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EMERGING ISSUES IN STATUTORY DAMAGES

About a dozen federal statutes offer statutory damages to successful plaintiffs. As the name suggests, "statutory damages" are damages whose amount (or range) is set by law, usually without regard to the actual harm suffered by a plaintiff. Statutory damages give plaintiffs a procedural advantage, simplifying their proofs and awarding them damages without requiring them to proffer evidence of actual injury. For defendants, they have become a multiplier of liability, especially when claims, or parties, are aggregated. Although a number of courts have criticized statutory damages in circumstances where they have become oppressive, judicial decisions are in disarray about courts' power to rein in statutory damages and, if so, under what legal theories. The result of this uncertainty means that, in many cases, a defendant's potential liability is difficult to calculate and potentially ruinous. Individuals and companies faced with unquantifiable risks face a chilling effect on their legal and, in many cases, socially beneficial, activity.[1]

1 *See, generally*, J. Cam Barker, "Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement," 83 Tex. L. Rev. 525 (2004) (arguing that aggregation of copyright claims violates the *Gore* guideposts when the infringement has low levels of blameworthiness); Blaine Evanson, "Due Process in Statutory Damages," 3 Geo. J.L. & Pub. Pol'y 601 (2005) (arguing that statutory damages should be reviewed to effect optimal deterrence and punishment); Sheila B. Scheuerman, "Due Process Forgotten: The Problem of Statutory Damages and Class Actions," 74 Mo. L. Rev. 103, 112 (2009) (analyzing the due process concerns created by the aggregation of claims in class actions); Richard A. Nagareda, "Aggregation and Its Discontents," 106 Colum. L. Rev. 1872, 1885 (2006) (same); Samuelson & Wheatland, "Statutory Damages in Copyright Law: Need of Reform" 51 Wm. & Mary L. Rev 439 (2009) (outlining due process concerns and proposing judicial and legislative reform); and Brief for Electronic Frontier Foundation *et al.* as Amici Curiae Supporting Defendant-Appellee, *Sony BMG Music Entm't v. Tenenbaum*, 721 F. Supp. 2d 85 (2010) 2011 WL 199606 (urging the First Circuit to consider the damages decisions and to provide guidance for secondary creators).

STATUTORY DAMAGES PROVISIONS

Statutory damages statutes take several forms. Some put floors on damages, others set ranges, and still others specify liquidated damages. For the most part, Congress has used statutory damages as a remedy in consumer protection statutes or intellectual property laws. Some of the better known ones are:

- **Anti-Counterfeiting Consumer Protection Act of 1996**, 15 U.S.C. § 1116(d). Plaintiffs may seek statutory damages between $1,000 and $200,000 per counterfeit mark for each type of goods or services sold, offered, or distributed, and up to $2 million per willful use of a counterfeit mark. 15 U.S.C. § 1117(c).
- **Anti-Cybersquatting Consumer Protection Act of 1999** ("ACPA") 15 U.S.C. § 1125(d). Plaintiffs are entitled to statutory damages between $1,000 and $100,000 from any person who "registers, traffics in, or uses a domain name" that is identical or confusingly similar to a distinctive mark, or that is dilutive of a famous mark, and who "has a bad faith intent to profit from that mark" under 15 U.S.C. § 1117(d).
- **Cable Piracy Act** (amending the Cable Communications Policy Act of 1984), 47 U.S.C. § 605(e). For acts of satellite and cable piracy, plaintiffs can recover from $1,000 to $10,000, in an amount the court considers just, and from $10,000 to $100,000 for willful violations committed for commercial advantage or financial gain.
- **Cable Privacy Act** (amending the Cable Communications Policy Act of 1984), 47 U.S.C. § 551(f)(2)(A). For violations of privacy and disclosure requirements by cable service providers, plaintiffs may obtain liquidated damages of $100 for each day of violation or $1,000, whichever is higher.
- **Copyright Act**, 17 U.S.C. § 504(c). In lieu of actual damages, plaintiffs may demand statutory damages between $750 and $30,000 for each act of infringement, and up to $150,000 for willful infringement.
- **Fair and Accurate Credit Transactions Act of 2003** (amending the Fair Credit Reporting Act, "FACTA"), 15 U.S.C. § 1681n(a). For willful failures to comply with the Act's disclosure requirements, plaintiffs may seek statutory damages between $100 and $1,000. If a person obtains a consumer report under false pretenses or knowingly without a permissible purpose, the plaintiff may seek actual damages or $1,000, whichever is greater.
- **Fair Debt Collection Practices Act of 1978**, 15 U.S.C. § 1692k(a). For violations of the Act's regulation of debt collectors, plaintiffs are entitled to as much as $1,000 per violation. In class actions, plaintiffs may seek the lesser of $500,000 or one percent of the debt collector's net worth. A similar scheme is established by the Electronic Fund Transfer Act of 1978 ("EFTA"), 15 U.S.C. § 1693.
- **Stored Communications Act of 1986** ("SCA"), 18 U.S.C. § 2707(c). For violations of electronic privacy, plaintiffs may sue for actual damages suffered and any profits made by the violator, subject to a floor of $1,000. If the violation is willful or intentional, the court also may assess punitive damages.
- **Telephone Consumer Protection Act of 1991** ("Junk Fax Act"), 47 U.S.C. § 227(b)(3)(B). For violations of the Act's prohibitions of unsolicited advertisements by telephone, cell phone, or fax machine, plaintiffs may seek actual monetary loss or $500 per violation, whichever is greater. Courts may treble the damage award for willful or knowing violations.
- **Truth in Lending Act of 1968** ("TILA"), 15 U.S.C. § 1640(a)(2)(A). For a lender's failure to disclose credit terms, consumers are entitled to statutory damages of twice the lender's finance charges, between $100 and $5,000, depending on the type of credit.[2] Plaintiffs in a class action are not subject to a minimum recovery, and the total recovery is limited to the lesser of $500,000 or 1 percent of the defendant's net worth.
- **Worker Adjustment and Retraining Notification Act of 1988** ("WARN Act"), 29 U.S.C. § 2104(a)(3). For violations of the Act's requirement of advance notification of 60 days for plant closings and layoffs of more than 50 employees, plaintiffs may seek back pay and benefits for the period of violation, up to 60 days; for failing to notify their local government, employers are liable up to $500 a day.[3]

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2 Lessors who fail to disclose the material provisions of consumer leases are liable for 25 percent of the total amount of monthly payments under the lease, but not less than $100 nor greater than $1,000. 15 U.S.C. § 1640(a)(2)(A)(ii).

3 Claims can be pursued on an individual basis or through a class action. The WARN Act provides that its rights and remedies "are in addition to, and not in lieu of, any other contractual or statutory rights and remedies of the employees, and are not intended to alter or affect such rights and remedies, except that the period of notification required by this chapter shall run concurrently with any period of notification required by contract or by any other statute." 29 U.S.C. § 2105.

POLICIES UNDERLYING STATUTORY DAMAGES STATUTES

Congress has given three general policies for statutory damages laws.

The first is to encourage aggrieved plaintiffs to vindicate their rights.[4] Fearing that many violations of consumer protection or intellectual property laws may result in actual damages too small to warrant filing a lawsuit, Congress established guaranteed minimum damages to encourage access to the courts.[5] Statutory damages are above and beyond other procedural incentives, such as attorneys' fee-shifting provisions or the ability to bring class actions.

Second, statutory damages provisions can expedite lawsuits because statutory damages do not require the same level of proof as actual damages.[6] At times, statutory damages are expedient because the damages can be hard to quantify or prove.[7] In other cases, simplifying plaintiffs' proofs is offered as yet another incentive to bring a lawsuit.[8]

Third, many statutory damages laws have a punitive purpose. Courts have explained that the statutory damages under the Copyright Act serve as a "punitive sanction of infringers,"[9] under TILA they "deter general illegalities which are only rarely uncovered and punished,"[10] and under the EFTA they serve a "punitive, as well as compensatory purpose."[11] As discussed below, the punitive element in statutory damages can raise due process issues in some circumstances.[12]

LACK OF STANDARDS: RANGE, WILLFULNESS, AND ACTUAL DAMAGES

Statutory damages regimes usually give broad ranges for the award of damages but lack meaningful standards for judges or juries to apply in deciding what damages to award. The Copyright Act specifies statutory damages between $750 and $30,000, and up to $150,000 in the case of "willful" infringement. Statutory damages under the Lanham Act range from $1,000 to $200,000 per counterfeit, with an increase to $2 million in the case of willful counterfeiting. Under other regimes, such as the TCPA, judges can treble awards when the violation is willful or knowing.[13]

Lack of Guidance to Judges or Juries. At the outset, few statutes give a judge or jury meaningful standards to use in setting statutory damages. For example, to determine a statutory award in a copyright case, the finder of fact may look at "the expenses saved and profits reaped by the defendants in connection with the infringements, the revenues lost by the plaintiffs as a result of the defendant's conduct, the

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4 *See, e.g.*, *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003) (noting that the statutory damage provisions of the Cable Privacy Act seek "to encourage the filing of individual lawsuits as a means of private enforcement of consumer protection laws").

5 *See, e.g.*, *Perrone v. Gen. Motors Acceptance Corp.*, 232 F.3d 433, 436 (5th Cir. 2000) (noting that statutory damages under TILA encourage private attorneys general to police disclosure compliance) and *Forman v. Data Transfer, Inc.*, 164 F.R.D. 400, 404 (E.D. Pa. 1995) (holding that statutory damages under the TCPA provide adequate incentive for an individual plaintiff to bring suit on his own behalf).

6 *See Perrone*, 232 F.3d at 436 (explaining that "statutory damages under [TILA] are reserved for cases in which the damages caused by a violation are small or difficult to ascertain").

7 *See Douglas v. Cunningham*, 294 U.S. 207, 209 (1935) (explaining that the statutory damages under the Copyright Act of 1909 "give the owner of a Copyright some recompense for injury due to him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits"); *Louis Vuitton Malletier, S.A. v. LY USA*, 2008 WL 5637161 at *1 (S.D.N.Y. Oct. 3, 2008) (explaining that Congress enacted statutory damages under the Lanham Act because counterfeiters' records are often "nonexistent, inadequate or deceptively kept in order to willfully deflate the level of counterfeiting activity actually engaged in, making proving actual damages in these cases extremely difficult if not impossible.").

8 *See F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 288, 233 (1952) (noting that statutory damages under the Copyright Act are permissible when the calculation of actual damages would involve auditing the plaintiff's entire company).

9 *Cass County Music Co. v. C.H.L.R. Inc.*, 88 F.3d 635, 643 (1996). Accord on *Davis v. The Gap Inc.*, 246 F.3d 152, 172 (2nd Cir. 2001) ("The purpose of punitive damages—to punish and prevent malicious conduct—is generally achieved under the Copyright Act through the provisions of 17 U.S.C. § 504(c)(2)").

10 *See Williams v. Public Finance Corp.*, 598 F.2d 349, 356 (5th Cir. 1979).

11 *Burns v. First American Bank*, 2006 WL 3754820, at *11 (N.D. Ill. 2006) (citing *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 352-53 (1998)).

12 When punitive damages are expressly available under the statute, however, some courts have suggested that statutory damages do not serve a punitive purpose. *See, e.g.*, *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1312-13 (11th Cir. 2009) (rejecting defendant's contention that statutory damages under FACTA were excessive because they were not compensatory in nature and explaining that plaintiffs could elect to receive actual damages or statutory damages, but not both, in addition to seeking punitive damages under 15 U.S.C. § 1681n(a)(2)). The Cable Privacy Act allows plaintiffs to seek punitive damages in addition to statutory damages under 47 U.S.C. § 551(f)(2)(B). Both the Stored Communications Act and FACTA allow plaintiffs to seek punitive damages in addition to statutory damages. *See* 18 U.S.C. § 2707(c) and 15 U.S.C. § 1681n(a)(1)(B)(2).

13 *See, e.g.*, *Texas v. American Blastfax*, 164 F. Supp. 2d 992 (W.D. Tex. 2001) (reducing a statutory damages award of $500 per violation to seven cents per violation, but trebling that amount for willfulness, amounting to $196,875 instead of $468,750,000).

infringers' state of mind—whether willful, knowing, or merely innocent"—and whether the parties have fulfilled their contractual obligations to each other.[14] Under the Supreme Court's decision in *Feltner v. Columbia Pictures Television, Inc.*, as long as a material dispute of fact must be resolved,[15] there is a constitutional right to a jury trial.[16] At least one commentator has questioned whether juries are equipped to compare the facts of a case to those of relevant precedent, adding yet another layer of uncertainty to the calculus of damages.[17]

Similar discretion is granted by other statutory damages provisions. The Cable Piracy Act, for example, provides no guidance on how courts should determine an award (which can range between $1,000 and $10,000) for the unauthorized receipt and exhibition of television programming. Some courts have based statutory awards on the number of people who viewed the television show if the violator is a commercial establishment,[18] others have awarded a flat sum for each violation,[19] and still others award the license fee that the commercial establishment, based on its maximum capacity, would have paid if it had legally purchased the programming.[20] Likewise, FACTA allows a range of $100 and $1,000 with no guidance on how to determine the award.[21]

Willfulness. The statutes' standard of willfulness is yet another area of ambiguity. A finding of willfulness under the Copyright Act can quintuple an award from $30,000 to $150,000 per infringement, but the term remains completely undefined.[22] In fact, the Act expressly states that "[n]othing in this paragraph limits what may be considered willful infringement." Congress has suggested that the award should be raised to its maximum only in "exceptional cases,"[23] but courts have interpreted "willfulness" expansively. In *Zomba Enters., Inc. v. Panorama Records, Inc.*, the court defined "willfulness" as knowledge that one's conduct constitutes copyright infringement.[24] In other cases, courts have found willfulness even when the defendant raised a plausible, if ultimately unsuccessful, fair use defense.[25] The definition of "willfulness" is similarly amorphous under the Cable Piracy Act, the TCPA, and FACTA.[26] For example, in *Safeco Insurance Co. of America v. Burr*, the Supreme Court held

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14 *Nimmer on Copyright*, § 14.04(B)(1)(a) (2009) (citing *N.A.S. Import. Corp. v. Chenson Enters., Inc.*, 968 F.2d 250, 252 (2d. Cir. 1992)).

15 *Nimmer,* § 14.04(c)(d) (2009).

16 523 U.S. 340 (1998).

17 *Nimmer*, § 14.04(C)(3) (2009). Statutory damages awards in copyright cases have varied widely. After $1 million in statutory damages were awarded for defendant's posting of news articles to a nonprofit conservative commentary web site to demonstrate the media's liberal bias, defendant settled for $10,000 in *L.A. Times, Inc. v. Free Republic*, 2000 WL 565200, at *1 (C.D.Cal. Apr. 4, 2000). On the other end of the spectrum, a defendant was ordered to pay the minimum statutory damage award of $2,500 for posting substantial portions of five Scientology texts to the internet. *Religious Tech. Ctr. v. Lerma*, CIV.A. No. 95-1107-A, 1996 WL 633131, at *16 (E.D. Va. Oct. 4, 1996). Examples of the variation in jury awards include the award of $275,000 for the infringement of certain pieces of jewelry, when the defendant earned only $19,000 from the entire line of jewelry (both infringing and noninfringing pieces) in *Yurman Design, Inc. v. PAJ, Inc.*, 93 F. Supp. 2d 449, 461-62 (S.D.N.Y. 2000), and an award of $31 million for broadcasting 440 episodes of several television shows in *Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186 (9th Cir. 2001), cert. denied, 534 U.S. 1127 (2002).

18 *See, e.g.*, *Time Warner Cable of New York City v. Taco Rapido Restaurant*, 988 F.Supp. 107, 111 (E.D.N.Y. 1997) ($50 per patron) and *Cablevision Systems Corp. v. Glen Mini Market 11*, 1997 U.S. Dist. LEXIS 3533, at *11-*12 ($30 per patron).

19 *See, e.g., Top Rank, Inc. v. Allerton Lounge*, 490*490 No. 96 Civ. 7864(SS), slip op. at 3 (S.D.N.Y. March 24, 1998) ($5,000 and $10,000).

20 *Joe Hand Promotions, Inc. v. McBroom*, Slip Copy, 2009 WL 5031580, *4 (M.D. Ga. Dec. 15, 2009).

21 There has been a debate among courts as to FACTA's constitutionality on this point. Compare *Grimes v. Rave Motion Pictures Birmingham*, L.L.C., 552 F. Supp. 2d. 1302, 1306 (N.D. Ala. 2008) and *Harris.*, 564 F.3d at 1310.

22 Under § 15 U.S.C. 1117(e), the Lanham Act provides that in regards to cybersquatting, "it shall be a rebuttable presumption that the violation is willful . . . if the violator . . . knowingly provided or knowingly caused to be provided materially false contact information to a domain name registrar, domain name registry, or other domain name registration authority in registering, maintaining, or renewing a domain name used in connection with the violation." Courts have also looked at the egregiousness of the defendant's cybersquatting, the defendant's status as a "serial" cybersquatter, and other behavior evidencing an attitude of contempt toward the court or the proceedings. *Verizon Cal. Inc. v. Onlinenic, Inc.*, 2009 WL 2706393, at *6-*9 (N.D.Cal. Aug. 25, 2009). The Lanham Act does not provide a definition for "willfulness" in regards to counterfeiting under 15 U.S.C. § 1117(c). In *Philip Morris USA, Inc. v. Castworld Products, Inc.*, 219 F.R.D. 494, 501 (C.D. Cal. 2003), the court noted that willfulness under the Lanham Act is analogized to the body of case law interpreting a similar provision in the Copyright Act.

23 S. Rep. No. 94-473, at 144-45 (1975) (stating that maximum awarded should be raised in "exceptional cases") and H. Rep. No. 94-1476 (1975) (same).

24 491 F.3d 574, 584 (6th Cir. 2007) (quoting *Nimmer,* § 14.04(B)(3) (1996)).

25 *See, e.g., Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1543-45 (S.D.N.Y. 1991) (finding commercial photocopier of college coursepacks found a willful infringer) and *Rogers v. Koons*, 960 F.2d 301, 313 (2d Cir. 1991) (characterizing artist as a willful infringer).

26 Under the Cable Piracy Act, base awards vary from $1,000 to $10,000 and up to $100,000 for willful violations. To determine willfulness, courts look at factors such as the following: (1) repeated violations over an extended period of time; (2) substantial unlawful monetary gains; (3) advertising of the broadcast; (4) charging of a cover charge or premiums for food and drinks; or (5) plaintiff's significant actual damages. *J&J Sports Prods., Inc. v. Arboleda*, Slip Copy, 2009 WL 3490859, *7 (M.D. Fla. Oct. 27, 2009). Under the TCPA, "willfulness" is not defined, but statutory damages may be trebled when the violation was willful or knowing. In *Sengenberger v. Credit Control Services, Inc.*, 2010 WL 1791270 (N.D. Ill. May 5, 2010), the court applied the definition of "willfulness" in the Communications Act of 1943—"the conscious or deliberate commission or omission of such act, irrespective of any intent to violate any provision[], rule or regulation"—to the TCPA, and found that the defendant acted willfully as "he acted voluntarily, and under its own free will, regardless of whether the defendant knew that it was acting in violation of the statute," citing *Pollock v. Bay Area Credit Services, LLC*, 2009 WL 2475167 (S.D. Fla. Aug. 13 2009).

that under FACTA, actual knowledge of the violation is not required and that reckless disregard—an "action entailing an unjustifiably high risk of harm that is either known or so obvious that it should be known"—can be considered willful.[27]

Intuitively, a plaintiff's actual damages would be one useful benchmark—if not the best benchmark—to guide judges and juries in deciding where to set their damage award. However, courts disagree whether actual damages are relevant at all in computing statutory damages. In some Lanham Act cases, courts have commented that plaintiffs "should not be entitled to a windfall," even when statutory damages are meant to serve as a deterrent.[28] Similarly, where plaintiffs offer no evidence of defendants' actual sales figures and profits, courts have been reluctant to award maximum statutory damages of $200,000 per counterfeit mark for each type of good, and up to $2 million for willful violation.[29] However, in another recent Lanham Act case, the court entered a $164 million default judgment, imposing maximum statutory damages of $2 million per violation against each of 41 defendants for the infringement of two trademarks.[30] Although the judge did not directly comment on the Lanham Act's definition of "willfulness," she awarded the maximum amount for willful violations under § 1117(d), finding that the defendants had engaged in counterfeiting and cybersquatting and had gone to great lengths to conceal themselves and the proceeds of such counterfeit sales.[31]

Under several statutory regimes, courts have expressly refused to consider actual damages on the ground that the basic purpose of statutory damages in the first place is to set damages independently of actual harm.[32] Thus, several cases have awarded plaintiffs statutory damages at levels irreconcilable with their actual damages.[33] Under the Copyright Act, for example, one court upheld a $19.7 million award in a case where actual damages were estimated to be between $59,000 and $6.6 million and refused to instruct the jury that statutory damages should be strictly related to actual injury.[34] In a FACTA case, a court found that the award of the maximum statutory award of $1,000 for an individual plaintiff was not excessive even when the plaintiff suffered no pecuniary damage at all.[35] Under the TCPA, one court commented that the statutory remedy need not be proportional to the plaintiff's own injury, reasoning that "Congress may choose an amount that reflects the injury to the public as well as to the individual."[36]

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27 551 U.S. 47, 57-58 (2007) (interpreting willfulness under 15 U.S.C. § 1681n(a) and finding that a company violates FACTA only when the company's action was a violation under a reasonable reading of the statute and the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless) (internal citations omitted).

28 *Adobe Systems, Inc. v. Tilley*, 2010 WL 309249, at *5 (N.D.Cal. Jan. 19, 2010). In some trademark cases, the amount of awards tracks the level of infringement, thus compare *Adobe Systems Inc. v. Brooks*, 2009 WL 593343, at *4 (N.D.Cal. Mar. 5, 2009) (awarding $10,000 per infringement based upon one infringing sale and evidence of possible additional infringement) with *Adobe Systems, Inc. v. Taveira*, 2009 WL 506861, at *6 (N.D.Cal. Feb. 27, 2009) (awarding $50,000 per mark where defendant sold at least 20 copies of counterfeit software and plaintiff alleged that more than 1,000 unauthorized copies were sold).

29 *Burberry Ltd. v. Euro Moda*, 2009 WL 4432678 (S.D.N.Y. Dec. 4, 2009) (collecting cases).

30 *Tory Burch LLC v. Yong Sheng*, No. 10-CV-09336, slip op. at 5 (S.D.N.Y. Jun. 13, 2011).

31 *Tory Burch*, at 4. In addition to the award of statutory damages, the judge ordered that the infringing domain names be transferred to plaintiff and that the money in defendants' various PayPal accounts be released to plaintiff in partial payment of the award.

32 *F.W. Woolworth*, 344 U.S. at 233 ("Even for uninjurious and unprofitable invasions of copyright the court may, if it deems just, impose a liability within statutory limits to sanction and vindicate the statutory policy"); *Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co.*, 74 F.3d 488, 496 (4th Cir. 1996), cert. denied 519 U.S. 809 (1996) (upholding the Copyright Act's then-maximum statutory damages award of $100,000 per infringed work despite plaintiff's inability to identify damages or lost profits and the fact that defendant's revenue from infringing sales totaled only $10,200); *Yurman,* 262 F.3d at 113-14 (affirming statutory damages under deferential standard when a jury found willfulness and the damages were within statutorily authorized range).

33 *But see Sony BMG Music Entm't v. Tenenbaum*, 721 F. Supp. 2d 85, 103 (D. Mass 2010) (listing authorities that require some relationship between the jury's award of damages and the damage suffered by the plaintiff); *Sir Speedy, Inc. v. L & P Graphics, Inc.*, 957 F.2d 1033, 1038 (2d Cir. 1992) ("In order to recover damages, a claimant must present evidence that provides the finder of fact with a reasonable basis upon which to calculate the amount of damages. He need not prove the amount of loss with mathematical precision; but the jury is not allowed to base its award on speculation or guesswork."); *Capitol Records, Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045, 1052 (D. Minn. 2010) (remitting the jury award because statutory damages should bear some relation to the actual damage suffered) and *Van Alstyne v. Electronic Scriptorium, Ltd.*, 560 F.3d 199, 205 (4th Cir. 2009) (requiring a showing of actual damages as a prerequisite for statutory damages under the SCA).

34 *Lowry's Reports, Inc. v. Legg Mason, Inc.*, 302 F. Supp. 2d 455, 458-60 (D. Md. 2004); Accord *Zomba Enterprises, Inc. v. Panorama Records, Inc.*, 491 F.3d 574 (6th Cir. 2007) (upholding an award of $806,000 ($31,000 per work) when plaintiff's actual damages were approximately $18,457.92 in lost licensing fees).

35 *Follman v. Village Squire, Inc.*, 542 F. Supp. 2d 816, 972 (N.D. Ill. 2007). Accord *Berenson v. National Financial Services, LLC*, 403 F. Supp. 2d 133 (D. Mass. 2005) (holding that a financial institution that violated the error-resolution provision of EFTA contained in 15 U.S.C. § 1693f was subject to statutory damages, even in the absence of actual damages).

36 *Centerline Equip. Corp. v. Banner Pers. Serv., Inc.*, 545 F. Supp. 2d 768, 777 (N.D. Ill. 2008) (citing *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66 (1919)).

THE PROBLEM OF AGGREGATION

Most statutory damages provisions were enacted years before the full implications of the statutory damages remedy could be foreseen.[37] The expansion of class action litigation and the advent of the internet, in particular, have led to abuses of statutory damages remedies. One of the most problematic issues is that of aggregation, either aggregation of claims or aggregation of parties. A number of cases have involved situations where a single defendant has been accused of multiple violations of a single statute and faced enormous multiplication of statutory damages.

Aggregation of Claims. Aggregation of claims has been a particular problem in copyright cases, where the advent of the internet has eliminated transaction costs and enabled free and instant copying, resulting in massive damages awards. In *L.A. Times, Inc. v. Free Republic*, a jury awarded $1 million to plaintiffs for the defendant's infringing act of posting several news articles on its nonprofit commentary web site.[38] In *Blizzard Entertainment, Inc. v. Alyson Reeves*, a judge awarded the plaintiff $85,478,600 because the defendant's web site allowed users to play World of Warcraft, a multiplayer online game created by plaintiff and otherwise played exclusively on plaintiff's web sites.[39] In *UMG Recordings, Inc. v. MP3.com, Inc.*, a judge awarded a single record company $53.4 million, or $25,000 per album, for defendant's infringement on its file-sharing web site.[40] After several trials and appeals, the Recording Industry Association of America has been awarded huge awards in two cases against people who used online peer-to-peer networks. In *Capitol Records v. Thomas-Rasset*, a jury awarded plaintiffs $1.5 million for the infringement of 24 songs on a file-sharing network and in *Sony BMG Music Entm't v. Tenenbaum*, a jury awarded $670,000 for the infringement of 30 songs on a similar file-sharing network.[41]

As dramatic as these results have been, they were almost certainly unintended by Congress. Congress revised the statutory damages regime under the Copyright Act in 1976, years before the public internet existed. Similarly, Congress further increased the minimum and maximum statutory award amounts under the Act to their current levels in 1999, before the spread of peer-to-peer file sharing.[42]

Aggregation of Parties. A similar issue is raised by the combination of statutory damages with class action practice. There, defendants have been sued for a single violation of

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37 In 1974, Congress amended 15 U.S.C. § 1640 (TILA) to strike an appropriate balance between the rights of claimants to recovery in a class action and protection of creditors from financial ruin by placing a ceiling on the total class recovery to "the lesser of $100,000 or 1 per centum of the net worth of the creditor" and making the award of statutory damages in the class context discretionary rather than a matter of right. Act of Oct. 28, 1974, Pub. L. No. 93-495, § 408(a), 88 Stat. 1518 (1974). Examples of more recent legislation includes the amendments to the Lanham Act in the Anti-counterfeiting Consumer Protection Act of 1996, Pub. L. No. 104-153, 110 Stat. 1386 (July 2, 1996), as amended by the Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, 122 Stat. 4256 (Oct. 13, 2008) and the Anti-Cybersquatting Consumer Protection Act of 1999, (ACPA) 15 U.S.C. § 1125(d).

38 2000 WL 565200, at *1 (C.D. Cal. Apr. 4, 2000).

39 *Blizzard Entertainment, Inc. v. Alyson Reeves*, 2010 WL 4054095 (C.D. Cal., July 2010). Defendant's web site mimicked plaintiff's servers and allowed players to avoid entering the plaintiff's server and subscription system.

40 92 F. Supp. 2d 349 (S.D.N.Y. 2000).

41 *Capitol Records Inc. v. Thomas*, No. 06-1497 (MJD/RLE) (D. Minn. Nov. 3, 2010) and *Sony BMG Music Entm't v. Tenenbaum*, 672 F. Supp. 2d 217 (2009).

42 In passing the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Congress noted that:

> [b]y the turn of the century the Internet is projected to have more than 200 million users, and the development of new technology will create additional incentive for copyright thieves to steal protected works.... As long as the relevant technology evolves in this way, more piracy will ensue. Many computer users are either ignorant that copyright laws apply to Internet activity, or they simply believe that they will not be caught or prosecuted for their conduct. Also, many infringers do not consider the current copyright infringement penalties a real threat and continue infringing, even after a copyright owner puts them on notice that their actions constitute infringement and that they should stop the activity or face legal action.

H.R. Rep. 106-216, at 3 (1999). Congress intended to mitigate the effect of astronomical awards by providing that under § 504(c)(1), "all parts of a compilation or derivative work constitute one work" for purposes of calculating statutory damages. *See* H.R. Rep. No. 1476, 94th Cong., 2d Sess., at 162 (1976). Many courts have adhered to this limitation. *See, e.g.*, *UMG Recordings, Inc. v. MP3.com, Inc.*, 109 F. Supp. 2d 223, 225 (S.D.N.Y. 2000) (awarding statutory damages on a per album basis and rejecting the "independent economic value") and *Bryant v. Media Right Productions, Inc.*, 603 F.3d 135 (2d Cir. 2010) (distinguishing statutory damages awarded on a per album basis when the compilation was created by plaintiff from statutory damages awarded on a per song basis when the compilation was created by defendant). In the Second Circuit, however, Chief Judge Walker concluded that the statutory damages compilation rule is ambiguous. *WB Music Corp. v. RTV Communication Group, Inc.*, 445 F.3d 538, 540 (2d Cir. 2006). Indeed, some courts have sought to circumvent the statute. In the recently settled case of *Arista Group LLC v. LimeWire Group LLC*, the district court held that statutory damages based on the infringement of a copyrighted "work" could be imposed on a per-song basis, versus a per-album basis, if the song was released as a single prior to the infringement. *Arista Group LLC v. LimeWire Group LLC*, No. 06 CV 5936 (S.D.N.Y. Apr. 4, 2011).

a statute that affects thousands of individuals. Although the amount of statutory damages in each individual instance may be modest, the aggregate amount of these claims in a class action can reach enormous levels.

In class action suits, some courts have held that the size of aggregated statutory damages should be a factor in deciding whether to certify a class under Federal Rule of Civil Procedure 23(b)(3), which allows certification only if class action is "superior to other available methods for fairly and efficiently adjudicating the controversy." Some judges have refused to certify classes that seek "potentially annihilating" damages because the procedural device "cuts against the grain of practical justice."[43] In *Ratner v. Chemical Bank New York Trust Co.*, for example, the court rejected class certification in a TILA class action when "the proposed recovery of $100 each for some 130,000 class members would be a horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation of the Truth in Lending Act."[44]

In *Leysoto v. Mama Mia I*, the court denied class certification because a restaurant's violation of FACTA caused very little actual economic harm, while plaintiffs sought damages in the range of $4.6 million to $46 million.[45] In *Parker v. Time Warner Entm't Co.*, the proposed class of 12 million customers sought $12 billion in damages for Time Warner's disclosure of customer information to third parties and failure to inform customers of such disclosure, in violation of the Cable Privacy Act.[46] The district judge refused to certify the class because it regarded the award as a firm-threatening liability based on alleged minor violations of the Cable Privacy Act. On technical grounds, the Second Circuit vacated the district court's refusal to certify the class and remanded for further proceedings but acknowledged the district court's "legitimate concern."[47] The court observed, "[i]t may be that the aggregation in a class action of large numbers of statutory damages claims potentially distorts the purposes of both statutory damages and class actions," creating "a potentially enormous aggregate recovery for plaintiffs, and thus an in terrorem effect on defendants, which may induce unfair settlements."[48] In *Bateman v. American Multi-Cinema, Inc.*, however, the Ninth Circuit reversed the lower court's refusal to certify a class in a FACTA suit, despite the size of the damage award (estimated to be between $29 million and $290 million), the disproportionality between the award and the actual harm suffered, and the defendant's compliance with FACTA.[49]

This imbalance is particularly evident in some classes of copyright cases. Instead of serving as a means to expand access to the courts for plaintiffs with modest damages, the Copyright Act's statutory damages provisions can give plaintiffs enormous powers of coercion and even chill expression.[50] Ironically, plaintiffs in some circumstances are not the individual litigants—such as graphic designers, recording artists, or small businesses—Congress intended to help. Instead, some are large corporations using the threat of statutory damages for business leverage or copyright trolls who file abusive lawsuits to coerce settlements.[51]

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43 *Stillmock v. Weis Markets*, 2010 WL 2621041, at *279 (4th Cir. 2010) (J. Wilkinson, concurring).

44 54 F.R.D. 412, 416 (S.D.N.Y. 1972).

45 *Leysoto v. Mama Mia I*, 255 F.E.D. 693 (S.D. Fla. 2009). Accord *Parker*, 331 F.3d at 22; *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226 (9th Cir. 1974) (holding that damages that would "shock the conscience" are permissible consideration in the class certification in the context of the Clayton and Sherman Acts); *but see Bateman v. American Multi-Cinema, Inc.*, 2010 WL 3733555 (9th Cir. 2010) (overturning the lower court's refusal to certify a class because of the large damages award under FACTA).

46 331 F.3d 13 (2d Cir. 2003).

47 *Parker*, 331 F.3d at 22.

48 *Parker*, 331 F.3d at 22.

49 2010 WL 3733555 (9th Cir. 2010).

50 *See, generally*, "RIAA v. The People: Five Years later, Electronic Frontier Foundation," http://www.eff.org/riaa-v-people (discussing the chilling effects of litigation strategy adopted by the Recording Industry Association of America), Brief for Electronic Frontier Foundation *et al*. as Amici Curiae Supporting Defendant-Appellee, *Sony BMG Music Entm't v. Tenenbaum*, 721 F. Supp. 2d 85 (2010) 2011 WL 199606 (urging the Second Circuit to consider the interests of creators, innovators, and consumers in deciding the role substantive due process should play in statutory damages decisions and to provide guidance for secondary creators) and 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 (2009) (discussing the chilling effects of awarding statutory damages for secondary infringement by technology innovators).

51 Accord *DirectTV v. Huynh*, 503 F.3d 847, 850 (9th Cir. 2007) (noting that under Section 605(e) of the Cable Piracy Act, DirecTV has pursued lawsuits against 25,000 defendants). Some of these defendants argue that they have never pirated DirecTV's services. Kevin Poulsen, "DirecTV Dragnet Snares Innocent Techies," SecurityFocus, July 17, 2003, http://www.securityfocus.com/news/6402.

In copyright litigation, this coercion is exacerbated by the imprecise boundaries of several common defenses. "Fair use," for example, is a defense to a claim of copyright infringement (*see* 15 U.S.C. § 107), but its precise boundaries are fact-bound and therefore difficult to predict.[52] In *Paramount Pictures Corp. v. ReplayTV*, a group of media companies sued SonicBlue, the creator of ReplayTV, a digital video recorder, for enabling customers to automatically skip commercials and share television programming over the internet.[53] After two years of copyright litigation, which included an action for declaratory relief brought by defendants,[54] SonicBlue declared bankruptcy. The company that acquired the ReplayTV technology from the estate proceeded to remove the allegedly infringing features from the device. The risk of facing statutory damages, ongoing litigation costs, and the unpredictability of the fair use defense resulted in the stifling of a possibly legitimate technological tool. Similarly difficult to predict, especially before a jury, is the common copyright defense that a defendant did not take protected content from a copyrighted work.[55]

JUDICIAL RESPONSES TO THE PROBLEMS OF IMPRECISION AND AGGREGATION

The unexpected results presented by statutory damages regimes have confronted courts with significant challenges. On a practical level, several courts have wrestled with the problems of translating statutory damages provisions to jury instructions and with ensuring fairness in implementing wide ranges of potential damages. In extreme cases, the disproportion between the quantum of actual damages and the level of statutory damages award has triggered due process concerns.

Disproportionality and Due Process Concerns. Some laws specify statutory damages in exceptionally broad ranges yet offer no meaningful guidance to a jury or a judge in setting a statutory damages award.[56] Thus, statutory damages awards may have no logical relationship with the actual damages plaintiffs suffer.

For years, courts saw no problem with such disparities. In *St. Louis, I.M. & S. Ry. Co. v. Williams*, the Supreme Court case examined the constitutionality of a statutory damages law with a range of $50 to $300 for violations of train fare regulation.[57] In *Williams*, the Court evaluated the proportionality of an award of $75 in reference to the economic harm of 66 cents and concluded that neither the award nor the statute violated due process. The Court noted that it considered not only the ratio of harm to award but also "the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates."[58] The Court concluded that the jury's award was constitutionally permissible since it was not "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable."[59]

In the past 15 years, however, the Supreme Court has departed from the reasoning in *Williams* and criticized punitive damages awards that were divorced from actual damages. In *BMW of North America, Inc. v. Gore*, an Alabama jury awarded the plaintiff $4,000 in compensatory damages and $4 million in punitive damages for the distributor's fraud in failing to reveal that it painted the plaintiff's newly acquired car before delivery.[60] The trial court refused to find the award grossly excessive but reduced it to $2 million, finding that the jury had multiplied the compensatory damages by similar sales nationwide instead of similar sales in

52 *See, e.g.*, *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522, 1543-45 (S.D.N.Y. 1991) (finding commercial photocopier of college coursepacks found a willful infringer) and *Rogers v. Koons*, 960 F.2d 301, 313 (2d Cir. 1991) (characterizing artist as willful infringer).
53 *Paramount Pictures Corp. v. ReplayTV*, No. CV 01-9358, 2002 WL 1315811 (C.D. Cal. Apr. 29, 2002).
54 *Newmark v. Turner Broad. Network*, 226 F. Supp. 2d 1215, 1220 (C.D. Cal. 2002).
55 *Cf. Nimmer,* § 14.04(C)(3) (2009). Statutory and nominative fair use under the Lanham Act are also difficult defenses to predict, since the interaction of the fair use principles and the Act's analysis with the "likelihood of confusion" analysis remains obscure, especially in regards to nominative fair use. *See Toho Co., Ltd. v. William Morrow and Co., Inc.*, 33 F. Supp. 2d 1206 (C.D. Cal. 1998) (suggesting that if there is a likelihood of confusion, the nominative fair use defense ceases to be available). Under the Lanham Act, the use of a trademark is fair when "the use . . . is descriptive of and used fairly and in good faith only to describe the goods or services of such party, or their geographic origin." 15 U.S.C. § 1115(b)(4).
56 *See, e.g.*, the Copyright Act (17 U.S.C. § 504(c)(1)), the Lanham Act (15 U.S.C. §1117(c)(1)), and the Cable Piracy Act (47 U.S.C. § 605(e)(3)(C)(i)(II)).
57 251 U.S. 63 (1919).
58 *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 64 (1919).
59 *Id*.
60 *BMW of N. Am., Inc. v. Gore*, 646 So. 2d 619 (Ala. 1994).

Alabama.[61] When the Supreme Court evaluated the constitutionality of the award, it established three "guideposts," namely "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases."[62] The Court found that although Alabama had a legitimate interest in punishing and deterring unlawful conduct, the award violated due process.[63] Enumerating several factors that establish reprehensibility, including physical harm, deceit, and malice, the Court found that although BMW's conduct caused economic harm, under the first guidepost, it was not sufficiently egregious to warrant such a large punitive damages award.[64] Furthermore, under the second guidepost, the Court found that the ratio of award to the harm caused, in this case of 500 to 1, far exceeded a constitutionally acceptable range.[65] Although the Court declined to delineate a constitutional ratio of punitive award to harm caused, it mentioned that even a ratio of 4 to 1 could be unconstitutional in some circumstances.[66] Finally, under the third guidepost, the Court found that the award far exceeded the penalties available under similar Alabama statutes, suggesting the award was excessive.[67]

In *State Farm Mut. Automobile Ins. Co. v. Campbell*, a Utah jury awarded the plaintiff $1 million in compensatory damages and $145 million in punitive damages for the fraud and intentional infliction of emotional distress caused by an insurance company.[68] In applying the *Gore* guideposts, the Court found that each one indicated that the verdict was excessive. Expanding on *Gore*'s analysis of reprehensibility, it noted that to evaluate the blameworthiness of the insurance company's conduct, the jury should have examined only the company's actions vis-à-vis the plaintiff, and not its nationwide insurance policies; in other words, a nexus must exist between the conduct sought to be deterred and the conduct that actually occurred.[69] In evaluating the disparity between the punitive damages award and the actual harm committed—here a ratio of 145 to 1—the Court repeated that no bright line exists but that even a ratio in the single digits could test the limits of due process when compensatory damages have already been awarded.[70] Under the third guidepost, the Court compared the punitive damages award to the comparable penalty for fraud under Utah law, measuring the $145 million punitive damages award against $10,000 in fines imposed by Utah law; it concluded that under all the guideposts, the award was grossly excessive.[71]

In *Philip Morris USA v. Williams*, an Oregon jury awarded the plaintiff $821,000 in compensatory damages and $79.5 million in punitive damages against the tobacco company for its negligence and deceit in connection with the death of the plaintiff's husband.[72] The trial court reduced the punitive damages award to $32 million, finding it excessive under *Gore*.[73] The Supreme Court granted certiorari but did not decide whether the jury's award of $79.5 million was unconstitutional *per se*. Instead, the Court concentrated on whether evidence of harm to nonparties caused by the defendant tobacco company could be used to calculate a punitive damages award. The Court held that, while harm to nonparties may be a factor in determining the degree of the conduct's overall reprehensibility, it should not be used by a jury to punish a particular defendant in a particular case. The Court concluded that due process forbids courts from using punitive damages to punish a defendant for harm inflicted upon nonparties and remanded the case for a new

61 *Id. at* 629.
62 *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 US 408, 418 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575 (1996) (holding that "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition" but that an award of $2 million in punitive damages for actual damages of $4,000 was "grossly excessive in relation to these interests").
63 *Id. at* 574.
64 *Id. at* 576-80.
65 *Id. at* 581.
66 *Id. at* 582.
67 *Id. at* 584.
68 *Campbell v. State Farm. Auto. Ins. Co.*, 2001 WL 1246676 (2001).
69 *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 US 408, 419-424 (2003).
70 *Id. at* 424-428.
71 *Id. at* 428.
72 549 U.S. 346 (2007).
73 *Williams v. Philip Morris Inc.*, 340 Or. 35, 51-54 (2006).

calculation of damages under the correct constitutional standard.[74]

Since one of the policies underpinning statutory damages is punishment, *Gore*, *Campbell*, and *Philip Morris* have obvious relevance.[75] The response of courts to these decisions has been mixed and often dependent upon the specific statute in question. Originally, courts rejected the application of the *Gore* "guideposts" to evaluate the constitutionality of statutory damages. In its examination of statutory damages under ACPA, for example, one court noted that "it is highly doubtful" that *Gore* applied and that due process was violated only by those awards that violate the *Williams* threshold in that they are "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable."[76] Other courts similarly rejected due process challenges to FACTA and the Junk Fax Act, explaining that these regimes clearly define the prohibited conduct and the range of possible fines, thus providing notice to defendants sufficient to satisfy the requirements of procedural due process.[77] In a case under the Anti-Cybersquatting Consumer Protection Act, the court upheld an award of $33.15 million, or $50,000 per violation, because the defendant registered and monetized at least 663 domain names that were confusingly similar to the plaintiff's trademarks.[78]

However, several recent decisions have found *Gore* relevant to statutory damages under the Copyright Act. In *Sony BMG Music Entm't v. Tenenbaum*, the district court found that the jury's award of $675,000 for the infringement of 30 songs, or $22,500 per song, was unconstitutionally excessive under both *Williams* and *Gore*. Having rejected the defendant's fair use argument and granted summary judgment to the plaintiffs on the issue of infringement,[79] the court then reduced the jury's statutory damages award to $2,500 per work, or three times the statutory minimum, for a total award of $67,500.[80] The judge reasoned that the jury's award was "far greater than necessary to serve the government's legitimate interests in compensating copyright owners and deterring infringement" and that it bore "no meaningful relationship to these objectives."[81] Citing a split of authority on whether the *Gore* guideposts could be applied to statutory damages, the judge explained that "[a]t their root, the standards articulated in [*Williams* and *Gore*] all aim at providing defendants with some protection against arbitrary government action in the form of damages awards that are grossly excessive in relation to the objectives that the awards are designed to achieve." The court reasoned that *Gore* and its progeny were concerned with substantive due process and therefore could be used to evaluate the excessiveness of an award under the Copyright Act, even when the Act provided fair notice of defendants' possible liability.[82] The appeal of *Sony v. Tenenbaum* was argued in the First Circuit on April 4, 2011. The court's opinion, when handed down later this year, may give some clarity to the limitations, if any, the due process clause imposes on calculation of statutory damages, although the issue will remain an open one until the Supreme Court finally resolves it.

Other Grounds for Limiting Statutory Damages. In two recent copyright infringement cases, courts have found other ways to limit statutory damages. In *Capitol Records*

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74 *Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007) (holding, however, that a jury may consider harm to nonparties in evaluating the degree of reprehensibility of the defendant's conduct toward the plaintiff).

75 Brief for Electronic Frontier Foundation *et al.* as Amici Curiae Supporting Defendant-Appellee, *Sony BMG Music Entm't v. Tenenbaum*, 721 F. Supp. 2d 85 (2010) 2011 WL 199606, at *7 (D. Mass. Dec. 27, 2010).

76 *Verizon*, 2009 WL 2706393, at *6-*9 (quoting *United States v. Citrin*, 972 F.2d 1044, 1051 (9th Cir. 1992)).

77 *See, e.g.*, *Harris*, 564 F.3d at 1312 (refusing to apply *BMW* guideposts in FACTA case since the civil penalties the defendant might face were defined by statute and thus did not implicate *BMW*'s "fair notice" concerns) and *Accounting Outsourcing, LLC v. Verizon Wireless Pers. Comm'ns, L.P.*, 329 F. Supp. 2d 789, 808-09 (M.D. La. 2004 (same regarding the Junk Fax Act); *see also DirecTV, Inc. v. Cantu*, 2004 WL 2623932, at *4-*5 (W.D. Tex. Sept. 29, 2004) (same for state statutory damages remedy). *But see Sony BMG Music Entm't v. Tenenbaum*, 721 F. Supp. 2d 85, 102 (2010) (holding that the fair notice provided by the range of statutory damages in the Copyright Act may fulfill the requirements of procedural due process but still raises issues of substantive due process under *Gore*).

78 *Verizon*, 2009 WL at *7.

79 *Sony BMG Music Entm't v. Tenenbaum*, 672 F. Supp. 2d 217 (2009).

80 *Sony BMG*, 721 F. Supp. at 101 (concluding that while "the due process principles articulated in the Supreme Court's recent punitive damages case law are relevant to Tenenbaum's case, the differences between the two approaches are, in practice, minimal.").

81 *Sony BMG*, 721 F. Supp. at 89.

82 *Sony*, 721 F. Supp. at 102. Similarly, in its analysis of due process concerns raised by the aggregation of statutory damages in a class action for copyright infringement in *Centerline Equip. Corp. v. Banner Pers. Serv., Inc.*, 545 F. Supp. 2d 768, 778 n. 6 (N.D. Ill. 2008), the court suggested in dictum that it would apply the *Gore* guideposts but declined to conduct that analysis based on the record before it. *Leiber v. Bertelsmann AG* (*In re Napster, Inc. Copyright Litigation*) 2005 WL 1287611, at *10-*11 (N.D. Cal. June 1, 2005).

v. Thomas-Rasset, the district court remitted the jury's $1.92 million statutory damages award, which it found "monstrous and shocking."[83] The defendant was found to have willfully infringed the copyright of 24 songs on KaZaA, a peer-to-peer file-sharing network. In the first jury trial, plaintiffs were awarded $220,000 in statutory damages, or $9,250 per song.[84] The judge subsequently threw out the award due to erroneous jury instructions. In a second jury trial, plaintiffs were awarded $1.92 million, or $80,000 per song. The judge remitted that award to $54,000, or $2,250 per song (three times the statutory minimum) and explained that the goal of deterring infringement could not "justify a $2 million verdict for stealing and illegally distributing 24 songs for the sole purpose of obtaining free music."[85] When the defendant rejected the plaintiffs' $25,000 settlement offer after the judge's order of remittitur, a third jury awarded plaintiffs $1.5 million, or $62,000 per song.[86]

In the recently settled case of *Arista Records LLC v. LimeWire LLC*, the district court pointed to the "absurd result" that would follow the plaintiff's statutory damage calculation, which amounted to $1.4 billion. The plaintiffs sought an award for the infringement of 11,000 sound recordings by LimeWire, the peer-to-peer network, in addition to the infringement by each individual online user.[87] The court noted that the plaintiffs' calculation would award them "more money than the entire music recording industry has made since Edison's invention of the phonograph in 1877" and rejected their interpretation of Section 504(c) of the Copyright Act because its adoption would offend the "canon that [courts] should avoid endorsing statutory interpretations that would lead to absurd results."[88] In May 2011, the Recording Industry Association of America and LimeWire settled for $105 million, avoiding further litigation on the calculation of statutory damages.

CONCLUSION

Statutory damages are an example of a legislative approach gone awry. Enacted decades ago to help small litigants vindicate legal injuries that otherwise might go without redress, statutory damages now have a life of their own. The growth of class action practice and the invention of the internet geometrically expanded the potential liabilities of defendants, but statutory damages provisions give courts little guidance on how to handle such a sweeping and vague remedy. In the past few years, courts have felt it necessary to scrutinize the operation of statutory damages and to curtail their effect. However, judicial responses to the emerging issues of statutory damages have been inconsistent. Absent clear guidance from the Supreme Court, those facing statutory damages actions will remain uncertain about their risks and exposure.

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83 *Capitol Records v. Thomas-Rasset*, 680 F. Supp. 2d 1045, 1054 (D. Minn. 2010).
84 *Capitol Records Inc. v. Thomas*, No. 06-1497 (MJD/RLE) (D. Minn. Oct. 4, 2007).
85 680 F. Supp. 2d 1045, 1052 (D. Minn. 2010). Similarly, in *Sony BMG*, a jury awarded plaintiffs $675,000 ($22,500 per song), which was deemed grossly excessive under the Due Process Clause and was reduced by the judge to $675,000 ($2,250 per song). 721 F. Supp. at 85 (D. Mass 2010).
86 *Capitol Records Inc. v. Thomas*, No. 06-1497 (MJD/RLE) (D. Minn. Nov. 3, 2010).
87 *Arista Records LLC v. LimeWire LLC*, No. 06 CV 5936 (S.D.N.Y. Mar. 10, 2011). The court rejected defendant's reliance on *Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284 (9th Cir. 1997), rev'd on other grounds sub nom. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998), and 4 *Nimmer* § 14.04(E)(2)(d) (2002). It pointed to the multiplicity of downstream infringements and *McClatchey v. Associated Press*, 2007 WL 1630261, at *4 (W.D. Pa. June 4, 2007), which rejected the defendant's reading of § 504(c), holding that "the most plausible interpretation of the statute authorizes a single award when there is any joint and several liability, even if there is not complete joint and several liability amongst all potential infringers." Accord *United States Media Corp. v. Eddie Entm't Corp.*, 1998 WL 401532, at *20 (July 17, 1998 S.D.N.Y.) and *Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 152 (S.D.N.Y. 2009).
88 *Arista Group LLC v. LimeWire LLC*, No. 06 CV 5936 (S.D.N.Y. Mar. 10, 2011) (citing *Torraco v. Port Authority of New York and New Jersey*, 615 F.3d 129, 145 (2d Cir. 2010)).