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Copyright Law: Statutory Damages in the Digital Age of Copyright Law

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Copyright law has a peculiar remedial framework. Once infringement has been established, a plaintiff may elect a statutory-damage award. If so, the Copyright Act relieves the copyright holder from the burden of providing any evidence whatsoever of actual harm.[2] Among developed Western democracies, the U.S. copyright statutory framework is exceptional.

In recent years, there is a growing understanding that statutory-damage awards, as written into the Copyright Act, are a poor fit for the digital age. Because a statutory-damage award is set for each individual infringed work, the total damages can add up significantly for online infringements that involve multiple works. For instance, even at the statutory minimum of $750 for each file, a user of a file-sharing network faces potential statutory damages of $360,000 when sharing forty songs. Additionally, due to the sheer amount of infringed works, digital intermediaries and online platforms face claims for astronomically high statutory-damage awards. In one case involving secondary liability for operating a file-sharing network, the plaintiff demanded a statutory-damages award of $75 trillion. Critics observe that these numbers tempt plaintiffs into asserting dubious infringement claims.

Other believe that the system of statutory damages is indispensable to protect the interests of copyright holders. By eliminating the burden to prove harm, statutory damages enable the pursuit of meritorious infringement claims that otherwise would be out of reach for cash-strapped plaintiffs. Independent photographers and designers, for instance, rely on the litigation-cost-reducing effect of statutory damages in order to obtain recourse against online infringements of their works by large corporations.

Systematic and comprehensive information on the use of statutory-

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1. Summarized and excerpted from Ben Depoorter, *Copyright Enforcement in the Digital Age: When the Remedy is the Wrong*, 66 UCLA L. REV. 4 (2019).

2. 17 U.S.C. § 504(c). Additionally, whenever a copyright owner finds that infringement was committed "willfully," a court may enhance the award of statutory damages. Section 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."

damage awards by litigants is absent, leaving many unanswered questions. To what extent do plaintiffs use statutory damages in an opportunistic manner? Or do statutory damages mostly serve the beneficial function of increasing access to justice for cash-strapped copyright holders? Comprehensive information on the role of courts in mediating statutory-damage claims by plaintiffs is also lacking.[3] Courts may enhance statutory awards when they deem the defendant's infringement willful, but what definition or definitions of "willfulness" do courts employ when assigning enhanced statutory awards? Is it possible to distill a reliable set of factors from the pertinent case law? Answers to these questions are essential if Congress is to effectively reform and adapt the Copyright Act to the digital age.

This Chapter examines the role of statutory damages in the copyright arena on the basis of an in-depth empirical analysis of docket records and case law. I conducted a docket study using a publicly available database containing docket entries, complaints, and pertinent documents from approximately one-thousand copyright disputes, providing valuable new insights on the types of claims, plaintiffs, and defendants involved in statutory-damage litigation. Also, I systematically analyze all 102 judicial decisions on copyright statutory damages by courts over a three-year period.

The findings reveal that statutory-damages claims are commonplace in virtually all areas of copyright law. Plaintiffs in copyright litigation requested statutory damages in 90% of pleadings. Instead of seeking compensation for the actual harm suffered from infringement, a large majority of plaintiffs turned to juries to set a statutory award. Not only that, copyright holders, even in industries that enjoy only weak copyright protection, almost universally claimed that they are entitled to enhanced statutory damages due to willful infringement. However, courts rarely granted enhanced damages. Plaintiffs sought enhanced damages for willful infringement in 81% of all copyright disputes in the examined period, yet courts awarded enhanced damages in less than 2% of all cases that moved to verdict. The striking gap between the demand and supply of statutory damages, as well as several additional factors relating to nature of claims and subject-matter areas, undermine the credibility of the nearly ubiquitous claims of willful infringement by plaintiffs.

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3. For the most comprehensive extant study, see Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009).

Docket Study

A. Dataset

The docket study I conducted is based on the Copyright Data Project, a publicly available database that contains docket entries, complaints, and other documents of almost one-thousand random copyright disputes (out of the 17,119 total federal copyright disputes filed) from the period between January 1, 2005 and December 31, 2008.[4] This four-year period provides an ideal window to study statutory damages since it allows us to compare the role of statutory damages in the context of P2P file sharing on the one hand, with more commonplace copyright disputes on the other. The database contains 46 coded fields and 125 different variables on each of the copyright disputes.

B. Pleadings

Table 1 below contains the remedy sought by plaintiffs in copyright disputes. As expected, injunctions are routine, enhanced statutory damages are commonplace, and actual damages are infrequent.

Table 1: Remedy Pleadings (n=383)

Injunction Pleaded		96%
Damages	Statutory Damages—Willful	70%
	Actual Damages	19%
	Statutory Damages—Regular	5%
	None	6%

Parsing these data with more granularly reveals clear distinctions between party type and copyright type. For example, Fortune 1000 (F1000) companies sought willful statutory damages in 89% of all cases but only in 44% of non-P2P cases. Yet for all parties in non-P2P cases, 60% of all claimants pleaded willful statutory damages. Of all claims for willful statutory damages, 73% were filed against small-firm defendants; individual defendants and F1000 defendants evenly split the remaining cases (13% and 14%, respectively).

4. Christopher A. Cotropia & James Gibson, *Copyright's Topography: An Empirical Study of Copyright Litigation*, 92 TEX. L. REV. 1981, 1984–86 (2014).

C. Case Outcomes

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

A number of general observations are noteworthy. Defendants in copyright litigation are relatively passive. Defendants responded in slightly more than half (57%) of the dataset's non-P2P cases. Only 23% of those responses included counterclaims or crossclaims. Dispositive motions that, if successful, would terminate one or more copyright claims (excluding motions for default judgment) were filed in only 20% of cases with no answer filed. The remaining 34% of commonplace cases lack a defensive action by the defendant, suggesting possible consent to judgment or settlement.

As non-P2P disputes moved toward termination, at least one party filed a dispositive motion 46% of the time. Most of the disputes in the sample set (80%) were terminated voluntarily following a settlement, agreed judgment, or voluntary dismissal. Very few cases were terminated by trial (3%) or by dispositive motion (11%). In non-P2P cases that reached judgment (16%), defendants were victorious more than half the time (54%).

When non-P2P cases were terminated, only a minority of cases resulted in a damage award or injunctive remedy as granted by the court. Of course, this is in line with expectations since most cases were terminated through action of the parties. Injunctions were granted in 22% of the cases, the majority (64%) resulting from an agreed judgment between the parties. Under 2% of all non-P2P cases were terminated with a grant of enhanced statutory damages. Regular statutory damages were obtained by plaintiffs in around 10% of terminated non-P2P cases. Thus, in non-P2P cases resulting in damages, regular damages are about five times more likely than enhanced damage awards. By contrast, in P2P cases, regular statutory damages are fifty times more likely to be obtained than enhanced statutory damages. When differentiating across plaintiffs, F1000 companies obtained regular statutory damages in a majority (54%) of terminated cases with remedies awarded.

D. Settlement Patterns

Most of the disputes in the dataset (80%) were terminated voluntarily via a direct action from the parties, either by settlement, agreed judgment,

or voluntary dismissal. As is commonplace in litigation more generally, very few disputes concluded after trial (less than 3%) or upon dispositive motion (11%).

Given the number of disputes that were terminated by the parties, it is important to recognize that court-ordered awards provide only partial and potentially selective information about the outcome of all copyright disputes initiated in this study's dataset. For instance, court-ordered willful statutory awards will be less frequent and lower on average if clear, egregious offenses are more likely to settle out of court. Therefore, it is also worthwhile to explore the dataset for settlement patterns.

When comparing the outcomes of disputes in non-P2P disputes across claims for actual damages, regular statutory damages, and willful statutory damages, a few findings emerge. Lawsuits that involve a claim for willful statutory damages settle more often (29%) than suits in which the plaintiff requests regular statutory damages (22%). Additionally, while willful statutory damage claims were dismissed voluntarily at about the same rate as claims with requests for regular statutory damages and actual damages, nonvoluntary dismissals were less frequent when involving willful statutory damage claims.

E. Analysis

The docket study reveals that a significant majority of plaintiffs accuses defendants of willful copyright infringement. Willful-infringement accusations are surprisingly prominent across all types of copyright subject-matter areas and litigants. The sheer number of willful infringement claims is remarkable, especially in light of the congressional intent to reserve enhanced statutory damages for exceptional instances.

Interestingly, despite the overwhelming number of assertions to the contrary by plaintiffs, courts rarely find that willful infringement took place. What does this mean? The most benign, albeit unrealistic, explanation for this gap between the demand and supply of willful statutory awards is that most of those claims are valid and are subsequently resolved in a settlement between the parties. That is, courts rarely honor requests for enhanced damages because such claims are disproportionally settled at earlier stages of litigation. Without inspecting the terms of all out-of-court settlements, a benign interpretation of willful damage claims cannot be decisively excluded.

Several of the findings suggest, however, that many claims for enhanced statutory damages are likely without merit. First, focusing solely

on cases where the plaintiff obtains a favorable verdict, enhanced statutory damages are seldom awarded. Of all cases where a plaintiff won on the merits of the case, only 2.8% of cases resulted in an award of willful statutory damages. The rarity of enhanced awards makes the nearly ubiquitous accusations of willful infringement and enhanced damages by plaintiffs highly suspect. Second, the prevalence of enhanced damage pleadings by low-IP industry claimants[5] further casts doubt on the benign interpretation that most of the accusations of willful infringement have merit. When copyright protection is relatively modest—as is the case for more functional works such as fashion items—it is less likely that so much infringing behavior is so egregious that it qualifies as willful. Since the scope of protection is narrower for these works, there is less potential for infringement to begin with.

Case Law Analysis

This Part looks behind the docket-analysis numbers to analyze litigated disputes involving discussions of willful infringement, the arguments raised by the plaintiffs, and the definition and application of enhanced damages for willful infringement by courts.

A. Coding

I identified all decisive court decisions on a claim of willful copyright infringement. The resulting dataset consists of 102 decisions from 2005 to 2008. Drawing upon the existing literature, leading treatises, and academic scholarship, and an initial examination of a random sample of 20 cases, a number of variables and data points were coded for all 102 cases: the subject-matter areas, the defendant's allegedly infringing actions, the plaintiff's proposed definition of willfulness, the definition of willfulness employed by the court, the remedial outcome and amount granted, the

5. Almost 30% of all litigated works in the non-P2P cases involve low-IP industries (Apparel/Fashion/Textiles, Architectural Works, and Industrial Design). *See* Cotropia & Gibson, *supra* note 4, at 1996. Parties in low-IP industries plead willful infringement as often or more than parties in subject-matter areas where copyright protection is considered to be stronger. For example, plaintiffs in apparel, fashion and textile industries claimed willful damages in 80% of disputes. Plaintiffs in non-P2P disputes involving film and TV claimed willful damages in 75% of disputes and plaintiffs in non-P2P disputes involving music claimed willful damages in 39% of disputes.

express calculation of the statutory award, whether the court awarded enhanced damages, the number of infringing works, the amount sought per infringing work, the total amount requested, the amount awarded by the court for each infringing work, the total award granted by the court, and the policy objectives that the court explicitly associated with an award of willful statutory damages.

B. Results

Willful infringement accusations mostly surface in three subject-matter areas: movies and television (27%), music (22%), and software, excluding video games (22%). The musical-work infringement cases included three disputes involving file-sharing and twelve disputes concerning public performances (12% of all cases).

In about 35% of all disputes in the dataset, arguments by the plaintiff that substantiate the alleged "willfulness" of the accused infringer's actions are wholly absent in the verdict. When the case for willfulness was expressed by the plaintiff, its most frequent basis was continued infringing activity by the defendant after receiving an infringement notice.

Courts do not have a uniform focal point for determining willful infringement, as Table 2 below illustrates.

Table 2: Most Common Judicial Approaches to Willfulness

Approach	**Percent**
Actual or constructive knowledge	43%
None	23%
Actual knowledge	10%
Willful blindness	8%

Courts primarily focus on actual or constructive knowledge when determining whether the infringement was committed willfully. Courts focus only on actual knowledge in about 10% of cases, as some courts (at the behest of the plaintiff) find it sufficient that the defendant was put on notice by the plaintiff at any time prior to litigation. Additionally, courts sometimes inquire into the "blameworthiness" of the defendant. In about 23% of cases, however, courts rule on willfulness without referencing any particular definition of willfulness. Some courts find willfulness with mere reference to the factual circumstances surrounding the infringement, including continued infringement after receiving notice, distribution on

P2P file sharing, and failure to cooperate with discovery. Finally, about 10% of willful infringement decisions consist of default judgements.

The 43 cases where a court defined willfulness as having actual of constructive knowledge can be broken down further by factors of consideration, as Table 3 shows.

Table 3: Actual or Constructive Knowledge: Factors of Consideration

Element	Count	Percent
Reckless disregard of plaintiff's rights	13	30%
Ignoring notices	9	21%
Continued after notice	8	19%
Default judgments	4	9%
Experienced businessman that should have known	3	7%
Actual knowledge	2	5%
D's failure to establish good faith and reasonable belief	1	2%
Desire and purpose to trade on good will	1	2%
Repeats infringement	1	2%
Deliberate act	1	2%

Thirteen cases (30%) involved instances where the court deemed the behavior of the defendant also to involve a reckless disregard of the rights of the copyright owner. Ignoring and continuing after being notified by the plaintiff are major considerations here as well (17 cases or 40%). Overall, continuing infringing behavior after receiving notice, is a factor of consideration in 25% of all cases involving willful infringement. In just 4% of those cases no finding of willfulness is made. Factors such as a history of repeat infringements or the business experience of the defendant figured less prominently in the opinions (less than 9%).

When courts discuss the purpose of statutory damages, they adhere to both the compensatory and deterrent goals of this form of relief. When setting regular statutory awards within the statutory range, courts generally estimate (on the basis of a rough proxy) the actual damages caused by the infringement and likely profits of the defendant. Deterrence motives feature prominently in judicial calculations of the statutory damage amounts (60% of cases where courts identified a policy objective). While some courts also focus on the goal of discouraging a specific infringer

(20% of cases where courts identify individual deterrence as a policy objective), most verdicts refer to the goal of deterring copyright infringement in general. Interestingly, when courts justify multiplying the award for the purpose of deterring future infringements, they do not set the multiplier to make up for the less than perfect probability of detection, as suggested by the economic analysis of punitive damages. Instead, courts regularly resort to a mechanical formula of multiplication, or simply ensure that the damage exceeds the compensatory level. In eight cases (8%) the court found willfulness and granted the maximum statutory award of $150,000 per infringed work. In 10% of all cases involving a finding of willfulness (76 cases), the court set the award at the $150,000 maximum.

Many plaintiffs accuse the defendant of willful infringement but nevertheless indicate that they would be satisfied with the court setting an award within the regular, non-willful statutory damages range.

C. Analysis

The analysis of the case law reveals considerable ambiguity as it relates to potential findings of willfulness and the enhanced awards that may follow as a result of such a finding. More than 20% of cases are adjudicated without any indication of what guided the court to its determination regarding willfulness. This flexible standard of "knowledge" that courts employ, and the role of notice letters, open the door to the potential award of enhanced damages in many disputes and may be a contributing factor to the practices highlighted by the docket study.

Additionally, the data reveal a peculiar litigation strategy of some plaintiffs. These plaintiffs assert willful infringement but state that they are satisfied with a regular statutory damage award. Why would a victim of willful infringement voluntarily deprive itself of the higher range for statutory damages? Two potential explanations come to mind. First, by turning down the higher range of willful infringement, the plaintiff might be hoping to be perceived by court and jury as a reasonable actor, potentially inducing a more favorable look at the various other facts at issue. Second, in this process of garnering sympathy, the plaintiff might hope that the court or jury will set the award at a higher amount than would otherwise be the case if the plaintiff had insisted on willfulness and was turned down by the court or jury.

Discussion

The data presented reveal a pervasive practice of overclaiming among plaintiffs. My findings reveal a stark discrepancy between the demand for statutory damages by plaintiffs on the one hand, and the supply by courts on the other hand. Although 80% of plaintiffs in all disputes claim they suffered conduct that constitutes willful infringement, courts consider enhanced damages to be justified in just 2% of cases where a plaintiff wins the case. This gap between the demand and supply of statutory damages undermines the legal credibility of the plaintiffs' claims in copyright disputes.

Several surrounding factors cast doubt on the pervasive practice of alleging willful infringement. For instance, claims of willfulness regularly surface in circumstances that make egregious infringement improbable. This is especially true for disputes in low-IP industries, and situations where plausible fair-use offenses are asserted, when harm is very minimal, or when there are no profits obtained from the infringement.

"Remedy overclaiming" likely serves strategic purposes. First, as revealed in the case law analysis, pleas of willful infringement are deployed by plaintiffs as a "bait-and-switch" tactic: by accusing the defendant of willful infringement, a plaintiff may appear more reasonable to the court and jury when subsequently requesting regular statutory damages and may hope to obtain a higher award within the regular statutory range. Second, by increasing the perceived risk to a defendant, claiming willful statutory awards might induce more generous settlement concessions than would otherwise be justified on the merits of the case and the likely outcome at trial. For instance, statutory awards are rare but not impossible when a defendant has a plausible fair-use defense. As a result, risk-averse defendants might simply prefer to avoid taking the chance of incurring enhanced statutory damages altogether.

The current abuse of the statutory damage framework can be addressed either by making remedy overclaiming more risky and costly to opportunistic plaintiffs or by reducing the risk of overclaiming to defendants.

Several recommendations could curtail opportunistic applications of enhanced statutory damages. First, Section 505 of the Copyright Act could be revised so that courts are able to take away from prevailing plaintiffs the benefit of fee-shifting if they overstated the damage claim. Second, courts should be enabled to award attorney fees *against* a prevailing plaintiff who engaged in egregious overclaiming of the damage

entitlement. Both approaches would make the abuse of the statutory-damage framework costlier and induce more realistic claims for relief by copyright plaintiffs. Third, various measures could reduce the overall risk of abusive damage claims to defendants, including the formulation of judicial guidelines, reducing the scope of enhanced damages, and making statutory damages unavailable when evidence of the inflicted harm is readily available. By reducing uncertainty about the actual application of statutory awards in courts, these measures, or a combination thereof, would curb the more opportunistic and abusive practices while retaining statutory damages as a crutch for cash-strapped plaintiffs with meritorious claims.

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