**ANNOTATIONS AND COMMENTS**

Under 17 U.S.C. § 504, a plaintiff may obtain statutory damages in lieu of actual damages and profits. Even though the statute suggests that statutory damages are awarded by the court, the Seventh Amendment requires that the determination, including the amount of such award, be made by the jury. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353, 118 S. Ct. 1279, 1287, 140 L. Ed. 2d. 438, 353 (1998). The jury should be provided with a special interrogatory form in order to report its findings on the issue of statutory damages. The minimum for statutory damages is not less than

1. $750 per work the defendant has infringed, unless the infringement was innocent, in which case the minimum statutory damages award is $200. 17 U.S.C. § 504. *See* note 7 below regarding the minimum award for innocent infringement.

Because statutory damages serve both compensatory and punitive purposes, plaintiff can recover statutory damages whether or not there is evidence of any actual damage suffered by plaintiff or any profits reaped by the defendant. *See F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233, 73 S. Ct. 222, 225, 97 L. Ed. 2d. 281 (1952) (“Even for uninjurious and unprofitable invasions of copyright the court may, if it deems just, impose a liability within statutory limits to sanction and vindicate the statutory policy” of discouraging infringement.).

2. Presenting both actual and statutory damages to Jury: A plaintiff may elect to seek a verdict of damages in the form of both actual and statutory damages. However, the Jury must be instructed that if it makes findings as to both actual and statutory damages, the plaintiff may elect only one or the other, but not both. *Yellow Pages Photos, Inc. v. Ziplocal,* 795 F.3d. 1255, 1284 (11th Cir. 2015).

3. Defining “work.” Only one measure of statutory damages is allowed *per work* infringed for *all infringements* of that work. 17 U.S.C. § 504; *MCA Television Ltd. V. Feltner*; 89 F.3d 766, 768-69. All of the parts of a compilation or derivative work constitute one work. 17 U.S.C. § 504.

4. Factors to be considered. *Cable/Home Commc’n Corp. v. Network Prods., Inc.*, 902 F.2d 829, 850 (11th Cir. 1990) (difficulty or impossibility of providing actual damages, attitude and conduct of parties, willfulness of defendant’s conduct, deterrence of future infringement); *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233, 73 S. Ct. 222, 225, 97 L. Ed. 2d. 281 (1952) (deterrence of future infringement).

5. Increase for willful infringement. If copyright owner proves the infringement was committed willfully, award may be increased to not more than $150,000. 17 U.S.C. § 504; *Yellow Pages Photos,* 795 F.3d at 1272(“willful copyright infringement encompasses reckless disregard of the possibility that one’s actions are infringing a copyright”); *see also MCA Television*, 89 F.3d at 768 (stating that “‘[i]t seems clean that as here used ‘willfully’ means with knowledge that the defendant’s conduct constitutes copyright infringement’” (quoting 3 Nimmer on Copyright (199), § 14.04[B], 14-58-60)).

6. In *Yellow Pages Photos, Inc. v. Ziplocal LP*, 795 F.3d at 1272, the Eleventh Circuit agreed with other circuits in holding that willfulness encompasses “reckless disregard of the possibility that one’s actions are infringing a copyright.” Although *Yellow Pages Photos* does not enunciate a clear test for what constitutes “reckless disregard,” the Eleventh Circuit, in an unpublished decision, held that reckless disregard can rise to the level of willfulness where “‘the infringer acted despite an objectively high likelihood that its actions constituted infringement.’” *Olem Shoe Corp. v. Washington Shoe Corp.*, 591 F. App’x 873, 877 (11th Cir. 2015) (quoting *In re Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007)).

7. Decrease for innocent infringement. 17 U.S.C. § 504 (If infringer proves it was not aware and had no reason to believe that its acts constituted an infringement of copyright, the award may be reduced to not less than $200.).

8. Unavailability of reduction for innocent infringement in certain cases. The final bracketed paragraph of the instruction describes a category of cases in which the defense of innocent infringement is unavailable. *See* 17 U.S.C. §§ 401-02.

a. “Proper form.” Under section 401, for the notice to be in proper form, three requirements typically must be met – the proper symbol or word, the year of first publication, and identification of the copyright owner. The year of first publication may be omitted “where a pictorial, graphic, or sculptural work, with accompanying text matter, if any, if reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys, or any useful articles,” see *id*. § 401, and for that reason this particular element is bracketed. The symbol/word and identification requirements each may be met by one of several alternatives. Because only one such alternative is likely to apply in a particular case, the alternative methods of satisfying the exception are bracketed.

b. “Proper form” – sound recordings. Section 402 provides the notice requirements for publicly distributed copies of sound recordings. Under section 402, for the notice to be in proper form, three requirements typically must be met – the proper symbol or word, the year of first publication, and identification of the copyright owner. In addition to the identification of the copyright owner, section 402 allows identification of the producer of the sound recording to suffice if no other name of the copyright owner appears in conjunction with the notice. *See* 17 U.S.C. § 402. The symbol/word and identification requirements each may be met by one of several alternatives. Because only one such alternative is likely to apply in a particular case, the alternative methods of satisfying the exception are bracketed.

c. Compilations/derivative works/collective works. Under section 401, in a case involving a compilation or derivative work incorporating previously published material, the year of first publication of the compilation or derivative work is sufficient. In such a case, the instruction should be modified accordingly. Section 404 provides special rules as to collective works, and should be considered and the instruction modified as needed, where collective works are at issue.

d. Unavailability of exception. Section 401’s limitation on the availability of the defense of innocent infringement does not apply in a case in which: an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use, if the infringer was: an employee or agent of a non-profit educational institution, library, or archives acting within the scope of his or her employment who infringed by reproducing the work in copies or phonorecords; a nonprofit educational institution, library, or archives itself that infringed by reproducing the work in copies or phonorecords; or a public broadcasting entity that, or a person who as a regular part of the nonprofit activities of a public broadcasting entity (as defined in subsection of section 118), infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

*See* U.S.C. §§ 401 & 504. In a case in which this exception to the exception applies, the instruction should be modified accordingly.

9. Availability of statutory damages for pre-registration infringement. Under 17 U.S.C. § 412, statutory damages are unavailable for copyright infringement that commenced prior to registration of an unpublished work or for infringement that commenced before registration within three months of its publication. In a case in which the issue of when infringement commenced presents a jury question, the instruction should be modified accordingly.