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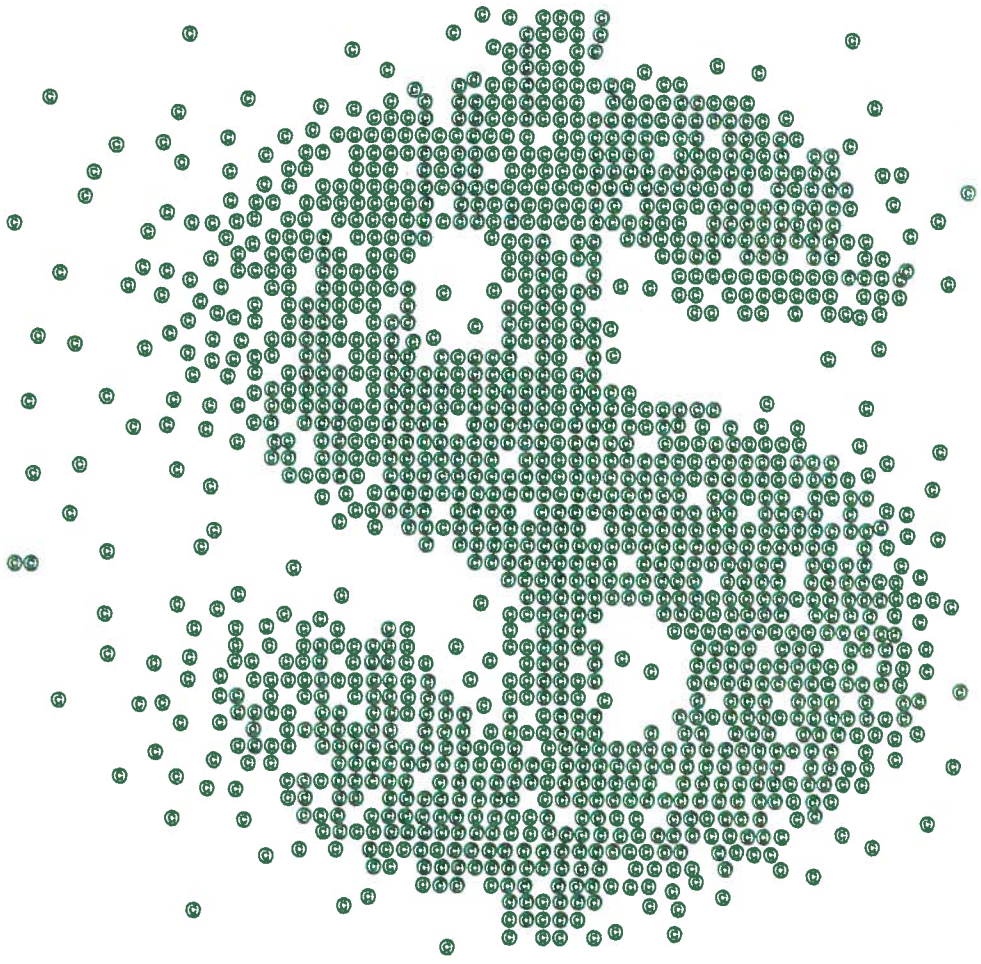
Legally Speaking
Statutory Damages As a Threat to Innovation

Considering the negative influence of U.S. statutory damage rules on technology innovation.



MANY *COMMUNICATIONS* READERS might have heard of the $1.92 million jury award against Jammie Thomas-Rasset for downloading 24 songs through a peer-to-peer file-sharing system. This was obviously way in excess of the actual harm to copyright markets caused by this downloading. However, U.S. law allows copyright owners to ask for statutory damages up to $150,000 per infringed work. This absurdly large award was more of a symbolic than an actual victory for the record labels who sued Thomas-Rasset, as she cannot possibly pay such a sum.

How much money should record labels be able to get against the makers of peer-to-peer file-sharing platforms who are found contributorily liable for infringements like Thomas-Rasset? Record label plaintiffs asked a federal judge for an award of $75 trillion in statutory damages against Limewire after the judge found it to be contributory infringer. (To put this number in perspective, consider that the gross domestic product of the U.S. economy is about $14 trillion.) Although the trial

judge considered the record labels' demand to be "absurd," she nonetheless was contemplating an award in the low billions.

Perhaps few will sympathize with Limewire or Thomas-Rasset. But we should care about the unbridled nature of statutory damages that put technology companies at risk whenever they introduce a product or service into the U.S. market that enables new ways to access or use copyrighted works. A recent empirical study asserts that copyright statutory damages poses a real threat to technology innovation in the U.S.[2] This column will explain why.

Why Statutory Damages?

Every country with a copyright law allows rights holders to sue infringers for compensation for harms caused by infringements (for example, a lost license fee or sales diverted to the defendant). Many countries also allow copyright owners to recover that part of the defendant's profits attributable to infringement.

In the U.S. and a distinct minority of other countries, copyright owners can ask for an award of statutory damages instead of lost profits or defendant profits from infringement. The original justification for U.S. statutory damages was to enable copyright owners to get some compensation when it was too difficult or expensive to prove harm resulting from infringement. A later justification was to enable copyright owners to vindicate their rights when litigation costs would swamp the amount that a copyright owner could recover for small-scale infringements. Statutory damages have also come to serve as a deterrent to infringements.

The normal range for U.S. statutory damage awards is between $750 and $30,000 per infringed work. U.S. courts have no discretion to award less than $750 per work unless the defendant can prove she was an innocent infringer. If the infringement is deemed willful, the upper bound is $150,000 per infringed work. Courts sometimes say a statutory damage award need not bear any relationship to injuries actual suffered.

When the U.S. Congress enacted the current copyright statute in 1976, it had no idea these rules would put technology developers at risk of outrageously large awards. Congress thought of "per work" awards would prevent excessive liability, not cause it.[3] However, digital technologies that enable users to access or use copyrighted works almost inevitably involve large numbers of works. Hence, the potential for statutory damage liability against their developers can be staggeringly large.

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MP3.com

Exemplifying the potential for excessive statutory damages awards against technology developers was a lawsuit that several record labels brought against MP3.com in the late 1990s. MP3.com bought 4,700 CDs of recorded music, ripped the music from the CDs, and loaded the music into a database for its new "beam-it" music service. The idea was to enable individuals who owned CDs to listen to their music through MP3.com anywhere in the world on any Internet-connected device.

The record labels concentrated their infringement case on the copies made by MP3.com in ripping the music from the CDs to create the database. MP3.com claimed the new service was lawful because it enabled its customers to make space-shift uses of their purchased music and it had only made intermediate copies of music it owned.

A trial judge ruled in favor of the labels and announced that unless MP3.com settled the case right away, he would award $25,000 per infringed CD in statutory damages, for a total of $118 million of liability. This was far in excess of the actual harm from ripping the music. Nor were there any profits to speak of, given that MP3.com had suspended the service once it was sued.

Faced with this calamitous impending award, MP3.com settled for $53.4 million. The judge made clear he intended for this very large award to deter other technology companies from succumbing to the temptation to offer similarly risky services.

Cablevision and Aereo

In 2006, Cablevision introduced a Remote Storage DVR service so that its subscribers could watch programs at a different time by accessing the programs on Cablevision servers. A consortium of television and filmmakers sued Cablevision for infringement because it had designed the system to make copies on its servers as part of the RS-DVR feature and because it transmitted the programs to subscribers, which the plaintiffs alleged were infringing public performances.

Cablevision pointed out that its RS-DVR technology enabled time-shift copying like that which the U.S. Supreme Court ruled was fair use in a 1984 case challenging the Sony Betamax video-tape recording (VTR) device. The plaintiffs tried to distinguish Cablevision's RS-DVR from the Sony VTR by pointing out that Cablevision time-shift copies were made on and transmitted through Cablevision servers.

Cablevision lost at the trial court level, but managed to win a non-infringement ruling at the appellate court level. Given the large number of time-shift copies of programs that could be made through its RS-DVR, Cablevision was at some risk of a very large statutory damage award for introducing this new service to its subscribers.

Aereo is a service that picks up broadcast signals and makes television programs available to its subscribers through Internet-connected devices. It offers day passes, but also monthly or yearly subscriptions for access to broadcast programs for viewing on the subscriber's computer or mobile devices.

ABC, among others, objected to this service. It sued Aereo for copyright infringement. Because Aereo makes a large number of television programs available, a statutory damage award against it would likely be very substantial. Although ABC was unable to get a preliminary injunction to stop Aereo

from streaming broadcast content to subscribers, it has appealed this loss. A California court has ruled in favor of broadcasters in a similar lawsuit.

Google

Google is at risk of an outrageously massive statutory damage award in a case charging it with infringement for scanning in-copyright books from major research library collections. The Authors Guild's class action lawsuit seeks statutory damages for the approximately 15 million in-copyright books alleged to have been infringed.

Although Google has a very plausible (and to me convincing) fair use defense for indexing book contents and making snippets available and although authors have suffered no actual damages from Google's use of in-copyright books, Google risks, by one estimate, as much as $3.6 trillion in statutory damages if it loses its fair use defense. Even capped at the statutory damage minimum, liability could be in the billions of dollars.

Google also faces billions in possible statutory damage liability in a still-pending lawsuit brought by Viacom against YouTube for clips of Viacom programs that were uploaded by fans to YouTube's servers.

Threats to Innovation

These examples illustrate one threat that copyright statutory damages pose to innovative technology developers. Executives must be prepared to bet the company's future on a technology design that copyright industry players may find threatening. Some who have taken the bet have found themselves sued individually and at risk of losing their houses and savings. Venture capitalists are often wary of investing in these kinds of risky technologies.[2]

But consider also the innovations that are not undertaken or abandoned because of the risk of high statutory damage awards. This is not just a hypothetical problem. Based on qualitative interviews with two dozen CEOs or founders of tech companies, Michael Carrier concludes that statutory damages have a chilling effect on the development of technologies that enable access to or new uses of digital content.[2]

An International View

The risk of excessive statutory damage awards against technology developers is, oddly enough, far lower outside the U.S. Less than 14% of countries in the world have statutory damage regimes.[1]

Although the U.S. copyright statute directs courts to craft statutory damage awards that are "just," the courts have failed to develop any guidelines to make them so.

Most of these nations are developing or emerging economies, such as Azerbaijan, Belarus, Bulgaria, Costa Rica, Dominican Republic, Kazakhstan, Kyrgyzstan, Liberia, Malaysia, Moldova, Ukraine, and Vietnam. These countries typically adopted statutory damages under pressure from the U.S. as part of bilateral free trade agreements.

Most developed countries with strong copyright industries, such as France, Germany, Japan, the Netherlands, the United Kingdom, and Sweden, do not have statutory damage regimes. Copyright plaintiffs in these countries can only seek compensation for harms suffered because of infringement and sometimes an accounting for defendant profits from infringement.

Of the relatively few developed countries that do have statutory damage regimes—which include Canada, Israel, and South Korea—there are limits on such awards not found in U.S. law. Canada, for instance, limits the maximum award for noncommercial infringements (for example, individual file sharing) to $5,000. Canadian copyright law also directs courts to consider the proportionality of a statutory damage award as compared with actual damages, with no more than a 10 times multiple over actual damages being awardable.[1]

Conclusion

Although the U.S. copyright statute directs courts to craft statutory damage awards that are "just," the courts have failed to develop any guidelines to make them so.[3] Legal commentators believe the U.S. statutory damage regime is in need of significant reform.[1,3] Even the Register of Copyrights has come out in favor of some reform of statutory damage rules.

There are two ways that U.S. statutory damage rules can be reformed. One is for Congress to enact some limits on these rules such as those adopted in Canada. The other is through the courts.[3] The U.S. Supreme Court could, for instance, have taken Thomas-Rasset's appeal of the excessive statutory damage award against her for file sharing. The Court has previously struck down punitive damage awards as violating the constitutional principle of due process of law. It has directed courts to take into account the relative magnitude of the wrong committed and the relative proportionality of a punitive award as compared with actual damages suffered.

Extending this approach to strike down excessive awards in copyright cases would make U.S. law more just and make it more consistent also with the copyright laws of other nations. It would also lessen the risk of exorbitant awards against technology developers.

It is certainly true that many innovative technologies are being developed in the U.S. Obviously some entrepreneurs are still willing to take risks. But that does not mean we should not worry about the potential harm to innovation posed by statutory damage rules. There would likely be even more innovation if these rules were reformed to make them more just.

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