

The University of Cincinnati Intellectual Property and Computer Law Journal

Volume 1 | Issue 1

Article 6

2016

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Recommended Citation

Rebecca Knight, *Jay-Z Has 99 Problems but a Sample Ain't One*, 1 U. Cin. Intell. Prop. & Computer L.J. (2016)

Available at: <http://scholarship.law.uc.edu/ipclj/vol1/iss1/6>

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Jay-Z Has 99 Problems but a Sample Ain't One

On October 21, 2015, a federal judge granted a motion for judgment as a matter of law in favor of rapper Jay-Z (aka Shawn Carter), music producer Timbaland (aka Timothy Mosely), and over twenty other named defendants, dismissing an eight year copyright infringement suit for lack of standing.¹ The plaintiff filed suit against the defendants in 2007, alleging that Jay-Z's song "Big Pimpin'" infringed on his rights in the song "Khosara, Khosara."² One week into the trial, the judge determined that the plaintiff lacked standing to pursue his infringement claim.³ Despite the judge's efforts to sort out the complex international copyrights issues, the judge's determination has serious flaws in the evaluation of an agreement entered into by the plaintiff, as well as Egyptian copyright law, that could allow the plaintiff to prevail on appeal.

The Clash over "Big Pimpin'"

The plaintiff, Osama Ahmed Fahmy, is the nephew and heir of the late Baligh Hamdi, a famous Egyptian music composer, who authored the musical composition "Khosara, Khosara" in or about 1957.⁴ The copyright in "Khosara, Khosara" was registered under Egyptian law in or about 1960 by Mr. Hamdi.⁵ Upon Mr. Hamdi's death in 1993, the copyright ownership in "Khosara, Khosara" was initially inherited by his siblings, and eventually ended up being jointly owned by his siblings' children, one of whom is the plaintiff.⁶ "Big Pimpin'" was a hit single from Jay-Z's 1999 album *Vol. 3 . . . Life and Times of S. Carter*.⁷ Both the album and the single achieved substantial commercial success. The album has been certified triple platinum (selling over three million records)⁸, and earned a Grammy nomination for Best Rap Album at the 43rd Annual Grammy Awards.⁹ The single "Big Pimpin'" was at the top of five different Billboard Singles charts in 2000¹⁰, and earned a Grammy nomination for Best Rap Performance by a Duo or Group.¹¹ The song was a result of the collaborative efforts of Jay-Z and Timbaland, with Jay-Z writing the lyrics and

Timbaland producing the beat.¹² The beat incorporates a sample of the first four measures in “Khosara, Khosara” playing in an ongoing loop.¹³ The use of this sample is at issue in the infringement suit.

The defendants asserted that they held a valid license to use portions of “Khosara, Khosara” in “Big Pimpin’,” and that license derived from rights originally granted by Hamdi to Sout el Phan, an Egyptian recording company in 1968.¹⁴ The license was granted as a part of a \$100,000 settlement agreement between the defendants and EMI Music Arabia, the company that controlled the distribution of “Khosara, Khosara” outside of Egypt.¹⁵ The plaintiff contended that the rights originally granted by his uncle in 1968, and by the plaintiff in later agreements, covered only the right to make sound recordings of “Khosara, Khosara” and not the right to make derivative works such as “Big Pimpin’.”¹⁶ Further, the plaintiff asserted that under Egyptian law, the right to make derivative works is an inalienable moral right reserved by the author and his heirs.¹⁷ Ultimately, neither the judge nor the jury made a determination on the merits of the infringement action. Instead, the judge determined that the defendant was entitled to a judgment as a matter of law because the plaintiff lacked standing to bring the suit.¹⁸

The Lack of Standing Determination

The first phase of the weeklong bifurcated jury trial concluded on October 20, 2015.¹⁹ The same day, the defendants filed a motion for judgment as a matter of law pursuant to Federal Rules of Civil Procedure 50 and 52 contending, among other things, that the plaintiff lacked standing to bring the infringement suit.²⁰ The judge’s determination rested on two bases: (1) Egyptian morality rights are not recognized in the United States, and (2) the plaintiff relinquished all of his economic rights in the musical composition of “Khosara, Khosara” by entering into an agreement with an Egyptian record label in 2002.²¹

First, the judge determined that the plaintiff could not pursue a copyright infringement claim based on moral rights in the United States.²² The doctrine of moral rights recognizes that an author (and the author’s heirs) has certain inalienable and non-transferrable rights to control the fate of his work, and

to protect the personal and reputational value of the work as a reflection of the author.²³ Egypt recognizes moral rights in all copyrights, but the United States recognizes moral rights only in certain visual art.²⁴ As such, the plaintiff's only recourse for the violation of moral rights in the musical compilation of "Khosara, Khosara" is "to go into Egypt before an Egyptian court and ask it to enforce" those rights.²⁵

Second, the judge determined that the plaintiff relinquished all of his rights in the musical composition of "Khosara, Khosara" in 2002, and his standing to sue for infringement ended at that time. Under the Copyright Act, only "[t]he legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right committed while he or she is the owner of it."²⁶ Pursuant to the Act, if the plaintiff transferred all of his economic rights in "Khosara, Khosara" to another individual or entity prior to the filing of the infringement suit, he would not be the legal owner and would lack standing. Central to the issue are several agreements that granted different exclusive rights to different entities in regards to "Khosara, Khosara." In 1968, Hamdi entered into an agreement with Sout el Phan, an Egyptian company, through which *some* rights in "Khosara, Khosara" were transferred.²⁷ In August 1995, an agreement between the plaintiff and Sout el Phan confirmed the "continuing viability" of the rights conferred in the 1968 agreement.²⁸ In December 1995, Sout el Phan transferred some exclusive distribution rights in "Khosara, Khosara" to EMI Music Arabia.²⁹ In March 2001, a settlement agreement between EMI Music Arabia and Timbaland granted rights to exploit "Khosara, Khosara" "in perpetuity, throughout the world . . . free and clear of any claim" by EMI Music Arabia.³⁰ The plaintiff maintained that none of the above agreements entered into by him or his uncle conferred the right to make derivative works, but rather only conferred the right to make recordings of "Khosara, Khosara."³¹

However, the crux of the standing issue was a 2002 agreement. Sometime in 2001, control of Sout el Phan's musical catalogue passed to Alam el Phan, another Egyptian entity.³² In 2002, the plaintiff signed

an agreement entitled “Authorization to Print, Publish, Sell, and Circulate” with Mohsen Mohammed Jaber, the owner of Alam el Phan.³³ The defendants argued that this 2002 agreement constituted a full and complete assignment of all of the plaintiff’s rights in the copyright of “Khosara, Khosara.”³⁴ The defendants further contended that Mohsen Mohammed Jaber became the legal owner of the copyright in 2002, such that only Jaber would have legal standing in an infringement suit—not the plaintiff.³⁵ The plaintiff testified that the purpose of the 2002 agreement was simply to “authorize the same rights that had been authorized originally from Baligh Hamdi to Sout el Phan . . . because of the sale of Sout el Phan” to Alam el Phan.³⁶

The court adopted the defendants’ stance, concluding that the 2002 agreement assigned all of the plaintiff’s economic rights in “Khosara, Khosara” to Jaber, and Jaber became “solely,” “fully,” and “irrevocably” the owner of all of those rights.³⁷ Taking a “plain meaning” textualist approach, the judge concluded that the plain language of the agreement made it clear that the plaintiff made a broad conveyance of all of his rights to Jaber, and did not merely renew the rights previously given in the 1968 and 1995 agreements.³⁸ In response, the plaintiff argued that the conveyance was legally deficient because it failed to comply with Egyptian law, which requires the agreement to contain explicit and detailed indication of each right being transferred, precluding the kinds of blanket assignments that were included in the agreement.³⁹ The judge also rejected this argument, finding that under Egyptian law, if *some* rights are being conveyed, then a detailed list of those rights must be included.⁴⁰ But if *all* rights are being transferred, then simply making a blanket statement of “all rights” is acceptable.⁴¹ Therefore, the plain language of the agreement and Egyptian law supported the conclusion that the plaintiff lacked standing because he ceased to be the legal owner of the copyright in “Khosara, Khosara” once he signed the 2002 agreement.

Critique of the Determination

The judge was not in a position to adequately evaluate the text of the agreement implementing a “plain meaning” textualist approach, or to make determinations about Egyptian law that were not supported by expert testimony.

The 2002 agreement was written in Arabic. During the trial, the court had to rely on an English translation which was inadequate to support the judge’s textualist approach. This inadequacy is highlighted in the judge’s decision. In the agreement, there was the following phrase: “maintaining our rights in respect of the public performance and mechanical printing.”⁴² However, expert testimony explained that this phrase was translated from the Arabic word *nisbah*.⁴³ According to the expert, *nisbah* refers to the right to receive royalties associated with a work of music.⁴⁴ The right to retain royalties from a copyrighted work is very different from the above translation provided to the court regarding public performances and mechanical printing. An accurate translation would have stayed true to the meaning of *nisbah*. The proven presence of inadequate translations demonstrate that the “plain meaning” approach taken by the judge was inappropriate.⁴⁵

The judge also made determinations on how Egyptian law is applied, but these determinations were not supported by the expert testimony given or the letter of the law. When determining whether or not Egyptian law requires explicit and detailed indications of the rights to be conveyed, no Egyptian rulings or examples were relied on. Instead, the defendants simply argued that if a copyright holder truly intended to transfer “all” economic rights, then specifically identifying each right to be conveyed in the agreement would be redundant and counterproductive.⁴⁶ On the other hand, the Plaintiff maintained that an assignment of economic rights should specifically describe each right to be conveyed, even if all rights are being transferred.⁴⁷ Under Egyptian law, for an assignment or transfer of rights to be valid, it must fulfill all of the imperative rules listed in Article 149 of Egyptian Law No. 82 of 2002.⁴⁸ Article 149 requires

that the transfer be “certified in writing and contain an explicit and detailed indication of each right to be transferred with the extent and purpose of the transfer and the duration and place of exploitation.”⁴⁹

Despite the black letter of the Egyptian law, the judge agreed with the Defendants and found that when all rights are being conveyed, a blanket assignment is all that is necessary. Thus, a detailed indication of each right was not necessary to have an adequate agreement. This conclusion is contrary to Egyptian law and was not supported by any of the Egyptian law expert testimony.

It is more plausible that the plaintiff intended to transfer all of the same reproduction and distribution rights that were given in the 1968 and 1995 agreements. The plaintiff took the same approach in 1995 to reconfirm the viability of the 1968 agreement when Sout el Phan was planning to extend rights to EMI Music Arabia. Reconfirming those rights again when yet another company became involved would have been reasonable under the circumstances.

These misguided and unsupported errors were outcome-determinative and caused the plaintiff to lose an eight year battle. If the judge had not found that the 2002 agreement conveyed all rights to Jaber, and that the English translation of the agreement was adequate, the plaintiff would have avoided dismissal and the issues would have been settled by the jury. Hopefully, the court of appeals takes a more sound approach, but until then, Jay-Z has one less problem.⁵⁰

¹ Fahmy v. Jay-Z, 2015 WL 6394455 (C.D. Cal. Oct. 21, 2015).

² Fahmy, 2015 WL 6394455 at *1.

³ *Id.* at *10.

⁴ *Id.* at ¶ 2 and ¶ 8.

⁵ Compl. ¶ 9.

⁶ *Id.*

⁷ See, Vol. 3: *The Life and Times . . .*, ALLMUSIC, <http://www.allmusic.com/album/vol-3-the-life-and-times-of-shawn-carter-mw0000247563> (last visited Oct. 24, 2015).

⁸ *Gold & Platinum Searchable Database*, RIAA (Recording Industry Association of America), <http://www.riaa.com/goldandplatinumdata.php?table=SEARCH> (last visited Oct. 24, 2015).

⁹ *43rd Annual Grammy Award Nominees*, MTV, <http://www.mtv.com/news/1435904/43rd-annual-grammy-award-nominees/> (last visited Oct. 24, 2015).

¹⁰ See Vol. 3: *The Life and Times . . .*, ALLMUSIC.

¹¹ *43rd Annual Grammy Award Nominees*, MTV.

¹² See Bonnie Eslinger, *Jay Z Tells Jury "Big Pimpin" Rights Not Among 99 Problems*, Law360 (Oct. 14, 2015), <http://www.law360.com/articles/714208/jay-z-tells-jury-big-pimpin-rights-not-among-99-problems>.

¹³ *Id.*

¹⁴ Fahmy, 2015 WL 6394455 at *2.

¹⁵ *Id.* See also Ben Sisario, *Jay Z and Timbaland Win Copyright Lawsuit Over "Big Pimpin" Sample*, The New York Times (Oct. 21, 2015), <http://www.nytimes.com/2015/10/22/business/media/jay-z-and-timbaland-win-copyright-lawsuit-over-big-pimpin-sample.html? r=0>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at *10.

¹⁹ *Id.* at *2.

²⁰ *Id.*

²¹ *Id.* at *10.

²² *Id.* at *6.

²³ See Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 Wash. & Lee L. Rev. 795, 800-801. See also Betsy Rosenblatt, *Moral Rights Basics*, <https://cyber.law.harvard.edu/property/library/moralprimer.html> (last visited Oct. 24, 2015).

²⁴ Fahmy, 2015 WL 6394455 at *6, *10. See also 17 U.S.C. § 106(A).

²⁵ Fahmy, 2015 WL 6394455 at *6 (internal citation omitted).

²⁶ 17 U.S.C. § 501(b).

²⁷ Fahmy, 2015 WL 6394455 at *2 (emphasis added).

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* (internal citation omitted).

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at *3.

³⁵ *Id.*

³⁶ *Id.* (internal citation omitted).

³⁷ *Id.* at *10.

³⁸ *Id.* at *8.

³⁹ *Id.*

⁴⁰ *Id.* at *9 (emphasis added).

⁴¹ *Id.* (emphasis added).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ See, e.g., *U.S. v. Sanchez*, 928 F.2d 1450, 1455 (6th Cir. 1991) (finding that, when interpreting claims of inadequate interpretation, the appellate court's ultimate determination is "whether such failure made the trial fundamentally unfair") (quoting *United States v. Tapia*, 631 F.2d 1207, 1210 (5th Cir. 1980)).

⁴⁶ *Id.* at *8.

⁴⁷ *Id.*

⁴⁸ *Id.* at *6.

⁴⁹ *Id.* at *8.

⁵⁰ See *Fahmy v. Jay-Z*, Case No. 16-55213 (Fahmy filed an appeal with the 9th Circuit on February 10, 2016).