

## insights

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# If they litigate, you can only try to mitigate statutory damages

Because they allow recoveries of up to \$150,000 per infringed work, statutory damages are a powerful copyright remedy. Defendants, of course, try to avoid statutory damages. In *Energy Intelligence Group, Inc. v. Kayne Anderson Capital Advisors, L.P.*, a defendant argued that a copyright owner should not be entitled to statutory damages because of its “litigious business strategy.”

In the case, the publisher of a daily oil industry newsletter sued an investment firm for copyright infringement. The publisher alleged the firm circulated the newsletter to more employees than allowed by the subscription agreement. The trial evidence showed that the publisher was aware of the firm’s ongoing infringement as early as 2007, but waited until 2014 to file suit. Indeed, the publisher’s director of sales testified that “My number one priority [is] contributing to litigation efforts.”

Because the potential statutory damages were higher than the additional subscription revenue, the defendant argued the copyright owner failed to mitigate its damages by waiting “for infringements to pile up” and then seeking “outsized statutory damages.” The trial court agreed, and instructed the jury that the owner could “not recover for any item of damage they could have avoided through reasonable efforts.” The jury returned a verdict for \$585,000, finding the publisher could have avoided 1,607 acts of infringement, and awarded \$15,000 for each of the 39 pre-knowledge infringements.

In its appeal, the defendant argued that mitigation of damages - the requirement that a plaintiff take reasonable steps to reduce or eliminate damages from continuing to accrue - should act as a complete defense to a statutory damages claim. The appellate court disagreed, finding only that mitigation is a factor the jury should consider. According to the court, statutory damages serve as deterrence as well as compensation, so common law “mitigation rules do not wholly preclude recovery of statutory damages.”

The appellate court ordered a new trial on damages, where the copyright owner will seek statutory damages for 1,646 acts of infringement, and the defendant will argue that because the publisher failed to mitigate its damages, the jury should award minimal, if any, damages for the post-knowledge infringements.

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