

Many excellent commentaries have been written on *SONY BMG Music Entertainment et al. v. Tenenbaum*, 721 F. Supp. 2d 85 (D.Mass. 2010)(the "Tenenbaum case"). Most conclude that the District Court applied the wrong standard in determining whether the jury award in the case violated due process. They suggest that if it had only applied the "*Williams*" standard, rather than the "BMW" or "*Gore*" standard, it would have recognized that the jury did not overstep its bounds. I think the *Tenenbaum* Court made an even more fundamental error than choose the wrong standard: It mounted an "as-applied" challenge to the jury's award that was not itself constitutionally permissible.

How can I say this? Very simply, because the Court had already confirmed three things: It clearly found that the Copyright Act was applicable to the case. *SONY BMG Music Entertainment v. Tenenbaum*, 672 F. Supp. 2d 217 (D.Mass. 2009) ("*Tenenbaum #2*"); *SONY BMG Music Entertainment v. Tenenbaum*, 626 F. Supp. 2d 152, 155 (D.Mass. 2009) ("*Tenenbaum #1*") It found the statute itself was constitutional. *Tenenbaum #1* at 152-154.¹ And, it found the jury was properly instructed on awarding damages under its provisions. *Tenenbaum #3*, 721 F. Supp. 2d at 92-93.

In my opinion, once it found these three things, its constitutional inquiry was at an end. It could not go on to undertake the analysis it did and unilaterally reduce the jury's award without *either* 1) rewriting the statute (by substituting a different statutory damages range), thereby violating separation of powers or 2) substituting its own judgment of the amount that should be awarded within the original range, for the jury's, thereby violating the Seventh Amendment. It wasn't entitled to do either.²

¹ In *St. Louis I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919), the Supreme Court considered whether the range of penalties provided for by a particular statute (i.e., between \$50 and \$300, plus costs and attorneys' fees) was "so severe and oppressive" and/or "obviously unreasonable" as to "amount to a denial of due process." It did not, as the *Tenenbaum* Court suggests, "squarely consider[] the issue of whether **a jury's award** ... violated the Due Process Clause." 721 F. Supp. 2d at 95 (emphasis added).

The distinction is an important one for the following reason: Separation of powers principles make the first type of inquiry appropriate. The Seventh Amendment makes the second inappropriate, *except* in accordance with its terms.

While the *Tenenbaum* Court could always have undertaken the type of statutory inquiry the *Williams* case contemplated, it chose not to do so. It focused exclusively on the jury verdict rather than the statute.

² It could, of course, have offered a remittitur or new trial.

It was the District Court, therefore, and not the jury in the final analysis that violated the Constitution.

The Proceedings Before The District Court:

Under section 504 of the Copyright Act, a plaintiff is entitled to elect his remedy. He can either choose an "actual damage" remedy or a form of liquidated damages. In 1999, the United States Congress increased the statutorily-prescribed range for the latter remedy. As a consequence, a litigant that opts for statutory damages is entitled to recover between \$ 750 and \$ 30,000 per infringement.³ Under the Seventh Amendment, the United States Supreme Court has been unequivocal in holding that the amount to be awarded ***within this range*** is a matter for a jury, rather than the court. *See Feltner v. Columbia Pictures Television Inc.*, 523 U.S. 340, 353 (1998)(the right to a jury trial includes "the right to have a jury determine the amount of statutory damages ... awarded to the copyright owner" for an infringement).

Consistent with this constitutional imperative, in the *Tenenbaum* case, the United States District Court for the District of Massachusetts initially left it to a jury to decide how much Sony and RIAA were entitled to recover for the unlawful downloading and file-sharing of their music. The jury awarded an amount within the range prescribed by the statute- or \$ 22,500- for each infringement.⁴ On July 9, 2010, the court set aside the jury's award on the grounds that it allegedly violated defendant's due process rights. The District Court made its own assessment of the damages to which it believed plaintiffs were entitled and reduced the jury's award accordingly. Specifically, it reduced the per-infringement award from \$ 22,500 to \$ 2,250 and total award from \$ 675,000 to \$ 67,500.⁵

As suggested above, after reviewing the decision in detail, I have reluctantly come to the conclusion that it was not the jury, but the

³ There are only two circumstances under which an award can deviate from that range: (1) where a defendant is found to have acted "willfully," damages of up to \$ 150,000 per infringement can be awarded, and (2) where a defendant is found to have been an "innocent infringer," damages as low as \$ 200 per infringement can be awarded. 17 U.S.C. §504(c)(2).

⁴ Since there were thirty compensable (30) infringements, the jury's award totaled \$ 675,000.

⁵ This was the maximum the District Court said was constitutionally allowable given the specific injury before it.

District Court that acted unconstitutionally. It usurped Congress' role, invaded the province of the jury, and deprived plaintiffs of a property right. Each of these usurpations violated the Constitution. The first violated separation of powers principles; the second, the Seventh Amendment; and the third, the Due Process and Just Compensation clauses.

I examine the first two violations briefly.

A. A Court Cannot Alter A Statutorily-Prescribed Damages Range Without Violating Separation Of Powers.

It is a fundamental precept of separation-of-powers principles that "the lawmaking function belongs to Congress, U.S. Const., Art. I, §, and may not be conveyed to another branch or entity." *Loving v. United States*, 517 U.S. 748, 758 (1996)(quoting *Field v. Clark*, 143 U.S. 649, 692 (1892)). This principle does not mean that only Congress can promulgate rules; it can obviously delegate some of its authority. *Wayman v. Southard*, 23 U.S. 1 (1825).

"The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."

Loving, supra, 517 U.S. at 759 (quoting *Cincinnati, W. & Z.R.Co. v. Commissioners of Clinton County*, 1 Ohio St. 77, 88-89 (1852)).

It follows that when Congress has specified the remedy or remedies that attach for the violation of a statute, the courts have no authority to rewrite the remedial scheme. See, e.g., *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 20 (1979); *National RR. Passenger Copr. V. National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974)(when legislation specifies a particular remedy or remedies, that remedy is generally understood to be exclusive); *Wilder Mfg. Co. v. Corn Products Refining*, 236 U.S. 165, 174-75 (1915)(where a statute prescribes the penalty for an offense or remedy for a statutory violation, "the punishment or the remedy can be only that which the statute prescribes"); *Barnet v. National Bank*, 98 U.S. 555 (1878). This is presumably as true where Congress has

provided for a *range* of damages as where it has specified a precise amount.

A court cannot alter the upper or lower limits of the statutorily-prescribed range without usurping the legislative function. And, while it could always, theoretically, have found the statute to have been unconstitutional on its face, it did not to do that here. (See *Tenenbaum #1* at 152-154). Quite to the contrary, it upheld the facial validity of the Act's provisions and the instructions it gave regarding their application. (See *Tenenbaum #3* at 92-93). The only fault the District Court found was with the jury's verdict. See *Tenenbaum #3*. Specifically, it took issue with the per-infringement figure the jury chose from within the range prescribed by the statute to remedy the proven infringement.⁶

B. The Supreme Court's Punitive Damages Jurisprudence Wasn't Applicable To The Tenenbaum Case And Did Not Authorize The Court's Actions.

The *Tenenbaum* Court premised its right to review the amount of the jury's award for excessiveness on the Supreme Court's punitive damages jurisprudence. Its reliance is misplaced.

In *Cooper Industries v. Leatherman Tool*, the United States Supreme Court held that a court is not precluded by the Seventh Amendment from reviewing an award of punitive damages because the amount of punitive damages a jury awards in a case is not a "fact" within the meaning of that Amendment. The Seventh Amendment isn't implicated, therefore, when a court substitutes its own judgment of what an appropriate punitive damages award would be for that of the jury.

The opposite is true when a court substitutes its judgment of the appropriate statutory damages award for that of the jury. Why the difference? Because the United States Supreme Court has been unequivocal in holding that the Seventh Amendment affords a plaintiff the

⁶ Query whether the fact that the figure falls within the range prescribed by an admittedly constitutional statute immunizes it against a due process challenge, or, indeed, any challenge except in accordance with the Seventh Amendment. See post at notes 8 and 9.

"right to a jury trial on all issues pertinent to an award of statutory damages under 17 U.S.C. § 504(c), **including the amount itself.**"

Feltner, 523 U.S. at 355; see also page 353 ("The right to a jury trial includes the right to have a jury determine **the amount** of statutory damages, if any, awarded to the copyright owner."). It follows that "if a party so demands, a jury must determine **the actual amount of statutory damages** under § 504(c) in order "to preserve 'the substance of the common-law right of trial by jury.'" 523 U.S. at 355 (emphasis added).

By substituting its own judgment as to where within the statutory range the appropriate per-infringement award lay in this case, the *Tenenbaum* court usurped the decision-making function of the jury and violated the Seventh Amendment.

This conclusion is inescapable since a review of the District Court's Opinion demonstrates that it engaged in virtually the same calculus it instructed the jury to undertake. Thus, by its own account, the Court instructed the jury to arrive at a damage figure by considering the following factors:

- (a) The nature of the infringement;
- (b) The defendant's purpose and intent;
- (c) The profit that the defendant reaped, if any, and/or the expense that the defendant saved;
- (d) The revenue lost by the plaintiff as a result of the infringement;
- (e) The value of the copyright;
- (f) The duration of the infringement;
- (g) The defendant's continuation of infringement after notice or knowledge of copyright claims;
- (h) The need to deter this defendant and other potential infringers, and
- (i) The defendant's "willfulness," if the jury found the infringements to be willful.

(*Tenenbaum* #3 at 93, citing Jury Instructions 3, Case No. 03-cv-11661-NG, document #909.)

As *Tenenbaum* #3 then goes on to demonstrate, the District Court considered precisely these same factors. Thus, it considered

. the nature of the infringement in which the defendant had engaged, finding "file-sharing" to be "low on the totem pole of reprehensible conduct" (721 F. Supp. 2d at 116);

. the defendant's purpose and intent, noting that Tenenbaum acted "willfully," although not for "commercial gain," (see, e.g., 721 F. Supp. 2d at 112, 116 ("Tenenbaum willfully engaged in thousands of acts of copyright infringement");

. the benefit Tenenbaum reaped and/or expense he saved by virtue of the infringement, finding that he saved at least \$ 1,500 per year (i.e., the cost of subscribing to a music downloading service, see 721 F. Supp. 2d at 114);

. the revenue plaintiff lost as a result of the infringements, calculating plaintiffs loss at either \$ 1.00/per song or \$1,500 per subscription license (see 721 F.Supp. 2d at 114-116);⁷

. more generally, the value of the copyright, divining from its review of 50 other copyright infringement cases [see 721 F.Supp. 2d at 108-110 and footnote 14] that its value lay somewhere between \$ X and \$ Y;

. the duration of Tenenbaum's infringement, noting that it extended over eight years or 96 months (see 721 F.Supp. 2d at 114 and n. 16);

. the fact that the infringement continued even after Tenenbaum was told to cease and desist and was put on notice of the claims; (see at 721 F.Supp. 2d at 116, 119-20); and, finally,

. defendant's willfulness (see, again, 721 F.Supp. 2d at 116 ("Tenenbaum willfully engaged in thousands of acts of copyright infringement").

Since it is the jury, and not the court, that is constitutionally tasked with these fact-finding functions, the Court usurped the jury's function when it undertook its own analyses and evaluations. *See Feltner; City of Monterrey.*

⁷ The District Court's calculation in this regard is totally unrealistic. Tenenbaum did not simply download music for his own personal use, he electronically *uploaded* it to a file so it could be shared with ever greater numbers of other Kazaa users. As anyone familiar with the workings of Kazaa knows, a song or tune so uploaded goes "viral", and within a short period of time, it is being shared with untold numbers of other users. Tenenbaum's actions didn't simply deprive plaintiffs of one license, therefore; it deprived them of myriad licenses- perhaps millions.

C. The Court Violated The Seventh Amendment
A Second Time When It Reduced The Award *Sua Sponte*.

The Seventh Amendment's re-examination clause provides that

"in suits at common law, no fact tried by a jury shall be ... re-examined ... [other than] according to the rules of the common law."

U.S.Const., Seventh Amendment. Because the "common law" this clause alludes to "is ... the common law of England," it only permits facts decided by a jury to be re-examined ***in the same circumstances they could have been re-examined in 1791***. *Dimick v. Schiedt*, 293 U.S. 474, 487 (1935)(Seventh Amendment "in effect adopted the rules of the common law, in respect of trial by jury, as these rules existed in 1791").

There were only three modes of re-examining such facts at common law: A court could re-examine them in the context of: (1) granting a new trial, (2) offering the parties a consensual "remittitur," or (3) in connection with issuing a *venire facias de novo* writ.⁸

The Seventh Amendment is "a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner."⁹ *Parsons v. Bedford*, 3 Pet. 433, 447-48 (1830)(Story, J). See also *Hetzel v. Prince William*, 523 U.S. 208, 211 (1998); *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, *supra*; *Kennon v. Gilmer*, 131 U.S. 22, 29-30 (1889).

The *Tenenbaum* Court did not reexamine the jury's facts in any of the three ways permitted by the Amendment. In other words, it did

⁸ "*Venire facias de novo* (meaning "may you cause to come anew") is a writ a court uses to summon new jurors when there is some irregularity or impropriety in the constitution of an already-existing jury, or where the verdict that jury has returned is so ambiguous or imperfect that no judgment can be entered upon it.

⁹ There is nothing in either the Copyright Act or *Feltner* that precludes a court from exercising its discretion to propose a common-law remittitur, provided the remitted damages remain within the permitted statutory range and plaintiff is afforded the opportunity to elect between a remittitur (or reduction in damages) or a new jury trial. Plaintiffs made it clear that they would not have agreed to a remittitur in this case, so a new jury trial would have been required.

not do so in the course of granting a new trial, as part of a common-law remittitur or in association with *venire facias*.

Instead, after conducting its own evaluation of the facts, it simply substituted its award for the jury's. It relied on three Court of Appeals' decisions to justify the substitution: *Bisbal-Ramos v. City of Mayaguez*, 467 F.3d 16 (1st Cir. 2006); *Ross v. Kansas City Power & Light Company*, 293 F.3d 1041 (8th Cir. 2002); and *Johansen v. Combusion Engineering, Inc.*, 170 F.3d 1320 (11th Cir. 1999). None of these cases involved the Copyright Act or, indeed, statutory damages. Rather, in each, the District Court was reducing a *punitive damages* award to the maximum that was constitutionally permissible.

As the Eighth Circuit noted in responding to a claim that the District Court's reduction constituted an improper and unilateral remittitur:

"While the traditional remedy of remittitur does require the plaintiff's consent in order to comport with the Seventh Amendment right to a jury trial, *Thorne*, 197 F.3d at 1212, [fn4] the court's mandatory review of a punitive damages award does not implicate the Seventh Amendment. The plaintiff's consent to a constitutional reduction of a punitive damages award is 'irrelevant' because the court must decide this issue as a matter of law."

Ross, 293 F.3d at 1049-1050.

The Eleventh Amendment is in accord:

"... [W]here a portion of a verdict is for an identifiable amount that is not permitted by law, the court may simply modify the jury's verdict to that extent and enter judgment for the correct amount. ...The Seventh Amendment is not offended by this reduction because the issue is one of law and not fact. ... No one would dispute that the court, not the jury, has the responsibility for determining this constitutional limit. Courts decide questions of law, not juries."

Johansen, 170 F.3d at 1330-1331.

The issue reduces, therefore, to a question of whether there is any reason to believe that the Supreme Court has retreated from its position that "the amount of statutory damages" to be awarded a copyright holder under § 504(c) is a question reserved to the jury. If it hasn't retreated from that position- and there is no reason to believe it has- then the Seventh Amendment is implicated by the actions the District Court took in this case and no amount of manipulating the "fact" and "law" labels can avoid that fact.

Indeed, the Seventh Amendment hasn't simply been implicated, it has been violated in the most fundamental of ways. In my opinion, there is only one outcome on appeal that would accord with the rule of law: reversal and a remand with directions to reinstate the jury verdict.

The fact that one may or may not personally applaud the outcome is irrelevant. If one believes in upholding the rule of law, then no other outcome is possible. It is the only outcome that can be reconciled with the manner in which our Constitution has allocated power between Congress and the courts, and judge and jury.

So, even for P2P-ers and file-sharers, much more is at stake than simply money. The right to have the representatives you elect make the laws is at stake, as well as the right to trial by jury. Both rights are in jeopardy in this case, even if they do not get discussed.¹⁰

¹⁰ Since courts do not reach constitutional issues where they can be avoided, I would not expect the Seventh Amendment issue to be discussed. There are myriad other grounds on which the First Circuit can reverse. It is only if it might otherwise affirm the lower court that it might address the issue. But, in my opinion, affirmance is unlikely.