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An Empirical Study of Copyright Statutory Damages

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Abstract

A prominent feature in the music industry campaign against file-sharing in the early 2000's and the emergence of copyright trolls more recently, statutory damage awards are criticized for being random, excessive, and out of touch. As copyright law's statutory damage framework is slated for reform, discussions on copyright damages to date are based primarily on anecdotal evidence. This paper enriches the debate by conducting an extensive empirical study of docket entries as well as case law on copyright statutory awards.

The results identify an intriguing gap between the demand and supply of statutory awards in copyright disputes. While plaintiffs almost universally seek to recover statutory damages, courts strictly scrutinize such requests. Contrary to popular perception, courts predominantly focus on the compensatory goal of statutory damages while reserving enhanced willful damage awards to a narrow set of circumstances.

Given the restrictive treatment of willful enhanced damages in courts, the effects of willful damage claims are felt mostly in the pre-litigation stage where strategic over-claiming by copyright holders might induce settlement concessions from risk-averse defendants. This Article looks at structural causes of remedy over-claiming in copyright and provides suggestions for potential reform.

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I. Introduction

In 2008, a handful file-sharers rejected settlement offers from record companies.[1] In the ensuing litigation, a major point of contention concerned the alleged injury due to individual acts of file sharing.[2] While it is hard to estimate the impact of file sharing on entertainment industries,[3] it is even more difficult to discern the precise damage inflicted by any individual file sharer.[4] Fortunately for copyright holders, however, the Copyright Act does not require victorious plaintiffs to provide evidence of actual damages.[5] A copyright holder may elect to receive statutory damages at any time during litigation.[6] By opting to recover statutory damages in favor of actual damages, a copyright owner is relieved from having to provide evidence of harm.[7]

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[1] Although the settlement letters in P2P file sharing cases routinely claimed that courts might apply the statutory damage ceiling of $30,000 for each infringing song shared on a P2P network, this claim had never been tested in court.

[2] *See* Capitol Records, Inc. v. Thomas, 579 F. Supp. 2d 1210 (D. Minn. 2008)(holding that liability for violation of the exclusive right of distribution requires actual dissemination). Appeals court ultimately decided that dissemination could be presumed on the basis of accessibility.

[3] *Infra*, note__.

[4] In order to estimate the injury caused by a file available in a publicly accessible folder on a peer-to-peer network, one would need to gather information about (1) the amount of times that the file was downloaded by others; and (2) how many of these downloads displace legal sales. Torrent technologies further complicate matters because of the fragmented nature of all downloads. For a general explanation of the operation of P2P networks, see Tim Wu, When Code Isn't Law, 89 Va. L. Rev. 679 (2003).

[5] Beginning in 1790, the first Congress enacted the original Federal Copyright Act. The original purpose of statutory damages was to provide a minimum award to copyright owners because of the difficulty of measuring actual damages and profits. *See* Stephanie Berg, *Remedying the Statutory Damages Remedy for Secondary Copyright Infringement Liability*, 56 J. COPYRIGHT SOC'Y U.S.A. 265, 273 (2009). A fundamental underpinning of Congress's enactment of the Copyright Act of 1976 was its concern with potentially excessive statutory awards. Congress attempted to circumvent such a result via novel rhetorical explication in the 1976 Act. Pamela Samuelson, Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in need of Reform*, 51 WM. & MARY L. REV. 439 (2009). However, as Pamela Samuelson and Tara Wheatland point out, Congress didn't limit anything and only exacerbated critics' unease. *Id*. In pertinent part, Samuelson and Wheatland argue that the 1976 Copyright Act's enactment has not had the desired impact Congress anticipated with such unintended consequences recently evident in the latest statutory damage awards in P2P file sharing cases. *Id.* at 453.

[6] 17 U.S.C. § 504(c) (2009). The 1976 Act limits the availability of statutory damages to copyright holders who register their works. If an infringement was committed willfully, the court may increase the award of damages to a sum of $150,000.

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As a result, one file-sharer was ordered to $222,000 in statutory damages for sharing twenty-four songs online.[8] In another case, a jury imposed $675,000 in statutory damages for sharing thirty songs.[9] Commentators have criticized these spectacular awards as "arbitrary and capricious, fueled by speculation, and lacking in sound justification".[10] Others have defended such awards as necessary to deter infringements in the context of massive file sharing and essential to prevent willful blindness.[11]

Statutory awards loom large over any copyright dispute. Copyright infringement claims and settlement letters routinely emphasize the potential statutory award of $150,000 for each work that is found willfully infringed. Statutory damage awards can add up significantly, particularly when a defendant is accused of infringing multiple copyrighted works. This is especially acute in the context of on line infringements. Even at the statutory minimum of $750, a user of a file-sharing network faces potential statutory damage of 360,000$ when sharing forty music albums. The potential for spectacularly high aggregated statutory damage awards is most likely when involving secondary liability and digital technology. In one case involving liability for operating a file-sharing network, the plaintiff requested a statutory

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[8] The 8th Circuit Court of Appeals reinstated this amount after a second and third jury trial had set willful statutory damages at $1.92 million and $1.5 million, respectively. *See* Capitol Records, Inc., et al v. Thomas-Rasset, 692 F.3d 899, 902 (8th Cir. 2012); Capitol Records v. Thomas-Rasset, 680 F. Supp. 2d 1045 (D. Minn. 2010). *See also* David Kravetz, *Jury in RIAA Trial Slaps $2 Million Fine on Jammie Thomas*, WIRED (June 18, 2009), http://www.wired.com/2009/06/riaa-jury-slaps-2-million-fine-on-jammie-thomas/ [http://perma.cc/XE8F-RU4E].

[9] Sony BMG Music Entm't v. Joel Tenenbaum, 660 F.3d 487, 490 (1st Cir. 2011). *See* Dave Itzkoff, *Student Fined $675,000 in Downloading Case*, N.Y. TIMES (July 31, 2009, 12:34 PM), http://artsbeat.blogs.nytimes.com/2009/07/31/ judge-rules-student-is-liable-in-music-download-case/ [http://perma.cc/8P4S-53QJ].

[10] Pamela Samuelson, The Unconstitutional Excessiveness of Some Statutory Damage Awards in Peer-to-Peer File-Sharing Copyright Cases, 158 U. Pa. L. Rev. PENNumbra 53, 56 (2009). See, e.g. Pamela Samuelson & Tara Wheatland, Statutory Damages in Copyright Law: A Remedy in Need of Reform, 51 Wm. & Mary L. Rev. 439 (2009); Kate Cross, David v. Goliath: How the Record Industry is Winning Substantial Judgments Against Individuals for Illegally Downloading Music, 42 Tex. Tech L. Rev. 1031, 1038 (2010); Cam Barker, Grossly Excessive Penalties in the Battle Against Illegal File-Sharing, 83 Tex. L. Rev. 525 (2004); Anna Cronk, The Punishment Doesn't Fit the Crime – Why and How Congress Should Revise the Statutory Copyright Damages Provision for Noncommercial Infringements on Peer-to-Peer File-Sharing Networks, 39 Sw. U. L. Rev. 181, 195 (2009); See Daniel Reynolds, The RIAA Litigation War on File Sharing and Alternatives More Compatible with Public Morality, 9 Minn. J. L. Sci. & Tech. 977 (2008).

[11] Ben Sheffner, *Constitutional Limits on Copyright Statutory Damages,* 158 U. Pa. L. Rev. PENNumbra 53, 60 (2009). *See also,* Justin Hughes, ‚*How (Dis)respected Is Copyright Law?*, IP VIEWPOINTS Series, The Media Institute, Washington, D.C., 13 December 2011. Available at http://www.mediainstitute.org/IPI/2011/121311.php. (emphasizing the role of juries in setting these awards).

damages award of 75 trillion dollars.[12] Similarly, the Book Search project exposed Google to a potential liability of approximately $4.5 billion.[13]

Even if courts rarely award such monstrous statutory damage awards, the impact of the statutory damage framework on copyright practice is acute. Since settlement decisions are made in the shadow of the possible outcomes at trial,[14] Section 504(b)'s potential for large statutory damage awards provides alleged infringers with a strong incentive to settle out of court. When, for instance, the recording industry offered college students the opportunity to settle their cases for amounts ranging between $3,000 and $11,000, most of the reportedly 30,000 defendants did so without hesitation.[15] The alternative – a statutory award imposed for each infringed work as well as the litigation costs incurred to bring a defense – is dire. New enforcement companies have fully embraced this basic economic reality of statutory damages. Targeting hundreds or even thousands of copyright defendants to obtain quick settlements, copyright trolls now accounts for a substantial amount of cases in several U.S. districts.[16]

These developments have generated eye-opening newspaper headlines. Today, statutory damages have become a topic of widespread controversy.[17] Critics

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[12] Samuelson et al/ , Rarity, 12("In the LimeWire case, the plaintiffs reportedly requested an amount of statutory damages that was more than the combined GDP of the entire world"). (with reference to Sarah Jacobsson Purewal, RIAA Thinks LimeWire Owes $75 Trillion in Damages, PCWORLD (Mar. 26, 2011),

http://www.pcworld.com/article/223431/riaa_thinks_limewire_owes_75_trillion_in_damages.html.

[13] Class Action Complaint at 2, Author's Guild v. Google Inc., No. 05 CV 8136 (S.D.N.Y. Sept. 20, 2005). This is a conservative estimate based on the statutory minimum of $750 per book it scanned without permission from the copyright holder. See Samuelson & Wheatland, *supra* note ___, 490–91.

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[15] Jeff Leeds, "Labels Win Suit Against Song Sharer," New York Times, Oct. 5, 2007.

[16] In re BitTorrent Adult Film Copyright Infringement Cases, 2012 U.S. Dist. LEXIS 61447,1 (E.D.N.Y. May 1, 2012) ("These actions are part of a nationwide blizzard of civil actions brought by purveyors of pornographic films alleging copyright infringement by individuals utilizing a computer protocol known as BitTorrent."); Mathew Sag, Copyright Trolling: An Empirical Study, 100 Iowa L. Rev. 1105 (2105) ("Multi-defendant John Doe lawsuits have become the most common form of copyright litigation in several U.S. districts, and in districts such as the Northern District of Illinois, copyright litigation involving pornography accounts for more than half of new case").

[17] See, e.g., Pamela Samuelson, Phil Hill & Tara Wheatland, Statutory Damages: A Rarity in Copyright Laws Internationally, But for How Long?, 60 J. Copyright Soc'y U.S.A. 1, 2 (2013) ("Virtually all of the law review literature in the United States has criticized the U.S. statutory damage regime").

argue that the statutory framework induces opportunistic litigation, overcompensates copyright owners, and chills creativity and free speech.[18]

As Congress prepares a revision of the 1976 Copyright Act that will seek to adapt copyright law to the digital age, the current statutory damage framework has been slated for reform.[19] Barring a few exceptions, however, discussions of statutory damages in copyright law have proceeded without comprehensive, empirical analysis. We lack answers to many important questions relating to the range, frequency and determination of statutory awards. To date, academic and policy debates on copyright law's statutory damage framework have relied mostly on anecdotal evidence.

In this Article, I conduct an extensive empirical examination of statutory damages in copyright disputes. Conducting a docket study as well as an extensive case law analysis, I focus on both the demand (plaintiffs) and supply (courts) of statutory awards. Using a dataset of 10 years of copyright litigation, I first analyze statutory damages filing and outcomes. Second, of the cases that proceed to trial, I analyze the various approaches of courts under Section 504.

A number of interesting finding emerge. Overall, the results unveil a stark discrepancy between the demand for statutory damages by plaintiffs and the response by courts. Courts focus on the commentary goals of statutory damages and rarely award willful statutory damages 150,000$ for each infringed work. This gap between the demand and supply of statutory damages undermines the credibility of the claims asserted by plaintiffs in copyright disputes.

Although courts rarely honor claims for maximum statutory awards, such claims may nevertheless have a significant impact on pre-trial outcomes. Given the high range, uncertainty involved, and the media attention to outliers, the potential for statutory damage awards might induce risk-averse defendant to settle claims that they otherwise would resist. In this regard, Section 504 is a contributing factor to the wider phenomenon of over-claiming and rights accretion in copyright law.[20] Like over-

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[18] *Infra*__.

[19] Since then, front and center in discussions by the House Judiciary Committee's Subcommittee on Courts, Intellectual Property and the Internet has conducted a series of copyright review hearings listed below. See, e.g., Statement of Pamela Samuelson to Subcommittee on Courts, Intellectual Property and the Internet, Committee on the Judiciary, United States House of Representatives, 113th Congress, 1st Session Hearing on "A Case Study in Consensus Building: The Copyright Principles Project" May 16, 2013.

[20] *Infra*__.

claiming more generally, remedy over-claiming may have a chilling effect on creative processes and innovation.[21]

To combat the problems associated with statutory damages this article offers various policy recommendations targeted at reducing remedy over-claiming in copyright law: (A) the development of statutory damage guidelines, which would provide much needed clarity while reducing the opportunity to deploy statutory damages in pre-trial scare tactics. These guidelines would provide greater certainty without tying the hands of courts; (B) adopting of a groundless threat provision, whereby copyright infringement claimants face negative repercussions when invoking willful damage awards in bad faith; (C) revision of the statutory damage provisions in line with the new economic reality of the internet, thereby reducing the number of instances where statutory damage awards are out of sync with the actual harm inflicted upon copyright holders.

Although the primary focus of this study is domestic U.S. copyright law, a better understating of the impact of statutory damages is relevant also on a more global scale. While only 24 out of 177 WIPO member states currently allow recovery of statutory damages for copyright infringement, the United States continues to insist upon "exporting this extraordinary remedy to other nations through bilateral and plurilateral treaties, as well as other mechanisms".[22]

This article proceeds as follows. Part I describes statutory damages awards in the statute and in the courts. Part II describes the various ways in which statutory damage awards depart from actual injury. Part III describes the empirical study and presents the main findings. Part IV provides policy recommendations. Part V concludes.

II. Copyright Law's Tripartite Damage Framework

Copyright law has a unique remedial framework. Unlike almost all other areas of law, victims of copyright infringements do not need to show injury in order to obtain damages from a defendant.[23] Once infringement has been established, a plaintiff may elect a statutory damage award. In doing so, Section 504 of the 1976

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[21] *Infra*__.

[22] See, e.g., Pamela Samuelson, Phil Hill & Tara Wheatland, Statutory Damages: A Rarity in Copyright Laws Internationally, But for How Long?, 60 J. Copyright Soc'y U.S.A. 1, 2 (2013).

[23]

Copyright Act relieves the copyright holder from the burden to provide any evidence whatsoever of actual harm. Among developed Western democracies, the U.S. copyright law's statutory framework is unique.[24] This part first describes statutory damages in copyright law.

The Copyright Act provides the courts discretion to determine awards within statutory minimum and maximum limits as it "considers just".[25] The framework of statutory damages incorporates a three-fold structure that consists of regular, reduced, and enhanced damages. The regular standard measure applies to all instances of infringement[26] where the defendant was not innocent (lower maximum) or willful (higher minimum and maximum range).

A leading treatise describes the litigation dynamics across these categories as follows: "Predictably, the parties approach these limits from opposite poles, the plaintiff typically seeking heightened damages for willful infringement at the same time that the defendant proclaims itself to have behaved innocently and, hence, to be entitled to a downward remittitur".[27]

The analysis in Part IV provides empirical verification of the phenomena of willful damage over-claiming. This Part first describes the three main legal categories of statutory damage awards. I focus on the pertinent statutory distinctions and precedent highlighted in the existing literature on statutory damages.

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[24] Pamela Samuelson, Phil Hill & Tara Wheatland, Statutory Damages: A Rarity in Copyright Laws Internationally, But for How Long?, 60 J. Copyright Soc'y U.S.A. 1, 2 (2013) ("the United States, only five WIPO member states have both an "advanced economy" and statutory damages for copyright infringement").

[25] 17 U.S.C. § 504(c)(1).

[26] Statutory damages are barred for infringements of copyright, however, when involving unpublished works when the infringement commenced (1) prior the date of registration and for any infringement "commenced after first publication of the work and (2) before the effective date of publication, unless such registration is made within three months after the first publication of the work". 17 U.S.C. § 504.

[27] 5-14 Nimmer on Copyright § 14.04 (at p. 4 and note 38). With reference to Childress v. Taylor, 798 F. Supp. 981, 993 (S.D.N.Y. 1992).

A. Regular Statutory Awards

Section 504 enables a successful copyright plaintiff[28] to recover statutory damages instead of actual damages and profits. Article 504(c)(1) provides that a copyright owner may elect, "at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than $750 or more than $30,000 as the court considers just."[29]

The statutory defined range provides courts with substantial discretion in setting a reward between the minimum and maximum. Although the Copyright Act does not set out any further specifications or guidelines, courts have been observed to focus on two goals when setting awards. First, a court might anchor the award on the amount of actual damages and profits that the copyright holder would likely have recovered if the plaintiff had opted to receive actual damages.[30] In determining what amount of statutory damages to impose, courts may consider factors such as "the expenses saved and profits reaped by the defendants in connection with the infringements, the revenues lost by the plaintiffs as a result of the defendant's conduct".[31]

This compensatory approach to statutory damages shifts the evidentiary burdens from the plaintiff copyright holder to the court and defendant. Interestingly, however, the value added by statutory damages is rather limited here since defendants carry most of the evidentiary burden anyway when a plaintiff elects to

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[28] Need registration.

[29] Article 504 a (c) (1). See 17 U.S.C. §§ 412, 504, 505. 17 U.S.C. § 504(c)(1). See Lauratex Textile Corp. v. Allton Knitting Mills, 519 F. Supp. 730 (S.D.N.Y. 1981), where the court stated that defendant's profits ($5,177) would "provide a basis for examining an appropriate amount of statutory damages," but in view of defendant's willfulness, awarded statutory damages of $40,000. In Quinto v. Legal Times of Wash., Inc., 511 F. Supp. 579 (D.D.C. 1981), the court considered the fair market value of plaintiff's work and the amount defendants saved by copying from plaintiff, rather than writing their own work, in determining the appropriate amount, as between the minimum and maximum. In Fallaci v. New Gazette Literary Corp., 568 F. Supp. 1172 (S.D.N.Y. 1983), the court found willfulness by the defendant, and awarded as "a reasonable deterrent" the sum of $10,000, which was double the value of republication rights in plaintiff's work. See International Korwin Corp. v. Kowalczyk, 665 F. Supp. 652, 659 (N.D. Ill. 1987), aff'd, 855 F. 2d 375 (7th Cir. 1988) (awarding plaintiff three times amount it would have charged for consensual license, given that "defendants must not be able to sneer in the face of copyright owners").

[30] *Infra*__.

[31] N.A.S. Import, Corp. v. Chenson Enters., Inc., 968 F.2d 250, 252 (2d Cir.1992)).

recover actual damages. A plaintiff that seeks to obtain actual damage benefits from a statutory presumption that, unless the defendant proves otherwise, an infringer's profits are entirely attributable to the copyright infringement.[32] Statutory damages nevertheless play a role here since statutory awards can be applied to punish defendants that hide the assessment of actual damages.[33] [to be completed__discussion of factors considered by courts, as identified by leading treatises]_

Second, in setting an award within the statutory provided range, courts may also take into account whether an award will be effective in deterring future infringements, thereby preserving copyright law's goal of protecting the incentive of creators. This deterrent purpose significantly increases the discretion of courts, and the unpredictability of statutory awards.

B. Lowered Statutory Awards

Section 504 (c) (2) includes a provision that lowers the statutory damage award for "good faith" infringers that sustain the burden that they were unaware and without reason to believe that he or she was committing a copyright infringement. In such cases Section 504 (c) (2) provides court with the discretion to reduce the award of statutory damages "to a sum of not less than $200".[34]

Two elements of the innocent infringement provision are notable. First, the reduction is discretionary. A court may elect damages to the maximum amount even if the defendant is innocent.[35] Second, the burden of proving good faith rests firmly

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[32] 17 U.S.C. § 504.

[33] Curet-Velasquez v. ACEMLA de Puerto Rico, Inc., 656 F.3d 47, 100 U.S.P.Q.2d 1042 (1st Cir. 2011) (Appeals court confirmed award of the maximum statutory damages for the copyright infringements because defendant obstructed district courts efforts to assess actual damages and profits).

[34] Section 504 (c) (2). Additionally, The Copyright Act includes a teacher-librarian-broadcaster exception. Section 504 (c) (2) provides that the court will remit statutory damages in any case where an infringer "believed and had reasonable grounds for believing" that his or her use of the copyrighted work constituted fair use under section 107. This provision applies to accused infringers who (1) are employees or agents of a nonprofit educational institution, library, or archives; and (2) public broadcasting entities which, as a regular part of the nonprofit activities of a public broadcasting entity infringed by performing or transmitting a published nondramatic literary work.

[35] NFL v. Primetime 24 Joint Venture, 131 F. Supp. 2d 458, 476–477 (S.D.N.Y. 2001) (Treatise quoted). See Major League Baseball Promotion Corp. v. Colour-Tex, Inc., 729 F. Supp. 1035, 1046

on the shoulders of the defendant.[36] The defendant must not only prove that he or she made a good faith estimation of the conduct being non-infringing, but must also be reasonable in holding that belief.[37] Advice of counsel will not be sufficient to sustain innocent infringement.[38]

C. Willful Statutory Awards

Where the copyright owner sustains the burden of proving, and the court finds that infringement was committed "willfully", a court may increase the award of statutory damages.[39] Article 504 (C) (2) provides courts with the discretion to increase the award of statutory damages for willful infringements to a sum of "not more than $150,000".[40]

A leading treatise understands "willful" to mean that the defendant had the knowledge that the conduct constitutes copyright infringement.[41]

Additionally, willfulness also captures situations where an infringer exhibited reckless disregard of a copyright holder's rights, even when lacking actual knowledge

(D.N.J. 1990) (*dictum*); Los Angeles News Serv. v. Tullo, 973 F.2d 791, 800 (9th Cir. 1992) (*dictum*) (citied in Nimmer on Copyright, 51-14 $ 14.04)

[36] H. Rep., p. 163. See Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522, 1544 (S.D.N.Y. 1991) (Treatise cited); Jobete Music Co., Inc. v. Johnson Communications, Inc., 285 F. Supp. 2d 1077, 1087–1088 (S.D. Ohio 2003) (holding open possibility that album liner notes listing composition as licensed through BMI might render innocent violation of ASCAP's copyright).

[37] Childress v. Taylor, 798 F. Supp. 981, 994 (S.D.N.Y. 1992) (Treatise quoted); King Records, Inc. v. Bennett, 438 F. Supp. 2d 812, 853 (M.D. Tenn. 2006) (Treatise cited); Allen-Myland v. International Business Machs. Corp., 770 F. Supp. 1014, 1027 (E.D. Pa. 1991) (Treatise quoted). See Little Mole Music v. Spike Inv., Inc., 720 F. Supp. 751, 755 (W.D. Mo. 1989) ("mere non-deliberate infringement is not 'innocent' "); Merrill v. Bill Miller's Bar-B-Q Enters., Inc., 688 F. Supp. 1172, 1176 (W.D. Tex. 1988); Broadcast Music, Inc. v. Lyndon Lanes, Inc., 1985 Copyright L. Dec. (CCH) ¶ 25,846, 227 U.S.P.Q. (BNA) 731 (W.D. Ky. 1985).

[38] NFL v. Primetime 24 Joint Venture, 131 F. Supp. 2d 458, 470–471, 476–477 (S.D.N.Y. 2001) (defendant declined to furnish its attorney's written opinion).

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[40] Although Congress intended this designation to only apply to "exceptional cases," courts have generally interpreted "willfulness" broadly. *See* Pamela Samuelson & Tara Wheatland, *Statutory Damages In Copyright Law: A Remedy In Need of Reform*, 51 WM. & Mary L. Rev. 439, 480-491 (2009) (presenting numerous examples of arbitrary, inconsistent, and excessive statutory damage awards). The prevailing party is also entitled to recovery of their attorney's fees and costs. *See* 17 U.S.C. § 505.

[41] Hearst Corp. v. Stark, 639 F. Supp. 970, 979 (N.D. Cal. 1986) (previous two sentences of Treatise quoted). See NFL v. Primetime 24 Joint Venture, 131 F. Supp. 2d 458, 470–471, 476–477 (S.D.N.Y. 2001) (previous two sentences of Treatise quoted).

of infringement.[42] Factors that have been held to constitute reckless disregard of a copyright holder's legal interest include a past practice of infringing other works,[43], complete ignorance of a sufficiently specific[44] warning letter from plaintiff's counsel,[45] willful blindness[46], bureaucratic ineptness[47], legal mistakes in the absence of legal counsel[48],

By contrast, a defendant who has been notified that his or her conduct infringes copyrights, but who reasonably[49] and in good faith believes the contrary is not "willful".[50]

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[42] King Records, Inc. v. Bennett, 438 F. Supp. 2d 812, 852 (M.D. Tenn. 2006) (previous sentences of Treatise quoted). See ***Central Point Software v. Global Software & Accessories, 880 F. Supp. 957, 967 (E.D.N.Y. 1995)***; Worlds of Wonder, Inc. v. Vector Intercontinental, Inc., 1 U.S.P.Q.2d 1982, 1985 (N.D. Ohio 1986); Original Appalachian Artworks, Inc. v. J.F. Reichert, Inc., 658 F. Supp. 458, 464 (E.D. Pa. 1987); Reebok Int'l Ltd. v. Jemmett, 16 U.S.P.Q.2d 1764 (S.D. Cal. 1990); DC Comics Inc. v. Bobtron Int'l Inc., 17 U.S.P.Q.2d 1404, 1406 (S.D.N.Y. 1990); Ice Nine Publ'g Co. v. Barnes, 17 U.S.P.Q.2d 1963, 1965 (C.D. Ill. 1990).

[43] See Lauratex Textile Corp. v. Allton Knitting Mills, 517 F. Supp. 900 (S.D.N.Y. 1981), *later opinion*, 519 F. Supp. 730 (S.D.N.Y. 1981). Cf. Engel v. Wild Oats, Inc., 644 F. Supp. 1089, 1092 (S.D.N.Y. 1986); Columbia Pictures Indus. Inc. v. Zuniga, 38 U.S.P.Q.2d 1360, 1364 (N.D. Ill. 1995) (defendant on probation for previous violation).

[44] see King Records, Inc. v. Bennett, 438 F. Supp. 2d 812, 861–863 (M.D. Tenn. 2006) (taking issue with insufficient specificity in pre-lawsuit and post-lawsuit notices)

[45] See N.A.S. Import, Corp. v. Chenson Enters., Inc., 968 F.2d 250, 252, 253 (2d Cir. 1992) (Treatise cited). The same result inured in Dolman v. Agee, 157 F.3d 708, 711, 715 (9th Cir. 1998), when defendant acted in the face of a letter from his lawyer calling the copyright situation "a mess." But see Henley v. DeVore, 733 F. Supp. 2d 1144, 1165 (C.D. Cal. 2010) (consulting own counsel not necessary to avoid good faith faire use).

[46] Video Views, Inc. v. Studio 21, 925 F.2d 1010, 1021 (7th Cir.), *cert. denied*, ***502 U.S. 861, 112 S. Ct. 181, 116 L. Ed. 2d 143 (1991)*** ("one who undertakes a course of infringing conduct may [not] hide its head in the sand like an ostrich.")

[47] Martin v. City of Indianapolis, 192 F.3d 608, 614 (7th Cir. 1999).

[48] International Korwin Corp. v. Kowalczyk, 855 F.2d 375, 379–380 (7th Cir. 1988).

[49] Peer Int'l Corp. v. Pausa Records, Inc., 909 F.2d 1332, 1336 (9th Cir. 1990) (Treatise cited), *cert. denied*, ***498 U.S. 1109, 111 S. Ct. 1019, 112 L. Ed. 2d 1100 (1991).***

[50] Zomba Enters., Inc. v. Panorama Records, Inc., 491 F.3d 574, 584 (6th Cir. 2007) (Treatise quoted); Danjaq LLC v. Sony Corp., 263 F.3d 942, 959 (9th Cir. 2001) (Treatise quoted); Princeton Univ. Press v. Michigan Doc. Servs., Inc., 99 F.3d 1381, 1392 (6th Cir. 1996 (*en banc*) (Treatise quoted), *cert. denied*, ***520 U.S. 1156, 117 S. Ct. 1336, 137 L. Ed. 2d 495 (1997)***; Henley v. DeVore, 733 F. Supp. 2d 1144, 1164 (C.D. Cal. 2010) (Treatise quoted); Wow & Flutter Music v. Len's Tom Jones Tavern, Inc., 606 F. Supp. 554, 556 (W.D.N.Y. 1985) (Treatise quoted); Hearst Corp. v. Stark, 639 F. Supp. 970, 980 (N.D. Cal. 1986) (Treatise quoted); RCA/Ariola Int'l, Inc. v. Thomas & Grayston Co., 845

For instance, when a fair use decision is a close call, not uncommon in any copyright disputes,[51] willfulness may be negated.[52]

III. Statutory Damage Awards in Theory

A. The Injury-Award Gap

As the summary in Part II above describes, Section 504 of the Copyright Act eliminates the evidentiary burden of plaintiff-copyright holders. The underlying assumption is that it may often be very difficult for a copyright plaintiff to provide evidence of harm.[53] The file sharing litigation is a recent example. When an infringer

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F.2d 773, 779 (8th Cir. 1988) (previous five sentences of Treatise quoted). See Lyons Partnership, L.P. v. Morris Costumes, Inc., 243 F.3d 789, 799–800 (4th Cir. 2001) (receipt of cease-and-desist letter does not make defendant willful); Blendingwell Music, Inc. v. Moor-Law, Inc., 612 F. Supp. 474, 486 n.18 (D. Del. 1985) (willfulness requires more than knowledge of infringement; issue of fact exists whether defendant believed plaintiffs' alleged antitrust violation justified his conduct and thereby relieved him of willfulness). See also Kamar Int'l, Inc. v. Russ Berrie & Co., 752 F.2d 1326, 1331 (9th Cir. 1984) (defining different levels of willfulness under 1909 Act), *later opinion*, 829 F.2d 783 (9th Cir. 1987).

[51] It si conventional wisdom in the academic literature that fair us eis hard to predict. The doctrine of fair use has been under attack for at least seventy years. See Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661, 662 (2d Cir. 1939) (per curiam) (referring to fair use doctrine as "the most troublesome in the whole law of copyright"); Michael W. Carroll, Fixing Fair Use, 85 N.C. L. Rev 1087, 1095 (2007); see also 2 Paul Goldstein, Goldstein on Copyright § 12.1, at 12:3 (3d ed. 2005) ("No copyright doctrine is less determinate than fair use."); Darren Hudson Hick, Mystery and Misdirection: Some Problems of Fair Use and Users' Rights, 56 J. Copyright Soc'y U.S.A. 485, 497 (2009) ("[T]he fair use doctrine provides us with very little direction in making legal or ethical decisions."); Gideon Parchomovsky & Kevin A. Goldman, Fair Use Harbors, 93 Va. L. Rev. 1483, 1491 (2007) ("[T]he vagueness of the fair use doctrine undermines its utility, upsets copyright's balance, and leads to the underuse of protected expression."); Pierre N. Leval, Commentaries, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1106–07 (1990) ("Judges do not share a consensus on the meaning of fair use.").

[52] 99 F.3d 1381, 1392 (6th Cir. 1996), *cert. denied*, ***520 U.S. 1156, 117 S. Ct. 1336, 137 L. Ed. 2d 495 (1997)***. (given five dissenting votes on the *en banc* denial of fair use, the court held that defendant's belief that their copying constituted fair use was unreasonable and willfulness).

[53] Goldstein, Copyright Law, $14.2, at 14:42 ("The rationale commonly given for statutory damages is that because actual damages are so often difficult to prove, only the promise of a statutory award will induce copyright owners to invest in and enforce their copyright") with reference to F.W. Woolworth Co. v. Contemporary Arts, 344 U.S. 228, 232 (73 S.Ct. 222, 97 L.Ed. 276) ("Few bodies of law would be more difficult to reduce to a short and simple formula than that which determines the measure of damage recoverable for actionable wrongs. The necessary flexibility to do justice in the

makes available a music file for download by other users on a peer to peer network (P2P), it is hard for a plaintiff to show how many times the file has actually been downloaded there. And even if a plaintiff were to demonstrate how many times a file had been downloaded from an individual defendant, the intractable question of actual injury arises: how many of those downloads displaced actual sales that would have taken place if the file had not been made available by the infringer?[54] Such difficult questions of attribution arise also outside the context of technological complications. For instance, when the popular band Green Day uses a video in the background of its stage performance during a live tour without permission of the author, how much of its concert revenue is attributable to the infringed copyright of public display?[55]

The difficulty in proving actual damages convinced Congress that the promise of a statutory award is necessary to enable copyright holders to enforce their rights in ways that will provide a deterrent to potential infringers. The conventional wisdom is that plaintiffs, after successfully demonstrating infringement, face significant expense in proving harm with the risk of, due to the intricate difficulties of attribution, would recover only nominal damages.[56] In most small claim disputes then, the evidence burden might turn many legitimate copyright infringement negative value suits. Due to the difficulties of providing evidence of actual damages, the costs of proving injury

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variety of situations which copyright cases present can be achieved only by exercise of the wide judicial discretion within limited amounts conferred by this statute. ") and Douglas v. Cunningham, 294 U.S. 207, 209 (1935) ("In many cases, plaintiffs, though proving infringement, were able to recover only nominal damages, in spite of the fact that preparation and trial of the case imposed substantial expense and inconvenience. The ineffectiveness of the remedy encouraged willful and deliberate infringement.") But *see* Samuelson & Wheatland, 502 (questioning this default assumption and recommending that parties "offer proof of damages and profits, or, in the alternative, to demonstrate why damages or profits are sufficiently difficult to prove that it is justifiable to offer no such proof.")

[54] For an overview of the available empirical evidence, *see* Stan Liebowitz, Economists Examine File Sharing and Music Sales, in Industrial Organization and the Digital Economy 145 (Gerhard Illing and Martin Peitz, eds., 2006). Most studies establish a negative impact of P2P activities on music sales. See, e.g., Stan Liebowitz, File Sharing: Creative Destruction or Just Plain Destruction?, 49 J. L. & Econ. 1 (2006) (presenting evidence that file sharing diminishes recording industry revenues). A few studies find, however, that file sharing has a positive impact on music industry sales. See, e.g., Felix Oberholzer & Koleman Strumpf, The Effect of File Sharing on Record Sales: An Empirical Analysis, 115 J. Pol. Econ. 1 (2007.

[55] *Seltzer v. Green Day, Inc.*,. 725 F.3d 1170 (9th Cir. 2013) (court ultimately found fair use because video had transformed the original photos).

[56] *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935) ("…the old law was unsatisfactory. In many cases plaintiffs, though proving infringement, were able to only nominal damages, in spite of the fact that preparation and trial of the case imposed substantial expense and inconvenience. The ineffectiveness of the remedy encouraged willful and deliberate infringement.")

might outweigh the actual harm in a large amount of smaller claim copyright disputes. As a result, copyright holders in small claim disputes do not have a financial incentive to bring suit. For these reasons the accepted wisdom is that, without statutory damages, too many infringements might go un-enforced, which threatens to erode the very incentives to create that the Copyright Act seeks to protect.

By alleviating the burden on copyright owners to establish actual damages, however, copyright law detaches the damage award from the actual harm incurred by the copyright holder. As a matter of law "no connection is required between actual and statutory damages".[57] By going down this road, statutory damages may either under- or over-compensate copyright holders.

B. Under-compensation

The remedy for a plaintiff in a copyright infringement suit is likely to be under-compensatory when a defendant earned little or any profits from infringement. A leading treatise observes that in such circumstances about 1/3 prevailing copyright owners requested and received the statutory minimum of $750.[58] Although higher than what the copyright owner would net when incurring the expense of proving actual harm, this minimum award is likely below the standard licensee fee for most copyrighted work. The potential for under-compensation is compounded further when the infringer committed *multiple* infringements of the *same* work. Although repeated infringement may have cost the plaintiff multiple sales, Section 504 provides a statutory damage award for each infringed work only.

In such *multiple infringement* cases, the copyright holder's comparable license is the statutory award over the number of times the infringer used the work without permission. Compensation is likely to be very modest when the lack of profits by the infringer or a lack of other evidence keeps the statutory award close to the statutory minimum of $750.

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[57] *Supra*__.

[58] Goldstein (review of nineteen cases in the Second, Seventh and Ninth Circuits in 2000-2009 period).

C. Over-compensation

On the other range of the spectrum, statutory damages are likely to over-compensate a copyright holder in at least two instances.

First, over-compensation is most likely when involving *multiple work* infringements. When a single infringer committed a copyright infringement involving multiple works, Section 504 provides statutory award for *each* infringing work. The Copyright Act of 1976 made these large monetary awards possible by changing the calculation of awards from "per infringement" to "per infringed work".[59] This multiplication effect can drive up the total statutory award even when the total harm involved might be modest – for instance, when the defendant has not distributed the various infringing works widely. The cumulative effect of this statutory provision can be imposing. [insert examples]. Such large damage amounts have been criticized as being punitive in nature, in violation of constitutional due process principles [complete discussion].

Second, Section 504's deterrent goal is likely to further widen the gap between the injuries suffered by the plaintiff and the damage leveled of the defendant. The Copyright Act's statutory damage framework aspires to compensate as well as deter. For the purpose of generating deterrence, it is well understood that actual damages will need to be enhanced. Such multiplication is necessary to deter a plaintiff from doing such acts in the future (specific deterrence), while also hopefully deterring others from similar infringing actions (general deterrence). From an economic perspective, multiplication of the actual damage in required to offset the less than perfect probability of apprehension. If the certainty of a sanction is lower than 100%, merely awarding harm and profits will leave the acts at positive expected value. In other words, the infringing act is not rendered unattractive. This is why willful damages foresee a much wider maximum ceiling – at 150,000 per infringed works. By its very nature, the deterrent purpose of statutory damages entails a degree of over-compensation.

A third reason why statutory awards might be over-compensatory is related to the fact that the recovery of statutory damages is entirely at a copyright owner's discretion. The copyright owner can opt for statutory damages at any time before final judgment is rendered.[60] Since the decision to apply statutory damages is the

[59] See infra__.

[60] But also after final judgment I factual damages is vacated. Obeler v. Goldin, 2nd cir

exclusive prerogative of the copyright holder, a rational copyright holder can be expected to elect statutory damages when the likely benefits of doing so exceed actual harm. Specifically, whenever the actual harm is lower than the actual harm (minus the costs of providing evidence), a plaintiff is likely to opt for statutory damages. Whether the exclusive selection of statutory awards by plaintiffs can be expected to increase the gap between actual injury and compensable award will depend on the relative ratio of under versus over-compensatory cases.

* * *

As the discussion above illustrates, the overall effect of statutory damages is theoretically ambiguous. The public perception, however, is more on-sided. It is commonly understood that statutory damages have set the path for excessive court awards in copyright law, as highlighted by the spectacular awards in the file sharing litigation and a few major intermediary liability infringement disputes. Accordingly, the shadow of these cases looms large over individual defendants, prompting generous settlement concessions by risk-averse defendants[61]; as capitalized upon by copyright trolls and other new enforcements business models. Although these assumptions figure prominently in discussions involving potential reform of statutory damages in the next great Copyright Act, they have never been tested rigorously.[62]

[61] In light of the potential costs imposed by the statutory damages regime of the Copyright Act (see 17 U.S.C. § 504) many persons accused of infringement choose to settle rather than litigate, even if they believe a plaintiff's claim to be without merit. On the asymmetric effect of uncertainty in copyright law, see James Gibson, Risk Aversion and Rights Accretion in Intellectual Property Law, 116 Yale L J 882 (2007) (risk aversion and user caution create licensing customs that reduce the perceived scope of permissible uses). Chilling effect on investments on investments in innovative technologies that provide products and services that involve copyrighted content. Michael Carrier, Copyright and Innovation: The Untold Story, 2013 WISCONSIN L. REV. 891.

[62] The call for reform of statutory damages has been made from various front, including judges, academics, public interest organizations, and the Copyright Office itself. See, e.g., David Sohn, Copyright Office Calls for Major Reforms To Copyright Law, Cdt, March 21, 2013; Maria A. Pallante, The Next Great Copyright Act, 36 (3) COLUMBIA JOURNAL OF LAW & THE ARTS, 315, at 329 (2013) ("there may be plenty to do on the edges, including providing guidance to the courts (e.g., in considering whether exponential awards against individuals for the infringement of large numbers of works should bear a relationship to the actual harm or profit involved"); Pamela Samuelson, et al., The Copyright Principles Project: Directions for Reform, 25 BERKELEY TECH. L.J. 1175, 1180 (2010); Sony BMG Music Entm't v. Tenenbaum, 660 F.3d 487, 490 (1st Cir. 2011), cert. denied, 132 S.Ct. 2431

Despite the controversy, systematic, comprehensive information on statutory damage awards is far and few. We currently lack answers on a number of important questions. First, where do courts set the statutory damage award within the statutory minimum and maximum range and on what basis? Although there are no formal guidelines, can a predictable set of factors be distilled from the case law? Second, when there is no evidence of injury to the defendant, when and how do courts determine statutory awards? Third, when and how do courts mediate the compensatory and deterrent purposes of statutory damages? Fourth, what definition(s) of willfulness do court employ when assigning enhanced statutory awards?

IV. Statutory Damage Awards in Practice – Docket Study

This Article examines the demand for and supply of statutory damage awards on the basis of an analysis of a random selection of almost 1,000 copyright disputes over a three-year period. This Part first explores docket and court records. Part V codes the case from the disputes contained in the docket study, in order to examine the pertinent definitions and variables employed by plaintiffs, defendant and courts on copyright remedies.

A. Dataset

The docket study presented in this Part is based on a publicly available database containing docket entries, complaints and other documents of almost one thousand copyright disputes in the period during January 1, 2005 to December 31, 2008.[63] The list of cases was populated by a search of all cases filed in federal courts from January 1, 2005 to December 31, 2008 for which the "Nature of Suit" is Copyright. The final list of cases in the database contains a random selection of 957

(2012) (noting that Congress might wish to examine the application of the Copyright Act regarding statutory damages); Public Knowledge, Principles for a Balanced Copyright Policy 1, May 21 (2012)("The United States should reexamine and reform its current system of statutory damages, taking into account the current state of technology and consumer uses, as well as specific circumstances that might call for mitigating damages"). Available at https://www.publicknowledge.org/documents/principles-for-a-balanced-copyright-policy.

[63] COPYRIGHTL.DATA:COPYRIGHTLITIG.DATAPROJECT,http://www.copyrightlaw data.com.

out of 17,119 cases.[64] The docket database contains 46 coded fields and 125 different variables on the copyright disputes in that period.[65] The dataset was made available in by the Copyright Litigation project in order to provide a general topography of copyright litigation.[66]

It is helpful to summarize a few general observations about the cases in the dataset deserve attention. In their analysis of the database, Contropia and Gibson observe that (1) "the Central District of California and Southern District of New York are "hot districts" for copyright cases",[67] (2) copyright cases are "no more likely to get contentious than other civil litigation, when they do get contentious, they get very contentious—resulting in significantly more docket entries, substantive rulings, and trials", (3) copyright dockets contain a remarkable number of (successful) small firms and "low-IP" industries.[68] Where pertinent, the analysis below will take into account these particularities of copyright litigation. Additionally, the results will distinguish between "regular" and "peer to peer" (P2P) cases. Separating both types of cases is important since the flood of P2P litigation in the 2005-2008 tome period has several unique facets, including the use of statutory damages.

Although the focus of this study is on litigation, the vast majority of copyright disputes are resolved by way of licenses and private settlements. Conventional wisdom is of course that knowledge about litigation patterns is important since private bargaining is shaped by the expected outcome at trial.[69] As will be discussed in more detail below, however, one important question raised by the docket study below is how the demands by plaintiffs may influence settlement patterns, independently from the actual outcomes in courts. In light of the actual case outcomes, plaintiffs engage in consistent over-claiming. Although willful statutory damages are awarded only in a very narrow set of circumstances, the potential for high awards might induce settlement concessions by risk averse defendants, also because information about statutory damage award patterns are not readily available.

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[64] Of those 957 cases, 294 were filed in 2005, 267 were filed in 2006, 206 were filed in 2007, and 190 were filed in 2008. See__.

[65] A separate, additional coding of the verdicts project conducted for and reported in Part V.

[66] This description was published in ___.

[67] However "the data indicate that cases in those districts are less likely to result in a plaintiff win" C&G.

[68] Infra__.

[69] On the conventional wisdom that individuals bargain within the expected outcome at trial, see Shavell, etc__.

One of the aims of the studies below is to bridge the gap between the public perception of statutory damage and the actual treatment of statutory damage requests by courts.

This Part summarizes the raw, descriptive information gathered from the complaints and dockets. The following two sections describe remedy pleadings (B) and case outcomes (C). I further distinguish across the size of the parties, copyright industries and the substantive areas of contention in copyright law. Part V looks behind the docket entries to examine the precedents set out in the case law.

B. Pleadings

The first table below contains the remedy sought by plaintiffs in copyright disputes. Per conventional wisdom, injunctions are commonplace in copyright disputes. Copyright holders seek to enjoin copyright infringements in all but a few cases (96.34%). Additionally, copyright plaintiffs plead enhanced statutory damages in an almost 70% of all disputes. By contrast, plaintiffs elect recovery of actual damages in less than 19% of disputes.

<table>
<tr><td rowspan="4">Damages</td><td>Statutory Damages - Enhanced</td><td>67.71%</td></tr>
<tr><td>Actual Damages</td><td>18.54%</td></tr>
<tr><td>Statutory Damages - Regular</td><td>5.48%</td></tr>
<tr><td>None</td><td>6.27%</td></tr>
<tr><td colspan="2">Injunction Pleaded</td><td>96.34%</td></tr>
</table>

Table 1. Remedy Pleadings (n=383)

The next few tables parse out the data further, distinguishing across different types of copyright plaintiffs. I first turn to the size of the parties in the dispute. The Copyright Litigation database contains three categories of disputants: Fortune 1000

companies (and subsidiaries), individuals (including Does), and small firms (any party that did not fall into one of the other two categories). [70]

As to types of plaintiffs and remedy pursued, the results reveal a clear distinction between commonplace and P2P litigation. In the 2005-2008 period, Fortune 1000 companies elected statutory damages in 89% of all claims (563 out of 627 cases). Further analysis reveals that 512 of these cases consist of P2P cases. When removing all P2P litigation from the sample (Table 3 below), F1000 companies elect statutory damages in 44% of cases (51 out of 115). Looking at commonplace litigation exclusively, small firms most frequently likely plead statutory damages, in 70% of cases (175 out of 248 cases). These findings confirm that statutory damages were a core component of file-sharing litigation campaign, finding their way to dockets 563 times in this three-year period. Additionally, the results confirm the conventional economic understanding that (for perhaps more minor infringements) and smaller plaintiffs are more likely drawn to statutory damages, in order to avoid the evidentiary burden of proving actual damages. Small firm elect statutory damages in 75% of all claims. Overall, willful statutory damages are elected a majority of all copyright cases. Even when taking out of consideration P2P cases,[71]60% of all claimants plead willful statutory damages.

[70] A general observation from the sample is that small firms dominate as plaintiffs in copyright litigation (64.23%). Individuals (21.41%) and Fortune 1000 companies (14.36%) are less dominant as plaintiffs. See_C&G_ Note also that authors of the copyrighted work are the plaintiff in the vast majority of cases (81.72%). ("This suggest that if "copyright troll" are active during this period, their activities do not show up on docket entries. On the defendant side of the caption, smaller firms dominated even more than they did as plaintiffs; they constituted the largest defendant 72.06% of the time. Fortune 1000 companies were a distant second, at 14.62% (which means they tend to be sued as often as they sue). Individuals placed third, at 13.32%, even though Doe defendants were coded as individuals.") C&G.

[71] 81%

Plead	F1000	Individual	Small Firm	Total
Statutory -- Willful	563 (89%)	41 (50%)	175 (70%)	779 (81%)
Statutory -- Regular	61 (9.7%)	9 (10.9%)	13 (5.2%)	83 (8.6%)
Actual Damages	2 (0.3%)	22 (26.9%)	47 (18.9%)	71 (7.4%)
None	1 (0.15%)	10 (12%)	13 (5.2%)	24 (2.5%)
Total	**627 (65.5%)**	**82 (8.6%)**	**248 (25.9%)**	**957**

Table 2. Plaintiff Claims – All Cases

Plead	F1000	Individual	Small Firm	Total
Statutory -- Willful	51 (44.3%)	41 (50%)	175 (70.6%)	267 (60%)
Statutory -- Regular	61 (53%)	9 (11%)	13 (5.2%)	83 (18.7%)
Actual Damages	2 (1.7%)	22 (26.8%)	47 (19%)	71 (16%)
None	1 (0.9%)	10 (12.2%)	13 (5.2%)	24 (5.4%)
Total	**115 (25.8%)**	**82 (18.4%)**	**248 (55.7%)**	**445**

Table 3. Plaintiff Claims – Commonplace Cases

On the other side of the coin, small firm defendants disproportionally face claims for statutory willful damages (72.6%). Individual defendants and F1000 companies evenly split the remaining cases (12.7% and 14.6%, respectively).[72]

[72] See Table 4 below.

Size of Defendant	Statutory -- Willful	Statutory -- Regular	Actual Damages	None	Total
F1000	39 (14.6%)	4 (4.8%)	13 (18.3%)		56 (12.5%)
Individual	34 (12.7%)	12 (14.4%)	5 (7%)	9 (37.5%)	60 (13.4%)
Small Firm	194 (72.6%)	67 (80.7%)	50 (70.4%)	15 (62.5%)	329 (73.9%)
Total	**267**	**83**	**71**	**24**	**445**

Table 4. **Type of Defendants – Commonplace Cases**

Next we turn examine difference across copyright industries in Table 5 below. Although the cases database contained in the dataset are relatively evenly split across industries,[73] especially plaintiffs in fashion industry litigation elected willful statutory damages as the preferred remedy.

Industry	Statutory Willful	Statutory Regular	Actual Damages
Advertising and Marketing	6		2
Apparel/Fashion/Textiles	42	2	5
Architecture	25	1	8
Commercial Art	23	3	4
Film and TV	27		7
Fine Arts	3		2
Individual			2
Industrial Design	13	1	13
Music	30	63	4
Other -- Misc.	15	2	3
Other -- Professional, Scientific, and Technical Services	11	2	5
Other -- Retail/Wholesale/Durable Goods	7		4

[73] C&G (Although some industry associated with low IP protection (including fashion) show up strongly on the dockets " no one industry dominated; the most litigious industry was Apparel/Fashion/Textiles, clocking in at 13.58%").

Performing Arts	2	1	
Public Sector	1		
Publishing	24	5	5
Software -- Other	35	3	7
Software -- Video Games	3		
	267	83	71

Table 5. Remedy Pursued – Per Industry

Finally, Table 6 below separates the various copyright infringement claims into § 106 subsection subject matter areas and links those claims to the remedy pursued in each case. The major findings can be summarized as follows. First, the three most frequent claims in copyright litigation (unauthorized reproductions - 87.99% of cases; unauthorized distribution - 73.89% and unauthorized derivative works - 36.81%), most commonly plead willful statutory damages. About 70-76% of plaintiffs in cases involving these claims request that enhanced, willful statutory awards are granted. Second, allegations based on public performance infringements, show a reverse ratio of willful to regular statutory damages pleadings. While 64% of plaintiffs request regular statutory damages, only 26% plaintiffs claim willful statutory awards. Third, for claims outside of Section §106, claims of secondary liability (26.63%) a more evenly distributed pattern across willful (48%) and regular statutory damages (40%) emerges.74 Despite these variations across statutory categories, the basic finding and consistent finding is that across all copyright infringement claims plaintiffs, statutory damages (willful and regular) are a de facto default for plaintiffs, accounting for 8_% of all pleadings in the database.

[74] Other claims out of Section 106 were quite uncommon: both claims on the Digital Millennium Copyright Act (4.70%) as well as the Visual Artists Rights Act claims were infrequent (1.31%).

Type of Claim	Stat - Willful	Stat - Reg	Actual	None	N
106(1) Reproduction	71.22%	5.34%	19.58%	3.86%	337
106(2) Adaptation	70.92%	4.96%	21.28%	2.84%	141
106(3) Distribution	76.06%	4.58%	17.25%	2.11%	284
106(4) Public Performance	26.32%	64.21%	9.47%	-	95
106(5) Public Display	69.32%	6.82%	21.59%	2.27%	88
106(6) Digital Audio Trans	100%	-	-	-	1
Secondary	48.78%	40.24%	10.37%	0.61%	164
106A VARA	100%	-	-	-	5
DMCA 512, 1201 & 1202	50%	11.11%	38.89%	0%	18

Table 6. Damage Pleading – Type of © Claim

C. Case Outcomes

Next, we analyze the remainder of the docket entries to obtain information regarding the course and outcome of copyright litigation.

A number of general observations from the sample of litigated disputes deserve attention. First, a general observation is that defendant in copyright litigation are relatively passive. Defendants responded in only slightly over half of commonplace cases (57.70% or 221 cases). Only 23.24% (89) of responses included counterclaims or cross-claims. Dispositive motions (motions that if successful would terminate one or more copyright claims, excluding motions for default judgment by the plaintiff) were filed (in only 33 cases of the 162 cases with no answer filed. The remaining 33.68% (129 cases) commonplace cases lack a defensive action by the defendant, suggesting possible consent to judgment or settlement. Second, as commonplace disputes moved toward termination, at least one party filed a dispositive motion 45.93% of the time. Third, most of the disputes in the sample

(80.16%) terminated voluntarily following a settlement, agreed judgment, or voluntary dismissal. Very few cases terminated via trial (2.87%) or by dispositive motion (10.97%). Fourth, of the minority of commonplace cases (16.18%) that were decided on the basis of an adversarial judgment defendants were victorious just over half of times (54.10%) while plaintiff bested defendants less than half of the time (45.90%).

Turning to analyze the role of remedies in copyright litigation, it is notable that when non-P2P cases terminated, only a minority of cases resulted in a damage or injunctive remedy granted by the court. Of course, this is in line with expectations since most cases terminated through action of the parties. Injunctions were granted in in 22.02% (83) of the cases, the vast majority (53 of 83 cases) resulting from an agreed judgment between the parties.

Differentiating across damage remedies, just 1.78% of non-P2P cases terminated with a grant of enhanced statutory damages. Regular statutory damages were obtained by plaintiffs in non-P2P cases in less than 10 percent of the 338 cases.

Type of Award	%
Statutory Damages - Enhanced	**1.78%**
Statutory Damages - Regular	9.17%
Actual Damages	**1.78%**
Agreed Damages	10.36%
Total	338

Table 7. Damage Awarded – non P2P - %

For cases terminating with a remedy awarded, a similar pattern emerges with regular damages being at least 5 times as like as willful damage awards and regular statutory damage 50 times more likely to be obtained than willful statutory damages in P2P cases. When differentiating across plaintiffs, F1000 are at the receiving end of regular statutory damages in a majority of cases (54%) of terminated cases with remedies obtained.

Damage Awarded	F1000	Individual	Small Firm	Total
Common suits = total	37 (15.4%)	5 (100%)	36 (100%)	78 (27.7%)
Statutory -- Willful	2 (5.4%)	1 (20%)	3 (8.3%)	6 (7.6%)
Statutory -- Regular	20 (54%)	3 (60%)	8 (22.2%)	31 (39.7%)
Actual Damages		1 (20%)	5 (13.8%)	6 (7.6%)
Agreed Damages	15 (40.5%)	-	20 (55.5%)	35 (44.8%)
P2P suits = total	203 (84.5%)			203 (72.2%)
Statutory -- Willful	2 (0.8%)	-	-	**2 (0.7%)**
Statutory -- Regular	121 (50.4%)	-	-	121 (43%)
Agreed Damages	80 (33.3%)	-	-	80 (28.4%)
Total	**240**	**5**	**36**	**281**

Table 8. Damage Awarded – All Cases

V. Statutory Awards in Practice – Case Law

This Part explores the role of courts in mediating damage awards pleadings in copyright infringement suits. While the previous Part used docket analysis to approach the demand and supply claims, this Part looks behind those numbers to analyze the substantive arguments used by parties in those disputes as well as the decisions by courts.

Since the analysis seeks, among other things, to provide better insight into the numbers revealed in Part III, I coded the decisive court decision in the 957 cases from January 1, 2005 to December 31, 2008 that were randomly selected in Part III from the 17,119 cases in this three-year period. While the original docket database contained 46 coded fields and 125 different variables on the copyright disputes in general, this second coding project focused more narrowly on the issue of the substantive remedial arguments pursued and awarded in those disputes.

The following data points and variables were coded at this stage. First, drawing on the existing literature (leading treatises and academic scholarship), the a series of variables of statutory damages were coded (including, actual damages) Second, a series of additional variables were added that would help categorize the

nature of arguments made by the plaintiff, side, defendant and the court as well as the type of the case: (1) nature of defense by the defendant; (2) amount of legal procedures; (3) bad faith arguments; (4) multiple infringement aspects; (5) reference to actual damages (within 504(c)(2)); (6) request by courts to provide evidence of uinjury.

[Overview of results: to be completed]

A preliminary analysis of the data provides the following insights. First, plaintiffs tend to tend to focus on bad faith accusations of defendant conduct in order to obtain willful statutory damages; in doing so they employ a wide definition of bad faith (including use of legal exception argument by defendant). Second, although courts rarely find willfulness, the courts that do employ a wide variety of definitions. Third, when setting regular statutory awards within the statutory range, courts overwhelmingly look to actual damage benchmarks. Fourth, when there are no relevant comparisons to access actual damages, courts set the statutory award near the lower end of the range. Fifth, when injury to the plaintiff is likely to be modest (even if evidence is absent), courts set awards at or near the lowest end of the statutory spectrum. Finally, general deterrence multipliers are rare but usually correlate with findings of bad faith (tying deterrence to egregious conduct rather than instance where the defendant had substantial profits).

VI. The Gap Between Case Outcomes and Settlement Practices

[To be completed]

Note to referee:

Section 1 of Part VI will explain how, despite the observation that courts push back strongly against the commonplace request for willful statutory damage remedies in copyright litigation, defendants might still be wary of willful damage claims. The relevant variables are (1) the degree of legal uncertainty in the application of statutory damages; specifically the multiple definitions of willfulness in the case law and the discretionary range within the statutory maximum and minimum awards; (2) the cumulative effect of this uncertainty on defendants that face multiplication of the statutory awards by having infringed multiple copyrighted works in one infringement; (3) a lack of public information on how statutory damage award request are actually

handled by courts; (4) lack of incentives for plaintiffs to plead statutory damages even when willfulness is extremely unlikely. Section 2 of Party VI argues that these structural factors help explain the frequency of statutory damage pleadings observed in the docket study section of the Article. I link these observations to the recent emergence of copyright trolls and other copyright enforcement models.

VII. Discussion and Proposals

The 1976 Copyright act has been slated for reform. The Register of Copyrights has called for a wholesale adaptation of the federal copyright statute for the digital age.[75] A team of academics, practitioners, and industry experts has produced *The Copyright Principles Project: Directions for Reform*, the culmination of three years of inquiry into "how current copyright law could be improved and how the law's current problems could be mitigated."[76] Congress has now firmly set its sights on copyright reform. The House Judiciary Committee announced a "wide review" of copyright law and "related enforcement mechanisms".[77] For the past few years it has been conducting a comprehensive series of hearings on U.S. copyright law across the country. Statutory damages figure prominently in these discussions. Despite the controversy, discussions of statutory damage have relied mostly on anecdotal evidence and case law survey that lack empirical depth.

The empirical examination of statutory damages filing and outcomes in this Article reveals a stark discrepancy between the demand for statutory damages by plaintiffs and the supply by courts. This gap between the demand and supply of statutory damages undermines the legal credibility of the claims asserted by plaintiffs in copyright disputes. Nevertheless, as Part VI discussed, inflated remedy claiming may nevertheless have strategic value in pre-trial bargaining.

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[75] *See generally* Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315 (2013) (setting out in detail the problems with the current copyright statute and the Register of Copyrights's vision for overhauling the statute and Copyright Office).

[76] Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1176 (2010).

[77] Press Release, House Judiciary Comm., Chairman Goodlatte Announces Comprehensive Review of Copyright Law (Apr. 24, 2013), *available at* http://judiciary.house.gov/index.cfm/2013/4/chairmangoodlatteannouncescomprehensivereviewofcopyrightlaw.

Such remedy over-reaching, however, raises some concerns. From a legal perspective, bad faith claims that are outside of the shadow of the law are questionable. From a policy perspective as well, over-claiming is problematic. Like over-claiming more generally, remedy over-claiming may have a chilling effect on creative processes and innovation.[78] Given the high range, uncertainty involved, and the media attention to outliers, the potential for statutory damage awards might induce risk-averse defendant to settle claims that they otherwise would resist. In this regard, Section 504 is a contributing factor to the wider phenomenon of rights accretion in copyright law.[79]

To combat the problems associated with statutory damages this article offers various policy recommendations targeted at reducing remedy over-claiming in copyright law: (A) the development of statutory damage guidelines, which would provide much needed clarity while reducing the opportunity to deploy statutory damages in pre-trial scare tactics. These guidelines would provide greater certainty without tying the hands of courts; (C) revision of the statutory damage provisions in line with the new economic reality of the internet, thereby reducing the number of instances where statutory damage awards are out of sync with the actual harm inflicted upon copyright holders; (C) removing the option to plead statutory damages whenever evidence of actual harm is available; (D) adopting of a groundless threat provision, whereby copyright infringement claimants face negative repercussions when invoking willful damage awards in bad faith.

A. Adopting Statutory Guidelines

[To be completed: This section develops a list of award guidelines, drawn from the most pertinent variables that surfaced in the case law coding of Part V. Such guidelines will address over-claiming to the extent that it is driven by legal uncertainty.]

B. Infringement Ceilings

One major source of discontent is the outlier awards that have been granted in a few selected cases. For instance in the case of the six-figure statutory damage

[78] *Infra*__.
[79] *Infra*__.

awards, as applied in Capitol Records v. Thomas-Rasset[80] and Sony BMG v. Tenebaum.[81] It has not been lost upon the public that these awards extend well beyond the means of the single mother and graduate student involved. More generally, there is a public sentiment that the awards are disproportionate and excessive.[82] Some argue that the punitive nature of the awards is inopportune because the statutory damage framework, as intended by Congress, merely seeks to substitute for actual damages.[83] Because substantive due process protections prohibit grossly excessive awards, some argue that statutory damage awards in copyright actions should be subject to additional scrutiny.[84]

As mentioned previously, since statutory damage awards are applied "for all infringements involved in the action, with respect to any one work", willful statutory awards can run up to substantial numbers, especially in the digital era where multiple works are infringed at one time, such as with P2P file sharing.

[To be completed: This section proposes a set of smaller ranges that would substitute the wide statutory range today. Each range is tied to a few relevant (to the likely injury and deterrence needs), categorical aspects of a dispute that are easy to identify.]

C. Changing the Evidentiary Default

Prior to the 1976 copyright act, some courts held that statutory damages were unavailable when the injury to the copyright holder and the profits of the infringers had been proven.[85] The 1976 Copyright Act made the statutory remedy available at the copyright owner's election, regardless of evidentiary considerations. Plaintiffs now are no longer required by law to present any evidence at all regarding actual

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[80] *Capitol Records v. Thomas-Rasset*, U.S. District Court of Minn., 06-CV-1497 (MJD/RLE). The court eventually reduced the award on remand stating that "The need for deterrence cannot justify a $2 million verdict for stealing and illegally distributing 24 songs for the sole purpose of obtaining free music. Moreover, although Plaintiffs were not required to prove their actual damages, statutory damages must still bear some relation to actual damages." *Id.* at 2.

[81] *Sony BMG Music Entertainment v. Joel Tenenbaum*, 2009 WL 927470).

[82] Pamela Samuelson & Ben Sheffner, Debate, *Unconstitutionally Excessive Statutory Damages Awards in Copyright Cases,* 158 PENNU 53 (2009); Cam Barker, Notes, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing,* 83 TEXAS L. REV. 525 (2004).

[83] *Id.*

[84] *Id.* at 529.

[85] See, e.g., Universal Pictures Co. v. Contemporary Arts, 193 F.2d. 354, 378, 73 U.S.P.Q. 4 (1st Cir. 1947).

damages or defendants' profits in support of their prayer for copyright statutory damages. Indeed, authorities agree that a plaintiff may recover statutory damages "regardless of the adequacy of the evidence offered as to his actual damages and the amount of defendant's profits, and even if he has intentionally declined to offer such evidence, although it was available." [86]

For at least two principle reasons, this decision is questionable. First, by treating statutory damages as a full-fledged alternative to actual damages, available to the copyright owner even in the presence of evidence of actual injury and profits, the Copyright Act inadvertently created a an opportunity for the opportunistic use of statutory damages by some copyright holders. Specifically, the elective nature of statutory damages has a selection effect on the type of copyright infringement plaintiffs. If conditions are conducive to obtaining an award above and beyond his or her actual harm, a plaintiff will of course elect statutory damages. As described above in Part II.2., certain infringements can add up significantly within the statutory framework infringement. For instance, infringement low injury infringement of multiple works, nominal damage infringements may add up to significant amounts.

If our system of statutory damages seeks to minimize the evidence burden on a copyright plaintiff, why does 504 come to aid of copyright plaintiffs when evidence of the damage is readily available? While it may make sense to relieve a copyright holder from the burden of establishing injury or contesting evidence provided by the defendant, it is doubtful that the election of statutory damages can be justified when evidence of both damage and profits is available. It creates the fertile ground that has enabled copyright trolls and other opportunistic enforcement business models, without providing benefits that cannot be obtained otherwise.

Removing the elective option when evidence of injury is readily available would remove opportunities for opportunistic applications of statutory damages. Note that this option would not need to interfere with the deterrent purpose of the statutory

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[86] NIMMER & NIMMER, *supra* note 1, § 14.04[A]. "But there is nothing that prevents courts from refusing to award more than the statutory minimum without an offering of proof that an amount in excess of the minimum is justified. In fact, the legislative history indicates that this is consistent with the intention of Congress with respect to cases in which there is no proof of actual damages and profits: "[The plaintiff in an infringement suit is not obliged to submit proof of damages and profits and *may choose to rely on the provision for minimum statutory damages."* H.R. REP. No. 94-1476, at 161 (1975) (emphasis added). S&W, at note 313

damage framework. Once actual damages are ascertained, enhancing the remedy could boost deterrence. For instance, a multiplier can be applied when the infringement is willful or when exacting actual harm and profits from infringers would be unlikely to deter other potential infringers in the future. Essentially, this proposal would change the default of assuming difficult evidentiary issues.

D. The Analogy with Groundless Threats Statutes and Frivolous Litigation Actions

[To be completed]

VI. Conclusion

This Article examines over-claiming as it relates to damage awards in copyright law. By analyzing court dockets I can observe the degree to which plaintiffs in copyright disputes demand statutory damages award. Next, I analyze the amount of successful plaintiffs that obtain statutory damage awards, the amount and the application of willful damages. In a second, more substantive analysis of cases, I analyzed in depth the how courts determine statutory damage awards, specifically whether a compensatory versus deterrent effect dominate the approach of judges and juries to statutory damages.

The results uncover a striking gap between the demand for statutory damages by plaintiffs, on the one hand, and the rare circumstances in which courts award statutory damage. Especially striking is the almost universal compensatory approach by courts to statutory damages, as opposed to the punitive deterrent and willful variation that receives so much attention. Overall, the statutory damage award copyright regime, as familiar from anecdotal settlement letter evidence and as discussed in commentary (including some academic scholarship), is not representative of the actual evidence in court dockets and substantive law.