



FINANCIAL REMEDIES IN MUSIC COPYRIGHT

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EXECUTIVE SUMMARY

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

1. Music copyright involves separate rights in records (*sound recordings*) and underlying *musical compositions* upon which the record is based. (Section 2)
2. The sound recording right is owned by the *record label*, and the composition right is owned by the *music publisher* to whom the *songwriter* transferred copyright. (Section 2).

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2. Copyright for compositions includes three *mechanical rights* (*reproduction, derivation, and distribution*), and a right for public display of sheet music. (Section 3)

4. A fifth right for a composition is the public *performance right*. (Section 4)

5. Copyright for sound recordings include reproduction, derivation, distribution and (for digital audio transmissions) public performance. (Section 5)

6. Revenues resulting from the sale and licensing of sound recordings are transacted largely through three accounting chains involving: a.) *physical records and permanent digital downloads*, b.) *interactive streaming and limited downloads*, and c.) *subscription transmission and non-interactive streaming*. (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. (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. Revenues may include domestic sales and licenses, 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, which must relate to the production, distribution, and marketing of the infringing product. Overhead costs are not deducted under willful infringement. Transactions for intra-organization transfers involving distribution and manufacturing must be based on actual costs. (Section 10)

11. A defendant bears the burden to prove apportionment of profits related to contributions from infringing and non-infringing elements 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)

13. Remittitur is a means for defendant to challenge a jury outcome. Different circuits have different standards under which remittitur must be granted. (Section 13)

1. INTRODUCTION

The distinguished copyright lawyer Arthur Latman once quipped, “Copyright law, not horse racing, is the sport of kings”. 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 2004.¹ Since that writing, 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 the last month (July, 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*.

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

Written from the perspective of a testifying economist, this paper reviews current market issues and legal procedures.² The paper is organized in sections that may be read sequentially or independently. An executive read might begin with Section 6, which establishes the accounting chains for money earned in three areas of music product: sales and download, interactive streaming, and non-interactive services. .

2. COPYRIGHT IN THE MUSIC INDUSTRY

Per the Copyright Act of 1976,³ there are two strata of music copyright -- the *sound recording* and the underlying *musical composition*... The term *sound recording* implicates the studio or live sounds imprinted on a produced album or track,⁴ while *musical composition* implicates underlying lyrics and melodies of the actual song.⁵ 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 their particular work.⁶

²As enabling statutes, the Copyright Acts of 1909 and 1976 established rules in common law that handle complexity and channel system feedback. The Act then establishes a process in common law that attempts to guide litigants to a resolution that is more “satisficing” than it is demonstrably optimal, efficient, market-based, or even “fair”. This notion of common law 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*).

³17 U.S.C. §101-1332 (2000).

⁴A *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).

⁵A *musical composition* can refer to an original piece or work of music either vocal or instrumental, the structure of a musical piece, or to the process of creating or writing a new piece of music.

⁶For 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. Gordon and Weatherly received royalties every time the actual song was recorded or performed by any artist.

With regard to *sound recordings*, record labels are engaged in the production and distribution of tracks and albums that feature the efforts of recording artists. The larger U.S. labels are owned by or affiliated with one of three integrated music companies – Universal Music Group, Sony Music Group, and Warner Music Group – that account for 65 to 70 percent of global sales of records and videos.⁷ The integrated companies also own manufacturing and distribution divisions that handle necessary operations for their labels and affiliates.

Major labels may pay artists royalties of 10 to 25 percent of qualifying revenues, depending on the professional stature of the artist, the number of album releases under contract, and the ability to hit sales targets.⁸ From due royalties, artists must pay studio producers, and recoup label advances and expenses. Labels also pay composition owners for reproduction and distribution of the song infringed in each track. (infra Section 3).

Outside of major companies, independent labels and artists now may use alternative platforms for production and distribution of their tracks. Independent record labels without major distribution deals can now place record product on major streaming and download sites and record stores through distributors that administer actual delivery (e.g., The Orchard), or digital rights aggregators that negotiate collective licenses without providing actual delivery. (e.g., the Merlin Network). Independent artists can also place self-recorded tracks on online platforms and stores using distribution services like CDBaby and Tunecore.⁹

Musical Compositions

Recorded music involves a second right for underlying songs imprinted on sound recordings. Rights for compositions first put in tangible form are held initially by the original songwriter(s). A songwriter will usually transfer copyright to a *music publisher*, who can promote commercial uses, collect royalties, and offer advances

⁷"Independent Music is now a growing force in the global market". Musicindie.com, 1 February 2014. Retrieved 20 March 2019.

⁸<https://www.manatt.com/Manatt/media/Media/PDF/US-Streaming-Royalties-Explained.pdf>

⁹Without any label contract, independent artists also can now use digital interfaces to post tracks for listening and sharing (e.g., Soundcloud), post new beats (e.g., Airbit, Beatstars), offer musical works for synchronization on film and other video (e.g., AudioSocket), seek equity funding from pooled private investors (e.g., Royalty Exchange), reach fans about upcoming local concerts (e.g., Bandsintown), podcast (Buzzsprout), and clear record samples from major rights owners (The Music Bridge), other independent artists, (Traccks), or sample libraries (TrackLib).

that stabilize payments to the writer. Small publishers often appoint larger publishers as *administrators* to handle actual royalty collections.

Musical compositions often have more than one writer, who signs to the co-publisher his/her respective share of copyright in the original song. As a co-owner of the composition, each co-publisher may exploit or license use of the entire work, provided a suitable accounting is made to other rights owners. The accounting provision is not in the statute but is an equitable consideration related to unjust enrichment and co-ownership.¹⁰

Each of the above major companies has a *publishing division* to license and administer rights in songs written by recording artists currently signed to (or aiming to be signed to) a label contract (e.g., Sony/ATV Music Publishing/Alan Jackson, Universal Music Publishing Group/Bruce Springsteen, and Warner Chappell Music/George Michael). A record label may also license songs owned by *independent publishers* that control copyrights for many non-recording (pure) writers (e.g., Kobalt Music Publishing, BMG Rights Management, and Songs Music Publishing)

A more established writer may also operate his/her own publishing entity and thus continue to control all copyright in the composition. The writer will designate a larger publisher to act as administrator to collect due royalties.¹¹ In a related *co-publishing* deal, a songwriter may assign a partial share of the copyright to a publisher and in exchange for publishing services and a share of publisher income.

Industry Growth

The global record industry reversed years of decline and saw positive growth in the recent period 2017-2018; the U.S. industry earned total revenues of \$9.8 billion retail (up 11.3% from 2017), and \$6.6 billion wholesale (up

¹⁰*Oddo v. Ries*, 743 F.2d 630, 633 (9th Cir. 1984).

¹¹For example, songwriters Max Martin and Lukasz Gottwald (p/k/a Dr. Luke) maintain publisher rights through their own entity Kasz Money Publishing; major publisher Kobalt Songs acts as administrator for Kasz.

11.9%).¹² Buyers for recorded music included store customers and digital services for interactive streaming/limited downloads, non-interactive subscription and webcast, and permanent download.¹³ Interactive streaming led the industry advance in 2018, as download and CD sales actually declined.

Interactive streaming services have overcome permanent downloads to dominate market growth, now accounting 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%). Interactive *video streaming* is made available through uploads on YouTube and Vevo, which are entirely ad-supported.

Streaming growth may continue with the continuing emergence of voice-activated assistance, digitally curated recommendations, integrated playlists, podcasts, and assisted artist-fan interaction, as well advanced at Spotify – a pureplay service provider. Digital music services offered by integrated tech companies will continue to combine music services with ecosystems that offer retail goods (Amazon), bundled software (Apple Music), and web-related functionalities (Google Music). Nonetheless, songwriters fear that streaming technologies allow listeners to unbundle single tracks from full albums, and thus reduce mechanical royalties generally due writers.

Non-interactive service (subscription, satellite radio, and webcast) now accounts for \$1.2 billion (up 32%) of revenues in the U.S. market. Key service providers include *Music Choice* (residential cable and satellite), *SiriusXM* (satellite radio), and *Pandora* (webcast). Subscription services monetize service exclusively with subscription fees. Webcasters may offer different tiers with subscription and advertising-based services.

Once the market leader in the digital space, 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). Having introduced commercial download service with iTunes, Apple Music maintains listening services for customers who have already bought

¹²RIAA 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>.

¹³*Interactivity* depends on whether the immediate track choice is selected by the listener or site programmer.

downloads, but is moving out of new sales. Napster and Amazon now continue to sell *unit downloads* to a diminishing base of users.

3. REPRODUCTION RIGHTS OF MUSICAL COMPOSITIONS

The structure of copyright law for music is here presented in the order in which creator rights were established – musical composition and sound recordings. Composition is the senior right because it was protected first for concerts, vaudeville, and other live musical performances before the invention of the first recording technology (i.e., the piano roll).

The owner(s) of musical compositions were granted exclusive rights 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 copyrighted work in copies or phonorecords;¹⁴
- b. The right to prepare *derivative work*. i.e., a compositional form in which a basic work may be recast, translated, transformed, or otherwise adapted;
- c. The right to *distribute* copies or phonorecords of the work to the public by sale or other transfer of ownership, or by rental, lease, or lending; and
- d. The right to *perform* the copyrighted work publicly.

A fifth right first established in 1909 relates to visual display of sheet music; I shall not discuss further.

Owner rights regarding reproduction, derivation, and distribution of musical compositions used on phonorecords are termed *mechanical rights*.¹⁵ Mechanical rights may also implicate *synchronizations* of musical compositions that are imprinted on video soundtracks (e.g., films, television programs, online videos, video

¹⁴17 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.”

¹⁵As applied to copyright in musical compositions, the term *mechanical right* is historically derived from the time when phonorecords (Id.) were “mechanically” reproduced on records and tapes, and not electronically reproduced on digital channels.

games). Mechanical and synchronization uses of composition may also implicate a sound recording of the work (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. Without statutory limit, original owners of musical compositions continue to retain exclusive control over derivative works and video synchronizations.

Rates in Section 115 are under the authority of the Copyright Royalty Board. (CRB),¹⁶ which enforces ratemaking standards set forth in 17 U.S.C. 801 (b). There are three types of reproductions: Subpart A: physical form, permanent download, and purchased telephone ringtone; Subpart B: interactive streaming and limited downloads;¹⁷ 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 2021,¹⁸ 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.¹⁹ The license rate for a ringtone is 24 cents per download.²⁰

¹⁶The Copyright Royalty Board (CRB) is an administrative body composed of three retired federal judges. The CRB became active in 2005 following the passage of the Copyright Royalty and Distribution Reform Act of 2004

¹⁷*Limited downloads* are copies that reside on a user’s listening device until the service subscription ends.

¹⁸17 U.S.C. 803(b)(1)(A)(i)(V).

¹⁹37 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)

²⁰74 CFR at 4515.

Record labels pay mechanical royalties earned from record sales directly to the publisher (through its collecting mechanical rights organization (MRO) – e.g., Harry Fox Agency²¹ or American Mechanical Rights Agency (AMRA) which splits collected royalties with writers per private contract.

Payment terms for Subparts B and C had been structured in a complex settlement agreement enacted after a ratemaking in 2008; simplified regulations were established in 2018.²² With some accounting simplification, each service provider accounts to an “all-in” royalty pool for due mechanical royalties under Section 115. Accounted payments for each provider service are based on a percentage share of revenue or content cost, credited for performance royalties paid for compositions (infra Section 4), and made subject to a payment floor based on number of subscribers. Once accounted, payment responsibility for the pooled amount is apportioned to individual service providers, per the proportion of streams.

The institutional structure for mechanical rights will change following the passage in 2018 of the Orrin G. Hatch-Robert Goodlatte Music Modernization Act.²³ Per Title I, 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

²¹The Harry Fox Agency was established in 1927 by NMPA as a licensing and collection agency for mechanical and synchronization rights in musical compositions. Harry Fox currently has over 48,000 collecting publisher affiliates.

²²Determination 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)

²³H.R. 1551, Pub.L. 115–264, at <https://www.copyright.gov/music-modernization/>

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.

4. PERFORMANCE RIGHTS OF MUSICAL COMPOSITIONS

The fourth listed right in 17 U.S.C. 106 protects public performances of musical compositions.²⁴ The U.S. established performance rights for live venues (e.g., music halls) before music was first recorded.

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 -- that continue to 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, *inter alia*).

Small performance rights commonly are licensed and administered in the U.S. through the efforts of three major performance rights organizations (PROs), with which songwriters and composers may list created works. The major PROs include American Society of Composers, Authors, and Publishers (ASCAP; e.g., Madonna), Broadcast Music, Inc. (BMI; e.g., Dolly Parton), and SESAC²⁵ (e.g., Bob Dylan). The PROs uniformly offer *blanket licenses* that cover the use of all works registered in their respective catalogs for a specified period of time.²⁶ Each PRO then negotiates, collects and distributes royalties, with split payment (50/50) for songwriter and publisher.²⁷ Rates at ASCAP and BMI are generally negotiated consensually, but can be

²⁴Under 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."

²⁵The acronym SESAC is no longer meaningful.

²⁶Broadcasters and cable channels may also obtain *program licenses* for particular time-segments in the day.

²⁷The PRO split is 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. Performance royalties are generally not used to recoup publisher advances. .

brought to arbitration to Rate Courts established by Justice Department Consent Decrees in the Southern District of New York.²⁸ 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.

There are apparent asymmetries in the domain of performance rights. First, movie theaters do not need performance licenses to cover music synchronized in movie soundtracks performed in the theater. By contrast, television channels, cable networks, and video streaming must cover movies and video, as well as other music performances on all broadcast and wired transmissions. Second, performance rights are not operative for transmissions of permanent downloads, but are operative for streaming and subscription service involving the same tracks.

5. COPYRIGHT FOR SOUND RECORDINGS

Separate copyright protection for sound recordings emerged in state law after new recording technologies (piano rolls) made possible the capture, fixation, and playback of musical sounds taken from music performances. 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 royalty to protect performances.²⁹

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).³⁰ The

²⁸For 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).

²⁹S. Rep. No. 104-128, at 14-15 (1995).

³⁰Digital 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).

DPRSRA amended 17 U.S.C. 106 to include for recording owners a limited performance right for sound recordings performed (17 U.S.C. 114) on a *digital audio transmission* that include wired or over-the-air transmissions that use digital technology.³¹ In 1998, the *Digital Millennium Copyright Act* (DMCA)³² further amended 17 U.S.C. 114 (Section 114) to set in place an institutional structure to facilitate licensing of the newly established performance right.

Section 114(d) of the DMCA recognized three categories of services with respect to the newly established performance royalty

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.³³ However, a specially programmed online broadcast venue performed by a commercial radio station must pay performance royalties to the record label (e.g., iHeart Radio owned by radio chain iHeart Media).

2. *Non-interactive services* – With some additional eligibility requirements related to complementarity of performances, music subscription (e.g., cable-based Music Choice, satellite radio SiriusXM) and webcast services (e.g., subscription and non-subscription offered by Pandora). perform tracks now covered by a statutory license³⁴ from the Copyright Royalty Board. License categories include pre-existing subscription (established before July, 1998, which marks the enactment of the DMCA),³⁵ new subscription (established after July, 1998),³⁶ and non-

³¹17 U.S.C. § 106(6) (2000).

³²Digital Millennium Copyright Act, Public Law No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

³³17 U.S.C. §114(d) (1) (A)-(B) (2000).

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

³⁵Determination 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).

³⁶Determination 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);

interactive webcasting.³⁷ Per Sections 114(f), performance royalties for eligible transmissions now may be collected and distributed through the collective *SoundExchange*, which divides collected dollars evenly between label and artists. Five percent of performance royalties collected under Section 114 are credited to payments for ephemeral reproductions of sound recordings used in transmissions, as established under Section 112(e).³⁸ Some business subscription services (e.g., Cloud Cover Music) are exempt from the performance royalty for use of digital audio transmissions, and thus pay only the ephemeral royalty for the audio transmission.³⁹

3. Remaining *digital audio transmissions* (i.e., permanent download, interactive streaming) must obtain performance rights for uses of sound recordings that are ineligible for Section 114 license.⁴⁰ For major labels, these licenses are established by direct deal between service provider and label. Smaller labels will rely upon collective rights deals established by Merlin.

6. ACCOUNTING FOR THE MONEY CHAIN:

Based on Sections 3-5, the money chains for sale and licensing of musical products through labels, publishers, artists, writers, MROs (mechanical rights organizations), and PROs (performing rights organizations) as follows.

³⁷Determination 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).

³⁸37 CFR 380.10(d).

³⁹Determination 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)

⁴⁰17 U.S.C. 114(b)-(d)(3) (2000).

1. Physical Units and Permanent Downloads

- a. Record deals are negotiated privately or through label rights aggregators.
- b. Store or music service pays label for sound recording transactions.
- c. Label pays artist royalty to artist.
- d. Label pays mechanical royalty to publisher through MRO.
- e. Publisher pays songwriter per private contract.

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.⁴¹ 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. Publisher collections were paid through MRO.

2. Interactive Streaming

- a. Record deals are negotiated privately or through label rights aggregators.
- b. Music service licenses rights for sound recordings from label.
- c. Label pays artist royalty to artist.
- d. Music service pays mechanical royalty to publisher(s) through MRO.
- e. Publisher pays songwriter per contract.
- f. Music service pays performance royalty through PRO.
- g. PRO splits royalty between publisher and writer.

Example: Spotify is an interactive streaming service with subscription and ad-supported tiers. Spotify in 2018 paid to the record labels a negotiated 59 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 a combined 13 percent (circa) to cover “all-in” mechanical and performance rights in compositions.⁴²

⁴¹S. 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>

⁴²<https://www.manatt.com/Manatt/media/Media/PDF/US-Streaming-Royalties-Explained.pdf>

3. Non-interactive Service

- a. Royalty rates for performances of sound recordings are established by the Copyright Royalty Board.
- b. Eligible service providers may include cable subscription, satellite radio, subscription webcast, and non-subscription webcast.
- c. Music service pays performance royalty for sound recordings through SoundExchange.
- d. SoundExchange splits royalty between label and artist.
- e. Music service pays mechanical royalty to publisher through MRO.
- f. Music service pays performance royalty through PRO.
- g. PRO splits royalty between publisher and writer

Example: Pandora is a non-interactive commercial webcaster that offers subscription and non-subscription service. Pandora' services are now 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 pays performance royalties for musical compositions through PRO.

Music Choice (a residential subscription service) and SiriusXM (a mobile satellite radio service) operate under the same payment structure under Section 114. Music Choice and SiriusXM now pay respective amounts of 8.5% and 10.5% (*SDARS III*) of gross revenues in sound recording royalties.

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 a 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 provably copyrighted melodies, lyrics, excerpts,

⁴³ Arnstein v. Porter, 154 F.2d 464 (2d Cir, 1946).

and beats that are parts of a protected composition, and possibly the selection and arrangement of song elements that may be individually unprotected.

Once composed, the infringing derivative may wind up in unauthorized reproductions, performances, or video synchronizations. The derivative use sometimes may also involve the unauthorized taking of the sound recording in which the 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. Infringers may so deprive rights owners of both compositions and recordings due accreditation, royalties, future licensing, and control of a copyright.

Among prominent instances of derivative infringement discussed below, George Harrison (*My Sweet Lord*) lifted a melody from ABKCO Music's *He's So Fine*, Michael Bolton (*Love is a Wonderful Thing*) derived from an earlier Isley Brothers song of the same name, Robin Thicke and Pharrell Williams (*Blurred Lines*) lifted a "look and feel" from Marvin Gaye's (*Got To Give It Up*), and Katy Perry took a repeated beat (called "ostinato") in *Dark Horse* from Flame's gospel-rap *Joyful Noise*.

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 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.

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

Because rights must often be enforced over several simultaneous infringers, a plaintiff bears the responsibility of identifying each beneficiary. Damage experts must then be prepared to quantify plaintiff actual damages, the individual profits of each defendant, 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

7. 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 and may not simply post profits earned by the defendant.

Lost licensing fees should be established on the basis of 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

⁴⁵Orgel 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).

⁴⁶Shapiro, 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).

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

⁴⁸Oracle 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.”

plaintiff damages after finding that plaintiff had established no sufficient benchmark for 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

There are four general strategies for determining damages. First, the plaintiff may present from its own licensing practices evidence of royalty amounts that could be expectedly paid for the contested use, or a reliable valuation method from an expert procedure. Second, a plaintiff may determine a benchmark fee or royalty based on comparable licenses that can be found on public websites. Third, a testifying expert familiar with deals in the industry can present royalty parameters from comparable licensing situations. Finally, an expert may determine total publisher royalties earned by all infringers, and present a due share based on comparable market negotiations.

Self-Licensing Procedures

Plaintiff is in a strong position if s/he can present a fact witness who can testify to historic license royalties that have been earned in a comparable transaction. For example, plaintiffs in *Bridgeport Music, et al. v. Justin Combs Publishing, et al.* recovered payment for compositions and sound recordings that appeared on three different tracks 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 Ohio Players and George Clinton) that had been licensed previously in a number of rap recordings. Plaintiff fact witness Jane Peterer demonstrated from the plaintiff's established licensing practices that original compositions could have received a

⁴⁹Id., 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

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

25% share of Bad Boy's mechanical royalties for each infringement. Understanding that the court would handle any double dipping issues, the jury extended a roughly equal valuation to the infringed sound recordings.⁵²

Public Interfaces

Musical beats and record samples⁵³ are now commonly licensed through websites and apps that present available tracks and facilitate deals through online engagement. Rates for basic beats generally 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. There is a Circuit split on possible *de minimus* protection for small sample uses.⁵⁶

Third Party Experts

No common industry rule for licensing of compositions may be evident for particular video synchronizations, dramatic performances, and well-known songs recorded or performed by popular music acts. In the complex licensing synchronization domain, royalty fees may differ for feature, background, thematic, and commercial uses

⁵²Id.

⁵³Samples 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/>.

⁵⁵R. 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'

of music, as well as the duration of use, popularity of the composition, and stature of the user. As stated more completely for film (where negotiated composition and sound recording rights are equally valued):

The amount paid will depend on a number of factors -- how the song is used (sung by a character in the film, background instrumental, vocal performance of a recording from a jukebox, etc.), the overall budget for the film and the music budget, the stature of song being used (old standards, current hits, new compositions), the actual timing of the song as used in the film (45 seconds, one minute, two minutes), whether there are multiple uses of the song in various scenes, whether the use is over the opening or closing credits, whether there's a lyric change, the term of the license (normally life-of-copyright), the territory of the license (usually the world or the universe), and whether there is a guarantee that the song will be used on a soundtrack album or released as a single.”⁵⁷

These valuations can involve the expertise of a music publisher, internal label, studio division, or experienced clearance agent familiar with the licensing terms established in the industry.⁵⁸ The matter of choosing among prospective witnesses expert 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 lost royalties by examining the amounts paid to other writers for use of the infringing composition, and determining a reasonable prorated share of the total that would have become payable through arms-length negotiation to the infringed party,

⁵⁷J. Brabec and T. Brabec, *MUSIC, MONEY, AND SUCCESS*, New York (2000), 174.

⁵⁸DMG Clearances, The Music Bridge, or EMG.

Such a prorated outcome resulted 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 professional, plaintiff expert Nancie Stern testified that writers of the infringing *Blurred Lines* would have come to share 50 percent of royalties with copyright owners of *Got to Give it Up* (The Estate of Marvin Gaye) 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 to The Gaye Estate a damage total of \$5.3 million (after remittitur, see Section 12). With a royalty share established with expert testimony, the Gaye Estate also received a 50 percent copyright share in the infringing work, and were then able to recover future royalties from the infringing writers.

Additional Remedies

While actual damage may be difficult to prove, a copyright plaintiff has three additional remedies not found in trademark and patent law.

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 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 exceptions related to 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 counted uses made thereof.

Second, as more fully discussed below, a plaintiff may disgorge (above actual damages) all additional profits severally from each defendant. A total award for infringement would be the sum of actual damages and additional profits. By simple arithmetic, the composite award actually mounts simply to the maximum of actual damages and defendant profits.

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

If profits are the smaller, proven actual damages can be a floor for recovery. 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 is a practical matter only 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, an infringing work would need to recall and destroy any outstanding album product, record a new studio track, and reprint records without the infringement.

An injunction can then be a costly proposition for 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 the releasing label Aftermath Records. The problem arose because of an injunction on use of an uncleared music sample from a Bollywood movie that appeared on the album's 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 is a critical label concern, and a strong bargaining chip for the plaintiff in a negotiated recovery before or after trial.

9. DISGORGEMENT REMEDIES

In addition to recovering actual damages jointly from all defendants, a prevailing copyright plaintiff may disgorge severally from each defendant any 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

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

contributory⁶¹ or vicarious⁶² infringements. *Indirect profits* arise from the sale of non-infringing products tied in some way to the infringement; e.g., advertising.⁶³ To win any disgorgement of defendant revenues, a plaintiff must prove a causal connection from the defendant's infringement to its profit from the infringing use.⁶⁴

The potential disgorgement of all additional profits presumably eliminates any profit gain that an infringer may expect to gain from a copyright theft. Congress here purposely established the remedy to prevent an infringer from unfairly benefiting from a wrongful act.⁶⁵ According to the U.S. Supreme Court, Congress' stiff disgorgement aimed particularly to deter 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 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*

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 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 person participates in *vicarious infringement* if 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. Moreover, it is not necessary to identify financial direct monetary gain resulting from direct sale; the use of infringing material (e.g., music) to create interest and atmosphere may be sufficient.

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 copyrighted street sculpture that was distributed to concert audiences at 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).

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).

revenues that the defendant earned from infringing sales. Once revenues are proven, the defendant must prove deductible costs and a basis for apportionment for the value of non-infringing elements.

With regard to direct infringement, a plaintiff here may identify gross revenue from any recording, performance, derivative, synchronization, or compilation⁶⁸ in which the infringing element is *commingled* as part of a complete song, album, or video. Allowable gross revenues may include domestic revenues, as well as foreign revenues earned from any precedent act of copying made in the U.S. in which a plaintiff may have an equitable interest.⁶⁹ A plaintiff may not cover foreign revenues if there is no such precedent act of infringement in the U.S. .

10. DEFENDANT COSTS

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

In copyright litigation, a defendant may deduct from earned revenues only those expenses 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, manufacturing, packaging,

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., Motown's Greatest Hits),

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]."

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).

artwork, recording, royalties, and promotion and marketing, as well as sales discounts.⁷² Major label expenses related to promotion and marketing include radio campaign, video production, and support for concert tours.

Among itemized expenses, a defendant record company would rightfully deduct dollar amounts paid to any independent entity for manufacturing, distribution, or royalty. However, unless substantiated by actual costs, it would be economically improper – without additional accounting -- for an integrated record company to deduct an *internal transfer price* paid by an internal label to its own distribution or manufacturing entity. This is because transfer prices within a vertically integrated corporation are often based on administrative rules, such as percentage of income earned, rather than actual costs incurred in distribution or manufacturing.⁷³ For example, UMG, which owns Capitol Records through its Capitol Music Group imprint, should not deduct transfer prices from its internal label to distributor Universal Music Group Distribution unless such transfer prices can be related to actual costs incurred by UMGD. The same problem holds for payment to UMG’s manufacturing entity, Universal Music Logistics.

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 been arisen regardless of whether the particular infringing product was actually released. Consequently, overhead costs are not properly related to any measure of incremental profits.

Some courts nonetheless allow non-willful defendants to deduct a share of company overhead.⁷⁴ (as well as paid income taxes⁷⁵) If overhead deduction is allowable, defendants must come up with a “fair” method of

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

⁷³ <https://www.accountingtools.com/articles/2017/5/16/transfer-pricing>

⁷⁴ *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).

⁷⁵ *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).

apportioning shares of overhead cost to infringing and non-infringing products – e.g., production costs⁷⁶ or product sales.⁷⁷ 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 production and marketing 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 recording artist. An expert should then verify that recouped amounts on label and artist income statements correspond to one another. A consistent accounting between label and artist cannot always be confirmed, but should be.

Deductions for promotion should not be used to protect general investments in an artist “brand”. Indeed, 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 deductions for *Dark Horse* included investments in her celebrity persona.⁷⁹ Deducting brand investments and overhead, the witness also claimed to the jury that the label earned profits of \$650,000 from collected revenues of \$31 million, or 2.1%.⁸⁰ If taken seriously, brand deductions like Mr. Drellishak’s would defeat the stated purpose of the Copyright Act - *to deter infringement and eliminate unjust enrichment*.⁸¹

⁷⁶*Sheldon*, supra note 69, at 52-53

⁷⁷*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).

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

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-damages-in-katy-perry-dark-horse-copyright-infringement-case/m:> \$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.

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.

11. APPORTIONMENT OF DEFENDANT PROFITS

After proving cost deductions from gross revenues, a copyright defendant also bears the burden of proving the value of non-infringing elements that may be *commingled* in a composite work or product that bear an infringing element. For example, derivative songs may commingle copyrighted melodies and original lyrics, or albums may contain both infringing and non-infringing tracks.

The defendant bears the legal burden to value any proffered apportionment technique for valuation of commingled elements. In this regard, the 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 after defendants presented no suitable technique.⁸³ Judges have otherwise made heuristic attempts to determine a proper apportionment.⁸⁴ The arbiter of defendant’s apportionment can be the jury itself.⁸⁵

Apportionment for Compositions

⁸²Harper and Row Publishers, Inc., v. Nation Enters., 471 U.S. 539, 576; 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985); (quoting Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 406, 60, S. Ct. 681, 84 L. Ed. 825 (1940); MGM must demonstrate a procedure for apportionment due a screenplay taken for a motion picture.

⁸³Smith 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).

⁸⁴Sheldon 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 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).

⁸⁵Andreas 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.”

There are two conceptual 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 work. For example, 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 infringers had added.

At times, infringing and non-infringing minutes of use are commingled throughout the track. Here the matter may involve some rough-hewn equity. For example, the jury recently apportioned 22.5% of songwriter profits arising from *Dark Horse* to track minutes in which infringing background music from *Joyful Noise* 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 v. Justin Combs*,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 passage to" the song. Generally, a jury may choose to find that defendants' subjective evidence on the value of the song to the album as a whole was insufficiently persuasive to meet defendants' burden.⁹¹

Apportionment for Album

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

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.

With regard to the second concern for apportionment – the contribution of an infringing song to the entire album or video -- the defendant must yet divide a credible means for determining the relative importance of the contested album track. As a matter of label marketing, some tracks on a new album release receive more attention in radio promotion and video production before or during the first weeks of an album release when most copies are commonly sold. Not all album tracks attract the same label support and audience response.

Based on differences in the commercial importance of some tracks, it is not always 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 apportionments reflected the share of radio airplay (as measured by BMI royalties paid to all album tracks) as it promoted sales of the album. Based on shares of radio play, a jury later 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 jury also held that infringing elements of the original work contributed to 66% of the value of the infringing album track.

Considering the above, I testified at deposition in 2012 regarding an Interscope release of Jay Z's composition *How We Do* (recorded on the album *The Documentary* by West Coast rapper The Game) that infringed an earlier work (*Elevator*) written by songwriters Ryan Lessem and Douglas Johnson. To apportion album sales for *How We Do*, I then considered the label's video expenses, marketing amounts, station audiences, and YouTube views for each track on the album release. Based on label data, I determined that the track *How We Do* was demonstrably the most important album track and thus deserving of a higher apportionment of album revenues.

⁹² *ABKCO Music Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988.

⁹³ *Three Boys Music Corp. v. Michael Bolton, et al.*, 212 F.3d 477 (9th Cir. 2000).

After the initial marketing spike is over (about eighteen months), measures of radio and video activity can be augmented with audience information from download and streaming sites, such as Last.fm⁹⁴ or ChartMasters.⁹⁵ This could also be useful for apportioning albums with no current marketing campaign, such as album re-releases and a greatest hits compilation.

Indeed, defense witness Douglas Bania published in 2015 a full article with the details of chart testimony provided to him by the marketing department of the Interscope label. 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.⁹⁶ All of this label information can be useful to identify the influence of label marketing on album sales. The Bania article unintentionally presents for copyright plaintiffs a very useful guide for discovery of available label marketing documents, and their relation to album or track sales. Defendants Thicke and Williams came to suffer the highest loss ever in music litigation.

Defendants may attempt to use apportionment to minimize a song's value in promoting album sales. For example, Jason King, a professor who specializes in branding of pop musicians, testified that the value of plaintiff's *Joyful Noise* to defendant's *Dark Horse* was insignificant, if not null, because track sales were driven primarily by the star power of the artist, Katy Perry, rather than the music itself.⁹⁷ Defense experts King and Bania fail to state that songs create a compositional basis for a new album and all marketing activity built around it. Moreover, major brand names have quickly lost commercial appeal because their releases could not maintain quality, (e.g. David and Shaun Cassidy, Britney Spears, LeeAnn Rimes, Michael Jackson). Not to

⁹⁴Using 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.

⁹⁵<https://chartmasters.org/category/analytics/>

⁹⁶D. 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>.

⁹⁷"Katy Perry had enormous celebrity brand value before the release of 'Dark Horse. That kind of celebrity can drive the success of a single, because the public is primed ..."She has a deep and intimate relationship with her fans [sic] She calls them Katy cats." Testimony in *Gray v. Perry*, supra note 78.

forget, every well-known successful artist was once a “no-brand” rookie who became successful due to the direct appeal of his/her music.

There are some final adjustments. Prejudgment interest is recoverable for a copyright award.⁹⁸ The appropriate discount rate is the one year Treasury bill rate.⁹⁹ Winning plaintiffs may also recover attorney’s fees (along with statutory damages) if the infringed work was registered previously with the Copyright Office.¹⁰⁰ 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

⁹⁸Frank Music Corp. v. Metro-Goldwyn-Mayer, 886 F. 2d 1548, 1550 (9th Cir. 1989).

⁹⁹Id., 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).

¹⁰⁰17 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).

In addition to recovery from sales and licensing of musical works, a copyright plaintiff may attempt to disgorge a share of profits from concerts and other live events where infringing songs were publicly performed. This would seem particularly appropriate for concerts where new album releases are promoted. Generally speaking, concerts are a growing revenue stream in the U.S. entertainment business.

Under 17 U.S.C. 106, the derivative right is an exclusive right held by the owner of the song. Without first consent, the performance right in a derivative work is not a properly licensed element of a PRO blanket license that would otherwise grant blanket rights for unmodified works performed at live events. Unless her consent to the derivation is explicit, an infringed plaintiff can seek recovery for performance of any derivative work.¹⁰¹

The precedent for recovery from music performed at live events was established in *Frank Music v. Metro-Goldwyn-Mayer*,¹⁰² where an MGM casino performed an infringing musical work (from the musical *Kismet*) in a ticketed review with several independent acts. The Ninth Circuit upheld revenue disgorgement of box office profits even though few ticket buyers (if any) had any idea beforehand that the particular work was to be performed later at the event. Even with no direct causal connection from the particular song to a box office sale, the song element here bore a *reasonable relationship*¹⁰³ to ticket sales for a musical performance this is apparently analogous to songs performed at concerts.

Concerts now are a major instrument for promoting new music releases. Record labels pay touring support for concerts in order to sell records, but do not generally earn direct revenue from concerts themselves (unless otherwise specified in an artist contract). Accordingly, in order to recover money from the performance,

¹⁰¹Fahmy v. Jay Z, (C.D. Ca. 2011), Case 2:07-cv-05715-CAS-PJW, Document 309. The Court yet specified that plaintiff would need to prove a *causal connection* between the infringement and defendant revenues. Depending on prevailing circuit law, necessary considerations for proof of causality may involve a *deterministic* or *reasonable relationship*; see *Thornton v. J Jargon Co.*, 580 F. Supp. 2d 1261 (M.D. Fla. 2008).

¹⁰²*Frank Music*, supra note 98 and surrounding text.

¹⁰³Supra note 101.

a plaintiff would need to sue directly the performing artist who either knew of, or was in a position to know of, the infringing material.

In this regard, performing artists are contracted and paid upfront for a prospective concert appearance; artists pay expenses from this total. Performing artists may also receive a fraction in gate receipts. If so contracted, label shares of concert revenues are also recoverable. It would not be proper to sue the venue, promoters, or merchandisers who were in no position to know of the infringement when arranging for the event. All defendant revenues are subject to cost deduction and apportionment for non-infringing songs performed at the concert.

Information on concert tours, events, and set lists related to new album releases are commonly available in discovery from the label or artist. For new releases, setlists at concert are predictably drawn from tracks on the album. A public source of information is *setlist.fm*, which is a fan-reported site that lists individual concert events and the music performed at the event.

12. REMITTITUR

Defendants apparently bear a considerable burden of proof in copyright litigation. That said, a defendant has some additional defense against unfair jury verdicts -- motion for remittitur¹⁰⁴ and motion for judgment as a matter of law. With regard to remittitur, a judge must offer to a plaintiff remittitur if s/he judges the jury award to be excessive;¹⁰⁵ the plaintiff may accept the lowered damage amount or choose to have a new trial.¹⁰⁶ Depending on

¹⁰⁴Remittitur is "[a]n entry on the record by which the plaintiff declares that he remits a part of the damages which have been awarded him." BLACK'S LAW DICTIONARY 1458 (4th ed. 1951). However, the term is commonly used to refer to the entire procedure. 2. See 6A J. MOORE, FEDERAL PRACTICE 11 59.05[3] (2d ed. 1974); 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE 8 2815 (1973); The plaintiff may so move for remittitur if the defendant has prevailed on a cross- or counter-claim. See, e.g., *Chickasha Cotton Oil Co. v. Chapman*, 4 F.2d 319 (5th Cir.).

¹⁰⁵*Linn v. United Plant Guard Workers*, 383 U.S. 53, 65-66 (1966). The practice of additur (the upward adjustment of plaintiff award) is unconstitutional in the U.S. *Dimick Y. Scheidt*, 293 U.S. 474, 477-80 (1935).

the circuit, a court may offer remittitur when jury damages are *not supported by evidence* or if damages are grossly excessive in a manner that would “*shock the conscience*.” (See below) If activated, a remittitur must reflect the maximum amount sustainable by proof.¹⁰⁷

Along with remittitur, defendant may seek motion for judgment as a matter of law. This could include an unconditional order for a total new trial, or a partial new trial confined to the issue of damages. However, a new trial is allowable only where it is found that passion and prejudice influenced the jury’s award.¹⁰⁸

Motions for remittitur have appeared recently in cases involving music copyright. In *Williams v. Gaye*,¹⁰⁹ the Central District of California cited Ninth Circuit standards on evidence support; the infringer must accept the jury’s valuation unless it exceeds the range of the reasonable market value.¹¹⁰ In this regard, the court found that the jury failed to deduct from defendant revenues overhead costs related to a non-willful infringement. The court also held that the jury improperly assigned to defendants Robin Thicke and Pharrell Williams greatly different multiples (45% v. 187%) of additional profits earned. Under remittitur, the jury award was reduced from \$7.3 million to \$5.3 million.

¹⁰⁶Fenner v. Dependable Trucking Co., 716 F.2d 598, 603 (9th Cir. 1983).

¹⁰⁷Oracle Corp. v. SAP AG, 765 F.3d 1081, 1094 (9th Cir. 2014)

¹⁰⁸Pershing Park Villas Homeowners Ass’n v. United Pac. Ins. Co., 219 F.3d 895

¹⁰⁹*Williams v. Gaye*, supra note 59.

¹¹⁰Polar Bear Prods., Inc. v. Timex Corp., 384 F.3d 700, 709 (9th Cir. 2004),

The “shock of conscience” appeared in the download case of *Capitol Records, Inc. v. Thomas-Rasset*.¹¹¹

The Eighth Circuit here upheld a District Court remittitur that found a jury award of \$1,920,000 (i.e., \$80,000 for each of twenty-four infringing songs) to be unconscionable; the award was reduced to \$54,000. The matter of remittitur ended quite differently in *Sony BMG Music Entm’t v. Tenenbaum*¹¹² where the District Court of Massachusetts did not allow remittitur after the jury awarded the plaintiff damages for thirty-four songs (at \$28,125 per song, or \$675,000).

Original sought valuations in the file-sharing cases were based on statutory damages (17 U.S.C. 504). Plaintiffs presented no apparent economic methodology behind the statutory claims. This is an entirely allowable procedure. Nonetheless, with the possibility of remittitur at the end, a plaintiff may be wise in the end to submit a supporting expert valuation to support the general validity of an award, especially if the maximum under willful infringement is \$150,000 per work

13. CONCLUSION

Some final points may be evident.

New writers and artists must be aware of copyright law as a taking of their creations can seriously harm their career, and a misguided lawsuit can hurt their finances.

¹¹¹ 692 F.3d 899, 904 (8th Cir. 2012).

¹¹² No. 07-11446-RWZ, 2012 WL 3639053 (D. Mass. Aug. 23, 2012),

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

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

An expert is useful to define data needs and to help compel production of documents. Attorneys should be working from the outset with an expert to help with discovery and to post reality checks on excessive valuations.

A financial expert should estimate the likely monetary outcome of any proven infringement, and help the attorney to decline or settle the case if appropriate.

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

Plaintiff and defendant experts must be heedful of the respective burden that each bears in proving damages.

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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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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 al., 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**.

William L. Roberts (p/k/a Rick Ross), et al. v. Stefan Kendal Gordy, Southern District of Florida, 2015, report, valuation of defendant enrichment resulting from infringement of a musical composition in a **multi-platinum release (*Party Rock Anthem*) and a Kia automobile commercial**.

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**.

Daniel Moser v. Raymond Ayala (p/k/a Daddy Yankee), et al., District Court of Puerto Rico, 2014, report, valuation of damages resulting from infringing reproduction and performance rights in **Daddy Yankee's multi-platinum song *Rompe***.

Dan Marino v. Usher Raymond, et al., Eastern District of Pennsylvania, 2013, report, valuation of damages resulting from infringing reproduction and performance rights in **Usher's song *Bad Girl***.

Ryan Lessem and Douglas Johnson v. Universal Music Group, Southern District of New York, 2013, report and deposition, valuation of damages involving copyright infringement in **50 Cent's song *How We Do***, recorded by rapper The Game.

Montana Connection, et al. v. Justin Moore, Middle District of Tennessee, 2013, report, estimated damages for infringement in **country hit song *Backwoods*** on Justin Moore's record album and concert performances.

VMG Salsoul v. Madonna Louise Ciccone, et al., Central District of California, 2013, report, valuation of damages resulting from copyright infringement in **Madonna's song *Vogue***.

Kernel Records Oy v. Timbaland, et al., Southern District of Florida, 2010, report, estimated damages resulting from copyright infringement of sound recording on multi-platinum **Nelly Furtado song *Do It***.

Anthony Lawrence Dash v. Floyd Mayweather, et al., District of South Carolina, 2011, report, valuation of damages involving use of a **copyrighted beat** in a **highly promoted WrestleMania event involving Floyd Mayweather**.

Rafael Vergara Hermosilla v. The Coca Cola Company, Southern District of Florida, 2010, report and deposition, valuation of defendant profits resulting from infringement of song ***Wavin' Flag*** in an **international advertising campaign for the World Cup**.

Chris Lester v. U2, Apple Computer, and Universal Music Group, Central District of California, 2009, report and deposition, estimated damages from copyright infringement involving U2's song ***Vertigo*** used in concerts and recordings.

Serendip LLC, et al. v. Warner Bros. Entertainment, Inc., Central District of California, 2009, report and deposition, estimated damages in copyright infringement on released DVD containing the **soundtrack to *A Clockwork Orange***.

D.L. Byron v. Rascal Flatts and Disney Corp., Southern District of New York, 2009, report, estimated copyright damages for infringement of **Pat Benatar composition *Shadows of the Night* by Rascal Flatts in multi-platinum composition *No Reins***.

Victor Lopez v. Daddy Yankee and Universal Music, Central District of California, 2009, consultant on damages for album track used on **multi-platinum release *Barrio Fino***.

Charles Watt v. Dennis Butler, et al., Northern District of Georgia, 2009, report, estimated copyright damages involving **platinum release *Betcha Can't Do It Like Me* by rap group D4L**.

The Jackson Sisters v. Universal Music Group, Superior Court of the State of California, 2008, consultant, assisted classic recording act for recovery of damages for unfair trade practices in **use of legacy materials in sound recording**.

MCS Music America, Inc., et al. v. Napster, Inc., et al., Central District of California, 2008, consultant to music publishers in copyright infringement matter involving limited downloads and subscription streaming by the **digital music service Napster**.

Henry Carter v. Independent Productions, Inc., et al., Superior Court of Delaware, 2008, consultant, royalty dispute among members of **rock band George Thorogood and the Destroyers**.

Bridgeport Music, Inc. v. Smelzgood Entertainment, et al., Middle District of Tennessee, 2007, report and trial testimony, estimated damages for unauthorized use of **George Clinton's classic funk composition *Atomic Dog* in Public Announcement's *D.O.G. in Me***.

Bridgeport Music, et al. v. Crited Music., Middle District of Tennessee, 2006, report, estimated damages for copyright infringement of **musical composition *You'll Like it Too***.

Thomas Turino, et al. v. Universal Music, et al., Central District of California, 2006, report and deposition, estimated damages resulting from copyright infringement in **Christina Milian's sound recording *Dip It Low***.

Bridgeport Music, et al. v. Bad Boy Records, et al., Middle District of Tennessee, 2006, report and trial testimony, estimated damages for unauthorized use of three compositions and sound recordings on **Notorious B.I.G. last album (*Ready to Die*) produced by P. Diddy.**

Mojo Music, et al., v. Walt Disney Records, Los Angeles Superior Court, 2004, report, valued synchronization rights in **musical compositions used in *Lion King 2*.**

Willie Woods v. BMG Music/Atlantic Recording Company, et al., Eastern District of Missouri, 2004, report, valued damages for unauthorized use of musical compositions in a **Nappy Roots' multi-platinum song *Po Folks*.**

Sharon Haygood, et al. v. Coca-Cola, et al., 17th District Court of Tarrant County, Texas, 2004, report and deposition, calculated professional losses for gospel artist who suffered **personal injury in automobile accident.**

Universal Music Publishing Group v. Fitness Quest, Inc., Northern District of Ohio, 2003, report and deposition, estimated damages from copyright infringement of **music soundtrack in an exercise video tape.**

Brought to Life v. MCA Records, Inc., et al., Southern District of New York, 2002, consultant, valued copyright damages in **Mary J. Blige song *Family Affair*.**

Michael A. Lowe v. Loud Records, Eastern District of Pennsylvania, 2002, report, valued damages for copyright infringement in **musical track *X* produced by Dr. Dre.**

Aimee Mann v. UMG Recordings, Inc., et al., Central District of California, 2002, consultant, estimated sales displacement and loss of income resulting from the **unauthorized release of compilation album of recording artist Aimee Mann.**

Jacques Loussier v. UMG Recordings, Inc., et al., Southern District of New York, 2002, consultant, surveyed data regarding copyright infringement of improvisational composer **by Eminem in song *Kill You*.**

Hamstein Music Group, et al. v. MP3.com, Inc., et al., Central District of California, 2002, consultant, estimated damages for multiple infringements by MP3.com involving multiple **musical compositions.**

Major Bob Music, Inc., et al. v. MP3.com, Inc., Southern District of New York, 2001, report, estimated damages for unauthorized use of **Garth Brooks' musical catalog** by digital library service MP3.com.

Chrysalis Music v. MP3.com, Inc., et al., Central District of California, 2002, consultant, estimated damages for multiple infringements by MP3.com of multiple **musical compositions.**

