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## Peer-to-Peer File-Sharing, Due Process, and the Judicial Role

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## PEER-TO-PEER FILE-SHARING, DUE PROCESS, AND THE JUDICIAL ROLE

### INTRODUCTION

We know their stories: Joel Tenenbaum, a college student, and Jammie Thomas-Rasset, a young mother, caught in that act now so ubiquitous among young people—unlawful peer-to-peer (P2P) file-sharing.<sup>1</sup> Both are seemingly tales of lone, luckless consumers being crushed by the monolithic record labels whose copyrights they've infringed. One can undoubtedly feel sorry for them. Their lives have been permanently uprooted by a controversy that is far larger than either of them. Popular media have recently taken up their cause and blamed the record companies for their merciless assaults.<sup>2</sup>

Despite the heartstrings so plaintively plucked, there is a reason for their suffering—copyright infringement. Major record labels claim they are suing infringers like Tenenbaum and Thomas-Rasset not in a vindictive swipe at consumers, but as a last-ditch effort to stem the overwhelming tide of infringement facilitated by P2P software.<sup>3</sup> These two cases, *Sony BMG Music Entertainment v. Tenenbaum*<sup>4</sup> and *Capitol Records, Inc. v. Thomas-Rasset*,<sup>5</sup> are the most prominent examples of the record companies' efforts against individual infringers. The issue in these cases that most concerns scholarly, judicial, and popular authorities is the enormous size of the statutory damage

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1. See KATHRYN C. MONTGOMERY, *GENERATION DIGITAL: POLITICS, COMMERCE, AND CHILDHOOD IN THE AGE OF THE INTERNET* 1–2 (2007) (discussing young people's embrace of the internet and illegal music file-sharing).

2. See, e.g., Jeff Leeds, *Labels Win Suit Against Song Sharer*, N.Y. TIMES, Oct. 5, 2007, at C4; Anjali Bhat, *Common Sense Won in the Tenenbaum Decision*, PUB. KNOWLEDGE POL'Y BLOG (July 12, 2010), <http://www.publicknowledge.org/blog/common-sense-prevailed-tenenbaum-decision>; Corynne McSherry, *Judge Cuts Damages in Sony v. Tenenbaum*, ELECTRONIC FRONTIER FOUND. DEEPLINKS BLOG (July 9, 2010), <https://www.eff.org/deeplinks/2010/07/judge-cuts-damages-sony-v-tenenbaum>. But see Thomas Sydnor, *The "Lessigation" of Copyright Scholarship: A Review of Statutory Damages in Copyright Law: A Remedy in Need of Reform (Part I)*, PROGRESS & FREEDOM FOUND. BLOG (July 1, 2009, 4:43 PM), [http://blog.pff.org/archives/2009/07/the\\_lessigation\\_of\\_copyright\\_scholarship\\_a\\_review.html](http://blog.pff.org/archives/2009/07/the_lessigation_of_copyright_scholarship_a_review.html).

3. See *infra* notes 49–59 and accompanying text.

4. 721 F. Supp. 2d 85 (D. Mass. 2010), *aff'd in part, vacated in part, rev'd in part*, 660 F.3d 487 (1st Cir. 2011).

5. 799 F. Supp. 2d 999 (D. Minn. 2011), *vacated*, 692 F.3d 899 (8th Cir. 2012).

awards leveled against the defendants.<sup>6</sup> Despite the fact that these awards were well within the Copyright Act's range for statutory damages,<sup>7</sup> the trial courts in both cases struck down the awards on substantive due process grounds, finding them unconstitutionally excessive.<sup>8</sup> Commentators have likewise railed against the size of the awards, seconding the trial judges' fear that the unfair excessiveness of these awards reached a constitutional magnitude.<sup>9</sup>

The First Circuit, after hearing the appeal in *Tenenbaum*,<sup>10</sup> vacated the trial court's decision to strike down the statutory award on due process grounds.<sup>11</sup> While it did so without reaching the constitutional issues in play,<sup>12</sup> it laid them out in a manner that implied the circuit's views on those issues.<sup>13</sup> The court was not bashful in pointing out that the record companies have legitimate interests to protect in suits like *Tenenbaum*.<sup>14</sup>

This Comment seeks to ground the debate over the excessiveness of the awards in the *Tenenbaum* and *Thomas-Rasset* cases. Taking the dispute out of the theoretical clouds will enable the copyright regime to adapt to future changes in the landscape of content creation and dissemination. Through this analysis, I seek to balance both the concerns of copyright owners in the face of contemporary internet culture and the struggles of that same culture to shuffle off restrictions that inhibit open, free access to creative content.<sup>15</sup>

I will first look back at the purposes of the Copyright Act's statutory damages provision and compare them to the peril faced by record companies in this age of internet dominance. From this analysis, I will show how

6. See, e.g., *Thomas-Rasset*, 799 F. Supp. 2d at 1001; *Tenenbaum*, 721 F. Supp. 2d at 89; 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, 526 (2004); Kate Cross, Comment, *David v. Goliath: How the Record Industry is Winning Substantial Judgments Against Individuals for Illegally Downloading Music*, 42 TEX. TECH L. REV. 1031, 1036 (2010); Greg Sandoval, *A Copyright Ruling No One Can Like*, CNET NEWS (July 13, 2010, 12:08 PM), [http://news.cnet.com/8301-31001\\_3-20010428-261.html](http://news.cnet.com/8301-31001_3-20010428-261.html).

7. See 17 U.S.C. § 504(c) (2006).

8. *Thomas-Rasset*, 799 F. Supp. 2d at 1011; *Tenenbaum*, 721 F. Supp. 2d at 116.

9. See Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 480 (2009); Jeffrey Stavroff, Comment, *Damages in Dissonance: The "Shocking" Penalty for Illegal Music File-Sharing*, 39 CAP. U. L. REV. 659, 662 (2011).

10. *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487 (1st Cir. 2011).

11. *Id.* at 515.

12. See *id.* at 510–11.

13. See *id.* at 512–15.

14. See *id.* at 492.

15. News and forum sites like TorrentFreak are prime examples of groups that spearhead the popular call for fewer limitations on dissemination and reproduction on the internet. See, e.g., Rick Falkvinge, *It's Time to Go on the Offensive for Freedom of Speech*, TORRENTFREAK (Jan. 22, 2012), <http://torrentfreak.com/its-time-to-go-on-the-offensive-for-freedom-of-speech-120122/>.

constitutional smoke-and-mirrors<sup>16</sup> cannot square with the plain truth of the matter: the plaintiff record companies have been damaged by the defendant infringers, and the Copyright Act's statutory damages are crafted to remedy such cases—especially in the P2P infringement context.

The right and the remedy are, of course, different things. I argue here that the right has clearly been violated and the remedy is at least constitutional, though perhaps undesirable. My deference to the Copyright Act's plain language goes only so far as is necessary to uphold core principles of statutory construction and deference to legislative judgment. While I recognize content providers' legitimate interests in copyrights on the internet, I support revision of the current statutory regime to better comport with modern societal and cultural norms.<sup>17</sup> Fundamental conceptions of the internet and its place in contemporary lifestyle call for a keen editing eye.

Part I will lay the groundwork for a more in-depth discussion of the issues involved in *Tenenbaum* and *Thomas-Rasset* by summarizing the development of modern copyright law, particularly statutory damages and their relation to the growth of the internet. Part II will then examine the two cases in detail, showing how and why the trial courts struck down the jury awards. Part III turns to the opinion of the First Circuit in *Tenenbaum*. There I will discuss implications visible in the court's opinion that speak to the constitutional issues in that case. After identifying those implications, I will discuss how the purposes of copyright statutory damages support the First Circuit's approach. I will also address a number of possible criticisms of the First Circuit's reasoning based on modern normative considerations.

While those criticisms raise definite concerns for the future of copyright, they do not undermine the proper disposition of the issues under the current statutory scheme. The proposed criticisms strike well beyond the scope of these two cases and beyond the judiciary's power. Rather, these concerns reflect a need for legislative action. They suggest a reassessment of the copyright regime in light of the new challenges posed by the internet's role as a vehicle for disseminating content.

Ultimately, I applaud the Eighth Circuit, which followed the First Circuit's approach in the appeal of *Thomas-Rasset*.<sup>18</sup> Because of the complicated procedural history in *Thomas-Rasset*, the Eighth Circuit was forced to address the constitutional concerns raised therein. Though the First Circuit did not

16. See generally Colin Morrissey, *Behind the Music: Determining the Relevant Constitutional Standard for Statutory Damages in Copyright Infringement Lawsuits*, 78 FORDHAM L. REV. 3059 (2010) (analyzing the debate over whether the looser *Williams* standard or the stricter *Gore* standard applies to due process review of statutory damage awards under the Copyright Act, and finding that *Williams* is the correct test).

17. See *infra* notes 176–85 and accompanying text.

18. *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899 (8th Cir. 2012).

actually decide the constitutional issues underlying the case, it laid out the appropriate standards. With this persuasive authority at its disposal, the Eighth Circuit upheld the statutory damage award against Thomas-Rasset.<sup>19</sup> The interests of the record companies are viable, and core jurisprudential concerns require that Congress, and not the judiciary, reform the copyright regime to better serve modern norms.

### I. COPYRIGHT AND STATUTORY DAMAGES

At its most fundamental level, copyright protects the public interest in the creation and dissemination of works of art.<sup>20</sup> It does so by providing economic incentives to creators that encourage them to innovate and author new works.<sup>21</sup> These incentives include certain exclusive rights to the use of their works,<sup>22</sup> which authors hold for specified time periods.<sup>23</sup> The Copyright Act enshrines these rights and provides remedies for copyright owners when infringement occurs.<sup>24</sup>

One such protection is the Copyright Act's statutory damages provision.<sup>25</sup> History shows that statutory damages have always been an important part of enforcement of copyrights.<sup>26</sup> They serve critical compensatory and punitive functions in contexts where actual damages cannot reliably serve those

19. *Id.* at 907.

20. See *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 543–44 (2d Cir. 1964); C. T. Drechsler, Annotation, *Extent of Doctrine of "Fair Use" Under Federal Copyright Act*, 23 A.L.R. 3d 139, 168–69 (1969); see also Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537, 2569 (2009) (noting that the fair use doctrine promotes "the ongoing progress of authorship and knowledge creation," which is a fundamental purpose of copyright law).

21. Jonathan Ingram, *Protecting Hospital Ratings with Copyright Law*, 31 *J. LEGAL MED.* 217, 221 (2010) ("The principal theory behind copyright protection is one of incentive: by protecting a work, an incentive to create is fostered, which increases public access to useful knowledge.").

22. See 17 U.S.C. §§ 106, 106A (2006).

23. See 17 U.S.C. § 302. This provision applies only to works created on or after January 1, 1978. *Id.* There are other provisions regarding works created before that date and other special cases. See 17 U.S.C. §§ 301, 303–305.

24. See 17 U.S.C. §§ 501–513.

25. 17 U.S.C. § 504(c).

26. Thomas W. Kirby, *Copyright Statutory Damages and Due Process Excessiveness: Why Gore and State Farm Punitive Damages Principles Do Not Apply*, *LANDSLIDE*, Jan.–Feb. 2011, at 38, 40. The 1796 and 1909 Acts also contained statutory damages provisions. United States of America's Memorandum in Defense of the Constitutionality of the Statutory Damages Provision of the Copyright Act, 17 U.S.C. § 504(c) at 4, *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008) (No. 06-cv-1497). Though the amount of damages due under the Act changed over time, the notion of statutory damages as a method of redressing injury was never seriously questioned. See *id.* at 3–5 (discussing persistence of and changes to the Copyright Act's statutory damages provision over time).

functions<sup>27</sup>—namely, in the P2P context.<sup>28</sup> Statutory damages are particularly apposite to file-sharing because they are meant to obviate the need for pleading and proving compensatory damages, which can be difficult or impossible to discover.<sup>29</sup> Once a plaintiff chooses to forgo compensatory damages and seek statutory penalties,<sup>30</sup> the amount of actual damages becomes irrelevant.<sup>31</sup>

Congress has provided increased protection for copyright holders in light of the growth of the internet.<sup>32</sup> The ease with which one may access and illegally reproduce copyrighted works via the internet is astounding.<sup>33</sup> As the technology facilitating infringement becomes more popular among casual internet users, the potential growth of this method of infringement reaches alarming proportions.<sup>34</sup>

27. Ben Sheffner, *Due Process Limits on Statutory Civil Damages? Unprecedented Ruling in Copyright Case a Double-Edged Sword for Businesses*, WASH. LEGAL FOUND. LEGAL BACKGROUNDER, Aug. 6, 2010, at 1, 1–2; see also Daniel R. LeCours, *Steering Clear of the “Road to Nowhere”: Why the BMW Guideposts Should Not Be Used to Review Statutory Penalty Awards*, 63 RUTGERS L. REV. 327, 345–46 (2010) (stating that statutory penalty schemes both deter unlawful conduct and compensate those harmed).

28. See H.R. REP. NO. 106-216, at 3 (1999) (discussing the purposes of the Copyright Damages Improvement Act of 1999, which include the need for stronger statutory penalties to combat infringement facilitated by advanced technologies, including computer software and internet applications). *But cf.* Lyombe Eko, *American Exceptionalism, the French Exception, Intellectual Property Law, and Peer-to-Peer File Sharing on the Internet*, 10 J. MARSHALL REV. INTEL. PROP. L. 95, 149–152 (2010) (comparing French and U.S. copyright regimes, finding that they both dislike P2P file-sharing infringement but pursue different methods of enforcing prohibitions against it).

29. Peter Thea, Note, *Statutory Damages for the Multiple Infringement of a Copyrighted Work: A Doctrine Whose Time Has Come, Again*, 6 CARDOZO ARTS & ENT. L.J. 463, 465–66 n.7 (1988).

30. *Id.*

31. See Kevin M. Lemley, *Eliminating Value of Infringement: An Economic Analysis of Internal Transactions and Indirect External Transactions in Software Infringement Cases*, 45 IDEA 425, 427 (2005). However, it should be noted that here the actual damages would likely be large. See *infra* note 189 and accompanying text.

32. See Digital Millennium Copyright Act (DMCA), Pub. L. No. 105–304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.); see also *In re Charter Commc’ns., Inc.*, Subpoena Enforcement Matter, 393 F.3d 771, 773 (8th Cir. 2005) (noting that the DMCA was enacted in response to the rise of copyright infringement via P2P software).

33. See Jay Dougherty et al., *Make It Available at Your Own Risk: A Look into Copyright Infringement by Digital Distribution*, 30 LOY. L.A. ENT. L. REV. 1, 4–5 (2009) (pointing out that millions of P2P downloads occur each week); William Henslee, *Money for Nothing and Music for Free? Why the RIAA Should Continue to Sue Illegal File-Sharers*, 9 J. MARSHALL REV. INTEL. PROP. L. 1, 13 (2009) (noting that P2P systems make downloads faster and more widely available).

34. See *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 923 (2005) (finding that “the probable scope of copyright infringement is staggering” in light of the widespread and growing use of P2P software); 63 AM. JUR. PROOF OF FACTS 3d § 1 (2001) (“While the basic human desire to get something for nothing, or nearly so, hasn’t changed in the

Responding to these concerns, in 1999 Congress increased the statutory penalty ranges and increased damages for both “willful” and “non-willful” infringers.<sup>35</sup> However, much scholarly work has focused on the detrimental effects of huge statutory penalties for P2P copyright infringement, claiming they are unfair, excessive, and in contravention to the purposes of the Copyright Act.<sup>36</sup> They often argue that the penalties’ excessiveness renders them unconstitutional.<sup>37</sup> Typically, commentators apply the “guideposts” for reviewing punitive damages awards enunciated in *BMW of North America, Inc. v. Gore*.<sup>38</sup> There, an automobile purchaser sued BMW, its American distributor, and the dealership for failure to disclose that the car he purchased had been repainted prior to sale.<sup>39</sup> The Supreme Court found that punitive damages of \$4,000,000 violated substantive due process in the face of compensatory damages of only \$4,000.<sup>40</sup> In the context of punitive damages, the Court reasoned that “[e]lementary notions of fairness . . . 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.”<sup>41</sup>

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two decades of the personal computer, the Internet has altered the technological landscape, by making it possible for large numbers of users located almost anywhere to copy the same file at virtually the same time, with a high degree of reliability.”).

35. See Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106–160, 113 Stat. 1774.

36. See, e.g., Alan E. Garfield, *Calibrating Copyright Statutory Damages to Promote Speech*, 38 FLA. ST. U. L. REV. 1, 52–53 (2010) (arguing that statutory damages, with wide and unpredictable ranges, “chill[]” speech, and should be reworked toward a more compensatory-centered remedial regime that promotes free speech); Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 39 (2010) (concluding that the current copyright system does not uphold the values of creation and dissemination it purports to support since it gives too much power to “intermediaries” who limit the rights of both creator and readers for their economic gain); Samuelson & Wheatland, *supra* note 9, at 509 (arguing that the compensatory, punitive, and deterrent purposes of statutory penalties do not comport with the current P2P cases, which often give arbitrary, inconsistent, unprincipled, and grossly excessive awards to plaintiffs).

37. See, e.g., Samuelson & Wheatland, *supra* note 9, at 487–88.

38. 517 U.S. 559, 574–75 (1996) (“Three guideposts, each of which indicates that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose for adhering to the nondisclosure policy adopted in 1983, lead us to the conclusion that the \$2 million award against BMW is grossly excessive: the degree of reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases.”).

39. *Id.* at 563 & n.2.

40. *Id.* at 565, 585–86.

41. *Id.* at 574.

The inapplicability of this case's standard is discussed elsewhere,<sup>42</sup> and will be discussed in this Comment in the context of the *Tenenbaum* and *Thomas-Rasset* cases,<sup>43</sup> but here I will note that the standard from *St. Louis, Iron Mountain & Southern Railway Co. v. Williams* is the correct one.<sup>44</sup> In *Williams*, the Court squarely addressed the issue of statutory damages when two sisters obtained statutory penalties of seventy-five dollars against a rail company that overcharged them by sixty-six cents for their tickets.<sup>45</sup> It enunciated a highly deferential standard that judged due process reasonableness not by relation to actual damages (which "of course seem[ed] large" on the facts of that case), but by "due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to [the law]."<sup>46</sup> These factors provide legislators with wide discretion to set statutory penalty rates.<sup>47</sup> They are particularly apposite in the P2P context where the move toward mainstream use creates "numberless opportunities" for infringement.<sup>48</sup>

Despite Congress's foresight, the protections afforded under the current Copyright Act statutory damages regime are cold comfort to major record companies like those involved in *Tenenbaum* and *Thomas-Rasset*. Their revenues have been catastrophically damaged by the growth of P2P file-sharing.<sup>49</sup> Since illegally obtained copies of sound recordings are easy substitutes for the traditional purchase of identical copies (whether online or in compact disc form), record companies have alleged huge losses in record sales.<sup>50</sup> The recording industry estimates its losses from P2P file-sharing in the

42. See, e.g., *Capitol Records, Inc. v. Thomas-Rasset*, 799 F. Supp. 2d 999, 1005–06 (D. Minn. 2011), *vacated*, 692 F.3d 899 (8th Cir. 2012); LeCours, *supra* note 27, at 357–58; Morrissey, *supra* note 16, at 3094; Sheffner, *supra* note 27, at 2–3.

43. See *infra* notes 74–83, 90–92 and accompanying text.

44. *St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63, 66–67 (1919) (Statutory penalties are only violative of due process where the penalty is "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.").

45. *Id.* at 64.

46. *Id.* at 67.

47. See *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 512 (1st Cir. 2011); see also *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989) (noting that *Williams* applies to awards "made pursuant to a statutory scheme"); *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 587 (6th Cir. 2007) (finding the *Williams* standard "extraordinarily deferential").

48. See *infra* note 94. However, the move toward mainstream infringement may in fact cause infringing P2P software applications to undermine themselves in the interests of convenience and speed. See *infra* note 187.

49. See Dougherty et al., *supra* note 33, at 4.

50. Stan J. Liebowitz, *File-Sharing: Creative Destruction or Just Plain Destruction?*, 49 J.L. & ECON. 1, 24 (2006). Liebowitz finds the correlation between declining sales and file-sharing piracy "[c]ommon sense." See *id.* ("When given the choice of free and convenient high-quality



billions of dollars, accruing from a twenty-five percent decrease in record sales.<sup>51</sup> This harm can only increase as P2P applications become more popular among internet users. The trend, moreover, is expected to and has begun spreading to other popular media industries such as film and television.<sup>52</sup>

Before resorting to suits directly against individual infringers, the major record companies attempted to attack and dismantle the P2P applications themselves.<sup>53</sup> First, the United States Court of Appeals for the Ninth Circuit held that the popular P2P application Napster could likely be found liable under the theories of contributory infringement and vicarious liability.<sup>54</sup> The record companies next attacked Grokster, a successor program that operated very similarly.<sup>55</sup> Thus, the P2P applications that facilitated individual users' infringement could not escape their clear violations of the record companies'

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copies versus purchased originals, is it really a surprise that a significant number of individuals will choose to substitute the free copy for the purchase?").

51. Sanjay Goel et al., *The Impact of Illegal Peer-to-Peer File Sharing on the Media Industry*, CAL. MGMT. REV., Spring 2010, at 6, 6. An important caveat to these figures is that they often come from studies funded by the media industry itself and thus must be viewed critically to assess their reliability. See Julian Sanchez, *How Copyright Industries Con Congress*, CATO INST. (Jan. 3, 2012, 3:07 PM), <http://www.cato-at-liberty.org/how-copyright-industries-con-congress/>.

52. Goel et al., *supra* note 51, at 6.

53. Heather N. Kjos, Note, *The Statutory Damages Regime of Copyright Law: The Non-Commercial User and Capitol Records, Inc. v. Thomas-Rasset*, 1 CYBARIS 174, 185 (2010).

54. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1022, 1024 (9th Cir. 2001). In *Napster*, end users of the Napster program directly infringed on the plaintiffs' copyrights by unlawfully reproducing copies of sound recordings located on other users' computers. *Id.* at 1013–14. The Ninth Circuit found that Napster, by providing the means for direct infringement, "knowingly encourage[d] and assist[ed] the infringement of plaintiffs' copyrights" and thus likely was contributorily liable. *Id.* at 1020, 1022. The court further concluded that Napster likely was vicariously liable because of its "failure to police the system's 'premises,' combined with a showing that Napster financially benefit[ed] from the continuing availability of infringing files on its system." *Id.* at 1024. In rejecting Napster's contention that its service constituted fair use, the court made observations about the dangers of P2P infringement that accord with the First Circuit's findings in *Tenenbaum*. It concluded that Napster had a "deleterious effect" on the current and potential legitimate digital download market, which the record companies had the right to explore. *Id.* at 1017.

55. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005). Whereas in *Napster*, the P2P application used a centralized list referring users to copyrighted works on others' computers, Grokster attempted to avoid liability by maintaining a decentralized system that simply gave users access to works stored on other users' computers. *Id.* at 919–20. The Court rejected this method of dodging liability, reasoning that since Grokster encouraged users to employ its service for infringing purposes, it could be liable under the "inducement rule." *Id.* at 941. The "inducement rule" adopted by the Court finds secondary liability where one "distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement." *Id.* at 936–37.

rights. The companies' work went unrewarded, however, since new applications constantly appear when the old are shut down.<sup>56</sup>

Beyond litigation against software companies, the recording industry attempted to educate the American public about the seriousness of infringement via P2P applications, cautioning that the practice was both illegal and subject to enormous penalties.<sup>57</sup> Still, their losses increased and their warnings went unheeded.<sup>58</sup> To continue their fight to uphold their rights and economic viability, the companies chose a treacherous course: suits directly against individual infringers.<sup>59</sup>

## II. LOOKING OUT FOR THE SMALL GUYS: SUBSTANTIVE DUE PROCESS IN *TENENBAUM AND THOMAS-RASSET*

The stage was thus set for *Tenenbaum* and *Thomas-Rasset*. The trial courts in both cases struck down huge jury awards of statutory damages on substantive due process grounds.<sup>60</sup> A brief analysis of the history and reasoning behind the trial courts' opinions will prepare the discussion of the First Circuit's *Tenenbaum* opinion.

### A. Sony BMG Music Entertainment v. Tenenbaum

Joel Tenenbaum infringed thousands of copyrights through P2P applications like Napster and Kazaa.<sup>61</sup> His infringement was like most others in the P2P context—he illegally downloaded copyrighted sound recordings by accessing other users' digital copies of the works.<sup>62</sup> He then placed these recordings in his "shared" folder in the application, which facilitated others' copying of those works.<sup>63</sup>

56. Sony BMG Music Entm't v. Tenenbaum, 660 F.3d 487, 492 (1st Cir. 2011); see also David W. Opperbeck, *Peer-to-Peer Networks, Technological Evolution, and Intellectual Property Reverse Private Attorney General Litigation*, 20 BERKELEY TECH. L.J. 1685, 1700–01 (2005) (noting that users migrated to new platforms for P2P file-sharing after *Napster* and *Grokster*); Hiawatha Bray, *Little-Used Corner of Net Becomes Piracy Battlefield*, BOS. GLOBE, Mar. 9, 2006, at D1 (discussing Usenet sites as growing alternatives to traditional P2P applications).

57. *Tenenbaum*, 660 F.3d at 492; see also Kjos, *supra* note 53, at 185 (noting that the record companies launched an advertising campaign to battle P2P file-sharing).

58. *Tenenbaum*, 660 F.3d at 492.

59. John Eric Seay, Note, "Hang 'Em High": Will the Recording Industry Association of America's New Plan to Posse Up with Internet Service Providers in the Fight Against Online Music Piracy Finally Tame the Wild Internet?, 16 J. INTELL. PROP. L. 269, 270 (2009).

60. Capitol Records, Inc. v. Thomas-Rasset, 799 F. Supp. 2d 999, 1011 (D. Minn. 2011), *vacated*, 692 F.3d 899 (8th Cir. 2012); Sony BMG Music Entm't v. Tenenbaum, 721 F. Supp. 2d 85, 116 (D. Mass. 2010), *aff'd in part, vacated in part, rev'd in part*, 660 F.3d 487 (1st Cir. 2011).

61. *Tenenbaum*, 721 F. Supp. 2d at 90.

62. *Id.*

63. *Id.*

Tenenbaum failed to stop this infringement even when warned by Sony and other companies that suit would follow without cessation.<sup>64</sup> After this stern warning and Tenenbaum's persistent pattern of infringement, those companies filed suit.<sup>65</sup> Though Tenenbaum had literally thousands of copyrighted works stored on his computer and in his shared folder, the companies alleged copyright infringement for only thirty recordings.<sup>66</sup> At trial, a jury found that Tenenbaum was liable for willful infringement under the Copyright Act.<sup>67</sup> The jury then proceeded to award statutory damages to the plaintiffs of \$675,000, or \$22,500 per recording.<sup>68</sup>

Appalled by the great size of the award, Judge Gertner filed a lengthy opinion that struck down the award as unconstitutionally excessive.<sup>69</sup> She did so without first resorting to the common-law mechanism of remittitur,<sup>70</sup> which allows the judge to reduce a jury award and then offer that reduced amount to the plaintiff, who may either accept it or reject it and be given a new trial.<sup>71</sup> Contrary to the established judicial practice of constitutional avoidance,<sup>72</sup> she reasoned that the constitutional due process question had to be addressed prior to remittitur, since remittitur would be ineffective in this case.<sup>73</sup>

After summarily rejecting the necessity of remittitur, Judge Gertner turned to the issue of substantive due process. She first had to determine the standard to be applied when reviewing a jury award of statutory damages.<sup>74</sup> The possibilities she considered included the standards enunciated in *St. Louis, Iron Mountain & Southern Railway Co. v. Williams* and *BMW of North America, Inc. v. Gore*.<sup>75</sup> Here again, Judge Gertner ruled against the clear mandate of the law.<sup>76</sup> *Williams* spoke directly to the issue of substantive due-process review of

64. *Id.* at 90–91.

65. *Id.* at 91.

66. *Tenenbaum*, 721 F. Supp. 2d. at 90–91.

67. *Id.* at 91.

68. *Id.*

69. *See id.* at 116.

70. *Id.* at 93–94.

71. *See* David Fink, Best v. Taylor Machine Works, *the Remittitur Doctrine, and the Implications for Tort Reform*, 94 NW. U. L. REV. 227, 227 (1999); 58 AM. JUR. 2d *New Trial* § 451 (2002).

72. *See generally* Clark v. Martinez, 543 U.S. 371, 380–381 (2005) (defining the doctrine of constitutional avoidance); *see also* 33 CHARLES ALAN WRIGHT & CHARLES H. KOCH, JR., FEDERAL PRACTICE AND PROCEDURE § 8363 (2006) (stating that avoiding constitutional questions is a well-established judicial practice).

73. *Tenenbaum*, 721 F. Supp. 2d at 93–94. Judge Gertner notes in the opinion's introduction that "[t]he plaintiffs in this case . . . made it abundantly clear that they were, to put it mildly, going for broke," and thus likely would not accept a remitted award. *Id.* at 88.

74. *Id.* at 95.

75. *Id.* at 95–100.

76. *See infra* Part III.C.

statutory damage awards,<sup>77</sup> while *Gore* was concerned with similar review in the punitive damages context.<sup>78</sup> Nevertheless, Judge Gertner found that the *Gore* standard was appropriate for this case, since the due process concerns it expressed were important in both statutory and punitive damages contexts.<sup>79</sup> She further found that statutory damages should bear some reasonable relation to actual damages.<sup>80</sup>

Applying the three *Gore* “guideposts” to the facts of the case, Gertner concluded that the jury award against Tenenbaum was “grossly excessive” and unconstitutional.<sup>81</sup> She then lowered the award to \$67,500, or \$2,250 per song.<sup>82</sup> This per-song amount was three times the statutory minimum, a calculation Judge Gertner based on the ancient practice of treble damages in punitive damage awards.<sup>83</sup>

#### B. Capitol Records, Inc. v. Thomas-Rasset

Jammie Thomas-Rasset also used Kazaa to illegally download music to her computer and then share those files with others.<sup>84</sup> She was sued by record companies for the infringement of twenty-four songs.<sup>85</sup> In the first case, a jury found willful infringement.<sup>86</sup> That jury, and another after, returned large statutory damages awards against her.<sup>87</sup> Judge Davis remitted the second

77. See *St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63, 63–65 (1919).

78. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562–63 (1996).

79. See *Tenenbaum*, 721 F. Supp. 2d at 102–03.

80. *Id.* at 103.

81. *Id.* at 121. Judge Gertner assessed the three guideposts separately. See *id.* at 103–16 (finding that Tenenbaum, though his conduct could be considered reprehensible, was still within the class of relatively harmless file-sharing offenders, that Congress likely did not anticipate this kind of infringement when increasing statutory penalties through the DMCA, and that “[w]hile file-sharing may be very economically damaging to the plaintiffs in the aggregate, Tenenbaum’s individual contribution to this total harm was likely minimal”).

82. *Id.* at 89.

83. See *Tenenbaum*, 721 F. Supp. 2d. at 117 (“Of course, 17 U.S.C. § 504(c) does not, by its own terms, limit the statutory damages available in cases such as Tenenbaum’s to three times the statutory minimum. However, capping the statutory damages range at \$2,250 in this case serves the objectives of compensating the plaintiffs and deterring illegal file-sharing while at the same time ensuring that the total award is not grossly excessive.”). But see Sheffner, *supra* note 27, at 3–4 (discussing Judge Gertner’s illogical application of treble damages).

84. *Capitol Records, Inc. v. Thomas-Rasset*, 799 F. Supp. 2d 999, 1002 (D. Minn. 2011), *vacated*, 692 F.3d 899 (8th Cir. 2012).

85. *Id.*

86. *Id.*

87. *Id.* (awarding a total damages award of \$222,000 in the first case and \$1,920,000 in the second case). Judge Davis did not remit after the first award because he found an error in jury instructions regarding the definition of “distribution” that warranted a new trial. See *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1226–27 (D. Minn. 2008).

award, and the plaintiffs rejected the remittitur.<sup>88</sup> At the third trial, which was limited to damages, the jury found statutory damages of \$1,500,000, or \$62,500 per song.<sup>89</sup>

When ruling on Thomas-Rasset's subsequent motion to alter or amend the judgment, unlike Judge Gertner, Judge Davis rejected the *Gore* guideposts.<sup>90</sup> He instead concluded that the *Williams* standard was clearly the most appropriate to copyright statutory damage awards.<sup>91</sup> Though he found the *Williams* standard applicable, he interestingly cited a punitive damages case to support his eventual lowering of the jury award.<sup>92</sup>

Judge Davis then applied the *Williams* standard to the case. He concluded that the award was unconstitutionally excessive even under that deferential standard.<sup>93</sup> He acknowledged some of the primary reasons advanced by both the record companies and the United States in support of the statutory award. First, he recognized that anonymous online infringers need to be deterred.<sup>94</sup> He also recognized that P2P file-sharing creates huge potential damages for record labels, not merely the loss of one consumer's purchase.<sup>95</sup> He further observed that record companies can hardly protect the value of their copyrights in the face of free music sharing.<sup>96</sup>

Though Judge Davis chose the appropriate standard for reviewing the jury award,<sup>97</sup> he still made a number of questionable contentions. For example, he

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88. *Thomas-Rasset*, 799 F. Supp. 2d at 1002–03.

89. *Id.* at 1003.

90. *Id.* at 1005. Judge Davis found that statutory damages, while punitive, are also compensatory. *See id.* He further noted that the notice concerns that underlay the *Gore* punitive-damages jurisprudence are simply inapplicable to statutory awards where the amount of liability is spelled out in the statute. *Id.* Finally, he pointed out that the *Gore* guideposts themselves “cannot be logically applied” to statutory awards. *Id.*

91. *Id.* at 1006.

92. *Id.* at 1011 (citing *Leatherman Tool Grp., Inc. v. Cooper Indus., Inc.*, 285 F.3d 1146, 1152 (9th Cir. 2002)).

93. *Thomas-Rasset*, 799 F. Supp. 2d at 1011.

94. *Id.* at 1010 (“Due to the nature of peer-to-peer networks, such as Kazaa, there are numberless opportunities for Thomas-Rasset—and other individuals—to commit infringement of copyrighted sound recordings. It is easy, costless, and quick to infringe online. There are millions of users seeking to download and distribute sound recordings. There are countless sound recordings and other copyrighted material to be infringed. Kazaa was capable of allowing the sharing of hundreds of millions of files at a time. At the time that MediaSentry interacted with Thomas-Rasset on Kazaa, there were more than 2 million users online sharing more than 800 million files. Thomas-Rasset, herself, compiled almost 2,000 songs in her Kazaa shared folder. Because of the design of peer-to-peer networks, such as Kazaa, copyright holders face formidable challenges in identifying and stopping infringers.”).

95. *Id.* at 1008 (“[O]nline piracy has cost the recording industry billions of dollars and has threatened its viability.”).

96. *See id.* at 1008–1009.

97. *See supra* notes 44–48 and accompanying text.

cited only a single district court opinion to support the “necessary” relationship between statutory and compensatory damages.<sup>98</sup> This assertion is quite unconvincing in light of the purposes of statutory damages, which, as discussed above, clearly obviate the need for a relationship between statutory and actual damages.<sup>99</sup> Judge Davis also followed Judge Gertner’s mistake of applying the concept of treble damages to the jury award.<sup>100</sup> Citing his rationale from a January 2010 order, which justified a cap on awards at three times the statutory minimum,<sup>101</sup> Davis lowered the \$1,500,000 statutory damages award to \$54,000, or \$2,250 per song.<sup>102</sup>

### III. LOOKING OUT FOR THE BIG GUYS: THE FIRST CIRCUIT AND *TENENBAUM*

Having discussed the reasoning of the trial court in *Tenenbaum*, I will now turn to the First Circuit’s disposition of the appeal of that case. After reporting its findings and responses to Tenenbaum’s claims on appeal, I discuss how legislative history, caselaw, and modern circumstances support its implied views on the substantive due process issues decided by Judge Gertner. Finally, I address a number of potential criticisms of its reasoning and the broader implications of its opinion. These critiques acknowledge the state of the law as

98. *Thomas-Rasset*, 799 F. Supp. 2d at 1008 (“However, because statutory damages have, in part, a compensatory purpose, ‘assessed statutory damages should bear some relation to the actual damages suffered.’” (quoting *Bly v. Banbury Books, Inc.*, 638 F. Supp. 983, 987 (E.D. Pa.1986))). This illogical move is even more surprising in light of Judge Davis’s repeated concession that statutory damages by nature require no relation to actual damages. *Thomas-Rasset*, 799 F. Supp. 2d at 1006 (“Congress expressly rejected the idea that a statutory damages award should bear some specific ratio to the actual harm suffered by the plaintiff . . .”); *see also id.* at 1007 (noting that neither the Constitution nor the Court requires a “strict proportionality” between harm suffered and statutory award). Perhaps Judge Davis was attempting to distinguish “strict” from “some” relation. The Court has not endorsed such a nuanced approach. The Eighth Circuit recognized Judge Davis’s fallacious reasoning in its opinion:

The district court similarly concluded that “statutory damages must still bear *some* relation to actual damages.” The Supreme Court in *Williams*, however, disagreed that the constitutional inquiry calls for a comparison of an award of statutory damages to actual damages caused by the violation.

*Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 909 (8th Cir. 2012).

99. *See supra* notes 25–31 and accompanying text; *see also* *Lowry’s Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 459 (D. Md. 2004) (stating that there has never been a requirement that statutory damages and actual damages be strictly related because statutory damages are an alternative to actual damages).

100. *See Thomas-Rasset*, 799 F. Supp. 2d at 1013.

101. *Capitol Records Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045, 1056–57 (D. Minn. 2010).

102. *Thomas-Rasset*, 799 F. Supp. 2d at 1012. Judge Davis failed to see that the trebling method increases, not decreases, awards. The court also failed to justify why the \$750 minimum award is the appropriate starting place from which to treble damages. *See Sheffner, supra* note 27, at 3–4 (pointing out the same illogical approach applied by Judge Gertner in *Tenenbaum*).

it stands today. Indeed, I believe it is rare that a statute is so out of touch with the interests of justice that a judicial foray is required to correct the discrepancy.<sup>103</sup> Such is not the case here.<sup>104</sup> Rather, on balance, modern cultural norms call for a congressional revision of the copyright regime in light of the new and expanding internet culture.<sup>105</sup>

#### A. *What It Did*

After hearing the appeal in *Tenenbaum*, the First Circuit rejected Judge Gertner's opinion. First, the court implicitly overturned the application of the *Gore* guideposts for substantive due process analysis in statutory damages.<sup>106</sup> The First Circuit implicitly found the *Gore* guideposts inapplicable because actual damages, an important part of the *Gore* analysis, are difficult or impossible to calculate in the P2P context.<sup>107</sup> Moreover, the fundamental

103. It is a common refrain in constitutional law that courts must only apply the law as given to them by Congress, not rewrite it to conform to their notions of what an appropriate result should be. *See, e.g.,* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 500 (1984) (Blackmun, J., dissenting) (“[I]n the absence of a congressional solution, courts cannot avoid difficult problems by refusing to apply the law. We must ‘take the Copyright Act . . . as we find it’ . . . .” (quoting *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 401–02 (1968))); *Owner-Operator Indep. Drivers Ass’n, Inc. v. Supervalu, Inc.*, 651 F.3d 857, 863 (8th Cir. 2011) (“Where the plain meaning of a statute is clear, we are not free to replace it with an unenacted legislative intent.” (quoting *Owner-Operator Indep. Drivers Ass’n v. United Van Lines, LLC*, 556 F.3d 690, 693 (8th Cir. 2009)) (internal quotation marks omitted)); *DGR Assocs., Inc. v. United States*, 94 Fed. Cl. 189, 194 (Fed. Cl. 2010) (“If Congress intended something different from what it stated, Congress alone must enact an appropriate amendment, as this Court can only apply the laws as written.” (citing *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992))).

104. The Copyright Act has often been found to be clear. *See, e.g.,* *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989) (noting that Congress’s primary goal in crafting the 1976 Act was to “enhanc[e] predictability and certainty”); Robert Meitus, Note, *Interpreting the Copyright Act’s Section 201(c) Revision Privilege with Respect to Electronic Media*, 52 FED. COMM. L.J. 749, 753–54 (2000) (concluding that the 1909 Act “lacked clarity and coherence,” in contrast to the 1976 Act, which was a product of “comprehensive hearings and reports” over a twenty-year span). *But see* Viva R. Moffat, *Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking*, 41 U.C. DAVIS L. REV. 45, 88 n.185 (2007) (arguing that the 1976 Act lacks clarity in a variety of areas). This clarity stands in marked contrast to other federal statutes that are notorious for being convoluted. *See, e.g.,* *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (finding the Bankruptcy Code “awkward, and even ungrammatical”).

105. *See infra* notes 181–85 and accompanying text.

106. *See* Sony BMG Music Entm’t v. Tenenbaum, 660 F.3d 487, 508–09 (1st Cir. 2011) (discussing both the *Williams* and *Gore* standards and noting the significant differences between the punitive damages and statutory damages contexts). The court’s language, ostensibly leaving this constitutional question undecided, undoubtedly points to the *Williams* standard. *See id.* at 509, 512 (noting that *Gore* addresses a “related but distinct” issue and explicitly noting the United States’s position that “an inferior federal court may not displace [*Williams*’s] on point holding”).

107. *See id.* at 502.

concern with fair notice motivating the *Gore* analysis is simply nonexistent in the statutory damages context.<sup>108</sup>

The court also dedicated significant discussion to rejecting Tenenbaum's contention that his status as a "consumer-copier" infringer necessitated a lower award because he did not make commercial gain from his infringement like a "publisher-copier" would.<sup>109</sup> Though he argued that such staggering awards did not comport with congressional intent, the court dismissed Tenenbaum's conclusion as contrary to the plain language and clear meaning of the Copyright Act.<sup>110</sup>

To actually dispose of the appeal, however, the court did not definitively reach the constitutional due process issues.<sup>111</sup> Instead, it vacated Judge Gertner's application of substantive due process to reduce a jury award of statutory damages based on her refusal to first proceed with common law remittitur.<sup>112</sup> Invoking the fundamental judicial principle of constitutional avoidance, the court concluded that Gertner improperly decided the constitutional question despite available non-constitutional grounds for decision.<sup>113</sup>

Although it did not formally reach the constitutional issues raised by the parties and addressed by Judge Gertner, the First Circuit's opinion hinted at its view on the subject. First, it acknowledged the serious threat to the recording industry's viability posed by P2P applications, both currently and in their potential growth.<sup>114</sup> Beyond recognition of the importance of copyright enforcement in the P2P context, the court only thinly veiled its preference for the *Williams* standard in substantive due process review of statutory damages awards. The court pointed out that *Gore* did not overrule *Williams*, implying that the standards do not cover the same issues or types of claims.<sup>115</sup> Further, the First Circuit found that the Supreme Court has never suggested that *Gore* should apply to statutory damages, and moreover that the notice issues present in *Gore* are simply inapplicable to statutory damage awards.<sup>116</sup> This preference

108. *Id.* at 513 ("The concerns regarding fair notice to the parties of the range of possible punitive damage awards present in *Gore* are simply not present in a statutory damages case where the statute itself provides notice of the scope of the potential award.").

109. *See id.* at 497–501.

110. *See id.* at 501 (disparaging Tenenbaum's attempt to convince the court to "ignore the plain language of the [Copyright Act] and Congressional intent").

111. *See Tenenbaum*, 660 F.3d at 511.

112. *Id.* at 515.

113. *See id.* at 511–13.

114. *Id.* at 492.

115. *See id.* at 513.

116. *Tenenbaum*, 660 F.3d at 513. The court, in comparing *Williams* and statutory damages to *Gore* and punitive damages, termed *Gore*'s focus on punitives a "related but distinct issue." *Id.* at 512. This result accords with the Sixth Circuit's findings in *Zomba*, in which the court found that an award of statutory damages under the Copyright Act was governed by *Williams*, in opposition



seems to be a logical outgrowth from the court's earlier emphasis on plain meaning<sup>117</sup>: the *Williams* standard applies on its face to statutory damages, whereas *Gore* does not.

### B. *What It Got Right*

From the analysis thus far, we have seen that the First Circuit showed implied support of the statutory damages award upon application of substantive due process review. Examining the court's reasoning in greater detail, I argue that current copyright statutes demand this result. While the penalty was high and likely very damaging to Tenenbaum, such sympathy cannot overcome the judiciary's limited role in the administration of the law.<sup>118</sup>

The First Circuit found that congressional intent clearly supports these statutory awards, contrary to arguments that Congress has either neglected to attend to the issue or is unaware of the huge awards in the P2P context.<sup>119</sup> Quite the opposite is true: Congress was well aware of the dangers posed by

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to dicta from other circuits indicating otherwise. *See Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 588 (6th Cir. 2007) ("Until the Supreme Court applies *Campbell* to an award of statutory damages, we conclude that *Williams* controls, not *Campbell*, and accordingly reject Panorama's due-process argument."). There, a music publisher sued a karaoke CD manufacturer for unlawfully copying and selling copies of its copyrighted works. *Id.* at 579–80. Even at a 44:1 ratio of statutory damages to lost licensing fees, the court found no constitutional violation under the highly deferential *Williams* standard. *Id.* at 588.

117. *See Tenenbaum*, 660 F.3d at 500.

118. *See* Scott C. Idleman, *The Emergence of Jurisdictional Resequencing in the Federal Courts*, 87 CORNELL L. REV. 1, 42 (2001) ("The federal judiciary, like the federal government as a whole, 'is one of delegated and limited powers.' . . . Moreover, because these limitations are intrinsic and structural, they cannot be overcome merely by demonstrating that the parties have consented to a court's exercise of power, or that this exercise would be of manifest utility to society or to the legal system." (footnotes omitted)); Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1, 27 (1998) ("The Framers plainly intended that the federal judiciary's policy-making role would be limited to the power of judicial review, a power that would be exercised only in cases or controversies of 'a Judiciary nature'; the Framers were aware of various alternate arrangements in the states but expressly chose to reject such arrangements in favor of a more limited judicial role."). Judge Gertner's flouting of the plain language of the Copyright Act amounts to a judicial enforcement not of law but of political opinion. This broad discretion to announce policy is best left to the legislature. *See Gonzalez v. Reno*, 212 F.3d 1338, 1356 (11th Cir. 2000) ("As policymakers, it is the duty of the Congress and of the executive branch to exercise political will. Although courts should not be unquestioning, we should respect the other branches' policymaking powers. The judicial power is a limited power. It is the duty of the judicial branch not to exercise political will, but only to render judicial judgment under the law.").

119. *See Tenenbaum*, 660 F.3d at 500 (finding that Congress did anticipate internet infringement like P2P and set the provisions of the Copyright Act accordingly).

the growth of the internet.<sup>120</sup> While P2P was not a mainstream medium of infringement at the time the Digital Millennium Copyright Act (“DMCA”) was enacted,<sup>121</sup> it shows remarkable congressional foresight for that very reason. The expansion of statutory penalties reflects a legislative judgment that internet-based infringement would similarly expand, requiring harsher controls.<sup>122</sup>

Expanding on this argument of deference to legislative intent, one can see problems with Judge Davis’s January 2010 order in *Thomas-Rasset* in which he justifies his method of lowering damages. In that order, he cites many statutes with treble damages provisions.<sup>123</sup> However, the Copyright Act has none.<sup>124</sup> If Congress had wanted such a provision in the Copyright Act, it would have included one.<sup>125</sup> This is all the more compelling when one recognizes the existence of such provisions in other statutes.<sup>126</sup> If Congress had created such provisions in other contexts and did not do so in the Copyright Act, a modicum of respect for Congress’s legislative competence requires us to accept that Congress consciously chose not to do so.<sup>127</sup>

Another reason related to legislative intent for upholding statutory awards in P2P infringement cases is the First Circuit’s conclusion that non-commercial classification is not relevant to either the jury or a reviewing judge.<sup>128</sup> The First

120. See Pamela Samuelson & Ben Sheffner, Debate, *Unconstitutionally Excessive Statutory Damage Awards in Copyright Cases*, 158 U. PA. L. REV. PENNUMBRA 53, 70 (2009), <http://www.pennumbra.com/debates/pdfs/CopyrightDamages.pdf>; Kirby, *supra* note 26, at 40.

121. See Christian E. Mammen, *File Sharing is Dead! Long Live File Sharing! Recent Developments in the Law of Secondary Liability for Copyright Infringement*, 33 HASTINGS COMM. & ENT. L.J. 443, 445–49 (2011) (discussing the enactment of the DMCA in 1998 and that the first cases to involve individual infringement in the form of peer-to-peer file-sharing did not arise until several years later).

122. See *Lowry’s Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 458 (D. Md. 2004) (The DMCA “substantially increase[d] statutory damages for non-willful and willful infringement in order to provide ‘more stringent deterrents’ to copyright violations including those involving computer users and Internet activity.”).

123. See *Capitol Records Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045, 1057 (D. Minn. 2010).

124. *Id.*

125. See 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.04(E)(1)(a) (2011) [hereinafter NIMMER].

126. See *Thomas-Rasset*, 680 F. Supp. 2d at 1057.

127. See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 412 (1971) (Burger, C.J., dissenting) (“Legislation is the business of the Congress, and it has the facilities and competence for that task—as we do not.”); see also Linda D. Jellum, “Which Is to be Master,” *the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 865 (2009) (concluding that “[w]hen a branch other than Congress . . . legislates, that branch violates formalist separation of powers”).

128. See Samuelson & Sheffner, *supra* note 120, at 71; see also H.R. REP. NO. 105-339, at 5 (1997) (criminalizing “computer theft of copyrighted works, whether or not the defendant derives

Circuit discussed the frivolity of this argument at length, showing how Tenenbaum's copying was hardly for personal use:

Tenenbaum argues to us that Congress never intended for the Copyright Act to impose liability or statutory damages against what he calls "consumer copiers." . . . Tenenbaum is not a "consumer-copier," a term he never clearly defines. He is not a consumer whose infringement was merely that he failed to pay for copies of music recordings which he downloaded for his own personal use. Rather, he widely and repeatedly copied works belonging to Sony and then illegally distributed those works to others, who also did not pay Sony. Further, he received, in turn, other copyrighted works for which he did not pay. Nor can Tenenbaum assert that his was merely a "non-commercial" use and distribution of copyrighted works as those terms are used elsewhere in the Act. His use and distribution was for private gain and involved repeated and exploitative copying.<sup>129</sup>

One distinction that should be addressed here is the significant difference between "shared folder" personal use and truly personal use, where the infringer does not allow the copy to remain available for others to share.<sup>130</sup> The former is clearly the kind at issue in *Tenenbaum* and *Thomas-Rasset*. It is arguably not personal and creates the widespread, viral harm that the First Circuit recognized as rightfully deterred.<sup>131</sup> It is in fact a pseudo-commercial

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a direct financial benefit from the act(s) of misappropriation, thereby preventing such willful conduct from destroying businesses"). *But see* Kjos, *supra* note 53, at 200. The Court in *Woolworth* famously noted that "[e]ven for uninjurious and unprofitable invasions of copyright the court may . . . impose a liability within statutory limits to sanction and vindicate the statutory policy." *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952). In the two primary cases, it can be argued that Tenenbaum and Thomas-Rasset, though they did not personally profit beyond the free recordings they obtained, were a part of the "profitable" enterprise of stealing music via P2P applications. The lack of cost should be considered identical to a profit; assuming as much, the brotherhood of dishonesty that drives illegal P2P downloading is an immensely profitable venture.

129. *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 497 (1st Cir. 2011) (footnote omitted).

130. Criminal law may lend a helpful hand here. In criminal prosecutions, a distinction is made between those who possess illegal drugs and those who possess with intent to distribute. *See United States v. Washington*, 586 F.2d 1147, 1153 (7th Cir. 1978) (concluding that simple possession does not become possession with intent to distribute by the mere possession of a small amount of drugs, but that other circumstantial evidence can show intent despite a small quantity). No great leap is needed to analogize here: those who merely download for their own personal use, without distributing to others, are clearly less culpable and deserve less punishment than those who download huge numbers of works and distribute them freely. The concept is indeed clearer in the P2P infringement context because the primary indicator of intent to distribute would be whether the user has copyrighted works in his shared folder. The existence of a file in a shared folder is likely strong circumstantial evidence of intent to distribute that file to others.

131. *See Tenenbaum*, 660 F.3d at 497 (finding that Tenenbaum "widely and repeatedly" copied works and "then illegally distributed those works to others").

use, since although the user himself may see no direct profit, making works available to the general public affects the commercial market for such works. Truly personal use, in contrast, does not affect the market as severely because only one hypothetical sale is lost. Nevertheless, this concern is not remediable under the current copyright scheme, which makes no such division.<sup>132</sup>

One method of introducing such a distinction would be to imply the “making available” right<sup>133</sup> into the distribution right.<sup>134</sup> Such a right would address the important difference between a “shared folder” infringer and private infringer. By distinguishing between those who facilitate widespread infringement through extensive “shared” folders and those who download copies for personal use without making them available for others’ downloads, the doctrine could address an important aspect of contemporary P2P infringement.<sup>135</sup> The circuits are divided on the viability of the “making

132. See Digital Millennium Copyright Act (DMCA), Pub. L. No. 105–304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.).

133. See *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 203 (4th Cir. 1997) (finding violation of the distribution right where a person or entity “has completed all the steps necessary for distribution to the public” without a showing of any actual dissemination of the copyrighted work). *But see* *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1162–63 (9th Cir. 2007) (finding that the plaintiff was not likely to succeed in proving that the defendant violated its distribution rights where defendant did not actually distribute the images); *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 168 (D. Mass. 2008) (“Merely because the defendant has ‘completed all the steps necessary for distribution’ does not necessarily mean that a distribution has actually occurred.”).

Traditional interpretive canons may justify the “making available” right as a standalone right, unconnected to the distribution right. Prof. Caminker argues, in the federal supremacy context, against the application of the *expressio unius est exclusio alterius* canon. See Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1032–33 (1995). He notes that there is an opposite maxim that calls for implied terms even where they are not enumerated. *Id.* at 1033. Though the Copyright Act has traditionally been interpreted as containing specific, enumerated rights (thus not admitting implied rights), here one could apply Caminker’s argument that there may be a “plausible explanation for why a particular text would sensibly refer expressly to certain examples of a more general proposition.” See *id.* at 1034. This is because the broader principles of the Copyright Act may support such implication. One such principle is the notion that the Copyright Act in its modern form is meant to adapt to changing social and technological circumstances in order to protect copyright holders no matter the technological loopholes discovered. Using the maxim of implication, then, one could imply from this broad purpose that the “making available” right is a necessarily implied adaptation to the special dangers posed by the P2P file-sharing model. While Caminker’s argument is not particularly persuasive on its own terms, the application of such an interpretational maxim at least points out the different ways in which the Copyright Act could be made to adapt to modern circumstances.

134. See 17 U.S.C. § 106(3) (2006).

135. See generally Brent C. Johnson, Note, *The Making Available Argument: Is Actual Distribution Required to Find Infringement Upon the Copyright Holder’s Distribution Right?*, 85 N.D. L. REV. 371, 389 (2009) (discussing how the plaintiff in *Atlantic Recording Corp. v. Howell*

available” right,<sup>136</sup> however, so neither the First nor the Eighth Circuit is bound to apply such a nuanced approach in the face of the Copyright Act’s clear enumeration of rights.<sup>137</sup> As with other criticisms reviewed later, although this matter is not for the courts to remedy, it suggests that Congress may need to better balance rights and access in their legislation, which now strongly favors powerful media interests.<sup>138</sup>

In addition to congressional intent, a number of modern circumstances militate in favor of upholding statutory awards in P2P infringement cases. First, the recording industry is suffering and will continue to suffer huge damages from the growth of mainstream P2P file-sharing.<sup>139</sup> Judge Gertner argued that Congress could not have intended such large statutory awards in P2P cases, since P2P file-sharing was not a major problem in 1999.<sup>140</sup> However, the development and popularization of this method of infringement supports high statutory penalties. Such awards will provide the necessary, harsh deterrence required to stamp out the wildfire of internet-based copyright infringement.<sup>141</sup> The flame is spreading far beyond copyrighted sound recordings. Other readily available online media, such as movies and television programs, are beginning to feel the pressure already experienced by the recording industry.<sup>142</sup>

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obtained summary judgment under the making-available doctrine by showing that the defendant kept more than 2000 copyrighted sound recordings in his shared folder); Darren Gelber, *Cybercrimes: File-Sharing Programs Violating Copyright and Child Pornography Distribution Laws*, N.J. LAW., Dec. 2008, at 66, 66 (describing how the shared-folder system operates).

136. See *supra* note 133.

137. Thomas-Rasset’s case in particular faced an uphill battle in advocating for the “making available” right. Judge Davis rejected it at length when it was presented to him during the first trial in that case. See *Capitol Records Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1223–24 (D. Minn. 2008). Judge Davis also found that Eighth Circuit precedent bound him to this conclusion, albeit somewhat indirectly. See *id.* (concluding that the actual-dissemination requirement enunciated in *National Car Rental* applies to P2P infringement).

138. See *infra* notes 172–74 and accompanying text.

139. See *Sony BMG Music Entm’t v. Tenenbaum*, 660 F.3d 487, 492 (1st Cir. 2011); *BMG Music v. Gonzalez*, 430 F.3d 888, 890 (7th Cir. 2005); Dougherty, *supra* note 33, at 4 (arguing that the recording industry “has been really slammed” by “widespread public sharing” via P2P applications).

140. *Sony BMG Music Entm’t v. Tenenbaum*, 721 F. Supp. 2d 85, 104 (D. Mass. 2010), *aff’d in part, vacated in part, rev’d in part*, 660 F.3d 487 (1st Cir. 2011).

141. See Seay, *supra* note 59, at 271.

142. See, e.g., *Sony Pictures Home Entm’t Inc. v. Lott*, 471 F. Supp. 2d 716 (N.D. Tex. 2007); *Twentieth Century Fox Film Corp. v. Streeter*, 438 F. Supp. 2d 1065 (D. Ariz. 2006); *Disney Enters., Inc. v. Delane*, 446 F. Supp. 2d 402 (D. Md. 2006); *Disney Enters., Inc. v. Farmer*, 427 F. Supp. 2d 807 (E.D. Tenn. 2006); see also Will Moseley, Note, *A New (Old) Solution for Online Copyright Enforcement After Thomas and Tenenbaum*, 25 BERKELEY TECH. L.J. 311, 337–38 (2010) (explaining that other industries are facing the same monumental dangers from P2P infringement already faced by the recording industry).

From this conclusion a further impetus for a strong statutory damages regime emerges. Computer technology is advancing so rapidly that new fora for file-sharing will always spring up as the old are caught and shut down.<sup>143</sup> The First Circuit recognized as much in its opinion.<sup>144</sup> The exponential growth of technology and internet-based vehicles for infringement requires an adaptable system of enforcement.<sup>145</sup> Thus, statutory penalties, which eliminate the burden of proving actual damages, are thoroughly warranted as a measure to expedite cases. By allowing quick responses to new technologies and innovations in infringement, this regime ensures that judgments are not irrelevant by the time they are entered.

One further method for improving the turnaround rate in copyright litigation is the implementation of a stronger administrative presence.<sup>146</sup> Currently, the Copyright Office does not wield the kinds of adjudicative powers that are common among administrative agencies.<sup>147</sup> The scope and power of administrative agencies is a hotly disputed subject and beyond the scope of this Comment.<sup>148</sup> However, it is worth noting that the same principles

143. See Tim Wu, *When Code Isn't Law*, 89 VA. L. REV. 679, 751 (2003) (concluding that "computer users will simply find new ways to free-ride" as P2P applications come and go). One troubling development in online media consumption is the growing popularity of "streaming" video and audio works. See *infra* notes 196–210 and accompanying text. Streaming technology is a new method by which users may circumvent copyright protections. Doubtless other methods will continue to be innovated to keep pace with increased protections. One wonders if the Copyright Act is thereby promoting innovation in infringement even when it attempts to deter.

144. See *Tenenbaum*, 660 F.3d at 492 ("Although these litigation efforts succeeded at shutting down particular networks, individual infringers continued to engage in illegal conduct by finding new peer-to-peer networks through which to download copyrighted songs.").

145. See *In re Verizon Internet Servs., Inc.*, 240 F. Supp. 2d 24, 37–38 (D.D.C.) (noting Congress's purpose in enacting the DMCA was to provide for copyright protection in light of the technological developments of the digital age), *rev'd sub nom.* Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc., 351 F.3d 1229 (D.C. Cir. 2003).

146. See generally Mark A. Lemley & R. Anthony Reese, *A Quick and Inexpensive System for Resolving Peer-to-Peer Copyright Disputes*, 23 CARDOZO ARTS & ENT. L.J. 1 (2005) (advocating for the introduction of administrative judges into the Copyright Office who can resolve certain classes of peer-to-peer copyright infringement cases); Jason Mazzone, *Administering Fair Use*, 51 WM. & MARY L. REV. 395 (2009) (promoting a similar administrative solution for fair use disputes).

147. See Timothy K. Armstrong, *Shrinking the Commons: Termination of Copyright Licenses and Transfers for the Benefit of the Public*, 47 HARV. J. ON LEGIS. 359, 420 n.376 (2010) ("For a regulatory system of such complexity and economic scope, copyright is unusual in that it has remained largely unaffected by the post-New Deal expansion in the power of administrative agencies.").

148. Compare *Crowell v. Benson*, 285 U.S. 22, 56–57 (1932) (noting the "utility and convenience" of administrative agencies within their proper limitations), with Martin H. Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 216–17 (finding few practical limits on the power of administrative agency adjudications). Cf. James O. Freedman, *Crisis and Legitimacy in the Administrative Process*, 27 STAN. L. REV.

that motivated the development of strong administrative agencies, namely, necessity and complexity,<sup>149</sup> are now more than ever straining the copyright regime's ability to cope with an increasingly fast-paced American society. Necessity grows from the need to give parties rules to live by *ex ante*. *Tenenbaum* highlights the problem of technology becoming obsolete before traditional litigation concludes.<sup>150</sup> This result cannot square with the exponential growth of the internet and the accompanying increase in disputes over copyrightable content in it.<sup>151</sup>

Furthermore, the internet is constantly redefined by technological innovation.<sup>152</sup> Complex technologies require informed responses.<sup>153</sup> Copyright law could profit greatly from the specialized experience of an administrative agency.<sup>154</sup> The other two major areas of intellectual property law, patent and

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1041, 1048 (1975) ("The anomalous position of administrative agencies in a system of government so deeply committed to the theory of the separation of powers has naturally been the subject of intense consideration.").

149. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 855 (1986) (concluding that Congress sought to provide the public with an "inexpensive and expeditious alternative forum" in creating the Commodity Futures Trading Commission); Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 DUKE L.J. 1565, 1568–76 (2011) (describing progressive efforts in the 1930s to promote administrative agencies that could adapt to the "rapidity of social and economic change" with specialized expertise).

150. Kazaa, one of the P2P programs at issue in *Tenenbaum*, has long been out of favor with consumers in light of newer, faster, and more secure programs. See Ross Drath, Comment, *Hotfile, Megaupload, and the Future of Copyright on the Internet: What Can Cyberlockers Tell Us About DMCA Reform?*, 12 J. MARSHALL REV. INTELL. PROP. L. 205, 206 (2012).

151. See *supra* notes 32–34 and accompanying text.

152. See Talya Yaylaian, Comment, *Warning: Statutes May Be Interpreted in an Unforeseeably Expansive Manner: United States v. Councilman*, 41 NEW ENG. L. REV. 293, 333 n.328 (2007) ("Because of rapid technological innovation and its dynamic influence on human interaction, however, the [internet] poses a number of difficulties to the imposition of traditional legal protocols." (quoting Thomas Flynn & Mark Chase, *Debating Community or Code: Case Studies in Alternative Internet Regulation*, in *REALLAW@VIRTUAL SPACE: COMMUNICATION REGULATION IN CYBERSPACE* 345, 347 (Susan J. Drucker & Gary Gumpert eds., 2d ed. 2005)) (internal quotation marks omitted)).

153. See *In re Verizon Internet Servs., Inc.*, 240 F. Supp. 2d 24, 38 (D.D.C.) (finding that Congress sought to address "rapid technological innovations on the Internet" through the DMCA), *rev'd sub nom. Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs., Inc.*, 351 F.3d 1229 (D.C. Cir. 2003). Jessica Litman has criticized the current legislative process for copyright reform for its inability to adapt to technological change. See Jessica Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 277 (1989).

154. See Armstrong, *supra* note 147, at 420 n.376 (noting that the "inclusion of exceedingly detailed and complicated technical provisions" in the Copyright Act counsels that its cases "might be better handled by administrative regulation"); Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 557–58 (suggesting reasons a model would be beneficial and providing a framework for such a model).

trademark, have reaped these benefits for many years.<sup>155</sup> While critics raise strong concerns regarding the legitimacy and fairness of dispute resolution through administrative agencies versus traditional Article III courts,<sup>156</sup> the fundamental essence of internet culture—speed and convenience—demands a more expeditious response.<sup>157</sup>

Current statutory awards also comport with deeper jurisprudential principles. Damage to the recording industry is also damage to the public because it discourages creation,<sup>158</sup> which, as discussed above, is a founding principle of copyright protection in the United States.<sup>159</sup> Though one might doubt the creativity applied by record companies, it takes only momentary reflection to recognize the substantial creativity and skill required to produce a high-quality, enjoyable sound recording.<sup>160</sup> Finally, there is an even more fundamental principle of American law, beyond copyright itself, that supports these awards: no matter who is losing money (even a lone infringer) or whose rights are being infringed (even large, wealthy record companies), citizens should be held to the rule of law for societal stability and protection of

155. The Patent and Trademark Office (PTO) reviews patent applications, trademark registrations, and disputes in each area. *See Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1528 (4th Cir. 1984) (“[T]he Patent and Trademark Office is the administrative agency initially charged with determining the registerability of a mark or figure . . . .”); *Canady v. Erbe Elektromedizin GmbH*, 271 F. Supp. 2d 64, 79 (D.D.C. 2002) (“[T]he PTO is a technically specialized administrative agency well-equipped to examine and determine patentability . . . .”).

156. *See, e.g.,* *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 860–62 (1986) (Brennan, J., dissenting) (cautioning that “important functions of Article III” in protecting separation of powers and an independent judiciary “are too central to our constitutional scheme to risk their incremental erosion” through increased administrative agency adjudicative powers). *But see* *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985) (recognizing the separation of powers concerns implicated in administrative agency adjudications but upholding their validity).

157. *See infra* notes 181–85 and accompanying text.

158. *See Capitol Records, Inc. v. Thomas-Rasset*, 799 F. Supp. 2d 999, 1010 (D. Minn. 2011) (“The public has a strong interest in rewarding and protecting copyright owners in order to encourage the creation of valuable works to be shared with the public.”), *vacated*, 692 F.3d 899 (8th Cir. 2012).

159. *See supra* notes 20–21 and accompanying text.

160. *See A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1016 (9th Cir. 2001) (affirming district court’s finding under a fair use analysis that the sound recordings at issue were “creative in nature”); H.R. REP. NO. 94-1476, at 56 (1976) (“The copyrightable elements in a sound recording will usually, though not always, involve ‘authorship’ both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording.”); Gabriel Jacob Fleet, Note, *What’s in a Song? Copyright’s Unfair Treatment of Record Producers and Side Musicians*, 61 VAND. L. REV. 1235, 1258–59 (2008); *see also* *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (emphasizing the low bar of creativity in copyright).



rights.<sup>161</sup> Thus, Tenenbaum's and Thomas-Rasset's purposeful disregard for the clear mandate of copyright law deserves retribution.<sup>162</sup> To do otherwise would invite erosion of this principle, vital since the Founding.<sup>163</sup>

### C. *What It Got Wrong*

Though dedicated to applying the law as Congress enunciated it, there are many potential criticisms of the First Circuit's *Tenenbaum* decision. First, one may argue that Judge Gertner was quite right to bypass remittitur in this case. Scholars have addressed the drawbacks of the doctrine,<sup>164</sup> and Gertner herself explained that the plaintiff record companies were clearly determined to reject any remitted award.<sup>165</sup> Practical assessments aside, however, the law does not support this sort of judicial discretion. The plaintiff's right to a jury

161. See *Morrissey v. Brewer*, 408 U.S. 471, 499 (1972) ("The rule of law is important in the stability of society."); Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173, 1173 (2006).

162. See *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952); *All-Star Mktg. Grp., LLC v. Media Brands Co.*, 775 F. Supp. 2d 613, 622 (S.D.N.Y. 2011) (noting that where willful infringement is found, copyright cases state that "a statutory award should incorporate not only a compensatory, but also a punitive component to discourage further wrongdoing by the defendants and others"); *Marvin Music Co. v. BHC Ltd. P'ship*, 830 F. Supp. 651, 656 (D. Mass. 1993) (finding that to "vindicate the statutory policy" under *Woolworth*, courts may consider "the award's deterrent value and the wilful [sic] nature of defendants' infringement").

163. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men."). It should be noted that the Massachusetts constitution explicitly proscribes the judicial exercise of legislative or executive authority, concluding that the rule of law would be promoted by separation of these powers. See MASS. CONST. art. XXX. The impermissible judicial discretion applied in *Tenenbaum* and *Thomas-Rasset* by Judges Gertner and Davis, respectively, is precisely the sort of judicial legislation (or flouting of Congressional legislation) that the Founders sought to prevent.

164. See, e.g., David Baldus et al., *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109, 1120 (1995) (noting that the process of judicial additur or remittitur does not adequately address the problem of "outliers," or especially low awards, in punitive and non-pecuniary jury awards). But see Brad Snyder, *Protecting the Media from Excessive Damages: The Nineteenth-Century Origins of Remittitur and Its Modern Application in Food Lion*, 24 VT. L. REV. 299, 342 (2000) (concluding that remittitur will "play a prominent role" in controlling punitive damages in the wake of *BMW v. Gore*). Snyder also proposes some interesting revisions of the remittitur doctrine to improve efficacy, including adopting a more comparative standard (as opposed to the looser "shocks the conscience" standard) and being more explicit about how much of an award is excessive (i.e., whether the judge is applying the maximum recovery rule, the minimum recovery rule, or reasonable jury rule). *Id.* at 343-44.

165. *Sony BMG Music Entm't v. Tenenbaum*, 721 F. Supp. 2d 85, 88 (D. Mass. 2010), *aff'd in part, vacated in part, rev'd in part*, 660 F.3d 487 (1st Cir. 2011).

determination of statutory damages is a matter of constitutional import,<sup>166</sup> not to be undone simply by a judge's determination that it would be impractical.

A second, more plausible critique is that many, if not most, of today's P2P infringers are uninformed about the consequences of their file-sharing.<sup>167</sup> Record companies have done their part to increase awareness through extensive advertising and awareness campaigns; however, those programs have gained only limited success.<sup>168</sup> Thus, further work is needed to ensure that internet users are fully aware of the potential rights and penalties in a given action or download. This is especially necessary in light of the huge statutory range.<sup>169</sup> If, as argued above, the range is constitutionally appropriate and awards within it should be accorded the substantial *Williams* level of deference,<sup>170</sup> increased awareness is vital. Moreover, to a lone infringer of the Tenenbaum or Thomas-Rasset variety, even the smallest possible per-work penalty of \$750 would likely be extraordinarily damaging when aggregated.<sup>171</sup>

Reliance on congressional intent opens the door to further criticism of the statutory damages regime. Specifically, one might argue that reliance on legislative processes cannot justify statutory damages provisions, since lone infringers have a miniscule voice in the creation of new policies or reform of the current scheme if they feel penalties are too high.<sup>172</sup> This is especially relevant when today's individual infringers are compared to the record labels'

166. See *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 355 (1998).

167. See H.R. REP. NO. 106-216, at 3 (1999) ("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 and continue infringing, even after a copyright owner puts them on notice that their actions constitute infringement and that they should stop the activity or face legal action. In light of this disturbing trend, it is manifest that Congress respond appropriately with updated penalties to dissuade such conduct."); see also Kjos, *supra* note 53, at 187–88 (discussing digital rights management as a more effective alternative to litigation in preventing P2P infringement, but noting that the RIAA engaged in extensive advertising campaigns that gave notice to consumers about the unlawful aspects of P2P file-sharing).

168. See *supra* notes 57–58 and accompanying text.

169. See *Tenenbaum*, 721 F. Supp. 2d at 99 ("Although I have doubts whether this extraordinarily broad statutory range afforded Tenenbaum *fair* notice of the liability he might face for file-sharing, it is indisputable that section 504(c) clearly set forth the minimum and maximum statutory damages available for each of his acts of infringement." (citation omitted)).

170. See *supra* text accompanying notes 44–48.

171. See Barker, *supra* note 6, at 554.

172. See Opperbeck, *supra* note 56, at 1710 ("End users of copyrighted materials, at least in contexts such as popular music and films, lack the resources and bargaining position to pursue . . . change-based aversion strategies."); see also Stavroff, *supra* note 9, at 708–20 (arguing that Congress must be the one to act on allegations of excessive penalties and that they should do so since the current scheme undermines the purposes of copyright).

lobbying muscle.<sup>173</sup> Thus, the First Circuit denies the practical truth of congressional intent: there is no way for a lone citizen to effect meaningful change in a system heavily influenced by wealthy interests.<sup>174</sup> Moreover, disenfranchised infringers will likely turn to developing new infringing programs instead of complying with what they see as unfair law.<sup>175</sup>

173. See Ory Sandel, Comment, *Dastar Through European Eyes: Effects of the Public Domain on Transatlantic Trade*, 12 UCLA ENT. L. REV. 93, 124 n.210 (2004). The Recording Industry Association of America (RIAA) spent \$1.25 million in the second quarter of 2011 alone in lobbying efforts on Capitol Hill. *RIAA Spent \$1.25M Lobbying Government in 2Q*, YAHOO! NEWS (Sept. 16, 2011), <http://news.yahoo.com/riaa-spent-1-25m-lobbying-government-2q-200138114.html>.

174. See generally Tom Pavone, *The Perils of Lobbying*, NEW STUDENT UNION (Aug. 7, 2011), <http://newstudentunion.wordpress.com/2011/08/07/the-perils-of-lobbying/> (arguing that the minority interests protected by lobbying are those of the rich).

A couple of notes on perspective are warranted here. First, not all content providers are “big bad business.” Some are small-time musicians and artists who depend on copyright protection to protect the small revenues the internet can provide them. See THE AM. SOC’Y OF COMPOSERS, AUTHORS & PUBLISHERS, MUSIC COPYRIGHT IN THE DIGITAL AGE: A POSITION PAPER 2 (2008) (“Most music creators—individual songwriters, lyricists or composers—are, in reality, the smallest of small business owners. Copyright first and foremost assures their ability to protect and earn income from their creations.”) Where do they turn when their rights are infringed by the growing mass of content-hungry internet consumers? Congress crafted the statutory damages regime and the stronger penalties of the DMCA for their benefit as well. Their creative works are quintessential artistic expressions and are at the core of what copyright seeks to protect. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994) (noting that “some works are closer to the core of intended copyright protection than others” and contrasting the value of “bare factual” works with “creative works”).

Second, companies like Google and other content disseminators are arguably the same type of “big business” as the content creators. See Mark Bartholomew, *Making a Mark in the Internet Economy: A Trademark Analysis of Search Engine Advertising*, 58 OKLA. L. REV. 179, 219 (2005) (characterizing Google’s business model that “disseminate[s] advertising based on trademarked keyword search terms” as “big business”); Adam Metz, *2011: The Year in Google Acquisitions: Which Ones Mattered for Big Business*, TECHREPUBLIC (Dec. 19, 2011, 10:30 AM), <http://www.techrepublic.com/blog/google-in-the-enterprise/2011-the-year-in-google-acquisitions-which-ones-mattered-for-big-business/718> (highlighting Google’s 2011 acquisitions, totaling in the tens of *billions* of dollars). They simply operate at, and profit from, the opposite end of creative expression—its dissemination. Instead of making money on the front end by owning copyrights, they make money on the back end by distributing content. When profit is the watchword, can any “big business” be trusted to protect consumer rights? Can the content disseminators strike a meaningful compromise, one that protects even small-time musicians from having their livelihood ripped away and cast out into the sea of the internet for all to take freely?

175. See Wu, *supra* note 143, at 682 (arguing that code designers may simply write new programs that exploit weaknesses or loopholes in current law as a substitute for compliance with the law itself). Wu further suggests that P2P file-sharing programs like Kazaa are “comparable to a temporary repeal of copyright laws for computer geeks.” *Id.* at 683. However, P2P file-sharing is no longer confined to the realm of “computer geeks,” as the current cases show. See Cross, *supra* note 6, at 1033 (listing various defendants in the RIAA’s litigation campaign, including

Further arguments against reliance on congressional intent stem from the rampant growth of copyright infringement via the internet.<sup>176</sup> In an age of quick, easy copying and distribution of files online, it could be argued that copyright protections no longer comport with community values. Though Congress ostensibly speaks for the popular will, many consumers do not view their infringing conduct as reprehensible.<sup>177</sup> Thus, the rule may have outlived its community and consumer support, and so it should be abrogated.<sup>178</sup> Even though Congress purportedly addressed individual infringers in the DMCA,<sup>179</sup> it could be argued that they did not foresee the enormous growth of infringing capabilities for the general public. If Congress reassessed copyright statutory damages today, they might find that a distinction between corporate and individual infringers would comport better with community values. It would be wise for them to fashion damages ranges that are higher for wealthier, corporate infringers and lower for individual infringers. Providing separate ranges geared toward deterrence of different classes of infringers would reduce the likelihood of a case like *Tenenbaum*, where a lone infringer is subjected to enormous penalties.<sup>180</sup> It can hardly be argued that Joel Tenenbaum needed to suffer hundreds of thousands of dollars in penalties in order to deter his conduct.

However, compromise to this end can be reached without scrapping the strong protections afforded by the Copyright Act. By pursuing copyright enforcement and protection less confrontationally, copyright owners (particularly large record, movie, and television companies with critical public relations at stake) can protect their copyrights without alienating consumers.<sup>181</sup> Copyright owners cannot escape the danger of the prospect of free online content.<sup>182</sup> Instead of attacking consumers and punishing them for desiring

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young children, the elderly, and the dead). The calamity facing the recording industry and other media industries grows exponentially as P2P technology goes mainstream.

176. See *supra* notes 32–34 and accompanying text.

177. See Daniel Reynolds, Note, *The RIAA Litigation War on File Sharing and Alternatives More Compatible with Public Morality*, 9 MINN. J.L. SCI. & TECH. 977, 986 (2008); see also Moseley, *supra* note 142, at 335 (noting that file-sharing is commonplace). However, this does not mean that consumers are unaware that their conduct is illegal. See *id.* at 332.

178. David Opderbeck argues extensively that the social norms surrounding P2P file-sharing evidence a discrepancy between community values and current law. See Opderbeck, *supra* note 56, at 1712–13 (arguing that P2P infringement subsists not only on social acceptance of the method, but also on principles of reciprocity within the anti-institutional open source coding community).

179. See *supra* note 167.

180. See *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 509 (1st Cir. 2011).

181. See Reynolds, *supra* note 177, at 983–86 (describing the public backlash over the RIAA's confrontational tactics).

182. See *Capitol Records, Inc. v. Thomas-Rasset*, 799 F. Supp. 2d 999, 1008 (D. Minn. 2011) (illegal P2P file-sharing “completely devalu[es] the recordings”), *vacated*, 692 F.3d 899 (8th Cir.

access to works, the smarter countermeasure would be to make legal, paid downloading and dissemination as easy as possible. Building on models like iTunes and Steam,<sup>183</sup> copyright owners should make compliance with copyright as or more convenient than infringing conduct aimed toward the same end. By focusing on convenience rather than cost, copyright owners can come to terms with the reality of internet consumption: consumers do not always desire free content, but instead seek the easiest and quickest way to gain access to content.<sup>184</sup> Cost, then, becomes only one factor among others in the quest to provide the most convenient access to online media.<sup>185</sup>

Another possible criticism speaks less to the First Circuit's *Tenenbaum* opinion and more to the copyright statutory damages regime as a whole. As technology progresses, it empowers both infringers and those who combat infringement. Though applications like Kazaa used encryption and other tactics to obscure the identities of those with whom files were shared,<sup>186</sup> new technologies could be developed to overcome those techniques. If created, those technologies would allow record companies to track actual file-sharing, and thus actual damages.<sup>187</sup> Upon such a development, Congress could then

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2012). Will Moseley notes that efforts at deterrence should focus on "marginal" file sharers (the more mainstream variety) and not on "hardcore" file sharers, who cannot reasonably be deterred because of their technological capabilities and unwillingness to use legal channels for access to copyrighted works. Moseley, *supra* note 142, at 344.

183. Apple's iTunes is an incredibly popular program for accessing musical works, and much of its business success can be attributed to its policy of making music downloading fast and cheap—so cheap, in fact, that any one song usually can be downloaded for ninety-nine cents. *See What is iTunes*, APPLE, <http://www.apple.com/itunes/what-is/> (last visited Apr. 10, 2012). Steam is a newer software application that allows users to download games and other content, but it protects copyrights by requiring users to supply credit card information on their user account in order to gain access. *See About*, STEAM, <http://store.steampowered.com/about/> (last visited Apr. 10, 2012). These models show how copyright protection can be maintained unobtrusively, almost unbeknownst to consumers at large. At the very least, these methods are far less intrusive than lawsuits against individual users.

184. *See* Seay, *supra* note 59, at 295 (promoting a new plan of enforcement that will allow users to "get legit" by paying monthly access fees to access unlimited downloading).

185. Of course, there will always be those citizens who insist on breaking the law. *See* Opderbeck, *supra* note 56, at 1711. Barring the untenable view that enforcement mechanisms must capture even the most determined infringers, one can see how focusing on convenience may go a long way toward stemming the tide of mainstream P2P infringement, which has the greatest potential to damage content providers.

186. *See* Henslee, *supra* note 33, at 13; Deborah Tussey, *Technology Matters: The Courts, Media Neutrality, and New Technologies*, 12 J. INTELL. PROP. L. 427, 464 (2005); Johnson, *supra* note 135, at 378.

187. BitTorrent, a newer P2P software program that has gained wide mainstream popularity, does not protect anonymity as well as past programs because of the interest in faster downloads. *See* Goel et al., *supra* note 51, at 13. If faster downloads are more important to users than anonymity (and thus protection from infringement actions), the interests of convenience may, in the end, be the undoing of mainstream internet-based infringement. *See* Clive Thompson, *The*

reform the current statutory damages regime, allowing statutory damages *only* when actual damages cannot be proven.<sup>188</sup> It should be noted, however, that this may do little to implement a practical reduction in the size of jury awards. Since the potential damages caused by lone infringers who liberally share files could be extraordinarily high,<sup>189</sup> such a reform may make statutory penalties a defendant's preferred alternative.

Reform in the application of joint and several liability to the P2P context may also reduce the size and effect of statutory damage awards. This reform would allow one statutory award where both the P2P provider and individual infringer were joined in one action.<sup>190</sup> If liability for statutory awards was shared between Tenenbaum and Kazaa, Tenenbaum would be subject to less crushing penalties. The practical consideration that Kazaa was essentially eliminated post-*Grokster* may destroy this avenue for Tenenbaum

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*BitTorrent Effect*, WIRED, Jan. 2005, at 151, 178 (describing the innovations of BitTorrent as "technology that is changing the landscape of broadcast media").

188. See NIMMER, *supra* note 125, § 14.04(A) ("The availability of statutory damages under the current Act, even under circumstances in which plaintiff's damages or defendant's profits are susceptible to precise evaluation, represents a departure from the pertinent provisions of the 1909 Act. Under that former law, the availability of statutory damages was to a degree discretionary with the court and turned largely upon the proof of actual damages and defendant's profits."); see also *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 232–33 (arguing that resort to the statutory scheme was appropriate where the actual damages done were difficult to compute); *id.* at 235 (Black, J., dissenting) (stressing that resort to the statutory range should be allowed only where actual damages or profits cannot be proven).

189. See *supra* notes 130–32 and accompanying text. Incorporating the "making available" right into the statutory scheme would all but ensure that actual damages from prodigious P2P infringer-users would be astronomical.

190. See H.R. REP. NO. 94-1476, at 162 (1976) ("Where the infringements of one work were committed by a single infringer acting individually, a single award of statutory damages would be made. Similarly, where the work was infringed by two or more joint tortfeasors, the bill would make them jointly and severally liable for an amount in the \$250 to \$10,000 range. However, where separate infringements for which two or more defendants are not jointly liable are joined in the same action, separate awards of statutory damages would be appropriate."). But see Tussey, *supra* note 186, at 463–64 (noting that decentralized P2P applications avoid the knowledge element of contributory infringement by establishing a system where there is no way to monitor user transactions).

specifically,<sup>191</sup> but could prove useful when faced with similar situations in the future involving new P2P software companies.<sup>192</sup>

Finally, there is a very broad critique aimed not at the First Circuit or Congress, but at the record companies themselves. In light of the extremely bad press resulting from these suits,<sup>193</sup> it may be sound business strategy to stop pursuing them and explore other options. Most defendants, like many Americans, are judgment-proof individuals.<sup>194</sup> The lack of economic recompense combined with the ensuing public relations nightmare indicate that this may be a legal yet inadvisable method of vindicating the companies' rights. This critique, it seems, has already been asked and answered: record companies have recognized the futility of suits against direct infringers and have stopped pursuing new ones (though without abandoning ongoing litigation).<sup>195</sup>

In any event, obsolescence may counsel against these individual infringer suits far more than inefficacy. Streaming audio and audio-visual works is a new horizon in dissemination of copyrighted works on the internet.<sup>196</sup> This method is the basis for such wildly popular services as Netflix, which millions of Americans use to view movies and television programs.<sup>197</sup> Netflix, however,

191. See generally *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (finding that P2P providers could be found contributorily and vicariously liable for their users' infringing activities). After the Supreme Court's finding, Kazaa settled its own lawsuit with the major record companies, agreeing to pay \$115 million in reparations and convert into a legal download service. See John O. Hayward, *Grokster Unplugged: It's Time to Legalize P2P File Sharing*, 12 INTELL. PROP. L. BULL. 1, 2–3 (2007).

192. See NIMMER, *supra* note 125, § 14.04(E)(2)(d) (suggesting that, where jointly and severally liable defendants are joined in one action, one statutory award per work infringed is appropriate).

193. See Goel et al., *supra* note 51, at 26. Goel's empirical analysis of the effectiveness of the music industry's legal efforts concluded that the industry's legal battles are advisable in addition to recommending educational campaigns and other more creative strategies to deter P2P infringement. *Id.* at 27.

194. See Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603, 606 (2006).

195. See David Kravets, *Copyright Lawsuits Plummet in Aftermath of RIAA Campaign*, WIRED (May 18, 2010, 1:24 PM), <http://www.wired.com/threatlevel/2010/05/riaa-bump/>; Greg Sandoval, *RIAA Drops Lawsuits; ISPs to Battle File Sharing*, CNET NEWS (Dec. 19, 2008, 5:01 AM), [http://news.cnet.com/8301-1023\\_3-10126914-93.html](http://news.cnet.com/8301-1023_3-10126914-93.html).

196. Streaming allows a user to perceive a file while it is transferred. Streaming does not create a copy of the file on the user's computer, at least not one that courts would view as more than a transitory, non-infringing copy. See *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 129–30 (2d Cir. 2008).

197. See *Netflix, Inc.: 2011 Earnings: Fourth Quarter*, N.Y. TIMES, <http://topics.nytimes.com/top/news/business/companies/netflix-inc/index.html> (last updated Jan. 26, 2012). The notion of protection by convenience may help stem the tide of internet infringement of film and television. The instantaneous nature of streaming allows customers to simply select a film or program and instantly view it. The convenience afforded by this quick and easy access to content

is a paid service.<sup>198</sup> Just as was seen in the P2P context, paid services live alongside ones that illegally provide free access to copyrighted materials.<sup>199</sup>

The growth of streaming and its potentially infringing uses brings to mind *Columbia Pictures Industries, Inc. v. Redd Horne, Inc.*, a case in which the Third Circuit had to account for a new technological development within the existing copyright scheme.<sup>200</sup> The plaintiffs in that case were copyright owners in motion pictures, while the defendants were owners of a pair of video stores where patrons could buy, rent, and even view films.<sup>201</sup> There, the plaintiffs sued for unauthorized public performance based on “novel application of relatively recent technological developments”—namely, in-store exhibition of videocassettes.<sup>202</sup> The court skillfully interpreted existing statutory terminology in order to address the new use of VCR technology.<sup>203</sup> It found that the term “publicly” as used in “public performance” refers to a place “open to” the public.<sup>204</sup> This definition, according to the court, encompasses both performances to a large audience of the public and performances in an area open to the public, though there the individual audiences were small.<sup>205</sup> Thus, the Third Circuit was able to adapt to new technology in order to uphold the grounding principles of copyright.

While analogy in the video-exhibition context was no large stretch of current copyright structure, the peculiar facts of streaming works suggest that it can sidestep many claims leveled against P2P infringement, thus preventing easy expansion or reinvention of existing statutes to address new problems. First, streaming does not involve making a copy of the work in question; it merely involves viewing a “performance” of another’s copy of the work.<sup>206</sup> Thus, no reproduction right is infringed, as is the case in P2P where each user makes a copy for himself.<sup>207</sup> Furthermore, the performance viewed by the consumer is almost certainly not a public performance under the current

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discourages consumers from pursuing more time-consuming, though free, methods of access. Thus, the convenience factor here may indeed outweigh the cost factor in the individual consumer’s decision-making process.

198. *See id.*

199. *See* BRIAN T. YEH, CONG. RESEARCH SERV., R41975, ILLEGAL INTERNET STREAMING OF COPYRIGHTED CONTENT: LEGISLATION IN THE 112TH CONGRESS 4 (2011).

200. 749 F.2d 154, 157 (3d Cir. 1984).

201. *Id.* at 156–57.

202. *Id.* at 157.

203. *Id.* at 157–58.

204. *See id.* at 159.

205. *Redd Horne*, 749 F.2d at 159.

206. *See* Aric Jacover, Note, *I Want My MP3! Creating a Legal and Practical Scheme to Combat Copyright Infringement on Peer-to-Peer Internet Applications*, 90 GEO. L.J. 2207, 2249–50 (2002).

207. *Id.* at 2250.



construction of “public” in copyright caselaw.<sup>208</sup> Though many consumers have the ability to stream a work, they likely view the works as individuals and would not qualify as “public.” Thus, the end consumer could not be subject to claims of unlawful reproduction or public performance.<sup>209</sup> By foreclosing these common types of claims, record, film, and television companies have far more to fear from the popularization of infringement via streaming technology than they do from P2P infringement.<sup>210</sup>

208. See 17 U.S.C. § 101 (2006) (“To perform or display a work ‘publicly’ means (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.”); NIMMER, *supra* note 125, § 8.14(C)(1)–(2). There is no caselaw on this issue as of yet. The relevant cases deal exclusively with the liability of a provider of streaming content, not the end user. See RAYMOND T. NIMMER, LAW OF COMPUTER TECHNOLOGY § 15:6 (Westlaw database updated Sept. 2012). In those cases, a provider escapes liability by making a “limited transmission . . . coupled with a limited end use of a work so that only the individual, family, or friends are involved” because such limited performance is not public “under either element of the definition.” *Id.* If an individual streams a work, he makes only a limited end use and does not even have the possibility of making a non-limited transmission. Thus, liability for an individual for a public performance violation is even less likely than it is for streaming content providers.

209. A broader acceptance of the “making available” right would help counter the provider who places his work online for huge numbers of individuals to access. See *supra* notes 133–38 and accompanying text. Indeed, the rationale supporting the “making available” right in the streaming context is precisely related to arguments in favor of such a right in the P2P context.

210. Despite its factual peculiarity, streaming faces its share of legal challenges, including the recently proposed Stop Online Piracy Act (SOPA). H.R. 3261, 112th Cong. (2011). This bill claims to strengthen copyright protections “[t]o promote prosperity, creativity, entrepreneurship, and innovation by combating the theft of U.S. property . . .” *Id.* It essentially criminalizes streaming of copyrighted works by punishing those who infringe “by the distribution or public performance of a work being prepared for commercial dissemination, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial dissemination.” *Id.* § 201(a)(1)(C). This definition incorporates the “making available” right in order to escape the actual distribution requirement that is hard to prove in the streaming context. It also eliminates the “public” element of the public performance issue since it redefines public performance to include making works available to the public via a computer network. Powerful content disseminators like Google, Tumblr, and Wikipedia organized a “blackout day” in opposition to the bill, though their distaste for it relates to a different provision than the one at issue here. See Kirsten Salyer, ‘American Censorship Day’ Makes an Online Statement, BLOOMBERG (Nov. 16, 2011, 4:02 PM), <http://www.bloomberg.com/news/2011-11-16/-american-censorship-day-makes-an-online-statement-the-ticker.html>. Yet the fact remains that content providers will not wait idly by as new technologies allow unfettered access to their content, but will instead apply their impressive lobbying muscle to marshal change in the regime to their benefit.

Certainly an analogy to *Redd Horne* could be made here. Taking the Third Circuit's interpretation of "publicly" in the video-exhibition context and applying it to streaming is both natural and sound. However, the facts involved in streaming are even more extreme than in *Redd Horne*. Unlike the group of viewers in *Redd Horne*, in streaming the "public" is typically only one individual at a time.<sup>211</sup> The works are also not "open to the public" in the same manner as in the video stores in *Redd Horne*. While at the video store, any member of the public could pay to view an exhibition,<sup>212</sup> in streaming the viewer must have access to the internet, must be able to find the work online, and must be given access to the work by the provider. Ultimately, an effective response to infringement via streaming technology will likely require concerted efforts by Congress to strike a compromise between copyright owners who deserve economic benefit for their works and the ever-growing mass of internet users who demand constant, free, and open access to content.<sup>213</sup>

These many criticisms do not reflect the shortcomings of the First Circuit's *Tenenbaum* opinion. That court ruled on that case by applying the plain language of the law.<sup>214</sup> They instead reflect possible deficiencies in the copyright regime itself. I do not conclude from these reflections that the current system is catastrophically defective or unbalanced. Instead, I mean only to say that the copyright regime must be ready to reevaluate and evolve, as it has done throughout its existence,<sup>215</sup> in response to the growth of P2P and the internet as a conduit for content. At bottom, the primary defect of the current system is not its inability to adapt, but rather the blistering speed at which innovation and creation now outpace the adaptation process.

211. See *Jacover*, *supra* note 206, at 2249–50.

212. *Columbia Pictures Indus., Inc. v. Redd Horne, Inc.*, 749 F.2d 154, 159 (3d Cir. 1984).

213. See Zohar Efroni, *A Momentary Lapse of Reason: Digital Copyright, the DMCA and a Dose of Common Sense*, 28 COLUM. J.L. & ARTS 249, 256–58 (2005) (discussing both Congress's balancing act and a court's struggle to apply it to anti-circumvention technology under the DMCA).

214. See *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 498 (1st Cir. 2011).

215. See PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 236 (1994) (finding that "[t]he digital future is the next, and perhaps ultimate, phase in copyright's long trajectory, perfecting the law's early aim of connecting authors to their audiences," and that the best method of accomplishing this has been extending rights over time into new media). *But see* Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 264 (2002) (noting that the new challenges posed by digital technology may threaten the U.S. intellectual property regime).

## CONCLUSION

The problem of copyright infringement via P2P file-sharing applications is bound to grow. It will gain popularity with an increasingly broad set of internet users and thereby harm the copyright interests of record companies and other entertainment industries. The First Circuit's opinion in *Tenenbaum* takes strong steps in favor of the rule of law and the vindication of copyright rights. Contrary to those commentators and judges who would allow broad discretion in altering jury awards of statutory damages in cases like *Tenenbaum* and *Thomas-Rasset*, Congress's intent and the necessities of the internet age demand a more principled system through which copyright protections are quickly and meaningfully enforced. Nevertheless, the copyright regime may need to address new situations and adapt to the exigencies of copyright protection in the digital age. There is a growing culture of free access to creative content on the internet. If Congress wants to truly reflect popular will, it may need to reassess current statutory measures in order to realign with social norms. However, this in no way calls for the complete dissolution of copyright in favor of the insatiable desire for quick, cheap (or free) content.

The Eighth Circuit agreed with the implied reasoning of its sister Circuit in rejecting a substantive due process attack on the jury award in *Thomas-Rasset*. As discussed previously, Judge Davis properly applied remittitur to the second jury award.<sup>216</sup> Thus, the appeal from this third trial could not be disposed of by resort to the doctrine of constitutional avoidance. Though it was forced to address the constitutional issues presented, the Eighth Circuit properly looked to the First Circuit for guidance. In light of the purposes of copyright law and the statutory damages regime coupled with modern circumstances, the Eighth Circuit correctly overturned Judge Davis's reduction of the jury award. While internet culture may be on the move, the only principled way to approach these cases is to give deference to the law as it stands. Legislative judgment must cause any necessary evolution in copyright. Judicial caprice is a shoddy guarantee for a legal right.

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216. See *supra* note 88 and accompanying text.

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