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Damages and The Arts

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In Contracts I, having been subjected to the wonderful world of "damages", I was immensely disappointed to discover that an author at one time could only collect nominal damages when his manuscript was rejected by a publisher, according to *Freund v. Washington Square Press, Inc.*, 34 N.Y.2d 379 (1974). In that case, the court held that it was too speculative to determine what damages were suffered by the author, since "a stable foundation for a reasonable estimate of royalties" had not been shown. *Ibid*, at 383. Being a composer myself, I remember being upset by this, and I vowed to look into it at a later date.

So, this semester, I decided to take Publishing Law (I highly recommend the course) whereupon I was happy to find that over the years, the *Freund* case has been overturned. Today, an author in the same position may recover reliance damages, and in some cases, expectancy damages can be awarded to artists and authors who show a reasonable estimate of their losses.[1]

The landmark case which changed the standard came in 1982 with *Harcourt Brace Jovanovich, Inc. v. Goldwater*, 532 F.Supp. 619 (S.D.N.Y. 1982) where the court held that a publisher had a duty to edit a manuscript and the publisher had to act in good faith. Since Senator Goldwater had written an outline for the book, which the publisher had initially accepted, and he had consistently asked for editorial assistance and received no response, the court determined that HBJ had not acted in good faith. The outline, incidently, helped to establish a more objective standard for a publisher's acceptance of a manuscript, and Senator Goldwater was able to keep his advance.

In 1984, in *Dell Publishing Co. v. Whedon*, 577 F.Supp. 1459 (S.D.N.Y. 1984), a court awarded reliance damages to an author who had written a 12-page outline and more than one half of a manuscript which had been approved by the publisher, but was told the manuscript was unsatisfactory upon completion. The court there held that a publisher owes the author a good faith opportunity to revise the manuscript and he must give the author a detailed explanation of the problems before rejecting it. The author in this case not only was able to keep her advance money, but she was also not obligated to give the publisher first proceeds from the subsequent sale of the book, since the contract was terminated.

Moving away from publishing contracts, the courts are beginning to use a more objective test in determining what damages should be awarded to artists in other similar situations. For instance, in 1977, a court awarded damages to a group of priests who wrote a hit song and were denied profits due to lack of promotion on the part of a new company which had taken over their original publisher. *Contemporary Mission, Inc., v. Famous Music Corporation*, 557 F.2d 918 (1977). In determining the amount of damages to be assessed, the court quoted Williston on Contracts, stating that "if the plaintiff has given valuable consideration for the promise of performance which would have given him a chance to make a profit, the defendant should not be allowed to deprive him of that performance without compensation unless the difficulty of determining its value is extreme."[2] The Court then determined a "reasonable estimate of royalties"[3] by computing percentages of the likelihood of the song reaching the top of the charts based on similar songs reaching the same status on the charts in the same year. The court found the analysis was sufficient to award damages.

Of course, some other courts have turned the other way, limiting *Contemporary Mission*[4], but at least today, authors and artists are able to recover damages if they can show a reasonable basis for determining those damages.

[1] see, *Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918 (1977).
[2] *Contemporary Mission, Inc. v. Famous Music Corporation*, 557 F.2d at 926 (1977).
[3] *Ibid*, at 926 (1977) quoting *Freund v Washington Sq. Press, Inc.* 34 N.Y.2d 379 (1974).
[4] see, *Zilg v. Prentice Hall*, 717 F.2d 671 (2d Cir. 1983) (publisher must make "minimum" efforts to satisfy obligation to publish in good faith).

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