

Copyright Law

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Topics:

- Remedies: Threats and Consequences
- Ask For What You Wish For
- Be Careful What You Wish For

Remedies for Copyright Infringement

Any / all parties liable for infringement face (and might be threatened with):

- Equitable remedies: Injunctions (permanent and preliminary; temporary restraining orders).
- “Legal” remedies: Actual damages.
- “Statutory” damages, as provided in the Copyright Act.
- “Other” relief (seizure, impoundment, destruction; attorneys’ fees).

The Copyright Claims Board (CCB).

Settling copyright cases.

Automated enforcement.

Criminal penalties.



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Injunctions and other equitable relief

- **Section 502:** “(a) Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28 [which involves claims against the U.S. government as a defendant], grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.”
- Claims for equitable relief in IP cases are subject to general standards governing equitable relief in all civil cases, rather than special standards developed for IP cases (such as presumption of irreparable injury). See *eBay, Inc. v. MercExchange* (U.S. 2006) (a patent case, since extended to copyright cases by lower courts). Plaintiff must show *inadequacy of remedies at law* (i.e., insufficiency of an award of damages to make the plaintiff whole).
- Equitable claims are subject to equitable defenses, including *unclean hands*, and *laches* (prejudicial delay) – although in IP cases, the *laches* defense may not bar a claim filed long after the three-year statute of limitations (which governs claims for damages), if the infringement is continuing. See *Petrella v. MGM, Inc.* (U.S. 2014).
- Trial judges have broad discretion to issue equitable orders (permanent and preliminary injunctions, and TROs).
- Practice tip: Ask for what you want, and want what you ask for! The language of injunctions and TROs is often grounded in the specific text proposed by a plaintiff; sometimes it is based on text negotiated among the parties.

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Actual damages

- **Section 504:** “(a) In General.—Except as otherwise provided by this title, an infringer of copyright is liable for either— (1) the copyright owner’s actual damages and any additional profits of the infringer, as provided by subsection (b); **or** (2) statutory damages, as provided by subsection (c). (b) **Actual Damages and Profits.**— The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer’s profits, the copyright owner is required to present proof only of the infringer’s gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.”
- Electing actual v statutory damages.
- Proving “what the defendant made (profits)” and “what the plaintiff lost (lost sales, lost licensing revenue” – but no double recovery.
- No “punitive” damages.
- Burden shifting mechanisms lead to battles of financial experts: industry experts, company-specific experts.

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Statutory damages (the big one!)

- **Section 504: “(c)—(1)** Except as provided by clause (2) of this subsection, the **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**. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work. **(2)** In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed **willfully**, the **court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000**. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200.”
- Timing of registration matters (see Section 412(2))!
- Election permitted regardless of whether plaintiff can in fact show presence or absence of actual damages.
- Per work. What is “a work”?
- Jury trial may be requested.
- What is “willful” infringement?

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Other relief

- **Section 503:** “**(a)(1)** At any time while an action under this title is pending, the court may order the **impounding**, on such terms as it may deem reasonable—**(A)** of all **copies or phonorecords** claimed to have been made or used in violation of the exclusive right of the copyright owner; **(B)** of all **plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced**; and **(C)** of records documenting the manufacture, sale, or receipt of things involved in any such violation, provided that any records seized under this subparagraph shall be taken into the custody of the court.... **(b)** As part of a final judgment or decree, the court may order the **destruction or other reasonable disposition** of all copies or phonorecords found to have been made or used in violation of the copyright owner’s exclusive rights, and of all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced.”
- Timing of registration matters (see Section 412(2))!
- Prejudgment!
- Know your federal marshals.
- Customs and Border Protection. You may be able to go along!
- **Attorneys’ fees in the discretion of the court (Section 505)** (both prevailing plaintiffs and prevailing defendants may be eligible; courts look to a variety of factors; see *Kirtsaeng v. John Wiley & Sons* (U.S. 2016))

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NEW! The Copyright Claims Board (CCB)

- Authorized by the CASE Act, passed in December 2020. “Copyright Alternative in Small-Claims Enforcement Act”
- Three-member tribunal of “Copyright Claims Officers” (CCOs) in the Copyright Office that will provide an [allegedly] “efficient and user-friendly option to resolve certain copyright disputes that involve less than \$30,000 in damages (max of \$15,000 per work).
- Defendants can opt out.
- Proceedings will be largely in writing, without live testimony.
- Limited rights to appeal.
- **For now:** see <https://www.copyright.gov/about/small-claims/>



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Settling copyright cases

- Litigators become (and/or partner with) business lawyers.
- Issues:
 - Timing and leverage.
 - Does the defendant continue to use the work?
 - How does the defendant access the work (IT / network / source v object code / master copy?).
 - Putting a price on things: existing v non-existent markets.
 - Paid-up license v continuing royalty.
 - Credit / attribution (as in music cases).
- Employment / consulting for the creatives.
- Corporate transactions as solutions: buy the company v license the work.
- Representations, warranties, and indemnities (reps and warranties).
- The Streisand Effect.



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- The notice and takedown system under Section 512
- YouTube and Content ID
- Copyright strikes

Google says:

“How Content ID works

Copyright owners can use a system called Content ID to easily identify and manage their content on YouTube. Videos uploaded to YouTube are scanned against a database of files that have been submitted to us by content owners.

Copyright owners get to decide what happens when content in a video on YouTube matches a work they own. When this happens, the video gets a Content ID claim.”

NFTs, Blockchain, and Smart Contracts: Why They Don’t Work To “Guarantee” © Protection Despite Many Promises, Hopes, and Dreams

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- **Section 506:** “(a)—(1) In general.—Any person who **willfully** infringes a copyright shall be punished as provided under section 2319 of title 18, if the infringement was committed—(A) for purposes of **commercial advantage or private financial gain**; (B) by the reproduction or distribution, including by electronic means, during any 180–day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a **total retail value of more than \$1,000**; or (C) by the distribution of a work being prepared for commercial distribution, **by making it available on a computer network accessible to members of the public**, if such person knew or should have known that the work was intended for commercial distribution.
- Directed to large scale piracy, but:
- Get the file sharers!
- Scare (“deter”) others.
- Sentencing: Handled under 18 U.S.C. Section 2319 (prison sentences of between 1 year and 10 years per offense)
- **Criminal © was added in 1897. There is no criminal patent law. There is criminal trademark law. Why the difference?**



MINECRAFT

END CITY

