NO. 12-2146

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

SONY BMG MUSIC ENTERTAINMENT, ET AL.,

Plaintiffs-Appellees,

v.

JOEL TENENBAUM,

Defendant-Appellant.

On Appeal From The United
States District Court
For The District Of Massachusetts

OPENING BRIEF FOR THE DEFENDANT–APPELLANT

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STATEMENT OF JURISDICTION

The district court had jurisdiction over this copyright case under 28 U.S.C. 1331 and 1338(a). Following an initial appeal, this Court remanded to the district court with instructions to consider remittitur and, in the absence of remittitur, the constitutionality of the statutory damages awarded by the jury. The district court entered a final order rejecting remittitur, finding the statutory-damages award constitutional, and disposing of all other claims on August 23, 2012. Defendant–Appellant Joel Tenenbaum timely filed his notice of appeal on September 17. This Court therefore has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE ISSUE

Is it a denial of due process to award statutory damages of $22,500 per song, for a total of $675,000 in this case, against an individual for willful but noncommercial copyright infringement that did not, taken alone, measurably harm the plaintiffs?

STATEMENT OF THE CASE

On August 7, 2007, the plaintiff recording companies sued Tenenbaum for infringing their copyrights in 30 songs by downloading the songs and making them available to others through online file-sharing software. This suit was part of a five-year litigation campaign against

file sharing in which the recording companies sued 12,500 accused file sharers and sent demand letters to 5,000 more. A litigation campaign of this scope by an industry against individual, noncommercial infringers — not the *makers* or *distributers* of file-sharing software like Napster or Kazaa, but the individual *users* of such systems, many of them, like Tenenbaum, college students or others without the resources to effectively defend — was unprecedented. Between 2003 and 2008, the recording companies' litigation campaign doubled the number of copyright cases in the federal courts.

Based on Tenenbaum's admission that he had engaged in file sharing, the district court (Judge Nancy Gertner) directed a verdict for the plaintiffs on the question of infringement and submitted to the jury only two questions: (1) whether Tenenbaum was a willful infringer; and (2) what amount of statutory damages, within the statutory range stated in 17 U.S.C. 504, was appropriate for each of the songs at issue. *Sony BMG Music Entertainment v. Tenenbaum*, 721 F. Supp. 2d 85, 87 (D. Mass. 2010) (*Tenenbaum I–Gertner*). On the second question, the jury was instructed to select an amount of statutory damages from the entire range ($750 per song to $150,000 per song) set out in § 504, with-

out guidance as to what part of that range might be appropriate for the sort of conduct at issue in this case. So instructed, the jury found that Tenenbaum's infringement was willful and awarded statutory damages of $22,500 per song, for a total of $675,000.

Tenenbaum argued that the jury instructions were legally incorrect because they invited the jury to return an award so excessive that it would violate due process. He asked for a new trial under proper instructions — instructions crafted by the trial court to present an appropriate range of damages for the conduct at issue to the jury. The district court reviewed the award under the Due Process Clause and reduced it to treble the statutory minimum, or $2,250 per song, for a total of $67,500. *Id.* at 116–18. The district court specifically held that the $675,000 award was unconstitutional under both *Williams* considered independently (the test urged by the recording companies) and *Williams* considered in light of *Gore* and the other modern punitive-damages cases (the test urged by Tenenbaum). *Tenenbaum I–Gertner* at 116.[1]

[1] "Based on my review of the *BMW* factors and the standard articulated in *Williams*, I conclude that the jury's award of $675,000 violates the Due Process Clause. The award bears no rational relationship to the government's interests in compensating copyright owners and deterring infringement. Even under the *Williams* standard, the award

The recording companies appealed. Relying on the doctrine of constitutional avoidance, and acting on the suggestion of the United States, this Court vacated the district court's due-process ruling and remanded to the district court with instructions to consider common-law remittitur before assessing the constitutionality of the jury's award of statutory damages. *Sony BMG Music Entertainment v. Tenenbaum*, 660 F.3d 487, 508–15 (1st Cir. 2011) (*Tenenbaum II–COA*). On remand, Tenenbaum again argued that an award of $675,000 violates due process, that the jury instructions that permitted such an award are consequently erroneous, and that he should receive a new trial under instructions crafted to assist the jury in selecting an appropriate damages amount.

The district court (Judge Rya W. Zobel) held that remittitur was not appropriate, adopted the *Williams*-only standard rather than applying *Gore* and the other modern punitive-damages cases, and found the award of $675,000 to be constitutional under *Williams*. *Sony BMG Music Entertainment v. Tenenbaum*, No. 07–11446, — F. Supp. 2d —, 2012 WL 3639053 (D. Mass.) (*Tenenbaum III–Zobel*) ("Given the deference

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cannot stand because it is 'so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.'" *Tenenbaum I–Gertner* at 116.

afforded Congress' statutory award determination and the public harms it was designed to address, the particular behavior of plaintiff in this case as explained above, and the fact that the award not only is within the range for willful infringement but also below the limit for non-willful infringement, the award is neither 'wholly disproportioned to the offense' nor 'obviously unreasonable.' It does not offend due process."). From this order, Tenenbaum appeals.

STATEMENT OF THE FACTS

The facts of this case were laid out by the parties and recounted by this Court in the context of the first appeal. *Tenenbaum II–COA*, 660 F.3d at 491–96. Tenenbaum willfully downloaded, uploaded, and shared 30 songs copyrighted by the plaintiff recording companies. In doing so, he was like the tens of millions of other Americans who used file-sharing software[2] in the interregnum between the rise of Napster and the rise of digital music distributed legally through vehicles like iTunes and Spotify.

Hearings before the Senate Judiciary Committee in 2000, just one

[2] *Napster's 11th Hour Frenzy*, Wired, Feb. 2001; *see also Timeline of File Sharing*, Wikipedia, Dec. 6, 2012.

year after Napster's launch, capture the feel of this time. Senators Orrin Hatch and Patrick Leahy demonstrated downloading music, defended their downloading as fair use, remarked about the popularity of file sharing on college campuses, described receiving favorite songs obtained in this manner from their children, characterized the development of file-sharing program Gnutella as "quite an accomplishment," and publicly praised Shawn Fanning, one of the founders of Napster.[3]

The unprecedented litigation campaign that the recording industry launched as part of its response to file sharing is a fact of this case, too: 12,500 cases; 5,000 more demands; average settlements of $3,500 per person; and only three defendants with the ability to resist, all of them defended by counsel acting *pro bono*. The fact is the recording company launched a litigation campaign to use the federal courts and the full force of federal process to "sear[] in the minds of the public that

[3] *Tenenbaum I–Gertner*, 721 F. Supp. 2d at 106–07 (*quoting Music on the Internet: Is There an Upside to Downloading?: Hearing Before the Senate Committee on the Judiciary*, 106th Cong. (2000) *and Utah's Digital Economy and the Future: Peer-to-Peer and Other Emerging Technologies: Hearing Before the Senate Committee on the Judiciary*, 106th Cong. (2000)), *rev'd on other grounds*, 660 F.3d 487.

maybe getting all of this stuff for free isn't legal after all";[4] to put it in law-school speak, the recording companies sought to achieve general deterrence of hundreds of millions of individuals by punishing a few harshly. The question presented by that fact is whether the law permits that use.

SUMMARY OF THE ARGUMENT

Joel Tenenbaum challenges the unchecked prosecution of individuals like him in service of general deterrence. Joel Tenenbaum was, at the time of the complained-of infringements, a teenager. He is now a 26-year-old Ph.D. in statistical physics looking for an academic job with this case hanging like an albatross around his neck.

Will the law check prosecutions like this by enforcing due-process limits on civil punishments and instructing juries in such a way that their verdicts come back both constitutional and sensible? $675,000 for 30 songs — songs available now for 99 cents on iTunes and that would have been available on file-sharing networks whether or not Tenenbaum, in particular, had used them — is absurd.

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[4] Rocco Castoro, *Downloading Some Bullshit: Interview With the President of the RIAA*, Vice, vol. 17, no. 8, at 58.

The absurdity of the award, and its complete lack of connection to anything about what Tenenbaum, in particular, did, and any harm that Tenenbaum, in particular, caused, make it unconstitutional under *St. Louis I.M. & S. Railway Co. v. Williams*, 251 U.S. 63, 67 (1919), whether read alone or in light of *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and the Supreme Court's other more recent punitive-damages cases. The judgment must therefore be vacated.

The way to avoid unconstitutional verdicts like this is to instruct juries about what part of the statutory range is appropriate. Asking this question, which is not the constitutional one about what, in numbers, the constitutional maximum is, allows this Court to avoid a difficult, and perhaps impossible, exercise in constitutional line drawing. The appropriate remedy is to vacate the judgment and remand for a new trial in which the court tells the jury what part of the statutory range is appropriate.

As the two trial judges who tried file-sharing cases against individuals, Chief Judge Michael Davis and Judge Nancy Gertner, agreed, the appropriate range in a case like this is from the statutory minimum ($750 per song) to treble that amount ($2,250 per song). Such a range

recognizes noncommercial, individual infringement that caused no measureable harm as the least offensive sort of infringement covered by the Copyright Act, but at the same time recognizes the willful nature of the infringement in this case by authorizing treble damages, an amount drawn from long legal practice in the common-law tradition.

ARGUMENT

Let us assume for purposes of appeal that Joel Tenenbaum is the most heinous of noncommercial copyright infringers. The question is whether the constitution limits the magnitude of the punishment that may be imposed on such an offender.

I. Judicial review of the award of statutory damages in this case is both appropriate and constitutionally required.

A. The Constitution requires judicial review.

This Court's earlier opinion and the district court's opinion on remand raise an initial question about whether statutory damages prescribed by Congress while acting within its enumerated powers are, for that reason, insulated from due-process scrutiny. In its earlier opinion, this Court noted that *Williams* and *Gore* involved "state-authorized awards of damages" not "Congressionally set awards" and expressed "concerns about intrusion into Congress' power under Article I, Section

8 of the Constitution" should this Court subject awards of statutory damages under the Copyright Act to constitutional scrutiny.[5]

This concern was the principal basis of the district court's opinion on remand and led the district court not to apply, in a rigorous fashion, either the factors set out in *Williams* or the guideposts and rules established in *Gore* and its progeny.[6] Upon further examination, however, this concern is misplaced; it is inconsistent with *Marbury v. Madison*, with the notion that the Bill of Rights limits Congress's Article I powers, and with the many Supreme Court cases that hold that the Fifth Amendment Due Process Clause imposes the same limits on the Federal Government as the Fourteenth Amendment imposes on the States.

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[5] *Tenenbaum II–COA*, 660 F.3d at 512–13 ("Further, both *Williams* and *Gore* concerned limitations on state-authorized awards of damages, and did not concern Congressionally set awards of damages, which Congress is authorized to do under its Article I powers. This fact in turn raises concerns about intrusion into Congress's power under Article 1, Section 8 of the Constitution.").

[6] *Tenenbaum III–Zobel*, 2012 WL 3639053 at *5 ("The court is also sensitive to the separation of powers issues raised by a challenge to a statutory damages range determined by Congress.) (*citing Tenenbaum II–COA*, 660 F.3d at 513), *6 ("Given the deference afforded Congress' statutory award determination . . . the award . . . does not offend due process.")

If the Fifth Amendment imposes limits on statutory damages, then, of course, Congress may not evade them by acting within its Article I, Section 8 enumerated powers. The point of the Bill of Rights is to limit the ways in which the Federal Government can exercise its enumerated powers. And it is for the judiciary to determine whether, in any particular case, the Federal Government has transgressed those limits. *Marbury v. Madison*, 5 U.S. 137 (1803). Indeed, the Supreme Court has specifically held that due-process review applies to a civil punishment even when that punishment is imposed pursuant to a statute specifying a range and the punishment falls within the specified range.[7]

Statutory damages imposed by the Federal Government can be subject to less searching scrutiny than statutory damages imposed by the States only if the content of the Fifth Amendment Due Process Clause differs from the content of the Fourteenth Amendment Due

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[7] *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 423 (2001) ("[L]egislatures enjoy broad discretion in authorizing and limiting permissible punitive damages awards. A good many States have enacted statutes that place limits on the permissible size of punitive damages awards. . . . Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, . . . [t]he Due Process Clause of its own force . . . prohibits the States from imposing 'grossly excessive' punishments on tortfeasors.").

Process Clause. But the Supreme Court, time and again, in area after area, has rejected that position and held that the same due-process standards apply under the Fifth and Fourteenth Amendments.[8] If the award of statutory damages in this case is a denial of due process, then the fact that it was an award made pursuant to an otherwise valid federal statute cannot save it.

The Seventh Amendment presents no barrier to the judicial review required by the Fifth Amendment. Judicial review of jury-imposed civil punishments is both permitted under the Seventh Amendment[9]

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[8] *See, e.g., Benton v. Maryland*, 395 U.S. 784, 795 (1969) ("Once it is decided that a particular Bill of Rights guarantee is fundamental to the American scheme of justice, the same constitutional standards apply against both the State and Federal Governments.") (internal citation omitted); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (applying the same standard to state and federal racial classifications and overruling *Metro Broadcasting*, which had provided for laxer review of so-called benign federal racial classifications).

[9] *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 (2001) ("Unlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a fact tried by the jury. Because the jury's award of punitive damages does not constitute a finding of fact, appellate review of the district court's determination that an award is consistent with due process does not implicate the Seventh Amendment.")

and required by the Due Process Clause.[10] It is the notion that judicial review might be denied in cases like this that offends separation-of-powers principles; a statute that purports to deny judicial review would improperly invade the domain of the judiciary, whose job it is to ensure (particularly in civil cases, where this kind of review is close to the only safeguard) that the punishment fits.

B. Congress invited judicial review.

Refusing to review the amount of statutory damages imposed in a particular case for reasons of deference to Congress is particularly inappropriate in the copyright context. This is so for two reasons. First, as the Supreme Court held in *Feltner*, Congress intended judges, not juries, to determine the "just" amount of statutory damages to impose in copyright cases. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S.

[10] *Honda Motor Co. v. Oberg*, 512 U.S. 415, 434–35 (1994) ("such a decision [the 'exaction of exemplary damages'] should not be committed to the unreviewable discretion of a jury"); *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 20–21, 21 n.10 (1991) (approving Alabama's punitive-damages scheme because it involved multiple levels of judicial review under "detailed substantive standards" that were more specific than the "manifestly and grossly excessive" or "evinces passion, bias and prejudice" standards in use in other states).

340, 346 (1998) (holding that *court* in § 504(c)(1) "appears to mean judge, not jury"). Congress wanted judges to take an active role.

Second, the Copyright Act is not like other statutes that prescribe specific statutory damages for specific offenses. Instead, the Copyright Act prescribes a broad range of damages for a broad range of offenses: $750 to $150,000 per copyrighted work for offenses ranging from stealing and publishing the advance copy of a presidential memoir, pirating and reselling copies of Microsoft Windows or Microsoft Office, exceeding the scope of a modern software license agreement, staging a play, or downloading music online.

The fact that statutory damages are per copyrighted work exacerbates the problem of the broad statutory range. If the recording companies had sued Tenenbaum for downloading 1,000 songs, as they say they could have, for example, the statutory range would have been from $750,000 to $150,000,000. Because of the per-song calculation and the fact that ordinary file sharers download many songs in a one-click process, the range of statutory damages that the recording industry can, on its view, pursue is without practical limit.

This feature of statutory damages — a single broad range from which the court is to select an amount "as [it] considers just" — was introduced only in the Copyright Act of 1976. The Copyright Act of 1790 did not provide for statutory damages at all, 1 Stat. 124, § 6, while the Copyright Act of 1831, 4 Stat. 436, §§ 6–7, and the Copyright Act of 1909, 35 Stat. 1075, § 25, provided different, specific amounts of statutory damages for specific kinds of infringement, like copying a book, copying a map, or preaching a sermon.

When coupled with Congress's decision to trust courts — meaning, as held in *Feltner*, judges — this change in the law argues strongly against deference to Congress. Congress chose to stop making judgments about precisely what statutory damages are appropriate for particular kinds of offenses and, instead, to delegate that decision to judges, informed by experience, with access to the witnesses and the litigation realities of particular cases, and steeped in the common-law tradition. Undoing that decision by deferring to Congress when a jury returns an award for any offense anywhere in the broad statutory range is the opposite of what Congress wanted and what the statute provides.

II. $675,000 for 30 songs is unconstitutional under *Williams* because it is a grossly disproportionate punishment.

The award of statutory damages against Tenenbaum violates the Due Process Clause because it is tied not to the actual injury that he caused or other features of his conduct, but to the injury caused by file sharing in general. The injury that Tenenbaum caused by downloading the 30 songs at issue instead of buying albums at the record store cannot be more than $450, the total cost of 30 $15 albums. And, as for distributing music to others, the recording companies presented no evidence that any third party received a particular song from Tenenbaum in particular and, even if Tenenbaum had never used file-sharing software, the 30 popular songs at issue would nonetheless have been available, for free, from other users. Tenenbaum's file sharing was a symptom or example of the recording industry's file-sharing problem, but it did not itself cause the recording industry's damages. The rise of file-sharing software did that.

Other measures of actual damages suggested by the recording companies suffer from the same problem of blaming Tenenbaum for what file sharing did as a whole. The companies suggest, for example, that actual damages can be measured by the value of a hypothetical li-

cense to do what Tenenbaum did, which they say is equal to the whole value of the songs in question because such a license would entitle Tenenbaum to distribute the songs for free and the recording companies "cannot compete with free." But the correct comparison, taking into account the rise of file sharing, is not the cost of a hypothetical license in a world where the song is available only from the record companies; rather, it is the cost of such a license in a world where the song is already widely available for free. So too for the proposal that actual damages be measured by the "decline in value of the copyright" caused by the free availability of the song.

Like punitive damages, statutory damages are imposed not only to compensate the plaintiff, but also to deter the defendant and others from engaging in similar conduct in the future. Punishment and deterrence are both the only available justifications for the award of statutory damages in this case, given the absence of measurable actual damages, and the avowed purpose of the recording industry's litigation campaign.[11] While this general approach, punishing one offender to de-

[11] According to Cary Sherman, the president of the RIAA, the goal of these lawsuits was to "generat[e] dinner conversations about what you may or may not do with your computer" and "sear[] in the minds of

ter others, is constitutional within limits, even gross limits of fair retribution for an individual's conduct, due process limits the extent of the punishment. This Court recognized as much in reviewing awards of statutory damages as early as a century ago.

In *St. Louis I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919), the Supreme Court considered the Arkansas legislature's effort to control overcharging by the railroad company that was serving its public. Arkansas provided that passengers who were overcharged for tickets by the railroad could recover a statutory award of "not less than fifty dollars nor more than three hundred dollars." *Id.* at 64. The railroad claimed that this was unconstitutionally unfair. *Id.* The *Williams* Court upheld the state's regulation as a reasonable effort by Arkansas to protect its population from commercial exploitation.

In the process of finding the statutory award under review within bounds, the Court articulated the due-process standard of gross disproportion. *Id.* at 66–67 (holding that due process "places a limitation upon the power of the states to describe penalties for violations of their laws"

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the public that maybe getting all of this stuff for free isn't legal after all." Rocco Castoro, *Downloading Some Bullshit: Interview With the President of the RIAA*, Vice, vol. 17, no. 8, at 58.

and that this limitation is passed "where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable"). The statute under challenge did not violate this standard of gross disproportion. Making a railroad pay an overcharged passenger $75 did not shock the conscience of the Court because making the railroad pay $75 to an overcharged passenger was within the bounds of fair retribution for its breach of its public trust.[12]

Under *Williams* and the other early cases, the award of statutory damages in this case is unconstitutional because it is "grossly excessive"

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[12] Other early cases likewise held that "grossly excessive" statutory damages "amount to a deprivation of property without due process of law." *Waters-Pierce Oil Co. v. State of Texas*, 212 U.S. 86, 111 (1909); *see also Southwest Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 491 (1915) ("to inflict upon the company penalties aggregating $6,300 was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law") (collecting cases). The Supreme Court, *see, e.g., Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276–77 (1989) ("the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme") (citing *Williams*), and lower courts, *see, e.g., Parker v. Time Warner Entertainment Co.*, 331 F.3d 13, 26 (2d Cir. 2003) ("A statutory penalty may violate due process where the penalty prescribed is 'so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.'") (*quoting Williams*); *United States v. Citrin*, 972 F.2d 1044, 1051 (9th Cir. 1992) (same), have continued to rely on *Williams* and these other early cases for the proposition that statutory damages are subject to due-process review.

and "wholly disproportioned to the offense." *Williams*, 251 U.S. at 67. $675,000 for 30 songs that would have cost $30 on iTunes is absurd. Nor can $675,000 be justified by the kind of public interest identified in *Williams*. *Id.* In all the early cases sustaining large awards of statutory damages, the defendant was a company charged with a public function: a railroad in *Williams*; the only telephone utility in *Danaher*; and Standard Oil in *Waters-Pierce*. The present suit vindicates only the private pecuniary interests of the recording companies, not any general right of the public, such as the right to travel, to place telephone calls, or to have gasoline and heating oil.

The statutory minimum is a baseline for the kind of offense that Tenenbaum committed: noncommercial, with no attempt at profit, by an individual, and causing no measurable harm. Treble the statutory minimum would be a customary punishment consistent with the common law. Ten times the statutory minimum would be severe punishment, extraordinary in the law, and, at $7,500 per song, well beyond the bounds of what a normal American might expect for this kind of com-

monplace[13] violation. The award in this case is *thirty* times the statutory minimum. A multiplier like that, imposed to punish an individual in order to deter others, and resulting in an astonishing $675,000 total award — a bankrupting award for a defendant like Tenenbaum — is grossly disproportionate under *Williams*.

III. *Gore*, *State Farm*, and the other modern civil-punishment cases make it even clearer that $675,000 for 30 songs is unconstitutional.

It compounds error to insulate application of the *Williams* standard for reviewing punitive statutory damages from the Supreme Court's well-developed jurisprudence reviewing punitive tort damages. *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). Nothing in the Supreme Court's cases, and certainly nothing in the Due Process Clause, suggests that the Government has more power to en-

[13] By 2001, just two years after its launch, Napster had 60,000,000 users sharing music online. *Napster's 11th Hour Frenzy*, Wired, Feb. 2001; *see also Timeline of File Sharing*, Wikipedia, Dec. 6, 2012.

force a substantive right by imposing a civil punishment under a statute rather than under the common law.[14]

The Supreme Court's later cases — which have been held to apply to statutory civil punishments by this Court;[15] the Second,[16] Third,[17]

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[14] If statutory damages were subject to review under *Williams* only and not under *Gore* and *Campbell*, then a legislature could evade *Gore* and *Campbell* simply by authorizing punitive damages in a statute. That kind of evasion is so plainly foreclosed that it has not even occurred to the lower courts. *See, e.g., Willow Inn, Inc. v. Public Service Mutual Insurance Co.*, 399 F.3d 224, 229–230 (3d Cir. 2005) (applying *Gore* and its progeny to punitive damages imposed under Pennsylvania statute that authorized punitive damages for insurance bad faith); *Capstick v. Allstate Insurance Co.*, 998 F.2d 810, 818 (10th Cir. 1993) (applying *Gore* and its progeny to punitive damages under Oklahoma statute that removed cap on punitive damages upon a showing of "oppression, fraud, or malice").

[15] *Romano v. U-Haul Int'l*, 233 F.3d 655, 672–73 (1st Cir. 2000) (reviewing statutorily capped punitive damages in a Title VII discrimination case under *Gore*).

[16] *Parker v. Time Warner Entertainment Co.*, 331 F.3d 13, 22 (2d Cir. 2003) (noting that statutory damages under the Cable Communications Policy Act of 1984 that turn out to be unconstitutionally excessive can be reduced under *Campbell* and *Gore*).

[17] *Willow Inn, Inc. v. Public Service Mutual Insurance Co.*, 399 F.3d 224, 229–230 (3d Cir. 2005) (applying *Gore* and its progeny to damages imposed under Pennsylvania statute authorizing punitive awards for insurance bad faith).

Fifth,[18] Seventh,[19] and Tenth[20] Circuits; and the leading commentators[21] — clarify what due-process review prevents: *arbitrariness*, that is, civil penalties that are not reliably tied to the actual injury imposed or other relevant features of the offense in such a way that individual defendants are not merely instruments for achieving general deterrence — heads on a pike — but rather can be said to deserve, individually, the punishment they receive. *See Campbell*, 538 U.S. at 416 (prohibiting

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[18] *Rubinstein v. Administrators of the Tulane Educational Fund*, 218 F.3d 392, 403–09 (5th Cir. 2000) (reducing a statutorily authorized Title VII punitive-damages award under *Gore* even though the award was well within the statutory range); *Deffenbaugh-Williams v. Wal-Mart Stores*, 156 F.3d 581, 594–98 (5th Cir. 1998) (same), *aff'd after remand*, 188 F.3d 278, 286 (5th Cir. 1999).

[19] *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 954 (7th Cir. 2006) (noting that an award of statutory damages under the Fair Credit Reporting Act that is unconstitutionally excessive can be reduced under *Campbell*).

[20] *Capstick v. Allstate Insurance Co.*, 998 F.2d 810, 818 (10th Cir. 1993) (applying *Gore* and its progeny to damages imposed under Oklahoma statute that removed cap on punitive awards upon a showing of "oppression, fraud, or malice").

[21] 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 copyright statutory damages must be reviewed under *Gore*); *see also* 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, 536–56 (2004) (same).

"the imposition of grossly excessive or arbitrary punishments"); *Gore*, 517 U.S. at 574–75 (same).

The order-of-magnitude difference between the verdicts in this case and in the only other individual file-sharing case to go to trial — $222,000, $675,000, $1,500,000, and $1,920,000 — demonstrate this kind of arbitrariness.[22] So does the difference between these verdicts and the $750 per song imposed on defaulting file-sharing defendants, *Tenenbaum I–Gertner*, 721 F. Supp. 2d at 109 (collecting cases); the $3,500 average settlement across individual file-sharing cases that were part of this litigation campaign;[23] or the damages imposed on commercial establishments who play copyrighted songs without the proper licenses, *Tenenbaum I–Gertner*, 721 F. Supp. 2d at 109–10 (collecting cases).

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[22] Several Justices have recognized the chilling effect that uncertain statutory damages can have on those who use or build on copyrighted works or create technology that operates on copyrighted works. *See, e.g., Grokster*, 545 U.S. at 959–60 (Breyer, J., concurring); *New York Times Co. v. Tasini*, 533 U.S. 483, 520 (2001) (Stevens, J., dissenting).

[23] *Music industry stops suing song swappers*, L.A. Times, Dec. 20, 2008.

The Supreme Court's later cases place sensible limits on jury awards beyond the guideposts described in *Gore* and *State Farm* and ably applied by the district court in its original decision. A defendant may be punished for his own similar acts only,[24] and only for the injury that he inflicted on the particular plaintiff in the case.[25] These rules preserve the civil nature of disputes between private parties. Resulting civil awards are justified by reference to the acts between those parties. Tenenbaum should not be punished either for or to affect the conduct of others who are strangers to his case.

IV. The appropriate remedy is a new trial in which the jury is instructed as to an appropriate range of damages under *Feltner* and the constitutional question under *Williams* is thereby avoided.

This Court should not attempt to determine the precise amount of the constitutional maximum that could have been awarded against

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[24] *Campbell*, 538 U.S. at 422–23 ("A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.").

[25] *Cf. Phillip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) ("the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation").

Tenenbaum. Such a determination contemplates a bright-line boundary to gross disproportion that does not exist and seems conceptually impossible. Instead, this Court should remand for a new trial on damages under proper numerical instructions that give the jury guidance without specifying a constitutional maximum.

Those instructions should rest on the only secure ground the statute offers: noncommercial, nonwillful infringers are defaulted at the minimum, $750 per copyrighted work infringed. Guidance for the jury in making an award above the minimum to express retribution for willfulness could draw on the hallowed standard of proportion for such conduct that is treble damage, offered to the jury as a guide to fair proportion rather than a constitutional limit of gross disproportion. While treble damages may not be a constitutional standard, they are surely an appropriate jury guide.

Congress asked judges to pick the amount of statutory damages from within the broad statutory range. *Feltner* held that juries must pick this amount under the Seventh Amendment. But nothing in *Feltner* and nothing in the statute prevents courts from instructing juries about what part of the statutory range is appropriate, while still leaving

the ultimate awarding of damages to the jury. Such an approach has the virtue of honoring Congress's intent that judges take an active role in determining statutory damages while avoiding the constitutional problems and questions raised by *Feltner*, *Williams*, and *Gore*.

CONCLUSION

Tenenbaum respectfully requests that this Court set aside the $675,000 award because it is grossly disproportionate to his individual offense and remand for a new trial on proper instructions.

Respectfully submitted,

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January 18, 2013

CERTIFICATE OF SERVICE

I certify that, on January 18, 2013, I filed an electronic version of this brief and served it on all counsel of record using the Court's CM/ECF system.

_____

CHARLES R. NESSON

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Rule 32(a)(7)(B). This brief contains 6,381 words according to the word-count feature of Microsoft Word.

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CHARLES R. NESSON

ADDENDUM

SONY BMG MUSIC ENTERTAINMENT, et al.
v.
Joel TENENBAUM.

Civil Action No. 07–11446–RWZ. | Aug. 23, 2012.

ZOBEL, District Judge.

This copyright infringement case is before me on remand from the First Circuit. *See Sony BMG Music Entm't v. Tenenbaum,* 660 F.3d 487 (1st Cir.2011). Plaintiffs, recording companies Sony BMG Music Entertainment, Warner Brothers Records, Inc., Atlantic Recording Corporation, Arista Records LLC, and UMG Recordings, Inc. (collectively, "Sony"), brought this action for statutory damages and injunctive relief under the Copyright Act, 17 U.S.C. § 101 *et seq*. They alleged that defendant, Joel Tenenbaum, willfully infringed the copyrights of thirty music recordings by using peerto-peer file-sharing software to illegally download and distribute such works. For brevity, I incorporate the First Circuit's discussion of the factual and procedural history, *id.* at 490–96, and summarize only that which is relevant to disposition of the issues on remand.

I. Background

After a five-day jury trial, District Judge Nancy Gertner partially granted Sony's motion for judgment as a matter of law, holding that plaintiffs owned the thirty copyrights at issue and that Tenenbaum infringed those copyrights through his downloading and distribution activities. The jury found that Tenenbaum's infringement was willful as to each of the thirty copyrighted works, and returned a verdict within the statutory range[1] of $22,500 per infringement, for a total damages award

[1] The Copyright Act permits recovery of either actual damages and profits, or statutory damages. 17 U.S.C. § 504(a). The statute establishes an award range of $750 to $30,000 for each act of non-willful infringement, and a range of $750 to $150,000 for each act of willful infringement. *Id.* § 504(c).

of $675,000.

Tenenbaum moved for a new trial or remittitur, arguing that the court should remit the award to the statutory minimum because its excessiveness both offended due process and merited common law remittitur. Judge Gertner bypassed the issue of common law remittitur, and reduced the jury award by a factor of ten on the basis that the award was unconstitutionally excessive under the standard for evaluating punitive damage awards enumerated in *BMV v. Gore,* 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996).[2] *See Sony BMG Music Entm't v. Tenenbaum,* 721 F.Supp.2d 85, 103 (D.Mass.2010).

The First Circuit affirmed Judge Gertner's findings on liability and the grant of injunctive relief.[3] It also rejected Tenenbaum's arguments "that the Copyright Act is unconstitutional under *Feltner [v. Columbia Pictures Television, Inc.,* 523 U.S. 340, 118 S.Ct. 1279, 140 L.Ed.2d 438 (1998)], that the Act exempts so-called 'consumer copying' infringement from liability and damages, that statutory damages under the Act are unavailable without a showing of actual harm, that the

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[2] *Gore* involved a Fourteenth Amendment due process challenge to a $2 million punitive damages award. In laying out the standard for finding a punitive damages award unconstitutional, the Supreme Court reasoned that the Constitution requires that a person "received 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." 517 U.S. at 574. The Court established three "guideposts" for evaluating whether a defendant received adequate notice: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of the punitive award to the actual or potential harm inflicted on the plaintiff; and (3) the disparity between the punitive award and the civil or criminal penalties authorized in comparable cases. *Id.* at 574–75.

[3] *See* Amended Judgment, July 9, 2010 (Docket # 48) (discussing injunctive relief).

jury's instructions were in error, and his various trial error claims."[4] *Tenenbaum,* 660 F.3d at 515. The court of appeals vacated Judge Gertner's ruling that the damages award violated due process, however, holding that the doctrine of constitutional avoidance required the district court to consider whether common law remittitur was appropriate before it considered Tenenbaum's due process challenge. *Id.* at 490, 515. It reinstated the original damages award, and remanded "for consideration of defendant's motion for common law remittitur based on excessiveness." *Id.* at 515. Tenenbaum filed a petition for writ of certiorari, which was denied on May 12, 2012. *Tenenbaum v. Sony BMG Music Entm't,* —— U.S. ——, 132 S.Ct. 2431, 182 L.Ed.2d 1075 (2012).

II. Discussion

A. Common Law Remittitur

Remittitur is appropriate only if the award exceeds "any rational appraisal or estimate of the damages that could be based on the evidence before the jury," where such evidence is reviewed in the light most favorable to the prevailing party. *Smith v. Kmart Corp.,* 177 F.3d 19, 30 (1st Cir.1999) (quoting *Milone v. Moceri Family, Inc.,* 847 F.2d 35, 36 (1st Cir.1988)). *See also E. Mountain Platform Tennis, Inc. v. Sherwin–Williams Co., Inc.,* 40 F.3d 492, 502 (1st Cir.1994). " '[T]he obstacles which stand in the path of' such claims of excessiveness 'are formidable ones.' " *Kmart,* 177 F.3d at 30 (quoting *Wagenmann v. Adams,* 829 F.2d 196, 215 (1st Cir.1987)). A damage award must stand unless it 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." *Correa v. Hosp. San Francisco,* 69 F.3d 1184, 1197 (1st Cir.1995) (quoting *Segal v. Gilbert Color Sys. Inc.,* 746 F.2d 78, 81 (1st Cir.1984)); *Kmart,* 177 F.3d at 30.

Under this stringent standard, there is no basis for common law remittitur. The jury was given a list of non-exhaustive factors to con-

[4] Plaintiff raises many of these same issues on remand. The First Circuit has already rejected them, *see Tenenbaum,* 660 F.3d at 496–508, and this court will not address them further.

sider in issuing its award, including:

> the nature of the infringement; the defendant's purpose and intent, the profit that the defendant reaped if any, and/or the expense that the defendant saved; the revenue lost by the plaintiff as a result of the infringement; the value of the copyright; the duration of the infringement; the defendant's continuation of infringement after notice or knowledge of copyright claims and the need to deter this defendant and other potential infringers.

Tenenbaum, 660 F.3d at 503–04. Tenenbaum did not object to these instructions.

In light of these factors, a rational appraisal of the evidence before the jury, viewed in the light most favorable to the verdict, supports the damages award. The jury learned that music recording companies' primary source of revenue stems from their exclusive rights to copy and distribute the musical works of their contracted artists. *Id.* at 491. It learned about the operation of peer-to-peer file-sharing networks and how such networks facilitated "the unauthorized and illegal downloading and distribution of copyrighted materials—especially music recordings...." *Id.* The jury also heard evidence from which it could rationally conclude that the value of a blanket license to upload music recordings to the internet for public consumption would be "enormous." *Id.* at 491 and n. 3 (quoting testimony by a representative from Universal Music Group which suggested the grant of a such a license would result in the record companies losing complete control over their assets and drive them out of business). *See also Kmart,* 177 F.3d at 30 ("Translating legal damage into money damages is a matter 'peculiarly within a jury's ken'....").

There was further evidence about the scope and scale of Tenenbaum's infringement activities. His illegal conduct lasted for at least eight years, from 1999 to 2007. *Id.* at 492–93. During that time, he not only downloaded but also distributed thousands of copyrighted works to users of peer-to-peer file-sharing networks. *Id.* at 493.

The trial evidence also supports the jury's determination that Tenenbaum willfully infringed plaintiffs' copyrights. He conducted his infringing activities while knowing that lawsuits were being brought against individuals who downloaded and distributed music without authorization. *Id.* He personally received multiple warnings from various sources—including his father in 2002, his college in 2003, and plaintiffs in 2005—and he was warned that his activities could subject him to liability of up to $150,000 per infringement. *Id.* at 493–94. In spite of these warnings, he continued to download and distribute copyrighted materials; indeed, even after receiving Sony's 2005 cease and desist letter, trial evidence shows that defendant continued his activities for two more years, until Sony filed this lawsuit against him. *Id.* at 495.

Plaintiffs' 2005 letter also informed Tenenbaum about the impact of his activities on the music industry and instructed him to preserve all evidence of his activities, including any recordings he made available for distribution; yet in spite of these instructions, Tenenbaum had his operating system on his laptop reinstalled and its hard drive reformatted. *Id.* at 494–95 and n. 7. Furthermore, as the First Circuit noted, "[s]trong evidence established that Tenenbaum lied in the course of these legal proceedings in a number of ways." *Id.* at 495. At trial, Tenenbaum admitted that he lied in responding to Sony's discovery requests about the scope of his conduct using online media distribution systems, his use of peer-to-peer networks, and the installment of such networks on his computer. *Id.* When he was confronted at trial with his attempts to shift blame for his actions to others—including a foster child living in his family's home, his sisters, a family house guest, and burglars—Tenenbaum finally admitted responsibility. *Id.* at 496. In short, there was ample evidence of willfulness and the need for deterrence based on Tenenbaum's blatant contempt of warnings and apparent disregard for the consequences of his actions. In spite of the overwhelming evidence from which the jury could conclude that Tenenbaum's activities were willful, the award of $22,500 per infringement not only was at the low end of the range—only 15% of the statutory maximum—for willful infringement, but was below the statutory maximum for *non*-willful infringement. Considering all of the aforementioned evidence, the jury's damage award was not so excessive as to

merit remittitur.

B. Due Process Challenge

I turn now to defendant's due process challenge. *See Tenenbaum,* 660 F.3d at 515 n. 28 ("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, should the issue continue to be raised.").

1. Standard

The First Circuit vacated the earlier due process analysis and strongly suggested, without deciding, that the standard for evaluating the constitutionality of statutory damages established in *St. Louis, I.M. & S. Ry. Co. v. Williams,* 251 U.S. 63, 40 S.Ct. 71, 64 L.Ed. 139 (1919)—rather than the Gore standard—should govern analysis of the constitutional issue. It noted that, in *Gore,* the Supreme Court did not overrule *Williams,* and that the Supreme Court has not "suggested that the *Gore* guideposts [for evaluating punitive damage awards] should extend to constitutional review of statutory damage awards." 660 F.3d at 513. Further, the First Circuit explained that "concerns regarding fair notice to the parties of the range of possible punitive damage awards present in Gore are simply not present in a statutory damages case, where the statute itself provides notice of the scope of the potential award." *Id.* Finally, the court observed that the only other circuit court to directly decide the issue applied the *Williams* test instead of *Gore. Id.* (citing *Zomba Enters., Inc. v. Panorama Records, Inc.,* 491 F.3d 574, 587 (6th Cir.2007)). *See also Capitol Records, Inc. v. Thomas–Rasset,* 799 F.Supp.2d 999, 1004 (D.Minn.2011) (concluding that *Williams,* and not *Gore,* should govern the standard of review for due process challenge to a statutory damages award under the Copyright Act); *Lowry's Reports, Inc. v. Legg Mason, Inc.,* 302 F.Supp.2d 455, 460 (D.Md.2004) (declining to apply *Gore* in due process challenge to statutory damages award under Copyright Act, noting: "The unregulated and arbitrary use of judicial power that the *Gore* guideposts remedy is not implicated in Congress' carefully crafted and reasonably constrained statute.").

Other courts have applied *Williams* to evaluate the constitutionality of statutory damages provisions and awards. *Centerline Equip. Corp. V. Banner Pers. Serv., Inc.,* 545 F.Supp.2d 768, 777–78 (N.D.Ill.2008) (applying *Williams* to uphold due process challenge to the statutory damages provision of Telephone Consumer Protection Act); *Accounting Outsourcing, LLC v. Verizon Wireless Pers. Commc'ns, L.P.,* 329 F.Supp.2d 789, 808–09 (M.D.La.2004) (same); *Texas v. Am. Blastfax, Inc.,* 121 F.Supp.2d 1085, 1090–91 (W.D.Tex.2000) (same); *Verizon California Inc. v. OnlineNIC Inc.,* No. 08–2832, 2009 WL 2706393, at *6–7 (N.D.Ca. Aug.25, 2009) (applying *Williams* to uphold statutory damages award under Anti Cybersq uatti ng Consumer Protection Act).

Moreover, two of the three *Gore* "guideposts," *supra* note 2, do not logically apply in the statutory damages context. The third guidepost—disparity between the punitive award and comparable civil penalties—is wholly inapplicable where the award is within the statutory range authorized by Congress. *See Thomas–Rasset,* 799 F.Supp.2d at 1006 ("The Copyright Act's explicit damages range is, itself, the very guidepost that the Supreme Court urges this Court to heed. Thus, comparing an in-range statutory damages award to the authorized statutory damages range is unhelpful."). It is likewise inappropriate to consider the second guidepost—the ratio of punitive damages to actual damages. Congress gave a Copyright Act plaintiff the right to elect statutory in lieu of actual damages, in part because it recognized that actual damages are extremely difficult to measure and prove in a copyright case. *See F.W. Woolworth Co. v. Contemporary Arts,* 344 U.S. 228, 224–25 (1952); *Lowry's Reports,* 302 F.Supp.2d at 460. Furthermore, the Supreme Court has instructed that the validity of a statutory damages award is "not to be tested" by comparing it to the actual damages suffered. *Williams,* 251 U.S. at 67.

Defendant offers no case that has held that a statutory damages award must be reviewed under *Gore,* nor one that has applied defendant's proposed "intelligent amalgam" due process standard. Def. Opening Br. on Remand at 8. Thus, I evaluate the constitutionality of the damages award under *Williams.*

2. Application of *Williams* Standard

Under *Williams,* which involved a challenge to a state statute setting an award range for railroads that overcharged passengers, a statutory damages award comports with due process as 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. at 67. The constitutionality of the 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.* The *Williams* standard is highly deferential. *Id.* at 66–67 (noting "wide latitude of discretion" afforded to state legislatures in setting damages awards). *See also Zomba,* 491 F.3d at 587 (describing review under *Williams* as "extraordinarily deferential—even more so than in cases applying abuse-of-discretion review.") (citing *Douglas v. Cunningham,* 294 U.S. 207, 210, 55 S.Ct. 365, 79 L.Ed. 862 (1935)); *cf. Browning–Ferris Indus. v. Kelco Disposal, Inc.,* 492 U.S. 257, 281, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989) (Brennan, J., concurring) (noting that the Supreme Court's "scrutiny of awards made without the benefit of a legislature's deliberation and guidance would be less indulgent than our consideration of those that fall within statutory limits."). The court is also sensitive to the separation of powers issues raised by a challenge to a statutory damages range determined by Congress. *See Tenenbaum,* 660 F.3d at 513 (noting that Congress is authorized to set awards of damages under its Article I powers, and that concerns could be raised by "intrusion" into that power).

Statutory damages have been available as a federal remedy for copyright infringement since the Copyright Act of 1790. Act of May 31, 1790, ch. 15, §§ 2, 6, 1 Stat. 124, 125. *See also Feltner,* 523 U.S. at 349–51 (discussing history of award of statutory damages for copyright infringement). As discussed above, Congress elected to give copyright holders the option of collecting statutory damages rather than actual damages because of the difficulty of measuring and proving the latter. In amending the Copyright Act's statutory damages provision in 1999, Congress found that infringement causes public harms including "lost U.S. jobs, lost wages, lower tax revenue, and higher prices for honest

purchasers of copyrighted [works]." H.R.Rep. No. 106–216 (1999), 1999 WL 446444, at *3. The 1999 amendments, which increased penalties for willful infringement, were expressly designed to address behavior like that of Tenenbaum. *See Tenenbaum,* 660 F.3d at 500 (citing legislative history of the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub.L. No. 106–160, 113 Stat. 1774, which increased the minimum and maximum awards available under section 504(c)).[5]

Given the deference afforded Congress' statutory award determination and the public harms it was designed to address, the particular behavior of plaintiff in this case as explained above, and the fact that the award not only is within the range for willful infringement but also

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[5] The relevant portion of the House Report reads:

> 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. The advent of digital video discs, for example, will enable individuals to store far more material than on conventional discs and, at the same time, produce perfect secondhand copies .... 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 the activity or face legal action. In light of this disturbing trend, it is manifest that Congress respond appropriately with updated penalties to dissuade such conduct. H.R. 1761 increases copyright penalties to have a significant deterrent effect on copyright infringement.

H.R.Rep. No. 106–216 (1999), 1999 WL 446444, at *3.

below the limit for non-willful infringement, the award is neither "wholly disproportioned to the offense" nor "obviously unreasonable." It does not offend due process.

III. Conclusion

The verdict and damages award, as reinstated by the First Circuit, stand. Plaintiff's Motion to Strike, or in the Alternative, to Disregard Defendant's Reply Briefs (Docket # 75) is ALLOWED to the extent that the court disregards facts and arguments that are improperly raised. Plaintiffs' Motion to Strike Defendant's Amended Further Submission (Docket # 81) is ALLOWED for failure to comply with LR 7.1(b)(3) and because defendant has had ample opportunity for briefing and argument on the issue.