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Monetary Remedies Under the United States Copyright Code

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It is a notable achievement that the past decade has brought about a marked increase in the volume of artistic and literary production in our nation. It is certain that a nation interested in its own cultural advancement must, at an early date, undertake the protection of intangible property rights, and this has been the fortunate and enlightened experience of our society. As a result of the increased production of copyrightable material, there has been, in recent years, increased interest in the protection of these forms of intellectual property.¹

The principle on which the copyright² law is founded—the encouragement of authors by granting exclusive rights to them for limited periods of time—is firmly embedded in our national life.³ The basis for this protection is found in section 8 of the Constitution which provides:

The 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.⁴

It is important to note that the Constitution does not establish copyrights but provides that Congress shall have the power to grant such rights if it thinks fit. The rights are given not primarily for the benefit of the author, but the benefit of the public. They serve as rewards to authors and inventors and stimulate them to produce for the benefit of the general public.⁵

It is a tribute to those who fashioned the Federal Constitution that they recognized that it was in the national interest to develop the cultural life of the nation. They understood the importance of giving financial incentives to authors. Incentives in the form of subsidies or

¹ Member of the New York and Federal Bars.
2. The term “copyright” as used herein is defined as “the exclusive privilege, secured according to certain legal forms of printing, or otherwise multiplying, publishing and vending copies of certain literary or artistic productions.” ¹ Bouvier, Law Dictionary 674 (8th ed. 1914).
3. For a thorough and informative discussion of the legislative history of copyright law, see Howell, The Copyright Law (3d ed. 1952).
patronage were wholly rejected. Instead, economic incentives were conceived in the form of legal protection by a copyright law. This protection provides an exclusive right to the author for a term of twenty-eight years from the date of first publication, with a right of renewal for an additional twenty-eight year period. At the end of this period the work becomes public property.\(^6\)

**The Statutory Provisions**

Pursuant to the constitutional language, Congress passed the first federal Copyright Act on May 31, 1790.\(^7\) This first act and its amendments and revisions in subsequent years attempted to provide an adequate initial and renewal copyright period and a standard of monetary recovery for the injured property owner.\(^8\) The present financial recovery provision is derived from prior legislation and is basically the same as section 25 of the Act of 1909. The present section 101(b) provides for the recovery of actual damages and profits, or in lieu of actual damages and profits, statutory damages which are not regarded as a penalty.\(^9\) In addition, sec-

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8. For an analytical and historical study of the renewal aspects of copyrights see Kupferman, Renewal of Copyright, 44 Colum. L. Rev. 712-35 (1944) and Bricker, Renewal and Extension of Copyright, 29 So. Cal. L. Rev. 23 (1955). The most recent Supreme Court decision on renewal rights is DeSylva v. Ballentine, 351 U.S. 570 (1956) which at 578 cites Kupferman as a "qualified commentator."


9. 17 U.S.C. § 101(b) (1952) provides: “To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims, or in 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 pro-
tion 101(e) in conjunction with section 1(e) provides special remedies for infringement of musical works by mechanical reproduction, and section 1(c) sets forth maximum damages for innocent infringement of non-dramatic works by broadcast.\textsuperscript{10} However, both of these areas are beyond the scope of this paper and are not included in this discussion. This paper is devoted primarily to consideration of monetary remedies available under the act, and does not evaluate other available remedies, such as destruction and impounding of the infringing works, injunctive relief, criminal liability or compulsory royalties.\textsuperscript{11}

Under the act, an injured party may recover:

(a) any actual damages suffered due to the infringement,
(b) the profits which the infringer made from the infringement,
(c) such damages in lieu of actual damages and profits as appear to
the court to be just, within the specified limits of the statutes,\textsuperscript{12}
(d) certain attorneys' fee and costs.

Basically, the act provides for compensation to the proprietor, by way of recovery of damages, for any loss brought about by the infringement. The awards are not penal\textsuperscript{13} but are designed to deprive the tortfeasor of any unjust enrichment.\textsuperscript{14} Relief is obtained by a plaintiff's showing the validity of his copyright and an infringement thereof.\textsuperscript{15} The showing

\textsuperscript{10.} See Kupferman, Rights in New Media, 19 Law & Contemp. Prob. 172, 176 (1954).
\textsuperscript{12.} Karp, Copyright Litigation, in Seven Copyright Problems Analyzed 143, 180 (1952).
\textsuperscript{13.} Sheldon v. Metro-Goldwyn Corp., 309 U.S. 390, 399 (1940); F. W. Woolworth Co. v. Contemporary Arts, 193 F.2d 162, 167 (1st Cir. 1951), aff'd, 344 U.S. 228 (1952); Turner & Dahnken v. Crowley, 252 Fed. 749, 754 (9th Cir. 1918).
\textsuperscript{14.} See Sheldon v. Metro-Goldwyn Corp., supra note 13. In this case, the Court also recognized the similarity of remedies in patent and copyright cases, stating: "In passing the Copyright Act, the apparent intention of Congress was to assimilate the remedy with respect to the recovery of profits to that already recognized in patent cases. Not only is there no suggestion that Congress intended that the award of profits should be governed by a different principle in copyright cases but the contrary is clearly indicated by the committee reports on the bill." Id. at 390. See also Sammons v. Colonial Press, 126 F.2d 341 (1st Cir. 1942).
\textsuperscript{15.} See National Comics Publications, Inc. v. Fawcett Publications, Inc., 198 F.2d 927 (2d Cir. 1952).
of an intent to infringe appears to be immaterial to liability under the act but it has a substantial effect in dealing with the quantum of damages.\textsuperscript{16}

A word about possible defenses to a suit for recovery of profits and/or damages. The doctrine of laches and the doctrine of estoppel have been before the courts, and in this area it has been held that a delay of fifteen months is not unreasonable.\textsuperscript{17} The courts, however, have clearly held that a copyright owner may not deliberately delay his prosecution and thereby speculate on the success of the exploitation.\textsuperscript{18} Some tribunals have held that laches may deprive plaintiff of damages and profits even though the facts justify an injunction,\textsuperscript{19} and that long acquiescence with knowledge of the infringement implied consent.\textsuperscript{20} Other defenses to a suit for recovery include abandonment,\textsuperscript{21} failure to join an indispensable party,\textsuperscript{22} plaintiff not the real party in interest,\textsuperscript{23}

\textsuperscript{16} See De Acosta v. Brown, 146 F.2d 408, 410 (2d Cir. 1944), cert. denied, 325 U.S. 862 (1945); Johns & Johns Printing Co. v. Paull-Pioneer Music Corp., 102 F.2d 282 (8th Cir. 1939). Some courts have allowed only the statutory minimum where there was no intent to infringe. North & Judd Mfg. Co. v. Krischer's Mfg. Co., 11 F. Supp. 739 (D. Conn. 1935); Haas v. Leo Feist, 234 Fed. 105 (S.D.N.Y. 1916). In Dreamland Ball Room v. Shapiro, Bernstein & Co., 36 F.2d 354 (7th Cir. 1929), the defendant owned a ballroom and hired an orchestra without knowing that some of the pieces they were playing were copyrighted and used without a license. The court reluctantly awarded minimum statutory damages stating:

"Appellants' argument in support of their position respecting the amount of damages [i.e., that under the circumstances an award of $250 was excessive], has much appeal. But, unfortunately for them, there are too many judicial precedents which we can neither hurdle nor side step to permit us to adopt their construction of a statute which has been somewhat aptly described as 'inartificially drawn.'" Id. at 355.

\textsuperscript{17} Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354 (9th Cir. 1947), where the court also said that this defense was not available to a deliberate infringer.


\textsuperscript{19} Pollitzer v. Foster, 59 F.2d 901 (6th Cir. 1932); Simpson v. Newport News Shipbuilding & Dry Dock Co., 18 F.2d 318 (S.D.N.Y. 1920).


\textsuperscript{21} Abandonment is the publication or acquiescence therein without statutory compliance. Egner v. E. C. Schirmer Music Co., 139 F.2d 398 (1st Cir. 1943), cert. denied, 322 U.S. 730 (1944); Deward & Rich Inc. v. Bristol Sav. & Loan Corp., 120 F.2d 537 (4th Cir. 1941).

\textsuperscript{22} Independent Wireless Tel. Co. v. Radio Corp., 269 U.S. 459 (1926) (copyright proprietor); Radio Corp. v. Emerson, 296 Fed. 51 (2d Cir.), cert. denied, 265 U.S. 582 (1924) (exclusive licensee).

\textsuperscript{23} Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 268 (2d Cir. 1944); Goldwyn Pictures Corp. v. Howells Sales Co., 282 Fed. 9 (2d Cir. 1922), cert.
and lack of, or defective copyright notice.\textsuperscript{24}

Perhaps the most successful defense is that of "fair use." Copying itself does not necessarily constitute infringement. The defendant must have appropriated a substantial and material portion of the plaintiff's work in order to justify a verdict against him. In this context, substantial means important rather than lengthy, and the question will be answered by the use to which the defendant puts the appropriated part of the plaintiff's work.

Decisional law recognizes the doctrine of "fair use." A reviewer, for example, may quote reasonably long passages for legitimate critical purposes. A scientist may use the words of his predecessor in expounding a theory of his own. But a manufacturer will be an infringer if he takes only a few sentences and uses them in an advertisement to exploit his products.\textsuperscript{25}

A problem frequently facing plaintiff's counsel is whether to proceed with an action at law or to seek relief in a court of equity. Historically, one who was injured by an infringement could sue in equity for an injunction and obtain an accounting of profits, or he could go to a court of law following the injunction and seek damages. With the enactment of modern rules of procedure, equity courts began to assess and award damages, and today a plaintiff may bring his action at law or in equity.\textsuperscript{26} However, the possibility of injunctive relief, plus opportunities for additional recovery beyond damages in the form of defendant's profits, have made the court of equity the prevailing forum.

Where neither an injunction nor an accounting for profits is sought, the action usually is at law for damages.\textsuperscript{27} However, under the statute, equity has jurisdiction to account for profits without a request for an


injunction,\textsuperscript{28} thus changing the law that an accounting for profits is normally an incident of an injunction in equity.\textsuperscript{29}

**Profits and Damages Defined**

When the plaintiff has established an infringement and seeks monetary recovery, he enters the area of profits and damages. These terms are often confused and attention should be directed to their proper meanings.

In reality, two kinds of profits are involved in infringement cases, those which the plaintiff has lost on sales he would have made but for defendant's acts and those which defendant made from unfair use of plaintiff's property, or from misrepresenting his items to be plaintiff's. Defendant's gains of the latter type are termed profits, but gains that plaintiff might have made except for defendant's acts are sometimes called profits and sometimes damages.

The term "damages" is generally used to describe injuries which plaintiff suffers from causes other than loss of his profits. Such loss may result from injury to plaintiff's reputation or to the saleability of plaintiff's property. Hence, damages sometimes include profits and other losses, sometimes refer only to plaintiff's lost profits, or sometimes do not refer to profits at all but to other injuries. As a result of this confusion, decisions are often difficult to understand and apply. As used in this discussion, damages refer solely to the latter of the three possible definitions.\textsuperscript{30} The term "accounting of damages" is misleading for there is no accounting of damages as distinguished from accounting of profits. As commonly used today, the word "damages" may include profits but profits do not include damages. An understanding of the differences between profits and damages is essential to a complete comprehension of this area of law.

The importance of separating profits and damages has been well demonstrated. In *Sammons v. Colonial Press*,\textsuperscript{31} an action wherein plaintiff sought to hold defendant-printer jointly liable with the infringing

\textsuperscript{28} Sheldon v. Moredall Realty Corp., 22 F. Supp. 91, modified, 95 F.2d 48 (2d Cir. 1938).

\textsuperscript{29} Belford v. Scribner, 144 U.S. 488 (1892); Sheldon v. Metro-Goldwyn Corp., supra note 13. See also Chappel & Co. v. Palermo Cafe Co., 249 F.2d 77 (1st Cir. 1957).

\textsuperscript{30} For related decisions distinguishing profits from damages, see Hamilton Brown v. Wolf Brothers, 240 U.S. 251 (1916); Aladdin Mfg. Co. v. Mantle Lamp Co., 116 F.2d 708 (7th Cir. 1941); Dowagic v. Deere & Webber, 284 Fed. 331 (8th Cir. 1922); Fahey Tobacco v. Senior, 252 Fed. 579 (3d Cir. 1918). At common law an infringer was compelled either to turn over the profits or to compensate the plaintiff for the damages. Note, 54 Yale L.J. 697, 704 (1945).

\textsuperscript{31} 126 F.2d 341 (1st Cir. 1942). See also Gross v. Van Dyke Gravure Co., 230 Fed. 412, 414 (2d Cir. 1916).
publisher for the profits made from the sales of the infringing book, the
court upheld the printer's liability for nominal damages on the familiar
principle of tort liability that all persons who unite in an infringement
are jointly and severally liable for the damages resulting therefrom.

The court held, however, that though joint liability was the rule in
damages, a different rule existed as to recovery of profits, and that co-
infringers, unless partners, were accountable only for the profits each
had received. In discussing the difference between profits and damages,
the court said:

Damages and profits are distinct items of recovery, and are awarded upon quite
different legal principles. . .

[T]he measure of damages is the profits which the plaintiff would have made
upon additional sales of its copyrighted book, had not the infringing book been
competing in the market.32

In *Lundberg v. Welles*,33 plaintiff sought damages from defendant for
the latter's infringement of plaintiff's copyright of the book "Imperial
Hearst" by the production and distribution of the motion picture "Citizen
Kane." In holding for the plaintiff on the procedural aspect of plaintiff's
questioning of defendant as to profits in an action at law, the court said,

The theory by which profits may be recovered in a suit in equity emanates from
antecedents that are wholly distinct from those which attend the recovery of dam-
ages in an action at law. The two are not only separable in principle, but also in
the consequences flowing therefrom . . . . Damages are measured by the loss to the
plaintiff whose rights have been infringed; profits express the actual gains accru-
ing to the defendant by virtue of his infringement. . . .34

The court appeared to favor inquiry into profits, because it could serve
as a guide in the damages aspect of the action at law. The court also
discussed the law vs. equity problem, stating,

Traditionally, in an action at law for infringement, damages only can be recovered.
However, inasmuch as infringements can be enjoined in equity, and in order to
avoid a multiplicity of suits, the infringer was considered a trustee as to his profits
for the benefit of the owner of the infringed work. Thus, an accounting of profits
is an equitable remedy, and profits are computed upon a theory that differs from
that governing damages.35

As noted above, the classification of sums of money as profits or

32. 126 F.2d at 344.
34. Id. at 361.
35. Ibid. See also Burdell v. Denig, 92 U.S. 716 (1875), where Justice Miller said,
"Profits are not the primary or true criterion of damages for infringement in an action
at law. That rule applies . . . mainly to cases in equity, and is based upon the idea
that the infringer shall be converted into a trustee, as to those profits, for the owner . . .
which he infringes. . . ." Id. at 720. See also Sheldon v. Metro-Goldwyn Corp., 309
U.S. 390, 399. (1940).
damages is important where there are two or more defendants. It appears that co-defendants are jointly liable for damages, but each defendant is separately liable for his profits unless there is a relationship of partnership or joint venture between the defendants.

**DAMAGES AND/OR PROFITS**

Before turning to a study of the elements included in an award of profits or damages, it would be useful to examine an area of copyright jurisprudence that is heavily clouded by conflicting authoritative views. The dispute centers about the determination as to whether a plaintiff is entitled to recover both actual damages and profits.

The statute states that a plaintiff may recover actual damages, “as well as all of the profits” produced by the infringement. However, the Supreme Court, in *Sheldon v. Metro-Goldwyn Corp.*, referred to the committee report on the monetary recovery provision of the 1909 act which, in substance, is the same as the present section 101(b). The Court then held that the plaintiff was entitled to recover only the greater of profits or damages, and not a cumulation of the two.

Similarly, in *Universal Pictures Co. v. Harold Lloyd Corp.*, the circuit court upheld the trial court’s award of damages to plaintiff since the damages exceeded the profits, and plaintiff, the court felt, was entitled only to the larger of the two. In upholding the award of damages alone, the court was influenced by the decision in *Sheldon v. Metro-Goldwyn Corp.*, which enunciated the intended similarity between the patent and copyright laws and cited the committee report:

36. For a thorough review of the rights and obligations of co-owners, see Kupferman, Copyright Co-owners, 19 St. John’s L. Rev. 95-110 (1945); Taubman, Joint Authorship and Co-ownership in American Copyright Law, 31 N.Y.U.L. Rev. 1246 (1956). In the related area of trademark law, see Wehringer, Trademark Licenses, Control Provided, Control Exercised, 47 Trade Mark Rep. 287 (1957).


38. Sammons v. Colonial Press, supra note 37; Dowagiac Mfg. Co. v. Deere & Webber Co., 284 Fed. 331 (8th Cir. 1922); Herman v. Youngstown, 216 Fed. 604 (6th Cir. 1914); cf. Belford v. Scribner, 144 U.S. 488 (1892) which is evidently contrary to the majority of cases because the publisher and printer were “practically partners.”

39. 17 U.S.C. § 101(b) (1952). The doctrine of dual recovery has substantial support in the authorities. See Amdur, Copyright Law and Practice 1117 (1936); 18 C.J.S. Copyright and Literary Property § 135, at 248 (1939); Howell, Copyright 34 (2d ed. 1946); Well, Copyright Law 467 (1917); Caplan, The Measure of Recovery in Actions for the Infringement of Copyright, 37 Mich. L. Rev. 564, 571 (1939).

40. 309 U.S. 390 (1940).


43. 162 F.2d 354 (9th Cir. 1947).

44. 309 U.S. 390, 400, 401 (1940).
The provision that the copyright proprietor may have such damages as well as the profits which the infringer shall have made is substantially the same provision found in ... the Revised Statutes ... relating to remedies for the infringement of patents. The courts have usually construed that to mean that the owner of a patent might have one or the other, whichever was the greater.\textsuperscript{45}

The view favoring the allowance of an award of both damages and profits under the statute was discussed in \textit{Atlantic Monthly Co. v. Post Publishing Co.},\textsuperscript{46} an action to restrain infringement of copyright, and to recover damages and profits, or, in the alternative, an award in lieu of damages. The cause of action arose by the premature publication in the \textit{Boston Post} of the \textit{Atlantic Monthly's} copyrighted article consisting of an open letter from Gov. Alfred E. Smith of New York in reply to an article published in that magazine concerning Governor Smith's adherence to the Roman Catholic Church. The court, though apparently confusing profits and damages, held that under the statute both profits and damages were recoverable by a successful plaintiff.

The Supreme Court had an opportunity to settle the issue in \textit{F. W. Woolworth Co. v. Contemporary Arts},\textsuperscript{47} which was an action to recover for infringement of a copyright on a work of art entitled “Cocker-Spaniel in Show Position.” The plaintiff had made small sculptures and figurines, among which were statues of the cocker spaniel, and sold them chiefly through gift and art shops. Defendant, from a different source, bought 127 dozen cocker spaniel statuettes and distributed them through thirty-four Woolworth stores. Unknown to Woolworth, these dogs had been copied from those of the plaintiff and by marketing them it became an infringer. The trial court, having found infringement, allowed recovery of “statutory damages” in the amount of $5,000.

The case came before the Supreme Court on Woolworth's contention that the statute should not have been applied because defendant's gross profit had been ascertained, thereby supplying an actual figure which became the sole measure of its liability. The court of appeals had allowed an award of $900 actual profits and $4100 “in lieu” damages.\textsuperscript{48} The Supreme Court found that proof of actual damages or profits did not prevent the granting of an award “in lieu” of damages where the one element of recovery was not proved as to amount, and affirmed the judgment as a $5000 statutory award in lieu of actual damages and


\textsuperscript{47} 344 U.S. 228 (1952).

\textsuperscript{48} 193 F.2d 162 (1st Cir. 1951).
profits. A dictum in the decision that "a rule of liability which merely takes away the profits from an infringement would offer little discouragement to infringers," was in answer to the defendant's contention that where actual profits were proved, the Court could not grant an award "in lieu of actual damages and profits" even though there were large but unascertainable damages. Since the Court was giving the owner of the copyright "some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits," there is a difference of opinion as to whether it is proper to interpret the Woolworth dictum as sanctioning a cumulative award of damages and profits.

Though the issue is not free from doubt, this writer inclines to the view that, as a result of a plain meaning reading of the statute and the views of the Supreme Court in Woolworth, a successful plaintiff may now be able to recover both profits and damages under the Code. It is manifest that either Congress or the courts should seek to resolve this ambiguity in the interest of clearly charting the remedies available to the injured property owner.

**Profits**

The right to an accounting of profits is normally incident to an injunction in copyright cases. Once an infringement has been established, the court will then order an accounting of the profits of the defendant. The defendant must prove every element of his cost in producing the infringing article, and these will then be subtracted from the dollar volume of defendant's sales to yield the profit which will be awarded the plaintiff. The copyright owner apparently is entitled to recover all the profits made by the infringer, even though the copyright owner would not have made that much himself from exploiting the copyright. The copyright proprietor is virtually never entitled to the gross profits of the infringer, since some portion of the profits arise from the efforts and expenditures of the infringer and not from the infringement.

49. 344 U.S. at 233.
52. Belford v. Scribner, 144 U.S. 488 (1892); Stevens v. Gladding, 17 U.S. (How.) 447 (1854); McCaleb v. Fox Film Corp., 299 Fed. 48 (5th Cir. 1924).
54. Dam v. Kirk La Shelle Co., 175 Fed. 902 (2d Cir. 1910); Amdur, Copyright Law and Practice 1119 (1936).
This was demonstrated in *Sheldon v. Metro-Goldwyn Corp.* an action wherein petitioners charged infringement of their play "Dishonest Lady" by respondents' motion picture "Letty Lynton" and sought an injunction and an accounting of profits. Petitioners' play was based upon the trial in Scotland in 1857 of Madeline Smith for the murder of her lover. Respondents, using a different title, took the same story for a motion picture. Respondents contended that the material taken by the infringement contributed to the success of the film in only small measure, and maintained that the reasons for their success were the popular actors, beautiful scenery, and excellent producers. The question presented was whether, in computing an award of profits against 'an infringer of a copyright, there might be some apportionment so as to give to the owner of the copyright only that part of the profits found to be attributable to the use of the copyrighted material. The trial court, having discussed at great length the unfairness of the rule that made the infringer liable for the entire profits, reasoned that as the better part of the subject film had been the work of the defendant, the plaintiff should be awarded only twenty-five per cent of the net profit, declaring that it was "punitive and unjust to award all the net profits . . . to the complainants . . . Yet under the . . . Copyright Act . . . as interpreted by the decisions . . . [the court could] do nothing else." On appeal, the Second Circuit disregarded the prior law and awarded the plaintiffs one-fifth of the net profits. The Supreme Court accepted the doctrine of apportionment and upheld the circuit court, stating:

We shall . . . consider the doctrine which has been established upon equitable principles with respect to the apportionment of profits in cases of patent infringement. We now observe that there is nothing in the Copyright Act which precludes the application of a similar doctrine based upon the same equitable principles in cases of copyright infringement.

In distinguishing this situation from that of *Callaghan v. Myers* and *Belford v. Scribner* the Supreme Court stated that in the latter cases it had been difficult if not impossible to separate the profits due to the infringing material from those due to the material in the public domain. It now appears that at long last the doctrine of apportionment is part of our copyright jurisprudence.

56. 309 U.S. 390 (1940).
58. 106 F.2d 45, 51 (2d Cir. 1939).
59. 309 U.S. at 401. The Court thereby refused to follow Dam v. Kirk La Shelle Co., supra note 54, where that court refused to allow the defendant to deduct expenditures of time and money of actors, advertising costs and other expenses.
60. 128 U.S. 617 (1888).
61. 144 U.S. 488 (1892).
ALLOWABLE DEDUCTIONS FROM PROFITS

Following the plaintiff's demand for profits, the defendant under the act has the burden of establishing all elements of his cost, thereby reducing the award recoverable in the accounting. In Sammons v. Colonial Press, previously discussed, the circuit court allowed as deductions from profit numerous items, including the labor cost of manufacturing the infringing book, the cost of materials used, a proportionate share of the overhead expense properly allocable to the infringing job, and uncollected accounts receivable related to the infringement.

In general, the profit realized from a commercial transaction is determined by deducting the cost of production from actual receipts.\textsuperscript{62} Courts have allowed as deductions the purchase price of an infringing dramatic composition apportioned as to reasonable value of use during the infringing period,\textsuperscript{63} reasonable salaries paid to corporate officers,\textsuperscript{64} tools,\textsuperscript{65} bookkeeping expenses,\textsuperscript{66} costs of production and disposition of the infringing copies,\textsuperscript{67} income taxes paid on the profits of an innocent infringement,\textsuperscript{68} and cost of personnel engaged in aiding customers.\textsuperscript{69} Where the infringing motion picture was one of more than forty made by defendant with the same supervisory staff normally maintained, overhead which assisted in producing the infringing picture was allowed as a credit.\textsuperscript{70} Other deductible items from defendant's gross profits are rent, cost of power and machinery, raw material, advertising expenses,\textsuperscript{71} interest on investment,\textsuperscript{72} commissions paid for obtaining the job,\textsuperscript{73} and depreciation.\textsuperscript{74}

Courts have disallowed as deductions income taxes paid on the profits

\textsuperscript{63} Dam v. Kirk La Shelle Co., supra note 54.
\textsuperscript{64} Callaghan v. Myers, supra note 62.
\textsuperscript{65} Sheldon v. Metro-Goldwyn Corp., 106 F.2d 45 (2d Cir. 1939), aff'd, 309 U.S. 390 (1940).
\textsuperscript{66} Bell & Co. v. Catalda Fine Arts, 86 F. Supp. 399, modified, 191 F.2d 99 (2d Cir. 1951).
\textsuperscript{67} Hartford Printing Co. v. Hartford Directory, supra note 62.
\textsuperscript{69} See note 66 supra.
\textsuperscript{70} See note 65 supra.
\textsuperscript{71} Sheldon v. Metro-Goldwyn Corp., supra note 65. For a general discussion of these points, see Warner, Radio and Television Rights 643-45 (1953).
\textsuperscript{73} Sammons v. Colonial Press, 126 F.2d 341 (1st Cir. 1942).
\textsuperscript{74} Sheldon v. Moredall Realty Corp., supra note 72.
of a wilful infringement, excessive salaries paid to personnel who did not perform reasonable services for the sums received, and personal and family expenses drawn by individual defendants or members of a firm. In the case of an infringer who produced more copies for sale than he actually sold, a deduction was allowed only for costs directly applicable to the copies sold and not for the cost of producing all the copies.

The American Law Institute, dealing primarily with the infringement and confusion of source of goods, defines "the net profits for which the actor is liable... [as] his gross income earned by means of the conduct which subjects him to liability less the allowable costs incurred by him in earning that income." The cost deductions allowed by the Restatement of Torts include:

(a) Cost of material, energy and labor consumed in the manufacture of goods or the performance of services from the disposal of which the income was derived;
(b) Waste in the process of manufacture or distribution of the infringing article to the extent such waste is unavoidable or not unreasonable under the circumstances;
(c) Selling costs, including the expenses of promotion and advertising, commissions and trade discounts, salaries and wages of persons engaged in sales, and transportation costs incurred by the seller;
(d) Interest on capital invested in the enterprise;
(e) Overhead costs properly allocable to income earned by means of the infringing conduct;
(f) Taxes, other than taxes on net income, deductible in ascertaining net profit;
(g) Average cost of the profitable and unprofitable sales when the defendant cannot determine a proper allocation of the costs.

Bad debts and returned goods are not counted in computing the net profits for which the defendant is liable; since the defendant is not charged with the sales price of these goods, he is not permitted to deduct the cost of producing them.

The permitting of deductions from defendant's profits is a process subject to many factors, but it is clear that the normal costs, the costs of raw materials, marketing and production will be permitted. The emphasis on the part of the defendant must be placed on showing to what extent the profits are demonstrably attributable to lawful uses.

75. Bell & Co. v. Catalda Fine Arts, supra note 66.
76. See note 63 supra.
77. Callaghan v. Myers, supra note 62.
78. See note 66 supra.
79. Restatement, Torts § 748 (1938).
The subject of damages leads us to the other side of the recovery coin.\textsuperscript{80} Damages generally describe losses other than the loss of profits due to lost sales. The successful plaintiff is entitled to recover any damages or diminution in the value of his copyright resulting from the infringement.\textsuperscript{81} In establishing these losses, the plaintiff should show harm to his standing in the business community, loss of business, plus any added expenses resulting from the tortious act of the defendant.

In an accounting, the plaintiff need only establish the infringement, and it will be presumed that sales resulted therefrom. In an action for damages, however, the plaintiff must show use by the defendant, and injury resulting from defendant's use. Thus, in a damage action the plaintiff has the greater burden, and this burden has resulted in a preference for accounting actions. It is essential that the plaintiff in all cases carefully establish his cause of action and prove the elements he is relying upon to justify either damages or an accounting for profits.

In extending their protection, the courts have held an infringer liable for damages arising solely from injury to the property rights of the plaintiff without resorting to the old fiction of placing the infringer in the position of a trustee of the profits. Apparently the wrongdoing is the attempt to obtain the business which another has developed through years of fair dealing at great cost and expense. The sums recoverable by the plaintiff are not limited to the defendant's profits, which are recovered in the accounting, but include injury to plaintiff's copyright and goodwill, reduced profit due to lost sales or sales made in competition with the infringing article, and additional advertising expenses spent in differentiating the works.

**Actual Damages**

The statute allows two types of damages, actual damages,\textsuperscript{82} and the so-called "in lieu" statutory damages. A reading of the applicable jurisprudence leads to the conclusion that the primary difficulty in granting actual damages as a remedy is the difficulty in computing them.\textsuperscript{83} Damages of this type are normally proved by established rules of evidence.\textsuperscript{84}

\textsuperscript{80} An excellent discussion of an interesting aspect of damages is found in Solinger, Unauthorized Uses of Television Broadcasts, 48 Colum. L. Rev. 848 (1948).

\textsuperscript{81} Note, Parody and Copyright Infringement, 56 Colum. L. Rev. 585, 598 (1956).

\textsuperscript{82} See Hendricks Co. v. Thomas Publishing Co., 242 Fed. 37 (2d Cir. 1917), where the court defined actual damages to mean "real, as opposed to 'nominal.'" Id. at 42.

\textsuperscript{83} Bigelow v. RKO Radio Pictures, 327 U.S. 251 (1946) (anti-trust); Bordonaro Bros. Theaters v. Paramount Pictures, 176 F.2d 594 (2d Cir. 1949); Dam v. Kirk La Shelle, 175 Fed. 902 (2d Cir. 1910).

\textsuperscript{84} Sargoy & Stein, United States Copyright Law Digest, Martindale-Hubbell (1958).
it is now clearly established that expert testimony may be utilized for these purposes. In addition, the trier is given considerable freedom in estimating the amount of recovery.\footnote{Note, The Requirement of Certainty in the Proof of Lost Profits, 64 Harv. L. Rev. 317 (1950). See also Straus v. Victor Talking Mach. Co., 297 Fed. 791 (2d Cir. 1924) where the court said: "The constant tendency of the courts is to find some way in which damages can be awarded . . . . Difficulty of ascertainment is no longer confused with right of recovery." Id. at 802. See also Szekely v. Eagle Lion Films, 242 F.2d 266, 269, cert. denied, 354 U.S. 922 (1957).}

In \textit{Universal Pictures Co. v. Harold Lloyd Corp.},\footnote{162 F.2d 354 (9th Cir. 1947).} an action for infringement of copyright in a motion picture, the trial court, finding that only a portion of the profits in exhibiting the infringing motion picture had been derived from the infringement, had awarded plaintiff $40,000 damages and $10,000 for attorneys' fees. The judgment was affirmed on the basis of expert testimony as to values inherent in the motion picture and plaintiff's own testimony on the value of the misappropriated copyright. The circuit court said that not mathematical exactness but only a reasonable approximation arrived at by consideration of the testimony of expert witnesses was required.

The major element of actual damages is based on the diminution in value of the copyright. This loss in value is usually measured by the profit the proprietor would have made but for the infringement.\footnote{Sammons v. Colonial Press, 126 F.2d 341, 344 (1st Cir. 1942).} The number of infringing copies circulated does not determine this lost profit, for there is no necessary correlation either between the defendant's sales and those which would have been made by the plaintiff\footnote{Woodman v. Lydiard-Peterson Co., 192 Fed. 67 (C.D. Minn. 1912), aff'd, 204 Fed. 921 (8th Cir. 1913).} or between the profits made by the infringer and those lost to the copyright proprietor.\footnote{See Sammons v. Colonial Press, 126 F.2d 341, 345 (1st Cir. 1942).} To find the diminution in the plaintiff's profits caused by the defendant's infringement, it is necessary to establish the number of sales which the plaintiff would have made, subtract therefrom his actual sales, and then multiply the difference by a profit ratio per sale.\footnote{This was done in Gross v. Van Dyk Gravure Co., 230 Fed. 412 (2d Cir. 1916). An analogous problem is presented when the subject of the suit is a copyrighted advertisement, infringement of which leads to fewer sales of the advertised article by the plaintiff. See Sebring Pottery Co. v. Steubenville Pottery Co., 9 F. Supp. 384 (N.D. Ohio 1934).} Although this might be accomplished with the aid of expert testimony, it is readily apparent that definitive proof of the quantity of lost sales is ordinarily impossible.\footnote{Note, Monetary Recovery for Copyright Infringement, 67 Harv. L. Rev. 1044 (1954).}

In the \textit{Universal Pictures Co. v. Harold Lloyd Corp.} litigation, a
method whereby plaintiff could establish his damages was demonstrated. The court therein accepted as sufficient evidence of damages the showing by plaintiff that the investment in the motion picture infringed upon was $652,000, and that the particular sequence appropriated cost plaintiff $188,000. In addition, the court accepted as evidence a showing of past profits, costs of production, and the testimony of several expert witnesses as to the values inherent in the picture including the reissue value destroyed by exhibition of the infringing picture. The court maintained "that uncertainty as to the amount and extent of damage will not deprive the [plaintiff] of his recovery." In this case, the court upheld as valid evidence the testimony of the plaintiff as to the value of his misappropriated property, and clearly stated that lack of a showing of market value of the property would not restrict the recovery to merely nominal damages. Thus, the plaintiff may use the best evidence he has, such as expert testimony as to inherent values. It also appears that a proprietor is entitled to recover for an infringement even though the damages are minor.

Courts have held that before the copyright owner can recover damages due to lost sales, he must prove that he would have made the sales wrongfully made by the infringer. Recovery has been allowed in damages for impairment of the copyright owner's goodwill; loss in the marketability of the copyright production resulting from the infringement; the cost of a change of plans caused by the infringement; and impairment of confidence in the plaintiff resulting from the defendant's acts; but where there was no showing of actual damages to plaintiff because of the infringement, plaintiff was entitled only to an amount of damages as appeared just.

In Sammons v. Colonial Press, the court in dictum indicated that a damage award to a successful plaintiff would be reduced if defendant could establish that the former had either made no effort to use his copyright, in which case he could not have been deprived of an actual gain, or that the copyrighted book was an expensive edition and the infringing

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93. Id. at 368; Sinclair Ref. Co. v. Jenkins Co., 289 U.S. 689 (1933). See also Bigelow v. RKO Radio Pictures, supra note 83.
95. See note 88 supra; Amdur, Copyright Law and Practice, 1113 (1936).
96. Sebring Pottery Co. v. Steubenville Pottery, supra note 90.
99. Id. at 560.
101. 126 F.2d 341 (1st Cir. 1942).
work a cheap edition. Thus, the profits from infringement might well come from actual sales in a market which the plaintiff would not have tapped anyway.\textsuperscript{102}

It is apparent that in proper cases, techniques are available for determining actual damages. However, in wide areas computation is often difficult and it is then that the courts turn to the act and the statutory awards enumerated therein.

**Statutory Damages**

It is often impossible to prove damages satisfactorily, and the profits attributable to the infringing use may be inadequate compensation. Hence, the act provides for arbitrary damages to prevent the infringer from escaping with only nominal liability.\textsuperscript{103} These statutory damages take on a special importance in matters involving small uses of the copyright without license, and they have long been a feature of copyright legislation.\textsuperscript{104} The power to award them appears to exist even if some actual damages or profits are shown.\textsuperscript{105} Basically, the statutory awards are utilized when, in the court's discretion, these awards would be more equitable.

In *Brady v. Daly*,\textsuperscript{106} an action at law for violation of a domestic copyright, the court emphasized the difficulty in proving damages, stating that "in the face of the difficulty of determining the amount of such damage in all cases, the statute provides a minimum sum for a recovery in any case."\textsuperscript{107}

In dealing with statutory damages, we enter a somewhat different conceptual area insofar as the statute\textsuperscript{108} provides that in lieu of unascertainable actual damages and profits, the court may award such damages as appear just. The statute then sets up a scale of damages which may be used. With certain limited exceptions the minimum

\textsuperscript{103} Note, Parody and Copyright Infringement, 56 Colum. L. Rev. 585-606 (1956).
\textsuperscript{104} The Statute of Anne, 8 Anne C. 19 (1709), the first English statute dealing with copyright, had a provision for a form of statutory damages, and at least ten of the twelve states which passed copyright acts before 1787 also had a similar statutory award. See U.S. Copyright Office Bulletin No. 3, Copyright Enactments of the United States, 1783-1906 (1906). The first federal act had a provision similar to the Statute of Anne. Act of May 31, 1790, ch. 15, § 6, 1 Stat. 124.
\textsuperscript{105} See F. W. Woolworth Co. v. Contemporary Arts, 344 U.S. 228 (1952). "We think that the statute empowers the trial court in its 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 limits is more just." Id. at 234.
\textsuperscript{106} 175 U.S. 148 (1899).
\textsuperscript{107} Id. at 154; see also Dam v. Kirk La Shelle, supra note 83.
\textsuperscript{108} 17 U.S.C. § 101(b) (1952).
damages are not to be less than $250 and the maximum damages are not to exceed $5,000.

The scale provided as a guide for the court is as follows:

(a) $10 for every infringing copy of a painting, statue, or sculpture;
(b) $1 for every copy of other works;
(c) $50 for every unauthorized delivery of a lecture, sermon, or address;
(d) $100 for the first infringing performance of dramatic or dramatic-musical works or choral or orchestral compositions and $50 for each subsequent performance;
(e) $10 for each performance of all other musical works.

Another confused area of copyright law, in addition to the problem of whether or not profits and damages are recoverable, is the determination as to whether statutory damages may be awarded if the actual damages and/or profits are ascertainable. Certain courts have held an award of statutory damages in terms of the statute proper only in the absence of proof of actual damages and profits, while others apparently feel that the election of statutory damages in lieu of actual damages is within the discretion of the court, or that statutory damages may be awarded even when there is proof of damages or profits.

In Edward B. Marks Music Corp. v. Borst Music Publishing Co., the court made no attempt to determine actual damages and merely awarded $250 statutory damages for each infringement. In Ziegelheim v. Flohr, statutory damages at one dollar per copy would have amounted to $4,100. However, the court awarded only $1,700 which amount it called reasonable and just for the damages and profits, the court determining by its own judgment the extent of the plaintiff's claim. In Toksvig v. Bruce Publishing Co., there were no actual damages to plaintiff, but as the defendant's profits were ascertained the court awarded statutory damages to the plaintiff, presumably under its inherent discretionary power to do so.

Statutory damages are valuable insofar as they prevent the award of merely nominal damages when actual damages are difficult to ascertain,
and also as they sometimes furnish the deterrent necessary to ward off prospective infringers. It appears clear that the choice of awarding statutory or actual damages rests solely with the court and is not the choice of the plaintiff-proprietor.\textsuperscript{115} Thus the courts have interpreted the awarding of statutory damages "in lieu of" actual damages and profits as a device in some cases to ease the difficult burden of assessing damages and profits.\textsuperscript{116}

In \textit{F. W. Woolworth Co. v. Contemporary Arts},\textsuperscript{117} the Supreme Court resolved the conflict of opinion between the Second Circuit which had held that the district court had no discretion to award statutory damages in lieu of a lesser amount of profits which were ascertainable and proved,\textsuperscript{118} and the First Circuit which had held that the district court had the discretion to award such statutory damages in lieu of the proved profits of the infringer which were less than the statutory damages awarded.\textsuperscript{119} The Court adopted the latter position.\textsuperscript{120} In so holding, the Supreme Court said that the trial court has discretion to determine whether on all the facts a recovery upon proven profits and damages or one estimated within the statutory limits is more just. Thus, the Court established the rule that where there is evidence only of the infringer's profits but damages are difficult to compute, the imposition of discretionary statutory damages is permissible. The Court took the view that lack of adequate proof of either the profits of the infringer or the damages to the copyright proprietor would warrant resort to the statute in the discretion of the trial court. Justices Black and Frankfurter dissented on the ground that the statute permitted resort to discretionary damages only in cases in which the proof of profits made by the infringer or of actual damages caused by the infringement was difficult or impossible, and not in a case as here where actual profits of the infringer were not only ascertainable, but uncontradicted.\textsuperscript{121}

In a prior decision, \textit{Sheldon v. Metro-Goldwyn Corp.},\textsuperscript{122} the Court had

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\bibitem{117} 344 U.S. 228 (1952).
\bibitem{118} Davilla v. Brunswick-Balke Collender Co., supra note 115.
\bibitem{119} F. W. Woolworth Co. v. Contemporary Arts, 193 F.2d 162 (1st Cir. 1951).
\bibitem{120} See note 84 supra.
\bibitem{121} Annot., 97 L. Ed. 283 (1953).
\bibitem{122} 309 U.S. 390, 399 (1940). See also Sammons v. Colonial Press, 126 F.2d 341 (1st Cir. 1942), where the court, citing no evidence of actual damages, upheld the award of minimum statutory damages, but cautioned that "if the district court finds after further hearing . . . that [defendants] made profits for which it must account, the amount of such profits will be the measure of recovery, and it will no longer be permissible to decree statutory damages 'in lieu of actual damages and profits.'" Id. at 350.
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implied that the "in lieu" clause of the statute was not applicable in those instances where profits had been proved. However, the Supreme Court in *Woolworth* apparently overruled this *Sheldon* dictum when it stated,

We think that the statute empowers the trial court in its 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 limits is more just.

It thus appears that if either actual damages or profits are shown to exist, but neither are ascertainable, the "in lieu" clause must be used.

Only one decision has been found granting statutory damages where both profits and damages existed and were proven as to amount. In that instance, it was said that the award of damages on the basis of so many dollars per infringing act was proper in order to bring about a result deemed just by the court, but was not proper where the evidence as to actual damages and profits indicated clearly that use of the specific measuring method would cause injustice.

The Supreme Court has said that the employment of the statutory yardstick, within set limits, is committed solely to the discretion of the court which hears the case and that this discretion is limited only by the specifications of maximum and minimum amounts awardable. Regardless of whether the statutory damages-measuring methods are used, no award of less than $250 or more than $5,000 is permissible, except in a limited area noted in the statute.

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124. 344 U.S. at 234.


126. Turner & Dahnken v. Crowley, supra note 110, was an action for infringement of a copyright on a musical composition, in which, 7,000 copies of the infringing publication having been printed, the trial judge allowed plaintiff damages in the amount of $7,000, on the basis of the statutory allowance of one dollar for every infringing copy made, sold, or found in the possession of the infringer. The evidence showed that plaintiff's profits from the publication of the infringed song would not have exceeded eight cents per copy. The appellate court ruled that damages in the amount of $560 should have been awarded.


128. F. W. Woolworth Co. v. Contemporary Arts, supra note 105; Buck v. Jewell-La Salle Realty Co., 51 F.2d 730 (8th Cir. 1931); Irving Berlin, Inc. v. Daigle, 31 F.2d 832 (5th Cir. 1929).
MINIMUM AND MAXIMUM AWARDS

Since an award which is within the statutory limits is discretionary, it may not be attacked on the ground that it is more than or less than the amount indicated by the specific measuring method applicable in the particular case. Thus, where damages for infringement of a copyrighted musical composition were sought, it was said that, although under the statute damages of ten dollars for every infringing performance of a musical composition might be awarded, yet, if in such case the damages computed on the ten-dollar basis did not amount to $250, an award of a sum less than that amount would not be permissible. Similarly, where a copyrighted book was infringed, it was held that there could be no award of less than $250, although less than 250 copies of the infringing book had been made and the act provides that damages may, in such a case, be assessed at one dollar for each infringing copy.

The reasons for including a minimum damage provision were stated by the Supreme Court in Douglas v. Cunningham:

The phraseology of the section [section 25, Act of 1909, now section 101(b)] was adopted to avoid the strictness of construction incident to a law imposing penalties, and to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits. In this respect the old law was unsatisfactory. In many cases plaintiffs, though proving infringement, were able to recover only nominal damages, in spite of the fact that preparation and trial of the case imposed substantial expense and inconvenience. The ineffectiveness of the remedy encouraged wilful and deliberate infringement.

In Jewell-La Salle Realty Co. v. Buck, the Supreme Court held that the statutory amount of ten dollars damages for each performance applied only where more than twenty-five infringing performances were proved, and that the schedules in section 101(b) of the Copyright Act appeared "to have been inserted merely as an aid to the court in awarding such damages as 'shall appear to be just'. . . . If as applied to musical compositions, the provisions of the entire section have proved unreasonable, the remedy lies with Congress." Statutory damages are most often awarded where the infringer's benefit and proprietor's harm have been almost negligible, and the cases often refer to the award of maximum and minimum amounts. The weight of authority clearly indicates that the amount is solely within the

130. Cravens v. Retail Credit Men's Ass'n, 26 F.2d 833 (M.D. Tenn. 1924).
132. Id. at 209.
133. 283 U.S. 202 (1931).
134. Id. at 207-08.
discretion of the trial court,138 in a sum not less than $250,138 even though the equities may seem to favor a smaller award.137 The $5,000 maximum is likewise mandatory.138 It is important to note that the minimum damage provision is of substantial value in that it provides a threat, and thereby a deterrent, to a potential infringer.139

**Costs and Attorney Fees**

The Copyright Act provides that,

In all actions, suits, or proceedings under this title, except when brought by or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs.140

This allowance in copyright cases is opposed to the traditional approach of the courts, and a few courts have reduced or eliminated the award of attorney's fees to reduce the occasional harshness of the $250 minimum.141 However, most courts have held an award of full costs to be mandatory under the act.142

In *Marks v. Leo Feist, Inc.*,143 the court said,

The general rule . . . is that each party to a litigation must pay his own counsel fees . . . .

But . . . the question of the expediency of the rule seems now to be a matter for the Congress in so far as the question concerns the federal courts; and that body has seen fit to change the rule in so far as copyright cases are concerned.144

In determining reasonable fees the courts consider the sums involved, the quantity of work needed, the skill and amount of work done, and

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135. Douglas v. Cunningham, supra note 125; Advertisers Exch. v. Hinkley, 199 F.2d 313 (8th Cir. 1952); Toksvig v. Bruce Publishing Co., 181 F.2d 664 (7th Cir. 1950); Hartfield v. Peterson, 91 F.2d 998 (2d Cir. 1937); No-Leak-O Piston Ring Co. v. Norris, 277 Fed. 951 (4th Cir. 1921).


137. Amsterdam Syndicate, Inc. v. Fuller, 154 F.2d 342 (8th Cir. 1946).


139. For an interesting discussion of the value of the minimum damage provision to the American Soc'y of Composers, Authors and Publishers (ASCAP), see Finklestein, Public Performance Rights in Music and Performance Right Societies, Seven Copyright Problems Analyzed 69, 79-80 (1952).


141. Lindsay & Brewster, Inc. v. Verstein, supra note 138; Cravens v. Retail Credit Men's Ass'n, supra note 130.


143. 8 F.2d 460 (2d Cir. 1925).

144. 8 F.2d at 460-61.
the result. As the allowance of attorney's fees is in the discretion of the district court, review is not often accomplished.

In Official Aviation Guide Co. v. American Aviation Associates, plaintiff brought suit for an injunction to halt the alleged infringement of five copyrights. The circuit court reversed a finding for the plaintiff and awarded defendant costs, stating,

In short, full costs are mandatory in favor of the successful or prevailing party. . . . The same provision of this statute that we think is mandatory as to ordinary costs is wholly discretionary as to extraordinary costs of attorneys' fees.

In Cloth v. Hyman, the defendant requested an award of attorneys' fees in a copyright infringement action. The plaintiff was the author of a copyrighted story which defendants were alleged to have copied in their novel and play "No Time for Sergeants." The story involved a latrine orderly who having wired together all the toilet seats pulled the wire upon being called to attention thereby also causing all the seats to come to attention. Defendants claimed the story was in the public domain, and plaintiffs consented to summary judgment for the defendants. The court found that the plaintiffs had not acted in good faith in bringing this suit, and awarded the defendants $3,000 in attorneys' fees thereby indicating that such awards are properly made against a litigant whose real motive is to vex and harass the other party.

It appears that the act makes the award of full costs mandatory, and though not frequently stated, the award goes to the prevailing party. Further, attorneys' fees should be liberally awarded in order to deter "professional plaintiffs" of little means from pursuing improper actions.


146. Marks v. Leo Feist, Inc., 8 F.2d 460, 461 (2d Cir. 1925); Hendricks v. Thomas Publishing Co., 242 Fed. 37, 42 (2d Cir. 1917).

147. 162 F.2d 541 (7th Cir. 1947).

148. Id. at 543.


150. Cloth v. Hyman, supra note 145; see Vernon v. Shubert, Inc., 220 Fed. 694 (S.D.N.Y. 1915), where the court ignored the rule of mandatory award of costs going to the prevailing defendant because the plaintiff "by a combination of circumstances, was led to the belief that his work had been appropriated, and . . . therefore, the suit was earnestly brought and in good faith. . . ." Id. at 696.

The present Copyright Act gives to the owner of the intellectual property certain substantive rights in codified form. The act is basically the one which has been in existence since 1909, and in the area of monetary awards allows the plaintiff to recover:

**Profits**, of the defendant which resulted from the sales of the infringing item less certain deductions which he can establish,

**Damages**, either actual or statutory, for injuries to his property other than through loss of sales, and

**Costs**, and expenses incurred by the prevailing party.

Courts should be liberal in allowing counsel fees and expenses, since their allowance may often be an aid to the prosecution of a valid claim and may assist a copyright owner in defending his property. They should be permitted particularly where the defendant has deliberately violated the standards of the community. Courts have granted successful plaintiffs certain litigation expenses and costs, and these awards may be justified on the ground that they are administered subject to the principles of equity and may serve as a deterrent to an intentional infringer.

The primary problem in actions for monetary recovery is a practical one. Specifically, the plaintiff must establish the infringement and the resultant injury, the defendant must establish his proper costs, deductions and good faith, and the parties must utilize these factors to bring about favorable discretion on the part of the court.

Recent criticism of the act in relation to the remedies for infringement may be valid insofar as it seeks to remove confusion in the area of actual vs. "in lieu" damages, and in clarifying whether a plaintiff may recover both profits and damages.

It appears essential that the minimum damage clause be retained though a practical approval would favor an increase of the minimum to $500. The $250 figure was an adequate sum when first placed in the law, but the economics of our day have reduced the value of this sum to a point where it does little to afford any relief to the injured copyright owner.