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## CASES OF INTEREST

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### IP/ENTERTAINMENT LAW WEEKLY CASE UPDATE FOR MOTION PICTURE STUDIOS AND TELEVISION NETWORKS

April 21, 2011

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**Trademark Properties Inc. v. A&E Television Networks**, USCA Fourth Circuit, April 11, 2011 (unpublished)

 [Click here for a copy of the full decision.](#)

- Fourth Circuit upholds jury verdict in *Flip This House* contract case, holding that evidence could support the jury's finding that parties formed an oral contract over distribution of revenue.

Plaintiff Richard Davis and his company filed suit against A&E Television Networks and other entertainment entities, alleging defendants breached an oral contract to split revenues from the reality television series *Flip This House*, which airs on A&E. In the district court, a jury found for the plaintiffs and awarded them \$4 million (representing roughly half of the net revenues of the show from its first season).

The defendants appealed, arguing, among other things, that the evidence could not have supported the jury's finding that an oral contract to split revenues had been reached. In a 2-1 opinion, the U.S. Court of Appeals for the Fourth Circuit upheld the jury's verdict, finding that the evidentiary record could support the jury's finding that Davis and A&E formed an oral contract under New York law.

Davis, a South Carolina real estate broker, conceived of a show centered on buying real estate properties at bargain prices, and then quickly renovating and selling them for a profit (a process known as "flipping"). Davis developed a pilot episode for the show and pitched it to several television networks, including A&E. A deal was struck, although nothing was reduced to writing, and the show was produced and aired on A&E. The relationship between the parties ended in 2006, over compensation issues.



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Davis claimed that the oral contract was formed in June 2004 during a telephone conversation with an A&E executive. Davis asserted that during the conversation, he and the executive discussed the terms under which Davis would agree to partner with A&E, including Davis' non-negotiable demand that he and A&E split the revenues. He claimed that the executive agreed to the terms by saying "Okay, okay I get it," with the only caveat being that A&E's board of directors needed to approve the development of the television series. The board eventually approved the show, and the parties began filming the first season, without ever having executed a written agreement.

Under New York law, which the district court applied to the dispute, the appellate court said that the jury needed to find that (1) Davis genuinely thought that the executive's statement constituted acceptance, and (2) that Davis' belief was reasonable. Viewing the record in the light most favorable to the plaintiffs, the court found evidence sufficient to support the jury's verdict. Specifically, the court credited Davis' testimony that his June 2004 phone call with the A&E executive involved a lengthy negotiation over such terms as production costs, production crew, production credits, the allocation of risk and splitting revenue. The court further found that the revenue-splitting term was a deal-breaker for Davis, and that the A&E executive never objected to it, conditioning acceptance only on board approval, which eventually occurred. According to the court, a reasonable jury could have found that a reasonable person could have viewed the executive's statement – "Okay, okay I get it" – as a manifestation of acceptance. The court further held that even though other evidence supported the defendants' position that the parties never reached an oral agreement, the jury was entitled to ignore that evidence.

The court rejected defendants' argument that key terms of the claimed oral agreement, including the revenue-splitting terms, were unenforceable because they were indefinite. Drawing mostly on Davis' testimony, the court found evidence sufficient to support findings of definiteness on material terms, including revenue-splitting.

The court also rejected defendants' challenges to several of the district court's evidentiary rulings and jury instructions. Among other rulings, the appeals court held that the district court had the discretion to exclude testimony by A&E executives to the effect that reality television stars never receive revenue-sharing contracts. The district court granted plaintiffs' objection to this testimony, on the ground that the executives were not designated as expert witnesses prior to the trial and could not testify to industry practice. The appeals court affirmed the district court under an abuse-of-discretion standard, finding that while the executives could have testified to A&E's



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practices, they should have been disclosed as expert witnesses if they were to testify to industry-wide practices.

In a brief dissenting opinion, Judge Duncan wrote that while Davis deserved to be compensated, the record did not support a finding that an oral contract had been reached. Specifically, Judge Duncan said that a reasonable person would not interpret “Okay, okay, I get it” as a manifestation of assent. Rather, he said, “Okay, okay I get it” connotes “I understand what you are saying.”

**Arista Records LLC v. Lime Group LLC**, USDC S.D. New York, April 7, 2011

 [Click here for a copy of the full decision.](#)

- In copyright infringement litigation against peer-to-peer network, court denies defendants’ motion that would have precluded plaintiffs from recovering a statutory damage award from defendants for sound recordings for which plaintiffs have already recovered a statutory damage award from an individual direct infringer with whom defendants are jointly and severally liable.

On May 11, 2010, the court [granted summary judgment](#) to plaintiff record companies on their claims against defendants for secondary copyright infringement. Defendants were affiliated with the LimeWire online file-sharing network, and the court found that they had induced hundreds if not thousands of users of LimeWire to use the system to infringe plaintiffs’ copyrights.

The litigation is now in the damages phase, with a trial on damages scheduled for May 2, 2011.

On March 10, 2011, the [court held](#) that plaintiffs are entitled to a single statutory damage award from defendants for each “work” infringed, notwithstanding that many individual direct infringers may have infringed that particular work on the LimeWire system.

In this decision, the court addressed the defendants’ assertion that plaintiffs are precluded from recovering a statutory damage award from defendants with respect to 104 sound recordings for which plaintiffs have already recovered a statutory damage award from an individual direct infringer with whom defendants are jointly and severally liable. The court stated that there is little guidance on this issue because the issue of whether a plaintiff should be precluded from recovering a statutory damage award from



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a secondarily liable inducer, with respect to those sound recordings for which that plaintiff has already obtained a judgment against an individual direct infringer, “has never been addressed.”

Section 504 of the Copyright Act provides that a copyright owner may elect to recover “an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally.” The court held that this language “does not speak to the issue of whether an award in one action precludes an award in a later action. Specifically, Section 504 does not state that a copyright owner is limited to a single statutory damage award for each work, no matter how many actions the owner brings. Rather, the language, ‘all infringements involved in this action,’ is included in Section 504 to make clear that a plaintiff copyright owner may obtain only one statutory damage award per work in any one action, regardless of the number of times that a particular work is infringed.”

According to the court, Section 504 speaks about limiting statutory awards based on infringements involved in “this action”; it does not speak to precluding statutory awards across different actions. “The statute does not state that an award of statutory damages against a defendant in one action has an effect on a statutory award against a different defendant in a different action.”

The court also stated that with respect to those 104 works for which plaintiffs have recovered a statutory damage award from a direct infringer, it will be permissible for the fact-finder to consider that plaintiffs have already recovered from a direct infringer for some portion of the infringement that defendants induced, because defendants are jointly and severally liable with those direct infringers.

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