United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: January 25, 2008

TO : James J. McDermott, Regional Director
Region 31

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Warner Bros. Pictures, Inc. 512-5012
Twentieth Century Fox 512-5012-0133-1600
Anschutz Film Group
Hardware Distribution, Inc.
Twentieth Century Fox Television
Imagine Television
Universal Pictures
New Line Cinema Corp.
Universal Family Entertainment LLC
(Writers Guild of American, West, Inc.)
Cases 31-CA-28563; -28566; -28567; -28568;
-28569; -28570; -28571; -28572; -28573

These cases were submitted for advice as to whether the Employers violated Section 8(a)(1) by notifying their employees that sending work product to the Union, pursuant to a Union strike rule, was a breach of their individual employment contracts.

We agree with the Region that the Employers did not violate the Act by notifying writers that sending Literary Material to the Union was a breach of their individual contracts with the Employers, as the work product is the Employers' property, the Employers have a legitimate interest in the nondisclosure of the work product, and no Section 7 rights are implicated by the nondisclosure requirement.

FACTS

Background Information:

In 2004, the East and West chapters of the Writers Guild of America ("the Union") and the Alliance of Motion Picture and Television Producers, Inc. ("the AMPTP")[1] signed

[1] The AMPTP is a multi-employer bargaining association consisting of employer-members who are engaged in motion picture and/or television production. All of the Employers, with the exception of New Line Cinema Corp. and

the Theatrical and Television Basic Agreement ("the CBA"), which by its terms, expired October 31, 2007.[2] As expressly permitted under the CBA,[3] each of the employer-members of the AMPTP ("the Employers") has also entered into written individual agreements ("Writers' Agreements") with their motion picture and television writers, most of whom are members of the Union. The Writers' Agreements did not expire with the expiration of the CBA on October 31.[4]

The Writers' Agreements obligate the writers to create and deliver "Literary Material" for the Employers' television programs and motion pictures.[5] The Writers' Agreements provide that the Literary Material constitutes "works for hire" (or similar language ceding ownership of the Literary Material to the Company), which is a term of copyright law whereby ownership rights in the Literary Material are vested in the Employers.[6] The Employers also

---

Anschutz Film Group, were signatories to the CBA. Katja Motion Pictures Corp., which employed one of the writers who received a letter that is the subject of the charge, is a subsidiary of New Line Cinema. Bristol Bay Productions employed another writer who received a letter from Anschutz Film Group. Bristol Bay is not a signatory to the CBA.

[2] All dates herein refer to 2007, unless otherwise indicated.

[3] Article 9 of the CBA provides that the terms of the CBA are minimum terms, and "nothing herein contained shall prevent any writer from negotiating and contracting with any Company for better terms for the benefit of such writer than are here provided. . . ."

[4] The Writers' Agreements state that either the writer or the Employer may terminate the agreement pursuant to certain events. In the event of a Writers Guild strike, the Employer may terminate the Agreements after three consecutive weeks. In the instant case, there is no indication that pursuant to the Agreements, the Employers terminated the writers' services. Further, no party contends that the Writers' Agreements are no longer enforceable.

[5] Literary Material consists of any writings, including outlines, treatments, scripts, etc., that the Employers contract with the writers to create.

[6] The relevant part of the "work for hire" language contained in the Universal Pictures' standard theatrical Writer's Agreement is set forth below. Similar language is

assert that, in addition to being their exclusive property, the Literary Material constitutes trade secrets under California law.[7] The Writers' Agreements also contain strict confidentiality clauses ("Confidentiality Clauses") which require the writers to maintain the absolute confidentiality of any work in progress.[8]

The Current Charge:

On November 5, the Union called a strike against most, if not all, signatory-Employers. Before the strike began, the Union established strike rules which were displayed on its website. One of the rules, Strike Rule No. 8, requires members to file all unproduced Literary Material written or being written for a struck company during the past six months, with the Union pursuant to the Union's script

---

contained in most of the Employers' standard Writers' Agreements.

The Work shall be prepared within the scope of Writer's employment hereunder and shall be a "work made for hire" for Universal as specially commissioned for use as a part of a motion picture in accordance with Sections 101 and 201 of Title 17 of the U.S. Copyright Act. As such, Universal shall be deemed the sole owner and author of the Work. Without limiting the foregoing, Universal shall have the exclusive right to register the copyright in all such Work in its name as owner and author thereof.

[7] See Cal. Civ. Code § 3426, et seq. (under California law, mere acquisition of trade secrets, even without subsequent disclosure or use, constitutes misappropriation).

[8] The "Confidentiality Clause" language contained in the Universal Pictures' standard theatrical Writer's Agreement is set forth below. Similar language is contained in most of the Employers' standard Writers' Agreements.

Non-disclosure/Confidentiality: Writer shall not release to any third party the Picture or any portion or element thereof in whatever form, manner or state of being (including, but not limited to, stills dialogue, clips or trailers) or any other confidential or proprietary information owned or controlled by Universal (including, but not limited to, any third party agreements, research and development information, designs and specifications, screenplays and advertising plans and materials), without the prior, express, written authorization of Universal's Vice President of Creative Advertising or other company officer of equal or higher stature.

validation program (SVP).[9] In addition to submitting Literary Material, a writer must also submit an SVP form identifying the writer, the title and type of material being submitted, whether the material is an original script or adaptation, and the status of the material. The Union instructed writers that the Literary Material and the validation form must be submitted no later than the fourth work day after the commencement of a strike.

The Union follows a detailed procedure for handling of the Literary Material and the validation forms once it receives them. The result of this process is a "virtual vault" where the Literary Material is stored electronically in a secured location.

According to the Union, the primary purpose of the SVP is to allow the Union to police struck work, thus encouraging Union members to exercise their Section 7 rights to withhold their services during the strike, promoting strike solidarity, and preventing its members from performing struck work.

On October 19, before the commencement of the strike, but after the Union published its strike rules, AMPTP counsel sent a letter to the Union objecting to the Union's SVP. The individual Employers each sent letters to the writers employed by them stating that the Union's SVP and strike rules infringe upon the property interests of the AMPTP Employer-members in the Literary Material and places writers in the untenable position of violating the Confidentiality Clauses contained in their Writers' Agreements with the Employers. Some of the Employers threatened their writers with legal action if they complied with Strike Rule No. 8.

---

[9] The Union's Strike Rule No. 8 provides:

The Guild will conduct a script validation program in the event of a strike. You will be required to submit copies of all literary material to the Guild at the outset of a strike. This includes literary material already competed and delivered to a company before the strike, all writing in progress for a company currently subject to the strike, as well as any spec or sample script, if any version of it was submitted to the producer or company before the strike. The filing of these copies will allow the Guild to determine the exact status of material at the beginning of a strike and may protect you in the event [of] allegations of strike-breaking or scab writing are made against your or another writer.

Past Practice Involving the Dissemination of Literary Material to the Union:

The Union maintains that the AMPTP, including the Employers, have never placed restrictions on writers providing their Literary Material to the Union for a variety of reasons, including enforcement of the CBA.[10] The Union maintains that, since 1927, the Union or one of its predecessor organizations has operated a commercial registration service that allows both members and non-members to register material to establish its existence as of a certain date.[11] The Union claims that members regularly register their work with the Union, whether such work is written while employed by a production company or for speculation and later resale.

The Employers deny that they are aware of a writer under contract with them ever disclosing Literary Material to the Union's Registry, and state that, if such a circumstance were to occur, the Employers would consider such disclosure to be in violation of the Confidentiality Clause contained in the Writer's Agreement. The purpose of the Registry is to aid writers in selling their work. As such, it does not appear that a writer hired by a production company would need to register material since it was already a "work made for hire" and property of the company. Indeed, the Union has not presented any specific examples of a writer under contract with any of the Employers that had previously submitted their contractual Literary Material to the Union's Registry.

The parties agree that Literary Material has been provided to the Union in the past, in connection with

---

[10] The Union also notes that writers have provided their Literary Material to the Union in disputes over writing credit. The Region concluded, and we agree, that the limited release of Literary Material for such credit determinations is largely unrelated to the issue in the instant cases. For at least 30 years, the CBA has expressly allowed the Union to determine writing credit for all projects written under its jurisdiction, and the release of Literary Material for such purposes typically occurs after the principal photography of the movie or television show at issue has been completed, at which time the Employers' confidentiality concerns are far lower than during the a project's developmental stage.

[11] According to the Union, around 130,000 pieces of Literary Material have been registered through the Registry during the past two years.

contract enforcement questions and formal grievances, particularly those involving compensation issues. The Employers typically provided the Union with scripts that had already been produced or were no longer in active development.

The Union is not aware of any occasion where it was denied access to Literary Material based on a Employer's assertion of confidentiality or a proprietary interest. Rather, if confidentiality concerns arose, the Union and the Employer would agree on an accommodation. The AMPTP would raise such confidentiality concerns in the rare case where Literary Material was provided to the Union before production. The AMPTP claims that the main difference between the release of the Literary Material during these contract enforcement grievances and the instant situation is that the Employers were involved in turning over the Literary Material to the Union. As such, they were able to have greater control over confidentiality concerns, whereas the Employers here have no control over what Literary Material is provided pursuant to the SVP.

ACTION

We agree with the Region that the Employers did not violate the Act by notifying writers that sending Literary Material to the Union pursuant to Strike Rule No. 8 and the SVP was a breach of their individual contracts with the Employers, as the work product is the Employers' property, the Employers have a legitimate interest in the nondisclosure of the work product, and no Section 7 rights are implicated by the nondisclosure requirement.

Initially, we agree with the Region that the Literary Material at issue in these cases is the intellectual property of the Employers, contains proprietary information, and is considered to be a trade secret by the Employers. Indeed, these are clearly the basis for the Confidentiality Clauses in the individual Writers' Agreements that prohibit the writers from disclosing the Literary Material to third parties.

We further agree with the Region that the Employers have only given permission for the Union to use certain specific Literary Material for discrete purposes, primarily in connection with arbitrations for compensation or other claims raised under the CBA or in credit determinations pursuant to the CBA. Contrary to the Union's contention, the evidence does not establish that a writer under contract with the Employers has ever disclosed Literary Material to the Union's Registry. Moreover, the evidence

shows that the Employers have always been concerned about confidentiality.[12]

The Board has repeatedly held an employee's disclosure of an employer's confidential business information is not a protected activity where the employer has a legitimate and substantial business interest in upholding confidentiality.[13] Thus, in Lafayette Park, the Board found that a rule prohibiting employees from disclosing "Hotel-private information" did not violate Section 8(a)(1). The Board stated, "[c]learly, businesses have a substantial and legitimate interest in maintaining the confidentiality of private information, including. . . trade secrets. . . , and a range of other proprietary information."[14]

In the instant case, the Employers have a substantial interest in maintaining the confidentiality of their Literary Material. Their interest is compelling because of the industry's competitive nature and their inability to control the use of materials submitted to the Union pursuant to the SVP. The Employers compete with each other and other production companies to find and develop new and different ideas which evolve into the Literary Material that the writers are contracted to write. It is extremely important that none of their competitors learn of their content and have an unfair opportunity to develop similar competing projects. As such, the Employers have a legitimate interest in the non-disclosure of Literary Material; their letters to the writers stressing their legal and contractual obligations under the Writers' Agreements merely protect that legitimate interest.

---

[12] Thus, the Union's reliance on Steeltech Mfg., 315 NLRB 213 (1994) is misplaced. In that case, the employer never raised confidentiality concerns until it released an ethics manual that limited disclosure of company information. The Board found that the confidentiality rule violated Section 8(a)(1) because it was introduced at the height of an organizing campaign and the employer lacked a sufficient business justification. To the contrary, the Employers here have frequently raised confidentiality concerns before, as evidenced by the Writers' Agreements and individual contract enforcement proceedings, and the Employers have a legitimate business justification for the rule.

[13] See Lafayette Park Hotel, 326 NLRB 824, 826 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999); Mediaone of Greater Florida, Inc., 340 NLRB 277 (2003).

[14] Lafayette Park, 326 NLRB at 826.

In dealing with a similar confidentiality clause between a motion picture production company and its employees, we concluded that:

> the Employer could lawfully prohibit employees from disclosing information "to any third party" concerning the "script, story, [or] characters" because this reasonably addressed the Employer's legitimate interest in protecting proprietary information about its film and did not implicate Section 7 rights.[15]

In that case, the Employer, after hearing that confidential information was disclosed to a third party, called an employee meeting to reiterate the importance of the confidentiality provisions, and to remind employees that any breach of their legal confidentiality obligations would result in termination.[16]

Likewise, the Literary Material at issue in the instant case is proprietary information for which the Employers have a legitimate reason to prohibit disclosure. As such, the Employers here also did not violate Section 8(a)(1) of the Act by sending the letters at issue here reminding writers of their contractual confidentiality obligations, even with the threat of legal action.

The Union argues that its member-writers have an equally important interest in the non-disclosure of Literary Material, and therefore the writers should be able to allow the Union to safeguard the Literary Material during the strike. While the Union and its writers may have legitimate concerns in keeping the Literary Material confidential to protect members' interests and in policing strike conduct, the fact remains that the Literary Material is the property of the Employers. As the Board has recently held, "[a]n employer has a basic property right to regulate and restrict employee use of company property."[17] Therefore, the Employers can regulate and restrict the writers' use of the Literary Material despite Strike Rule No. 8 and the SVP.

---

[15] Courage Productions, LLC, Cases 12-CA-21077, 21097, Advice Memorandum dated August 24, 2001, at 5.

[16] Id., at 3.

[17] Register Guard, 351 NLRB No. 70, slip op. at 5 (2007) (internal citations omitted).

Finally, we agree with the Region that the writers have extremely limited Section 7 rights in disclosing the Literary Material pursuant to the SVP, if any at all. As stated above, the primary purpose of the SVP is to allow the writers to protect themselves against internal union charges of strikebreaking. The Board has held, however, that a matter is not protected by Section 7 if it does not relate to a term or condition of employment,[18] and that the enforcement of internal union rules is not a term or condition of employment.[19] Therefore, members' compliance with the Union's strike rule does not appear to be protected by Section 7, and the Employers could not have violated Section 8(a)(1) by sending the letters at issue to the writers.[20]

Accordingly, we agree with the Region that the charges in the instant cases should be dismissed, absent withdrawal.

B.J.K

---

[18] See Waters of Orchard Park, 341 NLRB 642, 645 (2004) (the employee activity in question was found not to be protected by Section 7 because it did not relate to employees' terms or conditions of employment).

[19] See Nordstrom, Inc., 229 NLRB 601, 611 (1977) (the employer had no duty to furnish the names of employees who crossed a picket line because "union discipline is not an area of mandatory bargaining").

[20] Lafayette Park, 326 NLRB at 826. See also Super K-Mart, 330 NLRB 263, 263 (1999) (the employer did not violate Section 8(a)(1) because its "confidentiality provision reasonably is addressed to protecting [its] legitimate confidentiality interest and does not implicate employee Section 7 rights").