Nos. 10-1883, 10-1947, 10-2052

IN THE

United States Court of Appeals

FOR THE FIRST CIRCUIT

SONY BMG MUSIC ENTERTAINMENT, ET AL.,

Plaintiffs-Appellants/Cross-Appellees,

v.

JOEL TENENBAUM,

Defendant-Appellee/Cross-Appellant.

On Appeal from the United States District Court for the District of Massachusetts

BRIEF OF AMICUS CURIAE ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF DEFENDANT-APPELLEE AND URGING AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amicus Curiae the Electronic Frontier Foundation states that it does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF INTEREST[1]

The Electronic Frontier Foundation ("EFF") is a nonprofit civil liberties organization that has worked for more than twenty years to protect consumer interests, innovation, and free expression in the digital world. EFF and its more than 14,000 dues-paying members have a strong interest in helping the courts and policy-makers in striking the appropriate balance between intellectual property and the public interest. EFF files this brief under authority of the accompanying motion.

SUMMARY OF ARGUMENT

Amicus EFF files this brief in order to call the Court's attention to the broader impact of the remedies at issue in this litigation.[2] This appeal raises one of the most pressing problems in modern copyright: the tension between the range of statutory damages allowed under 17 U.S.C. § 504 and the requirements of constitutional due process. Following firm Supreme Court precedent, courts should review statutory damage awards to ensure that they meet the notice, deterrence, and punishment goals of copyright while at the same time serving its

[1] No party's counsel authored this brief in whole or in part. Neither any party nor any party's counsel contributed money that was intended to fund preparing or submitting this brief. No person other than amicus, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief. Web sites cited in this brief were last visited on December 18, 2010.

[2] EFF offers no opinion as to the correctness of the District Court's determination of liability.

broader constitutional and policy purposes. Unfortunately, courts have often failed to do so, effectively treating copyright damages as exempt from traditional due process standards.

This treatment is not just unconstitutional, it is harmful to copyright law's own fundamental purposes: to encourage creativity, dissemination of information, and innovation. Throughout the Copyright Act and its accompanying case law, Congress and the courts have attempted to fulfill those purposes by ensuring (1) that original creators are compensated for their efforts; and (2) that secondary users have the breathing room to build on original works. *See, e.g.,* 17 U.S.C. §§ 107-122 (noting exceptions and limitations to copyright owner's exclusive rights); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994) (allowing secondary user to distribute unauthorized parody of original work of authorship); *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (allowing distribution of copy technologies that enable unauthorized secondary uses of movies and television programs); *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992) (allowing unauthorized commercial copying of videogame software to enable creation of new and competing games).

In order for these policies to be effective, this balance must apply not only to determinations of liability but also to damages. Without balance, and especially where there is no evidence of actual harm or reprehensibility, excessive statutory

damage awards can stifle creativity and innovation that involves even a small risk of copyright liability. In this brief, we seek to provide the Court with examples of creators, innovators, and consumers who have been hampered by the lack of predictability and excessive potential of copyright damage awards, thereby hampering reasonable and prudent experimentation with copyrighted material, especially in the digital environment. Amicus urges the Court to consider the interests of these parties when determining what role substantive due process should play in the imposition of statutory damages, and to provide sound guidance so that secondary creators can adequately navigate the waters of copyright law moving forward. Amicus further urges the Court to affirm the District Court's ruling, which helps bring copyright damages into alignment with the substantive due process rights afforded to any defendant by ensuring damages bear a reasonable relationship to actual harm and reprehensibility.

ARGUMENT

I. INTRODUCTION

By its nature, copyright law must strike a delicate balance. Its ultimate aim is to stimulate the creation and dissemination of creative works. *See* U.S. Const. Art. I, sec. 8, cl. 8 (Congress may grant limited terms of intellectual property protection "[t]o promote the Progress of Science and useful Arts"); *Mazer v. Stein*, 347 U.S. 201, 218-19 (1954) (noting that copyright law rewards creators in order

"to afford greater encouragement to the production of literary (or artistic) works of lasting benefit to the world."). It accomplishes this purpose in part by granting exclusive rights to copyright owners to help ensure that they receive compensation for their work. At the same time, it imposes substantive restrictions on those rights so that secondary uses may flourish. These include the fair use doctrine, the first-sale doctrine, and other limitations and exceptions created by statute or common law. *See, e.g.,* 17 U.S.C. §§ 107-22.

When the balance is struck correctly, innovation flourishes. For instance, many new technological and artistic enterprises that depend on the use of copyrighted works rely heavily on fair use to provide a defense to any infringement claims for such use. *See, e.g., Sony*, 464 U.S. at 442 (holding that video recorders capable of substantial non-infringing uses, such as the "fair use" of time-shifting television programs, did not violate copyright law when used to copy protected works); *Perfect 10, Inc. v. Amazon, Inc.*, 508 F.3d 1146, 1164-68 (9th Cir. 2007) (finding Google's copying and indexing of millions of photographs to be fair use when used to enable information location services); *Sega*, *supra*. Because fair use case law provides some precedent and predictability for parties to use to determine their risks, content creators and technology innovators can estimate the probability of a successful fair use defense. That ability fosters, in turn, a spirit of experimentation essential to the progress of science and the useful arts.

What they cannot do, however, is estimate the cost if the defense fails. In enacting Section 504 of the Copyright Act, Congress provided almost no guidance on how to award statutory damages upon a finding of infringement. Thus, every innovator and creator that relies on an untested theory of fair use or other copyright exemption must assume that if they lose, their damages will fall somewhere between $750 and $150,000 per work – a range of *200 to 1*.[3] To date, no statute, case, or court can provide them with any reassurance as to where in the range they will fall. This unpredictability frustrates creativity and innovation, particularly for startup companies, online artists, critical commentators, libraries and other entities that cannot afford to take on unbounded legal risk. Indeed, for artists or innovators that use multiple digital works, the range of potential damages for even a single product can range from the thousands to the billions with little guidance as to the actual result if the defendant were to lose at trial, and even less assurance that the result would bear a reasonable relationship to the actual harm caused or the

[3] Awards for ordinary infringements range between $750 and $30,000 per infringed work, while awards for willful infringements can be elevated to $150,000 per infringed work. Although enhanced damages for willfulness should be employed only in "exceptional cases", S. REP. NO. 94-473, at 144-45 (1975), courts have instead lowered the bar for findings of willfulness, resulting in liberal application of enhanced damages. *See, e.g.*, *Island Software & Computer Serv., Inc. v. Microsoft Corp.*, 413 F.3d 257, 264 (2d Cir. 2005) (acknowledging that constructive knowledge is sufficient for willfulness); Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009). Furthermore, courts rarely reduce awards for "innocent" infringers below the $750 minimum for ordinary infringement. *Id.* at 1 n.1.

defendant's level of reprehensibility.

Traditional due process review – particularly the prohibition on grossly excessive awards of exemplary damage – could help reduce this uncertainty. Moreover, it is entirely appropriate: there is no basis for any such exception to traditional due process scrutiny for copyright law and creating such a categorical exception would undermine the very purposes of the Copyright Act as well as the Constitution. As discussed below, there are myriad examples of third parties who have no connection to file-sharing or the current troubles of the music industry but are nonetheless placed in jeopardy by statutory damage awards unbounded by traditional due process analysis. We urge the Court to consider their interests, and protect them by affirming the District Court's application of *Gore*'s due process analysis in this case.

II. DUE PROCESS PROHIBITS AWARDS OF EXEMPLARY DAMAGES THAT ARE GROSSLY EXCESSIVE

Awards of exemplary damages may serve legitimate government interests insofar as they provide an appropriate level of punishment for illegal conduct, and deterrence against future illegal acts. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003). But exemplary damage awards serve this function only if they are imposed "wisely and with restraint." *See id.* (quoting *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 42 (1991)). Due process therefore prohibits exemplary damage awards that are grossly excessive, because such

awards do not serve any legitimate interests and create "a devastating potential for harm." *See id.*

This due process protection is substantive as well as procedural. *See id.* In order to determine whether any particular award of exemplary damages is grossly excessive, the court must asses it in relation to "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* at 418 (citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996) and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 436 (2001)).

Statutory damage awards under the Copyright Act cannot be exempt from this scrutiny. Every act of Congress is subject to due process limitations because the Fifth Amendment limits Congressional power. *See Nebbia v. People of New York*, 291 U.S. 502, 510 (1934). Congress provided for statutory damages under the Copyright Act not simply to compensate copyright owners for infringements, but to punish and deter infringers. *See, e.g.*, *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 352 (1998); *On Davis v. The Gap, Inc.*, 246 F.3d 152, 172 (2d Cir. 2001).[4] Since statutory damages awarded under the Copyright

[4] Appellants recognize and even embrace this as the purpose of the jury's award

Act serve the same purposes of punishment and deterrence that common law punitive damage awards serve, they have the same potential to impose "devastating" harm and must be subjected to the same constitutional scrutiny. The District Court was therefore correct to assess the statutory damage award at issue here under the *Gore* / *State Farm* framework. *See Sony, et al. v. Tenenbaum,* No. 07-11446-NG, Slip. Op. at 29-52 (D. Mass. July 9, 2010) (assessing the jury's statutory damage award under the *Gore* framework).

To be clear, the fact Congress provided for a specific range of statutory damage awards does not exempt awards falling within that range from due process scrutiny. Notice of the potential size of an award is but one aspect of the procedural protections due process demands. *See, e.g.*, *State Farm*, 538 U.S. at 418. By definition, the substantive protections remain in place regardless of notice. There is nothing to suggest, for instance, that the awards vacated in *Gore*, *State Farm*, or *Leatherman* would have withstood a due process challenge had state legislatures simply passed statutes authorizing punitive damage awards up to 500 times greater than actual damages for fraudulent conduct.

Appellants' effort to persuade the Court to exempt copyright damage awards from traditional due process scrutiny is based primarily on the Supreme Court's decision in *St. Louis I.M. & S. Ry Co. v. Williams*, 251 U.S. 63, 67 (1919). *See*

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here. *See* Appellants' Brief at 38.

Appellants' Brief at 37-46. But *Williams* provides no basis for such an exception. While that case recognized that Congress has substantial latitude in prescribing statutory penalties for violation of federal law, it also recognized those penalties cannot be "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *Williams*, 251 U.S. at 67. Whether a specified penalty exceeds those bounds is precisely the question the due process framework articulated in *Gore* is designed to answer. *See Gore*, 517 U.S. at 575 (quoting *Williams*), 576 ("punitive damages may not be 'grossly out of proportion to the severity of the offense' "); *State Farm*, 538 U.S. at 426 ("In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered."). Thus, *Williams* does not support the copyright exceptionalism Appellants advocate. Rather, when read in conjunction with the *State* Farm and *Gore* framework, as it must be, *Williams* supports the review mandated by those subsequent decisions.

III. EXEMPTING STATUTORY DAMAGE AWARDS FROM DUE PROCESS SCRUTINY UNDERMINES THE COPYRIGHT SCHEME

The exception Appellants demand undermines the ultimate goal of the Copyright Act by discouraging the creation of new works and use of prior works for new purposes.

A. THE PURPOSE OF COPYRIGHT LAW IS TO ENCOURAGE NEW WORKS OF SPEECH, EXPRESSION, CREATIVITY AND INNOVATION

As noted above, the fundamental goal of copyright law is to promote creativity, innovation and the spread of information and knowledge for the good of the public. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 524 (1994). The Copyright Act pursues this goal by (1) providing authors with exclusive rights in their original work; and (2) providing safeguards for secondary uses of copyrighted works. *See, e.g.*, 17 U.S.C. §§ 107-122 (creating exceptions and limitations to original author's exclusive rights in order to encourage and protect subsequent use of those works).

Copyright's goal is thus *not* simply to enrich copyright owners. Rather, the purpose of copyright's incentives and safeguards is to benefit society as a whole by "promoting broad public availability of literature, music, and the other arts." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("[c]reative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other Arts."); *see also Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) ("The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors."); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429

(1984) (purpose of copyright restrictions is to stimulate creativity, not simply to "provide a special private benefit"); *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 349 (1991) ("[t]he primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and the useful Arts.'").

Copyright damages should reflect this fundamental goal. The potential for statutory damage awards without due process review, however, does the opposite, necessarily discouraging fair use innovators, follow-on creators, and other lawful users from making productive secondary uses of copyrighted works where such uses involve some perceived legal risk.

B. PERMITTING EXCESSIVE STATUTORY DAMAGE AWARDS WITHOUT DUE PROCESS REVIEW CHILLS SPEECH, EXPRESSION, CREATIVITY AND INNOVATION

1. Four Features of the Current Statutory Damage Regime Create the Potential for Awards to Chill Creativity and Innovation

Congress enacted copyright statutory damages for three reasons—compensation, punishment, and deterrence. *See, e.g.*, *Feltner*, 523 U.S. at 352; *On Davis*, 246 F.3d 1 at 172. Despite these worthy goals, four features of Section 504(c) have emerged to create an inconsistent legal framework that chills the productive activities of content creators and innovators and thereby thwarts the purposes of the Copyright Act.

First, the wide range of the remedy—$750 to $150,000 per infringed work—is so vast that it provides no practical means for predicting the outcome at trial. *Compare Religious Tech. Ctr. v. Lerma*, No. 95-1107-A, 1996 U.S. Dist. LEXIS 15454, at **31, 42-43 (E.D. Va. 1996) (awarding the statutory minimum of $2,500 for uploading portions of five Scientology texts) with *L.A. Times, Inc. v. Free Republic*, No. 98-7840 MMM AJWX, 2000 WL 1863566 (C.D. Cal. Nov. 16, 2000) (awarding $1,000,000 for posting news articles accompanied with commentary on website) with *Macklin v. Mueck*, 373 F. Supp. 2d 1334, 1336 (S.D. Fla. 2005) (in a default judgment, awarding maximum statutory damages of $300,000 against poetry website operator for posting two poems online).

Second, unguided judicial discretion makes the statutory damage calculation a black box controlled primarily by the judge's or jury's caprice. Fact finders are instructed to make awards "as the court considers just," 17 U.S.C. § 504(c)(1), but this vague admonition offers little guidance and potentially ignores important factors such as the relationship to actual harm, level of culpability, commerciality, or reprehensibility of the defendant's conduct.

Third, Congress has not required statutory damage awards to bear any reasonable relationship to the harm actually caused by the defendant. *See* 17 U.S.C. § 504(c) (allowing plaintiffs to recover up to $150,000 per work, even without any evidence of actual or estimated harm). This directly contradicts

bedrock principles of modern Supreme Court jurisprudence. *See State Farm*, 538 U.S. at 426 ("[C]ourts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered"); *Gore,* 517 U.S. at 580-81 (describing the long-standing principle that exemplary damages must demonstrate a reasonable relationship to compensatory damages).

Finally, when multiple copyrighted works are at issue, aggregation of statutory damage awards can amplify the total award to astonishing amounts. This is especially true in the digital sphere, where a single technology or website can interact with million and even billions of copyrighted files every day. As one court noted, such aggregate awards "could create a potentially enormous aggregate recovery for plaintiffs, and thus an *in terrorem* effect on defendants, which may induce unfair settlements." *Parker v. Time Warner Entm't Co., L.P.*, 331 F.3d 13, 22 (2d Cir. 2003) (discussing aggregation of statutory damages within the class action context). *See also Blizzard Entertainment, Inc. v. Alyson Reeves*, 2010 WL 4054095 (C.D. Cal., July 22, 2010) (awarding $85,478,600 in statutory damages against a single website based on the assumption that every one of the 427,393 registered users of the site violated 17 U.S.C. § 1201).

2. Innovators Face Unreasonable and Unpredictable Risks Without Due Process Constraints on Statutory Damages

In light of the inherent unpredictable and potentially excessive nature of statutory damages, innovators often face unreasonable and chilling levels of risk. In today's digital economy, technological innovation often involves copying data. When websites like Google, Facebook, or YouTube store or transmit copyrighted works, they may need to make dozens or even hundreds of copies of the millions of works they host. *See Perfect 10 v. Google, Inc.*, 416 F.Supp.2d 828, 844 (C.D. Cal 2006) (noting that Google must copy each image that it stores for its image search index to work); see also *Field v. Google*, 412 F.Supp.2d 1106 (D. Nev. 2006); *Parker v. Google*, *Inc*. 422 F.Supp.2d 492 (E.D. Pa. 2006); *Sony v. Connectix*, 203 F.3d 596, 601 (9th Cir. 2000) (noting that hundreds of copies of competitor's program were required to make fair use of underlying ideas and elements in order to create compatible alternative software program). While courts have often found as a matter of first impression that such copying was fair use, the risk of damages of up to $150,000 per work multiplied by millions if not billions of works is staggering. Smaller innovators will fear to experiment in the shadow of such danger, especially if there is no due process mechanism for tethering the award to the actual harm caused or the reprehensibility of the defendants.

Commercial innovators, for example, might recall the example of SONICblue, the manufacturer of ReplayTV, an innovative digital video recorder

("DVR") that allowed users to activate "AutoSkip," a feature that automatically skipped commercials embedded within legitimately acquired television content rather than forcing users to manually fast-forward through them.[5] As with most digital archiving, it was impossible for the AutoSkip feature to work without manipulating a "copy" of a television program or movie in the computer memory of the device.[6]

In 2001, a coalition of 28 major media companies sued SONICblue claiming that this feature allowed ReplayTV users to violate their copyrights.[7] In the Complaint, the plaintiffs alleged that every consumer who skipped commercials while watching television via their ReplayTV engaged in copyright infringement.[8] Without due process limitations—such as a reasonable relationship to actual harm or reprehensibility—juries that found either SONICblue or its customers liable would be free to award damages simply by multiplying each program containing a skipped commercial by up to $150,000. For individual consumers, this could add

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[5] Doug Isenberg, ReplayTV Lawsuit: Napster Redux?, CNet News, Nov. 12, 2001, http://news.cnet.com/2010-1071-281601.html.

[6] *Id.*

[7] Electronic Frontier Foundation, *Newmark, et. al., v. Turner Broadcasting System, Inc. et al.*, http://www.eff.org/cases/newmark-v-turner (describing subsequent lawsuit filed by five owners of ReplayTVs seeking declaratory judgment that their actions are not infringing).

[8] Complaint at 7, *Paramount Pictures Corp. et al. v. ReplayTV & SonicBlue*, Oct. 31, 2001, *available at* http://www.eff.org/files/filenode/newmark_v_turner/newmark-v-turner-20011031_complaint.pdf.

up to hundreds of thousands if not millions of dollars for the mere act of skipping television commercials. For SONICblue, the number would be multitudes worse, aggregated across the thousands of ReplayTV users leading to a maximum exposure for SONICblue that climbs rapidly to the billions and potentially trillions. Despite a reasonable fair use defense,[9] SONICblue and its customers faced crippling liability to litigate the issue. In 2003, the company was forced into bankruptcy after spending two years battling a copyright infringement lawsuit.[10]

Moreover, the risk is not confined to commercial enterprises. For example, the Internet Archive is a non-profit organization whose mission is to create "a digital library of Internet sites and other cultural artifacts in digital form."[11] To help compile its digital library, the Archive launched a project known as the Wayback Machine, which records copies of web pages at dozens of points in time, thereby documenting the evolution of a website.[12] The Wayback Machine is part of a larger project the Archive has undertaken in conjunction with organizations like the Smithsonian Institution and the Library of Congress to record valuable information for posterity and avert a "digital dark age" where information on the

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[9] *See Sony v. Universal*, 464 U.S. 417 (1984) (finding non-commercial personal uses of television programs, such time-shifting, to be fair use).
[10] Press Release, Electronic Frontier Foundation, Electronic Frontier Foundation on SonicBlue Bankruptcy, March 1, 2003, http://www.eff.org/press/archives/2008/04/17-2.
[11] Internet Archive, http://www.archive.org/.
[12] Internet Archive Wayback Machine, http://www.archive.org/web/web.php.

Internet disappears,[13] much like the records lost in the three fires at the famous library in Alexandria over a millennium ago.[14] The Archive makes its collections available at no cost to researchers, historians, and the general public.

The Archive's activities are likely protected by a number of copyright doctrines. However, because of the aggregate and unpredictable nature of statutory damages, the Archive faces extraordinary exposure for its activities should its defenses fail. For example, as of December 18, 2010, the Internet Archive had 600 preserved images of the website for the Recording Industry Association of America (RIAA), http://www.riaa.com.[15] Were the RIAA to sue the Internet Archive for copyright infringement based on these preserved images and prevail, the Archive would face up to $89 million in statutory damages, even absent a finding of actual harm or any reprehensibility. And these 600 images of the RIAA website are but a small drop in the large lake of information that the Archive has collected, which includes over 150 billion web pages.[16] Based on this figure, if all copyright owners of those webpages (or a certified class of them) were to sue and prevail, the Archive would face potential statutory damages of close to 2,000 times

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[13] About the Internet Archive, http://www.archive.org/about/about.php.

[14] *See* Sergey Brin, *A Library to Last Forever*, New York Times, October 8, 2009, *available at* https://www.nytimes.com/2009/10/09/opinion/09brin.html?_r=1 (advocating for digital preservation of written works in order to save cultural heritage).

[15] Search Results for "www.riaa.com" on Internet Archive, http://web.archive.org/web/*/http://www.riaa.com.

[16] Internet Archive, http://www.archive.org/index.php.

the United States' national debt. Thus, while the Archive's preservation of the web serves a broad public purpose and would likely be found a fair use, these numbers raise serious concerns for those who use innovative technologies to preserve, analyze, and educate – even without any motive to profit.

3. Educators, Archivists, Researchers, and Critical Commentators Face Unreasonable and Unpredictable Risks Without Due Process Constraints on Statutory Damages

a. Orphan Works and Access to Historical Knowledge

The chilling effects of statutory damages also extend to educational, archival, and research uses of copyrighted works. For example, consider the problem of orphan works: copyrighted works that are generally out-of-print and whose owners are difficult or impossible to locate.[17] In a Comment to the U.S. Copyright Office, the Society of American Archivists ("Archivists") told the story of a scholar in the 1990s who wrote an article about the experiences of Civil War soldiers in which he quoted from the letters and diaries of several soldiers.[18] It was unclear whether the letters and diaries qualified for copyright protection, but since the last Civil War soldier died in 1959, it was possible that the works were still protected by copyright.[19] Although 17 U.S.C. § 107, the fair use provision of the Copyright Act,

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[17] *See generally* http://www.copyright.gov/orphan/.

[18] Comment of Society of American Archivists In Response to the Notice of Inquiry Concerning Orphan Works, at 4, March 25, 2005, *available at* http://www.copyright.gov/orphan/comments/OW0620-SAA.pdf.

[19] *Id.*

lists scholarship, research and news reporting as purposes for which reproduction of a particular work might be considered fair, a historical magazine informed the scholar that he could not publish the article without first locating and obtaining permission from the families of every soldier he quoted.[20] As copyright infringement is a strict liability offense and statutory damages are high and may be aggregated (here, each diary or letter would likely be considered an independent work and thus eligible for damages from $750 to $150,000), the small probability that a living family member might come forward and initiate litigation was considered so great that the article was never published.[21]

Another victim of the orphan works problem is the Scripps Institution of Oceanography Archives ("Scripps") at the University of California, San Diego. Scripps boasts a collection of over 100,000 photographs, many donated by participants of oceanographic voyages.[22] However, because many of the photographs lack formal copyright documentation, Scripps has chosen to only display 4,000 of these images online.[23] Scripps could display the remaining 96,000 unpublished images and argue that such display is protected by fair use or other doctrines. But that is a high-risk choice: if Scripps lost it could face up to

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[20] *Id.*
[21] *Id.*
[22] Comment of the University of California, San Diego Libraries In Response to the Notice of Inquiry Concerning Orphan Works, at 2-4, March 20, 2005, *available at* http://www.copyright.gov/orphan/comments/OW0576-UCSD.pdf.
[23] *Id.*

$150,000 per photo times 96,000 photos for a total of $14.4 billion in damages. Thus, Scripps understandably is reluctant to share these important images with the world. Again, as Jule Sigall, former Associate Register of the U.S. Copyright Office, testified before Congress, statutory damage awards are "a substantial deterrent to users who wanted to make use of an orphan work, even where the likelihood of a claim being brought was extremely low."[24]

b. Political Commentators and Public Criticism

Exempting copyright statutory damages from due process review also threatens political commentary and public criticism. For example, Sedgwick Claims Management Services filed a copyright suit against former customer Robert Delsman. Angered by Sedgwick's denial of his disability claim, Delsman retaliated by posting two images of Sedgwick executives on his website, each morphed into Nazi figures Adolph Hitler and Heimlich Himmler, head of Hitler's SS police.[25] In its complaint for copyright infringement, Sedgwick sought up to $150,000 for each image, for a total of $300,000 in potential statutory damages.[26]

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[24] Cong. Testimony of Jule L. Sigall, Associate Register, U.S. Copyright Office, Senate Judiciary Committee, April 6, 2006, *available at* http://www.copyright.gov/docs/regstat040606.html.

[25] Order Granting Defendant's Motion to Dismiss at 2-3, *Sedgwick Claims Mgmt. Serv., Inc. v. Delsman*, No. C 09-1468 SBA (N.D. Cal July 1, 2009), *available at* http://www.citmedialaw.org/sites/citmedialaw.org/files/2009-07-17-Order%20Granting%20Delsman%27s%20Motion%20to%20Dismiss.pdf.

[26] *See* Complaint at 18, *Sedgwick Claims Mgmt. Serv., Inc. v. Delsman*, No. C 09-1468 SBA (N.D. Cal July 1, 2009), *available at*

Yet Delsman was merely using the Internet as his megaphone to "educate the consuming public" about what he felt were Sedgwick's shameful business practices.[27] Delsman risked enormous liability to assert his right to use the photographs for parodic and public commentary purposes. Ultimately, the trial court sided with Delsman, but the threat of $300,000 continues to loom as the case goes up on appeal.[28]

The statutory damage chilling effects also arise in political campaigning. In 2009, Stand for Marriage Maine ("SFMM")[29] received a copyright cease-and-desist letter from National Public Radio ("NPR") after SFMM used 20 seconds of NPR content in a video designed to persuade Maine voters to overturn the state legislature's legalization of same-sex marriage.[30] In the video, SFMM argued that if same-sex marriage were legalized, schoolchildren would be taught about gay

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http://www.citmedialaw.org/threats/sedgwick-claims-management-services-v-delsman.

[27] *See* Order, *supra* note 25.

[28] Rebecca Schoff, *Sedgwick Appeals Case Over Wild West Wanted Posters*, Chilling Effects Clearinghouse, Sept. 18, 2009, http://www.chillingeffects.org/weather.cgi?WeatherID=613.

[29] Stand For Marriage Maine is a political action committee of Maine residents who support a traditional definition of marriage. Stand For Marriage Maine, About Us, http://www.standformarriagemaine.com/?page_id=2.

[30] Ben Sheffner, *NPR Makes Copyright Claim Over Anti-Same-Sex-Marriage Ad; Another Political Fair Use Fight*, http://copyrightsandcampaigns.blogspot.com/2009/10/npr-makes-copyright-claim-over-anti.html.

sex.[31] SFMM supported its claims using material from a 2004 broadcast of the NPR program "All Things Considered."[32] With just two weeks left before the vote, NPR filed copyright complaints with the sites hosting the advertisement and the ads were taken down.[33] Although SFMM's use of the NPR content was likely a fair use, SFMM still risked up to $150,000 in statutory damages for using just 20 seconds of content.[34]

The NPR/SFMM incident is not an isolated example. During the 2008 presidential campaign, CBS, Fox News, and the Christian Broadcasting Network all filed copyright complaints against the John McCain campaign for posting campaign ads on YouTube that included short clips of news broadcasts, and NBC did the same for an Obama-Biden video.[35] Some of McCain's videos contained

[31] *Id*.

[32] Matt Wickenheiser, *NPR Wants Same-Sex Marriage Ad Pulled,* Portland Press Herald-Maine Sunday Telegram, October 20, 2009, *available at* http://updates.pressherald.mainetoday.com/updates/npr-wants-same-sex-marriage-ad-pulled.

[33] Sheffner, *supra* note 30.

[34] *Id.*

[35] David Sohn, *McCain Campaign Says Video Takedowns Stifle Fair Use*, Center for Democracy and Technology, Oct. 15, 2008, http://www.cdt.org/blogs/david-sohn/mccain-campaign-says-video-takedowns-stifle-fair-use; Jim Rutenberg, *Fox Orders Halt to McCain Ad*, The New York Times, Oct. 25, 2007, (The Caucus Blog), http://thecaucus.blogs.nytimes.com/2007/10/25/fox-orders-halt-to-mccain-ad/; Marc Santoro, *Fox Bars Candidates From Using Its Images*, The New York Times, Oct. 26, 2007, (The Caucus Blog), http://thecaucus.blogs.nytimes.com/2007/10/26/fox-says-all-candidates-to-stop-using-images-from-news-channel/; Sarah Lai Stirland, *Stifled by Copyright,*

fewer than ten seconds of news footage and were clearly used for the purpose of commentary and advocacy.[36] In all of these cases, there was no evidence of actual harm to the media giants that owned the copyrights.[37] Even so, the candidates each faced a potential judgment of up to $150,000 per video clip.[38] While some of these defendants were able to tolerate these risks and fight back, there are many more who cannot afford to do so and instead remain silent.

c. Digital Remix Artists

Like digital archiving and digital commercial skipping, digital sampling and remixing also necessarily involves copying and manipulating multiple copyrighted works, and thus presents the threat of enormous aggregate recovery.[39] Such unbounded liability can chill valuable creative endeavors. Consider Gregg Gillis, a 29-year-old former biomedical engineer and underground music celebrity known as Girl Talk, who creates low-budget musical works known as "mashups" by

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McCain Asks YouTube to Consider Fair Use, Wired, Oct. 14, 2008, (Threat Level blog) http://www.wired.com/threatlevel/2008/10/stifled-by-copy/.

[36] Stirland, *supra* note 35.

[37] *Id*.

[38] For other examples of criticism under the threat of copyright infringement, see *Lennon v. Premise Media Corp*, 556 F.Supp.2d 310 (S.D.N.Y. 2008); *Brave New Films 501(c)(4) v. Weiner*, 626 F.Supp.2d 1013 (N.D. Cal. 2009); *Savage v. Council on American-Islamic Relations*, https://www.eff.org/cases/savage-v-council-american-islamic-relations. *See also Donald Duck Meets Glenn Beck in Right Wing Radio Duck*, http://www.youtube.com/watch?v=HfuwNU0jsk0.

[39] *See generally* Lawrence Lessig, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (1st ed. 2008).

digitally splicing together samples from the work of popular artists such as Jay Z and Aerosmith.[40] Gillis has been profiled by *The New York Times* and *The Washington Post*, and his album "Feed the Animals" was listed number four on *Time*'s Top 10 Albums of 2008.[41] The album contains more than 300 samples from copyrighted works, none of them used with permission of the copyright owner.[42] Like the Internet Archive, Gillis makes valuable and transformative use of the works he copies. Yet, if the rightsholders were to sue Gillis and argue that he has harmed the market for licensing samples of these songs, Gillis' attorney would be obligated to inform him that he could be forced to pay up to $45 million for producing a single album of art.[43] Again, while Gillis is willing to take such risks, many other artists are likely chilled from doing so, especially when confronted with the potential for such staggering damage awards that are

[40] Robert Levine, *Steal This Hook?Girl Talk Flouts Copyright Law*, The New York Times, Aug. 6, 2008, *available at* http://www.nytimes.com/2008/08/07/arts/music/07girl.html; Live Q&A, *Girl Talk/Gregg Gillis On New Album, Music Industry*, Wash. Post, July 29, 2008, http://www.washingtonpost.com/wp-dyn/content/discussion/2008/07/16/DI2008071601445.html.

[41] *Id.*; Josh Tyrangiel, *4. Feed the Animals by Girl Talk – The Top 10 Everything of 2008*, Time, Dec. 2008, *available at* http://www.time.com/time/specials/2008/top10/article/0,30583,1855948_1864324_1864335,00.html.

[42] Levine, *supra* note 40.

[43] For other examples of critically-acclaimed remix culture, *see* Neda Ulaby, *Vidders Talk Back to Their Pop-Culture Muses*, National Public Radio, February 25, 2009, http://www.npr.org/templates/story/story.php?storyId=101154811; Literal videos, http://www.dustfilms.com/literalvideos.

untethered to actual harm or reprehensibility.[44]

4. Unpredictable and Excessive Statutory Damages Are Encouraging "Copyright Troll" Litigation

The promise of excessive statutory damage awards exempt from due process review and untethered from actual harm or reprehensibility has helped spur exploitive litigation by so-called "Copyright Trolls." In the past year alone, over 55,000 people have been sued as "John Does" for allegedly downloading and/or uploading copyrighted material.[45] For example, a law firm calling itself the U.S. Copyright Group (USCG) has filed several "John Doe" lawsuits implicating over 14,000 individuals.[46] Another plaintiff, Righthaven LLC, has brought over 130 copyright lawsuits in the Nevada federal courts by scouring the Internet for blogs, forums, and websites that have posted some or all of a newspaper story, purchasing the copyright to that story *ex post*, and then suing the online poster for copyright infringement, even where such use is a fair use.[47]

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[44] *See* Darryl Sterdan, *Girl Talk king of the mashup*, TORONTO SUN, http://www.torontosun.com/entertainment/music/2010/12/17/16591586.html (noting that despite the universal critical success of his 2010 album, *All Day*, legal issues still weigh heavily on Gillis' mind and even his dreams).

[45] Corynne McSherry, *A Field Guild to Copyright Trolls*, Sept. 28, 2010, *available at* https://www.eff.org/deeplinks/2010/09/field-guide-copyright-trolls; *see also* http://w2.eff.org/files/copyright_troll_lawsuit.htm.

[46] Nate Andersen, *The RIAA? Amateurs; Here's How you Sue 14,000+ P2P Users*, ARS TECHNICA, available at http://arstechnica.com/tech-policy/news/2010/06/the-riaa-amateurs-heres-how-you-sue-p2p-users.ars.

[47] *Id. See also* Steve Green, *Judge to Righthaven: Show why lawsuit shouldn't be*

These mass lawsuits are part of a business model that depends in large part on plaintiffs' ability to use the threat of statutory damages to pressure defendants into settling quickly. Without the assurances of a due process review requiring damages to have a reasonable relationship to actual harm and reprehensibility, defendants in these cases are forced to settle or else assume significant risks in fighting back, even where they have legitimate fair use or other defenses. For example, Righthaven sued one site, the Hepatitis C Support Project, because the Project had posted a copy of its newsletter containing a newspaper article about developments in Hepatitis C research on its website. The Project did so not to profit from selling the article but rather to serve part of its broader mission as a repository for information about Hepatitis C, including information on new research breakthroughs and trends.[48] Consistent with its mission, the Project includes full articles, such as the one at issue in the litigation, in its newsletter because some of its constituents have cognitive issues that require the full context of an article for understanding. Despite a solid fair use argument and numerous other valid defenses to using the article, the Project settled the case in substantial

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dismissed, LAS VEGAS SUN, http://www.lasvegassun.com/news/2010/nov/22/judge-righthaven-show-why-lawsuit-shouldnt-be-dism/ (reporting that U.S. District Judge James Mahan has ordered Righthaven to show cause why one of its lawsuits should not be dismissed on fair use grounds).

[48] *See* HCV Advocate, http://www.hcvadvocate.org/.

part because the prospect of $150,000 in damages was far too high for them to afford.

5. Unpredictable and Potentially Excessive Statutory Damages Encourage Abuse of the DMCA Takedown Provisions and Deter Legitimate Counter-Notification

Unbounded statutory damages also thwart Congress' intent in passing the "notice and takedown" system within the Digital Millennium Copyright Act ("DMCA"). As part of the DMCA, Congress enacted 17 U.S.C. § 512 to "facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education . . . ."[49] Congress crafted four statutory safe harbors with detailed provisions setting out "rules of the road," that provide both rightsholders and service providers with a more definite alternative to the doctrinal ambiguities that characterized early judicial efforts to apply evolving copyright principles and judge-made secondary liability doctrines to new Internet contexts.[50] So long as their activities fell within one of the four safe harbors, service providers could essentially "opt in" to this alternate, more definite, set of rules by meeting the statutory prerequisites, including implementing a notice-and-takedown policy, 17 U.S.C. § 512(c)(1)(C).

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[49] S. REP. NO. 105-190, at 1-2 (1998).

[50] *See* 3 David Nimmer, *Nimmer on Copyright* § 12B.01[A][1] (describing conflicting jurisprudence prior to 1998).

To limit abuse of the notice-and-takedown regime, Congress included a "counter-notice" provision that allows users accused of posting infringing content to challenge the takedown by agreeing to submit the matter to a court. If the accuser does not actually file suit within 10-14 days, the content may be re-posted without risk to the ISP. In theory, then, the counter-notice procedure provides users with a relatively rapid means to have their content restored.[51]

In practice, however, users who receive a notice of accused copyright infringement are faced with a stark choice – accept the removal of the content in question or claim a legitimate use, potentially incurring the extraordinary expense and risk of being hit with an excessive statutory damages award. That risk has deterred many individuals from filing counter-notices. For example, one Atlanta video maker decided not to counter-notice when her video—a mash-up commenting on a German soap opera that won an award at a fan conference—was taken down as a result of a copyright claim by the soap opera's producer. She believed she had a strong fair use defense, but could not risk the financial consequences if a court disagreed and imposed the maximum $150,000 statutory

[51] *See* Sen. Rep. No. 105-190 at 21 (1998) (Section 512 was intended to "balance the need for rapid response to potential infringement *with the end-users legitimate interests in not having material removed without recourse.*") (emphasis added); *see also id.* at 59 (Section 512(f) "is intended to deter knowingly false allegations to service providers in recognition that such misrepresentations are detrimental to rights holders, service providers, and *Internet users*." (emphasis added).

award.

DMCA misuse is not an isolated occurrence; indeed, there is little question that the DMCA takedown system has been widely abused. One 2006 study estimated that fully one-third of DMCA takedowns were improperly asserting infringement claims;[52] indeed with media companies sending as many as 160,000 takedown notices at a time, it could hardly be otherwise.[53] A robust counter-notice procedure is essential to maintaining the balance between rightsholders and internet users that Congress intended when it designed the safe harbors and the notice-and-takedown system. However, allowing statutory damages to be exempt from due process review undermines this procedure and allows copyright holders to intimidate and chill legitimate online uses of their content by wielding the otherwise unconstrained $150,000 club of Section 504(c).

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[52] *See* Jennifer Urban and Laura Quilter, *Efficient Process or "Chilling Effects"? Takedown Notices under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621 (2006)

[53] *See* Eric Bangerman, *Viacom: We goofed on Colbert parody takedown notice; case dismissed*, ARS TECHNICA, http://arstechnica.com/tech-policy/news/2007/04/viacom-we-goofed-on-colbert-parody-takedown-notice-case-dismissed.ars.

CONCLUSION

In light of the above, EFF urges this Court to affirm the District Court's decision below, especially in terms of the application of the Supreme Court's substantive due process cases to copyright statutory damages. In addition, EFF urges the court to recognize that in order to satisfy substantive due process, statutory damage awards must bear a reasonable relationship to some evidence of actual damages, even if circumstantial, as well as the defendant's level of reprehensibility. To hold otherwise would leave these awards completely untethered from the *Gore* guideposts and all other constitutional constraints. In doing so, this Court will ensure that due process helps fact finders award damages that further the generative and distributive purposes of copyright by limiting self-censorship and chilling effects; preventing abuse "troll" litigation; and encouraging prudent risk-taking in innovation, DMCA counter-noticing, and development of a robust fair use doctrine as applied to digital works.

Respectfully Submitted,

Dated: January 3, 2011

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