Buffalo Law Review

Volume 5 | Number 1 Article 32

10-1-1955

Contracts—Copyright

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them merely to register their reactions to the arguments of counsel at the trial level."[29] While an appellate court will not consider different theories or new questions if proof might have been offered to refute or overcome them had they been presented at the trial,[30] nevertheless, where the issue involves the meaning of a written contract which is in the record and where each party had full opportunity to adduce all pertinent evidence bearing on its construction, the Appellate Division is not limited to a choice between the opposing constructions contended for at the trial but is privileged to give to the contract a "meaning conceivably . . . different from that which either party justifiably attached to the words."[31]

The dissent took the position that an appellate court should confine itself to the theory mutually agreed upon by the parties.[32] "Trials are held to enable parties to bring to the court for decision disputed questions of fact or law, and parties who fail to avail themselves of the opportunity offered them to present such questions of fact or law to a trial court cannot on appeal present them for court will have an easier time in reaching such an equitable result.

It is fortunate for the defendant that the court was willing to work so vigorously to see that "exact justice" was done. It is suggested, however, that future defendants anticipate a divisible contract as well as an entire contract so that the decision in this court."[33]

Copyright

In an action for royalties under a contract licensing the publication of certain musical compositions, the contract was construed to run only for the statutory length of the copyrights, and judgment was rendered for defendant licensee.[34]

In 1917 plaintiff's assignor, Shubert Theatrical Company, produced a musical entitled "Maytime," adapted from a German play. The American version had a

29. *Rentways, Inc. v. O'Neill Milk & Cream Co., supra* note 5 at 346, 126 N. E. 2d at 274.

30. *Lindlots Realty Corp. v. County of Suffolk,* 278 N. Y. 45, 15 N. E. 2d 393 (1938); *Daley v. Brown,* 167 N. Y. 381, 60 N. E. 752 (1901); *Osgood v. Toole,* 60 N. Y. 475 (1875).

31. 3 WILLISTON, *op. cit. supra,* note 1, at 1743; see *Persky v. Bank of America Nat. Ass'n,* 261 N. Y. 212, 185 N. E. 77 (1933); see also, COHEN AND KARGER, POWERS OF THE NEW YORK COURT OF APPEALS 625-28 (2d ed. 1952).

32. *Daley v. Brown, supra* note 14; 6 CARMODY, NEW YORK PRACTICE § 336, at 255 (2d ed. 1934).

33. *Persky v. Bank of America Nat. Ass'n, supra* note 15 at 218-19, 185 N. E. at 79; see also, *Martin v. Home Bank,* 160 N. Y. 190, 54 N. E. 717 (1899); *Wright v. Wright,* 226 N.Y. 578, 123 N. E. 71 (1919).

34. *April Publications, Inc. v. G. Schirmer, Inc.,* 308 N. Y. 366, 126 N. E. 2d 283 (1955).

completely new musical score and lyrics. Shubert Co. acquired from the author of the play and from the composer and lyricist all rights to the music. It then made the contract under dispute in the instant case, granting the defendant publication and other mechanical rights in the compositions on a royalty basis. In accordance with the prevailing custom in the music publishing industry, the defendant then took out copyrights on the various compositions.[35]

In 1945, when the copyrights expired, the composer and the executor of the lyricist secured renewal copyrights for an additional term of twenty-eight years.[36] The defendant, in order to continue publishing the music, entered into a contract with the owners of the renewal copyrights whereby the defendant was to pay them royalties on all future publications. Simultaneously the defendant discontinued the payment of royalties to Shubert Co. Two years later the plaintiff, Shubert's assignee, brought this action for royalties due since 1945.

The majority of the court interpreted the contract as implying by its terms a license to publish under copyright.[37] Therefore, since Shubert could control this right for only the twenty-eight year period of the original copyright, it must be implied that the contract had a term of duration of twenty-eight years. The court pointed out that the reason the copyright was not mentioned in the contract was that it was assumed by both parties to be inherent in the agreement that the defendant would take out the copyright for his own protection. Since it was the established custom for the publisher to obtain the copyright, no inference could be drawn from a lack of specific copyright license in the contract. Shubert Company could not contract for more than it could give, and it could only offer a license for the statutory copyright period.[38]

The majority also stressed the fact that if the plaintiff succeeded, it would mean that defendant would have to continue paying royalties even after all copyrights expired and the rest of the world would be free to publish the compositions without permission and royalty-free. Such a contract might well be unenforcible as contrary to public policy.[39] The court declared that a contract should not be con-

35. It is undisputed that this custom was almost universally accepted by the industry, and no prior attempts to secure copyrights were made by any of the persons concerned.

36. See 17 U. S. C. § 24. The term "renewal" is actually imprecise, since under the statute only certain individuals have a right to the additional copyright term, and their right is in no way associated with ownership of the original copyright.

37. 308 N. Y. at 375, 126 N. E. 2d at 289.

38. The Court relied heavily on *Bottlers' Seal Co. v. Rainey,* 225 N. Y. 369, 122 N. E. 200 (1919), for the proposition that the consideration was the right to publish, equivalent to a copyright license.

39. See *Scott Paper Co. v. Marcalus Mfg. Co.,* 326 U. S. 249 (1945), which stated a comparable doctrine as related to patents. There is no reason to consider the public interest any less valuable in copyright cases than in patent cases.

strued so as to reach an absurd and unenforcible result.[40] Therefore it was necessary to assume that the parties intended the contract to be concurrent with the copyright term.

The dissent argues that the interpretation placed on the contract by the majority, while unquestionably a more just construction, was construed "so as to make [it] mean what the courts think [it] should have said in the first place."[41] They preferred to adopt the principle that a person making a poor contract is nevertheless bound by that contract even though it works an injustice. They felt that as a practical matter neither party considered at the time of the contract that the songs would still be popular thirty years later, and therefore neither had worded the contract to provide for such a situation. But the contract, as it was written by the parties, provided for royalties on each copy published, and in the absence of a limiting term must be applied as long as the defendant continues to publish the music.

Probably the dissent is quite correct in its method of contract interpretation. The consideration which Shubert offered was the right of original publication, simultaneous with the presentation of "Maytime," and the copyright was left to the publisher to be his protection from other publications. The parties intended the consideration of the defendant to be a royalty of five cents a copy for each copy, whenever published. But the protection of the public interest against undue restraint on musical and literary compositions after the statutory protection, comparable to the principles applied in patent law,[42] make this contract a violation of public policy, and therefore the result reached by the majority seems justifiable.

Terms Of The Contract

In *20 East 74th Street v. Minskoff*,[43] plaintiff, a corporate owner of a co-operative apartment house, sought damages from defendants, the promoters and developers of the co-operative, for failure to complete the building according to contract. The contract included a provision that the occurrence of three specified events would be considered by all the parties as "conclusive proof that the building has been fully completed in accordance with the provisions of this agreement." All three events, it was agreed, had occurred. The principal problem was whether, in spite of this contract provision and the occurrence of the three events, the defendants could be held liable on the theory that the conclusive presumption of

40. *Cf. Surace v. Danna*, 248 N. Y. 18, 16 N. E. 315 (1928).
41. 308 N. Y. at 378, 126 N. E. at 290.
42. *Supra*, note 39.
43. 308 N. Y. 407, 126 N. E. 2d 532 (1955).