

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

CAPITOL RECORDS INC. *et al.*,

Plaintiffs,

v.

Case No. 06-cv-1497 (MJD/RLE)

JAMMIE THOMAS,

Defendant.

DEFENDANT’S MOTION TO RECONSIDER REMITTITUR ORDER

In her motion for new trial, remittitur, and to alter or amend the judgment, Defendant Jammie Thomas asked this Court to strike down the award of statutory damages as inconsistent with the Due Process Clause and, in the alternative, remit the jury’s award of statutory damages as a matter of federal common law. *See* Docket No. 344 (motion). This Court granted Defendant’s motion in part by proposing a remittitur of the statutory damages to three times the statutory minimum, or \$2,250 per copyrighted work. *See* Docket No. 366 (order). There was no ruling on Defendant’s constitutional challenge in that order. *See id.* In light of Plaintiffs’ refusal to accept the proposed remittitur, *see* Docket No. 371, Defendant requests that this Court reconsider its order on her motion for new trial, remittitur, and to alter or amend the judgment and, instead of ordering remittitur, reach the merits of her constitutional challenge. *See* Docket No. 344 at 3–10 (pages of motion containing constitutional challenge); Docket No. 363 (reply brief further supporting constitutional challenge).

After Defendant briefed her constitutional challenge in connection with her motion for new trial, remittitur, and to alter or amend the judgment, the United States District Court for the District of Massachusetts issued an opinion in the only other individual file-sharing case to go to verdict that adopts much of Defendant's argument. *See* Ex. A (Judge Gertner's opinion). Judge Gertner agreed with Defendant that an award of statutory damages that is intended to punish or deter must be reviewed under the same standard that applies to common-law punitive damages, namely, the standard announced in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). *See* Ex. A at 25–29. Applying *Gore*, Judge Gertner held that the maximum constitutional award of statutory damages in a file-sharing case is three times the statutory minimum. *See id.* at 52–55.

Judge Gertner stated that she was reaching the merits of the constitutional challenge because of the recording-industry plaintiffs' unwillingness to accept a remittitur, which would have resulted in another trial on damages. *See id.* at 3. In our case, as in Judge Gertner's case, there is no reason to expect that a third trial on damages will lead to a result so different from the result in the first or second trials in this case or in the trial before Judge Gertner that the constitutional challenge would be materially different. Moreover, no result in this trial could moot the constitutional challenge entirely, since Defendant contends that even an award of minimum statutory damages would violate the Due Process Clause. *See* Docket No. 344 at 4 (motion challenging even an award of minimum statutory damages).

A “district court has the inherent power to reconsider and modify an interlocutory order any time prior to the entry of judgment.” *Murr Plumbing, Inc. v. Scherer Brothers Financial Services Co.*, 48 F.3d 1066, 1070 (8th Cir. 1995). Because a third trial on damages would add nothing to this Court’s consideration of the constitutional challenge, and because this Court must ultimately rule on that challenge at some point, Defendant respectfully requests that this Court set aside its earlier remittitur order, rule on Defendant’s constitutional challenge, and thereby eliminate the need for the coming trial on damages. *See Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041, 1049–50 (8th Cir. 2002) (when damages are reduced on a constitutional ground, the plaintiff has no Seventh Amendment right to reject the reduction and demand a new trial on damages).

Defendant requests the following specific relief. If this Court agrees with Defendant that even an award of minimum statutory damages is unconstitutional, then it should amend the earlier judgment so that Plaintiffs take nothing. If this Court agrees with Defendant that the award of statutory damages was unconstitutional but believes that a lesser amount of statutory damages would be constitutional, then what this Court should do depends on what the maximum amount is that this Court believes would be constitutional. If this Court believes that the maximum constitutional amount is less than \$750 per song, then this Court should still amend the earlier judgment so that Plaintiffs take nothing. This is because the Copyright Act does not authorize an award of statutory damages of less than \$750 per song. If this Court believes that the maximum constitutional

amount is more than \$750 per song but less than the jury awarded, then this Court should amend the earlier judgment so that Plaintiffs recover only that amount that this Court believes is constitutional.

The resulting amended judgment will be a final judgment from which the parties will be able to take their respective appeals to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

Dated: October 14, 2010

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