

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA**

CAPITOL RECORDS INC, <i>et al.</i> ,)	
)	
Plaintiffs)	
)	
v.)	Civil Action No. 06-cv-1497
)	
JAMMIE THOMAS,)	
)	
Defendant)	
)	

**UNITED STATES OF AMERICA’S RESPONSE TO
DEFENDANT’S MOTION TO RECONSIDER REMITTITUR ORDER**

Defendant has not demonstrated the compelling circumstances that are required for the Court to consider its prior Order for a new trial. Rather, nine months after the Court issued that Order and seventeen days before the new damages trial is to commence, defendant asks this Court to rule on the constitutionality of the prior jury’s statutory damages award. The Court should deny that request.

It is well-settled that a court should avoid reaching the merits of a constitutional question and instead decide a case on other grounds, if possible. Here, the Court properly avoided reaching the question of whether the Copyright Act’s statutory damages provision, as applied here, violates the Constitution and instead granted the alternative relief defendant sought in her post-trial brief: remittitur. *See* Defendant’s Motion for a New Trial, Remittitur, and to Alter or Amend the Judgment (Dkt. #344) (“Def’s Mem.”) at 10; *see also* United States of America’s Memorandum in Defense of the

Constitutionality of the Statutory Damages Provision of the Copyright Act, 17 U.S.C. § 504(c) (Dkt. #352) at 6-9 (arguing that the Court should first consider whether the second jury's damages award should be reduced under the standard for common law remittitur); Memorandum of Law & Order (Dkt. #366) at 26 ("Because the Court determines that remittitur is appropriate in this case, it will not reach the question of the constitutionality of the jury damages award."). Defendant has offered no justification for revisiting that ruling, other than the fact that plaintiff rejected the remitted award and opted for a new trial, as it was entitled to do. Defendant asks the Court to rule on the constitutionality of the prior jury's award, ignoring the fact that the jury in the upcoming trial may reach a very different award. The results of the new trial could render it unnecessary to decide the constitutional issue or, at the very least, could affect the constitutional analysis. This Court should deny defendant's motion and proceed with the upcoming trial.

STANDARD OF REVIEW

In this district, "[m]otions to reconsider are prohibited except by express permission of the Court, which will be granted *only upon a showing of compelling circumstances.*" See Civ. L.R. 7.1(h) (emphasis added). "A motion to reconsider should not be employed to relitigate old issues but rather to 'afford an opportunity for relief in extraordinary circumstances.'" See *UltiMed. Inc. v. Becton, Dickinson and Co.*, 2007 WL 2914462 at *1 (D. Minn. October 3, 2007) (quoting *Dale & Selby Suprette & Deli v. U.S. Dep't of Agric.*, 838 F. Supp. 1346, 1348 (D. Minn. 1993); see also *Piper Jaffray & Co. v.*

SunGard Systems Intern., Inc., 2007 WL 835420 at *1 (D. Minn. March 15, 2007) (same). “Motions for reconsideration serve a limited function: to correct manifest errors or law or fact or to present newly discovered evidence” and should not be used to “tender new legal theories for the first time.” *In re Mirapex Products Liability Litigation*, -- F.Supp.2d --, 2010 WL 3384825 (D. Minn. Aug. 25, 2010) (quoting *Hagerman v. Yukon Energy Corp.*, 839 F.2d 407, 413 (8th Cir. 1988)). Although a district court may have “greater discretion to grant a motion to reconsider an interlocutory order than a motion to reconsider a motion brought pursuant to Rules 59(e) or 60(b) . . . it also has an interest in judicial economy and ensuring respect for the finality of its decisions, values which would be undermined if it were to routinely reconsider its interlocutory orders.” *Discount Tobacco Warehouse, Inc. v. Briggs Tobacco and Special Co., Inc.*, Slip Copy, 2010 WL 3522476 at *2 (W.D. Mo. Sept. 2, 2010). “Accordingly, it may reconsider an interlocutory order only if the moving party demonstrates (1) that it did not have a fair opportunity to argue the matter previously, and (2) that granting the motion is necessary to correct a significant error.” *Id.*¹

¹ Although the Eighth Circuit has not explicitly determined the standard for a district court to use in deciding a motion for reconsideration of an interlocutory order, “some language in Eighth Circuit caselaw suggests that motions to reconsider ‘are nothing more than Rule 60(b) motions [to reconsider final orders] when directed at non-final orders.’” *Discount Tobacco Warehouse, Inc.*, Slip Copy, 2010 WL 3522476 at *2 (quoting *Elder-Keep v. Aksamit*, 460 F.3d 979, 984 (8th Cir 2006); see also *Broadway v. Norris*, 193 F.3d 987, 989 (8th Cir. 1999) (agreeing “with the District Court” that because “only Rule 60(b) encompasses a motion filed in response to an order,” the “motion for reconsideration” filed in that case “should be construed as a Rule 60(b) motion”). A motion brought pursuant to Federal Rule of Civil Procedure 60(b) is a request for “extraordinary relief which may be granted only upon an adequate showing of exceptional circumstances.” *United States v. Young*, 806 F.2d 805, 806 (8th Cir. 1986); see also *Broadway v. Norris*, 193 F.3d at 989-90 (Rule 60(b) “is not a vehicle for a simple

ARGUMENT

Defendant does not even attempt to show that she was denied a fair opportunity to argue this matter previously or that reconsideration is necessary to correct a significant error. In fact, the defendant herself sought remittitur as an alternative post-trial remedy, and she had ample opportunity to address the constitutional avoidance argument in her post-trial briefs. After considering all of the parties' arguments, the Court correctly sought to avoid the question of the constitutionality of the prior jury's application of the statutory damages provision of the Copyright Act by remitting the prior award under common law. In doing so, the Court, in light of the Seventh Amendment, gave plaintiffs "the option of choosing to reject the remittitur and exercise their right to a new jury solely on the issue of damages." *See* Memorandum of Law & Order (Dkt. #366) at 8. Plaintiffs opted for a new trial on damages. With that new trial set to begin in less than two weeks, it is unnecessary for this Court to answer the question of whether the previous jury award is consistent with the constitution.

It is well-settled that a court should only reach the merits of a constitutional question if it is necessary to decide a case before it. *See Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them."); *U.S. v. Allen*, 406 F.3d 940, 946 (8th Cir. 2005) ("When we are confronted with several possible grounds for deciding a case, any

reargument on the merits").

of which would lead to the same result, we choose the narrowest ground in order to avoid unnecessary adjudication of constitutional issues”).

Defendant seeks, contrary to this well-established principle, to have this Court rule on the constitutionality of the prior jury’s statutory damages award, notwithstanding that a new jury will soon hear evidence on the statutory damages issue. The new jury award will be based on a new record developed for the sole purpose of determining a proper damages award in this case. Regardless of whether the new jury awards a lower amount of damages or a figure similar to or even higher than what the previous jury awarded, its determination will help inform the Court’s analysis of any remittitur or constitutional arguments raised post-trial. Constitutional avoidance principles weigh strongly in favor of allowing the new jury to consider the damages issue, rather than going back and deciding whether the prior jury’s award was constitutional.²

CONCLUSION

For the reasons stated herein, the United States respectfully requests that this Court deny defendant’s motion to reconsider its remittitur order.

Dated: October 20, 2010

Respectfully submitted,

TONY WEST

² Defendant contends that this Court should re-examine its previous order in light of the fact that “[a]fter 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 file-sharing case to go to verdict that adopts much of Defendant’s argument.” *See* Defendant’s Motion to Reconsider Remittitur Order (Dkt. #45) at 2. But defendant waited more than three months after that opinion to make this motion. *See id.*, Attachment A. Further, that opinion is the subject of a pending appeal.

Assistant Attorney General

B. TODD JONES
United States Attorney

JOHN R. GRIFFITHS
Assistant Branch Director
Civil Division

/s/ Adam D. Kirschner

ADAM D. KIRSCHNER

IL Bar No. 6286601

Trial Attorney

Civil Division, Federal Programs Branch

United States Department of Justice

20 Massachusetts Ave., N.W., Room 7126

P.O. Box 883

Washington, D.C. 20044

Tel.: (202) 353-9265

Fax: (202) 616-8470

Email:adam.kirschner@usdoj.gov

Attorneys for the United States of America