

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 19-3934 PSG (JPRx)	Date	April 8, 2021
Title	Artem Stoliarov v. Marshmello Creative, LLC, et al.		

Present: The Honorable Philip S. Gutierrez, United States District Judge

Wendy Hernandez

Not Reported

Deputy Clerk

Court Reporter

Attorneys Present for Plaintiff(s):

Attorneys Present for Defendant(s):

Not Present

Not Present

Proceedings (In Chambers): The Court GRANTS Defendants’ motion for partial summary judgment

Before the Court is a motion for partial summary judgment filed by Defendants Christopher Comstock p/k/a Marshmello (“Marshmello”) and Daniel Campbell Smith (“Smith”) (collectively, “Defendants”). *See generally* Dkt. # 89 (“*Mot.*”). Plaintiff Artem Stoliarov p/k/a Arty opposed. *See generally* Dkt. # 95 (“*Opp.*”). Defendants replied. *See generally* Dks. # 103 (“*Reply*”). The Court finds the matter appropriate for decision without oral argument. *See* Fed. R. Civ. P. 78; L.R. 7-15. After considering the moving, opposing, and reply papers, the Court **GRANTS** Defendants’ motion.

I. Background

Plaintiff is an artist who claims he is the exclusive owner of musical elements (the “Arty Elements”) that he contributed to a remixed version of the song “I Lived,” which is titled “I Lived (Arty Remix).” *Defendants’ Statement of Uncontroverted Facts*, Dkt. # 89-1 (“*DSUF*”), ¶ 1. Plaintiff alleges that the song “Happier,” released on August 17, 2018, infringes his copyright in the Arty Elements. *Id.* ¶ 2. Plaintiff also asserts that Defendants’ live performances of “Happier” in the United States infringed his exclusive right to perform the Arty Elements. *Id.* ¶ 3. Plaintiff claims that he is entitled to a portion of the revenues and profits from Defendants’ live shows. *Id.* ¶¶ 4–5.

Defendants now move for summary judgment, arguing that Plaintiff has failed to establish evidence of a causal connection between profits from Defendants’ shows and their performances of “Happier.” *See generally Mot.* The Court agrees. Accordingly, the Court **GRANTS** Defendants’ motion for summary judgment.

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II. Legal Standard

“A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).

A party seeking summary judgment bears the initial burden of informing the court of the basis for its motion and identifying those portions of the pleadings and discovery responses that demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the nonmoving party will have the burden of proof at trial, the movant can prevail by pointing out that there is an absence of evidence to support the nonmoving party’s case. *See id.* If the moving party meets its initial burden, the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, “specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence. Rather, it draws all reasonable inferences in the light most favorable to the nonmoving party. *See T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630–31 (9th Cir. 1987). The evidence presented by the parties must be capable of being presented at trial in a form that would be admissible in evidence. *See Fed. R. Civ. P. 56(c)(2)*. Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *See Thornhill Publ’g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

III. Evidentiary Objections

In their reply, Defendants assert various evidentiary objections. *See generally* Dkt. # 103-2. To the extent that the Court relies on objected-to evidence, it relies only on admissible evidence and, therefore, the objections are overruled. *See Godinez v. Alta-Dena Certified Dairy LLC*, No. CV 15-01652 RSWL (SSx), 2016 WL 6915509, at *3 (C.D. Cal. Jan. 29, 2016).

IV. Discussion

The Court must determine whether Plaintiff has carried his burden of producing evidence of a causal connection between revenue generated by Defendants’ live shows and their performances of “Happier” at such shows. He has not.

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Under the damages provision of the Copyright Act, 17 U.S.C. § 504(b), a plaintiff may recover wrongfully obtained profits resulting from copyright infringement. These profits can be direct or indirect. *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 708 (9th Cir. 2004). If the profits were indirect, the plaintiff bears the burden of showing “a legally sufficient causal link between the infringement and subsequent indirect profits.”¹ *Mackie v. Rieser*, 296 F.3d 909, 915 (9th Cir. 2002). The plaintiff cannot merely “toss up an undifferentiated gross revenue number.” *See Polar Bear Prods.*, 384 F.3d at 711. Instead, the plaintiff must produce evidence of the gross revenue duly apportioned to the alleged infringement. *Id.* On the other hand, if the profits were direct, a lesser showing of causation is required. *See id.* at 711 n.7. Therefore, the Court must first determine whether the profits Plaintiff seeks in this case are direct or indirect.

Direct profits are easily defined: they are those generated by selling an infringing product. *Mackie*, 296 F.3d at 914. Indirect profits, on the other hand, are harder to classify: they are “revenue that has a more attenuated nexus to the infringement.” *Id.* The difference is best illustrated by example.

In *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505 (9th Cir. 1985), the plaintiff alleged that the defendant used plaintiff’s copyrighted songs as part of a larger musical revue. *Id.* at 509. The Court noted that profits from the show itself were recoverable as direct profits, and that a portion of the defendant’s increased hotel and gaming revenue, which were obtained from guests attracted by the infringing revue, were recoverable as indirect profits. *Id.* at 517.

Plaintiff’s claim for a portion of the profits from Defendants’ shows does not fall neatly into either category. However, the Court concludes that the profits Plaintiff seeks are indirect.

Here, it is undisputed that Defendants were not required to perform any song, including “Happier,” at any of the shows. *DSUF* ¶¶ 39, 94. Therefore, the profits from the shows are not direct in the sense that Defendants did not sell the performance of the infringing work—“Happier”—as a guaranteed part of the shows, unlike the defendant in *Frank Music Corp.* Instead, at most, Defendants used the *possibility* of their performance of “Happier” to obtain contracts to perform live shows. Accordingly, this case is one in which Plaintiff seeks profits that have “a more attenuated nexus to the infringement”—i.e., indirect profits. *See Mackie*, 296 F.3d at 914.

¹ Defendants can prevail on summary judgment by arguing that Plaintiff failed to meet his burden on causation. *See Celotex*, 477 U.S. at 323 (movant can prevail by pointing out an absence of evidence on an issue that the nonmoving party has the burden of proving at trial).

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Because Plaintiff seeks indirect profits, he must provide evidence of a causal link between the infringement and Defendants' profits. *See id.* at 915. Defendants argue that they are entitled to summary judgment because Plaintiff has failed to meet his burden on this issue. *Mot.* 24:21–24; *see Celotex*, 477 U.S. at 323. Plaintiff counters that he has met his burden by providing a gross revenue figure that is “narrowed” to the amount earned from Defendants' shows after “Happier” was released. *Opp.* 20:15–16. Plaintiff contends that this satisfies his burden because “[t]here is an obvious causal nexus between the infringing work and the gross revenues claimed in this matter.” *Id.* 20:18–21. The Court disagrees.

Plaintiff fails to introduce any non-speculative evidence of how much of Defendants' gross revenue from the shows, if any, could be attributed to the *possibility* that they would perform a single, allegedly-infringing song—“Happier.” Therefore, contrary to Plaintiff's assertions, the fact that he has “narrowed” the profits he seeks to those from shows that occurred after the release of “Happier” is insufficient—he still has “toss[ed] up an undifferentiated gross revenue number.”² *See Polar Bear Prods.*, 384 F.3d at 711. As in *Mackie*, the Court “can surmise virtually endless permutations to account for an individual's decision” to attend one of Defendants' shows, or for a concert promoter to obtain Defendants' services, many of which have nothing to do with “Happier.” *See* 296 F.3d at 916. Accordingly, Plaintiff has failed to establish a legally sufficient causal link between the indirect profits he seeks and the alleged infringement. As such, the Court **GRANTS** Defendants' motion for partial summary judgment.

V. Conclusion

Because Plaintiff seeks indirect profits and has failed to establish a legally sufficient causal link between such profits and the alleged infringement, the Court **GRANTS** Marshmello and Smith's motion for partial summary judgment. Plaintiff's claims against Defendants are dismissed to the extent they seek to recover such profits from Defendants' live performances in the United States.

IT IS SO ORDERED.

² For example, Plaintiff does differentiate shows that were negotiated before the release of “Happier,” shows in which “Happier” was not performed, and shows in which Defendants performed for free. While Plaintiff attempts to explain why he need not do so, the Court is unpersuaded. His failure to differentiate between shows that are relevant and irrelevant reveals his failure to meet his burden on causation.