

HYPOTHETICAL DAMAGES:  
AGAINST REMEDIAL DEFAULTS IN COPYRIGHT LAW

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*Copyright law does not require a copyright holder to prove damages in most cases. Once infringement has been established, copyright holders benefit from a statutorily presumption that, unless the defendant proves otherwise, an infringer's revenues are entirely attributable to the copyright infringement. Alternatively, if the infringed copyrighted work has been registered, a plaintiff may elect a statutory damage award. In both instances, copyright law effectively detaches the damage award from the actual harm incurred by the copyright holder.*

*This Article questions this copyright damage default in copyright law. While the Copyright Act correctly assumes that damages are difficult to prove in copyright infringement cases, the logic behind the asymmetric treatment of plaintiffs and defendants in infringement suits is questionable in light of the degree of uncertainty in copyright litigation and the potential chilling effects of over-deterrence on creative uses and free speech. Moreover, as we show in this Article, recent technological advances exacerbate the problematic nature of remedial default provisions in copyright law.*

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