

Copyright Statutory Damages: A Remedy in Need of Reform

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In many copyright infringement cases, plaintiffs will seek actual damages (e.g., lost license fees) and defendants' profits (the recoupment of which serves as a deterrent to infringement). In some situations, however, actual damages and/or defendant's profits will be difficult or expensive to prove, in which case statutory damages are available to ensure that plaintiffs are not denied monetary recovery and that defendants are not unjustly enriched. Up through the waning years of the twentieth century, this compensatory goal was considered the primary rationale for the availability of statutory damages, except in cases involving willful infringement. The Copyright Act of 1976 gives courts discretion to increase the maximum statutory damage award in cases involving willful infringement. Unfortunately, the statutory damage provision, both initially and as amended, provides a very broad range within which statutory damage awards can be made with almost no guidance for how to determine the amount which is "just" in any particular case. As a result, courts routinely impose statutory damages awards in excess of the approximate amount of actual damages. Courts are relying with increasing frequency on the rationales of punishment and deterrence in justifying these large awards. Statutory damage awards under the current regime are arbitrary and unpredictable, and can have a severe chilling effect—particularly in cases involving claims of fair use, aggregation of multiple statutory damage awards, and secondary liability.

Statutory damages in copyright law are also incongruent with the damages recoverable for infringement of other intellectual property rights under U.S. law. And the imposition of statutory damages without meaningful guidelines or limits is misaligned with international practice. Most countries do not allow for damage awards akin to U.S. statutory damages in ordinary copyright cases.

This paper will recommend several ways to work within the current legal framework to provide judges and juries with the guidance necessary to ensure statutory damage awards are tailored to a compensatory purpose, and are informed by traditional principles of punishment, deterrence, and due process. It will also propose, as a possible statutory reform, creating a separate provision for enhanced damages in cases of willful infringement, leaving the statutory damages provision to accomplish a narrower objective of achieving compensatory goals.