

Nos. 10-1883, 10-1947 & 10-2052

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

SONY BMG MUSIC ENTERTAINMENT, a Delaware General Partnership;
WARNER BROS. RECORDS, INC., a Delaware Corporation; ATLANTIC
RECORDING CORPORATION, a Delaware Corporation; ARISTA RECORDS,
LLC, a Delaware Limited Liability Company; UMG RECORDINGS, INC., a
Delaware Corporation; UNITED STATES,

Plaintiffs-Appellants/Cross-Appellees,

v.

JOEL TENENBAUM,

Defendant-Appellee/Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

REPLY/RESPONSE BRIEF FOR THE UNITES STATES AS
PLAINTIFF-APPELLANT/CROSS-APPELLEE

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INTRODUCTION AND SUMMARY

The district court made three significant errors. First, it violated the doctrine of constitutional avoidance by eschewing a common law remittitur procedure that would have rendered it unnecessary to reach the appropriate due

process standards for reviewing the jury's verdict or the court's power to enter a judgment on matters the Seventh Amendment requires be decided by a jury.

Second, having elected to review the jury award on due process grounds, the court applied an erroneous legal standard that fails to account for the deference owed to Congress when evaluating an award of statutory damages.

Finally, the court misconstrued the Copyright Act by concluding that Congress did not intend the full range of statutory damages to apply to unauthorized file sharing, and by inappropriately discounting the harm to plaintiffs' exclusive right to distribute copyrighted sound recordings.

Defendant's responsive brief offers no persuasive basis for sustaining the court's decision. His cursory dismissal of the principles of constitutional avoidance does not even address the substantial Seventh Amendment concerns raised by the district court's judgment. And his argument that the court was obligated to reach the due process issue because a new jury would inevitably reach the same verdict is too speculative to warrant entangling the court in unnecessary constitutional adjudication.

Even assuming the district court properly reached the question of whether the jury's verdict comports with due process, defendant errs in asserting that the appropriate constitutional standard is set forth in *BMW of North America, Inc. v.*

Gore, 517 U.S. 559 (1996), rather than *St. Louis, I. M. & S. Railway Co. v. Williams*, 251 U.S. 63 (1919). *Gore* addresses the specific constitutional problems inherent in vesting a jury with unfettered discretion to award punitive damages. Its standards are consequently intended to ensure that a defendant has fair notice of the potential sanction and reasonable protection against the arbitrary deprivation of property.

Statutory damage awards entered under provisions that prescribe the range of appropriate damages and the circumstances in which damages may be awarded do not raise any of these notice and fairness concerns. They are consequently governed by *Williams*, which stresses the deference owed the legislature and the legislature's wide latitude to determine the appropriate means of redressing and deterring a public wrong. Defendant's contention that *Gore* nonetheless applies here is not supported by *any* case law and fails to grapple with the critical distinction between a statutory damage award under criteria established by Congress and a punitive damage award entered at a jury's unbridled discretion.

Defendant's arguments as to the application of the Copyright Act to file sharers are also without merit. The district court reasoned that Congress did not intend the full range of statutory damages to apply to copyright infringements over a peer-to-peer network. Defendant, in his cross appeal, now carries this argument

substantially further by asserting that consumer copying is shielded from *all* liability if conducted for noncommercial purposes.

These sweeping contentions are based on a set of policy arguments that treat the text of the statute as if it is an irrelevant distraction rather than the focal point of the Court's inquiry. But the plain language of the statute cannot be so cavalierly disregarded. The statutory text make clear that anyone who reproduces or distributes publicly a phonorecord of a copyrighted sound recording without authorization has committed an actionable infringement and is liable for the full range of damages specified by the Copyright Act. The statute creates no safe harbor for consumer infringers or infringers who derive no commercial advantage or infringers who use peer-to-peer networks to reproduce and distribute protected works.

Defendant acknowledges that application of the statutory damages provision to his conduct is "nominally in keeping with the text of the statute" but asserts that the law "is too extreme to be defended." Appellee Br. at 1. The Court, however, cannot engraft onto the statute exceptions and limitations that are not fairly discernable in the statutory text. Arguments that the statute is too draconian, or that it should be modified in light of emerging technologies or a changing social consensus as to what merits copyright protection, must be directed to Congress.

The Court must give effect to the statute as it is now written, not as the defendant would like it to be rewritten.

Here, the statute makes clear that defendant's knowing and willful infringement of plaintiffs' copyrighted sound recordings renders him liable for the full range of damages specified by statute. The district court erred in concluding otherwise. The judgment should therefore be vacated and the matter remanded for further proceedings.

ARGUMENT

I. The Doctrine Of Constitutional Avoidance Requires The Case To Be Remanded For Consideration Of Common Law Remittitur.

Had the district court reviewed the jury's verdict under principles of common law remittitur, it would have avoided deciding two constitutional questions of substantial prospective significance. Common law remittitur affords the trial court ample authority to constrain an excessive jury verdict. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 433 (1996). Application of common law remittitur would therefore obviate any need to determine whether the verdict is so excessive as to violate constitutional standards of due process. *Cf. Exxon Shipping Co. v. Baker*, 554 U.S. 471, 502 (2008) (review of whether award of punitive damages exceeds standards of excessiveness prescribed by federal

maritime common law “precedes and should obviate any application of the constitutional standard”) (opinion for equally divided Court).

Moreover, as common law remittitur is limited to presenting the plaintiff with a choice between accepting a reduced verdict or submitting to a new trial, it presents no occasion to resolve the difficult constitutional question of whether, upon concluding that a jury’s damage award is excessive, the Seventh Amendment bars the court from taking the case from the jury and entering a reduced judgment. *Cf. Southern Union Co. v. Irvin*, 563 F.3d 788, 790 (9th Cir. 2009) (to avoid conflict with Seventh Amendment, the better course, upon determining that a punitive damage award is excessive, is to offer plaintiff the option of accepting remittitur or new trial); *Continental Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 643 (10th Cir. 1996) (same).

As explained in our opening brief, the doctrine of constitutional avoidance militates heavily against unnecessary constitutional adjudication. Tenenbaum nonetheless speculates that common law remittitur procedures would ultimately have no impact on the final judgment, and that the district court therefore had to reach the due process and Seventh Amendment issues implicated by the judgment below. Echoing the district court’s reasoning, he asserts that plaintiffs would not accept a remitted verdict but would instead demand a new trial. He maintains that

a new jury would inevitably award the same damages. And that, he concludes, would unavoidably raise anew the same question of whether a damage award of this magnitude comports with due process. Appellee Br. at 49-50 & n.13.¹

There is, however, no basis for concluding that a new jury would inevitably return the same verdict. The copyright statute accords each jury broad discretion, within the broad limits set by Congress, to award such statutory damages as it considers “just.” 17 U.S.C. 504(c). A new jury might well conclude that a different statutory damages award is warranted in light of the harm to plaintiffs, the reprehensibility of the defendant’s conduct, the need to deter defendant and others, and the public injuries caused by defendant’s unlawful behavior. And if a subsequent jury did in fact return a comparable verdict, that itself would cast doubt on defendant’s assertion that the verdict is grossly disproportionate to his offense. In either event, subjecting the jury award to constitutional review instead

¹ We assume defendant means that a new trial would be futile if the Court otherwise rejects his arguments as cross-appellant pertaining to prejudicial errors in the jury instructions. *See* Appellee Br. at 25-46. While the United States takes no position on these issues, defendant’s contentions, if accepted, would require the judgment to be vacated on other grounds and the matter remanded for a new trial. That would in turn moot the question of whether the instant damage award is constitutionally excessive. As the doctrine of constitutional avoidance applies here as well, we respectfully submit that the Court should resolve the jury instruction issues first and then determine whether it remains necessary to reach whether the district court erred in reviewing whether the jury verdict comports with due process.

of review under these established common law procedures is manifestly premature and embroils the court in a constitutional dispute that it need not and should not address.

The district court's error in reaching the due process issue is compounded by its entry of judgment for a reduced statutory damages award.

In *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S.C. 340 (1998), the Supreme Court held that there is a Seventh Amendment right to a jury trial on *all* issues pertinent to the award of statutory damages, including the amount of damages itself. The Seventh Amendment does not preclude the trial court from vacating a constitutionally excessive damage award and offering the plaintiff a choice between accepting a reduced judgment or submitting a new trial. *Dimick v. Schiedt*, 293 U.S. 474, 486-87 (1935). But there is a substantial constitutional question as to whether the court can go a step further and enter a reduced judgment based on its own evaluation of the harm to plaintiffs, the reprehensibility of defendant's conduct, and the need for deterrence. *Cf. Hetzel v. Prince William County*, 523 U.S. 208 (1998) (where a court concludes that a compensatory damages award is excessive because it is unsupported by the evidence, it may not fix the amount of the award itself but must instead either obtain the plaintiff's consent to a reduced award or order a new trial) (*per curiam*).

Tenenbaum does not address the Seventh Amendment and makes no effort to reconcile the district court's entry of judgment for a reduced statutory damages award with *Feltner's* holding that the amount of statutory damages must be determined by the jury if a jury trial is requested. These constitutional limitations on the district court's authority, however, cannot be dismissed merely because defendant chooses to ignore them.² The district court had and still has available to it a well-established common law procedure that permits careful scrutiny of the jury's award without implicating the substantial Seventh Amendment question implicated by the current judgment. The doctrine of constitutional avoidance requires that these common law procedures be exhausted before reaching the issue of whether the jury verdict comports with due process. The Court should therefore vacate the judgment and remand the case for consideration of common law remittitur.

II. Due Process Review Is Governed By *Williams*, Not *Gore*.

Even assuming the district court properly reached whether the jury's award comported with due process, it erred in failing to apply the deferential due process

² Indeed, by failing to address the point, defendant has arguably conceded it. Cf. *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.) (“a litigant has an obligation to spell out its arguments squarely and distinctly, or else forever hold its peace”) (internal quotation omitted), *cert. denied*, 494 U.S. 1082 (1990).

standards of review set forth in *St. Louis, I. M. & S. Railway Co. v. Williams*, 251 U.S. 63 (1919). Tenenbaum and his amicus argue that the pertinent due process standards are instead set forth in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and related precedent addressed to whether a jury's award of punitive damages is unconstitutionally excessive. But their arguments overlook the fundamental differences between an award of statutory damages under legislatively established standards specifying the range of an appropriate penalty, and an award of punitive damages under a regime that gives the jury unbridled discretion.

The *Williams* standards are tailored to review of statutory damages and take careful account of the deference the reviewing court must accord to a legislative determination of the appropriate penalty for unlawful conduct. *Williams* thus provides that although statutory penalties are subject to due process review, they must be sustained unless "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *Id.* at 66-67. It holds that because such penalties are intended to redress and deter public harms, the proportionality of the penalty must be measured, not by comparing it to the plaintiff's actual injury, but by comparing it to the "public wrong" the penalty was intended to redress. *Id.* at 66. And it stresses that because the reviewing court is

dealing with the considered determination of a coordinate branch of government, the legislative judgment is entitled to “wide latitude of discretion.” *Ibid.*

Gore, in contrast, is grounded in the specific due process concern that, in the absence of a limiting principle of proportionality, a jury’s unchecked power to award punitive damages deprives a defendant of fair notice of the potential sanction for his misconduct and subjects him to the risk of a wholly arbitrary deprivation of property. *Gore*, 517 U.S. at 574-75. These due process considerations have no logical application to statutes that, like the Copyright Act, specify the range of permissible monetary awards and the criteria under which they may be imposed. *See* 17 U.S.C. 504(c)(2). In those circumstances, the statute itself supplies the fair notice of potential sanction deemed absent in *Gore* and establishes substantive standards that guard against the risk of arbitrary deprivation of property. Thus, as one district court reasoned in holding that *Gore* has no application to review of statutory damages under the Copyright Act, “[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.” *Lowrys Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 460 (D. Md. 2004).

Tenenbaum nonetheless argues that the Supreme Court's excessiveness/due process precedents are all of a piece and do not distinguish between statutory damages awarded under a regime established by Congress and punitive damages awarded at the unfettered discretion of a jury. Appellee Br. at 12-14. This contention is belied by the case law. *Williams* and *Gore* establish different substantive standards for statutory damages and punitive damages. The mere fact that *Gore* cites *Williams* in support of the general proposition that punitive damages should be proportionate to the offense (*see Gore*, 517 U.S. at 575) does not suggest that the Court has discarded *Williams*' requirement that the reviewing court defer to a legislative determination of an appropriate penalty. To the contrary, *Gore* expressly holds that "a reviewing court engaged in determining whether an award of punitive damages is excessive should accord substantial deference to legislative judgment concerning appropriate sanctions for the conduct at issue." *Gore*, 517 U.S. at 583 (internal citation and quotation marks omitted). Nor does it indicate that the Court has jettisoned *Williams*' holding that, in the context of statutory damages, proportionality is determined with reference to the public harms to be redressed by the legislation, not the private harm incurred by the plaintiff.

Moreover, contrary to defendant's assertion, there is no support in the case law for the application of *Gore*'s standards to due process review of a statutory damages award. As explained in our opening brief, the only appellate decision to specifically address the appropriate standard for reviewing statutory damages under the Copyright Act holds that *Gore* has no clear application to the matter and that review may proceed under *Williams*. *Zomba Enterprises, Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 587 (6th Cir. 2007), *cert. denied*, 128 S. Ct. 2429 (2008). The extant district court authority similarly holds that *Gore* is inapposite, *Lowrys Reports, supra*; *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 Act).

Tenenbaum further errs in asserting that cases reviewing statutory damage awards under other statutes support the application of *Gore* rather than *Williams*. This Court's decision in *Romano v. U-Haul International*, 233 F.3d 655, 673 (1st Cir. 2000), which reviewed a punitive damages award authorized by Title VII of the Civil Rights Act, did not expressly consider whether *Williams* or *Gore* is controlling. It did, however, find, consistent with *Williams*' focus on deference to a legislative determination, that "a statutory cap provides strong evidence that a defendant's due process rights have not been violated." *Romano*, 233 F.3d at 673.

Defendant's reliance on *Parker v. Time Warner Entertainment Co.*, 331 F.3d 13 (2d Cir. 2003), and *Exxon Shipping Co., supra*, is also misplaced. The *Parker* court expressly notes that its discussion of whether *Gore* would apply to a statutory damages award under the Cable Communications Policy Act is only "hypothetical." *See, id.*, 331 F.3d at 22. The court's statements on *Gore* are thus dicta. *Exxon Shipping Co.* addresses excessiveness standards under federal maritime common law, not the Due Process Clause. *Id.* 554 U.S. at 501-02. Apart from making clear that the court should review a damage award under common law standards for excessiveness before reaching the due process issue, it has no relevance here.

Defendant's amicus, the Electronic Frontier Foundation, also errs in asserting that *Gore*, not *Williams*, sets the standards for due process review of a statutory damages award. Amicus argues that statutory damages are not exempt from due process scrutiny, and that damages must 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.

These contentions are meritless. First, applying *Williams* is not tantamount to exempting copyright damages from traditional due process scrutiny. *Williams*

dates back to 1919 and its continuing validity was reaffirmed in *Gore* itself. See *Gore*, 517 U.S. at 575. *Williams* thus sets forth the due process standard traditionally applied to statutory damage awards. Indeed, as we have shown above and in our opening brief, no case holds that *Gore* rather than the *Williams* standards or their functional equivalent applies to constitutional review of a statutory damage awards.

Second, amicus errs in asserting that the Due Process Clause requires statutory damage awards to be based solely on the harm inflicted on the plaintiff and the reprehensibility of defendant's conduct. *Williams* makes clear that statutory assessments may properly reflect the legislature's judgment as to the amount necessary to redress and deter *public* harms caused by the defendant and those like him. Thus, where the award "is imposed as a punishment for the violation of 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). Even in the punitive damage decisions on which Tenenbaum relies, the reviewing court must examine "potential" as well as actual harm when evaluating defendant's conduct. *Gore*, 517 U.S. at 575, 582; *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 (1993). In arguing that the Constitution nonetheless bars consideration of public harms, it is amicus, not the

government or plaintiffs, who urge the Court to support “copyright exceptionalism.”

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. As amicus notes, 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 Nunez v. Caribbean Intern. News Corp.*, 235 F.3d 18 (1st Cir. 2000)), (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 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. Amicus may question the wisdom of the balance now struck by Congress in this regard. 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 Court under the guise of constitutional adjudication.

III. The Copyright Act Applies With Full Force To Consumers Who Engage In The Unauthorized Copying And Distribution Of Protected Sound Recordings.

Tenenbaum asserts that “[n]o authority originating from Congress exists to support the notion that consumer copying is actionable,” and consequently urges the Court to dismiss plaintiffs’ complaint. Appellee Br. at 64, 80. The Copyright Act, however, subject to exceptions not relevant here, unequivocally states that anyone who copies or distributes a copyrighted sound recording without authorization has committed an actionable infringement and is liable for the full range of statutory damages. Tenenbaum’s contentions to the contrary are at odds with the plain language of the statute and gloss over the extent to which unauthorized file sharing infringes the copyright owner’s right to control the distribution of a protected work.

As an initial matter, though defendant labors to show that there is an implicit statutory exception for “consumer copying,” the unauthorized file sharing

at the heart of this case involves far more than simple reproduction of a copyrighted work for one individual's home use. Rather, "Tenenbaum admitted to downloading *and distributing* the thirty sound recordings at issue in this case." Slip op. at 8 (emphasis added). Thus, this case is not simply about home copying for personal use. It is rather about the injuries caused by the use of an internet-based technology that facilitates massive, unauthorized distribution of protected works to thousands of network participants.

Even if there were an all-encompassing exception for "consumer copying" – and there is not – that would not give Tenenbaum license to distribute copyrighted sound recordings to other participants in a peer-to-peer network. To the contrary, he would still remain subject to a suit for copyright infringement and still remain liable for statutory damages in whatever amount the jury deems "just."

As one Congressman has stated:

Let's start with a basic fact: Unauthorized distribution or downloading of copyrighted works on public P2P networks is illegal. To paraphrase the 9th Cir. in the Napster case, public P2P users "who upload file names to the search index for others to copy violate a copyright holders' distribution rights. P2P users who download files containing copyrighted music violate a copyright holder's reproduction rights." Any attempt to say otherwise is a bald-faced attempt to rewrite very well-settled law.

Piracy of Intellectual Property on Peer-to-Peer Networks: Hearing Before the H. Subcomm. on Courts, The Internet, and Intellectual Property of the Comm. on the Judiciary, 107th Cong., 2d Sess. 3 (2002) (remarks of Cong. Berman).

In any event, defendant's attempt to read into the Copyright Act an implied exception for all "consumer copying" is without merit. The statute vests the owner of the copyright in a sound recording with 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. "Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 122 * * * is an infringer of the copyright * * *." 17 U.S.C. 501(a). And if the copyright is infringed, "The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it." 17 U.S.C. 501(b).

The statute expressly sets forth the circumstances in which Congress intends to limit, qualify, or grant exceptions to these exclusive rights. *See* 17 U.S.C. §§ 107-122. Nothing in the plain language of these provisions, however, generally exempts unauthorized "consumer copying" from the copyright holder's right to bring a civil action to restrain further infringement and to recover actual or

statutory damages. And where a statute enumerates a set of express exceptions, those exceptions are ordinarily deemed the sole exceptions intended by Congress.

TVA v. Hill, 437 U.S. 153, 188 (1978).³

Tenenbaum nonetheless argues that when Congress enacted the Audio Home Recording Act of 1992, 17 U.S.C. § § 1001-1010, it “explicitly and unequivocally immunized *all* then-existing forms of consumer copying, digital *and* analog, for personal use.” Appellee Br. at 62. He does not, however, offer any textual support for this broad and surprising proposition. Indeed, he candidly concedes that the Audio Home Recording Act does not in fact immunize consumer copying using a computer. *Id.* at 63. Tenenbaum nonetheless reasons

³ Defendant asserts that apart from record company suits like this one, there have been no instances in which a corporate plaintiff has instituted an infringement action against a noncommercial consumer defendant. *See* Appellee Br. at 49. The meaning of a statute, however, must be divined from its plain language, not the number of suits brought under its authority. Before the advent of peer-to-peer networks, the costs of bringing a copyright action against an individual for making a single unauthorized copy for personal use were apt to far outweigh the benefits. That, and not a lack of statutory authority, explains why there have heretofore been few reported cases of infringement actions brought against home copiers. Peer-to-peer networks greatly change this cost-benefit calculus by exponentially increasing the potential harm to a copyright holder caused by consumer copying. Such networks enable a single home user to distribute an unauthorized copy to thousands of additional network participants, each of whom can in turn distribute the unauthorized copy to others. It is thus not surprising that infringement actions against “home copiers” have increased as peer-to-peer networking has become more prevalent.

that because using a computer to copy songs would have been prohibitively expensive at the time this statute was enacted, “Congress simply did not foresee the centrality of the computer in the future music marketplace.” *Id.* at 64. He therefore concludes that the statute’s omission of any provision immunizing home copying using a computer merely reflects the technological limitations of the time. It does not, in defendant’s view, evince Congress’s intent to except computer copying from the putative policy of immunizing from copyright infringement actions *all* private consumer copying for noncommercial purposes.

This contention misconceives the purposes of the Audio Home Recording Act and is utterly without support in the statutory text. The Audio Home Recording Act was Congress's response to a controversy between the music industry and the consumer electronics industry regarding the introduction of digital audio recording technology into the domestic consumer market. *See generally* S. Rep. No. 102-294, 102d Cong. 2d Sess. 30-45 (1992); H.R. Rep. No. 102- 873(I), 102d Cong., 2d Sess. 11-13 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3581-3583. Beginning in the 1980s, consumer electronics firms began to develop tape recorders and other consumer recording devices that employ digital audio recording technology. Unlike traditional analog recording technology, which results in perceptible differences between the source material and the copy, digital

recording technology permits consumers to make copies of recorded music that are identical to the original recording. Moreover, a digital copy can itself be copied without any degradation of sound quality, opening the door to so-called "serial copying" – making multiple generations of copies, each identical to the original source.

The capability of digital audio recording technology to produce perfect copies of recorded music made the technology attractive to the consumer electronics industry. However, the same capability was a source of concern to the music industry, which feared that the introduction of digital audio recording technology would lead to a vast expansion of “home taping” of copyrighted sound recordings and a corresponding loss of sales.

The Supreme Court’s decision in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) prompted further industry concern. There, the Supreme Court held that the use of VCR recording technology by consumers to make home copies of broadcast programs for viewing at another time (“time-shifting”) constituted a non-infringing “fair use” of the copyrighted material. The consumer electronics industry, together with consumer groups, argued that *Sony* recognized a general right to engage in home taping of copyrighted materials for personal use;

the music industry argued that *Sony* was decided on narrow grounds and did not give the Court's general imprimatur to home taping.

The Audio Home Recording Act of 1992 resolves this controversy over home taping and reconciles these various competing interests.⁴ The statute provides the music industry with two principal benefits relating to digital audio recording technology. First, the Act requires manufacturers of “digital audio recording devices” to incorporate circuitry that prevents serial copying. 17 U.S.C. §§ 1001(11), 1002. Second, the Act requires manufacturers of “digital audio recording devices” and “digital audio recording media” to pay royalties into a fund that is distributed to copyright holders, thereby affording them compensation for what would otherwise be the unauthorized copying of protected works. 17 U.S.C. §§ 1003-1007.

⁴ Before the Audio Home Recording Act of 1992 Act, there was an open question as to whether the earlier provisions of the Sound Recording Act of 1971 previously authorized home taping of sound recordings. *See Sony Corp.*, 464 U.S. at 430 n.11. The 1992 statute was intended to lay this controversy to rest and now sets forth in detail Congress’s policies on when home copying will be immunized from statutory liability. *See S. Rep. No. 102-94* at 31-34. It thus supersedes any provision of the Sound Recording Act that might previously have been thought to shield home taping from such liability. Defendant consequently errs in attempting to ground a right to home taping in the legislative history of the Sound Recording Act. *See Appellee Br.* at 54-58.

In exchange for these benefits, the statute provides manufacturers and consumers using specified types of recording devices or recording media with a precisely circumscribed immunity from suits for copyright infringement. This immunity is contained in Section 1008 of the Act, 17 U.S.C. 1008, which provides:

No action may be brought under this title alleging infringement of copyright [1] based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or [2] based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.

Crucially, this immunity does *not* extend to consumer copying using a computer or computer hard drive. The statutory immunity is limited to copying using a “digital audio recording device” or “digital audio recording medium.” These are specifically defined terms that do not include a computer or computer hard drive. Rather, a “digital audio recording device” is defined, with exceptions not relevant here, as any machine or device “the digital recording function of which is designed or marketed *for the primary purpose* of, and that is capable of, making a digital audio copied recording for private use.” 17 U.S.C. 1001(3) (emphasis added). Similarly, a “digital audio recording medium” is defined (again with inapplicable exceptions) as “any material object * * * that is *primarily*

marketed or *most commonly* used by consumers *for the purpose* of making digital audio copied recordings by use of a digital audio recording device.” *Id.*

1001(4)(A) (emphasis added).

In *RIAA v. Diamond Multimedia Systems Inc.*, 180 F.3d 1072, 1078 (9th Cir. 1999), the Ninth Circuit held that these definitions exclude personal computers and their hard drives from the immunity from infringement actions conferred by statute. The court reasoned that although personal computers are “capable of” making “digital audio copied recordings,” neither they nor their hard drives are “designed or marketed for the primary purpose of” making such recordings. *Ibid.* For similar reasons, hard drives fall outside the statutory definition of “digital audio recording medium,” since they are not “primarily marketed or most commonly used * * * for the purpose of” making such recordings. *See also* S. Rep. No. 102-294, *supra* at 48 (stating that a personal computer is not a “digital audio recording device” within the meaning of the statute).

Moreover, the Ninth Circuit later rejected “home taping” arguments nearly identical to those pressed by Tenebaum. Thus, in *A & M Records, Inc. v. Napster*, 239 F.3d 1004 (9th Cir, 2001), the creator of a peer-to-peer, file sharing network argued “that its users engage in actions protected by § 1008 of the Audio Home

Recording Act of 1992.” *Id.* at 1024. The court concluded, however, that “the Audio Home Recording Act does not cover the downloading of MP3 files to computer hard drives” because computers are not digital audio recording devices since their “primary purpose” is not to make digital audio copied recordings, and because computers do not make “digital music recordings” as defined by the Audio Home Recording Act. *Id.* at 1024-25.

Tenenbaum concedes that the statutory immunity expressly conferred by the Audio Home Recording Act does not extend to copying using a personal computer. Appellee Br. at 63. He essentially argues, however, that this deliberate omission should be ignored in order to vindicate an overarching congressional intent to immunize consumer copying for noncommercial, home use. *Ibid.* But the text of the statute cannot be tossed aside in favor of defendant’s dubious notions of congressional policy. “In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute’s meaning, in all but the most extraordinary circumstance, is finished.” *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992).

Here, the text of the Audio Home Recording Act makes plain that using a computer to make unauthorized copies of a protected work remains an actionable

infringement. That the statute predates technological changes in the ability of computer users to copy and easily distribute protected sound recordings is of no moment. *See* 17 U.S.C. 102(a) (copyright protection applies to “original works of authorship fixed in any tangible medium of expression, *now known or later developed*, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”) (emphasis added). The Supreme Court has held, in the specific context of construing the Copyright Act’s application to new and emerging technologies, that the reviewing court must apply the statute as written to the facts then before it and leave to Congress the task of determining whether the statute should be amended in light of new technological developments. *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 456 (1984). Indeed, that directive is especially applicable to the Audio Home Recording Act, for the legislative history shows that Congress was narrowly focused on issues pertaining to devices other than computers and expressly intended “to avoid affecting other technologies or other interests even by implication.” S. Rep. 102-294 at 52.

Even if the plain language of the statute could be set aside, Tenenbaum errs in asserting that the Audio Home Recording Act reflects an overarching congressional policy to immunize all consumer copying for noncommercial, home

use. The statute instead reflects a policy of balancing Congress's interest in promoting technological innovation against the need to ensure that such innovations do not erode the protections afforded copyright holders. In the Audio Home Recording Act, Congress achieved this balance by requiring the manufacturers of covered digital recording devices to make technical modifications that prevent serial copying of protected works, and to pay royalties that will compensate copyright holders for the otherwise uncompensated and unauthorized home copying facilitated by digital recording devices. These benefits and protections for copyright holders were the express *quid pro quo* for immunizing certain types of home copying from statutory liability.

Personal computers are deliberately excluded from this scheme. Computer manufacturers are not required to include means for preventing the serial recording of protected works, and copyright holders receive no royalty payments on computer sales as compensation for the revenue lost when computers are used to make unauthorized "home" copies of protected work. That is not, as defendant argues, indicative of a general policy of immunizing home copying from actions for infringement. It rather reflects a deliberate congressional determination to leave in place the established statutory remedies for *all* copyright infringement

effected with a computer, including the unauthorized reproduction and distribution of copyrighted sound recordings.

Finally, subsequent legislation confirms that there is no general congressional policy of shielding noncommercial consumer copying from statutory liability. Thus, in the *No Electronic Theft Act*, Pub. L. No. 105–147, 111 Stat. 2678 (1997), Congress made clear that one may be *criminally* liable for copyright infringement, even if engaged in noncommercial activity. The *No Electronic Theft Act* was enacted in response to *United States v. LaMacchia*, 871 F. Supp. 535 (D. Mass. 1994). There, a college student was charged with wire fraud for setting up an electronic bulletin board from which other users could download popular software applications at no cost. The student derived no direct commercial advantage from this operation, and because the criminal provisions of the Copyright Act at the time required the predicate copyright infringement to be “willful[] and for purpose of commercial advantage or financial gain,” the court concluded that the Act barred LaMacchia’s prosecution. *Id.* at 540, 545.

Congress, responded by amending the law to make clear that one could be held criminally liable for copyright infringement, even if the infringer did not

personally seek financial gain.⁵ Congress explained that this amendment “criminalizes computer theft of copyrighted works, *whether or not the defendant derives a direct financial benefit from the act(s) of misappropriation*, thereby preventing such willful conduct from destroying businesses, especially small businesses, that depend on licensing agreements and royalties for survival.” H.R. Rep. 105–339, 105th Cong., 1st Sess. 5 (1997) (emphasis added).

In sum, the Copyright Act applies with full force to consumers who use a computer to copy and/or distribute protected sound recordings, without regard to whether the consumer seeks financial gain or commercial advantage. Defendant’s arguments to the contrary are wholly without support in the text of the statute and belied by the Copyright Act’s purposes, evolution, and legislative history.

⁵ See Pub. L. No. 105–147, § (2)(b), amending 17 U.S.C. 506(a) so as to make one who willfully infringes a copyright criminally liable if the infringement was committed by “the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000,” without regard to whether the infringement is for commercial advantage or private financial gain.

IV. Individuals Who Use Peer-to-Peer Networks To Infringe A Copyright Holder's Exclusive Right To Reproduce and Distribute Protected Works Are Liable For Statutory Damages To The Full Extent Specified In The Statute.

Defendant's contention that statutory damages were "never intended for consumer copying (Appellee Br. at 48)" is also at odds with text of the statute. 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 "consumer copying" or 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, without regard to the ultimate purposes of the infringer or the means used to effect the infringement.

Defendant ignores the text of the statute and relies instead on a set of unsubstantiated, *ipse dixit* assertions about putative congressional copyright policy. Each of his contentions in this regard is without merit.

First, statutory damages are expressly available *in lieu of* actual damages and thus are not conditioned on an evidentiary showing of actual injury. As we have shown in our opening brief, the very purpose of statutory damages is to ensure that copyright owners have meaningful redress in instances where actual damages are difficult or prohibitively expensive to prove. *F. W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 222, 231-33 (1952). Indeed, in *F. W. Woolworth Co.*, the Supreme Court, though holding that evidence of actual injury is admissible to guide the court’s discretion as to what amount is “just,” took as a given that statutory damages “may be awarded without any proof of injury.” *Id.* at 231.⁶

Second, insofar as defendant means to argue that statutory damages are only available if there is in fact some non-trivial amount of actual damages, even if the quantum of damages is unproven or unprovable, that is both irrelevant and incorrect. Defendant has conceded that plaintiffs did incur some actionable amount of actual damages. *See, e.g.* Appellee Br. at 68-69 (noting that defendant

⁶ *Accord Douglas v. Cunningham*, 294 U.S. 208, 210 (1935) (upholding award of statutory damages despite plaintiff’s inability to prove actual damages); *Jewell-LaSalle Realty Co. v. Buck*, 283 U.S. 202, 203, 206-08 (1931) (same); *L.A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100, 103, 106-08 (1919) (award of minimum statutory damages appropriate despite testimony that damages could not be estimated).

is *not* invoking the doctrine that trivial, *de minimis* harm is not actionable); Appellee Br. at 23-24 (noting that the number of users to whom Tenenbaum made unauthorized distributions is unknown, but not disputing that some number of unauthorized distributions took place). In light of these express and tacit concessions, any issue as to whether statutory damages would apply in the absence of any actual harm is purely hypothetical and has no relevance to the case before the Court.⁷

In any event, under the express terms of the 17 U.S.C. 504(c)(1), the availability of statutory damages is conditioned solely on a finding of copyright infringement and the copyright holder's election to seek them in lieu of actual damages. The *amount* of a statutory damages award is constrained by what the trier of fact determines to be "just," and, as *F. W. Woolworth Co.* holds, evidence of actual damages – or the lack thereof – may guide that determination. But, consistent with the deterrent as well as compensatory purposes of a statutory

⁷ In our opening brief, we argued, not only that there was actual harm to plaintiffs' distribution rights, but that the district court had improperly discounted the extent of this harm. We thus showed that the district court erred in excusing the harm caused by Tenenbaum merely because many other network participants had committed the same infringement. Br. for U.S. at 49-53. We also showed that the district court had vastly understated the injury to plaintiffs by comparing the harm caused by infringing an exclusive performance right with the much greater harm caused by infringing an exclusive distribution right. Br. for the U.S. at 53-55. Defendant does not contest these two points in his brief to the Court.

damages award, nothing in the text of the statute makes the availability of statutory damages contingent on a showing of actual injury to the plaintiff. *See Venegas-Hernandez v. Sonolux Records*, 370 F.3d 183, 195 (1st Cir 2004) (“Statutory damages are not meant to be merely compensatory or restitutionary. The statutory award is also meant to discourage wrongful conduct”), *quoting Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 113-14 (2d Cir. 2001).

Third, *Feltner’s* holding that there is a right to a jury trial on statutory damages has no bearing on whether section 504(c) continues to apply to infringement actions. Tenenbaum argues that Congress expected that the broad discretion to decide what amount of statutory damages is “just” would be wielded by federal judges, and that Congress would not have intended the same broad discretion to be vested in a jury. He thus concludes that “[w]hen *Feltner* replaced judges with juries, it rendered the 1976 Act hopelessly indistinct * * *.” Appellee Br. at 68.

Congress, however, amended the statutory damages provision just one year after *Feltner* was decided. *See Digital Theft Deterrence and Copyright Damages Improvement Act of 1999*, P. L. No. 106-160, § 2, 113 Stat. 1774 (1999). Despite *Feltner’s* mandate that statutory damages now be decided by a jury, Congress did not qualify or restrict a copyright holder’s right to elect such damages in *any*

action in which an infringement is proven. Instead, it left the applicability of the provision unchanged and substantially *increased* the permissible range of damages. The 1999 amendments thus increased the minimum award for non-willful infringements from \$500 to \$750, increased the maximum award for non-willful infringements from \$20,000 to \$30,000, and increased the maximum award for willful infringements from \$100,000 to \$150,000. *Ibid.*

In light of this subsequent amendment, defendant's contention that statutory damages cannot be applied after *Feltner* is plainly incorrect, "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); accord *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 381-82 (1982). That presumption is especially warranted here. Indeed, it is highly unlikely that Congress, in enacting a bill reported out of the House Judiciary Committee (*see* H.R. Rep. No. 106-216, 106th Cong., 1st Sess. (1999)) and jointly introduced in the Senate by the chairman and ranking minority member of the Senate Judiciary Committee (*see* 145 Cong. Rec. S7452-53 (June 22, 1999) (remarks of Sen. Hatch)), was unaware of a one-year old Supreme Court decision construing the very same statutory provision

under legislative review.⁸ The only reasonable inference is that Congress was aware of *Feltner* when it amended the statutory damages provision, and that it fully intended the provision to continue to apply as written.

Finally, defendant's contention (Appellee Br. at 73) that "Congress could not have had file sharing in mind" when it authorized the award of statutory damages is not supported by the legislative history and does not warrant a departure from the plain and unambiguous text of the statute. As we have shown in our opening brief (Br. for United States at 43, 47), contemporaneous legislative history shows that Congress intended statutory damages to apply to infringement effected with emerging, internet-based technologies (*see* H.R. Rep. No. 106-216, 106th Cong., 1st Sess. 3 (1999)), and post-enactment legislative history indicates that Congress regards the use of peer-to-peer networks to steal copyrighted material as subject to the full panoply of statutory remedies. *See Privacy and Piracy: The Paradox of Illegal File Sharing on Peer-to-Peer Networks and the*

⁸ Defendant stresses that *Feltner* is not mentioned in the legislative debate on the 1999 amendments. That, however, might well mean that Congress regarded the change from judge assessments to jury assessments as unexceptionable, particularly given a trial judge's continuing, common law power to review the jury verdict for excessiveness. In any event, the mere omission of an express reference to *Feltner* is not sufficient to overcome the rule that Congress must be *presumed* to be aware of controlling precedent construing the statutory provisions under legislative review.

Impact of Technology on the Entertainment Industry: Hearing Before the Permanent Subcomm. on Investigations of the Sen. Comm. on Governmental Affairs, 108th Cong., 1st Sess. 10, 32-33 (2003) (statements of Sen. Levin and Sen. Pryor).

Whether Congress did or did not specifically anticipate the extent to which peer-to-peer networks would facilitate unlawful copyright infringement is entirely irrelevant. The Copyright Act makes statutory damages available without regard to how the infringement is effected. *See* 17 U.S.C. 504(c). It is aimed at protecting copyright holders from invasion of their legal rights and does not distinguish between how an unlawful infringement is carried out.

Infringers who use a peer-to-peer network to violate copyright protections are not entitled to some special dispensation. Unauthorized file sharing over peer-to-peer networks exponentially increases an infringer's ability to reproduce and distribute copyrighted work and, in so doing, vastly increases the potential harm to a copyright holder's exclusive rights. Defendant's notion that statutory damages are not available for infringements committed with new technologies that *increase* the harm to the copyright holder has no basis in the text of the copyright statute or any reasonable construction of underlying congressional policy.

V. Feltner Does Not Render Section 504(c) Unenforceable.

Tenenbaum finally argues that because Congress originally intended statutory damages to be assessed by a judge, the statute cannot be construed to authorize statutory damages to be assessed by a jury. Thus, because *Feltner* requires a jury trial where one is requested, the statute, in defendant's view, is constitutionally unenforceable. Appellee Br. at 74-79.

Tenenbaum did not brief this issue in the district court and has pointed to no extraordinary circumstances that would warrant raising it for the first time on appeal. He should thus be deemed to have waived the argument here. *Nat'l Ass'n of Soc. Workers v. Harwood*, 69 F.3d 622, 627 (1st Cir. 1995) ("Ordinarily, an appellant who has not proffered a particular claim or defense in the district court may not unveil it in the court of appeals.") (internal quotations omitted); *United States v. Slade*, 980 F.2d 27, 31 (1st Cir.1992) ("[A] party is not at liberty to articulate specific arguments for the first time on appeal simply because the general issue was before the district court.").

Even if the Court deems it appropriate to entertain Tenebaum's new argument, he again overlooks the effect of Congress's 1999 amendments of the statutory damages provision. As we have explained above, these amendments were enacted shortly after *Feltner* was decided. See *Digital Theft Deterrence and*

Copyright Damages Improvement Act of 1999, P. L. No. 106-160, § 2, 113 Stat. 1774 (1999). And because “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*, 434 U.S. at 580 (emphasis added), the Court must assume that Congress now expects and intends the statutory damages provision to be applied by juries, as *Feltner* requires. Thus, submitting a statutory damages claim to a jury thus does not, as defendant argues, amount to a judicial rewriting of the statute. It rather vindicates the intent of Congress.

Moreover, even if Congress’s intent to have juries assess damages were less clear, that would not render section 504(c) unenforceable after *Feltner*. As the Ninth Circuit reasoned on remand from the Supreme Court in *Feltner*, the Supreme Court’s decision “in no way implies that copyright plaintiffs are no longer able to seek statutory damages under the Copyright Act.” *Columbia Pictures Television, Inc. v. Feltner*, 259 F.3d 1186, 1192 (9th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002). Rather, as in other cases in which the Supreme Court has held that the Seventh Amendment requires a jury trial not otherwise prescribed by statute, the statute remains in effect, subject to the requirement that

the pertinent issues be submitted to a jury on request rather than tried by the judge. *Id.* at 1192.

In *Segrets, Inc. v. Gillman Knitwear Co., Inc.*, 207 F.3d 56 (1st Cir. 2000), this Court also held that section 504(c) remains enforceable after *Feltner*. There, the district court, in a decision rendered before *Feltner* was decided, denied the defendant's motion for a jury trial on plaintiff's request for statutory damages. *Id.* at 60. On appeal, the defendant argued that the Supreme Court's intervening decision in *Feltner* required reversal and a remand for a jury trial on the statutory damages issue. This Court held that *Feltner* applied retroactively to the case before it and therefore required reversal and remand for a jury trial on plaintiff's claim for statutory damages (*id.* at 63, 66) – a result patently inconsistent with Tenenbaum's contention that section 504(c) is no longer enforceable.

These decisions sustaining the continued availability of statutory damages after *Feltner* are consistent with settled Seventh Amendment precedent. In *Curtis v. Loether*, 415 U.S. 189 (1974), for example, the Supreme Court held that where the Seventh Amendment clearly requires a jury trial right, there is no need to decide whether the statute contemplated a jury trial because the result of the constitutional holding is not to invalidate the statute but merely to direct that a certain form of procedure be used in applying it. *Id.* at 1007 n. 6.

The Court reached a similar result in *Tull v. United States*, 481 U.S. 412 (1987). There, the Court remanded for a constitutionally required jury trial (*see id.* at 427), even though there was no evidence that Congress intended the statute at issue to provide one (*see id.* at 417 n.3).

Thus, as one noted commentator has explained:

Whenever the Supreme Court has determined that the particular statute under examination does not accord the right to a jury but the Seventh Amendment so requires in that type of case, the same pattern recurs: Notwithstanding that the Court holds the enactment of Congress unconstitutional, the statute itself goes on functioning.

Melville B. Nimmer and David Nimmer, 4 *Nimmer on Copyright*, §14.04[C][2] (2010). Tenenbaum's contention that *Feltner* renders section 504(c) unenforceable is thus incorrect.

CONCLUSION

For the foregoing reasons, and those set forth in our opening brief, the judgment should be vacated and the case remanded for consideration of common law remittitur. In the alternative, the judgment should be vacated and the case remanded for constitutional review of the jury verdict under *Williams*.

Respectfully submitted,

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FRAP 32(a)(7) CERTIFICATE OF COMPLIANCE

I certify that this brief has been prepared using a 14-point, proportionally spaced font and that, based on word processing software, this brief contains 9,230 words.

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CERTIFICATE OF SERVICE

I certify that on January 26, 2011, I served the foregoing Reply/Response Brief for the United States as Plaintiff-Appellant/Cross-Appellee by electronically filing the brief with the Court. As counsel for the defendant and private party, plaintiffs-appellants are registered with the Court's Electronic Case Filing System, the electronic filing of this brief constitutes service upon them under the Court's Administrative Order Regarding Electronic Case Filing, (September 14, 2009).

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