"RAGING BULL" DECISION HIGHLIGHTS IMPORTANCE OF ADR IN ENTERTAINMENT DISPUTES

By Jeffrey S. Grubman, Esq.

"Raging Bull" is a classic 1980 motion picture directed by Martin Scorsese and starring Robert De Niro as boxer Jake LaMotta. In the case of *Petrella v. Metro-Goldwyn-Mayer, Inc.*, the United States Supreme Court recently ruled that MGM can be sued for copyright infringement more than three decades after releasing the movie. The case was filed by Paula Petrella, the daughter of Frank Petrella, who co-wrote and sold his rights to the screenplay used to make the movie. Mr. Petrella died in 1981, and his rights transferred to his daughter, who claims that MGM needed her permission to continue to exploit the screenplay.

Although Ms. Petrella initially contacted MGM in the 1990s, she did not bring suit until 2009. The district court granted summary judgment for MGM, and the Ninth Circuit Court of Appeals affirmed on the grounds that Ms. Petrella's claims are barred by the equitable doctrine of laches, which bars a plaintiff's recovery due to an undue delay in seeking relief. However, like all copyright infringement claims, Ms. Petrella's claim is subject to a three-year statute of limitations. Therefore, Ms. Petrella was seeking damages only for the three years prior to the date she filed suit, attempting to benefit from DVD sales associated with a 25th anniversary edition.

The Court reversed and held that "in face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief." In other words, a copyright owner can wait idly for years, or even decades, and still file suit to collect damages for the three years prior to the filing of the suit. This decision has far-reaching implications. Given new revenue sources associated with constantly evolving forms of distributing content, content owners who may have abandoned any hope of recovery may now file suit. Also, people who believe (rightly or wrongly) that their works of art have been infringed, but dismissed any hope or expectation of collecting damages due to lapse of time, are now likely to sue. Consequently, the *Petrella* decision could lead to a floodgate of potential litigation.

Even before the Supreme Court's decision in *Petrella*, intellectual property / entertainment matters were ideally suited for mediation and other forms of ADR. The importance of secrecy and privacy, the need for expertise and the flexibility that ADR offers are three reasons why intellectual property and entertainment practitioners should use ADR as much as possible. The additional number of claims and the nature of the claims likely to result from the *Petrella* decision further reinforce the importance of ADR for entertainment matters.

Movie studios, television production companies, record companies and other potential targets of copyright infringement claims would be wise to use pre-suit mediation to resolve quickly and quietly old claims like Ms. Petrella's. Many of the people bringing these claims would likely settle for a small amount of money, often far less than what it would cost to defend a copyright infringement claim in federal court. Most people looking to benefit from the *Petrella* decision, whether or not represented by counsel, will likely send a demand letter before filing suit. Rather than attempting tonegotiate directly with an emotional and unrealistic potential plaintiff or rejecting the demand and inviting a lawsuit,

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the recipient should consider a pre-suit mediation. This process provides a mechanism for the aggrieved party to tell his or her story and have his or her "day in court" without ever filing a lawsuit. It also provides the opportunity for an experienced neutral familiar with entertainment litigation to explain the challenges that the plaintiff faces in an entertainment copyright case and likely adjust his or her expectations to a more realistic level. Finally, in addition to saving substantial attorneys' fees if the case settles during a pre-suit mediation, the pre-suit mediation also keeps the matter confidential and out of the press.

In a recent case, a party claimed that a Fortune 100 company had infringed its copyright in its national television advertising campaign. The alleged infringing television commercials were actively running. To avoid the potential negative publicity associated with a copyright infringement lawsuit, not to mention the possibility of a preliminary injunction preventing the commercials from running, the parties agreed to participate in pre-suit mediation. The Fortune 100 company was convinced that it and its advertising agency had not engaged in copyright infringement. Nevertheless, to avoid the negative publicity and business disruption, the company paid a sizeable amount of money (although still less than the attorneys' fees associated with litigating the case) to settle the case. The parties entered into a confidential settlement, which never saw the light of day.

The *Petrella* decision is just the latest example of the uncertainty that parties face when litigating. Litigation is a minefield that should be avoided whenever reasonably possible. Members of the entertainment industry and their attorneys should utilize pre-suit mediation and other ADR processes to control their risk and reduce their costs. ■

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