THE REDCOATS ARE COMING AGAIN

BY JEFFREY L. GRAUBART

The recent exchange of charges and countercharges by attorneys representing the artists' point of view (Billboard, June 4, Sept. 3) and the record companies' point of view (Billboard, July 23) did little to enlighten or make a positive contribution to our industry for a very simple reason: Both points of view reflect only the hackneyed phrases and positions long held by the practitioners of the art of negotiating record contracts.

A new view has been asserted elsewhere, however, although our industry has given little public acknowledgment to it. The U.K. courts' decision in Zang Tumb Tumm Records Ltd. vs. Johnson (Billboard, Feb. 27), dealing with "standard" recording and publishing agreements, has broken some new ground and may ultimately affect contract negotiations in the U.S.

That case was brought by ZTT and Perfect Songs, entities controlled by producer Trevor Horn and his wife, Jill Sinclair, against Holly Johnson, the former lead singer of Frankie Goes To Hollywood. The goal of the suit was to prevent the singer from providing his recording and songwriting services to anyone except the plaintiffs.

Johnson counterclaimed, maintaining that the recording and publishing agreements were unenforceable restraints of trade. He sought damages for breach of contract and plaintiffs' fiduciary duty to account for royalties.

The opinion of the High Court of Justice of England and Wales may be far more intriguing to U.S. readers than anything said by either of the earlier Commentary contributors: "The most important of the grounds of objection to this agreement . . . is that it is . . . [an] unreasonable restraint of trade," the court stated.

'The group may be left unemployed by ZTT, unable to work elsewhere'

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After noting that in addition to the two above-named companies, Sinclair and Horn effectively controlled the recording studios where at least half of the recording of the second Frankie album would take place, the court gave the following reasons for its opinion favoring the defendant:

- The parties were not at equal bargaining power in that the record company used its superior bargaining power to exact promises unfairly onerous to the group, which had "no bargaining power."
- "This was a 'take it or leave it' contract and the publishing agreement in this regard was in like case. If the group wanted the recording agreement, then it was made quite plain that they would get it only if they were prepared to sign the publishing agreement."
- The right of consultation given to the group in the contract has little significance because the company had "the decision as to when and where recording shall take place, and that without limit of time." It also had the power to determine the budget, what would be recorded, and who would be the producer.
- If a master is rejected by the company as not "commercially and technically acceptable," the company has no obligation to release it, but at the same time, the group "has no right to terminate; they must just accept the position."
- The duration of the option periods in the contract is too vague. The phrase "one album" is "wholly undefined" and "capable of indefinite extension."
- "The fact that under this agreement [because of the undefined length of the term] the group may be left unemployed by ZTT and unable to work for anyone else, taken by itself, is the really significant and important factor."
- The "leaving member" clause requiring such a member to potentially obligate himself or herself to make, as a solo artist, albums due to be made by the group is "a wholly nonsensical provision."

Although no U.S. court has gone as far as the English High Court of Justice, the direction to a U.S. court wishing guidance is clear. Moreover, the observations of the court are much more illuminating than are the charges and countercharges in the earlier Commentary exchanges about this vitally important area of relations between artists and record companies.

Two years ago, I wrote a Commentary ("When Will The Redcoats Arrive?," Billboard, Dec. 6, 1986) asserting that a revolution in the U.S. music publishing industry was overdue in light of burgeoning U.K. court decisions having to do with songwriter-publisher agreements. Once again, our British cousins have opened a new revolutionary war, this time confronting issues that mandate frank discussion, if not appropriate reform, by the U.S. record industry.