THEY'RE PLAYING OUR SONG: COPYRIGHT AT CONCERTS

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1. INTRODUCTION

Live concerts allow musicians to earn money from performances for appreciative audiences and represent a fast-growing source of revenue in the music industry. Concert appeal may grow with the emergence of alternative promotion, live streaming, and virtual reality.

Copyright plaintiffs in any matter may seek to recover damages for infringing material performed in concert. In *Fahmy v. Jay Z*, a District Court

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ruled as a matter of law that a plaintiff's claim for concert earnings could survive summary judgment and proceed to the next stage.[1] In *Marino v. Usher,* plaintiff Dan Marino sought to disgorge concert earnings resulting from Usher's song "Bad Girl".[2] Plaintiff Montana Connection sought to recover concert earnings from country singer Justin Moore for the work "Backwoods".[3]

The matter is now in center stage in two important cases. Ed Sheeran now faces Structured Asset Sales that claims, *inter alia*, that Sheeran's concert performances of the hit "Thinking Out Loud" infringed its earlier rights in Marvin Gaye's "Let's Get It On"; the District Court held in January, 2020 that the defendants are not protected by a blanket license from Broadcast Music Inc.[4] And producer Artem Stoliarov recently filed suit again the music group Bastille for its performance of the popular song "Happier", a purported infringement of Stoliarov's musical adaptation "I Lived (Arty Remix)".[5]

Assuming that plaintiff can prove liability, this article considers matters for analysis of financial recovery – i.e., causality of revenue, necessary revenue and

[1]Fahmy v. Jay Z, (C.D. Ca. 2011), Case 2:07-cv-05715-CAS-PJW, Document 309. *See also* note 13, infra.

[2]Marino v. Usher 2:11-cv-06811-(E.D. Pa.) Defendant won case on other legal grounds related to proper authorization of a co-written work.

[3]Montana Connection, et al. v. Justin Moore, (M.D. Tenn., 2013); case settled.

[4]Infra Supra note 13 and surrounding text. .

[5]Artem Stoliarov *v.* Marshmello Creative, LLC (2:19-cv-03934), C.D. Cal. (2019).

cost accounting,, and considerations for value apportionment from non-infringing elements. It is based in part on professional reports and testimony that I provided in my practice as a testifying expert in the area of intellectual property.

2. STATUTORY TERMS

The exclusive rights for derivations and public performance of musical works are established in 17 U.S.C. 106. Compulsory licenses (e.g., 17 U.S.C. 115) and the rights of joint owners (17 U.S.C. 201) do not extend to the production and performance of a derivative that changes the words or melody of the original.

Per 17 U.S.C. 504(b), a copyright plaintiff may recover damages that s/he actually suffered from lost sales or licensing opportunity that resulted from the infringement, as well as additional defendant profits not taken into account. Actual damages may be recovered from joint defendant infringers; remaining profit amounts are disgorged severally from each infringer. Plaintiff first bears the burden of identifying each infringer's revenues related to the infringement, and a necessary causal connection from infringement to the sought recovery.

Actual damages in a concert implicate the license amount that the song would rightfully have earned for its owner.[6] This would generally implicate licensing fees that plaintiff would have earned through its share of a PRO license for the event. By itself, this amount is expectedly small

More significantly, a plaintiff may disgorge any additional profit that an infringer may have gained from the performance. This could be part of a larger suit that includes reproduction rights for a related album. A prevailing plaintiff at the outset would need to prove *only gross revenues* earned from activity resulting from infringing use of the work.

Once plaintiff burdens are met, the defendant must prove deducible costs and a basis for apportioning value of non-infringing elements in the performance. With regard to music, the latter would include the relative values of elements commingled in the song, and songs commingled in the concert. The U.S. Supreme Court affirmed that "an infringer who commingles infringing and non-infringing elements must abide the consequences unless it can make a separation of the profits so as to assure to the injured party all that justly belongs to him."[7]

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[6]On Davis v. The Gap, 246 F.3d 152, 165 (2d Cir. 2001).

[7]Harper and Row Publishers, Inc., v. Nation Enters., 471 U.S. 539, 576; 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985); (quoting Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 406, 60, S. Ct. 681, 84 L. Ed. 825 (1940); MGM must demonstrate a procedure for apportionment due a screenplay taken for a motion picture.

3. **RECOVERING FROM LIVE PERFORMANCES**

A precedent case regarding allowable recovery from live events was established in *Frank Music v. Metro-Goldwyn-Mayer*,[8] where an MGM casino performed an infringing work (taken from the musical *Kismet*) in a ticketed review that contained eight separate staged acts. The use in a non-dramatic performance was found to be infringing because the contested theme had never been placed in the ASCAP catalogue, which the defendant incorrectly believed to have established the necessary allowance for its use.

As a general matter of law, a recovering claimant would need to establish some type of causal connection from tort to profits in order to disgorge the latter. In *Frank Music*, no ticket sale could be directly traced to the infringing song element. Nonetheless, the Ninth Circuit upheld revenue disgorgement of the casino's box office profits (as well as a share of indirect earnings from rooms, dining, and parking). Even with no direct causality, the musical score was an essential part of the audience appeal and the song was a part of the score. By later standards, song and sales had a *reasonable relationship.*[9]

Subsequent to *Frank Music*, a Circuit split emerged over profit causality in copyright matters that have implicated performances at live events, *inter alia*.

[8]886 F. 2d 1548, 1550 (9th Cir. 1989).

[9]*Thornton*, infra note 11.

[10] A judicious resolution appears in *Thornton v. J Jargon Co*.[11] The matter involved an unauthorized handout of the plaintiff's copyrighted trivia quiz as a component of a theater playbill; playbill contents were not known at the time of ticket purchase. The defendant claimed that the plaintiff failed to prove the requisite causality from use to sale, and so motioned for summary judgment.

With no preexisting standard for causality in the governing Eleventh Circuit, Judge Whittemore (M. D. Fl.) invoked Congressional intent behind the Copyright Act to adopt a *reasonable relationship* standard;[12] playbills enhance the theater experience and are required by the rules of Actor's Equity. The court denied defendant's motion for summary judgment and the case ultimately settled.

Returning to musical performances, the right to create and perform a derivative song is an exclusive right held by the original copyright owner. This is often misunderstood by defendants who claim protection under a blanket license issued by ASCAP or BMI. As ruled in January, 2020 by Judge Louis Stanton

[10]Infra note 11, at 1280. Judge Whittemore identified alternative jurisprudential standards for requisite evidence and proof. First, he considered the need to prove a *causal connection* between defendant's revenues and the *infringing use* of the plaintiff's particular work, which he associated with the Fourth and Ninth Circuits. Alternatively, he reviewed the need to demonstrate a discernible *reasonable relationship* between the defendant's revenues and *infringing activity* that includes the infringed work as a commingled element. The judge ascribed the latter standard to the Second, Seventh, and Eighth Circuits.

[11]580 F. Supp. 2d 1261 (M. Fl. 2008).

[12]Id. at 1280. Citing H.R. REP. No. 94-1476 at 161 (1976).

(S.D.N.Y.), an unauthorized derivative work is *not a properly licensed component of any PRO license that would otherwise cover performances of catalog works at a licensed concert.*[13] Unless consent to derivation and registration is explicit, Judge Stanton rejected declarations from BMI's Jose Gonzalez and ASCAP's Richard Reimer to rule that a defendant cannot protect against infringement by citing the appearance of the work in a blanket license catalog.[14]

4. BASIS FOR RECOVERY

To seek recovery, a copyright plaintiff would need to file action against the performing artist/touring company who either knew of, or was in a position to know of, the infringing material to be performed at the event. The label possibly may be implicated for contributory or vicarious infringement.

The terms for artist payments for performances and tours (including ticket sales and merchandise) appear in a contract negotiated between the artist's appointed agent and the talent buyer (e.g., promoter) who puts together the event

[13]Judge Stanton has been the sole District Court judge appointed to oversee the Rate Court with regarding to BMI, as established by BMI's Consent Decree with the U.S. Dept. of Justice. see *Structured Asset Sales, LLC v. Sheeran, et al*., Case 1:18-cv-05839-LLS Document 144 Filed 01/15/20, pp. 2-4

[14]Id.

or tour.[15] Payments generally include a *minimum guarantee* (or flat fee) as well as a *backend arrangement* for an artist share of concert revenues. Backend deals may be structured:

1. Guarantee versus Percentage Deal without Deductions: Artist earns the larger of the guarantee and a backend percent of box office revenue.

2. Guarantee versus Percentage Deal with Deductions: Artist earns the guarantee and -- after a specified sales breakeven point is reached -- a backend share of the talent buyer's net profits (infra)

3. Plus deal: Artist receives the specified minimum. Talent buyer pays from box office receipts all fixed and variable expenses for event, and keeps an allowable profit for its services. Remaining amounts after recovery of actual costs are split between artists and buyer (e.g., 85/15). The plus deal is used for the largest acts and the accounting is the most complex of the three contract arrangements. s.

Per a contract rider, a performing artist may also receive a share of *merchandise revenue* sold at the show. Merchandising amounts are significant revenue sources for performing artists at concerts. Terms are specified with the talent buyer who would bring in the merchandising platforms at the event.

[15]Material from this section is drawn from D. Waddell, R. Barnet, J. Berry, THIS BUSINESS OF CONCERNT PROMOTION AND TOURING, Chapter 10 (2007).

From concert earnings, the artist pays its act *manager* and event *agents* (e.g., 15 to 20 percent each) Production costs related to the event itself are handled by the talent buyer from gate earnings; amounts then do not touch the artist's ledger.[16]

5. RECORDING CONTRACTS AND CONCERTS

Label earnings from concerts may be implicated in recovery, depending on the relation between the performance and a prior album release. The label is not a direct infringer at the concert but may be implicated for its production role in albums and its promotion of the event.

New label releases involve promotion expenses related to touring, radio, and video production. In a traditional recording contract, the label would recoup promotion expenses from due artist royalties, but not share in the artist's concert, merchandise, songwriting, acting, and sponsorship revenues. The label was in the strict business of earning profits by selling records and leaving the remainder to the artist.

[16]Costs of the event are paid from gross amounts earned at the box office. Costs include payments for opening act, tour managers, transportation, set designers, site coordinators, stage managers, lighting directors, sound engineers, carpenters, pyrotechnics, catering, wardrobe crew, stylists, security, and attending physicians, ticket commissions and payment for venues. CITI GPS, Putting **The Band Back Together: Remastering the World of Music (2018), p. 57 at** https://www.citivelocity.com/citigps/music-industry/

On the label's profit and loss statement (P&L), cost deductions would appear for promotion expenses (including concerts), net artist royalties, publisher royalties,, pressing, and distribution). The basic label P&L statement then accounted for the costs of concert promotion. However, the plaintiff may yet challenge the deductibility of any promotion expenses that can be related to the use of infringing material.

Beginning in the year 2002 (with Robbie Williams and EMI), some artists and labels negotiated a number of alternative *revenue-sharing* contracts that split concert and merchandise revenues, as well as film appearances, sponsorships, and writer royalties. .Allowed revenue shares will then show up as income on the label's P&L. If the label is judged to be infringing, a revenue share for concert and merchandise earnings are appropriately disgorged, subject to deductions for cost and apportionment for the value of non-infringing elements.

Other artist contracts do not implicate the record label at all. For example, established artists may leave labels in order to enter *direct deals* with tour promoters; e.g., Madonna and Jay Z have revenue sharing arrangements with promoter Live Nation. Alternatively, a new artist may *self-promote* on free mixtape, streaming, and social media, and move directly to the concert stage before getting a label deal (e.g., Chance the Rapper). Neither of these arrangements would apparently involve a revenue recovery from a label. Finally,

while a plaintiff might attempt to explain why it is proper to include other parties (e.g., promoter, venue, and ticket service), these entities do not appear to have been in a demonstrable position to have known of the potential infringement when arranging and providing services.

6. APPORTIONMENT

After deducting for costs, artist earnings from a concert would be subject to apportionment for non-infringing elements, particularly other songs performed at the event. The defendant bears the burden of proof. It is essential here for contesting parties to review contracts, events, setlists, and accountings related to each infringing concert or tour.

Public information is particularly useful for a plaintiff for scoping preliminary market information on the importance of the song. Information on tours and events is commonly available through weekly reports of events and ticket sales that can be found in *Pollstar*. A public source of setlist information is *setlist.fm*, which is a fan-reported site that lists the music performed at a number of events.

The respective importance of listed songs on a setlist can be discerned by comparing relative audience appeal – e.g., video views on YouTube,

accumulated audiences on Last.fm,[17] or streaming and digital sales on Alpha Data (f/k/a BuzzAngle Music).[18] Radio play and video expenses may also be useful if new releases are implicated and can be related to the concert performance. e

7. CONCLUSION

After reviewing the basis for financial recovery, it is worth recalling the imprimatur behind the Copyright Act; common law precedents should also be kept in mind

The Copyright Act purposely minimizes the plaintiff's burden to prove defendant profits once infringement is proven. The potential disgorgement of additional profits is intended to minimize any profit gain that an infringer may expect to gain from a copyright theft. Congress purposely established the

[17]Using a search technology called "Audioscrobbler," **Last.fm** records the details of the tracks listened from user computers and portable devices. The data then are compiled to create reference pages for individual artists.

[18]**Alpha Data** provides statistics on record sales and music streaming now used in *Rolling Stone* charts. The website shows total music consumption including album sales, song sales, streaming history, and social media analytics. Data are collected from retailers, record stores, radio stations, and music venues. Related competitive services are offered at Soundcharts, Chartmetric, and Instrumental.

disgorgement remedy to prevent an infringer from unfairly benefiting from a wrongful act.[19] According to the U.S. Supreme Court, Congress' stiff disgorgement in copyright law is aimed particularly to deter recidivists, who would otherwise prey repeatedly on creators and profit themselves from catalogs of unlicensed work.[20] 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."[21] The precedents should be kept in mind

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

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

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

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