**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF TENNESSEE**
**NASHVILLE DIVISION**

| | | |
|---|---|---|
| **ISAAC DONALD EVERLY,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | **Case No. 3:17-cv-01440** |
| | ) | **Judge Aleta A. Trauger** |
| **PATRICE Y. EVERLY, PHILLIP J. EVERLY, CHRISTOPHER EVERLY, THE PHILLIP EVERLY FAMILY TRUST and EVERLY AND SONS MUSIC (BMI),** | ) | |
| | ) | |
| **Defendants.** | ) | |

**MEMORANDUM**

Isaac Donald Everly ("Don" or "Don Everly"), the plaintiff and counter-defendant in this action, and Phillip Everly ("Phil" or "Phil Everly"), who died in 2014, are brothers and comprised the music group, the Everly Brothers. Phil Everly is survived by his third wife, Patrice ("Patti") Everly, and two sons, Phillip J. Everly ("Jason Everly") and Christopher Isaac Everly ("Chris Everly"), by his first and second wives, respectively. Patti, Jason, and Chris Everly are the defendants and counter-plaintiffs in this action.[1]

One of the Everly Brothers' most famous hits is the song "Cathy's Clown," which was recorded and released in 1960. This case, reduced to its essence, is about who "authored" the song and, if both Don and Phil co-authored the song, whether Don Everly plainly and expressly repudiated Phil Everly's status as a co-author more than three years before the defendants filed their counterclaim. If so, those claims, all of which are premised upon Phil's status as a co-author

[1] Chris Everly, who is apparently disabled, has not been an active participant in this lawsuit.

of the song, are barred by the statute of limitations.

The parties had the opportunity to fully develop the record regarding these issues during a two-day bench trial conducted on April 27 and 28, 2021. After consideration of the testimony and exhibits presented at the trial, the court will enter judgment in favor of Don Everly.

## I. PROCEDURAL HISTORY

Don Everly filed his Complaint for Declaratory Judgment (Doc. No. 1) on November 8, 2017, against Patti Everly, Jason Everly, and Chris Everly as the statutory successors to Phil Everly's termination rights under the United States Copyright Act ("Copyright Act"), specifically 17 U.S.C. §§ 304(c) and 203(a), and against the Phillip Everly Family Trust ("Trust") and Everly and Sons Music (BMI) (alleged to be an assumed name for the Trust (Doc. No. 1 ¶ 8)), as a legal owner or successor to Phil Everly's rights or as a legal owner of the statutory successors' rights (collectively "defendants"). The Complaint contains three "Counts," each seeking a declaratory judgment, only two of which remain relevant: Count 1 seeks a declaration that Phil Everly is not an author of "Cathy's Clown" (hereinafter also referred to as the "Composition") and, therefore, that the defendants are not the statutory successors of an author with respect to the Composition and are estopped from exercising any rights granted to authors of copyrighted works, including the ability to terminate the March 21, 1960 assignment (the "1960 Grant") of 100% of the worldwide copyright in the Composition to Acuff-Rose Publications ("Acuff-Rose"); Count 3 seeks a declaration that Don Everly owns 100% of the U.S. copyright in "Cathy's Clown" and 100% of the songwriter royalties derived from that work. (Doc. No. 1, at 12–13.) In addition, Count 2 sought a declaration that the "Release and Assignment" signed by Phil on June 10, 1980 pertaining to "Cathy's Clown" (the "1980 Release"), discussed in more detail below, is not a grant of a transfer or license of copyright or of any right under a copyright and, therefore, is not subject to termination under 17 U.S.C. § 203(a).

The defendants filed an Answer and Counterclaim (Doc. No. 5) on November 29, 2017. The Counterclaim seeks declarations that (1) Phil Everly is an author of "Cathy's Clown" "pursuant to 17 U.S.C. § 203"; (2) the defendants' Notice of Termination to Sony/ATV dated November 8, 2014 ("2014 Notice of Termination"), purporting to terminate the 1960 Grant, with an effective date of November 14, 2016, was valid under 17 U.S.C. § 304(c); and (3) the defendants are "entitled to one-half of the income earned from the exploitation of the Composition."[2] (Doc. No. 5, at 7.)

The court issued an order granting summary judgment to plaintiff Don Everly on November 6, 2018, finding that Don had expressly repudiated Phil's claim of authorship more than three years prior to the filing of the defendants' Counterclaim. (Doc. No. 27.) The Sixth Circuit reversed and remanded, finding that a material factual dispute existed as to whether Don had expressly repudiated Phil's authorship of "Cathy's Clown" at all. *Everly v. Everly* ("*Everly I*"), 958 F.3d 442 (6th Cir. 2020). This court subsequently construed the scope of the remand as general rather than limited, as a result of which "all claims at issue in the Complaint and Counterclaim remain[ed] pending [following remand], effectively without limitation." (Doc. No. 65, at 4.)[3]

Recognizing that the resolution of certain questions of law that had never been considered on the merits might narrow and simplify the trial of this matter, the court granted the parties'

[2] The Counterclaim does not specify a date on which the defendants claim to have become entitled to income from the exploitation of the Composition, but their Proposed Findings of Fact and Conclusions of Law filed in anticipation of the bench trial assert that the defendants are entitled to one-half the income derived from the exploitation of "Cathy's Clown" "in the United States from November 14, 2016 (the effective date of termination) through the present." (Doc. No. 88, at 19.) Neither party has requested that the court order any type of accounting.

[3] The exception to the general remand is that this court also awarded summary judgment to the plaintiff as to the authorship of two other compositions. Because the defendants did not appeal that portion of this court's judgment, the Sixth Circuit found that the defendants had "forfeited any argument" regarding those two compositions and affirmed summary judgment for the plaintiff on the claims related to them. *Everly I*, 958 F.3d at 448 n.6.

request that they be allowed to file a second round of dispositive motions. The plaintiff filed a Motion for Partial Summary Judgment, asking the court to rule on Count 2 of the Complaint and issue a judicial declaration that the 1980 Release is not subject to termination under 17 U.S.C. § 203(a), because it is not a "grant of a transfer or license of copyright or of any right under a copyright." (*See* Doc. No. 70.) The court granted that motion. *See Everly v. Everly* ("*Everly II*"), No. 3:17-cv-01440, 2020 WL 5642359, at *7 (M.D. Tenn. Sept. 22, 2020). Doing so did not actually resolve any dispositive issue in the case, but it did revolve Count 2.

The defendants filed a Motion for Judgment as a Matter of Law, asking the court to hold that (1) the statute of limitations cannot operate to bar the defendants' defenses to the plaintiff's affirmative claims, even if it might, arguably, bar the defendants' Counterclaim; and (2) the proper accrual date for their copyright termination claim is the effective date of the termination. (Doc. No. 69.) With regard to the latter claim, the defendants argued that, as "newfound claimants" to the copyright rights accruing after termination of the 1960 Grant, they should be permitted to "proceed without prejudice to what may have occurred during the original term." (Doc. No. 69, at 2.) The court understood the defendants' argument to be that their ability to terminate the 1960 Grant should not be time-barred, even if their claim that Phil is an author of the Composition is time-barred. The court denied the defendants' motion in its entirety, holding that: (1) if the defendants' authorship claim is time-barred, their defenses based on authorship, which mirror their affirmative claim, would also be time-barred; and (2) if the defendants' claim that Phil Everly is a co-author is time-barred, then the defendants cannot show that they are the successors of an "author" and do not have the ability to terminate the 1960 Grant. *See Everly II*, 2020 WL 5642359, at *14. However, because the court merely denied summary judgment to the defendants, all of their claims technically remained pending.

The parties filed a Joint Pretrial Order identifying two "Contested Issues of Law" to be resolved by a bench trial, but the issues they identify are actually the contested issues of fact to be resolved by the court as the trier of fact:

> A. Did Don Everly plainly and expressly repudiate Phil Everly's status as a co-author of *Cathy's Clown* more than three years before Defendants filed their counterclaim, or did Don simply demand that Phil relinquish public credit and songwriter royalties for *Cathy's Clown*?
>
> B. If Don Everly did not plainly and expressly repudiate Phil Everly's authorship claim more than three years before Defendants filed their counterclaim, is Phil a co-author of *Cathy's Clown*?

(Doc. No. 96, at 1–2.) Because the court answers the first question posed in A, above, in the affirmative, it need not reach the second question, and judgment in favor of the plaintiff on all claims will logically ensue, based on the legal conclusions the court has already reached in prior Memoranda entered in this case.

## II. LEGAL FRAMEWORK

As the Sixth Circuit has explained, ownership in a copyright "vests initially in the author or authors of the work." 17 U.S.C. § 201(a); *Everly I*, 958 F.3d at 449. The owner of a copyright has the "exclusive right" to authorize the use and exploitation of a copyrighted work, including the rights to reproduce, perform, display, and distribute copies of the copyrighted work and to "prepare derivative works based upon the copyrighted work." 17 U.S.C. § 106. These ownership rights "may be transferred in whole or in part." *Id.* § 201(d). Accordingly, in order to monetize a work, the author "commonly sells his rights to publishers who offer royalties in exchange for their services in producing and marketing the author's work." *Everly I*, 958 F.3d at 449 (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547 (1985)).

Authorship of a work, however, imparts additional rights under copyright law "unaffected by the transfer of ownership." *Id.* Of particular relevance here is that authors possess a "termination

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