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## Is Your iTunes Playlist Worth Six Figures? Due Process, Statutory Damages, and Peer-to-Peer Copyright Infringement

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# Is Your iTunes Playlist Worth Six Figures? Due Process, Statutory Damages, and Peer-to-Peer Copyright Infringement

Ryan M. Hrobak\*

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### I. Introduction

This Note evaluates the constitutional due process problems presented by exorbitant statutory damages awards levied in peer-to-peer copyright infringement cases. Two recent cases sound the clarion call for additional analysis on this issue: *Sony BMG Music Entertainment v. Tenenbaum*<sup>1</sup> and *Capital Records, Inc. v.*

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1. 660 F.3d 487 (1st Cir. 2011). In *Tenenbaum*, the facts indicate that defendant Tenenbaum, a recent college graduate, began using peer-to-peer file sharing networks to download and distribute copyrighted music recordings in 1999. *Id.* at 492. Tenenbaum initially used the Napster network while he was in high school on his home computer in Rhode Island to download and distribute copyrighted music recordings. *Id.* When Napster was shut down in 2001 for enabling copyright infringement, Tenenbaum then used several other peer-to-peer networks for the same purposes. *Id.* at 492–93. Tenenbaum had knowledge that Napster’s demise resulted from its service as a platform for copyright infringement. *Id.* at 493. Tenenbaum continued to illegally download and distribute copyrighted music through 2007 over various peer-to-peer platforms. *Id.* He continued his copyright infringement at college. *Id.* Despite receiving several warnings about the illegality of his conduct from different sources, and having full knowledge that his conduct constituted copyright infringement, Tenenbaum continued to download and distribute; he also attempted to conceal his infringement. *Id.* at 493–96. Several recording companies sued Tenenbaum for copyright infringement, seeking statutory damages and injunctive relief under the Copyright Act, 17 U.S.C. §§ 101 *et seq.* (2012). *Tenenbaum*, 660 F.3d at 489. The recording companies alleged that Tenenbaum “willfully infringed the copyrights of thirty music recordings” over peer-to-peer networks by downloading and distributing the copyrighted music recordings without their authorization. *Id.* At trial, the court found for the recording companies on both the infringement of copyrights and the willfulness of Tenenbaum’s conduct. *Id.* The jury awarded the record companies statutory damages in the amount of \$22,500 per infringed recording within the statutorily authorized range for

*Thomas-Rasset*.<sup>2</sup> In *Tenenbaum*, the First Circuit reinstated a large jury award of statutory damages, requiring Joel

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willful copyright infringement of \$750 to \$150,000 per infringement. *Id.* In total, Tenenbaum owed \$675,000. *Id.* Subsequently, Tenenbaum filed a motion for a new trial or remittitur, but the district court chose not to address the remittitur question and instead reached the constitutional issue. *Id.* Highlighting the excessiveness of the amount awarded, the district court reduced the award by a factor of ten. *Id.* The parties cross-appealed. *Id.* The record companies sought reinstatement of the initial amount awarded by the jury. *Id.* Tenenbaum challenged liability and damages. *Id.* He challenged the constitutionality of the Copyright Act. *Id.* Tenenbaum also challenged the applicability of the Act and the statutory damages provision to his conduct. *Id.* The United States intervened to defend the Copyright Act's constitutionality and averred that the district court committed an error in bypassing the common law remittitur question to reach the constitutional issue in the case. *Id.* Because Tenenbaum's attorney failed to make many arguments at trial and failed to preserve several issues for appeal, many of Tenenbaum's claims were rejected out of hand, though the First Circuit did provide analysis and found against Tenenbaum nonetheless. *Id.* at 496–508. Ultimately, the First Circuit reasoned that because the district court erroneously bypassed the question of common law remittitur, the verdict must be reinstated. *Id.* at 515.

2. 692 F.3d 899 (8th Cir. 2012). In *Thomas-Rasset*, several record companies sued Thomas-Rasset for copyright infringement. *Id.* at 901–02. Thomas-Rasset infringed twenty-four copyrighted music recordings on a peer-to-peer network. *Id.* at 901. The record companies elected to receive statutory damages in lieu of actual damages pursuant to the Copyright Act, resulting in an initial jury award of \$222,000 total. *Id.* Then, the district court granted a new trial on the ground of improper jury instructions. *Id.* The second jury awarded statutory damages of \$1,920,000, which the court then remitted to \$54,000. *Id.* The companies sought a new trial on the damages issue, and a third jury levied \$1,500,000 in statutory damages, but the district court again ruled that the maximum award constitutionally permissible by the Due Process Clause of the Fifth Amendment amounted to \$54,000 and reduced the award. *Id.* at 901–02. Additionally, the court granted an injunction preventing Thomas-Rasset from using the copyrighted recordings in certain ways. *Id.* The companies had two grounds of appeal. *Id.* at 901. First, the companies sought to reinstate the first award of \$222,000. *Id.* Second, the record companies sought a broader injunction that would prevent Thomas-Rasset from making any of their recordings available to others over a peer-to-peer network. *Id.* On cross-appeal, Thomas-Rasset contended that any award of statutory damages violates the Due Process Clause and asked the Eighth Circuit to vacate the damages award. *Id.* The Eighth Circuit found for the record companies. *Id.* at 910. The court reasoned that courts may enjoin lawful conduct in circumstances in which “the defendant’s conduct has demonstrated that prohibiting only unlawful conduct would not effectively protect the plaintiff’s rights against future encroachment.” *Id.* at 906 (citation omitted). Thus, the broader injunction was appropriate. *Id.* Further, the court noted that the initial award of \$222,000 did not violate due process because of an extremely deferential standard for review of statutory damages awards and further that the punitive damages guideposts articulated by the Supreme Court do not apply to statutory damages. *Id.* at 907–09.

Tenenbaum to pay \$22,500 per song infringed.<sup>3</sup> This amounted to a total of \$675,000 for the recent college graduate to pay.<sup>4</sup> In *Thomas-Rasset*, the Eighth Circuit affirmed an award of \$9,250 per song infringed, yielding a total award of \$222,000.<sup>5</sup> Considering a single music download usually costs less than one dollar, some have bemoaned the injustice of these disproportionate awards.<sup>6</sup>

These cases emerged from the development of peer-to-peer file-sharing services, software with which middle-school children quickly became skilled, while presenting legal issues that legal professionals lacked the sophistication to handle.<sup>7</sup> Peer-to-peer downloading services gave rise to a new era of copyright infringement.<sup>8</sup> This new kind of infringement occurred on an enormous scale but notably without the pursuit of profit on the part of the infringers.<sup>9</sup> Infringements resulting from peer-to-peer networks significantly stifled the profiteering of record

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3. See *Tenenbaum*, 660 F.3d at 490 (noting that the jury originally awarded \$22,500 per infringement).

4. See *id.* (indicating that the judgment of \$22,500 per infringement “yielded a total award of \$675,000”).

5. See *Thomas-Rasset*, 692 F.3d at 910 (noting that *Thomas-Rasset* had to pay \$9,250 per infringement for a total award of \$222,000).

6. See Steven M. Tepp, *The Constitutional Challenge to Statutory Damages for Copyright Infringement: Don't Gore Section 504*, 10 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 93, 95 (2009) (indicating that “some have suggested that the actual damages to the plaintiffs are a mere seventy cents, a common royalty rate paid to the copyright owner of a sound recording for the licensed download of that sound recording”).

7. See *infra* notes 8–29 and accompanying text (discussing the context surrounding the peer-to-peer file sharing phenomenon).

8. See *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 491–92 (1st Cir. 2011) (indicating that “[i]n the late 1990s, copyrighted music recordings . . . began to appear on file-sharing software called ‘peer-to-peer networks’ without the authorization of the copyright holders . . . [thus] the unauthorized and illegal downloading and distribution of copyrighted materials—especially music recordings—became commonplace” (citing *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 919–20 (2005) (describing operation of peer-to-peer networks and noting that their advent has likely resulted in copyright infringement on a “staggering” scale))).

9. See *id.* at 492 (noting that the recording industry suffered significant financial losses as a result of the proliferation of peer-to-peer file sharing networks and the potential for music piracy that such networks enable). *But see Grokster*, 545 U.S. at 926 (discussing financial gains on the part of the service's operators).

companies.<sup>10</sup> Between the years of 1999 and 2008, “the recording industry as a whole suffered a fifty percent drop in both sales and revenues.”<sup>11</sup> The financial setbacks that record companies have endured as a result of peer-to-peer file sharing have prohibited the industry from developing and marketing new artists.<sup>12</sup> These setbacks also caused the music recording industry to lose a large number of jobs.<sup>13</sup>

Aiming to rectify this problem, record companies sought first to inform the general public that downloading and distributing music on these file-sharing networks amounted to copyright infringement.<sup>14</sup> Record companies then brought lawsuits against the peer-to-peer networks through which individual Internet users shared music.<sup>15</sup> These efforts, however, did not curtail the file-sharing phenomenon.<sup>16</sup> Even if the record companies managed to prevail against a particular peer-to-peer network, new peer-to-peer networks emerged through which individuals continued to share music files.<sup>17</sup> Thus, record companies began filing lawsuits against individuals who did the file sharing.<sup>18</sup>

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10. *See id.* (indicating that “[b]etween 1999 and 2008, the recording industry as a whole suffered a fifty percent drop in both sales and revenues, a figure plaintiffs attribute to the rise of illegal downloading”).

11. *See id.* (noting that the record industry suffered immense financial setbacks as a result of peer-to-peer infringements).

12. *See id.* (“This reduction in revenues has, in turn, diminished recording companies’ capacities to pursue, develop and market new recording artists.”).

13. *See id.* (noting that the financial losses sustained by the record industry caused a significant reduction in employment and that “Sony BMG Music Entertainment and Warner Music Group . . . each have suffered a fifty percent reduction in workforce since 2000”).

14. *See id.* (indicating that record companies “initiated a broad campaign to address the illegal infringement of copyrighted materials” by raising public awareness about the illegality of sharing music over peer-to-peer networks).

15. *See id.* (noting that record companies did not initially target individual file-sharers but instead filed suits only against the “proprietors of peer-to-peer networks”).

16. *See id.* (highlighting the failure of lawsuits against peer-to-peer networks to prevent infringements of copyrights owned by record companies because of the emergence of new peer-to-peer networks and the continued use of such networks to share music by individuals).

17. *See id.* (noting that, as a result of the failure of the record companies’ initial campaign against peer-to-peer networks, the record companies then sought to pursue claims against the individuals sharing music over the peer-to-peer networks).

18. *See* Jeff Leeds, *Labels Win Suit Against Song Sharer*, N.Y. TIMES, Oct.

Of the over 30,000 lawsuits initiated by record companies for such infringements,<sup>19</sup> most have resulted in settlements of between \$2,000 and \$5,000.<sup>20</sup> In some cases, courts rendered default judgments against the defendants or ruled for plaintiffs on summary judgment.<sup>21</sup> The courts imposed only the minimum amount of statutory damages in these cases.<sup>22</sup> Although the law technically requires no connection between actual and statutory damages,<sup>23</sup> “where it is clear that the plaintiff suffered no actual damages, and the defendant earned little if any profits from the infringement, courts tend to limit recovery to the minimum statutory sum.”<sup>24</sup>

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5, 2007, at C1, available at [http://www.nytimes.com/2007/10/05/business/media/05music.html?\\_r=0](http://www.nytimes.com/2007/10/05/business/media/05music.html?_r=0) (“Since 2003, record labels have brought legal action against about 30,000 people, accusing them of trafficking in copyrighted songs.”) (last visited Oct. 18, 2013) (on file with the Washington and Lee Law Review).

19. See *id.* (noting that record companies have filed over 30,000 such lawsuits).

20. See Pamela Samuelson & Ben Sheffner, Debate, *Unconstitutionally Excessive Statutory Damage Awards in Copyright Cases*, 158 U. PA. L. REV. PENNUMBRA 53, 54 (2009) (indicating that “[t]he overwhelming majority of these lawsuits have been settled by the file sharer’s agreement to pay some compensation to the plaintiffs, generally between \$2000 and \$5000”).

21. See *id.* at 54 (indicating that “[a]t least ten defendants in reported peer-to-peer cases involving sound recordings have either allowed default judgments to be entered against them or have lost on summary judgment motions” (citing Warner Bros. Records Inc. v. Tait, No. 07-134-J16-HTS, 2008 WL 2415036 (M.D. Fla. June 12, 2008); UMG Recordings, Inc. v. Blake, No. 06-00120-BR, 2007 WL 1853956 (E.D.N.C. June 26, 2007))).

22. See *id.* (highlighting that the damages awarded in these cases amounted only to the statutorily prescribed minimum); *Tait*, 2008 WL 2415036, at \*3 (awarding the statutorily authorized minimum amount of damages); *UMG Recordings, Inc.*, 2007 WL 1853956, at \*2 (same).

23. See 2 PAUL GOLDSTEIN, ON COPYRIGHT § 14.2.1.1 (3d ed. 2012) (indicating that “as a matter of law, no connection is required between actual and statutory damages”).

24. *Id.* (citing Reader’s Digest Assn., Inc. v. Conservative Digest, Inc., 642 F. Supp. 144, 147 (D.D.C. 1986) (awarding the statutory minimum), *aff’d*, 821 F.2d 800 (D.C. Cir. 1987)); Bly v. Banbury Books, Inc., 683 F. Supp. 983, 988 (E.D. Pa. 1986) (same); Doehrer v. Caldwell, 207 U.S.P.Q. 391, 393 (N.D. Ill. 1980) (awarding minimum statutory damages and indicating that statutory damages provisions “should not be converted into a windfall where, as a practical matter, the plaintiff has suffered only nominal damages”); Nat’l Council of Young Israel, Inc. v. Feir Co., 347 F. Supp. 1293, 1295, 175 U.S.P.Q. 351 (S.D.N.Y. 1972) (awarding the then-applicable statutory minimum of \$250 for each of four infringements); Abli, Inc. v. Standard Brands Paint Co., 323 F. Supp. 1400, 1404, 168 U.S.P.Q. 553 (C.D. Cal. 1970) (awarding \$500); Morser v. Bengor Prods. Co., 283 F. Supp. 926, 929, 159 U.S.P.Q. 267 (S.D.N.Y. 1968) (“We

The tendency of courts to err on the side of the minimum amount of statutory damages in peer-to-peer file sharing cases indicates that in such cases \$750 constitutes a “just” statutory award.<sup>25</sup> A court must award an amount within the statutorily authorized range as it “considers just.”<sup>26</sup> Because the statute requires not just any amount, but instead a just amount, some basis for the amount awarded pursuant to the statutory scheme seems necessary.<sup>27</sup> This just-amount requirement is undoubtedly an ambiguous standard. But considering the acquiescence of courts to award the statutorily prescribed minimum of \$750 for an infringement amounting to \$1 in actual damages—and possibly even less given the middleman’s cut—one may conclude that the minimum statutory award meets the just requirement of the statute for this sort of case.<sup>28</sup> The exorbitant awards in *Tenenbaum* and *Thomas-Rasset*, however, shatter whatever certainty existed regarding the just requirement of statutory damages with respect to peer-to-peer infringement cases.<sup>29</sup>

Given that *Tenenbaum* and *Thomas-Rasset* are outliers, this Note aims to flesh out some of the legal framework surrounding

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think that the [then-applicable] minimum statutory allowance of \$250 justly compensates the plaintiff and discourages further infringement by the defendants.”).

25. See GOLDSTEIN, *supra* note 23, § 14.2.1.1 (noting that “where it is clear that the plaintiff suffered no actual damages, and the defendant earned little if any profits from the infringement, courts tend to limit recovery to the minimum statutory sum”).

26. See 17 U.S.C. § 504(c)(1) (2012) (authorizing a statutory damages award “in a sum of not less than \$750 or more than \$30,000 as the court considers just”).

27. See GOLDSTEIN, *supra* note 23, § 14.2.1.1 (discussing the benchmarks that courts employ to arrive at a “just” statutory damages award).

28. See *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 910 (8th Cir. 2012) (affirming a comparatively high award of statutory damages of \$222,000); *Sony BMG Music Entm’t v. Tenenbaum*, 660 F.3d 487, 515 (1st Cir. 2011) (reinstating a comparatively high jury award of statutory damages of \$675,000); Samuelson & Sheffner, *supra* note 20, at 56 (noting that “[t]he jury awards against file-sharers Jammie Thomas-Rasset and Joel Tenenbaum are, by contrast, difficult to square either with Congressional intent or with the Supreme Court’s due process jurisprudence”).

29. See *Thomas-Rasset*, 692 F.3d at 910 (affirming an award of damages of \$9,250 per song, well above the statutory minimum); *Tenenbaum*, 660 F.3d at 515 (reinstating the original jury award of \$22,500 per song, well above the statutory minimum).



peer-to-peer infringement cases to arrive at a more straightforward approach for the evaluation of such exorbitant statutory awards. Specifically, this Note assesses (1) the purposes of statutory damages in the Copyright Act<sup>30</sup> and its legislative history, with an eye toward determining whether such large awards comport with congressional intent; (2) whether such large damages violate due process; and (3) what standard of review courts should apply when reviewing such awards.

## *II. Purposes, Legislative History, and Congressional Intent*

### *A. Ordinary/Knowing Infringement Statutory Regime*

The Copyright Act permits a copyright owner to “elect to recover statutory damages, instead of actual damages and defendant’s profits . . . regardless of the adequacy of the evidence offered as to his actual damages and the amount of defendant’s profits, and even if he has intentionally declined to offer such evidence, although it was available.”<sup>31</sup> The range of statutory damages for ordinary infringements spans from \$750 up to \$30,000 per infringement.<sup>32</sup> To arrive at specific statutory awards, courts have utilized two benchmarks:<sup>33</sup> (1) actual damages that a plaintiff would have recovered considering actual damages and profits, and (2) “an award that will induce [copyright owners] to create, and enforce rights in, copyrighted works and . . . to deter infringement.”<sup>34</sup> Reviewing courts hesitate to overturn damages awarded pursuant to this statutory scheme, overturning them “only for abuse of discretion, or, in rare cases, violation of constitutional due process.”<sup>35</sup>

Although the statute itself offers little guidance for courts to reach an appropriate statutory award absent proof of damages,

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30. 17 U.S.C. § 540(c) (2012).

31. 4 MELVILLE B. NIMMER & DAVID NIMMER, ON COPYRIGHT § 14.04[A] (2012).

32. 17 U.S.C. § 540(c)(1).

33. See GOLDSTEIN, *supra* note 23, § 14.2.1.1 (noting that “[t]wo benchmarks have guided courts in arriving at ‘just’ statutory awards”).

34. *Id.* (outlining the broad contours of the two benchmarks that courts employ to determine just statutory awards).

35. *Id.*

legislative history indicates that courts should not reach an award within the statutory range arbitrarily.<sup>36</sup> In fact, the legislative history contemplates the manner by which courts should arrive at the appropriate amount of statutory damages with some specificity:

[T]he plaintiff in an infringement suit is not obliged to submit proof of damages and profits and may choose to rely on the provision for *minimum* statutory damages. However, there is nothing in section 504 to prevent a court from taking account of evidence concerning actual damages and profits in making an award of statutory damages within the range set out in subsection (c).<sup>37</sup>

In 1999, Congress increased the statutorily authorized minimum to \$750 “to reflect inflation . . . and to otherwise preserve the deterrent effect of the statutory damage penalties.”<sup>38</sup> Interestingly, Congress expressly considered the problem of peer-to-peer file-sharing infringement when increasing the statutory minimum.<sup>39</sup>

When evidence of actual damages exists, courts generally use the evidence to arrive at an award within the statutory damages scheme.<sup>40</sup> But if no or little evidence of actual damages exists,

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36. See Samuelson & Sheffner, *supra* note 20, at 67 (“A more general point, though, is that the 1976 Act legislative history contemplates that courts would consider actual damages (or an approximation of them) in setting statutory damages.” (citing H.R. REP. NO. 94-1476, at 161 (1975) (“[T]he plaintiff in an infringement suit is not obliged to submit proof of damages and profits and may choose to rely on the provision for minimum statutory damages.”))).

37. H.R. REP. NO. 94-1476, at 161 (1975) (emphasis added).

38. H.R. REP. NO. 106-216, at 6 (1999).

39. See *id.* at 3–4 (indicating that Internet piracy requires Congress to raise the statutory range of damages); see also Samuelson & Sheffner, *supra* note 20, at 55 (noting that awarding \$750 per song infringed comports with congressional intent).

40. See GOLDSTEIN, *supra* note 23, § 14.2.1.1 (“Courts will often try to approximate actual damages and profits when making a statutory damages award. Where the parties have introduced some evidence on damages, profits, or both, courts have used these figures to guide their determination of statutory damages.” (citing M.S.R. Imps. v. R.E. Greenspan Co., 220 U.S.P.Q. 361, 373 (E.D. Pa. 1983) (noting that “statutory damages should attempt to approximate the normal ‘measure of damages’ guide of compensation for the wrong done and the injury suffered by plaintiff”))).

courts take into consideration copyright incentives and infringement deterrence.<sup>41</sup>

Notably, in *Thomas-Rasset*, the Eighth Circuit reiterated the oft-cited justification that “statutory damages are designed precisely for instances where actual harm is difficult or impossible to calculate.”<sup>42</sup> In these types of cases, courts typically award only minimum statutory damages “where the infringement was ‘technical rather than substantive,’ but have entered awards exceeding the minimum in cases where the infringer’s misconduct made a larger award a ‘reasonable deterrent.’”<sup>43</sup> Further, if the infringer does not cooperate with discovery requests, courts tend to award damages at the higher end of the spectrum if the failure to cooperate contributed to assessing actual damages.<sup>44</sup>

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41. *See id.* (“In cases where the evidence provides few if any clues for approximating actual damages and profits, courts often turn to the underlying rationale for statutory damages—sustaining copyright incentives while deterring infringement.”).

42. *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 908 (8th Cir. 2012); *see also Sony BMG Music Entm’t v. Tenenbaum*, 660 F.3d 487, 502 (1st Cir. 2011) (“Section 504’s text reflects Congress’s intent ‘to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits.’” (quoting *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935))); GOLDSTEIN, *supra* note 23, § 14.2 (“The rationale commonly given for statutory damages is that, because actual damages are so often difficult to prove, only the promise of a statutory award will induce copyright owners to invest in and enforce their copyrights and only the threat of a statutory award will deter infringers . . .”).

43. *See* GOLDSTEIN, *supra* note 23, § 14.2.1.1 (discussing what courts consider when awarding statutory damages in cases that have little to no evidence of actual damages (citing *Fallaci v. New Gazette Literary Corp.*, 568 F. Supp. 1172, 1174 (S.D.N.Y. 1983) (awarding \$10,000—twice the proven value of republication rights in copyrighted article—for deterrent purposes)); *Kepner-Trego, Inc. v. Carabio*, 203 U.S.P.Q. 124, 138 (E.D. Mich. 1979) (awarding the then-applicable minimum of \$250 for each infringement)).

44. *See id.* (noting that “courts have made awards at the high end of the statutory spectrum against infringers whose failure to cooperate with the plaintiff’s discovery efforts contributed to the difficulty in determining actual damages” (citing *Monogram Models, Inc. v. Industro Motive Corp.*, 492 F.2d 1281 (6th Cir.), *cert. denied*, 419 U.S. 843 (1974); *RSO Records, Inc. v. Peri*, 596 F. Supp. 849, 862 (S.D.N.Y. 1984))).

### B. Willful Infringement

Section 504(c)(2) of the 1976 Copyright Act permits a court to “increase the award of statutory damages to a sum of not more than \$150,000” if the copyright owner succeeds in proving that the “infringement was committed willfully.”<sup>45</sup> Raising the statutory ceiling for a “willful” infringement, however, presents difficulties because the Copyright Act fails to define “willfulness.”<sup>46</sup> Nevertheless, the drafters understood willfulness, within the context of the Copyright Act as a term of art.<sup>47</sup> Scholars have noted that Congress expected the increased statutory ceiling for willful infringement to apply only in extraordinary cases of professional counterfeiting.<sup>48</sup>

Notwithstanding the congressional intent for a finding of willfulness, courts have significantly departed from defining willfulness in this manner.<sup>49</sup> In so doing, courts considerably expanded the concept of willful copyright infringement to include those who did not have actual knowledge of their infringement but should have known that their conduct amounted to infringement.<sup>50</sup> Courts’ expansion of willfulness should give one

45. 17 U.S.C. § 504(c)(2) (2012).

46. See GOLDSTEIN, *supra* note 23, § 14.2.1.2 (“The Copyright Act does not define willfulness for purposes of determining the availability of increased statutory damages under section 504(c)(2).”).

47. See S. REP. NO. 94-473, at 144–45 (1975) (noting that a finding of willful infringement should only occur on exceptional facts); H.R. REP. NO. 94-1476, at 162 (1975) (same).

48. See Samuelson & Sheffner, *supra* note 20, at 65 (noting that Congress intended the “wholly new enhanced statutory damage award level for willful infringements . . . to be used in exceptional cases . . . [such as those involving] . . . professional counterfeiters”); Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 441 (2009) (“Congress intended this designation to apply only in ‘exceptional cases . . .’” (citing S. REP. NO. 94-473, at 144–45 (1975) (stating that enhanced damages should be available in “exceptional cases”); H.R. REP. NO. 94-1476, at 162 (1975) (same))).

49. See Samuelson & Wheatland, *supra* note 48, at 441 (noting that courts have expanded the definition of willfulness within the context of the Copyright Act far beyond what Congress intended (citing *Island Software & Computer Serv., Inc. v. Microsoft Corp.*, 413 F.3d 257, 264 (2d Cir. 2005) (noting that constructive knowledge suffices to show willfulness))).

50. See *id.* at 441 (“[C]ourts have interpreted willfulness so broadly that those who merely should have known their conduct was infringing are often treated as willful infringers.” (citing *Island Software & Computer Serv., Inc. v.*

pause to consider the problems that might emerge from the activist judicial expansion of Congress's legislation.<sup>51</sup>

### III. Discussion of *Tenenbaum and Thomas-Rasset*

In the first of these cases, *Sony BMG Music Entertainment v. Tenenbaum*, the First Circuit reinstated a large jury award of statutory damages, requiring Joel Tenenbaum to pay \$22,500 per song infringed.<sup>52</sup> This amounted to a total of \$675,000 for the recent college graduate to pay.<sup>53</sup> To arrive at this sum, the jury found that Tenenbaum's infringement met the willfulness threshold that pushed the maximum damages available to \$150,000 per infringement.<sup>54</sup> Then, the jury considered a "non-exhaustive list of factors" and determined that Tenenbaum owed \$22,500 per infringement.<sup>55</sup> The First Circuit painted Tenenbaum in a particularly negative light, suggesting that his conduct merited such an exorbitant award.<sup>56</sup>

The First Circuit's decision emerged from cross appeals of the U.S. District Court for the District of Massachusetts decision that found the jury award unconstitutionally excessive in violation of the Due Process Clause of the Fifth Amendment.<sup>57</sup> In addition to finding that the award violated the Due Process Clause under the

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Microsoft Corp., 413 F.3d 257, 264 (2d Cir. 2005) (noting that constructive knowledge suffices to show willfulness))).

51. *See id.* (discussing the departure of courts from congressional intent with respect to what constitutes willful infringement within the meaning of the Copyright Act).

52. *See Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 490 (1st Cir. 2011) (noting that the jury originally awarded \$22,500 per infringement).

53. *See id.* (indicating that the judgment of \$22,500 per infringement "yielded a total award of \$675,000").

54. *See id.* (indicating that the jury found that Tenenbaum's infringement met the willfulness threshold).

55. *See id.* (noting that the district court instructed the jury to consider nonexhaustive factors in the event that the jury levied an award of damages).

56. *See id.* at 492–96 (discussing Tenenbaum's conduct). One should also note that Tenenbaum had little to work with on appeal because his lawyer failed to preserve several objections that could have been used to argue for a reduction in the award. *See id.* at 505–07 (noting the objections that Tenenbaum's counsel failed to preserve).

57. *See id.* at 489 (discussing the procedural posture of the case).

standard for statutory damages articulated in *St. Louis, I.M. & S. Railway Co. v. Williams*,<sup>58</sup> the district court also noted that the Supreme Court's due process jurisprudence with respect to assessing punitive damage awards applies to statutory damages awards as well.<sup>59</sup>

In the newest case awarding damages well above the statutory minimum, *Capitol Records, Inc. v. Thomas-Rasset*, the Eighth Circuit affirmed an award of \$9,250 per song infringed.<sup>60</sup> In total, the Eighth Circuit ordered Jammie Thomas-Rasset to pay \$222,000.<sup>61</sup> To arrive at this award, the jury found that Thomas-Rasset's conduct amounted to willful infringement and that she attempted to conceal her infringement.<sup>62</sup>

After an examination of the inconsistent treatment of this case among the different levels of federal courts involved, the problems that such large awards in peer-to-peer infringement cases pose become clear.<sup>63</sup> In the district court's opinion vacating the verdict that the Eighth Circuit later affirmed, the judge

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58. 251 U.S. 63 (1919). In *Williams*, Arkansas regulated rates for transporting passengers on trains. *Id.* at 63–64. Under an Arkansas statute, a railroad company charging more than the amount prescribed by statute faced a penalty ranging from \$50 to \$300 for each offense. *Id.* A railroad company violated Arkansas law by overcharging two sisters sixty-six cents more than the statutorily prescribed fare. *Id.* at 64. The sisters sued, won, and obtained a verdict award of \$75. *Id.* The company appealed, arguing that the statutory penalties violated the Due Process Clause of the Fourteenth Amendment. *Id.* The Supreme Court indicated that statutory penalties violate the Due Process Clause when they are “so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.” *Id.* at 66–67. The Court reasoned that the nature of railroad carrying, the interests of the public, and the need for uniform passenger rates do not render the penalties “so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable.” *Id.* at 67. Thus, the Court affirmed the judgment. *Id.*

59. See *Sony BMG Music Entm't v. Tenenbaum*, 721 F. Supp. 2d 85, 101 (D. Mass. 2010) (“I conclude that the due process principles articulated in the Supreme Court's recent punitive damages caselaw are relevant to Tenenbaum's case . . .”).

60. *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 910 (8th Cir. 2012) (indicating that Thomas-Rasset had to pay \$9,250 per infringement).

61. See *id.* (noting the judgment against Thomas-Rasset at \$9,250 per infringement amounts to a total of \$222,000).

62. See *id.* at 906–07 (highlighting the relevant findings of the jury).

63. See *infra* notes 64–73 and accompanying text (discussing the problems of and reactions to large statutory damages awards in peer-to-peer infringement cases).

levied harsh criticism against the statutory regime permitting such a large sum to be assessed against a defendant like Thomas-Rasset.<sup>64</sup> The district court expressly called for congressional action<sup>65</sup>:

The Court would be remiss if it did not take this opportunity to implore Congress to amend the Copyright Act to address liability and damages in peer-to-peer network cases such as the one currently before this Court. The Court begins its analysis by recognizing the unique nature of this case. The defendant is an individual, a consumer. She is not a business. She sought no profit from her acts.<sup>66</sup>

The district court then contrasted Thomas-Rasset's infringement from other cases in which courts have upheld statutory damages awards well above the minimum threshold on the ground that those cases "involve corporate or business defendants and seek to deter future illegal conduct."<sup>67</sup> The district court noted that the parties identified "no case in which large statutory damages were applied to a party who did not infringe in search of commercial gain."<sup>68</sup> Then, the district court provided an illuminating account of the disparity between the damages suffered and the damages imposed<sup>69</sup>:

[T]he damages awarded in this case are wholly disproportionate to the damages suffered by Plaintiffs. Thomas allegedly infringed on the copyrights of 24 songs—the

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64. See *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1227 (D. Minn. 2008) ("The Court would be remiss if it did not take this opportunity to implore Congress to amend the Copyright Act to address liability and damages in peer-to-peer network cases such as the one currently before this Court.").

65. See *id.* (exhorting Congress to take legislative action to prevent such large awards from being levied against individual consumer infringers who did not seek to gain profit from the copyrights that they infringed).

66. *Id.*

67. See *id.* (highlighting the contrast of defendants like Thomas-Rasset, who seek no pecuniary gain from their copyright infringements, with business defendants who aim to reap profits from infringing copyrights).

68. See *id.* (noting the dearth of caselaw supporting an award of statutory damages well above the minimum threshold in the Copyright Act involving defendants who did not seek to profit from their infringements to support the position that the award levied against Thomas-Rasset was excessive).

69. See *id.* (offering a stark contrast between the damages suffered as a result of Thomas-Rasset's infringement and the award the jury verdict returned using raw numbers).

equivalent of approximately three CDs, costing less than \$54, and yet the total damages awarded is \$222,000 more than *five hundred* times the cost of buying 24 separate CDs and more than *four thousand* times the cost of three CDs.<sup>70</sup>

The district court further emphasized the lack of profiteering on the part of Thomas-Rasset and stated that “it would be a farce to say that a single mother’s acts of using [file-sharing program] Kazaa are the equivalent, for example, to the acts of global financial firms illegally infringing on copyrights in order to profit in the securities market.”<sup>71</sup>

The amount of money awarded in *Tenenbaum* and *Thomas-Rasset* contrasts markedly from the comparatively low amounts agreed upon in settlements and most notably from similar cases in which courts have tended to award only the statutory minimum.<sup>72</sup> Even the record companies found themselves shocked at the size of these awards.<sup>73</sup>

#### IV. Due Process and Standard of Review

As a general matter, the Supreme Court has established that statutory damages awards are subject to judicial review under the Due Process Clause even when the award falls within the statutorily authorized range.<sup>74</sup> The logical corollary of this is that

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70. *Id.*

71. *Id.* (emphasizing the importance of the kind of defendant that Thomas-Rasset represents to demonstrate that awards well above the statutory minimum are excessive with respect to such defendants).

72. *See supra* notes 21–22 and accompanying text (highlighting comparatively small settlements and the tendency of courts to award only the statutory minimum).

73. *See* Samuelson & Sheffner, *supra* note 20, at 58 (noting that “[e]ven the victorious record labels agree” that such awards are “stunningly huge” (citing Ben Sheffner, *Sony BMG Attorney: ‘We Were Shocked’ by Size of Verdict; Concedes \$1.92 Million*, COPYRIGHTS & CAMPAIGNS (June 20, 2009), <http://copyrightsandcampaigns.blogspot.com/2009/06/sony-bmg-attorney-we-were-shocked-by.html> (last visited Sept. 23, 2013) (indicating that the general counsel of Sony BMG said that they “were shocked . . . [and] . . . suspected [that they] were going to win, but . . . thought [the jury] would come in with a lower number” (quoting Press Release, Columbia Law Sch., *Aggressive Pursuit of Illegal File-Sharers Defended by Top Music-Industry Lawyer* (June 20, 2009)))) (on file with the Washington and Lee Law Review).

74. *See* *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (noting that



a statutorily authorized damages award is not per se constitutional because it falls within the statutorily permissible range.<sup>75</sup> Although one may rely upon *Tenenbaum* and *Thomas-Rasset* to support a contrary proposition, the controversial character of these cases suggests that a more demanding standard of review ought to apply to peer-to-peer infringement cases.<sup>76</sup> Indeed, authority splits on what standard of review should generally apply to statutory damages cases.<sup>77</sup>

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the Due Process Clause of the Fourteenth Amendment limits “the power of the states to prescribe penalties”).

75. See *id.* (indicating that the Due Process Clause prevents penalties “so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable” (citations omitted)).

76. See *supra* notes 52–75 and accompanying text (discussing the controversy surrounding the holdings in *Tenenbaum* and *Thomas-Rasset*).

77. See *Sony Music Entm’t v. Tenenbaum*, 721 F. Supp. 2d 85, 101 (D. Mass. 2010) (noting that a split of authority exists as to what standard applies to assessing whether a statutory damages award violates the Due Process Clause of the Fourteenth Amendment (citing *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 587 (6th Cir. 2007) (reviewing a total statutory damages award of \$806,000 for infringement of twenty-six copyrighted works under *Williams* after noting that the applicability of the Supreme Court’s punitive damages jurisprudence to statutory damages was questionable)); *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 954 (7th Cir. 2006) (suggesting in dictum that statutory damages awarded under the Fair Credit Reporting Act would be subject to review under *State Farm*); *Parker v. Time Warner Entm’t Co.*, 331 F.3d 13, 22 (2d Cir. 2003) (suggesting in dictum that the aggregation of statutory damages in a class action under the Cable Communications Policy Act of 1984 might raise due process concerns under *Gore* and *State Farm*); *Romano v. U-Haul Int’l*, 233 F.3d 655, 672–74 (1st Cir. 2000) (applying *Gore* to a punitive damages award in a Title VII employment discrimination action even though the award was subject to a statutory cap); *Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.*, No. C 07-03952 JW, slip op. at 25 n.25 (N.D. Cal. 2010) (holding that defendants’ reliance on *Gore* in challenging a statutory damages award was “misplaced”); *Verizon Cal. Inc. v. Onlinenic, Inc.*, No. C 08-2832 JF (RS), 2009 WL 2706393, at \*6–9 (N.D. Cal. Aug. 25, 2009) (concluding that “it is highly doubtful” that *Gore* and *State Farm* “apply to statutory damages awards” but admitting that certain principles announced in the Supreme Court’s recent punitive damages cases, such as the principle that a defendant should not be punished “for wrongful acts other than . . . those committed against the plaintiff,” might apply in statutory damages cases); *Centerline Equip. Corp. v. Banner Pers. Serv., Inc.*, 545 F. Supp. 2d 768, 778 n.6 (N.D. Ill. 2008) (suggesting in dictum that *State Farm* might provide grounds for remitting statutory damages awarded under the Telephone Consumer Protection Act); *Leiber v. Bertelsmann AG (In re Napster, Inc. Copyright Litigation)*, No. C MDL-00-1369 MHP, C 04-1671 MHP, 2005 WL 1287611, at \*10–11 (N.D. Cal. June 1, 2005) (suggesting in dictum that the court would apply *Gore* and *State Farm* in considering whether statutory damages for copyright infringement were

*A. Discussing the Williams Standard*

In *Williams*, the Supreme Court established the standard of review applied to statutory damages awards under the Due Process Clause that persists today.<sup>78</sup> *Williams* concerned a lawsuit between a railroad company and two sisters.<sup>79</sup> The sisters sued the railroad company for overcharging them by \$.66 in violation of the fare prescribed by statute.<sup>80</sup> Under an Arkansas statute, the jury was permitted to award between \$50 and \$300 per overcharge.<sup>81</sup> The plaintiffs prevailed in their suit, obtaining a verdict of \$75, nearly 114 times the overcharge.<sup>82</sup> The railroad

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unconstitutionally excessive); *Accounting Outsourcing, LLC v. Verizon Wireless Pers. Commc'ns, L.P.*, 329 F. Supp. 2d 789, 808–09 (M.D. La. 2004) (refusing to apply *Gore* and *State Farm* in reviewing the constitutionality of statutes providing statutory damages for plaintiffs who have received junk faxes because the statutes' provision of damages ranges obviated *Gore* and *State Farm's* "fair notice" concerns); *DirecTV, Inc. v. Cantu*, No. SA-04-cv-136-RF, 2004 WL 2623932, at \*4–5 (W.D. Tex. Sept. 29, 2004) (refusing to apply the *Gore* guideposts to a state statutory damages remedy since the civil penalties that the defendant might face were capped by statute and thus did not implicate *Gore's* "fair notice" concerns); *Lowry's Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 460 (D. Md. 2004) (refusing to apply the *Gore* guideposts in evaluating the constitutionality of a statutory damages award in a copyright infringement case); Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 491–97 (2009) (arguing that statutory damages awards for copyright infringement should be subject to analysis under the *Gore* guideposts); J. Cam Barker, Note, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 TEX. L. REV. 525, 536–56 (2004) (arguing that the Supreme Court's punitive damages jurisprudence applies to the aggregation of multiple statutory damages awards in file-sharing cases)).

78. See *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66–67 (1919) (noting the standard of review that applies to statutory damages awards when examined under the Due Process Clause of the Fourteenth Amendment).

79. See *id.* at 64 (noting that a railroad company "demanded and collected 66 cents more than the prescribed fare from each of two sisters carried over part of its line" and that the passengers subsequently sued for this overcharge).

80. See *id.* (indicating that the sisters sued the railroad company for overcharging them by 66 cents in violation of state law).

81. See *id.* at 64–65 ("By a statute of Arkansas, regulating rates for the transportation of passengers . . . any railroad company that demands or collects a greater compensation than the statute prescribes is subjected for every such offense to a penalty of not less than fifty dollars nor more than three hundred dollars . . .") (quotations omitted).

82. See *id.* at 64 (noting that the passengers in this suit "obtained judgments against the company for the overcharge, a penalty of seventy-five

company appealed, alleging that the large sum awarded violated the Due Process Clause.<sup>83</sup> Notwithstanding the disparity between the harm suffered and damages levied, the Supreme Court reasoned that “its validity is not to be tested in that way.”<sup>84</sup> Instead, the Court indicated that when the penalty “is considered with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates,” it does not violate the Due Process Clause.<sup>85</sup> In evaluating the railroad company’s claim, the Supreme Court established that an award of statutory damages violates the Due Process Clause only if “the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.”<sup>86</sup> On these facts, this standard was not met.<sup>87</sup>

Although *Williams* created a standard of review for determining whether a statutory damages award violates due process, reviewing courts apply this standard with extreme deference.<sup>88</sup> Indeed, the Supreme Court expressed reluctance to

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dollars”).

83. *See id.* (highlighting the railroad company’s argument that the damages awarded violate the Due Process Clause).

84. *See id.* at 67 (noting that the possibility for immense disparity between a verdict rendered and damages sustained does not automatically render such an award unconstitutional because other factors require consideration).

85. *See id.* (suggesting that the railroad industry and the concerns of the public incident to that industry merit consideration in assessing the validity of such awards within this statutory scheme).

86. *See id.* at 66–67 (articulating the standard applied to the judicial review of damages awarded pursuant to a statutory damages scheme to evaluate whether the award contravenes the Due Process Clause).

87. *See id.* at 67 (affirming the award under the Supreme Court’s standard of review and thus consistent with the Due Process Clause).

88. *See Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 587 (6th Cir. 2007) (noting that review under the *Williams* standard “is extraordinarily deferential—even more so than in cases applying abuse-of-discretion review”); *see also Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co.*, 74 F.3d 488, 496 (4th Cir. 1996) (indicating that courts review statutory damages awards with high deference); *Broad. Music, Inc. v. Star Amusements, Inc.*, 44 F.3d 485, 487–88 (7th Cir. 1995) (same); *Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1017 (7th Cir. 1991) (noting that “[t]he district court is accorded wide and almost exclusive discretion in determining the size of the statutory damage award”); *Lowry’s Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 458 (D. Md. 2004) (“Congress’ exercise of its Constitutional authority to regulate copyrights is entitled to substantial

review statutory damages awards with more heightened scrutiny because Congress granted to juries the discretion to determine the appropriate award within a “statutory yardstick.”<sup>89</sup> As a result of this deferential application, courts tend not to overturn statutory damages awards under *Williams*.<sup>90</sup> Given this highly deferential orientation of courts with respect to reviewing statutory damages awards, record companies seem to have the law on their side when they win a large verdict within the statutory scheme of the Copyright Act.<sup>91</sup> In a highly formalistic sense, the law most directly on point supports leaving such awards unscathed by judicial review in spite of the potential for sums exceeding far beyond the \$0.99 of damages per infringement suffered.<sup>92</sup>

Because of the deference with which courts apply the *Williams* standard, litigants challenging large awards in peer-to-peer infringement cases turn to the Supreme Court’s punitive damages jurisprudence for guidance.<sup>93</sup> Troubled by the disparity between actual damages suffered and damages awarded, advocates for a more demanding standard of review appear to

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deference.”); Colleen P. Murphy, *Judicial Assessment of Legal Remedies*, 94 NW. U. L. REV. 153, 202 (1999) (“No reported decision has reduced a litigated award that was within the appropriate statutory range.”).

89. *Douglas v. Cunningham*, 294 U.S. 207, 210 (1935) (indicating that a highly deferential standard of review will apply to assessing statutory damages awards because Congress set the parameters of the award by a “statutory yardstick”).

90. See Murphy, *supra* note 88, at 202 (noting that “[n]o reported decision has reduced a litigated award that was within the appropriate statutory range”).

91. See *supra* notes 78–90 and accompanying text (discussing the parameters of the standard of review that courts apply when assessing the constitutionality of damages awarded pursuant to a statutory scheme).

92. See *supra* notes 78–91 and accompanying text (noting that the law most directly on point regarding review of statutory damages supports a highly deferential standard of review which suggests that advocates for a more demanding standard of review seek a change in law with respect to this issue).

93. See, e.g., *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 907 (8th Cir. 2012) (“Thomas-Rasset urges us to consider instead [of the *Williams* standard] the ‘guideposts’ announced by the Supreme Court for the review of punitive damages awards under the Due Process Clause.”); *Sony BMG Music Entm’t v. Tenenbaum*, 660 F.3d 487, 509 (1st Cir. 2011) (“Tenenbaum separately argued the award was unconstitutionally excessive under the standard for reviewing punitive damage awards articulated in *Gore*.”).

argue for a change in the way that courts review statutory damages awards in the context of peer-to-peer infringement cases.<sup>94</sup> This position is a sensible one.<sup>95</sup> After all, it seems misguided to apply a standard of review to peer-to-peer infringement cases that developed well before the advent of the Internet, word processing, and personal computers.<sup>96</sup> Therefore, this call for a change in the law on the part of both litigants and academics merits consideration.<sup>97</sup>

*B. Discussing the Support for Applying Punitive Damages  
Jurisprudence to Statutory Damages*

Arguments for a more rigorous constitutional assessment of statutory damages awards analogically employ the Supreme Court's punitive damages jurisprudence.<sup>98</sup> Indeed, in her petition for certiorari, Thomas-Rasset commences assessment of the award levied against her by invoking punitive damages analogically:

Statutory damages imposed in this way are unpredictable, unconstrained, and equally as punitive as punitive damages; the jury's role in imposing them is even more divorced from finding facts, from deciding what happened, than it is in imposing punitive damages. The order-of-magnitude difference between the verdicts in this case, \$222,000 in the first trial, \$1,920,000 in the second trial, and \$1,500,000 in the third trial, demonstrates this. The verdicts are unpredictable and, in a deeper sense, arbitrary; they are not tied to any fact or

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94. See *infra* notes 98–118 and accompanying text (discussing arguments that support a more rigorous review of statutory damages awards).

95. See *Tenenbaum*, 660 F.3d at 508 (noting that the district court agreed with *Tenenbaum* that the *Gore* standard should apply to assess the due process problems presented by the amount of damages awarded in his case).

96. *St. Louis I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 63 (1919) (indicating that the Supreme Court decided this case in 1919, a time long before Al Gore invented the Internet).

97. See *supra* notes 88–96 and accompanying text (noting the controversy surrounding a change in the standard reviewing courts should apply in assessing the constitutionality of statutory damages awards).

98. See *infra* notes 99–119 and accompanying text (noting the use of the Supreme Court's punitive damages jurisprudence in such arguments).

rationale that justifies them, that explains why the law imposes this particular penalty on this particular defendant.<sup>99</sup>

The constitutional standard for assessing punitive damages awards begins with *BMW of North America, Inc. v. Gore*.<sup>100</sup>

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99. Petition for a Writ of Certiorari at 14, *Thomas-Rasset v. Capitol Records, Inc.*, No. 12-715 (Dec. 10, 2012).

100. 517 U.S. 559 (1996). In *Gore*, Gore, an Alabama consumer, purchased a BMW sports sedan from a BMW dealer in Alabama. *Id.* at 563. Nine months after driving the car, Gore sought to have the car detailed and learned that the car had been repainted. *Id.* Gore sued BMW for suppressing a material fact by failing to disclose the repainting. *Id.* At trial, BMW noted that it had a policy regarding damage incurred by vehicles during transportation or manufacture. *Id.* If the cost of the repair exceeded 3% of the car's retail price, the company serviced the car and sold it as used. *Id.* But if it did not exceed 3%, then BMW repaired it and sold it as new without informing the dealer that any repairs occurred. *Id.* at 563–64. The cost to repaint the sedan that Gore purchased amounted to \$601.37, only 1.5% of its retail price. *Id.* at 564. Gore prayed for \$4,000 in actual damages and \$4,000,000 in punitive damages. *Id.* Gore arrived at the punitive figure by introducing evidence that BMW had sold nearly 1,000 refinished cars as new since 1983. *Id.* The jury found for Gore and awarded \$4,000 in compensatory damages and \$4,000,000 in punitive damages. *Id.* at 565. On appeal, the Alabama Supreme Court rejected BMW's claim that the award was unconstitutionally excessive. *Id.* at 566. Nevertheless, the Alabama Supreme Court found that the jury calculated punitive damages incorrectly because the jury considered conduct in other jurisdictions. *Id.* at 567. Given this error, the Alabama Supreme Court remitted the punitive damages award to \$2,000,000. *Id.* The United States Supreme Court granted certiorari "to illuminate the character of the standard that will identify unconstitutionally excessive awards of punitive damages." *Id.* at 568 (quotations omitted). The Supreme Court affirmed, based on principles of state comity and sovereignty, that states may not levy sanctions against a tortfeasor for that tortfeasor's lawful conduct occurring in other states. *Id.* at 572. The Supreme Court reasoned that while Alabama may sanction BMW for conduct occurring within Alabama, it may not infringe on policy choices of other states. *Id.* Therefore, the Alabama Supreme Court's decision to disregard BMW's out-of-state conduct was proper. *Id.* Next, the Supreme Court addressed the issue of whether the award levied was nonetheless unconstitutionally excessive. *Id.* at 574. To answer this question, the Supreme Court articulated three guideposts that courts must use to assess whether a punitive damages award exceeds the constitutional maximum: the degree of reprehensibility, the disparity between harm suffered and the punitive damages award, and the difference between the amount imposed and the civil damages available in similar cases. *Id.* at 575. The Supreme Court noted that BMW exhibited no "egregiously improper conduct," thus BMW's conduct had a low degree of reprehensibility. *Id.* at 580. Further, while the Supreme Court avoided offering a discrete mathematical formula to determine constitutionally permissible ratios of punitive damages vis-à-vis actual harm, the Supreme Court noted that "[w]hen the ratio is a breathtaking 500 to 1 . . . the award must surely raise a suspicious judicial eyebrow." *Id.* at 582–83 (quotations omitted). Finally, the Supreme Court highlighted that the

*Gore* established three guideposts for courts to employ when evaluating whether a punitive damages award exceeds the constitutionally permissible amount.<sup>101</sup> These three guideposts include the reprehensibility of the defendant's conduct, the ratio of punitive damages awarded to actual harm, and the difference between the punitive damages awarded and the civil penalties imposed or authorized in similar cases.<sup>102</sup>

Those who argue for some kind of application of *Gore* caselaw to statutory damages contend that the same considerations for a due process limit on punitive damages apply to statutory damages.<sup>103</sup> The overriding rationale for applying the *Gore* standard emerges from a concern over excessive penalties.<sup>104</sup> After all, if *Gore* had not involved such a facially excessive award, it is difficult to imagine what impetus would have existed for appellate litigation.<sup>105</sup>

Copyright infringement cases involving peer-to-peer music sharing in which the plaintiffs elect for statutory damages manifest the problem of excessiveness in prominent form.<sup>106</sup> The \$750 minimum statutory award greatly exceeds the actual damages of less than \$1 caused by the infringement of one

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civil penalties available amounted to only \$2,500 in Alabama, and in other states maximum civil penalties can range from \$5,000–\$10,000. *Id.* at 584. Ultimately, the Supreme Court found that the \$2,000,000 in punitive damages awarded by Alabama exceeded the constitutional limit. *Id.* at 585–86.

101. *See id.* at 574–75 (noting the three guideposts that the Supreme Court used to find *Gore*'s award unconstitutionally excessive included the degree of reprehensibility of the defendant's conduct, the disparity between the punitive damages awarded and actual harm suffered, and the civil penalties authorized or imposed in similar cases).

102. *See id.* (listing the three guideposts that the Supreme Court employed in *Gore* to find the award unconstitutionally excessive).

103. *See, e.g., Samuelson & Sheffner, supra* note 20, at 66–67 (noting the similarities between due process issues in statutory and punitive damages cases).

104. *See Gore*, 517 U.S. at 574 (noting that “elementary notions of fairness” can constitutionally limit the severity of a penalty that a state can impose on a defendant).

105. *See id.* at 562–63 (noting that the issue in the case concerned whether the punitive damages award exceeded the constitutional limit).

106. *See infra* notes 107–18 and accompanying text (discussing the problems that excessive damages presents in the context of peer-to-peer infringement cases).

song.<sup>107</sup> Further, the amount awarded in a given case may rise to \$150,000 per infringement for willful infringements.<sup>108</sup> This means that a jury could penalize a defendant in a peer-to-peer infringement case \$150,000 per downloaded song.

Furthermore, proponents of *Gore's* application to statutory damages note that juries can render both punitive and statutory damages awards in equally arbitrary and uncertain manners.<sup>109</sup> In this vein, the Supreme Court has expressed concern over the constitutional due process issues presented by arbitrary and inconsistent assessments of punitive and statutory damages.<sup>110</sup> Notably, the constitutional problems of arbitrariness and imprecision in punitive damages cases emerge not from concerns peculiar to punitive damages, but stem from their assessment in a civil trial without the protections that a criminal trial would afford.<sup>111</sup> Empirically, inconsistent application of statutory damages in peer-to-peer cases, as Thomas-Rasset highlighted in her petition for writ of certiorari, supports this position.<sup>112</sup> Thus, drawing a formalistic distinction between punitive damages and statutory damages for purposes of determining the standard of review is ill-founded, for both present the same due process concerns of arbitrariness and uncertainty.<sup>113</sup>

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107. See *infra* notes 184–89 and accompanying text (noting that the statutory minimum amount of damages exceeds the actual damages caused by the infringement).

108. 17 U.S.C. § 504(c)(2) (2012).

109. See Samuelson & Sheffner, *supra* note 20, at 54–56 (noting examples of cases inconsistently applying the statutory damages provision of the Copyright Act).

110. See *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 499 (2008) (“The real problem . . . is the stark unpredictability of punitive awards.”).

111. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (“[D]efendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding. This increases our concerns over the imprecise manner in which punitive damages are administered.”).

112. See *Petition for Writ of Certiorari*, *supra* note 99, at 14 (noting the inconsistency, unpredictability, and arbitrariness of statutory damages assessments (citing *Metro-Goldwyn-Mayer Studios, Inc. v. Gorkster*, 545 U.S. 913, 959–60 (2005) (Breyer, J., concurring) (noting the chilling effects imposed upon those who innovate from copyrighted technology); *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 520 (2001) (Stevens, J., dissenting) (same))).

113. See *supra* notes 104–09 and accompanying text (discussing the similar constitutional due process problems that statutory and punitive damages



Proponents of applying the *Gore* standard to statutory damages also argue that statutory damages and punitive damages serve the same aims and purposes.<sup>114</sup> As punitive damages serve retributive and deterrent functions, statutory damages serve these functions as well. Indeed, the literature abounds with arguments that statutory damages have a deterrent purpose.<sup>115</sup> Furthermore, authority exists for the proposition that the Copyright Act's higher level of statutory damages for willful infringement functions punitively.<sup>116</sup> And many courts have acknowledged that statutory damages serve a punitive purpose.<sup>117</sup> Given these similarities with respect to the

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awards present).

114. See Colin Morrissey, Note, *Behind the Music: Determining the Relevant Constitutional Standard for Statutory Damages in Copyright Infringement Lawsuits*, 78 FORDHAM L. REV. 3059, 3086–87 (2010) (offering an overview of the reasons that scholars and other commentators set forth for explaining how statutory and punitive damages serve similar purposes (citing Defendant's Motion for New Trial, or in the Alternative, for Remittitur at 5–7, *Capitol Records Inc. v. Thomas-Rasset*, No. 06-cv-1497 (D. Minn. Oct. 15, 2007) (discussing the punitive nature of statutory awards); Samuelson & Sheffner, *supra* note 20, at 59 (delineating the purposes of statutory damages); Samuelson & Wheatland, *supra* note 48, at 460–61 (noting that courts have interpreted statutory damages for copyright infringement to be punitive))).

115. See Morrissey *supra* note 114, at 3070–72 and accompanying text (noting that statutory damages for willful infringement serve a deterrent function).

116. See *id.* at 3087 (noting that “[c]ourts have consistently acknowledged that deterring future infringement is a primary goal of the statute” (citing *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952) (noting that statutory damages serve “to discourage wrongful conduct”); *St. Luke's Cataract & Laser Inst., P.A. v. Sanderson*, 573 F.3d 1186, 1206 (11th Cir. 2009) (noting that deterrence plays a role in determining the award of statutory damages)); see also *Kemezy v. Peters*, 79 F.3d 33, 34 (7th Cir. 1996) (“[D]eterrence is a purpose of punishment.”); *Nat'l Football League v. Primetime 24 Joint Venture*, 131 F. Supp. 2d 458, 478 n.17 (S.D.N.Y. 2001) (indicating that statutory damages punish defendants in pursuit of a deterrent function (citations omitted)).

117. See *On Davis v. Gap, Inc.*, 246 F.3d 152, 172 (2d Cir. 2001) (“The purpose of punitive damages—to punish and prevent malicious conduct—is generally achieved under the Copyright Act through the provisions of 17 U.S.C. § 504(c)(2), which allow increases to an award of statutory damages in cases of willful infringement.” (citing 4 NIMMER § 14.02[B], at 14-23 to 24)); *Cass Cnty. Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 643 (8th Cir. 1996) (noting that statutory damages serve punitive purposes).

aims of punitive and statutory damages, many contend that a similar constitutional standard of review is proper.<sup>118</sup>

*C. Discussing the Support for Not Applying Punitive Damages Jurisprudence to Statutory Damages*

Those who support the application of punitive damages jurisprudence to statutory damages maintain that distinguishing between the two for purposes of constitutional review lacks any basis in reason.<sup>119</sup> They contend that any difference between the two is negligibly formal; in purposes and effects, statutory and punitive damages are substantively the same.<sup>120</sup> But those who maintain that a constitutional distinction should persist between statutory and punitive damages argue that the distinction has well-founded bases.<sup>121</sup> Arguments against an application of punitive damages jurisprudence to statutory damages insist that the disparate treatment between the two flows from inherent and meaningful differences between them.<sup>122</sup> Notably, the Department of Justice recently filed a brief with the Supreme Court concerning Thomas-Rasset's petition for writ of certiorari arguing that "because *Gore's* due process standard serves purposes unique to the review of a jury's award of punitive damages, it cannot coher[e]ntly be applied to an award of statutory damages under the Copyright Act."<sup>123</sup>

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118. See *supra* notes 98–117 and accompanying text (providing support for an application of the Supreme Court's punitive damages jurisprudence to statutory damages).

119. See *supra* notes 98–117 (discussing the similarities between statutory and punitive damages awards).

120. See *supra* notes 98–117 (noting the similarities between statutory and punitive damages).

121. See Samuelson & Sheffner, *supra* note 20, at 61–62 (discussing the differences between punitive and statutory damages); see generally Tepp, *supra* note 6.

122. See Samuelson & Sheffner, *supra* note 20, at 61–62 (noting the differences between statutory and punitive damages); Tepp, *supra* note 6, at 93 (insisting that "statutory damages are different from the punitive damages at issue in *Gore*, do not raise the policy concerns what were present in *Gore*, that the three-part test does not apply, and that even if that test were applied, the provisions of the Copyright Act would pass muster").

123. Brief for United States in Opposition at \*11, *Capitol Records, Inc. v. Thomas-Rasset*, 133 S. Ct. 1584 (2013) (No. 12-715).

Some scholars insist that the overriding factor leading to a more active standard of review in punitive damage cases is the lack of notice to the defendant regarding the potential punishment.<sup>124</sup> In fact, this proposition finds support in the *Gore* opinion, as the Supreme Court highlighted that people must have notice of both the conduct that may lead to punishment and the severity of that punishment.<sup>125</sup> But because the potential damages that one may incur pursuant to a statutory scheme are explicitly set forth in the statute, statutory damages schemes obviate constitutional concerns for notice.<sup>126</sup> With punitive damages, however, the amount of the award has neither a floor nor a ceiling and only the discretion of the jury serves to limit it, however arbitrarily that discretion is exercised.<sup>127</sup> Thus, people have absolutely no notice of the severity of punishment that they may incur in punitive damages cases.<sup>128</sup> Those who find this distinction persuasive support continued application of the *Williams* standard of review to statutory damages awards.<sup>129</sup>

A corollary to the lack of notice implicit in punitive damage awards is the unbridled discretion of juries to levy whatever amount of damages they consider proper.<sup>130</sup> In *Gore*, Justice Breyer took care to highlight this concern.<sup>131</sup> Relying on previous

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124. See Samuelson & Sheffner, *supra* note 20, at 60 (indicating that the overriding factor for the Supreme Court in *Gore* was the lack of notice to the defendant of the punishment that he incurred).

125. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 599, 574 (1996) (“Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.”).

126. See Samuelson & Sheffner, *supra* note 20, at 60–61 (arguing that the existence of a statute specifically delineating a potential range of damages provides notice).

127. See *id.* (noting that punitive damages awards suffer from constitutional notice concerns).

128. See *id.* (highlighting the notice problems of punitive damages awards).

129. See, e.g., *id.* at 62 (noting that *Gore* should not apply to constitutional review of statutory damages awards).

130. See *infra* notes 127–29 and accompanying text (discussing the seemingly infinite latitude that juries have in assessing punitive damages awards).

131. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 586–87 (1996) (Breyer, J. concurring) (highlighting the fairness concerns and constitutional issues surrounding a lack of standards to prevent juries from levying arbitrary awards).

Supreme Court caselaw, Justice Breyer noted that the Constitution demands “legal standards that provide ‘reasonable constraints’ within which ‘discretion is exercised’” that permit adequate appellate review of the award.<sup>132</sup> Further, Justice Breyer asserted that such legal standards do not require the utmost precision but merely must provide some constraint to prevent “purely arbitrary behavior.”<sup>133</sup> One commentator urged that Justice Breyer’s opinion supports the inference that when legislation imposes “quantitative limits” on the verdict, the verdict merits “a strong presumption of validity.”<sup>134</sup> Such commentators conclude that a range of damages from \$750–\$150,000 sufficiently eradicates any problems of arbitrariness, and thus absolves the statutory damages schemes of constitutional encroachments that punitive damages sometimes cause.<sup>135</sup> Thus, they conclude that the deferential *Williams* standard should apply instead of the *Gore* standard.

Further, it is urged that courts should exhibit the utmost deference to congressional decisions regarding copyright law.<sup>136</sup> In a case regarding intellectual property law, albeit in a different factual context, Justice Ginsburg noted that the Supreme Court “has been . . . deferential to the judgment of Congress in the realm of copyright.”<sup>137</sup> Indeed, because Congress possesses the explicit constitutional competence to legislate in the realm of copyright courts should not readily abrogate Congress’ judgments on such matters for fear of upsetting the structural integrity of the federal government established by the separation of powers.<sup>138</sup> Therefore, they claim, the *Gore* guideposts should not apply to statutory damages awards, especially in the context of copyright.

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(quotations omitted) (citing *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20–21 (1991))).

132. *Id.* at 587.

133. *Id.*

134. See Morrissey, *supra* note 114, at 3090 (suggesting a particular reading of Breyer’s concurrence in *Gore*) (citing *Gore*, 517 U.S. at 586–77, 595).

135. 17 U.S.C. § 540(c)(1) (2012).

136. See Samuelson & Sheffner, *supra* note 20, at 62 (noting that the proper amount of statutory damages available for copyright infringement in cases like *Tenenbaum* and *Thomas-Rasset* “are essentially legislative choices”).

137. *Eldred v. Aschcroft*, 537 U.S. 186, 198 (2003).

138. U.S. CONST. art 1, § 8, cl. 8.

Finally, those who argue against applying the *Gore* guideposts to statutory damages contend that such an approach amounts to an attempt to fit a square peg in a round hole.<sup>139</sup> Therefore, the guideposts offer no workable approach to assessing the constitutionality of these awards anyway.<sup>140</sup> The first guidepost, i.e., the “degree of reprehensibility” of the defendant’s conduct,<sup>141</sup> might have some applicability.<sup>142</sup> After all, one might argue that neither Tenenbaum nor Thomas-Rasset were completely innocent, but they also did not commit the most egregious of all copyright infringement.<sup>143</sup> Ben Sheffner, however, called the utility of this assessment into question because concluding that their conduct falls somewhere in the middle of the reprehensibility spectrum is generally unhelpful.<sup>144</sup>

Further, commentators insist that *Gore*’s second guidepost, the ratio between punitive and actual damages, is impossible to apply to statutory damages.<sup>145</sup> Sheffner noted that in cases like *Tenenbaum* and *Thomas-Rasset* one cannot compare statutory and actual damages because measuring actual damages is impossible or at best difficult.<sup>146</sup> After all, Congress created the right to elect statutory damages for cases in which copyright owners cannot prove actual damages even though an

139. See Samuelson & Sheffner, *supra* note 20, at 61 (“[A]ttempting to impose *Gore*’s rubric for analyzing punitive damages awards on copyright damages involves attempting to pound the proverbial square peg into a round hole.”).

140. See *id.* (noting that two of the guideposts do not analytically fit statutory damages and that although one can be applied, its application offers little to no help anyway).

141. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996).

142. See Samuelson & Sheffner, *supra* note 20, at 61 (conceding that the first guidepost may be applied in an analytically sound way).

143. See *id.* (“We can debate how ‘reprehensible’ infringers like Thomas-Rasset and Tenenbaum are; I agree that they aren’t the worst of the worst.”).

144. See *id.* (“But saying . . . [that Tenenbaum and Thomas-Rasset are] . . . in the mid-range of reprehensibility doesn’t tell us much about where in the statutory range the award should fall . . .”).

145. See *id.* at 61 (noting that the second guide post does not “work at all with copyright statutory damages”); Tepp, *supra* note 6, at 97 (“Application of [the second guidepost] is problematic, at best.”).

146. See Samuelson & Sheffner, *supra* note 20, at 61 (“[I]t is impossible to compare actual to statutory damages because . . . it is difficult or impossible to measure actual damages.”); Tepp, *supra* note 6, at 97 (noting the impossibility of comparing actual damages to statutory damages).

infringement nonetheless occurred.<sup>147</sup> Therefore, applying the second *Gore* guidepost would be unhelpful.<sup>148</sup>

Moreover, the third guidepost, “the civil or criminal penalties that could be imposed for comparable misconduct,” has no relevance.<sup>149</sup> After all, the statutory damages available are precisely “the civil or criminal penalties that could be imposed for comparable misconduct.”<sup>150</sup> Thus, an application of the third guidepost would amount to a comparison of the award levied with the statutory scheme pursuant to which the jury assessed the award.<sup>151</sup> This, they argue, is nonsensical.<sup>152</sup>

#### *D. Gore Supplies the Proper Standard of Review for Statutory Damages in Peer-to-Peer Copyright Infringement Cases*

The due process concerns advanced by advocates for applying *Gore* to statutory damages in peer-to-peer infringement cases, coupled with the reasons against application of that standard set forth by Sheffner and Tepp, led one commentator to conclude that courts should assess the due process implications of these awards under a less deferentially applied *Williams* standard.<sup>153</sup> The remainder of this Note will argue for an application of the *Gore* guideposts to statutory damages in peer-to-peer copyright infringement cases. To this end, this Note will set forth reasons

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147. See Samuelson & Sheffner, *supra* note 20, at 61 (“Indeed, statutory damages exist in part to relieve copyright owners of the burden of proving up actual damages where, as a practical matter, they cannot.” (citing *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 231 (1952))); Tepp, *supra* note 6, at 97 (“[T]he ratio of the harm suffered by the plaintiff to ‘punitive’ damages borders on the farcical where the statute is specifically designed to relieve the plaintiff of having to prove actual harm. It is an analysis that is precluded by the very nature of statutory damages.”).

148. See Samuelson & Sheffner, *supra* note 20, at 61 (concluding that the second guidepost should not apply); Tepp, *supra* note 6, at 97 (same).

149. See Samuelson & Sheffner, *supra* note 20, at 61 (noting that the third guidepost does not “work at all with copyright statutory damages”).

150. *Id.*

151. See *id.* (arguing that the statutory damages pursuant to which the award was levied are the damages with which the award would be compared).

152. See *id.* (noting that attempting this comparison makes no sense).

153. See Morrissey, *supra* note 114, at 3088–104 (presenting arguments against the application of *Gore* to statutory damages and concluding that a more deferential *Williams* standard ought to apply).

that eliminate the concerns advanced by those who maintain that the *Gore* guideposts are analytically inapposite to statutory damages in copyright law.<sup>154</sup>

Those who defend the continued application of *Williams* to the review of statutory damages in peer-to-peer infringement cases place great weight in the Supreme Court's emphasis on notice in reviewing punitive damage awards.<sup>155</sup> Legislation provides constructive notice of the potential penalty for copyright infringement.<sup>156</sup> Therefore, the chief concern underlying *Gore* does not exist.<sup>157</sup>

Admittedly, for *Gore* to apply, a lack of notice regarding the potential liability one might face in peer-to-peer copyright infringement cases must exist.<sup>158</sup> But as much sense as the concept of constructive notice of a statute makes to one who has endured three years of law school, spent countless hours prepping for a bar examination, and engages daily in legal practice, the notion that one can have notice without actually having notice does not resonate well with the nonlawyer.<sup>159</sup> One can argue that the average person, such as Tenenbaum or Thomas-Rasset, may hearken back to the days of taping a copy of a song from the radio

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154. See *infra* notes 158–225 and accompanying text (arguing for an application of the *Gore* guideposts to statutory damages awards in peer-to-peer copyright infringement cases).

155. See Morrissey, *supra* note 114, at 3089 (noting that the notice problems which occur in punitive damages cases do not exist in statutory damages cases); Samuelson & Sheffner, *supra* note 20, at 60 (“While it is true that the statutory range of \$750 to \$150,000 is broad, it is set forth in black and white at 17 U.S.C. § 504, and infringers have, at least, constructive notice of the penalties that may be imposed on them for their bad acts.”); Tepp, *supra* note 6, at 96 (“No serious contention can be made that there is a lack of notice . . .”).

156. See Samuelson & Sheffner, *supra* note 20, at 60 (asserting that infringing defendants have constructive notice of the potential penalties).

157. See *supra* notes 119–52 and accompanying text (offering the reasons set forth by those who do not support applying *Gore* to statutory damages cases).

158. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574–75 (1996) (noting that the three guideposts serve to assess whether BMW received “adequate notice of the magnitude of the sanction”).

159. See *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 908 n.1 (“Many computer users are either ignorant that copyright laws apply to Internet activity, or they simply believe that they will not be caught or prosecuted for their conduct. Also, many infringers do not consider the current copyright infringement penalties a real threat . . .” (quoting H.R. REP. NO. 106-216, at 3 (1999))).

and thus not consider himself on notice that he might incur up to \$150,000 of liability per downloaded song when that song costs less than \$1 to purchase simply because some law exists.<sup>160</sup> Such defendants, however, probably do have notice that they unlawfully downloaded a song worth \$1; they might reason that although some small penalty could theoretically result, it would probably never occur given the minimal cost to download a song.<sup>161</sup>

The Supreme Court established the *Gore* guideposts to reflect precisely this reality.<sup>162</sup> The first two guideposts, reprehensibility and the relationship between actual harm and the award assessed, stem from the commonsense notion that the penalty one might incur should bear some relationship to the nature of the conduct and the damage to the party harmed as a result of that conduct.<sup>163</sup> Further, the third guidepost, which requires a comparison to other civil or criminal damages, provides a third way of alleviating the notice problems surrounding punitive damages.<sup>164</sup> In short, the notice problems presented in punitive damages cases that *Gore* sought to alleviate stem from commonsense sensibilities regarding punishment as it relates to the conduct at issue.<sup>165</sup> Similar concerns of notice emerge in peer-to-peer copyright infringement cases when a teenager or

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160. See Samuelson & Sheffner, *supra* note 20, at 67 (“Constructive notice that a certain penalty may be awarded is, moreover, insufficient to shield awards from due process review.” (citing *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) (finding a due process violation in the application of a forfeiture provision); *Rubinstein v. Adm’rs of the Tulane Educ. Fund*, 218 F.3d 392, 403–09 (5th Cir. 2000) (reducing punitive damage award under equal employment laws even though it was below the statutory maximum))).

161. See H.R. REP. NO. 106-216, at 3 (1999) (noting that although internet users may be aware of the illegal nature of their activity they, they may not consider copyright infringement laws a threat).

162. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) (noting that the guideposts serve to ensure “[e]lementary notions of fairness . . . that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose”).

163. See *id.* (noting that “elementary notions of fairness” informed the adoption and application of the guideposts).

164. See *id.* (highlighting “[e]lementary notions of fairness” as the driving force behind an analysis under the three guideposts).

165. See *id.* (indicating that “[e]lementary notions of fairness” require assessment under the guideposts, implying that popular sentiments of fairness or justice are the constitutional concerns at issue).



homemaker downloads a song to save \$1.<sup>166</sup> Given the symmetry regarding constitutional concerns for notice in instances of punitive damages awards and statutory damages awards for peer-to-peer copyright infringements, the same due process concerns arise.<sup>167</sup> Therefore, a closer analysis of applying the *Gore* guideposts to statutory damages awards in peer-to-peer copyright infringement cases will demonstrate how the guideposts can likewise alleviate these due process problems.<sup>168</sup>

Those who argue against applying *Gore* to statutory damages awards in peer-to-peer copyright infringement insist that statutory damages exist for cases in which actual damages are difficult or impossible to determine.<sup>169</sup> They buttress their position by relying on caselaw holding that statutory damages awards need not have any relationship to actual damages.<sup>170</sup> *Gore*, however, requires taking account of actual damages caused by the defendant's conduct.<sup>171</sup> Therefore, they argue, applying the *Gore* guideposts makes little sense. This reasoning is flawed. First, the legislative history of the Copyright Act does not support their position because it contemplates that a plaintiff need not prove actual damages and thus may rely on the statutorily authorized minimum.<sup>172</sup> This suggests that Congress did not intend for the statutory damages range to provide juries with

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166. See H.R. REP. NO. 106-216, at 3 (1999) (discussing the mindset of the average internet user with respect to copyright law).

167. See *supra* notes 98–118 and accompanying text (discussing the support for applying *Gore* to constitutional review of statutory damages).

168. See *infra* notes 169–225 and accompanying text (arguing that the guideposts provide the proper standard by which to assess the constitutionality of statutory damages awards in peer-to-peer copyright infringement cases).

169. See, e.g., Samuelson & Sheffner, *supra* note 20, at 61 (“[I]t is impossible to compare actual to statutory damages because, as noted above, it is difficult or impossible to *measure* actual damages.”).

170. See, e.g., Morrissey, *supra* note 114, at 3096–97 (“Since Williams, the Supreme Court has held that the constitutionality of a statutory damage award is not to be judged by comparing it to the actual injury suffered.” (citing *St. Louis I. M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919))).

171. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996) (identifying “the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award” as the second guidepost).

172. See H.R. REP. NO. 94-1476, at 161 (1975) (noting that a plaintiff may rely on the statutory minimum instead of attempting to prove actual damages in a copyright infringement suit).

unbridled discretion within that range.<sup>173</sup> Indeed, this language suggests that the statutory minimum should serve as the default award absent hard evidence of greater harm to the contrary.<sup>174</sup> Furthermore, Congress raised the statutory minimum in 1999 to \$750 per infringement to combat illegal file-sharing, implying that they thought the \$750 minimum would rectify the problem.<sup>175</sup> Because proponents of continued application of the *Williams* standard place enormous emphasis on the omnipresent constructive notice that statutes supposedly provide, their inattention to the notice provided in the legislative history is perplexing.<sup>176</sup> If defendants have notice of a statute, then they would likewise have notice of the purposes that Congress articulated for that statute.<sup>177</sup> Defendants illegally downloading songs for \$1 should have notice of damages amounting only to \$750 unless they decide to start counterfeiting those songs and selling them for profit.<sup>178</sup> Thus, levying an exorbitant award of statutory damages against an infringing defendant in the peer-to-peer file-sharing context gives rise to the same constitutional notice concerns as excessive punitive damages awards.<sup>179</sup> To argue otherwise betrays a dubious evasion of the Constitution by way of legal formalism.<sup>180</sup>

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173. See *supra* note 172 and accompanying text (noting the legislative history with respect to statutory damages in the Copyright Act).

174. See *supra* notes 172–73 and accompanying text (highlighting congressional intent with respect to statutory damages in the Copyright Act).

175. See Samuelson & Sheffner, *supra* note 20, at 55 (noting that the minimum award of \$750 is consistent with congressional intent (citing H.R. REP. NO. 106-216, at 2–3 (1999))).

176. See *e.g.*, Tepp, *supra* note 6, at 96 (arguing that statutory notice precludes due process concerns without referencing the legislative history indicating that Congress contemplated an award of the statutory minimum for cases in which a plaintiff does not offer proof of actual harm).

177. See *supra* note 37 and accompanying text (providing the relevant legislative history).

178. See *supra* note 37 and accompanying text (supporting the proposition that absent a showing of actual damages, courts should levy only the statutory minimum).

179. See *supra* notes 158–68 and accompanying text (discussing the notice concerns presented by statutory damages schemes).

180. See *supra* notes 172–79 and accompanying text (discussing the realities of notice concerns in peer-to-peer infringement cases resulting in statutory damages awards without resorting to legal formalism).

One might object, however, to the argument that defendants in peer-to-peer infringement cases only cause less than \$1 of harm to record companies.<sup>181</sup> Such an objector would posit that the defendants in such cases not only downloaded copyrighted works but also distributed them to other users.<sup>182</sup> Therefore, because other file-sharers downloaded the songs from the defendants' share folders, those defendants caused far more than \$1 in harm.<sup>183</sup> This objection, however, stems from a mischaracterization of a defendant's conduct in a peer-to-peer infringement case by implying that the defendant actively took measures to distribute the copyrighted works.<sup>184</sup> An illegally downloaded song gets stored in a "share" folder by default.<sup>185</sup> Files stored in the share folder are available for download to other members of the peer-to-peer network.<sup>186</sup> In other words, when one downloads a song through the peer-to-peer network, the peer-to-peer software automatically makes it available to others on the network without the downloader taking any additional steps.<sup>187</sup> The implication that a defendant in a peer-to-peer infringement case somehow actively harmed a record

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181. See Morrissey, *supra* note 114, at 3097 (“[D]efendants in the RIAA’s copyright infringement suits have not just been sued for downloading songs instead of buying them—they have also been sued for distributing songs illegally.” (citing *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1212–13 (D. Minn. 2008) (noting that Thomas-Rasset was sued for downloading and distributing copyrighted songs)); Samuelson & Sheffner, *supra* note 20, at 60 (“Though it is tempting to say that an infringer who used KaZaA to obtain a song that costs ninety-nine cents on iTunes caused no more than ninety-nine cents in actual damages, such an analysis would be flawed . . . [because it] . . . ignores the distribution or ‘sharing’ engaged in by peer-to-peer users.”).

182. See *supra* note 182 and accompanying text (noting the objection that because peer-to-peer infringers make songs available for download, they cause more than nominal damages).

183. See *supra* notes 182–83 (noting that peer-to-peer downloading causes significant actual damages).

184. See *Petition for Writ of Certiorari*, *supra* note 99, at 6–7 (noting that Thomas-Rasset simply left the music in the default folder in which the peer-to-peer software stores downloaded material).

185. See *id.* (noting that the Kazaa software stores downloaded files in a share folder by default).

186. See *id.* (noting that “other Kazaa users could download” from the share folder).

187. See *supra* notes 185–87 and accompanying text (noting that making a song available in a share folder on a peer-to-peer system requires no conduct subsequent to downloading the file).

company through “distribution” of copyrighted sound recordings predicates the liability of the defendant upon default settings in software that someone else created.<sup>188</sup> This hardly seems sensible, let alone fair.<sup>189</sup>

*E. How to Apply the Gore Guideposts to Statutory Damages Awards in Peer-to-Peer Copyright Infringement Suits*

Because an excessively high award of statutory damages in a peer-to-peer copyright infringement suit presents the same concerns about “[e]lementary notions of fairness enshrined in our constitutional jurisprudence” regarding fair notice,<sup>190</sup> the *Gore* guideposts should apply. In light of the objections raised regarding the analytical feasibility of applying the *Gore* guideposts, the remainder of this Note will address how courts should apply the analytical framework of *Gore* to statutory damages awards in peer-to-peer copyright infringement suits.

*1. Applying the First Guidepost: Reprehensibility of Defendant’s Conduct*

Commentators agree that courts could logically apply the reprehensibility guidepost articulated in *Gore*.<sup>191</sup> Disagreement emerges, however, over the degree of reprehensibility of a defendant’s conduct in a peer-to-peer infringement case.<sup>192</sup> Sheffner argues that such a defendant is not innocent, but

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188. See *supra* notes 184–89 and accompanying text (noting that making a downloaded file available on a peer-to-peer network requires no affirmative action).

189. See Petition for Writ of Certiorari *supra* note 99, at 7–8 (noting that the district court concluded *sua sponte* “that merely making the songs available on a peer-to-peer network, without proof of actual distribution to a third party, was [not] distribution”).

190. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996).

191. See, e.g., Samuelson & Sheffner, *supra* note 20, at 61, 66 (conceding that the first guidepost could apply and highlighting the agreement regarding its application to copyright cases).

192. See *infra* notes 191–202 and accompanying text (noting scholarly disagreement over the applicability of the first *Gore* guidepost).

neither is he terribly egregious.<sup>193</sup> Therefore, the degree of reprehensibility falls somewhere in the middle of the statutory damages scheme.<sup>194</sup> Sheffner asserts that this is unhelpful because concluding that the conduct falls between the extremes does little to help determine precisely where the award should fall within the range.<sup>195</sup> Tepp, another defender of the *Williams* standard, argues that a reprehensibility analysis under *Gore* overlaps with determining whether the infringement amounted to willful infringement.<sup>196</sup> Therefore, “an enhanced award is supported.”<sup>197</sup>

Samuelson agrees that defendants like Tenenbaum and Thomas-Rasset “are far from innocent or inadvertent infringers.”<sup>198</sup> But she notes that such defendants do not reach the degree of reprehensibility of professional counterfeiters who profit from the distribution and sales of unauthorized copies of copyrighted material.<sup>199</sup> Insightfully, she recognizes that Tenenbaum and Thomas-Rasset “were merely young and foolish, not commercial counterfeiters; they merely enjoyed the songs they downloaded and shared, not sold them to others for profit.”<sup>200</sup> Therefore, the reprehensibility of Tenenbaum’s and Thomas-Rasset’s conduct was minimal at best; their conduct did not justify such an exorbitant award.<sup>201</sup>

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193. See Samuelson & Sheffner, *supra* note 20, at 61 (agreeing that Tenenbaum and Thomas-Rasset “aren’t the worst of the worst” in terms of reprehensibility).

194. See *id.* (suggesting that the degree of reprehensibility of the conduct of Tenenbaum and Thomas-Rasset places their damages somewhere between the two extremes in the statutory scheme).

195. See Samuelson & Sheffner, *supra* note 20, at 61 (“But saying, for example, that they’re in the mid-range of reprehensibility doesn’t tell us much about where in the statutory range the award should fall . . .”).

196. See Tepp, *supra* note 6, at 97 (“[T]he reprehensibility of the act prong overlaps with the willful standard for the award of an enhanced level of statutory damages.”).

197. *Id.*

198. Samuelson & Sheffner, *supra* note 20, at 57.

199. See *id.* (noting that the level of reprehensibility was low).

200. *Id.*

201. See *supra* notes 191–200 and accompanying text (noting the disagreement among scholars with respect to the applicability of the reprehensibility guidepost to statutory damages awards in peer-to-peer copyright infringement cases); see also *infra* note 202 and accompanying text

Given the disagreement over the reprehensibility of file-sharing infringement, scholars probably will not reach a consensus in the near future.<sup>202</sup> Here, the important point is that courts can apply the reprehensibility guidepost in an analytically sound way.<sup>203</sup> In response to Sheffner's proposition that a reprehensibility analysis does not yield much in the way of finding the right award within the statutory range, one can assert that the law abounds with malleable standards such as "reasonableness" and "unconscionability" that lawyers litigate over adeptly.<sup>204</sup> Further, because reprehensibility serves to provide a standard in the face of punitive damages, which have no range to begin with, there is no reason why it could not do similar work within a statutory damages scheme.<sup>205</sup> And Tepp's conflation of reprehensibility with willfulness betrays a misunderstanding of the specialized meaning of willfulness that Congress originally intended.<sup>206</sup> In any event, application of the reprehensibility guidepost would at least permit defendants like Tenenbaum and Thomas-Rasset to present arguments in support of an award's unconstitutionality.<sup>207</sup> Because their infringing conduct was "merely young and foolish," they could make a strong case for a low level of reprehensibility.<sup>208</sup> At the very least, due process requires that defendants have the opportunity to make such arguments.<sup>209</sup>

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(same).

202. See *supra* notes 193–201 and accompanying text (discussing the scholarly disagreement over the applicability of the first guidepost).

203. See *infra* notes 205–09 and accompanying text (noting the analytical propriety of applying the first guidepost to statutory damages in peer-to-peer copyright infringement cases).

204. See Samuelson & Sheffner, *supra* note 20, at 61 (concluding that characterizing a defendant's conduct as somewhere in the middle of the statutory damages scheme does not help determine what award to levy).

205. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) (noting the "considerable flexibility" that states have in assessing an award of punitive damages).

206. *Supra* note 46 and accompanying text.

207. See *supra* notes 204–09 and accompanying text (noting that defendants could avail themselves of reasonable arguments regarding a statutory damages award's unconstitutionality).

208. Samuelson & Sheffner, *supra* note 20, at 56.

209. See *supra* notes 204–08 and accompanying text (noting the arguments that one can raise with respect to the due process issue).

### 2. *Applying the Second Guidepost: Ratio of Damages Awarded to Actual Harm Inflicted on Plaintiff*

As discussed previously, some argue that statutory damages exist for cases in which determining actual damages is difficult or impossible.<sup>210</sup> But this Note has argued that in the case of peer-to-peer copyright infringements, defendants harm record companies to the tune of less than \$1 per infringement.<sup>211</sup> In any event, this Note also emphasized that Congress raised the statutory minimum to \$750 with peer-to-peer infringements in mind.<sup>212</sup> An award of a ratio of 750:1 should sufficiently compensate record companies and deter infringers.<sup>213</sup> Absent some extraordinary conduct by a defendant in such a case, courts should not permit an award above the statutory minimum because, as the Supreme Court noted in the context of punitive damages awards, “few awards exceeding a single-digit ratio . . . will satisfy due process.”<sup>214</sup>

### 3. *Applying the Third Guidepost: Sanctions for Comparable Misconduct*

Applying *Gore*'s third guidepost, civil or criminal sanctions for comparable misconduct, presents a greater analytical

210. See, e.g., *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 908 (8th Cir. 2012); see also *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 502 (1st Cir. 2011) (“Section 504’s text reflects Congress’s intent ‘to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits.’” (quoting *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935))); GOLDSTEIN, *supra* note 23, § 14.2 (“The rationale commonly given for statutory damages is that, because actual damages are so often difficult to prove, only the promise of a statutory award will induce copyright owners to invest in and enforce their copyrights and only the threat of a statutory award will deter infringers . . .”).

211. See *supra* notes 184–89 and accompanying text (arguing that peer-to-peer infringers harm record companies in the amount of roughly \$1 per download).

212. See *supra* notes 38–39 and accompanying text (discussing the congressional intent with respect to raising the statutory minimum to \$750).

213. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 410 (2003) (“[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process.”).

214. *Id.*

challenge because “statutory damages *are* the civil . . . penalties that Congress has chosen to impose on copyright infringers.”<sup>215</sup> But this overstates the problem. The application of the third guidepost among the lower courts in the punitive damages context varies.<sup>216</sup> Some lower courts have gone so far as to disregard the third guidepost altogether,<sup>217</sup> while others have insisted that the third guidepost requires determining whether a defendant had notice of the potential liability instead of a mere comparison to some existent statutory range of penalties.<sup>218</sup> Some commentators maintain that the focus of the analysis under the third guidepost should determine whether the legislature carefully “calibrated the statutory damage provisions to achieve just results.”<sup>219</sup>

Further, Samuelson has highlighted that Thomas-Rasset and Tenenbaum may have fared better if instead they had been charged with criminal copyright infringement.<sup>220</sup> In a criminal case, they would have had all of the heightened due process protection in provided by criminal law, the benefit of a more demanding standard of proof, and the available penalty could not have exceeded \$250,000.<sup>221</sup> Considering the exorbitant awards levied in *Tenenbaum* and *Thomas-Rasset* relative to the criminal copyright penalties, one may question whether the civil copyright statutory damages scheme bespeaks a criminal character.<sup>222</sup> In any event, given the liberal application of the third guidepost, and the existence of criminal penalties for similar misconduct, courts could certainly apply the third guidepost in an analytically sound manner.<sup>223</sup>

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215. Samuelson & Sheffner, *supra* note 20, at 61.

216. See Blaine Evanson, Note, *Due Process in Statutory Damages*, 3 GEO. J.L. PUB. POL’Y 601, 612 (2005) (discussing the varying approaches that courts have taken with respect to the third guidepost).

217. See *id.* at 612–13 (discussing cases ignoring the third guidepost).

218. See *id.* (discussing cases taking this approach).

219. Samuelson & Sheffner, *supra* note 20, at 67.

220. See *id.* (“Oddly enough, these defendants would almost have been better off if they had been charged with criminal copyright infringement . . .”).

221. See *id.* (“[T]he proof standard for willful infringement would have been higher and the maximum fine that could be levied was \$250,000 . . .”).

222. See *id.* (noting that the defendants would have been better off had they faced criminal copyright charges).

223. See *supra* notes 215–23 (discussing the third guidepost in relation to



### V. Conclusion

In the final analysis, Tenenbaum and Thomas-Rasset incurred hundreds of thousands of dollars of liability for conduct which most—if not all—current law students engaged in on a daily basis as sixth graders. Admittedly, this does not relieve Tenenbaum, Thomas-Rasset, or anyone else of culpability for unlawful acts. But it certainly does not follow that because one partook in the craze of peer-to-peer music sharing in its early heyday, one should therefore face such magnitudinous penalties that forever bar one from owning a home in which one might one day raise a family. Indeed, this seems to be what *Gore* was all about when the majority opinion invoked “[e]lementary notions of fairness enshrined in our constitutional jurisprudence.”<sup>224</sup> Elementary notions of fairness suggest that awards like those in *Tenenbaum* and *Thomas-Rasset* violate due process. Thomas-Rasset’s petition for writ of certiorari effectively captures this sentiment:

This is not *just*. It is unfair, it is not *due process*, for an industry to sue 12,500 people and threaten to sue 5,000 more, wielding a statute for which they lobbied, under which they can threaten hundreds of thousands or millions of dollars in statutory damages, where the only way to resist is through modern, complex, expensive federal process, so that the only reasonable choice is to pay the settlement and be done. That’s extortion, not law. We cannot govern that way.”<sup>225</sup>

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statutory damages in copyright law).

224. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996).

225. Petition for Writ of Certiorari, *supra* note 99, at 23.