

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)	
SONY BMG MUSIC ENTERTAINMENT)	
<i>et al.</i> ,)	Civ. Act. No 07-cv-11446-RWZ
)	
Plaintiffs,)	(formerly consolidated with
)	Civ. Act. No. 03-cv-11661-NG)
v.)	
)	On remand from the First Circuit Court of
JOEL TENENBAUM,)	Appeals, Nos. 10-1883, 10-1947, 10-2052
)	
Defendant.)	
_____)	

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INTRODUCTION

Joel Tenenbaum is a long-term, hardcore, and willful copyright infringer whose misconduct caused Plaintiffs to suffer incalculable harm. Plaintiffs asserted claims on only 30 sound recordings, but the evidence at trial demonstrated that Tenenbaum intentionally infringed literally thousands of sound recordings over a period of nearly ten years by using multiple peer-to-peer networks to download and distribute these recordings without authorization. He even acted as an original seeder to the networks by putting copies of new works online for other people to take. Tenenbaum knew his conduct was illegal, yet he deliberately broke the law—even, quite remarkably, during the course of this lawsuit.

Having engaged in the conduct that he did, it is not surprising that Tenenbaum would have no trouble lying about it. Time after time, Tenenbaum falsely denied responsibility for the infringement, blamed his friends and family for his own illicit activities, and lied under oath. At trial, the evidence of Tenenbaum's wrongdoing was so overwhelming that, after years of lies and deceit, he finally admitted to downloading and distributing the recordings at issue. As a result, the court granted a directed verdict on liability in Plaintiffs' favor. Thereafter, the jury found Tenenbaum's infringement willful and awarded Plaintiffs \$22,500 in statutory damages per work infringed—well within the range of statutory damages authorized by the Copyright Act.

Tenenbaum now asks the court to throw out the jury's verdict on due process grounds and enter judgment for the minimum statutory damages of \$750 per sound recording. Tenenbaum concedes that common law remittitur is inappropriate in this case, but argues that a minimum statutory damages award is all the Constitution permits. As demonstrated below, however, Tenenbaum's due process argument ignores the facts and the law and fails in every respect. Tenenbaum casts aside the evidence presented at trial and pays no regard to the

substantial deference that courts must give to Congress to set the appropriate range of statutory damages, and to juries to award damages within that range.

Tenenbaum's reliance on the standards for due process review of punitive damages awards as outlined in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), is entirely misplaced. The concerns animating those standards simply do not apply in the context of statutory damages, review of which is governed by the highly deferential standard articulated in *St. Louis, I. M. & S. Railway Co. v. Williams*, 251 U.S. 63 (1919). Both the range Congress authorized and the amount awarded by the jury here easily satisfy the *Williams* standard. Indeed, the jury's verdict is at the very low end of what it could have awarded under the Copyright Act.

For all of these reasons, and as more fully discussed below, Plaintiffs ask that the court affirm that the jury's award reflects the willfulness of Tenenbaum's conduct and comports with the deferential standard for constitutional review of a jury's award within a congressionally specified range.

FACTUAL BACKGROUND

I. The Record Companies And Peer-To-Peer Networks

Plaintiffs are record companies who own or control the exclusive rights to the copyrights in the sound recordings at issue. Plaintiffs sell their copyrighted sound recordings for profit. They do not sell licenses that would allow free distribution of their works on the Internet. "The value of such a blanket license would be enormous, as the grant of such a license would deprive [Plaintiffs] of their source of income and profits and essentially drive them out of business."

Sony BMG Music Entm't v. Tenenbaum, 660 F.3d 487, 491 (1st Cir. 2011).

Since the late 1990s, Plaintiffs have faced a massive problem of digital piracy on the Internet. On a monthly basis, copyright infringers unlawfully disseminate billions of perfect digital copies of Plaintiffs' copyrighted sound recordings over peer-to-peer networks, causing

devastating financial losses to Plaintiffs. The Supreme Court has characterized the magnitude of this online piracy as “infringement on a gigantic scale.” *Metro-Goldwyn-Mayer Studios Inc., v. Grokster, Ltd.*, 545 U.S. 913, 940 (2005). “Because music recordings are loaded onto peer-to-peer networks in digital form, recordings downloaded from peer-to-peer networks are virtually indistinguishable from recordings purchased through lawful means, making enforcement difficult.” *Tenenbaum*, 660 F.3d at 492.

The Department of Justice concluded that online media distribution systems are “one of the greatest emerging threats to intellectual property ownership,” estimated that “millions of users access [peer-to-peer] networks,” and determined that “the vast majority” of those users “illegally distribute copyrighted material through the networks.” Office of Att’y Gen., Report of the Department of Justice’s Task Force on Intellectual Property at 39 (2004).¹ As the Seventh Circuit has recognized, “[m]usic downloaded for free from the Internet is a close substitute for purchased music; many people are bound to keep the downloaded files without buying the originals.” *BMG Music v. Gonzalez*, 430 F.3d 888, 890 (7th Cir. 2005). Although the technologies are ever-changing, these problems are serious and persistent, as demonstrated by the recent arrests of those operating the Megaupload service. *See Ben Sisario, 7 Charged as F.B.I. Closes a Top File-Sharing Site*, N.Y. Times, Jan. 19, 2012.²

As the First Circuit has already concluded in this case, this massive infringement is enormously destructive to Plaintiffs, as loss in revenues from sales of their copyrighted works has diminished Plaintiffs’ capacity “to pursue, develop and market new recording artists” and has “resulted in a significant loss of industry jobs.” *Tenenbaum*, 660 F.3d at 492. Unfortunately,

¹ Available at <http://www.cybercrime.gov/IPTaskForceReport.pdf>.

² Available at <http://www.nytimes.com/2012/01/20/technology/indictment-charges-megaupload-site-with-piracy.html>.

infringing users of peer-to-peer systems are often “disdainful of copyright and in any event discount the likelihood of being sued or prosecuted for copyright infringement,” rendering the problem of online infringement even more difficult for copyright owners to combat. *In re Aimster Copyright Litig.*, 334 F.3d 643, 645 (7th Cir. 2003).

II. Joel Tenenbaum’s Long-Term, Willful Infringement Of Thousands Of Copyrighted Works

Joel “Tenenbaum was an early and enthusiastic user of peer-to-peer networks to obtain and distribute copyrighted music recordings.” *Tenenbaum*, 660 F.3d at 492. From 1999 through at least 2007, Tenenbaum engaged in a deliberate pattern of illegally obtaining and distributing thousands of copyrighted sound recordings through “a panoply of peer-to-peer networks . . . from several computers.” *Id.* at 492–96. Tenenbaum first began illegally obtaining music in 1999 through the Napster network, which he used not only to obtain for free songs that he knew were copyrighted, but also to then make those songs available to Napster’s millions of other users. *Id.* at 492. After learning that Napster had been shut down to halt precisely the kind of unlawful conduct in which he was engaged, Tenenbaum shifted to other peer-to-peer networks, including AudioGalaxy, iMesh, Morpheus, KaZaA, LimeWire, and others. *Id.* at 493; Trial Tr. Day 4 (Dkt No. 36-2) at 41:13–47:9. As Tenenbaum explained, he switched to KaZaA after Napster was shut down because he “continued to want a source for music without paying for it.” *Id.* at 43:15–17. He later installed and used LimeWire so that he could continue to “download music without paying for it.” *Id.* at 46:1–3.

Tenenbaum downloaded more than 800 sound recordings to his KaZaA shared folder and several thousand more sound recordings to his LimeWire shared folder, many of them Plaintiffs’ copyrighted sound recordings. *Id.* at 7:11–9:13, 45:3–25, 54:1–18, 91:7–15; Trial Exhs. 13 (Dkt Nos. 36-3 through 36-11), 35 (Dkt No. 36-12), and 43 (Dkt No. 36-13). Tenenbaum testified

that he used these multiple peer-to-peer networks over many years “so that [he] could achieve *the maximum amount of music downloading and uploading* with the least amount of wasted effort.” Trial Tr. Day 4 (Dkt No. 36-2) at 47:5–9 (emphasis added); *see also Tenenbaum*, 660 F.3d at 495.

In addition to using these networks to obtain copyrighted music from other network users, Tenenbaum also uploaded new sound recordings not otherwise available on these networks, with the express purpose of distributing those copyrighted works to millions of other users for free. *Tenenbaum*, 660 F.3d at 495. Tenenbaum testified multiple times at trial that his very intent was to take the music he downloaded (music that was not his to take in the first place) and share it with the millions of other users on the peer-to-peer networks. Trial Tr. Day 4 (Dkt No. 36-2) at 64:9–13, 82:20–24, 96:25–97:11. Tenenbaum also intentionally seeded some of these peer-to-peer networks with additional sound recordings, deliberately putting new copies of these works online “for other people to take.” *Id.* at 30:13–33:11.

Tenenbaum undertook all these actions despite being fully aware that obtaining and distributing copyrighted music through peer-to-peer networks is illegal. *Tenenbaum*, 660 F.3d at 493; Memo. & Order (Dkt No. 47) at 7–8. Tenenbaum received repeated warnings not to infringe on peer-to-peer networks, including from Goucher College, where he was enrolled, in the fall of 2003. *Tenenbaum*, 660 F.3d at 494; Trial Tr. Day 4 (Dkt No. 36-2) at 34:2–36:22; Trial Exh. 26 (Dkt No. 36-14) at 11–12. Each year Tenenbaum received a student handbook warning that using the college’s network to download and distribute copyrighted materials was illegal, but he did so anyway. *Tenenbaum*, 660 F.3d at 494; Trial Exh. 26 (Dkt No. 36-14) at 11–12. The handbook specifically warned Tenenbaum that such conduct subjected him to up to “\$150,000 for each act of willful infringement.” *Tenenbaum*, 660 F.3d at 494. Tenenbaum’s

father also warned him that individuals were being sued for such conduct and told him to stop, but Tenenbaum did not stop. *Id.* Despite all these warnings, Tenenbaum continued to infringe, unabated even during the course of the lawsuit. Trial Tr. Day 4 (Dkt No. 36-2) at 45:3 to 46:3, 54:1–18, 91:16–20; Trial Exh. 43 (Dkt No. 36-13); *Tenenbaum*, 660 F.3d at 495.

III. Tenenbaum’s Continued Deception Through Trial And The Harm To Plaintiffs Caused By His Massive Infringement

In September 2005, Plaintiffs sent Tenenbaum a letter informing him that his actions constituted infringement of their copyrighted sound recordings and that Plaintiffs would take legal action if he did not desist. *Tenenbaum*, 660 F.3d at 494. Even that did not stop Tenenbaum, *id.* at 494–95, and Plaintiffs filed suit in August 2007. Compl. (Dkt No. 1). Although Tenenbaum infringed upon thousands of their copyrights, Plaintiffs pursued damages for infringement of only 30 works.³ Memo. & Order (Dkt No. 47) at 2. Tenenbaum rejected Plaintiffs’ offer to settle those claims, and instead engaged in a pattern of lies and repeated refusals to take responsibility for his actions. *Tenenbaum*, 660 F.3d at 495. For example, in sworn discovery answers, Tenenbaum not only denied downloading any of the various peer-to-peer networks he used to obtain music illegally, but also denied any knowledge of whether such systems were even present on his two computers. *Id.*; Trial Tr. Day 4 (Dkt No. 36-2) at 14:2–9. In his deposition, he blamed any traceable infringement on a multitude of individuals that “included a foster child living in his family’s home, burglars who had broken into the home, his family’s house guest, and his own sisters.” *Tenenbaum*, 660 F.3d at 495–96; Trial Tr. Day 4 (Dkt No. 36-2) at 19:5 to 21:19. When Plaintiffs sought access to Tenenbaum’s computers to verify the existence of illegally downloaded songs, Tenenbaum had numerous files removed

³ Plaintiffs could have chosen to sue on a greater number of works, but that would have increased their evidentiary burden, lengthened the trial, and likely added to the magnitude of the verdict—none of which Plaintiffs considered necessary.

from one and falsely maintained that the other had been destroyed years earlier. Trial Tr. Day 4 (Dkt No. 36-2) at 48:2–49:4, 73:12–24, 99:16–101:9; *Tenenbaum*, 660 F.3d at 495 n.7.

During the trial in July 2009, Tenenbaum maintained his innocence during opening statements and throughout Plaintiffs’ case. Only after Plaintiffs had presented overwhelming evidence of Tenenbaum’s infringement did he finally change his tune. On the witness stand, Tenenbaum admitted that many of his statements made under oath throughout the course of the litigation had been false or misleading. Trial Tr. Day 4 (Dkt No. 36-2) at 89:7–13, 89:25–90:5, 98:12–99:2. He admitted that he had downloaded peer-to-peer client software on his computers and used a variety of different peer-to-peer networks to obtain and distribute thousands of copyrighted songs. *Tenenbaum*, 660 F.3d at 495. He also admitted that he knew use of peer-to-peer networks to share copyrighted music constituted copyright infringement punishable by up to \$150,000 in damages for each infringed work. *Id.* He testified that he knew he was distributing the music on his computer to millions of other users on the peer-to-peer networks he was using. Trial Tr. Day 4 (Dkt No. 36-2) at 9:14–10:17, 30:4–33:11, 44:8–45:2. Tenenbaum ultimately admitted to massive copyright infringement, including specifically his direct responsibility for downloading and distributing the 30 copyrighted sound recordings that are the subject of this lawsuit: “I used the computer, I uploaded, I downloaded music, this is what I did, that’s how it is, I did it.” *Tenenbaum*, 660 F.3d at 496.

Based on Tenenbaum’s admission, Judge Gertner directed a verdict in Plaintiffs’ favor on the question of infringement and reserved to the jury the questions of willfulness and statutory damages. Although copyright plaintiffs need not prove actual damages when they have elected statutory damages, *see* 17 U.S.C. § 504(c), Plaintiffs here provided extensive evidence at trial of

the devastating effect that infringement through peer-to-peer networks has had on them.

Tenenbaum, 660 F.3d at 491–92.

Plaintiffs’ witnesses testified that the ever-multiplying infringement caused when a song is illegally shared results in injuries ranging from lost revenues to diminution of copyright value to a diminished capability to identify and promote new artists to layoffs within the industry. *Id.* at 492, 502–03. Plaintiffs also demonstrated that the only legal means by which Tenenbaum could engage in the actions he undertook would be to obtain a blanket license to reproduce and distribute the 30 songs without limitation, which would essentially represent the entire value of each of the copyrighted works and vastly outstrip the cost of purchasing a single copy of each song for personal use. *Id.* at 491.

The court submitted the questions of willfulness and just damages to the jury and instructed the jury to consider “[t]he nature of the infringement,” “the defendant’s purpose and intent,” lost profits and revenue, the value of the copyright, the duration of the infringement, whether it persisted after notice, and the need for deterrence. Memo. & Order (Dkt No. 47) at 12 n.6. After deliberation, the jury returned a verdict finding that Tenenbaum’s infringement was willful and awarding statutory damages under section 504(c) of \$22,500 per song, for a total award of \$675,000. *Id.* at 2.

POST-TRIAL PROCEEDINGS AND REMAND

Tenenbaum filed a motion for a new trial or remittitur, challenging the jury’s award on both common law remittitur and constitutional grounds. The district court declined to consider Tenenbaum’s request for common law remittitur. Instead, the district court held the jury’s award unconstitutionally excessive, and vacated the award and amended the judgment to award \$2,250 per infringed work, for a total award of \$67,500. In analyzing the due process question, the

district court acknowledged the standard for reviewing statutory damages under *Williams*, but ultimately utilized the standard for reviewing punitive damages awards under *Gore*.

On appeal, the First Circuit rejected Tenenbaum's arguments that the Copyright Act's statutory damages provision is unconstitutional under *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998), that "Congress did not intend the Act to impose either liability or statutory damages where the copyright infringements at issue amounts to what [Tenenbaum] calls 'consumer copying,'" and that "statutory damages, as a matter of Congressional intent, cannot be awarded absent a showing of actual harm." *Tenenbaum*, 660 F.3d at 496. In doing so, the First Circuit expressly rejected Tenenbaum's characterization of himself as "a consumer-copier" whose actions cause no actual harm. *Id.* at 497–503. The First Circuit also rejected Tenenbaum's jury instruction challenges, including challenges based on the district court's instruction informing the jury of the statutory range that the Copyright Act establishes. *Id.* at 503–05. After rejecting each of Tenenbaum's challenges to the imposition of statutory damages, however, the First Circuit concluded that the district court had erred in refusing to consider the arguments for common law remittitur before addressing the constitutionality of the jury's award. *Id.* at 489–90. Accordingly, the First Circuit vacated the district court's due process ruling, reversed the reduction of the jury's statutory damages award, reinstated the jury's award, and remanded for consideration of the motion for common law remittitur. *Id.* at 490, 515.

ARGUMENT

I. The Court Should Not Remit The Jury's Damage Award.

The First Circuit remanded with an instruction that the district court consider Tenenbaum's "motion for common law remittitur based on excessiveness" and that, if the district court "determines that the jury's award does not merit common law remittitur, the court and the parties will have to address the relationship between the remittitur standard and the due process

standard for statutory damage awards.” *Id.* at 490, 515 & n.28. As stated in Tenenbaum’s opening brief, and demonstrated more fully below, the parties agree that common law remittitur is “neither appropriate nor desirable” in this case. Tenenbaum’s Opening Brief on Remand (Dkt No. 70) (“Tenenbaum Br.”) at 2.

A. Common law remittitur is not appropriate here.

The Supreme Court has made clear that reviewing courts have no authority under the Copyright Act to reevaluate what measure of statutory damages is “just.” *See Douglas v. Cunningham*, 294 U.S. 207, 208–09 (1935) (rejecting argument that “an appellate court may review the action of a trial judge in assessing an amount in lieu of actual damages, where the amount awarded is within the limits imposed by the [statute]”). Any within-range award, “in the contemplation of the statute, is just,” which means a factfinder cannot abuse its discretion by making such an award. *Id.* at 210. For that reason, the Copyright Act “takes [statutory damages] out of the ordinary rule with respect to abuse of discretion” review of the amount of damages awarded. *Id.*

The Supreme Court’s decision in *Feltner* makes clear that the jury, rather than the judge, is the factfinder of the “just” amount of statutory damages. *Feltner*, 523 U.S. at 356; *see also Tenenbaum*, 660 F.3d at 496. Accordingly, after *Feltner*, a jury’s “conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like, is made the measure of the damages to be paid,” *L.A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100, 106 (1919), and cannot be disturbed (absent a violation of the *Williams* due process standard) so long as it is within the statutory limits. As a result, *Feltner* adds a potential Seventh Amendment violation to the list of reasons why judges cannot second-guess a jury’s within range award.

This is especially so in this case. A remittitur is constitutional only if it preserves the jury's role as factfinder. Accordingly, the Seventh Amendment requires that a plaintiff be given the option of a new trial in lieu of accepting a remitted verdict. *Hetzel v. Prince William Cnty.*, 523 U.S. 208, 211 (1998). But the option of a new trial is illusory, and the Seventh Amendment right to a jury trial is ultimately denied, where a remittitur will result in endless retrials with no other recourse for a plaintiff. *See, e.g., Capitol Records, Inc. v. Thomas-Rasset*, 799 F. Supp. 2d 999, 1002–03 (D. Minn. 2011). In light of Tenenbaum's repeated vows to appeal *any* amount of statutory damages awarded in this case, common law remittitur would not bring the parties or the court any closer to a final resolution and would simply delay or, worse yet, deny altogether the court's ultimate constitutional review of the jury's award.

B. The overwhelming evidence of Tenenbaum's willful infringement and the substantial harm that he caused renders remittitur inappropriate on the facts of this case.

Notwithstanding *Douglas*, *Westermann*, and *Feltner*, the First Circuit was not persuaded that "remittitur is not available where . . . an award falls within a prescribed statutory range," *Tenenbaum*, 660 F.3d at 515 n.27, and instructed that this Court "must" consider common law remittitur even if Tenenbaum no longer requests it. *See* Oct. 7, 2011 Order at 3. The First Circuit also recognized, however, that it would be within this Court's discretion to "determine[] that the jury's award does not merit common law remittitur." *Tenenbaum*, 660 F.3d at 515 n.28. As the parties now agree, it does not.

The grant of remittitur is rare, and the standard is exceedingly high. In reviewing an award of damages for remittitur, "the district court is obliged to review the evidence in the light most favorable to the prevailing party and to grant remittitur or a new trial on damages only when the award 'exceeds any rational appraisal or estimate of the damages that could be based upon the evidence before it.'" *E. Mountain Platform Tennis, Inc. v. Sherwin-Williams Co.*, 40

F.3d 492, 502 (1st Cir. 1994) (quoting *Kolb v. Goldring, Inc.*, 694 F.2d 869, 873 (1st Cir. 1982)); *see also Casillas-Diaz v. Palau*, 463 F.3d 77, 83 (1st Cir. 2006) (remittitur permitted only when jury's award is so "grossly excessive, inordinate, shocking to the conscience . . . or so high that it would be a denial of justice to permit it to stand" (internal quotation marks omitted)); *Smith v. Kmart Corp.*, 177 F.3d 19, 30 (1st Cir. 1999) (in reviewing jury's verdict, courts must "[v]iew[] the evidence in the light most favorable to the verdict"). Given such exacting standards, courts rarely grant remittitur and do so only "for compelling reasons." *Casillas-Díaz*, 463 F.3d at 82.

Here, the jury's damage award is proper and in no way excessive. Indeed, the First Circuit considered and rejected each of the arguments relied upon by the district courts in this case and in *Capitol Records, Inc. v. Thomas-Rasset* to suggest otherwise. While both of those courts placed great emphasis on the purportedly "non-commercial" nature of individual file-sharing and the misconception that it causes very little actual harm, the First Circuit rejected both of those arguments as *a matter of fact*. *See Tenenbaum*, 660 F.3d at 497 ("Tenenbaum is not a 'consumer-copier'"); *id.* at 502 (rejecting Tenenbaum's actual harm argument as "wrong both as a matter of law and on the facts of record"). And with good reason.

Viewing the evidence in the light most favorable to the verdict, the record shows that Tenenbaum carried on a deliberate, long-term pattern of willful copyright infringement. For nearly ten years, Tenenbaum intentionally downloaded *and* distributed thousands of copyrighted sound recordings without authorization through a "panoply of peer-to-peer networks." *Id.* at 493. Tenenbaum undertook those actions despite his full awareness that his conduct was illegal, and even after receiving warnings from his college, his own father, and the Plaintiffs. *Id.* at 493–95. During the long history of this lawsuit, Tenenbaum lied repeatedly about what he had done and sought to blame a multitude of other individuals. *Id.* at 495–96. Tenenbaum continued these

lies well into trial until, under the crushing weight of the evidence against him, he changed his story on the witness stand, finally admitting that he was responsible for massive infringement and had lied about it repeatedly. *Id.* at 496. In the context of a statute that clearly authorizes greater damages for willful infringement, Tenenbaum's conduct was willful in the extreme.

There is also no question that Tenenbaum's conduct caused substantial harm to Plaintiffs. Even though the Copyright Act does not require Plaintiffs to prove actual damages, Plaintiffs "presented extensive testimony regarding the loss in value of the copyrights at issue that resulted from Tenenbaum's conduct, and the harm of Tenenbaum's actions to themselves and the recording industry, including reduced income and profits, and consequent job loss to employees." *Id.* at 502–03. To the extent that Tenenbaum rehashes his argument that the jury impermissibly punished him for the damage caused by file-sharing in general, rather than the damage caused by his own conduct, *see* Tenenbaum Br. at 7, the First Circuit considered and rejected that argument, concluding that "[t]he [district] court's entirely correct instruction foreclosed that risk." *Tenenbaum*, 660 F.3d at 506. Tenenbaum did not merely download copies of Plaintiffs' sound recordings for his personal use but personally distributed those works over the Internet for years, for free, to millions of other users on the peer-to-peer networks he was using. *Id.* at 493. His actions amounted to the exercise of a blanket worldwide license to reproduce and distribute Plaintiffs' valuable copyrighted sound recordings, and the value of such a blanket license is "enormous." *Id.* at 491. Moreover, the jury heard evidence that Tenenbaum distributed hundreds of Plaintiffs' copyrighted recordings, not merely the 30 for which he was sued. These facts more than justify the jury's verdict of \$22,500 per infringed work, an award at

the very low end of the range of damages the jury could have chosen and below the maximum for non-willful infringement.⁴

For his part, Tenenbaum does not dispute that the jury's verdict is not aberrational or the product of an abuse of discretion. In fact, Tenenbaum has no complaint at all about the manner in which the jury exercised its discretion. His complaint, rather, is only that Congress should not have granted such discretion in the first place. *See* Tenenbaum's Post-Trial Mot. (Dkt No. 26) at 18 (“[Tenenbaum] is not asserting that the jury abused its discretion. Rather, he asserts that the jury was given far too much discretion . . .”).

Moreover, any argument for common law remittitur cannot be reconciled with the reality that two properly instructed juries in Minnesota awarded even larger verdicts in a case involving similar conduct. *See Thomas-Rasset*, 799 F. Supp. 2d at 1002. Under these circumstances, it is impossible to conclude that the jury's determination was not a “rational appraisal” or was wholly aberrational. To the contrary, the combination of the very high standard for common law remittitur, the requirement that the facts be viewed in the light most favorable to the Plaintiff, and the facts that the award falls well within the range of awards deemed presumptively appropriate by Congress and is consistent with the conclusions of other properly instructed juries all confirm that there is no basis for remittitur. Accordingly, there is no dispute that remittitur is inappropriate in this case.

⁴ The full extent of the harm Tenenbaum caused is incalculable because the peer-to-peer networks that he chose to use make it impossible for Plaintiffs to obtain direct evidence of anything more than a fraction of Tenenbaum's illegal activity. *See In re Aimster Copyright Litig.*, 334 F.3d at 646 (discussing viral nature of peer-to-peer infringement and fact that a single copy “could be levered into the distribution within days or even hours of millions of identical, near-perfect . . . copies); *Atlantic Recording Corp. v. Anderson*, No. 06-3578, 2008 WL 2316551, at *9 (S.D. Tex. Mar. 12, 2008) (“[T]here is no way to ascertain the precise amount of damages caused by Defendant's actions in not only improperly downloading Plaintiffs' Copyrighted Recordings himself but also subsequently distributing some or all of Plaintiffs' Copyrighted Recordings to a vast community of other persons on KaZaA.”).

II. The Jury's Damage Award Is Consistent With Due Process.

A. *Williams*, not *Gore*, controls any due process challenge.

Although Tenenbaum reiterates his argument that the *Gore* guideposts should govern due process review of statutory damage awards, he acknowledges that the First Circuit has already “question[ed]” the relevance of those guideposts in the statutory damages context. Tenenbaum Br. at 3. As the First Circuit observed,

the Supreme Court to date [has not] suggested that the *Gore* guideposts should extend to constitutional review of statutory damage awards. The concerns regarding fair notice to the parties of the range of possible punitive damage awards present in *Gore* are simply not present in a statutory damages case where the statute itself provides notice of the scope of the potential award. And the only circuit court of which we are aware to directly address the issue declined to apply *Gore* in this context and instead applied the *Williams* test. *See Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 587 (6th Cir. 2007).

Tenenbaum, 660 F.3d at 513. The *Thomas-Rasset* court went further and expressly held that *Williams*, not *Gore* applies. *See Thomas-Rasset*, 799 F. Supp. 2d at 1004–05.⁵

Under *Williams*, constitutional review of *statutory* damages awards is highly deferential. An award complies with the Due Process Clause so long as it “cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable.” *Williams*, 251 U.S. at 67. Because a statutory damages award is intended to punish and deter, not just compensate, it may “of course seem[] large” when contrasted against the actual harm in a particular case. *Id.* (upholding \$75 damages award for \$0.66 overcharge). But the Supreme Court has made clear that the validity of a statutory damages award “is not to be tested in that

⁵ Although the district court in *Thomas-Rasset* subsequently deemed within-range awards excessive, its reasons for doing so largely track the district court’s reasons in this case and are, thus, fundamentally flawed for the same reasons. *See Thomas-Rasset*, 799 F. Supp. 2d at 1010–14. The *Thomas-Rasset* opinion focuses on the purported “non-commercial” nature of the defendant’s infringement, an idea that the First Circuit has squarely rejected, *Tenenbaum*, 660 F.3d at 497–501, and the “relation to actual damages,” *Thomas-Rasset*, 799 F. Supp. 2d at 1011, which is relevant under *Gore* but not under *Williams*, *see* 251 U.S. at 67 (validity of a statutory damages award “is not to be tested in that way.”).

way.” *Id.* Instead, because the statute itself reflects Congress’s determination of the appropriate amount of damages for the violation in question, the constitutionality of a statutory damages award must be assessed “with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to” law. *Id.* When comparing the size of an award against the gravity of the offense, a court must bear in mind that legislatures “still possess a wide latitude of discretion” when setting statutory damages, *id.* at 66, and must be cautious of “intrusion into Congress’s power under Article I, Section 8 of the Constitution.” *Tenenbaum*, 660 F.3d at 513.

On the other hand, the Supreme Court’s *punitive* damages jurisprudence reflects entirely different concerns that have no relevance in the statutory damages context. In particular, that jurisprudence is motivated by two concerns: the unbounded nature of punitive damages and the resulting lack of notice. “Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.” *Gore*, 517 U.S. at 574. Yet, in the typical punitive damages case, the jury’s discretion is unconstrained, meaning the defendant has no advance notice of how large an award it might face. In recognition of that fact, the Court has developed three “guideposts” to determine whether a defendant “receive[d] adequate notice of the magnitude of the sanction” that might be imposed and to impose an outer bound on the amount of punitive damages. *Id.*

As is readily evident, those “fair notice” and unbounded liability concerns “are simply not present in a statutory damages case where the statute itself provides notice of the scope of the potential award.” *Tenenbaum*, 660 F.3d at 513. That is especially true here, where the statute provides not only a range, but separate ranges for willful and non-willful conduct, and a

possibility of reduction for truly innocent conduct. Section 504(c)(1) states that a “copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages.” 17 U.S.C. § 504(c)(1). The statute makes clear that a single damages award will be assessed for each work infringed, in an amount “not less than \$750 or more than \$30,000 as the court considers just.” *Id.* It also provides that, if the court finds that the infringement “was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000.” § 504(c)(2). Thus, there is simply no question that the plain language of the statute provides clear notice that any act of willful copyright infringement will subject the infringer to a damages award between \$750 and \$150,000 for each work infringed. As such, there is nothing to be gained from subjecting the jury’s statutory damages award—especially an award below the cap for *non*-willful infringement—to analysis under *Gore*.⁶

For precisely that reason, the punitive damages “guideposts” make little sense when imported into the statutory damages context. The first *Gore* factor, reprehensibility, accounts for the fact that punitive damages are usually awarded under the common law where there is no legislative determination of the public interest in preventing the offense in question, let alone a legislative quantification of the appropriate range of penalties. But in a statutory damages scheme, Congress has already weighed those and whatever other factors it considers relevant, so there is no need for a court to do so. Such an open-ended inquiry into reprehensibility is a task far better suited to the legislature than the judiciary. The judiciary has undertaken that task

⁶ That *Williams* is relevant to punitive damages jurisprudence does not support an assumption that the converse must be true as well. It would make little sense to exempt unconstrained punitive damages awards from the substantive limitations set forth in *Williams*; the same cannot be said of applying the stringent procedural components of punitive damages jurisprudence to review of statutory damages awards.

reluctantly in the punitive damages context because there is no alternative. But when Congress has made the judgment, the judicial role is more modest: The court's role is limited to reviewing the rationality of Congress's assessment, giving great deference to its assessment of "the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to" law. *Williams*, 251 U.S. at 67.

The second *Gore* guidepost, which measures the disparity between the punitive damages award and the actual or potential harm caused, is similarly incompatible with *Williams* and Congress's judgment in the Copyright Act. Punitive damages awards punish defendants as an adjunct to a case of certain recovery for an injury inflicted. Statutory damages, by contrast, are a legislative response to a "violation of a public law," and "may [be] adjust[ed] ... to the public wrong rather than the private injury." *Id.* at 66. Thus, a statutory damages award often reflects the legislature's determination that any amount of damages tied to actual or provable harm would bear an insufficient relationship to the "the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to" law. *Id.* at 67 (affirming award of \$75 for charging \$0.66 more than prescribed fare); *see also F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952) (noting that the Copyright Act reflects Congress's determination that actual damages "would fall short of an effective sanction for enforcement of the copyright policy"). For that reason, the Supreme Court has emphatically instructed that the validity of a statutory damages award "is not to be tested" by comparison to the actual injury caused by a defendant's actions. *Williams*, 251 U.S. at 67; *see also id.* at 66 (statutory damages need not "be confined or proportioned to [the plaintiff's] loss or damages").

Moreover, unlike punitive damages, statutory damages are awarded in lieu of, not in addition to, compensatory damages. Indeed, Congress typically authorizes statutory damages

precisely because, as in the copyright context, actual damages would be “difficult or impossible” to prove. *Douglas*, 294 U.S. at 209; *see also* Staff of H. Comm. on the Judiciary, 87th Cong., Copyright Law Revision: Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 22 (Comm. Print 1961) (“1961 Report”), at 102 (“The value of a copyright is, by its nature, difficult to establish, and the loss caused by an infringement is equally hard to determine.”). Because punitive damages are generally appropriate only if there is an underlying compensatory award, *see* 25 C.J.S. Damages § 197 (2011), in the punitive damages context the second *Gore* guidepost compares two readily available numbers. Not so in the statutory context. Since statutory damages exist in large part to relieve copyright owners of the very burden of demonstrating the metes and bounds of the actual injury, it would undermine the entire statutory damages scheme to measure their constitutionality against something that the plaintiff is not required to prove and that Congress has determined often would be impracticable or impossible to prove. *See L.A. Westermann*, 249 U.S. at 106 (“[t]he fact that [statutory] damages are to be ‘in lieu of actual damages’ shows that something other than actual damages is intended”).

The third *Gore* guidepost—comparing a punitive damages award to authorized civil penalties—is, if anything, a worse fit because a statutory damages award *is* an authorized civil penalty. To the extent that the third guidepost is designed to ensure that damages awards are measured with “substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue,” *Gore*, 517 U.S. at 583 (internal quotation marks omitted), that feat can be accomplished for a statutory damages award by examining the statute itself. And to the extent that it is intended “to determine whether a particular defendant was given fair notice as to its potential liability,” *Zimmerman v. Direct Fed. Credit Union*, 262 F.3d 70, 83 (1st Cir. 2001), *see*

also *Gore*, 517 U.S. at 584, that too can be established by resort to the statute in question. Thus, in a statutory damages case, there is simply no work for the third *Gore* guidepost to do.

For all these reasons, the only other court to consider the issue in this context correctly concluded that constitutional review of statutory damages awards under the Copyright Act is governed by *Williams*, not *Gore*. *Thomas-Rasset*, 799 F. Supp. 2d at 1004–05. Courts have repeatedly reached the same conclusion in other statutory damages contexts. *See, e.g., Tenenbaum*, 660 F.3d at 513 (citing *Zomba Enters.*, 491 F.3d at 587, and observing that “the only circuit court of which we are aware to directly address the issue declined to apply *Gore* in this context and instead applied the *Williams* test”); *Accounting Outsourcing LLC v. Verizon Wireless Pers. Commc’ns, L.P.*, 329 F. Supp. 2d 789, 808–09 (M.D. La. 2004); *Lowry’s Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 460 (D. Md. 2004).⁷ The *Gore* guideposts exist to ensure that defendants in punitive damages cases have what statutory damages provisions clearly provide: fair notice of the bounds of what sanctions they may face for their actions. Those guideposts have no place in review of a statutory damages award, which instead must be held constitutional so long as Congress’s judgment about the appropriate amount or range of

⁷ *Tenenbaum* ignores these cases even though they are directly relevant to ascertaining the appropriate due process review. Instead, his opening brief cites a number of cases, *see Tenenbaum Br. 5, n.3*, none of which hold that a statutory damages award must be reviewed under *Gore*. *See Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 954 (7th Cir. 2006) (citing punitive damages cases in dictum for the proposition that “[a]n award that would be unconstitutionally excessive may be reduced”); *Parker v. Time Warner Entm’t Co.*, 331 F.3d 13, 22 (2d Cir. 2003) (citing *Gore* in dictum for the proposition that “the due process clause might be invoked” to reduce a damages award); *Romano v. U-Haul Int’l*, 233 F.3d 655, 672–74 (1st Cir. 2000) (applying *Gore* guideposts to a capped punitive damages award where no party suggested otherwise); *Centerline Equip. Corp. v. Banner Pers. Serv., Inc.*, 545 F. Supp. 2d 768, 777–78 & n.6 (N.D. Ill. 2008) (reviewing statutory damages scheme under *Williams* then noting that *Campbell* and *Gore* might become relevant if punitive damages were awarded); *In re Napster, Inc. Copyright Litig.*, Nos. 00-1369, 04-1671, 2005 WL 1287611, at *10–*11 (N.D. Cal. June 1, 2005) (suggesting in dictum that court would apply analysis “similar to the ‘guideposts’” when reviewing a class action statutory damages award).

damages “cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable.” *Williams*, 251 U.S. at 67.

B. The jury’s damage award easily passes constitutional muster under *Williams*.

Applying the deferential *Williams* standard, courts have repeatedly rejected due process challenges to awards under numerous state and federal statutory damages schemes.⁸ Courts have also rejected due process challenges to awards under the Copyright Act. *See, e.g., Zomba Enters.*, 491 F.3d at 587–88 (\$806,000 award, equal to 44 times actual damages, was “not sufficiently oppressive to constitute a deprivation of due process”); *Arista Records LLC v. Usenet.com, Inc.*, No. 07-8822, 2010 WL 3629587, at *4–*5 (S.D.N.Y. Sept. 16, 2010) (\$6,585,000 did not violate due process); *Propet USA, Inc. v. Shugart*, No. 06-0186, 2007 WL 4376201, at *2–*3 (W.D. Wash. Dec. 13, 2007) (\$500,000 statutory damages award for copyright infringement—“some forty times . . . actual damages”—not unconstitutionally excessive). As those decisions reflect, damages awards authorized by the Copyright Act easily satisfy the deferential *Williams* standard.

The Constitution expressly authorizes Congress “To promote the Progress of Science and useful Arts” by securing copyright protection for creators of intellectual property. U.S. Const. art. 1, § 8. “[T]he Clause ‘empowers Congress to determine the intellectual property regimes

⁸ *See, e.g., Verizon Cal. Inc. v. OnlineNIC, Inc.*, No. 08-2832, 2009 WL 2706393, at *6–*7 (N.D. Cal. Aug. 25, 2009) (rejecting due process challenge to \$50,000-per-violation statutory damages award under Anticybersquatting Consumer Protection Act); *Sadowski v. Med1 Online, LLC*, No. 07-2973, 2008 WL 489360, at *5 (N.D. Ill. Feb. 20, 2008) (rejecting due process challenge to \$500-per-violation statutory damages authorized by Telephone Consumer Protection Act); *Arrez v. Kelly Servs., Inc.*, 522 F. Supp. 2d 997, 1008 (N.D. Ill. 2007) (rejecting due process challenge to \$500 damages for failure to provide itemized pay statements); *Arcilla v. Adidas Promotional Retail Operations, Inc.*, 488 F. Supp. 2d 965, 972 (C.D. Cal. 2007) (rejecting due process challenge to \$1,000 award under Fair and Accurate Credit Transactions Act); *Accounting Outsourcing*, 329 F. Supp. 2d at 809–10 (rejecting due process challenge to state statute providing \$500-per-violation damages for unsolicited faxes).

that, overall, in that body’s judgment, will serve the ends of the Clause.” *Golan v. Holder*, 565 U.S. ____, slip op. at 21 (Jan. 18, 2012) (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003)). “To comprehend the scope of Congress’ power under the Copyright Clause, a page of history is worth a volume of logic.” *Eldred*, 537 U.S. at 200 (internal quotation marks omitted).

Copyright infringement has been subject to statutory damages since the first Congress passed the first copyright statute in 1790. Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 125 (authorizing recovery of “fifty cents for every sheet which shall be found in [the infringer’s] possession”). Even before then, states—at the Continental Congress’s urging—put in place infringement laws with statutory damages provisions with broad damages ranges comparable to section 504(c). *See Feltner*, 523 U.S. at 351 (citing Massachusetts and Rhode Island statutes authorizing damages between £5 and £3,000 and New Hampshire statute authorizing damages between £5 and £1,000). These statutory damages provisions have been designed to ensure that “the cost[s] of infringing substantially exceed the costs of compliance, so that persons who use or distribute intellectual property have a strong incentive to abide by copyright laws.” H.R. Rep. No. 106-216, at 6 (1999).

Although Congress has periodically increased the amount of statutory damages available, “the principle on which [Congress] proceeded—that of committing the amount of damages to be recovered to the court’s discretion and sense of justice, subject to prescribed limitations—[has been] retained.” *L.A. Westermann*, 249 U.S. at 107.⁹ That wide discretion is an appropriate

⁹ *See* Copyright Act of 1856, ch. 169, 11 Stat. 138 (authorizing “just” damages of “not less than one hundred dollars for the first, and fifty dollars for every subsequent performance” of a copyrighted work); Copyright Act of 1909, ch. 320, § 25(b), 35 Stat. 1075, 1081 (authorizing “just” damages of not less than \$250 or more than \$5,000); Copyright Act of 1976, Pub. L. No. 94-553, § 504(c), 90 Stat. 2541, 2585 (authorizing “just” per-work damages of not less than \$250 or more than \$10,000, or more than \$50,000 for willful infringement); Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (authorizing “just” per-work

reflection of the fact that many forms of copyright infringement are easy to accomplish and difficult to detect. Indeed, “[t]he actual damages capable of proof are often less than the cost to the copyright owner of detecting and investigating infringements.” 1961 Report, at 103. That is all the more true since the harms of copyright infringement are particularly difficult to quantify, and measurement “based solely on the value of the infringing items . . . significantly underrepresents the degree of economic harm inflicted.” H.R. Rep. No. 106-216, at 3.

In reviewing statutory damages awards under various copyright infringement provisions, the Supreme Court has repeatedly referred and deferred to Congress’s conclusion that such awards need bear little or no relation to any actual harm proven. For instance, in *L.A. Westermann*, the Court held that the plaintiff was entitled to the statutory minimum of \$250 for each infringing act, even though there was no evidence of any damages or profits and the district court had determined that only nominal damages of \$10 per act were warranted. 249 U.S. at 106–09. In *Douglas*, the Court reversed a court of appeals’ decision to reduce an award from the maximum of \$5,000 to the minimum of \$250, even though the trial court had found that no actual damages had been shown. 294 U.S. at 208–10. And in *F.W. Woolworth*, the Court affirmed a maximum award of \$5,000, even though the defendant’s profits from the infringement were only \$900. 344 U.S. at 231–32. In doing so, the Court expressly validated Congress’s determination that the strong public interest in preventing copyright infringement warrants harsh penalties for violations, noting that “a rule of liability which merely takes away the profits from an infringement would offer little discouragement to infringers . . . [and] fall short of an effective sanction for enforcement of the copyright policy.” *Id.* at 233.

damages of not less than \$500 or more than \$20,000, or \$100,000 for willful infringement); Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, 113 Stat. 1774 (authorizing “just” per-work damages of not less than \$750 or more than \$30,000, or \$150,000 for willful infringement).

As the foregoing illustrates, to suggest that there is something unconstitutional about statutory damages awards that are substantially greater than the quantifiable harm copyright infringement causes would be to suggest not only that copyright infringement law has been constitutionally suspect for more than a century, but also that this fact has repeatedly escaped the Supreme Court's notice. Quite the contrary, as the First Circuit recognized, the Court has expressly affirmed the validity of Congress's determination that "[e]ven for uninjurious and unprofitable invasions of copyright [a] court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy." *Id.* That determination reflects the Court's deference to the fact that the Constitution tasks Congress with establishing copyright policy, and that courts "are not at liberty to second-guess congressional determinations and policy judgments" in this arena. *Eldred*, 537 U.S. at 208.

Nor is there any basis to second-guess the damages award that the jury returned in this case, an award that the government concedes is a constitutional exercise of the discretion that the Copyright Act affords juries. The jury's award of \$22,500 per work is toward the low end of the range Congress has authorized for willful infringement (up to \$150,000 per work), and is even toward the low end of the ranges authorized in 1976 and 1988. *See* 1976 Act (authorizing up to \$50,000 for willful infringement); 1988 Act (authorizing up to \$100,000 for willful infringement). Indeed, taking inflation into account, the award is even toward the low end of the range authorized in 1909. *See* 1909 Act, § 25(b) (authorizing damages of not less than \$250 and not more than \$5,000); Dep't of Labor, Bureau of Labor Statistics, CPI Inflation Calculator, http://www.bls.gov/data/inflation_calculator.htm (\$22,500 in 2009 dollars is equivalent to \$1,038.28 in 1913 dollars). Given that infringement awards within comparable ranges have been deemed appropriate "[e]ven for uninjurious and unprofitable invasions of copyright," *F. W.*

Woolworth, 344 U.S. at 233, there is little reason to question the appropriateness of a within-range award here.

That is all the more true once the particular circumstances of this case are taken into account. As the government has argued in defending the constitutionality of the jury's award, that award is an appropriate reflection of the policies Congress intended the Copyright Act to further. Contrary to Judge Gertner's analysis, *see* Memo. & Order (Dkt No. 47) at 30–36, there is no room for doubt that Congress fully intended statutory damages to be available for conduct such as Tenenbaum's. Indeed, the First Circuit emphatically rejected Tenenbaum's argument that Congress did not intend for the Act to apply in such situations. *See Tenenbaum*, 660 F.3d at 497–503; *see also* H.R. Rep. No. 106-216 (explaining that Congress increased statutory damages ranges for the specific purpose of combatting pervasive Internet infringement). Nor is there any reason not to defer to Congress's determination that use of the Internet to engage in widespread copyright infringement is every bit as detrimental as—if not more detrimental than—other forms of copyright infringement. Use of peer-to-peer networks to steal copyrighted music “regrettably is quite common,” Memo & Order (Dkt No. 47) at 52; *see also* Tenenbaum's Post-Trial Mot. (Dkt No. 26) at 1 (“Tenenbaum was one of many millions of people sharing [copyrighted] music.”), and “the potential for this problem to worsen is great” since “the development of new technology will create additional incentive for copyright thieves to steal protected works.” H.R. Rep. No. 106-216, at 3.

Those same factors led the district court in *Thomas-Rasset* to conclude that statutory damages for this pervasive form of copyright infringement satisfy each of the criteria set forth in *Williams*, as “[t]he public has a strong interest in rewarding and protecting copyright owners,” “there are ‘numberless opportunities for committing the offense’ of illegally downloading and

distributing sound recordings online,” and there is a strong need for deterrence given that “[o]nline infringement is easy to complete . . . [and] causes real damage to the copyright holders.” *Thomas-Rasset*, 799 F. Supp. 2d at 1010 (quoting *Williams*, 251 U.S. at 67).

Tenenbaum’s own actions underscore the need for strong deterrents against abuses of new technology: Tenenbaum willfully infringed upon thousands of copyrights despite full knowledge that his actions were illegal and subject to substantial monetary consequences. That Tenenbaum undertook those actions knowing they were subject to damages awards that he would have difficulty satisfying only confirms Congress’s assessment that many Internet infringers “simply believe that they will not be caught.” H.R. Rep. No. 106-216, at 3.

The reasonableness of the jury’s award is also confirmed by the fact that “Tenenbaum is one of the most blameworthy” of file-sharers. Memo. & Order (Dkt No. 47) at 52. Tenenbaum admitted to obtaining and distributing thousands of copyrighted works with full knowledge that his actions constituted illegal copyright infringement and admitted to continuing to infringe after direct notice from Plaintiffs, and even after Plaintiffs commenced this litigation. Throughout the litigation, Tenenbaum also repeatedly lied under oath in an attempt to shift blame and avoid responsibility for his knowingly unlawful conduct. Notably, the jury made its determination without any suggestion from Plaintiffs that they expected a particular award. Plaintiffs at all times maintained that they left the determination of damages to the jury’s sound discretion.

That a jury rather than a judge determined the “just” level of damages is no reason to question the award’s appropriateness, whether under the statute or under the Due Process Clause. *See* Memo. & Order (Dkt No. 47) at 37 n.12 (suggesting that juries are “in need of additional guidance” from Congress if they are to be “entrusted with the responsibility of awarding statutory damages”). To the contrary, review under *Williams* should involve deference to both

the policy judgments of Congress and the jury's role as reaffirmed in *Feltner*. Juries have been entrusted with awarding statutory damages in copyright infringement cases for hundreds of years. *Feltner*, 523 U.S. at 351–52. Although Congress may not have originally envisioned that juries would award damages under section 504(c), the First Circuit emphatically rejected the argument that there is any problem with juries doing so after *Feltner*. *Tenenbaum*, 660 F.3d at 496. The teaching of *Feltner* is that the amount of statutory damages is a fact to be found by the jury in the same way the jury resolves other factual issues.

Moreover, any suggestion that this particular jury lacked sufficient guidance to determine an appropriate measure of damages is unfounded. *But see* *Tenenbaum* Br. 3 (“the jury has nothing concretely factual to relate to other than the number of statutory infringements and the quoted statutory range”). The First Circuit has already determined that Judge Gertner properly instructed the jury on the question of damages. *Tenenbaum*, 660 F.3d at 503–08. Section 504(c) makes clear that willfulness, a key aspect of *Tenenbaum*'s conduct, is a critical factor in determining whether a higher award is warranted. 17 U.S.C. § 504(c)(2). And the district court provided the jury with additional factors to guide its determination, including “[t]he nature of the infringement,” “[t]he defendant's purpose and intent,” lost profits and revenue, the value of the copyright, the duration of the infringement, whether it persisted after notice, and the need for deterrence. Memo. & Order (Dkt No. 47) at 12 n.6.

In sum, once due regard is given to the strong public interest in preventing widespread willful file-sharing, the countless opportunities file-sharing presents for infringement, and the need for adherence to copyright laws, and once the particularly blameworthy conduct of this defendant is taken into account, it is clear that an award well below what Congress has authorized for willful infringement—indeed, below what Congress has authorized even for *non-*

willful infringement—“cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable.” *Williams*, 251 U.S. at 67.

C. The Jury’s Award Is Constitutional Under *Gore*.

Even under the ill-suited *Gore* guideposts, the jury’s award easily withstands constitutional scrutiny. “When all is said and done, a punitive damage award will stand unless it clearly appears that the amount of the award exceeds the outer boundary of the universe of sums reasonably necessary to punish and deter the defendant’s conduct.” *Zimmerman*, 262 F.3d at 81. The jury’s award is well within the statutory range and those bounds.

First, Tenenbaum’s actions are unquestionably reprehensible in the context of the Copyright Act. *See Gore*, 517 U.S. at 575. As already discussed, *see supra* at 4–7, he repeatedly engaged in willful copyright infringement knowing that his actions were illegal. “[E]vidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant’s disrespect for the law.” *Id.* at 576–77. Tenenbaum then exacerbated his willful infringement by engaging in “deliberate false statements, acts of affirmative misconduct, [and] concealment” of his illegal conduct throughout the litigation. *Id.* at 579. As Judge Gertner concluded, these combined actions make Tenenbaum “one of the most blameworthy” of file-sharers. Memo. & Order (Dkt No. 47) at 52.

Second, the jury’s award bears a “reasonable relationship” to the harm Tenenbaum caused. *Mendez-Matos v. Municipality of Guaynabo*, 557 F.3d 36, 54 (1st Cir. 2009). Tenenbaum stole copyrighted songs and made them available to millions of other users. Those actions deprived Plaintiffs of literally immeasurable profits they otherwise could have obtained from sales to both Tenenbaum and the public. By putting copyrighted works in the public sphere for free, Tenenbaum contributed to the continuing decline in the value of copyrighted sound

recordings and exacerbated the threat to Plaintiffs' viability as companies that identify and promote continuing and new artists through sales of copyrighted sound recordings. Given that file-sharing has cost the industry billions of dollars, there is no basis to question the award here.

Finally, the reasonableness of the jury's award is reinforced by comparing it to civil penalties authorized by Congress. Not only is the award well within the statutory range; it is within the range of damages even for *non-willful* infringement. *See supra* at 24. To the extent it is relevant, *see Zimmerman*, 262 F.3d at 83 (comparison to other jury awards is only appropriate when no civil penalties are authorized), the award is also within the range that three juries have determined appropriate for comparable conduct. *See Capitol Records Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1213 (D. Minn. 2008) (\$9,250 per song); *Thomas-Rasset*, 680 F. Supp. 2d at 1050 (\$80,000 per song); *Thomas-Rasset*, 799 F. Supp. 2d at 1003 (\$62,500 per song). Thus, under no theory of constitutional review can it plausibly be said that the jury's award "exceeds the outer boundary of the universe of sums reasonably necessary to punish and deter the defendant's conduct." *Zimmerman*, 262 F.3d at 81.

III. The First Circuit Has Already Rejected The Premise Underlying Tenenbaum's Argument For Minimum Statutory Damages.

As part of his continuing effort to avoid responsibility for his misconduct, Tenenbaum argues that only a reduction to the statutory minimum of \$750 per recording would "eliminate[] the effect of the instruction authorizing the jury to return any verdict above the minimum up to [the statutory maximum of \$150,000 per recording]." Tenenbaum Br. at 9. In other words, Tenenbaum claims the *maximum* amount of damages that can awarded for his *willful* infringement is in fact the bare *minimum* that Congress deemed appropriate for *non-willful* infringement, such that the jury in fact had no discretion at all. According to Tenenbaum, anything more than the statutory minimum would violate his Seventh Amendment rights because

the district court did not determine the upper limit under the Due Process Clause and explain that limit to the jury before it assessed statutory damages. *Id.* at 10–11.

Once again, the First Circuit has considered and rejected Tenenbaum’s argument. Indeed, the First Circuit concluded that the argument that a “trial court must make its own assessment of the constitutional limits on damages and so instruct the jury . . . is exactly backwards.” *Tenenbaum*, 660 F.3d at 505. Precisely because the Constitution renders statutory damages the exclusive province of the jury, allowing the court to constrain a jury’s damages determination based on the court’s independent assessment of what amount of damages is appropriate would “raise Seventh Amendment concerns about judicial usurpation of the jury’s function.” *Id.*¹⁰

CONCLUSION

Wherefore, Plaintiffs respectfully request that the court (1) consider and reject common law remittitur on the grounds that such relief is not available as a matter of law in this case and that the jury’s damages award is based on a rational appraisal or estimate of the damages offered into evidence; (2) hold that *Williams*, not *Gore*, provides the appropriate standard for due process review of the jury’s verdict; and (3) find that the jury’s verdict satisfies the *Williams* standard.

¹⁰ In that respect, the First Circuit’s opinion undermines Tenenbaum’s due process argument as well. If Tenenbaum were correct that *any* award within the range authorized by Congress is unconstitutional, it would be anomalous to conclude that a district court may instruct the jury to award damages within that range. The logical implication of the First Circuit’s rejection of Tenenbaum’s jury instruction argument is that the range itself poses no constitutional problem, and that no award within the range is unconstitutional absent the truly unusual circumstances that would cause an award to violate the deferential standard of *Williams*.

Respectfully submitted this 27th day of January 2012.

SONY BMG MUSIC ENTERTAINMENT;
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By their attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on January 27, 2012.

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