EXHIBIT 3



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17.37 Copyright—Damages—Statutory Damages (17 U.S.C. § 504(c))

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(17 U.S.C. § 504(c))

The plaintiff is entitled to [statutory] damages for each work infringed. In determining [statutory] damages, you may consider the following factors:

1. the revenue lost by the copyright holder as a result of the infringement;
2. the profits earned by the defendant as a result of the infringement;
3. the need to deter future infringement;
4. the need to penalize the infringer;
5. the circumstances of the infringement; and
6. whether the infringement was intentional.

You may not award as statutory damages less than $750, nor more than $30,000 for each work you conclude was infringed.

[However, if you find the infringement was innocent, you may award as little as $200 for each work innocently infringed.]

[However, if you find the infringement was willful, you may award as much as $150,000 for each work willfully infringed.]

[Instruction[s] [*insert number of pertinent instruction, e.g., Instruction 17.36 (Copyright—Damages—Innocent Infringement), Instruction 17.37(Copyright— Damages— Willful Infringement)*] will tell you [what constitutes innocent infringement] [and] [what constitutes willful infringement]].

Comment

Electing to Pursue Statutory Damages: The plaintiff has the right to make an election before final judgment to recover statutory damages instead of actual damages and the defendant's profits.17 U.S.C. § 504 (c) (1). Once the copyright owner elects to recover statutory damages, the owner may not recover actual damages as well. *See Nintendo of Am., Inc. v. Dragon Pac. Int'l*.,40F.3d1007,1010(9thCir.1994).

Because a copyright owner has until final judgment to make an election, it may often be appropriate to instruct the jury on actual damages and statutory damages. *See* 17 U.S.C. § 504(c)(1) ("[T]he 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." (emphasis added)). But there may be circumstances when instructing on both actual damages and statutory damages is inappropriate—for example, if there is a directed verdict on actual damages or if the plaintiff presents no actual damages theory. *See L.A. News Serv. v. Reuters Television Int'l, Ltd.*, 149 F.3d 987, 995 n.8. (9th Cir. 1998). The word "statutory" in the first paragraph is bracketed and should not be used in those situations when the damages instructions include only statutory damages.

Relevant Factors to Determining Statutory Damages: The trier off act has considerable discretion in determining the amount of statutory damages. *See Dream Games of Ariz., Inc. v. PC Onsite*, 561 F.3d 983, 992 (9th Cir. 2009); *L.A. News Serv.*, 149 F.3d at 996 ("The [trier of fact] has 'wide discretion in determining the amount of statutory damages to be awarded, constrained only by the specified maxima and minima.'" (citation omitted)).

The Copyright Act does not provide a list of relevant factors a trier of fact should consider when awarding statutory damages. *See* 17 U.S.C.§ 504(c)(1).But a trier off act may consider multiple factors in making an award of statutory damages, including "evidence concerning actual damages and profits." H.R. Rep. No. 94-1476, at 161 (1976); *see also Desire, LLC v. Manna Textiles, Inc.*, 986 F.3d 1253, 1271–72 (9th Cir. 2021) (citing *Bryant v. Media Right Prods., Inc.*, 603 F.3d 135, 144 (2d Cir. 2010) (observing that a statutory damages award may account for the infringer's "expenses saved, and profits earned," "the revenue lost by the copyright holder," and "the deterrent effect on the infringer and third parties," among other factors)); *Nintendo of Am., Inc.*, 40 F.3d at 1011 (explaining that "statutory damages" have "punitive and deterrent purposes").

Jury Trial on Statutory Damages: The Seventh Amendment provides for the right to a jury trial on statutory damage issues, including the amount of such award. *See Feltner v. Columbia Pictures Television, Inc*., 523 U.S. 340, 355 (1998). The jury should be provided with a special interrogatory form in order to report its findings on the issue of statutory damages. The minimum for statutory damages is $750 per work infringed and the maximum is $30, 000 per work in fringed. 17 U.S.C. § 504(c)(1). The statutory minimum for innocent infringement is $200. 17 U.S.C. § 504(c)(2). In the case of willful infringement, the statutory maximum for damages is $150, 000. 17 U.S.C. § 504(c)(2).

Availability of Statutory Damages: A plaintiff can recover statutory damages "whether or notthere is adequate evidence of the actual damages suffered by plaintiff or of the profits reaped by defendant." *L.A. News Serv.*, 149 F.3d at 996 (citation omitted); *Peer Int'l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1337 (9th Cir. 1990). "Even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy" of discouraging infringement. *F.W. Woolworth Co. v. Contemporary Arts, Inc*., 344 U.S. 228, 233 (1952). When an injury can be shown, but neither profits nor damages can be proven, statutory profits are mandatory. *See Russell v. Price,,* 612 F.2d 1123, 1129-30 (9th Cir. 1979); *Pye v. Mitchell*, 574 F.2d 476, 481 (9th Cir. 1978).

Statutory damages are precluded when the copyright holder does not register the copyright before commencement of the infringement. *See Derek Andrew, Inc. v. Poof Apparel Corp.*, 528 F.3d 696, 699 (9th Cir. 2008); *Polar Bear Prods., Inc. v. Timex Corp*., 384 F.3d 700, 707 n.5 (9th Cir. 2004); *Mackie v. Rieser*, 296 F.3d 909, 912 n.3 (9th Cir. 2002). Nor are statutory damages awarded if the infringing activity started after the date of first public ation but before the effective date of registration of the work unless the copyright for the infringed work was registered within three months after the work was first published. 17 U.S.C. § 412.

Joint and Several Liability: If statutory damages are assessed against one defendantor a group of defendants who are jointly and severally liable, "each work infringed may form the basis of only one award, regardless of the number of separate infringements of that work." *Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.*, 658 F.3d 936, 946 (9th Cir. 2011) (quoting *Columbia Pictures Television v. Krypton Broad. of Birmingham, Inc.*, 106 F.3d 284, 294 (9th Cir. 1997)*, rev'd on other grounds sub nom by Feltner*, 523 U.S. 355. This is true even if there is incomplete joint and several liability between all parties. *Desire, LLC*, 986 F.3d at 1265 (holding that only one statutory award was available when "one infringer is jointly and severally liable with *all*-other infringers, but the other infringers are not completely jointly and severally liable with one another"). However, if separate copyright infringements are attributed to two or more defendants (in the same action) and those defendants are not jointly liable, separate awards of statutory damages are appropriate. *See Louis Vuitton Malletier, S.A.*, 658 F.3d at 946-47 ("[A] plaintiff may receive a single statutory award for all infringements of any one copyrighted work from either (1) any one defendant, where that defendant is separately liable or (2) multiple defendants, where those defendants are jointly and severally liable."); *Columbia Pictures Television*, 106 F.3d at 294 (holding that television stations owned by same owner and broadcasting episodes of same work, were separate copyright infringers for purposes of determining statutory damages).

One Compilation or Separate Works: Under 17 U.S.C. § 504(c)(1), statutory damages are awarded "with respect to any one work" and "all the parts of a compilation or derivative work constitute one work." Determining whether there is one compilation or separate works is "crucial" because, if "the 'one work' subject to the defendant's infringements is a compilation, Section 504(c) limits the copyright holder to a single statutory award." *VHT, Inc. v. Zillow Grp., Inc.*, 69 F.4th 983, 989 (9th Cir. 2023). The question is whether the individual components of a compilation "lived their own copyright lives, and value came from each [component's] individual content rather than their assembly within the [compilation]." *Id*. at 990. Relevant factors include whether the material was created or licensed by the owner on an individual basis or alongside other materials, whether the infringer selected that material based on how it was arranged alongside other materials or because of its individual content, and whether the material has "independent economic value." *Id.* (holding that photos were separate works when they were marketed and licensed individually, the infringer "used each photo independently to market home designs," and because "the photos had independent economic value"); *see also Columbia Pictures Television*, 106 F.3d at 295-96 (holding that each episode of a television series constituted a separate work, not a compilation, when episodes were produced, written, and registered separately, could be "repeated and rearranged at the option of the broadcaster," and "different episodes were broadcast over the course of weeks, months, and years").

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