

CASE NO. 06-6294

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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BRIDGEPORT MUSIC INC. and WESTBOUND RECORDS, INC.,

Plaintiffs/Appellees,

vs.

BAD BOY ENTERTAINMENT, INC. itself and d/b/a BAD BOY RECORDS,  
BAD BOY RECORDS LLC, JANICE COMBS PUBLISHING, INC. d/b/a  
JUSTIN COMBS PUBLISHING and UMG RECORDINGS, INC. itself and  
its division UNIVERSAL RECORDS,

Defendants/Appellants.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE

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FINAL BRIEF OF DEFENDANTS/APPELLANTS  
BAD BOY ENTERTAINMENT, INC. itself and d/b/a BAD BOY RECORDS,  
BAD BOY RECORDS LLC, JANICE COMBS PUBLISHING, INC. d/b/a  
JUSTIN COMBS PUBLISHING and UMG RECORDINGS, INC. itself and  
its division UNIVERSAL RECORDS

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ORAL ARGUMENT REQUESTED

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from which damages began to run, May 4, 1998, and the date the verdict was rendered, March 17, 2006.

**IX. THE DISTRICT COURT ERRED IN AWARDING UNCONSTITUTIONALLY EXCESSIVE PUNITIVE DAMAGES.**

Punitive damages in the total amount of \$3,500,000 (R. 368, Jury Verdict on Punitive Damages, Apx. 246) are grossly excessive and should be vacated or at least reduced.

“The courts have been reluctant to grant punitive damages. This is especially true in copyright cases.” *Smith v. Little, Brown & Co.*, 273 F. Supp. 870, 873 (S.D.N.Y. 1967), *aff’d*, 396 F.2d 150 (2d Cir. 1968). “Punitive damages are of course a pure windfall to a plaintiff. They amount to a penalty against a defendant. They should be awarded only in an extreme case.” *Id.* at 874. “[Punitive damages] are ordinarily only awarded against a person ‘to punish him for his outrageous conduct.’” *Szekely v. Eagle Lion Films, Inc.*, 140 F. Supp. 843, 850-51 (S.D.N.Y. 1956). “[E]xemplary damages are not recoverable as a matter of right. The allowance of such an award is in the discretion of the trier of the fact where punishment is appropriate because of the malicious and wanton nature of the acts of which the defendant has been found guilty.” *MacMillan Co. v. I.V.O.W. Corp.*, 495 F. Supp. 1134, 1147 (D. Vt. 1980) (declining to award punitive damages in common-law copyright infringement case, where, “[w]hile the

defendant's use of the plaintiff's work was deceptive, it was not done in malice, but rather as a wrongful means to gain a favorable contract price").

In reviewing the constitutionality of a punitive-damage award, the U.S. Supreme Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 134 L. Ed. 2d 809, 116 S. Ct. 1589 (1996), instructed courts to "consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damage award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Winkler v. Petersilie*, 124 Fed. Appx. 925, 937 (6<sup>th</sup> Cir. Feb. 25, 2005) (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418, 155 L. Ed. 2d 585, 123 S. Ct. 1513 (2003)).

**A. Defendants' Conduct Was Not Reprehensible.**

The standard for reprehensibility is as follows:

Reprehensibility is determined based on consideration of whether the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

*Winkler*, 124 Fed. Appx. at 938 (quoting *State Farm*, 538 U.S. at 419). "The weighing of only one of these factors in favor of plaintiff may not be sufficient,

and the absence of any factor weighing in favor of plaintiff ‘renders any award suspect.’” *Id.*

First, the harm caused to Plaintiffs was purely economic. Second, the record is devoid of any evidence that Defendants’ conduct evinced any indifference to or reckless disregard of the health or safety of others in any respect. Third, neither Plaintiff has submitted any proof that they are financially vulnerable.

Fourth, the non-credited sample of “Singing in the Morning” in “Ready to Die” is an isolated incident. Defendants are careful to license samples. (R. 419, Tr. VII, 1043, Apx. 2781; *see also id.* at 1050-53, Apx. 2788-91.) Indeed, the liner notes for the album *Ready to Die* credit samples in 12 of the 17 songs, including another sample in “Ready to Die.” (R. 370, Tr. Exs. 557, 558 (album liner notes), Apx. 1354-58, 1359-67; *see also* R. 419, Tr. VII, 1060-61, Apx. 2798-99 (the samples used in the songs Combs produced on *Ready to Die* were all licensed).)

Fifth, the harm was not the result of intentional malice, trickery or deceit. Defendants did not intentionally set out to copy Plaintiffs’ work. Instead, a non-party, Osten Harvey, Jr., admitted to placing the sample of “Singing in the Morning” in “Ready to Die” on his own accord, choosing the work himself because it sounded like another sample originally used in “Ready to Die” but that could not be cleared. (*See* R. 378, Tr. II, 281, Apx. 2015; R. 399, Video Depo. of Osten Harvey Jr., pp. 18-20, 126-32, Apx. 4345-47, 4453-59.) Defendants had no

role in or knowledge of the placement or selection of this sample, nor did they have any control over Harvey's actions. (R. 419, Tr. VII, 1037-40, 1058, 1133, 1177, Apx. 2775-78, 2796, 2871, 2915; R. 370, 7/19/94 Wallace Correspondence, Tr. Ex. 507, Apx. 690-99.)

Defendants, at most, were negligent in re-releasing the album, but, nevertheless, were engaged in settlement discussions with Plaintiffs, who neither objected to the continued sales of the album, nor sought any preliminary injunctive relief.

**B. The Disparity between the Actual or Potential Harm Westbound Suffered and the Punitive-Damage Award Is Great.**

While the Supreme Court has declined to adopt concrete or bright-line constitutional limits for the ratio between actual or potential harm and a punitive-damage award, the Court nonetheless observed that, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *Id.* (citing *State Farm*, 538 U.S. at 425). The Court cited a 4-to-1 ratio as being close to the line of unconstitutional impropriety. *Id.*

Westbound was awarded \$366,939 in compensatory damages and \$3,500,000 in punitive damages. The ratio, at face value, is approximately 10 to 1, far above the line of unconstitutional impropriety. Given that the compensatory



damages award is grossly excessive because it fails to account for a rational allocation of profits, the ratio is even more disproportionate.

BBE's profits, with the appropriate allocation, even without deducting for costs, should have been 20.5%, or, using the percentage Plaintiffs attributed to the infringement, 25%, of the total of \$597,926, or a range between \$122,575 and \$149,482. Half of that amount is a range between \$61,287.50 and \$74,741.<sup>17</sup> Punitive damages of \$1,500,000 is more than twenty times that amount.

BLLC's profits, even without the allocation, were substantially lower, at \$27,430. With the allocation, they are in the range between \$5,623 and \$6,858, and, accounting for only Westbound's portion, \$2,811.50 and \$3,429. Punitive damages of \$1,000,000 are nearly 400 times that amount.

Finally, UMG's profits of \$34,644, with the appropriate allocation, were in the range between \$7,102 and \$8,661, Westbound's portion in the range between \$3,551 and \$4,330.50. Again, punitive damages of \$1,000,000, more than 240 times that amount, are grossly excessive, certainly exceed a single-digit ratio and do not satisfy due process.

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<sup>17</sup> The District Court awarded half of the compensatory amount awarded by the jury because Westbound owns only the infringing sound recording and not the musical composition. (R. 461, Order, Apx. 113-20.)

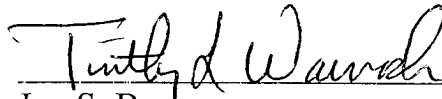
**C. The Punitive Damages Awarded Here Are Far Greater than the Civil Penalties Authorized or Imposed in Comparable Cases.**

Westbound's common-law claims are no different than Bridgeport's federal claims with the exception that Westbound did not qualify for federal copyright protection because of the date its work was created. With the exception of that fact, the underlying allegations are the same: Both Plaintiffs assert the intentional unauthorized use of "Singing in the Morning" in "Ready to Die." Although the federal Copyright Act does not govern the award of punitive damages to Westbound on its state-law claims, the Act is relevant for purposes of comparing the civil penalties authorized in comparable cases.

The Copyright Act provides a maximum statutory award of \$150,000 for willful infringement. 17 U.S.C. § 504(c)(2). The outcome of this case demonstrates the absurd dichotomy between state and federal protections for the same conduct. A plaintiff's recovering nearly 24 times the maximum amount of damage recoverable for intentional copyright infringement simply because the work is not protected by federal copyright law, as was the result here, is unreasonable.

or, in the alternative, modification of the verdict to reduce the compensatory damages to, at most, 25% of the verdict, or \$91,742.25 each, to allow for a rational separation of profits, and to vacate or reduce the punitive-damages award, and dissolution of the injunction and impoundment order.

Respectfully submitted,



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