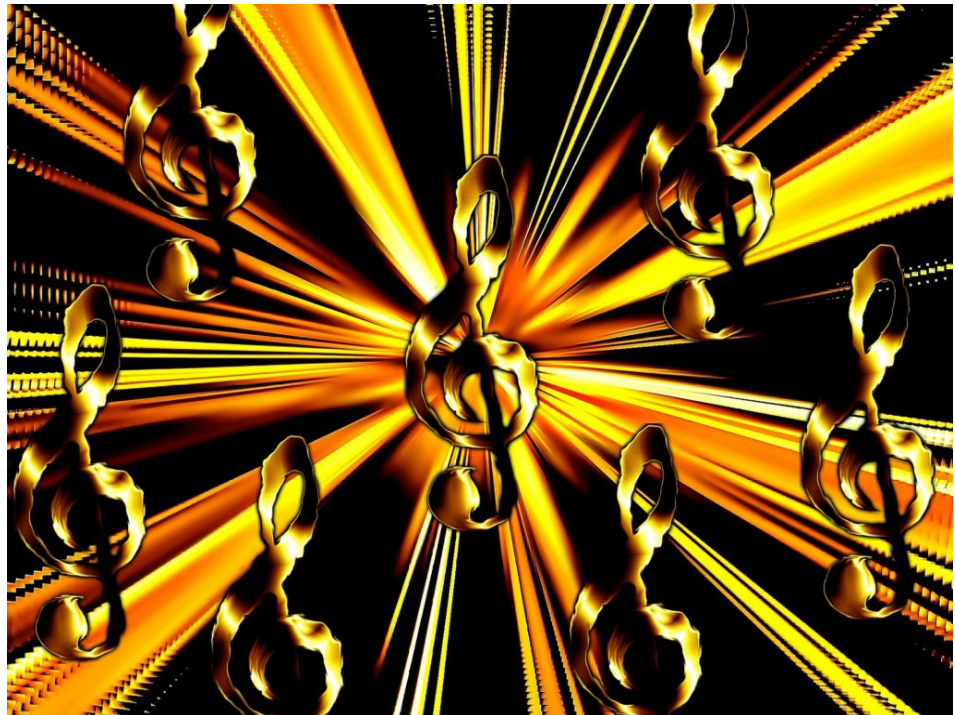


# Kluwer Copyright Blog

## Damages award proves golden for Spandau Ballet

Jeremy Blum, Sara Sefton (Bristows LLP) · Monday, March 4th, 2019

Recently there has been an increase in the number of damages hearings in the UK. The trend continues with a recent High Court case (*Reformation Publishing v Cruiseco Limited* [2018] EWHC 2761 (Ch)) where the band Spandau Ballet's management company sought compensation for unauthorised use of their copyright



against a company using two of their most famous songs (“True” and “Gold”) in marketing material. The Claimant owns the publishing rights in the music under a separate agreement with Gary Kemp, who was the author.

Infringement of the Claimant's copyright had already been determined and this particular hearing was concerned with the amount of damages that they were entitled to, calculated on the basis of a reasonable licence fee. The Claimants also sought additional damages under S97(2) of the Copyright, Designs and Patents Act 1988 (CDPA).

The decision provides a clear detailed summary of how damages in copyright infringement cases will be assessed and also highlights how notional licences will be construed.

It also provides an indication of the UK court's willingness to award additional damages in situations where the actual infringer is not necessarily the party behaving flagrantly, whilst also identifying what the court may consider when looking at whether or not to award these under S97(2) CDPA.

## Background

The first Defendant, CruiseCo Ltd, organises cruises and as part of their marketing for a ‘Back to the 80s’ trip they used the two Spandau Ballet recordings on a sizzle reel without permission. A third party agency was responsible for producing the reel on their behalf.

The clip was posted on the Defendant’s website and to a file sharing platform on 22 June 2017. A link to the clip on the platform was sent to a large number of UK travel agents (257), in an email encouraging them to share it.

After being contacted by the Claimant, the first Defendant took the sizzle reel down from their own website and asked travel agents not to use it on 26 June 2017. However, it was not removed from the file sharing platform for a year.

### *Duration of the infringement*

The key question for the purposes of assessing damages was how long the relevant infringement had continued for. This duration of infringement turned on how long the clip on the file sharing platform had been *made available to the public* under S20(2)(b) CDPA.

The Judge held that the availability of the video on the platform alone did not constitute communication to the public. However, providing the hyperlink to access that material did make said information available to the public. The question was therefore what counted as “*the public*.”

According to the Judge, the travel agents alone did not represent an indeterminate number of people and did not amount to “the public” under S20(2)(b).

There was an absence of direct evidence to show that the link had been sent to members of the general public, so the Judge rejected the Claimant’s contention that it was enough that the first Defendant had encouraged dissemination of the link.

As such, it was found that the period of infringement lasted 5 days and the Judge moved on to consider what a notional licence between the parties would look like.

### *The notional licence*

When assessing damages based on the ‘user principle’, which is how much a licence to use the copyright would cost, the court needs to set the parameters of how the hypothetical licence would be negotiated. Most of the terms of the hypothetical licence were already agreed between the parties. The outstanding points concerned the duration of the licence and its territorial scope.

The parties disagreed on whether the licence should be worldwide or limited to the UK and Australia. It was accepted that CruiseCo’s website was targeted at the UK and Australia, but that websites by their nature are accessible globally. It was also deemed that by encouraging travel agents to share the link, the sizzle reel may have ended up on other social media platforms which were not targeted at those UK or Australian audiences.

The Judge concluded that a hypothetical licence would therefore have been for internet use generally.

The Judge then had to decide whether the duration of the notional licence should be for the period

of infringement or the length of time that would have been agreed if a licence had been negotiated between the parties.

He considered the scope of a hypothetical licence for the purposes of assessing damages for copyright infringement should be informed by the duration of the infringement. Relying on a line of authorities applying the ‘user principle’, the Judge concluded that the duration of the notional licence was 5 days. It would be wrong *in principle* for a claimant to recover the same quantum of damages whether the infringement lasted 5 days or almost a year. He felt bound by previous authorities and concluded that the duration of the hypothetical licence must be informed by the period of the actual infringement.

The Judge considered that a reasonable *annual* licence fee for both songs would have been £155,000. However, a pro-rated fee for 5 days was not considered sufficient as there was substantial value in being associated with two iconic songs, even for a very short period. He concluded that taking 25% of the one-year licence fee struck a balance between the duration of the infringement and the fact that use of iconic songs would attract a substantial licence fee and therefore awarded damages of £38,750.

### ***Additional Damages***

On the issue of additional damages, it was held that whilst music licensing can be complicated, given the third party agency who created the sizzle reel had experience of the industry, it was likely to have understood the need for the clearance of both recording and publishing rights separately. The Judge considered that if the agency had been the infringer, their failure to obtain the correct clearances would have been sufficient to amount to flagrancy for the purposes of S97(2)(a). He considered their attitude to have been one of ‘couldn’t care less’.

Considering these circumstances, the Judge found that the third party was the agent of the first Defendant and therefore the flagrant conduct was imputed onto them. He awarded a further £25,000 in additional damages – bringing the total payable to £63,750.

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