

CHAPTER 1

Introduction to Monetary Damages

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§ 1.01 Introduction

Monetary damages are a form of judicial remedy that can be awarded to a claimant in compensation for an injury or loss wrongfully inflicted.¹ This form of remedy is most commonly referred to simply as “damages.” The essence of damages is the payment of money as a release from civil liability.

¹ See 1 *Dobbs Law of Remedies*, 3 (2d ed. 1993).

Because damages in Anglo-American jurisprudence are awarded by a jury of lay persons under the supervision of a judge, it is necessary to have certain guiding principles by which the judge can direct the jury. The rules that were developed by the judiciary to guide juries in their damages deliberations are essentially the law of damages. As one commentator has said: “The law of damages consists of the rules, standards, and methods used by the courts for measuring in money the compensation given for losses and injuries.”²

The law of intellectual property damages did not develop in a vacuum; it is very much a product of this general law of damages. Although each of the four principal fields of intellectual property law—copyright law, patent law, trademark law and trade secret law—has developed unique principles governing the award of damages for infringement or misappropriation, these principles emerged out of a legal tradition of compensating civil wrongs with money that dates back several millennia.

At the outset, it is useful to review the historic background from which modern intellectual property law damages developed. In this regard, it should be recognized that there are two general approaches to the award of money damages in Western legal tradition.³

The first approach assumes that all civil wrongs can be anticipated in advance and that a schedule of predetermined damages can be developed to address each and every type of wrong. Thus, an individual who has been injured in his person or property may know in advance exactly how much he will be compensated for that injury (if he should decide to bring a claim and if he should prevail on that claim) merely by consulting the tariff of damages. Of course, such a rigid schedule of prefixed damages allows no flexibility in fashioning relief for the injured party. Thus, in modern times, this approach has shifted from a fixed damage amount to a range within which the damage amount can be set. This is typically referred to as “statutory damages.”

The second approach acknowledges that the individual nature of most civil wrongs makes it difficult to prescribe in advance an exact monetary assessment for a particular injury to person or property. Under this approach, a decision-maker is accorded the discretion to award monetary damages based upon the facts of a particular claim. Under this approach, however, there is greater uncertainty as to the amount of compensation to be received by an individual

² McCormick, *Damages*, 1 (1935).

³ See § 1.02 *infra*.

that has suffered a civil wrong. But the advantage of this approach is it affords much greater flexibility in compensating the injured party.

The history of Western damages jurisprudence is marked by a progression from the award of prefixed damages to the award of discretionary damages.⁴ As the discretionary theory of damages became ascendant, however, it became clear that justice and fundamental fairness required that this discretion not be wholly unlimited. Certain general principles that served to limit discretionary damage awards were introduced. These general principles became the law of damages.

It is critical to understand that intellectual property law does not exist independent of this general law of damages. The award of damages for the infringement of intellectual property merely reflects special application of the general law of damages. Thus, it is useful to have a basic familiarity with certain principles that are central to the general law of damages.⁵

⁴ The theory of prefixed damages, however, has not wholly disappeared from contemporary measures of damages. In intellectual property law, for example, statutory damages (i.e., prefixed damages) can be awarded for copyright infringement. See 17 U.S.C. § 504(a). Statutory damages can also be awarded for trademark counterfeiting and cybersquatting. See 15 U.S.C. § 1117(c) and (d). Statutory enhanced damages can also be viewed as a type of prefixed damages. See § 1.03[2][c][ii] *infra*.

⁵ Section 1.03 *infra* introduces these principles and explains how they are incorporated in intellectual property law.

§ 1.02 Historical Background to Monetary Damages

The concept of awarding money to a property owner as compensation for a trespass upon his property is not new. The Code of Hammurabi, compiled by the King of Babylonia *circa* 1780 B.C., contains the following provision:

“If a man has cut a tree in a man’s plantation without (the knowledge of) the owner of the plantation, he shall pay 1/2 a maneh of silver.”¹

Indeed, one of the most common incidents of civilization is the development of judicial redress in the form of monetary payment for wrongs inflicted. In civilization after civilization since the time of King Hammurabi, history reveals the gradual substitution of a system of monetary compensation in place of clan vengeance for wrongs inflicted.² Moreover, to ensure that a monetary settlement would be reached between disputants (and civil peace thereby preserved), it was common for the state to publish a schedule of payments for various injuries. In effect, the state fixed in advance the cost of civil wrongdoing.³

This same tradition is found in the earliest Anglo-Saxon legal system. For example, the laws of Aethelbert, dating to approximately 600 A.D., include a lengthy listing of prescribed payments to be made in the event of certain specific wrongs being committed.⁴ This system of prefixed damages in civil cases continued in England until the Norman Conquest.

In the period after the Norman Conquest (1066 A.D.), however, English courts began to use petit juries composed of twelve yeomen from the area in which a civil dispute had occurred to make findings of fact relating to the dispute. By the late twelfth century, these petit juries were also being called upon to determine the monetary damages awarded in the dispute. During this earliest period, the jurors were left free to fix damages at any amount they saw fit, based upon their own experience and knowledge.⁵

¹ Code of Hammurabi, reprinted in *Treasury of Law*, 32-33 (Nice ed. 1964).

² See generally, Jolowicz, “Assessment of Penalties in Primitive Law,” 202-222, *Cambridge Legal Essays* (Alexander *et al.* eds., 1926) (discussing various ancient legal systems, including the Babylonian, Hittite and early Roman codes).

³ In fact, much of the Code of Hammurabi is nothing more than a tariff listing the price to be paid for various civil wrongs.

⁴ See “Decrees of Aethelbert,” reprinted in *The Laws of the Earliest English Kings*, 5-17 (Attenborough ed., 1922).

⁵ See generally, McCormick, *Damages*, 24-25 (1935).

By the beginning of the fourteenth century, however, a movement to rein in the unbridled discretion of jurors in fixing damages developed. A proceeding known as an “attaint,” by which a grand jury of twenty-four knights reviewed a verdict, was adapted to allow a reduction in the amount of damages, if found to be excessive.⁶ But the attaint was fraught with procedural burdens that limited its usefulness. Thus, by the fifteenth century, usage of the attaint began to decline and by the end of the sixteenth century, it had passed into history.⁷

Instrumental in the decline of the attaint was a doctrine developed in the fifteenth century that no attaint would lie if the petit jury awarded damages within the amount sought by the plaintiff in his pleadings.⁸ Over time, plaintiffs simply pled exorbitant amounts, making it a rare verdict that exceeded the plaintiff’s claim.⁹ And, in those few instances in which the petit jury did exceed the amount claimed, judges developed the practice of declaring the verdict void as to the excess amount and gave judgment only for the amount sought.¹⁰ In effect, the attaint became available only in cases in which the plaintiff was foolish enough to seek a small amount of damages—exactly the type of case in which it was least needed.

As usage of the attaint declined, the law judges became frustrated by the lack of a procedural device for constraining damage awards by jurors. In the fifteenth century, law judges began to substitute their own judgment on damages for that of the petit jury in certain types of cases. But it was not until the mid-seventeenth century that the law courts settled upon a procedure for constraining jury awards that was superior to the attaint and did not require a judge to set the actual award. “The real successor of the attaint was the device of setting aside the first verdict and granting a *new trial* of the case before a second petty jury.”¹¹ Utilization of this procedure (which was borrowed from the Chancery courts) was slow in developing, but by the end of the eighteenth century, “it was clear that in England the courts would grant a new trial if the award violated some rule of damages—such rules were still few and chiefly confined to contracts—or if even in tort cases the court, in its discretion, considered the amount unreasonable.”¹²

⁶ *Id.*, at 25-26.

⁷ See generally: Washington, “Damages in Contract at Common Law,” 47 L. Q. Rev. 345 (1935); Zane, “The Attaint,” 15 Mich. L. Rev. 1 and 127 (1916).

⁸ See Washington, “Damages in Contract at Common Law,” 47 Law. Q. Rev. 345, 350-351 (1931).

⁹ *Id.*

¹⁰ *Id.*

¹¹ McCormick, *Damages*, 26 (1935). (Emphasis in original.)

¹² *Id.*, at 27.

During this same period, English jurisprudence developed certain general principles that govern an award of damages to this day. At first, judges endeavored to guide juries by suggesting to them in advance certain rules that would allow damages to be awarded in a consistent and fair manner.¹³ As time passed, this developing “law of damages” began to find its way into law treatises and these suggestions to the jury began to take the form of instructions. By the nineteenth century, judges were required to instruct juries on the law of damages, and any misinstruction by the trial judge or improper application of the instructions by the jury was grounds for a new trial.¹⁴ These rules governing the law of damages were passed down to the English colonies in America and have been fulsomely developed and expanded by state and federal courts since that time.

¹³ *Id.*, at 27-28.

¹⁴ *Id.*, at 29.

§ 1.03 General Principles of Monetary Damages

It is not the goal of this book to explicate the entire range of legal principles relating to monetary damages that have developed since English judges began to instruct juries on how to reach a damages finding.¹ It is useful, however, to provide an overview of those damages principles that play a significant role in the award of monetary damages in intellectual property litigation.

At the broadest level, damages principles can be divided into two categories of rules: (1) rules that determine what types of injury may be compensated by being included in a damages award; and (2) rules that determine how a damages award is calculated. Each of these categories is discussed separately below.

[1]—Determining Whether Injuries May Be Compensated by Damages

There are two general principles of damages that determine whether a particular injury may be compensated by a damages award which are significant in intellectual property litigation. These are the doctrine of proximate cause and the standard of certainty. Both are rules of exclusion. In other words, they are used by the law to exclude particular items of loss from the damages calculation.

[a]—Proximate Cause

The doctrine of proximate cause is most commonly associated with determinations of whether tort liability exists for a particular action that eventually resulted in an injury.² Proximate cause, however, can also be used to exclude a particular item of loss from the damages calculation;³ and the doctrine is frequently used in exactly that manner in intellectual property litigation.

In defining proximate cause, resort is most often made to Section 431 of the *Restatement (Second) of Torts*, which states:

“The actor’s negligent conduct is a legal cause of harm to another if
 “(a) his conduct is a *substantial factor* in bringing about the harm.
 . . .”⁴

Section 432 further provides that:

¹ For an excellent general treatment of the law of damages, see *Dobbs Law of Remedies* (2d ed. 1993).

² See, e.g., *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339 (1928) (Cardozo, J.).

³ See generally, McCormick, *Damages*, 260 (1935).

⁴ *Restatement (Second) of Torts*, § 431 (1965) (emphasis added).

“the actor’s negligent conduct is not a *substantial factor* in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent.”⁵

It is frequently said that, in order to be a “substantial factor” and constitute the proximate cause of an injury, “it must appear that the harm would not have befallen the plaintiff ‘but for’ the defendant’s wrongdoing.”⁶ In other words, the doctrine of proximate cause seeks to limit liability or damages to those acts for which the defendant truly should be held responsible because of the role it played in bringing about an injury or loss.⁷

Proximate cause becomes an important consideration for damages when an injury is attributable to more than one act. Section 433A of the *Restatement (Second) of Torts* provides in pertinent part:

“(1) Damages for harm are to be apportioned among two or more causes where

“(a) there are distinct harms, or

“(b) there is a reasonable basis for determining the contribution of each cause to a single harm.”⁸

Thus, when cattle owned by two different ranchers trespass on a third party’s land and trample crops, the damages must be apportioned between the two owners of the cattle.⁹ In a lawsuit brought by the land owner against only one of the cattle ranchers, the cattle rancher could properly invoke the doctrine of proximate cause to exclude some portion of the crop loss suffered by the land owner as not being attributable to the rancher’s cattle.

Proximate cause, however, imposes more than merely a traceability requirement from an act to an injury. It also requires that the injury be reasonably foreseeable. Thus, Section 435 of the *Restatement (Second) of Torts* provides in part:

“(2) The actor’s conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor’s negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm.”¹⁰

⁵ *Id.*, at § 432 (emphasis added).

⁶ McCormick, *Damages*, 262 (1935).

⁷ See generally, *Restatement (Second) of Torts*, § 431 cmt. a (1965).

⁸ *Id.*, at § 433A.

⁹ *Id.*, at cmt. d.

¹⁰ *Id.*, at § 435.

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Courts and commentators frequently summarize this element of proximate cause as excluding recovery for the “remote consequences” of wrongful conduct. For example, when an automobile dealership

(Text continued on page 1-9)

breaches its contract with a pregnant woman to deliver a new car on a particular day and this breach so upsets the woman as to cause her to miscarry, that loss would be considered too remote and unforeseeable by the automobile dealership to be recoverable by the woman.

The doctrine of proximate causation is similarly used in intellectual property litigation as a means to exclude certain types of losses from a damages award.¹¹ This is particularly true in patent infringement litigation.¹² The United States Court of Appeals for the Federal Circuit requires that a patent owner must prove for each type of injury claimed that the injury was a “but for” consequence of the infringement *and* that it was a reasonably foreseeable consequence at the time of infringement. As the Federal Circuit has stated:

“[J]udicial relief cannot redress every conceivable harm that can be traced to an alleged wrongdoing For example, remote consequences, such as a heart attack of the inventor or loss in value of shares of common stock of a patentee corporation caused indirectly by infringement are not compensable. Thus, along with establishing that a particular injury suffered by a patentee is a ‘but for’ consequence of infringement, there may also be a background question whether the asserted injury is of the type for which the patentee may be compensated. Judicial limitations on damages, either for certain classes of plaintiffs or for certain types of injuries have been imposed in terms of ‘proximate cause’ or ‘foreseeability.’”¹³

Thus, proximate cause plays an important part in intellectual property damages by imposing limits on what an intellectual property owner can claim as compensable injury. Not all losses traceable to a particular act of infringement are recoverable. Only if the particular loss was foreseeable by a reasonable person at the time of infringement may an intellectual property owner include it in a damages claim.

[b]—The Standard of Certainty

The standard of certainty represents another rule by which particular types of loss are excluded from recovery. In its broadest statement, the standard of certainty requires a plaintiff seeking monetary damages to prove to a reasonable certainty the amount of loss suffered.¹⁴

¹¹ See generally, § 2.02[1][a] (copyright) *infra* and § 3.02[4] (patent) *infra*.

¹² It is also utilized in copyright infringement litigation. See, e.g., *Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147, 1171 (1st Cir. 1994) (copyright owner must prove that “the infringement was a proximate cause of its loss by demonstrating that the existence and amount of the loss was a natural and probable consequence of the infringement.”).

¹³ *Rite-Hite Corp. v. Kelly Co., Inc.*, 56 F.3d 1538, 1546 (Fed. Cir.) (*en banc*), *cert. denied* 316 U.S. 867 (1995). (Citations omitted.)

“[T]he ‘certainty’ requirement is usually accompanied by a statement that the damages must not be ‘contingent,’ ‘conjectural,’ or ‘remote.’”¹⁵

Reasonable certainty, however, does not require mathematical precision.¹⁶ While damages may not be awarded based on sheer speculation or guesswork, approximation based upon reasonable inferences is permitted.¹⁷ Moreover, difficulty in ascertaining the value of services or goods that make up the claimed loss does not render the damages so speculative and uncertain as to preclude recovery.¹⁸ This is particularly true when the difficulty in calculating damages is attributable to the defendant’s actions.

The standard of certainty essentially imposes an evidentiary burden upon a plaintiff seeking monetary damages. There is no bright line test as to what constitutes sufficient proof to meet this burden. It is clear, however, that, to the extent the defendant makes the plaintiff’s task of proving damages more difficult, the plaintiff’s burden under the standard of certainty will be relaxed.¹⁹

The standard of certainty presents a serious issue in intellectual property litigation. Given the nature of intellectual property infringement, proof of damages is often difficult. For example, it is hard to know (and harder to prove) how much damage (in terms of dollar value) is done to a company’s trademark when it is infringed by a company selling a product of substantially lesser quality. Moreover, the proof of damages is frequently within the exclusive control of an infringer. When that infringer is deliberately pirating the intellectual property, it typically cannot be trusted to cooperate in the effort to establish damages.

Therefore, courts in intellectual property litigation generally resolve any doubts or uncertainties about damages against the infringer.²⁰ For

¹⁴ See 1 *Dobbs Law of Remedies*, 319 (2d ed. 1993).

¹⁵ McCormick, *Damages*, 99 (1935).

¹⁶ See, e.g., *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563, 51 S.Ct. 248, 75 L.Ed. 544 (1931) (“[t]he wrongdoer is not entitled to complain that [the damages] cannot be measured with the exactness and precision that would be possible if the case . . . were otherwise”).

¹⁷ See, e.g.: *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264, 66 S.Ct. 574, 90 L.Ed. 652 (1946) (“jury may not render a verdict based on speculation or guesswork,” but “the jury may make a just and reasonable estimate of the damage based on relevant data”); *Story Parchment Co. v. Paterson Co.*, 282 U.S. 555, 563, 51 S.Ct. 248, 75 L.Ed. 544 (1931) (“while the damages may not be determined by mere speculation or guess, it will be enough if the evidence shows the extent of the damages as a matter of just and reasonable inference, although the result be only approximate”).

¹⁸ See McCormick, *Damages*, 103 (1935).

¹⁹ *Id.* at 102-103.

²⁰ See, e.g.:

Second Circuit: *MCA, Inc. v. Wilson*, 677 F.2d 180, 186 (2d Cir. 1981) (copyright case); *Orgel v. Clark Boardman Co.*, 301 F.2d 119, 121 (2d Cir.), *cert. denied* 371

example, the infringer's failure to keep or produce records from which an intellectual property owner could ascertain damages will be held against the infringer.²¹ Courts will allow an intellectual property owner to infer that the infringer made certain sales or derived certain profits from the infringement.²²

The Copyright Act of 1976 has taken this principle a step further. Title 17, Section 504(a) of the United States Code provides a copyright owner with the right to obtain a statutory damages award from an infringer, despite the fact that the owner is unable to prove with reasonable certainty actual damages caused by an infringement.²³ The rationale for providing such an alternative remedy is that the guarantee of statutory damages will induce copyright owners to invest in and enforce their copyrights, even when the owner is unable to prove actual damages with reasonable certainty.²⁴

As should be evident from the foregoing discussion, the standard of certainty is applied in a far less onerous manner in intellectual property litigation. It remains, however, as a limit on damages, and intellectual property owners must be careful not to proffer in litigation elements of damage or calculations that are so speculative as to run afoul of the standard of certainty.²⁵

U.S. 817 (1962) (copyright case); *Sheldon v. Metro Goldwyn Pictures Corp.*, 106 F.2d 45, 51 (2d Cir. 1939), *aff'd* 309 U.S. 390 (1940) (copyright case).

Federal Circuit: *Beatrice Foods Co. v. New England Printing & Lithographing Co.*, 899 F.2d 1171, 1175 (Fed. Cir. 1990) (patent case); *Del Mar Avionics v. Quinton Instrument Co.*, 836 F.2d 1320, 1327 (Fed. Cir. 1987) (patent case); *Lam, Inc. v. Johns-Manville Corp.*, 718 F.2d 1056, 1065 (Fed. Cir. 1983) (patent case).

²¹ See, e.g.: *Sensonics, Inc. v. Aerosonic Corp.*, 81 F.3d 1566, 1572 (Fed. Cir. 1996) (patent case); *Hartness International, Inc. v. Simplimatic Engineering Co.*, 819 F.2d 1100, 1110-1111 (Fed. Cir. 1987) (patent case).

²² See, e.g.:

Seventh Circuit: *Baldwin Cooke Co. v. Keith Clark, Inc.*, 420 F. Supp. 404, 407 (N.D. Ill. 1976) (copyright case).

Federal Circuit: *Lam, Inc. v. Johns-Manville Corp.*, 718 F.2d 1056, 1065 (Fed. Cir. 1983) (patent case).

²³ See, e.g., *Laratex Textile Corp. v. Allton Knitting Mills Inc.*, 519 F. Supp. 730, 732-733 (S.D.N.Y. 1981).

²⁴ See, e.g., *Unicity Music, Inc. v. Omni Communications, Inc.*, 844 F. Supp. 504, 510 (E.D. Ark. 1994).

²⁵ See, e.g.:

Second Circuit: *Peter Pan Fabrics, Inc. v. Jobela Fabrics, Inc.*, 329 F.2d 194, 196-197 (2d Cir. 1964) (copyright case); *L&L White Metal Casting Corp. v. Joseph*, 387 F. Supp. 1349, 1357-1358 (E.D.N.Y. 1975) (copyright case).

Eighth Circuit: *Pfanenstiel Architects, Inc. v. Chouteau Petroleum Co.*, 978 F.2d 430, 432 (8th Cir. 1992) (copyright case).

[2]—Calculating the Damages Award

Monetary damages include five principal components: compensatory damages, unjust enrichment, augmented damages, interest and attorneys' fees. Each of these is discussed separately below.

[a]—Compensatory Damages

The fundamental purpose of the damages remedy is to make the plaintiff whole for the plaintiff's recognized injuries or loss.²⁶ Thus, compensatory damages—monetary relief intended to compensate the plaintiff for the plaintiff's loss—is the component that is most true to the fundamental purpose of damages. In intellectual property litigation, there are two principal measures for calculating the loss to be redressed by compensatory damages—the market value measure and the lost opportunity measure.

[i]—Market Value Measure

The market value measure is what most courts refer to when they use the term “general damages.”²⁷ This approach to measuring damages is probably the most broadly used in Anglo-American jurisprudence. The market value measure determines the market value of an asset prior to a defendant's wrongful act and the market value of that same asset after the wrongful act. The difference between the two values is the damage that the defendant's wrongful act inflicted upon the owner of the asset. Such an asset can be tangible or intangible. Several examples may serve to elucidate the market value test.

The owner of an automobile parks it in a driveway. A truck is driven negligently down the street in such a manner as to crash into the automobile. Under the market value measure, the market value of the automobile prior to the accident is determined. The value of the automobile as damaged by the accident is then determined. The difference between the two values is the measure of the automobile owner's compensatory damages resulting from the truck driver's negligence under the market value measure.

The market value measure can also be applied with respect to contract breaches. For example, a company has a contract to buy a quantity of oats for \$10,000 in Kansas and a contract to sell the same oats for \$12,000 in Kentucky. The supplier of the oats, however, breaches the contract. The difference between the company's purchase price and sale price—\$2,000—is the measure of compensatory damages for this breach of contract under the market value measure.

²⁶ See 1 *Dobbs Law of Remedies*, 281 (2d ed. 1993).

²⁷ *Id.* at 288.

The market value measure plays a very important role in calculating compensatory damages for intellectual property infringement. When an intellectual property owner has difficulty proving with reasonable certainty the actual damages attributable to an infringement (e.g., lost sales due to the infringement), it may resort to the market value measure. In such circumstances, a court determines the value of the intellectual property prior to infringement (usually by determining what a willing buyer would have paid a willing seller for the intellectual property) and the value after infringement. The difference is the loss to the intellectual property owner resulting from the infringement and constitutes the owner's compensatory damages.²⁸

[ii]—Lost Opportunity Measure

In some instances, damage to an asset will not only diminish the market value of the asset, but also deprive the owner of the opportunity to derive some gain from use of the asset. This lost opportunity is referred to as special or consequential damages.²⁹ One common type of special or consequential damages is lost profits.³⁰

The market value measure compensates a plaintiff for the diminished value of an asset due to a civil wrong. The lost opportunity measure, on the other hand, compensates a plaintiff for the loss of income generated by that asset. It is important to note, however, that a plaintiff is normally permitted to seek only one or the other of these measures of damages, not both.³¹

Thus, if a plaintiff's business had a market value of \$1,000,000 before it was injured by a defendant's action, but it has a value of only \$500,000 after injury, then plaintiff's damages under the market value test would be \$500,000. If the profits lost because of defendant's action were \$1,000,000 over five years, then plaintiff's damages under the lost opportunity test would be \$1,000,000. Plaintiff, however, would not be able to claim both the diminishment in value *and* the lost profits. In valuing the business, the future profits would have been factored into the analysis. Thus, recovery of a market value

²⁸ See, e.g.:

Second Circuit: *Business Trends Analysts, Inc. v. Freedom Group, Inc.*, 887 F.2d 399, 406 (2d Cir. 1989) (copyright case).

Fifth Circuit: *Precision Plating & Metal Finishing, Inc. v. Martin-Marietta Corp.*, 435 F.2d 1262, 1263 (5th Cir. 1970) (trade secret case).

Ninth Circuit: *Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1174 (9th Cir. 1977) (copyright case, but noting same measure of damages is available in patent cases).

²⁹ See 1 *Dobbs Law of Remedies*, 302 (2d ed. 1993).

³⁰ *Id.*

³¹ *Id.* at 312-313.

measure of damages and a lost opportunity measure of damages would constitute an improper double recovery.

Is it possible that application of these two different measures of damages to a real case might yield different damages calculations? Yes, it is, and it frequently occurs. Plaintiffs must carefully consider which measure of damages will yield the greater award.

The lost opportunity measure is usually the preferred method of intellectual property owners for calculating compensatory damages because it allows recovery of lost profits which usually are greater than the diminishment in value of the intellectual property caused by the infringement. Copyright law, patent law, trademark law and trade secret law all allow for the recovery of an intellectual property owner's lost profits due to infringement under the lost opportunity measure. Proving lost profits, however, is often difficult in intellectual property litigation and an intellectual property owner may not always be able to meet its burden of proof.

[b]—Unjust Enrichment

Unjust enrichment is an alternative damages measure to compensatory damages. While compensatory damages seek to restore the plaintiff to the position the plaintiff was in prior to the defendant's wrongful act, unjust enrichment damages seek to deprive the defendant of whatever gain or benefit the defendant obtained from the defendant's wrongful act. Thus, unjust enrichment damages take from the defendant the fruits of the defendant's wrongful act and give them to the plaintiff.³² In effect, the defendant is forced to disgorge the defendant's ill-gotten gains. Unjust enrichment is also referred to as restitution.

Unjust enrichment is descended from the common law writ of *assumpsit*, which was a cause of action that sought to recover the gain derived by a defendant for the wrongful use of property.³³ It was typically used when a defendant had wrongfully obtained property, but then disposed of the property, making it impossible for the rightful owner to receive back the property. For example, a defendant takes plaintiff's cow and sells it for \$100. The plaintiff can no longer obtain back from the defendant the cow, but can obtain the \$100 that the defendant received for the cow.

Of course, if the fair market value of the cow in the foregoing example was \$100, then there is no difference between compensatory damages and unjust enrichment damages in that case. But what if the fair market value of the cow was only \$75 and the defendant had been

³² See *Restatement of Restitution* § 1 (1937).

³³ See generally, 1 *Dobbs Law of Remedies*, 571-586 (2d ed. 1993).

able to obtain \$25 extra by misleading the buyer into believing the cow produced “magic milk” that made a drinker of the milk smarter? In this example, there is a difference between compensatory damages and unjust enrichment damages. By seeking unjust enrichment damages instead of compensatory damages, the plaintiff actually would obtain a greater recovery. In such factual settings, a plaintiff must carefully consider which measure of damages will yield the greater award.

One commentator has identified five different ways to measure the gain obtained by a defendant for purposes of making an unjust enrichment award. These are:

“(1) the increased assets in the hands of the defendant from the receipt of the property;

“(2) the market value of services or intangibles provided to the defendant, without regard to whether the defendant’s assets were actually increased; that is, the amount which it would cost to obtain similar services, whether those services prove to be useful or not;

“(3) the use value of any benefits received, as measured by (i) market indicators such as rental value or interest or (ii) actual gains to the defendant from using the benefits, such as the gains identified in item (5) below;

“(4) the gains realized by the defendant upon sale or transfer of the asset received from the plaintiff;

“(5) collateral or secondary profits earned by the defendant by use of an asset received from the plaintiff, or, what is much the same thing, the savings effected by the use of the asset.”³⁴

Each of these may be understood with a simple example.

Plaintiff, while exploring for oil, mistakenly crosses onto the property of defendant and drills an oil well that strikes oil. The oil well increases the value of defendant’s land by \$1 million. Defendant, realizing plaintiff’s mistake, repossesses the property and begins selling the oil. Under measure (1) above, plaintiff would be entitled to the increase in the value of defendant’s land conveyed by plaintiff’s mistake, or \$1 million.

Suppose now that the defendant had requested the oil driller to drill a well on his land. Before the well was complete, however, the defendant ordered the oil driller off the property. The unfinished well adds little, if any, value to the property, but the cost of the work performed was \$50,000. If the oil driller seeks restitutionary damages, under measure (2) above, the oil driller would be entitled to \$50,000 even

³⁴ *Id.* at 566-567.

though the defendant's land has not appreciated in value from the oil driller's work.

In a different example, a plaintiff agrees to sell his cow to defendant. Defendant takes possession of the cow with payment to be made two weeks later. When the time to pay comes, defendant returns the cow, asserting that it does not produce as much milk as represented and, therefore, the sale agreement is void. During the two weeks, however, the defendant has had the benefit of the cow's daily milk output, regardless of how inadequate it might be. Under measure (3) above, the plaintiff would be entitled to either the rental value of the cow for two weeks or the value of the milk actually produced during the two weeks.

Measure (4) above is one of the most common measurements for unjust enrichment and is demonstrated by the example given previously of a defendant wrongfully taking and selling a cow. Under measure (4), the price realized from the sale of the cow is the measure of the unjust enrichment damages.

Measure (5) above can be explained by resort again to the example of the contract to sell the cow that is voided by the defendant after two weeks' use. Suppose that the defendant had not milked the cow during the two weeks, but had instead used the cow as one animal in a "petting zoo" for children, from which he had derived profits of \$1,000 over the two-week period. Under measure (5), plaintiff can obtain that portion of the profits realized from the petting zoo during the two-week period that is attributable to the cow's participation. In other words, the plaintiff is not entitled to all of the profits; rather, the profits must be apportioned.

Unjust enrichment is a damages measure that is frequently used in intellectual property litigation.³⁵ For example, the Copyright Act of 1976 expressly provides for the recovery by a copyright owner of "any profits of the infringer that are attributable to the infringement."³⁶ Indeed, provided that an award does not include a double recovery, a copyright owner may recover both actual damages *and* an infringer's profits.³⁷ Thus, a copyright owner can receive as a monetary award both compensatory damages and unjust enrichment damages.

³⁵ See generally, § 2.02[2] (copyright) *infra*; § 4.03[3] (trademark) *infra*; and § 5.03[2] (trade secrets) *infra*. Since the 1946 amendments to the Patent Act, an unjust enrichment measure of damages has not been available for patent infringement.

³⁶ 17 U.S.C. § 504(b).

³⁷ See, e.g.:

Second Circuit: Abeshouse v. Ultra Graphics, Inc., 754 F.2d 467, 470 (2d Cir. 1985).

Fifth Circuit: Miller v. Universal Studios, Inc., 650 F.2d 1365, 1375-1376 (5th Cir. 1981).

Ninth Circuit: JBJ Fabrics, Inc. v. Mark Industries, Inc., 5 U.S.P.Q. (BNA) 1414, 1418 (C.D. Cal. 1987).

Similarly, the Uniform Trade Secrets Act expressly provides that *in addition* to recovering its actual loss, a trade secret owner may recover the “unjust enrichment” caused by the misappropriation to the extent the enrichment is not taken into account in calculating the owner’s actual loss.³⁸

The Lanham Act also explicitly authorizes a trademark owner to recover the profits of an infringer.³⁹ Again, “subject to the principles of equity,” the trademark owner may recover both the infringer’s profits and its own damages sustained.⁴⁰

The Copyright Act, the Uniform Trade Secrets Act and the Lanham Act, however, each contemplate that the intellectual property owner shall recover only the *net* profits of the infringer traceable to the infringement. This presents two issues in utilizing an unjust enrichment measure of damages. First, the court must determine what are the infringer’s net profits. Second, the court must determine what portion of the net profits is attributable to the infringement (commonly referred to as the “apportionment problem”). These are significant issues in intellectual property litigation. The difficulty in making these determinations is eased slightly by the fact that the burden is generally placed on the infringer to prove its expenses that should be deductible from gross revenues to derive net profits.⁴¹ In addition, the burden is also placed on the infringer to prove apportionment.⁴²

[c]—Augmented Damages

Augmented damages are damages that are awarded to a plaintiff that exceed any compensatory measure of recovery.⁴³ Their purpose is to punish the defendant and/or to deter in the future the type of

³⁸ See Uniform Trade Secrets Act § 3(a) (amended 1985), 14 U.L.A. 455-456 (Supp. 1999).

³⁹ See 15 U.S.C. § 1117(a).

⁴⁰ See, e.g., *Sands, Taylor & Wood v. Quaker Oats Co.*, 34 F.3d 1340, 1347 (7th Cir. 1994) (15 U.S.C. § 1117(a) “allows an award of three nonexclusive monetary remedies: (1) recovery of profits; (2) damages sustained by the plaintiff; and (3) costs of the action”).

⁴¹ See 17 U.S.C. § 504(b) (Copyright Act); 15 U.S.C. § 1117(a) (Lanham Act).

⁴² See, e.g.:

Supreme Court: *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 261, 36 S.Ct. 269, 60 L.Ed. 629 (1916) (trademark case).

Fourth Circuit: *Konor Enterprises, Inc. v. Eagle Publications, Inc.*, 878 F.2d 138, 140 (4th Cir. 1989) (copyright case).

Seventh Circuit: *Roulo v. Russ Berrie & Co., Inc.*, 886 F.2d 931, 941 (7th Cir. 1989) (copyright case).

State Court:

Massachusetts: *USM Corp. v. Marson Fastener Corp.*, 467 N.E.2d 1271, 1276 (Mass. 1984) (trade secret case).

⁴³ See 1 *Dobbs Law of Remedies*, 452 (2d ed. 1993) (exemplary damages “go beyond any obvious elements of ordinary compensation”).

civil wrongdoing committed by the defendant. Augmented damages include punitive damages and statutory enhanced damages. Each type of augmented damages is discussed below.

[i]—Punitive Damages

Punitive damages, also known as exemplary damages, developed at common law in England. Punitive damages developed not with an intent to punish a defendant, but rather to augment compensatory damages as a sort of reward to the plaintiff for rendering the public service of bringing the defendant to account in cases in which a defendant's conduct was particularly outrageous.⁴⁴ In the United States, however, punitive damages developed more clearly as a means to punish a defendant for the defendant's conduct.⁴⁵ Because of this quasi-criminal purpose underlying punitive damages, such damages have been the subject of harsh criticism over the years. As a result, a number of rules have been developed by the judiciary in order to constrain the award of punitive damages.

First, punitive damages may only be awarded for outrageous conduct that is committed with malice or a high degree of recklessness.⁴⁶ Simple negligence will not suffice, as the purpose of punitive damages is to punish conduct deserving of punishment.

Second, the amount of punitive damages awarded must bear a reasonable relationship to the harm caused or likely to be caused by the conduct the court seeks to punish.⁴⁷ The degree of reprehensibility of the conduct, the duration of the conduct, the defendant's awareness of the conduct, any concealment of the conduct, and the frequency of such conduct in the past are all factors that may be considered in determining whether the punitive damages bear a reasonable relationship to the harm.⁴⁸ In addition, in fixing the amount of punitive damages, the defendant's financial position and the costs of litigation may be considered.⁴⁹ It is also clear that, in determining what constitutes a reasonable relationship between actual damages and an award of punitive damages, "few awards exceeding a single-digit ratio . . . will satisfy due process."⁵⁰ Thus, a punitive damages award of ten times actual damages or greater is now prohibited and even an award of more than four times actual damages "might be close to the line of

⁴⁴ See McCormick, *Damages*, 277-278 (1935).

⁴⁵ *Id.*

⁴⁶ See *Restatement (Second) of Torts*, § 908(1) (1979).

⁴⁷ See *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 21-22, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 1524, 155 L.Ed.2d 585 (2003).

constitutional impropriety.”⁵¹ Indeed, a decision on punitive damages by the United States Supreme Court held that “a 1:1 ratio [of punitive to compensatory damages] is a fair upper limit”^{51.1}

Third, punitive damages usually may not be awarded unless the plaintiff proves actual damages.⁵² This rule, however, has not been adopted in all states and is not uniformly applied.⁵³

Fourth, a heightened standard of proof is increasingly being required for an award of punitive damages. In some states, plaintiffs must now prove punitive damages by “clear and convincing evidence,”⁵⁴ and at least one state requires a criminal standard of proof, i.e., “beyond a reasonable doubt.”⁵⁵

Fifth, a jury must receive appropriate guidance from a court prior to rendering a punitive damages award and the award must be subject to adequate judicial review. A failure to provide either of these safeguards against an excessive award may violate due process.⁵⁶

In intellectual property litigation, punitive damages are arguably relevant only to common law actions alleging copyright infringement⁵⁷ or trademark infringement.⁵⁸ Punitive damages are not available under the Copyright Act, the Patent Act, the Lanham Act or the Uniform Trade Secrets Act. As discussed below, the principal approach toward augmented damages taken by the intellectual property laws in the United States is to allow statutory enhanced damages rather than punitive damages.

[ii]—Statutory Enhanced Damages

Over the last century, there has been a dramatic increase in the use of statutory enhanced damages in the United States. Statutory

⁵¹ *Id.*

^{51.1} Exxon Shipping Co. v. Baker, 2008 WL 2511219 at *21 (June 25, 2008). This case was decided under federal maritime common law and it remains to be seen whether it will be applicable beyond that limited area of the law.

⁵² See, e.g., Oliver v. Raymark Industries, Inc., 799 F.2d 95, 98 (3d Cir. 1986).

⁵³ See, e.g., Ault v. Lohr, 538 So.2d 454, 456 (Fla. 1989) (“a finding of liability alone will support an award of punitive damages ‘even in the absence of financial loss’”).

⁵⁴ See, e.g., Masaki v. General Motors Corp., 780 P.2d 566, 575 (Haw. 1989).

⁵⁵ See Col. Rev. Stat. § 13-25-127(2).

⁵⁶ See Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 21-22, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991).

⁵⁷ See Oboler v. Goldin, 714 F.2d 211, 213 (2d Cir. 1983) (“punitive damages have been awarded in common law copyright infringement actions as a matter of state law”). But see, Kelly v. L.L. Cool J., 145 F.R.D. 32, 38 n.7 (S.D.N.Y. 1992) (punitive damages unavailable under state law because the Copyright Act preempts state law causes of action for copyright infringement).

⁵⁸ See, e.g., Five Platters, Inc. v. Purdie, 419 F. Supp. 372, 383 (D. Md. 1976) (“Maryland law allows an award of punitive damages for unfair competition . . .”).

enhanced damages refer to the authorization or requirement in a statute to award a multiple of the compensatory damages, most typically double or treble damages. The federal antitrust laws providing “threefold” damages are perhaps the best known of these statutory enhanced damages.⁵⁹

Statutory enhanced damages are, in effect, a throwback to the prefixed damages regimes that existed in Western law prior to the development of discretionary damages. Statutes utilizing such damage multipliers are really preestablishing liquidated damages for a particular type of wrongful civil conduct for which actual losses cannot be entirely proved. In this respect, statutory enhanced damages differ from punitive damages in that their purpose is not necessarily to punish a defendant, but rather to ensure that the plaintiff is fully and fairly compensated.

Statutory enhanced damages play a very significant role in intellectual property litigation. The Patent Act, the Lanham Act and the

⁵⁹ See 15 U.S.C. § 15.

Uniform Trade Secrets Act each contain a statutory enhanced damages provision.⁶⁰

The Patent Act provides that “[t]he Court may increase the damages up to three times the amount found or assessed.”⁶¹ Thus, it is within the discretion of the trial court to augment an award by a maximum of three times the compensatory damages. This discretion, however, operates within fairly narrow boundaries and is limited to acts of *willful* patent infringement.⁶²

Similarly, the Lanham Act provides that “the court may enter judgment . . . for any sum above the amount found as actual damages, not exceeding three times such amount”⁶³ Again, it is within the discretion of the trial court to award augmented damages with a limit of three times the actual damages. Unlike the Patent Act, however, the Lanham Act expressly states that such augmented damages “shall constitute compensation and not a penalty.”⁶⁴ This statutory statement of purpose leads to a somewhat different exercise of discretion in making an award of augmented damages for trademark infringement.⁶⁵

The Uniform Trade Secrets Act also provides for augmented damages. “If willful and malicious misappropriation exist, the court may award exemplary damages in an amount not exceeding twice any [compensatory] award”⁶⁶ While again being within the discretion of the court, the cap on augmented damages is only two times the compensatory damages. Moreover, the discretion to make such an award is circumscribed by the requirement that the misappropriation be “willful and malicious.”⁶⁷

[d]—Interest

“Interest is the sum paid or payable for the use or detention of money.”⁶⁸ In order to compensate a plaintiff fully, interest should be awarded on most monetary damages. Unfortunately, historic religious attitudes opposed to the charging of interest heavily influenced Western

⁶⁰ See generally, Ch. 7 *infra*.

⁶¹ 35 U.S.C. § 284.

⁶² See § 7.03 *infra*.

⁶³ 15 U.S.C. § 1117(a).

⁶⁴ 15 U.S.C. § 1117(a).

⁶⁵ See § 7.04 *infra*.

⁶⁶ Uniform Trade Secrets Act § 3(b) (amended 1985), 14 U.L.A. 456 (Supp. 1999).

⁶⁷ See § 7.05 *infra*.

⁶⁸ 1 *Dobbs Law of Remedies*, 333 (2d ed. 1993).

jurisprudence with respect to judgment interest, leaving a more restrictive legacy toward the award of interest than would be appropriate under contemporary economic theory.

Anglo-American law generally differentiates between prejudgment interest and postjudgment interest. Postjudgment interest is a relatively simple matter to address. Although at common law postjudgment interest was not allowed, the United States in suits in federal court and every state in suits in state court has authorized by statute the award of postjudgment interest as a matter of right to a litigant obtaining a money judgment. Thus, in all intellectual property litigation, postjudgment interest is available on any money judgment.⁶⁹

Prejudgment interest is far more complicated. The common law rule is that, absent statute, prejudgment interest is not recoverable unless a claim is liquidated as a dollar sum or otherwise ascertainable in advance by some predetermined standard.⁷⁰ Under this rule, prejudgment interest is unavailable on virtually all tort causes of action and even many contract causes of action. Thus, if an insurance company agreed to pay a beneficiary \$1,000 upon the death of an insured, but failed to do so, prejudgment interest would be allowed, as the claim in the breach of contract lawsuit that would follow would be for a liquidated amount, \$1,000. Similarly, if a farmer agreed to sell 100 bushels of oats to a horse trainer for \$10 per bushel and, after delivering the oats, the trainer failed to pay, prejudgment interest would be allowed, as the claim in the breach of contract lawsuit between the farmer and the horse trainer would be ascertainable in advance simply by calculating 100 bushels multiplied by \$10 per bushel to derive the amount of \$1,000. Even if the defendant in each of these lawsuits pled viable defenses to liability, because the damages sought are readily ascertainable, prejudgment interest would still be allowed.

Historically, intellectual property claims were subject to the foregoing common law rule and prejudgment interest was unavailable on awards of money damages. This traditional approach, however, gradually eroded over the last half of the twentieth century.⁷¹

In 1946, Congress amended the Patent Act to authorize the award of “interest” on a damages award without explicitly referring to “prejudgment interest.”⁷² In 1983, the United States Supreme Court held

⁶⁹ See § 9.03 *infra*.

⁷⁰ See 1 *Dobbs Law of Remedies*, 336 (2d ed. 1993).

⁷¹ See generally, § 9.02 *infra*.

⁷² See Act of August 1, 1946, Ch. 726, § 1, 60 Stat. 778, originally codified at 35 U.S.C. § 70 and recodified under the Patent Act of 1952 as 35 U.S.C. § 284.

that Congress intended by this 1946 amendment to the Patent Act that “prejudgment interest should ordinarily be awarded” from the date of infringement.⁷³

Similarly, in the Trademark Counterfeiting Act of 1984, Congress expressly provided for the award of prejudgment interest.⁷⁴ An award of prejudgment interest, however, is discretionary with the trial court,⁷⁵ a significant difference from the award of prejudgment interest under the Patent Act.

By contrast, the Copyright Act and the Lanham Act are wholly silent on the award of prejudgment interest. Although the issue remains unsettled, the trend is toward allowing prejudgment interest on an award of money damages for copyright infringement⁷⁶ and for ordinary trademark infringement.⁷⁷ Such an award is within the discretion of the trial court.

The Uniform Trade Secret Act also fails expressly to provide for an award of prejudgment interest. Some individual states have authorized by statute the award of prejudgment interest in all civil lawsuits, including trade secret litigation.⁷⁸ In the majority of states, however, prejudgment interest is unavailable on an award of money damages for misappropriation of trade secrets.

[e]—Attorneys’ Fees and Costs

The “American rule” is that the prevailing party in litigation is ordinarily not entitled to recover attorneys’ fees from the losing party.⁷⁹ Each of the federal statutes governing intellectual property rights in the United States, however, authorizes the recovery of attorneys’ fees

⁷³ *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 654, 103 S.Ct. 2058, 76 L.Ed. 211 (1983).

⁷⁴ See Pub. L. No. 98-473, 98th Cong., 2d Sess., 98 Stat. 1837, 2178-2183 (Oct. 12, 1984), codified at 15 U.S.C. §§ 116-118; 18 U.S.C. § 2320.

⁷⁵ See 15 U.S.C. § 1117(b) (“the court may in its discretion award prejudgment interest”).

⁷⁶ See, e.g., *Kleier Advertising, Inc. v. Premier Pontiac, Inc.*, 921 F.2d 1036, 1040-1041 (10th Cir. 1990).

⁷⁷ See, e.g.:

Second Circuit: *American Honda Motor Co., Inc. v. Two Wheel Corp.*, 918 F.2d 1060, 1064 (2d Cir. 1990) (citing *Champion Spark Plug Co. v. Sanders*, 108 F. Supp. 674 (E.D.N.Y. 1952), *aff’d* 204 F.2d 125 (2d Cir. 1953)).

Seventh Circuit: *Gorenstein Enterprises, Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431, 436 (7th Cir. 1989).

⁷⁸ See, e.g., Va. Code Ann. § 8.01-382 (award of prejudgment interest allowed in all cases at discretion of trier of fact).

⁷⁹ See generally, § 8.02 *infra*.

by the prevailing party.⁸⁰ Similarly, the Uniform Trade Secrets Act authorizes recovery of attorneys' fees for prevailing parties.⁸¹

But, under each of these statutory authorizations, the award of attorneys' fees is discretionary. The standard by which a trial court should exercise its discretion and the manner by which fee awards are calculated are quite complex and should be reviewed with care prior to making a fee application.⁸² The one exception to this rule of discretion is in cases of trademark counterfeiting. In such cases, attorneys' fees "shall" be awarded, absent extenuating circumstances.⁸³

Costs are generally thought of as those expenses incurred during litigation that are not related to the services provided by attorneys or their agents. The recovery of the costs of litigation is authorized in all civil cases by Title 28, Section 1920 of the United States Code.⁸⁴ The statute, however, strictly limits the types of litigation expenses that are recoverable. And, none of the intellectual property statutes provides for any additional costs beyond those authorized by Section 1920 to be recoverable. Unlike the award of attorneys' fees, however, costs are not discretionary, but rather are automatically awarded to a prevailing party.⁸⁵

Damage experts have become a fixture in intellectual property litigation. Indeed, it is the rare patent infringement case in which the parties do not offer competing expert opinions on the appropriate measure of damages. Not surprisingly, many successful litigants have sought to recover the expense of hiring an expert as part of the costs of suit. It is important, however, to recognize that "[t]he law does not require expert testimony to establish damages. . . ."⁸⁶ There may well be times when expert testimony is helpful to the jury—especially when damages are based on a complex econometric model—but such testimony is not necessary, provided that the evidence of record supplies the jury with sufficient information upon which it may calculate a proper damages award. Thus, although some expert expenses have been awarded to successful litigants, for the most part, they have not been allowed in intellectual property cases.

⁸⁰ See 17 U.S.C. § 505 (copyright); 35 U.S.C. § 285 (patents); 15 U.S.C. § 1117(a) (trademarks).

⁸¹ See Uniform Trade Secrets Act § 4 (amended 1985), 14 U.L.A. 459 (Supp. 1999).

⁸² See generally: § 8.04 *infra* (fee awards in copyright litigation); § 8.05 *infra* (fee awards in patent litigation); § 8.06 *infra* (fee awards in trademark litigation); § 8.07 *infra* (fee awards in trade secrets litigation).

⁸³ 15 U.S.C. § 1117(b).

⁸⁴ See § 8.02 N. 13 *infra* (setting out the text of 28 U.S.C. § 1920).

⁸⁵ See § 8.08 *infra*.

⁸⁶ *DSPT International, Inc. v. Nahum*, 624 F.3d 1213, 1223(9th Cir. 2010) (cyber-squatting case).