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PERSPECTIVE

Copyright Act statutory damages in age of the internet

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In the internet era, one of the most significant legal concerns for an internet service provider (ISP) is the risk of exposure to damages for the copyright infringements of their users. In particular, ISPs that transmit or host user-generated content face a potentially greater risk than others because not only can they be held secondarily liable for "downstream" infringements of users, but that liability can come with statutory damages attached. Statutory damages, which are authorized by Section 504(c) of the Copyright Act, range from $750 to $30,000 for each infringed work, though a court may award up to $150,000 in cases of willful infringement. Under the principle of joint and several liability, an ISP with an uncounted number of users may see its damages exposure multiply hundreds or thousands of times over. The result is that a defendant may be held liable for multiple statutory damage awards for infringing a single work.

The 9th U.S. Circuit Court of Appeal's decision in *Columbia Pictures Television v. Krypton Broadcasting of Birmingham, Inc.* two decades ago illustrates the intersection of the joint and several liability principle with copyright statutory damages. The defendants in *Columbia Pictures* were three television stations that had directly infringed upon the plaintiff's copyrights independently of each other. Consequently, the company that owned the three stations was secondarily liable for their infringement. The court held that the plaintiff was entitled to separately calculated statutory awards against each of the three stations (as they were separate infringers) and that, with respect to these awards, each of the three stations was jointly and severally liable with their common owner.

While *Columbia Pictures* involved only three separate infringements in the broadcasting context, applying the joint and several liability principle to infringements on the internet has potentially punitive consequences. An "upstream" infringer, often the ISP, may be found secondarily liable for the infringements of numerous "downstream" infringers, the service provider's users. Even if a court exercises its discretion to award no more than the $750 minimum for each of the separate infringements subject to joint and several liability, a statutory award for tens or hundreds of thousands of internet-based direct infringements could bankrupt all but the most deep-pocketed service provider. The mere prospect of such an award could discourage companies from entering this market.

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To avoid punitive statutory damage awards against jointly and severally liable copyright defendants, some courts have invoked proportionality as a principle of statutory interpretation. In *Arista Records LLC v. Lime Group LLC*, for example, a file-sharing service provider faced a potential near-billion dollar damage award for the conduct of a multitude of downstream infringers. The New York district court found that "the most plausible interpretation of Section 504(c) is one that authorizes only a single statutory damage award per work against a secondarily liable defendant, particularly in the context of the mass infringement found in the context of online peer-to-peer file sharing." Accordingly, the court limited the plaintiffs' statutory damages to a single statutory damage award per work.

More recently, in its 2016 decision in *Friedman v. Live Nation Merchandise, Inc.*, the 9th Circuit adopted a different approach to the joint and several liability conundrum. The court held that, for a plaintiff to recover multiple damage awards against a secondarily liable defendant based on downstream infringement, it must join the direct infringers as defendants. The court found nothing in the text of Section 504(c) that "admits of a 'mass-marketing' exception" of the sort endorsed by the *Arista* court. The 9th Circuit also observed that its prior *Columbia Pictures* decision rested on the fact that each downstream infringer in that case was named as a defendant. Because the *Friedman* plaintiff had not joined any of the 100-plus alleged "downstream" infringers (retailers who distributed the infringing merchandise) as defendants, their unadjudicated liability could not enlarge the plaintiff's statutory damage award against Live Nation.

Applying the statutory damages formula, yet avoiding seemingly disproportionate outcomes, is a tricky task when a single ISP may be held liable for a statutory damages award multiplied by the hundreds of direct infringers with whom it is jointly and severally liable. *Friedman* attempts to avoid this prospect by importing a due process requirement that, in order for the copyright owner to obtain an expanded statutory award against the contributory infringer, the direct infringers also must be parties to a suit. But this does not avoid proportionality concerns in cases where direct infringers are joined. Would the *Arista* court have reached a different result under the *Friedman* approach if the plaintiff had joined all downstream file-sharing users as defendants? Presumably yes, as the court noted that, if the *Arista* plaintiffs "were suing multiple individually liable infringers in the same lawsuit, they would be entitled to one award with respect to each individual's infringement of any given work."

Internet service providers and other potential upstream infringers should understand that the current statutory damages regime is particularly unsuitable for internet cases. While courts have offered expedient solutions for limiting punitive awards, the solutions are neither definitive nor entirely responsive to the problem.

As the *Friedman* court noted, there is nothing in the statute to support a "mass-marketing" exception to multiple statutory damage awards, much less to indicate how a court should go about determining "mass infringement" type of cases. Nor is the *Friedman* rule that downstream infringers must be joined as defendants limiting in internet cases, where a plaintiff can identify and join large numbers of defendants with relatively little effort, and even a minimum award of $750 for each infringement might repay the expense.

The real problem with statutory damages under the Copyright Act is that Congress did not contemplate secondary liability for infringement on a massive scale. Until the contemporary reality of internet usage is addressed in the statute, ISPs face greater exposure than other alleged infringers.

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