IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

CAPITOL RECORDS INC., *et al.*, Plaintiffs v. JAMMIE THOMAS, Defendant	Civil Action No. 06-cv-1497

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)

INTRODUCTION

In a post-trial brief, defendant has made an as-applied challenge to the constitutionality of the statutory damages provision of the Copyright Act, 17 U.S.C. § 504(c). Defendant requests that the Court alter or amend the judgment entered in this case, on the ground that the jury's statutory damages award is unconstitutional as a violation of due process. The United States files this memorandum to defend the constitutionality of 17 U.S.C. § 504(c).

Although defendant has not moved alternatively for remittitur, the United States respectfully submits that under the doctrine of constitutional avoidance this Court should first determine whether remittitur is appropriate *before* deciding the constitutional question. Determining whether remittitur is appropriate may obviate the need to decide the constitutional issue as well as avoid a substantial question as to whether this Court could enter judgment for a reduced amount of statutory damages without violating the Seventh Amendment right to a jury trial mandated by the Supreme Court.

If it is necessary to reach the constitutional question to resolve defendant's motion,

then defendant's motion should be rejected because Congress' carefully crafted statute satisfies the Due Process Clause. As an initial matter, the correct standard for determining whether such an award violates due process was set forth by the Supreme Court in *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919), rather than in the Supreme Court's punitive damages jurisprudence. *See* Defendant's Motion to Alter or Amend the Judgment and Renewed Motion for Judgment as a Matter of Law (Dkt. #437) ("Def's Mem.") at 7-12 (citing *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003), and *BMW of North Am., Inc. v. Gore*, 517 U.S. 559 (1996)). This deferential standard is significantly less demanding than the standard applicable to punitive damages. Under *Williams*, a court is to examine whether an award within a statutory range is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable" by considering whether Congress has given "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]." *Williams*, 251 U.S. at 67.

The application of the Copyright Act's statutory damages provision in this case withstands constitutional scrutiny under the test adopted by the Supreme Court in *Williams*. In enacting the current statutory damages provision of the Copyright Act, Congress has given such regard to the public's interests, the opportunity to repeatedly commit this statutory violation, and the need to ensure adherence to the law. *Id*. at 67. Congress has established a regime to protect intellectual property that dates back to before the beginning of the Republic. The current damages range provides compensation for copyright owners because, *inter alia*, there exist situations in which actual damages are hard to quantify. Furthermore, in establishing that range, Congress took into account

the need to deter the millions of users of new media from infringing copyrights in an environment where many violators believe that they will go unnoticed. Accordingly, the statutory range specified by Congress for a copyright infringement satisfies due process.

BACKGROUND

I. Statutory Background

The remedy of statutory damages for copyright infringement dates back to the Statute of Anne in 1710. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 349 (1998). "In 1783, the Continental Congress passed a resolution recommending that the States secure copyright protections for authors." *Id*. at 350. Three of the twelve States that responded to this resolution "specifically authorized an award of damages from a statutory range, just as § 504(c) does today." *Id*. at 351.

An award of statutory damages for copyright infringement was first authorized under U.S. federal law almost immediately following the adoption of the Constitution. Under the Copyright Act of 1790, enacted by the First Congress, each infringer of a copyright was liable for "the sum of fifty cents for every sheet which shall be found in his or their possession." 1 Stat. 124, 125 (1790). Each subsequent modification of the Copyright Act has maintained a statutory damages provision.

The statutory damages provision at issue in this case was first enacted as part of the Copyright Act of 1976, and the amounts have been adjusted twice since that time, most recently in 1999. *See* Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, § 1 (1999). Under the Copyright Act of 1976, and the law in effect today, "an infringer of copyright is liable for either -- (1) the copyright owner's actual damages and any additional profits of the infringer" or (2) "statutory damages." 17 U.S.C. § 504(a). The copyright owner may elect to recover

statutory damages instead of actual damages and profits at any time before final judgment is rendered. *Id*. § 504(c)(1).

Under the 1976 law, if the copyright violation was not willful, the copyright owner was entitled to recover statutory damages of between $250 and $10,000 per infringed work. Pub. L. No. 94-553, § 22 (1976). If the violation was willful, the maximum statutory damages award increased to $50,000 per work. *Id*. In the 1999 amendment, Congress increased the statutory damages range to its current level: between $750 and $30,000 per infringed work in cases involving non-willful violations, with a maximum of $150,000 per infringed work for willful violations. *See* Pub. L. No. 106-160, § 2; *see also* 17 U.S.C. 504(c).[1] Congress explained that the increase was necessary not just to adjust for inflation but also because:

> 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.

H.R. Rep. 106-216, at 3 (1999).

II. Procedural Background

On April 19, 2006, plaintiffs filed this action for copyright infringement. *See* Dkt. #1. After discovery and trial, a first jury found that defendant had willfully infringed 24 copyrights owned by plaintiffs and awarded $9,250 per infringement for a total of $222,000. *See* Dkt. # 106. Defendant moved to set aside that verdict or have a new trial based on, in part, a challenge to the constitutionality of the jury's statutory damages

[1]An intermediate amendment of the 1976 Act set the range at $500 to $20,000, with a willfulness enhancement of up to $100,000. 102 Stat. 2853, 2860 (1988).

award. *See* Dkt. # 109. The United States moved to intervene, which this Court granted, to defend the constitutionality of the statutory damages provision. *See* Dkt. #s 129, 134. This Court did grant the motion for a new trial, but on grounds unrelated to the amount of damages awarded. *See* Dkt. # 197.

After a second trial, the jury awarded plaintiffs $1.92 million in statutory damages – $80,000 for each of the 24 songs for which the jury found plaintiff had willfully infringed a copyright. *See* Dkt. #338. Defendant again moved for a new trial, remittitur, and to alter or amend the judgment and again challenged the constitutionality of the Copyright Act's statutory damages provision as applied. *See* Dkt. #344. The United States filed a brief to defend the constitutionality of the Copyright Act's statutory damages provision. This Court avoided the constitutional issue and reduced the award under the "common law" doctrine of remittitur to $2,250 per sound recording infringed (an amount within the statutory range). *See* Court Memorandum of Law & Order ("Court Remit. Order") (Dkt. #366). Because plaintiffs have a Seventh Amendment right to a jury trial, this Court deferred amending the judgment pending notification of whether plaintiffs would accept the remitted amount or elect to have a new trial. *See id*. Plaintiffs elected to have a new trial.

The third jury awarded plaintiffs $1.5 million in statutory damages, $62,500 per infringement. *See* Dkt. #428. Defendant has again challenged the constitutionality of the award but does not move alternatively to reduce the award under the "common law" doctrine of remittitur. The United States now files this memorandum to defend the constitutionality of the statutory damages provision of the Copyright Act.

ARGUMENT

I. THIS COURT SHOULD FIRST DETERMINE WHETHER THE CONSTITUTIONAL QUESTIONS RAISED BY DEFENDANT CAN BE AVOIDED.

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."); *see also Feltner*, 523 U.S. at 345-47 (reaching the constitutional question after determining that the statute cannot be construed in a way that would avoid the necessity of reaching that constitutional question); *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 of which would lead to the same result, we choose the narrowest ground in order to avoid unnecessary adjudication of constitutional issues").

In this case, the Court may be able to avoid the constitutional question by deciding defendant's motion on grounds that do not implicate the constitutionality of the Copyright Act's statutory damages provision or the constitutionality of the jury award of $62,500 per infringement. Specifically, the Court could decide that the award should be reduced under the "common law" doctrine of remittitur. This is not to suggest an answer to the question of whether the award should be remitted in this particular case, but rather to suggest that an answer to such a question should precede any resolution of Mrs. Thomas's constitutional arguments.

The Copyright Act does not eliminate the discretion a trial judge otherwise has under common law to remit a jury award of statutory damages, so long as the remitted damages remain within the statutory range. If the Court determines that remittitur is

required, it may exercise its "discretion," 17 U.S.C. § 504(c)(2), and calculate a different amount within the statutory range that the Court deems "just," 17 U.S.C. § 504(c)(1). *See F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 232 (1952) (holding that in the context of an earlier version of the Copyright Act "the court'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, but with the express qualification that in every case the assessment must be within the prescribed limitations, that is to say, neither more than the maximum nor less the minimum. *Within these limitations* the court's discretion and sense of justice are controlling.") (emphasis added) (citation omitted); *see also Superior Forms Builder, Inc. v. Dan Chase Taxidermy Supply Co., Inc.*, 74 F.3d 488, 496-97 (4th Cir. 1996) (identifying several factors a court may use to review a jury's damages award within the statutory range).[2]

This Court, however, should reject defendant's attempt to have this Court address the constitutional question without addressing the non-constitutional standard for remittitur. *See* Def's Mem. at 2 n.2 ("In light of plaintiffs' demonstrated unwillingness to accept a reduced judgment, the defendant does not request common-law remittitur."). Should the Court remit the award to a figure lower than the $62,500 per infringement that the jury awarded (but still within the statutory range), it would be unnecessary to answer the question of whether the particular $1.5 million verdict in this instance is

[2]Although the Supreme Court has held that there is a Seventh Amendment right to a jury trial to decide the proper damages award in a copyright case, *see Feltner*, 523 U.S. 340, this Circuit has found outside of the copyright context that a district court may remit an award even when there is such a Seventh Amendment right to a jury trial as long as it offers a plaintiff the opportunity to accept the remitted amount or elect to have a new trial. *See Thorne v. Welk Inv., Inc.*, 197 F.3d 1205, 1212 (8th Cir. 1999).

unconstitutional.[3]

In determining whether to first address whether the award should be remitted, it is immaterial that plaintiffs did not accept the remitted amount after the previous trial. By remitting the second jury's award and allowing a retrial on damages, this Court avoided having to decide whether the prior award – $80,000 per infringement – exceeded due process. Although the latest award is higher than this Court's proposed remitted amount following the second trial, that does not necessarily mean that a future jury would not return a verdict similar to what this Court proposed. Further, to the extent that a future jury returned a verdict larger than the remitted amount, it may also inform the Court whether any of these verdicts were indeed excessive.

In any event, it is important for this Court to offer the plaintiffs the opportunity to accept a reduced amount because there is a serious question as to whether the Seventh Amendment would be violated should this Court reduce the award on constitutional grounds. The Supreme Court has held that there is a Seventh Amendment right to a jury trial to decide the proper damages award in a copyright case. *See Feltner*, 523 U.S. 340. Although the Eighth Circuit has found that the Seventh Amendment does not limit a court's authority to enter a reduced amount of *punitive damages* if the jury award is deemed excessive, *see Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041, 1050 (8th Cir. 2002), "the level of punitive damages is not really a 'fact' 'tried' by the jury," *see Cooper Indus. Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 (2001). In

[3] Defendant also suggests that the statutory minimum would be unconstitutional, *see* Def's Mem. at 2, but this Court should first determine on non-constitutional grounds what is the actual award before examining the constitutional question. Nevertheless, as explained below, *see infra* at 9-22, the statutory minimum satisfies due process as it is within the statutory range that Congress established after giving "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]." *Williams*, 251 U.S. at 67.

contrast, statutory damages under the Copyright Act have compensatory as well as deterrent elements and, under *Feltner*, they *must* be tried by a jury if a jury trial is requested. *See Feltner*, 523 U.S. at 354.

This Court should first determine whether the jury award should be reduced under the "common law" doctrine of remittitur before addressing the constitutional question. By following this route, this Court would not only possibly avoid addressing the due process issue but would also avoid potentially implicating plaintiffs' Seventh Amendment Right to a jury trial.

II. THE COPYRIGHT ACT'S STATUTORY DAMAGES PROVISION SATISFIES DUE PROCESS.

Should the Court find it necessary to address defendant's constitutional challenge after considering "common law" remittitur, it should hold that an award pursuant to the Copyright Act's statutory damages provision comports with due process. Indeed, the statutory benchmark for awarding statutory damages (a "just" amount within the statutory range, 17 U.S.C. § 504(c)(1)), is as favorable to the defendant (if not more favorable) than the constitutional limit set by *Williams*, under which a court may strike down a statutory award as a violation of due process only if it is "so severe and oppressive as to be wholly disproportioned to the offense [or] obviously unreasonable" because Congress has not given "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]." *Williams*, 251 U.S. at 67. It follows, therefore, that any award within the statutory range that a jury originally finds as "just," or that the Court considers "just" after remitting the original award for being "grossly excessive" as to create a "plain injustice" or a "monstrous" or "shocking result," *see Eich v. Borad of Regents for Cent. Missouri State Univ.*, 350 F.3d 752, 763 (8th Cir. 2003) (quotation omitted), necessarily satisfies the

constitutional review standard of *Williams.* Accordingly, this Court should reject any attempt by defendant to challenge the constitutionality of the statutory damages provision.

A. Courts Examine Statutory Damages Awards Under The Standard Articulated By The Supreme Court In *Williams.*

In arguing that the jury award in this case violates due process, defendant erroneously states that the standard to apply in the statutory damages context is the same as that in the punitive damages context. *See* Def's Mem. at 3. The line of authority for punitive damages does not provide the appropriate standard for determining whether statutory damages awards violate the Due Process Clause. Rather, the applicable standard is set forth in *Williams*. 251 U.S. at 64, 67 (holding that a statutory damages award of $75, for a violation that resulted in actual damages of only 66 cents, was within the statutorily-authorized range of $50 to $300 and did not violate due process). The *Williams* standard is quite distinct from, and much more deferential than, the framework articulated in *BMW of North Am., Inc. v. Gore*, 517 U.S. 559 (1996) and its progeny.[4]

In arguing that the standard for assessing a statutory damages award is the same as that in assessing a punitive damages award, plaintiffs rely on the recent decision in *Sony BMG Music Entertainment v. Tennenbaum*, 721 F.Supp.2d 85 (D.Mass. 2010), which also addressed peer-to-peer music file sharing. *See* Def's Mem. at 3. The Court in *Tennenbaum* noted that it was reviewing the award under both *Williams* and the punitive damages standards, *see Tennenbaum*, 721 F.Supp.2d at 101, but in effect it reviewed the award under the *Gore* framework, *see id*. at 103-116. That decision is currently on appeal

[4] The *Gore* framework assesses an award of punitive damages based on (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and civil penalties authorized or imposed in comparable cases. 517 U.S. at 575.

with briefing ongoing before the First Circuit. Although the *Tennenbaum* Court stated that there was a split in authority in whether *Williams* or *Gore* applied, it did not cite a single case that applied *Gore* outside of the punitive damages context; all the cases cited were either in dicta or applications of a statutory punitive damages provision. *See id*. at 101 n.10. In contrast, courts have consistently applied the *Williams* standard, rather than punitive damages jurisprudence, in assessing the constitutionality of statutory damages. *See Zomba Enters., Inc*. *v. Panorama Records, Inc.*, 491 F.3d 574, 587–88 (6th Cir. 2007) (concluding application of the Copyright Act's statutory damages provision did not violate the *Williams* standard); *Centerline Equip. Corp. v. Banner Personnel Services, Inc.*, 545 F. Supp. 2d 768, 777–78 (N.D. Il.) (applying the *Williams* standard to uphold the statutory damages provision of the Telephone Consumer Protection Act); *Accounting Outsourcing, LLC v. Verizon Wireless Pers. Commc'n, L.P.*, 329 F. Supp. 2d 789, 808–10 (M.D. La. 2004) (same); *Texas v. American Blastfax, Inc.*, 121 F. Supp. 2d 1085, 1091 (W.D. Tex. 2000) (same).

The framework articulated in *Gore* for assessing punitive damages is not applicable to statutory damages because the two remedies are distinct. Punitive damages are awarded by a jury to punish a wrongdoer; the jury's discretion in choosing an amount is usually unconstrained. Statutory damages, on the other hand, exist in large part to compensate victims of wrongdoing in areas where actual damages are difficult to calculate or prove. *See Cass County Music Co. v. C.H.L.R. Inc.*, 88 F.3d 635, 643 (8th Cir. 1996) ("statutory damages are by definition a substitute for unproven or unprovable actual damages"); *see also Lowry's Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 460 (D. Md. 2004). The discretion in choosing an amount of statutory damages, moreover, is constrained by the carefully crafted statute. As a result of these differences,

statutory damages do not implicate the due process issue of fair notice and unconstrained discretion that concerned the Supreme Court in *Gore*, *see Gore*, 517 U.S. at 574 ("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[.]"); rather, a statutory damages provision by its nature puts individuals on notice of a specific range of damages to which they may be subject, *see id*. at 595 (Breyer, J., concurring) (noting the absence of "legislative enactments [in *Gore*] that classify awards and impose quantitative limits that would significantly cabin the fairly unbounded discretion created by the absence of constraining legal standards"); *Lowry's Reports*, 302 F. Supp. 2d at 460 ("The unregulated and arbitrary use of judicial power that the *Gore* guideposts remedy is not implicated in Congress' carefully crafted and reasonably constrained [Copyright] statute."); *DirecTV, Inc. v. Cantu*, 2004 WL 2623932, at *4–*5 (W.D. Tex. Sept. 29, 2004) (rejecting due process claim and distinguishing *Gore* from statutory damages context because "fair notice is not a concern here"); *Accounting Outsourcing, LLC v. Verizon Wireless Pers. Commc'n, L.P.*, 329 F. Supp. 2d at 808–10.

Indeed, attempting to apply the *Gore* framework to statutory damages further demonstrates that ill fit. It does not make sense in the context of statutory damages to examine the disparity between the actual damages suffered by a plaintiff and the punitive damages award as required by *Gore*, *see Gore*, 517 U.S. at 575, because statutory damages may only be awarded when a plaintiff forgoes the right to recover actual damages, *Lowry's Reports*, 302 F. Supp. 2d. at 460, and are, in fact, a substitute or proxy for actual damages. Furthermore, statutory damages compensate those wronged in areas in which actual damages are hard to quantify in addition to providing deterrence to those

inclined to commit a public wrong. *See* Court Remit. Order at 9 ("The statutory damages provision of the Copyright Act has both deterrent and compensatory components") (citing *Cass County Music Co.*, 88 F.3d at 643); *see also F.W. Woolworth*, 344 U.S. at 233 ("The statutory rule, formulated after long experience, not merely compels restitution of profit and reparation for injury but also is designed to discourage wrongful conduct."); *see also, e.g., American Blastfax, Inc.*, 121 F. Supp. 2d at 1090 (the Telephone Consumer Protection Act "was meant to '*take into account the difficult to quantify business interruption costs* imposed upon recipients of unsolicited fax advertisements, effectively deter the unscrupulous practice of shifting these costs to unwitting recipients of junk faxes, and provide adequate incentive for an individual plaintiff to bring suit on his own behalf.'") (quoting *Kenro, Inc. v. Fax Daily, Inc.*, 962 F.Supp. 1162, 1166 (S.D. Ind. 1997)) (emphasis added) (quotations omitted). "[T]here is no way to ascertain the precise amount of damages caused by Defendant's actions in not only improperly downloading Plaintiffs' Copyrighted Recordings himself but also subsequently distributing some or all of Plaintiffs' Copyrighted Recordings to a vast community of other persons on KaZaA." *See Anderson v. Atlantic Recording Corp. v. Anderson*, 2008 WL 2316551 at *9 (S.D. Tex. March 12, 2008).

A further indication that the Supreme Court did not intend for its punitive damages jurisprudence to apply to statutory damages is that the *Gore* guideposts specifically compare a punitive damages award to civil penalties available for comparable conduct. *See Gore*, 517 U.S. at 575; *id*. at 583 ("[A] reviewing court engaged in determining whether an award of punitive damages is excessive should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue.") (quotations omitted). Thus, even in *Gore*, the Supreme Court differentiates statutory

damages based on legislative judgments, which are to be accorded "substantial deference," from punitive damages awards. Indeed, applying this guidepost from *Gore* in the context of statutory damages would be a tautology: a statutory damages award is by definition within the statutory range set by Congress.

Lastly, the *Williams* standard properly examines the role of statutory damages in righting public harms. *Williams*, 251 U.S. at 67 (considering whether there has been "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]."). In contrast, the Supreme Court has held that the effect of public harm should be limited in assessing the proper amount of punitive damages. *Philip Morris USA v. Williams*, 549 U.S. 346, 353-54 (2007). The very essence of statutory damages is to address public harms that are difficult to quantify and to deter others from committing those public harms. Given the sharp distinctions between statutory and punitive damages, this Court should apply the *Williams* standard in assessing the constitutionality of the application of the Copyright Act's statutory damages provision in this case.

B. The Copyright Act's Statutory Damages Provision Satisfies The *Williams* Standard.

The *Williams* standard is extremely deferential and does not turn on a particular ratio between statutory and actual damages. *See Zomba*, 491 F.3d at 587 (describing the *Williams* standard as "extraordinarily deferential—even more so than in cases applying abuse-of-discretion review") (citing *Douglas v. Cunningham*, 294 U.S. 207, 210 (1935) ("[E]mployment of the statutory yardstick, within set limits, is committed solely to the court which hears the case, and this fact takes the matter out of the ordinary rule with

respect to abuse of discretion.")).[5] Rather, "[t]he ultimate question" according to *Williams* is "whether a penalty" within the statutory range is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *See Williams*, 251 U.S. at 66-67. To make such a determination, a court is to examine whether a legislature has given "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*. at 67. Defendant's constitutional attack on an award within the Copyright Act's statutory range fails under this standard and should be rejected.

Dating back to the middle of the 17th century, "the common law recognized an author's right to prevent the unauthorized publication of his manuscript" because of "the principle that the manuscript was the product of intellectual labor and was as much the author's property as the material on which it was written." *Feltner*, 523 U.S. at 349. The first Congress recognized the need to protect this intellectual labor by enacting a federal statutory damages provision for copyright infringement in 1790. *See* Copyright Act of 1790, 1 Stat. 124, 125 (1790). Federal copyright law has authorized the awarding of statutory damages for copyright infringement in some form ever since, and the Court should defer to Congress' historical application of these provisions. *See* Staff of H. Comm. On The Judiciary, 87th Cong., Rep. of the Register of Copyrights on The General Revision of The U.S. Copyright Law (Comm. Print 1961), at ix (tracing the federal copyright statute from 1790 to its three general revisions in 1831, 1870, and 1909).[6]

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[5] The Sixth Circuit did use an objective ratio test in *Zomba* and found that a ratio of 44:1 of statutory damages to actual damages did not violate due process given that the ratio in *Williams* was 113:1. *See Zomba*, 491 F.3d at 588. But, as in this case, actual damages are not always calculable.

[6] This report, written in 1961, was part of an extensive review, by the Copyright Office, of the history, purposes, and effects of the Copyright Act. It culminated in

The Supreme Court has emphasized the weight to be afforded to the historical practices of the Congress in copyright, especially the First Congress, in evaluating constitutional challenges to the Copyright Act. In *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884), the Court upheld the extension of copyright protection to photographs under the Copyright Clause and in so doing held that "[t]he construction placed upon the constitution by the first act of 1790 and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive." *Id*. at 57. More recently, the Supreme Court reaffirmed, in upholding the constitutionality of copyright term extensions, that "[t]o comprehend the scope of Congress' Copyright Clause power, a page of history is worth a volume of logic." *Eldred v. Ashcroft*, 537 U.S. 186, 188 (2003) (quotation omitted).

The Copyright Act's statutory damages provision serves both to compensate and deter. Congress established a scheme to allow copyright owners to elect to receive statutory damages for copyright infringement instead of actual damages and profits because of the difficulty of calculating and proving actual damages. *F.W. Woolworth*, 344 U.S. at 231 (noting statutory damages are intended to allow "the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits"); *Lowry's Reports*, 302 F. Supp. 2d at 460 ("Statutory damages exist in part because of the difficulties in proving—and

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Congress' enactment of the 1976 Copyright Act.

providing compensation for—actual harm in copyright infringement actions.").[7] As the Copyright Office explained in its 1961 report to Congress, the need for statutory damages in the context of copyright infringement "arises from the acknowledged inadequacy of actual damages and profits in many cases:

> - The value of a copyright is, by its nature, difficult to establish, and the loss caused by an infringement is equally hard to determine. As a result, actual damages are often conjectural, and may be impossible or prohibitively expensive to prove.
>
> - In many cases, especially those involving public performances, the only direct loss that could be proven is the amount of a license fee. An award of such an amount would be an invitation to infringe with no risk of loss to the infringer.
>
> - The actual damages capable of proof are often less than the cost to the copyright owner of detecting and investigating infringements.
>
> - An award of the infringer's profits would often be equally inadequate. There may have been little or no profit, or it may be impossible to compute the amount of profits attributable to the infringement. Frequently the infringer's profits will not be an adequate measure of the injury caused to the copyright owner."

Staff of H. Comm. On The Judiciary, 87th Cong., Rep. of the Register of Copyrights on The General Revision of The U.S. Copyright Law (Comm. Print 1961), at 102–03.

Because actual damages are so hard to quantify, a court cannot look at the relation between the award and actual damages in assessing the constitutionality of the award; the actual damages are unknowable. The inadequacy of actual damages and profits to compensate copyright owners is evident under the circumstances of this case. It is

[7] The compensatory component of statutory damages is reflected in Congress' concern that the 1999 adjustment of the statutory damages range from the 1988 Amendments "reflect inflation over the past eleven years." *See* H.R. Rep. No. 106-216, at 6 (1999).

impossible for a copyright owner to calculate actual damages when an online media distribution system is used to distribute illegally copies of its copyrighted sound recordings; the number of subsequent acts of infringement by computer users who download illegal copies of the sound recordings from the original infringer is simply unknowable. Additionally, it is costly for owners of copyrighted sound recordings to detect and investigate copyright infringement because of the widespread, somewhat anonymous, nature of such infringement in today's world of advanced computer technologies. *See* H.R. Rep. No. 106-216, at 3 ("[C]opyright piracy of intellectual property flourishes, assisted in large part by today's world of advanced technologies.").

Rather than looking at the actual damages, the Supreme Court instructs courts to look at the public harm Congress is seeking to deter when assessing the propriety of a statutory damages range. *See Williams*, 251 U.S. at 66 (observing that the "[l]egislature may adjust [the] amount (of statutory damages) to the public wrong rather than the private injury"). Here, the harms to the owners of copyrighted sound recordings and to the public are substantial. And these harms are not negated merely because an infringer using an online media distribution system does not seek commercial gain. Such infringement can limit a copyright owner's (or their authorized licensees') ability to distribute legal copies of copyrighted sound recordings. *See* H.R. Rep. No. 105-339, at 5 (acknowledging the harm of infringement without commercial gain on businesses that depend on licensing agreements and royalties). It can also reduce a copyright owner's profits by permitting individuals who would otherwise be required to purchase copies of copyrighted sound recordings to obtain illegal copies for free.

A central element of the Copyright Act's statutory damages provision is to deter individuals from engaging in conduct that is harmful to the public. *See F.W. Woolworth*,

344 U.S. at 233 ("The statutory rule, formulated after long experience, not merely compels restitution of profit and reparation for injury but also is designed to discourage wrongful conduct."). In increasing the range of statutory damages in the 1999 amendments to the Copyright Act, Congress stated, "[i]t is important that the cost 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, at 6. Congress noted that, in 1999, the rate of software piracy equaled 25% of all sales in the United States and resulted in a loss of $2.9 billion to copyright owners. *Id*. at 3. According to Congress, further deterrence was necessary to prevent similar losses in the future because "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." *Id*. Congress further recognized that infringement harms the public because the high volume of infringement results in "lost U.S. jobs, lost wages, lower tax revenue, and higher prices for honest purchasers of copyrighted [sound recordings]." H.R. Rep. No. 106-216, at 3.

This Court has also recognized that peer-to-peer networking and illegal downloading in the aggregate "has caused serious, widespread harm to the recording industry." *See* Court's Remit. Order at 16. Such a cumulative effect, in which there are "numberless opportunities for committing the offense" creates a great public harm so as to require a "uniform adherence" to the law. *See Williams*, 251 U.S. at 67 (finding that due process is satisfied if the legislature has given "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]."). One study has estimated that global music piracy

causes the loss of (1) $12.5 billion of annual economic output in the United States, (2) 71,060 American jobs, (3) $2.7 billion in annual earnings to American workers, and (4) $422 million in annual U.S. tax revenue. *See* Stephen E. Siwek, *The True Cost of Sound Recording Piracy to the U.S. Economy*, Institute for Policy Innovation, Policy Report 188, August 2007, *available at* http://www.ipi.org (follow "The True Cost of Sound Recording Piracy to the U.S. Economy" hyperlink under Publications for 2007) (last visited February 1, 2011). Similarly, as Judge Murphy of this Circuit has noted, in dissenting on an issue unrelated to the one presently before this Court, "[a]nnual losses to copyright owners even *before the expansive growth in peer to peer file sharing* were estimated to be $11 to $20 billion," *see In re Charter Commc'ns, Inc.*, 393 F.3d 771, 779 (8th Cir. 2005) (Murphy, J., *dissenting*) (citing H. Rep. 205-339, at 4 (1997) (emphasis added), and this harm extends to "[l]ocal music retailers" and "artists" who "can lose economic incentive to create and distribute works," *id*.

The public harm done by copyright infringement is not limited to when the infringer is seeking commercial gain. *See F.W. Woolworth*, 344 U.S. at 233 ("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 [of deterrence]."). Whether one is seeking commercial gain or not plays no role in how Congress constructed the statutory range to deter the public harm of copyright infringement; a statutory distinction should not be created where none exists.[8] Further, as Judge Murphy of this Circuit stated, "[t]he repercussions of infringement via the internet

[8] A statutory distinction does exist in the criminal context. *See* 17 U.S.C. § 506(a)(1)(A). "[W]here 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." *See Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted).

are too easily ignored or minimized. Regarded by some as an innocuous form of entertainment, internet piracy of copyrighted sound recordings results in substantial economic and artistic costs." *In re Charter Commc'ns, Inc.*, 393 F.3d at 778 (Murphy, J., *dissenting*). Congress recognized this reality when considering the potential detrimental effect that new technology could have on copyrights:

> 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.

See H.R. Rep. No. 106-216, at 3 (1999).

Copyrights are of great value, not just to their owners, but to the American public as well. Congress has recognized this value from the first days of the Republic. The federal copyright statute, enacted by the First Congress and subject to numerous revisions since that time, has consistently authorized the awarding of statutory damages to ensure significant monetary awards in copyright infringement lawsuits that will make copyright owners whole and deter further infringement. This historical approach is followed in the current version of the Copyright Act's statutory damages provision; it provides compensation to copyright owners who have to invest resources into protecting property that is often unquantifiable in value and deters those infringing parties who think they will go undetected in committing this serious public wrong. Congress' expressed desire to increase deterrence, accompanied by congressional findings, demonstrates that Congress gave due regard to the public harm, opportunities to commit multiple violations, and need

to ensure compliance with the law in establishing its statutory range.[9] The Court should defer to Congress' reasoned judgment. The proper place for any policy debate of what should be the level of deterrence resides in the halls of Congress.

CONCLUSION

The United States respectfully requests that the Court first determine whether defendant's motion can be resolved without reaching the constitutional issue presented. If, however, the Court finds it necessary to address the constitutionality of the application of 17 U.S.C. § 504(c), it should find that it satisfies the Due Process Clause.

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[9] This issue is not just confined to the United States but is evident in United States' international agreements that require countries to have in place statutory damages to protect copyrights. *See, e.g.*, United States-Singapore Free Trade Agreement, Art. 16.9.9, May 6, 2003; United States-Morocco Free Trade Agreement, Art. 15.11.7, June 15, 2004; Central America Free Trade Agreement, Art. 15.11.8, Aug. 5, 2004.

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