LEGAL CORNER

HARVEY MARS, ESQ.

Harvey Mars is counsel to Local 802. Legal questions from members are welcome. E-mail them to **HsmLaborLaw@HarveyMarsAttorney.com**. Harvey Mars's previous articles in this series are archived at **www.HarveyMarsAttorney.com**. (Click on "Publications & Articles" from the top menu.) Nothing here or in previous articles should be construed as formal legal advice given in the context of an attorney-client relationship.

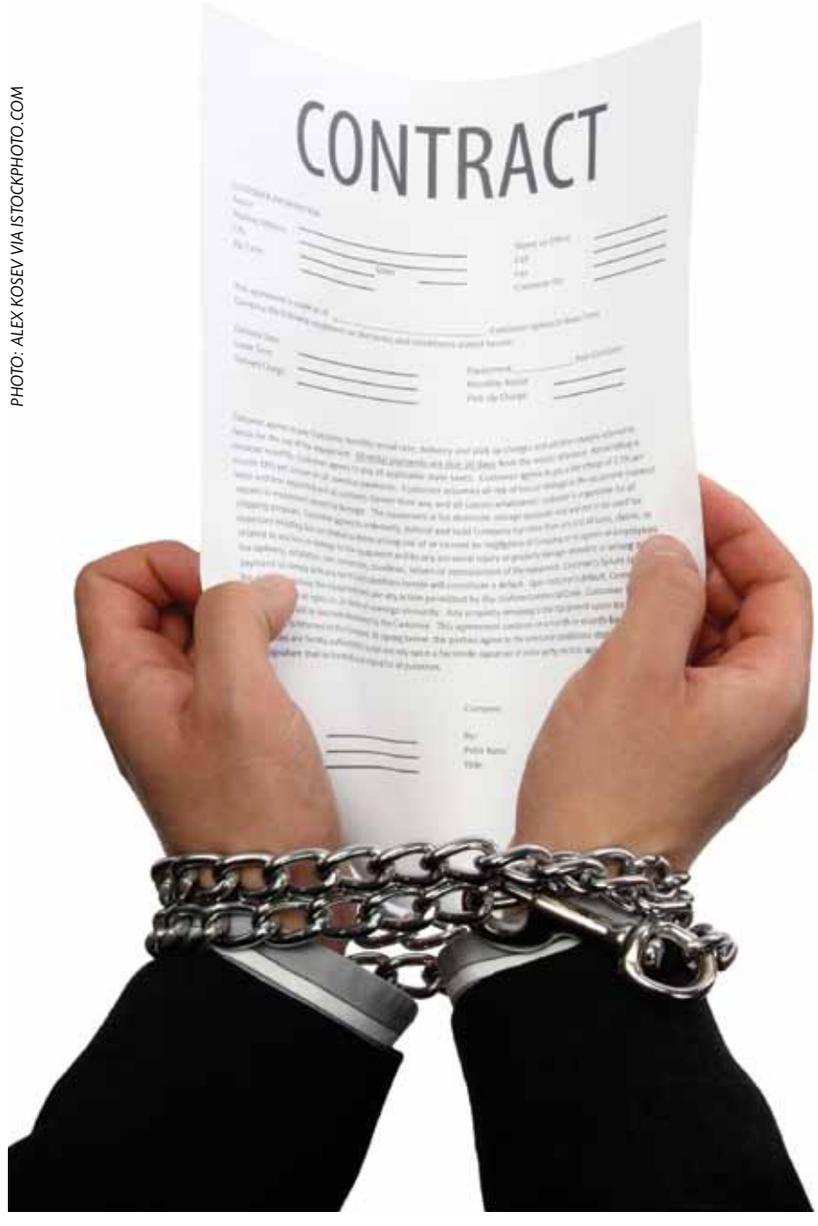

PHOTO: ALEX KOSEV VIA ISTOCKPHOTO.COM

WHEN YOUR HANDS ARE TIED

Does your employer have power over you even after you quit?

IF YOU'RE A synthesizer programmer and you program a new patch, effect or "plug in" for a producer, how long can that producer claim rights to it?

To put it another way: how much of your brain does your boss own after you leave a job?

There are certain instances when, in fact, your employer can actually have some power over you when you leave a job. For instance, let's say you teach piano students at a music studio. Your employer might make you sign a contract saying that if you leave the job, you won't take your students with you.

Or let's say you write a music curriculum for a music school. You might have to sign something that says you can't use that same curriculum elsewhere.

These kinds of contracts are known as **restrictive covenants**. Basically, they prohibit you from engaging in similar employment or utilizing information or trade secrets for a period of time after you leave a job.

Non-compete covenants are a particular type of restrictive covenant. In these contracts, you agree not to work for a competing employer or vie for contracts your former employer is attempting to obtain.

In my July 2007 column for Allegro "Are 'non-compete' contracts legal?" I discussed the legal standards courts use to judge whether these kinds of contracts are enforceable.

As I noted, these particular contracts are enforceable if their terms satisfy several conditions. The agreement must:

1. Be reasonable in its duration and geographic scope
2. Be necessary to protect the employer's legitimate interests
3. Not be harmful to the general public
4. Not be unreasonably burdensome to the employee. See *Reed, Roberts, Inc. v. Strauman, 40 N.Y. 2d 303 (1979)*.

A suit that I have recently successfully litigated demonstrates many of these principles in operation and is illustrative of some of the pitfalls that signing or drafting such agreements entails.

The suit, *Lionella Productions, Ltd and Andrew Barrett vs. James Mironchik, Index No. 108693/2008*, was litigated in the commercial division of the New York County Supreme Court.

DETAILS OF THE CASE

This case involved two Local 802 members. Andrew Barrett is a music synthesizer programmer who hired James Mironchik, an independent programmer, as his assistant.

Barrett claimed that Mironchik had utilized a piece of music software – called a "host plugin" – while he was working for him during a particular production, and now Mironchik was going to use the same software with a theatre competitor. Barrett claimed that this violated a non-compete clause that Mironchik had signed.

The covenant not to compete, which was admittedly drafted by Barrett without the assistance of counsel, entirely prohibited Mironchik from using this technology for live theatre projects he was involved in without Barrett's prior written consent.

The agreement also permitted Barrett to advise any of Mironchik's future or prospective employers of the existence of the covenant not to compete.

Barrett testified that he would not have discussed any of his programming techniques with Mironchik had Mironchik not signed the agreement.

Further, Barrett testified that the principal purpose of the agreement was to forestall competition, having realized that it was only a matter of time before other programmers would discover that host plugin software could be used in live theatre.

In addition to an unspecified amount of damages, Barrett also sought a permanent injunction requiring Mironchik to abide by the covenant indefinitely.

CONTINUED ON PAGE 31

IF THE BOSS CALLS YOU IN...

If you're a musician and you get called into a meeting with management where you think you are going to be disciplined, you should be aware of your right to have a union rep with you. The same applies to any employee in any setting, so long as there is either a union contract or bargaining relationship in place between your employer and the union. Below, we reprint an excerpt from a classic Allegro article from 2005 – written by the late Lenny Leibowitz – that explains your right to representation.

PHOTO: BREIGOUZE VIA ISTOCKPHOTO.COM

IN THE 1975 case NLRB vs. Weingarten 420 U.S. 251, the Supreme Court held that an employee who has been called into a meeting by the employer or a representative of the employer, and who "reasonably contemplates" that the meeting could lead to or result in discipline or dismissal, may request to be accompanied by a union representative. The employer must either accommodate that request, or terminate the interview.

"Requiring a lone employee to attend any investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate," said the court.

A QUICK SUMMARY

In brief, here are the salient features of the Weingarten rights. Musicians should remember the following:

- These rights apply only to an interview or interrogation that is attempting to develop the facts that might result in discipline to the interviewee;
- These rights do not apply where the decision to discipline has already been made and the meeting is called merely to announce it;
- The employee must request the representation, not the union, or anyone else – and the employer has no obligation to inform the employee of his or her rights. (It is not like the Miranda warning – "You have the right to remain silent" – which the police are required to relate to the interviewee.) If the employee doesn't ask for representation, he or she forfeits the right.
- The union representative may talk privately before, or even during the interview, but he or she may not disrupt the interrogation, for example, by instructing the employee not to answer.
- The union representative may be an official of the union, a member of the orchestra committee, or the entire orchestra committee.

One of the employer's options upon receiving a request from the employee is to simply stop the interview and impose discipline without it. This action, however, might give the union the right to argue at the arbitration that the employer violated the grievant's right to due process by failing to conduct a full and fair investigation before imposing the discipline.

Although for a short while the courts held that even nonunion employees had Weingarten rights, the Bush NLRB reversed that ruling and the reversal was upheld. Therefore, Weingarten rights are only available to union-represented employees.

If there are any questions about these rights, feel free to call the president's office at (212) 245-4802 or the office of Local 802 attorney Harvey Mars at (212) 765-4300.

Lenny Leibowitz (1938-2011) was the former counsel to Local 802 as well as a widely respected union attorney in the music industry.

Does your employer have power over you after you quit?

FROM PAGE 30

The suit commenced shortly after Mironchik allegedly utilized host plugin technology with one of Barrett's competitors on a theatrical production Barrett had unsuccessfully bid on.

When I examined the covenant, it was evident that it failed to satisfy the first requirement of the reasonableness standard employed by courts to determine whether a restrictive covenant was enforceable: the contract failed to specify its duration.

Since technology changes so rapidly, it was patently unreasonable to require a party to refrain from utilizing host plugin software forever.

However, that was not the end of the judicial inquiry.

Case law holds that even if a restrictive covenant is unenforceable as originally drafted, it may be revised by the court so that more reasonable terms could be inserted.

Thus, Barrett admitted that the fact that the agreement contained no time limitation rendered it unenforceable. However, he claimed that this defect could simply be corrected by inserting a three-year time limitation in the agreement (which was the amount of time the case had been pending at the time I sought its dismissal).

Fortunately for Mironchik, Barrett's argument was not a persuasive one. A leading New York Court of Appeals case has held that in order to be revised, a covenant not to compete must not be imposed as a condition of the defendant's initial employment and must not be part and parcel of a general plan to forestall competition. *BDO Seidman v. Hirshberg, 93 NY 2d 382 (1999)*.

Based upon Barrett's testimony, Justice Barbara Kapnick held that Barrett's covenant not to compete could not be corrected and thus was entirely unenforceable.

Justice Kapnick wrote that "unlike the case in *BDO Seidman*, the facts and circumstances weigh against partial enforcement, since the covenant was imposed as a condition of defendant's initial employment, not in connection with a promotion to a position of responsibility or trust and there is evidence that the agreement was part of a general plan to forestall competition."

On July 13 – roughly four years after the suit was commenced – the suit was dismissed in its entirety.

While this case had a fortunate outcome for the defendant, it could have concluded differently had the agreement contained a reasonable duration or if it had been offered to the defendant in exchange for a position of greater responsibility.

Bottom line: before signing a restrictive covenant, you have to be extremely cautious. If the agreement is a reasonable one, it may impact your future employment for many years to come.

Furthermore, if you have drafted a restrictive covenant without the benefit of counsel, you run the risk, as Barrett did here, of having a court invalidate it in its entirety, thus leaving your creative work unprotected. It is always best to have such agreements revised and reviewed by knowledgeable counsel.

For those interested in reading the decision it can be obtained online at: **http://bit.ly/Q5M9zK**