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At Hearing, Boston Music Downloader Argues for New Trial or Reduced Verdict

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Lawyers at a District of Massachusetts hearing about whether music downloader **Joel Tenenbaum** should have a new copyright infringement trial or whether the court should reduce the \$675,000 jury verdict, debated Congress' intent in setting infringement damages.

The history of an analogous District of Minnesota case, *Capitol Records Inc v. Thomas-Rasset*, which generated a verdict of **\$1.92 million or \$80,000 per song**, was also hotly debated. The case is headed for a third trial following Chief Judge Michael Davis' order last month to cut the verdict to \$54,000. Davis' order called the verdict "monstrous and shocking."

The hearing in *Sony BMG Music v. Tenenbaum* was about Tenenbaum's challenge to the July 31 verdict in *Capitol Records Inc. v. Alaujan*.

The court later split the cases into separate proceedings against defendants who hadn't settled.

The current plaintiff companies in the Tenenbaum case are Altantic Recording Corp., Sony BMG Music Entertainment, Warner Bros. Records Inc. and UMG Recordings Inc.

In the *Capitol Records* case, the jury **ordered Tenenbaum to pay \$675,000** to several record companies for illegally downloading and distributing 30 of their songs.

The Copyright Act allows for damages of \$750 to \$30,000 for each copyright infringement and up to \$150,000 for each willful infringement.

Tenenbaum's attorney, **Harvard Law School Professor Charles Nesson**, argued in his brief that damages should be no more than \$21.00. He claimed the record companies would have made 70 cents profit on each of the 30 songs if Tenenbaum had paid 99 cents for each song on iTunes. Nesson's brief also argued that the Copyright Act's remedies have been unconstitutionally applied to Tenenbaum.

At the hearing, U.S. District Judge Nancy Gertner told Nesson that there's a legal question about whether he properly preserved the right for a post-trial challenge of her jury instructions on damages.

Nesson's reply and argument throughout the 90-minute hearing centered on the excessive nature of damages available for copyright infringement involving music downloading.

"The idea that somehow Congress carefully considered this statutory damage against someone like Tenenbaum is completely figmentary," Nesson said. "You don't interpret a statute to produce absurd results or unconstitutional results."

Record company lawyer Timothy Reynolds of Denver-based **Holme Roberts & Owen** said that congressional reports related to the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, which increased the minimum and maximum copyright infringement damages, refute that point.

"You have to look at the language in the House report," Reynolds said.

"They didn't foresee the exact technology but they saw the problem coming. This is exactly the scenario that Congress anticipated."

The lawyers discussed several U.S. Supreme Court cases at the hearing, most frequently a 1919 case, **St. Louis I.M. & S. Railway Co. v. Williams**.

The *Williams* decision, which upheld an Arkansas law that set fines for railroad companies that overcharged passengers, discussed whether the law was "so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable."

Reynolds also said that the *Williams* case focused on the government's ability to protect the public from certain harm. In contrast, "the district court is obliged to review the evidence," when considering whether to reduce a jury verdict, he said.

"It's based on the evidence the jury had in the light most favorable to the prevailing party," Reynolds said. "The damages [here] were substantial. This defendant engaged in this conduct for years."

Gertner also asked Reynolds whether Judge Davis' comment that the *Thomas-Rasset* verdict was outrageous "suggests something to the plaintiffs, not about the legitimacy of these cases, but that judges are having trouble with these damages."

"One judge is having trouble with these damages," Reynolds replied.

"We have 24 jurors who are not."

In the *Thomas-Rasset* case, a Minnesota federal jury initially returned a \$222,000 verdict against Jammie Thomas-Rasset in October 2007. The retrial stemmed from Thomas-Rasset's motion for retrial or a reduction of the jury verdict on the ground that the Copyright Act's statutory damages were unconstitutional. The court ordered a new trial based on jury instruction errors, but didn't rule on the constitutionality question. It was the second trial that resulted in the \$1.92 million verdict.

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Williams standard because it addressed a statute Congress enacted to address specific harms, Bennett said.

"The court should give deference to Congress' consideration," Bennett said. "In this case, Congress acted not only to compensate owners and to deter others but to address the public harms created by copyright infringement."

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