**17.34 Copyright—Damages—Defendant’s Profits**

**(17 U.S.C. § 504(b))**

In addition to actual damages, the plaintiff is entitled to any profits of the defendant attributable to the infringement. You may not include in an award of profits any amount that you took into account in determining actual damages.

You may make an award of the defendant’s profits only if you find that the plaintiff showed a causal [relationship] [nexus] between the infringement and the [profits generated indirectly from the infringement] [defendant’s gross revenue].

The defendant’s profit is determined by [deducting] [subtracting] all expenses from the defendant’s gross revenue.

The defendant’s gross revenue is all of the defendant’s receipts from the [use] [sale] of a [[product] [work]] [[containing or using the copyrighted work] [associated with the infringement]]. The plaintiff has the burden of proving the defendant’s gross revenue by a preponderance of the evidence.

Expenses are all [operating costs] [overhead costs] [and] production costs incurred in producing the defendant’s gross revenue. The defendant has the burden of proving the defendant’s expenses by a preponderance of the evidence.

Unless you find that a portion of the profit from the [use] [sale] of a [product] [work] containing or using the copyrighted work is attributable to factors other than use of the copyrighted work, all of the profit is to be attributed to the infringement. The defendant has the burden of proving the [portion] [percentage] of the profit, if any, attributable to factors other than [copying] [infringing] the copyrighted work.

**Comment**

In a multi-defendant case, this instruction may need to be tailored according to the defendant to whom it applies. Where there are multiple infringers of a copyright, all infringers are jointly and severally liable for the plaintiff’s actual damages, but each defendant is severally liable for the defendant’s own illegal profits. *See Frank Music Corp. v. Metro-Goldwyn- Mayer, Inc.*, 772 F.2d 505, 519 (9th Cir. 1985) (citations omitted).

“In establishing the infringer’s profits, the copyright owner is required to present proof only of the infringer’s gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.” 17 U.S.C. § 504(b). The statute “creates a two-step framework for recovery of indirect profits: (1) the copyright claimant must first show a causal nexus between the infringement and the [infringer’s] gross revenue; and (2) once the causal nexus is shown, the infringer bears the burden of apportioning the profits that were not the result of infringement.” *Polar Bear Prods., Inc. v. Timex Corp*., 384 F.3d 700, 711 (9th Cir. 2004); *see also id.* at 714 n.10 (approving jury instruction stating: “Indirect profits have a less direct connection or link to the infringement. Plaintiff seeks indirect profits in this case. To recover indirect profits, Plaintiff must establish a causal relationship between the infringement and the profits generated indirectly from such infringement.”).

The “fundamental standard” for whether a causal nexus is shown as required for an award of indirect profits is that the plaintiff “must proffer some evidence . . . [that] the infringement at least partially caused the profits that the infringer generated as a result of the infringement.” *Polar Bear Prods.*, 384 F.3d at 711 (alteration in original) (quoting *Mackie v. Rieser*, 296 F.3d 909, 911 (9th Cir. 2002)) (holding that a plaintiff seeking to recover indirect profits must “formulate the initial evidence of gross revenue duly apportioned to relate to the infringement” (citation omitted)); *see also Mackie*, 296 F.3d at 916 (holding that an artist could not recover indirect profits unless he demonstrated with “non-speculative evidence” a causal link between the infringement and subsequent indirect profits, such as how many individuals subscribed to the symphony because the artist’s work appeared on one page of the symphony brochure).

In the Ninth Circuit, the calculation of actual damages under the 1909 Copyright Act differs from that under the 1976 Copyright Act. Prior to 1985, the Ninth Circuit interpreted the 1909 Copyright Act as allowing recovery of only the higher of actual damages or infringer profits. This differed from other circuits, where recovery of both actual damages and the infringer’s profits was allowed. However, in the 1976 Copyright Act, Congress resolved these differing interpretations to allow recovery of both actual damages and the infringer’s profits. *See Frank Music Corp.*, 772 F.2d at 512 & n.5.

A jury instruction on the defendant’s profits must adequately convey the burden of proof on attribution of profit. The copyright owner is required to present proof “only of the infringer’s gross revenue, and the infringer is required to prove . . . deductible expenses” and “what percentage of [the infringer’s] profits~~”~~ were not attributable to copying” the infringed work. *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 487 (9th Cir. 2000) (quoting 17 U.S.C. § 504(b)). However, “gross revenue” for purposes of determining indirect profits means “the gross revenue associated with the infringement, as opposed to the infringer’s overall gross sales resulting from all streams of revenue.” *Polar Bear Prods.*, 384 F.3d at 711 n.8 (citations omitted); *see also id.* at 711 (noting that the Ninth Circuit applies a “rule of reason” so that “the causation element . . . serves as a logical parameter to the range of gross profits a copyright plaintiff may seek”).

Where the defendant’s profits are derived from both infringing and noninfringing activities, not all of the defendant’s profits can be attributed to the infringement. Accordingly, the profits should be apportioned. *See Cream Records, Inc. v. Joseph Schlitz Brewing Co.*, 754 F.2d 826, 828-29 (9th Cir. 1985); *Polar Bear Prods.*, 384 F.3d at 711-12 (“[T]o conclude that a copyright plaintiff need only provide the company’s overall gross revenue, without regard to the infringement, would make little practical or legal sense.”). However, the benefit of the doubt in apportioning profits is given to the plaintiff. *See Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 886 F.2d 1545, 1549 (9th Cir. 1989) (appeal after remand). Precision is not required, as long as a “reasonable and just apportionment” of profits is reached. *See Frank Music Corp.*,*,* 772 F.2d at 518. In the final analysis, “where infringing and noninfringing elements of a work cannot be readily separated, all of a defendant’s profits should be awarded to a plaintiff.” *Nintendo of Am., Inc. v. Dragon Pac. Int’l*, 40 F.3d 1007, 1012 (9th Cir. 1994) (citation omitted).

For cases providing examples of the calculation of profits, *see Polar Bear Prods.*, 384 F.3d at 712-16 (upholding an award of profits based on expert testimony of certain sales figures but rejecting an award for enhanced brand prestige); *Frank Music Corp.*, 772 F.2d at 518-19 (discussing the calculation and proof of profits attributable to an infringement and holding that indirect profits are recoverable if they are ascertainable; e.g., the plaintiff could claim profits that resulted from hotel and gambling operations if those profits were attributable to an infringing stage show); *Cream Records*, 754 F.2d at 828-29 (awarding profits from the defendant’s sale of beverage following the defendant’s use of the plaintiff’s song in a commercial);  *Williams v. Gaye*, 895 F.3d 1106, 1129-30 (9th Cir. 2018) (explaining that the defendants “bore the burden of proof” and that the jury was free to apportion more than the percentage estimates of the defendant’s expert, but less than the percentage estimates of the plaintiff’s expert (citation omitted)); and *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 52 F.4th 1054, 1075 n.9 (9th Cir. 2022) (accepting that the plaintiff “satisfied its burden in proving disgorgement damages, even without placing an expert damages witness on the stand” because the “sales price” and “number of units sold” could be used to calculate the infringer’s “gross revenue”), *cert. denied*, 143 S. Ct. 2583 (2023).

For cases providing examples of the deductions from the defendant’s gross revenue, *see Frank Music Corp.*, 886 F.2d at 1548 (deducting direct costs of production from the defendant’s gross profit); *Kamar Int’l, Inc. v. Russ Berrie & Co*., 752 F.2d 1326, 1332 (9th Cir. 1984) (allowing deduction of overhead when the infringer demonstrated that it actually assisted production, distribution, or sale of the infringing product); *Three Boys Music*, 212 F.3d at 487 (adopting the special master’s recommendation to allow nonwillful infringers to deduct income taxes and management fees actually paid on infringing profits, but not on Net Operating Loss Carry- forward (NOL) because NOL did not have a “concrete financial impact”).

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