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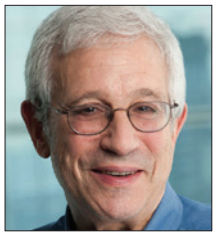
Reflections on an Interesting Year in Entertainment Law



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As I write this, the end of the year is approaching and I am reading all of the top favorite lists of the year. I thought that, for this special Annual Meeting report, I would list my favorite cases of 2015. My choice was based on what I found interesting, not necessarily on what were the most consequential or legally significant cases. Since I can't go into much detail in the space allotted, I recommend that anyone who finds them as interesting as I did do further research into the rulings and case histories.

Throughout my career, I have always derived a great deal of pleasure in telling clients, to their disbelief, that the song "Happy Birthday to You" was still under copyright and had to be cleared and royalties had to be paid. So, to my delight, this became the subject of a plethora of rulings and legal machinations resulting in a settlement in *Good Morning to You Productions v. Warner Chappell Music* (U.S. District Court for the Central District of California). The bottom line of all this seems to be that the song definitely is still under copyright and that there are two (or three) co-owners. The history of this case makes fascinating reading.

Other cases with broader implications involve the copyright ownership of motion pictures. It started with a strange (in my opinion, and in the opinion of most experts) ruling by the Ninth Circuit in *Garcia v. Google* that an actress in what turned out to be an anti-Muslim film had a copyrightable interest in the film and could enjoin its distribution—in this case, requiring Google to remove the film from its website. The full Ninth Circuit finally saw the error of its ways and, on rehearing, ruled that it was not possible for an actor, or any contributor to a film, to have a separate copyrightable interest because a film is a collaborative effort and not a joint work. Another case this year that dealt with and upheld this ruling was the Second Circuit case *16 Casa Duse v. Merkin*. It ruled that a director of a film ("Heads Up") could not have a separate copyrightable interest irrespective of whether he/she signed a work for hire agreement. I could almost hear the sigh of relief from independent filmmakers who, not infrequently, proceed to production without signed agreements from all of the cast and crew.

Fair use is an issue in which I have always had great interest, largely because it constitutes a significant percentage of questions from clients. It also is one of the most frustrating subjects for lawyers practicing entertainment law because very rarely can we give clients definitive answers. I have watched the evolution of cases over the last few years that have, for reasons I have yet to fathom, made the test of "transformativeness" the main test for fair use—clearly not one of the factors set forth in the Copyright Act. The latest example is *TCA Television v. Kevin McCollum* (U.S. District Court for the Southern District of New York). It ruled that a one-minute excerpt of the classic Abbot and Costello routine "Who's on First" in the Broadway play "Hand to God," performed by a human and a puppet, was sufficiently transformative to constitute fair use (in addition to a couple of other factors).

Last but not least, those interested in following copyright termination should check out the Second Circuit case *Baldwin v. EMI Feist Catalog*, which involved the attempted termination of EMI's rights on the song "Santa Claus Is Coming to Town".

I reiterate that these cases only represent my personal choice based on what I found interesting. There were several more in 2015 that are of greater significance and I'm sure that 2016 will also be an interesting year to be an entertainment lawyer.

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