

different factors, it will be necessary for the court to make an apportionment. However, the burden of proof is on the defendant in these cases; in establishing profits the plaintiff need prove only “the infringer’s gross revenue,” and the defendant must prove not only “his or her deductible expenses” but also “the element of profit attributable to factors other than the copyrighted work.”

**Statutory Damages.** Subsection (c) of section 504 makes clear that the plaintiff’s election to recover statutory damages may take place at any time during the trial before the court has rendered its final judgment. The remainder of clause (1) of the subsection represents a statement of the general rates applicable to awards of statutory damages. Its principal provisions may be summarized as follows:

1. As a general rule, where the plaintiff elects to recover statutory damages, the court is obliged to award between \$250 and \$10,000. It can exercise discretion in awarding an amount within that range but, unless one of the exceptions provided by clause (2) is applicable, it cannot make an award of less than \$250 or of more than \$10,000 if the copyright owner has chosen recovery under section 504(c).

2. Although, as explained below, an award of minimum statutory damages may be multiplied if separate works and separately liable infringers are involved in the suit, a single award in the \$250 to \$10,000 range is to be made “for all infringements involved in the action.” A single infringer of a single work is liable for a single amount between \$250 and \$10,000, no matter how many acts of infringement are involved in the action and regardless of whether the acts were separate, isolated, or occurred in a related series.

3. Where the suit involves infringement of more than one separate and independent work, minimum statutory damages for each work must be awarded. For example, if one defendant has infringed three copyrighted works, the copyright owner is entitled to statutory damages of at least \$750 and may be awarded up to \$30,000. Subsection (c)(1) makes clear, however, that, although they are regarded as independent works for other purposes, “all the parts of a compilation or derivative work constitute one work” for this purpose. Moreover, although the minimum and maximum amounts are to be multiplied where multiple “works” are involved in the suit, the same is not true with respect to multiple copyrights, multiple owners, multiple exclusive rights, or multiple registrations. This point is especially important since, under a scheme of divisible copyright, it is possible to have the rights of a number of owners of separate “copyrights” in a single “work” infringed by one act of a defendant.

4. Where the infringements of one work were committed by a single infringer acting individually, a single award of statutory damages would be made. Similarly, where the work was infringed by two or more joint tortfeasors, the bill would make them jointly and severally liable for an amount in the \$250 to \$10,000 range. However, where separate infringements for which two or more defendants are not jointly liable are joined in the same action, separate awards of statutory damages would be appropriate.

Clause (2) of section 504(c) provides for exceptional cases in which the maximum award of statutory damages could be raised from \$10,000 to \$50,000, and in which the minimum recovery could be reduced from \$250 to \$100. The basic principle underlying this provision is that the courts should be given discretion to increase statutory damages in cases of willful infringement and to lower the minimum where the infringer is innocent. The language of the clause makes clear that in these situations the burden of proving willfulness rests on the copyright owner and that of proving innocence rests on the infringer, and that the court must make a finding of either willfulness or innocence in order to award the exceptional amounts.

The “innocent infringer” provision of section 504(c)(2) has been the subject of extensive discussion. The excep-

tion, which would allow reduction of minimum statutory damages to \$100 where the infringer “was not aware and had no reason to believe that his or her acts constituted an infringement of copyright,” is sufficient to protect against unwarranted liability in cases of occasional or isolated innocent infringement, and it offers adequate insulation to users, such as broadcasters and newspaper publishers, who are particularly vulnerable to this type of infringement suit. On the other hand, by establishing a realistic floor for liability, the provision preserves its intended deterrent effect; and it would not allow an infringer to escape simply because the plaintiff failed to disprove the defendant’s claim of innocence.

In addition to the general “innocent infringer” provision clause (2) deals with the special situation of teachers, librarians, archivists, and public broadcasters, and the nonprofit institutions of which they are a part. Section 504(c)(2) provides that, where such a person or institution infringed copyrighted material in the honest belief that what they were doing constituted fair use, the court is precluded from awarding any statutory damages. It is intended that, in cases involving this provision, the burden of proof with respect to the defendant’s good faith should rest on the plaintiff.

#### CONSTITUTIONALITY

For information regarding constitutionality of certain provisions of this section, as enacted by section 101 of Pub. L. 94-553, see Congressional Research Service, *The Constitution of the United States of America: Analysis and Interpretation*, Appendix 1, Acts of Congress Held Unconstitutional in Whole or in Part by the Supreme Court of the United States.

#### AMENDMENTS

2010—Subsec. (c)(2). Pub. L. 111-295 substituted “section 118(f)” for “subsection (g) of section 118”.

2004—Subsec. (c)(3). Pub. L. 108-482 added par. (3).

1999—Subsec. (c)(1). Pub. L. 106-160, §2(1), substituted “\$750” for “\$500” and “\$30,000” for “\$20,000”.

Subsec. (c)(2). Pub. L. 106-160, §2(2), substituted “\$150,000” for “\$100,000”.

1998—Subsec. (d). Pub. L. 105-298 added subsec. (d).

1997—Subsec. (c)(2). Pub. L. 105-80 substituted “the court in its discretion” for “the court in its discretion”.

1988—Subsec. (c)(1). Pub. L. 100-568, §10(b)(1), substituted “\$500” for “\$250” and “\$20,000” for “\$10,000”.

Subsec. (c)(2). Pub. L. 100-568, §10(b)(2), substituted “\$100,000” for “\$50,000” and “\$200” for “\$100”.

#### EFFECTIVE DATE OF 1999 AMENDMENT

Pub. L. 106-160, §4, Dec. 9, 1999, 113 Stat. 1774, provided that: “The amendments made by section 2 [amending this section] shall apply to any action brought on or after the date of the enactment of this Act [Dec. 9, 1999], regardless of the date on which the alleged activity that is the basis of the action occurred.”

#### EFFECTIVE DATE OF 1998 AMENDMENT

Amendment by Pub. L. 105-298 effective 90 days after Oct. 27, 1998, see section 207 of Pub. L. 105-298, set out as a note under section 101 of this title.

#### EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by Pub. L. 100-568 effective Mar. 1, 1989, with any cause of action arising under this title before such date being governed by provisions in effect when cause of action arose, see section 13 of Pub. L. 100-568, set out as a note under section 101 of this title.

### § 505. Remedies for infringement: Costs and attorney’s fees

In any civil action under this title, the court in its discretion may allow the recovery of full costs by or against any party other than the

United States or an officer thereof. Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs.

(Pub. L. 94-553, title I, §101, Oct. 19, 1976, 90 Stat. 2586.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

Under section 505 the awarding of costs and attorney's fees are left to the court's discretion, and the section also makes clear that neither costs nor attorney's fees can be awarded to or against "the United States or an officer thereof."

**§ 506. Criminal offenses**

(a) CRIMINAL INFRINGEMENT.—

(1) IN GENERAL.—Any person who willfully infringes a copyright shall be punished as provided under section 2319 of title 18, if the infringement was committed—

(A) for purposes of commercial advantage or private financial gain;

(B) by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000; or

(C) by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution.

(2) EVIDENCE.—For purposes of this subsection, evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish willful infringement of a copyright.

(3) DEFINITION.—In this subsection, the term "work being prepared for commercial distribution" means—

(A) a computer program, a musical work, a motion picture or other audiovisual work, or a sound recording, if, at the time of unauthorized distribution—

(i) the copyright owner has a reasonable expectation of commercial distribution; and

(ii) the copies or phonorecords of the work have not been commercially distributed; or

(B) a motion picture, if, at the time of unauthorized distribution, the motion picture—

(i) has been made available for viewing in a motion picture exhibition facility; and

(ii) has not been made available in copies for sale to the general public in the United States in a format intended to permit viewing outside a motion picture exhibition facility.

(b) FORFEITURE, DESTRUCTION, AND RESTITUTION.—Forfeiture, destruction, and restitution relating to this section shall be subject to section 2323 of title 18, to the extent provided in that section, in addition to any other similar remedies provided by law.

(c) FRAUDULENT COPYRIGHT NOTICE.—Any person who, with fraudulent intent, places on any article a notice of copyright or words of the same purport that such person knows to be false, or who, with fraudulent intent, publicly distributes or imports for public distribution any article bearing such notice or words that such person knows to be false, shall be fined not more than \$2,500.

(d) FRAUDULENT REMOVAL OF COPYRIGHT NOTICE.—Any person who, with fraudulent intent, removes or alters any notice of copyright appearing on a copy of a copyrighted work shall be fined not more than \$2,500.

(e) FALSE REPRESENTATION.—Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 409, or in any written statement filed in connection with the application, shall be fined not more than \$2,500.

(f) RIGHTS OF ATTRIBUTION AND INTEGRITY.—Nothing in this section applies to infringement of the rights conferred by section 106A(a).

(Pub. L. 94-553, title I, §101, Oct. 19, 1976, 90 Stat. 2586; Pub. L. 97-180, §5, May 24, 1982, 96 Stat. 93; Pub. L. 101-650, title VI, §606(b), Dec. 1, 1990, 104 Stat. 5131; Pub. L. 105-147, §2(b), Dec. 16, 1997, 111 Stat. 2678; Pub. L. 109-9, title I, §103(a), Apr. 27, 2005, 119 Stat. 220; Pub. L. 110-403, title II, §201(a), Oct. 13, 2008, 122 Stat. 4260.)

HISTORICAL AND REVISION NOTES

HOUSE REPORT NO. 94-1476

Four types of criminal offenses actionable under the bill are listed in section 506: willful infringement for profit, fraudulent use of a copyright notice, fraudulent removal of notice, and false representation in connection with a copyright application. The maximum fine on conviction has been increased to \$10,000 and, in conformity with the general pattern of the Criminal Code (18 U.S.C.), no minimum fines have been provided. In addition to or instead of a fine, conviction for criminal infringement under section 506(a) can carry with it a sentence of imprisonment of up to one year. Section 506(b) deals with seizure, forfeiture, and destruction of material involved in cases of criminal infringement.

Section 506(a) contains a special provision applying to any person who infringes willfully and for purposes of commercial advantage the copyright in a sound recording or a motion picture. For the first such offense a person shall be fined not more than \$25,000 or imprisoned for not more than one year, or both. For any subsequent offense a person shall be fined not more than \$50,000 or imprisoned not more than two years, or both.

AMENDMENTS

2008—Subsec. (b). Pub. L. 110-403 amended subsec. (b) generally. Prior to amendment, text read as follows: "When any person is convicted of any violation of subsection (a), the court in its judgment of conviction shall, in addition to the penalty therein prescribed, order the forfeiture and destruction or other disposition of all infringing copies or phonorecords and all implements, devices, or equipment used in the manufacture of such infringing copies or phonorecords."

2005—Subsec. (a). Pub. L. 109-9 reenacted heading without change and amended text generally. Prior to amendment, text read as follows: "Any person who infringes a copyright willfully either—

"(1) for purposes of commercial advantage or private financial gain, or

"(2) by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copy-