

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

ISAAC DONALD EVERLY,

Plaintiff,

v.

**PATRICE Y. EVERLY, PHILLIP J.
EVERLY, CHRISTOPHER EVERLY,
THE PHILLIP EVERLY FAMILY TRUST
and EVERLY AND SONS MUSIC (BMI)**

Defendants.

)
)
)
)
) **Case No.** _____
)
)
)
)
)
)
)

COMPLAINT FOR DECLARATORY JUDGMENT

Isaac Donald Everly (“Don” or “Plaintiff”) files this Complaint for Declaratory Judgment pursuant to 28 U.S.C. §§ 2201, *et seq.*, against Patrice Y. Everly (“Patti Everly”), Phillip J. Everly (“Jason Everly”), and Christopher Everly (“Chris Everly”) as the statutory successors of the rights of Phillip Everly (“Phil”) under 17 U.S.C. §304(c) and 17 U.S.C. §203(a) of the United States Copyright Act (the “Copyright Act”), and against and the Phillip Everly Family Trust (“Everly Trust”) and Everly and Sons Music (BMI) as a legal owner or successor of the rights of Phil and/or the statutory successors noted above (collectively “Defendants”), and states as follows for his claims in this civil action.

NATURE OF THE ACTION

1. Plaintiff Isaac Donald Everly brings this declaratory judgment action because there is a dispute as to the effectiveness and validity of certain notices to terminate served by Defendants Patti Everly and Jason Everly, as a majority of the statutory successors of Phil, pursuant to 17 U.S.C. §§304(c) and 203(a) of the Copyright Act with respect to the ownership of the U.S. Copyright Termination Rights (defined herein) in and the United States portion of the

Composition's Songwriter Royalties (defined herein) derived from the musical composition "Cathy's Clown" ("Composition") made famous by the Everly Brothers (collectively the "Phil Everly Notices to Terminate").

2. The dispute arises from an actual controversy over whether or not the Phil Everly Notices to Terminate entitle the Defendants to recapture ownership of fifty percent (50%) of the U.S. Copyright Termination Rights in the Composition from Sony/ATV Acuff Rose Music and Acuff Rose Publications (collectively "Sony/ATV"), thereby reducing Don's claim thereto by half; and/or whether or not the Phil Everly Notices to Terminate entitle Defendants to recapture ownership of one-half of the Composition's United States portion of the Composition's Songwriter Royalties from Don¹, thereby reducing Don's claim thereto by half.

THE PARTIES

3. Plaintiff is a citizen and resident of Davidson County, Tennessee.

4. Upon information and belief, Defendant Patti Everly is citizen and resident of Davidson County, Tennessee, and is a statutory successor to the U.S. Copyright Termination Rights of Phil.

5. Upon information and belief, Defendant Jason Everly is a citizen and resident of Davidson County, Tennessee, and is a statutory successor to the U.S. Copyright Termination Rights of Phil.

6. Upon information and belief, Defendant Chris Everly is a citizen and resident of Los Angeles County, California, and is a statutory successor to the U.S. Copyright Termination Rights of Phil.

¹ Including one-half of the United States portion of the Composition's Songwriter Royalties for "Sigh, Cry, Almost Die" and "That's Just Too Much."

7. Upon information and belief, Defendant Everly Trust was organized under the laws of Tennessee, with Phillip Jason Everly and Patrice Yvonne Everly, as trustees.

8. Upon information and belief, Everly and Sons Music is an assumed name for the Everly Trust and/or the other Defendants.

JURISDICTION AND VENUE

9. This is an action for declaratory judgment arising under the 17 U.S.C. § 101 *et seq.* of the Copyright Act and the Declaratory Judgment Act, 28 U.S.C. §§2201 - 2202. Thus this Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§1331 and 1338.

10. Defendants engaged the services of Mr. Lewis J. Anderson and his company LegacyWorks LLC, a Tennessee Limited Liability Company with its principal place of business in Nashville, Davidson County, Tennessee (collectively “Anderson”) as their agent² to handle the Phil Everly Notices to Terminate, which are the subject matter of this Complaint. Upon information and belief, Anderson was engaged to research, prepare, serve, record, and administer the Phil Everly Notices to Terminate and as a result thereof to then vest ownership of the U.S. Termination Rights in Defendants and redirect to Defendants the monies due them by reason of the Phil Everly Notices to Terminate. All Defendants have transacted business in Davidson County, Tennessee and are subject to the personal jurisdiction of this Court. Thus, this Court has both subject matter and personal jurisdiction over Defendants.

11. Venue of this action is proper in this Judicial District pursuant to 28 U.S.C. §§ 1391(b)(1) and (2) because Defendants Patti Everly and Jason Everly each qualify as a citizen and resident of this Judicial District under §1391(c)(1). In addition, a substantial part of the

² See Document Cover Sheet dated November 11, 2014 in Exhibit G, wherein Anderson signed that document and declared under penalty of perjury that he was the “Duly authorized agent of Phil Everly Trust – Patti Everly, Jason Everly” with the latter two parties filing also on behalf of Chris Everly.

events giving rise to Plaintiff's claims has occurred and will continue to occur in this Judicial District.

FACTUAL ALLEGATIONS

12. Plaintiff incorporates by reference all preceding allegations as if fully set forth here.

13. In 1976, Congress enacted the 1976 Copyright Act (effective in 1978) to include provisions granting *authors* the right to terminate certain *grants of a transfer or license of copyright or of any right under a copyright* (1964 Revision Bill, H.R. 11947, 88th Cong. §§ 16(a), 22(c)(1964)(codified at 17 U.S.C. §§203(a), 304(c)(1976)). The laws were intended to “protect authors against unremunerative transfers.” H.R. Rep. No. 94-1476 at 124 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5740; *see also* Mills Music, Inc. v. Snyder, 469 U.S. 153, 172-173 (1985)(to “relieve authors of the consequences of ill-advised and unremunerative grants that had been made before the author had a fair opportunity to appreciate the true value of his work product...”).

14. Authors could terminate such grants or licenses “notwithstanding any agreement to the contrary.” 17 U.S.C. §§203(a)(5), 304(c)(5).

15. Copyright ownership in a musical composition vests in the claimant the exclusive ownership and control of the five (5) enumerated rights under the Copyright Act³ as well as the right to collect and retain one hundred percent (100%) of the monies derived from that copyright.

16. When an author or his/her statutory successors serve a notice to terminate pursuant to 17 U.S.C. §§203(a) or 304(c), that author or those statutory successors, thereby terminate the grant to the third party grantee solely with respect to the United States copyright

³ The right to reproduce, distribute, display, publicly perform and create derivative works.

rights and the United States publisher royalties derived from the United States copyright rights (“U.S. Copyright Termination Rights”).

“Cathy’s Clown” - the Copyright and the 1960 Grant to Acuff-Rose

17. By Agreement dated March 21, 1960 prepared and presented by Acuff-Rose Publications, Inc. (“Acuff-Rose”)(now Sony/ATV as successor-in-interest Acuff-Rose), Don and Phil signed a grant transferring one hundred percent (100%) of the worldwide copyright and all rights under copyright in the Composition to Acuff-Rose (the “1960 Grant”). A copy of the 1960 Grant is attached as **Exhibit A**.

18. Pursuant to the 1960 Grant, Don and Phil retained a contractual right to receive and collect the songwriter royalties:

“In consideration for and in full payment of the aforesaid sale, the Publisher hereby agrees to pay the following royalties jointly to the Composers with respect to the musical composition:...”⁴ (collectively the “Composition’s Songwriter Royalties”).

Acuff-Rose agreed to account to Don and Phil for the Composition’s Songwriter Royalties forty five (45) days after the end of each semi-annual calendar period.

19. Acuff-Rose registered the copyright in the Composition with the United States Copyright Office on April 18, 1960 (EP 139961) listing Don and Phil as “Authors” of words and music and Acuff-Rose as the “Copyright Claimant.” A copy of the Registration is attached as **Exhibit B**. It is not customary for authors of musical compositions to ever see either the copyright application(s) or registration(s) for their songs filed by their music publishers nor to investigate the accuracy of those documents when they are filed.

⁴ 3¢ for each pianoforte copy and dance orchestration, 10% of the retail selling price of each printed arrangement, fifty percent (50%) of net sums from mechanical rights, electrical transcription and reproduction rights, motion picture synchronization and television rights and all other rights (excepting public performing rights), fifty percent (50%) of the royalties earned for public performance licensed through BMI but no more than 2¢ per local U.S. broadcasting station performance and 3¢ per station per U.S. network broadcasting performance, fifty percent (50%) of net sums from sales and uses outside the United States and Canada, and no royalties on professional or complimentary copies.

20. From 1960 to 1980, Don and Phil wrote, recorded, and released dozens of album records and radio singles, supported those releases with a busy international touring schedule, personal appearances, television appearances, interviews, released solo projects and met the other business requirements expected of international superstars. During this time, they served in the military – Marine Corps. Reserves, worked with various other artists as songwriters and musicians, and continued with the life and pace of international celebrities. From the beginning of their career, the “business” of their celebrity was handled by personal managers, talent agencies, record labels, music publishers, lawyers and accountants.

21. From 1960 to 1980, the Composition was credited on all copies as being authored by both Don and Phil and they shared the Composition’s Songwriter Royalties equally.

The 1980 Release by Phil Everly

22. In and around 1979, Don reached out to Phil to address the incorrect authorship attribution for the Composition. Don and Phil discussed who actually wrote the Composition, and others, and acknowledged that Don was the sole author thereof.

23. Don agreed to leave the past the past, and agreed that Phil could retain the last twenty years of payments of half of the Composition’s Songwriter Royalties. The brothers agreed to memorialize the fact that Phil had not co-authored the Composition and the other songs. Accordingly, and in consideration of the right for Phil to retain those twenty years of royalty payments, a document called “Release and Assignment” dated June 10, 1980 (the “1980 Release”) was prepared upon information and belief, by Acuff-Rose, and presented to Phil for signature. The 1980 Release was notarized and recorded with the Copyright Office.

24. The 1980 Release acknowledged that Phil, “as his free act and deed,” was not a co-author of the Composition (and others) and in so doing stated that “all of his rights, interests

and claim in and to said compositions, including rights to royalties *and his claim as co-composer*, effective June 1, 1980” were released. The 1980 Release further stated “Phil Everly does hereby transfer, release, assign and set over unto Don Everly all of his rights, titles, interests and claim to the musical compositions....., the copyrights of which were obtained in 1960 by Acuff-Rose Publications, and which are still owned by them.” The 1980 Release included a clear admission that Phil did not compose the Composition: The release was of

“...not only the said Phil Everly’s right to royalties and other income arising out of said compositions from and after the effective date, but also **every claim of every nature by him as to the composition[sic] of said songs.**”

25. In order to facilitate the removal of Phil’s name as an author of the Composition and succeed in having third parties comply with that directive, the 1980 Release was prepared to include “assignment-type” language. It was then submitted to the performing rights society Broadcast Music, Inc. (“BMI”) and Acuff-Rose who were instructed to adjust their records accordingly – both being asked to remove Phil’s name and correctly credit Don as the sole author of the Composition, and also to thereafter pay all one hundred percent (100%) of the Composition’s Songwriter Royalties to Don. A copy of the 1980 Release recorded in the United States Copyright Office on June 18, 1980 is attached as **Exhibit C.**

26. As directed by the 1980 Release, Phil’s name was removed as a co-author of the Composition by BMI. BMI then paid one hundred percent (100%) of the worldwide songwriter share of public performance money derived from the Composition to Don, and acknowledged authorship credit solely to Don.

27. Also as directed by the 1980 Release, all of the Composition’s Songwriter Royalties payable by Acuff-Rose were credited and paid one hundred percent (100%) to Don and Phil’s name was removed as co-author of the Composition by Acuff-Rose in their records.

28. For the next thirty six (36) years, one hundred percent (100%) authorship was attributed to Don and one hundred percent (100%) of the Composition's Songwriter Royalties under the 1960 Grant was paid to Don.

29. The intent of the 1980 Release was for Phil to acknowledge he was not an author of the Composition and other songs. By this time, however, because of the popularity of the Composition, it was impossible to remove all third party credits showing both Don and Phil credited as authors of the Composition, and the marketing myth that the Composition was jointly authored continued.

30. Phil owned no rights to copyright at the time the 1980 Release was executed. The only right to which he may have been entitled was one-half of the Composition's Songwriter Royalties under the 1960 Grant payable by Sony/ATV, which is a right arising by contract and not copyright. Therefore, the 1980 Release was not a "*grant of a transfer or license of copyright or of any right under a copyright*" subject to termination under the Copyright Act, making the 2016 Phil Everly/Don Everly Notice invalid and ineffective, and the termination of an underlying grant does not result in termination of the contractual transfers of royalties. See Yount v. Acuff Rose – Opryland, 103 F.3d 830 (9th Cir. 1996). Defendants appear to be in agreement with this conclusion:

“...the 1980 Release, at best, granted Don the right to collect only certain royalties in connection with the exploitation of the Compositions. Further, the 1980 Release specifically acknowledged Acuff-Rose's ownership of the Compositions....Because Acuff-Rose retained all copyright ownership in the Compositions, Phil did not have the ability to transfer any copyright ownership in the Compositions to Don under the 1980 Release; rather, Phil was transferring *his contractual right* [emphasis added] to collect certain royalties in connection with the Compositions. Federal case law clearly demonstrates that royalty rights are contractual rights, rather than exclusive rights under federal copyright law.”

A copy of defense counsel's October 25, 2017 letter quoted above is attached as **Exhibit D**. The 1980 Release did not and could not serve as any transfer of termination rights or other rights of copyright; and hence could not qualify as "an agreement to the contrary."

"Cathy's Clown": The 1988 Renewal Copyright

31. On January 6, 1988, eight years after the 1980 Release was signed, the copyright to the Composition was renewed by Acuff-Rose as the "duly authorized agent of Don Everly" the sole renewal claimant listed on the renewal form. To provide public and legal notice that Don was the sole author of the Composition, the "Author" of words and music in the Renewal Registration was listed as Don (RE 371-084). A copy of the Renewal Registration is attached as **Exhibit E**.

Don Everly Terminates the 1960 Grant to Recapture the U.S. Copyright Termination

Rights From Sony/ATV

32. As the sole author of the Composition, Don served a notice to terminate dated March 11, 2011 on Sony/ATV pursuant to 17 U.S.C. §304(c)(the "2011 Don Everly/Sony Notice"), to terminate the 1960 Grant and recapture one hundred percent (100%) of the U.S. Copyright Termination Rights in the Composition (and 23 other copyrights) effective April 14, 2016. The 2011 Don Everly/Sony Notice was recorded in the United States Copyright Office on July 15, 2011. As of April 14, 2016, Don moved forward as the exclusive owner of the U.S. Copyright Termination Rights in the Composition and the right to the so-called "publisher's share" of royalties in the United States. In addition, Don retained all of the Composition's Songwriter Royalties around the world. A copy of the Certificate of Recordation and 2011 Don Everly/Sony Notice is attached as **Exhibit F**.

Phil Everly's Statutory Successors Terminate the 1960 Grant to Recapture the U.S.

Copyright Termination Rights from Sony/ATV

33. Unbeknownst to Don until August of 2016, Defendants Patti Everly and Jason Everly as a majority of the statutory successors of Phil, through their agent Anderson, served a conflicting notice to terminate dated November 8, 2014 on Sony/ATV pursuant to 17 U.S.C. §304(c) (the "2014 Phil Everly/Sony Notice"), purporting to terminate the 1960 Grant and recapture fifty percent (50%) of the U.S. Copyright Termination Rights in the Composition effective November 14, 2016. The 2014 Phil Everly/Sony Notice was recorded in the United States Copyright Office on November 17, 2014. A copy of the Certificate of Recordation and 2014 Phil Everly/Sony Notice is attached as **Exhibit G**.

Phil Everly's Statutory Successors Purport to Terminate the 1980 Release

34. Defendants Patti Everly and Jason Everly, as a majority of the statutory successors of Phil, through their agent Anderson, served another notice to terminate dated August 1, 2016 on Don pursuant to 17 U.S.C. §203(a) (the "2016 Phil Everly/Don Everly Notice"), attempting to terminate the 1980 Release and recapture fifty percent (50%) of (a) any U.S. copyright rights Don might hold as a result of a "grant" from Phil to Don under the 1980 Release, and (b) one-half of the United States portion of the Composition's Songwriter Royalties, effective August 15, 2018. The 2016 Phil Everly/Don Everly Notice was recorded in the United States Copyright Office on September 6, 2016. A copy of the 2016 Phil Everly/Don Everly Notice and confirmation of recordation is attached as **Exhibit H**.

35. The Court is being asked to address any uncertainty as to ownership, control and rights to the U.S. Copyright Termination Rights and one-half of the United States portion of the Composition's Songwriter Royalties because there are conflicting notices to terminate currently

in existence served on Sony/ATV with respect to the Composition and an invalid notice to terminate currently in existence served on Don with respect to the United States portion of the Composition's Songwriter Royalties derived from the Composition.

36. Absent a clear declaratory judgment from this Court, the licensing and administration of the U.S. Copyright Termination Rights and collection of the Composition's Songwriter Royalties will become so entangled that the Composition will lose value not only for the parties to this case but also to Sony/ATV the owner of all other rights in the Composition and it will be detrimental to the public and the ability to license the Composition for the remaining duration of U.S. copyright protection.

COUNT 1
(Phil Everly is not an "Author")

37. Plaintiff realleges and incorporates all of the allegations set forth in Paragraphs 1 through 36 above.

38. Authors and the statutory successors of authors are the only parties authorized to implement the termination provisions of 17 U.S.C. §§ 304(c) and 203(a) of the Copyright Act.

39. By Phil's admission in the 1980 Release that he did not compose the Composition, Phil could no longer be considered an "author."

40. Therefore, Plaintiff seeks a determination based on the proof that 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, thereby invalidating the Phil Everly Notices to Terminate.

COUNT 2
(The 1980 Release is not a Grant subject to Termination)

41. Plaintiff realleges and incorporates all of the allegations set forth in Paragraphs 1 through 40 above.

42. The only grants subject to termination pursuant to the provisions of 17 U.S.C. §§ 304(c) and 203(a) of the Copyright Act are grants of a transfer or license of copyright or of any right under a copyright.

43. Phil owned no rights under a copyright or any copyrights when he executed the 1980 Release.

44. Therefore, Plaintiff seeks a determination that the 1980 Release is not a grant of a transfer or license of copyright or of any right under a copyright, and hence not subject to termination pursuant to 17 U.S.C. §203(a), thereby invalidating the 2016 Phil Everly/Don Everly Notice.

COUNT 3
**(Don Everly Owns 100% of the U.S. Rights of Termination and the Composition's
Songwriter Royalties)**

45. Plaintiff realleges and incorporates all of the allegations set forth in Paragraphs 1 through 44 above.

46. Plaintiff has properly terminated the transfer of the 1960 Grant by virtue of the 2011 Don Everly/Sony Notice.

47. Therefore, Plaintiff seeks a determination that Plaintiff owns one hundred percent (100%) of the U.S. Copyright Termination Rights in the Composition; that Defendants are estopped from making any claims with respect to the Composition; and Plaintiff retains one

hundred percent (100%) of the Composition's Songwriter Royalties and those for Sigh, Cry, Almost Die and That's Just Too Much.

48. Plaintiff further seeks a determination that Defendants have no right to register any rights in the Composition with BMI, the United States Copyright Office, the Harry Fox Agency or any other party or redirect any monies derived from the Composition.

49. Plaintiff respectfully requests this Court award such other and further relief to which Plaintiff may be entitled, as the Court deems just and proper, including but not limited to an award of attorney's fees and the costs of this action.

Dated: November 8, 2017

Respectfully submitted,

/s/ Linda Frances Howard
LINDA FRANCES HOWARD (#16557)
Adams and Reese LLP
901 18th Avenue South
Nashville, Tennessee 37212
(615) 341-0068
linda.edellhoward@arlaw.com

/s/ Philip M. Kirkpatrick
PHILIP M. KIRKPATRICK (#06161)
Adams and Reese LLP
424 Church Street
Nashville, Tennessee 37219
(615) 259-1450
phil.kirkpatrick@arlaw.com

Attorneys for Isaac Donald Everly