

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

**DEFENDANT’S REPLY BRIEF TO
PLAINTIFFS’ MEMORANDUM OF POINTS AND
AUTHORITIES**

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ARGUMENT

I. PLAINTIFFS SEEK TO JUSTIFY THE AWARD AGAINST JOEL TENENBAUM AS DETERRENT PUNISHMENT FOR THE COLLECTIVE ACTIONS OF MILLIONS OF FILESHARERS ACROSS THE WORLD.

Plaintiffs disingenuously claim that Tenenbaum has caused them “immeasurable harm” tantamount to “a blanket license to reproduce and distribute the 30 songs without limitation, which would essentially represent the entire value of each of the copyrighted works.” Pl.’s Mem. at 8. Such an argument defies credibility. Literally millions of individuals across the globe were engaged in substantially the same conduct as Joel.¹ Are each and every one of them liable for “essentially . . . the entire value of each copyrighted work?”

Joel was just one arbitrarily chosen target in a massive “litigation campaign” against individual filesharers. For more than five years, these very plaintiffs, by their own admission “contacted over 18,000 people” regarding their not-for profit filesharing activities.² Declaration of Matthew J. Oppenheim dated June 24, 2009,

¹ Plaintiffs’ expert Stan Liebowitz produced a paper in December of 2004 showing that there were around “40 million unduplicated” filesharers per month in the U.S. Stan J. Liebowitz, File-Sharing: Creative Destruction Or Just Plain Destruction?, at 11, <http://som.utdallas.edu/centers/capri/documents/destruction.pdf>.

² Plaintiffs’ state that in September 2005, they “sent Tenenbaum a letter informing him that his actions constituted infringement of their copyrighted sound recordings and that [they] would take legal action *if he did not desist*.” Pl.’s Mem. at 6 (emphasis added). This statement is a blatant and malicious mischaracterization of Plaintiffs’ pre-suit tactics and should be regarded by this Court as emblematic of the lengths Plaintiffs will go to distort reality in order to disparage Tenenbaum (indeed, there is not space to take issue with each of Plaintiffs’ revisions of history). A copy of Plaintiffs’ letter was entered into evidence as Exhibit 11 and it states “We are writing in advance of filing suit against you in the event that you have an interest in resolving these claims If you have interest in discussing this matter, including settlement, the record companies request, with our consent that you contact their representatives on or before ten (10) calendar days from the date of this letter.” In other words, this was not a friendly request that Tenenbaum “desist” as Plaintiff’s assert. Tenenbaum was not given that option and the letter suggests nothing of the sort. Had Plaintiffs’ offered such, he might well have taken it. Rather, like the thousands of others who were similarly contacted, it was a notification stating, in effect, “We are suing you. You may contact us in

in Anderson v. Atlantic Recording Co. (D. Or. No. 07-934), available at http://bit.ly/Oppenheim_6-24-09. Of that group, over 12,500 people were directly sued and over 5,000 received “Presuit Notification Letters” that strongly “encouraged” settlements of several thousand dollars. These claims have been rehearsed at all stages of litigation and have been undisputed.

All of the aforementioned people were engaged in conduct substantially similar to Joel, yet they were not held liable for anything close the value of some hypothetical “global blanket license.” For those who settled, Plaintiffs found several thousand dollars was sufficient to compensate, punish, and deter. For those who defaulted, as noted by Judge Gertner, “the recording companies have generally asked courts to impose the statutory minimum amount of \$750 per infringed work, and courts have routinely granted these requests.” Sony BMG Music Ent’mnt v. Tenenbaum, 721 F. Supp. 2d 85, 109 (D. Mass 2010) (“Tenenbaum I”) (citing e.g., Elektra Entm’t Group Inc. v. Carter, 618 F. Supp. 2d 89, 94 (D. Me. 2009); Interscope Recordings v. Tabor, No. 08-03068, 2009 U.S. Dist. LEXIS 25854, at *2-*3 (W.D. Ark. Mar. 16, 2009); see also UMG Recordings, Inc. v. Alburger, No. 07-3705, 2009 U.S. Dist. LEXIS 91585, at *13, *15 (E.D. Pa. Sept. 29, 2009) (granting

10 days to settle or you will be sued.” It is this indignity and abuse that caused Tenenbaum to stand his ground in the first place, when virtually all others surrendered.

Additionally, the only portion of this letter which notified Tenenbaum of his copyright infringement stated that “Making copyrighted recordings available for others to download by putting those recordings into your so-called ‘shared’ folder is copyright infringement under the Copyright Act, as is the unauthorized downloading of copyrighted recordings.” The first portion of the preceding sentence is a false statement of the law in the First Circuit. See, e.g., Latin Am. Music Co. v. Archdiocese of San Juan of Roman Catholic & Apostolic Church, 499 F.3d 32, 46 (1st Cir. 2007) (“Mere authorization of an infringing act is an insufficient basis for copyright infringement.”); Arista Records LLC v. Does 1–27, 584 F. Supp. 2d 240, 249 (D. Me. 2008) (“[T]here is considerable authority for the proposition tha storage of copyrighted recordings and making them available on a network does not amount to copyright infringement.”).

an uncontested motion for summary judgment and imposing the minimum statutory damages per infringed work).

If the minimum statutory damages of \$750 per infringed work are sufficient to compensate the plaintiff and deter potential infringers in an ordinary file-sharing case where the defendant defaults, it is hard to see how an award of thirty times this amount is appropriate in this case. Even if Tenenbaum is more blameworthy than the average file sharer . . . it is absurd to say that he is *thirty times* more culpable.

Id. Plaintiffs' acceptance of — and unprompted requests for — damages at a rate *significantly* lower than those requested and defended here belies Plaintiffs' theory that Joel has caused them harms that merit such an egregious award. Had Joel never stood up to challenge the RIAA's litigation onslaught, Plaintiffs likely would have been satisfied with a default judgment at the statutory minimum or a settlement in the thousands. This Court should not be complicit in conferring upon Plaintiffs a windfall against Joel Tenenbaum that is disproportionately bankrupting in comparison to the vast majority of similarly situated defendants and functions as punishment for vainly attempting to legally question the RIAA's extraordinary litigation campaign.

Straining to find ways to substantiate Joel's alleged harm, Plaintiffs understandably glom onto the First Circuit's dicta that wrongly attributes to Tenenbaum the aggregate harms caused by the collective actions of global millions. Pl.'s Mem. at 13 (quoting Sony BMG Music Ent'mnt v. Tenenbaum, 660 F.3d 487, 502–03 (1st Cir. 2011) ("Tenenbaum II") (Plaintiffs "presented extensive testimony regarding the loss in value of the copyrights at issue that resulted from Tenenbaum's conduct, and the harm of Tenenbaum's actions to themselves and the

recording industry, including reduced income and profits, and consequent job loss to employees.”)). Plaintiffs’ reliance is misplaced for several reasons. First, the court expressed this faulty information in dicta to illustrate the point that Plaintiffs put on some evidence of harm, though not required to do so. While it is true that Plaintiffs put on some evidence, the First Circuit’s incautious language opined on an issue of fact that was not before the court, nor subject to its review — namely whether Plaintiffs’ demonstration of the harms caused by the aggregate actions of millions of filesharers all over the world could instead be attributed to Joel Tenenbaum. Second, Plaintiffs tacitly concede this misattribution by stating that “Plaintiffs here provided extensive evidence at trial of the devastating effect that *infringement through peer-to-peer networks* has had on them” — i.e., *not* that Joel Tenenbaum had on them. Pl.’s Mem. at 7–8. Indeed, Plaintiffs could not be so bold as to assert as fact what the First Circuit mistakenly sets forth in dicta. The following testimony by Plaintiff’s expert is illustrative of the kind of “evidence” Plaintiffs put on:

Q. What was your conclusion when you looked at [the data from the study]?

A. The conclusion was that file sharing was responsible for all of the decline in record sales.

Q. *Can you identify the particular harm that Mr. Tenenbaum has caused as a result of his activities in this case –*

A. *No.*

Q. – with respect to file sharing, I should say?

A. *No.*

J.A. at 140–41 (emphasis added). In closing argument, Plaintiffs summarized their other evidentiary showings as follows:

You also heard from Mr. Leak, Ms. Cho and Ms. Palerm, they told you that *online copyright infringement* has real and significant impacts on everyone in the record business. When record companies lose sales to illegal downloaders, artists, musicians, songwriters, engineers, producers all lose royalties. Lost sales to *free illegal downloads* has also caused significant layoffs and harmed my client’s abilities to develop new artists and produce the music that we all enjoy.

J.A. at 260 (emphasis added). Again, this generalized testimony about the *aggregate* harms caused by “online copyright infringement” and “free illegal downloads” speaks only to the plight of the record industry as a result of the *collective* practices of millions of individuals and is in no way specific to the conduct or harm of *this* Defendant. *Filesharing* is not on trial here, Joel Tenenbaum is. This Court cannot countenance the laughable assertions that *Joel Tenenbaum* individually caused unproven yet legally significant loss of value to Plaintiffs’ copyrights or that *Joel Tenenbaum* individually caused the record industry billions of dollars in lost profits and extensive “job loss to [record industry] employees.”

II. IF THIS COURT FINDS THAT THE JURY'S AWARD OF \$675,000 WAS UNCONSTITUTIONALLY EXCESSIVE, THEN THE JURY INSTRUCTION AUTHORIZING IT WAS ERRONEOUS AND PREJUDICIAL.

The First Circuit held that the trial court’s jury instruction was neither prejudicial nor erroneous. Tenenbaum II, 660 F.3d at 505. However, this finding was made in the explicit absence of a ruling on the constitutionality of either (1) the amount authorized or (2) the amount returned. The First Circuit expressly set aside these constitutional questions, forming the very basis of the instant

procedure. It would be preposterous to say that the First Circuit's ruling precludes a subsequent finding of error in the jury instructions if and when the constitutional issue is decided.

III. REMITTITUR IS INAPPROPRIATE AND THE AWARD SHOULD BE HELD AS A VIOLATION OF DUE PROCESS.

For the sake of brevity, Defendant incorporates the arguments presented in his Reply to Intervener United States' Memorandum on Remand ("Def.'s Reply to Gov.") showing that (1) remittitur is inappropriate and may be avoided; (2) if remittitur is imposed, this Court is not constrained by the statutory minimum and need not offer Plaintiffs a new trial; (3) if remittitur is held inappropriate, this Court should hold that the jury award violates due process and order a new trial, under proper instructions and recognizing that the instructions were erroneous and prejudicial, rather than determining on its own the appropriate amount of damages.

IV. THE AWARD VIOLATES DUE PROCESS.

Plaintiffs and the Government obscure the issues here by simplistically reducing this case to a binary choice between statutory damages law under St. Louis, I.M. & S. Ry. Co. v. Williams, 251 U.S. 63 (1919), and punitive damages law under BMW of N. Am. v. Gore, 517 U.S. 559 (1996), and State Farm Mut. Auto. Ins. Co. v. Campbell (2003). Contrary to both Plaintiffs' and Government's assertions, Defendant does not assert "that the Gore guideposts should govern due process review of statutory damage awards . . ." Pl.'s Mem. at 15. It is clear that the century-old Williams standard is the most relevant law, but it is not entirely apposite given its facts and context. Defendant merely advances that Gore and

State Farm are related and their analytical framework, which is much more fleshed out than Williams, provides a useful means of expressing the excessiveness of the instant jury award.

Under Williams, an award complies with Due Process so long as it “cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable.” 251 U.S. 63 at 67. How is it possible to know whether an award is wholly *dis*proportioned to the offense without knowing, even in broad strokes, what might be an award that *is* proportioned to the offense? How is it possible to know what *is* proportioned to the offense without some evidentiary showing that, at minimum, places the defendant’s offense in some monetary ballpark? Punitive damages jurisprudence provides useful guideposts for determining (1) the monetary value of the “offense”; (2) the range of awards that might be “proportioned” to that offense; and (3) when an award becomes “wholly disproportioned to the offense.”

Plaintiffs, Government, and the First Circuit espouse a theory that 17 U.S.C. § 504(c) contemplates imposing statutory damages without any showing of harm whatsoever, but such an interpretation — gleaned from statutory interpretation and case law rather than the statute itself — effectively destroys a defendant’s ability to make out a Due Process claim under Williams. If the court requires no evidentiary showing of the monetary value of the offense, a defendant is effectively incapable of showing that the award is “wholly disproportioned.” Williams undeniably contemplates that defendants should be able to make such a showing.

The opposite theory not only flouts Supreme Court precedent, it also interprets out of existence the copyright defendant's due process guarantee with regard to excessive awards.

V. IF THIS COURT IS CONSTRAINED TO REDUCTION WITHIN THE STATUTORY RANGE, THE MINIMUM IS THE ONLY AMOUNT THAT SATISFIES DUE PROCESS.

In analyzing Supreme Court jurisprudence, Judge Gertner noted that “[a]t their root, the standards articulated in Williams, BMW, and State Farm all aim at providing defendants with some protection against arbitrary government action in the form of damages awards that are grossly excessive in relation to the objectives that the awards are designed to achieve.” Tenenbaum I, 721 F. Supp. 2d at 101. Gertner found that “[t]here is no question that these standards have both substantive and procedural components.” Id. at 96. Even for punitive awards, “procedural regularity” (i.e., notice) is not alone sufficient for an award to survive scrutiny under the Due Process Clause. Id. at 96; see also id. at 102 (citing State Farm, 538 U.S. at 416 and 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 (“Due Process concerns articulated in BMW and State Farm are not obviated merely ‘because the defendant [could] see [the grossly excessive award] coming.’”).

Thus, when an award — whether punitive or statutory — “smacks of arbitrariness” it may offend due process. After Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998), the jury administration of statutory damages

has become arbitrary. It is indisputable that the literal text and manifest intent of Congress embodied in § 504(c) empowered judges, not juries to administer the huge discretionary statutory damages range. See id. at 345 (“[W]e cannot discern any congressional intent to grant . . . the right to a jury trial on an award of statutory damages.”). Pre-Feltner judges, through jurisprudential constraints, could implement the huge discretionary range in § 504(c) in a non-arbitrary way. Post-Feltner, the same task — when assigned to a jury who is neither bound by the common law nor schooled in constitutional strictures — is rendered arbitrary. This is especially the case when the statute is interpreted to require no evidentiary showing whatsoever.

These concerns were apparent to the Court as it decided Feltner and to scholars thereafter. See, e.g., Tr. of Oral Arg. at 6, Feltner, 523 U.S. 340 (1998) (No. 96-1768) (Justice Stevens noting, “[A] problem that I have that runs through the whole case [is] what the judge tells the jury”); David Nimmer & Jason Sheasby, After Feltner, How Will Juries Decide Damages?, Nat’l L.J. at C19, Feb. 8, 1999 (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 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.”). However, these concerns were not briefed and went totally unaddressed in the opinion. Ultimately, these very concerns have come to fruition in the instant case.

There are several options that would make post-Feltner decisions non-arbitrary and consistent with due process. First, holding that statutory damages are unavailable in a jury trial would be most consistent with Feltner. Feltner held that the Seventh Amendment requires a jury trial on statutory damages despite the statutory text expressly precluding such. Feltner can be read as going this far and no further. It is the lower courts that took Feltner as an act of judicial legislation, impermissibly grafting a novel requirement onto an act of Congress. Holding statutory damages unavailable does not leave copyright holders without remedy: (1) unless and until Congress addresses the problem identified in Feltner, statutory damages may still be administered under § 504(c) so long as no one invokes the right to a jury trial; (2) plaintiffs may always pursue actual damages and profits under § 504(b); and (3) plaintiffs may always receive injunctive relief. If jury trial is to be judicially grafted onto the Copyright Act, then limiting the jury's imposition of statutory damages to the statutory minimum would still provide copyright holders with a significant statutory remedy, and would also fully honor the wisdom of Congress in not assigning juries a sweeping and unsuitable, non-factual discretionary function. It would yield arguably reasonable results even in the absence of proof of any actual damage.

CONCLUSION

As directed by the court of appeals, this Court should consider whether to exercise a common law power to remit the jury's award and offer the plaintiffs the option of a new trial. Pursuant to considering this course of action, Court should clarify the uncertainty that apparently provoked the First Circuit to vacate the trial judge's decision to declare the jury's award to be unconstitutionally excessive and remand to this Court for further consideration. This Court should do so by demanding from Plaintiffs a binding stipulation as to whether they would demand a new trial if the award were remitted to any of the values described in Def.'s Reply to Gov., Section II.

This Court should find that a remittitur procedure that requires a new trial option for the *plaintiffs* inappropriate. The Court should consider whether the jury's award of \$675,000 for sharing 30 songs both shocks the judicial conscience and violates due process. Based on such consideration, this Court should rule that the jury's award is unlawful and set it aside.

Having set aside the jury's award, the Court should then remit the award to a just amount without regard to statutory limits, and offer to the *defendant* the option of accepting the remitted award or of having a new trial under proper jury instructions. The Court should not give Plaintiffs the option of forcing yet another trial, and certainly not with the same erroneous jury instructions as before.

As to the proper instructions, this Court should, pursuant to 28 U.S.C. § 1292(b), consider certifying the question back to the Court of Appeals to consider in light of this Court's ruling that the reinstated jury's award of \$675,000 is

unlawfully arbitrary and excessive.

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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) on February 6, 2012.

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