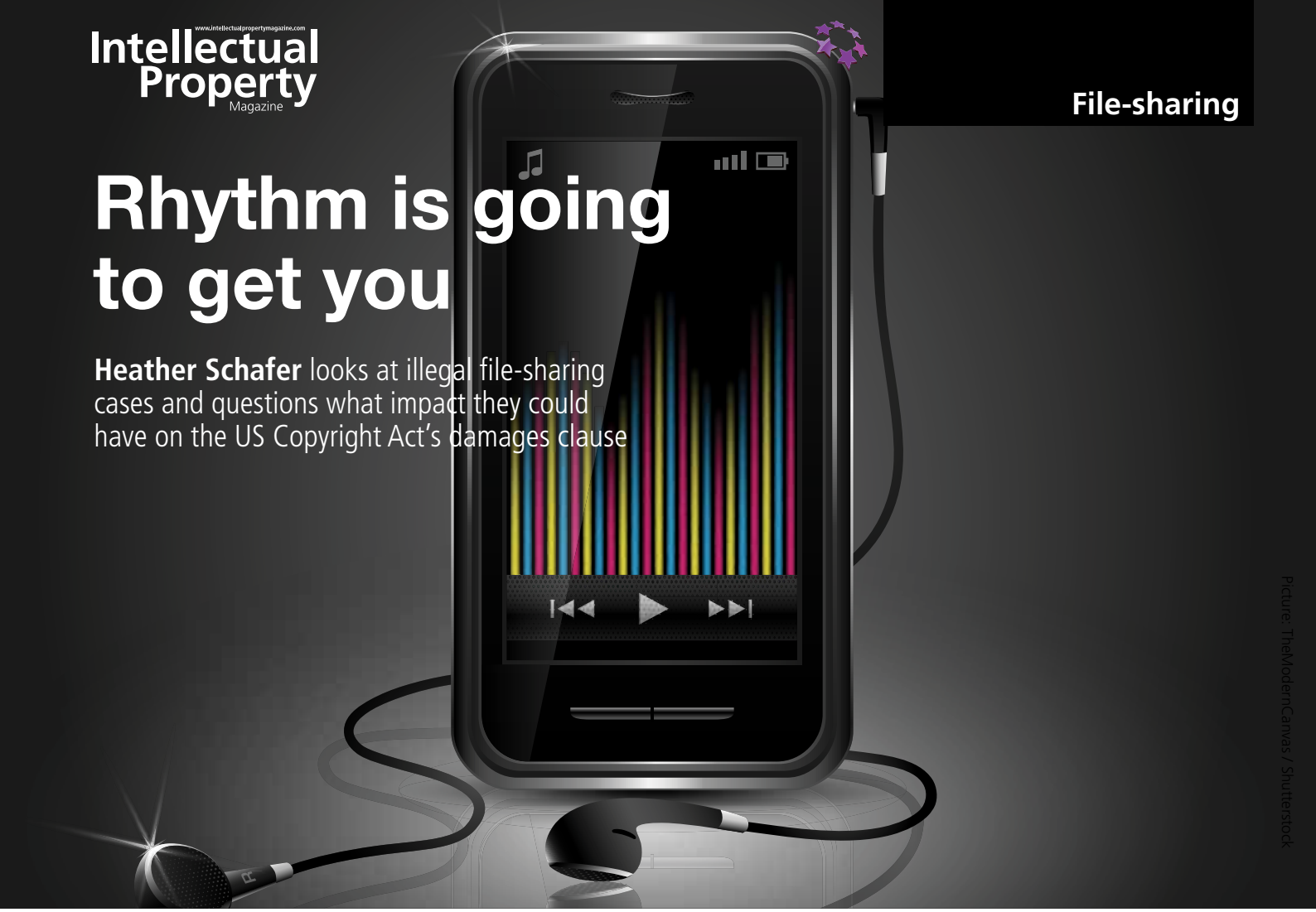
# Rhythm is going to get you

**Heather Schafer** looks at illegal file-sharing cases and questions what impact they could have on the US Copyright Act's damages clause



Picture: TheModernCanvas / Shutterstock

**Music is a universal balm for life.** Since time began, we have lauded music for its ability to communicate what words cannot articulate, to soothe tired minds and to uplift troubled souls. Communities grow and flourish around music; this has been so since the beginning of time.

The universal and almost esoteric tie between humans and music renders understandably the public outcry against the music industry illegal file-sharing cases. At the dawn of a new century, the recording industry declared war on illegal file-sharing by suing individuals. The public's shock and horror was palpable. The war has played out for over a decade. It has changed the way the publishing industry transmits everything from books and movies to music. The file-sharing phenomenon has been cited for closing down everything from movie theatres to libraries. Walking down a two-mile stretch of Michigan Avenue, US earlier this summer, I observed a scene replicated in city after city, on street after street. A gap-toothed street, three storied buildings, cavernous after being emptied of their inventories of books, music, and movies. Buildings once housing Virgin Records and Borders Books are now lifeless.

While technological change ravages the streets of US, and small bright Apple stores replace three story mammoth music stores, federal judges stagger to respond to a music industry-lodged lawsuit bonanza. At the same time, commentators question whether the US Copyright Act has the integrity to withstand the constitutional challenges raised by the file-sharing cases. A review of the case histories and judicial findings reveal good evidence that the US Copyright Act will survive unscathed due to the tools available to the judiciary to avert unconstitutional application of the Act.

## File-sharing cases

We seem most astounded by the identity of the defendants targeted by the music industry, from unsuspecting grandmothers to rowdy college kids.

Out of the illegal file-sharing wreckage, only two individuals have had their day in court. A single mother in rural Minnesota named Jammie Thomas-Rasset and Joel Tenenbaum, a doctoral student from Rhode Island. Both cases have risen to epic proportions, causing judges to raise the key word "constitutional rights" and commentators to cry for a revision of the statutory damages provision of the US Copyright Act[1].

Jammie Thomas-Rasset has been before a jury in the District of Minnesota three times. The music industry plaintiffs allege Thomas-Rasset infringed their copyrighted sound recordings by illegally downloading and distributing 24 recordings on the KAZAA peer file-sharing application. The music industry plaintiffs hold registered copyrights in the 24 songs, and their registration complies with a provision of the US Copyright Act allowing copyright owners to request "statutory damages" if they have registered their works within three months of publication, or before infringement occurred.

The US Copyright Act's statutory damages clause[2] allows a copyright owner to prove that the plaintiff infringed its registered copyright. Upon a court's finding of copyright infringement, the copyright owner can choose to seek "actual damages" – the money damages that the copyright owner can prove it actually suffered, or "statutory damages" – between $750 - $30,000 per work infringed and up to $150,000 per work infringed if the infringement was "willful".

During the first *Thomas-Rasset* trial, the jury found that Jammie had willfully infringed all 24 of the music industry sound recordings at issue[3]. Without one shred of evidence on actual harm, the jury awarded the music industry plaintiffs a whopping $9,250 for each song infringed, a total damage award of $222,000. Within a year of the trial, the court vacated the jury verdict and granted a new trial based on its conclusion that the court gave the jury improper instructions on how to levy statutory damages[4].

The second jury also found that Thomas-Rasset willfully infringed all 24 sound recordings, this time awarding a staggering $80,000 per song for a total verdict of $1,920,000[5]. Approximately six months later, the court, referring to the jury verdict as "shocking and unjust", remitted the damages award to $2,250 per song[6]. By using remittitur, the court did not have to reach the issue of the constitutionality of the damages award.

Remittitur is a procedural tool judges employ when they determine that a jury award is excessive, but want to avoid a new trial. Under remittitur, the plaintiff may either accept the reduced verdict or submit to a new trial. Trials are expensive, time consuming, and burdensome. The music industry plaintiffs (after unsuccessfully attempting to reach a side settlement with Thomas-Rasset), rejected the reduced verdict. Due to the rejection of remittitur, the case proceeded to trial for a third time on 2 November 2010.

The third jury to hear the *Thomas-Rasset* case returned a statutory damages award of $62,500 per song for a total verdict of $1,500,000[7]. Frustrated and appalled, Judge Michael J Davis of the District of Minnesota, again reduced the damages award on the grounds that the award was "constitutionally excessive[8]". Judge Davis reverted to his original reduction of $2,250 per song, for a total verdict of $54,000.

While the Thomas-Rasset case has ping-ponged its way through the Minnesota federal courts, a similar scenario has been playing out in the First Circuit and Federal Court for the District of Massachusetts. That case involves the young physics major, Joel Tenenbaum.

Last summer, the District Court for the District of Massachusetts reduced a jury's statutory damages award of $22,500 per song, for a total award of $675,000, to $2,250 per infringing work. In her opinion reducing the statutory damages award, District Judge Nancy Gertner bravely held that the jury award violated the consitution's due process clause[9]. The judge thoroughly explained the constitutional issues undergirding her holding. Her discussion included a detailed analysis of the *Thomas-Rasset* case and expressed how that case made clear the inevitability of reaching the constitutional due process issue. Judge Gertner clearly aligned with the District of Minnesota ruling by holding that $2,250 per song is the constitutional limit of what the jury could award in the case.

The parties appealed the *Tenenbaum* case to the First Circuit. In summer 2011, the First Circuit held that the District of Massachusetts prematurely reached the constitutional issue. It stated, "The court erred when it bypassed Tenenbaum's remittitur arguments based on excessiveness of the statutory damages award and reached the constitutional due process issue[10]." The First Circuit so held, even though the Massachusetts District Court carefully laid out the facts of both the *Tenenbaum* case and the *Thomas-Rasset* case as evidence of the futility of applying remittitur. In its 65-page opinion, the First Circuit detailed its reluctance to reach the constitutional due process issues, vacated the district court's due process damage ruling, reversed the reduction of the jury's statutory damages award, and returned the case to the District of Massachusetts for consideration of Tenenbaum's motion for common law remittitur based on excessiveness.

Copyright watch dogs, such as the Electronic Frontier Foundation, have been monitoring, commenting upon and instrumental in defending the file-sharing defendants. The extremely high jury awards in both cases have forced the courts to grapple with the constitutionality of the statutory damages clause of the Copyright Act. These cases beg the question, what will become of the US Copyright Act's statutory damages clause?

## Damages clause

For decades, the US Copyright Act's statutory damages clause has served to protect copyright owners. As discussed, a copyright owner who registers her or his work with the Copyright Office within three months of publication or before infringement, is relieved from having to prove actual monetary damages (which can be prohibitively expensive if not impossible) and entitled to instead recover statutory damages. The *Thomas-Rasset* and *Tenenbaum* cases illustrate an obnoxious and aberrant result of appeal to the statutory damages clause.

Throughout its history, the clause has been primarily relied upon in various cases wherein black market bootlegging (illegal) operations infringed copyright owner's rights in videos, music, and copyrighted creative works such as sculptures. The very nature of bootlegging makes it nearly impossible to assess and prove actual damages. Bootleggers tend to keep poor accounting records, move around from continent to continent and state to state. And most of the public seems to agree – they leach off of the creative works of others to catch a quick profit. In bootlegging cases, the value of statutory damages is clear – without statutory damages, there would be no method of stopping and punishing infringement. In these cases, the copyright violators damage not only copyright owners but also damage consumers who unknowingly purchase bootlegged products of poor quality.

In light of decades of copyright owner's effective use of the statutory damages clause, it seems highly unlikely that the illegal file-sharing cases, as worrying as they are, will influence the US legislature to redraft provisions of the US Copyright Act. While these cases clearly illustrate that statutory damage awards can be monstrous – they also clearly illustrate that the courts have the tools they need to keep the monstrosity in check. For example, the tool of common law remittitur based on excessiveness. It doesn't take super natural powers to predict what will happen in these cases. Regardless of how many times the cases are tried before juries, regardless of how many jury verdicts are issued, the judge is going to reduce the damage awards to what they deem the "constitutional maximum" of $2,250 per song. The only question is how long will the cases burden the courts and steal away Federal Judges valuable time before the parties to these cases decide to accept the inevitable and move on with the rest of the world in the 21st century.

**Footnotes**

1. Pamela Samuelson & Ben Scheffner, *Debate: Unconstitutionally Excessive Statutory Damage Awards in Copyright Cases*, 158 U PA L REV PENNUMBRA 53 (2009).
2. 17 USC §504(c).
3. *Virgin Records America, Inc v Jammie Thomas-Rasset*, No 06-1497, 2007 US Dist LEXIS 79585 (D Minn 1 Oct 2007).
4. *Capitol Records, Inc v Jammie Thomas-Rasset*, 579 F Supp 2d 1210 (D Minn 2008).
5. *Capitol Records, Inc v Jammie Thomas-Rasset*, No 06-1497, 79 Fed R Evid Serv 1203 (D Minn 11June 2009).
6. *Capitol Records, Inc v Thomas-Rasset*, 680 F Supp 2d 1045 (D Minn 2010).
7. *Capitol Records, Inc v Thomas-Rasset*, No 06-1497, 2010 US Dist LEXIS 109388 (D Minn 13 Oct 2010).
8. *Capital Records, Inc v Thomas-Rasset*, No 06-1497, 2011 US Dist LEXIS 85662 (D Minn 22 July 2011).
9. *Sony BMG Music Entertainment v Tenenbaum*, 721 F Supp 2d 85 (D Mass 2010).
10. *Sony BMG Music Entertainment v Tenenbaum*, Nos 10-1883, 10-1947, 10-2052, 2011 US App LEXIS 19086 (1st Cir 16 Sept 2011).

**Author**

Heather N Schafer is an intellectual property attorney residing in Chicago. Heather's practice focuses on IP protection and counseling for startups and emergent growth companies. Heather is an adjunct professor at Chicago Kent College of Law, and author of numerous treatise chapters and journal articles.