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COURT OF APPEALS

STATE OF NEW YORK

PAUL M. ELLINGTON,

Appellant,

-against-

No. 156

EMI MUSIC, INC.,

Respondent.

20 Eagle Street
Albany, New York 12207
September 11, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

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CHIEF JUDGE LIPPMAN: 156. Counselor,
would you like any rebuttal time?

MR. SCAROLA: Can I have three minutes,
Your Honor?

CHIEF JUDGE LIPPMAN: Three minutes. Sure,
go ahead.

MR. SCAROLA: May it please the court, Rick
Scarola for the appellant. We have a situation fully
briefed. I think the court can apprehend (sic) that
today the situation is concededly that the music
publisher retains seventy-five percent of the
royalties currently generated out of Duke Ellington's
work that's under contract that's at issue in - - -
in - - - in this case.

I think there are three ways in which I can
have a decision from this court that sends us back to
actually begin discovery and begin again.

CHIEF JUDGE LIPPMAN: Go ahead. What are
the three ways?

MR. SCAROLA: The - - - the first is the
simple conclusion that you can't look at this
language that talks about money actually received and
say that it was unambiguously, in 1961, the parties'
intention that "actually received" included a

1 scenario that didn't exist, was a universe that
2 wasn't even conceived of in 1961, that being this
3 consolidation in the music publishing industry that
4 has EMI, today owned by Sony, owning all of the music
5 publishing - - - sorry - - -

6 JUDGE PIGOTT: Are you getting - - - are
7 you getting less money as a result of - - - of their
8 buying the - - - the subsidiaries?

9 MR. SCAROLA: We're getting less money, and
10 it's not just as a result of buying sub - - -

11 JUDGE PIGOTT: Why, that - - - that - - - I
12 guess that's my - - -

13 MR. SCAROLA: - - - subsidiaries. Because I
14 think it's - - - it's a factual distortion that they
15 simply bought subsidiaries. I think - - -

16 JUDGE PIGOTT: Well - - -

17 MR. SCAROLA: And I'll get to that. There
18 is a - - - there is a part of this that the notion of
19 subsidiaries as a real thing. And - - - and that - -
20 - that's my second reason why I think we - - - we
21 win.

22 JUDGE SMITH: And you say - - - you say
23 they're affiliates - - -

24 MR. SCAROLA: They are - - -

25 JUDGE SMITH: - - - and, therefore, within

1 the definition of second party?

2 MR. SCAROLA: They are affiliated. That's
3 - - - that's one of the arguments, but we don't have
4 to rely on the affiliates language to win the case
5 below or to win - - - to win this point. Let me - -
6 - let me try to hit what would be my second point.
7 I'm sorry if I didn't answer the question.

8 CHIEF JUDGE LIPPMAN: Get to your second
9 and third. Go ahead, and then we'll question you.

10 MR. SCAROLA: This contract does not
11 mandate that there be foreign collecting agents. In
12 1961 it was not uncommon to have foreign collecting
13 agencies - - - agents. But nothing then and nothing
14 today precludes Mills Music as it then existed or if
15 you or me were to go into the music publishing
16 business, to have clients as artists and collect
17 royalties in Germany, in France, in Japan. We don't
18 need foreign collecting agencies.

19 JUDGE PIGOTT: Well, my - - - my - - - my
20 question was, as I understand this thing was working,
21 was the - - - the - - - let's say a European company
22 is - - - is keep - - - out of a hundred dollars
23 they're keeping fifty.

24 MR. SCAROLA: And they are.

25 JUDGE PIGOTT: And fifty comes to - - - to

1 - - - to you guys, and you split it twenty-five-
2 twenty-five.

3 MR. SCAROLA: That's what's happening
4 today.

5 JUDGE PIGOTT: Now they buy the European
6 company. They're getting seventy-five. You're - - -
7 you're getting twenty-five?

8 MR. SCAROLA: No to your first part, Your
9 Honor. Let - - - let me explain why. It hasn't
10 always been the - - - that way. That's what's been
11 asserted. This is a motion to dismiss below with all
12 these affidavits from adverse counsel - - -

13 JUDGE READ: But how has it - - - how - - -
14 how has - - -

15 MR. SCAROLA: - - - to the effect that that
16 was always the way it was. Because - - -

17 JUDGE READ: How has it been? Because I
18 had the same understanding Judge Pigott had from
19 reading.

20 MR. SCAROLA: That's because my adversary's
21 done a good job of distorting the record and some mis-
22 - - - misdirections. Let me talk about that.

23 JUDGE PIGOTT: But you're - - -

24 JUDGE READ: Tell us how it really is,
25 then.

1 JUDGE ABDUS-SALAAM: Yeah.

2 MR. SCAROLA: The way it real - - - well,
3 let's start with the way it really was. The
4 treatises say that the common foreign royalty
5 collection rate was fifteen percent, maybe
6 twenty-five percent, not fifty percent abroad.

7 JUDGE SMITH: Whatever was common, what was
8 happening in this relationship was exactly as Judge
9 Pigott stated it, wasn't it?

10 MR. SCAROLA: No, not at all. And
11 certainly not something you can conclude on this
12 record. Because what's in this record - - -

13 JUDGE SMITH: How - - - how - - - how are
14 you - - -

15 MR. SCAROLA: - - - is simply three
16 agreements. One of them is about one song, another
17 one is missing the critical page - - -

18 JUDGE SMITH: All right, so how was it?
19 How was Mr. - - - how was Judge Pigott's statement of
20 the facts wrong?

21 MR. SCAROLA: Simply that at this stage in
22 a motion to dismiss, we don't have any reason to
23 conclude that the facts, as they existed in 1961,
24 were not exactly as the treatises state - - -

25 JUDGE GRAFFEO: But how - - - how - - -

1 MR. SCAROLA: - - - they generally would
2 have been.

3 JUDGE GRAFFEO: Could you just tell us
4 simply what happened in - - - what was the
5 contemplation in 1961?

6 MR. SCAROLA: In 1961 the interest - - -

7 JUDGE GRAFFEO: Wasn't it if there was a
8 foreign collection agent they were going to get a
9 portion of the proceeds?

10 MR. SCAROLA: A portion, but there's a
11 piece missing from that.

12 JUDGE GRAFFEO: Okay, so aren't - - - so
13 aren't you trying to take this - - - what appears to
14 be a nets receipts contract and now have us view it
15 as a source contract?

16 MR. SCAROLA: Not at all, Your Honor.
17 That's what we've been - - - that's what we've been
18 tagged with and labeled with but not at all. Because
19 all this language says is "actually received".

20 JUDGE ABDUS-SALAAM: So are - - -

21 MR. SCAROLA: And - - - and - - - and if I
22 can just answer that part of the question.

23 JUDGE ABDUS-SALAAM: Yeah, I'd like for you
24 to answer it. But I'm - - - I'm trying to figure out
25 why you want to go back. Is it because you don't

1 know how it actually worked? Is that why you're
2 saying we need to go back for discovery? Because I'd
3 like to hear how you think it worked.

4 MR. SCAROLA: The - - - the way I think it
5 worked is that on a case-by-case basis there were
6 collecting agencies, in some instances. I expect
7 that the answer would be fifteen percent, twenty
8 percent, twenty-five percent was common. There - - -
9 there's been this fiction created on this record that
10 fifty percent was common in 1961.

11 JUDGE PIGOTT: Well, I wasn't - - - I
12 wasn't - - -

13 JUDGE SMITH: So what was common in the
14 industry?

15 JUDGE PIGOTT: I wasn't - - - I wasn't
16 focusing on whether that was true or not. What I - -
17 - my next question was going to be are you getting
18 less money because they bought the foreign
19 subsidiary? In other words, it seemed to me that you
20 were getting twenty-five - - - twenty-five dollars,
21 Europe was getting fif - - - getting fifty, and EMI
22 was getting twenty-five. And then EMI buys Europe.
23 Now they're getting seventy-five and you're getting
24 twenty-five, and you're upset about that. But I'm
25 just wondering why - - - you're still getting what

1 you were supposed to get - - - that you care?

2 MR. SCAROLA: Be - - - because the answer
3 is it's not established that we were getting only
4 twenty-five percent.

5 JUDGE SMITH: Assume - - - assume it was.
6 Assume the facts are exactly as - - - as Judge Pigott
7 suggested they were that first there's twenty-five-
8 twenty-five. Then all of a sudden, Mills Music or
9 Mills EMI is getting thir - - - is - - - is getting
10 seventy-five and you're getting twenty-five. Don't
11 you have the argument that you're supposed to get
12 half what they get, so you should be getting
13 thirty-seven-and-a-half?

14 MR. SCAROLA: If - - - if I follow your
15 numbers, and they're moving fast, I think the answer
16 is yes. We have the argument that - - - that is
17 effectively my - - - my - - - my second point. That
18 if, as a collective entity, EMI - - - which, by the
19 way, I mean there's no EMI Music - - -

20 JUDGE SMITH: This does - - - this does - -
21 - this does come back to the definition of
22 affiliates, doesn't it? Or - - - or - - - or - - -
23 whether - - - whether - - - whether affiliates - - -
24 I mean if - - - if you're entitled to everything that
25 an EMI affiliate gets, or half of everything an EMI

1 affiliate gets, I can see the argument. You're
2 entitled to half of that extra - - - extra fifty - -
3 -

4 MR. SCAROLA: In the broader sense, yes.
5 And in this case, we have the additional language
6 that affiliates - - - which by the way, it says any
7 other affiliates. It doesn't define, as my adversary
8 says, a limited group of affiliates. It says any
9 other affiliates. It's not just present speaking.
10 It's globally speaking.

11 JUDGE RIVERA: If - - - if I - - - if I - -
12 -

13 MR. SCAROLA: Affiliates is a form of
14 pronoun.

15 JUDGE RIVERA: - - - I understand - - -

16 MR. SCAROLA: And it contemplates what is -
17 - -

18 JUDGE RIVERA: If I understand in - - - in
19 part what - - - what you were trying to argue in the
20 briefing, and - - - and perhaps you can clarify my
21 understanding - - - I thought that you were arguing
22 that when the parties came to the table, what the
23 parties agreed to was if you're going to use foreign
24 affiliates, both sides would share that cost.

25 MR. SCAROLA: That's correct.

1 JUDGE RIVERA: But you did not intend that
2 the other party, the music industry party, would try
3 to underwrite its own costs by cutting into your - -
4 - your share?

5 MR. SCAROLA: That is the argument, and
6 even one more part of it. Duke Ellington signed an
7 agreement with a counterparty. At that time, that
8 agreement had the counterparty with its interests
9 fully aligned with Duke Ellington. They'd share
10 fifty-fifty in any costs incurred by actually going
11 out - - - if - - - if Mills chose to, which it didn't
12 have to - - -

13 JUDGE RIVERA: Because your - - - your - -
14 -

15 MR. SCAROLA: - - - to hire somebody. Now
16 - - -

17 JUDGE RIVERA: Your point is - - - you - -
18 - the sides agreed, look, if you've got those
19 expenses because you got to use someone outside of
20 you, let's share the expenses. But otherwise you
21 bear your own expenses, and it's fifty-fifty for
22 whatever you collect?

23 MR. SCAROLA: And as the world has changed,
24 EMI has made it 180 degrees the opposite. The
25 interests that EMI has today is exactly opposite that

1 of the artist. It is interested in having the
2 highest possible - - -

3 JUDGE SMITH: One more question.

4 MR. SCAROLA: - - - foreign royalties.

5 JUDGE SMITH: One - - - one more question.

6 MR. SCAROLA: In 1961 it wanted the lowest
7 possible.

8 JUDGE SMITH: If I could, just one more.
9 What about those royalty statements that you got for
10 years and years and didn't complain about?

11 MR. SCAROLA: Well, you know, I - - - I
12 think two things. There's a period that where they
13 didn't come to our clients, because they were going
14 to another entity called Famous Music. When you look
15 at these statements, I think they are at pages 468,
16 et cetera, of the record, they say, "Film
17 production," on the part where it's supposedly clear.
18 It wasn't clear until 2009 what was happening here in
19 any way that I can see from this record. And if you
20 were to try to parse all of that stuff, I don't
21 believe you or anybody else would. But in fact, in
22 both, they were not coming to our clients at all.

23 If they had been, I still don't believe
24 that a breach of contract somehow becomes sanctified
25 in a situation like this.

1 JUDGE SMITH: Is - - - is there evidence -
2 - - is there evidence in the record that he didn't
3 receive those things or didn't know what he was - - -
4 couldn't figure them out when he received them?

5 MR. SCAROLA: I'd have to dig for it.

6 JUDGE SMITH: Okay.

7 MR. SCAROLA: But the short answer is yes.
8 And the reason is that there was a period of time
9 from an agreement made in 1989 when all of these
10 royalties were quasi-assigned to a company called
11 Famous Music, now, ironically, also owned by Sony.
12 But in effect, all of the royalties that are the
13 subject of these contracts were being funneled
14 through Sony. So - - -

15 CHIEF JUDGE LIPPMAN: Okay, counselor.

16 MR. SCAROLA: - - - all of the companies
17 were some respect - - - I know it's already beyond my
18 time.

19 CHIEF JUDGE LIPPMAN: Thanks, counselor.
20 You'll have your rebuttal.

21 MR. ZAKARIN: May it please the court, Don
22 Zakarin for EMI.

23 CHIEF JUDGE LIPPMAN: Counselor, what do we
24 know about what was the understanding at that time
25 and vis-a-vis what's happening now, and do we need to

1 know more, at this stage of the legal process, in
2 order to sort out the back and forth between you?

3 MR. SCAROLA: Your Honor, I don't believe
4 so.

5 CHIEF JUDGE LIPPMAN: Why not?

6 MR. ZAKARIN: Because the contract is clear
7 on its face. It is a net receipts agreement. What
8 it provides for is that - - -

9 JUDGE SMITH: Nets - - - net receipts of
10 whom?

11 MR. ZAKARIN: Net receipts received - - -
12 it's the net receipts of EMI Mills or - - - let's do
13 it a second - - -

14 JUDGE SMITH: A second - - - second party.

15 MR. ZAKARIN: - - - party, second party.

16 JUDGE SMITH: Does - - - doesn't the case,
17 I mean even though I can't seem to persuade anybody
18 of this, but does - - - doesn't the case turn on
19 whether second party includes after-created
20 affiliates?

21 MR. ZAKARIN: Your Honor, actually, I don't
22 think it does, and I can explain why. Second party -
23 - - and it's interesting because the affiliates
24 argument's a subsidiary argument for them. I think -
25 - -

1 JUDGE SMITH: Well, I was doing my best to
2 promote it.

3 MR. ZAKARIN: Well, I think it's a loser
4 for them, in any event. And I think they perceive
5 it, as well, because they don't touch the contract.
6 Their analysis of the affiliate argument doesn't
7 touch the contract. If you look at this contract,
8 what is it? It is a copyright renewal agreement. It
9 is a grant of United States copyright renewal rights
10 to EMI Mills, Academy Music, Gotham Music, and their
11 predecessors and the affiliates of Mills.

12 JUDGE PIGOTT: Did my one-hundred-dollar
13 analogy work?

14 MR. ZAKARIN: Yes, your hundred-dollar
15 analogy is correct. Which is - - -

16 JUDGE PIGOTT: But now - - - now - - -

17 MR. ZAKARIN: Go ahead. I'm sorry.

18 JUDGE PIGOTT: - - - what I want to ask
19 about that is because it deals with foreign
20 affiliates. If you - - - I'm not suggesting you did
21 this. But if you did and you got this deal and you
22 say well, there's an awful lot of money going on
23 here, and you go to the guy that's handling it in the
24 United States and say you know what, we're firing
25 you. And you're now going to become an affiliate.

1 And so you're going to get all of this
2 money, but what you're going to do is keep fifty
3 percent of it, and then you're going to give us the
4 other fifty percent. I'm going to give twenty-five
5 dollars to - - - to Mr. Ellington. And so in effect,
6 we get seventy-five percent over here. In other
7 words, you could turn your employee into an affiliate
8 for purposes of - - - of - - - of making more money
9 than what Mr. Ellington did.

10 MR. ZAKARIN: You couldn't - - - you
11 couldn't do it with the original publisher here.
12 That is actually what Croce and Nolan v. Fox is
13 about. The original publisher can't subdivide its
14 rights in the United States. But foreign
15 sub-publishing was always done.

16 JUDGE SMITH: What in the - - - what in the
17 contract says that?

18 MR. ZAKARIN: That's just - - - that would
19 be a violation of the contract itself, which is - - -
20 and Nolan and Croce say that, which is that when the
21 original publisher is supposed to pay fifty percent
22 of its net receipts, that's the original publisher.
23 That's the entity here. In this case, original
24 publisher is second party.

25 JUDGE SMITH: Let's - - - all right. Let -

1 be improper if EMI did it. Which, by the way, is - -
2 -

3 JUDGE SMITH: It would - - - it would
4 obviously be improper. Isn't that why second party
5 is defined to include affiliates so you can't do
6 stuff like that?

7 MR. ZAKARIN: Second party is defined to
8 include - - - no, second party is defined to include
9 affiliates because it was intended to encompass all
10 of the original copyright owners in the U.S. If you
11 look at the agreement, the whereas clauses,
12 paragraphs 1, 2, 5, and 12, it is very clear from
13 those paragraphs, Your Honor, that you're referring
14 to the original United States owners of the original
15 copyright. And they're being granted by Ellington
16 the renewal copyrights in the United States.

17 JUDGE SMITH: What - - - what - - - what
18 would happen if one of those affiliates had received
19 some of the - - - the - - - through some contractual
20 arrangement had received some of - - - of the revenue
21 from the exploitation of the music? Ellington would
22 get half of it, right?

23 MR. ZAKARIN: They get half. That - - -
24 that's absolutely correct. Any of those companies,
25 what they receive - - -

1 JUDGE SMITH: But - - - but if - - - but if
2 you create a new affiliate the day after the contract
3 and it gets money, Ellington doesn't get half of it?

4 MR. ZAKARIN: No, if you create a new
5 original publisher, in effect, one of those owners of
6 the U.S. copyright conveys half of its interest in
7 the U.S. to one of those companies, that would be
8 Croce, Nolan. They couldn't do that. You would have
9 to gross up what both of them get so that Ellington
10 gets a full fifty percent of the receipts. But we're
11 talking here about foreign sub-publishing.

12 Now the foreign sub-publishers - - - and by
13 the way, this case - - - there's no claim in this
14 case. The claim that was dismissed was not that EMI
15 ever reduced or increased, rather, the sub-publishing
16 fee. That's not the claim in this case. The claim
17 in this case is that if an EMI company is the foreign
18 sub-publisher, it's entitled to zero.

19 JUDGE RIVERA: But - - - but okay. So tell
20 me why my description of what the parties' intent was
21 is wrong. It - - - it looks to me when you look at
22 that agreement that the parties came to the table and
23 said I'm getting fifty. You're getting fifty. If
24 you've got to shell out for a foreign entity so that
25 I can get royalties off the foreign purchases, then

1 okay, we'll share those costs. But otherwise it's
2 fifty-fifty.

3 MR. ZAKARIN: The otherwise part is not the
4 case. The otherwise - - - nothing says - - - and the
5 court below is correct, nothing in the agreement says
6 that if EMI purchases a foreign affil - - - a foreign
7 sub-publisher, becomes affiliated, that if it
8 purchases it that suddenly it's now no longer
9 entitled to any money. By the way - - -

10 JUDGE RIVERA: All right, that - - - that's
11 your argument. But what I'm asking you is doesn't it
12 sound like this is an agreement that the parties come
13 to the table and say we will share the cost of the
14 foreign affiliate, because that's not you. You need
15 a - - - an - - - someone or an entity external to you
16 to be able to raise royalties - - -

17 MR. ZAKARIN: No.

18 JUDGE RIVERA: - - - through these foreign
19 sales?

20 MR. ZAKARIN: I don't believe so, Your
21 Honor. The business at that time was that they were
22 not rolling up foreign companies. Over the course of
23 time, a lot of U.S. publishers have rolled up foreign
24 companies. They've purchased foreign sub - - -
25 sub-publishers.

1 JUDGE RIVERA: Is that what you mean by
2 rolled-up purchases?

3 MR. ZAKARIN: Yes.

4 JUDGE RIVERA: Thank you.

5 MR. ZAKARIN: They - - - they purchased
6 foreign sub-publishers. And by the way, when they
7 purchase them, there are contracts in place. They
8 pay for those foreign sub-publishers based upon the
9 earnings of those foreign sub-publishers. If we are
10 now going to say that if a company acquires another
11 company, suddenly we're changing the rights of that
12 other company. If I'm a manufacturer and I buy a
13 distributor in another country or I buy a parts
14 supplier in another country, if now I'm no longer
15 allowed for that - - - to have that company make any
16 money, I've got to - - - it's got to be - - - it's
17 got to distribute for free or I've got to takes its
18 products in - - -

19 JUDGE RIVERA: Yeah, but I think - - - I
20 think - - - I think the point - - - I think their
21 point is that's not the business when I came to the
22 table. That's not the understanding of any of us
23 when I came to the table.

24 MR. ZAKARIN: I don't - - - the - - - the
25 contract bespeaks the understanding. The contract -

1 - -

2 JUDGE RIVERA: You - - - you say it's not
3 ambiguous, correct?

4 MR. ZAKARIN: Contract is not ambiguous.
5 Net receipts agreements have been upheld. They've
6 been established. They are well known. They were
7 always well known.

8 JUDGE PIGOTT: Okay, Mr. Zakarin?

9 MR. ZAKARIN: Yes, Your Honor?

10 JUDGE PIGOTT: Can I ask - - - can I ask
11 you about in - - - in - - - in the Supreme Court's
12 decision he says, "To the extent that Ellington's
13 claims were predicated upon his attempt to have the
14 term 'affiliate' as used in 1961 agreement, apply to
15 entities that were completely unrelated, indeed, did
16 not exist at the time of the '61 agreement, his
17 amended complaint must be dispensed." Does that make
18 sense?

19 MR. ZAKARIN: Yes, it does because there
20 were - - -

21 JUDGE PIGOTT: The fact that he signs an
22 agreement in 1961, and - - - and EMI grows and there
23 are new affiliates, that somehow that that agreement
24 doesn't apply to any affiliate post-1961?

25 MR. ZAKARIN: That is correct, Your Honor.

1 JUDGE PIGOTT: So if you would - - - so if
2 - - - so if you made any deals with any affiliates,
3 foreign or domestic, that - - - that this - - - this
4 agreement does not apply? They're separate?

5 MR. ZAKARIN: It doesn't apply to future
6 affiliates. But that's less the issue on the
7 affiliate point.

8 JUDGE SMITH: Suppose - - - suppose - - -

9 MR. ZAKARIN: The real - - -

10 JUDGE SMITH: Suppose that you, instead of
11 buying the stock of these overseas publishers, you
12 bought the assets subject to the liabilities.

13 MR. ZAKARIN: Yes, Your Honor.

14 JUDGE SMITH: And so the revenue that had
15 gone to those - - - to those corporate entities now
16 goes directly into EMI Mills. He gets fifty percent
17 of the net revenue, doesn't he?

18 MR. ZAKARIN: No, these - - - if - - - if
19 we bought - - -

20 JUDGE SMITH: Even - - - even - - -

21 MR. ZAKARIN: - - - if we bought the assets
22 remember, these are companies that exist.

23 JUDGE SMITH: But he's getting net rev - -
24 - he's getting - - - you - - - he - - - he has to get
25 fifty percent of net revenue received by EMI Mills?

1 MR. ZAKARIN: EMI Mills, he gets that. But
2 by the way, EMI Mills - - -

3 JUDGE SMITH: But on my hypothetical EMI
4 Mills, that entity is now getting the revenue that
5 the sub-publishers used to get.

6 MR. ZAKARIN: But - - - but - - -

7 JUDGE SMITH: Why he can't he share in it?

8 MR. ZAKARIN: That's not EMI Mills, though.
9 Number one, those companies are not owned by EMI
10 Mills. They are sister corporations.

11 JUDGE SMITH: I - - - and I just gave you a
12 hypothetical that said he - - - they bought the - - -
13 EMI Mills bought the assets, not the stock but the
14 assets.

15 JUDGE SMITH: If EMI Mills, if that were
16 the structure, if EMI Mills had acquired those
17 company - - - or acquired the assets of those
18 companies, I would agree with you. That consolidates
19 the assets and the net revenues then of EMI Mills.

20 JUDGE SMITH: Why should it make a
21 difference whether they buy assets or buy stock?
22 They own the company one way or the other?

23 MR. ZAKARIN: EMI Mills doesn't own the
24 company, number one. It's owned by - - - it was
25 owned by EMI Group. They were purchased separately,

1 independently. They purchased foreign
2 sub-publishers.

3 JUDGE SMITH: They are - - - they are under
4 common ownership?

5 MR. ZAKARIN: They are under common
6 ownership.

7 JUDGE SMITH: Okay.

8 MR. ZAKARIN: The contract - - - and by the
9 way, as I said, second party - - - second party only
10 refers, not to foreign sub-publishers, but to
11 American companies that own the dir - - - direct
12 agreements with Ellington, that had the original
13 copyright from Ellington - - - by the way, such as
14 Exclusive Publications. If you look at the
15 schedules, they list all of the companies that have
16 the original copyright. And the affiliates were ex -
17 - - exclusive publications. And Mills - - - those -
18 - -

19 JUDGE RIVERA: What - - - what's the
20 duration of the agreement?

21 MR. ZAKARIN: Excuse me, Your Honor?

22 JUDGE RIVERA: What's the duration of the
23 agreement?

24 MR. ZAKARIN: The duration of the agreement
25 is copyri - - - is the renewal term of copyright,

1 which by the way, that renewal term is why Famous
2 Music had it but EMI is still the owner of the
3 foreign rights. There's a distinction between
4 foreign rights and the copyright. And - - -

5 JUDGE GRAFFEO: Counsel, is - - -

6 MR. ZAKARIN: - - - domestic.

7 JUDGE GRAFFEO: - - - is there any
8 precedent in the country that you would point to and
9 say that the situation is comparable?

10 MR. ZAKARIN: Yes, Job - - - Jobim.

11 JUDGE GRAFFEO: Is this a - - - is this a
12 novel case or is - - -

13 MR. ZAKARIN: No, Your Honor. It's
14 actually not.

15 JUDGE GRAFFEO: - - - is there another
16 case?

17 MR. ZAKARIN: Jobim is actually even a
18 harder case, which the court upheld the net receipts
19 agreement, because there was no actual - - - there
20 was no actual provision there for net receipts. The
21 - - - it was an agreement between Universal Music or
22 its predecessor, and Jobim's predecessors. Federal
23 case, I think 2010.

24 JUDGE GRAFFEO: That's the Southern
25 District?

1 MR. ZAKARIN: Yes, and they upheld the net
2 receipts agreements and said that Universal could
3 have its foreign affiliates sub-publishing, and they
4 were entitled to their fee. Otherwise, Universal
5 itself would be bearing the cost in each territory
6 solely. So it upheld the sub-publishing fee on net
7 receipts.

8 Judge Duffy in Berns, while he rejected the
9 amended pleading, went through exactly how it
10 operated. He - - - and it was - - - and it was
11 upheld there where it was an affiliate. It was an
12 affiliate, by the way, of EMI, acquired subsequently,
13 as well. That was the sub-pub - - - it was actually
14 Robert Melon (ph.), which EMI also acquired over the
15 course of time. And Judge Duffy exactly went through
16 the same analysis which is hundred dollars earned in
17 the foreign territory. Fifty kept by the
18 sub-publisher. Fifty comes to the U.S. Twenty-five
19 kept by EMI. Twenty-five goes to the Berns family.
20 And that was exactly how it works, and there was no
21 question about it.

22 CHIEF JUDGE LIPPMAN: Okay, counselor.
23 Thanks, counsel.

24 MR. ZAKARIN: Thank you, Your Honor.

25 CHIEF JUDGE LIPPMAN: Let's hear your

1 opponent.

2 MR. SCAROLA: I - - - I really need to talk
3 about what's happening today just quickly on - - - on
4 Berns - - -

5 CHIEF JUDGE LIPPMAN: What about those
6 cases, yeah?

7 MR. SCAROLA: - - - on Berns and on Jobim.

8 CHIEF JUDGE LIPPMAN: Jobim, yeah.

9 MR. SCAROLA: Jobim did not present this
10 case. It didn't pre - - - this issue. It didn't
11 present this issue.

12 CHIEF JUDGE LIPPMAN: What's different
13 about those cases?

14 MR. SCAROLA: In - - - in the Jobim case it
15 was assumed that certain foreign affiliate
16 sub-publishing was permitted. There was a contract
17 that covered that. The claim by that plaintiff was
18 not the claim presented here. The principle issue
19 being decided was simply whether the language of the
20 contract in a broader sense was of the so-called
21 industry jargon, at source or - - -

22 CHIEF JUDGE LIPPMAN: What about Berns?

23 MR. SCAROLA: In Berns, Judge Duffy, a man
24 of not a lot of patience with a - - - a poorly
25 handled case, had a third amended complaint presented

1 to him. That third amended complaint was the first
2 time that this issue was squarely presented. The
3 party's prior counsel had actually raised the
4 180-degree opposite issue previously. And Judge
5 Duffy said as to that third amended complaint, it,
6 "It has clarity, and it was available." Those are
7 his words. But I'm not going to allow it, because
8 you're too late. There were a lot of other abuses
9 and you're just too late.

10 CHIEF JUDGE LIPPMAN: Okay, what - - - what
11 was the other point you wanted to make?

12 MR. SCAROLA: All right, the important is -
13 - - Judge Abdus-Salaam, you - - - you asked me the
14 question do we need to know what happened in 1961 or
15 what was happening. The - - - the point is it would
16 be helpful, and we don't know. And this record is
17 confused because it's a motion to dismiss context
18 where Mr. Zakarin's been able to put in a whole bunch
19 of stuff.

20 But let me talk about what's happening
21 today in the real world, because it goes in various
22 ways to the questions a number of the members of
23 court have asked. Let's take EMI China. And I'm
24 willing - - - I'm outside the record now, just as
25 most of Mr. Zakarin's stuff is off of a motion to

1 dismiss. You look at EMI China. You know what EMI
2 China is? Based upon what's on the Internet, EMI
3 China is a piece of paper, at most. Maybe it's a
4 webpage, at most. You know what's happening in EMI
5 China? EMI China is really finding people on the
6 ground to which it's paying that fifteen or twenty
7 percent.

8 There is no real foreign sub-publisher
9 there. This notion that EMI has bought up all the
10 foreign sub-publishers around the world and that's
11 how we get to this place is a fiction. It's
12 certainly a fiction on this record. It's one that
13 Mr. Zakarin's done a great job of inserting into this
14 record. But you don't know that. The China example
15 is one. There are many others. You can go around
16 the world and find that you do not have arm's-length
17 sub-publishing agreements that were - - -

18 JUDGE READ: So are these all frauds?

19 MR. SCAROLA: - - - of an older sort that
20 EMI acquired.

21 JUDGE READ: Are you - - - are you saying
22 these are all frauds?

23 MR. SCAROLA: These are all - - - I - - - I
24 hate to use that word. The - - - the music
25 publishing business is a tough business. In China, I

1 think the situation may well be what I described. In
2 France, what might the situation be? What is
3 collecting royalties of this sort? It is a passive
4 exercise.

5 JUDGE GRAFFEO: Is this - - - is this what
6 - - -

7 MR. SCAROLA: Does EMI have an entity
8 there? Yes. Where is all of the money being run
9 through? It's being run through Nashville,
10 Tennessee, paid by Sony ATV, on an account called EMI
11 World Entertainment Inc.

12 JUDGE GRAFFEO: But a lot of - - -

13 MR. SCAROLA: There's no Mills anywhere.

14 JUDGE GRAFFEO: A lot of industries change
15 over time. Is this why, generally, our traditional
16 rule has been to look at the words of a contract?

17 MR. SCAROLA: And the words of the contract
18 say - - -

19 JUDGE GRAFFEO: And to hold parties to the
20 terms of a contract?

21 MR. SCAROLA: And the words of the contract
22 say "actually received." It's a gray area what
23 actually received means in the abstract. So you do
24 need to look at the context. I think it's at best
25 ambiguous, but in that - - -

1 JUDGE SMITH: Are you - - - are you - - -
2 are you saying - - -

3 MR. SCAROLA: - - - context - - -

4 JUDGE SMITH: Are - - - are you - - - you
5 saying that you have to include that if E - - - EMI
6 is intentionally diverting from itself some money
7 that it should actually receive and you're entitled
8 to a share of that?

9 MR. SCAROLA: We're saying that, and we're
10 saying, additionally, that EMI isn't actually
11 operating foreign sub-publishing enterprises in
12 anywhere the sense that the con - - - the contract
13 contemplated.

14 JUDGE SMITH: Well, why does that matter?

15 MR. SCAROLA: Because the contract
16 contemplated - - - as I think I tried to say earlier
17 - - - a unity of interest between then-Mills, the
18 publisher, and the artist as to what's happening
19 abroad. EMI had market - - - I mean Mills had market
20 power. It was a large player. When Duke signed up
21 with it, it signed - - - he signed up with an entity
22 that was going to get the best possible deal abroad.
23 When EMI melds everything into Sony, and we don't
24 know the full scope or the - - - the - - - the - - -
25 the nature of all the - - - the EMI entities that are

1 at the - - - at the top of the food chain. But when
2 they are all melded together into a single
3 enterprise, what's bargained for in the - - - in the
4 words "actually received" goes out the window. So
5 you need to interpret those words or trier of fact
6 does if you deem it ambiguous, to say does "actually
7 received" encompass this scenario where today it's
8 just one enterprise acting worldwide.

9 CHIEF JUDGE LIPPMAN: Okay, counselor.

10 Thanks.

11 MR. SCAROLA: Thank you.

12 CHIEF JUDGE LIPPMAN: Thank you both.

13 MR. SCAROLA: I apologize for going over,
14 Your Honor.

15 CHIEF JUDGE LIPPMAN: Appreciate it.

16 (Court is adjourned)

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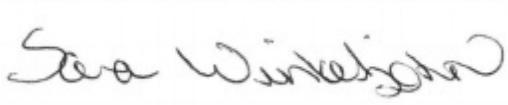
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Paul M. Ellington v. EMI Music Inc., EMI Music Publishing, EMI Music Publishing North America, No. 156 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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