Nos. 11-2820 & 11-2858

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,

and

UNITED STATES,

Intervenor/Cross-Appellee,

v.

JAMMIE THOMAS-RASSET,

Defendant-Appellee/Cross–Appellant.

BRIEF FOR UNITED STATES AS INTERVENOR/CROSS-APPELLEE

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Plaintiffs-Appellants/Cross-Appellees,

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UNITED STATES,

Intervenor/Cross-Appellee,

v.

JAMMIE THOMAS-RASSET,

Defendant-Appellee/Cross–Appellant.

BRIEF FOR UNITED STATES AS INTERVENOR/CROSS-APPELLEE

STATEMENT OF JURISDICTION

1. This is an action for copyright infringement under the Copyright Act, 17 U.S.C. § 101, *et seq*. The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1338(a).

2. The district court entered final judgment disposing of all the parties'

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claims on July 22, 2011. Clerk's Notation of Record ("NR.") 458. The private plaintiffs filed a timely notice of appeal on August 22, 2011. NR. 459. Defendant filed a timely cross-appeal on August 26, 2011. NR. 463. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The Copyright Act provides that the infringer of a copyrighted work may be held liable for "statutory damages" in lieu of actual damages, with such damages to be determined, within specified statutory limits, at the discretion of the trier of fact. 17 U.S.C. § 504(c). Though the plaintiffs have raised an additional, statutory issue in their appeal, the United States will focus on the following, constitutional issue presented by the defendant's cross-appeal:

Whether an award of statutory damages against an assertedly non-commercial defendant must bear a reasonable relation to the plaintiff's actual injury in order to satisfy the Due Process Clause, regardless of whether actual damages can be proven, regardless of whether the defendant's infringement was willful, and regardless of Congress's interest in deterring conduct deemed to be contrary to the public interest.

* 17 U.S.C. 504(c)

* *St. Louis, I. M. & S. Railway Co.* v. *Williams*, 251 U.S. 63 (1919)

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* *Sony BMG Music Entertainment* v. *Tenenbaum*, 660 F.3d 487 (1st Cir. 2011)

STATEMENT OF THE CASE

Plaintiffs complain that the defendant violated their copyright in 24 sound recordings by using an Internet-based, peer-to-peer network to download unauthorized copies of the recordings and to distribute them to others. They filed an action for copyright infringement against the defendant in federal district court, demanding injunctive relief restraining further acts of infringement as well as statutory damages under 17 U.S.C. § 504(c) of the Copyright Act.

Defendant asserted that the Act's statutory damages provision is unconstitutional because it permits a jury to award damages in an amount that bears no reasonable relation to the plaintiffs' actual injury. The United States consequently intervened in the action to defend the constitutionality of the statute. *See* 28 U.S.C. §§ 517, 2403(a).

The case was submitted to a jury on three separate occasions. In the first proceeding, the jury found that defendant had willfully infringed plaintiffs' copyrighted works and returned a verdict awarding $9,250 in statutory damages for each work infringed. App. 127-33. The district court set that award aside, concluding that it had erred in instructing the jury that merely making a work

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available for unauthorized distribution, without further proof of actual dissemination, amounted to an act of infringement. *See* App. 125; App. 55-80. The court accordingly directed a new trial, without reaching defendant's constitutional challenge to the statute. App. 83.

The second jury awarded plaintiffs $80,000 in statutory damages for each work infringed. The district court set that award aside as well, holding that it was excessive under common law remittitur standards and reducing the damage award to $2,250 per work infringed. App. 191. Plaintiffs exercised their right to reject the remitted judgment and the court therefore ordered a third jury trial, again without reaching defendant's constitutional challenge to the statute. App. 226, 228.

The third jury awarded statutory damages of $62,500 for each work infringed. App. 258-62. The district court, on cross motions for an amended judgment and other relief, concluded that the jury award violated due process and held that an award of $2,250 per work infringed is the maximum permitted by the Constitution in this case. App. 31. It therefore entered an amended judgment awarding plaintiffs a collective total of $54,000 in damages. App. 42-43.

Plaintiffs and defendant have both appealed. Plaintiffs argue that merely making a work available to the public without authorization is an actionable

infringement, that the district court therefore erred in setting aside the first jury verdict, and that the first jury verdict – though *lower* than the last jury verdict – should be reinstated. They further argue that a reinstated first jury verdict would comport with the Due Process Clause and should therefore be affirmed.

Defendant does not object to treating the first jury verdict as the operative verdict in the case and does not otherwise contest the jury's determination that she infringed the works cited in plaintiffs' complaint by distributing them to others without authorization. She concludes that this renders moot the question of whether merely making works available without authorization also amounts to a prohibited distribution. She argues, however, that, the first verdict, though substantially lower than the last verdict in the case, violates due process because it, too, does not bear a reasonable relation to plaintiffs' actual damages.

STATEMENT OF FACTS

1. Statute Involved.

The Copyright Act of 1976 confers upon the owner of a copyrighted musical work various exclusive rights, including the rights to reproduce, distribute, and perform the work. 17 U.S.C. § 106. For copyright purposes, a "musical work" consists of the notes and lyrics of a song, as distinct from any single performance of that work. When a musical work is performed by a

particular artist and the ensuing "series of musical, spoken, or other sounds" is fixed in a recording medium, the resulting work is a "sound recording." 17 U.S.C. § 101. The Act affords the owner of a copyright in a sound recording the exclusive right to reproduce the sound recording, to prepare derivative works, and to distribute the sound recording to the public. 17 U.S.C. §§ 101, 102(7), 106.

The transfer of a digital sound recording over the Internet and the resulting creation of a copy on a local computer hard drive amount to the "distribution" and "reproduction" of the work. *See* 17 U.S.C. § § 106(3), 115(d). Thus, one who, without the copyright owner's permission, downloads a sound recording over the Internet or subsequently transfers the sound recording to other Internet users has infringed the copyright. *See* 17 U.S.C. § 501(a). The copyright owner has a statutory cause of action against the infringer (17 U.S.C. § 501(b)) and may seek an injunction barring further acts of infringement (17 U.S.C. § 502), the impoundment and destruction of infringing copies and articles used in their reproduction (17 U.S.C. § 503), and damages (17 U.S.C. § 504).

This case concerns the application and constitutionality of the Copyright Act's statutory damages provision, 17 U.S.C. § 504(c). In brief, section 504 provides that an infringer is liable for either: (1) the copyright owner's actual damages and any additional profits of the infringer, or (2) "statutory damages," as

defined under section 504(c) of the Act.[1] Statutory damages are available at the election of the copyright owner, without proof of actual damages or lost profits. 17 U.S.C. § 504(c). Such provisions for an award of "statutory damages" have been included in federal copyright law since the first copyright act of 1790. See 1 Stat. 124-26 (1790). As the Register of Copyrights has explained, the value of a copyright is inherently difficult to determine and the loss caused, or profits derived, by an infringer may be difficult or prohibitively expensive to prove. Register of Copyrights, *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, 87th Cong., 1st Sess. 102-03 (House Judiciary Comm. Print 1961). Limiting the copyright owner to such actual damages as can be proved in court might therefore leave him without an adequate remedy. Accordingly, to ensure that copyright owners have meaningful redress, and to deter infringement, federal copyright law has long authorized an award of "statutory damages" in lieu of actual damages, with such damages to be determined, within broad statutory limits, at the discretion of the trier of fact. *See generally F. W. Woolworth Co.* v. *Contemporary Arts, Inc.*, 344 U.S. 222, 231-33 (1952); *L.A. Westermann Co. v. Dispatch Printing Co.,* 249 U.S. 100, 106-07

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[1] The full text of 17 U.S.C. § 504(c) is reprinted in the addendum to this brief.

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(1914); *Brady* v. *Daly*, 175 U.S. 148, 154 (1899).

If statutory damages are elected, the statute provides that the court may award such damages as it "considers just" within the range specified by statute.[2] 17 U.S.C. § 504(c)(1). Statutory damage awards may generally range between a minimum of $750 and a maximum of $30,000 per infringed work. *Ibid.* The statutory range of permissible damage awards, however, may be increased or reduced in light of the infringer's conduct. Thus, if the infringement is willful, the statutory maximum is increased to $150,000 per infringed work. *Ibid*. Conversely, if the defendant establishes that he was not aware and had no reason to believe that his actions constituted an infringement, the statutory minimum is reduced to $200 per infringed work. *Ibid*. The courts have identified a number of factors bearing upon the appropriate award within this statutory range. These include, but are not limited to, the expenses saved and profits reaped by the infringer, the revenues lost by the plaintiff, the value of the copyright, and the

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[2] Though the statute refers to an award of damages by "the court," the Supreme Court has held that there is a Seventh Amendment right to a jury trial on all issues pertinent to the award of statutory damages, including the determination of the amount of damages itself. *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U.S.C. 340 (1998). Consequently, after *Feltner*, determinations of the amount of statutory damages to be awarded under the Copyright Act must be made by the jury if a jury trial has been demanded. *See Sony BMG Music Entertainment*, 640 F.3d at 496-97 & n.8.

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deterrent effect on other potential infringers. *See Fitzgerald Publ'g Co.* v. *Baylor Publ'g Co.*, 807 F.2d 1110, 1116-17 (2d Cir. 1986); *see generally* 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* pp. 14-68 to 14-70 (2010).

2. District Court Proceedings.

Plaintiffs are a group of the country's largest recording companies. They allege that defendant Jammie Thomas-Rasset used peer-to-peer file-sharing software to download, to distribute, and to make available for distribution to others, 24 copyrighted sound recordings. They demanded injunctive relief restraining further infringement and directing the destruction of all infringing copies, as well as statutory damages under 17 U.S.C. § 504(c) and attorneys fees under 17 U.S.C. § 505.

a. The case was filed in 2006 and the decision at issue here was issued after three successive jury trials. In the first trial, the jury found that defendant had willfully infringed plaintiffs' copyrights and awarded them $9,250 per work infringed, for a total statutory damages award of $222,000. App. 127-33. Defendant filed a motion for new trial or remittitur, asserting that the statutory damages award was so excessive as to violate due process. App. 45. The government filed a brief urging the court to avoid unnecessary adjudication of the constitutional issue and arguing, in the alternative, that the statute comports with

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due process.

The court did not initially reach the constitutional issue. It concluded instead that it had erred in instructing the jury that merely making works available for distribution without authorization infringed the copyright owners' distribution rights, regardless of whether actual dissemination or transfer of the works had been shown. App. 82-83. The court held that the Copyright Act requires actual dissemination before an infringement of the distribution right may be found, and that its error in instructing the jury on this point was prejudicial and necessitated a new trial. App. 48-83.[3]

b. In the second trial, plaintiffs introduced evidence that each of the 24 sound recordings had been downloaded from the defendant's computer by plaintiffs' own investigators, thereby establishing actual distribution. *See* App. 136-38. The second jury found that defendant had willfully infringed the pertinent

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[3] The government took no position on whether merely making a work available for dissemination, without an actual transfer of the work to another party, violates the copyright owner's exclusive statutory right under 17 U.S.C. § 106 (3) to "distribute" the work. We agree with defendant that, as liability for distribution is no longer contested, this issue is not properly before the Court. *See Anderson* v. *United States*, 417 U.S. 211, 218 (1974) (It is "inadvisable * * * to reach out * * * to pass on important questions of statutory construction when simpler, and more settled grounds are available for deciding the case at hand"). We also agree with plaintiffs that, if the Court concludes this issue is moot, it should vacate the pertinent district court opinion. *See* Plaintiffs-Appellants Reply Br. at 6-7.

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works and awarded plaintiffs $80,000 per work infringed, for a total statutory damages award of $1.92 million. App. 172-83. Defendant again moved for a new trial or remittitur. The government filed a responsive brief reiterating the constitutional avoidance and due process arguments asserted in our prior submission.

The court avoided the constitutional issue and held that the judgment was excessive under common law remittitur standards. App. 191. It reasoned that Eighth Circuit precedent authorizes remittitur when the jury verdict is "so grossly excessive as to shock the conscience of the court." App. 195, quoting *Eich* v. *Bd. of Regents for Cent. Mo. State Univ.*, 350 F.3d 752, 763 (8th Cir. 2003)). The court concluded the jury award was excessive under these standards. App. 205-06.

In determining the appropriate amount of the remittitur, the court observed that many statutes, in order to further legislative goals of punishment and deterrence, make willful violators liable for treble damages. Though acknowledging that the Copyright Act does not have a similar provision, the court reasoned that treble damage provisions in other statutes provide an appropriate point of reference. It concluded that three times the minimum statutory damage award for willful infringement – $750 – is the maximum amount a jury could

reasonably award in this case. App. 213-14. It accordingly remitted the award to $2,250 per work infringed – for a total remitted award of $54,000. Consistent with remittitur practice, however, the court did not enter judgment for that amount but rather offered plaintiffs the choice between accepting the reduced judgment or scheduling a new trial on damages. App. 225-26; *see Dimick* v. *Schiedt*, 293 U.S. 474, 479-82 (1935) (discussing common law remittitur practice); *see also* Wright, Miller & Kane, 11 Fed. Prac. & Proc. Civ. § 2815 (2d ed. 2010).

c. Plaintiffs rejected the remitted judgment and the case went to trial for a third time, limited in this instance to the appropriate amount of statutory damages. *See* App. 254. The court gave the following jury instruction on statutory damages:

> In determining the just amount of statutory damages for an infringing defendant, you may consider the willfulness of the defendant's conduct, the defendant's innocence, the defendant's continuation of infringement after notice or knowledge of the copyright or in reckless disregard of the copyright, the effect of the defendant's prior or concurrent copyright infringement activity, whether profit or gain was established, harm to the plaintiff, the value of the copyright, the need to deter this defendant and other potential infringers, and any mitigating circumstances.

App. 255.

The jury returned a verdict of $62,500 per work infringed, for a total

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statutory damage award of $1.5 million. App. 258-62. Defendant again filed a motion to alter or amend the judgment. She did not, however, request common law remittitur. She instead asserted that, in light of the plaintiffs' demonstrated refusal to accept a remitted judgment, the court should reach the constitutional issue and determine whether the jury verdict violated due process. The government filed a third brief reiterating the constitutional avoidance and due process arguments raised in our prior submissions.

The court held that the jury's verdict violated due process and, rather than remitting the matter for yet another trial, entered judgment for $2,250 per work infringed – $54,000 in total. App. 35. The court held that although it had attempted to avoid the constitutional issues, it was now compelled to reach them in light of the several trials that had already been conducted and plaintiffs' demonstrated refusal to accept remittitur. App. 7.

The court held that the standards for determining whether a jury award of statutory damages under section 504(c) comports with due process are set forth in *St. Louis, I. M. & S. Railway Co.* v. *Williams*, 251 U.S. 63 (1919), rather than *BMW of North America, Inc*. v. *Gore,* 517 U.S. 559 (1996), and related precedents on punitive damage awards. It reasoned that while *Gore* is premised in large part on the need to ensure that defendants have reasonable notice of their potential

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liability, such concerns do not apply where Congress has expressly set forth the permissible range of damages in a statute. It also noted that while *Gore* directs consideration of comparable civil penalties, that factor plays no role in evaluating damage awards under statutes that themselves specified the appropriate civil sanction. App. 8-15.

Applying the *Williams* standard to this case, the court held that the jury's award of $1.5 million for stealing 24 songs for personal use is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." App. 29. The court reasoned that although due process does not require a statutory damages award to be proportioned to plaintiff's loss, statutory damages have, in part, a compensatory purpose and should therefore "bear some relation to the actual damages suffered." App. 28. It recognized the strong public interest in protecting copyright, that defendant's illegal distribution over the peer-to-peer network contributed to widespread damage to plaintiffs, that detecting infringement over such networks was difficult and expensive, and that the damage award must accordingly be sufficient to justify plaintiffs' expenditure in pursuing infringers, and to deter defendant and similar infringers. App. 24, 28-29. It further noted that defendant's on-line distribution to others caused damages to plaintiffs that are far ranging and difficult to calculate, that defendant had willfully

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infringed plaintiffs' copyrights and then denied responsibility for her acts, and that these facts justified a higher award to serve the increased need for deterrence in this case. App. 30. It concluded, however, that defendant could not fairly be held accountable for all the damages caused by millions of other infringers, and that the jury's $1.5 million award was far in excess of the amount needed to deter an individual consumer of limited means acting with no attempt to profit from her conduct. App. 29.

The court held that it must therefore reduce the award to the maximum amount that will comply with due process. Turning to that inquiry, it stated that federal statutes reflect a broad legal practice of establishing a treble damages award as "the upper limit permitted to address willful or particularly dangerous behavior," App. 31, and after surveying a number of treble damage provisions, *see* App. 31-34, again concluded that treble the $750 statutory minimum for willful copyright infringement was the maximum award permitted by the Due Process Clause in this case. It thus concluded:

> There is no treble damages provision included within the Copyright Act, and this Court does not seek to insert such a provision. The Court concludes that in this particular case, involving a first-time willful, consumer infringer who committed illegal song file-sharing for her own personal use, $2,250 per song, for a total award of $54,000, is the maximum award consistent with due

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process.

App. 34.

Finally, the court, though granting plaintiffs' request for an injunction restraining further infringement and compelling defendant to destroy any unauthorized copies of plaintiffs' copyrighted works, declined to include additional provisions expressly barring defendant from making copyrighted works available for distribution to the public. App. 41-42. The court reasoned that the injunction enjoins all infringement by defendant, including use of an online distribution system to reproduce or distribute copyrighted works without express permission. It concluded that these provisions adequately address plaintiffs' concerns, and that additional provisions barring defendant from making work available for distribution without permission are unnecessary. App. 42.

SUMMARY OF THE ARGUMENT

The Copyright Act's statutory damage provision is reasonably related to furthering the public interest in protecting original works of artistic, literary, and musical expression and its constitutionality must therefore be sustained under the applicable, highly deferential standards of judicial review.

1. As the district court correctly recognized, the applicable standard of review is set forth in *St. Louis, I. M. & S. Railway Co.* v. *Williams*, 251 U.S. 63

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(1919). There, the Supreme Court held that where the legislature has specified a range of monetary penalties for the violation of a statute, a judgment imposing a penalty falling within the statutory range comports with due process unless it "is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *Id.*, 251 U.S. at 66-67. The Court stressed that the legislature must be accorded wide latitude in fixing the appropriate penalties, and that the validity of the penalty must therefore be evaluated with due regard for the legislature's power to adjust the amount to the public harms caused by the statutory violation. *Ibid*.

Contrary to defendant's contentions, the Due Process Clause does not require that the statutory damage award be proportional to the actual harm defendant has caused the plaintiff. Defendant attempts to derive this rule from *BMW of North America, Inc*. v. *Gore,* 517 U.S. 559 (1996). But as the district court held, *Williams*, not *Gore*, establishes the applicable framework for determining whether an award of statutory damages under the Copyright Act comports with due process.

Gore is inapposite. It imposes limitations on a jury's authority to award punitive damages in circumstances where the legislature has not constrained the jury's discretion. It thus requires that the jury award not be grossly

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disproportionate to the plaintiff's injury or defendant's misconduct. Absent such limitations, the *Gore* Court reasoned, defendants could not have fair, constitutionally sufficient notice of the magnitude of potential sanctions.

The *Gore* framework, however, does not apply to a statutory regime in which Congress has specified in advance the range of appropriate damages. In that circumstance, the statute itself supplies the constitutionally required notice deemed missing in *Gore*. Moreover, unlike jury awards of punitive damages, an award of statutory damages is based on legislative judgments that must be accorded deference by the reviewing court. *Williams*, not *Gore*, sets forth the appropriate standards for conducting such review.

2. The Copyright Act's statutory damages provision is constitutional under *Williams*. The legislative history of the statute demonstrates that, in recent years, Congress has become increasingly concerned with the harm to creative industries caused by widespread copyright infringement over the Internet. In 1999, Congress substantially increased the applicable statutory assessments for the specific purpose of deterring this unlawful conduct. *See Digital Theft Deterrence and Copyright Damages Improvement Act of 1999*, P. L. No. 106-160, § 2, 113 Stat. 1774 (1999). As amended, the statute accords a jury wide latitude to consider the particular circumstances of the case and to impose as a sanction for copyright

infringement substantial statutory assessments where, in the jury's view, the award is necessary to deter future infringements by the defendant or others engaged in similar conduct. Under *Williams*, the Court must accord Congress's decision great deference and may invalidate the statutory scheme only if it concludes that the relationship between the public harms at stake and the permissible range of sanctions is "obviously unreasonable." The Copyright Act readily satisfies this highly deferential standard of review.

3. The district court placed undue emphasis on whether the damages award exceeded treble the amount of the statutory minimum. The court acknowledged that the Copyright Act imposes no such limitation but reasoned that, because other statutory regimes limit punitive damage awards to treble the amount of actual damages, a similar standard should guide review of statutory damages under the Copyright Act.

The district court's analogy to these treble damage provisions, however, is flawed. Unlike other statutory regimes, statutory damages under the Copyright Act are not based on actual harm to the plaintiff. To the contrary, Congress provided copyright holders the option of electing statutory damages precisely because, in copyright cases, actual harm often cannot be known. The plain language of the statute accordingly makes no reference to a treble damages

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limitation but instead fixes a different, specifically identified maximum on damage awards. A *de facto* rule nonetheless limiting awards to treble the statutory minimum has no basis in the text of the statute and is at odds with Congress's express decision to authorize a higher ceiling. The Court should therefore make clear that a treble-the-minimum limitation is not consistent with the text or purposes of the statute.

STANDARD OF REVIEW

The Court reviews questions concerning the constitutionality of a statute *de novo*. *United States* v. *Crawford*, 115 F.3d 1397, 1400 (8th Cir. 1997). It has cautioned, however, that " '[d]ue respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.'" *United States* v. *Mugan*, 441 F.3d 622 (8th Cir. 2006), quoting *United States* v. *Morrison*, 529 U.S. 598, 607 (2000).

ARGUMENT

I. Due Process Review Of A Statutory Damages Award Is Governed By *Williams*, Which Requires That A Statutory Assessment Be Sustained Unless It Is Grossly Disproportionate To The Offense And Obviously Unreasonable.

In *St. Louis, I. M. & S. Railway Co.* v. *Williams*, 251 U.S. 63 (1919), the

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Supreme Court held that legislative determinations regarding the appropriate civil sanction for an offense must be accorded great deference when challenged on due process grounds. The Court concluded that while the Due Process Clause imposes a substantive limitation on the legislature's authority to impose civil penalties for conduct injurious to a public or private interest, "enactments transcend the limitation only where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *Id*. at 66-67.

The *Williams* standard is premised on two, interrelated principles central to due process review of a statutory damages award. First, the Court recognized that statutory assessments are not intended solely to safeguard the pecuniary interests of private parties. Rather, they also seek to redress and deter harm to important public interests. The Court thus stressed that where the award is imposed for violating a public law, "the legislature may adjust its amount to the *public wrong rather than the private injury*, just as if it were going to the state." *Williams*, 251 U.S. at 66 (emphasis added).

Second, the Court stressed that in assessing whether the statutory assessment is "grossly disproportionate" to the offense, the reviewing court must accord substantial deference to the legislature's judgment as to the amount of an appropriate assessment. The *Williams* standard is, in this regard, consistent with

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modern precedents recognizing the deference owed to Congress in matters of economic regulation. During the era of *Lochner* v. *New York*, 198 U.S. 45 (1905), the Supreme Court routinely invalidated economic legislation under an expansive construction of substantive due process that subjected legislative policy determinations to exacting judicial scrutiny. *See generally United States* v. *Lopez*, 514 U.S. 549, 605-06 (1995) (Souter, J., dissenting). That expansive conception of substantive due process, however, has been discredited:

> The doctrine that prevailed in *Lochner* * * * and like cases – that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely – has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, "We are not concerned * * * with the wisdom, need, or appropriateness of the legislation."

Ferguson v. *Skrupa*, 372 U.S. 726, 730 (1963) (quoting *Olsen* v. *Nebraska ex rel. Western Reference & Bond Ass'n,* 313 U.S. 236, 246 (1941)).

Defendant's amici are correct in noting that a statute must still satisfy the requirements of substantive due process. *See* Br. of Electronic Frontier Foundation *et al.* as Amicus Curiae at 28. But both defendant and her amici fail to appreciate that such review is highly deferential, and that "the modern framework

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for substantive due process analysis concerning economic legislation requires only an inquiry into whether the legislation is reasonably related to a legitimate governmental purpose." *Honeywell, Inc.* v. *Minnesota Life and Health Ins. Guar. Ass'n*, 110 F.3d 537, 554 (8th Cir. 1997).

The *Williams* standard is consistent with these modern principles of deference to the legislative judgment in matters of economic regulation. Like modern, substantive due process case law, *Williams* counsels judicial restraint before imposing through the Due Process Clause substantive limitations on Congress' power to enact legislation promoting social and economic welfare, and it appropriately stresses that legislative judgments in this realm are entitled to "wide latitude of discretion." *Id*. at 66; *cf. Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) ("[L]egislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on the one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way"); *Collins* v. *City of Harker Heights, Tex.*, 503 U.S. 115, 125 (1992) (courts should exercise judicial restraint before expanding rights protected by substantive due process).

The district court was thus correct in concluding (App. 8) that due process review of an award of statutory damages under the Copyright Act is governed by

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Williams. As the court reasoned, *Williams* is "directly on point and provides clear guidance to the Court for the task at hand." App. 10. The Supreme Court continues to cite *Williams* as the Due Process Clause standard for statutory damages. App. 9, citing *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 276-77 (1989). And, thus far, the only court of appeals to address the question has concluded that *Williams* supplies an appropriate standard for determining whether an award of statutory damages under the Copyright Act comports with due process. App. 10, citing *Zomba Enterprises, Inc.* v. *Panorama Records, Inc.*, 491 F.3d 574, 587-88 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 2429 (2008).

Defendant nonetheless asserts that the *Williams* standard is inapplicable. She argues that her constitutional claim is instead governed by a different due process principle drawn from *BMW of North America, Inc.* v. *Gore,* 517 U.S. 559 (1996), and related precedents on punitive damage awards, a principle assertedly requiring that a statutory damages award bear a reasonable relationship to the actual harm the infringer caused the copyright owner. *See* Def. Br. as Appellant/Cross-Appellee at 7, 17.

Defendant, however, errs in asserting that *Gore* rather than *Williams* supplies the appropriate standard for due process review. First, defendant errs in

asserting that, unlike *Williams*, there is "no public interest in play" in copyright infringement suits. Def. Br. as Appellee/Cross-Appellant at 16. This narrow view of the purpose of statutory damages is at odds with long established precedent and overlooks the strong public interests in both assuring copyright holders adequate redress for infringement and deterring wrongful conduct. The exclusive rights conferred by a copyright are "intended to motivate the creative activity of authors * * * by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.'' *Sony Corp. of Am.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984). This public interest cannot be realized if the inherent difficulty of proving actual damages leaves the copyright holder without an effective remedy for infringement or strips the trial court of any effective means of deterring further copyright violations. The Copyright Act consequently provides that, "[e]ven 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." *F. W. Woolworth Co.* v. *Contemporary Arts, Inc.*, 344 U.S. 222, 233 (1952); *accord Douglas v. Cunningham,* 294 U.S. 207, 209 (1935); *accord Cass County Music Co.* v. *C.H.L. R., Inc.,* 88 F.3d 635, 642 (8th Cir. 1996).

Thus, contrary to defendant's contention, the assessments authorized by the

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Copyright Act's statutory damages provision further an important public interest: the effective functioning of a system that protects and rewards individuals who create original works of musical, literary, or other artistic expression. The Due Process Clause, as construed by *Williams*, requires that these assessments bear a reasonable relation to furthering that public purpose. But neither the statute nor due process requires that a statutory damage award be proportional to the plaintiff's proven injury.

Second, defendant further errs in contending that deference to the legislative judgment as to the appropriate amount of a statutory assessment has no application here. Defendant argues in this regard that the statutory damages provision "reflects Congress's judgment only at a very general level" and "does not reflect Congress's judgment about the range of statutory damages that is appropriate in any particular case." Def. Br. as Appellant/Cross-Appellee at 11. She concludes that the deference to the legislative judgment mandated by *Williams* is therefore inapplicable, reasoning that "[c]ourts should not defer to Congress when Congress has not made the decision in question." *Ibid*.

This misconceives the statutory scheme. As an initial matter, the Copyright Act sets forth several specific parameters for a statutory damages award. It specifies the minimum and maximum awards for an infringement (17 U.S.C. §

504(c)(1)), provides for an increase in the maximum for willful infringements (17 U.S.C. § 504(c)(2)), provides for a reduced, minimum award if the infringer was not aware and had no reason to believe that his actions constituted an infringement (*ibid*.), and authorizes the court to remit statutory damages if the infringer is, or is affiliated with, a nonprofit educational institution, library, archives, or public broadcasting entity and reasonably believes the use of the work is a "fair use" permitted by statute (*ibid*.).

The permissible statutory range is broad, but it nonetheless reflects a specific congressional determination as to the appropriate limits of a statutory award. An award that falls within this range is consistent with the congressional judgment as to what constitutes a suitable penalty for infringement and an appropriate deterrent to future wrongdoing. It is entitled to substantial deference for that reason alone.

More fundamentally, defendant errs in maintaining that Congress must specify a narrow range of damages appropriate to each particular case in order to merit the deference otherwise required by *Williams*. The legislative judgment at issue here is the determination that, while the outer boundaries of a statutory damages award should be fixed by statute, the statutory purposes are best served by affording the fact-finder broad flexibility to adjust a statutory damages award to

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the particular circumstances of each case. As the Supreme Court has explained "[t]he necessary flexibility to do justice in the variety of situations which copyright cases present can be achieved only by exercise of the wide judicial discretion within limited amounts conferred by this statute." *F.W. Woolworth Co.*, 344 U.S. at 232.

After *Feltner*, this task must fall to the jury rather than the trial court if a jury trial is requested. The statutory scheme, however, reflects Congress's continuing intent to rely upon the bounded but flexible discretion of the trier of fact in fixing a statutory damages award. Indeed, though Congress amended the statutory damages provision shortly after *Feltner* was decided, it did not otherwise constrain the jury's discretion or alter the basic statutory scheme. Settled principles of statutory construction hold that, in these circumstances, Congress must now be presumed to intend that the jury exercise this flexibility, and to intend further that the jury determine the appropriate statutory damages award.[4]

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[4]Congress amended the statutory damages provisions of the Copyright Act in 1999, shortly after the Supreme Court held in *Feltner* that the Seventh Amendment requires all such awards to be determined by a jury. *See Digital Theft Deterrence and Copyright Damages Improvement Act of 1999*, P. L. No. 106-160, § 2, 113 Stat. 1774 (1999). These provisions substantially increased the range of permissible damage awards but otherwise left the basic statutory scheme unchanged. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). It must

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That is the legislative determination to which the reviewing court must defer under *Williams* — that a jury of defendant's peers, operating within the limits set by statute and guided by the presiding judge's instructions, affords the best means of tailoring a statutory damages award to the circumstances of the case and the underlying objectives of the Copyright Act.

Finally, *Gore* by its own terms, has no application to judicial review of damage awards under a statutory damages regime established by Congress. In *Gore*, the Supreme Court set forth three "guideposts" for evaluating whether a jury's award of punitive damages is so "grossly excessive" as to violate the Due Process Clause: the degree of reprehensibility of the defendant's conduct, the ratio of the award to the actual harm inflicted on the plaintiff, and the relation of the award to civil or criminal penalties imposed by the legislature for similar misconduct. *Id.* , 517 U.S. at 574-75. These "guideposts," however, are tailored to review of a jury award of punitive damages under authority that typically places few constraints on the jury's discretion. Even before *Gore*, the Supreme Court noted that the wide discretion typically accorded juries in the award of punitive

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therefore be presumed to be aware of *Feltner's* mandate that statutory damages be set by a jury and to intend that juries determine, within the amended statutory limits, the appropriate amount of a statutory damages award. *Accord Sony BMG Music Entertainment*, 660 F.3d at 487 n.8.

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damages "pose[s] an acute danger of arbitrary deprivation of property." *Honda Motor Co., Ltd*, 512 U.S. at 432. The *Gore* guideposts are accordingly addressed to the specific due process concerns arising out of vesting a jury with virtually unbridled discretion.

Statutory damages under the Copyright Act differ in that they are entered pursuant to a legislative determination expressly circumscribing the permissible range of damages. The presence of legislatively-specified limitations on an appropriate damage award is a crucial distinction. Such standards implicate the reviewing court's obligation to defer to the legislative judgment on an appropriate assessment. Moreover, they limit the jury's discretion by precluding awards beyond a limit the legislature has deemed reasonable. As Justice Brennan observed, "I should think that, if anything, our scrutiny of awards made without the benefit of a legislature's deliberation and guidance would be less indulgent than our consideration of those that fall within statutory limits." *Browning-Ferris Industries* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989)(Brennan, J., concurring). He thus concluded that "I for one would look longer and harder at an award of punitive damages based on such skeletal guidance than I would at one situated within a range of penalties as to which responsible officials had deliberated and then agreed." *Ibid.*

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Gore is animated by fair notice concerns tht do not pertain to an award of damages under statutes that specify in advance the permissible range of a damage award. *Gore* thus reasons that, where a jury has unfettered discretion to award punitive damages, the defendant, absent some limiting principle of proportionality, does not have fair, constitutionally sufficient notice of the magnitude of the sanction that may be imposed for misconduct. *Gore*, 517 U.S. at 574-75. The *Gore* guideposts are intended to remedy this defect by ensuring that defendants have adequate notice of possible sanctions. Where, however, Congress has specified in advance the range of permissible damage awards, potential defendants already have express notice of the magnitude of the possible sanction, without need for a judicial gloss further constraining the jury's discretion.

Moreover*, Gore's* directive to consider the relation of the jury's damages award to civil or criminal penalties for the similar conduct (*see id*., 517 U.S. at 583-84) has no relevance to review of a damage award under a statute that already reflects a legislative determination of appropriate sanctions. *Gore* establishes this guidepost to aid the reviewing court in evaluating whether a jury's discretionary award of punitive damages is reasonably proportional to legislatively-imposed penalties for similar misconduct. The guidepost is thus a check on the jury's discretion, deemed necessary to ensure that the jury's otherwise unfettered power

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to fix punitive damages does not result in awards that are grossly disproportionate to the sanctions authorized by a responsible legislative body in comparable circumstances.

In the case of statutory damages under the Copyright Act, however, Congress has already imposed constraints on the jury's discretion and specified the range of permissible sanction. The *Gore* guidepost makes little sense in these circumstances, for the jury's damage award, if within the statutory limits, is itself the assessment imposed by the legislature for comparable cases. Applying *Gore* would mean comparing the statutory damage award to itself – a nonsensical result that underscores the extent to which the *Gore* guideposts are ill-suited to review of damages awarded under statutes that fix the minimum and maximum awards for defendant's misconduct.

Not surprisingly, no court decision – apart from the district court judgment vacated by the First Circuit in *Sony BMG Music Entertainment*, *supra* – has applied *Gore* to complaints that an award of statutory damages under the Copyright Act violates the Due Process Clause. In *Zomba Enterprises, Inc.* v. *Panorama Records, Inc.,* 491 F.3d 574, 587 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 2429 (2008), for example, the Sixth Circuit, in the only appellate decision to address the question under the Copyright Act, held that the application of *Gore* is

uncertain at best, and that due process review of a statutory damages award may therefore proceed under *Williams*.

Similarly, in *Lowrys Reports, Inc.* v. *Legg Mason, Inc.*, 302 F. Supp. 2d 455, 459-60 (D. Md. 2004), the district court held that *Gore* is inapplicable to statutory damages under the Copyright Act. The court reasoned that "[t]he unregulated and arbitrary use of judicial power that the *Gore* guideposts remedy is not implicated in Congress's carefully crafted and reasonably constrained statute." *Id.* at 460. It further noted that under the Copyright Act "[s]tatutory damages exist in part because of the difficulties in proving – and providing compensation for – actual harm," and "they may only be awarded when a plaintiff forgoes the right to collect actual damages * * * ." *Id.* at 460. The court therefore held that the damage award was not subject to the *Gore* analysis. *Ibid*; *see also Louis Vuitton Malletier, S.A.* v. *Akanoc Solutions, Inc.*, No. 07-03952, 2010 WL 559837 (N.D. Cal. March 19, 2010) * 13 (applying *Williams* rather than *Gore* to review of statutory damages under Copyright Act and Lanham Act), *aff'd in part and vacated in part on other grounds*, 658 F.3d 936 (9th Cir. 2011); *but see Leiber* v. *Bertelsman AG*, No. 00-1369, 2005 WL 1287611 at *10-11 (N.D. Cal. June 1, 2005) (suggesting in dicta that *Gore* applies to due process review of statutory damages under the Copyright

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Act).[5]

The *Gore* and *Williams* due process standards serve fundamentally different purposes. *Gore* is designed to impose constraints on a jury's discretion where the legislature has not prescribed the specific circumstances warranting a damage award or the range of permissible sanctions. *Williams*, in contrast, takes account of the appropriate relationship between the reviewing court and the legislature. Unlike *Gore*, it directs the trial court's attention to the deference owed a legislative judgment, the public purposes underlying a statutory damages regime, and the heavy burden a movant must carry before the court can set aside an award falling within the range specified by Congress. *Cf. Zomba* , 491 F.3d at 587 (review under *Williams* "is extraordinarily deferential – even more so than in cases

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[5] Case law under other statutory damage regimes similarly holds that *Williams*, not *Gore*, establishes the appropriate standards for due process review. *See*, *e.g*., *Centerline Equip. Corp*. v. *Banner Pers. Serv., Inc*., 545 F. Supp. 2d 768, 777–78 (N.D. Ill. 2008) (applying the *Williams* standard to uphold the statutory damages provision of the Telephone Consumer Protection Act); *Accounting Outsourcing LLC v. Verizon Wireless Personal Communications, LP*, 329 F. Supp. 2d 789, 808–10 (M.D. La. 2004) (same); *Texas* v. *Am. Blastfax, Inc*., 121 F. Supp. 2d 1085 ,1090–91 (W.D. Tex. 2000) (same); *Verizon California Inc.* v. *Onlinenic, Inc*., No. 08-2832, 2009 WL 2706393 (N.D. Ca. Aug. 25, 2009) (due process review of statutory damages under Anti-Cybersquatting Consumer Protection Act governed by *Williams*); *but see Parker v. Time Warner Entertainment Co.,* 331 F.3d 13, 22 (2d Cir. 2003) (stating, in dicta, that "it may be" that an award of statutory damages to a very large class under the Cable Communications Policy Act would be subject to review under *Gore* but noting that "[a]t this point in this case, * * * these concerns remain hypothetical").

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applying abuse-of-discretion review"). *Williams*, not *Gore*, thus establishes the appropriate standards for due process review of a statutory damage award. And it requires that statutory assessments be sustained as against due process challenge unless they are grossly disproportionate to the offense and obviously unreasonable.

II. The Copyright Act's Statutory Damages Provision Is Constitutional Under *Williams*' Highly Deferential Standards of Due Process Review.

Defendant argues that the statute, in any conceivable application to her circumstances, is unconstitutional *per se*. She thus asserts that *any* award within the range specified by Congress would violate due process because it would, even at the statutory minimum, be disproportionate to her individual culpability for file-sharing and far in excess of any actual injury she caused the plaintiffs. *See* Br. for Def. as Appellee/Cross-Appellant 14-16, 19. She concludes that the Court should "reverse and render a take-nothing verdict on the ground that any award of statutory damages, including an award of the statutory minimum, would deny her due process of law." *Id*. at 21.

Much of this argument is premised on the erroneous contention that due process requires a statutory damages award to be proportional to the copyright holder's injury. As explained above, however, the Copyright Act permits an

award of statutory damages in lieu of actual damages precisely because Congress has long recognized that actual damages may not be susceptible to proof, and because depriving the copyright holder of a remedy in such circumstances would encourage willful and deliberate infringement. *Douglas*, 294 U.S. at 209. Nothing in the Due Process precludes Congress from basing statutory assessments on these considerations rather than injury to the wronged party. Rather, under *Williams*, Congress is free to base an assessment on the nature and scope of the public harm, not the private injury.

The public harms caused by individuals who, like defendant, have used peer-to-peer Internet networks to copy and distribute protected works without authorization, are substantial. The First Circuit has found that the proliferation of peer-to-peer networks from 1999 onward has had a significant negative impact on the recording industry. *Sony BMG Music Entertainment*, 660 F.3d at 492. It found, in particular, that '[b]etween 1999 and 2008, the recording industry as a whole suffered a fifty percent drop in both sales and revenues," that the industry attributes the harm to a rise in illegal downloading, and that the reduction in revenues has led to significant job loss in the industry and "diminished recording companies' capacities to develop and market new recording artists." *Ibid*. The district court made similar findings below, concluding that "in aggregate,

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downloading has caused substantial, widespread harm to the recording industry" and that "defendant's individual acts of distribution likely led to distribution by an exponential chain of other users." App. 28.

Congress has set the range of permissible statutory damages at the levels which now prevail with the specific intention of deterring this unlawful conduct. As noted above, in 1999, Congress significantly increased the range of statutory damages. *See Digital Theft Deterrence and Copyright Damages Improvement Act of 1999*, P. L. No. 106-160, § 2, 113 Stat. 1774. In particular, the 1999 amendments increased the minimum award for willful infringements from $500 to $750, increased the maximum permissible award for non-willful infringements from $20,000 to $30,000, and increased the maximum permissible award for willful infringements from $100,000 to $150,000. *Ibid*.

The legislative history of the 1999 amendment of section 504(c) shows that Congress enacted these large increases for the specific purpose of deterring Internet-based, copyright infringement. Congress thus found that:

> By the turn of the century the Internet is projected to have more than 200 million users, and the development of new technology will create additional incentive for copyright thieves to steal protected works. * * * 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,

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> 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 they should stop the activity or face legal sanction. *In light of this disturbing trend, it is manifest that Congress respond appropriately with updated penalties to dissuade such conduct*.

H.R. Rep. No. 106-216, 106th Cong., 1st Sess. 3 (1999) (emphasis added).

Under *Williams,* Congress has "wide latitude" to take these considerations into account when setting a statutory penalty. Given the deference owed congressional judgment and the well-documented threat to the creative industries posed by widespread copyright infringement over peer-to-peer networks, it is plain that the statute establishes a range of damages that is reasonably related to the public harm caused by the unauthorized distribution of protected works over the Internet. The statutory damages provision may therefore be constitutionally applied to the defendant.

Defendant argues that she might have been sued for infringing more than 1,000 works and that the statute could thus have resulted in an "obviously" excessive award if a substantial, per-work assessment were applied to each such infringement. Br. for Def. as Appellee/Cross-Appellant at 15. Defendant, however, was sued for infringing 24 works, not a thousand works. And, in the

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first jury verdict – the verdict that plaintiffs and defendant agree should be treated as the operative verdict – the jury awarded $9,250 per work infringed. That is less than a third of the maximum for a non-willful infringement, notwithstanding the jury's conclusion that the defendant had engaged in willful infringement. To make out her constitutional claim, defendant must show, not only that *this* particular application of the statute is unconstitutional, but that *any* application of the statutory damage range is unconstitutional. Pointing to alleged infirmities in an entirely hypothetical, extreme application of the statute has no bearing on either question.

We note, in any event, that while the statute does authorize awards of up to $150,000 for each work willfully infringed, there are, in practice, significant safeguards calculated to ensure that statutory damage awards remain reasonable, proportionate to the public harms caused by the individual defendant's infringement, and tailored to the need for deterrence. The statutory range only establishes the boundaries of the jury's discretion. Within those limits, the jury has broad latitude to consider the totality of circumstances bearing on an appropriate sanction, including any mitigating factors that would warrant a lower damage award. As noted above, the well-established judicial practice is to instruct the jury that it may consider a wide variety of mitigating factors in setting a

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statutory damage award. The trial court here made full use of that authority, instructing the jury that it could consider, among other factors, the willfulness of the defendant's conduct, the defendant's innocence, the effect of the defendant's prior or concurrent copyright infringement activity, whether profit or gain was established, harm to the plaintiff, the value of the copyright, and any mitigating circumstances. App. 255. These constraints serve to keep statutory damage awards within reasonable bounds and refute defendant's broad contention that the statute is unconstitutional in any conceivable application to her circumstances.

Defendant similarly errs in asserting that the statute is unconstitutional because it sanctions awards that punish a defendant for harm caused by unauthorized file sharers as a class rather than her own misconduct. Br. for Def. as Appellee/Cross-Appellant at 20-21. There is no evidence that the jury's award is based on anything other than the defendant's infringement, her knowledge that her conduct was illegal (App. 23), her "past refusal to accept responsibility for her actions (App. 23)," and similar factors bearing on the need for award that would serve as a deterrent to future misconduct.

We agree that due process precludes a jury from imposing punitive damage awards that punish a defendant in a civil suit for injuries he or she has inflicted on third parties not before the court. *Philip Morris USA* v. *Williams*, 549 U.S. 346,

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353 (2007). It does not, however, bar the imposition of statutory damage awards set at levels high enough to deter the defendant or others like her from committing similar violations of the law in the future. *Cf. Gore*, 517 U.S. at 568 ("[p]unitive damages may be imposed to further a State's legitimate interest in punishing unlawful conduct and deterring its repetition"); *accord State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 416 (2003).

The ubiquity of unauthorized file-sharing and the aggregate harm it has caused the recording industry underscore the need for statutory damage awards that will serve as a strong deterrent to future copyright infringement. As one member of Congress remarked in hearings exploring the impact of peer-to-peer networks on copyright protection:

> In the world of copyright law, taking someone's intellectual property is a serious offense, punishable by large fines. In the real world, violations of copyright law over the Internet are so widespread and easy to accomplish that may participants seem to consider it equivalent to jaywalking – illegal but no big deal.
> But it is a big deal. Under U.S. law, stealing intellectual property is just that – stealing. It hurts artists, the music industry, the movie industry, and others involved in creative work. And it is unfortunate that the software being used – called "file sharing" as if it were simply enabling friends to share recipes, is helping create a generation of Americans who don't see the harm.

Privacy and Piracy: The Paradox of Illegal File Sharing on Peer-to-Peer Networks and the Impact of Technology on the Entertainment Industry: *Hearing*

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Before the Permanent Subcomm. on Investigations of the Sen. Comm. on Governmental Affairs, 108th Cong., 1st Sess. 10 (2003) (statement of Sen. Levin).

Copyright infringement over peer-to-peer networks poses a particularly serious threat to the creative industries. As Senator Levin's remarks indicate, infringement is easy and ubiquitous and readily accomplished by virtually any home computer user. It has occurred on a massive scale and wreaked serious economic harm. Moreover, the decentralized nature of peer-to-peer networks makes it particularly difficult to determine the scope of unauthorized distribution and the attendant harm to an individual copyright holder – the very reason why Congress has long provided for the award of statutory damages in lieu of actual damages.

At the same time, many infringers continue to regard their own acts of infringement as harmless and inconsequential. Congress plainly disagrees. It regards unauthorized file-sharing of protected works as a form of stealing that has deeply harmed important public interests. *Ibid*. Nothing in the Due Process Clause precludes it from responding with stiff monetary penalties calculated to deter this unlawful conduct.

The various policy arguments advanced by defendant's amici do not cast any further doubt on the constitutionality of the statutory scheme. Amici argue that

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statutory damages must be predictable and bear a reasonable relationship to actual harm to ensure that artists, authors, and scholars wishing to make lawful, secondary use of existing works are not chilled by the potential for onerous statutory liability if they innocently infringe copyrighted material. None of these contentions, however, establishes that the statutory damages provision is unconstitutional.

First, though the range of statutory damages is indeed broad, it provides constitutionally adequate notice of the potential sanction for infringement. Amici argue that the statutory range is "so vast that it provides no practical means for predicting the outcome at trial." Br. of Electronic Frontier Foundation as Amicus Curiae at 19. That the statute authorizes a very broad range of potential penalties, however, does not render the notice afforded a potential defendant constitutionally deficient.

In *United States* v. *Batchelder*, 442 U.S. 114 (1979), for example, the Supreme Court addressed a similar question in the criminal context, determining whether two, pre-sentencing guidelines statutes authorizing a broad range of fines and/or prison terms were void for vagueness because they failed to provide adequate notice of potential sanctions. One statute at issue provided for fines of not more than $5,000 and/or prison sentences of not more than five years; the

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other statute provided for fines of not more than $10,000 and/or imprisonment of not more than two years for the same criminal conduct. Despite the wide range of potential fines and prison terms, the Court concluded that the notice was constitutionally sufficient: "So long as the overlapping criminal provisions clearly define the conduct prohibited and punishment authorized, the notice requirements of the Due Process Clause are satisfied." *Id.* at 123.

Batchelder dealt with adequate notice of a criminal sanction – potential imprisonment – that poses significantly greater individual deprivations than the civil damage awards at issue here. If notice of the outer bounds of a wide range of potential criminal penalties affords a criminal defendant constitutionally sufficient notice, then notice of the minimum and maximum award of civil damages authorized by the Copyright Act must, *a fortiori*, be deemed constitutionally sufficient as well.

Second, amici err in asserting that the substantive standard for a damage award is so vague that it offends due process. They argue in this regard that the statutory standard – that damages be awarded in such amounts "as the court considers just (17 U.S.C. § 504(c)(1))" – is a "vague admonition" that "offers little guidance" to the court and that renders potential liability unpredictable. EFF Amicus Br. at 19. But again, so long as the statute "define(s) the conduct

prohibited and punishment authorized, the notice requirements of the Due Process Clause are satisfied." *Batchelder,* 442 U.S. at 123.

Third, the hypothetical possibility that an infringer of multiple works could be subject to substantial aggregate liability does not render the statutory scheme unconstitutional. Amici argue that "when multiple copyrighted works are at issue, aggregation of statutory damage awards can amplify the potential award to astonishing amounts." EFF Amicus Br. at 19. There are, however, meaningful, systemic safeguards against excessive jury awards. As an initial matter, the statute does not direct the mechanical application of the maximum statutory award for every work infringed. It instead contemplates that a jury of the defendant's peers will determine a just award in light of the facts of the case before it, and that the jury will be free to enter an award anywhere within the statutory range, all the way down to the statutory minimum. The jury's decision in this regard is guided by instructions from the trial court which, as in this case (*see* App. 255) will typically advise the jury that it is free to consider any mitigating circumstances. Thus, provided the statutory minimum is satisfied, a jury is not confined to considering the appropriate award for each work infringed but may also consider what award, *in the aggregate*, is "just."

Moreover, every jury award remains subject to the trial court's power to set

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aside a judgment that, in the court's view, is grossly disproportionate to the offense. It bears noting in this regard that we do not maintain that any award that falls within the prescribed statutory range is *per se* constitutional. Given the deference owed Congress, both in setting the permissible range of damage awards and in vesting a jury with discretion to determine the appropriate amount, a within-range award should come before the reviewing court with a strong presumption of validity. Under *Williams*, however, the court retains the authority to set aside unconstitutionally excessive jury awards if they are grossly disproportionate to the offense and obviously unreasonable. While that power should be exercised sparingly, it remains an important check on the jury that further bolsters the constitutionality of the statutory scheme. *Cf. Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 20-22 (1991) (punitive damages award consistent with due process where jury's discretion constrained by post-verdict review intended to ensure that they are reasonably related to purposes of award).

Finally, the question of whether statutory damage levels are chilling legitimate secondary uses of copyrighted work is a matter of legislative policy, not constitutional law. These concerns have little if any relevance to this case, which involves a defendant who merely wanted to obtain music without paying for it, who was aware her conduct was illegal, and who nonetheless persisted in willfully

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infringing plaintiffs' copyrights. *See* App. 22-23. In any event, the Copyright Act already sets forth important protections for lawful users of protected works as well as for innocent infringers. Thus, among many protections, the statute: (1) provides that the "fair use" of copyrighted material is not infringement (17 U.S.C. 107; *see generally Harper and Row Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539 (1985)), (2) affords the court discretion to remit statutory damages to $200 if the infringer was not aware and had no reason to believe that his acts constituted an infringement (17 U.S.C. 504(c)(2)), and (3) mandates that the court remit statutory damages if the infringer had reasonable grounds for believing he had made "fair use" of the protected work and is an educator, librarian, archivist, or employee of a public broadcasting entity (*ibid*.).

It is for Congress to determine whether, despite these safeguards, statutory damages unreasonably chill lawful secondary uses of existing work. That in turn requires Congress to consider, among other matters, whether the potential harm to lawful, secondary users is outweighed by the risk that artists will be discouraged from creating new works if statutory damage awards are not high enough to deter infringers. Defendant's amici may question the wisdom of the balance now struck by Congress. But the statutory balance is the product of policy choices firmly committed to the discretion of the legislative branch. It cannot be redrawn by the

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Court under the guise of constitutional adjudication.

III. Neither The Statute Nor The Constitution Limit Statutory Damages To Treble The Statutory Minimum.

The United States has not appealed from the district court's determination that the specific jury award at issue here is unconstitutionally excessive. *Williams* authorizes constitutional review of the jury verdict and we construe the district court's decision here as confined to the specific jury award at issue in this case. The court does not purport to hold that the statutory scheme is itself unconstitutional and the judgment thus does not directly affect the interests of the United States. We have consequently deemed it unnecessary to appeal from the district court judgment.

The district court's decisional rationale, however, may be read to suggest that treble the minimum amount of statutory damages should operate as a categorical ceiling on a statutory damage award in cases involving putatively "noncommercial" file sharers. There is no basis for such a rule, and as the government has an important institutional interest in the legal standards governing statutory damage awards, we urge the Court to reject any suggestion that the statute or Constitution limits damages to treble the statutory minimum.

As an initial matter, the statutory text does not impose any such limitation.

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The Copyright Act instead sets a different upper limit on an award – $150,000 per work in the case of a willful infringement. The evident purpose of this statutory scheme is to give the jury broad discretion in cases where actual damages cannot be proven, subject only to a statutorily specified ceiling – a ceiling far higher than treble the statutory minimum of $750 per work willfully infringed.

Nor can such a rule be fairly derived by analogy to other statutory regimes. Statutory damages under the Copyright Act are made available precisely because the amount of actual damages cannot be established with certainty. Thus, the statutory minimum award trebled by the court is not a measure of actual damages in the first instance. Moreover, while other statutory schemes do have treble damages limitations, those provisions do not purport to reflect a *constitutional* limit on an appropriate damage award. They instead reflect congressional judgment as to an appropriate limit on punitive awards under each particular statutory scheme. The text of the Copyright Act reflects a fundamentally different policy choice, one that affords the jury much greater latitude in order to meet the unique difficulties of deterring copyright infringement. Other statutory regimes thus are not relevant to determining an appropriate due process limitation on statutory damage awards under the copyright Act.

The district court reasoned in part that limiting the award to treble the

statutory minimum would ensure that it bear some relation to plaintiff's injury. Neither the statute nor the Constitution impose any such requirement, however. The statute permits a statutory damage award without *any* proof of injury. *F. W. Woolworth Co.*, 344 U.S. at 233 (1952). That does not mean that evidence of actual damage is wholly irrelevant. Rather, "when recovery may be awarded without any proof of injury, it cannot hurt and may aid the exercise of discretion to hear any evidence on the subject that has probative value." *Id*. at 231. But under *Williams*, the Constitution permits the award to be based on the relation to *public* harms. Thus, while evidence of actual harm may be considered, there is no constitutional or statutory requirement that the award bear any relation to proven, private injury.

Finally, defendant's putative status as a "non-commercial" infringer does not warrant engrafting onto the statutory damages provision a treble-the-minimum limitation that is absent from the statutory text. The statute does not support treating defendant as a noncommercial infringer. Rather, defendant, by participating in a peer-to-peer file-sharing network, had the expectation of receiving music from other network participants in exchange for making her own music files available to others. For purposes of the copyright law, that constitutes an expectation of receiving financial gain – the hallmark of commercial activity.

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Sony BMG Music Entertainment, 660 F.3d 497 & n.10; *see* 17 U.S.C. 101, defining "financial gain" as including "receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works"; *see also* 17 U.S.C. 506(a)(1), making criminally liable person who willfully infringes a copyrighted work if the infringement was committed for "purposes of commercial advantage or private financial gain."

In any event, nothing in the statutory scheme suggests that Congress intended special liability limitations to apply to noncommercial infringers. Section 504(c) provides, without limitation or qualification, that "the copyright owner may elect, at any time before final judgment is rendered, to recover instead of actual damages and profits, an award of statutory damages for all infringements involved in the action * * *." 17 U.S.C. 504(c)(1). There is no exception for infringers who do not seek commercial gain. Nor is there any exception for individuals who use peer-to-peer networks to violate the copyright holder's exclusive rights to reproduce and distribute their work. Rather, the statute makes statutory damages available in *any* action for infringement. "The statute," as the First Circuit has concluded, "does not condition the availability of either set of [actual or statutory] damage calculations on whether the offending use was by a consumer or for commercial purposes or not." *Sony BMG Music Entertainment*,

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600 F.3d at 499.

For similar reasons, defendant's putative status as a "noncommercial" infringer makes no difference in the constitutional analysis. Much of the harm from file-sharing can be attributed to similar, "noncommercial" users. Congress concluded that this infringing activity is contrary to important public interests. It has wide latitude under the Due Process Clause to establish a range of damage awards sufficient to provide adequate redress to copyright holders and to deter this unlawful conduct. Nothing in the Constitution limits the upper boundary on such damage awards to treble the statutory minimum.

The district court stated that "[t]here is no treble damages provision included in the Copyright Act, and this Court does not seek to insert such a provision." App. 34. That is a correct statement of the law and should, in both theory and practice, guide any court which undertakes review of a statutory damages award.

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CONCLUSION

For the foregoing reasons, the constitutionality of the Copyright Act's statutory damages provision should be sustained.

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FRAP 32(a)(7) CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF COMPLIANCE WITH EIGHTH CIRCUIT RULE 28A(h) REGARDING VIRUS SCAN

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

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CERTIFICATE OF SERVICE

I certify that on March 22, 2012, I served the foregoing Brief for the United States as Intervenor/Cross-Appellee by electronically filing the brief with the Court. As counsel for the appellant are registered with the Court's Electronic Case Filing System, the electronic filing of the Brief for Respondent constitutes service upon them.

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