

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

CAPITOL RECORDS, INC.; SONY BMG MUSIC ENTERTAINMENT;
ARISTA RECORDS LLC; INTERSCOPE RECORDS; WARNER BROS.
RECORDS, INC.; AND UMG RECORDINGS, INC.,

Plaintiffs-Appellants/Cross-Appellees,
v.

JAMMIE THOMAS-RASSET,

Defendant-Appellee/Cross-Appellant.

**On Appeal from the United States District Court
for the District of Minnesota
Case No. 06-cv-1497**

**OPENING BRIEF OF
APPELLANTS/CROSS-APPELLEES**

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SUMMARY OF THE CASE

This appeal arises out of three jury trials in which Jammie Thomas-Rasset repeatedly was found to have willfully infringed 24 copyrighted sound recordings held by six different recording companies (“Plaintiffs”). Although each jury awarded Plaintiffs statutory damages amounts that were within the range Congress has set for willful infringement under 17 U.S.C. § 504(c), the District Court vacated the first jury’s award of \$9,250 per work based on its erroneous conclusion that the Copyright Act does not grant copyright holders the exclusive right to make their works available to the public. The District Court then vacated the second jury’s award of \$80,000 per work based on its conclusion under a remittitur analysis that any award greater than \$2,250 per work would be “monstrous and shocking.” It then reduced the third jury’s award of \$62,500 per work to \$2,250 per work based on its conclusion that any higher award would violate the Due Process Clause.

The case presents important legal issues as to (1) whether the Copyright Act continues to protect a copyright holder’s historical exclusive right to make a copyrighted work available to the public, and (2) whether a statutory damages award that is well within the range that Congress has authorized for willful copyright infringement nonetheless violates the Due Process Clause. Plaintiffs respectfully request that the Court grant 30 minutes of argument time to address these important issues upon which this Court has not previously opined.

CORPORATE DISCLOSURE STATEMENT

Plaintiffs identify below parent corporations, as well as all publicly held corporations that own 10% or more of any Plaintiffs' stock:

Plaintiff CAPITOL RECORDS INC.'s, n/k/a Capitol Records LLC, parent corporation is CGI Private Equity LP, LLC, which is wholly owned by Citigroup Inc., a United States publicly traded company.

Plaintiff SONY BMG MUSIC ENTERTAINMENT, n/k/a Sony Music Entertainment, is a Delaware general partnership owned by Sony Music Holdings, Inc. (98%) and USCO Sub LLC (2%), neither of which is publicly traded. Its ultimate parent corporation is Sony Corporation (Japan), which is publicly traded in the United States.

Plaintiff ARISTA RECORDS LLC is a Delaware limited liability company owned by Arista Music (formerly BMG Music), a New York general partnership, which is not publicly traded.

Plaintiff INTERSCOPE RECORDS is a subsidiary of Vivendi, S.A., a publicly held French company.

Plaintiff WARNER BROS RECORDS INC. is indirectly wholly owned by Warner Music Group Corp., a Delaware corporation, which is a wholly owned subsidiary of AI Entertainment Holdings LLC, a Delaware limited liability

company, an affiliate of Access Industries, Inc. These entities are not publicly traded.

Plaintiff UMG RECORDINGS, INC.'s ultimate parent corporation is Vivendi S.A., a publicly held French company.

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STATEMENT OF JURISDICTION

Plaintiffs brought this action in the District Court seeking statutory damages and injunctive relief under the Copyright Act, 17 U.S.C. § 501 *et seq.*, against Defendant Jammie Thomas-Rasset. The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1338(a). A jury found Thomas-Rasset liable for willful copyright infringement. On July 22, 2011, the District Court entered a final order awarding Plaintiffs \$54,000 in statutory damages and granting in part and denying in part Plaintiffs' request for injunctive relief. Plaintiffs timely filed a notice of appeal on August 22, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the District Court erred by holding that an individual does not infringe a copyright holder's exclusive rights by making a copyrighted work available to the public without authorization.

- 17 U.S.C. §§ 101, 106(3)
- *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985)
- *New York Times Co. v. Tasini*, 533 U.S. 483 (2001)

2. Whether the District Court erred by holding that the Due Process Clause limits Plaintiffs to \$2,250 for each of Thomas-Rasset's acts of willful copyright infringement, even though that amount is dramatically lower than the statutorily prescribed maximum even for *non*-willful infringement.

- 17 U.S.C. § 501(c)
- U.S. Const. art I, § 8; amend. V, VII
- *St. Louis, I. M. & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919)
- *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998)

STATEMENT OF THE CASE

On April 19, 2006, Plaintiffs Capitol Records, Inc.; Sony BMG Music Entertainment; Arista Records LLC; Interscope Records; Warner Bros. Records, Inc.; and UMG Recordings, Inc., ("Plaintiffs") brought suit against Thomas-Rasset seeking damages and injunctive relief for copyright infringement. Although

Thomas-Rasset was caught infringing 1,700 copyrighted works, Plaintiffs sought statutory damages for the willful infringement of only 24 works, proceeding under 17 U.S.C. § 504(c), which authorizes an award of “not less than \$750 or more than \$30,000 as the court considers just” for each work infringed, and “not more than \$150,000” if the infringement was willful.

On October 4, 2007, a jury found Thomas-Rasset liable for willful infringement of all 24 works and awarded statutory damages of \$9,250 per work. Thomas-Rasset moved for new trial or remittitur, arguing that § 504(c) is unconstitutional as applied to her. Plaintiffs moved to amend the judgment to enjoin Thomas-Rasset from further infringing their copyrights by, *inter alia*, “distribut[ing]” or “mak[ing] any of Plaintiffs’ Recordings available for distribution to the public.” Dist.Ct.Doc.116. The United States also intervened to defend the constitutionality of § 504(c).

On May 15, 2008, the District Court granted a new trial, holding *sua sponte* that it erred by instructing the jury that “making copyrighted sound recordings available for electronic distribution on a peer-to-peer network, without license from the copyright owners, violates the copyright owners’ exclusive right of distribution, regardless of whether actual distribution has been shown.” App.47. The District Court denied Plaintiffs’ motion to certify that ruling for interlocutory appeal.

On June 18, 2009, another jury found Thomas-Rasset liable for willful infringement of all 24 works and awarded statutory damages of \$80,000 per work. Thomas-Rasset moved for new trial, remittitur, or to alter or amend the judgment, again arguing, *inter alia*, that § 504(c) is unconstitutional as applied. Plaintiffs also again asked the court to enjoin Thomas-Rasset from making their copyrighted works available to the public. The District Court declined to reach the constitutional question and instead remitted damages to \$2,250 per work. App.191. Plaintiffs declined the remitted award and exercised their right to a new trial limited to damages.

On November 3, 2010, a third jury awarded Plaintiffs \$62,500 per work. Thomas-Rasset filed a motion to alter or amend the judgment, again arguing, *inter alia*, that § 504(c) is unconstitutional as applied. Plaintiffs also again requested an injunction prohibiting Thomas-Rasset from making their copyrighted works available to the public. Although the District Court accepted Plaintiffs' argument that the controlling legal test was extremely deferential to a congressionally authorized statutory damages award, the court nonetheless granted Thomas-Rasset's motion and reduced damages to \$2,250 per work, which the court held was the maximum award allowed by the Constitution. App.1-43. The court also entered an injunction but refused to include language prohibiting Thomas-Rasset from continuing to make Plaintiffs' works available to others. App.42.

STATEMENT OF FACTS

A. Statutory and Factual Background

1. The Historical Scope of the Copyright Act

Copyright protection has long been a core tradition in our nation, one so fundamental that the Framers deemed it of constitutional significance. U.S. Const. art. 1, § 8, cl. 8. Since our earliest days, “the twofold right to make and to publish copies” has been the “historic basis of copyright.” 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”). Copyright legislation has always granted a copyright holder exclusive rights falling into those two distinct categories: rights relating to the actual copying of a work and rights relating to the public’s access to a work. The very first Copyright Act granted a copyright holder “the sole right and liberty of printing, reprinting, publishing and vending” a copyrighted work, and Congress retained those same protections throughout the next century. Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124 (“1790 Act”); *see also* Copyright Act of 1831, 4 Stat. 436 (“1831 Act”) (same); Copyright Act of 1856, ch. 169, 11 Stat. 138, 139 (“1856 Act”) (recognizing “sole right to print and publish”); Copyright Act of 1909, ch. 320, § 1(a), 35 Stat. 1075 (“1909 Act”) (recognizing “exclusive right ... [t]o print, reprint, publish, copy, and vend”).

Historically, the concept of “publishing” a work was a broad one, encompassing not just the familiar notion of choosing a publishing company for a book, but the more basic decision whether and to what extent a work should be made available to the public. That expansive understanding is reflected in dictionaries, judicial decisions, and treatises throughout the years. See Noah Webster, *American Dictionary of the English Language* (1828), <http://1828.mshaffer.com/> (defining “publish” as “[t]o send a book into the world, or to sell or offer for sale,” and “publication” as “the act of offering a book or writing to the public by sale or by gratuitous distribution”); *D’Ole v. Kansas City Star Co.*, 94 F. 840, 842 (W.D. Mo. 1899) (“In copyright law, [publication] is the act of making public a book; that is, offering or communicating it to the public by sale or distribution of copies.” (internal quotation marks omitted)); E.J. MacGillivray, *A Treatise Upon the Law of Copyright* 261-62 (1902) (“MacGillivray Treatise”) (“[g]ratuitous distribution to members of the public, or leaving copies in a place to which the public have access ... is publication”). At a more fundamental level, that broad conception of the publication right reflects Congress’ consistent understanding that when, where, and to what extent the public has access to a copyrighted work has a substantial impact on the value of the copyright itself.

The Copyright Act underwent a substantial revision in 1976, Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (“1976 Act”), and the enumeration of “exclusive rights of the copyright holder” that emerged from that revision no longer used the terminology of “publication” or “to publish.” *See* 17 U.S.C. § 106. Congress instead employed the term “to distribute” as a more natural fit, in modern parlance, than “publish” for the broad scope of the right the copyright holder has historically enjoyed. § 106(3). The change in terminology had the added advantage of breaking free of some case law that had interpreted publication narrowly to avoid deeming certain works part of the public domain. *See* Peter S. Menell, *In Search of Copyright’s Lost Ark: Interpreting the Right to Distribute in the Internet Age* 34-35 (Berkeley Program in Law & Econ., Working Paper Series, 2010), <http://escholarship.org/uc/item/3636t264> (“Menell”). But to the extent that linguistic change might suggest the 1976 revisions narrowed the scope of the right, Congress dispelled any confusion by explaining that “[c]ause (3) of section 106 establishes the exclusive right of publication.” H.R. Rep. No. 94-1476, 62 (1976). Thus, in its current form, the Copyright Act grants a copyright holder “the exclusive rights to do and to authorize any of the following: ... (3) 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.” 17 U.S.C. § 106(3). It further provides that “[a]nyone who violates any of the exclusive rights of the

copyright holder as provided by section[] 106 ... is an infringer of the copyright or right of the author.” § 501(a).

2. The Long-Standing Tradition of Statutory Damages

Copyright infringement has been subject to statutory damages since 1790. 1790 Act, § 2 (authorizing recovery of “fifty cents for every sheet which shall be found in [the infringer’s] possession”). The continuous availability of authorized *statutory* damages reflects Congress’ unbroken judgment throughout our nation’s history that “[t]he value of a copyright is, by its nature, difficult to establish, and the loss caused by an infringement is equally hard to determine.” 1961 Report 102. Thus, rather than impose upon a copyright owner the often difficult or impossible burden of establishing the value of the copyright and the amount of harm caused by the infringement, Congress has long provided that a copyright owner may choose between actual or statutory damages as recovery for infringement. The availability of statutory damages not only obviates the need for difficult or impossible proof, but also deters infringement and ensures appropriate incentives for the creation of copyrighted works.

In its current form, the Copyright Act provides that, for any act of infringement, the copyright owner may recover either actual damages plus any additional profits of the infringer, or in the alternative “may elect, at any time before final judgment is rendered, to recover ... an award of statutory damages.”

17 U.S.C. § 504(b), (c)(1). The choice belongs exclusively to the copyright owner. A copyright owner is entitled to statutory damages for each work infringed of “not less than \$750 or more than \$30,000 as the court considers just.” § 504(c)(1). That baseline range for garden-variety non-willful infringement is subject to two exceptions: If the copyright owner proves that the infringement was willful, the statutory range increases to “not more than \$150,000” per infringed work. § 504(c)(2). By contrast, if, subject to certain exceptions, the infringer proves that he or she “was not aware and had no reason to believe that his or her acts constituted an infringement of copyright,” the award may be reduced to “not less than \$200” per work. § 504(c)(2).¹

The Copyright Act’s damages provision has existed in the same basic form since 1976, subject only to repeated amendments to increase both the minimum and maximum amount of damages available. *See* 1976 Act, § 22 (authorizing minimum of \$250, maximum of \$10,000, and maximum for willful infringement of \$50,000); Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 10, 102 Stat. 2853, 2860 (“1988 Act”) (increasing minimum to \$500, maximum to \$20,000, and maximum for willful infringement to \$100,000); Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-

¹ This exception is generally reserved for situations where the copyright holder failed to place a copyright notice on its work. *See* 17 U.S.C. § 402(d).

160, § 2, 113 Stat. 1774 (“1999 Act”) (increasing minimum to \$750, maximum to \$30,000, and maximum for willful infringement to \$150,000).

3. The Viral Nature of Peer-to-Peer Networks

A peer-to-peer network allows an individual computer user to copy and distribute files directly with other users outside of the view of third parties. Because such networks do not rely on a central service to store files, purveyors of peer-to-peer networks, such as KaZaA, LimeWire, and iMesh, do not limit or control what files are being distributed on their network. That absence of oversight turned peer-to-peer networks into a hotbed of copyright infringement, particularly of popular music. Individuals, acting without authorization, upload copyrighted sound recordings to “shared” folders on their computers, then make the contents of those folders available on peer-to-peer networks for millions of other network users to download. See Lev Grossman, *It’s All Free!*, TIME (Apr. 29, 2003), <http://www.time.com/time/magazine/article/0,9171,447204,00.html>. Those other users, in turn, download the copyrighted music to their own “shared” folders, thereby making it even more readily available to other peer-to-peer network users. In this way, infringement on peer-to-peer networks is often described as “viral.”

As the Supreme Court has recognized, the vicious cycle made possible by peer-to-peer networks results in copyright “infringement on a gigantic scale.” *Metro-Goldwyn-Mayer Studios, Inc., v. Grokster, Ltd.*, 545 U.S. 913, 940 (2005).

In 2004, the Department of Justice concluded that peer-to-peer networks are “one of the greatest emerging threats to intellectual property ownership.” Report of the Department of Justice’s Task Force on Intellectual Property 39 (Oct. 2004), <http://www.cybercrime.gov/IPTaskForceReport.pdf> (“Task Force Report”). It estimated that “millions of users access P2P networks,” and that “the vast majority” of those users “illegally distribute copyrighted materials through the networks.” *Id.*; *see also Grokster*, 545 U.S. at 923 (users employed peer-to-peer networks “primarily to download copyrighted files”).

This massive copyright infringement has had a devastating effect on the recording industry. When that effect first became apparent, Plaintiffs and other members of the recording industry joined similarly affected industries in seeking to address this problem by suing the proprietors of peer-to-peer networks. Although those litigation efforts succeeded in establishing that use of peer-to-peer networks to share copyrighted files constitutes unlawful copyright infringement, *see, e.g., id.* at 940; *In re Aimster Copyright Litig.*, 334 F.3d 643, 654-55 (7th Cir. 2003); *A&M Records, Inc., v. Napster, Inc.*, 239 F.3d 1004, 1022-24 (9th Cir. 2001), repeated holdings to that effect did little to deter individual users. Instead, many individuals persisted in their infringing conduct, shifting from one peer-to-peer network to another as networks were shut down or converted to legitimate services operating in compliance with copyright law, and remaining “disdainful of copyright and in

any event discount[ing] the likelihood of being sued or prosecuted for copyright infringement.” *In re Aimster*, 334 F.3d at 645. Accordingly, in 2002, the recording companies reluctantly decided to commence a more broadly based enforcement program designed to identify and pursue individual peer-to-peer users who were unlawfully distributing their copyrighted works.

To do this, the recording companies engaged a firm, MediaSentry, to gather evidence of users distributing their copyrighted works. When peer-to-peer systems had an instant message feature, MediaSentry would send at least one notice to any account found infringing to inform that distributing copyrighted material is illegal and must stop. MediaSentry would also download a sample of the works being distributed from an individual’s unique Internet Protocol (“IP”) address and capture certain information about the individual distributing those files, including the individual’s online username. Once those IP addresses had been captured, the recording companies commenced “Doe” actions against the individuals responsible for the IP addresses. They then used the discovery process to obtain the identity of the individual users from the relevant Internet service providers (“ISPs”). *See Atl. Recording Corp. v. Heslep*, 2007 WL 1435395, at *1-*3 (N.D. Tex. May 16, 2007) (detailing industry’s enforcement program). After obtaining that information, the recording companies routinely offered, and individuals typically accepted, the option of settling these infringement claims for relatively low amounts. As a

result, the present action is one of only two such actions that proceeded to jury trial.

B. The District Court Proceedings

In 2005, Plaintiffs acquired evidence from MediaSentry that a KaZaA account with the username “tereastarr@kazaa.com” was making available to other KaZaA users for download more than 1,700 copyrighted sound recordings, including the 24 works at issue. MediaSentry immediately sent an instant message to the “tereastarr” account informing that the accountholder had been caught distributing copyrighted works and that such conduct was illegal and must stop. After tracing the account to an IP address provided by Charter Communications, Plaintiffs learned from Charter that the address was assigned to Thomas-Rasset. Plaintiffs sent Thomas-Rasset a letter informing her that she had illegally infringed their copyrights and inviting her to contact them about settling the matter. Thomas-Rasset contacted Plaintiffs but repeatedly denied that the account was hers, and the matter ultimately proceeded to litigation and trial on 24 of Plaintiffs’ copyrighted works.

1. The First Trial

Plaintiffs produced substantial evidence confirming that the “tereastarr@kazaa.com” account belonged to Thomas-Rasset. Plaintiffs’ witnesses explained in detail how they traced the illegal file-sharing back to the account and

IP address assigned to Thomas-Rasset. 10/2/07 Tr. 157-96, 204-10. Plaintiffs' evidence showed that the files in the accountholder's shared folder were not authorized copies, but were instead likely illegally downloaded from other KaZaA users. 10/2/07 Tr. 257-66. Plaintiffs further demonstrated that the "tereastarr" account made all 1,700 files, including the 24 works at issue, available to millions of other KaZaA users to download illegally, which MediaSentry confirmed by downloading a portion of each file. *Id.* And Plaintiffs proved that, although Thomas-Rasset volunteered her hard drive for forensic analysis to prove that she had never used KaZaA, the analysis revealed that it was *not* the hard drive Thomas-Rasset was using when MediaSentry detected the infringement, but was instead a replacement Thomas-Rasset obtained *after* MediaSentry sent the instant message informing the "tereastarr" accountholder that infringement had been detected.

Thomas-Rasset ultimately conceded the vast majority of the most damaging evidence against her. She did not deny that the IP address traced to the "tereastarr@kazaa.com" account was hers, or that "tereastarr" is a username she created and regularly uses for all sorts of accounts. 10/3/07 Tr. 411-16. She also conceded that the hard drive she supplied to Plaintiffs was not the hard drive she had at the time of the alleged infringement, and blamed her earlier representations to the contrary on faulty memory. And she admitted familiarity with an eclectic

collection of dozens of artists and works found in the “tereastarr” account’s shared folder. 10/3/07 Tr. 429-37. In addition, Thomas-Rasset admitted that she studied Napster in detail in college and wrote a case study concluding that Napster was legal, but also knew Napster was subsequently shut down for illegal copyright infringement. 10/3/07 Tr. 441. Nonetheless, she not only denied that the “tereastarr@kazaa.com” account was hers, but claimed she had never even heard of KaZaA or any file-sharing program other than Napster before this case. 10/3/07 Tr. 445-46.

In addition to their mountain of evidence establishing Thomas-Rasset’s liability for willful infringement, Plaintiffs also adduced substantial evidence of the significant damage that illegal file-sharing has caused to recording companies. Plaintiffs’ witnesses explained that the injury is not simply a matter of the illegal copies that any individual file-sharer makes, but is a product of the viral distribution of those illegal copies that peer-to-peer networks make possible, which, in turn, diminishes the value of Plaintiffs’ copyrights. They explained how the massive scale of this unauthorized distribution has cost recording companies billions in profits, caused substantial job loss within the industry, and dramatically decreased the number of artists that they represent. 10/2/07 Tr. 96-97, 129-31.

At the close of evidence, the District Court instructed the jury that Thomas-Rasset could be found liable for infringement if she reproduced or distributed

Plaintiffs' works, but did not instruct the jury to specify the basis for any infringement finding. The court also instructed that "making copyrighted sound recordings available for electronic distribution on a peer-to-peer network, without license from the copyright owners, violates the copyright owners' exclusive right of distribution, regardless of whether actual distribution has been shown." App.125. The jury found Thomas-Rasset liable for willful infringement and awarded statutory damages of \$9,250 per work, at the low end of the range authorized for *non*-willful infringement, for a total of \$222,000.

Both parties filed post-trial motions, Thomas-Rasset claiming the damages award was unconstitutionally excessive, and Plaintiffs seeking to enjoin Thomas-Rasset from further infringement. Several months later, the District Court *sua sponte* requested additional briefing on whether its instruction on making Plaintiffs' works available was erroneous. After supplemental briefing and a hearing, the District Court concluded that the instruction was reversible error, holding that making a work available to the public is not "distribution" under 17 U.S.C. § 106(3). App.44-87.

The court first concluded that the text of § 106(3) does not support reading "distribute" to encompass making available because it does not specifically reference making available or "offering" to distribute. App.57. Although the court acknowledged that the Register of Copyrights has interpreted § 106(3) to include

making available, and that courts have interpreted “distribute” the same way in other contexts, it rejected those positions as unpersuasive. App.57, 60. The court also rejected Plaintiffs’ reliance on the Copyright Act’s definition of the term “publication” as including “offering to distribute,” 17 U.S.C. § 101; notwithstanding Supreme Court precedent and legislative history stating otherwise, the court concluded that § 106(3) does not protect a publication right. App.67.

The court acknowledged that its reading conflicts with the Fourth Circuit’s decision in *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (1997), puts the United States in violation of two treaties requiring protection of making available, and contradicts representations by “past Presidents, Congresses, and the Register of Copyrights” that the Copyright Act complies with those obligations. App.77, 82. Nonetheless, the court deemed the interpretation adopted by the Fourth Circuit and two branches of government “simply not reasonable.” App.83. Accordingly, the court vacated the jury’s verdicts and ordered a new trial. Before doing so, the court opined at length on its view that the jury’s within-range damages award was too high and “implore[d] Congress to amend the Copyright Act to address liability and damages in peer-to-peer network cases.” App.84. Plaintiffs sought certification for an interlocutory appeal, but the court denied the motion.

2. The Second Trial

At the second trial, Plaintiffs produced the same substantial evidence of Thomas-Rasset's liability and the very real damage she caused. Thomas-Rasset continued to deny that the "tereastarr@kazaa.com" account was hers, but this time also testified that her young children and former boyfriend might be the culprits. 6/17/09 Tr. 564-71. She was then forced to admit that her new attempts to shift blame were directly contrary to positions she took in discovery and during the first trial, when she insisted that no one else in her household could have engaged in illegal file-sharing. 6/17/09 Tr. 574-85. The second jury also found Thomas-Rasset liable for willful infringement and awarded Plaintiffs \$80,000 per work, toward the middle of the range authorized for willful infringement, for a total of \$1,920,000.

Thomas-Rasset filed a post-trial motion again arguing that any statutory damages award would be unconstitutional in her case, but alternatively arguing that the jury's within-range award should be reduced under either a remittitur analysis or the Due Process Clause. The District Court declined to rule on the constitutional issue and instead remitted damages to \$2,250 per work, for a total of \$54,000. App.190-227. The court emphasized that Thomas-Rasset "was an individual consumer," "not a business acting for profit." App.204. To reach the \$2,250 figure, which is three times the statutory *minimum* for infringement, the

court relied on other statutes authorizing treble statutory or actual damages for willful conduct. App.212-13. Although the court acknowledged that “the Copyright Act contains no treble damages provision,” it unilaterally imposed such a limit not just upon this case, but upon all cases involving “noncommercial individuals who illegally download and upload music.” App.214. Plaintiffs declined the remittitur and exercised their right to a new trial, explaining that they could not accept a remittitur ruling that purported to set a new and dramatically lower statutory maximum for every case involving an individual file-sharer.

3. The Third Trial

The only question before the third jury was what amount of statutory damages to award. Accordingly, Plaintiffs’ evidence focused on the harms Thomas-Rasset’s conduct caused. Plaintiffs’ witnesses testified that file-sharing not only deprived them of sales but also devalued both the copyrights at issue and copyrighted sound recordings as a whole, leading to massive lay-offs within the industry. 11/2/10 Tr. 62-71. They testified that the cost of a license to copy and distribute any and all works in a company’s catalog would be tantamount to the value of the company itself. 11/2/10 Tr. 76-78. They also explained that file-sharing has contributed to a significant decline in the number of artists Plaintiffs represent and the number of albums they have released, effecting both a corporate and a societal cost. *Id.* Finally, they detailed how Thomas-Rasset repeatedly lied

about her file-sharing and attempted to cover up her illegal infringement, and explained the need for strong deterrence against similar actions by Thomas-Rasset and other would-be infringers. 11/2/10 Tr. 125-50; 11/3/10 Tr. 263-69. The jury awarded Plaintiffs \$62,500 per work, in the bottom half of the range authorized for willful infringement, for a total of \$1,500,000.

Thomas-Rasset filed a post-trial motion, again arguing that any statutory damages award would be unconstitutional, but alternatively that the award should be reduced under the Due Process Clause. This time, she did not ask the court to consider remittitur. Plaintiffs also renewed their request that the court enjoin Thomas-Rasset from distributing their works by making them available to the public.

The District Court granted Thomas-Rasset's motion and again reduced the award to \$2,250 per work, this time deeming that the maximum constitutionally permissible award. App.1-43. The court reached that result despite agreeing with Plaintiffs — and rejecting Thomas-Rasset's submissions — on the relevant facts and law.

The court first concluded that the constitutionality of a statutory damages award must be determined under the highly deferential standard set forth in *St. Louis, I. M. & S. Railway Co. v. Williams*, 251 U.S. 63 (1919), not the guideposts used to review punitive damages awards, *see BMW of North America, Inc. v. Gore*,

517 U.S. 559 (1996). App.8. Applying that deferential standard, the court acknowledged that “Congress intended the statutory damages to be ‘substantially’ higher than actual damages,” and that such damages “serve[] both to compensate the copyright holder and to deter infringers.” App.16-17. The court also acknowledged that “the due process clause [does not] require that the damages award be strictly proportioned to Plaintiffs’ losses.” App.18. And the court recognized Plaintiffs’ substantial evidence of the serious damage Thomas-Rasset’s infringement caused and the particularly culpable nature of her behavior. App.21-23. The court also found each *Williams* factor — “the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established [law],” *Williams*, 251 U.S. at 67 — readily satisfied. App.23-25.

Despite all that, the court held the jury’s within-range award unconstitutional. Emphasizing, as it had before, that “Thomas-Rasset was not a business acting for profit,” and characterizing her role “in the web of online piracy” as “miniscule,” the court concluded that “[s]uch an award against an individual consumer, of limited means, acting with no attempt to profit,” violates the *Williams* standard. App.26-29. Relying on largely the same reasoning set forth in its remittitur opinion, the court then deemed \$2,250 per work the constitutional maximum in a case “involving a first-time willful, consumer infringer who committed illegal song file-sharing for her

own personal use.” App.34. The court entered an injunction against Thomas-Rasset but again refused to enjoin her from making Plaintiffs’ copyrighted works available to others. App.41-42.

SUMMARY OF ARGUMENT

I. The District Court erred in rejecting the first jury’s verdict on the mistaken ground that the Copyright Act does not protect the copyright holder’s long-established exclusive right to control the terms on which a work is “made available” to the public. Correcting that error not only would lead to reversing the District Court’s erroneous refusal to enjoin Thomas-Rasset from making Plaintiffs’ copyrighted works available, but also would reinstate the first jury’s \$9,250-per-work verdict. Reinstating that verdict, in turn, would simplify the constitutional issues, as the first jury’s award was the most modest of the three.

The District Court’s conclusion that making a work available to the public is outside the scope of § 106(3) cannot be squared with the basic purpose and protections of the Copyright Act, as embodied in the text, structure, and history of the statute. Long before the advent of peer-to-peer networks, copyright holders enjoyed the right to determine when, where, and how to make their works available to the public. Indeed, the decision to make a work public is at the very heart of the exclusive rights copyright law is designed to protect, as the terms of the public’s access to a copyrighted work often dictate the value of the copyright. Numerous

provisions of the Copyright Act, including § 106(3) itself, therefore reflect Congress' understanding that making a work available is part of the distribution right protected by § 106(3). That interpretation is consistent with the plain meaning of "distribute" as interpreted by courts and the Register of Copyrights, as well as with the United States' international treaties obligations. It is also consistent with Congress' repeated recognition that the Copyright Act prohibits the viral infringement that peer-to-peer networks make possible, a prohibition that would be nearly impossible to enforce under the District Court's cramped reading of § 106(3).

The District Court's conclusion that making available is outside the scope of § 106(3) unless actual transfer of ownership can be proven rests on a misreading of statutory history and judicial precedent. Contrary to the District Court's belief, the 1976 revisions to the Copyright Act did not, *sub silentio*, eliminate the core publication right that Congress had protected since the earliest days of our nation. It merely incorporated that right and the attendant making available concept into the *broader* distribution right codified in § 106(3). Nor did this Court reject that interpretation of § 106(3) in *National Car Rental System, Inc. v. Computer Associates International, Inc.*, 991 F.2d 426 (8th Cir. 1993), a decision that simply did not address the making available issue. To the extent other courts have read § 106(3) narrowly to exclude making available protection, they have failed to

consider compelling arguments — arguments that recently persuaded the leading copyright treatise to adopt Plaintiffs’ reading of the statute — that making works available constitutes distribution for purposes of § 106(3).

II. The District Court’s constitutional holding cannot be reconciled with the highly deferential standard that governs review of authorized statutory damages awards, under which an award is constitutional 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. Although the District Court correctly identified that governing standard and found every relevant consideration to support both deference and a significant award, it then inexplicably displaced Congress’ considered judgment and a jury award comfortably within the congressionally authorized range with its own determination that statutory damages should be no higher than \$2,250 per work — less than a tenth of the maximum that Congress has authorized for *non*-willful infringement. In doing so, the District Court rejected the contrary views of not one but *three* juries, thereby denying Plaintiffs’ their Seventh Amendment right to have a jury, not a judge, determine what amount of statutory damages is just. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998).

The District Court’s holding is particularly inexplicable because its decision catalogues all the reasons why § 504(c) embodies Congress’ considered and

eminently reasonable judgment that copyright infringement is a serious offense that warrants substantial statutory damages. While the District Court implicitly suggested those reasons have less force in cases involving so-called “consumer infringers” and actual damages that are not readily quantifiable, Congress has “specifically acknowledged that consumer-based, noncommercial use of copyrighted materials constitute[s] actionable copyright infringement” subject to statutory damages, *Sony BMG Music Entm’t v. Tenenbaum*, --- F.3d ---, 2011 WL 4133920, at *11 (1st Cir. Sept. 16, 2011), and has concluded that statutory damages for copyright infringement do not depend on proof of or any relationship to actual damages. Indeed, the Supreme Court has recognized and validated Congress’ judgment that statutory damages may be awarded “[e]ven for uninjurious and unprofitable invasions of copyright.” *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952).

Moreover, Plaintiffs provided ample evidence of the enormously detrimental effect that file-sharing has had, as well as the exceptionally blameworthy conduct of Thomas-Rasset, with respect to both her massive willful infringement and her repeated dishonest attempts to avoid responsibility. Both Congress’ carefully crafted statutory damages scheme and the jury’s within-range award are reasonable and proportioned responses to that conduct.

The District Court’s contrary holding rendered this one of only two decisions — both in the file-sharing context and one of which has since been vacated, *Tenenbaum*, 2011 WL 4133920, at *25 — that have *ever* held a within-range statutory damages award unconstitutionally excessive. The District Court’s decision is fundamentally incompatible both with Plaintiffs’ constitutional right to have *a jury* determine what amount of statutory damages is just, and with the deference due to congressionally authorized awards. It reduces to the untenable conclusion that Congress has authorized and *three separate* juries (plus a fourth in *Tenenbaum*) have awarded damages that are “so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.” *Williams*, 251 U.S. at 67. Because that is plainly not the case, the jury’s award should be reinstated.

STANDARD OF REVIEW

The legal questions presented are reviewed *de novo*. *United States v. Rodriguez*, 581 F.3d 775, 796 (8th Cir. 2009).

ARGUMENT

I. Making Copyrighted Works Available to the Public Is a Core Component of the Distribution Right Protected by § 106(3).

The Copyright Act has long protected a copyright holder’s exclusive right to set the terms on which a copyrighted work will be made available to the public. Nothing in the 1976 revisions to the Copyright Act compels a different conclusion,

as to peer-to-peer networks or any other means of making copyrighted works available. To the contrary, settled principles of statutory construction, legislative history, and governing precedent all confirm that making a work available to the public remains part of the exclusive distribution right protected by § 106(3).

A. The Text, Structure, and Purpose of the Statute Confirm that Making a Copyrighted Work Available Constitutes Distribution.

1. Long before file-sharing and peer-to-peer networks, Congress recognized that the ability to control when, where, and how a copyrighted work will be made available to the public is a core component of the copyright holder's exclusive rights. That conclusion is only logical, as the terms on which the public has access to a work often have a substantial impact on the value of the copyright itself. A copyright law that protected copying and transferring a work, but not the intervening act of making a work public, would leave a gaping hole in Congress' efforts to protect every right "that materially affect[s] the value of [a] copyright." H. Comm. on Judiciary, 89th Cong., 1st Sess., Supplemental Report of the Register of Copyrights on the General Revisions of the U.S. Copyright Law 13-14 (Comm. Print 1965) ("1965 Report").

In keeping with that understanding, courts and commentators alike have repeatedly recognized that making a work available to the public is at the heart of the historical publication right now housed in the distribution right set forth in § 106(3). For example, "leaving copies in a place to which the public have access,

such as an hotel,” without authorization, has long been considered prohibited infringement, regardless of whether the copyright holder keeps watch to count how many hotel patrons peruse her work. MacGillivray Treatise 262. And a library cannot keep a work in its collection without authorization simply because the copyright holder cannot prove whether patrons have accessed or borrowed the work. *See Hotaling*, 118 F.3d at 203. Nor can a video store leave a video on its shelves without authorization, merely because no customer is caught renting it. *See Walt Disney Co. v. Video 47, Inc.*, 972 F. Supp. 595, 599 (S.D. Fla. 1996).

There is no reason to apply a different analysis to peer-to-peer networks or other technologically sophisticated means of making copyrighted works available. If anything, the need for such protection is greater in this context. On peer-to-peer networks, copyright holders can observe the contents of an individual’s shared folder and download shared works themselves (as MediaSentry did), but they cannot observe when another individual downloads a file from the user who shares it. Accordingly, copyright holders are largely limited to detecting when an infringer makes works available to others.² As the Supreme Court has recognized, peer-to-peer networks gained their immense popularity precisely because they

² The time-consuming process of downloading every work in a shared folder to prove distribution is not a realistic option in many instances — Thomas-Rasset had 1,700 files in her folder. Moreover, the means of detecting Internet infringement are often prohibitively expensive for smaller copyright holders with only a few copyrighted works.

make unauthorized distribution both easy to do and difficult to detect, thereby facilitating copyright “infringement on a gigantic scale.” *Grokster*, 545 U.S. at 940; *see also Warner Bros. Records, Inc. v. Payne*, 2006 WL 2844415, at *3 (W.D. Tex. July 17, 2006) (peer-to-peer network infringement “typically takes place behind closed doors and beyond the watchful eyes of a copyright holder” (internal quotation marks omitted)). The same is true as to other types of Internet sites that have become havens for infringement. That any would-be infringer now has at her fingertips the means to make a copyrighted work available to millions of others, at no cost to herself or those to whom she distributes the work, is all the more reason to protect with vigor the copyright holder’s core right to control the terms on which a work is made public.

2. Interpreting the distribution right to encompass making available is consistent with other provisions of the Copyright Act evincing Congress’ intent to extend such protection. For example, Congress defined criminal copyright infringement to include “making [a work] available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.” 17 U.S.C. § 506(a)(1)(c). It is not plausible that Congress would criminalize conduct that does not constitute infringement in the civil context. Indeed, the structure of the statute forecloses that

possibility. *See* § 501(a) (defining “infringement” as “violat[ion of] any of the exclusive rights of the copyright owner as provided by sections 106 through 122”).

Reading § 106(3) to encompass making available is also consistent with the plain meaning courts have given “distribute” in other contexts. For example, the Seventh and Tenth Circuits have concluded that placing child pornography in a shared folder on a peer-to-peer network constitutes “distribution” for purposes of criminal and sentencing provisions. *See United States v. Shaffer*, 472 F.3d 1219, 1223 (10th Cir. 2007) (interpreting 18 U.S.C. § 2252A(a)(2) and concluding that “plain meaning” of “distribute” encompasses such conduct); *United States v. Carani*, 492 F.3d 867, 876 (7th Cir. 2007) (interpreting U.S. Sentencing Guidelines § 2G.2.2(a)(1) and concluding that “[t]he notion that [the defendant] could knowingly make his child pornography available for others to access and download without this qualifying as ‘distribution’ does not square with the plain meaning of the word”). There is no reason to ascribe a different meaning to “distribute” in § 106(3). If anything, there would be more reason to interpret the term narrowly in the criminal context, where the rule of lenity requires ambiguity to be construed in the defendant’s favor. *See Burgess v. United States*, 553 U.S. 124, 135 (2008). Courts have not done so because making a file available to others unambiguously constitutes a form of distribution.

3. Interpreting § 106(3) to protect a copyright holder's exclusive right to make a work available to the public is also consistent with the representations of high-ranking officials and the long-standing canon that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

The United States is a signatory to two treaties — the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) — that "undisputed[ly] ... recognize a making-available right that is not dependent on proof that copies were actually transferred to particular individuals." App.80; *see* WCT Art. 6(1) & 8 (1996); WPPT Art. 12(1) & 14 (1996). "In implementing WCT and WPPT, Congress determined that it was not necessary to add any additional rights to Section 106 of the Copyright Act in order to implement the 'making available' right," as the Register of Copyrights advised that "making [a work] available for other users of [a] peer to peer network to download ... constitutes an infringement of the exclusive distribution right." Letter from Marybeth Peters, Register of Copyrights, to Rep. Howard L. Berman, 1 (Sept. 25, 2002), *reprinted in Piracy of Intellectual Property on Peer-to-Peer Networks: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Property of the House Comm. on the*

Judiciary, 107th Cong. 114-15 (2002). Indeed, “past Presidents, Congresses, and the Register of Copyrights have all indicated their belief that the Copyright Act implements WIPO’s make-available right.” App.82. Thus, even if § 106(3) were ambiguous (which it is not), settled principles of statutory interpretation would support adopting the reasonable construction that § 106(3) complies with our international treaty obligations.

B. The 1976 Revisions to the Copyright Act Did Not Eliminate the Core Publication Right or Its Making Available Protection.

Although Congress has not defined “distribute” for purposes of § 106(3), it has defined another highly relevant term: “publication.” The Copyright Act defines “publication” as “the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending.” 17 U.S.C. § 101. It further provides that “[t]he *offering* to distribute copies or phonographs to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication.” *Id.* (emphasis added). According to the District Court, that the definition of “publication” clearly *does* encompass making available confirms that § 106(3) *does not*, because § 106(3) protects the right “to distribute,” not “to publish.” App.66. The history of the Copyright Act and the 1976 revisions, however, compels precisely the opposite conclusion, as the right “to distribute” was clearly intended to *incorporate and broaden* the right “to publish.”

1. “The 1976 [Copyright] Act was the product of a revision effort lasting more than 20 years.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 462 n.9 (1984). At the time, existing law (the 1909 Act) protected an exclusive right of publication, as it had since the very first copyright statute. *See* 1909 Act, § 1(a) (recognizing “exclusive right ... [t]o print, reprint, *publish*, copy, and vend the copyrighted work” (emphasis added)); 1790 Act, § 1 (protecting “sole right and liberty of printing, reprinting, publishing and vending” a copyrighted work).

That right, in turn, encompassed not just control over actual sales or verified transfers of a work, but also the decision whether and how to make a work available to the public. *See* Eaton S. Drone, *A Treatise on the Law of Property in Intellectual Productions* 291 (1879) (“[It is not] essential that a single copy shall be disposed of before the work can be said to be published. The requirements of the law are met when the book is publicly offered for sale.”); MacGillivray *Treatise* 261-62 (“[g]ratuitous distribution to members of the public, or leaving copies in a place to which the public have access ... is publication”); *see generally* Menell 26-35. The broad scope of the publication right is reflected in contemporaneous judicial decisions. *See Jewelers’ Mercantile Agency, Ltd., v. Jewelers’ Weekly Publ’g Co.*, 155 N.Y. 241, 251 (Ct. App. 1898) (“It is not necessary that [a] book be actually sold; it is sufficient if it be offered to the public.”); *D’Ole*, 94 F. at 842

(“In copyright law, [publication] is the act of making public a book; that is, offering or communicating it to the public by sale or distribution of copies.” (internal quotation marks omitted)).

The authoritative and “comprehensive report” prepared by the Register of Copyright during the early stages of the 1976 revisions, *Sony*, 464 U.S. at 462 n.9, reveals early and lasting consensus that “the statute should continue to accord copyright owners the exclusive rights to exploit their works by ... making and publishing copies ... of the work.” 1961 Report 24. At the same time, concern arose that some courts had construed the term “publish” narrowly to avoid the harsh result of deeming a work part of the public domain and so some of that common-law baggage could cause “publish” to be construed “in such a narrow sense that there might be forms of distribution not covered.” Transcript of Meeting on Preliminary Draft for Revised U.S. Copyright Law: Discussions of §§ 5-8, 109-10, *contained in* Preliminary Draft for Revised Copyright Law: Discussions and Comments on the Draft (H. Comm. on the Judiciary Print 1964); *see also id.* at 128 (noting concern that “use of the words ‘publication’ or ‘published,’ in hundreds of common law and statutory cases, dissertations, and otherwise, has made the terms archaic today in light of our recent technological progress”). Accordingly, the committee substituted the broader term “distribute” to ensure that the historical publication right would continue to be given the broadest construction possible, in

keeping with the overarching goal of protecting all “uses of [a] work that materially affect the value of [a] copyright.” 1965 Report 13-14.

That change remained intact throughout the reform process, and the 1976 Act ultimately codified the copyright holder’s “exclusive rights to do and to authorize any of the following: ... (3) 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.” 17 U.S.C. § 106(3). The accompanying House report confirmed Congress’ understanding that § 106 continued to protect the historical publication right, reiterating that “Clause (3) of section 106 establishes the exclusive right of publication: The 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.’” H.R. Rep. No. 94-1476, 62; *see also id.* at 61 (“The five fundamental rights that the bill gives to copyright owners — the exclusive rights of reproduction, adaptation, publication, performance, and display — are stated generally in section 106.”).

2. Consistent with that understanding, the Supreme Court has interpreted § 106(3) as continuing to protect the publication right. In one of its first cases to address the scope of § 106, the Court confirmed that it remained the case, as it had for the past two centuries, that the Copyright Act protects a copyright holder’s

exclusive “rights to publish, copy, and distribute the author’s work.” *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985).

The District Court mistakenly read *Harper* for the opposite proposition — that § 106(3) does *not* protect the right “to publish,” and therefore does not protect making available — insisting that “the Supreme Court would not have named the right to ‘publish’ as a right separate from the right to ‘distribute’” if the two “were synonymous.” App.65. That conclusion is a complete non-sequitur. The point is not that distribution and publication are perfectly coterminous. Congress employed distribute precisely because it was broader than at least some judicial interpretations of publication. But whatever the ways in which the distribution right may be broader than a publication right, there is no way to read either § 106(3) or *Harper* as eliminating the publication right or cutting back on the exclusive right to authorize when, where, and how a copyrighted work will be made available to the public. The Court in *Harper* indisputably read § 106(3) to protect *both rights*. Indeed, that conclusion was central to its analysis.

Harper involved whether § 106(3) grants a right of first publication. *See* 471 U.S. at 552. In concluding that it does, the Court made clear that the right of *first* publication was part of the *right of publication*, relying on the same legislative history relevant here for the proposition that “[c]ause (3) of section 106[] establishes the exclusive right of publications.” *Id.* (citing H.R. Rep. No. 94-

1476, at 62). Thus, *Harper* in no way supports the conclusion that “not all publications are distributions,” App.67, and in fact confirms precisely the opposite — not all distributions are publications, but the distribution right necessarily encompasses the preexisting publication right, which both before and after the 1976 amendments encompassed making works available to the public.

C. Both the Supreme Court and Courts of Appeals Have Correctly Concluded that Making Works Available Constitutes Distribution.

1. *New York Times Co. v. Tasini*, 533 U.S. 483 (2001), strongly supports the common-sense conclusion that making works available to the public constitutes distribution under § 106(3). *Tasini* involved a challenge to a license the New York Times granted to LEXIS/NEXIS to make articles available for purchase through its electronic database. *Id.* at 489. Although the authors who held the copyrights to the articles in question did not allege or attempt to prove that any database users actually viewed or purchased the articles, the Court repeatedly characterized the database, and the Times’ authorization to include the copyrighted articles in that database, as infringing upon the authors’ distribution right under § 106(3). *See id.* at 498, 504-06. In doing so, the Court implicitly recognized that making those copyrighted works available to database users constituted distribution, regardless of whether the copyright holders could prove that any users actually accessed the unauthorized copies.

The District Court mistakenly read the Court’s opinion as addressing only whether placing unauthorized copies in the database violated the *reproduction* right, not whether making the database available violated the *distribution* right. App.72. But the Court specifically framed the question before it as including whether “LEXIS/NEXIS, by selling copies of the Articles through the NEXIS database, ‘*distribute[s]* copies’ of the Articles ‘to the public by sale,’ § 106(3),” and whether the Times, “through contracts licensing the production of copies in the Databases, ‘*authorize[s]* reproduction *and distribution* of the Articles, § 106.” 533 U.S. at 498 (emphasis added). The Court held that LEXIS/NEXIS “infringed the Authors’ copyrights by reproducing *and distributing* the Articles,” and that the Times infringed their rights “by authorizing” LEXIS/NEXIS to do so. *Id.* at 506 (emphasis added). Accordingly, *Tasini* strongly supports the conclusion that making works available to the public constitutes distribution, regardless of whether any consummated transaction is proven.

The Ninth Circuit reached the same conclusion in the only court of appeals decision to address whether making works available on a peer-to-peer network constitutes distribution. *See Napster*, 239 F.3d at 1014 (“Napster users who upload file names to the search index for others to copy violate [copyright holders’] distribution rights”); *see also Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1162 (9th Cir. 2007) (confirming *Napster*’s holding). It could hardly be otherwise.

Placing works on a peer-to-peer network for all the world to take is not remotely compatible with the copyright holder's exclusive right to authorize distribution of its works.

The Fourth Circuit also reached that conclusion in another context, holding that “[w]hen a public library adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the borrowing or browsing public, it has completed all the steps necessary for distribution.” *Hotaling*, 118 F.3d at 203. As the court explained, if distribution required proof of actual dissemination, “a copyright holder would be prejudiced by a library that does not keep records of public use, and the library would unjustly profit by its own omission.” *Id.* For largely the same reasons, district courts have concluded that making available constitutes distribution under § 106(3), both as to file-sharing and in analogous contexts. *See Motown Record Co. v. DePietro*, 2007 WL 576284, at *3 (E.D. Pa. Feb. 16, 2007) (file-sharing); *Payne*, 2006 WL 2844415, at *3 (same); *Universal City Studios Prods. LLP v. Bigwood*, 441 F. Supp. 2d 185, 190-91 (D. Me. 2006) (same); *Playboy Enters., Inc. v. Webworld, Inc.*, 991 F. Supp. 543, 551 (N.D. Tex. 1997) (Internet access to files); *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993) (same).

2. This Court's decision in *National Car* neither compels nor supports the District Court's narrow reading of § 106(3), as *National Car* simply did not

address — let alone reject — a making available argument. *National Car* involved a breach-of-contract claim against a party who contracted for a license to use computer software solely for its own use, but then used that software for the benefit of third parties. 991 F.2d at 429. The software was *only* utilized by the defendant; there was no allegation that additional copies were made for third parties. *Id.* In determining whether the Copyright Act preempted that claim by, the Court analyzed whether unauthorized use of copyrighted software to benefit a third party violates § 106(3)'s distribution right. *Id.* at 430. Explaining that the copyright holder “did not allege use *by* [third parties], but instead alleged use for their benefit,” the Court concluded that nothing had been distributed, and therefore held the claim not preempted. *Id.*

As is clear from that context, *National Car* was not addressing whether making a copy available to third parties for their potential use constitutes distribution because those were not the facts of the case. The Court was instead addressing the wholly distinct question whether making something *other than a copy* — there, “the ‘functionality’ of the [copyrighted] program,” *id.* at 434 — available to a third party constitutes distribution. Put differently, *National Car* addressed what must be distributed, not what constitutes distribution. That is readily evident from the Court’s emphasis on the fact that “[t]he copyright holder’s distribution right is the right to distribute *copies*.” *Id.* at 430; *see also id.* (“Section

106(3) grants the copyright owner the ‘exclusive right publicly to sell, give away, rent or lend any *material embodiment* of his work.’” (internal quotation marks omitted). Thus, *National Car* simply does not address one way or another the making available issue, which is only logical since there was no allegation that a copyrighted work had been made available to third parties.

3. Although some district courts — including the court below — have relied on *National Car* to conclude that making available is not distribution for purposes of § 106(3), see *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976 (D. Ariz. 2008); *Musical Prods., Inc. v. Roma’s Record Corp.*, 2007 WL 750319 (E.D.N.Y. Mar. 7, 2007), those decisions misread this Court’s holding and are flawed in multiple respects. For example, the court below is the only court that considered the impact of the WIPO treaties or the *Charming Betsy* canon. No other court has adopted an interpretation of § 106(3) in *acknowledged* conflict with the representations of high-ranking government officials and the United States’ treaty obligations. Nor did those courts consider all of the compelling statutory and legislative history revealing Congress’ intent that the right to distribute encompass the right to publish.

Moreover, numerous courts (including the court below) relied heavily on a leading treatise for the proposition that “making a work available is insufficient to establish distribution.” App.57 (citing 2-8 Nimmer on Copyright, § 8.11[A])

(2008)). Just this year, however, a new edition of the treatise rejected that position, and concluded that “the intent of Congress was to incorporate a ‘make available’ right into the copyright owner’s arsenal.” 2-8 Nimmer, § 8.11[D](4)(c) (2011). It did so for largely the same reasons detailed in Part I.B, *supra*, and also noted that courts had misread a reference to *National Car* in the earlier version of the treatise when reaching the opposite conclusion. *Id.* [C](3)(a) n.190. As the treatise’s new position reflects, once § 106(3) is understood in proper historical context, it is clear that Congress intended the Copyright Act that emerged from the 1976 revisions to protect the same core rights that Congress had always protected, which include the exclusive right to authorize the distribution of a work and determine when, where, and how it will be made available to the public.

* * *

The District Court erred by holding that its making available instruction was in error and *sua sponte* granting Thomas-Rasset a new trial. Accordingly, this Court should reinstate the first jury’s liability verdict and its \$9,250-per-work damages award. *See Frumkin v. Mayo Clinic*, 965 F.2d 620, 626 (8th Cir. 1992) (reinstating portions of first verdict as to which district court should not have granted new trial); *American Cas. Co. of Reading, Pa. v. B. Cianciolo, Inc.*, 987 F.2d 1302, 1305 (7th Cir. 1993) (“If judgment should have been entered on the first verdict, the court can restore that outcome despite the intervention of a second

trial.”); 15B Wright & Miller, Federal Practice & Procedure § 3915.5 nn. 10 & 11 (2d ed. 2011).

II. The Jury’s Within-Range Statutory Damages Award Is Constitutional.

The District Court correctly recognized that the standard for reviewing the excessiveness of a statutory damages award *within* the range set by Congress is highly deferential. The District Court also correctly concluded that all of the factors identified by the Supreme Court as supporting the necessity of large statutory damages and deference to a within-range award were present here. Despite all that, the District Court inexplicably substituted its own judgment for that of Congress and three juries and imposed what amounts to a bright-line rule that a “willful, consumer infringer who committed illegal song file-sharing for her own personal use,” App.34, is subject to statutory damages of no more than treble the statutory minimum — *i.e.*, \$2,250 per work. But the choice between a broad statutory range and treble damages (or any other regime) is one for Congress, not the judiciary. The District Court’s ruling is wholly inconsistent both with the proper deference owed Congress under *Williams* and with the exclusive province of the jury under *Feltner* to determine statutory damages. This Court should reinstate and affirm the constitutionality of the first jury’s \$9,250-per-work award.³

³ Although the District Court did not review the first jury’s award under a remittitur or constitutional analysis, that should not prevent this Court from doing so. The District Court has made clear that it does not consider any award greater than \$2,250 per work

A. Congress' Decision to Authorize Substantial Statutory Damages for Copyright Infringement Is Eminently Reasonable and Entitled to Deference.

The District Court correctly concluded that a statutory damages award is reviewed under the deferential *Williams* standard, not the more searching guideposts for review of punitive damages awards set forth in *Gore*. That should have been a distinction with real consequences for the court's analysis. As *Williams* makes clear, the fundamental question in a statutory damages case is whether *the legislature* has acted within its "wide latitude of discretion" in authorizing statutory damages. *Williams*, 251 U.S. at 66. Unlike a determination that a jury has returned an excessive compensatory or punitive damages award in a common-law case, a determination that a *within-range* statutory damages award is excessive is a holding that Congress has authorized an unconstitutional award. That is no small matter. Indeed, as far as we are aware, only one other court has found a within-range statutory damages award excessive, and that decision was vacated on appeal. *See Tenenbaum*, 2011 WL 4133920, at *25. Precisely because a claim that a statutorily authorized award is unconstitutionally excessive is an attack on Congress, the *Williams* standard is uniquely deferential. So long as the legislature's determination of what measure of damages is appropriate is not reasonable or constitutionally permissible in this case. *See* App.214-15; App.34. Remanding for the court to formalize its objection to the first jury's \$9,250-per-work award would be a meaningless gesture at this point, and would only further delay resolution of a case that has been through three trials in five years.

“wholly disproportioned to the offense or obviously unreasonable,” it withstands constitutional scrutiny. *Williams*, 251 U.S. at 67. Faithful application of that standard should have left the jury’s within-range award and Congress’ judgment undisturbed.

Applying the deferential *Williams* standard, courts have repeatedly rejected due process challenges to awards under numerous state and federal statutory damages schemes.⁴ Courts have also rejected due process challenges to awards under the Copyright Act. *See Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 588 (6th Cir. 2007) (\$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.*, 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*, 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

⁴ *See Verizon Cal. Inc. v. OnlineNIC, Inc.*, 2009 WL 2706393, at *6-*7 (N.D. Cal. Aug. 25, 2009) (rejecting challenge to \$50,000-per-violation award under Anticybersquatting Consumer Protection Act); *Sadowski v. Med1 Online, LLC*, 2008 WL 489360, at *5 (N.D. Ill. Feb. 20, 2008) (rejecting challenge to \$500-per-violation damages authorized by Telephone Consumer Protection Act); *Arrez v. Kelly Servs., Inc.*, 522 F. Supp. 2d 997, 1008 (N.D. Ill. 2007) (rejecting challenge to \$500 damages for failure to provide employees with itemized pay statements); *Arcilla v. Adidas Promotional Retail Operations, Inc.*, 488 F. Supp. 2d 965, 972 (C.D. Cal. 2007) (rejecting challenge to \$1,000 award under Fair and Accurate Credit Transactions Act); *Accounting Outsourcing, LLC v. Verizon Wireless Pers. Commc’ns, L.P.*, 329 F. Supp. 2d 789, 809-10 (M.D. La. 2004) (rejecting challenge to state statute providing \$500-per-violation damages for unsolicited faxes).

unconstitutionally excessive). As those decisions reflect, damages awards authorized by the Copyright Act easily withstanding constitutional scrutiny when measured against “the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to” copyright laws. *Williams*, 251 U.S. at 67.

As the District Court acknowledged, the public has a “strong interest in rewarding and protecting copyright owners,” as “the primary object in conferring the monopoly lie[s] in the general benefits derived by the public from the labors of authors.” App.24 (quoting *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948)). Thus, Congress has recognized the appropriateness of statutory damages that do not depend on proof of actual damages since the first Congress passed the first copyright statute. See 1790 Act, § 2. Even before then, states — at the Continental Congress’ urging — enacted infringement laws with statutory damages provisions with broad damages ranges comparable to § 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).

The Copyright Act’s statutory damages provisions consistently have been designed to ensure that “the cost of infringement substantially exceeds the costs of compliance, so that persons who use or distribute intellectual property have a

strong incentive to abide by the copyright laws.” H.R. Rep. No. 106-216, 6 (1999). Although Congress has periodically increased the amount of 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 v. Dispatch Printing Co.*, 249 U.S. 100, 107 (1919).⁵ That wide discretion reflects the reality that many forms of infringement are easy to accomplish but 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 102. That is all the more true since the harms of 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 by copyright and trademark crimes.” H.R. Rep. No. 106-216, at 3.

As the District Court also recognized, the concerns animating Congress’ decision to authorize significant statutory damages awards are equally — if not more — relevant in the file-sharing context. File-sharing is a particularly

⁵ See 1856 Act (authorizing “just” damages of “not less than one hundred dollars for the first, and fifty dollars for every subsequent performance” of a copyrighted work); 1909 Act, § 25(b) (authorizing “just” damages of not less than \$250 and not more than \$5,000); 1976 Act, § 504(c) (authorizing “just” per-work damages of not less than \$250 and not more than \$10,000, or not more than \$50,000 for willful infringement); 1988 Act (authorizing “just” per-work damages of not less than \$500 and not more than \$20,000, or \$100,000 for willful infringement); 1999 Act (authorizing “just” per-work damages of not less than \$750 and not more than \$30,000, or \$150,000 for willful infringement).

dangerous form of infringement because it essentially places the infringed work into the public domain. The file-sharer not only downloads a work for personal use, but also makes that work available for millions of other peer-to-peer network users to download at their leisure. 10/2/07 Tr. 250-53. Thus, for each work infringed, the copyright owner is deprived not only of the profit it would have made had the infringer purchased the work, but also of profits it would have made from the unknowable number of other individuals who need not pay for the work once the infringer makes it available for free.

Because peer-to-peer networks make it “easy, costless, and quick to infringe online,” App.25, they facilitate copyright “infringement on a gigantic scale.” *Grokster*, 545 U.S. at 940. That, in turn, produces harms far greater than the loss of profits from particular sales, including diminution in the value of each copyright infringed, an ever-increasing diminution in the value of all copyrights, and a resulting loss in Plaintiffs’ ability to find new artists and music to record, *i.e.*, to pursue their business. Accordingly, the District Court correctly recognized that file-sharing both “causes real damages to the copyright holders” and “injures the public by leading to a decrease in the incentive to create artistic works.” App.25-26. Moreover, “[t]he very nature of [a] peer-to-peer network ... ma[kes] it impossible ... to specifically quantify the damage done by” any given individual. App.21. As a result, “copyright holders face formidable challenges in identifying

and stopping infringers” on peer-to-peer networks, App.25, which create a particularly acute “need for securing uniform adherence to established” law rendering this pervasive form of infringement illegal. *Williams*, 251 U.S. at 67.

B. The District Court’s Constitutional Holding Is Directly Contrary to Congress’ Judgment as Embodied in § 504(c).

Notwithstanding the several pages of its opinion recognizing the deference owed Congress and detailing Congress’ eminently reasonable justifications for authorizing substantial statutory damages awards against willful infringers, App.15-26, the District Court ultimately did an about-face and substituted its own rule of statutory damages for that established by Congress. It deemed § 504(c) unconstitutional as applied to Thomas-Rasset and concluded that \$2,250 per work infringed — an amount barely above the statutory *minimum* Congress has authorize for all infringement, and not even close to the \$30,000 maximum for *non*-willful infringement — is “the maximum award consistent with due process.” App.34. The court gave only two cursory explanations for that holding: that Thomas-Rasset “was not a business acting for profit,” and that any higher award would bear an insufficient relationship to “the possible actual damage” she might have caused. App.26-27. But Congress considered *and rejected* both of those policy arguments as a basis for reducing statutory damages awards, and acted well within its “wide latitude of discretion” in doing so. *Williams*, 251 U.S. at 66.

1. Congress Has Rejected the Notion that “Non-Commercial” Infringers Are Categorically Less Culpable than Other Infringers.

Copyright statutes have always prohibited infringement by end-users *and* commercial enterprises and imposed civil penalties for both. The current statute unambiguously states that “an infringer of copyright is liable for ... statutory damages.” 17 U.S.C. § 504(a)(2). It gives no indication that its damages ranges should be judicially cabined for noncommercial infringement, peer-to-peer network infringement, infringement by individuals “of limited means,” App.29, 34, or any other type of infringement (though the jury of course may consider such factors when determining what award is just). Nor is Congress silent about factors that should alter the base-line statutory damages range. The statute provides only two criteria that warrant deviation: The maximum may be raised to \$150,000 per work for willful infringement, and the minimum may be lowered to \$200 for innocent infringement. § 504(c)(1). Thus, Congress focused on willfulness, not the degree of commercial incentive, as the key to the seriousness of the conduct. A willful non-commercial infringer faces the prospect of more significant statutory damages than a commercial enterprise engaged in non-willful infringement. And here the infringement was willful in the extreme.

The legislative history of the last amendment to § 504(c) removes any doubt that Congress intended the full force of the statute to be available against infringers

such as Thomas-Rasset. In 1999, Congress amended § 504(c) to increase the per-work minimum damages from \$500 to \$750, maximum damages from \$20,000 to \$30,000, and maximum damages for willful infringement from \$100,000 to \$150,000. *See* 1999 Act. A committee report accompanying an earlier version of that act singled out the proliferation of Internet infringement as the impetus for the increase:

By the turn of the century the Internet is projected to have more than 200 million users, and the development of new technology will create additional incentive for copyright thieves to steal protected works. ... As long as the relevant technology evolves in this way, more piracy will ensue.

H.R. Rep. No. 106-216, 3.

The report went on to highlight that higher penalties were needed to deter the kind of ordinary individuals who think their infringing actions are so common as to be acceptable or undetectable:

Many computer users are either ignorant that copyright laws apply to Internet activity, or they simply believe that they will not be caught or prosecuted for their conduct. Also, many infringers do not consider the current copyright infringement penalties a real threat and continue infringing, even after a copyright owner puts them on notice that their actions constitute infringement and that they should stop the activity or face legal action.

Id. This language confirms Congress' concern that the advent of ever-more sophisticated Internet technology threatened the copyright system and demanded

greater penalties. Certainly, it is virtually impossible to read the 1999 amendments as suggesting the first jury's award is too high: the amendments increased penalties substantially and the first jury's \$9,250-per-work award is less than a tenth of the *pre*-amendment maximum of \$100,000 for willful infringement.

The statutory history of the Act also strongly indicates that Congress fully intended to punish, deter, and compensate for copyright infringement that does not result in financial gain to the infringer. In one of its most recent amendments to the Act, Congress expressly rejected a distinction between commercial and noncommercial infringement, and did so in the particular context of a college student engaged in file-sharing. *United States v. LaMacchia*, 871 F. Supp. 535, 536 (D. Mass. 1994), involved a college student charged with wire fraud for creating an electronic bulletin board from which other users could download popular software applications at no cost. Because the criminal provisions of the Act at the time required infringement to be “willful[] and for purpose of commercial advantage or private financial gain,” the court concluded that the Act barred LaMacchia's prosecution. *Id.* at 540.

Congress responded to *LaMacchia* in short order. In 1997, it passed the No Electronic Theft (NET) Act, which revised the Act by defining “financial gain” to include “receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works.” Pub. L. No. 105-147, § 2(a), 111 Stat. 2678.

An accompanying committee report explained that “[t]he practical significance of these changes is that they criminalize LaMacchia-like behavior; that is, ‘computerized’ misappropriation in which the infringer does not realize a direct financial benefit but whose actions nonetheless substantially damage the market for copyrighted works.” H.R. Rep. No. 105-339, 8 (1997). Given Congress’ determination that noncommercial computerized infringement should be subject to the same *criminal* penalties as infringement driven by profit, there can be no justification for imposing the District Court’s policy preference for lesser penalties for so-called “non-commercial” infringers upon the Act’s *civil* damages provision.

There are two other problems with the District Court’s dismissal of Thomas-Rasset as a mere non-commercial infringer. First, it fails to recognize that an infringer without a traditional profit motive may actually inflict greater damage to the value of the copyright. As hard as it is to compete with a commercial infringer who makes an unauthorized copy and sells it at a cut-rate price, it is impossible to compete with free. Thus, an infringer like LaMacchia or Thomas-Rasset who lacks a traditional profit motive and makes a copyrighted work available to others for free actually strikes a greater blow to the value of the copyright. 11/2/10 Tr. 67-68.

Second, whatever sense a distinction between commercial and non-commercial infringers might have made in an era where only commercial

infringers could afford the equipment that enables wide-scale copying and distribution (and Congress never saw fit to draw the distinction even then), it makes no sense in light of current computer technology, which allows an end-user to facilitate massive distribution without investing any resources of her own. Thomas-Rasset “is not a consumer whose infringement was merely that [s]he failed to pay for copies of music recordings which [s]he downloaded for h[er] own personal use.” *Tenenbaum*, 2011 WL 4133920, at *8. Rather, as the District Court fully acknowledged, she made those works “accessible for free downloading by millions of Kazaa users who could subsequently share them with others.” App.20. Thomas-Rasset’s actions allowed her to save the expense of paying for the copyrighted works, but the real impact is measured not in terms of the money she saved, but in terms of the “repeated and exploitative copying” she enabled. *Tenenbaum*, 2011 WL 4133920, at *8. In short, Congress consciously and wisely made the judgment that the absence of a traditional commercial motive is not a mitigating factor when it comes to statutory damages. The District Court had no basis in the Due Process Clause or anything else to override that judgment.

2. Neither the Constitution Nor the Copyright Act Compels the Relationship Between Actual and Statutory Damages that the District Court Imposed.

The District Court correctly conceded that “Congress expressly rejected the idea that a statutory damages award should bear some specific relation to the actual

harm suffered by the plaintiff,” that the Due Process Clause does not “require that the damages award be strictly proportioned to Plaintiffs’ losses,” and that “Plaintiffs were not required to prove their actual damages.” App.14, 18, 27. Yet, without even attempting to reconcile its logic with those propositions, or to identify what Plaintiffs’ “actual damages” were, the District Court concluded that “statutory damages must still bear *some* relation to actual damages” and that any award higher than \$2,250 per work would not. App.28. The District Court had it right the first time; neither the Copyright Act nor the Due Process Clause imposes some nebulous outer limit on the relationship between actual and statutory damages, let alone gives rise to a bright-line rule of treble the statutory minimum for certain kinds of infringement.

Congress authorized statutory damages for the express purpose of *relieving* a plaintiff of the burden of quantifying actual injury by copyright infringement. One of the driving forces behind Congress’ adoption and retention of statutory damages for infringement has been its desire to compensate for “the acknowledged inadequacy of actual damages and profits in many cases,” which results because “actual damages are often conjectural, and may be impossible or prohibitively expensive to prove.” 1961 Report 102; *see also Cass Country Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 643 (8th Cir. 1996) (“statutory damages are by definition a substitute for unproven or unprovable actual damages”); *Tenenbaum*,

2011 WL 4133920, at *13 (“Section 504’s text reflects Congress’s intent ‘to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits.’” (quoting *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935))).

In keeping with that understanding, the Supreme Court has repeatedly and emphatically made clear that a statutory damages award for copyright infringement requires no proof of *or relationship* to actual damages. See *L.A. Westermann*, 249 U.S. at 106 (holding plaintiff entitled to statutory damages where no evidence of actual damages was presented); *Douglas*, 294 U.S. at 208 (reversing where lower court reduced damages award from statutory maximum to statutory minimum on ground that no actual damages were proven); *F.W. Woolworth*, 344 U.S. at 231 (affirming statutory maximum award where proven damages were significantly lower). Indeed, the Court has confirmed that “[e]ven for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy.” *Id.* at 233. In doing so, the Court has expressly validated Congress’ determination that copyright infringement is *always* against the public interest and should *always* be deterred, and that “a rule of liability which merely takes away the profits from an infringement would offer little discouragement to infringers [and] would fall short of an effective sanction for enforcement of the copyright policy.” *Id.*

Although the District Court acknowledged that the Copyright Act requires no relationship to or even proof of actual damages, the court purported to find such a requirement in the Constitution. The court was mistaken. Indeed, the court could not be correct without fundamentally ignoring the deference owed both Congress and the jury. The District Court's theory — that due process requires consideration of the relationship to actual damages when Congress determined that substantial statutory damages could be awarded in the absence of any actual damage — puts judges in a wholly untenable position. While *Williams* compels deference, such deference is not possible if the Due Process Clause commands the consideration of a factor Congress deemed irrelevant. And while *Feltner* held that fealty to the Seventh Amendment meant that the jury, not the judge, should assess the appropriate measure of statutory damages, *see* 523 U.S. at 355, the District Court's theory allows the judge to override the jury based on a finding of fact — the amount of actual damages — that a properly instructed jury need not find.

Not surprisingly, *Williams* conclusively rejected the notion that the Constitution requires statutory damages to “be confined or proportioned to [the plaintiff's] loss or damages.” *Williams*, 251 U.S. at 66. Indeed, in affirming an award 113 times larger than actual damages, the Court recognized that when a statutory damages award “is contrasted with the [actual damages] possible in any instance it of course seems large.” *Id.* at 67 (affirming \$75 award for \$0.66

overcharge). But the Court admonished that “its validity *is not to be tested in that way*,” as “the Legislature may adjust [the award’s] amount to the public wrong rather than the private injury.” *Id.* at 66-67 (emphasis added). Accordingly, *Williams* requires no case-specific relationship, strict or otherwise, between actual and statutory damages. All *Williams* requires is a reasonable relationship between the range of damages Congress has authorized and the offense for which they are authorized. The District Court correctly concluded that § 504(c) readily satisfies that standard, *see* App.23-26, for all the reasons set forth in Part II.A, *supra*. The court should have ended its analysis there, rather than invoking due process to impose an artificial cap on damages for a specific category of offenders — a cap that is inconsistent not just with the views of Congress, but with the views of *three separate* juries in this case and a fourth in a similar case. *See Tenenbaum*, 2011 WL 4133920, at *25.

The District Court’s holding is all the more troubling because the court did not purport to identify *what* relationship due process requires or how it measured that relationship. Nor could it after conceding that “[t]he very nature of the peer-to-peer network used by Thomas-Rasset made it impossible for Plaintiffs to specifically quantify the damage done by Thomas-Rasset.” App.21. And while the court deemed Thomas-Rasset responsible for only a “miniscule” portion of the broader damages caused by file-sharing, the court acknowledged all the factors that

render Thomas-Rasset a particularly egregious offender, conceding that she “acted willfully, failed to take responsibility, and contributed to the great harm to the recording industry inflicted by online piracy in general.” App.26.⁶ Accordingly, neither its legal analysis nor its factual analysis supports the court’s holding that the relationship between actual and statutory damages renders any award greater than \$2,250 per work unconstitutional.

C. Under a Correct Application of *Williams*, the Within-Range Awards of Both the First and the Third Jury Are Constitutional.

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, it is clear that a within-range award that allows for significant deterrence and punishment is particularly appropriate in this case. The first jury’s \$9,250-per-work award for Thomas-Rasset’s willful infringement of Plaintiffs’ copyrights — an award well below the maximum 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

⁶ In an attempt to cast Thomas-Rasset as having been saddled with an unfair share of the blame, the District Court misleadingly characterized her as “one of two [peer-to-peer network] users caught, sued, and subjected to a jury trial.” App.29. In fact, thousands of individuals were held responsible for their role in fomenting file-sharing infringement on a massive scale. Thomas-Rasset is merely one of only two such individuals who, rather than conceding infringement and reaching a settlement, repeatedly lied under oath and attempted to cover up her infringement. That multiple juries have deemed harsh damages appropriate under those circumstances reflects the particularly blameworthy nature of her conduct, not an effort to hold Thomas-Rasset responsible for the conduct of others.

or obviously unreasonable.” *Williams*, 251 U.S. at 67. The same is true as to the third jury’s \$62,500-per-work award, which is also well within the authorized range for willful copyright infringement, and significantly lower than the \$150,000-per-work statutory maximum. Congress’ considered judgment that the authorized range is appropriate is eminently reasonable and warrants deference. How the various factors emphasized by the District Court affect the determination of what measure of damages within that range is “just,” § 504(c), is a matter statutorily and constitutionally committed to the discretion of the jury, not the judge. *See* U.S. Const. amend. VII; *Feltner*, 523 U.S. at 355.

Although the third jury reached a different determination as to what award was just, that is no reason not to reinstate its award if the Court does not reinstate the first jury’s verdict. The higher award was well within the jury’s statutory discretion and is readily explained by the different facts developed at the third trial. For instance, whereas Thomas-Rasset simply denied engaging in infringement during her first trial, she not only continued to refuse to take responsibility at the second and third trials, but also attempted to shift blame to her young children. Moreover, because the third jury’s task was limited to determining damages, Plaintiffs’ witnesses testified in greater detail during the third trial regarding the very serious harms to which Thomas-Rasset’s infringement contributed.

In all events, Plaintiffs' evidence at both trials demonstrated that "Thomas-Rasset acted willfully, failed to take responsibility, and contributed to the great harm to the recording industry inflicted by online piracy in general." App.26. The District Court had it right when it recognized that "[t]hese facts can sustain the jury's conclusion that a substantial penalty is warranted." App.26. Neither the first jury's \$9,250-per-work award nor the third jury's \$62,500-per-work award is more substantial than the Constitution allows. The District Court's contrary conclusion cannot be reconciled with the Due Process Clause or Plaintiffs' Seventh Amendment right to have a jury determine statutory damages.

CONCLUSION

For these reasons, the Court should reinstate and affirm the first jury's \$222,000 award, and remand with instructions to grant an injunction prohibiting Thomas-Rasset from making Plaintiffs' works available to the public.

Respectfully submitted,

/s/ Paul D. Clement

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
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This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B), because it contains 13,999 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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/s/ Erin E. Murphy
Erin E. Murphy

**CERTIFICATE OF COMPLIANCE WITH
EIGHTH CIRCUIT RULE 28A(h)**

Pursuant to this Court's Rule 28A(h), I hereby certify that the electronic version of this corrected Brief for Appellants and the accompanying addendum have been scanned for viruses and are virus-free.

This 6th day of December, 2011. /s/ Erin E. Murphy
Erin E. Murphy

CERTIFICATE OF SERVICE

I hereby certify that on December 6th, 2011, I electronically filed the foregoing corrected Appellants' Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

This 6th day of December, 2011.

/s/Paul D. Clement
Paul D. Clement