

International reports

Music publishers score major victory in closely watched copyright case

[Baker Donelson - USA](#)
[E Scott Johnson](#)

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On April 9 2018 six music publisher groups secured a significant win in their long-running legal battle against Wolfgang's Vault, its owners and affiliates, when the District Court for the Southern District of New York granted summary judgment on the publishers' claim that the defendants had infringed copyrights in approximately 200 musical compositions in audio and audiovisual concert recordings offered as on-demand streams and digital downloads through the defendants' websites, including:

- wolfgangsvault.com;
- concertvault.com;
- musicvault.com; and
- daytrotter.com.

In a 54-page opinion, Judge Ramos granted summary judgment to the plaintiffs on their copyright infringement claims, including willful infringement of copyright in all audiovisual recordings, pre-1972 audio recordings and certain other recordings exploited by the defendants. With summary judgment on liability, the case will focus next on determining the damages amount. The Copyright Act allows plaintiffs to elect between actual damages and infringer's profits, or statutory damages of between \$750 and \$30,000 per infringed work, which may be increased up to \$150,000 for willfully infringed works.

National Music Publishers Association (NMPA) President David Israelite applauded the decision:

"Judge Ramos's opinion is a dramatic vindication for our members Sony/ATV and EMI Music Publishing, Warner/Chapel, ABKCO, peermusic, Spirit Music, and Iagem Music whose works have been willfully infringed by Wolfgang's Vault for years."

Wolfgang's Vault began operations in 2003 after its founder William Sagan purchased the archives of legendary concert promoter Bill Graham, which included:

- posters;
- handbills;
- concert tickets;
- t-shirts;
- memorabilia; and
- a treasure trove of high-quality audio and video recordings of live concerts.

Sagan continued to acquire concert recordings from other promoters and venue operators for many years. The collection includes concert performances by many iconic rock acts including:

- the Rolling Stones;
- the Allman Brothers Band;
- the Grateful Dead; and
- REM.

In 2005 the *Wall Street Journal* recognised the collection as possibly "the most important collection of rock memorabilia and recordings ever assembled in one business".

When the lawsuit was filed in 2015, Israelite issued a public statement regarding the significance of the case for its members, asserting that Wolfgang's Vault websites "have profited in large part because of the significant use of unlicensed music, primarily concert footage" and that "systematic copyright infringement cannot be a business model, and it is unfortunate that Wolfgang's Vault chose not to compensate all of the creators responsible for their content".

The judge's opinion includes a veritable primer on music licensing for platforms that stream music, including the technical requirements for securing compulsory licences under Section 115 of the Copyright Act. The defendants claim to have secured the licences required to offer on-demand streams of both audio and audiovisual recordings, disputing the plaintiffs' claim that concert videos require 'sync' licences. The



[E Scott Johnson](#)

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International reports

defendants claimed that they had acquired express permission from the artists and were not required to secure sync licences because the mechanical licences purportedly secured under Section 115 covered on-demand streaming of audiovisual recordings.

The plaintiffs asserted that audiovisual recordings are ineligible for compulsory mechanical licences under Section 115, which apply to making and distributing phonorecords as defined in the Copyright Act. The defendants argued that the statutory definition of phonorecords specifically references the material object in which the sounds are first fixed, and that an audiovisual recording is such a material object, thus meeting the statutory definition of 'phonorecord' and therefore subject to compulsory licensing under Section 115.

The court was not persuaded and quoted the statutory definition of phonorecords in its entirety, most notably: "material objects in which sounds other than those accompanying a motion picture or other audiovisual work are fixed". It noted that because audiovisual works are specifically excluded from the statutory definition of phonorecords, the defendants' audiovisual concert recordings were ineligible for Section 115 compulsory licensing.

The court further noted that while compulsory licences can be secured under Section 115 for audio-only recordings, only recordings that are lawfully fixed are eligible for the licence. To be 'lawfully fixed', among other things, defendants or their predecessors in title must have secured the musical performers' consent for the making and release as phonorecords of live recordings of their performances. The court concluded that the evidence did not support the plaintiffs' claim to having secured such consent and found that the documents that the defendants relied on, which granted certain exploitation rights from record companies associated with the featured artists, did not amount to evidence that the artists themselves had consented to the initial fixation of their performances decades earlier.

For pre-1972 recordings, which are not protected as sound recordings under the Copyright Act, the duplicator must obtain authorisation from the person or company that originally fixed the sound recording and that person or company must have made the fixation pursuant to a consensual or compulsory licence from the copyright owners of the musical compositions performed on the recording. The court found that the defendants had not met their burden of establishing that the pre-1972 concert recordings were first fixed or manufactured with the requisite licences.

The court observed that to obtain a compulsory licence for audio recordings under Section 115, a notice of intent to obtain a compulsory licence must be given before or within 30 days after making (and before distributing) the work to be licensed, and that timely notice is a pre-requisite for the licence. Because the notices of intent given by Wolfgang's Vault were sent after the recordings were first exploited, they did not comply with Section 115 of the Copyright Act and no valid licences were secured.

The court ruled that Sagan – as president, CEO and sole owner of Norton LLC (owner of Wolfgang's Vault) – was jointly and severally liable with the other defendants for the infringement and "deeply involved in the acquisition of the recordings at issue and the agreements that convey those recordings clearly disclaimed intellectual property rights and in many instances documented the licensing issues the collections presented". The judge held that Sagan "has the ability to supervise infringing activity and has a financial interest in that activity", and had even acknowledged "final decision-making authority".

The court stopped short of granting an injunction, stating that while the plaintiffs were harmed by the defendants, "that harm is not irreparable because [the plaintiffs] can be compensated." It further stated that:

"these licensing hurdles are not insurmountable. Defendants provide recordings of iconic songs and entertainers in a platform that makes them accessible to the general public. Licensing issues notwithstanding, the Court finds that the public's interest in having access to these recordings counsels against the imposition of a permanent injunction."

For further information please contact:

E Scott Johnson
Baker Donelson
www.bakerdonelson.com
Email: johnson@bakerdonelson.com
Tel: +1 410 685 1120



International reports

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