

CHAPTER I

Introduction and Scope of Work

This work is intended as a practical guide for any litigator prosecuting, defending, or evaluating a copyright infringement lawsuit or claim under the Digital Millennium Copyright Act (DMCA), any practitioner responsible for a copyrighted work that may become the subject of litigation, and any attorney advising clients on copyright and DMCA issues.

This book provides comprehensive coverage of the remedies available for copyright infringement under the 1976 Copyright Act (Title 17, sections 501 through 505 of the United States Code)¹ and the remedy provisions of the DMCA (17 U.S.C. §§ 512(f), 1203). Those remedies are as follows:

- Recovery of the copyright owner's compensatory actual damages resulting from an infringement, plus any of the defendant's profits attributable to the infringement that are not accounted for in computing the owner's actual damages (chapter 3).

1. The damages provision of the Copyright Act of 1909 (former 17 U.S.C. § 25) applies to conduct occurring before January 1, 1978. *See* Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 772 F.2d 505, 512 n.4 (9th Cir. 1985).

- Statutory damages, which are available as an alternative remedy to actual damages/profits in certain copyright cases (chapter 4).
- Monetary relief under the DMCA. Although the DMCA provides for “actual damages and profits” and statutory damages, these remedies differ in many important respects from the analogous remedies available for copyright infringement (chapter 5).
- Injunctive relief, in the court’s discretion. This book emphasizes the recent demise of the “presumption of irreparable harm” that used to apply in cases of infringement, and the renewed emphasis on the other elements necessary to obtain preliminary and permanent injunctive relief (chapter 6).
- Impoundment (seizure) and destruction of infringing items, in the court’s discretion (chapter 7).
- Attorneys’ fees and other costs to the prevailing party, awarded at the court’s discretion (chapter 8).

Copyright infringement is in the nature of a strict liability tort, and the legal principles that apply generally to tort recovery (such as causation and joint and several liability) apply with equal force to infringement claims. But copyright damages also incorporate some unusual features, such as the option to choose between two very different remedies (actual or statutory damages) at any time prior to entry of judgment and a shifting burden of proof with respect to establishing the defendant’s profits.

In addition, perhaps more than in other areas of civil litigation, foresight is required to take full advantage of (or to defend against) the range of available remedies. For example, a copyright owner must register a work within a prescribed timeframe to be eligible for statutory damages and attorneys’ fees (chapter 2). And *how* one litigates a copyright or DMCA action can have as significant an effect as the merits of the case on the availability of injunctions and fee awards—remedies that are equitable and highly discretionary.

Accordingly, this book is organized so that the table of contents provides a quick overview of the available remedies, while the chapter outlines provide a checklist of available subcategories of damages or

more detail on the elements and important considerations for each particular remedy. The coverage is intended to be both readable and complete, citing key cases as well as unusual ones and identifying significant differences among the circuits.