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Copyright Enforcement in the Digital Age: When the Remedy is the Wrong

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Copyright Enforcement in the Digital Age: When the Remedy is the Wrong

Ben Depoorter

ABSTRACT

Statutory damage awards are controversial in copyright law. To some, statutory damages are indispensable to enable the pursuit of meritorious copyright infringement claims that otherwise are too costly to pursue. Others are convinced that the availability of statutory damages tempts plaintiffs into asserting dubious infringement claims in order to obtain generous settlement concessions from risk averse defendants. In light of these contrasting viewpoints, we face the important policy question whether statutory damages should be redesigned for the digital age or, to the contrary, be retained in their current form, given the difficulties of enforcing copyrights online.

This Article conducts a comprehensive empirical study of copyright statutory damages. An extensive examination of docket entries and case law reveals a widespread practice of overclaiming of remedies in copyright litigation. Although 80 percent of plaintiffs in all disputes claim that they suffered conduct that constitutes willful infringement, courts find willful infringement in just 2 percent of cases where plaintiffs obtain a favorable verdict.

The findings suggest that remedy overclaiming in copyright serves strategic purposes. For instance, by highlighting the outer range of enhanced statutory awards in complaints, plaintiffs leverage the risk aversion of defendants to induce generous settlement concessions. In order to curb opportunistic uses of the statutory damages, I provide policy suggestions that would make remedy overclaiming more costly to plaintiffs and less threatening to defendants.

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TABLE OF CONTENTS

INTRODUCTION.....	402
I. DAMAGES AWARDS IN COPYRIGHT LAW.....	409
II. STATUTORY DAMAGES AWARDS: CONTROVERSY	413
A. The Optimistic Viewpoint	413
B. The Pessimistic Viewpoint	415
III. DOCKET STUDY.....	417
A. Dataset.....	417
B. Pleadings	418
C. Case Outcomes	424
D. Settlement Patterns	426
E. Analysis.....	428
IV. CASE LAW ANALYSIS.....	429
A. Coding.....	430
B. Results	431
C. Analysis	437
D. Summary.....	438
V. DISCUSSION AND PROPOSALS.....	438
A. Increasing the Costs of Overclaiming.....	441
B. Reducing the Benefits of Overclaiming	442
1. Guidelines & Standards.....	443
2. Reducing Outliers	444
3. Evidentiary Defaults	445
CONCLUSION	446

INTRODUCTION

In 2008, several major record labels sued a handful of individuals for distributing music on peer-to-peer (P2P) networks. In the ensuing litigation, one file-sharer was ordered to pay \$222,000 in statutory damages for sharing twenty-four songs online.¹ In another case, a jury imposed \$675,000 in statutory damages for the sharing of thirty songs.² A veritable copyright enforcement industry emerged. Targeting hundreds or even thousands of copyright defendants,³ so-called copyright trolls⁴ have obtained quick settlements against users of P2P software.⁵

These lawsuits are enabled by U.S. copyright law's statutory damages regime.⁶ The Copyright Act does not require that a copyright holder provide

1. The Eighth Circuit Court of Appeals reinstated this amount after a second and third jury trial had set willful statutory damages at \$1.92 million and \$1.5 million, respectively. See *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 901–02 (8th Cir. 2012); see also David Kravets, *Jury in RIAA Trial Slaps \$2 Million Fine on Jammie Thomas*, WIRED (June 18, 2009, 6:57 PM), <http://www.wired.com/2009/06/riaa-jury-slaps-2-million-fine-on-jammie-thomas> [<http://perma.cc/XE8F-RU4E>] (finding liability for sharing 24 songs on the Kazaa file-sharing network).
2. See *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 490 (1st Cir. 2011); see also Dave Itzkoff, *Student Fined \$675,000 in Downloading Case*, N.Y. TIMES: ARTSBEAT (July 31, 2009, 12:34 PM), <http://artsbeat.blogs.nytimes.com/2009/07/31/judge-rules-student-is-liable-in-music-download-case> [<https://perma.cc/QB8N-2699>] (holding Joel Tenenbaum, a Boston University student, liable for illegally downloading and sharing thirty songs).
3. See, e.g., *In re BitTorrent Adult Film Copyright Infringement Cases*, 296 F.R.D. 80, 82 (E.D.N.Y. 2012) (“These actions are part of a nationwide blizzard of civil actions brought by purveyors of pornographic films alleging copyright infringement by individuals utilizing a computer protocol known as BitTorrent.”); Matthew Sag, *Copyright Trolling, An Empirical Study*, 100 IOWA L. REV. 1105, 1105 (2015) (“Multi-defendant John Doe lawsuits have become the most common form of copyright litigation in several U.S. districts, and in districts such as the Northern District of Illinois, copyright litigation involving pornography accounts for more than half of new cases.”).
4. Targeting large groups of anonymous “Doe defendants,” such copyright enforcement businesses exploit the fear of statutory damages in order to pressure defendants into settling quickly. See Shyamkrishna Balganes, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723, 732 (2013) (“A copyright troll refers to an entity whose business revolves around the systematic legal enforcement of copyrights in which it has acquired a limited ownership interest.”).
5. Sag, *supra* note 3, at 1111 (“This model generated significant profits from a string of quick settlements.”).
6. See, e.g., Pamela Samuelson, Phil Hill & Tara Wheatland, *Statutory Damages: A Rarity in Copyright Laws Internationally, but for How Long?*, 60 J. COPYRIGHT SOC'Y U.S.A. 529, 530–32 (2013) (contrasting U.S. copyright law remedies to those of other countries and noting the status of the U.S. as an outlier).

evidence of harm from infringement in order to recover damages.⁷ Once infringement has been established, a copyright holder can elect to receive a statutory damage award.⁸

Conventional wisdom holds that the system of statutory damages is indispensable to protect the interests of copyright holders. By eliminating the burden to prove harm, statutory damages enable the pursuit of meritorious infringement claims that otherwise would be out of reach for cash-strapped plaintiffs.⁹ Independent photographers and designers, for instance, rely on the litigation-cost-reducing effect of statutory damages in order to obtain recourse against online infringements of their works by large corporations.¹⁰

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7. 17 U.S.C. § 504(c)(1) (2018) (“[T]he copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$750 or more than \$30,000 as the court considers just.”). By contrast, in all other areas of intellectual property law, personal injury lawsuits, and contract law litigation, plaintiff recovery is limited to compensation for the injury incurred. Even when a jury can impose “punitive damages,” such awards are limited in ways that statutory damages are not. First, constitutional law polices the amount by which a punitive award can exceed actual damages. See Ben Sheffner, *Rebuttal, Constitutional Limits on Copyright Statutory Damages*, in Debate, *Unconstitutionally Excessive Statutory Damage Awards in Copyright Cases*, 158 U. PA. L. REV. PENNUMBRA 53, 60–61 (2009). Second, to obtain punitive damages, the plaintiff must provide evidence of the actual injury.
 8. 17 U.S.C. § 504(c). See 2 PAUL GOLDSTEIN, *GOLDSTEIN ON COPYRIGHT* § 14.2, at 14:42 (3d ed. Supp. 2015) (following the 1976 Copyright Act, statutory damages are an alternative to damages and profits); 4 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 14.04[A] (2009 ed.) (A plaintiff may elect statutory damages “regardless of the adequacy of the evidence offered as to his actual damages and the amount of the defendant’s profits.” (footnote omitted)).
 9. See, e.g., *In re Braun*, 327 B.R. 447, 451–52 (Bankr. N.D. Cal. 2005) (“Statutory damages for copyright infringement are similar to unproven damages for violation of privacy in that actual damages resulting from such a wrong are difficult to prove, and legislatures have created a statutory remedy for this reason.”); Stephanie Berg, *Remedying the Statutory Damages Remedy for Secondary Copyright Infringement Liability: Balancing Copyright and Innovation in the Digital Age*, 56 J. COPYRIGHT SOC’Y U.S.A. 265, 273–75 (2009) (asserting that when U.S. Congress enacted the original Federal Copyright Act in 1790, the purpose of including statutory damages was to compensate copyright owners for infringements even when it is difficult to measure actual damages).
 10. For an example of a design company pursuing copyright infringements by large apparel manufacturers and distributors on the basis of statutory damages, see Kali Hays, *Appeals Court to Urban Outfitters: Pay \$530,000 After ‘Reckless Disregard’ of Fabric Copyright*, L.A. TIMES (Apr. 5, 2017, 2:15 PM), <http://www.latimes.com/fashion/la-ig-wwd-urban-outfitters-reckless-fabric-copying-20170405-story.html> [<https://perma.cc/A2DN-CWS4>].

Additionally, by increasing the potential incentives for enforcement of copyright law, statutory awards help sustain the deterrent effect of copyright law.¹¹

In recent years, however, this traditional perspective on statutory damages has been challenged by a much bleaker outlook.¹² There is a growing understanding that statutory damage awards, as written into the Copyright Act in 1976, are a poor fit for the digital age.¹³ Because a statutory damage award is set for each individual infringed work, the total damages can add up significantly for online infringements that involve multiple works.¹⁴ For instance, even at the statutory minimum of \$750 for each file, a user of a file-sharing network faces potential statutory damages of \$360,000 when sharing forty songs. At the other end of the statutorily provided range, a plaintiff can claim enhanced damages of up to \$150,000 against someone who, for example, watched an illegal live stream.¹⁵ Finally, due to the sheer amount of infringed works, digital intermediaries and online platforms face claims for astronomically high statutory damage awards. In one case involving secondary liability for operating a file-sharing network, the plaintiff demanded a statutory damages award of \$75 trillion.¹⁶ Similarly, Google's Book Search project exposed Google to potential

11. See, e.g., *Nintendo of Am., Inc. v. Dragon Pac. Int'l*, 40 F.3d 1007, 1011 (9th Cir. 1994) (noting that one potential purpose of statutory damages under the Copyright Act is “to penalize the infringer and to deter future violations” (quoting *Chi-Boy Music v. Charlie Club, Inc.*, 930 F.2d 1224, 1230 (7th Cir. 1991))); Sheffner, *supra* note 7, at 60 (emphasizing the role of statutory damages in effective deterrence in the face of massive online copyright infringements).
12. See *infra* Subpart II.B.
13. *Id.*
14. This danger has also been recognized outside of the online context. See, e.g., *Broad. Music, Inc. v. H.S.I., Inc.*, No. C2-06-482, 2007 WL 4207901, at *6 (S.D. Ohio Nov. 26, 2007) (public performance at a bar) (“The practice of awarding damages according to the number of technical infringements is troubling precisely because it places damages at the mercy of Plaintiffs. Measuring damages by the number of infringements permits Plaintiffs to ramp-up the punishment arbitrarily, independent of the underlying harm.”).
15. Streaming video content and live streaming of sports events are a major area of copyright infringement in the digital era. See, e.g., Todd Spangler, *Global Piracy in 2017: TV and Music Illegal Activity Rose, While Film Declined*, VARIETY (Mar. 21, 2018, 1:00 AM), <https://variety.com/2018/digital/news/piracy-global-2017-tv-music-film-illegal-streaming-1202731243> [<https://perma.cc/25CN-WQZ6>] (“Around 53% of total piracy occurred on unlicensed streaming platforms . . .”); Ernesto Van der Sar, *Tickbox Must Remove Pirate Streaming Addons From Sold Devices*, TORRENTFREAK (Feb. 14, 2018), <http://torrentfreak.com/tickbox-remove-pirate-streaming-addons-180214> [<https://perma.cc/673H-MFGC>] (“Online streaming piracy is on the rise and many people now use dedicated media players to watch content through their regular TVs.”).
16. Sarah Jacobsson Purewal, *RIAA Thinks LimeWire Owes \$75 Trillion in Damages*, PCWORLD (Mar. 26, 2011, 5:44 AM), http://www.pcworld.com/article/223431/riaa_thinks_limewire_owes_75_trillion_in_damages.html [<https://perma.cc/972S-TNCW>]; see also Samuelson, Hill & Wheatland, *supra* note 6, at 563 (“In the LimeWire case, the plaintiffs

liability of at least \$4.5 billion.¹⁷ Critics observe that the availability of statutory damages tempts plaintiffs into asserting dubious infringement claims.¹⁸

These two contrasting viewpoints raise an important question: To what extent are statutory damages applied opportunistically by rent-seeking plaintiffs as opposed to providing cash-strapped copyright holders an avenue to pursue meritorious infringement claims? This controversy goes to the core of copyright enforcement in the digital age: Since 2008, copyright holders face massive amounts of copyright infringements online and have reacted by aggressively enforcing their rights.¹⁹ In response, copyright holders turned to automated enforcement tactics²⁰ that spit out takedown notices on a massive scale.²¹ Statutory damages play a crucial role in this issue. In copyright law, remedies dictate what claims actually get filed and litigated, and how those claims are evaluated by defendants. The familiar ideal is that the remedy should

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- reportedly requested an amount of statutory damages that was more than the combined GDP of the entire world.” (footnote omitted)).
17. Between 2002 and 2015, Google scanned millions of books for its universal library project without permission. See Fourth Amended Class Action Complaint at 2, *Author’s Guild v. Google Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2011) (No. 05 CV 8136), 2011 WL 5905500. Four-and-a-half billion dollars is a conservative estimate of damages based on the statutory minimum of \$750 per book that Google scanned without permission from the copyright holder. See Samuelson, Hill & Wheatland, *supra* note 6, at 563 n.148. On the Google Books project generally, see Stephen Heyman, *Google Books: A Complex and Controversial Experiment*, N.Y. TIMES (Oct. 28, 2015), <http://www.nytimes.com/2015/10/29/arts/international/google-books-a-complex-and-controversial-experiment.html>.
 18. Sag, *supra* note 5, at 1114; see also Matthew Sag & Jake Haskell, *Defense Against the Dark Arts of Copyright Trolling*, 103 IOWA L. REV. 571, 573 (2018). Although dubious infringement claims are likely to be negated in litigation, the average defendant may prefer to settle the dispute and avoid incurring the costs of defending the claim in court. See, e.g., James DeBriyn, *Shedding Light on Copyright Trolls: An Analysis of Mass Copyright Litigation in the Age of Statutory Damages*, 19 UCLA ENT. L. REV. 79, 110 (2012) (positing that the threat of “outlandish” statutory damage awards are used to force settlements).
 19. For an overview, see REBECCA GIBLIN, CODE WARS: 10 YEARS OF P2P SOFTWARE LITIGATION 29–33 (2011) (describing P2P related litigation); Ben Depoorter, Alain Van Hiel & Sven Vanneste, *Copyright Backlash*, 84 S. CAL. L. REV. 1251, 1258–63 (2011) (describing scaled litigation campaign by the recording industry). See also Kristina Groennings, *Costs and Benefits of the Recording Industry’s Litigation Against Individuals*, 20 BERKELEY TECH. L.J. 571, 590 (2005) (describing lawsuits that involved the misidentification of file-sharers).
 20. See Ben Depoorter & Robert Kirk Walker, *Copyright False Positives*, 89 NOTRE DAME L. REV. 319, 326 (2013) (describing the use of bots in order to automate and scale online copyright enforcement).
 21. See, e.g., Chris Welch, *Google Received Over 75 Million Copyright Takedown Requests in February*, VERGE (Mar. 7, 2016, 11:02 AM), <http://www.theverge.com/2016/3/7/11172516/google-takedown-requests-75-million> [<https://perma.cc/C5X9-ZSAP>]. For a critical analysis of ongoing practices and the lack of transparency in this field, see Maayan Perel & Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 STAN. TECH. L. REV. 473 (2016).

“fit the wrong,”²² but if the opportunistic narrative on statutory damages is correct, in copyright law the remedies actually create the wrong. As a matter of public policy, we face the important question of whether statutory damages should be redesigned for the digital age or, to the contrary, be retained in their current form, given the difficulties of enforcing copyrights online.²³

Despite the controversy, systematic and comprehensive information on the use of statutory damage awards by litigants is absent, leaving us with many unanswered questions. We have little to no information on when and how copyright holders turn to statutory damages when challenging copyright infringers. To what extent do plaintiffs use statutory damages in an opportunistic manner? Or do statutory damages mostly serve the beneficial function of increasing access to justice for cash-strapped copyright holders? We also lack comprehensive information on the role of courts in mediating statutory damage claims by plaintiffs.²⁴ Courts may enhance statutory awards when they deem the defendant’s infringement willful, but what definition or definitions of “willfulness” do courts employ when assigning enhanced statutory awards? Is it possible to distill a reliable set of factors from the pertinent case law? Answers to these questions are essential if the U.S. Congress is to effectively reform and adapt the Copyright Act to the digital age.²⁵

22. *E.g.*, David G. Owen, *Deterrence and Desert in Tort: A Comment*, 73 CALIF. L. REV. 665, 668–69 (1985) (“The penalty, in common penal parlance, should fit the wrong . . .”).

23. Congress seemed poised to address this question, as it was preparing to revise the 1976 Copyright Act in 2013, including the statutory damage provisions. *The Register’s Call for Updates to U.S. Copyright Law: Hearing Before the Subcomm. on Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 44 (2013) (statement of Hon. Bob Goodlatte, Chairman, H. Comm. on the Judiciary), http://judiciary.house.gov/wp-content/uploads/2016/02/113-20_80067.pdf [https://perma.cc/4EUK-X8SB] (referencing “the Register’s call to revise, rather than update, the Copyright Act”). The House Judiciary Committee’s Subcommittee on Courts, Intellectual Property and the Internet conducted a series of copyright review hearings. *See, e.g.*, *A Case Study for Consensus Building: The Copyright Principles Project: Hearing Before the Subcomm. on Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 37 (2013) (testimony of Pamela Samuelson, Faculty Dir., Berkeley Ctr. for Law & Tech.), <http://judiciary.house.gov/wp-content/uploads/2016/02/113-31-80976.pdf> [https://perma.cc/FK6P-N2L6].

24. While the leading treatises describe common patterns in the case law, to date no statistical analysis has been conducted on the application of statutory damages in dockets or legal opinions. The most comprehensive extant study is the review of opinions undertaken by Pamela Samuelson and Tara Wheatland, which highlights the inconsistent nature of the case law. *See* Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009).

25. Calls for the reform of statutory damages have been made by various interested actors, including judges, academics, public interest organizations, and the Copyright Office itself. *See, e.g.*, *Sony BMG Music Entm’t v. Tenenbaum*, 660 F.3d 487, 490 (1st Cir. 2011) (noting that Congress might wish to examine the application of the Copyright Act regarding statutory damages); Pamela Samuelson et al., *The Copyright Principles Project: Directions for*

This Article examines the role of statutory damages in the copyright arena on the basis of an in-depth empirical analysis of docket records and case law. I conduct a docket study using a publicly available database containing docket entries, complaints, and pertinent documents from approximately one thousand copyright disputes,²⁶ providing valuable new insights on the types of claims, plaintiffs, and defendants involved in statutory damage litigation. Also, I systematically analyze all 102 judicial decisions on copyright statutory damages by courts over a three-year period.²⁷

The findings reveal that statutory damages claims are commonplace in virtually all areas of copyright law.²⁸ Plaintiffs in copyright litigation request statutory damages in 90 percent of pleadings.²⁹ Instead of seeking compensation for the actual harm suffered from infringement, a large majority of plaintiffs turn to juries to set a statutory award. Not only that, copyright holders, even in industries that enjoy only weak copyright protection, almost universally claim that they are entitled to enhanced statutory damages due to willful infringement. However, courts rarely grant enhanced damages. Plaintiffs sought enhanced damages for willful infringement in 81 percent of all copyright disputes in the examined period, yet courts awarded enhanced damages in less than 2 percent of all cases that moved to verdict. The striking gap between the demand and supply of statutory damages, as well as several additional factors relating to nature of claims and subject-matter areas, undermine the credibility of the nearly ubiquitous claims of willful infringement by plaintiffs.

These findings suggest that remedy overclaiming in copyright serves strategic purposes. For instance, by highlighting the outer range of enhanced

Reform, 25 BERKELEY TECH. L.J. 1175, 1176 (2010) (“[A]lthough copyright law today works reasonably well in some domains, it can be improved and should be refined in light of dramatic technological advances.”); David Sohn, *Copyright Office Calls for Major Reforms to Copyright Law*, CTR. FOR DEMOCRACY & TECH. (Mar. 21, 2013), <http://cdt.org/blog/copyright-office-calls-for-major-reforms-to-copyright-law> [<https://perma.cc/HC56-3L3N>].

26. The Copyright Data Project consists of a random sample of 957 out of the 17,119 federal copyright disputes filed from January 1, 2005 to December 31, 2008. Of those 957 cases, 294 were filed in 2005, 267 in 2006, 206 in 2007, and 190 in 2008. The database contains 46 coded fields for those disputes, along with 125 variables. Christopher A. Cotropia & James Gibson, *Copyright’s Topography: An Empirical Study of Copyright Litigation*, 92 TEX. L. REV. 1981, 1984–86 (2014) [hereinafter Cotropia & Gibson, *Copyright’s Topography*]; Christopher A. Cotropia & James Gibson, *Copyright Data Project*, COPYRIGHT L. DATA, <http://www.copyrightlawdata.com> [<https://perma.cc/QJ7T-U9AL>] [hereinafter Cotropia & Gibson, *Copyright Data Project*]. A separate, additional coding of several remedial aspects of the disputes in the database was conducted for this study, and it is reported in Part III.

27. *Infra* Part IV.

28. *Infra* Part III.

29. *Infra* Part III.

statutory awards in complaints, plaintiffs leverage the risk aversion of defendants to induce generous settlement concessions. First, claims of willful infringement might be deployed by plaintiffs as a “bait-and-switch” tactic: By accusing the defendant of willful infringement, a plaintiff may appear more reasonable to the court and jury when subsequently requesting the application of damage awards in the regular statutory range and may hope to obtain a higher award overall. Second, by highlighting the potential application of enhanced damages for willful infringement, plaintiffs are able to intimidate risk-averse defendants into generous settlements. In doing so, plaintiffs are able to leverage the risk aversion of many defendants, especially individual defendants and small businesses. Plaintiffs might anticipate that accused infringers will prefer to avoid the uncertain outcome in the relief stage and thus settle the dispute out of court. The alternative for these defendants—incurring steep litigation costs to bring a successful defense—is dire.³⁰

Infringement claims that are strong on the merits but include doubtful damage claims are especially vexing to accused infringers. Although the risk of a steep damage award might be minimal, the plaintiff is likely to win the case on the substantive merits. Because the Copyright Act enables a winning party to recoup his or her litigation costs by way of fee-shifting,³¹ the defendant also faces the unpleasant prospect of incurring considerable legal expenses. The anxiety of risk-averse defendants is further amplified by various features of copyright law, including the considerable discretion of juries in setting awards along the statutory range and the uncertainty about litigation outcomes.

I provide several recommendations that would curtail opportunistic applications of enhanced statutory damages. First, Section 505 of the Copyright Act could be revised so that courts are able to take away from prevailing plaintiffs the benefit of fee-shifting if they overstated the damage claim. Second, courts should be enabled to award attorney fees *against* a prevailing plaintiff who

30. See, e.g., Jeff Leeds, *Labels Win Suit Against Song Sharer*, N.Y. TIMES (Oct. 5, 2007), <http://www.nytimes.com/2007/10/05/business/media/05music.html> [<https://perma.cc/L84B-934J>] (describing imposition of \$222,000 statutory damage award against file-sharer). When, for instance, the recording industry offered individual offenders the opportunity to settle their cases for amounts ranging between \$3000 and \$11,000, most of the reportedly 30,000 defendants did so without hesitation. See *RIAA v. The People: Five Years Later*, ELECTRONIC FRONTIER FOUND. (Sept. 30, 2008), <http://www.eff.org/wp/riaa-v-people-five-years-later> [<https://perma.cc/AUC4-PMXA>]. On the use of threats to obtain settlements in copyright litigation, see William T. Gallagher, *Trademark and Copyright Enforcement in the Shadow of IP Law*, 28 SANTA CLARA COMPUTER & HIGH TECH. L.J. 453, 463–66 (2012) (documenting the strategic use of “cease and desist” letters and threats of IP litigation on the basis of original empirical data derived from 58 in-person interviews with experienced lawyers).

31. See 17 U.S.C. § 505 (2018). For an in-depth discussion, see *infra* Subpart I.A.

engaged in egregious overclaiming of the damage entitlement. Both approaches would make the abuse of the statutory damage framework costlier and induce more realistic claims for relief by copyright plaintiffs. Third, an alternative tactic could reduce the overall risk of abusive damage claims to defendants. This could be accomplished through various measures, including the formulation of judicial guidelines, reducing the scope of enhanced damages, and making statutory damages unavailable when evidence of the inflicted harm is readily available. By reducing uncertainty about the actual application of statutory awards in courts, these measures, or a combination thereof, would curb the more opportunistic and abusive practices, while retaining statutory damages as a crutch for cash-strapped plaintiffs with meritorious claims.

This Article proceeds as follows. Part I describes the statutory damages framework under federal copyright law. Part II describes the background, motivation, and unintended consequences of statutory damages in copyright law. Parts III and IV describe the empirical studies and present their main findings. More specifically, Part III explores docket and court records, while Part IV looks behind the docket entries to examine the precedents set out in the case law. Together, both studies help to evaluate the credibility of damage claims by plaintiff against the considerations and practices adopted by courts. Part V provides policy recommendations.

I. DAMAGES AWARDS IN COPYRIGHT LAW

Copyright law has a peculiar remedial framework. Once infringement has been established, a plaintiff may elect a statutory damage award. In doing so, Section 504(c) of the 1976 Copyright Act relieves the copyright holder from the burden of providing any evidence whatsoever of actual harm.³² Among developed Western democracies, the U.S. copyright statutory framework is exceptional.³³

The Copyright Act provides the courts wide discretion to determine awards within the statutory parameters as it “considers just.”³⁴ The framework of statutory damages incorporates a threefold structure that consists of regular, reduced, and enhanced damages.

32. 17 U.S.C. § 504(c) (2018); *see also supra* note 6.

33. *See* Samuelson, Hill & Wheatland, *supra* note 6, at 534–35 (“[O]nly five [World Intellectual Property Organization] member states including the United States have both an ‘advanced economy’ and statutory damages for copyright infringement . . .” (footnotes omitted)).

34. 17 U.S.C. § 504(c)(1).

First, Section 504 enables a successful copyright plaintiff³⁵ to recover regular statutory damages instead of actual damages and profits. Section 504(c)(1) provides that a copyright owner may elect the following:

[T]o recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$750 or more than \$30,000 as the court considers just.³⁶

This process may occur at any time before a final judgment is reached.

The statutory range provides courts with substantial discretion in setting awards between the minimum and maximum threshold. Although the Copyright Act does not set out any further specifications or guidelines, courts have been observed to focus on several goals when setting awards. In determining what amount of statutory damages to impose, courts may consider factors such as “the expenses saved and profits reaped by the defendants in connection with the infringements, [and] the revenues lost by the plaintiffs as a result of the defendant’s conduct.”³⁷ Additionally, courts are at liberty to set a number within the statutory range without inquiring into evidence. Finally, in setting an award within the statutorily provided range, courts can adjust an award in order to deter future infringements by the defendant and other potential infringers.³⁸ This deterrent purpose significantly increases the discretion of courts and the unpredictability of statutory awards.³⁹

35. The Copyright Act does require the registration of a copyright claim on the work in question prior to litigation. *Id.* § 411(a).

36. *Id.* § 504(c)(1).

37. *N.A.S. Import, Corp. v. Chenson Enters.*, 968 F.2d 250, 252 (2d Cir. 1992) (quoting *Boz Scaggs Music v. KND Corp.*, 491 F. Supp. 908, 914 (D. Conn. 1980)). This compensatory approach to statutory damages adds another layer of relief for copyright litigation plaintiffs. Defendants already carry most of the evidentiary burden when a plaintiff elects to recover actual damages, due to the statutory presumption that an infringer’s profits are entirely attributable to the copyright infringement. *See* 17 U.S.C. § 504(b). However, if it is clear that the plaintiff suffered no actual damages, courts tend to limit recovery to the statutory minimum. For a concise but useful overview of statutory damage determinations in federal courts, see 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 14.2.1, at 14:48 & n.21(3d ed. Supp. 2012).

38. *See* Samuelson, Hill & Wheatland, *supra* note 6, at 547 (discussing general deterrence rationale of statutory damages).

39. It has been argued that courts should apply due process jurisprudence more strictly to copyright statutory damage outcomes, see Samuelson & Wheatland, *supra* note 24, at 491–97; Samuelson, Debate, *Unconstitutionally Excessive Statutory Damage Awards in Copyright Cases*, *supra* note 7, 56–57 (2009) (arguing that punitive applications of the statutory damage framework against strangers to the litigation runs afoul of constitutional due

Second, Section 504(c)(2) provides lowered statutory damage awards for “good faith” infringers. These defendants must sustain the burden that they were either unaware or without reason to believe that they were committing copyright infringement. In such cases, Section 504(c)(2) provides the court with the discretion to reduce the award of statutory damages “to a sum of not less than \$200” per infringement.⁴⁰ The burden of proving good faith rests firmly on the shoulders of the defendant.⁴¹ The defendant must not only prove that he or she made a good faith estimation that his or her behavior was noninfringing but must also be reasonable in sustaining that belief.⁴² The best available evidence to date indicates, however, that courts rarely apply the reduced statutory award provision.⁴³

Third, whenever a copyright owner finds that infringement was committed “willfully,” a court may enhance the award of statutory damages. Section 504(c)(2) provides courts with the discretion to increase the award of statutory damages for willful infringements to a sum of “not more than \$150,000.”⁴⁴

While willfulness in this instance has not been defined by Congress, the leading treatise understand “willfulness” to refer to the state of mind of the

process principles). *But see, e.g., Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 586–88 (6th Cir. 2007) (explaining that statutory damage awards are judged under a more deferential standard than punitive damages).

40. 17 U.S.C. § 504(c)(2). Additionally, the Copyright Act includes a teacher-librarian-broadcaster exception. Section 504(c)(2) provides that “[t]he court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107.” This provision applies if the infringer was:

(i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in section 118(f)) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

Id.

41. See H.R. REP. NO. 94-1476, at 162–63 (1976).
42. *E.g., Merrill v. Bill Miller’s Bar-B-Q Enters.*, 688 F. Supp. 1172, 1176 (W.D. Tex. 1988).
43. See Samuelson & Wheatland, *supra* note 24, at 453–54, 454 n.57 (citing R. Anthony Reese, *Innocent Infringement in U.S. Copyright Law: A History*, 30 COLUM. J.L. & ARTS 133 (2007)). Reese provides a comprehensive treatment of innocent infringers in copyright law and shows the increasing risks of committing copyright infringement over time.
44. 17 U.S.C. § 504(c)(2). Although Congress intended this designation to only apply to “exceptional cases,” courts have generally interpreted “willfulness” broadly. See Samuelson & Wheatland, *supra* note 24, at 441 & n.4 (citing “S. REP. NO. 94-473, at 144–45 (1975) (stating that enhanced damages should be available in ‘exceptional cases’); H.R. REP. NO. 94-1476, at 162 (1975) (same)”).

infringer.⁴⁵ A finding of willfulness may also include situations where an infringer exhibited reckless disregard of a copyright holder's rights, even when lacking actual knowledge of infringement.⁴⁶ Factors that have been held to constitute reckless disregard include a defendant's prior history of infringements, willful blindness, and legal mistakes made by the infringer in the absence of legal counsel.⁴⁷ By contrast, a defendant is not "willful" when she has been notified that her conduct infringes copyrights but reasonably and in good faith believes the contrary.⁴⁸ For instance, willfulness may be negated⁴⁹ when a fair use decision is a close call.⁵⁰

Despite these valuable insights on judicial practices involving statutory awards, it remains open to question whether statutory awards can be predicted adequately *ex ante*. Several commentators criticize the lack of overall

45. 2 GOLDSTEIN, *supra* note 37, § 14.2.1.2, at 14:50 (3d ed. Supp. 2012); *see also* Lydia Pallas Loren, *Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement*, 77 WASH. U. L.Q. 835, 874 (1999) (stating that "[t]he exact nature of the defendant's mental state required for enhanced statutory damages is less than clear").

46. *See* *Island Software & Comput. Servs., Inc. v. Microsoft Corp.*, 413 F.3d 257 (2d Cir. 2005) ("To prove 'willfulness' under the Copyright Act, the plaintiff must show (1) that the defendant was actually aware of the infringing activity, or (2) that the defendant's actions were the result of 'reckless disregard' for, or 'willful blindness' to, the copyright holder's rights." (citing *Aimster Copyright Litig.*, 334 F.3d 643, 650 (7th Cir. 2003); *Lipton v. Nature Co.*, 71 F.3d 464, 472 (2d Cir. 1995); *N.A.S. Import Corp. v. Chenson Enters., Inc.*, 968 F.2d 250, 252 (2d Cir. 1992); *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 112 (2d Cir. 2001)).

47. 4 NIMMER & NIMMER, *supra* note 8, § 14.04, 11–12.

48. *Id.* at 11.

49. *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381, 1392 (6th Cir. 1996) (court remanded on the issue of willfulness, stating that the defendants' belief that their unauthorized copying of coursepacks constituted fair use was not "so unreasonable as to bespeak willfulness") (citing 3 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 14.04[B][3] (1996) ("[O]ne who has been notified that his conduct constitutes copyright infringement, but who reasonably and in good faith believes the contrary, is not 'willful' for these purposes.")).

50. There is a widely shared belief in the academic literature that fair use decisions are very difficult to predict. *See, e.g.*, 2 PAUL GOLDSTEIN, *GOLDSTEIN ON COPYRIGHT*, § 12.1, at 12:3 (3d ed. Supp. 2017) ("No copyright doctrine is less determinate than fair use."); Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1106 (2007) ("[L]eading courts and commentators generally acknowledge that the four-factor test as interpreted provides very little guidance for predicting whether a particular use will be deemed fair." (citation omitted)); Pierre N. Leval, *Commentaries, Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1106 (1990) ("Judges do not share a consensus on the meaning of fair use."). *But see* Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 554 (2008) ("[M]uch of our conventional wisdom about [U.S.] fair use case law, deduced as it has been from the leading cases, is wrong."); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2541 (2009) ("[F]air use law is both more coherent and more predictable than many commentators have perceived once one recognizes that fair use cases tend to fall into common patterns . . .").

consistency of the case law. Based on an extensive reading of case law on statutory awards, Pamela Samuelson and Tara Wheatland have concluded that the statutory damages regime “has been applied in a manner that often results in arbitrary, inconsistent, unprincipled, and grossly excessive awards and that reform is needed to address these problems.”⁵¹

II. STATUTORY DAMAGES AWARDS: CONTROVERSY

A. The Optimistic Viewpoint

Congress adopted statutory damages in the Copyright Act of 1909 as a baseline level of compensation for circumstances in which the cost of quantifying harm rivaled or exceeded the actual harm. The 1909 Act expressly stated that such recovery “shall not be regarded as a penalty.”⁵² As the threat of digital piracy emerged in the mid-1990s, copyright industries persuaded Congress to ramp up the upper bound for statutory damages levels to \$150,000 per work for willful infringement. To this date, Section 504 of the Copyright Act exists as an important instrument to alleviate the evidentiary burdens of plaintiff copyright-holders.

The premise is that copyright plaintiffs often face grave difficulty in providing evidence of injury for many copyright infringements.⁵³ The litigation involving file sharing highlights this issue. When an infringer makes a music file available for downloading on a P2P network, it is hard for a copyright holder to prove how many times the file has actually been downloaded from the defendant

51. Samuelson & Wheatland, *supra* note 24, at 497; *see also id.* at 485 (“Inconsistent statutory damage rulings in factually similar cases are, moreover, easy to find.” (footnote omitted)).

52. Copyright Act of 1909, Pub. L. No. 60-349, § 25(b), 35 Stat. 1075, 1081.

53. 2 GOLDSTEIN, *supra* note 8, § 14.2, at 14:42 (3d ed. Supp. 2015) (“The rationale commonly given for statutory damages is that, because actual damages are so often difficult to prove, only the promise of a statutory award will induce copyright owners to invest in and enforce their copyrights” (citing *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 232 (1952) (“Few bodies of law would be more difficult to reduce to a short and simple formula than that which determines the measure of damage recoverable for actionable wrongs. The necessary flexibility to do justice in the variety of situations which copyright cases present can be achieved only by exercise of the wide judicial discretion within limited amounts conferred by this statute.”); *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935) (“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 willful and deliberate infringement.”)). *But see* Samuelson & Wheatland, *supra* note 24, at 501–02 (questioning this default assumption and recommending that parties “offer proof of damages and profits, or, in the alternative, to demonstrate why damages or profits are sufficiently difficult to prove that it is justifiable to offer no such proof”).

by other online users.⁵⁴ Even if it would be possible to demonstrate how many times a file had been downloaded from an individual defendant, the intractable question of the precise injury arises: How many of those downloads displaced actual sales that would have taken place if the file had not been made available by the infringer?⁵⁵ Such difficult questions of attribution also arise outside the context of digital technologies. For instance, when the band Green Day plays a video that includes a copyrighted image in the background of its stage performance during a live tour without permission of the image's author, how much of its concert revenue is attributable to the infringement?⁵⁶

This difficulty of proving actual damages convinced Congress that the promise of a statutory award is necessary to enable copyright holders to enforce their rights in ways that will provide a deterrent to potential infringers. Even after successfully demonstrating infringement, plaintiffs often faced significant expense in proving harm.⁵⁷ Thus, the costs of proving injury might outweigh the actual harm of infringement for many smaller claim copyright disputes. As a result, copyright holders in small claim disputes do not have a financial incentive to bring suit.⁵⁸ The accepted wisdom is that without statutory damages, too

54. Sheffner, *supra* note 7, at 71 (noting that P2P network configuration “prevents third-party knowledge of transfers between peers”).

55. Although causal evidence of individual damage is difficult to obtain, several studies seek to obtain empirical evidence on the general impact of file-sharing on traditional music sales. For an overview, see Stan J. Liebowitz, *Economists Examine File Sharing and Music Sales*, in *INDUSTRIAL ORGANIZATION AND THE DIGITAL ECONOMY* 145 (Gerhard Illing & Martin Peitz eds., 2006). Most studies establish a negative impact of P2P activities on music sales. See, e.g., Stan J. Liebowitz, *File Sharing: Creative Destruction or Just Plain Destruction?*, 49 J.L. & ECON. 1 (2006) (presenting evidence that file-sharing adversely impacts record industry revenues). A few studies find, however, that file sharing has no statistically significant effect on music industry sales. See, e.g., Felix Oberholzer-Gee & Koleman Strumpf, *The Effect of File Sharing on Record Sales: An Empirical Analysis*, 115 J. POL. ECON. 1 (2007).

56. The court ultimately found fair use, primarily because the video had transformed the original photo. *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1179 (9th Cir. 2013).

57. *Cunningham*, 294 U.S. at 209 (1935) (“[T]he 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 willful and deliberate infringement.”).

58. In many small claim disputes, the evidentiary burden turns copyright infringement claims into suits with negative expected value. See generally William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979) (providing an economic model of the behavior of rational litigants). On the economics of small claims in copyright law, see Ben Depoorter, *If You Build It, They Will Come: The Promise and Pitfalls of a Copyright Small Claims Process*, BERKELEY TECH. L.J. (forthcoming 2019).

many infringements might go unenforced, which would threaten to erode the creative incentives that the Copyright Act seeks to protect.⁵⁹

B. The Pessimistic Viewpoint

Over the past decade or so, the conventional outlook on statutory damages has been challenged. The perception among commentators is that statutory damages have set the path for excessive court awards in copyright law,⁶⁰ as highlighted by the spectacular awards in file-sharing litigation.⁶¹ Whereas traditional piracy involved making multiple unauthorized copies of a copyrighted work, in the digital age, infringers commonly make one copy of multiple works. Because statutory damage awards, as set forth in the Copyright Act of 1976, are applied for each infringed work, the total amount can add up significantly for online infringements. Even at the statutory minimum of \$750 for each infringed work, the typical infringer on a file-sharing network may face an award of statutory damages in the several hundreds of thousands of dollars. Additionally, if a plaintiff claims enhanced damages for willful infringement, a defendant faces potential liability of up to \$150,000 for each infringed work. The shadow of these numbers may loom large over disputes⁶² and prompt settlement

59. See generally 2 PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 12.2, at 12:34 (2d ed. 1996) (“because actual damages are so often difficult to prove, only the promise of a statutory award will induce copyright owners to invest in and enforce their copyrights”).

60. See, e.g., Samuelson, Hill & Wheatland, *supra* note 6, at 530 (“Virtually all of the law review literature in the United States has criticized the U.S. statutory damage regime.” (footnote omitted)).

61. See *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 907 (8th Cir. 2012) (reinstating award of \$222,000 in statutory damages for sharing twenty-four songs online); *Sony BMG Music Entm’t v. Tenenbaum*, 660 F.3d 487, 490 (1st Cir. 2011) (reinstating award of \$675,000 in statutory damages for sharing thirty songs); Samuelson & Wheatland, *supra* note 24, at 480 (“The *Thomas*, *MP3.com*, and *Free Republic* cases . . . are examples of cases in which copyright statutory damage awards have been grossly excessive . . .” (footnotes omitted)). For other examples of allegedly disproportionate statutory damage awards, see *id.* at 481–91.

62. Cf. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (classic treatment of the impact of the legal system on settlement negotiations in the divorce context).

concessions by risk-averse defendants,⁶³ capitalized upon by copyright trolls and other new enforcement business models in recent years.⁶⁴

To date, comprehensive information on the use of statutory damage awards by litigants is lacking. We have no information on how copyright holders systematically employ statutory damages to address copyright infringements. Do most plaintiffs employ statutory damages in an opportunistic manner, or do statutory damages mostly serve the benevolent role of relieving copyright holders from the burden of proving damages? Second, there is little-to-no comprehensive information available on how courts treat statutory damage claims.⁶⁵ Where and on what basis do courts set the statutory damage award within the statutory range? When and how do courts mediate the compensatory and deterrent purposes of statutory damages? What definition or definitions of “willfulness” do courts employ when assigning enhanced statutory awards? Is it possible to distill a reliable set of factors from the pertinent case law?

Fortunately, empirical analysis can help answer these questions. A careful examination of docket records can reveal to what extent statutory damages are employed opportunistically in situations where injuries are likely to be

63. See Julie E. Cohen, *Pervasively Distributed Copyright Enforcement*, 95 GEO. L.J. 1, 17 (2006) (describing settlement incentives in the context of infringement actions for peer-to-peer file-sharing). In light of the potential costs imposed by the statutory damages regime of the Copyright Act, many persons accused of infringement choose to settle rather than litigate, even if they believe a plaintiff's claim to be without merit. This can set in motion a one-way ratchet effect towards more generous settlements. Cf. James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882 (2007) (describing how risk aversion and user caution create licensing customs that reduce the perceived scope of permissible uses); see also Ben Depoorter, Essay, *Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements*, 95 CORNELL L. REV. 957 (2010) (showing evidence of the feedback effect of settlement information in the context of tort litigation). Overall, copyright liability can have a chilling effect on investments in innovative technologies that provide products and services incorporating copyrighted content. Michael A. Carrier, *Copyright and Innovation: The Untold Story*, 2012 WIS. L. REV. 891, 895 (reporting on the basis of qualitative empirical evidence of an industry belief “that the *Napster* decision reduced innovation and that it led to a venture capital ‘wasteland.’”).

64. For an excellent analysis of the problems associated with copyright trolling, see Balganes, *supra* note 3, at 728–29 (describing how trolling disrupts copyright's “enforcement equilibrium”). On the challenges as well as opportunities of a more regulated market of third-party copyright enforcement, see Shyamkrishna Balganes, Essay, *Copyright Infringement Markets*, 113 COLUM. L. REV. 2277 (2013).

65. While the leading treatises seek to describe common patterns in the case law, to date no statistical analysis has been conducted on the application of statutory damages in dockets or legal opinions. The most comprehensive extant study is Samuelson & Wheatland's review of opinions, highlighting the inconsistent nature of the case law. See Samuelson & Wheatland, *supra* note 24.

minimal.⁶⁶ For instance, opportunistic litigation is more likely to involve disputes where there is minimal harm to the plaintiff, defendants are small and risk averse, and multiple works are infringed. Additionally, systematic examination of judicial opinions may reveal the most pertinent patterns with regard to the range, frequency, and the determination of statutory awards by courts.

This Article provides the first in-depth empirical analysis that engages the aforementioned issues. In what follows, I examine both the demand for and supply of statutory damage awards on the basis of an analysis of a random selection of almost one thousand copyright disputes over a four-year period.

III. DOCKET STUDY

A. Dataset

The docket study presented in this Part is based on the Copyright Data Project, a publicly available database that contains docket entries, complaints, and other documents of almost one thousand copyright disputes from the period between January 1, 2005 and December 31, 2008.⁶⁷ The list of cases was populated by a search on Bloomberg Law of all cases filed in federal courts from January 1, 2005 to December 31, 2008 for which the “Nature of Suit” is Copyright.⁶⁸ This four-year period provides an ideal window to study statutory damages since it allows us to compare the role of statutory damages in the context of P2P file sharing on the one hand, with more commonplace copyright disputes on the other. The final list of cases in the database contains a random selection of 957 out of 17,119 cases. By randomizing the cases for analysis, the analysis is based on a representative set of cases.⁶⁹ The docket database contains

66. On the valuable insights to be obtained from docket studies, see generally David A. Hoffman et al., *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 685 (2007) (“By looking at each individual order in the cases’ e-dockets, we can illuminate what the law’s rights and duties actually mean in practice. A legal right, after all, is given meaning by how the litigation to enforce it unfolds.”).

67. Of those 957 cases, 294 were filed in 2005, 267 in 2006, 206 in 2007, and 190 in 2008. Cotropia & Gibson, *Copyright Data Project*, *supra* note 26. The 2005–2008 period provides a unique vantage point since it enables comparison between regular copyright disputes and file-sharing litigation. These observations likely remain valid today since the copyright landscape has not been impacted by any major structural or legislative changes since then.

68. Additionally, a separate, additional coding of verdicts was conducted for this Article and is reported in Part IV.

69. Randomization is the proven method of statistical analysis to obtain a statistically representative sample from a larger data set. See generally DAVID M DIEZ, CHRISTOPHER D BARR, MINE CETINKAYA-RUNDEL, *INTRODUCTORY STATISTICS WITH RANDOMIZATION AND*

46 coded fields and 125 different variables on each of the copyright disputes randomly selected from that period.

It is helpful to summarize a few general observations about copyright litigation. In their topography of the field, Christopher Cotropia and James Gibson observe that (1) “the Central District of California and Southern District of New York are ‘hot districts’ for copyright cases,”⁷⁰ (2) copyright cases are “no more likely to get contentious than other civil litigation, [but] when they do get contentious, they get very contentious—resulting in significantly more docket entries, substantive rulings, and trials,”⁷¹ and (3) copyright dockets contain a remarkable number of (successful) small firms and “low IP” industries.⁷² Where pertinent, the analysis below will take into account these particularities of copyright disputes. Additionally, the results will distinguish between “regular” and “peer-to-peer” (P2P) or file-sharing cases. Separating both types of cases is important given the flood of P2P litigation in the 2005–2008 period.

B. Pleadings

The table below contains the remedy sought by plaintiffs in copyright disputes. As expected, injunctions are commonplace in copyright disputes. Copyright holders seek to enjoin copyright infringements in all but a few cases (96.34 percent). Additionally, copyright plaintiffs plead enhanced statutory damages in almost 70 percent of all disputes. By contrast, plaintiffs elect recovery of actual damages in less than 19 percent of disputes.

Table 1: Remedy Pleadings (n=383)

Damages	Statutory Damages—Willful	69.71%
	Actual Damages	18.54%
	Statutory Damages—Regular	5.48%
	None	6.27%
Injunction Pleaded		96.34%

SIMULATION 10–11 (2014), https://www.openintro.org/download.php?file=isrs1_tablet [<https://perma.cc/62C6-UK7N>].

70. Cotropia & Gibson, *Copyright's Topography*, *supra* note 26, at 1984. However, “the data indicate that cases in those districts are less likely to result in a plaintiff win.” *Id.*

71. *Id.*

72. *Id.* The term “Low-IP industries” is used to describe works for which the scope of intellectual property protection is minimal. *See id.* at 1985–86 & 1985 n.10.

The next few tables further parse out the data. The findings are distinguished across different types of copyright plaintiffs. I first turn to the size of the parties in the dispute: Fortune 1000 companies (and subsidiaries), individuals (including Does), and small firms (any party that did not fall into one of the two previous categories).

With regard to types of plaintiffs and remedy pursued, the results reveal a clear distinction between regular and P2P litigation. Overall, in the 2005–2008 period, Fortune 1000 (F1000) companies elected willful statutory damages in 89 percent of all claims (563 out of 627 cases). When removing P2P litigation from the sample (Table 3 below), F1000 companies are found to elect willful statutory damages in only 44 percent of cases (51 out of 115). Additionally, the results confirm the conventional understanding that smaller plaintiffs are more likely to be drawn to willful statutory damages—especially in cases of minor infringement—to avoid the evidentiary burden of proving actual damages.⁷³ Looking at non-P2P litigation exclusively, small firms plead willful statutory damages in 70 percent of the sampled cases (175 out of 248 cases).⁷⁴ Overall, willful statutory damages are elected in a majority of all copyright cases. Even when excluding P2P cases,⁷⁵ 60 percent of all claimants in copyright disputes plead willful statutory damages.

73. *Id.* at 1992. As a general observation, in the Cotropia & Gibson sample, the ranks of plaintiffs in copyright litigation involving non-P2P cases are dominated by small firms (64.23 percent). Individuals (21.41 percent) and Fortune 1000 companies (14.36 percent) were less often plaintiffs in these cases. *Id.* Note also that authors of the copyrighted work were plaintiffs in the vast majority of non-P2P cases (81.72 percent). *Id.* This suggests that if “copyright trolls” are active during this period, their activities do not show up on docket entries. “On the defendant side of the caption, smaller firms dominated even more than they did as plaintiffs; they constituted the largest defendant 72.06% of the time. Fortune 1000 companies were a distant second, at 14.62% (which means they tend to be sued as often as they sue). Individuals placed third, at 13.32%, even though Doe defendants were coded as individuals.” *Id.* (footnotes omitted).

74. By comparison, F1000 plaintiffs in non-P2P cases elect willful statutory damages in 44% of cases.

75. When including P2P cases, 81 percent of cases involve willful infringement claims. In every P2P case on the dockets in this four-year period, the music plaintiffs claimed statutory damages for willful infringement (513 disputes).

Table 2: Plaintiff Claims—All Cases

Plead	F1000	Individual	Small Firm	Total
Statutory—Willful	563 (89%)	41 (50%)	175 (70%)	779 (81%)
Statutory—Regular	61 (9.7%)	9 (10.9%)	13 (5.2%)	83 (8.6%)
Actual Damages	2 (0.3%)	22 (26.9%)	47 (18.9%)	71 (7.4%)
None	1 (0.15%)	10 (12%)	13 (5.2%)	24 (2.5%)
Total	627 (65.5%)	82 (8.6%)	248 (25.9%)	957

Table 3: Plaintiff Claims—non-P2P Cases

Plead	F1000	Individual	Small Firm	Total
Statutory—Willful	51 (44.3%)	41 (50%)	175 (70.6%)	267 (60%)
Statutory—Regular	61 (53%)	9 (11%)	13 (5.2%)	83 (18.7%)
Actual Damages	2 (1.7%)	22 (26.8%)	47 (19%)	71 (16%)
None	1 (0.9%)	10 (12.2%)	13 (5.2%)	24 (5.4%)
Total	115 (25.8%)	82 (18.4%)	248 (55.7%)	445

On the other side of the coin, small firm defendants disproportionately face claims for statutory willful damages (72.6 percent). Individual defendants and

F1000 companies evenly split the remaining cases (12.7 percent and 14.6 percent, respectively).⁷⁶

Table 4: Type of Defendants—Commonplace Cases

Plead	F1000	Individual	Small Firm	Total
Statutory— Willful	39 (14.6%)	34 (12.7%)	194 (72.6%)	267
Statutory— Regular	4 (4.8%)	12 (14.4%)	67 (80.7%)	83
Actual Damages	13 (18.3%)	5 (7%)	50 (70.4%)	71
None		9 (37.5%)	15 (62.5%)	24
Total	56 (12.5%)	60 (13.4%)	329 (73.9%)	445

76. See *infra* Table 4.

Table 5 below illustrates differences across copyright industries.⁷⁷ Plaintiffs in the fashion industry disproportionately elected willful statutory damages as their preferred remedy. Interestingly, claims of willfulness regularly surfaced in low IP industries (apparel/fashion textile, architecture, and industrial designs) despite the fact that copyright protection is rather limited in those industries.

77. Cotropia & Gibson, *Copyright's Topography*, *supra* note 26, at 1992 (Although some industry associated with low IP protection (including fashion) show up strongly on the docket, “[N]o one industry dominated; the most litigious industry was Apparel/Fashion/Textiles, clocking in at 13.58%.”).

Table 5: Remedy Pursued—Per Industry

Industry	Statutory Willful	Statutory Regular	Actual Damages
Advertising and Marketing	6		2
Apparel/Fashion/ Textiles	42	2	5
Architecture	25	1	8
Commercial Art	23	3	4
Film and TV	27		7
Fine Arts	3		2
Individual Authors			2
Industrial Design	13	1	13
Music	30	63	4
Other—Misc.	15	2	3
Other—Professional, Scientific, and Technical Services	11	2	5
Other— Retail/Wholesale/Durable Goods	7		4
Performing Arts	2	1	
Public Sector	1		
Publishing	24	5	5
Software—Other	35	3	7
Software—Video Games	3		
Total	267	83	71

Finally, when separating the various copyright infringement claims into § 106 subsection subject-matter areas and linking those claims to the remedy pursued in each case, the following findings emerge. First, the three most frequent claims in copyright litigation—unauthorized reproduction, unauthorized distribution, and unauthorized derivative works, which, combined, amount to about 70 to 76 percent of plaintiffs—most commonly

plead willful statutory damages.⁷⁸ Second, allegations based on public performance infringements show a reverse ratio of willful-to-regular statutory damages pleadings. While 64 percent of plaintiffs in these cases request regular statutory damages, only 26 percent of plaintiffs claim willful statutory awards. Third, outside of § 106, secondary liability claims are more evenly distributed across willful (48 percent) and regular (40 percent) statutory damages.⁷⁹ Despite these variations across statutory categories, a general finding is that statutory damages claims—both willful and regular—are the de facto default remedy asserted by plaintiffs, accounting for 82 percent of all pleadings in the database.

C. Case Outcomes

Next, I analyze the remainder of the docket entries to obtain information regarding the course and outcome of copyright litigation.

A number of general observations are noteworthy. Defendants in copyright litigation are relatively passive. Defendants responded in slightly over half of the dataset's non-P2P cases (57.70 percent, or 221 cases). Only 23.24 percent of those 221 cases contained responses that included counterclaims or cross-claims. Dispositive motions that, if successful, would terminate one or more copyright claims (excluding motions for default judgment) were filed in only 33 cases of the 162 cases with no answer filed. The remaining 33.68 percent (129 cases) of commonplace cases lack a defensive action by the defendant, suggesting possible consent to judgment or settlement. As non-P2P disputes moved toward termination, at least one party filed a dispositive motion 45.93 percent of the time. Most of the disputes in the sample set (80.16 percent) were terminated voluntarily following a settlement, agreed judgment, or voluntary dismissal. Very few cases were terminated by trial (2.87 percent) or by dispositive motion (10.97 percent). In non-P2P cases that reached judgment (16.18 percent), defendants were victorious just over half the time (54.10 percent). Conversely, plaintiffs bested defendants less than half of the time (45.90 percent) in those same disputes.

Turning to analyze the role of remedies in copyright litigation, it is notable that when non-P2P cases were terminated, only a minority of cases resulted in a

78. Respectively, the percentages of those three claims that plead willful statutory damages are: unauthorized reproductions, 87.99 percent; unauthorized distribution, 73.89 percent; and unauthorized derivative works, 36.81 percent.

79. Claims outside of § 106 were quite uncommon: Both claims under the Digital Millennium Copyright Act (4.70 percent) and the Visual Artists Rights Act (1.31 percent) were infrequent. Cotropia & Gibson, *Copyright's Topography*, *supra* note 26, at 1998.

damage award or injunctive remedy as granted by the court. Of course, this is in line with expectations since most cases were terminated through action of the parties. Injunctions were granted in 22.02 percent (83) of the cases, the majority (63.85 percent) resulting from an agreed judgment between the parties. Just 1.78 percent of all non-P2P cases were terminated with a grant of enhanced statutory damages. Regular statutory damages were obtained by plaintiffs in non-P2P cases in less than 10 percent of all 338 cases.

Table 6: Damage Awarded—Non-P2P Percent

Type of Award	Percent
Statutory Damages—Enhanced	1.78%
Statutory Damages—Regular	9.17%
Actual Damages	1.78%
Agreed Damages	10.36%
<i>Total</i>	338

When comparing cases that terminated with a damage award, a similar pattern emerged: Regular damages are at least five times as likely than enhanced damage awards. With regard to P2P cases specifically, regular statutory damage are fifty times more likely to be obtained than enhanced statutory damages. When differentiating across plaintiffs, F1000 companies are at the receiving end of regular statutory damage awards in a majority (54 percent) of terminated cases with remedies obtained.

Table 7: Damage Awarded—All Cases

Damage Award	F1000	Individual	Small Firm	Total
Common suits = total	37 (15.4%)	5 (100%)	36 (100%)	78 (27.7%)
Statutory—Willful	2 (5.4%)	1 (20%)	3 (8.3%)	6 (7.6%)
Statutory—Regular	20 (54%)	3 (60%)	8 (22.2%)	31 (39.7%)
Actual Damages	–	1 (20%)	5 (13.8%)	6 (7.6%)
Agreed Damages	15 (40.5%)	–	20 (55.5%)	35 (44.8%)
P2P suits = total	203 (84.5%)	–	–	203 (72.2%)
Statutory—Willful	2 (0.8%)	–	–	2 (0.7%)
Statutory—Regular	121 (50.4%)	–	–	121 (43%)
Agreed Damages	80 (33.3%)	–	–	80 (28.4%)
Total	240	5	36	281

D. Settlement Patterns

Most of the disputes in the dataset (80.16 percent) were terminated voluntarily via a direct action from the parties, either by settlement, agreed judgment, or voluntary dismissal. As is commonplace in litigation more generally,⁸⁰ very few disputes concluded after trial (2.87 percent) or upon

80. See, e.g., Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 112 (2009) (“[S]ettlement is the modal civil case outcome.”) (reporting settlement rates across areas of law in two districts).

dispositive motion (10.97 percent). The full breakdown of the termination of disputes is illustrated in Table 8 below.

Table 8: Termination Type—Commonplace cases (n=383)

Voluntary Dismissal	34.46%
Settlement	29.50%
Agreed Judgment	16.19%
Default Judgment	5.48%
Other Dismissal	4.44%
Trial	2.87%
12(b)(6) Dismissal	2.35%
Summary Judgment	2.09%
Still Open	1.57%
12(c) Dismissal	0.52%
Lack of Jurisdiction	0.52%
JNOV	0.00%

Given the number of disputes that were terminated by the parties, it is important to recognize that court-ordered awards provide only partial and potentially selective information about the outcome of all copyright disputes initiated in this study's dataset.⁸¹ For instance, court-ordered willful statutory awards will be less frequent and lower on average if clear, egregious offenses are more likely to settle out of court.⁸² Therefore, it is also worthwhile to explore the dataset for settlement patterns.

81. One such presumed selection effect is that hard cases go to trial and easy cases get settled. See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) (presenting the thesis that litigated cases have a 50 percent success rate); see also Peter Siegelman & John J. Donohue III, *The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects to Test the Priest-Klein Hypothesis*, 24 J. LEGAL STUD. 427, 430–31 (1995) (providing empirical evidence of the selection effect in the context of employment discrimination cases). See generally Joel Waldfoegel, *The Selection Hypothesis and the Relationship Between Trial and Plaintiff Victory*, 103 J. POL. ECON. 229 (1995) (providing evidence for the Priest-Klein selection hypothesis).

82. This would be in line with the Priest-Klein "50-percent rule." See Priest & Klein, *supra* note 81.

When comparing the outcomes of disputes in non-P2P disputes across claims for actual damages, regular, and willful statutory damages, a few findings emerge. Lawsuits that involve a claim for willful statutory damages settle more often (29 percent) than suits in which the plaintiff requests regular statutory damages (22 percent).⁸³ Additionally, while willful statutory damage claims were dismissed voluntarily at about the same rate as claims with requests for regular statutory damages and actual damages,⁸⁴ nonvoluntary dismissals were less frequent when involving willful statutory damage claims.⁸⁵

E. Analysis

The docket study reveals that a vast majority of plaintiffs accuse defendants of willful copyright infringement. Although accusations of willful infringement have always been understood to be common in the context of P2P infringements, accusations of willful infringement are surprisingly prominent across all types of copyright subject-matter areas and litigants. The sheer number of willful infringement claims is remarkable, especially in light of the congressional intention to reserve enhanced statutory damages for exceptional instances.⁸⁶

Interestingly, despite the overwhelming number of assertions to the contrary by plaintiffs, courts rarely find that willful infringement took place.⁸⁷ What does this tell us? The most benign, albeit unrealistic, interpretation of this gap between the demand and supply of willful statutory awards is that most of those claims are valid and are subsequently resolved in a settlement between the parties. That is, courts rarely honor requests for enhanced damages because such claims are disproportionately settled at earlier stages of litigation. Without inspecting the terms of all out of court settlements, a benign interpretation of willful damage claims cannot be decisively excluded. Several of the findings

83. Specifically, 78 out of 276 infringement claims with willful statutory damage claims settled, as compared to 19 out of 84 infringement claims involving regular statutory damage claims.

84. Voluntary dismissals occurred in 34 percent of willful statutory damages claims, 30 percent of claims for regular statutory damages, and 35 percent of claims for actual damages.

85. Nonvoluntary dismissals occurred in just 1.5 percent of willful statutory damages claims, as compared to 6 percent of claims for regular statutory damages, and 5.6 percent of claims for actual damages.

86. Samuelson & Wheatland, *supra* note 24, at 441 & n.4 (citing S. REP. NO. 94-473, at 144–45 (1975); H.R. REP. NO. 94-1476, at 162 (1975)); *see also, e.g.*, Microsoft Corp. v. Wubben, No. 1:06-cv-2209-WSD, 2007 WL 656688, at *2 (N.D. Ga. Feb. 28, 2007) (“The Court believes that statutory damage maximums should be reserved for cases of notable scope or particularly egregious conduct.”).

87. *See supra* Table 6 &

suggest, however, that many claims for enhanced statutory damages are likely without merit. First, focusing solely on cases where the plaintiff obtains a favorable verdict, enhanced statutory damages are seldom awarded. Of all cases where a plaintiff won on the merits of the case, only 2.8 percent of cases resulted in an award of willful statutory damages. The rarity of enhanced awards makes the nearly ubiquitous accusations of willful infringement and enhanced damages by plaintiffs highly suspect. Second, the prevalence of enhanced damage pleadings by low IP industry claimants⁸⁸ further casts doubt on the benign interpretation that most of the accusations of willful infringement have merit. When copyright protection is relatively modest—as is the case for more functional works such as fashion items⁸⁹—it is less likely that so much infringing behavior is so egregious that it qualifies as willful. Since the scope of protection is narrower for these works, there is less potential for infringement to begin with. Moreover, since infringements of works with only thin copyright protection are less obvious *ex ante*,⁹⁰ a finding of willfulness by courts is relatively unlikely.

IV. CASE LAW ANALYSIS

While Part III applied a docket analysis method to examine the demand and supply of willful statutory claims, this Part looks behind those numbers to analyze litigated disputes involving discussions of willful infringement, the arguments raised by the plaintiffs, and the definition and application of enhanced damages for willful infringement by courts.

88. Almost 30 percent of all litigated works in the non-P2P cases involve low IP protection areas (Apparel/Fashion/Textiles, Architectural Works, and Industrial Design). Cotropia & Gibson, *Copyright's Topography*, *supra* note 26, at 1996. Parties in low IP industries plead willful infringement as often or more than parties in subject-matter areas where copyright protection is considered to be stronger. For example, plaintiffs in apparel, fashion and textile industries claimed willful damages in 80 percent of disputes (42 out of 52). Plaintiffs in non-P2P disputes involving film and TV claimed willful damages in 75 percent of disputes (27 out of 36) and plaintiffs in non-P2P disputes involving music claimed willful damages in 39 percent of disputes (30 out of 101). *See supra*

Table 5.

89. *See* Cotropia & Gibson, *Copyright's Topography*, *supra* note 26, at 2016–17 (“Apparel is famously difficult to protect under copyright law, and industrial design and architectural works are likewise hampered by functionality constraints and other exceptions to copyright’s usual reach.” (footnotes omitted)).

90. *See id.* at 2018 (“Legal outcomes are less certain for industries and works at the periphery of copyright law”).

A. Coding

I identified all decisive court decisions where courts addressed a claim of willful copyright infringement.⁹¹ The resulting dataset consists of 102 decisions from 2005 to 2008.

While the original docket database contained a large set of coded variables relating to procedural aspects of litigation,⁹² this second coding project focused more narrowly on the substantive remedies pursued and awarded in each case.

Drawing upon the existing literature, leading treatises, and academic scholarship, and an initial examination of a random sample of 20 cases, the following variables and data points were coded for all 102 cases.⁹³ First, I identified the copyright subject-matter areas, as well as a description of the defendant's allegedly infringing actions. Second, the plaintiff's proposed definition of willfulness (if any) was coded, as was the definition of willfulness employed by the court and any additional considerations of culpability highlighted by the court. Third, the remedial outcome and amount granted were noted. Fourth, the express calculation of the statutory award was described. Fifth, it was coded whether the court awarded enhanced damages, and I noted the number of infringing works, the amount sought per infringing work, the total amount requested, the amount awarded by the court for each infringing work, and the total award granted by the court. Sixth, when available, I noted the policy objectives that the court explicitly associated with an award of willful statutory damages. Seventh, cases were analyzed to detect whether willful damage claims were tied to particular litigation strategies. Finally, a series of additional variables were coded that would help identify differences and common patterns in the topography of disputes where plaintiffs claimed willful infringement. These coded variables helped identify for each dispute: the presence of (1) awards of attorney fees, (2) a fair use defense, (3) accusation of multiple works being infringed, (4) default judgments, and (5) secondary liability claims.

91. Towards this purpose, I populated a list of cases by conducting a Westlaw search for all copyright cases between January 1, 2008 and December 31, 2008 that featured the terms "willful" and "infringement" in the opinion.

92. See sources cited *supra* note 26 and accompanying text.

93. The coding process consisted of three stages. In the first stage, two research assistants were trained and supervised to code half of the database each. In the second stage, a third research assistant verified and corrected (where needed) all coding. In the third stage, I personally verified the coding of all variables in the spreadsheet.

B. Results

As Table 9 below indicates, willful infringement accusations mostly surface in three subject-matter areas: movie pictures and television (26.5 percent), music (21.5 percent),⁹⁴ and software (21.5 percent, excluding video games). The musical work infringement cases included three disputes involving file-sharing and twelve disputes concerning public performances (11.7 percent of all cases). In almost all disputes (92 percent), the defendant is accused of infringing the copyright on multiple works. In the vast majority of cases (77.3 percent), the plaintiff was awarded attorney fees. Over half of the litigation (59 percent) resulted in a default judgement.

94. Just three out of twenty-two musical work cases in the dataset involved file-sharing.

Table 9: Subject-Matter Areas

Industry	Cases
Advertising and Marketing	3
Apparel/Fashion/Textiles	5
Architecture	1
Commercial Art	8
Movie Pictures	18
TV	9
Fine Arts	0
Individual Authors	2
Industrial Design	0
Musical Works	22
Other—Misc.	0
Other—Professional, Scientific, and Technical Services	4
Other—Retail/Wholesale/Durable Goods	0
Performing Arts	0
Public Sector	0
Publishing	8
Software—Other	22
Software—Video Games	0
Total	102

In about 35 percent of all disputes in the dataset, arguments by the plaintiff that substantiate the alleged “willfulness” of the accused infringer’s actions are wholly absent in the verdict.⁹⁵ When the case for willfulness was expressed by the

95. In a wide range of disputes in the dataset, plaintiffs demand enhanced damages without specifying what factually qualifies the behavior of the defendant as willful. The opinions do not include any specification as to why infringing behavior by the defendant qualifies as willful. For an illustration, see *Sony Pictures Home Entm’t v. Lott*, 471 F. Supp. 2d 716 (N.D. Tex. 2007) (defendant illegally downloaded digital copies of motion pictures and distributed them on peer-to-peer networks); *Elektra Entm’t Grp. v. Barnett*, No. 5:07-CV-00121-F, 2007 WL 3542456 (E.D.N.C. Nov. 14, 2007) (defendant used online media distribution system to download and distribute plaintiff’s copyrighted recordings); *Twentieth Century*

plaintiff, its most frequent basis was continued infringing activity by the defendant after receiving an infringement notice.⁹⁶

Second, courts do not have a uniform focal point for determining willful infringement. As Table 10 below illustrates, courts primarily focus on actual or constructive knowledge when determining whether the infringement was committed willfully (about 43 percent of cases).⁹⁷ Courts focus only on actual knowledge in about 10 percent of cases, as some courts (at the behest of the plaintiff) find it sufficient that the defendant was put on notice by the plaintiff at any time prior to litigation. Additionally, courts sometimes inquire into the “blameworthiness” of the defendant.⁹⁸ In about 23 percent of cases, however, courts rule on willfulness without referencing any particular definition of willfulness.⁹⁹

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- Fox Film Corp. v. Streeter, 438 F. Supp. 2d 1065 (D. Ariz. 2006) (defendant used content from plaintiff's films without permission); IQ Grp. v. Wiesner Publ'g, 409 F. Supp. 2d 587 (D.N.J. 2006) (plaintiff claims defendants used plaintiff's copyrighted artwork without permission). Similarly, the pleadings in these disputes rarely specify the willful aspects of the infringing conduct.
96. See, e.g., *Microsoft Corp. v. Moss*, No. 1:06-CV-1670-JOF, 2007 WL 2782503 (N.D. Ga. Sept. 20, 2007) (defendants continued to distribute illegal software despite cease and desist letter from Microsoft); *Wavemaker Music, Inc. v. Kartouche, Inc.*, No. 3:07-cv-233-HES-HTS, 2007 WL 2254505 (M.D. Fla. Aug. 3, 2007) (defendants ignored plaintiff's requests, and “continued to flout their obligation to attain a license for public performances of the copyrighted works”); *WB Music Corp. v. Symetry Enters.*, No. 3:06cv01214 (MRK) (WIG), 2007 WL 2126361 (D. Conn. June 26, 2007) (defendants refused ASCAP offers to sell them a license and continued with unlicensed activities).
97. See, e.g., *Yurman Studio, Inc. v. Castaneda*, 591 F. Supp. 2d 471, 486 (S.D.N.Y. 2008) (“For the purpose of awarding enhanced statutory damages under § 504(c)(2), an infringement is ‘willful’ if the defendant had ‘knowledge that its actions constitute an infringement.’ This knowledge may be ‘actual or constructive.’” (quoting *Fitzgerald Pub. Co. v. Baylor Pub. Co.*, 807 F.2d 1110, 1115 (2d Cir. 1986)); *Disney Enters. v. Merchant*, No. 6:05-CV-1489, 2007 WL 1101110, at *4 (N.D.N.Y. Apr. 10, 2007) (“An infringer acts willfully, within the meaning of the Act, when he or she knows or has constructive knowledge that infringement is occurring.” (citations omitted)); *Eros Entm't, Inc. v. Melody Spot, L.L.C.*, No. 99 CV 1157 (SJ), 2005 WL 4655385, at *8 (E.D.N.Y. Oct. 11, 2005) (“[I]t is sufficient to find that the defendant had either actual or constructive knowledge that his actions constituted an infringement.” (citations omitted)).
98. See, e.g., *Webloyalty.com, Inc. v. Consumer Innovations, LLC*, 388 F. Supp. 2d 435, 442 (D. Del. 2005) (“The factors used to determine the level of statutory damages include: ‘the expenses saved and the profits earned by the defendant, the revenues lost by the plaintiff, and the defendant’s state of mind.’ ‘Normally, it is the blameworthiness of the defendant which weighs the heaviest in the court’s analysis.’” (quoting *Compendia Songs v. On Top Commc'ns, LLC*, No. CIV.A.04-252-GMS, 2004 WL 2898070, at *4 (D. Del. Nov. 15, 2004))).
99. See, e.g., *Arista Records LLC v. Furia Sonidera, Inc.*, No. 05 CV 5906 (ILG) (RER), 2007 WL 922406 (E.D.N.Y. Mar. 26, 2007) (awarding \$500,000 in damages for willful infringement on the basis of file-sharing activities); *Broadcast Music, Inc. v. Porto Bello of Sw. Fla., Inc.*,

Some courts find willfulness with mere reference to the factual circumstances surrounding the infringement, including continued infringement after receiving notice, distribution on P2P file sharing, and failure to cooperate with discovery. Finally, about 10 percent of willful infringement decisions consist of default judgements.

Table 10: Most Common Judicial Approaches to Willfulness—Courts

Approach	Count	Percent
Actual or constructive knowledge	43	42.57%
None	23	22.77%
Actual knowledge	10	9.90%
Willful blindness	8	7.92%

In the 43 cases (42 percent) where a court defined willfulness as having actual or constructive knowledge, 13 cases (30 percent) involved instances where the court deemed the behavior of the defendant also to involve a reckless disregard of the rights of the copyright owner.¹⁰⁰ Ignoring and continuing after being notified by the plaintiff are major considerations here as well (17 cases, or 39.53 percent, of cases). Overall, continuing infringing behavior after receiving notice, is a factor of consideration in 25 percent of all cases involving willful infringement. In just 4 of those cases (3.9 percent) no finding of willfulness is made. Factors such as a history of repeat infringements or the business experience of the defendant figured less prominently in the opinions (less than 9 percent).

No. 2:05-CV-69-FTM-99SPC, 2006 WL 1824497 (M.D. Fla. June 30, 2006) (finding willful infringement for public performance of musical works without permission).

100. See *In re Barboza*, 545 F.3d 702, 707 (9th Cir. 2008) (“[A] finding of ‘willfulness’ in this context can be based on either ‘intentional’ behavior, or merely ‘reckless’ behavior.” (citations omitted)); *Disney Enters. v. Delane*, 446 F. Supp. 2d 402, 406 (D. Md. 2006) (“The standard for willfulness is whether the defendant had knowledge that his or her conduct represented infringement or the defendant recklessly disregarded that possibility.” (citation omitted)).

Table 11: Actual or Constructive Knowledge: Factors of Consideration

Element	Count	Percent %
Reckless disregard of plaintiff's rights	13	30.23%
Ignoring notices	9	20.93%
Continued after notice	8	18.60%
Default judgments	4	9.30%
Experienced businessman that should have known	3	6.98%
Actual knowledge	2	4.65%
D's failure to establish good faith and reasonable belief	1	2.33%
Desire and purpose to trade on good will	1	2.33%
Repeats infringement	1	2.33%
Deliberate act	1	2.33%
Total	43	100.00%

When courts discuss the purpose of statutory damages, they adhere to both the compensatory and deterrent goals of this form of relief. When setting regular statutory awards within the statutory range, courts generally estimate (on the basis of a rough proxy) the actual damages caused by the infringement and likely profits of the defendant.¹⁰¹ Deterrence motives feature prominently in judicial calculations of the statutory damage amounts (60.39 percent of cases where courts identified a policy objective). While some courts also focus on the goal of discouraging a specific infringer (20 percent of cases where courts identify individual deterrence as a policy objective), most verdicts refer to the goal of deterring copyright infringement in general.¹⁰² Interestingly, when courts justify multiplying the award for the purpose of deterring future infringements, they do not set the multiplier to make up for the less than perfect probability of detection,

101. In this regard, the findings resonate with prior research that establishes that courts proceed in this manner when there is some evidence available about harm and profits. See 2 GOLDSTEIN, *supra* note 8, at § 14.2.1, at 14:46 (3d ed. Supp. 2015) (“Courts will often try to approximate actual damages and profits when making a statutory damage award.” (footnote omitted)).

102. See, e.g., *Capitol Records, Inc. v. Zahn*, No. 3:06-0212, 2007 WL 542816, at *3 (M.D. Tenn. Feb. 16, 2007) (finding that the statutory scheme is “designed not solely to compensate the copyright owner for losses incurred, but also to deter future infringement” (quoting *Johnson v. Jones*, 149 F.3d 494, 504 (6th Cir.1998))).

as suggested by the economic analysis of punitive damages.¹⁰³ Instead, courts regularly resort to a mechanical formula of multiplication,¹⁰⁴ or simply ensure that the damage exceeds the compensatory level. In eight cases (7.8 percent) the court found willfulness and granted the maximum statutory award of \$150,000 per infringed work.¹⁰⁵ In 10 percent of all cases involving a finding of willfulness (76 cases), the court set the award at the \$150,000 maximum.

Many plaintiffs accuse the defendant of willful infringement but nevertheless indicate that they would be satisfied with the court setting an award within the regular, non-willful statutory damages range.¹⁰⁶

103. On the economics of punitive damages, see, for example, Robert D. Cooter, *Economic Analysis of Punitive Damages*, 56 S. CAL. L. REV. 79 (1982); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998).

104. See, e.g., *Girlsongs v. 609 Indus.*, 625 F. Supp. 2d 1127, 1131 (D. Colo. 2008) (“Recognizing the important deterrent purpose served by statutory damages, the courts routinely award as statutory damages in cases such as this amounts that are between two and three times license fees.” (citations omitted)).

105. *In re Frye*, No. CC-08-1055-PaMkK, 2008 WL 8444822 (B.A.P. 9th Cir. Aug. 19, 2008) (debtor copied content guides and submitted them as his own); *Axact (PVT), Ltd. v. Student Network Res., Inc.*, No. 07-5491 (FLW), 2008 WL 4754907 (D.N.J. Oct. 22, 2008) (infringing online database competed with plaintiff and engaged in repeat infringements and deliberate evasion); *Mitchell Int’l v. Fraticelli*, No. 03-1031 (GAG/BJM), 2007 WL 4197583 (D.P.R. Nov. 26, 2007) (defendant used and sold counterfeit software); *Entral Grp. Int’l v. Sun Sports Bar Inc.*, No. 05-CV-4836 (CBA), 2007 WL 2891419 (E.D.N.Y. Sept. 28, 2007) (karaoke bar copied and used copyrighted songs without permission); *Entral Grp. Int’l v. Honey Café on 5th, Inc.*, No. 05 CV 2290 NGG MDG, 2006 WL 3694584 (E.D.N.Y. Dec. 14, 2006) (same); *Quilled Creations, LLC v. Scrapcuts, LLC*, No. 04-CV-6385 CJS, 2005 WL 2136916 (W.D.N.Y. Sept. 2, 2005) (defendants copied plaintiff’s artwork, passed it off as their own creation, and did not cease their activities upon receiving notice from copyright owner); *Design Tex. Grp., Inc. v. U.S. Vinyl Mfg.*, No. 04 Civ. 5002(JSR), 2005 WL 2063819 (S.D.N.Y. Aug. 24, 2005) (repeat infringements of wallpaper design after notice); *U2 Home Entm’t v. Lai Ying Music & Video Trading, Inc.*, No. 04 Civ.1233 (DLC), 2005 WL 1231645 (S.D.N.Y. May 25, 2005), *aff’d in relevant part sub nom.*, *U2 Home Entm’t v. Wei Ping Yuan*, 245 Fed. App’x 28 (2d Cir. 2007) (repeated infringing commercial importation of Chinese movies by N.Y. video rental store).

106. See, e.g., *Microsoft Corp. v. Nop*, 549 F. Supp. 2d 1233, 1236 (E.D. Cal. 2008) (“Although plaintiff’s complaint alleges willful infringement of copyrights and trademarks, plaintiff seeks only the maximum amount of statutory damages permitted for non-willful copyright infringement”); *Microsoft Corp. v. McGee*, 490 F. Supp. 2d 874, 882 (S.D. Ohio 2007) (“Microsoft requests only the maximum amount of statutory damages available for non-willful trademark infringement and copyright infringement.”); *Broad. Music, Inc. v. H.S.I., Inc.*, No. C2-06-482, 2007 WL 4207901, at *5 (S.D. Ohio Nov. 26, 2007) (“Plaintiffs urge the Court to award \$3,000 for each copyrighted song that Defendants admit to publicly playing on September 8, 2005. Plaintiffs contend that damages of \$3,000 per song is an adequate deterrent to future infringement, [and] is justified in light of Defendants’ willful infringement”); *Disney Enters. v. Delane*, 446 F. Supp. 2d 402, 407 (D. Md. 2006) (“For the remaining ten programs, Plaintiffs have requested a reasonable amount of statutory damages. The evidence shows that Delane’s actions were willful infringements of Plaintiffs’ copyrighted programs.”). Interestingly, in *Broadcast Music, Inc. v. H.S.I., Inc.*, the plaintiffs’

C. Analysis

First, as Part III documented, plaintiffs in various low IP industries (including apparel/fashion/textiles, architecture, and industrial design) figure prominently in the docket records.¹⁰⁷ By contrast, movie pictures, cable television shows, musical works, and software account for 70.5 percent of all disputed works in the advanced stages of litigation involving damages for willful infringement. Additionally, disputes in movie pictures, cable television shows, musical works, and software disproportionately result in default judgments. Almost 85 percent of the total number of default judgments are situated in these subject-matter areas.

These differences between the docket record and the case law could be the result of differences among the strength of the infringement claims or the attitude of defendants across these industries. As the docket analysis in Part III revealed, willful infringement claims by low IP claimants get settled and dismissed more regularly than claims in the other main subject-matter areas. The fact that these cases are terminated prior to litigation could suggest that those claims were weaker to begin with.¹⁰⁸

Second, it is noteworthy that about 40 percent of all claims of willful infringement include only sparse information as to what actions amount to willfulness, according to plaintiffs. Many plaintiffs allege willfulness without any further specification whatsoever.¹⁰⁹ Other pleadings equate receiving a notice of complaint as satisfying the knowledge condition of willfulness. Properly conceived, actual or constructive knowledge requires more than simply receiving notice by the copyright holder, however: Actual notice entails that the infringing nature of the defendant's action are so obvious that, initially or certainly upon receipt of a notice from the copyright owner, the alleged infringer should have ceased the activity.¹¹⁰ A defendant who has been notified by a

strategy was to get a lower amount for each work but multiply that amount many times over by counting many technical infringements involving different works. 2007 WL 4207901, at *5.

107. *See supra*

Table 5.

108. The competing hypothesis is that they are stronger, causing defendants to settle and avoid the unpleasant prospect of litigation. Several of the factors highlighted in Subpart III.E cast doubt on this interpretation, however.

109. *See supra* note 100.

110. *See* Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1392 (6th Cir. 1996) (“[W]illfully’ means with knowledge that the defendant’s conduct constitutes copyright infringement. Otherwise, there would be no point in providing specially for the reduction of minimum awards in the case of innocent infringement, because any infringement that was nonwillful would necessarily be innocent.” (citation omitted)).

copyright owner that the copyright owner believes that the defendant's conduct constitutes copyright infringement might still reasonably and in good faith believe the contrary, and not be willful.¹¹¹

Third, a considerable amount of adjudication occurs in a void of meaning as to what actions might qualify as willful. Over 20 percent of cases are adjudicated without any indication of what guided the court to its determination regarding willfulness.

Fourth, the data reveals a peculiar litigation strategy on behalf of some plaintiffs. A portion of plaintiffs assert willful infringement but state that they are satisfied with a regular statutory damage award. Why would a victim of willful infringement voluntarily deprive itself of the higher range for statutory damages? Two potential explanations come to mind. First, by turning down the higher range of willful infringement, the plaintiff might be hoping that he or she will be perceived by court and jury as a reasonable actor, potentially inducing a more favorable look at the various other facts at issue. Second, in this process of garnering sympathy, the plaintiff might hope that the court or jury will set the award at a higher amount than would otherwise be the case if the plaintiff had insisted on willfulness and was turned down by the court or jury.

D. Summary

The analysis of the case law in this Part reveals considerable ambiguity as it relates to potential findings of willfulness and the enhanced awards that may follow as a result of such a finding. The flexible standard of "knowledge" that courts employ, and the role of notice letters, open the door to the potential award of enhanced damages in many disputes and may be a contributing factor to the practices highlighted by the docket study in Part III. The next Part discusses the implications of the findings and formulates several policy proposals.

V. DISCUSSION AND PROPOSALS

The 1976 Copyright Act has been slated for reform. The Register of Copyrights has called for a wholesale adaptation of the federal copyright statute

111. 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.04[B][3] (1996) ("[O]ne who has been notified that his conduct constitutes copyright infringement, but who reasonably and in good faith believes the contrary, is not 'willful' for these purposes." (cited in *Princeton Univ. Press*, 99 F.3d at 1392)).

for the digital age.¹¹² A team of academics, practitioners, and industry experts has produced *The Copyright Principles Project: Directions for Reform*, the culmination of three years of inquiry into “how current copyright law could be improved and how the law’s current problems could be mitigated.”¹¹³ The House Judiciary Committee announced a “wide review” of copyright law and “related enforcement mechanisms.”¹¹⁴ For the past few years, it has been conducting a comprehensive series of hearings on U.S. copyright law across the country. Statutory damages figure prominently in these discussions.¹¹⁵ The study presented in this Article provides empirical grounding for the ongoing discussions of the optimal reform of copyright remedies.

Although the 1976 Copyright Act provides neither a definition nor examples of willfulness,¹¹⁶ the legislative history indicates that Congress intended that enhanced damages apply to “exceptional” circumstances,¹¹⁷ such as large-scale counterfeiters and repeat infringers.¹¹⁸ In light of this observation, the data presented in Parts III and IV reveals a pervasive practice of overclaiming among plaintiffs. My findings reveal a stark discrepancy between the demand for statutory damages by plaintiffs on the one hand, and the supply by courts on the other hand. Although 80 percent of plaintiffs in all disputes claim they suffered conduct that constitutes willful infringement, courts only consider enhanced damages to be justified in just 2 percent of cases where a plaintiff wins the case. This gap between the demand and supply of statutory damages undermines the legal credibility of the plaintiffs’ claims in copyright disputes.

Several surrounding factors cast doubt on the pervasive practice of alleging willful infringement.¹¹⁹ Also, claims of willfulness regularly surface in circumstances that make egregious infringement improbable.¹²⁰ This is especially true for disputes in low IP subject-matter areas, and situations where

112. See generally Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315 (2013) (setting out in detail the problems with the current copyright statute and the Register of Copyright’s vision for overhauling the statute and Copyright Office).

113. Samuelson et al., *supra* note 25, at 1176.

114. Press Release, House of Representatives Judiciary Comm., Chairman Goodlatte Announces Comprehensive Review of Copyright Law (Apr. 24, 2013), <http://judiciary.house.gov/press-release/chairmangooodlatteannouncescomprehensivereviewofcopyrightlaw> [<https://perma.cc/QPZA-NNDW>].

115. See *id.* (“There are concerns about statutory license and damage mechanisms.”).

116. 17 U.S.C. § 504(c) (2018).

117. See *supra* note 44.

118. Samuelson & Wheatland, *supra* note 24, at 458.

119. *Supra* Subpart III.E.

120. *Supra* Subpart III.E.

plausible fair use offenses are asserted, when harm is very minimal, or when there are no profits obtained from the infringement.

“Remedy overclaiming” likely serves strategic purposes. First, as revealed in the case law analysis conducted in Part IV,¹²¹ pleas of willful infringement are deployed by plaintiffs as a “bait-and-switch” tactic: by accusing the defendant of willful infringement, a plaintiff may appear more reasonable to the court and jury when subsequently requesting regular statutory damages and may hope to obtain a higher award within the regular statutory range.¹²² Second, by increasing the perceived risk to a defendant, claiming willful statutory awards might induce more generous settlement concessions than would otherwise be justified on the merits of the case and the likely outcome at trial. For instance, statutory awards are rare but not impossible when a defendant has a plausible fair use defense.¹²³ As a result, risk-averse defendants might simply prefer to avoid taking the chance of incurring enhanced statutory damages altogether.

Remedy overclaiming is problematic in several ways. Bad faith claims unduly waste the time and resources of courts and defendants. Additionally, the potential for statutory damage awards may induce a risk-averse defendant to settle claims that they otherwise would resist. This is especially true when one considers the upper limits of the statutory range, the legal uncertainty involved, and the media attention to outliers. In this regard, § 504 may have the inadvertent effect of expanding the scope of copyright,¹²⁴ and even worse, it may produce a chilling effect on creative processes and innovation.¹²⁵

The current abuse of the statutory damage framework can be addressed either by making remedy overclaiming more risky and costly to opportunistic plaintiffs or by reducing the risk of overclaiming to defendants. The remainder of this Part discusses both approaches.

121. *Supra* Subpart IV.C.

122. *See, e.g.*, *Microsoft Corp. v. Online Datalink Comput., Inc.*, No. 07cv01165 WQH (CAB), 2008 WL 1995209, at *4 (S.D. Cal. May 6, 2008) (“Microsoft’s requested statutory damages are reasonable given Microsoft has only requested the maximum non-willful statutory damages despite the alleged willful conduct.” (footnote omitted)); *see also supra* note 10.

123. *Cf. L.A. Times v. Free Republic*, No. 98-7840 MMM (AJWx), 2000 WL 565200, at *1 (C.D. Cal. Apr. 4, 2000); Stipulation for Entry of Amended Final Judgment, *L.A. Times v. Free Republic*, No. CV 98-7840 MMM (AJWx) (C.D. Cal. June 11, 2002) (cited in Samuelson & Wheatland, *supra* note 24, at 462–63).

124. *See Depoorter & Walker, supra* note 20 (examining enabling effect of automated enforcement practices on aggressive enforcement practices); Jennifer E. Rothman, *The Questionable Use of Custom in Intellectual Property*, 93 VA. L. REV. 1899 (2007) (describing influence of customs in copyright licensing and how courts point to nonconformity with industry practices as a basis for infringement).

125. *See Carrier, supra* note 63, at 950–58.

A. Increasing the Costs of Overclaiming

Overstating legal claims about harm is risky in most areas of litigation. Inflated statements about injury or harm suffered may be contested in dismissal, summary motions, and discovery proceedings.¹²⁶ Exaggerated, inflated damage claims may constitute a form of insurance fraud¹²⁷ or be sanctioned as frivolous litigation.¹²⁸

Not so in copyright law. The statutory damage framework removes all accountability that plaintiffs would otherwise face when overstating damage claims in other areas of litigation. To explain, Section 504(c) of the Copyright Act entirely relieves plaintiffs of the obligation to justify damage claims in reference to any actual injury or harm. At any time during copyright litigation, a plaintiff is free to request that the court set an award along the statutorily provided range. If the plaintiff can convince the court that the copyright infringement was willful, the award can reach \$150,000 for each infringed copyrighted work.¹²⁹ This disproportionate gulf between the damage claim and the actual harm makes statutory damages troubling.

Although Section 505 of the Copyright Act penalizes copyright plaintiffs when filing unwarranted and frivolous claims,¹³⁰ it is wholly ineffective in addressing the problem of remedy overclaiming. Attorney cost fee-shifting under Section 505 is available only to the prevailing party in litigation.¹³¹ As a result, fee-shifting is not available to defendants when plaintiffs grossly overstate the available remedy in disputes that are otherwise meritorious. If a plaintiff prevails in litigation, unreasonable statements about the remedy are sheltered from Section 505. Moreover, even if a plaintiff loses the case, fee-shifting is

126. See, e.g., *Lawrence v. Fed. Home Loan Mortg. Corp.*, 808 F.3d 670, 675 (5th Cir. 2015) (affirming grant of summary judgment for failure to prove damages).

127. See generally Robert W. Emerson, *Insurance Claims Fraud Problems and Remedies*, 46 U. MIAMI L. REV. 907, 928–30 (1992) (discussing legal pursuit of inflated damages claims as insurance fraud).

128. See, e.g., FED. R. CIV. P. 11 (district court may sanction attorneys or parties who submit pleadings for an improper purpose or that contain frivolous arguments or arguments that have no evidentiary support).

129. 17 U.S.C. § 504(c) (2018).

130. Section 505 states that a district court “may . . . award a reasonable attorney’s fee to the prevailing party.” 17 U.S.C. § 505 (2018). For instance, when a plaintiff is found to have pursued a claim in bad faith, when a claim is held objectively unreasonable, or when the losing party delayed a hearing on the merits in order to run up the opposing party’s costs, courts can order a plaintiff to pay the expense or attorney’s fees of the opposing party, or both. See 4 NIMMER & NIMMER, *supra* note 8, at § 14.10[D].

131. *Id.*

unlikely unless the substance of the infringement claim itself was based on an unreasonable legal position.¹³²

Willful statutory damages are a nearly universal feature of infringement notice letters and infringement claims.¹³³ A partial explanation for this common occurrence includes the lack of incentives to induce plaintiff honesty.

In order to use fee-shifting to discourage remedy overclaiming, Congress needs to amend Section 505. An overhaul of Section 505 would enable courts to sanction a prevailing party that made unreasonable damage claims, including the appeal to willfulness in circumstances where such a finding is extremely unlikely. One possible avenue would be to revise Section 505 so that courts are able to take away the benefit of fee-shifting for a prevailing party that overstates the case with regard to the applicable remedy.¹³⁴

In the recent *Kirtsaeng* decision,¹³⁵ the U.S. Supreme Court emphasized again that district courts should take into account “all other circumstances relevant to granting fees.”¹³⁶ In light of the findings of the study presented here, it might make sense that a district court’s “range of considerations beyond the reasonableness of litigating positions” includes the reasonableness of the plaintiff’s remedy claim.¹³⁷

B. Reducing the Benefits of Overclaiming

A second approach to remedy overclaiming in copyright law involves targeting statutory damage claims as a means to induce unwarranted settlement concessions. If opportunistic plaintiffs leverage the perceived risk of copyright litigation into generous settlements, reducing the indeterminacy associated with judicial applications of statutory damages can undermine this strategy.

The study of the case law in Part IV of this Article indicates that courts reserve willful infringements for only a small subset of cases. Nevertheless, the

132. The Third Circuit has listed the following nonexclusive factors that courts should consider in making awards of attorney’s fees to any prevailing party: “frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.” *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994) (quoting *Lieb v. Topstone Indus.*, 788 F.2d 151, 156 (1986)).

133. *Supra* Subpart III.B, Table 2.

134. Alternatively, a more stringent approach would be to amend Section 505 so that courts are able to award attorneys’ fees *against* a prevailing party if the latter engaged in egregious remedy overclaiming.

135. *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979 (2016).

136. *Id.* at 1982; *see also* Scott Graham, *Copyright Fee-Shifting Clarified*, NAT’L L.J., June 20, 2016, at 1.

137. *Kirtsaeng*, 136 S. Ct. at 1988.

risk associated with statutory damages may still be daunting to defendants. The mere possibility of a maximum statutory award of \$150,000 is frightening, especially when the infringement involves multiple works.¹³⁸

The findings of this study support reform measures that reduce the uncertainty and risk of disproportionate statutory awards: the adoption of guidelines and standards, efforts to eliminate outlier awards, and limiting the availability of statutory damages when evidence of actual harm is readily available.

1. Guidelines & Standards

Reducing the existing ambiguity and inconsistency in the case law would eliminate the main causes of remedy overclaiming. Greater doctrinal predictability would greatly reduce the perceived risk of overstated damage claims, while also making the direct fee-shifting reform options presented in Subpart V.A more attractive. One way to improve legal transparency is to formulate a set of standards that courts would use in determining when and how to apply statutory damages. Along these lines, a group of copyright academics recommend that Congress develop “guidelines to make statutory damages more consistent and equitable.”¹³⁹

In light of the insights presented in this Article, the following guidelines would have an inhibiting effect on overclaiming. A useful first step could be to reduce the statutory range. For instance, the minimum statutory award could be mandated in cases where the plaintiff suffers no lost profits, or when damages and profits are nominal. A second course of action could be to require that courts explain the motivation and calculation involved with every statutory award on the record. Third, in order to improve transparency and enhance consistency in judicial statutory award practices, it would be helpful to set up a

138. The latter issue presents itself acutely in the context of secondary copyright infringement for online intermediaries. See Brief of the National Venture Capital Ass’n as Amicus Curiae in Support of Respondents at 4–5, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (No. 04-480): “The mandatory mechanism of statutory damages for copyright infringement has crushing implications for multi-purpose technologies, where illicit use by third parties could quickly mount into millions or even billions of dollars.” For examples of the cumulative effect of maximum statutory damages for multiple awards, see Purewal, *supra* note 16, and Bryan Sullivan, *Getty Likely to Settle \$1B Suit by Photographer for Appropriating Her Public-Domain Work*, FORBES (Aug. 3, 2016, 12:37 PM), <http://www.forbes.com/sites/legalentertainment/2016/08/03/pay-up-getty-sends-trolling-letter-to-photographer-highsmith-demanding-money-for-her-own-photos/#71ab0acc2c2b>.

139. Samuelson et al., *supra* note 25, at 1196; *id.* at 1221 (“If statutory damages are to be retained in U.S. copyright law, guidelines for their just application should be developed.”); see also Samuelson & Wheatland, *supra* note 24, at 501–09.

central database that documents statutory award verdicts. Just like today's tort and settlement databases, a statutory award archive could be created to increase transparency.¹⁴⁰

2. Reducing Outliers

Overstated statutory damage claims can intimidate defendants especially against the background of the spectacular, outlier awards that have received media attention over the past decade. Recent examples include the six-figure statutory damages awards for noncommercial file sharing by a single mother and a graduate student, as applied in *Capitol Records Inc. v. Thomas-Rasset*¹⁴¹ and *Sony BMG v. Tenebaum*.¹⁴²

No matter how unlikely maximum willful awards might be, the very possibility of these awards is imposing. As mentioned previously, since statutory damages awards are applied “for all infringements involved in the action, with respect to any one work,”¹⁴³ willful statutory awards can really add up, especially in the digital era where multiple works are infringed at once, as is common practice in online piracy.

Congress might consider eliminating enhanced statutory damage awards altogether in future revisions of the Copyright Act. This would be the most straightforward approach to eliminating the anxiety-provoking effect of outlier damage awards. Such a measure might appear drastic but would actually align the United States with most civil and common law systems throughout the world. In most countries, knowledge or reckless disregard by the infringer is a threshold requirement to be entitled to any monetary recovery. In the absence of monetary relief, copyright holders still have injunctive remedies at their disposal.¹⁴⁴

140. See Depoorter, *supra* note 63, at 967–68 (documenting information pooling concerning tort verdicts and settlements).

141. 680 F. Supp. 2d 1045 (D. Minn. 2010), *vacated by* 692 F.3d 899 (8th Cir. 2012). The court eventually reduced the award on remand because “[t]he need for deterrence cannot justify a \$2 million verdict for stealing and illegally distributing 24 songs for the sole purpose of obtaining free music. Moreover, although Plaintiffs were not required to prove their actual damages, statutory damages must still bear *some* relation to actual damages.” *Id.* at 1048–49.

142. 660 F.3d 487, 490 (1st Cir. 2011).

143. 17 U.S.C. § 504(c)(1) (2018); *see supra* text accompanying notes 14–17.

144. See PAUL GOLDSTEIN & P. BERNT HUGENHOLTZ, INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE 417 (3d ed. 2013) (“Monetary relief in both civil law and common law jurisdictions generally adheres to the same pattern and, with the notable exception of the United States, to the requirement that the infringer’s knowledge, or negligent disregard, of the infringement be shown before damages can be recovered.”).

Alternatively, Congress could reduce the number of occasions where outlier awards are possible. This could be accomplished, for instance, by restricting awards to the minimum range in the case of noncommercial infringements where the defendant obtains no financial profits and the harm to the plaintiff is minimal. Additionally, taking a page from the punitive damages jurisprudence,¹⁴⁵ a maximum cap could be imposed on the ratio of actual harm to enhanced awards.

3. Evidentiary Defaults

Prior to the 1976 Copyright Act, some courts held that statutory damages were unavailable when the injury to the copyright holder and the profits of the infringers had been proven.¹⁴⁶ The 1976 Copyright Act made the statutory remedy available at the copyright owner's election regardless of evidentiary considerations. Plaintiffs now are no longer required by law to present any evidence proving actual damages or defendants' profits in support of their prayer for copyright statutory damages. Indeed, authorities agree that a plaintiff may recover statutory damages "regardless of the adequacy of the evidence offered as to his actual damages and the amount of defendant's profits, and even if he has intentionally declined to offer such evidence, although it was available."¹⁴⁷

For at least two reasons, this direction is questionable. First, by treating statutory damages to the copyright owner as a full-fledged alternative to actual damages—even when there is evidence of actual injury and profits—the Copyright Act inadvertently enables the opportunistic use of statutory damages. Specifically, the elective nature of statutory damages has a selection effect on the type of copyright infringement plaintiffs: If conditions are conducive to

145. After years of uncertainty, the U.S. Supreme Court ultimately set limits on the punitive-to-compensatory damage ratio in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). For an overview, see Samuelson & Wheatland, *supra* note 24, at 464–73.

146. See, e.g., *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 193 F.2d 162, 168 (1st Cir. 1951); *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354, 378 (9th Cir. 1947).

147. 4 NIMMER & NIMMER, *supra* note 8 § 14.04[A], at 14:66. "[T]he plaintiff in an infringement suit is not obliged to submit proof of damages and profits and *may choose to rely on the provision for minimum statutory damages.*" *Id.* (emphasis added) (citing H.R. REP. NO. 94-1476, at 161 (1976)). In fact, the legislative history indicates that this is consistent with the intention of Congress with respect to cases in which there is no proof of actual damages and profits. See *id.* But there is nothing that prevents courts from refusing to award more than the statutory minimum without an offering of proof that an amount in excess of the minimum is justified. See Samuelson & Wheatland, *supra* note 24, at 502 (providing recommendation that courts "[a]sk the parties to offer proof of damages and profits, or, in the alternative, to demonstrate why damages or profits are sufficiently difficult to prove that it is justifiable to offer no such proof").

obtaining an award above and beyond his or her actual harm, a plaintiff will almost invariably elect to pursue statutory damages. If our system of statutory damages seeks to minimize the evidentiary burden on a copyright plaintiff, why then does Section 504(c) come to the aid of copyright plaintiffs when evidence of the damage is readily available? While it may make sense to relieve a copyright holder from the burden of establishing injury or contesting the defendant's evidence, it is doubtful that the election of statutory damages can be justified when evidence of both damage and profiteering is available. In the process, Section 504(c) has created fertile ground for copyright trolls and other opportunistic enforcement business models. For these reasons, it would be worthwhile to revise Section 504(c) so that statutory damages are not available when the defendant has offered credible evidence of its profits and/or the plaintiff's damages. Removing the elective statutory option in these circumstances would effectively eliminate a subset of potentially opportunistic applications of the statutory damage framework.

CONCLUSION

Once upon a time, copyright enforcement was a relatively quiet backwater where copyright holders sparred with commercial pirates and bootleg recorders.¹⁴⁸ No longer. The digital revolution has brought enforcement to everyone's doorstep. Copyright enforcement now affects what we can watch online, what we create and share with others,¹⁴⁹ and even determines what technologies we are allowed to use.¹⁵⁰

As the stakes have increased, so has the intensity of enforcement. Faced with rampant online infringements, copyright holders aggressively protect their rights. Programmed bots scrape the Internet for infringing material, automated systems spew out cease-and-desist letters at dazzling rates,¹⁵¹ and, as documented above, copyright holders routinely employ enhanced damage claims to threaten and subdue alleged infringers into making settlement concessions.

148. See, e.g., CLINTON HEYLIN, *BOOTLEG: THE SECRET HISTORY OF THE OTHER RECORDING INDUSTRY* (St. Martin Griffin ed. 1996).

149. See, e.g., Daniel Gervais, *The Tangled Web of UGC: Making Copyright Sense of User-Generated Content*, 11 VAND. J. ENT. & TECH. L. 841 (2009) (describing copyright aspects of user generated content online).

150. See Carrier, *supra* note 63, at 953–55 (describing chilling effect of copyright enforcement on venture capital investments in content-related innovative technologies since *Napster*). For a concise history of copyright holders' enforcement actions against new technologies, see Mark A. Lemley, *Is the Sky Falling on the Content Industries?*, 9 J. ON TELECOMM. & HIGH TECH. L. 125 (2011) (documenting negative overreactions to new technologies).

151. See Perel & Elkin-Koren, *supra* note 21 (questioning lack of transparency involving algorithmic law enforcement technologies).

The findings of the docket study and case analysis above suggest that the statutory damage framework is a remedy in dire need of reform. Excesses by opportunistic plaintiffs must be curbed, all the while preserving the valid purpose of statutory damages in reducing litigation costs. The substantive and procedural proposals formulated in this Article are an important step in this direction.