Calibrating Copyright Statutory Damages to Promote Speech

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This research builds upon an article I prepared for a symposium sponsored by the Brennan Center for Justice at NYU School of Law and Hofstra Law School (*Reclaiming the First Amendment: Constitutional Theories of Media Reform*, January 19, 2007). That paper argued for more expansive First Amendment limits on Copyright Law and explained how First Amendment jurisprudence provides guidance as to what those limits should be.

This new paper will focus on the specific topic of First Amendment limits on copyright statutory damages. Plaintiffs in copyright actions have the option of receiving statutory damages in lieu of their actual damages. The Copyright Act provides that these awards can be anywhere between $750 and $30,000 for each copyrighted work infringed, and that a court may increase these awards up to $150,000 if it finds an infringement "willful."

My argument will draw on analogies to Contract Law. Under Contract Law, damage awards do not ordinarily punish breaching parties but only seek to protect the expectations of non-breaching parties. Thus, punitive damages are not generally permitted and plaintiffs are instead typically limited to expectation damages -- damages intended to place them in the position they would have been had the contract been performed.

A consequence of this rule is that Contract Law sometimes encourages parties to breach. For instance, if Farmer A contracted to deliver 1,000 bushels of corn to B at the end of the growing season, but was subsequently offered $1 million by a movie producer to use the Farmer's land for the summer (to put in a baseball field, perhaps), then Contract Law would enable A to breach. A will not be subject to punitive damages even though he knowingly and willfully breaches the contract. At the same time, Contact Law will protect B by making A pay him damages for any increase in the price of corn that B pays to obtain the corn elsewhere. Contract Law enables A's "efficient breach" because it is better for society if A uses his resources in the most efficient manner even if this means breaching a contract.

These Contract Law rules are intended to help ensure the most efficient use of resources in economic markets. But why not have similar rules to protect the marketplace of ideas? If copyright damages raise the specter of plaintiffs receiving punitive-like damages – because of the risk of high statutory awards -- then many parties will avoid using copyrighted works even if they believe their use is a fair use or that their use will only result in minimal harm to a copyright owner. This is especially true of low budget artists such as documentary filmmakers or non-profit groups commenting on prominent copyrighted works, particularly works owned by large media conglomerates.

My thesis is that the First Amendment should place limits on statutory damages so that parties making limited use of copyrighted works will not be deterred by the threat of

these damages. Just as in Contract Law, courts can still protect copyright plaintiffs by awarding them “actual damages” for any infringement – perhaps, for instance, a reasonable licensing fee for the use. But the threat of potentially punitive statutory damages should be limited so that parties wanting to make derivative works will not have their creative speech chilled.