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Remitting the Remittal of Joel Tenenbaum's Remittitur Motion

by Jess Robinson

The following blog post was published on www.ipbrief.net on September 20, 2011.

Recently, the First Circuit overruled the district court's holding in Sony's copyright infringement case against Joel Tenenbaum. The district court had found Tenenbaum guilty on thirty counts, but it had reduced the jury's verdict of \$675,000 in statutory damages to \$67,500 because it was so excessive so as to unconstitutionally violate due process. The First Circuit agreed that Tenenbaum was guilty of the claims

against him, but it disagreed with how the district court had denied his motion for remittitur and instead chose to address a constitutional due process issue. According to the First Circuit, the doctrine of constitutional avoidance should have bound the district court to consider all nonconstitutional grounds for reaching a decision

(including remittitur) before addressing any constitutional issues. Reinstating the jury's verdict of \$675,000, the First Circuit remanded the case with orders to consider Tenenbaum's motion for remittitur.

Those in Tenenbaum's camp might call this a "disappointing ruling," and that's certainly understandable when he's put back on the hook for more than half a million dollars. Nevertheless, you can't help but ask yourself why the First Circuit overruled a verdict of downsized damages only to remand it so the parties can consider . . . downsized damages. Maybe the First Circuit is only following the rules and enforcing the doctrine of constitutional avoidance, but I think there's more going on. The

First Circuit's opinion leaves no room for doubt that Tenenbaum is guilty of having willfully violated copyright law, and it explains that Congress intended for statutory damage awards to be so high that it scares off potential infringers. Tenenbaum was caught precisely in congressional crosshairs and the case should be finished. Instead, by remanding the case for remittitur and saying that it "raises concerns about

application of the Copyright Act," the First Circuit implies that it agrees \$675,000 is too harsh a penalty for illegally sharing thirty copyrighted songs.

Even if it didn't agree, the First Circuit is extending the case's proceedings and making it more costly for Sony. It could also be more costly for Tenenbaum,



Image by Gaudencio Garcinuño

but I suspect his legal fees are less demanding than Sony's. On remand, Sony will have two options for how to go forward, and pointing out the continued cost of litigation is relevant because it should factor into its decision. Offered a remittitur, Sony can either accept it or push onward to a new trial for non-downsized damages. Now that Sony has already shelled out money to appeal the case, a cost-benefit analysis might push it to more seriously consider a remittitur, especially when it also knows the district court thought the original verdict was so excessive so as to be unconstitutional. I say "should factor in" only because Sony could very well ignore a cost-benefit analysis and push for a new trial just to prove a point.

The opinion implies the First Circuit thinks Sony will push for a new trial with high damages. Assuming it will, the First Circuit might have had a motive by vacating the verdict on due process grounds and ordering a remittitur. The way I see it, the district court only accomplished one thing by originally denying Tenenbaum's motion for remittitur but then downsizing the verdict on other grounds: it bypassed other opportunities to downsize the damages award so that it could legislate from the bench. I think the First Circuit substantively agrees with the district court's conclusion, and maybe even that the Copyright Act allows for unconstitutionally harsh punishments, but I think it would prefer the message to come from a jury. Under section 504(c) of the Copyright Act as codified in the U.S.C., the minimum damages allowed for thirty counts of copyright infringement is \$22,500 (\$45,000 less than the original downsized award). When there are so few copyright infringement cases like this that don't settle, I can see a lowball jury award being a strong, democratic signal to Congress that something's wrong with copyright infringement law.