

## *Copyright Remedies & Hypothetical Damages*

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Copyright law has a unique remedy system. Once infringement has been established, copyright holders benefit from a statutory presumption that, unless the defendant proves otherwise, an infringer's profits are entirely attributable to the copyright infringement. Alternatively, if the infringed copyrighted work has been timely registered, a plaintiff may elect a statutory damage award. In both instances, the Copyright Act employs a remedial default that (1) potentially detaches the damage award from the actual harm incurred by the copyright holder; (2) significantly reduces or even removes the evidentiary burden for plaintiff-copyright holders. By alleviating the burden for copyright owners that might encounter difficulty in establishing damages, the Copyright Act's remedy default regime, however, significantly increases the burden on defendants in copyright infringement suits. In this process, the asymmetric treatment of defendants potentially attracts opportunistic litigation, may overcompensate copyright owners, and chill creativity and free speech. This Article empirically evaluates the effect of copyright's default remedy system. Using a dataset of 360 cases involving copyright remedies under rule 504, I explore the role of judges in mediating the evidentiary burden on copyright litigants and the allocation of damage awards in copyright infringement suits.

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