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Music

Susan Fox

II. MUSIC

A. Copyright

1. *Jukebox Copyright Royalty Fee Held Lawful and Reasonable*

A coin dropped into a jukebox to play Barbara Streisand singing "Memories" more than likely conjurs up strong memories in the minds of jukebox operators. The memories are of the time when they could operate their jukeboxes free of royalty payments. Under an express exemption in the 1909 Copyright Act jukebox proceeds were exempt from royalty payments. The jukebox exemption, however, met its demise with the passage of the 1976 Copyright Act. The subject of royalty payments by jukebox operators was at issue in the recent case of *Amusement and Music Operators Association v., Copyright Royalty Tribunal*[1] (hereinafter *"Music Operators Association"*). The Court of Appeals for the Seventh Circuit held that the Copyright Royalty Tribunal did not act unlawfully or unreasonably by establishing a $50.00 per year royalty fee which would be implemented in stages and subject to future adjustments.[2]

The proceedings at issue arose under the Copyright Revision Act of 1976 (hereinafter "the Act").[3] Under the Act operators of "coin operated phonorecord players" (jukeboxes) are required to secure a compulsory license for the public performance of records purchased for use in these jukeboxes.[4] Section 116 of the Act requires operators to deposit a royalty fee of $8.00 per year for each jukebox used.[5] The Copyright Royalty Tribunal (hereinafter "the Tribunal") was established by the Act as the agency to determine and adjust copyright royalty rates. The Tribunal was directed to commence proceedings in January, 1980, to determine whether the $8.00 fee should be adjusted.[6]

Four organizations responded to the commencement of the proceedings. The jukebox operators were represented by the Amusement and Music Operators Association, while the copyright owners were represented by three performing rights societies: the American Society of

1. 676 F.2d 1144, *cert. denied*, 103 S.Ct. 210 (1982).
2. *Id.* at 1159.
3. 17 U.S.C. § 101-810.
4. Applications for such licenses must be filed with the Copyright Office within one month since the jukebox began the operation for which its operator seeks the license. 676 F.2d at 1146.
5. 17 U.S.C. § 116 (b)(1).
6. 676 F.2d at 1147.

Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc. On December, 10, 1980, the Tribunal's final rule was published, along with the relevant facts and the specific reasons for its conclusion.

The Tribunal's most significant rulings concerned the burden of proof, the structure of rates allowed by the Act, and the necessity for calculating rates of return. The jukebox operators argued that the burden to justify any increase in the $8.00 fee rested on the copyright owners. The Tribunal, however, reasoned that none of the parties had the burden of proof in the initial proceeding since new fee determinations were only to be made once every decade upon the petition of interested parties.[7]

The jukebox operators also argued that the Tribunal lacked the authority to create a reate structure that would allow automatic adjustments during the term of the proposed rate[8] to reflect the impact of inflation on the real value of the fee. The Tribunal rejected this contention, and held that nothing in the Act or its legislative history indicated an intent to proscribe the application of annual cost of living adjustments to the royalty fee.[9]

Finally, the Tribunal also rejected the argument that it was required to calculate individual compensation to copyright owners. It found that reliance on a collective rate of return to the copyright owners as a group was proper.[10] Section 116 of the Act specifically provides that the royalty fees are to be disbursed to the performing arts organizations.[11]

In its order of January 5, 1981, the Tribunal determined that the royalties payable by jukebox operators to the owners of copyrighted music should be set at a level of $50.00 per jukebox per year.[12] The key considerations in the Tribunal's analysis were the four statutory criteria (objectives) set out in the Act.[13] Based on these criteria the Tribunal

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7. 17 U.S.C. § 804(a)(1).

8. The term of the proposed rate refers to the option to to undertake a new rulemaking in each subsequent tenth calendar year, as authorized by 17 U.S.C. § 804 (a)(1).

9. 676 F.2d at 1148.

10. *Id.*

11. *Id.* The Tribunal determined that the legislative history of the Act did not indicate an intent for the Tribunal to regulate the internal operations of the performing arts societies.

12. $25.00 per year in 1982 and 1983, and $50.00 per year thereafter.

13. A) to maximize the availability of creative works to the public; B) to afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions; C) to reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contri-

concluded that its final rate decision adequately reflected concern for the impact on all the parties involved.[14]

The threshold issue for the court of appeals was a determination of the appropriate standard of review of a decision by the Tribunal.[15] The Tribunal argued that the "arbitrary and capricious" standard was proper in this case. The jukebox operators, however, argued that the "substantial evidence" test was required. The court stressed that the difference between the two standards was largely semantic, and that the primary concern was whether the Tribunal had given reasoned consideration to each of the pertinent factors involved in its decision.[16] In essence, the court felt that the basic requirement was that there be support in the record for what was done.[17] Moreover, the court cited a recent decision by the District of Columbia circuit where, in an analogous setting, the "arbitrary and capricious" standard was used to review a royalty fee established by the Tribunal.[18] In sum, the court stated that since the distinction between the two tests was without practical significance, a careful full-scope review would be pursued in both instances.[19]

On appeal, the jukebox operators attempted to demonstrate the depressed economic condition of the jukebox business.[20] Citing evidence of the decline in the jukebox operating business the operators argued that the $8.00 fee set by Congress should remain unchanged.[21] Additionally, they argued that the copyright owners had the burden of establishing the necessity for an increase in the fee, and that no statutory basis existed for the inflation adjustments.[22] Essentially, their argument is that the Tribunal erred by increasing the royalty fee when the evidence suggested that to do so may cause some jukeboxes to become unprofitable.

The court concluded that the legislative history of the Act clearly

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bution to the opening of new markets for creative expression and media for their communication; D) to minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices. 17 U.S.C. § 801.

14. 676 F.2d at 1149.

15. *Id.* Jurisdiction to review a decision of the Tribunal is based on 17 U.S.C. § 801.

16. *Id.* at 1150-51.

17. *Id.* at 1151.

18. Recording Industry Association of America v. Copyright Royalty Tribunal, 662 F.2d 1, 7-8 (D.C. Cir. 1981).

19. 676 F.2d at 1152.

20. *Id.* Eighteen percent of the jukeboxes in operation earned less than $300.00 per year, while 47% earned less than $700.00 per year.

21. 676 F.2d at 1152.

22. *Id.* at 1152.

refuted these contentions. Relying on the record of House and Senate Committee Reports[23] the court noted that the original $8.00 fee was reached as a political compromise, and that there is nothing in the reports to indicate that Congress felt the fee would be reasonable for the 1980's.[24] "The procedures established by the Act for determining and implementing the royalty fee underscore this conclusion. Section 804(a) of the Act directs the Tribunal to institute proceedings to adjust the jukebox fees set in section 116 in order to determine a reasonable fee under the criteria of section 801(b)(1)."[25] Therefore, because Congress directed the Tribunal to assess the propriety of an $8.00 fee in 1980, the court agreed with the Tribunal's conclusion that no special imprimatur is attached to the original fee.[26]

The court also rejected the argument that the burden was on the copyright owners to prove the necessity for a fee increase. This conclusion was based on the statutory scheme itself, which makes it clear that neither side is the proponent.[27] Subsequent to the establishment of a reasonable fee, the Tribunal is directed to assess the amount only upon the petition of a party with a significant interest.[28] Thus, this statutory directive is an exception to the usual practice that the proponent of a rule of order has the burden of proof.[29]

Moreover, the court concluded that the jukebox operators have failed to demonstrate that the Tribunal acted arbitrarily or capriciously when it established a $50.00 royalty fee. At the heart of the jukebox operators' case was a survey documenting the overall plight of the jukebox industry.[30] The court agreed with the Tribunal that this survey should be accorded little weight since the response rate on its questionnaire to jukebox operators was low.[31] Without this evidence the jukebox operators were left with little to support their allegation concerning current profitability of the industry. On the other hand, the court believed that the copyright owners presented the most credible and reliable evidence, and that the Tribunal did not act arbitrarily in

23. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 113, *reprinted in* 1976 U.S. Code Cong. & Ad. News 5728, 5729; S. Rep. No. 473, 94th Cong., 1st Sess. 96-97.

24. 676 F.2d at 1153.

25. *Id.* at 1154.

26. *Id.* at 1154.

27. *Id.* at 1154.

28. 17 U.S.C. § 804 (a)(2)(C).

29. 676 F.2d at 1154.

30. The survey indicated that any increase in the royalty fee would probably force some small operators out of business.

31. Approximately 14% of the responses were from jukebox operators.

considering this information.[32] Thus, the court concluded that the $50.00 fee was fully justified by the record as a whole.[33]

The Tribunal is endowed with plenary power to establish and adjust royalty rates in various segments of the entertainment industry. It is composed of five commissioners appointed by the President for seven year terms. The Tribunal is directed to accompany its final decisions with a statement of the facts it found relevant, the criteria it used, and the specific reasons for its conclusion.[34] Rulings of the Tribunal are not subject to legislative veto. Rather, judicial review was established as the method to assess the body's decisions. It was thought that this method would insure a more detailed and careful review of possible arbitrary or capricious determinations.[35]

The result in this case is significant because it underscores and affirms the power of the Tribunal. The court noted in its conclusion that ratemaking is an art, not a science.[36] Impliedly, the court was announcing that it will defer to the Tribunal's decisions as long as they appear reasonable and in conformity with the statutory criteria. Similar statements were made in *Recording Industry Association v. Copyright Royalty Tribunal*.[37] In that case the court noted that the Tribunal's decision was based on a reasonable interpretation of statutory language, and was entitled to deference. These statements indicate that the Tribunal has considerable discretion in charting royalty policy.

The scope of the Tribunal's power is likely to become an important issue in the near future due to the rapid growth of the cable industry. In a recent cases, where rate structures for roylaty fees paid by cable operators were at issue, the Tribunal was accorded more than the usual deference.[38] The court stated that the Tribunal must announce the basis for its decision, but noted that in this case, the body was not always explicit when it rejected proffered evidence.[39] The court did not sanction the lapses, but decided to regard them "charitibly" in light of the Tribunal's lack of professional staff and the novelty of the proceeding. The court's apparent justification for this was that it expected the quality of the Tribunal's decisionmaking to improve with experience.[40]

32. The evidence consisted mostly of market analogies.
33. 676 F.2d at 1157.
34. 17 U.S.C. § 803.
35. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 113 (1976).
36. 676 F.2d at 1159.
37. 662 F.2d 1 (1981).
38. National Cable TV v. Copyright Royalty Tribunal, 689 F.2d 1077 (D.C. Cir 1982).
39. *Id.* at 1091.
40. *Id.*

This type of language raises serious questions as to the scope of the Tribunal's power in the future. Namely, how will it be known that the Tribunal has become sufficiently experienced so that its "lapses" are no longer excusable? Future decisions must answer that question.

In the meantime, these recent decisions which accord strong deference to the Tribunal are just. As the courts have recognized, the Tribunal is still a relatively new body, and its decisionmaking will likely become more insightful and consistent as it achieves a greater working knowledge of the various segments of the entertainment industry.

Randy Berg

B. Breach of Contract

1. *Personal Service Contracts*

It is a longstanding rule that courts of equity will not order specific performance of personal service contracts.[1] In a decision applying this rule to bankruptcy-proceedings, *In re Noonan*,[2] the court stated that services performed under a personal service contract were for the personal benefit of the debtor rather than for the benefit of the estate and that a contract of such nature was not an asset that could be used for the estate's benefit or in the debtor's plan of reorganization absent his consent.[3]

In 1978, Robert Noonan, a songwriter known professionally as Willie Niles, entered into an eighteen month exclusive recording contract with Arista Records.[4] Under this contract, Noonan was obligated to record at least two albums and Arista had the option to extend the contract for three more consecutive eighteen month periods.[5]

Arista paid the production costs for the two albums.[6] Although Noonan was not personally liable for these costs, Arista was entitled to recoup the money from royalties from the sales of the albums.[7] However, the albums were not a commercial success and the resulting royalties failed to cover the production costs.[8] Nevertheless, Arista decided

1. Arkansas Smelting Co. v. Belden Mining Co., 127 U.S. 379 (1888); 5A Corbin, Contracts § 1204 (1964).

2. [1981-1982 Transfer Binder] Bankr. L. Rep. (CCH) ¶ 68,841 (Bankr. S.D.N.Y. Feb. 22, 1982); Ford, Bacon & Davis, Inc. v. Holahan, 311 F. 2d 901, 904 (5th Cir. 1962).

3. [1981-1982 Transfer Binder] Bankr. L. Rep. (CCH) at 81,291.

4. *Id.* at 81,289.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

to hold Noonan to a second eighteen month term.[9]

Dissatisfied with his contract, Noonan, in 1981, filed a voluntary petition for relief under Chapter Eleven[10] of the Bankruptcy Reform Act.[11] As a debtor in possession,[12] Noonan moved for an order rejecting the Arista contract as executory.[13] When Arista contested this motion, Noonan successfully converted his case to Chapter Seven.[14] This conversion provided for an automatic rejection of executory contracts as Noonan could not be forced to perform.[15] However, Arista moved to put Noonan back into Chapter Eleven.[16]

The court denied Arista's motion since the recording contract was for debtor's services and could not be assigned or assumed by Noonan's Bankruptcy Trustee.[17] The court held that Chapter Eleven did not apply as Noonan had no tangible assets to distribute in a business reorganization.[18] Noonan's contract was for personal services and

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9. *Id.*

10. 11 U.S.C. § 1101 (Supp. IV 1980).

11. [1981-1982 Transfer Binder] Bankr. L. Rep. (CCH) at 81,289.

12. 11 U.S.C. § 1101(1) (Supp. IV 1980).

13. A right given by 11 U.S.C. § 365 (West 1979), to trustees and to Chapter Eleven debtors in possession by the force of 11 U.S.C. § 1107 (Supp. IV 1980). [1981-1982 Transfer Binder] Bankr. L. Rep. (CCH) at 81,289.

14. 11 U.S.C. § 1112(a) (Supp. IV 1980). [1981-1982 Transfer Binder] Bankr. L. Rep. (CCH) at 81,289.

15. Noonan's application acknowledged that the reason for the conversion was to take advantage of the automatic rejection of executory contracts given by 11 U.S.C. § 365 (c) and (d)(1) (West 1979). The section reads as follows:

> (c) The trustee may not assume or assign an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties if:
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> (1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and,
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> (B) such party does not consent to such assignment or assumption. . . .
>
> (d)(1) In a case under Chapter Seven of this title, if the trustee does not assume or reject an executory contract or unexpired lease of the debtor within 60 days after the order for relief, or within such additional time, as the court, for cause, within such 60 day period, fixes, then such contract or lease is deemed rejected.

However, the application of 11 U.S.C. § 365(c)(1)(A) is limited to executory contracts which are truly personal. 16 Bankr. 634 (Bankr. M.D. Fla. 1981).

16. 11 U.S.C. §§ 303(a), 706(b) (West 1979); [1981-1982 Transfer Binder] Bankr. L. Rep. (CCH) at 81,289.

17. Where an executory contract between the debtor and another is of such a nature as to be based upon the debtor's personal skill, the trustee does not take title to the debtor's rights and cannot deal with the contract. Villar & Co. v. Conde, 30 F. 2d 588 (1st Cir. 1929); D.H. McBride, 132 F. 285 (S.D.N.Y. 1904); 4A Collier, Bankruptcy ¶ 70.22(3) (14th ed. 1983); [1981-1982 Transfer Binder] Bankr. L. Rep. (CCH) at 81,291.

18. [1981-1982 Transfer Binder] Bankr. L. Rep. (CCH) at 81,291.

therefore could never be part of an estate.[19] While sympathizing with Arista, the court decided that Noonan's interests outweighed Arista's.[20] To force Noonan to comply with the contract would be equivalent to involuntary servitude, a violation of the Thirteenth Amendment.[21]

This case has minimal impact in the entertainment industry as the court is merely following a well established rule that they will not enforce personal service contracts by specific performance. However, the court does expand the application of this rule to bankruptcy proceedings under the Bankruptcy Reform Act. Nevertheless, this is a narrow decision as Noonan had to satisfy the requirements to declare bankruptcy under Chapters Seven and Eleven, to escape his contract without any penalties. Perhaps, the only effect it will have in the entertainment industry is that the industry will investigate the finances of the other party more thouroughly before signing them to a personal service contract.

Grisel Feldfeber

2. *Explicit Drafting in Royalty Contracts*

In the entertainment industry, the term "royalty" does not commonly identify a king, queen, or other person of royal lineage; rather, it is the share paid to an artist out of the proceeds resulting from the sale or performance of his work.[1] Tied to such proceeds, the potential value of a royalty is often unknown; what presently may be an interest in a work of no acclaim may tomorrow become an interest in one of the industry's big hits. So you never really know what you have until you begin to get it, which is one good reason why contracts for interests in

19. *Id.*

20. *Id.*

21. The court stated that Arista should have known, from earlier decisions, that this contract would not be enforced by specific performance. [1981-1982 Transfer Binder] Bankr. L. Rep. (CCH) at 81,291.

In ABC v. Wolf, 52 N.Y. 2d 394 (1981), ABC sought specific performance of a sportscaster's contract. The court refused, stating that the court would have difficulty supervising such performance and to require such performance would be equivalent to involuntary servitude.

In *In re* Zotti, 16 Bankr. 625 (Bankr. S.D. Fla. 1981), the personal service nature of a contract between debtor and creditor, which primarily concerned the personal services of debtor to be rendered in sale of insurance and the recruitment and training of subagents together with a terminable at will provision in the contract, was determined to be unassumable on objection by the creditor; [1981-1982 Transfer Binder] Bankr. L. Rep. (CCH) at 81,292.

1. The American Heritage Dictionary of the English Language (1969, 1970).

certain royalties should be as explicit as possible, readying the parties for whatever eventualities might arise.

This is a lesson to be learned from the case of *In Re Miller*,[2] in which the Supreme Court of New Jersey upheld both the trial and appellate courts' determination that an ambiguous contract granting an interest in certain royalties terminated on a specified date, much to the chagrin of the potential beneficiary.

In 1945, after the War Department officially declared Glen Miller dead, David Mackay, the former orchestra leader's personal attorney and advisor, served as attorney for Miller's estate. Sharing concern with Miller's wife, Helen D. Miller, the sole beneficiary and executrix of the estate, over a decline in income from RCA recording royalties, Mackay suggested that perhaps RCA could do something with old "air checks," the recordings of radio broadcast performances of the Glen Miller Orchestra which Miller had used to evaluate the orchestra's performances. With Mrs. Miller's approval, Mackay undertook the "monumental task"[3] of cataloguing and monitoring the old recordings. RCA ultimately determined that it was feasible to make commercial quality recordings from the old air checks.

On August 14, 1951, Helen Miller, as executrix of the Glen Miller estate, entered into a contract with RCA dated August 8, 1951. The contract provided that RCA would release one album a year for three years and would pay the estate a six percent royalty on 91 1/2 percent of all sales, to be paid semi-annually. The contract also gave RCA the perpetual right to manufacture and release records of the selections made under the contract.

On the same day she signed the RCA contract, Helen Miller signed a document written by Mackay which stated that "the undersigned hereby sells, assigns, transfers and sets over unto David Mackay a sum equivalent to one-third of the royalties to accrue" from Mrs. Miller's contract with RCA.[4] The legal effect of this document is the issue of the case on appeal.

The recordings released pursuant to the 1951 contract met with greater commercial success than the parties had expected. In 1954, a new agreement was formed which provided that the estate would turn over to RCA all previously unreleased recordings of the Glenn Miller Orchestra, and RCA would between 1954 and 1959 re-record and release at least 80 performances and would pay the estate six percent of

2. 90 N.J. 210, 447 A.2d 549 (1982).
3. 447 A.2d at 551.
4. *Id.*

90 percent of all sales. The method of payment was modified to create a tax advantage to the estate; guaranteed payments were established until 1959 and a reserve fund was created to cover future payments. Significantly, the 1954 agreement did not give RCA a perpetual right to manufacture and release air check recordings.

The 1951 document that gave Mackay a one-third interest in monies accrued under the initial contract was also supplanted in 1954. The new agreement signed by Mrs. Miller was identical to its predecessor, with the exception that Mackay's percentage would be computed and paid only after the estate received the first $15,000.00 each year, the amount it earned in royalties prior to the release of the air checks.

Due to continued commercial success, in 1955 the parties again entered into a new contract. RCA agreed to increase the number of guaranteed releases, the guaranteed annual payments were continued, and the ceiling on the reserve fund was nearly doubled. Once again Mackay requested that Mrs. Miller execute a document entitling him to one-third of the proceeds, after the first $15,000.00 of the year, accruing from the 1955 contract with RCA. This time Mrs. Miller did not comply. Mackay wrote several letters in 1955 requesting Mrs. Miller's compliance, and on April 15, 1958, he wrote her suggesting that her idea of paying his one-third interest on a yearly basis rather than having a blanket assignment related to each RCA contract would have adverse tax consequences for the estate. For an unknown reason, sometime after April 15, 1958, Mrs. Miller complied with Mackay's request and executed the document he had written. It is important to note that throughout the time that the document remained unsigned, Mackay continued to receive the appropriate royalty payments.

In January, 1958, RCA and Mrs. Miller amended their agreement in response to further commercial success. The royalty rate for record club sales was adjusted, the annual payments were extended through 1964 and their minimum increased, and the reserve fund ceiling was similarly increased. "Mrs. Miller executed a document giving Mackay a right to one-third of the proceeds of the January, 1958 amendment to the 1955 RCA contract."[5]

Further amendments to the RCA contract were made in 1960, 1962, and 1963. The annual minimum payments were ultimately extended through 1967 and the reserve fund ceiling was altered in the 1960 and 1962 amendments. In reference to the payments to Mackay under the 1960 amendment, Mrs. Miller signed a document which dif-

5. *Id.* at 552.

fered from the previous documents in that it stated that Mackay was to receive one-third of the proceeds under the 1955 RCA contract "and any amendments thereof."[6] Apparently this clause would obviate the need for similar documents in the future.

Mackay continued to collect one-third of the royalties up to and through the time of Helen Miller's death on June 2, 1966. The Miller estate was left to the two children, Steven Miller and Jonnie Soper, and Mackay was named its executor. In letters dated June 20, 1968, Mackay wrote to Miller and Soper explaining his arrangements with the estate and suggesting certain modifications in the terms of payment. Both Miller and Soper agreed to the proposal and Mackay continued to receive one-third of the royalties thereafter.

Sometime in 1975, after Miller and Soper had a falling out with Mackay, they began an investigation into the attorney's dealings with the estate. They eventually brought an action for an accounting and against Mackay for monies they alleged he wrongfully took. The sole issue presented before the Supreme Court of New Jersey concerned the legal effect of the documents granting Mackay one-third of the royalties; none of the documents mentioned how long he would continue to collect that amount. The precise issue is whether there was sufficient credible evidence to support the trial court's conclusion that the documents executed by Mrs. Miller did not entitle Mackay to receive one-third of the royalties after March 15, 1967, the date upon which the guaranteed annual payments would cease.[7]

The majority reasoned that to resolve the ambiguity as to the duration of Mackay's interest, the trial court was forced to examine the intent of the parties in the context of pertinent established legal principles.

Firstly, it was asserted that "[p]erpetual contract performance is not favored in the law and is to be avoided unless there is a clear manifestation that the parties intended it."[8] The court, under the impression that the words of the documents themselves signified no such intent,

6. *Id.*

7.

> The trial court held that in agreeing to the terms as stated by Mackay in the June 20, 1968 letter, respondents [Miller and Soper] agreed to allow Mackay to continue to receive a third of the RCA royalties. The court determined, however, that this agreement was procured as the result of Mackay's undue influence over respondents and was therefore void.

Id. at 553. n.2.

8. *Id.* at 554 (citing West Caldwell v. Caldwell, 26 N.J. 9, 29, 138 A.2d 402 (1958); Koch v. Koch, 95 N.J. Super. 546, 550, 232 A.2d 157 (App. Div. 1967); 1 Williston on Contracts § 38 (3d ed. 1957); 3 Corbin, Contracts § 553 (1960)).

turned to the parties' conduct and concluded that their actions would indicate the opposite: if, as Mackay argues, the original transfer gave an interest in royalties as long as they accrued, it would not have been necessary to amend those transfers each time the payment schedule was changed; similarly, Mrs. Miller's suggestion that Mackay be paid yearly was considered a strong indication that she never intended the interest to be perpetual.[9] The court felt there was sufficient support for the trial court's finding that Mrs. Miller did not intend to give Mackay an interest in the royalties as long as they continued to accrue.[10]

The court then turned to an analysis of the trial court's conclusion that the interest in royalties ran only as long as the guaranteed payments in the underlying RCA contract continued (March 15, 1967). The court reasoned that if a contract contains no express term as to its duration, it is terminable at will or after a reasonable time.[11] Considering the effort expended by Mackay and the returns he received up until March 15, 1967,[12] that date was viewed as a reasonable termination date.

The court felt, however, that once again the trial court was forced to analyze the conduct of the parties and, if a definite period of time could be inferred from that conduct in light of surrounding circumstances, then that time period should govern.[13] The court found support for the March 15, 1967 termination date: the execution of new documents each time the payment schedule was modified, inferring that the interest lasted only as long as the payment schedule was in effect; Mrs. Miller's attempt to put Mackay's interest on a year-to year basis; and, most importantly, there is what the parties believed would be the revenue from the RCA contract—considering that Mackay in his accounting of the estate dated September 10, 1970, stated that it was anticipated that the income from the RCA contract would eventually dwindle to nothing, it would seem likely that Mrs. Miller understood the March 15, 1967 date to be the probable date of that expiration.[14]

Looking to the writings themselves, the court reasoned that "[w]here an ambiguity appears in a written agreement, the writing is to be strictly construed against the draftsman."[15] Since Mackay drafted

9. 447 A.2d at 554.

10. *Id.* (citation omitted).

11. *Id.* (citing Esslinger's v. Alachnowitz, 68 N.J. Super. 339, 172 A.2d 433 (App. Div. 1961)). *See* 1 Williston on Contracts § 38 (1957); 1 Corbin, Contracts § 96 (1967).

12. Mackay received more than $400,000.00 between 1952 and 1967. 447 A.2d at 554.

13. *Id.*

14. *Id.* at 554-55.

15. *Id.* at 555 (citing Terminal Construction Corp. v. Bergen County, 18 N.J. 294, 302,

the documents, his failure to ensure the duration of his royalties as he alleged it to be must be construed against him.

Similarly, the court reasoned that the use of the words "sell, assign, transfer and set over" did not suffice to convey a permanent interest in the royalties.[16]

The majority opinion was met with a very strong dissent, one which varied in the interpretation of the facts and the application of contract law. Preliminarily, the dissent argued that the majority overstated the ambiguity of the documents and also ignored the principle that the words of a contract are a primary indicator of the parties' intent.[17] Thus, the dissent inquired whether reasonable persons would agree on what the words of the contract meant, and what words reasonable people would have used if they intended a particular result.

The dissent concluded that the words "sell, transfer and set over" conveyed a permanent interest in the royalties.[18] In addition, they felt that the majority and the trial court misapplied the doctrine that courts frown upon the imposition of perpetual contractual performance; Mackay was being compensated for past services in preparing the air checks for presentation to RCA, not for any continuing service.[19] The presumption against perpetual contractual performance was considered inapplicable for another reason: the contract was not viewed as one in perpetuity since the estate's obligation to Mackay would cease once RCA stopped selling records and paying royalties to the estate.[20]

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113 A.2d 787 (1955)). *See* Restatement (Second) of Contracts § 206 (1981): "[i]n choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds."

16. 447 A.2d at 555. The court disagreed with the dissent's reasoning that the case of Hirsh v. Phily, 4 N.J. 408, 73 A.2d 173 (1950), supported that proposition. In *Hirsch*, the words "sell, transfer and set over" were accompanied by other words which were crucial in signifying an intent to convey a permanent interest ("to receive all moneys [sic] due or to grow due thereon.") 4 N.J. at 413-14.

17. 447 A.2d at 560 (citing *Hirsch*, 4 N.J. at 413).

18. *See supra* note 16. The dissent repeatedly asserts that the term "sale" does not commonly connote a temporary arrangement. 447 A.2d at 561.

19. *Id.* at 561-62. The dissent distinguished the cases cited by the majority. West Caldwell v. Caldwell, 26 N.J. 9, 138 A.2d 402 (1958), as a case involving a contract for continuing services, differs from the *Miller* case, which involves compensation for past services. Koch v. Koch, 95 N.J. Super. 546, 232 A.2d 157 (App. Div. 1967), as a case involving the duty of performing services, differs from the *Miller* case, which solely involves the duty to pay money.

20. 447 A.2d at 563. The dissent cited Lura v. Multaplex, 129 Cal. App. 3d 410, 179 Cal. Rptr. 847 (1982), in support of this proposition. In *Lura*, defendant promised to pay plaintiff a commission on each of the accounts which plaintiff had procured for defendant. Though the contract did not include a term specifying how long the commissions would be paid, the

The dissent grappled further with the majority's interpretation of the parties' conduct and the inferences that could be drawn therefrom. The most significant disparity in the judgments, however, concerns the approaches taken towards resolving the apparent ambiguity in the documents. The majority searches for the intent of the parties as revealed in their conduct; the dissent, on the other hand, turns to the parties' conduct only insofar as it related to the reasonable interpretation of the documents themselves. Where one scrutinizes conduct to lend meaning to words, the other reviews conduct to support the reasonable interpretation of those words.

These very disparate approaches are an integral part of the law of contract interpretation.[21] Yet, the case of *In Re Miller* does not serve the entertainment law industry best as a relevant example of the problems of contract interpretation; rather, it best serves as a lesson in contract draftsmanship. For all intents and purposes, Mackay may very well have been deprived of royalty payments which Mrs. Miller had fully intended he receive; after all, all royalties from the recordings were essentially a product of his ingenuity. Yet, he failed to secure his interest by drafting a "tight" instrument which comprehensively accounted for whatever eventualities might arise.

An open-ended contract is a ticket to future dispute. This is especially true when dealing with the volatile royalty. As an interest which can grow beyond expectations and can survive all probabilities, the royalty must be well protected.

Alejandro N. Mayorkas

C. Nuisance

1. *Rock Concert Injunction Unconstitutional*

An Ohio Court of Common Pleas held in *State ex rel. Pizza v. Tom S. A. Inc.*[1] that Ohio's attempt to abate illegal drug activity by enjoining a rock concert on private land was an overbroad application of Ohio's nuisance statute and violated the concert promoter's first and fourteenth amendment rights. It also held that the concert promoter

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court, reasoning that the contract was not one in perpetuity, held that the obligation to pay commissions ran only as long as the defendant continued to benefit from the accounts the plaintiff had secured. Analogizing that situation to the one present in the instant case, the dissent reasoned that as long as the estate continued to benefit from Mackay's past services, it was obligated to pay him his share of the royalties. 447 A.2d at 563.

21. *See* J. Calamari & J. Perillo, The Law of Contracts 116-125 (1977).

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1. 68 Ohio Misc. 19, 428 N.E.2d 878 (1981).

lacked culpability under Ohio's remedies statute because he had employed security guards to discourage drug violations. No appeal was taken by Ohio.

Rock concert promoter, Tom S. A., Inc., ("Tom"), scheduled a concert at the Toledo Speedway on August 23, 1981. Ohio prosecutor, Anthony Pizza, applied to both temporarily and permanently enjoin the concert on the basis that illegal drug activity had occurred at Tom's speedway concert the previous year. The cause was heard August 10, 1981, thirteen days before the scheduled concert.

The court found for Tom on two grounds. First, it considered the application of Ohio's nuisance statute, as a means of prohibiting an activity which is protected by the first and fourteenth amendments, to be overbroad. Second, it found that Tom had no duty to enforce Ohio law on private property, but, nonetheless hired security guards to discourage drug violations. He therefore lacked the requisite culpability to invoke application of Ohio's remedies statute.

In *Tom*,[2] the court examined how the first and fourteenth amendments protect free expression. It cited *Brooks v. Auburn University*[3] for the proposition that the Constitution protects the right to not only speak freely but also to *hear* freely.[4] In *Brooks* the president of Auburn University sought to bar Reverand William Sloan Coffin, a convicted felon and chaplain at Yale University, from making a scheduled appearance on campus. The president felt that Rev. Coffin advocated lawlessness.[5] The appellate court in *Brooks* ordered that the Reverand be allowed to speak.[6]

The *Tom* court emphasized the importance of free speech and expressed its suspicion toward government action which tended to affect freedom of expression[7] by referring to the following two cases. In *Zamora v. Columbia Broadcasting System*[8] a minor child shot and killed an 83-year-old woman. The child's father sued CBS, NBC and ABC television networks as parties responsible for violent programming which contributed to his son's desensitization and addiction to violent acts. The court in *Zamora* dismissed the claim in favor of the networks and recognized the importance of free speech in network

2. *Id.*
3. 412 F.2d 1171 (5th Cir. 1969).
4. *Id.* at 1172.
5. *Id.* at 1171.
6. *Id.*
7. 428 N.E.2d at 880.
8. Zamora v. Columbia Broadcasting System, 480 F. Supp. 199, 203 (S.D.Fla. 1979).

television.[9]

In *Dewine v. Ohio Elections Commission*,[10] when an Ohio statute prohibiting knowingly false statements about candidates in approaching elections was found not to violate the first amendment, the court emphasized that it had closely scrutinized government action tending to affect free speech.[11] Thus the *Tom* court reasoned that statutes which interfere with free expression should be subject to close judicial scrutiny.

The *Tom* court focused on the special problem of entertainment as an exercise of free expression, by relying on *Police Department of Chicago v. Mosley*[12] for the proposition that "the government has no power to restrict expression because of the message, ideas, subject matter, content, popularity or social utility of the ideas and beliefs put forward."[13] The Supreme Court in *Mosley* struck down an Illinois statute which prohibited picketing within 150 feet of schools unless the picketing was related to teacher employment disputes. Mosley, who picketed a Chicago high school due to racial discrimination, asked for declaratory judgment on the statute. The Court held that the statute violated the Constitution on its face because it made an "impermissible distinction between labor picketing and other peaceful picketing."[14] Thus, the subject matter of the communication is immaterial in the face of first amendment rights.

The *Tom* court found that entertainment also enjoys protection under the first amendment by relying on *Zacchini v. Scripps-Howard Broadcasting*.[15] In *Zacchini*, a news man who video taped Zacchini's entire fifteen second human-cannon-ball act, without Zacchini's permission to show it on the evening news, was in violation of Zacchini's property rights despite the news man's asserted first amendment privilege. Zacchini brought suit for damages claiming that Scripps-Howard had taken his property without due process. Zacchini asserted no first amendment right and Scripp-Howard's first amendment argument proved to be ineffective. While the Court stated that entertainment enjoys first amendment protection, the statement was not central to the holding. Consequently, the *Zacchini* opinion may be misplaced as pre-

9. 480 F. Supp. at 199.
10. Dewine v. Ohio Elections Commission, 61 Ohio App. 2d 25, 399 N.E.2d 99 (1978).
11. *Id.*
12. 408 U.S. 92, 95 (1972).
13. *Id.*
14. *Mosley*, 408 U.S. at 95.
15. 433 U.S. 562, 578 (1977).

cedent for the proposition that the Tom concert enjoyed first amendment protection.

The *Tom* court also relied on *Southwestern Promotions, LTD v. West Palm Beach*.[16] In *Palm Beach*, the city manager refused to allow the rock musical "Hair" to be performed in the city auditorium because he did not consider it to be "family entertainment."[17] The Court of Appeals for the Fifth Circuit held that the arbitrary suppression of free expression in a public building was a violation of first amendment rights.[18] Moreover, the court of appeals held that considerations of whether there were other suitable facilities for the event, or whether the event was staged solely for making money, were immaterial.[19] Therefore, the court concluded that entertainment for profit like Tom's rock concert "[was] entitled to protection under the right of free expression."[20]

Once the *Tom* court determined that the concert promoter could legitimately invoke first amendment protection,[21] the question remaining was how far that protection should be extended. This was largely a matter of judicial discretion, however there were some factors which guided the court's decision. These factors included: (a) the extent to which the defendant sought to incite imminent lawless action, (b) the the importance of the state's compelling interest, and (c) the strength of the causal nexus between the illegal act and the act which the state sought to enjoin.

With regard to the first factor of the extent of protection, the *Tom* court cited *Brandenburg v. Ohio*[22] for the proposition that an audience's unlawful conduct, absent a specific intention to incite imminent lawless action, was not sufficient justification to curtail the right of free expression.[23] In *Brandenburg*, the U.S. Supreme Court held that an Ohio

16. 457 F.2d 1016 (5th Cir. 1972).

17. *Id.* at 1017.

18. *Id.* at 1020.

19. *Id.*

20. *Tom*, 478 N.E.2d at 880, citing Southeastern Promotions, LTD v. Mobile, 457 F.2d 340 (5th Cir. 1972), ("Hair" rock musical permitted in Alabama); Goldstein v. Nantucket, 477 F. Supp. 606 (D. Mass. 1979) (use of Nantucket's transient street vendor ordinance to prohibit street musicians violates first amendment); People v. Remeny, 79 Misc. 2d 160, 359 N.Y.S.2d 504 (N.Y. City Crim. Ct. 1974), *aff'd*, 83 Misc. 2d 459, 367 N.Y.S.2d 146 (App. Div. 1975) (use of New York ordinance prohibiting leaflet advertising does not violate first amendment when applied to jazz concert leaflets). *See also* Valentine v. Chrestensen, 316 U.S. 52 (1942), (primarily commercial advertising not protected by first amendment).

21. *See supra* note 31 and accompanying text for a discussion of standing.

22. 395 U.S. 444 (1969).

23. *Tom*, 428 N.E.2d 878, at 881.

statute prohibiting the Klu Klux Klan from organizing meetings, was unconstitutional unless the meetings were directed toward inciting or producing imminent lawless action.[24] In *Tom*, the court found no basis for the State's contention that the concert promoter intended to incite illegal drug activity. In fact, the court described, at length, the promoter's efforts to discourage such activity by employing cameras, searches, and uniformed and undercover security guards. These precautions by the promoter proved to be important because the holding was based on these precautions as evidence of the promoter's lack of culpability in the alleged felony drug violations. The price of a comprehensive security system proved to be an effective defense against Ohio's remedies statute which required a showing of culpability.

The second factor regarding the extent of protection in the *Tom* decision focused on Ohio's compelling state interest to control illegal drug activity on private land. The court pointed out that the promoter had no duty to provide authorized personnel to enforce Ohio's drug laws. It cited *N.A.A.C.P. v. Button*[25] for the proposition that government restrictions on freedom of expression, in the name of a compelling state interest, are overbroad unless the restrictions are the narrowest possible. In *Button*, the compelling state interest was to prohibit solicitations by attorneys that encouraged law suits on racial discrimination. The Court in *Button* held that the prohibition was an overbroad violation of first amendment rights because it was not the narrowest possible.[26] The court in *Tom* considered the compelling state interest of Ohio controlling drug activity on private land by using a nuisance statute to be less compelling than the concert promoter's constitutional right of free expression.

In determining the relative weight of a nuisance statute as compared to the promoter's right to stage a rock concert, the *Tom* court relied on *Vance v. Universal Amusement Co., Inc.*[27] to show that nuisance actions should be narrowly construed when counterposed against free expression. In *Vance*, a Texas statute which temporarily prohibited film exhibitors who had past records of showing obscene films, from showing films not yet censured, was held to be invalid because it placed restraints on the first amendment rights of the exhibitors before any ruling had been made on the film's obscenity. Likewise, in *Tom*, the State attempted to enforce one of its nuisance statutes against activ-

24. *Brandenburg*, 395 U.S. 444, at 447.
25. 371 U.S. 415, 432-33 (1963).
26. *Id.*
27. 445 U.S. 308 (1980).

ities occurring on private property based on evidence of a past record of alleged violations. In both cases, the state was attempting to prohibit what the Supreme Court in *Vance* called an "invalid prior restraint on the exercise of first amendment rights."[28] The *Tom* court implied that Ohio's application for injunction was a prior restraint on Tom's exercise of first amendment rights, and therefore invalid.

A third factor regarding the extent of protection which was implied in *Tom* focused on the extent to which the illegal activities were connected with the activity that the State sought to enjoin. The court made a distinction between the concert and the drug activities by noting that the State could not expect to completely prohibit the legitimate exercise of free expression simply because some patrons acted illegally.[29] Even when the State offered extensive evidence that felony drug violations took place at the prior concert, the court would not accept the argument that the concert itself caused the violations, because there was no close nexus between the illegal drug activity and the legal concert activity which the State sought to enjoin.

The *Tom* case also presented the traditional problem of third party standing, because Tom S. A. Inc., the concert promoter, sought to assert a constitutional defense based on the first amendment rights of his patrons and the artists. The court found three independent grounds for standing based on (a) the close relationship between the defendant and the persons whose rights he sought to invoke, (b) the fact that the constitutional rights of the third persons had a direct effect on the business rights of the defendant, and (c) the fact that the state sought to impose a restriction on the defendant which may, in turn, have deprived the third parties of their rights.[30]

The first ground for standing was based upon the concert promoter's close relationship with his patrons and the artists that were scheduled to perform. Third party standing has been accepted by the Supreme Court as an exception to the general rule that a third party has no standing to raise the rights of another.[31] The Sixth Circuit in *Akron Board of Education v. State Board of Education of Ohio*[32] found that an Ohio municipal school board had standing to bring an action on behalf of parties within the municipal school district to oppose state

28. *Id.* at 312.

29. *Tom*, 428 N.E.2d 878, at 881.

30. *Id.*

31. Barrows v. Jackson, 346 U.S. 249 (1953), (white landowner had standing to assert rights of blacks in suit alleging invalidity of racially restrictive covenant).

32. 490 F.2d 1285 (6th Cir. 1974), *cert. denied*, 417 U.S. 932 (1974).

reapportionment. The Sixth Circuit held there was a sufficiently "close relationship" between the plaintiffs and the class of persons whose constitutional rights were claimed to be violated.[33] The *Tom* court held that there was a similarly close relationship between the promoter/property owner and the performers and patrons whose rights he asserted.[34]

A second ground for standing was founded on the basis that the injunction would have a direct adverse impact on the defendant's business.[35] In *Pentco, Inc. v. Moody*[36] an Ohio district court held that the owner of a massage parlor had standing to exercise the constitutional rights of his customers in a suit challenging the validity of a statute prohibiting such parlors. The owner's standing was valid because a violation of the constitutional rights of the customers would have a direct adverse impact on the defendant's business.[37] The *Tom* court found that the promoter, would have suffered a similar direct adverse impact on his business had the constitutional rights of his customers been violated.

The third and final ground for third party standing was based upon the fact that the restriction on Tom would have deprived the third parties whose rights Tom had invoked of their constitutional rights. In *Akron Center for Reproductive Health, Inc. v. City of Akron*[38] an Ohio abortion clinic was given standing to challenge an Ohio anti-abortion statute on behalf of its clients because the enforcement of the statute would have resulted in depriving those clients of their constitutional rights.[39] In *Tom*, the court found that the injunction of Tom's rock concert would have been a restriction that may have deprived his customers of their constitutional rights to hear free expression.[40] Thus Tom had the right to assert the rights of those customers.

The state's argument was based on nuisance. The Ohio prosecutor alleged that the concert promoter was subject to abatement under the Ohio nuisance statutes.[41] Ohio further alleged that it had a compelling state interest to enforce its criminal drug laws and that injunction should have been granted.

33. *Id.* at 1289.
34. *Tom*, 428 N.E.2d at 881.
35. *Id.*
36. 474 F. Supp. 1001 (S.D. Ohio 1978).
37. *Id.* at 1008.
38. 479 F. Supp. 1172 (N.D. Ohio 1979).
39. *Id.* at 1184.
40. 429 N.E.2d at 881.
41. Ohio Rev. Code Ann. 3719.10 (Baldwin 1980).

The *Tom* court found that the Ohio nuisance statute merely defined a nuisance, and did not prescribe the procedures to be used to abate the nuisance.[42] In order to determine the procedure for abatement, the court turned to the applicable remedies statute[43] and found that the statute required some degree of culpability on the part of the person against whom the injunction was sought.[44] The court found that since the concert promoter had employed cameras, searches and uniformed and undercover guards to help enforce Ohio's drug laws, and since the promoter had done so at his own expense when he had no duty to enforce Ohio's laws on private land, that there was no showing of culpability on the part of the promoter.

The court recognized Ohio's compelling state interest to enforce its criminal drug laws,[45] however in the present case, the court found that its method of enforcement was in direct opposition to a legitimate exercise of expression. Since the first amendment protects free expression, an injunction against the concert was found to be an overbroad exercise of the state's police power and was in violation of the constitution.

In conclusion, this opinion was rendered at the trial level in Ohio. Consequently, it does not change the law in the area of first amendment rights, nor should it. The decision is significant only because it consistently applies the established standards in the area of free speech against the laws of a state. The implication is that the Ohio judiciary is aware and respectful of the value and importance of free speech and expression, and is willing to uphold that value even at the expense of police efficiency.

Daniel D. Gilson

D. Antitrust

1. *Price Discrimination—Records*

When the Zoslaws' record store began to go under, due to local competition, they decided not to sink with the ship and instead filed an antitrust action, alleging violations of the Robinson-Patman Act and the Sherman Act.

The Ninth Circuit Court of Appeals, in *Zoslaw v. MCA Distribut-*

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42. *Tom*, 428 N.E.2d at 882.
43. Ohio Rev. Code Ann. 3767.02 (Baldwin 1980).
44. 428 N.E.2d at 882.
45. *Id.* at 881.

ing Corp.,[1] rejected the Zoslaws' claims of conspiracy by distributors and chain stores and monopolization by a chain store, in violation of the Sherman Act. The court remanded the Robinson-Patman price discrimination claim, except as to an ad agency, for a factual determination of whether records purchased by stores, following warehouse storage in California, remained in the flow of interstate commerce.[2]

From 1965-1977, Charles and Jane Zoslaw operated Marin Music Centre, a Mill Valley record store, which sold records, tapes, equipment, and other related merchandise. While in business, they encountered financial losses due to a rapid increase of competing stores who sold records at lower prices. The Zoslaws' eventually went out of business in 1977, but not before filing an involved antitrust action against numerous record distributors, including MCA Distributing Corp., Capitol Records, Inc., Polygram Distribution, Inc., and Warner/Electra/Atlantic Corp., (WEA), several retail record stores, including Tower Enterprises, Inc., (MTS) and CBS, Inc., and the Doug Robertson Advertising Agency.[3]

The Zoslaws' alleged that the distributors sold records and tapes to the retail chain stores at lower prices than to independent stores, in violation of § 2(a) of the Robinson-Patman Act,[4] which prohibits price discrimination in interstate commerce. They further alleged that the retailers violated §§ 2(d), 2(e), and 2(f) of the Robinson-Patman Act by encouraging and accepting the price discrimination.[5]

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1. Zoslaw v. MCA Distributing Corp., 698 F.2d 870 (9th Cir. 1982), *aff'g and remanding*, Zoslaw v. Columbia Broadcasting System, 583 F. Supp. 540 (N.D. Cal. 1980), *cert. denied*, U.S. , 103 S.Ct. 1777 (1983).

2. 693 F.2d 870.

3. *Id.* at 874.

4. 15 U.S.C.A. § 13(a) (West 1973), provides:

> [i]t shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or receives the benefit of such discrimination, or with customers of either of them.

5. 15 U.S.C.A. § 13(d) (West 1973), provides that:

> [i]t shall be unlawful for any person engaged in commerce to pay or contract for payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the . . . sale, or offering for sale of any products . . . unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

15 U.S.C.A. § 13(e) (West 1973), provides that "[i]t shall be unlawful for any person to

The Zoslaws' also alleged that the distributors and retailers had conspired to favor retail chain stores, in violation of section 1 of the Sherman Act.[6] Lastly, they alleged that MTS violated Section 2 of the Sherman Act by monopolizing the retail record market.[7]

Between 1976-1978, the district court granted summary judgment as to five of the distributors, as well as MTS and the Doug Robertson Advertising Agency on the Sherman Act claims. In May 1980, the last remaining defendant, ABC, was granted summary judgment on both claims and the court entered a final judgment in favor of all defendants in June 1980.[8]

The Zoslaws' appeal of the district court's findings is the basis for the instant case, wherein they challenged the finding that the allegedly discriminatory sales were not "in commerce" as required by section 2(a) of the Robinson-Patman Act. Alternatively, they contended that jurisdiction under section 2(d) and section 2(e) of the Act is applicable to the distributors and that section 2(f) grants the court jurisdiction over the retailers. The Zoslaws' further challenged the court's rejection of their claims of Sherman Act violations, monopolization and failure to deal.[9]

In order for the court to have jurisdiction over the alleged Robinson-Patman section 2(a) violations, the plaintiffs must show that the defendants were engaged in interstate commerce, that the price discrimination occurred in the course of such commerce, and that either or any of the purchases involved in such discrimination are in commerce.[10]

Each distributor maintained regional warehouses in California, which supplied records to stores in the San Francisco Bay Area, including MTS and Marin Music Centre. Depending on the distributor in-

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discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, . . . upon terms not accorded to all purchasers on proportionally equal terms."

15 U.S.C.A. § 13(f) (West 1973), provides that "[i]t shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

6. 15 U.S.C.A. § 1 (West 1973), provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal."

7. 15 U.S.C.A. § 2 (West 1973), provides that "[e]very person who shall monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor . . . ."

8. 693 F.2d at 875-75.

9. *Id.* at 876.

10. *Id.* at 877.

volved, each of the warehouses received a portion of their products from out of state. Occasionally, when a warehouse was out of a desired produce, "drop shipments" occurred, wherein an out of state manufacturing plant would send the product directly to the local retailer.[11]

The district court analyzed whether the record sales to retailers, subsequent to storage of the product, were in the flow of commerce by using the "intent" test.[12] Under this test, the flow of commerce ends when the goods reach their intended destination.[13] When determining whether goods have reached their intended destination, courts consider whether out of state goods are intended for a particular customer, even if sitting in a warehouse. If so, they are still "in commerce." However, goods that are stored in a warehouse for general inventory purposes are no longer considered in the "stream of commerce."[14]

The district court found that the distributors stocked their California warehouses for general inventory purposes, and held that subsequent sales to retailers were not in the flow of commerce and therefore not subject to jurisdiction under the Robinson-Patman Act.[15]

However, the circuit court disagreed with the district court's analysis, noting that the "intent" analysis gives interstate producers a means to avoid Robinson-Patman liability simply by setting up local warehouses in the states where the products are purchased.[16] The court cited a U.S. Supreme Court case which held that in-state storage of gasoline by an interstate oil producer did not end the flow of commerce, thereby imposing some limits on the "intent" test.[17]

The appellate court concluded that summary judgment was prematurely granted on the Robinson-Patman claims as there were material facts in dispute regarding whether the subsequent sales were in commerce,[18] which should be resolved by the jury on remand. However, the court agreed with the district court's finding that the "drop shipments," considered alone, were insufficient to confer jurisdiction.[19]

The district court found "no factual or legal basis upon which plaintiffs hope to hold the Doug Robertson Advertising Agency lia-

11. *Id.*
12. *Id.* at 877-78.
13. 4 J. Von Kalinowski, Antitrust Laws and Trade Regulation § 26.02 [3] at 26—40.1 (1983).
14. 693 F.2d at 878-79.
15. 533 F. Supp. at 550.
16. 693 F.2d at 878-79.
17. *Id.* (citing, Standard Oil Co. v. FTC, 340 U.S. 231, 238 (1951)).
18. 693 F.2d at 880.
19. *Id.*

ble."[20] The ad agency was responsible for MTS' advertising and owned 5 percent of several MTS subsidiary corporations, but was not connected to any price discriminatory behavior and was therefore not liable under the Robinson-Patman Act. The circuit court therefore upheld the district court's grant of summary judgment as to the Doug Robertson Advertising Agency.[21]

The appellate court began its analysis of the Zoslaws' Sherman Act claims by noting their procedural failure to comply with Rule 56 of the Federal Rules of Civil Procedure. The Zoslaws had filed an unauthenticated and disorganized opposition to defendants motion for summary judgment which failed to "give rise to a genuine issue of material fact sufficient to prevent a motion for summary judgment".[22]

Although the circuit court agreed with the district court's finding that the Zoslaws' Sherman Act claims were without merit, it fully examined each of the two aspects of the claim: that the record distributors and chain retailers, overall, conspired to favor the chain stores over the small stores[23] and that a vertical restraint of competition existed between each distributor and each chain store retailer.[24]

Since the Zoslaws' opposition motion failed to demonstrate any direct evidence of conspiracy, they attempted to demonstrate an inference of "conscious parallelism" between distributors based upon trade association and credit managers meetings.[25] Conscious parallelism "is admissable circumstantial evidence from which the fact finder may infer agreement."[26] This may help to support a finding of conspiracy, but standing alone, is insufficient. To prove conscious parallelism, plaintiffs must demonstrate that defendants used similar business practices, that these business practices were against the self interest of each conspirator and establish a plausible motive for the conspirator's conduct.[27]

The district court found and the circuit court agreed that the Zoslaws failed to demonstrate any of the requisite elements of conscious parallelism.[28] The Zoslaws tried to show similar business practices among distributors by pointing to their use of similar classification of

20. 533 F. Supp. at 551.
21. 693 F.2d at 882.
22. *Id.* at 883.
23. *Id.* at 884.
24. *Id.* at 886.
25. *Id.* at 884.
26. Theatre Enterprises, Inc. v. Paramount Distributing Corp., 346 U.S. 537, 540 (1954).
27. 693 F.2d at 884.
28. *Id.*

retail accounts, pricing structures and promotional schemes, but the distributors successfully demonstrated significant variations in these practices. The distributors were also able to justify the Zoslaws' claim that their actions were against their own self interest by demonstrating that legitimate good faith business decisions motivated their practices. Lastly, the motive element was unsubstantiated, as the existence of a conspiracy would actually have increased the bargaining power of the chain stores. The Zoslaws could not show why it would have been in the record distributors interest to lower prices on behalf of their largest group of customers, the chain stores.

The Zoslaws further attempted to prove that the distributors conspired on the basis of credit information exchanges and trade association meetings.[29] The court held that trade meetings, without any showing of illegal agreements, were insufficent to prove a conspiracy.[30] Further, the exchange of credit information was permitted when used by individual members to determine whether to exercise credit. Therefore, since there was no indication of any agreements to fix credit terms, the Zoslaws' conspiracy arguments were rejected by the circuit court.[31]

In addition, the Zoslaws alleged numerous vertical conspiracies in the form of price discriminations between individual distributors and retailers. They alleged that these secondary Robinson-Patman type violations also violated section 1 of the Sherman Act.[32]

The circuit court stated that such agreements, without proof of an exclusionary effect, do not give rise to a section 1 claim.[33] The Zoslaws did not present any evidence of any vertical agreements to exclude competition, but even if they had, such agreements do not violate section 1 unless they are unreasonable.[34]

The reasonableness of such agreements is determined by balancing the "competitive evils of the restraint against the anticompetitive benefits asserted on its behalf."[35] The court concluded that there was simply no indication that sales agreements between individual distributors and retailers constituted an unreasonable restraint of trade.[36]

The Zoslaws further alleged that the retail chain store, Tower

29. *Id.* at 885 (specifically, the Nat'l Ass'n of Record Mfrs.).
30. Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 575 (1925).
31. 693 F.2d at 886.
32. *Id.*
33. *Id.*
34. *Id.*
35. Gough v. Rossmoor, 585 F.2d 381, 388-89 (9th Cir. 1978).
36. 698 F.2d at 887.

Records, (MTS), attempted to monopolize the retail record and tape market in violation of section 2 of the Sherman Act.[37] A section 2 attempted monopoly must include a specific intent to control prices or destroy competition in some part of commerce, there must be predatory or anticompetitive conduct directed to accomplishing an unlawful purpose, and there must be a dangerous probability of success.[38]

The Zoslaws presented no direct evidence of intent to monopolize, but instead claimed that Tower Records engaged in predatory pricing by setting record and tape prices below the Zoslaws cost of doing business. The circuit court stated that a predatory price exists "where the firm foregoes short-term profits in order to develop a market position such that the firm can later raise prices and recoup profits."[39]

A price is not predatory if it is equal to or if it exceeds the average variable production costs.[40] Under this standard, the Zoslaws failed to show that MTS priced below its own average production costs, but only that they priced below the Zoslaws' production costs.[41]

The Zoslaws also contended that MTS engaged in predatory conduct by negotiating favorable sales terms with the individual distributors. The circuit court summarily disposed of this claim by stating that such conduct does not constitute an unreasonable restraint of trade under section 1 of the Sherman Act.[42] It further stated that the Zoslaws were unable to show any evidence of market power by MTS. In fact, MTS operated only two retail stores in the six San Francisco Bay Area counties which constituted a relevant market and accounted for no more than 10 percent of the total record and tape sales in the area.[43] Therefore, the Zoslaw's monopolization claim was also rejected by the court.

The Zoslaws' final contention was that the district court incorrectly granted summary judgment to Capitol Records, Inc., on their claim that Capitol refused to deal with them, in violation of section 1

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37. *Id.*

38. Twin City Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291, 1308-09 (9th Cir. 1982), *cert. denied*, , U.S. , 103 S.Ct. 364 (1982).

39. Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 856 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978).

40. P. Areeda & D. Turner, *Predatory Pricing and Related Practices Under § 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 711 (1975).

41. 693 F.2d at 888. The plaintiff might be able to prove a predatory pricing claim without meeting this standard if able to prove the defendant "sacrificed greater profits or included greater losses than necessary, in order to eliminate the plaintiff." William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1036 (9th Cir. 1981).

42. 693 F.2d at 888.

43. *Id.*

and section 2 of the Sherman Act. In June, 1975, Capitol Records, Inc., settled out of court with the Zoslaws and shortly thereafter, ceased selling merchandise to them. The Zoslaws then amended their complaint to reinstate Capitol as a defendant, due to their refusal to deal.[44]

The district court found no evidence that Capitol's refusal to deal was in any way connected with the alleged horizontal and vertical conspiracies and that Capitol's desire to avoid litigation was a legitimate business purpose.[45] Therefore, there was no genuine issue of material fact. The circuit court agreed that summary judgment was proper and pointed out that in the absence of any arrangement to restrain trade, a manufacturer's refusal to deal with a retail store because of an antitrust suit filed against it by the store, did not constitute an unlawful purpose in violation of the Sherman Act.[46]

Therefore, although the Zoslaws' were granted a remand as to the procedural question of whether there was jurisdiction over their Robinson-Patman claims, the federal court of appeals found no merit in their substantive claims of antitrust violations.

It was unfortunate that the Zoslaws' small retail record store was unable to compete with the large chain stores that opened in their area, but this fact alone was not enough to merit their antitrust action. They could not show that the other record retailers and distributors were conspiring to put them out of business, but only demonstrated that the free enterprise concept of open competition was at work, albeit to their personal detriment.

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44. *Id.* at 889.

45. *Id.* at 889-90 (citing House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867, 871 (2d Cir. 1962)).

46. 693 F.2d at 890.