Guardrail to Guardrail: Statutory Damage Awards in Copyright Infringement Litigation

By R. Buck McKinney

What happens when Congress provides a statutory damage scheme that ranges from $750 to $150,000 (with the opportunity to multiply the award tens, perhaps hundreds, of times), and leaves it almost entirely to the discretion of judge and jury to determine the appropriate award? Some would argue that it's a bit like losing your steering while careening down a highway—you could find yourself going guardrail to guardrail.

In fact, the Copyright Act has such a statute. Section 504(c) provides for statutory damages from $750 to $150,000, with the exact figure left largely to the discretion of the fact-finder.[1] This article will address ongoing debate related to that scheme, followed by a brief discussion of existing methodology for assessing statutory damages.

Winning the Battle, Losing the War

In 1990, telecommunications entrepreneur Elvin Feltner acquired three television stations in the southeastern United States, and in an effort to cut costs, attempted to renegotiate license fees for several television programs, including *Who's the Boss* and *TJ Hooker*.[2] After talks broke down, Columbia Pictures Television terminated Feltner's licenses, but the stations continued to air the programs anyway—prompting Columbia to file suit for copyright infringement. Following a bench trial on damages,[3] the California district court awarded $20,000 per work infringed, for a total award of $8.8 million (based upon 440 works).[4] At the time, it was the largest statutory damages award in the history of copyright litigation.[5] It would soon be eclipsed.

On appeal, Feltner claimed that his Seventh Amendment right to trial by jury was violated when the Court refused to submit the statutory damages issue to a jury. At that time, there was a split of authority, with the Second, Fifth, and Eleventh circuits holding that there was no such constitutional right, and the Fourth and Eighth circuits holding that there was.[6] The Ninth Circuit agreed with the former group, after which the Supreme Court granted certiorari to settle the matter. The Supreme Court ultimately held that where a plaintiff elects statutory damages, the defendant has a right to a jury trial on those issues, including a right to a jury determination of the amount of statutory damages. During oral argument, Justice Stephens cautioned that a jury might return an even *larger* verdict than the $8.8 million rendered by the district court.[7] He was correct. On remand, the jury returned a verdict of $31.68 million[8]—once again, the largest statutory damages verdict ever.[9]

Gathering Clouds

In the months leading up to the *Feltner* decision and thereafter, the idea of turning statutory damage awards over to a jury prompted widespread concern among scholars and copyright advocacy groups alike. An amicus brief filed in *Feltner* on behalf of an association of copyright lawyers suggested that juries were ill-equipped to exercise the discretion necessary to determine appropriate statutory damages.[10] The preeminent authority on copyright law was even more pessimistic:

> [I]t is doubtful that juries can be meaningfully instructed to compare the facts at bar against those of prior cases in order to slot an appropriate award into the scheme of precedent. Instead, they can simply compute an amount.[11]

Whatever concerns may have existed regarding jury verdicts, evidence was mounting that judges were also capable of assessing controversial awards. A long-held tenet of copyright law was (and is) that an award of statutory damages should bear *some* relationship to actual damages suffered.[12] Notwithstanding, in September 2000, a New York district judge awarded $25,000 per work infringed against a company that derived no demonstrable profits, with the understanding that it could result in a total award of $118 million.[13] The judgment was all the more confounding given that the plaintiffs failed to offer *any* evidence of harm, while the defendant presented evidence that its service actually *increased* plaintiffs' revenues.[14]

Over the ensuing years, controversial awards continued to accrue. Perhaps most troublesome were several cases suggesting that there wasn't any required nexus between actual damages and statutory damages.[15] Although it had long been recognized that statutory damages were awardable even where the plaintiff failed to present any proof of actual damages,[16] where such proof *was* available, courts routinely calibrated their awards accordingly—for instance, by "doubling" or "quadrupling" actual damages based upon the blameworthiness of the defendant.[17] That principle appeared to be eroding.

The Breaking Point?

If events over the first few weeks of 2010 are any indication, the breaking point may finally have been reached. As background, in 2003, the Recording Industry Association of America (RIAA), a trade association comprised of record companies, initiated a campaign against consumers who were using so-called peer-to-peer networks to share their music—targeting some 261 defendants.[18] By 2008, more than 30,000 such cases had been filed by the RIAA.[19]

The RIAA lawsuits were of a decidedly different flavor than the typical infringement case. To begin with, the plaintiffs were comprised of huge corporations, while the defendants were typically consumers (many of them college students) without any apparent profit motive.[20] Actual damages were usually (perhaps always) uncertain. Defendants routinely argued that damages should be limited to the price they would have paid for the songs if they had

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legally purchased them online ($0.99–$1.29 each), while record companies argued that the very nature of peer-to-peer networks caused damages to balloon exponentially.[21] Finally, the number of "works" involved was often enormous, leading to the possibility that statutory damages could be multiplied many times over.[22] Given these unique circumstances and the inherent lack of parameters set forth in the Act for awarding statutory damages, it was only a matter of time before the RIAA campaign would turn into a spectacle.

In June 2009, a Minneapolis jury returned a verdict of $1.92 million against mother-of-four Jammie Thomas-Rasset for downloading and illegally sharing 24 songs on the Kazaa peer-to-peer network.[23] The following month, a Boston jury returned a $675,000 verdict against college student Joel Tenenbaum for downloading and sharing 30 songs.[24] In contrast, two other recent "file-sharing" cases resulted in verdicts of $22,500 (for 30 works)[25] and $40,500 (for 54 works),[26] respectively. It is difficult to reconcile these widely divergent awards on the facts inasmuch as they all involved roughly the same conduct and number of infringements. Critics of the *Feltner* decision will note that the larger verdicts were awarded by *juries*, while the smaller verdicts were awarded by *judges*. Another important (and rather obvious) distinction is that, in the case of the smaller awards, the plaintiffs requested only minimum damages (i.e., $750 per work infringed) as opposed to leaving the award to the fact-finder's discretion.[27] However, these circumstances only serve to underscore the problem: the Act provides little, if any, guidance as to how the fact-finder's discretion ought to be exercised when making an award of statutory damages. As a result, discrete cases involving the same conduct and the same economic harm have resulted in wildly different awards and, occasionally, awards that simply shock the conscience.

As of this writing, the defendants in *Capital Records v. Thomas-Rasset* and *Sony BMG Music Entertainment v. Tenenbaum* have challenged the verdicts rendered against them on grounds of due process and common law principles of remittitur. Whether they will ultimately succeed is anybody's guess. Nevertheless, recent developments have been intriguing. On January 22, 2010, the court in *Thomas-Rasset* unexpectedly reduced the $1.92 million verdict to $54,000, noting that it was the "upper limit" that a jury could have reasonably set for the infringement in question.[28] According to one copyright expert, this is the first time in the history of copyright law that a court has overturned an award of statutory damages based on common law remittitur.[29] And while the judge sidestepped the constitutional challenge, Thomas-Rasset's counsel has suggested that his client will appeal the reduced award on due process grounds, even if the plaintiffs do not.[30] Meanwhile, the judge in *Tenenbaum* has issued a fervent plea to Congress to amend the Act:

> As this Court has previously noted, it is very, very concerned that there is deep potential for injustice in the Copyright Act as it is currently written. It urges—no implores—Congress to amend the statute. . . .[31]

While it is an open question whether Congress will act anytime soon to revise the statutory damage provisions of the Act, it is abundantly clear that the controversy surrounding statutory damages shows no signs of abating. Against this backdrop, the remainder of this article will address the factors *traditionally* relied upon by courts and juries to inform their statutory damage awards. Of course, in light of developing trends (both towards and away from well-established principles), and the wide range of statutory awards in such cases, "mileage may vary."

The Statutory Range and Burden of Proof

The range for statutory damages set forth in § 504(c) of the Copyright Act is $750 to $30,000 per work infringed.[32] If the copyright owner can prove that the infringement was "willful," the court may increase the award to $150,000.[33] Alternatively, if the defendant proves that he was not aware and had no reason to believe that his actions constituted infringement, the court, in its discretion, may reduce the statutory award to $200 per work infringed.[34]

Calculating Statutory Damages

Who Decides?

As set forth above, in the wake of *Feltner*, a copyright litigant has the right to elect to have statutory damages determined by a jury. The sole exception appears to be when a plaintiff elects minimum statutory damages (i.e., $750 per work infringed). In such cases, the constitutional right to a jury determination apparently no longer applies.[35] Notwithstanding, the parties can "waive" their right to jury trial,[36] and statutory damages are often assessed during bench trials, even in this post-*Feltner* age.[37] Thus, the "fact-finder" for purposes of determining statutory damages may be judge *or* jury, depending on the circumstances.

The "Factors"

The Act provides little guidance as to how statutory damages ought to be fixed, leaving the issue largely to the discretion of the fact-finder.[38] Several judicial opinions have asserted that this discretion is constrained *only* by the minimums and maximums set forth in the Act.[39] Notwithstanding, fact-finders have generally looked to one or more of the following factors to inform their decisions: (1) the expenses saved and the profits reaped, (2) the revenues lost by the plaintiff, (3) the value of the copyright, (4) the deterrent effect on others besides the defendant, (5) whether the defendant's conduct was innocent or willful, (6) whether a defendant has cooperated in providing particular records from which to assess the value of the infringing material produced, and (7) the potential for discouraging the defendant.[40]

Professor Nimmer has questioned whether the above factors "continue to apply" post-*Feltner*—now that statutory damages have been entrusted to juries.[41] Notwithstanding, references to these factors continue to appear in pattern jury

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instructions,[42] courts have upheld jury awards where such factors have been considered by the jury,[43] and one court has referenced these factors in connection with its decision to order remittitur of a jury's verdict.[44] As such, they appear to have continued vitality—even in jury trials.

The First Three Factors

The first three factors on the "list" are (1) the expenses saved and profits reaped by the defendant, (2) the revenues lost by the plaintiff, and (3) the value of the copyright. Although these factors appear at the top of the list, they are often absent from the fact-finder's analysis. Occasionally, this is because such evidence is scarce or speculative.[45] Nevertheless, the absence of such evidence is not fatal to a claim for statutory damages. Indeed, the difficulty of proving-up actual damages has been acknowledged as a proper justification for statutory damages.[46]

Where evidence of the first three factors *is* present, a court's determination of the quantum of such damages is similar to an analysis under § 504(b) of the Act (for non-statutory damages). For instance, where the plaintiff might otherwise have licensed the work to the defendant and the rate is demonstrable, the "lost license fee" may serve to establish both the expenses saved by the defendant and the revenues lost by the plaintiff.[47] Alternatively, where there are no established royalty or licensing rates, the fact-finder may look to other evidence—such as the "fair market value" of the labor involved to create the work in question—in order to establish the "value of the copyright."[48] Finally, the fact-finder may consider whether there has been a diminution in the fair market value of the plaintiff's copyrighted work as a result of the infringer's conduct.[49]

Where the court has made a finding of "actual damages," the next issue is the impact this ought to have on the ultimate award. As set forth above, some courts have traditionally held that a statutory damage award should bear *some* relationship to actual damages.[50] According to the preeminent copyright authority, a failure to establish some rational nexus between the two can "introduce randomness or worse into the litigation calculus."[51] Other courts have soundly rejected any such nexus.[52] If the latter view were correct, however, it is difficult to understand why an analysis of actual damages is even relevant.

When determining defendant's profits, the court may deduct expenses and costs related to same in order to arrive at the proper basis for determining statutory damages.[53] Where such evidence is lacking, the fact-finder may rely on gross profits.[54] Generally, the fact-finder does not take "apportionment" of profits into consideration.[55]

Deterrent Effect and Discouraging the Defendant from Further Infringement

In addition to compensating the copyright owner for losses incurred, statutory damages are intended to *deter* future infringement.[56] According to the U.S. Supreme Court, a damages scheme limited to an award of actual damages would not sufficiently serve the purposes of the Act:

> [A] rule of liability which merely takes away the profits from an infringement would offer little discouragement to the infringers. It would fall short of an effective sanction for enforcement of the copyright policy. The statutory rule, formulated after long experience, not merely compels restitution of profit and reparation for injury but also is designed to discourage wrongful conduct.[57]

As another court put it, infringers should not be allowed to "sneer in the face of copyright owners and copyright laws."[58] Accordingly, case law reflects many instances in which courts have set awards at several times the amount of actual damages as "punishment" for a willful infringement, and in order to deter future infringement.[59]

Whether Defendant's Conduct Was Innocent or Willful

Where the defendant's conduct is "willful," this factor generally weighs in favor of a larger award.[60] In such cases, the court may, in its discretion, increase the award of statutory damages to $150,000 per work infringed.[61] "Willfulness" is not defined in the Copyright Act, nor in its legislative history.[62] In practice, courts have required plaintiffs to prove willfulness by showing either that the defendant actually knew it was infringing the plaintiff's copyrights, or recklessly disregarded that possibility.[63]

Courts have found that willfulness may be inferred where the defendant has failed to appear and defend an action for infringement.[64] In addition, where the alleged acts of infringement occurred after the defendant was put on notice by plaintiff, this can constitute persuasive evidence of willfulness.[65] As one court put it, "one who undertakes a course of infringing conduct may [not] . . . hide its head in the sand like an ostrich."[66]

Conversely, a reasonable and good faith belief by the defendant that his conduct was lawful may insulate him from enhanced statutory damages, even if the belief was erroneous.[67] As set forth above, in cases where the defendant had a good faith belief that his conduct was lawful, the court, in its discretion, may reduce the award to not less than $200.[68] Notwithstanding, the fact-finder is not *obligated* to reduce the award to $200 per work infringed where such a showing is made. As with willful infringements, the actual award is left to the fact-finder's discretion.[69]

Plaintiff's Conduct

Some courts have held that the fact-finder may consider the *plaintiff's* conduct during litigation when assessing an award of damages.[70] Thus, in one case, the court reduced the award of statutory damages due to the vexatious, oppressive, and unreasonable manner in which the copyright owner prosecuted its infringement action,[71] and in another the court reduced an award when plaintiff's agent delayed eight months in answering inquiries as to whether certain material was actually copyrighted.[72]

How Many "Works"?

Under the Act, statutory damages are awarded *per work infringed*.[73] In other words, the relevant unit is not the number of infringements, but rather the number of copyrighted works that have been infringed by the defendant.[74] The rule seems simple enough, but several issues have vexed the courts. One such issue relates to so-called compilations, which are collections of independently copyrightable works. In many cases, a copyright owner will register his independently copyrightable works as a compilation—sometimes in

order to save the cost of independently registering each work. This can have a significant effect on the amount of damages awardable in the event of infringement, since the prevailing view is that all parts of a compilation constitute a single work for purposes of awarding statutory damages.[75]

Notwithstanding the foregoing limitation, the practitioner should be aware that the *opposite* is not true. In other words, where the infringer has used separate works to create a compilation, the copyright owner is still entitled to statutory damages for each work infringed, regardless of the fact that the *infringer* used them in a single "compilation."[76]

Where to from Here?

As set forth above, debate over the appropriate assessment of statutory damages has elevated to the point that at least one court is now "imploring" Congress to amend the Act.[77] Other courts are taking matters into their own hands. In January 2010, a court remitted damages in what may be the first decision of its kind.[78] Meanwhile, constitutional challenges to the current statutory damages scheme are pending in at least two district courts.[79] Whether these clarion calls will prompt statutory revision or a change in established jurisprudence remains to be seen. Until then, the factors set forth in the last half of this article are essentially the only guidance we have. ■

Endnotes

1. 17 U.S.C. § 504(c).

2. *See* Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc., 106 F.3d 284, 291 (9th Cir. 1997), *rev'd sub nom.* Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998). At the time, Feltner was attempting to renegotiate his contracts related to the programs in question.

3. Liability had already been established against Feltner on Columbia's motion for partial summary judgment.

4. *Feltner*, 523 U.S. at 344.

5. 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 14.04 (2009) [hereinafter Nimmer].

6. *See Columbia Pictures*, 106 F.3d at 291 (citing cases).

7. *Feltner*, 523 U.S. at 353. *See also, Davis Wright Tremaine Attorneys Win Largest Reported Copyright Infringement Statutory Damages*, Bus. Wire, Apr. 12, 1999, *available at* http://www.allbusiness.com/legal/trial-procedure-summary-judgment/6676139-1.html.

8. Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc., 259 F.3d 1186 (9th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002).

9. Nimmer, *supra* note 5, § 14.04.

10. Brief for American Intellectual Property Law Association as Amici Curiae Supporting Respondents, Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340 (1998) (No. 96-1768).

11. *See*, *e.g.*, Nimmer, *supra* note 5, § 14.04[C][3].

12. *See*, *e.g.*, RSO Records v. Peri, 596 F. Supp. 849, 862 (S.D.N.Y. 1984) ("[S]tatutory damages should bear some relation to actual damages suffered."); Bly v. Banbury Books, Inc., 638 F. Supp. 983, 987 (E.D. Pa. 1986) ("Assessed statutory damages should bear some relation to the actual damages suffered."); Fitzgerald Publ'g Co., Inc. v. Baylor Publ'g Co., Inc., 670 F. Supp. 1133, 1140 (E.D.N.Y. 1987) ("Undoubtedly these [statutory] damages should bear some relation to the actual damages suffered"); New Line Cinema Corp. v. Russ Berrie & Co., 161 F. Supp. 2d 293, 303 (S.D.N.Y. 2001) ("[S]tatutory damages should be commensurate with the actual damages incurred and, thus, the proper departure point is [defendant's] stipulated gross revenue.").

13. UMG Recordings, Inc. v. MP3.com, Inc., [1999–2000] Copyright L. Dec. (CCH) ¶ 28,141 (S.D.N.Y. 2000).

14. UMG Recordings, Inc. v. MP3.com, Inc., 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000).

15. *See*, *e.g.*, SESAC, Inc. v. WPNT, Inc., 327 F. Supp. 2d 531, 532 (W.D. Pa. 2003) ("To the extent that the courts in the cases cited by defendants found that the deterrent effect should be relative to the cost of the license, we disagree."); Lowry's Reports, Inc. v. Legg Mason, Inc., 302 F. Supp. 2d 455, 460–61 (D. Md. 2004) (finding that the district court did not err by declining to instruct the jury that statutory damages should bear a reasonable relationship to actual damages); New Form, Inc. v. Tekila Films, Inc., 2009 WL 4876791, at *1 (9th Cir. Nov. 12, 2009) ("There is no required nexus between actual and statutory damages under 17 U.S.C. 504(c) . . . [defendant's] excessive-verdict claim turns on the incorrect premise that statutory damages must be tethered to actual damages. Because there is no such requirement, the jury's verdict cannot be deemed excessive on that basis.").

16. *See* F.W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228, 233 (1952) (holding that "[e]ven for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within [the] statutory limits to sanction and vindicate the statutory policy" [of discouraging infringement]).

17. *See RSO Records*, 596 F. Supp. at 862 (citing cases).

18. David Kravets, *File Sharing Lawsuits at a Crossroads, After 5 Years of RIAA Litigation*, Wired, Sept. 4, 2008, *available at* http://www.wired.com/threatlevel/2008/09/proving-file-sh/.

19. *Id*.

20. *See*, *e.g.*, Sony BMG Music Entm't v. Tenenbaum, 2009 WL 4547019, at *16 (D. Mass. 2009) (where the court notes, "[t]here is something wrong with a law that routinely threatens teenagers and students with astronomical penalties for an activity whose implications they may not have fully understood").

21. *See* Capitol Records Inc. v. Thomas-Rasset, 2010 WL 291763, at *5 (D. Minn. Jan. 22, 2010).

22. *Id*. (where the court noted that defendant had almost 1,700 recordings on her computer).

23. *Id*. at *2.

24. David Kravets, *Judge Finalizes $675,000 RIAA Piracy Verdict, Won't Gag Defendant*, Wired, Dec. 7, 2009, *available at* http://www.wired.com/threatlevel/2009/12/piracy-verdict-finalized/.

25. BMG Music v. Gonzalez, No. 03 C 6276, 2005 WL 106592, 2005 Copyright L. Dec. (CCH) ¶ 28,933 (N.D. Ill. 2005).

26. Atl. Recording Corp. v. Howell, 2008 Copyright. L. Dec. (CCH) ¶ 29,625, 88 U.S.P.Q.2d 1475 (D. Ariz. 2008).

27. *Id*. at *3; *Gonzalez*, 2005 WL 106592, at *1.

28. Capitol Records Inc. v. Thomas-Rasset, 2010 WL 291763, at *10 (D. Minn. Jan. 22, 2010).

29. Ben Sheffner, *Did Judge Davis Have the Authority to Remit the* Thomas-Rasset *Award?* Copyrights & Campaigns, Jan. 24, 2010, *available at* http://copyrightsandcampaigns.blogspot.com/2010/01/did-judge-davis-have-authority-to-remit.html.

30. Ben Sheffner, *Labels Offer to Settle Thomas-Rasset Case for $25,000 Donation to Charity, Vacatur of Remittitur Order; Thomas Rasset Promptly Rejects*, Jan. 27, 2010, *available at* http://copyrightsandcampaigns.blogspot.com/2010/01/labels-offer-to-settle-thomas-rasset.html. In her January 22, 2010, order, Judge Davis gave the Plaintiffs the option of seeking a new trial on damages. On February 8, 2010, the Plaintiffs rejected the reduced verdict. The case will now go back for yet another determination of damages. *See* Sheri Qualters, *At Hearing, Boston Music Downloader Argues for New Trial or Reduced Verdict*, Nat'l L. J., Feb. 23, 2010.

31. Sony BMG Music Entm't v. Tenenbaum, 2009 WL 4547019, at *16 (D. Mass. 2009).

32. 17 U.S.C. § 504(c)(1).

33. *Id*. § 504(c)(2).

34. *Id*.

35. *See* BMG Music v. Gonzalez, 430 F.3d 888, 892 (7th Cir. 2005), *cert. denied*, 547 U.S. 1130 (2006).

36. Nimmer, *supra* note 5, § 14.04[C][2].

37. *See*, *e.g.*, BMG Music v. Gonzalez, No. 03 C 6276, 2005 WL 106592, 2005 Copyright L. Dec. (CCH) ¶ 28,933 (N.D. Ill. 2005); Atl. Recording Corp. v. Howell, 2008 Copyright L. Dec. (CCH) ¶ 29,625, 88 U.S.P.Q.2d 1475 (D. Ariz. 2008).

38. 17 U.S.C. § 504(c).

39. Peer Int'l Corp. v. Pausa Records, Inc., 909 F.2d 1332, 1336 (9th Cir. 1990); *see also* Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc., 259 F.3d 1186, 1194 (9th Cir. 2001); Nintendo of Am., Inc. v. Dragon Pac. Int'l, 40 F.3d 1007, 1010 (9th Cir. 1994).

40. Fitzgerald Publ'g Co. v. Baylor Publ'g Co., 807 F.2d 1110, 1117 (2d Cir. 1986); *accord* Eros Entm't, Inc. v. Melody Spot, L.L.C., 2005 WL 4655385, at *10 (E.D.N.Y. Oct. 11, 2005).

41. Nimmer, *supra* note 5, § 14.04[E][1][a].

42. *See*, *e.g.*, 9th Circuit Model Civil Jury Instructions 20.25 (2009). *But see* New Form, Inc. v. Tekila Films, Inc., 2009 WL 4876791, at *1 (9th Cir. Nov. 12, 2009) (holding that the district court did not abuse its discretion by declining to accept a proposed jury charge referencing actual damages and "fair market value").

43. *See* Lowry's Reports, Inc. v. Legg Mason, Inc., 302 F. Supp. 2d 455, 461 (D. Md. 2004) (upholding jury award of statutory damages where court instructed jury that deterrence was one of a variety of factors to be considered).

44. Capitol Records Inc. v. Thomas-Rasset, 2010 WL 291763 (D. Minn. Jan. 22, 2010).

45. This is particularly true where a defendant has defaulted, or purposefully destroyed evidence. *See*, *e.g.*, Atl. Recording Corp. v. Howell, 2008 WL 4080008 (D. Ariz. Aug. 29, 2008).

46. *See* F.W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228, 233 (1952).

47. Broad. Music, Inc. v. Spring Mount Area Bavarian Resort, Ltd., 555 F. Supp. 2d 537, 545 (E.D. Pa. 2008) ("Defendants recognized significant savings as a consequence of their infringement, and, conversely . . . Plaintiffs suffered a revenue loss"); Cass County Music Co. v. Khalifa, 914 F. Supp. 30, 35 (N.D.N.Y. 1996) (predicating a finding of actual damages on the fee that defendant would have had to pay to obtain an appropriate license); Manno v. Tennessee Prod. Ctr., Inc., 657 F. Supp. 2d 425, 433–34 (S.D.N.Y. 2009)

(predicating plaintiff's lost profits on "typical" royalties and fixing fees he might otherwise have received).

48. *See* Branch v. Ogilvy & Mather, Inc., 772 F. Supp. 1359, 1365 (S.D.N.Y. 1991) (determining that $27,000 was the "fair market value" of plaintiff's labor related to infringed illustrations).

49. *See* Cream Records, Inc. v. Jos. Schlitz Brewing Co., 754 F.2d 826 (9th Cir. 1985) (holding that the defendant's unauthorized use of plaintiff's song in a commercial had diminished the plaintiff's ability to license the work for other commercials, and thus diminished the licensing value of the work itself).

50. *See supra* note 12.

51. *See* NIMMER, *supra* note 5, § 14.04[E][1][a].

52. *See supra* note 15.

53. *See* Lauratex Textile Corp. v. Allton Knitting Mills Inc., 519 F. Supp. 730, 733 (S.D.N.Y. 1981).

54. *Id*.

55. Although "apportionment" of profits to reflect factors *other* than the copyrighted work is allowed in the determination of profits under 17 U.S.C. § 504(b), such apportionment is not allowed when plaintiff elects statutory damages under § 504(c). *See* Nintendo of Am., Inc. v. Dragon Pacific Int'l, 40 F.3d 1007, 1012 (9th Cir. 1994).

56. F.W. Woolworth Co. v. Contemporary Arts, 344 U.S. 228, 233 (1952); *see also* L.A. News Serv. v. Reuters Television Int'l, 149 F.3d 987, 996 (9th Cir. 1998).

57. *F.W. Woolworth Co.*, 344 U.S. at 233.

58. Int'l Korwin Corp. v. Kowalczyk, 665 F. Supp. 652, 659 (N.D. Ill.1987), *aff'd*, 855 F.2d 375 (7th Cir. 1988).

59. *See* Golden Torch Music Corp. v. Pier III Cafe, Inc., 684 F. Supp. 772, 774 (D. Conn.1988) (awarding $8,000 in statutory damages where licensing fees would have been $1,490); Broad. Music, Inc. v. R Bar of Manhattan, Inc., 919 F. Supp. 656, 660 (S.D.N.Y.1996) (surveying cases, and awarding $12,000 in statutory damages where licensing fees would have been $2,245); Broad. Music, Inc. v. Melody Fair Enters., Inc., 1990 WL 284743, at *4 (W.D.N.Y. July 31, 1990) (awarding $70,000 in statutory damages where licensing fees would have been about $17,000).

60. 17 U.S.C. § 504(c)(2); s*ee also* Manno v. Tennessee Prod. Ctr., Inc., 657 F. Supp. 2d 425, 434 (S.D.N.Y. 2009); Schiffer Publ'g, Ltd. v. Chronicle Books, LLC, 2005 WL 67077, at *5 (E.D. Pa. Jan. 10, 2005).

61. 17 U.S.C. § 504(c)(2).

62. *Schiffer Publ'g*, 2005 WL 67077, at *5.

63. Yurman Studio, Inc. v. Castaneda, 591 F. Supp. 2d 471, 503 (S.D.N.Y. 2008) (citing UMG Recordings, Inc. v. MP3.Com, Inc., No. 00 Civ. 472, 2000 WL 1262568, at *4 (S.D.N.Y. Sept. 6, 2000)); *see also* King Records, Inc. v. Bennett, 438 F. Supp. 2d 812, 860 (M.D. Tenn. 2006); Controversy Music v. Down Under Pub Tyler, Inc., 488 F. Supp. 2d 572, 578 (E.D. Tex. 2007).

64. *See* Arista Records, Inc. v. Beker Enters., Inc., 298 F. Supp. 2d 1310, 1313 (S.D. Fla. 2003) (citing Microsoft Corp. v. Wen, 2001 WL 1456654, at *4–5, 2001 U.S. Dist. LEXIS 18777, at *14–17 (N.D. Cal. 2001); Sony Music Entm't v. Cassette Prod., 1996 WL 673158, at *3 (D.N.J. 1996); Fallaci v. The New Gazette Literary Corp., 568 F. Supp. 1172, 1173 (S.D.N.Y. 1983); Original Appalachian v. Yuil Int'l Corp., 1987 WL 123986, 5 U.S.P.Q.2d (BNA) 1516, 1524 (S.D.N.Y.1987)).

65. *King Records*, 438 F. Supp. 2d at 860–61 (citing Video Views, Inc. v. Studio 21, Ltd., 925 F.2d 1010, 1021 (7th Cir. 1991); Chi-Boy Music v. Charlie Club, Inc., 930 F.2d 1224, 1227–28 (7th Cir. 1991)).

66. *Video Views*, 925 F.2d at 1021.

67. *See*, *e.g.*, Princeton Univ. Press v. Michigan Document Servs., Inc., 99 F.3d 1381, 1392 (6th Cir. 1996) (en banc), *cert. denied*, 520 U.S. 1156 (1997).

68. 17 U.S.C. § 504(c)(2).

69. *Id.*; Branch v. Ogilvy & Mather, Inc., 772 F. Supp. 1359, 1365 (S.D.N.Y. 1991).

70. *See* Warner Bros. Inc. v. Dae Rim Trading, Inc., 877 F.2d 1120, 1126 (2d Cir. 1989); Bourne Co. v. Hunter Country Club, Inc., 772 F. Supp. 1044, 1052 (N.D. Ill. 1990), *aff'd*, 990 F.2d 934, 939 (7th Cir. 1993).

71. *Warner Bros. Inc.*, 877 F.2d at 1126.

72. *Bourne Co.*, 772 F. Supp. at 1052.

73. 17 U.S.C. § 504(c)(1); s*ee also* H.R. REP. No. 94-1476, 2d Sess. at 162 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5778 ("Where the suit involves infringement of more than one separate and independent work, minimum statutory damages for *each work* must be awarded." (emphasis added)).

74. *Id.*; *see also* UMG Recordings, Inc. v. MP3.Com. Inc., 109 F. Supp. 2d 223, 225 (S.D.N.Y. 2000).

75. *See UMG Recordings*, 109 F. Supp. 2d at 225; King Records, Inc. v. Bennett, 438 F. Supp. 2d 812, 865 (M.D. Tenn. 2006); Teevee Toons, Inc. v. MP3.com., Inc., 134 F. Supp. 2d 546, 548 (S.D.N.Y. 2001); Xoom, Inc. v. Imageline, Inc., 323 F.3d 279, 285 (4th Cir. 2003); *cf.* Gamma Audio & Video, Inc. v. Ean-Chea, 11 F.3d 1106, 1117 (1st Cir. 1993) (holding that where multiple works were registered together on one form, *but were not identified as a "compilation,"* separate awards for each work could be granted); *see also* Costar Group Inc. v. Loopnet, Inc., 164 F. Supp. 2d 688, 709–12 (D. Md. 2001), *aff'd*, 373 F.3d 544 (4th Cir. 2004) (noting that the critical factor in deciding whether one or multiple awards of statutory damages should be awarded is whether registration is of "multiple works on a single form" or of a "compilation").

76. *See* WB Music Corp. v. RTV Commc'n Group, Inc., 445 F.3d 538, 539 (2d Cir. 2006).

77. Sony BMG Music, Entm't v. Tenenbaum, 2009 WL 4547019, at *16 (D. Mass. 2009).

78. Capitol Records Inc. v. Thomas-Rasset, 2010 WL 291763, at *10 (D. Minn. Jan. 22, 2010).

79. Defendants in *Tenenbaum* and *Thomas-Rasset* have vowed to continue their challenges on due process grounds. *See 5 Legal Cases That Defined Music in 2009*, REUTERS, Dec. 23, 2009, *available at* http://www.wired.com/epicenter/tag/tenenbaum/.