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Cases of Note - Battle of Rock Titans! Lick It Up!

by **Bruce Strauch** (the Citadel) <strauchk@earthlink.net>

Vincent Cusano v. Gene Klein, Stanley Eisen, the KISS Company et al., U.S. Court of Appeal for the Ninth Circuit, 2001 U.S. App. LEXIS 19750, Sept. 6, 2001.

Vincent Cusano a.k.a. Vinnie Vincent is an ex-rock god lead guitarist for **KISS**. From 1982 to 84, he co-authored and performed songs for the albums "Creatures of the Night" and "Lick It Up."

Dipping into our **ATG** rock 'n roll backfiles, we learn that glam rockers *The New York Dolls* and *Alice Cooper* begat **KISS** which ultimately begat charmers like *Nine Inch Nails*, *Metallica* and *Marilyn Manson* and millions of mall rat slugs that so adore them..

KISS "thunder rock" — read "ear-splitting" — was as the rock critics say "emblematic of the '70s" — which is a way of saying sheer tackiness unleashed. And what an era it was. **KISS** was at the *Casablanca* label which also produced *The Village People*. Yes, campy costumes were in. And it was a natural schtick for **KISS** to adopt horror faces, 8-inch heels and massive codpieces.

Just so you can grasp the dimensions of our insignificance, four guys from *Queens* started for \$30 a night and moved up to grossing \$119 million in 1978.

Well, these are out-on-the-rim artistic giants, by gosh! Courage? Why they mixed their own blood with the ink used for the first special-edition **KISS** comic by *Marvel*. Creativity? I'll have you know that from 1982 to 96 the band performed — without make-up!

And since I know you're wondering — No, it's not Cusano but *Gene Simmons* who has the five-inch tongue. *Gene* lives with *Playboy* fold-out veteran *Shannon Tweed* by whom he has two children. Who says they're not constant? This has been since 1982, the year of her signal triumph as *Playmate of the Year*. And who says our *Gene* is not a man of deep sentiment? He's kept thousands of polaroids of groupies.

But, as rock gods will do, the boys had a falling out and at the same time Cusano degenerated into debt and filed for Chapter 11 bankruptcy which is a reorganization.

I'll leave it to your imagination to figure out how you reorganize a rock god's life and finances. But the idea is the creditors agree to wait for his income stream to pay the debts rather than seizing his few tangible assets.

Without Cusano, however, the band was

hurting for fresh material, so in 1994 he co-authored three songs for the album "Revenge." In the same year, the coffee-table book "KISStory" was published with numerous photos of him in it.

I know you'll want that one prominently situated for when Mom comes to visit.

And further trying to get his act together, Cusano sued his old buddies claiming they were not paying him songwriting royalties.

Some Bankruptcy Info

The district court found that Cusano's claims for royalties on "Creatures" and "Lick" belonged to his bankruptcy estate and he did not have standing to bring suit.

When you file a petition for bankruptcy, an estate is created of all your assets. See 11 U.S.C. § 541(a); *In re Fitzsimmons*, 725 F.2d 1208; 1210 (9th Cir. 1984). The debtor must carefully and accurately schedule all those assets and the approximate dollar value of each. When a range of values exists, you "choose a value in the middle of the range." *In re Seruntine*, 46 B.R. 286, 288 (Bankr. C.D. Cal. 1984).

Because, of course, this is where bankruptcy fraud can creep in. You conveniently forget about property which creditors would want to seize. Or list the value as so low that no one would bother to seize it.

If the trustee in bankruptcy abandons one of the assets, then title reverts to the debtor. Generally, abandonment is irrevocable even if based upon a mistake in valuation. *In re McGowan*, 95 B.R. 104, 106 (Bankr. N.D. Iowa 1988). False or incomplete data submitted by the debtor permits revocation. *In re Ozer*, 208 B.R. 630, 633 (Bankr. E.D.N.Y. 1997).

Cusano's schedule read "songrights in ... Songs written while in the band known as 'KISS.'" — value "unknown." His proposed reorganization had him retaining ownership of his songrights in exchange for him kicking in \$1,521.60. And the trustee had gone along with it.

Which is not totally absurd. As money comes in from the rump band performing his songs, he would pay off creditors according to a schedule. And if it ever became elevator music — brrrr! Perish that thought! — the money might flow indefinitely.

But the case doesn't really say that and we don't have the reorg plan. One guess is that the trustee assumed the songs were worthless and let them go for the \$1,521.60 to be divided up among the creditors.

The appeals court held that Cusano might have been more helpful in itemizing the songs, albums and parties of copyright agreements, but that would not have added anything which wasn't easily within the grasp of the trustee and creditors.

But Cusano had not scheduled a claim for unpaid royalties which he had against his old buddies.

Cusano said these claims were an open book account — i.e. the account was still open as long as the songs were being performed — and he had no obligation to bring the claim until the last money entry.

The appeals court said, no, he was obliged to schedule in the bankruptcy petition any money he claimed he was bilked out of as receivables or a cause of action. Which he hadn't done.

The estate got the claims for the time prior to the bankruptcy petition and Cusano for afterwards.

Defamation

Cusano claimed he was defamed in the video "KISS X-Treme Close-Up" and the book "KISStory" published in 1992 and 1995 respectively. But there is a two year statute of limitation on defamation and his suit was brought just past that time in 1997.

Cusano said he hadn't noticed the defamation until just before filing suit for the unpaid royalties.

However, the time begins to run "upon the first general distribution of the publication to the public." *McGuiness v. Motor Trend Magazine*, 129 Cal. App. 3d 59, 61 (1982) and "generally" it doesn't matter if the plaintiff is unaware of the publication. *Johnson v. Harcourt Brace, Jovanovich, Inc.*, 43 Cal. App. 3d 880, 896 (1974). Exceptions are made for fraudulent concealment and situations where plaintiff couldn't reasonably have noticed the defamation. *McGuiness*, 129 Cal. App. 3d at 63; *Schneider v. United Airlines, Inc.*, 208 Cal. App. 3d 71, 77, 256 Cal. Rptr. 71 (1989).

Come on now. His life was in reorganization.

And California's Uniform Single Publication Act, Cal. Civ. Code § 3425.3, says that all printings over time of a first hardcover edition are but a single publication. So if there was any little overlap of the statute of limitations with books coming off the binding line,

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the two years still runs from when the first one hit the shelves of Barnes & Noble.

Forged Signature

Remember that in 1992 Cusano was no longer in the band but co-authored three songs for "Revenge." He claimed his old buddies attached a photocopy of his signature to an assignment to them.

The district court had a forensic examiner go over the assignment agreement and ordered Cusano to get a handwriting analysis from a neutral examiner. Cusano didn't get around to doing this, so the district court dismissed this claim. Then Cusano came up with an unsigned "Revenge" agreement completely different from the one with his signature. But no handwriting analysis report.

The appellate court agreed that Cusano inexcusably neglected to comply with a scheduling order — the method by which courts move the suits along and get to a conclusion. Otherwise there would be endless foot-dragging and delay by both lawyers and clients.

Rock On

And KISS rocks on. At *frankkiss.com*, you can buy boxer shorts, art, books, 'zines, a "love gun", and 3D action figures. A KISS camera modeled on Gene's face with a tongue that flicked when you snapped a photo — much to our regret — never made it into production.

Legally Speaking — Copyright, Tasini, and our new reality

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Back in April, I wrote about the *Tasini* case,¹ which was being heard by the U.S. Supreme Court.² Since that time, the Supreme Court has ruled in favor of the authors, and many of us are asking what this really means for the library world. Now that we have had a few months of experience with the new reality of *Tasini*, I thought that it was time to revisit the issue.

The 7-2 decision in the case of *New York Times v. Tasini* was delivered by Justice Ginsburg. The dissent came from Justice Stevens, who was joined by Justice Breyer. According to the majority opinion, inclusion of a work within a database does not constitute a medium-neutral compilation, but rather a re-publication of the work. In order to decide how databases fall under the law, the justices took a look at how the end user sees the information.

The case of the publishers rested in part on a provision in the copyright law that states that copyright in original works does not depend on the format of the works.³ The analogy which was used by the publishers was that of microfilm and microfiche, which have been popular methods of preserving newspapers and magazines since the 1930s.⁴ The Court did not buy this argument.

According to the decision:

We find the analogy wanting. Microforms typically contain continuous photographic reproductions of a periodical in the medium of

miniaturized film. Accordingly, articles appear on the microforms, written very small, in precisely the position in which the articles appeared in the newspaper. The *Times*, for example, printed the beginning of *Blakely's* "Remembering Jane" article on page 26 of the *Maga-*

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