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# “Now Known or Hereinafter Devised” How Five (5) Little Words Can Save Tons On Licensing Agreements Litigation

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# “Now Known or Hereinafter Devised”

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## *How five (5) little words can save tons on licensing agreements litigation.*

**By: Lisa M. Meyer**

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## I. Introduction

Technology is progressing at an exponential rate. Consumers buy the latest and greatest devices knowing full well that as soon as they open the package of their “new” technology it will become obsolete. It is like shoveling sand against the tide – no one will ever be able to keep up – especially not the legislature and the judicial system. Licensing contracts are created every day for copyrighted works including books, songs, motion pictures, sporting events, and so on. However, some older contracts, and even some newer contracts, were created before these new technologies were ever even contemplated. What does that mean for these agreements? What happens to an allegedly “fully integrated” licensing agreement when a new technology is invented? How are the terms of that agreement affected by this new technology? Who retains the rights to exploit the work in this new media, the licensee or the licensor? Unfortunately, these questions are not easy to answer, especially because everyone is always rushing to be the first to the marketplace with their exploitation of copyrighted works in a new medium. Licensors and licensees may rush to take advantage of the latest and greatest technological advance before stopping to make sure their licenses include the right to exploit a copyrighted work in a new medium.

Unfortunately the law simply cannot keep up with the pace of these technological advances, therefore, licensees and licensors have very little guidance from the legislation and the judiciary when it comes to determining whether or not the invention of a new technology can be exploited under an existing licensing agreement. Also, by the time the legislation and the judiciary weigh in on particular technological advances, there are hundreds or maybe thousands of other new technologies created that will still require judicial and legislative guidance.

Theoretically, though, if contracts include the five (5) little words “Now known or herein after devised” litigation can be avoided. Is that really the case?

In order to properly investigate these questions this paper will analyze the existing case law involving new technological advances for exploiting copyrighted works. The first cases involve the invention of new technologies for viewing television shows and listening to and sharing music files. The next set of cases involves musical compositions synchronized in motion pictures. Then there are several cases involving new media for the distribution of sound recordings and literary works. After which, there will be an outline of various recommendations for someone who is considering whether or not to exploit a licensed work in a new medium but in unsure whether or not the current licensing agreement includes this technology

## **II. Case Law Background**

### **a. New Technologies**

In the last twenty (20) years, the courts have tackled various cases involving new technologies potentially infringing on copyright holders’ rights. The legal analysis the courts engage in focuses on how the specific technological device or service works. The way in which a device or service specifically handles copyrightable works will affect how the court will ultimately determine whether or not this new technological device or service creates the means for a copyright infringement to occur. If the technology creates an electronic copy of the copyrighted work without the permission of the copyright holder then an infringement most likely has occurred.

The Ninth Circuit examined this issue in *A&M Records, Inc. v. Napster, Inc.*<sup>1</sup>, where the plaintiffs, holders in copyrights in various sound recordings, sued Napster, Inc. (“Napster”), a company which allowed users to share music files through peer-to-peer sharing website.<sup>2</sup> The

Ninth Circuit examined how this website and the underlying service actually handled these sound recordings.<sup>3</sup> This technology allowed users to upload copies of the sound recordings onto Napster's server and then allowed other users to search and download those sound recordings onto their personal computers via the internet.<sup>4</sup> Because the technology actually created a digital copy of the sound recording and allowed users to obtain a copy of that sound recording without providing a royalty to the copyright holder, the Ninth Circuit determined copyright infringement did in fact occur.<sup>5</sup>

Napster attempted to assert the affirmative defense of fair use, but the district court disagreed with their argument and the Ninth Circuit affirmed that determination.<sup>6</sup> In finding for the plaintiffs, the Court was forced to consider the best way to assess damages against Napster:

Imposing a compulsory royalty payment schedule would give Napster an 'easy out' of this case. If such royalties were imposed, Napster would avoid penalties for any future violation of an injunction, statutory copyright damages and any possible criminal penalties for continuing infringement. The royalty structure would also grant Napster the luxury of either choosing to continue and pay royalties or shut down. On the other hand, the wronged parties would be forced to do business with a company that profits from the wrongful use of intellectual properties. Plaintiffs would lose the power to control their intellectual property: they could not make a business decision *not* to license their property to Napster, and, in the event they planned to do business with Napster, compulsory royalties would take away the copyright holders' ability to negotiate the terms of any contractual arrangement.<sup>7</sup>

Therefore, the Ninth Circuit ordered "a partial remand of this case on the date of the filing of this opinion for the limited purpose of permitting the district court to proceed with the settlement and entry of the modified preliminary injunction."<sup>8</sup>

In *WPIX, Inc. v. ivi, Inc.*<sup>9</sup>, the plaintiffs were broadcasters of television programming and were seeking an injunction against ivi, Inc. ("ivi"), a website that was retransmitting the

plaintiffs' programs over the internet live.<sup>10</sup> The District Court issued a preliminary injunction on plaintiffs' behalf and the defendants appealed.<sup>11</sup> The Second Circuit noted:

[i]n a copyright case, a district court may grant a preliminary injunction when plaintiffs demonstrate: (1) a likelihood of success on the merits; (2) irreparable harm in the absence of an injunction; (3) a balance of the hardships tipping in their favor; and (4) non-disservice of the public interest by issuance of a preliminary injunction.<sup>12</sup>

The court then addressed each prong of the injunctive test.

For the first prong of the test for an injunction, "Likelihood of Success on the Merits," the Second Circuit used the two (2) step "Chevron Test"<sup>13</sup> to determine, "whether ivi, a service that streams copyrighted programming live and over the Internet, constituted a cable system under § 111 of the Copyright Act. If so, ivi had a statutory defense to plaintiffs' claim of copyright infringement, and ivi was entitled to a compulsory license to continue retransmitting plaintiffs' programming."<sup>14</sup> The court noted, "[that it was] unclear whether such a service (1) [was] or utilize[d] a 'facility' (2) that receive[d] and retransmit[ed] signals (3) through wires, cables, microwave, or other communication channels."<sup>15</sup>

Because the statute was unclear on this issue the Court then turned to the legislative history to try to determine whether or not ivi should have been considered a cable system.<sup>16</sup> The Court ultimately concluded, "Congress did not intend for § 111's compulsory license to extend to internet retransmissions. To the extent that there [was] any doubt as to Congress's intent, however, we proceed to *Chevron* step two, and we conclude that the position of the Copyright Office eliminated such doubt in its entirety."<sup>17</sup>

With regards to the second *Chevron* step the Court held, "(1) the statutory text [was] ambiguous as to whether ivi, a service that retransmits television programming over the Internet, [was] entitled to a compulsory license under § 111; (2) the statute's legislative history,

development, and purpose indicate[d] that Congress did not intend for § 111 licenses to extend to Internet retransmissions; (3) the Copyright Office’s interpretation of § 111 – that Internet retransmission services [did] not constitute cable systems under § 111 – align[ed] with Congress’s intent and [was] reasonable; and (4) accordingly, the district court did not abuse its discretion in finding that plaintiffs were like to succeed on the merits of the case.”<sup>18</sup>

The Second Circuit then analyzed the next element needed for an injunction “Irreparable Injury.”<sup>19</sup> For three (3) reasons the court held the plaintiffs would suffer “irreparable injury”: (1) “ivi’s actions harm[ed] plaintiff’s retransmission and advertising revenues by substantially diminishing the value of their copyrighted programming”<sup>20</sup>; (2) “plaintiff’s losses would be difficult to measure and monetary damages would be insufficient to remedy the harms”<sup>21</sup>; and (3) if the plaintiffs were to succeed on the merits, ivi would have been put out of business and therefore have been unable to pay any damages awarded to the plaintiffs.<sup>22</sup>

For the next element “Balance of Hardships” the Second Circuit determined the plaintiffs had sufficiently demonstrated that “[t]he balance of hardships, therefore, clearly tip[ped] in plaintiffs’ favor.”<sup>23</sup> Finally, for the final element “public interest” the Court noted, “the public ha[d] a compelling interest in protecting copyright owners’ marketable rights to their work and the economic incentive to continue creating television programming.”<sup>24</sup> Therefore, the Second Circuit affirmed the district court’s grant of an injunction in favor of the plaintiffs.<sup>25</sup>

In another broadcasting case, *WGN Continental Broadcasting Co. v. United Video, Inc.*,<sup>26</sup> WGN Continental Broadcasting Co. (“WGN”) was a “Superstation” in Chicago that utilized a new technology called “teletext,” which allowed WGM to transmit teletexts along with their broadcast of the nightly news.<sup>27</sup> Because WGN [was] a “Superstation” it could not reach their audiences in Albuquerque without the help of the defendant, United Video, Inc. (“United

Video”), which retransmitted the signal to the local cable affiliate.<sup>28</sup> However, when United Video retransmitted the signal, it removed WGN’s teletext and included their own.<sup>29</sup> WGN sued for copyright infringement, the district court found in favor of the defendants and WGN appealed.<sup>30</sup>

The circumstances surrounding the relationship between the parties created a unique analysis; the Seventh Circuit noted, “[i]t used to be that a cable system that picked up and retransmitted a broadcast signal containing a copyrighted program was not an infringer. But the Copyright Act of 1976 changed this, though it allow[ed] a cable system to pick up and retransmit broadcast signals without the copyright owner’s so long as it pays him royalties as fixed in the statute.”<sup>31</sup> Although the ultimate transmission, made by the local affiliate that contained the changes made by United Video, the infringement was actually implemented by United Video before they transmitted to the local affiliate: “The cable system select[ed] the signals it want[ed] to retransmit, pays the copyright owners for the right to retransmit their programs, and pa[id] the intermediate carrier a fee for getting the signal from the broadcast station to the cable system. The intermediate carrier pa[id] the copyright owners nothing, provided it really [was] passive in relation to what it transmit[ed], like a telephone company.”<sup>32</sup>

The dilemma this system created was “United Video could mutilate to its heart’s content the broadcast signal it picked up and the copyright owner would have no recourse against it. His only recourse would be against the cable systems – more than a thousand in the case of WGN – a thousand or more copyright infringement suits instead of one.”<sup>33</sup> The Seventh Circuit held “United Video [could not] avail itself of the passive carrier exception, because it was not passive – it did not retransmit WGN’s signal intact.”<sup>34</sup> Therefore, the Court upheld WGN’s injunction against United Video.<sup>35</sup>

These cases demonstrate the struggles the courts have had trying to keep pace with these modern technological advances. When a statute does not specifically address a technological device or service the courts have had to look elsewhere to opine how the legislature would have intended to treat this new technological medium had it been available when the statute was written. With regards to the statute in *WPIX*, the Ninth Circuit analyzed the legislative history and legislative intent to anticipate how the legislature would have responded to *ivi* transmitting live copyrighted programming over the internet.<sup>36</sup> As the cases below will demonstrate, when the case involves a contract between a licensee and a licensor the court, when they deem a contract is ambiguous, will also examine extrinsic evidence to determine what the parties initially intended before the technological advance was invented.

#### **b. Motion Pictures and Musical Compositions**

In the modern world motion pictures and musical compositions go hand-in-hand. It is almost impossible to imagine a modern motion picture without a musical score. Most motion pictures in the modern world have a corresponding soundtrack album, which is released for sale containing at least some of the songs from the motion picture. A song can become a major hit simply by appearing in a blockbuster motion picture.

According to Song-Database.com “Unchained Melody” by the Righteous Brothers spent thirteen (13) weeks on the Billboard charts after its initial release in 1965.<sup>37</sup> However, almost thirty-five (35) years later, after the song appeared in the motion picture, Ghost starring Demi Moore and Patrick Swayze<sup>38</sup>, the song reappeared on the Billboard charts again. This time the song spent another forty-four (44) weeks on the Billboard charts.<sup>39</sup> Success like this can make the incentive to clarify the terms of master recording’s licensing agreements imperative. The courts have tackled this issue on several occasions.

The United States Court of Appeals for the Second Circuit decided *Bourne v. Walt Disney Co.*<sup>40</sup> in 1995. The case involved an agreement between Walt Disney Co. (“Disney”) and Beebe Bourne, d/b/a Bourne Co. (“Bourne”) for the licensing rights to all the musical compositions appearing in Disney’s animated motion pictures.<sup>41</sup> Over a series of agreements and amendments Disney conveyed the publishing rights to these musical compositions to Irving Berlin, Inc., the predecessor of Bourne, when each film was originally released.<sup>42</sup> The parties later entered into a settlement agreement in 1965 which allowed Disney “a license in the theatrical motion picture and television grand performing rights in the Compositions, as defined by the American Society of Composers, Authors and Publishers, nothing in the settlement agreement gave Disney the right to synchronize or fix the Compositions on videocassette.”<sup>43</sup> Years later, Disney released Snow White and Pinocchio on videocassette but did not seek an additional license from Bourne for the musical compositions contained therein.<sup>44</sup> Bourne sued Disney for copyright infringement and sought damages for the royalties from the sales of the videocassettes.<sup>45</sup>

The jury concluded “Disney infringed Bourne’s copyrights by using the Compositions in television advertising.”<sup>46</sup> However, “concerning Disney’s right to use the Compositions in videocassettes, the jury found for Disney.”<sup>47</sup> Both parties appealed.<sup>48</sup> The Second Circuit first discussed Disney’s right to exploit the compositions in synchronization with the motion pictures on videocassette.<sup>49</sup> The first issue regarding these rights concerned contract integration.<sup>50</sup> If the multiple agreements entered into between the parties were fully integrated then there would be no need for further court interpretation of the contract terms.<sup>51</sup>

The Second Circuit noted, “[i]f, as Bourne contends, the 1937 Assignment Agreement was intended to constitute the entire agreement concerning the musical compositions from Snow

White, then Disney would have been left with no right to use the compositions in the original release of the motion picture in 1937 or in any subsequent releases.”<sup>52</sup> The Court found that this was unlikely to be the intent of either party.<sup>53</sup> The Court stated, “the evidence demonstrate[d] an implied understanding between Disney and Bourne that Disney’s rights to the Snow White compositions were to be controlled by the 1933 Shorts Agreement.”<sup>54</sup> Therefore, the Court held the terms of this implied contract were a question of fact for their jury to decide.<sup>55</sup>

The next question for the Second Circuit to consider was whether “motion picture” rights included the right to distribute the motion pictures on videocassettes.<sup>56</sup> Bourne argued videocassettes were not contemplated in the 1930s when these contracts were negotiated, and therefore the right to distribute the motion pictures on videocassette could not have been included in the terms of the original agreements.<sup>57</sup> The Court noted, “[i]f the production of home videocassettes clearly f[ell] outside the scope of the grants, then Disney’s use of the Compositions was unauthorized as a matter of law, and, therefore, the district court erred in submitting this question to the jury.”<sup>58</sup>

The Second Circuit did not agree “that the term ‘motion picture’ ha[d] a sufficiently definite and precise meaning as to allow for interpretation as a matter of law.”<sup>59</sup> Disney’s expert also noted, “there is no practical difference between storing a motion picture on film, videocassette, or any other storage media.”<sup>60</sup> Based on this testimony and other evidence offered by Disney that, “even in the 1930s Disney made available certain short subject cartoons for home viewing,” the Second Circuit agreed a jury determination with regards to the distribution on videocassettes was also proper.<sup>61</sup>

Finally, Disney argued its distribution of the videocassettes “without any express license from Bourne” was covered under “the first sale doctrine.”<sup>62</sup> “Bourne argue[d] that Disney, even

if it lawfully possessed the videocassettes, did not acquire the videocassettes as a result of a ‘first sale’ by Bourne, the copyright owner. Since no transfer of copies passed from Bourne to Disney, Bourne argue[d] that no ‘first sale’ ha[d] occurred.”<sup>63</sup> The Second Circuit disagreed with this argument because “Disney, was licensed by Bourne to exploit the copyrighted compositions in connection with its motion pictures. Having so licensed Disney, we do not see any good reason why Disney should [have] not [been] able to dispose of these lawfully made copies as it wishes.”

64

In a slightly less complicated case, *Greenfield v. Philles Records, Inc.*<sup>65</sup>, the Court of Appeals of New York considered whether a 1963 contract between the musical group, “The Ronettes”, and defendant production company, Philles Records, Inc., (“Philles”) allowed for exploitation of the groups’ songs in motion pictures, specifically the 1987 hit Dirty Dancing.<sup>66</sup>

The original contract conveyed:

All recordings made hereunder and all records and reproductions made therefrom together with the performances embodied therein, shall be entirely Philles’ property, free of any claims whatsoever by you or any person deriving any rights of interest from you. Without limitation to the foregoing, Philles shall have the right to make phonograph records, tape recordings or other reproductions of the performances embodied in such recordings by any method now or hereafter known, and to sell and deal in the same under any trade mark or trade names or labels designated by us, or we may at our election refrain therefrom.<sup>67</sup>

The Court of Appeals noted, “[d]espite the technological innovations that continue[d] to revolutionize the recording industry, long-settled common-law contract rules still govern[ed] the interpretation of agreements between artists and their record producers.”<sup>68</sup> The trial court found in favor of “The Ronettes” that the original agreement did not allow for synchronization rights and determined damages were “approximately \$3 million.”<sup>69</sup> “The Appellate Division affirmed, concluding that defendants’ actions were not authorized by the agreement with plaintiffs because

the contract did not specifically transfer the right to issue synchronization and third-party domestic distribution licenses.”<sup>70</sup>

The Court of Appeals sought to answer the question, “does the contract’s silence on synchronization and domestic licensing create an ambiguity when [it?] opens the door to the admissibility of extrinsic evidence to determine the intent of the parties?”<sup>71</sup> The Court noted, “New York has well-established precedent on the issue of whether a grantor retains any rights to artistic property once it [was?] unconditionally transferred.”<sup>72</sup> However, “[i]n this case, plaintiffs concede[d] that defendants own[ed] the master recordings. Notably, the agreement explicitly refer[red] to defendants’ ‘right to make phonograph records, tape recordings or other reproductions of the performances embodied in such recordings by any method now or hereafter known, and sell and deal in the same.’”<sup>73</sup>

The Court of Appeals determined this contract was not ambiguous and therefore defendants were within their rights to exploit the synchronization rights of the “The Ronettes” hits.<sup>74</sup> However, the Court remanded the case to the trial court for a determination as to the portion of those synchronization rights royalties due to “The Ronettes.”<sup>75</sup> The court noted, “[h]owever sympathetic plaintiffs’ plight, we [could not] resolve the case on that ground under the guise of contract construction.”<sup>76</sup>

The interesting distinction between this case and the *Walt Disney* case was the presence of the “magic phrase,” “by any method now or hereafter known,” included in the licensing agreement.<sup>77</sup> Despite this contractual language the Court still determined “The Ronettes” were owed royalties for the synchronization rights.<sup>78</sup> This was presumably in the interest of fairness – the Court did not want to allow the production company to reap all the benefits of the

synchronization rights to this wildly successful blockbuster motion picture without compensating the artists with at least a reasonable royalty.

Money is a common theme in these cases. Theoretically, though, infringers should consider this before they exploit another's copyrighted work in a new medium. Perhaps the infringers feel the potential royalties they might owe to the copyright holders are not sufficient enough to warrant litigation or they feel the injured copyright holder is not going to be in a financial position to afford the attorneys' fees for a lengthy litigation against a big corporation.

In another similar case, *Fred Ahlert Music Corp. v. Warner Chappell Music, Inc.*,<sup>79</sup> the plaintiffs were the successors of the songwriters of the song "Bye, Bye Blackbird" who "assigned their interests in the copyright to defendant Warner-Chappell's predecessor in interest."<sup>80</sup> After which, defendant granted A & M Records ("A & M") a mechanical license that provided for a "non-exclusive license to use, in whole or in part, [defendant's] copyrighted musical composition entitled 'Bye Bye Blackbird'<sup>81</sup> (Dixon-Henderson) in the recording and manufacturing of phonograph records to be manufactured and sold only in the United States...."<sup>82</sup> Subsequently, the plaintiff issued a synchronization license to Tristar Pictures, Inc. ("Tristar") to use the song in the hit motion picture Sleepless in Seattle.<sup>83</sup>

However, the litigation arose when Tristar contracted with Sony Music Entertainment, Inc. ("Sony") to include the song on the soundtrack for the motion picture.<sup>84</sup> "Plaintiff, however, contend[ed] that defendant [was] not entitled to royalties for the Sleepless Soundtrack Album because, 'under the terms of the grant', the only rights that defendant retained after termination were limited by its license with A & M. Put another way, plaintiff claim[ed] that the only right that defendant may retain with respect to the composition [was] to those royalties that arise from the production of phonorecords of the Cocker Derivative."<sup>85</sup>

The District Court for the Southern District of New York held, “the language here [was] very narrow and grant[ed] to A & M only the right to manufacture phonorecords of the Joe Cocker recording on Record No. SP 4182.”<sup>86</sup> Therefore, the Court held the plaintiff was entitled to royalties from Sony for the use of the song on the soundtrack and granted summary judgment in favor of the plaintiff.<sup>87</sup>

*Boosey & Hawkes Music Publishers, Ltd. v. Walt Disney Co.*,<sup>88</sup> involved a composer, Igor Stravinsky (“Stravinsky”), whose composition, which was assigned to Boosey & Hawkes Music Publishers, Ltd. (“Boosey”), appeared in Disney’s classic musical motion picture, Fantasia.<sup>89</sup> Boosey argued the initial license from Stravinsky to Disney in 1939 did not include the right to exploit the work in foreign home videos such as “video cassette and laser disc format (“video format”).”<sup>90</sup> “Because under United States law the work was in the public domain, Disney needed no authorization to record or distribute it in this country, but permission was required for distribution in countries where Stravinsky enjoyed copyright protection.”<sup>91</sup> The Court then noted, “[t]he 1939 Agreement convey[ed] the right ‘to record [the composition] in any manner, medium or form’ for use ‘in [a] motion picture.’ We believe[d] this language [was] broad enough to include distribution of the motion picture in video format.”<sup>92</sup>

The Second Circuit reasoned, “new-use analysis should rely on neutral principles of contract interpretation rather than solicitude for either party.”<sup>93</sup> The Court considered standard contract law when coming to this conclusion: “If the contract [was] more reasonably read to convey one meaning, the party benefitted by that reading should [have been] able to rely on it; the party seeking exception or deviation from the meaning reasonably conveyed by the words of the contract should have bear[ed] the burden of negotiating for language that would express the limitation or deviation. This principle favor[ed] neither licensors nor licensees. It follow[ed]

simply from the words of the contract.”<sup>94</sup> Therefore, the Second Circuit remanded the case back to the trial court, the Southern District of New York, for a determination of the limits of the licensing agreement and the contract claims.<sup>95</sup>

### **c. Sound Recordings**

Older contracts for the rights in sound recordings also create problems with regards to new technological devices and services. When certain rights contracts were entered into, the only means of exploiting a sound recording were phonorecords and radio airplay. With the invention of the compact disc and MP3, numerous new ways emerged to exploit a master sound recording digitally. Also unlike tangible mediums like phonorecords, digital copies are much easier to create, much less expensive to exploit and much easier to share. These new technologies have created a whole new wave of litigation surrounding these un contemplated uses of sound recordings.

In a case arising in Tennessee, *Polygram Records, Inc. v. Legacy Entertainment Group, LLC*<sup>96</sup>, the heirs of country singer Hank Williams sued for the rights to sound recordings produced for play airplay on a Nashville radio station in the 1950s.<sup>97</sup>

Williams and his band, The Drifting Cowboys, frequently performed live and by pre-recordings on a WSM<sup>98</sup> radio program known as Mother’s Best Flour. The pre-recordings were preserved on acetate records for broadcast on days Williams and the Drifting Cowboys were on tour or otherwise unavailable. WSM only used the acetate recordings to facilitate daily broadcasts of the Mother’s Best Flour program; it never exploited the acetate recordings to produce phonograph records.<sup>99</sup>

Two (2) other companies were competing with the heirs for the rights to the sounds recordings.<sup>100</sup> Legacy Entertainment Group (“Legacy”) bought the sound recordings from a man named Hillous Butrum (“Butrum”), who was a member of Williams’s band the “Drifting Cowboys,” who had purchased the sound recordings from Les Leverett (“Leverett”) for the

purpose of exploiting them in a commercial manner.<sup>101</sup> Leverett was a former employee of WSM, the radio station which produced the sound recordings for radio airplay.<sup>102</sup>

Leverett had obtained possession of the physical sound recordings from WSM when he rescued them from the trash when the station was moving to a new office.<sup>103</sup> Legacy argued they had acquired the licensing rights from WSM along with the physical sound recordings.<sup>104</sup> The Court held, “[p]ossession of a tangible embodiment of a work or performance such as the recordings at issue convey[ed] no rights or ownership interest to the tangible rights embodied therein, especially the right to commercially exploit the performances embodied therein.”<sup>105</sup> The Court further noted, “there is no evidence to support Legacy’s claim that it acquired any rights to the performances of Hank Williams embodied in the recordings.”<sup>106</sup>

The other company claiming rights to the sound recordings was Polygram Records, Inc. (“Polygram”).<sup>107</sup> Polygram was the successor of MGM Records (“MGM”) who had entered into an exclusive recording contract with Hank Williams during the time the sound recordings were originally created.<sup>108</sup>

The contract between Williams and MGM was in the form of a letter from MGM to Williams employing Williams’ ‘exclusive personal services ... for the purposes of making phonograph records, as MGM may require.’ The contract also provided, ‘during the period of this contract William will not perform for the purpose of making phonograph records for any person other than MGM...’<sup>109</sup>

The Court of Appeals of Tennessee held although this language granted MGM exclusive rights to any sound recording made for the purposes of “making phonograph records,” “nothing in the contract affords MGM or Polygraph the present right to exploit recordings of performances by Hank Williams that were for purposes other than producing phonograph records, such as pre-recorded radio broadcast.”<sup>110</sup> Therefore the Court held because the sound recordings were made

for radio airplay only that Polygraph did not have rights to the sound recordings either.<sup>111</sup> The Court of Appeals of Tennessee held, “[t]he trial court’s dismissal of all claims of Legacy and Polygram based upon the conclusions that neither has any right or interest in recordings at issue, and our affirmance thereof, renders the issue moot because neither Legacy or Polygram have standing to challenge the rights of the heirs of Hank Williams.”<sup>112</sup>

The Southern District of New York held in *Reinhardt v. Wal-Mart Stores, Inc.*,<sup>113</sup> the words “now or hereafter known” in a licensing contract were sufficient to allow the digital distribution of sound recordings.<sup>114</sup> Richard Reinhardt (“Reinhardt”), a former member of the band, “The Ramones”, brought a copyright infringement action against retailers and distributors for exploiting digital versions of his songs without his express permission.<sup>115</sup> The agreement read as follows:

[S]ection 5(a) of the Recording Agreement authorizes Ramones Productions “to manufacture, advertise, sell, distribute, lease, license or otherwise use or dispose of the Masters and phonograph records embodying the Masters, in any or all fields of use, by any method now or hereafter known.”

The Recording Agreement also provides that “‘Records,’ ‘phonograph records,’ ‘recordings,’ and ‘derivatives’ means all *forms of reproduction* including pre-recorded tapes and discs and electronic video recordings, *now or hereafter known*, manufactured or sold primarily for home use, school use, juke box use or use on means of transportation...” “Master” however, is specifically defined as “the equivalent of a 7 inch, 45 rpm, single-sided recording embodying the recorded performances by the Ramones.”<sup>116</sup>

The Southern District of New York interpreted this language to include the right to exploit digital copies of the song.<sup>117</sup> Therefore, the Court granted the defendant’s motion to dismiss.<sup>118</sup>

*F.B.T. Productions, LLC v. Aftermath Records*<sup>119</sup> involved a dispute over royalties for iTunes downloads and cellular telephone ringtone downloads for the recording artist Marshal B.

Mathers, III, otherwise known as the rap star, Eminem.<sup>120</sup> Eminem initially signed a recording contract with FBT, who in turn transferred those exclusive recording rights to Aftermath Records (“Aftermath”).<sup>121</sup> According to the agreement between Aftermath and FBT, Aftermath was obligated to pay FBT “between 12% and 20% of the adjusted retail price of all ‘full price records sold in the United States...through normal retail channels.’”<sup>122</sup> The agreement also entitled FBT to fifty percent (50%) of the net receipts for any license involving the “manufacture and sale of records or for any other uses.”<sup>123</sup> Subsequently, UMG Recordings, Inc. (“UMG”), as the parent company of Aftermath, entered into an agreement with iTunes.<sup>124</sup> Aftermath also entered into agreements with cellphone carriers in order to sell digital downloads of Eminem ringtones to their customers.<sup>125</sup>

FBT conducted an audit of Aftermath’s financial records in order to confirm the royalty rate it was receiving for Eminem’s masters and thereafter brought a suit against Aftermath for unpaid royalties.<sup>126</sup> A jury held in favor of Aftermath and FBT appealed.<sup>127</sup> The first question for the Ninth Circuit on appeal was whether or not the contracts were ambiguous.<sup>128</sup> Specifically the Court needed to determine whether or not iTunes should be considered “normal retail channels.”<sup>129</sup> The Court noted, “the agreements also provide that ‘notwithstanding’ the Records Sold provisions, F.B.T. is to receive a 50% royalty on ‘masters licensed by [Aftermath]...to others for their manufacture and sale of records or for any other uses.’”<sup>130</sup> The Ninth Circuit determined that the parties’ use of the term “notwithstanding” indicate[d] that FBT [was] entitled to a 50% royalty if an Eminem master [was] licensed to a third party.<sup>131</sup>

The Court analyzed the difference between a “sale” of a copyrighted work versus a “license” of a copyrighted work.<sup>132</sup> Aftermath owned the rights to the Eminem masters and contracted with Apple to sell digital downloads of the masters on iTunes.<sup>133</sup> The Ninth Circuit

concluded the contract between Aftermath and Apple for the iTunes downloads was a license of Aftermath's copyright.<sup>134</sup>

The contract between Aftermath and Eminem "provided that Aftermath had the right to exploit the 'masters in any all form of media now known or hereinafter developed.'"<sup>135</sup> The Court concluded the contracts provided that Aftermath was entitled to a 50% royalty for the licensing of the masters as iTunes downloads and ringtone downloads.<sup>136</sup> Therefore the Ninth Circuit reversed the trial court's grant of summary judgment in favor of FBT and remanded the case to the trial court.<sup>137</sup>

#### **d. Literary Works**

The invention of the "ebook" became the basis for the litigation in *Random House, Inc. v. Rosetta Books LLC*<sup>138</sup>. Rosetta Books LLC (Rosetta) contracted directly with authors of several literary works published in print paperback and hardcover form by the plaintiff, Random House, Inc. ("Random House").<sup>139</sup> The Southern District of New York analyzed each authors' agreement with Random House separately.<sup>140</sup> The Court noted, "Random House contend[ed] that the phrase 'in book form' mea[nt] to faithfully reproduce the author's text in its complete form as a reading experience and that, since ebooks concededly contain[ed] the complete text of the work, Rosetta [could not] also possess those rights. Random House reason[ed] that because the authors could not permit any material that would injure the sale of the work to be published without Random House's consent, the authors must have granted the right to publish ebooks to Random House."<sup>141</sup> The District Court held "Random House [was] not likely to succeed on the merits of its copyright infringement claim and [could not] demonstrate irreparable harm" and therefore denied Random House a preliminary injunction.<sup>142</sup>

In a similar case involving freelance writers and photographers for National Geographic, *Faulkner v. National Geographic Enterprises, Inc.*,<sup>143</sup> whose copyrighted works were later used in an electronic database without their consent. “These photographs and writings have now been published in ‘The Complete National Geographic’ (“CNG”), a digital collection of the past issues of the Magazine that offers users various means of searching, viewing, and displaying pages of these issues.”<sup>144</sup> The plaintiffs appealed to the Court of Appeals for the Second Circuit after the Southern District of New York granted summary judgment in favor of National Geographic.<sup>145</sup> In order to create the CNG each issue of National Geographic was scanned into a computer to create a digital record for every issue going back to 1888.<sup>146</sup> “Because of some contractual arrangements excluding electronic reproduction, approximately 60 out of 180,000 images have been blacked out in some iterations of the CNG. None of these images [were] at issue in this case. Except for the blacked-out images, there [were] no changes in the content, format, or appearance of the issues of the magazine.”<sup>147</sup> A user of the CNG could scan through the images of the magazine and [saw] exactly what he or she would have seen if they were flipping through a paper copy of the magazine.<sup>148</sup>

National Geographic argued that the CNG provided an exact replica of the magazine as it originally appeared in the paper version and similar to a microfilm copy.<sup>149</sup> The Second Circuit noted:

The district court determined that in all but a few circumstances none of the contractual agreements between the parties overrode application of Section 201(c)'s default provisions. The Faulkner appellants argue that their contracts were “intended to grant NGS limited publication rights in paper format only,” and accordingly the Section 201(c) privilege is not applicable. We again disagree.<sup>150</sup>

The Second Circuit held, “The transfer of a work from one medium to another generally [did] not alter its character for copyright purposes.”<sup>151</sup> Also the Court held that if the copyright holders intended to retain their rights to exploit their works in a digital format, then they should have specifically contracted for that limitation.<sup>152</sup>

However, one plaintiff, Psihoyos, was a copyright holder of two (2) photographs, whose contract expressly declined to convey rights to digital versions of his works, was excluded from the Southern District of New York’s grant of summary judgment.<sup>153</sup> Psihoyos also argued there were other photographs that were mistakenly included in the summary judgment that likewise should have been excluded with his other two (2) photographs.<sup>154</sup> The Second Circuit reversed the district court’s summary judgment with regards to these additional Psihoyos photographs, but affirmed summary judgment in favor of National Geographic for the other works.<sup>155</sup>

### **III. Analysis**

New technologies continue to create new legal questions for the legislature, judiciary and intellectual property attorneys. Given the rapid pace at which technological advances are entering the main stream every day and the lag time between the time of their inception and the time it takes for the judiciary and/or legislature to weigh in on their implications, it does not appear that this litigation trend is going to slow down any time soon. “Now Known or Hereinafter Devised” are five (5) words that may help to alleviate some of the questions when parties attempt to determine whether or not the agreement they previously executed allows them to exploit a copyrighted work in a newly invented medium.

As is the case with a lot of litigation, most of these cases could be avoided with a little forethought. When a licensee is thinking about exploiting a work in a new medium the first thing the licensee should do before acting on this impulse is consult an attorney. This seemingly

simple act is usually the one most parties skip because (1) they think they already know the answer, or (2) they worry their legal counsel will complicate matters more than they need to be. Although these two (2) things may in fact be true, the extra step of seeking guidance from counsel beforehand can save a lot of time, money and headache later if/when the original licensor files a suit for copyright infringement. It is always better to get an expert legal opinion regarding the terms and limitations of a contract before proceeding further.

The bottom line is the money. If there is a sufficient amount of money to be made in this new media (and face it, if there was not a substantial profit to be made, would the licensee be looking to expand into this new media?) then most licensors are going to want to argue that the original grant did not include this new medium. The growing cost of litigation – attorneys’ fees, court costs, expert witnesses, etc. – can quickly eat away even substantial profits earned from the exploitation of a copyrighted work in a new medium without proper clearance. And an even greater risk exists – if the first licensor succeeds; what is going to stop all the other copyright holders from coming after the infringer after the court finds in favor of the first copyright holder?

If the attorney says there is a question as to whether or not exploitation in the new media was not included in the original agreement, the next best step is to attempt to contract directly with the copyright holder. In the past some licensees have attempted to contract directly with the copyright holders and when they were unable to come to amicable terms, they proceeded without obtaining the proper clearances.<sup>156</sup> This is foolish for two (2) reasons. First, now the copyright holder is aware of the licensee’s intent to exploit the copyrighted work in a new medium and all they have to do is sit back and wait for the exploitation to occur and file a law suit for copyright infringement. Second, it is going to be much more difficult to claim a defense after a failed attempt to secure the approval from the copyright holder. The court is going to know the

licensee was aware he/she did not have the proper rights in the work and proceeded to exploit the material anyway. Sadly, however, this happens in copyright litigation anyway.

If contract negotiations fail and the licensee still wishes to exploit the work without the copyright holders' consent they can seek a declaratory judgment from the courts indicating the use is authorized under the current agreement. However, in this author's opinion, if instead of arguing the contract includes this new media and therefore no new compensation was due to the copyright holder, if the licensee made an offer for just compensation to the copyright holder for the rights to explicitly exploit the work in the new medium any new litigation would be expressly barred by the new agreement.

Unfortunately, not all licensees have the foresight to consult their attorneys before forging forward with the exploitation of copyrighted works in a new medium. The question then becomes, what is the likely outcome if/when they are sued for copyright infringement? As noted above, with the five (5) magic words "Now Known or Hereinafter Devised" already in the licensing contract the likelihood of success increases exponentially.

The Supreme Court of the United States of America has not weighed in on this issue and the reason for this may be a simple geography problem. It is common knowledge that the majority of entertainment industry is centered in New York City, New York and Los Angeles, California. The only other "major" hub is Nashville, Tennessee for country music. These three (3) jurisdictions see the majority of these infringement cases. It seems unlikely the Supreme Court of the United States will weigh in on issue only mainly affecting three (3) jurisdictions.

The good news, however, is there are some simple guidelines licensees can follow in order to limit the questions and ward off potential litigations. First, include the five (5) magic words "Now Known or Hereinafter Devised" in all new licensing contracts going forward.

Second, when in doubt, interpret the literal words of the contract. If a contract uses the term “home video” and it is not specifically defined in the agreement (Note: going forward define all terms of an agreement in the writing!) then interpret this term to mean “home video” as it existed at the time of the creation of the agreement. Therefore, if it was 1985 and the only “home videos” in existence were videocassettes then interpret “home video” to mean videocassettes for the terms of that agreement.

If the licensee now wishes to exploit the work licensed in this agreement in DVD, Blu-ray or OnDemand they need to seek a new license from the licensor. If the licensor is not readily available then reasonable measures must be undertaken to locate them. In the event, after reasonable efforts have been made and failed, the original licensor cannot be located then the licensee should move forward with the exploitation in the new medium with great caution. Also, as a show of good faith, licensees should create an escrow account so they can deposit commercially reasonable royalties earned from this exploitation in the event the copyright holder ever comes forward and sues for infringement.

If the copyright holder does in fact come forward alleging that an infringement has occurred, the hope is that they will accept the royalties from the escrow account as sufficient consideration for the exploitation of the copyrighted work in the new medium. Even if the copyright holder does not feel the royalties deposited in the escrow account were sufficient payment for the exploitation of the copyrighted work, hopefully the court will consider the escrow account a sign of good faith and find in the infringers’ favor. Also, there is a likelihood that the copyright holder will settle for the amount of royalties in the escrow account simply because, even if they considered the amount insufficient, they may feel a lengthy and costly litigation would not be worth fighting for the deficiency they felt they were entitled to.

Also if a copyright holder does come forward at a later date, he or she can then negotiate a more suitable rate going forward. Or the copyright holder could bar any further exploitation of their work in the media going forward until he or she can settle on new royalty rate that both the licensee and the licensor can find satisfactory. However, in the event the parties cannot come to an amicable agreement then hopefully the infringer will be in a position to cease and desist exploiting the copyrighted work in the medium. If not the copyright holder will need to go to court to seek an injunction. However, courts are reluctant to issue an injunction when damages would make a sufficient remedy. Therefore, there is a possibility that the copyright holder will be denied an injunction and will need to rely on the courts to determine a fair royalty rate going forward.

The next issue a licensee must consider when creating an escrow account for royalties in this situation is how long should they continue to set aside royalties in this escrow account? The best course of action is to continue depositing royalties into the escrow account for the remaining term of the copyright. Although it is fairly unlikely that a copyright holder would fail to claim their royalties for an extended period of time it is still the safest course of action to continue to deposit reasonable royalties into an escrow account for the entire term of the copyright. An infringer may have a variety of defenses against a copyright holder who unreasonably delays in exerting their rights. However, the only way to raise these defenses is in the context of a legal action. Even if an infringer would win a legal battle with one of these defenses they would still have to endure the time and expense associated with a copyright law suit. Therefore, the best course of action is to continue to place reasonable royalties in an escrow account for the copyright holder for the entire term of their copyright.

## IV. Conclusion

The greatest tragedy in the legal community today is that parties do not seek legal counsel before they act – they only come to their attorneys to help them after they have created a mess. The intellectual property field is no exception to this trend and, as discussed above, with the advent of new media every day they should be the first ones to seek advice and guidance from their legal counsel before moving forward in a new medium. It is much easier to advise a party before a mistake is made than it is to pick up the pieces after they have been hit with a law suit for damages or a preliminary injunction – both of which could cost them large sums of money or possibly their businesses.

When erring on the side of caution it is best to construe contracts literally not liberally. Although a court may ultimately determine that an older license in fact implicitly included the use of the work in a newly created medium<sup>157</sup>, the legal fees to get to that outcome will most likely outweigh, or at least equal, the royalty savings that were gained by the “win” (all sarcasm intended because at the end of years of litigation and thousands of dollars in legal fees can this really be considered a “win”?) in court.

So, ask before you act! Ask your legal counsel to analyze the contract, or multiple contracts as may be in the case in many licensing arrangements, if this new medium is within the scope of the original agreement, or agreements. If not, seek out the copyright holder and negotiate for a new license. Offer the copyright holder a modest but fair royalty as an incentive.

As we have all seen with the “Unchained Melody” example (discussed above) even a modest royalty can mean a big payout for everyone involved (both the licensee and the licensor) if the new license results in additional forty-four (44) weeks on the Billboard charts or its monetary equivalent, especially when its original run was only for thirteen (13) weeks.<sup>158</sup> That is

the beauty of the entertainment industry, you never can tell what song, motion picture, television show, novel or sporting event is going to be a monster hit. If everyone comes to amicable terms to exploit the copyrighted work in the new medium without the matter ending up in court it will be a case where everyone gets paid! And of course...that is really the goal after all.

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<sup>1</sup> 239 F.3d 1004 (9th Cir. 2001).

<sup>2</sup> *Id.* at 1011.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 1013-1014.

<sup>6</sup> *Id.* at 1014-1015.

<sup>7</sup> *Id.* at 1028-1029.

<sup>8</sup> *Id.* at 1029.

<sup>9</sup> 691 F.3d 375 (2d Cir. 2012).

<sup>10</sup> *Id.* at 277.

<sup>11</sup> *Id.* at 278.

<sup>12</sup> *Id.* (citations omitted).

<sup>13</sup> *Id.* at 279, citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (U.S. 1984).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 280 (citations omitted).

<sup>16</sup> *Id.* at 281.

<sup>17</sup> *Id.* at 282-283.

<sup>18</sup> *Id.* at 284-285.

<sup>19</sup> *Id.* at 285.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 286.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 287.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 288.

<sup>26</sup> 693 F.2d 622 (7th Cir. 1982).

<sup>27</sup> *Id.* at 624.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* (citations omitted).

<sup>32</sup> *Id.* (citations omitted).

<sup>33</sup> *Id.* at 625.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 628.

<sup>36</sup> *Id.* at 284-285.

<sup>37</sup> “Unchained Melody” by the Righteous Brothers 1965 #4 (October 20, 2013, 1:23 PM), <http://www.song-database.com/chhist.php?sid=1865>.

<sup>38</sup> Internet Movie Database, *Ghost* (1990), (October 20, 2013, 1:27 PM), <http://www.imdb.com/title/tt0099653/>.

<sup>39</sup> “Unchained Melody” by the Righteous Brothers 1965 #4 (October 20, 2013, 1:23 PM), <http://www.song-database.com/chhist.php?sid=1865>.

<sup>40</sup> 68 F.3d 625 (2d Cir. 1995).

<sup>41</sup> *Id.* at 624.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 625.

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<sup>44</sup> *Id.*  
<sup>45</sup> *Id.* at 623.  
<sup>46</sup> *Id.* at 626.  
<sup>47</sup> *Id.*  
<sup>48</sup> *Id.* at 624.  
<sup>49</sup> *Id.* at 627.  
<sup>50</sup> *Id.*  
<sup>51</sup> *Id.*  
<sup>52</sup> *Id.*  
<sup>53</sup> *Id.*  
<sup>54</sup> *Id.* at 628.  
<sup>55</sup> *Id.*  
<sup>56</sup> *Id.*  
<sup>57</sup> *Id.*  
<sup>58</sup> *Id.* at 629.  
<sup>59</sup> *Id.* at 630.  
<sup>60</sup> *Id.*  
<sup>61</sup> *Id.*  
<sup>62</sup> *Id.* at 631.  
<sup>63</sup> *Id.* at 632.  
<sup>64</sup> *Id.*  
<sup>65</sup> 98 N.Y.2d 562 (N.Y. 2002).  
<sup>66</sup> *Id.* at 566-568.  
<sup>67</sup> *Id.* at 568-569.  
<sup>68</sup> *Id.* at 569.  
<sup>69</sup> *Id.* at 568.  
<sup>70</sup> *Id.*  
<sup>71</sup> *Id.* at 570.  
<sup>72</sup> *Id.*  
<sup>73</sup> *Id.* at 572.  
<sup>74</sup> *Id.* at 572-573.  
<sup>75</sup> *Id.* at 573-574.  
<sup>76</sup> *Id.* at 573.  
<sup>77</sup> *Greenfield* at 568-569.  
<sup>78</sup> *Id.* at 573-574.  
<sup>79</sup> 958 F.Supp. 170 (S.D.N.Y. 1997).  
<sup>80</sup> *Id.* at 171.  
<sup>81</sup> Emphasis omitted.  
<sup>82</sup> *Id.*  
<sup>83</sup> *Id.*  
<sup>84</sup> *Id.* at 172.  
<sup>85</sup> *Id.* at 173.  
<sup>86</sup> *Id.* at 174.  
<sup>87</sup> *Id.*  
<sup>88</sup> 145 F.3d 481 (2d Cir.1998)  
<sup>89</sup> *Id.* at 483.  
<sup>90</sup> *Id.*  
<sup>91</sup> *Id.* at 484.  
<sup>92</sup> *Id.*  
<sup>93</sup> *Id.* at 487.  
<sup>94</sup> *Id.*  
<sup>95</sup> *Id.* at 493.  
<sup>96</sup> 205 S.W.3d 439 (Tenn. Ct. App. 2006).  
<sup>97</sup> *Id.* at 440-441.

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<sup>98</sup> WSM Radio (“WSM”).  
<sup>99</sup> *Id.* at 441.  
<sup>100</sup> *Id.* at 440-441.  
<sup>101</sup> *Id.* at 443.  
<sup>102</sup> *Id.*  
<sup>103</sup> *Id.*  
<sup>104</sup> *Id.* at 444.  
<sup>105</sup> *Id.*  
<sup>106</sup> *Id.* at 445.  
<sup>107</sup> *Id.* at 448.  
<sup>108</sup> *Id.*  
<sup>109</sup> *Id.*  
<sup>110</sup> *Id.* at 447.  
<sup>111</sup> *Id.*  
<sup>112</sup> *Id.*  
<sup>113</sup> 547 F.Supp.3d 346 (S.D.N.Y. 2008).  
<sup>114</sup> *Id.* at 354-355.  
<sup>115</sup> *Id.* at 354.  
<sup>116</sup> *Id.* (footnotes omitted).  
<sup>117</sup> *Id.* at 355.  
<sup>118</sup> *Id.*  
<sup>119</sup> 621 F.3d 958 (9th Cir. 2010).  
<sup>120</sup> *Id.* at 961-962.  
<sup>121</sup> *Id.* at 961.  
<sup>122</sup> *Id.*  
<sup>123</sup> *Id.* (*internal quotations omitted*).  
<sup>124</sup> *Id.* at 962  
<sup>125</sup> *Id.*  
<sup>126</sup> *Id.*  
<sup>127</sup> *Id.*  
<sup>128</sup> *Id.* at 964.  
<sup>129</sup> *Id.*  
<sup>130</sup> *Id.*  
<sup>131</sup> *Id.*  
<sup>132</sup> *Id.* at 964-965.  
<sup>133</sup> *Id.* at 965.  
<sup>134</sup> *Id.*  
<sup>135</sup> *Id.* at 966.  
<sup>136</sup> *Id.* at 967.  
<sup>137</sup> *Id.*  
<sup>138</sup> 150 F.Supp.2d 613 (S.D.N.Y. 2001).  
<sup>139</sup> *Id.* at 614.  
<sup>140</sup> *Id.* at 615-617.  
<sup>141</sup> *Id.* at 620-621.  
<sup>142</sup> *Id.* at 624.  
<sup>143</sup> 409 F.3d 26, 29 (2nd 2005).  
<sup>144</sup> *Id.*  
<sup>145</sup> *Id.*  
<sup>146</sup> *Id.* at 30.  
<sup>147</sup> *Id.* at 30-31.  
<sup>148</sup> *Id.* at 30.  
<sup>149</sup> *Id.* at 38.  
<sup>150</sup> *Id.* at 40.  
<sup>151</sup> *Id.*

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 41.

<sup>154</sup> *Id.* Also there was another photographer, Rickman, whose works should have been included in this excluded list.

<sup>155</sup> *Id.*

<sup>156</sup> *Supra Polygram* at 442.

<sup>157</sup> *Supra Bourne.*

<sup>158</sup> *Supra Song-Database.com.*