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## Cases of Note -- Copyright -- Estopped in the Name of Love

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## Estopped in the Name of Love

by **Bruce Strauch** (The Citadel) <strauchb@citadel.edu>

*Betty Newsome v. James Brown, Dynatone Publishing Company and Warner/Chappell Music, Inc.*, United States Court of Appeals for the Second Circuit, 2006 U.S. App. LEXIS 30979 (Dec. 12, 2006).

*Well what a pathetic Motownish pun for a title. Irresistible, vaguely on point, but far off the dare-I-say "soul" subject of this riveting article. Because what we have here ladies and gentlemen ...*

*for your listening and dancing pleasure ... I give you Mister Please Please ... Mister Night Train ... the hardest working man in show business ... JAMESBROWNDTHEFABULOUSFLAMES!!!*

*[enter stage right dancing on one foot]*

*"If you leave me, I go crazy ..."*

*Yes, the Godfather of Soul is gone at age 73, buried in a spangly blue suit with silver shoes. But the history of his litigation lives on, decided mere days before his final exit.*

*[bring out scarlet lined cape; drape around shoulders; escort to stage right]*

*[rip off cape; come back wailing]*

*[drape cape again]*

*[shuffle off this mortal coil]*

Professional dancer and quondam **James Brown** girlfriend, **Betty Newsome** wrote "It's a Man's World." Words and music.

*Yes, your illusions die hard.*

She registered copyright in 1964 in the name of **Clamike Music Publishing** with her as author. She assigned all rights in the song to **Clamike** with her getting a 50% cut back from all royalties.

While riding in a limo to a NY airport, **Newsome** hummed the melody to **Brown** and the two tried to create a new song. **Brown** wrote "It's a Man's Man's Man's World" (hereinafter **3Man**) and recorded it at **Rob Gallo's Talentmasters Studio** in NY in 1966 to become a mega-hit. Trebling "Man" allegedly was inspired by a comic movie of that year "It's a Mad, Mad, Mad World."

*Well, James got his inspiration where he found it.*

*But if you were in high school then as I was, you have total recall.*

*"This is a maaaaan's world!*

*Man made the car to take us over the road!*

*Man made the train to carry the heavy load!*

*Man made the electric light to light up the dark!*

*Man made the boat for water like Noah with his ark!*

*It's a maaaaan's world!*

*But it wouldn't be nothing  
Without a woman or a girl!"*

**Brown** assigned his rights to **Dynatone** for the initial copyright term of 28 years plus the renewal 28. **Dynatone** registered listing **Brown** as the sole author.

**Newsome** of course listened to radio and wanted to know why she was cut out. **Clamike** sued for copyright infringement. **Brown** counterclaimed that **Newsome** was infringing "3Man."

*The counterclaim seems kind of nerdy, but she did just hum it to him in a limo.*

They settled, giving **Newsome** co-authorship and **Clamike** one-third of the royalties.

**Brown** signed the settlement along with **Dynatone**, his publisher. **Clamike** signed. **Newsome** did not.

And the parties carried out the agreement. **Dynatone** took 2/3 distributing to **Brown** minus their cut. **Clamike** took 1/3 distributing to **Newsome** minus their cut.

Many years down the road, **Newsome** sued claiming the settlement did not bind her, and incredibly, that she was the sole author of both songs!

In her deposition **Newsome** admitted to receiving \$250,000 in royalties and being fully aware of the settlement terms. This would become a major problem for her.

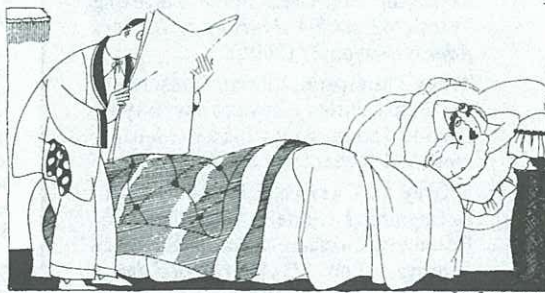
*I hate this successors in interest mess. It adds nothing to the understanding of the case and thoroughly strains one's limited attention span. But I can't avoid it.*

**Dynatone** was succeeded by **Warner/Chappell** and **Clamike** by **Mietus Copyright Management Company**. **Mietus** was a former employee of **Clamike**.

*Maybe I could have avoided it, but I would have had to falsify facts. Which I do in the classroom all the time. But I don't leave a paper trail there.*

### Copyright Renewal

Under the 1976 Act, the initial term ran for 28 years with a 28 year renewal. See 17 U.S.C. § 304(a)(2)(B)(ii). Renewal rights belong to the author or proprietor as of the time of expiration.



*Before the 1992 amendment, you had to renew or the work fell into the public domain. After 1992, renewal was automatic for any work published between 1964 and 1977.*

*If that makes any sense.*

*But the key point here is that both "Man's World" and "3Man" were published in 1964.*

In 2001, **Newsome** (not **Clamike** or **Mietus**) renewed copyright in "Man's World." The copyright for the song expired in 1993. **Newsome** said, as the registered author, she was copyright owner from that date, and not 2001.

To add to your confusion, back in 1994, **Warner/Chappell** wrote the Copyright Office asking them to correct "3Man" to include **Newsome** along with **Brown** as authors. **Mietus** did the same. The **Copyright Office** accepted this change. **Newsome** said she knew nothing of this and did not authorize it.

**Brown** et al. moved for summary judgment. They won, and got affirmed on appeal to the 2d Circuit. Let's see why.

### Summary Judgment

As you know, there must be no material question of fact requiring a jury. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

*First, did Brown via "3Man" violate Newsome's copyright on "Man's World?"*

The renewal term of 67 years for "Man's World" vested in **Newsome** in 1993 without regard to the prior assignment to **Clamike**. See 17 U.S.C. §§ 304(a)(2)(B)(ii), 304(a)(3)(B); *P.C. Films Corp. v. MGM/UA Homes Video, Inc.*, 138 F.3d 453, 456-57 (2d Cir. 1998) ("[R]enewal period is not merely an extension of the original copyright term but a new estate ... clear of all rights, interests or licenses granted under the original copyright.")

*Yes, 28 years was extended to 67 by the 1998 copyright extension.*

But "3Man" cannot violate **Newsome's** interest in "Man's World" because **Newsome** is a co-author of "3Man." **James Brown** and his assignee **Warner/Chappell** are out of the action because co-authors can't be liable to each other for infringement. Co-authors can use the work as they wish only having to account for profit shares. See *Thomson v. Larson*, 147 F.3d 195, 199 (2d Cir. 2002).

### Settlement Agreement

**Newsome** claimed she was not a co-author of "3Man" but the sole author. Still, the settlement brought by **Clamike** on her behalf runs on. It does not lapse with the renewal of either song.

*The statement of facts does not tell you*

*continued on page 63*

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*the settlement agreement ran ad infinitum. But you have to assume this based on the 2d Circuit's holding plus the thing was drafted by lawyers and folks in the music publishing biz.*

*It's tricky to see just what Newsome was angling for. An outrageous claim to both songs to bargain down from? A question of fact as to just what went on creatively in that limo?*

Newsome argued that she was not a party to the original suit, did not sign the settlement, and the settlement did not bind her. But Clamike was acting as her agent in bringing and settling the suit, and at all times, she behaved as though this were the case. She admitted to receiving money and accompanying accounting statements. She admitted to knowing she and Brown were credited as co-authors.

Accepting the royalties from "3Man" for over 35 years bars her from disclaiming co-authorship. See *Nat'l Am. Corp. v. Fed. Rep. of Nigeria*, 597 F.2d 314, 323 (2d Cir. 1979) (holding that a principal's acceptance of payments pursuant to a settlement agreement constitutes ratification of the agent's authority to bind the principal).

*Or as they love to say, she is "collaterally estopped" from denying she was a co-author.*

## Questions & Answers — Copyright Column

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**QUESTION:** *As a library in a for-profit educational institution, what rights does the library have concerning reproduction and other exceptions to the Copyright Act?*

**ANSWER:** Many of the exceptions are available only to nonprofit educational institutions. For example, the classroom exception found in section 110(1) and the distance education provision in section 110(2) are restricted to nonprofit institutions. Also, the negotiated *Multiple Copying for Classroom Use Guidelines* and *Educational Uses of Music Guidelines* apply only to nonprofit education. Neither the library exception nor fair use is so limited. Section 108, the library exception, contains criteria that a library or archive must satisfy in order to qualify for the exception, but nonprofit status is not one of them. A library must: (1) receive no direct or indirect commercial advantage from the reproduction of copyrighted works, (2) be open to the public or to researchers conducting specialized research

and (3) copies reproduced under this exception must contain the notice of copyright.

The exceptions for educational institutions, by contrast, are limited to nonprofit educational institutions. This includes the exception for classroom performances and displays and for distance education and online instruction are available only to nonprofit institutions. The reason for this restriction is statutory recognition of nonprofit education as a public good.

Fair use is not limited to nonprofit educational institutions, but it is probably less robust for for-profit institutions. One interesting development is that copyright owners do not appear to charge higher royalties for permissions to for-profit educational institution libraries. Thus, the royalties for electronic reserves, coursepacks, etc., seem to be the same for both types of schools.

**QUESTION:** *The library in an educational institution is familiar with the Videotaping*

*continued on page 64*