

[IP Law Daily, COPYRIGHT—S.D.N.Y.: COVID-19 crisis did not warrant new damages trial in music infringement dispute, \(Nov. 17, 2020\)](#)

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By Thomas Long, J.D.

Although the jury's "low" award disappointed publishers who owned copyrights in songs infringed in recorded performances made available online, nothing indicated that the trial was a "miscarriage of justice."

The onset of the COVID-19 crisis did not warrant granting a new damages trial to several music publishing companies who accused the operators of an online marketplace of engaging in copyright infringement by making recordings of iconic live concert performances available online for downloading and streaming, the federal district court in New York City has decided. After a nine-day trial, on March 12, 2020, a jury awarded the plaintiffs \$189,500 in statutory damages for infringing 197 works, but the plaintiffs contended that the trial was fundamentally unfair because the jury was unable to deliberate as the pandemic was worsening in New York. The court denied the plaintiffs' motion for a new damages trial, holding that the trial was not fundamentally unfair. In the court's view, there was nothing to indicate that the jury "took the path of least resistance" in reaching a low damages figure, or that the jury's purported concerns about the pandemic caused the verdict to be a "miscarriage of justice." However, the court granted the plaintiffs' motion for an award of attorney fees, although it reduced the amount of the award by 60 percent, arriving at a fee award of about \$2.4 million ([ABKCO Music, Inc. v. Sagan](#), November 13, 2020, Ramos, E.).

The plaintiffs are a collection of six groups of music publishers who claim to own or hold exclusive licenses in the copyrights to approximately 197 musical compositions. The collection contained the performances of The Rolling Stones, The Who, the Grateful Dead, Willie Nelson, Ray Charles, Aretha Franklin, and Carlos Santana, among others. Defendants William E. Sagan, Bill Graham Archives, LLC, and Norton, LLC acquired mechanical licenses to the works. The defendants reproduced those recordings principally in digital format and made them available for mass consumption through digital download and streaming services through the defendants' websites, including the Music Vault channel on YouTube. In a complaint filed in May 2015, the plaintiffs claimed that exploitation of the recordings infringed their copyrights in the works. In March 2018, the court [determined](#) on summary judgment that the defendants held no valid licenses authorizing the reproduction and distribution of the works, and it held that the defendants were liable for willful infringement of 167 works. At trial, the jury found that infringement of the remaining 30 works was not willful.

The trial began on March 2, 2020, and coincided with the beginning of the COVID-19 pandemic crisis in the United States. During the course of the trial, numbers of COVID-19 cases increased significantly, and on March 9, Mayor Bill de Blasio declared a state of emergency in New York City. On March 12, the final day of the trial, a juror ("Juror 5") requested to speak with the court about the pandemic and expressed his and other jurors' concerns and requested that the parties expedite the process of conducting the damages trial. Juror 5 was assured that safety precautions were being taken, and no cause was found for his dismissal. The case went to the jury that afternoon, and no party raised any objections relating to the COVID-19 pandemic or its impact on the jury's deliberations. The jury returned a verdict before the end of the day.

Motion for a new trial. The plaintiffs did contest the fact that the damages awarded were within the statutory range permitted by the Copyright Act, and they asserted no errors of law, instead contending that the jury's inability to reasonably deliberate under the circumstances of the emerging pandemic crisis made the trial fundamentally unfair. They pointed out the discrepancy between the length and complexity of the trial—about nine days with 12 witnesses and 326 exhibits—and the jurors' deliberation time of less than an hour. They also noted that the jury awarded them either \$1,000 or \$750 per work in statutory damages, which were very

low amounts relative to the plaintiffs' expectations. The plaintiffs pointed to Juror Five's concerns about the worsening COVID-19 pandemic.

The court rejected the plaintiffs' contention that the length of the trial might have affected the propriety of the jury's short deliberations. The court was not convinced that the jury was so eager to leave that they must have deliberated with insufficient care. Unlike the court in a case cited by the plaintiffs in support of their position, the court in this case had not applied any time pressure to the jury, and in fact told jurors "you can stay as long as you wish." Also, the court said that the jury had been properly instructed to use its discretion to award damages within the statutory range.

The plaintiffs did not persuasively show a connection between the potential impact of the pandemic and the relatively low amount of the award. The jury could just as easily have settled on a *higher* damages award, the court said. Nothing indicated that the low award was a result of the jury taking the "path of least resistance."

Finally, the court held that Juror Five's comments did not provide a basis for a new trial. Juror Five explicitly told the court that "I'm not trying to get a hung jury. I want to do my job. I want to do my duty. So does everyone in this room, and we plan on doing it fairly." No party sought to exclude Juror Five, which would not have prevented the trial from going forward. Thus, said the court, there was no basis to find that the jury's verdict was a "miscarriage of justice."

The motion for a new trial was denied.

Attorney fees. The plaintiffs sought an award of attorney fees under Section 505 of the Copyright Act as prevailing parties in the litigation. The fact that the damages award was below the plaintiffs' expectations did not mean that they weren't prevailing parties, the court explained; they prevailed on the merits on each asserted count of infringement, and the court found that most acts of infringement were willful. The court determined that the plaintiffs were entitled to a fee award based on (1) a limited amount of unreasonable behavior by the defendants; and (2) the large number of works found to be willfully infringed.

With respect to the first reason, the court noted that the defendants failed to proffer any admissible evidence supporting their claim that numerous artists in this case had consented to the recording and exploitation of their concert performances in the first place. This issue was important, because without such permission there could be no valid mechanical license for a performance. According to the court, the record showed that the defendants had reason to doubt that they had received any consent from artists when they first purchased the works. Even if they had come forward with evidence of consent, there were other problems with the mechanical license defense, in particular the question of whether the purported mechanical licenses for audiovisual recordings were within the statutory definition. The defendants' insistence that there was valid artistic consent "positioned the parties needlessly far apart on a foundational issue," weighing in favor of a fee award.

With respect to the second reason, the court noted that the large number of works infringed implicated copyright law's goals of compensation and deterrence. The court said that there was "voluminous, undisputed record evidence demonstrating that Defendants were on notice that the recordings they acquired lacked the consents and authorizations necessary to exploit them, both from performing artists and the copyright holders in the songs."

However, the court decided to reduce the award to the plaintiffs by 60 percent, based on the relative financial strength of the parties and the disparity between the fee award and the damages awarded at trial. The plaintiffs requested over \$6 million in fees; the court determined that an award of approximately \$2.4 million was reasonable.

This case is [No. 1:15-cv-04025-ER](#).

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Companies: ABKCO Music, Inc.; Colgems-EMI Music, Inc.; EMI Algee Music Corp.; Norton LLC

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