Neutral Citation Number: [2021] EWHC 932 (IPEC) (Ch)

Case No: IP-2017-000178

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY ENTERPRISE COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20 April 2021

Before:

Ian Karet (sitting as a Deputy High Court Judge)

- -

Between:

F.B.T. Productions, LLC	**Claimant**
- and –	
Let Them Eat Vinyl Distribution Limited	**Defendant**

- -
- -

Jamie Muir Wood (instructed by **Simons Muirhead & Burton LLP**) for the **Claimant**
Richard Colbey (instructed by **RafterMarsh UK**) for the **Defendant**

Hearing date: 9 March 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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IAN KARET (Sitting as Deputy High Court Judge)

Ian Karet:

Introduction

1. This is the trial of quantum in a claim for copyright infringement following the judgment on liability delivered by HHJ Hacon on 2 April 2019 ([2019] EWHC 829 (IPEC)).

2. As at the liability trial, Jamie Muir Wood appeared for the Claimant ("FBT") and Richard Colbey for the Defendant ("LTEV"). The trial was held remotely due to the Covid19 pandemic.

3. FBT brought the claim against LTEV and a second company, Plastic Head Music Distribution Limited ("Plastic Head"), alleging infringement of the copyright in the first album "Infinite" (the "Work") by Marshall Bruce Mathers III ("Eminem"). The Work was first released on vinyl and cassette in 1996. The claim covered both vinyl and CD formats of the Work. The judge found that LTEV infringed the copyright in the Work by making vinyl copies of the album. Neither of the Defendants was liable for any of the secondary acts of infringement pleaded, namely importing, offering for sale and selling copies of the album. The judge accepted that the Defendants neither knew nor had reason to believe that the vinyl and CD copies of the Work sold by Plastic Head were infringing copies of another party's copyright work.

4. LTEV made 2,891 vinyl copies, all of which were supplied to and distributed by Plastic Head. Distribution of vinyl copies continued until 9 October 2016. Plastic Head also sold CDs obtained from a business known as Boogie Up Productions which was based in the US and run by a Mr David Temkin. Mr Temkin had advised the Defendants that he had the right to license vinyl format copies of the album.

5. On 5 December 2016 FBT's solicitors sent a letter before action to LTEV. On 12 January 2017 Plastic Head withdrew from sale the CD copies of the Work supplied by Boogie Up. Advertising and marketing of the Work by the Defendants came to an end.

6. The Claimant elected an inquiry into damages and now claims damages on three bases:

    a) the loss of an opportunity to license a third party to exploit the Work (and various tracks comprised in the Work);

    b) the losses flowing from the licence the Claimant would have offered the Defendant for the exploitation of the Work; or

c) a reasonable royalty for the actual sales made by the Defendant based on the notion of a willing licensee/willing licensor negotiation.

7. FBT's Amended Points of Claim make a claim in respect of 2,000 copies of the Work which it would have sold for US$50. The release of the album would have been preceded by the release a series of 12-inch vinyl singles of re-mastered tracks from the Work. Each of the singles would have sold for US$20.16, which was chosen to refer to the year 2016. FBT claims that it intended to license a third party to manufacture and sell the new vinyl copies of the Work, retaining 90 per cent of the revenue, matching the split for a digital release it agreed.

8. The Claimant also claimed that it had lost the opportunity to be involved in the making of a full-length documentary about the re-issue of the Work.

9. The total claimed is £288,209, based on the currency conversion rate on 27 August 2020.

10. The parties had agreed a list of issues set out in orders made by HHJ Hacon on 6 March 2020 and 13 January 2021. Those issues centred on the loss of an opportunity, as described above. At trial the issues of loss of a licence fee and a notional royalty were also argued.

The witnesses

11. At trial there were four fact witnesses and two experts. Those witnesses who were in the United States of America (Mr Jampol, Mr Martin, Mr Levine and Mr Temkin) gave evidence very late at night or very early in the morning, and in order to accommodate the various time zones the usual order was varied slightly without an impact on the evidence overall.

12. FBT's main witness was Joel Martin. He is the manager of FBT and manager of business affairs for the Bass Brothers, the producers of the Work. He is based in the US and gave evidence very early in his morning. Neil Levine gave evidence for LTEV about the development of the business plan for the anniversary release of the Work.

13. The main witness for the Defendant was Stephen Beatty. He is the owns LTEV and is a shareholder in Plastic Head. He is also the Managing Director of both companies. I also heard evidence for the Defendant from David Temkin who had purported to grant a licence to the Work to LTEV.

14. The Claimant's expert was Jeffrey Jampol. He is based in California and gave evidence very late at night. The Defendant's expert was Adam Velasco. He is based in London. Both experts gave helpful background evidence about the

market for re-issues of old works, the market for vinyl records, who might collect such records and pricing.

FBT's plans for the 20th Anniversary release

15. FBT's main claim is for the loss of an opportunity to offer a series of vinyl records of singles taken from the Work and the Work itself. Mr Martin explained this claim as follows.

16. The Work was recorded by FBT and was released on 12 November 1996 as 250 cassettes and 250 vinyl records. It was not a great success. Eminen's second and third records, the "Slim Shady EP" and the "Slim Shady LP" were much more successful, and he is now a very famous artist.

17. There had been a 10th anniversary issue of "Slim Shady" in 2009. FBT wanted to make something of the 20th anniversary of the Work and began to plan that sometime in 2016. There was no evidence about when exactly the planning started. However, timing was important because the first track had to be released in November 2016 and everything needed to be ready for that.

18. In August 2016 Mr Martin engaged Mr Levine to produce a marketing plan for the 20th anniversary edition of the Work. It had not been released since 1996 because it contained unlicensed samples taken from other copyright material. The plan was to remove that material for the re-issue. On 25 August 2016 Mr Levine produced a plan for the release of a 12-inch vinyl picture disc "fan driven piece" together with associated merchandise, as well as a download and streaming versions. The idea was to appeal to Eminem's fan base.

19. Mr Martin said that FBT's plan went further than this. It was to make a digital and physical release of the title track followed by 5 or 6 further tracks from the album. These further single releases would be spaced about six weeks apart to keep the momentum going. The digital release of the further tracks would be accompanied by a limited physical vinyl release. Once the singles had been released, the plan was to release an album which would either be a re-release of the original Infinite album or a new compilation of the various re-mixed singles. Fans would have the choice to purchase the tracks as singles or altogether. The album would have been released on 12-inch vinyl and would not have been an exact repeat of the 1996 album. It would have been an expanded version including bonus tracks, *a cappella* versions and freestyles.

20. On 4 August 2016 a vinyl copy of the LTEV version of the Work was found in a record store in Detroit and drawn to FBT's attention. It was in LTEV packaging including a label on the cover which said "LTEV" and an LTEV product number. Mr Martin said that FBT was "astounded" and "completely

blindsided" by this and that it called into question the viability of the vinyl release of the Work. He was particularly concerned that fans would mistake the LTEV product for the proposed reissue. The original tapes of the Work would not have been used for LTEV's copies which would have been a lower quality product.

21. An annex to the Amended Points of Claim shows that both genuine and a variety of copy versions of the Work were at that time available on vinyl. FBT's letter before action of 5 December 2016 attached a print-out from Plastic Head's website that showed that FBT's version was marked with an "LTEV" product number. That also indicated that it was not an authentic pressing.

22. Mr Martin said that he had made oral arrangements for a vinyl pressing with a contractor he had known for many years and with whom he dealt by telephone and not in writing. Due to his concerns he put the pressing of the vinyl on hold on the basis that he could return to it up to 4-6 weeks before it was due out on the anniversary in November 2016.

23. By an agreement made on 9 November 2016, FBT licensed AWAL Digital Limited, a subsidiary company of Kobalt Music Group, to distribute the title track digitally, for example on platforms such as Spotify and Apple Music.

24. That agreement was titled "Digital Distribution Agreement" and granted exclusive rights to digital distribution worldwide. The revenue earned by AWAL from exploitation of the digital works delivered by FBT was to be split 90/10 between FBT and AWAL.

25. Mr Martin was not able to say when he took the decision not to proceed with the vinyl release. He said that it followed the 4 August discovery of the LTEV record. It seems, however, that the decision was taken in late October or early November. Mr Martin said that FBT's plans were not firm at the point that the vinyl project was abandoned.

26. Mr Levine's evidence was as follows. He had worked with Mr Martin for over 20 years, advising on marketing. Mr Martin had contacted him in 2016 about the reissue of the Work. An email exchange between them showed a conversation about producing the plan in August 2016, with Mr Martin following up on 24 August. Mr Levine sent the business plan to Mr Martin on 25 August 2016.

27. Mr Levine's plan focused on keeping the re-issue "super cool and exclusive". He thought fans would be very excited by this. FBT intended to produce vinyl as late as the second half of October 2016 (which was still in time for the November anniversary). As part of the publicity of the project for the re-issue Rolling Stone magazine published an interview with Jeff Bass of FBT on 17

November 2016. Mr Levine said that this interview was probably given about a month before it was published. The article refers to a re-mix of the Work with no samples in it, and it says that new re-mixes of some tracks would appear on digital services and limited-edition vinyl.

28. Mr Levine explained that his marketing plan was a proposal and was not firm. Some of his ideas would have required licences of merchandising from third parties which were not obtained.

29. Mr Levine understood that the digital release of the title track had already been scheduled for release when the decision was made not to proceed with the vinyl project. That indicated that the decision not to release vinyl was taken in late October or early November 2016.

30. On 17 November 2016, FBT made a digital release of a re-mastered version of the title track "Infinite" from the Work. This digital release was a single track that was only available for streaming or mp3 download. A documentary was released on YouTube that referred to the anniversary. It referred to the digital release and was not used to promote physical sales.

31. FBT purchased a further copy of the LTEV release in late November 2016, and it appeared that this was for use in legal proceedings. The letter before action included a screenshot of the Plastic Head website which showed the LTEV vinyl record was for sale at £18.50.

32. There was some debate about the prices that might have been charged for the vinyl records had they been released. Mr Martin's evidence was that the singles would have been priced at US$20.16 (signifying the year) and that the album would have been US$50. He said that FBT would have been able to keep 90 per cent of that on the basis that this was the split that FBT obtained on the digital release of the Work. Mr Martin was not clear, however how the pricing would have worked in practice. If retailers had charged $20.16 then that would not have left anything for a distributor, and it became clear that this price was intended to be the price that would have been charged to end customers rather than the price at which FBT would have sold to distributors. Mr Martin was also not clear that the profit split that could be obtained for a digital release, where there are no manufacturing overheads, could have been obtained for a vinyl release.

33. Mr Martin's evidence was that FBT would not have granted a licence to LTEV because LTEV was not a sufficiently reputable or substantial company.

LTEV's issue of the Work

34. Mr Beatty's evidence was as follows. LTEV is a company that specialises in licensing for re-release on vinyl recordings by successful artists. It has been

in business for 20 years and has licensed the works of several well-known artists. Re-issues of even highly successful albums may only sell a few thousand copies.

35. In December 2014 LTEV agreed to take a licence from Boogie Up Productions, signed for the grantor by Mr Temkin as "Shay Boogs". The licence agreement is titled "Exclusive Licence Agreement" and covered three albums, including the Work. It provided for an advance payment of £1,000 for the three albums, and a payment of £1.50 for each record sold. The first £1,000 of the royalty would be set off against the advance. LTEV was responsible for MCPS payments. The term was 5 years and the territory was the UK, "Eire and the whole of Europe" and Japan.

36. The costs of manufacturing a 12-inch vinyl disc and cover were £2.99 per disc. LTEV had paid £1.50 content licence to Boogie Up, giving a cost of production of £4.49, and £0.79 was set aside to cover MCPS fees, should MCPS make a claim under the relevant copyrights.

37. LTEV sold 2,891 copies of the Work at a price to the dealer at £7.75 per unit, giving a profit of around £2.50 per unit. LTEV's total profit was thus £7,227.50.

38. Mr Beatty did not accept that FBT's original tapes of the Work would have been needed to make a good quality product, but in the event the quality of the LTEV product does not appear relevant to the calculation of damages for infringement.

39. Mr Temkin said that the LTEV product was not exported from the UK to the United States, and it remains unclear how the two LTEV copies of the Work purchased in Detroit arrived there.

Expert evidence

40. Mr Jampol is a highly experienced record producer in the United States. His company works with a number of very well-known artists and he has experience of anniversary releases. He gave evidence on the basis of instructions that the vinyl releases would have been priced at US$20.16 for a single taken from the Work and US$50 for the Work. He was not asked to address what royalty might have been paid for exploitation of the work.

41. Mr Jampol said that the release of a series of records in this way would have appealed to Eminem fans. He had seen a picture of the LTEV record and noted that it had a picture cover. Unauthorised copies might sometimes be sold in blank covers. He thought that this might deceive purchasers. He did not comment on the "LTEV" markings. He was, however, clear that in the market for such products authenticity is critical to purchasers. They would know that

there were always unauthorised copies on the market, but these were not a substitute for genuine releases. A purchaser would thus be careful to buy only authentic goods.

42. Mr Jampol said that US$50 was a high price for an album. An anniversary release might more usually be priced at $24.

43. FBT would in Mr Jampol's view have been able to command 75per cent-90per cent of the revenue achieved from sales under a licencing agreement with a distributor.

44. Mr Velasco has significant experience in the UK in the re-issue of albums made under licence. In his view US$20.16 was a very high price for a 12-inch single and would attract very specific purchasers. The market for 12-inch singles in the UK was tiny and in the UK formed around 0.01per cent of singles sales. The proposed album price of US$50 was very high, not least because the intention was that fans would buy all the singles and then the album and so end up paying over US$170 in total for the re-release of the Work. He could also not see why a decision not to publish an album would lead to losses on a documentary. If the documentary contained new material then it would be of interest to fans.

45. Mr Velasco's evidence was that a content owner would usually receive around 26-28per cent of the UK published price to dealer, which is just over 50per cent of the retail price. He thought that the price of an album to dealers in the UK would generally be £4.99 to £6.99, which would give retail prices of £8.99 to £12.99.

46. He said that a 90/10 revenue split which was agreed for the digital issue was implausible for a physical release through dealers because it would not have made economic sense for anyone but FBT to be involved.

The legal principles

47. The parties agreed that the following principles applied to FBT's claim.

Loss of an opportunity

48. In *SDL Hair Ltd* v. *Next Row Ltd* [2014] EWHC 2084 (IPEC), HHJ Hacon set out the approach to a claim for damages for a lost opportunity, at paragraph 31:

> (1) A successful claimant is entitled, by way of compensation, to that sum of money which will put him in the same position he would have been in if he had not sustained the wrong, see *Livingstone v Rawyards Coal Co.* (1880) 5 App.Cas., 25 per Lord Blackburn at 39.

(2) The claimant has the burden of proving the loss, see *General Tire and Rubber Company v Firestone Tyre and Rubber Company Limited* [1976] RPC 197, at 212.

(3) The defendant being a wrongdoer, damages should be liberally assessed but the object is to compensate the claimant, not punish the defendant, see *General Tire* at p.212.

(4) The claimant is entitled to recover loss that was (i) foreseeable, (ii) caused by the wrong and (iii) not excluded from recovery by public or social policy, see *Gerber Garment Technology Inc v Lectra Systems Ltd* [1997] RPC 443, at 452.

(5) In relation to causation, it is not enough for the claimant to show that the loss would not have occurred but for the tort. The tort must be, as a matter of common sense, a cause of the loss. It is not necessary for the tort to be the sole or dominant cause of the loss, see *Gerber* at p.452.

(6) An inquiry will generally require the court to make an assessment of what would have happened had the tort not been committed and to compare that with what actually happened. It may also require the court to make a comparison between, on the one hand, future events that would have been expected to occur had the tort not been committed and, on the other hand, events that are expected to occur, the tort having been committed. Not much in the way of accuracy is to be expected bearing in mind all the uncertainties of quantification. See *Gerber* at first instance [1995] RPC 383, per Jacob J, at 395-396.

(7) Where the claimant has to prove a causal link between an act done by the defendant and the loss sustained by the claimant, the court must determine such causation on the balance of probabilities. If on balance the act caused the loss, the claimant is entitled to be compensated in full for the loss. It is irrelevant whether the court thinks that the balance only just tips in favour of the claimant or that the causation claimed is overwhelmingly likely, see *Allied Maples Group v Simmons & Simmons* [1995] WLR 1602, at 1609-1610.

(8) Where quantification of the claimant's loss depends on future uncertain events, such questions are decided not on the balance of probability but on the court's assessment, often expressed in percentage terms, of the loss eventuating. This may depend in part on the hypothetical acts of a third party, see *Allied Maples* at 1610.

(9) Where the claim for past loss depends on the hypothetical act of a third party, i.e. the claimant's case is that if the tort had not been committed the third party would have acted to the benefit of the claimant (or would have prevented a loss) in some way, the claimant need only show that he had a substantial chance, rather

than a speculative one, of enjoying the benefit conferred by the third party. Once past this hurdle, the likelihood that the benefit or opportunity would have occurred is relevant only to the quantification of damages. See *Allied Maples* at 1611-1614.

49. *Allied Maples* was considered by Nugee J (as he then was) in *Wellesley Partners LLP* v. *Withers* LLP [2014] EWHC 556 (Ch):

> "(4)…there are …cases where the claimant does not seek to establish as a matter of causation that he has lost the opportunity of acquiring a specific benefit which is dependent on the actions of a third party; rather, he claims he has lost the opportunity to trade generally, and claims the loss of profits that he would have made."

50. The Claimant says that its loss is of the type identified by Nugee J in *Wellesley* - the loss of a chance to trade generally, rather than the loss of a particular chance.

Notional Licence

51. In *Henderson* v. *All Around the World Recordings Ltd* [2014] EWHC 3087 (IPEC), HHJ Hacon to set out the law regarding the approach to be taken in respect of a notional licence agreement. The principles are summarised as follows:

> "18. *In Force India Formula One Team Limited v 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch); [2012] RPC 29 Arnold J considered *Wrotham Park* damages, i.e. of the type awarded in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798. In *Force India* damages for breach of a restrictive covenant in a contract were taken to be the amount of money which could reasonably have been demanded by the claimant for a relaxation of the covenant. Arnold J identified the following principles (at [386]):
>
> "(i) The overriding principle is that the damages are compensatory: see *Attorney-General v Blake* at 298 (Lord Hobhouse of Woodborough, dissenting but not on this point), *Hendrix v PPX* at [26] (Mance L.J., as he then was) and *WWF v World Wrestling* at [56] (Chadwick L.J.).
>
> (ii) The primary basis for the assessment is to consider what sum would have [been] arrived at in negotiations between the parties, had each been making reasonable use of their respective bargaining positions, bearing in mind the information available to the parties and the commercial context at the time that notional negotiation should have taken place: see *PPX v Hendrix* at [45], *WWF v World Wrestling* at

[55], *Lunn v Liverpool* at [25] and *Pell v Bow* at [48]–[49], [51] (Lord Walker of Gestingthorpe).

(iii) The fact that one or both parties would not in practice have agreed to make a deal is irrelevant: see *Pell v Bow* at [49].

(iv) As a general rule, the assessment is to be made as at the date of the breach: see *Lunn Poly* at [29] and *Pell v Bow* at [50].

(v) Where there has been nothing like an actual negotiation between the parties, it is reasonable for the court to look at the eventual outcome and to consider whether or not that is a useful guide to what the parties would have thought at the time of their hypothetical bargain: see *Pell v Bow* at [51].

(vi) The court can take into account other relevant factors, and in particular delay on the part of the claimant in asserting its rights: see *Pell v Bow* at [54]".

The Court of Appeal in *Force India* ([2013] EWCA Civ 780; [2013] RPC 36) did not dissent from Arnold J's summary of the law (at [97]).

19. *Wrotham Park* damages, though they are for breach of contract, are in all relevant respects the same as those I have to consider under this head, so the foregoing principles set out by Arnold J apply. In the inquiry as to damages for infringement of trade marks in *32Red Plc v WHG (International) Limited* [2013] EWHC 815 (Ch), Newey J's assessment was by consent also on the basis of willing licensor and willing licensee. Newey J endorsed the principles identified by Arnold J and expanded on them as follows:

(vii) There are limits to the extent to which the court will have regard to the parties' actual attributes when assessing user principle damages. In particular

(a) the parties' financial circumstances are not material;

(b) character traits, such as whether one or other party is easygoing or aggressive, are to be disregarded [29]-[31].

(viii) In contrast, the court must have regard to the circumstances in which the parties were placed at the time of the hypothetical negotiation. The task of the court is to establish the value of the wrongful use to the defendant, not a hypothetical person. The hypothetical negotiation is between the actual parties, assumed to bargain with their respective strengths and weaknesses [32]-[33].

(ix) If the defendant, at the time of the hypothetical negotiation, would have had available a non-infringing course of action, this is a matter which the parties can be expected to have taken into account [34]-42].

(x) Such an alternative need not have had all the advantages or other attributes of the infringing course of action for it to be relevant to the hypothetical negotiation [42].
(xi) The hypothetical licence relates solely to the right infringed [47]-[50].
(xii) The hypothetical licence is for the period of the defendant's infringement [51]-[52].
(xiii) Matters such as whether the hypothetical licence is exclusive or whether it would contain quality control provisions will depend on the facts and must accord with the realities of the circumstances under which the parties were hypothetically negotiating [56]-[58].

52. In *32Red* Newey J reviewed a number of agreements that might be comparable to see whether they assisted in the assessment of a notional licence.

Discussion

Loss of opportunity

53. Mr Muir Wood submits that loss of an opportunity raises a subjective rather than an objective question. FBT's evidence is thus critical to the assessment. Mr Martin had explained his plans, as described above; as a result of a member of his team purchasing a copy of the Work on vinyl that originated from LTEV FBT discontinued it plans to release the Work on vinyl. The court should consider only the evidence of Mr Martin and Mr Levine on this matter and not the observations of other witnesses who were not involved in that decision. FBT's decision led to a lost opportunity to trade generally, rather than the loss of a specific benefit based on the actions of a third party. FBT was not relying on a particular third party to buy its goods but, instead, was reliant on the opportunity to market copies of singles and, subsequently, an album, to members of the public generally, using a third party as the conduit for those sales.

54. Adopting for these purposes the approach Mr Muir Wood proposes, I do not accept that LTEV's infringing activities led to a loss of an opportunity for FBT. FBT found the LTEV copy of the Work on 4 August 2016. I accept that Mr Martin was, as he said, "astounded" and "completely blindsided" by this. Given that, I do not accept the discovery led FBT to abandon its plans, because they appear to have continued as before. Later in August Mr Martin asked Mr Levine to devise a marketing plan indicating that FBT intended to continue with a re-issue. Mr Levine was not at the time aware of the LTEV disc or the reasons for the cancellation. Plans for an issue of vinyl continued at least up to the date when Jeff Bass gave his interview to Rolling Stone. That

was likely to have been in the second half of October 2016. FBT's actions were inconsistent with a party that was not proceeding.

55. There were several unlicensed copies of the Work on the market, of which the FBT version was but one. The project Mr Martin conceived was intended to be, as Mr Levine put it, "super cool and exclusive", and I do not accept that FBT thought LTEV's release would affect that. Mr Jampol was clear that in the re-issue market authenticity is critical. A version such as that made by LTEV was clearly marked as coming from a third party and not FBT.

56. Applying the test set out in *SDL Hair*, FBT has not shown that the tort was a cause of any loss.

57. Similarly, LTEV's acts of infringement did not cause the loss of an opportunity to make a full-length documentary.

58. I conclude that the claim for damages on the basis for a loss of opportunity in relation to vinyl copies or a documentary does not succeed.

Loss of licence fees

59. FBT's second basis for damage is losses flowing from the licence that FBT would have offered the Defendant for the exploitation of the Work.

60. This can be dealt with shortly on the basis that it was FBT's evidence that it would not have offered a licence to LTEV because it was not an attractive potential licensee.

Notional royalty

61. The third basis on which FBT puts its claim for damages is a reasonable royalty for the actual sales made by the LTEV based on the notion of a willing licensee/willing licensor negotiation.

62. Applying the principles set out in *Henderson*, Mr Muir Wood submitted that the notional licence must reflect the position between FBT and LTEV and the number of works LTEV produced. The agreement by which Boogie Up granted rights to LTEV was not a relevant comparable agreement. The reasons for that included that the purported licensor in fact had no rights to grant the licence and that was not for the Work alone.

63. Mr Muir Wood noted Mr Velasco's evidence that the published to dealer price is generally half the retail price. Accordingly, the royalty figure should be based on half the proposed US$50 retail album price that FBT was aiming for (i.e. US$25) rather than the price that LTEV sold the record for (i.e. £7.75).

64. Mr Muir Wood submitted that, although the Boogie Up agreement was not a relevant comparable, the £1.50 fee which LTEV agreed to pay to Boogie Up was relevant. It amounted to a royalty rate of 37.5 per cent which was well over the 26-28per cent which Mr Velasco had suggested as a 'general rule'. Mr Martin and Mr Jampol had given evidence that a royalty rate of 75-90 per cent would be achievable, with 90per cent seen in the digital licence for the single that was in fact released.

65. Accordingly, a royalty rate should be based on LTEV selling the records at a published to dealer price of ~US$25 and paying a royalty of 75-90 per cent to FBT after deducting manufacturing costs of £2.99 and the MCPS contribution.

66. Mr Colbey submitted that the hypothetical royalty should be applied to the price to the dealer and not the retail price. The LTEV licence from Boogie Up was comparable because even though it turned out not to confer valid rights, LTEV at least thought it did.

67. Mr Colbey said that the 37.5 per cent figure put forward by FBT as flowing from the Boogie Up agreement was a convenient basis for the proportion of the £7,227.50 profits that LTEV had made. Applying that percentage to the profits would give damages on a notional basis of £2,710.31.

68. The principles in *Henderson* require the court to consider the right infringed and the time over which that took place. In this case the hypothetical negotiation would have been for a licence to make 2,891 copies of the Work in the United Kingdom.

69. The licence which LTEV took from Boogie Up grants a licence for vinyl production of the Work in the UK. The licence left LTEV the determination of a price to dealer. It sets a sum to be paid per disc, which is a convenient way to account. To that extent it is a useful comparable. However, it was granted by a grantor without valid rights. and it did not apply a royalty rate on sales by LTEV.

70. The AWAL digital licence is not a helpful comparable. The revenue split does not take into account the need to manufacture vinyl discs and create profit at each stage in the chain, and the 90/10 split does not give a valid comparable.

71. The £1.50 per record fee in the Boogie Up licence is within the range which Mr Velasco's gave for rates (26-28 per cent) of price to dealers and those prices (£4.99-£6.99).

72. I prefer Mr Velasco's evidence on the likely rates and prices in this market over Mr Jampol's. Mr Velasco has experience in the UK market. Mr Jampol's

comparison with the AWAL digital licence for the title track of the Work was not convincing.

73. The damages should thus be calculated for a licence to make 2,981 copies of the Work. The notional licensor would know that the licensee had experience in market with a number of re-issues of significant artists. The licence would be for the UK.

74. The licence would probably have been for a unit price per record. (If it had been a percentage of the price to dealer that would have been assumed so as to give a similar royalty.) Given the nature and reputation of the licensor (with valid rights) and the that this was a special anniversary disc which might attract higher pricing, the notional licensee would have been prepared to pay more than the £1.50 agreed with Boogie Up and would be able to set a higher price to dealer to maintain profits. The licensor would have in mind a likely retail price for the album of about US$24, which Mr Jampol said was a starting price for albums.

75. Taking all this into account, the hypothetical fee would be £2.50 per disc.

76. This is equivalent to a rate of just over 32 per cent on the price to dealer of £7.75 that LTEV in fact charged Plastic Head. It is a little higher than the rate Mr Velasco indicated, but his figures were based on a lower price to dealers.

Conclusions

77. FBT's claims for loss of an opportunity in respect of plans to sell vinyl record and to make a film do not succeed. FBT would not in fact have granted a licence to LTEV for the infringements committed so that there is no loss of licence.

78. Damages should be assessed on the basis of a fee for a notional licence to make 2,981 infringing copies and are £7,452.50. That figure should bear appropriate interest.