LITTLE LEGAL RECOURSE FOR ARTISTS' RAGE AGAINST MUSICAL TORTURE

One of the obvious questions from the announcement of the musicians Rage Against Musical Torture, and one that several people have been asking, is what avenues of legal recourse do the musicians have? It turns out remarkably few, if any.

A look at the recent case of *Jackson Browne v. John McCain* demonstrates why. Here is a link to the complaint in *Browne v. McCain*; as you can tell, Plaintiff Browne pled four causes of action for the wrongful use of his music. The four counts are copyright infringement, vicarious copyright infringement, violation of the Lanham Act and violation of state law (California) right to publicity. (You can see the court's rulings upholding the viability of these counts at the links provided here).

The lead count of copyright infringement is based upon 17 USC 501 et seq. The specific triggering conduct is delineated in 17 USC 106-122. Unlike in *Browne*, there really is no provision of the applicable law that comes into play. In *Browne*, there was an appropriation for use in a campaign commercial, that was broadcast on television and the internet, and the conduct happened in the United States; none of that is the case, unfortunately, for the musicians here. There was no "commercial use", there was no "secondary broadcast", and the putative conduct did not occur within the United States.

The key here is the nature of the use. As horrid as the conduct of using the artists' music for torture is, there is no evidence that the governmental actors, whether soldiers, CIA or contractors, obtained the music illegally. Furthermore, there is no evidence that they used

the music for a “commercial purpose”. It was not broadcast, nor was it played in a public setting; there is legally little to nothing to distinguish what was done from a person playing his boom box or stereo too loud in his apartment building. In short, there does not seem to be a “copyright infringement”. The same rationale explains why there is no apparent RIAA violation. Also, since there was no cognizable copyright violation, there was no “vicarious copyright infringement” as was present in *Browne*.

The next common count to proceed in these situations is via the “Lanham Act“. Here, again, the facts simply do not truly reach the scope of the claim. There is no legal basis for asserting that the restricted use made of the artists’ music would create confusion or imply that the artists approved of the torture; and, again, the conduct was not done in a public setting or performance. There just is not a federal trademark infringement for false association or false endorsement.

The last count in the *Browne* complaint was a pendant claim for state (California) law violation of “right to publicity”. This is a state law claim and, unfortunately, the known conduct occurred outside of the territorial United States. There is no hope of making out a state common law tort under these circumstances.

There are two general concerns at play here as well, statute of limitations and subject matter jurisdiction. Under 17 USC 507, all of the copyright/fair use type of issues bear a statue of three years for civil claims and five years for criminal violations (if applicable, which they do not seem to be). The known conduct seems to be outside of the statute period by now, even if a cognizable claim were able to be made out.

As to subject matter jurisdiction, the first question is whether or not the government is capable of being sued for any of the misuse to start with. The US government cannot be sued without its consent and, somewhat surprisingly,

the government, pursuant to 28 USC 1498, has so consented to suit. The bigger problem is territorial jurisdiction because the known acts occurred primarily, if not exclusively, outside of the United States. Even Guantanamo would appear to be excluded here. Although the Supreme Court, in *Rasul v. Bush*, permitted jurisdiction for purposes of the grand writ of habeas corpus, the decision clearly appears limited to that writ. That conclusion is supported by the historic *Eisentrager* decision (see the discussion here as well). The bottom line is that even were it possible to argue a valid claim exists, it seems highly unlikely a US federal court would accept jurisdiction of the claim.

What is needed for the artists to be able to protect their works, and their good name, out of this situation is an international "Doctrine Of Moral Rights" allowing them to have a justiciable interest in the moral manner in which their work is used. Indeed there is just such an international law, and it is embodied in what is known as "The Berne Convention". Under the Article 6 of the original (read French) iteration, there is a moral rights protection for authors and artists in the "right of integrity" of their works. This gives the artist an enforceable right against "mutilation or distortion that would prejudice the author's honor or reputation". In French law, this right is called "*droit au respect de l'oeuvre*" and is mentioned in Article 6 of the French Law No. 57-298 of 11 March 1957. This has been at times, in various European courts, construed as a right of an artist to not have his work used for an immoral purpose including, arguably, torture.

Unfortunately, although the US is a signatory to the Berne Convention, it does not recognize this extended moral "right of integrity" above and beyond the copyright, trademark and fair use law discussed above, which leaves the Rage Against Torture artists clean out of luck it seems. A case that appears as close to on point as can be found is *Shostakovich v. 20th Century-Fox*, 80

N.Y.S.2d 575, aff'd, 87 N.Y.S.2d 430 (1949). In *Shostakovich*, the court said:

> The wrong which is alleged here is the use of plaintiffs' music in a moving picture whose theme is objectionable to them in that it is unsympathetic to their political ideology. The logical development of this theory leads inexcapably [sic] to the Doctrine of Moral Right. There is no charge of distortion of the compositions nor any claim that they have not been faithfully reproduced. Conceivably, under the doctrine of Moral Right the court could in a proper case, prevent the use of a composition or work, in the public domain, in such a manner as would be violative of the author's rights. The application of the doctrine presents much difficulty however. With reference to that which is in the public domain there arises a conflict between the moral right and the well established rights of others to use such works. Clemens v. Belford Clark & Co., [14 F. 728 (1883)]. So, too, there arises the question of the norm by which the use of such work is to be tested to determine whether or not the author's moral right as an author has been violated. Is the standard to be good taste, artistic worth, political beliefs, moral concepts or what is it to be? In the present state of our law the very existence of the right is not clear, the relative position of the rights thereunder with reference to the rights of others is not defined nor has the nature of the proper remedy been determined. Quite obviously therefore, in the absence of any clear showing of the infliction of a wilful injury or of any invasion of a moral right, this court should not consider granting the drastic relief asked on either theory. The motion is accordingly denied in all respects.

Notably, the plaintiff in *Shostakovich* also sued in France and was successful there. Is there any hope in foreign courts for the artists here? Probably not. Iraq and Afghanistan are not signatories to the Berne Convention. Cuba is, but it seems unlikely that Cuba's courts could successfully be accessed and utilized for the conduct at Guantanamo, and it seems beyond unlikely the US government would honor a judgement from a foreign country under this theory, whether from Cuba or any other country.

In short, there does not appear to be any valid avenue for damage recovery or injunctive relief to the harmed artists for the wrongful appropriation of their music by the US government for use in its torture program. What the artists can do is to seek the truth via the FOIA action, a process they have started. The other thing they, and you, can do is to speak out in objection to the illegal torture and detention scheme of the United States government. If you wish to join with the artists, and the generals, in voicing your objection to torture visit the CloseGitmoNow website.