IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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

SONY BMG MUSIC ENTERTAINMENT; WARNER BROS. RECORDS, INC.; ATLANTIC RECORDING CORPORATION; ARISTA RECORDS, LLC; AND UMG RECORDINGS, INC.,

Plaintiffs, Appellants/Cross-Appellees,

v.

JOEL TENENBAUM,

Defendant, Appellee/Cross-Appellant

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Nancy Gertner, U.S. District Judge]

PETITION FOR REHEARING *EN BANC* OF THE DEFENDANT, APPELLEE/CROSS-APPELLANT

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RULE 35 STATEMENT

Pursuant to Federal Rule of Appellate Procedure 35(a)(2), Joel Tenenbaum seeks an en banc rehearing of his appeal. The panel found no error in Judge Gertner's instruction directing the jury to return a total statutory damage award against the defendant between $22,500 and $4,500,000. The jury returned an award of $675,000, which Judge Gertner subsequently determined to be unconstitutionally excessive by a factor of ten and reduced the award to $67,500 on constitutional grounds. The panel set aside Judge Gertner's constitutional ruling, reinstated the jury's $675,000 award, and remanded to the district court to allow a district judge to decide whether remittitur could be employed to avoid facing the constitutional question of the excessive jury award. Op. at 64.

The defendant seeks an en banc hearing on one ground: that it is unconstitutional to instruct a jury that it can return an unconstitutionally excessive award. To instruct the jury that it may ascribe an award in a range of up to $4,500,000 against a noncommercial copyright infringer is punitive, excessive, not authorized by statute, and a denial of due process. Indeed, it is difficult to find the right word. The trial judge *mis*instructed the jury that it could legally ascribe an award *67 times* what she herself later found to be the legally permissible constitutional maximum. For each of thirty separately listed songs, the verdict form directed the jury to fill in a blank answering the question, "[W]hat damages do you award the Plaintiff for **this** copyrighted work, from $750 to $150,000?":

	SOUND RECORDING	PLAINTIFF	With respect to this sound recording, was his infringement committed **willfully**?	Statutory Damages Award	
5	Nirvana "Come as You Are"	UMG Recordings, Inc.	NO	If you answered "NO", what damages do you award the Plaintiff for **this** copyrighted work, from $750 to $30,000?	
			(YES)	If you answered "YES", what damages do you award the Plaintiff for **this** copyrighted work, from $750 to $150,000?	22,500.00

This was error, plain and simple.

The panel's ruling that "[t]he district court's instructions on the range of statutory damage were not erroneous, let alone prejudicial," Op. at 40, does a grave injustice, not only to the defendant but to the law of copyright, the will of Congress, and the faith of those people who look to the law for justice. The panel approves an instruction that recites to the jury a range so broad that it encompasses, on one end, the largest most heinous corporate counterfeiters and, on the other end, the smallest infringement appropriately remedied by § 504(c). Instructing the jury to make its award within this range invites the jury to award unconstitutionally excessive damages.

This error cannot be remedied by remittitur, even were the parties disposed to accept such a procedure. Remittitur can and will do nothing to correct the prejudice of the misdirection and the panel's error in affirming it. On remittitur, a district judge must reduce an excessive award to the highest amount the jury could have properly awarded. See 11 Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, Federal Practice and Procedure § 2815 (2d ed. 1995 & Supp. 2011) (noting this method "is the only theory that has any reasonable claim of being consistent with the Seventh Amendment"). This method is based on the theory that, by returning an unconscionable award, the jury meant to return the maximum

allowable by law. Id. Given the fact that the jury in this case returned an award amounting to only 15% of the instructed maximum, it is fallacious to assume that, under proper instructions, it would have returned the maximum amount allowable by law. The remittitur process denies the defendant his right to fair jury trial by biasing the award to the legal maximum. Nor does remittitur accomplish the panel's stated purpose of avoiding constitutional adjudication. Regardless of how the mandated remittitur procedure comes out, the defendant's challenge to the erroneous instruction still stands.

This challenge should be heard here and now by this Court. To return this case for an unwarranted and futile procedure that will not correct the harm done to your appellant denies him due process and creates a wasteful judicial procedure that will affect further cases relying on the authority of the panel opinion. In the words of Rule 35, it is extraordinarily important that the full Court hear this appeal. From the first, the defendant has challenged as unconstitutional the use of federal law and process to threaten catastrophic fines against the generation of kids who were downloading and sharing music peer-to-peer. The massive campaign of lawsuits initiated by the recording industry against people who copied music for personal use and never sold or considered selling it in any commercial way was entirely unprecedented. The Copyright Act had never before been used to punish private individuals for private copying. Through four years of litigation, the Plaintiffs, Defendant, the Government, the court below, and now the First Circuit have been unable to produce *a single case* prior to Plaintiffs' campaign in which an

individual noncommercial consumer has been the object of copyright litigation. Again, that number is not "relatively few" as the panel stated. Op. at 31. That number is *zero*.

Of the thousands like the defendant who were sued by the recording industry, only two resisted through trial. This is the first of these two cases to reach a court of appeals. A similar case against a similarly noncommercial consumer found liable for downloading twenty-four songs without paying for them will shortly be heard in the Eighth Circuit. Capitol Records, Inc. v. Thomas-Rasset, No. 06-1497 2011 WL 3211362 (D. Minn. July 22, 2011). In her case, three jury trials on damages have been required. Jury verdicts in these three trials — involving these same Plaintiffs and the same prejudicial instruction — were $222,000 (set aside); $1,920,000 (remitted to $54,000; Plaintiffs declined to accept); and $1,500,000 (reduced on constitutional grounds to $54,000, now on appeal). Id. at *1–2.

The challenged erroneous instruction is the lynchpin in a process that has been grinding people into one-sided settlements and defaults and has repeatedly produced obviously unconstitutional awards. At a relatively early point in these proceedings, Judge Gertner observed the process "bankrupting" people, and declared, "[I]t's terribly important that you stop." Tr. of Mot. Hr'g of June 17, 2008 at 9:19–11:7 (Consol. Doc. No. 614).

ARGUMENT

Joel Tenenbaum does not ask this Court to condone his infringements. When faced with over 12,000 lawsuits by these very Plaintiffs, Def.'s Appellate Reply Br. at 6, district courts across the country resoundingly affirmed the message that downloading and sharing copyrighted music without paying for it is wrong. That is not at issue here. His appeal challenges the systemic and unthinking practice of quoting to juries the statutory damage range of 17 U.S.C. § 504(c).

I. THE JURY INSTRUCTION WAS ERRONEOUS.

The two trial judges who have presided over the only cases to have gone to trial (Thomas Rasset and Tenenbaum) *both* held that the constitutional maximum within the § 504(c) range is $2,500 for the conduct at issue. See Thomas-Rasset, 2011 WL 3211362 at *3; Dist. Op. at 53. Other courts have recognized that there may be a constitutional maximum for particular conduct somewhere below the statutory maximum. See, e.g., Atlantic Recording Corp. v. Brennan, 534 F. Supp. 2d 278, 282 (D. Conn. 2008) (listing possible meritorious defenses including "whether the amount of statutory damages available under the Copyright Act, measured against the actual money damages suffered, is unconstitutionally excessive); UMG Recordings v. Lindor, No. CV-05-1095(DGT) 2006 WL 335048 at *3 (E.D.N.Y. 2006) (holding that an affirmative defense claiming the unconstitutionality of a statutory damages claim was not "futile").

The panel opinion declares the instruction proper because it was "an accurate statement of the law." Op. at 37. However, it should hardly require mentioning that the Constitution trumps statutes. See, e.g., Marbury v. Madison, 5 U.S. 137, 180

(1803). Here, statutory damages are being applied against a person who copied for personal use rather than commercial gain. For consumer copiers, any copying or distribution is only incidental to their purpose of expanding their personal music collection. The panel opinion claims that Joel Tenenbaum is not a non-commercial user because he "widely and repeatedly copied works . . . and then illegally distributed those works to others." Op. at 22. Such characterization should not obscure the obvious disproportion between egregious commercial copyright infringers and a teenage boy downloading and sharing music for personal enjoyment.

II. THE JURY INSTRUCTION WAS PREJUDICIAL.

Review of jury instructions is *de novo*. See, e.g., SEC v. Happ, 392 F.3d 12, 28 (1st Cir. 2004). Jury instructions may be reversed if *inter alia*, they are "(1) misleading, unduly complicating, or incorrect as a matter of law; and (2) adversely affected the objecting party's substantial rights." E.g., Sheek v. Asia Badger, Inc., 235 F.3d 687, 697 (1st Cir. 2000). Upon review, "grave doubt" as to "the likely effect an error had on the verdict" necessitates that the error "be treated as if it had in fact affected the verdict." Ahern v. Scholz, 85 F.3d 774, 786 (1st Cir. 1996); accord O'Neil v. McAninch, 513 U.S. 432, 434 (1995) (defining "grave doubt" as a judge being in "virtual equipoise as to the harmlessness of the error").

Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998), left the lower courts with the task of shaping the administration of statutory damages with no guidance whatever, leaving the jury awash in arbitrariness bounded only by the outer limits of the statutory range. Such arbitrariness is obviously prejudicial. The

1976 Copyright Act authorized judges, *not juries* to assess statutory damages. Id. at 345 ("The language of § 504(c) does not grant a right to have a jury assess statutory damages."); see also 4 Nimmer on Copyright § 14.04(C)(1) (2010) (the "dominant view" before 1998 was that "it is for the judge, in the exercise of his discretion, to award statutory damages"). It was not until the Supreme Court's decision in Feltner that jury process was grafted onto a statutory damages regime written for judges. Judges had had the benefit of reasoning their decisions through a body of binding precedent rather than reinventing the statutory conception of a "just" award on an isolated case-by-case basis. This task was assigned to juries post-Feltner. Nimmer observed that because setting statutory damages "often involves extensive analysis of precedent so as to create a statutory damages regime consistent across a spectrum of cases[,] . . . [i]t is not clear how a jury ever can perform this type of analysis." David Nimmer & Jason Sheesby, After Feltner, How Will Juries Decide Damages?, Nat'l L.J., Feb. 8, 1999, at C19. "It is daunting, to say the least, to imagine how a judge could craft jury instructions that replace the type of analysis the court itself would undertake." Id.

Since Feltner, Congress has been utterly silent on how the new court-required jury regime for statutory damages should be administered. Lower federal courts have also ignored the problem. The panel has chosen to ignore the utter arbitrariness of simply telling the jury the statutory range by suggesting that it was the responsibility of Congress to create a sensible jury regime: "[H]ad Congress wished to prevent juries from being informed of the bottom and top ranges . . . it

easily could have done so." Op. at 40. This cannot suffice as sound jurisprudence. See e.g., Jones v. Liberty Glass Co., 332 U.S. 524, 533–34 (1947) (rejecting doctrine of legislative acquiescence as, at best "an auxiliary tool for use in interpreting ambiguous statutory provisions"); Leist v. Simplot, 638 F.2d 283, 318 (2d Cir. 1980) ("A house of Congress may have failed to act on an amendment for any number of reasons other than opposition to it [such as the] belief that the point was already covered by existing law . . . ."); Bangor Baptist Church v. Me. Dept. of Educ. and Cultural Serv., 576 F. Supp. 1299, 1319 (D. Me. 1983) ("Legislative acquiescence offers a precarious perch from which to construe a statute even in the best of circumstances."); Donajkowski v. Alpena Power Co., 596 N.W.2d 574, 581 (Mich. 1999) ("[W]e must take this opportunity to observe that legislative acquiescence is an exceedingly poor indicator of legislative intent.").

III. IMPOSING REMITTITUR TO SATISFY THE CANON OF CONSTITUTIONAL AVOIDANCE IS BOTH UNPRECEDENTED AND DANGEROUS.

Invocation of remittitur to satisfy constitutional avoidance when only constitutional claims remain is bad law and terrible policy. In Ashwander v. Tenn. Valley Auth., 297 U.S. 288 (1936), Justice Brandeis famously articulated the canon as follows:

> "The Court will not pass upon a constitutional question although properly presented by the record, *if there is also present some other ground* upon which the case may be *disposed of*. . . . [I]f a case can be *decided* on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter . . . ."

Id. at 347 (Brandeis, J., concurring). Indeed, every case cited by the panel contained alternative grounds for decision.[1] Op. at 53. Properly understood, constitutional avoidance is not appropriate when the sole remaining choice is between (1) passing on a constitutional issue or (2) imposing novel and meritless procedural burdens that leave the constitutional issue hanging in limbo.

The panel thus created a dangerous judicial obligation to satisfy constitutional avoidance, not when alternative grounds for decision are presented to the court, but whenever the court has the power to require further proceedings. As the panel proudly proclaimed in its October 7, 2011 Order: courts may remand for further proceedings essentially as they wish under 28 U.S.C. § 2106 or under Rule 59(d) of the Federal Rules of Civil Procedure. Order on Def.'s Motion for Clarification at 3. If the panel's mandate requires courts to avoid constitutional

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[1] See Gulf Oil Co. v. Bernard, 452 U.S. 89, 99 (1981) (finding it unnecessary to reach First Amendment claim where case could be affirmed on abuse of discretion grounds); Buchanan v. Maine, 469 F.3d 158, 173 (1st Cir. 2006) (finding it unnecessary to reach an Eleventh Amendment claim where the case could be disposed on statutory grounds).

Interestingly, the panel cites Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988), for the proposition that a constitutional determination should be postponed. In Lyng, the Supreme Court found it "inadvisable for this Court to vacate and remand *without* addressing the constitutional question on the merits," despite alternative grounds for decision, because "it appear[ed] reasonably likely that the First Amendment issue was necessary to the decisions below." Id. at 1320–21 (emphasis added). Here, a constitutional ruling is required to uphold the jury instructions, so it would be equally inadvisable to avoid the constitutional question in this case.

Finally, in Camreta v. Greene, 131 S. Ct. 2020 (2011), the Supreme Court held that there are occasions where courts should "avoid avoidance." Id. at 2031. In Camreta, the Court reasoned that in qualified immunity cases, constitutional avoidance is sometimes inappropriate "because it threatens to leave standards of official conduct permanently in limbo":

> Another plaintiff brings suit, and another court both awards immunity and bypasses the claim. And again, and again, and again. So the moment of decision does not arrive*. Courts fail to clarify uncertain questions, fail to address novel claims, fail to give guidance to officials about how to comply with legal requirements*.

Id. at 2032 (emphasis added).

issues by imposing further proceedings whenever they have the power, then constitutional issues can never be reached. Furthermore, the panel's unwarranted imposition of a frivolous procedure violates § 2106's limitation that further proceedings be "just under the circumstances."

CONCLUSION

For the foregoing reasons, the Court should rehear this case en banc.

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CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2011, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that all participants in the case or their counsel of record are registered ECF Filers and that service will be accomplished by the ECF/CM system.

Charles Nesson