**17.33 Copyright—Damages—Actual Damages**

**(17 U.S.C. § 504(b))**

The plaintiff is entitled to recover the actual damages suffered as a result of the infringement. Actual damages mean the amount of money adequate to compensate the copyright owner for the reduction of the fair market value of the copyrighted work caused by the infringement. In determining actual damages, you should consider the following:

1. [The amount a willing buyer would have been reasonably required to pay a willing seller at the time of the infringement for the actual use made by the defendant of the plaintiff’s work] [;] [and]
2. [The profits the plaintiff should have received for any sales lost because of the infringement. Profits are the gross revenue the plaintiff would have made on sales that did not occur because of the infringement minus additional expenses the plaintiff would have incurred in making those sales] [;] [and]
3. [*Insert any other factors that bear on the plaintiff ’s actual damages*].

**Comment**

Add applicable paragraphs from Instruction 17.34 (Copyright— Damages—Defendant’s Profits).

This instruction is based upon a jury instruction approved by the Ninth Circuit as “properly stat[ing] the law of damages in a copyright infringement suit” and “in line with our circuit’s caselaw.” *Wall Data Inc. v. L.A. Cnty. Sheriff’s Dep’t*, 447 F.3d 769, 787 (9th Cir. 2006). The circuit has noted that actual damages may be “awarded in the form of lost profits” or may be awarded based on “hypothetical-license damages,” which are determined by “the amount a willing buyer would have been reasonably required to pay a willing seller at the time of the infringement for the actual use made by [the infringer] of the plaintiff’s work.” *Oracle Corp. v. SAP AG*, 765 F.3d 1081, 1087 (9th Cir. 2014); *see also id.* at 1088 (explaining that a rule disallowing “hypothetical-license damages . . . could operate unfairly, given the difficulty [the copyright owner] might face in meeting the burden of proof for lost profits and infringer’s profits” (citing *On Davis v. The Gap, Inc.*, 246 F.3d 152, 166 (2d Cir. 2001)). “[T]he market value approach is an objective, not a subjective, analysis.” *Jarvis v. K2 Inc.*, 486 F.3d 526, 534 (9th Cir. 2007) (quoting *Mackie v. Rieser*, 296 F.3d 909, 917 (9th Cir. 2002)). Therefore, “[e]xcessively speculative claims of damages are to be rejected.” *Id.*

This instruction does not address whether the measures of actual damages (as either the plaintiff’s lost profits or the fair market value of the use illegally appropriated by the infringer) are mutually exclusive or additive, nor the danger of double recovery if both measures are presented to the jury.

For commentary on the plaintiff’s right to elect to recover statutory damages instead actual damages and the defendant’s profits, *see* Instruction 17.35 (Copyright—Damages—Statutory Damages).

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