



Dead Kennedys v. Biafra
 Cal.App. 1 Dist., 2003.
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Court of Appeal, First District, Division 4, California.

Dead KENNEDYS et al., Plaintiffs and Appellants,
 v.

Jello BIAFRA, Defendant and Appellant.

No. A094272.

(San Francisco County Super. Ct. No. 998892).

June 18, 2003.

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RIVERA, J.

*1 Jello Biafra, the former lead singer of the Dead Kennedys band, appeals from a judgment upon a concurrent jury and court trial finding in favor of the other three former members of the band on their complaint against him. Former band member, East Bay Ray, cross-appeals from the judgment entered against him for fraud damages. And, plaintiffs cross-appeal from the trial court's judgment ordering dissolution of the partnership. We reverse the judgment finding that East Bay Ray defrauded Biafra and, consequently, the dissolution order. In all other respects, we affirm the judgment.

I. FACTUAL BACKGROUND

The Dead Kennedys was a punk rock band, which

performed together from 1978 to 1986. Together the band created numerous musical compositions and sound recordings. The name of the band was a tribute to the ideals of John and Robert Kennedy. The four members of the band were respondents East Bay Ray aka Ray Pepperell, Klaus Flouride aka Geoffrey Lyall, and D.H. Peligro aka Darren Henley, and appellant Jello Biafra aka Eric Reed Boucher.^{FN1}The Dead Kennedys band toured extensively and recorded six full-length albums, numerous singles and extended-play albums.^{FN2}The song writing was a collaborative effort among the band members. The band's popularity has continued; it sold in excess of 134,000 records in 1998.

FN1. Respondents also instituted this action as the Dead Kennedys doing business as Decay Music, a California general partnership. We refer to the respondent band members, the Dead Kennedys and Decay Music collectively as respondents.

FN2. Cherry Red Records, an English company, owns the sound recordings to "Fresh Fruit for Rotting Vegetables," the Dead Kennedys's first album.

In or about August 1981, the band formed Decay Music, a general partnership. The members of the band were equal partners, with each having a one-quarter voting and ownership interest. The band conducted its business under the Decay Music entity with it acting as the publisher of records, retaining the rights to the music, and collecting the income from mechanical, songwriting and performance royalties. Decay Music financed the recording of the band's albums following its first album, incurring the expenses of producing the sound recording and those for artwork on the album covers.

While the band operated as a partnership beginning in August 1981, it did not memorialize its arrangement until April 1991. The 1991 agreement provided that "Decay Music administers, licenses

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and collects the income from Dead Kennedy[s] projects such as recordings, videos, merchandise, etc.”The 1991 agreement further set forth that net income from a particular project with the exception of songwriting income, was to “be divided equally among the major performers or participants of that particular project.”Pursuant to the 1991 agreement, songwriting income was divided by giving 75 percent to the individual songwriter or writers with the remaining 25 percent going to the partners as “reimbursement of recording, tour and promotion time and expenses.”The songwriting split between songwriters and members of the partnership was set forth in Schedule C to the 1991 agreement.

The Dead Kennedys initially recorded using the record label name of Alternative Tentacles. In 1981, East Bay Ray, Biafra and Michael Vraney formed Alternative Tentacles Records (ATR) as a partnership. Its purpose was to release the recordings of other artists and it functioned for that purpose from late 1981 to late 1983. In early 1984, Decay Music granted ATR the license to release the Dead Kennedys's sound recordings and pay Decay Music the royalties. ATR paid the artists in a band an artist royalty of 12 percent of the suggested retail list price for use of the sound recordings and the songwriters a mechanical royalty for use of the underlying musical compositions. Mechanical royalties were set by federal statute. (See 17 U.S.C. § 115(c)(2).) ATR was also responsible for promoting the bands. In 1983, Michael Bonanno became general manager of ATR. Bonanno agreed to pay the Dead Kennedys mechanical royalties of 10 times the statutory rate with increases when the statutory rate was raised. This amounted to 50 cents per album beginning in the late 1980's. At the time of trial, the statutory rate was 7.55 cents-75 cents per album under the ATR contract-but the Dead Kennedys continued to receive only 50 cents.

*2 In the mid-1980's, Biafra became the owner of ATR and operated it as a sole proprietorship. In 1987, ATR began releasing albums recorded by Biafra. In the period from 1987 to 2000, ATR re-

leased and promoted 18 albums by Biafra and one additional compilation album that included his work.

After the band ceased touring in 1986, ATR stopped promoting the Dead Kennedys's sound recordings (referred to, collectively, as the Catalog). Although the Dead Kennedys was its largest selling act at the time, as much as 50 percent or more of ATR's sales, ATR did not promote it because it was no longer “a new release.” Biafra admitted that the Catalog was not promoted; he opined that promotion was unnecessary because he was still recording and his name was associated with the Dead Kennedys. Timothy Jorstad, an expert in the music industry testified that based on the Dead Kennedys's sales, if an additional 40 cents per album were spent to promote the Catalog, it would generate an additional minimum sales of 20 percent.^{FN3}Thus, Jorstad opined that the loss to the Dead Kennedys was \$159,532 plus interest of \$53,382. Jorstad also calculated the amount of mechanical royalties underpayment and determined it to be \$49,044.55 plus 10 percent interest for a total of \$65,995.34.

FN3. Since the Catalog was selling approximately 100,000 units a year, if 40 cents per unit were spent, it would result in a \$40,000 budget for promotion.

Greg Werckman, the general manager of ATR from 1989 to 1996, admitted that ATR paid the Dead Kennedys at a lesser artist royalty rate than other bands on the label. The Dead Kennedys was paid 12 percent of a suggested retail list price of \$10.98 while other bands were paid based on 12 percent of an \$11.98 list price. Kristin Von Till became the general manager of ATR in 1996. Von Till brought the discrepancy to the attention of Werckman and Biafra in a meeting in early 1998. Rick Stott, an attorney representing both Biafra and ATR, was also present at the meeting. They agreed that the Dead Kennedys was owed additional money due to the multiplier discrepancy, but Biafra ordered Von Till not to communicate about the discrepancy to East

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Bay Ray. And Stott suggested that the band could be told that any payment was a royalty increase rather than a sum owed. Indeed, Stott, on behalf of ATR, subsequently offered the Dead Kennedys a raise in the royalty rate retroactive to 1989 but conditioned it upon the band's giving ATR a license on its releases for the lifetime of the copyrights at a fixed royalty rate. Stott wrote: " 'The proffered payment of royalty of 12 percent of an \$11.98 suggested retail list price retroactive to CD sales number one in 1988 is in consideration of a new licensing agreement. It is not a royalty owed Decay Music nor is it an arrearage on royalties. As your clients well know Decay Music has been paid every dime it has earned from ATR over the last ten years.' " Several months later, Von Till informed East Bay Ray of the discrepancy. Biafra subsequently terminated Von Till.

In October 1998, Stott, on behalf of Biafra, transmitted \$74,814.51 representing the underpaid royalty payments to counsel for the Dead Kennedys. The sum was to be held in a trust account pending Biafra's consent or a court order. The sum was released in January 2000, after the present litigation was filed.

*3 Decay Music had a separate license agreement with Alternative Tentacles UK (AT UK) to distribute the Dead Kennedys's records in Europe. AT UK was owned in part by Biafra. In May 1997, Decay Music authorized ATR to terminate the license with AT UK. At the time of termination, AT UK owed Decay Music over \$20,000 in record royalties. Decay Music agreed to allow Biafra, through ATR, to temporarily handle the European market. Biafra, however, subsequently vetoed attempts by Decay Music to permit other European labels to handle the distribution. Instead, ATR assumed the exclusive distribution of the Catalog worldwide. ATR received over \$35,000 in profits resulting from this relationship for the nine-month period ending September 30, 1998, none of which was shared with Decay Music.

Decay Music scheduled a partnership meeting for

September 30, 1998. It notified Biafra of the meeting and made several attempts to obtain an acceptable date from him for the meeting. Despite being given numerous optional dates for the meeting, Biafra maintained that he was unavailable. Decay Music met on September 30, 1998, and voted to terminate the oral license with ATR for the distribution of the Dead Kennedys's music. ATR was immediately notified of the decision. Despite the notification, ATR continued to distribute the Dead Kennedys's records.

II. PROCEDURAL HISTORY

On October 29, 1998, respondents filed this action against Biafra and Mordam Records, ATR's record distributor. The complaint sought a declaration that Decay Music validly terminated ATR's right to distribute the Dead Kennedys's music and compensatory and punitive damages against Biafra for breach of contract, breach of fiduciary duty and conversion. The complaint further sought an injunction enjoining Biafra and Mordam Records from exploiting the Catalog.

On November 25, 1998, Biafra removed the case to federal court on the ground that the action involved a claim for relief under the federal copyrights law. Decay Music moved to remand the case to the state court. The district court granted the motion, holding that federal subject matter jurisdiction did not exist in the case because "[a]n action for an accounting or determination of ownership as between alleged co-owners [of a copyright] is founded in state [contract] law and does not arise under copyright laws." (*Dead Kennedys v. Biafra* (N.D.Cal.1999) 37 F.Supp.2d 1151, 1153-1154.)

Following remand to the state court, Biafra filed an answer and a cross-complaint against East Bay Ray, Klaus Flouride and D.H. Peligro. The cross-complaint sought a declaration that Biafra was entitled to exclusive rights to the Catalog. Biafra also alleged additional claims including breach of contract, breach of fiduciary duty and conversion. Mor-

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dam Records in turn filed a cross-complaint in interpleader, alleging that it was in possession of money on a monthly basis in sums ranging from \$20,000 to \$100,000 representing the net share of record sales income for distribution of the Dead Kennedys's records and that it was aware of the competing claims for the money. Mordam interpleaded the amount of \$81,391.53. On July 26, 1999, the court ordered release of the interpled funds, with \$31,229.83 paid to Decay Music (excluding Biafra) and the remaining \$50,089.70 paid to ATR. The parties established a joint account for all further interpled funds. On March 14, 2000, the court entered judgment in interpleader on Mordam's cross-complaint against Decay Music and Biafra and dismissed the complaint against Mordam, with prejudice.

*4 On March 16, 2000, Biafra amended his cross-complaint to add a cause of action for involuntary dissolution of Decay Music. He alleged that his partners' wrongful filing of this action against him and their interference with his license to exploit the Dead Kennedys's music resulted in it not being "reasonably practicable to carry on the business of the partnership."

The case was tried concurrently to the court and jury commencing on May 1, 2000. By special verdict, the jury found that ATR breached the license agreement between it and Decay Music for failing to promote the Catalog and awarded damages against ATR of \$50,000. It also awarded Decay Music damages of \$33,888 on its claim that ATR failed to adjust the mechanical royalty rate it paid Decay Music, damages of \$50,000 on Decay Music's claim that ATR engaged in fraudulent conduct, and \$35,396 for Decay Music's cause of action for breach of contract against ATR for failing to pay Decay Music monies for the sales of the Dead Kennedys's recordings in the United Kingdom and Europe. The jury further found that Biafra breached his fiduciary duty and awarded Decay Music \$10,000. The jury also found that Biafra acted maliciously and found him liable for an additional

\$20,000 in punitive damages. Finally, the jury found in favor of Biafra on his cross-claim alleging that East Bay Ray engaged in fraudulent conduct and awarded him \$5,000 in damages.

In a special "advisory" verdict, the jury found that the four members of the Dead Kennedys agreed that Decay Music would own the rights to the band's creative works, that the four members did not agree that Decay Music would conduct its business on the basis of unanimous consent and that Biafra received reasonable notice of the September 30, 1998, Decay Music partnership meeting.

Following posttrial hearings, the trial court entered its statement of decision. The court disagreed with the jury's advisory verdict on the ownership rights of the band's creative works, finding that "[t]he individual band members who participated in the recording projects were and are the owners of the recordings subject to the exclusive license granted to the partnership." The court further found that dissolution of Decay Music was the appropriate remedy in this case on the ground "that antagonistic feelings have developed between partners to the extent that the partners cannot continue the partnership to their mutual advantage." The court ordered a sale of the partnership assets, finding that "the most persuasive evidence of respective ownership rights is contained in the 1991 partnership agreement" and that, therefore, the proceeds of the sale would be "distributed in proportion to the applicable percentages set out in that agreement."

III. DISCUSSION

Biafra contends that the judgment against him must be reversed because: (1) the 1991 partnership agreement did not establish the parties' respective ownership interests in the musical compositions of the Dead Kennedys; (2) the 1991 agreement did not effect a transfer of a copyright interest in the band's works to Decay Music; and (3) the statute of limitations bars the band's claims for unpaid royalties under an oral contract. He also argues that there was

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no evidence to support the jury's verdict on the fraud, breach of contract, and breach of fiduciary duty causes of action. Respondents cross-appeal contending that the trial court erred in granting Biafra's request for dissolution of the partnership and in overturning the jury's advisory verdict on the issue of the partnership's ownership interests in its creative works. They also argue that the evidence fails to support the jury's fraud verdict against East Bay Ray.

A. Biafra's Appeal

1. The 1991 Partnership Agreement

*5 Biafra contends that the 1991 agreement did not constitute a sufficient writing to meet the requirements for assignment of ownership interests in a copyright as set forth in title 17 United States Code section 204.

“The interpretation of a written instrument, even though it involves what might properly be called questions of fact [citation], is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect. [Citations.] Extrinsic evidence is ‘admissible to interpret the instrument, but not to give it a meaning to which it is not reasonably susceptible’ [citations], and it is the instrument itself that must be given effect. [Citations.] It is therefore solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence.”(*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.) Where conflicting extrinsic evidence is present, as here, an appellate court will uphold any reasonable construction of the contract by the trial court under the general rule of conflicting evidence. (*Id.* at p. 866; *Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 913; 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 681, p. 615.)

Section 204(a) of the copyrights law provides that

“[a] transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed....” (17 U.S.C. § 204(a).) The copyrights law defines “ ‘transfer of copyright ownership’ “ as an “assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright ... but not including a nonexclusive license.” (17 U.S.C. § 101.)

Here, the trial court found that the 1991 partnership agreement was a written instrument sufficient to satisfy section 204 of the copyrights law. The trial court's finding is supported by substantial evidence.

The 1991 agreement memorialized the partnership agreement between the members of the Dead Kennedys in the partnership entity, Decay Music, as it was “set up and has been functioning since August 1981 .”In the agreement, the members also granted to Decay Music the administration of all licenses to the Dead Kennedys projects including recordings, videos, and merchandise. That the agreement was not executed until 10 years after the oral transfer of the copyright does not defeat the validity of the transfer. Section 204 itself validates as an alternative to an instrument of conveyance, “a note or memorandum of the transfer.”(17 U.S.C. § 204(a); 3 Nimmer on Copyright (2002) Assignments and Licenses, § 10.03[A][3], p. 10-42.) “[I]f a prior oral grant is subsequently confirmed in writing, it validates the grant *ab initio* as of the time of the oral grant.”(3 Nimmer on Copyright, *supra*, § 10.03[A][3], p. 10-43.)

*6 Relying on *Konigsberg Intern., Inc. v. Rice* (9th Cir.1994) 16 F.3d 355, Biafra contends that the writing must be contemporaneous with the transfer. In *Konigsberg*, the court determined that a letter written three and a half years after the parties entered into an oral agreement to license certain movie rights was insufficient to effect a transfer of a copyright.(*Id.* at p. 357.)The problem with the writing in *Konigsberg*, however, was not that it was

not contemporaneous but that the writing failed to indicate any terms of a transfer and was not a product of the parties' negotiations. (*Ibid.*; see *Magnuson v. Video Yesteryear* (9th Cir.1996) 85 F.3d 1424, 1428-1429 & fn. 1; see also *Valente-Kritzer Video v. Pinckney* (9th Cir.1989) 881 F.2d 772, 775 [oral transfer of copyright license valid if later confirmed in writing].) In fact, the *Konigsberg* court recognized that other courts have upheld the validity of a written memorandum of transfer made subsequent to an earlier oral transfer when the writing is executed during the life of the license. (*Konigsberg Intern., Inc. v. Rice, supra*, 16 F.3d at p. 357, fn. 3.) Here, the 1991 agreement memorializing the transfer of licenses to Decay Music was negotiated between the parties, set forth the terms of the license and was executed during the life of the license. The agreement thus satisfied the copyrights law's written instrument requirement.

Biafra also argues that the 1991 agreement does not assign the exclusive right to control the Catalog to Decay Music, and that Schedule C to the agreement does not set forth the parties' ownership interests in the Catalog. But the extrinsic evidence offered on these issues and the 1991 agreement itself demonstrate otherwise. The agreement not only gave Decay Music the exclusive right to exploit the sound recordings of the Dead Kennedys, it also provided for the allocation of royalty payments among the members and any associated artists on the recordings. In particular, Schedule C to the agreement set forth the respective ownership interests in the various sound recordings. While songwriting was a collaborative effort among the band members and each shared in the songwriting income, pursuant to the 1991 agreement, 75 percent of the songwriting income was accorded to the individual songwriter or writers of a particular song, thus, evidencing the latter's greater ownership interest in the recordings. The evidence demonstrated that the parties agreed that their individual ownership interests in the Catalog were as reflected in Schedule C. ^{FN4}

FN4.Biafra's testimony that the ownership

interests in the recordings were documented on the albums lacked credibility. The evidence showed that the band worked collectively on the creation of its musical compositions and that they agreed to share the compositions as memorialized in their 1991 agreement.

Biafra argues that the agreement fails to reference copyright, ownership or other exclusive rights to control the Catalog. He, however, concedes that no magic words are required to transfer the ownership of a copyright. Indeed, the writing need not mention the word copyright. (*Schiller & Schmidt, Inc. v. Nordisco Corp.* (7th Cir.1992) 969 F.2d 410, 413; 3 Nimmer on Copyright, *supra*, § 10.03[A][2], p. 10-41.) "It doesn't have to be the Magna Charta; a one-line pro forma statement will do." (*Effects Associates, Inc. v. Cohen* (9th Cir.1990) 908 F.2d 555, 557.) Further, the writing need not address itself solely to copyright issues. (*Schiller & Schmidt, Inc. v. Nordisco Corp., supra*, 969 F.2d at p. 413 [sale agreement]; *Oddo v. Ries* (9th Cir.1984) 743 F.2d 630, 632-633 [partnership agreement].)

*7 Here, the express language of the 1991 agreement authorizes Decay Music to continue to administer, license and collect the income from Dead Kennedys projects as it has since August 1981. In addition, the evidence at trial included agreements between Decay Music and licensees acknowledging that Decay Music has "all right, title, ownership and interest" including copyright in certain "Master Sound Recordings" and granting exclusive and nonexclusive rights to third parties to distribute the recordings. Further, no individual member of the band entered into any individual agreements to license or merchandise the Dead Kennedys's recordings.^{FN5} Finally, the evidence demonstrated that the recordings were a collaborative effort among the band members and that the parties fully negotiated their respective rights in executing the 1991 agreement.^{FN6} In sum, the 1991 agreement sufficiently conveyed the parties' transfer of their copyright interests in the Catalog to Decay Music.^{FN7}

FN5. While Biafra in October 1981 filed a certificate of copyright registration for the song "Lets Lynch the Landlord," the song is on the "Fresh Fruit For Rotting Vegetables" album, the sound recordings of which are owned by Cherry Red Records.

FN6. Biafra asserts that the 1991 agreement cannot constitute a transfer of an exclusive license to the Dead Kennedys's recordings because other artists were involved in making some of the recordings. The 1991 agreement specifically refers to the other artists and provides for distribution of songwriting income to them. Other than the allocation of income to these artists set forth in Schedules B and C to the 1991 agreement, any contracts between Decay Music and these artists are not before us.

FN7. As partners, the band members are co-owners of the partnership's assets, including the copyrights. (*Oddo v. Ries, supra*, 743 F.2d at p. 632.)

For the first time on appeal, Biafra argues that if we conclude the agreement effectuates an exclusive license, we must also conclude that the license was for an unspecified duration and terminable at will.FN8As respondents point out, however, this was not Biafra's position below where he asserted that ATR was granted the license to distribute the recordings for the 35-year period provided by the federal copyrights law. (See 17 U.S.C. § 203(a)(3).) Biafra has thus waived the issue since he contended below that the license was fully executed under the federal copyrights law. He cannot now adopt a new and different theory on appeal. (*Sommer v. Gabor* (1995) 40 Cal.App.4th 1455, 1468.) Where the new theory, as here, "contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at trial the opposing party should not be required to defend against it on appeal."*(Ibid.)*

FN8. The trial court made no express find-

ing regarding the term of the exclusive license.

In any event, Biafra's current position is untenable. *Gardner v. Nike, Inc.* (C.D.Cal.2000) 110 F.Supp.2d 1282, upon which he relies, is inapposite. There, the court held that an exclusive licensee who was granted the rights to a cartoon character had no right to transfer its rights in the license because it was "not a 'joint owner' of the copyright, but rather '[t]he owner of [a] particular exclusive right.'" (*Id.* at pp. 1283, 1286.)The court therefore determined that the licensee was required to obtain the licensor's consent prior to any transfer.FN9(*Gardner v. Nike, Inc., supra*, 110 F.Supp.2d at pp. 1284-1287.) Here, the parties are not licensees as in *Gardner*, but the joint owners of the copyright interest in the Catalog who have transferred an exclusive license of that interest to Decay Music. Decay Music, as the current holder of the exclusive license, has "all of the protection and remedies accorded to the copyright owner" under the federal copyrights law. (17 U.S.C. § 201(d)(2).) The parties, in turn, as members of the Decay Music partnership and pursuant to their 1991 agreement, have the right to transfer ownership of the exclusive rights to the copyrights in whole or in part. (*Id.*, § 201(d)(1).) Contrary to Biafra's argument, Decay Music continues to hold the exclusive license pending resolution of the remaining partnership issues.

FN9. The *Gardner* decision has been criticized as contrary to established copyrights law. (See *In re Golden Books Family Entertainment, Inc.* (Bankr.D.Del.2001) 269 B.R. 311, 317-319; 3 Nimmer on Copyright, *supra*, § 10.02[B][4], pp. 10-24 to 10-26.)

2. Statute of Limitations

*8 Biafra contends that Code of Civil Procedure section 339, subdivision (1) barred respondents' claims for damages as a result of ATR's failure to promote the Catalog.

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The statute of limitations on an action upon an oral contract is two years. (Code Civ. Proc., § 339, subd. (1).) The statute provides that the action does not accrue “until the discovery of the loss or damage suffered by the aggrieved party thereunder.”(*Ibid.*) Where, as here, however, the claim for payments due was a continuing one, it is analogous to an action for payments due under an installment contract, and thus the claim is not barred by the statute of limitations if payments were due during the period of limitations. (*Conway v. Bughouse, Inc.* (1980) 105 Cal.App.3d 194, 199-200 [statute of limitations ran from date each monthly payment due since contract providing for monthly payments until plaintiff's death was an installment contract]); *Lee v. DeForest* (1937) 22 Cal.App.2d 351, 360 ([statute of limitations runs against a cause of action for recovery of an unpaid installment at the time it is payable].)

Biafra's reliance on *Brown v. Cosby* (E.D.Pa.1977) 433 F.Supp. 1331 is therefore misplaced. In *Brown*, the court, applying California law, determined that the plaintiff's claims for breach of an oral contract to share profits generated from a comic strip and commercial exploitation of its characters were barred by the two-year statute of limitations of Code of Civil Procedure section 339, subdivision (1).(*Brown*, at pp. 1336-1342.)The oral agreement in *Brown*, however, did not involve regular periodic payments, but rather the promise to pay the plaintiff 25 percent of the profits generated by the characters as his “fair share.” (*Id.* at p. 1335.)The defendants breached the agreement when they refused to communicate with him and produced a television show, films, books and products using characters identical or similar to those created by the plaintiff. (*Ibid.*) The court held that the plaintiff's cause of action accrued at the time of the defendants' failure to account to him for his fair share of the profits, reasoning that to allow the plaintiff to delay suit would shift to the defendants the risk and expense of commercial exploitation of his idea. (*Id.* at pp. 1341-1342.)

Here, the record demonstrates that ATR had a continuing obligation to pay artist and mechanical royalties to Decay Music; the statute of limitations hence did not begin to run on a cause of action for the recovery of an unpaid amount until it was payable. Thus, the trial court properly permitted the jury to determine contractual damages for those payments becoming due within the two-year period before this case was instituted.

3. *Fraud Claim*

The jury found that ATR engaged in fraudulent conduct and awarded respondents \$50,000 in damages on their claim. Biafra contends that the verdict is not supported by substantial evidence because there was no evidence of detrimental reliance.

*9 In reviewing the jury's verdict, we may not substitute our own inferences or deductions for those of the trial court. Our authority begins and ends with a determination of whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted, that will support the judgment. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 60.)

To establish a fraud cause of action, a plaintiff must prove misrepresentation, defendant's knowledge of the statement's falsity, intent to defraud, justifiable reliance and resulting damage. (*Hunter v. Up-Right, Inc.* (1993) 6 Cal.4th 1174, 1184.) Here, the evidence showed that ATR continually insisted that its payment of royalties to respondents was accurate, that there was no discrepancy in the multiplier rate paid to them as opposed to other bands on the label, and that respondents' attempts to obtain an increase in the rate amounted to “greed[].” The evidence further showed that ATR continually misrepresented the discrepancy, and that respondents relied on ATR's representations, assuming that another band on the label was paid a higher rate because its recording was a compilation with a different price structure. To their detriment, respondents continued to negotiate in good faith for a royalty increase

while ATR knowingly deceived them of the amounts due under their contract. In fact, Stott, the attorney for Biafra and ATR, who negotiated with respondents, did not acknowledge the underpayment of royalties but instead tried to gain a new licensing agreement from Decay Music, proffering a payment of a royalty rate increase in exchange. He maintained that Decay Music was not owed an arrearage on royalties as it had “ ‘been paid every dime it has earned from ATR over the last ten years.’ ” In sum, the evidence amply supported the jury’s fraud verdict.

McLaughlin v. National Union Fire Ins. Co. (1994) 23 Cal.App.4th 1132, upon which Biafra relies, is therefore inapposite. There, the court determined that although the defendant insurer may have intentionally misrepresented the scope and availability of coverage, plaintiffs failed to establish liability therefor because they could not prove detrimental reliance—plaintiffs did not accept or rely on the false coverage position but instead pursued legal remedies to challenge the insurer’s position. (*Id.* at pp. 1147-1148.) Here, substantial evidence demonstrated that respondents detrimentally relied upon ATR’s misrepresentations.

4. Breach of ATR’s United Kingdom/Europe License Agreement

The jury found that ATR breached the license agreement between it and Decay Music by failing to pay it monies for the sales of the Dead Kennedys’s recordings in the United Kingdom and Europe. Biafra contends that there is no evidence to support this verdict because ATR was authorized to distribute the recordings through September 30, 1998.

Biafra misreads the record. The evidence adduced at trial shows that Decay Music terminated its AT UK contract in May 1997. Thereafter, it permitted ATR to handle the distribution of the recordings as a temporary arrangement until September 1998. ATR, however, failed to share any profits from

European sales with Decay Music during this period and obstructed Decay Music’s efforts to establish its own distribution network in Europe. In short, ATR breached its agreement with Decay Music.

5. Breach of Fiduciary Duty

*10 Biafra also contends that there is no evidence to support the jury’s finding that he breached his fiduciary duty to his partners. He argues that he had no fiduciary obligation to Decay Music arising from his actions as the owner of ATR in its contract with Decay Music.

Biafra relies on Corporations Code section 16404, subdivision (f) which provides that “[a] partner may lend money to and transact other business with the partnership, and as to each loan or transaction, the rights and obligations of the partner regarding performance or enforcement are the same as those of a person who is not a partner, subject to other applicable law.” This section, however, is inapplicable here because the Uniform Partnership Act of 1994, of which Corporations Code section 16404, is a part does not apply to Decay Music, a partnership formed before the effective date of its provisions and governed by the Uniform Partnership Act. (Corp .Code, § 16111, subd. (a).) ^{FN10}Corporations Code section 15021 thus applies here and provides that a partner is accountable as a fiduciary to the partnership. The evidence shows that Biafra breached his fiduciary duty in numerous instances, including failure to account for the United Kingdom/Europe distribution, misappropriation of funds owed to Decay Music and misrepresentation of amounts owed to the partnership. Again, substantial evidence supports the jury’s verdict.

FN10. The Uniform Partnership Act of 1994 does not apply to this action because it was commenced on October 29, 1998, before the January 1, 1999 effective date of the revised act. (Corp.Code, §§ 16112, 16111, subd. (b).)

6. *Artwork*

Finally, Biafra asserts that the trial court failed to make a finding regarding the parties' copyright ownership interest in the Dead Kennedys's products, including the artwork on the album covers and inserts, T-shirts and logos. The trial court properly found that this right remained with Decay Music.

The court found that “[t]he right to control, administer and license all Dead Kennedys' intellectual property lies exclusively with plaintiff Decay Music...” Substantial evidence supports this finding. Specifically, the 1991 partnership agreement provided that the income from Decay Music projects including merchandise would be divided equally among the partners. And, the evidence showed that in entering license agreements with others, Decay Music represented that it had the right to use the band's artwork and designs. Moreover, the evidence showed that Decay Music paid for the expenses associated with producing the artwork and some of the artwork itself. Biafra, Winston Smith and others contributed to the artwork on the band's album covers and inserts. Winston Smith testified that he often worked in conjunction with Biafra, that he created some artwork specifically for the Dead Kennedys and permitted the band to use some of his preexisting artwork. In addition, Smith had a specific contract arrangement for the use of his artwork on Dead Kennedys's T-shirts, receiving 20 percent of the income on the shirts. In sum, the record supports the trial court's finding that Decay Music had the exclusive right to the artwork on the band's albums and merchandise.

B. Respondents' Cross-appeal

1. *Ownership of Dead Kennedys's Creative Works*

*11 In an advisory special verdict, the jury found that “the four members of Dead Kennedys agreed that Decay Music would own the rights to the band's creative works.” Respondents argue that the

trial court erred in rejecting this finding and instead concluding that Decay Music had an exclusive license to the Catalog but that “[t]he individual band members who participated in the recording projects were and are the owners of the recordings subject to the exclusive license granted to the partnership.” They assert that the trial court was required to accept the jury's advisory verdict on this issue because the jury's finding rested on a resolution of conflicting extrinsic evidence. We disagree.

“[W]here both legal and equitable issues are present, a jury may be empanelled to try the legal issues, and may also at the court's discretion be asked for advisory verdicts as to facts which may apply to the equitable issues, and that the ‘equity first’ rule is the court should resolve the equitable issues first [citation], and that the court's resolution of the equitable issues may resolve the legal issues. [Citation.] [¶] It is equally beyond dispute that while a jury may be used for advisory verdicts as to questions of fact, it is the duty of the trial court to make its own independent findings and to adopt or reject the findings of the jury as it deems proper.” (*A-C Co. v. Security Pacific Nat. Bank* (1985) 173 Cal.App.3d 462, 473-474.)

Here, respondents sought a declaratory judgment concerning Decay Music's rights to the Catalog, an equitable remedy properly tried before the court. This cause of action was tried concurrently with the legal issues with argument on the declaratory relief issue occurring following the discharge of the jury. The court properly rejected the jury's advisory finding on the issue of the ownership of the band's creative works. As the court found, “the parties [did not] intend that the partnership would acquire [the parties'] respective ownership rights to the songs and recordings. This is demonstrated not only by the terms of the 1991 agreement itself that states only that Decay Music ‘administers, licenses and collects the income from Dead Kennedys projects such as recordings, videos, merchandise, etc.’ but also from extrinsic evidence which includes the fact that both Biafra and East Bay Ray applied for copy-

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rights in their own names to songs that they individually composed for Dead Kennedys subsequent to August of 1981, and the correspondence between the parties subsequent to April of 1997 wherein they referred to the band as the 'owner' and Decay Music as the 'licensor.' " Inasmuch as the trial court's finding is supported by substantial evidence, we may not disturb it on appeal. (*Estate of Kreher* (1951) 107 Cal.App.2d 831, 837-838.)

2. Fraud Verdict Against East Bay Ray

The jury found in favor of Biafra on his cross-claim that East Bay Ray engaged in fraudulent conduct and awarded Biafra \$5,000 in damages. Respondents contend that this verdict is inconsistent and not supported by the evidence. This contention has merit.

*12 The jury found that East Bay Ray did not breach the partnership agreement by paying himself a fee for services rendered to Decay Music. The only evidence proffered by Biafra on his fraud claim was, however, limited to an approximate three and one-half percent of Decay Music's gross income which East Bay Ray deducted for administering and managing the partnership, precisely his fee for services to the partnership. Although Biafra testified that East Bay Ray never disclosed the administrative fee, the other partners testified that it was understood that East Bay Ray would receive a percentage of the gross income for his administrative services to the partnership, as had the previous business managers for the band. And the jury's finding that the payment of an administrative fee was not a breach of the partnership agreement is clearly inconsistent with a finding that East Bay Ray defrauded Biafra by not disclosing that fee. Even if we could conclude on this record that East Bay Ray failed to disclose the fee to Biafra, there is no evidence that Biafra relied on the nondisclosure to his detriment. In short, substantial evidence fails to support the jury's verdict on this cause of action. The judgment awarding Biafra \$5,000 on this claim is therefore reversed.

3. Dissolution of Decay Music

In light of our decision reversing Biafra's fraud claim, we conclude that we must also reverse the trial court's decision granting Biafra's request to dissolve the partnership. Inasmuch as Biafra defrauded the partnership and respondents were opposed to dissolution, we remand the matter to the trial court to reconsider whether dissolution is an appropriate remedy. In making that determination, the trial court is directed to hold an evidentiary hearing on the issue of whether the partnership's assets would be substantially diminished by a forced dissolution and sale of the partnership's primary asset.

A similar situation was presented in *Bates v. McTammany* (1938) 10 Cal.2d 697. There, the partnership was formed for the purpose of conducting a radio station and the partners had a renewable license from the Federal Communications Commission that could not be sold at a dissolution sale. The court determined that defendant was not entitled to dissolve the partnership because in addition to his unclean hands, ordering a dissolution would destroy a large part of the value of the business because the license could not then be renewed. (*Id.* at pp. 699-700.) "Equity may refuse dissolution and act to prevent the loss to the partnership if it is expedient to do so, rather than to relegate the plaintiff to his action for damages for breach of contract." (*Id.* at p. 700.)

Here, too, it is uncertain to what extent the value of the Catalog and the right to license its manufacture and distribution would be diminished if Decay Music is forced to sell it. (See *Schiller & Schmidt, Inc. v. Nordisco Corp.*, *supra*, 969 F.2d at p. 413 [recognizing "diseconomies of divided ownership" of copyrights].) Additionally, the record demonstrates that Biafra's fraudulent actions precipitated the rift in the partnership, and made it impossible for the partnership to carry on its business as it had in the past. As in *Bates v. McTammany*, *supra*, 10 Cal.2d at page 700, "[n]o serious contention may be made that [Biafra], himself at fault, may prevail on

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his application for a dissolution if it would cause loss to the partnership.”

*13 In the event that the trial court finds that dissolution of the partnership cannot be prevented, the court should also consider whether, on this record, the dissolution was “wrongfully” engendered by Biafra and if so, whether the provisions of Corporations Code section 15038 give the other three partners the right to continue the partnership business.FN11(See *Vangel v. Vangel* (1953) 116 Cal.App.2d 615.)

FN11.Corporations Code section 15038, subdivision (b) provides in pertinent part: “When dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows: [¶] ... [¶] (2) The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by themselves or jointly with others, may do so, during the agreed term for the partnership and for that purpose may possess the partnership property; provided, they secure the payment by bond or pay to any partner who has caused the dissolution wrongfully, the value of the partner's interest in the partnership at the dissolution, less any damages recoverable under subdivision (b)(1)(B), and in like manner indemnify the partner against all present or future partnership liabilities.”

IV. DISPOSITION

The judgment finding in favor of Biafra on his cross-claim against East Bay Ray for fraud and awarding damages of \$5,000 is reversed. The judgment for dissolution of the partnership is reversed and remanded. In all other respects, the judgment is affirmed. Respondents shall recover their costs.

We concur: REARDON, Acting P.J., and SEPULVEDA, J.
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