



**FINANCIAL REMEDIES IN
MUSIC COPYRIGHT**

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The attached presentation was compiled with a word processing error that has interfered with pagination, margins, and formatting of some pages and footnotes. Misplaced footnote citations appear on the following pages, or are redacted.

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EXECUTIVE SUMMARY

The paper is organized in fourteen substantive sections that review the structure of copyright law and financial remedy written from the perspective of a testifying economic expert in the area. The *Executive Summary* summarizes sections that may be read sequentially or independently depending on the reader's prior knowledge.

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COPYRIGHT LAW

Section 2: Revenues resulting from the sale and licensing of music on sound recordings are transacted through a.) *interactive streaming*, b.) *non-interactive subscription and streaming*, and c.) *permanent downloads and physical records*

Section 3: Music copyright involves separate rights in underlying *musical compositions* and *sound recordings* that may include the composition. The sound recording right is owned by the *record label* or *recording artist* that produces in studio the underlying master recording and distributes records in retail stores and digital media.

Section 4: The composition right is owned by the *music publisher(s)* to whom the original *songwriter(s)* transfer copyright. Federal protection was extended first to compositions in 1909 and records in 1976.

Section 5: As the earliest area for copyright, copyright for musical compositions includes three *mechanical rights* (*reproduction*, *derivation*, and *distribution*) related to record product, and a right for audiovisual *synchronizations* on soundtracks or live broadcast media.

Section 6: A final right for a musical composition is the public *performance right* related to live events and mediated transmissions of the work.

Section 7: Copyright for sound recordings includes reproduction, derivation, distribution, audiovisual, and (for digital audio transmissions) public performance.

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Section 8: The accounting chain for revenues and royalties related to the sale and licensing of music may differ considerably by commercial channel established. Revenues and royalties may be paid directly to rights owners, or indirectly through intermediaries or licensing collectives.

Section 9: An infringed plaintiff may recover *actual damages* and *additional profits* earned by each infringing party. Defendants are *jointly liable* for actual damages but *severally liable* for their remaining profit.

Section 10: 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 11: A plaintiff set to disgorge additional severable profits must prove gross revenues that a defendant earned from the sale or licensing of the infringing work.

Claimed revenues from recorded music may include domestic transactions, as well as foreign transactions that involve a prior act of infringement in the U.S.

Section 12: A label defendant bears the burden to prove offsetting costs related to the production, distribution, marketing, and licensing of infringing product, as well as deductible royalties for artists and writers. Transactions for distribution and manufacturing must be based on actual costs.

Section 13: A defendant bears the burden to prove apportionment of profits related to commingled contributions from infringing and non-infringing tracks or musical elements that may appear on the same record or composition. 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 14: Plaintiffs may recover infringer profits earned from live concerts where an infringing work was performed.

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

Henry V, Act III, Scene 1

1. INTRODUCTION

The distinguished copyright lawyer Arthur Latman once quipped, “Copyright law, not horse racing, is the sport of kings”; perhaps the brave King Henry would have agreed. In the course of my experience as an economic expert, I can share some reflections about the structure and economics of the “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, a memorable time when illegal file-sharing at Napster threatened retail sales at Tower Records.¹ But some basic issues remain in place. Since that time, copyright litigation has come to involve some of the most famous acts in the music business -- Dr. Dre, U2, Kanye West, Rascal Flatts, Justin Moore, Led Zeppelin, Jay-Z, Bruno Mars, Lady Gaga, P. Diddy, Madonna, Usher Raymond, Brad Paisley, Carrie Underwood, Ed Sheeran, and Led Zeppelin.

Written from the perspective of a testifying economist, this paper then reviews current market issues and institutional developments in the music industry

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

related to the economics of copyright. The work aims to establish the grids of copyright ownership and royalty-sharing, accounting chains for moneys earned, and statute-based parameters for good practice in enforcing rights in litigation.

Five introductory points should be noted:

1. Copyrights and payments for a sound recording of an underlying musical composition are administered through labels, artists, publishers, and writers that may be controlled by major companies or independent entities.
2. The potential number of sources and uses that generate revenues for recordings and compositions has grown significantly with the emergence of new audio and video technologies and related agencies.
3. The structure of the music industry has become more complex as new entities, intermediations, and payment arrangements related to promotion, production, distribution and publishing have emerged to challenge traditional business methods.
4. The proof of damages in copyright infringement involves considerable detail in expert accounting, economic analysis, interrogatory, document discovery, and the use of public source information related to the revenues and royalties generated.
5. Experts must be encouraged to scope the initial claim, assist with interrogatory and discovery, prepare questions for depositions, and communicate possible issues that would bear upon damages.

2. SERVICES FOR RECORDED MUSIC

Per the Recording Industry Association of America ([RIAA-2019-Year-End-Music-Industry-Revenue-Report.pdf](#)), the U.S. record industry earned total revenues of \$11.1 billion in retail revenues from physical and digital product (up 12.5% from 2018). Revenues were earned through *streaming, downloads, and unit sales*. Since 2015, the industry has reversed years of decline brought about by file-sharing, alternative video product, and disintermediation of record albums.

Interactive streaming services have led the industry comeback and now account for over fifty percent of total retail revenues. Streaming growth has implicated wide customer choice of full music catalog, along with voice-activated assistance, digitally curated recommendations, integrated playlists, social media integrations, and assisted artist-fan interaction. Growth will presumably continue with the emergence of new social media platforms, podcasts, and wireless video.

Major streaming providers include Spotify, Apple Music, Amazon, and Napster, inter alia. Interactive streaming revenues are now based largely on ad-free subscription service (generally \$9.99 per month); full paid subscription revenues (\$5.9 billion, up 27.5 percent) and limited subscriptions (\$829.5 million, up 11.0 percent). Ad-supported service is still popular with new listeners, with revenues at \$908.1 million (up 19.6 percent).

The market leader in *interactive streaming* is Spotify AB, a Swedish pureplay service provider that went public in 2018. The pureplay service is often credited with

reversing revenue downturns that resulted from illegal file-sharing networks (e.g., Napster). As a technology leader, Spotify has made since founding in 2006 twenty acquisitions that allow, *inter alia*, user-submitted playlists (three billion lists), independent podcasts (over 700,000 now available), metadata review, marketing support, virtual studios, and curation and recommendation based on machine learning from big data – considerable organizational capabilities. Competitive streaming services are offered by integrated tech companies that combine streaming with wider ecosystems built around the sale of retail goods (Amazon Prime), bundled devices (Apple Music), web-related functionalities (Google Music), and telecom services (Tidal Music).

Non-interactive streaming services may involve monthly subscription, mobile satellite radio, and webcast. Key non-interactive providers include *Music Choice* (home service), *Rockbot* (business service), *SiriusXM* (mobile satellite radio), and *Pandora* (webcast). Sirius, Music Choice, and Rockbot are subscription services that monetize cable and satellite transmissions to the user with subscription fees. Webcasters (e.g., Pandora) may offer to listeners different service tiers with subscription and advertising-based services. Most, but not all, revenues in the category are paid through the SoundExchange collective (infra). SoundExchange distributions accounted for \$908.2 million in the U.S. market (down 4.7 percent), while other non-interactive services accounted for \$251.1 million (down 0.1 percent).

Once the market leader in the digital space, *permanent download* revenues of albums, singles, and ringtones (introduced at Apple iTunes in 2003) fell in 2018;

download revenues are now at \$855.7 million, down 1.0 billion (down 17.6 percent). As a combined streaming and download services, Apple Music (launched in 2015) has embraced streaming but now maintains listening services only for customers who have already bought downloads. As of this writing (August, 2020), Amazon continues to sell *unit downloads* to a diminishing base of users. For the first time, total download sales are below physical retail (\$1.1 billion, down 0.6 percent), which has declined considerably in the past decade

3.COPYRIGHT AND INDUSTRY STRUCTURE

Per the Copyright Act of 1976 (17 U.S.C. §101-1332), there are two strata of music copyright -- the *sound recording* and the underlying *musical composition* upon which the recording is based. The term *sound recording* implicates the musical sounds imprinted on a record album or track derived from an initial studio or live master recording,² while *musical composition* implicates underlying lyrics and melody of the actual song.³ The relevant copyrights implicate different rights owners -- the record label and the music publisher - who collect royalties for respective use of the recording or composition.⁴

²A *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).

³A *musical composition* can refer to an original work of vocal and instrumental music, the structure of a musical work, or the process of creating or writing a new work of music.

⁴For example, when singer Gladys Knight recorded “Midnight Train to Georgia”, her record label (Buddah Records) owned rights in the sound recording, received sales dollars, and paid royalties to the artist. Publisher Larry Gordon controlled copyright in the lyrics and melody of the underlying composition, which was written by country writer Jim Weatherly (and re-titled by Cissy Houston). Gordon and Weatherly, or their successors in interest, continue to receive royalties every time the underlying composition is recorded or performed by any artist. As the successor-in-interest to Buddah Records, Sony Music Entertainment (owner of Legacy Recordings) receives royalties for use of the sound recording that may appear on soundtracks and album compilations. A full review of the music publishing industry can be found in R. D. Wixen, *THE PLAIN AND SIMPLE GUIDE TO MUSIC PUBLISHING*, 3rd Edition (2014), Hal Leonard Books; S. Winogradsky, *MUSIC PUBLISHING; THE COMPLETE GUIDE*, (2013), Alfred Music.

Sound Recordings

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

1. *Universal Music Group (UMG)* -- e.g., Capital Record Group, Def Jam Recordings, Interscope Geffen A&M, Island Records, Republic Records, Decca. Universal artists include The Beatles, Elton John, Lady Gaga, Jay-Z, Taylor Swift, and Justin Bieber.

2. *Sony Music Group (Sony Music)* – e.g., Epic Records, Columbia Records, RCA Records. Sony artists include Avril Lavigne, Gloria Estefan, Pink, Jennifer Lopez, and Tim McGraw.

3. *Warner Music Group (WMG)* – e.g., Warner Records, Atlantic Records, Electra Records, Parlophone. Artists include Beyonce, Cardi B, Faith Hill, David Bowie, and Led Zeppelin.

A number of other prominent companies – e.g., *BMG Rights Management (or BMG)* and *Big Machine Records* (now owned by Ithaca Holdings) -- own and manage prominent labels for production and financing but distribute through platforms controlled by other major companies.⁵

Through their controlled record labels, major integrated companies historically have performed vertically related roles in discovery, production, financing, promotion, manufacture, distribution, and licensing of recorded music. Each label (through its operating divisions) attempts to discover talent, finance production, and promote sales and licensing. As traditionally practiced, label promotion aimed to “cut through the noise” to reach undiscovered audiences, but most album releases do not cover costs. The traditional deal then followed a “blockbuster” model that aimed to maximize – over a wide portfolio of work – gains earned from largest releases.⁶

⁵ BMG through Warner Music’s ADA Worldwide, Big Machine through UMG

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

The blockbuster model has morphed as labels have come to discover new acts from reported data from digital play and have come to record for many acts a smaller number of ‘trial’ tracks for digital distribution on online channels through popup ads (e.g., Spotify’s Marquee), autoplay feeds (Discovery Mode), hit prediction (Musiiio), big data search algorithms for new talent, (e.g., Instrumental or WMG’s Sodatone). Big label releases now compete for audiences with smaller acts now available through digital platforms.

In addition to in-house labels, major record companies own separate divisions for *pressing and distribution* that handle necessary physical and administrative operations for new releases of physical product (i.e., CDs); with track digitization, server upload and channel distribution is nearly costless. Each company also owns a *publishing division* that often controls or administers copyrights in the musical compositions that appear on its records. Publishing divisions control composition rights (infra Section 4) and receive royalty for any original or subsequent use.

Record labels and signed artists traditionally committed to deals through contracts that specify term, requirements for album release, royalties, and a series of label options for future albums, *inter alia*. Major labels generally pay to primary *artists royalties* of 13 to 20 percent of a qualified royalty base of net units sold (as measured at specified wholesale prices), less a number of specified deductions. The paid royalty rate in a contract would depend on the professional stature of the artist, discount windows, option albums, specified sales targets, and sales territory. Paid royalty amounts in any period may vary from booked accounting depending on

withholding for precautionary reserves held in recoupment of label costs.⁷

From royalties otherwise payable to an artist, the label will recoup before payment any artist advances and expenses that it previously paid for production, marketing, and touring related to the album release. Payments from an artist's record sales may also be cross-collateralized with sales from his/her other albums under contract. As album sales and profitability have declined in the past decade, record labels and artists have come to put in place a number of different deals that collateralize label expenses with other revenues earned by the artist -- e.g., publishing, touring, and merchandising -- that had previously been clear from label claims

Starting from sale of the first record, recording artists become due to pay their contracted *studio producers* (3-4% of net sales; half-rate for audiovisual) and record mixers (0.5-1%) for their respective studio services on any recorded track; producer royalties based on album revenues are prorated for number of recorded tracks on the album. Artists also often agree to pay producers a cut of due royalties due through Sound Exchange (infra). Outside of the terms of a recording contract, the artist must also pay his/her hired *act manager* a royalty of 15 to 20 percent. film,

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

and sponsorships. Managers are not held liable for copyright infringement, but producers often are.

Major record companies now often perform services for independent labels (“indies”) that sign new acts. Among varying arrangements, service deals may involve *direct distribution*, (e.g., UMG distributes for Big Machine Label Group and Concord Music Group (internationally), *distribution alliances* (UMG’s Ingrooves, Sony’s RED and The Orchard, and Warner’s Alternative Distribution Alliance (ADA), “*piggyback*” deals involving other artist releases on the label, or *fulfillment deals* involving an independent distributor owned by a major company. Indies may also engage major companies to *press records*, *finance studio production*, *negotiate buyout options*, place an *equity investment*, or enter some type of *joint venture contract* that specifies mutual responsibilities. Now facing much reduced costs of digital coding and transmission, distribution operations at major companies now provide an important means of breaking news acts as well as generous profit margins -- around twenty five percent of sales revenues.

Independent labels also benefit considerably through *alternative administrator/distributor arrangements* that avoid major company channels (e.g., Kobalt Music Group, Concord Music Group). For a more independent approach, performers may self-record and distribute product through the physical and/or digital services of CDBaby, TuneCore, Stem, or Distrokid; services can be funded by label or independent equity. For an even leaner approach, Merlin Networks negotiates collective licenses on behalf of signed independent acts, who must upload the music

directly to each engaged music service. Independent acts from the “long tail” of content now may keep publisher and recording rights and complement releases with the relevant services of video platforms (e.g., YouTube, Vimeo), social media (e.g., Facebook, Instagram, Snapchat), track postings (Soundcloud), live events (Bandsintown), crowd-sourced financing (GigFunder), branding (Tuned Global), do-it-yourself software (Splice), user-made video clips (TikTok, Snapchat), detailed profiles (ReverbNation), beta testing (Venice Innovations Lab), big data tracking (Instrumental), independent distribution (TuneCore), royalty auctions (Royalty Exchange), and direct fan communication (WR1). Uploading 40,000 new tracks per day, new artists particularly recognize the streaming service Spotify for its popularity among younger listeners and ability to facilitate discovery in two-sided market interfaces – i.e., adaptive playlists, listener tracking, market analytics, podcast availability, artificial intelligence promotion, popup advertisements, autoplay feed, and open software platform. Other promotion instruments for artists include websites, mixtapes, blogs, email lists, and merchandising.⁸

⁸15 Music Marketing Strategies for Aspiring Musicians, at <https://www.renderforest.com/blog/music-marketing-strategies>. Musician deals are explained more fully in C. Knab, THE MUSICIANS’ BUSINESS AND LEGAL GUIDE, Prentice Hall. Independent artists also can now use digital interfaces to post tracks for listening and sharing (e.g., Bandcamp, Soundcloud), post new beats (e.g., Airbit, Beatstars), offer musical works for synchronization on film and other video. (e.g., AudioSocket), provide integrated global performance rights (AllTrack), and clear record samples from major rights owners (The Music Bridge), other independent artists, (Traccks), or sample libraries (TrackLib). Artists may now use artificial intelligence for composition (Jukedeck, Amper) or digital master (LANDR).

The ecosystem for music content has then become disintermediated from hierarchical organizations into market segments where individual services can be motivated, valued, and contracted through arrangements that vary with the nature of the specific service required, the transaction costs, and the complementarities between the components. This permits a greater domain for a granular valuation of idiosyncratic artist interests and skills previously combined through the routines of vertical organizations. Such disintermediation has tended to destabilize traditional income streams that have sustained the traditional recording (and concert) industries. Yet the evolution of control has enabled insightful executives, entrepreneurs, and artists to lever the best options to advance a professional career.

Musical Compositions

As explained above, music copyright involves a second right for use of the underlying composition. Copyright for compositions first put in a tangible medium is held initially by the original songwriter(s) who created the lyrics and melodies.

A songwriter seeking to promote a new work traditionally transferred full copyright to the control of an *independent music publisher*. When vested with a work, a traditional publisher would promote commercial uses, collect royalties, and offer royalty advances to stabilize writer earnings; writers were paid fifty percent of collected royalties. For example, Peermusic discovered and promoted major country catalogs (beginning with Jimmie Rodgers and the Carter Family), while Carlin

Music (now owned by Round Hill Music) controlled rights for Presley writers Jerry Lieber and Mike Stoller. Independent publishers traditionally paid to writers a share of fifty percent of collected royalties.

A number of alternative arrangements have modified the traditional publisher model. Publishers and writers now negotiate alternative sharing agreements based on new technologies and business arrangements; parties then adopt through competition and innovation the best performing system as a writer's career advances.

1. Each major record company now has an integrated *publishing division* to license and administer rights in songs written by recording artists signed to (or aiming to be signed to) a controlled label held by the company. Publishing divisions may also license works to other labels, share copyrights, or administer royalty collections for smaller music publishers that retain full copyright.

2. A more established writer may operate his/her own *self-publishing* entity, and thus retain an exclusive copyright and a full share of collected royalties. A self-publishing writer may retain full copyright but designate a larger publisher to act as a fee-based *administrator* for collecting royalties (10-15% commission). Alternatively, self-publishing writers may enter into *co-publishing* deals with larger entities that share royalties and rights; the sharing arrangement presumably provides to the large publisher a greater incentive to place the work with other artists and labels.

3. Musical compositions often have two or more *co-writers*. Each co-writer may designate its own publisher or administrator for its designated share of the song. Each controlling co-owner of a composition may license the entire unaltered work, provided that a suitable accounting be made to other accounting provision.

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

3. Major publishers also affiliate with *foreign subpublishers* to administer mechanical, synchronization and performance shares in their respective countries.

5. *Integrated label-publisher entities* now may sometimes control full label and publishing rights for integrated deals, but delegate distribution to an independent party. For example, BMG controls full catalog rights for Robbie Williams and the Rolling Stones but distributes through Warner's ADA. With outside private equity funding, Concord Music controls full catalog rights for Paul McCartney and Joni Mitchell but distributes internationally through the UMG network (and domestically through its own).

6. *Enhanced publishers* may appeal to artists with a reduced slate of label service, but superior administration. In varying combination, music publishers can offer writers synchronization, royalty administration, rights tracking, music production libraries, institutional investing, and label services. Having grown since 2011 to be the second biggest music publisher in the world (behind Sony/ATV), Kobalt Music (8,000 artists, including Trent Reznor, Prince, Gwen Stefani) administers both publishing and sound recording rights but takes copyright in no registered composition; artists are free to move catalog at any point. Priding itself for accountability and transparency, Kobalt offers a state-of-the-art digital tracking platform, reduced fees, expedited payout, and separate options for product distribution. Other publisher innovators StreamCut Media (with recording studio at Atlanta Doppler), Downtown Music

Holdings (high-tech rights management and administrative display through Songtrust interface), Round Hill Music (music production library, catalog investing), Primary Wave Company (talent management, fund investing), and Hipgnosis Songs Group (publicly held owner of publisher and catalog fund, 13,000 songs).

New rights management capabilities have emerged to lower administrative costs and widen opportunities for copyright collection. Here, rights owners will continue to develop blockchain technology to verify digital transactions enabled through *smart contracts*. Smart transactions can be catalogued in a trusted record of the creation, modification, and transfer sequence of a musical work, and so registered in a worldwide network of distributed computers. Blockchain transactions can be verified and secured without the agency of a human third party (e.g., through the Content Blockchain Project, <https://content-blockchain.org/essays-and-articles/>) While the associated operation costs of proving the verity of a candidate transaction are substantial, operations can be presumably monetized through cryptocurrencies that can be generated on the system.

From 2016 to early 2018, the Content Blockchain Project received an initial funding from the Google News Initiative to develop the opportunities of blockchain technology for the media industries. There are four European founding partners

6. COPYRIGHT FOR SOUND RECORDINGS

4. MECHANICAL RIGHTS OF MUSICAL COMPOSITIONS

The first federal protection of copyright appeared in the Copyright Act of 1909, which granted rights to writers and composers of musical compositions; rights were reestablished in the Copyright Act of 1976. Codified at 17 U.S.C. 106 in the Copyright Act, five major rights protect musical compositions set forth in tangible medium – the right to:

- (1) reproduce the copyrighted work in copies or phonorecords¹³
- (2) prepare derivative works based upon the copyrighted work
- (3) 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

The owner rights regarding reproduction, derivation, and distribution of musical compositions used on phonorecords are termed *mechanical rights*. Originally established to protect compositions used on piano rolls, mechanical rights now extend to physical records, downloads, and streaming.¹⁴ Related are *synchronization rights (synch rights)* for compositions that imprinted on video

¹³17 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.”

soundtracks and or performed with video on live media (e.g., films, television programs, online videos, video games). Synchronized compositions can be prerecorded production music (Epidemic Sound), original works-for-hire (e.g., Hans Zimmer’s soundtracks in *Gladiator* and *Lion King*), new songs (BeeGee’s disco catalog in *Saturday Night Fever*), or adapted from pre-existing works (e.g, Dolly Parton’s *I Will Always Love You*, performed by Whitney Houston in *The Bodyguard*). Synchronization rights for pre-existing compositions should be distinguished from neighboring *master use licenses of an imprinted sound recording* that are sometimes also contracted as well. (infra Section 6).

All composition rights are 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 any *unmodified version* of the same composition; secondary reproductions of unmodified work are eligible for statutory licenses per 17 U.S.C. 115 (aka Section 115). Statutory rates for musical compositions are under the authority of the Copyright Royalty Board (CRB), an appointed administrative body that has enforced ratemaking standards since 2005 (per 17 U.S.C. 801). The original owner continues to retain exclusive control over all rights related to derivative works, video synchronizations, and public performance.

With regard to statutory mechanical rights, there are three categories of ratemaking recognized in Section 115 of the Copyright Act:

Subpart A: physical form, permanent download, telephone ringtone

Subpart B: interactive streaming and temporary downloads (i.e., terminating when subscription ends)

Subpart C: limited offerings, mixed bundles, music bundles, paid locker services, and purchased content locker services.

Subject to the next five-year review in 2021,¹⁵ 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.¹⁶ The statutory amount of 9.1 cents often is used as a contract benchmark for composition uses in first release. The license rate for a composition in a ringtone is 24 cents per download.¹⁷

Record labels pay mechanical royalties earned from domestic record sales directly to the publisher (or through designed collecting *mechanical rights organization*, or MRO) – e.g., Harry Fox Agency (for major publishers, owned by SESAC)¹⁸ American Mechanical Rights Agency (AMRA, owned by Kobalt Music), or Music Reports Inc (statutory digital collections). The compensated

¹⁴As applied to copyright in musical compositions, the term *mechanical right* is historically derived from the time when phonorecords (Id.) were reproduced exclusively on physical media, and not electronically reproduced on digital channels.

¹⁵17 U.S.C. 803(b)(1)(A)(i)(V).

¹⁶37 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).

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

¹⁸The Harry Fox Agency was established in 1927 by the National Music Publishers Association as a licensing and collection agency for mechanical and synchronization rights in musical compositions. HFA keeps an administration fee of 11.5 percent of all collections

publisher splits collected mechanical royalties with each writer per the terms of private contract; writers now commonly receive seventy five percent of royalties net of expenses. The same transfer mechanism is established for user payments involving video synchronization. Outside of mechanical and synchronization payments collected and distributed by the MRO, writers and publishers collect separately for performance royalties administered by their chosen *performing rights organization* (infra Section 4).

Mechanical royalties earned on foreign sales are processed through comparable MROs that operate in each country where the record is distributed (e.g., Canada's Musical Reproduction Rights Agency; U.K.'s Mechanical Copyright Protection Society). Foreign collections of mechanical royalties can be based on per track license fees (Canada, same as U.S) or percent sales levies on sales to dealer (Europe, 8.7%). Foreign agencies in each country pay collection shares to national subpublishers that are owned by or affiliated with a controlling U.S. publisher. Writers then share in publisher collections per designated contractual terms, usually 50/50.

With regard to digital rights in Subparts B and C, digital music providers (DMP) account for due payment of royalties in a four-step process:

1. Initial due royalty amount from DMP to the pool is based on a percentage share of its total *service revenue* or *total content cost* (whichever is larger).
2. A provider's due royalty revenues is then credited for its performance royalties paid to each performing society (see Section 4, infra).

3. After crediting, a provider's due royalty is made subject to a "safety net"; i.e., specified *mechanical floors*, (§ 385.22) that are based on number of subscribers to the provider's particular service offerings.

4. Payments for the above totals are credited to individual content units based on respective share of total plays, and so paid to the rights owners.

The D.C. Circuit Court of Appeals in August, 2020 came to approve the CRB's basic framework, although it vacated the specific rates that the CRB had established:

The future institutional structure for mechanical rights under Section 115 will change in 2021 following enactment of Title I of the Orrin G. Hatch-Robert Goodlatte Music Modernization Act of 2018. (H.R. 1551, Pub.L. 115–264). Per Title I, digital music providers will be able to obtain blanket licenses for fully integrated *mechanical rights* for downloads and interactive streaming now covered separately under subparts A, B, and C through *Phonorecords III* via "one stop" integration of rights for musical works facilitates negotiation, ratemaking, and administration.¹⁹) Ratemaking for the integrated mechanical right would enforce new ratemaking standards based on a market-based willing-buyer, willing-seller transactions (17 U.S.C.802(b)(2)), as distinguished from the periodic resetting of adjusted historic and/or policy-based benchmarks (17 U.S.C. 801(b)(1)).

¹⁹Determination 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/> (September 11, 2019)

5. PERFORMANCE RIGHTS OF MUSICAL COMPOSITIONS

A final right listed in 17 U.S.C. 106 protects public performances of musical compositions.²¹ The U.S. established performance rights to protect the rights of composers in restaurants and live events before music was recorded on piano rolls. With the creation of ASCAP in 1914 (infra), rights owners established the first collection agency to issue performance licenses to live venues.

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

²¹Under 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."

Small performance rights commonly are collectively licensed and administered through the efforts of performance rights organizations (PROs), with which member or affiliated writers and composers may catalog created works. The three major PROs in the U.S. include American Society of Composers, Authors, and Publishers (ASCAP), Broadcast Music, Inc. (BMI), and SESAC.²² A fourth PRO, Global Music Rights, has an additional catalog of select writers.

ASCAP and BMI now offer to music licensees a *blanket license* that covers a contract term for unmodified uses of all works registered in its catalog.²³ Per SCOTUS, the blanket license is an instrument for transactional efficiency that minimizes the costs of negotiation and administration for all implicated parties.²⁴

Each PRO then negotiates licenses, collects due amounts, and distributes payments to writers and publishers for covered uses. Collected royalties are apportioned to writers and publishers based on surveyed airplay, digital records, television cue sheets, or concert setlists. Each PRO splits due amounts for any song between the registered writer(s) and publisher(s), generally 50/50.²⁵

²²The acronym SESAC is no longer meaningful.

²³Broadcasters and cable channels may also obtain *program licenses* for particular time-segments in the day.

²⁴*Broadcast Music, Inc., et al. v. Columbia Broadcasting System, Inc., et al.*, 441 U.S. 1, 99 S. Ct. 1551; 60 L. Ed. 2d 1; 201 U.S.P.Q. 497

²⁵Subject to private contract, publishers and writers often again split the publisher share evenly. The writer then winds up with 75 percent of performance royalties.

Each domestic PRO may also act as administrator and distributor for writer royalties collected by foreign PROs for performances of U.S.-registered works in their respective countries (e.g., Canada's SOCAN, U.K.'s Performing Rights Society), and may so collect and administer U.S. royalties due to foreign writers. Foreign license rates are established separately in each country per administered ratemaking. To date, PROs have attempted, but failed, to establish global databases to accommodate global registration and collection.

Domestic rates at ASCAP and BMI are generally negotiated with prospective media venues or general licensees (or their appointed industry agents). Disputes are brought to arbitration to Rate Courts established by U.S. Justice Department Consent Decrees administered in the Southern District of New York.²⁶ Per the

²⁶For 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).

Digital Millennium Copyright Act of 1998, the PROs may also collect royalties for jukebox (17 U.S.C. 116), public broadcasting (17 U.S.C. 118), and distant retransmission of cable signals (17 U.S.C. 119); the Copyright Royalty Board establishes royalty rates. Copyright licenses are not necessary for performances (i.e., transmissions) of permanent downloads (17 U.S.C. 115, Subpart A), but are required for interactive streaming services, limited downloads, and locker services that may involve the same tracks (Subparts B and C).

The PROs do not license performance rights for movie soundtracks performed in U.S. theaters; composers and film studios now transact combined rights in their synchronization licenses that cover music used in the soundtrack. By contrast, television channels, cable networks, and video streaming in the U.S. must cover independently both performances and synchronizations for all uses of movie, video, and live music used on broadcast soundtracks.

Many independent artist/writers now choose to avoid the interwoven network of domestic PROs for gathering disparate royalties and twice administering the writer's due. Rather, a writer/artist of digital tracks may avoid some collection costs by licensing integrated worldwide rights through an independent label/publisher that can collect and administer all due revenues. Publishers or administrators here may also provide more accurate tracking display and collect the neighboring right for the sound recording (e.g., Kobalt Music, Downtown Music, in Section 3).

Copyright protection for sound recordings involves the capture, fixation, and playback of musical sounds first recorded on master studio recordings from which later track imprints can be derived. Through the *Copyright Act of 1976*, Congress first granted federal protection for reproduction, derivation, and distribution of sound recordings. Previous sound recording rights had been subject to state law.

The 1976 Act did not protect performances (i.e., broadcast transmissions) of sound recordings that presumably benefitted sufficiently from free media promotion of the record product on public airwaves allotted to radio stations.²⁷ When new digital technologies came to enable more exact copying and retransmission of digital sound recordings, Congress enacted in 1995 the *Digital Performance Rights in Sound Recordings Act* (DPRSRA).²⁸ The DPRSRA here amended 17 U.S.C. 106 to include a limited performance right for sound recordings performed in a *digital audio transmission* based on wired or over-the-air channels (17 U.S.C. 114, or Section 114).²⁹ In 1998, the *Digital Millennium Copyright Act* (DMCA)³⁰ set in place an institutional structure to facilitate licensing of the newly established performance right for sound recordings (17 U.S.C. 114(d)).

²⁷S. Rep. No. 104-128, at 14-15 (1995).

²⁸Digital 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).

²⁹17 U.S.C. §106(6) (2000).

³⁰ Public Law No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

Section 114(d) recognized three categories of performance rights for sound recordings:

1. *Digital transmissions of over-the-air broadcasts* -- Digital rebroadcasts of radio and television stations remained exempt from paying performance royalties for sound recordings that were digitally retransmitted from original over-the-air station broadcasts.³¹ However, a specially programmed digital broadcast performed by a commercial radio station must pay performance royalties to the controlling label or artist. For example, radio stations owned by the chain iHeart Media do not need sound recording licenses, but the dedicated digital entity iHeart Radio does.

2. *Non-interactive services* – Subject to some restrictions on concentrated use, non-interactive satellite radio (e.g., SiriusXM), music subscription (e.g., Music Choice), and webcast services (e.g., Pandora). may perform tracks per terms of statutory licenses now established by Copyright Royalty Board.³² There are four license categories -- pre-existing subscription,³³ new subscription,³⁴ and subscription and ad-supported webcasting.³⁵

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

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

Performance royalties for eligible non-interactive transmissions of sound recordings can be collected and distributed through the collective *SoundExchange*, which now divides collected dollars between label (50%), recording artist (45%), and other musicians (5%). 17 U.S.C. 114(f) The collective in 2021 will start direct distribution to producers now contracted and paid directly by lead recording artists on the track. Performance royalties collected under Section 114 are also credited (5%) to payments for ephemeral reproductions used in transmissions. 17 U.S.C. Section 112(e).³⁶ Some business subscription services (e.g., Rockbot) are exempt from the performance royalty, and pay only the ephemeral rate.³⁷

³³Services established before enactment of the DMCA in July, 1998. *See* Determination of Rates and Terms for Satellite Radio and Preexisting Subscription Services (*SDARS III*), Docket Number 16-CRB-0001-SR/PSSR, at <https://www.crb.gov/rate/> (retrieved on September 11, 2019).

³⁴ Services established after enactment of the DMCA in July, 1998. *See* Determination of Royalty Rates and Terms for New Subscription Services for Digital Performance in Sound Recordings and Ephemeral Recordings (*New Subscription III*); Docket Number 14-CRB- 0002-NSR (2016-2020), at <https://www.crb.gov/rate/> (retrieved on September 11, 2019).

³⁵Now offered at Pandora Music. *See* Determination of Royalty Rates and Terms for Ephemeral Recording and Digital Performance of Sound Recordings (*Web IV*), at <https://www.crb.gov/rate/> (retrieved on September 11, 2019).

³⁶37 CFR 380.10(d).

³⁷Determination 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).

3. Remaining *digital transmissions* (e.g., interactive streaming, limited downloads, video, social media) are ineligible for Section 114 licenses. Prospective users then must directly establish performance rights for all digital transmissions with the controlling rights owner.³⁸ Interactive licenses may be established by direct deals with the label itself or a third-party agent, such as Merlin Networks. Video streaming services that perform recorded music on their content (e.g., YouTube) must obtain from the label the initial *master use rights* to cover the imprint of sound recordings used on the video soundtrack, as well as performance rights for transmission of the music.

TEXT AND FOOTNOTES 38-45 REDACTED

7.ACCOUNTING FOR THE MONEY CHAIN

The money chains for downloads and streaming can be summarized as follows.

Permanent Downloads

- *Sound recording rights* for tracks are negotiated between digital service provider and collecting label (or third-party aggregator).
- Service provider pays the collecting label or the artist the negotiated royalty amount for the sound recording.
- Collecting label pays *artist royalty share*. Artist pays producer and mixer share.
- Collecting label pays *mechanical royalty to publisher* to cover composition rights. Publisher pays writer share
- Service providers do not pay *performance royalty* for musical compositions in permanent downloads

Example: Apple iTunes was a pure download service in 2011 and generally received \$0.99 per unit download. Per a private deal with the record labels, Apple paid a negotiated 70 percent (circa) of collected revenues for sound recording rights for its tracks.⁴⁶ Per Section 115, Subpart A, the collecting label paid the publisher at the larger of 9.1 cents per song, or 1.75 cents per minute; publishers shared collected royalties with writers (75/25). As a pure download service, Apple iTunes in 2011 did not pay performance royalties for musical compositions.

⁴⁶S. 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>

Interactive Streaming (Limited Download, Locker Service)

- *Sound recording rights* are negotiated between digital service provider and each collecting label (or third-party rights aggregator).
- Service provider pays the collecting label or artist the negotiated royalty amount for the sound recording.
- Collecting label pays *artist royalty share* to recording artist. Artist pays producer and mixer share.
- Service provider pays *mechanical royalties to publisher* to cover composition rights. Publisher pays writer share
- Service providers pays *performance royalties* to PROs to cover performance rights. PRO pays publisher and writer shares.

Example: Spotify is an interactive streaming service with subscription and ad-supported tiers. Spotify in 2018 paid to the record labels a negotiated 52 percent (circa) of revenues for sound recording rights. Pursuant to rates established under Section 115, Parts B and C, Spotify paid to publishers/writers an “all-in” 13 percent (circa) to cover imputed mechanical and performance rights in musical compositions.⁴⁷ Writers would expectedly receive 75 percent of composition payments.

Non-interactive Streaming Service

-
- Service provider pays *performance royalty for compositions* through performance rights organizations, which splits royalty between publisher and writer.
 - *Performance royalties for sound recordings* for eligible service providers are established by the Copyright Royalty Board.
 - Service provider pays specified *performance royalty for sound recordings* through *SoundExchange*, which splits royalties between labels and artists.
 - Service provider pays statutory *performance royalty for compositions* through PROs, which splits royalty between publisher and writer.

⁴⁷<https://www.manatt.com/Manatt/media/Media/PDF/US-Streaming-Royalties-Explained.pdf>

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

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

Video Streaming

Video (e.g, YouTube) involves a combination of master use, synchronization, and performance rights in recordings and compositions used in the audiovisual work; video streaming is not eligible for a Section 114 license. Royalties depend on whether the video was generated and uploaded by a label or independent user.⁴⁸

The licensing process for *label-generated video* on YouTube involves a synch payment for use of the label recording on each performed video with inserted advertising. YouTube pays about 70 percent ad revenues to cover all video rights.

⁴⁸D. S. Passman, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS*, Simon & Schuster, New York, 9th edition, pp. 278-80.

Labels share collected revenues with artists and publishers to cover synch right for the composition (about 10 percent).

The licensing process for *user-generated* content on YouTube involves two separate synch payments for label and publisher. When accompanying label recordings are imprinted in the video, YouTube separately pays labels 40 percent and publishers 15 percent of ad revenues from the video to cover complementary synch rights to imprint the sound recording or composition. For musical compositions imprinted without an accompanying label recording, YouTube pays to the publisher a 50 percent revenue share to cover *synchronization* of the composition.

In addition to the above synch rights, YouTube also pays PROs per revenue-based blanket licenses to cover performance rights for transmission of compositions used on its videos.

8. INFRINGEMENT IN DERIVATIVE WORKS

Copyright infringement often arises from the unauthorized taking of an original composition in order to make a derivative or transformative work that involves some adaptation of the original melodies, lyrics, or musical beats (17 U.S.C. 106). The derivative use of compositions may also involve the unauthorized taking of the sound recording in which the infringed composition appeared.⁴⁹

Derivative infringement harms original rights owners who lose both royalties and control of his/her work. To prove infringement, plaintiffs must prove both the defendant's *initial access* to the copyrighted work *and substantial similarity* of the purported infringement;⁵⁰ defendants may argue that the contested taking involves generic melodies and “look and feel” that is not protectable by copyright law. Depending on the demonstration of liability, judges or juries may determine that implicated labels, publishers, artists, and writers must remedy copyright infringement of a track or composition.

⁴⁹Joined compositions and recordings appear in *Bridgeport v. Justin Combs Publishing op. cit, infra* note 58 and surrounding text.

⁵⁰*Arnstein v. Porter*, 154 F.2d 464 (F. 2d)

Among prominent instances of derivative infringement (infra Section 10), former Beatle George Harrison (*My Sweet Lord*) lifted a melody from ABKCO Music's *He's So Fine*. (previously recorded by the Chiffons in 1962, *infra*). In a multi- platinum song released in 1991 (*Love is a Wonderful Thing*), Michael Bolton derived from an earlier Isley Brothers song of the same name (1966), *infra*) In 2008, the Sixth Circuit upheld a jury that found that Notorious B.I.G and Puff Daddy infringed three works owned by Bridgeport Music, *infra* In 2015, a Circuit Court upheld a jury that found that Robin Thicke and Pharrell Williams (*Blurred Lines*) lifted a “look and feel” from Marvin Gaye’s *Got To Give It Up*, (1977). *infra*.

Per 17 U.S.C. 504(b), a prevailing plaintiff may recover “damages that s/he actually suffers from the lost sales or licensing opportunity, and additional profits not taken into account.” Infringer(s) may then wind up paying actual damages plus any additional defendant profits earned from infringement (i.e., the greater of actual damages and earned profits). Joined infringers of the same work (e.g., label, artists, writers, and publishers) are *jointly liable* for actual damages imposed on the plaintiff, but each is *severally liable* to disgorge any additional profits earned.

Because rights are often enforced over joined infringers, a plaintiff must identify each party and his/her related participation in revenues or royalties. (supra Sections 3-5). This involves a careful examination made possible through interrogatory and document discovery. Damage experts may testify to plaintiff’s actual damages, each defendant’s profits, and the monetary differential between them. As a matter of common law, “every indulgence should be granted plaintiff in

an attempt to arrive at a sum which is assuredly adequate”⁵¹ and any doubt regarding computation should be resolved in favor of the plaintiffs.⁵²

With the complex structure of rights in a musical work, it is helpful to think of copyright and collection shares in a song in an accounting grid framed by each owner/beneficiary of a contested track or composition. Grid cells for each entity can be populated with both ownership and collection shares of royalties that experts must discern and account for. Plaintiff interrogatories and document discovery should focus on the operations of each payment chain, and related process revenues. Record labels, recording artists, and producers may earn additional amounts that are not within the domain of product sales. Related contracts for rights and assignment of shares should be made available in discovery.

8. ACTUAL DAMAGES

Actual damages in copyright infringement commonly result from missed licensing opportunities that a plaintiff must prove.⁵³ A copyright plaintiff here bears the burden to prove that each sought remedy is related causally to use of the work.⁵⁴

⁵¹Orgel 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).

⁵²Shapiro, 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 93, at 1070, citing *Syigma Photo News, Inc. v High Society Magazine, Inc.*, 778 F. 2d 89, 95 (2d Cir. 1985).

⁵³On Davis v. The Gap, 246 F.3d 152, 165 (2d Cir. 2001).

⁵⁴Relevant case law is fully discussed in M.A. Einhorn, [Copyright, Causality, and the Courts](http://mediatechcopy.com/wp-content/uploads/2016/10/CAUSALCONNECTION.pdf), *Journal of the Copyright Society*, Winter, 2015. at <http://mediatechcopy.com/wp-content/uploads/2016/10/CAUSALCONNECTION.pdf>. See also *Mackie v. Rieser*, infra note 70 and surrounding text. *Thornton v. J. Jargon*, infra note 71 and surrounding text.

Without further discernment, a prevailing plaintiff may not simply recover profits from all defendant earnings related to the entire contract, catalog, album, or production in which the work may be implicated in one manner or another.

Plaintiff damages can be established from proven lost royalties for missed opportunities for mechanical, performance, and synchronization licenses. Amounts for claimed damages must be based on the terms and valuation in 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 may present comparable licenses that involved one or both parties, or benchmark outcomes in similar situations involving third parties in the industry.⁵⁵

Courts have become quite restrictive on the use of license benchmarks. In a major copyright case involving software owned by Oracle, the Ninth Circuit vacated a jury award of plaintiff damages after finding that plaintiff had established no sufficient benchmark license for the copyrighted software.⁵⁶ 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.⁵⁷

With appropriate caveats, there are six general strategies for proving damages in court:

1. *Plaintiff Licensing*: A copyright plaintiff is in the strongest position if s/he can present a fact witness or expert who can testify to license royalties that the plaintiff had earned in comparable transactions. For example, plaintiffs in *Bridgeport Music, et al. v. Justin Combs Publishing, et al.* recovered payment for

⁵⁵Oracle 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.”

⁵⁶Id., 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.”

⁵⁷ResQNet, 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.

rights in compositions and sound recordings that were infringed on the album *Ready to Die* that was recorded by Notorious B.I.G (Christopher Wallace) on Bad Boy Records (owned by Sean Combs, aka Puff Daddy).⁵⁸ As an established music publisher, Bridgeport Music and its record label Westbound Records had built major catalogs in funk music (including recordings by Ohio Players and George Clinton) and had licensed music samples to a number of legitimate users.⁵⁹ Plaintiff's licensing agent (Jane Peterer) demonstrated from Bridgeport's prior licensing activity that Bridgeport's original compositions could have received a 25% share of mechanical royalties for use of the work. A similar demonstration was demonstrated for sound recordings taken from Westbound Records. Plaintiff recovered \$4.4 million in damages.

2. *Defendant Licensing:* A plaintiff may discover defendant's sampling arrangements of other tracks and works; sampling is now very popular among prominent rap and hip-hop artists. For example, Dr. Dre, Kanye West, and Lupe Fiasco were among the many rap artists who sampled (without payment) funk Drummer Clyde Stubblefield, who appeared in background in James Brown's classic "Funky Drummer".⁶⁰ Samples are sometimes looped in a repeated fashion. With regard to small samples, there is an important Circuit split on possible *de minimus* protection of small uses of sound recordings.⁶¹

⁵⁸Bridgeport Music, Inc. et al. v. Justin Combs Publishing, et al. No. 06-6294.(October 17, 2007).

⁵⁹Samples 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*.

⁶⁰<https://genius.com/a/meet-the-funky-drummer-sampled-by-dr-dre-kanye-west>

⁶¹Bridgeport 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'.

3. Public Information: Industry standards and practices can provide useful royalty benchmarks for actual damages. Information on musical beats and record samples can be obtained through public websites and apps that present available tracks from participating artists and writers. Rates for basic beats may include an upfront fee (e.g., \$2,500 for an exclusive beat), plus a possible share of the new track. (e.g., 50% share of performance royalties).⁶² Sample fees may depend on the popularity of the original, prominence of the sampled work, artist status, marketing spends, distribution format, and sales territory.⁶³

2. Third Party Experts: Testifying experts can be used when a common industry rule for licensing of compositions is not apparent, e.g., video synchronizations, dramatic performances, and derivative uses of well-known songs. Royalty fees for synchronizations may differ for feature, background, thematic, and commercial uses of music, as well as the duration of use, popularity of the musical composition, and stature of the user. More precisely, the amount paid for film music may depend on a number of factors – “how the song is used (sung by a character in the film, background instrumental, vocal performance of a recording from a jukebox, etc.), the overall budget for the film and the music budget, the stature of song being used (old standards, current hits, new compositions), the actual timing of the song as used in the film (45 seconds, one minute, two minutes), whether there are multiple uses of the song in various scenes, whether the use is over the opening or closing

credits, whether there's a lyric change, the term of the license (normally life-of-copyright), the territory of the license (usually the world or the universe), and whether there is a guarantee that the song can be used on a soundtrack album or released as a single.”⁶⁴ Neighboring master use rights for a related sound recording used in the same movie are commonly licensed for the same rate as the composition. These necessary valuations in litigation can involve an experienced clearance agent.⁶⁵

⁶²<https://www.tracklib.com/howitworks/>.

⁶³R. Salmon, *The SOS Guide to Copyright Law on Sampling*, <https://www.soundonsound.com/sound-advice/sample-clearance>.

⁶⁴J. Brabec and T. Brabec, *MUSIC, MONEY, AND SUCCESS*, New York (2000), 174; see also D. Passman, *supra* note 42, 265-71.

⁶⁵For example, DMG Clearances, The Music Bridge, or EMG.

5.Royalty Shares: An expert may determine a plaintiff's lost royalties by examining the amounts paid to other paid co-writers and determining a reasonable prorated share that would have rightfully become payable through an arms-length negotiation. A prorated outcome came down in the matter of *Williams v. Gaye*, which involved infringement of Marvin Gaye's *Got To Give It Up* on Pharrell Williams' *Blurred Lines* (recorded by Robin Thicke),⁶⁶ Based on her personal experience as a licensing professional, plaintiff expert Nancie Stern testified that writers of the infringing *Blurred Lines* would predictably have come to share 50 percent of royalties with the original copyright owners of *Got to Give it Up* (The Gaye Estate) if rights licensing had been done – as it should have been -- prior to release of the infringing track (and 75 percent if later). The jury adopted the first standard and returned a damage total of \$5.3 million (after remittitur). The Gaye Estate also received a 50 percent copyright share in the infringing work and are thus able to recover future royalties from the infringing writers.

6.Statutory Damages: *Provided the work is first registered at the Copyright Office*, a plaintiff may choose at any point in trial to recover statutory damages and attorney's fees in lieu of 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 adjustments for proven willfulness (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 number of reproductions or performances made thereof

⁶⁶*Williams et al. v. Gaye et al.*, Case No. 2:13-cv-06004, (C.D.Cal. 2015).

7. *Defendant profits*: If actual damages cannot be proven, the disgorgement of additional profits remains a considerable remedy often adequate for the job. As a matter of arithmetic, a complete copyright award amounts simply to the maximum of actual damages and defendant profits related to its use. Actual damages represent a minimum for recovery and should be recognized – if provable -- as risk- protection as a flooring value. Actual damages are also jointly recoverable. If profits are the larger, the final award will be equal to measured profits (which can be severally recoverable).

8. *Injunctions*: With or without damage recovery, a prevailing plaintiff may also enforce an injunction against further reproduction, distribution, and sales of any infringing product. Unless plaintiff consent is acquired after judgment, the infringing defendant would need to recall and destroy any outstanding album product; it must then re-record the track or entirely eliminate it entirely.

An injunction against further use can then be a costly proposition for both label and artist. For example, the album *Truthfully Speaking* (a debut album from singer [Truth Hurts](#), produced by Dr. Dre) was a commercial disappointment for Dre's releasing label Aftermath Records. The problem arose because plaintiff Saregama India Limited – an Indian movie studio -- won an injunction on the

album after identifying use of a music sample on the album's lead track *Addictive*.⁶⁷

As a precaution against downstream injunctions, record labels now attempt more resolutely to ensure that all music samples of compositions and sound recordings are cleared correctly.

7. PROFIT DISGORGEMENT

In addition to recovering joint actual damages, a prevailing copyright plaintiff may disgorge severally from each defendant additional profits unaccounted for in the joined award. *Direct profits* arise from the sale or licensing of products on which an infringing work is commingled, and can also implicate direct, contributory,⁶⁸ or vicarious⁶⁹ infringements. *Indirect profits* arise from the sale of non-infringing products tied in some way to the infringement; e.g., products sold through infringing

⁶⁷ Saregama India Limited v. UMG (2003), <https://www.rediff.com/movies/2003/feb/05bappi.htm>. An earlier injunction involving music copyright on a hip-hop sound recording was issued in Grand Upright Music, Ltd. v. Warner Bros. Records Inc., 780 F. Supp. 182 (S.D.N.Y. 1991)

⁶⁸ *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).

⁶⁹ A defendant participates in *vicarious infringement* if s/he “has the right and ability to supervise the infringing activity and also direct financial interest in such activities.” *Gershwin, Id.*, at 1162; *Fonovisa, Id.*, at 264. No actual knowledge is required. It is not necessary to identify financial direct monetary gain resulting from direct sale; the use of infringing material (e.g., music) to create interest and atmosphere may be sufficient.

advertising that preceded the sale.⁷⁰ To disgorge a defendant's revenues, a plaintiff must prove a causal connection from the infringement to the purported profit arising from each infringing use.⁷¹

The potential disgorgement of additional profits from copyright infringement presumably eliminates any profit gain that an infringer may expect to gain from a taking. The U.S. Congress here purposely established the disgorgement remedy (which is not present in patent law) to prevent an infringer from unfairly benefiting from a wrongful act.⁷² According to the U.S. Supreme Court, the stiff disgorgement in copyright law is aimed particularly to deter recidivists, who would otherwise prey repeatedly on smaller creators and so profit by hopping around catalogs of unlicensed work.⁷³ That is, "by preventing infringers from obtaining any net profit, [the statute] makes any would-be infringer negotiate directly with the owner of a

⁷⁰The distinction between direct and indirect does not appear in the Copyright Act. A distinction first appears in *Mackie v. Rieser*, 296 F.3d 909, 911 (9th Cir. 2002), regarding an infringing photo of a street sculpture that was distributed to audiences at live performances of the Seattle Opera.

⁷¹Necessary considerations for establishing a causal connection in direct and indirect infringement may vary by circuit; see *Thornton v. J Jargon Co.*, 580 F. Supp. 2d 1261 (M.D. Fla. 2008). Facing a Circuit split on the causal connection between infringement and defendant profits earned at the box office (at 1280), Judge Whittemore enforced the predominant *reasonable relationship* by allowing plaintiffs to attempt to recover damages from an infringing work although audiences had come to view the infringement only after buying tickets. The judge cited Congressional intent behind the Copyright Act.

⁷²H.R. Rep. No. 1476, 94th Congress, 2d Session 161 (1976).

⁷³*Sony Corp. of America v. Universal City Studios, Inc.*, 104 S. Ct. 774, 793, reh'g denied, 104 S. Ct. 1619.

copyright that he wants to use, rather than bypass the market.”⁷⁴ Attorneys and their testifying experts must here understand the intent and interpretation of the disgorgement remedy.

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

Labels, distributors, writers, publishers, and artists may be held liable for infringement and made subject to severable disgorgement. A plaintiff expert here must identify gross revenue from any recording, performance, derivative, video use, or compilation in which the infringing element is solely taken or *commingled* as an identifiable component or track of a complete song, album, or audiovisual work. Royalty administrators and collecting agents bear no apparent monetary obligation for copyright infringement.

⁷⁴Taylor v. Meirick, 712 F. 2d 1112, 1120 (1983).

Beyond the normal enforcement of the Copyright Act on U.S. territory, the Supreme Court established in 1940 that a plaintiff may also recover *foreign earnings* earned from sales or licensing of musical product that involves a *prior act of copying* made in the U.S. in which a plaintiff may have had an equitable interest.⁷⁵ Indeed, a later defendant was held liable for *executing a contract* in the United States that authorized improper foreign exhibitions.⁷⁶ However, copyright plaintiffs do not have statutory standing in U.S. courts to recover for unauthorized foreign uses of works (e.g., performances or distributions) that have no precedent act of infringement in the U.S.⁷⁷ Along with domestic sales and licenses, the revenue base for a defendant record label may then include licensing income paid to the label by each *independent foreign distributor* that licenses content.

⁷⁵Sheldon 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]." See also John Gladstone Mills III, et al., 2 Pat. L. Fundamentals § 6:139 (2d ed. WL 2009) ("An *established exception* provides that extraterritorial acts are subject to the U.S. copyright law when there is *infringement within the United States* that permits further reproduction abroad." [emphasis mine]).

⁷⁶Peter Starr Production Co. v. Twin Continental Films, Inc., [783 F.2d 1440, 1443](#) (9th Cir. 1986).

⁷⁷For performances, see Robert Stigwood Group Ltd. v. O'Reilly, 530 F.2d 1096, 1101 (2d Cir. 1976) ("Copyright laws do not have extraterritorial operation. The [unauthorized] Canadian performances, while they may have been torts in Canada, were not torts here." (citation omitted). For distribution, see Subfilms, Ltd. v. MGM-Pathé Communications Co., 24 F.3d 1088, 1094 (9th Cir. 1994)

An accounting of recoverable label earnings from an infringing label release may be based on entries on annual various Profit and Loss Statements available in discovery:

- Physical albums (Basic, Deluxe)
- Download albums (Basic, Deluxe)
- Single Tracks (Downloads)
- Interactive Streaming Licenses
- SoundExchange Licenses
- Audiovisual Licenses
- Other Third-Party Licenses
- Pressing and Distribution Services
- Foreign Distributions and Licenses
- Touring and Merchandising Income

Additional earnings are also recoverable from infringing creatives – i.e., recording artists, publishers, and writers -- based on information reported on earning statements submitted by the party itself, or reported earnings from the label or performance rights organization.

10.DEFENDANT COSTS

A plaintiff's proof of defendant revenues for sales or licenses does not establish any profit total that plaintiff may immediately disgorge. Rather, once gross revenues are proven, the defendant may prove deductible expenses and a suitable means of determining an apportioned value for non-infringing factors that may have contributed to sales.

A copyright defendant may deduct from earned revenues only those actual costs that are related to production and distribution of the infringing product.⁷⁸ To prove costs, the generally accepted accounting principles (GAAP) of the accounting profession can be useful, but have no special evidentiary standing in any U.S. court.⁷⁹ If verifiable in some provable manner, deductible expenses may include distribution, pressing, packaging, artwork, recording, royalties, promotion, marketing, and sales discounts.⁸⁰ Label expenses related to promotion and marketing may include media campaign, video production, support for concert tours, and other expenses that can be identified on financial statements. Unless related to

⁷⁸Sheldon, *supra* note 75, at 54, *see also* Allen-Myland v. International Business Machines, 770 F. Supp. 1014 (E.D. Pa., 1991).

⁷⁹Shalala v. Guernsey Memorial Hosp., (93-1251), 514 U.S. 87 (1995).

⁸⁰*Boyd Jarvis*, *infra* note 95, at 295.

expenditures for the specific album release, general contracted amounts paid on behalf of the artist for brand or “personality” should not be deducted.

From a purely 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 are established regardless of whether the particular infringing product was actually released. Consequently, overhead costs are not properly related to any measure of incremental profits resulting from the infringement.

Some courts nonetheless have allowed non-willful defendants to deduct a share of company overhead⁸¹ (as well as paid income taxes⁸²). If some type of overhead deduction is allowable, defendants must come up with a “fair” method of apportioning shares of overhead cost to infringing and non-infringing products – e.g., production costs or product sales.⁸³ The decision of apportionment may involve matters of equity that may ultimately be decided by the judge or jury. Defendant

⁸¹Allen-Myland, *supra* note 78, 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).

⁸²L.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 75, at 53; In Design v. K-Mart Apparel Corp., 13 F. 3d 559, 566 (2nd Cir. 1994).

⁸³*Sheldon*, *Id.*, at 52-53; 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.

labels can legitimately deduct from gross revenues paid artist and publisher royalties as well as other proven costs related directly to the infringing release. Any paid amounts to artist, publishers, and writers can be recovered from any infringing party. Experts should also verify that entries on label, artist, and publisher income statements correspond to one another.

An accounting concern involving integrated record companies with internal pressing and distribution is that the purported costs of both may be self-dealing amounts that effectively go from “one pocket to the other” within the company’s divisions. Purported costs paid by a company-owned label to other company divisions may then actually be *internal transfer prices* based on administrative rules, such as a percentage of income earned, that would include elements for division overheads and a profit-markup.⁸⁴ Unless further verified by actual costs spent on pressing or distribution, it would then be economically improper for a defendant parent company to deduct any such transfer prices paid within its walls. For example, if otherwise a proper defendant, Universal Music Group should not deduct internal transfer prices paid by any owned label to distributor Universal Music Group Distribution or Universal Music Logistics, which are entities owned by UMG. .

⁸⁴<https://www.accountingtools.com/articles/2017/5/16/transfer-pricing>

Deductions for label investments in an artist brand not related to the actual release of a particular album should not be deducted. These amounts are related to the stated terms and *execution of a full recording contract* and do not apply to expenses for the album release. Missing the distinction, Steve Drellishak, a vice president at Universal Music Group, testified as a fact witness in the matter of *Marcus Gray, et al. v. Katy Perry, et al.*,⁸⁵ 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* would include investments in Perry's celebrity "brand", *none of which were related to the production of the album*. (e.g., \$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).⁸⁶ The accountant went on to claim to the jury that the label earned profits of \$650,000 from collected revenues of \$31 million, for a mere 2.1% profit margin.⁸⁷ If taken seriously, label accounting like Mr. Drellishak's would defeat the stated

⁸⁵Marcus Gray, et al. v. Katy Perry, et al., (C.D. Ca. 2019), 2:15-cv-05642

⁸⁶"[S]he always has to be in the most fashionable clothes, the most fashionable makeup . She changes her look a lot ... That's core to what the Katy Perry brand is." Jury Weighing Damages in Copyright Case Gets a Glimpse Into Costs of Making a Katy Perry Hit, July 31, 2019, at <https://ktla.com/2019/07/31/jury-weighing-damagesin-katy-perry-dark-horse-copyright-infringement-case/m>;

⁸⁷Costs 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.

purpose of the Copyright Act - *to deter infringement and eliminate unjust enrichment.*⁸⁸

12. APPORTIONMENT OF DEFENDANT PROFITS

After subtracting allowable expenses from gross revenues, a copyright defendant must then apportion and deduct the provable of non-infringing elements that may be *commingled* as a component or track in an infringing song or album, and thus contributed to profits. For example, defendant's tracks or compositions may include infringing melodies combined with new lyrics, and record albums may contain both infringing and non-infringing tracks sold in a composite unit.

As a matter of statute (17 U.S.C. 503), the defendant must prove the validity of any apportionment technique useful for valuation of commingled elements that may have contributed to monetization of the infringing work. In this regard, the U.S. Supreme Court affirmed that "an infringer who commingles infringing and non-infringing elements must abide the consequences unless it can make a separation of the profits so as to assure to the injured party all that justly belongs to him."⁸⁹ Indeed, plaintiffs have won full disgorgements of defendant profits after

⁸⁸Deductions for "brand investment" would add to deductible costs the glamour expenses of the largest acts that would have the most opportunity to infringe.

defendants could present no suitable apportionment technique.⁹⁰ In other instances, judges have made heuristic or equitable attempts to determine a proper apportionment.⁹¹ The first arbiter of the defendant's apportionment can be the jury itself, which the judge may later uphold or overrule.⁹²

⁸⁹Harper and Row Publishers, Inc., v. Nation Enters., 471 U.S. 539, 576; 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985); (quoting *Sheldon*, infra note 91, at 406; defendant MGM must demonstrate a procedure for apportionment due a screenplay taken for a motion picture.

⁹⁰Smith 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).

⁹¹*Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 407-08, 60 S.Ct. 681, 687-88, 84 L.Ed. 825 (1940) (approving apportionment where profits of defendant's film were largely attributable not to the plaintiff's pirated story but rather to the "drawing power" of the star 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); *Syigma 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).

⁹²*Andreas v. Volkswagen of America, Inc.*, 336 F.3d 789, 797-98 (8th Cir.2003) (citation omitted); "[t]he question of allocating an infringer's profits between the infringement and other factors, for which the defendant infringer carries the burden, is 'highly fact-specific' . and should [be] left to the jury." But *see*, [Katy Perry Prevails as Judge Erases 'Dark Horse' Decision - The New York Times\(nytimes.com\)](https://www.nytimes.com/2019/05/14/nyregion/katy-perry-prevails-as-judge-erases-dark-horse-decision.html), where Judge Christina Snyder vacated a jury verdict that awarded plaintiff \$2.8 million from a purported infringement by Katy Perry.

Apportionment for Compositions

There are two possible considerations for apportionment -- the contributive share of the infringed material in a defendant's musical composition, and the contributive 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 composition; this is the default standard for joint original works that combine efforts from different writers or composers. (17 U.S.C. 201) However, infringing melodists of the French song *Pour Toi* received from a jury an 88 percent share of profits from the infringing hit *Feelings*, even though the defendants took only the original melody.⁹³ Without any real measurement, the plaintiff prevailed after defense witness Lou Levy could not recall in testimony the modified lyrics that his infringing writers had added.

At times, infringing and non-infringing uses are commingled throughout an infringing track. Here the matter of apportionment may involve some rough-hewn equity. For example, a jury recently apportioned 22.5% of songwriter profits arising from Perry's *Dark Horse* to track minutes in which infringing background music from *Joyful Noise* had appeared.⁹⁴ However, a New Jersey District Court explicitly ruled out a similar "second-by-second"

⁹³Gaste v. Morris Kaiserman, et al., 863 F. 2d 1061, 1070 (2nd Cir. 1988).

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.⁹⁵ And in *Bridgeport Music*,⁹⁶ the Sixth Circuit court (referring to *Andreas*⁹⁷) found it allowable that the jury could have agreed that a strictly mathematical approach for apportionment may have failed to take into account the real significance of the infringing passage to the song.⁹⁸

Apportionment for Album

With regard to the second concern for apportionment – the contribution of an infringing song to monetize of an entire album or video product -- the defendant must yet present a credible means for determining the relative importance of the contested track to overall profitability of any released product. Two contrasting situations are apparent, depending on whether or not the track was used to promote the album through media play or live events before or during its early release.

⁹⁴*Gray v. Perry*, op cit., (overturned on liability grounds)

⁹⁵*Boyd Jarvis v. A&M Records, et al.*, 827 F. Supp. 282, 295 (N.J. 1993).

⁹⁶*Bridgeport Music*, supra note 58.

⁹⁷*Andreas*, supra note 92.

⁹⁸*Bridgeport Music*, supra note 58.

In the traditional business model of album release, record labels chose individual songs for radio promotion, video production, live events, and other media placement during the early weeks of release in order to generate critical interest, large sales volume and a high ranking on-tracking charts. With a selective marketing strategy, *it is not 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 mega-hit *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* (twenty two tracks).⁹⁹ Among other factors, the court's apportionments reflected the share of the song's radio airplay (as measured by BMI royalties paid to all album tracks) as it promoted sales of Harrison's entire album.

Based on shares of radio play of all album tracks, a jury in 2000 awarded to the Isley Brothers 28 percent of revenues from Michael Bolton's album *Time, Love, and Tenderness*, which included an infringing version of the group's earlier hit *Love is a Wonderful Thing*.¹⁰⁰ The Ninth Circuit upheld, finding that the Isley Brothers

⁹⁹*ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 508 F.Supp. 798, 799 (S.D.N.Y.1981), upheld 722 F. 2d 988 (9th Cir, 1982)

¹⁰⁰*Three Boys Music Corp. v. Michael Bolton, et al.*, 212 F. 3d 477 (9th Cir. 2000). The jury also held that infringed elements of the original work contributed to 66% of the value of the infringing album track.

had presented evidence that Bolton's infringing song was the album's lead single, the song was purposely released in order to promote the album, and that Bolton himself had engaged in telephone promotion of the song. Not mentioned in the verdict, an additional indicator of a leading single would be performance at tour concerts and prominence on social media, music service, and online video (see below).

Applying the above legal precedents, I testified as an expert at deposition in 2012 regarding an Interscope (UMG) release of Jay-Z's written composition *How We Do* (recorded by West Coast rapper The Game on the album *The Documentary*) that purportedly infringed an earlier work (*Elevator*) written by songwriters Ryan Lessem and Douglas Johnson. I considered the label's video expenses, marketing amounts, station audiences, and YouTube views for each track on the new album. Based on available data regarding two promoted radio songs, I determined that the track *How We Do* generated most radio spins over a larger station audience, and thus deserved the largest apportionment of album revenues earned in the earliest months of sales.

For related analysis, information on radio play is now available from label documents that may include data drawn from Media Monitors, RCS MediaBase, Chartmetric, and Nielsen Broadcast Data Systems, inter alia. With regard to digital tracking, record labels now track subsequent market data acquired from entities that featured digital sensing of online usage or mentions— e.g., Spotify, Gracenote, Nielsen Media, Shazam, and Next Big Sound.

Labels and artists here may also deploy counts of many alternative instruments and platforms – e.g., YouTube/Vimeo videos, Facebook sites, Instagram/Snapchat messages, Soundcloud tracks, Spotify playlists, streaming and digital sales on Alpha Data,¹⁰¹ audiences on Last.fm,¹⁰² out-of-channel mixtapes, live performances, audience influencers, online popups, email lists, merchandising, blogs, websites, and podcasts.¹⁰³ In this regard, a listing of confidential label instruments for promotion and market-sensing can be found in a public document made available by defense expert Doug Bania,¹⁰⁴ who presents a review of UMG Interscope marketing documents that should be useful to plaintiffs and their experts.

¹⁰¹Alpha Data (f/k/a/ Buzz Angle Music) provides statistics on record sales and music streaming now used in Rolling Stone charts. The website shows total music consumption including album sales, song sales, streaming history, and social media analytics. Data are collected from retailers, record stores, radio stations, and music venues. Related competitive services are offered at Soundcharts, Chartmetric, and Instrumental.

¹⁰²Using 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.

¹⁰³15 Music Marketing Strategies for Aspiring Musicians, Sept. 20, 2019, <https://www.renderforest.com/blog/music-marketing-strategies>

¹⁰⁴D. Bania, “Apportioning Copyright Damages – the Case of *Blurred Lines*”, Journal of Intellectual Property Law & Practice, 2015, 10(12), found at <https://www.experts.com/Articles/Apportioning-Copyright-Damages-Blurred-Lines-By-Doug-Bania>. The article contains details of chart testimony provided by the marketing department of UMG’s Interscope label to expert Bania. Interscope’s charts showed how the record label came to relate weekly sales of the song *Blurred Lines* (from Soundscan) to weekly radio play, video views, social media, downloads, and live promotion events.

For example, I learned from cumulative audience information on Last.fm that country artist Justin Moore's infringing song *Backwoods* was the second most popular song on the album release entitled *Justin Moore* (Big Machine Label Group); Moore is listed as a songwriter and recording artist. The song also appeared on the setlists for a concert tour after album release. With prominent concert play, the song should then be regarded as a leading single and presumably affected album revenues earned, in addition to Moore's received shares of the concert gate.

There are some final adjustments. The Third Circuit ruled that prejudgment interest is recoverable for a copyright award; to do otherwise would allow an unjust enrichment on the time value of money.¹⁰⁵ The common discount rate is the one year Treasury bill rate.¹⁰⁶ Winning plaintiffs may also recover attorney's fees if the infringed work was registered previously with the Copyright Office.¹⁰⁷ Copyright law does not allow recovery for punitive damages, which can nonetheless be established for other damages involving trademark and unfair competition.

¹⁰⁵William A. Graham Co. v. Haughey, 646 F.3d 138, Part III.A. (3rd Cir. 2011).

¹⁰⁶Id., 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).

¹⁰⁷17 U.S.C. §505, *In Design*, supra note 82, at 567, McCulloch v. Albert E. Price, Inc., 823 F. 2d 316, 322 (9th Cir. 1987).

13. LIVE EVENTS

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https://www.americanbar.org/content/dam/aba/publications/entertainment_sports_lawyer/spring-2020/esl36-2.pdf. The author retains copyright.

Live concerts allow artists to earn money from performances for appreciative audiences and represent a fast-growing source of revenue in the music industry. Concert appeal may grow with the emergence of independent promotion and video streaming.

The Ninth Circuit provided a legal basis for recovery from live events in *Frank Music v. Metro-Goldwyn-Mayer*.¹⁰⁸ MGM performed in a Las Vegas casino a composition from the musical *Kismet* in a ticketed cabaret that contained eight separate staged acts. The contested theme had never been placed in the ASCAP catalogue, which the defendant had incorrectly believed to have established the necessary allowance for its use. Nonetheless, the Ninth Circuit upheld revenue disgorgement of the casino's box office profits, as well as a share of indirect earnings from rooms, dining, and parking. Even if ticket purchasers were not aware beforehand of the performance, the song was part of a musical score and thus was an important part of the overall audience appeal of MGM's cabaret show.

In a later case in the Central District of California, a copyright claim for concert revenues was allowed to go to the jury in a 2015 ruling involving a Jay-Z

infringement of a song administered by Egyptian citizen Osama Fahmy.¹⁰⁹ Judge Christina Snyder ruled that Jay-Z's concert events represented direct infringements related to an immediate use of the contested work that could be tied to the transaction of a ticket sale.

¹⁰⁸886 F. 2d 1548, 1550 (9th Cir. 1989)

¹⁰⁹Fahmy v. Jay-Z, (C.D. Ca. 2011), Case 2:07-cv-05715-CAS-PJW, allowing a claim to go forward; Document 309. Marino v. Usher 2:11-cv-06811-(E.D. Pa.);

The right to derive a new work from a copyrighted song is an exclusive right held by the original owner. Derivatives are not then automatically covered by PRO licenses that would otherwise cover concert performances of the original. In this regard, BMI Rate Court Judge Louis Stanton in January, 2020 rejected declarations from two appointed PRO functionaries (ASCAP's Richard Reimer and BMI's Jose Gonzalez) who had believably filed declarations to the contrary.¹¹⁰ . Stanton's point is based on the underlying Consent Decrees (*op cit.*); ASCAP and BMI cannot license derivative works based no original compositions listed in their respective catalogs

Basis for Recovery

To seek recovery from concert infringement, a copyright plaintiff would need to file action against the performing artist (or his/her touring company) who either knew, or was in a position to know, that the infringing material was to be performed at the event. The terms for artist payments for performances and tours appear in a contract negotiated between the artist's agent or company and the promoter who puts

¹¹⁰Judge Stanton had been the sole District Court judge appointed to oversee the Rate Court with regard to BMI, as established by BMI's Consent Decree with the U.S. Dept. of Justice. see Structured Asset Sales, LLC v. Sheeran, et al., Case 1:18-cv-05839- LLS Document 144 Filed 01/15/20, pp. 2-4

together the event or tour.¹¹³ Payments to the artist generally include a *minimum guarantee* (or flat fee) as well as a *backend arrangement* for an artist share of concert revenues.

There are three structures for financial arrangements for concert artists:

a. *Guarantee versus Percentage Deal without Deductions*: Artist earns the larger of a guarantee payment for a concert and a backend percent of box office revenue from the event.

b. *Guarantee versus Percentage Deal with Deductions*: Artist earns the concert guarantee and -- after a specified sales breakeven point is reached -- a backend share of the promoter's net profits from the event (infra).

c. *Plus deal*: Artist receives a specified minimum for each planned event.

Promoter pays from box office receipts all fixed and variable expenses for event, and keeps an allowable profit for its services. Remaining amounts after recovery of actual costs are split between artist and promoter (e.g., 85/15).

The plus deal is used for the largest acts and the accounting is the most complex of the three contract arrangements. A performing artist may also receive a share of *merchandise revenue* sold at the show. From concert earnings, the artist pays its act *manager* and event *agents* for their respective administrative services. related to the concert (e.g., 15 to 20 percent each). Artists do not pay production costs related to the event itself, which are handled by the talent buyer from gate earnings.¹¹⁴

Recording Contracts and Concerts

Record labels often now participate in concert revenues for new album releases, depending on the contracted revenue-sharing relation with the performing artist. The label is not a direct infringer at the concert itself but is conceivably implicated as a contributory or vicarious infringer that directly benefits from the event.¹¹⁵

Moreover, concert play at a tour promotion is an indication that the single is an important part of the prior album itself, and so related to a higher apportionment of profits earned from the release (supra) .

In a traditional recording contract, a releasing label would recoup tour support from due artist royalties, but did not share in the artist's concert, merchandise,

¹¹⁴Costs at the event include payments for opening act, tour managers, transportation, set designers, site coordinators, stage managers, lighting directors, sound engineers, carpenters, pyrotechnics, catering, wardrobe crew, stylists, security, and attending physicians, ticket commissions and payment for venues. CITI GPS, *Putting The Band Back Together: Remastering the World of Music* (2018), p. 57 at <https://www.citivelocity.com/citigps/music-industry/>

¹¹⁵Supra notes 68-69.

songwriting, acting, and sponsorship revenues. Since 2002, some artists and labels have come to negotiate a number of alternative *revenue-sharing* contracts that split concert and merchandise revenues, as well as film appearances, sponsorships, and writer royalties. Allowed revenue shares from concerts will then expectedly show up as income on the label's P&L. If the label is judged to be a contributory infringer at the concert, revenue shares for both concert and merchandise earnings are appropriately disgorged, subject to deductions for cost and apportionment for the value of non-infringing elements.

Some concert acts do not implicate major labels at all. For example, established artists enter *direct deals* with tour promoters; e.g., Madonna and Jay-Z have revenue sharing arrangements with promoter Live Nation. Alternatively, a new artist may *self-promote* on distributed mixtape, streaming, and social media, and move directly to the concert stage before getting a label deal. Neither of these arrangements would apparently involve a revenue recovery from a participating label.

Apportionment

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

As a scoping exercise, public information is particularly useful for a plaintiff for scoping preliminary market information on the importance of the song. Information on tours and events is commonly available through weekly reports of events and ticket sales that can be found in *Pollstar*. A public source of setlist information is *setlist.fm*, which is a fan-reported site that lists the music performed at a number of events. The respective importance of listed songs on a setlist can be discerned by comparing relative audience appeal on radio, streaming, and video, as described in Section 12 above.

14. CONCLUSION

Some final points come to mind.

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

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

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

A financial expert is useful to scoping the probable claim and for preliminary estimates of damages.

An expert should define data needs and assist in disclosure of proprietary information and discovery of relevant defendant documents. Experts should be encouraged to post reality checks on excessive valuations, and should help attorneys decline or settle the case if appropriate.

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

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

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

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

ABOUT THE AUTHOR

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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, Cardi B., The Weeknd, 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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