

EXHIBIT 4

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

JOAN JETT, KENNETH LAGUNA and
CARIANNE MUSIC, INC.,

Plaintiffs,

-against -

THOMAS FICARA d/b/a REACH
ENTERTAINMENT, REACH
ENTERTAINMENT, INC., ENTERTAINMENT
UK LTD., SONY MUSIC ENTERTAINMENT
UK, SUPER D d/b/a SUPER D/PHANTOM
DISTRIBUTION, BERTUS DISTRIBUTIE, and
MSI MUSIC CORP. d/b/a MSI OF MIAMI,

Defendants.

ECF Case

Civil Action No. 04cv9466 (RMB)

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs Joan Jett, Kenneth Laguna and Carianne Music, Inc., submit this set of proposed findings of fact and conclusions of law, along with the supporting declaration of Kenneth Laguna (“Laguna Dec.”), as well as the exhibits annexed thereto, in response to this Court’s Order of June 26, 2007.

I. Proposed Findings of Fact

1. Plaintiffs Joan Jett and Kenneth Laguna wrote several musical compositions. Plaintiff Joan Jett recorded several songs. See, generally, Laguna Dec.

A. The Sound Recordings at Issue

2. For all purposes herein, albums are referred to in **bold** type and individual sound recordings are listed in *italics*.

3. Through various assignments, Plaintiff Carianne Music, Inc. (“Carianne”) is the owner of all rights title and interest, including copyrights, in and to the ten sound recordings included on the album which was commercially released as **I Love Rock ‘N’ Roll**.

4. The Album **I Love Rock ‘N’ Roll** includes sound recordings embodying the performance of Joan Jett of the following musical compositions:

- i. *I Love Rock 'N' Roll*
- ii. *(I'm Gonna) Run Away*
- iii. *Love Is Pain*
- iv. *Nag*
- v. *Crimson And Clover*
- vi. *Victim Of Circumstance*
- vii. *Bits And Pieces*
- viii. *Be Straight*
- ix. *You're Too Possessive and*
- x. *Little Drummer Boy*

See Laguna Dec. at ¶ 19 and Ex. 1.

5. Copyright Registration SR-32-394 covers the album **I Love Rock 'N' Roll**, and covers the ten (10) sound recordings that were included on that album and are listed in paragraph 3, *supra*. See Laguna Dec. at ¶ 19-20 and Ex. 1.

6. Copyright Registration SR-32-501 covers the individual recordings of the compositions *I Love Rock 'N' Roll* and *You Don't Know What You've Got*. Id. at ¶ 21 and Ex. 2.

7. Copyright Registration SR-35-094 covers the individual recordings *Crimson and Clover* and *Oh, Woe is Me*. Id. at ¶ 22 and Ex. 3.

8. In 1992 Blackheart Records, Inc., re-released the album **I Love Rock 'N' Roll** (the "**First Reissue**"). The **First Reissue** included additional sound recordings:

- i. *Oh Woe is Me*
- ii. *Louie Louie Intro*
- iii. *Louie Louie*
- iv. *You Don't Know What You Got (Live)*.

See id. at ¶¶ 25-26.

9. The **First Reissue** is subject to Copyright Registration SR-193-813. By virtue of different assignments, the same copyrights were subsequently transferred to Carianne. These assignments were recorded in the copyright office. Id. at 27 and Ex. 4.

B. Compositions at Issue

10. To distinguish the compositions from the sound recordings of those compositions, they are listed here in underline.

11. Joan Jett and Kenneth Laguna, *inter alia*, wrote the musical composition Be Straight, a recording of which is contained within **I Love Rock 'N' Roll** and the **First**

Reissue. The composition Be Straight is the subject of Copyright Registration PA 130-932. See Laguna Dec. at ¶ 31 and Ex. 5.

12. Joan Jett and Kenneth Laguna wrote the musical composition Victim of Circumstance, a recording of which is contained within **I Love Rock ‘N’ Roll** and the **First Reissue**. The composition Victim of Circumstance is the subject of Copyright Registration PA 130-931. Id. at ¶ 32 and Ex. 6.

13. Joan Jett wrote the composition Love Is Pain, a recording of which is contained within **I Love Rock ‘N’ Roll** and the **First Reissue**. The composition “*Love is Pain*” is the subject of Copyright Registration PA 130-930. Id. at ¶ 33 and Ex. 7.

14. Joan Jett wrote the composition Oh Woe is Me, a recording of which is contained within **I Love Rock ‘N’ Roll** and the **First Reissue**. The composition Oh Woe is Me is the subject of Copyright Registration PA 130-918. Id. at ¶ 34 and Ex. 8.

15. Joan Jett wrote the composition (I’m Gonna) Run Away, a recording of which is contained within **I Love Rock ‘N’ Roll** and the **First Reissue**. The composition (I’m Gonna) Run Away is the subject of Copyright Registration PA 130-929. Id. at ¶ 35 and Ex. 9.

C. Illegal Conduct by Bertus Distributie

16. Defendant Bertus Distributie reproduced, distributed and sold the **First Reissue**. See Laguna Dec. at ¶¶ 45-56.

II. Proposed Conclusions of Law

A. Copyrights At Issue

1. There are two copyrights that attach to a song — one in the sound recording itself (the “master component”), and one in the underlying words and music (the “composition

component”). See, e.g., T.B. Harms Co. v. Jem Records Inc., 655 F. Supp 1575, 1577 at fn. 1 (D.N.J. 1987); Copyright Office Circular 56a ; Melvin B. Nimmer and David Nimmer, Nimmer on Copyrights (hereinafter “Nimmer”), at § 2.10[a][2] (2005); Warshavsky & Berger, Will Case Change Law on Sampling, National Law Journal, Vol. 25; No. 6; Pg. C1 (October 14, 2002); reprinted as Fine Tuning, IP Law & Business, Vol. 02; No. 1; Pg. 41 (January 2, 2003).

B. Law of Copyright Infringement

2. 17 U.S.C. § 501 (a) provides, in pertinent part:

“[a]nyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through 118 ... is an infringer of the copyright,”

3. 17 U.S.C. § 106 provides, in pertinent part (*emphasis added*):

Subject to sections 107 through 120, the owner of copyright under this title has the exclusive rights to do *and to authorize* any of the following:

(1) to reproduce the copyrighted works in copies or phonorecords;

* * *

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease or lending to reproduce the copyrighted work in copies or phonorecords;

* * *

(4) in the case of ... musical ... works, to perform the copyrighted work publicly;

* * *

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission

C. Damages for Copyright Infringement

4. The law with regard to damages in copyright infringement actions is quite simple, and is governed by statute. 17 U.S.C. § 504(b) provides, in pertinent part:

The copyright owner is entitled to recover the actual damages suffered by him or her as a result of the infringement, and any profits of the infringer that are attributable to the infringement and are not taken into account in computing the actual damages. 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.

5. 17 U.S.C. § 504(c) provides, in pertinent part:

(1) Except as provided by clause (2) ... the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable ... in a sum of not less than \$750 or more than \$30,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000 ...

D. Statutory Damages

6. Because the profits of Bertus Distributie are unknown, Carianne has elected to proceed for statutory damages.

7. The Court has broad discretion in awarding statutory damages. See Fitzgerald Pub. Co. v. Baylor Pub. Co., 807 F.2d 1110, 1116 (2d Cir. 1986); NFL v. Primetime 24

Joint Venture, 131 F.Supp.2d 458, 472 (S.D.N.Y. 2001); Odegard, Inc. v. Costikyan Classic Carpets, 963 F. Supp. 1328, 1342 (S.D.N.Y. 1997).

8. In making such an award, the Court is required to consider various factors, including the expenses saved and profits reaped by the Defendants, the revenues lost by the Plaintiffs, the value of the copyright, the deterrent effect of the award on other potential infringers, and factors relating to individual culpability. F.W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228, 234 (1952); Fitzgerald Pub. Co. v. Baylor Pub. Co., 807 F.2d at 1117; Getaped.com, Inc. v. Cangemi, 188 F. Supp. 2d 398, 403 (S.D.N.Y. 2002); Guess?, Inc. v. Gold Center Jewelry, 997 F.Supp. 409, 411 (S.D.N.Y. 1998); Schwartz-Liebman Textiles v. Last Exit Corp., 815 F.Supp. 106, 108 (S.D.N.Y. 1992).

9. The default judgment in this case, as well as the facts and circumstances described in Plaintiffs' complaint and the declaration of Kenneth Laguna submitted herewith demonstrate that Bertus Distributie is a willful infringer.

10. Bertus has infringed the works in the following copyrights: SR-32-394, SR-32-501, SR-35-094, SR-193-813, PA 130-932, PA 130-931, PA 130-930, PA 130-918, and PA 130-929.

11. Plaintiffs acknowledge that SR-193-813, which covers the **First Reissue** is a compilation and that for its purposes in this lawsuit, it will not also seek recovery for the infringement of the recordings covered by Registration Nos. SR-32-394, SR-32-501, SR-35-094, all of which are included on the **First Reissue**.

12. Plaintiffs do seek recovery for use of the infringement of the various compositions. This Court previously denied that request of plaintiffs in connection with

another application in this matter, citing to *inter alia*, 17 U.S.C. § 504 for the proposition that a compilation would be treated as one work. Plaintiffs urge that they are seeking damages not for the compilation but for the infringement of separate copyrights in one infringing work. Plaintiffs contend that each composition could furnish the basis for a separate award of statutory damages.

13. Notwithstanding that the compositions are included on one infringing album, plaintiffs urge that each stands alone as being separately written by different authors and separately registered by the United States Copyright Office. See MCA Television Ltd. v. Feltner, 89 F.3d 766, 769 (11th Cir. 1996), cert. denied, 520 U.S. 1117 (1997) (holding each episode of a series a separate infringement for statutory damages); Columbia Pictures Television v. Krypton Broadcasting of Birmingham, Inc., 106 F.3d 284, 295, n.8 (9th Cir. 1997) (same), *rev'd* on other grounds, 523 U.S. 340 (1998).¹

14. Plaintiffs submit, therefore, that the last sentence of 17 U.S.C. § 504(c)(1) is not applicable here. Rather, plaintiffs urge that when a compilation infringes multiple separate copyrights, it constitutes separate infringements. In Twin Peaks Prods. v. Publ'ns Int'l, Ltd., 996 F.2d 1366 (2d Cir. 1993), the Second Circuit held that eight separately written teleplays of the television show *Twin Peaks*, illegally copied into one book published by the defendant did not trigger the last sentence of 17 U.S.C. § 504(c)(1) and that eight awards, not one award, of statutory damages were warranted. Id. 996 F.2d. at 1370-78.

¹ Indeed, the Supreme Court's recitation of the posture below makes mention of that methodology of multiplying statutory damages; nothing in its reversal casts doubt on this aspect of the circuits' manner of proceeding.

15. If the Court agrees that separately copyrightable works are infringed, then plaintiffs seek the maximum statutory award of \$150,000.00 for all six (6) works at issue (i.e. the one sound recording copyright and the six composition copyrights) for a total of \$900,000.00.

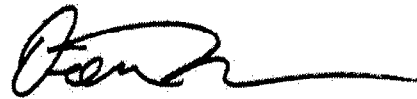
16. If the Court finds that six separately copyrightable works are infringed, then plaintiffs seek the maximum statutory award of \$150,000.00 for all six (6) works at issue (i.e. the one sound recording copyright and the six composition copyrights) for a total of \$900,000.00.

17. If the Court finds that only one separately copyrightable work is infringed, then plaintiffs seek the maximum statutory award of \$150,000.00.

18. All of the copyrighted works were registered with the Copyright Office well in advance of the accused infringement.

19. Statutory Damages here would be no less than \$150,000.00 per infringement.

Respectfully submitted,



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