UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SONY BMG MUSIC ENTERTAINMENT; WARNER BROS. RECORDS, INC.; ATLANTIC RECORDING CORPORATION; ARISTA RECORDS, LLC; AND UMG RECORDINGS, INC., Plaintiffs, v. JOEL TENENBAUM, Defendant.	Civ. Act. No. 1:07-cv-11446-RWZ (formerly consolidated with Civ. Act. No. 03-cv-11661-NG) On remand from the First Circuit Court of Appeals (Nos. 10-1883, 10-1947, 10-2052)

DEFENDANT'S OPENING BRIEF ON REMAND

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BACKGROUND

Plaintiffs, the largest record companies in the world, sued Defendant Joel Tenenbaum for sharing 30 of their copyrighted songs while he was a university student. After directed verdict on each infringement, the trial judge instructed the jury to return statutory damages in favor of the record companies against Tenenbaum of between $750 and $150,000 for each infringement (for a total range between $22,500 and $4,500,000).

The instruction resulted in a jury verdict of $675,000 ($22,500/song). Tenenbaum filed a motion for new trial or remittitur seeking either (1) a new trial to remedy the prejudicial instruction or (2) reduction of the award to the statutory minimum. The trial judge considered and rejected using the discretionary common law power of remittitur that trial judges have claimed to set aside shockingly excessive monetary jury awards and substitute an amount they consider reasonable. Judge Nancy Gertner held:

> "The Constitution's Due Process Clause is violated by a jury's award of $675,000 in statutory damages against an individual who reaped no pecuniary reward from his infringement and whose individual infringing acts caused the plaintiffs minimal harm." Sony BMG Music Entm't v. Tenenbaum, 721 F. Supp. 2d 85(D.Mass., 2010)("Tenenbaum I")

The First Circuit Court of Appeals vacated this holding, reinstated the jury's $675,000 award, and remanded the case to this Court to consider whether the federal judiciary should duck away from this stark and basic question by employing a procedure the trial judge, without abuse of discretion, had already duly considered

and rejected, the use of which is now opposed by both parties. Over the shoulder of these proceedings looms the United States Department of Justice as a party-intervenor.

ARGUMENT

I. REMITTITUR IS NOT APPROPRIATE.

Remittitur is neither appropriate nor desirable. On this the parties agree. The Court has no reason or occasion to act on its own motion.

II. THE JURY'S STATUTORY DAMAGE AWARD OF $675,000 VIOLATES DUE PROCESS.

The Court of Appeals instructs: "If the district court determines that the jury's award does not merit common law remittitur, the court and the parties will have to address the relationship between the remittitur standard and the due process standard for statutory damage awards." [1]

The "remittitur standard" queries whether a damage award is "grossly excessive, inordinate, shocking to the conscience of the court, or so high that it would be a denial of justice to permit it to stand."[2] The question of relationship of this standard to the due process standard for statutory awards, then, is whether a statutory damage award which is grossly excessive, inordinate, shocking to the

[1] Sony BMG Music Entm't v. Tenenbaum, 660 F.3d 487, 515 n.28 (1st Cir. 2011) ("Tenenbaum II").
[2] Correa v. Hosp. San Francisco, 69 F.3d 1184, 1197 (1st Cir. 1995).

conscience, and so high that it would be a denial of justice to permit it to stand violates due process. The question devolves to what due process standards should be applied to assess the jury's statutory damage award in Joel Tenenbaum's case?

From the viewpoint of a jury being asked to perform the function of making a damage award, statutory awards are different from compensatory or punitive awards. In performing its function of awarding compensatory damages, the jury relates to and puts a value on the plaintiff's actual injury. Punitive damages over and above a compensatory sum also must relate to the inherently factual determination of the plaintiff's actual injury. When a reviewing court scrutinizes a jury's punitive award, it considers "the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award." Campbell v. State Farm, 538 U.S. 408, 418, 425 (2003). "[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." Id. By contrast, when a jury performs its role in awarding statutory damages, the jury has nothing concretely factual to relate to other than the number of statutory infringements and the quoted statutory range. The verdict form in this case listed thirty numbered infringements and quoted the statutory range for each. These explicitly stated range limits comprised the only concrete elements in the jury's decisional frame.

The Court of Appeals questions whether the guideposts enunciated in BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996), extend to constitutional review of statutory damage awards. Tenenbaum II at 512–13. According to the Supreme

Court, the due process guarantee is meant to (1) provide notice to would-be defendants ("procedural due process"); and (2) limit and control arbitrary jury awards (the "substantive due process"). See Cooper Indus., Inc. v. Leatherman Tool Grp. Inc., 532 U.S. 424, 433–34 (2001) (noting that the Due Process Clause imposes "substantive limits" on punitive damages awards insofar as it prohibits states and the federal government from "imposing 'grossly excessive' punishments on tortfeasors."); State Farm, 538 U.S. at 416 (beginning constitutional review of a large punitive award by noting that "there are procedural *and substantive* constitutional limitations" on such awards); see also Sony BMG Music Entm't v. Tenenbaum, 721 F. Supp. 2d 85, 102 (D. Mass. 2010) ("[T]he due process concerns articulated in [Gore] and State Farm are not obviated merely 'because the defendant [could] see [the grossly excessive award] coming." (quoting J. Cam Barker, Note, Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement, 83 Tex. L. Rev. 525, 542 (2004))). The Gore guideposts articulate the Supreme Court's concern for arbitrary jury awards in the context of punitive damages, but they also express the Supreme Court's underlying general concern to control and limit the arbitrariness of jury damage awards. Such concerns apply in the context of statutory damages with equal or even greater force than to punitive damage awards.

Plaintiffs have unrelentingly attempted to keep 'statutory' damages review hermetically sealed from 'punitive' damages logic, insisting that constitutional

review must proceed exclusively under St. Louis, I.M. & S. Ry. Co. v. Williams, 251 U.S. 63 (1919), uninformed by nearly a century of jurisprudence that has evolved since that case was decided. First, such a position ignores the copious body of jurisprudence in the Supreme Court, First Circuit, and other circuits indicating that the two bodies of law overlap.[3] Indeed, the First Circuit has explicitly applied the Gore guideposts to Title VII awards, which provide a statutory range for a total compensatory and punitive award. Romano v. U-Haul, 233 F.3d 655, 672–75 (1st Cir. 2000). Second, the Supreme Court's decisions in both Gore and Williams merely exemplify the constitutional guarantee of due process. While either or both might provide useful analytic crutches, the propriety of each test is context-dependant. Here, we have the unprecedented context of ordinary citizens subjected to a

[3] See, e.g., (Gore, 517 U.S. at 574, 580–81 (analyzing 700 years worth of *statutory* damage provisions and citing Williams and its antecedents for the proposition that "exemplary damages imposed on a defendant should reflect the enormity of his offense" and (internal quotations omitted)); Murray v. GMAC Mortgage Corp., 434 F.3d 948, 954 (7th Cir. 2006) (suggesting in dictum that statutory damages awarded under the Fair Credit Reporting Act would be subject to review under State Farm); Parker v. Time Warner Entm't Co., 331 F.3d 13, 22 (2d Cir. 2003) (suggesting in dictum that the aggregation of statutory damages in a class action under the Cable Communications Policy Act of 1984 might raise due process concerns under Gore and State Farm); Romano v. U-Haul Int'l, 233 F.3d 655, 672–74 (1st Cir. 2000) (applying Gore to a punitive damages award in a Title VII action even though the award was subject to a statutory cap); Centerline Equip. Corp. v. Banner Pers. Serv., Inc., 545 F. Supp. 2d 768, 778 n.6 (N.D. Ill. 2008) (suggesting in dictum that State Farm might provide grounds for remitting statutory damages awarded under the Telephone Consumer Protection Act); Leiber v. Bertelsmann AG (In re Napster, Inc. Copyright Litigation), No. C MDL-00-1369 MHP, C 04-1671 MHP, 2005 WL 1287611, at *10–*11 (N.D. Cal. June 1, 2005) (suggesting in dictum that the court would apply Gore and State Farm in considering whether statutory damages for copyright infringement were unconstitutionally excessive); Blaine Evanson, Due Process in Statutory Damages, 3 Geo. J.L. & Pub. Pol'y 601, 601–02 (2005) (arguing for the application of the Supreme Court's recent punitive damages case law to statutory damages cases); Pamela Samuelson & Tara Wheatland, Statutory Damages in Copyright Law: A Remedy in Need of Reform, 51 Wm. & Mary L. Rev. 439, 491–97 (2009) (arguing that statutory damages awards for copyright infringement should be subject to analysis under the Gore guideposts); Barker, supra 83 Tex. L. Rev. at 536–56 (2004) (arguing that the Supreme Court's punitive damages jurisprudence applies to the aggregation of multiple statutory damages awards in filesharing cases). See also Verizon Cal. Inc. v. Onlinenic, Inc., No. C 08-2832 JF (RS) 2009 WL 2706393, at *6–*9 (N.D. Cal. Aug. 25, 2009) (doubting that Gore and State Farm control in statutory damages cases but admitting that certain principles announced in the recent punitive damages cases might apply).

statutory scheme imposing huge liability that, prior to this litigation, had never been applied to them.[4]

Williams considered whether a $75 statutory damage award in favor of a passenger against a railroad company for overcharging the passenger for a ticket was "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." Williams, 251 U.S. at 67. This standard for assessing statutory damages should be read and applied in light of Gore, State Farm, and other cases expressing the Supreme Court's antipathy to arbitrary and excessive jury awards. The statutory damage range in Williams was $50 to $300. The statutory damage range under the Copyright Act is $750 to $150,000. The statutory damage range at issue in Williams was narrowly drawn to apply only to the specific and "commonly known" act of railroads overcharging passengers for tickets. Id. at 67. The statutory damage range under the Copyright Act applies to the entire universe of copyright infringement of every kind by every kind of infringer — one range fits all. The statutory damage in Williams was imposed for the violation of what the Supreme Court described as a "public law" together with its observation that when the legislature imposes statutory damages as punishment for the violation of a public law rather than as redress for "private injury," the legislature

[4] In a similar consumer filesharing case involving these same plaintiffs, the district court judge noted: "The myriad of copyright cases cited by Plaintiffs and the Government, in which courts upheld large statutory damages awards far above the minimum, have limited relevance in this case. All of the cited cases involve corporate or business defendants and seek to deter future illegal commercial conduct. The parties point to *no case* in which large statutory damages were applied to a party who did not infringe in search of commercial gain." Capitol Records, Inc., v. Thomas, 579 F. Supp. 2d 1210, 1227 (D. Minn. 2008) (emphasis added).

may adjust its amount to the public wrong. Id. at 66. Statutory damages under the Copyright Act are imposed as recompense for private injury to the copyright holder.

Furthermore, the Williams court sided with plaintiff consumers against a commercial corporation. Here the situation is the reverse – commercial corporations suing an individual consumer, equivalent to the railroad suing its passengers. In contrast to the "numberless opportunities" a railroad has to overcharge its passengers, id. at 67, for all of which the railroad is responsible as the single wrongdoer, here the plaintiff corporations are responding to the conduct of millions of independent people, but are attempting to punish Tenenbaum for the actions of all of them. Punishing Tenenbaum for the offenses of others makes the award against Tenenbaum wholly disproportionate to *his* offense. The Copyright Actis being applied to punish Tenenbaum not only for his own actions but also for the aggregate actions of others, and for the effect of the decline of revenues in the music business on non-parties. Finally, the ratio of the penalty to any actual damage caused by this defendant far exceeds that sustained in any other case.

These distinctions speak not only to the excessiveness of the jury's award against Tenenbaum but as well to the arbitrariness of the jury process imposing it. The "jury" as the institutional cornerstone of our Bill of Rights, is a trier of fact,[5] not an imposer of fines within effectively unbounded range. Committing issues to

[5] "Jury," was understood contemporaneously with the adoption of the Bill of Rights and the Copyright Act of 1790 as "A number of freeholders, selected in the manner prescribed by law, empaneled and sworn to inquire into and try any matter of *fact*." Webster, An American Dictionary of the English Language (1828)(emphasis added).

juries involving no concrete facts invites arbitrariness, whether the matter is framed in terms of pain and suffering or punitive or statutory damages.

By all appearances, Congress never contemplated that non-businesses or non-competitors would be targeted as they have been in this unprecedented litigation campaign brought by the Recording Industry Association of America. All agree that Congress never intended juries, as opposed to judges, to impose the statutory damages called for by the Copyright Act.[6] But in the new context created by the intersection of computer technology, the internet, music, and a thoughtless ruling by the Supreme Court that juries should decide statutory damages, a noncommercial actor double-clicking a mouse on a personal computer triggers liability which is obviously excessive by any standard. Whether this Court reviews the award of $675,000 under Williams, Gore, or an intelligent amalgam of of due process doctrine, the award of $675,000 against Joel Tenenbaum in this case violates due process by every measure.

III. APPROPRIATE APPLICATION OF THE DUE PROCESS CLAUSE TO A JURY'S AWARD OF STATUTORY DAMAGES DOES NOT INTRUDE INTO CONGRESS'S POWER UNDER ARTICLE 1, SECTION 8 OF THE CONSTITUTION

The copyright clause of the constitution cannot conceivably be imagined to have empowered Congress to impose excessive statutory damages on citizens, no less by means of an arbitrary jury process. No prerogative of Congress is intruded upon by judicial consideration of Congress's constitutional limits.

Article 1, Section 8 of the Constitution should be understood as part of the

[6] Feltner, Tenenbaum II

effort of the document as a whole to constitute a government of limited powers. It authorized Congress to create limited monopolies to spur production of creative works for the benefit of the public. It is no intrusion on the Congress for judges to consider whether Congress exceeds its constitutional power when it purports to authorize the imposition by private copyright holders of excessive statutory damages on members of the public.

IV. ONCE THE DETERMINATION IS MADE THAT THE JURY'S AWARD OF $675,000 IS UNCONSTITUTIONAL, THE COURT SHOULD NOT SEEK TO REDUCE THE AWARD TO A CONSTITUTIONALLY ALLOWABLE MAXIMUM AMOUNT.

This Court should not consider reducing the amount of the jury's award to any amount other than to the statutory minimum. Reduction to any other amount would deny Tenenbaum his right to trial by a properly instructed jury. Only reduction to the statutory minimum eliminates the effect of the instruction authorizing the jury to return any verdict above the minimum up to $4,500,000.

The First Circuit seems to have flatly ruled that instructions given by Judge Gertner to the jury were neither erroneous nor prejudicial, notwithstanding the instruction's authorization to the jury to return an unconstitutional award. Tenenbaum II at 505. Those statements of approval by the Court of Appeals should be understood as having been made in the absence of a determination that the instruction authorized an unconstitutional award. The Court of Appeals rejected Tenenbaum's argument without considering whether the instruction's authorized maximum, as applied to Tenenbaum, was excessive. Indeed, the question of excessiveness was precisely the issue the Court of Appeals sought to avoid by

setting aside Judge Gertner's constitutional determination and remanding to this Court. However, once this Court makes a determination that the jury's $675,000 award is unconstitutionally excessive, it will necessarily follow that the instruction authorizing the jury to return the award was erroneous.

The same is true of the First Circuit's summary rejection of Tenenbaum's contention that explicitly stating a range with a maximum $4,500,000 was prejudicial. Without first determining that the jury's award was excessive, there is no way to conclude that the authorizing instruction was prejudicial. Without error there could be no prejudice. But once the issue of excessiveness is faced and determined, the prejudice to the defendant caused by the erroneous instruction is manifest. If an instruction invites constitutional error, and the jury, following the instruction, subsequently commits that very error, then the instruction was both erroneous and prejudicial.

However, were this Court to declare not only that the jury's award is unconstitutionally excessive but then go on, as Judge Gertner did, to determine a constitutionally allowable maximum and enter judgment for that reduced amount, Tenenbaum would be denied his right to be tried by a properly instructed jury. Reducing the jury's award to a maximum constitutionally allowable amount would require the Court to make a difficult and unnecessary constitutional determination. The task of determining the maximum allowable statutory damage itself involves a constitutional question fully as difficult as those the Court of Appeals would avoid. Moreover, reducing the jury's award to a maximum allowable amount would require

the Court to decide whether the Seventh Amendment permits the Court to reduce a statutory damage award under the Copyright Act without offering the plaintiffs a new trial, another question noted by the Court of Appeals. Tenenbaum II at 513–14. Punitive damages cases in which excessive jury awards have been lowered, unlike this case, involve no erroneous instruction. Instead, when a jury returns a constitutionally excessive punitive award, a judge may infer that the jury intended to return the maximum allowable amount. Here, there can be no such inference because the jury was informed of a maximum award and returned an award well below it. Indeed, the stronger inference is that the jury wanted to return a relatively moderate verdict with an award only *fifteen percent* of the maximum the instruction authorized.

V. NO WAIVER, NO DELAY.

Defendant Tenenbaum intends no waiver and seeks no delay of his opportunity to present to the Supreme Court of the United States the issues of statutory construction and constitutionality resolved against him by the First Circuit Court of Appeals.

Joel Tenenbaum maintains that § 504(c) of the Copyright Act is being misinterpreted and misapplied. Congress never intended statutory damages to apply to those who reap no pecuniary reward from their infringements. Congress never intended and has never authorized juries to determine and impose the statutory award. Congress intended that judges, not juries, impose the statutory damages it authorized, Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340,

345-47 (1998). The present authorization for juries to impose statutory damages comes from a concluding sentence in a Supreme Court opinion apparently resolving an issue that was neither briefed nor argued as to whether the Supreme Court has the power to authorize juries to impose statutory damages in the face of contrary intention of Congress.

CONCLUSION

For the foregoing reasons, this Court should find that jury award of $675,000 is unconstitutional, and having done so, either enter judgment for minimum statutory damages of $22,500, thus mitigating all effect of the now evidently erroneous and prejudicial instruction, or return the case to the Court of Appeals to reconsider its rulings in light of this Court's constitutional determination, and to consider whether the defendant is entitled to a new trial.

Respectfully Submitted,

Charles R. Nesson

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Date: January 3, 2012

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

s/ Charles R. Nesson