CALIBRATING COPYRIGHT STATUTORY DAMAGES TO PROMOTE SPEECH

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I. INTRODUCTION

a. Copyright law is all about striking the right balance. From an intellectual property law perspective, Copyright must find the proper balance between author and publisher incentives and public access to a work. If authors and publishers are inadequately compensated, works will be not be created and distributed. Yet every penny that goes to these parties increases the public's cost for a work. The goal, then, is to strike a balance between these competing interests in which copyright producers are adequately rewarded without unduly taxing copyright consumers.

b. Because copyright law abridges speech, copyright law must also strike a proper balance under the First Amendment. The First Amendment allows Copyright to abridge speech because these restraints encourage the creation and dissemination of creative works (copyright acts as an "engine of free expression"). But there is a point at which Copyright's restraints on speech can outweigh its benefits. If such a situation arises, then Copyright's balance may once again have to be recalibrated in order to pass constitutional muster.

c. For the most part, both the policy concerns of intellectual property law and the constitutional concerns of the First Amendment parallel each other so that a balance struck to satisfy one concern will often satisfy the other. But the two concerns are not always identical and they are enforced through different mechanisms. Whether Congress strikes the right balance as a matter of intellectual property policy is solely dependent on the quality and legitimacy of the legislative process. If Congress is captured by the copyright industries, then it might over-compensate authors or publishers at the public's expense. But unless there is a constitutional restraint, Congress is free to strike this lop-sided balance.

    i. By contrast, if the balance Congress strikes is thought to violate the Constitution (either the First Amendment or the Copyright and Patent Clause or any other provision), then judges can order Congress to revise the balance until it passes constitutional muster. The big question is when this type of judicial intervention is appropriate. To the extent that the balances struck by copyright law are simply public policy choices, it seems unlikely that unelected judges are more

qualified that elected representatives to make these choices. But if copyright trenches upon a vital societal interest that warrants a judicial counter-majoritarian check, then judges may be compelled to intervene notwithstanding their limited competence.

d. Any aspect of Copyright law can potentially affect the balance the law strikes both as a matter of intellectual property policy and the First Amendment. For the most part, however, courts and commentators tend to focus on those doctrines which most clearly affect this balance. These include the idea/expression dichotomy, the fair use doctrine, and copyright duration. By contrast, this article focuses on an area of Copyright law that has a substantial impact on Copyright's balance but which is largely unexamined. It is the area of statutory damages.

e. The article's primary thesis is that statutory damages have a harmful chilling effect on the creation of new works, particularly low budget derivative works that incorporate preexisting copyrighted works. The primary problem is that the Copyright Act's statutory damages regime makes it difficult for users of copyrighted works to predict ex ante their potential liability exposure. On the one hand, statutory damages may be limited to restitutionary or compensatory damages (perhaps that portion of a defendant's profits attributable to the use of the plaintiff's work). But it is also possible that a court will grant statutory damages that more closely approximate punitive damages. Because it is difficult for potential users to know in advance the limits of their exposure, their willingness to create new works will be chilled and society will be deprived of these works.

f. The solution to this problem is for policymakers to create a copyright damage regime that sends clearer signals about the liability exposure of using another's work. To determine what those signals should be, policymakers need to clarify what incentives they want to create with copyright remedies.

g. I argue below that copyright damages in some instances should only protect the copyright owner's restitutionary or compensatory interests, and that punitive-like damages should not be permitted. I contend that policymakers can draw lessons for structuring Copyright remedies from the common law of Contracts. In both areas, the public has an interest in avoiding the over-enforcement of rights resulting from punitive damage awards. The solution, appropriate for most Contract breaches and for some Copyright infringements, is for remedies to focus less on punishing the party in the wrong (either the contract breacher or the copyright infringer) and more on ensuring that the innocent party is adequately compensated for any loss.

II. THE PROBLEM: HOW THE UNPREDICTABILITY OF STATUTORY DAMAGE AWARDS CHILLS THE CREATION OF NEW WORKS

a. Imagine you are a documentary film maker with a small budget but a big idea. You want to do a movie about how the oil and gas industries have manipulated the media to create uncertainty about the scientific case for global warming. Much of the movie will consist of footage that you yourself will shoot (interviews, images of drought-plagued areas, etc.). But you also plan to use numerous clips from television to make your point (e.g. a clip of an oil company executive testifying before Congress; energy company advertisements; politicians discussing global warming; the media coverage of the science of global warming).

b. Of course, it is possible that your use of these clips will be considered a fair use. A court might find that your work is a form of commentary, criticism, or scholarship. But it is often difficult to know in advance how a fair use issue will be decided. There are so many variables (the amount of the underlying work used, whether your point could have been made without the underlying work, the nature of the underlying work, etc.) that making predictions is inherently risky.

c. You could approach the copyright owner of each clip to seek permission to use it (either for free or for a limited fee), but the more works you use, the more time-consuming and costly this process becomes. Moreover, the copyright owners might insist on an exorbitantly high fee or refuse your request altogether.

d. Another possibility is that you just forge ahead and use the clips. But before you can do this, you need to have some sense of your potential liability if your actions are not considered a fair use. Moreover, you might find it difficult to have your work distributed unless you can obtain insurance coverage in the event an infringement has occurred. But for an insurance company to cover this risk, it too must be able to assess your potential liability.

e. This is where the unpredictable nature of statutory damage awards creates a problem. It is perfectly possible, of course, that if you were ever sued and found liable, a statutory damage award would be limited to a share of your profits attributable to the unlawful use. In that instance, it might make sense for you to forge ahead, knowing that even if your use is found not to be fair, you will still not face liability beyond your actual profits.

f. But the Copyright Act provides that statutory damages for the infringement of any given work can fall within a fairly large range: between $750 and $30,000. And if an infringement is found to be "willful" – a term that is not defined in the act and which can simply mean that the user "knew" he was

violating someone's copyright -- then the damages could be as high as $150,000 for each infringed work.

g. Now do the math. Let's assume that in making your film, you use 30 clips from other sources. You know that these clips are protected by copyright and that your use would be infringing if it is not found to be a fair use (which you know is unclear). Moreover, while a court could certainly find that your use was not "willful" because you had a reasonable fair use argument, it need not necessarily reach that conclusion. Thus, all you know ex ante is that you could conceivably be hit with statutory damages of as much as $150,000 for each of the 30 works. That would be enough to make any low budget filmmaker think twice before using another's work, and especially leary of using parts of multiple works.

h. By contrast, if you knew in advance that your damages would be limited to a share of your profits or to a licensing fee that was proportionate to the revenue your film was likely generate, you might be more willing to forge ahead, and insurance companies might be more willing to cover your film.

i. The problem with the current statutory damages regime is that it is hard to predict your potential liability exposure. And since the liability could potentially be very high (especially if your actions are found to be willful), the only safe course may be to avoid using the underlying works in the first place.

j. All of this leads to the larger societal question: Does the chilling affect produced by the uncertainty of statutory damage awards lead to an undesirable underproduction of derivative works? If the answer to this question is "yes," then the solution is to recalibrate copyright's statutory damage awards so that they do not overly discourage the production of new works.

III. A LESSON FROM CONTRACT LAW REMEDIES

a. If policymakers believe that copyright's statutory damages regime does have an intolerable chilling effect on the creation of new works, then they might look to the common law of Contracts for ideas on how to restructure copyright remedies. Indeed, there is an important commonality in both contract law and copyright law that suggests that one area of the law could benefit from the other.

b. The most important commonality between these two legal regimes is that the impact of a wrongdoer's actions is often ambiguous from a societal standpoint. Let's first consider this in the contact law context and then we'll move to copyright.

c. ***Efficient Breaches and Beneficial Infringements***

i. Contract law has long recognized that there are instances in which it desirable from a societal standpoint for a party to breach a contract. This situation most typically arises when a party to a contract can more efficiently use his resources by breaching a contract and using his resources elsewhere.

ii. Consider, for instance, a contract in which a farmer promised to deliver 10,000 bushels of corn to a buyer at the end of the growing season. After the farmer makes this contract, but before the end of the growing season, a movie producer approaches the farmer and offers to pay him $1 million if he can put a baseball field on the farmer's land. This is an instance in which, from a societal standpoint, it is desirable for the farmer to breach. The fact that the farmer will make $1 million if he lets the movie producer use his land, but, say, only $100,000 if he delivers the corn to the buyer, suggests that the more efficient use of his property is as a movie set.

iii. Contract law implicitly recognizes the desirability of the farmer breaching the contract and its system of damage remedies will encourage him to breach. Contract law will not subject the farmer to punitive damages even if he knowingly and willingly breaches the contract. To the contrary, contract law will limit the buyer's damages to expectation damages – the damages necessary to put the buyer in the position he would have been in had the contract been performed. Thus, the farmer will have to pay the buyer for any increase in cost the buyer pays to obtain the corn elsewhere. But by not permitting the buyer to receive punitive damages, Contract law enables the farmer's "efficient breach." At the same time, Contract law still protects the buyer's expectation interest. It is simply does not "punish" the Farmer for the breach, even if it was done knowingly and willfully.

iv. This hypothetical illustrates a fundamental principle of Contract remedies. The purpose of these remedies is not to punish contract breakers but to protect the interests of the non-breaching party. As long as the latter's interest is protected, contract law does not want to overly discourage parties from breaching contracts (*i.e.*, by awarding punitive damages) because in some instances these breaches might be socially desirable.

v. Similar considerations could affect how copyright remedies are designed. Here, too, the act of the wrongful party (*i.e.*, the infringer) will often have ambiguous implications from a societal standpoint. On the one hand, our society has created private property rights in works of authorship in order to encourage the creation and dissemination of

works. When someone infringes another's copyright, he threatens to undermine the incentive system created by copyright law.

vi. On the other hand, if an infringing party is not just engaged in wholesale copying but is creating new works that incorporate parts of another, then the societal cost of punishing the infringer's actions is mixed. By punishing the infringer's action, society helps protect the integrity of copyright's incentive regime. But by preventing the infringer from creating his new work, society deprives itself of access to new and creative works.

    1. The Supreme Court acknowledged this ambiguous nature of copyright infringement in *Fogerty v. Fantasy, Inc*., which addressed the question of when courts should grant attorney fee awards under the Copyright Act. The court noted, "[w]hile it is true that one of the goals of the Copyright Act is to discourage infringement, it is by no means the only goal of that Act." Indeed, the Court noted that "[b]ecause copyright law ultimately serves the purpose of enriching the general public through access to creative works," a defendant's "successful defense . . . may further the policies of the Copyright Act every bit as much as a successful prosecution of an infringement claim by the holder of a copyright."

vii. Since copyright infringement, like the breach of a contract, is sometimes an ambiguous act from a societal standpoint, it may be appropriate to carefully calibrate copyright remedies so they do not overly discourage the use of copyrighted materials.

viii. Copyright, like Contracts, already does not generally allow for punitive damages. So, to that extent, the two are comparable. But copyright's statutory damages are sufficiently wide ranging that they can potentially have a punitive-like effect. Because potential infringers cannot always know in advance whether they will be subject to punitive-like damages, the threat of such awards can deter actions that from a societal standpoint might be desirable. The challenge, then, is to design a system of copyright remedies that adequately compensates copyright owners without unduly chilling the creation of new works.

ix. ***A Critique of the Contract Law Analogy***: Of course, good arguments can be made for rejecting any analogy between Contract law and Copyright. Copyright law, after all, is about a person's "property" rights, and infringement of these rights is considered a "tort." After all, the law does not usually encourage third parties to intentionally use another's property (*e.g.*, land or car) by limiting damage awards to the

harm caused by the use. Instead, it holds out the possibility of punitive damages to discourage the act.

1. But figuring out how the law should treat another's use of a copyrighted work is more complicated. Indeed, copyright law itself, though the idea/expression dichotomy, the fair use defense, and its compulsory licensing schemes, already recognizes that there are instances in which the societal benefit of allowing a use outweighs the property rights of the copyright owner.

    a. The issue is also clouded by the fact that copyright rights impact on speech. Both the underlying works and the infringing works are speech. Consequently, the First Amendment is potentially implicated by any restraints on the use of a copyrighted work.

d. ***Lessons from Contract Law on How to Structure Copyright Remedies***

i. Contract law damages are said to protect any one of three interests of the non-breaching party. Expectation damages try to put the party in the position he would have been in had the contract been performed. Reliance damages put the party in the position he would have been in had the contract never been made (by compensating him for any reliance on the contract). Finally, restitution damages require the breaching party to return any benefits he has received from the non-breaching party. Expectation damages are the most common remedy for breach of contract. Punitive damages are usually not permitted.

ii. As noted above, the focus of these remedies is not to punish the breaching party but to protect the expectations of the non-breaching party. Indeed, because Contract law does not ordinarily provide for punitive damages, there can be situations in which a party willfully breaches a contract but is liable for only nominal damages (*e.g.*, when the non-breaching party can obtain the same goods or services from another at the same price).

iii. How do contact law damage remedies compare to copyright? In some ways, the two seem comparable. Copyright law's provision for a plaintiff's "actual damages" arguably parallels the compensatory function of contract law's "expectation damages." Copyright allowance of damages for a defendant's profits corresponds to "restitution damages," to the extent that they force a defendant to return any benefit attributable to the infringement. In both cases, these copyright damages, like contract damages, arguably do not go beyond what is necessary to make the innocent party whole.

iv. The wild card in copyright remedies, however, is statutory damages. While these damages might also serve a compensatory purpose, they can potentially act like punitive damages. The fact that these damages raise the possibility of receiving punitive-like damages can deter new works from being created in situations where they are arguably socially desirable.

v. So what is the solution to the problem of statutory damages' unpredictability? One answer, of course, would be to eliminate statutory damage awards altogether, thereby limiting copyright plaintiffs to recovery of either actual damages or a defendant's profits. While this solution seems like a simple fix, it ignores the reason why Congress created statutory damages in the first place. According to the conventional wisdom, Congress created these damages because it recognized that it often difficult for a copyright plaintiff to prove his or her actual damages. As Professor Paul Goldstein has noted, "[t]he rational commonly given for statutory damages is that, because actual damages are so often difficult to prove, only the promise of a statutory award will induce copyright owners to invest in and enforce their copyrights and only the threat of a statutory award will deter infringers by preventing their unjust enrichment."

vi. One partial solution, then, might be to say that statutory damages are unavailable whenever there is proof of a plaintiff's actual damages and a defendant's profits. Indeed, under the 1909 Act, courts often refused to grant statutory damages in lieu of actual damages when there was evidence of both the plaintiff's actual damages and defendant's profits. (Nimmer: "When both the elements of actual damages and defendant's profits were ascertained it seems clear that under the 1909 Act, generally neither the plaintiff nor the defendant might demand an award based upon an 'in lieu' measure.")(But see Goldstein at § 14.2 (saying that the courts were split on this issue under the 1909 Act).

    1. This solution, however, would only solve the problem when there is adequate proof of actual damages and the defendant's profits.

vii. The real problem, however, is that both Congress and the Courts think that it is sometimes appropriate to award punitive-like statutory damages. In *Feltner v. Columbia Pictures,* 523, U.S. 340, 352 (1998), for instance, the Supreme Court said that "an award of statutory damages may serve purposes traditionally associated with legal relief, such as compensation and *punishment.*" The Court made a similar point in F.W. Woolworth Co. v. Contemporary Arts, 344 U.S. 228

(1952) when it was discussing the award of statutory damages under the 1909 Act:

1. "A rule of liability which merely takes away the profits from an infringement would offer little discouragement to infringers. It would fall short of an effective sanction for the enforcement of the copyright policy. The statutory rule, formulated after long experience, not merely compels restitution of profit and reparation of injury but also is designed to discourage wrongful conduct. The discretion of the court is wide enough to permit resort to statutory damages for such purposes. 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 statutory policy." (344 US at 233).

2. Thus, commentators fairly asked after noting that copyright law does not ordinarily allow for punitive damages: "How do awards of statutory damages for willful infringement differ from awards of punitive damages?" Joyce, et al, Copyright Law 908 (7th ed.).

viii. Of course, the Supreme Court is undoubtedly right to think that there should be a vehicle in copyright law through which courts can award punitive-like damages. For actions that amount to nothing more than flagrant piracy, it is not enough to just take away the defendant's profits. Instead, courts should be able to award punitive-like damages to deter future violations.

ix. The real question is whether the law is clear enough so that parties who are not egregious violators can feel confident that they will not be subject to these punitive-like sanctions. In other words, how should the law treat: (1) the documentary filmmaker who wants to use of clips from other sources to make her point; (2) the graphic artist who wants to use an assortment of other people's photographs to create a new work of art; etc. These uses might be considered a fair use but it could be hard to know in advance. The author could seek permission from each copyright owner but that may be difficult or prohibitively expensive if the author has little or no budget. The issue, then, is whether these low budget artists can have confidence that if they are sued, the damages will be limited to the copyright owner's actual damages or the defendant's profits and that the artist will not have to fear punitive-like damages. As will be seen, there is certainly jurisprudence in the area of statutory damages that could give these artists some comfort. But the law is arguably sufficiently ambiguous that these authors may not want to take the risk and will choose not to create their works.

IV. THREE OPTIONS FOR FIXING THE PROBLEM

a. *The Interpretative Fix: Construing the Existing Statutory Scheme to Make Statutory Damages Predictable and Reasonable*

i. ***Section 504 gives the decision-maker lots of discretion:*** Section 504(c), which authorizes the award of statutory damages, undeniably has plenty of discretion built into it. The decision as to amount of damages is to be made "as the court considers just." Likewise, if a copyright owner sustains the burden of proving, "and the court finds," that an infringement was committed willfully, the court may "in its discretion" choose to increase the award.

ii. In light of the Supreme Court's decision in *Feltner*, which held that there is a right to a jury trial "on all issues pertinent to an award of statutory damages," much of this discretion may now be in the hands of jurors. The role of judges, then, will be to properly instruct the jurors.

iii. Over the years, courts have often exercised their discretion in ways that would give low budget filmmakers and artists considerable comfort.

1. One benchmark courts use in determining what is a "just" award is to approximate the actual damages and profits the plaintiff would have recovered had he been able to prove them. (Goldstein at 14.2.1). This, in effect, would make statutory damages more like a compensatory remedy.

    a. Goldstein in fact notes that "[w]here it is clear that he plaintiff suffered no actual damages, and the defendant earned little if any profits from the infringement, courts tend to limit recovery to the minimum statutory sum."

2. At the same time, Goldstein says the other benchmark courts use is based on the rationale underlying statutory damages – "to promise copyright owners an award that will induce them to create, and to enforce rights in, copyrighted works, and, at the same time, to deter infringement." This rationale gives courts more discretion to authorize punitive-like damages.

    a. Fortunately, courts tend to award the punitive-like damages only when they find the infringer's misconduct justifies a larger award as a deterrent. Typical examples include "the repeated, unauthorized

performance of a copyrighted work despite the copyright owner's persistent objections and requests that defendants obtain a license, and the continued sale of infringing goods after being served with process in the copyright infringement action." (Goldstein)

iv. ***The Requirements for Showing Willful Infringement:*** As noted previously, if an infringement is shown to be "willful," the statutory damages can be increased to as much $150,000 for each work infringed. The question, then, is what it takes to show that an infringement was willful.

1. The Act itself does not define "willful" so the definition has been left to the courts. Willfulness is generally said to include "situations in which the defendant knew, had reason to know, or recklessly disregarded the fact that its conduct constituted copyright infringement."

    a. The good news for low budget creators of derivative works is that "reliance – albeit ultimately incorrect – on the often unpredictable fair use defense will support an argument that infringement was not willful." (Goldstein)

2. If willful infringement is found to occur, then courts will be more likely to grant an award that is intended to deter rather than to just compensate the plaintiff.

v. ***Assessment: Is the current discretionary system and the way it has been interpreted sufficient to avoid undue deterrence?*** This is a complicated empirical question for which there is probably no clear answer. On the one hand, courts have often used their discretion in ways that might give the authors of low budget derivative works some comfort (particularly if they have at least a credible fair use argument). But one could also easily imagine a lawyer telling these artists that if they "know" they are using someone else's work and they're not sure that their use is a fair use, then their actions could potentially be found to be "willful." Similarly, the attorney could say that courts might be inclined to award only limited damages, but the attorney would probably have to qualify this by saying that you can't know for certain until the award is made. Given this unpredictability, it may be in the interest of many low budget artists to simply avoid the risk. If that result is problematic from a societal standpoint, then perhaps the solution is to legislatively amend the act to provide courts and potential infringers clearer guidance.

b. ***The Legislative Fix: Amending Copyright's Remedy Provisions to Restore Proper Incentives***

i. Finding a statutory fix to the problem of statutory damages' unpredictability is easier said than done. If one accepts that punitive-like damages are appropriate to deter egregious violators, but that the threat of them should not deter non-egregious infringers, then the trick is to structure these damages in a way that gives potential infringers a clear signal as to when they will be imposed.

1. The tools for regulating the award maker's discretion in the current statute ("as the courts considers just," if "the court finds" willfulness, and "in its discretion") are arguably too vague to accomplish this purpose. The "considers just" and "in its discretion" language are very open-ended. While jurisprudence has developed which suggests that courts will use their discretion wisely, that may not be enough to give potential users the confidence to create their works.

2. Of course, under the current regime, the most important determinant of whether punitive-like damages will be issued is whether a defendant's conduct is considered "willful." The question is whether this criterion is the best way to distinguish between those situations when punitive-like damages should be allowed and those when they should not.

    a. To the extent that the jurisprudence has focused on the egregiousness of an infringer's actions, it seems to be making the proper distinction. But to the extent that the jurisprudence's primary focus is on whether an infringer "knew" his activity was infringing, it may not be sending the appropriate signal. After all, a low budget documentary filmmaker or graphic artist may "know" that they are using someone else's work without permission, but that should not be the determinant of whether they are subject to punitive-like damages.

ii. As noted above, the real distinction to be made is between purely egregious infringements (where there is no reason for society to encourage the activity) and infringements that are not egregious and are arguably beneficial from a societal standpoint (because they give the public access to new works). In some instance, the later uses might be considered fair uses. But there may be plenty of situations where a court would not want to go so far as to say that the use is free (which would be the result of a fair use finding) but would also not

want to punish the use. In those situations, courts should make sure that the copyright owners are compensated for any loss (or that a defendant doesn't enjoy profits attributable to the underlying work). But the law should not deter the use with the specter of punitive-like damages.

1. The relevant criteria for making this distinction is probably not willfulness or at least not exclusively willfulness (at least if that term focuses only on whether a party knew his use was infringing). Instead, the focus should be on fair use type factors such as (1) the likelihood that the infringer's use was harming a logical market for the copyright owner to exploit; (2) whether the infringer's use was transformative in that it produced something new; and (3) how feasible it was for the user – both financially and practically – to obtain permission to use the underlying works. It is true that these criteria will sometimes lead to a finding of fair use. But there may be situations in which a court thinks that the copyright owner is entitled to compensation for the use, but at the same time does not want to overly deter the infringer from making the use by the threat of a potentially high damage award.

2. A comparable example can perhaps be found in the Lanham Act, which provides for awarding of treble damages when a defendant uses a counterfeit mark. In the trademark context, this is arguably the most egregious of all violations, and the statute rightfully separates it out for punitive-like treatment. (15 USCA § 1117(b)).

3. ***Clarification of factors:*** The above analysis is not intended to minimize the liability of parties who make derivative works in markets that a copyright owner would logically exploit. For instance, making an unlicensed movie of a Harry Potter book or toy Harry Potter dolls would obviously be transformative but should be subject to the full range of copyright damages (including potentially punitive-like statutory damages) because it is exploiting a market that should be reserved for the copyright owner. But a documentary about how Harry Potter books have increased children's interest in reading that uses movie clips and passages from the book, or an abstract painting that uses some characters from the Potter books, should be immunized from the threat of punitive-like statutory damages. Mind you, both these examples might qualify as fair use. But the point is that it is often difficult to know in advance whether a fair use defense will be successful. These factors would encourage these derivative authors to forge ahead nonetheless

by giving them assurance that, if their uses are found not to be fair, then their exposure to liability will still be limited.

c. ***The Constitutional Fix: First Amendment Limits on Statutory Damages***

i. The First Amendment is a rather big gun to solve this relatively small problem. It would undoubtedly be preferable to fix the problem either through judicial interpretation of the current act or a legislative fix. Nevertheless, it is possible that neither will do the job. Indeed, to the extent that Congress has been captured by the copyright industries, it is unlikely to take any actions that will reduce the threat of damages to infringers. If anything, the movement has been in the opposite direction: to give the Copyright Act's remedy provisions greater force, as occurred with the amendment that doubled statutory damage awards. Thus, it might be worth considering how the First Amendment should apply in a situation where the political process is unlikely to adequately protect speech interests.

ii. To begin with, it is important to concede that any First Amendment claim would be an uphill battle. While the Supreme Court has acknowledged that Copyright law implicates the First Amendment, it has largely dismissed any First Amendment attacks on the ground that Copyright law already has its own built-in free speech safeguards, most notably the idea/expression dichotomy and the fair use doctrine. The first hurdle in any First Amendment argument would be to convince a judge that these free speech accommodations should not render all First Amendment attacks on Copyright futile. This may not be an easy argument to win but it is a sound argument.

iii. How courts should analyze statutory damages under the First Amendment is itself an interesting question. For the most part, First Amendment jurisprudence resolves disputes by deciding whether the speech at issue is protected or not. If the speech is not protected, then the government is free to regulate it.

1. In the Copyright context, it is possible that a court would conclude that infringing speech is not protected so that any First Amendment concerns immediately evaporate. That, in effect, was how Justice Ginsburg easily brushed aside a First Amendment challenge to the Copyright Term Extension Act. She noted that the First Amendment "protected the freedom to make – or decline to make – one's own speech," but that "it bears less heavily when speakers assert the right to make other people's speeches." To the extent that the latter even raises First Amendment concerns, she said that "copyright's built-in

free speech safeguards are generally adequate to address them."

2. This claim, however, is far too simplistic. It ignores the myriad ways in which the use of copyrighted works can serve important free speech interests.

3. If a court were willing to entertain a First Amendment challenge to the statutory damage regime, the issue would be whether the impact these damages have on free speech interests is more than the First Amendment can tolerate. This, in effect, is what the courts do when analyzing content-neutral laws. The problem in these instances is not that the government is censoring speech because it doesn't like the message. Instead, the problem is that even a content-neutral government action can sometimes harm speech interests in an intolerable manner. For instance, if the government banned all leafleting to prevent the accumulation of litter, the law might be content-neutral but it would still have an intolerable impact on a vital means of grassroots communication.

4. In the statutory damage context, we must start with the recognition that the First Amendment accepts the general legitimacy of copyright law notwithstanding the restraint it places on speech. The Supreme Court has made this clear in cases such as *Harper* & Row and *Eldred*. The issue, however, is not whether all of Copyright law is unconstitutional, but only whether this particular form of damages raises free speech concerns.

    a. For the most part, First Amendment jurisprudence does not focus on the speech impact of excessive damage awards. The one notable exception is in the area of defamation law, where the court specifically established rules for when punitive and presumed damages may be awarded.

    b. The appropriate question is whether statutory damages' impact on speech is more than the First Amendment can tolerate. It would be equivalent to a city that permitted use of a public park but only upon payment of a $10,000 fee. While the government may be permitted to charge a reasonable fee for the use of its facilities, such an exorbitant fee to use a traditional public forum (even though unrelated to the content of the speaker's message) is more than the First

Amendment could tolerate. Similarly, if the chilling affect of the specter of punitive-like statutory damages chills more speech that the First Amendment could tolerate, then a court could require the statutory damages regime to be modified in the ways suggested above.

V. CONCLUSION

a. Most intentional torts, such as fraud or punching a person in the nose, have no societal benefit and in fact are harmful. Society has every reason to structure Tort law to discourage such actions, not only by compensating the victims but also by holding out the threat of punitive damages.

b. But the societal consequences of the tortious act of copyright infringement are sometimes more ambiguous. While there are some instances, such as pure unadulterated piracy, that may have no socially redeeming aspects, there are other types of infringement that involve the creation of new socially valuable works. To that extent, copyright law has something in common with contract law, in which the actions of a breaching party are not always socially undesirable.

c. The key to properly calibrating copyright damages is to have a spectrum of options that correlate to the relative societal harm or benefit of the activity being sanctioned. That spectrum should look something like this:

   i. ***One end of the spectrum: Egregious piracy with no socially redeeming value:*** In these instances, society has a legitimate interest in not only compensating the injured party but deterring the wrongful behavior. Punitive-like damages administered through a statutory damage regime is appropriate.

   ii. ***The other end of the spectrum: Fair use:*** In these instances, where there are significant societal benefits from the use (scholarship, teaching, parody, news reporting) and the harm to the copyright owner is minimal, the law fairly precludes any liability so as to encourage the activity.

   iii. ***The middle of the spectrum:*** These are instances in which the infringing activity has a societal benefit but it is also inappropriate to deny the copyright owner any compensation. To a certain extent, this type of balance is reflected in the compulsory licensing schemes in the Copyright Act, which permit a use but require payment of a pre-determined fee. These licenses are in part intended to address circumstances in which negotiated licensing is not feasible, but they

can also address concerns of abusive monopoly power on the part of copyright owners (*e.g.*, the origins of section 115).

1. The situations considered in this article are those in which there is a societal benefit to the infringing use and the use does not exploit a market that logically belongs to the copyright owner. In some of these cases, it may be appropriate to treat the use as a fair use. But in others, it may be appropriate to require the user to pay a reasonable licensing fee (or relinquish profits that are attributable to the infringed work). Because these works have a social benefit, society may want to encourage their production. But if the users cannot tell in advance whether their actions might incur punitive-like damages, they will most likely not create their works. A properly calibrated remedies regime, however, can both encourage these artists to produce while at the same time protecting the legitimate interests of the copyright owners of the underlying works.