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Subcommittee On Courts, Intellectual Property And The Internet

Copyright Remedies

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The Copyright Alliance is a nonprofit, nonpartisan membership organization dedicated to promoting the ability of creative professionals to earn a living from their creativity. We represent the interests of creators and copyright owners across the spectrum of creative disciplines.

Copyright is the foundation for a market of cultural, educational, and scientific works, one that in 2012 contributed over one trillion dollars to the U.S. economy and directly employed 5.4 million workers.[1] It is an economic asset, sometimes the only asset a creator has in negotiating with a distributor of their works – whether that distributor is an internet company or a traditional media company. If copyright is weakened or if it becomes harder for the creator to obtain or maintain its protections, both the creator's negotiating position and the value proposition for the distributor are diminished.

Copyright protection promotes freedom of expression and individual autonomy. The Supreme Court has said, "[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas."[2] Internationally, the right

[1] STEPHEN SIWEK, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2013 REPORT 5, 10-11 (IIPA 2013).
[2] Harper & Row, Inc. v. Nation Enter., 471 U.S. 539, 558 (1985).

of creators "to benefit from the protection of the material and moral interests resulting from any scientific, literary or artistic production" is recognized as a human right.[3] Copyright empowers creators to choose how and when to release their work to the public, according respect for individual voices while also allowing flexibility to construct a range of business models that meet consumer interests. Empowered creators benefit the public at large by making more and better quality contributions to our society's cultural life.

A right which cannot be adequately enforced is illusory. Unfortunately, it has become increasingly difficult to enforce copyright, particularly for individual creators and small businesses. Two areas concerning copyright remedies which are of particular interest to members of the Copyright Alliance are (1) better options for addressing copyright claims of relatively small economic value; and (2) ensuring continued availability of statutory damages to provide meaningful remedies for copyright owners where actual damages would be inadequate as a remedy or hard to prove.

Addressing Copyright Claims of Small Economic Value

It is particularly difficult for copyright owners to enforce claims against infringers who make unauthorized online displays and reproductions of works where such uses, if licensed, may be of relatively small economic value. For example, works of visual art such as photographs and literary works such as articles are often used without permission in their entirety on web sites. The creators of those works may have little practical recourse against such infringers because cease-and-desist letters are routinely ignored and DMCA notices have little effect.

Because copyright is a federal act and all claims must be brought in federal court, where claims of relatively small economic value are at issue, it is rarely economically viable to hire an attorney to navigate the federal system, pay the federal court filing fees, and proceed with litigation that may involve lengthy and burdensome discovery, motions practice and a jury trial. These costs almost invariably exceed the expected licensing

[3] International Covenant on Economic, Social and Cultural Rights art. 15, Oct. 5, 1977, 993 U.N.T.S. 3 (signed but not ratified by the U.S.).

revenues and damages due to these authors. In many instances, works created by individuals or small businesses will not have been registered until the infringement is found, eliminating any statutory damages or attorney's fees. If there are no profits associated with the infringer's use, the copyright owner may be entitled only to licensing fees. The licensing fees associated with the online use of such a work will, in most instances, never justify the costs, time, and human resources that are required in a federal action, which can exceed hundreds of thousands of dollars and take a number of years to conclude. As a result, many legitimate claims are not pursued and respect for the rights of creators continues to be eroded.

We welcome the recommendations of the Copyright Office in its Small Claims Study, and suggest that in implementing any such recommendations, the Subcommittee strive to meet at least the following goals:

- Appropriately limit the scope and nature of claims
- Encourage the creation of new copyrighted works and authorized derivative works
- Provide effective remedies to plaintiffs, and incentivize participation by defendants
- Deter copyright infringements, and encourage licensing of copyrighted works
- Be cost-effective and efficient for all parties
- Discourage frivolous or "nuisance" claims

The Importance of Statutory Damages to Individuals and Small Businesses

Statutory damages are most important to individual creators, a group that is typically overlooked in discussions about remedies. The availability of statutory damages is often a threshold question for an individual creator deciding whether or not to pursue an infringement claim in federal court, given the extremely high costs involved. Eliminating or limiting this recourse deprives these creators of effective remedies for infringement of their works.

Statutory damages are a positive feature of copyright law, enabling meaningful remedies for creators and affording courts flexibility in a variety of situations. Particularly in copyright infringement cases, actual damages are very difficult to prove. Moreover, even when actual damages can be proven, they are often less than the cost of detecting and investigating infringements. The current statutory damages regime is appropriate, necessary, and need not be recalibrated.[4]

History and Role of Statutory Damages

The availability of damages set by statute has been a feature of U.S. copyright since before the first federal Copyright Act. Five of the twelve original colonies that passed copyright statutes before the Constitutional Convention had pre-established damages provisions.[5] The 1790 Copyright Act provided for such damages, as did every revision since. In the Copyright Act of 1895, Congress for the first time departed from the traditional manner of calculating damages per infringing *copy* to adopt the per infringed *work* standard that is still used today. When adjusted for inflation, the current range of statutory

[4] In the context of the Department of Commerce "Green Paper" roundtables, the Stanford Center for Internet & Society and the Electronic Frontier Foundation have proposed that "plaintiffs seeking statutory damages should be required to produce evidence of their actual harm, or the infringer's profits, to the extent such evidence is reasonably available. If a plaintiff does not produce such evidence, or in the alternative, demonstrate to the court's satisfaction that such evidence cannot reasonably be obtained, statutory damages should be limited to the minimum amounts."[4] Such a proposal would further put effective remedies for infringement out of reach of individuals and small businesses by imposing on them a requirement to assume legal expenses for an extensive damages phase of litigation. In other contexts, damages phase litigation can be as lengthy and exhaustive as the merits phase of a case. Casting such an onerous burden on creators and the courts will thwart the availability of appropriate legal recourse in meritorious cases. As a side note, commenters are incorrect when they say "this was the rule that applied under the U.S. Copyright Act as it existed before 1978." The U.S. Copyright Office noted in its 1956 revision study on damages, "There are several conflicting decisions on the question whether statutory damages may be awarded when actual damages or profits can be assessed."[4] Later decisions suggest they may: "if either profits or actual damages or both can be ascertained, the trial court has discretion to award statutory damages."[4] More importantly, as stated above, the very purpose of setting damages available by statute is to provide relief precisely when actual damages cannot be easily established or proven. Courts currently retain the ability to consider actual damages involved when awarding statutory damages; no further legislative fixes are needed.

[5] William S. Strauss, U.S. Copyright Office, *Studies on Copyright Law Revision Prepared for the Sen. Subcomm. on Patents, Trademarks, and Copyrights: The Damage Provisions of the Copyright Law (Study No. 22)* 1 (1956) [hereinafter *Study No. 22*] (stating that as a result of a 1783 Congressional resolution recommending states the adoption of copyright statutes, Massachusetts, New Hampshire, Rhode Island had statutorily provided minimum and maximum damages for copyright infringement; while Maryland and South Carolina had a fixed sum to be paid for each infringing sheet).

damages is in line with, or in some cases lower than, statutory damages under the 1909 and 1976 acts.[6]

Statutory damages are intended as a substitute for actual damages, primarily serving a compensatory and deterrent role, rather than punishment on top of ordinary damages. A report by the Register of Copyrights during the revision effort that led to the Copyright Act of 1976 details the principles underlying statutory damages: assuring adequate compensation to a copyright owner for her injury and deterring infringement.[7] As the report says, it is difficult to establish the value of a copyright and the loss caused by infringement. Many times the only direct loss that can be proven is the amount of a license. If awards were limited to this amount, it would invite infringement because the risk of loss to the infringer would be negligible. Just as inadequate would be an award solely of an infringer's profits, which may be impossible to compute or not an accurate measure of the copyright owner's injury.[8]

Statutory damages are also legally and constitutionally sanctioned. There is little question that legislatures can set the amount of civil damages by statute. The Supreme Court has long held that such damages need not correspond to actual damages, particularly where the damages involve a public wrong rather than a private injury.[9] "The protection of copyright," as the Eighth Circuit has said, "is a vindication of the public interest."[10] Both appellate courts that have considered the constitutionality of copyright's statutory

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[6] Thomas Sydnor & Debbie Rose, *Capitalist Copyrights: A Republican Reply to "Three Myths about Copyright*, COPYRIGHT ALLIANCE (Dec. 5, 2012), https://copyrightalliance.org/2012/12/capitalist_copyrights_republican_reply_three_myths_about_copyright?page=show#.UrzuXvRDu3Y.

[7] *See Study No. 22*, *supra* note 46.

[8] *See* Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228, 233 (1952) (". . . a rule of liability which merely takes away the profits from an infringement would offer little discouragement to 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. The discretion of the court is wide enough to permit a resort to statutory damages for such purposes. Even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy.").

[9] St. Louis IM & S. Ry. Co. v. Williams, 251 U.S. 63, 66 (1919).

[10] Capitol Records, Inc. v. Thomas-Rasset, 692 F.3d 899, 909-10 (8th Cir. 2012).

damages for individual file sharers have held that such awards are consistent with the Due Process Clause.[11]

Statutory Damages Are Appropriate In Cases Involving Individual Infringers As Well As Intermediaries

The current range of statutory damages remains vital to providing meaningful protection, especially in the online environment. Education about legal options for accessing content and cross-industry voluntary initiatives, like the Copyright Alert System, are other important methods used to direct individuals away from infringement. Nevertheless, there is no compelling reason to recalibrate statutory damages in cases of individual file sharers.

The current range of statutory damages is flexible enough to tailor remedies for individual file sharers in light of factors that the fact-finder finds appropriate. The Eighth Circuit has remarked,

> By its terms… the statute plainly encompasses infringers who act without a profit motive, and the statute already provides for a broad range of damages that allows courts and juries to calibrate the award based on the nature of the violation. For those who favor resort to legislative history, the record also suggests that Congress was well aware of the threat of noncommercial copyright infringement when it established the lower end of the range. Congressional amendments to the criminal provisions of the Copyright Act in 1997 also reflect an awareness that the statute would apply to noncommercial infringement.[12]

Moreover, courts are not without guidance when awarding damages. In *Sony BMG Music Entertainment v. Tenenbaum*, one of only two record label individual file sharing lawsuits to reach trial, the jury awarded $22,500 per infringed work for thirty works after finding the defendant's violations were willful (an award that is only 15% of the statutory maximum).[13] The jury was instructed to consider the following factors from a non-exhaustive list given by the court: "the nature of the infringement; the defendant's purpose

[11] *See* Sony BMG Music Entertainment v. Tenenbaum, 719 F.3d 67, 71-72 (1st Cir. 2013); Thomas-Rasset, 692 F.3d 899, 907-10.
[12] Capitol Records, Inc. v. Thomas-Rasset, 692 F. 3d 899, 908-09 (8th Cir. 2012).
[13] 719 F. 3d 67, 68 (1st Cir. 2013).

and intent; the profit that the defendant reaped, if any, or the expense that the defendant saved; the revenue lost by the plaintiff as a result of the infringement; the value of the copyright; the duration of the infringement; the defendant's continuation of infringement after notice or knowledge of copyright claims; and the need to deter this defendant and other potential infringers." The award reflected, among other things, the defendant's own admission during trial that he had distributed thousands of recordings beyond the thirty at issue and the fact that the defendant was not simply downloading but also uploading and making the songs publicly accessible online. Hence it is unnecessary to add any required "guidelines" for fact-finders to apply when awarding statutory damages. Doing so would decrease flexibility without resulting in more just results than juries have so far provided.

The current statutory damage provisions are also appropriate for dealing with secondary liability by intermediaries. The availability of statutory damages in this context may well be more important than ever. Copyright Alliance members partner with innovative startups to provide users with new, exciting ways to disseminate works. However, a small minority of businesses adopt an aggressive "it's better to ask forgiveness than permission" posture when it comes to creating platforms that exploit creative works—and then claim that copyright and statutory damages are chilling innovation when copyright owners take reasonable steps to protect their work. Statutory damages against indirect infringers protect legitimate services that partner with creators to provide sustainable and convenient platforms for consumers to access the creative works they love. The availability of damages deters unfair competition that would otherwise undermine the ability of legitimate services to succeed.

The sheer number of online services from the U.S. that have flourished online suggests that the potential availability of statutory damages is not hindering the development of new, legitimate services. At the same time, online infringement continues to increase at a significant rate,[14] meaning the deterrent effect of statutory damages

[14] DAVID PRICE, NETNAMES, SIZING THE PIRACY UNIVERSE 2 (2013).

remains necessary. For every infringing site like IsoHunt[15] and Hotfile[16] that goes offline, there are hundreds, thousands even, of illegitimate services that continue to operate—Google alone reports dozens of domains that receive over 100,000 takedown notices each month.[17] Statutory damages work effectively to the extent that they deter the development of services that exploit creators' works outside the bounds of copyright law.

Warnings about the "chilling effect" of statutory damages on new services should be taken with a grain of salt. The National Venture Capital Association (NVCA) warned in 2005 that a Supreme Court decision holding P2P file sharing service Grokster liable for inducing massive amounts of copyright infringement would have a chilling effect on investment in digital services.[18] The Supreme Court ultimately did hold Grokster liable,[19] but contrary to the NVCA's prediction, venture capital investment in the media and entertainment sector grew by over 50%; investment in online music companies alone topped over $1 billion in 2011 and 2012.[20] Put simply, there is no evidence to suggest similar predictions today are any more accurate. To the contrary, the growth of both online services and employment in the creative industries indicates that innovation is not being stifled.

Finally, while copyright owners who depend on the availability of statutory damages to defend their legitimate rights are concerned that a small number of unscrupulous entities are pursuing actions against individual file sharers for the purpose of extracting quick settlements rather than vindicating their rights, these appear to be nothing more than isolated instances of overly aggressive litigators, and there is no evidence that they are a result of copyright law in general or the current statutory damages regime in particular. Moreover, courts are already employing sanctions against such bad actors. For instance, in

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[15] Simon Pulman, *Columbia Pictures Industries v. Fung: IsoHunt Found Liable for Contributory Infringement*, CDAS IP, ENTERTAINMENT, AND MEDIA LAW BLOG (Apr. 9, 2013), http://cdas.com/columbia-pictures-industries-v-fung-isohunt-found-liable-for-contributory-infringement-2/.

[16] Todd Spangler, *Hotfile Shuts Down After $80 Mil MPAA Piracy Settlement*, VARIETY (Dec. 4, 2013, 10:18 AM), http://variety.com/2013/digital/news/hotfile-shuts-down-after-80-mil-mpaa-piracy-settlement-1200918378/.

[17] *See* GOOGLE, TRANSPARENCY REPORT: REQUESTS TO REMOVE CONTENT DUE TO COPYRIGHT (last visited JUL. 23, 2014), http://www.google.com/transparencyreport/removals/copyright/?hl=en.

[18] *See* Brief of the Nat'l Venture Capital Ass'n as Amicus Curiae for Respondents at 6, Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913 (2005).

[19] Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913, 941 (2005).

[20] Steven M. Marks, *Debunking the "Stifling Innovation" Myth: The Music Business's Successful Transition to Digital*, 2013 WIS. L. REV. 21 (2013).

Ingenuity 13 LLC v. Doe,[21] the District Court for the Central District of California relied on Federal Civil Procedure Rule 11 to rule against a group of abusive litigants. The court awarded attorney fees and punitive damages to the defendants based on "plaintiffs' brazen misconduct and relentless fraud" to the court. The court also referred plaintiffs to their respective state and federal bars, the District Standing Committee on Discipline, the U.S. Attorney for the Central District of California, the Criminal Investigation Division of the Internal Revenue Service, and notified all judges before whom the plaintiffs had pending cases. Copyright owners as a whole should not be punished for the short-lived, ill-advised litigation tactics employed by a small number of individuals, since judicial safeguards against these sort of actions are already readily available and used by courts when appropriate.

[21] No. 2:12-cv-8333-ODW(JCx), slip. op. at 10, 11 (C.D. Cal. May 6, 2013).