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The Copyright Act of 1976 and Prejudgment Interest

Jon M. Powers

INTRODUCTION

In formulating the remedy provisions of the Copyright Act of 1976,¹ Congress intended "to give the courts specific unambiguous directions concerning monetary awards" and "reasonable latitude to adjust recovery to the circumstances of the case."² Despite this intention, congressional silence on the issue of prejudgment interest has failed to provide needed direction for this important but often overlooked³ element of monetary awards. In the absence of congressional guidance, courts have treated the issue of prejudgment interest in conflicting ways.

Congress's failure to provide explicit guidance concerning prejudgment interest is especially troublesome because the 1976 Copy-

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1. 17 U.S.C. §§ 101-1101 (1994).

2. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 161 (1976).

3. The tendency of the courts to overlook prejudgment interest may stem from ancient Jewish and Christian teachings that held that all interest is usurious, immoral, and illegal. See 1 DAN B. DOBBS, *LAW OF REMEDIES* § 3.6(1) (2d ed. 1993); Anthony E. Rothschild, Comment, *Prejudgment Interest: Survey and Suggestion*, 77 NW. U. L. REV. 192, 195 (1982). Modern society has come to reject these ancient notions and to view interest as proper consideration for the use of money, which allows people to "buy time and goods that otherwise could not be available." 1 DOBBS, *supra*, § 3.6(1), at 334.

Despite the modern view of interest, the ancient attitudes continue to infect the common law treatment of interest recoveries. The traditional rule concerning prejudgment interest holds that courts should not award prejudgment interest unless the plaintiff's claim is liquidated or ascertainable. See *id.* § 3.6(1); Joel A. Williams, Comment, *Prejudgment Interest: An Element of Damages Not to be Overlooked*, 8 CUMB. L. REV. 521, 521-22 & n.8 (1977) (collecting cases). This rule treats prejudgment interest, not as an element of the plaintiff's damages, but as a penalty imposed upon the defendant for failing promptly to pay fixed damages. See *id.* at 522. Thus, the defendant generally is not penalized when the amount of damages is uncertain because she cannot make payment until the amount of damages has been fixed by the court. See *id.*

The traditional rule has been criticized for being overly concerned with the defendant's plight and treating plaintiffs differently based on the nature of their claims. See Rothschild, *supra*, at 198-99. Regardless of the initial uncertainty as to the extent of the plaintiff's claim, he is deprived of the use of that money. The money ultimately found to be owed to the plaintiff, at least in theory, has been earning interest for the defendant and should have earned "the exact amount due as prejudgment interest." Kent W. Seifried, Note, *Recovery of Prejudgment Interest on an Unliquidated State Claim Arising Within the Sixth Circuit*, 46 U. CIN. L. REV. 151, 164 (1977); see also, Rothschild, *supra*, at 198-99. Consequently, uncertainty as to the amount of the defendant's liability does not impair her ability to pay the damages.

Another explanation for the reluctance of courts to grant prejudgment interest is that the decision to grant prejudgment interest only arises, if at all, after the court has resolved the underlying liability issues. As a result, courts tend to resolve the issue in a cursory and impatient manner. See *id.* at 194; see also Charles T. McCormick, *Interest as Damages*, 9 N.C. L. REV. 237, 255-56 (1931).

right Act provides two fundamentally different types of damage awards. The relevant remedy provision of the 1976 Act offers the copyright owner a choice of recovering either her actual damages plus the infringer's profits or statutory damages.⁴ If the copyright owner elects the damages-plus-profits option, section 504(b) requires her to prove her actual damages caused by the infringement as well as the infringer's profits.⁵ Alternatively, a copyright owner may elect to recover statutory damages.⁶ Generally, when the copyright owner elects this latter option, the court has broad discretion to fix an award within the statutory limits of \$500 and \$20,000.⁷ The copyright owner need not present proof of actual damages and

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4. The damages provision of the 1976 Copyright Act is § 504 which states: "Except as otherwise provided by this title, an infringer of copyright is liable for either — (1) the copyright owner's actual damages and any additional profits of the infringer, as provided by subsection (b); or (2) statutory damages, as provided by subsection (c)." 17 U.S.C. § 504(a) (1994).

This Note refers to the § 504(b) remedy as "damages plus profits" and the § 504(c) remedy as "statutory damages."

5. Section 504(b) provides:

The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

17 U.S.C. § 504(b) (1994).

6. Section 504(c) of the 1976 Copyright Act states:

(1) Except as provided by clause (2) of this subsection, 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 \$500 or more than \$20,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) 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 \$100,000. 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 \$250. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or phonorecords; or (ii) a public broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in subsection (g) of section 118) infringed by performing a published nondramatic literary work or by reproducing a transmission program embodying a performance of such a work.

17 U.S.C. § 504(c) (1994).

7. See 17 U.S.C. § 504(c)(1) (1994); H.R. REP. NO. 1476, *supra* note 2, at 162 (stating that the court can exercise discretion in awarding an amount within \$250 and \$10,000). The limits set by the 1976 Act since have been amended to \$500 and \$20,000, respectively. See Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 10(b), 102 Stat. 2853, 2860 (codified as amended at 17 U.S.C. § 504(c) (1994)).

profits, although the court is free to consider evidence of damages and profits in setting an award.

Nearly all of the reported cases that deal with the issue of prejudgment interest have involved damages-plus-profits awards.⁸ Courts have taken three approaches to determining the availability of prejudgment interest on damages-plus-profits awards. One approach presumptively grants prejudgment interest on all damages-plus-profits awards under the 1976 Act. The Tenth Circuit, in *Kleier Advertising, Inc. v. Premier Pontiac, Inc.*,⁹ adopted this approach.¹⁰ That result was consistent with that Circuit's general rule that prejudgment interest is presumptively available on all federal claims.¹¹

A second approach denies prejudgment interest on all copyright damages awards. In *Robert R. Jones Associates v. Nino Homes*,¹² the Sixth Circuit held that the remedies specifically identified in the 1976 Act were sufficient to provide an effective deterrent to infringement.¹³ The court noted that the Copyright Act does not specifically mention interest, unlike the Patent Act which explicitly includes interest as an element of damages. The court held that Congress must have believed that the discretionary award of costs and attorney's fees would be sufficient to handle cases of flagrant infringement.¹⁴ *Nino* suggests that the 1976 Act precludes the award of prejudgment interest, even in extraordinary cases.¹⁵

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8. Compare *In Design v. K-Mart Apparel Corp.*, 13 F.3d 559, 569 (2d Cir. 1994) (construing § 504 (b)); *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, Nos. 91-56248, 91-56379, 91-56289, 1993 U.S. App. LEXIS 4068, at *23-*25 (9th Cir. Feb. 17, 1993) (same); *United States Payphone, Inc. v. Executives Unlimited*, Nos. 89-1081, 89-1085, 1991 U.S. App. LEXIS 7599, at *13 (4th Cir. Apr. 29, 1991) (same); *Kleier Advertising, Inc. v. Premier Pontiac, Inc.*, 921 F.2d 1036, 1041 (10th Cir. 1990) (same); *Robert R. Jones Assocs., Inc. v. Nino Homes*, 858 F.2d 274, 282 (6th Cir. 1988) (same); *In Design v. Lauren Knitwear Corp.*, 782 F. Supp. 824, 837 (S.D.N.Y. 1991) (same); *Tracy v. Skate Key, Inc.*, No. 86 CIV. 3439 (MBM), 1990 WL 9855, at (S.D.N.Y. Feb. 2, 1990) (same); *Broadcast Music, Inc. v. Golden Horse Inn Corp.*, 709 F. Supp. 580, 581 (E.D. Pa. 1989); *Harper House, Inc. v. Thomas Nelson Publishers, Inc.*, 4 U.S.P.Q.2d (BNA) 1897, 1914 (C.D. Cal. 1987) (same) *revd. on other grounds*, 889 F.2d 197 (9th Cir. 1989), *cert. denied*, 114 S.Ct. 1058 (1994); *Blackman v. Hustler Magazine, Inc.*, 620 F. Supp. 792, 802 (D.D.C. 1985) (same), *modified*, 800 F.2d 1160 (D.C. Cir. 1986); *Whelan Assocs., Inc. v. Jaslow Dental Labs., Inc.*, 609 F. Supp. 1325, 1327-28 (E.D. Pa. 1985) (same); *Aitken, Mazen, Hoffman, Miller, P.C. v. Empire Constr. Co.*, 542 F. Supp. 252, 264 (D. Neb. 1982) (same) *with Broadcast Music, Inc. v. Nortel Grill, Inc.*, No. CIV-89-1278E, 1991 WL 172079, at *2 (W.D.N.Y. Aug. 27, 1991) (construing § 504(c)); *Paramount Pictures Corp. v. Metro Program Network, Inc.*, Nos. C89-0013, C88-0090, 1991 WL 348168, at *12 (N.D. Iowa Apr. 8, 1991) (same).

9. 921 F.2d 1036 (10th Cir. 1990).

10. See 921 F.2d at 1040-42.

11. See 921 F.2d at 1042.

12. 858 F.2d 274 (6th Cir. 1988).

13. See 858 F.2d at 282.

14. See 858 F.2d at 282 & n.8.

15. See 858 F.2d at 282; see also *Aitken, Hazen, Hoffman, Miller, P.C. v. Empire Constr. Co.*, 542 F. Supp. 252, 264 (D. Neb. 1982) (refusing to allow prejudgment interest because it is not authorized by the 1976 Act).

Between these two extremes, a third approach views the decision to grant prejudgment interest on damages-plus-profits awards as discretionary — appropriate only in cases of flagrant or bad-faith infringement. In *Harper House, Inc. v. Thomas Nelson Publishers, Inc.*,¹⁶ the court declined to grant prejudgment interest on a damages-plus-profits award under the 1976 Act.¹⁷ Assuming prejudgment interest was available under federal common law, the court stated that it should be awarded only in exceptional cases, such as when there is bad-faith infringement.¹⁸

The propriety of granting prejudgment interest on the other remedy option, statutory damages, is also unclear; the few cases that have addressed the availability of prejudgment interest on statutory damages under the 1976 Act have not reached uniform results. In *Paramount Pictures Corp. v. Metro Program Network, Inc.*,¹⁹ the court granted prejudgment interest on a statutory-damages recovery while citing cases that dealt with the issue in the context of damages-plus-profits awards.²⁰ Although the court did not explain why those cases applied in the statutory-damages context, the court found them to be “well reasoned and elect[ed] to follow them.”²¹ In contrast, the court in *Broadcast Music, Inc. v. Nortel Grill, Inc.*,²² declined to apply the reasoning developed in damages-plus-profits cases to a statutory-damages case and held that an award of prejudgment interest was inappropriate.²³

This Note argues that prejudgment interest should be presumptively available on damages-plus-profits awards under section 504(b) but should not be available for statutory damages under sec-

16. 4 U.S.P.Q.2d (BNA) 1897 (C.D. Cal 1987), *revd. on other grounds*, 889 F.2d 197 (9th Cir. 1989), *cert. denied*, 114 S. Ct. 1058 (1994).

17. See 4 U.S.P.Q.2d (BNA) at 1914; see also Alois Valerian Gross, Annotation, *Interest on Copyright Damages*, 91 A.L.R. Fed. 839, 847 (1989).

18. See 4 U.S.P.Q.2d (BNA) at 1914.

19. Nos. C89-0013, C88-0090, 1991 WL 348168 (N.D. Iowa Apr. 8, 1991).

20. See 1991 WL 348168, at *12.

21. 1991 WL 348168, at *12.

22. No. CIV-89-1278E, 1991 WL 172079 (W.D.N.Y. Aug. 27, 1991).

23. See 1991 WL 172079, at *2. The court noted that in damages-plus-profits cases courts award prejudgment interest to provide full compensation to copyright owners. See 1991 WL 172079, at *2. Since the copyright owner in *Nortel Grill* did not show that statutory damages would not provide full compensation, the court concluded that prejudgment interest was inappropriate. See 1991 WL 172079, at *2. The court's reasoning implies that prejudgment interest may be appropriate when the copyright owner proves that the statutory damages award will not provide adequate compensation.

Another case, decided under the 1909 Act, also may provide some insight into this issue. In *Davis v. E.I. DuPont de Nemours & Co.*, 257 F. Supp. 729 (S.D.N.Y. 1966), the court held, that, even if prejudgment interest was available under the 1909 Act, the court would not award it because the plaintiff had chosen not to prove actual damages and instead had recovered the “more speculative” statutory damages. See 257 F. Supp. at 730. The court decided that, since it had used its discretion to set the damage award above the usual maximum, the aim of making the plaintiff whole had been achieved. See 257 F. Supp. at 730-31.

tion 504(c). Part I argues that Supreme Court precedent suggests that the explicit reference to interest found in the Patent Act does not prevent courts from awarding prejudgment interest under the 1976 Copyright Act. Part II asserts that the 1976 Copyright Act's silence regarding prejudgment interest does not represent a congressional choice to exclude this remedy and that, in the face of this silence, the underlying purposes of section 504 should determine the propriety of prejudgment interest awards. This Part concludes that courts may grant prejudgment interest on damages-plus-profits awards to fulfill the Act's compensation and restitution goals but may not do so on statutory-damages awards because of Congress's desire to set explicit limits on this type of liability. Part III suggests a standard whereby prejudgment interest should be awarded on damages-plus-profits awards unless the copyright owner unreasonably delayed asserting her copyright or there was a legitimate question as to the copyrightability of the infringed work.

I. COMPARISON TO THE PATENT ACT

The omission of any reference to prejudgment interest in the 1976 Copyright Act, by itself, does not indicate that Congress intended to prevent courts from granting prejudgment interest. Typically, statutory interpretation begins with the plain language of the statute.²⁴ The plain language of the 1976 Act, however, fails to provide much guidance on this issue.²⁵ A traditional source of assistance in interpreting copyright statutes has been the patent statutes.²⁶ This Part reasons that the explicit inclusion of interest awards within the remedy provision of the Patent Act does not

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24. See *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989); *Flora v. United States*, 357 U.S. 63, 65 (1958) ("In matters of statutory construction the duty of this Court is to give effect to the intent of Congress, and in doing so our first reference is to the literal meaning of words employed."); see also 2A SUTHERLAND STATUTORY CONSTRUCTION § 46.01 (Norman J. Singer ed., 5th ed. 1992) [hereinafter SUTHERLAND].

25. One could argue that, according to the canon of construction *expressio unius est exclusio alterius*, the omission of any reference to interest in the statute excludes prejudgment-interest awards. According to *expressio unius*, "[l]egislative prescription of a specified sanction for noncompliance with statutory requirements has been held to exclude the application of other sanctions." 2A SUTHERLAND, *supra* note 24, § 47.23. The 1976 Act provides an array of remedies consisting of injunctions, impoundment of infringing articles, damages, costs, and attorney's fees. See 17 U.S.C. §§ 502-05 (1994). Applying *expressio unius* to the 1976 Act thus would result in the conclusion that Congress, by specifying certain remedies, implicitly rejected all others. However, the Supreme Court has held that "the failure to mention interest in statutes which create obligations has not been interpreted by [this] Court as manifesting an unequivocal congressional purpose that the obligation shall not bear interest." *Rodgers v. United States*, 332 U.S. 371, 373 (1947); see *infra* notes 44-49 and accompanying text.

26. See *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 439 (1984) ("[I]t is appropriate to refer [to the patent laws] because of the historic kinship between patent law and copyright law."); *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948) (same).

compel the conclusion that Congress rejected the idea of awarding prejudgment interest under the 1976 Copyright Act.

In deciding whether or not interest is allowable under the 1976 Copyright Act, courts have compared its remedy provisions to those of the Patent Act, which explicitly provide for the award of interest.²⁷ A majority of courts that have performed this comparison have concluded that the differences in the two statutes compel the conclusion that Congress rejected prejudgment-interest awards under the 1976 Act.²⁸ These courts held that because the Patent Act, which governs similar subject matter, explicitly allows courts to award interest, the Copyright Act's silence suggests that Congress did not intend for prejudgment interest to be available under that statute.²⁹

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27. See, e.g., *Robert R. Jones Assocs. v. Nino Homes*, 858 F.2d 274, 282 n.8 (6th Cir. 1988); *Whelan Assocs. v. Jaslow Dental Lab., Inc.*, 609 F. Supp. 1325, 1328 (E.D. Pa. 1985), modified, 800 F.2d 1160 (D.C. Cir. 1986); cf. *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 886 F.2d 1545, 1551 (9th Cir. 1989) (using the Patent Act to determine if prejudgment interest is appropriate under the 1909 Act), cert. denied, 494 U.S. 1017 (1990); *Broadcast Music, Inc. v. Golden Horse Inn Corp.*, 709 F. Supp. 580, 581 (E.D. Pa. 1989) (citing *Baldwin Cooke Co. v. Keith Clark, Inc.*, 420 F. Supp. 404, 409 (N.D. Ill. 1976), which denied prejudgment interest under the 1909 Act based on a similar comparison to the Patent Act); *Aitzen, Hazen, Hoffman, Miller, P.C. v. Empire Constr. Co.*, 542 F. Supp. 252, 264 (D. Neb. 1982) (same).

The relevant provision of the Patent Act states: "Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court." 35 U.S.C. § 284 (1994) (emphasis added).

28. See *Robert R. Jones Assocs.*, 858 F.2d at 282; cf. *Broadcast Music*, 709 F. Supp. at 581 (citing *Baldwin Cooke*, 420 F. Supp. at 409, which denied prejudgment interest under the 1909 Act based on a similar comparison to the Patent Act); *Whelan Assocs.*, 609 F. Supp. at 1327-28 (holding that the omission of prejudgment-interest language in the 1976 Act requires the use of the federal common law rule as it existed before the Patent Act was amended to include interest); *Aitzen, Hazen, Hoffman, Miller, P.C.*, 542 F. Supp. at 264 (citing *Baldwin Cooke*).

29. See *Robert R. Jones Assocs.*, 858 F.2d at 282 n.8; *Baldwin Cooke*, 420 F. Supp. at 409 (1909 Act). Moreover, the Sixth Circuit, in *Robert R. Jones Assocs.*, held that "[t]his distinction [between the patent and copyright statutes] suggests that Congress believed that giving the court in copyright infringement cases the discretionary authority to award costs and attorneys' fees would be sufficient to enable the court to enhance the deterrent force of the law in cases of flagrant misconduct." *Robert R. Jones Assocs.*, 858 F.2d at 282 n.8. This conclusion, however, is questionable in light of the fact that Congress used the availability of attorneys' fees as an incentive for copyright owners to register their works promptly. See 17 U.S.C. § 412(2) (1994) (denying attorney's fees for "any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work"). Also, one commentator has criticized this argument because it fails to account for the different functions served by costs, attorney's fees, and prejudgment interest. See James L. Bernard, Note, *Prejudgment Interest and the Copyright Act of 1976*, 5 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 427, 474-75 (1995) (arguing that costs and attorneys' fees provide compensation for losses due to litigation whereas prejudgment interest provides compensation for damages due to delay).

The Ninth Circuit, in *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 886 F.2d 1545 (9th Cir. 1989), cert. denied, 494 U.S. 1071 (1990), took a different approach to comparing the

This interpretation, however, is inconsistent with the Supreme Court's analysis of differences between the two statutes. Because the Supreme Court regularly has imported concepts from the patent statute that were not mentioned explicitly in the corresponding copyright statute, the fact that the Patent Act contains explicit references to interest does not automatically evidence a congressional rejection of interest awards under the 1976 Act.

For example, in *Sheldon v. Metro-Goldwyn Pictures Corp.*,³⁰ the Court allowed expert testimony regarding the apportionment of profits under the 1909 Copyright Act even though Congress had amended the Patent Act specifically to allow this type of testimony but failed to do the same to the 1909 Copyright Act.³¹ The Court noted that the amendment to the Patent Act only recognized and did not expand a general rule that already had existed in courts of equity and concluded that Congress's failure to make a similar amendment to the 1909 Copyright Act did not foreclose the use of that general rule under the copyright law.³²

More recently, in *Sony Corp. of America v. Universal City Studios*,³³ the Court held that the manufacture of videotape recorders did not constitute contributory infringement of copyrighted television broadcasts.³⁴ In reaching this result, the Court used the "staple article of commerce" doctrine from patent law to determine contributory infringement, despite the fact that the 1976 Copyright Act did not expressly include contributory-infringement liability, and the Patent Act did.³⁵ The Court held that the lack of explicit language in the 1976 Copyright Act did not preclude the imposition of contributory-infringement liability for copyright infringement.³⁶

In these cases, the Court looked beyond mere differences in the statutes and supplemented the copyright statute with general equitable rules. In *Sheldon*, the Court decided that because the 1909 Copyright Act required courts to award only the profits that resulted from the infringement and not from other aspects of the infringer's work or business, courts could allow expert testimony to

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Patent Act to the 1909 Copyright Act, focusing on the availability of damages and profits under the two statutes. See *infra* text accompanying note 66.

30. 309 U.S. 390 (1940).

31. See 309 U.S. at 405.

32. See 309 U.S. at 405 ("[T]he fact that the copyright law was not similarly amended cannot be considered to detract from the jurisdiction of the court to receive similar evidence in copyright cases . . .").

33. 464 U.S. 417 (1984).

34. See 464 U.S. at 434-42.

35. See 464 U.S. at 434, 439, 442.

36. See 464 U.S. at 435. Concededly, the Court reached this conclusion, in part, because vicarious liability was imposed in almost all other areas of the law. Nevertheless, the Court explicitly held that "[t]he absence of such express language in the copyright statute does not preclude the imposition of [contributory-infringement] liability." 464 U.S. at 435.

make this determination.³⁷ Similarly, in *Sony*, the Court applied the patent-law contributory-infringement test because one of the purposes of the 1976 Act was to protect the copyright owner's monopoly, and adequate protection of this monopoly might require application of contributory-infringement liability.³⁸ Therefore, in deciding whether prejudgment interest is allowable under the 1976 Act, courts should look beyond the difference between the Patent Act and the Copyright Act and apply the general rules for deciding whether or not prejudgment interest is appropriate under a silent federal statute.

A possible explanation for the difference between the two statutes regarding prejudgment interest is the differing state of the case law when Congress enacted the patent and copyright statutes. In 1946, when Congress amended the Patent Act to include the award of interest, there existed a body of case law holding that prejudgment interest on patent damages generally was only available from the time damages were liquidated — typically the entering of judgment — and not from the date of infringement.³⁹ In order to avoid ratifying this long-standing test, Congress had to add explicit language concerning the award of interest.⁴⁰

In contrast, when Congress passed the 1976 revisions to the Copyright Act, there was limited precedent on the issue of prejudgment interest under the 1909 Copyright Act. In *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*⁴¹ the court, in determining whether the 1909 Act allowed prejudgment interest, explained that “[o]nly one circuit ha[d] considered the availability of prejudgment interest in a copyright infringement action and that case construed the 1976 Act, not the 1909 Act.”⁴² The court also noted one case that had upheld the award of prejudgment interest without discussing the issue, but that case was a 1978 case, decided after the enactment of the 1976 Act.⁴³ There did not exist a common law standard that had to be ratified or rejected. This fact may account for Congress's omission of specific language concerning prejudgment interest in the 1976 Copyright Act.

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37. See *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 404-5 (1940).

38. See *Sony Corp.*, 464 U.S. at 442.

39. See *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 651 (1983); *Duplate Corp. v. Triplex Safety Glass Co.*, 298 U.S. 448 (1936); *Tilghman v. Proctor*, 125 U.S. 136, 160 (1888).

40. See *Devex*, 461 U.S. at 653-4. See generally 3 SUTHERLAND, *supra* note 24, §§ 61.01-06 (indicating that courts should construe strictly statutes that abrogate the common law).

41. 886 F.2d 1545 (9th Cir. 1989), *cert. denied*, 494 U.S. 1017 (1990).

42. 886 F.2d at 1551.

43. See 886 F.2d at 1551 (citing *Lottie Joplin Thomas Trust v. Crown Publishers*, 592 F.2d 651, 656 (2d Cir. 1978)).

II. PURPOSES OF SECTION 504 OF THE 1976 COPYRIGHT ACT

The Supreme Court's treatment of other statutes silent on the issue of prejudgment interest indicates that congressional silence, in and of itself, does not preclude prejudgment-interest awards; rather courts should consider the underlying purposes of the statute to determine if prejudgment-interest is appropriate. Section II.A analyzes the Court's general approach to dealing with silent statutes and concludes that it is proper to explore Congress's objectives for section 504 to determine if prejudgment interest is appropriate under the 1976 Copyright Act. Section II.B argues that awarding prejudgment interest for damages-plus-profits awards is consistent with Congress's intention to provide compensation to copyright owners and prevent the unjust enrichment of infringers. Section II.C asserts that awarding prejudgment interest on statutory-damages awards is inconsistent with Congress's desire to place absolute limits on them and to avoid overly artificial awards.

A. *The General Treatment of Silent Federal Statutes*

As a general rule, courts grant prejudgment interest under other federal statutes that do not contain specific provisions regarding prejudgment interest if doing so will further congressional objectives. In *Rodgers v. United States*,⁴⁴ the seminal case on this issue, the Court held that "the failure to mention interest in statutes which create obligations has not been interpreted by [this] Court as manifesting an unequivocal congressional purpose that the obligation not bear interest."⁴⁵ The Court held that the question of whether or not prejudgment interest is available is answered by determining if awarding it is consistent with Congress's purpose in imposing the statutory obligation.⁴⁶

The Supreme Court recently has added two threshold requirements to the *Rodgers* analysis. In *Monessen Southwestern Railway v. Morgan*,⁴⁷ the Court held that, before a court can explore Congress's purposes in providing a remedy, it must examine (1) the general common law as it existed when Congress enacted the statute, and (2) if Congress subsequently has amended the statute, the case law interpreting the availability of prejudgment interest under the

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44. 332 U.S. 371 (1947) (construing the Agricultural Adjustment Act of 1938 (AAA)).

45. 332 U.S. at 373.

46. See 332 U.S. at 374. Ultimately, the Court determined that prejudgment-interest awards were inconsistent with Congress's goals for the Agricultural Adjustment Act because of the penal, instead of compensatory, nature of that statute's remedy provisions. Still, the Court decided that mere silence is not dispositive of the issue. See 332 U.S. at 374-76.

47. 486 U.S. 330 (1988).

prior statute.⁴⁸ If, at common law or under the statute's prior case law, courts held that prejudgment interest was inappropriate for that type of obligation, Congress's failure clearly to overturn these results strongly suggests that Congress approved of the courts' prior treatment of the issue.⁴⁹

The 1976 Copyright Act satisfies the first prong of the test laid out in *Monessen*. Well before the middle of this century, courts had repudiated the ancient common law prohibition of prejudgment interest on unliquidated damages awarded for injury to property or business.⁵⁰ Given that copyright-infringement claims are actions claiming injury to property,⁵¹ when Congress enacted the 1976 Copyright Act, the federal common law did not categorically bar prejudgment interest on copyright-infringement claims.

The 1976 Act also meets *Monessen's* second test — consistency with prior case law. Few courts had addressed the issue of prejudgment interest under the 1909 Copyright Act when Congress passed the 1976 Act.⁵² Nor did there exist a "virtual unanimity" among the courts that prejudgment interest was unavailable under the 1976 Act when Congress amended section 504 in 1988.⁵³ As a result, for the 1976 Act, the *Monessen* criteria will not be dispositive; it will be necessary to perform the *Rodgers* analysis and examine Congress's purposes in creating the two types of remedies in section 504.

B. Damages-Plus-Profits Awards

Congress's purpose in creating the damages-plus-profits provision was to compensate copyright owners and prevent the unjust

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48. See *Monessen*, 486 U.S. at 337-39. The statute at issue in *Monessen*, the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60 (1988), awarded damages for personal injury and wrongful death. See 486 U.S. at 337. In 1908, when FELA was enacted, the common law barred the recovery of prejudgment interest on those types of damages. See 486 U.S. at 337.

Moreover, the *Monessen* Court held that Congress's failure to amend FELA in the face of courts' "virtual unanimity over more than seven decades" that prejudgment interest should not be available under FELA represented Congress's acquiescence in that interpretation. 486 U.S. at 338.

49. See 486 U.S. at 337.

50. See *Wickham Contracting Co. v. Local Union No. 3, Intl. Bhd. of Elec. Workers*, 955 F.2d 831, 837-38 (2d Cir.) (noting that "awards of prejudgment interest . . . were acceptable well before the [1947 passage of the Labor Management Relations Act] in tort cases involving injury to property or business"), *cert. denied*, 506 U.S. 946 (1992).

51. See *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 603 (1834); *Creative Technology, Ltd. v. Aztech Syst. Pte., Ltd.*, 61 F.3d 696, 704 (9th Cir. 1995) (holding that federal copyright laws "are designed to protect the property rights of copyright owners" (quoting *Anderson v. Nidorf*, 26 F.3d 100, 102 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1399 (1995))).

52. See *supra* notes 39-43 and accompanying text.

53. Congress amended § 504 by raising various statutory-damages limits in the Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 10(b)(1)-(2), 102 Stat. 2853, 2860 (codified as amended at 17 U.S.C. § 504(c) (1994)).

enrichment of infringers. The House Report on the 1976 Act⁵⁴ states that the "basic aims" of section 504 were to provide courts with clear guidelines for awarding monetary damages and "reasonable latitude" to shape awards to suit the facts of each case.⁵⁵ The Report goes on to explain, in the section dealing with damages-plus-profits awards, that "[d]amages are awarded to compensate the copyright owner for losses from infringement, and profits are awarded to prevent the infringer from unfairly benefiting from a wrongful act."⁵⁶ Accordingly, most courts have interpreted this part of the Report to mean that the goals of section 504(b) are compensation and restitution.⁵⁷

Awards of prejudgment interest are necessary to achieve the goal of compensating copyright owners for losses due to infringement. Under various statutes and common law actions, courts have "overwhelmingly and repeatedly" held that prejudgment interest is necessary to provide full compensation.⁵⁸ The Supreme Court has reasoned that "[p]rejudgment interest is an element of complete compensation" because it "compensate[s] for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress."⁵⁹ In *Gorenstein Enterprises v. Quality Care-USA*,⁶⁰ a case decided under the Lanham

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54. See H.R. REP. NO. 1476, *supra* note 2, at 161.

55. See *supra* note 1 and accompanying text. These two goals might create "a tension" in determining the appropriateness of prejudgment-interest awards. See Bernard, *supra* note 29, at 464. However, these two aims were intended to address three specific problems that arose under the 1909 Act: (1) whether actual damages and the infringer's profits both could be awarded, (2) the appropriate method of calculating the infringer's profits, and (3) when and how a court could award statutory damages. See *id.* at 466 n.177. Although it is not entirely clear, it is likely that the first aim, to provide clear guidelines for monetary damages, addresses the first two concerns, while the second aim, allowing reasonable latitude to adjust awards, deals with the third concern. Ultimately, the two stated aims of § 504 provide only limited guidance on the issue of prejudgment interest.

56. H.R. REP. NO. 1476, *supra* note 2, at 161.

57. See e.g., *Kleier Advertising, Inc. v. Premier Pontiac, Inc.*, 921 F.2d 1036, 1041 (10th Cir. 1990); *United States Payphone, Inc. v. Executives Unlimited, Inc.*, Nos. 89-1081, 89-1085, 1991 WL 64957, at *4. But cf. *infra* note 73 and accompanying text.

58. See 1 DOBBS, *supra* note 3, § 3.6(3) (citing cases).

59. *West Virginia v. United States*, 479 U.S. 305, 310 n.2 (1987). It should be noted that in *Blau v. Lehman*, 368 U.S. 403 (1962), the Court declined to reverse a lower court's refusal to award interest on damages awarded under the Securities and Exchange Act because "interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness." 368 U.S. at 414 (quoting Board of Commrs. v. United States, 308 U.S. 343, 352 (1939)). Though this language may appear to reject the idea that prejudgment interest is necessary for compensation, it is more likely that the Court, in making this observation, only intended to argue that prejudgment interest need not be awarded in every situation and not to reject the general proposition that interest serves a compensatory role in damage awards. See *infra* notes 97-106 and accompanying text (discussing cases in which courts should not award prejudgment interest under the 1976 Copyright Act).

60. 874 F.2d 431 (7th Cir. 1988).

Act, the Seventh Circuit announced a general rule that prejudgment interest should be available for all violations of federal law because “[w]ithout it, compensation of the plaintiff is incomplete.”⁶¹ The Tenth Circuit, in *Kleier Advertising, Inc. v. Premier Pontiac, Inc.*,⁶² applied this general rule to the copyright context⁶³ and held that prejudgment interest was necessary to achieve the goal of compensating copyright owners under the 1976 Act.⁶⁴

In addition to providing complete compensation to the copyright owner, prejudgment-interest awards on the infringer's profits further the second goal of section 504(b): preventing the infringer from benefiting from his wrongful act. As a general rule, courts award interest to prevent a defendant from keeping the interest that accrues on funds that belong to the plaintiff.⁶⁵ The Ninth Circuit, in *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*,⁶⁶ a case decided under the 1909 Act, held that, to serve fully the restitutionary purpose of awarding profits, courts should require infringers to pay prejudgment interest on their profits.⁶⁷ The court explained that interest that accrues on profits from infringement can be viewed as another form of indirect profit attributable to the infringement.⁶⁸ The court concluded that there is no meaningful distinction between profits derived from the promotional use of the copyrighted work, which courts regularly awarded the copyright owner, and profits derived from the use of the revenue generated by the infringement.⁶⁹ In *Kleier Advertising, Inc. v. Premier Pontiac, Inc.*,⁷⁰ the Tenth Circuit applied this reasoning to the 1976 Act.⁷¹ The Tenth Circuit held that prejudgment-interest awards were necessary to fulfill the 1976 Act's goal of preventing unjust enrichment.⁷²

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61. 874 F.2d at 436.

62. 921 F.2d 1036 (10th Cir. 1990).

63. See 921 F.2d at 1041-42 (explaining that allowing prejudgment interest under the 1976 Copyright Act “comports with [the court's] earlier decision that ‘under federal law prejudgment interest is ordinarily awarded, absent some justification for withholding it’ ” (quoting *United States Indus., Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1256 (10th Cir. 1988))).

64. See 921 F.2d at 1042.

65. See 1 DOBBS, *supra* note 3, § 3.6(2), at 344 (If “the objective of the court is to force disgorgement of [a defendant's] unjust enrichment, interest upon the funds or property [held wrongfully] may be necessary to force complete restitution.”).

66. 886 F.2d 1545 (9th Cir. 1989), *cert. denied*, 494 U.S. 1017 (1990).

67. See 886 F.2d at 1552.

68. See 886 F.2d at 1552.

69. See 886 F.2d at 1552.

70. 921 F.2d 1036 (10th Cir. 1990).

71. See 921 F.2d at 1041.

72. See 921 F.2d at 1041. The author of a prominent treatise has argued that the authority upon which the *Kleier* court relied is questionable. See 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 14.02[B], at 14-25 to 14-26 (1995). The court cited *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 886 F.2d 1545 (9th Cir. 1989), *cert. denied*, 494

Some courts have reasoned that, because the 1976 Act allows courts to award *both* actual damages and the infringer's profits, the compensation and deterrence⁷³ goals can be achieved without prejudgment interest.⁷⁴ The majority view under the 1909 Copyright

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U.S. 1017 (1990) and *Gorenstein Enterprises v. Quality Care-USA*, 874 F.2d 431, 436 (7th Cir. 1988). See *Kleier*, 921 F.2d at 1041. In *Frank Music*, the Ninth Circuit decided that the 1909 Copyright Act allowed prejudgment-interest awards. See 886 F.2d at 1550-53; see also *supra* notes 66-69 and accompanying text. Under the 1909 Act, only the greater of actual damages or the infringer's profits, but not both, were available. See 886 F.2d at 1552. The court held that the award of only actual damages or profits would not necessarily compensate the copyright owner based on an analogy to the 1946 amendments to the Patent Act which explicitly allowed interest awards. See 886 F.2d at 1552. The court reasoned that prior to the 1946 amendments, the Patent Act allowed plaintiffs to recover both actual damages and the infringer's profits. See 886 F.2d at 1552. But in 1946, Congress eliminated the recovery of the infringer's profits and, in a "quid pro quo for the unavailability of profits," allowed the recovery of interest to provide full compensation. 886 F.2d at 1552 n.9 (citing *General Motors Corp. v. Devex Corp.*, 461 U.S. 648 (1983)). Because the 1909 Act limited recovery to either actual damages or profits, but not both, the court concluded that it was appropriate to award prejudgment interest. See *Frank Music*, 886 F.2d at 1552 n. 9. The Ninth Circuit expressed no opinion as to the propriety of prejudgment-interest awards under the 1976 Act. See 886 F.2d at 1552.

Professor Nimmer has argued that the Tenth Circuit's reasoning is inapplicable to the 1976 Act because it now allows the recovery of both actual damages and infringer's profits. See 3 NIMMER & NIMMER, *supra*, § 14.02[B], at 14-25 to 14-26. In addition, Professor Nimmer questioned the Tenth Circuit's reliance on *Gorenstein*, a trademark case decided under the Lanham Act, though he conceded that the general rule announced in *Gorenstein* may be the current trend. See *id.*

Although it is true that the Ninth Circuit's analogy to *Frank Music* is far from clear, this Note argues that the court's result is still correct because the 1976 Act's cumulative — instead of the 1909 Act's alternative — damages rule does not represent a congressional intent to preclude courts from awarding prejudgment interest. See *infra* notes 79-86 and accompanying text (arguing that the 1976 Act's cumulative-damages rule does not eliminate the need for prejudgment interest).

73. Most courts that have declined to award prejudgment interest on damages-plus-profits awards have recast § 504(b)'s second goal as deterrence instead of prevention of unjust enrichment. See, e.g., *Robert R. Jones Assocs. v. Nino Homes*, 858 F.2d 274, 282 (6th Cir. 1988) (determining that the goals of the 1976 Act are to "promote innovation" and "deter unauthorized exploitation of someone else's creative expression"); *Tracy v. Skate Key, Inc.*, No. 86 CIV. 3439, 1990 WL 9855 (S.D.N.Y. Feb. 2, 1990) (holding that the "legitimate" goals of the 1976 Act are to compensate plaintiffs and deter potential defendants). The term "deterrence" may distort analysis by imputing more of a penal intent to Congress than is appropriate. Cf. *supra* note 46 (noting that the Supreme Court had declined to award prejudgment interest under the silent AAA because of its penal nature). To be sure, Congress intended to deter infringement; but § 504(b)'s primary goals are compensation and prevention of unjust enrichment.

74. This argument was initially made in *Baldwin v. Keith Clark, Inc.*, 420 F. Supp. 404 (N.D. Ill. 1976), a case decided under the 1909 Act. In *Baldwin*, the court interpreted the 1909 Act's remedy provisions as allowing courts to award both actual damages and infringer's profits. See *Baldwin* 420 F. Supp. at 405. This interpretation was the minority position under the 1909 Copyright Act. See *supra* note 72. The court concluded that "even in a case of flagrant infringement such as that presented here, the cumulative award of defendant's profits and plaintiff's damages is sufficiently severe as to deter others from like conduct without the need for an award of prejudgment interest." 420 F. Supp. at 409. Given that the court held that the 1909 Act allowed cumulative awards, much of the court's reasoning remains relevant under the 1976 Act. *Baldwin* has been cited by courts, usually with little analysis, to support the proposition that prejudgment interest is unavailable under the 1976 Act. See *Robert R. Jones Assocs.*, 858 F.2d at 282 (6th Cir. 1988); *Broadcast Music, Inc. v. Golden Horse Inn Corp.*, 709 F. Supp. 580, 581 (E.D. Pa. 1989); *Blackman v. Hustler Magazine, Inc.*,

Act is that only the greater of actual damages or the infringer's profits, but not both, are available to the copyright owner.⁷⁵ Congress rejected this view when it explicitly stated that recoveries under the 1976 Act were to be "cumulative" — that the copyright owner was entitled to both her actual damages and the infringer's profits.⁷⁶ Though one circuit has held implicitly that the cumulative nature of section 504 does not eliminate the need for prejudgment interest,⁷⁷ other courts have suggested that the aggregate of the many components of the 1976 Act's remedy provisions provides sufficient compensation to the copyright owner and restitution by the infringer so that prejudgment-interest awards are unnecessary.⁷⁸

When a statute provides monetary awards consisting of multiple elements, however, the proper inquiry is whether Congress already has compensated the plaintiff for damages from the delay between the time of injury until the entering of judgment. In *Brooklyn Savings Bank v. O'Neil*,⁷⁹ the Supreme Court held that prejudgment interest should not be granted for double-backpay awards under the Fair Labor Standards Act of 1938.⁸⁰ The Court noted that Congress had provided the double-backpay remedy specifically to compensate employees for delays in payment of minimum wages.⁸¹ The

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620 F. Supp. 792, 802 (D.D.C. 1985) (citing *Baldwin* while denying prejudgment interest on both 1909 Act and 1976 Act claims), *modified*, 800 F.2d 1160 (D.C. Cir. 1986); Aitzen, Hazen, Hoffman, Miller, P.C. v. Empire Constr. Co., 542 F. Supp. 252, 264 (D. Neb. 1982).

75. See *Frank Music*, 886 F.2d at 1552.

76. See H.R. REP. NO. 1476, *supra* note 2, at 161.

77. *Kleier Advertising, Inc., v. Premier Pontiac, Inc.*, 921 F.2d 1036, 1041 (10th Cir. 1990).

78. In *Robert R. Jones Assocs.*, the Sixth Circuit held that the actual damages it awarded were "clearly sufficient to promote innovation . . . and deter unauthorized exploitation." *Robert R. Jones Assocs.*, 858 F.2d at 282. The court conceded that mere silence in the statute was not dispositive, but went on to rule that the difference between the 1976 Act and the Patent Act indicated that Congress believed that giving courts the ability to award costs and attorneys' fees would provide sufficient deterrent force. See 858 F.2d at 282.

Other courts have viewed awards of prejudgment interest as windfalls bestowed upon copyright owners. For example, in *Tracy v. Skate Key, Inc.*, No. 86 CIV. 3439, 1990 WL 9855 (S.D.N.Y. Feb. 2, 1990), the court declined to award prejudgment interest under the 1976 Act. See 1990 WL 9855, at *3. In that case, a painter had contracted with a skating rink to paint a mural on the outside of its rink for \$7500. The skating rink later changed its mind, cancelled its first progress payment, and painted over the mural. However, the rink had copied the mural and later used part of it as a logo. See 1990 WL 9855, at *1. The jury awarded the painter \$7500 in actual damages and \$57,500 representing the infringer's profits attributable to the logo. See 1990 WL 9855, at *3. In refusing to award prejudgment interest, the court noted the small amount of the initial contract relative to the infringer's profits. The court concluded that the jury's award was "sufficient to serve all the legitimate goals of the copyright laws, including compensation of plaintiffs and deterrence of potential defendants." 1990 WL 9855, at *3.

79. 324 U.S. 697 (1945).

80. See 324 U.S. at 715.

81. See 324 U.S. at 707. The Court stated that the double-backpay award constitutes a Congressional recognition that failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living [for covered workers] and to the free flow of commerce, that double payment must be made in

Court concluded that, because Congress already had provided a mechanism to compensate employees for delay damages, granting prejudgment interest would amount to a double recovery for delay.⁸² The Court's analysis in *Brooklyn Savings* is consistent with its more recent holdings that prejudgment interest serves to compensate plaintiffs for damages due to delay.⁸³ Thus, if a statute already provides compensation for delay, prejudgment interest is unnecessary and inappropriate; if a statute fails to provide explicit compensation for delay, it follows that prejudgment-interest awards remain proper.

Because neither actual damages nor profits compensate the copyright owner for delay, the cumulative nature of damages-plus-profits awards does not obviate the need for prejudgment-interest awards. Unlike the employees covered by the FLSA in *Brooklyn Savings*, copyright owners are not always entitled to the cumulative award of damages plus profits. As explained in the House Report, cumulative awards would be inappropriate when the copyright owner's actual damages correspond to the infringer's profits because "in effect they amount to the same thing."⁸⁴ But Congress determined that cumulative awards are appropriate when some of the copyright owner's actual damages do not correspond to the infringer's profits, or when the infringer has earned profits from the infringement that are not reflected in the actual damages.⁸⁵ Because Congress's criteria for making cumulative awards has nothing to do with delay, it is unlikely that Congress intended for cumulative awards to compensate copyright owners for delay.⁸⁶

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the event of delay in order to insure restoration of the worker to that minimum standard of well-being.

324 U.S. at 707 (footnote omitted).

82. See 324 U.S. at 715.

83. See, e.g., *West Virginia v. United States*, 479 U.S. 305, 310 n.2 (1987); *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 656 n.10 (1983).

84. H.R. REP. NO. 1476, *supra* note 2, at 161.

85. See *id.*

86. Furthermore, some of the alleged "windfall" from cumulative awards "may actually be profit that the owner would have obtained from licensing his copyright to the infringer had the infringer sought a license." *Taylor v. Meirick*, 712 F.2d 1112, 1120 (7th Cir. 1983).

One commentator, in determining whether the cumulative nature of § 504(b) erected a *per se* bar to the recovery of prejudgment interest, has looked to the Patent Act of 1876 for guidance. See Bernard, *supra* note 29, at 469-72. He reasoned that the "availability" of prejudgment interest under the 1876 Patent Act, which allowed the recovery of both the patentee's actual damages and the infringer's profits, 35 U.S.C. § 70 (1940), "strongly suggests" that the cumulative nature of section 504(b) does not preclude awards of prejudgment interest. See Bernard, *supra* note 29, at 472; see also *supra* note 72 (discussing the quid-pro-quo argument made by the court in *Frank Music*).

It is unlikely, however, that Congress intended for the remedy provisions of the 1876 Patent Act to play a role in construing § 504(b). In passing the 1909 Act, Congress made explicit reference to the 1876 Patent Act in the accompanying House Report. See H.R. REP. NO. 2222, 60th Cong., 2d Sess. 15 (1909) (stating that the remedy provision of the 1909 Act is substantially the same provision found in the 1876 Patent Act and that the "courts have

C. Statutory-Damages Awards

The rationale that supports granting prejudgment interest on damages-plus-profits awards does not apply to section 504's other type of remedy: statutory damages. The statutory-damages provision attempts to reconcile the inadequacy of damages-plus-profits awards in many cases and the desire to set limits on the infringers' liability.⁸⁷ Congress reconciled these competing interests by requiring that damages awarded under section 504(c) be within the statutory limits.⁸⁸ Although the court can look to evidence concerning actual damages and profits in setting an award within these limits,⁸⁹ unless one of the exceptions concerning willful or innocent infringement applies, the court cannot set an award exceeding the statutory maximum.⁹⁰

When the amount awarded under a statute does not directly relate to damages proven by the plaintiff, prejudgment interest is inappropriate. When Congress has defined the range of damages for plaintiffs who do not present evidence of actual damages, courts should treat the statutory award as fully compensatory and not award prejudgment interest.⁹¹ In addition, since statutory awards are inherently artificial, adding prejudgment interest to these

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usually construed that to mean that the owner of the patent might have one or the other [of damages or profits], whichever was the greater"). But this reference conflicted with the language of the 1909 Act, which suggested that the award of profits and damages was to be cumulative. See 3 NIMMER & NIMMER, *supra* note 72, § 14.01[A], at 14-4. Congress, in passing the 1976 Act, appeared to have completely disavowed the confusing approach adopted in 1909 when it stated that a basic aim of § 504 was to avoid "the confusion and uncertainty that have marked the present law." H.R. REP. NO. 1476, *supra* note 2, at 161. Thus, it is unlikely that Congress intended for courts to continue to make reference to a source of great confusion under the prior statute.

87. See Register's Report on the General Revision of the U.S. Copyright Law 102 (1961) ("The need for this special remedy [statutory damages] arises from the acknowledged inadequacy of actual damages and profits in many cases."), reprinted in 3 NIMMER & NIMMER, *supra* note 72, app. 14.

88. See H.R. REP. NO. 1476, *supra* note 2, at 162 ("[W]here the plaintiff elects to recover statutory damages, the court is obliged to award between \$250 [since amended to \$500] and \$10,000 [since amended to \$20,000].")

89. See *id.* at 161.

90. See *id.* at 162.

91. In *Marshall v. Security State Bank*, 970 F.2d 383 (7th Cir. 1992), the Seventh Circuit held that, where the plaintiff had elected to recover statutory damages, prejudgment interest was not available under the Truth In Lending Act. See 970 F.2d at 385-86. The Truth In Lending Act holds a creditor who fails to comply with the Act's disclosure provisions liable for actual damages or statutory damages equal to twice the finance charge but not less than \$100 or greater than \$1,000. The plaintiff in that case had not proven actual damages and elected to recover the statutory damage maximum of \$1,000. See 970 F.2d at 384. The court refused to award prejudgment interest on this award: "Where you have an arbitrary establishment of damages that has no relationship to what the actual damages might be . . . you should [not] tack on prejudgment interest because *the full compensation to these victims is what Congress says it should be.*" 970 F.2d at 386 (quoting the previous opinion in same action by bankruptcy judge) (emphasis added) (omissions and alterations in original).

awards does not increase their accuracy.⁹² This reasoning applies to the 1976 Act with equal force. The fact that Congress expressly defined the limits of statutory-damages awards suggests that it did not intend for courts to award prejudgment interest under section 504(c).⁹³ Moreover, granting prejudgment interest on the "more speculative" statutory-damages awards conflicts with Congress's aim of "avoiding artificial and overly technical awards."⁹⁴

III. A SUGGESTED STANDARD

Courts should presumptively grant prejudgment interest on damages-plus-profits awards under the 1976 Copyright Act. The general trend in the federal courts is to do so presumptively.⁹⁵ The rationale supporting this rule applies equally to the damages-plus-profits provision of the 1976 Copyright Act.⁹⁶ Under this standard, however, it is still necessary to identify those cases in which prejudgment interest should not be awarded.

This Part focuses on situations when prejudgment interest is inappropriate. Initially, this Part suggests that prejudgment interest should not be awarded when the copyright owner has been largely responsible for the delay during which she wishes to recover interest. This Part next argues that, because of the benefits to society of fixing the limits of the copyright monopoly, prejudgment interest should not be granted when the infringer was sufficiently justified in challenging the copyright. Finally, this Part rejects, as inconsistent with Supreme Court precedent, using the size of the damages-plus-

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92. In *Marshall* the court noted that adding prejudgment interest to this "rough guess" at damages does not improve the accuracy of the award and that there was no reason to believe that Congress intended "courts to enter judgments like \$1,050.46, and not \$1,000, when it created the TILA scheme." 970 F.2d at 836. See also *Montelongo v. Meese*, 803 F.2d 1341 (5th Cir. 1986) (declining to grant prejudgment interest on a \$500 statutory award under the Farm Labor Contractor Registration Act, which allowed plaintiffs to prove actual damages or collect \$500), cert. denied, 481 U.S. 1048 (1987).

93. Cf. *Broadcast Music, Inc. v. Nortel Grill, Inc.*, No. CIV-90-1278-E, 1991 WL 172079 (W.D.N.Y. Aug. 27, 1991). But see *Paramount Pictures Corp. v. Metro Program Network, Inc.*, Nos. C89-6013, C88-0090, 1991 WL 348168 (N.D. Iowa Apr. 8, 1991) (granting prejudgment interest on a statutory-damages award based on cases that dealt with the issue in the damages-plus-profits context).

94. H.R. REP. NO. 1476, *supra* note 2, at 161. However, this is not to say that the court should not take the time from infringement to the entering of judgment into account in setting the statutory-damages award; it should. But this factor should not allow courts to exceed the limits of § 504(c).

95. See *Gorenstein Enters. v. Quality-Care USA*, 874 F.2d 431, 436 (7th Cir. 1989) (announcing the rule that prejudgment interest should be presumptively available on all federal claims); 3 NIMMER & NIMMER, *supra* note 72, § 14.02[B], at 14-26 ("[T]he trend may currently be towards awards of prejudgment interest generally in federal courts." (footnotes omitted)); cf. *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 657 (1983) (holding that courts should award prejudgment interest under the Patent Act "absent some justification for withholding such an award").

96. See *supra* notes 58-72 and accompanying text.

profits award as a factor in the decision whether or not to deny prejudgment interest.

Prejudgment interest is inappropriate when the copyright owner has unreasonably delayed filing suit. Undue delay on the part of the plaintiff has been the Supreme Court's archetypal exception to the presumptive rule for awarding prejudgment interest under other statutes.⁹⁷ The delay shifts the investment risk to the defendant which allows the plaintiff to recover interest without bearing the corresponding risk.⁹⁸ Likewise, courts should not award prejudgment interest under the 1976 Copyright Act when the copyright owner has unreasonably delayed bringing suit.

Prejudgment interest should not be awarded in cases that involve novel defenses or claims of copyrightable subject matter. In *Fogerty v. Fantasy, Inc.*,⁹⁹ the Court held that prevailing plaintiffs and prevailing defendants should be treated alike in awarding attorneys' fees under the 1976 Copyright Act.¹⁰⁰ The Court explained that copyright law serves the purpose of enriching society through access to new works and that, to achieve this goal, it is important to demarcate the boundaries of copyright law as clearly as possible.¹⁰¹ Because a successful defense to copyright infringement furthers this goal, "defendants who seek to advance a variety of meritorious copyright defenses should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims of infringement."¹⁰²

Reflecting this general concern, Justice Stevens, in his concurrence in *General Motors Corp. v. Devex Corp.*,¹⁰³ warned that the public benefit that derives from patent litigation should not be overlooked when deciding to award prejudgment interest.¹⁰⁴ Justice Stevens, like the majority in *Fogerty*, noted the important role that litigation plays in circumscribing patent monopolies.¹⁰⁵

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97. See e.g., *West Virginia v. United States*, 479 U.S. 305, 311 n.3 (1987) ("This is not to say that an equitable consideration such as laches cannot bar an otherwise valid claim for interest." (citation omitted)); *General Motors Corp.*, 461 U.S. at 657 ("For example, it may be appropriate to limit prejudgment interest, or perhaps even deny it altogether, where the patent owner has been responsible for undue delay in prosecuting the lawsuit." (footnote omitted)).

98. See *Gorenstein*, 874 F.2d at 439 (Ripple, J., concurring); *Williamson v. Handy Button Mach. Co.*, 817 F.2d 1290, 1298 (7th Cir. 1987).

99. 114 S. Ct. 1023 (1994).

100. See 114 S. Ct. at 1033.

101. See 114 S. Ct. at 1030. For instance, the Court in *Fogerty* unanimously held that John Fogerty, the defendant, was entitled to attorneys' fees for finally determining that the song "The Old Man Down the Road" was [not] merely 'Run Through the Jungle' with new words." 114 S.Ct. at 1026.

102. 114 S. Ct. at 1030.

103. 461 U.S. 648 (1983).

104. See 461 U.S. at 658-59 (Stevens, J., concurring).

105. See 461 U.S. at 658 (Stevens, J., concurring).

Although prejudgment interest is warranted in the "typical" infringement case, there is a class of cases in which the infringer does not ultimately prevail but, nevertheless, was "sufficiently justified" in challenging the patent to warrant the denial of prejudgment interest.¹⁰⁶ Courts should not award prejudgment interest under the 1976 Act when the infringer is "sufficiently justified" in challenging the copyright.

Some courts have held that a prejudgment-interest award is inappropriate when the copyright owner has received a sizable damage award. In *In Design v. K-Mart Apparel Corp.*,¹⁰⁷ the Second Circuit affirmed a lower court's refusal to award prejudgment interest.¹⁰⁸ The copyright owner had urged the court to apply the *Rodgers* analysis to the 1976 Act.¹⁰⁹ The court decided that, regardless of the result of the analysis, the ultimate decision to award interest in any particular case is still an equitable and discretionary one.¹¹⁰ Since the copyright owner in that case had received a "sizable" damage award and failed to take measures to shorten the litigation, the district court's refusal to award interest was not an abuse of discretion.¹¹¹ Thus, the court of appeals did not need to decide if the 1976 Copyright Act generally allows prejudgment interest.¹¹²

The extent of a damages-plus-profits award, however, should not justify withholding prejudgment interest. Denying a copyright owner compensation for delay because she has been fully compensated for other types of damages is inconsistent with Congress's intent.¹¹³ Furthermore, delay damages are proportional to the size of other damages; as the other damages grow, so do the damages from delay. Assuming everything else is equal, to withhold prejudgment interest when other damages are large, but award it when they are small results in refusing relief when it is needed most.

CONCLUSION

The 1976 Copyright Act was the product of nearly two decades of study, debate, and negotiation. This product, at times quite com-

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106. See 461 U.S. at 658 (Stevens, J., concurring).

107. 13 F.3d 559 (2d Cir. 1994).

108. See 13 F.3d at 569.

109. See 13 F.3d at 569.

110. See 13 F.3d at 569.

111. See 13 F.3d at 569.

112. See 13 F.3d at 569; see also *United States Payphone, Inc. v. Executives Unlimited*, Nos. 89-1081, 89-1085, 1991 WL 64957, at *4 (4th Cir. Apr. 29, 1991) (declining to state a general rule but holding that "actual damages plus [the infringer's] profits, if any, will sufficiently compensate [the copyright owner] for its loss"); Bernard, *supra* note 29, at 472 ("Of course, an award of both profits and damages in a particular case may suggest that an additional award of prejudgment interest is cumulative and unnecessary.").

113. See *supra* notes 79-86 and accompanying text.

plicated, is “not so much an expression of anyone’s ideal as to how to draft legislation, but [is] the product of rather hard-fought compromises between conflicting interest groups.”¹¹⁴ As a result, courts should strive to maintain the balance Congress constructed in 1976 by remaining faithful to Congress’s original objectives for the Act. This is especially true when construing section 504, which Congress identified as the “cornerstone of the remedies section and the bill as a whole.”¹¹⁵ Prejudgment interest, granted in a manner consistent with the goals of section 504, can play an important role in preserving this balance.

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114. Melville B. Nimmer, *Preface to the 1978 Comprehensive Treatise Revision* of 3 NIMMER & NIMMER, *supra* note 72, at vi.

115. H.R. REP. NO. 1476, *supra* note 2, at 161.