Proskauer

Three Point Shot

March 2011

Still Teaching the World to Sing, Coca-Cola Scores in Dispute over Spanish Language Version of World Cup Anthem

For generations, Coca Cola Co. has taught the world to sing – and as the company has become an increasingly global brand, those singing do so in a multitude of languages. After the 2010 FIFA World Cup, however, the company faced at least one legal complication related to that strategy when it was taken to court by a Miami-based composer and producer who claimed that Coca-Cola had unlawfully taken his translation of a song and tried to teach it to the Spanish-speaking world.

The composer, Rafael "Rafa" Vergara Hermosilla, didn't claim to have written the song, "Wavin' Flag." The original version, written and performed by Somali-Canadian rapper K'naan (pronounced KAY-non), was chosen as the centerpiece of Coca-Cola's $300 million advertising campaign surrounding the World Cup. As part of the campaign, K'Naan wrote a new verse for the "Coca-Cola Celebration Mix," released in 150 countries, and the company created 12 different duet-versions with local music stars from around the world. For $6,000, Vergara agreed to write a Spanish-language version of the song for Coca-Cola (in conjunction with Universal Music Group, Inc, which was not named in the suit). The dispute arose over whether the agreement entered into with Vergara to write the Spanish-language version properly was a "work for hire" arrangement.

The 1976 Copyright Act defines a "work made for hire," in part, as, "a work specially ordered or commissioned for use as a contribution to a collective work," including "as a translation…if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire." Vergara, however, claimed he never agreed to a work for hire arrangement and never would have contemplated accepting the assignment if he knew it was a work-for-hire. When Universal asked him to sign a document stipulating that his was a work-for-hire contract, he refused, and demanded that for the Spanish version, his name appears next to the composer of the original English version.

Vergara, presumably, had a Coke and a smile in June, when a federal district court in Florida issued a preliminary injunction prohibiting Coca-Cola from distributing the Spanish version of the song without posting a conspicuous notice indicating the composer's contribution to the song. But just as Vergara thought he had put one past the Coca-Cola keeper, the company responded on January 12, filing a renewed motion for summary judgment, stating that discovery made subsequent to the June decision had disproven any of Vergara's claims to copyright.

Coca-Cola argued multiple points: first, the copyright for the original song belonged to Sony-ATV, and while Coca-Cola had permission to create local versions of the song, it was never capable of granting copyright rights to adapters like Vergara. The company also claimed that Vergara had assigned any rights he had to the work, that his translation was "limited, near-verbatim," and, as such, not copyrightable, and that he belatedly asserted his copyright interest as a tactical maneuver, "just as Coca-Cola was about to further rely on its right to use." Finally, the company argued that, as someone who intended to merge his Spanish translation with other copyrightable elements (such as the melody), Vergara could only be a co-owner, and as such, could not sue another co-owner for infringement.

Vergara's attorneys responded on January 27, disputing Coca-Cola's claims and stating that the company's motion, "seeks to re-litigate issues previously decided by the Court, distorts the facts and law to support the positions it advocates and complains of the inequity of a situation Coca-Cola created." However, the district court sided with Coca-Cola. In Hermosilla v. The Coca-Cola Company (S.D.N.Y. Feb. 23, 2011), the court granted Coca-Cola's motion for summary judgment, holding that extrinsic evidence uncovered during post-injunction discovery proved that Vergara had assigned his rights to the song. Vergara could not rely upon the preliminary injunction, the court stated, in the face of later discovery that offered a clearer understanding of the facts of the case.

While Coca-Cola continues to grow its brand through songs in many languages, it may face similar claims under both U.S. law and the laws of other jurisdictions. But this time, at least, it appears that Coca-Cola may keep on singing (and teaching others to do the same).

Show Me the Money – Just Make Sure I Know the Risk

With stadium and arena projects slated to launch in New York, Los Angeles, Atlanta, Minneapolis, Edmonton, and many other cities across North America, sports leagues, teams, and municipalities are increasingly asking banks to "Show Me the Money!" But, as these groups explore financing options for their projects, many will proceed cautiously with an eye toward the remnants of the economic downturn of 2007-08 – and a particular focus on the outcome of In Re Merrill Lynch Auction Rate Securities Litigation.

Before the credit crunch sidelined many stadium and arena projects in 2007-08, the sports industry was experiencing a renaissance in facility development with an estimated 27 major teams and cities planning new construction projects. In the midst of this boom, one of the most iconic stadiums in the United States, the Louisiana Superdome, was planning its own renovation, which it would finance through an arrangement with Merrill Lynch ("Merrill"). Under this arrangement, Merrill helped the owner of the Superdome, Louisiana Stadium & Exposition District ("LSED") raise over $238 million through the issuance of municipal bonds as auction rate securities ("ARS").

ARS are long-term variable-rate debt instruments that are traded at periodic Dutch auctions. At a Dutch auction, buy orders are entered at interest rates selected by the bidder. Once all bids are collected by a broker-deal, in this case Merrill, the interest rate for all orders is set to the lowest rate at which all of the ARS available at the auction can be sold. This system can be advantageous to an issuer such as the Superdome owners, if a competitive market sets a low interest rate on the debt. But there is a corresponding risk: if buy orders are insufficient to purchase all of the securities offered at the auction, the auction is said to have failed, and the interest rate until the next auction rises to the maximum rate (or failure rate), which in the case of the LSED arrangement was approximately 12%.

The LSED-Merrill arrangement was unique in two respects. First, LSED had the option to convert its variable rate payments, as set by the auction, into fixed obligations. Second, Merrill placed "support bids" at every auction to ensure that no auction would fail. While LSED was not aware of Merrill's support bid practice when it initially agreed to the ARS arrangement, it was made aware in 2006 when Merrill disclosed this practice and the associated risks pursuant to an SEC Order.

Despite this disclosure, LSED chose to maintain a variable-rate structure, opting not to exercise its right to convert to a fixed rate structure – a critical play-call that later figured into the court's assessment of LSED's securities fraud claims against Merrill.

In February 2008, a wave of auction failures resulted in the collapse of the ARS market and LSED's ARS went down with everyone else's. Or up, you might say, as LSED's interest rate climbed from 4% to the failure rate of 12%, increasing its debt cost an additional $65,000 per day.

In 2009, LSED filed a lawsuit against Merrill alleging that it was faced with debt-related costs that were much higher than it anticipated when it entered into the financing arrangement in 2005. More specifically, LSED alleged that Merrill stepped out of bounds by not providing adequate disclosures under the arrangement and breaching its fiduciary duty to LSED.

LSED's 2009 lawsuit against Merrill alleged liability for material misstatements and market manipulation under Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934. Both claims require, among other things, that the plaintiff prove that the defendant's alleged misstatements and manipulation were the proximate cause of its injury.

In December 2010, the District Court for the Southern District of New York granted Merrill's motion to dismiss with regard to LSED's federal claims. The court found that because LSED had the option of converting the ARS to fixed-rate instruments after they learned of Merrill's "support bid" practices, LSED "controlled its own destiny" and could have avoided the risks associated with the variable auction rates. The court noted that, despite receiving the disclosures regarding Merrill's support bidding, LSED "was content to pay a lower interest rate while the ARS market functioned as it had all along," but "[u]ltimately, the bet did not pay off." That, the court found, does not amount to securities fraud.

LSED’s state law claims fared better than its federal ones. LSED alleged that under Louisiana law, Merrill breached its fiduciary duty as LSED’s “advisor, underwriter, broker-dealer, and investment banker” to provide “advice and recommendations regarding the optimal structure for their debt restructuring.” The court declined to dismiss these claims, finding that Merrill’s advisory relationship with LSED was a fiduciary one, despite the fact that Merrill’s presentations to LSED contained boilerplate statements disclaiming a fiduciary relationship. Further, the court found that Merrill’s failure to disclose its support bidding practices at the outset of the relationship with LSED provides a sufficient basis for a claim that Merrill violated a fiduciary duty. The court similarly denied Merrill’s motion to dismiss the claims of intentional and negligent misrepresentation based on Merrill’s alleged misrepresentation of the nature of the ARS market and its failure to disclose its support bidding practices at the outset of the transaction.

Finally, the court also denied the motion to dismiss LSED’s fraud claim, finding that “knowingly selling an unwitting client an allegedly more profitable but flawed financial product raises an inference of an intent to obtain an unjust advantage.” The court found that LSED sufficiently alleged that Merrill’s support bidding practice (which LSED did not know about at the outset of its arrangement with Merrill) enhanced the profitability of Merrill’s services. Because LSED alleged damages as a result of Merrill’s support bidding practice, the court found that LSED sufficiently stated a claim for fraud.

The dispute between Merrill Lynch and LSED highlights the fine line between fair and foul in the world of sports finance. From a federal securities law perspective, this dispute shows that an underwriter will not necessarily be held liable for alleged misstatements and manipulation if an issuer does not adequately claim that the alleged misstatements and manipulation *caused* the alleged harm. However, this dispute also shows us that, under state law, the same inadequacy with respect to cause may not prevent an issuer from holding an underwriter liable for the same alleged conduct.

Accused Internet Pirate Sites Hung from the Yardarm

The Internet legal landscape has often been compared to the Wild West, but most recently the high seas may be the more apt comparison. Less than a week before the NFL Super Bowl, the biggest sports television event of the year, the federal Immigration and Customs Enforcement agency ("ICE") struck a blow against the unauthorized display of live sports broadcasts on the Internet, condemning a group of alleged pirate websites to the technological equivalent of the gallows.

Armed with a seizure warrant issued in the Southern District of New York on January 31, 2011, ICE seized the domain names of ten of the most popular websites involved in the unauthorized streaming of live sports and pay-per-view broadcasts. A notice informing visitors of the seizure appeared on each accused website, including Atdhe.net, ChannelSurfing.net, HQ-Streams.com, HQ-Streams.net, FirstRow.net, Ilemi.com, Illemi.com, Illemii.com, Rojadirecta.com and Rojadirecta.org.

The affidavit supporting the seizure warrant alleged that each accused website was subject to forfeiture pursuant to 18 U.S.C. § 2323 as "property used or intended to be used to commit or facilitate the commission of criminal infringement of copyrights in violation of 18 U.S.C. § 2319." Section 2319 incorporates violations of 17 U.S.C. §506(a)(1)(C), which provides for the punishment of any person willfully infringing a copyright, if the infringement involved "the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution."

Each of the accused websites is described as a "linking" site, meaning that the sites collect and catalog links to files on independent third-party websites that contain illegal copies of copyrighted sports broadcasts. Each accused site thus serves as a virtual treasure map for pirated content, organizing the links, usually by sport, event and/or starting time and allowing users to browse content to quickly find broadcasts that would otherwise be difficult to locate through a standard internet search. With one click, a user is able to immediately access the broadcast through an embedded video running live on a stream from the third-party site. During the streaming event, advertisements are displayed adjacent to the video and in many cases a user is required to view a short advertisement prior to accessing the selected video.

The affidavit asserts that in the period from December 11, 2010 to January 29, 2011, ICE agents were able to access copyrighted broadcasts of the NFL, NBA, NHL, Ultimate Fighting Championship and World Wrestling Entertainment, in addition to numerous other sporting events, including soccer, tennis, golf, rugby and darts. Additionally ICE agents found links to live programming on networks such as ESPN, MSNBC, CNBC and Fox News. At no time did any of the accused sites receive authorization to display any such copyrighted broadcasts over the Internet, the affidavit states.

Contrary to the assertions in the seizure warrant, the accused websites claim, by various means, that they are not in violation of copyright law because they do not actually host any videos and all videos accessed through their links can be found by users directly at the third-party host sites. For example, Atdhe.net's terms of service state that (i) its website is "not affiliated nor claim[s] to be affiliated with any of the owners of videos/streams played on our site" and (ii) "[a]ll content is copyright of their respective owners;" and urges all interested parties to "direct all copyright infringement issues to the companies that host these files."

The accused sites' argument is not without precedent, at least internationally. In July of 2009, the accused site Rojadirecta defeated a copyright infringement claim brought against it in Madrid, Spain on this basis. The Madrid District court dismissed the complaint on the grounds that Rojadirecta simply provided links to enable users to watch events, and that the actual infringement occurred in the decoding of encrypted broadcast signals, which Rojadirecta did not do. Further, the court noted that although the site included advertising, no profits were made directly from any infringement.

Despite the domain names seizures, the folks behind the accused websites, who are located outside of the U.S., appear to have simply changed their domain names and continued business as usual. Not long after the seizure, Atdhe.net became Atdhe.me, Rojadirecta moved to Rojadirecta.me, ChannelSurfing.net changed to ChannelSurf.eu and the Ilemi sites became Ilemi.tv. The end result is an ongoing game of "whack-a-site" for sports leagues and U.S. law enforcement, and ICE's seizure, unfortunately, may end up being no more than a harmless shot across the accused pirates' bows.

Editor's Note: Unauthorized streaming of sports events is far from harmless. The cost of sports broadcasting licenses is considerable: In 2010, the NFL received over $3 billion in broadcast rights fees from ESPN, Fox, CBS and NBC, with the NBA taking in over $900 million from ESPN/ABC and TNT for its 2010-11 season. With so much booty at stake, the piracy of live sports broadcasts is a serious issue that threatens the value of these broadcast rights. It remains to be seen whether the pirates will be able to stay one step ahead of the law, pillaging and plundering content at will, but sports fans will be watching – but hopefully not from an unauthorized feed.

Related Professionals

- **Howard Z. Robbins**
  Partner
- **Joseph M. Leccese**
  Chairman Emeritus of the Firm
- **Robert E. Freeman**
  Partner
- **Bradley I. Ruskin**
  Partner
- **Wayne D. Katz**
  Partner