**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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| SONY BMG MUSIC ENTERTAINMENT,<br>a Delaware general partnership;<br>ARISTA RECORDS LLC,<br>a Delaware limited liability company;<br>UMG RECORDINGS, INC.,<br>a Delaware corporation;<br>and BMG :MUSIC,<br>A New York general partnership,<br><br>*Plaintiffs,*<br><br>Vs.<br><br>DENISE CLOUD,<br>*Defendant.* | :<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>:<br>: | Case No. 2:08 CV 01200 WY |

**DEFENDANT CLOUD'S REPLY TO THE UNITED STATES OF AMERICA'S MEMORANDUM IN DEFENSE OF THE STATUTORY DAMAGES PROVISION OF THE COPYRIGHT ACT, 17 U.S.C. § 504©**

Defendant Denise Cloud, by and through her counsel undersigned below, hereby submit this reply to the United States of America's memorandum in defense of the statutory damages provisions of the Copyright Act, and the Amicus brief filed by the Free software Foundation.

## I. Cloud Agrees That Any Non-constitutional Issues Should Be Decided First; but Disagrees That this Means Only "After a Jury Trial" or Fully Developed Record.

Cloud agrees with the United States (hereinafter "U.S.") that any non-constitutional issues presented by the parties should be decided first. This means that this court could (and should) avoid any direct constitutional attacks on the statute itself by granting Cloud's rule 12 motion to dismiss on other grounds raised in her original motion, to wit:

a) Plaintiffs have not met the requirement of pleading a valid copyright infringement claim because there is no assertion in the complaint that Cloud made a "material object" and therefore could not have made a "copy" or "phonorecord"– a requirement for an infringement claim under 17 USC 504. This would follow the reasoning of the recent Second Circuit opinion in *The Cartoon Network, LP ("Cablevision") v CSC Holdings, Inc,* 536 F.3d 121 (2d Cir. 2008) , which declined to follow *MAI Systems Corp. v. Peak Computer In*c., 991 F.2d 511 (9th Cir. 1993), a much criticized case, which had incorrectly assumed that an unauthorized digital copy of a copyrighted work in computer memory will always infringe the copyright act.

b) Plaintiffs have not met the requirement of pleading a valid *willful* copyright infringement claim, because they allege no plausible facts indicating willfulness within the *Twombly* standard, and the willfulness count gives plaintiffs an unduly prejudicial *in terrorem* judicial weapon to force a coercive settlement.

c) Plaintiffs are collaterally estopped from arguing that "making available" a copyrighted work in the form of a digital file on a network is an infringement, because of the contrary holding in *Capitol Records, Inc. v. Thomas* 579 F. Supp. 2d 1210 (D. Minn. 2008), in which they were parties or in privity.

However, the U.S. goes further and argues that this court can only assess whether the Copyright Act as applied to this defendant is unconstitutional under the 5th and 8th amendments, *after a jury trial.* In other words, assuming *arguendo* that the plaintiffs are asking for a clearly excessive fine or punishment in their pleadings, (which they are), then the defendant must defend and litigate the claim first, despite Rule 12(b)(6)'s clear mandate to the court to look at

the pleadings to determine if there is a claim for relief that cannot be granted.

The "constitutional avoidance doctrine" does not require total abrogation of the doctrine of judicial economy. As one recent law review commentator[1] put it,

> "...the Supreme Court's decisions show that the strength of the constitutional avoidance policy varies from one situation to another, and its application depends on its costs and benefits in a given context....Despite the benefits of constitutional avoidance, it is best characterised as a flexible norm, not an absolute requirement....The lesson taught by cases like *Long* and *Zobrest* [two Supreme Court cases that did not apply the avoidance doctrine - *ed.*] is that the decision whether to apply the last resort rule depends on an assessment of the costs and benefits of avoidance in a given situation.

As this Court is well aware, the issue of the constitutionality of copyright statutory damages applies to the thousands of "internet downloading cases" in federal courts brought by these same record company plaintiffs since 2003. In all that time, only one case has been brought to trial (*Capitol v Thomas)*, and that resulted in a mistrial because of error caused by the RIAA's "making available" jury instruction, and has yet to be re-tried. Moreover, in that case, the district court rejected the position of the RIAA and the Government that statutory damages were not limited by constitutional punitive damage limitations of the 5th or 8th amendments. [2] , and refused to follow the Sixth Circuit's *Zomba* v. *Panorama* case. Cloud agrees with the District Court in *Capitol v. Thomas* that the entire RIAA litigation process is extortionate, and has the effect of extracting settlements out of innocent individuals who cannot afford to litigate to conclusion. The U.S. response that "we cannot address this until the conclusion of trial", is cynical to say the least. It is submitted that this situation is analogous to the exception to the

[1] See "The 'Order of Battle' in Constitutional litigation" by Michael C. Wells, University Of Georgia Law School , available at http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=michael_wells .

[2] See Legal Update, *Capitol v. Thomas and the Future of Peer to Peer File Sharing Litigation* Boston University Journal of Science and Technology Law, Vol 15, 2009 http://www.bu.edu/law/central/jd/organizations/journals/scitech/documents/Ali_WEB.pdf

mootness doctrine, known as "capable of repetition, yet evading review."

It is well known that a court will allow an otherwise moot or not ripe case to go forward if it is the type for which persons will frequently be faced with a particular situation, but will likely cease to be in a position where the court can provide a remedy for them in the time that it takes for the justice system to address their situation. The most frequently cited example is the 1973 United States Supreme Court case of *Roe v. Wade*, 410 U.S. 113 (1973) which challenged a Texas law forbidding abortion most circumstances. The state argued that the case was moot because plaintiff Roe was no longer pregnant by the time the case was heard. As Justice Blackmun wrote in the majority opinion, relying on *Southern Pacific Terminal Co. v. ICC*, 299 U.S. 498, 515 (1911), which had held that a case was not moot when it presented an issue that was "capable of repetition, yet evading review:"

> The normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid.

Those last lines are worth repeating. "**Where appellate review will be effectively denied, our law should not be that rigid."** That is the situation at bar. To force this to an unnecessary trial would be a kind of cruel and unusual punishment in itself, forcing the individual downloader defendant into bankruptcy or penury. This court should not apply the avoidance doctrine here. [3] The entire expensive litigation process involving statutory damages is part of the problem.

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[3] In *Zobrest vs.Catalina Foothills School District*. 509 U.S. 1 (1993), the Supreme Court did not apply the avoidance doctrine in a case involving the Establishment clause, because of the importance of the issue, though there were non-constitutional statutory grounds available for decision. See also *Michigan v. Long* 463 U.S. 1032 (1983).

However, this does not mean that this court needs to "develop the record", in order to adjudicate the constitutional issues prior to trial, as amicus Free Software Foundation[4] urges. In *Capitol v Thomas,* there was substantial testimony proffered by the plaintiffs therein ( and herein) on what the actual costs of digital audio files are, in order to amply illustrate the exorbitant ratio that statutory damages foists upon the heads of Cloud and others similarly situated. See, for example, the testimony in *Capitol Records, Inc. v. Thomas* 579 F. Supp. 2d 1210 (D. Minn. 2008,) where an RIAA witness testified that the range of prices for digital audio files on the internet are usually under one dollar.[5] This is a fact which can now be considered established in this case on equitable estoppel grounds, or alternatively, be noticed judicially, as it is readily verifiable on the internet. The transcript of the trial is at http://beckermanlegal.com/ http://beckermanlegal.com/pdf/?file=/Lawyer_Copyright_Internet_Law/virgin_thomas_071003T

[4] The Free Software Foundation has requested permission to file an amicus curiae brief arguing that the RIAA's statutory damages theory is unconstitutional., which Cloud supports generally. Among other things, the brief:
-reviews case law and scholarship subsequent to the Supreme Court's decision in the *State Farm* case to the effect that statutory damages are subject to due process scrutiny under the test enunciated in *State Farm* and in the *Gore* case;
-analyzes the Supreme Court cases in *Gore*, *State Farm*, and *Williams*, as well as the 6th Circuit's decision in *Zomba*;
-discusses other authorities for the principle that statutory damages under the Copyright Act must bear a reasonable relationship to actual damages;
-argues that the RIAA and the Department of Justice ought not to be permitted to blur the distinction between their "downloading" claim and their "distribution" claim;
-argues that the RIAA and Department of Justice ought not to be permitted to speculate as to what the record companies' damages might have been had they been able to prove that the defendant was in fact a distributor;
-argues that the RIAA's theory that every unauthorized download is a lost sale for damages purposes has been discredited;
-argues that even under the Williams test, which the RIAA and DOJ claim to be applicable, the RIAA's statutory damages theory is still flagrantly unconstitutional;
-points out that even the Department of Justice, which has argued on the RIAA's behalf that "statutory damages" are different than "punitive damages", has itself taken the position -- but months ago -- that "statutory damages ...are similar to punitive damages"; and
-points out that the US Supreme Court has recognized that statutory damages are indeed similar to punitive damages.

[5] Capitol Records, Inc. v. Thomas, 579 F. Supp. 2d 1210 (D. Minn. 2008) . The court also commented in dicta that the statutory damages scheme's application to peer-to-peer file sharing litigation was "wholly disproportionate" and "oppressive" when applied to individual users. Id. at 1228. A discussion of the case is at http://www.bu.edu/law/central/jd/organizations/journals/scitech/documents/Ali_WEB.pdf

ranscript280-543.pdf

## II. There Is No "Public Policy" in Deterring Online Music Piracy, since the Recording Industry Is 97% Owned by Foreign Corporations.

Also, Cloud disputes the Government's contention that statutory damages calculations should be liberal..."given the difficulty in quantifying actual damages for infringement of copyrights over music recordings and the public interest in deterring online music piracy". First, there is no such "public policy" in the United States, since the United States has no recording industry. According to one website[6], http://www.economyincrisis.org/content/ownership , IRS (Internal Revenue Service) data as of 2002 (latest data available) illustrates that the Sound Recording Industries are 97% foreign owned. This is why it must be remembered that the "RIAA" is a misnomer. ( See footnote 6, below.) There is no American-owned recording company of any great size.

Besides, there can be no public policy that could trump the clear statutory construction that results in debunking this "making available" nonsense. Making available digital audio files on the internet is simply *not an act of copyright infringement as defined in the statute*, as held in binding collateral litigation, and as confirmed by the second circuit in *Cablevision.* In fact, the real public policy consideration should be that music/recording copyright holders are flooding the courts with statutory damage cases. This case illustrates an alarming trend - large disproportionate civil statutory damage awards in copyright cases. Professional copyright trade organizations and lobbying organizations like the RIAA (Recording Industry Association of America) , NMPA (National Music Publishers Association ) and MPAA (Motion Picture

[6] See http://www.economyincrisis.org/content/ownership . See also http://talkpac.com/key-issues/radio-tax-overview/ .

Association of America), along with foreign or multinational trade organizations, like the International Federation of the Phonographic Industry (IFPI) , and the World Intellectual Property Organization (WIPO), have engineered increases in statutory damage limits all over the world, including 17 U.S.C. 504 , and have at the same time, mounted well financed and highly publicized campaigns against both professional and consumer infringers.

One example of this was the well publicized case of *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000) in which The RIAA[7] on behalf of the five major recording labels, brought suit against website MP3.com and sought in excess of $250,000,000 in statutory damages. In granting partial summary judgment in favor of the RIAA, the judge, in an obviously punitive mood, observed that internet companies "may have a misconception that, because their technology is somewhat novel, they are somehow immune from the ordinary applications of laws of the United States, including copyright law," but that "[t]hey need to understand that the law's domain knows no such limits." ) *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000) See also http://archives.cnn.com/2000/LAW/09/06/mp3.lawsuit.01/

Another example is the well publicized campaign of RIAA sponsored copyright litigation against thousands of individual music downloaders, which recently spawned the well publicized

[7] The RIAA was one of the parties seeking certiorari in *MGM Studios, Inc. v. Grokster,* Ltd. 545 U.S. 913 (2005.) Its name, "The Recording Industry Association of America" is somewhat of a misnomer, as it is largely comprised and financed by large non - U.S. owned music recording companies, such as, Sony/BMG, Universal, and EMI, after most of the U.S. recording industry was bought up by foreign interests in the 1980's and 1990's. Nevertheless, the Librarian of Congress, after a hearing before a copyright arbitration royalty panel ("CARP" ), gave the RIAA the responsibility for collecting and distributing the royalty fees to all copyright owners. See 63 FR 25394, 25397 (May 8, 1998) under the 1996 webcasting amendments to the copyright act, 17 U.S.C. §114(d) In November 2000, RIAA formed "SoundExchange," an unincorporated division of RIAA, to administer statutory licenses, including its responsibilities under the Librarian's May 8 order.

statutory damage award of $220,000 for downloading 24 songs that had a retail value of less than $24. *Capital Records vs. Thomas*, *supra*. See also http://recordingindustryvsthepople.blogsot.com, a website that tracks RIAA instituted litigation. Of note, is the statement made by the RIAA in *Capitol Records vs. Thomas* that most of the proceeds of these lawsuits are earmarked to file more lawsuits by the RIAA , as part of an "educational" campaign. See Proffer of Testimony of Cary Sherman of the RIAA , *Capital Records vs. Thomas* trial transcript, pp. 482 through 484, available at http://beckermanlegal.com/pdf/?file=/Lawyer_Copyright_Internet_Law/virgin_thomas_071003Transcript280-543.pdf

**III. The Requested Damages Here Do Not Even Pass the 1919 *Williams* Test.**

The U.S. urges, as they did in *Capitol Records, Inc. v. Thomas*, that the old case *St. Louis, I.M. &S Railway Co. v Williams,* 251 U.S. at 67 (1919) controls here, rather than *Gore* and *Campbell.* Cloud is accused of eight willful infringements, and even if an award were assessed in the same ratio range as in the 1919 Williams case (several hundred to one), any award of more than *a few hundred dollars* per infringement would be constitutionally infirm. Moreover, the deterrent effect on others cannot be used to increase this ratio (being proscribed by *Phillip Morris USA v. Williams*, 127 S. Ct. 1057 (2007), as discussed in Cloud's Rule 12 motion and brief,); nor may the costs of prosecution be considered to increase the necessity for a large award, because they are compensable separately under the statue, 17 U.S.C. 504. And, finally, after all is said and done, the U.S. neglects to mention the *de minimus* dollar amount involved in *St. Louis, I.M. &S Railway Co. v. Williams* ($75). Maybe it stands for the proposition that statutory damages should be less than $100, no matter what the ratio. Where the

U.S. sees a large ratio, Cloud sees an award that is *de minimis*. If the RIAA had demanded $75.00 this would have settled long ago.

## V. This Court Should Decline to Follow the Sixth Circuit Zomba Case Which Refused to Apply *Gore, Campbell* and *Philip Morris V. Williams* to Statutory Damage Cases.

The U.S. cites *Zomba vs. Panorama*, 491 F.3d 574 (6th Cir.)[8] for the proposition that the 1919 *Williams* case controls, rather than the modern *Gore, Campbell* and *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007), in which the Supreme Court recently considered "whether the Constitution's Due Process Clause permits a jury to base [a punitive-damage] award in part upon its desire to punish the defendant for harming persons who are not before the court." *Id*. at 1060. The Supreme Court declared that it is unconstitutional to consider the effect on "strangers to the litigation".

Cloud urges that this court not follow the Sixth Circuit, for this is a minority position, and the Sixth Circuit departed from the majority view when it refused to consider 5th and 8th amendment cases as limiting statutory damages. Even the U.S. pointed this out in an amicus brief it filed in *Capitol Records v. Thomas,* 579 F. Supp. 2d, 1210 (D. Minn. 2008) defending the constitutionality of the statutory damages award there, when it candidly admitted that:

> " The Sixth Circuit did mention that *Parker* and *Napster*, along with *DirecTV v. Gonzalez*, 2004 WL 1875046, at *4 (W.D. Tex. 2004), state in dicta that *Gore* and *Campbell "***may apply to statutory-damages awards."** *Parker v. Time Warner Entm't Co.,* 331 F.3d 13, 22 (2d Cir. 2003*) Leiber v. Bertelsmann AG (In re Napster, Inc. Copyright Litig.),* Nos. C MDL-00-1369 MHP & C 04-1671 MHP, 2005 WL 1287611,

[8] One of Cloud's counsel undersigned represented *Panorama,* argued the case at the Sixth Circuit, and petitioned for certiorari, which was denied. Panorama's petition can be found at http://www.ilrweb.com/viewILRPDF.asp?filename=panorama_zomba_080219PetitionCertiorari which contains a detailed discussion of the status of 5th and 8th amendment cases.

at*10 (N.D. Cal. June 1, 2005) (unpublished)."

The Sixth Circuit simply refused to apply leading Fifth Amendment[9] Due process cases, namely *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), *BMW of North America v. Gore*, 517 U.S. 559 (1996) and *Philip Morris USA v. Williams*, 127 S.Ct. 1057 (2007) on the grounds that they are not statutory damage cases, but yet reaches back to *St. Louis, I.M. & S.Ry. v. Williams,* 251 U.S. 63 (1919), a statutory damage award of $75.00, to sustain an $806,000 copyright award. Despite the clear trend of authority in other circuits, which it cited in its opinion , the Sixth Circuit stated "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." The Sixth circuit has taken too restrictive a view of the Fifth Amendment punitive damage cases decided by the Supreme Court. All of those cases stem from the language of the Fifth Amendment, which does not mention civil juries, nor state courts at all.

The Fifth Amendment, to be sure, is not directed to the States, but to federal power. The punitive damage limitation cases decided by this Court were decided under the Fourteenth Amendment, which has similar language as the Fifth ("…nor shall any State deprive any person of life, liberty, or property, without due process of law*;" U.S. Constitution, Amendment XIV. ).* Yet the policies of *Gore* and *Campbell* apply directly. It makes no difference that we are construing a statute here, rather than a jury verdict; the issue is exercise of governmental power. As the Supreme Court noted in *BMW v. Gore*, note 17,

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[9] " No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

> "State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute. See New York Co. Times v. Sullivan, 376 U.S. 254, 265 (1964) ("The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised"); San Diego Building Trades Council v. Garmon, 359 U.S. 236, 247 (1959) ("regulation can be as effectively exerted through an award of damages as through some form of preventive relief")."

*BMW v. Gore,* 517 U.S. 559, n. 17.

Likewise, it should be noted that "civil penalties" are expressly within *BMW v. Gore's* ambit:

> The strict constitutional safeguards afforded to criminal defendants are not applicable to civil cases, but the basic protection against "judgments without notice" afforded by the Due Process Clause, Shaffer v. Heitner, 433 U.S. 186, 217 (1977) (Stevens, J., concurring in judgment), is implicated by civil penalties.

*Id.,* 517 U.S. 559 at n. 22)

Moreover, to the extent that statutory damages punish and deter future conduct, they are within the reach of *Gore* and *Campbell*:

> By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution. *Cooper Industries*, *supra,* at 432; see also *Gore, supra,* at 568 ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition"); *Pacific Mut. Life Ins. Co.* v. *Haslip,* 499 U. S. 1, 19 (1991) ("[P]unitive damages are imposed for purposes of retribution and deterrence").

*State Farm v. Campbell.* 538 U.S. 408 (2003).

Just as *Gore* and *Campbell* were decided under the 14th amendment, which covers more than just jury trials, Cloud's case ought to be covered by the similar language of the Fifth Amendment. It is submitted that it is not fair notice to say that one can be fined in federal court for copyright infringements anywhere from $250 to $150,000, plus unspecified counsel fees, unless they be found later on to be a fair user, which is a case by case determination with no hard

and fast rules, and with much debate as to whether "file sharing" in the absence of a material object is even infringement after *Cablevision.*

Likewise, the Sixth Circuit has taken too restrictive a view of the few Eighth Amendment Excessive Fine cases that the Supreme Court has decided. To say, as did the Sixth Circuit, that "the Excessive Fines Clause does not apply to money damages in a civil suit" is taking a position never held by the Supreme Court. The clear arc of these cases, which the U.S. ignores, is that over time, more, not less, government activity is being limited by the Excessive Fines Clause. As this Court stated in *Austin v. United States*., 509 U.S. 602, (1993),

> "The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law." United States v. Halper, 490 U.S. 435, 447-448 (1989). "It is commonly understood that civil proceedings may advance punitive and remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties." Id., at 447. See also United States ex rel. Marcus v. Hess, 317 U.S. 537, 554 (1943) (Frankfurter, J., concurring). Thus, the question is not, as the United States would have it, whether forfeiture under §§ 881(a)(4) and (a)(7) is civil or criminal, but rather whether it is punishment.

The only novel question here, which the U.S. will not discuss, is whether a government empowered monopolist (for indeed copyright is a form of monopoly) may wield powers of punishment, which, if exercised by the sovereign, would be a prohibited excessive fine. The RIAA's activities appear to be quasi-governmental in nature.

## V. The Huge Range of Statutory Damages, Coupled with Uncertain Definitions of "Willful," "Innocent," and of "Copy"and "Phonorecord" as Requiring a Material Object, Deprives Cloud of Real "Notice" Within the Meaning of *Gore* and *Campbell*

Cloud agrees with the U.S. (and the *Gore* decision), that "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject her to punishment, but also of the severity of the penalty". U.S. Brief (p.7). However, Cloud disputes that "because statutory damages are by definition,

promulgated in a statute, persons held liable for them cannot be deemed to receive inadequate notice". Here, Cloud is threatened with a fine somewhere between $250 per infringement (the price of a traffic ticket,) and $150,000, a large fine that would be expected to accompany a felony conviction of a serious crime with a long prison sentence. Additionally, the plaintiffs cannot articulate why they have characterized her conduct as "willful", and do not claim any "material object" that was produced or made by Cloud. How can this be fair notice of the infraction and penalty?

The United States argues that cases dealing with excessive punitive damages, *BMW v. Gore* and *Campbell*, are not applicable due to the subtle differences between statutory damages and compensatory and punitive damages. The government ignores the reality of the application of statutory damages here. The Copyright Act's statutory damages scheme itself is difficult to understand because it is divided into three parts; 1) The "normal ranged" $750 to $30,000 for each infringed work. ; 2) for an "innocent infringer," a term not defined in the act, where statutory damages may be as low as $250 per infringed work; and 3) enhanced damages in the amount up to $150,000 per infringed work for willful infringement. However, there has been little meaningful guidance into what willful or innocent infringement means. Willful infringement has meant everything from operating a vast counterfeiting operation to being in a dispute as to whether a work has been jointly authored, to liability for good faith fair use, or inadvertent license breach, or operating a Xerox shop. Willfulness has been defined in the Third Circuit when "the infringer has knowledge that his conduct is infringing another's copyright or if the infringer has acted in reckless disregard of the copyright owner's rights. *Fitzgerald Pub. Co. v. Baylor Pub. Co.,* 807 F.2d 1110, 1115 (2d Cir.1986)." Quoting *Yash Raj Films (USA) Inc. v.*


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*Sur Sangeet Video Elecs. Inc.*, 2008 U.S. Dist. LEXIS 14951 at 12 (D.NJ 2008).

Willfulness is nevertheless an elusive standard. Cloud fails to see the difference between her alleged conduct compared to the conduct, say, of the infringer in *Princeton University Press* v. Michigan Document Services (99 F.3d 1381 (6th Cir. 1996) who was found not to be willful in xeroxing copyrighted course books for sale.

The fact that willfulness is not clearly defined in the Copyright Act contributes to depriving the statute of the proper due process notice that is supposed to distinguish statutory damages from the punitive damages assessed in *Gore.*

The United States argues that *Gore* is not applicable here, since statutory damages would necessarily be higher than a multiplier of compensatory damages, as statutory damages include compensatory damages. However, the government seems to suggest that a statutory fine that is hundreds of times higher than the actual damages will pass muster under *Williams*, let alone, *Gore*. The *Gore* framework provides general guidance that punitive damages need to be within a reasonable multiplier of compensatory damages caused by the defendant in question. But statutory damages that are many hundreds of times the amount of any loss of the plaintiffs are by definition unreasonable and excessive under the *Gore* standard. The fact that Congress passed it is irrelevant. Congress is eminently capable of passing statutes that do not pass constitutional muster. See for example *Printz v. United States*, 521 U.S. 898 (1997), holding unconstitutional certain interim provisions of the Brady Handgun Violence Prevention Act; *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), in which a unanimous Court voted to strike down anti-indecency provisions of the Communications Decency Act (the CDA), finding they violated the freedom of speech provisions of the First Amendment.

The United States admits, however, in contrasting *Gore* and *Campbell* with the 1919

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*Williams* statutory damages case, that a statutory damages scheme would not be unconstitutional so long as it is not "excessive". However, under the statutory scheme as it exists now, a person who intentionally photocopies a newsletter that they purchased for their own personal use, could be subject to willful infringement with potential damages in the hundreds of thousands of dollars, (unless he could make out a "Fair Use" defense, an equally opaque concept.) In *Lowry Reports v. Legg Mason, Inc.,* 302 F. Supp. 2d 455 (D. Md. 2004),which the U.S. relies, Legg Mason, a financial services company that subscribed to reports published by Lowrys, would photocopy the newsletters and pass them to other employees to review. Even though the use was internal and not for profit, a jury found that this was not fair use, but infringement. Even though there were plausible fair use defenses, the jury assessed damages of almost $20,000,000 ($82,000 each for the 240 infringed works.) The actual projected losses were in the neighborhood of $60,000. Clearly, this level of award was many, many times the lost profits attributable directly to the defendant. The government is not troubled by this, because of their pretzel logic - that since Congress authorized this huge range, it has to be reasonable by definition, and since *Gore* and *Campbell* were decided in the context of large jury verdicts, the instant case must also go to verdict to be decided. This is an overly restrictive and tortured view of 5th and 8th amendment jurisprudence. Due process and freedom from excessive fines do not only apply to criminal or civil jury trials that reach completion.[10]

## VI. The Eighth Amendment Does Apply to Copyright Statutory Damages Due to its Governmental Nature.

[10] The amicus filing of the Free Software foundation contains a summary of the cases which apply 5th and 8th amendment jurisprudence to statutory damage cases, and there is available a summary of these cases at http://www.p2pnet.net/story/18912 , which was submitted by the Free Software Foundation in the co-pending Massachusetts case, Sony et al. v Tenenbaum, 1:2007cv11446 Filed:August 7, 2007 ( docket available at http://news.justia.com/cases/featured/massachusetts/madce/1:2007cv11446/110872/


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In regard to the Eighth Amendment, The U.S. simply does not respond to Cloud's point that the plaintiff copyright holders are a government appointed monopolists who are given great powers to punish through excessive fines, which is the point of the Eighth amendment. The "sheriff" (the government) is clearly within in the reach of the Eighth amendment, but he also has a posse of private copyright holders, including the lobbying organization known as RIAA. The RIAA, (which is listed on the docket herein as a party receiving notice), is essentially part of the government in this country. It's name, "The Recording Industry Association of America" is somewhat of a misnomer, as it is largely comprised and financed by four large non - U.S. owned music recording companies, namely, Sony/BMG, Universal, and EMI, and Warner Brothers, after most of the U.S. recording industry was bought up by foreign interests in the 1980's and 1990's. Nevertheless, the Librarian of Congress, after a hearing before a copyright arbitration royalty panel ("CARP"), gave the RIAA the responsibility for collecting and distributing the webcasting royalty fees to all copyright owners. See 63 FR 25394, 25397 (May 8, 1998) under the 1996 webcasting amendments to the copyright act, 17 U.S.C. §114(d). In November 2000, RIAA formed "SoundExchange," an unincorporated division of RIAA, to administer statutory licenses in the U.S., including its responsibilities under the Librarian's May 8 order. Essentially , this trade group representing foreign companies, has, through its relentless lobbying and litigation efforts, hijacked whatever parts of the US music industry that were left after they bought up the bulk of it prior to 2000.

Illustrating the close working relationship between the RIAA and the Justice Department, the administration has just hired several of the RIAA's top lawyers; Tom Perrelli for associate attorney general, David Ogden for deputy attorney general, and in a move that is worthy of a Franz Kafka novel, "Donald Verrilli announced… that he had been named associate deputy


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attorney general. Verrilli is the lawyer who pulled the plug on Grokster, sued Google on behalf of Viacom, and represented the Recording Industry Association of America against a Minnesota woman named Jammie Thomas who's accused of illicit file sharing." See http://news.cnet.com/8301-13578_3-10133425-38.html and http://news.cnet.com/8301-13578_3-10157381-38.html?tag=mncol . It is no wonder that the RIAA now has the U.S. arguing their positions in court.

It should be noted that there have only been four Supreme Court cases since 1791 construing the 8th amendment, and each one has expanded its reach from purely criminal fines, to, at the moment, civil forfeitures and restitution, and possibly private Qui Tam actions, where part of the proceeds of suit goes to a private party. Statutory copyright damages should be added to this list.

Courts have recognized statutory damages to be essentially punitive in nature. *On Davis v. The Gap, Inc*., 246 F.3d 152, 172 (2d Cir. 2001). "Statutory damages for copyright infringement are not only 'restitution of profit and reparation for injury,' but are also in the nature of a penalty, 'designed to discourage wrongful conduct.'" *Cass County Music Co. v. C.H.L.R., Inc*. 88 F.3d 635, 643 (8th Cir. 1996) (quoting *F.W. Woolsworth Co. v. Contemporary Arts, Inc*., 344 U.S. 228 (1952)). The legislative history of the Copyright Act specifically states that "statutory damages are intended (1) to assure adequate compensation to the copyright owner for his injury, and (2) to deter infringement." See Staff of House Comm. on the Judiciary, 87th Cong., Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 103 (Comm. Print 1961), reprinted in 3 Omnibus Copyright Revision Legislative History (George S. Grossman ed., 1976), TX Law Rev. 525, 548-49 (2004).

The Second Circuit has recognized the general danger of multiplied statutory damages as

well. In a 2003 decision, the court noted that aggregating large numbers of statutory damages risks distorting the purpose of statutory damages, instead "creat[ing] a potentially enormous aggregate recovery for plaintiffs, and thus an in terrorem effect on defendants, which may induce unfair settlements." *Parker v. Time Warner Entertainment Co.*, 331 F.3d 13, 22 (2d. Cir. 2003). The court went on to note that these multipliers risk running afoul of constitutional due process. *Id.,* 331 F.3d at 22. See also *Fitzgerald Pub. Co. v. Baylor Pub. Co.*, 670 F. Supp. 1133, 1140 (E.D.N.Y. 1987) ("[Copyright statutory] damages should bear some relation to the actual damages suffered").See also *Johnson v. Jones*, 149 F.3d 494, 504 ( 6th Cir. 1998), ("partially punitive character" of statutory damages and cited deterrence as a basis for assessing such high damages.) Since the Due Process Clause prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor, see *Campbell*, 538 U.S. 408 (2003) and *Gore*, 517 U.S. 559 (1996), it should not matter what name it is called - statutory or punitive damages, the effect on the tortfeasor is the same - financial devastation, usually far in excess of the economic value of the case (apart from the statutory damages and attorney's fees).

In *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), the Supreme Court left open whether the Excessive Fines Clause, which was heretofore limited to criminal cases, had any applicability to civil penalties or to qui tam actions, and more recently, in *Austin v. United States,* 509 U.S. 602 (1993), the Court noted that the application of the excessive fines clause to civil forfeiture did not depend on whether it was a civil or criminal procedure, but rather on whether the forfeiture could be seen as punishment. The Court was apparently willing to consider any number of factors in making this evaluation; civil forfeiture was found to be at least partially intended as punishment, and thus limited by the clause, based on its common law roots, its focus on culpability, and various indications in the legislative histories of its more

recent incarnations.

The Eighth Amendment "clearly was adopted with the particular intent of placing limits on the powers of the new government." *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). This fear of a government sponsored monopoly on publication and the repression of free speech was why the framers, in the Enumerated Powers of Article I, placed limitations upon that power, such as the grant for "limited times" and "to promote the progress of science and the arts." *Eldred v. Reno*, 239 F.3d 372 (D.D.C. 2001). The holder of a copyright has a government granted monopoly with severe enforcement powers, and the history of copyright clearly indicates a distrust of copyright monopolies going back to England and the Statute of Anne. See *Eg. Wheaton v. Peters*, 33 U.S. 591, 598 (1834). See also "State of the Arts: Protecting Publishers or Promoting Progress?" Richmond Journal of Law and Technology Volume XII issue 2 ( 2005). Now as a result of recent sweeping amendments to the Copyright Act sought by large international publishing and music cartels, statutory damages, which are expressly not in relation to any actual damages suffered, are now between $750 and $150,000 per infringement. Whether they be deemed "statutory damages" or punitive damages or simply a fine, these amounts are completely indiscriminate. The awards go to the holder of a government connected copyright in a federal court, who admittedly is trying to "educate" the public of some public policy that it had invented itself, in lieu of the sovereign. But the oppressive hand of government is all over the transaction. It is not just a case of denial of Due Process between private litigants in state court like *BMW of North America, Inc. v. Gore, supra,* 517 U.S. at 559 - it is simply an unconstitutionally Excessive Fine levied in a Federal Court to a government granted monopolist, who otherwise, would have no such excessive power over the defendant

One function of an independent judiciary is to act as a check on unrestrained executive

and legislative power. In doing so, the courts must exercise the strength and common sense to look beyond all the propaganda and hype that a lobbying organization like the RIAA disseminates. Federal courts should put a stop to this quasi-governmental conduct and overreaching lobbying organization run by foreign cartels, that only pretends to care about American Music, but clearly does not care about the U.S. Constitution.

Respectfully submitted,

/s Lawrence E. Feldman

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Dated: May 13, 2009

**CERTIFICATE OF SERVICE**

The undersigned, counsel for defendant Denise Cloud hereby certifies that a true and correct copy of the within Reply to the United States of America's Memorandum in Defense of the Statutory Damages Provision of the Copyright Act, 17 U.S.C. § 504 was served on the following individuals via e-mail and first-class mail:

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Date: May 13, 2009

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