No. 11-1019

In the
Supreme Court of the United States

JOEL TENENBAUM,
Petitioner,

v.

SONY BMG MUSIC ENTERTAINMENT; WARNER BROS. RECORDS, INC.; ATLANTIC RECORDING CORP.; ARISTA RECORDS, LLC; AND UMG RECORDINGS, INC.
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY

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May 1, 2012

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Joel Tenenbaum is a fine and courageous young man who has just received his doctorate in statistical physics. He has devoted years of his life in response to the offense to justice he saw being perpetrated in Judge Gertner's Court. Judge Gertner herself observed: "Counsel representing the record companies have an ethical obligation to fully understand that they are fighting people without lawyers, to understand that the formalities of this are basically bankrupting people, and it's terribly critical that you stop it." Motion Hearing Tr. 9:19–11:7 (June 17, 2008). He stands at his peril to legally oppose the RIAA. He deserves to have his issues heard.

The RIAA initiated its direct litigation attack on individual file-sharing music consumers in 2003. The resulting campaign spawned twelve thousand lawsuits against individuals.[1] Only two of those individuals have had the fortitude to challenge the RIAA legally by forcing them to go through trial rather than accepting their settlement demands. All efforts to raise pretrial constitutional challenges were ruled premature. Jamie Thomas-Rasset has been subjected to three trials, the last resulting in a verdict of $1.5 million dollars for 23 songs, now pending appeal in the Eighth Circuit.[2] Joel Tenenbaum's case is the only case after trial to have been reviewed by a court of appeals.

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[1] Declaration of Matthew J. Oppenheim dated June 24, 2009, in *Anderson v. Atlantic Recording Co.* (D. Or. No. 07-934) *available at* http://bit.ly/Oppenheim_6-24-09.

[2] *Capitol Records, Inc. v. Thomas-Rasset*, 799 F. Supp. 2d 999, 1002–03 (D. Minn. 2011).

1. The First Circuit's misuse of remittitur threatens to push the defendant down an endless litigation rathole.

The remittitur procedure imposed by the First Circuit at the behest of DOJ (against the will of the parties) gives license to the RIAA to keep individual defendants like Tenenbaum in endless litigation. This unnecessary and unwarranted extension of power to the plaintiffs exacerbates their already profoundly unethical use of federal civil process against individuals who have neither the ability to defend in knowledge of copyright law and federal procedure nor the financial means to hire lawyers. Remittitur is here deployed as a claim of prematurity to frustrate Tenenbaum's effort to raise the fundamental constitutional, statutory and judicial issues that are here at stake. Even further, the deployment of remittitur as a means of fending off constitutional issues empowers the copyright-holding corporations to subject any individual who is seeking to protest the unconstitutionality of their settlement methods to years and then further years of endless litigation and repeated trials. Remittitur in this case will give RIAA the option to subject Tenenbaum to a second trial. Thomas-Rasset has already been subjected to three.

As a consequence of the First Circuit's opinion, remittitur is no longer a discretionary procedure for district judges. Pet. at 6a–7a, 58a. Under the logic of the First Circuit opinion, remittitur must be used endlessly until the defendant is forced to settle. Chief Judge Davis's opinion following Thomas-Rasset's third trial (tracking Judge Gertner's vacated opinion

on constitutionality) is vulnerable, because even though he has already gone around the remittitur-retrial merry-go-round once after her second trial, he should, according to the First Circuit's logic, go around yet again instead of reaching the constitutional issue.

> Even if Sony had declined any remitted award given and opted for a new trial, even if a different jury issued a comparable award, and even if Tenenbaum once again moved to reduce the award on constitutional grounds, it was still premature for the court to reach the constitutional question before that process had been carried out. A new trial could have materially reshaped the nature of the constitutional issue by altering the amount of the award at issue or even the evidence on which to evaluate whether a particular award was excessive.

Pet. App. 59a–60a. Such reasoning has no logical limit and requires trial judges to let the remittitur process run for a second, third, and fourth time, *ad infinitum*.

DOJ makes their settlement strategy of avoidance explicit: "The defendant, possessed of concrete knowledge of his potential liability, and the plaintiffs, faced with the prospect of another expensive trial, would have new incentives to settle." Opening Br. on Appeal at 25. By burying Tenenbaum

in retrial against adversaries for whom money is no object,[3] RIAA/DOJ will be permitted to force the only remaining individuals standing against them finally to settle like all the rest, thereby avoiding constitutional challenge and ensuring that none will be raised again. They use the asymmetric cost of litigation to make defense by the individual economically irrational.

This Court should do everything it can to remedy this misuse of process. Its effects are not ended because the RIAA has ceased suing individuals. Others are using the legal structure and litigation tactics they have put in place.[4] The weight of federal litigation is not a tool appropriately used to suppress legal challenge. The absence of cases pending in the federal courts highlights the problem: a deeply

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[3] The RIAA has stated publicly that these lawsuits are not primarily meant to recover actual money damages from real people like Joel Tenenbaum but are merely the "enforcement phase of its education program." RIAA Press Release of Sept. 8, 2003, *available at* http://bit.ly/RIAA_Education.

[4] *See, e.g.*, "Copyright Trolls," *Electronic Frontier Foundation*, *available at* https://www.eff.org/issues/copyright-trolls (noting "at least three groups have" followed the RIAA's lead and "begun to experiment with using mass copyright litigation to extract settlements from individuals"); Fight Copyright Trolls, http://fightcopyrighttrolls.com/about/ (a website dedicated to exposing the activities of the growing sector of "copyright trolls" who "threaten defendants with costly [copyright] lawsuits that can potentially result in as much as $150,000 statutory damage payments plus attorneys fees. . . . [T]hey threaten to raid your computer(s) in search for proof. To let this suit go away, trolls demand a couple of thousand dollars, increasing the amount if not paid promptly. Profit is split among trolls, rightsholders and companies that detected [IP addresses]."); Sarah Jacobsson Purewal, "Copyright Trolls: 200,000 BitTorrent Users Sued Since 2010," Today @ PCWorld (August 9, 2011), *available at* http://www.pcworld.com/article/237593/copyright_trolls_200000_bittorrent_users_sued_since_2010.html.

misshapen judicial architecture has been set in place. Without review, it is unfixable. The suppression of ability to challenge a process that is repeatedly producing appalling results, not circuit splits, is exactly why this case is worthy of this Court's present attention.

2. The constitutional and statutory issues merit this Court's review.

Jury awards of statutory damages for copyright infringements against noncommercial individuals who acted for personal use and sought no commercial gain and caused no provable damage are "appalling," *Thomas-Rasset*, 799 F. Supp. 2d at 1001, and it is for RIAA/DOJ to show that Congress really intended them. They point to the text of § 504(c), but the text offers statutory damages "instead of actual damages and profits." The text does not sanction statutory damages where there are *no* actual damages and profits, or statutory damages wholly divorced from actual damages and profits.

They point to *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 231–233 (1952), for the proposition that statutory damages may be awarded "[e]ven for uninjurious and unprofitable invasions of copyright" and "without any proof of injury." But the *Woolworth* language is pure dicta: the case involved an admittedly injurious and profitable commercial infringement and the defendant did not even raise the argument in question here. *Id.* at 230 ("Enough appears to indicate the real and substantial injury was inflicted."). In fact, every case they cite was between

businesses and was decided under the specific menu structure of the 1909 Copyright Act. The 1976 Act adopted a different structure to allow the trial judge, "after weighing the equities," to make an award that "is *justified by the proof*, and which *most closely reflects the extent of the plaintiff's injury*." Draft Bill S. 1361, reprinted in Cambridge Research Institute, Omnibus Copyright Revision: Comparative Analysis of the Issues 143 (1973) (emphasis added). Statutory damages should "bear some relationship to the actual damages suffered." *See Peer Int'l Corp. v. Luna Records, Inc.*, 887 F. Supp. 560, 568 (S.D.N.Y. 1995) (Sotomayor, J.).

The DOJ and RIAA claim that Congress tacitly approved statutory damages against individuals by repeatedly amending a Copyright Act that allows them, but prior to these RIAA lawsuits against individual file-sharers no noncommercial case had ever been brought — a point that passes without response. At the times Congress acted, there were no outcomes of cases against individuals for Congress to approve or disapprove. It cannot be assumed, with no mention at all, that Congress ever approved unrestrained discretionary jury damage awards against individual citizens for copyright infringement.[5] On the contrary, as this Court recognized in *Feltner v. Columbia Pictures Television,*

[5] Plaintiffs continue to cite the legislative history of the Digital Theft and Deterrence Act, but as indicated in Judge Gertner's opinion, statements by the bill's primary sponsors "strongly suggest that Tenenbaum is correct[and Congress] did not anticipate that individuals such as Tenenbaum who engaged in noncommercial file-sharing would be subjected to liability for statutory damages under section 504(c)." Pet. at. 113a–15a.

Inc., 523 U.S. 340, 345–347 (1998),), Congress recognized the problem of unrestrained discretionary statutory damages even in commercial cases and addressed that problem by making the award of statutory damages *solely* the power of precedent-guided, law-bound judges.

If, as the RIAA and DOJ suggest, this Court in *Feltner* engaged in summary judicial repair of a statutory provision that violated the Seventh Amendment, it must have done so on faith that lower courts would craft a new jury trial process that comports with justice. Compare *Daubert v. Merrell Dow Pharm., Inc.* 509 U.S. 579, 601 (1993). If so, then this case exemplifies how thoughtlessly the lower courts have undertaken that task. No judge in any court below has done more than woodenly quote the statute and follow the *Feltner* dictum, without analysis or further elaboration, as if the dictum was itself a statute, and their judicial duty to defer to it as if it had the weight of Congress and settled wisdom behind it. Obviously, neither is true.

Tenenbaum's challenge to § 504(c) is fully ripe for review. The RIAA/DOJ interpretation of the statute is facially unconstitutional because it purports to authorize juries to exercise an unconstitutional degree of discretion unrelated to any actual fact. The First Circuit's remand to the district court to consider remittitur, even if respected, relates only to the excessiveness of the jury's award, not to this facial challenge. RIAA/DOJ even claim that this Court's *Feltner* dictum insulates the appalling punitive jury awards their legal architecture

produces from the constraints of this Court's punitive damage jurisprudence.

3. The misuse of federal civil jury process against an individual defendant to punish and deter the conduct of others merits this Court's review.

RIAA's litigation assault on individual file-sharers, Tenenbaum and Thomas-Rasset among them, is procedurally unfair and profoundly unethical. It pits an industry against an individual and punishes the individual for what others have done and will do. It seeks to punish him beyond any rational measure of the damage he conceivably caused, not for the purpose of recovering compensation for actual damage caused by him, nor for the primary purpose of deterring him from further copyright infringement, but for the ulterior purpose of creating an urban legend so frightening to children using the internet, and so frightening to parents and teachers of students using the internet, that they will somehow reverse the tide of the digital future. The individual is to be grievously punished as an act of public education.[6]

Plaintiffs attempt to substitute the action of one individual for the actions of millions. They seek to leverage the damage attributable to all file sharing to justify heinous punishments for one. Tenenbaum, acting as one individual, did not (and could not) cause the injuries the RIAA describes. Nor is he

[6] *See supra* note 3.

answerable for the amount of damages that they seek to collect from him. File sharing as a whole caused the injuries about which the RIAA complains. Had Tenenbaum never shared, the songs would have been shared and available nonetheless. Tenenbaum did not create filesharing and he was not in any way critical to its spread or its effects. It cannot be that he, individually, caused the destruction of the complete value of each of plaintiffs' copyrighted works. It was not *Tenenbaum alone* who reduced income and profits for the recording industry; it was not *Tenenbaum* who cost employees their jobs — it was the global millions engaged in *filesharing* that did all this. The following testimony by Plaintiff's own expert makes the point:

> Q. What was your conclusion when you looked at [the data from the study]?
>
> A. The conclusion was that file sharing was responsible for all of the decline in record sales.
>
> Q. *Can you identify the particular harm that Mr. Tenenbaum has caused as a result of his activities in this case –*
>
> A. *No.*
>
> Q. – with respect to file sharing, I should say?
>
> A. No.

J.A. at 140–141 (emphasis added). Plaintiff's counsel in closing argument declared:

> *[O]nline copyright infringement* has real

> and significant impacts on everyone in the record business. When record companies lose sales to illegal downloaders, artists, musicians, songwriters, engineers, producers all lose royalties. Lost sales to *free illegal downloads* has also caused significant layoffs and harmed my client's abilities to develop new artists and produce the music that we all enjoy.

J.A. at 260 (emphasis added). These generalized condemnations of the *aggregate* harms caused by "online copyright infringement" and "free illegal downloads" speak to the plight of the record industry as a result of the *collective* practices of *millions* of individuals. The jury award is against *this* Defendant.

Punishment of an individual for the conduct of others is fundamentally unfair. Punishment of an individual to deter the behavior of others is the office of criminal law, replete with criminal protections for the defendant, including appointed counsel.

CONCLUSION

None of these issues is waived in any way that precludes this Court's review. All were addressed and resolved against the Petitioner by the court below.

This Court should take this case to rectify bad judicial process spawned by a too casual dictum which now has juries making appalling awards

without being given any fact to find except that the defendant knew what he was doing.[7] This is a travesty of a jury trial. *See generally*, Pamela Samuelson and Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 Wm. and Mary L. Rev 439 (2009). Calling upon jurors to assess statutory damages invites them into a byzantine process not ever contemplated by the Seventh Amendment. Asking laymen to assess damages of any kind is a difficult task, but when it is one not rooted in any sort of fact-based assessment linking dollar amounts to actions taken or crimes committed, it is simply not a practical endeavor, nor one that our Founding Fathers had in mind. Add to that the absurdly capacious range of statutory damages instructed to the jury, and they not only are not engaged in any fact-finding, but they have also been stripped of the autonomy to limit the damages to an amount they find reasonable given the nature and circumstances of the offense. Plaintiffs have managed to abuse the statutory language in order to bury the defendant under an excessive judgment that was neither appropriate nor intended by lawmakers.

This case is important to students of law who study how law is made and want to believe in and be part of its virtue in action, and to the future of our Creative Commons. Mike Masnick, *Too Much Copyright: This Generation's Prohibition*, TechDirt (April 20, 2012)[8]; Nicholas Carr, *The Library of*

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[7] "Willful" was defined for the jury to include merely "knowing."

[8] *Available at* http://www.techdirt.com/articles/20120419/14462618567/too-much-copyright-this-generations-prohibition.shtml.

Utopia, Technology Review (May/June 2012)[9].

For the foregoing reasons, I ask this Court to grant Joel Tenenbaum's petition.

Respectfully Submitted,

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[9] *Available at* http://www.technologyreview.com/web/40210/.