

Nos. 10-1883, 10-1947, 10-2052

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

SONY BMG MUSIC ENTERTAINMENT, ET AL.,

Plaintiffs-Appellants/Cross-Appellees,

v.

JOEL TENENBAUM,

Defendant-Appellant/Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

PLAINTIFFS-APPELLANTS/CROSS-APPELLEES' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

The undersigned counsel of record provides the following statement under Fed. R. App. P. 26.1(b): Each Plaintiff-Appellant identifies its parent corporation and lists any publicly held company that owns 10% or more of its stock:

The ultimate parent corporation of Plaintiff-Appellant Sony BMG Music Entertainment n/k/a Sony Music Entertainment is Sony Corporation (Japan), which is publicly traded in the United States.

The ultimate parent corporation of Plaintiff-Appellant Warner Bros. Records Inc. is Warner Music Group Corp., which is publicly traded in the United States.

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

The ultimate parent corporation of Plaintiff-Appellant UMG Recordings, Inc., is Vivendi S.A., a publicly held French company.

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STATEMENT OF JURISDICTION

Appellants brought this action in the district court seeking statutory damages and injunctive relief under the Copyright Act of 1976, 17 U.S.C. § 501 *et seq.* against Defendant-Appellee/Cross-Appellant Joel Tenenbaum. Joint Appendix (“Appx.”) 19-65.¹ The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1338(a). On July 31, 2009, a jury returned a verdict awarding Appellants \$675,000 in statutory damages. Appx. 70-77. On July 9, 2010, the court entered an order reducing the damages award to \$67,500 and enjoining Tenenbaum from further infringing Appellants’ copyrights. Addendum (“Add.”) 65-66. Appellants timely filed a notice of appeal on July 21, 2010. Appx. 80-81. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court erred by holding that the jury’s award of \$22,500 per work for willful infringement of 30 copyrighted works violated the Due Process Clause, even though that award is well within the range of statutorily prescribed damages awards for willful copyright infringement and even within the statutory range for non-willful infringement.

¹ The docket number for these proceedings is 1:07-cv-11446. Some of the docket entries, however, are found in 1:03-cv-11661, a consolidated docket for similar cases brought by these and other recording industry plaintiffs. Documents found in 1:07-cv-11446 are cited as “Doc. No.,” and documents found in 1:03-cv-11661 are cited as “Consol. Doc. No.”

STATEMENT OF THE CASE

On August 7, 2007, Appellants Sony BMG Music Entertainment, Warner Bros. Records Inc., Arista Records LLC, and UMG Recordings, Inc., brought suit against Appellee in the United States District Court for the District of Massachusetts (Gertner, J.) seeking damages and injunctive relief for copyright infringement under 17 U.S.C. § 501 *et seq.* Appx. 19-65.² Although Appellants had evidence indicating Tenenbaum had willfully infringed thousands of works, Appellants sought statutory damages for the willful infringement of only 30 copyrighted sound recordings under 17 U.S.C. § 504(c), which authorizes an award of “not less than \$750 or more than \$30,000 as the court considers just” for each work infringed, and an award of “not more than \$150,000” if the infringement was willful. Add. 4.

From the inception, Tenenbaum denied responsibility for the infringements. Add. 10. Tenenbaum also sought to dismiss Appellants’ claims on grounds that the statutory damages provision of the Copyright Act is unconstitutional. *See* Def. Joel Tenenbaum’s Mot. to Dismiss (Consol. Doc. No. 779). The United States intervened to defend the constitutionality of the statute. *See* United States of America’s Unopposed Mot. to Intervene (Consol. Doc. No. 792). The court denied

² Atlantic Recording Corporation was initially a plaintiff but was dismissed from the case on July 20, 2009. *See* Notice of Dismissal of Pl. Atlantic Recording Corporation (Consol. Doc. No. 891).

Tenenbaum's motion to dismiss, *see* June 15, 2009 Order re: Def.'s Mot. to Dismiss (Consol. Doc. No. 847), and the case proceeded to trial.³ After Tenenbaum admitted during his trial testimony that he was responsible for downloading and distributing all 30 of Appellants' copyrighted sound recordings, the court directed a verdict in Appellants' favor on infringement, leaving the issues of willfulness and damages for the jury's consideration. Add. 10. On July 31, 2009, the jury returned a verdict finding that Tenenbaum's infringement was willful and awarding statutory damages of \$22,500 per infringed work, for a total award of \$675,000. Appx. 70-77. On December 7, 2009, the court entered judgment on the jury's \$675,000 verdict and enjoined Tenenbaum from further infringing Appellants' copyrights. Appx. 78-79.

Tenenbaum subsequently filed a motion for, among other things, a new trial or remittitur arguing, *inter alia*, that the jury's damages award, although authorized by the statute, was unconstitutionally large. *See* Def.'s Mot. and Mem. for New Trial or Remittitur ("Def.'s Mot.") (Doc. No. 26). The United States again filed a brief defending the constitutionality of the statute. *See* United States of America's Mem. in Response to Def.'s Mot. for New Trial or Remittitur (Doc. No. 31). On

³ Before the trial began, the district court granted Tenenbaum's request to make a live webcast of the proceedings publicly available throughout trial. *Capitol Records, Inc. v. Alaujan*, 593 F. Supp. 2d 319 (D. Mass. 2009). Appellants petitioned this Court for a writ of mandamus or prohibition, arguing that the district court's order violated local court rules prohibiting webcasts of civil proceedings. The Court agreed and prohibited the webcast. *In re Sony BMG Music Entm't*, 564 F.3d 1 (1st Cir.), *cert. denied sub nom. Tenenbaum v. Sony BMG Music Entm't*, 130 S. Ct. 126 (2009).

July 9, 2010, the court granted Tenenbaum's motion in part, holding that the damages award violated the Due Process Clause and reducing damages to \$2,250 per song, for a total of \$67,500. Add. 1-66. Appellants filed a notice of appeal on July 21, 2010, Tenenbaum filed a notice of appeal on July 30, 2010, and the United States filed a notice of appeal on September 3, 2010. Appx. 80-84. This Court consolidated the appeals on September 17, 2010.

STATEMENT OF FACTS

Statutory Background

Copyright infringement has been subject to statutory damages since 1790. Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 125 (authorizing recovery of “fifty cents for every sheet which shall be found in [the infringer’s] possession”). The continuous availability of authorized *statutory* damages reflects the unbroken judgment of Congress throughout our Nation’s history that “[t]he value of a copyright is, by its nature, difficult to establish, and the loss caused by an infringement is equally hard to determine.” Staff of H. Comm. on the Judiciary, 87th Cong., Copyright Law Revision: Report of the Register of Copyrights on the General Revision of The U.S. Copyright Law 102 (“1961 Report”) (Comm. Print 1961). Thus, rather than impose upon a copyright owner the often difficult or impossible burden of establishing the value of the copyright and the amount of harm caused by the infringement, Congress has long provided that a copyright

owner may choose between actual damages or statutory damages as recovery for infringement. The availability of statutory damages not only obviates the need for difficult or impossible proof, but also deters infringement and ensures appropriate incentives for the creation of copyrighted works. *See F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 232-33 (1952).

In its current form, the Copyright Act provides that, for any act of infringement, the owner of the copyright may recover either the actual damages suffered plus any additional profits of the infringer, 17 U.S.C. § 504(b), or in the alternative “may elect, at any time before final judgment is rendered, to recover ... an award of statutory damages,” § 504(c)(1). The choice belongs exclusively to the copyright owner. A copyright owner is entitled to statutory damages for each work infringed of “not less than \$750 or more than \$30,000 as the court considers just.” *Id.* That baseline range for garden-variety non-willful infringement is subject to two exceptions: If the copyright owner proves that the infringement was willful, the statutory range increases to “not more than \$150,000” per infringed work. § 504(c)(2). By contrast, if the defendant has not had access to a copy of the work properly bearing the copyright notice, *see* § 402(d), and the infringer proves that he or she “was not aware and had no reason to believe that his or her acts constituted an infringement of copyright,” the award may be reduced to “not less than \$200” per work. § 504(c)(2).

The damages provision of the Copyright Act has existed in the same basic form since 1976, subject only to amendments to increase the minimum and maximum amounts of statutory damages available. *See* Copyright Act of 1976 (“1976 Act”), Pub. L. No. 94–553, § 22, 90 Stat. 2541 (authorizing minimum damages of \$250, maximum damages of \$10,000, and maximum for willful infringement of \$50,000); Berne Convention Implementation Act of 1988 (“1988 Act”), Pub. L. No. 100–568, 102 Stat. 2853 (increasing minimum to \$500, maximum to \$20,000, and maximum for willful infringement to \$100,000); and most recently the Digital Theft and Copyright Damages Improvement Act of 1999 (“1999 Act”), Pub. L. No. 106–160, 113 Stat. 1774 (increasing minimum to \$750, maximum to \$30,000, and maximum for willful infringement to \$150,000).

Because the Copyright Act’s statutory damages provisions refer to the “court,” statutory damages were typically awarded by the judge, rather than the jury. In *Feltner v. Columbia Pictures*, 523 U.S. 340 (1998), however, the Supreme Court held that the Seventh Amendment provides a right to a jury trial on the amount of statutory damages. Although the Court “discern[ed] no statutory right to a jury trial” in the language of § 504(c), it concluded that a statutory damages action is an action at law in which juries have historically had the authority to determine what amount of damages to award. *Id.* at 347, 351-52. Accordingly, the Court held that “[t]he Seventh Amendment provides a right to a jury trial on all

issues pertinent to an award of statutory damages under § 504(c) of the Copyright Act, including the amount itself.” *Id.* at 355.

Since *Feltner*, Congress has amended § 504(c) but has not altered the statutory damages scheme under which the jury, not the district judge, has authority to decide the amount of statutory damages to award within the ranges that Congress has specified. Indeed, in the wake of *Feltner*, the only amendment Congress enacted to the statutory damages regime has been to increase its amounts, thus substantially increasing the jury’s discretion. *See* 1999 Act (increasing minimum to \$750, maximum to \$30,000, and maximum for willful infringement to \$150,000). Legislative history explains that these amendments were designed to provide greater deterrence of copyright infringement in light of new technologies that substantially increase the ease and scale of copying. *See* H.R. Rep. 106–216, at 6 (1999).

The Peer-to-Peer Network Problem

A peer-to-peer network allows an individual computer user to copy and distribute files directly with other users outside of the view of third parties. Because such networks do not rely on a central service to store shared files, purveyors of peer-to-peer networks, such as KaZaA, LimeWire, and iMesh, do not regulate what kind of files are being shared. That absence of oversight has turned peer-to-peer networks into a hotbed of copyright infringement, particularly of

popular music. Individuals, acting without authorization, place copyrighted sound recordings into folders on their computers, then upload the index of those folders to the peer-to-peer networks, and make their contents available for millions of other network users to download. *See, e.g.*, Lev Grossman, *It's All Free*, *Time*, May 5, 2003. Those other users, in turn, download the copyrighted music to their own shared folders, thereby making it even more readily available to other network users.

As the Supreme Court has recognized, the vicious cycle made possible by peer-to-peer networks results in copyright “infringement on a gigantic scale.” *Metro-Goldwyn-Mayer Studios, Inc., v. Grokster Ltd.*, 545 U.S. 913, 940 (2005). In 2004, the Department of Justice concluded that peer-to-peer networks are “one of the greatest emerging threats to intellectual property ownership.” *See* Report of the Department of Justice’s Task Force on Intellectual Property, *available at* <http://www.cybercrime.gov/IPTaskForceReport.pdf> at 39 (Oct. 2004). It estimated that “millions of users access P2P networks,” and that “the vast majority” of those users “illegally distribute copyrighted materials through the networks.” *Id.*; *see also Grokster*, 545 U.S. at 923 (users employed peer-to-peer networks “primarily to download copyrighted files”).

This massive copyright infringement has had a devastating effect on the recording industry. When that effect first became apparent, Appellants and other

members of the recording industry joined similarly affected industries in seeking to address this problem by suing the proprietors of the peer-to-peer networks. Although those litigation efforts succeeded in establishing that use of peer-to-peer networks to share copyrighted files constitutes unlawful copyright infringement, *see, e.g., Grokster*, 545 U.S. at 940; *In re Aimster Copyright Litig.*, 334 F.3d 643, 654-55 (7th Cir. 2003); *A&M Records, Inc., v. Napster*, 239 F.3d 1004, 1022-24 (9th Cir. 2001), repeated holdings to that effect did little to deter individual file-sharers. Instead, many individuals persisted in their infringing conduct, shifting from one peer-to-peer network to another as networks were shut down or converted to legitimate services operating in compliance with copyright law, and remaining “disdainful of copyright and in any event discount[ing] the likelihood of being sued or prosecuted for copyright infringement.” *In re Aimster*, 334 F.3d at 645. Accordingly, in 2002, the record companies reluctantly decided to commence a more broadly-based enforcement program designed to identify and pursue individuals who were unlawfully using peer-to-peer networks to share copyrighted sound recordings.

The recording companies engaged a firm, MediaSentry, to gather evidence of infringement associated with users identified by their Internet Protocol (“IP”) addresses. To perform this task, MediaSentry searched peer-to-peer networks for individuals distributing infringing files for download and gathered evidence

concerning that infringement, including the IP address of each individual. Once those IP addresses had been captured, the record companies commenced “Doe” actions against the individuals responsible for the IP addresses. The record companies then used the discovery process to obtain records from internet service providers (“ISPs”) identifying these individuals. *See Atlantic Recording Corp. v. Heslep*, 2007 WL 1435395 at *1-*3 (N.D. Tex. May 16, 2007) (detailing the industry’s enforcement program). In pursuing these actions, recording companies routinely offered, and individuals often accepted, the option of settling these infringement claims for relatively low amounts. As a result, the present action is one of only two such actions that proceeded to jury trial. *See* Add. 40.

Tenenbaum’s Infringement and This Action

From 1999 through at least 2007, Joel Tenenbaum engaged in a deliberate pattern of illegally obtaining and distributing thousands of copyrighted sound recordings through peer-to-peer networks, among other ways. Add. 9. Tenenbaum first began illegally obtaining music through Napster, which he used not only to obtain for free songs that he knew were copyrighted, but also to then make those songs available to Napster’s millions of other users. *Id.* After learning that Napster had been shut down to halt precisely the kind of unlawful conduct in which he was engaged, Tenenbaum shifted to other peer-to-peer networks, including AudioGalaxy, iMesh, Morpheus, KaZaA, and LimeWire. *Id.* In addition

to using these networks to obtain copyrighted music from other network users, Tenenbaum also uploaded new sound recordings not otherwise available on these networks, with the express purpose of distributing these copyrighted works to millions of other users for free. Appx. 169-72. Tenenbaum undertook all these actions despite being fully aware that obtaining and sharing copyrighted music through peer-to-peer networks is illegal. Add. 9-10. In fact, his own father warned him that individuals were being sued for such conduct, but he did not stop. Appx. 117-18.

In September 2005, Appellants sent Tenenbaum a letter informing him that his actions constituted infringement of their copyrighted sound recordings and that legal action would be taken if he did not desist. Add. 10; Appx. 150-51. Even that did not stop Tenenbaum, Add. 10, and Appellants filed suit in August 2007. Appx. 19. Although Tenenbaum infringed upon thousands of their copyrights, Appellants only pursued damages for infringement of 30 works. Add. 4. Tenenbaum rejected Appellants' offer to settle those claims, and instead engaged in a pattern of repeatedly refusing to take responsibility for his actions. For example, in sworn discovery answers, Tenenbaum not only denied downloading any of the various peer-to-peer networks he used to obtain music illegally, but also denied any knowledge of whether such systems were even present on his two computers. Appx. 153-57. In his deposition, he blamed any traceable infringement on a

multitude of individuals he claimed had access to his computer, ranging from his sisters, to various houseguests, to unidentified “burglars.” Appx. 152, 157-61. When Appellants sought access to Tenenbaum’s computers to verify the existence of illegally downloaded songs, Tenenbaum had numerous files removed from one and falsely maintained that the other had been destroyed years earlier. Appx. 186-90.⁴

During opening statements and throughout Appellants’ case, Tenenbaum maintained his innocence. Only after Appellants had presented overwhelming evidence of Tenenbaum’s infringement did he change his tune. On the witness stand, Tenenbaum admitted that many of his statements made under oath throughout the course of the litigation had been false or misleading. *See* Appx. 142-206. He admitted that he had downloaded peer-to-peer client software on his computers and used a variety of different peer-to-peer networks to obtain and distribute thousands of copyrighted songs. Appx. 183-86, 195, 206. He also admitted that he knew use of peer-to-peer networks to share copyrighted music constituted copyright infringement punishable by up to \$150,000 in damages for

⁴ Tenenbaum’s counsel evinced a similar disregard for both copyright law and judicial procedures throughout the course of the litigation. A few months before trial, counsel uploaded seven of the copyrighted works at issue in the case to a publicly accessible Internet site with a sign that read, “Destroy Capitalism—Support Piracy!” *See* Ex. A to June 5, 2009 Pls.’ Mot. to Compel Discovery Responses (Consol. Doc. No. 842). Counsel then refused to comply with Appellants’ requests for discovery on this further act of infringement and distribution, ultimately resulting in sanctions from the district court. *See* June 16, 2009 Order (Consol. Doc. No. 850) (granting Appellants’ motion to compel discovery); March 2, 2010 Order (ordering Tenenbaum and his counsel to pay costs of Appellants’ motion to compel).

each infringed work. Appx. 174-80. He testified that he knew the music he uploaded could be and was being downloaded by the millions of other users of peer-to-peer networks. Appx. 149-51, 171-73, 184. Tenenbaum ultimately admitted that he was directly responsible for downloading and distributing the 30 copyrighted songs that are the subject of Appellants' lawsuit. Appx. 206. Based on that admission, the district court directed a verdict in Appellants' favor on the question of infringement and reserved to the jury the questions of willfulness and statutory damages. Add. 10.

Although actual damages for copyright infringement need not be proven when statutory damages are elected, *see* 17 U.S.C. § 504(c), Appellants provided extensive evidence at trial of the devastating effect that infringement through peer-to-peer networks has had on the music industry. Appellants' witnesses testified that the ever-multiplying infringement caused when a song is illegally shared results in injuries ranging from lost revenues to diminution of copyright value to a diminished capability to identify and promote new artists to layoffs within the industry. *See, e.g.*, Appx. 91-92, 123-41. Appellants also demonstrated that the only legal means by which Tenenbaum could engage in the actions he undertook would be to obtain a blanket license to reproduce and distribute the 30 songs without limitation, which would essentially represent the entire value of the

copyrighted work and vastly outstrip the cost of purchasing a single song or album for personal use. Appx. 87-88.

The questions of willfulness and appropriate damages were submitted to the jury. After being instructed to consider “[t]he nature of the infringement,” “the defendant’s purpose and intent,” lost profits and revenue, the value of the copyright, the duration of the infringement, whether it persisted after notice, and the need for deterrence, Appx. 68, the jury returned a verdict finding that Tenenbaum’s infringement was willful and awarded statutory damages under § 504(c) of \$22,500 per song, for a total award of \$675,000. Appx. 70-77.

Post-Trial Proceedings

After the district court entered judgment on the jury’s findings and verdict, Tenenbaum filed a motion for new trial or remittitur arguing, *inter alia*, that the jury’s statutory damages award violated the Due Process Clause. The United States intervened to defend the constitutionality of an Act of Congress, but nonetheless, the district court ultimately agreed with Tenenbaum and held that the Constitution required the award to be reduced to \$2,250 per song, for a total of \$67,500.

The district court began its analysis by concluding that the constitutional question could not be avoided through the doctrine of remittitur because Appellants were unlikely to accept any remitted award, and any new trial would

force the court to “confront the very constitutional question that the remittitur process was intended to avoid.” Add. 16. Turning to the constitutional question, the court first addressed whether the constitutionality of a statutory damages award is governed by the Supreme Court’s decision in *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919), which held that a statutory damages award satisfies due process so long as it is not “so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable,” *id.* at 67, or rather by the three guideposts that have been identified for constitutional review of punitive damages awards, *see BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996). Noting that the Court’s “punitive damages jurisprudence has both procedural and substantive components,” the district court rejected the principle that the *Gore* guideposts are concerned primarily with whether a defendant has fair notice of the potential penalties for a prohibited action. Add. 28. The district court later acknowledged that this Court has read the *Gore* factors as directed to notice, discussing *Zimmerman v. Direct Fed. Credit Union*, 262 F.3d 70, 83 (1st Cir. 2001), but “question[ed]” what it deemed a “narrow focus on the issue of ‘fair notice.’” Add. 39 n.13. In the end, the court concluded that “it is appropriate to apply the three *BMW* guideposts to the jury’s award in this case,” while “remain[ing] cognizant” of the fact that the jury’s award was authorized by § 504(c). Add. 31.

After concluding that *Gore* set forth the relevant test, the court first examined the third *Gore* guidepost—the difference between the jury’s award and authorized civil penalties. *Gore*, 517 U.S. at 575. The court conceded that “[t]he plain language of 17 U.S.C. § 504(c) authorizes the jury’s award in this case,” and that, “[s]ince the jury’s award ... fell within the range set forth in section 504(c), there is an identity between the damages authorized by Congress and the jury’s award.” Add. 32, 38. Nonetheless, the court mused about post-enactment actions and statements by Senators who co-sponsored the 1999 amendments to § 504(c) to question whether Congress intended a damages award of this amount to “be imposed on an ordinary individual engaged in file-sharing without financial gain.” Add. 32. The court seemingly disregarded more traditional expressions of legislative intent, such as the House Report accompanying the 1999 Amendments, Add. 34, and instead focused on post-enactment statements by two Senators. Add. 36-37. The court recognized that such legislative history would play no role in interpreting a statute like § 504(c) that the court conceded unambiguously authorized the jury’s award. Add. 38. Nonetheless, the court found this same legislative history instructive in applying the third *Gore* factor and in divining the kind of defendants Congress had in mind in setting the statutory range. Add. 38. Based on this analysis, the court concluded that Congress did not foresee application of § 504(c) to file-sharers, and that it thus “makes no sense” to defer to

§ 504(c) as a congressional determination of the appropriate size of damages in this case. Add. 36-38. For similar reasons, the court also concluded that “section 504(c) failed to provide Tenenbaum with *fair* notice of the liability he could incur for file-sharing.” Add. 39 n.13.

The court also examined whether other jury awards in similar cases have been comparable to the award in Tenenbaum’s case. Although the court purported to give deference to the jury’s verdict, it noted that the comparable jury awards were not before the jury and emphasized that “[u]nlike juries, judges can draw on their experience of setting awards in other copyright cases, as well as their research regarding the awards imposed by other judges, in settling on an appropriate figure.” Add. 39 n.12. The court went on to note that two juries in the case most similar to Tenenbaum’s awarded statutory damages of \$9,250 per song and \$80,000 per song. Add. 40 (*citing Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1213 (D. Minn. 2008), and *Capitol Records, Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045, 1048, 1050 (D. Minn. 2010)). But rather than rely on those jury determinations, the district court relied on the presiding judge’s dictum about the awards and viewed the amount of that judge’s remittitur (\$2,250 per song) as the appropriate benchmark for comparison. Add. 40. Ignoring the evidence presented by Appellants at trial of the extensive harm caused by peer-to-peer infringement, the court compared the jury’s verdict to default judgment cases

in which recording companies sought only the statutory minimum of \$750 per song, and treated that as evidence that such damages provide sufficient compensation and deterrence. Add. 41. Finally, the court compared the award to damages awarded against establishments that played copyrighted musical compositions without first acquiring a license, and maintained that damages in such cases are typically two to six times the amount of the license fees not paid. Add. 42-43.

Turning to the second *Gore* guidepost—the ratio between actual harm and a punitive damages award—the court paused only briefly to acknowledge that Congress provided statutory damages as an alternative to proving actual harm and benefit to the infringer because proving such impacts can often prove difficult or elusive. Add. 44. The court then went on to ask how much money Appellants lost as a result of Tenenbaum’s conduct. Add. 46. Ignoring the evidence presented at trial by Appellants about the billions of dollars of losses in revenue annually from file-sharing, the court noted that songs can now be purchased on iTunes for \$0.99, and that a full album typically costs about \$15. From that, the court concluded that Appellants’ lost profits were between \$21 (a profit margin of \$0.70 per song) and \$450 (assuming Tenenbaum might have purchased 30 albums). Add. 46-47. Although the court acknowledged Tenenbaum’s admission that he downloaded thousands of copyrighted songs and made them available to millions of other peer-

to-peer network users, it asserted that, “[w]hile file-sharing may be very economically damaging to [Appellants] in the aggregate, Tenenbaum’s individual contribution to this total harm was likely minimal” because other network users “would simply have found another free source for the songs had Tenenbaum never engaged in file-sharing.” Add. 47.

Turning to the benefit Tenenbaum reaped from his infringement, the court posited that it was not particularly substantial since “Tenenbaum did not derive any direct pecuniary gain from file-sharing.” Add. 49. And since a number of services now permit users to access a large number of songs for a flat monthly fee of \$15, the district judge concluded (presumably based on her own financial judgment as this fact was not in the record) that “the average customer today would be willing to pay no more than \$1,500 to engage in conduct roughly similar to Tenenbaum’s.” Add. 50. The court thus concluded that the ratio between the damages awarded and benefit derived could be no less than 450:1. Add. 51. Although the court also acknowledged that the losses to Appellants included the costs of detecting infringement, it asserted that this amount was likely overstated since the cost of deterrence per song is only “marginal” “once a recording company has decided to devote the resources necessary to detect one act of infringement by a file sharer.” Add. 51-52.

Turning to reprehensibility, the court pointed out that Tenenbaum's conduct caused economic, not physical, harm; did not evince indifference to health or safety of others; and did not target the financially vulnerable. Add. 53. But the court also acknowledged that Tenenbaum engaged in thousands of acts of copyright infringement with full knowledge that his actions were illegal, and tried to avoid responsibility by lying under oath and blaming others. *Id.* The court observed that in its view, "the reprehensibility of a file sharer's conduct does not increase linearly with the number of songs he downloads and shares." Add. 52. The court recognized Congress reached a different judgment, but then criticized that aspect of the statute: "Section 504(c) ignores this issue entirely, providing the same statutory damages ranges for each infringed work no matter how many works are infringed." *Id.* Although the court stated that among file-sharers, "Tenenbaum is one of the most blameworthy," it dismissed his individual conduct and the jury's finding of willfulness to find more generally that file-sharing is a "comparatively venial offen[se]" that "is fairly low on the totem pole of reprehensible conduct." Add. 54.

Taking into account its analysis of the three *Gore* factors, the court held that the jury's \$675,000 award violated the Due Process Clause under both *Gore* and *Williams*. The court held 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.” Add. 55. In reaching that judgment, the district court pointed to different statutory schemes that provide treble damages for willful conduct. The approved award of \$2,250 per work represents three times the statutory minimum. The court thus reduced the total award to \$67,500, an amount that it deemed “significant and harsh” in light of “the relatively minor harm that Tenenbaum caused.” Add. 57.

SUMMARY OF ARGUMENT

Joel Tenenbaum illegally and willfully obtained thousands of copyrighted songs and intentionally distributed those songs and others that he personally uploaded to millions of other users of peer-to-peer networks. By putting those copyrighted works onto publicly available networks for free, Tenenbaum fundamentally undermined the value of those copyrights, the profitability of Appellants’ business, and the entire statutorily established copyright scheme. Rather than defer to the jury’s verdict, or even attempt to measure the jury’s award against the strong public interest in deterring unauthorized distribution of copyrighted works, the district court simply removed Tenenbaum’s widespread, indiscriminate distribution from the equation, instead likening his actions to stealing a few albums from a music store. And rather than acknowledge that any due process analysis must give great weight to the fact that § 504(c) provided clear notice of the potential for statutory damages in the amount awarded, the district

court implausibly asserted that neither Congress nor Tenenbaum realized that this unambiguous statute would apply in this context. In the end, the court's holding has little to do with the Due Process Clause and everything to do with the court's own belief that the actions of individual file-sharers like Tenenbaum are "fairly low on the totem pole of reprehensible conduct." Add. 54. Congress and the jury, however, have determined otherwise.

The district court's elevation of its own policy views over those of Congress is all the more egregious given the Supreme Court's instruction that the constitutionality of a statutory damages award must be measured with particular regard for the fact that such awards represent Congress's determination of what constitutes adequate deterrence, punishment, and compensation for the public harm that they address. As the Court has made clear, such review is highly deferential to Congress's judgment: a statutory damages award is constitutional so long as it "cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable." *Williams*, 251 U.S. at 67.

There is no question that the Copyright Act's statutory damages provision and the jury's award well within that authorized range satisfy that standard. Statutory damages provisions have long been a feature of copyright law, and the Supreme Court has repeatedly affirmed application of those provisions without regard to whether they closely hew to the actual provable damages in a particular

case. Quite the contrary, the Court has expressly recognized that actual damages caused by copyright infringement can be “difficult or impossible” to prove, *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935), and that statutory damages may be awarded “[e]ven for uninjurious and unprofitable invasions of copyright,” *F.W. Woolworth*, 344 U.S. at 233. Moreover, Appellants provided ample evidence of the enormously detrimental effect that file-sharing has had on the recording industry, as well as the exceptionally blameworthy conduct of Tenenbaum, with respect to both his massive willful infringement and his repeated dishonest attempts to avoid responsibility during this litigation. In short, both Congress’s carefully crafted statutory damages scheme and the jury’s award—which was within the range set by Congress for *non-willful* infringement and nowhere near even the midpoint of the specified range for willful infringement—are a reasonable and proportioned response.

Even under the Supreme Court’s ill-fitting punitive damages jurisprudence, the jury’s award is clearly constitutional. Punitive damages review is designed to establish whether a defendant had fair notice of the size of a potential award and to put some outer limit on the jury’s unbounded discretion to impose punitive damages in any amount. Those concerns are fully addressed here, and in other contexts covered by the *Williams* test, by Congress’s specification of a statutory range of damages. Taking into account the particularly reprehensible nature of

Tenenbaum's willful infringement and pattern of deceit throughout this litigation; the award's reasonable relationship to the harm Tenenbaum caused; the need for both specific and general deterrence against additional acts of copyright infringement; and the fact that the award is well within the range of civil penalties authorized by statute, the jury's award cannot be said to be grossly excessive. As such, under any measure, the jury's \$675,000 award easily comports with the Due Process Clause and should be reinstated.

ARGUMENT

I. THE DISTRICT COURT'S ANALYSIS AND CONCLUSIONS ARE HOPELESSLY FLAWED.

In the district court's estimation, noncommercial file-sharing is not a serious problem. From repeatedly emphasizing the purportedly "relatively minor harm" Tenenbaum's actions caused, Add. 8, 57, to describing file-sharers as "comparatively venial offenders," Add. 54, the district court made its own policy views crystal clear.⁵ In its quest to enshrine those policy preferences through the Due Process Clause, the court substantially misjudged the seriousness of Tenenbaum's conduct. More fundamentally, the court lost sight of the fact that Congress has judged willful infringement like Tenenbaum's to be very serious, and that the Constitution gives Congress, not the court, the authority to make that

⁵ The district court also made manifest its hostility to Appellants for pursuing what the court thought were "comparatively venial offenders." Add. 54. At one point the court went so far as to question whether it was ethical to bring suits against individual file-sharers, and informed Appellants that "it's terribly critical that you stop" such suits. June 17, 2009 Motion Hearing 11.

determination. Congress and the Supreme Court have also given juries, not trial judges, the primary role in assessing statutory damages in a particular case. The district court's substitution of its own judgment for that of Congress and the jury was doubly inappropriate.

A. The District Court's Characterization of Tenenbaum's Conduct Bears No Relationship to Reality.

The district court's opinion considerably understates the serious harms file-sharing causes, regardless whether engaged in by "an ordinary individual" not acting for "financial gain." Add. 32. File-sharing is a particularly dangerous form of copyright infringement because it essentially places the infringed work into the public domain. The file-sharer not only downloads a song for personal use, but also makes that song available for millions of other peer-to-peer network users to download at their leisure without compensating the copyright holder.⁶ As a result, for each song infringed, the copyright owner is deprived not only of the profit it would have made had the infringer purchased the song, but also of the profits it would have made from the unknowable number of other individuals who need not pay for the work once the infringer distributes it for free. Although it is essentially impossible to isolate or quantify the loss attributable to a single act of file-sharing, it is entirely implausible to suggest that it is no more than the "nominal" cost of a

⁶ Peer-to-peer file-sharing is so pernicious from a copyright perspective because the technology allows an unlimited number of persons on the network to download and copy a song, then encourages the viral redistribution of that song. As the Supreme Court recognized in *Grokster*, file-sharing thus facilitates "infringement on a gigantic scale." 540 U.S. at 940.

single individual's lawful purchase of the work in question, particularly when that individual readily admits that other users downloaded his illegally obtained works. Add. 54; *see* Appx. 149-51, 171-73, 184. The cost of a license for a single download and a hypothetical license for the massive copying enabled by Tenenbaum's conduct are not remotely comparable. Nevertheless, the district court essentially equated the two.

Rather than take this indisputable and detrimental aspect of file-sharing into consideration when assessing the constitutionality of the jury's award, the district court brushed the issue aside, asserting that other users who obtained music from Tenenbaum "would simply have found another free source for the songs had Tenenbaum never engaged in file-sharing." Add. 47. This is remarkable. Rather than recognizing that widespread lawlessness and disrespect for copyright enhanced the need for deterrence or the egregiousness of Tenenbaum's individual conduct, the court invoked the "everybody's doing it" defense as a basis for minimizing the harm Tenenbaum inflicted on Appellants. Thus, when attempting to measure that harm, the court insisted that it amounted to no more (and probably less) than the lost profit margin on either 30 songs, which it estimated at \$21, or at most 30 albums, which it estimated at \$450. Add. 46-47. By excluding the most damaging of Tenenbaum's actions—his willful distribution to millions of other network users—from its calculation, the court arrived at the misleading conclusion

that the ratio between statutory damages and actual harm was as high as 22,500:1, or even 32,143:1.

This reduction of harm to a misguided and formulaic calculation of lost profits also gave no consideration to such difficult-to-quantify losses as diminution in value of each copyright infringed, an ever-increasing diminution in the value of all sound recording copyrights, and a resulting loss in Appellants' ability to find new artists and music to record, *i.e.*, to pursue their business, all of which were facts presented by Appellants at trial. *See, e.g.*, Appx. 85-92, 123-41. The district court's approach is particularly unjustifiable given the court's obligation to view the evidence in the light most favorable to the plaintiffs and the jury's verdict. *See Parker v. Gerrish*, 547 F.3d 1, 13 (1st Cir. 2008). That general deference is buttressed here by principles of constitutional avoidance and a respect for the province of the jury in the wake of the Supreme Court's decision in *Feltner*.

More fundamentally, the district court ignored that the difficulty of proving the actual amount of harm from infringement is the very reason the statutory damages provision exists. *See* 1961 Report, at 102 ("The value of a copyright is, by its nature, difficult to establish, and the loss caused by an infringement is equally hard to determine."); H.R. Rep. 106-216, at 3 (noting that use of the Internet for copyright infringement has resulted in "lost U.S. jobs, lost wages, lower tax revenue, and higher prices for honest purchasers"). Just as obviously,

the court ignored the primacy of the jury after *Feltner*. The district court barely disguised its latent hostility to *Feltner*. The court went so far as to drop a footnote emphasizing the advantages of judges over juries in assessing appropriate damages. *See* Add. 37 n.12. When it came to the damages suffered by Appellants, the court did not find a specific flaw in the jury's deliberation or even attempt to quantify the cost of detecting file-sharing; instead, it simply hypothesized—without citation to any supporting evidence—that the jury likely overestimated that amount. *See* Add. 52. In the process, the district court ignored ample evidence of the serious impact of the recording industry, including testimony that in the ten years since file-sharing became popular, the annual revenue of the recording industry has decreased by \$10 billion. *See* Appx. 123-41.

The district court similarly missed the point when assessing the benefits reaped by Tenenbaum. In the first place, the district court inappropriately focused on the infringer's benefit. By infringing, the infringer obtains the copyrighted work for free. Whether, in the absence of infringement, the infringer would have paid a little or a lot for the work is irrelevant. While a copyright holder can elect to recover its actual damages plus the benefits obtained by the infringer, statutory damages are an alternative to both measures. Moreover, rather than considering how much Appellants would have charged Tenenbaum for a blanket license to distribute their copyrighted works at will for free—clearly the relevant injury in

light of Tenenbaum's conduct—the court asked “how much Tenenbaum would have been willing to pay” to obtain access to each song for personal use. Add. 50. Since a variety of services now “allow users to access millions of songs ... for a flat monthly fee of less than \$15,” the court asserted that the entire benefit Tenenbaum derived from his actions was no more than \$1,500, the cost of subscribing to such a service for the duration of his infringement. Add. 50-51. That inquiry is not only legally irrelevant, but also misunderstands the nature of the “service” Tenenbaum actually “subscribed” to and once again wholly ignores the most damaging and destructive feature of the type of infringement at issue, namely, the fact that Tenenbaum did not merely infringe for his personal use but rather provided thousands of copyrighted songs to millions of other users for free. The district court pointed to no service that allows users to do that; nor could it, since the cost of such a service would be so prohibitively expensive that none exists. *See Appx. 86-87.*

The district court repeated this error yet again when it compared the damages award in this case to the awards in cases involving establishments that played copyrighted musical works without acquiring licenses. *See Add. 42-43.* Those cases involve the cost of a license for a single establishment to play or perform a musical composition at an identified place and time, not a blanket license to make a sound recording publicly available to all on 24/7 basis for free.

Leaving aside the difference between a sound recording and a musical composition, the former license preserves the value of the copyright for every other performance at every other venue, not to mention the full value of the rights of copying and distribution. A license to make unlimited copies without compensation to the record company would essentially require the licensee to purchase the copyright. Obviously that amount is vastly different from the small fees paid for performance licenses of musical works.

As these examples illustrate, the district court's opinion distorts the nature and extent of Tenenbaum's misconduct and the damage that it caused. Because its constitutional analysis rested on a demonstrably false premise—that Tenenbaum's actions caused little or no harm⁷—the court's review of the jury's award is fundamentally flawed under any constitutional standard.

B. The District Court Artificially Distorted the Scope of Section 504(c)'s Applicability.

In addition to dramatically understating the severity of Tenenbaum's actions, the district court obscured the most important aspect of the analysis: that the jury's award was plainly authorized by § 504(c) and well within the statutory range. Despite acknowledging that fact, the court nonetheless concluded that Congress could not really have meant for the statute to cover this conduct and that

⁷ For his part, Tenenbaum contended that file-sharing of copyrighted music is simply “not morally wrong.” Def.'s Mot. 16.

Tenenbaum, in turn, could not really have known that he might face this kind of damages award. *See* Add. 32, 39 n.13. That attempt to avoid the substantial deference due to Congress and invade the province of the jury renders the court's opinion indefensible.

First, there is simply no legal or factual merit to the district court's assertion that "Congress did not contemplate that the Copyright Act's broad statutory damages provision would be applied to college students like Tenenbaum who file-shared without any pecuniary gain." Add. 7. As the court acknowledged, "[t]he plain language of 17 U.S.C. § 504(c) authorized the jury's award in this case." Add. 38. From the earliest days of the Republic, copyright statutes have prohibited infringement by both end-users and commercial enterprises and imposed civil penalties for both. The current statute unambiguously states that "an infringer of copyright is liable for ... statutory damages, as provided." 17 U.S.C. § 504(a)(2). It gives no indication that its damages ranges must be cabined for noncommercial infringement, peer-to-peer network infringement, infringement by college students, *see* Add. 7, or any other type of infringement. As to the particular infringer, the statute provides only two criteria that warrant deviation from the base-line range: the maximum may be raised to \$150,000 per work for a willful infringer, and the minimum may be lowered to \$200 for an "innocent infringer." § 504(c)(1).

Notwithstanding that clear statutory directive, the district court embarked on a textbook illustration of misuse of legislative history to avoid giving due deference to Congress's determinations. Legislative history is properly used to illuminate the meaning of an otherwise ambiguous statutory provision, not to manufacture ambiguity where none exists. *See Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) (“We do not resort to legislative history to cloud a statutory text that is clear.”). And it should go without saying that “[f]loor statements from two Senators cannot amend the clear and unambiguous language of a statute.” *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 456 (2002). Yet the district court sought to derive Congress's “true” intentions in § 504(c) by resorting not even to floor statements made in the context of the legislation's passage, but to individual Senators' remarks and actions during committee hearings held months *after* § 504(c) was amended. *See* Add. 36-37 (citing remarks and actions of Senators Hatch and Leahy at committee hearings in July and October 2000). Such post-hoc statements in committee (even if they were clearly applicable, which they are not) should have no role in construing a statute, but in all events are manifestly insufficient to overcome a statute's unambiguous text.⁸

⁸ Moreover, the statements the district court relied upon are hardly illuminating. At most, they reflect Senator Leahy's belief that downloading a song to educate a congressional committee constitutes protected “fair use,” and Senator Hatch's admiration for the technological advance that file-sharing represents. Add. 36-37. Those are slim reeds upon which to rest a conclusion that even those two Senators—let alone all of Congress—questioned the applicability of § 504(c) to file-sharing infringers as written and enacted.

The district court's invocation of this post-enactment colloquy is particularly bizarre because the court did not even rest its holding on statutory grounds. If the court were correct that Congress did not intend § 504(c) to apply to noncommercial file-sharing, or intended the statute's damages range to be construed (despite the lack of any textual basis) as limited in that context, the logical holding would be that the jury's award violated the *statute*. Yet the court expressly recognized that the statute unambiguously authorized the jury's award. Nonetheless, after acknowledging that it "must give effect to this clear statutory language," the court contradicted itself by stating that § 504(c) "does not embody" any judgment to which the court could defer. Add. 38. The court's implausible assertion that a statute does not embody Congress's judgment on the matters it plainly addresses is a transparent attempt to circumvent the deference to legislative judgments required under *Williams*. See *Williams*, 251 U.S. at 66 (due process review is limited by "the express or tacit qualification that the [legislature] still possess[es] a wide latitude of discretion" when setting statutory damages); see also *Gore*, 517 U.S. at 583 (due process review "should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue" (internal quotation marks omitted)).

In any event, even assuming legislative history were relevant to the analysis, it would be the traditional pre-enactment material, such as the House Report that

the district court noted and then ignored, and not post-enactment colloquies, that would point the way. The actual legislative history of the last amendment to § 504(c) makes clear that Congress *did* intend the full force of the statutory damages provision to apply to conduct like Tenenbaum's. In 1999, Congress amended § 504(c) to increase the per-work minimum damages from \$500 to \$750, maximum damages from \$20,000 to \$30,000, and maximum damages for willful infringement from \$100,000 to \$150,000. *See* 1999 Act. A committee report accompanying an earlier version of that act singled out the proliferation of Internet infringement as the impetus for the increase:

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

H.R. Rep. 106-216, at 3.

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

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

Id. Whether or not Congress specifically anticipated infringement on peer-to-peer networks, this language leaves no room for doubt that Congress was concerned that the advent of ever more sophisticated Internet technology threatened the copyright system and demanded greater penalties. Certainly, it is virtually impossible to read the 1999 amendments as suggesting the award here is too high: The amendments increased penalties substantially and the award per violation here is less than a quarter of the *pre*-amendment maximum for willful infringement of \$100,000.

The district court's repeated suggestions to the contrary notwithstanding, *see* Add. 32, the statutory history of the Act also strongly indicates that Congress fully intended to punish, deter, and compensate for copyright infringement that does not result in financial gain to the infringer. Indeed, in one of its most recent amendments to the Act, Congress expressly rejected a distinction between commercial and noncommercial infringement, and did so in the particular context of a college student engaged in file-sharing. In *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994), a college student was charged with wire fraud for setting up an electronic bulletin board from which other users could download popular software applications at no cost. Because the criminal provisions of the Act at the time required infringement to be "willful[]" and for purpose of commercial advantage or financial gain," the court concluded that the Act barred LaMacchia's prosecution. *Id.* at 540, 545.

Congress responded to *LaMacchia* in short order. In 1997, it passed the No Electronic Theft (NET) Act, which revised the Act by defining “financial gain” to include “receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works.” Pub. L. No. 105–147 § 2(a), 111 Stat. 2678 (1997). A committee report accompanying the bill explained that “[t]he practical significance of these changes is that they criminalize LaMacchia-like behavior; that is, ‘computerized’ misappropriation in which the infringer does not realize a direct financial benefit but whose actions nonetheless substantially damage the market for copyrighted works.” H.R. Rep. 105–339, at 7 (1997). Given Congress’s determination that noncommercial computerized copyright infringement should be subject to the same *criminal* penalties as infringement driven by profit, there can be no justification for imposing the district court’s policy preference for lesser penalties for noncommercial infringers upon the Act’s *civil* damages provision.⁹

For the same reasons, there is no merit to the court’s conclusion that the statute did not provide Tenenbaum “*fair* notice” of the damages he might face for his infringement. Add. 39 n.13. The statute unambiguously authorizes damages of \$30,000 per work for any act of infringement, and specifically singles out

⁹ That is particularly true since, as the Supreme Court has pointed out, an infringer’s sale of a copyright work for little or no profit “might cause more damage to the copyright proprietor than sales of the infringing article at a higher price.” *F.W. Woolworth*, 344 U.S. at 232. File-sharing of the kind engaged in by Tenenbaum is the extreme example of this dynamic: Tenenbaum’s sharing of Appellants’ works for free essentially placed these works into the public domain.

willfulness as a justification for increasing that amount to \$150,000. Congress has made clear that the copyright infringement provisions govern everyday infringement by Internet users, and that absence of a profit motive does not make conduct less culpable. Willfulness, not profit motive, is the touchstone of enhanced statutory damages, and Tenenbaum's conduct was nothing if not willful. What is more, Tenenbaum conceded that he was on *actual* notice of the maximum damages he might face, as his university notified him that illegally downloading music was subject to damages of up to \$150,000 per act. Appx. 174-80. Thus, there is no legal or factual basis for refusing to defer to Congress's determination that willful file-sharing infringement is subject to substantial statutory damages awards or the jury's determination that an award of \$22,500 per violation was appropriate.¹⁰

II. CONSTITUTIONAL REVIEW OF STATUTORY DAMAGES IS GOVERNED BY *WILLIAMS*.

Constitutional review of *statutory* damages awards is highly deferential: An award complies with the Due Process Clause so long as it "cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously

¹⁰ Nor is there any merit to the district court's assertion that the 200:1 ratio between the statute's minimum and maximum damages was so exceptional or unusual as to deprive Tenenbaum of fair notice. Statutes have long authorized copyright infringement damages in ranges equal to or even greater than the range in § 504(c). See *Feltner*, 523 U.S. at 351 (noting early Massachusetts and Rhode Island statutes authorizing damages within a 600:1 ratio and an early New Hampshire statute authorizing damages within a 200:1 ratio); 1976 Act, § 504(c) (authorizing damages within a 200:1 ratio).

unreasonable.” *Williams*, 251 U.S. at 67.¹¹ For that reason, the decision below is virtually unprecedented. Because a statutory damages award is intended to punish and deter, not just compensate, it may “of course seem[] large” when contrasted against the actual harm in a particular case. *Id.* (upholding \$75 damages award for \$0.66 overcharge). But the Supreme Court has made clear that the validity of a statutory damages award “is not to be tested in that way.” *Id.* Instead, because the statute itself reflects Congress’s determination of the appropriate amount of damages for the violation in question, the constitutionality of a statutory damages award must be assessed “with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to” law. *Id.* When comparing the size of an award against the gravity of the offense, a court must bear in mind that legislatures “still possess a wide latitude of discretion” when setting statutory damages. *Id.* at 66.

The Supreme Court’s punitive damages jurisprudence reflects entirely different concerns that have no relevance in the statutory damages context. In particular, the Supreme Court’s punitive damages jurisprudence is motivated by two concerns, neither of which has any application in the context of awards within a statutory range: the unbounded nature of punitive damages and the resulting lack of notice. “Elementary notions of fairness enshrined in our constitutional

¹¹ The constitutionality of a damages award is a question of law that this Court reviews *de novo*. See *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 434-35 (2001).

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.” *Gore*, 517 U.S. at 574. Yet, in the typical punitive damages case, the jury’s discretion is unconstrained, meaning the defendant has no advance notice of how large an award it might face. In recognition of that fact, the Court has developed three “guideposts” to determine whether a defendant “receive[d] adequate notice of the magnitude of the sanction” that might be imposed and to impose an outer bound on the amount of punitive damages. *Id.*

As is readily evident, those “fair notice” and unbounded liability concerns are wholly beside the point in the statutory damages context since the authorizing statute will always provide notice of the potential award and a statutory range bounding that award. That is especially true here, where the statute provides not only a range, but separate ranges for willful and non-willful conduct, and a possibility of reduction for truly innocent conduct. Section 504(c)(1) states that a “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.” 17 U.S.C. § 504(c)(1). The statute makes clear that a single damages award will be assessed for each work infringed, in an amount “not less than \$750 or more than \$30,000 as the court considers just.” *Id.* It also provides that, if the court finds that the 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.” § 504(c)(2). Thus, there is simply no question that the plain language of the statute provides clear notice that any act of willful copyright infringement will subject the infringer to a damages award between \$750 and \$150,000 for each work infringed. As such, there is nothing to be gained from subjecting the jury’s statutory damages award, especially an award below the cap for non-willful infringement, to analysis under *Gore*.¹²

For precisely that reason, the punitive damages “guideposts” make little sense when imported into the statutory damages context. The first *Gore* factor, reprehensibility, accounts for the fact that punitive damages are usually awarded under the common law where there is no legislative determination of the public interest in preventing the offense in question, let alone a legislative quantification of the appropriate range of penalties. Thus, courts are instructed to examine a variety of the factors that would typically guide a legislature’s determination of how severely to punish an offense. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (courts should consider whether conduct caused physical or economic harm, involved indifference to health or safety of

¹² That *Williams* is relevant to punitive damages jurisprudence does not support the district court’s assumption that the converse must be true as well. Add. 28. It would make little sense to exempt unconstrained punitive damages awards from the substantive limitations set forth in *Williams*; the same cannot be said of applying the stringent procedural components of punitive damages jurisprudence to review of statutory damages awards.

others, targeted the vulnerable, was isolated or repeated, and involved intentional malice, trickery, or deceit).

In a statutory damages scheme, by contrast, Congress has already weighed those and whatever other factors it considers relevant and has determined how reprehensible the conduct is, so there is no need for a court to ask that question in the first instance. Such an open-ended inquiry into reprehensibility is a task far better suited to the legislature than the judiciary. The judiciary has undertaken that task reluctantly in the punitive damages context because there is no alternative. But when Congress has made the judgment, the judicial role is more modest: The court's role is limited to reviewing the rationality of Congress's assessment. That is why *Williams* instructs courts to examine the reasonableness of *Congress's* determination, giving great deference to its assessment of "the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to" law. *Williams*, 251 U.S. at 67.

The second *Gore* guidepost, which measures the disparity between the punitive damages award and the actual or potential harm caused, is similarly incompatible with *Williams* and Congress's judgment in the Copyright Act. Punitive damages awards punish defendants as an adjunct to a case of certain recovery for an injury inflicted. In that context, a requirement that the punitive damages award be proportionate to the degree of underlying injury makes sense.

Statutory damages, by contrast, are a legislative response to a “violation of a public law,” and “may [be] adjust[ed] ... to the public wrong rather than the private injury.” *Id.* at 66. Thus, a statutory damages award often reflects the legislature’s determination that any amount of damages tied to the actual harm, or the amount of harm that may be provable, would bear little relationship to the “the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to” law. *Id.* at 67 (affirming award of \$75 for charging \$0.66 more than the prescribed fare); *see also F.W. Woolworth*, 344 U.S. at 233 (noting that the Copyright Act reflects Congress’s determination that actual damages “would fall short of an effective sanction for enforcement of the copyright policy”). For that reason, the Supreme Court has emphatically instructed that the validity of a statutory damages award “is not to be tested” by comparison to the actual injury caused by a defendant’s actions. *Williams*, 251 U.S. at 67; *see also id.* (statutory damages need not “be confined or proportioned to [the plaintiff’s] loss or damages”). Thus, the district court’s extended efforts to discount the actual damages suffered by Appellants not only ignored relevant evidence and invaded the province of the jury after *Feltner*; it was a purposeless exercise in light of the clear teaching of *Williams*.

Moreover, unlike punitive damages, statutory damages are awarded in lieu of, not in addition to, compensatory damages. Indeed, Congress typically

authorizes statutory damages precisely because, as in the copyright context, actual damages would be “difficult or impossible” to prove. *Douglas*, 294 U.S. at 209; *see also* 1961 Report, at 102 (“The value of a copyright is, by its nature, difficult to establish, and the loss caused by an infringement is equally hard to determine.”). Because punitive damages are generally appropriate only if there is an underlying compensatory award, *see* 22 C.J.S. Damages § 197, in the punitive damages context the second *Gore* guidepost compares two readily-available numbers. Not so in the statutory context. Since statutory damages exist in large part to relieve copyright owners of the very burden of demonstrating the metes and bounds of the actual injury, it would undermine the entire statutory damages scheme to measure their constitutionality against something that the plaintiff is not required to prove and that Congress has determined often would be impracticable or impossible to prove. *See L.A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100, 106 (1919) (“[t]he fact that [statutory] damages are to be ‘in lieu of actual damages’ shows that something other than actual damages is intended”).

The third *Gore* guidepost—comparing a punitive damages award to authorized civil penalties—is, if anything, a worse fit because a statutory damages award *is* an authorized civil penalty. To the extent the third guidepost is designed to ensure that damages awards are measured with “substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue,”

Gore, 517 U.S. at 583 (internal quotation marks omitted), that feat can be accomplished for a statutory damages award by examining the statute itself. And to the extent the third guidepost is intended “to determine whether a particular defendant was given fair notice as to its potential liability,” *Zimmerman*, 262 F.3d at 83, *see also Gore*, 517 U.S. at 584, that too can be established by resort to the statute in question.¹³ Thus, in a statutory damages case, there is simply no work for the third *Gore* guidepost to do.

For all these reasons, courts have repeatedly concluded that constitutional review of statutory damages awards is governed by *Williams*, not *Gore*. *See, e.g., Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 587-88 (6th Cir. 2007); *Accounting Outsourcing LLC v. Verizon Wireless Pers. Commc’ns, L.P.*, 329 F. Supp. 2d 789, 808-09 (M.D. La. 2004); *Lowry’s Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 460 (D. Md. 2004).¹⁴ The *Gore* guideposts exist

¹³ This Court held in *Zimmerman* that the third guidepost exists “solely to determine whether a particular defendant was given fair notice as to its potential liability for particular misconduct, not to determine an acceptable range into which an award might fall.” 262 F.3d at 83 (emphasis added). The district court’s suggestion that *Campbell* overruled this aspect of *Zimmerman* is wholly unfounded. *See Add. 39 n.13*. Far from doing away with *Gore*’s emphasis on fair notice, *Campbell* reiterates that “fair notice” is “[t]he reason” for the Court’s punitive damages jurisprudence. *Campbell*, 538 U.S. at 416.

¹⁴ Although the district court posited a split of authority on this issue, *see Add. 27 n.10*, none of the cases it cited holds that a statutory damages award must be reviewed under *Gore*. *See Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 954 (7th Cir. 2006) (citing *Campbell* in dictum for the proposition that “[a]n award that would be unconstitutionally excessive may be reduced”); *Parker v. Time Warner Entm’t Co.*, 331 F.3d 13, 22 (2d Cir. 2003) (citing *Campbell* and *Gore* in dictum for the proposition that “the due process clause might be invoked” to reduce a damages award); *Romano v. U-Haul Int’l*, 233 F.3d 655, 672-74 (1st Cir. 2000) (applying *Gore* guideposts to a capped punitive damages award where no party suggested otherwise); *Centerline*

to ensure that defendants in punitive damages cases have what statutory damages provisions clearly provide: fair notice of the bounds of what sanctions they may face for their actions. Those guideposts have no place in review of a statutory damages award, which must instead be held constitutional so long as Congress’s judgment about the appropriate amount or range of damages “cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable.” *Williams*, 251 U.S. at 67.

Finally, the district court’s opinion demonstrates the dangers of applying *Gore*, rather than following the Supreme Court’s teaching in *Williams*. While the district court acknowledged that legislative history should play no role in interpreting an unambiguous statute, it used legislative history—post-enactment history no less—to inform its analysis under the third *Gore* factor. Add. 38. While the court acknowledged that statutory damages obviate the need to show the amount of harm suffered, it engaged in an extensive analysis of that subject under the guise of applying the second guidepost. Add. 36-38. And while the court purported to defer to Congress’s judgments about reprehensibility, it rejected the “proportionate reprehensibility” judgment embodied in § 504(c) (and the first

Equip. Corp. v. Banner Pers. Serv., Inc., 545 F. Supp. 2d 768, 777-88 & n.6 (N.D. Ill. 2008) (reviewing statutory damages scheme under *Williams* then noting that *Campbell* and *Gore* might become relevant if punitive damages were awarded); *In re Napster, Inc. Copyright Litig.*, 2005 WL 1287611 at *10-*11 (N.D. Cal. June 1, 2005) (suggesting in dictum that court would apply analysis “similar to the ‘guideposts’” when reviewing a class action statutory damages award).

copyright act as well). Add. 52.¹⁵ Then, for the *non plus ultra*, the court looked to different statutes providing treble damages for willful actions as a basis to substitute its own legislative determination (that damages of three times the minimum is the appropriate maximum punishment) for that of Congress. Add. 55-56. Any test that allows otherwise irrelevant considerations to inform the analysis and allows a court in a copyright case to give greater weight to Congress's judgments in the Telephone Consumer Protection Act than to its judgments in the Copyright Act has no place in the deferential review called for by *Williams*.

III. THE JURY'S AWARD IS CONSTITUTIONAL.

A. The Jury's Award is Constitutional Under *Williams*.

Applying the deferential *Williams* standard, courts have repeatedly rejected due process challenges to awards under numerous state and federal statutory damages schemes.¹⁶ Courts have also rejected due process challenges to awards

¹⁵ The district court proclaimed that "the reprehensibility of a file-sharer's conduct does not increase linearly with the number of songs he downloads and shares." Add. 52. Congress thought otherwise by imposing statutory damages on each work infringed. The court acknowledged this contrary judgment, but rather than defer, it criticized: "Section 504(c) ignores this issue entirely, providing the same statutory damages ranges for each infringed work no matter how many works are infringed." Add. 52.

¹⁶ See, e.g., *Verizon Cal. Inc. v. OnlineNIC, Inc.*, 2009 WL 2706393 at *6-*7 (N.D. Cal. Aug. 25, 2009) (rejecting due process challenge to \$50,000-per-violation statutory damages award under Anticybersquatting Consumer Protection Act); *Sadowski v. Med1 Online, LLC*, 2008 WL 489360 at *5 (N.D. Ill. Feb. 20, 2008) (rejecting due process challenge to \$500-per-violation statutory damages authorized by Telephone Consumer Protection Act); *Arrez v. Kelly Servs., Inc.*, 522 F. Supp. 2d 997, 1008 (N.D. Ill. 2007) (rejecting due process challenge to \$500 damages for failure to provide itemized pay statements); *Arcilla v. Adidas Promotional Retail Operations, Inc.*, 488 F. Supp. 2d 965, 972 (C.D. Cal. 2007) (rejecting due process challenge to \$1,000 award under Fair and Accurate Credit Transactions Act); *Accounting Outsourcing*, 329 F. Supp. 2d at

under the Copyright Act. *See, e.g., Zomba Enters.*, 491 F.3d at 587-88 (\$806,000 award, equal to 44 times actual damages, was “not sufficiently oppressive to constitute a deprivation of due process”); *Arista Records LLC v. Usenet.com, Inc.*, 2010 WL 3629587 at *4-*5 (S.D.N.Y. Sept. 16, 2010) (\$6,585,000 did not violate due process); *Propet USA, Inc. v. Shugart*, 2007 WL 4376201 at *2-*3 (W.D. Wash. Dec. 13, 2007) (\$500,000 statutory damages award for copyright infringement—“some forty times ... actual damages”—not unconstitutionally excessive). As those decisions reflect, damages awards authorized by the Copyright Act easily satisfy the deferential *Williams* standard.

The Constitution expressly authorizes Congress “To promote the Progress of Science and useful Arts” by securing copyright protection for creators of intellectual property. U.S. Const. art. 1, § 8. “To comprehend the scope of Congress’ power under the Copyright Clause, a page of history is worth a volume of logic.” *Eldred v. Ashcroft*, 537 U.S. 186, 200 (2003) (internal quotation marks and citations omitted). Copyright infringement has been subject to statutory damages since the first Congress passed the first copyright statute in 1790. Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 125 (authorizing recovery of “fifty cents for every sheet which shall be found in [the infringer’s] possession”). Even before then, states—at the Continental Congress’s urging—put in place infringement laws

809-10 (rejecting due process challenge to state statute providing \$500-per-violation damages for unsolicited faxes).

with statutory damages provisions with broad damages ranges comparable to § 504(c). *See Feltner*, 523 U.S. at 351 (citing Massachusetts and Rhode Island statutes authorizing damages between £5 and £3,000 and New Hampshire statute authorizing damages between £5 and £1,000). These statutory damages provisions have been designed to ensure that “the cost[s] of infringing substantially exceed the costs of compliance, so that persons who use or distribute intellectual property have a strong incentive to abide by copyright laws.” H.R. Rep. 106–216, at 6.

Although Congress has periodically increased the amount of statutory damages available, “the principle on which [Congress] proceeded—that of committing the amount of damages to be recovered to the court’s discretion and sense of justice, subject to prescribed limitations—[has been] retained.” *L.A. Westermann*, 249 U.S. at 107.¹⁷ That wide discretion is an appropriate reflection of the fact that many forms of copyright infringement are easy to accomplish and difficult to detect. Indeed, “[t]he actual damages capable of proof are often less than the cost to the copyright owner of detecting and investigating infringements.”

¹⁷ *See* Copyright Act of 1856, 11 Stat. 138 (authorizing “just” damages of “not less than one hundred dollars for the first, and fifty dollars for every subsequent performance” of a copyrighted work); Copyright Act of 1909, § 25(b), 35 Stat. 1075 (“1909 Act”) (authorizing “just” damages of not less than \$250 or more than \$5,000); 1976 Act, § 504(c) (authorizing “just” per-work damages of not less than \$250 or more than \$10,000, or more than \$50,000 for willful infringement); 1988 Act (authorizing “just” per-work damages of not less than \$500 or more than \$20,000, or \$100,000 for willful infringement); 1999 Act (authorizing “just” per-work damages of not less than \$750 or more than \$30,000, or \$150,000 for willful infringement).

1961 Report, at 103. That is all the more true since the harms of copyright infringement are particularly difficult to quantify, and measurement “based solely on the value of the infringing items ... significantly underrepresents the degree of economic harm inflicted by” infringement. H.R. Rep. 106–216, at 3.

In reviewing statutory damages awards under various copyright infringement provisions, the Supreme Court has repeatedly referred and deferred to Congress’s conclusion that such awards need bear little or no relation to any actual harm proven. For instance, in *L.A. Westermann*, the Court held that the plaintiff was entitled to the statutory minimum of \$250 for each infringing acts, even though there was no evidence of any damages or profits and the district court had determined that only nominal damages of \$10 per act were warranted. 249 U.S. at 106-09. In *Douglas*, the Court reversed a court of appeals’ decision to reduce an award from the maximum of \$5,000 to the minimum of \$250, even though the trial court had found that no actual damages had been shown. 294 U.S. at 208-10. And in *F.W. Woolworth*, the Court affirmed a maximum award of \$5,000, even though the defendant’s profits from the infringement were only \$900. 344 U.S. at 231-32. In doing so, the Court expressly validated Congress’s determination that the strong public interest in preventing copyright infringement warrants harsh penalties for violations, noting that “a rule of liability which merely takes away the profits from

an infringement would offer little discouragement to infringers ... [and] fall short of an effective sanction for enforcement of the copyright policy.” *Id.* at 233.

As the foregoing illustrates, to suggest that there is something unconstitutional about statutory damages awards that are substantially greater than the quantifiable harm copyright infringement causes would be to suggest not only that copyright infringement law has been constitutionally suspect for more than a century, but also that this fact has repeatedly escaped the Supreme Court’s notice. Quite the contrary, the Court has expressly recognized and affirmed the validity of Congress’s determination that “[e]ven for uninjurious and unprofitable invasions of copyright [a] court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy.” *Id.* That determination reflects the Court’s deference to the fact that the Constitution tasks Congress with establishing copyright policy, and that courts “are not at liberty to second-guess congressional determinations and policy judgments” in this arena. *Eldred*, 537 U.S. at 208.

Nor is there any basis to second-guess the damages award that the jury returned in this case. The jury’s award of \$22,500 per work is toward the low end of the range Congress has authorized for willful infringement (up to \$150,000 per work), and is even toward the low end of the ranges authorized in 1976 and 1988. *See* 1976 Act (authorizing up to \$50,000 for willful infringement); 1988 Act (authorizing up to \$100,000 for willful infringement). Indeed, taking inflation into account, the award is

even within the range authorized in 1909. *See* 1909 Act, § 25(b) (authorizing damages of not less than \$250 and not more than \$5,000); Bureau of Labor and Statistics Inflation Calculator, http://www.bls.gov/data/inflation_calculator.htm (\$22,500 in 2009 dollars is equivalent to \$1,038.28 in 1913 dollars). Given that infringement awards within comparable ranges have been deemed appropriate “[e]ven for uninjurious and unprofitable invasions of copyright,” *F.W. Woolworth*, 344 U.S. at 233, there is little reason to question the appropriateness of a within-range award here.

That is all the more true once the particular circumstances of this case are taken into account. For the reasons described in Part I, there is no reason to question Congress’s determination that use of the Internet to engage in widespread copyright infringement is every bit as detrimental as—if not more detrimental than—other forms of copyright infringement. As the district court admitted, use of peer-to-peer networks to steal copyrighted music “is regrettably quite common.” Add. 54; *see also* Def.’s Mot. 1 (“Tenenbaum was one of many millions of people sharing [copyrighted] music.”) And “the potential for this problem to worsen is great” since “the development of new technology will create additional incentives for copyright thieves to steal works.” H.R. Rep. 106–216, at 3. Tenenbaum’s own actions underscore the need for strong deterrents against abuses of new technology: Tenenbaum willfully infringed upon thousands of copyrights despite full knowledge that his actions were illegal and subject to substantial monetary

consequences. That Tenenbaum undertook those actions knowing they were subject to damages awards that he would have difficulty satisfying only confirms Congress's assessment that many Internet infringers "simply believe that they will not be caught." *Id.*

The reasonableness of the jury's award is also confirmed by the fact that "Tenenbaum is one of the most blameworthy" of file-sharers. Add. 54. Tenenbaum admitted to obtaining and distributing thousands of copyrighted works with full knowledge that his actions constituted illegal copyright infringement and admitted to continuing to infringe after direct notice from Appellants, and even after Appellants commenced this litigation. Throughout the litigation, Tenenbaum also repeatedly lied under oath in an attempt to shift blame and avoid responsibility for his knowingly unlawful conduct. Notably, the jury made its determination without any suggestion from Appellants that they expected a particular award. Appellants at all times maintained that they left the determination of damages to the jury's sound discretion. *See, e.g.*, Appx. 261-62.

That a jury rather than a judge determined the "just" level of damages is no reason to question the award's appropriateness, whether under the statute or under the Due Process Clause. *See* Add. 39 n.12 (suggesting that juries are "in need of additional guidance" from Congress if they are to be "entrusted with the responsibility of awarding statutory damages"). To the contrary, review under

Williams should involve deference to both the policy judgments of Congress and the jury's role as reaffirmed in *Feltner*. Juries have been entrusted with awarding statutory damages in copyright infringement cases for hundreds of years. *Feltner*, 523 U.S. at 351-52. Although Congress may not have originally envisioned that juries would award damages under § 504(c), if Congress thought juries were not up to this task, it presumably would have circumscribed the jury's role, not expanded the jury's discretion by expanding the damages range when it amended § 504(c) one year after *Feltner*. See 1999 Act. The teaching of *Feltner* is that the amount of statutory damages is a fact to be found by the jury in the same way the jury resolves other factual issues. The district court's apparent discomfort with allowing the jury to perform this function, see Add. 39 n.12, is hard to reconcile with the whole thrust of the Supreme Court's decision.

Moreover, any suggestion that this particular jury lacked sufficient guidance to decide an appropriate measure of damages is clearly unfounded. Section 504(c) makes clear that willfulness, a key aspect of Tenenbaum's conduct, is a critical factor in determining whether a higher award is warranted. 17 U.S.C. § 504(c)(2). And the district court provided the jury with additional factors to guide its determination, including "[t]he nature of the infringement," "[t]he defendant's purpose and intent," lost profits and revenue, the value of the copyright, the duration of the infringement, whether it persisted after notice, and the need for

deterrence. Appx. 68. Of course, if the decision below were correct, the jury presumably should have been instructed that in no event should it return an award in excess of \$2,250 per willful violation. That only confirms that the decision below reflects what amounts to a legislative judgment that contradicts Congress's own legislative judgment.

In sum, once due regard is given to the strong public interest in preventing widespread willful file-sharing, the countless opportunities file-sharing presents for infringement, and the need for adherence to copyright laws, and the particularly blameworthy conduct of this defendant is taken into account, it is clear that an award well below what Congress has authorized for willful infringement—indeed, below what Congress has authorized even for *non*-willful infringement—“cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable.” *Williams*, 251 U.S. at 67.

B. The Jury's Award is Constitutional Under *Gore*.

Even under the ill-suited *Gore* guideposts, the jury's award easily withstands constitutional scrutiny. “When all is said and done, a punitive damages award will stand unless it clearly appears that the amount of the award exceeds the outer boundary of the universe of sums reasonably necessary to punish and deter the defendant's conduct.” *Zimmerman*, 262 F.3d at 81. The jury's award is well within the statutory range and those bounds.

First, Tenenbaum's actions are unquestionably reprehensible in the context of the Copyright Act. *See Gore*, 517 U.S. at 575. As already discussed, *see supra* pp. 10-13, he repeatedly engaged in willful copyright infringement knowing that his actions were illegal. “[E]vidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant’s disrespect for the law.” *Id.* at 576-77. Tenenbaum then exacerbated his willful infringement by engaging in “deliberate false statements, acts of affirmative misconduct, [and] concealment” of his illegal conduct throughout the litigation. *Id.* at 579. As the district court conceded, these combined actions make Tenenbaum “one of the most blameworthy” of file-sharers. Add. 54.

Second, the jury’s award bears a “reasonable relationship” to the harm Tenenbaum caused. *Mendez-Matos v. Municipality of Guaynabo*, 557 F.3d 36, 54 (1st Cir. 2009). Tenenbaum stole copyrighted songs and made them available to millions of other users. Those actions deprived Appellants of literally immeasurable profits they otherwise could have obtained from sales to both Tenenbaum and the public. By putting copyrighted works in the public domain for free, Tenenbaum contributed to the continuing decline in the value of copyrighted sound recordings and exacerbated the threat to Appellants’ viability as companies

that identify and promote continuing and new artists through sales of copyrighted sound recordings. Given that file-sharing has cost the industry billions of dollars, there is no basis to question the award here.

Finally, the reasonableness of the jury's award is reinforced by comparing it to civil penalties authorized by Congress. Not only is the award well within the statutory range; it is within the range of damages even for *non-willful* infringement. *See supra* pp. 50-51. To the extent it is relevant, *see Zimmerman*, 262 F.3d at 83 (comparison to other jury awards is only appropriate when no civil penalties are authorized), the award is also within the range that two juries have determined appropriate for comparable conduct. *See Thomas* 579 F. Supp. 2d. at 1213 (\$9,250 per song); *Thomas-Rasset*, 680 F. Supp. 2d at 1048 (\$80,000 per song).¹⁸ Thus, under no theory of constitutional review can it plausibly be said that the jury's award "exceeds the outer boundary of the universe of sums reasonably necessary to punish and deter the defendant's conduct." *Zimmerman*, 262 F.3d at 81.

¹⁸ Although the district court subsequently deemed awards in those amounts excessive, its reasons for doing so largely track the district court's reasons here, and are thus fundamentally flawed for the same reasons as well. *See Thomas-Rasset*, 680 F. Supp. 2d at 1052-54.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's judgment and reinstated the jury's \$675,000 damages award.

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