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# Church-State Cases

James E. Serritella, Reuben & Proctor Chicago, Illinois

# CHURCH-STATE CASES

JAMES E. SERRITELLA, ESQUIRE

## I. PERFORMANCE OF COPYRIGHTED CHURCH MUSIC—

### *F.E.L. Publications, Ltd. v. Catholic Bishop*

The case of *F.E.L. Publications v. Catholic Bishop,*[1] which involves copyright law, is of special interest. F.E.L. Publications is a religious music publisher which sells licenses to copy its songs.[2] It brought suit against the Catholic Bishop of Chicago, alleging that the parishes in the Archdiocese of Chicago, without obtaining the required license, made copies of songs that F.E.L. published, incorporated those copies into homemade hymnals in churches, and sang the songs during services.[3] Both F.E.L. and the Catholic Bishop of Chicago filed motions for summary judgment in the United States District Court for the Northern District of Illinois. The court denied F.E.L.'s motion for summary judgment and granted the Catholic Bishop's motion, holding that F.E.L. had misused its copyright and had unclean hands.[4]

Our misuse defense focused on F.E.L.'s license; and, therefore, it is important to understand how it operates. F.E.L. possesses rights to about a dozen popular songs, and, subject to a few exceptions that are irrelevant, F.E.L. only permits a potential customer to license all of its 1400 songs. This means that to get permission to copy those dozen widely used songs, a licensee must buy a license to copy all of F.E.L.'s songs. The

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[1] 506 F. Supp. 1127 (N.D. Ill. 1981).

[2] *Id.* at 1130.

[3] *Id.* at 1129. Prior to 1963 and the Second Vatican Council, songs were not sung by the congregation in Catholic ceremonies. Hence, the market for hymnals did not exist. *Id.* Subsequent to the Council, corporations such as F.E.L. arose to fulfill the Catholic Church's need for songbooks. *Id.* at 1129-30. F.E.L. initiated a new marketing technique in 1972 whereby a prospective licensee would pay an annual rate of $100 to use all of F.E.L.'s listed songs. *Id.* at 1130-31. At the end of the year, the copies of the songs must be destroyed or the purchaser must pay another $100 fee. *Id.*

[4] *Id.* at 1137. The court noted that F.E.L.'s marketing technique was an unlawful extension of its copyright monopoly since it sought to license the nonprofit performance of religious songs for worship. *Id.* at 1134. Also, in establishing an all-or-nothing blanket license, F.E.L. formed tying contracts that are illegal per se under the Sherman Act. *Id.* at 1136. Therefore, F.E.L.'s "unclean hands" deprived the corporation of its right to an equitable remedy. *Id.* at 1137.

second significant feature of the license is that it only grants permission to copy the songs for a year. Thus, 1 year after the licensee buys the license, the permission expires and he has to destroy the copies, even if he has incorporated them into a hymnal. Because we do the legal work for a large portion of the media and the press in the Midwest, we have seen many copying licenses, and these features seemed most peculiar.

After analyzing this license, two defenses were clear. One was that the all-or-nothing provision constituted an illegal tying arrangement under the federal antitrust statutes. This is similar to the situation in the motion picture industry when the studio required a theater or a theater chain to buy all of its movies rather than marketing them on an individual basis. The United States Supreme Court held that this block-booking was an illegal tying arrangement.[5] Similarly, we raised the defense in our case that F.E.L.'s license was an illegal tying arrangement.[6] The court granted us summary judgment on that ground.[7]

Additionally, the court's grant of summary judgment was founded upon a second ground, that F.E.L.'s requirement that the licensee destroy the copies after 1 year means it is not really licensing the copying, but the use of F.E.L.'s music.[8] Since F.E.L. requires the licensee to destroy the copies after a year, what it is really licensing is how long the licensee can use those copies.[9] Under the copyright laws, while the copyright holder can license for-profit performances, such as those in a theater or a nightclub, the holder nevertheless does not have the right to license not-for-profit performances, including those in a church. Because of the insertion of this destruction clause in the F.E.L. license, the court held that F.E.L. illegally extended its copyright monopoly.[10]

Thus, the court found two misuses upon which to grant summary judgment. One was the block-booking. The second was the extension of the copyright monopoly to include the licensing of not-for-profit performances. The case is on appeal to the Seventh Circuit Court of Appeals. The Catholic Bishop also has a counterclaim pending against F.E.L. for damages as a result of F.E.L.'s violation of the antitrust laws. The district court has not yet addressed that counterclaim and will not do so until the

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[5] United States v. Loew's Inc., 371 U.S. 38, 48-49 (1962).

[6] 506 F. Supp. at 1134-36.

[7] *Id.* at 1136.

[8] The court concluded that F.E.L.'s marketing technique was "simply a means by which it licensed the not-for-profit religious performances of its copyrighted works; it is an extension of its copyright monopoly not authorized by the copyright laws." *Id.* at 1134.

[9] A copyright owner cannot increase the scope of his monopoly afforded by his copyright through a license agreement with the licensee. *Id.*; *see* Krampe v. Ideal Indus., Inc., 347 F. Supp. 1384, 1386 (N.D. Ill. 1972).

[10] 506 F. Supp. at 1134. *See also* 2 M. NIMMER, COPYRIGHT § 8:15(A) (1982).

appeal on those two defenses is resolved.[11]

There are other defenses pending in this case. Perhaps the strongest defense is that of laches.[12] When the English Liturgy first came into existence 15 years ago, publishers were glad to get their own songs and their own music distributed as widely as possible—nobody was holding anyone to the legalities. After functioning in this manner for 10 years, F.E.L. wanted to change the rules and hold everybody to the formalities. I think that the laches defense may be one of our strongest defenses. Since it is not the subject of the summary judgment motions, it is available to us if the Seventh Circuit reverses.

Two brief points are worth noting. First, the case is still pending. Second, the victory is not an excuse to begin violating the copyright laws. The copyright laws exist and the F.E.L. lawsuit has made everybody aware of them. There will be more suits if the copyright laws are disobeyed. It is, therefore, very important to set up procedures in your own dioceses to make sure they are obeyed. Copyright laws are especially important for Catholics, because, unlike most mainline Protestant denominations, Catholics do not have a national hymnal. They have to put together their own hymnals. When doing so, they should observe the formalities so as to avoid further lawsuits.

## II. "POLITICAL ENTANGLEMENT" UNDER THE CETA PROGRAM—

### *Decker v. United States Department of Labor*

The Comprehensive Employment and Training Act (CETA) is a federal job training program for the very poor.[13] It is hoped that by receiving training under the CETA program, the poor will be able to obtain normal employment. The program operates through prime sponsors, which generally are cities, municipalities, and subcontractors. The latter are the religious denominations and various not-for-profit groups.

The specific type of CETA program involved in *Decker v. United States Department of Labor*[14] was title IID.[15] This program involves both employees who teach—custodial child care workers, summer education

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[11] The district court granted summary judgment in favor of the defendant, sustaining the copyright use defense, and dismissed F.E.L.'s suit in its entirety. 506 F. Supp. at 1139.

[12] Laches is an ancient equitable defense analogous to estoppel. *See* Larson v. Crescent Planning Mill, 218 S.W.2d 814, 821 (Mo. Ct. App. 1949). Since F.E.L. waited 10 years to institute the controversial marketing technique, it may be argued that to hold in favor of F.E.L. is prejudicial to the defendant. F.E.L.'s unreasonable delay in asserting its copyright claim would work an unfair disadvantage to the defendant.

[13] *See* 29 U.S.C. § 841 (1976 & Supp. IV 1980).

[14] 473 F. Supp. 770 (E.D. Wis. 1979), *aff'd sub nom.* Decker v. O'Donnell, 661 F.2d 598 (7th Cir. 1980).

[15] 29 U.S.C. §§ 853-859 (Supp. IV 1980).

and recreation teachers, remedial education teachers, and tutors—and other types of employees who do not teach, such as cafeteria workers and safety-related school transportation employees. The suit was brought against Milwaukee's program which was very small. In fact, some think that the ACLU picked Milwaukee because its small program was seen as vulnerable. In *Decker*, Judge Reynolds held that the portion of the program that placed these CETA employees in parochial or church-related schools was unconstitutional.[16] A nationwide injunction was issued to prohibit the government and the various prime contractors from placing CETA workers in parochial schools.[17]

The decision of the district court was affirmed by the Seventh Circuit Court of Appeals.[18] The affirmance echoes notions we have heard for a long time in the parochial aid cases. These cases state that since the schools have a religious environment, the government must scrutinize any publicly funded personnel in parochial schools to insure that they do not advocate or proselytize.[19] Such scrutiny, however, constitutes entanglement which is unconstitutional.[20]

The more significant doctrinal result of the case is the court's holding that parochial schools cannot even use those workers that are not in sensitive religious areas.[21] The court reasoned that although these workers create no administrative entanglement, they do create political entanglement.[22] This type of entanglement occurs because various faith groups compete for more workers, more positions, and bigger contracts. The court concluded that the resulting political divisiveness was unconstitutional.[23] Somewhere along the line this false doctrine must be effectively debunked.

The Milwaukee Diocese which was denied a hearing, currently is considering whether or not to pursue the action. There is no incentive for doing so since the CETA program is winding down. Moreover, the government has specifically announced that it will discontinue title IID of the CETA program, which was the target of this case.

There are three significant features of *Decker*. First, it not only shows that the courts are continuing to use the reasoning found in prior parochial decisions, but also goes beyond the bounds of parochial aid since CETA is not a parochial aid program. Second, the case extends the

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[16] 473 F. Supp. at 776.
[17] *Id.* at 779.
[18] 661 F.2d 598 (7th Cir. 1980).
[19] *See, e.g.*, Meek v. Pittenger, 421 U.S. 349, 366, 369-72 (1975); Lemon v. Kurtzman, 403 U.S. 602, 618-19 (1970).
[20] *See* 403 U.S. at 620.
[21] *See* 661 F.2d at 614-15 & n.31.
[22] *Id.* at 615-17.
[23] *Id.* at 617.

doctrine of political entanglement further than ever before. Third, and least important, is the court's holding that the part of the CETA program relating to parochial schools is unconstitutional. This portion of the case is practically moot, as those of you who have CETA programs already know. The real problems with title IID of CETA now involve the winding down of the program and the payment of unemployment compensation. Nevertheless, the first two significant features of the case may have ramifications in cases which do not involve CETA.

## III. CHURCH PROPERTY—

### *Protestant Episcopal Church v. Barker*

Litigation over church property is exemplified by *Protestant Episcopal Church v. Barker*,[24] in which several local congregations, intending to break away from the mother church, petitioned the court to decide who was entitled to the church property.[25] A court may resolve this issue in two ways. One way is to premise the determination upon the church's polity. For example, if the polity is hierarchical, a court can let the hierarchical body make the decision as to who gets the property. If the polity is congregational, a court can let the congregation decide. The second method is to use the neutral principles of law approach. The court looks at the deed, and other documents involved. If the documents give the property to the hierarchical body, the court will give it to the hierarchical body. If the documents give it to the congregation, the court will give it to the congregation.

In the *Barker* case, the California court used the neutral principles of law approach.[26] The court found that, although the Protestant Episcopal Church might be hierarchical, there was nothing in the title papers or the articles of incorporation of three of the four Protestant Episcopal congregations that gave title of the property to the Episcopal Diocese.[27] The articles of incorporation for the fourth congregation indicated that the congregation held the property subject to an express trust in favor of the Diocese.[28] The court, therefore, gave only the property of the fourth congregation to the Diocese.[29] The critical factors in the court's determination were the contents of the articles of incorporation of the various local churches and the legal title to the property.[30]

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[24] 115 Cal. App. 3d 599, 171 Cal. Rptr. 541 (Ct. App.), *cert. denied*, 102 S. Ct. 523 (1981).
[25] *Id.* at 605, 171 Cal. Rptr. at 543.
[26] *Id.* at 616, 171 Cal. Rptr. at 549.
[27] *Id.* at 626, 171 Cal. Rptr. at 555.
[28] *Id.* at 626-27, 171 Cal. Rptr. at 555-56.
[29] *See id.* at 627, 171 Cal. Rptr. at 556.
[30] *See id.* at 622-25, 171 Cal. Rptr. at 553-55.

The same type of situation was presented in *Diocese of New Jersey v. Graves*.[31] There, however, the New Jersey Supreme Court followed the polity approach. The court held that since the Episcopal Church is hierarchical, it was proper for the church body to determine which entity was rightfully entitled to the property.[32] The court added that even if it were to follow the neutral principles of law approach, it would reach the identical result because both a state statute and the church canons stated that the hierarchical body had the right to approve transfers by a local church congregation.[33] Similarly, in *Marich v. Kragulac*,[34] a local congregation broke away from the Serbian Orthodox Church.[35] The Indiana court decided that it would use the polity approach and remanded the case to trial.[36] The district court was instructed that if the trial court found that the polity was hierarchical, then it had to give the church hierarchy the property. Alternatively, if it found that the polity was congregational, it had to give the congregation the property.

The significant thing about these cases is that almost all of them have dissents.[37] When faced with the issue, the courts seem to prefer the neutral principles of law approach, as opposed to the polity method. This preference occurs because the polity method requires more analysis. For example, it is unclear whether certain denominations are hierarchical or congregational.

This judicial preference should be of some concern to Catholic lawyers. We have always assumed, at least until *Jones v. Wolf*[38] was decided, that these cases would be decided on the basis of the polity test. Due to this assumption, we have not paid a great deal of attention to who has title to church property. The court's use of the neutral principles of law approach indicates that we should check our title documents to make sure that they reflect who is to get the property if a title contest ever arises.

Reviewing title documents is particularly important because of the profusion of cases involving the Catholic Church. There are twenty-two different contentious situations across the country involving Catholic church property. They tend to be situations in which the bishop has de-

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[31] 83 N.J. 572, 417 A.2d 19 (1980), *cert. denied*, 449 U.S. 1131 (1981).
[32] 83 N.J. at 580, 417 A.2d at 24.
[33] *See id.* at 580-81, 417 A.2d at 24.
[34] 415 N.E.2d 91 (Ind. Ct. App. 1981).
[35] *Id.* at 93.
[36] *Id.* at 100.
[37] *See* Protestant Episcopal Church v. Barker, 115 Cal. App. 3d 599, 627, 171 Cal. Rptr. 541, 556 (Roth, J., dissenting), *cert. denied*, 102 S. Ct. 323 (1981); Diocese of New Jersey v. Graves, 83 N.J. 572, 582, 417 A.2d 24, 34 (1980) (Schreiber, J., dissenting), *cert. denied*, 449 U.S. 1131 (1981).
[38] 443 U.S. 595 (1979).

cided to close a church, to alter the internal architecture of the church to conform with the new requirements of the liturgy, or to merge schools. Some of these situations have gotten into court. It is, therefore, a good idea to check the document before a problem develops.

One of the cases that has gotten into court is *Galich v. Catholic Bishop of Chicago.*[39] There, the bishop decided to close a local church because the cost of supporting it was too great.[40] The building was in a dilapidated state, and there were many other very strong functioning churches in the area, as well as a shortage of priests.[41] Certain members of the local congregation filed a lawsuit and tried to get the courts to require the bishop to keep the church open.[42] They alleged that there was both an implied and express trust in favor of the local congregation.[43] The court eventually decided the case based on the polity analysis.[44] It held that since this was a hierarchical church, the bishop was the proper person to make the decision.[45] The court, however, also used the neutral principles of law test,[46] but nevertheless found that the bishop had title to the property.[47] This case demonstrates the importance of sound documents.

In addition to court proceedings, church property disputes are often accompanied by landmark proceedings. When those who want to save a church lose in court, they usually go to the various landmark bodies. With respect to the Catholic Church, this means that there will probably be a landmark hearing where the property documents are properly organized. Those who want to keep the Catholic church open believe that if the landmark body designates the church as a landmark and thereby prevents the church hierarchy from demolishing the building, the hierarchy will appoint a priest to keep the church going.

Our dealings with local, state, and national landmark bodies reveal that there are three valid arguments against those seeking to impose landmark status. First, such status is not desirable from the perspective of the property owner. This is especially important in the federal forum. Second, there are constitutional problems with the designation of a church as a landmark. Landmark designation alters the church body's control over the disposition of the church because it often prevents the church from demolishing the building. The designation, however, does

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[39] 75 Ill. App. 3d 538, 394 N.E.2d 572 (Ct. App. 1979), *cert. denied,* 445 U.S. 916 (1980).
[40] 75 Ill. App. 3d at 540, 394 N.E.2d at 574.
[41] *Id.*
[42] *See id.* at 540-41, 394 N.E.2d at 574.
[43] *Id.* at 541, 394 N.E.2d at 574.
[44] *Id.* at 548, 394 N.E.2d at 579.
[45] *Id.*
[46] *Id.* at 542-45, 394 N.E.2d at 575-77.
[47] *Id.* at 545, 394 N.E.2d at 577.

not save the church, one of the principle ends sought by proponents of landmark status. The landmark body cannot force the hierarchy to use the building as a church. Therefore, landmark designation simply ties up the hierarchy. Third, the church does not meet the landmark requirements. Usually, the claims for landmark status are rather frivolous. The proponents state that this is a French church, or an Italian church, or a Polish church, or an Irish church. Since most Catholics are from some ethnic group, most churches originally had some ethnic association. It is quite difficult to distinguish one church from another on that basis. If one church is going to be designated a landmark, virtually all churches are going to be designated landmarks. To qualify as a landmark, there must be something historically or architecturally significant about a given church body.