Entertainment Litigation Update

Leaking the Secrets of Survivor: "Outwit, outplay and outlast" is the tagline to the popular CBS reality series, *Survivor*. That phrase could apply equally to both the rabid online forum in which the show's fans attempt to "spoil" the plot twists and secrets of the show and to the show's producer, who has attempted to thwart the spoilers. In 2010, DJB Inc., a company owned by *Survivor* executive producer Mark Burnett, filed a federal suit against James Early for violating trade secret laws by disseminating online spoilers for *Survivor's* 19th and 20th seasons.

California law defines a "trade secret" as information which "derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use." *Cal. Civ. Code* § 3426.1(d). Typically, trade secret law has been used to protect company secrets that would be valuable to a competitor. Here, DJB has used trade secret law in a novel manner: it alleges that the production releases information to the public on a periodic basis, but that to protect the value of the business, information concerning what will be released must be kept secret until its scheduled release date.

DJB settled with Early. Although the terms are confidential, Early was reportedly willing to identify his source as Russell Hantz, a popular contestant on *Survivor*. Hantz could be subject to a liquidated damages clause in his *Survivor* cast member's contract of up to $5 million. Viewers of the show may get a sneak peak as Hantz is currently scheduled to be a team captain in the latest season of *Survivor*, which premieres in February 2011. If he departs the island with attorneys by his side, we will know how much the producers of *Survivor* value keeping the secrets of their show.

First Sale Doctrine Protects Distribution of Promotional CDs: UMG Recordings, like many music companies, ships specially produced promotional CDs to select individuals, such as music critics and disc jockeys, who do not solicit the CDs. In *UMG Recordings v Augusto*, . 628 F.3d 1175 (9th Cir. 2011), the Ninth Circuit affirmed summary judgment in favor of defendant Tony Augusto on UMG's claim of copyright infringement after he sold his copies of promotional CDs on eBay.

Augusto argued that the distribution of the CDs by UMG effected a transfer of ownership, rendering them subject to the first sale doctrine (17 U.S.C. § 109(a)), which allows the owner of a copy of a copyrighted work to sell it without permission from the copyright owner. UMG countered that it merely *licensed* the CDs because it included specific language on the CDs stating they were the property of the record company and were licensed to the recipient for personal use only. Although the district court found that UMG established a *prima facie* case of copyright infringement, it held that the first sale doctrine applied, allowing Augusto to sell the copies without authorization from UMG.

At issue on appeal was whether Augusto owned the copies notwithstanding the limiting language on the CDs. The Ninth Circuit determined that there had been a transfer of ownership, not a license, because the CDs were sent to the recipients without any prior agreement. The limiting language was not effective because, under basic contract law, the mere receipt of an unsolicited offer does not impair the recipient's freedom of action. Moreover, UMG had no control over the CDs following their initial distribution. Thus, Augusto owned the CDs and the first sale doctrine applied.

UMG Recordings is distinguishable from *Vernor v. Autodesk*, 621 F.3d 1102 (9th Cir. 2010), in which the Ninth Circuit recently considered the first sale doctrine in the context of software licensing. In *Vernor*, the court held that the first sale doctrine did not apply to a paying licensee of software if the vendor: "(1) specifies that the user is granted a license; (2) significantly restricts the user's ability to transfer the software; and (3) imposes notable use restrictions."

Attorney Fee Awards: In Hollywood, it might serve future plaintiffs well to read the screenplay—and the jurisprudence of copyright law—before filing a copyright lawsuit. Just ask Sheri Gilbert.

In March 2009, Gilbert sued Warner Bros. and 33 other defendants for copyright infringement. *Gilbert v. New Line Productions, Inc.*, Case No. CV 09-02231 (C.D. Cal. 2010). Gilbert alleged that the studios, actors and others involved in the movie *Monster-in-Law* stole the idea for the film from a script she penned in 1998. She did not, however, read the screenplay for the movie to verify that it infringed anything she had written. She also apparently failed to read the long established case law holding that copyrights do not protect ideas, but only the expression of ideas. *See, e.g., Mazer v. Stein*, 347 U.S. 201, 217 (1954). Nevertheless, Gilbert pressed forward with her suit, naming as defendants virtually everyone involved with *Monster-in-Law* and seeking a portion of the worldwide box office receipts.

It took two years, but the defendants prevailed on summary judgment. The district court then awarded the defendants almost $900,000 in attorneys' fees and costs under the Copyright Act of 1976, 17 U.S.C. § 505. The court considered a number of factors, including the degree of the defendants' success and the "frivolousness" of the claim. All factors weighed heavily against Gilbert, including that Gilbert's claims "were without merit" because "there was an absence of substantial similarity between [Gilbert's] work" and the film. The court found that Gilbert "and those similarly situated" should be deterred from filing frivolous claims.

The court's unequivocal ruling should serve as an admonition to future copyright plaintiffs in Hollywood: read the script, and the law, before you file suit.