

1-1-2010

## Unconstitutional Excess, and other Recent Copyright Developments

Ali Sternburg

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/ipbrief>



Part of the [Intellectual Property Commons](#)

---

### Recommended Citation

Sternburg, Ali. "Unconstitutional Excess, and other Recent Copyright Developments." *American University Intellectual Property Brief*, Summer 2010, 28-31.

This Featured Column is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *Intellectual Property Brief* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact [fbrown@wcl.american.edu](mailto:fbrown@wcl.american.edu).

---

# Unconstitutional Excess, and other Recent Copyright Developments

**Keywords**

Constitution, Copyright, Sony v. Tenenbaym, Recording Industry Association of America ("RIAA")

# Unconstitutional Excess, and other Recent Copyright Developments

By Ali Sternburg

*This piece was originally featured as a column at [www.ipbrief.net](http://www.ipbrief.net). Columns explore various intellectual property law issues in a journalistic format, providing a detailed overview of the subject.*

On July 9, 2010, in *Sony v. Tenenbaum*,<sup>1</sup> Boston federal judge Nancy Gertner gave a multifaceted ruling that made things slightly less abysmal for the scapegoat music pirate, and potentially a lot worse for the major record labels and their Recording Industry Association of America (RIAA) confederates. In the latest development of *Sony v. Tenenbaum*, Judge Gertner reduced the labels' statutory damages awards that were to be paid by Joel Tenenbaum, who was convicted of file sharing by a jury last July.<sup>2</sup> She decreased the damages from \$675,000 to \$67,500,<sup>3</sup> using reasoning that was partially based on slightly arbitrary mathematics,<sup>4</sup> partially influenced by a very similar precedent (*Virgin Records America v. Thomas*<sup>5</sup>), and partially reluctantly constitutional.<sup>6</sup>



On its website, the RIAA explains that it is “the trade organization that supports and promotes the creative and financial vitality of the major music companies.”<sup>7</sup> Their self-description later declares that “the RIAA works to protect the intellectual property and First Amendment rights of artists and music labels,” as if that is not the mission which has made the organization notorious. Even though the RIAA formally stopped suing its

members' customers in 2008,<sup>8</sup> a lot of irreparable damage had already been done to its reputation, and the

repercussions continue. Through the course of its five-year campaign, the RIAA actively filed lawsuits against 35,000 people, including a recently deceased 83-year-old woman, a thirteen-year-old girl,<sup>9</sup> and a family that reportedly did not own a computer.<sup>10</sup> And rather than decreasing the amount of piracy, the efforts apparently increased the amount of P2P file sharing.<sup>11</sup> Most of those sued settled—for “extortion-like fees”<sup>12</sup>—or the

1. *Sony v. Tenenbaum*, Memorandum & Order Re: Defendant's Motion for New Trial or Remittitur, July 9, 2010, <http://www.scribd.com/doc/34122318/Sony-v-Tenenbaum-Damages-Ruling>

2. Jonathan Saltzman, “BU student fined \$675,000 for illegal music downloads,” *The Boston Globe*, August 1, 2009, [http://www.boston.com/news/local/massachusetts/articles/2009/08/01/bu\\_student\\_fined\\_675000\\_for\\_illegal\\_music\\_downloads/](http://www.boston.com/news/local/massachusetts/articles/2009/08/01/bu_student_fined_675000_for_illegal_music_downloads/)

3. Jonathan Saltzman, “File-sharing damages reduced tenfold,” *The Boston Globe*, July 10, 2010, [http://www.boston.com/news/local/massachusetts/articles/2010/07/10/file\\_sharing\\_damages\\_reduced\\_tenfold/?page=full](http://www.boston.com/news/local/massachusetts/articles/2010/07/10/file_sharing_damages_reduced_tenfold/?page=full)

4. Eric Goldman, “Copyright Statutory Damages Award Violates Constitutional Due Process--Sony v. Tenenbaum,” *Technology & Marketing Law Blog*, July 12, 2010, [http://blog.ericgoldman.org/archives/2010/07/copyright\\_statu.htm](http://blog.ericgoldman.org/archives/2010/07/copyright_statu.htm)

5. *Virgin Records America v. Thomas*, April 19, 2006, *Justia Dockets & Filings*, <http://dockets.justia.com/docket/minnesota/mndce/0:2006cv01497/82850/>

6. Nate Anderson, “Judge slams, slashes ‘unconstitutional’ \$675,000 P2P award,” *ars technica*, July 2010, <http://arstechnica.com/tech-policy/news/2010/07/judge-slams-slashes-unconstitution->

[al-675000-p2p-award.ars](http://al-675000-p2p-award.ars)

7. “RIAA – Who We Are”, *Recording Industry Association of America (RIAA)*, <http://riaa.org/aboutus.php>

8. Sarah McBride and Ethan Smith, “Music Industry to Abandon Mass Suits,” *The Wall Street Journal*, December 19, 2008, <http://online.wsj.com/article/SB122966038836021137.html>

9. Id.

10. Anders Bylund, “RIAA sues computer-less family, 234 others, for file sharing,” *ars technica*, <http://arstechnica.com/old/content/2006/04/6662.ars>

11. “RIAA v. The People: Five Years Later,” *Electronic Frontier Foundation*, September 2008, <http://www EFF.org/wp/riaa-v-people-years-later#7>

12. Mike Masnick, “Defining Success: Were The RIAA's Lawsuits

cases were dropped. Only two defendants went to trial in federal court, Jammie Thomas-Rasset and Joel Tenenbaum. These ongoing disputes continue to garner national attention because they are, as even notable sympathizer Techdirt's Michael Masnick said, "very flawed defendants who probably shouldn't have gone through with their fights against the RIAA"<sup>13</sup> because of evidence that both were actually avid file-sharers.

Tenenbaum, a 26-year-old Boston University graduate student, went to trial at the end of July 2009<sup>14</sup> for illegally downloading music; the jury awarded the record labels a combined \$675,000 for the 30 songs.<sup>15</sup> Because the jury had deemed his infringements "willful"—Tenenbaum had "unapologetically admitted from the witness stand that he had illegally downloaded and shared hundreds of songs from 1999 to at least 2007 through peer-to-peer networks"—by federal law, the jury had to award between \$750-\$150,000 for the infringement of each song. He was fined \$22,500 for each of the 30 songs, totaling the \$675,000. Last week, on July 9, 2010, Boston federal judge Nancy Gertner reduced the penalty to ten percent<sup>16</sup>—\$2,250 per song, and thus \$67,500.

Boston Globe writer Jonathan Saltzman said in a video piece accompanying the article<sup>17</sup> that it was "pretty apparent at the hearing earlier this year that Judge Gertner was very sympathetic to individuals who've been sued by the record labels." Although Gertner acknowledged that Joel Tenenbaum was not blameless, as he had continued to download music even after repeatedly warned not to, she maintained that "an award of \$675,000 was grossly excessive, and, in fact, violated the provision in the Constitution that says you cannot punish someone with grossly excessive awards."

---

A Success Or Not?," techdirt, June 7, 2010, <http://www.techdirt.com/articles/20100606/2308559704.shtml>

13. Mike Masnick, "Judge Says Damages In Tenenbaum Case Were 'Unconstitutionally Excessive,'" techdirt, July 9, 2010, <http://techdirt.com/articles/20100709/11305410154.shtml>

14. Jonathan Saltzman, "Four record labels suing BU student," The Boston Globe, July 28, 2009, [http://www.boston.com/news/education/higher/articles/2009/07/28/four\\_record\\_labels\\_suing\\_bu\\_student/](http://www.boston.com/news/education/higher/articles/2009/07/28/four_record_labels_suing_bu_student/)

15. Jonathan Saltzman, "BU student fined \$675,000 for illegal music downloads," The Boston Globe, August 1, 2009, [http://www.boston.com/news/local/massachusetts/articles/2009/08/01/bu\\_student\\_fined\\_675000\\_for\\_illegal\\_music\\_downloads/](http://www.boston.com/news/local/massachusetts/articles/2009/08/01/bu_student_fined_675000_for_illegal_music_downloads/)

16. Jonathan Saltzman, "File-sharing damages reduced tenfold," The Boston Globe, July 10, 2010, [http://www.boston.com/news/local/massachusetts/articles/2010/07/10/file\\_sharing\\_damages\\_reduced\\_tenfold/?page=full](http://www.boston.com/news/local/massachusetts/articles/2010/07/10/file_sharing_damages_reduced_tenfold/?page=full)

17. Id.

Saltzman said that when he called Tenenbaum on the day that the decision came out, Tenenbaum said that he had not heard that the ruling came down, he had not yet paid any money, and he does not plan to, as even the reduced amount is still "unpayable." Saltzman also added that Tenenbaum's lawyer, Harvard Law School Professor Charles Nesson, said that he was inclined to appeal because he thinks the award is still too large.

Even advocates for Tenenbaum are likely to disagree with parts of Professor Nesson's unique approach and chosen arguments, particularly the fair use defense. According to Judge Gertner, Nesson, on behalf of Tenenbaum, "argued that every noncommercial use is 'presumptively fair' and that the question of fair use in his case 'belong[ed] entirely to the jury, which [was] entitled to consider any and all factors touching on its innate sense of fairness.'" Gertner's analysis of this reasoning was on point and showed surprising affinity for fair use and similar doctrines; yet even fair use enthusiasts like Mike Masnick<sup>18</sup> and the author of this column<sup>19</sup> agree that the fair use defense was not a logical defense, either.

Gertner's conclusion, with her unmasked opinion on the (un)fairness of the calculation of the "statutory damages" in light of the harm<sup>20</sup> or "actual damages,"<sup>21</sup> and summaries of her Constitutional interpretations, is copied below:

The jury's \$675,000 award is wholly out of proportion with the government's legitimate interests in compensating the plaintiffs and deterring unlawful file-sharing. No plausible rationale can be crafted to support the award. It cannot withstand scrutiny under the Due Process Clause.

I grant Tenenbaum's Motion for a New Trial or Remittitur . . . insofar as it seeks a reduction in the

---

18. Mike Masnick, "Nesson Asking For Retrial In Tenenbaum Case, Claims It Was The Judge Who Screwed Up, Not Him," techdirt, December 9, 2009, <http://techdirt.com/articles/20091209/0357087263.shtml>

19. Ali Sternburg, "A Wireside Chat with Lawrence Lessig," American University Intellectual Property Brief, May 3, 2010, <http://www.ipbrief.net/2010/05/03/a-wireside-chat-with-lawrence-lessig/>

20. Mike Masnick, "Looking More Closely At Judge Gertner's Constitutional Analysis Of Copyright Awards In Tenenbaum Case," techdirt, July 12, 2010, <http://techdirt.com/articles/20100712/03481710175.shtml>

21. Ray Beckerman, "\$675,000 verdict reduced to \$67,500 in SONY v. Tenenbaum," Recording Industry vs. The People, July 9, 2010, <http://recordingindustryvspeople.blogspot.com/2010/07/675000-verdict-reduced-to-67500-in-sony.html>

jury's award on the grounds that it is so grossly excessive as to violate the Constitution. . . . I will amend the judgment in this case to reduce the jury's award to \$2,250 for each of the thirty infringed works.

The fact that I reduce this award, however, obviously does not mean that Tenenbaum's actions are condoned or that wholesale file-sharing in comparable circumstances is lawful. I have determined that Tenenbaum's conduct was not "fair use" and that it infringed the plaintiffs' copyrights. Furthermore, the jury's award, even as reduced, is unquestionably severe and is more than adequate to satisfy the statutory purposes and the plaintiffs' interests.

This decision is notable for several reasons. First, just as the judge in the Jammie Thomas-Rasset case, Judge Gertner ruled that the statutory damages awarded must be reduced. This ability to fix unreasonable penalties is interesting on its own merit, but particularly so because these undeniably disproportionate rates were set by Congress. This type of legislating from the bench by activist judges—to throw out a few buzz phrases—can be controversial, but it is a major way that copyright norms have changed<sup>22</sup> recently, particularly with the doctrine of fair use.<sup>23</sup> These rulings in two different circuits—the Thomas-Rasset case in the Eighth Circuit and the Tenenbaum case in the First Circuit—could demonstrate another step toward acknowledging that various areas of copyright law are in need of update and reform<sup>24</sup> to comply with modern technology and the realities of consumer habits. In the realm of statutory damages for infringement, often there is an accidental conflation of commercial purposes (like selling pirated CDs) with non-commercial uses (the type of downloading Tenenbaum did for his own listening in his home); some of the comments on the Techdirt piece<sup>25</sup> have convincingly argued this. However, according

---

22. Joe Mullin, "John Paul Stevens: Assessing the Departing Justice's IP Legacy," Law.com, April 15, 2010, [http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202448116969&Justice\\_Stevens\\_Assessing\\_His\\_IP\\_Legacy](http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202448116969&Justice_Stevens_Assessing_His_IP_Legacy)

23. Peter Jaszi, "Keynote Address: The Future of Fair Use," University of Maryland University College Center for Intellectual Property 2010 CIP Symposium: Sustaining Culture in Copyright, June 22, 2010, [http://cipcommunity.org/s/1039/index.aspx?sid=1039&gid=1&pgid=467#Jaszi\\_blurb](http://cipcommunity.org/s/1039/index.aspx?sid=1039&gid=1&pgid=467#Jaszi_blurb)

24. "The Copyright Reform Act (CRA)," Public Knowledge, <http://www.publicknowledge.org/cra/>

25. Mike Masnick, "Judge Says Damages In Tenenbaum Case Were 'Unconstitutionally Excessive'," techdirt, July 9, 2010, Blog Comments, <http://techdirt.com/articles/20100709/11305410154.shtml#comments>

to another source, in the 1997 No Electronic Theft Act, "Congress sent the clear signal that it wanted to jail non-commercial online infringers."<sup>26</sup> There are also foreboding threats to public interests and civil liberties from the international negotiations surrounding the drafts of Anti-Counterfeiting Trade Agreement (ACTA),<sup>27</sup> including these types of unreasonable damages.

On a broader level, the developments in this case signify the music industry's failure to adapt to what is reasonable and realistic. While some may have thought, or at least hoped, that "unquestionably severe" high damages would disincentivize infringement, the industry's insistence on enforcing and policing its intellectual property<sup>28</sup> has made many decide that the copyright owners are out of touch with reality. These two key RIAA cases are not yet concluded, and as they continue, they are likely to further harm the already poor relations with music fans that industry organizations like the RIAA, and others like ASCAP,<sup>29</sup> have managed to cultivate by choosing their particular battles against the people who quite clearly appreciate music. These cases join other recent decisions, including significant victories, like *You Tube v. Viacom*,<sup>30</sup> and some more nuanced partial developments, like *Salinger v. Colting*.<sup>31</sup>

With changes and modernizations in the Internet and technology come opportunities for artists to create and distribute their works in more innovative ways, and I look forward to when the industry decides to join

---

26. Eric Goldman, "Copyright Statutory Damages Award Violates Constitutional Due Process--Sony v. Tenenbaum," Technology & Marketing Law Blog, July 12, 2010, [http://blog.ericgoldman.org/archives/2010/07/copyright\\_statu.htm](http://blog.ericgoldman.org/archives/2010/07/copyright_statu.htm)

27. "International Experts Find that Pending Anti-Counterfeiting Trade Agreement (ACTA) Threatens Public Interests," Program on Information Justice and Intellectual Property (PIJIP), June 23, 2010, <http://www.wcl.american.edu/pijip/go/acta-communique>

28. Ray Beckerman, "'Ha ha ha ha ha. RIAA paid its lawyers more than \$16,000,000 in 2008 to recover only \$391,000!!!" Recording Industry vs. The People, July 13, 2010, <http://recordingindustryvs-people.blogspot.com/2010/07/ha-ha-ha-ha-ha-riaa-paid-its-lawyers.html>

29. Joan Anderman, "Pay to play," The Boston Globe, June 9, 2010, [http://www.boston.com/ae/music/articles/2010/06/09/pay\\_to\\_play/?page=full](http://www.boston.com/ae/music/articles/2010/06/09/pay_to_play/?page=full)

30. Greg Lultschik, "YouTube Prevails Over Viacom In \$1Billion Infringement Suit," American University Intellectual Property Brief, June 26, 2010, <http://www.ipbrief.net/2010/06/26/youtube-prevails-over-viacom-in-1-billion-infringement-suit/>

31. Peter Jaszi, "The most important copyright decision of the decade?," @ollectanea, June 6, 2010, [http://chaucer.umuc.edu/blog/cip/collectanea/2010/06/the\\_most\\_important\\_copyright\\_d.html](http://chaucer.umuc.edu/blog/cip/collectanea/2010/06/the_most_important_copyright_d.html)

these efforts and actually try to adapt to them—and yes monetize them<sup>32</sup>—rather than to fight a doomed, inevitably expensive battle against progress.

For more on the past, present, and future of Joel Tenenbaum and the RIAA, see: <http://joelfightsback.com>

---

32. Lawrence Lessig, “ASCAP’s attack on Creative Commons,” The Huffington Post, July 10, 2010, [http://www.huffingtonpost.com/lawrence-lessig/ascaps-attack-on-creative\\_b\\_641965.html](http://www.huffingtonpost.com/lawrence-lessig/ascaps-attack-on-creative_b_641965.html)