

Proving Damages at Trial in Copyright Litigation

Litigation Counsel of America

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Review

- (1) Plaintiff's "Actual Damages"
- (2) Disgorgement of Defendant's Profits
- (3) Statutory Damages
- (4) Willfulness/Innocence
- (5) Timing of Election/ No Double Recovery
- (6) Three years from filing suit (no laches)
- (7) Fee shifting (sometimes)

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Statutory Damages

- Range of \$750 to \$30,000
 - “*per work*”
- Increase for willfulness (up to \$150,000); decrease for “innocent infringement” (down to \$200); in court’s discretion
- **But availability and amount is for JURY**
 - “*in an amount you consider just*”
- So, how do you weave into the theme of your case for trial?

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Factors

(from various cases and jury instructions)

- Nature of the infringement
- Defendant's purpose and intent
- Profit the defendant reaped
- Expense the defendant saved
- Revenue the plaintiff lost as a result of the infringement
- Value of the copyright (scarcity)
- Duration of the infringement
- Defendant's continuation of infringement after notice or knowledge
- Need to deter the Defendant and other potential infringers
- Compliance with contractual obligations by the parties (where applicable)

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Apportionment

- “the infringer is required to prove ...deductible expenses and the *elements of profit attributable to factors other than the copyrighted work*”
- Apportionment not susceptible to precise measurement
- But, not just quantitative, it is qualitative
- Some factors:
 - Defendant’s marketing prowess and expenses (“brand”)
 - Other features driving sales
 - Defendant’s market position
 - (reputation for quality or “drawing power”)
 - Defendant’s creativity (“talent”)
 - Fame of the Plaintiff

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Impact of Licensing Market

- Are industry licenses based on the component or the entire product?
- What factors do industry licenses take into account (demand, content, risk, rarity, geographical reach, size, exclusivity, duration, credit, rights assignment, sub-licensing)
- Types of payments (lump sum, up-front with running royalty, per use or per unit)
- Correlating the industry norms to the defendant's revenue model (See Oracle v. SAP, 9th Cir. 2014)

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Fact Witnesses

- Importance of copyrighted features
 - *To Plaintiff's work*
 - *To Defendant's work*
- **What Drives Demand?**
- Various doctrines that limit what is copyrightable
 - *Scenes a faire*
 - *Merger of idea and expression*
 - *Public domain (names and titles)*
 - *Fair use*
 - *Derivative works (incorporation of prior works; versions)*
- Abstraction-filtration-comparison doctrine
 - *from Computer Associates v. Altai (2d Cir. 1992) to Oracle v. Google (Fed. Cir. 2014)*
 - *Supreme Court just asked SG's office for advice*
- Total Look (or Concept) and Feel

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Expert Witnesses

- Combine industry and/or technical expert with economist/accountant
 - *Moored to the facts*
- Don't just leave it to the other side to meet their "burden of proof"
 - *Make sure you get a rebuttal report*
- Be mindful of "burden shifting" situations
 - *Apportionment, Nexus and Extent of Use*

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Summary Judgment/Daubert/ Motions In Limine

- Proper methodology for deduction of costs
 - *Next Best Alternative*
 - *Incremental profits vs. “Full Absorption” profits*
 - *Role of “opportunity costs”*
- Burden of Proof – Whose burden? When does the burden shift?
 - *Plaintiff: “As a result of”/“Attributable to” the infringement*
 - *Defendant: “Factors other than the copyrighted work”*
- Surveys
 - *Ordinary Course*
 - *Litigation Created*

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Direct Case – Trial tips

- Weaving your damages case into the overall theme of the case
- Calling the other side in your case
- Not opening the door to excluded evidence
- Direct and Indirect revenue both count, but don't overreach

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Cross Examination – Trial tips

- Remember that (fact) accounting witnesses are like experts
- Importance of the pre-trial rulings
 - Did other side open door to revisit scope rulings?
- Should you ask a question you don't know the answer to?

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Increasing Importance of Copyright Damages After *Alice and Fed. Cir. damages cases*: It's Not Just About The **Trolls**

1. Oracle – 76% of patent portfolio potentially affected by *Alice v CLS*
2. Google – 58%
3. Microsoft – 55%
4. IBM – 49%
5. Cisco Systems – 38%
6. Apple – 34%
7. Hewlett-Packard – 31%
8. Rockstar – 31%
9. Intel – 29%
10. Round Rock Research – 26%
11. Alcatel-Lucent – 25%
12. Intellectual Ventures – 24%
13. Honeywell International – 18%
14. Nokia – 16%
15. Texas Instruments – 16%
16. Ericsson – 15%
17. Qualcomm – 15%
18. Micron Technology – 14%
19. Xerox – 12%
20. Panasonic – 10%
21. InterDigital – 9%
22. Samsung – 9%
23. GE – 8%
24. Philips – 7%
25. AT&T – 6%



Wild J., "Big US tech companies face major patent losses in the post-Alice world, IAM research reveals," Sept. 27, 2014.

5

Thank You



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