



Sky Diving for Dollars: Ninth Circuit Upholds Jury's \$6 Million Award to Skydive Arizona for Defendants' Trademark Infringement, False Advertising, and Cybersquatting

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Skydive Arizona sued a group of defendants, collectively called "Skyride" by the court, for trademark infringement, false advertising, and cybersquatting. At trial, the jury awarded Skydive Arizona \$1 million in actual damages for false advertising, \$2.5 million in actual damages for trademark infringement, \$2,500,004 in defendant's profits from the trademark infringement, and \$600,000 for statutory cybersquatting damages. The district court, upon its own initiative, then doubled the two actual damages awards, for a total of \$10.1 million. Finally, the district court enjoined Skyride from operating in Arizona. Skyride appealed and, except for the doubling of actual damages, lost.¹ See *Skydive Arizona, Inc. v. Quattrocchi*, No. 10-16099 (March 12, 2012), available here: <http://www.ca9.uscourts.gov/datastore/opinions/2012/03/12/10-16099.pdf>.

Trademark and false advertising litigation is different from other commercial litigation in many respects, but what the Ninth Circuit opinion highlights is the difference in precision required to support monetary damages. Skyride's appeal focused on the lack of evidentiary support for the jury award. Specifically, Skyride argued that the district court abused its discretion by:

(1) upholding the jury's actual damages award, because Skydive Arizona did not present sufficient evidence concerning the amount of damages; (2) upholding the jury's lost profits award, because the jury failed to deduct SKYRIDE's expenses and costs based on the "clearly erroneous" testimony of Skydive Arizona's expert; (3) enhancing the jury's damages award to punish SKYRIDE; and (4) upholding and enhancing the entire actual damages, lost profits, and statutory damages award, because the judgment was grossly excessive.

¹ Skydive Arizona appealed the geographic scope of the injunction as being too narrow and lost, but we won't address that here. For further background on this case and the facts at issue, see http://blog.ericgoldman.org/archives/2010/05/geographic_trad.htm.



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Other than (3), the Ninth Circuit found these arguments unpersuasive.

Under the Lanham Act, a court may award the following in its discretion: (1) defendant's profits; (2) any damages sustained by the plaintiff; and (3) the costs of the action. 15 U.S.C. § 1117(a). "In assessing profits the plaintiff shall be required to prove defendant's sales only." *Id.* A mark holder is held to a lower standard in proving the exact amount of actual damages. See *La Quinta Corp.*, 603 F.3d 327, 342 (9th Cir. 2010). Plaintiff's damages are measured in the same manner as in tort cases: "the reasonably foreseeable harms caused by the wrong." A jury award may be supported by "crude" measures "based upon reasonable inferences." See *Intel Corp. v. Terabyte Int'l, Inc.*, 6 F.3d 614, 621 (9th Cir. 1993).

The jury had only the following evidence to support the actual damages award: three exhibits showing Skydive Arizona's advertising expenditure for the years 1997-2007, declarations and witness testimony blaming Skydive Arizona for problems caused by Skyride's acts, and counsel's request that the jury consider Skydive Arizona's need to engage in corrective advertising.

To establish Skyride's profits, Skydive Arizona presented an expert who calculated Skyride's revenues by:

calculating the number of Arizona residents identified in SKYRIDE's records and then increasing that number by 2.131 to account for files missing residence information. He then multiplied that number by an average transaction amount, and then adjusted for resulting revenue from out-of-state residents who also jumped in Arizona. Lastly, [he] added an interest factor of 10%, using the prejudgment interest rate applicable under Arizona law.

Skyride argued after trial and on appeal that this expert testimony was clearly erroneous because "he did not properly deduct vendor payments or overhead costs, and he applied an improper interest rate." The Ninth Circuit stressed that Skyride did not challenge the admissibility of this expert testimony under Federal Rule of Evidence 702 through a *Daubert* challenge at any point during the trial and, therefore, upheld the award of profits. Of course, both courts could also have pointed out that, under the Lanham Act, the burden of deducting vendor payments and overhead was Skyride's and not Skydive Arizona's.

Skyride finally won a point on appeal by successfully arguing that the district court doubled the damages awards to punish Skyride. Lanham Act damages must be compensatory and cannot be punitive. 15 U.S.C. § 1117(a). The district court's commentary surrounding the doubling conveyed its distaste for Skyride's "purposefully deceitful" conduct and need for Skyride to "accept the wrongfulness of [its] conduct."

Skyride's last argument was that the overall award of \$10 million at trial was grossly excessive and punitive for a company with "only \$23 million" in nationwide gross revenues. The Ninth Circuit easily dismissed this contention that, essentially, Skyride was "too small to justify such a large award."

So, here is what you need to support a \$6 million damages award in a trademark and false advertising case: an unsympathetic defendant, proof of your advertising expenditures, proof of

defendant's revenues, and evidence suggesting the need for corrective advertising. Your results may vary.

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