Notes

Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*

I. Introduction

Imagine that you are a file-sharer. You download copyrighted songs to your computer for your personal use. You think of it like recording songs from the radio. Now imagine that a plaintiff sues you for downloading the one song to which she holds a registered copyright. Suppose the plaintiff knows that her monetary loss caused by your conduct is exactly one dollar.[1] At trial, this plaintiff can elect to recover statutory damages for copyright infringement and thereby receive a guaranteed $750 in damages,[2] all but one dollar of which would be noncompensatory in nature. The noncompensatory damages, those which exceed the loss that you caused, serve as a punishment,[3] and there are several valid reasons for their imposition: they admonish you for your misconduct, they deter future infringement by increasing its cost, and they add an incentive for the copyright owner to sue.

Now suppose that you have been a file-sharer for the past few years, accumulating some four thousand songs on your computer, all copyrighted and registered by the plaintiff. When the minimum statutory damage award of $750 is aggregated across every copyright that you have infringed, you are

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1. This figure is used for illustrative purposes only; it is likely that the direct harm to copyright owners from the sharing of a copyrighted music file is more than just one dollar. On the other hand, a recent study by professors at the Harvard Business School and the University of North Carolina concludes that file-sharing has no statistically significant effect on purchases of the average music album and that it increases the sales of "hot albums" by one CD sale for every 150 downloads. Felix Oberholzer & Koleman Strumpf, *The Effect of File-Sharing on Record Sales: An Empirical Analysis* 23–24 (Mar. 2004), *at* http://www.unc.edu/~cigar/papers/FileSharing_March2004.pdf.

2. 17 U.S.C. § 504(c)(1) (2000) (providing for a $750 minimum statutory damage award per copyrighted work infringed); *see id.* § 412 (forbidding the award of copyright infringement statutory damages for unpublished works that were unregistered at the time of infringement and for then-published works that were not registered within three months of their first publication). This conclusion assumes that your infringement did not qualify as "innocent," a possibility further discussed below. *See infra* notes 54–60 and accompanying text.

3. *See* Cass County Music Co. v. C.H.L.R., Inc., 88 F.3d 635, 643 (8th Cir. 1996) (noting that copyright's statutory damages comprise remuneration for injury but also serve as a penalty).

now liable for at least three million dollars in statutory damages to a plaintiff who has suffered four thousand dollars in monetary harm.[4] At this point, a "suspicious judicial eyebrow" might be raised.[5]

This is the scenario examined by this Note, and its concerns are not merely hypothetical. Recent copyright infringement lawsuits brought by major record companies against individual file-sharers target persons who have downloaded and shared on average more than one thousand copyrighted songs,[6] and these lawsuits ask for the same statutory damages used in the introductory example.[7] It is not surprising that most defendants have chosen to settle these cases rather than face the tremendous statutory damages prescribed by copyright law.[8]

These lawsuits illustrate that the punitive effect of even the minimum statutory damage award, when aggregated across a large number of similar acts, can grow so enormous that it becomes an unconstitutionally excessive punishment. The Second Circuit recently suggested as much when considering a different statutory damage scheme.[9] This Note argues that Congress should modify the Copyright Act's minimum statutory damage provision[10] because, when massively aggregated in the file-sharing scenario, it imposes an unconstitutional grossly excessive penalty.

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4. This assumes that no two songs are part of one compilation or derivative work, i.e., that no two songs came from the same album, for there is only one award of statutory damages for such songs. 17 U.S.C. § 504(c)(1); UMG Recordings, Inc. v. MP3.com, Inc., 109 F. Supp. 2d 223, 225 (S.D.N.Y. 2000) (holding that under 17 U.S.C. § 504(c)(1), statutory damages are awarded only once for the infringement of the copyrights in all songs on a music CD, despite a possible "independent economic value" in each song).

5. This phrase appears in *BMW of North America, Inc. v. Gore*, where the Court held unconstitutional a jury's punitive damage award of two million dollars to a plaintiff who suffered four thousand dollars in actual damages from the defendant's deceptive trade practices. 517 U.S. 559, 565, 585–86 (1996).

6. Frank Ahrens, *Music Industry Will Talk Before Suing*, WASH. POST, Oct. 1, 2003, at E1. These suits typically involve a few large record companies that own copyrights, instead of the individual copyright owner used in the introductory hypothetical.

7. *See, e.g.*, Complaint for Copyright Infringement at ¶ 13, Fonovisa v. Plank, No. CV03-6371 DT (FMOx) (C.D. Cal. Sept. 8, 2003) (requesting statutory damages pursuant to 17 U.S.C. § 504(c)), *available at* http://www.eff.org/IP/P2P/Fonovisa_v_Plank/fonovisa_plank_complaint.pdf (last visited Sept. 11, 2004).

8. *See* Benny Evangelista, *Downloading Teen Stars in Super Bowl Ad*, S.F. CHRON., Jan. 31, 2004, at A1 ("Many accused file-sharers have settled for about $2,000 to $3,000 each."); *Intellectual Property: Illegal File Sharers Become Craftier, Analysts Say*, NAT'L J. TECH. DAILY, Feb. 23, 2004 (AM Edition), LEXIS, Nexis Library, National Journal's Technology Daily File ("RIAA has filed 1,445 lawsuits since September, and most have been settled for an average of $3,000 each.").

9. Parker v. Time Warner Entm't Co., 331 F.3d 13 (2d Cir. 2003). This case involved aggregation under the class action mechanism of statutory damages for consumer privacy violations and is discussed further in section III(B)(1).

10. 17 U.S.C. § 504(c)(1) (2000).

Underlying this Note's criticism is the idea that a statutory damage award can be divided into compensatory and punitive components.[11] While distinguishing between the two may seem antithetical to one traditional justification for statutory damages—to provide compensation when the harm caused is hard to determine—for file-sharing at least, a rough dichotomy can still be drawn.[12] As discussed below, the punitive component of even the minimum statutory damage award turns out to be quite large.[13]

This large punitive component is not troublesome when statutory damages are awarded for one or a few instances of illegal file-sharing. The punitive component serves as an incentive to sue, and punishment for breaking the law is quite normal. However, when a given punishment is massively aggregated across many similar instances of misconduct, the resulting penalty can become so large that it becomes grossly excessive in relation to any legitimate interest in punishment and deterrence. As with the large punitive damage awards that the Court has held unconstitutional in the past decade,[14] such a tremendous punishment violates substantive due process guarantees.

Critics, however, have frowned on the Court's enforcement of an economic substantive due process right and urged the Court to refrain from action.[15] Scholars have noted that courts do not enforce all constitutional norms to their full conceptual limits and that economic substantive due process is a typical subject of such underenforcement.[16] Acknowledging these suggestions of judicial retreat, this Note still finds two uses for the Court's precedents in this area. First, the framework and structure laid out by the Court provide an understandable and reasoned way for Congress to develop and implement its own conceptions of substantive due process norms. Accordingly, this Note adopts the Court's analyses in giving meaning to that constitutional principle. Second, these precedents will guide

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11. *See* Unicity Music, Inc. v. Omni Communications, Inc., 844 F. Supp. 504, 510 (E.D. Ark. 1994) (noting that an award of statutory damages under copyright law is intended to both compensate the plaintiff and punish the defendant).

12. *See infra* notes 136–42 and accompanying text.

13. *See infra* note 143 and accompanying text.

14. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996). These cases are discussed in detail in section II(A)(1). *See infra* notes 71–109 and accompanying text.

15. *See, e.g.*, *Gore*, 517 U.S. at 598–604 (Scalia, J., dissenting) (criticizing the Court's "eagerness to enter this field" and to enforce a substantive due process right against punishments that are "too big").

16. *E.g.*, Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1212–14, 1220 n.24 (1978) (noting that the Due Process Clause, "particularly in its substantive application," is a "likely candidate[] for characterization as underenforced"); *The Supreme Court, 1997 Term—Leading Cases*, 112 HARV. L. REV. 192, 198 n.62 (1998) ("Substantive due process has effectively become an 'underenforced constitutional norm[].'").

courts when they uphold, deny, or construe around[17] claims of substantive due process violation, so understanding them is useful at a purely predictive level. Ultimately, because practical institutional reasons will likely make this norm "underenforced"—that is, not strongly enforced by the courts—Congress must, on its own accord, modify copyright law's minimum statutory damage provision to prevent the grossly excessive punishments that can result from its massive aggregation.[18]

To illustrate the need for congressional action, this Note examines a substantive due process challenge to the imposition of aggregated statutory damages in a scenario representative of the recent copyright infringement lawsuits.[19] Plaintiffs have filed the file-sharing lawsuits that generate this Note's concern only within the past fifteen months,[20] and this problem with copyright's statutory damage provision has not yet been meaningfully discussed.

This Note proceeds in two main parts. Part II briefly discusses file-sharing and its copyright implications, referencing the recent litigation against individual file-sharers by major record companies and setting the factual context for the analysis in Part III. Part III first surveys the Court's recent substantive due process jurisprudence regarding the size of punitive damage awards. It next provides the argument for applying these constitutional limits to aggregated statutory damage awards. Part III then explains the importance of aggregation to substantive due process limitations and works through a possible judicial application of these limits to the file-sharing scenario. Finally, this Part discusses reasons why courts will stop

17. Courts can, and often do, "create a judge-made constitutional 'penumbra' that has much the same prohibitory effect as the . . . Constitution itself" by interpreting statutes to avoid possible constitutional difficulties. Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 816 (1983); *see also* Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEXAS L. REV. 1549, 1581–85 (2000) (exploring the "penumbra problem"). Thus, judicial understandings of the substantive due process norm may help predict a case's outcome, even if the court does not openly strike down a statute as unconstitutional.

18. *See* Sager, *supra* note 16, at 1219–21, 1227 (arguing that judicially underenforced norms "should have the full status of positive law which we generally accord to the norms of our Constitution" and that "government officials have a legal obligation to obey an underenforced constitutional norm," which requires them to "fashion their own conceptions of these norms and measure their conduct by reference to these conceptions"); *see also infra* notes 202–06 and accompanying text. Various ways in which Congress can modify copyright's statutory damage provision are explored below. *See infra* notes 215–19 and accompanying text.

19. Rationally, we would expect that judicial resolution of this challenge is improbable, as the large penalties imposed by copyright's statutory damage provision would push defendants to settle within the $2,000–$5,000 range being offered by record companies. *See* Evangelista, *supra* note 8 (noting that settlement offers range from $2,000 to $5,000). But this does not mean that grossly excessive punishments are unharmful, just that their effect is being felt through the large settlement incentive that they create.

20. The record industry filed its first major round of lawsuits against individual file-sharers on September 8, 2003. Katie Hafner, *Is It Wrong to Share Your Music? (Discuss)*, N.Y. TIMES, Sept. 18, 2003, at G1.

short of invalidating an aggregated statutory damage award and calls for Congress to act on the concerns laid out in this Note by changing copyright law's minimum statutory damage provision.

II. Background: File-Sharing and Copyright

A. Music File-Sharing

Music file-sharing gained much of its fame from the Napster computer program, so this program makes a good starting point for our discussion. Napster facilitated the acquisition of high-quality music files over the internet.[21] It did this by allowing a user of its service to locate other computer users who were willing to allow that first user to copy a given song to her local computer.[22] The first user would then contact the "sharing" user directly and copy the music file over the internet.[23]

Napster was an immensely popular tool,[24] and although a court ordered it to shut down its system in July of 2001,[25] other file-sharing programs that offer the same functionality through slightly different and potentially more legal means have since taken Napster's place.[26] Studies indicate that today there are some sixty million users of file-sharing programs in the United States.[27]

People often share the music files on their computers without even knowing it—the default configuration of many file-sharing programs makes

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21. A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 901 (N.D. Cal. 2000), *aff'd in part and rev'd in part*, 239 F.3d 1004 (9th Cir. 2001).

22. *Id.* at 906.

23. *Id.* at 907.

24. Napster was estimated to have 75 million users at the peak of its growth. *Id.* at 902. Users downloaded approximately 10,000 songs per second using Napster, and Napster was growing by over 200% per month without marketing. *Id.*

25. *See* Reply Brief of Defendant/Appellee/Cross-Appellant Napster, Inc. at 3, 20, A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091 (9th Cir. 2002) (noting that the trial court's shut-down order was issued on July 11, 2001).

26. These new programs include Audiogalaxy, BearShare, eDonkey, FileTopia, Grokster, iMesh, KaZaA, LimeWire, Morpheus, and WinMX. They differ from Napster in that they do not require a centralized clearinghouse for a user to determine which other users are willing to share a given music file. As such, the programs' designers retain no control over the file-sharing networks that are used to swap files, and this deviation from Napster's design has proven to be a successful basis for arguing that the creator of such a "second generation" file-sharing program is not liable for any direct copyright infringement that occurs through the program's use. *See* MGM Studios, Inc. v. Grokster, Ltd., 259 F. Supp. 2d 1029, 1043, 1045–46 (C.D. Cal. 2003), *aff'd*, 380 F.3d 1154 (9th Cir. 2004).

27. Benny Evangelista, *Record Industry Suffers Setback in Court*, S.F. CHRON., Dec. 20, 2003, at A1 (noting the estimate that 60 million people in the United States use file-sharing programs); *see* Thomas Karagiannis & Michalis Faloutsos, *Is P2P Dying or Just Hiding?* 1 (2004) (finding from an internet traffic study that file-sharing has not declined from 2003 to early 2004), *available at* http://www.caida.org/outreach/papers/2004/p2p-dying/p2p-dying.pdf.

a user's downloaded music files available for others to copy.[28] Thus, unless users deliberately and manually reconfigure these programs, many music file downloaders unwittingly become music file sharers. Over time, users of file-sharing programs may end up amassing (and in many cases sharing) collections of copyrighted music files numbering into the hundreds and thousands of songs.[29]

People download music from file-sharing networks for many different reasons. Some like to create playlists of their favorite songs and find it easier to download a song using a file-sharing system than to digitize it from a CD that they own.[30] Often, these people think that since they have already purchased the CD, it is okay to download the song over the internet.[31] Other users claim that they download music to sample it and make a purchasing decision, deleting the music if they lack interest in it.[32] Finally, some users acknowledge that they download music with no intention of purchasing the song but deny that this is morally wrong,[33] although it seems that a growing number of people view illegal file-sharing as immoral.[34]

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28. *See P2P Group Defends Default Sharing on Software*, WASH. INTERNET DAILY, Dec. 16, 2003 (noting six file-sharing programs that share the user's files by default); Kim Peterson & Tricia Duryee, *5 in State Sued for File-Sharing*, SEATTLE TIMES, Dec. 4, 2003, at E1 ("[B]ecause some file-sharing programs share downloaded music by default, some people might not realize they may be at risk of being sued.").

29. *See, e.g.*, Ahrens, *supra* note 6 (noting that defendants in file-sharing lawsuits shared around one thousand copyrighted songs each); Amy Harmon & John Schwartz, *Despite Suits, Music File Sharers Shrug Off Guilt and Keep Sharing*, N.Y. TIMES, Sept. 19, 2003, at A1 (discussing file-sharer Soli Shin, who took her library of 1,094 songs offline because of the fear of litigation, and Dr. Steve Vaughan, "who said he had downloaded about 2,000 songs over the internet in recent years").

30. *See, e.g.*, Peterson & Duryee, *supra* note 28 (reporting an interview with a file-sharer: "'I usually have all the CDs,' she said. 'I just wanted some songs on the computer.'"); *Privacy & Piracy: The Paradox of Illegal File-Sharing on Peer-to-Peer Networks and the Impact of Technology on the Entertainment Industry: Hearing Before the Permanent Subcomm. on Investigations of the Senate Comm. on Gov't Affairs*, 108th Cong. (Sept. 30, 2003) [hereinafter *Government Affairs Hearings*] (statement of Lorraine Sullivan) ("I made a play list of favorites and listened to it when I cleaned house or did homework. . . . I didn't want to mix them manually and found it more convenient to have on my computer. I don't know how to 'upload' songs on the computer either.").

31. *See, e.g.*, *Government Affairs Hearings*, *supra* note 30 (statement of Lorraine Sullivan) ("I downloaded songs I already owned on CD . . . ."); Peterson & Duryee, *supra* note 28 (discussing a file-sharer who owned CDs and had no problem with downloading the songs on those CDs using a file-sharing network).

32. *See Music on the Internet: Is There an Upside to Downloading?: Hearing Before the Senate Comm. on the Judiciary*, 105th Cong. (July 11, 2000) [hereinafter *Judiciary Hearings*] (testimony of Hank Barry) (claiming that sampling of music is a frequent phenomenon and pointing for support both to a Pew Foundation report finding that people commonly sample music online and to a study showing that 28.3% of those who used Napster had increased their CD purchases); Harmon & Schwartz, *supra* note 29 (reporting on two file-sharers who use file-sharing networks to sample songs and decide what to buy on CD).

33. *See, e.g.*, Hafner, *supra* note 20 (detailing how teenagers download music without any intention to purchase it and largely do not see problems with this practice); *Government Affairs Hearings*, *supra* note 30 (statement of Dr. Jonathan D. Moreno) ("Many people with otherwise

While the attitudes and motives of file-sharers may vary, it does seem clear that file-sharing is here to stay. Each year new file-sharing systems are released, with new technologies making file-sharing faster and easier to use.[35] Though some of file-sharing's thunder may be stolen by legitimate digital-download services, such as Apple Computer's iTunes[36] and WalMart's Music Downloads,[37] file-sharing is not expected to fade away any time soon.[38]

B. Copyright's Treatment of Music File-Sharing

This subpart begins by explaining why the unauthorized file-sharing of copyrighted songs constitutes copyright infringement. It then discusses the remedies under copyright law for such infringement and concludes by describing the recent litigation, coordinated by the Recording Industry Association of America (RIAA), against individual file-sharers and the factual context under which the analysis in Part III will proceed.

1. File-Sharing of Copyrighted Songs is Copyright Infringement.—The United States Copyright Act rewards the creation of original works by granting to the author five exclusive rights which vest as soon as her work is

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healthy moral intuitions fail to see internet file-sharing as theft, or if they do, they do not perceive it as wrong, or at least not very wrong."); *see also* Geraldine Szott Moohr, *The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory*, 83 B.U. L. REV. 731, 767–73 (2003) (noting that "a substantial number of people do not view unauthorized use of copyrighted material for personal use as immoral" and exploring this social norm); Larry Solum, Legal Theory Blog: Copynorms & Litigation Costs (July 10, 2003) (noting that copyright laws have not created social norms that correspond to their mandates and that few people in society view the file-sharing of copyrighted songs as wrong), *at* http://lsolum.blogspot.com/2003_07_01_lsolum_archive.html (last visited Sept. 11, 2004).

34. *See, e.g.*, Amy Harmon, *New Parent-to-Child Chat: Do You Download Music?*, N.Y. TIMES, Sept. 10, 2003, at A1 (reporting that file-sharing lawsuits are prompting many parents to explain to their children that sharing copyrighted music files is wrong); Harmon & Schwartz, *supra* note 29 (reporting on a New York Times/CBS News poll that found that 36% of respondents viewed file-sharing as never being acceptable).

35. *See, e.g.*, Expert Report of Professor Lawrence Lessig at ¶ 66, A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000) (Nos. C 99-5183 MHP, C 00-0074 MHP) ("Gnutella is a simple substitute for Napster. It facilitates a better peer-to-peer searching capability and is operated in a far more decentralized manner."), *available at* http://www.lessig.org/content/testimony/nap/napd3.pdf. For a good discussion of file-sharing and its origins, see Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 374–401 (2003).

36. Apple iTunes Music Store, *at* http://www.apple.com/itunes/store/ (last visited Sept. 11, 2004) (selling individual songs for 99¢).

37. Walmart.com Music Downloads (underpricing iTunes by selling individual songs for 88¢), *at* http://musicdownloads.walmart.com (last visited Sept. 11, 2004).

38. *Government Affairs Hearings*, *supra* note 30 (statement of Dr. Jonathan D. Moreno) (noting that many people believe file-sharing to be the "wave of the future"); *see* Karagiannis & Faloutsos, *supra* note 27, at 1 (concluding that file-sharing network activity "has not diminished" in response to the RIAA lawsuits and "is likely to continue to grow in the future").

fixed in a tangible medium of expression: the rights to reproduce, adapt, distribute, publicly perform, and publicly display the work.[39]

Downloading and uploading copyrighted songs without permission violates at least the copyright owner's rights of reproduction and distribution.[40] The downloader's ownership of a CD containing the downloaded song does not change this conclusion. Although the CD owner has the right to sell or otherwise dispose of that particular CD, without more this ownership does not entitle the downloader to reproduce the copyrighted song or to distribute those copies.[41] Nor will the downloading and uploading of copyrighted music files qualify as a protected "fair use" of the works.[42] In a recent case, *A&M Records, Inc. v. Napster, Inc.*,[43] the Ninth Circuit considered two uses of copyrighted music files that were claimed by Napster to be protected under the fair use doctrine—sampling (downloading a song to evaluate whether it merits purchasing) and space-shifting (downloading a song already owned by the user for playing at another location)—and affirmed the district court's determination that neither practice constitutes fair use.[44] Accordingly, the court held that the unauthorized file-sharing of copyrighted songs is copyright infringement. The Seventh Circuit recently

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39. 17 U.S.C. § 106 (2000). Musicians commonly assign the copyright in their works to a music publisher. Cydney A. Tune, *Music Licensing—From the Basics to the Outer Limits*, 21-FALL ENT. & SPORTS LAW. 26, 28 (2003) (noting the ownership of songs' copyrights by music publishers). To be precise, there are two types of works implicated in a standard song: the "sound recording" and the underlying "musical work." *See* 17 U.S.C. § 102 (2000). Each is a separate, copyrightable work. *Id.* A musical work consists of rhythm, harmony, and melody, as represented, for example, by notations on sheet music. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.05[D] (perm. ed., rev. vol. 2004). A sound recording is the audible result of performing and recording the underlying musical work, as embodied, for example, on a CD track. *See* 17 U.S.C. § 101 (2000) (defining sound recordings as "works that result from the fixation of a series of musical, spoken, or other sounds"). Although this distinction is not further explored in this Note, the dichotomy does potentially increase the statutory damages for copyright infringement, as the person who downloads 1,000 music files is potentially infringing 2,000 copyrighted works.

40. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014 (9th Cir. 2001). Some scholars, however, argue that courts have misinterpreted the distribution right as encompassing the transmission of copyrighted works over digital networks; they fault the courts for ignoring the legislative history indicating that the right is limited to the distribution of tangible, material objects. *E.g.*, R. Anthony Reese, *The Public Display Right: The Copyright Act's Neglected Solution to the Controversy over RAM "Copies"*, 2001 U. ILL. L. REV. 83, 122, 125–35 (arguing that courts that have "begun to hold that transmissions over computer networks violate the copyright owner's distribution right" advance an "interpretation of the distribution right [that] contravenes the language and intent of the 1976 [Copyright] Act").

41. *See* 17 U.S.C. § 109 (2000) (discussing the first sale doctrine, which does not include an entitlement to violate the reproduction right or distribute unauthorized copies).

42. *Napster*, 239 F.3d at 1014–19.

43. 239 F.3d 1004 (9th Cir. 2001).

44. *Id.* at 1014–19 (rejecting fair use defenses based on sampling and space-shifting of copyrighted music files). *But cf.* RIAA v. Diamond Multimedia Sys., 180 F.3d 1072, 1079 (9th Cir. 1999) (holding that the space-shifting of music files from a user's hard drive to the user's own Diamond Rio portable music player, as opposed to the space-shifting over the internet from another person's hard drive, qualifies as fair use).

reached the same conclusion in *In re Aimster Copyright Litigation*.[45] Judge Posner succinctly wrote: "If the music is copyrighted, such [internet file] swapping, which involves making and transmitting a digital copy of the music, infringes copyright."[46]

2. The Statutory Damage Remedy for Copyright Infringement.—There are two general types of remedies for copyright infringement: the copyright owner may either recover her actual damages plus the additional profits of the infringer or elect at any time before final judgment to receive statutory damages.[47] The copyright owner recovers one award of statutory damages for each copyrighted work that is infringed by the defendant, and each statutory damage award may not be less than a statutorily fixed minimum amount.[48] Thus, although the exact amount of statutory damages is set by the judge or jury,[49] there is a floor below which a statutory damage award cannot fall.[50] This floor is important because the court has no choice but to award *at least* this amount in statutory damages, regardless of whether the plaintiff's damages are calculable and regardless of the actual amount of the plaintiff's loss.[51] The present statutory-damage-award minimum is $750 per copyrighted work infringed.[52] This amount has changed over time, increasing twice since its fixation at $250 by the 1976 Copyright Act, with the changes roughly tracking inflation.[53]

Though copyright law provides for lowering the minimum statutory damage amount upon a finding of "innocent infringement," the threshold for

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45. 334 F.3d 643 (7th Cir. 2003).

46. *Id.* at 645.

47. 17 U.S.C. § 504(a)–(c) (2000). Statutory damages, however, cannot be collected for an infringement of copyright in an unregistered, unpublished work or in a published work that was not registered within three months from its first publication. *Id.* § 412.

48. *Id.* § 504(c)(1) (2000).

49. Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 355 (1998) (finding a Seventh Amendment right to a jury trial on the amount of statutory damages under copyright law). The Copyright Act of 1976 allows "the court" to fix statutory damages as it considers just, within the prescribed range. 17 U.S.C. § 504(c)(1).

50. 17 U.S.C. § 504(c)(1).

51. Harris v. Emus Records Corp., 734 F.2d 1329, 1335 (9th Cir. 1984) ("Statutory damages may be elected whether or not there is adequate evidence of the actual damages suffered by plaintiff . . . ."); 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.04[A] (perm. ed., rev. vol. 2004) (explaining that a copyright owner may elect to recover statutory damages "regardless of the adequacy of the evidence offered as to his actual damages" and "even if he has intentionally declined to offer such evidence although it was available").

52. 17 U.S.C. § 504(c)(1).

53. The Berne Implementation Act of 1988 increased minimum statutory damages from $250 to $500, Pub. L. No. 100-568, 102 Stat. 2853, and the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999 increased minimum statutory damages from $500 to $750. Pub. L. No. 106-160, 113 Stat. 1774 (codified at 17 U.S.C. § 504). These changes roughly track inflation: $250 in 1976 dollars would be worth $519 in 1988 dollars and $731 in 1999 dollars. *See* U.S. Dept. of Labor, Bureau of Labor Statistics, *Consumer Price Index Inflation Calculator*, *at* http://data.bls.gov/cgi-bin/cpicalc.pl (last visited Sept. 11, 2004) (yielding these numbers).

such a finding is high, requiring that the infringer prove that he or she "was not aware and had no reason to believe that his or her acts constituted an infringement of copyright."[54] Judge Posner summarily noted in *Aimster* that file-swappers are "more commonly disdainful of copyright" than ignorant,[55] and even if file-swappers are ignorant, ignorant infringement is not necessarily innocent.[56] The legislative history of the 1976 Copyright Act indicates that innocent infringement was intended to be an "exceptional case[]," meant to protect against liability in cases of "occasional or isolated" innocent infringement and prototypically helping "broadcasters and newspaper publishers."[57] In the file-sharing scenario there are several reasons for a file-sharer to believe that her actions constitute copyright infringement: it is no secret that many popular songs are copyrighted;[58] there has been an ongoing, large-scale campaign coordinated by the RIAA to publicize the illegality of trading in copyrighted music files;[59] and websites of popular file-sharing systems contain notices that file-sharers should inform themselves about copyright violation.[60] Thus, while a finding of innocent infringement would certainly help relieve some of the concern about excessive punishment, a court is unlikely to make such a finding in the file-sharing context.

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54. 17 U.S.C. § 504(c)(2) (2000).

55. *In re* Aimster Copyright Litig., 334 F.3d 643, 645 (7th Cir. 2003).

56. Cass County Music Co. v. C.H.L.R. Inc., 896 F. Supp. 904, 909 (E.D. Ark. 1995) ("Even a non-deliberate infringement is not innocent."), *rev'd on other grounds*, 88 F.3d 635 (8th Cir. 1996).

57. H.R. REP. NO. 94-1476, at 162–63 (1976).

58. The copyright owner of a song can be determined by referencing the Music Publisher's Association web site. MPA Copyright Information Resource Guide, *at* http://www.mpa.org/copyright/copysearch.html (last visited Sept. 11, 2004).

59. *See* Ahrens, *supra* note 6 (noting the RIAA's "advertising and educational campaigns" to teach file-sharers about the copyright implications of their actions); *Government Affairs Hearings*, *supra* note 30, at 82 (statement of Mitch Bainwol, Chairman & CEO, RIAA) ("The music industry has, for a number of years, undertaken a massive campaign to educate consumers regarding the illegality of the unauthorized distribution of copyrighted music online."). Legal actions taken to combat file-sharing have also been high-profile; their coverage by the media publicizes the illegality of unauthorized file-sharing. *See, e.g.*, Electronic Frontier Foundation, *Tired of Being Treated Like a Criminal for Sharing Music Online?*, *at* http://eff.org/IP/P2P/music-to-our-ears.php (last visited Sept. 11, 2004) (displaying a full-page advertisement noting the illegality of file-trading, educating the public about copyright ramifications of these actions). A Nexis search for newspaper articles covering the Napster suit resulted in more than three thousand results. A search for articles covering the RIAA file-sharing lawsuits produced 361 articles from January 2004 and February 2004 alone.

60. *See, e.g.*, KaZaA Media Desktop, *at* http://www.kazaa.com (last visited Mar. 20, 2004) ("[I]t is your responsibility to obey all laws governing copyright in each country."); iMesh, End User License Agreement, *at* http://www.imesh.com/license_agreement.shtml (last visited Mar. 20, 2004) ("The unauthorized reproduction, distribution, modification, public display, communication to the public or public performance of copyrighted works is an infringement of copyright. Users are entirely responsible for their conduct and for ensuring that it complies with all applicable copyright and data-protection laws.").

3. Lawsuits Against Individual File-Sharers.—Since the beginning of music distribution through file-sharing networks, major record companies have battled in the courts to protect their copyrights and end illegal file-sharing. Their first round of attack, a lawsuit targeting the Napster file-sharing program, succeeded in establishing that Napster would likely be found contributorily liable for the copyright infringement of its software's users, thus convincing the court to shut down Napster's file-sharing network.[61] After success with this challenge, the battle against illegal file-sharing continued into a second round with the filing of a lawsuit targeting the FastTrack file-sharing technology, used by the Grokster, KaZaA, and Streamcast file-sharing clients.[62] Unlike the Napster file-sharing system, the FastTrack network does not have a centralized server through which its users locate other users who are willing to share files. Rather, the network is a "second generation" file-sharing system with a decentralized architecture, meaning that the defendant software designers who relied on the FastTrack network did not provide the site that facilitated direct copyright infringement and did not have control over the infringing conduct of their software's users.[63] This distinction, along with evidence of substantial noninfringing uses of the FastTrack network, led a court to rule that Grokster, KaZaA, and Streamcast were not liable for direct, contributory, or vicarious copyright infringement.[64]

With litigation targeting second-generation file-sharing systems proving ineffective at stopping illegal file-sharing, the recording industry has turned to a new strategy for their third volley in the battle: suing individual file-sharers. Since late 2003, major record companies have sued over 5,900 individuals who have allegedly used file-sharing programs to upload and download copyrighted songs.[65] On average, each lawsuit involves at least one thousand songs,[66] which, as noted above, can comprise up to two

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61. A&M Records, Inc. v. Napster, Inc., 284 F.3d 1091, 1095 (9th Cir. 2001). A similar challenge later succeeded in shutting down the Aimster file-sharing service. *In re* Aimster Copyright Litig., 334 F.3d 643, 656 (7th Cir. 2003).

62. MGM Studios, Inc. v. Grokster, Ltd., 259 F. Supp. 2d 1029, 1032–33 (C.D. Cal. 2003), *aff'd*, 380 F.3d 1154 (9th Cir. 2004).

63. *Id.* at 1041, 1045.

64. *Id.* at 1046.

65. *See* Recording Industry Association of America, Press Room, *at* http://www.riaa.com/news/ (last visited Nov. 3, 2004) (collecting press releases issued upon the filing of each new wave of lawsuits). Each wave contained the following number of lawsuits (RIAA press release date in parenthesis): 261 (Sept. 8, 2003); 80 (Oct. 31, 2003); 41 (Dec. 3, 2003); 532 (Jan. 21, 2004); 531 (Feb. 17, 2004); 532 (Mar. 23, 2004); 477 (Apr. 28, 2004); 493 (May 24, 2004); 213 (June 22, 2004); 506 (July 20, 2004); 744 (Aug. 25, 2004); 762 (Sept. 30, 2004); and 750 (Oct. 28, 2004). Add them up to get 5,922.

66. Ahrens, *supra* note 6. While the RIAA lawsuits are focused on those individuals who download and share a large number of songs, a representative complaint indicates that record companies have actually listed relatively few songs. *See, e.g.*, Complaint for Copyright Infringement at 6, Capitol Records, Inc. v. Doe, No. CV03-6378 ER (RNBx) (C.D. Cal. filed Sept. 8, 2003) (listing just nine songs), *available at* http://www.eff.org/IP/P2P/sample_riaa_

thousand copyrighted works.[67] Provided that the court finds a file-sharing defendant liable for copyright infringement, he or she would face minimum statutory damages of $750 per registered, copyrighted work.[68] The law would then require the court to aggregate this award across all works infringed, resulting in liability in the hundreds of thousands or even millions of dollars.[69] The discussion in Part III uses this scenario to examine the substantive due process implications of copyright law's minimum statutory damage provision.

III. Grossly Excessive Penalties and Aggregated Statutory Damages

This Part argues that the constitutional substantive due process guarantee, as interpreted by the U.S. Supreme Court, restricts the aggregation of minimum statutory damages for copyright infringement in the file-sharing context. The starting point for this argument is the Court's recent case law prohibiting grossly excessive punitive damage awards, so a brief explanation of that jurisprudence is in order. This Part then turns to the relevance of these constitutional limits to statutory damages in general and to statutory damages for illegal file-sharing in particular. Next, this Part reinforces the point that only the narrow category of massively aggregated statutory damages falls subject to constitutional criticism (and then only if the damages have a large punitive component) by discussing the role of aggregation in a constitutional challenge. Referencing the file-sharing context discussed in Part II, this Part then works through the application of substantive due process standards to the punitive aspect of an aggregated statutory damage award for illegal file-sharing, concluding that the punishment can fairly be deemed grossly excessive. Finally, this Part discusses why substantive due process will likely be an underenforced norm[70] in this context—one that the courts will refrain from enforcing for practical institutional reasons, but one that still compels Congress to modify copyright law's statutory damage provision to avoid the imposition of grossly excessive penalties.

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complaint.pdf. In the case of a defendant who opts not to settle, the record companies would presumably increase the stakes by amending the exhibit to their complaint to list the hundreds of copyrighted songs which they have record of the defendant downloading and sharing.

67. *See supra* note 39.

68. *See supra* notes 47–60 and accompanying text (discussing copyright law's statutory damage floor of $750).

69. A defendant sharing 1,334 copyrighted works would, at minimum, be liable for statutory damages of $1 million, assuming that none are part of a "compilation." *See* 17 U.S.C. § 504(c)(1) (2000) (setting minimum statutory damages at $750 per work, which results in $1,000,500 when multiplied by 1,334). Under § 504(c)(1), "all the parts of a compilation. . . constitute one work." *Id.* Of course, juries might mitigate the law's harshness, despite its clarity, by finding less than all of the instances of infringement attributable to the defendant or by finding that the defendant was mistakenly identified as a file-sharer.

70. *See* Sager, *supra* note 16, at 1213–20.

A. Due Process Prohibition of Grossly Excessive Punishments

1. Constitutional Limitations on Punitive Damages.—The legal doctrine of punitive damages has long been a part of American law, finding favor in some courts as early as 1784.[71] Since that time, the doctrine has faced criticism from scholars, who note that because these damages constitute punishment, they "do not serve the compensation function of the civil justice system and are awarded without the protections of the criminal justice system."[72] Yet before the late 1970s, punitive damages were a rather inconspicuous aspect of our legal system, and they saw little action.[73] In the past three decades, however, the frequency and size of punitive damage awards have climbed,[74] drawing increasing Supreme Court attention.[75]

Challenges to punitive damage awards have been brought under both the procedural and substantive limits of the Constitution's Due Process Clauses.[76] The 1993 case of *TXO Production Corp. v. Alliance Resources Corp.*[77] acknowledged the existence of substantive limits on the size of punitive damages, and it played a role in the Court's later jurisprudence. Justice Stevens wrote for the plurality that "the Due Process Clause of the Fourteenth Amendment imposes substantive limits 'beyond which penalties may not go.'"[78] The plurality declined the parties' invitation to formulate a

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71. Theodore B. Olson et al., *Constitutional Challenges to Punitive Damages after* BMW v. Gore, BRIEFLY . . . PERSPECTIVES ON LEGISLATION, REGULATION, AND LITIGATION, May 1998, at 2; *see* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 25 (1991) (Scalia, J., concurring) (noting that "punitive or 'exemplary' damages have long been a part of Anglo-American law").

72. Olson et al., *supra* note 71, at 2; *see also* Fay v. Parker, 53 N.H. 342, 382 (1873) (famously and harshly attacking punitive damages by calling them "a monstrous heresy").

73. Theodore B. Olson & Theodore J. Boutrous, Jr., *The Supreme Court's Developing Punitive Damages Jurisprudence*, 1994 PUB. INT. L. REV. 17, 18 (noting that before the 1970s "punitive damages were rarely awarded and generally assessed in relatively modest amounts in traditional tort law cases involving egregious, intentional misconduct that resulted in personal injury or death").

74. George L. Priest, *The Problem and Efforts to Understand It*, *Introduction* to PUNITIVE DAMAGES: HOW JURIES DECIDE 1, 1 (Cass R. Sunstein et al. eds., 2002) (noting a dramatic increase in punitive damages over the last two decades). For an alternative account of punitive damage trends, see Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1 (1990) (presenting empirical evidence that the size and frequency of punitive damages are not nearly as troubling as tort reformers claim).

75. Olson et al., *supra* note 71, at 2.

76. *See, e.g.*, TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 453, 462 (1993) (noting TXO's claims that a punitive damage award both resulted from a fundamentally unfair procedure and was a substantively arbitrary and grossly excessive deprivation of property). The substantive due process limits on punitive damages that were announced by the Court under the Fourteenth Amendment apply equally to the federal government under the Fifth Amendment. Lee v. Edwards, 101 F.3d 805, 809 n.2 (2d Cir. 1996) ("Although *Gore* examined the excessiveness of punitive damages awarded in a state court, the universal premise of [the] Supreme Court's due process reasoning suggests that the same considerations apply equally to the review of punitive damages awarded in federal court.").

77. 509 U.S. 443 (1993).

78. *Id.* at 453–54 (quoting Seaboard Air Line Ry. v. Seegers, 207 U.S. 73, 78 (1907)).

test for determining when a punitive damage award exceeds those limits,[79] but it did state that "[a] general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus."[80] Based on "the millions of dollars potentially at stake, TXO's bad faith, the fact that TXO's scheme was part of a larger pattern of fraud, trickery, and deceit, and TXO's wealth,"[81] the plurality held that a punitive damage award of ten million dollars for conduct that, if successful, would have resulted in harm of at least one million dollars was not "grossly excessive."[82] In short, the Court articulated that "grossly excessive" punitive damage awards are unreasonable and violate substantive due process, though it declined to provide any guidelines for determining gross excessiveness.[83]

A few years later, the Court overturned for the first time a punitive damage award as violating substantive due process. In *BMW of North America, Inc. v. Gore*,[84] a doctor discovered that part of his newly purchased BMW car had been repainted and that the dealership withheld this information from him when selling the car.[85] The doctor sued BMW and obtained a jury verdict awarding him compensatory damages of four thousand dollars and punitive damages of four million dollars, later reduced to two million dollars by the Alabama Supreme Court.[86] The U.S. Supreme Court granted certiorari to consider the propriety of the two-million-dollar punitive damage award.[87]

The Court stated that the Due Process Clause permits the imposition of damage awards to "punish[] unlawful conduct and deter[] its repetition," but that such awards must be "reasonably necessary" to vindicate the government's "legitimate interests in punishment and deterrence."[88] A damage award fails to meet this standard, and thus enters the "zone of arbitrariness" that violates due process of law, when the award can fairly be deemed "grossly excessive."[89] The Court then provided three guideposts for determining whether a damage award is grossly excessive.[90] Last year, the Court reaffirmed its reliance on these three guideposts in *State Farm Mutual Automobile Insurance Co. v. Campbell*.[91]

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79. *Id.* at 455–56.

80. *Id.* at 458 (quoting Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991)) (alterations in original).

81. *Id.* at 444.

82. *Id.* at 446, 459–62.

83. *Id.* at 459–62.

84. 517 U.S. 559 (1996).

85. *Id.* at 563–64.

86. *Id.* at 564–67.

87. *Id.* at 562–63.

88. *Id.* at 568.

89. *Id.*

90. *Id.* at 574–85.

91. 538 U.S. 408 (2003). The facts of that case are as follows: State Farm knew with near-certain probability that the insured driver it was defending in a negligence suit would be held at

Of the three gross excessiveness guideposts, first and most important is the reprehensibility of the defendant's conduct.[92] Obviously, more reprehensible conduct warrants greater punitive damages than a less blameworthy wrong.[93] This principle has a long historical pedigree,[94] so its inclusion as a guidepost in *Gore* is unsurprising. The courts themselves decide on the reprehensibility of a given action, and they will generally inquire into "the malice or ill-will of the actor, as well as the social opprobrium that attends the misconduct at issue."[95] Factors bearing on the reprehensibility of a defendant's action include whether

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.[96]

The Court emphasized that the existence of only one of these factors weighing against the defendant may alone be insufficient to sustain a punitive damage award,[97] and that the absence of all of these factors will render the award suspect of excessiveness.[98]

The second guidepost in the determination of gross excessiveness is the ratio of the punitive damage award to the actual or potential harm inflicted on the plaintiff. As with the first guidepost, the Court referenced the historical importance of this inquiry.[99] Based on its recent decisions in *Pacific Mutual*

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fault for the underlying automobile accident. *Id.* at 413. Instead of accepting an offer to settle the suit for the policy limit of $50,000, State Farm misled the driver about his coverage and sent the case to trial anyway, risking the imposition of huge personal liability on the driver for the chance of avoiding payment on the insurance policy altogether. *Id.* The jury held the driver at fault, as expected, imposing damages of approximately $186,000. *Id.* Despite its earlier assurances of full coverage, State Farm refused to contribute more than the policy limit of $50,000, suggesting instead that the driver sell his house to cover the excess liability. *Id.* This conduct spurred a lawsuit by the driver against State Farm for bad faith, fraud, and intentional infliction of emotional distress, which resulted in a jury award of $2.6 million in compensatory damages and $145 million in punitive damages. *Id.* at 414–15. The trial court reduced these awards to $1 million and $25 million, respectively. *Id.* at 415. The Utah Supreme Court, applying the *Gore* guideposts, reinstated the full punitive award. *Id.* at 415–16. On appeal, the U.S. Supreme Court affirmed the existence of a substantive due process prohibition on grossly excessive punitive damages and applied the three *Gore* guideposts in holding the punitive damages to be unconstitutionally large. *Id.* at 419–29.

92. *Gore*, 517 U.S. at 575.

93. *Id.* at 575–77.

94. *See Gore*, 517 U.S. at 575 (citing an 1852 case, Day v. Woodworth, 54 U.S. (13 How.) 363 (1852), to support the guidepost).

95. Olson et al., *supra* note 71, at 14.

96. *Campbell*, 538 U.S. at 419 (citing *Gore*, 517 U.S. at 576–77).

97. *Id.*

98. *Id.*

99. *Gore*, 517 U.S. at 580–81 (citing cases as early as 1852 that mention proportionality between actual and punitive damages and identifying statutes as early as 1275 that provide for punishments by doubling, tripling, or quadrupling damages).

Life Insurance Co. v. Haslip[100] and *TXO Production Corp.*,[101] where it held that ratios of four-to-one and ten-to-one were "'close to the line' . . . 'of constitutional impropriety,'"[102] the *Gore* Court said that the ratio of five hundred-to-one "'raise[s] a suspicious judicial eyebrow.'"[103] Although the Court rejected the notion of a mathematical bright line between the constitutionally acceptable and unacceptable,[104] a few years later in *Campbell*, the Court observed that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[105]

Finally, the third guidepost used to decide gross excessiveness is a comparison of the punitive damage award with the civil and criminal penalties for similar misconduct.[106] In *Gore*, the Court surveyed Alabama statutes on deceptive trade practices and noted that the maximum civil sanction of two thousand dollars for BMW's conduct was substantially smaller than the punitive damage award of two million dollars.[107] The Court concluded that this disparity could not "be justified on the ground that it was necessary to deter future misconduct" because "there [was] no basis for assuming that a more modest sanction would not have been sufficient to motivate full compliance with the disclosure requirement imposed by [Alabama law]."[108]

Considering the three guideposts together, the *Gore* Court acknowledged that Alabama had an interest in protecting its citizens from deceptive trade practices but held that BMW's conduct was not so egregious as to justify a two-million-dollar punitive sanction.[109]

The creation of these guideposts gave new contours to an existing substantive due process principle. Though the Court couched its opinion in procedural due process terms,[110] this framework functioned as a crutch, used

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100. 499 U.S. 1 (1991).

101. 509 U.S. 443 (1993).

102. *Gore*, 517 U.S. at 581 (quoting *Haslip*, 499 U.S. at 23–24, and citing *TXO Prod. Corp.* 509 U.S. at 459).

103. *Id.* at 583 (quoting *TXO Prod. Corp.*, 509 U.S. at 481).

104. *Id.* at 582.

105. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

106. *Id.* at 428; *Gore*, 517 U.S. at 583.

107. *Gore*, 517 U.S. at 583–84.

108. *Id.* at 585.

109. *Id.*

110. *See id.* at 574–75 ("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty . . . ."). Fair notice to the defendant is a classic procedural due process concept. *See* Fuentes v. Shevin, 407 U.S. 67, 80 (1972) ("For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'") (quoting Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1863)); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 523 (2d ed. 2002) (teaching that notice is a classic procedural due process issue); Paul M. Sykes, *Marking a Road to Nowhere? Supreme Court*

to reach discussion of the substantive due process "grossly excessive" standard[111] while citing to less-controversial procedural due process precedents.[112] The Court had already held in *TXO Production Corp.* that grossly excessive punitive awards violate substantive due process,[113] so *Gore*'s announcement of three guideposts for determining gross excessiveness merely clarified the meaning of that substantive rule.[114] Thus, despite procedural due process language in the *Gore* opinion, both commentators and the Court itself state that *Gore* imposed a substantive due process limit on the size of punitive awards.[115]

2. Differences Between Punitive Damages and Statutory Damages.— This Note addresses statutorily fixed damage awards, which differ from the jury awards of punitive damages in *Gore* and *Campbell*[116] in two significant respects. First, unlike a jury's punitive damage award, the amount of a

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Sets Punitive Damages Guideposts in BMW v. Gore, 75 N.C. L. REV. 1084, 1113 (1997) (remarking that notice has traditionally been associated with procedural due process).

111. *See Gore*, 517 U.S. at 574–75 (indicating that the three guideposts assess gross excessiveness of a punitive award). Indeed, the Court later talks in substantive due process language, stating that "the damages awarded [must] be reasonably necessary to vindicate the State's legitimate interests in punishment and deterrence." *Id.* at 568. Similarly, the *Campbell* Court stated that "[t]o the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property." 538 U.S. at 417.

112. *Gore*, 517 U.S. at 574 n.22 (citing four cases protecting against "judgments without notice"). Justice Scalia's dissent in *Gore* illustrates the controversy surrounding substantive due process rights: "I do not regard the Fourteenth Amendment's Due Process Clause as a secret repository of substantive guarantees . . . ." *Id.* at 598 (Scalia, J., dissenting).

113. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 458, 469 (1993) (noting that grossly excessive awards violate the Fourteenth Amendment's Due Process Clause, but ultimately not overturning the punitive damages being reviewed); *id.* at 470 (Scalia, J., concurring) (noting that the plurality was acknowledging a substantive due process right).

114. This move of using a later case to elaborate in detail on an already-established constitutional standard is not unique to this case. *See, e.g.*, County of Sacramento v. Lewis, 523 U.S. 833 (1998) (fleshing out the meaning of the already-established "shocks the conscience" substantive due process standard).

115. *See Campbell*, 538 U.S. at 416 (citing *Gore* for the proposition that there are substantive limitations on punitive damage awards); Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433 (2001) ("[T]he Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on [the] discretion [to fix punitive damages]."); CHEMERINSKY, *supra* note 110, at 524 (citing *Gore* for its holding that substantive due process prevents excessive punitive damage awards); Sykes, *supra* note 110, at 1112–13 (explaining why *Gore* was a substantive due process case).

116. *See, e.g.*, *Gore*, 517 U.S. at 565. This Note uses the word "punitive" in two different and potentially confusing ways. Used as an adjective, "punitive" describes any monetary award—whether the amount is fixed by judge, jury, or statute—that punishes the defendant. *See* BLACK'S LAW DICTIONARY 1270 (8th ed. 2004) (defining the adjective "punitive" as "[i]nvolving or inflicting punishment"). In contrast, and consistent with doctrinal usage, this Note employs the phrase "punitive damages" (or "punitive damage" as an adjective) to reference only jury-assessed punitive awards, whose amounts are not known before trial. *See* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 15 (1991) (describing the traditional approach to an award of punitive damages as "initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct").

minimum statutory damage award is always known. Second, unlike a punitive damage award, which is assessed by a jury, legislators fix the minimum amount of a statutory damage award.

To address the first difference, observe that the Court's rationale in *Gore* and *Campbell* indicates that substantive due process prohibits any grossly excessive monetary award that is imposed for the purposes of punishment and deterrence, without regard to its predictability.[117] Thus, the prohibition would apply even to known statutory damage awards if they had a punitive component.[118] Perhaps if the due process limit were procedural and depended solely on fair notice to the defendant, then the notice provided by a statutory damage provision would negate any constitutional concern. But, as just discussed above,[119] *Gore* ultimately applied a substantive due process standard. Substantive due process and procedural due process embody separate and distinct rights, so even if a defendant receives fair *notice* of the size of a punitive award, the three *Gore* guideposts would still be applied to ensure that the award's *size* is not grossly excessive. One court considering this issue put it simply: "[*Gore*]'s guideposts are applicable even when the defendant has adequate notice of the amount at issue."[120] Commentators agree: A grossly excessive penalty does not satisfy substantive due process merely because the defendant can see it coming.[121]

The second difference is that juries fix punitive damage awards while legislators fix the size of minimum statutory damage awards. This raises two questions: First, does judicial review of this legislative choice infringe on separation of powers? Second, do the *Gore* guideposts make sense when evaluating a legislatively fixed punishment? This Note defers answering the

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117. *See id.* at 568 (stating that the Court will examine "punitive award[s]" that serve the government's "interests in punishment and deterrence"). The Court's *Campbell* opinion supports this conclusion when it broadly states that the due process limit applies to "punishments," 538 U.S. at 416, 419, and "award[s]," *id.* at 417, not just punitive damages. Another Supreme Court case summarized *Gore* as "prohibit[ing] the States from imposing grossly excessive *punishments* on tortfeasors." *Cooper Indus.*, 532 U.S. at 434 (internal quotations omitted; emphasis added). This quote, focusing on "tortfeasors," also suggests that these prohibitions would not apply to criminal fines, only to awards assessed in the civil system. *See id.*

118. Though this conclusion follows from the Court's recent jurisprudence, a much older line of cases also reaches the same conclusion. St. Louis, Iron Mountain & S. Ry. v. Williams, 251 U.S. 63, 66 (1919) (holding that the Fourteenth Amendment's Due Process Clause "places a limitation upon the power of the States to prescribe penalties for violations of their laws").

119. *See supra* notes 110–15 and accompanying text.

120. VF Corp. v. Wrexham Aviation Corp., 112 Md. App. 703, 731 (Md. Ct. Spec. App. 1997), *aff'd in part and rev'd in part on other grounds*, 715 A.2d 188 (Md. 1998).

121. *See, e.g.*, CHEMERINSKY, *supra* note 110, at 524 (distinguishing between procedural and substantive due process and noting that "regardless of the procedures followed," substantive due process imposes limits on punitive damage awards); John Zenneth Lagrow, BMW of North America, Inc. v. Gore*: Due Process Protection Against Excessive Punitive Damages Awards*, 32 NEW ENG. L. REV. 157, 194 (1997) (finding that even if the defendant had notice of disproportionately large punitive damages, the award would still be reviewed for gross excessiveness).

first question until subpart III(D) below,[122] which discusses reasons for judicial nonenforcement of the substantive due process norm. It bears repeating here that this Note primarily implores Congress, not courts, to consider substantive due process limits on copyright's statutory damages.

To answer the second question, this Note looks to each of the three *Gore* guideposts in turn. The first guidepost, the reprehensibility of the defendant's conduct, translates easily from the review of a punitive damage award to the review of a statutory damage award. A determination of the blameworthiness of the defendant's conduct does not depend on whether punitive damages or statutory damages were awarded. Similarly, the second guidepost, the ratio "between the penalty and the harm to the victim caused by the defendant's actions,"[123] can be translated to a review of a statutory damage award. This guidepost does present the challenge of distinguishing between the compensatory and punitive portions of a statutory damage award, but the model developed in the next section accomplishes this for the file-sharing scenario.[124]

However, the third guidepost, a comparison of the challenged punishment to the "civil penalties authorized or imposed in comparable cases,"[125] presents a difficulty, because the civil sanction is precisely what is being scrutinized here. Resolving this difficulty requires an understanding of what purpose this guidepost serves. At the outset, we should be clear that the substantive due process baseline to which damages are compared under the Court's jurisprudence is the legitimate government *goal* of punishment and deterrence, not the actual *sanction* imposed by the government. Throughout its opinions in *Gore* and *Campbell*, the Court compares the jury's award of punitive damages to the government's "goal,"[126] "interest,"[127] "purpose,"[128] and "objective"[129] of punishing and deterring misconduct. The government is quite free to select punishment and deterrence as the goals of a law, and it can use punitive damages as a means to those ends; however, the means must not be grossly excessive in relation to those goals.

So why did the *Gore* Court examine legislative judgment about appropriate sanctions for the defendant's misconduct when assessing the jury's award of punitive damages? Perhaps the Court used the legislature's choice to get an idea of the highest constitutionally permissible punishment. But this would assume that the legislatively fixed sanction was itself

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122. *See infra* notes 202–10 and accompanying text.

123. Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424, 425 (2001).

124. *See infra* notes 136–42 and accompanying text.

125. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 428 (2003) (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996)).

126. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 584 (1996).

127. *Campbell*, 538 U.S. at 417; *Gore*, 517 U.S. at 568.

128. *Campbell*, 538 U.S. at 417; *Gore*, 517 U.S. at 587 (Breyer, J., concurring).

129. *Campbell*, 538 U.S. at 420.

constitutional, which is precisely the question here. Upon closer examination, however, we can see a concern with the interplay between the state's legislative and judicial branches. Underlying this concern is the following principle: the government, through its policymaking body, can choose to view misconduct with various levels of seriousness, and it may legitimately choose to set the punishment for some particular misconduct below the maximum constitutional penalty; when this happens, however, the courts should not allow punitive damages to effectively negate the legislature's policy choice by pushing the punishment back up. Accordingly, the *Gore* Court looked at the Alabama legislature's policy choice on the appropriate punishment for deceptive trade practices in reviewing the punitive damages that were awarded by actors in the judicial system. When the Court "accord[ed] 'substantial deference' to legislative judgments concerning appropriate sanctions,"[130] it recognized that the judiciary should not counteract the legislature's policy choice by awarding penalties many times higher than the legislature saw fit.[131]

Thus, *Gore* says that there *is* a constitutional limit on the size of punitive sanctions, even when fixed by the legislature,[132] but that within this limit, the jury's punishment should roughly follow the legislature's policy choice. This explanation coheres with the principle that substantive due process creates only a ceiling on punitive government action. The government may depart downward from the maximum constitutional penalty, but it may not depart upward.

In contrast to the facts of *Gore*, the punitive sanction that is reviewed by this Note is fixed by the legislature, so there is no worry of a jury's judgment negating a legislative punishment policy.[133] Because this motivating concern is not present, application of the third *Gore* guidepost to the minimum statutory damage context yields no useful information—we would be comparing the statutory damage award to itself. Thus, this Note does not apply the third *Gore* guidepost in determining whether the punitive portion of

130. *Gore*, 517 U.S. at 583 (O'Connor, J., concurring in part and dissenting in part) (quoting Browing-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 301 (1989)).

131. To be clear, this is not how the Court presented the third guidepost. They said that it was part of the constitutionality judgment. *Id.* at 574, 583 (calling the guidepost an indicium of gross excessiveness). But this doesn't make sense because of the circular reasoning explained above—the constitutional upper-bound would depend on a legislatively fixed sanction that has not itself been reviewed for constitutionality and whose review under the Court's guidelines would involve comparing the civil penalty to itself.

132. *See* Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424, 433 (2001) ("[L]egislatures enjoy broad discretion in authorizing and limiting permissible punitive damages awards. . . . Despite the broad discretion that States possess with respect to the imposition of . . . punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion.").

133. Yet, as discussed above, there is still the worry of a grossly excessive penalty, so the substantive due process limit does not vanish altogether. *See supra* note 117–21 and accompanying text.

an aggregated minimum statutory damage award is grossly excessive in relation to the legitimate government goals of punishment and deterrence.

3. Punitive Aspects of Copyright's Statutory Damages for Illegal File-Sharing.—Because the substantive due process prohibition of grossly excessive penalties governs any award that is punitive in nature,[134] it is worthwhile to examine the punitive aspect of copyright's minimum statutory damages when awarded for illegal file-sharing. If the statutory damage award has a significant punitive aspect, it acts like the punitive damages that were subject to the Court's scrutiny in *Gore* and *Campbell*. This punitive aspect can be examined through two inquiries. The first simply asks what portion of a statutory damage award exceeds the actual loss suffered by the plaintiff and is thus punitive in nature.[135] The second inquiry looks at the purposes of a jury's punitive damage award and asks whether these purposes also motivate the imposition of a statutory damage award for illegal file-sharing.

The result of the first inquiry, which distinguishes between the compensatory and noncompensatory portions of a statutory damage award, invariably turns on the method for valuing the plaintiff's loss. This is a tricky inquiry because, in some cases, the exact loss is hard to measure. Indeed, overcoming this difficulty is a purpose of statutory damages.[136] But the harm from an infringement of copyright via illegal file-sharing does lend itself to being valued, for the primary concern of copyright holders with illegal file-sharing is a diminution in sales revenues.[137] Still, the true

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134. *See supra* note 117 and accompanying text.

135. This inquiry assumes that any statutory damage amount that is not compensatory is punitive in nature (punitive awards, in turn, have both retributive and deterrent functions). *See, e.g.*, Cass County Music Co. v. C.H.L.R., Inc., 88 F.3d 635, 643 (8th Cir. 1996); Unicity Music, Inc. v. Omni Communications, Inc., 844 F. Supp. 504, 510 (E.D. Ark. 1994) (both drawing a dichotomy between the compensatory and the punitive purposes of statutory damages for copyright infringement); *see also* Kemezy v. Peters, 79 F.3d 33, 34 (7th Cir. 1996) (Posner, C.J.) (noting that "deterrence is a purpose of punishment").

136. *See, e.g.*, Lauratex Textile Corp. v. Allton Knitting Mills, Inc., 519 F. Supp. 730, 732 (S.D.N.Y. 1981) ("In general, statutory damages are appropriate where . . . the measure of actual damages is difficult to prove."); Kenro, Inc. v. Fax Daily, Inc., 962 F. Supp. 1162, 1166 (S.D. Ind. 1997) (noting that the statutory damage remedy for illegal "junk faxing" was intended to remedy not just the cost of fax paper, but also the "difficult to quantify business interruption costs imposed upon recipients of unsolicited fax advertisements").

137. *See* A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1016–17 (9th Cir. 2001) (discussing whether online file-sharing "harms the market for plaintiffs' copyrighted musical compositions and sound recordings by reducing CD sales"); Neil Strauss, *File-Sharing Battle Leaves Musicians Caught in Middle*, N.Y. TIMES, Sept. 14, 2003, at A1 (reporting that the RIAA's chief justification for its campaign against file-sharing is the economic harm caused to musicians); Press Release, RIAA, RIAA Brings New Round of Cases Against Illegal File Sharers, *at* http://www.riaa.com/news/newsletter/032304.asp (Mar. 23, 2004) (evincing concern with the displacement of legitimate music purchasing by illegal file-sharing). Consider, however, that musicians might suffer non-economic harms from illegal file-sharing, such as the loss of creative control over the distribution of their music.

economic cost of illegal file-sharing is a highly contentious issue and has been the center of much debate.[138] Although the exact amount of the economic loss may never be certain, trying to conceptualize this loss is not a worthless endeavor, and this discussion makes such an effort.

There are multiple ways in which we might measure the economic loss caused by a defendant's file-sharing activities. To illustrate one such approach, consider the following example. Suppose that file-sharer W illegally downloads to her computer Led Zeppelin's song *Stairway to Heaven*. The song is downloaded to a shared folder on her computer and thereby made available for others to copy. Suppose further that three other file-sharers, X, Y, and Z, subsequently download the song from W's computer. Thus, there are four people in this example who desired the song but who did not pay to obtain it. In other words, there are four lost sales. Because file-sharers are sued independently, we need a way to apportion this harm among the relevant actors. How might this be done?

A starting basis for apportioning the harm is to deem the person who initiates a file transfer (the downloader) as having caused harm by that action. This person benefits by receiving for free a work of music that must be purchased to be legitimately obtained. Allowing her to escape responsibility for causing harm is not consistent with her initiative in effecting the illegal transaction. Stated differently, this person's money would have gone to the copyright owner (if indirectly) in order for her to obtain the song, but now the money stays in her pocket as a direct result of her affirmative actions. In contrast, the file-uploader gets no economic reward from her outbound transfer and may be unaware of the sharing.[139] Thus, we can assign the downloader responsibility for causing one lost sale by illegally downloading the copyrighted song.

The other half of this transaction is the uploading of this song, so we might also assign to a person responsibility for one unit of economic loss per act of distribution—each time that the actor uploads a copyrighted music file, she is responsible for a lost sale. This seems satisfactory at first because the distribution of copyrighted works is illegal and is necessary for file-sharing to work. This conception, however, overstates the actual economic loss. In

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138. *See Napster*, 239 F.3d at 1016–17 (surveying competing studies showing that file-sharing both harms and benefits the music industries in various degrees). *Compare Government Affairs Hearings*, *supra* note 30 (statement of Mitch Bainwol, Chairman & CEO, RIAA) (citing figures showing that recording industry revenues are shrinking as a result of illegal file-sharing), *with Judiciary Hearings*, *supra* note 32 (statement of Hank Barry, CEO, Napster, Inc.) (citing figures showing that file-sharing helps the recording industry); *compare* Strauss, *supra* note 137 (reporting that many musicians do not receive much in royalties but rather make money from concert tickets and merchandise, thus suggesting that the economic harm for file-sharing is not passed on from record companies to musicians), *with* Music United for Strong Internet Copyright, *Why You Shouldn't Do It*, *at* http://www.musicunited.org/4_shouldntdoit.html (last visited Sept. 11, 2004) (arguing that the losses from file-sharing directly impact musicians and songwriters).

139. *See supra* notes 28–29 and accompanying text.

our example, this conception would count seven units of economic harm (one for W's song download, three for W's uploads, and three more for each of X, Y, and Z's downloads). Yet the copyright owner in our example has suffered only four lost sales. This scheme, then, is flawed.[140]

Instead, this Note adopts a conception of file-sharing's economic harm that attributes responsibility for economic loss to a person's instances of illegal downloading but not distribution. One person's distribution is another person's downloading, so counting economic loss as caused by acts of distribution, in addition to counting acts of downloading, would overstate the total amount of harm. While this Note settles upon this model of file-sharing's economic harm, it is certainly not a perfect conception. For example, this model does not account for whatever revenue is generated by persons who first illegally download a song for sampling and then later purchase it legitimately.[141] Nor does it counterbalance this revenue by accounting for revenues lost due to a record company's impaired ability to market a collection of several songs as one unit, as on the typical album, or to collect licensing fees from online retailers that play short music samples to their customers. Thus, this Note acknowledges the existence of imperfections in its model of file-sharing's economic harm; it concedes that changes in this model will alter the separation of the punitive and compensatory portions of a statutory damage award and ultimately affect the outcome of substantive due process review.[142]

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140. It would, however, be consistent to limit the copyright owner to recovering for four lost sales while allowing the copyright owner to choose between collecting four units of loss from W or one from each of W, X, Y, and Z. Where more than one person can be responsible for a plaintiff's loss, we often allow the plaintiff to choose from whom to recover. *See, e.g.*, 17 U.S.C. § 504(c) (2000) (contemplating joint and several liability for copyright infringement). This approach suffers here from the unavailability of information that would eliminate double recoveries. File-sharers typically do not know the identities of their counterparts, so a file-downloader would not know whether the file-sharer who transferred a song to him had already satisfied a judgment compensating the copyright owner for that lost sale.

141. *See* Harmon & Schwartz, *supra* note 29 (reporting on a Manhattan doctor who uses file-sharing systems to sample songs and decide what to buy on CD); Oberholzer & Strumpf, *supra* note 1, at 23–24 (suggesting the generation of music sales revenue from file-sharing).

142. This model might be improved by a numerical analysis allocating the record industry's total lost revenues caused by illegal file-sharing among the multitude of file-sharers, though such an analysis is beyond the scope of this Note. The courts in *Napster* and *Aimster* did not decide on a damage model since they granted only injunctive relief, so we lack the benefit of their decisions on this matter. *See Napster*, 239 F.3d at 1011; *In re* Aimster Copyright Litig., 334 F.3d 643, 655–56 (7th Cir. 2003).

Furthermore, a model that assigns responsibility for causing harm in fractions of lost sales could allocate responsibility among both uploaders and downloaders without overcounting the total number of lost sales. There are, however, inherent difficulties in determining the economic harm caused by uploading, due to the difficulty of tracking a file-sharer's uploads over time. It would therefore become difficult to value the compensatory component of a statutory damage award, in turn making it difficult to value the punitive component of such an award. Such a fractional-lost-sales model does not allow us to determine the ratio of punishment to compensation, thus preventing meaningful substantive due process review of the award under the *Gore* guideposts. The superior competence of the legislature in drawing a dividing line in murky situations such as this is

Having explained why a file-sharer is held responsible for causing one lost sale for each copyrighted work that he or she illegally downloads, it becomes apparent that the harm caused by the defendant's sharing of one copyrighted song is significantly less than $750, being closer to a typical music album's price.[143] Thus, the compensatory portion of a statutory damage award is heavily outweighed by the noncompensatory portion. This conclusion, that copyright law's minimum statutory damage award for illegal file-sharing has a substantial punitive component, explains why the substantive due process prohibition of grossly excessive punishments adheres in this context.

In addition to examining the punitive *portion* of a statutory damage award, we can also query whether it has punitive *purposes*. The answer is yes; the statutory damage remedy in copyright law is meant to punish and deter copyright infringement. In the legislative history of the Copyright Act of 1976, we find the declaration that "statutory damages are intended (1) to assure adequate compensation to the copyright owner for his injury, and (2) to deter infringement."[144] The latter deterrent effect is achieved by punishing infringers.[145] The courts too acknowledge that copyright's statutory damages have a punitive purpose: "[S]tatutory damages for copyright infringement are not only 'restitution of profit and reparation for injury,' but also are in the

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one reason that subpart III(D) suggests that courts will stop short of invalidating an aggregated statutory damage award.

143. For the sake of comparison, the RIAA's 2003 year-end statistics showed an average CD price of $15.06. *See* RIAA, *2003 Yearend Statistics*, *at* http://www.riaa.com/news/newsletter/pdf/2003yearEnd.pdf (last visited Sept. 11, 2004) (listing $11.2326 billion in revenue on 745.9 million CDs, which divides out to $15.06 per CD); *see also* Donna De Marco, *Music Going for a Song on the Internet; CD Prices Lowered to Boost Holiday Sales, but Web Sites Still a Hit*, WASH. TIMES, Dec. 12, 2003, at C08 (reporting an average CD price from January 2003 through October 2003 of $13.42). Both of these valuations of the cost of a lost CD sale are much less than the statutory damage floor of $750, meaning that a large part of that amount is noncompensatory.

144. STAFF OF HOUSE COMM. ON THE JUDICIARY, 87TH CONG., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 103 (Comm. Print 1961), *reprinted in* 3 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (George S. Grossman ed., 1976).

145. *See* Kemezy v. Peters, 79 F.3d 33, 34 (7th Cir. 1996) (Posner, C.J.) (noting that "deterrence is a purpose of punishment"). Some commentators argue that the deterrence function should actually extend far beyond any retributive award, suggesting the use of a "punitive damages multiplier" in calculating the proper amount of punitive damages. A. Mitchell Polinksy & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 889 (1998). Under their conception, punitive damages are properly calculated as the amount of loss in the case multiplied by the inverse probability of the injurer being found liable. *Id.* However, the Supreme Court appears to lack receptivity to this approach. In *Campbell*, the Court stated that "the argument that State Farm will be punished only in the rare case . . . had little to do with the actual harm sustained by the Campbells" and emphasized that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 427, 423 (2003). For a more lengthy discussion of punishment and retribution in damages, see generally Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 356–72 (2003).

nature of a penalty, 'designed to discourage wrongful conduct.'"[146] Thus, copyright's statutory damages, at least in part, serve the same purpose as a jury's award of punitive damages, "to punish the actor's misconduct, and deter others from committing similar acts."[147] While there is nothing wrong with the government imposing penalties for violations of its laws,[148] the penalties will be subject to substantive due process limits.[149]

B. The Role of Aggregation

In applying the *Gore* guideposts to evaluate whether a minimum statutory damage award imposes a grossly excessive penalty, the result depends on whether the statutory damages are aggregated across many similar violations. Aggregation creates the constitutional concern with copyright law's minimum statutory damage award.[150] This subpart explains this conclusion by discussing two troublesome byproducts of aggregation: distortion of the incentive-to-sue purpose of statutory damages and the inappropriate imposition of "wholly proportionate" reprehensibility.

When statutory damages are awarded singly or in small numbers, few disinterested parties have a problem with the amount being significantly higher than whatever loss the plaintiff has suffered.[151] The punitive portion of such a statutory damage award serves valuable functions, such as providing an incentive to sue, an incentive often of practical necessity for plaintiffs to enforce their rights.[152] But once the plaintiff has an adequate incentive to sue, there is little need to increase this monetary incentive by multiplying the penalty thousands of times. Recognizing this principle, a recent Second Circuit case, discussed below, observed that massive

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146. Cass County Music Co. v. C.H.L.R., Inc., 88 F.3d 635, 643 (8th Cir. 1996) (quoting F.W. Woolsworth Co. v. Contemporary Arts, Inc., 344 U.S. 228, 233 (1952)).

147. Olson et al., *supra* note 71, at 15.

148. Mo. Pac. Ry. v. Humes, 115 U.S. 512, 523 (1885) ("The power of the state to impose fines and penalties for a violation of its statutory requirements is coeval with government.").

149. St. Louis, Iron Mountain & S. Ry. v. Williams, 251 U.S. 63, 66 (1919) (holding that due process "places a limitation upon the power of the states to prescribe penalties for violations of their laws"); *see supra* notes 118–21 and accompanying text.

150. *Cf.* United States v. Green, No. 02-10054-WGY, 2004 U.S. Dist. LEXIS 11292, at *145 (D. Mass. June 18, 2004) ("It is well settled that several actions, none of which individually violates the Constitution, may do so collectively.").

151. In fact, courts honor the plaintiff's election of statutory damages even if no actual harm is proven to have been suffered from the defendant's misconduct. Harris v. Emus Records Corp., 734 F.2d 1329, 1335 (9th Cir. 1984) ("Statutory damages may be elected whether or not there is adequate evidence of the actual damages suffered by plaintiff or of the profits reaped by defendant.").

152. A statutory damage award is also intended to counteract the indeterminacy of the plaintiff's actual loss, though the model developed above in section III(A)(3) would address that concern here. *See supra* notes 136–49 and accompanying text. For a further survey of the purposes of punitive damages, see generally *Kemezy v. Peters*, 79 F.3d 33, 34–36 (7th Cir. 1996) (Posner, C.J.).

aggregation can distort the incentive-to-sue purpose of statutory damages and result in an unconstitutionally large penalty.[153]

Aggregation also raises questions of what I call "proportionate reprehensibility." At the outset, it is important to distinguish between the concepts of proportionate *reprehensibility* and proportionate *harm*. To be sure, the copyright owner must get remuneration for all of the harm caused by the defendant's illegal file-sharing. All things being equal, downloading twice the number of songs would merit twice the amount of compensation; the harm is wholly proportionate to the number of copyright infringements. But punishment serves functions distinct from remuneration. Punishment is the government's retribution for violating society's laws,[154] admonishing the defendant's illegal actions.[155] It also deters future misconduct by making the cost of illegal action more expensive than any realizable gain.[156] This distinction raises several questions: Does the defendant who first installs file-sharing software on her computer and then downloads two copyrighted songs really deserve twice the *punishment* as the defendant who installs file-sharing software and downloads just one song? Or, in the alternative, does the initial decision to engage in illegal file-sharing, by itself, comprise some significant part of the defendant's overall reprehensibility? If so, is not that factor present only once in the file-sharing scenario, regardless of how many songs are downloaded? Our current system of aggregating statutory damages imposes an answer of yes to the first question and no to the next two questions. To the extent that the defendant's reprehensibility is not wholly proportionate to the number of illegally downloaded songs, this imposition is inappropriate. The second section below takes up this discussion.

1. Suggestions of Parker v. Time Warner.—A recent Second Circuit case, *Parker v. Time Warner Entertainment Co.*,[157] speaks about the troubles of stacking statutory damage awards that have a punitive component. In *Parker*, cable television subscribers brought a class action alleging that Time Warner had violated certain consumer privacy provisions of the Cable Communications Policy Act of 1984 (CCPA).[158] The CCPA provides that a cable subscriber can recover statutory damages of $1,000 for a violation of

153. *See infra* notes 157–75 and accompanying text (discussing Parker v. Time Warner Entm't Co., 331 F.3d 13 (2d Cir. 2003)).

154. *See* Sharkey, *supra* note 145, at 359–63 (discussing the retributive nature of punitive awards).

155. *See* Cooper Indus. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (observing that the "imposition of punitive damages is an expression of moral condemnation").

156. Dream Dealers Music v. Parker, 924 F. Supp. 1146, 1153 (S.D. Ala. 1996) (stating that the amount of damages must "put the defendant on notice that it costs more to violate the copyright law than to obey it").

157. 331 F.3d 13 (2d Cir. 2003).

158. *Parker*, 331 F.3d at 15.

its privacy provisions.[159] If this minimum statutory damage award were aggregated across the relevant class of approximately twelve million cable subscribers, the resulting liability would be huge.

On appeal of denial of class certification, the Second Circuit spoke about the constitutional concern raised by aggregation. Citing to the substantive due process limit on punitive awards announced and applied in *Gore* and *Campbell*,[160] the court opined that "[i]t may be that the aggregation in a class action of large numbers of statutory damages claims potentially distorts the purpose of both statutory damages and class actions" and that "in a sufficiently serious case the due process clause might be invoked . . . [to] reduce the aggregate damage award."[161] Noting the potential for a "devastatingly large damages award, out of all reasonable proportion to the actual harm," the court ultimately avoided the constitutional issue by deciding the case on class-action grounds.[162]

The concurring opinion offered a similar analysis. Referring to the successful substantive due process challenges in *Gore* and *Campbell*, Judge Newman noted that, like punitive damages, statutory damages are intended in part to punish and deter, and he too suggested that due process objections analogous to those in *Gore* and *Campbell* might be raised upon the aggregation of the CCPA's statutory damage award.[163] Judge Newman also avoided deciding the constitutional question, but he suggested that the court resolve the case through statutory construction in addition to the class-action grounds relied upon by the majority.[164] He advocated employing the statutory construction principle that "statutes are not to be applied according to their literal terms when doing so achieves a result manifestly not intended by the legislature."[165] Finding that, on one hand, Congress would almost certainly not have intended for the aggregated effect of the CCPA's statutory damage provision to reach into the billions of dollars, but that, on the other hand, Congress likely still intended that violators pay for their misconduct, Judge Newman construed the statutory damage provision to authorize an award of substantially less than the minimum amount prescribed by statute.[166]

Judge Newman's approach of construing a statute against its literal terms has also been applied to a different statutory damage provision. In

159. 47 U.S.C. § 551(f)(2)(A) (2000).

160. *Parker*, 331 F.3d at 22 (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996), and State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003)).

161. *Id.*

162. *Id.*

163. *Id.* at 26 (Newman, J., concurring).

164. *Id.* at 27 (Newman, J., concurring).

165. *Id.*

166. *Id.*

Texas v. American Blastfax, Inc.,[167] Judge Sparks of the Western District of Texas applied this rule in interpreting the Telephone Consumer Protection Act's provision for exactly "$500 in damages for each violation" of the prohibition against sending unsolicited faxes.[168] In considering the aggregation of the statutory damage award across the 4.6 million unsolicited faxes sent by the defendant, Judge Sparks read the statutory damage provision against its literal terms, authorizing an award of seven cents per violation (the actual cost to recipients of an unsolicited fax) because it would be "inequitable and unreasonable" to award the full $500 amount.[169] Notably, this reduction eliminated *any* punitive portion of the statutory damage award.[170] Consistent with this Note's argument that only aggregated statutory damages are troublesome, in an earlier ruling, Judge Sparks ruled that the non-aggregated statutory damage provision did not create constitutional concern.[171]

These cases are not discussed to recommend departure from the plain text of minimum statutory damage provisions, but rather for their recognition that massive aggregation distorts the purposes of such provisions not just in copyright law, but in many contexts. *Parker*, in particular, emphasizes the idea that underlies this Note's argument: the aggregation of statutory damages containing a significant punitive component[172] across many similar acts[173] of relatively irreprehensible misconduct[174] raises substantive due process problems like those raised in *Gore* and *Campbell*.[175]

2. Wholly Proportionate Reprehensibility.—Before fully evaluating the *Gore* guideposts in the next subpart, let us briefly consider what effect the repetition of illegal file-sharing has on the defendant's reprehensibility. The

167. 164 F. Supp. 2d 892 (W.D. Tex. 2001).

168. 47 U.S.C. § 227(f)(1) (2000).

169. *Am. Blastfax*, 164 F. Supp. 2d at 900–01.

170. *Id.* Judge Sparks's calculus did not address the issue of damages for the invasion of privacy. *See id.*

171. Texas v. Am. Blastfax, Inc., 121 F. Supp. 2d 1085, 1090–91 (W.D. Tex. 2000). Judge Sparks cited to the much earlier case of *St. Louis, Iron Mountain & Southern Railway v. Williams*, 251 U.S. 63 (1919), which also upheld the constitutionality of highly punitive statutory damages when awarded singularly to each of two plaintiffs. *Id.* at 64–67; *Am. Blastfax*, 121 F. Supp. 2d at 1090–91.

172. *See* Parker v. Time Warner Entm't Co., 331 F.3d 13, 26 (2d Cir. 2003) (Newman, J., concurring) (noting the punitive role served by the CCPA's statutory damages).

173. *Id.* (Newman, J., concurring) (noting the "massive aggregation" of minimum statutory damages in this case).

174. *Id.* at 22 (contrasting the strict liability for statutory damages in this case with the "egregious conduct typically necessary to support a punitive damages award"); *id.* at 26 (Newman, J., concurring) (labeling the misconduct as a "somewhat technical violation").

175. *Id.* at 22 (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996), and State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003)); *id.* at 26 (Newman, J., concurring) (also citing both cases).

Court has clearly stated that "repeated misconduct is more reprehensible than an individual instance of malfeasance."[176] How much more reprehensible?

We might think that reprehensibility is "wholly proportionate" to the number of copyrights infringed—there should be twice the reprehensibility for twice the number of illegal acts. But is it indisputably true that the actions of a person who has downloaded two hundred copyrighted songs are twice as blameworthy as the actions of someone who has downloaded one hundred songs?[177] While an affirmative answer is certainly defensible, one could also argue for "partially proportionate" reprehensibility by employing an analogy to criminal law's single larceny rule. The broader form of that rule roughly states that a series of property crimes should be considered as a single count of larceny if done as part of a general fraudulent scheme.[178] The rule's rationale is that once a defendant commits to a larcenous course of action, for example the burglary of a consignment store, most of his blameworthiness comes from that decision to commit burglary, not from a decision to take two items from the store instead of one.[179] Although we are concerned here not with criminal liability for larceny but rather with civil liability for copyright infringement, an analogy can be drawn between the criminal defendant who enters a store and steals multiple items and the civil defendant who installs file-sharing software and downloads many files. In both cases, the defendant's blameworthiness is not a one-to-one multiple of the number of property right violations, for some of the defendant's reprehensibility comes from committing to the illegal course of action.

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176. *Gore*, 517 U.S. at 577.

177. To reiterate, there is no doubt that twice the amount of *harm* is caused and thus twice as much damage must be compensated, but this inquiry concerns the *moral blame* to be placed on the defendant.

178. *See, e.g.*, MO. ANN. STAT. § 570.050 (West 1999) ("Amounts stolen pursuant to one scheme or course of conduct, whether from the same or several owners and whether at the same or different times, constitute a single criminal episode and may be aggregated in determining the grade of the offense."); United States v. Billingslea, 603 F.2d 515, 520 n.6 (5th Cir. 1979) ("We note with approval the position adopted by a number of state courts that a series of larcenies may be properly charged in a single larceny where 'there was a continuing impulse, intent, plan, or scheme actuating the several takings.'"); Horsey v. State, 169 A.2d 457, 459 (Md. 1961) (holding that if separate takings were pursuant to "a common scheme or intent," then "the fact that the takings occur on different occasions does not establish that they are separate crimes"). The narrower form of the single larceny rule requires the takings to occur at the same time and place. *See, e.g.*, State v. Cabbell, 252 N.W.2d 451, 453 (Iowa 1977) ("Under the single larceny rule '. . . the stealing of property from different owners at the same time and at the same place constitutes but one larceny.'") (alteration in original).

179. *See generally* GEORGE E. DIX & M. MICHAEL SHARLOT, CRIMINAL LAW 241–51 (4th ed. 1996) (discussing the single larceny rule and merger doctrines).

C. Application: Illegal File-Sharing and Statutory Damages

This subpart discusses how this Note's constitutional challenge should pan out in the file-sharing scenario described above,[180] considering both the Court's recent substantive due process jurisprudence and the recent judicial concern with massively aggregating the punitive component of minimum statutory damage awards. This is not a challenge to one or even a few minimum statutory damage awards, but rather to the aggregation of such awards over many hundreds or thousands of instances of misconduct.[181] Because such aggregation distorts the incentive-to-sue justification of statutory damages, as *Parker* suggests,[182] and improperly treats the defendant's reprehensibility as wholly proportionate,[183] concern with imposing a grossly excessive penalty arises. Admittedly, *Parker* involved the aggregation of a statutory damage award millions of times, not thousands as would be in the case here, but that just means that along the spectrum of aggregation we have located a more extreme point that generates constitutional concern. It does not establish some lower bound of aggregation that must be satisfied before aggregated statutory penalties become grossly excessive.

The first *Gore* guidepost for determining gross excessiveness is the degree of reprehensibility of the defendant's conduct.[184] The *Campbell* Court's test evaluates several factors for determining a file-sharer's reprehensibility:[185] whether "the harm caused was physical as opposed to economic" (no); whether the conduct "evinced an indifference to or reckless disregard of the health or safety of others" (no); whether "the target of the conduct had financial vulnerability" (no);[186] whether the defendant's conduct "involved repeated actions" (yes); and whether "the harm was the result of intentional malice, trickery, or deceit, or mere accident" (neutral or indeterminate).[187] Thus, four of these five factors fail to indicate that the defendant's conduct is highly reprehensible. As for the fifth factor, although the file-sharer's recidivism tends to increase her culpability, the Court in

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180. *See supra* notes 61–69 and accompanying text.

181. *See* Ahrens, *supra* note 6 (reporting that the average file-sharer being sued has downloaded about one thousand songs).

182. *See supra* notes 151–75 and accompanying text (discussing Parker v. Time Warner Entm't Co., 331 F.3d 13 (2d Cir. 2003)).

183. *See supra* notes 176–79 and accompanying text (discussing wholly proportionate reprehensibility).

184. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996).

185. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003).

186. As a baseline for "financial vulnerability," consider that Dr. Gore was not financially vulnerable, *Gore*, 517 U.S. at 576, and that he presumably had a good amount of wealth (he was buying a $40,000 luxury car after all). *Id.* at 563. The plaintiffs here are record companies that very likely have significantly more resources than Dr. Gore did.

187. The file-sharer's conduct in our scenario does not fall at either extreme, for it is not the result of malice or trickery, but neither can it be said to be mere accident. *See supra* notes 54–60 and accompanying text (concluding that a finding of innocent infringement is unlikely).

Campbell emphasized that the existence of just one factor weighing against the defendant may alone be insufficient to sustain a punitive award.[188] When we also consider the single-larceny-rule analogy,[189] which would indicate that the repetition of the defendant's misconduct does not increase her blameworthiness in strict proportion, the balance tilts towards a lower degree of reprehensibility.[190]

The second *Gore* guidepost for evaluating the gross excessiveness of a punitive sanction is the ratio between the penalty and the harm to the victim caused by the defendant's actions.[191] While a court would likely desire more detailed evidence about actual harm,[192] there is a significant double-digit ratio[193] between the $750 minimum statutory damage award[194] and the typical retail price of a music album,[195] which cuts towards a finding of excessiveness. Yet the Court has stated that a high ratio "may be justified in cases in which the injury is hard to detect,"[196] and it is surely costly to monitor and detect the illegal downloading and uploading of music files.[197]

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188. *Campbell*, 538 U.S. at 419.

189. *See supra* notes 176–79 and accompanying text.

190. Prevailing social norms may also influence a court's judgment of reprehensibility. *See* Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 77 (2003) ("[I]t is difficult to imagine how a court could ever decide a case without relying upon cultural ideas and constructs. . . . [A] court must deliberate and judge within the categories of cultural meaning that it shares with society at large. No other alternative seems possible or desirable."). To the degree that this is true, the fact that many persons in society find no immorality in unauthorized file-sharing may suggest that courts would view illegal file-sharing with less reprehensibility. *See supra* note 33 (describing various polls, studies, and anecdotal evidence showing that a large section of society does not view unauthorized music-file sharing as immoral).

191. *Gore*, 517 U.S. at 580.

192. For a discussion of the extent to which courts' lack of expertise in assessing, and lack of information about, the compensatory/punitive divide weighs against invalidating an aggregated statutory damage award, see *infra* notes 202–10 and accompanying text. The recovery of statutory damages under copyright law does not require proof of actual loss; rather, it is the constitutional challenge that makes this information relevant.

193. The Court has stated that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Campbell*, 538 U.S. at 425.

194. 17 U.S.C. § 504(c)(1) (2000) (fixing minimum statutory damages of $750 per work).

195. *See supra* note 143 (providing data on average prices of CDs). While the retail price of a music album is a plausible valuation of the plaintiff's loss from an act of file-sharing, another plausible valuation would be the loss of per-song licensing fees from online music retailers. As a proxy for this value, consider that Apple's popular iTunes service sells single songs, with some restrictions, for approximately one dollar. Apple iTunes Music Store, *at* http://www.apple.com/itunes/store/shop.html (last visited Sept. 11, 2004) ("The iTunes Music Store is designed for instant gratification, letting you buy a song for just 99¢ . . . ."). The larger of these two values is used because it includes the lost revenue from the sale of the entire album on which a song may appear, which dovetails well with copyright law's treatment of all songs on a compilation as one work for statutory damage purposes. 17 U.S.C. § 504(c)(1).

196. *Gore*, 517 U.S. at 582.

197. In addition to administrative complexities, new file-sharing and networking technologies can disguise the identities of file-sharers, increasing the difficulty of detection. Saul Hansell, *Crackdown on Copyright Abuse May Send Music Traders Into Software Underground*, N.Y. TIMES, Sept. 15, 2003, at C1 ("Hundreds of software developers are racing to create new systems, or

On the other hand, copyright owners can file "John Doe" lawsuits and discover the identity of each "Doe Defendant,"[198] and record companies have recently filed almost six thousand lawsuits against file-sharers.[199] Still, the difficulty of identifying individual infringers does weaken the second *Gore* guidepost.[200]

All things considered, however, the aggregated punitive components of copyright's minimum statutory damage award in the file-sharing scenario of Part II may fairly be deemed grossly excessive under the two applicable *Gore* guideposts. Although the second *Gore* guidepost (comparing punitive and compensatory monetary amounts) may be somewhat less telling than the first (assessing reprehensibility), this is balanced by the attachment of more importance to the first guidepost than to the second.[201] But despite a good substantive due process argument under the *Gore* guideposts and the aggregation concerns of *Parker*, courts will likely still refrain from invalidating an aggregated statutory damage award out of practical institutional considerations, as explained in the next subpart.

D. Reasons for Judicial Inaction and Legislative Reforms

Courts are sometimes guided by "reasons having to do with the practical competence of courts and the imperatives of preserving a domain of official discretion."[202] Two such reasons make the judicial invalidation of an aggregated statutory damage award for illegal file-sharing unlikely. First is the difficulty of assessing the true monetary harm caused by unauthorized file-sharing for personal use. A court may acknowledge that there is a special legislative competence to make complex factual determinations and

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modify existing ones, to let people continue to swap music—hidden from the prying eyes of the Recording Industry Association of America, or from any other investigators.").

198. *See, e.g.*, Motown Record Co. v. Does 1–252, No. 1:04-CV-439-WBH, slip op. at 3 (N.D. Ga. Mar. 1, 2004) ("Plaintiffs may serve immediate discovery on Cox to obtain the identity of each Doe Defendant by serving a Rule 45 subpoena that seeks information sufficient to identify each Doe Defendant, including the name, address, telephone number, e-mail address, and Media Access Control address for each Defendant."), *available at* http://eff.org/IP/P2P/RIAA_v_ThePeople/JohnDoe/20040301_Motown_Order.pdf. The RIAA began filing John Doe lawsuits in response to the judicial invalidation of its use of 17 U.S.C. § 512 subpoenas to discover the identities of ISP customers engaging in illegal file-sharing. RIAA v. Verizon Internet Servs., 351 F.3d 1229 (D.C. Cir. 2003), *cert. denied*, 2004 U.S. LEXIS 6700 (U.S. 2004); Peter J. Pizzi, *'Doe' Defendants: The RIAA's New Front in the Battle Against 'P2P' Filesharers*, N.Y. L.J., June 8, 2004, at 5 (noting that the RIAA has "turned to the use of 'John/Jane Doe' lawsuits" in which "the RIAA usually files a complaint and then immediately applies for issuance of a subpoena directed to the Doe defendant's ISP, seeking to compel production by the ISP of account information identifying the Doe defendants").

199. *See supra* note 65 and accompanying text.

200. Congress should seek more information on the difficulty of injury detection and enforcement when evaluating the multiplier between compensatory and punitive damages.

201. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575 (1996).

202. Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 364–65 (1993).

that courts "lack both the expertise and familiarity"[203] with the economic analysis that is required to wisely assess the economic harm caused by illegal file-sharing. Further, courts may also be unwilling to decide on a model that allocates responsibility between uploaders and downloaders because this requires a policy-based balancing of interests that is outside of the judiciary's institutional role.[204]

These considerations suggest the second reason for judicial inaction: respect for separation of powers. *Gore* and *Campbell* were both cases about the state judicial system's review of a jury's award of punitive damages. While federalism concerns were implicated by the Supreme Court's review of the state courts' determinations,[205] the punishment decisions were all made within a judicial system. When, as with minimum statutory damages, the punishment has been established by duly elected legislators, not judicial actors, a concern for the propriety of unelected judges displacing the judgment of elected officials would likely motivate a reviewing court to require a higher showing of gross excessiveness to hold this legislative judgment unconstitutional.[206] For at least these reasons, courts will likely not invalidate an aggregated award of copyright-infringement minimum statutory damages in the file-sharing context.

Yet a lack of judicial invalidation should not and does not keep Congress from enforcing the substantive due process norm as discussed in this Note. Professor Sager has explained that courts sometimes refrain from enforcing a constitutional provision to its full conceptual boundaries because of institutional concerns, thus creating an "underenforced" constitutional norm.[207] And substantive due process is a classic example of an underenforced norm, exhibiting several of Sager's "indicia of underenforcement," such as a disparity between the scope of judicial enforcement constructs and the scope of plausible understandings of the

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203. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 41 (1973) (citing a lack of federal judicial competence to dispose of public revenues in deciding against an equal protection challenge to Texas's school-finance system).

204. The model laid out in this Note places responsibility for causing economic harm with the file-downloader, who seeks and initiates a file transfer, because this is the actor who saves the cost of the music's purchase, because the file-uploader gets no economic reward for the sharing, and because the file-uploader may be unaware of the sharing. *See supra* text accompanying note 139. A court may find that this judgment involves too much unbounded policy-setting and would thus be unwilling to base a constitutional decision on it.

205. *Gore*, 517 U.S. at 607–14 (Ginsburg, J., dissenting) ("The Court, I am convinced, unnecessarily and unwisely ventures into territory traditionally within the States' domain.").

206. *See* Fallon, *supra* note 202, at 364–65 (reasoning that because of respect for the judgments of elected officials, "standards of [substantive due process] review may be calculated to ensure only that government officials do not stray too egregiously beyond socially tolerable grounds"). While the Second Circuit did not specifically mention this concern in *Parker*, neither did it reach a decision on the substantive due process ground. Parker v. Time Warner Entm't Co., 331 F.3d 13, 22 (2d Cir. 2003) (declining to consider what limits the Due Process Clause may impose).

207. Sager, *supra* note 16, at 1213.

norm.[208] Accordingly, Congress is still responsible for upholding substantive due process guarantees to their full dimensions. Judicial inaction should not curtail appropriate congressional action.[209] A court's decision, for reasons of institutional competence, to reject a substantive due process challenge to copyright's minimum statutory damage law "should not end legislative discourse about the constitutionality of the enactment."[210]

Indeed, this may be an opportune moment to adjust statutory punishments in light of new behaviors and norms.[211] As Judge Newman suggested in *Parker* regarding the CCPA, Congress may not have anticipated the imposition under copyright law of million-dollar penalties on individual, personal-use file-sharers.[212] In fact, copyright's minimum statutory damage amount, adjusted for inflation, has remained about the same since 1976,[213] decades before Napster's invention.[214] Congress is well situated to hear complex evidence about the losses resulting from illegal file-sharing and to draw a more nuanced apportionment of the responsibility for causing this harm than has been developed in this Note.

With copyright law's aggregated minimum statutory damage provision imposing grossly excessive penalties on file-sharers, and with individuals litigating and almost always settling in the shadow of this liability (thus depriving the courts of most chances to rule on constitutional challenges), Congress needs to intervene and reform the law. One way to remedy the problem of excessive punishment is to implement a statutory damage scheme under which the courts have the option to depart downward from the current statutory floor when many similar infringement claims are aggregated.[215] In cases where statutory damages pose excessive penalty concerns, some judges already take this option through statutory construction,[216] indicating the need

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208. *Id.* at 1218–20; *The Supreme Court, 1997 Term—Leading Cases*, *supra* note 16, at 198 n.62 ("Substantive due process has effectively become an 'underenforced constitutional norm[].'").

209. Sager, *supra* note 16, at 1227 ("[P]ublic officials have an obligation in some cases to regulate their behavior by standards more severe than those imposed by the federal judiciary . . . ."); *id.* ("[G]overnment officials have a legal obligation to obey an underenforced constitutional norm which extends beyond its interpretation by the federal judiciary to the full dimensions of the concept which the norm embodies.").

210. *Id.* at 1227 n.48.

211. *See supra* notes 30–34 and accompanying text (describing popular preferences regarding unauthorized file-sharing).

212. *See supra* notes 163–66 and accompanying text (discussing Judge Newman's concurring opinion in *Parker v. Time Warner Entm't Co*., 331 F.3d 13 (2d Cir. 2003)).

213. *See supra* note 53 and accompanying text.

214. *See In re* Verizon Internet Servs., Inc., 240 F. Supp. 2d 24, 38 (D.D.C.) ("[P]eer-to-peer (P2P) software . . . [was] not even a glimmer in anyone's eye . . . in 1998.") (internal quotation marks removed), *rev'd sub nom*. RIAA v. Verizon Internet Servs., Inc., 351 F.3d 1229 (D.C. Cir. 2003), *cert. denied*, 2004 U.S. LEXIS 6701 (U.S. 2004).

215. To a degree, this is similar to Congress's amendments to the statutory damage provisions of the Truth in Lending Act, which allow departure from the normal statutory minimum when misconduct is aggregated under the class-action mechanism. 15 U.S.C. § 1640(a)(2)(B) (2000).

216. *See supra* notes 165–71 and accompanying text.

to formally authorize such an ability. Congress could arrive at a principled conception of a constitutionally acceptable punitive sanction by referencing the four-to-one ratio mentioned multiple times in the Supreme Court's substantive due process jurisprudence.[217]

As an alternative reform, Congress can mute concerns about grossly excessive punishments by replacing copyright's statutory damages for illegal file-sharing with a punishment system like that proposed by Professors Mark Lemley and Tony Reese.[218] They advocate shifting enforcement from the courts to a specialized dispute resolution system that cheaply and efficiently detects and punishes illegal file-sharing.[219] This scheme would allow the imposition of much smaller penalties across a larger spectrum of the file-sharing public, alleviating substantive due process concerns.

IV. Conclusion

When a minimum statutory damage award has a large punitive component, the danger arises that the award's punitive effect, when aggregated across many similar acts, will become so tremendous that it imposes a penalty grossly excessive in relation to any legitimate interest in punishment or deterrence. The Second Circuit recently expressed such concerns in *Parker*, and the substantive due process principles laid out by the Supreme Court in *Gore* and *Campbell* provide a roadmap for evaluating whether an aggregated punitive effect has become unconstitutionally excessive.

The recent copyright infringement lawsuits targeting illegal file-sharing create the context in which these factual predicates exist: a statutory damage award with a substantial punitive component, a large number of like-kind violations, and fairly low reprehensibility as assessed under the relevant *Gore* guidepost. Thus, massively aggregated awards of even the minimum statutory damages for illegal file-sharing will impose huge penalties, like the constitutionally infirm punitive damage award of *Gore*. Congress needs to act now and modify the minimum statutory damage provision of U.S. copyright law to remove the possibility of grossly excessive punishment.

—J. Cam Barker

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217. In *Campbell*, the Court reviewed its various discussions of the four-to-one ratio:

> In *Haslip*, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. We cited that 4-to-1 ratio again in *Gore*. The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. While these ratios are not binding, they are instructive.

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) (citations omitted).

218. Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1410–25 (2004).

219. *Id.*