

Copyright Liability and Music ‘Piracy’: Capitol Records v Thomas-Rasset

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Peer-to-peer (P2P) file-sharing is an evergreen topic of digital copyright law. More than two decades ago various technological prerequisites —internet and the increase of its bandwidth, as well as the standardization of MP3 conversion— made it possible for a creative US college student, Shawn Fanning, to create Napster. It was the archetype —the first generation— of P2P file-sharing services. It allowed for the signing up of end-users to a system that hosted the meta data of transferable files, which were stored on the hard drives of end-users —or peers—; to search in the database of meta data hosted by Napster; to get into direct HTTP connection with any end-user who had a permanent copy of the file requested; and to transfer that file as a whole between the two peers.² At its peak, Napster had 38 million global users.³

Rightholders acted swiftly in 2000 to destroy P2P file-sharing. In the US, after ten years, numerous cases,⁴ and hundred-millions of dollars of awarded —and rarely enforceable— damages the indirect liability of P2P service providers under the contributory —including the inducement and the material contribution theories— and/or the vicarious liability standard was fully clarified.⁵

This relative slowness was generally due to the ever-developing technological framework of P2P file-sharing. Partially due its court loss in 2001, Napster was quickly replaced by newcomers who altered their technological models. Second generation services outsourced the search engines and the hosting of meta data to supernodes —end-users’ high performance computers—. In 2004, a fully decentralized, multi-party environment was launched by BitTorrent Inc.⁶ Based on this open source protocol, numerous client software were created outside of the jurisdiction of the US, which made enforcing copyright even more problematic.

The troublesome fight against P2P service providers was replaced by a new strategy already before the BitTorrent protocol was finalized. As rightholders could not destroy their enemies at their roots, they started to target the key beneficiaries of the system: end-users.⁷ The Recording Industry Association of America (RIAA) targeted tens of thousands of alleged

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² JF Buford, H Yu and EK Lua, *P2P Networking and Applications*, (Burlington, Morgan Kaufmann Publishers, 2009) 164-166.

³ LJ Gibbons, ‘Napster: The Case for the Need for a Missing Direct Infringer’ (2002) 9 *Villanova Sports & Entertainment Law Journal* 57, 61.

⁴ eg *A&M Records, Inc. v Napster, Inc.*, 239 F.3d 1004 (2001); *In re: Aimster Copyright Litigation*, 334 F.3d 643 (2003); *Metro-Goldwyn-Mayer Studios Inc. v Grokster, Ltd.*, 545 U.S. 913 (2005); *Arista Records LLC, et al., v Lime Group LLC, et al.*, 784 F.Supp.2d 313 (2011); *Columbia Pictures Industries, Inc., et al., v Gary Fung, et al.*, 710 F.3d 1020 (2013).

⁵ Introduced by *Sony Corporation of America, et al. v Universal City Studios, Inc., et al.*, 464 U.S. 417 (1984).

⁶ J. Taylor and A Harrison: *From P2P and Grids to Services on the Web - Evolving Distributed Communities*, 2nd edn (London, Springer, 2009) 227-235.

⁷ HN Kjos, Note: ‘The Statutory Damages Regime of Copyright Law: The Non-Commercial User and Capitol Records, Inc. v Thomas-Rasset’ (2010) 1 *Cybaris an Intellectual Property Law Review* 176, 177.

infringers within the frames of its ‘educational campaign’ between 2003 and 2008. The logic was pure and simple. Rightholders requested the end-users in cease-and-desist letters to stop infringing the relevant copyrights, pay an amount of damages to settle the case out-of-court, or they will be sued and they might face the obligation to pay statutory damages and cover the attorneys’ fees and the costs of the proceedings.⁸

This strategy turned out to be defective, to be modest. The vast majority of the targeted users surrendered and paid the lump sum damages. Scandals —eg, the targeting of dead grandmothers⁹ or infants¹⁰— and a handsome of brave contenders, however, directed the spotlight on the deficiencies of this enforcement strategy.

This chapter addresses the doctrinal and procedural complications of P2P file-sharing case law, and the excessive use of statutory damages against end-users. We will focus on one of those two brave —maybe bold— end-users, who did not intend —or was unable— to settle the issue out-of-court. This chapter is about the Calvary of Jammie Thomas-Rasset,¹¹ who was the first end-user to bring her case to a jury trial in a P2P file-sharing case. The other ‘notorious’ case of extreme jury award was the *Tenenbaum* saga.¹²

Thomas-Rasset infringed on the copyrights of 24 songs —although she stored another 1700 files in her computer’s shared folder—. In the three consecutive jury verdicts she was ordered to pay statutory damages for a total of \$222.000,¹³ \$1.92 million¹⁴ and \$1.5 million,¹⁵ respectively; and the Eighth Circuit had neither any problem to return to the first amount in its judgment.¹⁶ Thomas-Rasset’s case is panoply of almost all relevant procedural steps: jury trial, ordering a new trial, remittitur, constitutional due process challenge, appeal, petition for a writ of certiorari. Surely, I do not intend to mean that P2P file-sharing is a legal or acceptable model of media consumption. I cannot condone Thomas-Rasset either. There is, however, a great disproportionality between the demands of rightholders —including damages, costs and attorney fees— against individual file-sharers and the actual losses of

⁸ SB Karunaratne, ‘The Case Against Combatting BitTorrent Piracy Through Mass John Doe Copyright Infringement Lawsuits’ (2012) 111 *Michigan Law Review* 283, 286-288.; R Sanders, ‘Will Professor Nimmer’s Change of Heart on File Sharing Matter?’ (2013) 15 *Vanderbilt Journal of Entertainment and Technology Law* 857, 860.; M Sag, ‘Copyright Trolling, and Empirical Study’ (2015) 100 *Iowa Law Review* 1005, 1114.

⁹ E Bangeman, ‘I sue dead people...’, *ArsTechnica*, February 4, 2005 (www.arstechnica.com/uncategorized/2005/02/4587-2/).

¹⁰ JP Mello, ‘RIAA Settles First Lawsuit Against 12-Year-Old Brianna LaHara’, *TechNewsWorld*, September 11, 2003 (www.technewsworld.com/story/31561.html). For further harsh punishments against negligent internet users see J Tehranian, ‘Towards a Critical IP Theory: Copyright, Consecration, and Control’ (2012), *Brigham Young University Law Review* 1237, 1268-1270.

¹¹ The defendant got married and changed her name from Jammie Thomas to Jammie Thomas-Rasset before the second decision was made.

¹² There the jury awarded a total of \$675.000 for the infringement of copyrights over 30 songs. The trial court judge reduced this sum to a total of \$67.500 under the Due Process Clause. Compare to *Sony BMG Music Entertainment, et al., v Joel Tenenbaum*, 721 F.Supp.2d 85 (2010). Later, the First Circuit vacated this ruling and reinstated the original amount of damages. See *Sony BMG Music Entertainment, et al., v Joel Tenenbaum*, 660 F.3d 487 (2011). On remand, the trial court reinstated the original \$675.000 damages. See: *Sony BMG Music Entertainment, et al., v Joel Tenenbaum*, 2012 WL 3639053 (2012). On *Tenenbaum* see eg, C Hultin, ‘Remittitur and Copyright’ (2013) 28 *Berkley Technology Law Journal – Annual Review of Law and Technology* 715, 725-729.

¹³ *Capitol Records Inc., et al., v Jammie Thomas*, 579 F.Supp.2d 1210 (2008).

¹⁴ *Capitol Records Inc., et al., v Jammie Thomas-Rasset*, 680 F.Supp.2d 1045 (2010).

¹⁵ *Capitol Records Inc., et al., v Jammie Thomas-Rasset*, 799 F.Supp.2d 999 (2011).

¹⁶ *Capitol Records Inc., et al., v Jammie Thomas-Rasset*, 692 F.3d 899 (2012). The full docket of the case is available via www.courtlistener.com/docket/4765689/capitol-records-inc-v-thomas-rasset/.

rightholders due to those individuals' activities, and the mere strategy to target end-users is also clearly defective and troublesome. This chapter is dedicated to these substantial dilemmas.

The structure of the chapter is as follows. Part I introduces the procedural history of the case. Part II will analyse the focal points of the case. The chapter will end with some concluding remarks.

I. The procedural steps of Capitol Records v Thomas-Rasset

A) Take one (2007-2008)

Capitol Records and other major labels sued Thomas in 2006 for downloading and sharing 24 songs with KaZaa. Plaintiffs sought injunctive relief, statutory damages, costs and attorney fees.¹⁷ The jury trial began on 2 October 2007. Two days later, the jury found that the defendant was liable for both reproducing and distributing the recordings. The jury awarded statutory damages in the amount of \$9.250 for each infringed work—for a total verdict of \$222.000—.

Thomas immediately filed a motion for a new trial or, in the alternative, for remittitur. Shortly thereafter, an Arizona court in Howell decided that making available to the public of protected subject matter, without any evidence to the transfer of the files between the peers, is not covered by the right of distribution.¹⁸ Based on this, on 15 May 2008, Judge Davis contemplated granting a new trial on the ground of giving an erroneous jury instruction. Following the parties' briefs and various amicus curiae briefs, Judge Davis vacated the jury verdict and granted a new trial on 24 September 2008.¹⁹

Judge Davis stressed that plaintiffs had a valid claim in the infringement of the right of reproduction, and so Thomas' liability shall stand in that respect. Furthermore, Judge Davis, unlike the Howell court,²⁰ found that the collection of data about defendant's activities by plaintiffs' agent, MediaSentry, can form the factual basis of an infringement claim. The Court was convinced that the active steps of Thomas constituted a substantial participation in the infringing practices of KaZaa.²¹ Irrespective of these, the Court was uncertain whether and to what degree these circumstances affected the jury's calculation of damages.²²

On the other hand, Judge Davis refused plaintiffs' all arguments to convince the Court that the making available to the public of sound recordings fits into the right of distribution. First, Judge Davis ruled that the plain meaning of distribution per the statutory language, the secondary sources and the conflicting case law seems not to include acts that do not lead to the transfer of copies.²³ Second, the Court excluded the equalization of publication and

¹⁷ This chapter focuses on statutory damages and attorney's fees, and will omit references to injunctive reliefs.

¹⁸ *Atlantic Recording Corporation, et al., v Pamela and Jeffrey Howell*, 554 F.Supp.2d 976 (2008).

¹⁹ Upon plaintiff's recommendation, the original Jury Instruction No. 15 was formulated as follows: '[t]he act of making copyrighted sound recordings available for electronic distribution on a peer-to-peer network, without license from the copyright owners, violates the copyright owners' exclusive right of distribution, regardless of whether actual distribution has been shown'. See *Capitol Records v Thomas* (2008), 1213.

²⁰ *Atlantic v Howell* (2008), 985-986.

²¹ *Capitol Records v Thomas* (2008), 1213.

²² *ibid.*, 1216.

²³ *ibid.*, 1216-1219.

distribution.²⁴ Third, the concept of authorization was similarly interpreted to exclude the mere making available to the public. Indeed, it was found to be 'a statutory foundation for secondary liability, not a means of expanding the scope of direct infringement liability'.²⁵ Finally, the Court also sidestepped the international obligations under WCT and WPPT. Judge Davis argued that since these treaties are not self-executing, the lack of clear congressional action to regulate the making available to the public right in the US Copyright Act makes plaintiffs' reliance on the treaty language baseless.²⁶ Judge Davis stressed the unjustified — 'unprecedented and oppressive'²⁷ — nature of statutory damages against end-users, who — unlike businesses against whom statutory damages were originally introduced — are neither willing nor able to gain profits from the unauthorized uses via P2P file-sharing.²⁸

B) Take two (2009-2010)

The second trial began on 15 June 2009, and ended three days later with an even harsher verdict. This time the jurors awarded statutory damages in the amount of \$80,000 for each infringement — for a total verdict of \$1.92 million —.²⁹ Importantly, the jury instruction on the infringement of right of distribution purposefully skipped any reference to the making available to the public element.³⁰

Thomas-Rasset immediately requested the Court to either vacate the verdict as it runs against the Due Process Clause of the U.S. Constitution; or to remit or, alternatively, grant a new trial due to the jury's excessive and shocking award.³¹ In his order issued on 22 January 2010, Judge Davis decided not to discuss the last alternative. The constitutional analysis remained unnecessary as well,³² as the Court found remittitur appropriate to settle the case.³³

Judge Davis noted that statutory damages are generally designed to deter infringers and compensate rightholders at the same time.³⁴ The awarded damages shall bear some relation to the actual damages caused by the infringements.³⁵ Besides economic consequences, factors like wilfulness or innocence and incorrigibility are also relevant in this assessment.³⁶ The Court found that the jury award is simply not in line with the facts of the case. Judge Davis noted that 'despite the combination of these justifications and the Court's deference to the jury's verdict, \$2 million for stealing 24 songs for personal use is simply

²⁴ *ibid.*, 1220.

²⁵ *ibid.*, 1220.

²⁶ *ibid.*, 1226.

²⁷ *ibid.*, 1228.

²⁸ *ibid.*, 1227. On the first ruling see K Nicholds, 'The Free Jammie Movement: Is Making a File Available To Other Users Over a Peer-to-Peer Computer Network Sufficient to Infringe The Copyright Owner's 17 U.S.C. § 106(3) Distribution Right?' (2009) 78 *Fordham Law Review* 983, 983-1028.; Kjos, 'The Statutory Damages Regime of Copyright Law', 189-195.; VR McDonald, 'Stirring the Waters: Whether The Pirate Bay Case and the Thomas-Rasset Case Will Impact File Sharing and Piracy in Sweden and the United States' (2011) 20 *Transnational Law & Contemporary Problems* 564, 577.

²⁹ *Capitol Records v Thomas-Rasset* (2010), 1050.

³⁰ *Capitol Records v Thomas-Rasset* (2012), 904.

³¹ *Capitol Records v Thomas-Rasset* (2010), 1050.

³² *ibid.*, 1057.

³³ On the procedural basis for the Court's remittitur see *ibid.*, 1050-1051. On remittitur's historical and constitutional background see: Hultin, 'Remittitur and Copyright', 716-722.

³⁴ *ibid.*, 1051-1052.

³⁵ *ibid.*, 1052.

³⁶ *ibid.*, 1053.

shocking. No matter how unremorseful Thomas-Rasset may be, assessing a \$2 million award against an individual consumer for use of Kazaa is unjust'.³⁷

The Court remitted the award to \$2.250 per infringed work—for a total of \$54.000—. It is the triple of the minimum statutory damages under the Copyright Act. Although Judge Davis expressly stated that he would have favoured an even lower sum, he declared to be bound to find a maximum amount that the jury would reasonably award in light of the record of the case.³⁸ The Court based its ruling on factual and policy considerations. On the one hand, it noted that Thomas-Rasset wilfully committed the infringements, she lied on the witness stand and her activity meaningfully contributed to the recording studios' monetary losses.³⁹ As plaintiffs were allowed to apply for statutory damages, the final amount shall not be a mere multiplication of the otherwise hardly calculable actual damages. Even if the Court would try to use actual damages as the basis of calculation, the Court would fail to reach a fair conclusion in this regard. As the strongest policy reason of the ruling, Judge Davis reaffirmed that statutory damages include a deterrence component, which heavily supports the application of higher awards.⁴⁰ The Court backed its decision with a long list of statutory references, including IP norms that expressly allow for the use of treble awards as a reasonable sum of reward. Judge Davis admitted that the Copyright Act does not include any similar rule, but reaffirmed that a triple minimum award shall be the sum that a reasonable jury should award for the infringements like Thomas-Rasset's.⁴¹

C) *Take three (2010-2011)*

Plaintiffs declined the remitted award on 8 February 2010, and they exercised their right to a new trial. The third trial started on November 2, 2010 and lasted for a single day. This jury turned out to be 'less angry', but it still awarded \$62.500 per infringed work—for a total of \$1.500.000—. ⁴² This time, Thomas-Rasset decided not to request a remittitur,⁴³ but fast-forwarded to challenge the verdict under the constitutional Due Process Clause.

The parties disagreed what standard serves the basis of the consideration of the constitutionality of a statutory damages verdict. The Court sided with plaintiffs. Judge Davis decided to follow the factors of a century-old precedent of the Supreme Court,⁴⁴ and refused to apply two more recent Supreme Court rulings⁴⁵ on the constitutionality of punitive damages.⁴⁶ Under *St. Louis v Williams*, a statutory damages award complies with the Due

³⁷ *ibid.*, 1054.

³⁸ *ibid.*, 1054-1055.

³⁹ *ibid.*, 1055-1056.

⁴⁰ *ibid.*, 1056.

⁴¹ *ibid.*, 1057. On the second decision see Kjos, 'The Statutory Damages Regime of Copyright Law', 195-197.; McDonald, 'Stirring the Waters', 577.; Hultin, 'Remittitur and Copyright', 730-734.

⁴² *Capitol Records v Thomas-Rasset (2011)*, 1003.

⁴³ As plaintiffs clearly demonstrated that they would not accept any remitted award, there was no reason to request it again. Compare to Hultin, 'Remittitur and Copyright', 734.

⁴⁴ *St. Louis, Iron Mountain & Southern Railway Company v Williams*, 251 U.S. 63 (1919). See further C Morrissey, 'Behind the Music: Determining the Relevant Constitutional Standard for Statutory Damages in Copyright Infringement Lawsuits' (2010) 78 *Fordham Law Review* 3059, 3079-3080.

⁴⁵ *BMW of North America, Inc. v Ira Gore Jr.*, 517 U.S. 559 (1996) and *State Farm Mutual Automobile Insurance Co. v Campbell, et al.*, 538 U.S. 408 (2003). See further Morrissey, 'Behind the Music', 3078-3079.; Kjos, 'The Statutory Damages Regime of Copyright Law', 180-181 and 197-200.

⁴⁶ These later rulings focused on "instructed courts reviewing punitive damages to consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive

Process Clause ‘[w]hen it is considered with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates’.⁴⁷ Judge Davis found this standard applicable to this case.⁴⁸

Judge Davis took a clear position regarding the relationship of statutory and actual damages, the lack of factual support of extreme damages, the need for deterrence and Thomas-Rasset’s wilful and incorrigible behaviour in his earlier ruling in 2010. Here, he repeated his main points,⁴⁹ but also contrasted them with the applicable *St. Louis v Williams* standard. The Court found that all the three prongs of this standard are relevant. First, there is a compelling public interest to protect the copyrights of plaintiffs. Second, the defendant—as any other file-sharer—can have limitless occasions to infringe those copyrights. Third, there is a need for securing uniform adherence—or else: deterrence—in these kind of cases.⁵⁰

Nevertheless, Judge Davis found his other arguments more persuasive regarding the inapplicability of such high damages. Namely, that Thomas-Rasset was an individual consumer rather than a business infringer; her achievable goals were limited to free access to music; a multi-million dollar penalty has adverse deterrent effects; the statutory damages shall have at least some relation to actual damages; the defendant was a part of the chain of infringers, but she was only one of a multi-million community sharing hundreds of millions of files at a single time. Taking all these into account, the Court declared the \$1.5 million award appalling, offensive and obviously unreasonable, and that it runs against the Due Process Clause.⁵¹

As courts must correct unconstitutional statutory damages verdicts, Judge Davis finally had to present his arguments regarding the maximum that a reasonable jury would—should—award. Here, Judge Davis did not only find the triple of minimum statutory damages amount reasonable, but he applied generally the same arguments that he used during the consideration of the motion for remittitur in 2010.⁵²

D) *Take four* (2012)

The first instance procedure ended on July 22, 2011 – more than thousand days after the first jury trial commenced. The story did not end here, however, as the plaintiffs continued to stick to a harsher punishment of Thomas-Rasset. They timely appealed, and argued that the district court erred in granting a new trial on the making available to the public issue in the first trial,

damages awarded by the jury and the civil penalties authorized or imposed in comparable cases”. See *State Farm v Campbell* (2003), 418. Judge Davis found the first two prongs of this standard inapplicable. See *Capitol Records v Thomas-Rasset* (2011), 1004-1006.

⁴⁷ *St. Louis v Williams* (1919), 67.

⁴⁸ *Capitol Records v Thomas-Rasset* (2011), 1004.

⁴⁹ *ibid.*, 1006-1009.

⁵⁰ *ibid.*, 1009-1010.

⁵¹ *ibid.*, 1010-1011.

⁵² *ibid.*, 1011-1014. On the third decision see McDonald, ‘Stirring the Waters: Whether The Pirate Bay Case and the Thomas-Rasset Case Will Impact File Sharing and Piracy in Sweden and the United States’, 577. The most important addendum at this point was Judge Davis’ reference to the *Tenenbaum* trial court decision. Here, Judge Gertner agreed with the treble damages concept, and reduced the original award to \$2.250 per infringed work. Compare to *Sony BMG v Tenenbaum* (2010), 117. This position became less convincing, when the First Circuit vacated the ruling due to Judge Gertner’s failure to consider remittitur before discussing the Due Process Clause. Compare to *Sony BMG v Tenenbaum* (2011), 508-509. On remand, the new trial judge—Judge Zobel—found no reason to apply remittitur, and hence the original damages award was reinstated. See *Sony BMG v Tenenbaum* (2012), 2. Compare to Hultin, ‘Remittitur and Copyright’, 728-729.

and in holding that \$2.250 is the maximum statutory damages under the Due Process Clause of the Constitution.⁵³ Indeed, plaintiffs argued that the first verdict was correct. By giving up the chance for a greater award, plaintiffs' strategy was to have the Eighth Circuit rule on the making available to the public issue with a precedential effect. The Circuit Court did not meet the plaintiffs' hopes. As the panel noted:

'[t]hat the companies seek these remedies with the objective of securing a ruling on a particular legal issue does not make that legal issue itself the matter in controversy. Once the requested remedies are ordered, the desire of the companies for an opinion on the meaning of the Copyright Act, or for a statement that Thomas-Rasset violated the law by making works available, is not sufficient to maintain an Article III case or controversy'.⁵⁴

The Eighth Circuit agreed with the plaintiff's second tactical claim.

The Eighth Circuit agreed with the district court that the *St. Louis v Williams* standard governs the issue at hand, rather than Supreme Court's other rulings on punitive damages. The circuit judges, however, interpreted the same standard in a totally opposite way as Judge Davis did. First, the Eighth Circuit noted that the Copyright Act offers wide latitude of discretion in setting the proper amount of damages. The original \$9.250 award per infringed work is not only within the statutory range, but it is still closer to the minimum award rather than to the possible maximum —\$150.000— for a wilful copyright infringement.⁵⁵ Second, the public interest to reward and incentivize rightholders support the strict treatment of illicit behaviours. Third, the circuit judges expressly refused that the non-commercial nature of Thomas-Rasset's activity had any relevance in setting the final amount of damages.⁵⁶ As the panel noted, the Congress was expressly aware of the spread of non-commercial online infringements in 1999 when it last amended the statutory limits.⁵⁷ Fourth, the Eighth Circuit believed that contrary to Judge Davis' intent, the district court's triple minimum damages award *de facto* sidestepped the Congressional intent to provide for a wide latitude of discretion.⁵⁸ Fifth, the circuit judges did not agree with defendant's and Judge Davis' reliance on the 'some relation between statutory and actual damages' theory either. The Eighth Circuit agreed with the combined (compensatory and punitive) role of statutory damages, but clearly favour the punitive role. The Court found that these damages function to adjust the public wrong —intended to be punished by the Legislature— rather than the private harms.⁵⁹ Finally, the Circuit Court also disagreed with defendant's syllogism that the jury's verdict is unconstitutional because the total awards could have ended up in the two-digit millions, if plaintiffs would intend to sue for a thousand songs —rather than only 24—. The Eighth Circuit did not feel that it was its task to talk about such hypothetical calculations at this point.⁶⁰

E) Take (a quick) five (2013)

⁵³ *Capitol Records v Thomas-Rasset* (2012), 905.

⁵⁴ *ibid.*, 905-906.

⁵⁵ *ibid.*, 908.

⁵⁶ *ibid.*

⁵⁷ *ibid.*, 908-909.

⁵⁸ *ibid.*, 909.

⁵⁹ *ibid.*, 909-910.

⁶⁰ *ibid.*, 910. On the final ruling see K Rayburn, 'Capitol Records, Inc. v Thomas-Rasset 692 F.3d 899 (8th Cir. 2012)' (2012) 17 *Intellectual Property Law Bulletin* 103, 103-106.; L Gesmer, 'After Judge Zobel Slams Tenenbaum, Eighth Circuit Whacks Thomas-Rasset' (2012) *Cyberspace Lawyer* 12, 12.

Thomas-Rasset's final attempt to redress the Eighth Circuit's disadvantageous ruling remained also unsuccessful. The Supreme Court denied granting her petition for writ of certiorari on 18 March 2013.⁶¹

II. Analysis

A. Economic Rights

The first concern surrounding the Thomas-Rasset Calvary is connected to the applicable — infringed— economic right(s) of rightholders. As we have seen, the actionable nature of the making available to the public of protected subject matter remained an uncertain issue throughout the *Thomas-Rasset* case. The first verdict was vacated on Judge Davis' disbelief in this concept, and, later, during the second trial, he skipped to refer to it in the jury instructions. The lack of support of this concept is partially —but most importantly— due to the lack of transposition of the international treaty language by the U.S. Congress. The WCT and the WPPT nevertheless entered into force in the US in 2002, and – based on the 'umbrella solution'⁶² – the US is bound to shelter rightholders' interests against unauthorized online activities. Under the umbrella solution, signatories to the WCT/WPPT can freely select the applicable right to online uses – be it 'making available to the public', as the treaties coined such acts, or anything else, but at least one right shall apply.

Several federal courts have expressly refused to accept the making available to the public right,⁶³ while other courts have decided the complete opposite.⁶⁴ The Supreme Court classified Internet-based simultaneous communication of TV signals as public performance in *Aereo*.⁶⁵ Several commentators have suggested that on-demand uses can fit into both the distribution and public performance rights.⁶⁶ The then-Register of Copyright, Marybeth Peters, in her testimony before the House Subcommittee on Courts, Intellectual Property, and the Internet, stated that 'making [a work] available for other users of a peer to peer network to download (...) constitutes an infringement of the exclusive distribution right, as well as the reproduction right.'⁶⁷ Peter S. Menell, based on the historical interpretation of the US Copyright Act, reached the conclusion that the right of distribution covers making available acts as well.⁶⁸ In line with this argument, David Nimmer – by inviting Menell to rewrite the section dealing with the right of distribution – amended his treatise on US copyright law in

⁶¹ *Jammie Thomas-Rasset v Capitol Records Inc., et al.*, 568 U.S. 1229 (2013).

⁶² On the acceptance of the umbrella solution see: M Ficsor, *The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation and Implementation* (New York, Oxford University Press, 2002) 145-254.

⁶³ Besides Howell and Tenenbaum, see *London-Sire Records, Inc., et al., v Doe 1, et al.*, 542 F.Supp.2d 153 (2008), 176.

⁶⁴ *Universal City Studios Productions LLLP, et al., v Clint Bigwood*, 441 F.Supp.2d 185 (2006), 190–191; *Motown Record Co. v DePietro*, 2007 WL 576284 (2007), 3; *Warner Bros. Records, Inc., v Payne*, 2006 WL 2844415 (2006), 3.

⁶⁵ *American Broadcasting Companies, Inc., et al. v Aereo, Inc.*, 134 S.Ct. 2498 (2014).

⁶⁶ M Ficsor, 'The Spring 1997 Horace S. Manges Lecture - Copyright for the Digital Era: The WIPO "Internet" Treaties' (1997) 21 *Columbia-VLA Journal of Law & the Arts* 197, 207-214; M Schlesinger, 'Legal Issues in Peer-to-Peer File Sharing, Focusing on the Making Available Right' in A Strowel (ed), *Peer-to-Peer File Sharing and Secondary Liability in Copyright Law* (Cheltenham, Edward Elgar, 2009), 47–49.

⁶⁷ Quoted by *ibid.*, 48, note 12.

⁶⁸ PS Menell, 'In Search of Copyright's Lost Ark: Interpreting the Right to Distribute in the Internet Age' (2012) *Journal of the Copyright Society of the USA*, 201-267.

early 2012. This way, he accepted that on-demand uses can fit into the right of distribution.⁶⁹ Maria Pallante, another former Register of Copyrights, also called for the clarification of the distribution right, although she did not explicitly refer to the codification of the right of making available to the public.⁷⁰ Finally, the USCO published a report in February 2016, where the Office concluded that the existing economic rights —namely, the right of distribution and public performance— are capable of covering on-demand uses.⁷¹ Based on this quick overview, we can easily conclude that the *Thomas-Rasset* case was a step —rather than the end-point— in the process of understanding what the making available to the public right means. Currently, the most plausible interpretation is that the public performance right covers service-type uses of works and the right of distribution encompasses the transfers of digital files.

In practice, the hassle around the relevant/applicable economic right in the *Thomas-Rasset* case turned out to be remote. No doubt, relying on the making available to the public concept could have eased the plaintiffs' burden to prove end-users' infringements.⁷² Its refusal by Judge Davis could have made the defendant's chances for a lower statutory damages award greater. Nevertheless, Judge Davis continued to refer to the infringement of the right of distribution in his jury instructions in the second and third trial. At the same time, he made it also clear that plaintiffs had no meaningful evidences regarding the downloading of the respective 24 songs from Thomas-Rasset's shared folder. As such, he inadvertently made it easier for plaintiffs to reach a huge statutory damages award.

B. Procedural Hurdles

Although end-users seemed to be exposed to excessive litigations in light of the outcome of the notorious file-sharing cases and the lack of any fair use defence,⁷³ there are several reasons that their doomsday never happened. Besides numerous negative side effects, this is generally due to the problems surrounding plaintiff's burden of proof.

Evidencing any actual dissemination of illicit files by alleged file-sharers was troublesome with respect to the first and second generation of P2P services, as confirmed by the *Thomas-Rasset* case. BitTorrent, the third generation of file-sharing services, allows for a more sophisticated mechanism to exchange —pieces of— files, but it also facilitates the collection of evidences of the infringements, especially the intertwined/multi-party sharing of data segments and the seeders' IP addresses.

⁶⁹ MB Nimmer and D Nimmer, *Nimmer on Copyright* (LexisNexis, Matthew Bender, 2013) §8.11[C][4][c]. Not everyone was convinced by this conclusion. As Rick Sanders noted: '[t]his Article does not criticize Nimmer's view because it is wrong. He is not obviously or necessarily wrong, but he is not obviously or necessarily right either, and this is problematic. If his opinion were expressed in a law review article, that would be appropriate. Indeed, Menell's article, on which revised section 8.11 is based, was a stimulating shot across the bow of those who had grown comfortable with the notion that the difficult proof of actual distribution was necessary to bring file sharing to heel. But Nimmer on Copyright is a treatise. Practitioners spend considerable sums of money on treatises not to be treated to law review-like normative arguments, but rather to be told, with confidence, what the law is'. See Sanders, 'Will Professor Nimmer's Change of Heart on File Sharing Matter?', 879.

⁷⁰ MA Pallante, 'The Next Great Copyright Act' (2013) 36 *Columbia-VLA Journal of Law & the Arts* 315, 324-325.

⁷¹ U.S. Copyright Office: *The Making Available Right in the United States*, February 2016 (www.copyright.gov/docs/making_available/making-available-right.pdf).

⁷² Sanders, 'Will Professor Nimmer's Change of Heart on File Sharing Matter?', 863-864.

⁷³ *A&M v Napster* (2001), 1020-1021.; *BMG Music v Gonzalez*, 430 F.3d 888 (2005), 890; *MGM v Grokster* (2005), 963.

The identification of the actual infringers posed an extreme hurdle for plaintiffs. IP addresses on their own were not enough to prove liability. Case law is diverse in this respect, but the more convincing court decisions confirm that the reliance on an alleged infringer's IP address will not make plaintiffs' claim plausible yet.⁷⁴ As the Ninth Circuit concluded in 2018, '[t]he allegations are not "enough to raise a right to relief above a speculative level"'.⁷⁵ Identifying the actual infringer is a must for a successful claim.

The RIAA discontinued filing any new cases in 2008 against 'average' file-sharers. This was mainly due to the massive and hardly recoverable costs of proceedings.⁷⁶ Independent movie makers,⁷⁷ especially porn movie producers, have worked out a new litigation strategy. The massive or multi-defendant John Doe lawsuits were the majority of copyright lawsuits in 19 of the 92 federal districts in 2013.⁷⁸ Indeed, as Matthew Sag's empirical research evidenced, '[o]f the 3817 copyright law suits filed in 2013, over 43% were against John Does and more than three-quarters of those related to pornography'.⁷⁹

In this system, plaintiffs initiated a great bunch of file-sharers, who were originally not identified, in order to save costs. Based on BitTorrent's technological specialities, the underlying theory of such claims was to 'join' the numerous—but unidentified—defendants who formed a 'swarm' and simultaneously contributed to the sharing of protected subject matter. As the users' identity was unclear, and their connection to any alleged infringement was solely based on the visible IP addresses, plaintiffs' intent with the lawsuits was to require the courts to oblige internet service providers (ISPs) to unveil the identity of the persons behind the IP addresses. And, ultimately, rightholders hoped to stop the infringements in a single case. In reality, rightholders' main strategic goal was to force the identified end-users to settle the case out-of-court for a law-enough settlement fee, and to save dollars on the costs.⁸⁰ This theory was generally called as the 'swarm joinder theory',⁸¹ and because of this the rightholders were routinely called as copyright trolls,⁸² 'systematic opportunists'.⁸³

This strategy never prevailed, however. Many cases were either voluntarily dropped by the plaintiffs or they died on the lack of standing, on jurisdictional grounds, on the uncertainties related to the applicability of joinder to file-sharing cases or due to 'potentially abusive litigation tactics'.⁸⁴ *In re BitTorrent* is a notable example. Here, the court concluded:

'plaintiffs have improperly avoided more than \$25,000 in filing fees by employing its swarm joinder theory. (...) Nationwide, these plaintiffs have

⁷⁴ Compare to *Elf-Man LLC v Eric Cariveau, et al.*, 2014 WL 202096. On the opposite view see: *Malibu Media LLC v Kaleb Gilvin*, 2014 WL 1260110.

⁷⁵ *Cobbler Nevada, LLC v Thomas Gonzales*, 901 F.3d 1142 (2018), 1147.

⁷⁶ Sanders, 'Will Professor Nimmer's Change of Heart on File Sharing Matter?', 860-861.

⁷⁷ Voltage Pictures initiated one of the most well-known cases against 24,500 John Does. See *Voltage Pictures, LLC v Does 1-5000*, 2010 WL 4955131. This case was later voluntarily dropped.

⁷⁸ Sag, 'Copyright Trolling, and Empirical Study', 1108 and 1117-1118.

⁷⁹ *ibid.*, 1108-1109. On the excessive numbers of pornography related Doe suits see *ibid.*, 1127-1133.

⁸⁰ Karunaratne, 'The Case Against Combatting BitTorrent Piracy Through Mass John Doe Copyright Infringement Lawsuits', 284-285.; Hultin, 'Remittitur and Copyright', 738-739.; Sag, 'Copyright Trolling, and Empirical Study', 1109-1110.

⁸¹ AR Tanielian and P Kampan, 'Saving Online Copyright: Virtual Markets Need Real Intervention' (2019) 22 *The Journal of World Intellectual Property* 375, 378.

⁸² Sag, 'Copyright Trolling, and Empirical Study', 1111-1114.

⁸³ *ibid.*, 1113.

⁸⁴ See in details: Karunaratne, 'The Case Against Combatting BitTorrent Piracy Through Mass John Doe Copyright Infringement Lawsuits', 291-302.; Sag, 'Copyright Trolling, and Empirical Study', 1121-1126.

availed themselves of the resources of the court system on a scale rarely seen. It seems improper that they should profit without paying statutorily required fees'.⁸⁵

C. Statutory Damages

Rightholders might elect at any time before the final judgment is made to recover a statutorily set amount of damages for every infringed work that the rightholders duly registered at the US Copyright Office (USCO).⁸⁶ If statutory damages are elected, the rightholders are freed from the burden to prove their actual damages and the infringer's profit.⁸⁷ The judge—or jury—shall grant an award between the statutory minimum—\$750—and maximum—\$30,000—.⁸⁸ In case the infringer was not aware and had no reason to believe that his or her acts constituted an infringement, the minimum might be reduced to \$200.⁸⁹ In case of wilful infringements, the maximum award can be \$150,000 for each infringed work.⁹⁰ As a further gratis, the prevailing rightholders can also request the recovery of their full costs and reasonable attorney's fees, if the infringed works were duly registered.⁹¹

Statutory damages were historically introduced with several purposes in mind. First, to ease the difficulties of evidencing hardly calculable rightholders' losses and infringers' profits. Second, to provide for a significantly broad latitude of evaluation of facts, and so to find the most reasonable/just award for the infringement. Third, and most importantly, to compensate rightholders and deter infringers at the same time. Statutory damages were not designed to be punitive, but they have immense punitive features as well. The US Supreme Court has confirmed this complex nature in several judgments.⁹²

In *Thomas-Rasset*, all awards were nominally within the limits for a wilful infringement—\$750 and \$150,000—. The following table summarizes the proportions of the awarded damages with respect to the available minimum and maximum statutory damages, as well as to Judge Davis' nominally lowest award.

Instance	Amount per infringed work (in USD)	Multiple (of the available minimum)	Ratio (% of the available maximum)	Proportion of the lowest award to the other awards
Verdict #1	9.250	12.33	6.17	1:4.11
Verdict #2	80.000	106.67	53.33	1:35.56
Remitted	2.250	3	1.5	1:1

⁸⁵ *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80 (2012), 92

⁸⁶ USCA §412.

⁸⁷ USCA §504(b).

⁸⁸ USCA §504(c)(1).

⁸⁹ USCA §504(c)(2).

⁹⁰ *ibid.*

⁹¹ USCA §505. On the taxonomy, the historical development, the policy basis and the current regime of statutory damages see e.g. P Samuelson and T Wheatland, 'Statutory Damages in Copyright Law: A Remedy in Need of Reform' (2009) 51 *William and Mary Law Review* 441, 446-463.; J Tehranian, 'The Emperor Has No Copyright: Registration, Cultural Hierarchy, and the Myth of American Copyright Militancy' (2009) 24 *Berkeley Technology Law Journal* 1399, 1408-1412.; Morrissey, 'Behind the Music', 3064-3073.; Kjos, 'The Statutory Damages Regime of Copyright Law', 178-180.

⁹² Besides the rulings indicated in notes 44-45 above, see especially *F.W. Woolworth Co. v Contemporary Arts, Inc.*, 344 U.S. 228 (1952).

award				
Verdict #3	62.500	83.33	41.67	1:27.78
Reduced award	2.250	3	1.5	1:1
Final judgment	9.250	12.33	6.17	1:4.11

The damages awarded by the first jury and both courts remained in the lower end of the spectrum —although their proportion is 1 to 4.11—. Viewed from this perspective, the Eighth Circuit’s award does not seem to be “punitive” *per se*. To the contrary, the awards of jury #2 and #3 were in the middle third of the latitude —with proportions of 1 to 35.56 and 1 to 27.78, respectively—, and seem to exaggerate the threats of individual file-sharers, and raise concerns over the jurors’ intention to punish Thomas-Rasset. The circuit panel concluded that the total of \$222.000 represents an award in the lower end of the spectrum. As this amount represents only 6.17% of the available maximum amount, the panel’s conclusion is literally correct. Indeed, in *Tenenbaum*, the final damages per infringed work was \$22.500 – 30x of the minimum, 15% of the maximum and a 1 to 10 ratio with Judge Davis’ award. Compared to that, Thomas-Rasset seems to be lucky.

It is more problematic that some of the policy considerations that the Eighth Circuit based its conclusion on are partially flawed. First, the court’s argument regarding the significant decrease of the music industry’s incomes between 1999 and 2006⁹³ has been contested,⁹⁴ and empirical evidences suggest that the quality of outputs in the music industry has not decreased at all.⁹⁵ The Court’s conclusion has no reasonable connection to a single user’s download of 24 songs either. Neither should a single defendant be obliged to bear all the losses of rightholders, nor could anyone believe that only an excessive award could deter a user from causing further billions of losses to the music industry. No doubt, the message —of excessive damages— is for the other millions of file-sharers who were not sued in this case. But sending out such a message in a single decision shall not be the task of a court.

Second, the Eighth Circuit claimed that the Congress was aware of the negative effects of massive online infringements when it voted on the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999.⁹⁶ This claim is partially flawed. Online activities, including infringements as of 1999 were significantly different from those that Napster later triggered. The scale and the consequences of file-sharing have always been enormous, which unquestionably legitimizes law enforcement against such illicit uses. This, however, does not legitimize the excessive use of statutory damages against individual users, whose acts

⁹³ *Capitol Records v Thomas-Rasset* (2012), 908.

⁹⁴ eg, A Huygen *et al.*, *Ups and Downs - Economic and cultural effects of file sharing on music, film and games* (Delft, TNO-rapport, TNO Information and Communication Technology, 2009) (www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1350451) 83-102.; P Tschmuck, *The Economics of Music File Sharing - A Literature Overview* (Wien, Institute of Culture Management and Culture Sciences - University of Music and Performing Arts, Mimeo, 2010) (www.musikwirtschaftsforschung.files.wordpress.com/2010/06/tschmuck-the-economics-of-file-sharing-end.doc) ; J Waldfogel, *Bye, Bye? Miss American Pie? The Supply of New Recorded Music Since Napster* (Cambridge, National Bureau of Economic Research, 2011) (www.nber.org/papers/w16882).

⁹⁵ eg, J Waldfogel, ‘Copyright Protection, Technological Change, and the Quality of New Products: Evidence from Recorded Music since Napster’ (2012) 55 *The Journal of Law & Economics* 715, 715-740.; G Lunney, *Copyright’s Excess: Money and Music in the US Recording Industry* (Cambridge, Cambridge University Press, 2018).

⁹⁶ *Capitol Records v Thomas-Rasset* (2012), 908.

represent only a drop of the ocean. Indeed, end-users' behaviour has significantly changed in the last 20 years, represented best by the concept of 'sharing economy'. The social opinion on sharing protected works over the Internet is significantly different from the deterrence function of statutory damages.⁹⁷ Furthermore, it is troublesome that the current setting of statutory damages were introduced exactly in the pre-P2P era and without allowing users to raise their concerns on this matter. Heather Kjos noted that '[i]ndividual consumers cannot afford to lobby, and these individual consumers create our social norms'.⁹⁸ Likewise, William Patry observed that 'the punitive provisions of copyright laws have been on a mindless upward curve, defying both gravity and any relationship to need or purpose'.⁹⁹

Finally, the Eighth Circuit refuted Judge Davis' conclusion by claiming that 'the district court effectively imposed a treble damages limit on the \$750 minimum statutory damages award'.¹⁰⁰ I respectfully disagree with this opinion. Judge Davis expressly noted that his conclusion is based on the interpretation of the facts of the case. As such, he did not deny that higher amounts might be awarded, if the facts – especially in the BitTorrent environment – speak for that. Unlike KaZaa, where the access to unauthorized works was based on a 'peer to peer' connection, BitTorrent is designed as a 'peers to peers' system. In other words, the possible number of downloads in the BitTorrent model is much greater than in the earlier generations of P2P file-sharing. Judge Davis' logic would have allowed future judges to flexibly consider the awarding of reasonably higher damages against BitTorrent users.

It looks hardly possible to reach any consensus at this point. Both courts' conclusion has its merits and weaknesses, both fit within the statutory latitude, and can be backed by pre-existing case law. I would nevertheless argue that Judge Davis considered the relevant facts and interpreted the legal and social role of statutory damages in a more straightforward way. His arguments left a proper level playing field for rightholders. \$2,250 was still quite a lot for each infringed work; and left the recovery of attorney's fees and costs untouched. Thus, rightholders could have recovered a significant sum on a single user. No wilful infringers could have raised any legitimate defence against a sum that was 1.5% of the available maximum award. Overall awards might easily culminate to hundred thousands of dollars, but the possibility that defendants file a petition for bankruptcy might be also lower than in cases of grossly excessive damages awards. This kind of calculation could also delegitimize infringers' argument that the fear of excessive awards deprives them of a right to trial. This way the constitutional challenge of verdicts/judgments under the Due Process Clause could remain needless as well. The trial judge's position perfectly illustrated that the compensatory nature of statutory damages shall be superior to the deterrence/punitive nature of this relief. Indeed, in line with (the) Congress' initial goals, significant awards shall be reserved for exceptional cases.¹⁰¹ Damages that roll away from the actual losses of the rightholders are not reasonable or just, and most probably unconstitutional as well.¹⁰² Finally, to a certain degree, Judge Davis' more balanced approach could have foreclosed the tremendous negative

⁹⁷ On the gap between social and legal norms see especially J Tehranian, 'Infringement Nation: Copyright Reform and the Law/Norm Gap' (2007) 2007 *Utah Law Review* 537, 537-551.; S Larsson, *Metaphors an Norms – Understanding Copyright Law in a Digital Society* (Lund, Lund University, 2011).

⁹⁸ Kjos, 'The Statutory Damages Regime of Copyright Law', 177.

⁹⁹ W Patry, *How to Fix Copyright* (New York, Oxford University Press, 2011) 173.

¹⁰⁰ *Capitol Records v Thomas-Rasset* (2012), 909.

¹⁰¹ Sag, 'Copyright Trolling, and Empirical Study', 1120.

¹⁰² Samuelson and Wheatland, 'Statutory Damages in Copyright Law', 480-497. This opinion has already been expressed before the Thomas-Rasset case was started. See JC Barker, 'Grossly Excessive Penalties in the Battle Against Illegal File-sharing: The Trouble Effects of Aggregating Minimum Statutory Damages for Copyright Infringement' (2004) 83 *Texas Law Review* 525, 525-559.

externalities of the content industry's file-sharing litigation, eg, irrecoverable damages, bad public relations and growing disobedience of copyright norms.

III. Conclusion

The US Supreme Court has noted in its seminal *Grokster* ruling:

‘[w]hen a widely shared service or product is used to commit infringement, it may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory or vicarious infringement’.¹⁰³

Nevertheless, rightholders did not follow this piece of advice. Rightholders won several battles against end-users, but their campaigns were destined to death. Not only were such massive campaigns economically unfeasible, but the dogmatic loopholes and the procedural hurdles made trying individual cases difficult, and the negative externalities associated with their enforcement strategy had unforeseen and long-lasting effects.

The closure of the *Thomas-Rasset* and *Tenenbaum* cases could have easily put this part of digital copyright history *ad acta*. P2P file-sharing has, however, not disappeared; nor did the platform economy fully eliminate end-user inconveniences, eg, affordability of full repertoires, accessibility of language versions or disappearing contents. It remains timely to discuss whether the US copyright law can properly address unauthorized online activities of end-users.

Notable reform proposals were published by leading US academia,¹⁰⁴ but none of them were followed. The idea of small claims proceedings, a proposal finalized by the U.S. Copyright Office in 2013,¹⁰⁵ was finally signed into law on 27 December 2020.¹⁰⁶ The efficiency of the *CASE Act* is, however, still unknown. The maximum available damages — \$30.000 and maximum \$15.000 per infringed work— as well as the defendant's right to opt-out of the procedure might practically incentivize rightholders bring their cases against massive users to court—or settle without trial—. The *Consolidated Appropriations Act*, that included the *CASE Act*, introduced the bill on *Protect Lawful Streaming Act* as well. Streaming has undoubtedly become the primary way of media consumption. It is interesting to see that the Congress' reaction to this phenomenon was to severe criminal sanctions against unauthorized activities. It seems that rightholders' multiple defeats in the P2P file-sharing wars did not caution them to select a more reasonable strategy. They seem to return to their

¹⁰³ *MGM v Grokster* (2005), 930.

¹⁰⁴ Pamela Samuelson and Tara Wheatland stressed that ‘[a]wards of statutory damages are frequently arbitrary, inconsistent, unprincipled, and sometimes grossly excessive’. See Samuelson and Wheatland, ‘Statutory Damages in Copyright Law’, 441. They recommended to consider statutory damages in the context of other copyright remedies, and listed those principles that courts should and should not do when awarding statutory damages. See *ibid.*, 497-510. Matthew Sag recommended the lowering of statutory damages and denying the right to use joinder in P2P file-sharing cases. See Sag, ‘Copyright Trolling, and Empirical Study’, 1135-1145.

¹⁰⁵ On the preparation of the Office's report and the document itself see www.copyright.gov/docs/smallclaims/.

¹⁰⁶ E Cochrane, ND Schwartz and G Friedman, ‘Trump Signs Pandemic Relief Bill After Unemployment Aid Lapses’, *The New York Times*, 27 December 2020 (www.nytimes.com/2020/12/27/us/politics/trump-signs-pandemic-relief.html); T Key, ‘New Year, New IP Law - Protect Lawful Streaming Act, CASE Act, and Trademark Modernization Act’, *The IPKat*, 6 January 2021 (ipkitten.blogspot.com/2021/01/new-year-new-ip-law-protect-lawful.html).

old-fashioned tactics: lobbying. As it happened numerous times in the 20th and the 21st century,¹⁰⁷ they expect to resolve their problems through legislation. Bad news for them: any normative solution that disregards social realities will remain futile.

¹⁰⁷ In essence see: J Litman, *Digital Copyright* (Amherst, Prometheus Books, 2006).