v. Ashcroft*, 537 U.S. 186, 198 (2003) (discussing the Copyright Term Extension Act and holding that the “Court has been . . . deferential to the judgment of Congress in the realm of copyright”); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984) (“The judiciary’s reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurring theme. Sound policy, as well as history, supports [the Court’s] consistent deference to Congress when major technological innovations alter the market for copyrighted materials.” (citation omitted)); *Graham v. John Deere Co.*, 383 U.S. 1, 6 (1966) (“Within the limits of the constitutional grant, the Congress may, of course, implement the stated purpose of the Framers by selecting the policy which in its judgment best effectuates the constitutional aim. This is but a corollary to the grant to Congress of any Article I power.”).

³⁴⁷ *Eldred*, 537 U.S. at 198.

³⁴⁸ *Id.* at 192–93.

Congress had not exceeded its powers by extending the duration of copyright protection.³⁴⁹

First, the Court held that Congress possessed the power to extend the terms of existing copyrights.³⁵⁰ “Text, history, and precedent,” the Court concluded, “confirm that the Copyright Clause empowers Congress to prescribe ‘limited Times’ for copyright protection and to secure the same level and duration of protection for all copyright holders, present and future.”³⁵¹ In analyzing the history of American copyright legislation, the Court noted that the congressional history surrounding past copyright term extensions confirmed Congress’ power to extend copyright.³⁵² The Court further analogized to patents—a type of intellectual property also covered in the same constitutional clause as copyrights—and emphatically reaffirmed a case which held that duration of a patent “‘depend[s] on the law as it stood at the emanation of the patent, together with such changes as have been since made.’”³⁵³

Second, the Court found that the copyright extension legislation at issue was a rational exercise of Congress’ authority under the Constitution.³⁵⁴ The Court cut straight to the chase: “[W]e defer substantially to Congress.”³⁵⁵

The *Eldred* Court simply was not willing to second-guess Congress’ judgment in matters of copyright law.³⁵⁶ Thus, *Eldred* instructs that the federal courts should not second-guess Congress’ judgment as to the range of statutory damages for copyright infringement.

³⁴⁹ *Id.* at 194.

³⁵⁰ *Id.* at 199.

³⁵¹ *Id.* (quoting U.S. CONST. art. I, § 8, cl. 8).

³⁵² *Id.* at 200–01 (“Since [the First Congress enacted the first American copyright statute in 1790], Congress has regularly applied duration extensions to both existing and future copyrights.”).

³⁵³ *Id.* at 201–03 (quoting *McClurg v. Kingsland*, 42 U.S. (1 How.) 202, 206 (1843)).

³⁵⁴ *Id.* at 204–05.

³⁵⁵ *Id.* (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)) (discussing the heavy deference owed by the federal courts to Congress in legislative matters pursuant to the Copyright Clause of the Constitution).

³⁵⁶ *Id.* at 208.

2. *The Eighth Amendment's Prohibition of "Excessive Fines" Does Not Apply to Statutory Damages Awards in Civil Lawsuits Between Private Parties*

Ms. Thomas-Rasset and Mr. Tenenbaum are not the first defendants to denounce statutory damages for copyright infringement as "excessive fines" prohibited by the Eighth Amendment.³⁵⁷ However, the federal courts have made clear that statutory damages awarded under the Copyright Act are not susceptible to Eighth Amendment scrutiny in private litigation.³⁵⁸

Indeed, the words "excessive" and "fine" in their respective everyday usages³⁵⁹ would seem to limit high statutory damages awards. As used in the Eighth Amendment, however, "excessive fines" have a unique meaning: they are payments to the government for an offense in lawsuits that are prosecuted by the government.³⁶⁰ Thus, statutory damages awards in civil lawsuits like those involving Ms. Thomas-Rasset and Mr. Tenenbaum are not subject to judicial review under the Eighth Amendment's Excessive Fines Clause. The Eighth Amendment simply "does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded."³⁶¹

3. *Statutory and Punitive Damages Face Different Constitutional Standards in Determining Their Due-Process Validity*

Gore and *Campbell* appear to guarantee relief to Ms. Thomas-Rasset and Mr. Tenenbaum. Surely, statutory damages of \$1.92 million for downloading twenty-four songs or \$675,000 for downloading 30 songs seem "shocking."³⁶² However, except for Judge Gertner's most recent

³⁵⁷ *E.g.*, *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 586 (6th Cir. 2007) ("Panorama next argues that such a high award of statutory damages, in light of the relatively low actual damages, renders the district court's award an 'excessive fine' under the Eighth Amendment.")

³⁵⁸ *See id.*

³⁵⁹ "Excessive" is defined as "exceeding the unusual, proper, or normal;" "fine" is defined as "a sum . . . imposed as punishment for a crime." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 792, 852 (1981).

³⁶⁰ *See Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 259–60 (1989).

³⁶¹ *Id.* at 264.

³⁶² *Capitol Records, Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045, 1054 (D. Minn. 2010).

ruling that eliminated 90% of Mr. Tenenbaum's \$675,000 judgment, the lower federal courts have largely refused to extend *Gore* and *Campbell* to statutory damages.³⁶³ Moreover, the Supreme Court has yet to definitively rule on this issue.³⁶⁴

The United States filed substantially similar amicus briefs in both *Thomas-Rasset* and *Tenenbaum* in defense of the statutory damages clause of the Copyright Act.³⁶⁵ The principal contention was that Ms. Thomas-Rasset and Mr. Tenenbaum incorrectly invoked *Gore* and *Campbell* to contest their respective statutory damages liabilities.³⁶⁶ Instead, the United States advocated the *Williams* standard of review.³⁶⁷ The United States announced the *Williams* standard accordingly:

[A] court may strike down a statutory award as a violation of due process only if it is "so severe and oppressive as to be wholly disproportioned to the offense [or] obviously unreasonable" because Congress has not given "due regard for the interests of the public, the numberless opportunities

³⁶³ See, e.g., *Zomba Enters., Inc.*, 491 F.3d at 587 ("We know of no case invalidating such an award of statutory damages under *Gore* or *Campbell* . . ."); *Lowry's Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 459–60 (D. Md. 2004) (declining to apply *Gore* and *Campbell* to an award of punitive damages on the ground that "[t]he unregulated and arbitrary use of judicial power that the *Gore* guideposts remedy is not implicated in Congress' carefully crafted and reasonably constrained statute"). But see *Zomba Enters., Inc.*, 491 F.3d at 587 (citing *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003) ("We note that some courts have suggested in dicta that [*Gore* and *Campbell*] may apply to statutory-damage awards.").

³⁶⁴ *Zomba Enters., Inc.*, 491 F.3d at 581, cert. denied, 553 U.S. 1032 (2008).

³⁶⁵ See United States of America's Memorandum in Response to Defendant's Motion for New Trial or Remittitur and in Defense of the Constitutionality of the Statutory Damages Provision of the Copyright Act, 17 U.S.C. § 504(c), *Sony BMG Music Entm't v. Tenenbaum*, 721 F. Supp. 2d 85 (D. Mass. 2010) (No. 07-11446-NG) [hereinafter United States' Brief in *Tenenbaum*]; United States of America's Memorandum in Defense of the Constitutionality of the Statutory Damages Provision of the Copyright Act, 17 U.S.C. § 504(c), *Thomas-Rasset*, 680 F. Supp. 2d 1045 (No. 06-1497) [hereinafter United States' Brief in *Thomas-Rasset*].

³⁶⁶ United States' Brief in *Tenenbaum*, supra note 365, at 8; United States' Brief in *Thomas-Rasset*, supra note 365, at 7.

³⁶⁷ United States' Brief in *Tenenbaum*, supra note 365, at 8; United States' Brief in *Thomas-Rasset*, supra note 365, at 7–8.

for committing the offense, and the need for securing uniform adherence to [the law].³⁶⁸

According to the United States, punitive damages and statutory damages serve different purposes. On the one hand, punitive damages serve as punishment for wrongful conduct.³⁶⁹ On the other, statutory damages “exist in large part to compensate victims of wrongdoing in areas where actual damages are difficult to calculate or prove.”³⁷⁰ Although both punitive damages and statutory damages serve some deterrent purpose, the United States argued that this was no reason to equate the two; punitive damages function as “retribution” whereas statutory damages do not have a retributive purpose but rather compensate an injured party when actual damages are not easily quantifiable.³⁷¹

Applying *Williams*, the United States deemed the statutory damages awards assessed to Ms. Thomas-Rasset and Mr. Tenenbaum constitutional.³⁷² The United States asserted that no “ratio” guidepost, as in *Gore* and *Campbell*, guides courts in determining the constitutionality of a statutory damages award.³⁷³ Rather, the award must be within the statutory range set by Congress.³⁷⁴ In both cases, the awards fell within the \$750 to \$150,000 range.³⁷⁵ Logically, the next question that the United States addressed was whether that predetermined range reflected a reasonable exercise of congressional power.

The United States vigorously supported the reasonableness of the Copyright Act’s statutory damages range.³⁷⁶ In order to ensure

³⁶⁸ United States’ Brief in *Tenenbaum*, *supra* note 365, at 12–13 (quoting *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66–67 (1919)).

³⁶⁹ *Id.* at 8–9; United States’ Brief in *Thomas-Rasset*, *supra* note 365, at 10.

³⁷⁰ United States’ Brief in *Tenenbaum*, *supra* note 365, at 8–9; *see* United States’ Brief in *Thomas-Rasset*, *supra* note 365, at 10.

³⁷¹ United States’ Brief in *Thomas-Rasset*, *supra* note 365, at 10; *see* United States’ Brief in *Tenenbaum*, *supra* note 365, at 14.

³⁷² United States’ Brief in *Tenenbaum*, *supra* note 365, at 13; United States’ Brief in *Thomas-Rasset*, *supra* note 365, at 12.

³⁷³ United States’ Brief in *Tenenbaum*, *supra* note 365, at 10; United States’ Brief in *Thomas-Rasset*, *supra* note 365, at 11.

³⁷⁴ United States’ Brief in *Tenenbaum*, *supra* note 365, at 7; United States’ Brief in *Thomas-Rasset*, *supra* note 365, at 12.

³⁷⁵ *Sony BMG Music Entm’t v. Tenenbaum*, 721 F. Supp. 2d 85, 87 (D. Mass. 2010); *Capitol Records Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045, 1050–51 (D. Minn. 2010).

³⁷⁶ United States’ Brief in *Tenenbaum*, *supra* note 365, at 2; United States’ Brief in *Thomas-Rasset*, *supra* note 365, at 2.

compensation for infringement, as well as to deter widespread internet infringements, Congress not only established a damages mechanism for damages too difficult to calculate but also accounted for “the need to deter the millions of users of new media from infringing copyrights in an environment where many violators believe that they will go unnoticed.”³⁷⁷ In the eyes of the United States, Ms. Thomas-Rasset and Mr. Tenenbaum are those “violators” who “believe that they will go unnoticed.”³⁷⁸

4. *Statutory Damages Deter Online Copyright Infringement and Mitigate the Difficulties of Calculating Actual Damages in This Quickly Evolving Commercial Environment*

Suppose a college student downloads one song from a file-sharing network. Suppose further that the student saves the downloaded song in a “shared folder” accessible by other file-sharing users when the student is connected to the network. Suppose even further that other individuals download the song from the student’s shared folder. This sequence of events inevitably repeats itself, possibly hundreds, or thousands of times.

The internet, although remarkable in its scope and possibilities, renders copyright protection substantially difficult as illustrated by the hypothetical above. Is it practical to impose upon copyright owners the heavy burden of calculating the injury caused by each and every infringer in the sequence above? Is it fair?

A range of predetermined statutory damages is helpful in situations where damages are difficult or impossible to quantify.³⁷⁹ Prior to the enactment of the 1976 Copyright Act, the Register of Copyrights emphasized the purpose and significance of statutory damages to the House Committee on the Judiciary—the congressional arm charged with implementing the copyright laws.³⁸⁰ “The need for this special remedy,”

³⁷⁷ United States’ Brief in *Tenenbaum*, *supra* note 365, at 2; United States’ Brief in *Thomas-Rasset*, *supra* note 365, at 2; *see also* COBLE, *supra* note 57, at 6 (amending the Copyright Act’s statutory damages provision, stressing it was “important that the cost of infringement substantially exceed the costs of compliance, so that persons who use or distribute intellectual property have a strong incentive to abide by the copyright laws”).

³⁷⁸ *See* United States’ Brief in *Tenenbaum*, *supra* note 365, at 2; United States’ Brief in *Thomas-Rasset*, *supra* note 365, at 3.

³⁷⁹ *E.g.*, *St. Luke’s Cataract & Laser Inst., P.A. v. Sanderson*, 573 F.3d 1186, 1206 (11th Cir. 2009) (quoting *Cable/Home Commc’ns Corp. v. Network Prods., Inc.*, 902 F.2d 829, 850 (11th Cir. 1990)).

³⁸⁰ KAMINSTEIN, *supra* note 9, at 102.

the Register emphasized, “arises from the acknowledged inadequacy of actual damages and profits in many cases”:

- The value of copyright is, by its nature, difficult to establish, and the loss caused by an infringement is equally hard to determine. As a result, actual damages are often conjectural, and may be impossible or prohibitively expensive to prove.
- In many cases, especially those involving public performances, the only direct loss that could be proven is the amount of a license fee. An award of such an amount would be an invitation to infringe with no risk of loss to the infringer.
- The actual damages capable of proof are often less than the cost to the copyright owner of detecting and investigating infringements.
- An award of the infringer’s profits would often be equally inadequate. There may have been little or no profit, or it may be impossible to compute the amount of profits attributable to the infringement. Frequently, the infringer’s profits will not be an adequate measure of the injury caused to the copyright owner.³⁸¹

Thus, the Copyright Act’s statutory damages clause not only deters copyright infringement but also assures adequate compensation for copyright owners.³⁸²

The Register of Copyright’s 1961 report to Congress, as well as Congress’ subsequent enactment of and amendments to the 1976 Copyright Act’s statutory damages provision, convey a strong message: copyright owners may be compensated without having to discuss calculations of the exact amount of injury caused by an infringement, and copyright infringers who believe that their wrongful activities will go unnoticed face serious punishment.³⁸³

³⁸¹ *Id.* at 102–03.

³⁸² *Id.* at 103.

³⁸³ See COBLE, *supra* note 57, at 6; KAMINSTEIN, *supra* note 9, at 101–10.

V. THE FUTURE

A. *Most Federal Courts Will Continue to Uphold the Statutory Damages Clause*

Downloading a song (legally or illegally) is easy. Moreover, those who download legally pay a reasonable price, around \$0.99.³⁸⁴ Why then are courts upholding massive statutory damages awards when the average retail price for many songs on the internet is around a dollar?

The answer is that the federal courts exercise the utmost deference to Congress in its copyright legislation and will generally not second-guess congressional judgment.³⁸⁵ Judges Michael Davis and Nancy Gertner, the judges presiding over *Thomas-Rasset* and *Tenenbaum* respectively, exemplify the judiciary's deference to Congress' copyright legislation.³⁸⁶

In response to Ms. Thomas-Rasset's post-trial motion challenging the jury's \$1.92 million judgment, Judge Davis noted that Congress sets the range of statutory damages for copyright infringement.³⁸⁷ Congress' intent in setting this wide range of statutory damages provides more justification:

Courts and juries must be able to render awards that deter others from infringing intellectual property rights. It is important that the cost of infringement substantially exceed the costs of compliance, so that persons who use or distribute intellectual property have a strong incentive to abide by the copyright laws.³⁸⁸

Although Judge Davis remitted the \$1.92 million statutory damages judgment to \$54,000, the Copyright Act's statutory damages provision

³⁸⁴ The average song on Apple iTunes is \$0.99. The average song on Amazon MP3 is between \$0.89 and \$0.99. Other legitimate online music services offer similar prices. See *Music Download Review*, TOPTENREVIEWS, <http://music-download-review.toptenreviews.com/> (last visited Feb. 23, 2011).

³⁸⁵ See discussion *supra* Part IV.B.1.

³⁸⁶ Even though Judge Gertner's post-trial opinion in *Tenenbaum* is an outlier in holding a statutory damages award unconstitutionally excessive on due process grounds, Judge Gertner did not find the statutory damages clause of the Copyright Act unconstitutional on its face. See *Sony BMG Music Entm't v. Tenenbaum*, 721 F. Supp. 2d 85, 91 (D. Mass. 2010).

³⁸⁷ *Capitol Records Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045, 1055 (D. Minn. 2010).

³⁸⁸ COBLE, *supra* note 57, at 6; see *Thomas-Rasset*, 680 F. Supp. 2d at 1055 (quoting COBLE, *supra* note 57, at 6).

remained intact.³⁸⁹ Judge Davis declined to determine the constitutionality of the of statutory damages provision itself.³⁹⁰

For different reasons, Judge Gertner in *Tenenbaum* slashed Mr. Tenenbaum's \$675,000 judgment to \$67,500.³⁹¹ Judge Gertner, however, did not declare the entirety of the statutory damages clause unconstitutional; rather, Judge Gertner simply stated that the statutory damages judgment in Mr. Tenenbaum's particular case exceeded the limits permitted under the Constitution.³⁹²

Other copyright infringement cases indicate that the federal courts will either uphold the Copyright Act's statutory damages provision³⁹³ or avoid the constitutional question all together.³⁹⁴

B. Any Change in the Statutory Damages Clause Must Come From Legislative Action Rather than Judicial Intervention

Three separate and distinct branches govern the United States: the legislators who make laws, the executives who enforce laws, and the judiciary who interpret laws.³⁹⁵ The Framers of the Constitution envisioned the separation of these three branches and charged each branch with unique roles.³⁹⁶ The logic of separating these powers is to prevent one branch from dominating the other and "to preclude the exercise of arbitrary power."³⁹⁷

The duty of the federal courts is "to say what the law is."³⁹⁸ The Constitution is the paramount law of the land that guides the judiciary in its duty.³⁹⁹ If the constitutionality of an act of Congress is disputed, the

³⁸⁹ *Thomas-Rasset*, 680 F. Supp. 2d at 1050, 1056.

³⁹⁰ *Id.* at 1057.

³⁹¹ *Tenenbaum*, 721 F. Supp. 2d at 89.

³⁹² *Id.* at 89–90.

³⁹³ *E.g.*, *Columbia Pictures Television, Inc. v. Krypton Broad., Inc.*, 259 F.3d 1186, 1192–93 (9th Cir. 2001); *Propet USA, Inc. v. Shugart*, No. C06-0186-MAT, 2007 WL 4376201, at *3 (W.D. Wash. Dec. 13, 2007).

³⁹⁴ *See, e.g.*, *Sony Music Entm't v. Cloud*, No. 08-CV-01200, 2009 WL 1507566, at *4 (E.D. Pa. May 29, 2009).

³⁹⁵ *See Our Government*, THE WHITE HOUSE, <http://www.whitehouse.gov/our-government> (last visited Feb. 23, 2011).

³⁹⁶ *See generally* U.S. CONST. art. I (describing the legislative power); U.S. CONST. art. II (describing the executive power); U.S. CONST. art. III (describing the judicial power).

³⁹⁷ *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

³⁹⁸ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

³⁹⁹ *Id.* at 178.

federal courts determine whether the disputed act comports with the Constitution.⁴⁰⁰ Thus, “[a]n act of Congress repugnant to the constitution cannot become a law.”⁴⁰¹

The federal courts defer to Congress’ judgment in matters involving copyright laws and should not second-guess its copyright legislation.⁴⁰² Without a specific legislative directive, the courts will not expand, alter, or amend copyright law.⁴⁰³ The obvious risk of judges asserting their own beliefs as to what the law ought to be is the overconcentration of power in one branch of government (here, the judiciary).⁴⁰⁴ Moreover, elected officials drafted the Copyright Act and the vast library of other federal legislation.⁴⁰⁵ Federal judges, however, are appointed for life terms.⁴⁰⁶ Thus, if a representative or senator supports the passage of a controversial law, the citizens residing in that lawmaker’s district can mobilize and elect another person. Conversely, if a federal judge categorically declares the statutory damages clause of the Copyright Act unconstitutional and devises a different range of damages, parties who disagree with the judge (say, the music industry) cannot simply wait for the next election cycle and vote the judge out.

Judge Davis in *Thomas-Rasset* case and Judge Gertner in *Tenenbaum* deferred (cautiously) to Congress’ judgment in determining the range of statutory damages for copyright infringement; they did not declare the statutory damages clause unconstitutional on its face.⁴⁰⁷ Despite these

⁴⁰⁰ *Id.* at 177–78.

⁴⁰¹ *Id.* at 138.

⁴⁰² *See, e.g., Eldred v. Ashcroft*, 537 U.S. 186, 204 (2003); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984).

⁴⁰³ *See Sony Corp.*, 464 U.S. at 431 (citing cases providing “a recurring theme” of the federal courts’ “reluctance to expand the protections afforded by the copyright without explicit legislative guidance”).

⁴⁰⁴ *See, e.g., 16A AM. JUR. 2D Constitutional Law* § 239 (2009).

⁴⁰⁵ *See* U.S. CONST. art. I.

⁴⁰⁶ *See id.* at art. III.

⁴⁰⁷ *See Sony BMG Music Entm’t v. Tenenbaum*, 721 F. Supp. 2d 85, 99 (D. Mass. 2010) (“Although I have doubts whether this extraordinarily broad statutory range afforded Tenenbaum *fair* notice of the liability he might face for file-sharing . . . it is indisputable that section 504(c) clearly set forth the minimum and maximum statutory damages available for each of his acts of infringement.”); *Capitol Records Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045, 1050–51 (D. Minn. 2010) (“[T]he Court is cognizant that Congress chose the range of statutory damages available for copyright infringement, within which the jury’s decisionmaking was bounded.”). However, Judge Gertner did find the statutory damages awarded against Mr. Tenenbaum unconstitutional. *Tenenbaum*, 721 F. Supp. 2d at 89.

holdings, both judges, in dicta, expressed their worries about heavy statutory damages awards against noncommercial infringers.⁴⁰⁸ Moreover, both judges called for Congress to rethink and amend the statutory damages provision of the Copyright Act.⁴⁰⁹

C. Though Constitutional, Recent District Court Decisions Are Unfair, Arbitrary, and Contrary to the Framers' Intent that Copyrights Provide Incentives to Stimulate Artistic Creativity

The Copyright Act's statutory damages clause is constitutional on its face.⁴¹⁰ However, a federal court declared the clause unconstitutional as applied against Mr. Tenenbaum—even under the highly deferential *Williams* standard.⁴¹¹ Moreover, if the federal courts substantially adopt Judge Gertner's reasoning in *Tenenbaum*, Ms. Thomas-Rasset's statutory damages judgment might also be deemed unconstitutional. Even imposing the \$750 low end of the Copyright Act's statutory damages range for infringing one song that may be purchased for less than \$1 might contravene "the deepest notions of what is fair and right and just."⁴¹² Ray Beckerman,⁴¹³ an attorney who administers the *Recording Industry vs The*

⁴⁰⁸ See *Sony BMG Music Entm't v. Tenenbaum*, 672 F. Supp. 2d 217, 237 (D. Mass. 2009) ("There is something wrong with a law that routinely threatens teenagers and students with astronomical penalties for an activity whose implications they may not have fully understood."); *Capitol Records Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1227 (D. Minn. 2008) ("[S]tatutory damages awards of hundreds of thousands of dollars is certainly far greater than necessary to accomplish Congress's goal of deterrence.").

⁴⁰⁹ *Tenenbaum*, 672 F. Supp. 2d at 237 ("[The court] urges—no *implores*—Congress to amend the statute to reflect the realities of file sharing." (emphasis added)); *Thomas*, 579 F. Supp. 2d at 1227 ("The Court would be remiss if it did not take this opportunity to *implore* Congress to amend the Copyright Act to address liability and damages in peer-to-peer network cases such as the one currently before this Court." (emphasis added)).

⁴¹⁰ See *Tenenbaum*, 721 F. Supp. 2d at 107.

⁴¹¹ *Id.* at 101 (noting that "the [\$675,000] damages award in this case fails under either test," i.e., the *Williams* test or the three *Gore/Campbell* guideposts); see also *id.* at 116 ("Even under the *Williams* standard, the award cannot stand because it is 'so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.' . . . [T]he punitive nature of the jury's award still dwarfs that in *Williams*." (quoting *St. Louis, IM & S. Ry. Co. v. Williams*, 251 U.S. 63, 66–67 (1919))).

⁴¹² This being the famous due process standard set out by Justice Frankfurter. *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting).

⁴¹³ Ray Beckerman represented a defendant accused by the major records labels of copyright infringement through illegal file-sharing networks. See *UMG Recordings, Inc. v. Lindor*, No. CV-05-1095, 2006 WL 3335048 (E.D.N.Y. Nov. 9, 2006).

People blog agrees; commenting on Judge Davis' decision to reduce Ms. Thomas-Rasset's judgment from \$1.92 million to \$54,000, Mr. Beckerman stated:

[T]he Court erred in (a) failing to decide the constitutional question, and decide that even the minimum statutory damages of \$750 would be unconstitutionally excessive under the due process clause as against actual damages of 35 cents, and (b) permitting a new trial at all. Even if the Court could find a permissible rationale for declining to decide the constitutional question, which it can't, there is still no way under existing copyright law any award of more than \$750 could be legally sustainable. So even under that scenario the judge should be directing judgment for \$18,000, not setting himself up for another circus.⁴¹⁴

Conversely, in *Tenenbaum*, the court did reach the constitutional question and declared the \$675,000 verdict against Joel Tenenbaum unconstitutionally excessive.⁴¹⁵ However, even Judge Gertner's 90% reduction of Mr. Tenenbaum's judgment seems arbitrary and excessive. Judge Gertner conceded that the record labels' actual damages amounted to about \$30 (or \$1 per recording that Mr. Tenenbaum infringed).⁴¹⁶ Thus, critics of this reasoning, including Beckerman, find it difficult to comprehend how \$67,500 survives constitutional muster.⁴¹⁷

⁴¹⁴ Ray Beckerman, *Reported that RIAA Will Ask for a 3rd Trial in Capitol Records v. Thomas*, RECORDING INDUSTRY VS THE PEOPLE (Jan. 29, 2010), <http://recordingindustryvspeople.blogspot.com/2010/01/reported-that-riaa-will-ask-for-3rd.html>.

⁴¹⁵ *Tenenbaum*, 721 F. Supp. 2d at 89.

⁴¹⁶ *Id.* at 116 ("The plaintiffs here may have suffered approximately \$1 in actual damages for each song that Tenenbaum illegally downloaded, but the jury awarded the plaintiffs \$22,500 per song, for a statutory-to-actual-damages ratio of approximately 22,500:1.").

⁴¹⁷ *E.g.*, Ray Beckerman, *\$675,000 Verdict Reduced to \$67,500 in SONY v Tenenbaum*, RECORDING INDUSTRY VS THE PEOPLE (July 9, 2010), <http://recordingindustryvspeople.blogspot.com/2010/07/675000-verdict-reduced-to-67500-in-sony.html> ("Since the Court concluded that the actual damages were ~ \$1 per work, or \$30 total, I don't understand how it arrived at the conclusion that an award of 2250 times that amount passes constitutional muster."); *see also Judge Reduces \$675K Fine to \$67,500 in File Sharing Case*, DIGITAL TRENDS (July 10, 2010), <http://www.digitaltrends.com/computing/judge-reduces-675k-fine-to-67500-in-file-sharing-case/> ("I still don't have \$70,000—and \$2,000 per song still seems ridiculous in light of the fact that you can buy them for 99 cents on iTunes . . . I mean \$675,000 was also absurd.").

As applied in these cases, the Copyright Act's statutory damages regime exerts overly aggressive and excessive penalties on copyright infringers. In order to have more predictable results and proportionate penalties, Congress must revisit the statutory damages clause of the Copyright Act and realign it with measures that protect artists while simultaneously "Promot[ing] the Progress of Science and useful Arts."⁴¹⁸

1. Arbitrariness: All Infringements of All Shapes and Sizes Are Subjected to the Same Potentially Enormous Penalty

A college student, sitting in his dorm room, ponders whether he should purchase the new Kanye West album on iTunes for \$9.99. He listened to the free, thirty-second preview samples, and he liked about half of the songs but does not know whether the catchy thirty-second samples are representative of the entire song's quality and whether the entire album is truly worth \$9.99. The student accesses a file-sharing network, finds three songs from the Kanye West album, and downloads the songs onto his computer's hard drive—free of charge. He really enjoys Kanye West's music, decides to buy a ticket to the next big arena concert, wants to buy Kanye West apparel and merchandise, and spreads positive reviews of Kanye West's music on his Facebook profile page. Under the Copyright Act, the college student may be found liable for copyright infringement, and he may be subjected to statutory damages even though he downloaded only three songs, even though he did not profit or intend to profit from downloading the songs, and even though the student contributed to Kanye West in alternative revenue streams, i.e., merchandise, apparel, and concert tickets.

Alternatively, envision a vast file-sharing network actively promoting its expansive library of content (mostly made accessible without the copyright owners' consent) and encouraging its users to download the content. Every day, thousands of users access the network and download all types of content: movies, television shows, music, software, and other media. Under the Copyright Act, the file-sharing network may be found liable for copyright infringement and may be subjected to statutory damages.

Something is seriously wrong with these hypotheticals. Why is it that the Copyright Act subjects the curious, frugal college student, whose only desire was to make an intelligent decision before buying an album, to the same amount of statutory damages as the vast file-sharing network? Here

⁴¹⁸ U.S. CONST. art. I, § 8, cl. 8.

lies the most significant flaw in the current Copyright Act: its arbitrariness and failure to distinguish small-scale, noncommercial infringers from large-scale, commercial infringers.⁴¹⁹

Simply stated, Congress' enactment of and the amendments to the 1976 Copyright Act did not meaningfully contemplate the rise of widespread electronic file-sharing networks. The internet as we understand it today was not widely available for consumer and commercial use in the 1970s; even during the late 1990s, the consumer internet was still in its infant stages and was nowhere as developed as it is today.⁴²⁰ As Mr. Tenenbaum stated early on in his trial, "the copyright statute did not envision free and open space of cyberspace."⁴²¹

Judges Davis and Gertner commented on the arbitrariness of the Copyright Act's statutory damages clause and implored Congress to take action. In *Thomas-Rasset*, Judge Davis called on Congress to amend the statutory damages clause:

The Court would be remiss if it did not take this opportunity to implore Congress to amend the Copyright Act to address liability and damages in peer-to-peer network cases such as the one currently before this Court. . . . The defendant is an individual, a consumer. She is not a business. She sought no profit from her acts. The myriad of copyright cases cited by Plaintiffs and the Government, in which courts upheld large statutory damages awards far above the minimum, have limited relevance in this case. All of the cited cases involve corporate or business defendants and seek to deter future illegal commercial conduct. The parties point to no case in which large statutory damages were applied to a party who did not infringe in search of commercial gain.⁴²²

⁴¹⁹ Although the Copyright Act alone does not distinguish small-scale from large-scale infringements, the Act does permit the court to assess the appropriate amount of statutory damages as "the court considers just." 17 U.S.C. § 504(c)(1) (2006); see *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 345–46 (1998). Still, the jury verdicts in both *Thomas-Rasset* and *Tenenbaum* demonstrate that small-scale, noncommercial infringers continue to face monstrous statutory damages penalties.

⁴²⁰ See Barry M. Leiner et al., *A Brief History of the Internet*, THE INTERNET SOCIETY, <http://www.isoc.org/internet/history/brief.shtml#Timeline> (last visited Feb. 6, 2011).

⁴²¹ Response in Opposition to Plaintiffs' Motion, *supra* note 168, at 2.

⁴²² *Capitol Records Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1227 (D. Minn. 2008).

Judge Gertner followed a similar approach in *Tenenbaum*:

As this Court has previously noted, it is very, very concerned that there is a deep potential for injustice in the Copyright Act as it is currently written. It urges—no implores—Congress to amend the statute to reflect the realities of file sharing. There is something wrong with a law that routinely threatens teenagers and students with astronomical penalties for an activity whose implications they may not have fully understood. The injury to the copyright holder may be real, and even substantial, but, under the statute, the record companies do not even have to prove actual damage. Repeatedly, as new developments have occurred in this country, it has been Congress that has fashioned the new rules that new technology made necessary. It is a responsibility that Congress should not take lightly in the face of this litigation and the thousands of suits like it.⁴²³

Judge Gertner further warned that the statutory damages clause of the Copyright Act “provid[es] the same statutory damages range for each infringed work no matter how many works are infringed” and may produce “unconscionably large awards.”⁴²⁴

Judges Davis and Gertner, as well as other federal judges who will preside over future file-sharing lawsuits, are in a difficult position. They understand that they are to defer to Congress in matters of copyright law⁴²⁵ and uphold copyright legislation so long as it is a rational exercise of Congress’ power.⁴²⁶ However, Judges Davis and Gertner obviously took issue with imposing such substantial penalties on noncommercial, consumer infringers; Judge Davis remitted the award⁴²⁷ and Judge Gertner declared the award unconstitutional.⁴²⁸ Indeed, both judges did not excuse Ms. Thomas-Rasset and Mr. Tenenbaum’s illegal file-sharing conduct.⁴²⁹

⁴²³ Sony BMG Music Entm’t v. Tenenbaum, 672 F. Supp. 2d 217, 237 (D. Mass. 2009) (internal citations and quotation marks omitted).

⁴²⁴ Sony BMG Music Entm’t v. Tenenbaum, 721 F. Supp. 2d 85, 115 (D. Mass. 2010).

⁴²⁵ See *id.* at 99.

⁴²⁶ See *id.* at 115.

⁴²⁷ Capitol Records Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045, 1048 (D. Minn. 2010).

⁴²⁸ *Tenenbaum*, 721 F. Supp. 2d at 89.

⁴²⁹ See *id.* at 116; *Thomas-Rasset*, 680 F. Supp. 2d at 1053–54.

A line of reasonableness, however, must be drawn somewhere. These damages awards should bear some relation to the actual damages sustained by the record labels. The point of “shocking” was enough for Judge Davis to remit Ms. Thomas-Rasset’s liability from \$1.92 million to \$54,000;⁴³⁰ “unconstitutionally excessive” was enough for Judge Gertner to reduce Mr. Tenenbaum’s judgment from \$675,000 to \$67,500.⁴³¹

Regardless of whether the “majority rule” for reviewing statutory damages awards under the Copyright Act becomes one of common law remittitur or constitutional scrutiny under the Due Process Clause, one common trend can be gleaned from *Thomas-Rasset* and *Tenenbaum*: federal judges are fed-up with the music industry’s efforts to make examples out of single mothers and students.

2. *Over Deterrence: The Copyright Act Deters and Punishes the Wrong Class of Persons*

Jeremy Bentham stated that “the general object of all laws is to prevent mischief.”⁴³² It follows that the task of legislators is to draft laws with precision and care, ensuring that the punishment is proportionate to the offense.⁴³³ Unfortunately, the statutory damages clause of the Copyright Act lacks the precision and proportion that Bentham demanded.

The Copyright Act applies too much deterrence to the wrong group of people—noncommercial parties who receive little to no pecuniary gain from their conduct. Under current law, a jury may assess up to \$150,000 in statutory damages to a party found liable for willfully infringing just one copyright.⁴³⁴ Just one song download—available for legal download on iTunes for \$0.99—permits extreme, bankrupting liability. Tens or hundreds of thousands of dollars for one song is excessive and has no relation to the actual economic injury sustained by the record labels.⁴³⁵

⁴³⁰ *Thomas-Rasset*, 680 F. Supp. 2d at 1054.

⁴³¹ *Tenenbaum*, 721 F. Supp. 2d at 89.

⁴³² JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* 178 (London, Oxford Univ. Press 2d ed. 1879) (1823), available at http://books.google.com/books?id=EfQJAAAAIAAJ&printsec=frontcover&source=gbs_v2_summary_r&cad=0#v=onepage&q=&f=false.

⁴³³ See *id.* at 178–79.

⁴³⁴ See 17 U.S.C. § 504(c)(2) (2006).

⁴³⁵ See *Tenenbaum*, 721 F. Supp. 2d at 116 (“The award bears no rational relationship to the government’s interests in compensating copyright owners and deterring infringement.”); *Thomas-Rasset*, 680 F. Supp. 2d at 1054 (“No matter how unremorseful Thomas-Rasset may be, assessing a \$2 million award against an individual consumer for use of Kazaa is
(continued)

Indeed, because “most individuals are risk averse, adequate deterrence can undoubtedly be obtained with an award that is much, much lower.”⁴³⁶

The Copyright Act’s statutory damages clause is a leviathan. Its range of damages is monstrous, especially in an age where individuals can easily transfer media in multiple mediums. It valiantly topples down commercial copyright infringers but also arbitrarily bankrupts everyday people who simply want to hear music for their own personal, noncommercial use. Indeed, stealing music is nothing more than stealing—plain and simple; by not paying for the recording, the thief not only deprived the songwriter and the artist (among other parties) of royalties but also trespassed upon and misappropriated the songwriter’s creative expression (an injury that may be more emotional than economic). However, the copyright infringement cases affirming large statutory damages awards before *Thomas-Rasset* and *Tenenbaum* involved *commercial defendants* like karaoke CD sellers,⁴³⁷ television stations,⁴³⁸ and magazine owners.⁴³⁹ Judge Davis in *Thomas-Rasset* wisely observed that there has been “no case in which large statutory damages were applied to a party who did not infringe in search of commercial gain.”⁴⁴⁰ Judge Gertner also highlighted the fact that “Congress did not contemplate that the Copyright Act’s broad statutory damages provision would be applied to college students like Tenenbaum who file-shared without any pecuniary gain.”⁴⁴¹

3. *Massive Jury Verdicts Will Inhibit Innovation, Kill Collaboration, and Chill Expression*

Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd. was one of the first United States Supreme Court cases addressing the issues of illegal music file-sharing.⁴⁴² “The more artistic protection is favored,” the Court

unjust. Even Plaintiffs admit that Thomas-Rasset is unlikely to ever be able to pay such an award.”); *Sony BMG Music Entm’t v. Tenenbaum*, 672 F. Supp. 2d 217, 237 (D. Mass. 2009) (“The injury to the copyright owners may be real, and even substantial, but, under the statute, the record companies do not even have to prove actual damage.”); *Capitol Records Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1227 (D. Minn. 2008) (“[T]he damages awarded in this case are wholly disproportionate to the damages suffered by the Plaintiffs.”).

⁴³⁶ *Tenenbaum*, 721 F. Supp. 2d at 115.

⁴³⁷ *Zomba Enters., Inc. v. Panorama Records*, 491 F.3d 574, 574 (6th Cir. 2007).

⁴³⁸ *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 340 (1998).

⁴³⁹ *Jordan v. Time, Inc.*, 111 F.3d 102, 102 (11th Cir. 1997).

⁴⁴⁰ *Thomas*, 579 F. Supp. 2d at 1227.

⁴⁴¹ *Tenenbaum*, 721 F. Supp. 2d at 89.

⁴⁴² *See id.* at 913.

observed, “the more technological innovation may be discouraged; the administration of copyright law is an exercise in managing the trade-off.”⁴⁴³ The current statutory damages clause, however, is an inadequate trade-off. The lawsuits commenced by the record labels against noncommercial parties like Jammie Thomas-Rasset and Joel Tenenbaum illustrate the music industry’s less-than-rosy attitude towards internet culture: “As more and more forms of content go digital, the owners of that content are becoming more possessive and turning increasingly to the law for help.”⁴⁴⁴

Instead of being proactive and shifting its business models to accommodate the internet culture, the music industry initially dismissed the possibility that the internet could (now, would) be the ideal method of reaching consumers.⁴⁴⁵ The music industry has largely “refused to recognize the potential of file-sharing as a new format.”⁴⁴⁶ Matt Mason, a commentator who is particularly critical of the music industry’s reluctance to embrace new technologies, opined that “the CD market went into decline because it became an obsolete format, peddled by an out-of-touch industry too stubborn to change.”⁴⁴⁷ The major record labels, those entities that commenced the copyright infringement lawsuits against Ms. Thomas-Rasset and Mr. Tenenbaum, “had it so good for so long [because] they could keep selling people back their entire record collection on tape, then CD.”⁴⁴⁸

Mr. Mason offers Apple as an example of a company that understands “the potential of file-sharing as a new format.”⁴⁴⁹ Apple’s “iTunes proved that music no longer needed a physical system of distribution to be a legitimate, profitable business.”⁴⁵⁰ Indeed, it is no surprise that Apple is a dominant player in today’s music industry, claiming the first place market position at 25% of music units sold in 2009, followed by brick-and-mortar outlets WalMart and Best Buy.⁴⁵¹

⁴⁴³ *Id.* at 928.

⁴⁴⁴ *Copyright Law: Killing Creativity*, *ECONOMIST*, Apr. 17, 2004, at 81.

⁴⁴⁵ *Id.* at 82.

⁴⁴⁶ MASON, *supra* note 81, at 158.

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.* at 158–59.

⁴⁵⁰ *Id.* at 159.

⁴⁵¹ Press Release, The NPD Group, Digital Music Increases Share of Overall Music Sales Volume in the U.S. (Aug. 18, 2009), available at http://www.npd.com/press/releases/press_090818.html.

Moreover, monstrous and excessive statutory damages awards may chill artistic expression. The announcement of six- and seven-figure jury verdicts for copyright infringement may deter individuals from utilizing copyrighted works, even for lawful fair use; a person may decide to “play it safe” and not innovate from a copyrighted work at all (even if the innovation would constitute a fair use) because of the risks posed by potentially massive statutory damages penalties.⁴⁵² Thus, statutory damages deter not only copyright infringement but also creativity and innovation.⁴⁵³ Surely, the Framers would not have devoted a clause in the Constitution for *promoting* copyrights if they believed that Congress could also *prevent* creativity and innovation—the key ingredients in a work of authorship.

4. *Massive Jury Verdicts Are Contrary to the Compensatory Rationale of Money Damages*

“\$2 million for stealing 24 songs for personal use is simply shocking.”⁴⁵⁴ Even though statutory damages provide relief to a party when actual damages are difficult to quantify, “statutory damages must still bear *some* relation to actual damages.”⁴⁵⁵ And although statutory damages serve both a compensatory and deterrence purpose,⁴⁵⁶ Congress should revisit the general purpose of awarding money damages in the first place: making the injured party “whole.”⁴⁵⁷

One who suffers a loss because of another’s wrongdoing is entitled to be made whole.⁴⁵⁸ A person is made whole with compensatory

⁴⁵² See Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 495–96 (2009) (arguing that gross and excessive awards of statutory damages “are likely to have other negative spillover effects, such as chilling lawful, even if close to the boundary, uses of copyrighted works, especially those that would promote freedom of speech and freedom of expression, as well as the development of innovative new technologies and services”).

⁴⁵³ See *id.* at 443 (“[T]he potential chilling effect [of the Copyright Act’s statutory damages provision] on individuals and technology providers alike is significant.”).

⁴⁵⁴ *Capitol Records Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045, 1054 (D. Minn. 2010); see also David Kravets, *Court Reduces ‘Shocking’ File Sharing Award*, WIRED (Jan. 22, 2010, 3:10 PM), <http://www.wired.com/threatlevel/2010/01/judge-reduces-shocking-file-sharing-award/>.

⁴⁵⁵ *Thomas-Rasset*, 680 F. Supp. 2d at 1049 (emphasis in original).

⁴⁵⁶ See, e.g., KAMINSTEIN, *supra* note 9, at 103.

⁴⁵⁷ See, e.g., 22 AM. JUR. 2D *Damages* § 27 (2009).

⁴⁵⁸ *Id.*

damages.⁴⁵⁹ It is hornbook law that compensatory damages “are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant’s wrongful conduct.”⁴⁶⁰ Conversely, damages that make one more than whole are punitive, a type of private fine that “is an expression of . . . moral condemnation” for a person’s wrongdoing.⁴⁶¹

Although the United States Copyright Office stated that statutory damages aim to deter and compensate for copyright infringement,⁴⁶² the notion that a court could charge a single mother or college student hundreds of thousands of dollars for downloading twenty to thirty songs (retailing for around \$1.00 per song) is troubling. Indeed, record labels and other content owners will undoubtedly elect for statutory damages in lieu of actual damages; after all, Congress relieved them of the task of calculating their actual injuries.⁴⁶³ However, recent statutory damages awards, especially those against *noncommercial* parties like Jamie Thomas-Rasset and Joel Tenenbaum, appear to be wholly deterrence-based.⁴⁶⁴ The deterrence rationale of the statutory damages has engulfed and rendered insignificant the compensatory purpose.

VI. CONCLUSION

Jammie Thomas-Rasset and Joel Tenenbaum did something wrong—they downloaded copyright-protected recordings without paying the copyright owners. Jammie Thomas-Rasset and Joel Tenenbaum violated the rights of the copyright owners. Because the record labels were able to prove their ownership of the recordings and that Ms. Thomas-Rasset and Mr. Tenenbaum copied (downloaded) the recordings, the record labels were able to present a case for copyright infringement.⁴⁶⁵ Indeed, the courts should penalize Ms. Thomas-Rasset and Mr. Tenenbaum for their wrongful and unlawful conduct. A penalty of \$1.92 million or \$675,000,

⁴⁵⁹ *Id.*

⁴⁶⁰ *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001) (citing RESTATEMENT (SECOND) OF TORTS § 903 (1979)).

⁴⁶¹ *Id.*

⁴⁶² KAMINSTEIN, *supra* note 9, at 103.

⁴⁶³ *See* 17 U.S.C. § 504(c) (2006).

⁴⁶⁴ *See Capitol Records Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045, 1052 (D. Minn. 2010) (“[B]ecause statutory damages have, in part, a compensatory purpose, ‘assessed statutory damages awards should bear some relation to actual damages suffered.’” (quoting *Bly v. Banbury Books, Inc.*, 638 F. Supp. 983, 987 (E.D. Pa. 1986))).

⁴⁶⁵ *Id.* at 1049; *Sony BMG Music Entm’t v. Tenenbaum*, 721 F. Supp. 2d 85, 91 (D. Mass. 2010).

however, is simply excessive, monstrous, and shocking. The reduced amounts of \$54,000 and \$67,500 are also tainted with excessiveness and bear little if any relation to the alleged injuries sustained by the record labels.

The statutory damages judgments against Ms. Thomas-Rasset and Mr. Tenenbaum in no way “promote the Progress of Science and useful Arts.”⁴⁶⁶ The statutory damages provision of the Copyright Act runs contrary to the Framers’ intention that copyright provide incentives to stimulate artistic creativity for the general public good. Although a judgment of \$80,000 per infringed work might be appropriate for a commercial infringer, it is grossly inappropriate for noncommercial infringers acting in their individual capacities without any intention to profit from the infringement. The federal judiciary has paved the way towards a renovated and proportionate statutory damages regime in civil copyright infringement cases. Now, Congress must do its part. Congress must rethink statutory damages for copyright infringement and amend the Copyright Act so that single mothers and graduate students will not find themselves drowning in million-dollar penalties.

⁴⁶⁶ U.S. CONST. art. I, § 8, cl. 8.