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## "Statutory Damages" in Copyright Law and the MP3.com Case

By Michael Landau

**Summary:** A multi-million award against the company MP3.com highlights the importance of "statutory damages" in U.S. copyright law. Statutory damages can apply in many copyright cases, raising the stakes for even minor incidents of copyright infringement. This article explains what statutory damages are and how they are applied.



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### Introduction

On September 6, 2000, Judge Rakoff, in *UMG Recordings v. MP3.com*, awarded the plaintiffs \$25,000 in "statutory damages" per CD uploaded on the MP3.com system. MP3.com stated that "no more than 4,700 CDs" owned by the plaintiffs were on the system, while the plaintiffs alleged that the number was closer to 10,000 CDs. In any event, this places the damages at between \$118 million and \$250 million.

Obviously, these "statutory damages" must be pretty important, right? What on earth are they?

This article will discuss statutory damages, a major weapon in a copyright plaintiff's arsenal, and their potential use to deter music uploading and downloading via the Internet. Statutory damages are available in all copyright cases should the plaintiff so desire. They may be awarded to the plaintiff even though the actual market harm may be quite small, or difficult to calculate with certainty.

Although technically not "punitive damages," in the traditional tort sense in which damages can be designed to punish someone, they are meant to send a strong message, "DO NOT INFRINGE!"

### What the Copyright Act Says

One of the major misconceptions of parties who use copyrighted material without authorization is that they are only liable for the

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actual profits that they make, or for the plaintiff's actual losses, if they are found responsible for copyright infringement. That is indeed the traditional measure of damages, and it is set forth in section 504(a) (1) of the Copyright Act of 1976, which says that a copyright infringer is liable for "the copyright owner's actual damages and any additional profits of the infringer..."

Section 504(c), however, gives the plaintiff another option, namely statutory damages: "[T]he 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." The plaintiff, therefore, has a choice of whether to get into a serious battle of the accountants and economists or to ask the court to determine a damage amount that it "considers just," as stated in section 504(c).

There is a great deal of "wiggle room" with respect to what the court "considers just," and in 1999, Congress increased the amounts. In cases in which the plaintiff cannot prove that the infringement was "willful," the Copyright Act allows a sum of "not less than \$750 or more than \$30,000" per infringement. However, if the court finds that the defendant's behavior was "willful," the court has discretion "to increase the award of statutory damages to a sum of not more than \$150,000" per infringement.

Therefore, depending upon the judge, her definition of "willful," and her definition of "just," a defendant in a copyright infringement suit may face liability of as high as \$150,000 per infringement. While damages at the highest end of the spectrum are rare, damages that far exceed the actual loss to the plaintiff are not. Statutory damages are meant to send a message and to "sting" or make it hurt!

Prior to 1998, statutory damages was a determination solely for the judge. Although the Copyright statute expressly states "the court," the Supreme Court ruled that the Seventh Amendment of the Constitution mandates that statutory damages be a jury issue if one of the parties so requests. So, statutory damages now creates a real "wild card."

### **Some Examples**

A good example of statutory damages, in lieu of actual damages, being awarded occurred in *Engel v. Wild Oats, Inc.*, a case involving the reproduction of unauthorized works by photographer Ruth Orkin on T-shirts. The plaintiff was awarded \$20,000 in statutory damages in a case in which the defendant had made only \$1,200 profit from the sales of the shirts.

Probably the most common use of statutory damages is in cases involving the unlicensed performance of music at restaurants and stores. The usual scenario is as follows: ASCAP or BMI, the major performance-rights licensing societies, contacts a business regarding the business obtaining a "blanket license." A "blanket license" is a license that allows the licensee to have access to the licensor's entire library of music for purposes of public performance of the work, for a single yearly fee. (Playing music without a license would be a violation of the copyright holder's "right of performance.") After some time of communication between the licensing society and the business in question, the business ultimately refuses to obtain a license. The licensing society then initiates a lawsuit for copyright infringement

and asks for statutory damages. They are almost always successful. The "going rate" is about \$2,500 per song played.

In addition to statutory damages, prevailing parties are also, in some cases, entitled to recover their attorneys' fees. Attorneys' fees can often easily exceed the amount in dispute in a case. Therefore, in the event that infringement is found, the potential exposure can be substantial. In fact, in one case, which took years and went all the way to the Supreme Court, the attorneys' fees were more than \$1.3 million.

### **Digital Music and Calculating Damages**

It should be noted that businesses are not the only defendants who may face potential exposure for statutory damages. The Copyright Act provides that statutory damages may be requested in any case. With the issue of uploading and downloading digital music unsettled, individual users could potentially face liability. Until the MP3.com and Napster cases make their way through the courts, it is not clear what does and does not infringe.

The district court judge's decision against Napster stated that the uploading and downloading violated the copyright holders' "right of distribution."

In the MP3.com case mentioned in the beginning of this article, Judge Rakoff made a point of noting that The Official MP3.Com Guide to MP3, issued in 1999, recites at page 62:

Warning. Current U.S. and international copyright laws forbid the unauthorized copying and distribution of music files over the Internet. Don't be the example chosen by some record company or recording artist to show the rest of the world that the law really works.

Again, the same book states at page 93:

Warning. It is against U.S. and international copyright law to distribute and/or sell music or any copyright-protected intellectual property without the written permission of the copyright holder. This includes posting MP3 files of copyrighted music on the Internet or making copies. Buying a music CD does not mean that you own the content. You merely have permission (also known as a license) from the legal owners of the material on that CD to listen to it in a noncommercial setting.

Therefore, even MP3.com itself acknowledges that Napster type uploading may be infringement by the end user.

It is also not clear whether Section 1008 of Title 17, The Audio Home Recording Act, exempts the downloading of music to personal computers from liability for infringement.

For example, Section 1008 provides:

No action may be brought under this title alleging infringement of copyright based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio

recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.

There is first a question of whether a personal computer's hard drive is a "digital audio recording device" or a "digital audio medium" for purposes of the Copyright Act. A "digital audio recording device" is defined as any machine, "the digital recording function of which is designed or market for the primary purpose of, and is capable of making a digital audio copied recording for private use." Because the primary purpose of a computer is not the copying of music, it does not fall within the definition.

There is a similar problem with the definition of "digital audio medium." Section 1001 of the Copyright Act defines a "digital audio medium" as "any material object... that is primarily marketed or most commonly used by consumers for the purpose of making digital audio copied recordings by use of a digital audio recording device." Again, the primary purpose of a computer's hard drive is not to make or store copies of music. Indeed, in the case involving the Diamond Rio MP3 player, the United States Court of Appeals for the Ninth Circuit reached the same conclusion.

Another term that is questionable in the Audio Home Recording Act is "noncommercial." While admittedly the copies of music made via Napster or similar software is personal, a strong argument can be made that it is not "noncommercial," but non-cash. If many parties make copies of their MP3 files available for the purposes of exchange, all parties are made better off by having exchanged and obtained additional music. This entire system may be viewed as a non-cash commercial exchange, similar to barter-type exchanges.

Even the Supreme Court case that held that the videotaping of television shows on VCRs was a "fair use," *Sony Corp. v. Universal City Studios, Inc.*, may not be applicable to the situation of music uploading and downloading. While many interpret *Sony* broadly to allow all personal taping, others, including me, interpret the case more narrowly. The *Sony* case dealt with "time shifting," (that is, the temporary taping of shows to watch them at a later time), not building a library of copyrighted works. In addition, in *Sony*, the user/taper was authorized to initially view the show, and was counted in the ratings. *Sony* did not deal with having access to and taping another person's material.

Given the unsettled state of the law, parties who are uploading and downloading music without authorization are at risk. While it is usually corporate defendants who are subject to copyright infringement, on September 18, 2000, it was reported that a student at Oklahoma State University faces possible criminal copyright charges after police found as many as 1,000 music files on his hard drive. According to Reuters, "Police seized the student's computer after university officials were notified by the RIAA (Recording Industry Association of America)."

If the RIAA is playing such "hardball" as encouraging the initiation of criminal proceedings against students who download files, it is not at all farfetched that they, or one of the record companies, would bring a regular infringement action and ask for statutory damages. Because statutory damages and/or attorneys' fees can be devastatingly extreme, uploaders and downloaders beware!

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