Intellectual Property

The Constitutional Challenge to Statutory Damages for Copyright Infringment: Don't *Gore* Section 504

*By Steven M. Tepp**

In its 1996 decision in *BMW v. Gore*, the Supreme Court read the Due Process Clause of the Fourteenth Amendment to impose limitations on the discretion of juries to impose punitive damages.[1] Recently, some defendants in copyright infringement cases have argued that the standard set forth in *Gore* should be applied at least to limit the Copyright Act's provision of statutory damages for civil infringement on the grounds that such damages are unconstitutionally excessive, punitive damages.[2] Although no court has ever accepted this argument, there is a relative paucity of decisions on the subject, leaving the ultimate direction of the law in some doubt. This article seeks to begin to fill the void by providing a comprehensive review of the question. Part I will recount the history of statutory damages in copyright, demonstrating that they are a long-standing aspect of U.S. law and the product of over two centuries of collective wisdom. Part II will summarize the three-part test the Court crafted in *Gore* and note the policy considerations that drove the Court's rationale in that case and its progeny. Part III will analyze whether to apply and what result accrues from the application of that three-part test to statutory damages for copyright infringement. This article concludes that copyright statutory damages are different from the punitive damages at issue in *Gore*, do not raise the policy concerns that were present in *Gore*, that the three-part test does not apply, and that even if that test were applied, the provisions of the Copyright Act would pass muster.

I. History of Statutory Damages for Copyright Infringement

Statutory damages for civil copyright infringement (hereinafter "statutory damages") are among the most venerable aspects of American copyright law. Prior to the ratification of the Constitution, several state copyright statutes provided for either a statutory maximum and minimum award (Massachusetts, New Hampshire, and Rhode Island) or a fixed sum to be paid for each infringing copy (Maryland and South Carolina).[3]

After the ratification of the Constitution, Congress wasted little time in enacting federal copyright protection. The Copyright Act of 1790 included a provision for statutory damages; it was "fifty cents for every [infringing] sheet... one [half] thereof to and for the use of the United States."[4] It is noteworthy that from the very first instance of federal copyright protection, statutory damages have served a hybrid purpose beyond merely compensating the aggrieved copyright owner.

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Through much of the nineteenth century statutory damages were increased and expanded to apply to the infringement of newly protected categories of works.[5] However, in the Copyright Act of 1895, Congress for the first time departed from the traditional manner of calculation of statutory damages (per infringing copy/performance) to the standard we are familiar with today (per infringed work).[6] While maintaining the traditional method for some categories of works, the Act provided:

> In the case of infringement of a copyrighted photograph made from any object not a work of fine arts, the sum recovered was to be not less than $100 nor more than $5,000, and that in the case of infringement of a copyright in a painting, drawing, engraving, etching, print, or model or design for a work of art, or a photograph of a work of the fine arts, the sum to be recovered was to be not less than $250 nor more than $10,000. One half of such sum accrued to the copyright proprietor and the other half to the United States.[7]

The Copyright Act of 1909 generally carried forward the statutory damages provisions of the 1895 Act, but two aspects of that enactment are noteworthy. First, in what appears to be an historically unique instance, Congress reduced the maximum level of statutory damages to $5,000. This appears to have been in direct response to the testimony of a prominent attorney who believed that an adverse judgment in a prior infringement action was a direct result of the judge's unwillingness to impose the level of statutory damages that the law would have compelled had infringement been found, but which "were altogether incommensurate with any suffering which [the plaintiff] had endured or with any profit which our opponent had derived from the practice."[8]

Second, in setting the levels of statutory damages, it is evident that Congress made an effort to approximate realistic levels of actual damages. The legislative history contains examples of this with regard to musical works reproduced in the form of player piano rolls[9] and newspaper reproduction of photographs.[10] Thus, historically, Congress has specifically acted to set statutory damages at levels that were compensatory and not likely to produce manifestly unjust or extravagant awards.

The Copyright Act of 1976[11] put in place the statutory damages structure that remains the law today.[12] Those amendments did away entirely with the "per infringing copy" standards in favor of a single "per infringed work" framework applicable to all copyrightable works: $250 to $10,000. In order to address concerns about the unjust application of statutory minimums to "innocent" infringers, a sub-minimum of $100 was established.[13] Conversely, a ceiling of $50,000 was established for instances where the plaintiff demonstrates that the infringement was willful.[14]

The extensive legislative history of the 1976 Act provides useful insight into how and why statutory damages are structured the way that they are. In a report to Congress, the Register of Copyrights reviewed the principles undergirding statutory damages:

> The need for this special remedy arises from the acknowledged inadequacy of actual damages and profits:
>
> • The value of a copyright is, by its nature, difficult to establish, and the loss caused by an infringement is equally hard to determine. As a result, actual damages are often conjectural, and may be impossible or prohibitively expensive to prove.
>
> • In many cases, especially those involving public performances, the only direct loss that could be proven is the amount of a license fee. An award of such an amount would be an invitation to infringe with no risk of loss to the infringer.
>
> • The actual damages capable of proof are often less than the cost to the copyright owner of detecting and investigating infringements.
>
> • An award of the infringer's profits would often be equally inadequate. There may have been little or no profit, or it may be impossible to compute the amount of profits attributable to the infringement. Frequently, the infringer's profits will not be an adequate measure of the injury caused to the copyright owner.
>
> In sum, statutory damages are intended (1) to assure adequate compensation to the copyright owner for his injury and (2) to deter infringement.[15]

In considering the appropriate maximum and minimum amounts of statutory damages, great attention was paid to both the adequacy of the compensation and deterrent effect as well as to the desire to avoid exorbitant awards, especially in instances of multiple infringements.[16] The question of multiple infringements was addressed in several ways, including the minimum level of ordinary statutory damages and the still lower level available in the case of innocent infringers.[17] In the end, Congress was satisfied that these safeguards allowed the statutory damages system to serve its purpose without imposing undue levels of liability.[18]

The dollar amounts for statutory damages were all doubled by the Berne Convention Implementation Act of 1988.[19] Those amounts were later raised by fifty percent (except the innocent infringer level, which remained at $200) by the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999,[20] bringing us to the current range of $750 to $30,000, or up to $150,000 where the infringement was willful.[21] The legislative history of the latter clearly states Congress' concerns that digital technology and the Internet had resulted in substantial economic costs to copyright owners and the U.S. economy as a whole.[22] Congress saw a need to increase the level of statutory damages because:

> [m]any computer users... simply believe that they will not be caught... [a]lso, many infringers do not consider the current copyright infringement penalties a real threat and continue infringing, even after a copyright owner puts them on notice.... In light of this... H.R. 1761 increases copyright penalties to have a significant deterrent effect on copyright infringement.[23]

This demonstrates Congress' view that statutory damages must both provide compensation and result in deterrence; Congress did not describe statutory damages as punitive.

II. Due Process and Punitive Damages

A. BMW v. Gore[24]

Outside the copyright context, in 1996, the Supreme Court struck down an award of $2 million in punitive damages on top of a $4,000 award in compensatory damages by an Alabama state court to Mr. Ira Gore, Jr., the purchaser of a used BMW automobile to whom the dealer did not disclose that the vehicle had been repainted since its initial manufacture.[25] The basis of the Court's decision was that the award was "grossly excessive" and therefore violated the Due Process Clause of the Fourteenth Amendment.[26] The Court set forth three "guideposts" for evaluating whether punitive damages are grossly excessive: the degree of reprehensibility of the defendant's conduct, the disparity between the harm or potential harm suffered by the plaintiff and the punitive damages award, and the difference between this remedy and the penalties authorized in comparable situations.[27]

The first guidepost is the degree of reprehensibility of the defendant's conduct. The Court described the degree of reprehensibility guideline as "[p]erhaps the most important indicium of the reasonableness of a punitive damages award."[28] Specifically mentioned as reprehensible were "crimes marked by violence," "trickery and deceit," and "intentional malice."[29] The Court also noted that "infliction of economic injury, especially when done intentionally through affirmative acts of misconduct... can warrant a substantial penalty."[30] Further, the Court held that "evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law."[31]

The second guidepost rejects outright any notion that punitive damages could be subjective, demanding instead that "exemplary damages must bear a 'reasonable relationship' to compensatory damages."[32] It is perhaps telling that in citing examples of existing federal law which provide punitive damages, the Court cited the treble damages provisions of trademark law and patent law, but not the statutory damages provisions of the Copyright Act.[33]

In assessing a reasonable ratio, the Court "rejected the notion that the constitutional line is marked by a simple mathematical formula.... We can say, however, that a general concer[n] for reasonableness... properly enter[s] into the constitutional calculus."[34] Expanding on this, the Court observed that "[a] higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine."[35] Nonetheless, the Court did appear to put an outer boundary on the ratio at 10-1.[36]

The third guidepost is the sanctions for comparable misconduct. This provides for a comparison of the punitive damages to both civil and criminal penalties that are available.[37] In conducting this comparison, the Court instructed that "a reviewing court engaged in determining whether an award

of punitive damages is excessive should 'accord "substantial deference" to legislative judgments concerning appropriate sanctions for the conduct at issue.'"[38] While it clearly referenced criminal penalties, the Court gave no guidance on how to place a value on imprisonment.

B. Subsequent Case Law

Since *Gore*, the Supreme Court has issued two more rulings that have provided a bit more context and detail for the application of the guideposts. In *State Farm v. Campbell* the Court reversed a punitive damages award by a Utah state court of $145 million on top of an award of $1 million in compensatory damages to Ms. Inez Campbell and the estate of her late husband for State Farm's bad faith, fraud, and intentional infliction of emotional distress.[39] The Court reiterated the underpinning of its application of the Due Process Clause to punitive damages, noting that "elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty...."[40]

In early 2007 the Court reversed an award of $79.5 million in punitive damages on top of an award of $821,000 in compensatory damages to the estate of a smoker in *Philip Morris USA v. Williams*.[41] In its decision, the Court noted that it "has long made clear that 'punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition.'"[42] Importantly, the Court also held that, "[u]nless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of 'fair notice,' ... it may threaten 'arbitrary punishments' ... that reflect not an 'application of law' but 'a decisonmaker's caprice.'"[43] Taken together, *State Farm* and *Philip Morris* indicate that the Court's due process concerns were both procedural (notice) and substantive (not capricious).[44]

III. Can and Should the Gore "Guideposts" Be Applied to Statutory Damages?

While the *Gore* guideposts apply to punitive damage awards, there is no indication from the Court that they should or do apply to statutory damages. A threshold question to address is whether statutory damages are punitive. As noted above, there are different levels of statutory damages available for innocent infringements, ordinary infringements, and willful infringements. For purposes of this analysis, this article considers that there are two levels, or types, of statutory damages: compensatory and enhanced. The innocent infringer reduction is a sub-class of the first, or compensatory type.[45]

A. Are Compensatory Statutory Damages Punitive?

It appears elementary that compensatory damages are not punitive and thus not subject to the guideposts. However, two instances have been presented where statutory damages are argued to be punitive in effect. The first is where even the minimum statutory damages award is grossly excessive in comparison to actual damages. The second is where multiple infringements generate a huge total statutory damages award.

The first instance is claimed by some to exist in the context of lawsuits for infringement arising from the use of file-sharing software. In this instance, some have suggested that the actual damages to the plaintiffs are a mere seventy cents, a common royalty rate paid to the copyright owner of a sound recording for the licensed download of that sound recording.[46] Compared to the statutory minimum of $750, this is a remarkable discrepancy. Yet this valuation ignores the degree to which the infringement facilitates and promotes other infringements of the work and the extent to which it contributes to the popularity of peer-to-peer infringements.[47] The flaw in this narrow view of compensation was described nearly a half a century ago by the Register of Copyrights, who noted that an award of mere licensing fees "would be an invitation to infringe with no risk of loss to the infringer."[48]

Beyond the example of peer-to-peer infringement, this raises the question of whether the $750 minimum is so high that it is likely to produce awards beyond actual damages. Indeed, common consumer products like CDs, DVDs, books, and videogames all cost substantially less than $750. Of course, the statutory damages framework is applied on a per infringement basis, so a thousand infringing copies of a single work is subject to the same $750 minimum statutory damages award as a single infringing copy.

This leaves the instance involving a single or very few infringements of a single work. The infringer would be subject to a minimum of $750 in statutory damages. Of course, that award would come about only as a result of federal litigation. One might reasonably conclude that litigation in such an instance is highly unlikely given the time and expense of the undertaking relative to the damage done and likely award. Granted, a successful plaintiff might be able to obtain an award that includes attorney's fees,[49] but there is no guarantee that will be the case. It simply does not make sense to risk tens of thousands of dollars in litigation expenses over a $750 award. Even if one might imagine a sufficiently headstrong plaintiff, willing to bring such a case and completely uninterested in settlement, the entire scheme of statutory damages ought not rise or fall over such a far-fetched and unlikely scenario.

As discussed earlier, Congress has historically made an effort to adjust statutory damages to properly compensatory levels.[50] Presumably, the $750 minimum represents Congress' judgment as to the lowest reasonable estimation of the true actual damages. It is worth noting that, adjusted for inflation, statutory damages are considerably lower today than they were in 1909. For example, the $250 minimum in the 1909 Act equates to well over $5,000 today.[51]

The second instance in which some have suggested that statutory damages are punitive is multiple infringements generating a huge statutory damages award.[52] While the argument may have use as a polemic tool, it fails to advance the legal analysis. Indeed, the infringement of a huge number of works *should* result in a huge award of damages, lest it fail to compensate the copyright owner and/or allow the infringer to retain some amount of profit from its illegal activity. Moreover, as discussed above, Congress has given the issue of multiple infringements specific attention and the law reflects its judgment as to how best to achieve compensation.[53]

B. Are Enhanced Statutory Damages Punitive?

Where a court has found the defendant's infringement willful and awarded an enhanced level of statutory damages, there is a better argument that the award is punitive. In describing the purpose of statutory damages, Congress has referred to compensation and deterrence.[54] Deterrence is not necessarily synonymous with punishment, even though they both may be achieved through the same means: monetary awards in excess of mere compensation. The distinction thus appears to exist in the policy goal that drove the enactment of statutory damages, not the means through which that goal is achieved.

The Supreme Court has stated that deterrence is one of the objectives of punitive damages.[55] Yet the opposite is not necessarily true; while statutory damages clearly are designed to be deterrent, that objective is not paired with punishment or retribution.[56] Perhaps this explains the apparent distinction the Supreme Court perceives between treble damages and statutory damages.[57]

The aim of providing civil remedies for copyright infringement that are deterrent but not punitive is consistent with the global standards for copyright protection found in the World Trade Organization:

> The judicial authorities shall have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered....[58]

> Members shall ensure... remedies which constitute a deterrent to further infringements.[59]

Similarly, numerous Free Trade Agreements which the United States has ratified obligate the signatories to provide statutory damages "in an amount sufficiently high to constitute a deterrent to future infringements and with the intent to compensate the right holder...."[60]

By its terms, the guideposts employed by the Court in the *Gore* line of cases apply to punitive damages. While statutory damages may have one aspect in common with punitive damages (deterrence), that does not transform them into punitive damages.[61]

The Sixth Circuit recently recognized this distinction in *Zomba Enterprises, Inc. v. Panorama Records, Inc*.62 In that case, defendant Panorama was found to have willfully infringed plaintiff Zomba's copyright in certain musical works. Enhanced statutory damages of $31,000 for the infringement of each of 26 works were awarded, totaling $806,000.63 Panorama challenged the constitutionality of the award on due process grounds. The court noted the distinction between the Supreme Court's rulings regarding punitive damages in *Gore* and *State Farm* and the question of statutory damages at bar.64 Finding "no case invalidating such an award of statutory damages under *Gore* or *Campbell* [*State Farm*] ..." the court declined to apply the guidelines. Instead, the court applied the standard set forth by the Supreme Court in *St. Louis*, *I.M. & S. Ry. Co. v. Williams,* that the statutory award is to be invalidated "only where the penalty prescribed is so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable."[65]

It appears that Congress' stated intent in enacting was deterrent but not punitive. This distinction carries over into international characterizations of statutory damages. Furthermore, the Supreme Court has chosen to apply a completely different standard in recent punitive damages cases than it has historically in the statutory damages context. Thus, there is good reason to view statutory damages as deterrent, but not punitive. As such, the *Gore* line of cases does not apply and should not be applied. If any due process standard must be applied in the review of statutory damages, it is the one the Supreme Court has itself applied in the *Williams* decision.

C. Do Statutory Damages Implicate the Policy Considerations Present in the Gore Line of Cases?

Even if statutory damages could be construed as punitive, one might fairly question whether the concerns the Court had with the punitive damage awards in *Gore*, *State Farm*, and *Philip Morris* would be present in the context of a statutory damages award. As noted above, the due process concerns that have moved the Court are fair notice of the offense and the severity of the penalty.[66] In contrast to unregulated punitive damages awards (such as those at issue in *Gore* and its progeny), the scope of copyright protection and the provision of statutory damages for infringement are clearly codified in federal law and have been so for over two centuries. No serious contention can be made that there is a lack of notice in either respect. "The unregulated and arbitrary use of judicial power" that the *Gore* guideposts remedy is not implicated in Congress' carefully crafted and reasonably constrained statute.[67]

To the extent that a defendant may argue that the range of damages available is "grossly excessive," it is noteworthy that Congress has throughout the history of the Copyright Act sought to calibrate statutory damages at a reasonable level based on objective market prices and expert testimony.[68] It is a tall order to contend to a court that despite the peaceful coexistence of the Due Process Clause and statutory damages for over two centuries, the latter is inconsistent with the former. Indeed, the Supreme Court has already had several opportunities to consider the constitutionality of aspects of the Copyright Act that, like statutory damages, trace their origin back to 1790. The most recent was *Eldred v. Ashcroft* in 2003:

> The [appeals] court recounted that "the First Congress made the Copyright Act of 1790 applicable to subsisting copyrights arising under the copyright laws of the several states." [*Eldred v. Reno,* 239 F.3d 372 (D.C. Cir. 2001).] That construction of Congress' authority under the Copyright Clause "by [those] contemporary with [the Constitution's] formation," the court said, merited "very great" and in this case "almost conclusive" weight. *Ibid.* (quoting *Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 57, 28 L. Ed. 349, 4 S. Ct. 279, 1884 Dec. Comm'r Pat. 186 (1884)*). As early as *McClurg v. Kingsland, 1 How. 202, 42 U.S. 202, 11 L. Ed. 102 (1843)*, the Court of Appeals added, this Court had made it "plain" that the same Clause permits Congress to "amplify the terms of an existing patent." *239 F.3d at 380*. The appeals court recognized that this Court has been similarly deferential to the judgment of Congress in the realm of copyright. *Ibid.* (citing *Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 78 L. Ed. 2d 574, 104 S. Ct. 774 (1984)*; *Stewart v. Abend, 495 U.S. 207, 109 L. Ed. 2d 184, 110 S. Ct. 1750 (1990)*).[69]

The Court in *Gore* agreed that "a reviewing court engaged in determining whether an award of punitive damages is excessive should 'accord substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue."[70] There is nothing in the *Gore* decision to suggest that the Court wished to or saw itself as substituting its own judgment for that of the legislature as to appropriate limits on a jury's discretion to award damages. Rather, the Court was applying its judgment in the *absence* of the legislature's judgment or any other limit on the jury's discretion. The case in statutory damages could not be more different. In fact, the Court has already found itself comfortable with Congress' selection of a range for statutory damages in an earlier version of the Copyright Act.[71] It bears noting again that the statutory range of $250 minimum and $5,000 maximum approved by the Court in *Woolworth* in 1952, when adjusted for inflation, equates to a range of roughly $2,000 minimum and $40,000 maximum in 2007 dollars.[72] Both of these figures exceed the actual present statutory amounts for ordinary infringements.

Finally, a defendant may argue that statutory damages as applied by a particular jury represent a grossly excessive punitive award. Historically, the Court has given great latitude to awards of statutory damages.[73] Further, this argument runs headlong into the Court's post-*Gore* deference for jury decisions in copyright; "in cases where the amount of the damages was uncertain[,] their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it."[74] In invoking this language with regard to statutory damages two years after its decision in *Gore*, the Court has already at least implied its view that statutory damages are not subject to the guideposts.

D. What Is the Result of an Application of the Guideposts to Statutory Damages?

Notwithstanding the above analysis, one might wonder what result would be generated by applying the guideposts to statutory damages.

1. Degree of Reprehensibility

To the extent that statutory damages are in fact subjected to the guideposts, it seems more likely to occur in the context of enhanced statutory damages. As such, the reprehensibility of the act prong overlaps with the willful standard for the award of an enhanced level of statutory damages.[75] The Court in *Gore* held that conduct is reprehensible and justifies a penalty when it is intentional.[76] It also held that an increased award is appropriate where the conduct was repeated and at least suspected by the defendant to be a violation.[77] Given the widespread publicity surrounding copyright infringement on peer-to-peer systems and the recording industry's concomitant litigation, where the defendant has distributed numerous copyrighted works on a peer-to-peer system, it would tax credulity to argue that this standard has not been met.

The Court has also held that "[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible." [78] Again, where the defendant is part of the machinery of the distribution of billions of copyrighted works on a peer-to-peer system, that defendant is not only harming the specific copyright owners, but is undermining the incentives in the Copyright Act to create new works for the benefit of the public. For all these reasons, an enhanced award is supported.

2. Ratio of Punitive Damages to Actual Harm

Application of this guidepost is problematic, at best. Indeed, the ratio of the harm suffered by the plaintiff to "punitive" damages borders on the farcical where the statute is specifically designed to relieve the plaintiff of having to prove actual harm. It is an analysis that is precluded by the very nature of statutory damages.

It is worth noting, nevertheless, that the current statutory framework appears calibrated to a 4:1 ratio. That is, statutory damages for routine infringements may receive an award of up to $30,000. In the case of willful infringements, the court may raise that amount another $120,000, for a total of $150,000. That represents a 4:1 ratio, well under the Court's 10:1 threshold.

3. Sanctions for Comparable Misconduct

Similarly, the difference between a given award and remedies available in similar cases is a pointless inquiry here. By definition, an award of statutory damages must be within the congressionally authorized range. It is a tautology to inquire whether an award within the range of statutory damages is consistent with legislative judgments concerning the appropriate sanction for the conduct at issue.

The Court will also consider the availability of criminal penalties as a sign of the seriousness of the government's interest in the offense and judgment concerning appropriate sanctions.[79] Criminal penalties are available for copyright infringement[80] and carry a penalty of up to five years in prison and a fine of up to $250,000 for a first offense involving the infringement of works that have a total value of more than $2,500.[81] Considering only the fine, Congress has specifically enacted a penalty that can be as much as 100 times the actual damages caused by the first offense. Subsequent offenses are subject to up to 10 years in prison and a fine of up to $500,000 (a ratio of up to 200:1).[82] All of these facts support an award of enhanced statutory damages.

Thus, it appears that application of the guideposts is awkward at best and, in any case, appears to favor upholding statutory damages award.

CONCLUSION

Statutory damages are a time-honored and accepted method for assessing awards in copyright infringement litigation. Recent decisions regarding the Due Process Clause and punitive damages are not applicable to statutory damages and should not be shoehorned into this field. The courts should continue to defer to Congress' historically careful judgment in this area.[83]

Endnotes

1 517 U.S. 559 (1996).

2 *See* Defendant Bertlesmann A.G., Bertlesmann, Inc., and Bemusic, Inc.'s Notice of Motion and Conditional Motion for Summary Judgment, *In re Napster, Inc. Copyright Litigation*, No. C-MDL-00-1369 MHP (N.D. Calif. July 21, 2006); Defendant James Michael Boggs' Response in Opposition to Plaintiff's Rule 12(b)(6) Motion to Dismiss Counterclaims, *Atlantic Recording Corp. v. Boggs*, C.A. No. 2:06-cv-00482 at 22 (S.D. Tex. April 26, 2007); Answer, Affirmative Defenses and Counterclaims, *Lava Records LLC, et al. v. Amurao*, No. 07 CV 321 (CLB)(S.D.N.Y. Feb. 12, 2007).

3 William S. Strauss, U.S. Copyright Office, *Studies on Copyright Law Revision Prepared for the Sen. Subcomm. on Patents, Trademarks, and Copyrights: The Damage Provisions of the Copyright Law (Study No. 22)* 1 (1956).

4 1 Stat. 124-26 (1790).

5 *See* Copyright Act of 1802 (2 Stat. 171 (1802) (making designs, engravings, and prints eligible for copyright protection and providing for statutory damages of $1 for every infringing print)); Copyright Act of 1831 (4 Stat. 436 (1831) (making musical works eligible for copyright protection and providing for statutory damages of $1 for every infringing sheet)); Copyright Act of 1856 (11 Stat. 138 (1856) (granting performance and publication rights in dramatic compositions and providing for statutory damages of not less than $100 for the first unauthorized performance and $50 for every subsequent unauthorized performance)); Copyright Act of 1870 (16 Stat. 198) (setting statutory damages for the infringement of paintings and statues at $10 for each infringing copy)).

6 28 Stat. 956 (1895).

7 Strauss, *supra* note 3 at 2.

8 Arguments Before the Comms. on Patents of the Senate and House Conjointly, on S. 6330 and H.R. 19853 to Amend and Consolidate the Acts Respecting Copyright, 59th Cong., 142 (Dec. 7-8, 10-11, 1906) (statement of Ansley Wilcox, Esq., of Buffalo, N.Y.). *See* H.R. Rep. No. 60-2222, at 15 (1909).

9 *See* Arguments Before the Comms. on Patents of the Senate and House, Conjointly, on S. 6330 and H.R. 19853 to Amend and Consolidate the Acts Respecting Copyright, 59th Cong., 123-24, 199 (June 6-9, 1906) (statement of Charles S. Burton, Esq. of Chicago, Ill.).

10 *See* Hearings Before the Comms. on Patents of the Senate and House on Pending Bills to Amend and Consolidate the Acts Respecting Copyright, 60th Cong., 150-60 (Mar. 26-28, 1908); H.R. Rep. No. 60-2222, at 15 (1909).

11 90 Stat. 2541 (1976).

12 *See* 17 U.S.C. § 504(c).

13 S. Rep. 94-473, at 162-63 (1975). Innocent infringers are those who "sustain[] the burden of proving... that [they] were not aware and had no reason to believe that his or her acts constituted an infringement...." 17 U.S.C. § 504(c)(2).

14 *Id.*

15 Register of Copyrights, 87th Cong., *Report on the General Revision of U.S. Copyright Law* 102-03 (Comm. Print 1961).

16 *Id.* at 104-05.

17 Register of Copyrights, 89th Cong., *Supplemental Report on the General Revision of U.S. Copyright Law* 135-37 (Comm. Print 1965).

18 S. Rep. 94-473, at 143-45 (1975); H.R. Rep. 94-1476, at 161-63 (1975).

19 102 Stat. 2853, 2860 (1988).

20 113 Stat. 1774 (1999).

21 17 U.S.C. § 504(c) (2007).

22 H.R. Rep. 106-216, at 3 (1999).

23 *Id.*

24 517 U.S. 559 (1996).

25 *Id.*

26 *Id.* at 568, 574.

27 *Id.* at 574.

28 *Id.* at 575.

29 *Id.* at 576.

30 *Id.*

31 *Id.* at 576-77 (citation omitted).

32 *Id.* at 580 (citations omitted).

33 *Id.* at 581, n.33 (citing 15 U.S.C. § 1117; 35 U.S.C. § 284).

34 *Id.* at 582-83 (citation omitted).

35 *Id.* at 582.

36 *Id.*

37 *Id.* at 583.

38 *Id.* (citation omitted).

39 538 U.S. 408 (2003).

40 *Id.* at 417 (citing *Gore,* 517 U.S. at 574).

41 166 L. Ed. 2d 940 (2007).

42 *Id.* at 948 (citing *Gore,* 517 U.S. at 568).

43 *Id.* (citations omitted).

44 Blaine Evanson, *Due Process in Statutory Damages*, 3 Geo. J.L. & Pub. Pol'y 601, 603 (2005).

45 Although the reduced award for innocent infringers may not be fully compensatory to the aggrieved copyright owner, it falls within the compensatory class as it by definition does not involve a finding of willfulness and does not include a correspondingly enhanced award. In essence, the compensatory class is defi ned here as every statutory damages award that is not enhanced.

46 J. Cam Barker, *Grossly Excessive Penalties in the Battle Against Illegal File-Sharing: The Troubling Effects of Aggregating Minimum Statutory Damages for Copyright Infringement*, 83 Tex. L. Rev. 525 (2004); Defendant James Michael Boggs' Response in Opposition to Plaintiff's Rule 12(b)(6) Motion to Dismiss Counterclaims, Atlantic Recording Corp. v. Boggs, C.A. No. 2:06-cv-00482 at 22 (S.D. Tex., April 26, 2007).

47 *See* MGM v. Grokster, 545 U.S. 913, 924-26 (2005).

48 *See supra* note 16.

49 *See* 17 U.S.C. § 505.

50 *See supra* notes 9-11.

51 The inflation calculator provided on the website of the Bureau of Labor Statistics (www.bls.gov) shows that $250 in 1913 (the earliest date available) is worth $5,250.43 today.

52 *See* Barker, *supra* note 46, at 537; Defendant Bertlesmann A.G., Bertlesmann, Inc., and Bemusic, Inc.'s Notice of Motion and Conditional Motion for Summary Judgment, In re Napster, Inc. Copyright Litigation, No. C-MDL-00-1369 MHP (N.D. Calif. July 21, 2006).

53 *See supra* notes 17-19.

54 *See supra* note 24.

55 *State Farm* at 416 ("punitive damages serve a broader function; they are aimed at deterrence and retribution.") (citations omitted).

56 *See supra,* note 24; *but see* On Davis v. The 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)....").

57 *See supra* note 34.

58 Agreement on Trade-Related Aspects of Intellectual Property Rights (1994), Article 45. Article 45 also permits the adoption of "pre-established" damages.

59 *Id*. at Article 41.

60 *See* Singapore-U.S. FTA, Art. 16.9.9; Morocco-U.S. FTA, Art. 15.11.7; Central America-U.S. FTA, Art. 15.11.8. It is worth noting that in light of these provisions, a ruling that statutory damages generally are unconstitutional, or even that only enhanced statutory damages are unconstitutional, would create serious doubts about whether the United States is meeting its international obligations. Failure to meet those obligations could subject the United States to trade sanctions under the enforcement provisions the Free Trade Agreements.

61 *But see* In re Napster, Inc. Copyright Litigation, No. C MDL-00-1369 MHP (N.D. Calif. June 1, 2005)("Extending the reasoning of Gore and its progeny, a number of courts have recognized that an award of statutory damages may violate due process....") (citing Parker v. Time Warner Entm't Co., 331 F.3d 13, 22 (2d. Cir. 2003); In re Trans Union Corp. Privacy Litig., 211 F.R.D. 328, 250-51 (N.D.Ill. 2002). Both *Parker* and *Trans Union* are distinguishable in that they involve certification of a class action suit, not the application of the *Gore* guideposts.

62 491 F.3d 574 (6th Cir. 2007).

63 *Id*. at 580.

64 *Id*. at 586-87.

65 *Id* at 587 (quoting St. Louis, I.M. & S. Ry. Co. v. Williams, 251 U.S. 63, 66-67 (1919)).

66 *See supra* note 41.

67 Lowry's Reports, Inc. v. Legg Mason, Inc., 302 F. Supp. 2d 455, 460 (D. Md. 2004) (holding that the *Gore* guideposts do not apply to statutory damages) (citing Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 20 (1991) ("As long as the discretion is exercised within reasonable limits, due process is satisfied")).

68 *See infra* Part I.

69 Eldred v. Reno, 239 F.3d 372, 379-80 (D.C. Cir. 2001).

70 *Gore,* 517 U.S. at 583 (citations omitted).

71 "The necessary flexibility to do justice in the variety of situations which copyright cases present can be achieved only by the exercise of the wide judicial discretion within limited amounts conferred by this statute." Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228, 232 (1952).

72 www.bls.gov.

73 "Even for uninjurious and unprofi table invasions of copyright the court may, if it deems just, impose a liability within statutory limits to sanction and vindicate the statutory policy." 344 U.S. at 233.

74 Feltner v. Columbia Pictures, Inc., 523 U.S. 340, 353 (1998) (citations omitted).

75 "Here... 'willfully' means with knowledge that the defendant's conduct constitutes copyright infringement." 4 Nimmer & Nimmer 14.04[B][3].

76 *See supra* note 31.

77 *See supra* note 32.

78 *Philip Morris,* 549 U.S. at 949.

79 *See supra* note 38.

80 17 U.S.C. § 506.

81 18 U.S.C. § 2319(b).

82 *Id*.

83 Congress continues to reassess the appropriate application of statutory damages. Shortly before this issue went to print, H.R. 4279 was introduced. Section 104 of that bill would amend the statute to allow "either one or multiple awards of statutory damages with respect to infringement of a compilation."