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Bourne Co. v. Tower Records, Inc., 976 F.2d 99 (2d Cir. 1992)

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is one scheme or several is a question for the jury, and in this case, the evidence supported a jury finding of a single conspiracy to defraud the IRS spanning many years and involving many individuals in Alexander's businesses. The cases that Alexander relied upon for his defense to these counts were expressly limited to their facts. Also, the court instructed the jury that when a count alleges two different videotapes or magazines to be obscene, they need find only one of them obscene in order to return a guilty verdict. Thus, the verdicts returned on the obscenity counts were not inconsistent. The standard of obscenity that Alexander challenged was laid down by the United States Supreme Court in *Miller v. California*, and therefore the circuit court was bound by it. The forfeiture, provided by 18 U.S.C. § 1467, is allowed when there is a sufficient nexus between racketeering activities and protected materials acquired through such activities. The court held that obscenity is not protected by the First Amendment, and a convicted racketeer may not launder dirty money by investing it in materials that involve protected speech. It also held that there was no unconstitutional chilling effect at work because this forfeiture was a criminal penalty and not a prior restraint. Further, the court held that the penalties imposed did not violate Alexander's Eighth Amendment rights, and there was ample evidence to support his conviction on all counts.

-C.L.

BOURNE CO. v. TOWER RECORDS, INC., 976 F.2D 99 (2D CIR. 1992).

Walt Disney Company and Buena Vista Home Video appealed from a preliminary injunction issued by the United States District Court for the Southern District of New York, barring their use of songs from the movie "Pinocchio" on videocassette trailer advertisements.

In 1939, Disney and Bourne entered into a copyright agreement which assigned to Bourne copyrights to the songs from the movie "Pinocchio." Disney claimed that the agreement allowed them to freely use the songs but only gave Bourne the right to collect fees for the use of the songs by third parties. Bourne claimed that, under the agreement, Disney relinquished all rights to the songs, except for the right to employ them in public performances of motion pictures. Regardless of the proper meaning of the agreement, over the next five decades Disney used the songs in ways inconsistent with Bourne's view of its agreement with Disney. However, Bourne did not object to Disney's use of the songs until

1981.

The Second Circuit Court of Appeals stated that in seeking an injunction against Disney's further use of the songs, Bourne was required to initially demonstrate irreparable harm. Although irreparable harm is presumed when a plaintiff establishes a prima facie case of copyright infringement, the court stated that it is equally settled that a party's delay in the enforcement of copyrights rebuts that presumption. The court held that Disney's use of the songs for several decades and Bourne's failure to object to the violations of its claimed contractual rights demonstrated a lack of urgency for preliminary relief. Because Bourne failed to establish the existence of irreparable harm, the circuit court held that Bourne was not entitled to an injunction and reversed the judgment of the district court.

-J.B.K.

COLUMBIA PICTURES INDUSTRIES, INC. v. PROFESSIONAL REAL ESTATE INVESTORS, INC., 944 F.2D 1525 (9TH CIR. 1991), *cert. granted*, 112 S. Ct. 1557 (1992).

A group of California movie studios brought a copyright infringement action against hotel operators (PRE), challenging the operators' rental of video discs to hotel guests to watch in their hotel suites. PRE filed antitrust counterclaims against the movie studios, alleging that the copyright infringement suit was a sham brought with the intent to monopolize and restrain trade in violation of the Sherman Act. The United States District Court for the Central District of California granted summary judgment to the hotel operators (PRE) on the infringement claim, and this was affirmed on appeal. However, the same district court entered summary judgment in favor of the movie studios on the antitrust counterclaim, and PRE appealed, alleging:

- (1)the court focused only on the lawsuit and failed to consider PRE's other allegations of anticompetitive conduct;
- (2)the copyright infringement action was a sham, thus the studios have no immunity from antitrust liability under the Noerr-Pennington doctrine;
- (3)the court should have permitted PRE additional discovery to prove that he copyright lawsuit was a sham; and,
- (4)the district court abused its discretion in dismissing the pendent state law claims when it dismissed PRE's counterclaim.

The Ninth Circuit Court of Appeals affirmed the district court's entry of summary judgment for the studios on the antitrust