



**MEDIA, TECHNOLOGY, COPYRIGHT**

**FINANCIAL REMEDIES IN  
MUSIC COPYRIGHT**

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**EXECUTIVE SUMMARY**

The paper is organized in thirteen substantive sections that review the structure of copyright law and financial remedy in infringement 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 prior knowledge.

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## COPYRIGHT LAW

**Section 2:** Music copyright involves separate rights in underlying *musical compositions* and *sound recordings* that may include the composition. The composition right is owned by the *music publisher(s)* to whom the original *songwriter(s)* transfer copyright. The sound recording right is owned by the *record label* that produces the underlying studio master recording and distributes records in retail stores and digital media.

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

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

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

## FINANCIAL REMEDIES

**Section 6:** Revenues resulting from the sale and licensing of music on sound recordings are transacted largely through a.) *physical records and permanent downloads*, b.) *interactive streaming*, and c.) *non-interactive subscription and streaming*. Streaming technologies have emerged as the primary instrument for distributing music to listeners; downloads and album sales have actually declined.

**Section 7:** 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 8:** 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 9:** 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 10:** 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 11:** 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, not transfer prices within a parent company. Overhead costs are not deducted under willful infringement. Paid royalties may be recovered from infringing artists and writers.

**Section 12:** A defendant bears the burden to prove apportionment of profits related to commingled contributions from infringing and non-infringing elements that may appear on the same composition or recording. Valuation can be determined through measures of play, audience, or dollars spent on promotional media – e.g., radio, video, downloads, and streaming, *inter alia*.

**Section 13:** 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, when illegal file-sharing at Napster threatened retail sales at Tower Records.<sup>1</sup> 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

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

related broadly to the economics of copyright. The work aims to establish the grids of copyright ownership and royalty-sharing, accounting chains for moneys earned, important industry trends, and rules for good practice in enforcing rights in litigation.

Five points are apparent:

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 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.
3. 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.
4. The proof of damages in copyright infringement involves considerable detail in 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. COPYRIGHT AND ORGANIZATION IN THE MUSIC INDUSTRY

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

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<sup>2</sup>A *sound recording* is a work that results "from the fixation of a series of musical, spoken, or other sounds...regardless of the nature of the material subjects, such as disks, tapes, or other phono records, in which they are embodied." 17 U.S.C § 101 (2000).

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

<sup>4</sup>For 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 continue to receive royalties every time the underlying composition is recorded or performed by any artist. A full review of the music publishing industry can be found in R. D. Wixen, *THE PLAIN AND SIMPLE GUIDE TO MUSIC PUBLISHING*, 3rd Edition (2014), Hal Leonard Books; S. Winogradsky, *MUSIC PUBLISHING; THE COMPLETE GUIDE*, (2013), Alfred Music.

### *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. UMG is now owned by the French conglomerate Vivendi SA (ninety percent) and Chinese tech company Tencent (ten percent). UMG owns UMG Recordings, Inc. for U.S. operations, Bravado (for merchandising and brand management), and INgrooves (distributor). 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. SME is an American music conglomerate owned by Sony Corporation of America; Sony Music is incorporated as a general partnership of Sony Music Holdings Inc. through Sony Entertainment, a subsidiary of Sony. Sony artists include Avril Lavigne, Gloria Estefan, Pink, Jennifer Lopez, and Tim McGraw.



3. *Warner Music Group (WVG)* – e.g., Warner Records, Atlantic Records, Electra Records, Parlophone. As of June 3, 2020, WVG is a publicly held company on NASDAQ (opening valuation at \$12.75 billion). WVG also owns Uproxx Media Group (news reporting), Songkick (concert listing), and EMP Merchandising. 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.<sup>5</sup>

Through their owned record labels, major integrated companies perform 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 aims to “cut through the noise” to reach undiscovered audiences, but most album releases do not cover costs. The traditional label deal then follows a “blockbuster” business model that aims to

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<sup>5</sup> BMG through Warner Music’s ADA Worldwide, Big Machine through UMG.

maximize – over a wide portfolio of work -- gains earned from the big volume releases.<sup>6</sup>

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 product releases. 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 3) and receive an independent stream of royalty for any original or subsequent use of the song.

Record labels and signed artists commit 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

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

amounts in any period may vary from booked accounting depending on withholdings for precautionary reserves held in recoupment of label costs.<sup>7</sup>

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 and made subject to a balancing for precautionary reserves. As album sales and profitability have declined in the past decade, record contracts and artists have come to put in place a number of different deals that collateralize label expenses with other revenues; e.g., publishing, touring, and merchandising,

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 their producers a cut of 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,

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

and sponsorships. Managers are not held liable for copyright infringement and defendant artists do not claim manager payments as deductible expenses.

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 a generous profit margin -- around twenty five percent of sales revenues.

Independent labels may also operate through *alternative administrator/distributor arrangements* that avoid major company channels (e.g., Kobalt Music Group, Concord Music Group). For a more minimalist approach, performers may self-record and distribute independent product through the services CDBaby (physical, digital) or TuneCore (digital only). For an even leaner approach, Merlin Networks negotiates collective licenses on behalf of signed independent acts,

which must upload the music directly to each engaged music service on a Merlin contract. Independent acts from the “long tail” of content now complement their 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), detailed profiles (ReverbNation), and direct fan communication (WR1). Uploading 20,000 new tracks per day, new artists particularly recognize the streaming service Spotify for its adaptive playlists, listener tracking, market analytics, podcast availability, artificial intelligence promotion, open software interface, and popularity among younger listeners. Other promotion instruments for new artists include websites, mixtapes, blogs, online popups, email lists, and merchandising.<sup>8</sup>

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<sup>8</sup>15 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).

### *Musical Compositions*

In addition to sound recordings produced by record labels, music copyright involves a second right for use of the underlying song, as imprinted on a record or video track or performed at live events. Copyright for compositions first put in a tangible medium is held initially by the original songwriter(s) who created the lyrics and melodies. Each co-owner of a copyright has the right to license 100% of the unaltered work to any user.

Songwriters seeking to promote a new work traditionally transferred the full copyright for particular songs or terms of work to the control of *independent music publishers* who then controlled all later rights in the song (e.g., Carlin 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. When vested with a work, a traditional publisher would promote commercial uses, collect royalties, and offer royalty advances to stabilize writer earnings.

A number of alternative arrangements have modified the traditional publisher model.

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.

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 designate a larger publisher to act as a fee-based *administrator* for collecting royalties (10-15% commission); administrators retain no copyright share. 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 publisher greater incentive to place the work.

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 (non-exclusive) uses of the entire unaltered work, provided that a suitable accounting be made to other owners.<sup>9</sup>

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

5. *Label-owning entities* now may sometimes license global rights in integrated sound recordings and publishing rights controlled by the same artist-writer. Distribution is frequently through a major company.<sup>10</sup> For example, Concord

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

<sup>10</sup>Concord Music releases are self-distributed in the U.S., internationally distributed by UMG. Most of Chrysalis's releases are distributed through Warner's ADA.

Music Group and BMG/Chrysalis Music Publishing combine integrated publishing with full label operations for recording, promotion and financing.

6. *Enhanced publishers* do not offer integrated full label services but may appeal to independent artists. Publishers may offer to new artists separate options for product distribution (Kobalt Music), studio recording (StreamCut Media), and rights management and administrative display (Downtown Music Holdings).

New rights management capabilities have emerged to lower administrative costs and widen opportunities for copyright collection and artist engagements. 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.<sup>11</sup>) 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.<sup>12</sup>

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<sup>11</sup><https://content-blockchain.org/essays-and-articles/>

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



It is meaningful to think of copyright and collection shares in a song in an accounting grid framed by each co-writer and his/her designated publishers and collection administrators. Grid cells for each entity can be populated with both ownership and collection shares of composition 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 publisher accountings. Related contracts for rights and assignment of shares should be made available in discovery.

#### **4. MECHANICAL RIGHTS OF MUSICAL COMPOSITIONS**

The structure of copyright law for music is here presented for musical compositions and sound recordings.

The owner(s) of musical compositions were first granted federal protection in the Copyright Act of 1909; the right was reestablished in the Copyright Act of 1976. The copyright in a musical work is established when the protected material is

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<sup>12</sup>Without access to cryptocurrency, content owners might prefer to integrate existing legacy protections on their works (e.g., watermark, fingerprints) and so operate with more scaled down computing needs enabled through open and interoperable databases. (e.g., Open Music Initiative, dotBlockchain Music Project). B. Rosenblatt, WATERMARKING TECHNOLOGY AND BLOCK CHAINS IN THE MUSIC INDUSTRY (<https://www.digimarc.com/docs/default-source/digimarc-resources/whitepaper-blockchain-in-music-industry.pdf?sfvrsn=2>)

put in a tangible medium from which it may be provably copied. Additional protections follow if owners register the work with the Copyright Office.

Codified at 17 U.S.C. 106, four major rights protect musical compositions that are apparent in tangible medium

- a. The right to *reproduce* the work in copies or phonorecords;<sup>13</sup>
- b. The right to prepare *derivative work*. i.e., a compositional form in which a basic work may be musically transformed, reworded, translated, or otherwise adapted;
- c. The right to *distribute* copies or phonorecords of the work to the public by sale, rental, lease, or lending; and
- d. The right to *perform* the copyrighted work publicly.

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

The 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.<sup>14</sup> Related are *synchronization rights* for musical compositions that are imprinted on video

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<sup>13</sup>17 U.S.C. §101 (2000). *Phonorecords* are “material objects in which sounds...are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term 'phonorecords' includes the material object in which the sounds are first fixed.”

soundtracks (e.g., films, television programs, online videos, video games). Synchronization rights for musical compositions should be distinguished from neighboring *master use licenses* that are contracted for use of the imprinted sound recording (infra Section 5). Synchronized compositions can be original work-for-hire (major soundtracks) or adapted from existing recordings of the work

The mechanical right for reproductions of compositions used on audio phonorecords is exclusively controlled by the rights owner for the first record imprint of the work. Once the first phonorecord is publicly distributed, other artists may legally record (or “cover”) any *unmodified version* of the same composition; secondary reproductions are eligible for compulsory licenses per 17 U.S.C. 115 (aka Section 115). Compulsory rates for musical compositions are under the authority of the Copyright Royalty Board. (CRB), an administrative body of retired judges that has enforced ratemaking standards since 2005 (per 17 U.S.C. 801). Outside of the compulsory license for unaltered audio uses, the original owner continues to retain exclusive control over all rights related to modified (derivative) works and video synchronizations.

There are three categories of ratemaking for use of compositions recognized as mechanical rights in Section 115 of the Copyright Act: *Subpart A*: physical form,

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

permanent download, and purchased telephone ringtone; *Subpart B*: interactive streaming and limited downloads (terminating when subscription ends); and *Subpart C*: limited offerings, mixed bundles, music bundles, paid locker services, and purchased content locker services.

Subject to the next five-year review in 2021,<sup>15</sup> 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.<sup>16</sup> The statutory amount of 9.1 cents often is used as a contract benchmark for uses in first release, but reduced rates are often found for off-price product, free goods, foreign sales, and recorded tracks where the artist is also a writer of the work. The license rate for a composition in a ringtone is 24 cents per download.<sup>17</sup>

Record labels pay mechanical royalties earned from domestic record sales directly to the publisher (or through its designed collecting *mechanical rights organization*, or MRO) – e.g., Harry Fox Agency (now owned by SESAC)<sup>18</sup> or

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<sup>15</sup>17 U.S.C. 803(b)(1)(A)(i)(V).

<sup>16</sup>37 CFR 255.3(i)-(m); see Adjustment or Determination of Compulsory License Rates for Making and Distributing Phonorecords, Docket Number 2006-3 CRB DPRA, <https://www.crb.gov/rate/> (retrieved September 13, 2019).

<sup>17</sup>4 CFR at 4515. The sound recording right is now set at a 50 percent share of the ringtone price charged by the mobile carrier.

<sup>18</sup>The Harry Fox Agency was established in 1927 by the National Music Publishers Association as a licensing and collection agency for mechanical and synchronization rights in musical compositions;

American Mechanical Rights Agency (AMRA, now owned by Kobalt Music). The compensated publisher splits collected mechanical royalties (after expenses) with each writer per the terms of private contract; writers now commonly receive seventy five percent. The same transfer mechanism is established for user payments involving video synchronization. Outside of mechanical and synchronization payments collected and shared by the publisher, writers and publishers may also collect separately for performing royalties from their *performing rights organization* (infra Section 4).

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

Payment terms for streaming, limited download, and locker rates in Subparts B and C have been structured per the terms of a complex settlement agreement that

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SESAC (infra Section 4) acquired the agency in 2015. The Blackstone Group acquired SESAC in 2017. Harry Fox currently has over 48,000 collecting publisher affiliates.

was enacted after a CRB ratemaking in 2008; somewhat simplified regulations were established in 2018.<sup>19</sup> With some accounting simplification, each affected *digital service provider* (DSP; e.g., Spotify, Amazon) now accounts to an “*all-in*” royalty pool for due payment in a four step process:

1. Initial due royalty amounts from each DSP to the pool are based on a percentage share of its service revenue or content cost (whichever is larger).
2. A service provider’s due amount is then credited for performance royalties paid previously for compositions on the service (infra Section 4).
3. After crediting of performance royalties, a provider’s due royalty is made subject to a payment floor (called the *mechanical floor*) based on number of subscribers to the provider’s service.
4. Putative due royalty amounts are then pooled. Based on the relative share of streaming units, payment shares of the total are assigned to individual providers, which pay the publishers (or their administrators).

The future institutional structure for mechanical rights will change in 2021 following the passage in 2018 of the Orrin G. Hatch-Robert Goodlatte Music

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<sup>19</sup>Determination of Rates and Terms for Making and Distributing Phonorecords (*Phonorecords III*); Docket No. 16-CRB-0003-PR (2018-2022), at <https://www.crb.gov/rate/> (retrieved on September 11, 2019)

Modernization Act.<sup>20</sup> Per Title I of the MMA, digital music providers in 2021 will be able to obtain (blanket) licenses for integrated *mechanical rights* in downloads and interactive streaming now covered separately under subparts A, B, and C in Section 115; this integration facilitates negotiation, ratemaking, and administration. Administrative efforts for collected royalties will be handled by a newly appointed Mechanical Licensing Cooperative (MLC), which will aggregate and maintain contact information, process mechanical payments, and pay publishers. The digital service providers will be collectively represented in ratemaking by a newly appointed Digital Licensing Coordinator.

#### **4. PERFORMANCE RIGHTS OF MUSICAL COMPOSITIONS**

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

Performance rights for musical compositions can be termed *grand* or *small*. *Grand performance rights* involve live dramatic productions -- staged musicals,

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<sup>20</sup>H.R. 1551, Pub.L. 115–264, at <https://www.copyright.gov/music-modernization/>

operas, or full concert versions thereof – where the work must be licensed directly from 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*).

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.<sup>22</sup> A fourth PRO, Global Music Rights, has an additional catalog of select writers.

Each PRO offers to music licensees a *blanket license* that covers a contract term for unmodified uses of all works registered in its catalog.<sup>23</sup> 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

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<sup>21</sup>Under 17 U.S.C. §101, to "perform" a musical composition (outside of audiovisual applications) is to "recite, render, play, dance, or act it, either directly or by means of any device or process."

<sup>22</sup>The acronym SESAC is no longer meaningful.



writer(s) and publisher(s), generally 50/50.<sup>24</sup> The blanket license is an instrument for transactional efficiency that minimizes the costs of negotiation and administration for all implicated parties.<sup>25</sup>

Each PRO may also act as administrator and distributor for writer royalties collected by foreign PROs for licensed performances of U.S. works in their respective countries (e.g., Canada's SOCAN, U.K.'s Performing Rights Society). Foreign license rates are established 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.<sup>26</sup> Per the

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

<sup>24</sup>The PROs split collections between writers and publishers at 50/50. Subject to private contract, publishers and writers often again split the publisher share evenly. The writer then winds up with 75 percent of performance royalties.

<sup>25</sup>*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

<sup>26</sup>For ASCAP, see *United States v. ASCAP*, 1940-43 Trade Cas. ¶56, 104 (S.D.N.Y. 1941); 1950-51 Trade Cas. ¶62,595 at 63,754 (S.D.N.Y. 1950); 41 Civ. 1395 (S.D.N.Y. 2001). For BMI, see *United States v. Broadcast Music, Inc.*, 1940-43 Trade Cas. ¶56, 096 (E.D. Wisc. 1941); 1966 Trade Cas. ¶71, 941 (S.D.N.Y. 1966); 1996-1 Trade Cas. ¶71, 378 (S.D.N.Y. 1994).

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, which are covered solely by mechanical licenses for reproductions (17 U.S.C. 115, Subpart A, supra). However, both performance and mechanical licenses 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 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 soundtracks in their respective broadcast or digital media.

## **5. RIGHTS FOR SOUND RECORDINGS**

Copyright protection for sound recordings involves technologies that make possible the capture, fixation, and playback of musical sounds first actually recorded on

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master studio recordings from which later track imprints are 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 federally protected the reproduction right for sound recordings, but not performances (i.e., transmissions) that presumably benefitted sufficiently from free media promotion of the record product.<sup>27</sup> When new digital technologies came to enable more exact copying and transmission of original sound recordings, Congress enacted in 1995 the *Digital Performance Rights in Sound Recordings Act* (DPRSRA).<sup>28</sup> The DPRSRA amended 17 U.S.C. 106 to include a limited performance right for sound recordings performed in a *digital audio transmission* that included wired or over-the-air use of *digital technology* (17 U.S.C. 114, or Section 114).<sup>29</sup> In 1998, the *Digital Millennium Copyright Act* (DMCA)<sup>30</sup> further amended Section 114 to set in place an institutional structure to facilitate licensing of the newly established performance right for sound recordings.

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<sup>27</sup>S. Rep. No. 104-128, at 14-15 (1995).

<sup>28</sup>Digital Performance Right in Sound Recordings Act of 1995, Public Law No. 104-39, 109 Stat. 336 (Nov. 1, 1995). For a comprehensive account of the legislative history of the Act, see E.D. Leach, *Everything You Always Wanted To Know About Digital Performance Rights But Were Afraid To Ask*, 48 J. COPYRIGHT SOC'Y 191 (2000).

<sup>29</sup>17 U.S.C. §106(6) (2000).

<sup>30</sup>Digital Millennium Copyright Act, Public Law No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

Section 114(d) of the DMCA recognized three categories for the new performance licenses established in the DPRSRA of 1995:

*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<sup>31</sup> However, a specially programmed digital broadcast performed by a commercial radio station must pay performance royalties to the controlling record labels. For example, radio stations owned by the chain iHeart Media do not need performance licenses for sound recordings, but the digital entity iHeart Radio does.

*2. Non-interactive services* – Subject to some additional eligibility requirements related to complementarity of sequential performances, non-interactive satellite radio (e.g., SiriusXM), music subscription (e.g., Music Choice), and webcast services (e.g., Pandora). may perform sound recording tracks that are covered by a statutory license established by Copyright Royalty Board.<sup>32</sup> There are four license categories for ratemaking -- pre-existing subscription (established before enactment

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<sup>31</sup>17 U.S.C. §114(d) (1) (A)-(B) (2000).

<sup>32</sup>17 U.S.C. §114(d) (2) (A) (i) (2000). 17 U.S.C. §114(j) (6) (2000).

of the DMCA in July, 1998),<sup>33</sup> new subscription (established after July, 1998),<sup>34</sup> and subscription and ad-supported webcasting (both offered at Pandora).<sup>35</sup>

Per Section 114(f), performance royalties for eligible transmissions of sound recordings on non-interactive services are usually collected and distributed through the collective *SoundExchange*, which now divides collected dollars between label (50%), recording artist (45%), and other musicians (5%). The collective 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 to payments for ephemeral reproductions used in transmissions, as established under Section 112(e).<sup>36</sup> Some business subscription services (e.g., Rockbot) are exempt from the performance royalty for sound recordings used

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<sup>33</sup>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).

<sup>34</sup>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).

<sup>35</sup>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).

<sup>36</sup>37 CFR 380.10(d).

in digital audio transmissions, and thus pay only the ephemeral royalty (5% of performance).<sup>37</sup>

3. Remaining *digital transmissions* (e.g., interactive streaming, limited downloads, video, social media) are ineligible for statutory licenses under Section 114; prospective users of sound recordings then must directly negotiate performance rights for all digital transmissions.<sup>38</sup> For each major label, interactive licenses for sound recordings are established by direct deals between a service provider and the label itself. Smaller labels will rely upon collective rights deals established by a third party, 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.

## **6.INDUSTRY GROWTH AND TRENDS**

The record industry in 2017-2018 saw positive growth and continued to reverse years of revenue decline brought about by file-sharing, alternative video product, and

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<sup>37</sup>Determination of Royalty Rates and Terms for Making Ephemeral Copies of Sound Recordings for Transmission to Business Establishments (*Business Establishments III*), Docket Number 17-CRB-0001-BER (2019-2023), at <https://www.crb.gov/rate/> (retrieved on September 11, 2019).

<sup>38</sup>17 U.S.C. 114(b)-(d)(3) (2000).

disintermediation of record albums-.<sup>39</sup> Audiences included record and track buyers as well as users of various streaming services. Revenues were earned through *streaming, downloads, and unit sales*.

Interactive streaming services have led the industry comeback and now account for over fifty percent of retail revenues. Major providers include Spotify, Apple Music, Amazon, and Napster, inter alia. Interactive streaming revenues are now based largely on ad-free subscription service (generally \$9.99 per month) but ad-supported service is still popular with new streaming listeners.<sup>40</sup> More than half of streaming units on Spotify are in the rap/hip hop genre – an apparent consequence of younger audiences attracted to the service. Streaming growth in the music industry has implicated 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.

The market leader in *interactive streaming* is Spotify AB. a Swedish pureplay service provider that went public in 2018. Spotify is prized for its innovative

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<sup>39</sup>The U.S. industry earned total revenues of \$9.8 billion retail (up 11.3% from 2017), and \$6.6 billion wholesale (up 11.9%). RIAA, 2018 Year-End Music Industry Revenue Report, at <http://www.riaa.com/wp-content/uploads/2019/02/RIAA-2018-Year-End-Music-Industry-Revenue-Report.pdf>. (visited September 25, 2019)

<sup>40</sup> Respectively, \$5.4 billion, up 32%; \$760 million, up 15%, Id..

features that accommodate individual listener tastes and artist promotions (supra). 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). As pointed out above, interactive streaming services negotiate royalties directly with labels.

*Non-interactive services* may involve monthly subscription, mobile satellite radio, and webcast.<sup>41</sup> 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. Each non-interactive service qualifies for a statutory license covered by Section 114.

Once the market leader in the digital space (introduced at Apple iTunes in 2003), *permanent download* revenues fell in 2018).<sup>42</sup> As a combined service, Apple Music (launched in 2015) has embraced streaming but now maintains listening services only for customers who have already bought downloads; Apple is moving

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<sup>41</sup>Accounted for \$1.2 billion (up 32%) of revenues in the U.S. market, Id.

<sup>42</sup>Declined \$1.0 billion (down from \$1.4 b), while physical sales fell to \$1.2 billion (from \$1.5 b). Id.



out of new sales. As of this writing (April, 2020), Amazon continues to sell *unit downloads* to a diminishing base of users.

The pureplay streaming service of Spotify is often credited with reversing revenue downturns that resulted from illegal file-sharing networks (e.g, Napster); the service now has the largest track catalog (over 50 million) and worldwide user base (130 million subscribers; 163 million ad-free users) compiled from seventy nine countries.<sup>43</sup> A technology leader, Spotify has made since founding in 2006 eighteen 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.

Nonetheless, Spotify now pays between 65 and 70 percent of earned revenues to major content owners that account for most use (infra Section 5). While the stock price has nearly doubled since the initial public offering on April 6, 2018 (\$147.92 to \$273.35 on July 2, 2020), Spotify has operated at an annual loss since inception in 2008 in pursuit of a high-growth user and sales trajectory.<sup>44</sup> Many artists view

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<sup>43</sup>M. Vega, Eye-Opening Spotify Statistics – Who Shuffles and Who Skips to Premium?, January 2, 2020, <https://review42.com/spotify-statistics/>

accounting operations at Spotify as faulty and labels fear that disintermediation, audience fragmentation, and track unbundling that may interfere with full monetization of production and marketing of new album releases.

Particularly if augmented with video, streaming service might be well-integrated in a more complete *music-oriented social network* (C2C), as is now emerging at Facebook. In 2017-2019, Facebook came to license all major content providers and now offers service in more than thirty countries.<sup>45</sup> Facebook will move to allow artists to post social media pages with more complex features. With streaming, Facebook aims to form B2C and C2C fan communities to form in an emerging “video first” social network, a key feature that will presumably be greatly enhanced with 5G wireless technology.

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<sup>44</sup> E.g., “Loss-Making Spotify will Continue to Put Growth Ahead of Profit for Next Few Years”, Music Business Worldwide, May 6, 2020, <https://www.musicbusinessworldwide.com/loss-making-spotify-will-continue-to-focus-on-growth-over-profit-for-next-few-years/#:~:text=Since%20it%20launched%2012%20years,bn%20at%20today's%20exchange%20rate.> Co-founder and CEO Daniel Ek noted: “We’re in the growth stage, trying to capture that growth. Eventually we will get to more of a point of maturity where we’ll focus more on profit over growth, but for the next few years it’s going to be predominantly growth for us.”

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<sup>45</sup>What’s Facebook’s Game Plan in Music, Music Business Worldwide, October 27, 2019, <https://www.musicbusinessworldwide.com/tamara-hrivnak/>

## 7.ACCOUNTING FOR THE MONEY CHAIN

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

### 1. Permanent Downloads

- a. *Sound recording rights* for tracks are negotiated between digital service provider and each collecting label (or third-party rights aggregator).
- b. Service provider pays the collecting label the negotiated royalty amount for the sound recording.
- c. Collecting label pays *artist royalty to recording artist*, who pays the producer and mixer.
- d. Collecting label pays *mechanical royalty to publisher/songwriter* (or through MRO)
- e. Service providers do not pay *performance royalty* for musical compositions used in transmissions of downloads

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

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<sup>46</sup>S. Knopper, The New Economics of the Music Industry, October 25, 2011; at <http://www.rollingstone.com/music/news/the-new-economics-of-the-music-industry-20111025>

## **2. Interactive Streaming/Limited Download/Locker Service**

- a. *Sound recording rights* are negotiated between digital service provider and each collecting label (or third-party rights aggregator).
- b. Service provider pays the collecting label the negotiated royalty amount for the sound recording.
- c. Collecting label pays *artist royalty to recording artist*, who pays the producer and mixer.
- d. Service provider separately pays *mechanical and performance royalties to publishers and collecting agents* to cover composition rights.
- e. Publishers and collecting agents share collected mechanical and performance royalties with writers.

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

## **3. Non-interactive Streaming Service**

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

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

d. Service providers do not pay *mechanical royalties* for non-interactive uses of composition under Section 114.

*Example 1:* SiriusXM (a mobile satellite radio service with 200 curated channels of ad-free music) and Music Choice (a home subscription service now owned by Sirius) operate under Section 114. Sirius XM and Music Choice now pay respective amounts of 10.5% and 8.5% (*SDARS III*) of gross revenues for 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.

#### **4. 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.<sup>48</sup>

The licensing process for *label-generated video* on YouTube involves one payment for use of the label's sound recording on each video piece. YouTube pays about 70 percent of ad revenues to labels to cover all music rights for the video.

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

Labels share collected revenues with artists and publishers to cover composition rights (about 10 percent).

The licensing process for *user-generated* content on YouTube involves two separate 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 to cover the complementary rights to imprint the sound recording or composition on each video piece. 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 on its video piece.

YouTube also pays PROs per revenue-based blanket licenses to cover performance rights for compositions used on its video content.

## 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 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.<sup>49</sup>

Derivative infringement redounds to the eventual harm of 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;<sup>50</sup> 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 are jointly liable for copyright infringement of a track or composition.

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<sup>49</sup>Joined compositions and recordings appear in *Bridgeport v. Justin Combs Publishing op. cit, infra* note xx and surrounding text.

<sup>50</sup>*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). In a multi-platinum song released in 1991, Michael Bolton (*Love is a Wonderful Thing*) derived from an earlier Isley Brothers song of the same name (1966). In the most popular song of 2015, Robin Thicke and Pharrell Williams (*Blurred Lines*) lifted a "look and feel" from Marvin Gaye's *Got To Give It Up*, (1977). In a trial ending in August, 2019, a jury found Katy Perry, Dr. Luke, and Max Martin (and three others) to have lifted a repeated beat (called "ostinato") in the hit *Dark Horse* taken from Flame's gospel-rap *Joyful Noise* (vacated in 2020)).

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). Multiple infringers of the same work are *jointly liable* for actual damages imposed on the plaintiff, but *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 Section 2). 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"<sup>51</sup> and any doubt regarding computation should be resolved in favor of the plaintiffs.<sup>52</sup>

## 8. ACTUAL DAMAGES

Actual damages in copyright infringement commonly result from missed licensing opportunities that a plaintiff must prove.<sup>53</sup> A copyright plaintiff here bears the burden to prove claimed damages that are related causally to use of the work.<sup>54</sup> A

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<sup>51</sup>*Orgel v. Clark Boardman Co.*, 301 F. 2d 119, 121 (2<sup>nd</sup> Cir. 1960), cert. denied 371 U.S. 817, 83 S. Ct. 31, 9 L.Ed. 2d 58 (1962).

<sup>52</sup>*Shapiro, Bernstein, & Co. v. Remington Records, Inc.*, 265 F. 2d 263 (2<sup>nd</sup> 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).

<sup>53</sup>*On Davis v. The Gap*, 246 F.3d 152, 165 (2d Cir. 2001).

<sup>54</sup>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.

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 as one element. Proving actual damages is a complicated undertaking if a plaintiff can demonstrate no previous licensing history.

When several writers are named defendants, there is a default statutory remedy (i.e., equal copyright share) for infringed material used in an original *joint work* in which the infringed element makes a copyrightable contribution. 17 U.S.C. 201 The terms for default recovery in an original joint work should not be confused with works in which the infringing element has been later added as a background, nor a *compilation* that consists of full constituent parts drawn from other existing stand-alone works (e.g., a Greatest Hits album).

Plaintiff damages can be established from proven lost royalties for missed opportunities for mechanical, performance, and synchronization licenses. Amounts for 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.<sup>55</sup>

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

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

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<sup>55</sup>Oracle Corp. v. SAP AG, 765 F.3d 1081, 1088 (9th Cir. 2014). “The touchstone for hypothetical-license damages is the range of [the license’s] reasonable market value.”

<sup>56</sup>Id., at 1093. The “reasonable market value” of a hypothetical license may be determined by reference to similar licenses that have been granted in the past or “evidence of ‘benchmark’ licenses in the industry approximating the hypothetical license in question.”

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).<sup>58</sup> 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 rap recordings.<sup>59</sup> Plaintiff's licensing agent (Jane Peterer) demonstrated from Bridgeport's established licensing practices 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.

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

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<sup>57</sup>ResQNet, Inc. v. Lansa, Inc., 594 F.3d 860 (Fed. Cir. 2010), *see* Title III (Damages); the Federal Circuit disallowed expert use of benchmark licenses that were not similar to the patent license in question.

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

<sup>59</sup>Samples can be described as strings, basslines, drum loops, vocal hooks, or entire bars of music, often manipulated and repurposed with a number of available mixing technologies, that are taken for a studio recording from earlier sound recordings. When the underlying composition is re-recorded by studio musicians, the infringing item is termed an *interpolation*. When use is repeated, the sample is said to be *looped*.

drummer Clyde Stubblefield, who appeared as a backup musician in James Brown's "Funky Drummer".<sup>60</sup> 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.<sup>61</sup>

From previous defendant licensing practices, contracts regarding other samples can be made discoverable. Agreements for samples would expectedly include any or all of four payment streams – a fixed fee, a percentage rate on royalty-bearing sales, a percentage rate based on streaming revenues, and/or per unit royalties per sold or licensed transaction.

*3.Public Information:* Industry standards and practices can provide useful royalty benchmarks for actual damages. Musical beats and record samples can be licensed through 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 royalties earned by the new track (e.g.,

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

<sup>61</sup>*Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005), found infringement of a two-second guitar chord in N.W.A. song '100 Miles and Runnin'. The chord was used five times throughout the song. "Get a license or do not sample. We do not see this as stifling creativity in any significant way." *But see*, *VMG Salsoul v. Ciccone*, 9th Cir. June 2, 2016, PDF slip opinion. <http://cdn.ca9.uscourts.gov/datastore/opinions/2016/06/02/13-57104.pdf>; affirming a District Court and rejecting *Bridgeport* to excuse Madonna's snip of a two note horn sample in her Superbowl song 'Vogue'.

50% share of performance royalties).<sup>62</sup> License fees for beats and samples may depend on the popularity of the original, prominence of the sampled work, artist status, marketing spend, distribution format, and sales territory.<sup>63</sup>

*4.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

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

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

there is a guarantee that the song will be used on a soundtrack album or released as a single.”<sup>64</sup> Neighboring master use rights for a related sound recording used simultaneously in the same movie are commonly licensed for the same rate as the composition.

These necessary valuations in litigation can involve the expertise of a music publisher, internal label, studio division, or experienced clearance agent familiar with licensing terms established in the industry.<sup>65</sup> Reaching an admissible choice may be difficult due to expert willingness to testify, potential conflicts of interest among sought parties, and possible disclosure on protected information.

*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. As noted above, participants in a joint work are entitled to equal shares of the royalty pot.

A prorated outcome came down in the matter of *Williams v. Gaye*, which involved infringement of Marvin Gaye’s *Got To Give It Up* on Pharrell Williams’

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

<sup>65</sup>For example, DMG Clearances, The Music Bridge, or EMG.

*Blurred Lines* (recorded by Robin Thicke),<sup>66</sup> 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.

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<sup>66</sup>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*.<sup>67</sup>

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.

## 9. PROFIT DISGORGEMENT

In addition to recovering joint actual damages, a prevailing copyright plaintiff may disgorge severally from each defendant any 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,<sup>68</sup> or vicarious<sup>69</sup> infringements. *Indirect profits* arise from the sale of non-infringing products tied in some way to the infringement; e.g., products sold through infringing

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<sup>67</sup> 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)

<sup>68</sup> *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 (11<sup>th</sup> Cir. 1990); *Sega Enter., Ltd. v. MAPHIA*, 948 F. Supp. 923, 933 (N. D. Cal. 1996).

<sup>69</sup> 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.<sup>70</sup> 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.<sup>71</sup>

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.<sup>72</sup> 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.<sup>73</sup> That is, "by preventing infringers from obtaining any net profit, [the statute] makes any would-be infringer negotiate directly with the owner of a

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

<sup>71</sup>Necessary 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.

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

<sup>73</sup>*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.”<sup>74</sup> 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 units of infringing sales or licenses. Information on revenues and units sold can be learned from company records; weekly data on record sales are also available from Soundscan. Once revenues are proven, the defendant must prove 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 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.

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<sup>74</sup>Taylor 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.<sup>75</sup> Indeed, a later defendant was held liable for *executing a contract* in the United States that authorized improper foreign exhibitions.<sup>76</sup> 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.<sup>77</sup> 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.

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<sup>75</sup>*Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F. 2d 45, 52 (2d Cir. 1939), aff'd 309 U.S. 290, 60 S. Ct. 681, 84 L.Ed. 2d 825 (1940). Regarding the international distribution of an infringing movie first made in the U.S., "the [defendant] Company made the negatives in this country, or had them made here, and shipped them abroad, where the positives were produced and exhibited. [emphasis mine] The negatives were 'records' from which the work could be 'reproduced', and it was a tort to make them in this country. The plaintiffs acquired an *equitable interest in them as soon as they were made, which attached to any profits from their exploitation* [emphasis mine], whether in the [United States or sales in foreign companies held by the defendants]." 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]).

<sup>76</sup>*Peter Starr Production Co. v. Twin Continental Films, Inc.*, 783 F.2d 1440, 1443 (9th Cir. 1986).

<sup>77</sup>For 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-Pathe Communications Co.*, 24 F.3d 1088, 1094 (9th Cir. 1994).

An accounting of recoverable label earnings from an infringing label release may then 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 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. In order to ensure that accounting is complete, all discovered information should begin from the first contract entered.

## 10. DEFENDANT COSTS

A plaintiff's proof of defendant revenues for units sold or licensed does not establish any profit total that should plaintiff may immediately disgorge. Rather, once gross revenues are proven, the defendant may prove deductible expenses and a suitable means of apportionment 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.<sup>78</sup> 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.<sup>79</sup> If verifiable in some provable manner, deductible expenses may include distribution, pressing, packaging, artwork, recording, royalties, promotion, marketing, and sales discounts.<sup>80</sup> Label expenses related to promotion and marketing may include radio campaign, video production, support for concert tours, and other expenses that can be identified on financial statements. Unless related to

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

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

<sup>80</sup>*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 overhead<sup>81</sup> (as well as paid income taxes<sup>82</sup>). 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.<sup>83</sup> The decision of apportionment may involve matters of equity that may ultimately be decided by the judge or jury. Defendant

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<sup>81</sup>Allen-Myland, *supra* note 78, at 1025; Kamar International Inc., v. Russ Berrie & Co., 752 F. 2d 1326, 1331 (9<sup>th</sup> Cir. 1984); Sammons v. Colonial Press, Inc., 126 F. 2d 341, 351 (1<sup>st</sup> Cir. 1942).

<sup>82</sup>L.P. Larson, Jr. Co. v. Wm. Wrigley, Jr. Co. 277 U.S. 97, 48 S. Ct. 449, 72 L. Ed. 800 (1928); *Sheldon*, *supra* note 75, at 53; In Design v. K-Mart Apparel Corp., 13 F. 3d 559, 566 (2<sup>nd</sup> Cir. 1994).

<sup>83</sup>*Sheldon*, *Id.*, at 52-53; Love v. Kwitny, 772 F. Supp. 1367, 1371 (S.D.N.Y. 1991), *aff'd* 963 F. 2d 1521 (2<sup>nd</sup> 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. Experts should also verify that entries on label, artist, and publisher income statements correspond to one another.

An accounting concern involving defendant record company with integrated 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.<sup>84</sup> 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, Universal Music Group, which owns the Capitol Records label through its Capitol Music Group imprint, should not automatically deduct the full value of transfer prices paid to distributor Universal Music Group Distribution. The same problem holds for payment to UMG’s pressing entity, Universal Music Logistics.

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<sup>84</sup><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 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.*,<sup>85</sup> 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" (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).<sup>86</sup> 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.<sup>87</sup> If taken seriously, label accounting like Mr. Drellishak's would defeat the stated

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

<sup>86</sup>"[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>;

<sup>87</sup>Costs Behind a Katy Perry Hit Glimpsed by a Jury over *Dark Horse* Copyright Case, August 2, 2019, <https://www.cyclolore.net/entertainment/costs-behind-a-katy-perry-hit-glimpsed-by-a-jury-over-dark-horse-copyright-case>. The jury awarded a profit total of \$1.3 billion.

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

## **11. APPORTIONMENT OF DEFENDANT PROFITS**

After subtracting allowable expenses from gross revenues, a copyright defendant must then prove the deductible value 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 derivative works with 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."<sup>89</sup> Indeed, plaintiffs have won full disgorgements of defendant profits after

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<sup>88</sup>Deductions 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.<sup>90</sup> In other instances, judges have made heuristic attempts to determine a proper apportionment.<sup>91</sup> The arbiter of the defendant's apportionment can be the jury itself.<sup>92</sup> Determination could arguably be perceived as a straight matter of equity made subject to the review of a judge.

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

<sup>90</sup>Smith v. Little, Brown & Co. 273 F. Supp. 870 (S.D.N.Y. 1967). "It is impossible on this record to attribute any particular part of defendant's sales ... to the plagiarized portion . Defendant's profit is due to the book as a whole, not to any particular chapter or paragraph. The book as a whole infringed plaintiff's common law copyright. Under the circumstances, I believe that the only fair thing to do is to award to plaintiff the entire amount of defendant's small profit." *see also* Fedtro, Inc. v. Kravex Mfg. Corp. 313 F. Supp. 990 (E.D.N.Y., 1970).

<sup>91</sup>*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).

<sup>92</sup>*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."

### *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 works that combine efforts from different writers or composers. (17 U.S.C. 201) However, infringed 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.<sup>93</sup> 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 minutes of use 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.<sup>94</sup> However, a New Jersey District Court explicitly ruled out a similar "second-by-second"

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<sup>93</sup>Gaste v. Morris Kaiserman, et al., 863 F. 2d 1061, 1070 (2<sup>nd</sup> 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.<sup>95</sup> And in *Bridgeport Music*,<sup>96</sup> the Sixth Circuit court (referring to *Andreas*<sup>97</sup>) 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.<sup>98</sup>

#### *Apportionment for Album*

With regard to the second concern for apportionment – the contribution of an infringing song to the monetization 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 sales or licensing of the album product. Two contrasting situations are apparent, depending on whether or not the track was used to promote the album before or during its early release (i.e., traditional label promotion).

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<sup>94</sup>*Gray v. Perry*, op cit., (overturned on liability grounds)

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

<sup>96</sup>*Bridgeport Music*, supra note 58.

<sup>97</sup>*Andreas*, supra note 92.

<sup>98</sup>*Bridgeport Music*, supra note 58.

In the traditional business model of album release, record labels chose individual tracks for radio promotion, video production, 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 so selective a marketing strategy, it is not here proper to attempt a simple allocation of profits based on the number of tracks on the album. For example, after finding that George Harrison's 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).<sup>99</sup> 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*.<sup>100</sup> The Ninth Circuit upheld, finding that the Isley Brothers

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<sup>99</sup>ABKCO Music, Inc. v. Harrisongs Music, Ltd., 508 F.Supp. 798, 799 (S.D.N.Y.1981), upheld 722 F. 2d 988 (@nd Cir, 1982)

<sup>100</sup>Three Boys Music Corp. v. Michael Bolton, et al., 212 F. 3d 477 (9<sup>th</sup> 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.

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 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 station 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. In addition to tracking of early promotion of radio breakout, 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

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Labels and artists may also deploy counts of many alternative instruments and platforms – e.g., YouTube/Vimeo videos, Facebook sites, Instagram/Snapchat messages, Soundcloud tracks, Spotify playlists, out-of-channel mixtapes, live performances, audience influencers, online popups, email lists, merchandising, blogs, websites, and podcasts.<sup>101</sup> In this regard, a listing of some important label (UMG’s Interscope) instruments for promotion and market-sensing can be found in a public document made available by defense expert Douglas Bania,<sup>102</sup> which presents a guide of label documents useful to plaintiffs and their experts.

It is now possible to complement label information with data taken from public -- e.g., views on YouTube, audiences on Last.fm,<sup>103</sup> or streaming and digital sales on Alpha Data (f/k/a BuzzAngle Music).<sup>104</sup> For example, I learned from

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<sup>101</sup>15 Music Marketing Strategies for Aspiring Musicians, Sept. 20, 2019, <https://www.renderforest.com/blog/music-marketing-strategies>

<sup>102</sup>D. Bania, “Apportioning Copyright Damages – the Case of *Blurred Lines*”, *Journal of Intellectual Property Law & Practice*, 2015, 10(12), also found at <https://www.experts.com/Articles/Apportioning-Copyright-Damages-Blurred-Lines-By-Doug-Bania>. The article contains details of chart testimony provided by the marketing department of UMG’s Interscope label to expert Bania. Interscope’s charts showed how the record label came to relate weekly sales of the song *Blurred Lines* (from Soundscan) to weekly radio play, video views, social media, downloads, and live promotion events.

<sup>103</sup>Using a search technology called “Audioscrobbler,” Last.fm records the details of the tracks listened from user computers and portable devices. The data then are compiled to create reference pages for individual artists.

<sup>104</sup>Alpha Data provides statistics on record sales and music streaming now used in Rolling Stone charts. The website shows total music consumption including album sales, song sales, streaming history, and social media analytics. Data are collected from retailers, record stores, radio stations, and music venues. Related competitive services are offered at Soundcharts, Chartmetric, and Instrumental.

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 was a contributing element to concert appeal and revenues that Moore had earned.

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.<sup>105</sup> The common discount rate is the one year Treasury bill rate.<sup>106</sup> Winning plaintiffs may also recover attorney's fees if the infringed work was registered previously with the Copyright Office.<sup>107</sup> Copyright law does not allow recovery for punitive damages, which can nonetheless be established for other damages in complex infringements involving trademarks and unfair competition.

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

<sup>106</sup>Id., In re Bloom, 875 F. 2d 224, 228 (9<sup>th</sup> Cir. 1989); Columbia Brick Works, Inc. v. Royal Ins. Co., 768 F. 1066, 1071 (9<sup>th</sup> Cir. 1985).

<sup>107</sup>17 U.S.C. §505, *In Design*, supra note 82, at 567, McCulloch v. Albert E. Price, Inc., 823 F. 2d 316, 322 (9<sup>th</sup> Cir. 1987).

## 12. LIVE EVENTS

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[https://www.americanbar.org/content/dam/aba/publications/entertainment\\_sports\\_lawyer/spring-2020/esl36-2.pdf](https://www.americanbar.org/content/dam/aba/publications/entertainment_sports_lawyer/spring-2020/esl36-2.pdf)

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.

While the legal matter may be contested, concert damages for infringing compositions may be recoverable. 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.<sup>108</sup> 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. Infringement could then presumably implicate both ticket sales and contracted amounts committed in tour development.

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<sup>108</sup>Fahmy v. Jay-Z, (C.D. Ca. 2011), Case 2:07-cv-05715-CAS-PJW, allowing a claim to go forward; Document 309. Marino v. Usher 2:11-cv-06811-(E.D. Pa.); Defendant won case on other legal grounds related to proper authorization of a co-written work; Montana Connection, et al. v. Justin Moore, (M.D. Tenn., 2013); case settled.

The matter of concert revenues is now in center stage in two important cases. Ed Sheeran now faces the Estate of heirs to Ed Townsend that claims, *inter alia*, that Sheeran's concert performances of the hit *Thinking Out Loud* infringed Townsend's *Let's Get It On*,<sup>109</sup> co-written with Marvin Gaye. And producer Artem Stolyarov recently filed suit against the music group Bastille for its performance of the song *Happier*, a purported taking of Stolyarov's adaptation *I Lived (Arty Remix)*.<sup>110</sup>

Allowable recovery from infringing performances in live events was established in *Frank Music v. Metro-Goldwyn-Mayer*,<sup>111</sup> where an MGM casino performed an infringing work (taken 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 with no proven causality of ticket sales directly related to use of the composition, the song was part of a musical score and thus was a part of the overall audience appeal.

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<sup>109</sup>Griffin et al v. Sheeran et al (S.D.N.Y. 2017) 1:17-cv-05221-LLS.

<sup>110</sup>Artem Stolyarov v. Marshmello Creative, LLC (2:19-cv-03934), C.D. Cal. (2019).

<sup>111</sup>886 F. 2d 1548, 1550 (9<sup>th</sup> Cir. 1989).

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.<sup>112</sup> Judge Stanton's point is simple; ASCAP and BMI cannot license derivative works based on 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 releasing label of the infringing album conceivably may be implicated as a beneficiary for contributory or vicarious infringement.

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

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<sup>112</sup> Judge Stanton has 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.<sup>113</sup> 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:

1. *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.

2. *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).

3. *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. Merchandising amounts are significant revenue sources for performing

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<sup>113</sup>Material from this section is drawn from D. Waddell, R. Barnet, J. Berry, THIS BUSINESS OF CONCERT PROMOTION AND TOURING, Chapter 10 (2007).

artists at concerts. Artist agents negotiate terms with the talent buyer who would bring in the merchandising platforms at the event.

From concert earnings, the artist pays its act *manager* and event *agents* for their respective administrative services. related to the concert (e.g., 15 to 20 percent each). If a concert work is found infringing, neither payment appears to be legitimately recoverable from the receiving party. Artists do not pay production costs related to the event itself, which are handled by the talent buyer from gate earnings.<sup>114</sup>

#### *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 to infringement at the concert itself but is conceivably implicated as a contributory or vicarious infringer.<sup>115</sup>

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,

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

<sup>115</sup>Supra 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 artist contracts 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 (e.g., Chance the Rapper). Neither of these arrangements would apparently involve a revenue recovery from a non-participating label. As a final point, other parties to a concert – i.e., promoter, venue, and ticket service -- do not appear to have been in a demonstrable position to have known of any potential infringement and are not rightfully joined as defendants in a copyright matter.



### *Apportionment*

After deducting for costs, artist earnings from a concert would be subject to apportionment for non-infringing elements, particularly other songs performed at the event. The defendant bears the burden of proof to establish offsetting costs. 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.

### **13. CONCLUSION**

Some final points come to mind.

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

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

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

A financial expert 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

**Michael A. Einhorn** ([mae@mediatechcopy.com](mailto:mae@mediatechcopy.com), <http://www.mediatechcopy.com>) is an economic consultant and expert witness active in the areas of intellectual property, media, [entertainment](#), damage valuation, licensing, antitrust, personal injury, and commercial losses. He received a Ph. D. in economics from Yale University. He is the author of the book *Media, Technology, and Copyright: Integrating Law and Economics* ([Edward Elgar Publishers](#)), He has published over seventy professional and academic articles and lectured in Great Britain, France, Holland, Germany, Italy, China, and Japan.

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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