

17.34 Copyright—Damages (17 U.S.C. § 504)

If you find for the plaintiff [*name*] on the plaintiff [*name*]'s copyright infringement claim, you must determine the plaintiff [*name*]'s damages. The plaintiff is entitled to recover the actual damages suffered as a result of the infringement. In addition, the plaintiff is also entitled to recover any profits of the defendant attributable to the infringement and not taken into account in [computing the actual damages] [the calculation of damages]. The plaintiff must prove damages by a preponderance of the evidence.

Comment

Give this instruction along with Instructions 5.1 (Damages—Proof), 17.33 (Copyright—Damages—Actual Damages), and 17.36 (Copyright—Damages—Defendant's Profits).

Under 17 U.S.C. § 504(b), the copyright owner is entitled to recover the actual damages suffered as a result of the infringement, as well as any profits of the infringer that are attributable to the infringement and that are not taken into account in computing the actual damages. *See Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 708 (9th Cir. 2004) (noting additionally that “actual damages must be suffered ‘as a result of the infringement,’ and recoverable profits must be ‘attributable to the infringement’” (quoting § 504(b))); *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 512 n.5 (9th Cir. 1985).

Section 504(c)(1) provides that the plaintiff may “elect, *at any time* before final judgment is rendered” whether to seek actual or statutory damages. § 504(c) (emphasis added); *see Derek Andrew, Inc. v. Poof Apparel Corp.*, 528 F.3d 696, 699 (9th Cir. 2008); *L.A. News Serv. v. Reuters Television Int’l, Ltd.*, 149 F.3d 987, 995 (9th Cir. 1998). If the copyright owner elects to recover statutory damages, the owner cannot also recover actual damages. § 504(c)(1); *see also* Instruction 17.37 (Copyright—Damages—Statutory Damages); *Derek Andrew*, 528 F.3d at 699; *Nintendo of Am., Inc. v. Dragon Pac. Int’l*, 40 F.3d 1007, 1010-11 (9th Cir. 1994) (explaining the punitive purpose of statutory damages and the compensatory purpose of actual damages).

When injury is shown, but neither profits nor damages can be proved, statutory damages are mandatory. *Russell v. Price*, 612 F.2d 1123, 1129-30 (9th Cir. 1979); *Pye v. Mitchell*, 574 F.2d 476, 481 (9th Cir. 1978). When the copyright owner fails to register its copyright before commencement of the infringement, it can recover only actual damages and profits and cannot seek statutory damages. *Derek Andrew*, 528 F.3d at 699; *Polar Bear Prods.*, 384 F.3d at 707 n.5.

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