

# Chicago Daily Law Bulletin.

## Appeals court rules '50/50' up for grabs in movie title dispute

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By Patricia Manson | [pmanson@lbpc.com](mailto:pmanson@lbpc.com) | Law Bulletin staff writer

The chances of the rap duo Phifty-50 prevailing on its trademark-infringement claims apparently were a lot less than 50-50.

The 7th U.S. Circuit Court of Appeals declined to revive a lawsuit that Eastland Music Group LLC brought against corporations behind a movie titled "50/50."

Eastland Music has registered Phifty-50 as a trademark and also claims a trademark of "50/50."

Eastland Music alleged that Lionsgate Entertainment Inc. and Summit Entertainment LLC infringed on its trademark rights by naming a 2011 movie — starring Joseph Gordon-Levitt and Seth Rogen — "50/50."

The movie is about a man given a 50 percent chance to survive cancer.

U.S. District Judge George W. Lindberg held that the movie's title was descriptive, and dismissed the suit for failure to state a claim.

A three-judge panel of the 7th Circuit last week affirmed Lindberg's ruling.

"The title of a work of intellectual property can infringe another author's mark only if the title falsely implies that the latter author is its origin," Chief Judge [Frank H. Easterbrook](#) wrote for the panel, citing *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003).

The panel said Eastland Music did not allege that anyone was confused about the source of the movie.

And citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the panel said such an allegation would have been "too implausible to support costly litigation."

"At oral argument, plaintiffs' counsel conceded that not a single person has ever contacted Eastland or its web site to seek a copy of the film or complain about the film's contents or quality," Easterbrook wrote.

"Nor does the complaint allege that any potential customer has turned to Lionsgate or Summit in quest of the rap duo's products."

The panel noted that only "Phifty-50" — not "50/50" — was registered.

"Phifty-50" was "registrable," the panel said, because "it is a made-up homophone of a familiar phrase, which in ordinary usage is suggestive or descriptive."

"It takes a powerful showing of association between such an expression and a particular producer of goods to establish a trademark claim — and Eastland Music has not attempted such a showing," Easterbrook wrote.

The panel said Eastland Music would have failed at such an attempt.

Wikipedia lists eight movies with "50/50" or a "sound-alike variant" in their titles, the panel said.

The panel said the first film in that list opened in 1916 and the final in 2011.

One of the films, which was released in 1982, was about a rock band, the panel said.

The panel said other works with "50/50" in their title include Frank Zappa's 1973 song "50/50" and the 1995 song "50/50 Luv" by the rap group B.G. Knocc Out & Dresta.

"If there is any prospect of intellectual property in the phrase 50/50, Eastland Music is a very junior user and in no position to complain about the 2011 film," Easterbrook wrote. "Phifty-50 entered a crowded field, and its rights are correspondingly weak and narrow."

Joining the opinion were Judges [Joel M. Flaum](#) and [Ilana Diamond Rovner](#). *Eastland Music Group LLC, et al. v. Lionsgate Entertainment Inc., et al.*, No. 12-2928.

[Gerald C. Willis](#) of McAndrews, Held & Malloy Ltd. argued the case before the 7th Circuit on behalf of Eastland Music.

He could not be reached for comment.

Tom J. Ferber of Pryor, Cashman LLP in New York argued the case on behalf of the defendants.

Ferber said he was not surprised that the 7th Circuit ruled in favor of his clients.

He said Easterbrook's questions during oral argument indicated that the judge agreed that "50/50" was a common term in artistic expression.

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## Pryor Cashman wins trademark suit over the movie '50/50'

2/21/2013

COMMENTS (0)

By Erin Geiger Smith

Feb 21 (Reuters) - The 7th Circuit U.S. Court of Appeals said Thursday that the title of the movie "50/50" did not cause confusion with rap duo Phifty-50's trademark.

Eastland Music Group, LLC, the proprietor of Phifty-50, sued Lionsgate Entertainment Inc, the producer of a film about a young man's battle with cancer, in November 2011, saying the movie company had infringed its rights by using 50/50 in the film's title.

Eastland, the opinion said, also claims a trademark for the phrase "50/50."

In a five-page opinion, Chief Judge Frank Easterbrook and Judges Joel Flaum and Iliana Rovner sided with Pryor Cashman client Lionsgate and upheld the Chicago federal district court's July 2012 decision to throw out the lawsuit.

U.S. District Judge George Lindberg's decision had followed the logic of the 2nd U.S. Circuit Court of Appeals in the 1989 case Rogers v. Grimaldi, which said that the title of an artistic work infringes a trademark only if it is devoid of artistic significance or is explicitly misleading about the work's source.

Lindberg ruled that the title "50/50" had artistic relevance to the plot of the film in that it referenced the main character's chance of survival.

The appeals court agreed, though it said it didn't need to go so far as to decide whether to follow Rogers, which has not yet been adopted by the 7th Circuit.

Instead, Easterbrook wrote for the panel, the "complaint fails at the threshold: it does not allege that the use of '50/50' as a title caused any confusion about the film's source."

Just like no moviegoer would have thought the jeweler Tiffany & Co was the source for the film 'Breakfast at Tiffany's,' no consumer would think the rap group was the source of the film '50/50,' the judge wrote.

## ROGERS V. GRIMALDI RECAP

The court also pointed to at least eight other films with 50/50 or a variant in the title, noting that if there is "any prospect of intellectual property in the phrase 50/50," Eastland is a "very junior user and in no position to complain."

Ronald diCerbo of McAndrews, Held & Malloy who represented Eastland was not immediately available to comment.

Lionsgate's team was led by Pryor Cashman partner Tom Ferber. He said that he knew the appeals court might want to avoid the constitutional discussion required to follow Rogers.

He also argued to the court that the term "50/50" was one in parlance before the rap duo ever existed and that Eastland Music's trademark allegations were therefore not supportable.

The bottom line, Ferber said, is that Lionsgate wasn't "using a trademark, we were using a term that pre-existed the plaintiffs."

Ferber, as it happens, was also on the winning team that represented defendant MGM/UA Entertainment Co against the claims brought by Ginger Rogers over the Federico Fellini film "Ginger & Fred" that served as the basis of the Grimaldi case. At the time, he said, he was an associate and handled the majority of the briefing.

That lawsuit, Ferber said, "was arguably one of the biggest cases I've ever been involved in."

The film "50/50" featured the somewhat more modern stars Joseph Gordon-Levitt and Seth Rogen.

The case is Eastland Music Group v. Lionsgate Entertainment, U.S. Court of Appeals for the 7th Circuit, No. 12-2928.

For Eastland: Ronald diCerbo of McAndrews, Held & Malloy

For Lionsgate: Tom Ferber of Pryor Cashman.

(This article has been corrected. The previous version misspelled Pryor Cashman in paragraph 12 and incorrectly referred to Easterbrook's instead of Eastland Music's trademark allegations in paragraph 13.)

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## 7th Circ. Tosses Rap Label's Mark Suit Over '50/50' Movie

By **Matthew Heller**

Law360, New York (February 21, 2013, 5:39 PM ET) -- The Seventh Circuit on Thursday affirmed the dismissal of a trademark infringement suit over the title of the 2011 indie film "50/50," finding a Florida music company that owns the "Phifty-50" mark had not shown consumers would be confused as to the origin of the movie.

Eastland Music Group LLC's rights in the "Phifty-50" mark were not enough to make Lionsgate Entertainment Inc. and others behind "50/50" liable for infringement without a showing of consumer confusion, the appeals court said in upholding a federal judge who dismissed the case in July. Eastland's Phifty-50 label releases music by a hip-hop duo of the same name.

"Eastland Music's complaint does not (and could not plausibly) allege that consumers treat it as the producer or source of the film 50/50, or treat Lionsgate as the producer of [Phifty-50's] 2003 rap album," the appellate opinion said.

The court cited the admission of Eastland's attorney Gerald Willis when he was asked at oral argument whether anyone had called the company "and said, 'Please send us a copy of the DVD of '50/50.'"

"Not that I'm aware of," Willis replied.

"Nor does the complaint allege that any potential customer has turned to Lionsgate or Summit in quest of the rap duo's products," Judge Frank H. Easterbrook wrote for the Seventh Circuit. "Counsel for plaintiffs also told us that no [consumer] survey has been done."

"50/50" stars Joseph Gordon-Levitt as a public radio journalist who is diagnosed with a rare form of cancer. In dismissing Eastland's case, U.S. District Judge George W. Lindberg said the title of the film was descriptive because it refers to the main character's 50 percent chance of surviving the disease.

"If the accused film bore the title 'Phifty-50,' allegations of confusion or secondary meaning could be omitted from the complaint," the Seventh Circuit said. But the title, it continued, differs from Eastland's mark, requiring "a powerful showing of association between such an expression and a particular producer of goods to establish a trademark claim — and Eastland Music has not attempted such a showing."

The appeals court also noted: "The phrase 50/50 or a sound-alike variant (50-50, fiftyfifty, fifty/fifty) has been in use as the title of intellectual property for a long time. ... If there is any prospect of intellectual property in the phrase 50/50, Eastland Music is a very junior

user and in no position to complain about the 2011 film. Phifty-50 entered a crowded field, and its rights are correspondingly weak and narrow.”

Eastland filed the suit in November 2011 against Lionsgate, its film studio Mandate Pictures LLC and “50/50” distributor Summit Entertainment LLC, alleging trademark infringement, unfair competition and unjust enrichment.

According to Eastland's website, Phifty-50 consists of two Jacksonville, Fla., rappers who “had a 50-50 chance to make it out da hood.” The duo's 2003 album was titled “In Due Time.”

Circuit Judges Frank H. Easterbrook, Ilana Rovner and Joel Martin Flaum sat on the Seventh Circuit panel.

Eastland is represented by Ronald A. DiCerbo, Hopeton S. Walker and Gerald C. Willis of McAndrews Held & Malloy Ltd.

Lionsgate, Mandate and Summit are represented by Tom J. Ferber and Ross M. Bagley of Pryor Cashman LLP, and Joseph P. Bonavita of Gould & Ratner LLP.

The case is Eastland Music Group LLC et al. v. Lionsgate Entertainment Inc. et al., case No. 12-2928, in the U.S. Circuit Court of Appeals for the Seventh Circuit.

--Editing by Chris Yates.

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## Lionsgate Wins Appellate Ruling in '50/50' Trademark Fight

11:09 AM PST 2/21/2013 by Eriq Gardner

**The 7th Circuit says that the chances of victory for any trademark plaintiff suing a film company over a movie title are zilch when no confusion is alleged.**



<sup>[2]</sup> Chris Helcermanas-Benge/Summit Entertainment

An appeals court has upheld Lionsgate's victory against a music label that alleged the film *50/50*, starring **Joseph Gordon-Levitt** and **Seth Rogen**, infringed its trademark hold on "Phifty-50."

The plaintiff was a Florida-based company called Eastland Music Group that said that it had been using the mark since 2000 in connection with entertainment services and products. The [lawsuit further stated](#) <sup>[5]</sup> Eastland was in the business of putting out CDs and DVDs, and alleged that Lionsgate's plans to release the film on DVD threatened to harm the recognition and goodwill its marks have earned in the marketplace.

In July, a federal judge [dismissed the lawsuit](#) <sup>[6]</sup>, ruling the Lionsgate's film title wasn't explicitly misleading. On Thursday, Seventh Circuit Judge **Frank Easterbrook** confirmed Lionsgate's victory for a different reason.

In his opinion ([read here](#) <sup>[7]</sup>), the judge said that it isn't necessarily to look at constitutional defenses like whether Lionsgate had fair use to the title because it was artistically relevant to a movie about a character's 50 percent odds of beating cancer. He also waived away the plaintiff's procedural objection about evidence used that formed the lower court judge's opinion.

"This complaint fails at the threshold," writes Judge Easterbrook. "It does not allege that the use of '50/50' as a title has caused any confusion about the film's source -- and any such allegation would be too implausible to support costly litigation."

The judge adds, "At oral argument, plaintiffs' counsel conceded that not a single person has ever contacted Eastland or its web site to seek a copy of the film or complain about the film's contents or quality. Nor does the complaint allege that any potential customer has turned to Lionsgate or Summit in quest of the rap duo's products."

The judge makes use of Wikipedia.

"Wikipedia lists eight films with that title, opening in 1916, 1925, 1972, 1981, 1982, 1992, 2004, and 2011," he notes. "Six of these movies predate Eastland Music's use. The 1982 film is by and about a rock band.... If there is any

prospect of intellectual property in the phrase 50/50, Eastland Music is a very junior user and in no position to complain about the 2011 film."

The opinion also serves to reemphasize the Supreme Court's 2003 ruling in *Dastar Corp. v. Twentieth Century Fox Film Corp* [8], which Judge Easterbrook interprets as not allowing trademark law to be used to obtain rights over the content of an artistic work in so far as amounting to an indefinite extension of a copyright. Trademarks have become more popular in Hollywood; but appeals courts are careful about allowing too much of a power grab.

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