

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

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CAPITOL RECORDS, INC., SONY BMG MUSIC ENTERTAINMENT,  
ARISTA RECORDS LLC, INTERSCOPE RECORDS, WARNER BROS.  
RECORDS INC., and UMG RECORDINGS, INC.,

*Plaintiffs-Appellants/Cross-Appellees,*

v.

JAMMIE THOMAS-RASSET,

*Defendant-Appellee/Cross-Appellant.*

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On Appeal from the United States District Court  
for the District of Minnesota

District Court No. 06-cv-1497-MJD

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**BRIEF OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.,  
AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rules 26.1 and 29(c)(1) of the Federal Rules of Appellate Procedure:

The Motion Picture Association of America, Inc. certifies that it has no parent corporation, and that no publicly held corporation owns 10% or more of its stock.

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## IDENTITY AND INTEREST OF *AMICUS CURIAE*<sup>\*</sup>

The Motion Picture Association of America, Inc. (MPAA) is a not-for-profit trade association founded in 1922 to address issues of concern to the U.S. motion picture industry. Its members include Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc. MPAA members and their affiliates are the leading producers and distributors of filmed entertainment in the theatrical, television, and home entertainment markets—both domestically and abroad. They depend heavily upon the protection afforded by the U.S. Copyright Act, as well as copyright laws worldwide, to ensure the continued creation and availability of their works.

The district court rendered two rulings of significant concern to MPAA and its members. *First*, the court determined that the Copyright Act fails to protect copyright owners' exclusive right to make works publicly available— notwithstanding that various multilateral and bilateral international treaties obligate the United States (and numerous other countries) to provide a right of “making

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\* No party's counsel authored this brief in whole or in part. No party or a party's counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus curiae* or its counsel made such a monetary contribution. MPAA submits this brief, with the consent of all parties, pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.

available” and notwithstanding that the Legislative and Executive branches, in ratifying and implementing those treaties, believe the Copyright Act provides that right. *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008). The court misconstrued the Copyright Act. As the Legislative and Executive branches have opined, the making available right falls squarely within the exclusive rights that Section 106 of the Act affords copyright owners. That right is, in fact, an international copyright norm. The right has particular importance in a digital age where unauthorized third parties routinely make available valuable copyrighted works for instantaneous dissemination to millions of Internet users around the globe. MPAA has a strong interest in ensuring that the United States honors its international copyright commitments and that U.S. copyright law conforms to the international standards for which the United States itself has advocated.

*Second*, MPAA has a strong interest in correcting the district court’s erroneous ruling that the Due Process Clause requires “some relation” between a statutory damages award and the “actual damages suffered.” *Capitol Records, Inc. v. Thomas-Rasset*, No. 06-cv-1497, 2011 WL 3211362, at \*11 (D. Minn. July 22, 2011). That ruling improperly would require copyright owners who elect statutory damages to present proof of actual damages. Requiring such proof would significantly alter well-established ground rules for copyright litigation, add

substantial practical burdens and unreasonably increase the costs of pursuing such litigation, and defeat Congress’s goal of providing copyright holders with an alternative form of relief to enforce their copyrights.

## ARGUMENT

### I. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT THE COPYRIGHT ACT DOES NOT CONTAIN A MAKING AVAILABLE RIGHT

The Copyright Act grants copyright owners the exclusive right “to distribute” and “to authorize” distribution of “copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending.” 17 U.S.C. § 106(3). Appellants correctly argue (Br. 26-42) that the right to make copyrighted works available to the public—such as by placing (or authorizing others to place) those works on servers or computers accessible to Internet users—falls within, *inter alia*, the Section 106(3) rights. As a leading treatise on copyright law concludes, “the intent of Congress was to incorporate a ‘make available’ right into the copyright owner’s arsenal” without requiring copyright owners “to show consummated acts of actual distribution.” NIMMER ON COPYRIGHT § 8.11[D][4][c] (Matthew Bender & Co., Inc. 2011).

The district court adopted a contrary and incorrect reading of the Copyright Act. It concluded that Section 106(3) affords only a right of “actual dissemination,” requiring proof that specific individuals actually received specific

works a defendant makes available. 579 F. Supp. 2d at 1226. In reaching that conclusion, the district court violated a fundamental principle of statutory construction—courts must construe a statute in conformity with the United States’ international obligations if at all possible.

Several multilateral and bilateral treaties require the United States to provide “a making-available right that is not dependent on proof that copies were actually transferred to particular individuals.” *Id.* at 1225. Both the Legislative and Executive branches have “indicated their belief that the Copyright Act implements [the] make-available right.” *Id.* at 1226. Various courts and copyright scholars have done the same. *See* Appellants’ Br. 27-28, 35-39. Under these circumstances, the court erred by failing to interpret the Copyright Act consistently with U.S. international obligations. By casting doubt on whether the United States honors its international copyright commitments, the court’s decision will undermine the ability of U.S. copyright owners to secure effective worldwide copyright protection.

**A. Multiple International Agreements Require The United States To Afford Copyright Owners An Exclusive Right Of Making Available**

1. In 1998, Congress ratified the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), and enacted implementing legislation as part of the

Digital Millennium Copyright Act (DMCA). *See* Pub. L. No. 105-304, 112 Stat. 2861 (1998). The purpose of these treaties is to ensure adequate worldwide protection of copyrighted works “at a time when borderless digital means of dissemination are becoming increasingly popular.” H.R. Rep. No. 105-551, pt. 1, at 9 (1998). The treaties “provide guarantees abroad of the same strong protection . . . that is provided domestically.” *Id.*

The “most prominent achievement” of the WIPO treaties is “the recognition at the international level of an exclusive making available right with regard to online uses . . . .” Brigitte Lindner, *The WIPO Treaties*, in *COPYRIGHT IN THE INFORMATION SOCIETY* 6 (B. Lindner & T. Shapiro eds. 2011). Article 8 of the WCT provides:

[Copyright owners] shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, *including the making available to the public of their works* in such a way that members of the public may access these works from a place and at a time individually chosen by them.

WCT art. 8 (emphasis added). Similarly, Article 6(1) of the WCT, entitled “Right of Distribution,” provides copyright owners with “the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.” *See also* WPPT arts. 12(1) & 14 (according the making available right to producers of sound recordings).

2. Subsequent to ratifying the WIPO treaties, the United States entered into nine free trade agreements (FTAs) that, like the WCT and WPPT, obligate the United States to afford a making available right. For example, article 17.4.2 of the United States-Australia FTA, which came into effect in 2005, states:

Each Party shall provide to authors, performers, and producers of phonograms the right to authorise or prohibit the making available to the public of the original and copies of their works, performances, and phonograms through sale or other transfer of ownership.

U.S.-Australia FTA art. 17.4.2 (footnotes omitted); *see also, e.g., id.* arts. 17.5 & 17.6.3; U.S.-Bahrain FTA, arts. 14.4.2 & 14.5 (2006); Dominican Republic-Central America-U.S. FTA, arts. 15.5.2 & 15.6 (2007); U.S.-Chile FTA, arts. 17.5.2, 17.5.3, & 17.6.2 (2004).

In ratifying these FTAs, Congress explicitly recognized that the agreements obligate the United States to provide a right of making available. *See, e.g.,* S. Rep. No. 109-364, at 27-28 (2006) (Oman FTA); S. Rep. No. 109-199, at 24 (2005) (Bahrain FTA); S. Rep. No. 109-128, at 31 (2005) (Dominican Republic-Central America FTA); S. Rep. No. 108-117, at 17 (2003) (Singapore FTA); H.R. Rep. No. 108-224, pt. 2, at 4 (2003) (Chile FTA). Congress also determined there was no need to amend the Copyright Act to implement these FTAs.

3. These treaties reflect the domestic and international consensus that the making available right is a broad and integral protection of copyright holders that falls within, among other provisions, the distribution right.

*First*, as the district court acknowledged, the making available right mandated by the WIPO treaties and FTAs does *not* require proof of actual dissemination. 579 F. Supp. 2d at 1225; *see also* WIPO, GUIDE TO THE COPYRIGHT AND RELATED RIGHTS TREATIES ADMINISTERED BY WIPO 208 (2003) (the treaties cover those acts “which only consist of making the work accessible to the public [where] . . . members of the public still have to cause the system to make it actually available to them”); Lindner, *supra*, at 19 (“[T]he offer of the content is sufficient for the making available right to come into play whether the user ultimately requests the transmission or not.” (footnote omitted)); Jane C. Ginsburg, *Recent Developments in U.S. Copyright Law—Part II, Caselaw: Exclusive Rights on the Ebb?*, *Revue Internationale du Droit d’Auteur* (October 2008), p. 37, [http://lsr.nellco.org/columbia\\_pllt/08158](http://lsr.nellco.org/columbia_pllt/08158) (“[T]he [making available] right is triggered when the public is invited to access, rather than when any member of the public in fact *has* accessed.” (footnote omitted) (emphasis in original)).

*Second*, the U.S. delegation to WIPO supported adoption of the making available right by WIPO, and it advised WIPO that the U.S. Copyright Act

contains a making available right. *See* Ginsburg, *supra*, at 38. As Professor Ginsburg observed, it is

surprising that U.S. courts would interpret the scope of the distribution right to exclude the offering of copies to the public when the United States' treaty negotiators in 1996 represented that the US could implement the making available right through the distribution right, and have since concluded bilateral free trade agreements incorporating a making available right.

*Id.* at 38 (footnotes omitted).

*Third*, there was no controversy among WIPO signatory nations over the need for a making available right. As universally recognized, once a work is made available to millions of Internet users around the world without authorization, the value of the copyright in that work is immediately and irreparably compromised. Nations debated only the method by which signatory countries should implement the making available right—whether through existing rights (such as distribution, performance, or communication), a combination of rights, or a new right.

Ultimately, the drafters of the WIPO treaties adopted what they termed an “umbrella solution” giving each signatory nation the freedom to choose the particular method of implementation. That approach permitted the United States to implement the making available right through, among other things, its existing distribution right in Section 106(3) of the Copyright Act, as the U.S. Delegation sought. *See* MIHÁLY FICSOR, THE LAW OF COPYRIGHT AND THE INTERNET: THE



1996 WIPO TREATIES, THEIR INTERPRETATION AND IMPLEMENTATION 249 (2002) (referring to a U.S. Delegation statement that the making available right, which is “key to the ability of owners of rights to protect themselves in the digital environment,” could “be implemented in national legislation through application of any particular exclusive right” (citation omitted)); Lindner, *supra*, at 18 (“Under the umbrella solution, Contracting Parties are free to characterize the [making available] right legally in a way which fits in their regional or national legal system.”); WIPO, *Understanding Copyright and Related Rights* at 12, [http://www.wipo.int/freepublications/en/intproperty/909/wipo\\_pub\\_909.pdf](http://www.wipo.int/freepublications/en/intproperty/909/wipo_pub_909.pdf) (“Most national laws implement [making available] as part of the right of communication to the public, although some do so as part of the right of distribution.”); Ginsburg, *supra*, at 37.

**B. The District Court Failed To Follow Established Principles Of Statutory Construction When It Interpreted The Copyright Act Inconsistently With U.S. International Obligations And The Views Of The Executive And Legislative Branches**

1. “[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). The *Charming Betsy* canon remains an accepted “maxim of statutory construction,” *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); its continuing relevance is “beyond debate.” *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568,

575 (1988). See Note, *The Charming Betsy Canon, Separation of Powers, and Customary International Law*, 121 HARV. L. REV. 1215, 1215 (2008) (*Charming Betsy* “has become deeply embedded in American jurisprudence”); Curtis Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 483 (1998) (“[C]ourts regularly rely on the *Charming Betsy* canon in interpreting domestic law.”); Restatement (Third) of the Foreign Relations Law of the United States § 114 (1987) (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”).

*Charming Betsy* reflects the principle that “[t]he conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—‘the political’—Departments of the Government.” *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918). See U.S. CONST. art. II, § 2, cl. 2 (granting treaty power to the President “by and with the Advice and Consent of the Senate”). Thus, *Charming Betsy* provides a “means of both respecting the formal constitutional roles of Congress and the President and preserving a proper balance and harmonious working relationship among the three branches of the federal government.” Bradley, 86 GEO. L.J. at 525. It ensures that courts do not interpret statutes in a manner that undermines the foreign policy decisions of the political branches to enter into binding international agreements.

2. The district court acknowledged that “given multiple reasonable constructions of U.S. law, the *Charming Betsy* doctrine directs the Court to adopt the reasonable construction that is consistent with the United States’ international obligations.” 579 F. Supp. 2d at 1226. The court circumvented that doctrine by proclaiming that it is “simply not reasonable” to construe the Copyright Act as including a right of making available. *Id.* And the court improperly dismissed “concern for U.S. compliance with the WIPO treaties and the FTAs” by declaring that such concern “cannot override the clear congressional intent in § 106(3).” *Id.*

No “clear congressional intent” favors the district court’s reading. To the contrary, as Professor David Nimmer has explained in criticizing the decision below, a construction of Section 106(3) that includes a making available right (and that is compatible with U.S. international commitments) is not at all unreasonable, but instead “is actually the [construction] to be preferred.” NIMMER, *supra*, § 8.11[E][1]. Indeed, a statutory interpretation that protects a making available right is the only proper construction that accords with the views of the Legislative and Executive branches that ratified and implemented the relevant treaties:

- **Congress.** Congress did not merely ratify the WCT and WPPT; it enacted legislation as part of the DMCA to ensure that it fully implemented those treaties. The legislative history of the DMCA reflects Congress’s view—based upon the advice of various government officials—that the WIPO

treaties “do not require any change in the substance of copyright rights or exceptions in the U.S. law.” H.R. Rep. No. 105-551, pt. 1, at 9 (1998).

- **The President.** Because Congress wanted to ensure that it adopted legislation fully implementing the WIPO treaties, the Senate required the President to approve legislation achieving that objective as a precondition to depositing the instruments of ratification for those treaties. *See Resolution of Ratification, WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT)* (1996), Supplement to Treaty Doc. 105-17, § (c)(1) (Oct. 21, 1998). Thus, when President Clinton signed the DMCA, he certified to Congress’s satisfaction that U.S. law complies fully with the WIPO treaties, including their making available provisions. As the Department of Justice observed, “[t]he United States has entered into and implemented two treaties and several Trade Agreements containing specific provisions regarding the ‘making available’ right. . . . [W]ith respect to each Trade Agreement containing provisions regarding the ‘making available’ right, the President has informed Congress that no change to existing U.S. law was required to implement those provisions.” Statement of Interest of the United States at 6-7, *Elektra Entm’t Grp. Inc. v. Barker*, 551 F. Supp. 2d 234 (S.D.N.Y. 2008) (No. 05-cv-7340), 2006 WL 5721794 (internal citations omitted).

- **Register of Copyrights.** During the DMCA hearings, the Register of Copyrights informed Congress that “[t]here is no need to alter the nature and scope of the copyrights and exception[s], or change the substantive balance of rights embodied in the Copyright Act” in order to comply with the WIPO treaties. Sept. 16, 1997 Statement of Marybeth Peters, Register of Copyrights, *WIPO Copyright Treaties Implementation Act; and Online Copyright Liability Limitation Act, Hearing on H.R. 2281 & H.R. 2180 Before the House Subcomm. on Courts and Intellectual Property of the Comm. on the Judiciary*, 105th Cong. 43 (1997) (DMCA Hearings). Following enactment of the DMCA, the Register advised Congress that “making [a work] available for other users of [a] peer to peer network to download . . . constitutes an infringement of the exclusive distribution right . . . .” Sept. 25, 2002 Letter from Marybeth Peters to Rep. Howard L. Berman, *reprinted in Piracy of Intellectual Property on Peer-to-Peer Networks: Hearing Before the Subcommittee on Courts, the Internet, and Intellectual Property of the House Committee on the Judiciary*, 107th Cong. 114 (2002). *See also id.* at 114-15 (“[I]n implementing the new WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT), Congress determined that it was not necessary to add any additional rights to Section 106 of the Copyright Act in order to implement

the ‘making available’ right under Article 8 of the WCT.” (footnote omitted)); Jesse Feder, *Keynote Address, Symposium – Fair Use, Public Domain, or Piracy . . . Should the Digital Exchange of Copyrighted Works be Permitted or Prevented?*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 265, 268-69 (2001) (Copyright Office official noted that the Office in 1997, as part of preparing its recommendations on the DMCA, discussed the legislative measures necessary to implement the WIPO treaties and concluded that the making available right “was already covered in U.S. law . . . under existing exclusive rights in the Copyright Act, so no change was made in that area.”).

- **Commerce Department.** During the DMCA hearings, the Assistant Secretary of Commerce and Director of the Patent and Trademark Office—who served as co-chair of the U.S. Delegation to WIPO—advised that “nothing in these [WIPO] Treaties or the implementing legislation affects the issue of liability for particular acts of copyright infringement . . . .” DMCA Hearings at 37 (Sept. 16, 1997) (statement of Bruce Lehman).
- **State Department.** The Assistant Secretary of State for Economic and Business Affairs, who co-chaired the U.S. WIPO Delegation, advised Congress that the provisions in the WCT and WPPT reflected “the internationalization of *American* standards on copyright protection”—in

other words, the extension of “U.S. [l]egal concepts of copyright protection to the rest of the world, which is very much in our interest.” *WIPO Copyright Treaty (1996) and WIPO Performances and Phonograms Treaty (1996) before the Comm. on Foreign Relations*, Sen. Exec. Rpt. 105-25, 105th Cong. 2d Sess. at 34 (Oct. 14, 1998) (testimony of Alan P. Larson) (emphasis added). The State Department has advised the World Trade Organization (WTO) that the unauthorized making available of copyrighted works constitutes infringement under U.S. copyright law. *See, e.g.*, U.S. Submission to WTO Trade Policy Review Body, WT/TPR/M/126/Add.3, at 140 (Nov. 22, 2004); U.S. Submission to WTO Trade Policy Review Body, WT/TPR/M/88/Add.1, at 136 (Jan. 8, 2002).

In short, construing the Copyright Act to protect making available is a reasonable interpretation of the Act—widely held as correct by officials at the highest levels of the political branches—that avoids a conflict between U.S. laws and U.S. international obligations. Under *Charming Betsy*, the district court erred when it rejected that construction.

3. The district court also sidestepped *Charming Betsy* on the erroneous ground that the applicable treaties are not “self-executing and lack any binding legal authority separate from their implementation through the Copyright Act.” 579 F. Supp. 2d at 1226 (citations omitted). The court was wrong; *Charming Betsy*

applies to treaties that are not self-executing. *See generally* Rebecca Crootof, Note, *Judicious Influence: Non-Self-Executing Treaties and the Charming Betsy Canon*, 120 YALE L.J. 1784 (2011) (collecting authority). Indeed, if a treaty were self-executing, there would be no need to construe a separate federal statute under *Charming Betsy*.

Moreover, Congress intended to implement fully the treaties at issue: on the advice of the President, the Register of Copyrights, the Commerce Department, and the State Department, Congress believed it could do so by relying upon existing provisions of the Copyright Act. Congress rightly concluded that “previously enacted legislation . . . [is] fully adequate to give effect to an apparently non-self-executing international agreement, thus obviating the need of adopting new legislation to implement it.” Restatement (Third) of the Foreign Relations Laws of the United States § 111 cmt. h (1987). “[T]he total combination of what Congress did and did not do” in enacting the DMCA to implement the WIPO treaties reflects Congress’s understanding that the non-amended portions of the Copyright Act reflect “treaty norms.” Ginsburg, *supra*, at 39.

By construing the Copyright Act to exclude a making available right, the district court failed to follow *Charming Betsy* and contravened the clear intent of both the Legislative and Executive branches in enacting the DMCA to ensure that



the United States provides copyright owners with the full scope of protection contemplated by the WIPO treaties.

**C. The District Court’s Decision Will Seriously Impair The Ability Of Copyright Owners To Secure Effective Worldwide Copyright Protection**

The making available right is an international norm of copyright protection. More than 150 countries, including the United States and its major trading partners, have committed to affording copyright owners that right by becoming signatories to the WIPO treaties or bilateral trade agreements with the United States. For example, the European Union, the People’s Republic of China, and the Republic of Korea have all committed to providing and protecting the making available right. *See* Tilman Lüder, *The Next Ten Years in E.U. Copyright: Making Markets Work*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 33-36 (2007) (discussing judicial decisions in the European Union that applied the making available right to P2P file-sharing and other Internet-based services without proof that files had been physically transferred); Decree of the State Council of the People’s Republic of China No. 468, art. 2 (2006) (“Any organization or individual that makes another person’s work, performance, or sound or video recording available to the public through information network shall obtain permission from, and pay remuneration to, the right owner, except as otherwise provided for by laws or administrative regulations”), [http://www.wipo.int/clea/docs\\_new/pdf/en/cn/](http://www.wipo.int/clea/docs_new/pdf/en/cn/)

cn064en.pdf; U.S.-Korea FTA arts. 18.4.2, 18.5, & 18.6.3(a) (obligating Korea, as part of the recently-approved and much-heralded FTA, to afford a right of making available). Just as our key trading partners honor their international commitments, so too must the United States.

The district court suggested that it is inconsequential whether U.S. law comports with the international norm of making available—because, the court thought, copyright owners can deal with online copyright infringement without that right. *See* 579 F. Supp. 2d at 1225. The district court missed the point underlying *Charming Betsy*. By overriding the views of the Legislative and Executive branches—that U.S. law comports with U.S. international commitments to provide a right of making available—the court effectively usurped the foreign relations responsibilities that the Constitution commits to those political departments.

Furthermore, by placing U.S. law outside international copyright norms, the court has seriously undermined legislative policy underlying the Copyright Act itself. As the *en banc* Ninth Circuit observed, Congress drafted the Copyright Act with the “objective of achieving ‘effective and harmonious’ copyright laws among all nations,” “to secure a more stable international intellectual property regime,” and to “strengthen[] the credibility of the U.S. position in trade negotiations with countries where piracy is not uncommon’ . . . .” *Subafilms, Ltd. v. MGM-Pathe Commc’ns Co.*, 24 F.3d 1088, 1097-98 (9th Cir. 1994) (en banc) (quoting H.R.

Rep. No. 100-609, at 20 (1988), and S. Rep. No. 100-352, at 4-5 (1988)); *see* H.R. Rep. No. 94-1476, at 130 (1976) (1976 House Report) (“In an era when copyrighted works can be disseminated instantaneously to every country on the globe, the need for effective international copyright relations . . . assume[s] ever greater importance.”). The district court’s misinterpretation of the Copyright Act contravenes each of these legislative objectives.

As the Supreme Court has admonished:

If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements.

*Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995).

The district court ignored that admonition. If other countries believe that the United States—the world’s leading exporter of copyrighted works and one of the world’s most vocal proponents for strong copyright protection—fails to comply with its own international copyright commitments, copyright owners will have little hope of securing such protection abroad. The decision below thus misinterprets the Copyright Act in a way that makes it more difficult and costly for copyright owners to deal with copyright infringement. And the decision undermines the credibility of the United States, impairing the ability of copyright owners to obtain worldwide and effective copyright protection that Congress

envisioned when it enacted the Copyright Act. Where, as here, the law can be reasonably construed to avoid such problematic results, *Charming Betsy* mandates that construction.

## **II. THE DISTRICT COURT ERRONEOUSLY CONCLUDED THAT THE DUE PROCESS CLAUSE REQUIRES “SOME RELATION” BETWEEN ACTUAL DAMAGES AND STATUTORY DAMAGES**

Three separate juries awarded the plaintiffs statutory damages within the range permitted by Congress for defendant’s willful copyright infringement. *See* 17 U.S.C. § 504(c) (authorizing awards of between \$750 and \$150,000 per infringed work). The district court set aside each award. The court nullified the first award, erroneously believing it had given the wrong jury instruction on making available; the court reduced the second award on common law remittitur; and it rejected the third award, ruling that the Due Process Clause mandated a reduction. *See* 2011 WL 3211362, at \*2. As Professor Nimmer observed: “It is difficult to discern any basis for the court’s reduced award . . . [g]iven that defendant’s conduct was as egregious as can be. . . . Unfortunately, reason seems to have broken down completely in this domain.” NIMMER, *supra*, § 14.04[E][1][a].

MPAA strongly believes that this court should correct the *ad hoc* Due Process analysis reflected in the decision below. The district court’s analysis arbitrarily substitutes the court’s judgment for that of Congress and three separate

juries, significantly increases the costs and uncertainties of litigation, and employs an arbitrary and unprecedented method of calculating statutory damages for willful infringement. At the heart of the district court’s problematic analysis is the erroneous premise that Due Process necessarily requires “some relation” between a statutory damages award and actual damages. MPAA urges this Court to make clear that Due Process does not require any such relationship—one that would improperly require copyright owners to prove actual damages when they have elected to recover statutory damages.

**A. The District Court Premised Its Constitutional Analysis Upon The Mistaken View That There Must Be A Relationship Between Actual Damages And Statutory Damages**

1. Following the third trial, defendant argued that a statutory damages “award violates the due process clause of the Constitution” unless the award bears a “reasonable relationship to the actual damages caused by Defendant.” 2011 WL 3211362, at \*2. She advocated an approach used to assess the constitutionality of punitive (not statutory) damages, where courts focus upon the ratio between an actual damages award and a punitive damages award. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). According to defendant, plaintiffs were not entitled to any statutory damages award whatsoever because plaintiffs had not proven that her

infringement caused them any identifiable damage. Mot. to Alter or Amend J. at 1, 10 (Dist. Ct. Dkt. 437) (Dec. 6, 2010).

The district court correctly rejected defendant's arguments, holding that the punitive damages decisions are inapplicable to statutory damages cases. 2011 WL 3211362, at \*4-6; *accord Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 587-88 (6th Cir. 2007); *Lowry's Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 459-60 (D. Md. 2004). The district court also correctly recognized that the Copyright Act does not require proof of actual damages where a copyright owner elects statutory damages. 2011 WL 3211362, at \*7.

Yet the court stated, twice, that Due Process requires "*some* relation" between actual damages and statutory damages. *Id.* at \*11 (emphasis in original); *see also id.* at \*8. And it ruled that "the damage suffered by Plaintiffs [cannot] support this verdict" because "[p]laintiffs cannot calculate how many other computer users committed infringement with the illegal copies of works accessed from [defendant] or the amount of damage that their access caused." *Id.* at \*12. Ironically, the court recognized that "[t]he very nature of the peer-to-peer network used by [defendant] made it *impossible* for Plaintiffs to specifically quantify the damage done by [her]." *Id.* at \*9 (emphasis added). The court nevertheless determined, in apparent contradiction, that "there is simply no basis for attributing [to the defendant] more than a miniscule portion" of the general damage caused by

file-sharing. *Id.* The district court then relied upon this “finding” to strike the jury’s statutory damages award as insufficiently supported by actual damages. *See id.* at \*12. Under the district court’s Due Process analysis, proof of actual damages effectively becomes mandatory so that a court can determine the relationship between actual damages and a statutory damages award—just as in the punitive damages cases that the court held are irrelevant to a statutory damages analysis.

2. The district court said it was relying upon *St. Louis, Iron Mountain & Southern Railway Co. v. Williams*, 251 U.S. 63 (1919), to assess the constitutionality of the statutory damages award. *See* 2011 WL 3211362, at \*3-4; *accord Zomba*, 491 F.3d at 587. But the district court’s constitutional analysis is wholly inconsistent with *Williams* to the extent that it focuses upon the relationship between actual damages and statutory damages.

In *Williams*, the lower court awarded damages of \$75 against a railroad company that had collected from the plaintiff passengers \$0.66 more than allowed by law. 251 U.S. at 64. The statutory damage award fell within the range of \$50 to \$300 per violation allowed under the Arkansas statute. *Id.* at 64. The defendant in *Williams* (like the defendant here) argued that the statutory damages award “contravened due process of law” because the award was “not proportionate to the actual damages sustained.” *Id.* (internal quotation marks omitted). The Court, however, squarely rejected that argument.

The Court held that Due Process does not require statutory damages to “be confined or proportioned to [the plaintiff’s] loss or damages[.]” *Id.* at 66. The “validity” of the award “is not to be tested” by its relationship to actual damages. *Id.* at 67. The Court recognized that “[w]hen the penalty is contrasted with the [actual damage] possible in any instance it of course seems large . . . .” *Id.* However, Due Process permits statutory damages to be imposed as a punishment for the violation of a public law. *See id.* at 66. An award of statutory damages is unconstitutional only if the award prescribed by Congress is “so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.” *Id.* at 67. In short, while the district court properly embraced the *Williams* standard, it failed to undertake an analysis that comports with *Williams*.

**B. Interpreting The Due Process Clause To Require A Relationship Between Actual Damages And Statutory Damages Would Radically Upend A System Of Copyright Protection That Has Existed For More Than A Century**

1. Section 504 of the Copyright Act vests copyright owners with the sole discretion to enforce their rights by “*either*” proving actual damages (with no cap on recovery) “*or*” electing statutory damages (with maximum limits). 17 U.S.C. § 504(a). Congress accorded that choice to copyright owners, recognizing “the acknowledged inadequacy of actual damages and profits in many cases” 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); 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”).

Requiring plaintiffs that seek statutory damages to show a relationship between the jury’s statutory damages award and actual damages effectively mandates proof of actual damages and thereby strips copyright owners of the choice the Copyright Act affords. Such a requirement would defeat Congress’s intent in fashioning statutory damages as an alternative means to enforce copyright laws.

2. For over a century the Supreme Court has recognized that there need not be any relationship between actual damages and statutory damages in copyright infringement cases. See *Sony BMG Music Entm’t v. Tenenbaum*, --- F.3d ----, Nos. 10-1883, 10-1947, 10-2052, 2011 WL 4133920, at \*12-13 (1st Cir. Sept. 16, 2011) (citing cases).

- ***Brady v. Daly*, 175 U.S. 148 (1899)**. The Court observed that Congress allowed statutory damages for copyright infringement “because of the inherent difficulty of always proving by satisfactory evidence what the amount is which has been actually sustained.” *Id.* at 157. Statutory damages allows the copyright owner to avoid “the difficulty of proving with

definiteness in all cases the amount of damages which plaintiff really had suffered.” *Id.*

- ***L.A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100 (1919).** The Court held that the Copyright Act of 1909 requires an award within the range of prescribed statutory damages, even when a plaintiff “does not show the amount of damages . . . to the effect that damages could not be estimated or stated ‘in dollars and cents.’” *Id.* at 103. After observing that “any accurate proof of actual damages was obviously impossible” in the case, *id.* at 104 (internal quotation marks omitted), the Court concluded that the district court erred in departing from the statutory range. “The fact that [statutory] damages are to be ‘in lieu of actual damages’ shows that something other than actual damages is intended—that another measure is to be applied in making the assessment.” *Id.* at 106. Rather than tying a “just” statutory award to proof of actual damage, the Court instead directed courts to consider “the nature of the copyright . . . [and] the circumstances of the infringement . . . .” *Id.*
- ***Jewell-LaSalle Realty Co. v. Buck*, 283 U.S. 202 (1931).** The Court held that statutory damages are appropriate where “[t]he infringement was proved, but there was no showing of actual damages.” *Id.* at 203. The Court affirmed an award of \$250 (the minimum statutory amount) for the

defendant's single unauthorized orchestral performance of a copyrighted musical composition, and explained that a "primary purpose" of the remedial provision of the Copyright Act is to provide "statutory damages where actual proof was lacking." *Id.* at 206.

- ***Douglas v. Cunningham*, 294 U.S. 207 (1935).** The Court affirmed a district court's award of *maximum* statutory damages for infringement of a story published in the Sunday edition of the Boston Post, even though "no actual damage had been shown." *Id.* at 208. The plaintiffs "admitted [their] inability to prove actual damages," but, as the Court explained, statutory damages "give 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." *Id.* at 209.
- ***F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228 (1952).** The Court reaffirmed that statutory damages may be awarded when "the record is inadequate to establish an actually sustained amount" of damages suffered by a copyright holder. *Id.* at 230. The Court explained that evidence of actual damages, when available, "may aid the exercise of discretion" in fashioning an appropriate award within the statutory range. *Id.* at 231. Nevertheless, the Court made clear that statutory-based "recovery may be awarded without *any* proof of injury . . . ." *Id.* (emphasis added). "Even for

uninjurious and unprofitable invasions of copyright the court may, if it deems just, impose a liability within statutory limits to sanction and vindicate the statutory policy.” *Id.* at 233.

Such longstanding and uniform historical practice informs the Court’s constitutional analysis in a variety of contexts, including Due Process. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (declining to recognize a new due process liberty interest in light of a long history of contrary practice); *Williams v. Illinois*, 399 U.S. 235, 239-40 (1970) (Equal Protection) (“While neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack, these factors should be weighed in the balance.”); *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922) (property rights) (“If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.”).

Thus, relying upon the above Supreme Court precedent, the First Circuit recently “join[ed] [its] sister circuits” in rejecting a copyright defendant’s proposed jury instruction that “statutory damages cannot be awarded unless reasonably related to actual damages”; the court concluded that such an instruction “would have been error.” *Tenenbaum*, 2011 WL 4133920, at \*17 (citations omitted). The court below equally erred by insisting on “some relation” between the jury’s statutory damages award and actual damages.

3. MPAA's members face substantial hurdles in attempting to quantify the harm caused by P2P file-sharing. When a movie or television program is "shared" over a P2P network by an individual, the ensuing illegal distribution is exponential. The recipients of the illegal download from that individual may redistribute that movie or TV show to several more computer users, who in turn redistribute to countless others, and so on. What begins as one distribution quickly results in hundreds, thousands, or millions of digital copies distributed throughout the world—without the knowledge, consent, or remuneration of the copyright owner. The copyright owner has no way of determining precisely how many people downloaded that movie or TV show down the redistribution chain after the first act of infringement. Thus, the copyright owner cannot estimate accurately the magnitude of actual harm caused by a specific distribution of a work because such harm is inexorably tied to the actual number of subsequent distributions of that work.

The difficulty with proving actual damages is not limited to cases involving unlawful P2P file-sharing. The Supreme Court decisions discussed above, dating back to 1899, illustrate the wide variety of historic contexts in which quantifiable proof of actual harm from infringement was difficult or impossible. Modern technology also has brought new methods of infringement beyond file-sharing—such as unauthorized real-time streaming of television programming to millions of

Internet users around the globe. Proving the amount of actual damages in such cases (including the impact upon licensed outlets) also can be exceedingly difficult. Requiring plaintiffs to prove actual damages when seeking statutory damages—or otherwise making actual damages relevant in every copyright infringement case—would likely open the door for infringers to increase substantially the costs of litigation, thereby depriving many copyright owners of an effective means of enforcing their rights.

Plaintiffs may choose, in appropriate cases, to provide evidence of the harm, and even the actual damages and profits, flowing from copyright infringement; nothing in the Copyright Act precludes courts and juries from considering such evidence. But there is no statutory or Due Process requirement that plaintiffs provide such evidence. Imposing such a requirement would, as explained above, unjustifiably disrupt a system of copyright protection that has existed for more than a century. The jury's primary focus belongs, and must remain, on the defendant's infringing conduct. *See L.A. Westermann*, 249 U.S. at 106.

## CONCLUSION

For the foregoing reasons, MPAA respectfully requests that this Court reverse the judgments below and rule that (1) the Copyright Act includes an exclusive right of making available; and (2) Due Process does not require a relationship between statutory damages and actual damages.

Respectfully submitted,

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This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 6,790 words, as determined by the word-count function of Microsoft Word 2007, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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This the 8th day of December, 2011.

/s/ Robert Alan Garrett  
Robert Alan Garrett



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Pursuant to this Court's Rule 28A(h), I hereby certify that the electronic version of this *Brief of the Motion Picture Association of America, Inc., as Amicus Curiae In Support of Plaintiffs-Appellants* has been scanned for viruses and is virus-free.

This the 8th day of December, 2011.

/s/ Robert Alan Garrett  
Robert Alan Garrett

## CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2011, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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