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Calculating Civil Damages for Copyright Infringement

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Azerbaijan Competitiveness and Trade (ACT) Project

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Calculating Civil Damages for Copyright Infringement

In pursuit of its goal to become a member of the World Trade Organization (WTO), the Republic of Azerbaijan is reviewing its intellectual property regime with a focus toward bringing its copyright laws into conformity with the WTO's Agreement on Trade-Related Aspects of Intellectual Property (TRIPS). In furtherance of this aim, the government of Azerbaijan wishes to review international best practices on determining claim amounts for violations of copyrights and related rights in civil trials. This document will describe the general theories of copyright damages and their calculations in civil trials and will include samples of related copyright laws from countries with strong copyright protection, as well as discussing any guidance provided by international organizations such as the World Intellectual Property Organization (WIPO).

Definition of Copyright, Related Rights and Infringement Thereof

Copyright is a bundle of exclusive rights granted in works of authorship. The copyright property rights, also called economic rights, give the author or owner of a work exclusive right to, among other things, sell, copy, transmit, adapt or perform the work. Many countries also include non-economic rights, also called moral rights, such as the right to be known as the author of a work and to prevent the work from being altered or distorted. Works of authorship include not just books and articles but other expressions as well, such as those consisting of text, image or data put down on any medium (paper, computer memory) such as music, maps, computer programs, photos or video. Works of authorship do not include inventions which are covered under patent law. For simplicity, hereafter the term copyright will include moral rights.

Infringement of a copyright is the exercising by a third party of any one of the bundle of copyrights over a work without permission from the owner unless there is a legal exception, such as fair use as in the exception for parody allowed in the United States. Legal theories of damages for infringement of the property rights of copyright follow the misappropriation of property theory of damages (recovery of economic loss) whereas theories on damages for infringement of the moral rights may often follow tort damage theory or in the alternative, be governed by other areas of law such as defamation.

The philosophy behind awarding damages to the owner of an infringed copyright is to put the copyright owner in the position he would have been in had the infringement not occurred. However, there are public policy reasons to award the owner a higher monetary recovery beyond his pure damages. The first is to avoid unjust enrichment so as to prevent bad behavior from being rewarded. The second is to avoid a situation where it is economically rational to infringe a copyright rather than get permission to the work. This ‘economical infringement’ exists when it is no more expensive to pay damages after infringing a copyright than it would have been to get permission to the work beforehand. For these reasons, courts in many jurisdictions may also award recovery of other expenses such as attorney’s fees and other indirect damages. In addition, statutory damages, an amount fixed by statute multiplied against the number of works infringed (but not against the number of copies made), is often an alternative available at the option of either the owner or the court and usually (but not always) results in a higher award than actual damages would have led to. Statutory damages are also useful in cases where actual damages would be very difficult to substantiate through financial records.

Azerbaijan Copyright Law

Article 45 of Azerbaijan’s 1996 Law on Copyrights and Related Rights: Means of Protection of Copyright and Neighboring Rights, covers civil penalties for misuse of copyrights and related rights (Article 165 of the Azerbaijan Criminal Code covers the criminal penalty aspect). Article 45 states that in addition to general methods of civil law protection, the court, on demand of the owner, may instead of granting standard civil law damages, (a) award all income the infringer made from the infringement, or (b) award from 100 to 50,000 Manats (statutory damages). Section 4 states that a prevailing owner may recover his reasonable expenses including attorneys’ fees. Finally, Section 5 states that in addition to the above awards, the owner may seek a payment in the amount of the royalties it might receive for a typical use of the work. The court may grant these awards even if the infringer did not know about the infringement.

**Law of the Republic of Azerbaijan
on Copyrights and Related Rights
Article 45. Means of Protection of Copyrights and
Neighboring Rights**

1. Owners of copyrights and neighboring rights may apply to the court for protection of their rights:
2. While hearing a disputes related to copyrights and neighboring rights, beside the general means of civil right protections, a court may pass a decision on the following with a demand of claimant:
 - 1) taking from the infringer the profit gained from infringement of copyrights and neighboring rights in exchange of recovering damages,
 - 2) payment of compensation in the amount of 100 to 50 thousand manats in exchange of recovering damages or taking the profit;
 - 3) confiscation of the materials and equipment used for making (production) of pirate duplicates according to the decision of a court taking into consideration the gravity of the

- crime and legal interests of other persons;
- 4) confiscation and destruction of pirate duplicates through judicial procedures without payment of compensation to the infringing party;
3. Activities aimed for passing through the technical protection means of the copyrights and subjects of the neighboring rights by direct interference or indirect methods, causes a liability determined by the law for violation of the copyrights and the neighboring rights.
4. A court has an authority to pass a decision on repayment of the reasonable expenses incurred by the right owner, including the costs of the lawyer's services, if the law violation is proved. The court can also make a decision on compensation to the author (other right owner) or owner of the neighboring rights irrespective of whether violator had known about infringement or not.
5. Along with the compensation, the author or owner of the neighboring rights has right to demand repayment of the royalties that it could have received in ordinary use of the work.

International Law and Guidance: WTO and WIPO

The World Intellectual Property Organization Copyright Treaty (WCT)

Azerbaijan joined WIPO in 1995 and as a member, adopted The World Intellectual Property Organization Copyright Treaty (WCT) which entered into force in Azerbaijan in 2006. WCT Article 14 requires that members have enforcement procedures in place that include remedies for copyright infringement that would serve as a deterrent to infringement. While not specifically requiring statutory or other damages beyond simple recovery of losses, this is however implicit in the Article's requirement to avoid non-deterrent penalties such as would lead to incentives for efficient infringement. The WCT does not go into detail on how courts should calculate copyright infringement damages, leaving that to the discretion of its members as long as their laws provide a deterrent effect for copyright infringement.

WIPO Copyright Treaty
Article 14 Provisions on Enforcement of Rights

(2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements

WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPS)

As with the WCT, TRIPS gives it's the judicial authorities of its members wide latitude in how they craft their copyright infringement damages laws. TRIPS Article 45 states that its members have the right to require copyright infringers to compensate owners of the infringed copyright for any injury to the owner and to pay the owner's expenses, including attorneys' fees. The authorities may also allow recovery of profits in place of or in addition to the payment of

pre-established (statutory) damages even if the infringement was unintentional. As with WCT again, TRIPS does not offer specific details on how courts should calculate those damages.

TRIPS
PART III — Enforcement of Intellectual Property Rights
SECTION 2: CIVIL AND ADMINISTRATIVE PROCEDURES AND REMEDIES
Article 45: Damages

1. 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 because of an infringement of that person's intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity.
2. The judicial authorities shall also have the authority to order the infringer to pay the right holder expenses, which may include appropriate attorney's fees. In appropriate cases, Members may authorize the judicial authorities to order recovery of profits and/or payment of pre-established damages even where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity.

Since neither the WCT nor TRIPS gives specifics on how to calculate copyright infringement damages, we must then look to how courts in other countries, including those of WTO members, approach the problem. We will start first with an overview of the general theories of copyright damages and then turn to how most courts interpret those theories when they award damages for copyright infringement.

Copyright Damages

Broadly speaking, monetary damages are given to a claimant to compensate for wrongful injury as a release from civil liability by the wrong-doer. Generally, this group of monetary damages consists of compensation for injury, recovery of unjust enrichment including the infringer's profits from the infringement, interest on monetary damages and attorneys' fees. In addition, enhanced damages are sometimes included, such as punitive damages to punish outrageous conduct. An example of the use of punitive damages can be seen in two recent (2006 and 2009) Canadian cases involving Microsoft Corporation¹ where in addition to statutory damages of \$80,000 Canadian dollars in one case and \$500,000 in the other, the court awarded punitive damages of \$50,000 and \$200,000 respectively because in both cases the infringers continued infringing not only after receiving warnings from Microsoft, but in one case even after the trial had begun. The courts awarded punitive damages to punish bad behavior and to discourage future infringements. Finally, and somewhat unique to copyright infringement in the intellectual property field (as opposed to patent or trademark infringement where it usually is not

¹ Full text of the opinion for Microsoft Corporation v. 1276916 Ontario Ltd can be found at: <http://decisions.fct-cf.gc.ca/en/2009/2009fc849/2009fc849.html> . The full text for Microsoft v. 9038-3746 Quebec Inc can be found at: <http://decisions.fct-cf.gc.ca/en/2006/2006fc1509/2006fc1509.html>

allowed), a second category of statutory (codified) damages are also available to copyright owners.

Actual damages are generally defined as the real world injury or monetary losses to the owner and require supporting verifiable evidence to be provided in court such as records of sales of, or profits from, the infringed work. Courts often use experts and forensic accounting to establish these losses through review of financial records (which may therefore become part of the public record), but generally the losses need only be reasonably supported by evidence (as opposed to being beyond any doubt or overly exacting) and doubts are usually decided in favor of the owner. Even so, the legal fees arising from providing this proof may deter copyright owners from pursuing legal claims if the copyright law in their country does not allow for recovery of legal fees, or offer the alternative of statutory damages (or only offer these awards to those who have registered their copyright, as does the United States).

Statutory damages are a codified set amount or range of compensation that the court can award the owner for each single work that is infringed. This amount may be significantly more than actual damages and is sometimes used when actual damages cannot be substantiated or when it is too difficult to establish the number of infringing copies. This is commonly the situation with copyright damages as it is often difficult to calculate the number of infringing copies produced or distributed, especially in an online environment such as the internet where many digital copies of books, film, music or photos can be easily transferred. For example, the US music industry (often led by the Recording Industry Association of America, or RIAA) primarily relies on statutory damages in its pursuit of illegal music file sharing claims. Statutory damages are also used when awarding only actual damages would not create an incentive for compliance with copyright law because the cost of paying damages after infringing a work is not much more than having paid for a license in the first place. Some nations do not permit statutory damages, believing them to be punitive but most do not consider them overly punitive unless awards are given that seem to have no bearing on the harm done. In some countries, courts consider statutory damages merely a way to include other expenses a copyright owner may incur in pursuing infringement of its rights (such as investigation and identification of an infringing use, administrative fees, opportunity costs) if the general copyright law does not specifically allow for these expenses to be included under actual damages.

Calculating The Infringer's Profits

While often included under actual damages, infringer's profits are usually considered an amount that is in addition to (as in the US), or instead of (many other countries), true losses. The aim in the countries that award infringer's profits in addition to actual losses is to prevent unjust enrichment and economic infringement.

To calculate the infringer's profits, courts may look at the infringer's balance sheets (if available) to see what revenue came in on the infringed product. If this can be established, then

the main points of contention are what costs should be deducted from the revenue to find the profit and what amount of the revenue is actually attributable to the sale of the infringed product. Determining these facts may require the use of expert witnesses or forensic accounting. Often (as in the US), the owner need only present proof of the infringer's gross revenue and then the infringer has burden to establish its deductible expenses (marketing, production, advertising, and similar costs), as well as what parts of the revenue were not attributable to the infringement. Generally, doubts over amounts at this stage are decided in favor of the copyright owner but what exactly counts as deductible expenses varies from country to country. For example, courts in the United Kingdom allow deductions for the cost of making the infringing product as well as general business overhead, while courts in Germany (which do still allow the deduction for the cost of making the good) only allow a deduction for overhead if the overhead is clearly and directly attributable to producing the infringing good. This is the case when a certain piece of equipment has not also been used to produce other products. Regardless, the profits generally should be related to what was directly infringed and not be so indirect as to include an entire larger work when the infringing work was just a very small part like one song in a show or a small photo in an expansive advertisement spread. In this case, the burden to show what is the proper apportionment of profits usually falls on the infringer and many courts set a low threshold on when an infringed work will be found to be more than just a small part of a larger whole.

Finally, some courts do find that the copyright owner may have a claim in some cases to profits the infringer made on related goods connected to the infringed product. Known as 'indirect profits' or 'indirect damages,' courts will not award these amounts if they are too remote or speculative. An example of when a US court did awards indirect damages occurred in the 2006 case of *William A. Graham Co. v. Haughey*² where a jury awarded an insurance company (which chose only to claim the infringer's profits) almost \$19 million for its copyrighted textual explanations of insurance issues that a competitor had taken and included into its internal files and sales programs for use in client proposals. These damages (equaling about 70 percent of the infringer's profits during the period of infringement) were indirect because the copyrighted material was not sold but was only used by employees to generate revenue for the infringer. This jury verdict was affirmed by the 3rd Circuit Court of Appeals on May 16, 2011, which held that the high jury award did not 'shock the judicial conscience' Furthermore, it upheld a later court award of \$4.6 million in interest on those profits amounts even though there is no explicit mention of awarding interest in the US Copyright Act, especially interest on the infringer's profits. The court noted that without granting interest, the infringer would have had unjust enrichment in the form of an interest-free loan of a sort.

² The full opinion, which contains a good overview of the methods and philosophy of calculating copyright infringement damages under US law can be found at: <http://www.ca3.uscourts.gov/opinarch/102762p.pdf>

Calculating Actual Damages

The term actual damages covers the copyright owners actual losses (lost profits, lost license fees) occurring due to the infringement of the copyright on his work. There is no magic formula that can be applied in all cases as each case is different and must stand on its own merits and be judged based on the individual circumstances. There are however, a few possible routes courts may follow when attempting to calculate actual losses depending in part on what evidence is available. These are: (a) the owner's loss of revenue or profit from the work, (b) what royalty the owner would have received from the infringer if they had come to agreement before the infringement or (c) the market value of royalties for the infringed work. In addition, in some countries such as the US, the owner has a right to both his losses and the infringer's profits attributable to the infringed work as long as there is no double accounting. This is because courts feel that in some cases, the infringer's profits might be small compared to the damage done to the owner (as in the case of cheap knock-offs).

(a) Owner's lost revenues or profits

A claim for lost profits is typically only available if the owner and the infringer are competitors meaning they sell a similar good in the same market. If this is the case and if there are extensive financial records available such as the copyright owner's historical sales records and proof of the average profit for the work, there are a couple of different methods of calculating this loss that are available to courts:

- Courts may take the average revenue the owner received for the infringed work for a certain period before the infringement and then compare that to the revenue that came in during the time of infringement. The difference is assumed to be the owner's actual loss of revenue. Then in many countries, the court may require the owner to subtract his typical overhead for producing the product.
- A second method that may be used if the two parties sold the product for the same price, is to just do a one-to-one accounting on sales. This implies that any sales and profit the infringer gained are therefore sales and profits the owner lost due to the infringement. However, this is a rather rare circumstance where the owner must be able to show that the infringer's customers would have bought from the owner 'but for' the availability of the product from the infringer. The infringer is therefore likely to argue that the products were different enough in some way as to preclude this measurement.

(b) Reasonable royalty

In cases where both the owner's lost profits and infringer's profits are too difficult to substantiate, or in cases where the two parties sell in different markets (are not competitors), courts may look at what reasonable royalty the owner would have received if the infringer licensed the work before the infringing use. To do this, courts may look at past licenses agreed to by the owner or see if there are customary rates for that type of work in license agreements for a similar products sold for a similar use. Both of these may be difficult to determine, especially if the work infringed was not something the owner intended to license for sale or had not yet started selling. Furthermore, the amounts awarded may not provide the economic incentive to prevent infringements if the infringer ends up only having to pay what it would have paid if it had asked for permission first. Note again that TRIPS Article 45 requires that member states create laws that are a deterrent to future infringements.

(c) Market value test

If no empirical foundation exists to either (i) determine lost sales or the infringer's profits (no financial documents) or (ii) calculate a reasonable royalty (too few preexisting similar licenses), courts may turn to the concept of a market value test. This entails deciding what the fair market value of the copyright license would be in a perfect world (reasonable willing buyer negotiating with a reasonable willing seller). This method explores a hypothetical license negotiation occurring before any infringing use of the copyright. In the alternative, the owner may attempt to show how the infringing use lowered the copyright's market value, including through damage to the owner's professional reputation or goodwill.

(d) Other claim amounts

Other expenses beyond true losses may be awarded to the owner of an infringed copyright. Courts may find that any or all of the following awards are owed to the copyright owner by the infringer in addition to direct actual losses:

- Payment of the prevailing copyright owner's attorneys' fees. Some countries make this automatic while in others like the US, it is at the discretion of the court based on the facts of the case. Awards for attorneys' fees may be reduced if failed legal motions or court actions taken by the owner added substantially to these costs. This was the situation in a 2005 Australian case (Universal Music Australia PTY LTD v. Sharman Liens Holdings Ltd³) where the court only awarded the owner 90 percent of the costs it incurred relating to the court case, and did not included costs it felt were incurred due to the owners failed conspiracy claims and related claims. It is important to note that due to the difficulty of proving the amounts involved in claims for actual

³ Full text of the case (known as the Australia Kazaa case as it involved use the peer-to-peer file sharing service that allowed easy transfer of digital music files) can be found here:
http://www.austlii.edu.au/au/cases/cth/federal_ct/2005/1242.html

damages and the high costs incurred through the use of experts or forensic accounting, if attorneys' fees are not awarded to copyright owners who prevail in court, many copyright owners will not pursue the civil remedy for infringement for their works. This could conflict with the duty to create deterrents to infringement as required by TRIPS Article 45.

- Remuneration for any loss of business reputation or loss of credit of authorship which may damage the author's reputation. These two losses may have not correlate to lost sales or other damage measurements and courts therefore have discretion to award an amount not based on measurements used to determine those damages. These injuries are often considered a type of tort and thus may follow a country's standard theories or rules for determining tort damages. For example, in Germany courts may demand a restoration in kind which could entail the infringer providing significant publicity regarding the identity of the true owner or author of a work infringed.
- Recovery of a loss in sales of the copyright owner's related non-infringed products that occurred due to the infringement of the main work. For example, loss in sales of supplements such as video game expansion packs when infringing copies of the main edition of a video game were sold by the infringer.
- Payment for expenses the copyright owner incurred that were necessitated by the infringement. This might include attempts to respond to or mitigate the harm caused by the sale of the infringing copies.
- Reimbursement for costs incurred by the owner in originally creating the infringed work in the first place, such as for research and development.

Calculating Statutory Damages

Calculating statutory damages is generally straightforward as the amounts are, by definition, set out in a codified law. The amounts are generally listed as a range, within which the court has discretion to choose what amount will be multiplied times the number of infringed works. Less common is when the statutory amount is merely a multiple (2x, 3x) of an inferred full price that would have been paid had the infringer sought permission from the copyright owner. This method requires the same type of calculation efforts found in the reasonable royalty or market value test. The term 'work' for these purposes, includes all versions of a work and all parts of a compilation work. Often the codified range is quite broad and the court has discretion on what amount to chose but it should be reasonable and appropriate to the facts of the specific case. Some factors courts have considered in past cases include:

- The purpose of the infringing use – was it part of a large commercial piracy enterprise or just a small occurrence.
- The number of infringements of each work (a few copies or was it hundreds or more).
- The amount of infringement (just a small technical copying or substantial use).

- The value what was infringed (expensive software or simple graphical image).
- The infringer's awareness of the infringement (unaware that the use was infringing or was it in bad faith and intentionally infringing).
- The infringer's behavior after becoming aware of the infringing use (such as through a cease-and-desist letter) and if there was any attempt to obtain permission from the owner.
- Other actual damages aspects such as the size of the infringer's profits or the owners lost profits and expenses the infringer avoided through misappropriation may also be considered again.

In the US for example, if there is no actual evidence in the way of damages to the owner or profits for the infringer or bad faith, courts have awarded only the statutory minimum amount.

As mentioned above, some countries do not permit statutory damages on the theory they are overly punitive. One example of how they can be punitive even while conforming to the codified law is evident in a 2010 Russian copyright infringement case (*Terra Publishers v. AST Publishing Group*) on the unauthorized sale of books. A Moscow Arbitration Court awarded the equivalent of almost \$250 million USD in damages to a small publishing company. The amount was derived by multiplying the price the copyright owners charged for a deluxe leather-bound collectable edition against the infringer's print run and then doubling it. This award amount is far more than the copyright owner's ever would have made in their limited deluxe run.

Conclusion

Azerbaijan's courts will continue to have wide latitude in how they calculate copyright damages, specifically for actual losses and infringer's profits. There is no one simple formula to use in every circumstance as the specific facts of each case and the availability of financial records will vary from infringement to infringement. The type of evidence available may indicate which damage calculation method the court should use: lost profits, reasonable royalty, or market value test). There are however, a few broad guidelines the courts should follow:

- If actual losses (such as lost profits) (a) do not create an incentive not to infringe or (b) allow an unjust enrichment by the infringer to occur, additional damages should be awarded to the owner to create a deterrent effect on future potential infringers.
- In cases where determining actual damages incurs high attorneys' fees, courts should require the infringer to pay the prevailing copyright owner's fees so as not to deter copyright owners from pursuing their rights against infringers in civil courts.
- Once infringement is established in court, doubts arising from financial evidence generally should be decided in favor of the copyright owner.

In summary, when calculating copyright infringement damages, Azerbaijan's courts should look to accomplish two things: (i) placing the copyright owner at least as good a financial place as he was before the infringement and (ii) providing a disincentive for future copyright infringements.

Annex 1

Sample Copyright Damages Statutes with Brief Summaries on Damages Terms -Australia, Canada, EU, Kazakhstan, United Kingdom, United States-

(Underlines added to indicate text directly related to damages)

Australia: Australian Copyright Act 1968

Summary: If the infringer was not aware of the infringement, the owner only gets infringer's profits (not owner's losses); otherwise owner gets either owner's losses or infringer's profits. Court may award addition appropriate damages if other facts warrant it (flagrant infringement, need for deterrence, defendants conduct after informed of infringing use, infringer transferred work from analog to digital, additional benefit accrued to infringer).

Part V—Remedies and offences

Division 2—Actions by owner of copyright

115 Actions for infringement

(1) Subject to this Act, the owner of a copyright may bring an action for an infringement of the copyright.

(2) Subject to this Act, the relief that a court may grant in an action for an infringement of copyright includes an injunction (subject to such terms, if any, as the court thinks fit) and either damages or an account of profits.

(3) Where, in an action for infringement of copyright, it is established that an infringement was committed but it is also established that, at the time of the infringement, the defendant was not aware, and had no reasonable grounds for suspecting, that the act constituting the infringement was an infringement of the copyright, the plaintiff is not entitled under this section to any damages against the defendant in respect of the infringement, but is entitled to an account of profits in respect of the infringement whether any other relief is granted under this section or not.

(4) Where, in an action under this section:

(a) an infringement of copyright is established; and

(b) the court is satisfied that it is proper to do so, having regard to:

(i) the flagrancy of the infringement; and

(ia) the need to deter similar infringements of copyright; and

(ib) the conduct of the defendant after the act constituting the infringement or, if relevant, after the defendant was informed that the defendant had allegedly infringed the plaintiff's copyright; and

(ii) whether the infringement involved the conversion of a work or other subject-matter from hardcopy or analog form into a digital or other electronic machine-readable form; and

(iii) any benefit shown to have accrued to the defendant by reason of the infringement; and

(iv) all other relevant matters;

the court may, in assessing damages for the infringement, award such additional damages as it considers appropriate in the circumstances.

Consideration for relief for electronic commercial infringement

(5) Subsection (6) applies to a court hearing an action for infringement of copyright if the court is satisfied that:

(a) the infringement (the *proved infringement*) occurred (whether as a result of the doing of an act comprised in the copyright, the authorising of the doing of such an act or the doing of another act); and

(b) the proved infringement involved a communication of a work or other subject-matter to the public; and

(c) because the work or other subject-matter was communicated to the public, it is likely that there were other infringements (the *likely infringements*) of the copyright by the defendant that the plaintiff did not

prove in the action; and

(d) taken together, the proved infringement and likely infringements were on a commercial scale.

(6) The court may have regard to the likelihood of the likely infringements (as well as the proved infringement) in deciding what relief to grant in the action.

(7) In determining for the purposes of paragraph (5)(d) whether, taken together, the proved infringement and the likely infringements were on a commercial scale, the following matters are to be taken into account:

(a) the volume and value of any articles that:

(i) are infringing copies that constitute the proved infringement; or

(ii) assuming the likely infringements actually occurred, would be infringing copies constituting those infringements;

(b) any other relevant matter.

(8) In subsection (7):

article includes a reproduction or copy of a work or other subject-matter, being a reproduction or copy in electronic form.

Canada: Copyright Act of 1921 (as amended 1988 and 1997)

Summary: The Owner is entitled to damages plus the portion of the infringer's profits made from the infringement, plus damages from infringement of moral rights. For the profits calculation, the owner need only prove receipts or revenues from the infringements and the infringer has the burden to show his costs that should be deducted from the revenues. In the alternative, the owner may elect to get from \$500 to \$20,000 per infringed work at court's discretion.

Copyright

34. (1) Where copyright has been infringed, the owner of the copyright is, subject to this Act, entitled to all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.

Moral rights

(2) In any proceedings for an infringement of a moral right of an author, the court may grant to the author or to the person who holds the moral rights by virtue of subsection 14.2(2) or (3), as the case may be, all remedies by way of injunction, damages, accounts, delivery up and otherwise that are or may be conferred by law for the infringement of a right.

Liability for infringement

35. (1) Where a person infringes copyright, the person is liable to pay such damages to the owner of the copyright as the owner has suffered due to the infringement and, in addition to those damages, such part of the profits that the infringer has made from the infringement and that were not taken into account in calculating the damages as the court considers just.

Proof of profits

(2) In proving profits,

(a) the plaintiff shall be required to prove only receipts or revenues derived from the infringement; and

(b) the defendant shall be required to prove every element of cost that the defendant claims.

Statutory damages

38.1 (1) Subject to this section, a copyright owner may elect, at any time before final judgment is rendered, to recover, instead of damages and profits referred to in subsection 35(1), an award of statutory damages for all

infringements involved in the proceedings, with respect to any one work or other subject-matter, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$500 or more than \$20,000 as the court considers just.

Where defendant unaware of infringement

(2) Where a copyright owner has made an election under subsection (1) and the defendant satisfies the court that the defendant was not aware and had no reasonable grounds to believe that the defendant had infringed copyright, the court may reduce the amount of the award to less than \$500, but not less than \$200.

Special case

(3) Where

(a) there is more than one work or other subject-matter in a single medium, and

(b) the awarding of even the minimum amount referred to in subsection (1) or (2) would result in a total award that, in the court's opinion, is grossly out of proportion to the infringement, the court may award, with respect to each work or other subject-matter, such lower amount than \$500 or \$200, as the case may be, as the court considers just.

Collective societies

(4) Where the defendant has not paid applicable royalties, a collective society referred to in section 67 may only make an election under this section to recover, in lieu of any other remedy of a monetary nature provided by this Act, an award of statutory damages in a sum of not less than three and not more than ten times the amount of the applicable royalties, as the court considers just.

Factors to consider

(5) In exercising its discretion under subsections (1) to (4), the court shall consider all relevant factors, including

(a) the good faith or bad faith of the defendant;

(b) the conduct of the parties before and during the proceedings; and

(c) the need to deter other infringements of the copyright in question.

No award

(6) No statutory damages may be awarded against

(a) an educational institution or a person acting under its authority that has committed an act referred to in section 29.6 or 29.7 and has not paid any royalties or complied with any terms and conditions fixed under this Act in relation to the commission of the act;

(b) an educational institution, library, archive or museum that is sued in the circumstances referred to in section 38.2; or

(c) a person who infringes copyright under paragraph 27(2)(e) or section 27.1, where the copy in question was made with the consent of the copyright owner in the country where the copy was made.

Exemplary or punitive damages not affected

(7) An election under subsection (1) does not affect any right that the copyright owner may have to exemplary or punitive damages.

European Union: EU Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights (IPRED)

Summary: If infringer has knowledge or reasonable grounds to know infringed, damages set from loss of earnings or unfair profits and may include amounts for other losses such as moral prejudice, or if too difficult to calculate these, then may use what royalties would have received if requested (plus attorney's fees).

Paragraph (26)

Whereas: With a view to compensating for the prejudice suffered as a result of an infringement committed by an infringer who engaged in an activity in the knowledge, or with reasonable grounds for knowing, that it would give rise to such an infringement, the amount of damages awarded to the rightholder should take account of all appropriate aspects, such as loss of earnings incurred by the rightholder, or unfair profits made by the infringer and, where appropriate, any moral prejudice caused to the rightholder. As an alternative, for example where it would be difficult to determine the amount of the actual prejudice suffered, the amount of the damages might be derived from elements such as the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question. The aim is not to introduce an obligation to provide for punitive damages but to allow for compensation based on an objective criterion while taking account of the expenses incurred by the rightholder, such as the costs of identification and research.

Section 6 Damages and legal costs

Article 13 Damages

1. Member States shall ensure that the competent judicial authorities, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the rightholder damages appropriate to the actual prejudice suffered by him/her as a result of the infringement.

When the judicial authorities set the damages:

(a) they shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the rightholder by the infringement;

or

(b) as an alternative to (a), they may, in appropriate cases, set the damages as a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question.

2. Where the infringer did not knowingly, or with reasonable grounds know, engage in infringing activity, Member States may lay down that the judicial authorities may order the recovery of profits or the payment of damages, which may be pre-established.

Kazakhstan: Law on Copyright and Neighboring Rights

Summary: The owner may chose between damages (including loss of earnings), the infringer's revenue from the infringement or a statutory damages range from 20 to 50,000 financial units (derived from the minimum salary) determined by the court. The following is the most recent available English version of Kazakhstan's Copyright Law.

Chapter V Copyright and Neighboring Rights Sanctions (Infringement of Copyright and Neighboring Rights)

Art. 48.

Infringement of copyright or neighboring rights under this Law shall make the infringer liable to civil, criminal and administrative sanctions in accordance with the legislation of the Republic of Kazakhstan.

(Copyright and Neighboring Rights Sanctions)

Art. 49.

(1) The courts shall ensure protection for copyright and neighboring rights through the following remedies:

1. recognition of the rights;
2. restoral of the prior situation;
3. cessation of the acts that infringe or are liable to infringe rights;
4. payment of damages, including loss of earnings;
5. surrender of revenue obtained by the infringer through the infringement;
6. payment of an indemnity of between 20 and 50,000 times the minimum salary set by the legislation of the Republic of Kazakhstan; the court shall determine the amount of the indemnity to be paid in place of damages or surrender of revenue;
7. adoption of other measures provided for in the legislative texts as required to defend such rights.

The choice between the measures referred to in items 4, 5 and 6 shall be made by the holder of copyright or neighboring rights.

(2) As a provisional measure, the court may prohibit the defendant from manufacturing, reproducing, selling or using copies of works or phonograms presumed to be infringing. The court may also order seizure, descriptive or real, of all copies of works or phonograms presumed to be infringing and of the materials and equipment used in their manufacture.

(3) The court may order the confiscation of infringing copies of a work or phonogram and of the materials and equipment used in their manufacture. Infringing copies of a work or phonogram may be surrendered to the holder of copyright or neighboring rights, at the latter's request, or destroyed on a court order.

The material and equipment used in their manufacture may be destroyed or confiscated by order of the court.

The Netherlands: The Copyright Act of 1912 and Related Rights Act of 1993

Summary: The owner has a right to damages and may request in addition, the infringer's profits from the infringement. Also has a right to damages for infringement of moral rights.

Copyright (Authorship) Article 27

1. Notwithstanding the assignment of his copyright wholly or in part, the author shall retain the right to bring an action for damages against persons who infringe the copyright.

Article 27a

1. In addition to claiming damages, the author or his successor in title may request the court to order anyone who has infringed the copyright to hand over the profits originating from the infringement and to render account therefor.

Neighboring Rights (Moral) Article 16

1. In addition to claiming damages, the right-holder referred to in articles 2, 6, 7a and 8 may request the court to order anyone who has infringed his rights to handing over the profits originating from the infringement and to render account therefore.

United Kingdom: Copyright, Designs and Patents Act 1988

Summary: The owner gets an accounting and payment of profits; If the infringer had not intent to infringe then the owner is not entitled to damages but does still have the right to the infringer's profits and any other remedy allowed in the law. The court may award additional damages after taking into account if the infringement was flagrant and the benefit accrued to the infringer. Infringement of a moral right is treated as a breach of statutory duty.

Chapter VI Remedies for Infringement Rights and remedies of copyright owner 96 Infringement actionable by copyright owner

- (1) An infringement of copyright is actionable by the copyright owner.
- (2) In an action for infringement of copyright all such relief by way of damages, injunctions, accounts or otherwise is available to the plaintiff as is available in respect of the infringement of any other property right.
- (3) This section has effect subject to the following provisions of this Chapter.

97 Provisions as to damages in infringement action.

- (1) Where in an action for infringement of copyright it is shown that at the time of the infringement the defendant did not know, and had no reason to believe, that copyright subsisted in the work to which the action relates, the plaintiff is not entitled to damages against him, but without prejudice to any other remedy.
- (2) The court may in an action for infringement of copyright having regard to all the circumstances, and in particular to—(a) the flagrancy of the infringement, and (b) any benefit accruing to the defendant by reason of the infringement, award such additional damages as the justice of the case may require.

103 Remedies for infringement of moral rights.

- (1) An infringement of a right conferred by Chapter IV (moral rights) is actionable as a breach of statutory duty owed to the person entitled to the right.

United States: US Code Title 17—Copyrights

Summary: The owner is entitled to actual damages and profits attributable to the infringement, or statutory damages. To show infringer's profits, the owner need only show proof of the infringer's gross revenue and then it is up to the infringer to show its deductible expenses and what amount of its profits are not attributable to the infringement. Statutory is between \$750 and \$30,000 per work at the discretion of the court (can take into account the number of infringements of each work when calculating the value of damages per work.). If the defendant can show "not aware and had no reason to believe" they were infringing copyright may have the damages reduced to \$200 per work but if prove willful infringement then moves up to a max of \$150,000 per work. statutory damages are only available in the United States for works that were registered with the Copyright Office prior to infringement, or within three months of publication.

§ 504. Remedies for infringement: Damages and profits

- (a) In General.— Except as otherwise provided by this title, an infringer of copyright is liable for either—
- (1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b) or
 - (2) statutory damages, as provided by subsection (c).
- (b) Actual Damages and Profits.— The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.
- (c) Statutory Damages.—
- (1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$750 or more than \$30,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.
 - (2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was:
 - (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or
 - (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in subsection (g) of section 118) [1] infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.
 - (3)
 - (A) In a case of infringement, it shall be a rebuttable presumption that the infringement was committed willfully for purposes of determining relief if the violator, or a person acting in concert with the violator,

knowingly provided or knowingly caused to be provided materially false contact information to a domain name registrar, domain name registry, or other domain name registration authority in registering, maintaining, or renewing a domain name used in connection with the infringement.

(B) Nothing in this paragraph limits what may be considered willful infringement under this subsection.

(C) For purposes of this paragraph, the term “domain name” has the meaning given that term in section 45 of the Act entitled “An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes” approved July 5, 1946 (commonly referred to as the “Trademark Act of 1946”; 15 U.S.C. 1127).

(d) Additional Damages in Certain Cases.— In any case in which the court finds that a defendant proprietor of an establishment who claims as a defense that its activities were exempt under section 110 (5)* did not have reasonable grounds to believe that its use of a copyrighted work was exempt under such section, the plaintiff shall be entitled to, in addition to any award of damages under this section, an additional award of two times the amount of the license fee that the proprietor of the establishment concerned should have paid the plaintiff for such use during the preceding period of up to 3 years.

*transmission of a copyrighted work on the type of device usually used in a private home with exceptions for some small businesses establishments