

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

_____	)	
SONY BMG MUSIC ENTERTAINMENT;	)	
WARNER BROS. RECORDS, INC.;	)	
ATLANTIC RECORDING	)	
CORPORATION; ARISTA RECORDS,	)	Civ. Act. No. 1:07-cv-11446-RWZ
LLC; AND UMG RECORDINGS, INC.,	)	
	)	(formerly consolidated with Civ. Act.
Plaintiffs,	)	No. 03-cv-11661-NG)
	)	
v.	)	On remand from the First Circuit
	)	Court of Appeals (Nos. 10-1883,
JOEL TENENBAUM,	)	10-1947, 10-2052)
	)	
Defendant.	)	
_____	)	

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**DEFENDANT’S REPLY BRIEF TO INTERVENOR  
UNITED STATES’ MEMORANDUM ON REMAND**

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## ARGUMENT

### I. THE GOVERNMENT ADVOCATES A REMITTITUR REQUIREMENT THAT PREVENTS FINALITY AND ELIMINATES CONSTITUTIONAL GUARANTEES.

The Government urges, against the will of the parties, a remittitur process that is both misconceived and constitutionally dangerous. On the Government's theory, remittitur of an excessive jury award must always be imposed before any constitutional question of excessiveness may be reached. Plaintiffs correctly assert that remittitur is inappropriate where, as here, "it will result in endless retrials with no other recourse for a plaintiff." Plaintiff's Opening Brief on Remand ("Pl.'s Mem.") at 11. The same is true from the defendant's side as well. Defendant joins in Plaintiff's appraisal that "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." *Id.* Moreover, remitting the jury's award to the maximum constitutional allowable dollar amount may obviate the due process problem of excessiveness, but only by denying the defendant his Seventh Amendment right to a jury's deliberative judgment. The Government's recommended procedure usurps the jury's function and biases the process of determining awards to the maximum possible despite the fact that the jury here unequivocally showed its desire to return an award substantially less than the maximum they were empowered to return.

The verdict form that has been routinely and unthinkingly used to guide jury deliberations in Plaintiffs' law suits against file sharers, and which has now been

explicitly approved by the First Circuit Court of Appeals,<sup>1</sup> directs jurors to fill in a number within a stated range for each infringement. Every resulting jury award has been excessive. See Sony BMG Music Ent'mnt v. Tenenbaum, 721 F. Supp. 2d 85, 121 (D. Mass 2010) ("Tenenbaum I") (reducing a jury award of \$675,000 to \$67,500 on constitutional grounds); Capitol Records v. Thomas Rasset, No. 06-1497 2011 WL 3211362 (D. Minn. July 22, 2011) (noting three excessive jury awards through three retrials: \$222,000 (set aside); \$1,920,000 (remitted to \$54,000); and \$1,500,000 (reduced on constitutional grounds)). A new trial here with no change in instruction and verdict form will, predictably, once again produce an excessive award, which, when once again remitted according to the Government's procedure, will prompt yet another new trial, and on and on the process will go until one side or the other gives up. Remittitur morphs from a discretionary power to a mandated procedure. Consequently, no award — compensatory, punitive or statutory — can be challenged on constitutional grounds. Such an outcome flies in the face of logic and a century of due process jurisprudence where there has been no such requirement.

The true motivation for the Government's nonsensical position can be found in its opening brief during appeal: "The defendant, possessed of concrete knowledge of his potential liability, and the plaintiffs, faced with the prospect of another expensive trial, would have new incentives to settle." at 25. The United States Department of Justice thus endorses the most extreme and cynical use of the

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<sup>1</sup> The First Circuit's approval of the jury instruction was made in the absence of a constitutional finding regarding either the award or the maximum amount the jury was instructed it may return. Upon a finding that either the award or the instructed amount were excessive, the jury instructions must then be found erroneous and prejudicial.

recording industry corporations' strategy of overwhelming single noncommercial individuals with costly asymmetric litigation. Not even the RIAA goes this far. The role of the judiciary cannot be to foist upon litigants a battle of attrition that denies finality, appellate review, and constitutional guarantees.

**II. THIS COURT CAN DENY REMITTITUR IN SATISFACTION OF THE FIRST CIRCUIT MANDATE BEFORE CONSIDERING WHETHER THE AWARD MUST BE REMITTED.**

The Government admonishes this Court that it “cannot disregard the appellate court’s mandate merely because Defendant and Plaintiffs ask it to.” Government’s Reply Brief on Remand (“Gov’t Mem.”) at 1. According the Government, this Court is constrained into a binary choice between (1) remitting the jury’s award exclusively on the grounds of excessiveness and give the plaintiffs the option of a new trial or (2) not remit. This Court should not be so misled. The First Circuit’s mandate is to “consider” remitting the jury’s award, not necessarily to remit it. The court’s concluding footnote makes this unmistakably clear by its use of the conditional “if”: “*If* the district court determines that the jury’s award does not merit common law remittitur . . . .” Sony BMG Music Ent’mnt v. Tenenbaum, 660 F.3d 487, 515 n.28 (1st Cir. 2011) (“Tenenbaum II”).

Further consideration of remittitur might best start from the base of consideration already given by the trial judge in the exercise of her discretion not to use it. Decision on remittitur is unquestionably committed to the discretion of the trial judge. See e.g., Dagnello v. Long Island R. Co., 289 F.2d 797, 806 (1961) (“[W]e appellate judges [are] not to decide whether we would have set aside the verdict if we were presiding at trial, but whether the amount is so high that it would be a

denial of justice to permit it to stand. *We must give the benefit of every doubt to the judgment of the trial judge . . .*” (emphasis added)); Neese v. Southern Ry., 350 U.S. 77, 77 (1955) (reviewing denial of remittitur under abuse of discretion). Judge Gertner exercised her discretion by asking the plaintiffs whether, if she remitted the award, they would accept it rather than reject it in favor of a new trial. She failed, however, to get a definitive answer. As described by the First Circuit:

At the hearing on Tenenbaum’s motion, the court asked counsel for plaintiffs to hypothesize as to what his clients’ position would be if the court were to order a reduction or remittitur of the award. Understandably, plaintiffs’ counsel did not take a firm position; he said his clients would have to consider the amount and other factors but thought it unlikely such a remittitur would be acceptable.

Tenenbaum II, 660 F.3d at 510.

Judge Gertner's stated concern was to avoid the obvious burden of a new trial not only on herself, but also on her court, her jurors and the parties. Her abuse was to have improperly assumed Sony’s statement of likelihood that it would opt for a new trial to be a certainty. Her “reasons are based on assumptions, not facts. Sony could not have decided its course of action if remittitur were allowed unless it knew the amount.” Id. at 510 n.23. This Court’s further consideration of remittitur might then consist of clarifying this uncertainty. Nothing prevents this Court from demanding to know from Plaintiffs to a certainty whether they would opt for a new trial in preference to remittitur to whatever the specific amounts the Court might consider.

Several amounts that would be reasonable upon the exercise of remittitur can be gleaned from Judge Gertner's thoroughly reasoned opinion and Plaintiffs litigation history. First, Judge Gertner observed:

If we use the \$0.70 wholesale price for music sold on the iTunes Music Store as a rough proxy for the plaintiffs' profits from each sale, then Tenenbaum's illegal downloading of the thirty sound recordings for which he was found liable deprived the plaintiffs of approximately 21 in profit.

Tenenbaum I at 112. Second, Judge Gertner considered subscription services over the time period for Tenenbaum's conduct: "[I]t seems fair to say that the average consumer today would be willing to pay no more than \$1,500 to engage in conduct roughly similar to Tenenbaum's between 1999 and 2007." Id. at 114.

Third, in literally thousands of cases against similarly situated defendants Plaintiffs have found the statutory minimum to be sufficient for compensation, punishment, and deterrence. Thus, the minimum would be a reasonable amount here. By their own admission, Plaintiffs "contacted over 18,000 people" regarding their not for profit filesharing activities. Declaration of Matthew J. Oppenheim dated June 24, 2009, in Anderson v. Atlantic Recording Co. (D. Or. No. 07-934), available at [http://bit.ly/Oppenheim\\_6-24-09](http://bit.ly/Oppenheim_6-24-09). Of that group, over 12,500 were directly sued and over 5,000 received "Pre-Suit Notification Letters" that strongly "encouraged" settlements of several thousand dollars. For those who settled, these very Plaintiffs were satisfied with a settlement of several thousand dollars. For those who defaulted, as Judge Gertner noted, "the recording companies have generally asked courts to impose the statutory minimum amount of \$750 per



infringed work, and courts have routinely granted these requests.” Id. at 109 (citing e.g., Elektra Entm’t Group Inc. v. Carter, 618 F. Supp. 2d 89, 94 (D. Me. 2009); Interscope Recordings v. Tabor, No. 08-03068, 2009 U.S. Dist. LEXIS 25854, at \*2–\*3 (W.D. Ark. Mar. 16, 2009); see also UMG Recordings, Inc. v. Alburger, No. 07-3705, 2009 U.S. Dist. LEXIS 91585, at \*13, \*15 (E.D. Pa. Sept. 29, 2009) (granting an uncontested motion for summary judgment and imposing the minimum statutory damages per infringed work). Thus, there is little reason to believe that any more is required in the instant case than in the thousands of other cases involving similarly situated defendants:

If the minimum statutory damages of \$750 per infringed work are sufficient to compensate the plaintiff and deter potential infringers in an ordinary file-sharing case where the defendant defaults, it is hard to see how an award of thirty times this amount is appropriate in this case. Even if Tenenbaum is more blameworthy than the average file sharer . . . it is absurd to say that he is *thirty times* more culpable.

Id.

Thus, this Court could demand that Plaintiffs answer definitively whether they would opt for a new trial if the jury’s award were to be remitted to the following specified amounts: (a) \$67,500 — treble the statutory minimum for the 30 songs in question; (b) \$22,500 — the statutory minimum for the 30 songs; (c) \$4,500 — treble the amount of subscription services found to be similar in nature to Tenenbaum’s conduct; (d) \$1,500 — the amount of those subscription services; (e) \$63 — treble lost profits; or (f) \$21 — Plaintiff’s lost profits.

Other concerns pointed out by the First Circuit might also be fairly met on further consideration by this Court of the appropriateness and scope of remittitur.

The First Circuit speculates that a new trial could materially reshape the nature of the constitutional issue by altering the amount of the award at issue or even the evidence on which to evaluate whether a particular award was excessive. Tenenbaum II, 660 F.3d at 511. As discussed supra Section I, there is no reason to believe that a new trial, without any changes, would produce a different result. Nevertheless, further consideration of these speculative possibilities on the one hand weighed against a determined certainty of Plaintiffs' opting for new trial in the event of remittitur on the other would surely satisfy the First Circuit's mandate to consider remittitur.

### **III. EVEN PROCEEDING BY REMITTITUR, THERE IS NO NEED TO GIVE PLAINTIFFS THE OPTION TO FORCE A NEW TRIAL.**

The response to the arbitrariness and excessiveness of the new trial option typically associated with remittitur stems from the Seventh Amendment mandate that “no fact tried by a jury, shall be otherwise reexamined in any court of the United States.” U.S. Const. amend VII. Because, doctrinally, in the purview of the Seventh Amendment, the determination of *compensatory* damages is deemed a factual determination, jury awards of *compensatory* damages may be revised by judges only if the plaintiff accepts the remitted award, thus waiving his Seventh Amendment right. By contrast, jury awards of *punitive* damages may be revised by judges without offense or constraint of the Seventh Amendment, and therefore without giving the plaintiff a new trial option. The Supreme Court articulated this distinction in Cooper Indus. v. Leatherman Tool, 532 U.S. 424, 437 (2001).

Unlike the measure of actual damages suffered, which presents a question of historical or predictive fact . . . the level of punitive

damages is not really a ‘fact’ ‘tried’ by the jury. . . . Because the jury’s award of punitive damages does not constitute a finding of “fact,” appellate review of the District Court’s determination that an award is consistent with due process does not implicate the Seventh Amendment . . . . (citations omitted).

The First Circuit recognized that it is a matter of first impression both in the Supreme Court and the First Circuit whether a *statutory* damage award under the Copyright Act may be reduced without offering the plaintiff a new trial. Tenenbaum II, 660 F.3d at 513. Yet, having recognized this, the First Circuit simply assumed the answer in its mandate without any reasoning on the matter. See id. at 515 (“If, on remand, the court allows any reduction through remittitur, then plaintiffs *must be given the choice of a new trial* or acceptance of remittitur.” (emphasis added)).

Simply assuming that a new trial option automatically comes along with remittitur is wrong both as process and as substantive doctrine. Procedurally, the issue was not briefed, argued, or substantively addressed in the opinion. Substantively, the level of statutory damages is, to use the words of Cooper Indus., “not really a ‘fact’ ‘tried’ by the jury” — even more than is true for punitive damages. Compensatory damages are treated as factual because they relate to the determination of actual injury. Punitive damages are *not* treated as a factual determination even though their imposition must be proportionately anchored to compensatory damages. See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 410 (2003) (“[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process.”). As asserted by the First Circuit, statutory damages under the Copyright Act require *no proof of*

*actual damage whatsoever*. A fortiori, statutory damages cannot be treated as factual and therefore the Seventh Amendment is not implicated by reducing the award without offering a new trial.

This Court thus faces a choice among three approaches: (1) following the First Circuit's mandate as written even though it is wrong, costly, dilatory, and opposed by both parties, or (2) reading the mandate to allow for the further consideration of the doctrine of remittitur that leads to recognition that Plaintiffs need not be given the option of forcing a new trial as an automatic attendant consequence of remittitur, or (3) avoiding the issue by forgoing the Government's recommended remittitur procedure altogether.

#### **IV. THE COMMON LAW POWER OF JUDICIAL REMITTITUR IS NOT LIMITED TO REDUCING AWARDS TO THE CONSTITUTIONAL MAXIMUM.**

Notwithstanding similarity in the verbalization used to articulate standards of excessiveness under the due process clause and under the common law power of remittitur, examination of the process of their application reveal that their function is very different. A judge who sets aside a jury award as unconstitutionally excessive completes her constitutional duty. The due process clause gives no judicial authority to chose and enter a different award, and no warrant or need to articulate in a precise dollar amount the outer bound of what the constitution permits. Such an awkward pinpoint determination of what the Supreme Court recognizes to be an "inherently imprecise" constitutional line is uncalled for. Cooper Indus., 532 U.S. at 434 (citing United States v. Bajakajian, 524 U.S. 321, 336 (1998)).

Proceeding by remittitur avoids this awkwardness because the articulated remittitur standard, like the due process standard, is used only to justify the rejection of the jury's award, not as the standard for determining what the remitted award should be. Remittitur, when granted, is to an amount the judge deems within the range of reasonableness, not an assertion of the outer bound of what shocks the conscience. The theory of reduction to the constitutional maximum stems from punitive damages cases where a jury, with unbounded discretion, returns an excessive award. By returning an award that exceeds constitutionality, so the story goes, the jury intended to return the maximum constitutionally allowable. When applied to statutory damages, such reasoning is a misfit. This is especially so where, as here, the jury was made aware of some maximum allowable amount and returned an award significantly lower. Here, no awkward pinpoint legal assertion of the constitutional outer bound of reasonableness is called for or required.

**V. THE COMMON LAW POWER OF JUDICIAL REMITTITUR IS NOT CONSTRAINED BY THE STATUTORY MINIMUM.**

The First Circuit explicitly recognizes that the Copyright Act does not constrain a judge's common law powers to remit statutory damage awards. Tenenbaum II, 660 F.3d at 515 n.27 (seeing "no reason to think Congress meant to override" the "common law power of courts to consider remittitur" of a statutorily authorized amount). Thus, should this Court choose to remit the jury's award, it would not be constrained by the statutory minimum specified per infringement.

In Texas v. American Blastfax, Inc., 164 F. Supp. 2d 892 (W.D. Tex. 2001), Judge Sparks examined a statutory penalty under the Telephone Consumer

Protection Act that provided for exactly “\$500 in damages for each violation” of the prohibition against sending unsolicited faxes. 47 U.S.C. § 227(f)(1) (2000). Judge Sparks found that the particular aggregation of statutory damages across all the violations at issue was “inequitable and unreasonable” and instead entered an award of seven cents per violation against the literal terms of the statute. Blastfax, 164 F. Supp. 2d at 900–01. Notably, this figure represented *only* the actual cost to recipients of an unsolicited fax and thereby removed any punitive portion from the statutory award. Thus, if common law remittitur exists notwithstanding the statute, then courts must have the power to reduce awards to reasonable levels without regard to the statutory text.

**VI. REMITTING THE JURY’S AWARD WILL DENY TENENBAUM HIS RIGHT TO TRIAL BY A PROPERLY INSTRUCTED JURY.**

Whether this Court’s response to the arbitrariness and excessiveness of the jury’s \$675,000 award is to set it aside by force of common law remittitur or constitutional due process, the premise for either necessarily entails the conclusion that instructions specifically authorizing the jury to return an award of \$4,500,000 was prejudicial error. This means that any remission of the jury’s award imposed by the Court will deny Tenenbaum his right to trial by a properly instructed jury unless either (1) he waives that right or (2) the error of the trial instruction and verdict form are corrected and *he* is given the option a new trial.

## CONCLUSION

As directed by the court of appeals, this Court should consider whether to exercise a common law power to remit the jury's award and offer the plaintiffs the option of a new trial. Pursuant to considering this course of action, Court should clarify the uncertainty that apparently provoked the First Circuit to vacate the trial judge's decision to declare the jury's award to be unconstitutionally excessive and remand to this Court for further consideration. This Court should do so by demanding from Plaintiffs a binding stipulation as to whether they would demand a new trial if the award were remitted to any of the values described in Def.'s Reply to Gov., Section II.

This Court should find that a remittitur procedure that requires a new trial option for the *plaintiffs* inappropriate. The Court should consider whether the jury's award of \$675,000 for sharing 30 songs both shocks the judicial conscience and violates due process. Based on such consideration, this Court should rule that the jury's award is unlawful and set it aside.

Having set aside the jury's award, the Court should then remit the award to a just amount without regard to statutory limits, and offer to the *defendant* the option of accepting the remitted award or of having a new trial under proper jury instructions. The Court should not give Plaintiffs the option of forcing yet another trial, and certainly not with the same erroneous jury instructions as before.

As to the proper instructions, this Court should, pursuant to 28 U.S.C. § 1292(b), consider certifying the question back to the Court of Appeals to consider in light of this Court's ruling that the reinstated jury's award of \$675,000 is

unlawfully arbitrary and excessive.

Respectfully Submitted,

  
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With the assistance of Phil Hill, Harvard Law School 2013  
Date: February 6, 2012



**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 February 6, 2012.

Respectfully Submitted,

  

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