

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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HNH INTERNATIONAL, LTD. and NAXOS OF
AMERICA, INC.,

Index No. 150024/2006

Plaintiffs,

-against-

COMPLAINT

PRYOR CASHMAN SHERMAN & FLYNN LLP,
n/k/a PRYOR CASHMAN LLP,

Defendant.

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Plaintiffs HNH INTERNATIONAL, LTD. and NAXOS OF AMERICA, INC.,
by their attorney Jeffrey A. Jannuzzo, Esq., as and for their Complaint against defendant
PRYOR CASHMAN SHERMAN & FLYNN LLP, n/k/a PRYOR CASHMAN LLP, allege
as follows:

1. This is an action for professional negligence and breach of fiduciary
duty, arising out of representation in a commercial matter, where defendant gave negligent
advice concerning copyright protection of sound recordings, and the amount in controversy
exceeds \$2 million. Assignment to the Commercial Division is requested.

THE PARTIES AND VENUE

2. Plaintiff HNH INTERNATIONAL, LTD. (“HNH International”) is a
corporation organized and existing under the laws of Hong Kong Special Administrative
Region, People’s Republic of China.

3. Plaintiff NAXOS OF AMERICA, INC. (“Naxos of America”) is a corporation in good standing organized under the laws of the State of New Jersey.

4. Defendant PRYOR CASHMAN SHERMAN & FLYNN LLP, n/k/a PRYOR CASHMAN LLP, is a domestic registered limited liability partnership under the laws of the State of New York, with its principal place of business located in the City, County and State of New York, at 410 Park Avenue, New York, NY 10022.

5. Venue is proper in New York County pursuant to CPLR 503(a) and (c) by reason of the residence of defendant.

6. By Stipulation dated April 12, 2007, defendant accepted service of the Summons With Notice dated December 6, 2006 and waived any defects in service.

7. By Notice of Appearance dated May 3, 2007, served by ordinary mail on May 3, 2007, defendant appeared in this action.

THE FACTS

A. Defendant’s Declared Expertise In Copyright Matters

8. At least from 1999 through to the present, defendant has held itself out as expert in the area of intellectual property protection in the music industry. As of the filing of this Complaint, defendant’s website stated:

Pryor Cashman’s music practice is as eclectic as the music industry itself. Always on the cutting edge of new technologies, the firm advises a wide range of clients in matters as traditional as recording artist, producer and songwriter agreements and as topical and complex as the myriad of new media uses for music. The music practice has been a mainstay of the firm from its inception. The ever-expanding landscape of the industry requires the kind of historical experience and diligent attention

to constantly emerging developments that few other firms can offer. Pryor Cashman's clients cover the entire spectrum of the music business from music publishing and record companies to scores of the most successful artists, producers and songwriters in both the American and overseas marketplaces. <http://www.pryorcashman.com/practices-91.html>. (*Emphasis added.*)

9. As of the filing of this Complaint, defendant's website stated:

Pryor Cashman's Intellectual Property attorneys are experts in all aspects of copyright registration and protection and offer a full range of legal services in connection with copyrights. These services include advice on the copyrightability and protectability of creative material and other intellectual property, copyright registration and assistance in obtaining copyright protection in the U.S. and throughout the world. We also advise and provide litigation services for actual or potential copyright infringements and advise clients on how to avoid infringement of other copyrighted material. We provide full legal services in all aspects of assigning and transferring copyright ownership and in searching and providing advice regarding the copyright or public domain status of existing works. <http://www.pryorcashman.com/practices-97.html>. (*Emphasis added.*)

10. The foregoing statements on defendant's website accurately describe how defendant held itself out as expert in such matters, at the time of the events in question.

11. Plaintiffs had previously relied on defendant's expertise in retaining defendant to represent them in an action in the Southern District of New York entitled *Metropolitan Opera Association, Inc. v. Naxos of America, Inc., HNH International, Ltd., and Klaus Heymann*.

B. Plaintiffs' Request For Advice On Historical Sound Recordings

12. In May 1999, on behalf of itself and its American subsidiary plaintiff Naxos of America, plaintiff HNH International requested that defendant render advice on the right to manufacture and distribute historical sound recordings created between 1928 and 1950.

13. Plaintiff HNH International had obtained historical “shellac” sound recordings by acclaimed classical music performers such as Sergei Rachmaninov, Yehudi Menuhin and Pablo Casals, recorded on media that were no longer accessible to modern listeners, and wanted to be able to use contemporary techniques of digital re-mastering to make high quality compact discs of sound recordings.

14. Plaintiff HNH International informed defendant that it wanted advice on the legal right to distribute these newly re-mastered historical recordings in the United States. Plaintiff Naxos of America wanted to be able to distribute the digitally re-mastered historical recordings in the United States.

15. The invoices for the professional services and advice referred to herein were invoiced by defendant to plaintiff HNH International, and were paid by plaintiff HNH International.

C. Defendant's Negligent May 17, 1999 Memo

16. Defendant gave plaintiffs “clearance” to distribute the historical recordings, and advised plaintiffs that such recordings were not protected by copyright, and that plaintiffs did not have to pay royalties for copyright purposes.

17. Defendant first gave the “clearance” and rendered its advice in a memorandum dated May 17, 1999 (“the May 17, 1999 Memo”). The Memo declared in the opening sentence: “*we see no glaring problems with respect to the recordings from 1928 to 1950 that you are presently interested in distributing*”

18. The May 17, 1999 Memo stated that sound recordings were not subject to copyright. The three conclusions of the Memo are set forth verbatim, as follows:

“1. There is no copyright protection for sound recordings fixed prior to February 15, 1972.

“2. It is assumed most *musical compositions* are in the public domain allowing the conclusion that there is no protection for them. However, full copyright clearance is subject to those compositions (lyrics and music) for which copyright protections may still exist. No such prohibitions are presently known.

“3. Although no problems are presently known it is appropriate to keep in mind the *right of privacy/publicity* laws as regards famous artists that perform in these public domain recordings. Prominent use of an artist’s name, picture, likeness or voice may violate state laws on rights of publicity, misappropriation, and unjust enrichment. As a precaution, **the covers of your CD’s should be scrutinized** to avoid any of the above claims.”
(*All emphasis added.*)

19. The term *sound recordings* above refers to the actual recording made of a performance. The term *musical compositions* above refers to the underlying music or lyrics that are being performed.

20. The May 17, 1999 Memo emphasized throughout the body thereof that there was no copyright protection for sound recordings. The Memo mentioned the issue of

common-law copyright in passing, but nowhere in the Memo did defendant advise that there might actually be a problem with distributing historical sound recordings because of common-law copyright. Nowhere in the memo did defendant deviate from the conclusion expressed on the first page thereof that “*there is no copyright protection for sound recordings fixed prior to February 15, 1972.*”

21. By contrast, in Section 2 of the Memo, defendant did advise that there might be a problem with the underlying *musical compositions*, if the *lyrics or music* thereof were copyrighted between 1928 and 1950, and the Memo set forth the parameters thereof.

22. Similarly, in Section 3 of the Memo, defendant did advise that there might be a problem with the performers’ *rights of publicity*, arising from the use of the artists’ *name, picture, likeness or voice*, and unfair competition arising from such use.

Section 3 of the Memo’s opening paragraph stated:

Even if a *sound recording* or *musical composition* is in the public domain, individual artists and performers are provided certain rights which, unless authorization is provided, must be avoided. Discussed below are the artists and performers rights. (*Emphasis added.*)

23. The May 17, 1999 Memo then discussed certain such rights, and Section 3 concluded by repeating the conclusion set forth on point 3 of the first page of the Memo, and re-iterated that the cover and marketing materials had to be reviewed with regard to infringement of such rights of publicity, etc:

Thus, **the cover and marketing materials of a CD** must be carefully reviewed so as to avoid any violation of the state laws. Generally, the use of a prominent *artist’s name, picture, likeness or voice* may come into conflict with these laws. **When**

designing the cover and marketing materials of a CD, an investigation should be conducted on the artist or performer prior to any sale. (*All emphasis added.*)

24. Both in its conclusion, and in the body of the Memo, defendant advised of the possible violation of state laws only with regard to the cover and marketing materials, and affirmatively advised as to the issue of copyright protection that “*there is no copyright protection.*”

25. Plaintiff HNH International relied on this advice to expend the funds and effort to digitally re-master the historical recordings and to manufacture the CDs, and plaintiff Naxos of America relied on the advice to distribute and sell the CDs.

D. Defendant’s Negligent Follow-up Advice

26. After defendant sent the negligent May 17, 1999 Memo, plaintiffs continued to correspond with defendant to insure that they could proceed with the digital re-mastering, manufacture and distribution of the historical sound recordings. In an email dated July 13, 1999, plaintiffs inquired as follows:

Someone just brought to my attention a change in the Copyright Statute last year that . . . grants copyright protection to all sound recordings published after 1923 for 95 years. We are about to release the first three *out-of-copyright* recordings in the United States and want to make sure there are no surprises. (*All emphasis added.*)

27. Defendant responded in an e-mail dated July 15, 1999 as follows:

To confirm our answer, yes, our opinion is correct and the Sonny Bono statute (extension of copyright term to 95 years) does not apply to sound recordings. There is *no copyright protection* for sound recordings fixed prior to February 15, 1972.

The extension of the copyright term, however, applies to the words (lyrics) and written composition of the underlying performance. Based on our last conversation . . . this is not an issue since you are planning on paying the mechanical royalty. *(All emphasis added.)*

28. Having received this additional reassurance, plaintiffs replied in an e-mail of the same day: “*Many thanks from a greatly relieved client.*”

29. On the same day, July 15, 1999, plaintiffs faxed defendant a letter with copies of the covers for the CDs that they intended to use for the first four of the series of historical sound recordings, including two CDs of recordings by Sergei Rachmaninov, made on various dates between 1929 and 1941.

30. On the same day, July 15, 1999, defendant responded:

I received your fax today and wanted to confirm that all four sound recordings are fine to release. Since Rachmaninov died more than 50 years ago (approximately 56 years ago) California’s post-mortem publicity statute does not apply. *(Emphasis added.)*

31. In Fall 1999, after the first of the digitally re-mastered historical recordings were in the stores in the United States, plaintiffs were approached by the representative of the estate of a noted performer, offering access to the estate’s archives of historical recordings. Plaintiffs proposed sending an email to the estate’s representative, offering to pay a token royalty in return for access to the archives. The proposed email to the estate said:

As you know, what we are doing is perfectly legitimate and, in the opinion of our American lawyers, is also legitimate in the USA. * * * However, rather than make our point in court at great expense, I would be prepared to pay the . . . estate a token

royalty of 5 cents per CD for sales outside the US . . . and the royalty of 25 cents per CD for sales in the United States
(*Emphasis added.*)

32. Prior to sending this e-mail to the estate, by e-mail dated September 27, 1999, plaintiffs checked with defendant and asked: “*Please advise whether it is OK to send the e-mail message below.*”

33. Defendant responded in an e-mail dated October 4, 1999 as follows:

Sorry I missed you. What I wanted to say was that we think you should not send the e-mail below because it says many unnecessary things that could be misconstrued * * * *

From our point of view, you don't need to pay a royalty for copyright purposes since the sound recordings were well before 1972. (*Emphasis added.*)

34. Based on this advice, plaintiffs did not send the e-mail to the estate, and plaintiffs continued to manufacture and distribute the historical sound recordings as which defendant had given “clearance” in the May 17, 1999 Memo, the July 15, 1999 fax, and the other emails and communications referred to herein.

E. The Cease-and-Desist Letter from BMG

35. The digitally remastered historical recordings were extremely successful, both commercially and artistically. Classical music lovers were thrilled to be able to listen to high quality CDs of recordings of performances of long-deceased artists.

36. In December 1999, plaintiff Naxos of America received a letter from the music company BMG dated December 6, 1999, demanding that Naxos of America cease-

and-desist from distributing the historical sound recordings of Sergei Rachmaninov in the United States.

37. Plaintiffs forwarded the letter to defendant, and sought its advice on how to respond.

38. By e-mail dated December 8, 1999, defendant provided its first response, and stated as follows:

BMG could possibly have copyright protections in its recordings but such protection would only possibly cover some enhancement or some originality added to the recording (such as an introduction). * * * *

What we currently believe BMG to be doing is attempting to make a case on right of publicity/privacy or unfair competition. * * * * I just sent you a detailed memo on right of publicity and privacy. (*Emphasis added.*)

39. Defendant did send plaintiffs a memorandum dated December 6, 1999, entitled “*Copyrights in Photographs and Publicity Rights for Artists,*” which was prepared in response to an October 21, 1999 e-mail requesting advice on the use of photographs of the artists in classical/jazz/nostalgia recordings, that were taken at the time of the original recordings.

40. The December 6, 1999 memo concluded that:

[T]he prominent use of an artist’s name, picture, likeness or voice may conflict with the right of privacy laws and also the laws of unfair competition, unjust enrichment, and Lanham Act provisions discussed in our previous memo. (*Emphasis added.*)

41. The December 6, 1999 memo thus reinforced that the advice of the May 17, 1999 Memo on the issues of unfair competition, unjust enrichment, etc. was limited to

the subject matter of the use of the artist's name, picture, likeness or voice. Like the May 17, 1999 Memo and the July 15, 1999 fax (and the other emails and communications referred to herein), the December 6, 1999 memo gave no warning that the historical sound recordings that plaintiffs were manufacturing and distributing infringed on common-law copyright.

42. Plaintiffs immediately responded to the December 6, 1999 memo by e-mail dated December 9, 1999 as follows:

This is very interesting stuff but what does it mean in practical terms? Are we safe to release the sound recordings of artists who have been dead more than 10, 20, 30 or 40 years? It does not seem safe to use the pictures of American artists or do the individual states also protect non-US citizens? (*Emphasis added.*)

43. Defendant reassured plaintiffs that it was indeed safe to release the sound recordings.

44. Defendant responded on plaintiffs' behalf to the cease-and-desist letter from BMG, rejecting BMG's claims.

F. Defendant's Discovery But Concealment Of Its Mistake

45. Unbeknownst to plaintiffs, after receiving BMG's cease-and-desist letter, defendant conducted additional legal research, which clearly identified the mistake in the May 17, 1999 Memo, and clearly identified the risk of infringement of common-law copyright.

46. Defendant prepared an internal legal memorandum dated December 30, 1999, entitled "*Common-law Copyrights of Sound Recordings Fixed Prior to February 15, 1972.*" The internal memo was prepared for a partner on the case by a junior lawyer.

47. The opening sentence of the December 30, 1999 internal memo stated as follows:

Per your request, I conducted research for case law concerning common-law copyrights protecting sound recordings fixed on or before February 15, 1972, with emphasis on facts analogous to HNH International's scenario, e.g., the enhancement of historical recordings. (*Emphasis added.*)

48. The internal memo of December 30, 1999 then discussed at length the issue of common-law copyright protection and stated in Section 1 thereof:

Hence, common-law copyright protection still exists for historical recordings fixed on or before February 15, 1972. (*Emphasis added.*)

49. The foregoing language in the December 30, 1999 internal memo is emphasized in yellow highlighter on defendant's original of that memorandum, with a handwritten notation in the right-hand margin: "*What does this mean?*"

50. The handwriting of the foregoing notation is that of the most senior partner at defendant working on the matter.

51. The December 30, 1999 internal memo extensively discussed case law on claims for common-law copyright. None of this information or legal research was contained in the May 17, 1999 Memo.

52. The December 30, 1999 internal memo concluded as follows:

In sum, if BMG were to bring an action under the theory of unfair competition, claiming that HNH had in fact intentionally "copied" BMG's sound recordings, HNH could face a permanent injunction preventing it from selling Rachmaninov CD's, compensatory damages and punitive damages. (*Emphasis added.*)

53. Thereafter, defendant prepared a memorandum addressed to plaintiff HNH International's chief executive, dated January 19, 2000 ("the Phantom Memo"). This memorandum incorporated the research contained in the internal memo of December 30, 1999, including summarizing the case law in support of common-law copyright.

54. The Phantom Memo of January 19, 2000 concluded as follows:

Over all, the cases summarized above are not favorable for HNH and expose HNH to the possibility of a lawsuit initiated by BMG. Courts will generally protect a plaintiff who can establish valid ownership in a recording fixed prior to 1972, and who can show that the defendant copied the recording. (*Emphasis added.*)

55. Neither the December 30, 1999 internal memo nor the January 19, 2000 Phantom Memo were ever sent to plaintiffs, nor were their contents and conclusions communicated to plaintiffs.

56. Even after the defendant discovered that its advice had been incorrect or incomplete, defendant continued to advise plaintiffs that they could manufacture and distribute the sound recordings, that the sound recordings were not protected by copyright, and that plaintiffs did not have to pay any royalties for copyright purposes.

57. The first time plaintiffs saw the December 30, 1999 internal memo or the January 19, 2000 Phantom Memo, or learned their contents, was long after the New York Court Of Appeals had ruled in favor of the plaintiff in *Capitol Records, Inc. v. Naxos of America, Inc.* ("the Capitol Records Litigation"), when plaintiffs received back their files from the law firm which the two partners in defendant responsible for this matter had joined after leaving defendant.

G. Corroboration of Non-Receipt of Phantom Memo, Etc.

58. In 2000, plaintiff HNH International posted a page on its website www.hnh.com entitled “*How can Naxos Historical release recordings by other record companies? Is this piracy?*”

59. This 2000 webpage remained on the website until at least the time of the Capitol Records Litigation in 2002.

60. This 2000 webpage summarized the advice contained in the May 17, 1999 Memo, and even presented the advice in the same order as the advice set forth in the May 17, 1999 Memo. The 2000 webpage stated:

Internationally, sound recordings are protected for 50 years from the date of publication (worldwide except in USA). * * *

*

In the United States, the situation is more complicated. There, sound recordings were not protected by copyright until 1972, but by a variety of state laws, including the rights of the artist’s personality, unfair competition and the like.

There is nothing illegitimate in releasing out-of-copyright sound recordings the same way it is not illegitimate to release Bach, Mozart, Beethoven or Mahler without paying a mechanical copyright . . . to their descendants or manufacturing a drug whose patent has expired. (*All emphasis added.*)

61. There is no mention in the 2000 webpage that common-law copyright protects any of the historical recordings at issue, just as there is no mention thereof in the May 17, 1999 Memo, or the July 15, 1999 fax, or the other e-mails and communications referred to herein.

H. The Capitol Records Litigation

62. In November 2002, Capitol Records, Inc. sued plaintiff Naxos of America in federal court in the Southern District of New York, in an action entitled *Capitol Records, Inc. v. Naxos of America, Inc.* (“the Capitol Records Litigation”).

63. At the time the litigation was brought, the two partners of defendant who had advised plaintiffs in 1999 and 2000 had left defendant and joined another firm.

64. These two former partners of defendant had arranged to have the files and papers relating to this subject matter delivered to their new firm.

65. The December 30, 1999 internal memo and the January 19, 2000 Phantom Memo were contained in the files obtained by these two former partners and transferred to the new firm.

66. Not knowing of the existence or contents of either the December 30, 1999 internal memo or the January 19, 2000 Phantom Memo, plaintiffs continued to retain the two partners and their current firm to defend plaintiff Naxos of America in the Capitol Records Litigation.

67. The invoices for the professional services and disbursements to defend the Capitol Records Litigation were invoiced to plaintiff HNH International, and those payments that were made of such invoices were made by plaintiff HNH International.

68. In May 2003, the U.S. District Court determined, among other things, that Capitol Records had no copyright interest in the sound recordings at issue, because the

original recordings had been made in England, and the English copyrights for the recordings had expired.

69. In June 2004, the U.S. Court Of Appeals for the Second Circuit certified to the New York Court Of Appeals the question, among others: “*Does the expiration of the term of a copyright in the country of origin terminate a common-law copyright in New York?*”

70. The former senior partner at defendant left the firm he had joined after leaving defendant, and joined another firm, before the appeal to the N.Y. Court of Appeals was prepared.

71. Not knowing of the existence or contents of either the December 30, 1999 internal memo or the January 19, 2000 Phantom Memo, plaintiffs continued to retain such partner at his next firm to defend the appeal.

72. In April 2005, the New York Court Of Appeals determined as follows:

[W]e conclude that New York provides common-law copyright protection to sound recordings not covered by the federal Copyright Act, regardless of the public domain status in the country of origin, if the alleged act of infringement occurred in New York. 4 N.Y.3d 540, 563 (2005).

73. The New York Court Of Appeals concluded:

[W]ithout regard to the issue of abandonment, Naxos is not entitled to defeat Capitol’s claim for infringement of common-law copyright in the original recordings. 4 N.Y.3d at 565.

74. Thereafter, plaintiffs discharged the former senior partner and his current firm, and retained new counsel to negotiate a settlement of the claims by Capitol Records.

75. After the discharge of the former senior partner and his current firm, plaintiffs obtained their files from the firm to which the two partners had gone after leaving defendant Pryor Cashman. Plaintiffs found within those files the unsent December 30, 1999 internal memo and January 19, 2000 Phantom Memo, which had correctly identified the risks of a claim for common-law copyright infringement, but which had never been sent nor their contents communicated to plaintiffs.

I. Sums Paid to Settle The Capitol Records Litigation

76. New counsel retained by plaintiffs engaged in extensive preparation and mediation in an effort to settle the Capitol Records Litigation.

77. The invoices for the professional services and advice in connection with the mediation and settlement were invoiced by new counsel to plaintiff HNH International, and were paid by plaintiff HNH International.

78. A settlement was reached in Fall 2005. Pursuant to Paragraph 10 of the settlement agreement in the Capitol Records Litigation, the terms thereof are confidential and cannot be disclosed other than pursuant to court order or as otherwise required by law.

J. Continuous Representation

79. The two former partners of defendant continuously represented plaintiffs from the time they rendered the advice while partners at defendant, through the

time they left defendant, and through conclusion of the appeal in the Second Circuit Court of Appeals.

80. The most senior of such partners continuously represented plaintiffs from the time he rendered the advice while he was a partner at defendant, through the time he left defendant, and through the conclusion of the appeal in the New York Court of Appeals.

81. Plaintiffs continued to repose confidence in such attorneys, and in their ability and good faith, and there was continuing trust and confidence in the relationship between plaintiffs and such attorneys.

82. To have brought a malpractice claim against defendant while the representation in connection with the underlying matter was ongoing would have jeopardized the defense of the Capitol Records Litigation.

83. Commencing a malpractice action against defendant would have required plaintiffs to sever their relationship with the attorneys who were defending the Capitol Records Litigation, at a time when plaintiffs still maintained a relationship of trust and confidence with such attorneys, and while corrective efforts were on-going.

84. The representation was in connection with the specific matter from which the malpractice arose, *i.e.*, the intellectual property advice and “clearance” to proceed with the historical sound recordings.

85. There was an on-going, continuous, developing and dependent relationship between the plaintiffs and such attorneys; and a mutual understanding of the

need for further representation on the specific subject matter underlying the malpractice claim.

86. This action was commenced less than three years from the time that the most senior of such partners was discharged, and is timely.

FIRST CAUSE OF ACTION
Professional Malpractice

87. All prior allegations are incorporated herein.

88. In the May 17, 1999 Memo, the July 15, 1999 fax, and the other emails and communications referred to herein, defendant gave the negligent advice that there was no copyright protection for sound recordings fixed between 1928 and 1950, that plaintiffs did not need to pay royalties for copyright purposes, and that it was “fine to release” the sound recordings.

89. In the May 17, 1999 Memo, the July 15, 1999 fax, and the other emails and communications referred to herein, defendant failed to identify that sound recordings fixed in such period were in fact covered by common-law copyright, and it failed to advise that its advice that “there is no copyright protection” was valid only as to federal copyright law.

90. While defendant mentioned common-law copyright in passing in the May 17, 1999 Memo, that passing reference did not detract from the clear conclusion set forth in the May 17, 1999 Memo, in the July 15, 1999 fax, and the other emails and communications referred to herein, that there was no copyright protection, that plaintiffs did

not need to pay royalties for copyright purposes, and that it was “fine to release” the sound recordings.

91. That common-law copyright applied in New York to sound recordings made before 1972 was well-established in New York case law. As the Court of Appeals held in the Capitol Records Litigation:

Because the federal Copyright Act did not protect musical recordings, state common-law could supply perpetual copyright protection to recordings without regard to the limitations of “publication” under the federal act (see *Goldstein v. California*, 412 U.S. at 560-561, 570, 93 S.Ct. 2303). It is clear that both the judiciary and the State Legislature intended to fill this void by protecting the owners of sound recordings in the absence of congressional action. 4 N.Y.3d 540, 560 (2005).

92. In giving the advice that “there is no copyright protection,” that plaintiffs did not need to pay royalties for copyright purposes, and that it was “fine to release” the sound recordings, defendant failed to identify well-established law to the contrary.

93. As set forth above, defendant discovered in December 1999 that its advice contained in the May 17, 1999 Memo, the July 15, 1999 fax, and the other e-mails and communications, was incorrect or incomplete.

94. Defendant had a professional duty of care to immediately disclose to plaintiffs that its advice had been incorrect or incomplete.

95. Defendant failed to disclose that its original advice had been incorrect or incomplete, and failed to send either the December 30, 1999 internal Memo or the January 19, 2000 Phantom Memo to plaintiffs, or to advise them of the contents thereof.

96. Defendant fraudulently concealed from plaintiffs that its original advice had been incorrect or incomplete, fraudulently concealed from plaintiffs the December 30, 1999 internal memo and the January 19, 2000 Phantom Memo, and fraudulently concealed from plaintiffs the contents thereof.

97. But for defendant's negligent advice, and breach of duty of care, plaintiff HNH International and plaintiff Naxos of America would either not have engaged in the digital re-mastering, manufacture, and distribution of the sound recordings at all, or would have ceased when demanded to do so by the record companies who sent the cease-and-desist letters in December 1999 and thereafter.

98. But for defendant's breach of duty of care, and fraudulent concealment, plaintiffs would have ceased manufacturing and distributing the sound recordings upon disclosure of the December 30, 1999 internal memo, or the January 19, 2000 Phantom Memo, or the contents thereof.

99. But for defendant's negligent advice, breach of duty of care, and fraudulent concealment, plaintiff Naxos of America would not have been subject to suit in the Capitol Records Litigation.

100. But for defendant's negligent advice, breach of duty of care, and fraudulent concealment, plaintiff HNH International would not have had to expend funds to defend such lawsuit and the appeals and other proceedings, and mediation and settlement related thereto.

101. But for defendant's negligent advice, breach of duty of care, and fraudulent concealment, plaintiffs HNH International and Naxos of America would not have had to make the payments made to settle the Capitol Records Litigation.

102. Plaintiffs have been damaged by defendant's negligent advice, breach of duty of care, and fraudulent concealment, in an amount not less than \$2,500,000, as follows:

- A. Fees and disbursements paid to defendant in connection with the negligent advice.
- B. Fees and disbursements paid to the two former partners of defendant and their subsequent law firm in connection with the Capitol Records Litigation, as well as fees and disbursements to experts, outside suppliers, and other costs and expenses.
- C. Fees and disbursements paid to the former senior partner of defendant and his next law firm in connection with the Capitol Records Litigation, as well as fees and disbursements to experts, outside suppliers, and other costs and expenses.
- D. Fees and disbursements paid to new counsel after discharge of the foregoing former senior partner and his next law firm, in connection with the mediation and settlement of the Capitol Records Litigation, and other costs and expenses.
- E. The amounts paid in connection with the settlement of the Capitol Records Litigation.

103. Defendant is liable in professional malpractice to plaintiffs in such amounts, together with costs and disbursements, and statutory interest.

SECOND CAUSE OF ACTION
Breach of Fiduciary Duty

104. All prior allegations are incorporated herein.

105. As set forth above, defendant discovered in December 1999 that its advice contained in the May 17, 1999 Memo, the July 15, 1999 fax, and other e-mails and communications referred to herein was incorrect or incomplete.

106. Defendant had a fiduciary obligation to immediately disclose to plaintiffs that its advice had been incorrect or incomplete.

107. Defendant failed to disclose that its advice had been incorrect or incomplete, and failed to send the December 30, 1999 internal memo or the January 19, 2000 Phantom Memo to plaintiffs, or to advise them of the contents thereof.

108. Defendant fraudulently concealed from plaintiffs that its advice had been incorrect or incomplete, and fraudulently concealed from plaintiffs the December 30, 1999 internal memo, the January 19, 2000 Phantom Memo, and the contents thereof.

109. By failing to disclose and fraudulently concealing the December 30, 1999 internal memo, the January 19, 2000 Phantom Memo, and the contents thereof, defendant breached its fiduciary duty to plaintiffs.

110. Had defendant disclosed the December 30, 1999 internal memo or the January 19, 2000 Phantom Memo to plaintiffs or advised them of the contents thereof, plaintiffs would have ceased manufacturing and distributing the sound recordings, and would not have incurred the damages referred to above.

111. Defendant is liable in breach of fiduciary duty to plaintiffs in such amounts set forth above as were expended from the time that defendant discovered that its

advice had been incorrect or incomplete, together with costs and disbursements, and statutory interest.

WHEREFORE, plaintiffs HNH INTERNATIONAL, LTD. and NAXOS OF AMERICA, INC. demand judgment against defendant PRYOR CASHMAN SHERMAN & FLYNN LLP, n/k/a PRYOR CASHMAN LLP as follows:

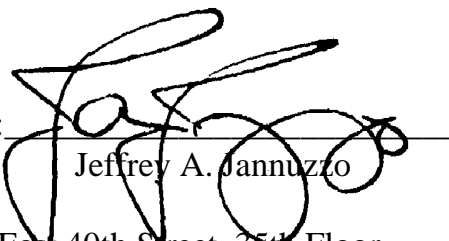
A. On the First Cause of Action, in an amount not less than \$2,500,000, together with costs and disbursements, and statutory interest.

B. On the Second Cause of Action, in an amount not less than \$2,500,000, together with costs and disbursements, and statutory interest.

C. For such other and further relief as the Court deems proper, together with interest, costs and where applicable, attorneys' fees.

Dated: New York, New York
May 29, 2007

JEFFREY A. JANNUZZO, ESQ.
Attorney for plaintiffs

By: 
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