



My Sweet Profits - They're So Grand  
By: Jim Astrachan

Last week I was approximating damages flowing from a copyright infringement. The statute is disarmingly simple on this subject and reads, "...an infringer is liable for either the copyright owner's actual damages and any additional profits of the infringer or statutory damages".

I first considered the copyright owner's actual damages, but soon focused on the profits of the infringer, as they looked to be large. The statute only allows recovery of those profits of the infringer that are attributable to the infringement. To prevent double dipping, only profits of the infringer not taken into account in computing actual damages are recoverable.

"Attributable to the infringement," I pondered. "What about the case where the infringer mixes its work with the copyright owner's? For example, a CD with one infringing song, or a musical review with one infringing act? And even if attribution is required, can the copyright owner claim more than merely a pro-rata share of the profits based on duration of total music versus infringed music?"

A number of years ago the copyright owner of the musical *Kismet* sued the MGM Grand Hotel claiming that MGM's production of *Hallelujah Hollywood*

infringed *Kismet*. The claim was straight forward. *Hallelujah Hollywood* featured ten acts and ran for one hundred minutes. The *Kismet* portion was eleven minutes in length, but only nine minutes infringed the original work.

The *Kismet* owners first tried to claim they were damaged by the infringement, but the court believed the damages claimed were speculative and they were not allowed. That's when the case really became interesting because *Kismet's* owners also went after MGM's profits. And they did not limit themselves merely to profits derived from the play; *Kismet's* owners went after a portion of the profits from the entire MGM Grand operation. The court had to now focus on the meaning of "profits attributable to the infringement".

MGM Grand is a Las Vegas mega-hotel. It has stores, theatres, Jai Alai, restaurants, gambling, and nightclubs. It rents rooms. Money flows like water and profits are plentiful. During the time of the infringement, MGM Grand's total net profits was \$395 million!

First the court looked at profits from *Hallelujah Hollywood* and concluded that the net profit from the revue, after deduction of direct costs and overhead, was \$2.5 million. It allowed the deduction of overhead because it determined the infringement was not willful, conscious or deliberate. Had the court found willfulness, it likely would have disallowed the overhead expense. Next the court considered whether it could award indirect profits (profits from other hotel activities, such as gambling and room rentals) and concluded it could.

The basis for allowing recovery of indirect net profits was the court's conclusion that some of these profits were attributable to the infringement. Why? *Hallelujah Hollywood* had considerable promotional value for MGM Grand and all of its profit centers. The purpose of the revue, the court concluded, was to draw people to the hotel, its gaming tables, theaters and restaurants. The revue was heavily advertised. But the profits had to be apportioned. Experts testified that 2% of MGM Grand's net profits were attributable to this popular revue, and the plaintiffs were entitled to 9% of this figure because the revue contained nine percent infringing materials.

Years ago, ex-Beatle, George Harrison, found himself in a defensive posture similar to the MGM Grand. The Harrison song, *My Sweet Lord* was found to have infringed the song, *He's So Fine*, and was included on two of Harrison's albums: *All Things Must Pass* and *The Best of George Harrison*. Many of the songs on the *All Things* album were dogs and received little air play. Almost all of the songs on the *Best of* album were very popular.

In seeking profits from the *All Things* album, plaintiff asserted, and the court agreed, it was also entitled to profits derived from the performance of other songs on the album due to their lack of popularity and the popularity of *My Sweet Lord*. In other words, the use or sale of the unpopular songs was driven by the inclusion on the album of *My Sweet Lord*. Therefore, a vast majority of the profits from *All Things* was attributable to the infringement and the court initially awarded

\$925,000. Conversely, the court awarded only \$21,500 of the profits from *The Best of* album because of the substantial popularity of each song on that album.

Next the court attributed apportioned profits to sources other than the infringed music, noting that if it had found an intentional infringement by Harrison it would have awarded all of the earnings attributable to *My Sweet Lord*. The court considered that Harrison's name and lyrics, contributed to sales, so it apportioned 25% of the already apportioned profits to these factors. It apportioned 75% to the infringed music on the basis of the immense popularity of the *He's So Fine* music, reasoning no one would have bought that song for its lyrics alone.

There are no hard and fast rules when it comes to apportionment. Many of the same principles used by professionals who value businesses are applicable, but experience in the industry and a large dose of creative thinking helps.

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*James B. Astrachan is a principal at the Baltimore firm of Astrachan, Gunst & Thomas, P.C. Jim is former Chair of the Maryland Bar Association IP Committee and can be reached at [jastrachan@aggt.com](mailto:jastrachan@aggt.com).*