

# LEGAL UPDATE

## ***CAPITOL RECORDS V. THOMAS AND THE FUTURE OF PEER-TO-PEER FILE-SHARING LITIGATION***

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Beginning in 2003, the Recording Industry Association of America (RIAA) initiated a sustained legal effort to stem the increasing popularity of music file-sharing networks, which facilitated illegal transfers of copyrighted material.<sup>1</sup> The industry targeted not only the entities which controlled such networks,<sup>2</sup> but also educational institutions<sup>3</sup> and individuals who facilitated unauthorized

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<sup>1</sup> Amy Harmon, *The Price of Music: The Overview: 261 Lawsuits Filed on Music Sharing*, N.Y. TIMES, September 9, 2003, at A1.

<sup>2</sup> *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

<sup>3</sup> John Schwartz, *More Lawsuits Filed in Effort to Thwart File Sharing*, N.Y. TIMES, March 24, 2004, at C4.

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downloading of sound recordings.<sup>4</sup>

On October 4, 2007, *Capitol Records v. Thomas* became the first file-sharing case to reach a jury verdict.<sup>5</sup> The jury found that Jammie Thomas willfully infringed twenty-four of the Plaintiffs' copyrights on sound recordings and awarded the RIAA members in the suit<sup>6</sup> \$220,000 in statutory damages.<sup>7</sup> On September 24, 2008, however, the United States District Court for the District of Minnesota vacated the jury verdict that it had presided over eleven months earlier and ordered new trial.<sup>8</sup> In its ruling, the court commented on two issues of particular significance to the future of RIAA litigation: (1) the court held that it had erred when instructing the jury that "making sound recordings available for distribution on a peer-to-peer network, regardless of whether actual distribution was shown, qualified as distribution under the Copyright Act;"<sup>9</sup> and (2) the court commented in dicta that the statutory damages scheme's application to peer-to-peer file sharing litigation was "wholly disproportionate" and "oppressive" when applied to individual users.<sup>10</sup>

I. A BRIEF HISTORY OF COPYRIGHT PROTECTION

Society recognized protection against forms of copyright infringement as early as the Statute of Anne in 1710.<sup>11</sup> Such protections were embraced and urged by the Founding Fathers in the Continental Congress of 1783.<sup>12</sup> The Copyright Act of 1790 codified these rights and afforded copyright holders the exclusive right to "print, reprint, publish, or import, or cause to be printed, reprinted, published, or imported."<sup>13</sup>

Congress updated and revised the Copyright Act frequently over the past two centuries, while still maintaining the core rights afforded in 1790.<sup>14</sup> As

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<sup>4</sup> *Id.*

<sup>5</sup> *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008).

<sup>6</sup> Plaintiff's party included RIAA members: Capitol Records, Inc.; Sony BMG Music Entertainment; Arista Records LLC; Interscope Records; Warner Brothers Records, Inc.; and UMG Recordings, Inc.

<sup>7</sup> Special Verdict Form, *Capitol Records*, 579 F. Supp. 2d 1210 (No. 06-1497).

<sup>8</sup> *Capitol Records*, 579 F. Supp. 2d at 1228.

<sup>9</sup> *Id.* at 1212.

<sup>10</sup> *Id.* at 1227-28.

<sup>11</sup> 8 Anne ch. 19 (1710).

<sup>12</sup> See *Feltner v. Columbia Pictures Television*, 523 U.S. 340, 350 (1998) (citing U.S. Copyright Office, *Copyright Enactments: Laws Passed in the United States Since 1783 Relating to Copyright*, Bulletin No. 3, p. 1 (rev. ed. 1963)).

<sup>13</sup> 1 Stat. 124 (1790).

<sup>14</sup> See United States of America's Memorandum in Defense of the Constitutionality of the Statutory Damages Provision for the Copyright Act, 17 U.S.C. § 504(c) (2006), at 13;

such, the latest revision, The Copyright Act of 1976, generally provides that a copyright owner holds exclusive rights to reproduce and distribute copyrighted material.<sup>15</sup> The right of distribution grants a copyright owner the exclusive right to “distribute copies or phonorecords of copyrighted work to the public by sale or other transfer of ownership. . .”<sup>16</sup> Recent litigation by the RIAA against file sharers on peer-to-peer networks has generally focused upon the infringement of this right. Courts are split on whether making copyright material “available for distribution” infringes a copyright owner’s exclusive right to “distribution” under Section 106(3).<sup>17</sup> Some courts hold that “actual distribution” must occur for one to infringe the distribution right.<sup>18</sup> A court’s ruling on this matter holds particular significance for RIAA litigation, as there remains no way to monitor or prove actual transfer of copyrighted material through peer-to-peer networks.<sup>19</sup>

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*Capitol Records*, 579 F. Supp. 2d 1210 (No. 06-1497) (citing STAFF OF H. COMM. ON THE JUDICIARY, 87TH CONG., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 103, ix (Comm. Print 1961)).

<sup>15</sup> 17 U.S.C. §106(3) (2006). The entirety of Section 106 states:

. . . the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

<sup>16</sup> 17 U.S.C. § 106(3) (2006).

<sup>17</sup> See *Capitol Records*, 579 F. Supp. 2d at 1216.

<sup>18</sup> See, e.g., *Atl. Recording Corp. v. Howell*, No. CV06-2076-PHX-NVM, at \*6 (D. Ariz. Apr. 29, 2008), 2008 WL 1927353 (“Merely making an unauthorized copy of a copyrighted work available to the public does not violate a copyright holder’s exclusive right of distribution.”).

<sup>19</sup> See Plaintiff’s Supplemental Brief Pursuant to May 15, 2008 Order, *Capitol Records*, 579 F. Supp. 2d 1210 (2008) ( No. 06-1497), at \*2. (“If Defendant Thomas and others cannot be held liable when they make thousands of works available for unauthorized copying, copyright owners’ exclusive right to distribute their works will be rendered worthless.”).

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II. BACKGROUND ON *CAPITOL RECORDS V. THOMAS*

On April 19, 2006, Plaintiffs filed a Complaint against Jammie Thomas, alleging that she illegally downloaded and distributed twenty-four sound recordings through Kazaa, an online peer-to-peer file sharing network.<sup>20</sup> Plaintiffs argued that such action infringes upon rights protected by the Copyright Act.<sup>21</sup> For such violations, Plaintiffs sought statutory damages as outlined in Section 504 of the Act,<sup>22</sup> which allow an award between \$750 and \$30,000 for each infringement.<sup>23</sup>

At trial, Plaintiffs demonstrated that Defendant Thomas had 1,702 digital audio files in her Kazaa shared file folder that were available for other Kazaa users to download.<sup>24</sup> Plaintiffs showed that they owned the copyright to many of the 1,702 music files.<sup>25</sup> Many of these files were downloaded by MediaSentry, the Plaintiffs' independent investigator, and included the twenty-four music files that were the subject of the suit.<sup>26</sup> Furthermore, Thomas testified that she had studied the ruling in *A&M Records, Inc. v. Napster, Inc.*,<sup>27</sup> and was aware that copying and sharing copyrighted material over the internet was illegal.<sup>28</sup>

At the close of evidence, Plaintiffs submitted a definition of "distribution" under 17 U.S.C. § 106 as Proposed Jury Instruction No. 8.<sup>29</sup> The court submitted this instruction, over Defendant's objection, to the jury as Jury Instruction No. 15. It read,

The act of making copyrighted sound recordings available for electronic distribution on a peer-to-peer network, without license from the copyright owners, violates the copyright owners' exclusive right of distribution, regardless of whether actual distribution has been shown.<sup>30</sup>

On October 4, 2007, the jury found that Thomas had willfully infringed on all twenty-four of the Plaintiffs' copyrights and awarded statutory damages in the amount of \$9,250 for each infringement, resulting in a total verdict of

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<sup>20</sup> Complaint for Copyright Infringement, *Capitol Records*, 579 F. Supp. 2d 1210 (No. 06-1497).

<sup>21</sup> *Id.*; 17 U.S.C. §106 (2006).

<sup>22</sup> *Id.*

<sup>23</sup> 17 U.S.C. § 504(c) (2006).

<sup>24</sup> Plaintiff's Supplemental Brief Pursuant to May 15, 2008 Order, *supra* note 19, at \*4.

<sup>25</sup> *Id.*

<sup>26</sup> Special Verdict Form, *supra* note 7.

<sup>27</sup> *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001).

<sup>28</sup> Plaintiff's Supplemental Brief Pursuant to May 15, 2008 Order, *supra* note 19, at \*4.

<sup>29</sup> *Capitol Records*, 579 F. Supp. 2d at 1212.

<sup>30</sup> *Id.*

\$222,000.<sup>31</sup>

In response to the verdict, Thomas filed a motion for new trial, or, in the alternative, for remittitur.<sup>32</sup> Thomas challenged the constitutionality of the amount of statutory damages awarded to the Plaintiffs, asserting that such an award violated her due process rights.<sup>33</sup> Thomas stated that “the ratio of actual damages to the award is not only astronomical, it is offensive to our Constitution and offensive generally.”<sup>34</sup> Plaintiffs filed their response to this motion on November 8, 2007,<sup>35</sup> and the United States moved to intervene to defend the constitutionality of 17 U.S.C. § 504(c) on December 3, 2007.<sup>36</sup>

The court responded to Defendant’s motion for new trial on May 15, 2008, but did not comment on the other issues stated in the Defendant’s brief.<sup>37</sup> Instead, the court evoked the privilege afforded to it by Federal Rules of Civil Procedure Rule 59(d) and stated that it was considering granting a new trial on grounds that Jury Instruction No. 15 was contrary to binding Eighth Circuit precedent as outlined in *National Car Rental System, Inc. v. Computer Associates Int’l, Inc.*<sup>38</sup> The court also noted that one of the cases relied on by the Plaintiffs in advancing Jury Instruction No. 15, *Atlantic Recording Corp. v. Howell*, had since been vacated and reconsidered.<sup>39</sup> Thus, the court requested that the parties brief the issue and informed them that it would hear oral arguments on whether a finding of “actual distribution” must occur in order for one to infringe the exclusive right of “distribution” as outlined in The Copyright Act.<sup>40</sup> In addition, the court also accepted five amicus briefs from the Electronic Frontier Foundation, Public Knowledge, United States Interest Industry Association, and Computer & Communications Industry Association (jointly); The Copyright Law Professors; The Intellectual Property Institute at William Mitchell College of Law; The Motion Picture Association of America,

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<sup>31</sup> Special Verdict Form, *supra* note 7.

<sup>32</sup> Defendants Motion for New Trial, Or in the Alternative, for Remittitur, *Capitol Records*, 579 F. Supp. 2d 1210 (No. 06-1497).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at \*12.

<sup>35</sup> Plaintiff’s Response in Opposition to Defendant’s Motion for New Trial, or in the Alternative, for Remittitur, *Capitol Records*, 579 F. Supp. 2d 1210 (No. 06-1497).

<sup>36</sup> United States of America’s Memorandum in Defense of the Constitutionality of the Statutory Damages Provision for the Copyright Act, 17 U.S.C. § 504(c) (2006), *supra* note 14.

<sup>37</sup> Order on Defendant’s Motion for New Trial, *Capitol Records*, 579 F. Supp. 2d 1210 (No. 06-1497).

<sup>38</sup> *Id.* at \*2.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at \*3.

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Inc.; and The Progress & Freedom Foundation.<sup>41</sup>

III. THE DISTRIBUTION DISCUSSION:

On September 24, 2008, the court granted Defendant's motion for new trial.<sup>42</sup> The court, however, relied not on the constitutionality of the damage award, as argued in Defendant's first brief dated October 19, 2007, but upon the issue the Court raised *sua sponte* on May 15, 2008.<sup>43</sup>

A. *Prejudicial Effect of Erroneous Jury Instructions*

A court may only overturn a jury verdict if "errors misled the jury or had a probable effect on the jury's verdict."<sup>44</sup> Thomas argued that in this case, the jury's special verdict form did not specify whether the jury believed that "actual distribution" of the recordings had occurred.<sup>45</sup> Therefore, if Jury Instruction No. 15 was erroneous and liability only exists under an "actual distribution" standard, it is unclear whether the jury would have returned a verdict against her.<sup>46</sup> For this reason, Thomas argued, a new trial should be granted.<sup>47</sup>

Plaintiffs, on the other hand, argued that even if distribution under Section 106 required "actual distribution," Thomas was still guilty of violating Plaintiffs' exclusive rights of reproduction.<sup>48</sup> Plaintiffs stated that the jury was properly instructed on this allegation through Jury Instruction No. 14 and it is likely that the jury's verdict rested upon Thomas's violation of Plaintiffs' reproduction (not distribution) rights.<sup>49</sup>

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<sup>41</sup> Brief Amici Curiae of Electronic Frontier Foundation et al. in Support of Defendant Jammie Thomas, *Capitol Records*, 579 F. Supp. 2d 1210 (No. 06-1497); Brief of Copyright Law Professors As Amici Curiae in Support of Defendant, *Capitol Records*, 579 F. Supp. 2d 1210 (No. 06-1497); Memorandum of Amicus Curiae of Intellectual Property Institute of William Mitchell College of Law In Support of Defendant's Motion for a New Trial, *Capitol Records*, 579 F. Supp. 2d 1210 (No. 06-1497); Brief for Motion Picture Association of America, Inc. as Amici Curiae Supporting Plaintiffs, *Capitol Records*, 579 F. Supp. 2d 1210 (No. 06-1497); Amicus Curiae Brief of Thomas D. Sydnor of the Progress and Freedom Foundation Opposing the Motion for a New Trial, *Capitol Records*, 579 F. Supp. 2d 1210 (No. 06-1497).

<sup>42</sup> *Capitol Records*, 579 F. Supp. 2d at 1228.

<sup>43</sup> Order on Defendant's Motion for New Trial, *supra* note 37.

<sup>44</sup> *Capitol Records*, 579 F. Supp. 2d at 1214 (citing *Slidell, Inc. v. Millennium Inorganic Chems., Inc.*, 460 F.3d 1047, 1054 (8th Cir. 2006)).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

The court ultimately agreed with Thomas, stating that it “[could not] know whether the jury reached its verdict on permissible or impermissible grounds.”<sup>50</sup> In response to Plaintiff’s reproduction argument, the court noted that even if the jury reached its verdict based upon Jury Instruction No. 14, “there is no way for the court to determine if the jury would have granted the same high statutory damage award based solely on violation of the reproduction right.”<sup>51</sup>

*B. Unauthorized Dissemination of Copyright Material to Investigators Constitutes Infringement*

The only evidence of actual distribution of copyright material in *Capitol Records v. Thomas* concerned MediaSentry, Plaintiff’s investigating agent. As such, Thomas made two arguments to refute assertions that “actual distribution” had occurred: (1) that disseminating copyrighted material to a copyright holder’s agent cannot constitute infringement, and (2) that Thomas did not “significantly participate” in such distribution, and thus cannot be liable.

Addressing Thomas’s first assertion, the court noted that the Eighth Circuit has distinctly held that authorization from a copyright holder to an investigator to “pursue infringement does ‘not authorize the investigator to validate [the third party’s] unlawful conduct.’”<sup>52</sup> The court cited *Atlantic Recording Corp. v. Howell*, a similar infringement case pursued by the RIAA in an Arizona District Court that was litigated concurrently with *Capitol Records v. Thomas*, stating, “The Investigator’s assignment was part of the recording companies’ attempt to stop Howell’s infringement, and therefore the 12 copies obtained by *MediaSentry* are unauthorized.”<sup>53</sup> As such, actual dissemination of copyright material to *MediaSentry*, or other such investigators, satisfied the distribution requirements of 17 U.S.C. §106.<sup>54</sup>

The court also rejected Thomas’s second assertion that her participation in the distribution of copyright material was passive and not substantial.<sup>55</sup> Thomas argued that she had no part in actively copying or distributing copyrighted material.<sup>56</sup> Thomas argued that her actions were distinguishable

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 1215 (citing *Olan Mills, Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1348 (8th Cir. 1994)).

<sup>53</sup> *Id.* (citing *Atl. Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 985 (D. Ariz. 2008) (Internal citations omitted)).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Defendant’s Second Memorandum of Law in Support of Her Motion For New Trial, *Capitol Records*, 579 F. Supp. 2d 1210 (No. 06-1497), at \*9-10.

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from those of the defendants in *RCA/Ariola Int'l, Inc. v. Thomas & Grayston Co.*<sup>57</sup> In that case, the defendants were held to be direct infringers, as they had supplied customers with empty tapes and helped them copy material.<sup>58</sup> The court, however, stated that there was substantial evidence of direct participation:

Plaintiffs presented evidence that Thomas, herself, provided the copyrighted works for copying and placed them on a network specifically designed for easy, unauthorized copying. These actions would constitute more substantial participation in the infringement. . .<sup>59</sup>

While the court clearly stated that unauthorized distribution of copyright material to MediaSentry would constitute infringement, and that Thomas's actions rose to the level of substantial participation in such distribution, the court maintained that it was "impossible to determine upon which basis the jury entered its verdict or how the erroneous jury instruction affected the jury's damage calculation."<sup>60</sup> Thus, the court proceeded to consider the validity of Jury Instruction No. 15 and whether making copyright material available to the public infringed upon a copyright owner's exclusive right to "distribution" under the Copyright Act.<sup>61</sup>

*C. Defining the Distribution Requirement*

After concluding that analysis of Jury Instruction No. 15 was necessary toward the ultimate outcome of *Capitol Records v. Thomas*, the court proceeded to analyze the precise parameters of the exclusive Distribution right as defined by the Copyright Act.<sup>62</sup> More specifically, the question confronting the court was whether making copyright material available for distribution infringed upon a copyright owner's exclusive right to distribute the copyrighted material.<sup>63</sup> If making items available for distribution constituted infringement, Jury Instruction No. 15 stated the law correctly and the lower court had committed no error.<sup>64</sup>

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<sup>57</sup> Defendant's Reply Brief in Support of Her Motion For New Trial, *Capitol Records*, 579 F. Supp. 2d 1210 (No. 06-1497), at \*5-6.

<sup>58</sup> *RCA/Ariola Int'l, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 781 (8th Cir. 1988).

<sup>59</sup> *Capitol Records*, 579 F. Supp. 2d. at 1216.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 1216-27.

<sup>63</sup> *Id.*

<sup>64</sup> A resolution of this question in Plaintiff's favor may not have resulted in a denial of Defendant's Motion of New Trial. It is unclear whether the Court would grant new trial or remittitur on Defendant's original grounds, which urged the Court to scrutinize the constitutionality of the award of statutory damages. This issue is discussed *supra*.



1. Plain Meaning

In determining the meaning of “distribution” in the Copyright Act, both parties urged the Court to adopt the plain meaning of the term.<sup>65</sup> Each party, however, proffered not only alternative meanings, but also alternative authorities for the Court to consider.

The court began its analysis by looking at Section 106 itself and attempted to find any clear meaning in the wording of the statute.<sup>66</sup> While the provision delineates actions that effectuate distribution – “by sale, transfer of ownership, rental, lease, or lending” – the court found no indication that an offer to undertake any of these acts constituted distribution.<sup>67</sup>

Subsequently, the court turned to secondary sources, namely the dictionary definition and leading copyright treatises. The court found that these authorities favored Thomas’s position that distribution required actual transfer.<sup>68</sup> In particular, the court cited Professor Nimmer’s famed copyright treatise where he wrote, “[i]nfringement of [the distribution right] requires an actual dissemination of either copies or phonorecords.”<sup>69</sup>

This position, however, was undercut by the congressional testimony of the Register of Copyrights who stated: “Making a work available for other users of [a] peer to peer network to download . . . constitutes an infringement of the exclusive distribution right. . .”<sup>70</sup> The court responded to the testimony by stating that “opinion letters from the Copyright Office to Congress on matters of statutory interpretation are *not* binding and are ‘entitled to respect insofar as they are persuasive.’”<sup>71</sup> Interestingly, the Court dismissed the Registrar’s opinion without much substantive discussion.<sup>72</sup> Persuasive authority is not binding, but one would assume that the Registrar’s opinion on the matter deserved considerably more attention. Regardless, the court seemed to prioritize Nimmer’s treatment and chose to disregard the Registrar’s opinion on the matter.<sup>73</sup>

Ultimately, the court concluded that there was “not one uniform definition

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<sup>65</sup> Defendant’s Second Memorandum of Law in Support of Her Motion For New Trial, *supra* note 56, at \*3; Plaintiff’s Supplemental Brief Pursuant to May 15, 2008 Order, *supra* note 19, at \*7.

<sup>66</sup> 17 U.S.C. §106 (2006).

<sup>67</sup> *Capitol Records*, 579 F. Supp. 2d at 1217.

<sup>68</sup> *Id.*.

<sup>69</sup> *Id.* at 1223 (citing MELVILLE B. NIMMER, NIMMER ON COPYRIGHTS § 8.11[A], at 8-124.1).

<sup>70</sup> *Id.* at 1217 (citing Letter from Marybeth Peters, Register of Copyrights, to Rep. Howard L. Berman, Rep. from the 28th Dist. of Cal. (Sept. 25, 2002)).

<sup>71</sup> *Capitol Records*, 579 F. Supp. 2d at 1217.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

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of [distribution] throughout copyright law.”<sup>74</sup> Additionally, if Congress intended that making items available for distribution was an act of infringement, it was “quite capable of explicitly providing that definition within the statute.”<sup>75</sup> Thus, “Congress’s choice not to include offers to do the enumerated acts or the making available of the work indicates its intent that an actual distribution or dissemination is required in §106(3).”<sup>76</sup>

2. Distribution as Publication

In addition to the plain language argument, Plaintiffs also advocated that distribution under the section was synonymous with publication.<sup>77</sup> Within the Copyright Act, publication is defined as,

the distribution of copies or phonorecords or a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for the purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.<sup>78</sup>

Under this description, Plaintiffs would have a very strong argument that Thomas’s sharing of music files on Kazaa would be considered publication.<sup>79</sup> The exclusive right of publication, however, is not one of those specifically protected within Section 106.<sup>80</sup> Plaintiffs, therefore, presented evidence that publication and distribution were used interchangeably within the Act and such interchangeability properly reflected congressional intent.<sup>81</sup>

Taking this argument further, Plaintiffs supplied legislative history in which distribution and publication were used synonymously in direct discussion of Section 106.<sup>82</sup> One particular piece of legislative history cited by the court was a House Committee report, which stated that the “Rights of Reproduction, Adaptation, and Publication” were “[t]he first three clauses of section 106.”<sup>83</sup>

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<sup>74</sup> *Id.* at 1217-18.

<sup>75</sup> *Id.* at 1218.

<sup>76</sup> *Id.*

<sup>77</sup> Plaintiff’s Supplemental Brief Pursuant to May 15, 2008 Order, *supra* note 19, at \*12-15.

<sup>78</sup> 17 U.S.C. § 101 (2006).

<sup>79</sup> *Capitol Records*, 579 F. Supp. 2d at 1219.

<sup>80</sup> 17 U.S.C. § 106 (2006).

<sup>81</sup> Plaintiff’s Supplemental Brief Pursuant to May 15, 2008 Order, *supra* note 19, at \*12-15.

<sup>82</sup> *Id.*

<sup>83</sup> *Capitol Records*, 579 F. Supp. 2d at 1220 (citing H.R. REP. NO. 94-1476, at 61-62 (1976)).

Even more directly, the House Committee Report stated that Section 106(3) “‘establishes the exclusive right of publication’ and ‘governs unauthorized public distribution’ –using the words ‘distribution’ and ‘publication’ interchangeably within a single paragraph.”<sup>84</sup> While Plaintiffs believed such evidence was particularly indicative, the court stated that it did “not find these snippets of legislative history to be dispositive.” In particular, the court stated that “[n]owhere in this legislative history does Congress state that distribution should be given the same broad meaning as publication. . .[E]ven if the legislative history indicated that some members of Congress equated publications with distributions under §106(3), that fact cannot override the plain meaning of the statute.”<sup>85</sup>

In addition to the legislative history, Plaintiffs significantly relied upon *Harper & Row Publishers, Inc. v. Nation Enterprises*, where the Supreme Court stated that the Copyright Act “recognized for the first time a distinct statutory right of first publication.”<sup>86</sup> The court, however, distinguished *Harper & Row* from the legal question at hand. In *Harper & Row*, the Supreme Court “did not discuss the meaning of the term distribution; nor did it discuss publication or distribution in general.”<sup>87</sup> Additionally, the Supreme Court used “distribute” and “publish” to reference distinct concepts elsewhere in the opinion.<sup>88</sup> For this reason, the court concluded that “distribution” and “publication” remain separate rights within the framework of the Copyright Act and the statutory definition of “publication” was broader than that of “distribution.”<sup>89</sup> “While a publication effected by distributing copies or phonorecords of the work is a distribution, a publication effected by merely offering to distribute copies or phonorecords to the public is merely an offer of distribution, not an actual distribution.”<sup>90</sup> For this reason, Section 106(3) attaches liability to a more limited set of actions and replacing ‘distribution’ with ‘publication’ would enlarge such liability without textual direction to do so.<sup>91</sup>

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<sup>84</sup> H.R. REP. NO. 94-1476, at 62 (1976).

<sup>85</sup> *Capitol Records*, 579 F. Supp. 2d at 1219.

<sup>86</sup> *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 552 (1985).

<sup>87</sup> *Capitol Records*, 579 F. Supp. 2d at 1220.

<sup>88</sup> *Id.* (The specific reference to *Harper & Row* cited by the Court was: “Section 106 of the Copyright Act confers a bundle of exclusive rights to the owner of the copyright. Under the Copyright Act, these rights –to **publish**, copy, and **distribute** the author’s work – vest in the author of an original work from the time of its creation.” (emphasis added). *Harper & Row*, 471 U.S. at 546-47.).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

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3. The Authorization Clause of Section 106(3) Is Not a Foundation for Direct Liability

As a separate ground for establishing that Thomas violated Section 106(3) by placing copyright music in a shared Kazaa folder and allowing other users to illegally download such material, Plaintiffs argued that Section 106 provides exclusive rights to not only undertake, but also to authorize the actions outlined in the Section.<sup>92</sup> As Plaintiffs did not authorize the potential distribution of their copyrighted material, they argued that Thomas infringed on their right by potentially allowing other users to download the files.<sup>93</sup>

Plaintiffs pointed primarily to Section 106, which states that a copyright owner has exclusive rights “to do or to authorize” the rights listed in the Section.<sup>94</sup> The court rejected this argument, stating that the authorization clause of Section 106 provided a basis for establishing secondary liability, not direct infringement.<sup>95</sup> “Without actual distribution, there can be no claim for authorization of distribution.”<sup>96</sup>

The Supreme Court decision in *New York Times Co. v. Tasini* was particularly significant.<sup>97</sup> Plaintiffs argued that the Supreme Court had held in that case that “the right to authorize” could be a source of direct liability and was not limited to contributory claims.<sup>98</sup> In *Tasini*, plaintiffs were freelance journalists who sold their articles to newspaper publishers.<sup>99</sup> The publishers subsequently placed their work on electronic databases, and also licensed out the journalists’ work to other electronic publishers.<sup>100</sup> The Supreme Court held that the Electronic Publishers infringed upon the journalists’ copyrights as they “reproduc[ed] and distribut[ed] the Articles in a manner not authorized by the Authors.”<sup>101</sup> Plaintiffs argued that in *Tasini* there was no contributory infringement claim.<sup>102</sup> Therefore, by recognizing that the electronic publishers infringed upon the authors’ right to authorize, the Supreme Court validated the authorization clause as a basis for direct infringement liability.<sup>103</sup>

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<sup>92</sup> Plaintiff’s Supplemental Brief Pursuant to May 15, 2008 Order, *supra* note 19, at \*15-17.

<sup>93</sup> *Id.* at \*15.

<sup>94</sup> *Id.* (citing 17 U.S.C. §106 (2006)).

<sup>95</sup> *Capitol Records*, 579 F. Supp. 2d at 1221.

<sup>96</sup> *Id.*

<sup>97</sup> *New York Times Co. v. Tasini*, 533 U.S. 483 (2001).

<sup>98</sup> Plaintiff’s Supplemental Brief Pursuant to May 15, 2008 Order, *supra* note 19, at \*19.

<sup>99</sup> *Tasini*, 533 U.S. 483.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 506.

<sup>102</sup> Plaintiff’s Supplemental Brief Pursuant to May 15, 2008 Order, *supra* note 19, at \*9.

<sup>103</sup> *Id.*

The Court rejected Plaintiffs' characterization of *Tasini* and distinguished it from the instant case.<sup>104</sup> The court stated that in *Tasini* the Supreme Court "made clear that the primary liability by the Print Publishers, which occurred without any proof of actual dissemination to the public, was the violation of the reproduction right, 17 U.S.C. §106(1)."<sup>105</sup> Thus, the Supreme Court was "not recognizing an independent authorization right." Rather, the print publishers were found liable for "aiding in the reproduction" of the articles for use by the electronic publishers.<sup>106</sup> For this reason, relying on *Tasini* as a basis for bringing a direct infringement claim through the Authorization clause of Section 106 was misplaced.<sup>107</sup>

#### 4. *National Car Rental* As Existing Eighth Circuit Precedent

Perhaps most influential to the Court's ultimate determination that "distribution" under Section 106(3) required "actual dissemination" of copyrighted material was *National Car Rental System, Inc. v. Computer Associates International, Inc.*<sup>108</sup> *National Car Rental* concerned a license agreement between National Car Rental System ["National"] and Computer Associates ["CA"] in which National was permitted to use CA's software to process data.<sup>109</sup> National, however, allegedly also used the software to process data for other companies.<sup>110</sup> The Eighth Circuit reasoned that such action did not infringe upon CA's copyright. The precise text of *National Car Rental* utilized by the court stated,

[E]ven with respect to computer software, the distribution right is only the right to distribute *copies* of the work. As Professor Nimmer has stated, "[i]nfringement of the [distributed right] requires an actual dissemination of either copies or phonorecords." 2 Nimmer on Copyright

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<sup>104</sup> *Capitol Records*, 579 F. Supp. 2d at 1222.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Nat'l Car Rental Sys, Inc. v. Computer Assoc. Int'l, Inc.*, 991 F.2d 426 (8th Cir. 1993). The Court was probably influenced not by *National Car Rental*, but by *Atl. Recording Corp. v. Howell* - one of the cases cited by Plaintiffs in advocating for Jury No. 15 in September 2007. In that order, the Court stated that neither of the parties brought *National Car Rental* during the jury instruction debate. Most likely, *National Car Rental* was brought to the Court's attention by the Arizona District Court's reexamination of *Howell*, which specifically included discussion of *National Car Rental*. The Court notes the Arizona District Court's analysis of *National Car Rental* on \*1223-24 of its opinion.

<sup>109</sup> *Nat'l Car Rental*, 991 F.2d at 430-31.

<sup>110</sup> *Id.*

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§8.11[A], at 8-124.1.<sup>111</sup>

Interestingly, the court in *National Car Rental* cited Nimmer directly in rendering its opinion. It is very likely that this is the reason the court chose to dismiss the Registrar of Copyright's opinion on the plain meaning of distribution and assumed the Nimmer definition without much discussion. Even still, however, the *National Car Rental* decision predated the Registrar's letter interpreting Section 106(3) by nine years. In an era of rapidly advancing technology and increasingly complex threats to copyrights, the Court may have been better served to address the relevance of the *National Car Rental* analysis a bit more thoroughly.

5. Matters of Policy and Equity

Plaintiffs argued that even if *National Car Rental* stated that actual dissemination was required to infringe §106(3), the case before the Court was distinguishable. Specifically, they argued that peer-to-peer networks make it extremely difficult to retain evidence of wrong-doing and makes "proof of actual dissemination difficult."<sup>112</sup> Plaintiff argued that courts have long recognized such concerns: "[F]or decades courts have found book stores, music stores, and video rental stores who made copies of copyrighted works available without authorization liable for infringement, without requiring additional monitoring to catch a member of the public accepting the defendant's offer."<sup>113</sup> To support this contention, Plaintiffs rested significantly upon the Fourth Circuit ruling of *Hotaling v. Church of Jesus Christ of Latter-Day Saints*.<sup>114</sup>

In *Hotaling*, the Fourth Circuit held a library liable for distributing copyright work to the public.<sup>115</sup> Specifically, the Fourth Circuit wrote,

When a public library adds a work to its collection, lists the work in its index or catalog system, and makes the work available to the borrowing or browsing public, it has completed all the steps necessary for distribution to the public. At that point, members of the public can visit the library and use the work. Were this not to be considered distribution within the meaning of §106(3), a copyright holder would be prejudiced by a library that does not keep records of public use, and the library would unjustly profit by its own omission.<sup>116</sup>

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<sup>111</sup> *Id.* at 434.

<sup>112</sup> Plaintiff's Reply Brief Pursuant to May 15, 2008 Order, \*9, *Capitol Records*, 579 F. Supp. 2d 1210 (No. 06-1497).

<sup>113</sup> Plaintiff's Supplemental Brief Pursuant to May 15, 2008 Order, *supra* note 19, at \*17.

<sup>114</sup> *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 203.

Plaintiffs argued that the specific concerns the Fourth Circuit identified in this ruling apply directly to music shared through peer-to-peer file sharing programs.<sup>117</sup> The court, however, was not persuaded by the Fourth Circuit's reasoning. "[T]he Fourth Circuit did not analyze any case law. . . [n]or did it conduct any analysis of §106(3). Instead, the court was guided by equitable concerns."<sup>118</sup> Thus, while the court noted that some courts had applied *Hoteling, National Car Rental* was not only binding, but "consistent with the logical statutory interpretation of §106(3), the body of Copyright Act case law, and the legislative history of the Copyright Act."<sup>119</sup> To allay Plaintiffs' concerns regarding the seeming inability to catch and document illegal transfers of copyright material through peer-to-peer networks, the court stated that direct evidence of actual dissemination was not required.<sup>120</sup> Rather, Plaintiffs were free to supply circumstantial evidence to prove that actual distribution occurred.<sup>121</sup>

*D. International Agreements as a Source for Broad Copyright Liability*

In order to persuade the court that Section 106(3) should include liability for those who make copyrighted material available, Plaintiffs argued that by becoming party to certain international agreements, the United States implied that such liability existed within its legal framework.<sup>122</sup> The United States is party to the World Intellectual Property Organization Copyright Treaty (WCT) and the World Intellectual Property Organization Performance and Phonograms Treaty ("WPPT").<sup>123</sup> These treaties include liability for those who not only actually distribute copyright material, but also for those who simply make such material available.<sup>124</sup>

Plaintiffs argued that by ratifying these treaties, Congress and the Executive Branch expressed a belief that existing United States law complied fully with the provisions of the WCT and WPPT.<sup>125</sup> Amici submitted by the MPAA and the Progress and Freedom Foundation also stated that some free-trade agreements to which the United States is a party also provide for "making

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<sup>117</sup> Plaintiff's Supplemental Brief Pursuant to May 15, 2008 Order, *supra* note 19, at \*18.

<sup>118</sup> *Capitol Records*, 579 F. Supp. 2d at 1224.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 1225.

<sup>121</sup> *Id.*

<sup>122</sup> Plaintiff's Supplemental Brief Pursuant to May 15, 2008 Order, *supra* note 19, at \*26-28.

<sup>123</sup> S. REP. NO. 105-190, 5, 9 (1998).

<sup>124</sup> World Intellectual Property Organization Copyright Treaty art. 6(1), art. 8 (Dec. 23, 1996); World Intellectual Property Organization Performance and Phonograms Treaty art. 12(1), art. 14 (Dec. 20, 1996).

<sup>125</sup> Plaintiff's Supplemental Brief Pursuant to May 15, 2008 Order, *supra* note 19, at \*26.

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available” liability.<sup>126</sup> Thus, Plaintiffs argue that under the *Charming-Betsy* rule, which states that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains,” the Court should resolve that Section 106(3) includes making-available liability.<sup>127</sup>

The court rejected Plaintiffs’ argument and stated that “the WIPO treaties are not self-executing and lack any binding legal authority separate from their implementation through the Copyright Act.”<sup>128</sup> The treaties did not create any “enforceable making-available right” and were only persuasive if Section 106(3) was ambiguous.<sup>129</sup> In this respect, the court’s opinion was quite aggressive. The court “acknowledge[d] that past Presidents, Congresses, and the Register of Copyrights have indicated their belief that the Copyright Act implements WIPO’s making-available right.”<sup>130</sup> But, despite their interpretations, “after reviewing the Copyright Act itself, legislative history, binding Supreme Court and Eighth Circuit precedent, and an extensive body of case law examining the Copyright Act” the court concluded that their reading was incorrect.<sup>131</sup>

IV. ADMONITIONS TO CONGRESS ON THE APPLICABILITY OF STATUTORY DAMAGES IN FUTURE RIAA LITIGATION

Subsequent to granting Plaintiffs’ motion for new trial on grounds that the court raised *sua sponte*, the court commented on the applicability of statutory damages – the issue which was the basis for Plaintiffs’ original motion for new trial.<sup>132</sup> “The Court would be remiss if it did not take this opportunity to implore Congress to amend the Copyright Act to address liability and damages in peer-to-peer network cases such as the one currently before this Court.”<sup>133</sup> Clearly, the court was persuaded by Thomas’s argument that statutory damages in this case were beyond reasonable limits.<sup>134</sup> It remains unclear if the court would have granted either a new trial or a remittitur based solely on the constitutionality of statutory damages. The court, however, voiced its

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<sup>126</sup> Brief for Motion Picture Association of America, Inc. as Amici Curiae Supporting Plaintiffs, *supra* note 41, at \*11-13; Amicus Curiae Brief of Thomas D. Sydnor of the Progress and Freedom Foundation Opposing the Motion for a New Trial, *supra* note 41, at \*4-10.

<sup>127</sup> *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

<sup>128</sup> *Capitol Records*, 579 F. Supp. 2d at 1226.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 1227.

<sup>133</sup> *Id.*

<sup>134</sup> Defendants Motion for New Trial, Or in the Alternative, for Remittitur, *supra* note 32.



displeasure at the \$220,000 jury verdict and called for Congressional action.

A. *Statutory Damages Generally*

A copyright holder may elect to recover for actual damages caused by the infringers conduct, or in the alternative, statutory damages.<sup>135</sup> If chosen, statutory damages permit the fact-finder to set an award between certain congressionally defined limits.<sup>136</sup> Statutory damages are particularly applicable when the calculation of actual damage is too difficult or unfair.<sup>137</sup> Additionally, statutory damages are intended to both compensate the victim and deter future infringement.<sup>138</sup> The Copyright Act establishes a staggered range for statutory damages in regards to copyright infringement. Generally, under a statutory damages regime, the fact finder must award at minimum \$750 and at most \$30,000 per infringement.<sup>139</sup> In cases where an individual was unaware of infringement, however, the minimum award the fact finder may reduce the award to \$200.<sup>140</sup> Where the fact finder believes that infringement was willful, statutory damages may be increased to \$150,000 per infringement.<sup>141</sup> These particular figures are from the 1999 revision of the Copyright Act, where statutory damages were increased.<sup>142</sup>

B. *Statutory Damages as Applied in Capitol Records v. Thomas*

In October 2007, Thomas was found liable for infringement and ordered to pay \$9,250 for each act of infringement, thus amounting to a total award of \$222,000.<sup>143</sup> Thomas argued that this award was “grossly excessive” and violated the Due Process Clause of the United States Constitution.<sup>144</sup> She argued that song recordings are typically available online for one dollar a

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<sup>135</sup> 17 U.S.C § 504 (2006).

<sup>136</sup> *Id.*

<sup>137</sup> See Plaintiff’s Response in Opposition to Defendant’s Motion for New Trial, or in the Alternative, for Remittitur, *supra* note 35, at \*8.

<sup>138</sup> See STAFF HOUSE COMM. ON THE JUDICIARY, 87TH CONG., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW 103 (Comm. Print 1961), reprinted in 3 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (George S. Grossman ed., 1976).

<sup>139</sup> 17 U.S.C. § 504 (C)(1) (2006).

<sup>140</sup> 17 U.S.C. § 504 (C)(2) (2006).

<sup>141</sup> *Id.*

<sup>142</sup> See Plaintiff’s Response in Opposition to Defendant’s Motion for New Trial, or in the Alternative, for Remittitur, *supra* note 35, at \*9-10.

<sup>143</sup> Special Verdict Form, *supra* note 7.

<sup>144</sup> Defendants Motion for New Trial, Or in the Alternative, for Remittitur, *supra* note 32, at \*2-3.

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song.<sup>145</sup> Assuming that Plaintiffs made seventy cents per song, actual damages as applied to the twenty-four sound recordings at issue would amount to \$16.80.<sup>146</sup> Additionally, even if the court awarded the minimum prescribed statutory damages amount of \$750, this would still be more than 1000 times the actual damages.<sup>147</sup>

Because of this, Thomas urged the court to analyze the statutory damage award with the same scrutiny applied to punitive damage awards.<sup>148</sup> Under such a framework, the court should take into account the Supreme Court precedent of *BMW of North America, Inc. v. Gore*<sup>149</sup> and *State Farm Mutual Automobile Insurance Co. v. Campbell*.<sup>150</sup> In *Gore*, the Supreme Court concluded that an award that was 500 times compensatory damages was “grossly excessive” and violated the defendant’s due process rights.<sup>151</sup> In *Campbell*, the Court struck down an award which was 145 times the compensatory damages.<sup>152</sup> With respect to these decisions, Thomas argued, the damages award was “not only astronomical, [but also] offensive to our Constitution and offensive generally.”<sup>153</sup>

In response, however, Plaintiffs argued that the Defendant completely ignored the harm caused by her actions, which caused “unlawful distribution of [the] sound recordings to potentially millions of other Kazaa users.”<sup>154</sup> Thus, the actual injury to Plaintiffs was not \$16.80, but substantially more. In addition, the jury’s verdict reflected an opinion that defendant’s conduct was less than 10% of the potential statutory award.<sup>155</sup>

As far as the constitutionality of the statutory damage award, the United States also moved to intervene and defended the jury’s verdict.<sup>156</sup> Both

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at \*2.

<sup>147</sup> *Id.* at \*3.

<sup>148</sup> *Id.* at \*9-12.

<sup>149</sup> *BMW of North Am., Inc. v. Gore*, 517 U.S. 559 (1996).

<sup>150</sup> *State Farm Mutual Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

<sup>151</sup> *Gore*, 517 U.S. at 574. The Court in *Gore* used three “guideposts” in making its decision, which it also used in *Campbell*. These guideposts included: (1) the reprehensibility of the defendant’s conduct, (2) the difference between the harm, or potential harm, suffered by the plaintiff and the punitive damage award, and (3) the difference between the remedy imposed and civil penalties in comparable cases.

<sup>152</sup> *Campbell*, 538 U.S. at 429.

<sup>153</sup> Defendants Motion for New Trial, Or in the Alternative, for Remittitur, *supra* note 32, at \*12.

<sup>154</sup> Plaintiff’s Response in Opposition to Defendant’s Motion for New Trial, or in the Alternative, for Remittitur, *supra* note 35, at \*2.

<sup>155</sup> *Id.* at \*3.

<sup>156</sup> United States of America’s Memorandum in Defense of the Constitutionality of the

Plaintiffs and the United States argued that the analysis used to scrutinize punitive damages awards were inapplicable to statutory damage judgments.<sup>157</sup> Rather, the applicable standard was much more deferential and would only be second-guessed if it was “so severe and oppressive as to be wholly disproportionat[e] to the offense or obviously unreasonable.”<sup>158</sup> As more evidence of reasonableness and Congressional intent, both Plaintiffs and the United States cited Congressional reports commenting on the updated statutory damage scheme:

Many computer users are either ignorant that copyright laws apply to Internet activity, or they simply believe that they will not be caught or prosecuted for their conduct. Also, many infringers do not consider the current copyright penalties a real threat and continue infringing even after a copyright owner puts them on notice. . . In light of this disturbing trend, it is manifest that Congress respond appropriately with updated penalties to dissuade such conduct.<sup>159</sup>

As copyright infringement increased due to technological advances, Congress intended for the updated statutory damages scheme to serve as a deterrent.<sup>160</sup> Thus, while the award might have been substantial, it was neither unreasonable nor disproportionately reflective of what actual damages may have occurred to copyright holders.<sup>161</sup>

The court, however, was not persuaded by such arguments and particularly

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Statutory Damages Provision for the Copyright Act, 17 U.S.C. § 504(c) (2006), *supra* note 14.

<sup>157</sup> *Id.* at \*7-12; Plaintiff’s Response in Opposition to Defendant’s Motion for New Trial, or in the Alternative, for Remittitur, *supra* note 35, at \*12-26.

<sup>158</sup> United States of America’s Memorandum in Defense of the Constitutionality of the Statutory Damages Provision for the Copyright Act, 17 U.S.C. § 504(c) (2006), *supra* note 14, at \*8 (citing *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919) (ruling that statutory damages of \$75 in relation to an actual damage of 66 cents was within the authorized range of \$50 and \$300 and thus did not violate due process rights)).

<sup>159</sup> H.R. REP. NO. 106-216, at 3 (1999). Plaintiff’s Response in Opposition to Defendant’s Motion for New Trial, or in the Alternative, for Remittitur, *supra* note 35, at \*10; United States of America’s Memorandum in Defense of the Constitutionality of the Statutory Damages Provision for the Copyright Act, 17 U.S.C. § 504(c) (2006), *supra* note 14, at \*15.

<sup>160</sup> United States of America’s Memorandum in Defense of the Constitutionality of the Statutory Damages Provision for the Copyright Act, 17 U.S.C. § 504(c) (2006), *supra* note 14, at \*15.

<sup>161</sup> Plaintiff’s Response in Opposition to Defendant’s Motion for New Trial, or in the Alternative, for Remittitur, *supra* note 35, at \*3; United States of America’s Memorandum in Defense of the Constitutionality of the Statutory Damages Provision for the Copyright Act, 17 U.S.C. § 504(c) (2006), *supra* note 14, at \*19.

commiserated with Thomas's position. Noting the "unique nature of this case," the court stated that the defendant sought no profit from her infringement and was not a business.<sup>162</sup> There was no commercial conduct and thus the cases cited by the Plaintiffs and United States involving commercial parties had "limited relevance."<sup>163</sup> "[I]t would be a farce to say that a single mother's acts of using *Kazaa* are the equivalent, for example, to the acts of global financial firms illegally infringing on copyrights in order to profit in the securities market."<sup>164</sup>

In addition, the court accepted Thomas's argument that the damages were "wholly disproportionate" to actual damages, which the Court indicated were "less than \$54." If statutory awards were supposed to deter conduct, "awards of hundreds of thousands of dollars [are] certainly far greater than necessary to accomplish Congress's goal of deterrence."<sup>165</sup>

In its three page commentary, the court cited little case law and ignored indications of specific congressional intent to deter copyright infringe via the internet and other advanced technologies. That said, it remains to be seen if this court, or others grappling with RIAA litigation, will scrutinize statutory awards in a similar manner when directly presented with the issue.

#### V. CONCLUSION

*Capitol Records v. Thomas* is certainly a decision that will impact future RIAA litigation. In light of advanced technologies, peer-to-peer file sharing networks being the most prolific, copyright owners face a daunting task of protecting their material in an arena where monitoring and enforcement costs seem astronomical. If courts replicate the *Capitol Records v. Thomas* decision and require actual dissemination in order to hold an individual liable for infringing on the exclusive right to distribute, the task for the RIAA becomes inherently more difficult. More striking, however, are Judge Davis's comments on the validity of statutory damages. If the RIAA is unable to procure more than a few thousand dollars per infringement suit, one wonders if the RIAA will continue to bring cases of infringement against individuals at all. Such awards hardly remedy RIAA losses due to illegal music copying on peer-to-peer networks and, more significantly, are unlikely to deter other users. As a background to these issues, the court dismisses commentary and interpretation of Section 106(3) from the executive and legislative branches without much discussion. Other courts may tread more cautiously.

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<sup>162</sup> *Capitol Records*, 579 F. Supp. 2d at 1227.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*