Against the Grain

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Cases of Note -- Copyright -- Nashville Squabbles -- Declaratory Judgement

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LEGAL ISSUES

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Legally Speaking — eBooks Price-Fixing Lawsuits Skimming Along

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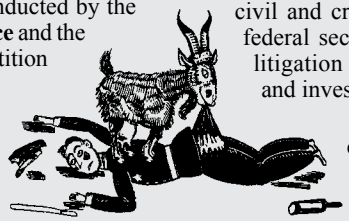
Class action lawsuits on behalf of eBook purchasers are skimming along in federal district court in New York City. The suits — the first of which was filed in August 2011 — claim that several major publishers conspired with **Apple** and **Barnes & Noble** to fix the price of eBooks. At the same time, government investigations of the same claims are being conducted by the **U.S. Department of Justice** and the **European Union's** competition authority.



More than a dozen class action lawsuits have been filed in California and New York by a number of different plaintiffs and their law firms. Plaintiffs in all the actions allege one or more conspiracies to fix prices in the market for electronic books. As set forth in the complaints, plaintiffs are purchasers of electronic books who allege that the defendants engaged in anti-competitive conspiracies in violation of federal antitrust laws and various states' laws, causing consumers to pay inflated prices for electronic books (or eBooks) for use on **Kindles**, **Nooks**, **iPads**, and other portable readers.

The defendants include **HarperCollins Publishers**, a subsidiary of **News Corporation**; **Hachette Book Group**; **Macmillan Publishers**, a sub of **Holtzbrinck Publishers, LLC**; **Penguin Group Inc.**, a subsidiary of **Pearson PLC**; and **Simon & Schuster Inc.**, and **Random House, Inc.**, as well as **Barnes & Noble, Inc.**, and **Apple, Inc.**

In December 2011, the various lawsuits were ordered consolidated before U.S. **Judge Denise Cote** in Manhattan. A former career prosecutor, **Judge Cote** was appointed by **President Clinton** in 1994 and has developed a reputation for efficiently handling complex civil and criminal litigation, including the federal securities and ERISA class-action litigation brought by former employees and investors in **WorldCom**.

In the eBook suits, consumers claim that the publishers feared **Amazon's** low-ball $9.99 pricing model to such a degree that they conspired with **Apple** and each other to force a new pricing model on the book industry which allowed publishers to set prices directly, effectively ending **Amazon's** ability to provide consumer-friendly pricing for eBooks. The new model is known as the "agency model," as opposed to the traditional wholesaler-retailer model.

After the publishers unanimously and simultaneously adopted the new pricing model, the price of eBooks shot up 30 percent, according to the complaint. (Most best-sellers now sell for $12.95 to $15.95.)

In December 2011, the **European Commission** announced that it had opened a price-fixing probe of **Apple** and five major publishers, including France's **Hachette Livre**, German-owned **Macmillan**, U.K. publisher **Penguin**, and U.S.-based **Harper Collins** and **Simon & Schuster**. Two days later, the head of the **U.S. Department of Justice's** Antitrust Division confirmed in Congressional testimony that it was investigating the electronic book industry, along with the **European Commission** and the attorneys general of two states (Texas and Connecticut).

Plaintiffs' counsel in the federal litigation assert that the competitive threat posed by **Amazon** led the publishers to take joint (and illegal) actions in an attempt to avoid the sea change in the delivery of books and maintain profit margins.

One of the recent complaints quotes a statement made by the CEO of **Hatchett Book Group** to *The New Yorker* magazine, "If it's allowed to take hold in the consumer's mind that a book is worth ten bucks, to my mind it's game over for this business." The complaint also quotes **Macmillan's** CEO as claiming that the market was previously "fundamentally unbalanced" but that thanks to the agency model, it would now be "stable and rational."

The lawsuits seek damages for the purchasers of eBooks, an injunction against pricing eBooks with the agency model, and forfeiture of the illegal profits received by the defendants as a result of their anticompetitive conduct, which could total tens of millions of dollars.

Given the high stakes (and the various pending government investigations), this case could last as long as the Google Books case.

Cases of Note — Copyright — Nashville Squabbles – Declaratory Judgment

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Severe Records, LLC; Chris Sevier v. John rich; Shanna Crooks; Muzik Mafia, LLC; John D. Richfella Publishing, UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, 658 F.3d 571; 2011 U.S. App. LEXIS 19430.

It's Tennessee by golly — you know, Nashville? — so you get **Mark Sevier** who is

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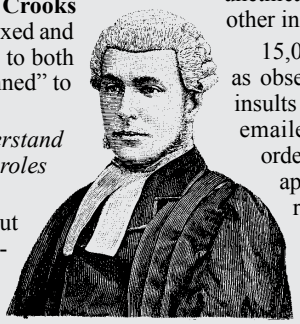
an attorney arguing his own case, a **National Guard Judge Advocate General**, and an owner of **Severe Records**. He has written and produced hundreds of works.

Sevier wrote music and lyrics for "Better," recorded it, and pitched it to big deal recording artists. And **Shanna Crooks** is just such an artist.

And being completely divorced from current pop culture, I had to go to the Web and find she is a hot-looking blonde who sang "Alive" in the *Twilight* series.

Despite being a lawyer, **Sevier** fell into the old oral contract trap and that may very well have launched this whole mess. **Crooks** recorded the song and **Sevier** mixed and edited it. **Sevier** said they were to both hold the copyright, and he "planned" to give her half the royalties.



I mean did they really understand this? And what their respective roles were?

The collaboration worked out so well they did a second recording "Watching Me Leave." **Sevier** wrote the music and the pair wrote the lyrics. **Crooks** peddled the songs to record companies and struck deals with **Rich** of **Richfella Publishing** and **Muzik Mafia**. As part of this, **Crooks** assigned her copyright to **Richfella**.

Meanwhile, **Severe Records** released the songs through **CD Baby's** online store and told **Crooks** he would account to her for her share of sales. Then, like any hasty marriage, they began to squabble.

Rich emailed **Musik Mafia** and other members of the music community, accusing **Sevier** of "illegally selling music." **Musik** then got a lawyer to send a cease-and-desist letter accusing **Sevier** of copyright infringement.

It's an age of email, and soon the emails were flying. **Sevier** said he was a co-author of the songs and had a right to exploit them. And anyhow, **Crooks'** contribution to "Better" was de minimus.

He's a lawyer. They use words like that.

They threatened and sassed each other back and forth, and finally **Rich** taunted **Sevier** to go ahead and sue. Make my day.

Getting ready for that, **Sevier** filed copyright on the two songs in his and **Crooks'** names. **Rich** threatened **CD Baby**, but they wouldn't knuckle under and kept selling the songs. Meanwhile **Crooks** and **Sevier** were spitting at each other. He told her she had "self-entitlement/narcissistic syndrome," and she gave him a "you'll never work in this town again" threat. And **Rich's** accountant chimed in with the same dire warning.

And on it went. More cease-and-desist letters. Accusations of selling bootleg CDs and unauthorized digital downloads. Counter-accusations of defamation, unjust enrichment, quantum meruit, tortious interference with **Sevier's** contract with **CD Baby**. **Muzik** said **Sevier** had no right to **Crooks'** picture on **Severe Records** Website; **Sevier** said fair use. Counter-counter accusations of false endorsement under the ***Lanham Act*** and deceptive business practices under Tennessee law.

Whew. Are you tense and worked up? It goes on.

Sevier switched from **CD Baby** to **IODA** and their licensing agreement with **MySpace** allowed **Sevier** to place digital stores on *MySpace.com* Websites. **Sevier** put a digital store on **Crooks'** Website.

Certainly a nice "in-your-face" move.

Crooks then posted to all her fans that "a guy named **Chris Sevier**" was up to no good, had been up to no good in the past, and the stuff he was doing was "clearly wrong, unethical, and down right dirty." And other insults.

15,000 obsessed fans read this, and as obsessed fans will do, they posted insults and threats against **Sevier**. He emailed **Musik**, **Rich**, and **Crooks** ordering a correction and unqualified apology. And said civil action was right around the corner.

Rich shot back calling **Sevier** a bottom feeder with shady business practices and not one to be trusted by the music giants of the town. And rounded it out with: "Everything about your practices in this town is rather disgusting to us, to be perfectly honest. Keep sending us your humorous emails though, we REALLY enjoy getting those! As always, we wish you the best of luck fighting for your share of the table scraps."

You know, back when you had to write and address a letter and put a stamp on it, insults did not get so frenzied. People would occasionally pause and think about what they were doing.

Any-hoo, **Crooks** told **Apple's iTunes** music store **Sevier** had no right in the songs, and they were removed. Ditto **IODA** removed the songs from all their digital music store connections and cut off the distribution agreement with **Sevier**.

And at last suit was joined. **Sevier** alleged libel, false light, malicious harassment, intentional infliction of emotional distress, interference with contract, and copyright infringement.

Good grief. Emotional distress or "outrage" in legal shorthand requires stress so bad a reasonable person can't sustain it. And behavior completely outside the bounds of civilized behavior. This seems to be business as usual, and everyone had quite a good time email ranting.

But that aside, the copyright claim was the hook that got **Sevier** into the federal court.

Rich et al. moved for dismissal of the copyright claim because (1) **Sevier** failed to allege any acts of infringement, and (2) you can't sue a co-owner of copyright or her licensees.

The district court agreed with this and said as that disposed of the federal matter all the other mess of claims should go to state court.

The Appeal

To protect copyright, the legal owner may bring suit for infringement. ***Fogerty v. MGM Grp. Holdings Corp.***, 379 F.3d 348, 352 (6th Cir. 2004). So the two big questions are who owns it, and did someone copy it? ***Bridgeport Music, Inc. v. UMG Recordings, Inc.***, 585 F.3d 267, 274 (6th Cir. 2009).

There was nothing in the complaint alleging improper copying by **Crooks**. In fact, **Sevier** conceded that no one copied, but rather defendants prevented him from copying. The Sixth Circuit said they "expressly decline" grossly expanding infringement to "any acts that create barriers to a copyright holder's ability to fully exploit that copyright."

Declaratory Judgment

Sevier also asked for a declaratory judgment as to who owned what in the songs.

The ***Declaratory Judgment Act*** provides "the opportunity to clarify rights and dase legal relationships without waiting for an adversary to file suit." ***Fireman's Fund Ins. Co. v. Ignacio***, 860 F.2d 353, 354 (9th Cir. 1988). It's at the court's discretion and not an absolute right of the litigant to be heard in federal court. ***Wilton v. Seven Falls Co.***, 515 U.S. 277, 287 (1995). The district court's refusal to exercise jurisdiction can only be reviewed for abuse of discretion, which is to say the higher court has a real firm conviction that the lower court was wrong. ***Paschal v. Flagstar Bank***, 295 F.3d 565, 576-77 (6th Cir. 2002).

i.e. well, whadda ya think?

Sevier wanted a declaratory judgment identifying the authors of "Watching Me Leave" and declaring **Crooks** not an author of "Better." The district court said **Sevier** and **Crooks** were really fighting over contract rights and not declaration of authorship.

The Sixth Circuit disagreed. **Sevier** brought the action "in reasonable apprehension of litigation" due to all the cease-and-desist letters and the back-and-forth threats. ***Rich et al.*** repeatedly accused **Sevier** of violation of copyright without regard to his assertion of co-authorship. This makes it a federal question to be determined under the ***Copyright Act***.

There is no contract dispute at the heart of the matter. After all the charges of infringement, ***Rich et al.*** cannot say "But we didn't really mean it," upon landing in federal court on a claim of declaration of non-infringement.

Sevier clung to federal court over the question of ownership of the songs.

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Marketing for **Oxford University Press**. **Tricia** is now managing the **Global Institutional Marketing Team** for both journals and online products, which focuses on marketing efforts to key regions and library customers around the world. **Tricia** has over fourteen years of experience marketing academic journals, first at **Duke University Press** and then at **OUP** which she joined in 1999.

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