

Research on Damages

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1 Damages as a Remedy

Damages are monetary awards paid to a claimant to compensate for losses or injuries.¹ Generally speaking, they are meant to achieve two goals: (1) damages are awarded to restore the plaintiff to their original economic position had the injury not occurred, and (2) deter future wrongful acts.²

2 Primer on Statutory Damages

Statutory damages are established payments in law to compensate for specific categories of injuries.³ They are sometimes created because of the difficulty in quantifying actual damages. Statutory damages provisions give plaintiffs a procedural advantage, because they do not require plaintiffs to provide evidence of actual injury.⁴ Statutory damages statutes come in a variety of flavors: some define a minimum level of damages award, and others specify liquidated damages.⁵ Generally speaking, Congress include statutory damages most frequently in consumer protection legislation or intellectual property laws.⁶ Section 504 of the Copyright Act is one of the most prominent examples of statutory damages:^{7,8}

”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.”

Beyond the range of \$750 to \$30,000, more or less statutory damages may be awarded depending on the defendant’s knowledge of the violation. For example, Section 504 stipulates that if the violation was intentional, then the maximum statutory damage awarded per work may be increased to \$150,000. However, if the infringer did not know they were violating the Copyright Act, then the damages can be reduced to a minimum of \$200, given that the work did not provide a proper copyright notice.

The following is a list of other major examples of statutory damages:

1. **Stored Communications Act of 1986 (“SCA”), 18 U.S.C. § 2707(c).** In violations of electronic privacy under the SCA, the court may assess damages in a civil action the sum of actual damages

¹*Damages*. URL: <https://www.law.cornell.edu/wex/damages>.

²Babawy. *A Primer on the Fundamental Elements of Economic Damages Analysis*. 2018. URL: http://www.willamette.com/insights_journal/18/summer_2018_1.pdf.

³Legal Information Institute”. *Statutory damages*. URL: https://www.law.cornell.edu/wex/statutory_damages.

⁴Jones Day LLP”. *Emerging Issues in Statutory Damages*. July 2011. URL: <https://www.jonesday.com/en/insights/2011/07/emerging-issues-in-statutory-damages>.

⁵Liquidated damages are a type of actual damages that may be awarded in a breach of contract claim.

⁶Jones Day LLP”, *Emerging Issues in Statutory Damages*.

⁷Copyright Alliance”. *What Are Statutory Damages*. Mar. 22, 2021. URL: <https://copyrightalliance.org/faqs/statutory-damages-why-do-they-matter/>.

⁸17 U.S.C. § 504

suffered, ”but in no case shall a personal entitled recover receive less than the sum of \$1,000.” The court may also assess punitive damages if the violation is found to be intentional.

2. **Telephone Consumer Protection Act of 1991 (“Junk Fax Act”), 47 U.S.C. § 227(b)(3)(B).** For violations of TCPA’s provisions on unsolicited advertisements by telephone, cell phone, or fax, plaintiffs are entitled to recover actual monetary loss from such a violation, or to receive \$500, whichever is greater.
3. **Truth in Lending Act of 1968 (“TILA”), 15 U.S.C. § 1640(a)(2)(A).** If a lender fails to disclose credit terms, then plaintiffs are entitled to statutory damages of twice the lender’s finance charges, between \$100 and \$5,000, dependent upon the type of credit.
4. **Fair and Accurate Credit Transactions Act of 2003 (“FACTA”), 15 U.S.C. § 1681n(a).** If an entity **willfully** fails to comply with FACTA’s disclosure requirements, then plaintiffs are entitled to statutory damages between \$100 and \$1,000.
5. **Cable Privacy Act, 47 U.S.C. § 551(f)(2)(A).** If a cable service provider violates the privacy and disclosure requirements under the Act, plaintiffs may obtain liquidated damages of \$100 for each day of violation or \$1000, whichever is higher.

3 Primer on Actual Damages

Actual damages are a type of damages award that compensates for loss suffered by a party. The amount awarded is based on the **proven harm, loss, or injury suffered**.⁹ In *Birdsall v. Coolidge*, 93 U.S. 64 (1876), the Supreme Court stated that “the amount awarded shall be precisely commensurate with the injury suffered, neither more nor less.” Typically, to calculate the precise value of actual damages, courts will look at lost income, medical bills, repair costs, and other tangible monetary values. In some cases, courts may also include compensation for emotional distress, though there is disagreement as to how to assess the exact monetary value of emotional damages.¹⁰ The discussion of *Mack v. Johnson* 430 F. Supp. 1139, 1977 U.S. Dist. defines this clearly, stating that actual damages include, but are not limited to, “out-of-pocket, or pecuniary losses, as well as compensation for physical and mental suffering.”

One common form of actual damages are *liquidated damages*. These damages are contained in some legal contracts to estimate hard-to-quantify losses to one of the parties. Liquidated damages allow for the payment of a agreed-upon sum should one of the parties be in breach of contract.¹¹ Liquidated damages are usually not meant to be punitive but rather a “fair” representation of the losses.

Actual injury requirements can either be a remedy rule or a liability rule. In cases of negligence, actual injury constitute a part of the *prima facie* cause of action. In other cases, the focus is directly on the remedial issue.¹² Courts require plaintiffs to demonstrate that the defendant’s misconduct caused the plaintiff to sustain actual injury before recovery of damages is allowed.

4 Advantages of Statutory Damages

4.1 Encourages private attorneys to police behavior

Because statutory damages lower the burden of proof on the plaintiff, they act as an economic incentive to encourage litigation. In the discussion of *Parker v. Time Warner Entertainment Co., L.P.*, 331 F.3d 13, District Judge Stephen R. Underhill writes that statutory damages are established “usually in order to

⁹ *Actual damages*. URL: https://www.law.cornell.edu/wex/actual_damages.

¹⁰ John Fabian Witt. *Torts and Regulation: Cases, Principles, and Institutions*. 2nd ed. CALI eLangdell Press, 2016.

¹¹ Kenton. *Liquidated Damages*. Feb. 25, 2021. URL: <https://www.investopedia.com/terms/l/liquidateddamages.asp>.

¹² Fischer. “The Puzzle of the Actual Injury Requirement for Damages”. In: *Loyola of Los Angeles Law Review* 42 (2008), pp. 197–236. URL: <https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=2651&context=11r>.

encourage the filing of individual lawsuits as a means of private enforcement of consumer protection laws, often because there would otherwise be no incentive to bring an individual claim.” Therefore, the presence of concrete statutory damages makes taking proper precautions economically interesting to entities, who otherwise may have not taken the efficient level of care if there were no credible legal threat. At the same time, however, the ease at which statutory damages can be brought can be a downside (see Section 5 on the Disadvantages of Statutory Damages).

This ease of bringing suit, aside from encouraging the efficient level of precaution, also act as a deterrent to wrongful conduct. In *Nintendo of Am., Inc. v. Dragon Pac. Int’l*, 40 F.3d 1007, the 9th Circuit notes that the the purpose of statutory damages under the Copyright Act was “to penalized the infringer and deter future violations.”

4.2 Clear tiers

17 U.S.C. § 504(c) of the Copyright Act lays out three distinct tiers of damages:

1. **The “lowest” tier:** “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.”
2. **The “middle” tier:** “...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.”
3. **The “highest” tier:** “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.”

The above illustrates the ability of statutory damages to differentiate between types of violations. These tiers reduce the liability on accidental violations. This configuration makes sense from a societal perspective, since the level of effort of lodging a lawsuit under statutory damages provisions is easier. In *Seagate Tech., LLC.*, 497 F.3d 1360 (Fed. Cir. 2007), the Federal Circuit held that “proof of willful infringement permitting enhanced damages requires at least a showing of **objective recklessness.**” Enhanced damages brought about by proving willful infringement can possible destroy a business, so the Seagate ruling helped to preserve a balance.¹³

5 Disadvantages of Statutory Damages

5.1 Aggregated statutory damages are akin to excessive punitive damages

When statutory damages are combined with class actions, aggregated damages can result in enormous liability exposure for defendants, even when the class’s actual damages are little or nonexistent.¹⁴ Courts have yet to introduce the same due process limits on punitive damages on aggregated statutory damages, partly because courts do not want to consider a due process limit before the class is certified. Another reason is that companies facing such legal action will likely choose to settle, rather than risk the (quite literally) massive liability exposure.

The problem of aggregated statutory damages is an example of “over-deterrence” created by litigation incentives. As stated in Section 4, one reason why Congress often includes statutory damages provisions

¹³Fanning. “ENHANCED DAMAGES: HISTORICALLY, RECENTLY, AND WHY WILLFULNESS IS NOT A PREREQUISITE”. in: *Southern Illinois University Law Journal* (2018), pp. 477–497. URL: https://law.siu.edu/_common/documents/law-journal/articles-2018/spring-2018/8%20-%20Fanning%20-%20sm.pdf.

¹⁴Scheurman. “Due Process Forgotten: The Problem of Statutory Damages and Class Actions”. In: *Missouri Law Review* 74.1 (2009), pp. 103–152. URL: <https://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=3812&context=mlr&httpsredir=1&referer=>.

in consumer protection laws is to reduce the barrier to litigation (and increase oversight). The class action mechanism serves to “grease the wheels” of litigation as well, because individual action may only result in awards too paltry to be worth costly attorney fees. Class actions also inherently imply that “the number of individuals similarly situated with respect to a common defendant is very large.” The “similarly situated” stipulation likely makes it easy for attorneys to prove that the defendant’s violation passes muster on the relevant statutory damages provision for everyone, thereby justifying the aggregation based on the class action’s “addition effect.”¹⁵

5.1.1 Kesler v. Ikea U.S. Inc.

In this case, Ikea provided the plaintiff with a receipt that included the expiration date of the plaintiff’s credit card, which violated the Fair and Accurate Credit Transactions Act of 2003. The plaintiff brought a class action containing all consumers affected by Ikea’s mistake, resulting in a statutory damages award ranging from \$240 million to \$2.4 billion.¹⁶ The court certified this nationwide class, despite stating that the suit was absurd and should be reconsidered by Congress.¹⁷

5.2 Broad interpretation of range leading to uncertainty

The Lanham Act’s statutory damages provision allows \$1,000 to \$200,000 per counterfeit, and up to \$2 million if the counterfeiting was intentional. This is just one example of a broad range, and statutory damages provisions typically do not provide further guidance to judges and juries on how to calculate the appropriate value. Some have argued that the jury is ill-equipped to make the correct determination, and one simply has to look at the varying range of statutory damages in Copyright Act violations to confirm this.¹⁸

5.3 Ambiguity over determining “willfulness”

Under the Copyright Act, a determination of “willful” violation can multiply the statutory damages by five times, up to \$150,000 per infringement, yet there is no clear standard for what constitutes willfulness. The Act itself writes that “Nothing in this paragraph limits what may be considered willful infringement under this subsection.”¹⁹

6 Advantages of Actual Damages

6.1 Internalize negative externalities

Exorbitant transaction costs often preclude economically efficient private agreements, so allowing actual damages/tort liability induces injurers to internalize the probable harm they place on society.²⁰ In the context of federal privacy laws, we may roughly define a type of “accident” as a data breach or data leak. The probability of such an accident occurring decreases with higher levels of precaution taken by those storing the data.²¹ Taking precaution, such as hiring more data security experts, costs additional resource, so entities may not take infinite amounts of precaution to offset the probability of accidents entirely. Using the notation from Cooter and Ulen’s Law and Economics textbook:

Let the probability of an data leakage be defined as p . Let the quantity of precaution be d . For the sake of simplicity, let us say that the only type of precaution that will reduce the change of data leakages is hiring more data security officers. p will decrease as d increases; that is, they are inversely related. Therefore, $p(d)$

¹⁵Nagareda. “Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA”. in: *Columbia Law Review* 106.7 (2006), pp. 1872–1923. URL: <https://www.jstor.org/stable/40041686>.

¹⁶See 15 U.S.C. § 1681n(a)(1) (2006)

¹⁷Kesler, 2008 WL 413268

¹⁸Jones Day LLP”, *Emerging Issues in Statutory Damages*.

¹⁹17 U.S.C. § 504(c)(3)(B)

²⁰Robert Cooter and Thomas Ulen. *Law Economics*. Upper Saddle River, NJ, United States: Prentice Hall, 2012.

²¹For now, let’s assume that the value of the data is the same for the sake of simplicity.

is a decreasing function. Let A denote the monetary value of the harm resulting from an instance of data leakage. The expected value of the harm is therefore $p(d) \cdot A$.

Since precaution costs money, let c denote the cost of one unit of precaution (e.g., hiring one more data security officer). cx is the total amount spent on precaution (cost of hiring one data security officer times number of security officers hired). As such, in this simplest model, the social cost of a data leakage is:

$$SC = cx + p(d)A$$

The resulting curve will be a U-shape, so the corresponding d to the lowest point on this curve is the economically efficient level of precaution to take because it minimizes the expected social costs of an instance of data leakage.

Why does this matter? If the entity that accidentally leaked data is “strictly liable,” meaning that they have to fully compensate victims under the rules of actual damages, then the victim (the public) does not have to take any precautions whatsoever (ideally, though the real-world is not as perfect).²² Pure statutory damages likely fail to achieve this effect and if the floor on statutory damages is high enough, this model shows that there may be a moral hazard.²³

7 Disadvantages of Actual Damages

7.1 Difficult to calculate

By far the most commonly cited issue with actual damages is the difficulty to calculate the “correct amount.” In Thomas Sedgwick’s *A Treatise on the Measure of Damages*, he argues that juries consciously or subconsciously take culpability into account when deciding actual damages, thereby setting a level of compensation that is greater than the loss actually suffered. In addition, this subjectivity likely results in different awards for theoretically “identical” losses, which is unfair and sets troublesome precedent.

Apart from jury subjectivity, the facts of the case can make actual damages impossible to objectively determine. In *Kehoe v. Fidelity Federal Bank and Trust*, a case involving the improper disclosure of personal information contained on driver’s license records, the Eleventh Circuit noted that damages for a violation of the right to privacy are a “**quintessential example of damages that are uncertain and possibly immeasurable.**” Pursuing actual damages under a future federal digital privacy law may run into similar issues.

7.2 Little incentive for those with small injury to pursue private rights of action

If the economic injury to an individual is small, then situations only authorizing private right of action without statutory damages renders little incentive to private litigants to hold wrongdoers responsible.²⁴

7.3 Ambiguity in whether non-pecuniary losses are compensated

After the Watergate scandal, Congress passed the Privacy Act. The Privacy Act regulates the treatment of personal data by the federal government. The damages provision in this Act reads:

In any suit brought under the provisions of subsection g(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of—(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person

²²Cooter and Ulen, *Law Economics*.

²³Ibid.

²⁴Pearce. “NOTE COMMENT: BROADENING ACTUAL DAMAGES IN THE CONTEXT OF THE COMMODITIES EXCHANGE ACT”. in: *Journal of Law and Policy* 16.449 (2007). URL: <https://advance-lexis-com.proxy.lib.duke.edu/api/document?collection=analytical-materials&id=urn:contentItem:4S1C-DD70-00CV-20CD-00000-00&context=1516831>.

entitled to recovery receive less than the sum of \$1,000; and (B) the costs of the action together with reasonable attorney fees as determined by the court.

It is unclear whether the “actual damages” stipulated in this clause include more than “out-of-pocket” losses, and courts have differed on the definition of actual damages with respect to this Act. In *Johnson v. Department of Treasury*, the lower court concluded that “actual damages” under the Privacy Act was limited to pecuniary losses only. At the Fifth Circuit, however, the court reversed this judgment and held that “actual damages” included non-pecuniary (emotional distress) damages as well. The Supreme Court declined to provide further guidance in a case involving the damages provision of the Privacy Act.²⁵

Particularly for the Privacy Act and **future federal digital privacy legislation**, the precise definition of actual damages is important. As oftentimes the case with privacy violations, while the immediate, provable harm/monetary loss is likely low, the non-pecuniary harms of fear and anxiety are somewhat common.²⁶ There may also be other non-quantifiable losses like reputation damage, made more likely by social media, that would be considered “zero” under the strictest definitions of actual damages.

Cases on non-pecuniary damages for further reading:

1. *McDougald v. Garber*, 73 N.Y.2d 246 (1989)
2. *United States v. CB I Constructors, Inc.*, 685 F.3d 827 (9th Cir. 2012)

²⁵*Doe v. Chao*, 540 U.S. 614, 124 S. Ct. 1204, 157 L. Ed. 2d 1122, 2004 U.S. LEXIS 1622, 72 U.S.L.W. 4178, 17 Fla. L. Weekly Fed. S 132, Unemployment Ins. Rep. (CCH) P17,159 (Supreme Court of the United States February 24, 2004, Decided), available at <https://advance-lexis-com.proxy.lib.duke.edu/api/document?collection=casesid=urn:contentItem:4BSK-M4Y0-004C-100X-00000-00context=1516831>.

²⁶ALEX KARDON *, ARTICLE: DAMAGES UNDER THE PRIVACY ACT: SOVEREIGN IMMUNITY AND A CALL FOR LEGISLATIVE REFORM, 34 Harv. J.L. Pub. Pol’y 705, (Spring, 2011), available at <https://advance-lexis-com.proxy.lib.duke.edu/api/document?collection=analytical-materialsid=urn:contentItem:5312-58K0-00CW-H0P2-00000-00context=1516831>.