

***Statutory Damages:  
A Rarity in Copyright Laws Internationally, But For How Long?***<sup>1</sup>

*By Pamela Samuelson, Phil Hill, & Tara Wheatland  
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One innovation that the United States has contributed to copyright laws in the international arena is the availability of statutory damages as a remedy for copyright infringement. Under the current U.S. regime, successful plaintiffs are entitled to ask for the “extraordinary remedy” of statutory damages, in lieu of actual damages or an accounting of defendant’s profits, at any point up to the entry of final judgment. Statutory damages are extraordinary mainly because they allow successful plaintiffs to recover substantial monetary damages without any proof that (1) the plaintiff suffered any actual harm from the infringement or (2) the defendant profited from the infringement. These damages can be awarded in whatever amount the judge or jury deems “just” in a range between \$750 and \$30,000 per infringed work, and up to \$150,000 per work if infringement is willful. In an earlier article, one of us demonstrated that statutory damages have often been “arbitrary, inconsistent, unprincipled, and sometimes grossly excessive.”<sup>2</sup> \* \* \* Virtually all of the law review literature in the United States has criticized the U.S. statutory damage regime. And yet, the United States has insisted upon exporting this “extraordinary” remedy to other nations through bilateral and plurilateral treaties, as well as other mechanisms.

While all countries with copyright laws allow plaintiffs to be compensated for actual harm arising from infringement, and many allow the disgorgement of defendants’ profits attributable to infringement, most countries in the world—including many developed countries with strong copyright industries such as England, France, Germany, and Australia—do not provide for statutory damage awards for copyright infringement. Although punishment seems to have become a common feature in domestic awards of statutory damages, most countries focus their civil remedy regimes on compensation, not on punishment. Both the existence of statutory damages and their evolving role as a punitive measure make the United States an outlier in the international arena. \* \* \*

**I. Global Survey**

\* \* \* Statutory damages are uncommon in copyright laws around the world. Including the United States, only 24 of the 177 WIPO member states surveyed (or 13.56%) allow recovery of statutory damages for copyright infringement.<sup>3</sup> By having statutory damages, the United States is mostly in strange company.

Several features of the collection of countries with statutory damages are worth noting. Countries with “emerging and developing economies” dominate the list. According to IMF,

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<sup>1</sup> [This abridged version was prepared for use in Harvard Law School’s CopyrightX course. The full text and citations are available at (SSRN abstract # 2240569)].

<sup>2</sup> See, e.g., Pamela Samuelson & Tara Wheatland, *Copyright Statutory Damages: A Remedy In Need of Reform*, 51 WM. & MARY L. REV. 439, 441 (2009).

<sup>3</sup> These countries are: Azerbaijan, Bahamas, Bahrain, Belarus, Bulgaria, Canada, China, Costa Rica, Dominican Republic, Israel, Kazakhstan, Kyrgyzstan, Liberia, Lithuania, Malaysia, Morocco, Republic of Korea, Republic of Moldova, Russian Federation, Singapore, Sri Lanka, Ukraine, the United States, and Vietnam.

nineteen of the twenty-four countries with statutory damages have “emerging and developing economies.”<sup>4</sup> Including the United States, only five WIPO member states have both an “advanced economy” and statutory damages for copyright infringement, which represents less than one-sixth of the advanced economies in the WIPO sample.<sup>5</sup> The other twenty-eight advanced economies do not have statutory damages.<sup>6</sup> Over half of the countries with statutory damages have populations less than 10 million.<sup>7</sup> One-third of the countries with statutory damages are post-Soviet states.<sup>8</sup> Only two European Union countries have statutory damages.<sup>9</sup> Finally, for the most part, countries that have statutory damages are not known for having substantial copyright industries.

By contrast, most of the countries with large and successful copyright industries, including the Netherlands, the United Kingdom, Australia, Germany, and France, do not have statutory damages. Recent reports estimate that core copyright industries represent 6.36% of U.S. gross domestic product (GDP), 7.3% of GDP in the United Kingdom, and 10.3% of GDP in Australia. Even France, which is well-known for its strong protection of copyright and authors’ rights, does not have a statutory damages regime. Presumably, these countries deem their copyright remedies sufficient to protect their valuable and productive creative industries without the availability of statutory damages. \* \* \*

[Although no multinational treaty requires statutory damages for copyright infringement, Part II explains how the United States has used bilateral trade agreements to encourage and, lately, to require statutory damages that emulate the U.S. provision with increasing specificity. Whereas treaty language began with open-ended and permissive language, the language has evolved to require three central elements: mandatory imposition, election at the sole discretion of the rights holder, and amounts sufficient to compensate the copyright owner and deter future infringement.

Part III discusses how the U.S. Trade Representative, predominantly at the urging of the International Intellectual Property Association, can single out countries with trade practices that

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<sup>4</sup> These countries are: Azerbaijan, Bahamas, Bahrain, Belarus, Bulgaria, China, Costa Rica, Dominican Republic, Kazakhstan, Kyrgyzstan, Liberia, Lithuania, Malaysia, Morocco, Republic of Moldova, Russian Federation, Sri Lanka, Ukraine, and Vietnam.

<sup>5</sup> These countries are: Canada, Israel, Republic of Korea, Singapore, and the United States.

<sup>6</sup> The twenty-eight advanced economies among the WIPO member states that do not have statutory damages are: Australia, Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Luxembourg, Malta, Netherlands, New Zealand, Norway, Portugal, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom.

Two of the advanced economies on the IMF’s list are not WIPO member states: Hong Kong and Taiwan. *Id.* at 180. Hong Kong does not have statutory damages, while Taiwan does. Copyright Act, art. 88 (last amended 2010) (Taiwan), [hereinafter “Taiwan Copyright Act”]. This Article includes a few details on Taiwan’s statutory damage provision, *infra* Part IV, even though Taiwan is not a WIPO member state.

<sup>7</sup> WIKIPEDIA, *List of World Countries By Population*, [http://en.wikipedia.org/wiki/List\\_of\\_countries\\_by\\_population](http://en.wikipedia.org/wiki/List_of_countries_by_population). (last visited Feb. 19, 2013). In ascending order of total population, those countries are: Bahamas, Bahrain, Lithuania, Republic of Moldova, Liberia, Costa Rica, Singapore, Kyrgyzstan, Bulgaria, Israel, Azerbaijan, Dominican Republic, Belarus.

<sup>8</sup> WIKIPEDIA, *Post-Soviet states*, [http://en.wikipedia.org/wiki/Post-Soviet\\_states](http://en.wikipedia.org/wiki/Post-Soviet_states) (last visited Feb. 19, 2013). These countries are: Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan, Lithuania, Republic of Moldova, Russian Federation, and Ukraine.

<sup>9</sup> These countries are Bulgaria and Lithuania—also formerly Soviet states and atypical members of the EU.

affect domestic intellectual property interests. Criticisms are directed at countries (1) without statutory damages, (2) that employ various efforts to curtail the severity of statutory damages, and (3) that provide some the same limitations as present in the United States.]

#### IV. Limitations on statutory damages abroad

\* \* \* Countries targeted by the United States have little leeway to assess whether and to what extent statutory damages, or specific features thereof, are compatible with their existing legal framework and civil remedial norms—in copyright law and beyond.<sup>10</sup> Still, many countries imposing statutory damages do so with concerted efforts to limit negative aspects of the remedy. \* \* \* In fact, many of these limits directly address some of the very problems that have arisen in the United States under § 504(c).<sup>11</sup> The more the United States imposes detailed treaty obligations relating to statutory damages, however, the less freedom countries will have to tailor their respective provisions. Further, if the United States succeeds in promulgating an ossified form of statutory damages, then the United States will miss the opportunity to learn from the experiments of other countries that might more precisely calibrate the balance between effective and just administration of statutory damages. This Part explores some of the limits on statutory damages that appear in other countries, contrasts them with the lack of such limits in the United States, and discusses how such limits may be constrained by [U.S. efforts].

##### A. Purposive limitations

U.S. case law shows that opening the door to extra-compensatory purposes for statutory damages can be problematic. Domestically, statutory damages started with compensatory and modest deterrent goals in mind, but today large awards are frequently made or supported on extra-compensatory, *i.e.*, punitive rationales.<sup>12</sup> \* \* \* Statutory awards are often crafted or justified, even in the absence of evidence, as (1) a rough approximation of the compensation due

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<sup>10</sup> See, e.g., PEDRO ROFFE, *BILATERAL AGREEMENTS AND A TRIPS-PLUS WORLD: THE CHILE-USA FREE TRADE AGREEMENT 44* (2004), available at <http://www.quno.org/geneva/pdf/economic/Issues/Bilateral-Agreements-and-TRIPS-plus-English.pdf> (“In the Chilean system, damages are only supposed to compensate for the losses caused by the injury. So, theoretically, damages may never exceed the actual prejudice suffered by the right holder. The obligation of statutory damages alters drastically the Chilean general system of compensatory damages upon which IPRs had traditionally relied.”); see also *infra* Part IV.A (purposive limitations).

<sup>11</sup> For example, the Canadian government created a website to announce the Copyright Modernization Act; in that site’s FAQ, the government asks and answers: “Will the Bill allow record labels to sue individuals and groups for large amounts, like in the U.S.? This Bill ensures that Canadians will not face disproportionate penalties for minor infringements of copyright by distinguishing between commercial and non-commercial infringement.” *Questions and Answers*, GOV’T OF CANADA (Nov. 29, 2011), available at [http://balancedcopyright.gc.ca/eic/site/crp-prda.nsf/eng/h\\_rp01153.html#record](http://balancedcopyright.gc.ca/eic/site/crp-prda.nsf/eng/h_rp01153.html#record). For a more detailed analysis of some of the problems that have arisen in the application of the statutory damages provision in the United States, see Samuelson & Wheatland, *supra* note 4, at 480–91.

<sup>12</sup> See, e.g., *On Davis v. Gap, Inc.*, 246 F.3d 152, 172 (2d Cir. 2001) (“The purpose of punitive damages—to punish and prevent malicious conduct—is generally achieved under the Copyright Act through the provisions of 17 U.S.C. § 504(c)(2), which allow increases to an award of statutory damages in cases of willful infringement.”); *Nat’l Football League v. PrimeTime 24 Joint Venture*, 131 F. Supp. 2d 458, 478 n.17 (S.D.N.Y. 2001) (noting that statutory damages are “partly punitive”). \* \* \*

for actual harm and/or profits lost,<sup>13</sup> (2) a deterrent sufficiently large to discourage the defendant in a particular case from infringing again in the future,<sup>14</sup> (3) retribution for the defendant's reprehensible conduct,<sup>15</sup> and (4) a general deterrent. The general deterrence rationale can be further separated into (1) the general deterrent value punishing a defendant fairly, including retribution, in proportion to her own conduct, in such a way that other similarly situated potential defendants would fear being punished, and (2) punishing a defendant with an award beyond what her conduct individually merits in order to set an example that will deter the public at large.<sup>16</sup> This list demonstrates the varying degrees to which an award of statutory damages can become unmoored from the specific harms at issue in a given infringement case.

Many countries reject civil damages as an inappropriate vehicle for extra-compensatory or punitive purposes.<sup>17</sup> This international aversion to punitive civil damages is the source of some

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<sup>13</sup> In justifying the 1999 amendments which increased the statutory maxima, the bill's primary sponsor noted, "In most cases, courts attempt to do justice by fixing the statutory damages at a level that approximates actual damages and defendant's profits." 145 Cong. Rec. 13,785 (1999) (Sen. Hatch). *See also* H.R. Rep. 94-1476, at 161.

<sup>14</sup> *See, e.g.,* Pedrosillo Music, Inc. v. Radio Musical, Inc., 815 F. Supp. 511, 517 (D.P.R. 1993) (awarding less than \$10,000 "would not deter [this] defendant from continuing to violate the copyright laws."); Int'l Korwin Corp. v. Kowalczyk, 855 F.2d 375, 383 (7th Cir. 1988) (increased statutory damages may be necessary in a particular case to prove to a defendant that it "costs less to obey the copyright laws than to violate them[.]"); *cf.* Melvin Halpern, *The Sound Recording Act of 1971: An End to Piracy on the High* ©'s?, 40 GEO. WASH. L. REV. 964, 992 (1972) (noting inadequacy of statutory damages under 1909 Act to deter the same defendant from continuing the same infringing acts after being held liable). This purpose is sometimes called "specific deterrence."

<sup>15</sup> *See, e.g.,* Broad. Music, Inc. v. Spring Mount Area Bavarian Resort, Ltd., 555 F. Supp. 2d 537, 545 (E.D. Penn. 2008) (justifying statutory damages above plaintiff's request because, during the relevant time, "Defendants were on repeated notice of their infringement, were continually offered a simple and straightforward opportunity to terminate their infringement, and opted instead to flatly ignore Plaintiffs' attempts to resolve this dispute."); *cf.* United States v. Halper, 490 U.S. 435, 448 (1989) ("[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.").

<sup>16</sup> The distinction appears slight, but is important. All remedies have some general deterrent value because, so the argument goes, a decision against one defendant sends a message to other similarly situated potential defendants that they are equally at risk. \* \* \* Thus, an award that embodies compensation, retribution, and/or specific deterrence provides general deterrent value without augmenting further the remedy imposed on the defendant at bar. *Cf. Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 904 n.13 (1984) (recognizing that compensatory remedies for discriminatory discharges under the National Labor Relations Act, such as reinstatement and backpay, provide "deterrence against unfair labor practices" in addition to "meaningful relief for illegally discharged employees").

When the desire for general deterrence is a separate and additional component of the award against the defendant at bar, the situation is starkly different. The award ceases to be a reflection of the controversy between the two parties—severing the connection between the conduct at issue and the award imposed—and instead becomes about the conduct of non-parties, *i.e.*, strangers to the litigation. *See, e.g.,* Sony BMG Music Entm't v. Tenenbaum, 660 F.3d 487, 504 (1st Cir. 2011) (approving a jury instruction providing a non-exclusive list of factors to consider including "the need to deter this defendant *and other potential infringers*" (emphasis added)); Fitzgerald Publ'g Co., Inc. v. Baylor Publ'g Co., Inc., 807 F.2d 1110, 1117 (2d Cir. 1986) (noting that courts may consider the deterrent effect on others besides the defendant); Viacom Int'l Inc. v. Fanzine Int'l, Inc., No. 98CIV.7448(RCC), 85974, 2001 WL 930248, at \*5 (S.D.N.Y. Aug. 16, 2001) (concluding that "a substantial award is necessary to deter" the defendant specifically and justifying it as an award that "will serve to deter other potential infringers"); *cf.* Phillip Morris USA v. Williams, 549 U.S. 346, 353 (2007) ("[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation."). \* \* \*

<sup>17</sup> *See, e.g.,* ALBERTO BERCOVITZ & GERMAN BERCOVITZ MILAGROS DEL CORRAL, INTERNATIONAL COPYRIGHT LAW AND PRACTICE, SPA § 8[4][a][iii] (Paul Edward Geller ed., 2012) ("Spanish civil law in principle does not

of the discomfort with the U.S. statutory damage provision, particularly in light of the increasing prevalence of the punitive rationale for statutory damages in the United States. Even WIPO acknowledges that in the international arena “[t]he concept of statutory damages as a remedy is subject to some debate because a number of legal systems see them as too close conceptually to punitive damages.”<sup>18</sup> Of course this sentiment is not exclusive to foreign jurisdictions.<sup>19</sup>

Existing statutes abroad reflect this aversion to treating statutory damages as punitive or extra-compensatory. For example, some countries adopting statutory damages expressly limit the remedy to compensation.<sup>20</sup> Some countries address specific deterrence with court orders requiring that the infringer pay a specified amount if he or she infringes again.<sup>21</sup> Rather than holding the defendant liable in the case at bar for additional sums—which represent the court’s hypothesis about the amount of money necessary to deter the defendant’s potential future infringements not at bar—such a court order creates a specific deterrent against future misconduct that will be applied only if the defendant actually engages in the misconduct again. Even if that sum is never applied, the court order functions as a constant reminder of the consequences of recidivism.<sup>22</sup>

In trade agreements dealing with statutory damages, some countries were able to secure purposive limitations in which the “[p]arties understand that [statutory] damages . . . do not constitute punitive damages.”<sup>23</sup> This limitation should help prevent some of the excesses under U.S. law by ensuring that courts do not rely on punitive goals to craft or justify large damage awards. The fact that the limitation exists at all reveals some countries’ fundamental discomfort with the U.S. brand of statutory damages.

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allow punitive damages.”); Adam Liptak, *Foreign Courts Wary of U.S. Punitive Damages*, NEW YORK TIMES, (March 26, 2008), <http://tinyurl.com/2o74j7>; *id.* (citing Italian court which explains, “[P]rivate lawsuits brought by injured people should have only one goal—compensation for a loss.”). Many countries do not have punitive damages at all. Liptak, *supra* note 81. (“Most of the rest of the world views the idea of punitive damages with alarm.”). Some countries have refused to enforce punitive damage awards from the U.S. courts. *Id.* (citing Italy and Germany). \* \* \*

<sup>18</sup> *Which kind of damages are available in IP disputes?*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, <http://www.wipo.int/enforcement/en/faq/judiciary/faq08.html#pre> (last visited Feb. 17, 2013)

<sup>19</sup> *See* St. Louis I.M. & S.R. Co. v. Williams, 251 U.S. 63, 64 (1919) (characterizing statutory damages as “essentially penal” and “primarily intended to punish”); *see also* BMW of N. Am v. Gore, 517 U.S. 559, at 575 (1996) (describing *Williams*, a case involving *statutory* damages, as holding that a “*punitive* award may not be wholly disproportioned to the offense” (emphasis added)); \* \* \*

<sup>20</sup> *See* Morocco, art. 62 (setting amount “as deemed equitable by the court to compensate for the prejudice suffered”); Bahrain, art. 64(2); Ukraine, art. 52(2)(d) \* \* \*

<sup>21</sup> *See, e.g.*, Copyright Act (Act No. 8/2011) § 72(5) (Sierra Leone) (“Where there is a danger that an act of infringement may be continued, the court shall (a) expressly order that the act shall not be committed; and (b) fix a fine which is twice the original fine, which shall be paid if the order is not respected.”); Copyright Act (Act No. 12 of 2002) § 28(4) (Tonga) (“Where there is a danger that acts of infringement may continue, the Court shall order that no further acts be committed and fix a fine not exceeding \$20,000 which shall be due if the order is not respected.”).

<sup>22</sup> These fines appear to go to the state rather than the copyright owner. If the defendant infringes again, the plaintiff is still made whole for the infringements at issue through ordinary mechanisms. In other words, although recidivism is punished, that punishment does not parley into an additional monetary recovery for the plaintiff.

<sup>23</sup> U.S.-Peru, art. 16.11(8), 16.11(8) n.2; *see also* U.S.-Colombia, art. 16.11(8), 16.11(8) n.2. \* \* \*

Language in more recent bilateral trade agreements seems to foreclose purposive limitations by requiring countries to provide statutory damages in an amount sufficient to compensate *and* serve as a deterrent to future infringements. The type of deterrence required, however, is ambiguous. On the one hand, the language could require statutory amounts that would provide specific deterrence, discouraging the defendant at bar from infringing again in the future. Such specific deterrence also has general deterrent value because it announces to similarly situated potential defendants that they too will be equally deterred. Construed broadly, however, the language could require statutory awards large enough to serve as a general deterrent against infringement broadly, beyond the conduct at issue in a given case. Such a rationale sanctions awards wholly out of proportion to the conduct at bar. Because the treaty language is susceptible to either reading, countries bound by such trade agreements have opened the door, perhaps unintentionally, to disproportionate awards.

## B. Statutory guidelines

Among the most straightforward innovations are guidelines, memorialized in a statute, that assist courts in awarding an appropriate amount of statutory damages. The United States has no statutorily set guidelines. \* \* \* U.S. courts have also failed to develop any sophisticated jurisprudence on the proper considerations for setting a statutory award. Although courts have developed lists of non-exhaustive “factors to consider,”<sup>24</sup> the ultimate award amount is left to the discretion of the court. Further, there is no requirement that these factors be addressed at all, much less that they be given serious weight, or that the court make specific findings on the factors, or that there exists any evidence to consider when evaluating the factors. \* \* \* These problems are exacerbated when juries are tasked with setting the statutory award, as they lack the ability to assess comparable cases.<sup>25</sup> The lack of guidance in the statute and lack of any robust jurisprudence on how to award statutory damages in the United States has resulted in awards that are arbitrary and inconsistent—similar or even identical fact patterns often result in drastically different awards.<sup>26</sup> It is also worth noting that, like punitive damages, statutory damage awards are increasing at a staggering rate.<sup>27</sup>

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<sup>24</sup> These factors include: “the expenses saved and profits reaped by the defendants in connection with the infringements, the revenues lost by the plaintiffs as a result of the defendants’ conduct, and the infringers’ state of mind whether willful, knowing, or merely innocent.” *Boz Scaggs Music v. KND Corp.*, 491 F. Supp. 908, 914 (D.C. Conn. 1980). *See also* *Tenenbaum*, 660 F.3d at 503–04 (approving a jury instruction providing a non-exclusive list of factors to consider including “the nature of the infringement,” “the value of the copyright,” and “the need to deter this defendant *and other potential infringers*” (emphasis added)); *Nat’l Football League v. PrimeTime 24 Joint Venture*, 131 F. Supp. 2d 458, 472-82 (S.D.N.Y. 2001) (reviewing factors used in various courts).

<sup>25</sup> After the Supreme Court decided that the Seventh Amendment requires the right to a jury trial on statutory damages, David Nimmer wrote, “It is daunting, to say the least, to imagine how a judge could craft jury instructions that replace the type of analysis the court itself would undertake” because the setting of statutory damages “often involves extensive analysis of precedent so as to create a statutory- damages regime consistent across a spectrum of cases[;] . . . [i]t is not clear how a jury ever can perform this type of analysis.” David Nimmer & Jason Sheesby, *After Feltner, How Will Juries Decide Damages?*, NAT’L L.J., Feb. 8, 1999, at C19.

<sup>26</sup> Three examples will illustrate the point. In one series of cases, the same plaintiff recording company sued several different entities for continuing to make and sell records after their statutory license was terminated, and in three different suits, obtained three different statutory damages awards. *Peer Int’l Corp. v. Luna Records, Inc.*, 887 F. Supp. 560, 569 (S.D.N.Y. 1995) (\$10,000 per work); *Peer Int’l Corp. v. Max Music & Entm’t, Inc.*, No. 03 Civ. 0996KMWDF, 2004 WL 1542253 (S.D.N.Y. July 9, 2004) (\$30,000 per work); *Peer Int’l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332 (9th Cir. 1990) (\$50,000 per work). In another case, recording companies brought suit against an

Several countries, including Canada and Israel, have statutorily codified guidelines for applying statutory damages.<sup>28</sup> At best, guidelines can help provide consistency and certainty in and across awards; at minimum, they can help constrain the factors that enter the analysis. Israel, for example, recently amended its statutory damages provision, *inter alia*, to include the following list of factors:

- (1) The scope of the infringement;
- (2) The duration during which the infringement continued;
- (3) The severity of the infringement;
- (4) The actual injury caused to the claimant according to the assessment of the court;
- (5) The benefit derived by the defendant from the infringement, according to the assessment of the court;
- (6) The character of the defendant's activity;
- (7) The nature of the relationship between the defendant and the claimant;
- (8) The good faith of the defendant.<sup>29</sup>

While these factors are not exhaustive, their statutory enumeration places them in higher regard than non-enumerated factors and does not suggest to courts that they must or should consider harms not at bar or strangers to the litigation. The factors refer to “*the* infringement,” “*the* defendant,” and “*the* claimant,” which suggests that any additional considerations should be similarly cabined to the parties and conduct at bar—seemingly foreclosing general deterrence.

Canada lists the following factors for determining the appropriate amount statutory damages:

- (a) the good faith or bad faith of the defendant;
- (b) the conduct of the parties before and during the proceedings;
- (c) the need to deter other infringements of the copyright in question; and
- (d) in the case of infringements for non-commercial purposes, the need for an award to be proportionate to the infringements, in consideration of the hardship the award may cause

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individual file-sharer and the first jury awarded statutory damages of \$9,250 per song for a total award of \$220,000; after a mistrial on unrelated grounds, a second jury, on the same facts, awarded \$80,000 per song for a total award of \$1.92 million; the judge remitted the award down to \$2,250 per song for a total of \$54,000; when the plaintiffs opted for a third trial, it resulted in a \$1.5 million judgment. *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899, 901–02 (8th Cir. 2012). A similar fate befell Elvin Feltner who sought and obtained a ruling from the U.S. Supreme Court that he was entitled to a jury trial on statutory damages; on remand, a jury awarded more than three times the original judge-made award, producing an award over \$31 million. *Columbia Pictures Television, Inc. v. Krypton Broad., Inc.*, 259 F.3d 1186 (9th Cir. 2001) (recounting facts and procedural history, and affirming jury award).

<sup>27</sup> According to Nimmer, the largest statutory award was \$4 million as of 1990, then \$9 million in 1997, and \$53.4 million in 2000. 4 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 14.04 (2012).

<sup>28</sup> *See also* Lithuania, art. 83(4)(1) (setting damages by taking into account factors relevant to the case at bar, including “culpability of the infringer, his property status, causes of unlawful actions and other circumstances relevant to the case, as well as the criteria of good faith, reasonableness and justice”); Malaysia, § 37(8); Singapore, § 119(5). Both Malaysia and Singapore require courts to consider eight factors, six of which clearly relate exclusively to the case at bar. However, both include two closing factors that seem more expansive: (1) the need to deter other similar infringements and (2) all other relevant matters. \* \* \*

<sup>29</sup> Israel, § 56(b).

to the defendant, whether the infringement was for private purposes or not, and the impact of the infringements on the plaintiff.<sup>30</sup>

While the generally applicable factors (a)–(c) are not nearly as detailed as in Israel, they provide some guidance. The text again appears to focus on the parties and conduct at bar. Although, factor (c) apparently brings additional infringements not at bar into the court’s considerations, it does so only to a limited extent—it only empowers the court to consider other infringements of the very copyright at bar. The text is ambiguous as to whether the court may consider the need to deter *others* from infringing the copyright at bar, or if the court is limited to deterring the defendant at bar from infringing the copyright at bar again in the future. If the former, then the factor is broad, but not as broad as it could be—it does not empower the court to consider the need to deter infringement generally. If the latter, then the factor is narrow—the court can only consider the need to deter *this* defendant from infringing *this* copyright, nothing more.

### C. Tailoring to type

Some countries have attempted to tailor awards of statutory damages to the type of infringement involved in the case. It is the broad applicability of statutory damage awards for copyright infringement—i.e., their ostensibly equal application to all infringements of any exclusive right, of any type of copyrighted work, in any type of media—that makes U.S. copyright statutory damages so unique and so ripe for arbitrariness.

Some countries recognize that different types of infringement, or infringement of different exclusive rights, might justify tailored treatment under the remedies scheme. For example, Azerbaijan generally allows statutory damages between 110 and 55,000 manats, but the range is reduced from 220 and 5,500 manats for infringement of integrated circuit topographies.<sup>31</sup> A number of countries allow recovery of statutory damages for violation of moral rights—in fact many countries *only* allow statutory damages for moral rights, not for copyright infringement more generally.<sup>32</sup> In Vietnam, statutory damages are sometimes available, but a minimum recovery only exists for moral rights violations.<sup>33</sup>

Canada provides several limitations specific to a category of infringing conduct. For example, where the prevailing plaintiff in an infringement suit is a collecting society, it may recover only (1) actual damages and profits, or (2) statutory damages between three and ten times the royalty fixed by the Canadian Copyright Board, as the court considers just.<sup>34</sup> Canada’s most innovative limitations are in the context of non-commercial infringements. Whereas infringement for

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<sup>30</sup> Canada, § 38.1(5). The final factor was added in a recent comprehensive revision in 2012.

<sup>31</sup> Compare Azerbaijan, art. 45(2), with Law of the Republic of Azerbaijan on Legal Protection of Topographies of Integrated Circuits, art. 13.4.2 (2008) (authorizing payment between 220 and 5,500 Manats).

<sup>32</sup> Ethiopia Copyright Law, *supra* note 16, § 33(4); Copyright (Amendment) Act No. IX of 2009, §§ 44(1), 44(4) (Malta). In some ways, the case for statutory damages for moral rights is stronger than for economic rights—moral rights are less susceptible to a monetary valuation, and thus a substitute remedy to avoid denying recovery altogether seems more appropriate in these cases.

<sup>33</sup> Compare Vietnam, art. 205(1)(c) (authorizing an amount not to exceed 500 million VND “[w]here it is impossible to determine the level of compensation on the basis” of actual damage); with *id.* art. 205(2) (authorizing between 5 million to 50 million VND for “spiritual damage”).

<sup>34</sup> Canada, § 38.1(4).



commercial purposes can bear statutory liability between 500 CAD\$ and 20,000 CAD\$ per work, infringement for non-commercial purposes bears liability between 100 CAD\$ and 5,000 CAD\$ for *all* works involved in the proceedings.<sup>35</sup> In setting the amount of statutory damages for non-commercial infringements, courts are instructed to consider, *inter alia*, “the need for an award to be proportionate to the infringements, in consideration of the hardship the award may cause to the defendant . . . .”<sup>36</sup> These considerations place non-commercial infringers in a special category for the purposes of statutory damages and treat the defendant’s motives and susceptibility to financial hardship as mitigating factors.

Further, once a plaintiff receives statutory damages for non-commercial infringements from a defendant, neither that plaintiff nor any other can recover statutory damages from that same defendant for any other non-commercial infringements that occurred prior to filing suit.<sup>37</sup> These innovations encourage plaintiffs to join suit, share litigation costs in what is likely a low return suit, and bring all potential claims at once. This arrangement compares favorably to many of the file-sharing suits in the United States in which multiple plaintiffs brought suit against many thousands of non-commercial home users for only a small subset of the possible infringements available to them.<sup>38</sup> Seeking remedy for only a subset of possible infringements provides a dual advantage. First, plaintiffs can claim magnanimity for not seeking damages for all the infringements they could. Second, they can invoke those infringements not at bar to justify an award that is egregious when considering only the subset of infringements at bar.<sup>39</sup> \* \* \*

Importantly, electing statutory damages in any scenario does not prejudice the copyright owner’s ability to collect exemplary or punitive damages.<sup>40</sup> In this fashion, Canada has attempted to excise the punitive functions from statutory damages.

#### **D. Availability limitations**

Some countries employ a stronger version of tailoring to type by placing limits on the situations in which statutory damages are available. Such limits recognize that although statutory damages may be justified in some cases, in many cases—perhaps most—the plaintiff can be made whole, and the defendant can be deterred, without resorting to an extraordinary remedy.

Under present U.S. law, a plaintiff can elect to receive an award of statutory damages at any time before final judgment, with no requirement to demonstrate that the ordinary remedies of

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<sup>35</sup> *Id.* § 38.1(1). Persons who provide Internet or digital services primarily for the purposes of enabling copyright infringement are liable for infringement if an infringement actually occurs using those services. *Id.* § 27(2.3). Such persons are deemed commercial for the purposes of statutory damages if a work was actually infringed as a result of that service. *Id.* § 38.1(1.11).

<sup>36</sup> *Id.* § 38.1(5)(d).

<sup>37</sup> *Id.* § 38.1(1.12)–(1.2).

<sup>38</sup> *See, e.g.*, *Tenenbaum*, 660 F.3d at 490 (“Sony pursued claims against Tenenbaum for only thirty copyrighted works, even though it presented evidence that Tenenbaum illegally downloaded and distributed thousands of copyrighted materials.”).

<sup>39</sup> *Sony v. Tenenbaum*, No. 07-11446-RWZ, 2012 WL 3639053, at \*2 (D. Mass. Aug. 23, 2012) (rejecting remittitur, citing “evidence about the scope and scale of Tenenbaum’s infringement activities. . . . [H]e not only downloaded but also distributed thousands of copyrighted works to users of peer-to-peer file-sharing networks.”).

<sup>40</sup> Canada, § 38.1(7).

damages, profits, and attorney's fees will not suffice. As long as the registration requirement is met, a defendant has no ability to challenge the awarding of statutory damages, or to require the plaintiff to present evidence on the actual damages or defendant's profits.

Notwithstanding the fact that actual damages have been assessed in innumerable infringement cases, U.S. authorities frequently note the difficulties of proving actual harm as a justification for administering often-substantial statutory awards. Because statutory damages are susceptible to imprecision, arbitrariness, and excessiveness, however, it may be good policy to limit their availability to cases in which they represent a plaintiff's only real option to obtain meaningful monetary relief. Bulgaria,<sup>41</sup> China,<sup>42</sup> Dominican Republic,<sup>43</sup> Republic of Korea,<sup>44</sup> Taiwan,<sup>45</sup> and Vietnam<sup>46</sup> all recognize that damages may be difficult to prove, but permit statutory damages only when such difficulties are actually shown to exist.

There is also considerable disagreement as to whether a judge's approval should be necessary to receive statutory damages. Some countries have adopted the present U.S. model of making statutory damages available solely at the election of the plaintiff.<sup>47</sup> Indeed, the present state of trade agreement language mandates that countries make statutory damages so available. Nevertheless, several countries follow the former U.S. rule, which allows resort to statutory damages only where a judge has deemed them appropriate.<sup>48</sup> Recent changes in Moldova appear to reflect this tension. Whereas the Moldovan laws had previously given the copyright owner discretion to elect statutory damages among other remedies, recent amendments have taken away that ability, committing the decision to the courts.<sup>49</sup> \* \* \*

### **E. No minimum recovery**

In some cases, even the statutory minimum can seem disproportionately large in relation to the conduct at bar. Although there are provisions in U.S. law that allow or require deviation

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<sup>41</sup> Bulgaria, art. 94(a) (allowing statutory damages where "there is no sufficient data about" the amount).

<sup>42</sup> China, art. 49 (allowing statutory damages where "unlawful gains of the infringer cannot be determined").

<sup>43</sup> Dominican Republic, art. 177 ¶ III (allowing statutory damages where it is "impossible to place a value on the actual injury").

<sup>44</sup> YANG & SHIN, *supra* note 43, § 8[4][a] (noting availability in Korea only where it is "difficult to assess damages under any of the methods" of calculating actual damages and lost profits).

<sup>45</sup> Taiwan Copyright Act, *supra* note 23, art. 88(2) (allowing statutory damages only where it is difficult to prove actual damages).

<sup>46</sup> Vietnam, art. 205(1)(c) (allowing statutory damages "[w]here it is impossible to determine the level of compensation on the bases" of actual harm).

<sup>47</sup> Bahamas, § 41(3)(b); Bahrain, art. 64(2); Belarus, art. 56(2)–(3); Bulgaria, art. 94a; Canada, § 38.1(1); Kazakhstan, art. 49(1); Kyrgyzstan, art. 49(6); Liberia, § 2.42(IV)(1); Lithuania, art. 83(4)(1); Morocco, art. 62; Russian Federation, art. 1301; Singapore, § 119(2)(d); Sri Lanka, § 170(10).

<sup>48</sup> Azerbaijan, art. 45(2) ("[B]esides the general means of civil-legal enforcement, [a court] shall have the right to issue a resolution on" statutory damages, in place of damages or profits.); China, art. 49; Dominican Republic, art. 177 ¶ III; Israel, § 56(a) ("[T]he court *may*, at the claimant's request, award to the claimant, in respect of each infringement, damages without proof of injury . . . ." (emphasis added)); Korea, art. 125-2 (cited in YANG & SHIN, *supra* note 43); Ukraine, art. 52(2)(d); Vietnam, art. 205(c)–(d). Though not a WIPO member, Taiwan also leaves election to the discretion of the court. Taiwan Copyright Law, *supra* note 23, art. 88(2). \* \* \*

<sup>49</sup> Compare Moldova, art. 63(2) (2010), with Moldova, art. 38(2) (1993).

below the statutory minimum in certain cases, awards below the ordinary minimum of \$750 are extremely rare. \* \* \* Perhaps recognizing that establishing a minimum amount of statutory damages can produce unfair or excessive awards under certain circumstances, China,<sup>50</sup> Israel,<sup>51</sup> Lithuania,<sup>52</sup> Republic of Korea,<sup>53</sup> Singapore,<sup>54</sup> and Vietnam,<sup>55</sup> provide no minimum recovery, only an upper limit on the award amount. In fact, when statutory damages first appeared in Lithuania in 2003, the statute provided a minimum recovery, but this statutory minimum was removed in 2008.<sup>56</sup> This approach leaves the decision of whether to award statutory damages to the discretion of the judicial authorities.<sup>57</sup>

## F. Anti-aggregation measures

Some countries have designed their statutory damages provisions to recognize and account for the unfairness that can result from aggregating a number of statutory damage awards, even at the statutory minimum. In the United States, the problems with arbitrariness and excessiveness in statutory damage awards have manifested in cases where numerous works are infringed, and statutory damage awards are aggregated. In *UMG Recordings, Inc. v. MP3.com, Inc.*, for example, a judge was willing to multiply an already-high statutory damage award of \$25,000 per work by the 4,700 works at issue in the case, for a staggering potential liability of over \$118 million, despite the complete absence of any evidence of harm to plaintiffs or profits by defendants. Potential for extremely high aggregated statutory damage awards is particularly acute in cases involving secondary liability and digital technology, such as the litigation over Napster,<sup>58</sup> LimeWire,<sup>59</sup> and the Google Book Search project<sup>60</sup>. In such cases, potential statutory

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<sup>50</sup> China, art. 49 (authorizing up to 500,000 RMB Yuan).

<sup>51</sup> Israel, § 56(a) (authorizing an amount not to exceed NIS 100,000).

<sup>52</sup> Lithuania, art. 83(4)(1) (authorizing up to 1,000 times the minimum living standards).

<sup>53</sup> YANG & SHIN, *supra* note 43 (noting statute authorizes up to 10 million won, 50 million if infringed with intent to profit).

<sup>54</sup> Singapore, art. 119(d) (authorizing not more than 10,000 per work, but no more than \$200,000 in total without additional proof of actual loss).

<sup>55</sup> Vietnam, Art. 205(1)(c) (authorizing an amount not to exceed 500 million VND “[w]here it is impossible to determine the level of compensation on the basis” of actual damage). Moral rights violations provide a minimum recovery. *Id.* art. 205(2) (authorizing between 5 million to 50 million VND for “spiritual damage”).

<sup>56</sup> Compare No. IX-1355, Law Amending the Law on Copyright and Related Rights, art. 79(6) (2003) (Lith.) (providing a range between 10 and 1,000 times minimum living standards), with Lithuania, art. 83(4)(1) (authorizing up to 1,000 times minimum living standards).

<sup>57</sup> A court’s ability to award no statutory damages is similar to leaving to judges the decision of whether resort to statutory damages is appropriate. See *supra* notes 126–28 and accompanying text (discussing court approval as an availability limitation). Allowing a court to award no statutory damages does extra work in jurisdictions where the plaintiff, not the court, elects to pursue statutory damages. *E.g.*, Lithuania, art. 83(4)(1); Singapore, art. 119(d). This scenario is an intriguing way around current treaty language that requires statutory damages to be available solely at the election of the copyright owner. See *supra* note 50 (discussing modern treaty language regarding statutory damages).

<sup>58</sup> *In re Napster, Inc.*, No. C MDL-00-1369 MPH, 2005 WL 1287611, at \*10 (N.D. Cal. June 1, 2005) (noting the risk of a grossly excessive aggregated statutory damage award).

<sup>59</sup> Motion for Preliminary Injunction, 2-3, *Arista v. Limewire*, June 4, 2010 (“LimeWire’s liability undoubtedly will run into the hundreds of millions or even billions of dollars.”).

<sup>60</sup> See Class Action Complaint at 2, *Author’s Guild v. Google Inc.*, No. 05 CV 8136 (S.D.N.Y. Sept. 20, 2005). Even at the statutory minimum of \$750 per book scanned, Google potentially faces \$4.5 billion in liability. See

damages could “run into the hundreds of millions or even billions of dollars.”<sup>61</sup> In the LimeWire case, the plaintiffs reportedly requested an amount of statutory damages that was more than the combined GDP of the entire world.<sup>62</sup> Advances in digital technology have also exposed private individuals to massive statutory damage awards, exemplified by the recording industry’s lawsuits against individual filesharers.<sup>63</sup>

Countries have adopted several approaches to grapple with these issues. Canadian law authorizes a court to award less than the minimum, even absent proof of innocent infringement, where there is more than one work in a single medium and aggregating even the minimum amount would result in an award that is “grossly out of proportion to the infringement.”<sup>64</sup> Israeli law treats all infringements undertaken as part of a single set of activities as a single infringement for the purposes of statutory damages.<sup>65</sup> Malaysia’s law sets a cap of 500,000 MYR for the aggregate award.<sup>66</sup> Singapore’s law places a S\$200,000 cap on the total, aggregated statutory award in absence of any evidence that the plaintiff’s actual loss exceeded that amount.<sup>67</sup>

## V. Statutory damages in plurilateral trade agreements

\*\*\* Although statutory damages are fairly new on the global scene, they have only become a featured topic in multilateral trade negotiations over the past few years. [TRIPS Article 45 authorized but did not mandate statutory damages. It allowed member states to satisfy their TRIPS obligations either by allowing disgorgement of profits or pre-established damages. After TRIPS, international intellectual property policy turned away from multilateralism toward bilateral agreements of the type discussed in Part II. These “TRIPS-plus” standards have been criticized because they incorporate provisions reducing or eliminating the country-specific flexibility embodied in TRIPS.]

After a period of bilateralism in the wake of TRIPS, the pendulum has started swinging back toward the multilateral side with negotiations on the Anti-Counterfeiting Trade Agreement

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Samuelson & Wheatland, *supra* note 4, 490–91. The damages are even more massively aggregated in the litigation over the Google Book Search project because the suit is a class action. Some U.S. courts have noted the potential for Due Process violations where statutory damages are aggregated in a class action suit. *See, e.g.,* Murray v. GMAC Mortg. Corp., 434 F.3d 948, 954 (7th Cir. 2006) (allowing class certification, notwithstanding potentially excessive statutory damages, because excessive awards may be reduced on constitutional grounds); Parker v. Time Warner Entm’t Co., 331 F.3d 13, 22 (2d Cir. 2003); In re Napster, Inc., No. C MDL-00-1369 MPH, 2005 WL 1287611, at \*10 (N.D. Cal. June 1, 2005) (noting the risk of a grossly excessive aggregated statutory damage award). *See also* Scheuerman, *supra* note 6, at 104; *see generally* Barker, *supra* note 6.

<sup>61</sup> Motion for Preliminary Injunction, 2-3, Arista v. LimeWire, June 4, 2010.

<sup>62</sup> Plaintiffs in the LimeWire lawsuit allegedly requested up to \$75 trillion in statutory damages, which is more money than the GDP of the entire world combined as of 2011. *See* Sarah Jacobsson Purewal, *RIAA Thinks LimeWire Owes \$75 Trillion in Damages*, PCWORLD (Mar. 26, 2011), [http://www.peworld.com/article/223431/riaa\\_thinks\\_limewire\\_owes\\_75\\_trillion\\_in\\_damages.html](http://www.peworld.com/article/223431/riaa_thinks_limewire_owes_75_trillion_in_damages.html).

<sup>63</sup> *See, e.g.,* Barker, *supra* note 6 at 559 (“[M]assively aggregated awards of even the minimum statutory damages for illegal file-sharing will impose huge penalties . . .”).

<sup>64</sup> Canada, § 38.1(2). \*\*\*

<sup>65</sup> *See* Israel, § 56(c).

<sup>66</sup> Malaysia, § 37(1)(d) (allowing “statutory damages of not more than twenty-five thousand ringgit for each work, but not more than five hundred thousand ringgit in the aggregate”).

<sup>67</sup> Singapore, art. 119.2.

(ACTA) and Trans-Pacific Partnership (TPP). Negotiations around both ACTA and TPP were fraught with controversy, not least because the United States and the other countries invited to the table attempted to negotiate the treaty in secret.<sup>68</sup>

Early ACTA drafts included a provision mandating statutory damages. The United States in particular pushed statutory damages, over the objections of some of the other participating countries.<sup>69</sup> In the final version, however, statutory damages were presented as just one among three alternative remedies, at least one of which *must* be imposed.<sup>70</sup> \* \* \* Perhaps hearkening to earlier bilateral trade agreements, other provisions in ACTA explicitly instruct that the chosen remedy be sufficient to “constitute a deterrent to further infringements.”<sup>71</sup> Notably, “deterrence” under ACTA may be less expansive than the kind endorsed by U.S. courts. Given the fact that a country can satisfy its ACTA obligations by implementing only the evidentiary presumptions regarding the amount of damages sufficient to compensate for the infringement,<sup>72</sup> it is difficult to see how such an explicitly compensatory remedy, targeted at the infringements at bar, can qualify as the expansive form of general deterrence. \* \* \*

With ACTA negotiations closed, the focus has shifted to the Trans-Pacific Partnership. In many respects, the TPP has been subject to the same criticisms of secrecy and overreach levied against ACTA.<sup>73</sup> \* \* \* Substantively, TPP appears to escalate the push for statutory damages. Under one version of the TPP, parties are required to “establish or maintain a system that provides for pre-established damages,” which are available upon the election of the right holder and in an amount “sufficiently high to constitute a deterrent to future infringements and to compensate fully the right holder for the harm caused by the infringement.”<sup>74</sup> This version embodies all the central elements from the most recent bilateral trade agreements \* \* \* .

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<sup>68</sup> Eric Pfanner, *In Secret, Nations Work Toward Crackdown on Piracy*, NEW YORK TIMES (Feb. 8, 2010) available at <http://www.nytimes.com/2010/02/08/technology/08piracy.html>; Nate Anderson, *Secret ACTA treaty can't be shown to public, just 42 lawyers*, ARS TECHNICA (Oct. 15, 2009), <http://arstechnica.com/tech-policy/news/2009/10/these-42-people-are-shaping-us-internet-enforcement-policy.ars>.

<sup>69</sup> A leaked draft dated January 18, 2010, indicated that the United States and Japan wish the treaty language to read that countries “shall” impose either pre-established damages or an alternative presumption for determining damages, while the EC, Canada, and New Zealand would provide that countries “may” impose such remedies. Michael Geist, *Putting Together the ACTA Puzzle: Privacy, P2P Major Targets* (Feb. 3, 2009), <http://www.michaelgeist.ca/content/view/3660/125/> (noting that some countries other than the United States would like the imposition of statutory damages to be optional).

<sup>70</sup> ACTA, art. 9(3). The other options are additional/exemplary damages, and evidentiary presumptions regarding actual damages sufficient to compensate the right holder. This alternative structure, is similar to the relevant provision in the U.S.-Australia trade agreement which requires either a system pre-established damages or a system of additional/exemplary damages. U.S.-Australia, art. 7.

<sup>71</sup> ACTA, art. 6(1); *see also id.* art. 27(1) (providing same as applied to “Enforcement in the Digital Environment”).

<sup>72</sup> ACTA, Art. 9(3)(b). Such presumptions include various ways of calculating damages, including the quantity of infringing goods multiplied by profits per unit, a reasonable royalty, and a lump sum based on royalties or fees that would be due if the infringer had asked for authorization. *Id.* n.3.

<sup>73</sup> *See, e.g., Trans Pacific Partnership Agreement*, ELECTRONIC FRONTIER FOUNDATION, <https://www EFF.org/issues/tpp> (last visited Feb. 17, 2013).

<sup>74</sup> Trans-Pacific Partnership, Intellectual Property Rights Chapter, Feb. 10, 2011 draft, art. 12(4), available at <http://keionline.org/sites/default/files/tpp-10feb2011-us-text-ipr-chapter.pdf>.

## CONCLUSION

The United States' particular breed of statutory damages is both an unprecedented and unparalleled civil remedy. Although today there are very few other countries in the world with statutory damages, that may change if the United States continues mandating or encouraging their implementation. Despite U.S. pressure on other countries to adopt statutory damages as broad and untethered as ours, many countries have either resisted adoption or established sensible limits to their statutory damages regime that help prevent some of the arbitrary, unfair, and excessive awards that have occurred in the United States. Countries adopting statutory damages, voluntarily or not, should consider including some of these limits.

In light of the innovations abroad that seek to curtail the pernicious effects of statutory damages, the United States should consider revisions to its own regime. Several alterations may make statutory damages unnecessary. For example, adjusting the relevant legal standard for proving damages can ameliorate the injustice that is said to result when a plaintiff is unable to prove their damages to a sufficient degree of certainty. Disgorging defendants' profits, awarding attorney fees to successful plaintiffs, or perhaps permitting recovery of a modest multiple over actual damages can achieve deterrence. If punitive damages are necessary to punish and deter, they should not be inextricably intertwined into a unitary award of statutory damages that does not delineate compensatory amounts from extra-compensatory amounts. Instead, punitive damages should be awarded separately from compensation and disgorgement remedies. Once separated, the proportionality between compensation and punishment can be assessed under ordinary Due Process standards.

Short of jettisoning statutory damages altogether, statutory damages might be altered to mirror provisions in other areas of U.S. law (and some of the infringement-specific provisions in other national copyright laws), providing a fixed or narrow-range of pre-established damages for specific types of infringement, such as playing music on a jukebox without paying the statutory license fees, or peer-to-peer filesharing of music, or movies. We might also learn from the limitations imposed in other countries. For example, if statutory damages must be available, it would not defeat their purpose to require a plaintiff seeking more than the statutory minimum to satisfy a threshold showing that actual harm, though difficult to quantify with precision, nevertheless exceeds the minimum amount. Nor does it diminish the efficacy of statutory damages to craft mechanisms that account for aggregation.

Instead of foisting our statutory damages provisions upon the rest of the world, the United States should permit every country to assess independently the validity of statutory damages for its own system of justice and, if it chooses to adopt statutory damages, to craft limitations where it deems appropriate. The United States should regard the law of statutory damages as a presently imperfect, on-going experiment. Ultimately, we should acknowledge that even if we have something to teach the rest of the world about the creation and application of statutory damages, we have as much, if not more, to learn.