Songwriters & U.S. Law

WHEN WILL THE REDCOATS ARRIVE?

BY JEFFREY L. GRAUBART

In 1776, we declared our independence from England and fought the Revolutionary War in the fields and towns of North America.

However, except as changed by later legislation and by our courts, the basic English common law, as brought to North America by the English colonists, has become the law of the U.S. and Canada and is the basis on which both American and Canadian law has "developed."

But in 1986, from the perspective of North American songwriters, it is clear that development stopped decades ago, and that this "revolutionary war" has been won by their English counterparts, in the law courts of the U.K.

Indeed, with the 1985 U.S. Supreme Court decision in Mills Music Inc. vs. Snyder holding that, after termination of the songwriter's grant of copyright to a music publisher, the publisher may continue to share royalty income from the sale of previously licensed records, it can easily be argued that development has *regressed* many years.

Although our courts have not generally delved into the issue of the fairness of agreements between the music publisher and the songwriter (primarily on the basis that it would be unwarranted interference with freedom of contract if they were to relieve an adult party from a bad bargain), the British courts have done so, as their recent decisions have shown, with the landmark 1974 case of A. Schroeder Music Publishing Co. vs. Macaulay, and with its progeny.

In so doing, the British courts have asserted a public policy of fairness to the creator, which has not yet been articulated by any American court or legislative body.

In the Macaulay case, a young songwriter sought to repudiate the writer/publisher agreement he had with a music publisher and was successful in doing so in three levels of the British courts.

Macaulay contended that the agreement was oppressive and an unreasonable restraint of trade (because of his inablility to deal with his compositions for a five-year period except with the defendant), and therefore void as being against public policy. The House of Lords, in affirming the judgment of the trial court that had declared the agreement to be void, made the following observations:

- If the publisher is not bound with a "positive undertaking" to exploit a composer's works, it would be an unreasonable restraint of trade to tie the composer "for this period of years so that his work will be sterilized and he can earn nothing from his abilities as a composer if the publisher chooses not to publish."
- Had Macaulay the right to recover his compositions after a reasonable time of inactivity by the publisher, the agreement would not be against public policy.
- Because the contract was not negotiated between the parties, but instead the plaintiff was offered a "take-it-or-leave-it" agreement by a party with superior bargaining power, the agreement was oppressive and did not satisfy the test of fairness.

In the 10 years that followed, other British decisions in favor of the creators emerged, and the British courts thereby confirmed and expanded the reasoning of the House of Lords in Macaulay, culminating in late 1985, with the decision in Elton John vs. Dick James Music.

At issue in that case were writer/publisher agreements signed by Elton John and lyricist Bernie Taupin with Dick James Music when the writers were 20 and 17 years old, respectively. Armed with the Macaulay decision, plaintiffs sought to set aside the publisher and recording agreements entered into with various entities controlled by Dick James on the grounds of undue influence, and demanded return of all copyrights and master recordings.

The court refused to set aside the agreements, citing the long period of time between plaintiffs' questioning the validity of the agreements and their bringing the action.

However, the court did rule on behalf of John and Taupin on a most controversial provision present in many international publishing agreements. They won support where the publisher enters into subpublishing agreements with wholly owned subsidiaries in foreign territories—which, in some instances, are nothing more than a paper creations, having no offices, staff, or physical presence.

Typically, under such an agreement, each such "subpublisher" retains as much as 50% of all revenue generated in its own territory. Accordingly, when it is time to account to the writers, the parent music publishing accounts only for the fraction "received" from its subsidiary in the foreign territory.

John and Taupin claimed that the publisher had breached its fiduciary duty and had also, with other defendants, breached an implied warranty not to "unfairly, artificially or unjustifiably reduce" the receipts upon which royalties were payable.

Although the court found that the U.S. subsidiary was, in fact, a real operating entity justifying its retention of a 35% subpublisher's fee, the court did not allow the retention of a subpublisher's percentage by the other subsidiary subpublishers.

With respect to the other subsidiaries, the court ruled that the proper compensation to be retained by the subsidiaries was the amount acutally paid to the local publisher/administrator in each territory. In so doing, the court exhibited a good understanding of the commercial realities of the music publishing industry.

Although the U.K. court refused to declare the agreement void, as was done in Macaulay, it did comment negatively about the agreement, pointing out as "unfair" the following aspects:

- There was no provision for an increased royalty rate in the later years of the agreement, notwithstanding the potential level of success the writers' compositions might enjoy.
- As in Macaulay, the copyrights were assigned for their full terms with no provision for a reversion based on the publisher's failure to exploit individual compositions (or for failure to exploit any compositions at all).

American law has its deep roots in English law. But, as has often been pointed out, these roots were planted in the 17th and 18th centuries, and since then, the legal vines have grown in different directions. One might say that some of the American vines have failed to grow at all.

American courts have in the past failed to impose a fairness standard on the writer/publisher agreement. So whether American courts or American legislatures adopt the logic of Schroeder vs. Macaulay and its progeny, thereby creating a revolution in the U.S. music publishing industry, remains to be seen.

In fairness, however, that logic at least warrants further self-examination by responsible members of the music publishing industry.

'American courts have, in the past, failed to establish a fairness standard'

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