DAMAGE VALUATION IN MUSIC COPYRIGHT

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1. INTRODUCTION

Some years before his death, the distinguished copyright lawyer Arthur Latman came to quip, "Copyright law, not horse racing, is the sport of kings". For those who know the track sheets of both disciplines, he wasn't kidding.

But Mr. Latman neglected to state a critical distinction between the two kingly sports. Horse betters know how to handicap. Copyright lawyers don't.

In the course of my career as a testifying expert in intellectual property cases, I can share my honest reflections. The best of copyright attorneys appear to have digested considerable amounts of statute and case law related to legal terminology, explicit rights, fair use, first sale, merger doctrines, "look and feel", parody/satire, etc. Less certain in the conversation is the proper awareness about estimating damages and ways to use an expert to facilitate settlement. As a result, it is thus possible for an attorney to with an elegant case only to wind up with a pocketbook from the Glue Factory.

What matters to the client is not the game of jurisprudential chess that is played in court parlors. Rather, clients prefer what tinkles in the cash register.

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To this end, this paper will review considerations that may determine proper valuations of copyright in compositions and recordings from the perspective of a testifying expert active in the area of media, entertainment, and intellectual property.

2. THE LEGAL FOUNDATIONS OF COPYRIGHT

Copyrights in musical compositions and sound recordings are protected by the Copyright Act of 1976, which is encoded in Title 17 of the U.S. Code.[1] Per statute, each track of recorded music implicates separate copyrights in the sound recording and the underlying musical composition. For example, when Peter, Paul, and Mary recorded Bob Dylan's "Blowing in the Wind" the record label owned rights in the track that was imprinted on the record while the famous writer owned rights in the words and music in the underlying song.

Musical Compositions

Section 106 of the Copyright Act grants four exclusive rights to writers of musical compositions, or the publishers to whom writers generally transfer their copyrights.[2] These four rights include:

a. The right to reproduce the copyrighted work in copies or phonorecords,
b. The right to prepare derivative works based on the copyrighted work,
c. The right to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending, and
d. The right to perform the copyrighted work publicly.

For a fuller listing of all rights itemized in Section 106, see the attached Table 1.

The first three rights regarding the reproduction, derivations, and distribution of copies of musical compositions are termed the *mechanical rights*.[3] When implicated in digital

[1] 17 U.S.C. §101-1332 (2000).

[2] 17 U.S.C. §106 (2000).

downloads or streams, these are termed *digital rights.* Music publishers collect mechanical or digital royalties from licensees of their compositions through the services of mechanical rights organizations (MROs), most prominently the Harry Fox Agency (HFA).[4] Record labels pay mechanical or digital royalties on record sales based on the number of units sold of the protected work. After deducting for administrative expenses, the MROs return collected moneys to publishers, who pay writers their contracted share.

The copyright owner has exclusive authority to license first-time reproductions of the original work. After an authorized phonorecord[5] of a composition is publicly distributed, subsequent performers may legally record (or cover) an unmodified version of the same musical work on another phonorecord without further permission from the rights owners, subject to a statutory (or compulsory) license. Statutory fees were established by the Copyright Office in 1997, and are adjusted biennially. At present, the statutory mechanical royalty fee is the larger of 9.1 cents per song or 1.75 cents per minute.[6]

Copyright owners also retain the exclusive right to license their works for use with corresponding video material in movies, videos, or programs. These contracts are termed synchronization licenses. Synchronization licenses are not subject to compulsory licenses, which means that a song can never be used with an image without clearing the use with the rights owner.

Performance Rights

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[3]The term mechanical right is historically derived from the time when records were mechanically and not electronically reproduced. The right to license the reproduction of music on television, video, and motion picture soundtracks is termed the synchronization right.

[4]HFA is the music publishing industry's principal clearinghouse for the administration of mechanical and synchronization rights licenses. Unlike the performing rights societies, HFA is only a collection agency and does not negotiate contracts with licensees.

[5]17 U.S.C. § 101 (2000) "'Phonorecords' are material objects in which sounds...are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term 'phonorecords' includes the material object in which the sounds are first fixed."

[6]37 C.F.R. sec. 255.3 (2001).

The fourth listed right of Section 106 protects public performances of musical works from unauthorized use. Under 17 U.S.C. §101, to "perform" a musical composition (outside of audiovisual applications) is to "recite, render, play, dance, or act it, either directly or by means of any device or process."[7] Performance rights may implicate use in live venues and transmission media (such as airwaves and wires),

Public performance rights for compositions used in audio, non-dramatic[8] presentations are almost universally conveyed through licenses granted by the nation's three performing rights organizations (PROs)–the American Society of Composers, Authors, and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC -- with which rights owners catalog their works.[9] Each PRO licenses to performance venues musical works registered in its respective catalog and collects and distributes money for the publishers and writers who are its members or affiliates.[10]

Sound Recordings

In addition to musical compositions, Section 106 also protects sound recordings that imprint the work on disks, tapes, phonorecords, or digital tracks.[11] In the original Copyright Act of 1976, the protection of sound recordings was limited to rights of reproduction, derivation, and distribution. Under this domain, broadcast stations that played recorded music paid copyright royalties only to writers and publishers of the underlying composition, but not to the artists and labels that actually recorded the track.[12]

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[7]17 U.S.C. §101 (2000).

[8]PROs do not license music for dramatic performances, such as staged musicals, operas, or full concert versions of either. If a song is used in such a venue, prospective producers must acquire a performance license directly from the infringing writer/publisher and /or producers.

[9]The acronym no longer is meaningful.

[10]Analog transmissions covered by public performance licenses include broadcast radio, television, and cable/satellite. Digital transmissions include subscription services (e.g., Muzak), satellite radio (Sirius), Internet radio (Live 365, Pandora), and internet services (Rhapsody or iTunes). .

[11]The Copyright Act defines "sound recording" as a work that results "from the fixation of a series of musical, spoken, or other wounds...regardless of the nature of the material subjects, such as disks, tapes, or other phono records, in which they are embodied." 17 U.S.C § 101 (2000).

[12]Presumably, broadcast performances promote record sales that otherwise would not take place. See, e.g., S. Rep. No. 104-128, at 14-15 (1995).

Congress enacted in 1995 a limited performance right for sound recordings by passing the Digital Performance Rights in Sound Recordings Act (DPRSRA).[13] The act amended Section 106 to include for rights owners in the sound recording the right "to perform the copyrighted [recording] publicly by means of a digital audio transmission", which would include wired or over-the-air transmissions that use digital technology.[14] The Digital Millennium Copyright Act of 1998 (DMCA) further amended sections 17 U.S.C. §114.[15] As a result, record labels are now compensated for public performances of their sound recordings on digital music subscription services (e.g., Muzak), satellite radio broadcasts (Sirius), Internet radio (Live 365, Pandora), and online music providers (Apple's iTunes and Rhapsody).[16]

Section 114 of DPRSRA sets forth a three-tier structure for digital audio transmissions:

1. Record labels retain exclusive authority to license and establish rates of all *downloaded* and *interactively streamed* digital audio transmissions,[17] *except*

2. *Digital transmissions of over-the-air broadcasts* (e.g., radio and television stations) remain exempt from paying royalties to owners of sound recordings, [18] *and*

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[13]Pub. L. No. 104-39, 109 Stat. 336 (1995). For a comprehensive account of the legislative history of the Act and a highly detailed description of its terms, see Eric D. Leach, Everything You Always Wanted To Know About Digital Performance Rights But Were Afraid To Ask, 48 J. COPYRIGHT SOC'Y 191 (2000).

[14]17 U.S.C. § 106(6) (2000).

[15]Pub. L. No. 105-304, 112 Stat. 2860 (1998). For criticism of the complexity of this licensing framework, see David Nimmer, Ignoring the Public, Part I: On the Absurd Complexity of the Digital Audio Transmission Right, 7 UCLA ENT. L. REV. 189 (2000).

[16]17 U.S.C. § 114(d) (1)-(3) (2000).

[17]17 U.S.C. §114(b), (d) (3) (2000).

[18]17 U.S.C. §114(d) (1) (A)-(B) (2000).

3. Some *non-interactive streaming* uses are eligible for a compulsory license that is subject to statutory rates and collected by Sound Exchange. The remaining non-interactive uses are under the exclusive licensing authority of the record label.[19]

Table 2 presents a general grid of the terms of copyright for mechanical, synchronization, and performance rights.

3. THE LEGAL FRAMEWORK FOR DAMAGES

Infringers of copyrighted songs and recorded tracks have violated copyrights in both unknown fare and established works. In the former case, the deprived writer may be an unknown individual who loses a career opportunity for accreditation in their work.[20] In the latter, a more established writer or publisher may lose both a licensing opportunity and control of their original composition.[21]

Per Section 504(b) of the Copyright Act, a "plaintiff may recover damages that he actually suffers from the lost sales or licensing opportunity, and additional profits not taken into account".[22] If infringing in solo, a copyright infringer will wind up paying to a winning plaintiff all profits earned from the use of the infringing song. If infringement involves more than one party (e.g., an infringing writer, producer, and a record label), all parties are *jointly liable* for the actual damages that the plaintiff suffers as a result of the infringement. Each is *severally liable* to disgorge any additional profits, if any, earned above its assigned damage total.

Per the terms of Section 504(c), a plaintiff may choose instead to recover statutory damages to compensate for harms that are neither measurable nor otherwise reflected in

[19]17 U.S.C. §114(d) (2) (A) (i) (2000) An "eligible nonsubscription transmission" is a non-interactive nonsubscription digital audio transmission that is not exempt and that is part of a service that provides audio programming consisting of performances of sound recordings. 17 U.S.C. §114(j) (6) (2000).

[20]Boyd Jarvis, infra note 47.

[21]ABKCO Music, infra note 49, 48

[22]17 U.S.C. § 504(b).

actual damages.[23] For non-willful infringement, recovery may be not less than $750 or more than $30,000 per infringement. The penalty for acts of willful infringement is not more than $150,000 per infringement. Plaintiffs may recover statutory damages (and attorney's fees) only if the underlying work is properly registered with Copyright Office.

Table 3 identifies areas in which rights owners of musical compositions may recover as actual damages unpaid licensing fees and royalties, as well as defendant profits that have not been accounted for in these damage assessments. Table 4 identifies areas in which rights owners of sound recordings may recover licensing fees, royalties, and unpaid amounts.

4. ACTUAL DAMAGES

Experts may measure actual damages that arise from a copyright infringement by estimating earnings from lost sales and/or licensing opportunities.[24] Plaintiffs may recover damages from labels, publishers, artist, writers, or producers. Licensing valuations should be estimated as the price that "a willing buyer would have been reasonably required to pay to a willing seller for plaintiff's work."[25] To establish market value, the court must identify benchmark transactions that involve uses of works that are comparable to the infringed property.[26]

Some benchmarks for musical compositions are as follows:

Mechanical Licenses: Rights owners of infringed musical compositions may recover *mechanical royalties* that they would have earned for proper licensing of reproductions of their works. Payments for reproductions are generally estimated by multiplying a per unit

[23]Frank Music, infra note 51.

[24]On Davis v. The Gap, Inc. 246 F. 3d 152 (2nd Cir. 2001) (upholding the idea that plaintiff's distinctive eyewear was a properly licensed item in the clothing advertisements in which it contributed a visual draw).

[25]Frank Music, infra note 51, at 512; sourcing Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp. 562 F. 2d 1157, 1174 (9th Cir. 1977); see also Flying J Inc. v. Central CA Kenworth et al., 2002 U.S. App. LEXIS 18377 (9th Cir. 2002); Jack Mackie v. Bonnie Rieser, et al., 296 F. 3d 909 (9th Cir. 2002), 3 M. Nimmer, Nimmer on Copyright, §14.02, at 14-6 (1985).

[26]Id., Frank Music, at 513.

fee times the number of infringing copies sold. Per unit fees for infringed compositions are reasonably based on statutory license fee, which is also the market standard for compensating independent songwriters whose works appear on an album.[27]

Public Performance Royalties: Performance royalties are paid for live and transmitted uses of the composition. Fees per performance depend on methods designed and deployed by each PRO in order to allocate the pot of collected royalties from various types of licensees.[28] Some rough estimates of the outcome:

Radio: 6-12 cents/use
Feature Use Primetime, Local TV: $1.50/use; Network TV: $5.75/station
Background Use, Primetime: 0.38/minute; Network TV: $0.55/ (minute-station)
Theme Song, Local TV: $0.80 Network TV: $2.50/station

Synchronization Licenses: Synchronization licenses cover musical compositions that are integrated into recorded soundtracks in movies, videos, and commercials. Synch fees for theater movies range from $15,000 to $60,000.[29] Representative synch fees for musical compositions used on television programs are $400 (1-30 seconds), $450 (31-60), $550 (61-120), and $650 (120+).[30] In both instances, distinctions must be made for feature, background, thematic, and commercial uses, as well as the popularity of the composition.

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[27]Supra note 6 and surrounding text.

[28]Id., 238-9.

[29]J. Brabec and T. Brabec, MUSIC, MONEY, AND SUCCESS, New York (2000), 174. The amount paid will depend on a number of factors -- "how the song is used (sung by a character in the film, background instrumental, vocal performance of a recording from a jukebox, etc.), the overall budget for the film and the music budget, the stature of song being used (old standards, current hits, new compositions), the actual timing of the song as used in the film (45 seconds, one minute, two minutes), whether there are multiple uses of the song in various scenes, whether the use is over the opening or closing credits, whether there's a lyric change, the term of the license (normally life-of-copyright), the territory of the license (usually the world or the universe), and whether there is a guarantee that the song will be used on a soundtrack album or released as a single." At http://www.ascap.com/musicbiz/money-pictures.html (retrieved January 12, 2005).

[30]Brabec, Id., 142.

A second license is necessary to use a pre-recorded sound recording that may contain a musical composition.

An expert may determine lost performance or synchronization royalties by examining the total amount collected by the infringing publisher or writer, and then determining a reasonable share for the infringed party. Such a process is more complicated for the mechanical components, since infringer collections are reduced if the infringing work is a *controlled composition* written by the lead artist on an album. Through industry custom and practice, controlled compositions are generally compensated at 75% of the full statutory rate.

5. DEFENDANT PROFITS

In addition to recovering actual damages, a copyright plaintiff may disgorge from any defendant any additional profit that results from an infringement that is unaccounted for in the calculation of actual damages. Additional profits for direct, contributory,[31] or vicarious[32] infringement may here be recovered from labels, publishers, artists, writers, or producers. Such recovery is intended to eliminate any potential profit that would be earned otherwise from acts of infringement. Congress purposely designed profit disgorgement to "prevent the infringer from unfairly benefiting from a wrongful act."[33]

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[31]Contributory infringement results from a person "who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another" and who therefore is therefore "equally liable with the direct infringer." Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F. 2d 1159, 1162 (2d Cir. 1971); Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996). Moreover, actual knowledge is not necessary; contributory liability can also be incurred if the defendant had reason to know or was willfully blind to any form of infringing activity. Cable/ Home Communication Corp. v. Network Productions, 902 F.2d 829, 846 (11th Cir. 1990); Sega Enter., Ltd. v. MAPHIA, 948 F. Supp. 923, 933 (N.D.Cal. 1996).

[32]A person may participate in vicarious infringement if he "has the right and ability to supervise the infringing activity and also
has a direct financial interest in such activities." Gershwin, Id., at 1162; Fonovisa, Id., at 264. No actual knowledge is required.
Moreover, it is not necessary to identify financial direct monetary gain resulting from direct sale; the use of infringing material
(e.g., music) to create interest and atmosphere may be sufficient.

It is here hoped that such stiff disgorgement penalties may deter potential infringers, particularly recidivists who would otherwise prey on creators and profit themselves from a catalog of unlicensed work.[34] That is, "by preventing infringers from obtaining any net profit, [the statute] makes any would-be infringer negotiate directly with the owner of a copyright that he wants to use, rather than bypass the market".[35] To otherwise allow potential infringers to retain profits could evidently promote theft, or otherwise tip the balance of negotiations to the disadvantage of the rights owner.

To establish defendant enrichment, the plaintiff is required to prove only gross revenues received by the infringer. Gross revenues earned by a defendant may include domestic and foreign revenues earned from any reproduction or performance made in the U.S. [36] Once defendant revenues are established, the defendant must prove deductible expenses and apportionment for the presence of other mitigating factors; see Table 5.[37]

Music defendants may deduct expenses related to direct production of the infringing material,[38] which may include (per the terms of a defining case[39]) verifiable costs related to distribution, manufacturing, packaging, artwork, recording, royalties, and promotion and marketing, as well as sales discounts.
If actual costs are proven, the defendant can deduct only those expenses related to actual production or distribution of the infringing song or track. Unless substantiated by actual costs, the defendant cannot properly claim as a deductible expense some intramural transfer of dollars made from one division of its company to another; e.g., a fixed percentage of revenues from the label division to the distribution division

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[33]H.R. Rep. No. 1476, 94th Congress, 2d Session 161 (1976).

[34]Sony Corp. of America v. Universal City Studios, Inc., 104 S. Ct. 774, 793, reh'g denied, 104 S. Ct. 1619.

[35]Taylor v. Meirick, 712 F. 2d 1112, 1120 (1983).

[36]Sheldon v. Metro-Goldwyn Pictures Corp., 106 F. 2d 45, 52 (2d Cir. 1939), aff'd 309 U.S. 290, 60 S. Ct. 681, 84 L.Ed. 2d 825 (1940).

[37]17 U.S.C. § 504(b).

[38]Id., at 54, see also Allen-Myland v. International Business Machines, 770 F. Supp. 1014 (E.D. Pa., 1991).

[39]Boyd Jarvis, infra note 47, at 295.

If infringement is willful, the defendant may not deduct any apportionment of any common or overhead costs. From an economic perspective, these costs would have been incurred regardless of whether the infringing product was sold, and are not then a considerable element when determining incremental profits earned by an infringing release. This particularly implicates general and administrative expenses.

If infringement is non-willful,[40] a defendant may legally deduct from gross revenues a share of company overhead,[41] as well as income taxes.[42] As explained in the above paragraph, this is an arguable allowance from an economic perspective. If overhead can be deducted, defendants must come up with a fair method of assigning the defined amount to infringed works. Previous methods have been based on proportion of production costs[43] or product sales.[44]

In addition to recovery from album sales, a plaintiff may attempt to recover a share of artist profits earned in concerts if the infringing work is so performed. It is here necessary to sue the artist as well as the label. Recovery would rightfully occur here whenever the use of the infringed work is not covered by a performance license entered with a performing rights organization. This is more common than imagined. The infringed work may not yet be catalogued with any PRO. If it is, *only unchanged* use of the original composition is permitted by the performance license. That said, both plaintiffs in the Harrison and Bolton cases would have rightfully recovered much more from concert revenues.

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[40]A plaintiff can prove willful infringement by showing knowledge or reckless disregard concerning the possibility that the action was an infringement. Fitzgerald Publishing Co. v. Baylor Publishing Co., 807 F. 2d 1110, 1115 (2nd Cir. 1986); Twin Peaks Prods. Inc. v. Publications Int'l Ltd., 996 F. 2d 1366, 1382 (2nd Cir., 1993).

[41]Allen-Myland, supra note 38, at 1025; Kamar International Inc., v. Russ Berrie & Co., 752 F. 2d 1326, 1331 (9th Cir. 1984); Sammons v. Colonial Press, Inc., 126 F. 2d 341, 351 (1st Cir. 1942).

[42]L.P. Larson, Jr. Co. v. Wm. Wrigley, Jr. Co. 277 U.S. 97, 48 S. Ct. 449, 72 L. Ed. 800 (1928); Sheldon, supra note 37, at 53; In Design v. K-Mart Apparel Corp., 13 F. 3d 559, 566 (2nd Cir. 1994).

[43]Id., Sheldon, at 52-53

[44]Love v. Kwitny, 772 F. Supp. 1367, 1371 (S.D.N.Y. 1991), aff'd 963 F. 2d 1521 (2nd Cir. 1991), cert denied, 113 S. Ct. 181, 121 L. Ed. 127 (1992).

6. APPORTIONMENT

Infringing defendants often combine copyrighted musical works with their own independent contributions; e.g., infringed melodies with new words or sampled music that is looped through an infringing musical work. While courts have sometimes granted full awards to owners of the infringed work,[45] plaintiff awards can be reduced based on an apportionment for the value of the independent contribution. It remains the defendant's responsibility to prove the validity of any apportionment technique.

There are two areas for consideration in an apportionment – the value of the infringed work to the new work, and the value of the new work to the entire album or video.[46] With regard to the former, a District Court explicitly ruled out a "second-by-second" apportionment of the worth of an infringing composition between infringing and non-infringing elements.[47] The court here recognized, inter alia, the importance of recognizable choruses and beats that can be more important to an infringing composition than a literal "time count" would determine.

As another apportionment matter, it is not necessary to assign equal weight to infringed melodies and new lyrics when determining the apportioned value of each element in a new work. In this regard, infringed writers of the French song "Pour Toi" received an 88 percent share of profits from the infringing hit "Feelings", even though the defendants took only the melody from the original work.[48]

With regard to the second concern for apportionment -- value of an infringing song to an entire album--, a District Court estimated the relative importance of each track on an album in promoting sales of the release. That is, after finding that George Harrison's chart-breaking "My Sweet Lord" was an infringement of the classic rock hit "He's So Fine", the court awarded to plaintiffs 50 percent of the sound recording profits from

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[45]Roulo v. Russ Berrie & Co. 886 F. 2d 931 (7th Cir. 1989), cert. denied, 110 S. Ct. 1124 (1990).

[46]Three Boys, infra note 50.

[47]Boyd Jarvis v. A&M Records, et al., 827 F. Supp. 282, 295 (N.J. 1993). In related photographic cases, courts have ruled out or a page-by-page apportionment of a magazine with an infringing collection of photographs. Blackman v. Hustler Magazine, 800 F. 2d 1160 (1986).

[48]Gaste v. Morris Kaiserman, et al., 863 F. 2d 1061, 1070 (2nd Cir. 1988).

Harrison's entire album "All Things Must Pass".[49] The apportionment was based on the song's proportion of BMI royalties, which corresponded roughly to its share of radio airplay.

Based on relative shares of radio play, a jury awarded to the plaintiff (Isley Brothers) 28 percent of revenues from defendant's (Michael Bolton) album "Time, Love, and Tenderness", which included an infringing version of the group's earlier hit "Love is a Wonderful Thing".[50] The infringed work was also judged to contribute to 66% of the value of the infringing composition that appeared on the album.

Plaintiffs may also attempt to recover indirect profits arising from other income that the defendant received as a consequence of the infringement. In a landmark decision, a District Court awarded to copyright owners a share of casino and hotel revenues for an infringement performed in an in-house Las Vegas revue of popular Broadway shows.[51] In an advertising venue, Cream Records received 1.37 percent of the profit of Schlitz malt liquor after the defendant took its well-known "Movie Theme from Shaft" for a beer commercial.[52] However, particularly since the Ninth Circuit's decision in *Polar Bear v. Timex*,[53] valuations of purported indirect profits will involve tests of causality, which is not a trivial thing to prove.[54]

If plaintiffs can recover damages, they may also recover prejudgment interest for lost money that would otherwise have been had.[55] The appropriate discount rate is the one year Treasury bill rate.[56] Winning plaintiffs may also recover attorney's fees if the infringed work was registered with the Copyright Office.[57]

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[49]ABKCO Music Inc. v. Harrisongs Music, Ltd., 722 F.2d 988.

[50]Three Boys Music Corp. v. Michael Bolton, et al., 212 F. 3d 477 (9th Cir. 2000).

[51]Frank Music v. Metro-Goldwyn Mayer, 772 F. 2d 505, 517 (9th Cir. 1985).

[52]Cream Records, Inc., v. Jos. Schlitz Brewing Co., 754 F. 2d 826, 829 (9th Cir. 1985).

[53]384 F. 3d 700 (9th Cir. 2004).

[54]"It is therefore particularly important for the plaintiff in [an] indirect profit action to demonstrate the alleged causal link between the infringement and profits sought". Id., 384 F. 3d at 711 n. 7.

[55]Frank Music Corp. v. Metro-Goldwyn-Mayer, 886 F. 2d 1548, 1550 (9th Cir. 1989).

Courts lean toward plaintiffs in damage recovery. As a matter of common law, "every indulgence should be granted plaintiff in an attempt to arrive at a sum which is assuredly adequate"[58] and any doubt regarding computation should be resolved in favor of the plaintiffs.[59] Although defendants are permitted to deduct related expenses from identified product revenues, their failure to identify such expenses may result in a complete award of plaintiff revenues.[60] Furthermore, Courts have also awarded full consideration to plaintiffs when defendants have failed to provide a suitable procedure for allocating revenues or costs.[61]

7. FINAL POINTS

Some final points may be useful.

The decision to enter a music copyright case is a risky investment because the claim is complex and damage recovery is quite uncertain.

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[56]Id., In re Bloom, 875 F. 2d 224, 228 (9th Cir. 1989); Columbia Brick Works, Inc. v. Royal Ins. Co.., 768 F. 1066, 1071 (9th Cir. 1985).

[57]17 U.S.C. §505, In Design, supra note 42, at 567, McCulloch v. Albert E. Price, Inc., 823 F. 2d 316, 322 (9th Cir. 1987).

[58]Orgel v. Clark Boardman Co., 301 F. 2d 119, 121 (2nd Cir. 1960), cert. denied 371 U.S. 817, 83 S. Ct. 31, 9 L.Ed. 2d 58 (1962);

[59]Shapiro, Bernstein, & Co. v. Remington Records, Inc., 265 F. 2d 263 (2nd Cir. 1959). Moreover, when there is "imprecision in the computation of expenses, a court should err on the side of guaranteeing the plaintiff a full recovery." Gaste, supra note 48, at 1070, citing Sygma Photo News, Inc. v High Society Magazine, Inc., 778 F. 2d 89, 95 (2d Cir. 1985).

[60]Ice Music v. Michael Schuler and Coral Studios 1996 U.S. Dist. LEXIS 12083 (S.D.N.Y. 1996). Boyd Jarvis, supra note 47, at 293; Russell v. Price, 612 F. 2d 1123, 1130-31(9th Cir. 1979); cert. denied`446 U.S. 952, 100 S. Ct. 2919, 64 L. Ed. 2d 809 (1980).

[61]Smith v. Little, Brown & Co. 273 F. Supp. 870 (SDNY 1967); Fedtro, Inc. v. Kravex Mfg. Corp. 313 F. Supp. 990 (EDNY, 1970).

Litigators must always use all available data to monitor the ongoing worth of each component in a copyright claim. This is no small task. An expert is useful to define data needs and to help compel production of documents.

Attorneys should be handicapping with an expert. The expert should estimate the likely monetary outcome, and help the counselor to decline or settle the case if appropriate.

All potential parties should be identified and valued as a source of damage and profits that may be disgorged.

Parts of a damage recovery involve less risk than others. An expert should help discern a downside strategy that accounts for variable chances of success.

In this regard, both artist royalties and publishing incomes are relatively easy to identify beforehand from disclosed financial statements. There are few proper deductions from these dollar amounts. Plaintiff lawyers should estimate "easy totals" as some indication of the minimum worth of the plaintiff claim.

Parties that take a case to court may have an additional fight on their hands regarding legal liability. Plaintiffs should avoid bifurcation, as it takes effort to establish all liability before all numbers are in.

Experts should quantify the dollar difference between plaintiff damages and defendant profits. Defendants may be willing to pay plaintiff damages in order to settle, but will never disgorge all profits. An expert then helps decide whether to press for the larger in court.

With good expert advice, defendants should consider offering a reasonable motion for final judgment in order to avoid a trial that may be costly and risky to both parties.

A proper financial accounting of label profits will involve considerable analysis. From the outset, costs are less apparent and will require more expert analysis. .

Plaintiffs must beware -- the payoff in the end may be modest if costs are high relative to revenues. A bad expert proof of indirect profits may involve a successful motion *in limine*.

Defense must beware -- their experts may fail to verify costs appropriately and to design an apportionment technique that can pass a Daubert challenge. The outcome is total disgorgement of revenue.

Plaintiffs should avoid trials if appeals are likely to come up on the back end. Appeals can be costly and are frequent enough.

ABOUT THE AUTHOR

Michael A. Einhorn (mae@mediatechcopy.com, http://www.mediatechcopy.com) is an economic consultant and expert witness active in the areas of intellectual property, media, entertainment, damage valuation, licensing, antitrust, personal injury, and commercial losses. He received a Ph. D. in economics from Yale University. He is the author of the book *Media, Technology, and Copyright: Integrating Law and Economics* (Edward Elgar Publishers), a Senior Research Fellow at the Columbia Institute for Tele-Information, and a former professor of economics and law at Rutgers University. He has published over seventy professional and academic articles and lectured in Great Britain, France, Holland, Germany, Italy, Sri Lanka, China, and Japan.

In the technology sector, Dr. Einhorn worked at Bell Laboratories and the U.S. Department of Justice (Antitrust Division) and consulted to General Electric, AT&T, Argonne Labs, Telcordia, Pacific Gas and Electric, and the Federal Energy Regulatory Commission. He has advised parties and supported litigation in matters involving patent damages and related valuations in semiconductors, medical technologies, search engines, e-commerce, wireless systems, and proprietary and open source software.

Litigation support involving media economics and copyright damages has involved music, movies, television, advertising, branding, apparel, architecture, fine arts, video games, and photography. Matters have involved Universal Music, BMG, Sony Music Holdings, Disney Music, NBCUniversal, Paramount Pictures, DreamWorks, Burnett Productions, Rascal Flatts, P. Diddy, Nelly Furtado, Usher, 50 Cent, Madonna, and U2.

Matters involving trademark damages have included the Kardashians/BOLDFACE Licensing, Oprah Winfrey/Harpo Productions, Madonna/Material Girl, CompUSA, Steve Madden Shoes, Kohl's Department Stores, *The New York Observer*, and Avon Cosmetics. Matters in publicity right damages have involved Zooey Deschanel, Arnold Schwarzenegger, Rosa Parks, Diane Keaton, Michelle Pfeiffer, Yogi Berra, Melina Kanakaredes, Woody Allen, and Sandra Bullock.

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This biography is also available at *http://www.jurispro.com/MichaelEinhorn*

TABLE 1

Protected Rights for Copyrighted Works (17 U.S.C. 106)

The owner of the copyright has the exclusive rights to do and to authorize the following:

(1) to reproduce the **copyrighted work** in copies or phonorecords;

(2) to prepare derivative works based upon the **copyrighted work**;

(3) to distribute copies or phonorecords of the **copyrighted work** to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic **works**, pantomimes, and motion pictures and other audiovisual **works**, to **perform** the copyrighted work **publicly**;

(5) in the case of literary, musical, dramatic, and choreographic **works**, pantomimes, and pictorial, graphic, or sculptural **works**, including the individual images of a motion picture or other audiovisual **work**, to display the copyrighted work publicly; and

(6) in the case of **sound recordings**, to **perform** the copyrighted work **publicly** by means of a **digital audio transmission**.

Additional restraints and exemptions appear in 17 U.S.C. 107-122.

More at http://www4.law.cornell.edu/uscode/17/106.text.html

TABLE 2

The Copyright Matrix

	Mechanical Rights	Performance Rights*
Musical composition	**Owned by publisher**	**Owned by publisher**
	Collected by MRO	**Collected by PRO**
	Royalties directly paid to publisher	**Royalties directly paid to publisher and writer**
	Exclusive or Compulsory Licenses	**Blanket Licenses**

*The relationships illustrated in the chart are usually true for non-dramatic performances of musical compositions in radio broadcast and digital audio transmissions and may differ in other circumstances.

Sound recording	**Owned by label** **Collected in record sale or licensing** **Label collects price or fee**	**Owned by label** **Collected for digital audio transmissions only** **Collected directly or by Sound Exchange**

TABLE 3

Accounting Grid for Musical Compositions

	Mechanical	Synch	Performance	Defendant Profits
Singles	X			X
CDs	X			X
Movies		X		X
Home Video		X		X
TV Movie		X	X	X
Music Network Video		X	X	X
Analog Radio			X	NA.
Digital Radio			X	NA
TV Program		X	X	X
TV Advertisement		X	X	X
Dramatic Uses			X	X
Live Concerts			X	X
Internet Downloads	X			X
Internet Streams			X	X

TABLE 4

Accounting Grid for Sound Recordings

	Audio Use	Video Use	Performance	Defendant Profits
Singles	X			X
CDs	X			X
Movies		X		X
Home Video		X		X
TV Movie		X		X
Music Network Video		X		X
Analog Radio/Music Service				NA.
Digital Radio/Music Service			X	NA
TV Program		X		X
TV Advertisement		X		X
Dramatic Uses				X
Live Concerts				X
Internet Downloads	X			X
Internet Streams			X	X

TABLE 5

Breaking Down Defendant Profits

Recoverable Revenue

- Domestic Revenues
- Foreign Revenues

Deductible Expenses

- Direct production costs
  - Distribution
  - Manufacturing
  - Packaging
  - Artwork
  - Recording
  - Royalties
  - Promotion and Marketing
  - Sales Discounts and Returns

Discretionary Deductions

- Company overhead
- Income taxes

Allocation Issues

- Common costs
  - Relative costs
  - Relative revenues
  - Relative net incomes
- Apportionment Issues
  - Infringing/Noninfringing Elements
  - Lyrics/Melodies
  - Tracks/Albums

Possible Recovery

- Collateral goods and services
- Prejudgment Interest

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