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ENTERTAINMENT ALERT

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***The Sopranos* Litigation Makes The Case For Following Best Practices**

The final episode of the hit television series *The Sopranos* aired in June, 2007. The final episode of a five year court battle over the creation and profits of the series, however, didn't play out until just before this past Christmas.¹ Could this costly and distracting litigation have been avoided? Maybe . . . if the show's creator, David Chase, had followed best practices in film and television development.

The Facts

In June, 1995, Robert Baer, a lawyer and aspiring writer, succeeded in getting a meeting with David Chase, who was already an established TV writer/producer. Over lunch at The Ivy², Baer, a former prior county prosecutor in New Jersey, very generally pitched Chase about using the New Jersey mob world as the setting for movies and TV shows.

Prior to the meeting, Chase, himself a New Jersey native, had considered projects that used New Jersey organized crime elements, including a story about a mob boss in therapy. Not long after the meeting with Baer, Chase pitched this story to a TV network, which quickly committed to what would become *The Sopranos*.

Soon thereafter, Chase made a research trip to New Jersey which included meetings set up by Baer, to which Baer accompanied him. For example, Chase met with a police detective, who took him on a tour of mob landmarks, as well as a waiter from an Italian restaurant, one "Tony Spirito,"³ who recounted stories of loan sharking, power struggles and such colorful mobsters as "Big Pussy" and "Little Pussy" Russo.

Chase offered to pay Baer for his trouble, but Baer refused immediate payment. Instead, Baer testified, he told Chase, "It's a long shot this thing ever goes anywhere . . . [I]f it ever does, then you take care of me . . .," to which Chase allegedly said, "Fine."

¹ And it could yet be appealed. Stay tuned . . .

² The court, citing to the Defendant's Rule 56 Statement of Uncontroverted Material Facts, referred to the restaurant as "The Ivy, in Santa Monica, California." The Santa Monica branch of The Ivy, however, is more properly known as "Ivy At The Shore," while the simple "The Ivy" is reserved for the original on N. Robertson in West Hollywood, which continues to be an entertainment industry power spot.

³ Similar to Tony Soprano?

The Sopranos, which initially aired in 1999, went on to great success⁴, elevating Chase's stature in the industry as well as his writer and producer fees. Chase never paid Baer, however; nor did Baer's ship rise with the tide.

The Lawsuit

In 2002, Baer sued Chase in New Jersey Federal District Court, seeking compensatory, consequential and punitive damages on (as later amended) ten counts: breach of express contract, breach of implied contract, common law fraud, equitable fraud, negligent misrepresentation, breach of fiduciary duty, state and federal unfair competition, interference with economic advantage, and unjust enrichment. All counts other than unjust enrichment were eventually dismissed before trial. On December 21, 2007, an eight person jury, after deliberating little more than an hour, decided that Chase owed Baer nothing.

At the end of the day, it was a total victory for Chase, but also a total annoyance.⁵ With the luxury of hindsight, what Chase might have done differently?

Best Practices

The best practice in film and television project development is to have a comprehensive written agreement with every "creative worker," meaning anyone who touches on artistic aspects of a project. This includes not only the writer, the film editor, production designer, and cinematographer, but also any location scout, researcher or consultant, functions that Baer in part performed.

A first priority for a creator in Chase's shoes should be to obtain written acknowledgment of the "work-for-hire" status of each creative worker. "Work-for-hire" is a principle of U.S. copyright law which, in particular circumstances, treats the moving force behind a creative work as its author and owner for copyright purposes. In many instances, this means that a corporate employer will be deemed to be the author and owner, and not necessarily the creative workers who have contributed expressive labor. If Copyright Act formalities are observed, work-for-hire can apply to a creative worker who is not an employee in the traditional sense.

Next, the creator of a movie or TV series will want assurance that, except as specifically agreed in writing, the creative worker will not claim a right to payment, attribution (in the form of screen or other credit), or creative or business control with respect to the project. And the creator will also want assurance that, in the event of a dispute, the creative worker will not seek an injunction against production or exploitation of the work, but rather will be limited to a damages remedy.

An employer has ready opportunities to obtain these assurances prior to, and as a condition of, payment to the creative worker. The same opportunities may not be present, however, where payment terms have not been worked out or payment is conditional. Nevertheless, if it is not practical to present formal documentation to a prospective worker before commencing substantial efforts, then the employer, together with counsel, should develop a strategy to protect the employer's ownership.

In a California decision denying a creative worker's claim to part ownership of a motion picture, the court warned about the risk of "claimjumping" by "research assistants, editors, and former spouses, lovers and

⁴ Another success in 1999 was *Analyze This*, an unrelated "mob boss in therapy" motion picture starring Robert De Niro and Billy Crystal. The organized crime genre plainly was undergoing an identity crisis, exacerbated, perhaps, by the end of the millennium.

⁵ According to a report distributed by World Entertainment News Network, Chase said after the verdict, "This was like a fly buzzing in my bathroom for seven years and we finally swatted it. (Baer) tried to be a writer, and he failed, and he took it out on me." See <http://pro.imdb.com/news/wenn/2007-12-21#celeb6>

friends” against “authors who [simply] talked with people about what they were doing.”⁶ While there is no magic bullet against such claims, creators, including corporate employers, need to be mindful of the risks and, wherever practical, take precautions. It can be awkward securing advance written clearance from a casual source, much less a former prosecutor. But just ask David Chase what may happen if you don’t.

For more information on this Alert or any other entertainment or business matter, contact Ezra Doner, (212) 592-1412, edoner@herrick.com, or your usual Herrick contact.

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⁶ *Aalmuhammed v. Lee*, 202 F.3d 1227 (9th Cir. 2000)