

Whoomp! There It Is: A Copyright Judgment Creditor's Final Recovery

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24 years after Tag Team's hit song "Whoomp! (There It Is)" topped the charts, a long and ugly dispute regarding ownership rights to the song and related copyright infringement damages has been settled in bankruptcy court. The dispute and its resolution showcase a not uncommon end for large IP judgments: the judgment debtor files for bankruptcy

and the judgment creditor is left to recover against the bankruptcy estate's assets.

In 1993, Tag Team, which is comprised of artists Cecil Glenn and Steven Gibson, entered into a recording agreement with Bellmark Records governing the ownership in the composition, recording, performance, and royalty rights to the song. Under the recording agreement, Tag Team assigned half of its copyright interest in the song to Bellmark. In 1997, Bellmark filed for bankruptcy. As part of Bellmark's bankruptcy proceedings, DM Records, Inc. purchased substantially all of Bellmark's assets for \$166,000. DM was a music content company that licensed 90's chart toppers like "Whoomp!" and "Macarena" for use in movies, television shows, video games, and ads. Following the sale, DM exploited the recording, performance, and composition rights to "Whoomp!"

In 2002, the former president of Bellmark, Alvertis Bell, sued DM for copyright infringement, regarding the composition rights to "Whoomp!" Bell contended the composition rights to the song were not among the assets DM purchased from Bellmark's bankruptcy estate. Rather, Bell contended those rights were assigned to Alvert Music, a third party affiliated with Bellmark, prior to Bellmark's bankruptcy filing. DM's ownership of the recording and performance rights to "Whoomp!" was undisputed.

In 2012, the Eastern District of Texas determined that Alvert owned the "Whoomp!" composition rights, and a jury awarded Bell over \$2.2 million as damages for copyright infringement. Notably, the judgment represents 100% of copyright damages, even though Bell owned only 50% of the copyright. The judgment was affirmed by the Fifth Circuit in an opinion indicating that Tag Team could seek its share of the royalties from Alvert. Bell's claim to about \$1.3 million in attorney's fees under the Copyright Act, on top of the judgment, was pending in November 2015, when the district court proceedings were halted by DM's filing of a chapter 11 bankruptcy case in the Southern District of Florida.

Initially, DM sought to reorganize its liabilities under chapter 11 of the Bankruptcy Code. However, in 2016, DM's chapter 11 bankruptcy reorganization case was converted to a chapter 7 liquidation case because, among other reasons, DM was not generating enough revenue to continue operating in chapter 11. Shortly thereafter, the chapter 7 trustee sued Tag Team seeking quiet title over "Whoomp!" because Tag Team asserted ownership over the recording and performance copyrights, although Tag Team did not file a claim in the bankruptcy case. The trustee's complaint conceded that DM may have owed Tag Team royalties under the Bellmark recording agreement, which was an asset of DM's estate.

In June 2017, the chapter 7 trustee struck a deal with Alvert and Tag Team to resolve the parties' disputes. The global settlement approved by the bankruptcy court on September 28, 2017, provides for Alvert to receive all of DM's assets, other than certain specifically excluded property. DM's rights to "Whoomp!" are among the assets Alvert received as part of the settlement. Tag Team will receive a portion of the income derived from exploitation and any future sale of the rights to "Whoomp!" and may recover performance royalties from third parties. Certain assets were transferred to Mark and David Watson,

the founders of DM. These notably include the rights to any malpractice claim DM filed against its former counsel (we presume a claim exists regarding DM's misunderstanding that it purchased the composition rights to "Whoomp!" from the Bellmark bankruptcy estate), and songs written, recorded or produced by the Watsons, as well as songs "recorded by the artist known as Prince by whatever name, names or symbols he is known." The settlement also sets forth a process for the chapter 7 trustee and the Watsons to sort through master recordings in storage and turn them over to the proper party under the settlement.

There are several lessons to be learned by industry and legal professionals from the events and cases regarding the rights to "Whoomp!" First, anyone who purchases property from a bankruptcy estate, should conduct careful diligence regarding the assets being purchased to determine what is being purchased and what intellectual property rights are being obtained as a result of the sale. A properly run bankruptcy sale process should provide sufficient time for potential purchasers to perform the necessary review. Anyone interested in purchasing property from a bankruptcy estate should retain experienced bankruptcy counsel, and other professionals if necessary, to assist in the due diligence and the sale process. Copyright ownership rights in musical recordings can be particularly complex, with multiple entities owning separate strands of rights (performance, composition, music vs. lyrics etc.). Accordingly, guidance from someone knowledgeable about copyright ownership in the recording industry context would be essential.

Second, anyone seeking significant IP infringement damages against an entity must be aware of the "end game." A favorable judgment after an expensive and time consuming litigation battle may result in just a pyrrhic victory for the judgment creditor. If a party is just looking to recover monetary damages, that party should understand the costs of litigation and whether the judgment debtor will be able to pay the judgment. While it is always possible for a judgment creditor to recover in full, in cash, the likelihood of recovering a fraction of the judgment amount is greater, and there is also a chance of having to accept a full or partial non-cash distribution, i.e. assets in a liquidation or equity interests in a reorganization. Finally, the bankruptcy court is a forum in which it is usually better for litigants to settle than to continue fighting.