

No. \_\_\_\_\_

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**In the Supreme Court of the United States**

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JAMMIE THOMAS-RASSET,  
*Petitioner,*

v.

CAPITOL RECORDS INC. *et al.*,  
*Respondents.*

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*On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Eighth Circuit*

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**PETITION FOR A WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

Is there any constitutional limit to the statutory damages that can be imposed for downloading music online?

**PARTIES TO THE PROCEEDING**

The parties to the proceeding are Jammie Thomas–Rasset, Petitioner; Capitol Records Inc., Sony BMG Music Entertainment, Arista Records LLC, Interscope Records, Warner Bros. Records Inc., and UMG Recordings Inc., Respondents; United States of America, Intervenor; Electronic Frontier Foundation, Internet Archive, American Library Association, Association of Research Libraries, Association of College and Research Libraries, and Public Knowledge, *amici* on behalf of Petitioner; and Motion Picture Association of America Inc., *amicus* on behalf of Respondents.

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## PETITION FOR A WRIT OF CERTIORARI

Jammie Thomas–Rasset respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1–22) is reported at 692 F.3d 899. The opinion of the district court (App., *infra*, 23–60) is reported at 799 F. Supp. 2d 999.

### JURISDICTION

The judgment of the court of appeals was entered on September 11, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides: “No person shall be \* \* \* deprived of life, liberty, or property, without due process of law.”

The remedies section of the Copyright Act, 17 U.S.C. 504, provides:

#### **§ 504. Remedies for infringement: Damages and profits**

**(a) In General.** — Except as otherwise provided by this title, an infringer of copyright is liable for

either — (1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or (2) statutory damages, as provided by subsection (c).

**(b) Actual Damages and Profits.** — The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

**(c) Statutory Damages.** — (1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$750 or more than \$30,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200.

### STATEMENT

1. Napster, Grokster, Kazaa, Morpheus, and the other file-sharing programs that Americans have used to share music, video, and software since 1999 are, by now, familiar. *See, e.g., Metro-Goldwyn-Mayer Studios Inc. v. Grokster*, 545 U.S. 913 (2005) (holding Grokster liable for its users' copyright infringement); *Harper v. Maverick Recording Co.*, 131 S. Ct. 590 (2010) (Alito, J., dissenting from denial of certiorari) (arguing that 17 U.S.C. 402(d), which provides that a copyright notice on published phonorecords precludes a defense of innocent infringement, should not foreclose that defense for individuals who download music online and who therefore may never have seen the published phonorecord).

In 2000, just one year after Napster's launch, Senators Orrin Hatch and Patrick Leahy, in hearings before the Senate Judiciary Committee, demonstrated downloading music, defended their downloading as fair

use, remarked about the popularity of file sharing on college campuses, described receiving favorite songs obtained in this manner from their children, characterized the development of file-sharing program Gnutella as “quite an accomplishment,” and publicly praised Shawn Fanning, one of the founders of Napster.<sup>1</sup> By 2001, Napster had 60,000,000 users sharing music online.<sup>2</sup>

The recording industry responded in court. It started by suing companies: those that distributed music online themselves, like MP3.com; and those that developed and distributed file-sharing software and encouraged users to share music peer to peer, like Napster, Grokster, and Kazaa. *E.g.*, *Grokster*, 545 U.S. 913 (involving both Grokster and Kazaa); *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091 (9th Cir. 2002) (affirming injunction shutting down Napster); *UMG Recordings, Inc. v. MP3.com, Inc.*, 109 F. Supp. 2d 223 (S.D.N.Y. 2000) (example of litigation against MP3.com). These lawsuits succeeded in shutting down particular targets, but did little to limit the growth of file sharing in general.

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<sup>1</sup> *Sony BMG Music Entertainment v. Tenenbaum*, 721 F. Supp. 2d 85, 106–07 (D. Mass. 2010) (quoting *Music on the Internet: Is There an Upside to Downloading?: Hearing Before the Senate Committee on the Judiciary*, 106th Cong. (2000) and *Utah’s Digital Economy and the Future: Peer-to-Peer and Other Emerging Technologies: Hearing Before the Senate Committee on the Judiciary*, 106th Cong. (2000)), *rev’d on other grounds*, 660 F.3d 487.

<sup>2</sup> *Napster’s 11th Hour Frenzy*, *Wired*, Feb. 2001; see also *Timeline of File Sharing*, *Wikipedia*, Dec. 6, 2012.

In 2003, the recording industry began suing individual file sharers, like Jammie Thomas–Rasset. The Recording Industry Association of America (RIAA) hired MediaSentry to search for and download recordings of copyrighted music from users of software like Kazaa and record their usernames and IP addresses. App., *infra*, 4–5. Then, the recording companies that owned the copyrights to the downloaded music filed *Doe* lawsuits and subpoenaed from the Internet service provider who had assigned each IP address documents identifying the customer account and computer to which the IP address had been assigned at the time of the download. *Id.* at 6. Finally, the recording companies sent a demand letter to or sued the owner of that account for copyright infringement. *Idem.*

The recording industry eventually sued 12,500 people — in doing so, doubling the number of copyright cases in the federal courts<sup>3</sup> — and sent demand letters to 5,000 more.<sup>4</sup> Never before have the federal courts been enlisted in a litigation campaign of this scale,

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<sup>3</sup> See David Kravets, *Copyright Lawsuits Plummet in Aftermath of RIAA Campaign*, Wired Threat Level, May 18, 2010 (using statistics from the Administrative Office of the United States Courts).

<sup>4</sup> Decl. of Matthew J. Oppenheim at ¶ 7, *Andersen v. Atlantic Recording Corp.*, No. CV-07-934-BR (D. Ore. June 24, 2009). Oppenheim, while in-house counsel at the RIAA and later a partner at Jenner & Block and Oppenheim + Zembrak, exercised “oversight of the record industry’s peer-to-peer enforcement program.” *Id.* at ¶ 1. Oppenheim and Solicitor General Verrilli, while in private practice, appeared as counsel for Respondents in this case.



initiated by an industry and aimed at individuals. Most people settled for an average of \$3,500,<sup>5</sup> rather than pay the six figures that it would have taken to present a defense.<sup>6</sup>

According to Cary Sherman, the president of the RIAA, the goal of these lawsuits was to “generat[e] dinner conversations about what you may or may not do with your computer” and “sear[] in the minds of the public that maybe getting all of this stuff for free isn’t legal after all.” Rocco Castoro, *Downloading Some Bullshit: Interview With the President of the RIAA*, Vice, vol. 17, no. 8, at 58. Litigation was the alternative that the industry came up with after traditional advertising and public relations failed. *Idem*. In December 2008, five years after the first lawsuit was filed, the recording industry announced that it would stop filing new lawsuits,<sup>7</sup> but would continue prosecuting those already filed, including this case.

2. a. Jammie Thomas–Rasset, a Native American from Duluth, Minnesota, used the file-sharing software Kazaa to download music. She left the music that she

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<sup>5</sup> *Music industry stops suing song swappers*, L.A. Times, Dec. 20, 2008.

<sup>6</sup> Jammie Thomas–Rasset and Joel Tenenbaum, the only defendants to take their cases to trial, had counsel acting *pro bono*.

<sup>7</sup> Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, Wall St. J., Dec. 19, 2008. The RIAA replaced its litigation campaign with a set of agreements with Internet service providers (ISPs) under which the ISPs warn their users of detected infringement and, for repeated offenders, cut them off from the Internet.

downloaded in the default Kazaa share folder, from which other Kazaa users could download it in turn. She was one of tens of millions of Americans who shared music in this manner in the years following the invention of Napster. She was also one of the more than 17,500 who was caught and prosecuted by the recording industry as part of its litigation campaign.

In 2005, MediaSentry downloaded songs and song samples from a Kazaa user with username tereastarr, recorded tereastarr's IP address, and traced this IP address to Charter Communications in Duluth. App., *infra*, 5. The RIAA then subpoenaed from Charter Communications the identity of the Charter customer to whom this IP address was assigned when the downloads happened. *Id.* at 6. Charter identified Jammie Thomas–Rasset. *Idem.* The RIAA sent her a demand letter, but she refused to pay their demand. *Idem.* In 2006, the Respondent recording companies filed suit, alleging copyright infringement with respect to 24 songs and seeking an injunction and statutory damages. *Idem.*

b. The United States District Court for the District of Minnesota (Chief Judge Michael J. Davis) had jurisdiction under 28 U.S.C. 1331 and 1367. The case was tried three times. In October 2007, the first jury found Thomas–Rasset liable for willful copyright infringement and imposed \$9,250 of statutory damages per song, for a total of \$222,000. *Id.* at 7. After the trial, however, the district court *sua sponte* concluded that it had erred in instructing the jury that merely making the songs available on a peer-to-peer network, without proof of actual distribution to a third party, was distribution within the meaning of 17 U.S.C. 106(3),

the section that grants the copyright owner the exclusive right to distribute copies. 579 F. Supp. 2d 1210, 1214–26. The district court set aside the verdict and ordered a new trial. *Id.* at 1226–27. In a closing section addressing the damages award and entitled “Need for Congressional Action,” the district court noted the unprecedented nature of statutory damages of this magnitude against an individual who infringed for personal use only, calculated that the \$222,000 damages award represented multiples of 500 to 4,000 times any reasonable measure of actual damages, and observed that Thomas–Rasset “acted like countless other Internet users” such that the imposition of massive statutory damages against her would be “unprecedented and oppressive.” *Id.* at 1227–28.

In June 2009, the case was tried again. The jury again found Thomas–Rasset liable for willful copyright infringement and, this time, imposed statutory damages of \$80,000 per work, or \$1,920,000 for the 24 songs at issue. App. *infra*, 9. Thomas–Rasset moved for a remittitur or, in the alternative, to set aside the verdict as unconstitutionally excessive under the Due Process Clause. *Idem.* The district court found the award of statutory damages to be “outrageous[],” “monstrous,” and “shocking,” and remitted it to \$2,250 per song, or three times the statutory minimum, citing as authority the “broad legal practice of establishing a treble award as the upper limit permitted to address willful or particularly damaging behavior.” 680 F. Supp. 2d 1045, 1056–57. Having granted remittitur, the district court did not rule on Thomas–Rasset’s constitutional objection. *Id.* at 1057.

The recording companies refused to accept the remittitur and demanded a new trial on damages, which was held in November 2010. App., *infra*, 9. This time, the jury imposed statutory damages of \$62,500 per work, or \$1,500,000 for the 24 songs at issue, and the district court entered judgment accordingly. *Id.* at 9–10. Thomas–Rasset moved to alter or amend the judgment, arguing that imposing \$1,500,000 in statutory damages for 24 songs violates the Due Process Clause. *Id.* at 10. She did not seek common-law remittitur. The district court agreed with Thomas–Rasset and again reduced the damages to \$2,250 per song, or \$54,000, this time on constitutional grounds. 799 F. Supp. 2d 999, 1006–14. The recording companies appealed, challenging (i) the district court’s conclusions about the meaning of *distribution* and (ii) the constitutional limit on statutory damages for downloading music online.

c. The United States Court of Appeals for the Eighth Circuit (Judges Diana E. Murphy, Michael J. Melloy, and Steven M. Colloton) held that the first issue was moot and reversed on the second issue. App., *infra*, 22. The first issue was moot because Thomas–Rasset did not oppose reinstatement of the first, and lowest, award of statutory damages, which would be the consequence of reversing the district court’s decision regarding the meaning of *distribution*. On the second issue, the court of appeals held that statutory damages are reviewed under the standard in *St. Louis I.M. & S. Railway Co. v. Williams*, 251 U.S. 63, 67 (1919), rather than under the standards announced in this Court’s more recent punitive-damages cases. Applying that standard, the court of appeals concluded that \$222,000 was a constitutional

award of statutory damages for downloading 24 songs online.

3. A copyright owner who wins an infringement action must choose between receiving “actual damages and any additional profits of the infringer” or so-called “statutory damages.” 17 U.S.C. 504(a). Thomas–Rasset, who downloaded music to listen to, neither profited nor even attempted to profit from her infringement. As for actual damages, in none of their cases against individuals have the recording companies been able to show actual damages. One component of actual damages is the profit the recording companies would have received had Thomas–Rasset purchased the 24 songs at issue online, at a cost of about \$1 per song, or on CDs, at a cost of about \$15 per album, instead of downloading them using Kazaa. The recording companies offered no evidence at trial about their profit margin on such sales; and, in any event, that profit cannot exceed \$360, the total cost of 24 \$15 albums.

The larger component of actual damages is the harm allegedly caused by Thomas–Rasset’s allowing the 24 songs at issue to be available for download from her computer through Kazaa. It is the availability of music for free through file-sharing services like Kazaa that, the recording industry contends, was responsible for its collapse. But the uncontested evidence at trial was that (a) it is impossible, given the nature of file-sharing networks, to determine whether any third party received a particular song from Thomas–Rasset as opposed to from another user of Kazaa and, more importantly, (b) even if Thomas–Rasset had never used Kazaa, the 24 popular songs at issue would nonetheless have been available, for free, from other Kazaa users.

Thomas–Rasset may have thrown one stick on the recording industry’s pyre, one stick out of tens of millions, but Napster, Kazaa, and the like were the ones who set it on fire.

Other measures of actual damages suggested by the recording companies suffer from the same problem. The companies suggest, for example, that actual damages can be measured by the value of a hypothetical license to do what Thomas–Rasset did, which they say is equal to the whole value of the songs in question because such a license would entitle Thomas–Rasset to distribute the songs for free and the recording companies “cannot compete with free.” But the correct comparison, taking into account the existence of Napster, Kazaa, and other file-sharing programs, is not the cost of a hypothetical license in a world where the song is available only from the record companies; rather, it is the cost of such a license in a world where the song is already widely available for free. So too for the proposal that actual damages be measured by the “decline in value of the copyright” caused by the free availability of the song; it was the rise of file sharing in general, not Thomas–Rasset’s conduct in particular, that caused any decline in the value of the recording company’s copyrights.<sup>8</sup>

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<sup>8</sup> The point is made nicely by an excerpt from *The Social Network*, in which Napster cofounder Sean Parker meets Facebook cofounder Eduardo Saverin:

SEAN

I brought down the record companies with Napster and Case’s gonna suffer for their sins too.

Unable to show actual damages or profits on the part of the infringers, the recording companies have chosen to pursue statutory damages in this and every other file-sharing case against an individual defendant. Statutory damages are an amount between \$750 and \$30,000 per work, “as the court considers just.” 17 U.S.C. 504(c)(1). When the infringement is willful, the maximum is increased to \$150,000 per work; when the infringement is innocent, the minimum is decreased to \$200 per work. 17 U.S.C. 504(c)(2). Thus, for willful infringement of the copyright in 24 songs, the statutory range is from \$18,000 to \$3,600,000. Indeed, if the recording companies had sued Thomas–Rasset for downloading 1,000 songs, as they say they could have, the statutory range would have been from \$750,000 to \$150,000,000. Because of the per-song calculation and the fact that ordinary users of Kazaa download many songs, the range of statutory damages that the recording industry is permitted to pursue is without practical limit.

The range of statutory damages provided for in the Copyright Act applies to everything that is copyright

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EDUARDO

You didn’t bring down the record companies. They won.

SEAN

In court.

EDUARDO

Yes.

SEAN

You want to buy a Tower Records, Eduardo?

Aaron Sorkin, *The Social Network* 122 (2011).

infringement. It applies as much, for example, to stealing and publishing the advance copy of a presidential memoir, pirating and reselling copies of Microsoft Windows or Microsoft Office, exceeding the scope of a modern software license agreement, or staging a play as it does to downloading music using Napster or Kazaa. This feature of statutory damages — a single broad range from which the court is to select an amount “as [it] considers just” — was introduced only in the Copyright Act of 1976. The Copyright Act of 1790 did not provide for statutory damages at all, 1 Stat. 124, § 6, while the Copyright Act of 1831, 4 Stat. 436, §§ 6–7, and the Copyright Act of 1909, 35 Stat. 1075, § 25, provided different, specific amounts of statutory damages for specific kinds of infringement, like copying a book, copying a map, or preaching a sermon.

The problem of a broad range, applicable to all kinds of copyright infringement, and provided with the sole guidance that the award be “just” is made worse by the manner in which the lower courts have reacted to *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998). In *Feltner*, this Court held that *court* in § 504(c)(1) “appears to mean judge, not jury,” *id.* at 346, so that, under the Copyright Act, it is the judge, not the jury, that determines the amount of statutory damages. *Id.* at 345–46. But this Court also held that “the Seventh Amendment provides a right to a jury trial on all issues pertinent to an award of statutory damages \* \* \* including the amount itself.” *Id.* at 355. *Feltner* remanded the case to the Ninth Circuit without resolving this incompatibility. *Idem.* The Ninth Circuit resolved it by leaving the statutory-damages provision intact, except that, now, a jury, rather than a judge, is



to pick the amount of statutory damages with the statutory range quoted to them as their only tangible guide. *See Columbia Pictures Television, Inc. v. Krypton Broadcasting of Birmingham, Inc.*, 259 F.3d 1186, 1192–93 (9th Cir. 2001). The other lower courts have gone along with this regime of jury sentencing.

Statutory damages imposed in this way are unpredictable, unconstrained, and equally as punitive as punitive damages; the jury’s role in imposing them is even more divorced from finding facts, from deciding what happened, than it is in imposing punitive damages. The order-of-magnitude difference between the verdicts in this case, \$222,000 in the first trial, \$1,920,000 in the second trial, and \$1,500,000 in the third trial, demonstrates this. The verdicts are unpredictable and, in a deeper sense, arbitrary; they are not tied to any fact or rationale that justifies them, that explains why the law imposes this particular penalty on this particular defendant.<sup>9</sup> And there is nothing in the Copyright Act to combat this arbitrariness: (i) the Act does not permit appellate review, even for abuse of discretion, of the fact-finder’s (at the time, the district judge’s; after *Feltner*, the jury’s) award of statutory damages, so long as it is within the statutory range, *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 232–34 (1952); *Douglas v. Cunningham*, 294 U.S. 207, 210 (1935); and

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<sup>9</sup> Several Justices have recognized the chilling effect that uncertain statutory damages can have on those who use or build on copyrighted works or create technology that operates on copyrighted works. *See, e.g., Grokster*, 545 U.S. at 959–60 (Breyer, J., concurring); *New York Times Co. v. Tasini*, 533 U.S. 483, 520 (2001) (Stevens, J., dissenting).

(ii) the Act does not permit the fact finder to impose statutory damages below the statutory minimum, even if the fact finder believes that justice requires that result and even in the absence of any actual damages suffered by the copyright owner or profits made by the infringer, *Jewell–La Salle Realty Co. v. Buck*, 283 U.S. 202, 203–08 (1931); *L.A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100, 106–07 (1919).

4. a. Thomas–Rasset contends that the award of statutory damages against her violates the Due Process Clause because it is tied not to the actual injury that she caused or other features of her conduct, but to the injury caused by file sharing in general. Like punitive damages, statutory damages are imposed not only to compensate the plaintiff, but also to deter the defendant and others from engaging in similar conduct in the future. While this general approach, punishing one offender to deter others, is constitutional within limits, even gross limits of fair retribution for an individual’s conduct, due process limits the extent of the punishment. This Court recognized as much in reviewing awards of statutory damages as early as a century ago.

In *Williams*, decided in 1919, a railroad challenged statutory damages of “not less than fifty dollars nor more than three hundred dollars” imposed for overcharging two passengers by 66 cents in violation of Arkansas’s regulation of railroad rates. 251 U.S. at 63–64. The railroad argued that such statutory damages “contravene due process of law” because “the penalty is arbitrary and unreasonable, and not proportionate to the actual damages sustained.” *Idem*. This Court held that the Due Process Clause “places a

limitation upon the power of the states to describe penalties for violations of their laws” and that due process is denied “where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.” *Id.* at 66–67. This Court sustained the penalty at issue, noting that, although “[w]hen the penalty is contrasted with the overcharge possible in any instance it of course seems large,” the penalty was not unconstitutional in light of “the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates.” *Id.* at 67.

Other early cases likewise held that “grossly excessive” statutory damages “amount to a deprivation of property without due process of law.” *Waters-Pierce Oil Co. v. State of Texas*, 212 U.S. 86, 111 (1909); see also *Southwest Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 491 (1915) (“to inflict upon the company penalties aggregating \$6,300 was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law”) (collecting cases). This Court, see, e.g., *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276–77 (1989) (“the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme”) (citing *Williams*), and lower courts, see, e.g., *Parker v. Time Warner Entertainment Co.*, 331 F.3d 13, 26 (2d Cir. 2003) (“A statutory penalty may violate due process where the penalty prescribed is ‘so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.’”) (quoting *Williams*); *United States v. Citrin*, 972 F.2d 1044, 1051 (9th Cir. 1992) (same),

have continued to rely on *Williams* and these other early cases for the proposition that statutory damages are subject to due-process review.

Under *Williams* and the other early cases, the award of statutory damages in this case is unconstitutional because it is “grossly excessive” and “wholly disproportioned to the offense.” *Williams*, 251 U.S. at 67. \$222,000 for 24 songs that would have cost \$24 on iTunes is absurd. Nor can \$222,000 be justified by the kinds of other features of the offense identified in *Williams*. The first such feature was that the offense affected “interests of the public.” *Idem*. In all the early cases sustaining large awards of statutory damages, the defendant was a company charged with a public function: a railroad in *Williams*; the only telephone utility in *Danaher*; and Standard Oil in *Waters-Pierce*. The present suit vindicates only the private pecuniary interests of the recording companies, not any general right of the public, such as the right to travel, to place telephone calls, or to have gasoline and heating oil. The court of appeals misunderstood this factor in thinking that it was satisfied merely because copyrights are important, App., *infra*, 17–18; all private rights are important, but not all vindicate public interests like those in *Williams*, *Danaher*, and *Waters-Pierce*.

The second and third such features were “the numberless opportunities for committing the offense” and “the need for securing uniform adherence.” *Williams*, 251 U.S. at 67. At issue in *Williams* was the behavior of a railroad: if it overcharged two customers, it might overcharge many more. Here, although the recording companies looked for evidence that Thomas–Rasset continued file sharing after litigation

began, they came up empty handed. Thomas–Rasset is not in the business of file sharing; in light of the district court’s injunction, there is no further opportunity for her to commit the same offense in the future; and there is no uniformity concern in this case, unlike in the railroad case, where it is important that different passengers be charged the same amount by their common carrier. The court of appeals failed to discuss these features of Thomas–Rasset’s offense entirely.

b. While the court of appeals misstated and misapplied the *Williams* standard, its more important error was in thinking that the *Williams* line of cases stands apart from this Court’s more modern cases, like *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), that test punitive damages against the Due Process Clause. App., *infra*, 16–17. Nothing in this court’s cases, and certainly nothing in the Due Process Clause, suggests that the Government has more power to enforce a substantive right by imposing a civil punishment that is divorced from actual injury under a statute rather than under the common law. (The constitutional objection in this case is a means objection: Congress may protect copyrights in many ways, but not, for example, through prior restraints that violate the First Amendment, *see, e.g., Suntrust Bank v. Houghton Mifflin Co.*, 252 F.3d 1165, 1165 (11th Cir. 2001) (*per curiam*), and not, Thomas–Rasset contends, through civil punishments that violate the Due Process Clause.)

If statutory damages were subject to review under *Williams* only and not under *Gore* and *Campbell*, then

a legislature could evade *Gore* and *Campbell* simply by authorizing punitive damages in a statute. That kind of evasion is so plainly foreclosed that it has not even occurred to the lower courts. *See, e.g., Willow Inn, Inc. v. Public Service Mutual Insurance Co.*, 399 F.3d 224, 229–230 (3d Cir. 2005) (applying *Gore* and its progeny to punitive damages imposed under Pennsylvania statute that authorized punitive damages for insurance bad faith); *Capstick v. Allstate Insurance Co.*, 998 F.2d 810, 818 (10th Cir. 1993) (applying *Gore* and its progeny to punitive damages under Oklahoma statute that removed cap on punitive damages upon a showing of “oppression, fraud, or malice”). What offends the due process clause is excessive civil punishments, regardless of whether those punishments are imposed by statute or under the common law.

The error of looking only to *Williams* is a serious one, for this Court’s later cases clarify both what due-process review is guarding against — *arbitrariness*, that is, a civil penalty that is not tied to the actual injury imposed or other relevant features of the offense, *see Campbell*, 538 U.S. at 416 (prohibiting “the imposition of grossly excessive or arbitrary punishments”); *Gore*, 517 U.S. at 574–75 (same) — and what that review involves. Two examples illustrate the point.

First, judicial review of civil penalties imposed by a jury is both permitted under the Seventh Amendment, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 (2001) (“Unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a fact tried by the jury. Because

the jury's award of punitive damages does not constitute a finding of fact, appellate review of the district court's determination that an award is consistent with due process does not implicate the Seventh Amendment."), and required by the Due Process Clause, *Honda Motor Co. v. Oberg*, 512 U.S. 415, 434–35 (1994) ("such a decision [the 'exaction of exemplary damages'] should not be committed to the unreviewable discretion of a jury"); *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 20–21, 21 n.10 (1991) (approving Alabama's punitive-damages scheme because it involved multiple levels of judicial review under "detailed substantive standards" that were more specific than the "manifestly and grossly excessive" or "evinces passion, bias and prejudice" standards in use in other states). The absence of review sanctioned by *Woolworth* and *Douglas* as a matter of statutory interpretation, and the lax, generalized review employed by the court of appeals in this case, do not satisfy the requirements of *Oberg* and *Haslip*.

Second, a defendant may be punished for his own similar acts only, *Campbell*, 538 U.S. at 422–23 ("A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business."), and only for the injury that he inflicted on the particular plaintiff in the case, not for any injuries that he inflicted on nonparties, *Phillip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) ("the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly

represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation”). These cases preserve the civil nature of a case notwithstanding the imposition of a punishment: the case remains between two parties, and the civil punishment must be justified with reference to the acts between those parties, not acts in the world in general.

Put more plainly: in a civil case, Thomas–Rasset cannot be punished for the harm inflicted on the recording industry by file sharing in general; while that would no doubt help accomplish the industry’s and Congress’s goal of deterring copyright infringement, singling out and punishing an individual in a civil case to a degree entirely out of proportion with her individual offense is not a constitutional means of achieving that goal.

### REASONS FOR GRANTING THE PETITION

1. The circuits are split on whether *Gore, Campbell*, and this Court’s other modern punitive-damages cases apply to statutory damages, or whether the only constitutional review of statutory damages is under *Williams* and the other cases of that era. The First,<sup>10</sup> Second,<sup>11</sup> Third,<sup>12</sup> Seventh,<sup>13</sup> and Tenth<sup>14</sup> Circuits, as

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<sup>10</sup> *Romano v. U-Haul Int’l*, 233 F.3d 655, 672–73 (1st Cir. 2000) (reviewing statutorily capped punitive damages in a Title VII discrimination case under *Gore*).

<sup>11</sup> *Parker v. Time Warner Entertainment Co.*, 331 F.3d 13, 22 (2d Cir. 2003) (noting that statutory damages under the Cable Communications Policy Act of 1984 that turn out to be unconstitutionally excessive can be reduced under *Campbell* and



well as the leading commentators,<sup>15</sup> agree with Thomas–Rasset that statutory damages must pass muster under *Gore* and *Campbell*. The Sixth Circuit,<sup>16</sup> and the Eighth Circuit in this case, disagree and hold that, until this Court expressly applies *Gore* and *Campbell* to statutory damages, they will apply only

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*Gore*).

<sup>12</sup> *Willow Inn, Inc. v. Public Service Mutual Insurance Co.*, 399 F.3d 224, 229–230 (3d Cir. 2005) (applying *Gore* and its progeny to damages imposed under Pennsylvania statute authorizing punitive awards for insurance bad faith).

<sup>13</sup> *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 954 (7th Cir. 2006) (noting that an award of statutory damages under the Fair Credit Reporting Act that is unconstitutionally excessive can be reduced under *Campbell*).

<sup>14</sup> *Capstick v. Allstate Insurance Co.*, 998 F.2d 810, 818 (10th Cir. 1993) (applying *Gore* and its progeny to damages imposed under Oklahoma statute that removed cap on punitive awards upon a showing of “oppression, fraud, or malice”).

<sup>15</sup> Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 Wm. & Mary L. Rev. 439, 491–97 (2009) (arguing that copyright statutory damages must be reviewed under *Gore*); see also Note, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 Tex. L. Rev. 525, 536–56 (2004) (same).

<sup>16</sup> *Zomba Enterprises, Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 587–88 (6th Cir. 2007) (“Until the Supreme Court applies *Campbell* to an award of statutory damages, we conclude that *Williams* controls, not *Campbell*, and accordingly reject Panorama’s due-process argument.”).

*Williams*. This Court should grant *certiorari* to resolve this conflict.

2. Why should a lawyer care about these cases? Why should a law teacher or law student or law judge? The citizens of cyberspace care about these cases because they are a challenge to the freedom of the Internet, to a teenager's freedom to adopt the latest technology, play with it, build with it, share with it, see where it leads, free of the worry that the law will come calling. That is an important freedom that is tied up in these cases; it is the freedom defended by the Electronic Frontier Foundation, the Internet Archive, the American Library Association, the Association of Research Libraries, the Association of College and Research Libraries, and Public Knowledge, the *amici* who supported Thomas–Rasset below; and the arguments for and against it jump to mind.

But lawyers should care about these cases for an entirely different reason: This is not *just*. It is unfair, it is not *due process*, for an industry to sue 12,500 people and threaten to sue 5,000 more, wielding a statute for which they lobbied, under which they can threaten hundreds of thousands or millions of dollars in statutory damages, where the only way to resist is through modern, complex, expensive federal process, so that the only reasonable choice is to pay the settlement and be done. That's extortion, not law. We cannot govern that way.

The two district judges who tried these cases, Michael Davis and Nancy Gertner, understood this. Judge Davis raised the distribution issue *sua sponte* so that he could grant a new trial, called for relief from

Congress, and throughout his opinions called the statutory damages sought by the recording industry harsh and oppressive. Judge Gertner had this to say:

I can't say this is a situation that is a good situation or a fair situation, it is, however, the situation \* \* \* if you really wish to stand and fight, you need to have legal representation because otherwise all you're going to do is stand in place, their fees go up and we'll end this case with the higher end of the statutory damages rather than the lower end. \* \* \*

You know it seems to me that counsel representing the record companies have an ethical obligation to fully understand that they are fighting people without lawyers, to fully understand that, more than just how do we serve them, but just to understand that the formalities of this are basically bankrupting people, and it's terribly important that you stop.

Tr. of Mot. Hr'g of June 17, 2008, *Tenenbaum*, Docket No. 614 at 9:19–11:7. Arbitrary statutory damages made the RIAA's litigation campaign possible; in turn, that campaign has inspired copycats like the so-called Copyright Enforcement Group; the U.S. Copyright Group, which has already sued more than 20,000 individual movie downloaders; and Righthaven, which sued bloggers. This Court should grant *certiorari* to review this use of the federal courts as a scourge.

3. The narrow issue involved in this case, whether copyright statutory damages must be justified by the actual injury to the plaintiff caused by the defendant,

is of national importance because of the ever-expanding scope of copyright. It is important to the entire recording and publishing industries, obviously. But copyright also governs software programs, and not just copying and distribution of those programs, but also their use — for the lower courts have held that exceeding the terms of a software license agreement can constitute copyright infringement. *See, e.g., Apple Inc. v. Psystar Corp.*, 658 F.3d 1150, 1159 (9th Cir. 2011). This Court should grant *certiorari* to bring clarity to this practically important area of law.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 10, 2012

## **APPENDIX**

**APPENDIX**

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**APPENDIX A**

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

**No. 11-2820**

**[Filed September 11, 2012]**

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Capitol Records, Inc.; Sony BMG Music )  
Entertainment; Arista Records LLC; )  
Interscope Records; Warner Bros. )  
Records Inc.; UMG Recordings, Inc., )  
*Plaintiffs - Appellants,* )

v. )  
Jammie Thomas-Rasset, )  
*Defendant - Appellee,* )  
United States of America, )  
*Intervenor below - Appellee.* )

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Motion Picture Association of America, )  
Incorporated, )  
*Amicus on Behalf of Appellant,* )  
Electronic Frontier Foundation; Internet )  
Archive; American Library Association; )  
Association of Research Libraries; )  
Association of College and Research )  
Libraries; Public Knowledge, )  
*Amici on Behalf of Appellee.* )

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**No. 11-2858**

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Capitol Records, Inc.; Sony BMG Music )  
Entertainment; Arista Records LLC; )  
Interscope Records; Warner Bros. )  
Records Inc.; UMG Recordings, Inc., )  
*Plaintiffs - Appellees,* )  
v. )  
Jammie Thomas-Rasset, )  
*Defendant - Appellant,* )  
United States of America, )  
*Intervenor below - Appellee.* )

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Motion Picture Association of America, )  
Incorporated, )  
*Amicus on Behalf of Appellee,* )  
American Library Association; )  
Association of Research Libraries; )  
Association of College and Research )  
Libraries; Public Knowledge; Electronic )  
Frontier Foundation; Internet Archive, )  
*Amici on Behalf of Appellant.)* )  
----- )

Appeal from United States District Court  
for the District of Minnesota - Minneapolis

Submitted: June 12, 2012

Filed: September 11, 2012

Before MURPHY, MELLOY, and COLLOTON, Circuit  
Judges.



COLLTON, Circuit Judge.

This appeal arises from a dispute between several recording companies and Jammie Thomas-Rasset. There is a complicated procedural history involving three jury trials, but for purposes of appeal, it is undisputed that Thomas-Rasset willfully infringed copyrights of twenty-four sound recordings by engaging in file-sharing on the Internet. After a first jury found Thomas-Rasset liable and awarded damages of \$222,000, the district court granted a new trial on the ground that the jury instructions incorrectly provided that the Copyright Act forbids making sound recordings available for distribution on a peer-to-peer network, regardless of whether there is proof of “actual distribution.” A second jury found Thomas-Rasset liable for willful copyright infringement under a different instruction, and awarded statutory damages of \$1,920,000. The district court remitted the award to \$54,000, and the companies opted for a new trial on damages. A third jury awarded statutory damages of \$1,500,000, but the district court ultimately ruled that the maximum amount permitted by the Due Process Clause of the Fifth Amendment was \$54,000 and reduced the verdict accordingly. The court also enjoined Thomas-Rasset from taking certain actions with respect to copyrighted recordings owned by the recording companies.

The companies appeal two aspects of the remedy ordered by the district court. They object to the district court’s ruling on damages, and they seek an award of \$222,000, which was the amount awarded by the jury in the first trial. They also seek a broader injunction that bars Thomas-Rasset from making any of their

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sound recordings available to the public. For tactical reasons, the companies do not seek reinstatement of the third jury's award of \$1,500,000. They urge instead that this court should reverse the district court's order granting a new trial, rule that the Copyright Act does protect a right to "making available" sound recordings, reinstate the first jury's award of \$222,000, and direct entry of a broader injunction. In a cross appeal, Thomas-Rasset argues that *any* award of statutory damages is unconstitutional, and urges us to vacate the award of damages altogether.

For reasons set forth below, we conclude that the recording companies are entitled to the remedies they seek: damages of \$222,000 and a broadened injunction that forbids Thomas-Rasset to make available sound recordings for distribution. But because the verdicts returned by the second and third juries are sufficient to justify these remedies, it is unnecessary for this court to consider the merits of the district court's order granting a new trial after the first verdict. Important though the "making available" legal issue may be to the recording companies, they are not entitled to an opinion on an issue of law that is unnecessary for the remedies sought or to a freestanding decision on whether Thomas-Rasset violated the law by making recordings available.

### I.

Capitol Records, Inc., Sony BMG Music Entertainment, Arista Records LLC, Interscope Records, Warner Bros. Records, and UMG Recordings, Inc., are recording companies that own the copyrights to large catalogs of music recordings. In 2005, they

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undertook to investigate suspected infringement of these copyrights. MediaSentry, an online investigative firm hired by the recording companies, discovered that an individual with the username “tereastarr” was participating in unauthorized file sharing on the peer-to-peer network KaZaA.

During the relevant time period, KaZaA was a file-sharing computer program that allowed its users to search for and download specific files from other users. KaZaA users shared files using a share folder. A share folder is a location on the user’s computer in which the user places files—such as audio or video recordings—that she wants to make available for other users to download. KaZaA allowed its users to access other users’ share folders, view the files in the folder, and download copies of files from the folder.

MediaSentry accessed tereastarr’s share folder. The investigative firm determined that the user had downloaded copyrighted songs and was making those songs available for download by other KaZaA users. MediaSentry took screen shots of tereastarr’s share folder, which included over 1,700 music files, and downloaded samples of the files. But MediaSentry was unable to collect direct evidence that other users had downloaded the files from tereastarr. MediaSentry then used KaZaA to send two instant messages to tereastarr, notifying the user of potential copyright infringement. Tereastarr did not respond to the messages. MediaSentry also determined tereastarr’s IP address, and traced the address to an Internet service account in Duluth, Minnesota, provided by Charter Communications. MediaSentry compiled this data in a report that it prepared for the recording companies.

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Using the information provided by MediaSentry, the recording companies, through the Recording Industry Association of America (RIAA), issued a subpoena to Charter Communications requesting the name of the person associated with tereastarr's IP address. Charter informed the RIAA that the IP address belonged to Jammie Thomas-Rasset. The RIAA then sent a letter to Thomas-Rasset informing her that she had been identified as engaging in unauthorized trading of music and inviting her to contact them to discuss the situation and settle the matter. Thomas-Rasset contacted the RIAA as directed in the letter and engaged in settlement conversations with the organization. The parties were unable to resolve the matter.

In 2006, the recording companies sued Thomas-Rasset, seeking statutory damages and injunctive relief for willful copyright infringement under the Copyright Act, 17 U.S.C. § 101 *et seq.* They alleged that Thomas-Rasset violated their exclusive right to reproduction and distribution under 17 U.S.C. § 106 by impermissibly downloading, distributing, and making available for distribution twenty-four copyrighted sound recordings.

A jury trial was held in October 2007. At trial, Thomas-Rasset conceded that "tereastarr" is a username that she uses regularly for Internet and computer accounts. She admitted familiarity with and interest in some of the artists of works found in the tereastarr KaZaA account. She also acknowledged that she wrote a case study during college on the legality of Napster—another peer-to-peer file sharing program—and knew that Napster was shut down

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because it was illegal. Nonetheless, Thomas-Rasset testified that she had never heard of KaZaA before this case, did not have KaZaA on her computer, and did not use KaZaA to download files. The jury also heard evidence from a forensic investigator that Thomas-Rasset removed and replaced the hard drive on her computer with a new hard drive after investigators notified her of her potential infringement. The new hard drive did not contain the files at issue.

At the close of evidence, the district court instructed the jury that one who reproduces or distributes a copyrighted work without license infringes the copyright. The court's instructions defined "reproduction" to include "[t]he act of downloading copyrighted sound recordings on a peer-to-peer network." The court also instructed that the act of "making copyrighted sound recordings available for electronic distribution on a peer-to-peer network, without license from the copyright owners, violates the copyright owners' exclusive right of distribution, regardless of whether actual distribution has been shown." The jury found Thomas-Rasset liable for willful infringement and awarded the recording companies statutory damages of \$9,250 per work, for a total of \$222,000.

Thomas-Rasset moved for a new trial or, in the alternative, for a remittitur, arguing that the size of the jury's statutory damages award violated her rights under the Due Process Clause. The United States intervened to defend the constitutionality of the statute on statutory damages, 17 U.S.C. § 504(c). The recording companies also filed a post-trial motion, seeking to amend the judgment to include an injunction enjoining

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Thomas-Rasset from infringing the recording companies' copyrights by "using the Internet or any online media distribution system to reproduce (*i.e.*, download) any of Plaintiffs' Recordings, to distribute (*i.e.*, upload) any of Plaintiffs' Recordings, or to make any of Plaintiffs' Recordings available for distribution to the public."

Several months later, the district court *sua sponte* raised the issue whether it erred by instructing the jury that making sound recordings available for distribution on a peer-to-peer network violates a copyright owners' exclusive right to distribution, "regardless of whether actual distribution has been shown." The parties filed supplemental briefs in which the recording companies defended the court's instruction and Thomas-Rasset argued that the court erred when it instructed the jury on the "making available" issue. After a hearing, the district court granted Thomas-Rasset's motion for a new trial on this alternative ground, holding that making a work available to the public is not "distribution" under 17 U.S.C. § 106(3). The issue whether making copyrighted works available to the public is a right protected by § 106(3) has divided the district courts. *Compare, e.g., Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 981-84 (D. Ariz. 2008), and *London-Sire Records v. Doe 1*, 542 F. Supp. 2d 153, 176 (D. Mass. 2008), with *Motown Record Co. v. DePietro*, No. 04-CV-2246, 2007 WL 576284, at \*3 (E.D. Pa. Feb. 16, 2007), and *Warner Bros. Records, Inc., v. Payne*, No. W-06-CA-051, 2006 WL 2844415, at \*3 (W.D. Tex. July 17, 2006).

The district court convened a second trial in June 2009, at which the recording companies produced

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substantially the same evidence of Thomas-Rasset's liability. At this trial, however, Thomas-Rasset attempted to deflect responsibility by suggesting for the first time that her children and former boyfriend might have done the downloading and file-sharing attributed to the "terreastar" username. The court again instructed the jury that reproduction or distribution constituted copyright infringement. But this time, the court omitted reference to making works available and instructed the jury that "[t]he act of distributing copyrighted sound recordings to other users on a peer-to-peer network, without license from the copyright owners, violates the copyright owners' exclusive distribution right." The jury again found Thomas-Rasset liable for willful infringement, and awarded the recording companies statutory damages of \$80,000 per work, for a total of \$1,920,000.

Following the second trial, Thomas-Rasset filed a post-trial motion in which she argued that any statutory damages award would be unconstitutional in her case, but in the alternative that the court should reduce the jury's award either through remittitur or based on the Due Process Clause. The district court declined to rule on the constitutional issue and instead remitted damages to \$2,250 per work, for a total of \$54,000, on the ground that the jury's award was "shocking." The recording companies declined the remitted award and exercised their right to a new trial on damages.

A third trial was held in November 2010, and the only question for the jury was the amount of statutory damages. The jury awarded the recording companies

statutory damages of \$62,500 per work, for a total of \$1,500,000.

Thomas-Rasset then moved to alter or amend the judgment, again arguing that any statutory damages award would be unconstitutional, but alternatively that the district court should reduce the award under the Due Process Clause. The district court, relying in part on the now-vacated decision in *Sony BMG Music Entm't v. Tenenbaum*, 721 F. Supp. 2d 85 (D. Mass. 2010), *vacated in relevant part by*, 660 F.3d 487 (1st Cir. 2011), granted Thomas-Rasset's motion and reduced the award to \$2,250 per work, for a total of \$54,000. The court ruled that this amount was the maximum award permitted by the Due Process Clause. The district court also entered a permanent injunction against Thomas-Rasset, but refused to include language enjoining her from "making available" copyrighted works for distribution to the public.

The recording companies appeal the judgment of the district court, arguing that the district court erred in (1) granting a new trial based on the "making available" instruction in the first trial, and (2) holding that the Due Process Clause limits statutory damages to \$2,250 per infringed work. They request that we reinstate and affirm the first jury's \$222,000 award, and remand with instructions to grant an injunction prohibiting Thomas-Rasset from making the copyrighted works available to the public. Thomas-Rasset cross-appeals, arguing that even an award of the minimum statutory damages authorized by the Copyright Act would be unconstitutional.



II.

In their brief on appeal, the record companies urge this court to review the district court's order granting a new trial after the first verdict. The companies argue that the court erred by holding that an individual does not infringe a copyright holder's exclusive rights by making a copyrighted work available to the public without authorization. They argue that accepting their position on that issue would "lead to reversing the District Court's erroneous refusal to enjoin Thomas-Rasset from making Plaintiffs' copyrighted works available, but also would reinstate the first jury's \$9,250-per-work verdict," for total damages of \$222,000. Although the third jury's verdict awarded \$62,500 per work, for a total of \$1,500,000, the companies seek only the smaller amount awarded by the first jury, because they want a ruling on the legal issue whether making works available is part of the distribution right protected by the Copyright Act.

In reply, Thomas-Rasset says that she has no objection to reinstatement of the first verdict, subject to her arguments on the constitutionality of the damages. She maintains that she still disagrees with the recording companies about the meaning of "distribute" in the Copyright Act, 17 U.S.C. § 106(3), but she does not object to the relief that the companies request on appeal. She now suggests that this court should reinstate the first jury's verdict on liability (albeit without making precedent on the meaning of "distribute") and then determine whether the first damages award of \$222,000 is constitutional. Thomas-Rasset is liable for willful infringement under any of the verdicts, and it suits her fine to cap the

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maximum possible damages at \$222,000 rather than \$1,500,000. Thomas-Rasset also offers to acquiesce in the entry of an injunction that forbids her to make copyrighted works available for distribution. In light of these concessions, she suggests that the issue whether making works available is part of the distribution right protected by the Copyright Act is moot.

Our response to these tactical maneuvers is to observe that this court reviews judgments, not decisions on issues. *Thompson v. Mo. Bd. of Prob. & Parole*, 39 F.3d 186, 189 n.2 (8th Cir. 1994); see *California v. Rooney*, 483 U.S. 307, 310 (1987). The record companies appeal the district court's final judgment and seek additional remedies that the district court refused to order. The entitlement of the companies to these remedies—damages of \$222,000 and an injunction against making copyrighted works available to the public—are the matters in controversy. That the companies seek these remedies with the objective of securing a ruling on a particular legal issue does not make that legal issue itself the matter in controversy. Once the requested remedies are ordered, the desire of the companies for an opinion on the meaning of the Copyright Act, or for a statement that Thomas-Rasset violated the law by making works available, is not sufficient to maintain an Article III case or controversy. *Chathas v. Local 134 IBEW*, 233 F.3d 508, 512 (7th Cir. 2002); *Alliance to End Repression v. City of Chicago*, 820 F.2d 873, 875-76 (7th Cir. 1987).

For the reasons set forth below, we conclude that when the district court entered judgment after the verdict in the third trial, the court should have

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enjoined Thomas-Rasset from making copyrighted works available to the public, whether or not that conduct by itself violates rights under the Copyright Act. We also conclude that statutory damages of at least \$222,000 were constitutional, and that the district court erred in holding that the Due Process Clause allowed statutory damages of only \$54,000. We therefore will vacate the district court's judgment and remand with directions to enter a judgment that includes those remedies. The question whether the district court correctly granted a new trial after the first verdict is moot.

### A.

After the third trial, the district court entered an injunction that prohibits Thomas-Rasset from “using the Internet or any online media distribution system to reproduce (i.e., download) any of Plaintiffs' Recordings, or to distribute (i.e., upload) any of Plaintiff's Recordings.” The recording companies urged the district court to amend the judgment to enjoin Thomas-Rasset from making any of their sound recordings available for distribution to the public through an online media distribution system. The district court declined to do so on the ground that the Copyright Act does not provide an exclusive right to making recordings available. The court further reasoned that the injunction as granted was adequate to address the concerns of the companies. We review the grant or denial of a permanent injunction for abuse of discretion. *Fogie v. THORN Americas, Inc.*, 95 F.3d 645, 649 (8th Cir. 1996). “Abuse of discretion occurs if the district court reaches its conclusion by applying

erroneous legal principles or relying on clearly erroneous factual findings.” *Id.*

We conclude that the district court’s ruling was based on an error of law. Even assuming for the sake of analysis that the district court’s ruling on the scope of the Copyright Act was correct, a district court has authority to issue a broad injunction in cases where “a proclivity for unlawful conduct has been shown.” See *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949). The district court is even permitted to “enjoin certain otherwise lawful conduct” where “the defendant’s conduct has demonstrated that prohibiting only unlawful conduct would not effectively protect the plaintiff’s rights against future encroachment.” *Russian Media Grp., LLC v. Cable America, Inc.*, 598 F.3d 302, 307 (7th Cir. 2010) (citing authorities). If a party has violated the governing statute, then a court may in appropriate circumstances enjoin conduct that allowed the prohibited actions to occur, even if that conduct “standing alone, would have been unassailable.” *EEOC v. Wilson Metal Casket Co.*, 24 F.3d 836, 842 (6th Cir. 1994) (internal quotation omitted).

Thomas-Rasset’s willful infringement and subsequent efforts to conceal her actions certainly show “a proclivity for unlawful conduct.” The recording companies rightly point out that once Thomas-Rasset makes copyrighted works available on an online media distribution system, she has completed all of the steps necessary for her to engage in the same distribution that the court did enjoin. The record also demonstrates the practical difficulties of detecting actual transfer of recordings to third parties even when a party has made

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large numbers of recordings available for distribution online. The narrower injunction granted by the district court thus could be difficult to enforce.

For these reasons, we conclude that the district court erred after the third trial by concluding that the broader injunction requested by the companies was impermissible as a matter of law. An injunction against making recordings available was lawful and appropriate under the circumstances, even accepting the district court's interpretation of the Copyright Act. Thomas-Rasset does not resist expanding the injunction to include this relief. We therefore will direct the district court to modify the judgment to include the requested injunction.

### B.

On the question of damages, we conclude that a statutory damages award of \$9,250 for each of the twenty-four infringed songs, for a total of \$222,000, does not contravene the Due Process Clause. The district court erred in reducing the third jury's verdict to \$2,250 per work, for a total of \$54,000, on the ground that this amount was the maximum permitted by the Constitution.

The Supreme Court long ago declared that damages awarded pursuant to a statute violate due process only if they are "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919). Under this standard, Congress possesses a "wide latitude of discretion" in setting

statutory damages. *Id.* at 66. *Williams* is still good law, and the district court was correct to apply it.

Thomas-Rasset urges us to consider instead the “guideposts” announced by the Supreme Court for the review of punitive damages awards under the Due Process Clause. When a party challenges an award of punitive damages, a reviewing court is directed to consider three factors in determining whether the award is excessive and unconstitutional: “(1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003); *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-75 (1996).

The Supreme Court never has held that the punitive damages guideposts are applicable in the context of statutory damages. *See Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 586-88 (6th Cir. 2007). Due process prohibits excessive punitive damages because “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.” *Campbell*, 538 U.S. at 417 (quoting *Gore*, 517 U.S. at 574). This concern about fair notice does not apply to statutory damages, because those damages are identified and constrained by the authorizing statute. The guideposts themselves, moreover, would be

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nonsensical if applied to statutory damages. It makes no sense to consider the disparity between “actual harm” and an award of statutory damages when statutory damages are designed precisely for instances where actual harm is difficult or impossible to calculate. *See Cass Cnty. Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 643 (8th Cir. 1996). Nor could a reviewing court consider the difference between an award of statutory damages and the “civil penalties authorized,” because statutory damages *are* the civil penalties authorized.

Applying the *Williams* standard, we conclude that an award of \$9,250 per each of twenty-four works is not “so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.” 251 U.S. at 67. Congress, exercising its “wide latitude of discretion,” *id.* at 66, set a statutory damages range for willful copyright infringement of \$750 to \$150,000 per infringed work. 17 U.S.C. § 504(c). The award here is toward the lower end of this broad range. As in *Williams*, “the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to [federal law]” support the constitutionality of the award. *Id.* at 67.

Congress’s protection of copyrights is not a “special private benefit,” but is meant to achieve an important public interest: “to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). With the

rapid advancement of technology, copyright infringement through online file-sharing has become a serious problem in the recording industry. Evidence at trial showed that revenues across the industry decreased by fifty percent between 1999 and 2006, a decline that the record companies attributed to piracy. This decline in revenue caused a corresponding drop in industry jobs and a reduction in the number of artists represented and albums released. *See Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 492 (1st Cir. 2011).

Congress no doubt was aware of the serious problem posed by online copyright infringement, and the “numberless opportunities for committing the offense,” when it last revisited the Copyright Act in 1999. To provide a deterrent against such infringement, Congress amended § 504(c) to increase the minimum per-work award from \$500 to \$750, the maximum per-work award from \$20,000 to \$30,000, and the maximum per-work award for willful infringement from \$100,000 to \$150,000. *Id.*

Thomas-Rasset contends that the range of statutory damages established by § 504(c) reflects only a congressional judgment “at a very general level,” but that courts have authority to declare it “severe and oppressive” and “wholly disproportioned” in particular cases. The district court similarly emphasized that Thomas-Rasset was “not a business acting for profit, but rather an individual consumer illegally seeking free access to music for her own use.” By its terms, however, the statute plainly encompasses infringers who act without a profit motive, and the statute already provides for a broad range of damages that allows



courts and juries to calibrate the award based on the nature of the violation. For those who favor resort to legislative history, the record also suggests that Congress was well aware of the threat of noncommercial copyright infringement when it established the lower end of the range. *See* H.R. Rep. 106-216, at 3 (1999), 1999 WL 446444, at \*3.<sup>1</sup> Congressional amendments to the criminal provisions of the Copyright Act in 1997 also reflect an awareness that the statute would apply to noncommercial infringement. *See* No Electronic Theft (NET) Act, Pub. L. No. 105-147, § 2(a), 111 Stat. 2678 (1997); *see also* H.R. Rep. 105-339, at 5 (1997), 1997 WL 664424, at \*5. In holding that any award over \$2,250 per work would violate the Constitution, the district court effectively imposed a treble damages limit on the \$750 minimum

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<sup>1</sup> According to the House report in 1999:

By the turn of the century the Internet is projected to have more than 200 million users, and the development of new technology will create additional incentive for copyright thieves to steal protected works. The advent of digital video discs, for example, will enable individuals to store far more material than on conventional discs, and at the same time, produce perfect secondhand copies. . . . Many computer users are either ignorant that copyright laws apply to Internet activity, or they simply believe that they will not be caught or prosecuted for their conduct. Also, many infringers do not consider the current copyright infringement penalties a real threat and continue infringing, even after a copyright owner puts them on notice that their actions constitute infringement and that they should stop the activity or face legal action. In light of this disturbing trend, it is manifest that Congress respond appropriately with updated penalties to dissuade such conduct.

statutory damages award. The district court based this holding on a “broad legal practice of establishing a treble award as the upper limit permitted to address willful or particularly damaging behavior.” Any “broad legal practice” of treble damages for statutory violations, however, does not control whether an award of statutory damages is within the limits prescribed by the Constitution. The limits of treble damages to which the district court referred, such as in the antitrust laws or other intellectual property laws, represent congressional judgments about the appropriate maximum in a given context. They do not establish a *constitutional* rule that can be substituted for a different congressional judgment in the area of copyright infringement. Although the United States seems to think that the district court’s ruling did not question the constitutionality of the statutory damages statute, the district court’s approach in our view would make the statute unconstitutional as applied to a significant category of copyright infringers. The evidence against Thomas-Rasset demonstrated an aggravated case of willful infringement by an individual consumer who acted to download and distribute copyrighted recordings without profit motive. If an award near the bottom of the statutory range is unconstitutional as applied to her infringement of twenty-four works, then it would be the rare case of noncommercial infringement to which the statute could be applied.

Thomas-Rasset’s cross-appeal goes so far as to argue that *any* award of statutory damages would be unconstitutional, because even the minimum damages award of \$750 per violation would be “wholly disproportioned to the offense” and thus

unconstitutional. This is so, Thomas-Rasset argues, because the damages award is not based on any evidence of harm caused by her specific infringement, but rather reflects the harm caused by file-sharing in general. The district court similarly concluded that “statutory damages must still bear *some* relation to actual damages.” The Supreme Court in *Williams*, however, disagreed that the constitutional inquiry calls for a comparison of an award of statutory damages to actual damages caused by the violation. 251 U.S. at 66. Because the damages award “is imposed as a punishment for the violation of a public law, the Legislature may adjust its amount to the public wrong rather than the private injury, just as if it were going to the state.” *Id.* The protection of copyrights is a vindication of the public interest, *Sony Corp. of Am.*, 464 U.S. at 429, and statutory damages are “by definition a substitute for unproven or unprovable actual damages.” *Cass Cnty. Music Co.*, 88 F.3d at 643. For copyright infringement, moreover, statutory damages are “designed to discourage wrongful conduct,” in addition to providing “restitution of profit and reparation for injury.” *F.W. Woolworth Co. v. Contemporary Arts*, 344 U.S. 228, 233 (1952).

Thomas-Rasset highlights that if the recording companies had sued her based on infringement of 1,000 copyrighted recordings instead of the twenty-four recordings that they selected, then an award of \$9,250 per song would have resulted in a total award of \$9,250,000. Because that hypothetical award would be obviously excessive and unreasonable, she reasons, an award of \$222,000 based on the same amount per song must likewise be invalid. Whatever the constitutionality of the hypothetical award, we disagree

that the validity of the lesser amount sought here depends on whether the Due Process Clause would permit the extrapolated award that she posits. The absolute amount of the award, not just the amount per violation, is relevant to whether the award is “so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.” *Williams*, 251 U.S. at 67. The recording companies here opted to sue over twenty-four recordings. If they had sued over 1,000 recordings, then a finder of fact may well have considered the number of recordings and the proportionality of the total award as factors in determining where within the range to assess the statutory damages. If and when a jury returns a multi-million dollar award for noncommercial online copyright infringement, then there will be time enough to consider it.

\* \* \*

For the foregoing reasons, we conclude that the recording companies are entitled to the remedies that they seek on appeal. The judgment of the district court is vacated, and the case is remanded with directions to enter a judgment for damages in the amount of \$222,000, and to include an injunction that precludes Thomas-Rasset from making any of the plaintiffs’ recordings available for distribution to the public through an online media distribution system.

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**APPENDIX B**

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**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

**Civil File No. 06-1497 (MJD/LIB)**

**[Filed July 22, 2011]**

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CAPITOL RECORDS, INC., et al., )  
Plaintiffs, )  
)  
v. )  
)  
JAMMIE THOMAS-RASSET, )  
Defendant. )  

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Andrew B. Mohraz, David A. Tonini, and Timothy M. Reynolds, Holme Roberts & Owen, LLP; Felicia J. Boyd, Barnes & Thornburg, LLP; and Matthew J. Oppenheim, Oppenheim Group, LLP; counsel for Plaintiffs.

Joe Sibley and K. A. D. Camara, Camara & Sibley, LLP, and Brant D. Penney and Garrett D. Blanchfield, Jr., Reinhardt Wendorf & Blanchfield, counsel for Defendant.

Adam D. Kirschner, United States Department of Justice, and Gregory G. Brooker, Assistant United

States Attorney, for Intervenor United States of America.

## **MEMORANDUM OF LAW & ORDER**

### **I. INTRODUCTION**

This matter is before the Court on Plaintiffs' Motion to Amend Judgment [Docket No. 435] and Defendant's Motion to Alter or Amend the Judgment and Renewed Motion for Judgment as a Matter of Law [Docket No. 437].

### **II. SUMMARY OF THE COURT'S OPINION**

The Court grants Thomas-Rasset's motion and reduces the damages award to its constitutional maximum of \$2,250 per song – three times the statutory minimum.

The Court is intimately familiar with this case. It has presided over three trials on this matter and has decided countless motions. It has grappled with the outrageously high verdict returned in a case that was the first of its kind to go to trial. The Court is loath to interfere with the jury's damages decision. However, the Constitution and justice compel the Court to act.

The Court concludes that an award of \$1.5 million for stealing and distributing 24 songs for personal use is appalling. Such an award is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable. In this particular case, involving a first-time willful, consumer infringer of limited means who committed illegal song file-sharing

for her own personal use, an award of \$2,250 per song, for a total award of \$54,000, is the maximum award consistent with due process.

This reduced award is punitive and substantial. It acts as a potent deterrent. It is a higher award than the Court might have chosen to impose in its sole discretion, but the decision was not for this Court to make. The Court has merely reduced the jury's award to the maximum amount permitted under our Constitution.

The Court further grants Plaintiffs' request to amend the Judgment to include a permanent injunction, but declines to enjoin Defendant from making available Plaintiffs' works because, as the Court previously held, the Copyright Act does not provide a making-available right.

### **III. BACKGROUND**

Plaintiffs are recording companies that owned or controlled exclusive rights to copyrights in sound recordings, including 24 at issue in this lawsuit. On April 19, 2006, Plaintiffs filed a Complaint against Defendant Jammie Thomas-Rasset alleging that she infringed Plaintiffs' copyrighted sound recordings pursuant to the Copyright Act, 17 U.S.C. §§ 101, 106, 501-505, by illegally downloading and distributing the recordings via the online peer-to-peer file sharing application known as Kazaa. Plaintiffs sought injunctive relief, statutory damages, costs, and attorney fees.

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The first trial on this matter began on October 2, 2007. On October 4, 2007, the jury found that Thomas-Rasset had willfully infringed all 24 of Plaintiffs' sound recordings at issue and awarded Plaintiffs statutory damages in the amount of \$9,250 for each willful infringement. [Docket No. 100] The total damages award was \$222,000. On October 5, the Court entered judgment on the jury's verdict. [Docket No. 106]

On October 15, Defendant filed a Motion for New Trial, or in the Alternative, for Remittitur, based solely on the issue of the constitutionality of the Copyright Act's statutory damages provision in the case. [Docket No. 109] On September 24, 2008, the Court vacated the verdict and granted a new trial based on its conclusion that it had erred in giving Jury Instruction No. 15, which addressed the existence of a making-available right. [Docket No. 197] The Court made no findings regarding the constitutionality of the damages award. The second trial of this matter began on June 15, 2009. On June 18, 2009, the jury returned a verdict finding that Thomas-Rasset had willfully infringed all 24 sound recordings and awarding statutory damages in the amount of \$80,000 for each song, for a total verdict of \$1,920,000. [Docket No. 336] On June 19, 2009, the Court entered judgment on the jury's verdict. [Docket No. 338]

Thomas-Rasset filed a motion requesting that the Court set aside the award of statutory damages and provided three alternative bases: 1) the statutory damages provision of the Copyright Act, as applied to Thomas-Rasset, violated the due process clause of the U.S. Constitution; therefore, Plaintiffs must accept a \$0



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verdict; 2) the jury's application of the statutory damages provision of the Copyright Act was excessive and shocking so the Court should remit the verdict to the minimum statutory damages of \$750 per sound recording infringed; or 3) the jury's application of the statutory damages provision of the Copyright Act was excessive and shocking so the Court should grant a new trial. Thomas-Rasset also raised issues related to the sufficiency of the evidence to sustain the verdict and the Court's evidentiary rulings. Plaintiffs requested that the Court amend the June 19, 2009 Judgment to include a permanent injunction.

On January 22, 2010, the Court issued an Order holding that the jury's statutory damages award of \$80,000 per song infringed was shocking and unjust and remitted the damages award to \$2,250 per song, three times the statutory minimum. [Docket No. 366] Because the Court reduced the damages award based on remittitur, it did not reach the question of whether the verdict was unconstitutional. The Court further denied Defendant's evidentiary objections and, conditioned upon Plaintiffs' acceptance of the remittitur, granted Plaintiffs' request for an injunction.

On February 8, 2010, Plaintiffs exercised their right to reject remittitur and request a new jury trial solely on the issue of damages. [Docket No. 371]

The case proceeded to trial for a third time on November 2, 2010. On November 3, the jury returned a verdict awarding statutory damages in the amount of \$62,500 for each song, for a total verdict of \$1,500,000. [Docket No. 427] On November 8, the Court entered judgment on the jury's verdict. [Docket No. 428]

Plaintiffs have now filed a Motion to Amend Judgment, seeking to include the same injunctive relief they previously sought in the final judgment. Defendant has filed a Motion to Alter or Amend the Judgment and Renewed Motion for Judgment as a Matter of Law requesting that the Court remove or reduce the award of statutory damages as unconstitutional.

#### **IV. DISCUSSION**

##### **A. Motion to Alter or Amend the Judgment**

###### **1. Introduction**

Defendant requests that this Court amend the judgment to reduce the damages award on the grounds that the award violates the due process clause of the Constitution because it bears no reasonable relationship to the actual damages caused by Defendant. Specifically, she brings an as-applied challenge to the constitutionality of the statutory damages awarded under 17 U.S.C. § 504(c).

Although, in the past, the Court endeavored to avoid unnecessary adjudication of a constitutional issue by relying upon remittitur, based on Plaintiffs' demonstrated refusal to accept remittitur, the Court must now address the constitutionality of the damages award, because, after yet another trial on damages, the Court would face the same constitutional question. Moreover, Defendant has not requested remittitur at this juncture.

“[A] court has a mandatory duty to correct an unconstitutionally excessive verdict so that it conforms to the requirements of the due process clause.” Ross v. Kansas City Power & Light Co., 293 F.3d 1041, 1049 (8th Cir. 2002) (quoting Johansen v. Combustion Eng’g, Inc., 170 F.3d 1320, 1331 (11th Cir. 1999)). The Court has a duty to review whether a statutory damages award conforms to the due process clause even when a jury has rendered the award. See, e.g., S.W. Tel. & Tel. v. Danaher, 238 U.S. 482, 491 (1915) (reversing judgment entered on jury’s \$6,300 statutory damages award because the award “was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law”). See also Seaboard Air Line Ry. v. Seegers, 207 U.S. 73, 78 (1907) (noting that the due process clause imposes “limits beyond which penalties may not go”).

## **2. Standard for Review of the Constitutionality of the Statutory Damages Award**

The parties disagree on the applicable standard for review of the constitutionality of a statutory damages award. Plaintiffs and the Government assert that the correct standard is found in St. Louis, I.M. & S. Ry. Co. v. Williams, 251 U.S. 63, 67 (1919), while Defendant claims that the punitive damages standard found in 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), applies. The Court concludes that the Williams standard applies to its analysis.

**a) The Williams Standard**

Under Williams, an award of statutory damages satisfies due process so long as it is not “so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable.” 251 U.S. at 67. In Williams, the Supreme Court upheld a statutory penalty of \$75 for a railroad ticket overcharge of 66 cents. The railroad alleged that the award, within the statutory range of 50 to 300 dollars, violated due process. The Supreme Court explained that the government had the power to impose fines and to permit the aggrieved party to collect them in a private lawsuit. Id. at 66. And there was no requirement that the award “be confined or proportioned to [the aggrieved party’s] loss or damages; for, as it is imposed as a punishment for the violation of a public law, the Legislature may adjust its amount to the public wrong rather than the private injury, just as if it were going to the state.” Id. (citation omitted). The Supreme Court acknowledged that the penalty seemed large when contrasted with the overcharge, but concluded that the award conformed to the due process clause “[w]hen it is considered with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates.” Id. at 67.

In Williams, the Supreme Court directly addressed the constitutionality of an award of statutory damages within a range set by a legislature. The Supreme Court has continued to cite to Williams as the due process clause standard for statutory damages. See Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 276-77 (1989) (noting authority that

“the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme”) (citing Williams, 251 U.S. at 66-67). Courts have continued to apply the Williams standard today to their review of the constitutionality of statutory damage awards under the Copyright Act. See, e.g., Zomba Enters., Inc. v. Panorama Records, Inc., 491 F.3d 574, 587-88 (6th Cir. 2007). The Williams standard is directly on point and provides clear guidance to the Court for the task at hand.

### **b) Inapplicability of Punitive Damages Jurisprudence**

Thomas-Rasset relies on a series of cases addressing the constitutionality of punitive damages to argue that the statutory damages awarded here are excessive. See Gore, 517 U.S. 559, Campbell, 538 U.S. 408. In these cases, the Supreme Court

instructed courts reviewing punitive damages to consider three guideposts: (1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

Campbell, 538 U.S. at 418 (citation omitted). The Campbell court instructed that “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” Id. at 425.

While statutory damages awards under the Copyright Act undoubtedly contain a punitive component, see Cass County Music Co. v. C.H.L.R., Inc., 88 F.3d 635, 643 (8th Cir. 1996) (stating that “statutory damages . . . are intended not only to put the plaintiff in the position he would have been but for the infringement, but also, and arguably preeminently, to punish the defendant”), they also contain a compensatory component, see id. (“[S]tatutory damages are by definition a substitute for unproven or unprovable actual damages.”); see also F.W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228, 231 (1952) (stating that statutory damages are intended to permit “the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits”) (citation omitted). Statutory damages are materially distinct from punitive damages awards. Moreover, while Gore addressed a punitive damage award awarded in addition to compensatory damages, the Copyright Act statutory damages award is awarded in place of compensatory damages, precisely because actual damages are so difficult to calculate.

The Court finds the Gore guideposts to be inapplicable and unhelpful to its analysis for three main reasons. First, as explained above, statutory damages and punitive damages are two distinct remedies with different purposes and attributes. Second, the Supreme Court’s underlying consideration in the Gore punitive damages jurisprudence is lack of notice; that concern does not neatly apply to a review of statutory damages awarded within a range explicitly set forth by Congress. Third, the Gore guideposts

themselves do not logically fit an analysis of statutory damages.

**(1) Notice**

The three guideposts set forth in Gore were aimed at ensuring that the defendant had fair notice of the potential punitive penalty. See Campbell, 538 U.S. at 416-17 (providing that the reason that “[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor” is because “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose”) (quoting Gore, 517 U.S. at 574) (other citations omitted).

Punitive damages are potentially unlimited and subject to the unbridled discretion of the jury. The Supreme Court was concerned about punitive damage awards because punitive damages awards are subject to an “unregulated and arbitrary use of judicial power.” Lowry’s Reports, Inc. v. Legg Mason, Inc., 302 F. Supp. 2d 455, 460 (D. Md. 2004).

In contrast, by definition, statutory penalties provide parties with clear notice about their potential liability, albeit within a wide range. Here, the Copyright Act incorporates limits on statutory damages awards. Those limits were followed in this case. While the extremely high damages award was completely unexpected by Thomas-Rasset, and likely by Congress, in the Gore sense of the word, Thomas-Rasset was on

“notice” of the potential statutory penalties awarded against her.

**(2) Inapplicability of the Gore Guideposts**

Aside from the fact that the award at issue here is not a punitive damages award and the purpose of the Gore guideposts – avoiding an unconstitutional lack of notice – is inapposite in this case, the Gore guideposts themselves cannot be logically applied to this award.

The most glaring example of the fact that the Gore guideposts do not fit this case is the guidepost requiring courts to examine “the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.” Campbell, 538 U.S. at 418. The Supreme Court reasoned that courts should give “substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue.” Gore, 517 U.S. at 583.

A statutory damages award, such as the one in this case, will be within the permissible range of this guidepost because it will **be** the civil penalty authorized by Congress. The Copyright Act’s explicit damages range is, itself, the very guidepost that the Supreme Court urges this Court to heed. Thus, comparing an in-range statutory damages award to the authorized statutory damages range is unhelpful.

In the second guidepost, the Supreme Court stated that courts should examine the disparity between the actual or potential harm suffered and the punitive



damage award. Campbell, 538 U.S. at 418. Punitive damages are awarded in addition to compensatory damages, so a comparison between the two is easily made. In contrast, under the Copyright Act, statutory damages are awarded in lieu of actual damages. No jury determination of compensatory damages exists to which the Court could compare the statutory damages award.

Moreover, Congress expressly rejected the idea that a statutory damages award should bear some specific ratio to the actual harm suffered by the plaintiff because the statute provides copyright holders with the right to elect either “actual damages and any additional profits of the infringer” or “instead . . . statutory damages.” 17 U.S.C. § 504(a), (c)(1). See also Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc., 259 F.3d 1186, 1194 (9th Cir. 2001) (“A plaintiff may elect statutory damages regardless of the adequacy of the evidence offered as to his actual damages and the amount of the defendant’s profits.”) (citation omitted).

Only the third factor, the degree of the defendant’s culpability or reprehensibility, logically applies to statutory damages awards.

Because the Williams standard is directly applicable to this case and the Gore standard does not logically apply to statutory damages, the Court now examines whether the jury’s award of statutory damages in this case complies with the Williams standard. The Court must decide whether the statutory damages award is so severe and oppressive as to be wholly

disproportioned to the offense or obviously unreasonable.

**3. Whether the Award Is So Severe and Oppressive as to Be Wholly Disproportioned to the Offense or Obviously Unreasonable**

**a) Statutory Damages Framework**

The Copyright Act provides that “an infringer of copyright is liable for either . . . the copyright owner’s actual damages and any additional profits of the infringer . . . or . . . statutory damages.” 17 U.S.C. § 504(a).

The statute further provides:

(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually . . . in a sum of not less than \$750 or more than \$30,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of

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statutory damages to a sum of not more than \$150,000.

17 U.S.C. § 504(c).

Congress last amended the statutory damages section of the Copyright Act in 1999, significantly increasing the minimum and maximum statutory awards to their current levels. Congress intended the statutory damages to be “substantially” higher than actual damages:

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

H.R. Rep. No. 106-216, at 6 (1999).

The statutory damages provision of the Copyright Act serves both to compensate the copyright holder and to deter infringers. Cass County Music Co., 88 F.3d at 643. If a plaintiff requests that a jury decide the amount of statutory damages, then “a jury must determine the actual amount of statutory damages under § 504(c).” Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 355 (1998).

A plaintiff can recover statutory damages even though it did not submit evidence regarding actual damages, such as lost profits:

[S]tatutory damages for copyright infringement are not only “restitution of profit and reparation for injury,” but also are in the nature of a penalty, “designed to discourage wrongful conduct.” “The discretion of the court is wide enough to permit a resort to statutory damages for such purposes. Even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy.”

Cass County Music Co., 88 F.3d at 643 (quoting F.W. Woolworth Co., 344 U.S. at 233) (footnote and emphasis omitted).

**b) The Relationship Between  
Statutory Damages and Actual  
Damages**

Thomas-Rasset argues that the ratio of the statutory damages award to actual damages in this case, when measured in songs, is 1:62,500. She bases this calculation on a cost of \$1 per song online. She further argues that, based on a cost of \$15 per album, the ratio is still 1:4,166. Thomas-Rasset concludes that these ratios are unconstitutionally high.

The Court will not require strict proportionality between actual harm – which cannot be precisely quantified – and the damages award here. Because Plaintiffs chose to seek statutory damages rather than actual damages, the Copyright Act does not require them to present proof of the actual damages caused by Thomas-Rasset’s infringement. See, e.g., F.W.

Woolworth Co., 344 U.S. at 233 (holding that “[e]ven for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy”); Cass County Music Co., 88 F.3d at 643 (“[S]tatutory damages are by definition a substitute for unproven or unprovable actual damages.”).

Nor does the due process clause require that the damages award be strictly proportioned to Plaintiffs’ losses. In the case of statutory damage awards, Congress “may adjust its amount to the public wrong rather than the private injury, just as if [the penalty] were going to the state.” Williams, 251 U.S. at 66 (citation omitted). Therefore, due process does not “require that [the statutory damages award] be confined or proportioned to [the plaintiff’s] loss or damages.” Id. However, because statutory damages have, in part, a compensatory purpose, “assessed statutory damages should bear some relation to the actual damages suffered.” Bly v. Banbury Books, Inc., 638 F. Supp. 983, 987 (E.D. Pa. 1986).

**c) The Factual Support for Actual Damages Inflicted**

Thomas-Rasset argues that there is no evidence of harm caused by her actions – if Plaintiffs were damaged, it was by Kazaa or Kazaa users as a whole, not by Thomas-Rasset in particular. She notes that Plaintiffs’ witnesses could not testify about their specific profit margins on any of the 24 songs at issue; nor could they testify to how many third parties, other

than MediaSentry, received any of the 24 songs from Defendant. Thomas-Rasset points out that, even if she had not shared the 24 songs on Kazaa, those same popular songs would have been available on Kazaa from other users. She concludes that, therefore, Plaintiffs failed to prove any actual injury based on Defendant downloading the 24 songs rather than buying them.

Plaintiffs contend that their actual damages were far greater than the cost of purchasing the songs on iTunes or the CD albums containing the songs. The evidence showed that Thomas-Rasset willfully infringed 24 of their copyrighted sound recordings. The songs, along with almost 2,000 others, were in Thomas Rasset's directory, which she shared with the millions of users of the Kazaa network. Plaintiffs' songs were accessible for free downloading by millions of Kazaa users who could subsequently share them with others. Plaintiffs argue that the valuation of actual damages cannot be limited to the harm only caused by reproducing 24 songs.

Plaintiffs further note that Wade Leak testified that illegal online distribution not only causes the loss of the potential sale of that song to the downloader, but also causes a devaluing of the copyright in general because the marketplace becomes accustomed to obtaining music for free. Leak and JoAn Cho testified that it was difficult for Plaintiffs to compete in the legitimate market with an illegal peer-to-peer market providing access to the same recordings for free. Plaintiffs argue that offering the sound recordings for free – and thus, completely devaluing the recordings – causes more damage to the value of their copyright than if

Defendant had attempted to illegally sell them at a high profit. See F.W. Woolworth, 344 U.S. at 232 (recognizing that “sales at a small margin might cause more damage to the copyright proprietor than sales of the infringing article at a higher price”).

Plaintiffs’ witnesses further testified that the cost of obtaining a license to engage in Thomas-Rasset’s conduct would be prohibitive: in order to obtain an unlimited license to distribute music online for free, a person would have to buy the entire recording company. Even the cost of an unlimited license for one popular individual sound recording would cost millions of dollars – the entire value of the track.

Plaintiffs argue that Thomas-Rasset’s infringement deprived them of the profits they might have made not only from Defendant, but also from an unknowable number of other Kazaa users as well. They point out that widespread peer-to-peer infringement has damaged the value of copyrighted sound recordings as a whole. Overall, online piracy has cost the recording industry billions of dollars and has threatened its viability.

The very nature of the peer-to-peer network used by Thomas-Rasset made it impossible for Plaintiffs to specifically quantify the damage done by Thomas Rasset, because Kazaa does not keep logs of the works that she distributed illegally and does not permit third parties to see what works she distributed. Thomas-Rasset placed all 24 of Plaintiffs’ works in her Kazaa shared folder, kept them in that folder, and kept her computer on and connected to the Internet for an extended period of time with Kazaa running, likely

distributing these works to countless other Kazaa users. Defendant's own misconduct made it difficult to quantify the damage that she caused. The Court rejects her suggestion that she caused no harm. At the same time, while online piracy as a whole may have caused billions in damages, there is simply no basis for attributing more than a miniscule portion of that damage to Thomas-Rasset.

**d) Evidence of Willfulness and the Need for Deterrence**

As the Court instructed the jury, factors other than the damages caused and gains obtained by the defendant's infringement are relevant to the decision of the proper amount of statutory damages. Facts that go to the deterrence aspect of statutory damages, such as a defendant's willfulness or innocence, and incorrigibility, are also relevant. The jury found that Thomas-Rasset acted willfully. Thomas-Rasset testified that she had studied Napster in college and that, before 2003, she had learned that copying and distributing copyrighted music recordings over the Internet without the owner's permission was against the law. Therefore, she was aware that downloading songs off of and distributing songs via Kazaa was illegal.

Moreover, Thomas-Rasset refused to accept responsibility for downloading and distributing the infringing sound recordings. She lied in her trial testimony by denying responsibility for her infringing acts and, instead, casting possible blame on her children and ex-boyfriend for her actions. Thomas-Rasset's past refusal to accept responsibility for her actions raises the need for strong deterrence.



**e) Williams Factors**

Having analyzed the harm caused by Thomas-Rasset's actions, the willfulness of her infringement, and the need for deterrence, the Court now addresses whether the \$1.5 million statutory damages award passes muster under the Williams standard. The Williams court highlighted three factors when analyzing whether the statutory damages award complied with the due process clause: "the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates." Williams, 251 U.S. at 67. The Court examines each factor with regard to this case.

**(1) Public Interest**

Thomas-Rasset argues that there is no public interest at play in this case. She notes that she is an individual, not a company providing a necessary public service, like the railroad in Williams. She claims that this lawsuit only vindicates the recording companies' private pecuniary interests, not the general rights of the public. The Court disagrees.

There is a significant public interest in vindicating copyright. In fact, "the primary object in conferring the monopoly lie[s] in the general benefits derived by the public from the labors of authors." United States v. Paramount Pictures, 334 U.S. 131, 158 (1948). Copyright "is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public

access to the products of their genius after the limited period of exclusive control has expired.” Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984). The public has a strong interest in rewarding and protecting copyright owners in order to encourage the creation of valuable works to be shared with the public.

**(2) Opportunities for Committing the Offense**

Due to the nature of peer-to-peer networks, such as Kazaa, there are numberless opportunities for Thomas-Rasset – and other individuals – to commit infringement of copyrighted sound recordings. It is easy, costless, and quick to infringe online. There are millions of users seeking to download and distribute sound recordings. There are countless sound recordings and other copyrighted material to be infringed. Kazaa was capable of allowing the sharing of hundreds of millions of files at a time. At the time that MediaSentry interacted with Thomas-Rasset on Kazaa, there were more than 2 million users online sharing more than 800 million files. Thomas-Rasset, herself, compiled almost 2,000 songs in her Kazaa shared folder. Because of the design of peer-to-peer networks, such as Kazaa, copyright holders face formidable challenges in identifying and stopping infringers. It is clear that there are “numberless opportunities for committing the offense” of illegally downloading and distributing sound recordings online.

**(3) Need for Securing Uniform Adherence**

The third Williams factor was “the need for securing uniform adherence to established passenger rates.” The need for deterrence also exists in this case. Online infringement is easy to complete; it causes real damage to the copyright holders, and, thereby injures the public by leading to a decrease in the incentive to create artistic works; and it is widespread.

**f) Unconstitutional Severity and Oppressiveness of the Award**

To protect the public’s interest in enforceable copyrights, to attempt to compensate Plaintiffs, and to deter future copyright infringement, Thomas-Rasset must pay a statutory damages award. Plaintiffs have pointed out that Thomas-Rasset acted willfully, failed to take responsibility, and contributed to the great harm to the recording industry inflicted by online piracy in general. These facts can sustain the jury’s conclusion that a substantial penalty is warranted. However, they cannot justify a \$1.5 million verdict in this case.

As the Court noted in its January 2010 Order, Thomas-Rasset was not a business acting for profit. Instead, she was an individual consumer illegally seeking free access to music for her own use. Congress set a high maximum for statutory damages in order to ensure that damages awards could be large enough to outweigh the potential gain from infringing. In the case of commercial actors, the potential gain in revenues is enormous and enticing to potential infringers. In the

case of an individual, like Thomas-Rasset, who infringes by using peer-to-peer networks, the potential gain from infringement is access to free music to build a personal library, which could be purchased, at most, for thousands of dollars, not the possibility of hundreds of thousands – or even millions – of dollars in profits. Although Plaintiffs highlight cases upholding large statutory damages awards under the Copyright Act, all involve commercial infringers – businesses, not private individuals committing infringement for their personal use. In fact, the only case in which the court examined the constitutionality of a large statutory damages award against a non-commercial, individual downloader is Sony BMG Music Entertainment v. Tenenbaum, in which the Judge Gertner reached the same conclusion of unconstitutionality as this Court now reaches. See 721 F. Supp. 2d 85, 116 (D. Mass. 2010). There is no doubt that a multi-million dollar penalty is overkill to deter a private individual from obtaining free songs online. The need for deterrence cannot justify a \$1.5 million verdict for stealing and illegally distributing 24 songs for the sole purpose of obtaining free music.

Nor can the damage suffered by Plaintiffs support this verdict. Plaintiffs were not required to prove their actual damages, and the Court does not shift that burden to them now. Even so, the possible actual damage weighs in the Court's analysis. One purpose of statutory damages under the Copyright Act is to act as a substitute for actual damages when they are difficult to calculate. However, as the Court has already explained, statutory damages must still bear **some** relation to actual damages.

Plaintiffs cannot calculate how many other computer users committed infringement with the illegal copies of works accessed from Thomas-Rasset or the amount of damage that their access caused. Detecting online piracy and identifying infringers on peer-to-peer networks is difficult and costly. The recovery to Plaintiffs must be sufficient to justify their expenditure in pursuing infringers.

The Court acknowledges that, in aggregate, illegal downloading has caused substantial, widespread harm to the recording industry. Thomas-Rasset's individual acts of distribution likely led to distribution by an exponential chain of other users. She is a part of that chain, and her illegal actions contributed to the end result of widespread damage to Plaintiffs. These facts justify a statutory damages award that is many multiples higher than the simple cost of buying a CD or legally purchasing the songs online. Yet, although Thomas-Rasset played a role in the web of online piracy, she played a miniscule role – she was one of more than 2 million users sharing more than 800 million files on the day that MediaSentry obtained files from her. It cannot be that she must pay the damages caused by millions of individuals because she was one of two users caught, sued, and subjected to a jury trial.

The Court has weighed the near impossibility of quantifying the damages caused by the chain effect of Thomas-Rasset's distribution of copyrighted sound recordings over the Internet, the substantial damages caused by online piracy in aggregate, the compelling need for deterrence in this particular case, and the formidable obstacles to identifying and pursuing infringers. The Court accords deference to the jury's

verdict. Yet an award of \$1.5 million for stealing and distributing 24 songs for personal use is appalling. Such an award against an individual consumer, of limited means, acting with no attempt to profit, is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.

**4. The Maximum Constitutionally Allowable Statutory Damages Award in This Case**

**a) Standard for Reduction under the Due Process Clause**

Because the Court concludes that the \$1.5 million award violates the due process clause, it must reduce the award to the maximum amount that will comply with due process. See Tenenbaum, 721 F. Supp. 2d at 117; see also Leatherman Tool Group, Inc. v. Cooper Indus., Inc., 285 F.3d 1146, 1152 (9th Cir. 2002) (reducing unconstitutionally high punitive damages award to the “maximum award . . . consistent with due process”).

**b) Maximum Permissible Statutory Damages Award**

As the Court explained in its January 2010 Order, it cannot accept Thomas Rasset’s invitation to simply compare the costs of the pilfered songs on iTunes and reach the maximum permissible award. Thomas-Rasset caused damages to Plaintiffs that are far ranging and difficult to calculate. By distributing the songs at issue online for free, Thomas-Rasset exponentially increased Plaintiffs’ damages. Additionally, unlike actual

damages, statutory damages can include a deterrence component, which can justify a higher award. Here, Thomas-Rasset willfully infringed on Plaintiffs' copyrights and then denied responsibility for her infringing acts and, instead, blamed others. These facts justify a higher award to serve the increased need for deterrence.

Moreover, Plaintiffs elected to recover statutory damages **in lieu of** actual damages. Therefore, it would be improper to limit Plaintiffs' recovery based on a strict multiple of Plaintiffs' actual damages. In any case, the damages caused by Thomas-Rasset's infringement cannot be calculated with precision.

The Court concludes that a statutory damages award of \$2,250 – 3 times the statutory minimum – per sound recording infringed is the maximum permitted under the due process analysis. As the Court explained in its January 2010 Order, there is a broad legal practice of establishing a treble award as the upper limit permitted to address willful or particularly damaging behavior. Federal statutes allow for an increase in statutory damages, up to triple statutory damages, when the statutory violation is willful or demonstrates a particular need for deterrence. See, e.g., Digital Millennium Copyright Act, 17 U.S.C. § 1203(c)(4) (providing that “the court may increase the award of damages up to triple the amount that would otherwise be awarded” if the person committed the violation “within 3 years after a final judgment was entered against the person for another such violation”); Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(3), (c)(5) (permitting court to increase statutory damages award “to an amount equal to not

more than 3 times” the statutory damages amount of \$500, for willful or knowing violations). In these other contexts, treble statutory damages have been set as the permissible outer limit of statutory damages awards, even in the face of willful behavior.

Other statutes, while not trebling statutory damages, allow tripling of a dollar amount other than actual damages, such as the cost of settlement service, the defendant’s profits, the amount of a fraudulent claim, or a month’s rent. See, e.g., Real Estate Settlement Procedures Act, 12 U.S.C. § 2607(d)(2) (“Any person or persons who violate the prohibitions or limitations of this section shall be jointly and severally liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service.”); Lanham Act, 15 U.S.C. § 1117(b) (providing that, under certain circumstances involving the use of a counterfeit mark or designation, “the court shall, unless the court finds extenuating circumstances, enter judgment for three times such profits or damages, whichever amount is greater”); Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a(a) (“In addition, such a person shall be subject to an assessment of not more than 3 times the amount claimed for each such item or service in lieu of damages sustained by the United States or a State agency because of such [false] claim . . . .”); Mass. Gen. Laws ch. 186, § 14 (“Any person who commits any act in violation of this section [by interfering with a tenant’s quiet enjoyment] shall also be liable for actual and consequential damages or three month’s rent, whichever is greater . . .”).



Many statutes permit the recovery of treble actual damages, either because of willful behavior or as a matter of course when Congress has found the violation to be particularly serious. See, e.g., Clayton Act, 15 U.S.C. § 15(a) (providing that “any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . shall recover threefold the damages by him sustained”); Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c) (providing that “[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter . . . shall recover threefold the damages he sustains”); False Claims Act, 31 U.S.C. § 3729(a)(1) (establishing “civil penalty of not less than \$5,000 and not more than \$10,000 . . . plus 3 times the amount of damages which the Government sustains because of the act of that person”); Patent Act, 35 U.S.C. § 284 (providing that “the court may increase the damages up to three times the amount found or assessed”); Residential Lead-Based Paint Hazard Reduction Act, 42 U.S.C. § 4852d(b)(3) (“Any person who knowingly violates the provisions of this section shall be jointly and severally liable to the purchaser or lessee in an amount equal to 3 times the amount of damages incurred by such individual.”).

Finally, when statutory damages provisions do not provide specific guidance, courts have turned to the treble damages formula to address willful behavior. See, e.g., Zuffa, LLC v. Al-Shaikh, Civil Action No. 10-00085-KD-C, 2011 WL 1539878, at \*9 (S.D. Ala. Apr. 21, 2011) (noting that, in awarding statutory damages for first time violations of the

Communications Act of 1934, 47 U.S.C. § 605(e)(3)(C), where the court is permitted to increase the statutory damages award by an unspecified amount up to \$100,000 based upon a finding of willfulness and attempted gain, many courts have “multiplied the amount of statutory damages awarded . . . by three (3), to compute the amount of enhanced damages”) (gathering cases).

There is no treble damages provision included within the Copyright Act, and this Court does not seek to insert such a provision. The Court concludes that in this particular case, involving a first-time willful, consumer infringer who committed illegal song file-sharing for her own personal use, \$2,250 per song, for a total award of \$54,000, is the maximum award consistent with due process. See also Tenenbaum, 721 F. Supp. 2d at 117 (concluding that “an award of \$2,250 per song, three times the statutory minimum, is the outer limit of what a jury could reasonably (and constitutionally) impose in this case” )(footnote omitted).

The Court must settle upon a precise dollar amount that is the maximum award permissible, yet any specific dollar amount will appear to be somewhat arbitrary. Why is an award of \$2,251 per song oppressive while an award of \$2,250 is not? See Tenenbaum, 721 F. Supp. 2d at 117-18 (“Some will undoubtedly murmur that my decision to draw the constitutional line at \$2,250 per infringed work is to some extent arbitrary. But this criticism applies to any line drawing process; it is always possible to argue that the line should have been drawn a bit differently.”). The Court must arrive upon a tangible dollar amount.

Having carefully weighed all of the relevant factors, the Court concludes that, in this case, setting the limit at three times the minimum statutory damages amount is the most reasoned solution.

This award constitutes the maximum amount a jury could award, consistent with the due process clause. This reduced award is punitive and substantial. It acts as a potent deterrent. It is a higher award than the Court might have chosen to impose in its sole discretion, but the decision was not for this Court to make. The Court has merely reduced the jury's award to the maximum amount permitted under our Constitution.

## **B. Plaintiffs' Request for Injunctive Relief**

### **1. Propriety of an Injunction**

Plaintiffs request that, under Federal Rule of Civil Procedure 59(e), the Court amend the Judgment in this case to include an injunction, as requested in Plaintiffs' Complaint. The Court thoroughly addressed this request in its January 2010 Order, and the parties raise no materially new arguments that would change the Court's ruling. See Capitol Records Inc. v. Thomas-Rasset, 680 F. Supp. 2d 1045, 1059-62 (D. Minn. 2010). Therefore, based on the same reasoning set forth in the Court's previous Order, the Court grants Plaintiffs' request, with the exception that the Injunction will not include a ban on the act of making available Plaintiffs' sound recordings.

The Copyright Act provides:

Any court having jurisdiction of a civil action arising under this title may . . . grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.

17 U.S.C. § 502(a). “Injunctions regularly are issued pursuant to the mandate of Section 502, because the public interest is the interest in upholding copyright protections.” Taylor Corp. v. Four Seasons Greetings, LLC, 403 F.3d 958, 968 (8th Cir. 2005) (citation omitted).

To determine whether permanent injunctive relief is warranted, [the Court] balance[s] three factors: (1) the threat of irreparable harm to the moving party; (2) the balance of harm between this harm and the harm suffered by the nonmoving party if the injunction is granted; and (3) the public interest.

Id. at 967.

**a) Irreparable Harm**

Plaintiffs have demonstrated irreparable harm, whether or not the Court applies the traditional presumption of irreparable harm based upon a finding of copyright infringement. Although Plaintiffs are awarded a large monetary judgment against Defendant to compensate them for any past infringing acts and deter future infringement, there are strong doubts

whether Plaintiffs will ever recover the monetary award from Defendant. Moreover, the Court holds that the likelihood of future infringement is raised because Defendant did not accept responsibility for her actions, and online infringement is easy to execute, but difficult to detect. Nor does Plaintiffs' failure to seek a preliminary injunction prevent entry of a permanent injunction at this point in the litigation. Cf. MercExchange, L.L.C. v. eBay, Inc., 500 F. Supp. 2d 556, 573 (E.D. Va. 2007) (holding plaintiff's failure to seek a preliminary injunction was "plainly not dispositive" and concluding that failure was only relevant in that particular case because it was "consistent with [the plaintiff's] strategy of pursuing market participants to exact licenses for infringement") (footnote omitted). There is no indication that Plaintiffs' decision to forgo seeking a preliminary injunction was part of an overall strategy to attempt to exact licenses or was otherwise contrary to the propriety of entry of a permanent injunction at this time.

Congress provided for statutory damages for the very reason that actual damages for copyright infringement are difficult to prove. It would be contrary to Congress's intent and the jury's verdict to deny injunctive relief to Plaintiffs because they took advantage of the option of seeking statutory damages due to the difficulty of proving actual damages. This challenge of measuring damages contributes to a finding of irreparable harm.

As the Court has already discussed in this Order, illegal distribution over peer-to-peer networks, such as Kazaa, causes substantial damage to Plaintiffs.

Additionally, a license to engage in Defendant's activity would be prohibitively expensive. The downloaded sound recordings in this case were exact replicas of Plaintiffs' copyrighted sound recordings. Therefore, by distributing these recordings to other Kazaa users, Thomas-Rasset directly competed with Plaintiffs' copyrighted material. Measuring damages from peer-to-peer copyright infringement is particularly difficult because Kazaa permits anonymous file sharing, so copyright holders cannot monitor every act of infringement over the network.

The harm Plaintiffs face is irreparable and monetary damages are inadequate precisely because actual damages are difficult to compute. Given the large volume of songs in Thomas-Rasset's Kazaa share file and her past refusal to accept responsibility for her actions, it is reasonable to conclude that an injunction is necessary to prevent future infringement. This threat of repeated infringement, the difficulty of detecting future infringement by Thomas-Rasset, and the viral aspect of damages weigh in favor of a finding of a threat of irreparable harm.

#### **b) Balance of the Hardships**

The balance of the hardships favors an injunction. The requested injunction would inflict minimal hardship on Thomas-Rasset. There is no cognizable harm to Defendant from being enjoined from doing something that is against the law and for which she has already been found liable. Thomas-Rasset fails to identify any hardship that would be inflicted upon her if the injunction is issued. On the other hand,

Defendant's conduct could create exponential harm to Plaintiffs.

**c) Public Interest**

Injunctions regularly are issued pursuant to the mandate of section 502, because the public interest is the interest in upholding copyright protections. Since Congress has elected to grant certain exclusive rights to the owner of a copyright in a protected work, it is virtually axiomatic that the public interest can only be served by upholding copyright protections and, correspondingly, preventing the misappropriation of the skills, creative energies, and resources which are invested in the protected work.

Taylor Corp., 403 F.3d at 968 (citations omitted).

The public interest weighs in favor of an injunction. There is no allegation that Thomas-Rasset engaged in parody or other critical use of Plaintiffs' copyrighted material, and her fair use defense was waived; instead, Defendant engaged in "simple piracy." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 578 n.10 (1994). Here, the public interest is in favor of upholding copyright protections and the copyright holder's exclusivity.

## 2. Scope of the Injunction

The Court grants Plaintiffs' request for an injunction. Analysis of each equitable factor favors entry of a permanent injunction barring future infringement. Therefore, the Court grants Plaintiffs' motion to amend the judgment.

Because Plaintiffs continually create new works that will be vulnerable to infringement and would require litigation if the injunction were limited to existing works, the injunction covers works to be created in the future. See, e.g., Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1392 (6th Cir. 1996) ("The weight of authority supports the extension of injunctive relief to future works.") (citations omitted).

The Court also orders Thomas-Rasset to destroy all unauthorized copies of Plaintiffs' recordings, to the extent that she still possesses them. See 17 U.S.C. § 503(b) (permitting court to order "destruction or other reasonable disposition of all copies . . . made or used in violation of the copyright owner's exclusive rights"). Thomas-Rasset offers no legitimate reason why she should keep unauthorized copies of the infringed songs.

Plaintiffs further request that the Court include language in the injunction barring Defendant from making any of Plaintiffs' sound recordings available for distribution to the public. Plaintiffs argue that, if Thomas-Rasset makes Plaintiffs' copyrighted works available on a peer-to-peer network, she will have completed all of the steps necessary for her to engage in the same illegal distribution of Plaintiffs' works for



which she has already been found liable. Because the Court has held that the Copyright Act does not provide a making available right, it will not enjoin Thomas-Rasset from making the copyrighted sound recordings available to the public. See Capitol Records v. Thomas, 579 F. Supp. 2d 1210, 1226-27 (D. Minn. 2008). As granted, the Injunction adequately addresses Plaintiffs' concern. It enjoins all infringement by Defendant, including use of an online distribution system to reproduce or distribute Plaintiffs' sound recordings without a lawful license or Plaintiffs' express authority.

Accordingly, based upon the files, records, and proceedings herein, **IT IS HEREBY ORDERED:**

1. Plaintiffs' Motion to Amend Judgment [Docket No. 435] is **DENIED IN PART** and **GRANTED IN PART** as follows: The Judgment [Docket No. 428] will be amended to include the following permanent injunction:

Defendant shall be and hereby is enjoined from directly or indirectly infringing Plaintiffs' rights under federal or state law in the copyrighted recordings and any sound recording, whether now in existence or later created, that is owned or controlled by Plaintiffs (or any parent, subsidiary, or affiliate record label of Plaintiffs) ("Plaintiffs' Recordings"), including without limitation by using the Internet or any online media distribution system to reproduce (*i.e.*, download) any of Plaintiffs' Recordings, or to distribute

(i.e., upload) any of Plaintiffs' Recordings, except pursuant to a lawful license or with the express authority of Plaintiffs. Defendant also shall destroy all copies of Plaintiffs' Recordings that Defendant has downloaded onto any computer hard drive or server without Plaintiffs' authorization and shall destroy all copies of those downloaded recordings transferred onto any physical medium or device in Defendant's possession, custody, or control.

2. Defendant's Motion to Alter or Amend the Judgment and Renewed Motion for Judgment as a Matter of Law [Docket No. 437] is **GRANTED** as follows:

The Judgment [Docket No. 428] is amended to reduce the damages award to \$2,250 per sound recording infringed.

**LET JUDGMENT BE ENTERED ACCORDINGLY.**

Dated: July 22, 2011

s/ Michael J. Davis

Michael J. Davis

Chief Judge

United States District Court

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**APPENDIX C**

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**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

**Civil File No. 06-1497 (MJD/LIB)**

**[Filed July 22, 2011]**

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CAPITOL RECORDS INC.; SONY BMY )  
MUSIC ENTERTAINMENT; ARISTA )  
RECORDS LLC; INTERSCOPE RECORDS; )  
WARNER BROS. RECORDS INC.; )  
and UMG RECORDINGS INC. )  
Plaintiffs, )  
)  
)  
v. )  
)  
)  
JAMMIE THOMAS-RASSET, )  
Defendant. )  
)

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**JUDGMENT IN A CIVIL CASE**

- Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:

1. Plaintiffs' Motion to Amend Judgment [Docket No. 435] is **DENIED IN PART** and **GRANTED IN PART** as follows: The Judgment [Docket No. 428] will be amended to include the following permanent injunction: Defendant shall be and hereby is enjoined from directly or indirectly infringing Plaintiffs' rights under federal or state law in the copyrighted recordings and any sound recording, whether now in existence or later created, that is owned or controlled by Plaintiffs (or any parent, subsidiary, or affiliate record label of Plaintiffs) ("Plaintiffs' Recordings"), including without limitation by using the Internet or any online media distribution system to reproduce (i.e., download) any of Plaintiffs' Recordings, or to distribute (i.e., upload) any of Plaintiffs' Recordings, except pursuant to a lawful license or with the express authority of Plaintiffs. Defendant also shall destroy all copies of Plaintiffs' Recordings that Defendant has downloaded onto any computer hard drive or server without Plaintiffs' authorization and shall destroy all copies of those downloaded recordings transferred onto any physical medium or device in Defendant's possession, custody, or control. 2. Defendant's Motion to Alter or Amend the Judgment and Renewed Motion for Judgment as a Matter of Law [Docket No. 437] is **GRANTED** as follows:

App. 63

The Judgment [Docket No. 428] is amended to reduce the damages award to \$2,250 per sound recording infringed.

July 22, 2011  
Date

RICHARD D. SLETTEN, CLERK

s/ J. Zuech  
(By) J. Zuech Deputy Clerk

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**APPENDIX D**

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**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

**Civil File No. 06 1497 (MJD/LIB)**

**[Filed November 8, 2010]**

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CAPITOL RECORDS INC., )  
a Delaware corporation; )  
SONY BMG MUSIC ENTERTAINMENT, )  
a Delaware general partnership; )  
ARISTA RECORDS LLC, )  
a Delaware limited liability company; )  
INTERSCOPE RECORDS, )  
a California general partnership; )  
WARNER BROS. RECORDS INC., )  
a Delaware corporation; and )  
UMG RECORDINGS, INC., )  
a Delaware corporation; )  
)  
Plaintiffs, )  
)  
v. )  
)  
JAMMIE THOMAS RASSET, )  
)  
Defendant. )  

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**JUDGMENT IN A CIVIL CASE**

This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

**IT IS ORDERED AND ADJUDGED THAT:**

Judgment is entered in favor of Plaintiffs and against Defendant as follows:

1. Capitol Records, Inc. – \$62,500 for the 1 sound recording, for a total of \$62,500.
2. Sony BMG Music Entertainment – \$62,500 for each of the 6 sound recordings, for a total of \$375,000.
3. Arista Records LLC – \$62,500 for each of the 2 sound recordings, for a total of \$125,000.
4. Interscope Records – \$62,500 for each of the 3 sound recordings, for a total of \$187,500.
5. Warner Bros. Records Inc. – \$62,500 for each of the 3 sound recordings, for a total of \$187,500.
6. UMG Recordings, Inc. – \$62,500 for each of the 9 sound recordings, for a total of \$562,500.

Dated: November 8, 2010 s/ Michael J. Davis  
Michael J. Davis  
Chief Judge  
United States District Court