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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

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SONY BMG MUSIC ENTERTAINMENT, )	
ET AL., )	CV. NO. 07-11446-NG
PLAINTIFFS )	
VS. )	COURTROOM NO. 2
JOEL TENENBAUM, )	1 COURTHOUSE WAY
DEFENDANTS )	BOSTON, MA 02210
----- )	

HEARING  
FEBRUARY 23, 2010

3:18 P.M.

BEFORE THE HONORABLE NANCY GERTNER  
UNITED STATES DISTRICT COURT JUDGE

VALERIE A. O'HARA  
OFFICIAL COURT REPORTER

1 A P P E A R A N C E S:

2 For The Plaintiffs:

3 Dwyer & Collora, LLP, by DANIEL J. CLOHERTY, ESQ.,  
4 600 Atlantic Avenue, Boston, Massachusetts 02210-2211;

5 The Oppenheim Group, by MATTHEW J. OPPENHEIM, ESQ.,  
6 7304 River Falls Drive, Potomac, Maryland 20854;

7 Holme Roberts & Owen LLP, TIMOTHY M. REYNOLDS, ESQ.,  
8 1801 13th Street, Suite 300, Boulder, Colorado 80302

9 For the Intervenor Plaintiff:

10 U.S. Deparment of Justice, Civil Division, Federal  
11 Programs, MICHELLE BENNETT, ATTORNEY,  
12 20 Massachusetts Avenue, NW, Washington, DC 20001

13 For the Defendant:

14 Harvard Law School, by CHARLES NESSON, ESQ.,  
15 1525 Massachusetts Avenue, Cambridge, Massachusetts  
16 02138;

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PROCEEDINGS

THE CLERK: All rise. United States District Court is now in session.

THE COURT: Good afternoon, you can be seated. Let me just do an agenda here. It seems to me that there are four broad categories of things to address, and you need to help me as to what I really need to address, so one category is whether there is anything left of the sanctions issue. I just want to know whether there's anything left of the plaintiff's motion for sanctions. I know that it's still pending, but I understand that the sanctions that were keyed to the recordings plaintiffs have withdrawn any -- you don't want to press with that because the recordings were taken off the website; is that right?

MR. OPPENHEIM: Good afternoon, your Honor.

THE COURT: I'm sorry, I just walk right out and start talking. Good afternoon.

MR. OPPENHEIM: That's quite all right. While we did withdraw the motions with issues that arose afterwards, we have been working with counsel for the defendant to work through those issues, and if it would please the Court, we jointly agree to a stipulated order that I'd like to hand up to the Court for its entry that we believe will resolve the issues.

THE COURT: All issues with respect to the motion

1 to compel, I'm sorry, the motion for fees and costs and  
2 filing the motion to compel?

3 MR. OPPENHEIM: No, your Honor.

4 THE COURT: Only with respect to the recordings?

5 MR. OPPENHEIM: Just with respect to the  
6 recordings. So with your permission, your Honor?

7 THE COURT: Yes, you can. Okay. I'll sign that.  
8 But the motion for costs in connection with the motion to  
9 compel is still pending?

10 MR. OPPENHEIM: You're right, your Honor, it is,  
11 and we believe that the Court granted our motion --

12 THE COURT: You don't have to waste time on that.  
13 I just want to know it's still on my plate.

14 MR. OPPENHEIM: Yes, your Honor.

15 THE COURT: Then there's the defendant's motion  
16 for a new trial or remittitur. Let me look at the motion  
17 for new trial. Actually let me ask the remittitur question  
18 first. This may be a little bit of an unfair question, but  
19 I will ask it anyhow to the plaintiffs, if I did what  
20 Judge Davis did in the Thomas case, would you do what the  
21 plaintiffs did in the Thomas case?

22 In other words, not to put too fine a point on it,  
23 if I then granted a remittitur as Judge Davis did in the  
24 Thomas case to the amount that he did, which I believe was  
25 \$2,250 per song, in the Thomas case the plaintiffs rejected

1 that and forced a new trial.

2 Would you take the same position?

3 MR. REYNOLDS: Your Honor, in all likelihood, yes.  
4 We would, of course, consider anything the Court ruled on in  
5 due course, but there were other issues aside from just the  
6 amount. The amount wasn't the only issue, but there were  
7 other issues as well.

8 THE COURT: Was your objection to that amount --  
9 obviously what Judge Davis is not precedent per se, but it's  
10 an important example. It's something that I take very  
11 seriously. Was it the amount per se? Is there another  
12 amount? What was the nature of your objection, if you want  
13 to share that? Is it any remittitur or that remittitur?  
14 Let's start with that.

15 MR. REYNOLDS: We would, I think, consider  
16 anything the Court did obviously, but that remittitur was  
17 not acceptable for a number of reasons separate including  
18 the amount but also because it could be read to create a  
19 statutory ceiling or a cap on damages in cases that are at  
20 least similar to this one.

21 THE COURT: Hasn't it de facto done that by the  
22 fact that he did it? I mean not --

23 MR. REYNOLDS: I would hope not.

24 THE COURT: Okay. And if I were to grant a new  
25 trial, again, I'm not saying I would, but it occurred to me

1 that -- let me say this, what you're hearing from me is  
2 constitutional avoidance for a moment, and so I'm actually  
3 going through all the steps to avoid the due process  
4 discussion of the damages for a moment.

5 If I were to grant a new trial on any of the  
6 grounds, one of the things I would do would have been to  
7 submit to the jury the same due process standards that you  
8 all have submitted to me now to evaluate the damage award.  
9 In other words, I would have given to the jury the standards  
10 that are articulated under BMW and State Farm and Williams.  
11 Would you have objected to that?

12 MR. REYNOLDS: Yes, your Honor, on multiple  
13 grounds. First off, we do not believe BMW and that line of  
14 cases has any application to the statutory issue here.

15 THE COURT: What about Williams?

16 MR. REYNOLDS: Williams I think obviously does  
17 have application, but I don't think that the jury decides  
18 the constitutional question, and I think the jury focuses on  
19 the damages as they're instructed, as your Honor instructed  
20 listing the elements that are in the jury instructions, but  
21 the constitutional question is a different question that the  
22 Court answers based on different standards.

23 THE COURT: So what if I had granted a Rule 50  
24 motion directing a verdict to so much of the case, so much  
25 of the damages as hit the constitutional standard and I had

1 set the constitutional standard, if I were to do that on a  
2 new trial, in other words, let me just using Judge Davis'  
3 number for a moment, if I had after I had heard the  
4 plaintiffs' case at the conclusion of the evidence submitted  
5 to the jury damages up to X point, X point being what I  
6 thought the constitutional maximum is, you would have  
7 objected to that, too?

8 MR. REYNOLDS: Yes, your Honor.

9 THE COURT: Okay. All right. Then let's start  
10 with the defendants' motion for a new trial, then we'll  
11 build through the constitutional challenges. Mr. Nesson.

12 MR. NESSON: Your Honor, I'm perfectly content to  
13 rest on our papers. I've presented as best I can.

14 THE COURT: I'm astonished. Let me just get my  
15 breath for a moment here. Okay. Let me just flag the  
16 evidentiary issue had to do with your challenge to the  
17 admissibility of the settlement, to so much of the  
18 settlement as I allowed in, and then you also objected to  
19 the instructions, and your objection seems to be that it was  
20 wrong to have given the statutory cap to the jury because  
21 the better way would have been the way the First Circuit  
22 did, which is to say allowing the jury to find -- I can't  
23 remember the case now -- allowing the jury to find a number  
24 and then make any kind of adjustment for the statutory  
25 cap.

1 MR. NESSON: Yes, your Honor.

2 THE COURT: The problem with that, Mr. Nesson, is  
3 that what you asked for in instructions was the jury should  
4 be told only that its task is to assess damages that are  
5 just.

6 MR. NESSON: Yes.

7 THE COURT: In other words, in the request for  
8 instructions, you did not tee up the issues which you are  
9 now teeing up, which is a problem. In other words, You  
10 didn't ask me for the instruction that you now say I was  
11 wrong not to have given. The instruction you asked for was  
12 an instruction that says the jury should be told only that  
13 its task is to assess damages that are just.

14 Now, that's a version of what you're arguing now,  
15 but I would then not even according -- it would be one thing  
16 to say assess damages that are just, but it has to be at  
17 least \$750 per song. What you just said to me for your  
18 instructions was just assess damages that are just.

19 MR. NESSON: Well, that is my position, your  
20 Honor. I think you should have asked the jury to assess the  
21 damages that are just, and then it was your responsibility  
22 to put it within the statutory limits. It's under the  
23 statute the charge is to you to establish the statutory  
24 range.

25 THE COURT: So I shouldn't have even told them

1 \$750 is the minimum?

2 MR. NESSON: No, you should not have.

3 THE COURT: Counsel, I take it you disagree?

4 MR. REYNOLDS: Yes, your Honor, we believe in  
5 addition to the Court, the reason your Honor articulated,  
6 which is, there was no alternative instruction proposed.  
7 The case, your Honor, is referring to the First Circuit is  
8 the La Mano case, which is a 1981 standard, and in the civil  
9 rights context, Congress has made it clear that the jury is  
10 not to be instructed on that amount.

11 Congress could have done the same thing here, but  
12 it didn't, and every Court to my knowledge, I'm not aware of  
13 any decision that says the jury should not be instructed on  
14 this, and I think the jury has to be instructed on it in  
15 order to arrive at the appropriate amount, otherwise you  
16 could have all kinds of problems after the trial.

17 I think more importantly, your Honor, a challenge  
18 to a jury instruction must somehow show that the jury was  
19 wrongly instructed, that they misapprehended the law, that  
20 they were instructed improperly on the law. Merely telling  
21 the jury what the range is does not get the defendant there.  
22 That is not a basis for a new trial in this case. There was  
23 no error in the jury instructions that would require a new  
24 trial.

25 THE COURT: Although it is the case that -- you

1 can come forward. Mr. Feinberg, you just assumed I would be  
2 very late and so you decided you could come in.

3 MR. FEINBERG: It wouldn't be the first time.

4 THE COURT: I understand. I understand. So you  
5 can come forward. The problems with the instructions is  
6 that the instructions were in the statutory language but  
7 offered no other standards.

8 MR. REYNOLDS: If I may, your Honor --

9 THE COURT: Yes.

10 MR. REYNOLDS: -- I disagree completely. The  
11 standards that the jury were given were very explicit and  
12 very detailed. You know, we have a full page of  
13 considerations that the jury is supposed to go through in  
14 arriving at the amount, the nature of the infringement, the  
15 purpose of the intent, the profit, the lost revenue, et  
16 cetera, et cetera.

17 The jury had significant standards here in order  
18 to guide their discretion in arriving at a number between  
19 the lower and the maximum, the minimum and the maximum that  
20 Congress set.

21 THE COURT: Were my instructions the same as the  
22 instructions in the Thomas case?

23 MR. REYNOLDS: They weren't verbatim the same, but  
24 they were similar in the sense of 1, instructing the jury on  
25 the facts they were to consider; and, 2, instructing the

1 jury on the appropriate range of damages.

2 THE COURT: Were they the same instruction in the  
3 first trial in the Thomas case?

4 MR. REYNOLDS: Very similar, your Honor, very  
5 similar with the exception of the making available issue.

6 THE COURT: Right. And so with the very same  
7 instructions, you wind up with juries that verdicts are as  
8 widely different as Thomas 1, Thomas 2 and Tenenbaum?

9 MR. REYNOLDS: Three different trials, three very  
10 different presentations of evidence, especially comparing  
11 this case to the Thomas case, and even in the Thomas case,  
12 you had two different, first of all, a different standard of  
13 law that was articulated in the second case --

14 THE COURT: In the first case.

15 MR. REYNOLDS: -- and the second case some  
16 additional instances of conduct on the defendant's behalf  
17 that may have contributed to that verdict, so I think both  
18 on the law and on the way the evidence came in and instances  
19 of perjury and those kind of things that contributed to the  
20 second verdict being different.

21 THE COURT: And there will be a new trial in  
22 Thomas?

23 MR. REYNOLDS: That's my understanding, yes.

24 THE COURT: Let me ask a legal question, another  
25 legal question. If I were to grant remittitur in this case,

1 reduce the damages, and if the plaintiff then did what they  
2 did in the Thomas case and say we don't accept it, we want  
3 to go to trial, is there any procedural bar to my then  
4 looking at the due process challenge to the damages?

5           Would there be any due process bar to that, in  
6 other words, can I do two phases here? One is, as I said,  
7 constitutional avoidance; one is remittitur under the usual  
8 principles, which means if you don't accept the remittitur,  
9 the plaintiffs can accept it's sort of a conditional new  
10 trial motion, and if the plaintiff does decide to do that  
11 and go to a new trial, I could then re-examine the same  
12 issues under constitutional standards. Any reason why I  
13 couldn't do that?

14           MR. REYNOLDS: I'm having -- so I understand the  
15 question, would that be a looking at the statute and the  
16 defendant's challenge as a challenge on the face of the  
17 statute challenging the constitutionality because you'd have  
18 to compare it to the evidence as an applied challenge?

19           THE COURT: It would be essentially as an applied  
20 challenge. In other words, I would first deal with the  
21 damages, putting aside the motion for a new trial, I'll look  
22 at the damages, and I'd be first addressing the damages  
23 under the traditional remittitur standards, which are very  
24 close to the constitutional standards, but, in any event,  
25 just the traditional remittitur standards.

1           If I agree, as Judge Davis did, to a number,  
2           assuming I pick some number, and under the remittitur  
3           approach, the plaintiff then can say, "We don't accept that  
4           number, new trial," so it's essentially a conditional  
5           granting of a new trial, but rather than ordering a new  
6           trial at that point, if the plaintiff doesn't accept the  
7           remittitur, I then address the constitutionality of the  
8           damages given in this case under the standards of Williams,  
9           at least, and possibly BMW and State Farm.

10           MR. REYNOLDS: I don't think so, your Honor,  
11           because at that point we would be deprived of our rights to  
12           a jury trial. If your Honor is going to order a remittitur,  
13           we at that point have to have the opportunity to accept or  
14           have a new trial. We can't then have the Court come back  
15           with all respect and say, well, now it's unconstitutional.

16           I think that that's saying --

17           THE COURT: Well, you understand that the answers  
18           you're giving me to the question about the terms of a new  
19           trial, the acceptance of remittitur is forcing me to address  
20           the constitutional issue.

21           MR. REYNOLDS: I understand that.

22           THE COURT: Okay.

23           MR. NESSON: Could I just respond?

24           THE COURT: Yes, of course, go on.

25           MR. NESSON: On the question of whether Congress

1 had the opportunity to instruct the Court to withhold the  
2 range from the jury, Mr. Reynolds says under 1981A, the  
3 Congress did that explicitly, and under this statute, they  
4 could have done that but didn't.

5 I would just want to make a point as clearly as I  
6 can, your Honor, that the Congress under this statute was  
7 instructing the Judge to deal with the range, that that's  
8 what the United States Supreme Court in Feltner concluded  
9 8 to 1, that is, that there was no construction of this  
10 statute, 504(c) that permitted the jury to consider the  
11 issue.

12 And so the mandate of the statute was for the  
13 Judge to consider both the justness and the range, and then  
14 the Seventh Amendment overrode that so that the end result  
15 is that the jury has to consider, there has to be a jury  
16 verdict, but there's nothing in the Seventh Amendment that  
17 says that the jury has to be told the range. The actual  
18 Congressional statute was a direction to you to decide it,  
19 and there's nothing in the Seventh Amendment that overrides  
20 that.

21 THE COURT: And you're saying that the language of  
22 504(c) is the Court in its discretion?

23 MR. NESSON: Yes, and the Supreme Court.

24 THE COURT: And it's overridden then by Feltner.

25 MR. NESSON: Yes, exactly. In Feltner, they look

1 at the Court, and Scalia in dissent, alone dissent is  
2 saying, well, we could interpret the Court to mean both the  
3 Judge and the jury, but the majority, 8 to 1, says no, in  
4 that statute the Court is talking about just the Judge, so  
5 it's the Judge that's instructed in that statute.

6 THE COURT: That doesn't -- it doesn't then -- it  
7 still doesn't get around the notion of the instructions that  
8 I gave were the pattern instructions or the notion that  
9 whether or not you teed up this issue by the request that  
10 you made. In other words, whether or not you preserved the  
11 objection you're now making in the instructions that you  
12 submitted, and, in any event, whether or not there was error  
13 in my using the pattern jury instructions, which is what I  
14 did.

15 Do you want to address this, Mr. Reynolds?

16 MR. REYNOLDS: I would submit I don't disagree  
17 with Mr. Nesson that the statute itself doesn't say the jury  
18 should or should not be instructed, but the law is clear  
19 that that is the range. There's no error in instructing a  
20 jury on the range. There's not a single authority to  
21 suggest that it is error to instruct the jury on the range  
22 in these cases. That's the pattern instruction. That's the  
23 instruction that's given in all of these type of cases. The  
24 defendant, to have a new trial jury, especially on the issue  
25 of jury instructions has to show error, and the defendant

1 has not done that here.

2 THE COURT: Let's move on then, as it seems that  
3 everyone is obliging me to, to the defendant's argument  
4 either with respect to remittitur or a constitutional due  
5 process argument. Mr. Nesson, do you want to address that?

6 MR. NESSON: Well, again, your Honor, I would rely  
7 on the papers as filed. The \$675,000 judgment is evidence  
8 that this statute, as applied, produces absurd results.

9 I've objected to the statute from the beginning as  
10 being misinterpreted and misapplied, and at every point that  
11 I was able to do it, I protested the idea that the jury  
12 would be told that they could award a damage award of  
13 \$150,000 per infringement, so the idea that somehow I've not  
14 successfully raised that issue comes as a shock to me.

15 THE COURT: Well, I'm moving onto the next issue.  
16 One is the question of instructions and whether that issue  
17 was preserved in the instructions that you gave me, and,  
18 second, whether or not even if it was preserved whether it  
19 was error to have given the pattern instructions. I'm now  
20 past that.

21 Assuming now that all we're dealing with is the  
22 appropriateness of the damages under a remittitur standard  
23 or the constitutionality of the damages under a due process  
24 standard, that's what I wanted to hear.

25 MR. NESSON: As far as I can tell, the standards

1 are exactly the same. The question is excessiveness, and in  
2 terms of excessiveness, I think there's no question under  
3 the Williams standard, as I've looked at it, it seems  
4 completely clear that this attempt by the plaintiffs to  
5 create a hermetically sealed, separate environment where  
6 there's a new category of noncompensatory damage, which is  
7 meant to deter but is somehow not punitive, seems completely  
8 false in any kind of realistic way, and then the idea that  
9 somehow Congress carefully considered this statutory damage  
10 as against someone like Mr. Tenenbaum is completely  
11 figmentary.

12 If you, for example, compare the statute under  
13 1981(a) where the Congress is dealing with a statutory  
14 damage, they make complete findings of fact. Likewise,  
15 under the Facsimile Act, the Congress examines the problem,  
16 makes explicit findings of fact and then addresses the  
17 problem in explicit terms, whereas in this situation, it's  
18 completely clear that Congress had no intention, no thought,  
19 no mention of peer-to-peer, that it completely preceded  
20 Congressional consciousness of the peer-to-peer problem,  
21 that the problem that the Congress --

22 THE COURT: Which had only just begun at the time  
23 of the 1999 statute.

24 MR. NESSON: Correct. Not a mention in the  
25 statutory history of peer-to-peer, it's all about LaMacchia,

1 it's all about the person who seeds billboard, original  
2 seeder with software and then distributes it to the millions  
3 of people that the net allows to come to a billboard.

4 It simply did not address the question that arises  
5 with the peer-to-peer, network, and that becomes so clear  
6 when you see that the very sponsors of the 1999 act, Hatch  
7 and Leach, then go forward with hearings in 2000, 2001 in  
8 which they celebrate Shawn Fanning and make it completely  
9 clear themselves that they have no inkling that the statute  
10 that they sponsored is somehow to be applied against the  
11 peer-to-peer defendant.

12 So given that context, for me, that leads to an  
13 interpretive question, applying the standard, traditional  
14 rule of cannon of instruction, that you do not interpret a  
15 statute to produce absurd results, you do not interpret a  
16 statute to produce unconstitutional results.

17 That should lead to an interpretation that  
18 eliminates the constitutional objection, so if your Honor is  
19 interested in avoiding the constitutional question, that  
20 seems completely the direction to go; and then, second, if  
21 you take their argument that somehow statutory damages is  
22 different because Congress carefully considered the matter,  
23 you look at the actual consideration that Congress makes  
24 here, there was none.

25 So, that comparing it to a jury that actually

1 considers punitive damages where they consider the specific  
2 case in front of them and make a punitive award and somehow  
3 saying that that should be circumscribed by a relationship  
4 that BMW and Gore and State Farm elicit, but the statutory  
5 damage is completely unconstrained because Congress so  
6 carefully considered it. That's just not real. It's just  
7 not real.

8 THE COURT: Well, if you also count the numbers of  
9 times that Williams is cited in BMW and State Farm, that  
10 gives additional weight to your argument that of course it  
11 was intended to deal with statutory.

12 MR. NESSON: To me, it's clear that the Court is  
13 thinking of compensatory damages, and noncompensatory  
14 damages and noncompensatory damages are within a statutory  
15 scheme, they're punitive, whether they're capped or not  
16 capped. It's just one big category, and noncompensatory  
17 damages should bear a rational relationship to compensatory  
18 damage. That seems to be what the Supreme Court has been  
19 saying since BMW, since before it.

20 THE COURT: Okay. Thank you. Mr. Reynolds.

21 MR. REYNOLDS: Your Honor, I'm not sure --

22 THE COURT: Let me just ask you what do I make of  
23 Senator Lahey saying in 1999, I'm sorry, in 2000 at a  
24 hearing called Music On The Internet, Is There An Upside To  
25 Downloading? And he goes, "When I go on college campuses,

1 as many of us do, and everybody is talking about what they  
2 have downloaded, how they share and so on, and when my kids  
3 pick up Black Muddy River, which happens to be one of my  
4 favorites of The Dead and send it to me, they've heard a new  
5 version, and I log on in the morning while I'm having my  
6 breakfast, and there it is, I mean, it's a whole different  
7 world, and I think we have to recognize that on where we go.  
8 Then Senator Hatch says something similar.

9 Doesn't that support Mr. Nesson's argument that  
10 Tenenbaum and Thomas were not what Congress had in mind?

11 MR. REYNOLDS: Absolutely not, your Honor. It's a  
12 very narrow view of what Senator Lahey was saying. I don't  
13 know what version of Black Muddy River he was referring  
14 to.

15 THE COURT: I don't know. I was going to do some  
16 independent research.

17 MR. REYNOLDS: Somebody else recorded. This is  
18 not a question of whether peer-to-peer has potentially some  
19 legitimate purposes. I think a lot of people, when new  
20 technology comes out, and rightfully so, look at new  
21 technology, whoa, what can we do with this? This can be a  
22 great thing, but very early on, I should say very quickly it  
23 became apparent peer-to-peer was used for almost nothing but  
24 wholesale theft of copyright music. Ninety, ninety-nine  
25 percent.

1           Since that statement, Senator Lahey, Senator Hatch  
2 and virtually every single person on Capitol Hill has come  
3 and said this is not okay.

4           THE COURT: But the question is whether or not  
5 \$750 per song to \$150,000 per song is in fact the framework  
6 that they intended with the Tenenbaums of the world?

7           MR. REYNOLDS: It is the very framework they  
8 intended, your Honor, and here's why: You know, people give  
9 Congress a lot of grief because the law didn't catch up, and  
10 Congress is always behind the times. I don't necessarily  
11 disagree with that, but here they were right on top of it.  
12 You have to look at the language in the House report that  
13 doesn't refer to anything specific but refers instead  
14 broadly to the idea of the Internet and millions of people  
15 connecting and the advancement of technology that everybody  
16 knew was coming.

17           You know, by 1999, file sharing on the Internet,  
18 P2P had become a big thing, but the distribution of  
19 copyrighted works hadn't, and it was clear, and this is a  
20 quote, "By the turn of the century, the Internet is  
21 projected to have more than 200 million users, not  
22 sophisticated users, not seeders, users, every day people,  
23 and the development of the new technology will create  
24 additional incentive for copyright thieves to steal  
25 protected works."

1           They might not have specifically foreseen the  
2 exact technology, but they saw the problem coming. The  
3 problem turned out to be P2P, and so it's a fallacy to look  
4 at this language and say Congress didn't anticipate this or  
5 Congress didn't intend for these damages, \$750 to \$150,000  
6 to cover this very type of infringement, your Honor.

7           This is exactly the scenario that Congress  
8 anticipated, and I would go one step further because if you  
9 look at the language as it goes on, many computer users are  
10 either ignorant that copyright law applies -- who were they  
11 talking about? They were talking about people who are just  
12 like Joel Tenenbaum who were either ignorant, or, on the  
13 other hand, simply believe they would not be caught or  
14 prosecuted for their crime.

15           Also, many infringers do not consider the current  
16 copyright infringement poses a real threat and continuing  
17 infringing even after they've been put on notice to stop.  
18 Again, this is a textbook example. They could have taken  
19 Joel Tenenbaum's name and plugged it right into there.

20           THE COURT: Do you think if Congress had set  
21 damages in file sharing cases, if they had had  
22 Joel Tenenbaum rather than Brian LaMacchia in front of them,  
23 they would have said \$750 to \$150,000 per song?

24           MR. REYNOLDS: I have no reason to believe they  
25 wouldn't have, your Honor, and, in fact, that's what they

1 did. There's nothing in this language here and certainly  
2 nothing in the statute. Leave aside, I don't think we even  
3 need to get to the legislative history. The statute doesn't  
4 suggest any distinction on its face, and, clearly, the  
5 legislative history to the extent it supports the view, it  
6 supports the view that these types of damages were enacted  
7 specifically for this type of case, maybe not specifically  
8 anticipating P2P, but specifically anticipating the exact  
9 problems that P2P causes by infringers just like  
10 Joel Tenenbaum.

11 THE COURT: What I'm fiddling for, what do I make  
12 of the fact -- I don't have the words in front of me -- but  
13 the fact that on different ends of the country or sort of in  
14 the middle of the country here Judge Davis, the very first  
15 time after the first verdict made a comment about how  
16 outrageous it was and now has made a finding that in the  
17 Thomas case that it was sufficiently outrageous to have  
18 engendered remittitur?

19 Doesn't that suggest something to the plaintiffs  
20 here about not the legitimacy of the prosecution or the  
21 litigation even, not the legitimacy of these cases but that  
22 Judges are having trouble with the damages?

23 MR. REYNOLDS: One Judge.

24 THE COURT: And the public, not to mention the  
25 public?

1           MR. REYNOLDS: One Judge, your Honor is having  
2 trouble with the damages, that we know, but we have 23 or 24  
3 jurors, independent jurors selected to be independent and to  
4 listen fairly and impartially and correctly instructed on  
5 the law that have found the exact opposite. That have  
6 looked at this and said this needs to be deterred.

7           THE COURT: By that measure, the BMW, the  
8 Supreme Court should have not done the BMW case, that was  
9 the bad paint job with substantial damages.

10          MR. REYNOLDS: Very different.

11          THE COURT: I mean, the fact that a jury has said  
12 it doesn't necessarily mean that there isn't a round of  
13 constitutional review that a Judge has to look at.

14          MR. REYNOLDS: I agree, your Honor, that  
15 constitutional review, the review in and of itself is  
16 entirely appropriate. However, in this case, you have  
17 Congress that specifically set a range to not only look at,  
18 not only to penalize the defendant but to -- it's not just  
19 punitive, it's remedial as well. It's also designed to  
20 deter other infringers, and it's designed to encourage  
21 enforcement, so the Congress had many things in mind, and  
22 the jury was properly instructed on all of the factors and  
23 came out with the numbers that they did in each of these  
24 three cases.

25          THE COURT: In the BMW case, which I know you

1 don't believe applies to this, but, as I said, BMW cites to  
2 Williams, the Judge, the Court declares an award  
3 unconstitutional where the paint job on the BMW was \$4,000  
4 in compensatory damages and \$4 million in punitives. The  
5 Alabama court had reduced it to 2 million which the  
6 Supreme Court also rejected.

7           The State Farm case was \$145,000 in punitive  
8 damages in favor of a plaintiff who had \$145 million; is  
9 that right? In favor of a plaintiff that suffered  
10 \$1 million in compensatory damages, and the Court also found  
11 that to be excessive.

12           Even in the Williams case, which you believe to be  
13 the measure here for statutory, a statutory case, the Court  
14 endorsed punitive damages or an award of statutory damages  
15 that I think was 114 to 1, whereas this is \$2,500 to 1.

16           In other words, if the amount of money that the  
17 record companies have lost per song is approximately, let's  
18 see, we've done the computation, the record companies  
19 reduced 70 cents for each 99 cent song on iTunes. The song  
20 could be purchased for 99 cents or a \$1.29 apiece. The cost  
21 of an album is \$15. 70 cents per song means approximately  
22 \$21 in profit over the songs that are involved here, and  
23 even if you give them a dollar in profit as opposed to 70  
24 cents in profit, the relationship between actual damages to  
25 the damages in this case is \$22,500 to 1.

1           Is there not another case in the galaxy that has  
2 upheld damages to that degree?

3           MR. REYNOLDS: Your Honor, as usual, you move very  
4 quickly, and you've said a lot, and I want to address  
5 everything you've said, so if I leave anything unsaid,  
6 please let me know.

7           THE COURT: I talk fast. Go on.

8           MR. REYNOLDS: Thank you. First of all, I want to  
9 address the Court said a number of times that Gore cites  
10 Williams. Absolutely Gore cites Williams, but for what  
11 proposition? Specifically, and the only reason it cites  
12 Williams is because when Gore cites that it says,  
13 specifically it recognizes that a jury's award of  
14 legislative judgments concerning appropriate sanctions for  
15 the conduct at issue should be given substantial deference.

16           In other words, what the Court says is if you have  
17 the legislature deciding on something, then we should use  
18 that as a yardstick to measure what the jury did.

19           That is Williams, that is this case. This jury  
20 did exactly what Congress intended them to do when it passed  
21 a statute, it awarded an amount between the maximum and the  
22 minimum and frankly on the very low end of the minimum. So  
23 the fact that Gore and State Farm cite Williams, it actually  
24 supports the plaintiff's position here that when the  
25 legislature has acted, that is the measure you use because

1 it's entitled to substantial deference.

2 In terms of I could go through many other reasons  
3 why Gore --

4 THE COURT: In *Browning Ferris*, the Court rejects  
5 the challenges to punitive damages under an excessive fines  
6 clause but cites *Williams* as an example of an opinion which  
7 the Court expressed the view that due process clause places  
8 the outer limits on the size of civil damages awards  
9 pursuant to a statutory scheme. That's a quote from  
10 *Browning Ferris*, 492, U.S. at 296.

11 MR. REYNOLDS: That's right.

12 THE COURT: The majority in *BMW v. Gore* cites  
13 *Williams* for the proposition that punitive damage awards may  
14 not be wholly disproportionate to the offense. 517 U.S. at  
15 575. In any event, what's the meaningful difference between  
16 *Williams* and all these other cases?

17 In *Williams*, I am to look at whether the damage  
18 award is so severe and oppressive as to be wholly  
19 disproportionate to the offense when it is considered with  
20 due regard to the interests of the public, the numberless  
21 opportunities for committing the offense and the need for  
22 securing uniformed adherence to establish passenger rate.  
23 There's what *Williams* was about that it then not be so  
24 severe and oppressive or disproportionate.

25 What's the meaningful substantive difference

1 between that case, which you accept, and these other cases  
2 which you don't?

3 MR. REYNOLDS: The citation that you just gave  
4 demonstrates to me the meaningful difference, and that is  
5 under Williams, you focus on the offense, the defendants'  
6 offense. What the defendant wants to do instead is focus on  
7 some measure of actual damages. The measure of actual  
8 damage, so let's stop right there for a moment. Completely  
9 disconnected, completely disconnected. The citation your  
10 Honor just read from I don't remember which Court --

11 THE COURT: BMW.

12 MR. REYNOLDS: -- I think it was Gore,  
13 specifically talks about when you have the legislature  
14 acting that the constitutional bounds focus on the need to  
15 correct the offense and the need to protect the public. You  
16 focus on the offense, not on the damages.

17 The defendant comes in and says --

18 THE COURT: But even if you're right, even if  
19 that's the difference between Williams and all these other  
20 cases --

21 MR. REYNOLDS: One difference.

22 THE COURT: -- and I'm just looking to look for  
23 want of a better word, the "reprehensibility standard,"  
24 looking at that, \$675,000 justifies the reprehensibility  
25 standard, \$675,000?

1           MR. REYNOLDS: Absolutely, your Honor, because not  
2 only do we have the reprehensibility, the need to deter, the  
3 multiple long-term, multiple perjuries, long-term lies to  
4 the Court through the deposition process, destruction of  
5 evidence, or at least the hiding, the deliberate concealment  
6 of evidence, leave aside the long-term infringement, your  
7 Honor has said a number of points, and I'm switching back  
8 here now to the damages.

9           This is not just -- the copyright act is not just  
10 a penal provision, it's also remedial, and in this case, we  
11 have substantial evidence of harm. Your Honor has suggested  
12 that the harm is \$21. The evidence in this case showed that  
13 it was substantially more than that.

14           THE COURT: Harm occasioned by Mr. Tenenbaum's  
15 conduct?

16           MR. REYNOLDS: By Mr. Tenenbaum's conduct.  
17 Mr. Tenenbaum downloaded all 30 sound recordings at issue,  
18 no question about that. He also distributed, and he did so  
19 multiple times.

20           THE COURT: Do you have any indication that if he  
21 hadn't distributed them that the kid in the dorm next door  
22 wouldn't have? In other words, the way this works is that  
23 there are multiple -- there are songs that are available for  
24 file sharing, and if he doesn't put his on, you know, your  
25 son or my daughter would have offered theirs? I actually

1 have a stepdaughter so that I should make a different  
2 example.

3 In other words, to what degree is he responsible  
4 for the offering up, when I believe the testimony at the  
5 trial was that whether someone actually downloaded from what  
6 he offered up would depend upon the sound quality and any  
7 number of things, and if they didn't like the sound quality  
8 on his, they'd take it from somebody else's.

9 Which was the case that doesn't allow for  
10 third-party harms? Philip Morris, if you can't say  
11 that -- there may be numbers of people out there who you  
12 wish to deter, but you can't do this by this award, all you  
13 can do is deter him.

14 MR. REYNOLDS: Again, your Honor, starting with  
15 the premise that we reject the idea, and the Supreme Court  
16 has rejected the idea in Williams specifically that there's  
17 any proportionality requirement for the copyright act. The  
18 proportionality, the defendant in Williams argued exactly  
19 that the damages, the penalty, the statutory penalty was  
20 disproportionate to the actual harm. The Supreme Court said  
21 unequivocally that is not the test. You focus on the  
22 offense. Let's leave that issue aside.

23 THE COURT: The harm, you're talking about damages  
24 to the plaintiff?

25 MR. REYNOLDS: Correct, the actual damages. So I

1 submit that the entire premise of this argument is  
2 misdirected and does not support any finding that the jury's  
3 verdict here was unconstitutional, but leave that aside.  
4 Your Honor, and I'm glad your Honor brought this up, the  
5 defendant's argument, well, they could have just downloaded  
6 it from someone else. This argument that the defendant made  
7 is wrong technically, it's wrong legally, and it's wrong  
8 morally. Technically, your Honor, it's not possible. The  
9 defendant has suggested that you can only go after the  
10 original seeder pretending they are downloading from someone  
11 else. That is simply not the case.

12 THE COURT: I'm not suggesting to you that it was  
13 wrong to bring the case, wrong to hold people's feet to the  
14 fire with respect to downloading, the issue, we're only  
15 talking about damages.

16 MR. REYNOLDS: Correct. What I'm trying to get at  
17 is the idea that someone could have just gone somewhere  
18 else, if you take that to its extreme, it's an absurd  
19 argument. The peer-to-peer system depends on people just  
20 like Joel Tenenbaum sharing files. If nobody is sharing  
21 files, it doesn't work.

22 THE COURT: How do you deal with Philip Morris, I  
23 mean, unless this is another case you don't think applies to  
24 copyright, which is to say, you can't enable the jury to  
25 come to a number that will deter third parties beyond the

1 individual in front of you, and yet that seems to be the  
2 argument that you're making to justify the damage award.

3 MR. REYNOLDS: His distribution violates the  
4 statute; he's responsible for the harm caused by that  
5 distribution. He's responsible for the harm caused by that  
6 distribution. We're not required to prove it. The case law  
7 is long established on that point, but his distribution  
8 harms the plaintiffs. It harms the plaintiffs, it harms  
9 these plaintiffs in many ways. There's a direct loss from  
10 the sale, and there's also a harm to the value of the  
11 copyrighted work.

12 Now, I want to address because this is an  
13 important point, the jury did not look at anything but these  
14 plaintiffs and these particular sound recordings, and I  
15 direct the Court's attention to the verdict form.

16 If you answered yes, and this is for every single  
17 sound recording at issue, all 30 of them, when asked to  
18 determine whether it was willful or not, the jury answered  
19 each time the defendant's infringement was willful. Then  
20 the Court instructed the jury, if you answered yes, what  
21 damages do you award the plaintiff for this, underline,  
22 bold, this copyrighted work from \$750 to \$150,000. This  
23 jury was told unequivocally you look at this work and you  
24 award statutory damages for this work. So when the jury  
25 does that, it wasn't looking at other works, it wasn't

1 looking at other people downloading or what other people did  
2 on the network.

3 THE COURT: But you have to justify -- I know what  
4 the jury did, and I understand deference to Congress, and I  
5 understand deference to the jury, and this discussion is  
6 taking place in that framework. But, nevertheless, you  
7 agree that there is an oversight responsibility that I have,  
8 you say that that responsibility comes from Williams and not  
9 from these other cases which talk about essentially  
10 balancing the damages, compensatory damages and the punitive  
11 damages. So you're saying but Williams is the standard --

12 MR. REYNOLDS: Correct.

13 THE COURT: -- and based on that review, you think  
14 that the whole \$675,000 can be justified in terms of  
15 Mr. Tenenbaum's harm to your defendants -- to your  
16 plaintiffs?

17 MR. REYNOLDS: I agree with you right up to the  
18 last point. I believe that the verdict, the whole  
19 discussion of the amount of the verdict and the damages to  
20 the plaintiffs and all of the other issues that the jury was  
21 told to consider really go to the remittitur issue. That's  
22 why I said the premise. I agree with you right up to the  
23 point where you say we have to look at the harm to the  
24 plaintiff to determine the constitutionality.

25 THE COURT: What's the difference between --

1 Williams is a constitutional standard?

2 MR. REYNOLDS: Correct.

3 THE COURT: What's the difference? And Williams  
4 was saying that so severe and oppressive as to be wholly  
5 disproportionate to the offense, so the question is even on  
6 your terms, is this verdict wholly disproportionate to the  
7 offense as a constitutional matter?

8 MR. REYNOLDS: Not in any way, your Honor, not in  
9 any way.

10 THE COURT: Mr. Reynolds, I have to admit that my  
11 initial preliminary comments to you were when I asked if  
12 there could be remittitur followed by the constitutional  
13 challenge was essentially asking the plaintiffs if they want  
14 a constitutional decision from me or would rather have a  
15 remittitur decision from me? That was the gist of that  
16 question.

17 MR. REYNOLDS: The answer is, your Honor --

18 THE COURT: If you missed the point.

19 MR. REYNOLDS: The answer, your Honor, candidly is  
20 we'd like both, and we'd like the motion to be denied. I  
21 don't know how to answer it otherwise. I don't know that  
22 you can avoid the constitutional issue in this case, and I  
23 think that, you know, the issue under Williams we're talking  
24 about back and forth here, but I want to make sure we're on  
25 the same page.

1           With regard to the damages that this defendant  
2 caused, we put on substantial evidence. The defendant kept  
3 these songs in his shared folder for years, that he saw that  
4 songs were being distributed from his shared folder to the  
5 other people on the Internet. That's the whole purpose of  
6 the peer-to-peer network.

7           The defendant can't escape liability by claiming,  
8 oh, they could have downloaded from someone else. This  
9 defendant distributed them. He is liable for this  
10 infringement. The argument that, well, he could have  
11 downloaded from somebody, anybody, another infringer could  
12 have downloaded from someone aside from the defendant is  
13 also morally wrong because what it does, your Honor, is it  
14 seeks to immunize all of this conduct on the Internet.

15           Because if you take that argument to its extreme,  
16 every single person who distributes files on the Internet  
17 could have said, oh, they could have gotten them from  
18 somebody else.

19           THE COURT: No, it's not immunizing the conduct,  
20 it's saying, as Judge Davis said, that you don't need, what  
21 was his verdict, \$1.2 million to accomplish the plaintiffs'  
22 goals and the goals of the statute, that a lesser number  
23 will accomplish the goals of the statute.

24           MR. REYNOLDS: Your Honor, that decision is a  
25 decision that is up to Congress, not to the Courts, and

1 Congress made that decision clear, and its decision on that  
2 point is entitled to substantial deference, and that's clear  
3 from the Eldridge case.

4 THE COURT: Yes, but a moment ago, it is a shared  
5 responsibility. Congress made the decision, the jury made  
6 the decision, and you agree under Williams, I have a  
7 constitutional obligation to review it for excessiveness and  
8 severity essentially.

9 MR. REYNOLDS: Compared to the offense, yes,  
10 that's right.

11 THE COURT: It's not just Congress's  
12 responsibility, it's not just the jury's responsibility,  
13 I've got one, too.

14 MR. REYNOLDS: Right. But to my knowledge the  
15 defendant hasn't cited a single authority that would say  
16 that this decision from this jury or any decision should  
17 like it should be overturned on constitutional grounds, and  
18 when you look at the Williams factors, there's not a single  
19 authority, there's no case since Williams that has  
20 overturned a statutory award on the grounds that it's  
21 unconstitutional.

22 The standard is extremely deferential under  
23 Williams because Congress has to have the authority to set  
24 copyright policy, and that's what Congress did here. This  
25 standard has been applied not only in copyright cases but as

1 your Honor pointed out in the Telephone Consumer Protection  
2 Act cases, we cite a case from the Anti-Cyber Squading  
3 Consumer Protection Act.

4           These statutory awards frankly that are much  
5 higher than what was at issue in Williams in terms of the  
6 ratio where it's a few pennies per fax under the Telephone  
7 Consumer Protection Act, you know, the defendants would  
8 argue it's just a few pennies per fax. You could still  
9 support based on mere pennies, and this is where there was  
10 capable of proof of damages, mere pennies that that  
11 supported a \$1500 verdict against the defendant.

12           In this case you've got a lot more than that. We  
13 don't know, we don't know the true extent of the defendant's  
14 infringement. We weren't required to prove it, and the  
15 defendant didn't put on any evidence to try to prove what  
16 the harm was to plaintiffs in this case, and it wasn't our  
17 burden to do it, and if the defendant is going to come in  
18 this Court and tell your Honor you need to reverse the  
19 jury's verdict because there wasn't sufficient evidence or  
20 there wasn't sufficient harm to these plaintiffs, the  
21 defendant has no evidence to do that, your Honor, none  
22 whatsoever.

23           And I would submit to you that by contrast, even  
24 though we weren't required to prove it, we put on, the  
25 plaintiffs put on substantial evidence of harm from the

1 downloading and the distribution of these sound recordings.

2 THE COURT: Okay. Mr. Nesson, final word.

3 MR. NESSON: Just two points, your Honor, first  
4 I'd like to come back to the Congressional situation.  
5 Mr. Reynolds is asking the Court to assume that Congress did  
6 something that produces totally unconscionable, in some ways  
7 quite ridiculous results. He's asking you to say that  
8 Congress intended just the kind of consequence that played  
9 out in Thomas twice, ultimately with a \$1.92 million verdict  
10 against a woman who had made no profit, caused minimal  
11 damage downloading 24 songs and against Mr. Tenenbaum  
12 \$675,000, no profit, minimal damage, 30 songs.

13 The idea that Congress intended that and did it  
14 without any discussion whatsoever, no controversy, somehow  
15 extending this huge liability to 200 million people by  
16 basically a paragraph which is ambiguous and can be read, I  
17 believe, clearly, should be read to refer to LaMacchia as a  
18 distributor, not to the distributees.

19 There was no intent by Congress to criminalize or  
20 bankrupt all of LaMacchia's distributees. That just wasn't  
21 what Congress was concerned about, so the idea that somehow  
22 Congress has done this and you are obliged to pay deference  
23 and produce verdicts under instructions to the jury which  
24 authorize them to return a \$4.5 million against  
25 Mr. Tenenbaum based on an interpretation of the statute,

1 which somehow is so wooden that you can't get away from it  
2 except by constitutional ruling, it just -- it's almost like  
3 an insult to the Congress.

4 The Congress didn't do that, and they shouldn't be  
5 thought to have done that, and the way to avoid a judgment  
6 that what they did was unconstitutional is to recognize that  
7 isn't what they did. This statute is perfectly amenable to  
8 an instruction that 504(c) does not apply in a situation  
9 where the damages are nominal.

10 The statute is structured: 504(b) sets up actual  
11 damages; and 504(c), the statutory damage provision,  
12 according to the Courts that have looked at it, was adopted  
13 because sometimes there were problems of proving the actual  
14 damages.

15 It wasn't cases where there were none or whether  
16 they were nominal, it was cases where there were  
17 difficulties of proving the actual damages, and so to  
18 relieve copyright holders of the difficulty in these peculiar  
19 copyright situations of proving substantial actual damages,  
20 they passed the statutory damage section of 504(c), but if  
21 you just say 504(c) was not meant to radically expand the  
22 coverage of the copyright act beyond 504(b), it was really  
23 meant to just provide the alternative, the in lieu damage  
24 for not going under 504(b), okay, you go under 504(c), that  
25 makes perfectly good sense.

1           And it leaves the Congress in the position where  
2 they're not trying to bankrupt people who don't cause any  
3 damage and don't make any profit and are not commercial  
4 people and are using home computer equipment to do stuff  
5 that it just is coming naturally to a generation of kids is  
6 just not real. All right. That's point No. 1.

7           Second, I'd just like to say a word about the  
8 remittitur. The remittitur in this situation I believe if  
9 you just do it the way Judge Thomas did it --

10           THE COURT: Judge Davis in the Thomas case.

11           MR. NESSON: Excuse me, Judge Davis in the Thomas  
12 case, it leaves a situation that's very unfair. We have  
13 from the beginning here in trying to raise the question of  
14 the abusive interrum nature of the way these prosecutions  
15 go forward against file sharers, and at every point that's  
16 been deferred because somehow we shouldn't address the  
17 constitutional question, but if the end result here is that  
18 when a trial is brought, and let's imagine a new trial in  
19 this case, we go to a jury, and the jury is instructed in a  
20 way that has the maximum damage in it, and I don't see  
21 anything surprising when the jury is told find between  
22 \$750 and \$150,000, and that's your instruction to them, that  
23 they come out with something moderate by their likes, a mere  
24 \$675,000.

25           That is that maximum instruction. It's so

1 polluting to any notion of what reality is in terms of a  
2 damage award, and if the end result is that what your Honor  
3 does is take their excessive award and drop it down to what  
4 you consider to be the constitutional max, then we never had  
5 a chance to have the jury actually make an honest decision  
6 about what they consider to be just. I shouldn't say  
7 honest, an unreflected, straightforward decision.

8           It means that in the next trial, the jury once  
9 again will return a verdict that's excessive and once again  
10 it will get remitted down to the maximum, and that leaves a  
11 jury trial for the defendant as the constitutional maximum.  
12 That's the best we're going to do.

13           THE COURT: There is an alternative, as I've said.  
14 Again, I will think long and hard before I order a new trial  
15 in this case if I order a new trial, long and hard. There  
16 is an alternative, and the alternative is after the  
17 plaintiffs' case, the Judge says this case supports only so  
18 much of the statutory range as X. In other words, with  
19 something Judge Davis could do in the next trial of the  
20 Thomas case, he could say that the plaintiffs' case  
21 supported only \$750 to \$2250 per song and nothing further.

22           So, I mean, that would be available for a Judge to  
23 do, it seems to me, at a directed verdict stage, so it's  
24 just not giving the jury no guidance, you would be able to  
25 do that, but your argument is essentially the argument you

1 made before, which is that we should have said to the jury,  
2 you determine what the damages are, and then I should have  
3 made an adjustment in terms of 504.

4 MR. NESSON: Yes, indeed.

5 THE COURT: I understand. Thank you. Is there  
6 anything further?

7 MR. REYNOLDS: Yes, your Honor. I want to address  
8 a couple of points. The defendant has said a number of  
9 times that he has caused minimal damages. We reject that  
10 categorically. There is absolutely no evidence. This  
11 defendant has put on no evidence of what damages he caused.  
12 We put on substantial evidence of the damages that the  
13 defendant caused as he downloaded and distributed for nearly  
14 10 years of these sound recordings. These recordings might  
15 have been distributed thousands of times for all we know,  
16 that's why we're not required to prove damages.

17 It is difficult, if not possible to do so, in this  
18 type of case. The defendant said that Congress intended to  
19 go after distributors. This defendant is a distributor,  
20 your Honor, this defendant was doing this, and I would  
21 submit to your Honor that this defendant wasn't even  
22 profiting because he supported the very networks that he  
23 relied on to get his music for free. That is a form of  
24 profit, your Honor, whether it's cash or whether it's in  
25 kind through a song.

1           In terms of 504(c), there's no basis to suggest  
2 that 504(c) does not apply when there are only nominal  
3 damages. The Supreme Court has categorically rejected that  
4 view of the copyright act. The Westman case said you have  
5 to award the minimum, even if there's no evidence of any  
6 damages. The Woolworth case says the same thing.

7           I want to just point out, your Honor, the  
8 defendant has said on a number of occasions that the  
9 plaintiffs are trying to bankrupt him. The plaintiffs  
10 aren't trying to bankrupt anyone, your Honor.

11           This defendant, almost from the moment he started  
12 file sharing, his conduct was illegal, and he did it anyhow  
13 despite being warned by multiple people, including  
14 Goucher College, who not only warned him about these  
15 lawsuits but warned this defendant of the very range of  
16 statutory damages that were available, and he ignored it, he  
17 ignored it, so the Gore concerns about notice, did this  
18 defendant know what was going on, he not only had statutory  
19 notice, he had actual notice.

20           Then in terms, your Honor --

21           THE COURT: I don't take Gore to just be a notice  
22 case. The Supreme Court is muddying the waters on this.  
23 The decision talks about notice, and then it goes on to talk  
24 about substance. It talks about procedural due process but  
25 then goes on to talk about substantive due process.

1           MR. REYNOLDS: But I think the substantive means  
2 procedural, in all fairness, your Honor, that the idea is  
3 you should have some notice what you're going to be facing  
4 in terms of when you go forward so that you can counsel  
5 clients and defendants, look at this, this is what we're  
6 likely to face here.

7           In terms of, you know, the suggestion that we're  
8 trying to bankrupt the defendant, as I said, he was warned  
9 multiple times. This verdict is not Congress's fault, it's  
10 not the plaintiff's fault, and it's certainly not the jury's  
11 fault, it's the defendant's fault.

12           The defendant could have stopped this conduct  
13 years ago, years before the lawsuit. Instead what the  
14 defendant did is he thumbed his nose at every single  
15 opportunity, to the plaintiffs, to the law, to this Court,  
16 to the process, and he lied repeatedly and continued to  
17 infringe even after the case was going on. He committed  
18 perjury in his deposition. There's no -- this defendant has  
19 no one to blame but himself for this conduct, the  
20 infringement and the refusal to take responsibility.

21           In terms of Williams, your Honor, I do believe  
22 Williams is the appropriate standard. There are many  
23 reasons why Gore doesn't apply, not the least of which we've  
24 already addressed the fairness issue, this defendant knew up  
25 front what the damages were.

1           THE COURT: It's Gore and the litany of cases that  
2 the Supreme Court seems not to be making, either it's sloppy  
3 language -- which I hate to say about the Supreme Court --  
4 seems not to be making the distinction. Williams began a  
5 debate, which then is repeated in Browning, Ferris; Pacific  
6 Mutual; TXO; Honda; Cooper Industries and State Farm; and  
7 ultimately BMW; and the question is whether there's any  
8 meaningful distinction between excessive damages in a common  
9 law setting vs. excessive damages in a statutory setting,  
10 not in the abstract, but as applied to this person.

11           Let me just make one other point, and I'm not sure  
12 that this is in your brief or whether this is something that  
13 my clerk provided. I just want to put this in. There's a  
14 thing called Rhapsody-To-Go. Do you know about that,  
15 Rhapsody-To-Go where for \$15 a month, you can download music,  
16 you know about that?

17           MR. OPPENHEIM: It's a service I've heard about.

18           THE COURT: So if he had signed on to  
19 Rhapsody-To-Go for eight years, he would have paid \$1,440.

20           MR. OPPENHEIM: And he wouldn't have ended up  
21 distributing a single time, but that's not what he did.

22           THE COURT: Okay.

23           MR. OPPENHEIM: All of these services --

24           THE COURT: Did you stand just for that?  
25 Mr. Reynolds, anything further?

1           MR. REYNOLDS: Yes, your Honor, in terms of  
2 between, in terms of Gore, I think if you look at the  
3 Supreme Court's citation and the Gore line of cases, when  
4 the Supreme Court cites Williams, it does so for general  
5 propositions of looking at damages.

6           THE COURT: Right.

7           MR. REYNOLDS: It does not apply the Williams  
8 standard to punitive damages. In fact, it announces a  
9 different standard because those cases are dealing with  
10 harms caused against private individuals. In other words,  
11 the harm that was at issue in each one of those cases was  
12 against, you know, when the paint job was done, it harmed a  
13 single individual in that state, in a particular state, I  
14 believe it was Alabama.

15           In this case, Congress -- and this is a  
16 fundamental distinction -- Williams looks not just at the  
17 harm, and, again this is not what the jury looks at.

18           THE COURT: What about Philip Morris? Philip  
19 Morris, the Court says it cannot use punitive damages to  
20 punish a defendant for his misconduct to third parties, but  
21 you can consider it in evaluating the reprehensibility of  
22 defendant's conduct to the plaintiff, and to some degree  
23 that's the framework you're saying.

24           To the extent that what he did is an example to  
25 others, to the extent that he shared music with others, I

1 should look at that insofar as it bears on his conduct, not  
2 try to deter all the others?

3 MR. REYNOLDS: Your Honor, there's a fundamental  
4 distinction, and that is, again, in the punitive damages  
5 context, you're looking at the harm to one person. In the  
6 statutory damages context, Congress has said, wait a minute,  
7 we've got a problem here that we need to address because  
8 there are more harms than just the harm to an individual  
9 plaintiff.

10 THE COURT: What about Mr. Nesson's argument that  
11 it's statutory damages only in cases in which people can't  
12 prove the actual damages, but it's still a damages-based  
13 award, you're still not -- you're looking at people who  
14 simply have problems of proof with respect to actual  
15 damages, not that you are undamaged totally.

16 MR. REYNOLDS: It's both, your Honor. The notion  
17 that you can only elect statutory damages if you can't prove  
18 actual damages is false. The statute says in lieu of. It  
19 doesn't say, well, in any case you can't prove them, go  
20 ahead and take the statutory rap. That's not what the  
21 statute says, and that is a false premise, your Honor. The  
22 statute gives a copyright owner the choice, and there's no  
23 requirement to prove actual damages.

24 Turning back to -- and in this case, even if that  
25 were not the case, in this case, we've demonstrated that

1 it's very difficult to prove actual damages, and the  
2 defendant certainly hasn't put on any evidence as to what  
3 they are.

4 With respect to the, again, the distinction  
5 between punitive and statutory, in the punitive context,  
6 you're looking at the harm to one particular plaintiff, and  
7 the jury is focused on that, and in that context, the jury  
8 shouldn't be allowed to go out and look at the harm to other  
9 plaintiffs.

10 In the statutory context, when you're analyzing  
11 the statutory regime and the jury's award for  
12 constitutionality, the Supreme Court has made it clear that  
13 you may and you should look at the Congress' right to  
14 protect the public interest, and that is in this case  
15 Congress specifically identified a number of things that it  
16 wanted to protect. No. 1, and this is, you know, straight  
17 from the statute, Congress found that online infringement  
18 caused lost jobs, lost wages, lower tax revenue, harm to the  
19 market for legitimate works. That's straight in the  
20 statute.

21 In addition to that, both Congress and the Courts  
22 have long recognized that copyright is important to society  
23 and that it benefits everyone to protect copyright.

24 THE COURT: I don't think that we disagree. The  
25 issue is whether or not as Judge Davis says a District Court

1 should order remittitur -- he's talking about remittitur --  
2 only when the verdict is so grossly excessive as to shock  
3 the conscious of the Court. The verdict is not considered  
4 excessive unless there's plain injustice or a monstrous or  
5 shocking result, and he remitted.

6 MR. REYNOLDS: We're shifting to remittitur  
7 again.

8 THE COURT: I don't understand materially.

9 MR. REYNOLDS: There's a fundamental  
10 distinction.

11 THE COURT: Oh, because one gives you the ability  
12 to get a new trial.

13 MR. REYNOLDS: The remittitur standard, I hate to  
14 leave Williams, your Honor, but I'm going to.

15 THE COURT: Okay.

16 MR. REYNOLDS: The remittitur standard, your  
17 Honor, is, as I said, Williams focuses on the need,  
18 Congress' ability to protect the public from this type of  
19 harm, the multiple opportunities for this type of harm to  
20 occur, this type of infringement to occur and the need to  
21 secure adherence to the law. That's what Williams looks at.

22 When you look at remittitur, the common law  
23 remittitur, the case law is clear that the District Court is  
24 obliged to review the evidence. It's a much  
25 more evidence -- it's based on the evidence that the jury

1 had, and the Court is obliged to review the evidence in the  
2 light most favorable to the prevailing party. That standard  
3 must be adhered to here, and the light most favorable  
4 demonstrates the damages were substantial, your Honor. This  
5 defendant engaged in this conduct for years. I don't want  
6 to keep repeating myself, your Honor, but I can't say it  
7 enough.

8 With respect to the remittitur standard, the First  
9 Circuit goes on. The Court can grant a remittitur only  
10 where the award exceeds any rational appraisal or estimate  
11 of the damages that could be based on the evidence before  
12 it.

13 Your Honor, I would be happy to walk through every  
14 one of these elements that the Court instructed the jury in  
15 which the defendant agreed to were properly instructed, the  
16 nature of the infringement; the purpose of the intent, the  
17 revenue lost; the value, the diminution in value of the  
18 copyright; the duration of the infringement, the  
19 continuation of the infringement after being told to stop;  
20 the need to deter this defendant and others.

21 The plaintiffs put on overwhelming evidence on  
22 every single one of these factors that the jury was  
23 instructed, every one of these factors. There is no basis  
24 to suggest that the jury's verdict was not supported by the  
25 evidence, and there's certainly no basis to suggest that it

1 exceeds any rational appraisal of the evidence that the  
2 plaintiffs put on here. \$675,000 is entirely appropriate  
3 for the evidence that plaintiffs put on and this defendant's  
4 conduct.

5 THE COURT: I understand your argument.  
6 Mr. Nesson, last word.

7 MR. NESSON: Thank you, your Honor. First, may I  
8 just bring two citations to the Court's attention? One is  
9 from the Supreme Court's case in United States vs. Kirby way  
10 back in 1868 but a very often repeated paragraph, "All laws  
11 should receive a sensible construction. General terms  
12 should be so limited in their application as not to lead to  
13 injustice, suppression or an absurd consequence. It will  
14 always, therefore, be presumed that the legislature intended  
15 exceptions to its language which would avoid results of this  
16 character. The reason of the law in such cases should  
17 prevail over its letter." And that has resonated down  
18 through years of citation, your Honor.

19 Second, a District Court case from the federal  
20 court in Texas, Texas vs. American Blastfax. That was a  
21 case under the Fax Act in which the Judge looking at the  
22 amount of damage that the application of the minimum damage  
23 would have resulted in concluded that it was extravagant and  
24 excessive and simply --

25 THE COURT: Under remittitur standard or

1 constitutional standard?

2 MR. NESSON: Well, unfortunately he was not being  
3 particularly articulate. He did it as an interpretive  
4 matter of the statute. The statute required a minimum of  
5 \$500 per infringement, and he said it's too much, I'm just  
6 going to be interpret it to be up to \$500 per infringement,  
7 and, in fact, he then opted for actual damage, treble  
8 because of willfulness. That's a district court case in the  
9 Fifth Circuit.

10 Last, your Honor, if I can conclude --

11 MR. REYNOLDS: Can you give me the cite?

12 MR. NESSON: The citation, yes, is  
13 164 Fed Supp.2d., 892, 2001. Last, if I can conclude,  
14 Mr. Reynolds keeps collapsing a critical distinction. This  
15 damage award was for 30 songs. It was on 30 songs that you  
16 directed the verdict, and so the question of disproportion  
17 is the relationship between what the jury returned, \$675,000  
18 and the actual damage that was caused by just these 30  
19 songs.

20 The fact that Mr. Tenenbaum continued to do this  
21 or did it with 871 other songs or however, whatever they  
22 wanted to say beyond the scope of the 30 songs, the question  
23 that's before you is the excessiveness of the award for  
24 these 30 songs. That's all the jury was asked to consider.  
25 That's all that you directed the verdict on.

1           And so it's the comparison of those two things,  
2 the actual damage for these 30 songs, and I think I've made  
3 an impregnable case that that's at a max \$21, and the logic  
4 of peer-to-peer downloading assures that even if other  
5 people were downloading from Joel, as long as these songs  
6 were what they were, that is, widely proliferated, extremely  
7 popular songs, which when you went on a peer-to-peer program  
8 like KazaA, you would come up with literally thousands of  
9 opportunities to download, and it's utterly random which  
10 person, which shareholder you actually went to.

11           If his shareholder would not have been available,  
12 there would have been a thousand others, and so it was  
13 completely luck of the drawer, and anybody that was  
14 downloading from Joel would have downloaded from somebody  
15 else. The fact that they downloaded from him did not cost  
16 the plaintiffs even a dollar because the persons who would  
17 have downloaded from Joel would have downloaded it from  
18 someone else, end of story for these 30 songs.

19           THE COURT: Although the question, the argument is  
20 a deterrence argument, which is, that if Joel Tenenbaum has  
21 to pay \$675,000, it will stop. If Joel Tenenbaum or if  
22 Jamie Thomas-Rasset has to pay whatever she has to pay, it  
23 will stop.

24           MR. NESSON: Yes, but that's where the  
25 excessiveness issue comes to bear. It's perfectly clear

1 that the Supreme Court has recognized deterrence as an  
2 element to be considered in damage.

3 THE COURT: Right.

4 MR. NESSON: But they've also recognized that it's  
5 got to be proportioned, it's got to be within reason.  
6 That's why in fact they are quoting the ratios in BMW and in  
7 State Farm.

8 THE COURT: Right. But the plaintiffs argue that  
9 BMW and the rest are dealing, that Williams is just looking  
10 at the reprehensibility of the conduct and not the  
11 relationship between what Mr. Tenenbaum got and what the  
12 plaintiffs were harmed. That balance is not a balance that  
13 I should engage in because Williams is restricted just to  
14 how reprehensible the conduct is.

15 Now, you can make the same argument with respect  
16 to reprehensibility to some degree.

17 I think I have two more people to pop up, and  
18 you're each representing a different plaintiff, so you have  
19 to pop up. We'll start with --

20 MR. OPPENHEIM: I'll allow the government lawyer  
21 to speak in one moment, if I could quickly respond to the  
22 point Mr. Nesson just made.

23 THE COURT: Okay.

24 MR. OPPENHEIM: We obviously don't agree with his  
25 assessment that this is a question of comparing actual

1 damages to the \$675,000 award. We disagree with that  
2 standard, but just for a moment taking that argument, it's  
3 as though we were at different trials because much of what  
4 Mr. Nesson said just simply wasn't in the record.

5           There wasn't a record created about the fact that  
6 these works would have been available even if Mr. Tenenbaum  
7 hadn't been distributing, there's nothing in the record  
8 about that, and, frankly, I think that if that had been an  
9 issue in the trial, it would be a very interesting issue,  
10 and I think it would have gone our way, but it wasn't an  
11 issue in the trial. There also isn't a record as to what  
12 the actual damages were here.

13           Mr. Nesson, excuse me, Mr. Tenenbaum has brought  
14 up a motion for a new trial and for remittitur, and he bears  
15 the burden here, and he bears the burden on his argument  
16 that we disagree with the standard here that the actual  
17 damages were disproportionate to the 675,000, but he can't  
18 point to what the actual damages are. He points to \$21 and  
19 totally ignores the distribution. We proved distribution,  
20 the Court required us to by virtue of the making available  
21 decision the Court had previously made.

22           So we didn't quantify it but we proved it. He put  
23 forward no proof as to the distribution, so now for him to  
24 come forward and claim that it's disproportionate, he's  
25 without an evidentiary basis to do it, so while it might be

1 an interesting question in another case, there is no record  
2 in this case for him to make that argument.

3 THE COURT: Okay. Ms. Bennett, representing the  
4 government.

5 MS. BENNETT: Yes, your Honor, thank you. I'd  
6 just like to make a few points about the issues that have  
7 arisen. First of all, your question about whether the  
8 Court -- it's our position that the Court should address the  
9 remittitur question first to avoid the constitutional issue.

10 If the plaintiffs are to reject that, the remedy  
11 is a new trial, not to then go to the constitutional issue.  
12 During a new trial, I guess any number of things could  
13 happen. The Court might determine different jury  
14 instructions are warranted, the jury might award a different  
15 amount that no longer violates the remittitur standard, so  
16 the Court should absolutely address the remittitur question  
17 first. Either the Court determines a remittitur award is  
18 appropriate or not, and then if the plaintiffs reject that,  
19 then the new trial is the result.

20 Also, there was discussion about that Congress  
21 didn't carefully consider peer-to-peer file sharing, the  
22 issue that we have here, and I think that's just contrary to  
23 the legislature history. We cite some portions of it in our  
24 brief, but I'd like to point something out to the Court in  
25 the No Electronic Theft Act, which was two years before the

1 1999 amendments that are in issue in this case and the House  
2 Report 105-339.

3           The report says, "The extension of an audio  
4 comprehension technique commonly referred to as MP3 now  
5 permits infringers to transmit large volumes of CD quality  
6 music over the Internet. As long as the relevant technology  
7 evolves in this way, more piracy will ensue." Congress was  
8 absolutely concerned with preventing and deterring the type  
9 of infringement that was going to occur and that was  
10 occurring because of the advent of the Internet.

11           The third point, your Honor, you asked about the  
12 meaningful difference between Williams and Gore. It's the  
13 United States' position that Williams is still good law,  
14 that the Supreme Court hasn't overruled it and that this  
15 Court, if it does reach the constitutional question, should  
16 apply Williams, and the distinction is that Williams gives a  
17 great deal of deference to Congress.

18           In Gore, the Court was addressing a jury's  
19 verdict, and in the cases, the subsequent cases the Court  
20 cited Campbell and Philip Morris was discussing jury  
21 verdicts in which the jury's discretion was unconstrained.  
22 You're talking about a statute that does constrain the  
23 jury's discretion. In addition, the Court instructed the  
24 jury on several factors that further constrained its  
25 discretion in this case.

1           So we think the Court should apply the Williams  
2 standard because it addressed the issue we have here, which  
3 is a statute that Congress enacted to address specific  
4 harms, and the Court should give deference to Congress'  
5 consideration.

6           The last issue I just want to point out, there's  
7 been a lot discussion about the harms in this case, and as  
8 we've indicated in our briefs, it's Congress' position that  
9 the harm was greater than 99 cents or the cost of a song  
10 because of infringement has the ability to multiply  
11 basically, but even if that weren't the case, Congress in a  
12 statute such as this one can address public harms.

13           As the Court noted in Williams, which was a  
14 similar statutory damages provision, "Nor does giving the  
15 penalty to the aggrieved passengers require that it be  
16 confined or proportioned to his loss or damages; for as it  
17 is imposed as a punishment for the violation of a public  
18 law, the legislature may adjust its amount to the public  
19 wrong, rather than the private injury, just as if it were  
20 going to the state."

21           In other words, in this case Congress acted not  
22 only to compensate the copyright owners but also to deter  
23 others from infringing copyrights and to address the public  
24 harms that result from copyright infringement. We cited a  
25 report in our brief about the lost jobs, the lost tax

1 revenues that come from that, so Congress had a much broader  
2 purpose, and the Court under the Williams standard should  
3 consider that purpose and Congress' consideration of that  
4 purpose in awarding a verdict.

5 One last point, your Honor, I'd like to address  
6 plaintiffs' proposed interpretation of the Copyright Act  
7 that he claims would avoid the constitutional issue, and as  
8 I believe plaintiffs pointed out, this just isn't supported  
9 by the Copyright Act itself. The statute clearly allows a  
10 copyright owner to choose between actual damages or  
11 statutory damages.

12 It doesn't say if actual damages can't be proven  
13 or if they're nominal. There's just clearly no language in  
14 the statute that would support that interpretation, and, in  
15 fact, the Supreme Court specifically reject that  
16 interpretation in the F.W. Woolworth case in which the  
17 plaintiffs, I'm sorry, the defendant was arguing that  
18 profits were proven at a certain amount and the Court had to  
19 award that profit amount.

20 The Supreme Court said no, the Court could award  
21 statutory damages because even for uninjurious or  
22 unprofitable invasions for copyright, the Court may impose  
23 liability within the statutory limits to sanction and  
24 vindicate the statutory policy, and so the Court should  
25 reject that interpretation to avoid the constitutional

1 issue.

2 THE COURT: But you agree that some constitutional  
3 review is required at least by the Williams standard, you  
4 just suggest it is a different standard than in BMW, Gore  
5 and the cases afterwards?

6 MS. BENNETT: That's right, your Honor. If your  
7 Honor reaches and makes its way through all of the  
8 nonconstitutional arguments and must reach the  
9 constitutional issue, there is a due process review, but the  
10 review is under Williams, not Gore.

11 THE COURT: Okay. Thank you, all.

12 MS. BENNETT: Thank you, your Honor.

13 THE CLERK: All rise.

14 (Whereupon, the hearing was suspended at  
15 5:05 p.m.)

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C E R T I F I C A T E

UNITED STATES DISTRICT COURT )  
DISTRICT OF MASSACHUSETTS )  
CITY OF BOSTON )

I, Valerie A. O'Hara, Registered Professional Reporter, do hereby certify that the foregoing transcript was recorded by me stenographically at the time and place aforesaid in No. 03-11661-NG, Capital Records, Inc., et al. vs. Joel Tenenbaum and thereafter by me reduced to typewriting and is a true and accurate record of the proceedings.

/S/ VALERIE A. O'HARA

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VALERIE A. O'HARA

REGISTERED PROFESSIONAL REPORTER

DATED MARCH 8, 2010