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The Increasing Relevance of Copyright Statutory Damages: Some Brief Digressions Upon *Capitol Records v. Thomas*

Sherwin Siy*

The *Thomas* case[1] has brought two separate copyright questions to the fore: the extent of the distribution right[2] and the extent of statutory damages. From its inception and through the declaration of a mistrial last year, the former question excited a great deal of the copyright law blogosphere, and presents a few interesting questions for debate; the latter has gained more mainstream attention,[3] but did not initially raise as much of a controversy within the confines of the case itself.

After all, more was at stake in the interpretation of "making available," since Judge Michael J. Davis chose to order a new trial based on flawed jury instructions that equated "making available" with the distribution right.[4] There are also interesting parallels between the distribution right and the right of "making available" as articulated in international agreements; there is the continuing discussion of whether or how "distribution" is distinct from

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1 Capitol Records, Inc. v. Thomas, 579 F. Supp. 2d 1210 (D. Minn. 2008).

2 17 U.S.C. § 106(3) (2006).

3 *See, e.g.*, Jeff Leeds, *Labels Win Suit Against Song Sharer*, N.Y. TIMES, Oct. 5, 2007, at C1; Tony Long, *Commentary: RIAA Hits a Sour Note With Its File-Sharing Witch Hunt*, WIRED, Oct. 11, 2007, http://www.wired.com/culture/lifestyle/commentary/theluddite/2007/10/luddite_1011; Nilay Patel, *RIAA Wins First-ever File-sharing Case to Go to Trial, Awarded $222,000*, ENGADGET, Oct. 4, 2007, http://www.engadget.com/2007/10/04/riaa-wins-first-ever-file-sharing-case-to-go-to-trial-awarded.

4 *Thomas*, 579 F. Supp. 2d at 1226–27.

"publication."[5] On the other hand, the statutory damages assessed to Jammie Thomas are high, certainly, but clearly within the confines set by the statute.

In terms of effects on copyright policy, though, the question of statutory damages will likely be of greater import than questions about the making available right. The issues surrounding the distribution right have had their greatest impact on the *Thomas* case because of the particular strategy that the record labels have used to find and sue file sharers—relying upon investigators to locate copyrighted files that defendants are placing in open shared folders without authorization.[6] Construing this as a distribution allows litigation to proceed without need for any further evidence beyond the location of the file in the shared folder, or without debating whether or not the investigators' own downloads constitute a distribution by the sharer.[7]

However, a less expansive definition of the distribution right would not bar litigation: a fact-finder is certainly allowed to make reasonable inferences at trial, and in a civil case where the burden of proof is a preponderance of the evidence, it should not be that difficult to prove that a user offering up a shared file to thousands of others seeking it would have distributed it at some point. Nor, in most cases, should it be difficult to find that the user had made an unauthorized reproduction of the copyrighted work at issue.

So while there are worthwhile legal controversies surrounding the interpretation of distribution that have affected the *Thomas* case and will certainly affect other areas of copyright controversy, the end result of interpreting distribution one way or another will likely have less practical impact in the long term.[8]

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5 *See id.* at 1219–20, 1225–26 (discussing interplay between "publication" and "distribution" and the role of treaty language in the decision, respectively).

6 *See id.* at 1214–16.

7 The court in *Thomas* concluded that the investigator's downloads would constitute a distribution by Thomas. *Id.* at 1216. Even assuming distribution was defined more narrowly, this would seem to encompass most unauthorized file sharers of copyrighted works.

8 Indeed, a strategy of mass file sharing lawsuits may soon be rendered obsolete, as many labels have found little effect on downloading trends and a large amount of bad publicity resulting from them. *See, e.g.*, Sarah McBride & Ethan Smith, *Music Industry to Abandon Mass Suits*, WALL ST. J., Dec. 19, 2008, at B1. A large number of cases still

However, the singular fact that first made mainstream headlines in the *Thomas* case was the extent of statutory damages. Thomas was initially found liable for a total sum of $222,000; a matter of $9,250 for each of the twenty-four tracks Thomas infringed.[9] After the retrial, a new jury awarded plaintiffs $1.92 million in damages, $80,000 per track infringed.[10] The significance that the press and public afforded this fact is in line with the significant role that large statutory damages play in a wide and increasing range of copyright controversies in the digital age. As such, a number of issues surrounding copyright statutory damages could benefit from further research and greater scrutiny.[11]

As headline-grabbing as even the first award was, it would not necessarily have been news to those familiar with the statute. Section 504 clearly allows such an award.[12] Without a showing of actual damages, a plaintiff can be awarded a value between $750 and $30,000 per work infringed.[13] This range can be extended—innocent infringers may pay out as little as $200 per work infringed, whereas willful infringers face a range from $750 up to $150,000.[14]

Measured in terms of actual damages, Thomas's infringement could be valued at as little as $1 per track (the approximate retail value on a download service like iTunes). Perhaps more realistically, the damages could be adjusted upwards to account for a number of other factors, including multiple potential sales lost

proceeding through litigation were apparently initiated before this decision was made. *See, e.g.*, Eliot Van Buskirk, *Nothing to See Here: RIAA Lawsuits Continue*, EPICENTER, May 6, 2009, http://www.wired.com/epicenter/2009/05/nothing-to-see-here-riaa-lawsuits-continue.

9 *Thomas*, 579 F. Supp. 2d at 1213, 1227–28 (noting, even though beyond the scope of the trial court's review, the "unprecedented and oppressive" amount of damages).

10 *See, e.g.*, David Kravets, *Jury in RIAA Trial Slaps $2 Million Fine on Jammie Thomas*, THREAT LEVEL, Jun. 18, 2009, http://www.wired.com/threatlevel/2009/06/riaa-jury-slaps-2-million-fine-on-jammie-thomas.

11 One prominent and thorough study is a forthcoming paper by Pamela Samuelson and Tara Wheatland released in the past year since the Symposium. Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. (forthcoming 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1375604.

12 17 U.S.C. § 504(c) (2006).

13 *Id.* § 504(c)(1).

14 *Id.* § 504(c)(1)–(2).

from repeated distributions of the same track. The minimum that a jury could have awarded in statutory damages, however, is $18,000 total.

Even leaving aside the simple immensity of this minimum, the range of values available to a court in assigning damages represents a extraordinary amount of discretion; a range that spans over two orders of magnitude. In a case where thousands of works may have been infringed, a court may then decide, in the absence of any evidence of actual harm, whether damages should be measured in millions or billions of dollars.

Both the size and the sizable range of copyright statutory damages are an outlier compared to other provisions in the U.S. Code. For instance, someone obtaining a consumer report fraudulently or for unlawful purposes is liable for actual damages or $1000, whichever is greater.[15] A federal agency that fails to comply with the Privacy Act and thus creates an adverse harm to an individual is liable to the individual for at least $1000.[16] Negligently or fraudulently preparing bankruptcy records can result in damages of $2000 to a debtor, or twice the amount paid by the debtor to the preparer.[17] Failing to comply with statutory requirements in mortgage loan servicing results in actual damages, plus a maximum additional $1000 in cases of a pattern or practice of noncompliance.[18] In class actions under that same section, damages beyond actual damages are capped at $1000 per class member, with a maximum additional award equal to either $500,000 or one percent of the net worth of the defendant.[19] Those harmed by force, threats of force, or physical obstruction in seeking access to or provision of reproductive health services may sue for statutory damages which are capped at $5000 per violation.[20] A plaintiff whose communications have been illegally intercepted, disclosed, or used in violation of the Wiretap Act[21]

15 15 U.S.C. § 1681n(a)(1)(B) (2006).
16 5 U.S.C. § 552a(g)(4)(A) (2006).
17 11 U.S.C. § 110(i)(1)(B) (2006).
18 12 U.S.C. § 2605(f)(1) (2006).
19 *Id.* § 2605(f)(2).
20 18 U.S.C. § 248(c)(1) (2006).
21 *Id.* §§ 2510–2522.

can obtain the greater of actual damages or statutory damages in a range of $50 to $500 for a first-time offense or $100 to $1000 for repeat offenses, with a court able to increase the award to the greater of $100 per day of a violation or $10,000.[22] Consumers harmed by junk faxes or prohibited autodialing are entitled to statutory damages of $500 or actual damages, whichever is greater.[23]

In this admittedly brief, unscientific survey of statutory damages provisions, the amounts at issue in copyright infringement do seem to occupy an extreme, especially considering that these values can be leveled against defendants unquestionably less sophisticated than the large and/or regulated entities encompassed by some of the larger awards noted above.[24]

Given this outlying position in the U.S. Code, it would be a fair question to ask if the high values of these damages seem to be performing a particularly effective job as a deterrent. The answer, however, coming from two different sides of the copyright debate, finds statutory damages ineffective in at least two ways.

Those who are most concerned that scofflaws be deterred may note that in some cases, statutory damages may not be sufficient to offset potential profits by large-scale infringers.[25] And at the other end of the scale, there are other considerations: if low-value infringements are not deterred by statutory damages several hundred times their actual value, would damages thousands of times greater have any appreciable additional deterrent effect? If

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22 *Id.* § 2520(c)–(d).

23 47 U.S.C. § 227(b)(3) (2006).

24 *See, e.g.*, Capitol Records, Inc. v. Thomas, 579 F. Supp. 2d 1210, 1227 (D. Minn. 2008) ("The Court does not condone Thomas's actions, but it would be a farce to say that a single mother's acts of using Kazaa are the equivalent, for example, to the acts of global financial firms illegally infringing on copyrights in order to profit in the securities market.").

25 *See, e.g.*, Sarah A. Zawada, Comment, *"Infringed" Versus "Infringing": Different Interpretations of the Word "Work" and the Effect on the Deterrence Goal of Copyright Law*, 10 MARQ. INTELL. PROP. L. REV. 129, 149–52 (2006) (noting that some infringers may profit more from an infringement than statutory damages may cover). However, it should be noted that plaintiffs can choose between actual and statutory damages at any time. *See* 17 U.S.C. § 504(c).

heightened deterrence effects cannot justify the current size and range of statutory damages, what does?

Doubtless, the range has increased since its inception. In 1976, the range of copyright statutory damages was from $250 to $10,000, with innocent infringement minimums of $100, and willful set with a maximum of $50,000.[26] These values have, through amendments in 1988[27] and in 1999[28] reached their current values.[29] Even in the original text of the 1976 Act, however, the range still encompassed the same large multiplier range, granting a judge or jury incredible latitude in determining a statutorily-set penalty.

Part of the reason for this range of discretion can be found in a particular feature of the 1976 Act's statutory damages regime. According to § 504(c)(1), statutory damages are calculated according to the number of works infringed, regardless of the number of copies, distributions, or performances made in each offense.[30] Whether a photograph is reproduced in a single piece of artwork, or printed in a newspaper with circulation in the thousands, only one award will be available within the statutory range.

Nor is the scale or scope of the work infringed considered in counting statutory damages. An infringement of a single sonnet is subject to the same range of statutory damages as an infringement of a 1400 page novel.[31] Given this lack of differentiation, a wide range is necessary to account for all of the variations in culpability that a single act of infringement can encompass.

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[26] Copyright Act of 1976, Pub. L. No. 94-553, § 504(c), 90 Stat. 2541 (codified at 17 U.S.C. § 504(c)).

[27] Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 10, 102 Stat. 2853, 2860 (doubling the minimum and maximum range).

[28] Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub. L. No. 106-160, § 2, 113 Stat. 1774 (increasing minimum and maximum range by fifty percent).

[29] 17 U.S.C. § 504(c) (2006).

[30] Copyright Act of 1976 § 504(c)(1).

[31] Although the statutes offer more explicit guidance in considering such factors when deciding certain questions of liability, such as in fair use, those considerations are not explicitly referenced for use as guidelines after infringement has been found.

These features stand in contrast to the Copyright Act of 1909, which contained an extremely complex statutory damages provision.[32] Essentially, the 1909 Act provided for a basic range

[32] Copyright Act of 1909, Pub. L. No. 60-349, § 101(b), 35 Stat. 1075 (amended by Act of July 30, 1947, ch. 391, § 101(b), 61 Stat. 652, 661 (1947)) (codified at 17 U.S.C. § 101(b)), *reprinted in* CRAIG JOYCE, ET AL., COPYRIGHT LAW 272 (7th ed. 2008) [hereinafter Copyright Act of 1909]. In relevant part, this read:

> [I]n lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in case of a newspaper reproduction of a copyrighted photograph, such damages shall not exceed the sum of $200 nor be less than the sum of $50, and in the case of the infringement of an undramatized or nondramatic work by means of motion pictures, where the infringer shall show that he was not aware that he was infringing, and that such infringement could not have been reasonably foreseen, such damages shall not exceed the sum of $100; and in the case of an infringement of a copyrighted dramatic or dramatico-musical work by a maker of motion pictures and his agencies for distribution thereof to exhibitors, where such infringer shows that he was not aware that he was infringing a copyrighted work, and that such infringements could not reasonably have been foreseen, the entire sum of such damages recoverable by the copyright proprietor from such infringing maker and his agencies for the distribution to exhibitors of such infringing motion picture shall not exceed the sum of $5,000 nor be less than $250, 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. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery 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.
>
> First. In the case of a painting, statue, or sculpture, $10 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;
>
> Second. In the case of any work enumerated in section 5 of this title, except a painting, statue, or sculpture, $1 for every infringing copy made or sold by or found in the possession of the infringer or his agents or employees;
>
> Third. In the case of a lecture, sermon, or address, $50 for every infringing delivery;
>
> Fourth. In the case of a dramatic or dramatico-musical or a choral or orchestral composition, $100 for the first and $50 for every subsequent infringing performance; in the case of other musical compositions $10 for every infringing performance.

Id.

of between $250 and $5000, which could be adjusted upwards by a court.[33] Significantly, though, the statute provides also particular guidelines for certain specific infringements.

Within the slightly smaller range of the 1909 Act, each infringing copy made would increase the amount of the statutory damages, up to the maximum of $5,000.[34] The amount of the multipliers would also depend upon the type of work infringed: for paintings, statutes, and sculptures, $10 were assessed for each copy made.[35] For lectures, sermons, or addresses, $50 were assessed for each infringing delivery.[36] Infringing dramatic, orchestral, or choral productions would result in $100 for the first infringing performance and $50 for each performance subsequent; other musical works would be liable for $10 per infringing performance.[37] Other works would create liability at $1 per infringing copy.[38]

Though criticized (likely rightly) for its impenetrability,[39] the statutory damages provision of the 1909 Act contained degrees of guidance and subtlety that are absent from the current statute. Within its mandated maximum and minimum range, courts had a rough guide to account for the variations in the number of infringing copies produced. Courts also had some statutory guidance in dealing with particular types of infringers: newspapers infringing a photograph could only be liable for $50 to $200; certain innocent infringements made specifically in motion pictures were capped at $100.[40]

The variety and specificity of these provisions may have complicated calculations, but their presence also created specific, bright-line caps for particular types of infringers and

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33 *Id*.

34 6 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 22:154 (2007).

35 Copyright Act of 1909.

36 *Id.*

37 *Id.*

38 *Id.*

39 *See, e.g.*, PATRY, *supra* note 34 ("Section 101(b) of the 1909 Act was one of the many failures of that Act. In addition to confusion over whether statutory damages were awardable under section 101(b) only when actual damages or defendant's profits were unascertainable, section 101(b) presented a baffling smorgasbord of provisions . . .").

40 Copyright Act of 1909, *supra* note 32.

infringements. Today's statute provides no such guidance alongside its range, which has increased both proportionately and numerically.

If that wide range is meant to encompass a range of infringing copies from one to up to thousands, as well as infringements of large and small scale alike, perhaps a set of guidelines could be crafted so that various instances of infringement could be consistently, predictably, and fairly placed within that scale. In addition to adjusting for easily quantifiable factors like the number of copies produced, or the amount of work infringed, a court might also be advised to account for the "depth" of the infringement—to what extent the protectable, creative content embodied in the work was at the heart of the value sought by the infringer. Such guidelines need not be a mechanical formula that must be applied; however, they could provide a useful benchmark, with additional adjustments available at the fact finder's discretion.

Accounting for such context-dependent factors would not be new to copyright litigation—such open-ended considerations are part and parcel of making decisions on liability, so they may well have a place in the remedies phase as well. The contours of the rights held by copyright owners and users are themselves highly context-dependent, varying from situation to situation depending upon the types of works, identities of the parties, and the particular uses made of the works.[41]

Allowing for some flexibility and discretion would seem to be necessary—the current situation, in which statutory damages are collapsed into three broad categories, may be a recognition of the impossibility of accounting for all of the possible relevant factors. Ultimately a decision will be based upon the facts of a particular case—and a court would be the best determiner of how those facts

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[41] *See, e.g.*, 17 U.S.C. §§ 108, 110, 115 (2006). Each alter the basic rights held by copyright holders depending upon context. Libraries, certain business establishment owners, and sound recording artists are all specifically entitled to particular uses in certain situations. *See also* Oren Bracha, *Standing Copyright Law on its Head? The Googlization of Everything and the Many Faces of Property*, 85 TEX. L. REV. 1799, 1807–09 (2007) ("These bundles of entitlements vary greatly with context, depending on the parties involved, their relationship, and the resource at issue. . . . [T]he Copyright Act is the epitome of context-specific entitlements.").

should affect the penalties. Nonetheless, statutory guidance might be particularly helpful in an area where a jury or judge is faced with such a wealth of a range.

Such guidance might also have the role of clarifying the purpose behind statutory damages, preventing not only troublingly disproportionate awards, but also immunizing the provisions against constitutional challenges. A lack of proportionality is at the heart of a number of challenges to application of section 504, rooted in the theory that the size and discretionary range of the damages available deny a defendant of substantive due process, in the same way that disproportionate punitive damages do.[42]

Without taking a position on the merits of the constitutional argument, it is worth noting that, at least for the *Thomas* jury, the availability of higher statutory damages seemed to serve a punitive purpose.[43] According to at least one juror, a reason for the size of the damages was related to Thomas's apparent lack of credibility in her defense of mistaken identity.[44] A set of guidelines that garnered a value attributable to specific aspects of findings of infringement might be better insulated against constitutionality challenges.

CONCLUSION

Much ado is being made of the "making available" question because it affected the specific outcome of the *Thomas* and the specific tactics that have been used—that have been easy to use—by plaintiffs. No matter how it is decided, there are workarounds for the types of stakeholders involved in the *Thomas* trial. Even if distribution is construed as making available, sharers and software developers can evade this particular avenue of enforcement by

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[42] *See, e.g.*, Brief of Defendant in Opposition to Plaintiff's Motion to Dismiss Counterclaims, Capitol Records, Inc. v. Alaujan, No. 03-CV-11661-NG (D. Mass. Oct. 27, 2008) (originally docketed Sony BMG Music Entm't v. Tenenbaum, No. 1:07-cv-11446-NG); J. Cam Barker, Note, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: the Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 TEX. L. REV. 525 (2004).

[43] *See* Capitol Records, Inc. v. Thomas, 579 F. Supp. 2d 1210 (D. Minn. 2008).

[44] *See* David Kravets, *RIAA Juror: 'We Wanted to Send a Message'*, WIRED, Oct. 9, 2007, http://blog.wired.com/27bstroke6/2007/10/riaa-juror-we-w.html.

altering their behavior (e.g., using closed networks, or physical media "sneakernet" transfers).[45] And if distribution is held to require actual transfer, plaintiffs could still have file sharers on the hook for distributions to investigators, probable-by-a-preponderance-of-evidence showing of actual distribution, or infringement of reproduction rights.

On the other hand, statutory damages and their unpredictability will be a factor not only in many file sharing cases, but every single copyright infringement case in which a plaintiff does not elect actual damages. Even beyond the impact upon litigation, the chilling effects of a large negative outcome can pressure early settlement before the merits can be decided at trial, whether the defendant is a single file sharer, a large newspaper publisher, or a cable company. A fresh look at the consequences of the available range, and a more predictable and nuanced accounting of the awarded values, could be valuable in ensuring that they serve their intended purpose.

[45] A sneakernet transfer describes the transfer of data from one machine to another by physically moving a tape, disk, or some other removable media. Paul Boutin, *Sneakernet Redux: Walk Your Data*, WIRED, Aug. 26, 2002, http://www.wired.com/culture/lifestyle/news/2002/08/54739.