FINANCIAL REMEDIES IN MUSIC COPYRIGHT

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EXECUTIVE SUMMARY

The paper is organized in eleven substantive sections that review the legal structure of copyright in music and financial remedies for infringement.

1. Music copyright involves separate rights in underlying *musical compositions* and *sound recordings* that may include the composition. (Section 2)

2. The composition right is owned by the *music publisher(s)* to whom the original *songwriter(s)* transfer copyright. The sound recording right is owned by the *record label*

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that produces the underlying studio master recording and distributes records in retail stores and digital media. (Section 2).

2. Copyright for musical compositions includes three *mechanical rights* (*reproduction, derivation*, and *distribution)* related to record product, and a right for public display of sheet music. (Section 3). Rights owners also control use of music *synchronizations* of their compositions on audiovisual soundtracks.

4. A fifth right for a musical composition is the public *performance right* related to live events and mediated transmissions of the work (Section 4)

5. Copyright for sound recordings includes reproduction, derivation, distribution and (for digital audio transmissions) public performance. (Section 5). *Master use rights* cover tracks integrated on audiovisual soundtracks.

6. Revenues resulting from the sale and licensing of music on sound recordings are transacted largely through three accounting chains represented by a.) *physical records and permanent downloads*, b.) *interactive streaming*, and c.) *non-interactive subscription and streaming.* Rights for online video combine features of the first two chains. (Section 6)

7. An infringed plaintiff may recover *actual damages* and *additional profits* earned by each infringing party. Defendants are *jointly liable* for actual damages but *severally liable* for their remaining profit. (Section 7)

8. Actual damages can be valued through *benchmark licenses* that correspond to hypothetical market-based transactions. Benchmark licenses can be established through plaintiff testimony, public information, and industry expertise. (Section 8)

9. A plaintiff set to disgorge additional severable profits must prove gross revenues that a defendant earned from the sale or licensing of the infringing work. Claimed revenues from recorded music may include domestic transactions, as well as foreign transactions that involve a precedent act of infringement in the U.S. (Section 9)

10. A defendant bears the burden to prove offsetting costs related to the production, distribution, marketing, and licensing of infringing product, as well as due royalties for artists and writers. Transactions for distribution and manufacturing must be based on actual costs, not transfer prices within a parent company. Overhead costs are not deducted under willful infringement. (Section 10)

11. A defendant bears the burden to prove apportionment of profits related to contributions from infringing and non-infringing elements that may be commingled on the same composition or recording. Valuation can be determined through measures of

play, audience, or dollars spent on promotional media – e.g., radio, video, downloads, and streaming, *inter alia.* (Section 11)

12. Plaintiffs may recover infringer profits earned at live concerts where an infringing work was performed. (Section 12)

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Once more unto the breach, dear friends, once more"

Henry V, Act III, Scene 1

1. INTRODUCTION

The distinguished copyright lawyer Arthur Latman once quipped, "Copyright law, not horse racing, is the sport of kings"; perhaps the brave King Henry would have agreed. In the course of my experience as a damages expert, I can share some reflections about the structure and economics of the former sport of kings as it relates to infringement of musical compositions and sound recordings.

The paper modifies an earlier article that I first published in 2004, when illegal file-sharing at Napster may have threatened retail sales at Tower Records.[1] But some

[1]Whose Song is it Anyway?: Infringement and Damages in Musical Compositions, Entertainment and Sports Lawyer, Spring, 2004.

basic issues remain in place. Since that time, copyright litigation has come to involve some of the most famous acts in the music business -- Dr. Dre, U2, Kanye West, Rascal Flatts, Justin Moore, Led Zeppelin, Jay-Z , Bruno Mars, Lady Gaga, P. Diddy, Usher Raymond, Brad Paisley, Carrie Underwood, Ed Sheeran, and Led Zeppelin. In August, 2019, a jury assessed Capitol Records, Katy Perry, Dr. Luke, Max Martin, and three additional co-writers a judgment of $2.8 million for the release of the track *Dark Horse*, which was based on an earlier gospel rap composition *Joyful Noise.*

When discussing the strictures of copyright law, the reader must keep in mind the nature of the music industry as it involves "frenemy" creators, publishers, and labels in markets with no equilibrium. Rather, industry structure in music is based synchronously on the domain of intellectual property as well as the intangible value of routines, relationships, legal procedures, and organizational capital that enhance transactional efficiency, generate dynamic capabilities, and activate feedback. The industry then responds to ongoing anti-equilibrium by contract innovation, organizational change, and intermediary agencies that perform facilitating roles. The structures of copyright then

may guide parties to resolutions that are more "satisficing" than efficient, market-based, or even "fair", and to continual rent-seeking.[2]

Written from the perspective of a testifying economist (Id.), this paper then also reviews current market issues and institutional developments in the music industry. The paper is organized in sections reviewed in the Executive Summary; material may be read sequentially or independently depending on prior knowledge. The upshot of the work is to establish the grids of copyright and administration, accounting chains for moneys earned, important industry trends, and common law rules for enforcing rights in litigation.

2. COPYRIGHT AND ORGANIZATION IN THE MUSIC INDUSTRY

Per the Copyright Act of 1976 (17 U.S.C. §101-1332), there are two strata of music copyright -- the *sound recording* and the underlying *musical composition.* The term *sound recording* implicates the sounds imprinted on a produced record album or track derived from an initial studio or live master recording,[3] while *musical composition*

[2]This notion of common law as a procedure-based means for handling complexity reached the economics profession through the works of Nobel-laureate economist Friedrich von Hayek (*The Constitution of Liberty*) and legal scholar Bruno Leoni (*Freedom and the Law*).

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[3]A *sound recording* is a work that results "from the fixation of a series of musical, spoken, or other sounds...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).

implicates underlying lyrics and melody of the actual song.[4] The relevant copyrights implicate different rights owners -- the record label (sound recording) and the music publisher (musical composition) – who collect royalties for any use of its controlled work.[5]

Sound Recordings

With regard to *sound recordings*, record labels are engaged in the financing, production, and distribution of tracks and albums derived from *master recordings* produced in the recording studio. The larger U.S. labels and label groups are owned by or affiliated with one of three fully integrated music companies (down from five in 2000) that together account through their labels for 65 to 70 percent of global sales of records and videos.

[4]A *musical composition* can refer to an original work of vocal and instrumental music, the structure of a musical work, or the process of creating or writing a new work of music.

[5]For example, when singer Gladys Knight recorded "Midnight Train to Georgia", her record label (Buddah Records) owned rights in the sound recording, and so received sales dollars and paid royalties to the artist. Publisher Larry Gordon actually retained copyright in the lyrics and melody of the underlying composition, which was written by country writer Jim Weatherly (and re-titled and first recorded by Cissy Houston). Gordon and Weatherly continue to receive royalties every time the actual song is recorded or performed by any artist. A full review of the music publishing industry can be found in R. D. Wixen, THE PLAIN AND SIMPLE GUIDE TO MUSIC PUBLISHING, 3rd Edition (2014), Hal Leonard Books; S. Winogradsky, MUSIC PUBLISHING; THE COMPLETE GUIDE, (2013), Alfred Music.

1. *Universal Music Group (UMG)* -- e.g., Capital Record Group, Def Jam Recordings, Interscope Geffen A&M, Island Records, Decca. UMG is now owned by Vivendi SA and is also known as UMG Recordings, Inc.),

2. *Sony Music Entertainment (SME)* – e.g., Epic Records, Columbia Records, RCA Records. SME is now owned by the Sony Corporation.

3. *Warner Music Group (WMG)* – e.g., Warner Records, Atlantic Records, Electra Records. WMG is now owned by Access Industries

Major companies perform vertically integrated roles in discovery, production, financing, promotion, manufacture, and distribution of recorded music, as well as publishing of compositions. Each record label itself (through its operating divisions) attempts to discover talent, finance production, and promote record sales. As traditionally practiced, label promotion aims to "cut through the noise" to reach undiscovered audiences; most album releases do not cover costs. The traditional label deal then follows a "blockbuster" business model that aims to maximize – over a wide portfolio of work -- gains earned from big product volume releases.[6]

In addition to their in-house labels, the major record companies own separate divisions for pressing and distribution that handle necessary operations for their own and

[6]A. Elberse, Blockbusters: Hit-making, Risk-taking, and the Big Business of Entertainment, Harvard Business School Press, 2013. Prof. Elberse derived her results from ten years of interviews with a wide spectrum of entertainment executives, a reflection of prevailing corporate culture of beliefs now commonly held but ultimately challengeable.

affiliated labels. Each company also owns a publishing division that controls or administers copyrights in the musical compositions that appear on its record releases.

Major labels and artists commit to deals through Recording contracts that specify term, requirements for album release, royalties, and a series of label options for future albums, *inter alia*.[7] Major labels generally pay to primary artists royalties of 13 to 20 percent of a qualified royalty base of net units sold (as measured at specified wholesale prices), less a number of specified deductions. The paid royalty rate in a contract would depend on the professional stature of the artist, discount windows, option albums, specified sales targets, and sales territory. Paid royalty amounts in any period may vary from booked accounting depending on withholdings for precautionary reserves against deficiencies in recoupment of label costs. From royalties due otherwise, the label will recoup before payment any royalty advances and expenses that it previously paid for production, marketing, and touring related to the release. Payments from an artist's record sales may be cross-collateralized with sales from his/her other albums and made subject to a balancing for precautionary reserves. Recording contracts can often involve disagreements in delivery, promotion, and accounting, and thus present opportunities for moral hazard that are difficult to monitor. (Caves, note 7)

[7]The discussion on record contracts is based on Passman, infra note 42, Part II. A general review of the market processes in the culture and entertainment industries appears in R.. Caves, Creative Industries: Contracts between Art and Commerce, Harvard University Press, 2000

Starting from sale of the first record, artists also become due to pay studio producers (3-4% of net sales; half-rate for audiovisual) and record mixers (0.5-1%) for their respective studio services on any recorded track; producer royalties on albums are prorated for number of recorded tracks. Outside of the terms of a recording contract, the artist must also pay his/her hired act manager a royalty of 15 to 20 percent. As album sales and profitability have declined in the past decade, record contracts and artists have come to put in place a number of different deals that collateralize label expenses with other revenues; e.g., publishing, touring, merchandising, film, and sponsorships. (first entered between Robbie Williams and EMI in 2002).

Product distribution and financing implicate economies of scale and risk diversification, and so remain important bottlenecks that favor large companies. That said, independent labels ("indies") can now ally with major partners in a number of alternative arrangements that resemble the current movie industry. Among varying interfaces in records, an indie label may produce independently and engage with a major company for direct distribution, (e.g., Concord Music Group distributes with UMG Distribution), joint production financing, (Bad Boy Records operated a joint production venture with Warner Music), distribution alliances (UMG's Ingrooves, Sony's The Orchard, and Warner's Alternative Distribution Alliance), and artist buyouts (called upstreaming) The internet has expanded the distribution bottleneck further through independent distributors (physical and digital with CDBaby; digital with Tunecore) and

"indie" piggyback arrangements for shared distribution costs among labels (Knab, note 8) Distributors may also achieve organizational efficiencies by merging with one another or concert promoters, or creating a combined label/distributor operation.

With no production or distribution services, digital rights aggregators (Merlin Networks) negotiate collective licenses on behalf of independent acts, which must upload the content directly to the music service. Independent acts from the "long tail" of content now complement their releases with video platforms (e.g., YouTube), social media (e.g., Facebook, Snapchat), and concert listings (Bandsintown).[8] Uploading 20,000 new tracks per day, new artists recognize the streaming service Spotify for its innovativeness, use of AI promotion, popularity among younger listeners, and reduced fifty percent revenue share (with a "no-touch" policy on copyright).

[8]Growth in the "long tail" of music content and distribution is consistent with empirical findings by Joel Waldfogel How Digitization Has Created a Golden Age of Music, Movies, Books, and Television. 31(3), 195-214 and Will Page, Written Direct Testimony, Determination of Rates and Terms for Making and Distributing Phonorecords (*Phonorecords III*); Docket No. 16-CRB-0003-PR (2018-2022. Musician deals are explained more fully in C. Knab, THE MUSICIANS' BUSINESS AND LEGAL GUIDE, Prentice Hall. Independent artists also can now use digital interfaces to post tracks for listening and sharing (e.g., Bandcamp, Soundcloud), post new beats (e.g., Airbit, Beatstars), offer musical works for synchronization on film and other video. (e.g., AudioSocket), provide integrated global performance rights (AllTrack), and clear record samples from major rights owners (The Music Bridge), other independent artists, (Traccks), or sample libraries (TrackLib). Artists may now use artificial intelligence for composition (Jukedeck, Amper) or digital master (LANDR).

Musical Compositions

Music copyright involves a second right for the underlying song imprinted on sound recordings and audiovisual works, or performed at live events. Copyright for compositions first put in a tangible medium is held initially by the original songwriter(s) who created the lyrics and melodies. An owner (or co-owner) of a copyright has the right to license 100% of the unaltered work to any user.

Songwriters have traditionally transferred the full copyright for particular songs or for designated terms of work to the control of *independent music publishers* (e.g., Carlin Music for Presley writers Jerry Lieber and Mike Stoller). When invested with a work, an independent publisher will promote commercial uses, collect royalties, and offer royalty advances to stabilize writer earnings. Traditional publisher and writer collection shares were 50/50, but the publisher kept exclusive copyright in the song itself.

A number of alternative publisher arrangements have come into play. Each major record company now has a *publishing division* to license and administer rights in songs written by recording artists signed to (or aiming to be signed to) the label. Alternatively, a more established writer may operate his/her own *self-publishing* entity; a pure self-publisher retains a full collection share and all of the copyright. A self-publishing writer will then designate a larger publisher to act as a fee-based *administrator* for collecting royalties (10-15%), or a *co-publisher* to collect royalties and share in the copyright. For

example, songwriters Max Martin and Lukasz Gottwald publish through their own Kasz Money Publishing; Kobalt Songs administers collections.

. Major publishers also affiliate with *foreign subpublishers* to administer mechanical, synchronization and the publisher share of performance royalties in their respective countries (infra Sections 3-4). Alternatively, integrated global management for combined label and publisher rights can be found at Chrysalis/BMG Rights Management, Concord Music Group, and Kobalt Music Group.

Musical compositions now often have two or more *co-writers*, here possibly including the recording artist(s) or studio producer(s) who adds background rhythm and instrumentation to the topline work (e.g, Norman Whitfield in Motown), sometimes replacing topline melody entirely (Dr. Dre in rap). Each co-writer may designate its own publisher or administrator for its designated share of the song. Each controlling publisher of a work may license (non-exclusive) uses of the unaltered work, provided that a suitable accounting be made to other owners.[9]

It is then meaningful to think of copyright and collection shares in a song in an accounting grid framed by each co-writer and his/her designated publishers and collection administrators, For example, a grid for the five original co-writers in the Katy Perry track "Dark Horse" (infra Section 10) is summarized as follows:

[9]The accounting provision is not in the Copyright Act but is an equitable consideration related to unjust enrichment and co-ownership. Oddo v. Ries, 743 F.2d 630, 633 (9th Cir. 1984).

ACCOUNTING FOR "DARK HORSE"

Writer	Publisher	Administrator	PRO
Katy Perry	When I'm Rich You'll Be My Bitch	Warner Chappell	ASCAP
Dr. Luke	Kasz Money Publishing	Kobalt Songs	ASCAP
Max Martin	Kasz Money Publishing	Kobalt Songs	ASCAP
Cirkut	Kasz Money Publishing	Kobalt Songs	ASCAP
Sarah Hudson	Prescription Songs	Kobalt Songs	ASCAP
	DeeEtta Music		

Cells can be populated with both ownership and collection shares of composition royalties (here redacted).. Record labels, recording artists, and producers (supra) may earn additional amounts that are not within the domain of publisher accountings.

Industry Growth and Trends

The record industry in 2017-2018 saw positive growth and continued to reverse years of revenue decline. The U.S. industry earned total revenues of $9.8 billion retail (up 11.3%

from 2017), and $6.6 billion wholesale (up 11.9%).[10] Audiences included record and track buyers as well as users of various streaming services. *Interactive streaming* – where track choice is made directly by the listener -- led the industry advance, as CD sales and downloads actually declined.

Interactive streaming services now account for over fifty percent of retail revenues .Major providers include Spotify, Apple Music, Amazon, and Napster, inter alia. Interactive streaming revenues are now based largely on subscriptions ($5.4 billion, up 32%), but ad-supported service is still popular with new streaming listeners. ($760 million, up 15%). Streaming growth in the music industry is expected to continue with the greater emergence of voice-activated assistance, digitally curated recommendations, integrated playlists, podcasts, social media integrations, and assisted artist-fan interaction.

The market leader in streaming is Spotify AB (Page, note 9) – a Swedish pureplay service provider that went public in 2018. Competitive streaming services are offered by integrated tech companies that combine streaming with wider ecosystems built around retail goods (Amazon Prime), bundled devices (Apple Music), web-related functionalities (Google Music), and telecom services (Sprint Telecommunications with Tidal Music),.

[10]RIAA, 2018 Year-End Music Industry Revenue Report, at http://www.riaa.com/wp-content/uploads/2019/02/RIAA-2018-Year-End-Music-Industry-Revenue-Report.pdf. (visited September 25, 2019)

Non-interactive services (subscription, satellite radio, and webcast) now account for $1.2 billion (up 32%) of revenues in the U.S. market. Key service providers include *SiriusXM* (mobile satellite radio), *Music Choice* (home cable/satellite), *Rockbot* (business service) and *Pandora* (webcast). Sirius, Music Choice, and Rockbot are subscription services that monetize service exclusively with subscription fees. Webcasters (e.g., Pandora) may offer to listeners different tiers with subscription and advertising-based services.

Once the market leader in the digital space (introduced at Apple iTunes in 2003), *permanent download* revenues in 2018 fell to $1.0 billion (down from $1.4 b), while physical sales fell to $1.2 billion (from $1.5 b). Apple Music (launched in 2015) has embraced streaming but now maintains listening services for customers who have already bought downloads, but is moving out of new sales. Napster and Amazon now continue to sell *unit downloads* to a diminishing base of users. Spotify is often credited with reversing revenue downturns that resulted from illegal file-sharing networks (e.g, Napster); the service now has the largest track catalog (over 50 million) and worldwide user base (108 million subscribers, 124 ad-supported). To attract independent artists, Spotify (as of October, 2019) has made seventeen acquisitions that allow, *inter alia*, independent podcasts, metadata review, marketing support, virtual studios, user-submitted playlists, and curation and recommendation based on big data.

Nonetheless, Spotify now pays between 65 and 70 percent of earned revenues to major content owners that account for most use (infra Section 5), Spotify has operated at a quarterly loss since inception in 2008; the stock price fell 25 percent since going public in April, 2018. Many artists view accounting operations as faulty and labels fear that disintermediation, audience fragmentation, and track unbundling made possible in streaming reduces or gains diminishes the revenue streams needed to finance label production and marketing.

Digital service providers can enhance economic efficiency through new capabilities or alliances that lower transaction costs and generate positive user networks. With regard to the first, rights owners and audiences will continue to develop blockchain technology to verify digital transactions enabled digitally through *smart contracts.* Smart transactions can be catalogued in a trusted record of the creation, modification, and transfer sequence of a musical work, and so registered in a worldwide network of distributed computers. Blockchain transactions can be verified and secured without the agency of a human third party (e.g., through the Content Blockchain Project.[11]) However, the associated costs (software design and operating electricity) of proving the verity of a candidate transaction are substantial but presumably monetized through

[11] https://content-blockchain.org/essays-and-articles/
From 2016 to early 2018, the Content Blockchain Project received an initial funding from the Google News Initiative to develop the opportunities of blockchain technology for the media industries. There are four European founding partners

cryptocurrencies generated on the system. Without access to cryptocurrency, content owners might prefer to integrate existing legacy protections on their works (e.g., watermark, fingerprints) and so operate with more scaled down computing needs enabled through open and interoperable databases. (e.g., Open Music Initiative, dotBlockchain Music Project).[12]

Particularly if augmented with video, streaming service can be integrated in a more complete *music-oriented social network* (C2C), as is now emerging the new capabilities added at Facebook. In 2017-2019, Facebook has licensed all major content providers and now offers service in thirty countries.[13] Facebook will move to allow artists to post social media pages with more complex features. With streaming, Facebook aims to form B2C and C2C fan communities to form in an emerging "video first" social network. The Facebook system is moving in the direction of once-leading music site Myspace, which preceded Facebook as the leading social media network by offering a very complex music network).[14]

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[12](B. Rosenblatt, WATERMARKING TECHNOLOGY AND BLOCK CHAINS IN THE MUSIC INDUSTRY (https://www.digimarc.com/docs/default-source/digimarc-resources/whitepaper-blockchain-in-music-industry.pdf?sfvrsn=2

[13]What's Facebook's Game Plan in Music, Music Business Worldwide, October 27, 2019, https://www.musicbusinessworldwide.com/tamara-hrivnak/

[14]Before succumbing to user losses that resulted from deep technical flaws. Myspace enabled interactive, user-submitted music, profiles, blogs, photos, and videos, along with Myspace's own music service (joint ventured with major labels), record label, television series, TMZ channel,

3. REPRODUCTION RIGHTS OF MUSICAL COMPOSITIONS

The structure of copyright law for music is here presented in the historic order in which creator rights were established – musical composition and sound recordings.

The copyright in a musical work is established when the protected material is put in a tangible medium from which it may be provably copied; additional protections follow if owners register the work with the Copyright Office (i.e., recovery of statutory damages and attorney's fees). 17 U.S.C. 504. The owner(s) of musical compositions were first granted federal protection in the Copyright Act of 1909 and so reestablished in the Copyright Act of 1976.

Codified at 17 U.S.C. 106, four major rights protect musical compositions

a. The right to *reproduce* the work in copies or phonorecords;[15]

b. The right to prepare *derivative work*. i.e., a compositional form in which a basic work may be musically transformed, reworded, translated, or otherwise adapted;

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concert streaming, studio deal, and personalized and advertisements and recommendations. *https://en.wikipedia.org/wiki/Myspace*

[15]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."

c. The right to *distribute* copies or phonorecords of the work to the public by sale, rental, lease, or lending; and

d. The right to *perform* the copyrighted work publicly.

A fifth right first established in 1909 relates to visual *display* of sheet music.

The three owner rights regarding reproduction, derivation, and distribution of musical compositions used on phonorecords are termed *mechanical rights.*[16] Related are *synchronization rights* for musical compositions that are imprinted on video soundtracks (e.g., films, television programs, online videos, video games). Video uses may also implicate a *master use license* for any sound recording imprinted in the soundtrack. (infra Section 5).

The mechanical right for reproductions of compositions used on phonorecords is exclusively controlled by the rights owner for the first record imprint of the work. Once the first phonorecord is publicly distributed, other artists may legally record (or "cover") any *unmodified version* of the same composition; secondary reproductions are eligible for compulsory licenses per 17 U.S.C. 115 (aka Section 115). Compulsory rates are under the authority of the Copyright Royalty Board. (CRB), an administrative body of retired judges that has enforced ratemaking standards since 2005 (per 17 U.S.C. 801). Outside of the

[16]As applied to copyright in musical compositions, the term *mechanical right* is historically derived from the time when phonorecords (Id.) were reproduced exclusively on physical media, and not electronically reproduced on digital channels.

compulsory license, the original owner continues to retain exclusive control over derivative works and video synchronizations.

There are three categories of ratemaking recognized in Section 115: *Subpart A*: physical form, permanent download, and purchased telephone ringtone; *Subpart B*: interactive streaming and limited downloads (terminating when subscription ends); and *Subpart C*: limited offerings, mixed bundles, music bundles, paid locker services, and purchased content locker services.

Subject to the next five-year review in 2021,[17] the statutory mechanical royalty fee for physical and permanent download sales in Section A is fixed at the larger of 9.1 cents per song or 1.75 cents per minute.[18] The amount often appears also for uses in first release, but reduced rates are often found for off-price product, free goods, foreign sales, and recorded tracks where the artist is also a writer of the work. The license rate for a composition in a ringtone is 24 cents per download.[19]

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[17] 17 U.S.C. 803(b)(1)(A)(i)(V).

[18] 37 CFR 255.3(i)-(m); see Adjustment or Determination of Compulsory License Rates for Making and Distributing Phonorecords, Docket Number 2006-3 CRB DPRA, https://www.crb.gov/rate/ (retrieved September 13, 2019).

[19] 74 CFR at 4515. The sound recording right is now set at a 50 percent share of the ringtone price charged by the mobile carrier. .

Record labels pay mechanical royalties earned from domestic record sales directly to the publisher (or through a collecting mechanical rights organization (MRO) – e.g., Harry Fox Agency[20] or American Mechanical Rights Agency (AMRA)). The compensated publisher splits collected mechanical royalties (after expenses) with each writer per private contract. Writers may also collect separately from their performing rights organization (infra Section 4).

Mechanical royalties earned on foreign sales are processed through comparable MROs that operate in each country where the record is distributed (e.g., Canada's Musical Reproduction Rights Agency; U.K.'s Mechanical Copyright Protection Society). Foreign collections can be based on per track license fees (Canada) or percent sales levies on the entire album (Europe). Foreign agencies in each country pay collection shares to national subpublishers that are owned by or affiliated with a controlling U.S. publisher.

Payment terms for Section 115 rates in Subparts B and C were structured in a complex settlement agreement that was enacted after a CRB ratemaking in 2008; somewhat simplified regulations were established in 2018.[21] With some accounting

[20]The Harry Fox Agency was established in 1927 by the National Music Publishers Association as a licensing and collection agency for mechanical and synchronization rights in musical compositions; SESAC (infra Section 4) acquired the agency in 2015. The Blackstone Group acquired SESAC in 2017. Harry Fox currently has over 48,000 collecting publisher affiliates.

[21]Determination of Rates and Terms for Making and Distributing Phonorecords (*Phonorecords III*); Docket No. 16-CRB-0003-PR (2018-2022), at https://www.crb.gov/rate/ (retrieved on September 11, 2019)

simplification, each affected digital service provider (DSP) now accounts to an *"all-in"* royalty pool for due royalties. Accounted payments for each DSP service are based on a percentage share of revenue or content cost. Accounts are then credited for performance royalties paid for compositions (infra Section 4); the remainder covers due mechanical royalties. The remainder is pooled, subject to a payment floor (called the *mechanical floor*) based on number of subscribers to the DSP service. Per the proportion of streams, accounted and pooled royalties is apportioned to individual service providers, which pay the publishers (or there administrators).

The institutional structure for mechanical rights will change following the passage in 2018 of the Orrin G. Hatch-Robert Goodlatte Music Modernization Act.[22] Per Title I of the MMA, digital music providers in 2021 will be able to obtain (blanket) licenses for integrated *mechanical rights* in downloads and interactive streaming now covered under separate subparts in Section 115. Administrative efforts for collected royalties will be handled by a newly appointed Mechanical Licensing Cooperative (MLC), which will aggregate and maintain contact information, process mechanical payments, and pay publishers. The digital service providers will be collectively represented in ratemaking by a newly appointed Digital Licensing Coordinator.

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[22]H.R. 1551, Pub.L. 115–264, at https://www.copyright.gov/music-modernization/

4. PERFORMANCE RIGHTS OF MUSICAL COMPOSITIONS

The fourth listed right in 17 U.S.C. 106 protects public performances of musical compositions.[23] The U.S. established performance rights for live events before music was first recorded on piano rolls. The first licenses and collections for performance rights were established in 1914, with the creation of ASCAP (infra).

Performance rights for musical compositions can be termed *grand* or *small*. *Grand performance rights* involve live dramatic productions -- staged musicals, operas, or full concert versions thereof – where the work must be licensed directly and exclusively from the publisher. *Small performance rights* implicate songs performed at non-dramatic events (concerts, bars, caterers, sports events, *inter alia*) or on transmitted venues (broadcast radio, television, cable, streaming, subscription service, social media, *inter alia*).

Small performance rights commonly are collectively licensed and administered through the efforts of performance rights organizations (PROs), with which member or affiliated writers and composers may catalog created works. The three major PROs in the U.S. include American Society of Composers, Authors, and Publishers (ASCAP;

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[23]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."

e.g., Madonna), Broadcast Music, Inc. (BMI; e.g., Dolly Parton), and SESAC[24] (e.g., Bob Dylan); Global Music Rights (e.g., Pharrell Williams) has an additional catalog of select writers.

Each PRO offers a *blanket license* that covers a term of unmodified use of all works registered in its catalog.[25] Each PRO then negotiates licenses, and collects and distributes royalties for covered uses in its catalog. Collections from all license uses are apportioned to participating writers and publishers based on surveyed airplay, digital records, television cue sheets, or concert setlists. Each PRO splits due amounts for any song between the registered songwriter and publisher; co-publishing writers may garner the full writer's share and some share of the publisher.[26] The blanket license is an instrument for transactional efficiency that minimizes the costs of negotiation and administration for all implicated parties.

Each PRO may also act as administrator for writer royalties collected by foreign PROs for public performances of U.S. works in their respective countries (e.g., Canada's SOCAN, U.K.'s Performing Rights Society). Foreign license rates are established

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[24]The acronym SESAC is no longer meaningful.

[25]Broadcasters and cable channels may also obtain *program licenses* for particular time-segments in the day.

[26]The PROs split collections between writers and publishers at 50/50. Subject to private contract, publishers and writers often split the publisher share evenly. The writer then winds up with 75 percent of performance royalties. .

separately in each country. To date, PROs have failed to establish databases to accommodate global registration and collection – e.g., the U.S. led Global Repertory Database.

Domestic rates at ASCAP and BMI are generally negotiated consensually with prospective licensees, but can be brought to arbitration to Rate Courts established by U.S. Justice Department Consent Decrees in the Southern District of New York.[27] Per the Digital Millennium Copyright Act of 1998, the PROs also may collect royalties for jukebox (17 U.S.C. 116), public broadcasting (17 U.S.C. 118), and distant retransmission of cable signal (17 U.S.C. 119); the Copyright Royalty Board establishes royalty rates.

Performance licenses are not necessary for transmissions of permanent downloads, which are covered by mechanical licenses alone (Subpart A, supra Section 3). However, both performance and mechanical licenses are required for interactive streaming services (Subparts B, C) that may involve the same tracks.

Performance licenses are not necessary for works imprinted in movie soundtracks performed in U.S. theaters; a synchronization license for reproduction in the soundtrack

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[27]For ASCAP, see United States v. ASCAP, 1940-43 Trade Cas. ¶56, 104 (S.D.N.Y. 1941); 1950-51 Trade Cas. ¶62,595 at 63,754 (S.D.N.Y. 1950); 41 Civ. 1395 (S.D.N.Y. 2001). For BMI, see United States v. Broadcast Music, Inc., 1940-43 Trade Cas. ¶56, 096 (E.D. Wisc. 1941); 1966 Trade Cas. ¶71, 941 (S.D.N.Y. 1966); 1996-1 Trade Cas. ¶71, 378 (S.D.N.Y. 1994).

is sufficient. By contrast, television channels, cable networks, and video streaming in the U.S. must cover all use of movie, video, and live music for both performances and necessary synchronizations in the soundtrack.

5.RIGHTS FOR SOUND RECORDINGS

Separate copyright protection for sound recordings emerged in state law after new recording technologies made possible the capture, fixation, and playback of musical sounds, which are first recorded on master studio recordings from which later imprints in record and video are derived. Through the *Copyright Act of 1976*, Congress first granted federal protection for reproduction, derivation, and distribution of sound recordings. Record labels presumably benefitted from free radio promotion and needed no additional protection for broadcast performances.[28]

When new digital technologies came to enable more exact copying and transmission of original sound recordings, Congress enacted in 1995 the *Digital Performance Rights in Sound Recordings Act* (DPRSRA).[29] The DPRSRA amended 17 U.S.C. 106 to include for recording owners a limited performance right for sound recordings performed in a

[28]S. Rep. No. 104-128, at 14-15 (1995).

[29]Digital Performance Right in Sound Recordings Act of 1995, Public Law No. 104-39, 109 Stat. 336 (Nov. 1, 1995). For a comprehensive account of the legislative history of the Act, see E.D. Leach, Everything You Always Wanted To Know About Digital Performance Rights But Were Afraid To Ask, 48 J. COPYRIGHT SOC'Y 191 (2000).

digital audio transmission that included wired or over-the-air use of digital technology (17 U.S.C. 114, or Section 114).[30] In 1998, the *Digital Millennium Copyright Act* (DMCA)[31] further amended Section 114 to set in place an institutional structure to facilitate licensing of the newly established performance right for sound recordings.

Section 114(d) of the DMCA recognized three categories for the new performance licenses:

1. Digital transmissions of over-the-air broadcasts (i.e., rebroadcasts of radio and television stations) remained exempt from: paying performance royalties for sound recordings digitally retransmitted from over-the-air station programming.[32] However, a specially programmed digital broadcast performed by a commercial radio station must pay performance royalties to the controlling record labels (e.g., iHeart Radio owned by radio chain iHeart Media).

2. *Non-interactive services* – With some additional eligibility requirements related to complementarity of performances, non-interactive satellite radio (e.g., SiriusXM), music subscription (e.g., Music Choice), and webcast services (e.g., Pandora). may perform sound recording tracks that are covered by a statutory license established by

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[30]17 U.S.C. § 106(6) (2000).

[31]Digital Millennium Copyright Act, Public Law No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

[32]17 U.S.C. §114(d) (1) (A)-(B) (2000).

Copyright Royalty Board.[33] There are four license categories for ratemaking for sound recordings used in eligible transmissions -- pre-existing subscription (established before enactment of the DMCA in July, 1998),[34] new subscription (established after July, 1998),[35] and subscription and ad-supported webcasting.[36] Per Section 114(f), performance royalties for eligible transmissions of sound recordings are usually collected and distributed through the collective *SoundExchange*, which now divides collected dollars between label (50%), recording artist (45%), and other musicians (5%); the collective will start covering producers in 2021. Performance royalties collected under Section 114 are also credited to payments for ephemeral reproductions used in transmissions, as established under Section 112(e).[37] Some business subscription services (e.g., Rockbot) are exempt from the performance royalty for sound

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[33]17 U.S.C. §114(d) (2) (A) (i) (2000). 17 U.S.C. §114(j) (6) (2000).

[34]Determination of Rates and Terms for Satellite Radio and Preexisting Subscription Services (*SDARS III*), Docket Number 16-CRB-0001-SR/PSSR, at https://www.crb.gov/rate/ (retrieved on September 11, 2019).

[35]Determination of Royalty Rates and Terms for New Subscription Services for Digital Performance in Sound Recordings and Ephemeral Recordings (*New Subscription III*); Docket Number 14-CRB-0002-NSR (2016-2020), at https://www.crb.gov/rate/ (retrieved on September 11, 2019).

[36]Determination of Royalty Rates and Terms for Ephemeral Recording and Digital Performance of Sound Recordings (*Web IV*), at https://www.crb.gov/rate/ (retrieved on September 11, 2019).

[37]37 CFR 380.10(d).

recordings used in digital audio transmissions, and thus pay only the ephemeral royalty (5% of performance).[38]

3. Remaining *digital transmissions* (e.g., interactive downloads, streaming, video, social media) are ineligible for a Section 114 license and must negotiate direct performance rights for all sound recordings.[39] For major labels, interactive licenses for sound recordings are established by direct deal between service provider and label. Smaller labels will rely upon collective rights deals established by a third party, such as Merlin Networks. Video streaming services that perform recorded music (e.g., YouTube) must also obtain the initial master use rights to integrate the music on a video soundtrack, as well performance rights for the composition.

6. ACCOUNTING FOR THE MONEY CHAIN

Based on Sections 3-5, the complete money chains for sale and licensing of sound recordings and musical compositions can be summarized as follows.

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[38]Determination of Royalty Rates and Terms for Making Ephemeral Copies of Sound Recordings for Transmission to Business Establishments (*Business Establishments III*), Docket Number 17-CRB-0001-BER (2019-2023), at https://www.crb.gov/rate/ (retrieved on September 11, 2019).

[39]17 U.S.C. 114(b)-(d)(3) (2000).

1. Physical Units and Permanent Downloads

a. Record deals are negotiated with private label or third-party rights aggregator.

b. Store or music service compensates label for *sound recording rights*.

c. Label pays artist royalty to recording artist, who pays the producer and mixer.

d. Label pays *mechanical royalty* to publisher (or through MRO)

e. Publisher shares mechanical royalty with songwriter per private contract.

f. Stores and services do not pay *performance royalty* collected for musical compositions used in physical sales or downloads.

Example: Apple iTunes was a pure download service in 2011. Per a private deal with the record labels, Apple paid a negotiated 70 percent (circa) of collected revenues for sound recording rights for its tracks.[40] Per rates established in Section 115, Subpart A, the collecting label paid the publisher at the larger of 9.1 cents per song, or 1.75 cents per minute; publishers shared mechanical royalties with writers. As a pure download service, Apple did not pay performance royalties for musical compositions.

2. Interactive Streaming

a. Record deals are negotiated with private label or through third-party rights aggregators.

b. Music service compensates label for *sound recording rights*..

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[40]S. Knopper, The New Economics of the Music Industry, October 25, 2011; at http://www.rollingstone.com/music/news/the-new-economics-of-the-music-industry-20111025

c. Label pays artist royalty to recording artist, who pays the producer and mixer.

d. Music service pays an "*all-in" royalty*, which includes *mechanical royalty* to publisher(s)

e. Publisher shares mechanical royalty with songwriter. .

f. The "all-in royalty" includes credit for a *performance royalty* that the service provider previously paid to the PRO.

g. PRO splits performance royalty between publisher and songwriter.

Example: Spotify is an interactive streaming service with subscription and ad-supported tiers. Spotify in 2018 paid to the record labels a negotiated 52 percent (circa) of revenues for sound recording rights. Pursuant to rates established under Section 115, Parts B and C (*Phonorecords III*), Spotify paid to publishers and writers an "all-in" 13 percent (circa) to cover imputed mechanical and credited performance rights in musical compositions.[41] Mechanical and performance components were paid separately through respective agencies

3. Non-interactive Service

a. Royalty rates for *sound recording performances* are established by the Copyright Royalty Board.

b. Eligible service providers may include home subscription, satellite radio, subscription webcast, and non-subscription webcast.

c. Music service pays specified performance royalty for sound recordings, usually through SoundExchange.

d. SoundExchange splits royalty between label, artist(s), and (in 2021) producers.

[41] https://www.manatt.com/Manatt/media/Media/PDF/US-Streaming-Royalties-Explained.pdf

e. Music service pays *performance royalty* through PRO via licenses negotiated with and collected by each.

f. PRO splits performance royalty between publisher and songwriter.

g. Services do not pay mechanical royalties for non-interactive uses under Section 114.

Example 1: SiriusXM (a mobile satellite radio service with 200 curated channels of ad-free music) and Music Choice (a home subscription service now owned by Sirius) operate under Section 114. Sirius XM and Music Choice now pay respective amounts of 10.5% and 8.5% (*SDARS III*) of gross revenues for sound recording performances. The services also pay the PROs for performance rights in the musical compositions.

Example 2: Owned by Sirius, Pandora is a non-interactive commercial webcaster that offers subscription and ad-supported services that are eligible for Section 114 licenses for performance rights in sound recordings. Adjusted for inflation, Section 114 rates for webcasters are now $0.0018 per non-subscription performance and $0.0023 for subscription performance (*Web IV*). (Pandora actually licenses its subscription services directly from labels.) Pandora pays performance royalties for musical compositions through PRO.

4. **Video Streaming**

Video (e.g, YouTube) involves a combination of use rights and performance rights in compositions and recordings used in the audiovisual work; streaming is not eligible for a Section 114 license.

The licensing process for *label-generated video* on YouTube involves a payment for use of the master recording. YouTube pays about 70 percent of ad revenues to labels, which share collected revenues with publishers (about 10 percent) and artists.

The licensing process for *user-generated* content at YouTube involves separate payments for label and publisher. When sound recordings are imprinted, YouTube separately pays labels 40 percent and publishers 15 percent of ad revenues to cover related master use and synchronization rights. .For musical compositions imprinted without an accompanying label recording, YouTube will pay a 50 percent revenue share to cover the synchronization In addition to synchronization rights, performance rights for compositions used on either type of user-generated content are covered by PRO licenses negotiated with and paid to each.[42]

[42]D. S. Passman, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS, Simon & Schuster, New York, 9th edition, pp. 278-80.

7. **INFRINGEMENT IN DERIVATIVE WORKS**

Music infringement often arises from the unauthorized taking of an original work in order to make a derivative work that involves some adaptation or taking from the copyrighted compositional form (17 U.S.C. 106); plaintiffs must prove both the defendant's *initial access* to the copyrighted work *and substantial similarity* of the purported infringement.[43] Infringing derivation could implicate takings of melodies, lyrics, excerpts, and beats, to the eventual harm of the original owner who loses both royalties and control of his/her work. The derivative use sometimes may also involve the unauthorized taking of the sound recording in which the infringed composition appeared.[44] Depending on the demonstration of liability, judges or juries may determine that implicated labels, publishers, artists, and writers are jointly liable for copyright infringement of a composition or recording.

Among prominent instances of derivative infringement (infra Section 10), former Beatle George Harrison (*My Sweet Lord*) lifted a melody from ABKCO Music's *He's So Fine.* (previously recorded by the Chiffons in 1962). In a multi-platinum song released in 1991, Michael Bolton (*Love is a Wonderful Thing*) derived from an earlier Isley

[43]Arnstein v. Porter, 154 F.2d 464 (F. 2d)

[44]Joined compositions and recordings appear in *Bridgeport Music*, infra note 51 and surrounding text.

Brothers song of the same name (1966). In the most popular song of 2015, Robin Thicke and Pharrell Williams (*Blurred Lines*) lifted a "look and feel" from Marvin Gaye's (*Got To Give It Up,* 1977). In a trial ending in August, 2019, a jury found Katy Perry, Dr. Luke, and Max Martin (and three others) to have used a repeated beat (called "ostinato') in *Dark Horse* from Flame's gospel-rap *Joyful Noise* (recorded in 2008).

Per 17 U.S.C. 504(b), a "plaintiff may recover damages that s/he actually suffers from the lost sales or licensing opportunity, and additional profits not taken into account." A solo infringer will then wind up paying actual damages plus any additional defendant profits earned from infringement (i.e., the greater of actual damages and earned profits). Multiple infringers of the same work are *jointly liable* for actual damages, but *severally liable* to disgorge any additional profits earned.

Because rights must often be enforced over several joined infringers, a plaintiff bears the responsibility of identifying each party, e.g., per the copyright grid established in Section 2 (supra). Damage experts must then testify to plaintiff actual damages, each defendant's profits, and the monetary differential between them. As a matter of common law, "every indulgence should be granted plaintiff in an attempt to arrive at a sum which is assuredly adequate"[45] and any doubt regarding computation should be resolved in favor of the plaintiffs.[46]

8. **ACTUAL DAMAGES**

Actual damages in music infringement commonly result from missed licensing opportunities that a plaintiff must prove.[47] A copyright plaintiff here bears the burden to prove causality from the infringement; claimed damages and defendant profits must be related to use of the work. A plaintiff may not simply post profits from all defendant earnings related to the entire contract or catalog in which the work may be implicated as one element. Supra note 47.

As actual damages, an infringed writer would earn a presumptive share of license payments (mechanical, performance, and synchronization) that s/he would have rightfully received as a participant. When several writers are named defendants, there is a default statutory remedy (i.e., equal copyright share) for infringed material in an original *joint work* written, or intended to be written, in which the taken element makes a copyrightable contribution. 17 U.S.C. 201 The terms for recovery in a joint work should not be confused with demonstrated works in which the infringing element

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[45]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).

[46]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*, infra note 86, at 1070, citing Sygma Photo News, Inc. v High Society Magazine, Inc., 778 F. 2d 89, 95 (2d Cir. 1985).

has been later added, nor a *collective work* (or *compilation*, note 68) that consists of full constituent parts drawn from other existing stand-alone works (e.g., a Greatest Hits album).

Generally, a plaintiff will need to prove actual damages resulting from the infringement. Damages can be established from lost royalties for missed mechanical, performance, and synchronization licenses; amounts are based on the terms and valuation in a a *hypothetical license*; i.e., the royalty payment that a willing buyer and a willing seller would have transacted in an arm's length negotiation in a similar situation. To establish hypothetical license royalties, an expert must identify comparable licenses that involved one or both parties, or benchmark outcomes in similar situations involving third parties in the industry.[48]

Proving actual damages can be difficult, as Courts have become quite restrictive on the use of license benchmarks. In a major copyright case involving Oracle software, the Ninth Circuit vacated a jury award of plaintiff damages after finding that plaintiff had

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

[48]Oracle Corp. v. SAP AG, 765 F.3d 1081, 1088 (9th Cir. 2014). "The touchstone for hypothetical-license damages is the range of [the license's] reasonable market value."

established no sufficient benchmark license for the copyrighted software.[49]\ And in a prior landmark patent case, the Federal Circuit disallowed expert use of benchmark licenses that were not similar to the patent license in question.[50]

With appropriate caveats, there are four general strategies for determining damages. First, the plaintiff may present from its own licensing practice evidence of royalty amounts that it would expectedly have earned for the contested use, or a reliable method for valuing the same. Second, a plaintiff may determine a benchmark fee or royalty based on comparable licenses found on public websites. Third, a testifying expert familiar with deals in the industry can present royalty parameters (with proper confidentiality) from similar licensing situations. Finally, an expert may determine total royalties earned by all infringers, and present as actual damages a due share based on comparable market negotiations.

[49]Id., at 1093. The "reasonable market value" of a hypothetical license may be determined by reference to similar licenses that have been granted in the past or "evidence of 'benchmark' licenses in the industry approximating the hypothetical license in question."

[50]ResQNet, Inc. *v.* Lansa, Inc., 594 F.3d 860 (Fed. Cir. 2010), *see* Title III (Damages); the Federal Circuit disallowed expert use of benchmark licenses that were not similar to the patent license in question.

Self-Licensing Procedures

A copyright plaintiff is in the strongest position if s/he can present a fact witness who can testify to historic license royalties that have been earned in comparable transactions. For example, plaintiffs in *Bridgeport Music, et al. v. Justin Combs Publishing, et al.* recovered payment for rights in compositions and sound recordings infringed on the album *Ready to Die* recorded by rap artist Notorious B.I.G (Christopher Wallace) on Bad Boy Records (owned by Puff Daddy, Sean Combs).[51] As an established music publisher, Bridgeport Music and its record label Westbound Records had built major catalogs in funk music (including recordings by Ohio Players and George Clinton) that had licensed previously to a number of rap recordings. Plaintiff's licensing agent (Jane Peterer) demonstrated from Bridgeport's licensing practices that the original compositions could have received a 25% share of mechanical royalties for each infringing reproduction. Understanding that the court would handle any double dipping issues, the jury extended a roughly equal valuation to the infringed sound recordings.[52]

[51]Bridgeport Music, Inc. et al. v. Justin Combs Publishing, et al. No. 06-6294.(October 17, 2007).

[52]Id.

Public Interfaces

Musical beats and record samples[53] are now commonly licensed through websites and apps that present available tracks and facilitate deals through online engagement. Rates for basic beats may include an upfront fee (e.g., $2,500 for an exclusive beat), plus a possible share of royalties earned by the new track (e.g., 50% share of performance royalties).[54] License fees for beats and samples may depend on a number of factors -- the popularity of the original, prominence of the sampled work, artist status, marketing spend, distribution format, and sales territory.[55] License fees do not generally vary by seconds-of-use or number of notes in the work, and thre is a Circuit split on possible *de minimus* protection for small sample uses.[56]

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[53]Samples can be described as strings, basslines, drum loops, vocal hooks, or entire bars of music, often manipulated and repurposed with a number of available mixing technologies, that are taken for a studio recording from earlier sound recordings. When the underlying composition is re-recorded by studio musicians, the infringing item is termed an *interpolation.* When use is repeated, the sample is said to be *looped.*

[54]https://www.tracklib.com/howitworks/.

[55]R. Salmon, The SOS Guide to Copyright Law on Sampling, https://www.soundonsound.com/sound-advice/sample-clearance,

[56]Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792 (6th Cir. 2005), found infringement of a two-second guitar chord in N.W.A. song '100 Miles and Runnin'. The chord was used five times throughout the song. "Get a license or do not sample. We do not see this as stifling creativity in any significant way." *But see*, VMG Salsoul v. Ciccone, 9th Cir. June 2, 2016, PDF slip opinion. http://cdn.ca9.uscourts.gov/datastore/opinions/2016/06/02/13-57104.pdf; affirming a District Court and rejecting *Bridgeport* to excuse Madonna's snip of a two note horn sample in her Superbowl song 'Vogue''.

Third Party Experts

No common industry rule for licensing of compositions may be apparent for particular video synchronizations, dramatic performances, and well-known songs recorded or performed by popular music acts. In the synchronization domain, royalty fees may differ for feature, background, thematic, and commercial uses of music, as well as the duration of use, popularity of the musical composition, and stature of the user. More precisely, the amount paid for film music may 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."[57] Rights for a composition and a related master recording used in the same movie are commonly licensed for the same rate

[57]J. Brabec and T. Brabec, MUSIC, MONEY, AND SUCCESS, New York (2000), 174; see also Passman, supra note 42, 265-71.

These necessary valuations in litigation can involve the expertise of a music publisher, internal label, studio division, or experienced clearance agent familiar with licensing terms established in the industry.[58] The matter of choosing among prospective witnesses is complicated by the expert's willingness to testify where actual or potential conflicts are involved. Navigating a choice may be difficult due to potential conflicts of interest among sought parties.

Royalty Shares

If an outside benchmark rate is not available, a damages expert may alternatively determine a writer's actual damages (lost royalties) by examining the amounts paid to other writers for uses of the infringing composition, and determining a reasonable prorated share of the total that would have become payable to the infringed party through an arms-length negotiation. As noted above, participants in a joint work are entitled to equal shares of the royalty pot.

A prorated outcome came down in the matter of *Williams v. Gaye,* which involved infringement of Marvin Gaye's *Got To Give It Up* on Pharrell Williams' *Blurred Lines*, (recorded by Robin Thicke),[59] Based on her personal experience as a licensing

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[58]For example, DMG Clearances, The Music Bridge, or EMG.

[59]Williams et al. v. Gaye et al., Case No. 2:13-cv-06004, (C.D.Cal. 2015).

professional, plaintiff expert Nancie Stern testified that writers of the infringing *Blurred Lines* would predictably have come to share 50 percent of royalties with the original copyright owners of *Got to Give it Up* (The Gaye Estate) if rights licensing had been done – as it should have been -- prior to release of the infringing track (and 75 percent if later). The jury adopted the first standard and returned a damage total of $5.3 million (after remittitur) The Gaye Estate also received a 50 percent copyright share in the infringing work, and are now able to recover future royalties from the infringing writers. This is a considerable advantage when the infringing work has some additional expected lifetime.

Additional Remedies

While actual damages may be difficult to prove, a copyright plaintiff has three additional remedies.

First, a plaintiff may choose at any point (provided the work is registered at the Copyright Office) to recover statutory damages and attorney's fees to compensate for harms that are neither measurable nor otherwise reflected in measured damages 17 U.S.C. 504(c)(1). Statutory recovery is generally between $750 and $30,000 per infringing work. The law allows for remedy adjustments for demonstrated defendant willfulness (allowing up to $150,000 per work) or non-willfulness (allowing below $750

per work). 17 U.S.C. 504(c)(2) Statutory damages are assessed per the total number of infringing works, and not the tallied uses made thereof.

Second, as more fully discussed below, a plaintiff may severally disgorge (above joint actual damages) additional profits earned by each defendant. A total award for infringement would be the sum of actual damages and additional profits.

By simple arithmetic, the composite award actually amounts simply to the maximum of actual damages and defendant profits. In many instances, the final award then is simply defendant profits. However, if profits are the smaller (or unlikely otherwise to be recovered), actual damages represent a minimum for recovery, and should be recognized for this insurance value. If profits are the larger, the only net advantage of claiming actual damages is the possibility that some part of the total remedy can be recovered jointly. This double-sided accounting may then be quite practical if one or more of the infringers represent a payment risk.

Third, a prevailing plaintiff may also enforce an injunction against new reproduction, distribution, and sales of any infringing product. Without obtaining subsequent plaintiff consent, the infringing defendant would need to recall and destroy any outstanding album product, record a new studio track, and reprint records without the infringing element. This is a more serious issue for physical albums released to record stores.

An injunction can then be a costly proposition for both labels and artists. For example, the album *Truthfully Speaking* (a debut album from singer Truth Hurts, produced by Dr. Dre) was a commercial disappointment to Dre's releasing label Aftermath Records. The problem arose because plaintiff placed an injunction on use of a movie sample that appeared on the lead track *Addictive*.[60] Record labels now attempt more resolutely to ensure that all music samples of compositions and sound recordings are cleared correctly. The risk of a serious commercial loss should be considered as part of a negotiated settlement. .

9. REMEDIES

In addition to recovering actual damages jointly from all defendants, a prevailing copyright plaintiff may disgorge severally from each defendant additional profits unaccounted for in the joined damage award. *Direct profits* arise from the sale or licensing of products on which an infringing work is commingled, and can also implicate contributory[61] or vicarious[62] infringements. *Indirect profits* arise from the sale of non-

[60] Saregama India Limited v. UMG (2003).https://www.rediff.com/movies/2003/feb/05bappi.htm. An earlier injunction involving music copyright on a hip-hop sound recording was issued in *Grand Upright Music, Ltd. v. Warner Bros. Records Inc.,* 780 F. Supp. 182 (S.D.N.Y. 1991)

[61]*Contributory infringement* involves a person "who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another" and who therefore

infringing products tied in some way to the infringement; e.g., products sold through infringing advertising.[63] To win a disgorgement of defendant revenues, a plaintiff must prove a causal connection from the defendant's infringement to it's the purported profit arising from the infringing use.[64]

The potential disgorgement of additional profits presumably eliminates any profit gain that an infringer may expect to gain from a copyright theft. Congress here purposely established the disgorgement remedy (which is not a part of patent law) to prevent an infringer from unfairly benefiting from a wrongful act.[65] According to the U.S. Supreme Court, Congress' stiff disgorgement in copyright law is aimed particularly to deter

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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). 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).

[62]A defendant participates in *vicarious infringement* if s/he "has the right and ability to supervise the infringing activity and also direct financial interest in such activities." Gershwin, Id., at 1162; Fonovisa, Id., at 264. No actual knowledge is required. 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.

[63]The distinction between direct and indirect does not appear in the Copyright Act. A distinction first appears in *Mackie v. Rieser*, 296 F.3d 909, 911 (9th Cir. 2002), regarding an infringing photo of a street sculpture that was distributed to audiences at live performances of the Seattle Opera.

[64]Necessary considerations may vary by circuit; see *Thornton v. J Jargon Co*., 580 F. Supp. 2d 1261 (M.D. Fla. 2008).

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

recidivists, who would otherwise prey repeatedly on creators and profit themselves from catalogs of unlicensed work.[66] 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."[67] Attorneys and their testifying experts must here understand the legislative intent behind the disgorgement remedy.

Per Congressional intent, the copyright statute also minimizes the plaintiff's burden to prove defendant profits once infringement is proven. Per 17 U.S.C. 504(b), the prevailing plaintiff is required to prove *only gross revenues* earned from infringing sales. Information on revenues and units sold can be learned from company records; weekly data on record sales are also available from Soundscan. Once revenues are proven, the defendant must prove deducible costs and a basis for apportionment for the value of non-infringing elements. 17 U.S.C. 503

With regard to direct infringement, a plaintiff here may identify gross revenue from any recording, performance, derivative, video use, or compilation[68] in which the

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

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

[68]17 U.S.C. 101. A *compilation* in music is usually a record album that contains a collection of tracks that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. (e.g., a Greatest Hits album).

infringing element is *commingled* as part of a complete song, album, or audiovisual work. Depending on circumstances, labels, distributors, and parent companies may also be held liable for disgorgement, as well as writers, artists, and producers who created the composition or the recording in the first place; pure administrators and collecting agents bear no apparent obligation.

Upheld in the U.S. Supreme Court, a plaintiff may recover both domestic and foreign earnings from sales or licensing of musical product that involves a *precedent act of copying* made in the U.S. in which a plaintiff may have an equitable interest.[69] Along with domestic sales and licenses, the revenue base for a defendant record label may then also include licensing income paid by an independent foreign distributor. If the foreign distributor is held by a defendant parent company, the revenue base from the parent should rightfully include distributor profit earned from sale to retail dealers. The amount of foreign retail sales can be approximated from available royalty statements.

An accounting of recoverable earnings from an infringing release may then be based on entries on annual Profit and Loss Statements

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[69]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). Regarding the international distribution of an infringing movie first made in the U.S., "the [defendant] Company made the negatives in this country, or had them made here, *and shipped them abroad, where the positives were produced and exhibited.* [emphasis mine] The negatives were 'records' from which the work could be 'reproduced', and it was a tort to make them in this country. The plaintiffs acquired an *equitable interest in them as soon as they were made, which attached to any profits from their exploitation* [emphasis mine], whether in the [United States or sales in foreign companies held by the defendants]."

Physical albums (Basic)

Physical albums (Deluxe)

Download albums (Basic)

Download albums (Deluxe)

Single Tracks (Downloads)

Interactive Streaming Licenses

SoundExchange Licenses

Audiovisual Licenses

Other Third Party Licenses

Pressing and Distribution Services

Foreign Distributions and Licenses

Touring Income

10. DEFENDANT COSTS

A plaintiff's proof of defendant revenues is not immediately sufficient to prove any profit total that should be disgorged. Rather, once gross revenues are established, the defendant bears the burden to prove deductible expenses and a suitable means of apportionment for non-infringing factors that may have contributed to sales.

In copyright litigation, a defendant may deduct from earned revenues only those actual costs that are related to production and distribution of the infringing product.[70] To this end, the generally accepted accounting principles (GAAP) of the accounting profession can be useful, but have no special evidentiary standing in any U.S. court.[71] If veritable in some provable manner, deductible expenses may include distribution, pressing, packaging, artwork, recording, royalties, promotion, marketing, and sales discounts.[72] Major label expenses related to promotion and marketing may include radio campaign, video production, and support for concert tours.

From an economic perspective, a defendant should not be allowed to deduct any apportionment of common or overhead costs assigned by formulaic share to an infringing work (e.g., cost of headquarters, executive salaries). This is because the fixed administration costs of overhead would have arisen regardless of whether the particular infringing product was actually released. Consequently, overhead costs are not properly related to any measure of incremental profits.

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

[71]Shalala v. Guernsey Memorial Hosp., (93-1251), 514 U.S. 87 (1995).

[72]*Boyd Jarvis*, infra note 88, at 295.

Some courts nonetheless have allowed non-willful defendants to deduct a share of company overhead.[73] (as well as paid income taxes[74]) If overhead deduction is allowable, defendants must come up with a "fair" method of apportioning shares of overhead cost to infringing and non-infringing products – e.g., production costs[75] or product sales.[76] The decision may ultimately be made by the jury.

Defendant labels can legitimately deduct from gross revenues any paid artist and publisher royalties as well as other provable costs related to the infringing release. However, some amount of production and marketing costs are now recouped from due royalties that would otherwise be paid to the artist. An expert should then avoid "double counting" and also verify that recouped amounts on label and artist income statements correspond to one another.

An accounting concern involving a defendant record company is that the purported costs of integrated production and distribution are self-dealing amounts that

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[73]Allen-Myland, supra note 70, 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).

[74]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 69, at 53; In Design v. K-Mart Apparel Corp., 13 F. 3d 559, 566 (2nd Cir. 1994).

[75]*Sheldon*, supra note 69, at 52-53

[76]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).

effectively go from "one pocket to the other" within divisions owned by the same company. Purported costs paid by an owned label to other divisions may then actually be *internal transfer prices* based on administrative rules, such as a percentage of income earned, that would include elements for division overheads and a profit-markup.[77] Unless further verified by actual costs, it would then be economically improper for a defendant parent company to deduct any such transfer prices paid. For example, UMG, which owns the Capitol Records label through its Capitol Music Group imprint, should not deduct transfer prices paid to distributor Universal Music Group Distribution unless related to actual costs. The same problem holds for payment to UMG's pressing entity, Universal Music Logistics.

Deductions for promotion should not be used to protect label investments in an artist brand. These amounts are related to the stated terms and execution of a full recording contract rather than any individual release that may be related to the contract. Missing the distinction, Steve Drellishak, a vice president at Universal Music Group, testified as a fact witness in the matter of *Marcus Gray, et al. v. Katy Perry*, et al., [78] where Perry and her writers in the song *Dark Horse* took a repeating background from plaintiffs' gospel rap composition *Joyful Noise.* The witness told jurors that cost

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[77]https://www.accountingtools.com/articles/2017/5/16/transfer-pricing

[78]Marcus Gray, et al. v. Katy Perry, et al., (C.D. Ca. 2019) , 2:15-cv-05642

deductions for *Dark Horse* would include investments in Perry's celebrity "brand" ($13,000 for a wardrobe stylist for one night, $3,000 for a hairdo, $800 for a manicure, and $2,000 for flashing cocktail ice cubes).[79] The accountant went on to claim to the jury that the label earned profits of $650,000 from collected revenues of $31 million, for a 2.1% profit margin.[80] If taken seriously, brand accounting like Mr. Drellishak's would defeat the stated purpose of the Copyright Act - *to deter infringement and eliminate unjust enrichment.*[81]

11. APPORTIONMENT OF DEFENDANT PROFITS

After proving expense deductions from gross revenues, a copyright defendant also bears the burden of proving the deductible value of non-infringing elements that may be *commingled* in an infringing work or product, and thus contributed to profits. For

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[79]"[S]he always has to be in the most fashionable clothes, the most fashionable makeup .. She changes her look a lot … That's core to what the Katy Perry brand is." Jury Weighing Damages in Copyright Case Gets a Glimpse Into Costs of Making a Katy Perry Hit, July 31, 2019, at https://ktla.com/2019/07/31/jury-weighing-damagesin-katy-perry-dark-horse-copyright-infringement-case/m;

[80]Costs Behind a Katy Perry Hit Glimpsed by a Jury over *Dark Horse* Copyright Case, August 2, 2019, https://www.cyclolore.net/entertainment/costs-behind-a-katy-perry-hit-glimpsed-by-a-jury-over-dark-horse-copyright-case. The jury awarded a profit total of $1.3 billion.

[81]Deductions for "brand investment" would add to deductible costs the glamour expenses of the largest acts that would have the most opportunity to infringe.

example, infringing songs may include copyrighted melodies or samples mixed with modified lyrics, and albums or concerts may contain both infringing and non-infringing songs.

As a matter of statute (17 U.S.C. 503), the defendant bears the legal burden to prove any apportionment technique for valuation of commingled elements. In this regard, 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."[82] Indeed, plaintiffs have won full disgorgements of defendant profits after defendants could present no suitable apportionment technique.[83] Judges have otherwise made heuristic attempts to determine a proper apportionment.[84] The arbiter of the defendant's apportionment can be the jury itself/[85]

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[82]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*, infra note 84, at 406; defendant MGM must demonstrate a procedure for apportionment due a screenplay taken for a motion picture.

[83]Smith v. Little, Brown & Co. 273 F. Supp. 870 (S.D.N.Y 1967). "It is impossible on this record to attribute any particular part of defendant's sales … to the plagiarized portion . Defendant's profit is due to the book as a whole, not to any particular chapter or paragraph. The book as a whole infringed plaintiff's common law copyright. Under the circumstances, I believe that the only fair thing to do is to award to plaintiff the entire amount of defendant's small profit." *see also* Fedtro, Inc. v. Kravex Mfg. Corp. 313 F. Supp. 990 (E.D.N.Y., 1970).

[84]Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 407-08, 60 S.Ct. 681, 687-88, 84 L.Ed. 825 (1940) (approving apportionment where profits of defendant's film were largely attributable not to the plaintiff's pirated story but rather to the "drawing power" of the star

Apportionment for Compositions

There are two considerations for apportionment -- the proper share of the infringed material in a defendant's musical composition, and the value of that composition to the entire album or video in which it appears. With regard to the first, it is possible, though not necessary, to assign equal weight in value to melodic and lyrical components commingled in the same song; this is the default standard for joint works. (17 U.S.C. 201) However, infringed melodists 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 original melody.[86] The plaintiff prevailed after defense witness Lou Levy could not recall in testimony the modified lyrics that his infringing writers had added.

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performers and the artistry of others involved in the creation of the film); Abend v. MCA, Inc., 863 F.2d 1465, 1480 (9th Cir.1988) (remanding for apportionment where factors other than the underlying story-- particularly the talent and popularity of Alfred Hitchcock, Jimmy Stewart, and Grace Kelly--"clearly contributed" to the success of the film "Rear Window"), aff'd on other grounds, 495 U.S. 207, 110 S.Ct. 1750, 109 L.Ed.2d 184 (1990); Sygma Photo News, Inc. v. High Soc'y Magazine, Inc., 778 F.2d 89, 96 (2d Cir.1985) (apportioning profits from sales of "Celebrity Skin" magazine where promotional cover contained not only infringing photograph of Raquel Welch but also a list of other nude celebrity photographs contained within).

[85]Andreas v. Volkswagen of America, Inc., 336 F.3d 789, 797-98 (8th Cir.2003) (citation omitted); "[t]he question of allocating an infringer's profits between the infringement and other factors, for which the defendant infringer carries the burden, is 'highly fact-specific' . and should [be] left to the jury."

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

At times, infringing and non-infringing minutes of use are commingled throughout the track. Here the matter of apportionment may involve some rough-hewn equity. For example, the jury recently apportioned 22.5% of songwriter profits arising from Perry's *Dark Horse* to track minutes in which infringing background music from *Joyful Noise* had appeared.[87] However, a New Jersey District Court explicitly ruled out a similar "second-by-second" apportionment after pointing out the importance of recognizable choruses and beats (particularly in an infringing "hook" or introduction) that can add considerably to the worth of an infringing composition.[88] And in *Bridgeport Music*,[89] the Sixth Circuit court (referring to *Andreas*[90]*)* found it allowable that the jury could have agreed that a strictly mathematical approach for apportionment may have failed to take into account the real significance of the infringing passage to the song.[91]

Apportionment for Album

With regard to the second concern for apportionment – the contribution of an infringing song to the entire album or video -- the defendant must yet present a credible means for

[87]*Gray v. Perry*, supra note 78.

[88]Boyd Jarvis v. A&M Records, et al., 827 F. Supp. 282, 295 (N.J. 1993).

[89]*Bridgeport Music*, supra note 51.

[90]*Andreas*, supra note 85.

[91]*Bridgeport Music*, supra note 51.

determining the relative importance of the contested album track. Two contrasting situations are apparent, depending on whether or not the track was used to promote the album before or during its early release (i.e.., traditional label promotion).

In the traditional promotion model, labels choose tracks for radio promotion, video production, and social media placement during the early weeks of release that generate the largest sales volume. It is not here proper to attempt a simple allocation of profits based on the number of tracks on the album. For example, after finding that George Harrison's *My Sweet Lord* infringed the classic rock hit *He's So Fine*, the court awarded to plaintiffs 70 percent of mechanical royalties and 50 percent of sound recording profits that Harrison had earned from sales of his entire album *All Things Must Pass*.[92] Among other factors, the court's apportionments reflected the share of radio airplay (as measured by BMI royalties paid to all album tracks) as it promoted sales of Harrison's album.

Based on shares of radio play, a jury in 2000 awarded to the Isley Brothers 28 percent of revenues from Michael Bolton's album *Time, Love, and Tenderness*, which included an infringing version of the group's earlier hit *Love is a Wonderful Thing*.[93] The

[92]ABKCO Music, Inc. v. Harrisongs Music, Ltd., 508 F.Supp. 798, 799 (S.D.N.Y.1981), upheld 722 F. 2d 988 (@nd Cir, 1982)

[93]Three Boys Music Corp. v. Michael Bolton, et al., 212 F. 3d 477 (9th Cir. 2000). The jury also held that infringed elements of the original work contributed to 66% of the value of the infringing album track.

Ninth Circuit upheld, finding that the Isley Brothers had presented evidence that Bolton's infringing song was the album's lead single, the song was purposely released in order to promote the album, and that Bolton himself had engaged in telephone promotion of the song.

Detailed information on radio play on each station is now available from Media Monitors, RCS MediaBase, and Nielson Broadcast Data Systems. Alternatively, a listing of some important label (UMG's Interscope) marketing instruments can be found in a public document made available by expert Douglas Bania,[94] which presents a very useful guide for plaintiff interrogatories and discovery of label documents.

Considering promotion through radio play, I testified at deposition in 2012 regarding an Interscope release of Jay-Z's composition *How We Do* (recorded by West Coast rapper The Game on the album *The Documentary*) that purportedly infringed an earlier work (*Elevator*) written by songwriters Ryan Lessem and Douglas Johnson. I considered the label's video expenses, marketing amounts, station audiences. and YouTube views for each track on the new album. Based on available data regarding two

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[94]D. Bania, "Apportioning Copyright Damages – the Case of *Blurred Lines*", Journal of Intellectual Property Law & Practice, 2015, 10(12), also found at https://www.experts.com/Articles/Apportioning-Copyright-Damages-Blurred-Lines-By-Doug-Bania. The article contains details of chart testimony provided by the marketing department of UMG's Interscope label to expert Bania. Interscope's charts showed how the record label came to relate weekly sales of the song *Blurred Lines* (from Soundscan) to weekly radio play, video views, social media, downloads, and live promotion events.

promoted radio songs, I determined that the track *How We Do* generated most spins over a larger station audience, and thus deserved the largest apportionment of album revenues earned in the earliest months of sales.

Label promotion now may be only a part of the story. After the initial promotion spike is over (about twelve to eighteen months), marketing measures can be augmented with cumulative audience information from streaming sites, such as views on YouTube, audiences on Last.fm,[95]. or streaming and digital sales on Alpha Data (f/k/a BuzzAngle Music).[96] For example, I learned from cumulative audience information on Last.fm that country artist Justin Moore's contested song *Backwoods* was the second most popular song on the album release entitled *Justin Moore*, and a draw to his later concerts.

There are some final adjustments. The Third Circuit ruled that prejudgment interest is recoverable for a copyright award; to do otherwise would allow an unjust enrichment on the time value of money.[97] The appropriate discount rate is the one year

[95]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.

[96]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.

[97]William A. Graham Co. *v.* Haughey, 646 F.3d 138, Part III.A. (3rd Cir. 2011);

Treasury bill rate.[98] Winning plaintiffs may also recover attorney's fees if the infringed work was registered previously with the Copyright Office.[99] Copyright law does not allow recovery for punitive damages, which can nonetheless be established for other damages in complex infringements involving trademarks and unfair competition.

12. LIVE EVENTS

Live concerts allow artists 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 independent promotion, live streaming, and virtual reality.

Copyright plaintiffs have sometimes sought to recover damages for infringing material performed in live events.[100]"The matter is now in center stage in two important cases. Ed Sheeran now faces the Estate of hHeirs to Ed Townsend that claims, *inter alia*, that Sheeran's concert performances of the hit *Thinking Out Loud* infringed

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[98]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).

[99]17 U.S.C. §505, *In Design*, supra note 54, at 567, McCulloch v. Albert E. Price, Inc., 823 F. 2d 316, 322 (9th Cir. 1987).

[100]Fahmy v. Jay-Z , (C.D. Ca. 2011), Case 2:07-cv-05715-CAS-PJW, allowing a claim to go forward; Document 309. 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; Montana Connection, et al. v. Justin Moore, (M.D. Tenn., 2013); case settled.

Townsend's *Let's Get It On,*[101] co-written with Marvin Gaye. And producer Artem Stolyarov recently filed suit again the music group Bastille for its performance of the r song *Happier,* a purported infringement of Stolyarov's adaptation *I Lived (Arty Remix).*[102]

Allowable recovery from unauthorized performances in live events was established in *Frank Music v. Metro-Goldwyn-Mayer,*[103] where an MGM casino performed an infringing work (taken from the musical *Kismet*) in a ticketed review that contained eight separate staged acts. 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

[101]Griffin et al v. Sheeran et al (S.D.N.Y. 2017) 1:17-cv-05221-LLS.

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

[103]886 F. 2d 1548, 1550 (9th Cir. 1989).

and the song was a part of the score. By later standards enforced in many circuits, song and sales had a *reasonable relationship.*[104]

By extension, the right to create and perform a derivative song is an exclusive right held by the original copyright owner. Without the owner's consent, an unauthorized derivative is not a properly licensed component of any PRO license that would otherwise cover performances of catalogued works at a licensed concert. Unless her consent to derivation and registration is explicit, an infringed plaintiff can seek recovery for performance of any derivative work.[105]

Basis for Recovery

To seek recovery from concert infringement, 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 as a beneficiary for contributory or vicarious infringement.

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[104]*Thornton v. J Jargon, Co.*, 580 F. Supp. 2d 1261 (M.D. Fla. 2008). Facing a Circuit split on the causal connection between infringement and defendant profits earned at the box office (at 1280), Judge Whittemore enforced the predominant *reasonable relationship* by allowing plaintiffs to attempt to recover damages from an infringing work although audiences had come to view the infringement only after buying tickets. The judge cited Congressional intent behind the Copyright Act. Supra note 65.

[105]Supra. The Court yet specified that plaintiff would need to prove a *causal connection* between the infringement and defendant revenues.

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 or tour.[106] Payments generally include a *minimum guarantee* (or flat fee) as well as a *backend arrangement* for an artist share of concert revenues. There are three structures for backend deals:

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 artist 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.

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

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

performing artists at concerts. Agents specify terms with the talent buyer who would bring in the merchandising platforms at the event.

From concert earnings, the artist pays its act *manager* and event *agents* for their respective administrative services. (e.g., 15 to 20 percent each) Artists do not pay production costs related to the event itself, which are handled by the talent buyer from gate earnings.[107]

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 as a contributory or vicarious infringer for its production role in the album and its promotion of the event.

New album releases involve label 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,

[107]Costs at the event 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/

songwriting, acting, and sponsorship revenues. ds and leaving the remainder to the artist. On the label's profit and loss statement (P&L), the label did yet list costs of concert promotion, which presumably could be challenged for uses related to the infringement.

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, revenue shares for both concert and merchandise earnings are appropriately disgorged, subject to deductions for cost and apportionment for the value of non-infringing elements.

Some 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.

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 on radio, streaming, and video, as described in Section 11 above.

13. CONCLUSION

Some final points come to mind.

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

New writers and artists must then have a precautionary understanding of copyright law as a taking of their creations can harm their career, and a misguided lawsuit can hurt their finances.

Established writers and artists must be heedful of comparable sounds that may be judged to be substantially similar to preexisting work.

A financial expert can make preliminary estimates, define data needs, and help compel production of documents.

Experts should be encouraged to post reality checks on excessive valuations, and should help attorneys decline or settle the case if appropriate.

The copyright grid and accounting chains should be established. Potential parties should be identified and preliminarily valued as a source of damage and profits that may be disgorged.

Plaintiff and defendant experts must be heedful of the respective burden that each bears in proving damages. Facing the risk of losing an entire claim, an expert's analytic techniques must meet standards of peer review.

Plaintiffs should itemize actual damages and revenues from items related to infringement. The infringement base may span earnings from domestic and foreign sales and licensing, as well as concert revenues related to infringing acts

Defendants should deduct for actual expenses related to production, pressing, distribution, marketing, royalty compensation, and the valuation of non-infringing elements in the work.

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Litigation support involving media economics and copyright damages has involved music, movies, television, advertising, branding, apparel, architecture, fine arts, video games, and photography. Music matters have involved Katy Perry, Led Zeppelin, U2, Usher, Madonna, Universal Music, BMG, Sony Music Holdings, Disney Music, NBCUniversal, Paramount Pictures, LMFAO, D4L, Randy Newman, Aimee Mann, Rascal Flatts, Nappy Roots, Rick Ross, P. Diddy, Notorious B.I.G., and 50 Cent. .

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MUSIC ENGAGEMENTS

Gray et al. v. Katy Perry et al. *Central District of California*, 2019, report and deposition, valuation of damages resulting from copyright infringement in **Katy Perry's song *Dark Horse***.

Dan Marino v. Dante Barton and Will Guice, Pennsylvania Court of Common Pleas, 2018, report and testimony, valuation of damages resulting from breach of contract among three songwriters claiming rights in **Usher's song *Bad Girl.***

Michael Skidmore v. Led Zeppelin, et al., Central District of California, 2016, trial testimony, estimated damages in infringement matter against rock group Led Zeppelin regarding **classic song *Stairway to Heaven.***

*Robert W. Cabell v. Zorro Productions, Inc., et a*l., Northern District of California, report, estimated commercial damages resulting from infringement of copyright in a **musical adaptation of movie *Zorro***.

Sidney Earl Swanson v. MJJ Productions, Central District of California, 2015, report, copyright infringement matter regarding a musical composition used in a **sound recording *Chicago* by Michael Jackson.**

Alexander Graham-Sult and David Graham v. Bill Graham Archives, LLC, et al., Northern District of California, 2015, report and deposition, valuation of copyrights and business concern resulting from fiduciary breach of the estate of **rock concert producer Bill Graham**.

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Cartagena Enterprises, Inc. v. J. Walter Thompson Co., et al., American Arbitration Association, 2015, report, valuation of damages resulting from infringement of prominent salsa dance composition in an advertising message **by leading advertising agency and the largest bank in Puerto Rico.**

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