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Statutory Damages Under the Copyright Act of 1976

INTRODUCTION

Statutory damages have long been a feature of United States copyright laws. Three of the early state copyright statutes prescribed fixed damages for infringement, and the first federal copyright law, enacted in 1790, also provided such a remedy. Despite its long history, this legislative measure of recovery in copyright infringement suits has generated numerous problems. The statutory damages provision of the Copyright Act of 1909

1. Statutory damages are, in fact, unique to American copyright law. Claims for damages in civil actions in other countries are generally limited to the copyright owner's actual damages and/or the infringer's profits. Some foreign laws, however, prescribe minimum and maximum amounts for such damages. Many foreign laws also provide for punitive damages, the amounts of which depend on the defendant's intent to infringe. For a general discussion of the damages provisions of various foreign copyright laws, see Strauss, The Damage Provisions of the Copyright Law, Copyright Law Revision Study No. 22 (Comm. Print 1956), in 2 STUDIES ON COPYRIGHT 1009-15 (1963).

2. Three states enacted fixed damages legislation in 1783. The Massachusetts statute provided for an award of damages of a sum not to exceed 3,000 pounds, but not less than five pounds. Legislation adopted in New Hampshire and Rhode Island provided that damages were not to exceed 1,000 pounds or be less than five pounds. See infra notes 22-24 and accompanying text. See also Patry, The Right to a Jury in Copyright Cases, 29 J. COPYRIGHT SOCY 139, 150 (1981).


4. Id. Section 2 of the Act provided, in relevant part:

[If any other person or persons . . . shall print, reprint, publish, or import . . . any copy or copies of such map, chart, book or books, without the consent of the author or proprietor thereof, . . . then such offender or offenders shall . . . forfeit and pay the sum of fifty cents for every infringing sheet which shall be found in his or their possession, . . . the one moiety thereof to the author or proprietor of such map, chart, book or books who shall sue for same, and the other moiety thereof to and for the use of the United States, to be recovered by an action of debt . . . .]

Id. § 2. This section applied only to works that had been previously published.

5. 17 U.S.C. § 101(b) (1976) (repealed 1978). Statutory damages were derived from the following language of the provision: "[I]n lieu of actual damages and profits, such damages as to the court shall appear to be just . . . and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty." Id. Because of the language of the statute, statutory damages were often referred to as "in lieu" damages. See e.g., Sid & Marty Krofft Television Prods. v. McDonald's Corp., 562 F.2d 1157, 1176 (9th Cir. 1977).
("the 1909 Act"), the predecessor to the current act, was the source of conflicting decisions and often the subject of heated controversy.

Judicial uncertainty centered primarily around when statutory damages were available as a remedy for copyright infringement and how to measure the award. Conflicts also arose over whether statutory damages should be awarded in cases of innocent infringement, and whether statutory damages were to be assessed by judge or jury. Attempts at legislative revision were largely unsuccessful until Congress passed the current act, the Copyright Act of 1976 ("the 1976 Act").

The 1976 Act substantially revised the statutory damages clause of the 1909 Act, thereby resolving many of the existing conflicts. Despite this legislative reform, judicial uncertainty still surrounds the award of statutory damages, giving rise to the inconsistent application of the statute. Because statutory damages may be the only monetary relief available to copyright owners, Congress reacted to this situation by passing the Copyright Act of 1976.

8. The controversy centered around the mandatory assessment of the $250 minimum damages award against innocent infringers of copyrights. Users of copyrighted material contended that the $250 minimum was too harsh a remedy for those who did not know that they were infringing. Copyright owners, on the other hand, insisted that the minimum amount was necessary to prevent inroads upon the copyright owner's rights. See generally Caplan, The Measure of Recovery in Actions for the Infringement of Copyright, 37 MICH. L. REV. 564 (1939). See also infra notes 79-88 and accompanying text.
9. Brown, The Operation of the Damage Provisions of the Copyright Law: An Explanatory Study, Copyright Law Revision Study No. 23 (Comm. Print 1958), in 2 STUDIES ON COPYRIGHT 1067, 1085-86 (1963). The statutory damages provision included minimum arbitrary amounts for each infringement, which the courts could award in their discretion. The suggested amounts depended on the nature of the infringement and the type of copyright infringed. Judicial confusion arose over whether these discretionary amounts were to be applied in cases involving multiple infringements. Strauss, supra note 1, at 1007-08. See also Jewell-LaSalle Realty v. Buck, 283 U.S. 202 (1931). See infra note 42 for the schedule of the minimum arbitrary amounts.
11. See infra notes 89-97 and accompanying text.
12. See infra notes 85-87 for the various unenacted bills.
15. See infra notes 134-48 and accompanying text.
owners\textsuperscript{16}, a consistent approach to damages awards should be adopted by federal courts.

This note will first trace the history and development of statutory damages as a remedy for copyright infringement. It will then examine the difficulties the courts had in applying the statutory damages provision of the 1909 Act. The 1976 amendments will then be analyzed, and the problems eliminated by the current legislation will be discussed. Next, the problems engendered by the current judicial application of the statutory damages provision are examined. Finally, this note will make specific recommendations to effectuate a uniform approach to the award of statutory damages.

**BACKGROUND**

**History of the Statutory Damages Provision**

The first law to protect the rights of authors in their works was the English Statute of Anne,\textsuperscript{17} enacted in 1710. This statute granted an author the exclusive right to print books for fourteen years from the date of publication, with the right to renew for another fourteen years thereafter if the author was still alive.\textsuperscript{18} Damages for violation of the statute were set at one penny per infringing sheet, one half to the Crown and the other half to the plaintiff. The purpose of this statutory damages provision was

\begin{itemize}
  \item \textsuperscript{16} The other types of monetary relief, actual damages and the infringer’s profits, are often conjectural and may be impossible or prohibitively expensive to prove. A copyright owner must therefore seek statutory damages in order to receive adequate compensation for his injury.
  \item \textsuperscript{17} 8 Anne c.19 (1710) was titled “An act for the encouragement of learning by vesting the copies of printed books in the authors or purchasers of such copies during the times therein mentioned.” Prior to the Statute of Anne, copyright laws existed, but these were designed to check the spread of the Protestant Reformation, not to promote learning. In 1556, the King of England exercised unlimited authority over the press by granting a monopoly of all printing to the Stationers’ Co., which was made up of the leading publishers in London. Printing was subject to the orders of the Star Chamber, and all published works had to be entered in the register of the Stationers’ Co. The company was given the powers to search for and confiscate any books not printed by the company, and infringers were imprisoned by the Star Chamber. The Star Chamber was abolished in 1640, and the powers of the Stationers’ Co. revoked. The orders of the Star Chamber were replaced by various ordinances and licensing acts which prohibited the printing of books without the author’s permission. See CAMBRIDGE RESEARCH INSTITUTE, OMNIBUS COPYRIGHT REVISION COMPARATIVE ANALYSIS OF THE ISSUES 5-6 (1973); Patry, supra note 2, at 145-46.
  \item \textsuperscript{18} 8 Anne c.19 (1710).
\end{itemize}
twofold: first, to insure adequate compensation to the plaintiff, because actual damages were difficult to ascertain and prove;\textsuperscript{19} and, second, to deter future infringement.\textsuperscript{20} Although the remedy was created by statute, it was considered to be a remedy at law recoverable by an action of debt.\textsuperscript{21}

The need for copyright laws in the United States was acknowledged in 1783, when the Continental Congress passed a resolution recommending that the several states secure to authors and publishers copyright protection.\textsuperscript{22} Every state except Delaware responded to this recommendation.\textsuperscript{23} Most of the statutes were patterned after the Statute of Anne and provided for fixed damage rates.\textsuperscript{24} Three states, however, enacted legislation fixing a minimum and maximum amount of recovery similar to the limitations found in the current act.\textsuperscript{25}

The first federal copyright act was passed by Congress in 1790,\textsuperscript{26} pursuant to the authority granted to it by the Constitution.\textsuperscript{27} The federal act, also patterned after the Statute of Anne, prescribed a fixed damage rate for the unauthorized publication of previously published works.\textsuperscript{28} Each infringer was required to pay fifty cents per sheet, half of which went to the copyright

\begin{itemize}
\item[19.] See, e.g., Millar v. Taylor, 4 Burrows 2303, 2350, 98 Eng. Rep. 201, 227 (K.B. 1769) ("This Act was brought in . . . not from any doubt or distrust of a just and legal property in the works or copyright . . . but upon the common-law remedy being inadequate, and the proofs difficult, to ascertain the damage really suffered by the injurious multiplication of the copies of those books . . .").
\item[20.] This purpose is inferred from the Supreme Court's statement in F.W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228 (1952): "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. The discretion of the court is wide enough to permit a resort to statutory damages for such purposes." Id. at 233.
\item[21.] 4 Burrows at 2380-81, 98 Eng. Rep. at 243. See also Patry, supra note 2, at 147-48.
\item[22.] Copyright Enactments. "Laws Passed in the United States Since 1783 Relating to Copyright," 140 Copyright Office Bull. No. 3 (Rev. 1973) [hereinafter cited as Copyright Enactments].
\item[23.] Id. at 1-21.
\item[24.] For a summary of the various state copyright laws see Patry, supra note 2, at 150. See also Copyright Enactments, supra note 22, at 1-21.
\item[25.] See supra note 2. The current act provides for minimum and maximum damages of $250 to $10,000. See infra note 120 for the text of the current statutory damages provision.
\item[26.] Act of May 31, 1790, ch. 15, 1 Stat. 124 (repealed 1947).
\item[27.] U.S. Const. art 1, § 8, cl. 8, provides, in pertinent part: "Congress shall have Power . . . to promote the Progress of Science and Useful Arts, by Securing for Limited Times to Authors and Inventors the Exclusive Right to Their Respective Writings and Discoveries."
\item[28.] See supra note 4 for the text of this provision.
\end{itemize}
owner, the other half accruing to the federal government. Dam-
ages for infringement of public works were to be recovered at law
by an action of debt. The purpose of these federal statutory
damages was the same as that of the Statute of Anne: to com-
pensate the copyright owner where actual damages or profits
were difficult or impossible to prove, and to deter future in-
fringement.

The provisions of the original federal copyright act remained
intact until the 1909 Act, although several new provisions were
added during the 1800's. Most of these provisions extended copy-
right protection to other works, such as engravings, musical
compositions, dramatic works, and paintings. Pursuant to
the Supplemental Copyright Act of 1819, federal courts were
granted original federal subject matter and equity jurisdiction
over copyright cases. The equitable power of the courts was

29. Patry, supra note 2, at 156.
porary Arts, Inc., 344 U.S. 228 (1952); Brady v. Daly, 175 U.S. 148 (1899); Peter Pan
Fabrics v. Jobela Fabrics, 329 F.2d 194 (2d Cir. 1964); Register of Copyrights, Report on
the General Revision of the Copyright Laws 102 (1961), in 2 STUDIES ON COPYRIGHT 1199,
1302 (1963) [hereinafter cited as 1961 Register's Report].
31. Act of April 29, 1802, ch. 36, 2 Stat. 171 (repealed 1947). The act extended copy-
right protection to designs, engravings, and prints, and provided for damages of $1 for
every infringing print, one half to accrue to the plaintiff and the other half to the United
States.
The act extended copyright protection to the performance of dramatic compositions. An
infringer could be liable for damages in a sum not less than $100 for the first perfor-
mance and $50 for every subsequent performance. The award of damages under the stat-
utory limits was within the court's discretion.
34. Act of July 8, 1870, 41st Cong., 2d Sess., ch. 230, 16 Stat. 198 (repealed 1947). This
act extended protection to paintings, photographs, and statues, and provided that an
infringer would be required to forfeit $10 for every copy, one half to accrue to the plaintiff
and the other half to the United States.
36. The Supplemental Copyright Act provided in part:
That the circuit courts of the United States shall have original cognisance, [sic] as
well in equity as at law, of all actions, suits, controversies, and cases, arising
under any law of the United States, granting or confirming to authors . . . the
exclusive right to their respective writings, . . . and upon any bill in equity, . . .
shall have authority to grant injunctions, . . . to prevent the violation of the
rights of any authors . . . .
Id. Prior to the Copyright Act of 1819, district courts had original jurisdiction over admi-
ralty cases and some lesser civil and criminal matters, but not copyright matters. Juris-
diction for copyright cases rested upon diversity of citizenship where the matter in con-
troversy exceeded $500. Judiciary Act of 1789, § 11, 1 Stat. 73 (1789). See also 7B J.
limited, however, to the issuance of injunctions. Actions to recover statutory damages remained at law. 37

Statutory Damages Under the Copyright Act of 1909

The Copyright Act of 1909 was the first major revision of the federal copyright laws. 38 Although the civil remedies provisions underwent a major revision, 39 the statutory damages clause found in section 25 of the Act was essentially a restatement of existing law. 40 The provision allowed a court to award damages, in lieu of actual damages and profits, in an amount which appeared to the court to be just, but within the mandatory limits of not less than $250 nor more than $5,000 for each infringement. 41

The legislation set forth an elaborate system of minimum dollar amounts which courts could use as a discretionary guide in assessing the amount of statutory damages to be awarded within the mandated limits. For example, a copyright owner could recover a minimum award of one dollar for every infringing copy of a book. 42 These yardstick measurements applied to the number of copies “made or sold by or found in the possession of the

MOORE, MOORE'S FEDERAL PRACTICE § 5-1 (2d ed. 1983).

37. In Stevens v. Gladding, 58 U.S. (17 How.) 447 (1854), the Supreme Court stated: “There is nothing in this act of 1819, which extends the equity powers of the courts to the adjudication of forfeitures; it being manifestly intended, that the jurisdiction therein conferred should be the usual and known jurisdiction exercised by courts of equity for the protection of analogous rights.” Id. at 455. See also Brady v. Daly, 175 U.S. 148 (1899), wherein the plaintiff brought an action at law to recover damages for the infringement of his copyrighted play, following a suit in equity to have the defendant enjoined from infringing the copyrighted play. The Supreme Court affirmed the lower court's award of statutory damages.


39. The 1909 Act consolidated the damages provisions from all prior copyright acts into one section, section 25 (later section 101). Prior to the 1909 Act, statutory damages were both remedial and penal in nature in that half of the damages award went to the plaintiff and the other half went to the United States. The 1909 Act eliminated the forfeiture of the award to the United States, thus making the damages provisions clearly remedial. The 1909 Act further provided that a plaintiff could recover an infringer’s profits in damage actions. See generally H.R. Rep. No. 2222, 60th Cong., 2d Sess. 15 (1909).

40. Id. The only new provision added was a section giving copyright protection to lectures and sermons.


42. Id. The yardstick measurements applied only within the $250-5,000 range and prescribed the following awards: $10 for every infringing copy of a painting, statue, or sculpture, and $1 for every infringing copy of any other copyrighted work; $50 for every infringing delivery of a lecture, sermon, or address; $100 for the first and $50 for every subsequent performance of a dramatic or dramatico-musical or orchestral composition;
infringer or his agents or employees."\(^{43}\) The statute further provided for special monetary limits in cases of newspaper reproductions or photographs and infringements of nondramatic works by means of motion pictures.\(^{44}\) The maximum limitation of $5,000 did not apply in cases where infringements occurred after the defendant had been served with notice of the existence of the copyright.\(^ {45}\) The proliferation of copyright infringement suits gave rise to numerous problems regarding the interpretation and application of this broadly drafted provision. It soon became apparent that judicial uncertainty and inconsistencies surrounded the award of damages under the 1909 Act.

**When Statutory Damages Could Be Awarded**

Since the mandatory minimum and maximum limitations applied in all cases where statutory damages were awarded,\(^{46}\) it was necessary for a court to determine when statutory damages were applicable. Some courts held that statutory damages were not recoverable where the plaintiff failed to demonstrate an injury resulting from the infringement.\(^ {47}\) These courts reasoned that the purpose of statutory damages was to compensate the copyright owner who established the fact of injury but could not

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\(^{44}\) Id. The special limits for newspaper reproductions of photographs were $50-200, and for a nondramatic or undramatized work innocently infringed by a motion picture, the damages could not exceed $100.

\(^{45}\) 17 U.S.C. § 101(b) (1976) (repealed 1978). The notice provision stated that "the limitation as to the amount of recovery [shall not] apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him." Id. Courts were not required to award more than $5,000 where the defendant received actual notice, and cases awarding more than the maximum were rare. See Brown, supra note 9, at 1083-86.


\(^{47}\) See, e.g., Washingtonian Publishing v. Pearson, 140 F.2d 465 (D.C. Cir. 1944) (statutory damages not awarded where no damage to plaintiff and no profits to defendant printer); F.A. Mills, Inc. v. Standard Music Roll Co., 223 F. 849 (D.N.J. 1915), aff'd, 241 F. 360 (3d Cir. 1917) (nominal damages of six cents awarded where no actual damage to plaintiff and no profits to defendant); Shapiro, Bernstein & Co. v. Bleecker, 224 F. Supp. 595 (S.D. Cal. 1963) (statutory damages not awarded where existence of damages and profits not proved).
prove the amount of damages.\textsuperscript{48} Other courts took a contrary view, holding that minimum damages were mandatory, even though the existence of actual damages was not established by the plaintiff.\textsuperscript{49}

An even greater conflict existed over whether statutory damages could be awarded when actual damages or profits were ascertainable. Based on an early Supreme Court case,\textsuperscript{50} several courts held that statutory damages could not be awarded if either actual damages or profits were proved, even though the amount of actual damages or profits was negligible.\textsuperscript{51} Thus, courts had no discretion to award statutory damages where a lesser amount of actual damages or profits could be ascertained and proved. This practice was severely restricted by the United States Supreme Court in \textit{F. W. Woolworth Co. v. Contemporary Arts, Inc.}\textsuperscript{52} In this case, the Court held that statutory damages could be awarded, even though there was evidence of the infringer's profits. The Court reasoned that a trial court was vested with broad discretion to determine whether it was more just to

\textsuperscript{48} In Woodman v. Lydiard-Peterson Co., 192 F. 67 (D. Minn. 1912), the court stated: [I]t cannot be possible that, where the court is of the opinion that there were no damages at all, it still is bound to allow $250, and that, where the court is of the opinion that it would be a matter of injustice to allow even $1, it would be compelled by law to allow $250. Some other construction must be given to that provision. I think it means that where the court is satisfied that there are substantial damages, but the evidence is incomplete or is insufficient, so that the court cannot determine just what the damages are, then it may allow them on that basis. But wherever the court is of the opinion that the damages cannot be more than $50 or $100, it should not allow $250. \textit{Id.} at 71. In \textit{Washington Publishing Co. v. Pearson}, the court held that because there were neither damages to the plaintiff nor profits to the defendant printer, to impose statutory damages on the printer would amount to a penalty. 140 F.2d at 466.

\textsuperscript{49} See, e.g., Fisher, Inc. v. Dillingham, 298 F. 145, 152 (S.D.N.Y. 1924) (no actual damages, but $250 awarded); Quackenbush Music, Ltd. v. Wood, 381 F. Supp. 904, 906 (M.D. Tenn. 1974) (no specific damages proved, but $250 awarded for each cause of action); Manpower, Inc. v. Temporary Help of Harrisburg, 246 F. Supp. 788, 791 (E.D. Pa. 1965) (no actual damages or profits, but one dollar per copy for 3,000 copies awarded).

\textsuperscript{50} \textit{Sheldon v. Metro-Goldwyn Pictures}, 309 U.S. 390 (1940).

\textsuperscript{51} The Court in \textit{Sheldon} stated, "We agree with petitioners that the in lieu clause is not applicable here, as the profits have been proved and the only question is as to their apportionment." \textit{Id.} at 399. Cases relying on the language in \textit{Sheldon} include Washingtonian Publishing v. Pearson, 140 F.2d 465, 466 (D.C. Cir. 1944); Malsed v. Marshall Field & Co., 96 F. Supp. 372, 376 (W.D. Wash. 1951). See also Universal Pictures v. Harold Lloyd Corp., 162 F.2d 354, 378 (9th Cir. 1947); Davilla v. Brunswick-Balke Collender Co., 94 F.2d 567, 568-70 (2d Cir.), \textit{cert. denied}, 304 U.S. 572 (1938); Atlantic Monthly v. Post Publishing, 27 F.2d 556, 560 (D. Mass. 1928).

\textsuperscript{52} 344 U.S. 228 (1952).
allow a recovery based on proven damages or one estimated within the statutory scheme.\textsuperscript{53}

By leaving the matter to the discretion of the court, the \textit{Woolworth} decision appeared to settle the question of when statutory damages could be awarded. Judicial uncertainty nevertheless continued.

In \textit{Shapiro, Bernstein \& Co. v. 4636 S. Vermont Ave., Inc.},\textsuperscript{54} the Ninth Circuit interpreted the \textit{Woolworth} case to hold that a trial court had discretion to choose between actual damages and profits or statutory damages where both actual damages and profits had been proved. Statutory damages were, however, mandatory if either damages or profits could not be proved.\textsuperscript{55} The Court of Appeals for the Second Circuit adopted the rule that a plaintiff could recover both the infringer’s profits and statutory damages when actual damages could not be calculated.\textsuperscript{56} The court reasoned that since the statute conferred broad discretion on the courts, both statutory damages and profits were recoverable by the copyright owner.\textsuperscript{57} Due to these varying interpretations, the measure of a plaintiff's recovery turned largely upon where the copyright action was brought.

\textbf{Statutory Damages in Multiple Infringement Cases}

The mandatory minimum and maximum limitations of $250 and $5,000, respectively, applied to each separate infringement.\textsuperscript{58} Thus, an important consideration in awarding statutory damages was the number of infringements involved in the action. Although technically each infringing copy or performance constituted a separate infringement of a copyright, the courts generally did not construe the statutory damages provision as requiring a separate minimum damages award of $250 for each copy

\textsuperscript{53} The Court stated that “[w]e § sound exercise of judicial discretion to determine whether on all the facts a recovery upon proven profits and damages or one estimated within the statutory limit is more just.” \textit{Id.} at 234.

\textsuperscript{54} \textit{367 F.2d 236, 240 (9th Cir. 1966)}.

\textsuperscript{55} \textit{Id.} at 240.


\textsuperscript{57} \textit{Lottie Joplin Thomas Trust}, 592 F.2d at 657.

or performance. Rather, if multiple copies were made of a single copyrighted work, then only one copyright was considered infringed for purposes of applying the minimum or maximum damages award. For example, if 1,000 copies of a single copyrighted book were made, there would be only one infringement subject to the damages award. On the other hand, if several different copyrighted works had been infringed, then the legislative remedy would apply to each work infringed. In cases involving a related series of infringing events, it was not always clear whether the series of events constituted one infringement or several, even though only one copyright may have been involved.

*L. A. Westermann Co. v. Dispatch Printing* was the first Supreme Court case to construe the statutory damages provision. In this case, the Court held that where the same copyrighted work appeared as an advertisement in two different days' editions of defendant's newspaper, two separate infringements had occurred, giving rise to two separate claims for minimum dam-

59. The Copyright Act provided suggested minimum amounts to be awarded for each infringing copy or performance. These minimum amounts, or yardstick measurements, are discussed *supra* note 42 and accompanying text. If a minimum damages award of $250 were required for each infringing copy or performance, the yardstick measurements would have no meaning. See Davis v. E.I. DuPont de Nemours & Co., 249 F. Supp. 329 (S.D.N.Y. 1966).


62. For example, the continuous run of an infringing play constituted a related series of infringing events. It was not always clear whether each performance of the play constituted a separate infringement giving rise to separate statutory damages awards, or whether the entire run constituted one infringement. Compare Select Theatres v. Ronzoni Macaroni Co., 59 U.S.P.Q. (BNA) 288 (S.D.N.Y. 1943) (infringing play presented over radio in 20 installments constituted 20 infringements) with MCA, Inc. v. Wilson, 677 F.2d 180, 187 (2d Cir. 1981) (infringing play performed once a week for 130 weeks constituted one infringement).

63. 249 U.S. 100 (1919).
The Court found that the two awards were justified because different advertisers sponsored each publication. Two later cases, citing Westermann as authority, held that each succeeding publication of a single copyrighted work constituted a separate infringement for purposes of awarding minimum damages. Other courts, however, grouped all the publications together into a single act of infringement.

An even greater problem existed in cases involving infringement of musical or dramatic works in network broadcasts. If a simultaneous broadcast of an infringing performance over several different network stations constituted a separate infringement for each station outlet, a defendant could be liable for substantial statutory damages. Such a situation occurred in Law v. National Broadcasting Co., in which the court held that NBC's broadcast of plaintiff's composition on three separate occasions, with chain hookups of sixty-seven, sixty-six, and eighty-five stations, constituted a total of 218 infringing performances. In Davis v. E.I. DuPont de Nemours & Co., however, the court rejected such an approach and held that a simultaneous television broadcast over 162 different network stations constituted a single act of infringement for purposes of awarding statutory damages.

64. Id. at 105. The case actually involved six different copyrighted illustrations. Five of the illustrations were published once, and the other illustrations published twice. The court determined that each of the six copyrights was infringed and that each publication constituted a separate infringement, making a total of seven infringements. Id.
65. The Court reasoned that each advertiser was an independent infringer and that by publishing the advertisements, the defendant participated in the advertisers' independent infringements. Id. at 105.
68. 51 F. Supp. 798 (S.D.N.Y. 1943).
69. The court awarded $10 for each of the 218 infringing performances, for a total of $2,180. Id. at 799.
71. Id. at 342-43. The court awarded the plaintiff $25,000 in statutory damages. Pursuant to the statute, the defendant's willful infringement removed the $5,000 maximum limitation. 17 U.S.C. § 101(b) (1976) (repealed 1978). The $25,000 awarded exceeded the amount that would have been awarded if the yardstick measurement of $50 per infringing performance had been applied to each station's broadcast. See supra note 42.
The courts adopted two tests to determine the number of infringing acts: the "time test" and the "heterogeneity test." Courts using the "time test" looked to the length of time separating each publication or performance. Generally, when the interval between repeated infringements was a matter of days, courts treated the infringements as one continuing violation, justifying a single minimum damages award. Where the interval between infringements was substantially longer, courts viewed the infringements as multiple infringements, with each infringement giving rise to a claim for at least minimum statutory damages. Thus, the amount of damages awarded pursuant to the statute could turn simply on the number of days separating each publication or performance.

Courts adopting the "heterogeneity test" looked at the business circumstances surrounding the repeated infringements. Under this approach, many factors, such as differences between advertisers, financial arrangements, audiences, or locations, were analyzed. The courts then determined whether the circumstances were so similar that the infringements should be treated as one continuous statutory violation or so different that they should be treated as multiple infringements.

72. 3 M. NIMMER, supra note 14, § 14.04[E]. See e.g., Robert Stigwood Group v. O'Reilly, 530 F.2d 1096, 1103 (2d Cir., 1976) ("Another test would be whether each infringement claimed is a separate transaction, perhaps involving different tortfeasors . . . . We take the rule to be that when the components of the infringing activity are heterogeneous, the presumption is that each infringing activity is a separate infringement."); Iowa State Univ. Research Found. v. American Broadcasting Co., 475 F. Supp. 78, 81-82 (S.D.N.Y. 1979) ("In determining the number of times a defendant has infringed upon protected work, common sense provides the surest guide. In close cases, this circuit has also used the 'time test' ... and the 'heterogeneity' test ... ").

73. See Robert Stigwood Group, 530 F.2d at 1102-03; Iowa State Univ. Research Found., 475 F. Supp. at 82.


76. See e.g., Robert Stigwood Group, 530 F.2d at 1103; Iowa State Univ. Research Found., 475 F. Supp. at 82.

77. See Westermann Co., 249 U.S. at 105 (two advertisements sponsored by two different advertisers constituted two separate infringements); Robert Stigwood Group, 530 F.2d at 1103 (separate sponsors and locations constituted separate infringing performances);
Although application of these tests resulted in more uniform decisions, the tests were not a complete answer to the problem of determining the number of infringements. Judicial confusion still existed because the length of the interval and the degree of heterogeneity necessary to constitute separate infringements were not always clearly defined.\textsuperscript{78}

**Criticism of the Mandatory Minimum Limitation**

The mandatory minimum statutory damages award of $250 provoked a great deal of controversy between the copyright owners and the users of copyrighted material.\textsuperscript{79} Criticism of the minimum damages provision centered on its apparent harshness when applied to an innocent infringer, particularly when multiple copyrights were infringed, since each infringement constituted a separate statutory award.\textsuperscript{80} Courts were also reluctant to award the statutory minimum in cases where the infringer failed to realize any profit and the copyright owner suffered only nominal damages.\textsuperscript{81}

Various groups of copyright owners insisted that innocent infringements were rare.\textsuperscript{82} Copyright proprietors also stressed that the mandatory minimum award was vitally important.
because it discouraged pirating and provided more than mere nominal damages where actual damages and profits could not be proved.\textsuperscript{83} The minimum statutory award was also of particular importance to performing rights societies, such as the American Society of Composers, Authors, and Publishers ("ASCAP"), because potential liability for damages in the amount of $250 encouraged users of recorded music to pay the licensing fee charged by the societies for the use of such music.\textsuperscript{84}

Dissatisfaction with the harshness of the minimum damages award resulted in the introduction into Congress of several bills to amend the provision.\textsuperscript{85} Each bill contained provisions for limiting the liability of innocent infringers, either by reducing the minimum limitation\textsuperscript{86} or by eliminating it altogether.\textsuperscript{87} The bills met strong opposition from copyright owners, however, and none became law.\textsuperscript{88} Thus, courts continued to wrestle with the problem of awarding minimum statutory damages to plaintiffs in cases of innocent infringement.

\textit{Judge or Jury Determination of Amount of Damages}

The statutory damages provision of the 1909 Act stated that

\begin{itemize}
  \item \textsuperscript{83} See 1961 Register’s Report, supra note 30, at 1303-04.
  \item \textsuperscript{84} For a discussion of how these performing rights societies operate, see Brown, supra note 9, at 1078-82. The practices of these societies were critized by Senator Duffy in Duffy, International Copyright, 8 AIR L. REV. 213, 220-23 (1937).
  \item \textsuperscript{86} Section 14(d) of the 1931 Vestal bill provided that in cases of innocent infringement, a plaintiff could only recover an amount equivalent to the fair and reasonable value of a license, but not less than $50 nor more than $2,500. H.R. 12549, 71st Cong., 3d Sess. (1931). The Sirovich bill limited recovery in innocent infringement cases to just compensation for the use made of the infringed right, with the amount of compensation to be determined with the aid of expert testimony as to current rates. H.R. 11420, 74th Cong., 2d Sess. (1936).
  \item \textsuperscript{87} Section 16(d) of the 1926 and 1930 Vestal bills provided that a plaintiff would not be entitled to any statutory damages if the defendant proved that his conduct was innocent. H.R. 10434, 69th Cong., 1st Sess. (1926); H.R. 6990, 71st Cong., 2d Sess. (1930). Section 25 of the Duffy bill eliminated the minimum damages award entirely, providing that statutory damages would be paid in an amount “not exceeding $20,000 . . . as shall in the opinion of the court be . . . just, proper, and adequate, in view of the circumstances of the case.” S. 3047, 84th Cong., 1st Sess. § 25(a)(3) (1935).
  \item \textsuperscript{88} The Duffy bill, however, was passed by the Senate on August 7, 1935. S. 3047, 87th Cong., 1st Sess. (1935), 79 CONG. REC. 12615 (1935).
\end{itemize}
damages were to be awarded as the court considered just.\textsuperscript{89} Because the statute was unclear as to what was meant by the use of the word "court," judicial uncertainty arose over whether the judge or the jury was to measure the statutory damages award.

The first appellate court case to address the issue, \textit{Mail & Express Co. v. Life Publishing Co.},\textsuperscript{90} held that the jury could be directed to award minimum statutory damages if it found for the plaintiff. The court rejected the defendant's argument that the trial judge could have awarded the minimum damages, but was not authorized under the statute to direct the jury to do so. The Second Circuit reasoned that use of the word "court" did not require the judge to act by himself in assessing minimum damages.\textsuperscript{91} Rather, the statute allowed the judge to direct the jury to assess the damages within the limitations prescribed by the legislation.\textsuperscript{92}

A jury trial was also allowed on the plaintiff's claim for statutory damages in \textit{Chappell & Co. v. Cavalier Cafe}.\textsuperscript{93} There, the court rejected the plaintiff's argument that the judge must assess damages because this remedy was merely incidental to equitable injunctive relief. The \textit{Chappell} court determined that under the common law the plaintiff could have recovered such damages by an action of debt for which the right to a jury trial clearly existed.\textsuperscript{94}

Other courts, however, denied the right to a jury trial,\textsuperscript{95} finding that the word "court" meant that a judge was to assess the damages.\textsuperscript{96} Some courts even held that statutory damages were

\begin{itemize}
\item \textsuperscript{89} "[I]n lieu of actual damages and profits, such damages as to the court shall appear to be just . . ." 17 U.S.C. § 101(b) (1976) (repealed 1978).
\item \textsuperscript{90} 192 F. 899 (2d Cir. 1912).
\item \textsuperscript{91} "[W]e do not think that by use of the word 'court' it is required that the judge acting by himself shall assess the damages when a case is calling for an award under the minimum damages clause. We think it the better view that the statute permits him to direct the jury to assess the damages within the prescribed limits." \textit{Id.} at 901.
\item \textsuperscript{92} \textit{Id.}
\item \textsuperscript{93} 13 F.R.D. 321 (D. Mass. 1952).
\item \textsuperscript{94} \textit{Id.} at 322-23. The court stated that statutory damages could not properly be considered as merely incidental to injunctive relief because the right to such damages was provided as a distinct and separate remedy by the statute. \textit{See also} BMI v. Moor-Law, Inc. 203 U.S.P.Q. (BNA) 487 (D. Del. 1978) (right to a jury trial); Chappell & Co., v. Pumpernickel Pub, Inc., 79 F.R.D. 528 (D. Conn. 1977) (right to a jury trial).
\item \textsuperscript{95} \textit{See, e.g.}, Chappell & Co. v. Palermo Cafe, 249 F.2d 77 (1st Cir. 1957); Cayman Music, Ltd. v. Reichenberger, 403 F. Supp. 794 (W.D. Wis. 1975).
\item \textsuperscript{96} \textit{Cayman Music}, 403 F. Supp. at 796. \textit{See also} Sid & Marty Krofft Television Prods. v. McDonald's Corp., 562 F.2d 1157, 1177 (9th Cir. 1977).
\end{itemize}
merely incidental to injunctive relief and hence were equitable in nature, thus precluding a jury trial on all issues of the case.\textsuperscript{97}

The fact that decisions in this area could not be reconciled resulted in inconsistent application of the legislative remedy. The right to a jury trial in statutory damages copyright cases thus depended largely upon the jurisdiction in which the case was brought.

**LEGISLATIVE HISTORY OF THE 1976 ACT**

**STATUTORY DAMAGES Provision**

The conflicting decisions arising from the application of the statutory damages provision of the 1909 Act and criticism of the mandatory minimum damages award sparked attempts to revise the legislation. In 1961, the Register of Copyrights submitted a report to Congress\textsuperscript{98} based on a series of studies concerning the major substantive issues of copyright revision.\textsuperscript{99} The report contained detailed recommendations to reform the copyright laws, including substantial changes in the statutory damages provision.\textsuperscript{100} The Register’s recommendations were incorporated into a preliminary draft of provisions which were intended to provide the basis for further discussions on the revision of the copyright laws.\textsuperscript{101}

\textsuperscript{97.} *Cayman Music*, 403 F. Supp. at 796-76; BMI v. Papa John’s, 201 U.S.P.Q. (BNA) 302 (N.D. Ind. 1979). In *Papa John’s*, the court relied on three factors in holding that statutory damages were equitable in nature. First, the court determined that by creating a remedy where actual damages were not provable at law, Congress had simply authorized by statute what equity courts had been doing for some time: “Not to suffer a wrong to be without a remedy.” Second, the court compared statutory damages to the back pay awards under Title VII and found the two to be similar. Since back pay awards were similar to the equitable relief of restitution, the court reasoned that, similarly, statutory damages should also be committed to the equitable jurisdiction of the court. Finally, the court turned to the use of the word “court,” and determined that since the statute conferred broad discretion on the “court” to determine the amount, juries were meant to be precluded from deciding the issue. *Id.*


\textsuperscript{99.} The series consisted of 35 studies prepared under the supervision of the Copyright Office. These studies are reprinted in 1 & 2 \textit{STUDIES ON COPYRIGHT} (1963).

\textsuperscript{100.} The Register recommended that the statutory damages provision be clarified to remove the danger of exorbitant awards in multiple infringement cases. The Register also recommended that the minimum damages award be reduced in cases where innocent infringement was proved, and that statutory damages be awarded in all cases where actual damages and profits would be less than $250. The question of whether a jury should measure the statutory damages award was not addressed. 1961 Register’s Report, *supra* note 30, at 1304-05.

\textsuperscript{101.} \textit{COMM. ON THE JUDICIARY, PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW
Following discussions on the preliminary draft in early 1964 and subsequent debates on a draft bill submitted to Congress for comment, a bill to amend the copyright laws was introduced in both houses in 1965. The statutory damages provision of the bill allowed the copyright owner to elect statutory damages instead of actual damages and profits. In cases involving innocent infringement, the bill allowed a court to reduce the minimum damages award to $100, or to eliminate it entirely when an instructor infringed the copyright. The maximum limitation on damages was increased to $20,000 where the copyright owner proved willful infringement. The bill also included a

(1964), reprinted in 3 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (1976). This draft resolved the question of when statutory damages could be awarded by permitting the copyright owner to recover the greater of either actual damages, infringer's profits, or statutory damages. In order to clarify the award of statutory damages in multiple infringement cases, section 38 of the draft provided that one award would be made for "all infringements of a single work for which the infringer is liable." Id. at 29. A single work was defined as including "all of the material appearing in any one edition or version of the work used by the infringer." Id. at 29 n.26. A separate clause was included which allowed a court in its discretion to withhold or reduce statutory damages if the infringer proved that he was not aware that his acts constituted infringement. The draft also increased the maximum damages award to $10,000.

102. Transcripts of the discussions on the preliminary draft are found in COMMITTEE ON THE JUDICIARY, PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW 37-311 (1964) and COMMITTEE ON THE JUDICIARY, FURTHER DISCUSSIONS AND COMMENTS ON PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW 1-242 (1964), reprinted in 3 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (1976).


105. This right to elect statutory damages was never contemplated by Congress during the discussions held on the preliminary draft and the bill submitted to Congress for comment. The transcripts of the discussions on the preliminary draft appear in COMMITTEE ON THE JUDICIARY, FURTHER DISCUSSIONS AND COMMENTS ON PRELIMINARY DRAFT FOR REVISED U.S. COPYRIGHT LAW 135-69 (1964), reprinted in 3 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (1976); transcripts of the discussions on H.R. 11947, 88th Cong., 2d Sess. (1964) appear in COMMITTEE ON THE JUDICIARY, 1964 REVISION BILL WITH DISCUSSIONS AND COMMENTS 199, 201-05 (1964), reprinted in 4 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (1976).

106. The text of H.R. 4347, supra note 104, was amended during the second session of the 89th Congress to allow the court to remit any statutory damages in infringement cases involving instructors. See H.R. Rep. No. 2237, 89th Cong., 2d Sess. 24-25 (1966), reprinted in 11 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY (1976). In addition to instructors, the final bill that became the Copyright Act of 1976 allowed the courts to remit statutory damages in cases involving library and archives copying and infringing transmissions by public broadcasting entities.

107. H.R. 4347, 89th Cong., 1st Sess. 29 (1965), reprinted in 11 OMNIBUS COPYRIGHT
clause making one damages award payable for all infringements involved in the action for any one work, for which any one infringer was liable individually, or for which two or more infringers were liable jointly or severally.\textsuperscript{108}

A supplementary report prepared by the Copyright Office to accompany the revised bill\textsuperscript{109} stated that one of the objectives of the legislation was to correct the multitude of problems that arose when awards of minimum statutory damages were applied to multiple infringement situations.\textsuperscript{110} The bill allowed for separate awards of statutory damages where separate works were involved in an action, but an infringed work involving a compilation of several copyrights was to constitute only one work.\textsuperscript{111} The report stated that only one award would be made for each work involved, regardless of the number of times it was infringed.\textsuperscript{112} In suits where the infringements were committed by joint tortfeasors, the bill specified that the plaintiff could recover a single award of statutory damages, for which the tortfeasors were jointly and severally liable.\textsuperscript{113} Where separate infringements were joined in the same action and the defendants were not jointly liable, however, separate awards of statutory damages would be appropriate.\textsuperscript{114}

Another goal of the revised bill was to satisfy the objections of copyright owners to the elimination of the mandatory minimum award, yet reflect concern for the impact of statutory damages on innocent infringers.\textsuperscript{115} The bill provided that the minimum damages award of $250 would be available in all cases of infringement, but that a court had discretion to reduce the amount to $100 where the defendant proved his infringement was innocent.\textsuperscript{116}

Subsequent copyright revision bills were introduced during the

\textsuperscript{108} Id. This amount was later increased to $50,000. See infra note 118. For cases discussing the willful infringement requirement, see infra note 131.

\textsuperscript{109} 1965 REVISION BILL, supra note 82.

\textsuperscript{110} Id. at 136.

\textsuperscript{111} Id.

\textsuperscript{112} Id. The report stated that the criterion to be considered was the number of distinct works infringed, not the number of copyrights, exclusive rights, owners, or registrations involved.

\textsuperscript{113} Id. at 136-37

\textsuperscript{114} Id.

\textsuperscript{115} Id. at 137.

\textsuperscript{116} Id.
90th, 91st, 92nd, 93rd, and 94th Congresses, but the statutory damages provisions of these bills remained substantially the same as that of the revision bill introduced in 1965. Legislation introduced during the 94th Congress was passed by both houses and signed into law by President Ford on October 19, 1976. Section 504(c) of the 1976 Act embodied the new law on statutory damages in copyright infringement cases.

The legislative history of section 504(c) reveals that Congress sought to clarify when statutory damages could be awarded and how they were to be measured in multiple infringement cases. Similarly, the legislation seeks to protect innocent infringers from the harshness of the mandatory minimum award.


118. The maximum limitation of $20,000 was increased to $50,000 in the final bill. Compare H.R. 4347, 89th Cong. 1st Sess. (1965) with H.R. 2223, 94th Cong., 1st Sess. (1975).

119. The law was passed by the Senate, 94th Cong., 2d Sess., 122 CONG. REC. 3841 (1976), the House, 94th Cong., 2d Sess., 122 CONG. REC. 32015 (1976), and signed into law, 122 CONG. REC. 35087 (1976).

120. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101-810 (1982)). Section 504(c), the statutory damages clause, provides:

(1) Except as provided by clause (2) of this subsection, the 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 $250 or more than $10,000 as the court considers just. For the purposes of this subsection, all the parts of a composition or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $50,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than $100. The court shall 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 was a fair use . . . , if the infringer was: (i) an employee or agent of a nonprofit educational institution, library or archives . . . , or (ii) a public broadcasting entity . . . .


analysis of section 504(c), together with recent case law, reveals that Congress's major objectives have been met. Application of the statutory damages provision, however, is still plagued with both new and existing problems.

One of the most fundamental changes provided by the 1976 Act involving damages is the clause which grants a copyright owner the right to elect statutory damages instead of actual damages and profits at any time prior to final judgment. This right to elect statutory damages is absolute, and therefore does not depend upon the adequacy of the evidence introduced as to actual damages and profits, a factor largely determinative of whether statutory damages could be awarded under the 1909 Act. Furthermore, the House Report, which accompanied the 1976 Act, indicates that the copyright owner may elect to receive statutory damages even though he has adequate proof of his actual damages and the infringer's profits, but intentionally declines to present it. By removing the decision to award statutory damages from the court's discretion, section 504(c) clearly resolves the judicial uncertainty that existed under the 1909 Act regarding when statutory damages can be awarded.

_CODE CONG. & AD. NEWS 5778-79. See supra notes 100-01 and 115-16 and accompanying text.


124. See infra notes 134-46 and accompanying text.


126. See supra notes 46-51 and accompanying text. See, e.g., Lauratex Textile Corp. v. Allton Knitting Mills, 519 F. Supp. 730 (S.D.N.Y. 1981), a case involving infringement of plaintiff's copyrighted textile design. There, the court found that the evidence presented at trial permitted a calculation of defendant's gross profits and therefore an approximate measure of the plaintiff's damages. The plaintiff, however, had elected to receive statutory damages. After finding the actual damages of $5,177, the court went on to award the plaintiff $40,000 based on the amount of actual damages and proof of the defendant's willful infringement.


129. But see Weave Corp. v. Romitez Jacquard Mills, 2 COPYRIGHT L. REP. (CCH) 25,511 n.4 (S.D.N.Y. March 4, 1983), wherein the court states that section 504(c) allows a court to
This right to elect statutory damages, even though adequate proof of actual damages and profits is available, may not comport with one of the underlying purposes of the statutory damages award: to compensate the copyright owner when damages and profits are difficult to prove. Nevertheless, the approach is desirable because it encourages a copyright owner to bring an action to protect his rights in the copyrighted work, thereby deterring future infringement. It also relieves the copyright owner of the often difficult burden of proving actual damages and profits, yet assures recovery of at least some measure of compensation.

The harshness of the $250 mandatory minimum damages award is alleviated in the current act by allowing for a reduction of the minimum damages award to $100 in cases where innocent infringement is proved. The clause strikes an equitable balance between the competing interests of the copyright owners and the users of copyrighted material. On the one hand, the minimum damages award is still available to act as a deterrent against violations of a copyright owner's rights. Furthermore,

award statutory damages in addition to actual damages and profits if the court finds that the infringement was willful.

130. See supra note 30 and accompanying text.

131. Because the minimum statutory damages award is available in all copyright infringement cases, it operates "as an effective deterrent against numerous small, erosive violations of a copyright owner's rights." 1965 REVISION BILL, supra note 82, at 137.

Another deterrent against copyright infringement is the possibility of an increased statutory damages award if the copyright owner proves willful infringement. Section 504(c)(2) provides that statutory damages may be increased up to a maximum of $50,000 in cases where willful infringement is proved. See supra note 120. Several courts have construed the willfulness requirement as allowing increased statutory damages. See, e.g., Lauratex Textile Corp. v. Alton Knitting Mills, 519 F. Supp. 730 (S.D.N.Y. 1981) (statutory damages increased to $40,000 where defendant acted with a reckless disregard for plaintiff's rights); George Simon, Inc. v. Spatz, 492 F. Supp. 836 (N.D. Cal. 1980) (double statutory damages awarded where defendant knew that plaintiff's songs were copyrighted, yet repeatedly refused to obtain a license to have the songs performed); Hospital For Sick Children v. Melody Fare, "516 F. Supp. 67 (E.D. Va. 1980) (increased damages where defendant knew that copyright existed and failed to obtain a license).

132. At first glance there may not appear to be a great difference between the old minimum award of $250 and the current minimum award of $100 in cases of innocent infringement. In actual application of the minimum amount, however, there is a great difference. For example, a nightclub owner might reasonably believe that the band he has hired to play in his club has a license to perform copyrighted songs when, in fact, it does not. If the band plays 10 songs, each infringing a copyright, under the old act the nightclub owner would have been liable for a minimum of $2,500, 10 copyrights multiplied by $250. Under the 1976 Act, provided he can prove innocent infringement, he will be liable for $1,000, 10 copyrights multiplied by $100.
the copyright owner is assured of recovering at least some compensation for his injury. On the other hand, where the defendant was not aware that he was infringing and had no reason to believe he was infringing, he will no longer be subject to unwarranted liability.

The reduction in the minimum damages award is also consistent with the underlying policies of the statutory damages provision. Because the purpose of deterring infringement is not present as to infringements committed innocently, an award of statutory damages against an innocent infringer can only be for the purpose of compensating the copyright owner. By reducing the minimum damages award to $100, the statute assures that an innocent infringer will merely be compensating the copyright owner for the wrongful taking, and will not be excessively penalized for his innocent activity.

**Multiple Infringements**

Section 504(c) provides that one statutory damages award is payable for all infringements involved in the action with respect to any one work for which a single defendant or two or more joint tortfeasors are liable. The House Report and the legislative history make clear that in cases involving multiple infringements, only one award is payable for each work, "no matter how many acts of infringement are involved in the action and regardless of whether the acts were separate, isolated, or occurred in a related series." The current provision presents a departure from the approach taken under the 1909 Act, where courts employed various tests, such as the "time" test and the "heterogeneity" test, to determine the number of infringements involved in the action, and then awarded separate statutory damages for each infringement. Although this departure appears to ease the court's burden in determining the number of infringements involved and how damages are to be awarded in multiple infringement cases, the current Act's approach may prove problematic.

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133. See supra note 30 and accompanying text.
134. See supra note 120. But see Kamakazi Music Corp. v. Robbins Music, 534 F. Supp. 69 (S.D.N.Y. 1982), wherein the court allowed separate damages awards to owners of different rights in the same copyright.
136. See supra notes 74-77 and accompanying text.
There is nothing in section 504(c) to prevent a copyright owner from bringing separate actions against the same infringer for separate infringements of the same work. Because each separate infringement represents a separate cause of action, section 504(c) may well foster a multiplicity of suits by copyright owners in order to obtain more than one statutory damages award. The doctrine of res judicata, which prevents a plaintiff from maintaining an action based on a claim that was or should have been litigated in a prior action, may bar the copyright owner's subsequent actions. Because of judicial inconsistency in defining what claims should have been litigated in the first action, the doctrine thus may not serve to fully prevent future suits by the

138. In Commissioner v. Sunnen, 333 U.S. 591 (1948), the Supreme Court stated:

The general rule of res judicata applies to repetitious suits involving the same cause of action . . . . The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." . . . But where the second action between the same parties is upon a different cause or demand, the principle of res judicata is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but "only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered."

Id. at 597-98. This statement by the court refers to two facets of the doctrine of res judicata. The first facet concerns a judgment that has an important effect on the issues of law or fact involved in the second suit, or "issue preclusion." The second facet refers to "claim preclusion" where a claim in a subsequent suit may be barred entirely by a judgment on the merits on the same claim in a previous suit. See generally, Vestal, Res Judicata/Claim Preclusion: Judgment for the Claimant, 62 Nw. U.L. Rev. 357 (1967); Developments in the Law-Res Judicata, 65 Harv. L. Rev. 818 (1952) [hereinafter cited as Res Judicata Developments]. The concept of claim preclusion is the facet of res judicata that would apply to the copyright owner's subsequent actions, since he is bringing a subsequent suit on which may or may not be the same claim that was adjudicated in the original suit. It therefore becomes necessary to determine what is meant by the term "claim" in order to determine whether a subsequent action should be barred. For a thorough discussion of this doctrine, see generally F. James & G. Hazard, Civil Procedure ch. 11 (2d ed. 1977).

139. See Res Judicata Developments, supra note 138, at 824-31, for a collection of cases expressing various views as to the types of claims that will be barred in subsequent actions. In Vestal, supra note 138, at 361, the author states that a mechanical definition of claim would seem to be less desirable than one which is derived from public policy considerations which underlie the doctrine of res judicata/preclusion. The author further suggests that the purpose of the second suit and the reasonable expectations of the parties might be considered important factors in defining the term "claim." Id.
proprietor of the copyright. The current view adopted by the courts is that those claims that include "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the claim arose" should be maintained in a single action.\(^{140}\)

Since separate copyright infringements may or may not constitute a "series of connected transactions,"\(^{141}\) courts might feel constrained to apply either or both the "time" and "heterogeneity" tests to determine whether an action is barred by res judicata. The application of these tests, however, led to judicial inconsistency under the 1909 Act.\(^ {142}\) Courts may determine that, in the interests of judicial economy, a copyright owner should recover separate awards for each separate infringement of a single copyright in a single action. This approach appears to have been followed in at least one recent case,\(^ {143}\) despite the fact that it contradicts the congressional intent that the infringement of one work gives rise to a single award of statutory damages.\(^ {144}\)

In order to resolve this problem, the legislature should amend section 504(c) to state that with respect to one work, one award would be payable for all the infringements committed prior to the time of suit. This revision eliminates the danger of multiple suits for successive minimum damages awards because all infringements of one work by a single defendant or jointly liable defendants would have to be litigated in a single action. Although this approach appears to limit the amount of damages a copyright owner can recover, the range of damages under the statute is sufficiently broad to enable a court to award the plaintiff a just remedy.

**Trial by Jury**

In revising the copyright laws, Congress did not address the issue of whether an award of statutory damages gives rise to the right to a jury trial. The legislature did not amend or explain the use of the word "court" in the statutory provision.\(^ {145}\) Judicial

\(^{140}\) Restatement (Second) of Judgments § 24 (1982).
\(^{141}\) See supra notes 62-78 and accompanying text.
\(^{142}\) See supra notes 74-77 and accompanying text.
\(^{143}\) Milene Music, Inc. v. Gotauco, 551 F. Supp. 1288 (D.R.I. 1982) (statutory damages multiplied by number of times copyright was infringed).
\(^{145}\) Id.
uncertainty still exists concerning whether the judge or jury should assess the statutory damages award. Recent decisions indicate a trend toward categorizing an award of statutory damages as an equitable remedy, thus denying the right to a jury trial on all issues when a plaintiff elects to recover statutory damages. One commentator has suggested that leaving the awarding of statutory damages to the judge, not the jury, is perhaps the better view. The denial of this constitutional right is not warranted, however, either by the language of section 504(c) or by the history and purpose of the statutory damages award.

The history of statutory damages reveals that under the early federal copyright laws, such damages were recovered by an action of debt, an action exclusively at law, triable by a jury. Statutory damages were intended to act as a substitute for actual damages, traditionally a legal remedy, because of the inherent difficulty in establishing the value of a copyright and determining the amount of injury. In 1819, when equity jurisdiction for copyright cases was granted to the federal courts, the equitable powers extended only to the issuance of injunctions, and did not attach to the awarding of statutory damages. The Copyright Act of 1909 did nothing to change the legal nature of statutory damages, because the legislative history of the act indicates that the statutory damages provision was essentially a restatement of existing law. Furthermore, the 1976 Act also failed to change this provision, and the legal nature of statutory damages appears to have remained at law.


148. 3 M. NIMMER, supra note 14, § 14.04[C].

149. See supra note 29 and accompanying text.

150. See supra notes 19-30 and accompanying text.

151. See supra notes 35-36 and accompanying text.

152. See supra notes 38-40 and accompanying text.

basis for concluding that statutory damages are an equitable remedy precluding a jury trial.\textsuperscript{154}

Although section 504(c) states that the measurement of statutory damages is within the court’s discretion, the language cannot be deemed controlling, because “court” may refer to either judge, singularly, or judge and jury, together.\textsuperscript{155} Judicial interpretation of similar federal statutes is that such language gives rise to the right to a jury trial on the issue of damages.\textsuperscript{156} Furthermore, this interpretation is consistent with the copyright owner’s right to elect statutory damages.\textsuperscript{157} If a claim for statutory damages precludes a jury trial, then a copyright owner could deprive the defendant of a trial by jury on other issues in the case, such as liability, simply by electing statutory damages prior to trial. Since the statute allows a copyright owner to make

\begin{itemize}
  \item \textsuperscript{154} The few cases which have held that statutory damages are equitable in nature failed to consider the historical background of the statutory damages provision. In Twentieth Century Music v. Frith, 645 F2d 6 (5th Cir. 1981), the court merely stated that the whole suit before it, in which the plaintiffs had sought an injunction and minimum damages, was equitable in nature. In Rogers v. Breckenridge Hotels Corp., 512 F. Supp. 1326, 1327 (E.D. Mo. 1981), the court relied on the language of the provision in reasoning that “the court in its discretion” suggested that statutory damages were a form of equitable relief. The court in Glazier v. First Media Corp., 532 F. Supp. 63 (D. Del. 1982), relied only on the legislative history of the current act, which never addressed the jury trial issue. The one case to examine the history of statutory damages, Broadcast Music v. Papa John’s, 201 U.S.P.Q. (BNA) 302 (N.D. Ind. 1979), found the history to be inconclusive, and held that an action for statutory damages was analogous to a common law action on the case.
  \item \textsuperscript{155} \textit{Accord} Curtis v. Loether, 415 U.S. 189 (1974); Barber v. Kimbrell’s Inc. 577 F.2d 216 (4th Cir.), cert. denied, 439 U.S. 934 (1978). See also the Massachusetts ratification debates on the adoption of the United States Constitution in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION (J. Elliott ed. 1891), wherein is stated:
  \begin{quote}
  The word \textit{court} does not, either by a popular or technical construction, exclude the use of a jury to try facts. When people in common language, talk of a trial at the \textit{Court} of Common Pleas, or the Supreme Judicial \textit{Court}, do they not include all branches and members of such court—the jurors as well as the judges? They certainly do, whether they mention the jurors expressly or not.
  \end{quote}
  \textit{Id.} at 113 (emphasis in original).
  \item \textsuperscript{156} In Curtis v. Loether, 415 U.S. 189 (1974), the Supreme Court examined the damages provision of the fair housing provision of the Civil Rights Act of 1968, 42 U.S.C. § 3612 (1976), which read, “The court may grant relief, as it deems appropriate.” The Court held that Congress meant that the damages should be determined by a jury. In Barber v. Kimbrell’s Inc, 577 F.2d 216 (4th Cir.), cert. denied, 439 U.S. 934 (1978), the court similarly interpreted the statutory damages provision of the Truth in Lending Act, 15 U.S.C. § 1640(a)(2)(B) (1976), which provided that such damages were to be in such amount “as the court may allow.”
  \item \textsuperscript{157} \textit{See supra} notes 125-29 and accompanying text.
\end{itemize}
his election at any time prior to judgment, the owner can determine which issues, if any, will be tried by a jury, by varying the time at which he makes his election. Surely such a result could not have been intended by Congress.

Because of the continuing conflict among the circuits in this area, the Supreme Court should consider granting certiorari should an appropriate case arise to settle this important issue. An analysis of the 1976 Act as well as the history and purpose of the statutory damages award warrants the finding that the remedy is legal in nature and entitles the litigants to the right to a trial by jury.

CONCLUSION

Uniform application of the remedy of statutory damages in copyright infringement cases is essential to copyright owners because it may be the only monetary remedy available to them. Under the Copyright Act of 1909, the application of the statutory damages provision was far from uniform, resulting in conflicting decisions and judicial confusion. Several of the statutory damages problems that arose under judicial application of the 1909 Act have been resolved by the 1976 Act.

The issue of when statutory damages can be awarded is resolved under the 1976 Act by allowing the plaintiff to elect this remedy at any time prior to final judgment. The reduction of minimum damages in innocent infringement cases alleviates the harshness of the mandatory minimum award. Although the 1976 Act clarified how statutory damages are to be awarded in multiple infringement cases, legislative amendment will be necessary to prevent a multiplicity of suits by copyright owners. Uniform application of the statutory damages provision has not been achieved, however, because of the failure of the 1976 Act to address whether an award of statutory damages gives rise to the right to a jury trial. This omission has resulted in a continuing conflict among the circuits on the jury trial issue. If given the opportunity, the Supreme Court should grant certiorari to decide this important question.

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