

# UNDERSTANDING COPYRIGHT DAMAGES

ART COPYRIGHT COALITION 2017

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## AVAILABLE COPYRIGHT DAMAGES

- Actual Damages
  - Statutory Damages
  - DMCA
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## COPYRIGHT INFRINGEMENT IS A “STRICT LIABILITY” OFFENSE

- Copyright infringement is a “STRICT LIABILITY” crime.
- Liability falls on everyone involved who knew whether the goods in question were infringing or not.
- The excuse, “*I did not know*” is not a defense.
- If one deals with the infringing goods they are liable, period!
- Knowledge and degree of involvement influences the amount of statutory damages not liability.

## **EACH DEFENDANT IN THE STREAM OF COMMERCE IS LIABLE FOR THEIR PROFITS**

- Separate damages can be recovered from each party for each infringement through the entire the stream of commerce.
  - This includes the manufacturer, exporter, importer, distributor and/or retail outlets.
  - Often deal with one entity due to indemnifications (no inherent indemnification in copyright law)
  - Often, the issue is having to file separate law suits.
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## **ACTUAL DAMAGES**

No copyright registration prior to commencement of initial infringement

Two possible avenues:

1. Copyright owners lost profits.
  2. Infringers net profits attributable to the infringement.
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## LOST PROFITS

- The royalty you would have earned if you had licensed or the flat fee you would have charged.
  - The number of lost sales resulting directly from the infringement.
  - Cannot use a speculative number, you need to show it is a real number – actual past comparable license, industry standard, canceled order, demonstrable drop in sales, etc.
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## CALCULATING PROFITS

- Start with gross sales of infringing items THEN
- Subtract – Direct Cost of goods sold +shipping + import duties + taxes THEN
- Subtract allocatable share of overhead related to infringing goods:

Two methods used by the courts –Incremental or Full Absorption

Incremental: Added Direct cost i.e. new employee or rent new space to sell or house infringing goods

Full Absorption: % of infringement to overall number of goods sold or revenues. (*Company sold 10,000 infringing products for \$100,000 and overall 100,000 units so infringing units = 10% can deduct 10% of overhead or sold \$400,000 so infringing units = 25% can deduct 25% of overhead*)

**NOT** standard accounting or overall company overhead rate

## COPYRIGHT DAMAGES

To illustrate: On a sale from a factory of \$15,000 worth of infringing goods:

Manufacturer Profits	\$10,000
Exporter Profits	\$5,000
Importer Profits	\$5,000
Distributor Profits	\$10,000
Retailer Profits	\$20,000
Total Profits	\$50,000

**Damages on a \$15,000 sale would equal at least \$50,000  
in actual damages**

## STATUTORY DAMAGES

Only available if registered copyright with Library of Congress Copyright office **prior** to beginning of infringement. Easy and cheap - \$55. ([www.copyright.gov](http://www.copyright.gov)) for one published or hundreds of unpublished works. Prerequisite to filing suit (if expedite \$810 per registration).

For regular infringement range is from \$750 - \$30,000

For willful infringement range is from \$750-\$150,000

Guidelines exist but largely in discretion of judge or jury

## ATTORNEY'S FEES

- Attorney's fees to prevailing Plaintiff are only available if Plaintiff registered copyright with Library of Congress' Copyright Office prior to beginning of infringement.
- Attorney's fees may be awarded to Defendant if they prevail.

BUT AWARDS ARE DISCRETIONARY ON THE PART OF THE JUDGE,  
SO MAY NOT AWARD ALL OR EVEN ANY

Harder to get now

## SUPREME COURT RECENT RULING

Justice [Elena Kagan](#), writing for the court, said whether the losing side's position was objectively reasonable should play a major role in the analysis.

Justice Kagan said other considerations — including motivation, deterrence and compensation — must also play a role in the analysis.

But she appeared to suggest that the student, Supap Kirtsaeng even though he won, was unlikely to prevail under the correct standard.

*KIRTSAENG, DBA BLUECHRISTINE99 v. JOHN WILEY & SONS, INC.*, 133 S. Ct. 1351, 568 US \_\_, 185 L. Ed. 2d 392 - Supreme Court, 2013

# DMCA (DIGITAL MILLENNIUM COPYRIGHT ACT)

- DMCA (Digital Millennium Copyright Act) deal with on circumvention of copyright protection systems (control access to a work) 17 USCA §1201 and improper use of Copyright Management Information (CMI) – title or identifying information - name of owner of work, terms or conditions of use of material, 17USCA §1202.
- Damages 17 USCA §1203:
  - Injunction, impounding , actual damages, attorney fees and statutory damages
  - §1201 violations \$200-2,500 per violation.
  - **§1202 violations \$2,500-\$25,000 per violation**
  - NO PRE-INFRINGEMENT REGISTRATION REQUIRED

# DMCA

- If the infringer removes COPYRIGHT MANAGEMENT INFORMATION from the work IT opens up the possibility a DMCA claim.
- (c) Definition. — As used in this section, the term “copyright management information” means any of the following information conveyed in connection with copies or phonorecords of a work or performances or displays of a work, including in digital form, except that such term does not include any personally identifying information about a user of a work or of a copy, phonorecord, performance, or display of a work:
  - (1) The title and other information identifying the work, including the information set forth on a notice of copyright.
  - (2) The name of, and other identifying information about, the author of a work.
  - (3) The name of, and other identifying information about, the copyright owner of the work, including the information set forth in a notice of copyright

# DMCA

## § 1202 . Integrity of copyright management information<sup>3</sup>

- (a) False Copyright Management Information. — No person shall **knowingly** and with the intent to induce, enable, facilitate, or conceal infringement —
    - (1) provide copyright management information that is false, or
    - (2) distribute or import for distribution copyright management information that is false.
  - (b) Removal or Alteration of Copyright Management Information. — No person shall, without the authority of the copyright owner or the law —
    - (1) **intentionally** remove or alter any copyright management information,
    - (2) distribute or import for distribution copyright management information knowing that the copyright management information has been removed or altered without authority of the copyright owner or the law, or
    - (3) distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that copyright management information has been removed or altered without authority of the copyright owner or the law,
  - knowing, or, with respect to civil remedies under [section 1203](#), having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.
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