Appeal No. 04-1934; 04-1935

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MARIA VENEGAS-HERNANDEZ; GUILLERMO VENEGAS-HERNANDEZ; RAFAEL VENEGAS-HERNANDEZ; YERAMAR VENEGAS-VELAZQUES; GUILLERMO VENEGAS-LLOVERAS, INC.,

Plaintiffs – Appellants\Cross – Appellees,

v.

ASOCIACIÓN DE COMPOSITORES Y EDITORES DE MÚSICA LATINOAMERICANA (ACEMLA); LATIN AMERICAN MUSIC COMPANY, INC. (LAMCO)

Defendants – Appellees\Cross – Appellants,

v.

PEER; PEER INTERNATIONAL CORPORATION; SOUTHERN MUSIC COMPANY; LUIS RAUL BERNARD; JOSE L. LACOMBA; LUCY CHAVEZ-BUTLER

Defendants – Appellees

Appeal from the United States District Court for the District of Puerto Rico

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PLAINTIFFS – APPELLANTS\CROSS – APPELLEES PETITION FOR PANEL <u>REHEARING</u>

Plaintiffs–Appellants\Cross-Appellees Maria Venegas-Hernandez, Guillermo Venegas-Hernandez, Rafael Venegas-Hernandez, Yeramar Venegas-Velazques, and Guillermo Venegas-Lloveras, Inc. ("Appellants"), respectfully submit this petition for panel rehearing. Pursuant to Fed. R. App. Pro., Rule 40, the points at issue are set forth as concisely as possible below:

I. The Operation of the "[C]ompulsory [B]equest" Established by 17 U.S.C. § 304(a)(1)(C)(ii) Should Be Interpreted in a Manner That Is Consistent with the Constitutional Grant of Power under Which It Was Enacted.

Art. I, § 8, cl. 8 of the Constitution (the "Copyright and Patent Clause"), provides that Congress shall have the power:

> To promote the progress of science and the useful arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

When interpreting legislation enacted pursuant to this power, the Supreme Court has made clear that its purpose and language should guide a court's analysis. *See* Feist v. *Publ'ns v. Rural Tel. Ser. Co.*, 499 U.S. 340 (1991) (interpreting Copyright Act's requirement of originality); Graham v. John Deere Co., 388 U.S. 1 (1966) (interpreting Patent Act's requirement of non-obviousnes requirement); Brenner v. Manson, 383 U.S. 519, 529 (1966) (interpreting the Patent Act's requirement of usefulness).

Consistent with these precedents, Appellants argued in this appeal that the Patent and Copyright Clause should guide the Court's determination as to the distribution of rights amongst a renewal class pursuant to 17 U.S.C. § 304(a)(1)(C)(ii). This Court rejected this "constitutional attack" on the grounds that it was not "far more developed" and because the Supreme Court in De Sylva v. Ballentine, 351 U.S. 570 (1956) "made no reference to any possible will and went out of its way to say that 'the author cannot assign his family's renewal rights.'" Slip op. at p. 10.

It is respectfully submitted that this misapprehends Appellants' argument and the Supreme Court's decision in De Sylva. Appellants' do not "attack" the statue as unconstitutional, nor do they contend that Congress could not specify as a condition for

granting a copyright that the author bequest 50% of any renewal rights to his or her spouse and the remainder to his children. What Appellants contend is that since the statute is silent as to the distribution, the authorizing grant of power as set forth in the Constitution should guide this determination. Congress has required an author to make a "compulsory bequest" to his widow and/or children, which cannot be assigned to any third persons. The statute, however, does not specify a 50% share for an authors spouse. In fact, the statute is silent as to how this "compulsory bequest" is divided between the widow and/or children. Consistent with the Copyright and Patent Clause, this determination should be made by the "Author," not a court. Appellants do not "attack" the statute but respectfully submit that, consistent with Supreme Court precedent, it should be interpreted under the guidance of the Copyright and Patent Clause.

II. The District Court Did Not Consider the Merits of Appellants' Equitable Claim for Rescission Because It Held that Such a Claim Was Barred as a Matter of Law.

The facts supporting Appellants' claim for rescission are set forth at page 13-18 of their Opening Brief. These are as follows:

> In 1952, Venegas signed a "blanket agreement" (the "1952 Agreement") which states, in part, that he "agrees to compose and write music and/or lyrics exclusively for and during the period of this agreement and/or extension thereof, for and on behalf of [Peer]." *[Final Opinion, Addendum at tab 3, p. 5.]* The 1952 Agreement further provided that: (1) Peer would "make reasonable efforts to publish or exploit certain of the musical compositions composed and written by [GVL],' and to pay royalties of, *inter alia,* fifty percent of the net [royalties] received;" and (2) the agreement would be construed pursuant to the laws of New York. *[Final Opinion, Addendum at tab 3, p. 6.]* Below Venegas' signature, additional text was added to the document, which was not initialed or otherwise authenticated by Venegas. *[Appendix at tab 9, p. 11.]* The clause is set in quotation marks in typeset different than the rest of the 1952 Agreement. *[Id.; Final Opinion, Addendum at tab 3, p. 6.]* The added clause stated: "After the expiration date, this contract will

continue in force until all monies advanced are recovered" (the "Additional Clause"). *[Id.]*

Peer construed the 1952 Agreement to include the Additional Clause so that the terms of the 1952 Agreement remained in force and bound Venegas until 1964. *[Final Opinion, Addendum at tab 3, p. 41; Testimony of David Jacome, Tr. 617:21-24; Testimony of Peter Jaegerman, Tr. 711:6-7]* From 1952 until 1964, Peer claimed any songs written by Venegas based upon the 1952 Agreement. *[Testimony of David Jacome, Tr. 618:7-19.]* During this same period, Venegas was horribly upset with Peer and refused to provide songs to Peer. *[Final Opinion, Addendum at tab 3, p. 42; Appendix at tab 1, p. 1; Testimony of Peter Jaegerman, Tr. 707:23-708:6.]* Peer then obtained songs written by Venegas by copying recordings or by hiring musicians to perform his songs; from these recordings and performances Peer would transcribe the songs. *[Id.]*

Sometime in 1964, Venegas contacted Peer to obtain a release from Peer's construction of the 1952 Agreement. *[Appendix at tab 2, p. 3; Testimony of Peter Jaegerman, Tr. 711:9-14.]* At that time, Peer had "leverage" against Venegas because by Peer's construction of the 1952 Agreement, Venegas was still bound to provide any songs he wrote to them and Peer was entitled to obtain those works from recordings and other musicians. *[Testimony of Peter Jaegerman, Tr. 719:11 – 720:14.]*

On April 24, 1964, Mr. Alberto Salinas in Peer's New York Office wrote to Mr. Angel Fonfrias in Peer's Puerto Rico office as follows:

> I opportunely received your letter of March 17th, where you informed me that the referenced author is willing to pay us what he owes us in exchange for our giving him his release, as well as your letter of April 15th, asking me to prepare and send you the necessary documents.
>
> With this letter I am sending you the letter in quadruplicate directed to Peer International Corporation, that should be signed by Guillermo Venegas in all its copies. You will notice it is dated April 29th, to allow you time to contact the author, so try to get his letter signed on that date. …
>
> I have made a study of the works of this author and I find that we have not received various manuscripts, for which reason they have not been registered in Washington. <u>Is there a way you can get said manuscripts without the author suspecting that we need them to register them in Washington?</u> …

[Appendix at tab 2, p. 3; Testimony of Peter Jaegerman, Tr. 717:15 – 718:5 (underlining supplied).] The referenced letter was dated April 29, 1964, and is referred to as the 1964 Agreement. *[Testimony of Peter Jaegerman, Tr. 718: 6 – 11.]* The 1964 Agreement stated in pertinent part:

> I send you herewith the sum of $412.65 which represents the unearned balance of the advance which you made to me in connection with my aforesaid contract with you on July 29, 1952.

> In consideration of the forgoing payment it is agreed between us that the aforementioned blanket agreement between myself and you dated July 29, 1952, is hereby terminated as of this date, except that you are to continue to own and control all of the rights in the musical compositions set forth … in accordance with the terms and provisions of my aforesaid agreement with you.
>
> Your signature at the bottom will signify your acceptance of and agreement to all of the terms and conditions set forth in this letter.

[Final Opinion, Addendum at tab 3, pp. 7-8, quoting Peer Exh. 9.] Even after signing the 1964 Agreement, Venegas continued to assert that songs identified therein did not belong to Peer. *[Final Opinion, Addendum at tab 3, p. 17.]* This letter was not properly signed by Peer as required by its own terms and conditions. *[Appendix at tab 3, p. 7.]*

Peer subsequently registered renewal rights for eight renewal songs with the Copyright Office for Venegas-Lloveras' songs. *[Peer Defs. Exhs. 27, 30, 33, 36, 39, 42 & 47.]* In connection with these renewal registrations, the assignment documents were not signed by Venegas. Although the Copyright Act requires the actual signature of the author, these assignments were signed by Peer on behalf of Venegas. *[Peer Defs. Exhs. 28, 31, 34, 37, 40, 43 & 48.]*[1]

"Peer Defendants stopped issuing royalty reports in 1993 and did not provide any royalty reports to Plaintiffs until discovery in this litigation. Further, Peer Defendants stopped paying royalties in 1993 and to date has not paid anything to Plaintiffs." *[Final Opinion, Addendum at tab 3, p. 18 (citations omitted).]* Peer has taken the position that it has no obligation to provide information to the Venegas Siblings. *[Tr. 862:1-2.]*

In 1997, Peer wrote to the Venegas Siblings asking for their assignment of rights to Peer for the following songs:

Ausencia	*Noche sin ti*
Amor mi dulce amor	*Por el camino*
Borracho sentimental	*Recordacion*
Borre tu amor	*Tu partida*
Carino	*Tu bien lo sabes*
Llega la noche	*Alma triste*
Miedo	*Apocalipsis*
Nada puedo hacer	*Concierto para decirte adios*
Ni a la distancia	*Genesis*
No acepto olivido	*Hasta que me oiga Dios*
No, no digas nada	*Primavera*

[1] *The subject renewal registrations and assignments were for: Cien Mil Corazones; Cuando Me Vaya; Dejame Qe Te Diga; Por El Camino; No Te Vayas Asi; Una Cancion;* and *Mas Alla.*

No vuelvas mas *Raza negra*

[Appendix at tab 12, p. 24-33.] Peer explained that these assignment documents "confirm that Peer … will continue to publish the works written by Guillermo Venegas Lloveras." *[Id. at p. 24.]* The Venegas Siblings rejected this request by Peer. *[See Final Opinion, Addendum at tab 3, p. 19.]*

Because these facts fully support Appellants' claim of rescission, the District Court should have held that any claim by Peer based upon contract is rescinded. The District Court, however, held that it could not consider this claim at equity because, as a matter of law, Peer allegedly made some payments to the author while he was alive. *Final Opinion,* p. 39.[2]

While this Court correctly holds that the District Court's exercise of its equitable discretion is reviewed with deference on appeal, it does not address the threshold question raised by Appellants. The District Court did not consider Appellants' claim at equity because it held that the claim was barred as a matter of law. The District Court never reached the equitable determination. What Appellants request is that this equitable claim be considered on its merits. This is a threshold issue of law which should be reviewed *de novo.*

III. The Text of the Copyright Act Should Control Its Interpretation.

[2] The District Court's Final Opinion is included with the Addendum to Appellant's Opening Brief at tab 3.

For the reasons set forth by this Court, a straight-forward or "bare-bones" reading of the Copyright Act provides that authorization is infringement. Nothing in the legislative history is inconsistent with this reading. And, in any case, Congress votes on the text of the law not the text of a committee report. Where, as here, the test of the law is clear, it should be given effect. *Cf.* Storage Technology Corp. v. Custom Hardware Engineering & Consulting, Inc., 04-1462, Fed. Cir., Slip op. (August 24, 2005).

The Court, however, held that the "low" stakes and the interest of "maintaining uniformity" with another circuit favored an interpretation inconsistent with the text of the legislation. Slip op. at p. 20. It is respectfully submitted that this analysis devalues the law actually passed by the members of Congress. Its text, and not a judicial policy of uniformity or disfavoring low-stakes cases, should control. If a straight-forward interpretation of its text creates a conflict with another circuit, that conflict is for the Supreme Court to resolve.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I caused to be served copies of the attached motion by first class mail, postage prepaid, addressed as follows:

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