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3 IN THE UNITED STATES DISTRICT COURT  
4 NORTHERN DISTRICT OF ILLINOIS  
5 EASTERN DIVISION

5 ERON BUCCIARELLI-TIEGER, et al., ) DOCKET NO. 06 C 4258  
6 )  
6 Plaintiffs,) )  
7 )  
7 vs. )  
8 )  
8 VICTORY RECORDS, INC., et al., ) Chicago, Illinois  
9 ) October 18, 2006  
9 Defendants.) 9:15 o'clock a.m.

10  
11 TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE  
12 MILTON I. SHADUR, Judge  
13

14 APPEARANCES:

15 For the Plaintiffs:

MR. ROBERT M. SPALDING

16  
17 For the Defendants:

MR. CHRISTOPHER S. GRIESMEYER

18  
19 JESSE ANDREWS  
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25

\* \* \* \* \*

1 THE CLERK: 06 C 4258, Bucciarelli vs. Victory  
2 Records.

3 MR. SPALDING: Good morning, your Honor. Robert  
4 Spalding on behalf of plaintiffs-counter-defendants.

5 MR. GRIESMEYER: Good morning, your Honor.  
6 Christopher Griesmeyer, G-r-i-e-s-m-e-y-e-r, on behalf of the  
7 defendants.

8 THE COURT: Well, I appreciate your patience.

9 MR. GRIESMEYER: Certainly. No problem, Judge.

10 THE COURT: My motion call never goes like this. But  
11 as it happened the jury injure came back with a verdict  
12 yesterday, so that all we had was the motion call.

13 Why don't you sit down and let me tell you where I am  
14 coming from. And then I will hear from each side after I have  
15 done that. Okay. So you don't have to be standing up shifting  
16 from heel to heel while I am talking.

17 When I first started to review these papers, I was  
18 somewhat in despair, because I had as I saw it in two different  
19 places a really illegible contract. Thank goodness it turns  
20 out that Exhibit B to the Friedman affidavit turned out to have  
21 something that was legible so I could find out what the parties  
22 had really said in this contract that they entered into.

23 And it was apparent to me, you know up until then --  
24 by the way, it was really very difficult to understand which  
25 side was really presenting the thing in an appropriate manner

3  
1 because I didn't know precisely what the contract read. I read  
2 what the parties had said about the contract, but I didn't have  
3 the contract.

4           When I read the contract it was plain that a  
5 purported termination on the ground that this was a contract  
6 that was terminable at will was really a nonsustainable  
7 position. It cannot be said, given the form of that contract,  
8 including the options that were involved and the rights that  
9 were involved, that it was within the power of the party that  
10 had the ultimate interest and the intellectual property to  
11 essentially cut the legs out from the defendants here in the  
12 situation in which the consequence of that would be either the  
13 (or both) the inability to deal with the matter as an asserted  
14 copyright infringer or as an asserted trademark infringer.

15           I read the Walthal case. But as often happens in my  
16 business serendipity strikes in an extraordinary number of  
17 situations. It's quite right that our Court of Appeals came  
18 down just a month ago with this Automation by Design against  
19 Raybestos Products decision that made clear the scope of what  
20 Walthal did or did not stand for. And the consequence of that  
21 decision is to make it plain -- to make really two things  
22 plain. One, that the kind of claim that is made here is one  
23 that -- by the plaintiffs -- is one that depends on the notion  
24 that there is no termination provision in the contract. And  
25 that in the absence of a termination provision in the contract

4  
1 you fall back to the common law of terminability at will.

2           In this situation the facts of what the ongoing  
3 rights are that were given to Victory Records are such that  
4 that has built into it a notion of continuity that prevents it  
5 from being terminable at will.

6           There is another interesting component of the  
7 decision in Automation by Design -- and that is, as I read  
8 through the thing and I got to page 21 of the slip opinion by  
9 Judge Rovner, she commented about the contract that was there  
10 as saying, "Similarly the economic realities of the agreement  
11 favor treating the license as perpetual rather than terminable  
12 at will."

13           Now in that situation the economic realities went  
14 into perpetual existence. I am not suggesting that here. But  
15 what I am suggesting is that the Court of Appeals has very  
16 sensibly said, "When we construe contracts of this kind, we  
17 also look at the economic realities." The economic realities  
18 here would negate any notion that the plaintiffs here would be  
19 in a position in which they have an obligation to deliver, for  
20 example, an added work to the defendant, but then the defendant  
21 can't use it. It's absurd, frankly. It's just not  
22 sustainable. It's not sustainable as a matter of contract law.  
23 It's not sustainable as matter of common sense.

24           Now that doesn't mean that that calls for the  
25 outright dismissal of Count 9. The reason that I say that is

1 that -- and incidentally, you are going to be ultimately doing  
2 this before Judge Moran, I am glad to say. But this is the  
3 kind of case that I love to keep, but I am not going to. I am  
4 not making a ruling about "exclusivity" as a matter of law.  
5 That is I am not making a ruling, for example, which is a kind  
6 of unique issue about whether these entertainers would be in a  
7 position to essentially create by creating another record or  
8 album to create essentially a competitive situation in which  
9 their they conduct somehow could be charged or challenged by  
10 Victory Records as violating the purpose of the agreement. I  
11 am not expressing any indication about that. One that is  
12 ultimately for Judge Moran to determine.

13           That's why I said I am not dismissing Count 9. But  
14 what I am ruling is that the main thrust of the motion which  
15 respect to Count 9, the one that claims terminability at will  
16 is not legally sound.

17           Now with that being the case -- and I should add one  
18 thing, you know, as long I have talked about not expressing a  
19 view on that. If plaintiffs intended to take such action,  
20 essentially they would be operating at their peril. That is,  
21 if they engage in that and it turns out to be unlawful under in  
22 terms of contract law and they are therefore causing harm to  
23 Victory Records that's something that will be tried out before  
24 Judge Moran. And I am not suggesting a ruling either way. I  
25 am simply making plain that the scope of the ruling that I am

6  
1 announcing this morning is one that knocks out the claim based  
2 upon terminability at will.

3           Now that then carries with it the idea that Counts 1  
4 and 2, which are the claim of copyright infringement and  
5 trademark infringement respectfully, that those have to fall  
6 because they depend entirely on the notion of a valid  
7 termination. And I've just indicate that termination which is  
8 e grounded on the notion of terminability at will, will not  
9 fly.

10           I am not indicating a ruling on Count 3, which is  
11 essentially the federal law of unfair competition, you know  
12 Section 1125. That may or may not be sustainable in light of  
13 the things that I have said. Nor am I making a determination  
14 about Count 4 as to whether it is appropriate to look at Ohio  
15 or law or Illinois law. We leave that again for Judge Moran to  
16 determine.

17           So far as Count 5 is concerned that's one is  
18 asserting -- wait a minute. Let me see my notes on that. oh,  
19 Count 3 is a fraud claim. That one does not seem to me to be  
20 sustainable. And the reason is that it like very much like a  
21 breach of contract claim that is sought to be dressed up as  
22 fraud. That is, if in fact Victory Records was not accounting  
23 appropriately for royalties or whatever that is, the notion  
24 that that somehow converts it to a tort instead of a contract  
25 really is not consistent with at least Seventh Circuit law.

7  
1 That may -- might -- present a question about whether you look  
2 at Ohio law or Illinois law. And I don't think that the  
3 parties have given full attention on how that choice impacts on  
4 that claim. But certainly in fraud terms, at least the law  
5 that we are accustomed to dealing with here would not support  
6 that.

7 Count 6, that's the one "interferes with business  
8 relationship." I have got to tell you that despite the fact  
9 that we live in notice pleading regime, the way that I  
10 read that one it doesn't seem to that it's got enough meat on  
11 the bones. I think in order to sustain that kind of claim more  
12 would have to be alleged that would support the idea, justing  
13 saying it doesn't make it so. That's the old Lincoln line, you  
14 know. When he posed the question, "If you call a dog's tail a  
15 leg, how many legs does the dog have?" When the answer came  
16 back "Five," he said, "No. Calling a tail a leg doesn't make  
17 it so." Well that sort of same that applies here.

18 So on that one I am just giving you an indication  
19 that I believe that in order to sustain such a claim of  
20 business interference, which looks awfully in candor, that  
21 would really have to be amended to do a better job that has  
22 been done here.

23 So far as Count 7 is concerned, which is rescision, if  
24 what is really meant is rescision, it's always been my  
25 understanding that the party that seeks to rescind has an

1 obligation to return what has been derived under the contract.  
2 And I don't see any suggestion that these people would like to  
3 give back the million of dollars that they have gotten in order  
4 to justify rescission as relief.

5           Now that I have read it, and I am not sure that  
6 rescission is exactly what you are talking about as contrasted  
7 maybe with revocation. But if it's revocation, then it goes  
8 back to the point that I was making about terminability at  
9 will. But you'd better take a fresh look at that. Because if  
10 you are really talking rescission, what you better do is to  
11 tender, that's always a condition of rescission.

12           Then the, let's see. What's 8? Oh, 8 is unjust  
13 enrichment. Well, that one as you know or at least under  
14 Illinois law, you cannot assert an unjust enrichment claim if  
15 you have got a contract. You can't argue quantum meruit if the  
16 parties have a contract. And so again I don't think that  
17 anybody submitted, if Ohio law is applicable, anybody submitted  
18 anything on that. So again I am not in a position to rule  
19 ultimately if Ohio law were to govern. And if Ohio law were  
20 different, maybe Count 8 could be supported, but certainly not  
21 in Illinois.

22           Anyway, let me see if I have got anything else here.  
23 No. I guess that all that I had just in the way of short  
24 scrawled notes for myself. And obviously as I indicate, I am  
25 not dealing ultimately with the case here. That remains for



9  
1 Judge Moran. But I did feel that it was appropriate to knock  
2 out at least the things that I had mentioned at the outset.  
3 And that had do with to terminability at will with the  
4 necessary adjuncts to that which are Count 1 and 2.

5 Is there anything about what I have said that's not  
6 clear? I am not asking whether you agree with it, but is there  
7 anything that's not clear?

8 MR. GRIESMEYER: No, Judge. I think it's well  
9 thought out and reasoned approach. I guess I am just curious  
10 as to what exactly the ruling is today, given the fact that you  
11 have indicated that Judge Moran.

12 THE COURT: I have indicated what my rulings --

13 MR. GRIESMEYER: Okay.

14 THE COURT: I have said the three things that are  
15 definitely my rulings. And that is, I am granting the motion  
16 to dismiss Count 9 to the extent that the motion is based upon  
17 the nonterminability at will of the contract. I am also  
18 granting the motion to dismiss Counts 1 and 2 that are  
19 necessarily hooked to that. With respect to the others, Count  
20 3 might well fall with that. But I am not ruling on that  
21 because you may want to develop further as to whether that can  
22 survive, notwithstanding the fact that the terminability at  
23 will not -- isn't going to fly.

24 The others I was simply giving you my views rather  
25 than my ultimate rulings for the reasons that I had indicated

1 as limiting what I was dealing with. But I felt that the  
2 terminability at will really had to be dealt with at out the  
3 outset because so much of the case hinges on that.

4 And I don't know. Is there anything else that is not  
5 clear about what I have dealt with?

6 MR. SPALDING: I don't think so. I think that  
7 clarifies for me the scope of the answer. I take the Court is  
8 not going to be issuing a written opinion on this?

9 THE COURT: That's right. I have just given you my  
10 ruling.

11 MR. SPALDING: That's fine.

12 THE COURT: I have trouble enough keeping up with two  
13 sets of motion calls without also committing a lot of rulings  
14 to papers.

15 MR. GRIESMEYER: Certainly.

16 THE COURT: Okay.

17 MR. SPALDING: Thank you, your Honor.

18 MR. GRIESMEYER: Thank you, your Honor.

19 (WHICH WERE ALL OF THE PROCEEDINGS HAD AT THE HEARING OF  
20 THE ABOVE-ENTITLED CAUSE ON THE DAY AND DATE AFORESAID.)  
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## C E R T I F I C A T E

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the report of proceedings in the above-entitled cause.

JESSE ANDREWS, CSR  
OFFICIAL COURT REPORTER  
UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION  
DATED: October 18, 2006