

REMITTITUR AND COPYRIGHT

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Recently, decisions on peer-to-peer file sharing copyright infringement cases have come down from the First and Eighth Circuit Courts of Appeals. The defendants in these cases are normal, everyday people, but there is nothing everyday about the damage awards, which sometimes amount to over \$1,000,000. The courts in both of these decisions utilized the common law doctrine of remittitur. The doctrine of remittitur allows the court to lower the amount of damages when those damages are grossly excessive based on evidence presented to the jury. When the court grants remittitur, the party who receives the damage award has the option to accept the remitted damage award or choose to have a new trial if the party is unhappy with the remitted amount. In *Sony BMG Music Entertainment v. Tenenbaum*, the court did not find remittitur appropriate where the defendant moved for remittitur after the jury awarded the plaintiff \$675,000 in damages for the defendant's downloading of thirty-four songs.¹ In contrast, in *Capitol Records, Inc. v. Thomas-Rasset*, the District Court of Minnesota granted the defendant's motion for remittitur after the jury awarded the plaintiff \$1,920,000 in damages, equal to \$80,000 per song the defendant downloaded.² The court in that case held that remittitur was appropriate, and the plaintiff moved for a new trial instead of accepting the remitted amount.³

This Note proceeds in three parts. Part I examines the history of the doctrine of remittitur. Part II next examines the doctrine's interaction with copyright law. Finally, Part III explores the future potential applications of the doctrine. Recently, the Recording Industry Association of America ("RIAA") has stated that it will no longer pursue litigation against individual infringers, leaving suits against facilitators as the best means for recovering damages for online copyright infringement. Independent filmmakers also have ongoing lawsuits against downloaders from peer-to-peer file sharing networks. Whether or not remittitur will play a role in these cases remains to

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1. *Sony BMG Music Entm't v. Tenenbaum (Tenenbaum III)*, No. 07-11446-RWZ, 2012 WL 3639053 (D. Mass. Aug. 23, 2012).

2. *Capitol Records, Inc. v. Thomas-Rasset (Thomas-Rasset V)*, 692 F.3d 899, 904 (8th Cir. 2012).

3. *Id.*

be seen. Because the damage amounts in lawsuits against facilitators are less likely to be grossly excessive and shocking to the conscious, remittitur will unlikely factor into those cases.

I. REMITTITUR BACKGROUND

Remittitur allows the court to lower the amount of damages awarded to the plaintiff “when the verdict is so grossly excessive as to shock the conscience of the court.”⁴ In deciding whether or not the verdict is excessive, the court “can rely on its own reading of all the trial evidence presented.”⁵ If, after reviewing the trial evidence and concluding that the verdict was “grossly excessive,”⁶ a court issues a remittitur, the plaintiff has the choice of whether or not to accept the remitted amount. If the plaintiff chooses not to accept the remitted damage award, the plaintiff may instead proceed to a new trial.⁷ There has been some disagreement among circuit courts as to whether or not a plaintiff may appeal the remitted amount if he does not choose to have a new trial.⁸

This Part will first walk through the history of remittitur, specifically examining Supreme Court jurisprudence on the doctrine. Next, this Part will discuss the constitutionality of remittitur under the Seventh Amendment.

A. THE HISTORY OF REMITTITUR

Remittitur first appeared in federal courts in 1822, in *Blunt v. Little*.⁹ In that case, the defendant moved for a new trial after the jury returned a verdict for allegedly excessive damages.¹⁰ The court determined the appropriate amount of damages and instructed the plaintiff that he could

4. *See* *Eich v. Bd. of Regents for Cent. Mo. State Univ.*, 350 F.3d 752, 763 (8th Cir. 2003).

5. *Capitol Records Inc. v. Thomas-Rasset (Thomas-Rasset II)*, 680 F. Supp. 2d 1045, 1050 (D. Minn. 2010) (citing *Schaefer v. Spider Staging Corp.*, 275 F.3d 735, 738 (8th Cir. 2002)).

6. *Eich*, 350 F.3d at 763.

7. *See* *Korotki v. Goughan*, 597 F. Supp. 1365, 1387 (D. Md. 1984).

8. *See* *Gilbert v. St. Louis-San Francisco R.R. Co.*, 514 F.2d 1277, 1280–81 (5th Cir. 1975) (holding that a plaintiff who accepted remittitur under protest could still appeal the remitted amount). *But see* *Collum v. Butler*, 421 F.2d 1257, 1258 (7th Cir. 1970) (holding that when a plaintiff accepts the remitted amount instead of opting for a new trial, he has waived his right to appeal the remitted amount).

9. *See* Suja A. Thomas, *Re-Examining The Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731, 731–32 (2003) (citing *Blunt v. Little*, 3 F. Cas. 760 (C.C.D. Mass. 1822)).

10. *See id.*

accept this amount or have a new trial.¹¹ The Supreme Court later accepted the court's power to remit a verdict in *Northern Pacific Railroad Company v. Herbert*.¹² The rationale for remittitur is not only to help control excessive jury verdicts but also to limit time spent in court. With remittitur, parties can come to an agreeable solution without having to try the entire case over, which would impose substantial additional costs to both sides.

Before its application in federal court, remittitur appeared in English Common Law. There is some case law from the 1700s to suggest that remittitur and its former counterpart, additur,¹³ were parts of English Common Law.¹⁴ Additionally, Mayne's *Treatise on Damages*, originally published in 1856, notes that the doctrine may have stemmed from an unofficial solution judges often employed to prevent the necessity of a new trial:

When an excessive verdict is given, it is usual for the judge to suggest to counsel to agree on a sum, to prevent the necessity of a new trial. In the absence of agreement the Court has no power to reduce the damages to a reasonable sum instead of ordering a new trial. It would seem also from what was said in the case in which this was recently decided, that where the damages are too small, the Court cannot with the defendant's consent increase them, if the plaintiff asks for a new trial.¹⁵

Furthermore, in applying additur or remittitur, the court generally did so when the damages were more certain, such as in debt cases, as opposed to cases where the damages were more subjective, such as in personal injury cases.¹⁶ Much like in English Common Law, the doctrine of remittitur does not frequently appear in federal court decisions. Despite this infrequency, the application of remittitur has been shaped by key Supreme Court decisions. As set forth below, these Supreme Court decisions formulated rules that frame remittitur analysis and implementation today.

1. *Dimick v. Schiedt* *Outlaws Additur, but Upholds Remittitur*

Dimick v. Schiedt examined the constitutionality of additur, the increase of the jury's damage award, but also considered the constitutionality of

11. *See id.*

12. *See* *Northern Pac. R.R. Co. v. Herbert*, 116 U.S. 642, 646–47 (1886).

13. Additur occurs when the court increases the jury's verdict.

14. *See generally* *Blunt*, 3 F. Cas. 760.

15. *Id.* (citing JOHN DAWSON MAYNE, *MAYNE'S TREATISE ON DAMAGES*, 580 (1st ed. 1856)).

16. *See* *Dimick v. Schiedt*, 293 U.S. 474, 480 (1935).

remittitur in the context of its relationship to additur.¹⁷ In that case, the plaintiff won a \$500 verdict due to the defendant's negligent car operation.¹⁸ The plaintiff moved for a new trial on the basis of the verdict being inadequate.¹⁹ The trial court judge agreed and ordered a new trial unless the defendant would agree to an award of \$1500 instead.²⁰ The defendant agreed, but the plaintiff appealed this decision, arguing that he should have the right to try the case again in front of a jury.²¹ The court of appeals reversed the decision, holding that additur was unconstitutional.²² The Supreme Court ultimately agreed, holding additur unconstitutional under the Seventh Amendment.²³

The Supreme Court considered the constitutionality of remittitur while considering whether or not the doctrine of additur existed under common law at the time of the adoption of the U.S. Constitution in 1791.²⁴ The Court determined that additur was not sufficiently established under English Common Law for it to satisfy this requirement.²⁵ The Court next considered the argument that because federal courts used the analogous doctrine of remittitur, additur should similarly be constitutional.²⁶ To aid in their analysis, the Court also considered the constitutionality of remittitur.²⁷ From its research of treatises dating earlier than 1791 and a sampling of common law cases, the court determined that there was sufficient support to show the existence of remittitur in 1791.²⁸ Since *Dimick*, courts have uniformly continued to accept the power of federal courts to remit damage awards.²⁹

2. *The Trial Court Has Discretion in Deciding Remittitur*

In *Neese v. Southern Railway Co.*, the Supreme Court upheld the trial court's decision to remit \$10,000 of a verdict for \$60,000 because remittitur grants

17. *See id.* at 474.

18. *See id.*

19. *See id.* at 475.

20. *See id.*

21. *See id.*

22. *See id.*

23. *See id.*

24. *See id.*

25. *See id.*

26. *See id.* at 482.

27. *See id.*

28. *See id.* at 477–87 (finding that the treatises constituted sufficient evidence of remittitur's existence under Common Law).

29. *See, e.g.,* Denholm v. Houghton Mifflin Co., 912 F.2d 357, 361 (9th Cir. 1990); Evers v. Equifax, Inc., 650 F.2d 793, 797 (5th Cir. 1981); Johnson v. Rogers, 621 F.2d 300, 306 (8th Cir. 1981); Holmes v. Wack, 464 F.2d 86 (10th Cir. 1972).

the trial court discretion in deciding the appropriate remitted amount.³⁰ In that case, after the jury returned a verdict for the plaintiff, the defendant moved for a new trial due to excessive damages.³¹ Instead of granting this motion, the trial court decided that remittitur would be more appropriate.³² While the plaintiff accepted the amount, the defendant appealed the remittitur, arguing that the trial court abused its discretion.³³ The court of appeals agreed with the defendant, holding that the trial court did abuse its discretion.³⁴ However, the Supreme Court reversed the decision of the court of appeals, holding that the trial court did not abuse its discretion when its basis for remittitur was strongly supported by the record.³⁵

3. *Consideration of F.R.C.P. Rule 59 Is Appropriate When Deciding How To Remit Damages*

Over thirty years after the Supreme Court's decision in *Neese*, the Supreme Court again discussed the trial court's power to use, or decline to use, remittitur in *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, and held that courts should look to the guidelines outlined in Federal Rule of Civil Procedure ("FRCP") 59 to aid them in their decision.³⁶ In that case, the defendant appealed the jury's award of \$6,000,000 in punitive damages for an antitrust action.³⁷ The court of appeals affirmed the damage amount, holding that the trial court did not abuse its discretion in denying the defendant's motion for a new trial or for remittitur.³⁸ The Supreme Court upheld the decision by the court of appeals, holding that denying a motion for remittitur of punitive damages of \$6,000,000, when the actual damages were \$51,000, was not an abuse of discretion.³⁹ The Court stated that in determining whether or not remittitur was appropriate, the trial court should consider the guidelines provided by FRCP 59.⁴⁰ In stating that the consideration of Rule 59 is the appropriate way to decide whether or not the damage amount is excessive with regard to potentially granting a motion for a new trial or

30. *See Neese v. Southern Ry. Co.*, 350 U.S. 77, 77 (1955).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 78.

36. *Browning-Ferris Indust., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989) (noting that FRCP 59 outlines that the inquiry should be into whether or not the district court abused discretion in refusing to grant the motion).

37. *Id.* at 259.

38. *Id.* at 262.

39. *Id.*

40. *Id.* at 278.

remittitur, the Court declined to create a rule that would limit the proportionality of punitive damages to compensatory damages.⁴¹

B. REMITTITUR AND THE SEVENTH AMENDMENT

Since *Dimick*, there has been some scholarly analysis as to whether or not remittitur is constitutional under the Seventh Amendment.⁴² The Seventh Amendment defines the jury's role in civil trials and outlines when the court can make decisions that potentially alter a decision the jury has already made.⁴³ Currently, under *Dimick*, remittitur is constitutional and does not violate the Re-examination Clause of the Seventh Amendment.⁴⁴

The Re-examination Clause states, "In suits at common law . . . no fact tried by a jury, shall be otherwise re-reexamined in any court of the United States, than according to the rules of the common law."⁴⁵ Practically, this means that it may be unconstitutional for the court to deem a jury's verdict excessive. However, the analysis of remittitur's constitutionality differs depending on the interpretation of the Re-examination Clause.⁴⁶ Some analysis by scholars of remittitur's constitutionality considers "the rules of the common law" to be the rules that existed under English Common Law at the time of the enactment of the U.S. Constitution.⁴⁷ Other analysis considers "the rules of common law" fluid and malleable and not locked down to one particular time period.⁴⁸ Criticism of the constitutionality of remittitur comes primarily from the view that common law must have existed in 1791.⁴⁹ This argument asserts that the Court did not conduct sufficient case law research on remittitur within that time period in England and as a result did not have enough support to assert that it existed to a degree sufficient enough to satisfy the Reexamination Clause.⁵⁰ This argument has some basis in *Dimick*, in which the Court cited similar authority prior to 1791 regarding the existence of remittitur and additur and held both to be unconstitutional

41. *Id.* at 279.

42. *See* Thomas, *supra* note 9.

43. *See id.* at 732.

44. *See* *Dimick v. Schiedt*, 293 U.S. 474, 480 (1935).

45. U.S. CONST. amend. VII.

46. *See* Thomas, *supra* note 9, at 763–64.

47. *See id.*

48. *See* Kenneth S. Klein, *The Myth of How to Interpret the Seventh Amendment Right to a Civil Jury Trial*, 53 OHIO ST. L.J. 1005, 1025 (1992) (citing *Galloway v. United States*, 319 U.S. 372, 390 (1943)).

49. *See id.*

50. *See id.* at 734.

under the Seventh Amendment.⁵¹ However, at the time of *Dimick*, precedent in federal courts established remittitur and its function, and the Supreme Court reasoned that remittitur and additur interacted differently with the purpose of the Seventh Amendment.⁵² The Supreme Court has declared repeatedly that the purpose of the Seventh Amendment is to preserve the substance of trial by jury, not necessarily the procedure.⁵³ The Court in *Dimick* articulated that in the case of remittitur, the jury, by way of approving a higher amount, has necessarily found the reduced amount to be insufficient, whereas with additur, the jury, by way of not approving the higher amount, has implicitly found the lower amount to be sufficient.⁵⁴

1. *Codified State Equivalents of Remittitur Are Constitutional Under the Seventh Amendment*

In *Gasperini v. Center for Humanities, Inc.*, the Supreme Court held that it was proper for the Second Circuit to apply New York State's codified equivalent of remittitur in determining whether or not the trial court erred in using its discretion to lower the damage amount.⁵⁵ In that case, Gasperini, who sued the Center for Humanities for infringing the copyright of his photographic slides, appealed to the Supreme Court, arguing that New York's laws, specifically New York Civil Practice Law and Rules ("CPLR") section 5501(c), controlling compensation awards were unconstitutional under the Seventh Amendment.⁵⁶ CPLR section 5501(c) evaluates the excessiveness of damages by determining whether the verdict "materially deviates from what is reasonable compensation."⁵⁷ This standard differs from the traditionally applied "shock the conscience" standard under common law.⁵⁸

The Supreme Court examined the basis for the initial damage award.⁵⁹ At trial, Gasperini called an expert witness who testified that the \$1500 per photographic slide "industry standard" value was based on the amount that

51. *See id.*; *Dimick v. Schiedt*, 293 U.S.474, 482 (1935). The court in *Dimick* cites English case law to show the existence of both remittitur and additur in almost equal amounts but still holds that additur is unconstitutional because it was not sufficiently established in 1791 English Common Law.

52. *See Correction of Damage Verdicts by Remittitur and Additur*, 44 Yale L.J. 318, 323–24 (1934).

53. *See id.*

54. *See Dimick*, 293 U.S. at 490–91.

55. *See Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 419 (1996).

56. *See id.* at 421.

57. *See id.* at 415.

58. *See id.* at 416.

59. *See id.* at 422.

the slide owner could earn for a license fee on the slide during the creator's lifetime plus fifty years.⁶⁰ However, the Second Circuit held that this testimony regarding the "industry standard" was insufficient to establish such a high amount of damages and that the uniqueness of the photos and a showing of actual earnings, such as a future book deal displaying the images from the slides, were necessary.⁶¹ The Supreme Court granted certiorari in this case in order to decide the appropriate standard to determine the excessiveness of a jury's verdict in an action for damages.⁶² The Supreme Court held that in order to determine whether or not the verdict was excessive under New York law, the trial court needed to consider other relevant New York decisions.⁶³ In doing so, the Supreme Court also considered whether or not appellate courts could remit the amount themselves under the Seventh Amendment.⁶⁴ Interestingly, while the Court ultimately concluded that appellate courts could remit the damage amount, in this case, the Court vacated the judgment of the Second Circuit and remanded the decision back to the District Court to revisit the damages in light of the uniqueness of the photographs and other relevant factors.⁶⁵ This decision by the Supreme Court suggests that federal appellate courts sitting under diversity jurisdiction do not have the power to remit damages under the Seventh Amendment.⁶⁶

As the Court has not reconsidered the constitutionality of common law remittitur since 1934, it remains constitutional under the Seventh Amendment. To this extent, given the infrequency with which remittitur appears as an issue in the Supreme Court, it will likely remain constitutional for the foreseeable future.

II. REMITTITUR AND COPYRIGHT

Remittitur has recently reappeared in two key peer-to-peer file sharing copyright infringement cases.⁶⁷ While both cases applied a "shock the conscious" standard and had similar damage awards, the cases reached

60. *See id.* at 420.

61. *See id.* at 419.

62. *See id.*

63. *See id.* at 438.

64. *See id.* (noting that the Seventh Amendment explains the role of the court in civil jury trials).

65. *See id.*

66. *See id.* at 439 (Stevens, J., dissenting).

67. *See Tenenbaum III*, No. 07-11446-RWZ, 2012 WL 3639053, at *1 (D. Mass. Aug. 23, 2012); *Capitol Records, Inc. v. Thomas-Rasset (Thomas-Rasset V)*, 692 F.3d 899, 905 (8th Cir. 2012).

different conclusions on the appropriateness of applying remittitur.⁶⁸ Copyright damages are dictated by statute, which provides a range of amounts per infringed work. This Part will discuss how statutory damages function under copyright law while further exploring the changing role of courts in determining statutory damages after the decision in *Feltner v. Columbia Pictures Televisions, Inc.* Next, this Part will examine, through the lens of peer-to-peer file sharing cases *Sony BMG Music Entertainment v. Tenenbaum* and *Capitol Records, Inc. v. Thomas-Rasset*, how remittitur interacts with statutory damages under the Copyright Act.

A. STATUTORY DAMAGES UNDER THE COPYRIGHT ACT

Under the Copyright Act, plaintiffs can elect to receive statutory damages any time prior to final judgment.⁶⁹ These damages range from \$750 to \$150,000 per infringed work.⁷⁰ The upper range of statutory damages, from \$30,000 to \$150,000 per infringed work, is only awarded where the infringement was willful.⁷¹ The purpose of statutory damages in copyright law has historically been to provide some means of compensating a plaintiff when actual damages are hard to prove, as they often are in copyright infringement cases.⁷² However, under the current version of the Copyright Act, statutory damages are only available to those who have registered their copyright within three months of publication, thus giving statutory damages the additional purpose of encouraging registration.⁷³ Congress additionally reformed the Copyright Act to provide statutory damages “per infringed work” as opposed to “per infringement” in order to ensure that the damages do not become too excessive, while still providing a deterrent to potential infringers.⁷⁴ However, due to the large range of potential damage awards “per infringed work,” this protection does not ensure that the award will not be excessive.⁷⁵ Congress does not provide guidance within the act for how to determine the amount of statutory damages, outside of the provision that damages ranging from \$30,000 to \$150,000 per infringed work be reserved for willful infringers.⁷⁶ This creates a wide range of possible damage amounts

68. See *Tenenbaum III*, 2012 WL 3639053, at *1; *Thomas-Rasset V*, 692 F.3d at 905.

69. 17 U.S.C. § 504(c) (2006).

70. *Id.*

71. *Id.*

72. Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 446 (2009).

73. 17 U.S.C. § 504(c).

74. See Samuelson & Wheatland, *supra* note 72, at 453.

75. *Id.*

76. 17 U.S.C. § 504(c).

for copyright infringement, and because of the lack of clear guidelines, the court's best option to award more reasonable damages is through remittitur.

1. *Feltner Eliminates The Court's Role in Determining Statutory Damages*

Originally for damages under the Copyright Act, the court in *Feltner* decided statutory damages after a jury trial on whether or not the defendant infringed the plaintiff's copyright.⁷⁷ In the case, after a jury found that the defendant willfully infringed the plaintiff's copyright by continuing to broadcast television shows after Columbia Pictures revoked the license to do so, the trial court judge awarded the maximum of \$20,000 for each infringement, totaling \$8,800,000 in damages.⁷⁸ On appeal, the Ninth Circuit upheld the award.⁷⁹ When the Supreme Court examined the issue, they determined that under the Seventh Amendment, statutory damages were an issue to be examined by the jury.⁸⁰ The Supreme Court remanded the case and ordered a jury trial on statutory damages.⁸¹ On remand, the jury awarded the plaintiff \$72,000 for each infringement, totaling \$31,680,000, three and a half times the damages from the initial bench decision.⁸²

The defendant appealed the award again to the Ninth Circuit, arguing that the award was unconstitutional because the language of the Copyright Act required that statutory damages be decided by a judge.⁸³ The Ninth Circuit rejected this argument, holding that the Supreme Court's decision did not render the statutory damages provision of the Copyright Act unconstitutional.⁸⁴

The *Feltner* decision removed what was previously an avenue for judges to control statutory damages and keep them from becoming grossly excessive.⁸⁵ After 1998, judges were left with remitting statutory damage awards or deeming them unconstitutionally excessive. Statutory damages left to juries tend to result in higher awards for the plaintiff, oftentimes at

77. *See Feltner v. Columbia Pictures Televisions, Inc.*, 523 U.S. 340, 346 (1998).

78. *Id.* at 344.

79. *Id.*

80. *Id.* at 355.

81. *Id.*

82. *Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1195 (9th Cir. 2001).

83. *Id.* at 1192.

84. *Id.* at 1198. *Feltner* subsequently petitioned the case to the Supreme Court, but certiorari was denied. *Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186 (9th Cir. 2001), *cert. denied sub nom. Feltner v. Columbia Pictures Television, Inc.*, 534 U.S. 1127 (2002).

85. Samuelson & Wheatland, *supra* note 72, at 456.

shocking amounts when the defendant is an individual infringer.⁸⁶ In these cases, remittitur provides a way for judges to reign in grossly excessive damages to an amount that bears a more reasonable relationship to actual harm. This role of remittitur plays out in the following copyright cases.

B. *SONY BMG MUSIC ENTERTAINMENT V. TENENBAUM*

The court in *Sony BMG Music Entertainment* considered remitting the damage award at the request of the court of appeal and ultimately deemed the amount to be inappropriate for the defendant, Joel Tenenbaum. In 1999, Joel Tenenbaum, a college student, began downloading songs from the Internet using a peer-to-peer file-sharing program.⁸⁷ After he downloaded the songs, he made them available for others to download by placing them in his shared songs folder.⁸⁸ Initially, Tenenbaum used Napster to download files, but after the service was shut down due to contributory copyright infringement, Tenenbaum turned to other services such as Limewire and Kazaa to satisfy his music needs.⁸⁹ In 2002, while attending Goucher College, his father warned him that downloading songs using peer-to-peer networks was illegal copyright infringement.⁹⁰ Additionally, Goucher College warned students about the legal risks of downloading music files from the Internet.⁹¹ Despite his awareness that his actions were illegal, he continued using these services until 2007.⁹² In 2005, he received a letter from a law firm. The letter notified Tenenbaum that the firm was aware he had illegally downloaded songs and that he could either settle or be sued.⁹³ He responded by offering to settle for \$500.⁹⁴ The firm rejected his offer and countered with a \$12,000 settlement amount.⁹⁵ Instead of settling, Tenenbaum decided to go to court.⁹⁶

86. See *Columbia Television Pictures*, 259 F.3d at 1195. The original statutory damages found Feltner liable for \$20,000 per infringed work, while the jury trial on remand found Feltner liable for \$72,000 per infringed work. *Id.*

87. See *Sony BMG Music Entm't v. Tenenbaum (Tenenbaum I)*, 721 F. Supp. 2d 85, 90 (D. Mass. 2010).

88. See *id.*

89. See *id.*

90. See *Sony BMG Music Entm't v. Tenenbaum (Tenenbaum II)*, 660 F.3d 487, 489 (1st Cir. 2011).

91. See *id.*

92. See *id.*; *Tenenbaum I*, 721 F. Supp. 2d at 90.

93. See *Tenenbaum I*, 721 F. Supp. 2d at 90.

94. See *id.*

95. See *id.*

96. See *id.*

1. *Damages and Remittitur at the Trial Court*

At trial, the judge directed a verdict for the plaintiffs, leaving the jury only to answer whether or not Tenenbaum willfully infringed, and if so, what damages were appropriate.⁹⁷ The plaintiffs presented evidence that Tenenbaum had illegally downloaded thousands of songs; however, the plaintiffs only focused on thirty songs.⁹⁸ Under 17 U.S.C. § 504(c), the plaintiff has the right to elect to take statutory damages as opposed to actual damages.⁹⁹ Unlike actual damages, plaintiffs may collect statutory damages even in the absence of a showing of actual harm or a showing of profit by the defendant.¹⁰⁰ Statutory damages can be as low as \$750 or as high as \$30,000 or \$150,000 per song, depending on whether or not the jury finds the infringement willful.¹⁰¹ The trial court instructed the jury that “willful infringement means that a defendant had knowledge that his actions constituted copyright infringement or acted with reckless disregard for the copyright holder’s rights.”¹⁰² The jury found that Tenenbaum willfully infringed when he downloaded songs from the Internet and then shared them. Strikingly, the jury awarded the plaintiffs \$22,500 per song for each of the thirty songs the plaintiffs focused on during litigation.¹⁰³

Tenenbaum filed a motion for a new trial or remittitur on the grounds that these damages were excessive, regardless of the fact that these damages were within the statutory limits set for both willful and non-willful infringement.¹⁰⁴ The court applied the standard for remittitur articulated in *Segal v. Gilbert Color Systems, Inc.*, reviewing the jury award to determine if it was “grossly excessive, inordinate, shocking to the conscious, or so high that it would be a denial of justice to permit it to stand.”¹⁰⁵ The plaintiffs made it clear that they would not accept a remitted amount.¹⁰⁶ Instead of lowering the amount using remittitur, the trial court instead considered the defendant’s argument that the damage award violated his due process rights.¹⁰⁷

While both remitting a damage award and finding a damage amount unconstitutionally excessive result in the reduction of a damage award, only

97. *See id.* at 87.

98. *See id.* at 90.

99. *See id.*

100. *See id.*

101. *See id.*

102. *See Tenenbaum II*, 660 F.3d 487, 507 (1st Cir. 2011).

103. *See Tenenbaum I*, 721 F. Supp. 2d at 87.

104. *See id.* at 88.

105. *See id.* (quoting *Segal v. Gilbert Color Sys. Inc.*, 746 F.2d 78, 81 (1st Cir. 1984)).

106. *See id.*

107. *See id.* at 89.

remittitur requires the plaintiff's participation.¹⁰⁸ Finding the damages unconstitutionally excessive does not give the plaintiff an opportunity to reject the lowered amount; instead, their only recourse is to appeal the decision.¹⁰⁹

In this case, the trial court held that the damage amount, totaling \$675,000, was unconstitutionally excessive.¹¹⁰ The trial court acknowledged that because the damage amount fell within the range set by Congress, Tenenbaum was on notice as to how much he could potentially pay if he fought the charges in court.¹¹¹ However, the trial court weighed this against the amounts that most juries award in copyright infringement cases.¹¹² The trial court determined that the damages awarded in this case were significantly above what is normally awarded and that the amount was larger than necessary to serve the governmental interests underlying statutory damages.¹¹³ The trial court reduced the damages from \$22,500 per song to \$2,500 per song.¹¹⁴ Both parties appealed.¹¹⁵

2. *The First Circuit Holds that the Trial Court Should Have Considered Remittitur*

The First Circuit struck down the trial court's decision, finding that the trial court violated the principle of constitutional avoidance—the principle that the court must avoid deciding the constitutionality of an issue when there is another issue that could be decided instead.¹¹⁶ The First Circuit also considered and rejected Tenenbaum's argument regarding the constitutionality of the Copyright Act and the applicability of the statutory damages provision to his conduct.¹¹⁷ Because the First Circuit held that the trial court erred in considering the constitutionality of the damages before considering the appropriateness of remittitur, the First Circuit remanded the decision back to the trial court to consider remittitur.¹¹⁸

108. *See id.* at 93.

109. *Id.*

110. *See id.* at 89.

111. *See id.* at 88.

112. *See id.* at 89.

113. *See id.*

114. *See id.*

115. *Tenenbaum II*, 660 F.3d 487, 489 (1st Cir. 2011).

116. *See id.*

117. *See id.*

118. *See id.* at 490.

3. *The Trial Court Reconsiders Remittitur, but Still Does Not Find It Appropriate*

On remand, Judge Zobel considered remittitur, after the retirement of Judge Gertner, the original trial court judge.¹¹⁹ Judge Zobel stated that “[r]emittitur is appropriate only when the award exceeds any rational appraisal or estimate of the damages that could be based on the evidence before the jury, where such evidence is viewed in the light most favorable to the prevailing party.”¹²⁰ Judge Zobel considered the appropriateness of remittitur under the same standard articulated originally by the trial court, which quoted *Segal*.¹²¹ Based on the key phrases “grossly excessive” and “shocking to the conscious,” Judge Zobel held that there was no basis for remittitur in this case.¹²² The trial court began by considering the non-exhaustive list of factors provided to the jury for its determination of the damage award.¹²³ The factors included:

The nature of the infringement, the defendant’s purpose and intent, the profit that the defendant reaped if any, and/or the expense that the defendant saved; the revenue lost by the plaintiff as a result of the infringement; the value of the copyright; the duration of the infringement; the defendant’s continuation of infringement after notice or knowledge of copyright claims and the need to deter this defendant and other potential infringers.¹²⁴

First, the trial court held that based on these factors, the evidence supported the damage verdict.¹²⁵ Evidence showed that “music recording companies’ primary source of revenue stems from their exclusive rights to copy and distribute the musical works of their contracted artists.”¹²⁶ This evidence weighed on the factor regarding the revenue lost by the plaintiffs, as well as the value of the copyright.¹²⁷ Furthermore, the plaintiffs presented evidence of how peer-to-peer file sharing networks operate and facilitate illegal downloading, particularly music records.¹²⁸ This evidence helped

119. *See Tenenbaum III*, No. 07-11446-RWZ, 2012 WL 3639053, at *1.

120. *See id.* at *2 (internal quotes omitted).

121. *See id.*

122. *See id.*

123. *See id.*

124. *See id.*

125. *See id.*

126. *See id.*

127. *See id.*

128. *See id.*

support the need for a deterrence factor.¹²⁹ Finally, the plaintiffs also presented evidence of the duration and severity of Tenenbaum's downloading activities, which spanned eight years and included thousands of songs.¹³⁰

The evidence further supported that Tenenbaum willfully infringed.¹³¹ He continued to download illegal music despite multiple warnings that his conduct could result in a lawsuit.¹³² Judge Zobel found that the evidence sufficiently supported the damages and denied Tenenbaum's motion for remittitur or a new trial.¹³³

Tenenbaum illustrates that even though damage awards may be incredibly large, particularly relative to the amount the defendant would have paid to legally purchase the plaintiffs' infringed works, the damage awards might not "shock the conscious" under remittitur analysis.

C. *CAPITOL RECORDS, INC. V. THOMAS-RASSET*

Capitol Records, on the other hand, shows how courts that employ a remittitur analysis can properly remit damage awards in peer-to-peer file sharing cases. In 2005, Capitol Records, Inc. and other recording companies investigated the suspected infringement of their music copyrights by hiring MediaSentry, an online investigative firm.¹³⁴ The firm discovered a user by the name of "tereastarr" sharing files on Kazaa.¹³⁵ MediaSentry found over 1,700 music files in tereastarr's shared folder, which included songs that users have downloaded and shared with other Kazaa users.¹³⁶ MediaSentry attempted to notify tereastarr of their awareness of tereastarr's infringement, but tereastarr never responded.¹³⁷

The RIAA issued a subpoena to get the name of the person associate with tereastarr's IP address, and the RIAA was informed that the user's name was Jammie Thomas-Rasset.¹³⁸ RIAA sent Thomas-Rasset a letter and hoped to initiate a settlement.¹³⁹ Thomas-Rasset contacted them as instructed, but the parties were unable to come to an agreement.¹⁴⁰ In 2006, Capitol Records

129. *See id.*

130. *See id.*

131. *See id.* at *3.

132. *See id.*

133. *See id.*

134. *See Thomas-Rasset V*, 692 F.3d 899, 903 (8th Cir. 2012).

135. *See id.* at 904.

136. *See id.*

137. *See id.*

138. *See id.*

139. *See id.*

140. *See id.* at 903.

and others sued Thomas-Rasset for violating their exclusive rights to reproduction and distribution under 17 U.S.C. § 106, as well as for willfully infringing their copyright under 17 U.S.C. § 101.¹⁴¹

Thomas-Rasset acknowledged that tereastarr is her frequent username for Internet and other computer accounts.¹⁴² In college, prior to the trial, Thomas-Rasset wrote a case study on the legality of Napster and was aware that Napster was ultimately shut down due to its illegality.¹⁴³ Despite this research, Thomas-Rasset denied knowledge of Kazaa's existence before this case and stated that she had never used Kazaa.¹⁴⁴

Thomas-Rasset has, at different times, provided alternative theories for who may have downloaded the files.¹⁴⁵ At her deposition, she stated that her hard drive was replaced and perhaps someone else had downloaded the files on it earlier.¹⁴⁶ She also tried to blame the infringement on her husband and two sons.¹⁴⁷ The recording companies offered to settle with Thomas-Rasset initially for \$5,000,¹⁴⁸ which she declined.¹⁴⁹

At the first trial in October 2007, the jury found Thomas-Rasset liable for willful infringement, and awarded the plaintiffs damages of \$222,000.¹⁵⁰ However, the trial court erred because it provided a jury instruction that gave the wrong explanation of what was required to establish "distribution" under the Copyright Act.¹⁵¹ The court granted a new trial as a result of this error, not ruling on whether or not the damages awarded were constitutional.¹⁵²

1. *The Trial Court Grants Remittitur in the Second Trial*

The second trial began in June 2009.¹⁵³ For Thomas-Rasset, No Doubt's "Bathwater" and other songs from the 1990s only got more expensive.¹⁵⁴ The

141. *See id.* at 905.

142. *See id.*

143. *See id.*

144. *See id.*

145. *See id.*

146. *See id.*

147. *File-Sharer Says Kid May Have Done It*, CBS NEWS (June 22, 2009), http://www.cbsnews.com/2100-502303_162-5103122.html.

148. Sara Yin, *Jammie Thomas Refuses to Pay \$1.5 Million Fine For Illegal Downloads*, PC MAG (Nov. 5, 2010), <http://www.pcmag.com/article2/0,2817,2372230,00.asp>.

149. *See* Capitol Records, Inc. v. Thomas-Rasset (*Thomas-Rasset I*), 579 F. Supp. 2d 1210, 1227 (D. Minn. 2008).

150. *See id.* at 1213.

151. *See id.*

152. *See id.*

153. *See* Capitol Records, Inc. v. Thomas-Rasset (*Thomas-Rasset II*), 680 F. Supp. 2d. 1045, 1050 (D. Minn. 2010).

jury this time returned a verdict for \$1,920,000—\$80,000 per song for twenty-four songs—based on the statutory damages provisions of the Copyright Act.¹⁵⁵ Thomas-Rasset asked the court to set aside the damages, arguing that the statutory damages provision of the Copyright Act did not apply to her because she is an individual infringer and that the statutory damages were so excessive and shocking that they should be remitted or, in the alternative, she should be granted a new trial.¹⁵⁶

The court first considered Thomas-Rasset's motion for remittitur.¹⁵⁷ When deciding whether or not to order remittitur, the court applied the standard articulated in *Eich v. Board of Regents for Central Montana State University*: “[a] verdict is not considered excessive unless there is plain injustice or a monstrous or shocking result.”¹⁵⁸ The recording companies argued that the trial court did not have the power to remit the statutory damage award because remittitur violates the Seventh Amendment.¹⁵⁹ The court disagreed, holding that remittitur did not interfere with the plaintiffs' right to a jury trial, which the Seventh Amendment protects, because the plaintiffs had the option to choose a new trial instead of accepting the remitted amount.¹⁶⁰

In deciding whether or not remittitur was appropriate, the court next considered whether or not the statutory damages met the grossly excessive standard.¹⁶¹ In its consideration, the court looked at the relationship between statutory damages and actual damages.¹⁶² Thomas-Rasset provided evidence that the ratio between statutory damages and actual damages in this case was at least 1:5,333 (based on legally purchasing the entire album) and possibly as large as 1:62,015 (based on purchasing the songs as singles).¹⁶³ The plaintiffs pointed out that statutory damages under the Copyright Act do not require any showing of actual harm. The court disagreed, however, noting that because statutory damages do have “in part, a compensatory purpose, assessed statutory damages should bear some relation to the actual damages

154. *See id.* No Doubt's “Bathwater” is one of the songs Thomas-Rasset downloaded on Kazaa.

155. *See id.*

156. *See id.*

157. *See id.*

158. *See id.* (citing *Eich v. Bd. of Regents for Cent. Mo. State Univ.*, 350 F.3d 752, 763 (8th Cir. 2003)).

159. *See id.*

160. *See id.* at 1051.

161. *See id.*

162. *See id.* at 1052.

163. *See id.*

suffered.”¹⁶⁴ The plaintiffs further contested Thomas-Rasset’s calculation of the ratio between statutory damages and actual damages and argued that their actual damages were significantly higher than the one-time purchase cost of a song or album for each of the twenty-four infringing files.¹⁶⁵ They argued that because Thomas-Rasset kept these files in the shared folder, she made them available for download to millions of other users, multiplying the one-time purchase amount every time another person downloaded the song from her shared folder.¹⁶⁶ These other users would likely in turn place their files in their shared folder, making them available to an even greater number of users.¹⁶⁷ Thomas-Rasset responded by arguing that punishing her for the shared folder would essentially be the same as punishing her for the entire system of illegal music downloading, which would be unconstitutional.¹⁶⁸

The court then considered the evidence of willfulness and the factor of deterrence in this case.¹⁶⁹ Willfulness and deterrence contribute to determining the appropriate amount of statutory damages under 17 U.S.C. § 504.¹⁷⁰ The court noted that the jury found that due to Thomas-Rasset’s research on Napster in college, she was aware that downloading copyrighted music was illegal.¹⁷¹ The court cited Thomas-Rasset’s reluctance to take responsibility for her actions—in which she initially denied ever using peer-to-peer file sharing programs on her computer and later implicated her children and ex-boyfriend—as a factor showing “the need for strong deterrence” in this case.¹⁷²

The court then weighed these considerations against each other to determine the appropriateness of remittitur.¹⁷³ The court held that because Thomas-Rasset was not operating for a profit and merely operating with the intent of downloading free music, the vast majority of the damages were for deterrence purposes.¹⁷⁴ Considering this, the court reasoned that the need for deterrence could not possibly justify two million dollars in damages for “stealing and illegally distributing 24 songs for the sole purpose of obtaining free music.”¹⁷⁵ The court also reasoned that the plaintiffs could not support a

164. *See id.* at 1050 (internal citation omitted).

165. *See id.*

166. *See id.*

167. *See id.*

168. *See id.* at 1053.

169. *See id.*

170. *See id.*

171. *See id.*

172. *See id.*

173. *See id.*

174. *See id.*

175. *See id.*

verdict of that size based on their evidence of actual damages. While the Copyright Act did not require a showing of actual damages, the plaintiff must still show some correlation between statutory damages and actual damages.¹⁷⁶ While the plaintiffs provided evidence of the difficulty of calculating the actual damages caused by Thomas-Rasset's infringement and by online infringement generally, the court held that "\$2 million for stealing [twenty-four] songs for personal use is simply shocking."¹⁷⁷

After deciding to remit the damages, the court next determined the proper amount of damages.¹⁷⁸ Thomas-Rasset requested that the amount be remitted to \$18,000.¹⁷⁹ To determine the proper amount, the court applied the "maximum recovery rule," whereby the court remits the damages to "the maximum amount the jury could properly have awarded."¹⁸⁰ The court reasoned that remittitur is not meant to substitute the reasoning of the jury but instead serves to bring the damages to "the maximum amount sustainable by the record, so that the statutory damage award is no longer shocking or monstrous."¹⁸¹ While the plaintiffs argued that the court should look to other jury verdicts in similar cases, essentially looking only to *Tenenbaum*, the court noted that the Eighth Circuit already decided that doing so was not appropriate when deciding damages because each case should be decided "within the framework of its distinctive facts."¹⁸² Further, the court noted that because the court in *Tenenbaum* was also considering whether or not to remit the damage award, the case would bear little weight even if it were to be considered.¹⁸³

The court ultimately decided to remit the damages to three times the statutory minimum per infringed sound recording, based on the precedent of using treble damages for willful behavior.¹⁸⁴ The court was careful to note that they were not trying to create a treble damages provision within the Copyright Act; the court merely tried to find an amount of damages that did not "veer into the realm of gross injustice" for noncommercial infringers.¹⁸⁵ The plaintiff had the choice of accepting an award of \$2,250 per song or

176. *See id.* at 1053–54.

177. *See id.* at 1054.

178. *See id.*

179. *See id.*

180. *See id.* (citing *K-B Trucking Co. v. Riss Int'l Corp.*, 763 F.2d 1148, 1163 (10th Cir. 1985)).

181. *See id.* at 1055.

182. *See id.* (citing *Vanskike v. Union Pac. R.R. Co.*, 725 F.2d 1146, 1150 (8th Cir. 1984)).

183. *See id.*

184. *See id.* at 1056.

185. *See id.*

scheduling a new trial.¹⁸⁶ Thomas-Rasset moved for reconsideration of the remittitur order, which was denied.¹⁸⁷ The record companies declined the remitted amount and instead opted for a new trial.¹⁸⁸

1. *The Trial Court Refuses to Consider Remittitur Again Because the Plaintiff Will Not Accept the Remitted Award*

In the third trial, the jury only determined the amount of statutory damages.¹⁸⁹ The jury awarded \$62,500 per song, totaling \$1,500,000 in damages.¹⁹⁰ Thomas-Rasset again moved to alter the judgment, and the court again granted the motion, lowering the damage award to \$2,250 per song.¹⁹¹ However, because the plaintiffs demonstrated in the previous two trials that they were unwilling to accept remittitur, the court instead lowered the damage award on the basis that \$1,500,000 was unconstitutionally excessive.¹⁹² This decision elicited an appeal to the Eighth Circuit.

2. *The Eighth Circuit Court of Appeal Does Not Comment on Remittitur*

Both parties appealed the new statutory damages amount.¹⁹³ The recording companies argued that the jury's original damage award from the first trial of \$222,000 should be reinstated, while Thomas-Rasset argued that any statutory damages in this case would be unconstitutional.¹⁹⁴ The Eighth Circuit vacated the judgment and remanded the case "with directions to enter a judgment for damages of \$222,000."¹⁹⁵ However, the opinion did not discuss remittitur outside of its reiteration of the procedural history of the case.¹⁹⁶

The courts in *Tenenbaum* and *Thomas-Rasset* considered similar factors to determine whether or not the awards were sufficiently excessive for remittitur.¹⁹⁷ The largest factor considered in both cases was whether or not

186. *See id.* at 1061.

187. *See* Capitol Records, Inc. v. Thomas-Rasset (*Thomas-Rasset III*), No. 06-1497 (MJD/LIB), WL 4286325, at *1 (D. Minn. Oct. 22, 2010).

188. *See* Capitol Records, Inc. v. Thomas-Rasset (*Thomas-Rasset IV*), 799 F. Supp. 2d 999, 1001 (D. Minn. 2011).

189. *See id.*

190. *See id.*

191. *See id.*

192. *See id.* at 1003.

193. *See Thomas-Rasset V*, 692 F.3d 899, 902 (8th Cir. 2012).

194. *See id.*

195. *See id.* at 916.

196. *See id.*

197. *See Thomas-Rasset II*, 680 F. Supp. 2d 1045, 1053-54 (D. Minn. 2010); *Tenenbaum III*, No. 07-11446-RWZ, 2012 WL 3639053, at *2-3 (D. Mass. Aug. 23, 2012).

there was sufficient evidence for the jury to base its verdict.¹⁹⁸ While the court in *Tenenbaum* stopped its inquiry there, finding that there was sufficient evidence for the jury to base its verdict, the court in *Thomas-Rasset* looked to further factors such as the relationship between statutory damages and actual damages, factual support for actual damages inflicted, evidence of willfulness, and the need for deterrence.¹⁹⁹

III. FUTURE APPLICATIONS OF REMITTITUR IN COPYRIGHT

The RIAA stated in 2008 that it will no longer pursue litigation against individual infringers from file sharing websites.²⁰⁰ As a result, the RIAA's strategies for recouping some of its losses from peer-to-peer file sharing have changed.²⁰¹ Instead of suing the individual infringers, the RIAA has been going after the facilitators of that infringement.²⁰² Facilitators range from the ISP providers of individual downloaders to sites like YouTube that allow users to upload their own content.²⁰³ The remaining litigation between copyright owners and individual peer-to-peer file sharers largely comes from smaller, independent filmmakers.²⁰⁴ Whether or not a judge in these situations could apply remittitur remains to be examined. This Part will explore the possible application of remittitur in two of the more common internet copyright infringement scenarios. First, Section III.A will discuss the application of remittitur in a hypothetical scenario based on *Viacom v. YouTube* but where the parties went to trial on damages. Second, Section III.B will discuss the application of remittitur in the case of suits brought by small, independent filmmakers against individual peer-to-peer file sharers.

A. VIACOM *v.* YOUTUBE

In *Viacom v. YouTube*, Viacom sued YouTube for allowing users to upload its copyrighted videos for free.²⁰⁵ The district court granted YouTube's

198. *See id.*

199. *See Thomas-Rasset II*, 680 F. Supp. 2d at 1053–54; *Tenenbaum III*, 2012 WL 3639053, at *2–3.

200. Eliot Van Buskirk, *RIAA to Stop Suing Music Fans, Cut Them Off Instead*, WIRED (Dec. 19, 2008), <http://www.wired.com/business/2008/12/riaa-says-it-pl>.

201. *See id.*

202. *See id.*

203. *See id.*; *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F. 3d 19, 25–26 (2d Cir. 2012).

204. *See* Lee Gesmer, *Porn Movies, Copyright Trolls and Joinder (Yes, Joinder)*, MASS L. BLOG (Oct. 31, 2012), <http://www.masslawblog.com/copyright/porn-movies-copyright-trolls-and-joinder-yes-joinder>.

205. *See Viacom*, 676 F. 3d at 28.

motion for summary judgment, holding that YouTube's activities fell under the Safe Harbor provision of the Digital Millennium Copyright Act.²⁰⁶ The Safe Harbor provision of the Digital Millennium Copyright Act limits the liability for copyright infringement of service providers if the actions of the service provider meet a set of threshold criteria and specific safe harbor requirements.²⁰⁷ On appeal, the Second Circuit vacated the order granting summary judgment and remanded the case to the trial court to determine whether YouTube had knowledge, awareness, or was willfully blind to specific instances of infringement.²⁰⁸ Neither the Second Circuit nor the trial court considered the potential damages from the posting of copyrighted videos on YouTube.²⁰⁹ If the case does go to trial, and Viacom's claims succeed, the damage awards could be astronomical, leading to the question of whether remittitur may apply.

1. *If Viacom Succeeds on Remand, Will YouTube Possibly Have Success with Remittitur?*

Because no trial court has heard Viacom's evidence of YouTube's infringement, it is difficult to predict whether or not a trial court will potentially remit the amount.²¹⁰ Nevertheless, the factors the trial courts in *Tenenbaum* and *Thomas-Rasset* considered in determining the appropriateness of remittitur provide useful guidance.²¹¹

Part of what the *Thomas-Rasset* court found most troubling about the damage award was that it was disproportionate to the actual damages.²¹² Particularly problematic for the court was the fact that if it were to decide that the statutory damages were not disproportionate to the actual damages, the actual damages the court would use for comparison would have to be for illegal downloading as a whole, not just for Thomas-Rasset's actions.²¹³ This differs from the scenario in *Viacom*, where as a facilitator of copyright

206. *See id.* at 29.

207. *See id.* at 27. The court stated that the threshold criteria includes whether the party is a service provider, whether it has a repeat infringer policy, and whether it has a mechanism in place to identify copyright infringement. *Id.* The court also stated that the specific safe harbor requirements include lack of actual knowledge of infringing material, lack of financial benefit from infringement, and removal of the infringing work upon notice of infringement. *Id.*

208. *See id.* at 41–42.

209. *See id.*

210. *See id.*

211. *See Thomas-Rasset II*, 680 F. Supp. 2d 1045, 1053–54 (D. Minn. 2010); *Tenenbaum III*, No. 07-11446-RWZ, 2012 WL 3639053, at *2–3 (D. Mass. Aug. 23, 2012).

212. *See Thomas-Rasset II*, 680 F. Supp. 2d at 1053–54.

213. *See id.*

infringement on the Internet, YouTube has touched a greater amount of the infringement directly.²¹⁴ Unlike in *Thomas-Rasset*, where it was next to impossible to determine the actual damages resulting from Thomas-Rasset's infringement, the court could more easily calculate the amount of damage YouTube facilitated through its website.²¹⁵ By taking the number of infringed works, the number of times the video was viewed, and the amount of money the plaintiffs would have earned otherwise, the court could create a more accurate estimation.²¹⁶ That is not to say calculating damages would be trivial, just that since YouTube's infringement is more readily quantifiable through uploading, viewing, and sharing data, it would be easier to attribute the infringement costs to YouTube than it would be to Thomas-Rasset.²¹⁷

Many of the other factors analyzed in *Tenenbaum* and *Thomas-Rasset* would likely militate against using remittitur as well.²¹⁸ The standard of "grossly excessive" will, perceptibly, be harder to meet when the defendant is a large company with large profits.²¹⁹ Viacom sued YouTube for \$1 billion.²²⁰ Considering that YouTube's purchase price in 2006 was \$1.65 billion²²¹ and that YouTube generated approximately one billion dollars for Google in its 2012 fiscal year,²²² the damage amount seems less shocking compared with Thomas-Rasset's liability.²²³ While Thomas-Rasset may have saved some money by downloading songs from the Internet, the amount of money she saved did not come close to \$1,250,000.²²⁴ Because the amount of damages here is closer to how much revenue YouTube generates²²⁵ and because

214. Unlike an individual infringer who only touches what they download or upload, a facilitator or service provider touches every piece of uploaded content.

215. See Rob Reid, *The Numbers Behind the Copyright Math*, TED BLOG (Mar. 20, 2012) <http://blog.ted.com/2012/03/20/the-numbers-behind-the-copyright-math> (estimating the amount of damages caused by other infringement facilitators by looking at the losses in revenue between the years prior to their existence and after, specifically Napster).

216. See *Thomas-Rasset II*, 680 F. Supp. 2d at 1053–54 (considering how to calculate an individual infringer's damage contribution by a similar formula).

217. See *id.*

218. See *id.*; *Tenenbaum III*, No. 07-11446-RWZ, 2012 WL 3639053, at *2–3 (D. Mass. Aug. 23, 2012).

219. See *Thomas-Rasset II*, 680 F. Supp. 2d at 1053–54 (discussing the relationship between statutory damages and actual damages).

220. See Frederick Townes, *Viacom Sues YouTube for \$1 Billion... The End of the Tube?*, MASHABLE (March 13, 2007), <http://www.mashable.com/2007/03/13/viacom-youtube/>.

221. See *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F. 3d 19, 25–26 (2d Cir. 2012).

222. See Erick Schonfeld, *Citi: Google's YouTube Revenues Will Pass \$1 Billion in 2012 (And So Could Local)*, TECHCRUNCH, (Mar. 21, 2011), <http://www.techcrunch.com/2011/03/21/citi-google-local-youtube-1-billion>.

223. See *Thomas-Rasset II*, 680 F. Supp. 2d at 1053–54.

224. See *id.*

225. See Townes, *supra* note 220; *Viacom*, 676 F.3d at 28.

YouTube derives profits from infringing videos,²²⁶ the amount of damages is less likely to shock the conscious.²²⁷ When the amount is less likely to shock the conscious, remittitur is less likely to be a viable option.²²⁸ Even if remittitur is appropriate, Viacom could still choose to reject remittitur.

2. *Viacom May Reject Remittitur in Favor of a New Trial*

Even if the trial court grants remittitur, as in *Thomas-Rasset*, Viacom may still choose to reject remittitur in favor of a new trial.²²⁹ If Viacom were to reject the remitted amount, there would be a new trial, and if they again were awarded damages, it would be unlikely that remittitur would be granted a second time, given that Viacom would have shown its unwillingness to accept a remitted amount.²³⁰ It seems unlikely that a company as large as Viacom, who has already spent large amounts of money pursuing this litigation,²³¹ would choose to accept a remitted amount instead of pursuing another opportunity to receive a higher damage award. This seems especially unlikely given that choosing a new trial would provide a greater bargaining position for settlement and allow plaintiffs to negotiate for a damage award higher than the remitted amount.²³² Because remittitur itself is unlikely in Viacom, and Viacom's potential acceptance of the remitted amount is equally unlikely, remittitur does not appear to have a significant role in this litigation.

B. INDEPENDENT FILMMAKER CASES

The remaining category of copyright infringement lawsuits where remittitur is likely to apply concerns suits against individual infringers by independent filmmakers. Lawsuits brought by independent filmmakers tend to be brought by the makers of independent motion pictures, such as *The*

226. See Ellen Seidler, YouTube (and Netflix) monetize online piracy, VOX INDIE, (Jan. 26, 2013), <http://voxindie.org/YouTube-netflix-monetize-piracy>.

227. See *Thomas-Rasset II*, 680 F. Supp. 2d at 1053–54.

228. See *id.* at 1050.

229. See *id.*

230. See *Thomas-Rasset IV*, 799 F. Supp. 2d 999, 1001 (D. Minn. 2011).

231. See Lisa Lerer, *Viacom's Expensive Suit*, FORBES (Mar. 27, 2007), http://www.forbes.com/2007/03/27/youtube-viacom-google-tech-cx_ll_0328google.html (estimating that Viacom's legal fees will be upwards of \$350 million for its lawsuit against YouTube and Google).

232. See Greg Sandoval, *Jammie Thomas Rejects RIAA's \$25,000 Settlement Offer*, CNET (Jan. 27, 2010), http://news.cnet.com/8301-31001_3-10442482-261.html?tag=mncol;9n. After the court remitted Thomas-Rasset's damages to \$52,000, Capitol Records attempted to settle with Thomas-Rasset, offering her an amount even lower than the remitted damages, but she rejected the amount. The \$25,000 settlement is higher than the initial settlement offer of \$2,000.

Hurt Locker,²³³ or the makers of pornographic films.²³⁴ Both groups have tried a new litigation strategy—going after users downloading their films from torrent streams, where the filmmakers attempt to join multiple downloaders of the copyrighted work as defendants, usually without naming the parties first.²³⁵ So far, neither group has had much success.²³⁶

In these lawsuits, plaintiffs file a suit against multiple “John Doe” defendants, sometimes even thousands of them,²³⁷ listing only the IP address corresponding to each “Doe,” since that is the only information the plaintiffs have at that time.²³⁸ Once they file the lawsuit, they subpoena the Internet Service Provider for the personal details belonging to the IP addresses.²³⁹ After they have the personal details, the plaintiffs then send a letter to the defendants, offering to settle for a small amount.²⁴⁰ This settlement allows the defendants to avoid being named in the lawsuit. Notably, when the copyrighted material is pornographic, many defendants are willing to pay to avoid personal embarrassment.²⁴¹ However, if a defendant moves to sever the case, the plaintiffs often drop him as a defendant completely.²⁴² These cases are yet to make it to trial and to be heard on damages.²⁴³

1. *If Independent Motion Picture Filmmakers Take Peer-to-Peer File Sharers to Trial, Remittitur May Be Appropriate*

If an independent producer of a film such as *The Hurt Locker* took a peer-to-peer file sharer to trial, the analysis for damages would likely look similar

233. See Ernesto, *Hurt Locker BitTorrent Lawsuit Dies, But Not Without Controversy*, TORRENTFREAK (Dec. 22, 2011), torrentfreak.com/hurt-locker-bittorrent-lawsuit-dies-but-not-without-controversy-111222.

234. See Gesmer, *supra* note 204.

235. See *id.*

236. After Vontage Pictures tried to subpoena the personal details of various IP addresses, a large number of these addresses were dismissed from the case. Ernesto, *supra* note 233. See also *Third Degree Films v. Does 1–47*, 286 F.R.D. 188, at *4 (D. Mass. Oct. 2, 2012) (holding that the plaintiff cannot join “John Doe” defendants in a single action, the plaintiff instead must file individual suits); *SBO Pictures, Inc. v. Does 1–3036*, No. 11-4220 SC, 2011 WL 6002620, at *3–4 (N.D. Cal. Nov. 30, 2011) (holding that allowing plaintiffs to join multiple defendants who downloaded sexually explicit material has a coercive affect and should not be allowed).

237. See *SBO Pictures*, 2011 WL 6002620, at *1. SBO Pictures tried to sue 3,036 defendants in one suit. *Id.*

238. See *id.*

239. See Gesmer, *supra* note 204.

240. See *id.*

241. See *id.*

242. See *id.*

243. See *id.*

to the analysis in *Tenenbaum* and *Thomas-Rasset*.²⁴⁴ Using film retail prices, producers could demonstrate how much money they would have made had those who downloaded the films from peer-to-peer file sharing purchased or rented the films instead.²⁴⁵ If the jury were to come back with a verdict where the damages did not bare some relationship to that demonstrable harm, like in *Thomas-Rasset*, the judge could deem remittitur appropriate and lower the damages.²⁴⁶

2. *If Pornography Filmmakers Take Peer-to-Peer File Sharers to Trial, Remittitur Is Unlikely to Be Appropriate Because Damages from the Jury Will Likely Be Lower*

Remittitur is much less likely to be utilized within the context of suits filed by pornography filmmakers, namely because it is unlikely the case would even go to trial.²⁴⁷ For these filmmakers, the lawsuits themselves are their source of revenue.²⁴⁸ They do not seek damages to make up for the money lost as a result of peer-to-peer file sharing, as many of the producers of these adult films do not sell them in the first place.²⁴⁹ Instead, these lawsuits are designed to extract a settlement from the defendants, not to actually take them to trial.²⁵⁰ The cost of filing the lawsuit is \$350, no matter how many “Doe’s” are defendants.²⁵¹ If a plaintiff filmmaker offers to settle with each of the defendants individually for \$5000, then the moment the first “Doe” settles, the plaintiff has already recouped the cost of filing the lawsuit.²⁵² The “Doe’s” have a large incentive to settle. If they do not, their Internet Service Provider may be subpoenaed, and the defendant may become a named party in the lawsuit.²⁵³ Rare is the individual who would like to be a named defendant, for instance, in a lawsuit for infringing the copyright of “Big Butt Oil Orgy 2.”²⁵⁴

If a defendant does not settle, then the calculus for a plaintiff to proceed with litigation changes dramatically. Because courts thus far have been

244. See *Thomas-Rasset II*, 680 F. Supp. 2d 1045, 1053–54 (D. Minn. 2010); *Tenenbaum III*, No. 07-11446-RWZ, 2012 WL 3639053, at *2–3 (D. Mass. Aug. 23, 2012).

245. See *id.*

246. See *id.*

247. See Gesmer, *supra* note 204.

248. See James DeBriyn, *Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages*, 19 UCLA ENT. L. REV. 79, 86 (2012).

249. See *id.*

250. *Third Degree Films*, 286 F.R.D. at 190.

251. See Gesmer, *supra* note 204.

252. See DeBriyn, *supra* note 248.

253. See Gesmer, *supra* note 204.

254. *Third Degree Films*, 286 F.R.D. at 190.

reluctant to allow joinder in these cases, the plaintiff would likely have to pursue separate lawsuits against these defendants.²⁵⁵ The plaintiff would then have to incur the legal costs associated with going to trial, significantly more than the \$350 filing fee.²⁵⁶ It is easier for adult filmmakers to continue to sue “Doe” defendants and extract settlements than to incur the cost of going to trial seeking statutory damages.²⁵⁷

IV. CONCLUSION

While remittitur did make an appearance in the peer-to-peer music file-sharing copyright infringement cases *Tenenbaum* and *Thomas-Rasset*—and seems to be a useful tool for judges to have some control over statutory damages after *Feltner*—it is unlikely to continue to make appearances in copyright trials. Remittitur is not likely to be appropriate in lawsuits against the facilitators of peer-to-peer file sharing because the damages sought bear more of a relationship to actual harm and are less likely to shock the conscious. While remittitur could play a role if lawsuits filed by independent filmmakers go to trial, it will not play a role in lawsuits filed by adult filmmakers due to the incentives those filmmakers have to not go to trial.

255. See Gesmer, *supra* note 204.

256. See *id.*

257. See *id.*

