



PANITCH TRAINING ACADEMY

Insights From Leaders In IP Law

Training Academy Session # 40

Understanding Copyright Damages: Legal Framework & Case Insights

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Session Overview

1. Introduction to Copyrights (Slides 3-10)
2. Why Damages Matter (Slide 11)
3. Types of Copyright Damages (Slides 12-22)
4. Landmark Cases (Slides 23-29)
5. Practical Implications & Risk Mitigation (Slides 30-31)
6. Preemption (Slides 32-34)

Introduction

What does Copyright law protect? - 17 USCS § 102

Original Works of Authorship

Fixed in any Tangible Medium of Expression

- Must be original
- Protects expression - Not ideas
- Fixed in any tangible medium of expression
- Works of Authorship
 - Books, photographs, movies, songs, websites, computer programs, etc.

Copyright does **NOT** protect an idea, procedure, process, system, method of operation, concept, principle, or discovery

Introduction

- **Rights** vest with author immediately upon creation
 - "When pen lifts from paper"
- Unregistered works may be protected
- Registration gives added protection

Notice

- Recommended but not required.
 - © Copyright, 2026, Panitch Schwarze Belisario & Nadel LLP

Introduction

Exclusive Rights

- **Reproduce** protected work
- Prepare **derivative works** based on original
 - A “derivative work” is a work based upon one or more preexisting works, such as a translation, dramatization, motion picture version, abridgment, condensation, etc.
- **Distribute** copies of protected work
- **Perform** protected work publicly
- **Display** protected work publicly

Introduction

AI and Derivative Works

- Copyright can protect **only material that is the product of human creativity.**
- The term “author,” **excludes non-humans.**
- When an AI technology receives solely a prompt from a human and produces complex written, visual, or musical works in response, the “traditional elements of authorship” are determined and executed by the technology—not the human user.
- Where a work contains AI-generated material - and also contains sufficient human authorship – a copyright claim is supported and the work is registerable.
 - Federal Register Version, 88 Fed. Reg. 16,190 (Mar. 16, 2023).

Introduction

AI and Derivative Works

Original Work of Authorship	Prompt to AI
	“Draw this person as an exaggerated character”

Introduction

AI and Derivative Works



Introduction

Duration of Protection

(Works created after January 1, 1978)

- In General - life of the author and 70 years after the author's death
- Joint Works - life of the last surviving author and 70 years after such last surviving author's death
- Works Made for Hire - 95 years from the year of its first publication, or 120 years from the year of its creation, whichever expires first

Introduction

Infringement

- Violation of any of the **Exclusive Rights**
 - **Ownership** - shown by registration
 - **Copying** - shown by *access* and *substantial similarity*

Remedies

- Injunctions
- Actual damages and profits
- Statutory Damages
 - With respect to any one work, not less than \$750 or more than \$30,000, as the court considers just
- Attorney's fees and costs

Introduction

Why Damages Matter?

- Consequences of infringement
- Legal & financial impact on creators and businesses
- **17 U.S. Code Chapter 5 - COPYRIGHT INFRINGEMENT AND REMEDIES**
 - § 501. Infringement of copyright
 - § 502. Remedies for infringement: Injunctions
 - § 503. Remedies for infringement: Impounding and disposition of infringing articles
 - § 504. Remedies for infringement: Damages and profits
 - § 505. Remedies for infringement: Costs and attorney's fees

Types of Copyright Damages

- Actual Damages
- Statutory Damages
- Other Remedies

Types of Copyright Damages

Statutory Damages 17 U.S.C. § 504

- **Actual damages v. Statutory damages**
 - Actual damages
 - Can elect actual damages for any copyright infringement after registration (Disgorgement, lost profits, reasonable royalty)
 - Statutory damages
 - Registration must occur within 3 months of publication or before the infringement occurs.
 - Can get attorney's fees

Types of Copyright Damages

Actual Damages 17 U.S.C. § 504(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.

Types of Copyright Damages

Actual Damages 17 U.S.C. § 504(b)

- Lost Profits and Market Impact
 - 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.
- Calculation methods
 - In establishing the copyright holder's profits, the copyright owner is required to present proof of the copyright holder's gross revenue, and
 - the copyright holder is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work. Fixed versus incremental costs

Types of Copyright Damages

Infringer's Profits 17 U.S.C. § 504(b)

- Disgorgement – Disgorgement in copyright law refers to recovering the infringer's profits, not the copyright owner's losses. Under federal law, this remedy is expressly authorized in 17 U.S.C. § 504(b), which allows a plaintiff to recover “any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages.”
- Calculation methods
 - In establishing the infringer's profits due to the infringement, the copyright owner is required to present proof 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.

Types of Copyright Damages

Statutory Damages: 17 U.S.C. § 504(c)

- No proof of actual financial harm is required
- Damages Range (Per Infringed Work):
 - *Standard:* **\$750 – \$30,000**, as the court considers just
 - *Willful infringement:* Up to **\$150,000**; infringer knew its conduct was infringing or acted in reckless disregard
 - *Innocent infringement:* As low as **\$200**; infringer must prove it had no awareness and no reason to believe its acts were infringing
- Registration Prerequisite
 - Statutory damages are available only if the work was registered before infringement began, or within three months of first publication (17 U.S.C. § 412)

Types of Copyright Damages

Statutory Damages

- **17 U.S.C. § 504(c)(1):**
 - “[T]he copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, **with respect to any one work**, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, **in a sum of not less than \$750 or more than \$30,000 as the court considers just.** For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.”

Types of Copyright Damages

Statutory Damages 17 U.S.C. § 504(c)

- Willful v. Innocent Infringement
 - 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 infringement of a copyright, **the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200.**

Types of Copyright Damages

Other Remedies

- **17 U.S.C. § 502 Remedies for infringement: Injunctions**
 - (a) Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.

Types of Copyright Damages

Other Remedies

- **17 U.S. Code § 505 - Remedies for infringement: Costs and attorney's fees Seizure of Infringing Materials**
 - In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.
 - A reasonable attorney's fee to the prevailing party, awarded in the court's discretion.
 - There is no presumption for or against fees; the court must exercise equitable judgment.

Types of Copyright Damages

Other Remedies

- 17 U.S. Code § 503 - Remedies for infringement: Impounding and disposition of infringing articles
 - Seizure of infringing materials - the legal process where a court orders the taking of property, such as infringing products or digital assets, to stop copyright infringement and prevent further violations, often leading to the property's destruction or other legal disposition.

Landmark Cases

Compensatory Damages

- Infringer's Profits
 - *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940)
- Actual Damages
 - *On Davis v. The Gap, Inc.*, 246 F.3d 152 (2d Cir. 2001)

Statutory Damages

- *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228 (1952) & *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998)

Statute of Limitations

- *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014) & *Warner Chappell Music, Inc. v. Nealy*, 601 U.S. 366 (2024)

Attorney's Fees

- *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994) & *Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U.S. 197 (2016)

Compensatory Damages (Infringer's Profits)

Disgorgement of Profits & Apportionment

***Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390 (1940)**

- Apportionment of profits is permissible — the copyright owner recovers only the portion attributable to the infringement.
 - “The purpose is thus to provide just compensation for the wrong, not to impose a penalty by giving to the copyright proprietor profits which are not attributable to the infringement.” *Sheldon*, 309 U.S. at 399.
- *Sheldon* established a two-part test for apportionment: the infringer must show
 - (1) that not all profits are due to the use of the infringing material, and
 - (2) that the evidence is sufficient to provide a fair basis for separating infringing from non-infringing profits.

Compensatory Damages (Actual Damages)

On Davis v. The Gap, Inc., 246 F.3d 152 (2d Cir. 2001)

- **Facts:** The Gap used Davis's protected eyewear design without authorization in a nationwide ad campaign.
- Davis could not recover statutory damages (no timely registration), could not show lost sales or lost licensing opportunities, and could not tie the Gap's parent-company revenue to the infringing ad. Without the license fee theory, he would receive nothing.
- **Holding:** Actual damages under § 504(b) may be measured by the **fair market value of a hypothetical license** for the infringing use.
 - “The question is not what the owner would have charged, but rather what is the fair market value.” *On Davis*, 246 F.3d at 166.
 - Fair market value is “the reasonable licensing fee on which a willing buyer and a willing seller would have agreed for the use taken by the infringer.” *On Davis*, 246 F.3d at 167.

Statutory Damages

***F.W. Woolworth Co. v. Contemporary Arts*, 344 U.S. 228 (1952)**

- Statutory damages serve a dual purpose — **compensation and deterrence**
 - “Even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy.” *F.W. Woolworth Co.*, 344 U.S. at 233.

***Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998)**

- The **Seventh Amendment guarantees the right to a jury trial** on all issues pertinent to an award of **statutory damages**, including the amount.

Factors Courts Consider When Assessing Statutory Damages:

- Infringer’s culpability; Infringer’s profits and expenses saved; Revenues lost by the copyright owner; Deterrent value of a damage award

Statute of Limitations

17 U.S.C. § 507: “No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.”

- A copyright claim accrues, triggering the three-year limitations period, when an infringing act occurs.
- **Separate-accrual rule:** A new statute of limitations begins to run with every separate instance of infringement.

***Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014)**

- Laches cannot bar a damages claim brought within § 507(b)'s three-year limitations period.
 - “[W]e have never applied laches to bar in their entirety claims for discrete wrongs occurring within a federally prescribed limitations period.” *Petrella*, 572 U.S. at 680.

Statute of Limitations

***Warner Chappell Music, Inc. v. Nealy*, 601 U.S. 366 (2024)**

- Nealy filed suit in 2018 for infringement stretching back to 2008; he discovered the infringement in 2016, making his claim timely under the discovery rule.
- "The Copyright Act entitles a copyright owner to obtain monetary relief for any timely infringement claim, no matter when the infringement occurred." *Warner Chappell*, 601 U.S. at 368.
- The three-year limitations period governs when a plaintiff must file suit, but once a claim is timely, nothing in the Copyright Act limits how far back damages may reach.

Attorney's Fees

***Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994)**

- “Prevailing plaintiffs and prevailing defendants are to be treated alike, but attorney's fees are to be awarded to prevailing parties only as a matter of the court's discretion.” *Fogerty*, 510 U.S. at 534.
- Nonexclusive factors: frivolousness, motivation, objective unreasonableness, and the need to advance considerations of compensation and deterrence

***Kirtsaeng v. John Wiley & Sons, Inc.*, 579 U.S. 197 (2016)**

- Courts should give “substantial weight” to the objective reasonableness of the losing party's position, but it is not dispositive.
- A court may still award fees even when the losing party advanced a reasonable position, or deny fees even when the losing party's position was unreasonable.

Practical Implications & Risk Mitigation

- How to Protect Your Work
 - Licensing and Contracts
 - Copyright Registration Benefits

Practical Implications & Risk Mitigation

Avoiding Infringement

- Fair Use Considerations 17 USCS § 107
- Proper Content Attribution

Preemption 17 U.S.C. § 301

- **Copyright preemption** refers to the principle that federal copyright law supersedes state laws when both address the same rights. It's codified in **17 U.S.C. § 301**, and it plays a critical role in determining whether a state-law claim—like misappropriation, unfair competition, or breach of contract—is barred because it overlaps with rights protected by federal copyright.
- **1. Subject Matter Test**
 - The work must fall within the scope of copyrightable subject matter under §§ 102 and 103 (e.g., literary, musical, pictorial works).
- **2. Equivalency Test**
 - The state-law right must be “equivalent” to one of the exclusive rights under § 106 (e.g., reproduction, distribution, performance).
 - If the state claim adds an extra element—like breach of fiduciary duty or violation of a confidentiality agreement—it may escape preemption.

Preemption 17 U.S.C. § 301

Preempted Claim type	Why preempted
Conversion of copyrighted material	No extra element
Unjust enrichment	Mirrors infringement
Implied-in-law contract	No actual promise involved
Right of publicity	In cases based solely on use of a copyrighted performance or recording
Misappropriation of ideas	If the idea is embodied in a fixed copyrightable expression

Preemption 17 U.S.C. § 301

Not Preempted Claim type	Why preempted
Breach of express contract	Requires proof of promise
Trade secret misappropriation	Involves confidentiality and improper acquisition
Fraud or misrepresentation	Requires proof of deception
Trespass to chattels	Involves interference with systems

Speakers



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