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# Cases of Note-Copyright-Those Dreaded Statutory Damages

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# LEGAL ISSUES



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## Cases of Note — Copyright

### Those Dreaded Statutory Damages

Column Editor: **Bruce Strauch** (The Citadel) <strauchb@citadel.edu>

*C. Elvin Feltner, Jr., Petitioner v. Columbia Pictures Television, Inc.*, 523 U.S. 340; 1998 U.S. LEXIS 2301 (1998).

And that U.S. gives it away. This is a big Soo-preem Cawt case with a majority opinion by **J. Thomas**. Who says he never writes an opinion?

**Columbia Pictures TV** cut off licensing TV series to three stations due to delinquent royalty payments. And after the fashion of those who don't pay, the stations kept running the shows among which was that fabulous TV Land pabulum "Who's the Boss," "Silver Spoons," "Hart to Hart" and "T.J. Hooker." None of which is necessary for understanding the case, but does ground this whole thing in TV Wasteland verisimilitude.

**Columbia** sued for copyright infringement, won summary judgment on the issue, and elected to recover statutory damages rather than determine the actuals. This is an option under § 504(c) of the Act.

**Feltner**, the owner of all of the stations, appealed. He claimed the Seventh Amendment gave him a right to a jury trial on damages.

#### And Now the Appeal

Under the Act, in lieu of proving actual damages, you can recover statutory damages "... of not less than \$500 or more than \$20,000 as the court considers just." 90 Stat. 2585, as amended, 17 U.S.C. § 504(c)(1). And, warming the hearts of lawyers all over the land, if the infringement was willful, "... the court [in] its discretion may increase the award ..." to a max of \$100,000. *Id.*

The Statute is silent on the point of a jury trial.

The trial judge held each episode was a separate violation for a total of 440. **Feltner** had done it willfully, but the judge set the damages at \$20,000 per rather than the \$100,000, **Columbia** was slaving for.

*No, I haven't a clue as to his reasoning.*

Nonetheless, a hefty total of \$8,800,000.

*Which you will admit is fairly easy to divide by three to get the plaintiff's lawyer's share. Yes, you have to round off a tad.*

The Court of Appeals for the Ninth Circuit held for **Columbia** in reliance upon **Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.**, 562 F.2d 1157 (CA9 1977). This held that the **1909 Copyright Act** required the trial judge to assess the statutory damages. And if **Congress** wanted to change the **Krofft** rule, it would have changed the language of the Act.

*Assuming they read it, as we're finding of late that they don't.*

#### At the Supremes

The first consideration was whether the whole 7th A. Constitutional thingy could be dodged by a careful reading of the statute. And it couldn't.

There is no grant of a right to a jury assessment. The language is damages assessed in an amount "the court considers just." § 504(c)(1). No mention of juries at all.

"Court" seems to mean judge, not jury. Cf. **F.W. Woolworth Co. v. Contemporary Arts, Inc.**, 344 U.S. 228 (1952). This is based on all the other uses of the word "court" in the Act which mean judge (grant injunctions, order the impounding, order the destruction blah-blah).

So to the Constitution it is.

#### 7th Amendment

"[I]n Suits at common law ... the right to trial by jury shall be preserved ..." U.S. Const. Amdt. 7. This has been interpreted to mean not just suits which the common law of England recognized and were brought over here when we were colonies, but all suits at law rather than equity. **Parsons v. Bedford**, 3 Peters 433, 447 (1830).

*Don't ask me where to find that book.*

*But we will take the usual detour to explain law and equity. Back in Merrie Olde England when the king had real power, the courts had only one remedy — money damages. So if you kept, let's say, trespassing*

*on my land to graze your cows, I had to sue you and assess the damages after the fact each time.*

*But because the King had real power, I could go and grovel to him and ask him to order you to stop trespassing. And since he was busy hawking, drinking, and wenching, he appointed a Chancellor in Equity to handle these matters for him. My plea was heard before this man. No jury.*

*One of those Chancellors came up with the remedy of injunction. Stay off Strauch's land. Furthermore, the Chancellor developed what was in effect his own court system which thrived on the fees it charged and was not about to turn this nifty remedy over to the law courts. Chancery as it was called in England was the court in Dickens' Bleak House.*

*We have merged law and equity, but the right to jury trial remains one for matters of law.*

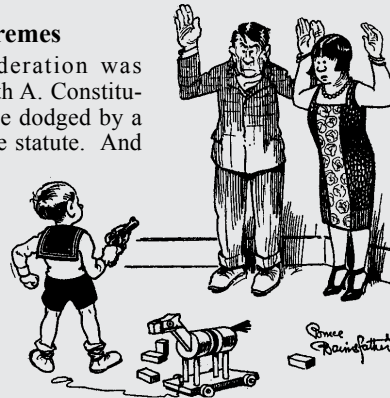
Our Supreme has oft had occasion to rule on the right to jury trial in law type matters unknown to 18th-century England. See, e.g., **Wooddell v. Electrical Workers**, 502 U.S. 93 (1991). But our case has "close analogues" to § 504(c).

By the 17th century, an author was protected under common law and could sue in law courts for damages. And since it was a law court, he got a jury trial. See, e.g., **Stationers Co. v. Patentees**, Carter's Rep. 89, 124 Eng. Rep. 842 (C.P. 1666).

The 1710 Statute of Anne was the first English copyright statute to protect published books. 8 Anne ch. 19 (1710). An action under this statute was tried in a law court.

Even though the Constitution specifically mentions copyright under the limited powers of **Congress**, those lads in Washington initially couldn't be bothered, and recommended the States handle it. Twelve states (no Delaware) enacted copyright statutes

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# Questions & Answers — Copyright Column

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**QUESTION:** *A public library is interested in scanning business articles from the local newspaper essentially to replace the vertical file. Would the scanned articles be restricted to in-building use only just as the contents of the traditional vertical file were so restricted?*

**ANSWER:** Newspaper articles are copyrighted just as are other text works. Because of the high level of interest in business articles that deal with the local community, it is easy to understand why a library would be interested in scanning them. Vertical files traditionally consisted of clippings literally torn from the newspaper, but over time, with the development of the photocopier, many libraries began to photocopy articles of interest rather than clipping the original newspaper issues. While section 108 of the *Copyright Act* does not mention photocopying for vertical files as an exception to the exclusive rights of the copyright holder, making occasional single photocopies of articles from local newspapers for the vertical file likely would qualify as a fair use. Scanning in lieu of photocopying may also be fair use, but it also seems a bit more systematic than photocopying.

A good solution would be to seek blanket permission from the local newspaper to scan business articles and make them available for in-library use as a local resource. In fact, the newspaper might be willing to expand use beyond the library, so asking the paper could result in even broader permission.

**QUESTION:** *A campus program that offers online professional development courses to K-12 educators is part of the e-Learning for Educators eight state program and has purchased courses from another online organization. These courses have pdfs of*

*journal articles embedded into them. The media and Web librarian asks whether the program can use these pdfs in the courses without getting permission. The online courses are password protected. Does the TEACH Act permit using these pdfs? Or should the program find another source for the journal articles?*

**ANSWER:** It depends on whether the online organization acquired the rights to the articles for the purchasers of its courses, which seems unlikely. More probably, the campus should use its own license agreements for these journal articles.

The first step would be to consult the owner of the courses and inquire about this. The *TEACH Act* is not related to this issue, as it involves reproduction of textual material. The *TEACH Act*, found in section 110(2) of the *Copyright Act* exempts certain performances and displays that are transmitted, but it does not relate to the copying of text materials.

**QUESTION:** *A faculty member brought copies of music CDs that he owns and has asked the library to put them on reserve for his class. These are not purchased copies of original CDs but rather are reproduced copies. The library does not own the CDs in question. The library does not seek to copy or stream the CDs but only to place the copies on reserve. Is it permissible to put copies of works on reserve that the library does not own?*

**ANSWER:** Under the old ALA Model Policy on Reserves, either the library or the faculty member should own a copy of the item placed on reserve. The complicating factor in here is that the faculty member's copies are not legitimate copies. If they were, then placing them on reserve for use of the

teacher's class would be no problem. The fact that the CDs are copied makes it a more difficult issue for the library. It could be that the faculty member had permission to copy the CDs, but that is not clear. The library then is faced with a dilemma. Does it adopt a policy that all works placed on reserve must be owned by the library or permit faculty-owned copies and occasional copies from interlibrary loan on reserve. Further, if it accepts faculty-owned copies for reserve, must these copies be legitimate copies?

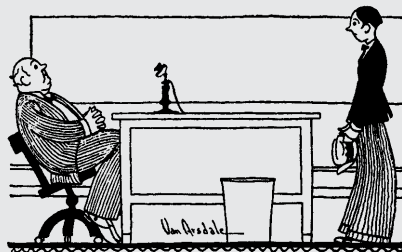
The faculty member likely could stream the portions of the CD that he wanted to use for his class, however.

**QUESTION:** *A children's librarian asks whether it infringes copyright to read a book to children during story hour at a public or school library.*

**ANSWER:** No, it does not infringe copyright. While common sense does not always provide the answer to a query about copyright, in this instance common sense and the law actually converge. Reading aloud to children is a time-honored tradition that increases young people's interest in books and reading. Section 110(4) of the *Copyright Act* permits nonprofit performances of nondramatic literary and musical works when there is no payment of fees to performers, promoters, or organizers and where either there is no direct or indirect admission charge, or if there is one, proceeds go to charitable or educational purposes.

**QUESTION:** *A campus library does not permit textbooks to be placed on reserve. What about supplemental reading material that is not the main text for the course? Many of them look like textbooks, but they are not the textbook assigned by the faculty members. If it's required reading, does that mean it is a textbook?*

**ANSWER:** Actually, textbooks can be placed on reserve as long as they are used as a backup copy for a student who may have forgotten to bring hers to the campus that day and not in lieu of the student's actually purchasing the textbook for a course. Some libraries have policies against putting textbooks on reserve, however. Typically, when the term "textbook" is used, it means the assigned text for the course that all students are supposed to buy. But the term "textbook" is broader than just the assigned textbook. Certainly, a non-assigned textbook (meaning that it is intended to be assigned to a class, but it was not the assigned textbook for a particular course) can be placed on reserve for supplemental reading, even if it is assigned reading. 🌿



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with actions for damages and no reference to equity jurisdiction.

This changed in 1790 when Congress passed the first copyright act which authorized damages for infringement. There were statutory damages of fifty cents for every sheet in the infringer's possession. The

*Copyright Act of 1831* raised the damages to \$1/sheet, and these matters were consistently tried to juries. See, e.g. *Backus v. Gould*, 48 U.S. 798 (1849).

A right to a jury trial includes the right of a jury determining the amount of damages awarded. *Lord Townshend v. Hughes*, 2 Mod. 150, 151, 86 Eng. Rep. 994, 994-995 (C.P. 1677). 🌿