

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA**

	X	
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MALIBU MEDIA, LLC,	:	
	:	Case No. 2:14-cv-511-FtM-38CM
Plaintiff,	:	
	:	
vs.	:	
	:	
MARK DANFORD,	:	
	:	
Defendant.	:	
	:	
	X	

**PLAINTIFF’S MOTION FOR RECONSIDERATION OF ORDER [CM/ECF 24]**

Plaintiff, Malibu Media, LLC (“Plaintiff”) moves for reconsideration of Your Honor’s Order entering default judgment against Defendant Mark Danford (“Defendant”) and awarding statutory damages in the amount of \$6,000.00.

**I. INTRODUCTION**

The final judgment in this matter is for less than the statutory minimum and should be modified to comply with 17 U.S.C. § 504. To explain, this action concerns Defendant’s willful and systematic infringement of forty seven (47) of Plaintiff’s copyrighted works over a ten month period of time. *See* CM/ECF 10. Although Defendant was properly served, *see* CM/ECF 12, he failed to timely appear or respond, resulting in the entry of a clerk’s default. *See* CM/ECF 18. On May 12, 2015, Your Honor entered default judgment in Plaintiff’s favor, finding “the allegations in the operative complaint are well-plead, Danford [Defendant] is liable for direct copyright infringement. [T]he Court finds Malibu Media [Plaintiff] is entitled to recover statutory damages for infringement of its copyrighted works pursuant to 17 U.S.C. § 504.” CM/ECF 24 at p. 3. 17 U.S.C. § 504(c)(1)–(2) limits the range of statutory damages a court may

enter to between \$750.00 and \$150,000.00 per work:

[T]he copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, 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 \$750 or more than \$30,000 as the court considers just. ... In a case where the copyright owners 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 \$150,000.

17 U.S.C. § 504(c)(1)–(2).

Accordingly, this Court must enter an award between \$35,250.00 (\$750.00 per work) and \$7,050,000.00 (\$150,000.00 per work). *See id.* (granting courts broad discretion to issue awards within the permissible statutory range as they “consider[ ] just.”).

Here, Your Honor awarded “Plaintiff Malibu Media, LLC [only] \$6,000.00 in statutory damages pursuant to 17 U.S.C. § 504.” CM/ECF 24 at p. 8. This equates to \$127.66 per work, which is less than the statutory minimum of \$750.00 per work. Consequently, Plaintiff now moves for the entry of an amended final judgment awarding Plaintiff damages within the permissible statutory range.

## **II. LEGAL STANDARD**

This motion is properly brought pursuant to Your Honor’s inherent authority. It is axiomatic that “the power to decide in the first instance carries with it the power to reconsider.” *E.g., Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1087 (10th Cir. 1980). A motion to reconsider is the favored procedure where, as here, a court has misapplied the record facts to the controlling law. *See Madura v. BAC Home Loans Servicing L.P.*, 851 F. Supp.2d 1291, 1296 (M.D. Fla. 2012) (recognizing “the need to correct clear error or manifest injustice” as a ground to justify reconsideration of a prior order); *Lamar Advertising of Mobile, Inc. v. City of Lakeland*, 189

F.R.D. 480, 489 (M.D. Fla. 1999) (same); *see also* *Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000) (“A manifest error is demonstrated by ... misapplication, or failure to recognize controlling precedent [or the applicable facts].”).

### **III. ARGUMENT**

#### **A. Your Honor Correctly Held That, By Virtue Of His Default, Defendant Is Liable For Willfully Infringing Plaintiff’s Forty Seven Copyrighted Works**

Your Honor correctly explained that Plaintiff’s operative Complaint alleges Defendant “willfully copied and distributed the Works without permission....” CM/ECF 24 at p. 1. Your Honor further correctly found that “the allegations in the operative complaint are well-plead” and that Defendant “is liable for direct copyright infringement. ... Malibu Media [Plaintiff] is entitled to recovery statutory damages for infringement of its copyrighted works pursuant to 17 U.S.C. § 504.” *Id.* at p. 3. Thus, Your Honor correctly ruled that, with respect to each of its works, Plaintiff is entitled to an award of statutory damages of not more than \$150,000.00 (and not less than \$750.00). *Accord* 17 U.S.C. § 504(c) (setting forth the permissible range of statutory damages).

#### **B. The Order’s Statutory Award is Below the Mandatory Minimum Award**

Although the Order properly found Plaintiff entitled to statutory damages, it relied upon a number of “similarly situated” cases to award Plaintiff only \$6,000.00 (the equivalent of just \$127.66 per work). CM/ECF 24 at p. 5. As explained below, Plaintiff respectfully submits that Your Honor misconstrued the case law in a way that led to the entry of an impermissibly low award.

##### **1. The Copyright Act Imposes Statutory Damages on a Per Work, Not Per Case Basis**

The Order suggests that three similarly situated cases warrant a statutory award of

\$6,000.00. The cases cited indeed assessed damages at \$6,000.00, but each such case involved only one copyrighted work. *See Countryman Nevada, LLC v. Adams*, No. 6:14-cv-491, 2015 WL 574395 (M.D. Fla. Feb. 11, 2015) (awarding \$6,000.00 per work in a similarly situated case involving one work); *TCYK, LLC v. Martin*, No. 8:14-cv-00087, 2014 WL 6978149 (M.D. Fla. Dec. 9, 2014) (same); *Thompsons Film, LLC v. Velez*, No. 6:13-cv-671, 2014 WL 3721288 (M.D. Fla. July 28, 2014) (same); *Bait Productions PTY Ltd. v. Aguilar*, No. 8:13-cv-161, 2013 WL 5653357 (M.D. Fla. Oct. 15, 2013) (same). In these cases, an award of \$6,000.00 was appropriate and lawful because the Copyright Act imposes statutory damages on a *per work* basis. *See* 17 U.S.C. § 504(c)(1) (“an award of statutory damages for all infringements involved in the action, *with respect to any one work*”); *MCA Television Ltd. v. Feltner*, 89 F.3d 766, 772 (11th Cir. 1996) (emphasizing that § 504’s statutory damages are set forth on a per work basis, with reference to each individual work infringed); *BWP Media USA Inc. v. A.R. Commc’ns, LLC*, No. 6:14-cv-120, 2014 WL 5038590 \*4 (M.D. Fla. Oct. 6, 2014) (“Statutory damages must be calculated according to the number of separately copyrightable works infringed”). Since *Countryman Nevada*, *TCYK*, *Thompson*, and *Bait Production* each involved only one copyrightable work, the \$6,000.00 award granted in those cases was within the permissible per-work range of \$750.00 and \$150,000.00. *See* 17 U.S.C. § 504(c).

Here, Your Honor found that, for purposes of ascertaining damages, Plaintiff’s works and BitTorrent infringement claims are analogous to those at issue in *Countryman Nevada*, *TCYK*, *Thompson*, and *Bait Productions*. *See* CM/ECF 24 at p. 5. Your Honor overlooked, however, that Defendant infringed not merely one (1), but forty seven (47), of Plaintiff’s works. Adopting the \$6,000.00 per work analysis utilized in *Countryman Nevada*, *TCYK*, *Thompson*, and *Bait Production*, the proper award here would be \$282,000.00. Such an award is appropriate and

lawful under the Copyright Act because it is not less than \$35,250.00 (\$750.00 per work) and not more than \$7,050,000.00 (\$150,000 per work). *See* 17 U.S.C. § 504(c). Neither the Copyright Act nor *Countryman Nevada, TCYK, Thompson*, or *Bait Production* supports an award of less than \$750.00 per work, especially where, as here, Defendant's infringements were willful.

**2. Since Statutory Damages Are Designed To Punish And Deter, Evidence of Actual Damages Cannot Cause a Court to Depart from the Permissible Range of Statutory Damages**

Your Honor's Order departs downward from the statutory minimum because Plaintiff "failed to provide any evidence of its own lost sales, profits, or licensing fees as a result of the infringement to assist the Court in determining the appropriate amount of statutory damages to award." CM/ECF 24 at p. 5. The Order explains that it was for this reason that "a statutory award of \$6,000 is appropriate," and it cites *Clever Covers, Inc. v. Southwest Fla Storm Defense, LLC*, 554 F.Supp.2d 1303, 1313 (M.D. Fla. 2008). *Clever Covers* involved the infringement of two copyrighted works for which a copyright holder sought \$300,000.00 (\$150,000.00 per work), the maximum available award. *See Clever Covers*, 554 F. Supp.2d. at 1313. The *Clever Covers* Court acknowledged that the defendants had willfully infringed, but was reluctant to award "a windfall recovery" of \$300,000.00 since indirect evidence suggested the plaintiff's actual damages were \$160,000.00, at most. *See id.* Instead, the Court awarded "\$31,000 per infringed copyright, or a total of \$62,000," an award well within the permissible statutory range and one that the Court deemed adequate to punish and deter. *See id.*

*Clever Covers* is not analogous to this case because this suit involves infringement via the BitTorrent protocol. This being the case, Defendant necessarily and materially aided thousands of other individuals, also using the BitTorrent protocol, to further infringe Plaintiff's works. Plaintiff's actual damages are thus not merely the lost sales of its content to Defendant, but also

to those thousands of other infringers. In the aggregate, these lost sales far exceed \$70,500.00 (the modest award Plaintiff requested). *See* CM/ECF 21 at p. 10. Moreover, *Clever Covers* further reaffirmed that, besides compensation, statutory damages serve the dual purposes of punishment and deterrence. *See Clever Covers*, 554 F. Supp.2d at 1310 (“The court should be guided by purposes of the Act including ... deterrence of further wrongful conduct by defendant and others.”); *see also Bait Productions Pty Ltd. v. Murray*, No. 8:13-cv-0169, 2013 WL 4506408, \*7 (M.D. Fla. Aug. 23, 2013) (“[T]he imposition of statutory damages serves to sanction or punish defendants in order to deter wrongful conduct.” (citing *St. Luke’s Cataract & Laser Inst., P.A. v. Sanderson*, 573 F.3d 1186, 1205 (11th Cir. 2009))).

So while *Clever Covers* indeed recognizes that maximum statutory damages should not be awarded when such would create an unfair windfall for a copyright holder, it in no way states that a court may consider actual damages to issue an award outside of the lawful statutory range. Indeed, the statutory language makes clear that the election of statutory damages is an alternative to actual damages, such that “[p]roof of actual damages or profits is not necessary.” *Nintendo of Am., Inc. v. Ketchum*, 830 F. Supp. 1443, 1445 (M.D. Fla. 1993) (“Under 17 U.S.C. § 504(b), the copyright owner may elect statutory damages *in lieu* of actual damages and profits[,], whether [or not] there is adequate evidence of actual damages to the copyright owner or profits gained by the infringer.”). In other words, and because statutory damages are intended to also punish and deter, they “need not necessarily be proportionate to actual damages because statutory damages also serve a deterrent function.” *Malibu Media, LLC v. Fitzpatrick*, No. 1:12-cv-22767, 2013 WL 5674711, \*5 (S.D. Fla. Oct. 17, 2013); *see also Sony BMG Music Entm’t v. Tenenbaum*, 719 F.3d 67, 71 (1st Cir. 2013) (explaining that when a copyright holder pursues exclusively statutory damages, the damages need not bear any relation to actual damages); *Capitol Records*,

*Inc. v. Thomas-Rasset*, 692 F.3d 899, 909–10 (8th Cir. 2012) (same). Consequently, evidence of actual damages cannot cause a court to depart from the permissible range of statutory damages; a court is simply without discretion to issue an award of less than \$750.00 per work or more than \$150,000 per work.<sup>1</sup> *Accord Cable/Home Comm. Corp. v. Network Productions, Inc.*, 902 F.2d 829, 852 (11th Cir. 1990) (“The court has wide discretion in determining the amount of statutory damages to be awarded, constrained only by the specified maxima and minima.”). Plainly, nothing in *Clever Covers* supports an award of \$6,000.00 (\$127.66 per work) in this case. If Your Honor were to rely upon the \$31,000.00 per work analysis in *Clever Covers*, the award here would be \$1,457,000.00. Alternatively, the Court could award \$105,750.00, adopting the \$2,250.00 per work standard frequently used in similar cases involving willful infringement via the BitTorrent protocol. *See, e.g., Malibu Media LLC v. John Does*, 950 F. Supp.2d 779, 780–81 (E.D. Pa. 2013) (awarding \$2,250.00 per infringement for the online infringement of numerous copyrighted works); *Tenenbaum*, 721 F. Supp.2d at 116 (same); *Thomas-Rasset*, 680 F. Supp.2d at 1045 (same).

#### IV. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests Your Honor reconsider the Order and issue an amended final judgment awarding Plaintiff statutory damages within the permissible statutory range.

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<sup>1</sup> The one exception, not here implicated, is if the court finds that the infringer “was not aware and had no reason to believe that his or her acts constituted an infringement of copyright.” In that unique instance, a court has discretion to reduce an award of statutory damages to not less than \$200.00 per work. *See* 17 U.S.C. § 504(c)(2). That situation does not apply here because this Court correctly found Defendant *willfully* infringed forty seven (47) of Plaintiff’s copyrighted works over a ten month time period. *See Arista Records, Inc. v. Beker Enters., Inc.*, 298 F. Supp.2d 1310, 1313 (S.D. Fla. 2003) (“Default alone establishes willfulness based on allegations of willfulness in plaintiff’s complaint” (citing *Microsoft Corp. v. Wen*, No. C 99-04561, 2001 WL 1456654 (N.D. Cal. Nov. 13, 2001))). Additionally, the innocent infringement defense is not available when, as here, each of the infringed works contained a copyright notice.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 26, 2015, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and all parties using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing document via U.S. Mail to the persons set forth in the Service List below.

/s/ M. Keith Lipscomb  
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