

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

CAPITOL RECORDS, INC., *et al.*,

Case No.: 06cv1497-MJD/LIB

Plaintiffs,

vs.

JAMMIE THOMAS-RASSET,

Defendant.

**PLAINTIFFS' RESPONSE IN
OPPOSITION TO DEFENDANT'S
MOTION TO ALTER OR AMEND
THE JUDGMENT AND
RENEWED MOTION FOR
JUDGMENT AS A MATTER OF
LAW**

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Plaintiffs respectfully submit this response in opposition to Defendant's Motion to Alter or Amend the Judgment and Renewed Motion for Judgment As a Matter of Law ("Motion," Doc. No. 437), and state as follows:

INTRODUCTION AND SUMMARY OF ARGUMENT

More than thirty jurors have now considered Defendant's misconduct and willful infringement of Plaintiffs' copyrights and agreed, unanimously, to verdicts that fall well within the statutory range established by Congress. The most recent jury, like the other two, based its award on overwhelming evidence of Defendant's wrongdoing, evidence that Defendant's Motion ignores completely. Plaintiffs proved that Defendant willfully infringed all 24 of the works in suit, that her misconduct caused substantial but immeasurable harm to Plaintiffs, that she falsely denied her misconduct under oath, that she attempted to pin the blame on others including her children, that she provided false evidence in an effort to escape responsibility, and that she perpetuated her lies and fabrications to the national media long after she was caught.

Defendant now asks the Court to set aside the jury's verdict, arguing that Plaintiffs' inability to quantify precisely the amount of actual damages Defendant's actions caused renders *any* statutory damages award unconstitutional. (Mot. at 2.) In doing so, Defendant asks this Court to do nothing less than ignore the evidence, rewrite the Copyright Act, and disregard nearly a century of Supreme Court precedent. Her arguments pay no regard to the Supreme Court's repeated admonition that the Copyright Act does not require proof of actual damages, or to the deferential standard that governs review of authorized statutory damages awards.

A statutory damages award is governed by the standard set forth in *St. Louis, Iron Mountain & Southern Railway Co. v. Williams*, 251 U.S. 63 (1919), the touchstone of which is deference to the legislature’s “wide latitude of discretion” in responding to public wrongs. *Id.* at 66. *Williams* addressed precisely what is at issue in this case, whether a statutory damages award violates due process. Defendant’s attempt to replace the *Williams* standard with the punitive damages guideposts set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), not only conflates punitive and statutory damages, but also ignores the fact that those guideposts are designed to compensate for the absence of the very legislative judgment to which *Williams* requires courts to defer. In addition to being contradicted by the record, Defendant’s focus on the award’s ratio to actual damages runs head-on into *Williams* itself, which expressly rejects the notion that statutory damages must “be confined or proportioned to [a plaintiff’s] loss or damages.” *Williams*, 251 U.S. at 66. Applying the *Williams* standard, the jury’s award easily comports with due process, as Congress’s judgment concerning the appropriate response to copyright infringement “cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.” *Id.* at 67.

BACKGROUND AND SUMMARY OF FACTS

This case was originally tried to a jury from October 2-4, 2007. The jury found that Defendant had willfully infringed Plaintiffs’ copyrights in the 24 sound recordings and awarded statutory damages of \$9,250 per recording. (Doc. No. 100.) The Court set aside that verdict in its order of September 24, 2008. (Doc. No. 197.) The case was then tried to a jury from June 15-18, 2009. The jury found that Defendant had willfully

infringed Plaintiffs' copyrights in the 24 sound recordings and awarded statutory damages of \$80,000 per recording. (Doc. No. 336.) The Court set aside that verdict in its order of January 22, 2010 and ordered a new trial on the issue of damages. (Doc. No. 366.) The damages case was tried to a third jury from November 2-3, 2010. The jury awarded statutory damages of \$62,500 per recording. (Doc. No. 427.) On November 8, 2010, the Court entered judgment on this jury's verdict. (Doc. No. 428.) Defendant filed her Motion on December 6, 2010. (Doc. No. 437.)

Plaintiffs' evidence at the damages trial showed that Defendant had approximately 1,950 files—many of them Plaintiffs' copyrighted sound recordings—in her KaZaA shared folder on her computer at the time MediaSentry detected her infringement. (*See* Excerpts from Trial Tr., attached as Exhibit A, at 108:13-109:20.) The evidence demonstrated that Defendant was distributing over five times as many files as the average KaZaA user at the time she was caught distributing Plaintiffs' copyrighted works. (*Id.* at 110:7-111:11.) Plaintiffs' evidence also showed that Defendant either downloaded these sound recordings from other KaZaA users (*id.* at 114:3-23), or that she copied them to her KaZaA shared folder from her music collection (*id.* at 114:23-115:25), making her the original “seeder” of these works on the KaZaA network. Either way, the undisputed evidence showed that Defendant downloaded and installed KaZaA, that she put all 24 of Plaintiffs' works into her KaZaA shared folder, that she kept them there, that she kept her computer on and connected to the Internet at all times with KaZaA running, and, therefore, that she was distributing these works to millions of other users on the network for many months, if not years. (*See id.* at 142:24-143:17; 181:3-12; 134:19-135:12.)

Defendant admitted that she had used the Napster file sharing program in college. (*Id.* at 193:9-194:13.) She did a study on the Napster program (*id.*) and also received instruction on copyright law. (*Id.* at 188:9-189:7.) By her own admission, Defendant knew long before she began using KaZaA that copying and distributing copyrighted music files over the Internet was illegal, yet she did it anyway.

Defendant also concealed her infringement and refused to accept responsibility for her actions. She lied about what she had done and provided Plaintiffs, her counsel, and her own expert with false evidence—a new computer hard drive that she knew was not connected to her Internet account at the time Plaintiffs detected her infringement and would have no evidence of her infringement. (*Id.* at 150:1-18; 171:2-14; 172:13-173:13; 174:1-175:12; 203:18-205:4; 206:3-9.) She also pointed to a parade of completely implausible scenarios and unlikely culprits who, she claimed, might have used her computer and her “tereastarr” user name to commit the infringement, none of which the jury believed. (*Id.* at 217:8-218:22.)

Defendant’s misconduct caused significant but immeasurable harm to Plaintiffs. Although actual damages for copyright infringement need not be proven when statutory damages are elected, *see* 17 U.S.C. § 504(c), Plaintiffs provided extensive evidence at trial of the devastating effect that infringement through peer-to-peer networks has had on the recording industry. Plaintiffs’ witnesses testified that the ever-multiplying infringement caused when a song is illegally distributed results in substantial injuries including lost sales of legitimate works (*id.* at 68:8-14; 70:6-71:19), diminution of copyright value (*id.* at 67:11-68:7; 352:11-17), a diminished capacity to identify and

promote new artists (*id.* at 76:22-77:19; 351:20-25), and layoffs within the industry (*id.* at 351:15-19). As Plaintiffs' representatives testified, legitimate markets simply cannot compete with the free recordings distributed by peer-to-peer infringers like Defendant. (*Id.* at 67:11-68:7; 263:7-15.) The only legal means by which Defendant could distribute Plaintiffs' works the way she did would be to obtain a blanket distribution license for all 24 works, which would represent the entire value of the copyrighted work and would vastly outstrip the cost of purchasing a single song or album for personal use. (*Id.* at 75:11-20; 263:16-20.) The cost of such blanket licenses to distribute Plaintiffs' works on the open market can only be compared to "the entire value of the company." (*Id.* at 75:21-76:7.)

Defendant's Motion does not challenge the Court's instruction to the jury regarding what factors to consider in awarding statutory damages. Those factors include:

the willfulness of the defendant's conduct, the defendant's innocence, the defendant's continuation of infringement after notice or knowledge of the copyright or in reckless disregard of the copyright, the effect of the defendant's prior or concurrent copyright infringement activity, whether profit or gain was established, harm to the plaintiff, the value of the copyright, the need to deter this defendant and other potential infringers, and any mitigating circumstances.

(Jury Instruction No. 17, Doc. 422, at 19.) The jury's verdict properly reflects its consideration of these factors and the overwhelming evidence of Defendant's willfulness, the substantial harm she caused to Plaintiffs and to the value of Plaintiffs' copyrights, and the strong need to deter Defendant and others like her from engaging in the same misconduct.

ARGUMENT

I. Statutory Damages Under the Copyright Act Are Not Dependent Upon Proof of Actual Damages.

Defendant's Motion rests on a faulty premise: that a plaintiff must prove actual damages to recover statutory damages under the Copyright Act. While Plaintiffs did prove, and the jury clearly found, substantial actual damages caused by Defendant's infringement, neither the statute nor the Constitution requires such proof.

The Copyright Act itself pointedly provides statutory damages as an alternative to actual damages. By its plain language, § 504(c) does not condition the availability of statutory damages on proof of actual damages. Quite the contrary, the statute permits a copyright owner to elect to recover statutory damages "*instead of* actual damages and profits." 17 U.S.C. § 504(c) (emphasis added). Indeed, one of the driving forces behind Congress's adoption and retention of statutory damages has been its desire to compensate for "the acknowledged inadequacy of actual damages and profits in many cases," which results because "actual damages are often conjectural, and may be impossible or prohibitively expensive to prove." Staff of H. Comm. on the Judiciary, 87th Cong., Copyright Law Revision: Report of the Register of Copyrights on the General Revision of The U.S. Copyright Law 102 ("1961 Report") (Comm. Print 1961); *see also Douglas v. Cunningham*, 294 U.S. 207, 209 (1935) (actual damages caused by infringement may be "difficult or impossible" to prove). For that reason, the Supreme Court has repeatedly concluded that statutory damages must be awarded even if a plaintiff cannot or does not prove actual damages.

The Supreme Court first addressed the issue in *L.A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100, 106 (1919). Much as in this case, the record there, “while showing that the plaintiff was damaged by the infring[ement], d[id] not show the amount of the damages.” *Id.* at 103. As the Court noted, the absence of such proof was “aptly” explained by the fact that damages primarily consisted of “discouragement of and the tendency to destroy [the plaintiff’s] system of business,” which rendered “any accurate proof of actual damages . . . obviously impossible.” *Id.* at 103-04 (internal quotation marks omitted). Nonetheless, because the plaintiff was unable to provide such proof, the district court declined to award damages within the statutorily prescribed range, and instead awarded only nominal damages. *Id.* at 102.

The Supreme Court reversed. The Court explained that, by providing for statutory damages “in lieu of actual damages,” Congress made clear “that something other than actual damages is intended -- that another measure is to be applied in making the assessment.” *Id.* at 106 (quoting Copyright Act of 1909, § 25(b), 35 Stat. 1075 (“1909 Act”)). Congress also made clear what that other measure should be: “the court’s conception of what is just in the particular case . . . is made the measure of the damages to be paid, but with the express qualification that in every case the assessment must be within the prescribed limitations.” *Id.* The Court, thus, concluded that the Copyright Act not only permits but *requires* a within-range statutory damages award regardless of whether a plaintiff offers a definitive measure of harm. *See id.* at 107-08.

The Court took that logic a step further in *F. W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228 (1952). There, the district court awarded the maximum statutory

damages of \$5,000, even though uncontradicted evidence showed only about \$900 in actual damages. The Supreme Court granted *certiorari* to determine whether a court may award damages authorized by the statute but in excess of proven actual damages. *See id.* at 229. It answered with a resounding “yes.” Not only did the Court reject the argument that statutory damages are confined to proven actual damages; it confirmed that a plaintiff need not even suffer *any* actual damages, let alone quantify and prove them. It instead concluded that “even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy.” *Id.* at 233; *see also Douglas*, 294 U.S. at 208-10 (reversing a court of appeals’ decision to reduce an award from the maximum of \$5,000 to the minimum of \$250, even though the trial court had found that no actual damages had been shown).

As the Court’s analysis in these cases confirms, the very purpose of statutory damages is to offer a measure of recovery in contexts where actual damages are “difficult or impossible” to prove. *F. W. Woolworth*, 344 U.S. at 231 (quoting *Douglas*, 294 U.S. at 209). And as the Court recognized, the Act’s statutory damages provision embodies Congress’s considered and reasonable judgment that copyright infringement is *always* against the public interest and should *always* be deterred. For that reason, “a rule of liability which merely takes away the profits from an infringement would offer little discouragement to infringers [and] would fall short of an effective sanction for enforcement of the copyright policy.” *Id.* at 233.

Implicitly recognizing that her proposed “evidence of actual damages” requirement finds no support in the Copyright Act, Defendant instead suggests this evidentiary requirement is constitutionally compelled. (Mot. at 10.) Tellingly, Defendant makes no effort to reconcile that argument with *L.A. Westermann, F. W. Woolworth*, or *Douglas*. Nor could she, as it rests on the implausible theory that the Supreme Court has repeatedly approved statutory damages awards without regard to such evidence for nearly a century, all the while failing to notice that the awards it has approved are unconstitutional. Quite the contrary, the Supreme Court, like Congress, has instead recognized and rejected the logical fallacy upon which Defendant’s argument rests—that where damages cannot be quantified or conclusively proven, damages do not exist.

The record in this case refutes that argument as well. The record here is replete with evidence of the real and substantial injury Defendant’s infringement caused. While Defendant refused to reveal the details of her infringement, the evidence proved either that she downloaded all 24 copyrighted sound recordings for free or that she seeded them to the network for the first time. (Trial Tr. at 114:3-115:25.) The evidence also showed that Defendant distributed Plaintiffs’ works for months or years to millions of other peer-to-peer network users to download from her for free. (*Id.* at 142:24-143:17; 181:3-12; 134:23-135:12.) Plaintiffs described the immense value of the sound recordings that Defendant infringed. (*Id.* at 75:21-76:7.) As a result, Defendant’s infringement deprived Plaintiffs of the profits they might have made not only from Defendant, but from an

unknowable number of other network users as well. (*Id.* at 78:10-17; 91:2-24; 282:4-19; 296:4-13.)

Plaintiffs also provided substantial evidence of the broader harms to which Defendant's infringement contributed. The ubiquitous infringement engaged in by millions of peer-to-peer users has reduced the value of the particular copyrights infringed, as well as the value of copyrighted sound recordings as a whole. (*Id.* at 67:11-68:7; 352:11-17.) As Plaintiffs' uncontested trial evidence showed, these and other harms have cost the recording industry billions of dollars since the advent of peer-to-peer network technology. (*Id.* at 282:7-8; 296:14-18.) Defendant does not dispute this, but rather only faults Plaintiffs for their inability to define the specific portion of that harm caused by Defendant. (Mot. at 5.) But the nature of the infringing technology that Defendant chose to use made such a particularized showing impossible. (Trial Tr. at 78:10-17.) Defendant's chosen program does not keep logs of the works she distributed illegally and does not allow third parties to see what works she distributed. (*Id.* at 116:20-4; 366:19-25.)

Defendant's protest that the jury's award reflects "the harm caused by file sharing in general" (Mot. at 5) has no merit. The jury received clear instruction to award damages based, in part, on the harm caused by "the [D]efendant's conduct." (Jury Instruction No. 17, Doc. 422, at 19.) The jury is presumed to have followed the Court's instructions. *Sloan v. Motorists Mut. Ins. Co.*, 368 F.3d 853, 856 (8th Cir. 2004). And the record shows that the jury did exactly that. Indeed, the jury's verdict of \$62,500 per work — less than half the amount it could have awarded under § 504(c) — does not

come close to compensating Plaintiffs for the actual losses caused by millions of other peer-to-peer infringers. Rather, the jury's award properly reflects Defendant's substantial and repeated distribution of Plaintiffs' valuable works, the harm she caused in terms of lost sales and diminution in the value of Plaintiffs' copyrights, Defendant's willfulness, and the need for strong deterrence to counter Defendant's refusal to take responsibility for her actions, a refusal that continues to this day after three separate jury verdicts. Had the jury awarded damages based on "file-sharing defendants as a class" (Mot. at 10) and the billions of dollars of harm "caused by file sharing in general" (*id.* at 5), it could not have awarded anything less than the statutory maximum.

Likewise, Defendant provides no basis upon which a factfinder might absolve her of *any* responsibility, or to show that the damages she caused were "nonexistent or *de minimis*," as she contends. (*Id.* at 10.) The law generally does not look favorably on parties whose own misconduct makes it difficult to pinpoint the extent of the injury they have caused. *See Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946) (to preclude recovery in such circumstances "would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain"). And here, Defendant had, and took, every opportunity to direct her arguments about reduced culpability and lack of quantifiable harm to the jury, and the jury rejected them. *See Plamp v. Mitchell Sch. Dist. No. 17-2*, 565 F.3d 450, 462 (8th Cir. 2009) (evidence must be viewed in light most favorable to jury's verdict).

In sum, every authority confirms what the language of section 504 clearly states — statutory damages are properly awarded even if the plaintiff cannot, or chooses not to,

prove actual damages. *L.A. News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 996 (9th Cir. 1998); *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984); H.R. Rep. No. 94-1476, at 161 (1976); 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, § 14.04[A] (2009). Indeed, both Congress and the Supreme Court have conclusively rejected the argument that the absence of a definite measure of damages renders statutory damages unavailable or inappropriate in any way. To the contrary, they have recognized what the facts of this case prove: that copyright infringement can — and here, did — cause substantial injury and merit substantial statutory damages even when that injury cannot be quantified.

II. Section 504 of the Copyright Act Makes No Distinction Between So-Called “Commercial” and “Non-Commercial” Infringers.

Another fallacy underlying Defendant’s Motion is her contention that her infringement is somehow in less need of punishment or deterrence because she “is an individual, not a company.” (Mot. at 6.) Congress disagrees. Section 504 makes no distinction between “commercial” and “noncommercial” infringement, but rather broadly applies to any “infringer of copyright.” 17 U.S.C. § 504(a). The absence of a “commercial infringement” limitation in § 504(c) is particularly telling, as the criminal provision of the Act (§ 506) does include such a limitation: it requires infringement to be *both* “willful” and, *inter alia*, “for purposes of commercial advantage or private financial

gain.” *Id.* § 506(a)(1).¹ “[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted). That presumption applies with particular force here, given that Congress has repeatedly recognized and reaffirmed that statutory damages should be uniformly available even though infringement may result in “little or no profit” or profits that “may be impossible to compute.” *See* 1961 Report 102. Statutory damages were adopted in part to respond to and compensate for this reality.

Even if § 504 could somehow be read to include the same “financial gain” limitation as § 506, that would not help Defendant. As Congress made clear in the No Electronic Theft (NET) Act of 1997, “financial gain” where it actually appears in the statute is not limited to actual profit, but rather “includes receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works.” Pub. L. No. 105-147 § 2(a), 111 Stat. 2678 (1997), *codified at* 17 U.S.C. § 101. Congress expanded the definition in this manner in direct response to the holding in *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994), that the creation of an unauthorized electronic forum to “share” copyrighted works for free was not criminal infringement

¹ “[C]ommercial advantage or private financial gain” is not an absolute requirement; there are two other potential triggers for criminal responsibility. *See* 17 U.S.C. § 506(a). Moreover, even in the context of criminal copyright law, Congress has clarified that it seeks to avoid a narrow conception of financial gain. *See* No Electronic Theft Act of 1997, Pub. L. No. 105-147, 111 Stat. 2678; H.R. Rep. 105-339 (1997).

because it was not done for profit. In clarifying that “financial gain” includes “receipt . . . of anything of value,” 17 U.S.C. § 101, Congress recognized that infringers who do “not realize a direct financial benefit” may “nonetheless substantially damage the market for copyrighted works.” H.R. Rep. 105-339, at 7 (1997).

Courts have repeatedly rejected Defendant’s distinction regarding noncommercial use when addressing the commercial nature of an alleged “fair use.” “Direct economic benefit is not required to demonstrate a commercial use.” *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1015 (9th Cir. 2001).² Infringement may be commercial when it is done for the benefit of others, *see, e.g., Worldwide Church of God v. Philadelphia Church of God*, 227 F.3d 1110, 1118 (9th Cir. 2000) (church that copied religious text for members “unquestionably profit[ed]” from unauthorized “distribution and use of [the text] without having to account to the copyright holder”); *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 922 (2d Cir. 1994) (researchers gained indirect economic advantage by photocopying copyrighted scholarly articles), or simply to save oneself the expense of having to purchase the copyrighted work, *see, e.g., Sega Enters. Ltd. v. MAPHIA*, 857 F. Supp. 679, 687 (N.D. Cal. 1994) (downloading copies of video games “to avoid having to buy video game cartridges” constitutes commercial use).

² “[T]he purpose and character of the use” is one of multiple factors that guide a court’s determination of whether a defendant’s actions are subject to the Copyright Act’s “fair use” defense. *See* 17 U.S.C. § 107. Whether a use is “commercial or noncommercial” is thus a consideration — but not a dispositive one — in determining whether it is “fair.” *See Napster*, 239 F.3d at 1015.

For precisely those reasons, the Ninth Circuit affirmed a district court's finding that file-sharing constitutes commercial copyright infringement. *See Napster*, 239 F.3d at 1015. As the district court explained, "a host user sending a file cannot be said to engage in a personal use when distributing that file to an anonymous requester," and those who download files from peer-to-peer networks "get for free something they would ordinarily have to buy." *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 912 (N.D. Cal. 2000). The Ninth Circuit agreed that "commercial use is demonstrated by a showing that repeated and exploitative unauthorized copies of copyrighted works were made to save the expense of purchasing authorized copies." *Napster*, 239 F.3d at 1015. The same is true here: Defendant's unauthorized uploading and downloading of Plaintiffs' copyrighted works was done with the "commercial" purpose of saving herself and other network users the expense of purchasing authorized versions, and is materially indistinguishable from the "LaMacchia-like behavior" Congress targeted in the NET Act. H.R. Rep. 105-339, at 7.

Finally, legislative history reveals that Congress intended to prevent losses to the copyright owner, which may occur even where an infringer does not directly profit from her infringement. *See, e.g.*, Prohibiting Piracy of Sound Recordings: Hearings on S. 646 and H.R. 6927 Before Subcomm. 3 of the H. Comm. on the Judiciary, 92d Cong. 4 ("[T]he siphoning off of sales that would otherwise be made by the creators and owners of the recording . . . has reached alarming proportions."); *id.* at 55 ("these increased remedies will enable the copyright proprietor to deal effectively and forcefully with those who steal the creative efforts of others — not only the large and rather professional

operators, but all the innumerable small operators who are fully aware of what they are doing”). Indeed, Defendant’s version of “noncommercial” infringement may cause even greater injury to copyright holders than “for-profit” infringement. As one of Plaintiffs’ company representatives testified:

[I]t’s worse if [sound recordings] are being offered for free because it’s completely devaluing the recordings in the marketplace. The marketplace is getting an understanding that they should be free and that devalues them completely It makes [selling the sound recordings] much tougher. It’s very hard for us to compete with free.

(Trial Tr. 67:18-68:7.) *See also F. W. Woolworth*, 344 U.S. at 232 (recognizing that “sales at a small margin might cause more damage to the copyright proprietor than sales of the infringing article at a higher price”).

III. Constitutional Review Of Statutory Damages Is Governed By *Williams*.

Constitutional review of a *statutory* damages award is governed by the standard set forth in *Williams*, and that review is highly deferential: An award within the range set by Congress complies with the Due Process Clause so long as Congress’ authorization of the award “cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable.” *Williams*, 251 U.S. at 67. Because a statutory damages award is intended to punish and deter, not just compensate, it may “of course seem[] large” when contrasted against the actual harm in a particular case. *Id.* (upholding \$75 damages award for \$0.66 overcharge). But the Supreme Court has made clear that the validity of a statutory damages award “*is not to be tested in that way.*” *Id.* (emphasis added). Instead, because the statute itself reflects Congress’s determination of the

appropriate amount of damages for the violation in question, the constitutionality of a statutory damages 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” the law. *Id.* When comparing the size of an award against the gravity of the offense, a court must bear in mind that legislatures “still possess a wide latitude of discretion” when setting statutory damages. *Id.* at 66.

The Supreme Court’s punitive damages jurisprudence reflects entirely different concerns that have no relevance in the statutory damages context. In particular, the Supreme Court’s punitive damages jurisprudence is motivated by two concerns, neither of which has any application in the context of awards within a statutory range: the unbounded nature of punitive damages and the resulting lack of notice. “Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive 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.” *Gore*, 517 U.S. at 574. Yet, in the typical punitive damages case, the jury’s discretion is unconstrained, meaning the defendant has no advance notice of how large an award it might face. In recognition of that fact, the Court has developed three “guideposts” to determine whether a defendant “receive[d] adequate notice of the magnitude of the sanction” that might be imposed and to impose an outer bound on the amount of punitive damages. *Id.*

As is readily evident, those “fair notice” and unbounded liability concerns are wholly beside the point in the statutory damages context since the authorizing statute will always provide notice of the potential award and a statutory range bounding that award.

That is especially true here, where the statute provides not only a range, but specific ranges for willful and non-willful conduct, and a possibility of reduction for truly innocent conduct where the copyright owner has not given the defendant access to a properly-noticed copyrighted work.

Section 504(c)(1) makes clear that, when a copyright holder elects statutory damages, a single damages award will be assessed for each work infringed in an amount “not less than \$ 750 or more than \$ 30,000 as the court considers just.” 17 U.S.C. § 504(c)(1). It also provides that, if the court finds that the infringement “was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$ 150,000.” *Id.* § 504(c)(2). Thus, the plain language of the statute provides clear notice that any act of willful copyright infringement will subject the infringer to a damages award between \$750 and \$150,000 for each work infringed. As such, there is nothing to be gained from subjecting the jury’s statutory damages award to analysis under *Gore*.

For precisely that reason, the punitive damages “guideposts” make little sense when imported into the statutory damages context. The first *Gore* factor, reprehensibility, accounts for the fact that punitive damages are usually awarded under the common law where there is no legislative determination of the public interest in preventing the offense in question, let alone a legislative quantification of the appropriate range of penalties. Thus, courts are instructed to examine a variety of the factors that would typically guide a legislature’s determination of how severely to punish an offense. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (courts should

consider whether conduct caused physical or economic harm, involved indifference to health or safety of others, targeted the vulnerable, was isolated or repeated, and involved intentional malice, trickery, or deceit).

In a statutory damages scheme, by contrast, Congress has already weighed those and whatever other factors it considers relevant and has determined how reprehensible the conduct is, so there is no need for a court to ask that question in the first instance. Such an open-ended inquiry into reprehensibility is a task far better suited to the legislature than the judiciary. The judiciary has undertaken that task reluctantly in the punitive damages context because there is no alternative. But when Congress has made the judgment, the judicial role is more modest: The court's role is limited to reviewing the rationality of Congress's assessment. That is why *Williams* instructs courts to examine the reasonableness of *Congress's* determination, giving great deference to its assessment of "the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to" the law. *Williams*, 251 U.S. at 67.

Application of the first *Gore* guidepost to review of statutory damages would also raise a significant Seventh Amendment concern. As the Supreme Court has recognized, the first guidepost contemplates judicial reexamination of the factual basis for a jury's punitive damages award. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440 (2000) (first guidepost permits courts to reconsider issues such as "witness credibility and demeanor"). That kind of factual reexamination does not present a constitutional problem in the punitive damages context, where the Seventh Amendment is

not implicated “[b]ecause the jury’s award of punitive damages does not constitute a finding of ‘fact.’” *Id.* at 437. The same cannot be said of a statutory damages award under the Copyright Act, which is a factual question committed by the Seventh Amendment to the jury. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998) (“[The Seventh Amendment] right to a jury trial includes the right to have a jury determine the *amount* of statutory damages, if any, awarded to the copyright owner” (emphasis in original)). For that reason, judicial review of statutory damages awards must take Seventh Amendment concerns into consideration, which the *Williams* standard does by focusing on *Congress’s* assessment of reprehensibility, rather than allowing a court to second guess the jury’s assessment of reprehensibility.

The second *Gore* guidepost, which measures the disparity between the punitive damages award and the actual or potential harm caused, is similarly incompatible with *Williams* and Congress’s judgment in the Copyright Act. Punitive damages awards punish defendants as an adjunct to a case of certain recovery for an injury inflicted. In that context, a requirement that the punitive damages award be proportionate to the degree of underlying injury makes sense. Statutory damages, by contrast, are a legislative response to a “violation of a public law,” and “may [be] adjust[ed] ... to the public wrong rather than the private injury.” *Williams*, 251 U.S. at 66. Thus, a statutory damages award often reflects the legislature’s determination that any amount of damages tied to the actual harm, or the amount of harm that may be provable, would bear little relationship to “the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to” the law. *Id.* at 67 (affirming

award of \$75 for charging \$0.66 more than the prescribed fare); *see also F. W. Woolworth*, 344 U.S. at 233 (noting that the Copyright Act reflects Congress’s determination that actual damages “would fall short of an effective sanction for enforcement of the copyright policy”). For that reason, the Supreme Court has emphatically instructed that the validity of a statutory damages award “is not to be tested” by comparison to the actual injury caused by defendant’s actions. *Williams*, 251 U.S. at 67; *see also id.* at 66 (statutory damages need not “be confined or proportioned to [the plaintiff’s] loss or damages”). Thus, Defendant’s extended effort to discount the actual damages suffered by Plaintiffs (Mot. at 9-11) not only ignores relevant evidence, it was a purposeless exercise in light of the clear teaching of *Williams*.

Moreover, unlike punitive damages, statutory damages are awarded in lieu of, not in addition to, compensatory damages. Defendant entirely ignores that distinction in suggesting that statutory and punitive damages are one and the same. (Mot. at 3, 5.) Indeed, Congress typically authorizes statutory damages precisely because, as in the copyright context, actual damages would be “difficult or impossible” to prove. *Douglas*, 294 U.S. at 209; *see also* 1961 Report, at 102 (“The value of a copyright is, by its nature, difficult to establish, and the loss caused by an infringement is equally hard to determine.”). Because punitive damages are generally appropriate only if there is an underlying compensatory award, *see* 22 C.J.S. Damages § 197, in the punitive damages context the second *Gore* guidepost compares two readily-available numbers. Not so in the statutory context. Since statutory damages exist in large part to relieve copyright owners of the very burden of demonstrating the metes and bounds of the actual injury, it

would undermine the entire statutory damages scheme to measure their constitutionality against something that the plaintiff is not required to prove. *See L.A. Westermann*, 249 U.S. at 106 (“[t]he fact that [statutory] damages are to be ‘in lieu of actual damages’ shows that something other than actual damages is intended”).

Applying the second *Gore* guidepost would also raise another significant Seventh Amendment concern. Where, as here, a plaintiff does elect to present proof of actual injury, the jury’s assessment of that proof is incorporated into its statutory damages award, which is intended not just to punish but also to compensate and deter. Any attempt to isolate a strictly compensatory portion of a statutory damages award for purposes of comparison under the second *Gore* guidepost would thus require the reviewing court to reexamine the jury’s assessment of the evidence of actual injury.

The third *Gore* guidepost—comparing a punitive damages award to authorized civil penalties—is, if anything, a worse fit because a statutory damages award *is* an authorized civil penalty. To the extent the third guidepost is designed to ensure that damages awards are measured with “substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue,” *Gore*, 517 U.S. at 583 (internal quotation omitted), that feat can be accomplished for a statutory damages award by examining the statute itself. And to the extent the third guidepost is intended to determine whether a defendant receives “fair notice” of potential liability, *see Gore*, 517 U.S. at 584, that too can be established by resort to the statute in question. Thus, in a statutory damages case, there is simply no work for the third *Gore* guidepost to do.

For all these reasons, courts have repeatedly concluded that constitutional review of statutory damages awards is governed by *Williams*, not *Gore*. See, e.g., *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 587-88 (6th Cir. 2007); *Accounting Outsourcing, LLC v. Verizon Wireless Pers. Comm'ns, L.P.*, 329 F. Supp. 2d 789, 808-09 (M.D. La. 2004); *Lowry's Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 460 (D. Md. 2004). The *Gore* guideposts exist to ensure that defendants in punitive damages cases have what statutory damages provisions clearly provide: fair notice to the bounds of what sanctions they may face for their actions. Those guideposts have no place in review of a statutory damages award, which must instead be held constitutional so long as Congress's judgment about the appropriate amount or range of damages "cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable." *Williams*, 251 U.S. at 67.

IV. The Jury's Award Is Constitutional.

A. The Jury's award is constitutional under *Williams*.

Applying the deferential *Williams* standard, courts have repeatedly rejected due process challenges to awards under numerous state and federal statutory damages

schemes.³ Courts have also rejected due process challenges to awards under the Copyright Act. *See, e.g., Zomba Enters.*, 491 F.3d at 587-88 (\$806,000 award, equal to 44 times actual damages, was “not sufficiently oppressive to constitute a deprivation of due process”); *Arista Records LLC v. Usenet.com, Inc.*, No. 07 Civ 8822, 2010 WL 3629587, at *4-5 (S.D.N.Y. Sept. 16, 2010) (\$6,585,000 did not violate due process); *Propet USA, Inc. v. Shugart*, No. C06-0186, 2007 WL 4376201, at *2-3 (W.D. Wash. Dec. 13, 2007) (\$500,000 statutory damages award for copyright infringement—“some forty times . . . actual damages”—not unconstitutionally excessive). As those decisions reflect, damages awards authorized by the Copyright Act easily satisfy the deferential *Williams* standard. Defendant’s arguments to the contrary are wholly without merit.

“To comprehend the scope of Congress’ power under the Copyright Clause, a page of history is worth a volume of logic.” *Eldred v. Ashcroft*, 537 U.S. 186, 200 (2003) (internal quotation omitted). Copyright infringement has been subject to statutory damages since the first Congress passed the first copyright statute in 1790. *See* Act of May 31, 1790 (“1790 Act”), ch. 15, § 2, 1 Stat. 124, 125 (authorizing recovery of “fifty

³ *See, e.g., Verizon Cal. Inc. v. OnlineNIC, Inc.*, No. C 08-2832, 2009 WL 2706393, at *6-7 (N.D. Cal. Aug. 25, 2009) (rejecting due process challenge to \$50,000-per-violation statutory damages award under Anticybersquatting Consumer Protection Act); *Sadowski v. Med1 Online, LLC*, No. 07 C 2973, 2008 WL 489360, at *5 (N.D. Ill. Feb. 20, 2008) (rejecting due process challenge to \$500-per-violation statutory damages authorized by Telephone Consumer Protection Act); *Arrez v. Kelly Servs., Inc.*, 522 F. Supp. 2d 997, 1008 (N.D. Ill. 2007) (rejecting due process challenge to \$500 damages for failure to provide itemized pay statements); *Arcilla v. Adidas Promotional Retail Operations, Inc.*, 488 F. Supp. 2d 965, 972 (C.D. Cal. 2007) (rejecting due process challenge to \$1,000 award under Fair and Accurate Credit Transactions Act); *Accounting Outsourcing*, 329 F. Supp. 2d at 809-10 (rejecting due process challenge to state statute providing \$500-per-violation damages for unsolicited faxes).

cents for every sheet which shall be found in [the infringer's] possession"). Even before then, states—at the Continental Congress's urging—put in place infringement laws with statutory damages provisions with broad damages ranges comparable to § 504(c). *See Feltner*, 523 U.S. at 351 (citing Massachusetts and Rhode Island statutes authorizing damages between £5 and £3,000 and New Hampshire statute authorizing between £1 and £1,000). These statutory damages provisions have been designed to ensure that “the cost[s] of infringement substantially exceed the costs of compliance, so that persons who use or distribute intellectual property have a strong incentive to abide by the copyright laws.” H.R. Rep. No. 106-216 (1999), at 6.

Although Congress has periodically increased the amount of statutory damages available, “the principle on which [Congress] proceeded -- that of committing the amount of damages to be recovered to the court's discretion and sense of justice, subject to prescribed limitations -- [has been] retained.” *L.A. Westermann*, 249 U.S. at 107.⁴ That wide discretion is an appropriate reflection of the fact that many forms of copyright infringement are easy to accomplish and difficult to detect. Indeed, “[t]he actual

⁴ *See* Copyright Act of 1856, 11 Stat. 138 (authorizing “just” damages of “not less than one hundred dollars for the first, and fifty dollars for every subsequent performance” of a copyrighted work); Copyright Act of 1909, § 25(b), 35 Stat. 1075 (“1909 Act”) (authorizing “just” damages of not less than \$250 or more than \$5,000); Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, § 504(c) (authorizing “just” per-work damages of not less than \$250 or more than \$10,000, or more than \$50,000 for willful infringement); Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (authorizing “just” per-work damages of not less than \$500 or more than \$20,000, or \$100,000 for willful infringement); Digital Theft and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, 113 Stat. 1774 (authorizing “just” per-work damages of not less than \$750 or more than \$30,000, or \$150,000 for willful infringement).

damages capable of proof are often less than the cost to the copyright owner of detecting and investigating infringements.” 1961 Report, at 103. That is all the more true since the harms of copyright infringement are particularly difficult to quantify, and measurement “based solely on the value of the infringing items significantly underrepresents the degree of economic harm inflicted by” infringement. H.R. Rep. 106-216, at 3.

In reviewing statutory damages awards under various copyright infringement provisions, the Supreme Court has repeatedly referred and deferred to Congress’s conclusion that the strong public interest in copyright protection warrants substantial statutory damages even when a plaintiff cannot or does not prove the extent of the injury caused by a particular infringer. *See* Part I, *supra* at 7-9. That determination reflects the Court’s deference to the fact that the Constitution tasks Congress with establishing copyright policy, and that courts “are not at liberty to second-guess congressional determinations and policy judgments” in this arena. *Eldred*, 537 U.S. at 208.

According to Defendant, there is no public interest at issue in this case because Plaintiffs seek to vindicate their “private pecuniary interests” under the Act. (Mot. at 7; *see also id.* at 6, distinguishing Defendant’s infringing conduct from “a public function” such as a railroad.) Nothing could be further from the truth. The protection of *private* parties’ interests in the intellectual property they create furthers the *public*’s substantial interest in “promot[ing] the Progress of Science and useful Arts.” U.S. Const. art. I, § 8. As the Supreme Court has observed, “reward to the author or artist serves to induce release to the public of the products of his creative genius.” *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948). And Congress has used private-party damage

awards as tool to further the public's interest in promoting "the Progress of Science and useful Arts" since the earliest days of our nation. *See* 1790 Act, ch. 15, § 2. Defendant's "public interest" argument, thus, provides no plausible basis upon which to distinguish *Williams*. (Mot. at 6.) Just as in this case, *Williams* involved *private* parties recovering statutory damages from a private actor — recovery that the legislature authorized to further an underlying *public* interest.

Nor is there any basis to second-guess the damages award that the jury returned in this case. The jury's award of \$62,500 per work is in the middle of the range Congress has authorized for willful infringement (up to \$150,000 per work), and is even well below the high end of the range authorized in 1988. *See* 1988 Act (authorizing up to \$100,000 for willful infringement). Indeed, taking inflation into account, the award is well within the range authorized in 1909. *See* 1909 Act, § 25(b) (authorizing damages of not less than \$250 and not more than \$5,000); Bureau of Labor and Statistics Inflation Calculator, http://www.bls.gov/data/inflation_calculator.htm (\$62,500 in 2010 dollars is equivalent to \$2,837.57 in 1913 dollars). Given that infringement awards within comparable ranges have been deemed appropriate "[e]ven for uninjurious and unprofitable invasions of copyright," *F. W. Woolworth*, 344 U.S. at 233, there is no basis to question the appropriateness of a within-range award here.

That is all the more true once the particular circumstances of this case are taken into account. There is no reason to question Congress's determination that use of the Internet to engage in widespread copyright infringement is every bit as detrimental as—if not more detrimental than—other forms of copyright infringement. (*See* Memo. of Law

& Order, Doc. No. 366 at 16, “[I]llegal downloading has caused serious, widespread harm to the recording industry”; *see also* Trial Tr. at 296:14-18, discussing the billions of dollars of damages from peer-to-peer infringement.) And “the potential for this problem to worsen is great” since “the development of new technology will create additional incentives for copyright thieves to steal protected works.” H.R. Rep. 106-216, at 3. Defendant’s own actions underscore the need for strong deterrents against abuses of new technology: Defendant willfully infringed upon over 1,700 copyrights and, to this day, continues to refuse to take responsibility for her actions. (*See* Memo. of Law & Order, Doc. No. 366 at 14, Defendant’s “actions demonstrate a refusal to accept responsibility and raise the need for strong deterrence.”)⁵

Rather than expressly deny as much, Defendant instead contends her infringement is somehow in less need of punishment or deterrence because she “is an individual, not a company.” (Mot. at 6.) As discussed in Part II, *supra* at 12-16, Congress disagrees. Section 504 makes no distinction between “commercial” and “noncommercial” infringement, but rather broadly applies to any “infringer of copyright.” 17 U.S.C. § 504(a).

⁵ The Court should reject Defendant’s misguided contention that “the damages were caused by a shift in technology generally, rather than the particular conduct of the defendant at bar.” (Mot at 11.) Defendant, not the technology, chose to distribute Plaintiffs’ works to millions over the Internet. Blaming the technology only underscores Defendant’s continued unwillingness to take responsibility for her actions. This is particularly true in light of Defendant’s acknowledgment that she was well-aware of the legal issues surrounding infringement on Napster prior to her use of KaZaA.

In sum, once due regard is given to the strong public interest in preventing widespread, illegal file-sharing, the countless opportunities file-sharing presents for infringement, and the need for adherence to copyright laws, and considering the particularly blameworthy conduct of this Defendant, it is clear that an award well within the range that Congress has authorized for willful infringement “cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable.” *Williams*, 251 U.S. at 67.

B. The Jury’s award is constitutional under *Gore*.

Even under the ill-suited *Gore* guideposts, the jury’s award easily withstands constitutional scrutiny. The amount of a punitive damages award will stand unless it clearly appears that the amount “is so great that it indicates passion or prejudice on the part of the jury.” *Moore v. Am. Family Mut. Ins. Co.*, 576 F.3d 781, 791 (8th Cir. 2009); *Asa-Brandt, Inc. v. ADM Investor Servs., Inc.*, 344 F.3d 738, 747 (8th Cir. 2003) (punitive damages award upheld where “there is a reasonable relationship between the punitive damages award and *the harm likely to result from the defendant’s conduct* as well as the harm that has actually occurred” (emphasis in original)); *Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1027 (8th Cir. 2000) (punitive damages award upheld where amount was not “grossly excessive”). The jury’s award is well within the statutory range and those bounds.

First, Defendant’s actions are unquestionably reprehensible in the context of the Copyright Act. *See Gore*, 517 U.S. at 575. As already discussed, *see supra* at 3-5, Defendant engaged in willful copyright infringement knowing that her actions were

illegal. “[E]vidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant’s disrespect for the law.” *Id.* at 576-77. Defendant then exacerbated her willful infringement by engaging in “deliberate false statements, acts of affirmative misconduct, [and] concealment” of her illegal conduct throughout the litigation. *See id.* at 579. Defendant “lied on the witness stand by denying responsibility for her infringing acts and, instead, blamed others, including her children, for her action.” (Memo. of Law & Order, Doc. No. 366 at 21.) Defendant also destroyed evidence, in the form of her original computer hard drive, and intentionally produced false evidence to Plaintiffs, in the form of her new hard drive, which she knew would contain no evidence of her infringement. (Trial Tr. at 150:1-18; 171:2-14; 172:13-173:13; 174:1-175:12; 203:18-205:4; 206:3-9.)

Second, the jury’s award bears a “reasonable relationship” to the harm Defendant caused. *Asa-Brandt*, 344 F.3d at 747. Defendant stole copyrighted songs and distributed them to millions of other users. These actions deprived Plaintiffs of literally immeasurable profits they otherwise could have obtained from sales to both Defendant and the public. By putting copyrighted works in the public domain for free, Defendant contributed to the continuing decline in the value of copyrighted sound recordings and exacerbated the threat to Plaintiffs’ viability as companies that identify and promote continuing and new artists through sales of copyrighted sound recordings. Given that file-sharing has cost the recording industry billions of dollars, there is no basis to question the award here.

Defendant premises her challenge to the jury's award of statutory damages on a factual argument entirely without support in the record. According to her, "a charitable estimate of [Plaintiff's] actual harm is \$1 per song, the price of a song on iTunes, or \$15 per song, the price of an album containing the song at the record store." (Mot. at 8.) Her entire argument flows from the erroneous and unsupported assertion that she simply stole 24 songs, roughly the equivalent of two albums. The record is clear that Defendant did exponentially more than simply steal 24 songs. Defendant intentionally kept these files in her KaZaA shared folder for a long period of time, and Defendant left her computer on and connected to the Internet "all the time." (Trial. Tr. at 181:3-12.) Defendant was well-aware of how peer-to-peer networks, such as KaZaA, worked. By placing and storing these files in her KaZaA shared folder, Defendant was distributing Plaintiffs' copyrighted works in an unlimited, unprotected, and viral method to millions of other users on the KaZaA network, all of whom were looking to download for free. Each one of these millions of users could easily access these files in Defendant's shared folder, download them, and subsequently allow untold numbers of other people to do the same.

Thus, Defendant improperly limits her valuation and damages theory to the harm caused by Defendant's illegal reproduction of 24 songs. In fact, the jury was entitled to, and properly did, consider the substantial harm Defendant caused through both reproduction and distribution of Plaintiffs' works.

Defendant's contentions about a lack of quantifiable harm and reduced culpability because she is an individual, and not a corporation, have no basis in the law and no factual merit. As previously discussed, the Copyright Act does not require proof of

actual harm and does not excuse infringement merely because the infringer is an individual. Equally important, Defendant tried all of these arguments on the jury, and the jury rejected them. The factual record more than adequately supports the jury's rejection. *See Plamp*, 565 F.3d at 462 (evidence must be viewed in light most favorable to jury's verdict).

Third, the reasonableness of the jury's award is reinforced by comparing it to civil penalties authorized by Congress. The award is well within the statutory range for willful infringement, falling in the middle of the damages spectrum. To the extent it is relevant, *see JCB, Inc. v. Union Planters Bank, NA*, 539 F.3d 862, 877 (8th Cir. 2008) (comparison to other jury awards appropriate when no civil penalties are authorized), the award is also within the range that three other juries have determined appropriate for comparable conduct. *See Capitol Records Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1213 (D. Minn. 2008) (\$9,250 per work); *Sony BMG Music Entm't v. Tenenbaum*, 721 F. Supp. 2d 85, 91 (D. Mass. 2010) (\$22,500 per work); *Capitol Records Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045, 1050 (D. Minn. 2010) (\$80,000 per work). Thus, under no theory of constitutional review can it plausibly be said that the jury's award "exceeds the outer boundary of the universe of sums reasonably necessary to punish and deter the defendant's conduct." *Zimmerman v. Direct Fed. Credit Union*, 262 F.3d 70, 81 (1st Cir. 2001).

Regarding the third *Gore* guidepost, Defendant relies on the district court's reasoning in *Sony BMG Music Entm't v. Tenenbaum*. (Mot. at 9.) The *Tenenbaum* opinion, however, only demonstrates the dangers of applying *Gore*, rather than following

the Supreme Court’s teaching in *Williams*. While acknowledging that legislative history should play no role in interpreting an unambiguous statute, *Tenenbaum* used legislative history—post-enactment “history” no less—to inform its analysis under the third *Gore* factor. *Tenenbaum*, 721 F. Supp. 2d at 104-07. Likewise, after acknowledging that statutory damages obviate the need to show the amount of harm suffered, *Tenenbaum* engaged in an extensive analysis of that subject under the guise of applying the second guidepost. *Id.* at 102. And while purporting to defer to Congress’s judgments about reprehensibility, *Tenenbaum* rejected the “proportionate reprehensibility” judgment embodied in § 504(c) (and the first copyright act as well). *Id.* at 115. *Tenenbaum*’s attempt to shoehorn an analysis of statutory damages into the *Gore* framework is ill-fitted and has no place in the deferential review called for by *Williams*.

V. Remittitur Is Not A Viable Means Of Constitutional Avoidance.

The United States has previously intervened in this case and argued that this Court should employ the common-law doctrine of remittitur to avoid Defendant’s constitutional arguments. (United States’ Memo., Doc. No. 352, at 6.) Defendant, however, has explicitly not requested a common-law remittitur. (Mot. at 2 n.2.) Nor would remittitur be appropriate or avoid the constitutional issue.

The Supreme Court has made clear that reviewing courts have no common-law authority under the Copyright Act to reevaluate a factfinder’s determination of what measure of statutory damages is “just.” *See Douglas*, 294 U.S. at 208-10 (rejecting argument that “an appellate court may review the action of a trial judge in assessing an amount in lieu of actual damages, where the amount awarded is within the limits imposed

by the [statute]”). Any within-range award, “in the contemplation of the statute, is just.” *Id.* at 210. As “the language and the purpose of the statute” make clear, “the employment of the statutory yardstick, within set limits, is committed solely to the court which hears the case.” *Id.*; see also *L.A. Westermann*, 249 U.S. at 106 (within the statutory range, “the court’s discretion and sense of justice are controlling”). For that reason, the Court has held that the Copyright Act “takes [statutory damages] out of the ordinary rule with respect to abuse of discretion” review of the amount of a damages award. *Douglas*, 294 U.S. at 210. The premise of common-law remittitur — that a jury award is unsupported by the evidence, see *Taylor v. Otter Tail Corp.*, 484 F.3d 1016, 1020 (8th Cir. 2007) — is therefore inapplicable to a within-range award given the nature of the “just” standard for statutory damages under § 504(c).

Feltner alters the analysis only by making clear that the jury, rather than the judge, is the finder of this fact and by adding a Seventh Amendment violation to the list of reasons why judges cannot second-guess a jury’s within-range award. *Feltner* did not otherwise disrupt “the principle on which [Congress] proceeded -- that of committing the amount of damages to be recovered to the court’s discretion and sense of justice, subject to prescribed limitations.” *L.A. Westermann*, 249 U.S. at 107. Thus, after *Feltner*, a jury’s “conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like, is made the measure of the damages to be paid,” and cannot be disturbed (absent a violation of the *Williams* standard) so long as it is within the statutory limits. *Id.* at 106. To grant a judge common-law authority to displace the jury’s finding on this point would render

meaningless the central holding of *Feltner*, namely, that the Seventh Amendment provides “the right to have a jury determine the *amount* of statutory damages.” *Feltner*, 523 U.S. at 353.

This is especially so in this case. A remittitur is constitutional only if it preserves the jury’s role as factfinder. Accordingly, the Seventh Amendment requires that a plaintiff be given the option of a new trial in lieu of accepting a remitted verdict. *Hetzel v. Prince William County*, 523 U.S. 208, 211 (1998). The option of a new trial is illusory, however, where a succession of remittiturs results in endless retrials with no other recourse for a plaintiff. Three separate juries have now rendered awards well within the statutory range, and any further remittitur to an amount that the Court, rather than the jury, deems acceptable would effectively deny Plaintiffs their Seventh Amendment right “to have a jury determine the *amount* of statutory damages.” *Feltner*, 523 U.S. at 353.

In any event, even if courts had some common-law authority to review within-range awards under the Copyright Act, neither this Court nor a new jury would have any nonconstitutional authority to award damages below the minimum that Congress has mandated. Yet Defendant contends that “even an award of the minimum statutory damages permitted by the Copyright Act would be unconstitutional.” (Mot at 2.) Accordingly, it is clear as a practical matter that this Court will need to consider the constitutional question no matter what amount of statutory damages might ultimately be awarded. And, after three trials in this matter, Plaintiffs now seek to vindicate their right to a verdict that falls within the statutory range under the Copyright Act. A fourth trial of

this matter will not assist the Court in avoiding the Constitutional issues that have been presented.

CONCLUSION

WHEREFORE, Plaintiffs ask that Defendant's Motion be denied.

Respectfully submitted this 4th day of February 2011.

/s/ Timothy M. Reynolds

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