NOS. 10-1883, 10-1947, 10-2052

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

SONY BMG MUSIC ENTERTAINMENT, ET AL.,

Plaintiffs-Appellants/Cross-Appellees,

v.

JOEL TENENBAUM,

Defendant-Appellee/Cross-Appellant.

On Appeal From The United States District Court
For The District Of Massachusetts

OPENING BRIEF FOR THE DEFENDANT-APPELLEE/CROSS-APPELLANT

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INTRODUCTION

This is a civil action against a single individual, not against the millions of others who acted similarly. It is an action for redress of damage caused to Plaintiffs by this single individual, not for damage to others or caused by others. The challenged judgment is directed toward someone who downloaded free music knowing it was illegal. What the law has done in response is too extreme to be defended. This use of federal judicial authority is vastly out of proportion to the harm yet nominally in keeping with the text of the statute supposedly supporting it. Thus, the very foundation of the statute comes into question. The fundamental issue before this Court is whether the lower court's judgment against Defendant Joel Tenenbaum — levied without evidence of any harm directly attributable to him — should stand. This result is unconstitutional, unauthorized by statute, and imposed by a judicial process riven with error.

STATEMENT OF JURISDICTION

Defendant adopts the Statement of Jurisdiction given by the Government at Gov't Br. 1–2.

STATEMENT OF THE ISSUES

1. Is the award of damages against the defendant unconstitutionally excessive?

2. Was the jury properly guided by the trial judge's instructions?

3. Does the statute under which the defendant was prosecuted apply to individual noncommercial consumers?

4. Does 17 U.S.C. § 504(c) remain operative in the wake of *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998)?

STATEMENT OF THE CASE

When the acts in question began, Joel Tenenbaum was a teenager. At the time, no one knew precisely what the legal status of filesharing was. This was the "interregnum" that the district court referenced in its opinion denying a Fair Use defense. *See Sony BMG Music Entm't v. Tenenbaum*, 672 F. Supp. 2d 217, 221 (D. Mass. 2009). The Recording Industry Association of America ("RIAA") changed that. RIAA President Cary Sherman described the 2003 decision to sue individual filesharers:

> The time had come to shift over to a strategy that would be more effective. The lawsuits were obviously controversial in the media, but the reality was that most people had no idea that what they were doing was illegal at the time of those lawsuits . . . . That completely flipped overnight when we started the lawsuits . . . . So we think it had a tremendous impact by very clearly searing in the minds of the public that

> maybe getting all of this stuff for free isn't legal after all . . . . As unpopular as that was going to be, we were prepared to take it on.

Rocco Castoro, *Downloading Some Bullshit*, Viceland Online (August 2010), http://www.viceland.com/int/v17n8/htdocs/downloading-some-bullshit-484.php#ixzz192OKfxhi.

Joel received a letter in September 2005 from an unknown law firm informing him for the first time that he had been detected infringing copyright and that he had only two options: settle or be sued. Tr. Exh. 24. There was no prior notification, no cease and desist, only a note from a stranger telling him "pay up or be sued." He sent back a letter offering to settle for $500. Tr. Exh. 23; *see also* J.A. 336 (redacted version). Plaintiffs rejected his offer and demanded $12,000 in settlement. The litigation strategy at the heart of the RIAA campaign against individual noncommercial filesharers thus takes advantage of the difficulty and cost of litigating in federal court. So overwhelming is the asymmetry that no one can rationally defend. Accordingly, defense here is to some degree economically irrational, but otherwise this court would never have occasion to hear the issues presented by this case.

Alleging the unauthorized download and distribution of 30 songs, Plaintiffs filed a copyright infringement action in federal court demanding injunctive relief and statutory damages. Along with a crowd of others, he stood — at the time unrepresented — before the court with his mother by his side when the following transpired:

> JUDGE: I can't say this is a situation that is a good situation or a fair situation, it is, however, the situation . . . if you really wish to stand and fight, you need to have legal representation because otherwise all you're going to do is stand in place, their fees go up and we'll end this case with the higher end of the statutory damages rather than the lower end. Really these cases have been resolved anywhere from $3,000 to $10,000.
>
> MRS. TENENBAUM: My son was offered $12,000, your Honor, and every time we appear that goes up. We've offered it time and time again since this very inception. They won't—
>
> JUDGE: Is that right? . . . . (Turning to RIAA counsel) You know it seems to me that counsel representing the record companies have an ethical obligation to fully understand that they are fighting people without lawyers, to fully understand that, more than just how do we serve them, but just to understand that the formalities of this are basically bankrupting people, and it's terribly important that you stop.

Tr. of Mot. Hr'g of June 17, 2008 at 9:19–11:7 (Consol. Doc. No. 614).

Later, Plaintiffs asserted that § 504(c) allows any award between $750 and $150,000 per infringement, multiplied across unlimited

infringements, even against a noncommercial defendant engaged in individual filesharing for personal use. Here, that range could have yielded an award ranging from $22,500 up to $4,500,000 for 30 songs, which have a total retail value of approximately $30. On Plaintiffs' theory, Joel's total liability could have run into the *billions* had they merely chosen to sue on more songs.

Defendant moved to dismiss the complaint, challenging the application of § 504(c) on Due Process and 8th Amendment grounds. *See* J.A. 318–21. The United States intervened to defend the statute. Denying the motion to dismiss as premature, the district court postponed constitutional concerns, noting the inability to compare actual damages to statutory damages in the absence of a factual record, and reserved Defendant's right to file the challenge contingent on the outcome. *See id*.

At trial, Plaintiffs presented multiple experts testifying to the aggregate harm to the entire recorded music industry[1] purportedly

[1] Plaintiffs represent about 70% of recorded music sales. *See* "American Association of Independent Music," http://a2im.org/mission/ (accessed Dec. 26, 2010) (website of a trade group that represents the independent music sector comprising 30% of music industry marketshare and 38% of digital music sales).

resulting from millions of non-party filesharers worldwide. Defendant's efforts to present issues of fairness involving Plaintiffs' contributory behavior to the filesharing problem were blocked, as were Defendant's experts describing fairness and the difficulties facing the Digital Generation in understanding copyright and its application to songs freely floating on the Internet. Defendant testified forthrightly that he had downloaded and shared the 30 songs, and he was impeached with his unwillingness to say so beforehand.[2] Joel's $500 money order and accompanying letter were not only excluded but redacted in a manner that turned the evidence against him. *See* J.A. 336.

No evidence of actual harm caused by Defendant was ever introduced.

At the conclusion of evidence, the trial judge directed a verdict on 30 infringements. She instructed the jury only on damages giving them a broad and non-exhaustive list of eight factors that might bear on damages. *See* J.A. 66–69. She then instructed the jury of the statutory range but conveyed none of the context pertaining to the diversity of

[2] Plaintiffs attempted to further impeach him by introducing evidence that, in addition to listening to free music, Joel had looked at free pornography. This effort was rebuffed. *See* Trial Tr. of July, 29, 2009, at 70–79 (Doc. No. 55).

infringements that the Copyright Act covers nor how this determination fits into a larger scheme of copyright jurisprudence. Instead, she said simply, "The Copyright Act entitles a plaintiff to a sum of not less than $750 and not more than $150,000 for an act of infringement that you find to be willful as you consider just." *Id.* at 68.

The verdict form listed the 30 songs, provided the jury with a choice on willfulness, and a box in which to assign an award for each song.

	SOUND RECORDING	PLAINTIFF	With respect to this sound recording, was his infringement committed **willfully**?	Statutory Damages Award	
5	Nirvana "Come as You Are"	UMG Recordings, Inc.	NO	If you answered "NO", what damages do you award the Plaintiff for **this** copyrighted work, from $750 to $30,000?	
			(YES)	If you answered "YES", what damages do you award the Plaintiff for **this** copyrighted work, from $750 to $150,000?	22,500.00

See J.A. 73–79.

The jury awarded $22,500 for each of the 30 songs, for a total award of $675,000. The district court subsequently reduced this amount to what the court considered the constitutional maximum, entered judgment against the defendant for $67,500 and permanently enjoined him from further copyright violation.

This is the first filesharing case to reach a federal court of appeals following a trial.

SUMMARY OF ARGUMENT

The district court's reduced award of $67,500 for thirty infringements remains excessive. As an initial matter, the court below was correct that the reasoning of the Supreme Court's recent punitive damages jurisprudence is relevant to the issue of whether a particular award of statutory damages under the Copyright Act is excessive. The very same concerns that have animated that line of cases — lack of fair notice, arbitrariness, and substantive fairness — apply with equal force to the highly punitive and unpredictable award here.

But while it applied the proper standard, the district court did not reduce the award to a constitutionally acceptable level. The award itself must be examined in the aggregate, not on a per infringement basis, and a $67,500 award for the minimal harm Tenenbaum caused Plaintiffs by infringing thirty songs remains unreasonable. By any measure of harm, such an award vastly exceeds the presumptive constitutional maximum of a "single-digit ratio" between the jury's award and the harm caused by a defendant that was announced by the Supreme Court in *State Farm*.

Moreover, the jury's award was tainted by jury instructions that were inadequate in several respects. First, Congress never intended for juries to set statutory damages, but the Supreme Court found a jury trial right in *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998). Yet *Feltner* gave no hint of how juries could be properly instructed to operate within a complicated statutory scheme. The district court's instructions failed to grapple with the problem: by simply reciting to the jury the minimum and maximum of the range with no context, the jury was improperly primed to award an unconstitutionally excessive amount.

Second, while the trial was littered with testimony of harm *flowing to* parties not in the litigation and *caused by* parties other than Joel Tenenbaum, the district court's instructions did nothing to inform the jury that its award may not implicate these "strangers to the litigation." In so doing, the instructions ran afoul of Due Process principles outlined by the Supreme Court most recently in *Philip Morris USA v. Williams*, 549 U.S. 346 (2007).

Third, statutory damages were never "intended to provide the plaintiff with a windfall recovery," *Warner Bros., Inc. v. Dae Rim*

Trading, Inc., 677 F. Supp. 740, 769 (S.D.N.Y. 1988); instead, courts are nearly unanimous that statutory awards should meaningfully relate to the damage caused by the defendant. The district court's failure to inform the jury of this was also prejudicial error.

Correcting the foregoing errors is critical, and would result in meaningful relief for Tenenbaum. But their correction does not fully address the systemic problems that produce unconscionable awards. At bottom, this case presents a gross distortion of the traditional understanding of copyright law. The damages are so disproportionate to the offense because the statute was never meant to apply to not-for-profit individual consumers like Tenenbaum. Statutory damages exist to solve problems of proving significant harms difficult to quantify — not to authorize *in terrorem* punishment for "venial offenders" like Tenenbaum. Pl. Add. 54. Thus, this Court should hold that the § 504(c) remedy is unavailable.

Compounding the problem is that § 504(c) was actually declared unconstitutional by the Supreme Court in *Feltner*. But rather than amending the statute to incorporate the jury trial right, Congress has left the scheme entirely untouched. The "shocking" result in this case

testifies to the present unconstitutional scheme and requires congressional action. Thus, this Court should take this unintended and unconstitutional application of the § 504(c) remedy off the table.

ARGUMENT

I. THE AWARD, EVEN AS REDUCED, IS EXCESSIVE.

A. The Gore *Standard Applies In This Case.*

The threshold question is what standard courts should apply when reviewing a jury's award of statutory damages. Both Plaintiffs and the Government maintain that the governing standard is that articulated in *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919), with no subsequent refinement. In *Williams*, a railroad challenged a jury's assessment of a $150 statutory award to two sisters the railroad had overcharged by 66 cents each. *Id.* at 63–64. The Supreme Court held that such an award was permissible because it was not "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *Id.* at 67. Plaintiffs claim that "[t]here is no question" that, under this standard, a $675,000 award for copying 30 songs — without personal gain and where direct harm to Plaintiffs was minimal — is not "obviously unreasonable." Pl. Br. 22.

Amazingly, Plaintiffs call the massive award a "reasonable and proportioned response" to Tenenbaum's conduct. *Id.*

The district court properly rejected Plaintiffs' legal theory and, even assuming *arguendo* that *Williams* governed, rejected its application to these facts. As to the theory, the district court held that "the due process principles articulated in the Supreme Court's recent punitive damages case law are relevant to Tenenbaum's case." Pl. Add. 28. The district court also found that the original damages award would have failed anyway under *Williams* because the award, according to *both* the court below and the court in *Capitol Records Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045 (D. Minn., 2010), is "unprecedented and oppressive." Pl. Add. 8.

Moreover, the district court found that the Supreme Court's more recent damages jurisprudence "aim[s] at providing defendants with some protection against arbitrary government action in the form of damages awards that are grossly excessive in relation to the objectives that the awards are designed to achieve." *Id.* at 28. That is why *Williams* is in fact of a piece with the modern line of punitive damages cases, such as *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), and

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003). Those cases demonstrate that the analysis of a damages award pursuant to a statute and one awarded under the common law of torts must be similar.[3]

In *Gore*, the Court did not draw a bright line between statutory and punitive damages. The Court explicitly relied on *Williams* for the principle that a non-compensatory award may not be wholly "disproportioned to the offense." 517 U.S. at 575 (quoting *Williams*, 251 U.S. at 66–67). Later, in *State Farm*, the Court demonstrated its recognition that *Gore's* very underpinning is the jurisprudence of *statutory* damages:

> [I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process . . . . *The* [*Gore*] *Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for [statutory] sanctions of double, treble, or quadruple damages to deter and punish. Id.*, at 581, and n.33. While these ratios are not binding, they are instructive. They demonstrate what should be obvious: Single-digit multipliers

[3] Moreover, the line between "statutory damages" awards and "punitive damages" awards continues to blur, as more and more states regulate by statute when punitive damages may be awarded, and in what amounts. *See, e.g.*, *Gore*, 517 U.S. at 614 (Appendix to Dissenting Opinion of Ginsburg, J., regarding "State Legislative Activity Regarding Punitive Damages").

> are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, *id.*, at 582, or, in this case, of 145 to 1.

538 U.S. at 425 (emphasis added).

Appellate courts, including this Court, have followed the Supreme Court's lead in connecting the dots between *Williams* and *Gore*. In *Romano v. U-Haul Int'l*, 233 F.3d 655 (1st Cir. 2000), an employment discrimination case, the plaintiff won an award of *statutory damages* under 42 U.S.C. § 1981a. Not only did the Court view *Gore* as applicable, but it explicitly "subject[ed] the $285,000 award to the *Gore* three-guidepost analysis." *Id.* at 673.

The Second Circuit has also indicated that *Gore* should apply to cases involving statutory damages. *Parker v. Time Warner,* 331 F.3d 13 (2d Cir. 2003), involved statutory damages under the Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.*, and the court held that the interplay between two statutes:

> [M]ay expand the potential statutory damages so far beyond the actual damages suffered that the statutory damages come to resemble punitive damages . . . [S]uch a distortion could create a potentially enormous aggregate recovery for plaintiffs, and thus an *in terrorem* effect on defendants, which may induce unfair settlements. And it may be that in a sufficiently serious case the due process clause might be

> invoked . . . to nullify that effect and reduce the aggregate damage award.

331 F.3d at 22 (citing *State Farm* and *Gore*).

Moreover, the Supreme Court itself in *Exxon Shipping Co. v. Baker* extended many of the teachings of *Gore* and *State Farm* beyond the context of tort law punitive damages and into the world of maritime common law. 128 S. Ct. 2605, 2626–27 (2008). Even if those cases "provide[d] no occasion to consider a 'common-law standard of excessiveness'" at issue in *Exxon*, the Court drew extensively on these and related cases to give content to the idea that "the common sense of justice would surely bar penalties that reasonable people would think excessive for the harm caused in the circumstance." *Id.* Thus, in contrast to Plaintiffs' misguided idea that *Gore* and *State Farm* "reflect[] entirely different concerns that have no relevance in the statutory damages context," Pl. Br. 38, those and other related cases in fact form the very core of the "sense of justice" that must guide this Court's review.

B. Even A $67,500 Award Violates Due Process.

Applying the proper legal standard is the beginning and not the end of the analysis. Though the district court was correct in holding

that the Court's recent punitive damage jurisprudence is relevant to the instant case, it erred in allowing an award of $67,500 despite the unprecedented ratio of damages to harm caused. Because Plaintiffs refused to offer a definitive measure of their harm — as they still do — the district court articulated a number of different metrics. On the low end of the *reduced* award, the ratio of damages to harm was 45:1. Pl. Add. 51. At the high end, the ratio remains an an astounding 3,214:1. *See* Pl. Add. 47. Whatever the final tally, even the reduced award is not in the ballpark of the "single-digit ratio" that the Supreme Court in *State Farm* said is the lodestar of Due Process. *See* Pl. Add. 23.

1. *The district court did not consider the effects of aggregating individual violations.*

The district court recognized that, under *Gore*, courts must ensure that an award of damages tracks the defendant's reprehensibility and the harm caused to the Plaintiff.[4] But as the district court noted, "the reprehensibility of a file sharer's conduct does not increase linearly with

[4] Defendant does not seek to minimize the third *Gore* guidepost which compares an award to comparable fines to guage legislative intent. But this factor has less relevance because "it is far from clear that Congress contemplated that a damages award as extraordinarily high as the one assessed in this case would ever be imposed on an ordinary individual engaged in file-sharing without financial gain." Pl. Add. 32; *see also* Sec. III, *infra*.

the number of songs he downloads and shares." Pl. Add. 52. Accordingly, "the aggregation of statutory damages awarded under section 504(c) may result in unconscionably large awards." *Id.*

Yet, despite these correct observations, the district court erred when it held that the Constitution permits a *per infringement* maximum. Pl. Add. 55 ("I conclude that an award of $2,250 per song, three times the statutory minimum, is the outer limit of what a jury could reasonably (and constitutionally) impose in this case."). Even in cases that do not analyze statutory damages under *Gore*, it is the *aggregate* damage award that is analyzed to determine whether they pass constitutional muster. *See Zomba Enters., Inc. v. Panorama Records*, 491 F.3d 584, 588 n.11 (6th Cir. 2007) (referring to the "statutory-damage award" as the aggregate amount of $806,000); *Lowry's Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 457 (D. Md. 2004) (examining whether the "$19 million dollar verdict" should stand).

The aggregate amount is the only appropriate way to analyze the damage award lest this Court give plaintiffs free reign to elicit virtually any amount of money from any of millions of noncommercial infringers

who have downloaded songs on peer-to-peer networks. As Plaintiffs take great pains to stress, literally millions of users have downloaded thousands of songs. Thus, a ruling that damages of $2,250 *per song* for knowing infringements are constitutional without analyzing the fairness of the aggregate amount would give plaintiffs license to extract arbitrarily high damages from millions of users based on nothing more than the number of songs they choose to sue on.

To put the problem into stark relief, consider the following scenario. In 2008, one study reported that the average British teenager had 800 illegal songs on his iPod. Dan Sabbagh, *Average Teenager's iPod Has 800 Illegal Music Tracks*, Times Online (June 16, 2008), http://technology.timesonline.co.uk/tol/news/tech_and_web/personal_tech/article4144585.ece. If $2,250 per infringement were constitutional, this would mean the average teenager is exposed to a $1.8 million judgment. If Plaintiffs then got judgments of $1.8 million from 30,000 teenagers — approximately the number of lawsuits they filed against American consumers through the end of 2008 — they would obtain outstanding judgments of $54 *billion*. This is more than the *total revenue* the *entire* recording industry would earn over six years

at its current size of $8.5 billion per year. *See* J.A. 130–31. Indeed, given Plaintiffs' theory of the stratospheric penalties they are entitled to recover for even harmless infringements, one wonders why they do not simply abandon the business of making records for the business of suing filesharers.

Plaintiffs no doubt recognize that they would provoke immediate and harsh congressional and judicial action if they actually decided to pursue this option. In response, they have carefully cultivated a "Goldilocks" strategy to sweep the aggregation problem under the rug: suing on thirty infringements resulted in a verdict high enough to send a message but low enough so that they can defend the aggregate award without being immediately laughed out of court. But constitutional analysis cannot turn on litigation strategy. Instead, this Court must set an upper limit on the overall damages that Joel Tenenbaum can face. Under the *Gore* analysis, $67,500 is too much for his conduct.

Further, in the absence of careful legislative calibration, an initially plausible statutory scheme can go awry through the unrestrained stacking of statutory damages. This is because "the initial decision to engage in illegal file-sharing, by itself, comprise[s] some

significant part of the defendant's overall reprehensibility." J. Cam Barker, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 Tex. L. Rev. 525, 550 (2004). Thus, "[t]o the extent that the defendant's reprehensibility is not wholly proportionate to the number of illegally downloaded songs, [the current] imposition [of aggregated statutory damages] is inappropriate." *Id.* Barker likens this situation to the single larceny rule in criminal law, where a series of property crimes are often considered a single count of larceny if done as part of a general fraudulent scheme.[5] Most of a defendant's reprehensibility stems from the decision to undertake a larcenous course of conduct, not from the decision to take five items instead of one.

[5] *See, e.g.*, Mo. Ann. Stat. § 570.050 (West 1999) ("Amounts stolen pursuant to one scheme or course of conduct, whether from the same or several owners and whether at the same or different times, constitute a single criminal episode and may be aggregated in determining the grade of the offense."); *United States v. Billingslea*, 603 F.2d 515, 520 n.6 (5th Cir. 1979) ("We note with approval the position adopted by a number of state courts that a series of larcenies may be properly charged in a single larceny where 'there was a continuing impulse, intent, plan, or scheme actuating the several takings.'").

So too here. With filesharing, at least some amount of reprehensibility logically originates from the decision to install software and engage in downloading illegally, rather than how many songs are downloaded from that activity. This is especially salient considering that hundreds of songs can be queued for download by a few mouse-clicks and completed in a manner of hours.

2. The ratio of damages to harm still far exceeds the standard announced by the Supreme Court in State Farm.

The district court's discussion of the second *Gore* guidepost is thoughtful and comprehensive. Yet, after an excellent analysis, the court erred by not following the very standard so aptly articulated. The court, quoting *State Farm*, noted that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." Pl. Add. 23. Yet even the reduced award exceeds the *State Farm* standard by a country mile: depending on the metric used to determine harm, the ratio could be as high as 3,214:1 or as low as 45:1. *See supra* p.16.

Plaintiffs do not dispute that these ratios would be presumptively impermissible under the Constitution. Instead, they claim that the district court's "formulaic" invocation of ratios of damages to harm

"gave no consideration to such difficult-to-quantify losses as diminution in value of each copyright infringed, an ever-increasing diminution in the value of all sound recording copyrights, and a resulting loss in [Plaintiffs'] ability to find new artists and music to record." Pl. Br. 27. But the "formulaic" use of such ratios is *precisely* what the Supreme Court endorsed in *State Farm* and *Gore*. Even *Williams* implies at least an estimate of this: how can a judge know if an award is "wholly *disproportioned* to the offense," *Williams*, 251 U.S. at 67 (emphasis added), without some sense of *proportion*? Moreover, Plaintiffs' parade of unquantifiable harms demonstrates the overall harm suffered because of worldwide filesharing. *See infra* Sec. II.B. They do not attempt to define what portion of that harm was caused by the defendant *in this action* — presumably because the result is so embarrassingly low.

Ultimately, Plaintiffs' theory rests on little more than clever wordplay. They argue that Tenenbaum's actions "deprived [them] of literally *immeasurable* profits." Pl. Br. 55 (emphasis added). According to the Oxford English Dictionary, "immeasurable" has multiple definitions: "not measurable" or "immense." *Oxford English Dictionary*

(2d ed. 1989). This Court should not accept Plaintiffs' invitation to conflate the two. On the contrary: in this case, Plaintiffs' lost profits due to Joel Tenenbaum's filesharing are, if anything, immeasurably *small*.

3. Plaintiffs grossly overstate the harm caused by Tenenbaum's "distribution" of sound recordings.

Responding to the district court's conclusion that Tenenbaum caused "relatively minor harm," Pl. Add. 8, 57, Plaintiffs now attempt to portray Tenenbaum as equivalent to a commercial bootlegger, claiming that he "obtained thousands of copyrighted songs and intentionally distributed those songs and others that he personally uploaded to millions of other users of peer-to-peer networks." Pl. Br. 21. This is false. Their unfounded allegation of the scale of Tenenbaum's distribution flies in the face of the fact that they have submitted no evidence of how many other users actually obtained songs from him. Even the Government rejects the theory that Tenenbaum "distributed" Plaintiffs' songs to "millions of other users," noting that "there is no ready way to determine the number of times the defendant infringer has violated the copyright holder's distribution rights." Gov't Br. 51. Though the number of other users Tenenbaum may have distributed the songs to is unknown, this number surely did not run into the

millions — especially with so many copies of the same song available from other users. *See* Pl. Add. 47.

Indeed, Plaintiffs' disingenuous theory of the scope of the harm Tenenbaum caused — which equates "mak[ing] song[s] available for millions of other peer-to-peer network users" with actually "distribut[ing] those songs . . . to millions of other users," Pl. Br. 21, 25 — runs counter to this Court's copyright jurisprudence. This Court has made clear that "[m]ere authorization of an infringing act is an insufficient basis for copyright infringement." *Latin Am. Music Co. v. Archdiocese of San Juan of Roman Catholic & Apostolic Church*, 499 F.3d 32, 46 (1st Cir. 2007); *see also Arista Records LLC v. Does 1-27*, 584 F. Supp. 2d 240, 249 (D. Me. 2008) ("[T]here is considerable authority for the proposition that storage of copyrighted recordings and making them available on a network does not amount to copyright infringement."). "Distribution" is a right reserved to a copyright holder, and one that could result in significant harm when infringed. On the other hand, "making a song available" to other users on a network where millions of other users are doing the same is not infringement and does not in and of itself result in substantial harm. This is partially

because, in contrast to affirmative distribution, "the individuals who downloaded songs from Tenenbaum's shared folder would simply have found another free source for the songs had Tenenbaum never engaged in file-sharing." Pl. Add. 47.

Plaintiffs make plain their exaggerated theory of the harm Tenenbaum caused them when they claim that "[t]he district court's opinion considerably understates the serious harms file-sharing causes." Pl. Br. 25. But *filesharing* was not on trial in this case — Joel Tenenbaum was. This Court must not countenance Plaintiffs' repeated attempts to equate the harm caused by individuals with harm caused by global filesharing.

II. THE JURY INSTRUCTIONS FAILED TO GUIDE THE JURY PROPERLY.

A. The District Court Improperly Assumed That Juries Should Be Made Aware Of the Entire Statutory Range.

"The language of § 504(c) does not grant a right to have a jury assess statutory damages." *Feltner* 523 U.S. at 345; *see also* 4 Nimmer on Copyright § 14.04(C)(1) (2010) (the "dominant view" before 1998 was that "it is for the judge, in the exercise of his discretion, to award statutory damages"). In 1998, reversing centuries of congressional intent, the Supreme Court in *Feltner* held that "the Seventh

Amendment provides a right to a jury trial on all issues pertinent to an award of statutory damages . . . including the amount itself." 523 U.S. at 355 (1998). The *Feltner* opinion, however, did not consider how juries could be instructed so that they fit into a complicated framework that Congress intended to be the sole domain of judges. The district court's solution was to recite to the jury a non-exhaustive list of factors that bear on damages supplemented by an open invitation to the jury to consider any other factors the jury might think relevant and appropriate. The court then directed the jury to set awards for each infringement within the bounds of the stated statutory range. This was error.

1. *It was error to instruct the jury of the entire statutory range with no context.*

With *Feltner*, the Supreme Court apparently shifted the determination of the amount of statutory damages from judge to jury rather than simply declaring the statute unconstitutional and then leaving it to Congress to formulate a new and constitutional mode of administering its statutory damage scheme.[6] In so doing, it failed to

[6] We here say "apparently" because the Court in *Feltner* "failed to attempt any analysis" of whether the courts should continue to apply

provide any structure for guiding the jury's use of the wide power shifted to it. The power to set statutory damages within an exceedingly wide range was therefore unanchored from the wisdom and experience of judges and turned over to a jury uninformed of context, precedent, or legal principle.

A colloquy at oral argument in *Feltner* reveals that the Court itself had no answer to whether juries should be instructed regarding the statutory range. Justice Stevens told the counsel for the petitioner,[7] who was arguing in favor of the jury trial right, that "a problem that [he had] that runs through the whole case" is "what the judge tells the jury." Tr. of Oral Arg. at 6, *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998) (No. 96-1768). Justice Stevens asked: "Would it suffice if the jury is told, 'render such damages as you consider to be just?'" Petitioner's counsel did not give an on-point answer, instead responding that he thought "the jury would be instructed according to

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the statutory damages scheme with the word "jury" replacing the word "court" in 504(c) or whether Congress would need "to amend the Copyright Act if it wanted to retain within the copyright owner's arsenal a meaningful device of securing an award of statutory damages." 4 Nimmer on Copyright § 14.04 (2010); *see also infra* Sec. IV.

[7] Petitioner's counsel was Chief Justice John Roberts, then a partner at Hogan & Hartson.

the factors it's supposed to consider, as juries are, for example, in awarding punitive damages." *Id.* Justice Stevens replied that he remained skeptical: "I'm just not sure what the judge tells the jury." *Id.*

The district court, like Justice Stevens, noted the imperfect fit between the scheme created by 504(c) and the use of a jury. *See* Pl. Add. 39 n.12. Yet it did nothing to mitigate the problem.

Plaintiffs argue that "[a]lthough Congress may not have originally envisioned that juries would award damages under § 504(c), if Congress thought juries were not up to this task, it presumably would have circumscribed the jury's role, not expanded the jury's discretion by expanding the damages range when it amended § 504(c) one year after *Feltner*." Pl. Br. 53. But when Congress raised the maximum statutory damages from $100,000 to $150,000 for willful infringement, there was no indication that that the amendment's drafters were even aware of *Feltner* or its impact. Senator Hatch, a sponsor, said "[w]hat this bill does is give *courts* wider discretion to award damages that are commensurate with the harm caused and the gravity of the offense." 145 Cong. Rec. S7452-04 (Sen. Hatch) (1999) (emphasis added). A search of the Congressional Record reveals that *Feltner* has never been

contemplated in the context of any copyright legislation.[8] And, despite *Feltner*'s holding, Congress has not amended § 504(c) to replace the word "court" with "jury." The evidence thus reveals that Congress thought it was giving this expanded discretion to judges, not juries.

Injecting a jury into a complicated framework where a judge was the expected decisionmaker poses a serious problem. David Nimmer wrote in 1999 that because the setting of statutory damages "often involves extensive analysis of precedent so as to create a statutory-damages regime consistent across a spectrum of cases[,] . . . [i]t is not clear how a jury ever can perform this type of analysis." David Nimmer & Jason Sheesby, *After* Feltner*, How Will Juries Decide Damages?*, Nat'l L.J., Feb. 8, 1999, at C19. His conclusion was that "[i]t is daunting, to say the least, to imagine how a judge could craft jury instructions that replace the type of analysis the court itself would undertake." *Id.* Thus, this Court must decide whether it was consistent with the goals of the Copyright Act, as modified by *Feltner*, for the jury

[8] This is the result of a search for "FELTNER" in the Westlaw databases for the Congressional Record (CR) and U.S. Code Congressional and Administrative News (USCCAN) (as of Dec. 21, 2010).

to be instructed as to the range of damages but not to any larger context. This appears to be an issue of first impression for this Court.

Since *Feltner*, at least two sets of model jury instructions tell judges to make the jury aware of the statutory range, but they do so without any comment from the authors or courts. *See* 3B Fed. Jury Prac. & Instr. § 160.93 (5th ed. 2010); 9th Cir. Model Civil Jury Instr. § 17.25. Such instructions are impermissible. Instead, juries should be asked to award an amount that it considers "just," and then have potential awards situated in specific contexts. At minimum, a jury instruction should be limited to stating the *constitutional* maximum for the particular harm. Either way, the court's instruction to the jury that it could award an unconstitutionally high amount of damages necessitates a new trial. Moreover, this Court must face this question even if it believes that the constitutional maximum is higher than $2,250 per infringement. If the constitutional maximum is less than $150,000 per infringement — or, put another way, if a total award of $4.5 *million* would be constitutionally impermissible for this conduct — then the Court must still answer whether a judge may affirmatively instruct the jury that it can award an unconstitutionally high amount.

The district court rejected Tenenbaum's argument that the statutory range be omitted from the jury instructions on two grounds. The district court first noted that the jury instructions "correctly articulated the statutory damages ranges authorized by Congress and did so in a way that was neither confusing nor misleading." Pl. Add. 13. This is wrong on multiple counts. First, as explained in greater detail below in Section II.A.2, instructing the jury as to the statutory range *was* confusing and misleading: mandating a specific range of punishment, unmoored from the overall statutory scheme and the context of other cases, left the jury out to sea and displaced their intuitive sense of a "just" award. Second, in light of the district court's holding, the court's instructions *did* misstate the law: a jury was *not* authorized to award $150,000 per infringement, because that would exceed the court's own determination of the constitutional limit.

The district court's second rationale for stating the range fares no better. It noted that, while Congress has instructed courts not to inform juries in Title VII cases that their awards are subject to a statutory ceiling, the absence of such direction from Congress "suggests that it intended to permit judges to inform juries of section 504(c)'s statutory

damages ranges." Pl. Add. 14 n.5. But this simply cannot be the case because Congress never contemplated that statutory damages would ever be submitted to juries in the first place. *Feltner*, 523 U.S. at 346 ("[T]he word 'court' in [§ 504(c)] appears to mean judge, not jury."). Thus, unlike in the Title VII context, Congress cannot have been expected to affirmatively direct judges to shield the statutory range from a jury it never envisioned participating.

Before *Feltner*, judges were able to situate statutory damages in a spectrum of precedent and thereby had some guidance as to the meaning of what a "just" award would be. The jury instructions, however, contained no such context. Other than making the jury aware of damage awards in other cases,[9] the only possible way to come close to the congressional directive would therefore be to omit the statutory range altogether. Instead, the court instructed the jury of a dollar range that displaced the jury's intuitive notion of what is "just" and instead mandated a number within an expansive range, covering the gammut of copyright infringements. This no doubt contributes to the staggering

[9] This has in fact been suggested by some commentators. *See* Colleen P. Murphy, *Judicial Assessment Of Legal Remedies,* 94 Nw. U. L. Rev. 153, 198 (1999) ("If courts engage in comparative review, then the jury should be informed of the comparative data.").

difference between statutory damages assessed by juries and those deemed reasonable by judges in filesharing cases.

The district court told the jury that "the Copyright Act entitles a plaintiff to a sum of not less than $750 and not more than $150,000 per act of infringement . . . as you consider just." J.A. 68. For each song, the verdict form asked the jury: "If you answered 'YES' [to "willful" (defined as "knowing")], what damages do you award the Plaintiff for **this** copyrighted work, from $750 to $150,000?" J.A. 73–79. Because the jury was given this range along with only a vague list of non-exhaustive factors,[10] the statutory maximum hangs in the air with no context for understanding it. In fact, the range gives the misleading suggestion that Congress intended this specific range to apply to this very kind of case, and not that the range applies to *all* possible copyright infringements.

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[10] The jury was instructed that it should consider the following non-exhaustive list of factors: "(a) The nature of the infringement; (b) The defendant's purpose and intent; (c) The profit that the defendant reaped, if any, and/or the expense that the defendant saved; (d) The revenue lost by the plaintiff as a result of the infringement; (e) The value of the copyright; (f) The duration of the infringement; (g) The defendant's continuation of infringement after notice or knowledge of copyright claims; and (h) The need to deter this defendant and other potential infringers." J.A. 68.

2. Informing the jury of the statutory maximum sets an anchor predisposing the jury to award an unconstitutional amount.

The key problem with this type of bounded instruction is rooted in what psychologists call "anchoring." In such a scenario, a subject will "start with some anchor, the number [she] know[s], and adjust." Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* 23 (2008). Problems arise because "adjustments [from the anchor] are typically insufficient." *Id.* Thus, when charities seek donations in mailings, "the particular suggested amounts have been shown to influence what people donate — when the suggestions are higher, the donations are as well." *Id.*

Evidence shows that even arbitrary numbers can influence subjects' evaluation of unrelated matters. In another experiment, subjects were asked if they'd be willing to pay the monetary equivalent of the last two digits of their social security number for a bottle of wine, and if not, how much they would be willing to pay. Dan Ariely, *"Coherent Arbitrariness": Stable Demand Curves Without Stable Preferences*, 118 Q.J. Econ. 73, 75–77 (2003). Subjects whose last two digits were in the top quintile were willing to pay 323% more than those whose last two digits were in the bottom quintile. In other words, those

with broader ranges returned higher values — even when the initial suggestion was completely unrelated to anything about wine.

Thus, unlike most common law punitive damages cases, where no range is given to a jury, anchoring the damages range with a maximum that was *held to be unconstitutional* positively invites arbitrary and excessive jury awards. The impact of the $150,000 upper limit with no instruction explaining that the higher end of the range is meant to apply to egregious infringers encourages jurors to set awards well beyond what is constitutionally permissible against a single non-commercial defendant who has made no profit and who individually caused minimal damage.

The outcomes from previous verdicts in filesharing cases bear this out. The juries in *Thomas-Rasset*, all three of which were informed of the $150,000 statutory maximum, predictably returned wildly excessive and disparate awards for 24 songs with a total retail value of around $24: in the first trial, $9,250 per infringement for a total of $221,500, 680 F. Supp. 2d at 1048; in the second, $80,000 per infringement totaling $1,900,000, *id.*; in the third, $62,500 per infringement for a total of $1,500,000. *See* Ben Sheffner, *Thomas-Rasset Verdict: $1.5*

Million, Copyrights & Campaigns (Nov. 3, 2010), http://copyrightsandcampaigns.blogspot.com/2010/11/third-thomas-rasset-verdict-15-million.html. Here, with the jury likewise instructed, the jury awarded $22,500 per infringement for a total of $675,000. These cases have produced jury awards from three to *thirty-six* times the maximum the constitution is said to allow.

B. The District Court's Instructions Failed To Mitigate The Risk That The Jury Would Consider Harm By Other Filesharers As Well As Harm Caused To Non-Parties.

Tenenbaum's trial included extensive testimony about the alleged harm suffered by the *entire* recording industry due to *global* filesharing. But under *Philip Morris USA v. Williams,* the district court was required to instruct the jury that the defendant could not be sanctioned for harm involving "strangers to the litigation." 549 U.S. 346 (2007). This Court should remand this case for a new trial on damages to ensure "that the jury will ask the right question." *Id.* at 355. That question is what damages should *Joel Tenenbaum* pay — not the entire universe of filesharers.

1. *Testimony about filesharing by non-parties and its effects on non-parties permeated the trial and created a risk that Due Process would be violated.*

In *Philip Morris,* the Supreme Court held that a damages award based "in part upon [the] desire to punish the defendant for harming persons who are not before the court . . . would amount to a taking of 'property' from the defendant without due process." *Id.* at 349. The idea that a defendant might be punished for harms against non-parties raises traditional Due Process concerns of lack of fair notice, arbitrariness, and caprice. *Id.* at 352–53. Accordingly, when testimony offered at trial introduces the risk that the jury's deliberation could result in punitive awards that reflect damage to non-parties, "it is constitutionally important for a court to provide assurance that the jury will ask the right question, not the wrong one." *Id.* at 355. The ideal method for ensuring that the jury addresses the appropriate question is the jury instruction. *Id.* at 357–58.

Philip Morris dealt specifically with the issue of punishment for harm to non-parties. The instant case also implicates that danger, because Plaintiffs represent only four specific record labels. Pl. Br. 2. Yet Plaintiffs' witnesses consistently testified to harms allegedly

suffered by the *entire* recording industry — even though not all of this harm would have flowed to these four plaintiffs. Plaintiffs make the same mistake before this Court, referring to the "devastating effect *on the recording industry*," Pl. Br. 8; "layoffs *within the industry*" Pl. Br. 13; and the fact that "file-sharing has cost *the industry* billions of dollars." Pl. Br. 56 (emphases added). But the "big four" music labels are simply not the same as the *entire* music industry — they represent about 70% of it. *See supra* n.1.

More importantly, the same Due Process concerns that motivated the Court's analysis in *Philip Morris* apply *a fortiorari* when juries are encouraged to consider harm caused by non-parties. Despite this, the prosecution's expert witness, Dr. Stanley Liebowitz, testified extensively about the overall financial effect that worldwide filesharing had on the entire recording industry. First, Dr. Liebowitz testified that between 1999 and 2008, record industry revenues (adjusted for inflation) declined from $18.5 billion to $8.5 billion. J.A. 130–31. When asked for the explanation of this decline in revenue and corresponding decline in sales, Dr. Liebowitz responded that "the [explanation] that jumps out right away is file sharing." *Id.* at 132. The witness then

described another study of his and admitted that he was unable to discuss the harm caused by Tenenbaum in particular:

> Q. What was your conclusion when you looked at that [other data]?
>
> A. The conclusion was that file sharing was responsible for all of the decline in record sales.
>
> Q. Can you identify the particular harm that Mr. Tenenbaum has caused as a result of his activities in this case --
>
> A. No.
>
> Q. -- with respect to file sharing, I should say?
>
> A. No.

Id. at 140–41.

Under *Philip Morris*, such testimony posed a double risk of running afoul of Due Process: it was about the harm caused by filesharing worldwide — *not* Tenenbaum's particular conduct — that flowed to the "record industry" in general — *not* these particular plaintiffs. Plaintiffs' closing argument neatly summarizes the content and effect of this testimony:

> You also heard from Mr. Leak, Ms. Cho and Ms. Palerm, they told you that online copyright infringement has real and significant impacts on everyone in the record business. When record companies lose sales to illegal downloaders, artists, musicians, songwriters, engineers, producers all lose royalties. Lost sales to free illegal downloads has also caused

> significant layoffs and harmed my client's abilities to develop new artists and produce the music that we all enjoy.

Id. at 260. Such statements present a substantial risk of unduly prejudicing the defendant.

Indeed, the generalized, non-specific testimony was far more extensive here than in *Philip Morris* and in other cases where new trials were required in light of prejudicial testimony. The problem in *Philip Morris* arose solely because of argument made by the plaintiff's attorney in his closing argument about the number of people killed by cigarettes generally, not by defendant Philip Morris's cigarettes in particular. 549 U.S. at 350–51. The Ninth Circuit in *White v. Ford Motor Co.*, 500 F.3d 963 (9th Cir. 2007), then followed *Philip Morris* and remanded the case for a new trial because the plaintiff presented evidence that 54 other people had suffered a similar injury caused by defendant's truck. *Id.* at 971–73. Likewise, a remand was required in *Merrick v. Paul Revere Life Ins. Co.*, 500 F.3d 1007 (9th Cir. 2007), because of testimony by a single witness along with discussion by the attorney at closing argument that was not cabined by a limiting jury instruction. *Id.* at 1015–18.

The same prejudice occurred here. Plaintiffs put Tenenbaum on trial for far more than the downloading and sharing of 30 songs. There was thus a risk that the jury implicitly deemed him responsible for an entire industry's $10 billion loss in annual revenues, significant layoffs, and inability to develop new and better music.

2. The trial court failed to alleviate Due Process concerns created by this testimony.

It is plausible that Plaintiffs were allowed to introduce some of the aforementioned testimony to demonstrate the seriousness of filesharing. *Cf. Philip Morris*, 549 U.S. at 356–57 (acknowledging that a plaintiff may introduce evidence of harm to non-parties in order to establish the defendant's reprehensibility). Yet the *Philip Morris* Court recognized that introduction of such testimony "raises a practical problem" in light of the concern that the defendant would be punished for impermissible harms. *Id.* at 357. The Court therefore asked: "How can we know whether a jury, in taking account of harm caused others under the rubric of reprehensibility, also seeks to *punish* the defendant for having caused injury to others?" *Id.* It answered that "where the risk of that misunderstanding is a significant one — because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument

the plaintiff made to the jury — a court, upon request, must protect against that risk." *Id.*

Tenenbaum indeed requested that the district court "protect against that risk," but the court failed to do so. Defendant's proposed jury instructions clearly sought to ensure he would not be subject to punishment on the basis of conduct by other filesharers worldwide. The requested instruction regarding the scope of damages read:

> The uses in question here are the defendant's alleged downloading and sharing of five songs.[11] While there may be evidence relating to other downloading and sharing, the only issue of infringement or fair use that is before you concerns these five songs. If you find that the Plaintiffs have proved infringement, and if you find that the Plaintiffs have proved that Joel's use was not fair, you may only award damages, if any, as to those five songs.

J.A. 329.

Yet instead of adopting this instruction or some variation thereof, the judge gave the jury a list of eight broad factors to consider including (d) "the revenue lost by the plaintiff as a result of the infringement" and (h) "the need to deter this defendant and other potential infringers." J.A. 68. The instructions then included a troubling statement of

[11] The proposed instructions refer to five songs instead of thirty because of some confusion regarding the number of works at issue in this litigation.

residual authority to consider all of the evidence and argument presented at trial: "This list of factors is not exhaustive. . . . You may include any other considerations you believe relevant to a just and appropriate determination of damages." *Id.* This residual instruction explicitly invited the jury to consider Plaintiffs' extensive testimony regarding the alleged harmful effects that all filesharing had on the entire recording industry, but the jury was never instructed how to properly account for the extensive testimony about harms to and caused by non-parties to the litigation as required by *Philip Morris*. With such boundless discretion, it is no surprise that the result was a plainly unconstitutional award of $675,000 for the noncommercial downloading and sharing of just 30 songs. A new trial with a jury instructed to consider only harms *by* the named defendant that flowed *to* the named plaintiffs is the minimum required.

C. The District Court Failed To Convey To The Jury That Statutory Damages Must Reasonably Relate To The Harm Caused.

When judges set the amount of damages, the nearly universal view has been that statutory damages should be woven "out of the same bolt of cloth as actual damages." 4 Nimmer on Copyright

§ 14.04(E)(1)(a) (2010). *See also Venegas-Hernandez v. Peer*, 2004 WL 3686337, *30 (D.P.R. 2004), *partially vacated on other grounds*, 424 F.3d 50 (1st Cir. 2005) ("When determining the exact amount of statutory damages to award to a copyright plaintiff, the court has discretion to award an amount that 'the court deems just,' however, statutory damages should be commensurate with the plaintiff's actual damages.") (*citing New Line Cinema Corp. v. Russ Berrie & Co.*, 161 F. Supp. 2d 293, 303 (S.D.N.Y. 2001)).[12]

The view that statutory damages should reasonably track actual damages is reinforced by the legislative history of both the 1999 increase in damages and the original 1976 Act. Speaking about the

[12] Cases from within other circuits include *Yurman Studio v. Casteneda*, 2008 U.S. Dist. LEXIS 99849, *4–*5 (S.D.N.Y. 2008) ("At the end of the day, 'statutory damages should bear some relation to actual damages suffered.'"); *Warner Bros., Inc. v. Dae Rim Trading, Inc.*, 677 F. Supp. 740, 769 (S.D.N.Y. 1988) (statutory damages are "not intended to provide the plaintiff with a windfall recovery"); *Davis v. E. I. Du Pont de Nemours & Co.*, 249 F. Supp. 329, 341 (D.C.N.Y. 1966) ("[T]he [copyright] cases neither minimize the compensatory statutory purpose nor indicate that deterrence should be carried to an extreme."); *Webloyalty.com, Inc. v. Consumer Innovations, LLC*, 388 F. Supp. 2d 435, 443 (D. Del. 2005) ("[T]he amount of a statutory damages award must also take into account the actual profits earned by the defendant and revenues lost by the plaintiff."); *Bly v. Banbury Books, Inc.*, 638 F. Supp. 983, 987 (E.D. Pa. 1986) ("[N]umerous courts have held that assessed statutory damages should bear some relation to the actual damages suffered.").

1999 revision, Senator Hatch was satisfied with the increase in the maximum penalties because "[i]n most cases, courts attempt to do justice by fixing the statutory damages at a level that approximates actual damages and defendant's profits." 145 Cong. Rec. 13,785 (1999) (Sen. Hatch).

The House Conference Report for the original 1976 Act shows that the drafters of the current Copyright Act likewise never envisioned damage awards above the minimum would be unmoored from the actual harm caused. The Conference Report reveals Congress's belief that "the plaintiff in an infringement suit is not obligated to submit proof of damages and profits and may choose to rely on the provision for *minimum* statutory damages." H.R. Rep. 94-1476, at 161 (1976) (emphasis added). Accordingly, one appellate court has held that "[i]f a copyright owner seeks only 'minimum' statutory damages, the record on damages need not be developed at all. If a greater amount of statutory damages is sought, the district court may make the appropriate award when the evidentiary record adequately supports that determination." *Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1016–17 (7th Cir. 1991).