

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

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.

*On Appeal from the United States District Court
for the District of Minnesota
Case No. 06-CV-1497*

REPLY BRIEF OF APPELLEE / CROSS-APPELLANT

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ARGUMENT

I. The making-available issue is moot.

Thomas agrees to entry of an injunction that bars her from making the recording companies' music available to the public online. Thomas is interested in litigating the constitutionality of copyright statutory damages as applied to no-damages file-sharing cases like hers. In an attempt to present that issue as cleanly as possible for this Court and the Supreme Court, Thomas is mooting the "making available" issue by agreeing on appeal to the specific relief that the recording companies seek on the basis of their argument that making available constitutes distribution.

Thomas has now agreed to all the specific relief that the recording companies seek on the making-available issue. Because there is no disputed action of this Court that would turn on whether making available constitutes distribution, the making-available issue is moot. Vacatur of the judgment below is inappropriate because only this issue is moot, not the entire case. *Cf. Arizonians for Official English v. Arizona*, 520 U.S. 43, 72 (1997) (cited by the recording companies; involved mooting of entire case).

Instead, this Court should include in its opinion some statement that it has not reached the making-available issue and that its opinion should not be treated as endorsing either the district court's opinion on that point or the re-

recording companies' arguments against that opinion on appeal. In subsequent litigation, the recording companies can cite that statement to explain that the district court's opinion is only what it is — one district judge's resolution of the making-available issue that was never reviewed on appeal.

II. Any award of statutory damages is unconstitutional.

Cases like *F.W. Woolworth Co. v. Contemporary Arts*, 344 U.S. 228 (1952), *Douglas v. Cunningham*, 294 U.S. 207 (1935), and *Jewell–La Salle Realty Co. v. Buck*, 283 U.S. 202 (1931), are inapposite because they considered and rejected statutory challenges to statutory damages, not constitutional challenges. The defendants in *Woolworth*, *Douglas*, and *Buck* argued that the Copyright Act, as then in effect, did not provide for the statutory damages that were awarded in their cases.¹ The recording companies, pulling out *dicta* like *Woolworth's* statement that statutory damages may be imposed “[e]ven for uninjurious and unprofitable invasions of copyright,” 344 U.S. at 233, describe these cases as a “solid wall of precedent” in the path of Thomas’s constitutional challenge. R. & R. Br. at 20–23.

¹ *Woolworth*, 344 U.S. at 231 (“Petitioner’s contention here is that the statute was misapplied”); *Douglas*, 294 U.S. at 208–209 (“The sole question presented . . . is whether consistently with section 25(b) of the Act of 1909, 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 section.”); *Buck*, 282 U.S. at 203–208 (discussing how to calculate statutory damages under the relevant statutory language).

This and similar statements in the recording companies' response brief² are misleading. In fact, the Supreme Court has never considered the constitutionality of statutory damages awarded under the Copyright Act. As for why the Court has never considered the constitutional question despite taking up statutory-damages cases,³ any number of explanations are possible: the absence of a circuit split on the issue, making it not worthy of *certiorari*; the failure of the litigants in the earlier cases to preserve or present constitutional questions; or the fact that the statutory-damages cases in the Supreme Court all predate the Court's recent line of decisions (*Gore*, *State Farm*, etc.) on due-process limits on civil punishments.

² For example, right before discussing *Douglas*, *Buck*, and *Woolworth*, the recording companies state: "Thomas-Rasset asserts that the *Constitution* requires proof of actual damages even if the Copyright Act does not, but the Supreme Court has squarely rejected that argument." R. & R. Br. at 21. This is misleading because the cases discussed involved statutory challenges to statutory damages, not constitutional challenges.

A particularly glaring example is on page 23 of the recording companies' response brief. There, the recording companies write: "The Court's rejection of constitutional challenges to damage awards at the very top of the statutory range despite *no actual evidence of harm* is controlling here. *See Douglas*, 294 U.S. at 208–10." *Douglas*, however, considered only a question of statutory interpretation, not any constitutional challenge to the statute. It did not consider or even mention a constitutional challenge, much less reject one.

³ *See* R. & R. Br. at 22–23 ("If there were something constitutionally amiss about statutory damage awards . . . it is unlikely this fact would have escaped the Supreme Court's attention for the last century.")

The recording companies similarly misapprehend Thomas's argument about whether Congress considered and approved the statutory damages awarded in this case. *See* R. & R. Br. at 14–18. Congress may or may not have considered whether copyright statutory damages would apply to file sharing. Whether Congress did or not is beside the point. Thomas's argument is simply that a broad and general range, like the one that Congress put into the Copyright Act, is, by its nature, not tailored to any specific sort of infringement. This is an argument about what tailoring means, not an argument about Congress's intent.

Unlike earlier versions, the current Copyright Act sets out a single range of statutory damages for all infringement (with the minimum and maximum dependent on whether the defendant infringed innocently, knowingly, or willfully), regardless of the kind of work, the kind of infringer, or the kind of infringement. The same statutory range applies to stealing and publishing a presidential memoir, pirating and reselling copies of Microsoft Office, and the noncommercial individual file sharing at issue in this case.

Given the many different circumstances to which the statutory range applies, this Court cannot in good conscience say that Congress tailored the statutory range to any particular set of circumstances. The problem is compounded when one considers that the recording companies claim infringe-

ment of thousands of songs, but chose to sue on 24 only. If the recording companies are correct, then they are claiming that Congress considered and approved damages ranging from one song times the minimum (\$250) to thousands of songs times the maximum (hundreds of millions of dollars or more). While deference to Congress may sometimes be appropriate, it is appropriate only when Congress has actually made a specific decision.

Consider, for example, a statute that simply provides for an award of statutory damages “in such amount as the court considers just” without stating a range. This could be argued to reflect Congress’s judgment that *any* amount considered by a court to be just is appropriate for any situation to which the statute applies. But that argument would be unpersuasive: the statute reflects not Congress’s judgment about what amount would be appropriate, but rather Congress’s decision to leave that judgment for courts to make in particular cases.⁴ Indeed, in operation, the statutory range is so broad and the number of songs the recording companies can choose to sue on is so large, that the Copyright Act functions in file-sharing cases just like the hypothetical any-amount statute.

⁴ The same would be true of a statute that authorizes a range of \$50 to \$10,000,000 or \$50 to \$1,000,000: a range that broad is not a determination that any particular amount within the range is appropriate in any particular case.

The recording companies make fun of Thomas's everybody-else-was-doing-it argument, *see, e.g.*, R. & R. Br. at 4 (““Everybody else was doing it” is a poor excuse when invoked by children, and provides absolutely no basis for eliminating Plaintiffs’ entitlement to statutory damages.”), but fail to address that argument on the merits. Because file sharing was so widespread, and because the songs that Thomas shared were popular and were available from many others on KaZaA, anyone who downloaded music from Thomas — setting aside the fact that there is no evidence that anyone ever did so — would have been able to download the music from someone else on KaZaA even if Thomas had never engaged in any file sharing. That is, the recording companies’ damages were caused by file sharing as a whole, not by Thomas’s actions in particular.

The recording companies make the same mistake when they suggest that the actual harm caused by Thomas was “[t]he cost of a license to copy a work and distribute it to the entire Internet for free,” which “would be equal to the entire value of the work, since this is equivalent to putting the work into the public domain.” R. & R. Br. at 34. This may be what Napster or KaZaA did, but it is not what the individual user, Thomas, did: the songs she listened to were on KaZaA, available to the whole Internet, and would have been there even if Thomas had never discovered file sharing. Punishing an

individual for injuries caused by a group to which the individual belongs rather than by the individual herself is neither American nor constitutional.

Nullum poena sine iniuriam.

CONCLUSION

Thomas respectfully requests that this Court reverse and render a judgment awarding the recording companies their requested injunction, but denying any award of statutory damages.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 1,926 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

I hereby certify that the electronic version of this Reply Brief has been scanned for viruses and is virus free.

/s/ K.A.D. Camara

K.A.D. Camara

CERTIFICATE OF SERVICE

I hereby certify that, on March 26, 2012, I electronically filed this Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ K.A.D. Camara

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