# 17.35 COPYRIGHT—DAMAGES—STATUTORY DAMAGES (17 U.S.C. § 504(c))

If you find for the plaintiff on the plaintiff’s copyright infringement claim, you must determine the plaintiff’s damages. The plaintiff seeks a statutory damage award, established by Congress for [[the work infringed] [each work infringed]]. Its purpose is not only to compensate the plaintiff for [his] [her] [its] losses, which may be hard to prove, but also to penalize the infringer and deter future violations of the copyright laws.

The amount you may award as statutory damages is not less than $750, nor more than

$30,000 for each work you conclude was infringed.

[However, if you find the infringement was innocent, you may award as little as $200 for each work innocently infringed.]

[However, if you find the infringement was willful, you may award as much as $150,000 for each work willfully infringed.]

[Instruction[s] [*insert number of pertinent instruction, e.g., Instruction 17.36 (Copyright—Damages—Innocent Infringement), Instruction 17.37 (Copyright—Damages— Willful Infringement)*] will tell you [what constitutes innocent infringement] [and] [what constitutes willful infringement]].

# Comment

The jury should be provided with a special interrogatory form in order to report its findings on the issue of statutory damages. The minimum for statutory damages is $750 per work infringed and the maximum is $30,000 per work infringed. 17 U.S.C. § 504(c)(1). In the case of willful infringement, the statutory maximum for damages is $150,000. 17 U.S.C. § 504(c)(2).

The Seventh Amendment provides for the right to a jury trial on statutory damage issues, including the amount of such award. *See Feltner v. Columbia Pictures Television, Inc*., 523 U.S. 340, 355 (1998).

There is wide discretion in determining the amount of statutory damages, constrained only by the specified statutory maximum and minimum. *See Dream Games of Ariz., Inc. v. PC Onsite*, 561 F.3d 983, 992 (9th Cir. 2009); *L.A. News Serv. v. Reuters Television Int’l*, 149 F.3d 987, 996 (9th Cir. 1998); *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984) (noting that trier of fact must be guided by “what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like,” restrained only by qualification that amount be within prescribed maximum or minimum).

Because statutory damages serve both compensatory and punitive purposes, plaintiff can recover statutory damages whether or not there is adequate evidence of the actual damage suffered by plaintiff or the profits reaped by the defendant. *See L.A. News Serv.*, 149 F.3d at 996; *Peer Int’l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1337 (9th Cir. 1990); *Harris*, 734 F.2d at 1335. “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” of discouraging infringement. *F.W. Woolworth Co. v. Contemporary Arts, Inc*., 334 U.S. 228, 233 (1952). When an injury can be shown, but neither profits nor damages can be proven, statutory profits are mandatory. *See Russell v. Price,* 612 F.2d 1123 (9th Cir. 1979); *Pye v. Mitchell*, 574 F.2d 476, 481 (9th Cir. 1978).

Statutory damages are precluded when the copyright holder does not register the copyright before commencement of the infringement. *See Derek Andrew, Inc. v. Poof Apparel Corp.*, 528 F.3d 696, 699 (9th Cir. 2008); *Polar Bear Prods., Inc. v. Timex Corp*., 384 F.3d 700, 707 n.5 (9th Cir. 2004); *Mackie v. Rieser*, 296 F.3d 909, 912 n.3 (9th Cir. 2002). Nor are statutory damages awarded if the infringing activity started after the date of first publication but before the effective date of registration of the work, unless the copyright for the infringed work was registered within three months after the work was first published. 17 U.S.C. § 412.

The plaintiff has the right to make an election before final judgment to recover statutory damages instead of actual damages and defendant’s profits. 17 U.S.C. § 504(c)(1). If the plaintiff is unable to meet its burden of proving actual damages, it may still seek statutory damages. *See L.A. News Serv.*, 149 F.3d at 995 & n.8. However, the converse is not true. Once the copyright owner elects to recover statutory damages, the owner may not recover actual damages as well. *See Nintendo of America, Inc. v. Dragon Pac. Int’l*., 40 F.3d 1007, 1010 (9th Cir. 1994). Apportionment of damages to reflect profits other than those derived from the infringement is not available when the plaintiff elects statutory damages. *See id*. at 1012.

If statutory damages are assessed against one defendant or a group of defendants who are jointly and severally liable, each work infringed may form the basis of only one award, regardless of the number of separate infringements of that work. *See Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.*, 658 F.3d 936, 946 (9th Cir. 2011) (citing *Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284, 294 (9th Cir. 1997)*, rev’d on other grounds sub nom by Feltner v. Columbia Pictures Television, Inc*., 523 U.S. 340, 355 (1998). This is true even if there is incomplete joint and several liability between all parties. *Desire, LLC v. Manna Textiles, Inc.*, 986 F.3d 1253, 1265 (9th Cir. 2021) (holding that only one statutory award was available when “one infringer is jointly and severally liable with all other infringers, but the other infringers are not completely jointly and severally liable with one another”). However, if separate copyright infringements are attributed to two or more defendants (in the same action) and those defendants are not jointly liable, separate awards of statutory damages are appropriate*. See Louis Vuitton Malletier, S.A.*, 658 F.3d at 946-47 (“[A] plaintiff may receive a single statutory award for all infringements of any one copyrighted work from either (1) any one defendant, where that defendant is separately liable or (2) multiple defendants, where those defendants are jointly and severally liable.”); *Columbia Pictures Television*, 106 F.3d at 294 (holding that television stations owned by same owner and broadcasting episodes of same work, were separate copyright infringers for purposes of determining statutory damages).

The proper test for assessing what is a separate work when the infringement involves episodes of a broadcast series focuses on whether each episode has an independent economic value and is, in itself, viable. *Columbia Pictures Television*, 106 F.3d at 295-96.

*Revised Mar. 2021*