



ILLINOIS STATE
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Intellectual Property

The newsletter of the ISBA's Section on Intellectual Property Law

March 2024 • Volume 63 • Number 3 •

Bankruptcy Sale or Termination of Copyrights. Which One Rules?

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Introduction

A battle between a record company and the members and heirs of a famous rap group is brewing in the Southern District of Florida. The primary issue is whether an author's ability to terminate a transfer of rights under the Copyright Act is negated by a bankruptcy court order permitting a sale of the author's works.

2 Live Crew and Its Copyrights

Mark Ross, Luther Campbell, and Christopher Wong Won (now deceased) were members of the rap group 2 Live Crew. In 1987, the members of the group entered into an oral agreement to grant Skywalker Records, the copyrights in their works in order to produce their albums. In 1990, the group memorialized the oral agreement in writing. 2 Live Crew is famous in the annals of copyright because of the copyright battle over their parody of Roy Orbison's *Pretty Woman* which resulted in the much-cited fair use case *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 114 S. Ct. 1164; 127 L. Ed. 2d 500 (1994). Eventually, Skywalker Records changed its name to Luke Records.

Bankruptcy Proceedings

Skywalker Records/Luke Records and Campbell filed for bankruptcy protection in 1995. The band's former tax attorney and in house counsel, Joseph ("Lil' Joe") Weinberger, created Lil' Joe Records. The bankruptcy trustee rejected the license deals with the members of the band and sold the copyrights in the band's works to Lil' Joe for \$800,000. No one objected to the sale.

Campbell's First Try to Regain the Copyrights

About 10 years later, Campbell sold the copyrights in the 2 Live Crew albums to Jeffrey Thompkins. Then, Thompkins sued Lil' Joe Records for copyright infringement. Thompkins argued that even though the license agreement had been rejected in the bankruptcy case, Campbell retained ownership of the copyrights. So Campbell had the right and authority to sell the copyrights to Thompkins. The Eleventh Circuit Court of Appeals affirmed summary judgment for Lil' Joe Records in *Thompkins v. Lil' Joe Records*, 476 F.3d 1294 (11th Cir. 2007). The court held that Campbell waived any rights he might have had in the copyrights by failing to object to the bankruptcy sale.

This should have ended the saga of the 2 Live Crew copyrights. But it did not.

Copyright Termination Now at Issue

On November 4, 2020, 2 Live Crew (consisting of Ross, Campbell and Won's heirs) served Lil' Joe Records with a Notice of Termination with respect to the 1990 written agreement pursuant to 17 U.S.C. §203 which states as follows:

Conditions for Termination. --In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination. . . 17 U.S.C.A. § 203 (West)

Declaratory Judgment Suit

Lil' Joe Records filed suit in the Southern District of Florida seeking a declaratory judgment that the Notice of Termination was not effective and that its copyright ownership remains undisturbed.

Both sides have brought a Motion for Summary Judgment which awaits a hearing.

Lil' Joe Records' Arguments for Summary Judgment in Its Favor

Lil' Joe Records makes two primary arguments to invalidate the Notice of Termination:

1. *2 Live Crew Lost Termination Rights in the Bankruptcy.* The underpinnings of this argument is that two of the authors, Luke Records and Campbell, were divested of all rights when their copyrights became part of its

bankruptcy estate pursuant to the plain language of 11 U.S.C. §541 which states that all legal and equitable interests become property of the estate. A bankruptcy trustee, as the representative of the bankruptcy estate, is the only party who can pursue the bankrupt debtor's interests. Since Luther Records and Campbell no longer have rights in the works, the required majority of authors for termination does not exist.

2. *The Authors Transferred All of Their Copyright Interests in the 1990 Written Agreement.* Lil' Joe Records argues that the 1990 agreement relinquished all rights in the copyrights. So 2 Live Crew cannot terminate the 1990 agreement.
3. *The Copyrighted Works Were Works Made For Hire.* Lil' Joe Records argues that because Campbell, Ross and Won were employees of Luke Records, the works were made for hire. Works made for hire cannot be the subject of a Notice of Termination.

2 Live Crew's Arguments for Summary Judgment in Their Favor

2 Live Crew makes two primary arguments in favor of validating their Notice of Termination:

1. *Public Policy Favors Validating the Termination:* The legislative intent of §203 was to address the unequal bargaining power that artists have at the starts of their careers. As the value of their works increase, artists should have the ability to reap the benefits from their early works.
2. *Termination Rights Are Inalienable and Were Not Lost Through the Bankruptcy Sale.* To make this argument, 2 Live Crew points to the plain language of §203 which permits the termination notwithstanding any agreements to the contrary. 2 Live Crew argues that the bankruptcy sale operated as 'an agreement to the contrary'. Thus, 2 Live Crew argues that the termination right is inalienable. The termination right can only be exercised by the author or their heirs. The bankruptcy sale order was silent regarding whether termination rights would be negated. Even if the order had addressed termination rights, the bankruptcy trustee would not have had standing to disturb the termination rights. The rights were not vested at the time of the order. The termination rights did not exist until the 35-year window opened for the Notice of Termination under §203(b)(2).
3. *The 1990 Agreement Does Not Establish that the Copyrights Were Works Made for Hire.* 2 Live Crew argues that the 1990 Agreement was a production agreement for any output from the members of the band. Skywalker/Luke Records had no control over the output of their creative works.

Analysis of the Arguments

2 Live Crew has the stronger arguments on the "works made for hire" issue. They will probably be able to establish that the creation of music was not within the scope of employment. The 1990 Agreement was more in the nature of a production agreement rather than an incubator of the creation of music.

The issue of termination rights appears to be a case of first impression. While other copyrights have been sold

through a bankruptcy sale, prior cases do not appear to address this specific question. 2 Live Crew has strong arguments in favor of the survival of their termination rights. The Copyright Act is no stranger to inalienable rights. For example, §106A of the Copyright Act gives certain artists an inalienable right to the integrity of and attribution for their works.

Both sides skirted the issue of whether the bankruptcy sale was a grant of transfer within meaning of §203. The bankruptcy sale order provided for the sale to be free of all liens and encumbrances. 2 Live Crew assumes that the sale was within the scope of §203. Lil' Joe Records did not particularly address the issue altogether.

The clash of the public policies behind two very powerful federal statutes is now in play. The Bankruptcy Code has a public policy interest in assuring the finality of bankruptcy sales. Section 363(m) of the Bankruptcy Code assures the validity of a bankruptcy sale to a bona fide purchaser; even if the sale order is reversed or modified on appeal. Without the assurances that the sale will be valid, potential purchasers of copyrights would avoid participating in bankruptcy sales. However, 2 Live Crew asserts that the public policy behind the Copyright Act's protection of artists' rights should prevail over the public policy behind bankruptcy sales.

Conclusion

The outcome of this case will affect the sale of copyrights through a bankruptcy. If Lil' Joe Records prevails, the validity of bankruptcy sales of copyrights will be considered final. If 2 Live Crew prevails, the vindication of the rights of authors will be assured. However, the value of copyrights sold through a bankruptcy will be greatly diminished.

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