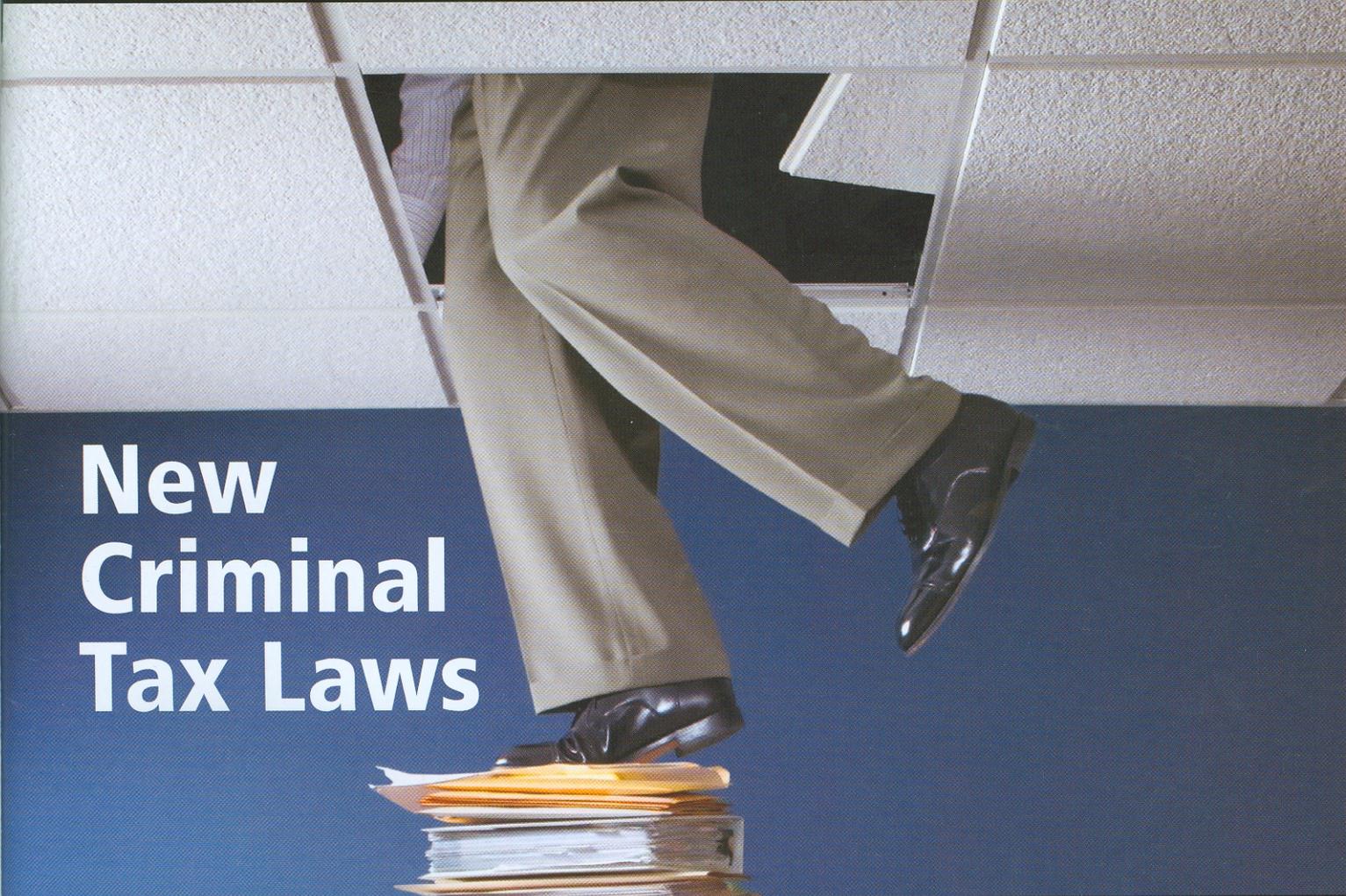


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Statutory Damages in Copyright Litigation

By Andrew Berger

Statutory damages, although a potent weapon in copyright litigation, are often a trap for the unwary.¹ The Copyright Act of 1976 (the "Act") limits the availability of statutory damages, the number of grants of statutory damages to be awarded and the parties against whom those grants will be individually assessed.² The Act also impacts on the availability of actual damages when the copyright owner elects statutory damages before the entry of final judgment.³ Further, the Act limits the range of statutory damages to be awarded depending on whether the infringement was innocent, non-willful or willful.⁴

Litigants on both sides of the fence sometimes misunderstand these limits. Copyright owners mistakenly seek statutory damages for post-registration infringements of a work that continue the pattern of pre-registration infringement of the same work.⁵ Where multiple infringers acting in concert infringe one work multiple times, some copyright owners wrongly believe they are entitled to multiple awards of statutory damages individually assessed against each infringer.⁶

Further, defendants sometimes incorrectly assert that the unauthorized infringing compilations they create from a plaintiff's separate, copyrightable works are subject to only one award of statutory damages.⁷ Also, copyright owners who elect to receive an award of statutory damages mistakenly believe they can still raise issues on appeal regarding actual damages.⁸ Finally, parties are sometimes uncertain where in the spectrum from innocence to willfulness infringing conduct falls and the statutory damages that will be assessed for that conduct.⁹

This article attempts to clear up these misunderstandings and explains the uncertainties so that all parties may better assess the statutory damages that may be awarded in copyright litigation.

Post-Registration Infringing Conduct That Commenced Pre-Registration

Title 17, § 412(2) of the U.S.C., with one exception not relevant here, prohibits recovery of statutory damages for infringements of a work that commence before the work is registered.¹⁰ But this section is silent about whether a copyright owner may recover statutory damages for infringements of that work that continue after registration. Courts usually say no. The majority hold that the copyright owner is not entitled to statutory damages for the continuation of post-registration infringements that commenced pre-registration.¹¹ Copyright owners who attempt to avoid this result argue that the post-registration infringements are new, different and separate and thus are wholly divorced from the pattern of pre-registration infringements of the same work.

ANDREW BERGER (berger@thshlaw.com) is counsel to the New York law firm of Tannenbaum Helpert Syracuse & Hirschtritt LLP. He graduated from Cornell University and Cornell Law School. A shortened version of this article appeared in 78 *BNA Patent, Trademark & Copyright Journal* at p. 391, published July 24, 2009. That version is also posted on the ABA Section of Litigation Web site at <http://www.abanet.org/litigation/committees/intellectual/articles.html>.

This argument usually fails. Courts interpret the words "infringement . . . commenced after the first publication" in § 412(2) to mean "the first act in a series of acts."¹² Further, *Mason v. Montgomery Data, Inc.*¹³ adopted a bright-line rule that most circuits have followed. *Mason* prohibited claims for statutory damages for a defendant's post-registration infringements of a work "if the same defendant commenced an infringement of the same work prior to registration."¹⁴

Mason relied on the legislative history of § 412, which revealed "Congress' intent that statutory damages be denied not only for the particular infringement that a defendant commenced before registration, but for all of that defendant's infringements of a work if one of those infringements commenced prior to registration."¹⁵ The purpose of § 412 was to encourage early registration and "[t]he threat of such a denial [of statutory damages] would hardly provide a significant motivation to register early if the owner of the work could obtain those remedies for acts of infringement taking place after a belated registration."¹⁶

Since *Mason*, courts bar statutory damages for post-registration infringements even if they differ from the infringements pre-registration. In *Shady Records, Inc. v. Source Enterprise, Inc.*, the district court noted that "[t]he clear rule announced in *Mason* which is easily applied to preclude statutory damages . . . [is] where any infringement occurs before the effective date of the work's copyright registration is preferable."¹⁷

Nimmer on Copyright suggests that a plaintiff might be able to recover statutory damages if a "qualitative new infringement occurs after registration" along with "a large lapse of time between the first bout of infringement and its post-registration successor."¹⁸ But no case has been found that has adopted this view.

One Award Against Those Who Act in Concert

Another misconception concerns the number of awards of statutory damages to which a copyright owner may be entitled. Copyright owners often believe they merit multiple awards of statutory damages for multiple infringements by multiple parties acting in concert.¹⁹ But the Act limits a copyright owner to one grant of statutory damages in that circumstance.

The section provides that a copyright owner "may elect . . . to recover . . . 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 or severally."²⁰

The copyright owner is restricted to one award of statutory damages regardless of the number of acts of infringement, whether they are separate, isolated or occurring over many years.²¹ As *Goldstein* aptly states, "an infringer will be liable for a single statutory award

whether it makes one copy of a copyrighted painting or one thousand and whether it performs the copyrighted work once or nightly over a period of months."²²

The copyright owner remains restricted to one award of statutory damages against multiple infringers where they act in concert and are therefore jointly and severally liable.²³ Section 504(c)(1) relies on the common law to define joint or several liability. Those principles do not depend on whether the defendants engaged in the same act or exhibited the same level of willfulness.²⁴ The Act "is unconcerned about gradations of blameworthiness."²⁵

Multiple Awards for Unauthorized Compilations of Separately Copyrighted Works

Confusion also surrounds the limitation on the number of statutory damages that may be assessed for infringement of a compilation or a derivative work. The limitation is contained in the last sentence of 17 U.S.C. § 504(c)(1), which provides that "all the parts of a compilation or derivative work constitute one work."²⁶

The confusion arises from the "facial" ambiguity in this limitation.²⁷ It is unclear whether the phrase "compilation or derivative work" refers to the copyrighted work that the plaintiff creates, which is then infringed, or the infringing work the defendant creates from multiple, separately copyrightable works of the plaintiff.

Most courts assume, without extensive discussion, that the one-work limitation refers to a plaintiff-created compilation or derivative work.²⁸ Thus, where record labels made CDs containing multiple copyrighted songs that the defendant infringed, courts awarded the labels one grant of statutory damages.²⁹ Where the defendant infringed a plaintiff-crafted compilation of clip-art images, a court reached the same conclusion.³⁰ Similarly, where the defendant copied 122 photographs from a catalogue that the plaintiff put together, the plaintiff was limited to one grant of statutory damages.³¹

But in *Greenberg v. National Geographic Society*, the district court found that the "compilation" referenced in § 504(c)(1) was the infringing work the defendant created from multiple, separately copyrightable works of the plaintiff. There, the defendant took 64 of the plaintiff's copyrighted photographs and published them in four magazine compilations the defendant created. The court nevertheless limited *Greenberg* to only four awards of statutory damages.³²

WB Music Corp. v. RTV Communication Group, Inc. has now resolved the ambiguity, at least in the Second Circuit. The court found that the phrase "compilation or derivative work" in the last sentence of § 504(c)(1) refers to a work created by a plaintiff.³³ Thus, the court held that the one-work limitation is inapplicable if the defendant creates the infringing compilation or unauthorized derivative work from multiple, separately copyrighted works of the plaintiff.³⁴

There, the defendant copied 13 of the plaintiff's copyrighted songs onto seven CDs. The district court found that the plaintiff was entitled to seven awards of statutory damages.³⁵

Confusion also exists about the amount of statutory damages to be awarded.

The Second Circuit reversed, holding that the limitation is triggered only by an infringement of a plaintiff-created compilation or derivative work. The court stated, "[T]here is no evidence that any of [the plaintiff's] separately copyrighted works [that were infringed] were included in a compilation authorized by the copyright owners. Rather, the [infringing] compilations were created by the defendants."³⁶ Accordingly, the court held that the plaintiff was entitled to an award of statutory damages for each of the 13 songs that the defendant infringed.³⁷

Election Moots All Issues Regarding Actual Damages

There is another restriction that sometimes confuses copyright owners: the impact on actual damages on appeal arising from an election to receive statutory damages.

Section 504(c) permits a copyright owner at any time before final judgment is entered to choose between two types of damages: actual damages or statutory damages. This means that a copyright owner may ask a jury to award actual damages and, if the copyright owner is dissatisfied with the award, then ask the court to assess statutory damages.³⁸ But once the election is made to accept statutory damages, copyright owners often do not realize they have forfeited the right to seek actual damages on appeal. As *Jordan v. Time, Inc.* holds, there are no two "bites of the apple."³⁹

In *Jordan*, a jury awarded the plaintiff actual damages of \$5,000. Before the entry of final judgment, the plaintiff requested that the court, pursuant to § 504(c), assess statutory damages, and the plaintiff was awarded \$5,500. The Eleventh Circuit dismissed the appeal of the actual damage award, stating, "[a] plaintiff is precluded from electing statutory damages and then appealing the award of actual damages," adding "once a timely election is made to receive statutory damages all questions regarding actual and other damages are rendered moot."⁴⁰

Areas of Uncertainty

Finally, parties are sometimes uncertain whether infringing conduct was innocent, non-willful or willful and the amount of statutory damages to be assessed.⁴¹

The uncertainty begins with the absence of a definition of willfulness in the Act. Courts hold that a defendant was willful if it knew its conduct was infringing or acted with reckless disregard for the copyright owner's rights,⁴² but it is often difficult to predict whether infringing conduct falls within that definition.⁴³

Here are a few guidelines that may assist in determining willfulness: Willfulness will be found where a defendant continues infringement in defiance of a court order.⁴⁴ Willfulness may be found where a defendant continues to infringe after being warned to stop that conduct.⁴⁵ But a defendant who has been warned may avoid a willfulness finding by demonstrating that it reasonably and in good faith believed its continuing conduct was not infringing.⁴⁶ Further, the good-faith belief may be evidenced by an unsuccessful fair use defense if that belief was objectively reasonable.⁴⁷

Absence of Statutory Guidelines

Whether non-willful or willful conduct is found, confusion also exists about the amount of statutory damages to be awarded. There are no guidelines in the Act assisting courts in fixing statutory damages. There is only one statutory requirement: The award must be "just."⁴⁸

Wide Discretion

Courts have wide discretion to weigh the factors they examine in setting statutory damages. These factors include: (1) any revenues the plaintiff may have lost as a result of the infringement; (2) the expenses saved or the profits gained by the defendant in connection with the infringement; (3) the value or nature of the plaintiff's copyrights; (4) the need to deter the defendant and others similarly situated from committing future infringements; (5) the defendant's financial situation; (6) the defendant's state of mind; and (7) in the case of willful infringement, the need to punish the defendant.⁴⁹

Courts may give whatever weight they wish to each factor and may consider all, some or none of them.⁵⁰ For example, some courts focus on the actual damages the plaintiff suffered as a result of the infringement. These courts state "statutory damages should bear some relation to actual damages suffered"⁵¹ and set statutory damages at a multiple of actual damages.⁵²

Other courts decline to base statutory damages on a multiplier of actual damages. For example, in *UMG Recordings, Inc. v. MP3.com, Inc.*, the court stated that "any attempt to reduce this determination [of the amount of statutory damages] to some kind of mathematical formula or equation is spurious."⁵³ Although *UMG* considered a number of factors in assessing the amount of statutory damages to be awarded, that case calibrated statutory damages primarily to deter future infringing conduct. The court stated that "[s]tatutory damages . . . [of] approximately \$118,000,000" would be warranted

because “the potential for huge profits in the rapidly expanding world of the Internet is the lure that tempted . . . MP3.com to break the law and that will also tempt others to do so if too low a level is set for the statutory damages in this case.”⁵⁴ The court in *Lowry’s Reports, Inc. v. Legg Mason, Inc.* affirmed the jury’s statutory damage award of \$19.7 million, even though the defendant argued “the actual harm” from the infringements was “\$59,000.”⁵⁵

Because of the discretion courts have in weighing the factors they examine in setting statutory damages, cases involving similar infringing conduct may result in different awards.⁵⁶ Ironically, when the same case is later retried, the award may be even greater, as evidenced by *Capital Records, Inc. v. Thomas*.⁵⁷ *Capital Records* also highlights the debate that continues whether statutory damages should compensate or deter.

In *Capital Records*, record companies sued the defendant for making 24 songs in her Kazaa shared folder available to others to download. In the first trial, the jury assessed statutory damages of \$9,250 per song for a total of \$220,000.⁵⁸ The trial judge vacated the verdict finding it “wholly disproportionate to the damages suffered by Plaintiffs.”⁵⁹ The court stated that, although the defendant “infringed . . . 24 songs – the equivalent of approximately 3 CDs, costing less than \$54, . . . the total damages awarded is more than five hundred times the cost of buying 24 separate CDs and more than four thousand times the cost of three CDs,”⁶⁰ noting,

[w]hile the Copyright Act was intended to permit statutory damages that are larger than the simple cost of the infringed works in order to make infringing a far less attractive alternative than legitimately purchasing the songs, surely damages that are more than one hundred times the cost of the works would serve as a sufficient deterrent.⁶¹

On remand, the jury increased the award to \$80,000 per song for a total of \$1.92 million or more than eight times the damages awarded in the first trial.⁶² The award will likely spark a due process challenge because it is so far removed from any possible damage the plaintiff suffered from the infringement. The award also highlights the difficulties parties face when attempting to estimate statutory damages.⁶³

With such potentially high stakes, understanding these limitations and uncertainties will assist all parties in prosecuting or defending a copyright case involving statutory damages. ■

1. See *Lowry’s Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455 (D. Md. 2004) (jury award of statutory damages of \$19.7 million); *Columbia Pictures Television, Inc. v. Krypton Broadcasting, Inc.*, 259 F.3d 1186, 1189 (9th Cir. 2001) (statutory damages award of more than \$31 million).

2. 17 U.S.C. § 412(2) limits the availability of statutory damages. This section requires registration of the work before it is infringed or within three months after its initial publication. 17 U.S.C. § 504(c)(1) provides for one grant of statutory damages where multiple infringers acting in concert infringe one work

multiple times. That last sentence of this section also provides for one grant of statutory damages where a plaintiff-created compilation or derivative work is infringed by defendant.

3. Courts construing 17 U.S.C. § 504(c)(1) hold that, once plaintiff elects to receive statutory damages at any time before the entry of final judgment, all appellate issues regarding actual damages are mooted. See, e.g., *Jordan v. Time, Inc.*, 111 F.3d 102, 104 (11th Cir. 1997).

4. 17 U.S.C. § 504(c)(1) provides for a range of statutory damages for ordinary non-willful infringement of between \$750 and \$30,000. Section 504(c)(2) provides an enhanced range for willful infringement of between \$30,000 and \$150,000 per work infringed. Finally, this section states that statutory damages may be reduced to not less than \$200 for innocent infringement.

5. See, e.g., *Silberman v. Innovative Luggage, Inc.*, 2003 WL 1787123, *8 (S.D.N.Y. 2003) (“[A]s long as infringement commenced before the date of registration, statutory damages . . . are barred even if infringement continued after the date of registration.”) (emphasis in original); *Fournier v. Erickson*, 202 F. Supp. 2d 290, 298 (S.D.N.Y. 2002) (“Each subsequent appearance [of plaintiff’s photograph after its registration] was part of the continuous, ongoing advertising campaign. Because the alleged infringement commenced before the effective date of his registration, Fournier is not entitled to statutory damages.”).

6. See *Walt Disney Co. v. Powell*, 897 F.2d 565, 569 (D.C. Cir. 1980) (“Both the text of the Copyright Act and its legislative history make clear that statutory damages are to be calculated according to the number of works infringed, not the number of infringements.”).

7. See *WB Music Corp. v. RTV Comm’n Group, Inc.*, 2004 WL 964247 (S.D.N.Y. 2004), *rev’d*, 445 F.3d 538 (2d Cir. 2006) (awarding statutory damages based on the number of defendant-created compilations).

8. See *supra* note 3.

9. For instance, *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 855 F. Supp. 905 (E.D. Mich. 1994), *rev’d en banc*, 99 F.3d 1381, 1392 (6th Cir. 1996), found defendant liable for willful infringement of six works and assessed it \$5,000 for each work for a total of \$30,000. An *en banc* appellate court reversed the award as excessive finding no willfulness.

10. 17 U.S.C. § 412 (2) sets forth the exception, which applies to published works only. The exception permits an award of statutory damages for a post-infringement registration of a published work if the work is registered within three months of its first publication.

11. See cases *supra* note 4; see also *Johnson v. Univ. of Va.*, 606 F. Supp. 321, 324–25 (W.D. Va. 1985) (“[T]he alleged post-registration infringements involve only photographs which were first used by defendants prior to registration. Consequently, those alleged post-registration infringements ‘commenced’ prior to registration, and thus pursuant to § 412 they provide no basis for allowing statutory damages.”).

12. See *Dyer v. Napier*, 2006 WL 680551, *3–4 (D. Ariz. Mar. 16, 2006). See also *Troll Co. v. Uneeda Doll Co.*, 483 F.3d 150, 158 (2d Cir. 2007) (“[A] plaintiff may not recover statutory damages and attorney’s fees for infringement occurring after registration if that infringement is part of an ongoing series of infringing acts and the first act occurred before registration.”).

13. 967 F.2d 135 (5th Cir. 1992). Cases following *Mason’s* bright-line rule include *Derek Andrew, Inc. v. Poof Apparel Corp.*, 528 F.3d 696, 701 (9th Cir. 2008); *Bouchat v. Bon-Ton Dep’t Stores, Inc.*, 506 F.3d 315, 330 (4th Cir. 2007); *Qualey v. Caring Ctr. of Slidell*, 942 F. Supp. 1074, 1076–77 (E.D. La. 1996).

14. 967 F.2d at 144.

15. *Id.* at 143 (emphasis in original).

16. *Id.* at 144.

17. 2004 U.S. Dist. LEXIS 26143, *71 (S.D.N.Y. Jan. 3, 2005). See also *Whelan Assoc., Inc. v. Jaslow Dental Lab., Inc.*, 609 F. Supp. 1325, 1331 (E.D. Pa. 1985) (holding that post-registration infringing software that was “different” because it contained “improvements” was found to be part of a “series of infringements” that began with the pre-registration software).

18. Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 7.16(C)(1) at 7-181 (2008).

19. Sometimes courts make the same mistake. See *Antenna Tel. v. Aegean Video, Inc.*, 1996 WL 298252, *11 (E.D.N.Y. 1996), (“Since the prevailing plaintiff is entitled to a separate statutory damage award for each infringement committed by the Defendants, the court must determine the total number of infringements and their distribution between the parties.”).

20. 17 U.S.C. § 504(c)(1) (emphasis added).
21. H.R. Rep. No. 94-1476 at 162 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5778: "A single infringer of a single work is liable for a single amount . . . no matter how many acts of infringement are involved in the action and regardless of whether the acts were separate, isolated, or occurred in a related series."
22. Paul Goldstein, Goldstein on Copyright § 14.2.2.2 at 14:63 (2009). It makes no difference if a defendant infringes two separate rights of the copyright owner such as the right to reproduce and the right to distribute. The copyright owner is still entitled to one grant of statutory damage because only one work has been infringed. *Id.*
23. See, e.g., *Smith v. NBC Universal*, 2008 WL 612696, *2 (S.D.N.Y. Feb. 28, 2008).
24. See *Fitzgerald Pub. Co. v. Baylor Pub. Co.*, 807 F.2d 1110, 1117 (2d Cir. 1986) ("Consideration of these factors in setting the statutory damage award sometimes results – on account of their several and joint liability – in a less culpable defendant being held liable in an amount greater than otherwise would be the case had it appeared in the action alone. This possibility is not a fatal obstacle. . . . [T]he relevant faults of the defendants are irrelevant.").
25. *Id.* On remand in that case, the district court awarded statutory damages jointly and severally against two willful defendants even though one had victimized the other. See 670 F. Supp. 1133 (S.D.N.Y. 1987), *aff'd mem.*, 862 F.2d 304 (2d Cir. 1988).
26. The Act at 17 U.S.C. § 101 defines a compilation as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term 'compilation' includes collective works." That section also defines a collective work to include one "in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole."
27. See *WB Music Corp. v. RTV Comm'n Group, Inc.*, 445 F.3d 538, 540 (2d Cir. 2006).
28. See, e.g., *Eastern Am. Trio Prods., Inc. v. Tang Elec. Corp.*, 97 F. Supp.2d 395, 419 (S.D.N.Y. 2000).
29. See, e.g., *UMG Recordings, Inc. v. MP3.com, Inc.*, 109 F. Supp. 2d 223 (S.D.N.Y. 2000); *Country Roads Music, Inc. v. MP3.com*, 279 F. Supp. 2d 325 (S.D.N.Y. 2003).
30. *Xoom, Inc. v. Imageline, Inc.*, 323 F.3d 279 (4th Cir. 2003).
31. *Stokes Seeds, Ltd. v. Park Seed Co., Inc.*, 783 F. Supp. 104, 107 (W.D.N.Y. 1991).
32. 2003 WL 25841579 (S.D.Fla. Feb. 18, 2003).
33. *WB Music*, 445 F.3d at 540–41.
34. *Id.* If a defendant were exposed to only one grant of statutory damages, defendant would have the perverse incentive to bundle an unlimited number of plaintiff's separately copyrighted works together into one unauthorized compilation.
35. 2004 WL 964247, *1 (S.D.N.Y. May 5, 2004).
36. 445 F.3d at 541.
37. *Id.*
38. See, e.g., *Branch v. Ogilvy & Mather, Inc.*, 772 F. Supp. 1359, 1364 (S.D.N.Y. 1991) (jury awarded plaintiff nominal damages of \$1; plaintiff asked the court to award statutory damages and received an award of \$10,000).
39. *Jordan v. Time, Inc.*, 111 F.3d 102, 104 (11th Cir. 1997); *Twin Peaks Prods., Inc. v. Publications Intl.*, 996 F.2d 1366, 1382 (2d Cir. 1993).
40. *Id.*
41. An innocent infringer is one who is not aware and has no reason to believe its acts constitute infringement. See *Los Angeles News Serv. v. Reuters Television Int'l Ltd.*, 149 F.3d 987, 995 (9th Cir. 1998); *Eastern Am. v. Tang*, 97 F. Supp. 2d at 419. A defendant is rarely able to establish innocence; and the presence of a copyright notice on the work prevents a defendant from claiming innocence. See 17 U.S.C. § 401(d); *Matthew Bender & Co. v. West Pub. Co.*, 240 F.3d 116, 123 (2d Cir. 2001).
42. See *Island Software & Computer Serv., Inc. v. Microsoft Corp.*, 413 F.3d 257, 263 (2d Cir. 2005).
43. See *supra* note 9.
44. See *Kepner-Tregoe, Inc. v. Vroom*, 186 F.3d 283, 288–89 (2d Cir.1999) (maximum statutory damages awarded where defendant "chose to ignore the injunction [prohibiting continuing use of the infringing program]"; *Nat'l Football League v. PrimeTime 24 Joint Venture*, 131 F. Supp. 2d 458, 479 (S.D.N.Y. 2001) (Maximum statutory damages awarded where defendant continued its conduct after district court granted summary judgment finding that conduct infringing).
45. *Microsoft v. Gonzales*, 2007 WL 2066363, *7 (D.N.J. July 13, 2007) ("Willfulness may be inferred if a defendant continued infringing behavior after receiving notice.").
46. *Branch v. Ogilvy & Mather, Inc.*, 772 F. Supp. 1359, 1364 (S.D.N.Y. 1991); *Wenaha Music Co. v. Irish Wheel, Inc.*, 1994 WL 661028, *1 (W.D.N.Y. Nov. 16, 1994) ("[I]t does not follow that the defendants' subsequent failure to cease the alleged infringing acts constitutes willfulness. . . . [D]efendants' actions may be carried out in reliance on advice of counsel.").
47. See *Princeton Univ. Press v. Michigan Document Servs., Inc.*, 99 F.3d 1381, 1392 (6th Cir. 1996) ("[W]e cannot say that the defendants' belief that their copying constituted fair use was so unreasonable as to bespeak willfulness."); but see *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1530–33, 1544 (S.D.N.Y. 1991) (unsuccessful fair use defense did not negate willfulness).
48. 17 U.S.C. § 504(c)(1).
49. See *Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co.*, 74 F.3d 488, 496 (4th Cir. 1996); *Read Corp. v. Portec, Inc.*, 970 F.2d 816, 826–27 (Fed. Cir. 1992), abrogated on other grounds, *Markham v. Westview Inst., Inc.*, 52 F.3d 967 (Fed. Cir. 1995); *Fitzgerald Publ'g. v. Baylor*, 807 F.2d at 1117; *Getaped.Com, Inc. v. Cangemi*, 188 F. Supp. 2d 398, 403 (S.D.N.Y. 2002); *Stevens v. Aeonian Press, Inc.*, 64 U.S.P.Q.2d 1920, 1923, 2002 WL 31387224, *3; *Basic Books v. Kinko's*, 758 F. Supp. at 1545; see also cases collected at *Model Jury Instructions in Copyright, Trademark and Trade Dress Litigation* (ABA 2008) at ¶ 1.7.8 at p. 85.
50. See *Nintendo of Am., Inc. v. Dragon Pac. Int'l*, 40 F.3d 1007, 1010 (9th Cir. 1994) ("The district court has wide discretion in setting the amount of statutory damages under the Copyright Act.").
51. *RSO Records, Inc. v. Peri*, 596 F. Supp. 849, 862 (S.D.N.Y. 1984).
52. See, e.g., *Broadcast Music, Inc. v. It's Amore Corp.*, 2009 WL 1886038, *8 (M.D. Pa. June 30, 2009) ("courts routinely compute statutory damages . . . between two to six times the license fee defendants 'saved' by not obeying the Copyright Act"); see also *EMI April Music, Inc. v. White*, 618 F. Supp. 2d 497, 508 (E.D. Va. 2009) ("[C]ourts have routinely awarded statutory damages in amounts that arc between two and three times license fees"); *Manno v. Tenn. Prod. Ctr., Inc.*, 2009 WL 2059897, *7 (S.D.N.Y. July 16, 2009) ("Case law reflects many instances in which courts have set [statutory damage] awards at several times the amount of lost profits.").
53. 2000 WL 1262568, *5 (S.D.N.Y. Sept. 6, 2000).
54. *Id.* *6.
55. 302 F. Supp. 2d 455, 458, 464 (D. Md. 2004).
56. See *Peer Int'l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332 (9th Cir. 1990) (statutory damage award of \$10,000); *Peer Int'l Corp. v. Max Music & Entm't, Inc.*, 2004 WL 1542253 (S.D.N.Y. 2004) (statutory damage award of \$30,000); *Peer Int'l Corp. v. Luna Records, Inc.*, 887 F. Supp. 560 (S.D.N.Y. 1995) (statutory damage award of \$50,000). See also Samuelson & Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1375604 at pp. 30–31.
57. 579 F. Supp. 2d 1210 (D. Minn. 2008).
58. *Id.* at 1213.
59. *Id.* at 1227.
60. *Id.*
61. *Id.*
62. See <http://jolt.law.harvard.edu/digest/copyright/riacapitol-v-thomas-rasset>.
63. To date, two appellate courts have rejected due process challenges to statutory damage awards. See *Zomba Ents. Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 586–88 (6th Cir. 2007); *Lowry's Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 459–60 (D. Md. 2004).