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Book Review [Fatal Subtraction: The Inside Story of Buchwald v. Paramount]

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BOOK REVIEW

Oh, But It Doesn't Have to be that Way

FATAL SUBTRACTION: THE INSIDE STORY OF *BUCHWALD V. PARAMOUNT*. By Pierce O'Donnell and Dennis McDougal. New York, NY: DOUBLEDAY, 1992. Pp. 577 Hardbound. \$25.00.

Reviewed by **Dennis P. Lilly***

This book is an entertaining and very readable account of one of the film industry's most notable recent lawsuits. It is the plaintiffs' story of what happened when world famous, Pulitzer Prize winning journalist Art Buchwald, and his friend, producer Alain Bernheim, sued Paramount over star comic Eddie Murphy's blockbuster film "Coming to America." They claimed that Paramount had based the film on their material and had denied them both the credit and an estimated \$5,000,000 in fixed and contingent compensation they could have earned. These authors are particularly qualified to chronicle the case: Mr. O'Donnell handled the litigation for the plaintiffs, and Mr. McDougal covered the case extensively throughout its course for the Los Angeles Times.

The case took over three years to move from inception in November 1988 to the final trial decision in March 1992. There were more than 13 months of pretrial activity, and then three separate trial phases before Judge Harvey A. Schneider of the Los Angeles County Superior Court. Paramount only recently filed its long-awaited appeal. Interest in the case ran high, both among lawyers and industry insiders and also with the general public. As befits a "Hollywood story" intended for a general readership, the narrative is filled with special appearances by executives, celebrities, and prominent professionals from the film industry, consulting,

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participating in trial preparation, testifying or maneuvering behind the scenes.

I enjoyed reading this book. It not only provides an intriguing insight into the conduct of civil litigation at the highest levels of American business, but also delivers on its promotional promise: to expose "How Hollywood Really Does Business." To that end it is thorough in detailing how the plaintiffs' case developed, and there are extensive discussions of some of the strategy and tactics plaintiffs' team employed.

Unfortunately, Paramount's side is not included, leading to speculation about their thinking as the case progressed. Some of the portraits painted of Paramount executives, employees and representatives are unflattering. But viewing the case through the prism of only one side enhances the drama and suspense, as we await, with the plaintiffs, the punches and counterpunches we can only speculate the Paramount opponents will throw. The book tells a very good story, of Davids standing up to Goliaths, besting them in arduous struggles on legal point after legal point, only to have financial victory snatched from their hands at the very end. This story would have made an excellent novel, and a very good film as well; the themes are certainly not new in fiction or in Hollywood.

However, this case involved real people and companies in a titanic struggle that could have been avoided. And to this point the plaintiffs have not succeeded in their quest to have Hollywood's routine treatment of talent overturned. This litigation has been neither efficient nor effective in achieving the plaintiffs' goals of personal vindication and studio reform. This case so far has consumed enormous amounts of time and money without resolving definitively either the underlying legal or economic issues involved. And the public may continue to believe that the studios routinely and intentionally mistreat their most important human resources, the talent who create the films.

For their part, the studios could avoid most of these lawsuits by modifying current practices somewhat, at no substantial cost to themselves either financially or in terms of ultimate control. The mechanisms are readily apparent in the arrangements other companies use with employees and independent contractors for control of work product and for

contingent compensation. The studios could easily employ comparable approaches.

THE CASE

The narrow subjects of this litigation were the separate contracts plaintiffs entered into with Paramount in 1983. Art Buchwald had written a treatment for a film about the adventures of an African prince who finds himself lost in the United States; Alain Bernheim, his friend of many years, had agreed to produce if a film were developed from this treatment. Each entered into a written contract with Paramount providing for credit and compensation if Paramount chose to develop a film "based upon" Art Buchwald's material. Under the contracts, each would be paid a fixed amount and each would also have a "net profits participation," promising them a share in the film's "net profits," as defined in the contract, if there were any.

After working with the material for some time and spending several hundred thousand dollars on it, Paramount apparently dropped the project. The plaintiffs then took the idea to other studios. Warner Brothers showed an interest, but dropped the project when it was learned that Paramount was developing a similar film for Eddie Murphy. Thus it appeared that there would be no film made from the Buchwald/Bernheim material.

Then in the summer of 1988 Paramount released the very successful "Coming to America," starring Eddie Murphy, a comedian heavily courted by, and under contract to, Paramount. The film recounted the adventures of an African prince lost in America, but gave neither credit nor compensation to either Mr. Buchwald or Mr. Bernheim. They were incensed; they believed that Paramount had in fact based the film on their submission, and that they had been improperly left out. After some maneuverings, including difficulties in finding an appropriate lawyer who was willing to risk the wrath of the studios by prosecuting the case, the plaintiffs came to Mr. O'Donnell and his firm, and the lawsuit chronicled in this book followed.

At its basic level, this case dealt with the way the large studios treat creative talent. Plaintiffs' situations are portrayed as typical in the business, examples of the routine abuse of creative talent, especially writers. First, the stu-

dios—so goes the perception—obtain access to the writer's material; here Paramount obtained access by way of the contracts with plaintiffs. Then the studio will deny having used the material. If forced to acknowledge use, the studio will try to minimize the writer's pay by forcing him or her (except at the very top or bottom layers of the talent pyramid) to agree to contingent compensation provisions, the "net profits" participation, which effectively preclude any such compensation in almost all situations. Thus the creative people believe themselves exploited, underpaid, and manipulated.

The authors report that the plaintiffs and their lawyers viewed this case as a crusade against the monolithic Hollywood studios, especially after Paramount took a hard line in negotiations. If there were a settlement, it would have to be public. If a lawsuit was needed, that battle would be waged on behalf of the entire Hollywood creative community. The idea seems to have been that clear legal rulings on when a studio has used material, coupled with a very substantial money judgment, would force Paramount and the other studios to change their ways of dealing with creative talent.¹ Both sides geared up for a titanic campaign, to be conducted not only in and about the courtroom, but also by way of private meetings and contacts and through the media which eagerly covered the unfolding drama.

Unfortunately for the plaintiffs, the case has not, as yet, turned out their way. Whatever the promise of the case may have been at inception, Judge Schneider's decisions did not overturn the established industry practices in fundamental ways, and they could make it harder for future claimants to mount successful challenges.² Unless the pending appeal

1. What were not attacked in this case were the general accounting principles and standards used in film industry accounting. These include often subjective estimates and allocations of revenues and costs, for individual films and for packages of films. It is therefore difficult to analyze any financial information released by film companies, even when prepared and presented fully in conformity with generally accepted accounting principles as applied in this industry. In addition, all the companies view the specific results of specific films to be highly confidential. In fact, Paramount abandoned part of its defense in this case when an audit by an outsider of some of its specific financial results was about to be ordered.

2. See Dan Cox, "*Batman' Case May Sting Suits*," DAILY VARIETY, Jan. 26, 1994, at 3. However, on September 26, 1994 a Los Angeles state court jury returned a verdict of \$7,300,000 for a screenwriter who contended that MCA had improperly used his screenplay in creating the TV hit show "Northern Exposure." See John Horn, *Concept for TV's "Exposure" Stolen*, L.A. Jury Rules,

makes some major changes, this book can still be looked upon as an accurate description of "How Hollywood Really Does Business."

LIMITATIONS ON THE CASE'S IMPACT

At the outset this case appeared to have the potential to seriously upset long standing, staunchly defended studio practices. The plaintiffs were ideal. The issues were clear. Plaintiffs had contracts with Paramount. Paramount's film "Coming to America" had clearly produced millions of dollars for the studio, and the plaintiffs had received none. Yet even from the beginning, beneath these appearances the case had only limited potential to alter fundamentally the industry's treatment of most writers. And the court's decisions further limited the case's impact on the studios, and thus the creative talent who must deal with them.

Art Buchwald was certainly one of the writers best able to take on the studios. He was already world famous, very visible; any complaints he made would receive wide publicity. In addition, he did not need to write for Hollywood for a living. His position of independence and influence is very different from that of the usual writer: he could afford a campaign on principle which those who depended on future writing assignments from the studios could not.

Mr. Buchwald's situation was unusual in one other respect. Despite his fame and renown as a writer, he had no successful track record of writing for films. Accordingly, his contract was more or less the standard form for a neophyte writer, with the addition of the contingent compensation "net profits" provisions. Established writers for Hollywood might command stronger, improved contractual provisions which could have obviated the complaints raised in this case.

At the same time the simple fact that these plaintiffs had written contracts at all limited the potential impact of this crusade. Most writers claiming studio misuse of their material do not. Since the case turned on the interpretation of a contract, it is not, and could not have been, immediately helpful to all those writers who submit materials without a preexisting written agreement. In fact it may now have become

S.J. MERCURY, Sep. 27, 1994, at A1. On the surface both cases appear similar to the Buchwald litigation. Perhaps a jury would have been more generous to Mr. Buchwald and Mr. Bernheim than Judge Schneider turned out to be.

harder for a writer who does not have a well known agent or attorney to get any studio review of his or her work.³

In another respect, the court limited the case's impact by restricting the potential recovery a plaintiff can expect in this type of suit. Judge Schneider declined to entertain assertions of breach of fiduciary duty or tort theories which might have supported exemplary damages. Moreover, in determining the damages to be awarded, the court focused on what comparable people in comparable situations might have earned for their work. Thus the plaintiffs were awarded a total of \$900,000, when, according to the authors, over \$2,000,000 in costs and the value of legal services had been accrued by the plaintiffs' side through the trial level. With the appeal now in process, the case is still far from over.

THE FIRST ISSUE: "BASED UPON"

In this phase of the case the court first held the contracts valid and enforceable. Thus the plaintiffs could recover under their contracts if Paramount's film were "based upon" their submissions. But the contracts contained no definition for "based upon," leaving the court adrift to determine the meaning of the term as used in these contracts.

Judge Schneider sought to establish what the custom and usage of the industry might be with respect to what the term meant in contracts like these. But after listening to the several experts presented by both sides, he concluded there was no established industry custom and usage for the term. He then determined that the proper source for an analytical framework or legal standard in this case would be the federal copyright rules for determining when a copyright infringement has taken place. Applying that framework, focusing on the defendant's access to plaintiffs' work and the degree of similarity between the two works, the judge concluded that "Coming to America" was in fact "based upon" Mr. Buchwald's work.

Regardless of whether the court's use of federal copyright law analogues was appropriate, under that standard or any other available standard the court would have to conduct a detailed inquiry into the particular facts and circumstances

3. See Marcus, *Buchwald v. Paramount Pictures Corp. and the Future of Net Profit*, 9 CARDOZO ARTS & ENT. L.J. 545, 555 n.65 (1991).

presented. The parties will necessarily have to engage in extensive and expensive fact investigation, development and presentation. While that may be true of many other cases as well, the result of this pretrial and trial work will remain unpredictable under the inherently amorphous available standards. Future plaintiffs could well be discouraged by this scenario, and conversely studio defendants could be encouraged to take a hard line in defending these cases.

The obvious solution for most of these situations would be to define, clearly and in advance, when a film will be deemed "based upon" preexisting material. When a writer has a contract with the studio, as in the present case, the contract should contain a full definition. If a dispute arose the court would be interpreting very different contract language than the skimpy "based upon" language standing alone. For writers who do not have the protection of a preexisting written contract, a studio's publication of standards for "based upon" would identify its practices on the issue if not the practices of the broader industry. One might hope that if one studio moved to clarify its usage, the others would not be far behind. The Writers Guild, representing writers, could also seek better practices and language from the studios in this area. Even though the studios seem to win most of these disputes,⁴ a good-faith attempt to amplify, standardize and publicize their practices here can only improve the writers' present perception of the studios.

THE SECOND ISSUE: NET PROFITS

After ruling in Phase 1 of the case that "Coming to America" was based upon Mr. Buchwald's work, the court turned to the determination of the damages to be awarded to plaintiffs for Paramount's breach of contract. Under the contracts, if Paramount used Mr. Buchwald's material it was obliged to compensate him and Mr. Bernheim. The fixed compensation was small, but the contract also provided for contingent compensation in the form of a "net profits" participation. Whether the plaintiffs would actually receive any contingent compensation would depend on a calculation of "net profits," a term defined at great length and in great detail in the contract. Regardless of the actual financial results

4. *Id.* at 555-57.

of the film, plaintiffs would be entitled to contingent compensation only if the contractual calculation produced a positive amount.

Participations of any kind can lower the up-front costs of film production for the studios by deferring part of the agreed cost for talent until the film produces revenues. They may also act as incentives for the participants to perform at exceptional levels in the film, or to advance some other interest of the studio and the participant. They may take the form of gross participations, becoming due and payable from early dollars earned by the film; Eddie Murphy and the director, John Landis, had gross participations in "Coming to America." Mr. Buchwald's and Mr. Bernheim's participation were net profits participations, which are payable from virtually the last receipts from the film. Gradations along the way from first gross to residual net profits are limited only by the negotiating clout of the individual involved and the ingenuity of the negotiators. Few can command any type of gross participation. More, but still relatively few, can command even a net profits participation. The likelihood of any payout from a participation, assuming a successful picture, depends on how far down the way from first gross to residual net profits the participant is, how many others are ahead of that particular participant and what their particular participations are. When a participant is in the plaintiffs' position, with an expensive film, expensive marketing costs, and several sizable gross participations ahead of them, it is unlikely that even a major blockbuster film will generate net profits under the contractual definition. This phenomenon may have caused Eddie Murphy to refer to net profits participations as "monkey points," and permitted Paramount to assert that "Coming To America," with total revenues of more than \$300,000,000, still had not generated any "net profits" for Mr. Buchwald and Mr. Bernheim.

Thus, having succeeded in upholding the applicability of the contracts in Phase 1 of the case, the plaintiffs now had to overcome some of the terms of their contracts or step outside the contractual language if they were to obtain any contingent compensation. To that end Mr. O'Donnell then mounted what proved to be a successful attack on the net profits provisions themselves, arguing that they were unconscionable. Judge Schneider agreed, but only in part. He ruled that sev-

eral specific provisions in the net profits definitions were unconscionable. However, he did not void the provisions as a whole, or rule that the entire concept of contingent compensation by way of a contractually defined net profits approach was unconscionable. Moreover, he left the burden of proof with respect to each specific provision on the plaintiffs. Thus, in the final analysis Judge Schneider merely set aside specific aspects of the calculation which plaintiffs could persuade him were inappropriate. And even with these changes, it was by no means certain that the calculation would produce any amounts for the plaintiffs.

As it turned out, in determining the actual amounts to be awarded as damages for the plaintiffs, Judge Schneider chose not to engage in an attempted calculation under the contracts. Rather, he determined what would be fair compensation for the plaintiffs based on probable payouts to similarly situated people for similar films: a mere \$150,000 for Mr. Buchwald and \$750,000 for Mr. Bernheim. In part this reflected the court's perception that a windfall, totally out of proportion to the actual contributions of the plaintiffs to the finished film, should be avoided. In fact neither Mr. Buchwald nor Mr. Bernheim had done any additional direct work on the production of "Coming To America."

These results can hardly encourage future net profits participants to pursue litigation to the point of a court decision. Assuming an affirmance on appeal, the studios can continue to insist on their net profits provisions, with some modifications to address the specific problems Judge Schneider found, and can expect courts to approve and enforce them in future cases. The changes required by the court would not necessarily alter the reality that the basic structure of the "net profits" calculation in the contracts usually will not produce any amount for the "net profits" participants. At the least the studios might expect subsequent courts to agree with Judge Schneider that only an amount constituting a "reasonable" level of compensation should be awarded to those who do not actually work on the finished film.⁵

5. Opting for a jury trial could make a major difference. *See supra* note 2 and accompanying text. Plaintiffs in the Buchwald case chose not to have a jury trial, based on their evaluation of Judge Schneider's sophistication about film industry practices and on their perception that Eddie Murphy could have had a devastating influence on a jury.

These results are unfortunate, because the case could have produced a very healthy reexamination of the studios' approach to talent compensation. There is no need for an arrangement that engenders suspicion and mistrust of the studios, when simple, straightforward alternatives for executive compensation and participation are readily available in many other industries. In fact, the studios could start by looking at the incentive contracts they provide for some of their own executives. It should be easy to develop standard arrangements which would trigger incentive compensation amounts of negotiated size upon the occurrence of external, objectively determinable events, as in many other industries. These do not have to involve any proprietary revelations or disclosures by the studios of actual financial results: while not ideal, the publicly reported U.S. theatrical box office figures could be used as a starting point in a formula to derive a series of amounts to serve as triggers. The ingenuity that created and defends the current "net profits" complexity should be able to identify appropriate alternatives without much trouble.

Even the term "net profits" is unnecessarily obtuse. It should be changed, as, apparently, some studios have already done. The term suggests a participation in the film's actual financial results, perhaps even as determined under generally accepted accounting principles. That would be appropriate for financial investors in the film, but misrepresents the intent of the provisions when used currently to provide additional, contingent compensation to talent who are already receiving payment for their personal services on the film. Financial, equity investors receive a return from the film for taking on the risk of loss in providing funding which may not be returned; theirs is an investment function, and their return should be based, more or less, on the actual performance of the film.⁶ Creative talent, on the other hand, do not bear a

6. The publicly syndicated limited partnership film investment arrangements used in the 1980s provide examples of returns to investors being dependent on the results of the specific films involved. On one level the return to investors included amounts calculated from "net profits" as defined in the investment documents. The structure of those definitions was similar to the provisions of the talent contracts, but the function was clearly different, and the provisions were often supplemented so that the investors had alternative sources for a financial return on their investments. Still, those investors could believe that their definitions of "net profits" were also artificial, and distorted in favor of the studios. But they presumably were advised by counsel on the meaning of the provisions and the potential payout, and presumably had a

financial risk of loss: they have been paid for their services, and any contingent compensation represents a bonus for their work when the film happens to be unusually successful. In the case of talent, these provisions merely determine the timing and amount, if any, of the contingent compensation for work already done; they do not represent a return on a financial investment. It can thus be argued that talent with "net profits" participations should only receive amounts when all of the financial investors and others with greater clout have been fully covered. Obviously, there may be some calculation of a trade-off if a person agrees to a smaller fixed fee in exchange for a participation. But, since it is well known that "net profits" participations rarely pay off, the creative person should give up very little, if anything, in fixed compensation when offered such a participation. In any event, talent contingent compensation provisions should not be cast in terms specifically appropriate for an actual equity investment in the film.

CONCLUDING THOUGHTS

According to the authors, only after plaintiffs won the first phase of the court case, i.e. when the court held that "Coming to America" was in fact "based upon" their work, did anyone actually attempt to quantify precisely the plaintiffs' potential net profits compensation. At that point the authors profess surprise at the realization that the calculation provided in the contracts' would probably never produce any net profits for the plaintiffs, regardless of the ultimate revenues from the film. As indicated above, that conclusion should not have been a surprise. It was widely understood throughout the industry that very few films could ever produce net profits for the participants under the standard contractual definitions. These provisions had been the subject of articles, seminars and forums for years, within and outside the film business.⁷

choice of investing or not. Creative talent who are dependent on the studios for employment may believe they do not have that choice, whether or not they have access to professional counsel.

7. See Kenneth Ziffren and Richard Zimbert, *Motion Picture Participations, Syllabus on Participations in the Motion Picture, Television and Music Industries*, Entertainment Law Institute Twenty-Seventh Annual Program, 10-394 (1981); Leon Brachman and David Nochimson, *Contingent Compensation for Theatrical Motion Pictures*, Entertainment Law Institute Thirty-First An-

Rather, what is surprising in this scenario is that no one on the plaintiffs' side would have evaluated the potential payoff under the contracts long before embarking on the litigation and the extensive (and expensive) pretrial work it entailed. Exact figures might not have been possible prior to some disclosures by Paramount. Nonetheless, estimates at various revenue levels should have been feasible for the potential return to net profits participants in plaintiffs' positions in a film with these characteristics, i.e. a high budget, top level talent with gross participation deals, and very wide, very expensive theatrical distribution. It is curious that a thorough investigation of potential payoff did not precede the decisions to commence the lawsuit. But it certainly produced a more exciting and dramatic story.

For me there is a degree of sadness in reading this otherwise entertaining account of a titanic legal contest. At face value, Mr. Buchwald undertook this litigation as a matter of principle, to vindicate his rights to credit and compensation for making a contribution to "Coming to America." Plaintiffs and their team fought the good fight against a mighty adversary. They won their legal victories. But if this decision stands on appeal, they have lost an enormous amount in economic terms. And they have failed to overturn the standard practices of the studios, either with respect to their basic treatment of writers and others seeking to have their material considered, or with respect to the usual contingent compensation, the net profits participation, for talent who are able to get any provision at all in their contracts. It's unfortunate if the first thorough court examination of these practices in many years results in simply more business as usual, because "how Hollywood really does business" in these respects is neither a good way nor a necessary way to run this business.