RECENT COURT DECISIONS* AND LEGISLATION

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CHAPTER 2

*Case summaries included in this article based upon the author's coverage of these court rulings in *Entertainment Law & Finance.*

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RECENT COURT DECISIONS AND LEGISLATION

I. CALIFORNIA TALENT AGENCIES ACT AND SEVERABILITY

The Court of Appeal of California, Second Appellate District, Division One, reversed a grant of summary judgment for actress Rosa Blasi that had voided her agreement with her personal manager for violating the California Talent Agencies Act, Labor Code Sec. 1700 et seq. *Marathon Entertainment Inc. v. Blasi*, 140 Cal. App. 4th 1001 (Cal. App. 2d Dist. 2006) Blasi had sought to avoid paying management commissions to Marathon Entertainment from the TV series "Strong Medicine." She claimed that other employment that Marathon procured for her without a talent license voided her entire Marathon-management agreement. But Blasi had obtained the TV-series role through her licensed talent agent, rather than Marathon. The court of appeal noted: "[U]nder the doctrine of severability of contracts, Marathon might be permitted to recover the Strong Medicine commission because not only did the complaint allege that Marathon provided lawful personal manager services neither prohibited nor regulated by the Act, but Blasi produced no evidence in the trial court linking the procurement of her Strong Medicine employment contract to any illegal activity by Marathon."

The court of appeal distinguished *Marathon Entertainment* from *Waisbren v. Peppercorn Productions Inc.*, 41 Cal. App. 4th 246 (1996), which held that a manager's incidental procurement of employment for a client required the manager to meet the requirements of the California Talent Agencies Act. In *Marathon Entertainment*, the court of appeal explained: "The parties believe that our decision in Waisbren completely precludes severance if the personal manager commits even a single violation of the Act and contend that the [California Labor] Commissioner has also adopted that view. … Although Waisbren held that the personal manager's contract was unenforceable as a matter of law because of the manager's illegal acts of procurement, Waisbren did not expressly discuss the doctrine of severability of contracts."

The California Supreme Court agreed to hear the *Marathon Entertainment* case.

II. RECORDING CONTRACTS AND PERSONAL JURISDICTION

The U.S. District Court for the Middle District of Georgia found that an Alabama-based record label was subject to personal jurisdiction in a suit in Georgia brought by Georgia-based artists the label had signed. *Best v. Raley Records and Entertainment Inc.*, 7:06-cv-23 (M.D.Ga. 2006). The plaintiffs obtained a deal, which included salaries, with Raley Records through third-party Brian Driggers. The label later terminated the artist contract prior to end of the stated contract term. The plaintiffs filed suit for fraud and breach of contract, among other things. The district court noted that the plaintiffs alleged that the label had "engaged in the following business transactions within the State of Georgia: (1) directed Plaintiffs to record a demo with their new lead singer …, (2) made a contract offer to Plaintiffs, through [co-defendant] Driggers in Thomasville, Georgia, which Plaintiffs accepted … and (3) paid [plaintiffs Patrick] Best and [Henry] McGill for their work." But the district court found no personal jurisdiction over the label's owners because the plaintiffs' allegations -- that the label owners had asked the band to record with a new lead singer and that the band had worked with one of the owners in Alabama who later informed the artists that the contract had ended -- "do not constitute business transactions, a tortious act or omission, or tortious injury caused within Georgia."

III. RECORD PRODUCTION CONTRACTS AND MEANING OF "COMMENCEMENT"

The U.S. District Court for the Southern District of New York upheld a jury determination in favor of a producer plaintiff as to the meaning of "commencement of recording" in a production-release agreement. *T.E.A.M. Entertainment Inc. v. Douglas*, 04 Civ. 1552 (JSR) (S.D.N.Y. 2006). Artist Ashanti and her mother had asked Gerald Parker to help them find a major-label deal. Ashanti and Parker entered into two production agreements. But after a year, Ashanti asked to be released so that she could go after a deal with Noontime Music, one of Parker's competitors. Parker signed an agreement releasing Ashanti that, in addition to a royalty-percentage right, stated:

"*You [Parker's company T.E.A.M.] shall have the right to produce two (2) masters for my [Ashanti's] first album recorded pursuant to the Noontime Agreement [i.e. Ashanti's record agreement with Noontime]. You should be paid an all-in recording fund in the amount of $25,000 for each said two (2) masters ($10,000 of which, per master shall be deemed to be a recoupable producer' fee advance) exclusive of mastering costs and fees or advances payable to Ashanti Douglas or us for recording. Said advance shall be payable to you one half (1/2) upon the commencement of recording and the balance upon the delivery to and acceptance of the masters by Noontime Music, Inc.*"

Parker filed suit against Ashanti and her mother after he received no payments. The defendants claimed that the term "commencement of recording" was a term of art that the drafting lawyer testified meant "when you have songs, the songs are approved, you submit a budget, and then you begin the recording

process." Parker testified, however: "I commenced [recording] by ... continuing to embellish the recordings that we had with previously worked on, that I thought -- not that I thought -- that I knew that I was told that this new company had taken some sort of a liking to, with the hope that maybe they would use these, one of these songs, and I continued to commence by creating a new material that I felt would be suitable for the project. ... As far as the new ... recordings that I was -- would hope to be used by Ashanti, I would create from the starting with the creative sessions and editing sessions."

The trial court told the jury that "[contract] terms are to be given their ordinary meanings except where the terms are specifically defined in the contract or where you find that they are terms of art and should be given the special meanings testified to." The jury decided that the defendants breached the release agreement.

Denying the defendants' motion for a judgment as a matter of law, the district court emphasized: "The Release Agreement was drafted by Kendall Minter, who also drafted the Noontime Agreement. In the latter, he expressly defined 'commencement of recording' as a term of art, … but in the Release Agreement he left it undefined. … While he testified that people in the recording business would nonetheless recognize it as a term of art, Parker, who indisputably was in the business, testified to the contrary, saying that, in his experience, 'commencement of recording' meant undertaking the prerequisites to recording, such as creating the music and editing the background tapes. … This was more than sufficient to create a genuine factual dispute, which the jury resolved in plaintiff's favor."

But granting the defendants' request for a new trial on Parker's lost profits, the court noted that plaintiff's expert Seymour Straus "assumed that Ashanti's albums released by Universal [with whom Ashanti ultimately signed and became successful] were a good proxy for (the unknowable) royalties from the hypothetical Noontime albums. [No Ashanti albums were released under the Noontime contract.] However, upon review, the Court is of the view that plaintiff never presented the jury with any material evidence with which to evaluate the plausibility of the analogy. This is not a case of an established artist, for, at the time here relevant, Ashanti was a virtual unknown. The jury was never provided with any way to evaluate how Noontime, a company with different resources than Universal, might have fared in trying to promote this unknown artist to stardom."

The case was settled shortly after the lost-profits trial began.

IV. RECORDING CONTRACTS AND ARTIST BROADCASTS

The Court of Appeals of Tennessee, at Nashville, decided that neither the record company to which the late country legend Hank Williams had signed, nor a company that obtained rights in the physical masters of Williams' 1950s radio performances had the right to exploit those recordings. *Polygram Records Inc. v. Legacy Entertainment LLC*, 77 U.S.P.Q.2D (BNA) 1680 (Tenn. Ct. App. 2006). Williams had been bound to MGM Records under an exclusive deal from 1947 to early 1953. In 1951 and 1952, Williams and his band, The Drifting Cowboys, performed live and on pre-recorded acetate discs for the "Mother's Best Flour" program on WSM radio. WSM decided to discard the acetates when moving from its downtown-Nashville offices in the 1960s. A photographer for the station then took possession of the recordings and sold them to Hillous Butrum, a former Drifting Cowboy. Butrum removed skips and hisses, added voiceovers, more music and registered the re-mixes for copyrights.

Legacy Entertainment bought the re-mixes from Butrum in 1997. When Legacy prepared to release the re-mixes on CD, Polygram Records, the successor to MGM Records, filed suit in Davidson County Chancery Court arguing it had the exclusive rights to the WSM recordings under MGM's contract with Williams. Williams's heirs, Jett Williams and Hank Williams Jr., joined Polygram as plaintiffs. The trial court found that it was the Williams heirs, rather than Polygram or Legacy, who owned the rights to the WSM performances.

Affirming, the court of appeals noted that the Williams acetates had been made only for broadcast on WSM, which had used the recordings for no other purpose. In addition, there was no evidence that Butrum or the station photographer who sold them to Butrum had any intangible rights in Williams' original acetate performances. The court explained: "Possession of a tangible embodiment of a work or performance such as the recordings at issue conveys no rights or ownership interests to the intangible rights embodied therein, especially the right to commercially exploit the performances embodied therein. … [I]t is evident Butrum's copyrights only pertain to the enhancements by Butrum."

Legacy further argued that it had the right to use Hank Williams' name and likeness to exploit the recordings because Williams hadn't specifically reserved those rights in his contract with WSM. But the court of appeals emphasized: "We are unwilling to infer, indeed to jump to the illogical conclusion that Hank Williams assigned these rights without limitation based on the mere fact his heirs cannot establish that the 1951 informal agreement with WSM provided to the contrary."

Polygram claimed the rights to the WSM recordings under William's MGM contract, which stated in part that MGM "*shall have the right to make records or other reproductions of the performances embodied in such recordings by any method now or hereafter known.*" The contract stated that it covered Williams' exclusive personal services "*for the purpose of making phonograph records, as [MGM] may require*" and that "*during the period of this contract [Williams] will not perform for the purpose of making phonograph records for any person other than [MGM] ... All recordings and all records and reproductions made therefrom, together with the performances embodied therein, shall be entirely our property, free of any claims whatsoever by you or any person deriving any right or interest from you.*"

Nevertheless, the court of appeals concluded: "In considering the entire contract, we find it significant that the first page of the contract places its focus on '*recordings made for the purpose of making phonograph records.*' ... [N]othing in the contract affords MGM or Polygram the present right to exploit recordings of performances by Hank Williams that were for purposes other than producing phonograph records, such as a pre-recorded radio broadcast. Moreover, there is no evidence in the record to establish that the Mother's Best Flour performances were recorded for the purpose of making phonograph records."

V. ROYALTY-COLLECTION AGREEMENTS AND ARTIST BANKRUPTCY

The U.S. Bankruptcy Court for the Southern District of New York, Poughkeepsie Division, decided that an artist in bankruptcy may reject an agreement he or she entered into for a third party to collect the artist's royalties. *In re: Helm*, 335 B.R. 528 (Bank. Ct. S.D.N.Y. 2006). In 2004, musician/songwriter Levon Helm signed an agreement for the Royalty Recovery Project (RRP) to collect music royalties due Helm. In 2005, Helm filed for bankruptcy under the federal Bankruptcy Code. He subsequently sought an order to allow him to reject the RRP agreement as an executory contract under the Bankruptcy Code's 11 U.S.C. Sec. 365.

The Bankruptcy Code doesn't define "executory contract," but the *Helm* bankruptcy court noted the majority judicial view is it is one "that is not so fully performed that a breach by either side would constitute a material breach of the contract." Thus, the bankruptcy court's task was to "ascertain whether both Royalty and Debtor [Helm] owe performance pursuant to the Agreement, and determine whether the failure to perform same would constitute a material breach."

RRP argued that its agreement with Helm wasn't executory because Helm only had to "sit back and collect checks." RRP added that Helm "cannot now, after Royalty has rendered its performance, refuse to pay for services that Royalty has fully performed." Helm countered in part that "Royalty has not collected any money pursuant to the Agreement, and has therefore not earned any right to a commission."

Looking at whether the agreement was executory as to RRP, the bankruptcy court found: "Royalty's characterization of the Agreement as 'fully performed' ignores the plain language of the contract at issue. … [T]he Agreement is perpetual in term; its jurisdiction is the universe (in the event that Debtor's work is being used at the space station and beyond); and it grants Royalty the exclusive right to collect Debtor's royalties 'currently due or becoming due.' … Royalty's failure to collect royalties coming due in the future would constitute a material breach of the contract."

The bankruptcy court also found the RRP contract executory as to Helm. The court explained that "it is likely that [the RRP agreement] was intended to ensure Debtor's cooperation with Royalty's collection efforts. The Court finds that Mr. Helm's cooperation in identifying existing and potential infringements was necessary to enable Royalty to perform under the Agreement … Thus, it appears that Mr. Helm's refusal, failure, etc., to supply documents, or information, to Royalty, with regard to the arrangements made with third party users of his work, would constitute a material breach of the Agreement; such a failure would go to the heart of the Agreement, defeat its very purpose, and justify Royalty's non-performance."

Once a contract is determined to be executory, a bankruptcy court asks a debtor to use "sound business judgment" in deciding whether to reject the contract. On this, the bankruptcy court in New York noted that Helm "has stated that in the exercise of his considered business judgment, the matters delegated to Royalty pursuant to the Agreement are matters within the ordinary competence of an attorney familiar with entertainment law, and can be collected at a far lower cost than provided for in the Agreement." But this didn't leave RRP without some potential relief for what it argued was Helm's attempt to avoid paying for royalties RRP already collected: 11 U.S.C. Sec. 365(g) permits contract-rejection damages.

VI. MECHANICAL LICENSES AND DOWNLOADING

The U.S. District Court for the Southern District of New York decided that Bridgeport Music didn't breach a mechanical-licensing agreement by filing a copyright-infringement suit against its licensee for granting digital-download licenses for third-parties to use the Bridgeport songs. *Bridgeport Music Inc. v. Universal Music Group Inc.*, 05 CIV. 6430 (S.D.N.Y. 2006) Bridgeport claimed that the mechanical licenses issued in 1991 to PolyGram Records, which defendant UMG later acquired, didn't cover digital downloading

because that distribution medium didn't exist then. UMG contended in its counterclaim to Bridgeport's suit that digital downloads are the same as CD and cassette uses and thus covered by the mechanical licenses. By filing suit, UMG argued, Bridgeport breached its licensing promise that it was "the sole and lawful owner of all right, title and interest in and every matter and thing granted and released herein."

But the district court noted: "Even if it is ultimately determined that UMG's position as to the scope of the mechanical licences prevails, it would not follow that Bridgeport has breached the contract for bringing a good faith, if unsuccessful, copyright infringement action in support of its position. … Bridgeport's assertion in its Complaint that the mechanical licenses did not extend to all of the uses Defendants have engaged in does not contradict its warranty that it was the owner of the compositions, and had the authority to grant the licenses."

VII. MUSIC ATTORNEYS AND RULE 11 SANCTIONS

The U.S. District Court for the Eastern District of Michigan Southern Division, issued sanctions under Rules 11 of the Federal Rules of Civil Procedure against three lawyers who filed suit on behalf of their clients against music artist Kid Rock, his record company and music publisher. *Eb-Bran Productions Inc. v. Warner Elektra-Atlantic Corp.*, 03-75149 (E.D.Mich. 2006). The Eastern District noted that in *Ritchie v. Williams*, 395 F.3d 283 (6th Cir. 2005), the appeals court had held "that several state law claims asserted by these plaintiffs [against Kid Rock alleging violation of early music contracts he signed] were completely preempted by the Copyright Act and thus barred by the three-year statute of limitations found in the Copyright Act. It further held that the non-preempted state-law claims were likewise time-barred under the applicable Michigan statutes of limitations." The district court then noted in part that in suing Kid Rock again, the plaintiffs were pursing "relief in connection with the same underlying transactions and occurrences that gave rise to its prior federal and state-court actions."

The district court went on to decide: "This Court rejects Plaintiff's counsel's argument that their continued pursuit of the claims and legal positions in this action was reasonable in light of their having consulted with another attorney, M. Wm. Krasilovsky, on whether they should continue this litigation. … A review of Mr. Krasilovsky's letter shows that he was consulted on different matter; i.e., whether Plaintiff should appeal the Sixth Circuit's decision in Ritchie to the United States Supreme Court. … The claims, allegations and contentions advocated by Plaintiff in its original complaint, amended complaint, motion to remand, and opposition to Defendants' motion for summary judgment were not warranted by existing law or by nonfrivolous arguments for the extension, modification, or reversal of existing law or the establishment of new law. *Fed. R. Civ. P. 11(b)(2)*. Accordingly, pursuant to *Rule 11(c)*, sanctions in the amount of $40,616.00 will be imposed on Plaintiff's attorneys, Demetrius Jones, Gregory Reed, and Stephanie Hammonds, and their respective law firms, jointly and severally."

VIII. COPYRIGHT PREEMPTION AND RIGHT OF PUBLICITY

The U.S. Court of Appeals for the Ninth Circuit decided that singer Debra Laws state right-of-publicity claim over the use of her voice in a Jennifer Lopez sound recording and music video was preempted by federal copyright law. *Laws v. Sony Music Entertainment Inc.*, 448 F.3d 1134 (9th Cir. 2006). Laws signed an agreement with Elektra/Asylum Records in 1979 that gave the record company the "sole and exclusive right to copyright such master recordings" and "the exclusive worldwide right in perpetuity … to lease, license, convey or otherwise use or dispose of such master recordings." Laws sued under California common and statutory law after a sample from her track "Very Special" was licensed by the label for the Jennifer Lopez track "All I Have."

Affirming the district court, the Ninth Circuit found: "Laws does not dispute Sony's contention that the recording of 'Very Special' was a copyrighted sound recording fixed in a tangible medium of expression. Laws' right of publicity claim is based exclusively on what she claims is an unauthorized duplication of her vocal performance of the song 'Very Special.' Although California law recognizes an assertable interest in the publicity associated with one's voice, we think it is clear that federal copyright law preempts a claim alleging misappropriation of one's voice when the entirety of the allegedly misappropriated vocal performance is contained within a copyrighted medium."

Laws 1979 agreement with Elektra had also stated that Elektra "shall not, without [Laws] prior written consent, utilize or authorize others to utilize the Masters in any so-called 'audio-visual' or 'sight and sound' devices intended primarily for home use," and that Elektra "or our licensees shall not, without your prior written consent, sell records embodying the Masters hereunder for use as premiums or in connection with the sale, advertising or promotion of any other product or service."

On this, the court explained: "We express no view as to the effect of Laws's reservation in the production agreement and no view as to any remedies that Laws may have against Elektra. Whether or not the two parties contracted around the actual use of a copyright does not affect our preemption analysis. To the extent

that Laws has enforceable, contractual rights regarding the use of Elektra's copyright, her remedy may lie in a breach of contract claim against Elektra for licensing 'Very Special' without her authorization."

IX. COPYRIGHT INFRINGEMENT AND FAIR-USE DEFENSE

The U.S. Court of Appeals for the Second Circuit affirmed that the inclusion, without a license, of thumbnail-size reproductions of concert posters of the Grateful Dead in a book on the band's history constituted copyright fair use. *Bill Graham Archives (BGA) v. Dorling Kindersley Ltd. (DK)*, 448 F.3d 605 (2d Cir. 2006). BGA, the posters copyright owner, sued over 7 posters in the defendants' book "Grateful Dead: The Illustrated Trip." Looking at the four factors fair-use factors of Sec. 107 of the Copyright Act, the Second Circuit's opinion is summarized as follows:

"[On purpose and character of use, m]ost important to the court's analysis of the first factor is the 'transformative' nature of the work. ... While there are no categories of presumptively fair use, … courts have frequently afforded fair use protection to the use of copyrighted material in biographies … DK's purpose in using the copyrighted images at issue in its biography of the Grateful Dead is plainly different from the original purpose for which they were created. …While the small size [as reproduced in the book] is sufficient to permit readers to recognize the historical significance of the posters, it is inadequate to offer more than a glimpse of their expressive value. In short, DK used the minimal image size necessary to accomplish its transformative purpose. Second, DK minimized the expressive value of the reproduced images by combining them with a prominent timeline, textual material, and original graphical artwork, to create a collage of text and images on each page of the book. To further this collage effect, the images are displayed at angles and the original graphical artwork is designed to blend with the images and text. Overall, DK's layout ensures that the images at issue are employed only to enrich the presentation of the cultural history of the Grateful Dead, not to exploit copyrighted artwork for commercial gain. … Third, BGA's images constitute an inconsequential portion of Illustrated Trip. ... [And s]ignificantly, DK has not used any of BGA's images in its commercial advertising or in any other way to promote the sale of the book."

"[Regarding the nature of the copyrighted work, w]e agree with the district court that the creative nature of artistic images typically weighs in favor of the copyright holder. We recognize, however, that the second factor may be of limited usefulness where the creative work of art is being used for a transformative purpose."

"[On the amount and substantiality of the portion used by the defendants, n]either our court nor any of our sister circuits has ever ruled that the copying of an entire work favors fair use. At the same time, however, courts have concluded that such copying does not necessarily weigh against fair use because copying the entirety of a work is sometimes necessary to make a fair use of the image. … We conclude that such use by DK is tailored to further its transformative purpose because DK's reduced size reproductions of BGA's images in their entirety displayed the minimal image size and quality necessary to ensure the reader's recognition of the images as historical artifacts of Grateful Dead concert events."

"[As to the effect of the defendants' use upon the plaintiff's market for or value of the originals,] the parties agree that DK's use of the images did not impact BGA's primary market for the sale of the poster images. … Instead, we look to whether DK's unauthorized use usurps BGA's potential to develop a derivative market. … In a case such as this, a copyright holder cannot prevent others from entering fair use markets …Since DK's use of BGA's images falls within a transformative market, BGA does not suffer market harm due to the loss of license fees."

X. LIFE-STORY GENERAL RELEASE AND WAIVER OF CLAIMS

The U.S. Circuit Court of Appeals for the Ninth Circuit ruled that a general release signed by the individual on whom the film "Flashdance" was based barred her claim to a co-authorship interest in the film copyright as well as her additional claims. *Marder v. Lopez*, 450 F.3d 445 (9th Cir. 2006). Maureen Marder sued over a 2003 music video featuring Jennifer Lopez that recreated scenes from "Flashdance." Marder's complaint included copyright, Lanham Act, unfair competition and right of publicity claims. The appeals court noted that the language of the 1982 release that Marder had signed with Paramount Pictures was "exceptionally broad and we hold that it is fatal to each of Marder's claims against Paramount. … [T]hough in hindsight the agreement appears to be unfair to Marder -- she only received $2300 in exchange for a release of all claims relating to a movie that grossed over $150 million -- there is simply no evidence that her consent was obtained by fraud, deception, misrepresentation, duress, or undue influence. Indeed, when she signed the Release, Marder was represented by counsel. She has not asserted that her counsel in 1983 was incompetent or deficient in any way."

The release stated in part that Marder "*releases and discharges Paramount Pictures Corporation ... of and from each and every claim, demand, debt, liability, cost and expense of any kind or character which have arisen or are based in whole or in part on any matters occurring at any time prior to the date of this Release.*" The appeals court noted that Marder's copyright claims were based on her contributions to the film screenplay

and this involved "matter" from before the date she signed the release. The court added that it wasn't "impermissibly redundant to secure a waiver of claims and a grant of rights in the same document."

XI. RIGHT OF PUBLICITY AND "PREDOMINATE USE"

The Court of Appeals of Missouri, Eastern District, Division Five, affirmed a jury verdict that the use of the name of the professional hockey player Tony Twist as a character in the "Spawn" comic books violated the hockey player's right of publicity. *Doe v. McFarlane*, ED85283 (Mo. Ct. App. 20, 2006). In an earlier stage of the case in which the Missouri Supreme Court had remanded for a second trial on an instructional error, the supreme court adopted a predominant-use test for determining whether speech that is both expressive and commercial is protected by the First Amendment. The jury then awarded Twist $15 million in damages.

On appeal of that verdict, the appellate court decided: "To the extent defendant/comic creator Todd McFarlane's and his company's] literary experts' testimony is at all relevant, on balance, it does not outweigh the evidence that McFarlane named the character after the hockey player and that use of the name was part of his and [his company's] marketing efforts to hockey fans. To the extent McFarlane's own claims about his artistic reasons for using the name 'Tony Twist' are significant, it was well within the trial court's discretion to find that his testimony lacked credibility. For instance, the timing of McFarlane's claims of artistic motivation is suspicious. Before the lawsuit was filed, McFarlane stated only that the character 'Tony Twist' was named after the hockey player with the same name; after the lawsuit was filed, he claimed that he chose the name for additional literary reasons. Moreover, although McFarlane said alliteration was a factor in naming Twist -- and that it was just coincidence that he picked the letter 'T' and the names 'Tony' and 'Twist' to accomplish that element, which happened to be the name of a real person -- none of the other hundreds of characters in the comic book had first and last names that started with the same letter … The predominant purpose of the use of the name 'Tony Twist' was to sell comic books and related products and not to make an expressive comment about Twist the hockey player. Therefore, use of the name is not entitled to First Amendment protection."

The court of appeals also found that the trial judge's instruction allowing the jury to consider future damage to the commercial value of the plaintiff's name was proper.

XII. CONTENT CREATION AND SEXUAL HARASSMENT

The Supreme Court of California ruled that the use of "sexually course and vulgar language" by the writers of the TV series "Friends" didn't constitute sexual harassment within the meaning of the California Fair Employment and Housing Act (FEHA), Calif. Gov. Code Sec. 12900 et seq. *Lyle v. Warner Brothers Television Productions*, 42 Cal. Rptr. 3d 2 (Calif. Sup. Ct. 2006). Plaintiff Amaani Lyle had been hired as a writers' assistant on "Friends." She was fired four months later, the defendants contending because her skills weren't sufficient.

In its ruling, the state supreme court noted in part: "Here, the record shows that the instances of sexual antics and sexual discussions identified above did not involve and were not aimed at plaintiff or any other female employee. It further confirms that such 'nondirected' conduct was undertaken in group sessions with both male and female participants present, and that women writers on the *Friends* production also discussed their own sexual experiences to generate material for the show. That the writers commonly engaged in discussions of personal sexual experiences and preferences and used physical gesturing while brainstorming and generating script ideas for this particular show was neither surprising nor unreasonable from a creative standpoint. Indeed, plaintiff testified that, when told during her interview for the *Friends* position that 'the humor could get a little lowbrow in the writers' room,' she responded she would have no problem because previously she had worked around writers and knew what to expect. Although plaintiff contends the writers 'sorely understated the actual climate' of the writers' room in her interview, these types of sexual discussions and jokes (especially those relating to the writers' personal experiences) did in fact provide material for actual scripts. The fact that certain discussions did not lead to specific jokes or dialogue airing on the show merely reflected the creative process at work and did not serve to convert such nondirected conduct into harassment because of sex."

XIII. FILM-CONTENT DELETION AND COPYRIGHT INFRINGEMENT

The U.S. District for the District of Colorado declined to accept a public-benefit argument by companies that sold DVD copies of motion pictures -- edited without the permission of the film studios that produced them -- to justify deleting what the editing companies claimed was objectionable content. *CleanFlicks of Colorado LLC v. Soderbergh*, 433 F. Supp. 2d 1236 (D. Colo. 2006). Granting the studios' and film directors' motion for a permanent injunction, the district court found that the editing companies violated the film studios' exclusive rights to reproduce

and distribute movies that the studios make. The court noted, "Under the facts of this case, the presumed destruction of the [editing companies'] businesses is not a justification for denying these copyright holders -- the Studios -- the right to control the reproduction and distribution of the protected work in their original form."

XIV. FILM CONTENT AND MODIFICATION RIGHTS

The Supreme Court of New York, New York County, decided that the producers of several films by Woody Allen had the right, under a settlement agreement between Allen and the producers, to make a modified version of each movie for network television and airline exhibition. *Moses Productions Inc. v. Sweetland Films*, 12 Misc. 3d 1158A, 819 N.Y.S. 2d 211 (N.Y. Sup. Ct. 2006). The settlement agreement had been reached after Allen's personal services corporation sued the producers to collect monies from the films. Allen's original creative-control clause with the producers stated in essence that Allen would have "final and complete creative control over the [films]." The movies at issue in the settlement-agreement dispute included "Bullets Over Broadway," "Celebrity," "Deconstructing Harry" and "Mighty Aphrodite."

The court explained that in the settlement agreement "the parties agreed to the creation of one modified version of each film, subject to generally accepted network television censorship and/or standards and practices requirements. At issue is whether the modifications proposed by Defendants meet the requirements of the parties' agreement. This dispute is not about whether making a network version of the films is the best way to preserve Woody Allen's artistic vision; rather, it is one of contract interpretation." The court went on to note that while Moses Productions had put forth "no alternative list of proposed modifications to the films[,] … it has nonetheless taken the unreasonable position that few or no modifications are permissible for these four films. … Plaintiff bases its objections on the premise that the modifications proposed by Defendant are 'more restrictive and extreme than what Network Practices would require.' "

But the court found: "[I]n light of Plaintiff's total opposition to Defendants' proposed edits to these four films, it seems futile to go through the proposed edits line by line, only to conclude that an insignificant number of words in this gray category might survive network scrutiny. … In any case, the Settlement Agreement permits Defendants to create only one modified version of each film. Therefore, Defendants' single modified version of each film might well have to satisfy the more conservative standards for daytime programming." Allen's company also argued that the producers' right to make the modified versions nevertheless was limited by the creative-control clauses in their original agreements with Allen. The court acknowledged that it was "undeniable that Defendants have proposed not insignificant modifications to these four films." But the court emphasized that under the settlement agreement, "Moses consented, 'notwithstanding anything set forth in any agreements related to the Pictures,' to the development of 'one (1) modified version [of each of the films] that complies with generally accepted Network Television censorship and/or standards and practices requirements.' … [T]he parties' consent to the creation of a network version of the films in the Settlement Agreement supercedes any contrary provisions in previous agreements."

Moses Productions then argued that under the settlement agreement, modifications could only be made if the modified versions of the films would be profitable in the settlement trustee's "reasonable good faith business judgment." The court noted, however: "Defendants argue that enforcement of this provision of the Settlement Agreement would be premature, because the determination of the profitability of the modified films is to be made separately by the Trustee, and only after the instant dispute over Defendants' proposed modifications to the films has been resolved. … I agree with Defendants."

XV. FILM-PRODUCTION FINANCING AND BREACH OF CONTRACT

No reasonable jury would find a meeting of the minds was reached on the essential elements of an alleged agreement for the plaintiff to produce an educational film in return for the defendants' promise to finance an unrelated feature film, the U.S. District Court for the Southern District of New York ruled. *Baker v. The Robert I. Lappin Charitable Foundation*, 415 F. Supp. 2d 473 (S.D.N.Y. 2006). Robert I. Lappin and The Robert I. Lappin Charitable Foundation hired plaintiff Gil Baker as writer and producer of the film "Great Jewish Achievers" (GJA). Baker sued after the Lappin defendants failed to provide funding for the full-length film "Bungalow 6" that Baker wished to make.

The district court granted summary judgment for the defendants on Baker's breach-of-contract claim. The court explained: "As Baker conceded at his deposition, there was no discussion, much less any agreement, on critical items such as the nature of the investment (whether loan or equity or otherwise); the time of performance (when Lappin was to provide the $500,000 [for 'Bungalow 6']); the manner of performance (whether the funds would be paid in a lump sum or installments); the terms of repayment (if the monies were to be repaid at all); whether interest would be paid and if so at what rate; whether Lappin would share in profits and if so in what manner and to

what extent; whether and to what extent Lappin would have any control over content, casting, or other creative issues; and who would own the copyrights."

XVI. FILM-OPTION AGREEMENTS AND THEATRICAL RELEASE

The U.S. Court of Appeals for the Ninth Circuit found a genuine issue of material fact existed as to whether a film-option agreement required that a film be released initially in theaters. *LaHaye v. Goodneuz Group LLC*, 04-55839 (9th Cir. 2006). Rev. Tim LaHaye, co-author of the Christian-book series "Left Behind," had filed suit against a production company over a film based on one of the books. The appeals court first found, in its unpublished opinion, that there was a genuine issue of material fact as to whether the defendants breached the option contract by refusing to negotiate a long-form agreement. According to the court: "Neither the language of the contract, nor the circumstances under which the parties contracted, illuminates the conditions under which a long-form agreement would be 'needed.' "

The appeals court then noted: "The terms of the [option] contract suggest an implicit obligation to release the film theatrically. To the extent that [the option contract], which prescribes the consideration the producers must pay for each type of production, contemplates production of a film, it expressly and exclusively prescribes consideration for a 'theatrical motion picture' -- not for any other kind of motion picture. Further, [the option contract] provides that the purchase price set forth … pertains to a 'theatrical motion picture.' "

However, the appeals court further found: "Because the contract contemplates the possibility that the final budget might not exceed $10 million, there is no question that the contract did not require a minimum budget of some $30 to 40 million. Because the contract contemplates the possibility that the producers could exercise the option as late as April 14, 2000, there is no triable issue as to whether the producers were required to release the film by January 1, 2000."

Finally, the Ninth Circuit concluded the evidence outside the written option deal could be considered in interpreting the contract: "The agreement related only to option rights, and not to the parties' relationship if the producers chose to exercise the option. Details on the rights of the parties in the event that the producers exercised the option would naturally be covered in a separate agreement. Accordingly, we find that the [option] agreement is only partially integrated. In trying the claims for breach of contract, breach of implied covenant, and declaratory relief regarding the long-form agreement and theatrical release, therefore, the district court should consider parol evidence to supplement or explain the terms of the agreement, but not to contradict them."

XVII. FILM DISTRIBUTION AND PROFIT RIGHTS

The U.S. District Court for the Southern District of Texas, Houston Division, denied a default award to the producer of the film "Altered Love" in a suit for payment from a distributor but allowed the producer a further opportunity to establish lost profits. *Jenny's Memorial Business Enterprises v. Peacock Films*, H-03-5873 (S.D.Tex. 2006).

The district court explained: "[The plaintiff] established that someone is distributing 'Altered Love' and, in all probability, receiving revenue. However, that revenue may not be sufficient to permit Jenny's to recover any 'Net Receipts.' The contract defines 'Net Receipts' as: All money received (gross receipts) minus 35% of the gross receipts paid to [the distributor] Peacock as a Distribution Fee minus Distribution Expenses minus money advanced to Jenny's or on behalf of Jenny's. … Because the Distribution Fee is so large, Altered Love' cannot produce even a dollar of 'Net Receipts' unless the distribution costs do not exceed 65% of the gross receipts. Before this court will award Jenny's damages, it must receive evidence that 'Altered Love' produced Net Receipts, i.e., some evidence, even approximate evidence, of the film's Gross Receipts and Distribution Expenses. … If Jenny's complies with all of the discovery rules and intransigence by Peacock … prevents Jenny's from producing evidence of damages then this court will entertain a motion for discovery sanctions which might allow an award of money that would be based on the criteria for sanctioning abuses of the discovery process, rather than on California's laws [under the distribution contract's choice-of-law clause] governing damage awards."

XVIII. LEGISLATIVE CONCERNS

A. Video Games and Content Regulation.

The U.S. District Court for the District of Minnesota struck down a state law aimed at regulating the access of minors to videogames. *Entertainment Software Association v. Hatch*, 06-CV-2268 (JMR/FLN) (D. Minn. 2006). The "Minnesota Restricted Video Games Act" prohibited individuals under 17 years of age from buying or renting video games rated "AO" for "adults only" or "M" for "mature" by the industry's Entertainment Software Rating Board (ESRB). The district court initially noted that the "Act imposes a regime which attempts to regulate video games based on content. … As these games enjoy First Amendment protection, any such restriction is presumptively invalid and subject to strict scrutiny." Issuing a permanent injunction against enforcement of the law the day before it was to take

effect, the district court agreed with the plaintiff trade associations that use of industry ratings as a basis for violation of the state statute amounted to an improper delegation of authority. Here the court explained that the "ESRB rating is determined by a private body with no duty to answer to the public. Indeed, the rating scheme does not provide a method for the public or the State to challenge a rating once it is determined."

In promulgating the law, the state had relied on a study titled "An Update on the Effects of Playing Violent Video Game." The court found the study insufficient as a basis for enacting the Minnesota statute. According to the court: "[T]here is a paucity of evidence linking the availability of video games with any harm to Minnesota's children at all. A person, indeed a legislature, may believe there is a link and a risk of harm, but absent compelling evidence, the belief is pure conjecture. The State's professed concerns, in the absence of evidence showing them to be well-founded, do not outweigh the chilling effect on free speech that would result from the Act's becoming effective."

Several other federal courts have struck down state video-game-regulation statutes, including in California, Illinois, Louisiana, Michigan and Oklahoma. See, *Video Software Dealers Association v. Schwarzenegger*, 401 F.Supp. 2d 1034 (N.D. Calif. 2005); *Entertainment Software Association v. Blagojevich*, 404 F.Supp. 2d 1051 (N.D. Ill. 2005); *Entertainment Software Association v. Foti*, 06-431-JJB-CN (M.D.La. 2006); *Entertainment Software Association v. Granholm*, 404 F.Supp. 2d 978 (E.D. Mich. 2005); *Entertainment Merchants Association v. Henry*, CIV-06-675-C (W.D.Okla. 2006).

B. "Truth in Musical Advertising" Laws.

Promoted by The Vocal Group Hall of Fame, these laws are meant to stop "false, deceptive or misleading affiliation, connection or association" between a recording group and a performing group. In 2004, South Carolina became the first state to enact a "Truth in Musical Advertising" statute. In 2006, Connecticut, Illinois and Pennsylvania enacted these statutes; and state Senates in Delaware, Michigan and Massachusetts approved "Truth in Musical Advertising" legislation. North Dakota also has a "Truth in Musical Advertising" statute and there is a push for passage in a number of other states. These statutes generally mandate:

- That the owner of a federally registered service-mark for the group name authorize a live performance;
- That at least one original commercial-recording member of the group who has the legal right to use and hasn't abandoned the group name is involved in a live performance;
- That tribute groups are identified as such in all advertisements and promotions; or
- That the original recording group has authorized the live performance.

There are some variations in remedies available under these state laws, but they typically allow for injunctions against unauthorized performances, fines ranging from $5,000 to $50,000 and a requirement that violators pay illegal concert income to the statutory party-in-interest.

C. Platform Equality and Remedies for Rights Holders in Music Act of 2006 ("PERFORM" Act).

Introduced in both the U.S. Senate (S. 2644) and House of Representatives (H.R. 5361) in spring 2006, the PERFORM Act would require the payment by cable, Internet and satellite broadcasters of fair-market value for performances and distributions of digital recordings. The legislation is a response to satellite-radio devices that can copy large amounts of music. The PERFORM Act would also require a transmitting entity to prevent consumers from making copies except for "reasonable recording." Legislation co-sponsor Sen. Dianne Feinstein (D-Calif.) has stated that "new technologies and business models have become so advanced that the clear lines between a listening service and a distribution services have been blurred."

D. Section 115 Reform Act of 2006 (SIRA).

Introduced in the U.S. House of Representatives in June 2006, SIRA would establish a blanket-compulsory license for to use musical compositions for digital phonorecord deliveries, including complete and partial downloads and interactive streaming. SIRA would require the Register of Copyrights to appoint a general designated agent to issue the licenses, and collect and distribute royalties, which would be retroactive to covered uses dating back to Jan. 1, 2001. The proposed legislation has been criticized for potential representation problems for songwriters and some publishers by designating one agent to handle all licensing. SIRA and the Orphan Works Act discussed below were combined, with an anti-piracy measure, into the Copyright Modernization Act of 2006 in September, before being tabled due to opposition and the November elections. The proposals are expected to be considered again in 2007.

E. The Songwriters Capital Gains Tax Equity Act.

Signed by Pres. Bush in May, this law will take effect on Jan. 1, 2007. Lobbied for by the Nashville

Songwriters Association International, the Tax Equity Act will permit songwriters to pay a 15% capital-gains tax rate on the sale of musical compositions. To now, music publishers have been able to claim the capital-gains rate on sales of song catalogs, but songwriters have been required to pay self-employment taxes and much higher ordinary income taxes on such dispositions.

F. Orphan Works Act of 2006.

Introduced in the U.S. House of Representatives in May by Rep. Lamar Smith (R-Tex.). The Orphan Works Act limits liability for use of copyright-protected works when copyright owners can't be found. To be covered by the proposal, before using a work a party must document that a diligent, good-faith search has been conducted to find the copyright owner and, if known, the author and owner must in any case be cited when the work is used. An "infringer" would be required to pay a copyright owner who steps forward "reasonable compensation," which isn't defined in the proposal and must be established at cost to the owner. No payment to the copyright owner would be required if the work has been used "without any purpose of direct or indirect commercial advantage and primarily for a charitable, religious, scholarly, or educational purpose."