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Proving Disgorgement Damages in a Copyright Infringement Case Is a Three-act Play

by Richard C. Wolfe and Serona Elton

Remedies allowed by the Copyright Act include injunctive relief, impoundment, destruction, damages, and court costs.[1] If the plaintiff has timely registered a claim of copyright with the copyright office, the plaintiff then has additional arrows in his or her quiver in the form of statutory damages and attorneys' fees. While many copyright formalities were eliminated when the United States joined the Berne Convention, this provision of the law was retained as a powerful incentive to encourage copyright owners to register their works in a timely manner.

If the infringement is of an unpublished work, then registration is timely if it is made before the infringement commenced.[2] If the work is published, then registration is deemed timely if it is made within three months after the first publication of the work and the infringement commenced after the first publication of the work.[3] There are certain exceptions in the event of a live broadcast, because it would be physically impossible to register a copyright before the infringement occurred, as the infringement is taking place simultaneously with the initial distribution of the work.[4]

Benefits of a Timely Registration

A copyright owner with a timely registered claim of copyright "may elect" an award of statutory damages rather than actual damages and profits.[5] In certain circumstances, like infringement of multiple copyrights, statutory damages may result in a higher damages model. Numerous courts have held that once the election has taken place, it is not reversible. In other words, once a plaintiff has elected statutory damages, they can no longer seek an award of actual damages or the infringer's profits.[6] While the courts have the discretion to award statutory damages "in lieu of," or in addition to, actual damages and profits, most of the case law is based on the 1909 Copyright Act, not the 1976 Copyright Act.[7] However, courts continue to have "wide discretion in determining the amount of statutory damages, constrained only by the specified maxima and minima."[8] The statutory language authorizing the election mandates that it must be made "at any time before final judgment is rendered."[9] The election by the copyright owner could even occur after the judge (in a bench trial) or jury had returned a verdict on liability and an award of actual damages and profits.[10] An election at such a late stage in the trial raises the possibility that a court could grant the lesser of the two damage amounts[11] because it was irritated the copyright owner had not elected statutory damages at an earlier stage, opting to put the court or the jury to the trouble of calculating actual damages and the infringer profits. However, note that the Supreme Court held in *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998), the Seventh Amendment provides a right to a jury trial on all issues pertinent to an award of statutory damages under §504(c) of the Copyright Act, including the amount itself.[12]

This article will not explore the computation of statutory damages, but rather will focus on the calculation of the infringer's profit or so-called "disgorgement damages."

Defining "Actual Damages"

The Copyright Act fails to define the term "actual damages." However, numerous cases have held that actual damages are consistent with the normal calculation that would be expected of damages for any tort, *i.e.*, monetary compensation proximately caused by the infringing activity. Actual damages are often calculated to reflect "the extent of which the market value of the copyright has been injured or destroyed by an infringement."[13] Rarely is a plaintiff's lawyer able to present a damage model of actual damages with clear precision, due to the present and future value of the copyright, which itself is generally uncertain. This is because a copyright's present value is always calculated based upon an estimate of its future earnings which, in turn, depends upon some kind of prediction often imprecise of the future taste of the consuming market. This uncertainty is not unique to copyright law. The Ninth Circuit stated, "[a]lthough certainty as to the amount of damages will not preclude recovery, uncertainty as to the fact of damages may."[14] The calculation of actual damages and the infringer's profits is sometimes overlapping. For example, some courts have considered that sales of an infringing article have displaced sales that the copyright owner would otherwise have made. In such cases, the volume of lost sales can be a measure of actual damages.[15] While the courts will not allow a double recovery, a creative plaintiff's lawyer can employ an analysis to determine the greater profit margin as being *either* the infringer's profit margin or the plaintiff's profit margin, then use that damage model to assess actual damages. In determining lost profits, a copyright owner must not only prove the volume of sales lost, but also the profit margin on such sales. Thus, unlike the net profit analysis on disgorgement profits, which is discussed later in this article, the plaintiff maintains the burden of proof of the proper profit margins.

Whether representing a plaintiff or a defendant in a copyright infringement case, counsel must be well versed in the shifting burdens on the issue of disgorgement damages. Section 504(b) of the Copyright Act provides a powerful weapon when properly used. When the plaintiff opts for actual damages and disgorgement of profits attributable to the defendant's use of the infringing material, the damages portion of the case operates like a three-act play, with the burden of persuasion passing back and forth between the parties.

Statutory Law

Damages for copyright infringement are set forth in 17 U.S.C. §504. Each alternative presents special challenges. However, it is the authors' opinion that the damage model, based upon actual damages and profits, is usually the method that results in the largest and most predictable award and is generally elected except where infringements of multiple copyrights occur, or where the infringer earns a small amount of profits. This article will focus on the burdens associated with this model, particularly with respect to profits.

With respect to actual damages and profits, §504(b) states:

> The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

According to the legislative history, profits are awarded to "prevent an infringer from unfairly benefiting from their wrongful act."[16] The legislative history also states:

> The language of the subsection makes clear that only those profits "attributable to the infringement" are recoverable; where some of the defendant's profits result from the infringement and other profits are caused by different factors, it will be necessary for the court to make an apportionment. However, the burden of proof is on the defendant in these cases; in establishing profits the plaintiff need prove only "the infringer's gross revenue," and the defendant must prove not only "his or her deductible expenses" but also "the element of profit attributable to factors other than the copyrighted work."[17]

As aptly stated in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 567 (1985), "[R]arely will a case of copyright infringement present such clear-cut evidence of actual damage." Because actual damages are often difficult to quantify with reasonable precision, infringement cases usually focus upon the other portion of this damage option, commonly referred to as *disgorgement of the infringer's profits*. Remembering that the Copyright Act allows the plaintiff to disgorge the defendant's profits, only

those profits that are "not taken into account in computing actual damages" will be considered.[18] Where a plaintiff opts to seek both actual damages and disgorgement, typically the plaintiff recovers "the larger of the two amounts or all of one and so much of the other as is not included in the one."[19] Courts are required to scrutinize the damage model to ensure that no double recovery occurs.[20] Where it is assumed that the infringer's profits resulted from sales that were diverted from the plaintiff's authorized goods, a court cannot assess both actual damages and disgorgement damages for such calculations would yield a double recovery.[21] However, where the infringer is selling in a different market than the copyright owner or where the infringer's sales are not a result of a diversion of customers or sales from the copyright owner, then it is appropriate to assess both actual damages, as well as disgorgement damages.

Act I: Plaintiff's Burden to Show Gross Revenue Earned by the Infringer

While the plain language of 17 U.S.C. §504 does not expressly require a plaintiff to show a nexus between the defendant's gross revenue and the infringements, courts in virtually every circuit have held that the plaintiff must do so. The 11th Circuit Court of Appeals has not yet addressed this issue of burden. The recent case of *Ordonez-Dawes v. Turnkey Properties, Inc.*, No. 06-60557-CIV, 2008 WL 828124 (S.D. Fla. March 27, 2008), cites cases from the Second, Fourth, Seventh, Eighth, Ninth, and federal circuits, all requiring some form of nexus:

See, e.g., Polar Bear Productions, Inc. v. Timex Corp., 384 F.3d 700, 711 (9th Cir. 2004) ("Thus, a copyright owner is required to do more initially than toss up an undifferentiated gross revenue number; the revenue stream must bear a legally significant relationship to the infringement."); *Bouchat v. Baltimore Ravens Football Club, Inc.*, 346 F.3d 514, 522 (4th Cir. 2003) ("In sum, we conclude that the Defendants could properly be awarded summary judgment...if...there exists no conceivable connection between the infringement and those revenues...."); *On Davis v. The Gap*, 246 F.3d 152, 160 (2d Cir. 2001) ("[W]e think the term 'gross revenue' under the statute means gross revenue reasonably related to the infringement, not unrelated revenues."); *The University of Colorado Foundation, Inc. v. American Cyanamid Co.*, 196 F.3d 1366, 1375 (Fed. Cir. 1999) (requiring the plaintiff to show a connection between defendant's gross revenues and the alleged infringement); *Taylor v. Meirick*, 712 F.2d 1112, 1122 (7th Cir. 1983) ("It was not enough to show [Defendant]'s gross revenues from the sale of everything he sold...."); *see also Andreas v. Volkswagen of America, Inc.*, 336 F.3d 789, 796 (8th Cir. 2003) (explaining that the "burden of establishing that profits are attributable to the infringed work often gets confused with the burden of apportioning profits between various factors contributing to the profits").[22]

The court, in *Ordonez-Dawes*, didn't ultimately have to decide how to approach this burden because the defendant defaulted, resulting in the entire amount of gross revenue, $12,030,500, plus actual damages of $58,760, being awarded to the plaintiff.[23]

The court, in the recent case of *Thornton v. J. Jargon Co.*, 580 F. Supp. 2d 126 (M.D. Fla. 2008), discussed this burden, and chose to "follow the courts which have required a 'reasonable relationship' between the infringing activity and the infringer's gross revenue."[24] In *Thornton*, the defendant, a theatrical producer of a musical, used the plaintiff's copyrighted materials in the printed program for the show. The plaintiff produced evidence of the defendant's gross ticket revenue from the production of the musical, and argued that he had met his burden. The defendant argued that since the plaintiff's copyrighted material was not included in the performance of the musical and was only included in the program, which was given out for free to ticket holders, the plaintiff was not able to demonstrate a causal link between the infringement and the gross ticket revenue.[25] In arriving at its decision to apply the "reasonable relationship" requirement, the court placed primary reliance on the plain language of the statute, which creates a light burden on the plaintiff, and applied the well-established principle that a claim of damages must not be based on pure speculation.[26] The plaintiff satisfied his burden by seeking revenue only from those shows at which the infringing programs were actually handed out, and by introducing evidence that the Actors' Equity Union required a program to be created and distributed.[27] In satisfying its burden, a plaintiff need only focus on gross revenue, ignoring expense and the appointment issue.[28]

Acts II & III: Defendant's Burden to Prove Deductible Expenses and Attribution

Once the plaintiff has met the burden to establish the infringer's gross revenue and the nonspeculative relationship between the revenue and the infringement, the burden shifts to the defendant to prove 1) deductible expenses, and 2) the elements of profit attributable to factors other than the copyrighted work (*i.e.*, apportionment).

The Copyright Act shifts this burden to the defendant because, "[v]ery often, the act of infringement allows

the infringer to pocket as net profit a much larger percentage of his gross revenue than he could have absent the infringement."[29] If the defendant does not meet this burden, the gross revenue figure is left to stand as the complete measure of damages.[30]

• *Deductible Expenses* — The defense lawyer must understand the accounting issues relative to direct expense, indirect costs, and overhead allocations in order to reduce his or her client's exposure. Through the use of the defendant's accountants and/or independent experts, the defense must demonstrate the expenses to be deducted from gross revenue. Such expenses typically include those directly related to the infringing use: production costs (*i.e.*, costs of goods sold) and marketing and distribution expenses, and indirect costs, such as general advertising and a reasonable allocation of business overhead expenses (*i.e.*, those expenses related to operating the defendant's business, such as rent, executive services, depreciation, and income taxes).[31] While all of these are typically considered, there exists a general principle that "a plagiarist may not charge for his labor in exploiting what he has taken."[32]

Often the most controversial, and perhaps the largest item of deduction, is the overhead allocation. The case of *Hamil America, Inc. v. GFI*, 193 F.3d 92 (2d Cir.1999), well articulates the general approach established in *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45 (2d Cir. 1939), with respect to deducting overhead expenses.[33] The principle established in Sheldon is that "[o]verhead which does not assist in the production of the infringement should not be credited to the infringer; that which does, should be; it is a question of fact in all cases."[34] In other words, while overhead items may support both illegitimate and infringing activities, it would be improper to deduct those overhead expenses from the infringer's gross revenue if the activity did not contribute to the infringement as that would overstate expense and allow an infringer to retain ill-gotten revenue. The defendant must first establish a reasonable nexus between the category of overhead and the production or sale of the infringing product. The second step is for the defendant to offer "a fair and acceptable formula for allocating a given portion of overhead to the particular infringing items in issue."[35] While the reasonableness of the proffered allocation formula is a question of fact in each case,[36] the consequences to the damage award are often such that the trial becomes a battle of experts on the issue of the allocation formula. As outlined in *Hamil*, some methods of allocating overhead to the infringement proffered have included the production cost of the infringing product as a percentage of the total production costs;[37] the number of infringing products as a percentage of total products;[38] and, although rejected in *Gaste v. Kaiserman*, 863 F.2d 1061, 1071 (2d Cir. 1988), some courts have accepted an allocation based upon the dollar sales from the infringing product as a percentage of total dollar sales. In cases where infringement has been found to be willful, courts give "extra scrutiny to the categories of overhead expenses claimed by the infringer to ensure that each category is directly and validly connected to the sale and production of the infringing product."[39]

Other cases, such as *Design v. K-Mart Apparel Corp.*, 13 F.3d 559 (2d Cir. 1994), *abrogated on other grounds by Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), provide a lengthy discussion of different types of expenses that are allowable. When the court is confronted with imprecision in the computation of expenses, according to *Gaste,* the court should "err on the side of guaranteeing the plaintiff a full recovery." However, "want of precision is not a ground for denying apportionment altogether."[40]

"When a defendant infringer's own failure to keep records results in uncertainty, all doubt must be resolved in favor of the plaintiff."[41] Numerous courts have held that a defendant cannot use his or her own lack of reliable accounting as a shield to liability for wrongful acts. However, the Second Circuit has held that even when defendants had not been "able to establish their costs with precision, they should be able to deduct the minimum amount they in all likelihood spent."[42]

• *Apportionment of Profits* — Once the court considers the net profits that are related to the infringement, it must consider whether all of the net profits are attributable to the use of the infringing material. These issues almost always arise when the infringing material is not the entire work, such as when infringing material is included in a book of otherwise original material, or an infringing sample of pre-existing music

is included as a segment of a new musical work.[43] The case most cited regarding the apportionment of damages is *Sheldon v. Metro-Goldwyn Pictures Corporation*, 309 U.S. 390 (1940) *(Sheldon II)*. *Sheldon II* established that apportionment is appropriate when the evidence shows that not all of the infringer's profits are the result of the infringement. "[Apportionment] is ultimately a delicate exercise informed by considerations of fairness and public policy, as well as fact."[44]

"[T]he defendant may show that the existence and amount of its profits are not the natural and probable consequences of the infringement alone, but are also the result of other factors which either add intrinsic value to the product or have independent promotional value."[45] Where such a showing is made, apportionment is required.[46]

Judge Learned Hand recognized there is "no real standard" to govern apportionment.[47] The analysis must be made by the fact finder on a case-by-case basis.[48] Mathematical exactness when apportioning profits is not required. Rather, the fact finder must only make a reasonable approximation.[49] Again, expert testimony is essential to this portion of the trial, and the expert cannot rely exclusively on a quantitative analysis without considering other factors that play a role in the relative importance of the infringement.

In coming up with a method of reasonable approximation, it is improper to rely exclusively on a quantitative analysis without considering other factors that play a role in the relative importance of the infringement.[50] For example, in a case involving a film which contains infringing material, the trier of fact must make an objective analysis if the monetary success of the film was due to the infringing material contained in the script, or to the prominence of the actors, the contributions of the director, the scenery, the costumes, the amount of advertising, and even the value of the noninfringing portions of the script.

A plaintiff must be prepared to demonstrate a reasonable allocation methodology, but he cannot be awarded all of the defendant's profits where the defendant cannot, with certainty, compute their own share.[51] However, where the copyrighted portions are so intermingled with the rest of the infringing work that they cannot be well-distinguished from it, the entire profits realized by the defendant will be given to the plaintiff.[52] For example, in *Business Trends Analysts, Inc. v. Freedonia Group, Inc.*, 887 F.2d 399, 407 (2d Cir.1989), the defendant copied so extensively from the plaintiff's report on robotics that the court found the differences amounted only to a "crude effort to give the appearance of dissimilarity."[53] In court opinions where the damages were calculated by the lower court in a bench trial, a very detailed approach including numerous financial figures that impacted the apportionment calculation is provided. In cases where a jury decided the issue of damages, the parties and court are frequently not provided with a delineation of the components of the jury's indirect profits award. In these cases, absence proof to the contrary, it is assumed the jury fulfilled its duty to apportion.[54]

Conclusion

Issues of attribution and apportionment will rarely be decided on a summary judgment motion. Issues of damages in copyright cases are complex. Trial counsel fully versed with accounting principles and experts and having industry-specific experience will almost always be necessary. Given these issues, bifurcation of liability and damages must be considered as potential advantages to both the plaintiff and defense.

[1] 17 U.S.C. §502-505.

[2] 17 U.S.C. §412(1).

[3] 17 U.S.C. §412(2).

[4] *Football Ass'n Premier v. YouTube*, 2009 U.S. Dist. Lexis 57438 (SD NY 2009); *see also* 17 U.S.C. §411 (c).

[5] 17 U.S.C. §504(c)(1).

[6] *See Twin Peaks Productions, Inc. v. Publications International, Ltd.*, 996 F.2d. 1366 (2d Cir. 1993).

[7] *See, e.g., Robert Stigwood Group, Ltd. v. O'Reilly*, 530 F.2d 1096 (2d Cir. 1976), *cert. denied*, 429 U.S. 848 (1976); *F. W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228 (1952); *L.A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100 (1919).

[8] *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1335 (9th Cir. 1984) (citing *L.A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100 (1919) (the court points out in footnote 4 that *Westermann* still applies for this principle of law despite the fact that it arises under the 1909 act)).

[9] 17 U.S.C. §504(c)(1).

[10] *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 347 n.5 (1998).

[11] Pursuant to 17 U.S.C. §504(c), statutory damages range from $750 to $30,000 *per infringement* increasing to $150,000 if the infringement is willful and reducing as low as $200 if the infringement was innocent.

[12] *See Feltner,* 523 U.S. at 348-352 (pending a historical perspective of copyright law and damages for infringement, dating back to the middle of the 17th century).

[13] *Frank Music Corporation v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 512 (9th Cir. 1985) (*Frank I*).

[14] *Id.* at 513.

[15] *Big Seven Music Corp. v. Lennon,* 554 F.2d 504 (2d. Cir. 1977).

[16] H.R. Rep. No 94-1476 at 161 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5777.

[17] *Id.*

[18] 17 U.S.C. §504(b).

[19] *Deltak v Advanced Systems* 767 F. 2d 357, 363 (7th Cir. 1985).

[20] *Taylor v. Meirick*, 712 F.2d 1112 (7th Cir. 1983) (discussing the issue of double recovery at length).

[21] *Davis v. Gap*, 246 F.3d at 160.

[22] *Ordonez-Dawes v. Turnkey Properties, Inc.*, No. 06-60557-CIV, 2008 WL 828124 at *4 (S.D. Fla., March 27, 2008).

[23] *Ordonez-Dawes v. Turnkey Properties, Inc.*, No. 06-60557-CIV, 2008 WL 1840716 at *3 (S.D. Fla., April 22, 2008).

[24] *Thornton v. J. Jargon Co.*, 580 F. Supp. 2d at 1280 (citing on *Davis v. The Gap*, 246 F.3d 152, 160 (2d Cir. 2001); *Andreas v. Volkswagen of America, Inc.*, 336 F.3d 789, 796 (8th Cir. 2003); and *Taylor v.*

Meirick, 712 F.2d 1112, 1122 (7th Cir. 1983)).

[25] *Thornton*, 580 F. Supp. 2d at 1279.

[26] *Id.* at 1280.

[27] *Id.*

[28] *Montgomery v. Noga*, 168 F.3d 1282, 1296 (11th Cir. 1999).

[29] *Johnson v. Jones*, 149 F.3d 494, 506 (6th Cir. 1998).

[30] *Frank I*, 772 F.2d at 514. *See also Arthur Rutenberg Corp. v. Dawney*, 647 F. Supp. 1214 (M.D. Fla. 1986) (court followed the well-established principle that "[d]efendants are obliged to prove their deductible expenses...or else 'the gross figure is left to stand as the profit factor'") (citing *Russell v. Price*, 612 F.2d 1123, 1130-1 (9th Cir. 1979)).

[31] "It is settled law that the income tax paid on profits is not deductible where infringement was conscious and deliberate." *Design v. K-Mart Apparel Corp.*, 13 F.3d 559, 566 (2d Cir. 1994), *abrogated on other grounds* by *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994) (citing *L.P. Larson, Jr., Co. v. Wm. Wrigley, Jr., Co.*, 277 U.S. 97 (1928)). "But the [c]ourt carefully limited the breadth of its holding recognizing that there could be cases where the circumstances of the infringer's conduct dictated that such a tax deduction would be proper." *Id.* at 566 (citing *Larson*, 277 U.S. 97).

[32] *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45, 51 (2d Cir. 1939) (*Sheldon I*).

[33] *Hamil America, Inc. v. GFI*, 193 F.3d 92, 105-108 (2d Cir. 1999).

[34] *Sheldon I*, 106 F.2d at 54 (citing *Levin Bros. v. Davis Mfg. Co.*, 72 F.2d 163 (8th Cir. 1934)).

[35] Melville B. Nimmer & David Nimmer, 4 Nimmer on Copyright §14.03 [B] at 14-39 (1996).

[36] *Sheldon I*, 106 F.2d at 54.

[37] *Id.* at 52.

[38] *Wilkie v. Santly Bros.*, 139 F.2d 264, 265 (2d Cir. 1943).

[39] *Hamil*, 193 F.3d at 107.

[40] *Gaste*, 863 F.2d at 1070 (citing *Sygma Photo News, Inc. v. High Society Magazine, Inc.*, 778 F.2d 89, 95 (2d Cir. 1985)).

[41] *Id.* at 1071 (citing *Shapiro, Bernstein & Co. v. Remington Records, Inc.*, 265 F.2d 263, 272-73 (2d Cir. 1959).

[42] *Id.* at 1071 (citing *Sygma*, 778 F.2d at 95).

[43] *See Grand Upright Music Ltd. v. Warner Bros. Records, Inc.*, 780 F. Supp. 182 (S.D.N.Y. 1991),

involving the popular rap artist Biz Markie. This well-known case begins with the sentence, "'Thou shalt not steal.'" *Grand Upright*, 780 F. Supp. at 182 (citing The Bible, Exodus 20:15).

[44] *Data Gen. Corp.*, 36 F.3d at 1176.

[45] *Id.* at 1175.

[46] *Id.* at 1177 ("Indeed, we believe that Grumman's evidence is sufficiently compelling that Grumman is entitled to some apportionment as a matter of law.").

[47] *Sheldon I*, 106 F.2d at 51.

[48] *Andreas v. Volkswagen of America, Inc.*, 336 F.3d 789, 798 (8th Cir. 2003) (citing *Estate of Vane v. The Fair, Inc.*, 849 F.2d 186, 190 (5th Cir. 1988), *cert. denied*, 488 U.S. 1008 (1989)).

[49] *Sheldon II*, 309 U.S. 390 (1940) *(Sheldon II)*.

[50] *Frank Music Corporation. v. Metro-Goldwyn-Mayer, Inc.*, 886 F.2d 1545, 1548 (9th Cir. 1989) *(Frank II)*. *In Frank II,* the defendant used the plaintiff's material in a musical review performed at the MGM Grand's Ziegfeld Theater. In apportioning the profits from the show, the district court considered that the infringing material was included in Act IV of a 10-act show, which amounted to a 10-minute segment of a 100-minute show, and awarded the plaintiff 10 percent of the profits. The court found the exclusively quantitative approach improper and modified the apportionment award.

[51] *Sheldon I*, 106 F.2d at 51.

[52] *Sheldon II*, 309 U.S. at 401-02.

[53] *Business Trends*, 887 F.2d at 407 (citing *Business Trends Analysts v. Freedonia Group, Inc.*, 700 F. Supp. 1213, 1230 (S.D.N.Y. 1988) (quoting *Meier Co. v. Albany Novelty Mfg. Co.*, 236 F.2d 144, 146 (2d Cir. 1956)).

[54] *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 711-712 (9th Cir. 2004).

Richard C. Wolfe *is a partner with Wolfe & Goldstein in Miami. He is a former certified public aaccountant and past chair of The Florida Bar Entertainment, Arts and Sports Law Section.*

Serona Elton *is an assistant professor at the University of Miami's Frost School of Music in the music business and entertainment industries program. Previously, she was the vice president of mechanical licensing and repertoire data services for EMI Recorded Music, North America. She is also an attorney licensed in New York and Florida.*

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