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Cover Page Footnote

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BEHIND THE MUSIC: DETERMINING THE RELEVANT CONSTITUTIONAL STANDARD FOR STATUTORY DAMAGES IN COPYRIGHT INFRINGEMENT LAWSUITS

*Colin Morrissey**

Record labels have brought thousands of copyright infringement lawsuits against individuals engaged in the online downloading and distribution of music. As these lawsuits work their way through the court system, a debate has emerged over the constitutionality of the large statutory damage awards some juries have awarded. In arguing that the copyright statute results in unconstitutional damage awards, commentators as well as defendants accused of copyright infringement contend that courts should apply the rigorous standard of review for punitive damages that the U.S. Supreme Court adopted in BMW of North America v. Gore *to find large statutory damage awards unconstitutional. But the record labels and numerous commentators maintain that* Gore *has no place in the review of statutory damages. They instead argue that the deferential review the Court outlined in* St. Louis, Iron Mountain & Southern Railway Co. v. Williams *is the proper standard, and that under this standard, statutory damage awards are constitutional. This Note seeks to resolve the conflict over the proper standard of constitutional review for statutory damages in copyright infringement lawsuits. It concludes that courts should apply the* Williams *standard to statutory damages because of the substantial differences between statutory and punitive awards, but they should apply it more rigorously than in the past to ensure that all statutory damage awards for copyright infringement satisfy due process.*

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INTRODUCTION

The invention of Napster in 1999 and the Peer-to-Peer (P2P) downloading services that spawned in its wake have led to rampant digital copyright infringement. At its peak, Napster had around twenty-six million users worldwide.[1] Had it not been ordered to remove copyrighted content from its system, the company estimated it would have had seventy-five million users by the end of the year.[2] While it is difficult to measure exactly how many people currently use P2P networks, almost all studies say usage continues to grow.[3] In an effort to curb this widespread infringement, the Recording Industry Association of America (RIAA), a trade group that represents the recording industry, has targeted the individuals who use these services with copyright infringement lawsuits.[4] Since 2003, the major record labels[5] have filed nearly 35,000 lawsuits accusing individuals of downloading and distributing music in violation of their copyrights.[6] But by the end of 2009, only two of these suits had been tried before a jury. *Capitol Records Inc. v. Thomas*[7] was first tried in 2007 and resulted in a $222,000 verdict for the plaintiff record labels for the infringement of twenty-four songs.[8] A new trial was required due to a faulty jury instruction,[9] and in June 2009 a second jury found Thomas-Rasset guilty of copyright infringement and found her liable for a $1.92 million statutory

1. *See Napster Use Slumps 65%*, BBC NEWS, July 20, 2001, http://news.bbc.co.uk/2/hi/business/1449127.stm.

2. *See* A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896, 902 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001).

3. ELEC. FRONTIER FOUND., RIAA V. THE PEOPLE: FIVE YEARS LATER 9 (2008), *available at* http://www.eff.org/files/eff-riaa-whitepaper.pdf.

4. *See* discussion *infra* Part I.B.

5. At the time the campaign began, the major record labels were Universal Music Group, Warner Music Group, EMI Group, Sony Music, and BMG Music. *See* Jeff Leeds, *EU Said To Back Label Deal*, L.A. TIMES, June 18, 2004, at C1. Sony then merged with BMG, creating Sony BMG, before eventually buying it out, leaving just Sony Music Entertainment. *See* Ethan Smith, *Sony To Take Over Music Partnership*, WALL ST. J., Aug. 6, 2008, at B1.

6. *See* Sarah McBride & Ethan Smith, *Music Industry To Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, at B1.

7. No. 06-cv-1497 (D. Minn. filed Apr. 19, 2006). The name on the court docket was later changed from Thomas to Thomas-Rasset. *See* Civil Motion Hearing at 1, Capitol Records Inc. v. Thomas, No. 06-cv-1497 (D. Minn. May 20, 2009).

8. Capitol Records Inc. v. Thomas, 579 F. Supp. 2d 1210, 1213 (D. Minn. 2008).

9. *Id.* at 1228.

damage award.[10] The second suit to be tried was *Sony BMG Music Entertainment v. Tenenbaum*.[11] Like Jamie Thomas-Rasset, Joel Tenenbaum was found guilty of copyright infringement, and the jury awarded the record labels $22,500 per song for thirty songs for a judgment totaling $675,000.[12]

The size of the verdicts in these cases, especially the second Thomas-Rasset trial, was surprising even to music industry executives and musicians.[13] These large awards have reignited a debate both inside and outside the courtroom over the constitutionality of statutory damages for copyright infringement.[14] Many commentators and defendants in copyright infringement suits believe that large statutory damage awards are unconstitutional.[15] This argument generally relies on the premise that there are similarities between statutory and punitive damages that require courts to apply the U.S. Supreme Court's punitive damages jurisprudence, specifically the three "guideposts" laid out in *BMW of North America, Inc. v. Gore*,[16] to statutory damage awards.[17] The theory is that because *Gore*

10. Memorandum of Law & Order at 5, Capitol Records Inc. v. Thomas-Rasset, No. 06-cv-1497 (D. Minn. Jan. 22, 2010). This award was then remitted, *id.* at 2, and declined by the plaintiffs, who instead opted for a third trial on damages. Notice of Plaintiffs' Decision RE: Remittitur at 6, Capitol Records Inc. v. Thomas-Rasset, 06-cv-1497 (D. Minn. Feb. 8, 2010).

11. No. 07cv11446-NG, 2009 U.S. Dist. LEXIS 115734 (D. Mass. Dec. 7, 2009); *see also* Denise Lavoie, *Jury Awards $675K in Boston Music Downloading Case*, ABC NEWS, Aug. 2, 2009, http://abcnews.go.com/Technology/wireStory?id=8232281 (noting that *Sony BMG Music Entertainment v. Tenenbaum* was the second RIAA lawsuit to go to trial).

12. *See* Judgment at 1, Sony BMG Music Entm't v. Tenenbaum, No. 07cv11446-NG (D. Mass. Dec. 7, 2009) (entering judgment for plaintiff).

13. Copyrights & Campaigns, http://copyrightsandcampaigns.blogspot.com/2009/06/sony-bmg-attorney-we-were-shocked-by.html (June 20, 2009, 14:46 EST) (noting an executive at Sony said, "We were shocked," about the verdict); Daniel Kreps, *Richard Marx "Ashamed" He's Linked to $1.92 Million RIAA Fine Against Minnesota Mom*, ROLLING STONE: ROCK & ROLL DAILY, June 24, 2009, http://www.rollingstone.com/rockdaily/index.php/2009/06/24/richard-marx-ashamed-hes-linked-to-192-million-riaa-fine-against-minnesota-mom (discussing the opinion of Richard Marx, whose songs Thomas-Rasset distributed); Posting of Moby to Moby.com, http://www.moby.com/journal/2009-06-20/riaa-have-sued-jammie-thomas-rasset-minn.html (June 20, 2009) (calling the nearly two million dollar verdict "utter nonsense").

14. The applicability of the U.S. Supreme Court's punitive damage jurisprudence to the review of statutory damages has already been discussed prior to these two cases. *See generally* Blaine Evanson, Note, *Due Process in Statutory Damages*, 3 GEO. J.L. & PUB. POL'Y 601 (2005). These recent verdicts have significantly heated up the debate, specifically in the context of statutory damage awards for copyright infringement. *See, e.g.*, Pamela Samuelson & Ben Sheffner, Debate, *Unconstitutionally Excessive Statutory Damage Awards in Copyright Cases*, 158 U. PA. L. REV. PENNUMBRA 53 (2009), http://www.pennumbra.com/debates/pdfs/CopyrightDamages.pdf (debating the constitutionality of statutory damage awards for copyright infringement).

15. *See, e.g.*, Motion for a New Trial, Remittitur, and to Alter or Amend the Judgment at 2, 4–5, Capitol Records Inc. v. Thomas-Rasset, No. 06-cv-1497 (D. Minn. July 6, 2009) [hereinafter Thomas-Rasset Motion for a New Trial] (arguing that the "shocking" and "grossly excessive" verdict was "inconsistent with the Due Process Clause").

16. 517 U.S. 559 (1996).

17. *See* discussion *infra* Part II.A.

mandates an exacting review of damage awards,[18] large judgments like those in the *Thomas-Rasset* and *Tenenbaum* cases fail the *Gore* test. But the record labels, in addition to numerous commentators, argue that damages awarded under copyright's statutory damage provision are constitutional.[19] They contend that there are substantial differences between punitive and statutory damages, so the Court's standard of review for statutory damages outlined in *St. Louis, Iron Mountain & Southern Railway Co. v. Williams*[20] should control.[21] Since *Williams* is more deferential than *Gore*,[22] proponents of applying the *Williams* standard to statutory damage awards maintain that they easily pass this test.

As there are a number of lawsuits against P2P network users still in the pipeline, now is an extremely important moment in this debate over the constitutionality of statutory damages. However, as a threshold issue, both sides must be on the same playing field. Since *Williams* is a deferential standard and *Gore* is more rigorous, the standard used for review has a substantial impact on the outcome of this constitutional question. This Note seeks to determine the proper standard of constitutional review for statutory damages for copyright infringement and explore the issue of their constitutionality by examining the opinions of courts and commentators, as well as arguments asserted by parties involved in copyright infringement suits.

Part I provides some background on the types of damages discussed in this Note and traces the basic history of copyright damages through the most recent revision of the damage provision in 1999. Part I concludes by detailing the *Thomas-Rasset* and *Tenenbaum* cases and discussing the relevant constitutional standards for statutory and punitive damages as outlined in *Williams* and *Gore* respectively. Then, Part II highlights the due process concerns and similar purpose statutory and punitive damages share to outline the argument for *Gore*'s application in a statutory damages context. Part II discusses the argument for why the *Gore* guideposts have no application, focusing on the differences between the two awards, the importance of deference to the decisions of the legislature, and the difficulty in applying the *Gore* guideposts to statutory damage awards. Finally, Part III advocates for the use of the *Williams* standard instead of *Gore* when a court reviews a statutory damage award for copyright infringement and argues that the review under *Williams* should be more rigorous.

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18. *See infra* Part I.C.1.

19. *See, e.g.*, Plaintiffs' Response in Opposition to Defendant's Motion for a New Trial, Remittitur, and to Alter or Amend the Judgment at 7, Capitol Records Inc. v. Thomas-Rasset, No. 06-cv-1497 (D. Minn. Aug. 14, 2009) [hereinafter Opposition to Thomas-Rasset Motion] (calling Thomas-Rasset's constitutional argument "baseless").

20. 251 U.S. 63 (1919).

21. *See* discussion *infra* Part II.B.

22. *See infra* Part I.C.2.

I. LEAD UP TO LITIGATION: THE DEVELOPMENT OF THE STATUTORY DAMAGE PROVISION, THE RIAA'S LAWSUITS, AND THE SUPREME COURT'S CONSTITUTIONAL STANDARDS

This part discusses the important elements of the debate over the constitutionality of statutory damages for copyright infringement in order to lend context to the arguments that follow. First this part explores the types of damages relevant to this conflict and the purposes they serve, focusing mainly on statutory damages. Next, this part discusses the RIAA's copyright infringement lawsuits, specifically *Thomas-Rasset* and *Tenenbaum* and the resulting statutory damage awards in order to provide an understanding of what sparked this debate. Finally, this part outlines the two different constitutional standards, namely *Gore* and *Williams*, that courts, commentators, and parties in copyright infringement suits have argued are applicable in the review of statutory damage awards.

A. *Damages for Copyright Infringement*

This section discusses the types of damages involved in this conflict, with a strong focus on statutory damages. First, Part I.A.1 details the differences between punitive, actual, and statutory damages. Next, Part I.A.2 explores the development of copyright infringement damages since the first federal Copyright Act in 1790. Finally, Part I.A.3 focuses on the current damage provision and the purposes it is designed to serve, and Part I.A.4 covers the most recent adjustment to the statutory range.

1. Actual, Statutory, and Punitive Damages

This Note discusses three unique types of damage awards: actual, statutory, and punitive damages. Under current copyright law, both actual and statutory damages are authorized remedies.[23] Actual damages, also known as compensatory damages, are the standard measure of providing redress for injuries caused by a wrongdoer.[24] In the context of copyright law, the owner of a copyright receives "the actual damages suffered by him or her as a result of the infringement."[25] These actual damages are calculated by determining "the value of the uses [of the copyrighted work] that would have been had if the defendant had not infringed the copyright."[26] Additionally, a plaintiff who recovers actual damages is entitled to receive any of the infringer's profits related to the infringement.[27]

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23. 17 U.S.C. § 504 (2006); *see also* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.01[B] (2009).

24. 22 AM. JUR. 2D *Damages* § 25 (2003).

25. 17 U.S.C. § 504(b).

26. TERENCE P. ROSS, INTELLECTUAL PROPERTY LAW: DAMAGES AND REMEDIES § 2.02[1] (2009).

27. *See* 4 NIMMER & NIMMER, *supra* note 23, § 14.03; ROSS, *supra* note 26, § 2.02[2].

The Copyright Act also contains a statutory damage provision.[28] Statutory damages are awarded between a maximum and minimum amount that is set by a legislative body in a statute.[29] Under copyright law, statutory damages allow a copyright owner to recover between $750 and $30,000 per infringed work, with special exceptions for innocent infringement and willful infringement.[30] Statutory damages are recovered instead of actual damages and are generally unrelated to the harm suffered by a copyright owner.[31] The following sections discuss in greater detail the development of the current copyright damage provision, the purposes statutory damages are designed to serve, and the Supreme Court's jurisprudence governing their constitutionality.[32]

Unlike actual and statutory damages, punitive damages are not intended to compensate the plaintiff for his injury.[33] Instead, the jury awards punitive damages in addition to actual damages to punish the defendant for wrongful acts that were "intentionally or maliciously done."[34] The purpose of these damages is simple—to deter the defendant and others from future wrongful conduct and to exact punishment for the offense committed.[35] As will be discussed in Part I.C.1, the size and constitutionality of a punitive damage award is governed by the Supreme Court's decision in *Gore*. Though punitive damages are not awarded in copyright infringement lawsuits,[36] their relevance to this debate stems from the argument that statutory damages are similar to punitive damages, and thus should be reviewed under the constitutional standard for punitive damages.[37]

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28. 17 U.S.C. § 504(c).

29. ROSS, *supra* note 26, § 2.02[3]; *see also* 4 NIMMER & NIMMER, *supra* note 23, § 14.04[A].

30. 17 U.S.C. § 504(c)(1)–(2).

31. ROSS, *supra* note 26, § 2.02[3]; *see also* 4 NIMMER & NIMMER, *supra* note 23, § 14.04[A] (noting that a copyright owner can elect to recover statutory damages "regardless of the adequacy of the evidence" of the actual damage suffered, or even if no evidence of actual damages is offered).

32. *See infra* Part I.A.2–4, C.2.

33. 22 AM. JUR. 2D *Damages*, *supra* note 24, §§ 24, 25, 539; *see also* 1 LINDA L. SCHLUETER, PUNITIVE DAMAGES 29 (5th ed. 2005).

34. *See* 1 SCHLUETER, *supra* note 33, at 29.

35. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) (noting that punitive damages "are aimed at deterrence and retribution" (citing Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991))); *see also* 1 SCHLUETER, *supra* note 33, at 29–31.

36. 4 NIMMER & NIMMER, *supra* note 23, § 14.02(c)(2); *see also* Hays v. Sony Corp. of Am., 847 F.2d 412, 415 (7th Cir. 1988) (holding punitive damages are not available in copyright suits); Oboler v. Goldin, 714 F.2d 211, 213 (2d Cir. 1983) (same); Blair v. World Tropics Prods., 502 F. Supp. 2d 828, 838 (W.D. Ark. 2007) (same); Curcio Webb LLC, v. Nat'l Benefit Programs Agency, Inc., 367 F. Supp. 2d 1191, 1198 (S.D. Ohio 2005) (same).

37. *See infra* Part II.A.

2. Legislative History of Copyright's Damage Provision

The previous section discussed three types of damage awards. The remainder of Part I.A focuses only on the remedies available under copyright's damage provision—statutory and actual damages. Statutory damages for copyright infringement have existed since England codified the world's first copyright statute in 1710.[38] The Statute of Anne, also titled "An Act for the Encouragement of Learning," granted authors the exclusive right to control their works.[39] The Act featured a statutory damage provision that required an infringer to pay one penny per infringing sheet, half of which went to the author and the other half to the Crown.[40] The Act awarded statutory damages to compensate the copyright owner and deter future infringement.[41] As discussed throughout the remainder of this section, from the first federal copyright statute through the most recent revision of copyright law in 1999, this has consistently been the rationale for allowing the recovery of statutory damages for copyright infringement.

U.S. copyright law traces its roots back to a period before the formation of the federal government.[42] Upon the recommendation of the Continental Congress that all states pass acts granting authors and printers protection for their works,[43] every state except for Delaware passed a copyright statute.[44] Even though all these statutes were in large part modeled after the Statute of Anne, their damage provisions varied quite dramatically, and featured both actual and statutory damages.[45] Seven of twelve states required an infringing party to pay an award based on the value of the damage he caused to the copyright holder[46] while the other five statutes included either a maximum and minimum award or a fixed, per-copy amount.[47]

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38. Statute of Anne, 1710, 8 Ann., c. 19 (Eng.); *see also* Priscilla Ferch, Note, *Statutory Damages Under the Copyright Act of 1976*, 15 LOY. U. CHI. L.J. 485, 487 (1984) (discussing the damages provision of the Statute of Anne).

39. Statute of Anne, 1710, 8 Ann., c. 19, § 1 (Eng.); *see also* RICHARD C. DE WOLF, AN OUTLINE OF COPYRIGHT LAW 6–7 (1925) (detailing the rights granted by the Statute of Anne); 1 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 11 (1994) (same).

40. Statute of Anne, 1710, 8 Ann., c. 19, § 1 (Eng.); *see also* Ferch, *supra* note 38, at 487 (discussing the damages provision of the Statute of Anne).

41. *See* Ferch, *supra* note 38, at 487–88.

42. *See* Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 350 (1998) (tracing the early history of copyright law).

43. THORVALD SOLBERG, COPYRIGHT ENACTMENTS OF THE UNITED STATES, 1783–1906, at 11 (2d ed. 1906); *see also* 1 PATRY, *supra* note 39, at 19.

44. *See Feltner*, 523 U.S. at 350; Maurice J. Holland, *A Brief History of American Copyright Law*, *in* THE COPYRIGHT DILEMMA 3, 10 (Herbert S. White ed., 1978). *See generally* SOLBERG, *supra* note 43, at 11–30 (listing all the state statutes).

45. *See* COPYRIGHT: CURRENT VIEWPOINTS ON HISTORY, LAWS, LEGISLATION 2 (Allen Kent & Harold Lancour eds., R.R. Bowker Co. 1972) (1972) (noting the early state copyright statutes were similar to British law); WILLIAM S. STRAUSS, STUDY NO. 22: THE DAMAGE PROVISIONS OF THE COPYRIGHT LAW 1 (1956), *reprinted in* 2 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (George S. Grossman ed., 1976) (detailing the damage provisions of early state copyright statutes).

46. *See* STRAUSS, *supra* note 45, at 1 (noting that the Georgia and New York statutes required the payment of "just damages," the New Jersey, North Carolina, Pennsylvania, and

Unlike state copyright law, the first federal copyright statute only allowed recovery of statutory damages.[48] Under the authorization of Article I of the Constitution,[49] Congress created the first federal copyright statute in 1790.[50] The Act borrowed extensively from the Statute of Anne, even more so than the state copyright statutes, to the extent that "[i]f the Statute of Anne had been under copyright, its copyright would have been infringed by the first American copyright statute."[51] Congress adopted a damage provision authorizing a statutory damage award of fifty cents for every infringing sheet, with half going to the copyright holder and half going to the federal government.[52] And just like the Statute of Anne, this damage scheme was designed to serve the dual purposes of providing compensation for the copyright owner when actual damages were hard to prove and penalizing the copyright infringer to deter infringement.[53] Though subsequent amendments to copyright law changed the type of work covered, the term of protection, and the amount of the statutory award,[54] this same basic damage provision stayed in place for over one hundred years.[55]

Virginia statutes required the payment of "double the value of all the copies," and the Connecticut statute featured both).

47. *See id.* (noting that the Massachusetts, New Hampshire, and Rhode Island copyright statutes all set a minimum and maximum damage award and that Maryland and South Carolina copyright statutes set a fixed amount for each infringing copy).

48. *See* Act of May 31, 1790, ch. 15, § 2, 1 Stat. 124, 124 (repealed 1947); Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 446–47 (2009).

49. U.S. CONST. art. I, § 8, cl. 8 (authorizing Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries").

50. Act of May 31, 1790 § 2, 1 Stat. at 124; *see also* Ferch, *supra* note 38, at 485.

51. Holland, *supra* note 44, at 11. *Compare* Act of May 31, 1790 ("An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned."), *with* Statute of Anne, 1710, 8 Ann., c. 19 (Eng.) ("An Act for the Encouragement of Learning by vesting the Copies of printed Books in the Authors or Purchasors of such Copies during the Times therein mentioned.").

52. *See* Act of May 31, 1790 § 2, 1 Stat. at 124; *see also* Ferch, *supra* note 38, at 488–89.

53. *See* Ferch, *supra* note 38, at 489; Steven M. Tepp, *The Constitutional Challenge to Statutory Damages for Copyright Infringment: Don't* Gore *Section 504*, ENGAGE, July 2009, at 93, 93, *available at* http://www.fed-soc.org/doclib/20090720_TeppEngage102.pdf (proclaiming it "noteworthy" that early statutory damages had a "hybrid purpose").

54. *See, e.g.*, Act of Aug. 18, 1856, ch. 169, § 1, 11 Stat. 138, 139 (repealed 1947) (adding dramatic works to copyrightable subject matter, granting their creators the right of public performance, and setting the award for the unauthorized performance of a public work at one hundred dollars for the first performance and fifty dollars for each subsequent performance); Act of Feb. 3, 1831, ch. 16, §§ 1, 7, 4 Stat. 436, 438 (repealed 1947) (adding musical works to copyrightable subject matter, extending the initial term of protection to twenty-eight years, and increasing the award for maps, charts, musical compositions, cuts, and engravings to one dollar); Act of Apr. 29, 1802, ch. 36, § 3, 2 Stat. 171, 172 (repealed 1947) (setting the award for prints at one dollar per print).

55. *See* Tepp, *supra* note 53, at 93 (noting that Congress first changed the form of the statutory damages provision in 1895).

The Copyright Act of 1895 added a number of new works to the scope of copyrightable subject matter and introduced two new concepts to the calculation of statutory damages under federal copyright law.[56] First, and most importantly, Congress created statutory ranges featuring maximum and minimum awards, instead of a set penalty, to calculate damages for the infringement of any of the newly added works.[57] Second, the Act changed the way damage awards were calculated, awarding statutory damages for the new works per each infringed work, rather than per infringement.[58] These changes represented the first major step towards the damage provision as we know it today.[59]

At the urging of the Register of Copyrights and President Theodore Roosevelt, Congress began a major revision of copyright law in 1905.[60] After years of conferences, studies, and hearings, the Copyright Act of 1909 was enacted.[61] The Act made numerous changes to the statute's damage provision by continuing the trends that began with the 1895 Act.[62] First, the 1909 Act allowed a copyright holder to recover actual damages for the first time under federal copyright law.[63] When a copyright owner's work was infringed, he could recover either the actual damages suffered and the defendant's profits, or a statutory damage award.[64] The decision regarding which type of damages should be awarded belonged to the court, and statutory damages were generally only awarded when the evidence of the actual damage suffered was scarce.[65] Congress also expanded the use of the statutory range as a device for calculating damages.[66] The Act treated the set amounts awarded previously as guidelines instead of a requirement,

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56. Act of Mar. 2, 1895, ch. 194, § 4965, 28 Stat. 965, 965 (repealed 1947) (providing copyright protection for paintings, drawings, engravings, etchings, prints, models, and photographs); Tepp, *supra* note 53, at 93.

57. *See* Act of Mar. 2, 1895 § 4965, 28 Stat. at 965 (awarding between $100 and $5000 for infringement of photographs and between $250 and $10,000 for infringement of paintings, drawings, engravings, etchings, prints, and models); Tepp, *supra* note 53, at 93.

58. *See* Act of Mar. 2, 1895 § 4965, 28 Stat. at 965; Tepp, *supra* note 53, at 93.

59. *See* Tepp, *supra* note 53, at 93 (labeling the Act a change to "the traditional manner of calculation of statutory damages").

60. *See* ABE A. GOLDMAN, STUDY NO. 1: THE HISTORY OF U.S.A. COPYRIGHT LAW REVISION FROM 1901 TO 1954, at 1 (1955), *reprinted in* 1 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY, *supra* note 45, at 1 (detailing the legislative process for the Copyright Act of 1909); Ferch, *supra* note 38, at 490 ("The Copyright Act of 1909 was the first major revision of the federal copyright laws.").

61. *See* Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075, *repealed by* Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541; CAMBRIDGE RESEARCH INST., OMNIBUS COPYRIGHT REVISION: COMPARATIVE ANALYSIS OF THE ISSUES 8 (1973).

62. *See* Tepp, *supra* note 53, at 93 ("The Copyright Act of 1909 generally carried forward the statutory damages provisions of the 1895 Act . . . .").

63. Act of Mar. 4, 1909 § 25(b), 35 Stat. at 1081; *see also* Samuelson & Wheatland, *supra* note 48, at 448 (discussing the new actual damages provision).

64. Act of Mar. 4, 1909 § 25(b), 35 Stat. at 1081 (allowing a copyright owner to recover actual damages or "in lieu" of that, a statutory damage award).

65. *See* STRAUSS, *supra* note 45, at 7–8 (discussing when courts would award statutory damages).

and set a statutory minimum and maximum that governed all damage awards.[67] Congress spent a great deal of time and effort to ensure the statutory range would properly compensate copyright owners and deter future infringement.[68]

The damage provision created in 1909 was still in place in 1955 when Congress commissioned a study on the problems with copyright law and the need for reform.[69] The Copyright Office prepared thirty-five studies on the state of copyright law, including one that focused on the damage provision.[70] Based on these studies, the Register of Copyrights issued a report to Congress in 1961 recommending that copyright law be revised.[71] The goals of amending the damage provision were twofold: clearing up the confusion and uncertainty surrounding the provision and providing courts with the discretion to tailor awards to the facts of each case in order to avoid artificial or rigid awards.[72] The legislative process began in 1964 and featured twelve years of draft bills and revisions until the Act was finally passed in 1976.[73] Congress followed many of the recommendations for amending the statute and made a number of significant changes.[74] The result of this revision was a damage provision featuring the same basic structure employed today.[75]

3. An Outline of the Current Statutory Scheme

Codified at 17 U.S.C. § 504, the current provision governing damage awards for copyright infringement is the result of centuries worth of revisions and amendments.[76] Today, any copyright holder who has registered his work with the U.S. Copyright Office before it is infringed can elect to receive either actual or statutory damages at any time before the final verdict.[77] If a copyright owner elects to receive statutory damages, no

67. Act of Mar. 4, 1909 § 25, 35 Stat. at 1081 (listing each type of work copyright law protected and a per-infringement amount for the court to use as a guide when deciding the size of a statutory award); *see also* Ferch, *supra* note 38, at 490 (detailing the "elaborate system" of per infringed work amounts in the statute).

68. *See* 1 PATRY, *supra* note 39, at 74; Tepp, *supra* note 53, at 93.

69. *See* 1 PATRY, *supra* note 39, at 74–75.

70. STRAUSS, *supra* note 45. *See generally* 1–2 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY, *supra* note 45 (reprinting all of the studies).

71. H. COMM. ON THE JUDICIARY, 87TH CONG., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (Comm. Print 1961) [hereinafter REGISTER OF COPYRIGHTS], *reprinted in* 3 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY, *supra* note 45, at 3; *see also* 1 PATRY, *supra* note 39, at 74–75 (discussing the legislative history of the 1976 Act).

72. *See* COMMERCE CLEARING HOUSE, COPYRIGHT REVISION ACT OF 1976, at 252 (1976).

73. *See* 1 PATRY, *supra* note 39, at 78–89.

74. *See* Samuelson & Wheatland, *supra* note 48, at 451–63 (discussing the changes made by the Act); *infra* Part I.A.3.

75. *Compare* Copyright Act of 1976, Pub. L. No. 94-553, § 504, 90 Stat. 2541, 2585, *with* 17 U.S.C. § 504 (2006).

76. *See supra* text accompanying notes 48–75.

77. 17 U.S.C. § 504; *see also* 4 NIMMER & NIMMER, *supra* note 23, § 14.01[B]. Since the Copyright Act of 1976, the copyright owner has had the right to choose which type of

evidence of the actual damage suffered is required.[78] However, the court may consider any evidence of the harm caused by infringement that is available when fixing the size of the award.[79] Other factors the court may consider include the parties' conduct and the effectiveness of the award in deterring the defendant and the public in general from future infringement.[80]

The current statutory damage provision no longer features a "per infringement" or "per sheet" standard for assessing damages.[81] Congress made this change in 1976 to alleviate concerns that per-infringement awards presented a copyright owner with too many potential causes of action and would lead to excessive awards.[82] Now, a copyright owner recovers a minimum of $750 and a maximum of $30,000 "per infringed work."[83] Where the award falls within that range is entirely at the discretion of the district court,[84] as the only guidance Congress has provided is that the amount should be "just."[85]

There are additional statutory damage levels that function as exceptions to the standard minimum and maximum and are awarded based on the defendant's conduct.[86] Congress added an "innocent infringer" provision in 1976, which allows the court the discretion to lower the damage award to $200 per infringed work if the "infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright."[87] This provision alleviates concerns with excessive awards in cases of "occasional or isolated innocent infringement"[88] while still providing a copyright owner compensation for his injury and deterring future infringing

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damages is awarded. *See* Ferch, *supra* note 38, at 504 (discussing this "fundamental" change to copyright law).

78. *See* Lowry's Reports, Inc. v. Legg Mason, Inc., 302 F. Supp. 2d 455, 459 (D. Md. 2004) (finding that statutory damages do not have to "be strictly related to actual injury"); NEIL BOORSTYN, COPYRIGHT LAW 302 (1981) (noting that statutory damages are not tied to proof of actual damages).

79. *See* 2 PATRY, *supra* note 39, at 1172–73 (including the plaintiff's lost revenues and the defendant's profits and expenses saved among relevant factors for the court to consider).

80. *See id.*

81. *See* 17 U.S.C. § 504(c); *see also* Samuelson & Wheatland, *supra* note 48, at 447, 453, 455 (discussing the shift to a "per infringed work" rule and its effects).

82. *See* STRAUSS, *supra* note 45, at 11–12; Samuelson & Wheatland, *supra* note 48, at 453.

83. The statutory range has increased twice since it was set at $250 to $10,000 per infringed work in 1976. *See* Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, § 2, 113 Stat. 1774, 1774 (increasing the limits to $750 and $30,000); Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 10, 102 Stat. 2853, 2860 (increasing the limits to $500 and $20,000); Copyright Act of 1976, Pub. L. No. 94-553, § 504, 90 Stat. 2541, 2585 (setting the statutory range at $250 to $10,000 per infringed work).

84. *See* 2 PATRY, *supra* note 39, at 1172 (compiling cases).

85. *See* 17 U.S.C. § 504(c)(1).

86. *Id.* § 504(c)(2); *see also* ROSS, *supra* note 26, § 2.02[3][g].

87. 17 U.S.C. § 504(c)(2). The minimum award for innocent infringement was originally set at $100 per infringed work in the Copyright Act of 1976, § 504(c)(2).

88. *See* COMMERCE CLEARING HOUSE, *supra* note 72, at 254.

acts.[89] The statute also allows the court to raise the maximum award to $150,000 if the copyright owner can prove that the infringement was committed "willfully."[90] Although the 1976 Act did not set out the definition of willful, courts have since construed the willful infringement provision to be applicable when a defendant has knowledge that her conduct represents an infringement.[91]

Statutory damage awards for copyright infringement continue to serve the same two purposes they have served since the Statute of Anne: providing adequate compensation to copyright owners harmed by infringement and deterring future infringing acts.[92] Actual damage awards are frequently inadequate in both these respects, so Congress has carefully crafted a statute that ensures both these goals are met.[93] The failings of actual damages to provide adequate compensation generally stem from difficulties a plaintiff faces when attempting to prove the harm suffered due to an infringement.[94] Infringement is often difficult for a copyright owner to discover and detect.[95] It can also be extremely costly to prove the amount of harm suffered when infringement is found because of the difficulty in establishing the value of a copyright and the speculative nature of the damages.[96] And even in cases where copyright owners can easily find infringement and easily prove actual damages, the injury is frequently small and will often cost more to prove than the amount that would be recovered.[97] When faced with the prospect of a recovery that would not even cover the expenses incurred in an infringement suit, a copyright owner will generally forgo investigating the infringements and litigating the

89. *See* Ferch, *supra* note 38, at 505–06.

90. 17 U.S.C. § 504(c)(2). The willful infringement maximum was originally $50,000 in the Copyright Act of 1976 § 504(c)(2).

91. *See, e.g.*, Peer Int'l Corp. v. Pausa Records, Inc., 909 F.2d 1332, 1335 n.3 (9th Cir. 1990); Fitzgerald Pub. Co. v. Baylor Pub. Co., 807 F.2d 1110, 1115 (2d Cir. 1986); United States v. Moran, 757 F. Supp. 1046, 1050 (D. Neb. 1991); Fallaci v. New Gazette Literary Corp., 568 F. Supp. 1172, 1173 (S.D.N.Y. 1983); *see also* 4 NIMMER & NIMMER, *supra* note 23, § 14.04[B][3].

92. *See* REGISTER OF COPYRIGHTS, *supra* note 71, at 103; Ferch, *supra* note 38, 487–88.

93. *See* F. W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228, 233 (1952) (describing the statutory damages provision as having been "formulated after long experience"); REGISTER OF COPYRIGHTS, *supra* note 71, at 102–03 (discussing the need for statutory damage awards).

94. *See* Lowry's Reports, Inc. v. Legg Mason, Inc., 302 F. Supp. 2d 455, 460 (D. Md. 2004) ("Statutory damages exist in part because of the difficulties in proving . . . actual harm in copyright infringement actions."); *see also F. W. Woolworth*, 344 U.S. at 230–33; REGISTER OF COPYRIGHTS, *supra* note 71, at 102.

95. *See* ROGER D. BLAIR & THOMAS F. COTTER, INTELLECTUAL PROPERTY: ECONOMIC AND LEGAL DIMENSIONS OF RIGHTS AND REMEDIES 77–78 (2005); REGISTER OF COPYRIGHTS, *supra* note 71, at 102.

96. *See* BLAIR & COTTER, *supra* note 95, at 75–76; REGISTER OF COPYRIGHTS, *supra* note 71, at 102; *see also* Samuelson & Wheatland, *supra* note 48, at 446 n.22 (providing examples of why it can be difficult and costly to prove actual harm, such as the infringing party not keeping accurate records regarding their sales or the parties exploiting different markets).

97. *See* REGISTER OF COPYRIGHTS, *supra* note 71, at 102.

case.[98] If the copyright statute forced copyright owners to prove their actual damages—instead of allowing them to elect to receive a statutory damage award—it would frequently lead to underenforcement and undercompensation.[99] Statutory damages are thus required to provide the necessary incentive for copyright owners to register their works, enforce their copyrights, and seek compensation when their works are infringed.[100]

Statutory damages are also more effective than actual damages at deterring copyright infringement.[101] In many cases, the injury caused to the copyright owner is simply the cost of a license to use the copyrighted work.[102] If a potential infringer knows that the most he will have to pay for illegally using a work would be the same amount he would pay for using it legally, he will not be deterred from infringing the work.[103] Statutory damage awards are necessary to provide "a high enough penalty so that defendants will realize that it is less expensive to comply with the law than to violate it."[104] In addition, damage awards for copyright infringement must be large enough to deter the public, not just the defendant, from future acts of infringement, an end that small awards of actual damages often cannot accomplish.[105] Instead, larger awards, like those awarded under the current statutory damage scheme, are necessary to provide a proper deterrent.[106]

4. The Digital Theft Deterrence and Copyright Damages Improvement Act of 1999

The Digital Theft Deterrence and Copyright Damages Improvement Act of 1999 set the minimum and maximum statutory damage awards at their current levels.[107] The Act changed the range for statutory damages for the second time since 1976, increasing the minimum statutory award from $500 to $750, the maximum statutory award from $20,000 to $30,000, and the maximum statutory award for willful infringement to $150,000.[108] The award for innocent infringement, however, remained at $200.[109] Congress increased the statutory damage awards for two reasons.[110] First, they

98. *See id.*

99. *See* BLAIR & COTTER, *supra* note 95, at 77–78.

100. *See id.*; *see also* ROSS, *supra* note 26, § 2.02[3] ("[T]he guarantee of statutory damages will induce copyright owners to invest in and enforce their copyrights.").

101. *See* REGISTER OF COPYRIGHTS, *supra* note 71, at 102–03.

102. *See id.* at 102.

103. *See id.*

104. 2 PATRY, *supra* note 39, at 1172.

105. *See* Samuelson & Sheffner, *supra* note 14, at 60 (arguing that compensating copyright owners for their actual losses is not always sufficient to deter others from committing infringing acts).

106. *See id.*

107. Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. 106-160, 113 Stat. 1774; *see also* ROSS, *supra* note 26, § 2.02[3][d] (discussing the Act).

108. *See* 17 U.S.C. § 504(c) (2006); *see also* ROSS, *supra* note 26, § 2.02[3][c]–[d].

109. *See* Tepp, *supra* note 53, at 94.

110. *See* ROSS, *supra* note 26, § 2.02[3][d].

adjusted the range to account for inflation.[111] Second, and even more importantly, lawmakers expressed concerns that statutory damage awards needed to be larger to help combat widespread digital copyright infringement.[112] Piracy of copyrighted works had resulted in "lost jobs to American workers, lost taxes to Federal and State governments, and lost revenue to American companies."[113] Infringement had become extremely easy because of the Internet and other digital technology, and copyright infringers were both willfully and ignorantly violating current copyright laws.[114] This bipartisan bill aimed to curb the negative economic impact of copyright infringement on copyright owners and the U.S. economy as a whole.[115] Congress believed that increasing the damage award for copyright infringement would be a significant deterrent to those who pirated copyrighted works[116] and would help to compensate copyright owners for injuries caused by infringement.[117]

B. *The RIAA's Litigation Campaign Against P2P Network Users*

In September 2003, the RIAA announced that it had filed lawsuits against 261 P2P network users for downloading and distributing copyrighted music online and promised thousands more suits to follow.[118] These lawsuits signaled the beginning of a new campaign aimed at increasing awareness of the illegality of online downloading, as well as deterring the practice, by targeting individuals who shared music online with copyright infringement lawsuits.[119] The record labels had previously only targeted the services and the individuals who ran them,[120] but these lawsuits proved largely unsuccessful in stopping illegal downloading.[121]

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111. 145 CONG. REC. 30,786 (1999). Though the rates provided by the current statutory damages provision may seem high, when adjusted for inflation the current range is lower than in the past. *See* Samuelson & Sheffner, *supra* note 14, at 68–69 tbls.1 & 2.

112. *See* 145 CONG. REC. 30,785–86, 31,312–13; *see also* ROSS, *supra* note 26, § 2.02[3][d].

113. 145 CONG. REC. 31,312.

114. *See* 145 CONG. REC. 30,785.

115. *See* Tepp, *supra* note 53, at 94.

116. *See* 145 CONG. REC. 31,312–13; 145 CONG. REC. 30,785–86.

117. *See* Tepp, *supra* note 53, at 94.

118. *See* Nick Wingfield & Ethan Smith, *The High Cost of Sharing*, WALL ST. J., Sept. 9, 2003, at B1.

119. *See* David W. Opderbeck, *Peer-to-Peer Networks, Technological Evolution, and Intellectual Property Reverse Private Attorney General Litigation*, 20 BERKELEY TECH. L.J. 1685, 1701–02 (2005); McBride & Smith, *supra* note 6.

120. *See, e.g.*, Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (shutting down the Grokster P2P service); *In re* Aimster Copyright Litig., 334 F.3d 643 (7th Cir. 2003) (shutting down the Aimster file-sharing service); A & M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff'd in part, rev'd in part*, 239 F.3d 1004 (9th Cir. 2001), *remanded to* No. C 99-05183 MHP, 2001 U.S. Dist. LEXIS 2186 (N.D. Cal., Mar. 5, 2001) (shutting down Napster); John Borland, *RIAA Sues Campus File-Swappers*, CNET NEWS, Apr. 3, 2003, http://news.cnet.com/2100-1027-995429.html (discussing lawsuits filed against four college students who hosted P2P file sharing networks at their schools); *see also* Lori A. Morea, *The Future of Music in a Digital Age: The Ongoing Conflict Between Copyright Law and Peer-to-Peer Technology*, 28 CAMPBELL L. REV. 195,

In order to find defendants for their lawsuits, the record labels hired investigators to join the P2P services and search for users who were "sharing" their recordings.[122] The RIAA then used the IP addresses found by the investigators and subpoenaed Internet Service Providers (ISPs) to provide them with the names and street addresses of users.[123] Over the course of five years, record labels filed nearly 35,000 lawsuits.[124] The RIAA reached out to each defendant with a settlement offer,[125] and the majority of the lawsuits did, in fact, reach a settlement for an amount ranging from $3000 to $11,000.[126] It has since been announced that the RIAA is continuing to pursue any infringement action they have commenced,[127] but they will now try to work with ISPs on new strategies to curb infringement instead of filing new lawsuits.[128] To date, only two of the thousands of suits have actually been tried, *Thomas-Rasset* and *Tenenbaum*.[129] These cases are the flash point in the debate over the constitutionality of statutory damage awards and are discussed in turn in this part.

198–201 (2006) (noting that in the beginning copyright owners fought infringement by suing the services); Shana Dines, Note, *Actual Interpretation Yields "Actual Dissemination": An Analysis of the "Make Available" Theory Argued in Peer-to-Peer File Sharing Lawsuits, and Why Courts Ought To Reject It*, 32 HASTINGS COMM. & ENT. L.J. 157, 162–66 (2009) (tracing the recent history of copyright infringement lawsuits filed by the RIAA).

121. *See* Opderbeck, *supra* note 119, at 1699–702; Kristina Groennings, Note, *Costs and Benefits of the Recording Industry's Litigation Against Individuals*, 20 BERKELEY TECH. L.J. 571, 572–73 (2005).

122. *See* ELEC. FRONTIER FOUND., *supra* note 3, at 2.

123. *See id.*; Opderbeck, *supra* note 119, at 1702. The RIAA originally used the subpoena power granted in the copyright statute. *See* 17 U.S.C. § 512(h) (2006) (allowing a copyright owner to subpoena an ISP in order to force it to identify a subscriber accused of copyright infringement). But it was held in *RIAA v. Verizon Internet Services, Inc.*, 351 F.3d 1229 (D.C. Cir. 2003), that the manner in which the RIAA was using this subpoena power was illegal, so they were forced to file "John Doe Lawsuits" for each IP address before obtaining the subpoenas. *See* ELEC. FRONTIER FOUND., *supra* note 3, at 4.

124. *See* McBride & Smith, *supra* note 6.

125. *See* Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653, 663–64 (2005); Daniel Reynolds, Note, *The RIAA Litigation War on File Sharing and Alternatives More Compatible with Public Morality*, 9 MINN. J. L. SCI. & TECH. 977, 982 (2008).

126. ELEC. FRONTIER FOUND., *supra* note 3, at 5.

127. *See* Nate Anderson, *Hypocrisy or Necessity? RIAA Continues Filing Lawsuits*, ARS TECHNICA, Mar. 9 2009, http://arstechnica.com/tech-policy/news/2009/03/hypocrisy-or-necessity-riaa-continues-filing-lawsuits.ars.

128. *See* McBride & Smith, *supra* note 6 (discussing the RIAA's plan to work with ISPs to combat infringement). Though the RIAA claims its lawsuit program has been effective, there is disagreement over whether that claim is true. *Compare* ELEC. FRONTIER FOUND., *supra* note 3, at 9–13 (discussing numerous reasons the lawsuit program did not work, including the continued widespread use of P2P networks and creation of more efficient and more private P2P services), *with* RIAA, For Students Doing Reports, http://www.riaa.org/faq.php (last visited Apr. 11, 2010) (claiming the major increases in the recording industry's digital revenues and halt to the growth of P2P downloading are proof of the program's success).

129. Glynn S. Lunney, Jr., *Copyright, Private Copying, and Discrete Public Goods*, 12 TUL. J. TECH. & INTELL. PROP. 1, 2 (2009); Jonathan Saltzman, *Civil Trial Opens on Sharing of Songs*, BOSTON GLOBE, July 29, 2009, at B1.

1. *Capitol Records Inc. v. Thomas-Rasset*

The major record labels filed a copyright infringement lawsuit against Jammie Thomas-Rasset on April 19, 2006.[130] Thomas-Rasset, a single mother from Minnesota, was alleged to have "shared" music through the popular P2P downloading service Kazaa because she allowed other users to download music from her hard drive.[131] Though her hard drive contained over 1700 songs,[132] the record labels only sued for the unauthorized distribution of twenty-four of them.[133] In 2007, Thomas-Rasset was found to have willfully infringed the copyrights of all twenty-four songs, and the plaintiffs were awarded $222,000 in statutory damages.[134] However, in May 2008, Judge Michael Davis informed the parties that his instruction to the jury that "making copyrighted sound recordings available" for users of a P2P network to download violated the record labels' exclusive right of distribution may have been in error.[135] Federal courts are currently split as to whether "making available" or "actual dissemination" is distribution,[136] so Judge Davis called for briefs and oral arguments in order to determine which formulation was proper.[137] Judge Davis ultimately rejected the "make available" theory, holding that requiring actual dissemination is the logical interpretation of the Copyright Act, and ordered a new trial.[138] In dicta in the new trial order, Judge Davis pleaded with Congress to amend the Copyright Act's statutory damage provision, as he believed it had resulted in an award that was "wholly disproportionate" to the harm caused to the record labels.[139]

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130. Capitol Records Inc. v. Thomas, 579 F. Supp. 2d 1210, 1212 (D. Minn. 2008).

131. *Id.* at 1212–13, 1215; *see also* Ken Nicholds, Note, *The Free Jammie Movement: Is Making a File Available to Other Users over a Peer-To-Peer Computer Network Sufficient To Infringe the Copyright Owner's 17 U.S.C. § 106(3) Distribution Right?*, 78 FORDHAM L. REV. 983, 997–98 (2009) (discussing the case).

132. *See* Opposition to Thomas-Rasset Motion, *supra* note 19, at 3–4.

133. *Thomas*, 579 F. Supp. 2d at 1212.

134. *Id.* at 1213.

135. *Id.*

136. *See generally* Dines, *supra* note 120 (discussing the two theories of distribution); Nicholds, *supra* note 131 (same). There are a number of courts that use the "making available" standard to define distribution. *See, e.g.*, A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014 (9th Cir. 2001); Atl. Recording Corp. v. Anderson, No. H-06-3578, 2008 U.S. Dist. LEXIS 53654, at *18–19 (S.D. Tex. Mar. 12, 2008); Motown Record Co. v. DePietro, No. 04-CV-2246, 2007 U.S. Dist. LEXIS 11626, at *12 n.38 (E.D. Pa. Feb. 16, 2007). But there are also many that require actual dissemination. *See, e.g.*, Nat'l Car Rental Sys., Inc. v. Computer Assocs. Int'l, Inc., 991 F.2d 426, 430 (8th Cir. 1993); Elektra Entm't Group, Inc. v. Barker, 551 F. Supp. 2d 234, 239–45 (S.D.N.Y. 2008); Atl. Recording Corp. v. Howell, 554 F. Supp. 2d 976, 981 (D. Ariz. 2008).

137. *See Thomas*, 579 F. Supp. 2d at 1213; *see also* Nicholds, *supra* note 131, at 999–1000.

138. *Thomas*, 579 F. Supp. 2d at 1225–28; *see also* Nicholds, *supra* note 131, at 1000–01.

139. *Thomas*, 579 F. Supp. 2d at 1227.

The retrial occurred in June 2009,[140] and the record labels presented evidence that the songs were actually downloaded (disseminated) from Thomas-Rasset's hard drive.[141] Once again the jury found that Thomas-Rasset willfully infringed the copyrights of the record labels and awarded the plaintiffs an even larger award than the first trial—$1.92 million, or $80,000 per song.[142] Thomas-Rasset moved for a new trial on a number of grounds, including an argument that the award was unconstitutional under *Gore*.[143] However, Judge Michael Davis declined to rule on the constitutionality of the award, and instead remitted the award to $54,000, which he determined was the maximum amount a reasonable jury could have awarded.[144] The plaintiffs declined this remitted amount, necessitating a third trial on the issue of damages.[145]

2. *Sony BMG Music Entertainment v. Tenenbaum*

The second of the RIAA lawsuits to go to trial began in July 2009.[146] Like Jammie Thomas-Rasset, the RIAA accused Joel Tenenbaum, a 25-year-old graduate student, of downloading and distributing music through P2P networks in violation of the record labels' copyrights.[147] Charles Nesson, a professor at Harvard Law School, led Tenenbaum's defense after Judge Nancy Gertner encouraged him to do so.[148] Nesson's defense of the case was unconventional and erratic, to the point that Judge Gertner characterized it as "truly chaotic."[149] However, none of Nesson's tactics mattered much after Joel Tenenbaum admitted on the witness stand that he had been lying from the beginning and he had downloaded and distributed music.[150]

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140. *See* Memorandum of Law & Order, *supra* note 10, at 5; Steve Karnowski, *Music Cos. Vow To Show Minn. Woman Shared 24 Songs*, ABC NEWS, June 15, 2009, http://abcnews.go.com/Technology/wireStory?id=7844261.

141. *See* Opposition to Thomas-Rasset Motion, *supra* note 19, at 4.

142. *See* Memorandum of Law & Order, *supra* note 10, at 5.

143. *See* Thomas-Rasset Motion for a New Trial, *supra* note 15, at 4–5.

144. Memorandum of Law & Order, *supra* note 10, at 17–22, 26 (finding that any amount over $54,000 would be "monstrous and shocking").

145. Memorandum of Law & Order, *supra* note 10, at 3 (ordering plaintiffs to accept remittitur or ask for a new trial on damages); Notice of Plaintiffs' Decision RE: Remittitur, *supra* note 10, at 6 (declining remittitur and requesting a new trial). At the time of this Note's publication, the third trial had not yet occurred.

146. Revised Scheduling Order at 2, Capitol Records Inc. v. Alaujan, No. 03cv11661-NG (D. Mass. May 28, 2009).

147. *See* Saltzman, *supra* note 129.

148. *See* John Schwartz, *Tilting at Internet Barrier, a Stalwart Is Upended*, N.Y. TIMES, Aug. 11, 2009, at A11.

149. Memorandum and Order at 2, Sony BMG Music Entm't v. Tenenbaum, No. 07cv11446-NG (D. Mass. Dec. 7, 2009) (elaborating upon the decision to deny use of a fair use defense). Nesson ignored deadlines and even recorded conferences with the judge and opposing counsel without consent. *Id.* at 2 n.3.

150. *See* Jonathan Saltzman, *BU Student Admits Illegal Downloads*, BOSTON GLOBE, July 31, 2009, at B1 (noting that Tenenbaum admitted liability); Ben Sheffner, *Oy Tenenbaum! RIAA Wins $675,000, or $22,500 per Song*, ARS TECHNICA, July 31, 2009,

As a result of this revelation, Judge Gertner ordered a directed verdict on the issue of infringement, leaving only the issues of willfulness and total damages in the hands of the jury.[151] The jury deliberated for only three hours before finding Tenenbaum's infringement was willful and awarding the plaintiffs $675,000, or $22,500 for each of the thirty songs.[152] Tenenbaum plans to appeal the verdict and is aiming to have it overturned on the grounds that it is unconstitutionally excessive.[153] Judge Gertner, like Judge Davis, has expressed unease over the Copyright Act's current statutory damage provision.[154] Concerned with the "deep potential for injustice," she "implore[d]" Congress to change the copyright statute.[155] Judge Gertner also held a posttrial proceeding to determine if the damage award is unconstitutional.[156]

C. *The Supreme Court and the Review of Damage Awards*

Many of the arguments between commentators and parties to copyright infringement suits over the constitutionality of statutory damages after *Thomas-Rasset* and *Tenenbaum* center around finding the proper standard of constitutional review. Those who argue that statutory damage awards for copyright infringement are unconstitutional do so by drawing comparisons to punitive damage awards. They assert that the same metric courts use to determine the constitutionality of punitive awards should be applied to statutory awards.[157] But others argue that statutory damages are significantly different than punitive damages, and courts should undertake a different, more deferential, review of the awards.[158] For this Note it is important to explore the Supreme Court's jurisprudence surrounding both statutory and punitive awards. Part I.C.1 details *Gore* and the constitutional guideposts it created to review punitive damage awards. Part I.C.2 discusses *Williams* and the standard it outlines for the review of statutory damages.

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http://arstechnica.com/tech-policy/news/2009/07/o-tenenbaum-riaa-wins-675000-or-22500-per-song.ars.

151. *See* Sheffner, *supra* note 150; Copyrights & Campaigns, http://copyrightsandcampaigns.blogspot.com/2009/07/plaintiffs-win-tenenbaum-case-court.html (July 31, 2009, 04:02 EST).

152. *See* Judgment, *supra* note 12, at 1; Jonathan Saltzman, *Student Must Pay $675k for Songs*, BOSTON GLOBE, Aug. 1, 2009, at A1; Sheffner, *supra* note 150.

153. *See* Matthew Hutchins, *Trial Judge Sinks Nesson's Piracy Defense*, HARV. L. REC., Dec. 3, 2009, at 11.

154. Memorandum and Order, *supra* note 149, at 34–35.

155. *Id.* at 34.

156. Sheri Qualters, *At Hearing, Boston Music Downloader Argues for New Trial or Reduced Verdict*, NAT'L L.J., Feb. 23, 2010, http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202444421502&At_hearing_Boston_music_downloader_argues_for_new_trial_or_reduced_verdict&slreturn=1&hbxlogin=1#. At the time of this Note's publication, no decision had been reached.

157. *See infra* Part II.A.

158. *See infra* Part II.B.

1. *BMW of North America, Inc. v. Gore*—The Constitutional Standard for Punitive Damages

The Supreme Court's standard for assessing the constitutionality of a punitive damage award was articulated in *BMW of North America, Inc. v. Gore*.[159] The case involved a plaintiff who bought a BMW that had been damaged and repainted.[160] The jury found that because the dealership failed to disclose that the car was damaged, it had violated an Alabama fraud statute, and awarded the plaintiff a $4000 compensatory award and a $4 million punitive award.[161] After the Alabama Supreme Court reduced the punitive damages to $2 million because the jury had improperly punished BMW for its acts in other jurisdictions,[162] the U.S. Supreme Court undertook its own review of the award to determine if it complied with due process.[163] The Court held that the Constitution requires 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."[164] It determined that an award of $2 million was grossly excessive and did not give BMW notice of the size of the penalty it faced for its actions.[165] The Court concluded that the punitive damage award assessed against BMW violated due process and thus reversed the award.[166]

The Court's decision was based upon three guideposts it articulated to determine when adequate notice of the size of a punitive damage award has been given and, thus, when that award is constitutional.[167] The first guidepost is "the degree of reprehensibility" of the defendant's actions.[168] The Court reasoned that because "some wrongs are more blameworthy than others," the size of a punitive damage award should be tied to the defendant's conduct.[169] The *Gore* Court believed that this guidepost may

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159. *See* Samuelson & Wheatland, *supra* note 48, at 464 ("*Gore* is the foundational ruling of the U.S. Supreme Court's modern due process jurisprudence on punitive damages.").

160. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 563 (1996); *see also* Bruce J. McKee, *The Implications of* BMW v. Gore *for Future Punitive Damages Litigation: Observations from a Participant*, 48 ALA. L. REV. 175, 181 (1996) (detailing the damage to the car).

161. *Gore*, 517 U.S. at 565; *see also* McKee, *supra* note 160 at 183.

162. *Gore*, 517 U.S. at 567; BMW of N. Am., Inc. v. Gore, 646 So. 2d 619, 627–29 (Ala. 1994); *see also* Steven L. Chanenson & John Y. Gotanda, *The Foggy Road for Evaluating Punitive Damages: Lifting the Haze from the* BMW/State Farm *Guideposts*, 37 U. MICH. J.L. REFORM 441, 456 (2004); John Zenneth Lagrow, Comment, BMW of North America, Inc. v. Gore*: Due Process Protection Against Excessive Punitive Damages Awards*, 32 NEW ENG. L. REV. 157, 178 (1997).

163. *Gore*, 517 U.S. at 562–63.

164. *Id.* at 574.

165. *Id.* at 574–75; *see also* Lagrow, *supra* note 162, at 181.

166. *Gore*, 517 U.S. at 574; *see also* Chanenson & Gotanda, *supra* note 162, at 458–59.

167. *Gore*, 517 U.S. at 574–75; *see also* McKee, *supra* note 160, at 185; Paul M. Sykes, Note, *Marking a Road to Nowhere? Supreme Court Sets Punitive Damages Guideposts in* BMW v. Gore, 75 N.C. L. REV. 1084, 1090 (1997).

168. *Gore*, 517 U.S. at 575.

169. *Id.*; *see also* Lagrow, *supra* note 162, at 180. The Court later elaborated upon the factors that should be considered when determining the reprehensibility of the defendant's conduct, including whether the injury "was physical as opposed to economic," the conduct

be the most important factor in judging the reasonableness of a punitive award.[170] The second guidepost is the ratio between the actual harm the defendant caused and the size of the punitive damage award.[171] The Court recognized that requiring punitive damages to be reasonably related to actual damages was the most common measure of a punitive award's excessiveness.[172] However, it refused to draw a bright-line rule regarding what is reasonable.[173] The third and final guidepost requires a comparison of the award to civil sanctions for similar misconduct.[174] The Court believed that because legislatures spend a great deal of time and effort determining the proper size of a penalty, courts reviewing damage awards should give deference to their decisions.[175] Since the *Gore* decision, the Court has made clear on numerous occasions that these guideposts govern the review of the constitutionality of a punitive damage award.[176]

2. *St. Louis, Iron Mountain & Southern Railway Co. v. Williams*—The Constitutional Standard for Statutory Damages

The Supreme Court outlined the standard for determining the constitutionality of a statutory damage award in *St. Louis, Iron Mountain & Southern Railway Co. v. Williams.* The decision elaborated upon the review created in *Waters-Pierce Oil Co. v. Texas*,[177] a case that upheld a statutory damage award of $1.6 million against a Texas oil company for violating two state antitrust laws.[178] The *Waters-Pierce* Court recognized that the damage award at issue was large, but held that the Court could "only interfere with such legislation and judicial action of the States enforcing it if the fines imposed [were] so grossly excessive as to amount to a deprivation of property without due process of law."[179]

The *Williams* Court used *Waters-Pierce* as a baseline, but refined the due process standard for statutory damages and added an element of

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displayed "an indifference to or a reckless disregard of the health or safety of others," and if "the harm was the result of intentional malice, trickery, or deceit, or mere accident." State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003) (citing *Gore*, 517 U.S. at 576–77).

170. *Gore*, 517 U.S. at 575; *see also* Lagrow, *supra* note 162, at 180; McKee, *supra* note 160, at 187.

171. *Gore*, 517 U.S. at 580.

172. *Id.*; *see also* Lagrow, *supra* note 162, at 180.

173. *Gore*, 517 U.S. at 582–83; *see also* Chanenson & Gotanda, *supra* note 162, at 457–58; McKee, *supra* note 160, at 189.

174. *Gore*, 517 U.S. at 583.

175. *Id.*; *see also* Chanenson & Gotanda, *supra* note 162, at 458.

176. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 418 (2003); Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 440 (2001).

177. 212 U.S. 86 (1909).

178. *Id.* at 96–97, 111–12; *see also* Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 117–18 (2009).

179. *Waters-Pierce*, 212 U.S. at 111–12 (citing Coffey v. County of Harlan, 204 U.S. 659 (1907)).

proportionality.[180] The case involved an Arkansas statute that regulated the rates a railroad company could charge and prescribed a statutory award for its violation.[181] Two sisters who were charged sixty-six cents more than the statute allowed brought a suit against the company operating the train.[182] The jury awarded seventy-five dollars to the plaintiffs, and the train company appealed, claiming a violation of due process.[183] The Court held that while the Due Process Clause does place a limit on a legislature's ability to determine sanctions for wrongful conduct, lawmakers are still afforded "a wide latitude of discretion" in where they set statutory penalties.[184] A statutory damage award only violates the Due Process Clause when "the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable."[185] This standard has governed the review of the constitutionality of a statutory damage award for the past ninety years.[186] Since the *Gore* decision, courts have declined to use the guideposts to review statutory damage awards and continue to rely on the standard outlined in *Williams*.[187]

II. DETERMINING WHETHER COURTS SHOULD APPLY THE SUPREME COURT'S PUNITIVE DAMAGES JURISPRUDENCE TO STATUTORY DAMAGE AWARDS

Part I of this Note explored copyright's damage provision and its development, the RIAA's lawsuits against P2P network users, and the Supreme Court's statutory and punitive damages jurisprudence. These discussions provided important background for the debate over which constitutional standard should be applied to statutory damages for copyright infringement. This part now presents the arguments on each side of that debate. Part II.A first considers why some commentators and defendants in copyright infringement lawsuits believe that *Gore* should be used to review statutory damage awards. Then, Part II.B discusses the reasons other commentators as well as record labels argue *Gore* has no application in the review of statutory damage awards.

180. St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63, 66–67 (1919); *see also* Scheuerman, *supra* note 178, at 116–18.

181. *Williams*, 251 U.S. at 63–64.

182. *Id.* at 64.

183. *Id.*

184. *Id.* at 66.

185. *Id.* at 66–67 (citations omitted); *see also* Scheuerman, *supra* note 178, at 117–18.

186. *See* Scheuerman, *supra* note 178, at 122–23.

187. *See, e.g.*, Zomba Enters., Inc. v. Panorama Records, Inc., 491 F.3d 574, 587 (6th Cir. 2007) (rejecting the *Gore* guideposts in favor of the *Williams* standard); Verizon Cal. Inc. v. OnlineNIC, Inc., No. C 08-2832 JF (RS), 2009 U.S. Dist. LEXIS 84235, at *20 (N.D. Cal. Aug. 25, 2009) (same); Native Am. Arts, Inc. v. Bundy-Howard, Inc., 168 F. Supp. 2d 905, 914 & n.6 (N.D. Ill. 2001) (same).

A. *Arguments That Courts Should Use* Gore *To Review Statutory Damages*

The argument that courts should apply the *Gore* guideposts to statutory damage awards for copyright infringement is primarily based on the similarities between statutory and punitive damage awards. Part II.A.1 discusses the constitutional concerns statutory damages share with punitive damages, first focusing on arbitrariness and uncertainty before turning to excessiveness. Part II.A.2 discusses the similar purposes served by statutory damages in the context of copyright infringement and punitive damages.

1. The Constitutional Issues Common to Statutory and Punitive Damages

a. *Arbitrariness and Uncertainty*

The arbitrariness and uncertainty surrounding the size of punitive damage awards are major constitutional concerns.[188] In order for a punitive damage award to reach the standard of fairness the Due Process Clause requires, there must be some level of consistency in the way juries assess awards.[189] Such consistency is necessary to provide potential wrongdoers with the requisite notice of the severity of the punishment they may face for their actions.[190] For this reason, as Justice Breyer's concurrence stated, providing consistency and ensuring punitive awards are not arbitrary were both major motivations for the creation of the *Gore* guideposts.[191]

The Supreme Court was particularly concerned with inconsistent punitive damage awards in different cases involving similar conduct.[192] Similarly, since the creation of the first statutory damage award range for copyright infringement in 1895, commentators have argued that courts apply the Copyright Act's statutory scheme inconsistently in similar situations and, thus, it is arbitrary.[193] In his review of the remedial system of copyright law as it existed in 1939, Julian Caplan discussed the "controversy" surrounding the system of awarding judgments between the minimum and maximum set in the statute.[194] Caplan noted that despite the limits placed

188. *See* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2625 (2008) ("The real problem, it seems, is the stark unpredictability of punitive awards.").

189. *See id.* at 2625–26 (discussing the Court's concern with ensuring consistency in order to provide fairness).

190. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574 (1996) (discussing the notice required by the Due Process Clause).

191. *Id.* at 586–97 (Breyer, J., concurring).

192. *See Baker*, 128 S. Ct. at 2625–26 (finding that variations in the size of punitive awards may be desirable if it was because courts were tailoring their decisions to find the "optimal" award based on the facts, but that this was generally not the case); *see also Gore*, 517 U.S. at 565 & n.8 (noting that in a case with very similar facts decided shortly before *Gore*, the jury awarded a similar compensatory award with no punitive damages).

193. *See* Julian Caplan, *The Measure of Recovery in Actions for the Infringement of Copyright*, 37 MICH. L. REV. 564, 572–75 (1939).

194. *Id.* at 573–75. At the time of Caplan's article, the minimum was $250 and the maximum was $5000. *See id.* at 575.

on the size of each award, judgments varied greatly from case to case.[195] Some courts awarded the maximum while some courts awarded only the minimum amount while expressing their displeasure that they were even required to award that much.[196] Caplan found it "impossible to find any rationalization" for the discrepancies.[197]

Commentators have continued this line of argument in relation to the current copyright statute.[198] A comparison of the RIAA lawsuits that have resulted in default or summary judgment against the defendant—and a minimum statutory award of $750 per song[199]—to the much larger jury awards in *Tenenbaum* and the two *Thomas-Rasset* trials[200] illustrates the inconsistent application of the statutory damage provision and the arbitrary nature of the resulting awards.[201] While all of these cases had similar facts, the results could not be more different.[202] Additionally, as Jammie Thomas-Rasset has argued, evidence of the "arbitrariness, variability, and unpredictability in awards" can be found in the huge difference between the sizes of the verdicts in her first two trials.[203] Even though these two trials clearly had the same exact facts, the first jury assessed an award of $9250 per song,[204] while the second jury awarded $80,000 per song.[205] The fact that the second jury's award is almost nine times larger is evidence that statutory damage awards for copyright infringement implicate the same concerns of arbitrariness and uncertainty as punitive damage awards.[206]

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195. *See id.* at 574.

196. *Compare* Dreamland Ball Room, Inc. v. Shapiro, Bernstein & Co., 36 F.2d 354, 355 (7th Cir. 1929) (awarding the minimum), *and* M. Witmark & Sons v. Calloway, 22 F.2d 412, 414 (E.D. Tenn. 1927) (same), *with* Douglas v. Cunningham, 294 U.S. 207, 208, 210 (1935) (awarding the maximum), *and* Cory v. Physical Culture Hotel, Inc., 14 F. Supp. 977, 985 (W.D.N.Y. 1936) (same).

197. Caplan, *supra* note 193, at 574–75.

198. *See, e.g.*, Samuelson & Sheffner, *supra* note 14, at 54–56 (providing examples of inconsistent application); Samuelson & Wheatland, *supra* note 48, at 485–88 (discussing how easy it is to find inconsistent applications of the statute).

199. *See, e.g.*, BMG Music v. Gonzalez, 430 F.3d 888, 889–90, 893 (7th Cir. 2005) (affirming the district court's award of $750 a song for thirty songs in summary judgment); Warner Bros. Records Inc. v. Tait, No. 3:07-cv-134-J16-HTS, 2008 U.S. Dist. LEXIS 46034, at *7–9 (M.D. Fla. June 12, 2008) (awarding $750 per song for seven songs in a summary judgment); UMG Recordings, Inc. v. Blake, No. 5:06-CV-00120-BR, 2007 U.S. Dist. LEXIS 46414, at *4, *8 (E.D.N.C. June 26, 2007) (awarding $750 per song for eleven songs in a default judgment).

200. *See supra* Part I.B.1–2.

201. *See* Samuelson & Sheffner, *supra* note 14, at 55–56 (discussing the discrepancies and describing the awards in *Thomas-Rasset* and *Tenenbaum* as "arbitrary and capricious").

202. *See id.*

203. Reply in Support of Motion for a New Trial, Remittitur, and to Alter or Amend the Judgment at 2, Capitol Records Inc. v. Thomas-Rasset, No. 06-cv-1497 (D. Minn. Aug. 28, 2009) [hereinafter Thomas-Rasset Reply].

204. Capitol Records Inc. v. Thomas, 579 F. Supp. 2d 1210, 1213 (D. Minn. 2008).

205. *See* Memorandum of Law & Order, *supra* note 10, at 5.

206. *See* Thomas-Rasset Reply, *supra* note 203, at 2.

Much of the uncertainty surrounding statutory damage awards is due to the size of the range Congress created.[207] The maximum of $150,000 per infringed work is two hundred times greater than the minimum.[208] Courts have discretion as to where to set an award within the range, so every copyright infringement case features a great deal of uncertainty surrounding the size of each statutory award.[209] This uncertainty is compounded in cases of multiple infringed works.[210] In many of the cases the record labels brought against individuals, the P2P network users were downloading and distributing hundreds, if not more than a thousand, songs.[211] Copyright owners may allege the infringement of one work, all the works, or any number in between.[212] As a result, the statutory range for a single infringement is essentially inapplicable, and the true range of the potential liability a defendant may face for infringement is between the $200 minimum award for one instance of innocent infringement, and the maximum $150,000 for willful infringement multiplied hundreds or thousands of times over.[213] So in spite of the fact that a set maximum and minimum govern statutory damages for copyright infringement, the aggregation of multiple claims leads to an extremely broad statutory range and "open-ended damage judgments."[214] This results in arbitrary awards, critics argue, so statutory damages for copyright infringement should be subjected to the same level of judicial scrutiny as punitive damage awards.[215]

b. *Excessiveness*

In the *Gore* decision, the Court held that the punitive damage award at issue violated due process because it was "grossly excessive."[216] But the

207. *See* Samuelson & Wheatland, *supra* note 48, at 458–59 (noting that a statutory damage award is not a fixed amount, the statutory range is broad, and statutory damages punish a wide variety of wrongful acts); Evanson, *supra* note 14, at 621 (noting that large statutory ranges such as the range for copyright infringement can lead to arbitrary awards).

208. *See* 17 U.S.C. § 504(c) (2006); *see also* Samuelson & Wheatland, *supra* note 48, at 458–59.

209. Samuelson & Wheatland, *supra* note 48, at 459 ("Exactly where in this very broad range any particular statutory award will be rendered is anybody's guess.").

210. *See* Evanson, *supra* note 14, at 624–25.

211. *See id.* at 625 (noting that most lawsuits against P2P network users involve over 1000 songs).

212. Jammie Thomas-Rasset shared approximately 1700 songs through Kazaa, and Joel Tenenbaum admitted at trial to downloading and sharing hundreds of songs. *See* Opposition to Thomas-Rasset Motion, *supra* note 19, at 3–4; Marguerite Reardon, *BU Student Found Liable in Music-Swapping Case*, CNET NEWS, July 31, 2009, http://news.cnet.com/digital-media/?keyword=Joel+Tenenbaum. But, the record labels only sued for the infringement of twenty-four and thirty works, respectively. *See supra* text accompanying notes 133, 152.

213. *See* Evanson, *supra* note 14, at 621–25 (finding that because file-sharing suits generally involve over 1000 songs, it "effectively abrogates the cap" on statutory damage awards).

214. *Id.* at 625–26.

215. *Id.* at 626.

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

concern with excessively large awards is not confined to punitive damages.[217] As the Court has made clear over the years, the excessiveness issue that led to the creation of the *Gore* guideposts applies to all awards.[218]

In a number of copyright infringement cases defendants have argued that the *Gore* guideposts should apply to statutory damages because they are just as susceptible to excessiveness as punitive damage awards and that the *Gore* Court intended for the guideposts to apply to all excessive civil sanctions.[219] The arguments that statutory damages for copyright infringement are excessive generally take one of two forms: the damage awards overcompensate and overdeter[220] or they are excessive in relation to the actual harm the copyright owner has suffered.[221] The argument that statutory damage awards are excessive because they overcompensate and overdeter is based on the premise that there is an optimal level of compensation and deterrence for copyright infringement and statutory awards have a tendency to be greater than that level.[222] Even though damage awards must be within a carefully crafted, legislatively created range that is designed to serve the goals of copyright damages as accurately as possible, as discussed previously, that range is actually quite large, especially when claims are aggregated.[223] Since courts have a great deal of discretion to fix awards within the wide range, some argue that the damage awards that result are not an accurate reflection of important legislative decisions regarding how best to punish and deter wrongful conduct.[224] As a result, they conclude that statutory damage awards often overcompensate

217. *See* Samuelson & Wheatland, *supra* note 48, at 492 ("[T]he Supreme Court has applied due process excessiveness reviews to a wide variety of sanctions—not just to punitive damages . . . .").

218. The Supreme Court's due process jurisprudence makes clear that excessiveness concerns are in regards to punishment in general. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) (holding that due process proscribes excessive punishments generally); *Gore*, 517 U.S. at 562 (same); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 454 (1993) (same).

219. *See, e.g.*, Thomas-Rasset Motion for a New Trial, *supra* note 15, at 4–5 (discussing the application of *Gore* to civil punishments); Revised Amicus Brief of Free Software Foundation in Connection with Defendant's Motion to Dismiss on Grounds of Unconstitutionality of Copyright Act Statutory Damages as Applied to Infringement of Single MP3 Files at 4–5, Sony BMG Music Entm't v. Tenenbaum, 07-CV-11446-NG (D. Mass. May 18, 2009) [hereinafter Amicus Brief of Free Software Foundation] (noting that the guideposts were based on a review of the history of damage awards generally, not just punitive awards).

220. *See infra* text accompanying notes 222–25.

221. *See infra* text accompanying notes 226–30.

222. *See* Evanson, *supra* note 14, at 621–22.

223. *See supra* text accompanying notes 207–14.

224. *See* F. W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228, 232 (1952) (noting that statutory damages result from the "exercise of the wide judicial discretion"); Evanson, *supra* note 14, at 621, 626 (finding that statutory damage awards do not reflect legislative decisions regarding proper punishment because the range is so large).

copyright holders and greatly exceed the award required to adequately deter infringement.[225]

Both commentators and defendants in copyright infringement suits have argued far more frequently that statutory damages for copyright infringement are excessive when compared to actual injury.[226] The theory is that the actual harm each infringement caused is equal to the cost of obtaining the song legally.[227] As one commentator has noted, even a minimum statutory damage award of $750 seems excessive when compared to one lost sale.[228] As the size of the damage awards moves further up the statutory range, the awards become even more excessively large.[229] Many commentators have gone so far as to label any portion of the judgment in excess of the amount of actual harm caused the "punitive" part of the statutory award.[230]

The excessiveness problem in statutory damage awards, both in terms of overcompensation and overdeterrence, and in relation to harm caused, becomes even more prevalent when multiple infringement claims are aggregated.[231] Many who argue that *Gore* should be applied to statutory damage awards for copyright infringement have drawn a comparison between copyright infringement and class action suits, as they both involve

225. *See* Evanson, *supra* note 14, at 621–22 (noting the lack of restraint on excessively large statutory damage awards).

226. Answer, Affirmative Defenses and Counterclaims at 2, Lava Records LLC v. Amurao, No. 07 CV 321 (CLB) (2d Cir. Feb. 12, 2007); Defendant Denise Cloud's Brief in Support of Her Rule 12(b)(6) Motion to Dismiss at 6, Sony BMG Entm't v. Cloud, No. 2:08 CV 01200 (E.D. Pa. Oct. 29, 2008); Defendant James Michael Boggs' Response in Opposition to Plaintiffs' Rule 12(b)(6) Motion to Dismiss Counterclaims at 21–22, Atl. Recording Corp. v. Boggs, No. 2:06-cv-00482 (S.D. Tex. Apr. 26, 2007); Samuelson & Sheffner, *supra* note 14, at 55–56 (discussing the ratio of actual harm suffered to the statutory award); 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, 545–49 (2004) (comparing the harm caused by P2P network users with the size of a statutory award).

227. This amount has been claimed to be as high as the cost of a CD and as low as the thirty-five cent profit record labels make for selling a song on iTunes. *See* Capitol Records Inc. v. Thomas, 579 F. Supp. 2d 1210, 1227 (D. Minn. 2008) (comparing the harm caused by Thomas-Rasset to the cost of three CDs); Amicus Brief of Free Software Foundation, *supra* note 219, at 1–2 & n.1 (arguing that the copyright infringement of P2P network users causes an injury of, at most, thirty-five cents).

228. *See* Barker, *supra* note 226, at 548.

229. *See* Thomas-Rasset Motion for a New Trial, *supra* note 15, at 2 (noting that the $80,000 per song Jammie Thomas-Rasset was ordered to pay is more than 5000 times the cost of a CD and over 60,000 times the cost of a song on iTunes).

230. *See, e.g.*, Samuelson & Wheatland, *supra* note 48, at 462; Barker, *supra* note 226, at 545–49.

231. Aggregating multiple claims can result in an even greater distortion of congressional intent regarding compensation and deterrence as well as awards that are even more out of line with the actual injury caused by infringement. *See* Defendant's Opposition to Plaintiffs' Motion to Dismiss Counterclaims at 13, Capitol Records, Inc. v. Alaujan, No. 03-CV-11661-NG (D. Mass. Oct. 27, 2008) [hereinafter Defendant's Opposition] (arguing that aggregation of statutory damage awards "exacerbates their gross excessiveness"); Evanson, *supra* note 14, at 624–26 ("[A]ggregated damages may far exceed the award contemplated by the legislature . . . .").

a large number of claims.[232] The case most frequently cited is *Parker v. Time Warner Entertainment Co.*,[233] which discussed the issues that arise from aggregating a large number of statutory damage awards in the context of a class action lawsuit.[234] *Parker* involved the violation of consumer privacy laws that allowed each cable subscriber to recover a minimum statutory damage award of $1000.[235] The plaintiffs sought class certification for an estimated twelve million Time Warner Cable subscribers.[236] The court was concerned with creating a situation combining a minimum statutory award with a system that aggregates numerous claims.[237] It reasoned that "[s]uch a combination may expand the potential statutory damages so far beyond the actual damages suffered that the statutory damages come to resemble punitive damages."[238] The court cited the Supreme Court's punitive damages jurisprudence, including *Gore*, and refused class certification out of fear that it would "distort[] the purpose of . . . statutory damages," create a "devastatingly large damages award, out of all reasonable proportion to the actual harm suffered," and potentially violate due process.[239] A number of courts have acknowledged the relevance of *Parker* to copyright infringement cases.[240] Like statutory damage awards aggregated in a class action, statutory damage awards for copyright infringement can result in grossly excessive awards that are similar to punitive damages and "raise[] substantive due process problems like those raised in *Gore* and *Campbell*."[241]

2. Statutory Damages Serve the Same Purpose as Punitive Damages

Commentators and defendants in copyright infringement suits have argued that because statutory and punitive awards serve a similar purpose, the Supreme Court's punitive damages jurisprudence should govern statutory damage awards for copyright infringement.[242] Punitive damage

232. *See, e.g.*, Barker, *supra* note 226, at 550–52; Evanson, *supra* note 14, at 618.
233. 331 F.3d 13 (2d Cir. 2003).
234. *Id.*
235. *Id.* at 15, 25.
236. *Id.* at 16.
237. *Id.* at 22.
238. *Id.*
239. *Id.*
240. *See* UMG Recordings, Inc. v. Lindor, No. CV-05-1095 (DGT), 2006 U.S. Dist. LEXIS 83486, at *8–9 (E.D.N.Y. Nov. 9, 2006) (discussing favorably the cases the defendant cited in her briefs, which included *Parker*); *In re* Napster, Inc. Copyright Litig., No. C 04-1671 MHP, 2005 U.S. Dist. LEXIS 11498, at *38–39 (N.D. Cal. May 31, 2005) (discussing the application of *Parker* in a statutory damages context); *see also* Defendant's Memorandum of Law in Support of Motion for Leave to File Second Amended Answer at 3, *Lindor*, No. CV-05-1095 (DGT) (E.D.N.Y. Apr. 26, 2006) (citing *Parker*); Amicus Brief of Free Software Foundation, *supra* note 219, at 4–7 (detailing cases that have discussed *Parker* favorably in the context of statutory damages).
241. Barker, *supra* note 226, at 552.
242. *See, e.g.*, Defendant's Motion for New Trial, or in the Alternative, for Remittitur at 5–7, Capitol Records Inc. v. Thomas, No. 06-cv-1497 (D. Minn. Oct. 15, 2007) (discussing the punitive nature of statutory awards); Samuelson & Sheffner, *supra* note 14, at 59

awards are intended to punish the defendant for his wrongful conduct and to deter him and others from committing similar wrongful acts again.[243] Like punitive damages, an important justification for the existence of statutory damage awards for copyright infringement has always been that they deter both the wrongdoer and the public in general from future acts of infringement.[244] Courts have consistently acknowledged that deterring future infringement is a primary goal of the statute.[245] Punishment, on the other hand, has never been an express purpose of the statutory damage provision.[246] Nonetheless, it is frequently argued that statutory damages punish infringers.

One formulation of the argument that statutory damages for copyright infringement punish is that the "willful infringer" increases the award based on the defendant's conduct and is thus punitive in nature.[247] Another version of the argument posits that statutory damages punish as a means of deterrence.[248] Professor Charles Nesson has taken this argument even further. In his defense of Joel Tenenbaum he argued that when Congress increased the size of statutory damage awards in 1999, it essentially enacted a criminal statute enforced through the civil system.[249] Nesson contends that the statute grants copyright owners a power that goes beyond the level of a civil damage award intended to punish and into the realm of a criminal sanction.[250]

The opinion of many courts, that "another role has emerged for statutory damages in copyright infringement cases [besides compensation]: that of a punitive sanction on infringers," reinforces the view that statutory damages

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(discussing the purposes of statutory damages); Samuelson & Wheatland, *supra* note 48, at 460–61 (noting that courts have interpreted statutory damages for copyright infringement to be punitive).

243. *See supra* text accompanying notes 33–34.

244. *See supra* text accompanying notes 101–06.

245. *See* F. W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228, 233 (1952) (holding that statutory damages are "designed to discourage wrongful conduct"); St. Luke's Cataract & Laser Inst., P.A. v. Sanderson, 573 F.3d 1186, 1206 (11th Cir. 2009) (holding that deterrence is a consideration when awarding statutory damages).

246. The main goals of statutory damages for copyright infringement have always been to compensate copyright holders and deter future infringement. *See supra* text accompanying notes 101–06.

247. *See, e.g.*, On Davis v. Gap, Inc. 246 F.3d 152, 172 (2d Cir. 2001) (holding that the willful damages provision punishes); Rodgers v. Quests, Inc., Nos. C79-243-Y, C80-1899-Y, 1981 U.S. Dist. LEXIS 17276, at *25 (N.D. Ohio Oct. 30, 1981) (noting the increase allowed by the willful infringer provision "constitute[s] punitive damages"); *see also* Samuelson & Wheatland, *supra* note 48, at 461 (discussing the willful infringer provision).

248. *See* Kemezy v. Peters, 79 F.3d 33, 34 (7th Cir. 1996) (noting that "deterrence is a purpose of punishment"); Nat'l Football League v. Primetime 24 Joint Venture, 131 F. Supp. 2d 458, 478 n.17 (S.D.N.Y. 2001) (citations omitted) (noting that statutory awards punish in order to deter); *see also* Barker, *supra* note 226, at 548–49 (finding deterrence to be accomplished through punishment).

249. *See* Defendant's Opposition, *supra* note 231, at 4–7.

250. *See id.* at 3 ("The 'Digital Theft Deterrence . . . Act of 1999' is essentially a criminal statute, punitively deterrent in its every substantive aspect . . . .").

serve a similar purpose to punitive damages and are intended to punish.[251] Like the U.S. Court of Appeals for the Eighth Circuit, many other courts have expressly adopted the opinion that statutory damages serve the same purpose as punitive damages, or at least a partly punitive purpose.[252] There are also a number of courts that have impliedly accepted that rationale by suggesting that statutory damage awards are "punishment."[253] The fact that statutory damages punish and deter in the same manner as punitive damages illustrates the punitive character of statutory damage awards. Since statutory damages and punitive damages are used to accomplish similar goals, they should be reviewed under the same constitutional standard.[254]

B. *Arguments That* Gore *Is the Wrong Standard for Statutory Damages*

Part II.A discussed the arguments for applying the Supreme Court's punitive damage jurisprudence to statutory damages. This part explores the arguments that the *Gore* guideposts should not govern statutory damage awards for copyright infringement because they in no way implicate many of the concerns that drove the Supreme Court to create them. Part II.B.1 examines the constitutional concerns with punitive damages that are not present with statutory damages, namely, the lack of a notice issue and worry about unchecked jury discretion. Part II.B.2 discusses the tradition of judicial deference for legislative decisions like the creation of the minimum and maximum award for copyright infringement. Finally, Part II.B.3 analyzes how poorly the *Gore* guideposts fit in a statutory damages context.

1. Constitutional Concerns Underlying the *Gore* Decision That Are Not Implicated by Statutory Damages for Copyright Infringement

a. *Lack of Notice*

As the *Gore* Court stated, "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."[255] This concern with adequate notice is what led the Court to review the constitutionality of the

251. Cass County Music Co. v. C.H.L.R., Inc., 88 F.3d 635, 643 (8th Cir. 1996) ("[S]tatutory damages have evolved and now are intended . . . to punish the defendant . . . .").

252. *See, e.g.*, *On Davis*, 246 F.3d at 172 (holding that the statutory damage provision is used to accomplish the goals of punitive damages); Calio v. Sofa Express, Inc., 368 F. Supp. 2d 1290, 1291 (M.D. Fla. 2005) (quoting *On Davis*, 246 F.3d at 172); *Nat'l Football League*, 131 F. Supp. 2d at 478 n.17 (discussing the "punitive character" of statutory damages).

253. *See* Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 352 (1998); Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co., 74 F.3d 488, 496 (4th Cir. 1996).

254. Samuelson & Wheatland, *supra* note 48, at 463 (concluding that the limits the Supreme Court has placed on punitive damages should be applied to copyright damages).

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

award.[256] Notice concerns with punitive damage awards result from the fact that they are not set in a statute; rather, the court fixes them at some potentially unlimited amount every time they are awarded, and therefore, the public has no prior indication of the size of the sanction.[257]

Proponents of a more deferential standard of review argue that statutory damage awards for copyright infringement do not exhibit the same constitutional notice concerns as punitive damage awards.[258] Copyright law requires that no statutory damage award be lower than $200 or higher than $150,000.[259] These limits "set forth in black and white" the potential liability an individual faces for copyright infringement and provide clear notice.[260] In defense of the statutory damage scheme, record labels and the U.S. Department of Justice (DOJ) have advanced the argument that a defendant has clear notice of the potential civil sanction he faces when he commits an act of infringement.[261] They assert that "[b]ecause statutory damages are, by definition, promulgated in a statute, persons held liable for them cannot be deemed to have received inadequate notice."[262] This notice, they argue, differentiates statutory damages from punitive damages and removes the review of their constitutionality from the realm of the Court's punitive damages jurisprudence.[263] Instead, the proper standard to apply is that which is set forth in *Williams*.[264]

256. *Id.* at 574–75; *see also* Samuelson & Sheffner, *supra* note 14, at 60 (labeling notice the "underlying concern" in *Gore*).

257. *See* Samuelson & Sheffner, *supra* note 14, at 61 (discussing "[t]he due process concerns present in the case of unlimited punitive damages").

258. Tepp, *supra* note 53, at 96 ("No serious contention can be made that there is a lack of notice [with statutory damages].").

259. 17 U.S.C. § 504(c)(2) (2006).

260. Samuelson & Sheffner, *supra* note 14, at 61 ("[I]nfringers have, at least, constructive notice of the penalties that may imposed on them for their bad acts."); *see also* Accounting Outsourcing, LLC v. Verizon Wireless Pers. Commc'ns, L.P., 329 F. Supp. 2d 789, 809 (M.D. La. 2004) (holding that, with statutory damages, defendants in copyright infringement suits cannot claim they did not have notice of the punishment).

261. *See* Opposition to Thomas-Rasset Motion, *supra* note 19, at 13–14 (remarking that the statute provides notice); 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 7, Sony BMG Music Entm't v. Cloud, No. 08-CV-01200 (E.D. Pa. Mar. 25, 2009) [hereinafter U.S. Memorandum in Defense of the Statutory Damages Provision, *Cloud*] (same).

262. U.S. Memorandum in Defense of the Statutory Damages Provision, *Cloud*, *supra* note 261, at 7 (citing Lowry's Reports, Inc. v. Legg Mason, Inc., 302 F. Supp. 2d 455, 460 (D. Md. 2004)); *see also* DirecTV, Inc. v. Cantu, No. SA-04-CV-136-RF, 2004 U.S. Dist. LEXIS 22715, at *13–15 (W.D. Tex. Sept. 29, 2004); *Accounting Outsourcing, LLC*, 329 F. Supp. 2d at 809–10 (M.D. La. 2004).

263. *See* 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 11, Capitol Records Inc. v. Thomas-Rasset, No. 06-cv-1497 (D. Minn. Aug. 14, 2009) [hereinafter U.S. Memorandum in Defense of the Statutory Damages Provision, *Thomas*] (arguing that because of the statutory range *Gore* is not applicable in a statutory damages context).

264. *Id.* at 10.

b. *Unchecked Discretion of the Court*

Punitive damage awards run a substantial risk of offending due process because juries are allowed wide latitude in fixing their amounts, which can result in unfairness.[265] Leading up to the *Gore* decision, the Supreme Court had expressed concern with the jury's discretion when setting a punitive damage award.[266] In *Pacific Mutual Life Insurance Co. v. Haslip*, [267] for example, the Court expressed its concern that "unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities."[268] In *Gore*, Justice Breyer's concurring opinion discussed the need for "reasonable constraints" when fixing damage awards.[269] He noted that when there are limits on a court's discretion, including "legislative enactments . . . that classify awards and impose quantitative limits" on the size of the verdict, then the verdict is entitled to "a strong presumption of validity."[270] But when these restraints are lacking, the Constitution requires a strict review of the damage award, like that which was undertaken in *Gore*.[271]

After the second Thomas-Rasset trial, the RIAA and the DOJ argued that the range Congress created in the copyright statute is a sufficient check on the discretion of courts awarding statutory damages.[272] Indeed, the statutory damage provision places clear limits on the size of the awards,[273] which the Supreme Court has held act as constraints on the discretion of courts assessing statutory damage awards.[274] Since the *Gore* decision, courts have refused to apply the guideposts to statutory damage awards based on these constraints.[275] As the court in *Lowry's Reports, Inc. v. Legg*

265. *See* Honda Motor Co. v. Oberg, 512 U.S. 415, 432 (1994); *see also* Int'l Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 50 (1979) (discussing the impact of "unpredictable" punitive damage awards).

266. *See, e.g.*, Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991) (noting that wide discretion in setting awards had led to "punitive damages that 'run wild.'"); *see also* Sykes, *supra* note 167, at 1097–107 (tracing the Supreme Court's punitive damages jurisprudence that led to *Gore*).

267. 499 U.S. 1 (1991).

268. *Id.* at 18 (citing Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 111 (1909)).

269. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 586–87 (1996) (Breyer, J., concurring) (citing *Haslip*, 499 U.S. at 20–21) (discussing the Court's concerns with the discretion allowed by the Alabama statute); *see also* McKee, *supra* 160, at 190–91 (discussing Justice Breyer's concurrence); Sykes, *supra* note 167, at 1092–94 (same).

270. *Gore*, 517 U.S. at 586–87, 595 (Breyer, J., concurring) (quoting TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 453–54 (1993)).

271. *Id.* at 596.

272. *See* Opposition to Thomas-Rasset Motion, *supra* note 19, at 7; U.S. Memorandum in Defense of the Statutory Damages Provision, *Thomas*, *supra* note 263, at 2.

273. *See* 17 U.S.C. § 504(c)(2) (2006).

274. *See* F. W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228, 232 (1952) (holding that damage awards are fixed "within limited amounts").

275. *See, e.g.*, Verizon Cal. Inc. v. OnlineNIC, Inc., No. C 08-2832 JF (RS), 2009 U.S. Dist. LEXIS 84235, at *22–23 (N.D. Cal. Aug. 25, 2009) (finding that *Gore* does not apply

Mason, Inc.,[276] reasoned, "The unregulated and arbitrary use of judicial power that the *Gore* guideposts remedy is not implicated in Congress' carefully crafted and reasonably constrained [copyright] statute."[277] Through the lens of the Supreme Court's due process jurisprudence, the fact that a maximum and minimum constrain statutory damage awards is significant.[278] These limits on jury discretion assure that statutory damage awards for copyright infringement do not implicate the same constitutional concerns as *Gore* and that the guideposts do not apply.[279]

2. The Supreme Court's Tradition of Deference to Legislative Decisions Regarding Copyright Law

When a legislature has set a penalty or sanction for wrongful conduct, the Supreme Court generally gives great deference to that decision.[280] This sentiment is best expressed by Justice Sandra Day O'Connor's concurring opinion in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*[281] Justice O'Connor expressed the need for a reviewing court to "accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue."[282] This opinion ended up being the basis of the creation of the third guidepost in *Gore*, which requires the court to compare the punitive award to legislatively created sanctions for similar misconduct and to give a great deal of deference to the legislature's decisions.[283]

It has been argued that Congress's decision to allow statutory damage awards for copyright infringement is the type of legislative decision that deserves deference from the reviewing court and that this deference removes statutory damages from the scope of the Supreme Court's punitive

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because there is no unchecked judicial discretion with statutory damage awards); Lowry's Reports, Inc. v. Legg Mason, Inc., 302 F. Supp. 2d 455, 460 (D. Md. 2004) (same).

276. 302 F. Supp. 2d 455 (D. Md. 2004).

277. *Id.* at 460 (citing Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 20 (1991)).

278. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 586–97 (1996) (Breyer, J., concurring) (discussing the need for limits on the court's discretion when setting awards); *Haslip*, 499 U.S. at 20 ("As long as the discretion is exercised within reasonable constraints, due process is satisfied." (citing Schall v. Martin, 467 U.S. 253, 279 (1984); Greenholtz v. Inmates of Nebraska Penal and Corr. Complex, 442 U.S. 1, 16 (1979); McGautha v. California, 402 U.S. 183, 207 (1971))).

279. *See Lowry's Reports*, 302 F. Supp. 2d at 460; Tepp, *supra* note 53, at 96 (noting that *Gore* should not be applied to statutory damages because the statute limits the court's discretion).

280. *See* William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373, 375–76 (1988); *see also* Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part).

281. 492 U.S. 257.

282. *Id.* at 301 (O'Connor, J., concurring in part and dissenting in part) (citing Solem v. Helm, 463 U.S. 277, 290–92 (1983)).

283. *Gore*, 517 U.S. at 583.

damages jurisprudence.[284] The Constitution expressly grants Congress the power to create laws governing copyright,[285] so the Supreme Court has generally found that when it comes to legislative decisions regarding copyright law, "[t]he wisdom of Congress' action . . . is not within [the Court's] province to second-guess."[286] The Court specifically addressed the issue of deference regarding the statutory damages range in *Douglas v. Cunningham*.[287] It held that because decisions about where to fix statutory damage awards for copyright infringement involve the application of a congressionally created "statutory yardstick," the resulting awards require very deferential review.[288] Statutory damage awards for copyright infringement have always been reviewed under a standard that is "extraordinarily deferential—even more so than in cases applying abuse-of-discretion review."[289] Thus, opponents of the *Gore* standard argue that this tradition of deference to congressional acts regarding copyright law indicates that the strict review outlined in *Gore* has no place in the review of statutory damage awards for copyright infringement.[290] Even the *Gore* decision itself emphasizes the importance of deferring to decisions of the legislature about sanctions for misconduct.[291] Thus, the proper review for

284. Plaintiffs' Motion to Dismiss Counterclaims at 13, Atl. Recording Corp. v. Boggs, No. 2:06-cv-00482 (S.D. Tex. Mar. 30, 2007) [hereinafter Boggs Motion to Dismiss] ("[T]he statutory damages provisions in the Copyright Act reflect a carefully considered and targeted legislative judgment . . . . The wisdom of Congress' regime and the amounts set forth therein is not within the province of [the Court] to second guess." (citing Eldred v. Ashcroft, 537 U.S. 186, 222 (2003))); *see also* Tepp, *supra* note 53, at 97 (noting that the *Gore* Court had no desire to substitute its judgment in place of the legislature, and that the guideposts are designed to be applied in the absence of legislative decisions about appropriate sanctions).

285. U.S. CONST. art. I, § 8, cl. 8.

286. *Eldred*, 537 U.S. at 222; *see also* Stewart v. Abend, 495 U.S. 207, 230 (1990) (stating "it is not our role to alter the delicate balance Congress has labored to achieve"); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (holding that Congress has been granted the right to make decisions about copyright law).

287. 294 U.S. 207 (1935).

288. *Id.* at 210.

289. Zomba Enters., Inc. v. Panorama Records, Inc., 491 F.3d 574, 587 (6th Cir. 2007) (citing *Douglas*, 294 U.S. at 210); *see also* Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co., 74 F.3d 488, 496 (4th Cir. 1996) (holding that the standard for reviewing statutory damages awards is very deferential); Broad. Music, Inc. v. Star Amusements, Inc., 44 F.3d 485, 487–88 (7th Cir. 1995) (same); Video Views, Inc. v. Studio 21, Ltd., 925 F.2d 1010, 1017 (7th Cir. 1991) (finding that due process concerns with statutory awards for copyright infringement require only "limited" review); Lowry's Reports, Inc. v. Legg Mason, Inc., 302 F. Supp. 2d 455, 458 (D. Md. 2004) (holding Congress's decisions regarding copyright law are "entitled to substantial deference"); Colleen P. Murphy, *Judicial Assessment of Legal Remedies*, 94 NW. U. L. REV. 153, 202 (1999) ("No reported decision has reduced a litigated award that was within the appropriate statutory range."); Thomas C. Welshonce, *Record Companies Score Two Victories in One Case Against Online Music Sharing*, J. ALLEGHENY COUNTY B. ASS'N, Mar. 28, 2008, at 5, *available at* http://www.acba.org/ACBA/pdf/TLJ/LJv10-08_032808r.pdf (noting the *Williams* standard to be even more deferential than review for abuse of discretion).

290. *See* Tepp, *supra* note 53, at 96–97 (discussing how the Court's deferential treatment of copyright law precludes the use of *Gore* in reviewing statutory damages).

291. *See supra* text accompanying notes 174–75.

statutory damages, they argue, is the highly deferential standard outlined in *Williams*.

3. The Difficulties in Applying the *Gore* Guideposts to Statutory Damages

To argue that the *Gore* guideposts have no place in the review of statutory damage awards for copyright infringement, two commentators have attempted to apply the guideposts to statutory damages in order to illustrate the poor, bordering on impossible, fit.[292] Applying the first guidepost requires using the factors outlined in *Gore* and *Campbell*.[293] Steven M. Tepp found that some of the factors point to the conclusion that the conduct of P2P network users like Jammie Thomas-Rasset and Joel Tenenbaum is "reprehensible," and some do not.[294] Ben Sheffner came to a similar conclusion, arguing that their conduct certainly was not innocent within the meaning of the statute, but it also was not the most blameworthy—the degree of reprehensibility of their conduct likely falls somewhere in the middle.[295] Sheffner noted that deciding that P2P network users fall in the middle of the scale does not help the inquiry, as the second *Thomas-Rasset* jury set the damage award almost exactly in the middle of the statutory range and the result was still a large award.[296]

Tepp and Sheffner found the second and third guideposts to be an even poorer fit than the first.[297] The second guidepost requires comparing the actual harm the plaintiff suffered to the size of the award.[298] But the copyright statute allows a copyright owner to elect to receive statutory damages in lieu of actual damages, so a comparison of a statutory award to actual damages would contravene the very purpose of having statutory damages in the first place.[299] The third guidepost requires a comparison of the size of the statutory damage award to other criminal and civil sanctions set by the legislature.[300] To both commentators, it was inapposite to compare statutory damages to congressionally created civil sanctions for similar actions, because they *are* congressionally created civil sanctions.[301] As Tepp noted, it is completely circular to compare a statutory damage award to itself to determine its constitutional validity.[302]

In August 2009, the U.S. District Court for the Northern District of California in Verizon California Inc. v. OnlineNIC, Inc., undertook a similar analysis of the applicability of the *Gore* guideposts to damages awarded under a federal anticybersquatting law that used a statutory

292. *See* Samuelson & Sheffner, *supra* note 14, at 61; Tepp, *supra* note 53, at 97.
293. *See supra* text accompanying notes 168–69.
294. *See* Tepp, *supra* note 53, at 97.
295. *See* Samuelson & Sheffner, *supra* note 14, at 56, 61.
296. *See id.* at 61.
297. *See id.*; Tepp, *supra* note 53, at 97.
298. *See supra* text accompanying notes 171–73.
299. *See* Tepp, *supra* note 53, at 97.
300. *See supra* text accompanying notes 174–75.
301. *See* Samuelson & Sheffner, *supra* note 14, at 61; Tepp, *supra* note 53, at 97.
302. *See* Tepp, *supra* note 53, at 97.

range.[303] The court found the task to be "problematic."[304] First, it found that the majority of the factors used to determine reprehensibility were irrelevant in the context of statutory damages.[305] Next, like Sheffner and Tepp, the court found that the second guidepost was "out of place" since a comparison to actual damages would run counter to the primary purpose of statutory damage awards.[306] Finally, the court held that the third guidepost, a comparison to other civil penalties, "rest[ed] almost entirely on the 'fair notice' aspect of the due process limitations on damages awards."[307] Since statutory damage awards "explicitly disclose[] the range of penalties that may be awarded on a per-violation basis," there are no notice concerns, and the third guidepost is inapplicable.[308] As commentators and the *OnlineNIC* court have concluded, applying the *Gore* guideposts to statutory damages is an "imperfect fit,"[309] "awkward at best,"[310] and "involves attempting to pound the proverbial square peg into a round hole."[311] This is a clear illustration that *Williams* should be applied to the review of statutory damages, not *Gore*.[312]

III. *WILLIAMS*, NOT *GORE*, IS THE PROPER STANDARD FOR THE CONSTITUTIONAL REVIEW OF STATUTORY DAMAGE AWARDS FOR COPYRIGHT INFRINGEMENT

After discussing each side of the debate over the proper standard of review for statutory damages in Part II, Part III of this Note argues that the guideposts that *Gore* created have no application in the constitutional review of statutory damage awards for copyright infringement. Part III.A.1 highlights the fact that notice was *Gore*'s main due process concern, and notice is not an issue with statutory damage awards. Part III.A.2 then argues that the *Gore* Court's general concerns with excessiveness in comparison to actual harm are equally inapplicable. Finally, Part III.A.3 contends that statutory damages for copyright infringement cannot be arbitrary because they are set within the statutory range. This Note concludes by arguing that the deferential review outlined in *Williams* is the proper constitutional standard for statutory damages, and that in order to provide a proper due process review courts must undertake a thorough application of the test.

303. No. C 08-2832 JF (RS), 2009 U.S. Dist. LEXIS 84235 (N.D. Cal. Aug. 25, 2009).
304. *Id.* at *23.
305. *Id.* at *23–24.
306. *Id.* at *24.
307. *Id.* at *25.
308. *Id.* at *25–26.
309. *Id.* at *26.
310. *See* Tepp, *supra* note 53, at 97.
311. *See* Samuelson & Sheffner, *supra* note 14, at 61.
312. *See id.*

A. Gore *Has No Place in the Review of Statutory Damages*

Part III.A sets forth the reasons that this Note concludes the *Gore* guideposts should not be applied to statutory damage awards for copyright infringement. First, it contends that because statutory damage awards provide notice, they do not implicate the main issue underlying the *Gore* decision. Next, this part argues that the popular contention that statutory damages are excessive compared to the harm infringement causes is inaccurate and that such a comparison would undermine the main purpose of statutory awards. Finally, this part argues that contrary to the claims of many commentators, statutory damage awards for copyright infringement are not arbitrary.

1. Statutory Damages Satisfy the *Gore* Court's Chief Concern

The *Gore* Court discussed a number of issues with punitive damages, but notice was at the "heart" of the decision.[313] Not only were all of the other concerns the Court expressed—such as arbitrariness, uncertainty, and excessiveness—secondary, they were only an issue because of their effect on notice.[314] The Court created each of the three guideposts to ensure punitive damages awards provide notice as due process requires.[315] By tying the award to "the accepted view that some wrongs are more blameworthy than others" in the first guidepost, the Court provided notice that the size of a punitive sanction would be related to the "enormity of [the] offense."[316] The second guidepost—requiring a "reasonable relationship" to the harm caused—is similarly based on long-standing beliefs regarding how large punishments should be, and ensures the public has notice that punishments will be comparable to the amount of damage their actions cause.[317] Finally, the third guidepost looks to guarantee fair notice by providing punitive damage awards that are comparable to established legislatively created sanctions.[318] By ensuring that an award is not arbitrary or excessive and complies with the three guideposts, the *Gore*

313. Accounting Outsourcing, LLC v. Verizon Wireless Pers. Commc'ns, L.P., 329 F. Supp. 2d 789, 808–09 (M.D. La. 2004).

314. Because the public never would have expected an award so excessive, there was no notice. *See* Lagrow, *supra* note 162, at 181 ("[T]he award went beyond constitutional limits as BMW did not have fair notice that its nondisclosure policy would result in such a large punitive award." (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 584 (1996))). In his concurring opinion, Justice Breyer also noted that awards decided arbitrarily fail to provide proper notice. *Gore*, 517 U.S. at 587–88 (Breyer, J., concurring).

315. *See* Lagrow, *supra* note 162, at 194 (finding that the guideposts are used to determine if a punitive award provided notice); Sykes, *supra* note 167, at 1090, 1108–09 (same).

316. *Gore*, 517 U.S. at 575 (citing Day v. Woodworth, 54 U.S. (13 How.) 363, 371 (1852)); *supra* text accompanying notes 168–70.

317. *See Gore*, 517 U.S. at 580–81, 583; *supra* text accompanying notes 171–73.

318. *See Gore*, 517 U.S. at 583–85; *supra* text accompanying notes 174–75; *see also* Verizon Cal. Inc. v. OnlineNIC, Inc., No. C 08-2832 JF (RS), 2009 U.S. Dist. LEXIS 84235, *25–26 (N.D. Cal Aug. 25, 2009) (discussing the third guidepost).

decision corrects the constitutional notice problems that punitive damages present.

Unlike punitive awards, statutory damages provide notice of the size of the punishment for copyright infringement. There is little merit to the argument that P2P network users, or anyone else that infringes a copyright, are unaware of the liability they may face for their actions.[319] Commentators have argued that when multiple infringement claims are aggregated, like in the RIAA's litigation campaign, the statutory range is no longer an accurate barometer of the potential liability one faces for infringement.[320] It is true that lawsuits aggregating multiple claims in a single action may potentially lead to liability that is a great deal larger than the maximum statutory award for a single infringement.[321] But it does not follow that large suits and large damage awards do not provide notice. No matter how many songs Jammie Thomas-Rasset, Joel Tenenbaum, and every other P2P network user downloads or allows another user to download from them, there is still constructive notice that they are subject to potential liability of up to $150,000 for every single song.[322] Since statutory damage awards for copyright infringement satisfy the chief concern underlying the entire *Gore* decision, there is no reason the guideposts should be used in a review of their constitutionality.

2. Arguments That Statutory Damages Are Excessive in Relation to Actual Harm Are Inaccurate and Inapposite

The fact that statutory damages for copyright infringement provide an infringer with notice of the size of the sanction they will face for their actions likely removes them from the reach of the *Gore* guideposts.[323] But even if the notice the copyright statute's damage provision provides was insufficient to quiet the calls to apply *Gore*, there can still be no argument it should be applied to determine if statutory damage awards are excessive in relation to the amount of harm caused by infringement. The copyright damage provision allows a copyright owner to recover statutory damages in lieu of actual damages and profits.[324] Courts have consistently held that when a copyright owner elects to receive statutory damages, there is no requirement that they be reasonably related to actual damages.[325] This is true with all statutory damages, not just with copyright infringement.[326] Since *Williams*, the Supreme Court has held that the constitutionality of a statutory damage award is not to be judged by comparing it to the actual

319. *See supra* text accompanying notes 258–64.
320. *See supra* text accompanying notes 210–14.
321. *See supra* text accompanying note 213.
322. *See supra* text accompanying notes 258–64.
323. *See supra* text accompanying note 314.
324. 17 U.S.C. § 504(c) (2006).
325. *See infra* text accompanying notes 326–32.
326. *Williams*, which serves as the constitutional standard of review for all statutory damage awards, held that a statutory award does not need to be related to actual harm. *See* St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63, 67 (1919).

injury suffered.[327] Copyright infringement causes damage to the copyright owner that is difficult and costly to prove,[328] so courts do not require proof of actual injury,[329] or even any injury at all when awarding statutory damages.[330] To force a copyright owner to provide evidence of actual harm in order to compare a statutory damage award to the injury suffered and to determine if it was constitutionally excessive would undermine the purpose for the creation of the statutory damage provision.[331] Such a comparison has no place in the review of statutory damage awards.[332]

Regardless of whether or not the comparison should even be made, the argument that statutory damage awards are excessive when compared to actual harm is fundamentally flawed. Most often this argument is based on the premise that a P2P network user's infringement has harmed the copyright owner to the tune of one lost sale for each song at issue at trial.[333] But, defendants in the RIAA's copyright infringement suits have not just been sued for downloading songs instead of buying them—they have also been sued for distributing songs illegally.[334] In addition, P2P network users have actually downloaded and distributed hundreds, or even thousands, more songs than they have been sued for.[335] In the most extreme sense, the actual damage a P2P network user has caused is not the lost revenue from the sale of twenty or thirty songs on iTunes, but rather lost revenue from a license for unlimited distribution for every single one of the hundreds or thousands of songs he "shared."[336] At the very least, the actual damage caused must be measured in terms of the countless sales that have been lost

327. *Id.* (holding that even though the statutory damage award at issue seemed excessive when compared to the actual damage suffered, "its validity is not to be tested in that way").

328. *See supra* text accompanying notes 93–100.

329. *See, e.g.*, L.A. News Serv. v. Reuters Television Int'l, Ltd., 149 F.3d 987, 996 (9th Cir. 1998) (noting that actual damages are difficult to prove, and holding that damages are not required to be proven when awarding statutory damages); Lowry's Reports, Inc. v. Legg Mason, Inc., 302 F. Supp. 2d 455, 460–61 (D. Md. 2004) (noting that damages need not be proven); *see also* Yurman Design, Inc. v. PAJ, Inc., 262 F.3d 101, 113–14 (2d Cir. 2001) (same); Columbia Pictures Television., Inc. v. Krypton Broad. of Birmingham, Inc., 259 F.3d 1186, 1194–95 (9th Cir. 2001) (holding that a comparison to actual damages is not required); Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co., 74 F.3d 488, 496 (4th Cir. 1996) (same); Atl. Recording Corp. v. Anderson, No. H-06-3578, 2008 U.S. Dist. LEXIS 53654, at *23–26 (S.D. Tex. Mar. 12, 2008) (same).

330. *See* F. W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228, 233 (1952).

331. *See supra* text accompanying notes 92–100.

332. *See* Verizon Cal. Inc. v. OnlineNIC, Inc., No. C 08-2832 JF (RS), 2009 U.S. Dist. LEXIS 84235, at *22–23 (N.D. Cal. Aug. 25, 2009) (holding that because statutory damages for copyright infringement do not need to be related to actual harm, *Gore* is not applicable).

333. *See, e.g.*, Thomas-Rasset Motion for a New Trial, *supra* note 15, at 2; Amicus Brief of Free Software Foundation, *supra* note 219, at 1–2 & n.1; Samuelson & Wheatland, *supra* note 48, at 458–59 nn.78–79; Barker, *supra* note 226, at 545–49; *see also supra* text accompanying notes 226–30.

334. *See, e.g.*, Capitol Records Inc. v. Thomas, 579 F. Supp. 2d 1210, 1212–13 (D. Minn. 2008) (noting that Thomas-Rasset was sued for downloading and distributing copyrighted songs).

335. *See supra* text accompanying note 212.

336. *See* Opposition to Thomas-Rasset Motion, *supra* note 19, at 5 (noting that the conduct of the defendant is generally the type that would require a license).

because the defendants are allowing other users to download songs from them.[337] It is "difficult, perhaps impossible" to track exactly how many times a song was downloaded on a P2P network, and thus distributed,[338] but the P2P network users the RIAA has targeted placed songs in a folder that could have been accessed by any one of the seventy million people who were using P2P networks at the time the lawsuit program began.[339] To assert that each song an individual downloader infringes damages the record labels to the tune of a lost sale on iTunes is simply inaccurate, as the harm caused by a P2P network user's downloading and distribution of such songs is actually far greater.[340]

3. Unlike Punitive Damages, Statutory Damage Awards for Copyright Infringement Are Not at Risk of Being Arbitrary

Like the excessiveness issue, the fact that statutory damages provide proper notice likely renders the argument that *Gore* should be applied to statutory damages because they are arbitrary moot.[341] But even if that is not the case, there is still no concern that statutory damages are arbitrary. As Justice Breyer discussed in *Gore*, punitive damages are arbitrary because of the lack of "legal standards that provide 'reasonable constraints' within which 'discretion is exercised.'"[342] But, unlike punitive damages, copyright's statutory damage provision has been held to provide constraints on the discretion of the court.[343] There is a substantial difference between a punitive award, which can often be the result of "a decisionmaker's caprice,"[344] and a damage award that results from a statutory range, created with a great deal of Congress's time, thought, and effort, that limits the discretion of courts setting damage awards for copyright infringement.[345] The limits placed on the court's discretion ensure that statutory damages are not similar to punitive awards, as they are not set at some arbitrary amount and do not deprive copyright infringers of due process.[346] In fact, none of

337. *See* Samuelson & Sheffner, *supra* note 14, at 60 (finding that focusing on only the original download and not the subsequent distribution is a "flawed" conception of actual harm caused).

338. *Id.* (discussing the lack of any records when P2P network users download songs).

339. *See* Ray Delgado, *Law Professors Examine Ethical Controversies of Peer-to-Peer File Sharing*, STANFORD REP., Mar. 17, 2004, http://news-service.stanford.edu/news/2004/march17/fileshare-317.html.

340. *See* Samuelson & Sheffner, *supra* note 14, at 60.

341. *See supra* text accompanying note 314.

342. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 587 (1996) (Breyer, J., concurring) (quoting Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 20–21 (1991)); *see also supra* text accompanying notes 269–71.

343. F. W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228, 232 (1952) (holding that a court's discretion when awarding statutory damages is "exercise[d] . . . within limited amounts"); *see also supra* text accompanying notes 272–79.

344. Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 436 (2001) (citing *Gore*, 517 U.S. at 587).

345. *See supra* text accompanying notes 70–73, 110–17.

346. Lowry's Reports, Inc. v. Legg Mason, Inc., 302 F. Supp. 2d 455, 460 (D. Md. 2004) ("The unregulated and arbitrary use of judicial power that the *Gore* guideposts remedy is not

the major constitutional concerns with punitive damage awards that the Supreme Court articulated in *Gore* are present with statutory damages for copyright infringement. The inevitable conclusion is that *Gore* and the guideposts it created have no application in the review of a statutory damage award.

B. *Due Process Requires a More Thorough Review Under the* Williams *Standard*

When a court reviews the constitutionality of a statutory damage award, the proper standard to use is outlined in *Williams*. The guideposts outlined in *Gore* are designed to be a check on a number of important constitutional issues; but the statutory damage provision simply does not implicate the same concerns.[347] A number of courts have suggested in dicta that the Supreme Court's punitive damages jurisprudence may have some relevance to statutory damages.[348] However, in each of those decisions, the lower courts (1) were ruling on class action certification,[349] (2) refused to rule on whether *Gore* or *Williams* was the proper standard,[350] or (3) actually applied *Williams* in the end.[351] While courts have consistently applied the *Williams* standard to statutory damages,[352] *Gore* has never been applied to review and overturn a statutory award.[353] Thus, the exacting review that has become a staple of the Supreme Court's punitive damages jurisprudence has no relevance in the review of a statutory damage award. Instead, statutory damages for copyright infringement are constitutional unless "the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable."[354]

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implicated in Congress' carefully crafted and reasonably constrained statute." (citing *Haslip*, 499 U.S. at 20)).

347. *See supra* Parts II.B, III.A.

348. *See, e.g.*, Zomba Enters. v. Panorama Records, Inc., 491 F.3d 574, 587 (6th Cir. 2007); Parker v. Time Warner Entm't Co., 331 F.3d 13, 22 (2d Cir. 2003); Verizon Cal. Inc. v. OnlineNIC, Inc., No. C 08-2832 JF (RS), 2009 U.S. Dist. LEXIS 84235, at *25–26 (N.D. Cal. Aug. 25, 2009); *In re* Napster, Inc. Copyright Litig., No. C 04-1671 MHP, 2005 U.S. Dist. LEXIS 11498, at *37–39 (N.D. Cal. June 1, 2005); DIRECTV, Inc. v. Gonzalez, No. SA-03-CV-1170 XR, 2004 U.S. Dist. LEXIS 16734, at *12–14 (W.D. Tex. Aug. 23, 2004).

349. *See, e.g.*, *Parker*, 331 F.3d at 15; *In re Napster*, 2005 U.S. Dist. LEXIS 11498, at *5.

350. *See, e.g.*, *In re Napster*, 2005 U.S. Dist. LEXIS 11498, at *40–42; *Gonzalez*, 2004 U.S. Dist. LEXIS 16734, at *13.

351. *See, e.g.*, *Zomba*, 491 F.3d at 586–88; *OnlineNIC*, 2009 U.S. Dist. LEXIS 84235, at *20–26.

352. *See, e.g.*, *Zomba*, 491 F.3d at 586–88; United States v. Citrin, 972 F.2d 1044, 1051 (9th Cir. 1992); *OnlineNIC*, 2009 U.S. Dist. LEXIS 84235, at *20; Centerline Equip. Corp. v. Banner Pers. Serv., 545 F. Supp. 2d 768, 777–78 (N.D. Ill. 2008); Native Am. Arts, Inc. v. Bundy-Howard, Inc., 168 F. Supp. 2d 905, 914–15 (N.D. Ill. 2001); Texas v. Am. Blastfax, Inc., 121 F. Supp. 2d 1085, 1090–91 (W.D. Tex. 2000); Kenro, Inc. v. Fax Daily, Inc., 962 F. Supp. 1162, 1165 (S.D. Ind. 1997).

353. *See Zomba*, 491 F.3d at 587; Tepp, *supra* note 53, at 93 (noting that "no court has ever accepted [the] argument" that *Gore* applies to statutory damages).

354. St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63, 66–67 (1919).

The conclusion that the *Williams* standard should be used to review statutory damage awards for copyright infringement means that all statutory damage awards likely satisfy due process. Unlike punitive damages, which are set by an unsophisticated jury, Congress has set limits on statutory damage awards.[355] Because of this, the Supreme Court's constitutional review for statutory damages is extremely deferential to Congress's decisions.[356] The *Williams* standard is so deferential, and sets the bar so low for satisfying due process, that no court has ever used it to invalidate an award of statutory damages.[357] The way *Williams* is currently applied to review statutory damage awards for copyright infringement, there is no reason to believe that this trend will not continue.

Settling on the *Williams* standard as the proper level of constitutional review for statutory damages does not end the discussion. The current statutory damage provision has the potential to result in extremely large awards,[358] and these large awards are the cause of a number of worrisome issues. For example, there is a real concern that the statutory damage provision as constructed has the potential to overcompensate and overdeter.[359] It is true that Congress adjusted the statutory range only ten years ago in order to combat exactly the type of conduct P2P network users are accused of.[360] However, it is hard to argue that awards that range from hundreds of thousands of dollars to multimillion dollar damage awards are not substantially more than what is necessary to deter defendant P2P network users, as well as the general public, from future copyright infringement and to adequately compensate the plaintiff record labels for their injury.[361]

There is also a legitimate worry that statutory damages have strayed from their traditional purposes. The goals of copyright damages have always been to compensate copyright owners for their injuries and deter future acts of copyright infringement.[362] But recently, numerous courts, including the Supreme Court, have stated that an important purpose of statutory damages is to punish the infringer.[363] In addition, plaintiffs in copyright

355. *See* 17 U.S.C. § 504 (c) (2006).

356. *See supra* Part II.B.2.

357. *See supra* text accompanying note 289.

358. *See, e.g.*, Capitol Records Inc. v. Thomas, 579 F. Supp. 2d 1210, 1227–28 (D. Minn. 2008) (awarding $222,000 in statutory damages); Memorandum of Law & Order, *supra* note 10, at 5 (awarding $1.92 million in statutory damages); Judgment, *supra* note 12, at 1 (awarding $675,000 in statutory damages).

359. *See supra* text accompanying notes 222–25.

360. *See supra* text accompanying notes 112–17.

361. Judge Davis, for example, believed that the damage award in the first Thomas-Rasset trial, which was substantially smaller than the award in the second trial, as well as in the Tenenbaum trial, was far too large considering the offense committed. *See Thomas*, 579 F. Supp. 2d at 1227 (noting the judgment was "more than *five hundred* times the cost of buying 24 separate CDs and more than *four thousand* times the cost of three CDs").

362. *See supra* text accompanying notes 92–106, 243–46.

363. *See, e.g.*, Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 352–53 (1998); On Davis v. The Gap, Inc., 246 F.3d 152, 172 (2d Cir. 2001); Cass County Music Co. v. C.H.L.R., Inc., 88 F.3d 635, 643 (8th Cir. 1996).

infringement suits have plainly admitted the belief that statutory damages punish.[364] Punishment may be an important function of the statutory damage provision, especially as a means of providing deterrence.[365] But because it has never been Congress's express goal, it is especially important to keep statutory damage awards from overpunishing copyright infringers and violating due process.

Finally, and perhaps most importantly, there is a great deal of apprehension regarding the statutory damage awards that result when numerous infringement claims are aggregated. The aggregation of multiple statutory damage awards leads to uncertainty over the size of the award,[366] greater concerns of overcompensation and deterrence,[367] and generally larger awards. As technological advances are made and it becomes easier and more efficient to investigate and prove digital copyright infringement, there exists the potential for lawsuits involving thousands of claims of infringement and statutory damage awards near the $150,000 maximum multiplied thousands of times over.[368]

These concerns with large statutory damage awards have resulted in calls to apply the Supreme Court's punitive damages jurisprudence to the review of statutory awards[369] or even to amend the current statute.[370] But such drastic changes to the system of assessing copyright damages are unnecessary. Courts should instead apply a more rigorous constitutional review under the *Williams* standard and truly consider the possibility that these large statutory damage awards may fail that test. While *Williams* is a deferential standard, courts have potentially been too deferential in applying it. In *Tenenbaum*, for example, Judge Gertner called the $675,000 award "astronomical" and discussed the "injustice" of allowing such large damage awards against students and teenagers.[371] And in *Thomas-Rasset*, Judge Davis emphatically stated after the first trial that the statutory damages awarded were completely out of proportion to the offense committed[372] and called the second verdict "monstrous and shocking" and "unjust" when

364. Plaintiffs' Response to Defendant Denise Cloud's Motion to Dismiss for Failure to State a Claim Pursuant to Fed. R. Civ. P. 12(b)(6) at 16, Sony BMG Music Entm't v. Cloud, No. 2:08 CV 01200 WY (E.D. Pa. Nov. 21, 2008); Boggs Motion to Dismiss, *supra* note 284, at 13.

365. *See supra* text accompanying note 248.

366. *See supra* text accompanying notes 210–14.

367. *See supra* text accompanying notes 231–41.

368. *See* Barker, *supra* note 226, at 554 (discussing "the aggregation of such awards over many hundreds or thousands of instances of misconduct" (citing Frank Ahrens, *Music Industry Will Talk Before Suing*, WASH. POST, Oct. 1, 2003, at E1)).

369. *See, e.g.*, *id.* at 536–54 (discussing why *Gore* should apply to statutory damages for copyright infringement); Evanson, *supra* note 14, at 617–37 (discussing the application of *Gore* to statutory damages generally).

370. *See, e.g.*, Capitol Records Inc. v. Thomas, 579 F. Supp. 2d 1210, 1227 (D. Minn. 2008) (same); Memorandum and Order, *supra* note 149, at 34–35 (calling for the statute to be amended); Samuelson & Wheatland, *supra* note 48, at 497–510 (outlining proposals for reform).

371. Memorandum and Order, *supra* note 149, at 34–35.

372. *Thomas*, 579 F. Supp. 2d at 1227; *see also supra* text accompanying note 361.

ordering remittitur for the $1.92 million award.[373] Yet none of these awards were found to fail the *Williams* test. This is not to say that these awards definitively violate due process, but these comments would seem to indicate that they do. If courts are so deferential when reviewing the constitutionality of a statutory damage award under *Williams* that no award is ever overturned, it is the functional equivalent of not providing any due process review. In order to ensure that statutory damage awards for copyright infringement are constitutional, courts must review the awards with an eye towards the plain language of the *Williams* test—when a statutory damage award is "severe and oppressive," "wholly disproportioned," and "obviously unreasonable," it should be found to be unconstitutional.[374]

As important as it is for courts to provide a true due process review under *Williams*, determining if a statutory damage award is constitutional is unfortunately not as simple as a straightforward application of the test. Large statutory damage awards for copyright infringement present a difficult constitutional issue, and the court must have regard for a number of important considerations before reducing or reversing an award. First and most importantly, the court must remember that the review is not the same as the review outlined in *Gore*.[375] The actual harm caused by infringement may be an important guide when decreasing the award to ensure its constitutionality, but courts should not look to some ratio between actual damages and statutory damages.[376] There is no requirement that a plaintiff prove his actual damages suffered and no requirement that the statutory award be reasonably related to actual damages.[377] So, while courts should look to evidence of actual injury if it exists to provide guidance when determining if an award is constitutional, it cannot control the inquiry.

It is also necessary for courts to be cognizant of the fact that defendants in copyright infringement suits have often caused a great deal more harm than the handful of actual infringements at issue. In the suits brought by the record labels against P2P network users, most of the defendants have actually infringed the copyrights of hundreds, if not thousands, of songs.[378] While courts cannot truly penalize the defendant for conduct he has not been sued for, they must be aware of the fact that reducing an award based on the infringements at issue does not truly compensate the plaintiffs for their injury. Such a decision also has an impact on future infringement suits.[379] Record labels have focused on only a limited number of songs at

373. Memorandum of Law & Order, *supra* note 10, at 3, 17.

374. St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63, 66–67 (1919).

375. *See* discussion *supra* Part III.A.

376. *See supra* text accompanying note 79; *see also* Bly v. Banbury Books, Inc., 638 F. Supp. 983, 987 (E.D. Pa. 1986) ("[W]hether and to what extent a plaintiff has been harmed by a defendant's infringement" is relevant to the statutory award.).

377. *See supra* text accompanying notes 324–32.

378. *See supra* note 212.

379. *See, e.g.*, Memorandum and Order, *supra* note 149, at 2 (noting that the court was "deeply concerned by the rash of file-sharing lawsuits").

trial because of the difficulties of proving infringement, as well as ownership, of the copyrights.[380] Reducing damage awards to the optimal level of compensation and deterrence based on only the accused infringing acts would require copyright holders to litigate more claims and larger cases in the future to ensure adequate compensation for their actual injuries. This would lead to an inefficient use of the resources of the court, the copyright holder, and the infringer required to litigate the difficult suit.[381] It is important that courts take into consideration concerns with judicial economy, as well as the time and expense involved in investigating, proving, and defending large copyright suits when deciding whether or not to reduce a statutory damage award.

In the examination of the constitutionality of a statutory damage award, courts should also consider the defendant's conduct.[382] There is a widespread belief that digital copyright infringement is somehow less wrong simply because it is extremely prevalent.[383] But, the conduct of P2P network users is the equivalent of stealing hundreds of CDs, adding them to the users' own record collection, and allowing anyone who desires to make their own copy of any of the songs.[384] This is extremely harmful behavior that has, in the aggregate, resulted in multibillion dollar losses for the recording industry, hundreds of millions of dollars in lost tax revenue, and tens of thousands of lost jobs every single year.[385] Courts reviewing statutory damage awards must remember just how serious copyright infringement is.

Courts should also consider the effect the conduct of the defendant during the trial process may have had on the jury's verdict. The actions of Jammie Thomas-Rasset and Joel Tenenbaum are perfect examples of the type of conduct that is likely to result in a higher jury verdict. Thomas-Rasset continues to deny she used P2P services despite the mountain of evidence against her, and even claimed on the witness stand that she had never heard of Kazaa despite the fact that the program was found on her hard drive and she wrote a paper on Napster in college.[386] Joel Tenenbaum

380. *See supra* text accompanying notes 94–100.

381. *See supra* text accompanying notes 95–97.

382. *See supra* text accompanying note 80.

383. *See, e.g.*, Capitol Records Inc. v. Thomas, 579 F. Supp. 2d 1210, 1227–28 (D. Minn. 2008) ("Unfortunately, by using Kazaa, Thomas acted like countless other Internet users. Her alleged acts were illegal, but common."); Defendant's Opposition, *supra* note 231, at 4–7 ("To members of the born-digital generation, . . . sharing music on the Internet is as commonplace and innocuous as driving 60 in a 55 mph zone . . . .").

384. *See* MGM Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 961 (2005) (Breyer, J., concurring) ("[D]eliberate unlawful copying is no less an unlawful taking of property than garden-variety theft.").

385. *See* RIAA, Piracy: Online and on the Street, http://www.riaa.com/physicalpiracy.php (last visited Apr. 11, 2010); *see also supra* text accompanying note 113.

386. *See* Opposition to Thomas-Rasset Motion, *supra* note 19, at 4; Nate Anderson, *Jammie Thomas Takes the Stand, Admits to Major Misstep*, ARS TECHNICA, June 16, 2009, http://arstechnica.com/tech--policy/news/2009/06/jammie-thomas-takes-the-stand-admits-to-major-misstep.ars.

continued illegally downloading music even after he was sued by the record labels, admitted on the witness stand to lying in written discovery responses and during a deposition,[387] and his attorney aggravated the judge and confused the jury.[388] There is a strong likelihood that both juries took these actions into account when fixing the statutory awards, so it is important that the judges reviewing the awards do not disregard them.

Finally, courts must accord deference to Congress's authority to set the statutory range.[389] When the statutory range was created, Congress took years to make sure they set the range so that it would adequately compensate copyright holders at a level similar to actual damages.[390] In 1999, Congress recognized the benefits to copyright owners and the public in general that result from combating infringement, and increased the range to its current levels in order to provide adequate compensation and deterrence in the face of the exact type of conduct at issue in the RIAA's lawsuits.[391] But even with Congress's higher statutory range, digital copyright infringement continues to increase.[392] It is extremely important that any court that aims to reduce a large statutory damage award is sure that the new award provides the substantial compensation and deterrence that Congress has recognized is necessary.

Providing the proper due process review of statutory damages for copyright infringement requires courts to strike a delicate balance. Because statutory damages are set within a congressionally created range, they are simply not the same as punitive damages and should not be reviewed under the same constitutional standard. They should be reviewed with deference to the legislature's decision regarding where to set the statutory range under *Williams*—a standard which will generally lead to awards being found constitutional. But, courts reviewing statutory awards must balance the need to be deferential with the need to provide a true due process review. They must be cognizant of the aforementioned concerns with large statutory damages. This requires courts to follow the plain language of the test outlined in *Williams* and find any awards that violate it to be unconstitutional. On top of that, courts must be aware of the far-reaching impact their review of a damage award may have. Before making any decision on the constitutionality of a statutory damage award they must consider the concerns with reducing or overturning awards discussed

387. *See* Sheffner, *supra* note 150.
388. *See supra* text accompanying note 149.
389. *See supra* Part II.B.2.
390. *See supra* text accompanying note 68.
391. *See supra* text accompanying notes 107–17.
392. *See* ELEC. FRONTIER FOUND., *supra* note 3, at 9–10 (noting that, since the RIAA began suing P2P downloading services and individuals who use them, P2P file-sharing has continued to increase every year). In the most stunning example of how little deterrence the current statutory damages provision may actually provide, Joel Tenenbaum continued to download and share music illegally after he received a warning letter from the record labels and even after he was sued for copyright infringement in 2007. *See* Sheffner, *supra* note 150.

above.[393] While this is certainly a difficult balance for courts to achieve, when they do, they have provided proper due process review for statutory damages in copyright infringement lawsuits.

393. *See supra* text accompanying notes 375–92.