

1 retrial, verdict and judgment on Plaintiffs' claims.

2 Plaintiffs' claim for breach of contract arose from the written "Retail Licensing Agreement"
3 (hereinafter "Agreement") entered into by the parties on June 12, 2000. In that agreement, Plaintiffs
4 permitted Defendant to manufacture and sell Licensed Products, i.e. souvenirs, bearing reproductions of
5 Plaintiff's copyrighted statues and drawing of the "High Scaler." The Agreement provided for payment
6 of a 17 percent royalty on the sale of Licensed Products. *Plaintiff's Brief (ECF No. 380), Exhibit 1,*
7 *Retail Licensing Agreement, pg. 1.* Section 2 of the Terms and Conditions of the Agreement further
8 stated:

9 (a) The Royalty Rate shall be applicable to the gross selling
10 price of all Licensed Products delivered or shipped, without deduction of
11 any costs or expenses incurred in the manufacture, advertisement,
12 distribution, or sale thereof, or from uncollectible accounts. Royalties
due for each calender quarter after the date hereof shall be paid to
Licensor within fifteen (15) days after the last day thereof.

...

13 (d) All payments made to Licensor shall be in United States
14 Currency. Time is of the essence with respect to all payments due
15 Licensor. Interest at the rate of one and one half percent (1 1/2%) per
month shall accrue on any amount due Licensor from and after the date
upon which payment is due until the date said payment is actually made.

16 *Retail Licensing Agreement, pg. 3.*

17 Nevada Revised Statute (NRS) § 11.190.1(b) provides a six year statute of limitations for an
18 action upon a written contract. Plaintiffs filed the instant lawsuit on April 1, 2011. They were therefore
19 entitled to seek recovery of any unpaid royalties from April 1, 2005 through the last date Licensed
20 Products were sold.

21 Plaintiffs' accountant expert, Annette Carro, testified at trial regarding the amount of royalties
22 that were due from the sale of Licensed Products for the period of April 1, 2005 through September 30,
23 2012. Based on her review of Defendant's inventory records and profit and loss statements, Ms. Carro
24 estimated that the total amount of royalties earned during this 7 and 1/2 year period was \$78,617.00.
25 Ms. Carro arrived at this amount through the following methodology: She reviewed Defendant's
26 quarterly inventory records which identified Licensed Products subject to the Agreement by the letters
27 "HS." She also included items identified as "rock" which she was informed were Licensed Products
28 subject to the Agreement. Ms. Carro then determined the percentage that Licensed Products in the

1 inventory reports bore to the total sales inventory for each quarter. (Defendant’s store primarily sold
2 food items, including drinks.) She multiplied that inventory percentage for Licensed Products by the
3 total sales for each month from April 1, 2005 through September 30, 2012 to estimate the total sales of
4 Licensed Products. She then multiplied the total amount allocated to the sale of Licensed Products by
5 the royalty rate of 17 percent to arrive at the estimated royalty amount. Ms. Carro did not make any
6 deduction for royalties that were actually paid to Plaintiff.

7 Ms. Carro’s calculation also included royalties on the sale of a book, “The Story of Hoover
8 Dam,” that was sold in Defendant’s store. Defendant purchased and sold copies of a version of this
9 book, known as “Version C,” that contained the image of Plaintiff’s copyrighted “High Scaler” drawing
10 on the back cover. Ms. Carro testified that it was her understanding that these books sold for \$17.95. A
11 17% royalty on this amount was approximately \$3.00. Ms. Carro was not aware that other versions of
12 the book, which did not contain the “High Scaler” drawing on the back cover, were sold in Defendant’s
13 store. She therefore included all sales of the “Story of Hoover Dam” during the subject period in her
14 calculation of royalties. Ms. Carro testified that royalties for the sales of “The Story of Hoover Dam”
15 constituted \$46,000.00 of the total \$78,617.00 in alleged royalties. During final argument, Plaintiff’s
16 counsel allocated \$46,199.46 of the requested damages for royalties to the sale of “The Story of Hoover
17 Dam” and \$32,417.54 to the sale of other Licensed Products.

18 Defendant raised a number of issues regarding Plaintiffs’ estimate of their breach of contract
19 damages, including the number of books sold by Defendant which bore the “High Scaler” drawing on
20 the back cover and whether Ms. Carro’s estimate of the royalties for other Licensed Products was
21 reasonable. The jury was also provided with evidence regarding the amount of royalties that were paid
22 to Plaintiff under the Agreement. The jury’s verdict of \$47,817.36 is the total amount of unpaid
23 royalties awarded to Plaintiff for the sale of Licensed Products during the period from April 1, 2005
24 through September 30, 2012.

25 DISCUSSION

26 Nevada Revised Statute (NRS) § 99.040.1 states as follows:

27 1. When there is no express contract in writing fixing a different
28 rate of interest, interest must be allowed at a rate equal to the prime rate at
the largest bank in Nevada, as ascertained by the commissioner of

1 financial institutions, . . . plus 2 percent upon all money from the time it
2 becomes due in the following cases:

3 (a) Upon contracts, express or implied, other than book accounts.

4 (b) Upon the settlement of book or store accounts from the day on
5 which the balance is ascertained.

6 In *Paradise Homes, Inc. v. Central Surety and Ins. Corp.*, 84 Nev. 109, 437 P.2d 78, 83 (1968),
7 the Nevada Supreme Court stated that pursuant to this statute “[i]t is beyond argument that interest is
8 recoverable as a matter of right in actions upon contract, express or implied, upon all money from the
9 time it becomes due.” The Court stated that “[t]hree items must be determined to enable the trial court
10 to make an appropriate award of interest: (1) the rate of interest; (2) the time when it commences to run;
11 and (3) the amount of money to which the rate of interest must be applied.” *Id.* The Court further
12 stated:

13 The statute also states that interest runs from the time “money becomes
14 due.” We construe that to be the time when performance was due as
15 resolved by the court upon trial of the cause. The amount of money to
16 which the interest rate will be applied must be determined by the
17 following factors: (1) if the contract breached provides for a definite sum
18 of money, that sum; (2) if the performance called for in the contract, the
19 value of which is stated in money or is ascertainable by mathematical
20 calculation from a standard fixed in the contract or from established
21 market prices of the subject matter, that sum. Pre-judgment interest shall
22 be allowed on the amount of the debt or money so determined, after
23 making all deductions to which the defendant may be entitled. (citations
24 omitted).

25 *Id.*

26 Prejudgment interest may not be awarded when the amount of money owed under the contract is
27 neither definite nor readily ascertainable. *M.C. Multi-Family Dev. v. Crestdale Assocs.*, 124 Nev. 901,
28 183 P.3d 536, 546-47 (2008) and *Jeaness v. Besnilian*, 101 Nev. 536, 706 P.2d 143 (1985). *See also*
Alter v. Resort Properties of America, 2014 WL 2466282, *4 (Nev.Sup.Ct. May 30, 2014)
(unpublished disposition).

29 The Agreement in this case provided for the payment of money that was “ascertainable by
30 mathematical calculation from a standard fixed in the contract.” First, the Agreement provided for the
31 payment of a 17 percent royalty on the gross sales price of each Licensed Product. Second, the
32 Agreement provided that royalties were to be paid within 15 days after the last day of each calendar

1 quarter in which sales of Licensed Products occurred. Third, the Agreement provided that “[i]nterest at
2 the rate of one and one-half percent (1 1/2 %) per month shall accrue on any amount due Licensor from
3 and after the date upon which said payment is due until the date said payment is actually made.” *Retail*
4 *Licensing Agreement*, pg. 3. Thus, interest began to accrue on unpaid royalties fifteen days after the
5 end of the calendar quarter in which Licensed Products were sold.¹

6 Ms. Carro made her estimate of the royalties by reviewing Defendant’s inventory records for
7 each quarter, and Defendant’s profit and loss statements for each month, during the period from April 1,
8 2005 through September 30, 2012. Based on that method, it appears that Ms. Carro could have testified
9 as to the amount of royalties that accrued during each calendar quarter, or each year between April 1,
10 2005 and September 2012. She was not asked, however, to provide such testimony. It is no doubt true
11 that some of the royalties accrued and became payable years before September 30, 2012. It unknown,
12 however, whether the sales of Licensed Products were evenly distributed over quarters between April
13 2005 and September 2012, or whether substantial sales occurred in some quarters or years versus other
14 periods in which relatively few Licensed Products were sold.

15 Plaintiffs argue that prejudgment interest should be granted on the entire \$47,817.36 damage
16 award from April 1, 2005 because Defendants failed to preserve or produce records which would have
17 specifically identified the dates and amounts of the sales of Licensed Products. While there is some
18 fairness in this argument, Plaintiffs did not file their lawsuit until nearly eleven years after the
19 Agreement was entered into which may explain why documents were no longer available for production
20 and review. Defense witnesses also testified that Plaintiff was provided with documents showing the
21 sales of souvenirs on which the royalties were calculated at the time payments were made. In any event
22 as stated above, Ms. Carro could have provided a break down of her calculation of the royalties on a
23 quarter-by-quarter, or year-by-year basis, but she was not asked to do so in her testimony.

24
25 ¹The Court does not understand what Plaintiffs mean by their assertion that the interest provision in the
26 Agreement “is not a prejudgment interest provision.” *Plaintiffs’ Brief (ECF No. 380)*, pgs 3-4. Pursuant to NRS
27 § 99.040.1, interest on unpaid royalties was recoverable at the rate provided for in the Agreement from the date
28 that payment was due. If Plaintiffs wants to stipulate to a lower interest rate, however, they are free to do so. If
Plaintiffs contend that they are entitled to both “contractual” interest and “statutory” interest on the same
royalties for the same time period, the Court rejects such an assertion as having no legal merit.

1 During the June 23, 2016 status hearing, the Court raised the possibility of dividing the
2 \$47,817.36 evenly among the years between 2005 and 2012 as a method for fairly apportioning an
3 award of the prejudgment interest. This was opposed by the Defendant. Based on the cases discussed
4 above, as well as the decision in *Las Vegas-Tonopah-Reno Stage v. Gray Line*, 106 Nev. 283, 792 P.2d
5 386, 389-390 (1990) discussed hereinafter, there does not appear to be a valid legal basis to impose
6 such an allocation. Because of the lack of evidence establishing when specific royalty amounts
7 accrued, there is no way to validly calculate an award of prejudgment interest pursuant to NRS §
8 99.040.1 for the time period prior to September 30, 2012.

9 Plaintiffs argue that they are also entitled to recover prejudgment interest pursuant to NRS §
10 17.130.2 which states as follows:

11 When no rate of interest is provided by contract or otherwise by law, or
12 specified in the judgment, the judgment draws interest from the time of
13 service of the summons and complaint until satisfied, except for any
14 amount representing future damages, which draws interest only from the
15 time of the entry of the judgment until satisfied

14 Although NRS § 17.130.2 authorizes the recovery of interest on damages from the date of
15 service of summons and complaint, it also requires proof as to when those damages were incurred in
16 order for the court to award prejudgment interest thereon. In *Las Vegas-Tonopah-Reno Stage v. Gray*
17 *Line*, the Nevada Supreme Court held that NRS § 17.130 was ambiguous as to when interest begins to
18 run on damages that are incurred after the service of the complaint, but prior to the entry of judgment.

19 The Court stated:

20 We do not believe that the legislature contemplated this problem when it
21 determined that interest should run from the date the complaint was
22 served. Nor do we think that the legislature would want to permit
23 damages to bear interest from the date the complaint was served even
24 though they were actually incurred some time after the service of the
25 complaint. Accordingly, we conclude that interest should begin to accrue
26 from the time damages actually occur if they are sustained after the
27 complaint is served but before judgment, rather than from the date of
28 serving the complaint or from the date of judgment. To carry interest,
damages must be sustained and specifically quantified. Thus, interest
should be awarded on damages suffered after serving the complaint but
prior to judgment once the time when incurred and the amount of these
damages have been proven by a preponderance of the evidence.

792 P.2d at 390.

Applying this interpretation to the facts before it, the Court further stated:

1 In this case, damages of \$217,529 were incurred between October 1984
2 and October 1985. No breakdown was made as to what damages were
3 sustained prior to or after service of the complaint, nor was any
4 breakdown of these damages made on a month-to-month basis.
5 Therefore, Gray Line was entitled to interest on this loss from the date the
6 loss ended, November 1, 1985, until satisfied, and not from the service of
7 the complaint in January 1985. If Gray Line had specifically proven its
8 damages in smaller increments, such as month-to month, it would have
9 been entitled to interest accruing beginning at the end of each month in
10 which the damage was sustained.

11 *Id.*

12 *See also Gibellini v. Klindt*, 110 Nev. 1201, 885 P.2d 540, 545 (1994) (“If a party is unable to
13 prove when costs were incurred, interest on those costs should be awarded only from the time of
14 judgment); *Hornwood v. Smith’s Food King No. 1*, 107 Nev. 80, 807 P.2d 208, 214 (1991)
15 (“Prejudgment interest on a damage award is only allowed where the damage award is known or
16 ascertainable at a time prior to entry of judgment.”).

17 Although it is probable that a substantial portion of the royalties awarded by the jury accrued
18 well before September 30, 2012, Plaintiffs did not present any evidence as to when specific royalties
19 accrued. Therefore, prejudgment interest cannot be awarded to Plaintiffs for any period prior to that
20 date under NRS § 17.130.2. Plaintiffs are entitled to recover prejudgment interest on the damages
21 award for breach of contract from September 30, 2012 through the date of judgment at the interest rate
22 provided in the Agreement.

23 Prior to the end of the preceding trial, the parties stipulated to a \$19,000.00 judgment in favor of
24 the Defendant Hansen on his counterclaim against Plaintiff Liguori. Mr. Hansen’s counterclaim related
25 to amounts he paid to Mr. Liguori for the creation of certain statues that Plaintiff never produced or
26 delivered; and for rent that Mr. Liguori owed relating to his sale of jewelry in Mr. Hansen’s store.
27 *Amended Counterclaim (ECF No. 59)*. These claims did not arise out of the Retail Licensing
28 Agreement. Although Mr. Hansen asserted them as permissive counterclaims in this action, they could
have been pursued in a separate action. The Court agrees with Plaintiffs that Defendant’s \$19,000.00
judgment on his counterclaim should not be offset against the damages recovered by Plaintiffs for the
breach of contract and copyright infringement prior to the calculation of prejudgment interest on those
damages. The decision in *Barbara Ann Hollier Trust v. Shack*, 131 Nev.Adv.Op. 59, 356 P.3d 1085,

1 1092 (2015) does not require such an offset. Unlike this case, the counterclaim in that case arose out of
2 the same transaction upon which the plaintiff obtained recovery.

3 Finally, the Court agrees with Plaintiffs that prejudgment interest should be awarded on
4 Plaintiffs' judgment for copyright infringement. The jury found that Defendant willfully infringed
5 Plaintiff's copyright and awarded \$130,000 in statutory damages. As stated in *Polar Bear Productions,*
6 *Inc. v. Timex Corp.*, 384 F.3d 700, 718 (9th Cir. 2004) (citing *McRoberts Software, Inc. v. Media 100,*
7 *Inc.*, 329 F.3d 557, 572-73 (7th Cir. 2003), "prejudgment interest is, as general matter, routinely
8 available for willful violations of federal law." Although Defendant argues that he acted in good faith,
9 the jury reached the contrary conclusion. An award of prejudgment interest is therefore appropriate.

10 **CONCLUSION**

11 The Court will award interest on the judgment for breach of contract from September 30, 2012
12 at the rate of 1 1/2 percent per month, or 18 percent per annum, simple interest through the date of
13 judgment. The Court will also award prejudgment interest on the judgment for copyright infringement
14 at the federal statutory rate. The Court will not offset the amount of Defendant's stipulated judgment
15 on its counterclaim prior to calculating prejudgment interest on the judgment in Plaintiffs' favor. There
16 still remain a couple of issues regarding entry of the judgment which the Court wishes to discuss with
17 counsel. The Court will set a further status hearing on this matter as soon as is convenient to counsel
18 and the Court. Counsel may appear by telephone if they desire.

19 **IT IS SO ORDERED.**

20 DATED this 4th day of August, 2016.

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22 GEORGE FOLEY, JR.
23 United States Magistrate Judge
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