

Down Like the Titanic

By: Jim Astrachan

Late last month the Second Circuit Court of Appeals sunk the copyright infringement claim of an aspiring songwriter who said he had written the Academy Award-winning theme song from the blockbuster movie, *Titanic*. It kept afloat his claim that Fox Film Music had copied the same song which was released as, *Lonely Grill*, by the band *Lonestar*. With summary judgment granted to the *Titanic* songwriters, but denied to Fox Film, this case points out the need for every company to adopt a policy either rejecting unsolicited submissions of anything even remotely creative, or requiring the submitter to sign an agreement before the submission is even read.

John Jorgansen, the songwriter, claimed that the hit song sung by Celine Dion and written by James Horner and Will Jennings, *My Heart Will Go On*, infringed his song, *Long Lost Lover*. He also claimed *Lonely Grill* infringed, *Long Lost Lover*. Jorgansen had sent mass mailings of his song throughout the industry, and he claimed that his song was substantially similar to those recorded by Ms. Dion and *Lonestar*. He alleged Defendants had copied his songs.

To succeed in a copyright case, a plaintiff must prove ownership of the copyright and copying. Registration of the work is *prima facie* evidence of ownership; copying can be proved by direct evidence or circumstantial evidence. Most cases are made on circumstantial evidence because there are not often witnesses to the occurrence. A showing of access and substantial similarity between the two works will meet a plaintiff's burden of proof in the absence of direct evidence.

The *Titanic* music case was lost when Jorgansen was unable to prove access; all he could establish was that he had sent unsolicited mass mailings of his tape. He was unable to provide any reasonable documentation that he actually mailed the tapes or when and to whom they were mailed. But that was not his only problem, as one recipient actually acknowledged he received the tapes.

The songwriter claimed he had sent a tape to Careers BMG Music Publishing whose managing partner, Bruce Pollock, Plaintiff asserted, must have given the tape to the movie songwriters, who in turn copied. Maybe. But without more, the claim failed.

Bruce Pollock acknowledged receipt of the tape, but said he didn't listen to it; he said he tossed it. Nor did he send a copy to anyone, he claimed. He said he didn't even know the movie songwriters. Plaintiff was unable to prove that Pollock did anything with the tape after receipt, and his case was dismissed by the court.

The *Lonely Grill* case was a different story, however. It was not appropriate for summary judgment because Plaintiff was able to establish two things. First he had provided his music to an executive at Sony. Second, although the executive said he threw the songs away, Plaintiff contended that the Sony executive had told him that his tapes had been sent to people ultimately involved in recording the *Lonely Grill* music. Essential facts were in dispute.

I don't know where this case will ultimately lead, but here's the point. The *Titanic* songwriters missed the iceberg because Plaintiff could not prove to whom he sent the tapes, nor could he establish that the movie songwriters had a "reasonable opportunity to hear his unpublished work." This followed because there was no evidence of any connection or relationship between the recipient of the unsolicited tape and the movie's songwriters. But, as to *Lonely Grill*, the Court held that a reasonable possibility of access can be inferred if the songwriter had sent the tape to someone who had a relationship with the alleged infringer. That's a bit chilling.

Why create the risk of an expensive lawsuit when adopting a company policy of returning unsolicited materials will go a long way toward avoiding a suit, or if suit does occur, provide a great defense? Here's what I would do.

Adopt a written policy to be implemented by the mail room or a manager with no creative responsibility. Every time unsolicited material is received, it should be channeled to this person, who will log the name of the sender and a brief description

of the material, e.g. song, advertisement, slogan. The material is then returned with no copy retained along with a brief letter that reads something like this.

We appreciate the interest of [our listeners and professional] people who suggest ideas and material, including programs, formats and literary works for our use, but we do receive many suggestions that duplicate submissions of others, including members of our staff. And we may even start using materials or exploit ideas similar to yours that we receive after the date of your submission.

So we have adopted a policy of refusing to consider any materials or ideas.

We must therefore return your material, unreviewed.

Some companies live on unsolicited material, and if yours is one of them, delete the penultimate paragraph of, and add this paragraph to, the letter:

If, however, you wish to resubmit your material, sign and return the enclosed agreement to us with your submission. The agreement specifies the maximum we will

pay to you if we use your material. Please do not resubmit any material with a value in excess of this amount. Please note, also, that we are not obligated to use your material, even if we pay for it.

The referred-to agreement is a release and transfer of rights. It also contains representations that the submission is original and does not infringe the rights of others. And that takes us full circle.

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