MUSIC COPYRIGHT IN THE ENTREPRENEURIAL AGE

Transactions and Litigation

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1. INTRODUCTION

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

In the course of my career as a testifying expert in intellectual property cases, I can share my honest reflections about the handicaps of each. The best of copyright attorneys appear to have digested considerable amounts of statute and case law related to legal terminology, explicit rights, fair use, first sale, merger doctrines, "look and feel", parody/satire, etc. Less certain in the conversation is the proper awareness about presenting the economic factors to facilitate transactions, and estimating damages to facilitate settlement of litigation. The consequent legal argument may be elegant, but the outcome can sometimes be in the glue factory.

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

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from 2004,[1] this revision appears at a propitious time for the music industry. Beyond the now-familiar interfaces of online copying, new applications of copyright law may now emerge in both transactions and litigation in the age of the music entrepreneur,[2] where new and developing technologies continually emerge to challenge the established channels and to complement the now-familiar music delivery services such as iTunes, Spotify, Pandora, Live365, and YouTube. As technology evolves, artists and business innovators may continue to disintermediate production, manufacture, distribution and marketing by extracting and mixing recorded tracks,[3] presenting virtual concerts from different geographic origins,[4] marketing off-label downloads and streaming,[5] distributing independently to major online retailers,[6] testing the appeal of various

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

[2] According to economist Joseph Schumpeter (*Capitalism, Socialism and Democracy*. Routledge, 1976), an entrepreneur is the agent who converts a new work or invention into a successful innovation that has market appeal. In a manner quite different from the generally more cerebral artist or inventor, the entrepreneur tests available artifacts, systems and processes to introduce and modify new products, business models, and organizational modes to create a "gale of creative destruction" that changes the fundamental structure of a commercial sector.

[3] *Avid* provides computer technologies (Pro Tools®, Media Composer®, ISIS®, Interplay®, and Sibelius®) that allow musicians to mix sounds and produce works outside of the major recording studio

[4] Beyond the video streaming of live concerts from an on-site band (now made possible on major services such as *LiveStream* or *Ustream*, inter alia), *Big Life Music* (now owned by Universal Music Publishing) provides pairing and gaming technology for musicians to mix and webcast live audio input streamed synchronously from different locations.

[5] Websites at *CD Baby* and *Bandcamp* respectively allow independent artists and labels to sell albums and tracks fans directly or through music services. An early starter in 1998, *CD Baby* was bought by the manufacturing company Disc Makers in 2008 for $22 million. http://en.wikipedia.org/wiki/CD_Baby

In 2013 *Bandcamp* launched mobile apps for iOS and Android devices, providing the ability to download music straight from the app. http://en.wikipedia.org/wiki/Bandcamp

[6] *TuneCore* and *The Orchard* are intermediary distribution services that allow recorded artists to place product on major download, streaming services, and other music venues. TuneCore now represents about 10 percent of the songs in the iTunes library, where it accounts for almost 4 percent of all digital sales.[6], http://en.wikipedia.org/wiki/TuneCore,
The Orchard merged with Sony's IODA (Independent Online Distribution Alliance in 2012; the operation now distributes for over one hundred labels as well. http://en.wikipedia.org/wiki/The_Orchard_%28company%29

recommendation engines,[7] helping develop brands with synchronized tracks,[8] and seeking venture financing for pet projects.[9] At times, this can also integrate the complementary services of a major record company, particularly with their affiliated distributions of independent recordings originally produced off-label.[10]

But the independent writers and artists who now set out to create and distribute works and recordings in the "brave new world" of media disintermediation may find they have wound up in a wilder version of the Wild West. They may at times infringe, purposely or unwittingly, upon the works of others. And their best works themselves may be infringed in a manner that may harm their best professional efforts in their young careers. Copyright litigation in the last ten years has implicated, rightly or wrongly, some of the most famous acts in country, rock, and hip-hop – Dr. Dre, U2, Kanye West, Rascal Flatts, Justin Moore, Led Zeppelin, Jay Z, 50 Cent, Madonna, Lady Gaga, P. Diddy, and Brad Paisley/Carrie Underwood.

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[7]Music services and artists now use recommendation strategies based on *Twitter*, online friendships, crowdsourcing, knowledgeable curators, or technical matching algorithms. In July, 2010, Amanda Palmer, Low Places, and Bedhed gave up record label deals to sell highly successful albums on *Bandcamp*, using *Twitter*. (supra note 6) Acquired in March, 2014 by *Spotify*, *The Echo Nest* seems now to have captured the industry's attention with its algorithmic Application Performance Interface. The API allows software developers and listeners the ability to access and mix tracks and here recommendations based on *The Echo Nest's* banks of over thirty five million recorded tracks from 2.5 million artists,

[8]The service *fanatic.fm* links band music to pictures and videos to provide sponsored commercial messages that can be accessed and uploaded on *YouTube* or *Vimeo.* Owned jointly by AT&T and the Chernin Group, *Fullscreen* mixes music with professionally prepared and sponsored videos that are uploaded directly to *YouTube or Vevo.* The *Fullscreen* network generates more than 3 billion monthly video views and reaches almost 100 million subscribers monthly. http://en.wikipedia.org/wiki/Fullscreen_%28company%29

[9]*Kickstarter* allows independent and established artists to seek funding from independent investors for their particular projects. Musicians on *Kickstarter* have included Amanda Palmer, Daniel Johnston, Stuart Murdoch, and Tom Rush. http://en.wikipedia.org/wiki/Kickstarter

[10]Operated by major companies, distribution alliances combine major distribution with independent labels not owned by a major company; successful independent works may get picked up by the affiliated major label with larger advance, tour support, and video release. With over 130 independent labels in its network, the Warner Music Group appears to have the largest distribution network with the Alternative Distribution Alliance. http://en.wikipedia.org/wiki/Alternative_Distribution_Alliance But Sony's The Orchard works with over 100 (supra note 7). Once owned and still affiliated with Universal Music Group, Fontana Distribution has over sixty independent labels in its network (http://en.wikipedia.org/wiki/Fontana_Distribution)

So the lines are drawn and the caveats are necessary. If you play in "transactions", or have to move to "litigation", you must know the law and economics of copyright.

2. COPYRIGHT FOR MUSICAL COMPOSITIONS

The copyrights in musical compositions and sound recordings are protected by the Copyright Act of 1976, which is encoded in Title 17 of the U.S. Code.[11] Per statute, each recorded song implicates separate copyrights in the sound recording and the underlying musical composition (or work). For example, when Peter, Paul, and Mary recorded Bob Dylan's work "Blowin in the Wind", the record label owned rights in the imprinted record track while the publisher of the song retained rights in the lyrics and melody in the underlying musical composition. With some variation,[12] featured recording artists generally are paid directly by the label that sells the record,[13] while songwriters are compensated from publisher royalties collected from the entity that recorded or performed the work

Musical Compositions

Section 106 of the Copyright Act grants four exclusive rights to the owner of a musical composition, which is the original songwriter or a publisher to whom the writer transfers the copyright.[14] These four statutory rights include:

a. The right to reproduce the copyrighted work in copies or phonorecords,

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[11] 17 U.S.C. §101-1332 (2000).

[12] Artists are compensated differently in some non-interactive streaming. Infra note 40 and surrounding text.

[13] A featured recording artist may earn some 10 to 15 percent of prorated revenues for physical records, but as high as 50 percent for digital tracks when viewed as licenses; see M. Hogan, Universal Settles Influential Eminem Digital-Revenue Lawsuit, October 31, 2012, http://www.spin.com/articles/universal-settles-influential-eminem-digital-revenue-lawsuit/

[14] 17 U.S.C. §106 (2000). Larger writers often set up their own publishing entities in order to control administration and avoid the costs of compensating another publishing entity.

b. The right to prepare derivative works.[15]

c. The right to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending, and

d. The right to perform the copyrighted work publicly.

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

The first three rights regarding the reproduction, derivations, and distribution of copies of musical works have been termed the *mechanical rights*.[16] When implicated in digital downloads or streams, the same rights are termed *digital rights.* Rights owners may collect mechanical or digital royalties from licensees of their compositions either directly or through the agent services of mechanical rights organizations (MROs), most prominently the Harry Fox Agency (HFA).[17]

For physical records sold in stores or record clubs, the recording entity (usually a label) pays to writers or publishers mechanical royalties on a per sold track basis from revenues so collected from the sale of the entire album. By contrast, publishers directly collect royalties for works used on digital singles or albums by the online music services. If appointed, the collecting publisher who owns a composition will then pay the songwriter a contracted share of the collected totals of mechanical, digital, or synchronization royalties.

The copyright owner has exclusive authority to license first-time reproductions of his or her original work. After an authorized phonorecord[18] of a composition is publicly distributed,

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[15]A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a derivative work. 17 U.S.C. 101

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

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

[18]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

subsequent performers may legally record (or "cover") any unmodified version of the same musical work on another audio sound recording without further permission from the rights owner, subject to the rates of a statutory (or compulsory) license established in Section 115 of the Copyright Act. Statutory fees only cover the original work and never apply to any derivative work[19] in which the lyrics or the melody is somehow modified.

Statutory fees were established by the Copyright Office in 1997, and are adjusted biennially. At the present time (2014), the statutory mechanical royalty fee is the larger of 9.1 cents per song or 1.75 cents per minute.[20]

In addition to mechanical and digital rights, a copyright owner also retain the exclusive right to license his or her works for use with corresponding video material in movies, games, television programs, advertisements, and online videos. These contracts are termed synchronization licenses. As synchronization uses are not subject to compulsory licenses, a song can never be used with any visual image without clearing the use with the copyright owner. Any licensee of synchronization rights must also obtain complementary rights to use a neighboring sound recording that may be used in the video.

Performance Rights

The fourth listed right of Section `106 protects public performances of musical works from unauthorized use.[21]

Performance rights may implicate use of a work in live venues and transmission media (such as airwaves and wires).

Public performance rights for compositions used in audio, *non-dramatic*[22] presentations are usually conveyed through licenses granted by the nation's three performing rights organizations

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directly or with the aid of a machine or device. The term 'phonorecords' includes the material object in which the sounds are first fixed."

[19]Supra note 15

[20]37 C.F.R. sec. 255.3 (2001).

[21]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."

(PROs)– the American Society of Composers, Authors, and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC -- with which rights owners catalog their works.[23] Subject to possible review by Rate Courts established by Justice Department Consent Decrees in the Southern District of New York for ASCAP[24] and BMI[25], each PRO licenses to performance venues all musical works that are registered in its respective catalog and collects and distributes money to the publishers and writers who are its members (ASCAP) or affiliates (BMI).[26] Pending the outcome of a review of the present market situation (including possible anti-competitive concerns), it is possible that the U.S. Department of Justice will come to modify its Consent Decrees with ASCAP and BMI to allow individual member or affiliate publishers to partially withdraw certain digital uses of catalogued works from the PROs and so license them to digital users more directly.[27].

Compared with label profits, publishing incomes are relatively easy to estimate. Data are often made available in financial statements from one infringing party or another. There are few proper deductions from these dollar amounts. Facing anticipated vagaries in label revenues and costs, plaintiff lawyers should estimate publishing totals totals as some mark of the minimum worth of the plaintiff claim.

3. COPYRIGHTS FOR SOUND RECORDINGS

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

[23]The acronym no longer is meaningful.

[24]*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).

[25]*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).

[26]Analog transmissions covered by public performance licenses include broadcast radio, network and local television, cable, concerts, and general uses at http://www.ascap.com/licensing/licensefinder. Digital transmissions include subscription, satellite, and download and streaming services. Infra note 33-36 and surrounding text.

[27]http://www.justice.gov/atr/cases/ascap-bmi-decree-review.html. But see E. Christman, Dept. of Justice Sends Doc Requests, Investigating UMPG, Sony/ATV, BMI and ASCAP Over Possible Coordination. Billboard Magazine, July 13, 2014, at http://www.billboard.com/biz/articles/news/publishing/6157513/dept-of-justice-sends-doc-requests-investigating-umpg-sonyatv.

In addition to the musical works discussed previously, Section 106 of the Copyright Act also protects *sound recordings* that imprint the song on tapes, phonorecords, or digital tracks.[28] In the original *Copyright Act of 1976*, the protection of such sound recordings was limited to similar rights of reproduction, derivation, and distribution, *but not public performance.* In this pre-digital domain, the artists and labels that actually recorded the track presumably benefitted from the promotional airplay, and thus needed no additional royalty to compensate them for their efforts.[29]

Cautious of the new digital technologies that enabled easier copying, Congress enacted in 1995 a limited performance right for sound recordings by passing the *Digital Performance Rights in Sound Recordings Act* (DPRSRA).[30] The act amended Section 106 of the Copyright Act to include for rights owners in the sound recording the right "to perform the copyrighted [recording] publicly by means of a digital audio transmission", which would include wired or over-the-air transmissions that use digital technology.[31] The Digital Millennium Copyright Act of 1998 (DMCA) further amended Section 114 of the Copyright Act.[32] As a result of their new digital rights, record labels and other owners of masters are now compensated for public performances of their sound recordings in all digital media – e.g., music subscription services, satellite radio, webcasters, videos, ringtones, download services, and interactive streaming, inter alia.[33]

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

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

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

[30]Pub. L. No. 104-39, 109 Stat. 336 (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).

[31]17 U.S.C. § 106(6) (2000).

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

[33]17 U.S.C. § 114(d) (1)-(3) (2000).

1. *Digital transmissions of over-the-air broadcasts* (e.g., radio and television stations) remain exempt from paying royalties to owners of sound recordings.[34] However, a specially programmed online service owned by a commercial radio station must yet pay the requisite royalties to the record label.[35]

2. Record labels and other owners of master recordings retain exclusive authority[36] to license sound recordings and establish royalty rates for all recordings used on *download, interactive streaming, and video services,* such as *iTunes*,[37] *Spotify*,[38] or *YouTube.*[39] Labels share collected revenues with artists per the terms of their respective recording contracts that may compensate artists for as much as 50 percent of the received amount from the digital licenses. Streaming and video services (but not download) must pay additional performance royalties to the respective PRO that administers the underlying musical composition.

3. Under specified requirements, *music subscription* (e.g., Music Choice*), digital satellite* (Sirius XM) *or non-interactive streaming* uses (Pandora) are eligible for a

[34] 17 U.S.C. §114(d) (1) (A)-(B) (2000).

[35] The radio service iHeart Radio is owned by the media chain iHeartMedia (formerly Clear Channel) and is one such example. Rates are negotiated or established by the Copyright Royalty Board. Infra note 42 and surrounding text.

[36] 17 U.S.C. §114(b), (d) (3) (2000).

[37] For a $1.29 track, the download service Apple iTunes now pays 70 percent of its collected revenues to the record label and music publisher that own the sound recording and composition featured in the track. The publisher receives 9.1 cents of this total in a direct payment from the service. 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

[38] As an interactive streaming service, Spotify pays a negotiated 70 percent (about 0.70 cents per stream) of collected revenues to the label owner of a sound recording; royalties are apportioned to individual tracks based on their share of use at the service. V. Luckerson, Here's How Much Money Top Musicians Are Making on Spotify http://business.time.com/2013/12/03/heres-how-much-money-top-musicians-are-making-on-spotify/. Publishers can expect another 10 percent. Knopper, Id. Other online streaming services include Rdio, Deezer, Rhapsody, Napster, Beats, MySpace Music, and Guvera.

[39] For performance and synchronization of record tracks, YouTube shares 40 percent of its advertising revenues with record labels that own sound recordings appearing on a performed video, and another 20 percent if the song is featured on an "owned video" released by the label. H. Lindvall, How Record Labels are Learning to Make Money from YouTube, http://www.theguardian.com/media/2013/jan/04/record-labels-making-money-YouTube

compulsory license that is subject to statutory rates and collected by *Sound Exchange* on behalf of labels and artists.[40] Each of these music services must also pay royalties to the PROs for performance rights in the underlying composition.[41] As of January 1, 2014, *Music Choice* and *Sirius XM* respectively paid 8.5 and 11 percent of service revenues to *SoundExchange*.[42] The streaming services *Pandora* and *iHeartRadio* respectively paid $.0013 and $.0023 cents per stream.[43]

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[40] 17 U.S.C. §114(d) (2) (A) (i) (2000). An "eligible nonsubscription transmission" is a non-interactive nonsubscription digital audio transmission that is not exempt and that is part of a service that provides audio programming consisting of performances of sound recordings. 17 U.S.C. §114(j) (6) (2000). When acting as a negotiating and collection agent for a record label, SoundExchange now pays 50 percent of collected revenues to the label, 45 percent to the featured artist(s), and 5 percent to the backup musicians and vocalists appearing on the track.

[41] Supra note 21 and surrounding text.

[42] D. Oxenford, Full Text of Copyright Royalty Board Decision on Sirius XM and Music Choice Royalties Released – The Basics of the Decision, January 4, 2013; at http://www.broadcastlawblog.com/2013/01/articles/full-text-of-copyright-royalty-board-decision-on-sirius-xm-and-music-choice-royalties-released-the-basics-of-the-decision/. The royalty at Music Choice will stay fixed until 2017 while Sirius XM will increase to 12 percent in 2015-2017

[43] D. Oxenford, Final Webcasting Royalty Rates Published – A Comparison of How Much Various Services Pay, March 14, 2011, at http://www.broadcastlawblog.com/2011/03/articles/final-webcasting-royalty-rates-published-a-comparison-of-how-much-various-services-pay/ The difference in the two fees inheres in the fact that Pandora is a pureplay service while iHeartRadio is owned by a radio concern (iHeartMedia, formerly Clear Channel) subject to different rates established by the Copyright Royalty Board. Other major non-interactive webcasters subject to pureplay rates include Slacker (personalized radio) and Live365 (format radio).,

> With smaller percentage of revenue totals, each subscription, satellite, and streaming service also licenses from the PROs the necessary performance rights in musical compositions in a respective catalog. For example, Pandora now pays about 4 percent of collected revenues to publishers and writers who own the composition, compared with 55 percent to the owner of the sound recording.[44] For its use of musical compositions, YouTube pays publishers a percentage of its advertising revenue related to video synchronization for user uploads, plus additional licensing fees to the PROs for actually performing the music.[45]

Tables 2 and 3 present a grid of the copyrights now present in musical compositions and sound recordings per the terms of the U.S. Copyright Act.

4. FINANCIAL REMEDIES

Infringers of copyrighted songs and recorded tracks may violate efforts from both unknown fare and established works. In the former case, the deprived writer may be an unknown individual who may lose an important career opportunity for accreditation in their work.[46] In the latter, a more established writer or publisher may lose both a licensing opportunity and control of their original composition.[47]

Per Section 504(b) of the Copyright Act, a "plaintiff may recover damages that s/he actually suffers from the lost sales or licensing opportunity, and additional profits not taken into account".[48] If infringing in solo, a copyright infringer will wind up paying to a plaintiff actual damages and any additional profits earned from its use of the infringing song. If more than one

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[44]Pandora Media, Inc. Form 10-KT, February, 2014, 23, at https://www.sec.gov/Archives/edgar/data/1230276/000104746914000909/a2218261z10-kt.htm

[45]E. Christman, YouTube, NMPA Reach 'Unprecedented' Deal to Pay Independent Music Publishers, t http://www.billboard.com/biz/articles/news/publishing/1160146/youtube-nmpa-reach-unprecedented-deal-to-pay-independent-music. YouTube pays a percentage royalty to independent publishers of 15 percent. Publishers also collect synchronization fees from content creators, such as Fullscreen, that use technology tools to integrate music and professional video content fur audience development on behalf of major brands. Supra note 9

[46]Boyd Jarvis, infra note 74.

[47]ABKCO Music, infra note 76, 48

[48]17 U.S.C. § 504(b).

party infringes (e.g., an infringing writer, producer, and label), the infringers are *jointly liable* for the actual damages suffered, but *severally liable* to disgorge any additional profits, if any, earned above its assigned damage total.

Per the terms of Section 504(c), an infringed plaintiff may instead choose at the of trial instead to recover statutory damages to compensate for harms that might be neither measurable nor otherwise reflected in actual damages.[49] For non-willful infringement, recovery may be not less than $750 nor more than $30,000 per infringed work. The penalty for acts of willful infringement is not more than $150,000 per infringed work. Plaintiffs may recover statutory damages (and attorney's fees) only if the underlying work is properly registered with Copyright Office.

Experts should first quantify plaintiff damages, defendant profits, and the differential between them. Defendants may be willing to pay plaintiff damages in order to settle, but will never disgorge all profits. An expert then helps decide whether to press for the larger in court. The statutory damage serves as some credible backup, but these remedies will require some predicate estimate of damages to be effective. With good expert advice, defendants should also consider offering a reasonable motion for final judgment in order to avoid a trial that may be costly and risky to both parties.

5. ACTUAL DAMAGES

Experts may measure actual damages to a plaintiff by estimating potential earnings from lost sales and/or licensing opportunities.[50] Infringed plaintiffs may recover damages from labels, publishers, artists, writers, producers. or entities who benefitted from infringing advertising or promotion. Valuation of lost licensing fees should be estimated as the price that "a willing buyer would have been reasonably required to pay to a willing seller for plaintiff's work."[51] To

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[49]Frank Music, infra notes 79, 86 and surrounding text

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

[51]Frank Music, infra note 79, at 512; sourcing Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp. 562 F. 2d 1157, 1174 (9th Cir. 1977); see also Flying J Inc. v. Central CA Kenworth et al., 2002 U.S. App. LEXIS 18377 (9th Cir. 2002); Jack Mackie v. Bonnie Rieser, et al., 296 F. 3d 909 (9th Cir. 2002), 3 M. Nimmer, Nimmer on Copyright, §14.02, at 14-6 (1985).

establish market value, the court must identify benchmark transactions that involve uses of works that are comparable to the infringed property.[52]

Some benchmarks for musical compositions are as follows:

Mechanical Licenses: Writers or publishers of infringed musical compositions may recover *mechanical royalties* that they would have earned otherwise for proper licensing of reproductions of their works. Payments for reproductions are generally estimated by multiplying a per unit fee times the number of infringing copies sold. Per unit fees for infringed compositions are commonly based on the statutory license fee, which is the industry standard for compensating non-featured songwriters whose works appear on an album.[53]

An expert may determine lost royalties by examining the total amounts collected by infringing publishers or writers, and then determining a reasonable share payable to the infringed party. Such a process is somewhat more complicated if the infringing work is a *controlled composition* written or co-written by the featured artist on an album.[54] By industry custom and practice, the artist would expectedly earn a 75% share of the statutory rate (in addition to royalties received as an artist). As a non-featured writer, the infringed party would more expectedly have earned the full mechanical rate (with no royalties received as an artist).

Public Performance Royalties: Performance royalties are paid for live and transmitted uses of the composition. Fees per performance depend on methods designed and deployed by each PRO in order to allocate the pot of collected royalties from various types of licensees.[55] Some rough estimates of the outcome:

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

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

[53]Supra note 16 and surrounding text.

[54]If the featured artist has a writer share in a composition imprinted in a label track, that share will be reduced by 25% as common industry practice. The collection amounts of other writers will not be affected.by the controlled composition clause. For example, for every Elton John – Bernie Taupin song that appears on an Elton John album, the artist share (50 percent) is compensated by the publisher with a 25 percent discount.

[55]Id., 238-9.

Theme Song, Local TV: $0.80 Network TV: $2.50/station

Synchronization Licenses: Synchronization licenses cover musical compositions that are integrated into recorded soundtracks in movies, videos, and commercials. Synch fees for theater movies range from $15,000 to $60,000.[56] Representative synch fees for musical compositions used on television programs are $400 (1-30 seconds), $450 (31-60), $550 (61-120), and $650 (120+).[57]

In both instances, distinctions must be made for feature, background, thematic, and commercial uses, as well as the popularity of the composition. Many commercial applications are enjoyed with changed words that parody the original work in some manner. A second license is necessary to use – in the same video application -- a pre-recorded sound recording that may contain a popular musical composition.

6. DEFENDANT PROFITS

In addition to recovering actual damages, a prevailing plaintiff may disgorge any additional defendant profits that result from an infringement if such profit is unaccounted for elsewhere in the calculation of actual damages. Additional profits for direct, contributory,[58] or vicarious[59]

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

[57]Brabec, Id., 142.

[58]*Contributory infringement* results from a person "who, with knowledge of the infringing activity, induces, causes, or materially contributes to the infringing conduct of another" and who therefore is therefore "equally liable with the direct infringer." Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc., 443 F. 2d 1159, 1162 (2d Cir. 1971); Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir. 1996). Moreover, actual knowledge is not necessary; contributory liability can also be incurred if the defendant had reason to know or was willfully blind to

infringement may here be recovered from labels, publishers, artists, writers, producers, and entities that profit from infringing advertisements.

Such recovery is intended to eliminate any potential profit that would be earned otherwise from acts of infringement. Congress purposely designed profit disgorgement to "prevent the infringer from unfairly benefiting from a wrongful act."[60] As such, copyright remedies are much stiffer than patent and antitrust remedies, where infringed plaintiffs may only recover actual damages (possibly trebled).

It is here hoped that such stiff disgorgement penalties may deter potential infringers, particularly recidivists, who would otherwise prey on creators and profit themselves from a catalog of unlicensed work.[61] 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".[62] To otherwise allow potential infringers to retain profits could evidently promote theft, or otherwise tip the balance of negotiations to the disadvantage of the rights owner. *These penalties are very protective of the interests of the independent writer and artist.*

To establish defendant enrichment, the law minimizes the plaintiff's burden once infringement is proven. The plaintiff is required to prove *only gross revenues* received by the infringer. Gross revenues earned by a defendant may include domestic and foreign revenues earned from any predicate act of reproduction or performance made in the U.S.[63] Once defendant revenues are

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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).

[59]A person may participate 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.

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

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

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

[63]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).

established, the defendant must prove deductible expenses and any suitable means of apportionment for the presence of other mitigating factors; see Table 4.[64]

Music defendants may deduct from revenues those expenses that are related to direct production of the infringing material,[65] which may include verifiable costs related to distribution, manufacturing, packaging, artwork, recording, royalties, and promotion and marketing, as well as sales discounts.[66]

If actual costs are to be *proven*, the defendant can deduct only those expenses related to actual production or distribution of the infringing song or track. Unless substantiated by actual costs, the defendant cannot properly claim as a deductible expense some intramural transfer of dollars made from one division of a defendant record company to another; e.g., a fixed percentage of revenues paid from the label division to the distribution division owned by the same corporate concern.

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

If infringement is non-willful,[67] a defendant apparently may be allowed to deduct from gross revenues a share of company overhead,[68] as well as income taxes.[69] As explained in the above paragraph, the overhead allowance is arguable from an economic perspective. Nonetheless, if overhead deduction is allowed, defendants must come up with a fair method of assigning the

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[64]17 U.S.C. §504(b).

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

[66]Boyd Jarvis, infra note 74, at 295.

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

[68]Allen-Myland, supra note 65, 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).

[69]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 48, at 53; In Design v. K-Mart Apparel Corp., 13 F. 3d 559, 566 (2nd Cir. 1994).

defined amount to infringed works. Previous methods have been based on proportion of production costs[70] or product sales.[71]

In addition to recovery from product sales and licensing, an infringed plaintiff may attempt to recover defendant revenues earned in live concerts if the infringing work is so performed at the event. It is here necessary to sue the performing artist, not the box office or concert promoters who collected and divided the revenues. It is also possible to sue any party who collects improper performance royalties from any PRO for a work improperly registered in their catalog and so licensed to the concert venue. .

7. APPORTIONMENT

Infringing defendants often recombine copyrighted musical works with their own independent contributions to produce a new work; e.g., infringed melodies with new words or sampled music that is taken and looped as background in an infringing musical work. While courts have sometimes granted full awards to owners of the infringed work,[72] plaintiff awards can be reduced based on an apportionment for the value of the independent contribution. It remains the defendant's burden to prove the validity of any apportionment technique – a difficult task.

There are two considerations for an apportionment – the value of the infringed portion to the new musical work, and the value of the new work to the entire album or video in which it may be a defined element.[73] With regard to the former, a District Court explicitly ruled out a "second-by-second" apportionment of the worth of an infringing composition between infringing and non-infringing elements.[74] The court here recognized, *inter alia*, the importance of recognizable

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

[71]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).

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

[73]Three Boys, infra note 77.

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

choruses and beats (particularly in the "hook") that can be more important to the worth of an infringing composition than a literal "time count" would determine.

In this line of thought, it is not necessary to assign equal weight to melodic and lyrical components of a work when determining the apportioned value of each element. 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 melody from the original work.[75] The court recognized that the melody in the infringing work was more important than the trivial lyrics.

With regard to the second concern for apportionment – the contribution of an infringing song to the worth of an entire album or video --, a District Court must come up with a credible means of determining the relative importance of the track in promoting sales of the album or video. For example, after finding that George Harrison's chart-breaking *My Sweet Lord* was an infringement of the classic rock hit *He's So Fine*, the court awarded to plaintiffs 70 percent of the mechanical royalties, and 50 percent of the sound recording profits, that Harrison received from his entire album *All Things Must Pass*.[76] Among other factors, the apportionments reflected the share of radio airplay (as measured by BMI royalties) as it promoted sales of the album.

Based on relative shares of radio play, a jury awarded to the plaintiff (Isley Brothers) 28 percent of revenues from defendant's (Michael Bolton) album *Time, Love, and Tenderness,* which included an infringing version of the group's earlier hit *Love is a Wonderful Thing*.[77] The infringed elements of the original work were also judged to contribute to 66% of the value of the infringing composition that appeared on the album.

In apportioning the contribution of single tracks to new albums, experts can now consider detailed radio airplay estimates upon weekly data available from Nielsen Broadcast Data Systems. However, alternative measures of promotional clout are now necessary when prior radio play is not critical to promoting. Here the problem becomes more difficult. While *Billboard Magazine* does provide ordinal rankings of downloads and streams on a weekly basis,

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

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

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

the venue does not provide counts of either. As a probable best bet, experts may consider the counts of album tracks in streams (*Last.fm*) or online video searches (*YouTube*) to estimate the total count and relative contribution of certain tracks that appear on the album.

Plaintiffs may also attempt to recover indirect profits arising from *other income* that the defendant received as a consequence of the infringement. In a landmark decision, the Ninth Circuit upheld an award to song publishers that included – inter alia -- a share of casino and hotel revenues earned synchronously when their song *Kismet* was performed without authorization in an in-house revue of popular Broadway shows.[78] In an advertising venue, Cream Records received 1.37 percent of the profit of Schlitz malt liquor after the defendant took its well-known *Movie Theme from Shaft* for a beer commercial.[79] Nonetheless, particularly since the Ninth Circuit's landmark decision in *Polar Bear v. Timex*,[80] plaintiffs that attempt to recover indirect profits resulting from a copyright infringement (particularly in advertising) will often face challenges to prove causality of enrichment, which is not a trivial thing for an expert to prove.[81]

That said, Courts generally lean toward plaintiffs in damage recovery. As a matter of common law, "every indulgence should be granted plaintiff in an attempt to arrive at a sum which is assuredly adequate"[82] and any doubt regarding computation should be resolved in favor of the plaintiffs.[83] Although defendants are permitted to deduct related expenses from identified product revenues, their failure to identify such expenses may result in a complete award of plaintiff

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

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

[80]384 F. 3d 700 (9th Cir. 2004).

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

[82]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);

[83]Shapiro, Bernstein, & Co. v. Remington Records, Inc., 265 F. 2d 263 (2nd Cir. 1959). Moreover, when there is "imprecision in the computation of expenses, a court should err on the side of guaranteeing the plaintiff a full recovery." Gaste, supra note 75, at 1070, citing Sygma Photo News, Inc. v High Society Magazine, Inc., 778 F. 2d 89, 95 (2d Cir. 1985).

revenues.[84] Furthermore, Courts have also awarded full consideration to plaintiffs when defendants have failed to provide a suitable procedure for allocating revenues or costs.[85]

If plaintiffs can recover damages, they may also recover prejudgment interest for lost money that would otherwise have been had.[86] The appropriate discount rate is the one year Treasury bill rate.[87] Winning plaintiffs may also recover attorney's fees if the infringed work was registered with the Copyright Office.[88]

8. FINAL POINTS

Some final points may be useful.

New writers and artists must be aware of copyright law as infringement of their creations can seriously harm their developing career.

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

Litigating attorneys must always use all available data to monitor the ongoing worth of each component in a copyright claim. This is no small task.

An expert is useful to define data needs and to help compel production of documents. Attorneys should be working from the outset with an expert to administer the collection of data.

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[84]Ice Music v. Michael Schuler and Coral Studios 1996 U.S. Dist. LEXIS 12083 (S.D.N.Y. 1996). Boyd Jarvis, supra note 74, at 293; Russell v. Price, 612 F. 2d 1123, 1130-31(9th Cir. 1979); cert. denied`446 U.S. 952, 100 S. Ct. 2919, 64 L. Ed. 2d 809 (1980).

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

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

[87]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).

[88]17 U.S.C. §505, In Design, supra note 69, at 567, McCulloch v. Albert E. Price, Inc., 823 F. 2d 316, 322 (9th Cir. 1987).

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

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

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

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

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

ABOUT THE AUTHOR

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

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

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

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

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TABLE 1
Rights for Copyrighted Works

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

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

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

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

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

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

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

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

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

TABLE 2
Rights for Musical Compositions

	Mech./Dig.	Synch	Performance
Downloads and CDs	X		
Movies and Video Games		X	
TV Programs		X	X
TV Advertisements		X	X
Network Video		X	X
Broadcast Radio			X
Satellite Radio			X
Music Subscription			X
Streaming			X
Live Concerts			x

Mechanical, Digital, Synchronization, and Interactive Performance

Works usually owned by publisher, sometimes by writer
Licenses negotiated with owner (compulsory reproduction after 1st use)
Royalties collected by owner (or agent)
Publisher collections shared with writer

All Other Performance

Works usually owned by publisher, sometimes by writer
Licenses negotiated with PRO
Royalties collected by PRO
Collections split between publisher and writer

TABLE 3

Rights for Sound Recordings

	Audio	Video	Performance
Downloads and CDs	X		
Movies and Games		X	
TV Programs		X	
TV Advertisements		X	
Network Video		X	X
Digital Radio			X
Satellite Radio			X
Music Subscription			X
Streaming			X

Audio, Video, and Interactive Streaming:

Recordings usually owned by label, sometimes by artist
Contracts negotiated with owner
Royalties collected by owner (or agent),
Label collections shared with artists

All Other Performances

Recordings usually owned by label, sometimes by writer
Contracts negotiated with owner or SoundExchange
Royalties collected by owner or SoundExchange
SoundExchange collections split between label and artists.

TABLE 4

Breaking Down Defendant Profits

Recoverable Revenue

- Domestic Revenues
- Foreign Revenues

Deductible Expenses

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

Discretionary Deductions

- Company overhead
- Income taxes

Allocation Issues

- Common costs
  - Relative costs
  - Relative revenues
  - Relative net incomes
- Apportionment Issues
  - Split Infringing and Noninfringing Elements
  - Split Lyrics and Melodies
  - Value Track Share in Album

Possible Recovery

- Collateral goods and services
- Prejudgment Interest