Brooklyn Journal of International Law

Volume 20
Issue 1
SYMPOSIUM:
Intellectual Property and Competition Law:
Changing Views in the European Community and
the United States of America

Article 10

9-1-1993

Agency as a Means of Obtaining Jurisdiction in New York Over Foreign Corporations: A Failed Theory

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NOTES

AGENCY AS A MEANS OF OBTAINING JURISDICTION IN NEW YORK OVER FOREIGN CORPORATIONS: A FAILED THEORY

I. INTRODUCTION

New York and federal courts interpreting section 301[1] of the New York Civil Practice and Laws Rule (NY CPLR) have utilized the law of agency as a means of finding personal jurisdiction over foreign corporations. Agency is traditionally defined as a fiduciary relationship "between two persons, by agreement or otherwise, where one (the agent) may act on behalf of the other (the principal) and bind the principal by words and actions."[2] Whether the parties are defined as master and servant, or employer and employee, the principal generally maintains control over the agent.[3] However, because independent contractors neither have fiduciary responsibility to a principal, nor are their actions controlled by a principal, they are generally excepted from this rule.[4]

In applying the law of agency metaphorically to personal jurisdiction, New York courts have held that when a local subsidiary corporation has served as the de facto agent of its foreign parent corporation, jurisdiction may be asserted over

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1. N.Y. CIV. PRAC. L. & R. § 301 (McKinney 1990).

2. BLACK'S LAW DICTIONARY 62 (6th ed. 1990). *See also* RESTATEMENT (SECOND) OF AGENCY §§ 1-2 (1958).

3. "It is the element of continuous subjection to the will of the principal which distinguishes the agent from other fiduciaries and the agency agreement from other agreements." RESTATEMENT, *supra* note 2, § 1 cmt. b.

4. RESTATEMENT, *supra* note 2, § 2(3). Professionals such as attorneys or auctioneers, however, can be both agents and independent contractors since they remain fiduciaries despite the fact that their actions are not controlled by their principals. RESTATEMENT, *supra* note 2, § 1 cmt. e.

the foreign parent. When the subsidiary has performed important activities within the forum on behalf of the foreign parent—activities that the parent would have had to perform itself were it not for its reliance on the subsidiary[5]—the foreign parent is said to be "doing business" in New York through its in-forum subsidiary.

In a line of cases interpreting the same statute, however, a number of district courts within the Southern District of New York have applied the agency analysis under significantly different circumstances.[6] In these cases, the courts found jurisdiction over foreign subsidiary corporations through the activities conducted on their behalf within the forum by the local parent corporations. Thus, in a "flip" of the traditional subsidiary-serves-parent relationship, these courts held that the parent corporations served as de facto agents for their wholly-owned foreign subsidiaries, despite the fact that the subsidiaries, by definition, were in no position to control the actions of their parents. By eliminating the element of control from the agency analysis, courts holding that agency may exist within a flip relationship define "agent" much as a layperson would use the word "surrogate": someone who does something on behalf of someone else.

Not all courts interpreting New York law have been willing to use the blackletter law of agency in so colloquial a manner. Some courts have held fast to the blackletter requirement that control must exist within an agency relationship and have refused to find jurisdiction over a foreign subsidiary in a flip agency relationship. This inconsistency in application has resulted in conflicting opinions that effectively eviscerate the metaphorical use of agency as a reliable test for finding personal jurisdiction. Plaintiffs seeking to file claims within their own jurisdiction, multinational corporations seeking to limit the fora in which claims could be brought against them, and

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5. *See* Palmieri v. Estefan, 793 F. Supp. 1182 (S.D.N.Y. 1992); Gelfand v. Tanner Motor Tours, 385 F.2d 116, 121 (2d Cir. 1967), *cert. denied*, 390 U.S. 996 (1968).

6. *See Palmieri*, 793 F. Supp. 1182; Intersong-USA, Inc. v. CBS, Inc., No. 84 Civ. 0998, 1990 U.S. Dist. LEXIS 11645 (S.D.N.Y. Sept. 6, 1990); Larball Publishing Co. v. CBS, Inc., 664 F. Supp. 704 (S.D.N.Y. 1987); Jayne v. Royal Jordanian Airlines Corp., 502 F. Supp. 848 (S.D.N.Y. 1980); Freeman v. Gordon & Breach, Science Publishers, Inc., 398 F. Supp. 519 (S.D.N.Y. 1975).

courts seeking reliable precedent for subsequent decisions are all left without a clear definition of "agency" to guide them.

In *Palmieri v. Estefan*,[7] a recent decision in the line of cases containing a flip agency relationship, musician-composer Eddie Palmieri sued musician-composer Gloria Estefan, the members of her band the Miami Sound Machine, her New York-based record company Sony Music Entertainment, Inc. (Sony Music), and thirty-three of Sony's foreign subsidiaries[8] for copyright infringement. On a Rule 12(b)(2) motion to dismiss for lack of jurisdiction, Judge Leonard B. Sand of the Southern District of New York ruled that the court had jurisdiction over the foreign subsidiary corporations based on activities conducted on their behalf in New York by the parent corporation, Sony Music.

The facts and the corporate defendants in *Palmieri* are nearly identical to those found in two other Southern District of New York cases[9] decided within the last six years. Nonetheless, these cases resulted in conflicting decisions on the same question of law: whether the parent corporation within the forum can and did serve as the agent of its foreign subsidiaries for jurisdictional purposes. Because neither of these district court decisions has been reviewed by the Second Circuit, in deciding *Palmieri*, Judge Sand had the opportunity to do more than simply follow the reasoning of one case over that of the other. Judge Sand might have resolved the question of whether Sony's foreign subsidiaries were present in New York without relying on the agency analysis. Instead, Judge Sand accepted the validity of the "flip" agency theory and applied it without question. Judge Sand's decision, therefore, failed to resolve the confusion and uncertainty inherent in the agency theory as applied to NY CPLR section 301.

This Note will discuss the shortcomings and inconsistencies of the agency theory. It will argue that the agency theory

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7. 793 F. Supp. 1182 (S.D.N.Y. 1992).

8. The *Palmieri* court followed the lead of the defendant Sony Music Entertainment and referred to these 33 foreign corporations as "affiliates" of Sony Music Entertainment or its domestic parent Sony USA. Nevertheless, this Note will refer to these corporations as "subsidiaries" since courts, law review articles, and treatises universally refer to corporations whose stock is wholly or mostly owned by other corporations as "subsidiaries."

9. *Intersong-USA*, No. 84 Civ. 0998, 1990 U.S. Dist. LEXIS 11645; *Larball*, 664 F. Supp. 704.

should be abandoned because the theory distorts and misapplies the traditional law of agency, leading to confusion among litigants and inconsistent results by the courts. In place of this theory, this Note will suggest that courts utilize a new jurisdictional test that emphasizes the degree to which a foreign corporation benefits economically from its vicarious activity in the forum through a forum-based corporation. This "Economic Benefit Test" avoids the imprecision of the agency theory and provides the structure for a logical, fact-based analysis.

II. OBTAINING PERSONAL JURISDICTION OVER FOREIGN CORPORATIONS IN NEW YORK

When a foreign corporation is licensed to do business in New York, its activities within the state automatically place it under the personal jurisdiction of the courts.[10] However, when a foreign corporation is not licensed to transact business within New York, the courts may still be able to obtain personal jurisdiction over it through NY CPLR section 301 or 302.[11]

A. NY CPLR Section 301

Comprising just a single sentence, section 301 acknowledges the continued validity of the common law that existed prior to the statute's 1962 enactment: "A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore."[12] Under New York common law, courts may exercise personal jurisdiction over unlicensed foreign corporations on the theory that they are "doing business" in New York[13] and are therefore "present" in the state "not occasionally or casually, but with a fair measure of permanence and continuity."[14] Once a court finds that a corporation

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10. JACK B. WEINSTEIN, ET AL., NEW YORK CIVIL PRACTICE § 301.12 (Supp. 1992).

11. N.Y. CIV. PRAC. L. & R. § 302 (McKinney 1990) is New York's long-arm statute. Agency is also utilized in the case law of § 302, although that use is strikingly dissimilar from the agency theory which has developed in the case law of § 301. *See infra* notes 76-119 and accompanying text. A detailed examination and analysis of § 302 would be outside the scope of this Note since it is principally concerned with how agency is used as a means for courts to assert jurisdiction over foreign corporations under § 301.

12. N.Y. CIV. PRAC. L. & R. § 301 (McKinney 1990).

13. *See* Simonson v. Int'l Bank, 200 N.E.2d 427 (N.Y. 1964); Bryant v. Finnish National Airlines, 208 N.E.2d 439 (N.Y. 1965).

14. *See* Tauza v. Susquehanna Coal Co., 115 N.E. 915, 917 (N.Y. 1917). *See*

is doing business within the forum, "jurisdiction does not fail because the cause of action . . . has no relation in its origin to the business . . . transacted."[15]

The test for doing business is traditionally said to be "a 'simple pragmatic one,' which varies in its application on the particular facts of each case."[16] Factors that a New York court is likely to consider include the following: whether the foreign corporation "solicit[s] business in the state; . . . the existence of an office [in the state]; and the presence of employees . . . in the state."[17] A finding of the existence of only a single one of these factors will generally be insufficient for a finding of jurisdiction. "[A] 'doing business' determination is unique to each case, requiring consideration of all the facts and circumstances, without relying unduly on any one factor."[18]

Courts may also find that a foreign corporation is doing business in New York based upon that corporation's relationship with a related entity that is indisputably present within the state. Jurisdiction could be asserted over the foreign corporation even if, independently, it does not have enough "continuous and systematic"[19] contacts within the forum to meet the doing business test. However, common ownership of a foreign and a local corporation has never, in itself, been sufficient for a court to find that the foreign corporation is auto-

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also Saracero v. S.C. Johnson & Son, 83 F.R.D. 65, 67 (S.D.N.Y. 1979); Bulova Watch Co. v. K. Hattori & Co., 508 F. Supp. 1322, 1333 (E.D.N.Y 1981); Frummer v. Hilton Hotels Int'l, Inc., 227 N.E.2d 851, 853 (N.Y. 1967).

15. *Susquehanna Coal*, 115 N.E. at 918, *quoted in* Freeman v. Gordon & Breach, Science Publishers, Inc., 398 F. Supp. 519, 521 (S.D.N.Y. 1975).

16. Landoil Resources Corp. v. Alexander & Alexander Servs., 565 N.E.2d 488, 490 (N.Y. 1990) (quoting Bryant v. Finnish Nat'l Airline, 208 N.E. 439, 441 (N.Y. 1965)). *See also* Keramchemie GMbH v. Keramchemie (Canada) Ltd., 771 F. Supp. 618, 622 (S.D.N.Y. 1991).

17. Hoffritz for Cutlery, Inc. v. Amajac, Ltd., 763 F.2d 55, 58 (2d Cir. 1985), *quoted in Keramchemie*, 771 F. Supp. at 623 n.5.

18. H. Heller & Co. v. Novacor Chemicals Ltd., 726 F. Supp. 49, 52 (S.D.N.Y. 1988). *See, e.g.*, Miller v. Surf Properties, Inc., 176 N.E.2d 318 (N.Y. 1958) (mere solicitation in New York is insufficient for finding jurisdiction). *But see* Aquascutum of London, Inc. v. S.S. Champion, 426 F.2d 205, 211-12 (2d Cir. 1970) (under the "solicitation plus" rule, evidence of some other financial or commercial dealings may be enough to establish presence). *See also* Artemide SpA v. Grandlite Design and Mfg. Co., 672 F. Supp. 698 (S.D.N.Y. 1987) (presence of defendant's "wholly independent" sales representatives in New York was insufficient to establish presence of defendant within the forum).

19. Frummer v. Hilton Hotels Int'l, Inc., 227 N.E.2d 851, 853 (N.Y. 1967).

matically present for jurisdictional purposes.[20] Courts evaluating such relationships utilize two theories: the "mere department" theory and the "agency" theory. A court may exercise jurisdiction on the foreign corporation by a positive finding under either or both tests.[21]

1. Mere Department

For jurisdictional purposes, the actions of a local corporation may be imputed to a foreign corporation if both corporations are commonly owned and the parent corporation maintains complete control over its subsidiary, regardless of whether the subsidiary is separately incorporated.[22] The control by the parent over the subsidiary must be "so complete that the subsidiary is, in fact, merely a department of the parent."[23] The mere department or "alter-ego theory"[24] is drawn from the judicial doctrine of piercing the corporate veil.[25]

Although the New York courts have used the term "mere department" for many years,[26] the four factors used to determine whether such control exists were not set forth until a 1984 Second Circuit case, *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*[27]

The first and most essential factor of the mere department test is common ownership of the corporations.[28] The remain-

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20. Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333, 336 (1925).

21. *See, e.g.*, Bialek v. Racal-Milgo, Inc., 545 F. Supp. 25 (S.D.N.Y. 1982); Bulova Watch Co. v. K. Hattori & Co., 508 F. Supp. 1322 (E.D.N.Y. 1981); Jayne v. Royal Jordanian Airline Corp., 502 F. Supp. 848 (S.D.N.Y. 1980); Freeman v. Gordon & Breach, Science Publishers, Inc., 398 F. Supp. 519 (S.D.N.Y. 1975); Tokyo Boeki (U.S.A.), Inc. v. SS Navarino, 324 F. Supp. 361 (1974).

22. HARRY G. HENN & JOHN R. ALEXANDER, LAWS OF CORPORATIONS §§ 146, 148 (3d ed. 1983); NORMAN D. LATTIN, THE LAW OF CORPORATIONS § 14 (2d ed. 1971).

23. Sunrise Toyota, Ltd. v. Toyota Motor Co., 55 F.R.D. 519, 528 (S.D.N.Y. 1972), *quoted in Freeman*, 398 F. Supp. at 522.

24. Murray E. Knudsen, Note, *Jurisdiction Over a Corporation Based on the Contacts of a Related Corporation: Time for a Rule of Attribution*, 92 DICK. L. REV. 917, 926-27 (1988).

25. HENN & ALEXANDER, *supra* note 22, § 146; LATTIN, *supra* note 22, § 14.

26. Talsky v. Wolf, 177 N.Y.S. 263, 265 (App. Div. 1919); *see also* Fogg v. Morris Plan Ins. Soc., 188 N.Y.S. 867, 871 (Sup. Ct. 1921); Lowendahl v. Baltimore & O.R. Co., 6 N.E.2d 56, 57 (N.Y. 1936). The United States Supreme Court made use of the term "mere department" as early as 1919. United States v. Reading Co., 253 U.S. 26, 63 (1919).

27. 751 F.2d 117, 120-22 (2d Cir. 1984).

28. *Id.* at 120.

ing three factors clarify the extent of the parent's control over and involvement with its subsidiary. These factors include:

> the financial dependency of the subsidiary on the parent corporation . . . the degree to which the parent corporation interferes in the selection and assignment of the subsidiary's executive personnel and fails to observe corporate formalities . . . [and] the degree of control over the marketing and operational policies of the subsidiary exercised by the parent.[29]

The development of these factors represents an implicit acknowledgement by the courts that the essence of the test is an assessment of the degree to which the foreign corporation benefits from the activities of the in-state corporation. In this sense, the mere department test seeks many of the same answers as the agency test discussed below.[30]

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29. *Id.* at 120-22.

30. Bulova Watch Co. v. K. Hattori & Co., 508 F. Supp. 1322, 1334 (E.D.N.Y. 1981):

> Although the "agency" and "mere department" theories of jurisdiction are stated as separate principles, it should be clear from the mass of cases dealing with this problem that a line cannot simply be drawn between the two . . . . The apparently distinct notions are metonyms for a jurisdictional balancing assessing the fairness of requiring an out-of-state party to defend itself in New York when it derives benefits from in-state activities. The factors to be weighed include the significance of the New York business to the defendant's overall activities.

Id. (citations omitted).

One commentator proposes a "single economic entity" analysis to determine the "fairness" of a court's imposition of jurisdiction over a foreign subsidiary or a foreign parent corporation:

> It might be proposed that the parent should be amenable to the jurisdiction of the state where its subsidiary has the requisite minimum contacts [*See* International Shoe Co. v. Washington, 326 U.S. 310 (1945)] whenever it is reasonable to conclude that the parent and subsidiary constitute a "single economic entity." Under the proposed analysis, the acts of the subsidiary would be attributed to the parent such that the court would have judicial jurisdiction over the parent to the same extent that it would the subsidiary . . . . Where the corporations constitute a "single economic entity," the acts of the parent would be attributed to the out-of-state subsidiary in the same way . . . .

Charles I. Wellborn, *Subsidiary Corporations: When Is Mere Ownership Enough To Establish Jurisdiction Over The Parent*, 22 BUFF. L. REV., 681, 687-88 (1973) (citations and emphasis omitted).

2. Agency

Frummer v. Hilton Hotels International, Inc. and *Gelfand v. Tanner Motor Tours, Ltd.*,[31] the leading state and federal cases on the agency theory, are now more than twenty-five years old. The Second Circuit's decision in *Gelfand* was directly influenced by the New York Court of Appeals decision in *Frummer* six months earlier.

a. Frummer v. Hilton Hotels International, Inc.

While staying at the London Hilton on a trip to England, New York resident Jack Frummer was injured when he slipped and fell in his hotel bathtub.[32] In a suit filed in a New York court, Frummer sought recovery from Hilton (U.K.), the lessee and operator of the London Hilton, as well as from Hilton Hotels Corporation and Hilton Hotels International. The latter two defendants were Delaware corporations admittedly doing business in New York. Hilton (U.K.), however, moved to dismiss Frummer's complaint against it for lack of in personam jurisdiction.[33]

The New York Court of Appeals acknowledged that the plaintiff's cause of action did not arise from any contact that Frummer may have had with Hilton (U.K.) or its agents in New York.[34] Nonetheless, the court held that jurisdiction may be asserted over Hilton (U.K.) as it was "'doing business' [in New York] in the traditional sense"[35] of New York CPLR section 301 through the activities conducted in the forum on its behalf by the Hilton Reservation Service.[36] The Service, owned not by Hilton (U.K.), but by Hilton Hotels Corporation and Hilton Hotels International, was a not-for-profit organization created to benefit individual Hilton hotels through its

31. Frummer v. Hilton Hotels Int'l, Inc., 227 N.E.2d 851, 852 (N.Y.), *cert. denied*, 389 U.S. 923 (1967); Gelfand v. Tanner Motor Tours Ltd., 385 F.2d 116 (2d Cir. 1967).

32. *Frummer*, 227 N.E.2d at 852.

33. *Id.*

34. *Id.* The court therefore held that N.Y. CIV. PRAC. L. & R. § 302, the state's long-arm statute, was unavailable to Frummer as a basis for finding personal jurisdiction over Hilton (U.K.).

35. *Id.* (citations omitted).

36. *Id.* at 853.

promotional and booking services.[37] The fact that the Service "both accept[ed] and confirm[ed] hotel reservations at the London Hilton"[38] allowed the court to hold that "the Service does all the business which Hilton (U.K.) would do were it here by its own officials."[39] This was "the significant and pivotal factor"[40] in the court's analysis and enabled it to distinguish this case from *Miller v. Surf Properties*.[41] In *Miller*, the court had held that "mere solicitation" by a travel service in New York on behalf of an out-of-state hotel was insufficient to bring that hotel within the court's jurisdiction.[42]

In holding that Hilton (U.K.) was present in New York, the court did not rely exclusively on the fact that the Hilton Reservation Service and Hilton (U.K.) were commonly owned, for as the Supreme Court decided in *Cannon Mfg. Co. v. Cudhay Packing Co.*, common ownership, in itself, is insufficient to determine jurisdictional presence.[43] Instead, the court held that common ownership was "significant only because it gives rise to a valid *inference* as to the *broad scope* of the agency in an absence of an express agency agreement."[44]

b. Gelfand v. Tanner Motor Tours, Ltd.

Like *Frummer*, *Gelfand* was a case involving a travel agent, although here the travel agent served as an independent contractor for the foreign defendants which were commonly owned bus companies based in California and Nevada.[45] New York residents Nettie and Phillip Gelfand, passengers on a Grand Canyon bus tour, sued the defendants for injuries they sustained when the defendants' tour bus lost a wheel midtrip in Arizona.[46] Tanner Motor Tours operated its tour of the Grand Canyon under the name Gray Line by virtue of its membership in the Gray Line Sight-Seeing Companies Associ-

37. *Id.*
38. *Id.* at 857.
39. *Id.*
40. *Id.*
41. 151 N.E.2d 874 (N.Y. 1958).
42. *Id.* at 876.
43. 267 U.S. 333, 336 (1924).
44. Frummer v. Hilton Hotels Int'l, Inc., 227 N.E.2d at 851 (emphasis added).
45. Gelfand v. Tanner Motor Tours, Ltd., 385 F.2d 116, 118 (2d Cir. 1967), *cert. denied*, 390 U.S. 996 (1968).
46. *Id.*

ated, a non-profit corporation involved in promoting and publicizing its members' tours to travel agents nationwide.[47] Gray Line's east coast operations were handled for a flat fee by independent contractor Herbert DeGraff whose office also represented other members of the travel industry. As part of his promotion of package bus tours, DeGraff booked and confirmed passengers on Tanner's Gray Line tour of the Grand Canyon.[48] Over a three-year period, DeGraff booked and confirmed approximately three-sevenths of the passengers on that particular tour and generated $120,000 in business for the defendants each year.[49]

Based on these facts, the federal district court held that it had no jurisdiction over the defendants because their contacts with Gray Line Associated and Degraff in New York lacked "some integrating factor, like directness of control, or the formalization of service . . . ."[50] Soon after this decision, however, the New York Court of Appeals made its ruling in *Frummer* which had a substantial affect on the Second Circuit's interpretation of section 301. On appeal, the Second Circuit found that the "integrating factor" sought by the district court was contained within DeGraff's activities.[51] For the court, that "integrating factor" was also the "decisive test":[52] "the [reservation] Service does all the business which [defendant corporation] could do were it here by its own officials."[53] The court then interpreted these words to mean that

> a foreign corporation is doing business in New York "in the traditional sense" when its New York representative provides services beyond "mere solicitation" and these services are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services.[54]

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47. *Id.*
48. *Id.*
49. *Id.* at 119.
50. *Id.* at 120. The district court case is unreported and unavailable on Westlaw.
51. *Id.*
52. *Id.*
53. *Id.* at 120-21 (quoting Frummer v. Hilton Hotels Int'l, Inc., 227 N.E.2d 851, 853 (N.Y. 1967)).
54. *Id.*

In conclusion, the court held that Tanner's reliance upon DeGraff for three-sevenths of its business on that particular tour not only established a systematic course of doing business in New York,[55] but satisfied the due process requirements of *International Shoe v. Washington*.[56]

3. Flip Agency

Flip agency exists when a court asserts in personam jurisdiction over a wholly-owned foreign subsidiary corporation based on the activities undertaken on its behalf by its in-forum parent corporation. Those courts that have used the agency theory in these flip circumstances have not, on the whole, been restrained by the blackletter rules of agency. Rather than basing their decisions on whether the subsidiary/principal could have controlled the actions performed on its behalf by its parent/agent, these courts examine the degree to which the in-forum corporation serves the economic needs of the foreign corporation.[57] These courts derive justification for such an analysis from the holding of *Gelfand v. Tanner Motor Tours* which states that a foreign corporation is doing business in New York whenever its New York "representative" provides it with services that are so important to the foreign corporation that without them the foreign corporation would have to come into New York and perform them itself.[58] The word "representative" is critical in the flip agency theory since the word is completely nonspecific, designating neither parent and subsidiary corporation nor principal and agent.

Three decisions from the Southern District of New York illustrate the flip agency theory: *Freeman v. Gordon and Breach, Science Publishers, Inc.*;[59] *Saraceno v. S.C. Johnson & Son, Inc.*;[60] and *Larball Publishing Co. v. CBS, Inc.*[61]

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55. *Id.*

56. 326 U.S. 310 (1945).

57. *See* PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS § 4.02.1 (1983): "The 'agency' metaphor relies essentially on function—the economic relationship of the local component's activities to the corporate group of which it is part."

58. *Gelfand*, 385 F.2d at 121.

59. 398 F. Supp. 519 (S.D.N.Y. 1975).

60. 83 F.R.D. 65 (S.D.N.Y. 1979).

61. 664 F. Supp. 704 (S.D.N.Y. 1987). Larball, a music publishing company,

In *Freeman*, a 1975 decision, the district court noted that "[u]nder more usual circumstances, the conduct of a New York subsidiary is sought to be imputed to a foreign parent with the goal of subjecting the parent to the jurisdiction of our courts. Here, a reverse set of facts pertains."[62] Freeman, the former editor of the International Journal of Magnetism, filed a breach of contract action against the journal's publishers. Since the journal was published by the London-based, wholly-owned subsidiary of a New York corporation, the subsidiary filed a motion to dismiss for lack of jurisdiction.

The flip of what the *Freeman* court characterized as the "usual circumstances"[63] did not deter the court from following the Second Circuit's analysis in *Gelfand* and denying the motion to dismiss. Disregarding a rigid application of the agency analysis—under which an in-forum parent corporation could not serve as an agent for jurisdictional purposes because the parent could not be controlled by its foreign subsidiary—the court held that "the rules developed by the New York courts for application in the converse (subsidiary rendering parent present) situation apply equally to the matter at bar."[64]

In *Saraceno*, a New York resident sought recovery for the injuries she allegedly suffered when a can of household pesti-

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sued CBS Inc., CBS Records, and several of CBS's foreign subsidiaries for infringing the copyright of a song Larball owned. Larball alleged that Miguel Bose, a recording artist of the CBS Record's Spanish subsidiary, copied the music from one of Larball's songs without its permission. This subsidiary released the infringing song in Spain, Puerto Rico and the United States. Soon thereafter, Ray Coniff, an American artist with CBS Records, recorded his own version of Larball's song. Within two years, nearly a dozen other foreign subsidiaries had recorded and released the Bose and Coniff versions. *Id.* at 706.

The court's tacit acceptance of the flip agency theory is implicit in the introduction to the court's analysis of the jurisdictional question:

> While the existence of a parent-subsidiary relationship is, in and of itself, an insufficient basis for finding in personam jurisdiction over the subsidiary, there are two theories pursuant to which a subsidiary may be found to be present in the jurisdiction: (1) *if the parent acts as its agent*; or (2) if the subsidiary is a "mere department" of its parent.

Id. at 706-07 (emphasis added) (citations omitted).

62. *Freeman*, 398 F. Supp. at 521.

63. *Id.*

64. *Id.* Although the court did find that it had jurisdiction over the foreign subsidiary, it declined to state whether it relied on either the mere department or the agency theory. Instead, the court held that "while two separate corporate entities have been established, only one commonly owned enterprise exists which, in order to function, must rely upon the joint endeavors of each constituent part." *Id.* at 522.

cide exploded while she was visiting her family in Spain. The defendant was a Dutch subsidiary of S.C. Johnson, a Wisconsin corporation licensed to do business in New York.[65] The subsidiary had manufactured the insecticide and subsequently marketed it in Spain.[66] In her suit, the plaintiff claimed that the Dutch subsidiary was subject to the court's jurisdiction since the subsidiary was a mere department of the New York parent corporation,[67] and that the parent corporation served as the agent of the subsidiary in New York.[68]

Although the court ultimately accepted the subsidiary's argument that jurisdiction could not be asserted based on either the mere department or agency theory, the court[69] held that it was nonetheless possible for an agency relationship to exist in circumstances where the parent, rather than the subsidiary corporation, resided in the forum.

> Most of these cases involve a New York subsidiary and a foreign parent. We find it immaterial for these purposes that the foreign corporation over which jurisdiction is sought to be established is the subsidiary of the corporation licensed to do business in New York, rather than the parent.[70]

By 1987 the flip agency theory was so well established (and yet still unnamed) that the court in *Larball* employed the theory without fanfare. In a copyright infringement suit, CBS filed a motion to dismiss Larball's claims against its foreign subsidiaries for lack of personal jurisdiction. Larball argued that the subsidiaries should be subject to the court's jurisdiction under both the mere department and agency theories of

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65. Saraceno v. S.C. Johnson & Son, 83 F.R.D. 65 (S.D.N.Y. 1979).

66. *Id.*

67. *Id.* at 68.

68. *Id.* at 67.

69. Judge Leonard Sand decided *Saracero*; he would later decide *Palmieri*.

70. *Saraceno*, 83 F.R.D. at 67 n.5. *See also* Jayne v. Royal Jordanian Airlines, 502 F. Supp. 848, 856 (S.D.N.Y. 1980): "The relationship of parent and subsidiary, though not by itself jurisdiction-conferring, gives rise to an inference of a broad agency relationship between the two, even when, as here, it is the parent that is within the jurisdiction and not the subsidiary." In *Jayne*, the estates of two New York plane crash victims sued the Jordanian-based Arab Wings, the operator of the aircraft and a near wholly-owned subsidiary of the Royal Jordanian Airlines (a.k.a. ALIA). ALIA was Jordan's government-owned airline. It conceded that its own activities within New York subjected it to the court's in personam jurisdiction. *Id.* at 851.

section 301. The court neither gave justification for utilizing flip agency nor acknowledged that agency traditionally flows in the opposite direction (*i.e.*, the forum-based subsidiary acts as the agent for the foreign parent).[71]

The court relied on *Frummer*[72] to find that jurisdiction over the foreign subsidiaries could be asserted under the agen-

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71. In *Jayne*, although the court did cite to *Freeman*, the citation referred only to *Freeman's* discussion of the mere department and agency theories of § 301, and not to the flip agency theory. *Jayne*, 502 F. Supp. at 856 (citing Freeman v. Gordon & Breach Science Publishers, Inc., 398 F. Supp. 519, 521 (S.D.N.Y. 1975)). Indeed, when the court later cited *Frummer* for that court's definition of agency under § 301, the words contained within the brackets of the quotation speak to the *Larball* court's own particular interpretation of agency: "In *Frummer v. Hilton Hotels Int'l.*, the New York Court of Appeals held that an agency relationship would be found "where *[one corporation]* does all the business which *[the other corporation]* could do were it here by its own officials." Larball Publishing Co. v. CBS, Inc., 664 F. Supp. 704, 707 (quoting Frummer v. Hilton Hotels Int'l, Inc., 227 N.E.2d 851, 853 (N.Y. 1967), *cert. denied*, 389 U.S. 923 (1967) (emphasis added)).

Not only does this bracketed information indicate that the court believed that either the subsidiary or the parent can serve as the agent for jurisdictional purposes, but the information could also indicate that the court believed that agency may exist between *unrelated* corporations. If that was the court's position, it would broaden the scope of the agency theory under § 301, which heretofore had been limited almost exclusively to suits involving parents and their related subsidiary corporations. The only exception that comes to mind is Gelfand v. Tanner Motor Tours, Ltd., 385 F.2d 116 (2d Cir. 1967), where the presence of an independent contractor working in the forum on behalf of the foreign defendant was sufficient to bring the defendant under the court's jurisdiction.

However, the New York Court of Appeals appears not to approve of the application of the agency theory unless the foreign and local corporate entities are related: "Where, as here, there exists truly separate corporate entities, not commonly owned, a valid reference of agency cannot be sustained." Delagi v. Volkswagenwerk AG, 278 N.E.2d 895, 897 (N.Y. 1972).

The court is probably alluding to the language in *Frummer* where common ownership was "significant only as it gives rise to a valid inference as to the broad scope of an agency agreement . . . ." Frummer v. Hilton Hotels Int'l, Inc., 227 N.E.2d 851, 854 (N.Y. 1967). It is difficult to reconcile this statement with the fact that the *Delagi* court acknowledged the Second Circuit's decision in *Gelfand*, a case where the foreign defendant was unrelated to DeGraff, the in-state sales representative. *See supra* notes 45-58 and accompanying text. Not only was DeGraff's company not related to the defendant's, but DeGraff was an independent contractor whose actions were not controlled by the defendants.

The *Delagi* court may have been trying to say that a court may infer that an agency relationship inherently exists between related corporations, and that actual jurisdiction would then be "established by the activities conducted on its behalf by its agent." *Delagi*, 278 N.E.2d at 897 (quoting *Frummer*, 227 N.E.2d at 854). However, for agency to exist between "truly separate corporate entities," a stronger, more traditional showing of an agency relationship is necessary.

72. *Frummer*, 277 N.E.2d at 853.

cy theory. Central to the court's analysis was the existence of "matrix[73] licensing agreements" between the CBS in New York and all of its foreign subsidiaries. Judge Duffy summarized these "matrix agreements":

> [T]he agreements require the subsidiaries to grant to CBS the exclusive right to manufacture and distribute recordings made from the subsidiaries' matrices in the "outside territory", defined as the world other than the country in which the subsidiary is located. Pursuant to the agreements, CBS undertakes to distribute recordings to its subsidiaries' [sic] in the United States and grants sublicenses to its subsidiaries elsewhere.[74]

For the *Larball* court, the critical issue was the nature of the economic relationship between the two corporate entities. The court found that CBS had almost absolute control over the world-wide distribution of its subsidiaries' recordings, and that these services were so vital to the subsidiaries that if CBS did not act on their behalf, they would find it necessary to perform these services personally in New York.[75]

These three cases demonstrate that without an appellate court decision to the contrary, several federal courts in the Southern District of New York apparently believe that their section 301 analysis should not be constrained by a traditional definition of agency. By expanding upon the holdings of *Frummer* and *Gelfand*, these courts readily disregarded the need for a principal to have control over an agent within an agency relationship. Of far greater relevance for these courts is a foreign corporation's economic reliance upon the acts undertaken on its behalf by an in-forum corporation.

4. Narrow Interpretations of Agency Under Section 301

At the same time that some judges in the Southern District of New York were willing to expand the scope of the agency theory, several other judges, both within the Southern District and in state courts, have insisted that control by a foreign

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73. "A matrix is defined as 'any device . . . used directly or indirectly, in the manufacture of Records and which is derived from a Master Recording, and every duplicate of such device.'" *Larball*, 664 F. Supp. at 706 n.2.

74. *Id.* at 707.

75. *Id.* at 707-08.

corporation over its in-forum representative is an essential factor in the agency theory under section 301. These judges, whose decisions include *DelBello v. Japanese Steak House*;[76] *Selman v. Harvard Medical School*;[77] *Como v. Commerce Oil Co.*;[78] and *Intersong-USA v. CBS, Inc.*,[79] were willing to de-emphasize or ignore the relevance of the economic benefits accruing to the foreign entity in favor of a stricter adherence to the law of agency and the perceived right of corporations to limit liability. In defending their position on the element of control, these judges did not look to prior decisions decided under section 301. Instead, they ruled that control was a necessary factor in determining in personam jurisdiction under section 301 by applying agency as it had been defined by courts that had decided cases under a completely different statute: CPLR section 302, New York's long-arm statute.

The *DelBello*, *Selman*, *Como*, and *Intersong-USA* courts did not explain why they found that agency as applied to section 302 should be applied interchangeably to section 301. Section 302, the "transacting business" statute, covers cases of "specific jurisdiction": *i.e.*, where the cause of action must arise out of a transaction of business by a defendant or her agent within the forum.[80] On the other hand, section 301, the "doing business" statute, covers cases of "general jurisdiction": *i.e.*, where the cause of action may arise outside the forum.[81]

In *DelBello*, DelBello and his partner Breslow were New York residents who had applied for, and received, a license to open a restaurant in New York from the defendant, a Florida franchisor of "oriental-type steak house[s]."[82] When the partners sued the franchisor for breach of contract, they claimed that the franchisor should be subject to the jurisdiction of the New York court by reason of the franchise agreement: the

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76. 352 N.Y.S.2d 537 (App. Div. 1974).

77. 494 F. Supp. 603 (S.D.N.Y. 1980).

78. 607 F. Supp. 335 (S.D.N.Y. 1985).

79. No. 84 Civ. 0998, 1990 U.S. Dist. LEXIS 11645 (S.D.N.Y. Sept. 6, 1990).

80. N.Y. CIV. PRAC. L. & R. § 302(a) (McKinney 1990) states that "a court may exercise jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent: 1. *transacts any business* within the state . . . ." (emphasis added). *See* Joseph M. McLaughlin, *Practice Commentaries* on N.Y. CIV. PRAC. L. & R. § 302 at C302:2-3 (McKinney 1990).

81. *Id.* § 301 at C301:1-3.

82. DelBello v. Japanese Steak House, 352 N.Y.S.2d 537, 539 (App. Div. 1974).

partners argued that under the agreement they became agents of the franchisor, that their acts within the forum became the acts of the franchisor, and that such acts "constituted doing business" in the forum.[83]

In reversing the lower court's decision[84] and granting the franchisor's motion to dismiss, the Appellate Division stated that the partners could not have been the agents of the franchisor because the franchisor exercised no control over the partners.[85] As precedents for its decision, the court did not look to cases that examined agency under section 301, but instead followed two state Appellate Division cases applying section 302.[86]

In *Selman*, a Southern District of New York case, the plaintiff, a medical student at a foreign university, sued the American Association of Medical Colleges (AAMC) and a number of other domestic medical schools that had denied his transfer request. AAMC, an Illinois corporation with offices in Washington, D.C., was the developer of the Medical College Admissions Test. This nationwide exam was administered by the American College Testing Program (ACTP), an independent Iowa corporation serving AAMC as an independent contractor. Selman contended that the court had jurisdiction over AAMC because ACTP acted as an agent on behalf of AAMC while it administered the admissions exam in New York.

The court held ACTP was not the agent of AAMC and, therefore, the court had no jurisdiction over AAMC under section 301.[87] The court reasoned that: (1) there was no evidence

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83. *Id.* at 540. Although the court did not expressly state under which statute DelBello and his partner sought to bring the franchisor within the jurisdiction of the court, the only conclusion that may be drawn from the court's opinion is that the statute was § 301, since the court's decision concerns whether the franchisor was "doing business" in New York through the plaintiffs. Later in the opinion, the court also considered, and rejected, the plaintiffs' efforts to bring the franchisor within the court's jurisdiction under § 302.

84. Unreported decision by the Special Term of the Supreme Court in Erie County, New York.

85. *DelBello*, 352 N.Y.S.2d at 540. The court also stated in dictum that the partners' efforts to establish themselves as the agents of the franchisor must fail because "[t]he independent acts in New York for their own purposes by residents in a contract relationship with a non-resident person or corporation in another state may not be attributed to the non-resident so as to become the acts of the non-resident in New York." *Id.*

86. Lodge v. Western New York Dance Studios, 286 N.Y.S.2d 632 (App. Div. 1974); Hodom v. Stearns, 301 N.Y.S.2d 146 (App. Div. 1969).

87. Selman v. Harvard Medical School, 494 F. Supp. 603, 612-13 (S.D.N.Y.

that the two corporations were commonly owned; (2) there was no evidence of an agency agreement; and (3) there was no evidence that AAMC had any control over the alleged agent, ACTP.[88] The court came to this holding not by citing to the agency test as defined by *Frummer* and *Gelfand*,[89] but by citing instead to *Delagi v. Volkswagenwerk AG*[90] and *Louis Marx & Co. v. Fuji Seiko Co. Ltd.*[91]

Louis Marx clearly expressed that its test for agency related to section 302, and not to both jurisdictional statutes:

> To constitute an agent for purposes of the statute [*i.e.*, section 302], the alleged agent must have acted in this state for the benefit of and with the knowledge and consent of the non-resident and the non-resident must exercise some element of control over the agent.[92]

However, the *Selman* court, in quoting the *Louis Marx* decision, deleted the critical first phrase of that sentence—"To constitute an agent *for purposes of the statute . . .* "—and replaced it with a phrase implying that the definition was applicable to both section 301 and section 302: "Moreover, in order to be an agent *for purposes of New York personal jurisdiction . . . .*"[93]

1980). The court also held that it had no jurisdiction over AAMC under § 302 principally because: (1) AAMC did not have sufficient contacts within the forum to constitute the "transaction of business" under § 302(a)(1); (2) since Selman was living in Mexico at the time the alleged injury took place, there was no tortious act within the forum affecting the plaintiff within the forum under § 302(a)(2). *Id.*

88. *Id.* at 611.

89. *See supra* notes 31-56 and accompanying text.

90. The *Delagi* court held that where "there exists truly separate entities, not commonly owned, a valid reference of agency cannot be sustained." 278 N.E.2d 895, 896 (N.Y. 1972); *see supra* note 71. The court did not hold, however, that common ownership is always essential to the existence of agency. *See* WEINSTEIN, *supra* note 10, § 301.16 at 3-40. Nor does *Delagi* hold that control is essential to agency under § 301; control was a *factor* for the court, but only in cases where the plaintiff was claiming that a wholly-owned subsidiary was a mere department of a parent corporation. *Delagi*, 278 N.E.2d at 897.

91. 453 F. Supp. 385 (S.D.N.Y. 1978).

92. *Id.*

93. Selman v. Harvard Medical School, 494 F. Supp. 603, 611 (S.D.N.Y. 1980) (emphasis added). It is interesting to note that Judge Kevin Thomas Duffy was the author of both the *Selman* opinion and the *Larball* opinion decided seven years later. In *Larball*, Judge Duffy selected only one case—*Frummer*—as the precedent he needed to find that CBS acted as the agent of its foreign subsidiaries for purposes of determining jurisdiction under § 301. In sharp contrast to *Selman*, the only mention of "control" in *Larball* was the control that the court

Judge John F. Keenan wrote the opinions in *Como v. Commerce Oil Co.*,[94] decided in 1985, and *Intersong-USA v. CBS Inc.*,[95] decided in 1990. Both cases addressed the question of whether the acts of an alleged agent within the forum may be attributed to a foreign corporation for the purposes of section 301 jurisdiction. Both opinions used cases decided under section 302 to hold that jurisdiction could not be asserted because of the absence of control by the foreign corporation over the in-forum agent.

Como involved a suit filed in the Southern District of New York by a group of investors against, among others, Commerce Oil and Miller Drilling, both foreign corporations.[96] The investors alleged that Miller Drilling was present in the forum through the forum-based activities of seven limited partnerships which raised money in New York for oil and gas projects outside the state. These partnerships hired Miller Drilling to drill and operate the wells.[97]

The court held that the seven limited partners did not serve as Miller Drilling's agents for the purposes of section 301.[98] The court acknowledged that Miller Drilling "requested, or at least consented to, the solicitation of investors by the New York-based limited partnerships,"[99] and that Miller Drilling clearly benefited from these solicitations.[100] However, the court was "not convinced that Miller Drilling exercised sufficient control over these partnerships"[101] so that the limited partners' efforts in the forum might be attributed to the defendant. The two cases the court used as precedent for this hold-

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said CBS (the parent-agent) had over the distribution of the recordings produced by its subsidiaries (the subsidiary-principals). Thus, in *Larball*, the court found that agency existed under § 301 even when the agent had control over its principals. Such an analysis is a substantial departure from the analysis Judge Duffy used in *Selman*.

94. 607 F. Supp 335 (S.D.N.Y. 1985).

95. No. 84 Civ. 0998, U.S. Dist. LEXIS 11645 (S.D.N.Y. Sept. 6, 1990).

96. Because the court held that Miller Drilling's contacts with New York did not meet the standards set by the Court of Appeals in Laufer v. Ostrow, 434 N.E.2d 692, 694-95 (N.Y. 1982), Miller Drilling was not found to be doing business in New York directly through its own actions. *Como*, 607 F. Supp. at 339.

97. *Como*, 607 F. Supp. at 339-40.

98. *Id.* at 340.

99. *Id.*

100. *Id.*

101. *Id.*

ing were *Louis Marx v. Fuji Seiko, Inc.*[102] and *Delagi v. Volkswagenwerk AG of Wolfsburg Germany.*[103] However, as discussed earlier, *Louis Marx* examined agency under section 302.[104] On the other hand, *Delagi* only discussed the issue of control as it related to the mere department test of section 301, and not in terms of the agency theory.[105]

Five years after *Como*, Judge Keenan again applied the standards for agency under section 302 to assert jurisdiction under section 301. The facts of *Intersong-USA Inc. v. CBS Inc.*[106] were strikingly similar to *Larball*, where jurisdiction was found over foreign subsidiaries under the agency theory. As in *Larball*, a music publishing company sued CBS and its foreign subsidiary record companies for infringing the copyright to a song created by one of Intersong's artists. When the foreign subsidiaries filed a motion to dismiss for lack of personal jurisdiction, Intersong claimed that the court had jurisdiction over the subsidiaries under section 301 since CBS acted on behalf of the subsidiaries within the forum as an agent.[107]

The court did not, however, use Judge Duffy's analysis in *Larball* to resolve the agency issue. Agreeing with the foreign subsidiaries, the court held that the matrix agreements[108] represented nothing more than a mere licensing arrangement, through which the affiliates obtain royalties.[109] Finding that "[t]here [was] no evidence that CBS does anything on behalf of the affiliates,"[110] the court held that "the relationship between CBS and its affiliates [was] that of licensor-licens-

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102. 453 F. Supp. 385 (S.D.N.Y. 1978).

103. 278 N.E.2d 895 (N.Y. 1972). *See supra* note 90.

104. *See supra* text accompanying notes 91-92.

105. "[T]his court has never held a foreign corporation present on the basis of control, unless there was in existence at least a parent-subsidiary relationship. The control over the subsidiary's activities, we held, must be so complete that the subsidiary is, in fact, merely a department of the parents." *Delagi*, 278 N.E.2d at 897 (citations omitted).

106. No. 84 Civ. 0998, 1990 U.S. Dist. LEXIS 11645 (S.D.N.Y. Sept. 6, 1990).

107. *Intersong* also claimed that the foreign subsidiaries were mere departments of CBS, Inc. In resolving the mere department issue, the court used Judge Duffy's analysis in *Larball* to hold that the relationship between these commonly-owned corporate entities did not meet the four-part test of Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp., 751 F.2d 117, 120-22 (2d Cir. 1984). *See supra* notes 27-29 and accompanying text.

108. *See supra* notes 73-74 and accompanying text.

109. *Intersong* at *11.

110. *Id.* at *14.

ee,"[111] rather than principal-agent pursuant to section 301.

Judge Keenan held that CBS could not be the agent of its foreign subsidiaries since "[t]here is no suggestion, nor could there be, that the foreign affiliates exert any type of control over CBS."[112] The court supported these holdings by relying on a definition of agent that was derived from case law interpreting section 302 rather than section 301, and by misapplying the facts of *Gelfand*.

The court distinguished this case from *Gelfand*[113] by noting that the subsidiaries "do not rely on CBS for their major profits."[114] In *Gelfand*, the foreign defendant corporation depended upon the services of its New York promoter for three-sevenths of the defendant's business on a *particular* out-of-state bus tour. In contrast, because Judge Keenan found that CBS's foreign subsidiaries did not depend entirely upon CBS for their economic survival,[115] he consequently held that "CBS works with the matrix agreements for its own benefit."[116] This analysis disregards the fact that the New York promoter in *Gelfand* was not responsible for three-sevenths of the foreign defendant's entire *yearly* income. Instead, the promoter was responsible for a substantial portion of that one tour, which was just one of many tours conducted by the defendants.[117]

The court agreed with the foreign subsidiaries that under section 301 an agent is "one who has 'acted in this state for the benefit of and with the knowledge and consent of the non-resident and the non-resident must exercise some element of control over the agent.'"[118] While the court credited this definition to *H. Heller & Co. v. Novacor Chemicals Ltd.*, a case in which one of the issues concerned agency under section 301, the exact quote actually comes fourth-hand from *Louis Marx &*

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111. *Id.* at *16.

112. *Id.* at *15.

113. Gelfand v. Tanner Motor Tours, Ltd., 385 F.2d 116 (2d Cir. 1967), *cert. denied*, 390 U.S. 996 (1968).

114. Intersong-USA v. CBS, Inc. No. 84 Civ. 0998, 1990 U.S. Dist. LEXIS 11645, at *13.

115. *Id.*

116. *Id.* at *14.

117. *Gelfand*, 385 F.2d at 118-19.

118. *Intersong*, No. 84 Civ. 0998, 1990 U.S. Dist. LEXIS 11645, at *11-12 (quoting H. Heller & Co. v. Novacor Chemicals Ltd., 726 F. Supp. 49, 55 (S.D.N.Y. 1988)).

Co. v. Fuji Seiko, which defined an agent under section 302.[119] Once again, therefore, a court within the Southern District had applied the case law related to section 302 to a case arising under section 301.

5. Conclusion

The cases described in this section and in the previous section on flip agency demonstrate that courts have addressed issues of in personam jurisdiction over foreign corporations in two ways under section 301. Under the first method of analysis, courts use the legal concept of agency broadly and metaphorically. A court using this method examines the relationship between the foreign and local corporations in terms of the economic benefits gained by the foreign corporation as a result of the local corporation's actions on its behalf within the forum. If the benefits received are so substantial that, under the rule of *Gelfand* and *Frummer*, the local corporation does all the work in the forum that the foreign corporation would do using its own employees if it were actually in the forum, then that court will hold that the local corporation served as the agent of the foreign corporation. The court will then assert jurisdiction over the foreign corporation whether the foreign corporation is the parent corporation or simply a subsidiary.

Under the second method of analysis, courts address the degree to which the foreign corporation has benefited from its contacts within the forum, but adhere to a narrow interpretation of agency under section 301. They will not assert jurisdiction over the foreign corporation unless it can be shown that a traditional principal and agent relationship existed respectively between the foreign corporation and the in-forum corporation. Since *Gelfand* and *Frummer*, the leading appellate cases on the issue, took a broader view of agency, the courts using this method of analysis have had to look elsewhere to find precedent for their views. That precedent has come from cases in which the cause of action arose under section 302 rather than section 301.

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119. *Heller* borrowed the definition from Selman v. Harvard Medical School, 494 F. Supp. 603, 611 (S.D.N.Y. 1980); *Selman* borrowed it from the source, Louis Marx & Co. v. Fuji Seiko Co., 453 F. Supp. 385, 390 (S.D.N.Y. 1978).

III. *PALMIERI V. ESTEFAN*: A RESTATEMENT OF FLIP AGENCY

In *Palmieri v. Estefan*,[120] foreign subsidiaries of CBS Records (now owned by Sony Music Entertainment)[121] were sued in a copyright infringement action in the Southern District of New York for the third time[122] since 1987. As they did in *Larball* in 1987 and *Intersong* in 1990, these foreign affiliaties filed motions to dismiss the infringement claims for lack of personal jurisdiction, claiming they were not present within the forum because they did not have sufficient contacts within the forum to constitute doing business under section 301.

Plaintiff Eddie Palmieri, composer and musician, alleged that in 1989 the defendants Gloria Estefan and two members of her band, The Miami Sound Machine, infringed the copyright Palmieri has owned since 1981 on a song entitled "Paginas De Mujer."[123] In his suit filed in the Southern District of New York on May 7, 1991, Palmieri not only sued Estefan and her band, but also her New York recording company Sony Music Entertainment, Inc.,[124] and its thirty-three wholly-owned subsidiary music companies around the world.[125] Palmieri claimed that the court had personal jurisdiction over the moving defendants under both the mere department and the agency theories of NY CPLR section 301. Central to Palmieri's argument for agency was the presence of a matrix agreement[126] between Sony Music and its subsidiar-

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120. 793 F. Supp. 1182 (S.D.N.Y. 1992).

121. The Sony Corporation is the successor in interest to CBS Records Inc., having purchased CBS Records in 1988. *Id.* at 1184.

122. The two prior cases are Larball Publishing Co. v. CBS, Inc., 664 F. Supp 704 (S.D.N.Y. 1987) and Intersong-USA Inc. v. CBS Inc., No. 84 Civ. 0998, 1990 U.S. Dist. LEXIS 11645 (S.D.N.Y. Sept. 6, 1990). *See supra* notes 71-75 and 106-19 and accompanying text.

123. *Palmieri*, 793 F. Supp. at 1183.

124. Sony Music Entertainment, Inc. (Sony Music) is wholly owned by Sony Corporation of Japan.

125. Within the motion to dismiss, each moving defendant claimed to be incorporated under the laws of its own country and to operate under those laws. In identical statements known collectively as "Affiliate Affs.," each affiliate insisted that it produces, manufactures, and distributes musical recordings only within its own country or territory. *See Palmieri*, 793 F. Supp. at 1184.

126. The court in *Palmieri* stated:

> A matrix agreement grants each moving defendant the exclusive right to manufacture and distribute within its territory any recording in the repertoire of Sony Music and any other party to a matrix agreement with

ies. In a decision dated May 18, 1992, United States District Court Judge Leonard B. Sand ruled that the court had personal jurisdiction over these defendants under NY CPLR section 301, but only under the agency theory.[127]

> Sony Music. Each moving defendant in turn grants to Sony Music and any other party to a matrix agreement the exclusive right to manufacture and distribute within their respective territories any selection from the defendant's repertoire.
>
> Each moving defendant has the power to decide whether to release a selection from Sony Music or another moving defendant's repertoire, and the matrix agreement does not obligate a moving defendant to do so. If the moving defendant does decide to release a selection, it pays a fee to the moving defendant from whose repertoire the selection comes.

Id. at 1185 (citations omitted). *See also supra* notes 73-74 and accompanying text.

127. In deciding that the mere department theory would not apply to the relationship between Sony Music and its subsidiaries (the moving defendants), Judge Sand relied upon and agreed with the decisions of two previous cases involving essentially the same defendants.

In both Larball Publishing Co. v. CBS, Inc., 654 F. Supp. 704 (S.D.N.Y. 1987), and Intersong-USA, Inc. v. CBS, Inc., No. 84 Civ. 0998, 1990 U.S. Dist. LEXIS 11645, *15 (S.D.N.Y. Sept. 6, 1990), the plaintiffs claimed infringement of their copywritten music by the wholly-owned foreign subsidiaries of CBS Records in New York. When CBS Inc. sold CBS Records and all of its foreign subsidiaries to Sony Inc. of Japan in 1988, Sony Inc. renamed the New York corporation Sony Music Entertainment, Inc. and maintained the matrix agreements between the New York parent and its foreign subsidiaries.

Utilizing the four-part test for mere department found in Volkswagenwerk v. Beach Aircraft, 751 F.2d 117, 120-22 (2d Cir. 1984) (*see also supra* notes 27-29 and accompanying text), Judge Sand found that common ownership, the essential element in the test, existed among the defendants. *Palmieri*, 793 F. Supp. at 1188. Even if some of the moving defendants were not directly owned by Sony Music in New York, every defendant was owned by Sony Corp. of Japan. As he continued his analysis of the relationship between the defendants, Judge Sand noted additional ties:

> There is no question that Sony Music exercises some control over the activities of the moving defendants. As discussed *supra*, Sony Music does require approval of major financial decisions of the moving defendants, reviews their budgets and is provided with regular financial reports by them. Sony Music has on occasion guaranteed at least one of the affiliates' financial obligations. Sony Music also approves key personnel decisions, and assists the affiliates in strategy for negotiations with artists, and in formulating various business policies.

Id.

Despite finding that Sony Music does exercise a degree of control over its foreign subsidiaries and despite this enumeration of business contacts between parent and subsidiaries, Judge Sand held that Sony Music's level of involvement was insufficient to meet the requirements of the *Volkswagenwerk* test, *id.* at 120, and that the moving defendants were not "wholly dependent upon [Sony Music's] financial support to stay in business." *Id.* (quoting *Volkswagenwerk*, 751 F.2d at 121).

In rejecting the necessity of control within the agency relationship, Judge Sand was not swayed by Judge Keenan's holding in *Intersong*[128] that agency could not be found for the purpose of asserting in personam jurisdiction under section 301 unless the foreign corporation exhibited control over the acts of the in-state agent. Instead, Judge Sand referred to *Frummer*[129] and emphasized that:

> The interrelatedness of the corporations is the factor on which the courts have focused, rather than on the "control" of one by the other. In the context of related corporate entities, the *Frummer* standard remains the "decisive test" for agency, and the courts have not required that control be proven as an element for an agency relationship to obtain jurisdiction.[130]

Judge Sand agreed[131] with Judge Duffy's characterization of the relationship between CBS and its foreign subsidiaries in *Larball*:

> It is clear that were CBS [Sony Music] not handling the subsidiaries [sic] worldwide sales, the subsidiaries would be required to perform this function themselves. Thus, I find that CBS [Sony Music] is conducting all the business its subsidiaries' [sic] could do were they present by their own officials.[132]

Judge Sand's decision to follow Judge Duffy's analysis may

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128. Intersong-USA, Inc. v. CBS, Inc., No. 84 Civ. 0998, 1990 U.S. Dist. LEXIS 11645, at *15 (S.D.N.Y. Sept. 6, 1990).

129. "[T]he common ownership of two corporations may 'give rise to a valid inference as to the broad scope of the agency.'" *Palmieri*, 793 F. Supp at 1193 (quoting Frummer v. Hilton Hotels Int'l, Inc., 227 N.E.2d 851, 854 (N.Y. 1967)).

130. *Id.* Judge Sand then cited to several cases which explicitly state either that it is immaterial whether, for the purposes of determining jurisdiction, it is the parent corporation which serves as the in-state agent for its foreign subsidiary. *See* Jayne v. Royal Jordanian Airlines Corp., 502 F. Supp. 848, 856 (S.D.N.Y. 1980) (defendant, a Jordanian air charter service, was brought under the court's jurisdiction through the activities on its behalf by its Jordanian parent corporation, which was amenable to jurisdiction in New York). *See also* Saracero v. S.C. Johnson & Son, Inc., 83 F.R.D. 65, 67 n.5 (S.D.N.Y. 1979); Titu-Serban Ionescu v. E.F. Hutton & Co., 434 F. Supp. 80, 83 (S.D.N.Y. 1977) (all stating that it is immaterial whether the parent or the subsidiary serves as the agent); Freeman v. Gordon & Breach, Science Publishers, Inc., 398 F. Supp. 519, 522 (S.D.N.Y. 1975).

131. *Palmieri*, 793 F. Supp. at 1192.

132. Larball Publishing Co. v. CBS, Inc., 664 F. Supp. 704, 707-08 (S.D.N.Y. 1987).

have been influenced by the financial figures supplied by Sony Music and its subsidiaries.[133] Although a confidentiality stipulation between the parties forced the judge to speak vaguely about the exact amounts involved,[134] he stated that it was "clear that the [moving] defendants derive hundreds of millions of dollars in profits from sales due to acts signed by Sony Music."[135] He also noted that the defendants conceded in their memorandum of law that "a substantial percent of the sales of the moving defendants are attributable to product licensed to the moving defendants under the matrix agreement."[136]

In sharp contrast to Judge Keenan's position on essentially identical matrix agreements in *Intersong*,[137] Judge Sand agreed with the plaintiff's argument[138] that the matrix agreements were more than "mere licensing arrangements."[139] According to the plaintiff, the foreign subsidiaries are not merely licensing the recordings, they are acquiring the very product that they will then market and profit from in their own countries.[140] This ready-made product comes to them through careful research, promotion and the nurturing of scores of musicians and composers by the parent corporation in New York. In addition, the foreign subsidiaries use the matrix agreements to license and market the music product developed in their own countries to the rest of the world.[141]

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133. Both the plaintiff's and the defendants' initial memoranda of law regarding the motion to dismiss, as well as all discovery materials, are protected from public disclosure through a stipulation of confidentiality filed with the court on December 13, 1991. The information contained within these documents is, therefore, unavailable for this Note.

134. *Palmieri*, 793 F. Supp. at 1186 n.8: "We refrain from citing specific percentages to accommodate the parties' confidentiality stipulation. The precise figures do not alter the legal analysis."

135. *Id.* at 1191.

136. *Id.* at n.10. Because it is unlikely that the financial fortunes of Sony Music and its subsidiaries changed significantly for the better in the course of two to three years, it is not unreasonable to conclude that in *Intersong*, Judge Keenan was either unimpressed by this financial information or Intersong's counsel was unable to unearth as much information in discovery as Palmieri's.

137. Intersong-USA, Inc. v. CBS, Inc., No. 84 Civ. 0998, 1990 U.S. Dist. LEXIS 11645, at *15 (S.D.N.Y. Sept. 6, 1990).

138. *Palmieri*, 793 F. Supp. at 1191.

139. *Id.* at 1190.

140. *Id.*

141. Judge Sand summarized his interpretation of the matrix agreements as follows:

In the present case, much of the product marketed abroad derives from

The opinions of both Judge Sand in *Palmieri* and Judge Keenan in *Intersong* referred to *Saraceno v. S.C. Johnson & Son, Inc.*,[142] a case in which the actions of the New York parent corporation did not create an agency relationship as defined by *Frummer*.[143] In *Palmieri*, Judge Sand distinguished *Saraceno*: "Unlike *Saraceno*, the [Sony] subsidiaries are not foreign corporations with little contact or relationship to New York."[144] Thus, for Judge Sand, the determining factor in granting jurisdiction was the actual locus of the contacts.

In contrast, Judge Keenan in *Intersong* found that *Saraceno* was "applicable"[145] to the facts before him. Because he characterized the matrix agreements as "a mere licensing arrangement,"[146] he held that the foreign subsidiaries had "little contact in New York"[147] and that CBS conducted no activities in New York on behalf of its subsidiaries.[148]

After Judge Sand held that the court had personal jurisdiction over Sony's foreign subsidiaries under the agency theory of section 301, he addressed the question of whether an assertion of jurisdiction in these circumstances would offend constitutional due process requirements. In a single paragraph, the court cited *International Shoe Co. v. Washington*[149] and its progeny,[150] and acknowledged the need for the plaintiff to demonstrate that the defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit

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> the recordings of artists signed by Sony Music in New York. Second, the foreign subsidiaries market their material exclusively through Sony Music, the New York corporation. And it is through Sony Music and the interlocking matrix agreements that the foreign subsidiaries are able to market their products throughout the world.

Id. at 1192.

142. Saraceno v. S.C. Johnson & Son, Inc., 83 F.R.D. 65 (S.D.N.Y. 1979). *See supra* notes 65-70 and accompanying text.

143. *Saraceno*, 83 F.R.D. at 67-68.

144. *Palmieri*, 793 F. Supp. at 1192.

145. Intersong-USA, Inc. v. CBS, Inc., No. 84 Civ. 0998, 1990 U.S. Dist. LEXIS 11645, at *15 (S.D.N.Y. Sept. 6, 1990).

146. *Id.*

147. *Id.* (quoting Bulova Watch Co. v. K. Hattori & Co., 508 F. Supp. 1322, 1334 (E.D.N.Y. 1981)).

148. *Id.* at *15-16.

149. 326 U.S. 310 (1945).

150. *See, e.g.*, Asahi Metal Industry Co. v. Superior Ct., 480 U.S. 102 (1987); Burger King v. Rudzewicz, 471 U.S. 462 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980); Hanson v. Denckla, 357 U.S. 235 (1958).

does not offend 'traditional notions of fair play and substantial justice.'"[151] The court then concluded its discussion of the due process requirement by holding that the "record demonstrated 'purposeful availment' by the defendants"[152] and that such availment met the requirements of due process.[153]

IV. ANALYSIS

State and federal courts applying New York law disagree on the method of application of the law of agency to issues of jurisdiction. These conflicts exist because the use of the agency theory to resolve jurisdictional issues is in itself seriously and inherently flawed. Although disagreement between courts about the application of a law to particular facts is neither unusual nor inappropriate, it is problematic when the law is so vague that courts as well as litigants are uncertain of a law's meaning. Since courts cannot apply vague, ill-defined laws with any consistency, potential parties are left to wonder whether their associations with New York corporations will subject them to jurisdiction by New York courts.

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151. Palmieri v. Estefan, 793 F. Supp. 1182, 1194 (S.D.N.Y. 1992) (quoting *International Shoe*, 326 U.S. at 316).

152. *Id.* The court is referring here to Hanson v. Denckla, 357 U.S. 235, 316 (1958).

153. *Id.* Although Judge Sand's handling of the due process requirement may appear to be perfunctory and incomplete, state and federal courts have held that finding that a defendant "does business" in the forum automatically satisfies the Fourteenth Amendment due process requirements for personal jurisdiction. *See, e.g.*, Intermeat, Inc. v. American Poultry, Inc., 575 F.2d 1017, 1022 (2d Cir. 1978) ("The constitutional standard of due process may be met by fewer contacts, however, than those required under the more restrictive statutory test of 'doing business,' . . . as the New York Court of Appeals implicitly recognized in Simonson v. International Bank." (citations omitted)); Freeman v. Gordon and Breach, Science Publishers, Inc., 398 F. Supp. 519, 526 n.4, (S.D.N.Y. 1975) ("Implicit in our holding of 'doing business' is the holding that [the defendant] has acted in New York 'with a fair measure of permanence and continuity' and has purposely availed itself of the privilege of conducting business activities in this forum."). *See also* Frummer v. Hilton Hotels Int'l, Inc., 227 N.E.2d 851 (N.Y. 1967):

> [L]itigation in a foreign jurisdiction is a burdensome inconvenience for any company. However, it is part of the price which may properly be demanded of those who extensively engage in international trade. When their activities abroad, either directly or through an agent, become as widespread and energetic as the activities in New York conducted by [the defendant], they receive considerable benefits from such foreign business and may not be heard to complain about the burdens.

Id. at 854.

A. The Agency Theory Distorts the Rules of Agency

The agency theory is vague and ill-defined principally because it is based on a distorted application of the traditional law of agency. Courts apply the law of agency metaphorically rather than literally to issues of jurisdiction arising under section 301. In a traditional literal agency analysis, the existence of a fiduciary relationship between two parties may cause one party (the principal) to be liable vicariously for acts performed on its behalf by the other party (its agent). But when agency is applied to cases arising under section 301, a court is deciding whether to assert jurisdiction over the foreign corporation, not whether to find the foreign corporation vicariously liable for the acts of an in-forum corporation.

For example, in *Gelfand*,[154] the plaintiffs, New York residents, alleged that they were injured by negligent acts of Tanner Motor Tours, a foreign bus company, and not by any negligence on the part of Harold DeGraff, Tanner's promotional representative in New York. The plaintiffs were simply attempting to sue Tanner in a convenient forum for Tanner's alleged torts in another state. DeGraff was not a party to the cause of action in negligence and there was no attempt to hold Tanner liable for any actions of DeGraff. However, because Tanner received significant economic benefits from its contacts in New York through DeGraff, the Second Circuit held that Tanner was doing business in New York and was therefore present for jurisdictional purposes. This holding would not have been possible if the Second Circuit had applied agency traditionally rather than metaphorically.

The ability of the principal to control the actions of the agent is a necessary factor in establishing the existence of a traditional agency relationship.[155] Without the ability to control its agent, the principal could not be vicariously liable for the agent's activities. However, when the agency theory is used for jurisdictional purposes, some courts have held that control was not a necessary factor in determining whether an agency relationship existed. Indeed, neither of the two leading agency

154. Gelfand v. Tanner Motor Tours, Ltd., 385 F.2d 116 (2d Cir. 1967), *cert. denied*, 390 U.S. 996 (1968).

155. *See supra* note 3 and accompanying text.

cases under section 301, *Frummer*[156] and *Gelfand*, viewed control over the in-forum agent as a relevant factor in asserting jurisdiction over the foreign defendants.

In *Frummer*, where the court held that the Hilton Reservation Service in New York acted as the agent for Hilton Hotels (U.K.), it never discussed the element of control that is required in a traditional agency relationship.[157] Instead, the court used the fact that the Reservation Service and Hilton Hotels (U.K.) were commonly owned as a way to find "a valid *inference* as to the *broad scope* of the agency in the absence of an express agency agreement . . . ."[158] The court did not explain why common ownership would give rise to such a "valid inference" of agency, nor did the court define the parameters of the "broad scope of the agency." The court left unresolved the issue of whether common ownership was a vital element in determining the existence of an agency relationship, or whether agency, as it was defined in *Frummer*, could exist between independently-owned corporations.

Likewise, in *Gelfand*, neither common ownership nor control were vital factors in determining the existence of an agency relationship under section 301. "The court in *Frummer specifically disavowed* any reliance upon the corporate relationship of the two Hilton subsidiaries other than that 'it gives rise to a valid inference as to the broad scope of the agency . . . .'"[159] Promotional representative Harold DeGraff was an independent contractor and therefore unrelated to the defendant Tanner Motor Tours, yet the court held that his efforts

156. *Frummer*, 227 N.E.2d at 851.

157. *Id. See also* PHILLIP I. BLUMBERG, THE LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS IN THE LAW OF PARENT AND SUBSIDIARY CORPORATIONS § 4.02.1 (1983) ("Although 'agency' is asserted as the justification, the existence of such economic interdependence does not make the local corporation an 'agent' of its foreign component so as to bind the foreign component as its principal or subject it to substantive liability.").

158. *Frummer*, 227 N.E.2d at 854 (emphasis added).

159. Gelfand v. Tanner Motor Tours, Ltd., 385 F.2d 116, 120 (2d Cir. 1967), *cert. denied*, 390 U.S. 996 (1968) (emphasis added) (quoting *Frummer*, 227 N.E.2d at 854). *But see* Delagi v. Volkswagenwerk A.G. of Wolfsburg, Germany, 278 N.E.2d 895, 898 (N.Y. 1972), in which the Court of Appeals held that "control" was a vital element in the mere department analysis. "[T]his court has never held a foreign corporation present on the basis of control, unless there was the existence at least of a parent-subsidiary relationship. The control over the subsidiary must be so complete that the subsidiary is, in fact, *merely a department* of the parent." (citations omitted) (emphasis added).

in the forum on behalf of the foreign defendants were sufficient for the court to find jurisdiction over Tanner Motor Tours. The court also made no mention of control as a vital element in determining whether an agency relationship existed. Apparently, the court did not consider control to be a requirement for a finding of an agency relationship. Since DeGraff was authorized to confirm tour reservations for the foreign defendants, he had the "power to make the one employing him a party to a transaction."[160] Nevertheless, he could not be considered an agent in the traditional[161] sense because under the facts of the case he was "subject to no control over his conduct."[162]

Since agency is applied metaphorically for jurisdictional purposes, one might reason that the metaphor could easily be adapted to a variety of circumstances. But the striking split of opinions among courts about the control requirement indicates that the agency theory's inherent imprecision is its greatest flaw. Rather than serving as a way for courts to simplify a complicated sets of facts, the agency theory impedes an analysis of the jurisdictional question. As Judge Cardozo wrote in his opinion in *Berkey v. Third Avenue Railway Co.*, "[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."[163] The solution to Judge Cardozo's concerns cannot be for the courts to define precisely the parameters of the agency theory, for if the metaphor is strictly defined it ceases to be a metaphor. However, the courts could abandon the agency theory and replace it with a simple test which would assist courts in determining jurisdictional presence through an evaluation of economic benefits the foreign entity receives from its contacts in the forum.

B. Inconsistent Application of the Agency Theory

Courts cannot apply vague and ill-defined legal theories with any degree of consistency and predictability because the application of that theory will vary with each interpretation. Because the agency theory uses the law of agency metaphori-

160. RESTATEMENT, *supra* note 2, § 2 cmt. b.
161. RESTATEMENT, *supra* note 2, § 2 cmt. b.
162. RESTATEMENT, *supra* note 2, § 2 cmt. b.
163. 155 N.E.2d 58 (N.Y. 1926).

cally, courts are particularly challenged to arrive at consistent decisions, and sharp differences of opinion unavoidably result. If the *Palmieri* and *Intersong* courts differ so sharply in their interpretations of the law, having applied the same theory to virtually identical facts, the law is obviously so unclear that potential litigants cannot possibly know how to act to avoid liability. After Judge Keenan's decision in *Intersong*, CBS had good reason to believe that its foreign subsidiaries would be exempt from appearing in the Southern District if similar suits arose in the future.

Larball,[164] *Palmieri*, and the other flip agency cases demonstrate that control continues to be an unnecessary factor in determining agency,[165] despite the presence of a line of district court cases that have held otherwise by relying on the more traditional definition of agency used in causes of action arising under section 302, New York's long-arm statute.[166] These differences in interpretation among the courts exist because the courts have received little guidance from the appellate courts subsequent to *Frummer* and *Gelfand*. Cases such as *Delagi*[167] and *DelBello*[168] served only to confuse later courts that have tried to understand agency under section 301 by looking to, and misapplying, agency as it is defined pursuant to section 302.[169] More recent decisions from the Court of Appeals dealing with the agency theory in the context of section 301, such as *Landoil Resources v. Alexander & Alexander*,[170] fail to develop or clarify the law any further, relying instead on past declarations of the law in *Frummer*, *Gelfand*, and *Delagi*.[171] Indeed, the agency theory, as applied to section

164. Larball Publishing Co. v. CBS, Inc., 664 F. Supp. 704 (S.D.N.Y. 1987).

165. *See supra* notes 57-75 and accompanying text.

166. *See supra* notes 77, 87-88, 91-102, 106-19 and accompanying text.

167. Delagi v. Volkswagenwerk A.G. of Wolfsburg, Germany, 278 N.E.2d 895 (N.Y. 1972). *See supra* notes 81, 90, and 105 and accompanying text.

168. DelBello v. Japanese Steak House, Inc., 352 N.Y.S.2d 537 (App. Div. 1974). *See supra* notes 82 and 85 and accompanying text.

169. *See supra* notes 76-119 and accompanying text.

170. 565 N.E.2d 488 (N.Y. 1990).

171. In *Landoil*, the Court of Appeals addressed a certified question from the Second Circuit: whether a syndicate of insurance underwriters based at Lloyd's of London was subject to suit in New York based on the activities of a Lloyd's administrative department overseeing, from London, an insurance policy trust fund located in New York. Among its claims, the plaintiff alleged that the syndicate was under the court's jurisdiction because Lloyd's administrative department served as the syndicate's agent in the forum.

301, has not changed appreciably since the *Frummer* and *Gelfand* decisions in 1967.[172] Although the observance of precedent is both the rule and the life-blood of the common law, appellate courts must seize the opportunity to clarify past decisions that fail to lend proper guidance to lower courts.

The importance of the *Palmieri* decision lies not so much in what it does, but rather in what it does not do. Judge Sand's holding that Sony Music's foreign subsidiaries are subject to the personal jurisdiction of the court establishes no new precedent. Even the atypical flip adaptation of the agency theory that was applied by the *Palmieri* court has been previously used. Although its holding is contrary to that of Judge Keenan's in *Intersong*, it is essentially identical to that of Judge Duffy in *Larball* five years earlier.[173] It is, of course,

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The court chose not to decide whether agency actually existed, holding that it would not find jurisdiction, even assuming, *arguendo*, that an agency relationship actually did exist. For the court to find jurisdiction over a foreign defendant through its agent, the agent would have to be located in New York and the agent should do all its solicitations in New York. Otherwise, "[i]t cannot be said to be performing acts in New York on a systematic and a continuous basis or for the benefit of the [s]yndicate." *Id.*

In arriving at this holding, the court referred only to *Frummer*, *Gelfand*, and *Laufer v. Ostrow*, a Court of Appeals case in which the court found jurisdiction over the foreign defendant through its own, and *not* an agent's, continuous and systematic activities in the forum. In dicta, the *Laufer* court refers to its decision in *Delagi*, but only in terms of *Delagi's* requirement that there be control by the parent over the subsidiary in cases utilizing the mere department theory. 434 N.E.2d 692, 695 (N.Y. 1982) (citing *Delagi*, 278 N.E.2d at 898).

172. The continued reliance on *Frummer* can be seen in Judge Sand's remarks during an appearance before the court on July 9, 1992 by attorneys for both sides subsequent to the *Palmieri* decision on May 18, 1992. During that appearance, the court sought to ascertain whether it should submit a certified question to the Court of Appeals for the Second Circuit or whether it should forego the certified question and allow the case to be bifurcated, splitting liability and damages:

> Suppose I hear from counsel who are defendants on that with respect to all aspects of this, other than argument on the merits of Frummer and agency and so on. If I may be colloquial, I've done my time on that issue. I've had my say. I understand the issue is not free from doubt, but otherwise I would not be raising the question of certification.

Transcript of Appearance, Palmieri v. Estefan, 91 Civ. 3098 (LBS), (S.D.N.Y.), July 9, 1992, page 5, line 23 to page 6, line 5.

In a stipulation between the parties dated September 22, 1992 (filed with the court on September 29, 1992), the parties agreed to bifurcate the trial. If the court determines that an infringement of copyright did not incur, neither Sony Music Entertainment nor its foreign subsidiaries would be liable, mooting the need for the certified question.

173. It would be fair to say, however, that Judge Sand's analysis is more deeply and soundly based in legal precedent than Judge Duffy's, despite the fact that

unrealistic to expect that a district court judge would eliminate or even redefine agency theory, substituting the metaphoric application of the law of agency with an analysis less prone to subjective adaptation and misinterpretation. Such changes are more likely to come from appellate courts. Nevertheless, *Palmieri* is at least a missed opportunity to challenge the validity of a legal theory that courts continue to apply inconsistently.

C. The Agency Theory and Public Policy

Perhaps the most important reason for a corporation to incorporate subsidiaries separately is its desire to limit corporate liability. But that legitimate desire must be balanced against a plaintiff's need for appropriate recourse for harms caused by foreign corporations. Courts that decline to assert jurisdiction over foreign subsidiaries in circumstances of flip agency because they cannot envision an application of agency in which the parent is in no position to control the actions of its subsidiary, fail to consider the ramifications of their decisions on plaintiffs.

For example, in *Intersong*, the court's decision not to assert jurisdiction meant that the plaintiff's only alternative was to file suit against each of the foreign subsidiaries in its own country. Clearly, most plaintiffs would find this to be an impossible imposition that would essentially force them to abandon their claims. By focusing principally on the question of whether the relationship between the foreign and in-forum corporations met the strict requirements of a traditional application of agency, the *Intersong* court failed to consider the United States' interest in providing American plaintiffs with appropriate recourse to torts committed by foreign parties.[174] The court's failure is troubling considering the substantial benefits that the foreign subsidiaries derived from the matrix agreements and other contacts in the forum.[175]

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they both arrive at the same conclusion. Judge Sand was less conclusory in his analysis than Judge Duffy because he realized that his decision ran directly against Judge Keenan's and that it was likely that the foreign subsidiaries would appeal.

174. Individual states would also have such an interest when a suit involved parties located in different states, as was the case in *Gelfand*.

175. See *supra* note 153 for a quotation from *Frummer* that presents a view-

The conflict among courts that disagree about the validity of flip agency could conceivably be resolved by an appellate court decision stating that, henceforth, courts may not assert jurisdiction over a foreign corporation unless the plaintiff can demonstrate that the foreign corporation controlled the actions of the in-forum corporation. Such a decision would eliminate assertions of jurisdiction in flip agency circumstances and preserve the integrity of the law of agency.

However, the integrity of the law of agency is clearly not at issue. The existence of an agency relationship, in itself, is essentially meaningless. The courts should be concerned with ascertaining whether the foreign corporation derived such economic benefits from its relationship with an in-forum corporation that it could be fairly said to be doing business within the forum. Because the agency theory does not provide a clear and predictable means for evaluating the depth to which the foreign corporation has benefited economically from its contacts within the forum, it cannot serve to guide the behavior of potential litigants. Unless the theory is abandoned, many plaintiffs with valid claims will continue to be denied access to the courts for what in essence amounts to technical deficiencies under the law of agency.

D. Economic Benefit Test

1. The Need for a Test

Judge Sand's application of the agency theory places too great an emphasis on a "familial" relationship[176] between the local and foreign defendants[177] and too little on what should be at the heart of the court's in personam jurisdiction over the

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point that is sympathetic to the interests of the in-forum plaintiff.

176. "The interrelatedness of the corporations is the factor on which courts have focused, rather than on the 'control' of one by the other. In the context of related corporate entities, the *Frummer* standard remains the 'decisive test' for agency . . . ." Palmieri v. Estefan, 793 F. Supp. 1182, 1193 (S.D.N.Y. 1992) (citations omitted).

177. This dependence is likely induced by an oft-quoted excerpt from Frummer v. Hilton Hotels Int'l, Inc., 227 N.E.2d 851, 854 (N.Y. 1967), addressing the common ownership of the local and foreign corporations: "[T]he fact that the two are commonly owned is significant only because it gives rise to a valid inference as to the broad scope of the agency in the absence of an express agency agreement." Nothing, however, in that sentence restricts such inferences only to commonly owned corporations.

defendants—the quality of the contacts the foreign defendant has with the forum through its agent.[178] The holding of *Palmieri* is actually based on the degree to which the foreign record companies depend on the activities of Sony Music in New York.

> In the present case, much of the product marketed abroad derives from the recordings of artists signed by Sony Music in New York. Second, the foreign subsidiaries market their material in New York exclusively through Sony Music, the New York corporation. And it is through Sony Music and the interlocking matrix agreements that the foreign subsidiaries are able to market their products throughout the world . . . . For all the reasons above, we find it appropriate to obtain jurisdiction over the foreign affiliates on the basis of their agency relationship with Sony Music.[179]

However, the clarity of that holding is clouded by the court's attempt to follow precedent and place those contacts in the context of an agency relationship between local parent and foreign subsidiary.

The leading federal case interpreting New York's agency theory, *Gelfand v. Tanner Motor Tours*,[180] held that an independent promotional representative, legally an independent contractor, served as the agent of two foreign bus companies for the purpose of section 301 jurisdiction. If an independent contractor can serve as an agent under the statute, it is clear that it is not necessary for there to be common ownership between principal and agent.[181] The courts have also held

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178. *See* Murray E. Knudsen, Note, *Jurisdiction Over a Corporation Based on the Contracts of a Related Corporation: Time for a Rule of Attribution*, 92 DICK. L. REV. 917, 931 (1988).

179. *Palmieri*, 793 F. Supp. at 1192.

180. 385 F.2d 116 (2d Cir. 1967), *cert. denied*, 390 U.S. 996 (1968). *See supra* notes 45-56 and accompanying text.

181. *See* Engebretson v. Aruba Palm Beach Motel, 587 F. Supp. 844 (S.D.N.Y. 1984):

> Defendants argue that *Frummer* precludes the exercise of authority here because [the in-forum sales representative] is an independent entity whereas the agent there was a corporate affiliate. There is language in certain opinions indicating that some common ownership is vital. However, common ownership is not required . . . . I find that the presence of an agent in New York with the undisputed authority to bind the foreign principal by confirming reservations is sufficient to warrant a finding that the Aruba defendants are "doing business" in New York.

that control by the principal over the agent is not vital to the existence of agency.[182] Therefore, without the need for either common ownership or control, the only truly vital criterion for agency is that the foreign defendant receive a significant economic benefit from its contacts in the forum. This is the "decisive test"[183] contained in *Frummer*'s holding: "[T]he [local entity] does all of the business which [the foreign corporation] could were it here by its own officials."[184]

Assuming that *Frummer*'s "decisive test" does relate exclusively to the degree to which the foreign defendant receives forum-related economic benefits, the law of agency, even when applied metaphorically, is an inaccurate and inefficient method of identifying and evaluating these benefits. Not only is agency an inappropriate metaphor for asserting jurisdiction because it is more generally recognized and utilized as a method of attaching vicarious liability, but the law of agency's traditional emphasis on the ability of the principal to control the acts of her agent has been viewed as irrelevant by many courts, including the New York Court of Appeals (*Frummer*) and the United States Court of Appeals for the Second Circuit (*Gelfand*). Thus, the agency theory, as applied to section 301, should be replaced with a test that specifically identifies and evaluates the nature of the foreign defendant's contacts with the forum as well as the benefits received by that defendant from these contacts.

2. The Proposed Test

The purpose of the Economic Benefit Test (EBT) is to give courts a simple method of determining whether they should assert personal jurisdiction over foreign corporations alleged to be doing business in the forum through the economic ties they have with in-forum corporations.[185] By replacing the agency

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Id. at 850 (citations omitted).

182. *See supra* notes 57-75 and 128-130 and accompanying text.

183. Gelfand v. Tanner Motor Tours, Ltd., 385 F.2d 116, 120 (2d Cir. 1967), *cert. denied*, 390 U.S. 996 (1968).

184. Frummer v. Hilton Hotels Int'l, Inc., 227 N.E.2d 851, 853 (N.Y. 1967)

185. The EBT is certainly not the first attempt to find a reasoned, fact-intensive method of determining whether a court should claim personal jurisdiction over a foreign corporation said to be doing business in the forum. Charles Wellborn devised the "single economic entity" analysis as a way of determining when "the acts of the subsidiary would be attributed to the parent such that the court would

theory, the EBT will free courts from the inherent limitations of the law of agency. These limitations continue to affect judicial decision-making,[186] despite instances where the courts had attempted to show that agency was simply being used as a metaphor for substantial, purposeful financial availment within the forum.[187]

The EBT is not designed to affect a court's ability to find that a foreign corporation is doing business in the forum through its own "ongoing and continuous" activities within the forum.[188] Nor will the test replace the mere department analysis,[189] since that theory operates to impute jurisdiction vicariously upon a parent corporation only when the parent's control over that subsidiary is so strong that both entities are viewed as one. In contrast, the EBT should be utilized in cases involving relationships between parent and subsidiary corporations which may or may not be viewed as a single entity, and

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have judicial jurisdiction over the parent to the same extent that it would the subsidiary." Charles I. Wellborn, *Subsidiary Jurisdiction in New York: When is Mere Ownership Enough to Establish Jurisdiction Over the Parent*, 22 BUFF. L. REV. 681, 688-89 (1973). The applicability of this analysis is limited because it is essentially a mere department analysis and places too great an emphasis on the "familial" relationship between the corporations. Such an emphasis would prevent the analysis from being used in cases such as *Gelfand* where the in-forum corporation was an independent contractor.

More recently, Murray E. Knudsen proposed a "rule of attribution." Murray E. Knudsen, Note, *Jurisdiction Over a Corporation Based on the Contacts of a Related Corporation: Time for a Rule of Attribution*, 92 DICK. L. REV. 917 (1988). The scope of this rule is broader than that of the "single economic entity" since it is designed to apply to related as well as independently-owned corporations. *Id.* at 944. As a practical tool, however, the rule fails to ask the specific questions necessary to determine the degree to which the foreign corporation benefits from its vicarious involvement in the forum:

> To attribute the in-state activities of a corporation to a related out-of-state corporation, there are two essential criteria. First, the in-state corporation must carry on commercial activity on behalf of the out-of-state corporation. Second, the out-of-state corporation must purposefully avail itself of those in-state activities. This purposeful availment or intent requirement can be further broken down into two sub-elements. The out-of-state corporation must know that the in-state activities are being done on its behalf *and* the out-of-state corporation must accept the benefit derived from these in-state activities . . . . It is a "rule" that is not conclusory, but one that turns upon the individual facts of each case.

Id. at 944 (citations omitted).

186. *See supra* notes 76-119 and accompanying text.

187. *See supra* notes 57-75 and accompanying text.

188. *See supra* notes 22-30 and accompanying text.

189. *See infra* notes 194-95 and accompanying text.

in cases where the foreign and in-forum corporations are completely independent and unrelated.

This new test is principally an economic one because economics is at the heart of the relationship between the foreign and in-forum corporations. Moreover, economic benefit has been the prevailing "yardstick" by which the leading agency cases have measured a foreign entity's contacts with the forum.[190] The proposed test is not, however, a bright line which can be reduced to mathematical certainty; it also requires a fact-centered, case-by-case judicial evaluation based on the evidence. In addition, this test allows a court to consider policy issues and fairness to the parties in order to yield a more just result.

3. The Four Factors of the EBT Test

In determining whether the foreign corporation has received sufficient economic benefits through its association with an in-forum corporation to subject itself to New York jurisdiction, a court should weigh the following factors: 1) evidence of a deliberate financial relationship between the forum-based and foreign corporations; 2) the degree to which the in-forum corporation can contractually bind the foreign corporation; 3) the duration of the financial relationship; and 4) the foreign corporation's actual financial involvement in the forum as a percentage of its expenses, sales, or net profits.

The first inquiry in the EBT analysis is whether the foreign corporation consciously became involved in a financial relationship with the in-forum corporation. If a foreign corporation's involvement in the forum was not deliberate, but came about solely through the unilateral actions of an in-forum corporation, the analysis need go no further. An assertion of a court's jurisdiction under such circumstances would violate the Due Process Clause of the Fourteenth Amendment since it would meet neither the "minimum contacts" standard of *In-*

190. *See* Gelfand v. Tanner Motor Tours, Ltd., 385 F.2d 116, 120-21 (2d Cir. 1967), *cert. denied*, 390 U.S. 996 (1968) ("In our view, the decisive test is that upon which the court in *Frummer* relied, 'the [in-forum corporation] does all of the business which the [foreign corporation] could do were it here by its own officials.'") (emphasis added) (quoting Frummer v. Hilton Hotels Int'l, Inc., 227 N.E.2d 851, 853 (N.Y. 1967).

ternational Shoe[191] nor comport with "traditional notions of fair play and substantial justice."[192] Framing the issue in this way obviates the need for the court to differentiate between commonly and separately owned corporations. Common ownership is not a relevant factor in the EBT, just as it was not in *Frummer* and *Gelfand* which both held that common ownership was "significant only because it gives rise to a valid *inference* as to the broad scope of the agency in the absence of a valid agency agreement . . . ."[193] However, common ownership is vital to the mere department test of *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*[194] If the foreign and forum-based corporations are commonly owned and meet all four factors of the mere department test, a court could impute the independent and unsolicited actions of the forum-based corporation to the foreign corporation for jurisdictional purposes.[195]

Once the court has sufficient evidence to determine that the foreign corporation has consciously established a financial relationship with an in-forum corporation, the court should determine the extent of that involvement by addressing the remaining factors of the EBT.

The second factor, whether there is evidence of a contractual arrangement in which the foreign corporation has permitted the in-forum corporation to act on its behalf is directly related to the first inquiry. An agreement between two such entities would serve as prima facie evidence of a deliberate financial relationship which would, therefore, satisfy the first inquiry of the EBT.

Unlike the agency theory, the EBT is unconcerned with the issue of control within the corporate relationship. Although some courts continue to interpret the agency theory as requiring that evidence of control by the foreign corporation over the in-forum corporation is vital to an assertion of the court's jurisdiction,[196] the relevant inquiry under this factor of the EBT is

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191. International Shoe v. Washington, 326 U.S. 310 (1945).

192. Milliken v. Meyer, 311 U.S. 457, 463 (1940).

193. Frummer v. Hilton Hotels Int'l, Inc., 227 N.E.2d 851, 852 (N.Y. 1967), *quoted in Gelfand*, 385 F.2d at 120.

194. 751 F.2d 117, 120-22 (2d Cir. 1984). *See supra* notes 28-30 and accompanying text.

195. *See supra* notes 22-25 and accompanying text.

196. *See supra* notes 75-119 and accompanying text.

simply the degree to which the in-forum corporation has been permitted to bind the foreign corporation contractually.

Once a court finds evidence of a contractual arrangement, the court should then look to whether the arrangement relates to an essential part of the foreign corporation's business, or is merely peripheral or incidental. For example, in *Gelfand v. Tanner Motor Tours, Ltd.*,[197] the in-forum travel agent had the power to make and confirm reservations for the foreign corporation's Grand Canyon bus tours. This contractual arrangement went to the very heart of the Tanner Motor's financial viability. It is likely that the corporation would have been hurt significantly without such an agreement since it would not have otherwise had access to customers from the lucrative New York market. On the other hand, if Tanner's contact with the forum simply consisted of an agreement authorizing a New York-based employment agency to place classified ads in New York papers for clerical positions at Tanner Motor's California headquarters, the Second Circuit might not have asserted its jurisdiction. Such an agreement would be only indirectly related to Tanner's corporate purpose and it would have a negligible effect on Tanner's financial viability.

The third factor, the duration of the financial relation between the forum-based and foreign corporations, is significant because the longer a foreign corporation has maintained its financial contacts with the in-forum corporation, the easier it will be for a court to justify that the foreign corporation is doing business in the forum pursuant to section 301. Although a single tortious act that is actually committed within the forum,[198] or a tortious act committed outside the forum but having direct effect within the forum,[199] may be sufficient for a court to hold that the foreign corporation has transacted business in New York pursuant to New York's long-arm statute, section 301 requires that the foreign corporation's contacts with the forum occur "not occasionally or casually, but with a fair measure of permanence and continuity."[200]

The fourth inquiry, a determination of the foreign corporation's financial involvement in the forum as a percent-

197. *Gelfand*, 385 F.2d 116, 119 (2d Cir. 1967)
198. N.Y. CIV. PRAC. L. & R. § 302(a)(2) (McKinney 1990 & Supp. 1992).
199. N.Y. CIV. PRAC. L. & R. § 302(a)(3) (McKinney 1990 & Supp. 1992).
200. Tauza v. Susquehanna Coal Co., 115 N.E. 915, 917 (N.Y. 1917).

age of its expenses, sales, or net profits, enables the court to assess the relative importance of that involvement to the corporation. If the financial activity generated within the forum represents a substantial percentage of the foreign corporation's expenses, sales, or profits, the court could have strong evidence to find that the benefits accruing to the corporation outweigh the burdens it may experience defending itself within the forum.[201]

Assisting the court in making such a determination would be an assessment of the likelihood that the foreign corporation would either form an agreement with another in-forum corporation or come into the forum itself should the existing contractual agreement come to an end. The court might also determine that the in-forum corporation provides special services or has expertise in areas crucial to the foreign corporation's operations that would be costly or difficult to replace. Alternatively, if the contractual agreement produces relatively insignificant sales and profits for the foreign corporation, or if corporate purchases within the forum are *de minimis*, the court may find that such evidence would serve to preclude an assertion of its jurisdiction. For example, in *Saraceno v. S.C. Johnson & Son, Inc.*,[202] evidence showing that the foreign corporation used in-forum suppliers for only one-fiftieth of one percent of its needs was persuasive in the court's decision not to assert its jurisdiction.[203]

4. The EBT and *Palmieri v. Estefan*

In order to demonstrate that the EBT would be a viable and superior replacement for the agency theory, it will be help-

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201. *See* Frummer v. Hilton Hotels Int'l, Inc., 227 N.E.2d 851 (N.Y. 1967):

> We are not unmindful that litigation in a foreign jurisdiction is a burdensome inconvenience for any company. However, it is part of the price which may properly be demanded of those who extensively engage in international trade. When their activities abroad, either directly or through an agent, become as widespread and energetic as the activities in New York conducted by [the foreign corporation], they receive considerable benefits from such foreign business and may not be heard to complain about the burdens.

Id. at 852.

202. 83 F.R.D. 65 (S.D.N.Y. 1979). *See supra* notes 65-70 and accompanying text.

203. *Saraceno*, 83 F.R.D. at 68.

ful to see how a court might apply the test to the facts of *Palmieri v. Estefan*.[204]

First, the matrix agreements existing between the foreign subsidiary record companies and Sony Music in New York[205] are strong evidence of a deliberate financial relationship. Without these voluntary though vital agreements, the subsidiaries would not only be unable to market their own musical product abroad, but they would also be denied the exclusive right to license the musical product developed by Sony Music in the United States and by the other subsidiaries in their respective countries.[206] The subsidiaries sought to characterize the matrix agreements as mere licensing arrangements and argued that they could not be doing business in New York since the agreements ultimately produced sales in their respective countries rather than in New York.[207] Judge Sand, however, took a broader, more practical view of the agreements and agreed with the plaintiff that "the worldwide network of affiliates and Sony Music is very important to the business of each affiliate . . . ."[208] Although the matrix agreements do not in themselves involve financial transactions within the forum, the *exclusive* licensing rights guaranteed by these agreements point to the financial transactions that will inevitably result.

Second, while the terms of the matrix agreements do not obligate any foreign subsidiary to license any particular musical release,[209] Sony Music is the only party with the authority to broker music product between itself and the subsidiaries. The fact that this authority comes at the direction and with the approval of the subsidiaries does not negate the fact that Sony Music's efforts on their behalf bind them contractually.[210] Relevant to this analysis is the fact that the foreign subsidiaries did not sign their matrix agreements with the other foreign subsidiaries; rather, each subsidiary signed its agreement with Sony Music in New York.[211] Therefore, the

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204. 793 F. Supp. 1182 (S.D.N.Y. 1992). *See supra* notes 120-53 and accompanying text.

205. *See supra* notes 138-41 and accompanying text.

206. *Palmieri*, 793 F. Supp. at 1185.

207. *Id.* at 1190-91.

208. *Id.* at 1191.

209. *Id.* at 1185.

210. *Id.*

211. *Id.*

foreign subsidiaries could have access to the musical product of Sony Music and the other subsidiaries only through the matrix agreements with Sony Music.

Because ongoing access to new musical product is critical to the music industry, the matrix agreements affect what is perhaps the most essential part of the subsidiaries' business. Without access to the musical recordings of Sony Music and the other subsidiaries, the individual foreign subsidiaries could only market their own product in their respective countries, thereby severely limiting their financial strength, product diversity, and corporate viability.

Third, although *Palmieri* is not explicit about how long the foreign subsidiaries have participated in the matrix agreements, it is clear from the *Larball*[212] and *Intersong*[213] opinions that the foreign subsidiaries and Sony Music (along with its predecessor in interest, CBS, Inc.) have been parties to these agreements for a number of years. The ongoing nature of this financial relationship between the parties to the agreements demonstrates the likelihood of substantial financial benefits accruing to the foreign subsidiaries. It also lends weight to the argument that these subsidiaries have had contact with the forum "not occasionally or casually, but with a fair measure of permanence and continuity."[214]

Finally, the foreign subsidiaries' financial involvement in the forum is substantial. Although a stipulation between the parties prevents public disclosure of the actual figures,[215] the court found that "defendants derive hundreds of millions of dollars in profits from sales signed by Sony Music."[216] A major portion of the foreign subsidiaries' sales in their own countries is derived from product originally produced by Sony Music. It is evident that the subsidiaries rely heavily on Sony Music's expertise in selecting, nurturing, producing, and re-

212. Larball Publishing Co. v. CBS, Inc., 664 F. Supp. 704 (S.D.N.Y. 1987).

213. Intersong-USA, Inc. v. CBS, Inc., No. 84 Civ. 0998, 1990 U.S. Dist. LEXIS 11645 (S.D.N.Y. Sept. 6, 1990).

214. Tauza v. Susquehanna Coal Co., 115 N.E. 915, 917 (N.Y. 1917); *see also supra* notes 198-200 and accompanying text.

215. *See supra* notes 134-35 and accompanying text.

216. Palmieri v. Estefan, 793 F. Supp. 1182, 1191 (S.D.N.Y. 1992). The court also noted that "in their memorandum of law, defendants concede that a substantial percentage of the sales of the moving defendants are attributable to products licensed to the moving defendants under the matrix agreements." *Id.* at 1191 n.10.

cording the various musical acts that make up Sony Music's repertoire.[217] Should the need arise, it is unlikely that the subsidiaries would be able to assume these activities without great difficulty.

By serving as both a clearinghouse and a storeroom for musical product from around the world, Sony Music provides its foreign subsidiaries with a convenient and economical way to market its own products and acquire products from elsewhere, particularly the United States. The court did not calculate the cost that the subsidiaries would incur by attempting such activity on their own within the forum, but it is likely that these costs would be financially prohibitive. Based on the considerable benefits accruing to the foreign subsidiaries by way of their matrix agreements with Sony Music, it would not be unreasonable for a court to hold that these benefits easily outweigh the burdens the foreign subsidiaries might experience defending themselves in New York. Indeed, since New York is the home of the parent corporation as well as the location of recording studios sometimes used by the subsidiaries' artists, it would be difficult for the subsidiaries to argue successfully that jurisdiction should be denied based on the doctrine of *forum non conveniens*.

Palmieri easily meets all four factors of the EBT, a result that neither conflicts with much of Judge Sand's analysis nor with the ultimate decision. Jurisdiction over Sony Music's foreign subsidiaries would result through the use of either the agency theory or the EBT. By utilizing the EBT, however, the court could avoid having to shoehorn the particular facts of this case into the uncertain common law definition and application of the agency theory. The EBT would eliminate the need for the court to explain how an agency relationship exists even when the parent corporation is serving as the agent for its foreign subsidiaries. The EBT is neither intended nor would it serve as a way for plaintiffs to hale foreign corporations into the forum unfairly. It would not "open the floodgates." Rather, the EBT simply provides the court with a clear and reasonable way to assess the parties' jurisdictional claims and defenses.

The EBT allows the court to go right to the heart of the jurisdictional analysis: How and to what extent did the foreign

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217. *Id.*

corporation benefit economically from its vicarious involvement with a forum-based corporation? Thus, utilization of the EBT will eliminate the conflicting opinions that have plagued many of the cases in which the courts have invoked the agency theory. Although, in borderline cases, courts may differ in their decisions, the EBT at least provides for a logical, fact-based analysis of the jurisdictional issues.

The EBT is not, of course, the first test constructed to assist the courts in determining whether to assert jurisdiction under section 301. Courts addressing the question of whether a subsidiary corporation is a mere department of the parent corporation use the four-part test of *Volkswagenwerk Aktiengesellschaft v. Beech Aircraft Corp.*[218] to determine whether they may pierce the corporate veil and hold that the parent does business in the forum based on the acts of its subsidiary. Just as the mere department test consolidated the various theories related to the doctrine of piercing the corporate veil, so too does the EBT consolidate and clarify the theories related to agency and jurisdiction.

Armed with both the mere department test and the EBT, courts would be able to decide these often thorny jurisdictional issues in a more orderly and predictable manner. Both judges and litigants will know in advance what evidence is relevant to the issue, providing all concerned parties a considerable savings in time and money. Prompt resolutions will also allow these cases to advance more quickly to the merits or to settlement, rather than remaining bogged down in endless procedure.

V. CONCLUSION

Agency, used as a metaphor for securing personal jurisdiction over a foreign corporation under NY CPLR section 301, is a vague and misleading legal theory. In applying this theory over the last twenty-five years, courts in both the state and federal systems have distorted the law of agency and have issued conflicting opinions, even when cases have had nearly identical facts. Since the leading "doing business" cases have held that issues of control by the principal over the agent are

218. 751 F.2d 117, 120-22 (2d Cir. 1984). *See supra* notes 27-29 and accompanying text.

not relevant for jurisdictional purposes pursuant to section 301, and the law of agency is concerned with assertions of vicarious liability rather than assertions of vicarious jurisdiction, the law of agency is an inherently inappropriate base for a jurisdictional theory.

Consequently, the agency theory, as it applies to section 301, should be abandoned. It should be replaced by a jurisdictional test that clearly, logically, and fairly determines whether a foreign corporation is doing business in New York based on the economic benefits it has received through the acts performed on its behalf by a corporation residing within the forum.

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