

Against the Grain

Manuscript 8216

Cases of Note- Copyright - Sea Divers Implied-in-Fact Contract

Bruce Strauch

Bryan M. Carson

Jack Montgomery

Follow this and additional works at: <https://docs.lib.purdue.edu/atg>



Part of the [Library and Information Science Commons](#)

This document has been made available through Purdue e-Pubs, a service of the Purdue University Libraries.
Please contact epubs@purdue.edu for additional information.

Legally Speaking from page 51

lation that would have sent the legislation back to the senate for further debate.

SiriusXM was against the elimination of the U.S. Copyright 801(b) section that allowed courts to set rates when establishing rates for licensing music, which the *1998 Digital Millennium Act* typically allowed lower rates for the satellite radio providers. Furthermore, the company wanted to ensure that the law included a 50-50 split between the artists and the record labels for the pre-1972 recording payments because prior payments from the **SiriusXM** did not include the artists. Finally, the company was concerned about the terrestrial radio royalty agreement that would require the company to provide royalties to music publishers and writers.

After a last minute agreement, **SiriusXM** agreed to the legislation that prevented the bill from returning to the Senate. The 50-50 split payment was easily agreed upon by the artists and publishers, because that was an increase in royalties, as well as the new standards for setting royalty rates. However, **SiriusXM** was not successful in the terrestrial radio issue that closed the AM/FM radio royalty loophole of music recorded prior to 1972, therefore digital music providers will have to pay royalties for music pre-1972.

A significant aspect of the *Music Modernization Act* is the public accessible database, which would be more efficient for academic libraries to locate copyrighted materials and secure music licensing agreements for pa-

trons faster. The database would also provide transparency, as well as convenience. Another aspect of the act, is the new standards in royalty payments that could possibly make some music more affordable and accessible.

An issue with the act has been noted that includes the public accessible database, which is required by the law to provide a database of each copyright owner in order to pay the royalty. This is the mechanical licensing collective system that receives payments, identifies the copyright holders, and distributes royalties to the owners of the rights. The mechanical licensing collective has to create a public accessible database that contains the information of the copyright owner, as well as maintaining the database, which is important to ensure that the database is accurate and the owners receive their royalty payments.

In addition to maintaining the database, the legislation changed once the Senate revised the legislation. The House bill required an independent group to oversee the mechanical licensing collective that would be selected by the U.S. Copyright Office. In addition, the House bill required a group that would consist of members from all stakeholders to evaluate the mechanical licensing collective. Instead, the Senate bill provides an audit every five years, which the information is reported to the mechanical licensing collective board of directors that includes music publishers and songwriters.

Furthermore, the *Music Modernization Act's* pre-1972 recordings are under the Federal regulations, which excludes state laws regarding the fair use, the first sale doctrine, and protections for libraries and educators do apply

explicit, which would avoid any issues that the state law could possibly hinder in music usage.

Overall, the *Music Modernization Act* will benefit the artists, as well as other important people within the industry. The legislation will also provide a foundation for digital music usage in the future. In addition, the U.S. Copyright was enhanced to maintain the changes in the digital era. Hopefully, the mechanical licensing collective system will create a database that will be transparent and better assist libraries that seek music licensing agreements.

Bibliography

Leas, R. "Q&A David Crosby Talks Twitter, Streaming, Kanye, and His New Album *Lighthouse*." *Stereo Gum*. (October 12, 2016): <https://www.stereogum.com/1904725/qa-david-crosby-talks-twitter-streaming-kanye-and-his-new-album-lighthouse/franchises/interview/>

Levine, R. "Allocation for Music Producers (AMP) Act Introduced to Senate." *Billboard*. (March 23, 2018): <https://www.billboard.com/articles/business/8257740/allocation-music-producers-amp-act-introduced-senate>

"Music Modernization Act." *U.S. Congress*. (2018): <https://www.congress.gov/bill/115th/congress/house-bill/5447/related-bills>

"Senate Passes Music Modernization Act." *Variety*. (September 12, 2018): <https://variety.com/2018/music/news/senate-passes-music-modernization-act-1202947518/> 🐦

Cases of Note — Copyright

Sea Divers Implied-in-Fact Contract

Column Editor: **Bruce Strauch** (The Citadel, Emeritus) <bruce.strauch@gmail.com>

MINNIEAR v. TORS. 266 Cal. App. 2d 495; 1968 Cal. App. LEXIS 1536

In the *September ATG*, our edge-of-the-seat exciting column made a glancing reference to "Sea Hunt," the TV show that launched the career of **Lloyd Bridges**. Now our intrepid legal analyst has chosen to delve deeply.

Mid-decade of the 1950s, **Harold Minniear** dreamed up an underwater adventure series for TV. He had been in the picture business as a writer for 22 years.

Minniear brought in **Lamar Boren**, an underwater photographer. They agreed to collaborate in a pilot film. No written contract was ever executed, but **Minniear** was to bring ideas, talent, cast, writers, directors, script, film editor and



artsy stuff. **Boren** would use his technical skills to film the pilot.

Next, **Minniear** hired **Thomas Scott** to edit and cut the film. **Scott** had worked for **Ivan Tors** and **Ziv Television Programs**. **Scott** worked at the **Ziv** lot on his own time. This was known to other **Ziv** employees. And *Sea Divers* was completed.

In 1956, **Minniear** held a showing of the pilot on the **Ziv** lot. **Ivan Tors** was invited. **Tors** was a seasoned producer for **Ziv TV** and at the time was doing a series called *Science Fiction Theatre*.

Tors pronounced the pilot excellent and said he was interested in doing a series on underwater skindivers. "Where do we go from here?" he asked.

Minniear said he had enough ideas for a full season and described one where a jet pilot is trapped underwater.

Producer **Tors** began *Sea Hunt* for **Ziv**. And hired **Boren** for underwater

photography. And tried to hire **Minniear's** leading man as an actor.

This actor's name has vanished from history. Was he being ethical in his refusal? If so, why didn't he warn Minniear?

Not knowing what was going on, **Minniear** was unsuccessfully trying to sell *Sea Divers*. **Boren** announced he wanted nothing more to do with the **Minniear/Boren** project. **Boren** then sold the trapped jet pilot idea to **Ziv** for the first episode of *Sea Hunt*.

Is it a ruthless world or what?

Sea Divers and *Sea Hunt* both feature an ex-Navy frogman named Mike, commissions for dangerous underwater work, and California honeys in bathing attire.

The pilot of *Sea Divers* has Mike hired to find a canister of smuggled diamonds.

Episode one of *Sea Hunt* has the trapped jet pilot.

continued on page 53



PERSONAL
DEDICATED STAFF



VISIBILITY &
CONTROL



1 VENDOR
1 INVOICE

Why Prenax?

We improve your subscription management process



REPORTING



REDUCED COSTS



PRENAX ONLINE

Subscriptions

E-journals, all digital content, magazines & newspapers

Multi-User Licenses

Databases, contracts for multiple users & digital software

Memberships

Professional memberships

Books

Reports, editions, new titles & loose-leaves

Contact us today to learn more at: Sales@Prenax.com or 603-717-0383
www.Prenax.com

Cases of Note from page 52

Another **Ziv** episode of *Sea Hunt* has gold dust recovered from the ocean floor. **Minniear** felt this was stolen. The court found the only similarity was underwater adventure, ex-Navy frogman, and decorative honeys. So not a substantial similarity copyright case.

Yes, **Minniear** sued. Otherwise, we wouldn't be reading this. **Minniear** got a "nonsuit" at the trial court level which led to an appeal.

And surprise! We don't need copyright and that old idea v. expression thing.

Minniear's Legal Theory

Minniear said there was an implied-in-fact contract which was common in the industry. He had shown the pilot, and it was an industry understanding to pay for ideas or material used.

The leading California case on this is *Desny v. Wilder*, 46 Cal.2d 715. Ordinarily, an idea is not protectable under copyright law, but "[i]n the field of entertainment the producer may properly and validly agree that he will pay for the service of conveying to him ideas which are valuable and which he can put to profitable use." *Desny* at p. 738.

"It is not essential to recovery that plaintiff's story or synopsis possess the elements of copyright predictability if the fact of con-

sensual contract can be found." *Desny* at p. 744. This is to say the idea that becomes the subject matter of the contract need not be novel or concrete.

The — I guess — "implied" meeting of the minds is found by the idea man submitting the idea or material with the reasonable expectation of payment and the producer listening to the idea understanding the expectation of payment.

The appellate court agreed there was substantial evidence that **Minniear** expected payment and **Ziv** knew it. Remember **Tors**' "where do we go from here?"

Pilots are made for prospective purchasers. Producer **Tors** was present at the showing and he requested mimeographed (yes it was pre-Xerox) copies of future series ideas. **Ziv** kept the pilot film for over a year.

An underwater adventure series will have unavoidable basic elements. I mean, we have to have bikini beauties after all and underwater spear gun fights. But there were "sufficient plot ideas, themes, sequences and dramatic 'gimmicks'" between *Sea Divers* and *Sea Hunt* for a jury to infer **Minniear's** pilot inspired *Sea Hunt*.

Minniear got his reversal.

But what a can of worms to determine the value of his ideas. I am unable to find whether it was retried or settled and for how much.

Sea Hunt was a four season pop phenomenon. **Larry Hagman, Bruce Dern, Robert**

Conrad, Ted Knight and Leonard Nimoy all guested. **Lloyd's** sons **Beau and Jeff Bridges** had their first roles.

Lloyd Bridges was later asked to play **Captain Kirk** in *Star Trek*, but he declined, giving us **William Shatner**.

Among the scuba crowd, there is a group that likes to use the antiquated scuba gear of the show and reenact scenes at the Silver Springs, Florida locale.

Ivan Tors tried to repeat his success with *Malibu Run*, but it was pitted on Wednesday night against *Wagon Train* and died a hard death after a season.

*But hanging around water filming stories gave **Tors** a brilliant idea — a single-dad wholesome American family with a genius dolphin for a pet. *Flipper* was born. An aquatic *Lassie*. With massive children's merchandising: comic books, song books, coloring books, lunch boxes, puzzles, a board game, water toys, swim trunks.*

*It was such a merchandising bonanza that **Tors** ran with the cutesy animal genre and became a TV legend. *Gentle Ben. Daktari. Zebra in the Kitchen. Clarence the Cross-Eyed Lion. And fizzled as the Baby Boomers outgrew cute animals.**

*But he did the underwater filming for the *James Bond Thunderball*. 🐬*