Loyola of Los Angeles
Entertainment Law Review

Volume 7 | Number 1 Article 9

1-1-1987

Copyright Infringement: Copyright Violations in a Catholic Archdiocese-The Signs of the Father's

Anthony Colannino

COPYRIGHT INFRINGEMENT: COPYRIGHT VIOLATIONS IN A CATHOLIC ARCHDIOCESE— "THE SINS OF THE FATHERS"

While music may be an ethereal food for the soul, as Bach maintained, like its mundane counterpart it is also a commodity to be bought and sold. And for many churches and synagogues which must apportion ever inadequate financial resources to "more practical" considerations, it has also become a source of temptation. With the proliferation of inexpensive plain-paper copiers, the need to purchase legitimate copies of music from the publisher has been reduced to a minimum. This, combined with an unconscious risk/utility analysis of the practice of illicit copying, may influence the attitudes of otherwise law abiding pastors. Modern technology has come to the clerics as an Eve to her Adam.

In the long run, however, it is often the case that no one wins when the law is violated. *F.E.L. Publications v. Catholic Bishop of Chicago*,[1] is a case in point. In *F.E.L.* the plaintiff music publisher attempted to recover damages for numerous copyright violations and tortious contractual interference from the Catholic Bishop of the Archdiocese of Chicago. The ensuing litigation has spanned ten years, six court contests and three denials of certiorari by the United States Supreme Court.[2] For its troubles, plaintiff F.E.L. Publishers Ltd. ("FEL"), has merely obtained a $190,400 copyright violation award and an as yet unresolved amount of damages for its contractual interference claims. The Catholic Bishop's sole consolation has been intimate access to a group of men and women keenly in need of his particular expertise.[3]

In this recent battle, the Seventh Circuit Court of Appeals split its opinion into two sections, one dealing with the copyright infringement award under section 101(b) of the 1909 Copyright Act[4] (the "1909 Act")

---

1. 754 F.2d 216 (7th Cir. 1985).

2. The previous court cases, in chronological order and excluding the present case, are as follows: F.E.L. Publications v. Catholic Bishop of Chicago, 214 U.S.P.Q. (BNA) 409 (7th Cir. 1982), *cert. den.*, 459 U.S. 859 (1982); F.E.L. Publications v. Catholic Bishop of Chicago, 739 F.2d 284 (7th Cir. 1984), *cert. den.*, 106 S. Ct. 11 (1985); *cert. den.*, 106 S. Ct. 79 (1985); F.E.L. Publications v. Catholic Bishop of Chicago, No. 76 C 3471 (N.D. Ill. May 8, 1986); F.E.L. Publications v. Catholic Bishops of Chicago, No. 76 C 3471 (N.D. Ill. Aug. 5, 1986); F.E.L. Publications v. Catholic Bishop, No. 76 C 3471 (N.D. Ill. Aug. 7, 1986).

3. This reference, of course, is to those whose profession is the law.

4. The 1909 Act was repealed by Pub. L. No. 94-553, Title I, § 101, Oct. 19, 1976, 90 Stat. 2541 (codified at 17 U.S.C. § 101). However, § 112 of Pub. L. No. 94-553 mandates that all causes of actions involving copyrights which arose prior to January 1, 1978 shall be gov-

and the other concerning the tortious interference award decided under Illinois state law. The appellate court found that the United States District Court for the Northern District of Illinois had properly exercised its discretion in refusing to grant plaintiff statutory damages in lieu of actual damages for the copyright infringement claim, but that it had incorrectly allowed the jury to consider the Catholic Bishop's conduct toward the parishes within the Chicago Archdiocese in reaching its verdict on the tortious interference claim.[5]

I. STATEMENT OF FACTS

FEL is a large publisher of religious music. From 1965 until 1976, it sold song-sheets and hymnals directly to parishes constituting the Catholic Archdiocese of Chicago. In addition, prior to November of 1972, FEL sold licenses to the parishes which allowed them the right to copy FEL songs on a two cents per-song/per-copy basis. These parishes in turn bound copies of the songs into hymnals which were custom made for each parish. Because of FEL's perceptions of large-scale unauthorized copying within the parishes of the Archdiocese of Chicago, it instituted a licensing scheme in November of 1972. This scheme allowed the parishes to make unlimited copies of FEL songs for an annual fee of $100. In addition, FEL offered the parishes a one time "Prior Copying Release" for a fee of $500. This release would forgive the parishes for all claims of past copyright infringement.[6] FEL also provided many other

---

erned by the 1909 Act. Because the claims sued upon by FEL occurred prior to September of 1976, the 1909 Act represents the applicable law.

5. *F.E.L.*, 754 F.2d at 217.

6. The "Prior Copying Release" provided for the payment of the $500 one time fee in compensation for all past violations of FEL's copyrights. Pertinent parts of FEL's licensing scheme are reprinted below:

> 4. PERFORMANCE RIGHTS. F.E.L. grants to USER the right to perform the music and/or text at not-for-profit performances for purposes of worship and/or classroom use (including related C.C.D., Christian Education, and Sunday School classes) at USER's premises identified below at Article 18. All public performances for profit are to be cleared through F.E.L.'s performance rights organization: A.S.C.A.P., One Lincoln Plaza, New York, N.Y. 10023.
>
> 5. MINISTRY EXCEPTION. USER agrees to confine use of the copies to USER's premises as identified below at Article 18, with the occasional exception of homes, lecture rooms, and other places where the agent of USER might need copies in the performance of the agent's ministry, music, or teaching profession in the service of USER. This exception is not intended to be a "free continuing" License for places the agent of USER might visit (other churches, retreat houses, and schools not on contiguous premises) but is designed only for the convenience of the agent of USER at times when the agent is presented in the service of USER on premises other than those identified below at Article 18. This is not a License for a group of churches, for a diocese, for conventions, for national, international, or other territorial organizations, etc., but only for a specific church, and/or school, or institution, or local chapter of an organization.

licensing schemes of which the parishes could avail themselves.[7]

Believing that most or all of the parishes were continuing to illegally copy its musical materials even after the introduction of its licensing scheme, FEL filed suit in September of 1976 for past and continuing copyright infringements. During the litigation, the Catholic Bishop was granted leave by the trial court to collect all FEL materials contained within his parishes and deliver them to a warehouse under the control of FEL. Thereafter, the Chancery Office of the Catholic Bishop sent two letters to each of the parishes within the Archdiocese. These letters directed each parish to collect all FEL materials, including unauthorized copies, and deliver them to the Catholic Bishop for ultimate delivery to FEL. Each letter also advised the parishes that FEL materials were not to be used in any way until the litigation had been resolved. Copies of these letters were also sent to many of the bishops and archbishops throughout the United States.[8] Apparently concerned that distribution of these letters had harmed its business, FEL subsequently amended its complaint to allege tortious interference of its business relationships both within the parishes constituting the Archdiocese of Chicago and nationwide.

Unable to resolve their conflict, FEL and the Catholic Bishop proceeded to trial in the United States District Court for the Northern Dis-

---

. . .

8. EXPIRATION. Upon the expiration of this License, and its non-renewal, all rights granted herein shall cease and terminate. If this License is not renewed, then USER agrees to destroy all copies licensed herein and to notify F.E.L. with a signed letter within 10 days after the expiration of this License specifying that copies were destroyed.

. . .

14. COPIES MAY NOT BE SOLD. USER agrees not to sell the copies. Separate charges and licenses are required to permit copies to be sold to the congregation or others when allowed by F.E.L. USER further agrees not to sell, lend, or otherwise dispose of the copies at any church, school, entity, or person other than those persons in the service of USER (agents) necessary to permit USER to carry out the uses licensed herein. This is not a license for publishers, businesses, or not-for-profit organizations who wish to sell products including F.E.L. copyrighted music and/or texts, even at nominal charges.

15. SONGS MAY NOT BE RECORDED OR TAPED. USER agrees not to record, tape, or use as soundtracks for film-strips or motion pictures, or sound reproduce in any manner the music and/or texts licensed herein. Separate charges and licenses are required.

7. In addition to the annual licensing scheme, FEL provided "One Time Licensing" schemes, printed hymnals (priced as low as nineteen cents per copy), sheet music and congregation cards.

8. It is unclear whether the Chancery Office sent the letters or whether these letters found their way to the other archdioceses by way of the parishes. As will be discussed *infra*, at note 35 and accompanying text, however, who sent the letters is unimportant since the Catholic Bishop remained responsible for the acts of his parishes, just as if he were the principal actor.

trict of Illinois.[9] At trial, the Catholic Bishop admitted liability for the copyright infringement. FEL then requested from the court actual damages for the copyright infringement based upon its licensing scheme[10] and actual damages and punitive damages for the tortious interference claim. The jury returned an award of $190,400 based upon FEL's scheme for the infringement, and $2 million in actual damages and $1 million in punitive damages for the tortious interference claim.[11] However, in its award the jury failed to differentiate between those tort damages which were awarded due to the interference with the Chicago parishes, and those which were granted as compensation for interference with all other parishes.

Apparently disturbed that the jury decided to use FEL's own proposed formula in calculating the copyright infringement award, FEL filed a post judgment motion for a grant of statutory damages in lieu of actual damages, as provided by section 101(b) of the 1909 Act.[12] The Catholic Bishop responded by moving for a judgment notwithstanding the verdict relative to the tortious interference claim.[13]

---

9. *See* F.E.L. Publications v. Catholic Bishop of Chicago, 214 U.S.P.Q. (BNA) 409 (7th Cir. 1982).

10. In effect, FEL requested that the jury: (1) multiply the number of parishes by the amount of its licensing fee; (2) multiply this result by the number of years in which it could recover for the violations; (3) multiply the number of parishes by the one time Prior Copying Release Fee; and (4) add the result of number three with the result of number two to determine damages.

11. FEL could only claim infringement for the three years immediately preceding the filing of its suit (*see infra* note 17 and accompanying text). During this period of infringement, the Chicago Archdiocese consisted of 238 individual parishes. If the number of these parishes is multiplied by the $100 licensing scheme and that sum is multiplied by the three years for which FEL may sue, the gross result is $71,400. Additionally, if the one time $500 Prior Copying Release is multiplied by the same number of parishes, that gross result is $119,000. When these two results are added together, the total gross damage award amounts to $190,400:

(1)	238 Parishes	×	$100 Fee Per Year	=	$23,800 Gross Damages Per Year ;
(2)	$23,800 Gross Damages Per Year	×	3 Years	=	$71,400 Gross Total Licensing Damages ;
(3)	238 Parishes	×	$500 Prior Copying Release	=	$119,000 Gross Prior Copying Damages ;
(4)	$71,400 Gross Total Licensing Damages	+	$119,000 Gross Prior Copying Damages	=	$190,400 Gross Total Damages ;

12. Perhaps plaintiff's counsel should have heeded the aphorism: "One should never pray to God unless one is prepared to accept that for which one has asked."

13. A judgment notwithstanding the verdict (also known as a Judgment *Non Obstante Veredicto* or J.N.O.V) was historically available only to a plaintiff who wished to challenge a trial verdict for the defendant. However, most jurisdictions now allow either plaintiff or de-

II. THE *F.E.L.* DECISION

A. The Copyright Infringement Award

As stated above, FEL based its copyright infringement claim upon the unconsented copying of religious music books and song-sheets within and by the parishes of the Archdiocese of Chicago. Although FEL had been granted its actual damages,[14] it claimed upon appeal that the district trial judge had abused whatever discretion he maintained pursuant to the 1909 Act by refusing to award statutory damages in lieu of the jury's award. This claim was countered by the Catholic Bishop's assertion that statutory damages could not be awarded where actual damages were ascertainable.

Under section 101(b) of the 1909 Act, a copyright holder is entitled to the actual damages suffered as a result of the infringement and the amount of the infringer's profits, or such statutory damages as may appear just to the court.[15]

Although the copyright infringements may have been occurring over an eleven year period,[16] the statute of limitations contained within the 1909 Act limits an action to the three years immediately prior to suit.[17] Therefore, the amount of FEL's actual damages were readily calculable by the trial court as $190,400.[18] Because the actual damages were so readily calculated,[19] FEL was left to plead profits and statutory damages.

---

fendant to raise a J.N.O.V. motion after trial. *See* BLACK'S LAW DICTIONARY 952 (5th ed. 1979).

14. FEL's actual damages were calculated by FEL's own formula. *See supra* note 11.

15. Section 101(b) of the 1909 Act provides in pertinent part:

> If any person shall infringe the copyright in any work protected . . . such person shall be liable: . . . .
>
> (b) to pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only, and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated . . . and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty . . . .

17 U.S.C. § 101(b), *repealed* 1976. *See also* F.W. Woolworth Co. v. Contemporary Arts, 344 U.S. 228 (1952).

16. FEL had supplied the materials under litigation from 1965 until 1976. *See* F.E.L. Publications v. Catholic Bishop, 214 U.S.P.Q. (BNA) 409, 410 (1982). Apparently the violations may have occurred since the beginning of their contractual relationship.

17. Section 115(b) of the 1909 Act.

18. *See supra* note 11.

19. *F.E.L.*, 754 F.2d at 219.

In attempting to persuade the appellate court that the Archdiocese of Chicago, a non-profit organization, had made profits upon the use of the copied music (and that such profits should have been awarded to FEL as damages) FEL was placed in a difficult position. Indeed, the appellate court dismissed such claims out of hand.[20] Having lost the question of actual damages or profits, FEL turned to the issue of statutory damages and insisted that the trial court had indeed abused its discretion by failing to provide FEL with statutory damages in lieu of actual damages. The appellate court concluded that the trial court had not abused its discretion and upheld the trial court's determination of the copyright claim violation.

To support its position, the appellate court cited the 1952 United States Supreme Court decision in *F.W. Woolworth Co. v. Contemporary Arts, Inc.*[21] That Court determined that section 101(b) of the 1909 Act had been (and should be) interpreted so as to vest in the trial court broad discretion to determine whether it would be more just to allow a recovery based on calculation of actual damages and profits, as found from evidence, or one based upon a "necessarily somewhat arbitrary estimate" within the limits permitted by the 1909 Act.[22] Although that decision involved copyright infringement upon a tangible art form, section 101(b) of the 1909 Act treats both music and tangible art forms as synonymous for the purposes of protection.[23] Finding the case to be binding precedent, the appellate court concluded that the district court in *F.E.L.* was entitled to as much discretion as the district court in *Woolworth*.[24]

---

20. The court held: "Nor were profits to the Catholic Bishop from the unauthorized copying at issue because FEL's music was used for ecclesiastical, not commercial purposes." *Id.*

21. F.W. Woolworth Co. v. Contemporary Arts, 344 U.S. 228 (1952). In *Woolworth*, respondent was the assignee of the copyright covering a painting. Petitioner obtained 127 small statuettes of the subject of the painting and sold them without license from respondent, thus violating respondent's copyright upon the painting. *See F.E.L.*, 754 F.2d at 219.

22. *Woolworth*, 344 U.S. at 231-32.

23. Section 5 of the 1909 Act provides that the application for registration with the Copyright Office in Washington D.C. shall specify the class to which a copyrighted article belongs. (Such classes include, among others, "(e) Musical compositions, . . . (g) Works of art; models or designs for works of art, [and] (h) Reproductions of a work of art.") The section is clear to indicate that such classifications shall not be held to limit the subject matter of a copyright, nor would any error in classification invalidate or impair the copyright protection secured under Title I of the 1909 Act.

24. The *Woolworth* Court, in turn, found its authority in its earlier decision of L.A. Westermann Co. v. Dispatch Printing, 249 U.S. 100 (1919). In *Westermann*, the copyrighted materials were illustrations which were published in a newspaper, in contravention to the rights of the copyright holder. The Court held that it is not what may be viewed as explicitly provable that is the measure of damages, but rather "the [trial] court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like . . . but with the express qualification that in every case the assess-

Therefore, the trial judge had properly exercised his discretion in refusing to award FEL statutory damages in addition to or in lieu of the actual damages.

However, the mere determination that a trial court has broad discretion did not foreclose the issue of whether that court has abused its discretion. Therefore, the appellate court was forced to discuss those issues which determine abuse of discretion.

To determine appropriate and "just" statutory damages,[25] the *F.E.L.* court delineated three factors which it felt should be considered: (1) the difficulty or impossibility of proving actual damages; (2) the circumstances of the infringement; and, (3) the efficacy of the damages as a deterrent to future copyright infringement.[26] In addition, the appellate court maintained that statutory damages and actual damages may be cumulative since "statutory damages and actual damages are not mutually exclusive remedies."[27] Having concluded that the trial judge properly considered all pertinent aspects of the case,[28] the appellate court in

---

ment must be within the prescribed limitations . . . ." *Woolworth*, 344 U.S. at 232 (citing *Westermann*, 249 U.S. at 106-07).

25. As in most cases, just damages are probably subsumed by that award which will outrage the defendant's sense of conservativism and solicit an equal but opposite reaction from the plaintiff. Under such circumstances one should question how helpful the rubric of "what is just . . . considering the nature of the copyright, the circumstances of the infringement and the like," as provided in *Westermann*, really is.

26. *F.E.L.*, 754 F.2d at 219 (citing *Woolworth*, 344 U.S. at 232-33).

27. *F.E.L.*, 754 F.2d at 219 (citing Lottie Joplin Thomas Trust v. Crown Publishers, 592 F.2d 651, 657 (2d Cir. 1978); and Peter Pan Fabrics v. Jobela Fabrics, 329 F.2d 194, 196 (2d Cir. 1964)). It should be noted that the Seventh Circuit's blanket statement that statutory and actual damages are not mutually exclusive is not an accurate statement of either the language of § 101 nor of the case law which had previously interpreted it. Rather, those cases which the *F.E.L.* appellate court relies upon have merely held that it is improper for a trial court not to consider an award of statutory damages in addition to *profits* where actual "*damages* are not susceptible of precise calculation . . . ." *Lottie Joplin*, 582 F.2d at 657 (citing *Peter Pan*, 329 F.2d at 196) (emphasis added). For a discussion of cumulative versus exclusive remedies, *see infra*, beginning at note 50 and accompanying text.

28. The appellate court found that in refusing to award FEL statutory damages in addition to or in lieu of actual damages awarded, the trial judge had properly considered evidence showing: (1) the unauthorized copying of FEL materials in 238 parishes for a period limited to 3 years by the statute of limitations; (2) FEL's licensing scheme — used by the court at FEL's request — to determine FEL's actual damage to its business; (3) FEL's business was "substantially made whole" by the award of actual damages; (4) profits considerations were unnecessary because the music was used for ecclesiastical and not commercial purposes; (5) the circumstances of the infringement; (6) the business relationship FEL had with the Chicago Archdiocese; and, (7) the types of people engaged in the infringement. As a result, the court found that it was apparent that the trial judge considered these circumstances in determining that it was just to allow only actual damages within the parameters established by *Woolworth*. And although FEL complained that the trial court improperly considered FEL's delay in filing suit as a reason for denying statutory damages, the court found that delay in filing suit cer-

F.E.L. held that the trial judge "acted within his discretion in determining that the jury's award was just and that additional, statutory damages were not necessary to deter[29] future copyright infringement."[30]

B. The Tortious Interference Award

The court next addressed the issue of the tortious interference claim. The question raised by the Catholic Bishop was whether the Catholic Bishop and the Archdiocese were the same legal entity under Illinois law.[31] If that was the case then the trial court's determination that the jury could consider the Bishop's actions in determining damages would be improper. In addition, the Bishop contended that FEL presented insufficient evidence to allow recovery for the tort based upon a loss of business outside of the Chicago Archdiocese. The *F.E.L.* court found the Catholic Bishop's arguments regarding the local parishes persuasive. But, it disagreed that the evidence was insufficient to allow recovery for tortious interference with FEL's business outside of Chicago.[32]

In an action for tortious interference with a business relationship, the court held that the plaintiff must establish the existence of a separate and independent business relationship with a third party.[33] Under Illinois law, generally "a party cannot be liable in tort for interfering with its own contract, or even for breaching its own contract."[34]

---

tainly could be characterized as one of the "circumstances of the infringement" referred to in *Woolworth*. *F.E.L.*, 754 F.2d at 219-20.

The appellate court also made short shrift of FEL's argument that "the trial judge committed reversible error by improperly considering the punitive damages awarded for FEL's tortious interference claim" by stating that there was sufficient evidence that the trial court's findings were indeed based upon permissible factors. *F.E.L.*, 754 F.2d at 220.

29. Once the appellate court outlined the three prongs of its test, FEL's only real hope of prevailing upon a request for statutory damages would have to be based upon the third "deterrence" prong. Obviously the first "damages proof" prong cut against FEL since the actual damages were so easily ascertainable. *See supra* note 11. And although the "circumstances of the infringement" prong could conceivably have been of help to FEL, the fact that the infringer was an ecclesiastical organization which copied the music for ecclesiastical rather than commercial purposes could only work against FEL.

30. *F.E.L.*, 754 F.2d at 220. It should also be noted that of major import to the court's decision was the fact that FEL was objecting to the very damages determination scheme that it had urged upon the court in closing arguments. This is what prompted the court to conclude: "We fail to see how the trial judge abused his discretion by calculating F.E.L.'s damages according to the method F.E.L. suggested." *F.E.L.*, 754 F.2d at 220.

31. *F.E.L.*, 754 F.2d at 221.

32. *Id.* at 222.

33. *Id.* at 221 (citing Hannigan v. Sears, Roebuck, 410 F.2d 285 (7th Cir. 1969), *cert. den.*, 396 U.S. 902; Republic Gear v. Borg-Warner Corp., 406 F.2d 57 (7th Cir. 1969), *cert. den.*, 384 U.S. 1000 (1969)).

34. *F.E.L.*, 754 F.2d at 221 (citing Fuller v. Chicago College of Osteopathic Medicine, 719 F.2d 1326 (7th Cir. 1983); DP Service v. AM Int'l, 508 F.Supp. 162, (N.D. Ill. 1981)).

The court reasoned that Illinois law provides that the Catholic Bishop is organized as a "corporation sole."[35] Furthermore, FEL did not dispute that the Catholic Bishop and the parishes were the same legal entity.[36] In fact, the very basis of FEL's copyright infringement claim against the Catholic Bishop is the claim that the Catholic Bishop is responsible for the copying of the litigated materials by the parishes.[37] Consequently, the court found it to be improper for the jury to consider the Catholic Bishop's conduct toward its own parishes in its determination of the merit of FEL's tortious interference claim or for the jury to award any damages to FEL because of that conduct.[38]

On the other hand, FEL claimed that, even if the Catholic Bishop was the same legal entity as the parishes, he could nonetheless be held liable for tortiously interfering with the business relationship between FEL and the parishes.[39] To support this position, FEL cited several cases which held that corporate officers would be liable in tort for wrongfully inducing the breach of their corporation's contracts.[40] However, as the court indicated, the $100 annual licenses did not require the purchaser to "actually use [FEL's] music . . . [nor] to renew the license after its expiration."[41] Because no contracts were breached, the court found that the authority relied upon by FEL was unpersuasive. Yet, even though the Catholic Bishop could not be sued for his interference with the parishes under the control of the Archdiocese of Chicago, the *F.E.L.* court found that the other Roman Catholic dioceses in the United States function as entities independent of the Catholic Bishop of Chicago. Therefore, the court found that this part of FEL's tortious interference claim was not infirm.[42]

---

35. As a corporation sole, the Catholic Bishop owns all the real and personal property in the Chicago Archdiocese. "In short, the parishes within the Archdiocese are not legal entities separate and independent from the Catholic Bishop, but are subsumed under the Catholic Bishop. See Galich [v. Catholic Bishop], 75 Ill.App.3d at 546-47. . . ." *F.E.L.*, 754 F.2d at 221.

36. *F.E.L.*, 754 F.2d at 221.

37. *Id.*

38. *Id.*

39. *Id.*

40. *F.E.L.*, 754 F.2d at 221 (citing Fuller v. Chicago College of Osteopathic Medicine, 719 F.2d 1326 (7th Cir. 1983); Swager v. Couri, 77 Ill.2d 173 (3d Dist. 1979); and, Worrick v. Flora, 133 Ill.App.2d 755 (3d Dist. 1971)).

41. *F.E.L.*, 754 F.2d at 222.

42. *Id.*

III. ANALYSIS

A. *The Copyright Infringement Award*

As with all matters of copyright protection predicated upon the Anglo-Saxon models of legal thought, copyright protection in the United States is founded upon statutory law rather than common law traditions.[43] Therefore, the *F.E.L.* court was required to look to applicable statutes in determining what relief was mandated for a copyright infringement. However, as will be discussed below, in applying the applicable statute the court's reasoning seemed to be based as much upon common law principles as upon statutory construction.

The 1909 Act

As discussed supra, the 1909 Act expressly provides the mechanism whereby the trial court may elect to allow the infringed copyright holder actual damages and the profits of the infringer, or statutory damages within certain prescribed limits.[44] Indeed, this is the interpretation given to section 101(b) by the Supreme Court.[45]

One of the reasons given for such discretion by that Court was the concept that the trial court should be allowed to permit resort to statutory damages for the purposes of discouraging wrongful conduct.[46] This allows the trial court that flexibility which is required by individual circumstances.[47] Based upon this doctrine, the *F.E.L.* court could (and did) easily find that the trial court did not abuse its discretion in awarding those actual damages which FEL sought as the sole method of recompense during trial. Certainly, where a plaintiff argues that one method of calculating damages will provide full recompense for injuries sustained at the hands of the defendant, a claim that the trial court abused its discre-

---

43. The first true Anglo-Saxon copyright statute was the famous English "Statute of Anne" (8 Anne c. 19, 1710). When the United States broke away from England and settled upon its present form of government, it promptly enacted a copyright statute similar to the Statute of Anne known as the Copyright Act of May 31, 1790 (1 Stat. 124). This was superseded by the "International Copyright Act" of 1891 (26 Stat. 1106), the 1909 Act and, finally, the 1976 Copyright Act (Title 17 U.S.C. § 101 *et seq.*, 90 Stat. 2541 *et seq.*, Pub. L. No. 94-553).

This is not to say that principles of natural law did not incline society to protect artists' rights to the proprietary interests associated with their product. Witness the Celtic proverb reprinted in ALAN LATMAN, THE COPYRIGHT LAW, (5th ed. 1979): "To every cow her calf."

44. *See supra* note 15.

45. *Woolworth*, 334 U.S at 232.

46. *Id.* at 233.

47. *Id.* at 232.

tion in following that formula strains the bona fides of the plaintiff to the point of fracture.

Therefore, the court in *F.E.L.* quite properly dismissed FEL's many claims that an injustice had been committed in the rendition of the verdict.[48] However, the *F.E.L.* court used this concept as a springboard to the proposition that both statutory and actual damages may be dispensed at the discretion of the trial court.

1. Damages

Aside from the fact that the above statement is mere dicta,[49] it contradicts the fair meaning of the wording of section 101(b)[50] and misstates the concept illuminated by *Woolworth*. If the Supreme Court had meant to state that statutory damages could be awarded in addition to actual damages in order to discourage wrongful conduct, it could have easily done so. Rather, that Court, in citing *Westermann*, expressly held that when awarding damages, the court must elect between actual damages and statutory damages.[51] Further, if statutory damages are elected, such damages must remain within the statutory limits.[52]

---

48. FEL's claims included the following: (1) If FEL had been allowed to sue under the 1976 Act, it would have used the election of damages remedy provided therein to elect statutory damages; (2) the infringement occurred over a 15 year period but the 1909 Act contains a three year statute of limitations which unfairly frustrated FEL's damage recovery; (3) the trial judge improperly considered the punitive award pursuant to its tortious interference claim in deciding not to award statutory damages under the copyright infringement claim. *See F.E.L.*, 754 F.2d at 216.

In dismissing each of these claims, the appellate court properly pointed-out that what one wishes to do and what one is allowed to do under law are two different things. That court also found that there was no indication that the trial court considered the tort claim in determining injury under the copyright claim. Therefore, there was no abuse of discretion in the trial court which required reversal.

49. The issue of whether statutory damages may be granted in addition to actual damages and profits was not a question in issue during the presented appeal. Indeed, the question presented was whether the trial court had overstepped its discretion in refusing to allow an award of statutory damages in lieu of actual damages.

50. *See supra* note 15.

51. *Woolworth*, 334 U.S at 223.

52.

> 'In other words, the court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement and the like, is made the measure of the damages to be paid, *but* with the express qualification that in every case the assessment must be within the prescribed limitations . . . . [The court] has no discretion when proceeding under this provision to go outside of them.' [*Westermann*, 249 U.S. at 106-07] . . . . It is plain that the court's *choice* between a computed measure of damages and that imputed by statute cannot be controlled by the infringer's admission of his profits which might be greatly exceeded by the damage inflicted.

Woolworth, 334 U.S. at 232 (emphasis added).

The court went on to state that if actual damages could not be determined then statutory

But to support its erroneous conclusion, *F.E.L.* ostensibly cited to two contrary cases in the Second Circuit.[53] In reality, however, the only true authority cited to support this contention was *Peter Pan Fabrics Inc. v. Jobeta Fabrics, Inc.*[54] In *Peter Pan*, the court found that because *Woolworth* wished to dissuade wrongful conduct, the "cumulative" rather than the "alternative" theory "would seem appropriate" under section 101(b). As is abundantly obvious, however, the rubric of what "seems" appropriate should not be used as the primal touchstone for an analysis of an express statutory provision. In this case, that provision provides that statutory damages may only be awarded in lieu of actual damages and profits.[55]

2. Profits

In its determination that the trial court did not abuse its discretion in awarding actual damages in lieu of statutory damages, the appellate court quickly brushed aside the issue of profits to the Catholic Bishop. Indeed, the *F.E.L.* court stated: "Nor were there profits to the Catholic Bishop from the unauthorized copying at issue because FEL's music was used for ecclesiastical, not commercial, purposes."[56] However, no authority was cited to uphold this position and although it may be presumed that ecclesiastical organizations will use religious music for religious and not commercial purposes, such presumptions do not always reflect the realities of life.[57]

Because the court in *F.E.L.* does not discuss whether there was any evidence presented by FEL to show profit on the part of the Catholic

---

damages would be allowable. *Id.* Because FEL's actual damages were so readily calculable, however, this contention was mere dicta. Clearly, neither *Woolworth*, nor *Westermann* intended to perpetrate the doctrine that an assessment of damages was cumulative where the statute expressly states that one method of determining damages may be chosen *in lieu* of the other.

53. Lottie Joplin Thomas Trust v. Crown Publisher, 592 F.2d 651 (2d Cir. 1978) and Peter Pan Fabrics v. Jobeta Fabrics, 329 F.2d 194 (2d Cir. 1964).

54. 329 F.2d 194 (2d Cir. 1964). In *Lottie Joplin*, the court merely makes the conclusory statement that the Second Circuit had already determined that statutory damages and actual damages could be awarded on a cumulative basis. In support of that proposition, the *Lottie Joplin* appellate court cites *Peter Pan*.

55. *See supra* note 15.

56. *F.E.L.*, 754 F.2d at 219.

57. Clearly, the use of the copied music at any function which generates income to the local parish (and consequently the Catholic Bishop of the Archdiocese) could be considered as a profit making enterprise. Examples could include "concerts" at the local parish hall after which "donations" are collected and "special events" during the exercise of an ecclesiastic service itself wherein donations exceed those normally experienced.

Bishop as a result of the infringement,[58] it is unclear how that court could make such a bold pronouncement. Perhaps the court should have remanded to the trial court for a determination of whether, in fact, profit had been made upon the infringement.

B. The Tortious Interference Award

It appears that both counsel for FEL and the appellate court misunderstood the gravamen of FEL's tortious interference complaint. FEL did not contend that the Catholic Bishop had interfered with its contracts with the parishes; rather FEL contended that the Catholic Bishop had interfered with its business relationship with the parishes.[59] Unfortunately, to support its position, FEL cited cases in which the tortious interference claim presented was that of inducing a breach of contract.[60] Since no breach of contract was occasioned in *F.E.L.*,[61] the appellate court properly concluded that these cases were inapplicable.[62]

However, it must be remembered that the claim was not one of inducing breach of contract. Rather than making the sweeping dismissal of FEL's claim, it would have been helpful for the court to indicate whether, under the equitable doctrines of the State of Illinois as they now exist, a corporate officer could be held liable for any other tortious interference claims — especially the tortious interference of a "business relationship" upon which FEL sued.[63]

Certainly, in refusing to acknowledge the difference between the tortious interference with a contract and the tortious interference of a business relationship, the appellate court placed itself in the logically inconsistent position of concluding that while FEL could not recover from the Catholic Bishop for the interference with FEL's business in the Archdiocese of Chicago, it could recover for interference with its busi-

58. The mere fact that an organization is religious or non-profit does not conclusively show that certain acts of that organization did not in fact garner profits. An excellent example of this situation are the wineries owned by the Roman Catholic Church, such as the Christian Brothers winery of California.

59. *F.E.L.*, 754 F.2d at 219.

60. Fuller v. Chicago College of Osteopathic Medicine, 719 F.2d 1326 (7th Cir. 1983); Swager v. Couri, 77 Ill. 2d 173 (3d Dist. 1979); Worrick v. Flora, 133 Ill. App. 2d 755; 273 N.E.2d 708 (3rd Dist. 1971).

61. "The purchase of an F.E.L. license did not require the purchasing parish to actually use F.E.L.'s music. Nor was a parish required to renew the license after its expiration. Therefore, the cases cited by F.E.L. do not apply to this case. *F.E.L.*, 754 F.2d at 221-22." *I.e.*, there was no contract, therefore, no breach was induced.

62. *Id.* at 222.

63. Although the tortious interference of a contract requires the existence of a legally binding contract which has been breached due to the interference of the party being sued, *Fuller* at 1330, FEL claimed a tortious interference with its business relationship, not its contracts.

ness in parishes outside of the Archdiocese. But since the complaint of interference was the same for both those parishes within the Archdiocese and those without, if one class of parishes cannot support a damages verdict because there was no contract with which the Bishop could interfere, the same holds true for the second class. For as the appellate court pointed out, FEL did not have contracts with any of the parishes (including those parishes outside of the Archdiocese of Chicago) which could have been breached. If this would preclude recovery for those parishes within the Archdiocese of Chicago, it should also preclude recovery for those without.

IV. CONCLUSION

Although the court in *F.E.L.* came to the correct conclusion regarding whether or not the trial court had exceeded its authority in granting only those damages for the copyright infringement which were plead by FEL at trial, the analysis presented to justify the conclusion was insufficient. The inherent danger is clear; future trial courts will look to the reasoning of the *F.E.L.* decision as binding precedent,[64] not merely the outcome. At best, this decision will confuse the issues to be litigated. At worst, it may solidify faulty analytical reasoning and logically indefensible views of earlier precedent.

Secondly, the court's dismissal of FEL's tortious interference claim against the parishes within the Archdiocese of Chicago was flawed as to both its reasoning and its result. Perhaps the court in *F.E.L.* was as influenced by the presumed bona fides of the parties as by the state of the law of Illinois. Once again, the decision provides the same dangers inherent to its analysis of the copyright claims. In this instance, however, the further effect of an arguably improper decision has already been presented upon an adjudicated party. In the final analysis, the dilemma presented by the decision in this case boils down to this: future courts may be faced with the choice of violating principles of stare decisis or sound analytical reasoning.

Anthony Colannino

64. The author realizes that the portion of the decision dealing with the 1909 Act will not conclusively determine the outcome of suits brought under the 1976 Act. However, the reasoning used in this case may well determine how the 1976 Act will be interpreted. Further, that portion of the holding in this decision which deals with the tortious interference claim will continue to bind lower courts until overruled.