

Insights: Industry Summaries

IP Industry Summary: “Whoomp! (There It Is)”: Fifth Circuit Determines Copyright Ownership of Popular Nineties Song after Decade-Long Battle

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In re Isbell Records, Inc., Nos. 13-40878, 14-40545, 2014 WL 7210778 (5th Cir. Dec. 18, 2014)

For over a decade, Alvertis Isbell and DM Records, Inc. have been engaged in a dispute over the ownership of the composition copyright for the song “Whoomp! (There It Is).” The Fifth Circuit has finally determined the true owner of the copyright, and in the process, it has addressed an interesting issue in copyright law: whether a partial owner of a copyright can recover the full amount of actual damages for infringement of the copyright. Under the circumstances of this case, the Court answered the question in the affirmative.

Alvertis Isbell was the president of Bellmark Records, a company that was “in the business of owning sound recordings.” Isbell also formed his own music publishing company, Alvert Music. The writers and producers of “Whoomp!,” a group called Tag Team, entered into a recording agreement with Bellmark Records. The recording agreement assigned fifty percent of the rights to “Whoomp!” to “Bellmark’s affiliated designee publisher.” The agreement also gave Bellmark’s affiliated designee publisher, among other rights, “the sole, exclusive worldwide and universal right to administer and exploit the copyrights and musical composition.”

When Bellmark filed for bankruptcy in 1997, DM Records bought its assets. Those assets included “all property of the company,” but no particular property was specified. DM began exploiting the composition copyright of “Whoomp!” upon purchasing Bellmark’s assets.

Isbell, doing business as Alvert Music, sued DM for copyright infringement in 2002 seeking a declaratory judgment regarding the ownership of the composition copyright of “Whoomp!” After a series of procedural events, including a dismissal and a reversal of the dismissal, the case finally went to trial in 2012. The district court ruled that Alvert Music was the “affiliated designee publisher” referenced in the recording agreement between Bellmark and Tag Team. Thus, Alvert Music owned fifty percent of the composition copyright of “Whoomp!,” and DM was liable for copyright infringement for its exploitation of the song after its purchase of Bellmark’s assets. The jury awarded Isbell approximately \$2 million in actual damages. This figure approximated the total amount of royalties that DM received from exploitation of the “Whoomp!” copyright.

DM appealed to the Fifth Circuit, raising several procedural issues. Among its arguments was an assertion that because Alvert Music was found to own only fifty percent of the copyright, it was entitled to, at most, fifty percent of the damages from the infringement. In a matter of first impression, the Court determined that a

partial copyright owner may recover 100% of damages from infringement of the copyright.

The Court distinguished this case from Second Circuit precedent that limits a copyright co-owner's damage award to its "proper share." *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F.2d 268 (2d Cir. 1944); *Manno v. Tenn. Prod. Ctr., Inc.*, 657 F. Supp. 2d 425 (S.D.N.Y. 2009) (citing *Edward B. Marks*, 140 F.2d 268 (2d Cir. 1944)). Here, there was evidence from which a jury could find that Isbell was entitled to 100% of the royalties but was responsible for accounting to the owner of the other half of the copyright, Tag Team, whereas the Second Circuit case dealt with non-joinder of a copyright co-owner and involved no evidence from which a jury could find that one co-owner was responsible for accounting to the other. Therefore, the Court affirmed the damages award to Isbell.

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