WASHINGTON MONITOR

FTC denies request for guidelines requiring disclosure of product placements in television programs

The Federal Trade Commission has denied a request that it adopt guidelines that would have required advertisers to disclose product placements in television programs using "the prominent superscript 'ADVERTISEMENT'" on screen. The request was filed by Commercial Alert, an Oregon-based organization cofounded in 1998 by Ralph Nader and Commercial Alert's executive director, Gary Ruskin.

According to Commercial Alert, "product placements may deceive consumers by blurring the line between advertising and programming." In its request to the FTC, Commercial Alert argued that "the failure to disclose that advertisers have paid for their products' appearances in programming constitutes an unfair or deceptive practice in violation of Section 5 of the Federal Trade Commission Act."

Commercial Alert cited, as examples of unfair or deceptive product placements, "American Idol" in which judges drank from cups with Coca-Cola logos, "Who Wants to Be a Millionaire" in which host Regis Philbin responded to a contestant's request to call a friend for help by saying "Let's go to our friends at AT&T," "The Best Damn Sports Show Period" in which hosts drank Snapple beverages while the Snapple logo appeared as part of the set backdrop, and Revlon cosmetics in "All My Children."

Practices are "deceptive" under section 5 of the FTC Act if they are likely to be misleading and affect consumers' decisions concerning advertised products or services. Practices are "unfair" if they are likely to cause to substantial, unavoidable injury to consumers, and do not benefit consumers or competition.

The FTC's Associate Director for Advertising Practices, Mary K. Engel, responded to Commercial Alert's request for guidelines by writing (in a letter to Ruskin) that even "assuming" that "consumers are not aware when an advertiser has paid for a product to appear in programming, it does not appear that failure to identify the placement as advertising violates Section 5 of the FTC Act."

It doesn't, Engel explained, because "in product placement, few objective claims appear to be made about the product's performance or attributes." Since the "principle reason for identifying an advertisement as such is that consumers may give more credence to objective representations about a product's performance or other attributes if made by an independent third party than if made by the advertiser itself," the lack of objective claims in product placements meant that "the rationale for disclosing that an advertiser paid for a product placement . . . is absent."

For this reason, Engel concluded that no Guideline was warranted. "If, through product placement, false or misleading objective, material claims about a product's attributes are made, the Commission can take action against the advertiser through an enforcement action. . . ," she added.

Letter to Commercial Alert (FTC, Feb. 10, 2005), available at http://www.ftc.gov/os/closings/staff/050210productplacemen.pdf

American Airpower Heritage Museum may register "pin-up girl" drawings as trademarks, despite similarities to works by artists Alberto Varga and Gil Elvgren, Trademark Trial and Appeal Board decides

Artists Alberto Varga and Gil Elvgren drew "pin-up girl" artworks in a well-known and recognizable style. It is a style that is referred to by some as "nose art," because U.S. servicemen painted similar illustrations on the noses of their aircraft during World War II. Perhaps for that reason, the American Airpower Heritage Museum decided to register similarly-styled illustrations as Museum trademarks. At first, however, the Museum was not successful.

A Trademark Office Examining Attorney refused to register the illustrations, on the grounds that they falsely suggest a connection with Varga and Elvgren, and thus were not eligible for registration under section 2(a) of the Trademark Act. On appeal, however, the Museum finally succeeded. In an opinion marked "Not Citable as Precedent," the Trademark Trial and Appeal Board decided that the illustrations are eligible for registration, and thus it reversed the Examining Attorney's refusal to do so.

For a mark to be ineligible for registration, because it falsely suggests a connection with some person: (1) the mark must be the same as or a close approximation of the person's name or identity; (2) the mark must point uniquely and unmistakably to that person; (3) the person must not be connected with the goods or services of the

applicant; and (4) the person's name or identity must be of sufficient fame that when it is used as a mark for goods or services, a connection with that person would be presumed by purchasers. In this case, three of the four factors were not satisfied.

The Board acknowledged that the Museum's illustrations were "reminiscent" of Vargas' and Elvgren's works, but they were "not the same" as any specific painting. "Moreover," the Board added, "there is scant evidence that the 'pin-up girl' painting(s) of either Vargas or Elvgren amounted to the artist's name or identity in the minds of consumers [because] there are simply hundreds of 'pin-up girl' art pieces." Thus, the Museum's proposed marks were not "a close approximation of [either] artist's previously used name or identity."

The Board also concluded that the "record clearly does not establish that 'pin-up girl' art in general is uniquely and unmistakably associated with either artist, Vargas or Elvgren. To the contrary, it is clear . . . that numerous artists were involved in painting 'pin-up girls,' particularly in the 1940s, which was the time during which applicant's various 'nose art' design marks were originally painted on the fuselages of airplanes."

Finally, the Board said that "While there is no doubt that many of the 'nose art' paintings on the fuselages of airplanes during World War II were inspired by magazine and calendar 'pin-up girl' art, and that Alberto Vargas' works in particular were widely copied therefor, the record does not establish that either Alberto Vargas or Gil Elvgren were sufficiently famous that consumers would view [the Museum's] marks . . . and presume a connection with [either] artist."

American Airpower Heritage Museum was represented by Wendy K. B. Buskop of Buskop Law Group. Margery A. Tierney was the Trademark Office's Examining Attorney.

In re American Airpower Heritage Museum, No. 76144075, (TTAB 2004), available at www.uspto.gov/web/offices/com/sol/foia/ttab/2aissues/2004/76144075.p df

College radio stations to pay ASCAP, BMI and SESAC slightly more for compulsory public performance licenses as a result of cost-of-living adjustment, Copyright Office announces

Most college and university radio stations are paying slightly more this year, than they did last, for their ASCAP, BMI and SESAC music public performance licenses. The Copyright Office announced a "Cost of Living Adjustment" that increased by 3.2% the compulsory license fees payable by broadcasters licensed to nonprofit educational institutions (that are not affiliated with National Public Radio), effective January 1, 2005.

The compulsory license in question is found in section 118 of the Copyright Act. It permits public broadcasters to perform nondramatic musical compositions in return for license fees fixed by Copyright Office regulation, rather than by negotiation. The fee is adjusted annually to reflect increases in the cost of living.

The fees that college radio stations must pay under the compulsory license remain quite modest. As a result of the Copyright Office's recently-announced cost of living adjustment, for the year 2005, those fees will be \$262 each for ASCAP and BMI and \$85 for BMI. The new rates will be codified in Copyright Office Regulations appearing at 37 CFR section 253.5.

Cost of Living Adjustment for Performance of Musical Compositions by Colleges and Universities, 69 Fed.Reg. 69822 (Copyright Office, Library of Congress 2004), available at http://www.copyright.gov/fedreg/2004/69fr69822.html

INTERNATIONAL DEVELOPMENTS

Toronto's "Globe and Mail" newspaper infringed freelancer's Canadian copyrights by including articles in electronic databases, unless freelancer impliedly licensed electronic republication, Ontario Court of Appeal decides

Canadian author Heather Robertson is doing for her nation's freelance journalists what American journalist Jonathan Tasini did for freelancers in the United States. Robertson is spearheading a legal battle in Canadian courts to establish the principle that newspapers and other periodicals may *not* reproduce freelance articles in electronic databases, without licenses from the journalists who wrote them. So far, Robertson is winning her case against Toronto's *Globe and Mail* newspaper, just as Tasini won his case against the *New York Times* (*ELR* 23:3:9). But Robertson's case isn't over quite yet.

Robertson is the author of the book *Driving Force:* The McLaughlin Family and the Age of the Car, an excerpt from which was published in the October 1995 edition of the Globe and Mail. She also wrote a book review of Ellen Fairclough's book Saturday's Child: Memoirs of Canada's First Female Cabinet Minister which was published in the December 28, 1995 edition of the Globe. Both pieces were included – without Robertson's express consent – in the electronic version of the Globe which is contained in three databases: Info Globe Online, the Globe's CD-ROM, and the electronic version of the Canadian Periodic Index.

Robertson filed a copyright infringement suit against the *Globe*'s publisher which responded with two defenses. First, it argued that it owns a "collective" copyright in the *Globe*, and that copyright authorizes it to republish the newspaper in electronic newspapers. Second, it argued that even if its collective copyright did not authorize database republication, Robertson impliedly licensed the *Globe* to republish her contributions electronically, when she authorized their original publication in print. In reply, Robertson argued that an authorization to publish in print and republish electronically would be the conveyance of a "proprietary" interest in her copyrights, and as such would have had to have been in writing to be valid, under Canadian copyright law.

A trial court ruled – in Robertson's favor – that the publisher's collective copyright did not authorize the republication of Robertson's pieces in the kinds of databases in which they appeared. On the other hand, the trial court also ruled – in the publisher's favor – that a license to publish in print and republish electronically would *not* have to be in writing. And the trial court ruled that a trial would be necessary to determine whether Robertson had in fact impliedly licensed electronic republication, at the time she authorized print publication of her pieces.

Both sides appealed the first two rulings (though not the third). In a 2-to-1 opinion by the Court of Appeal of Ontario, the trial court's decision has been affirmed.

Writing for the majority, Justice Karen M. Weiler held that the three databases in which Robertson's pieces appeared did not, "on a qualitative basis," reproduce "any substantial part" of the *Globe*, so the publisher's collective copyright did not authorize it to include Robertson's pieces in those databases.

Justice Weiler also agreed with the trial court that a simultaneous license of print and electronic rights to articles would not convey a "proprietary" interest in their copyrights, so such a license could be valid even if it were not in writing.

The case has therefore been returned to the trial court, for a trial on the question of whether Robertson in fact granted the *Globe*'s publisher electronic database republication rights, by implication, at the time she first authorized print publication.

Court of Appeal Justice Robert Blair dissented. In his opinion, the databases did reproduce a "substantial part" of the *Globe*, and thus he would have reversed the trial court and ruled in favor of the publisher.

Robertson was represented by Michael McGowan. The publisher of the Globe was represented by Sheila R. Block.

Robertson v. The Thomson Corp., Court of Appeal of Ontario No. C38148 (Ont.Ct.App. 2004), available at www.ontariocourts.on.ca/decisions/2004/october/C38148.htm

RECENT CASES

Miramax movie "Rounders" did not infringe copyright to screenplay "The Shell Game," Court of Appeals affirms; but screenwriter's implied contract claim is not preempted by Copyright Act, so appellate court reverses dismissal of that claim

Screenwriter Jeff Grosso will be allowed to prove, if he can, that Miramax "stole the ideas and themes" of his screenplay "The Shell Game" when it produced the movie "Rounders." A federal Court of Appeals has held that Grosso alleged a valid claim for breach of implied contract under California state law. And it held that Grosso's state law claim is not preempted by the Copyright Act

In an opinion by Judge Mary Schroeder, the appellate court acknowledged that the Copyright Act does preempt state law claims that assert rights in copyrightable works that are equivalent to the rights protected by federal copyright law. Unjust enrichment claims are an example of state law claims preempted by the Copyright Act, Judge Schroeder noted.

On the other hand, the judge reasoned, Grosso's state law implied contract claim was not preempted, because it requires him to prove an "extra element" that federal copyright law alone would not: namely, that he submitted "The Shell Game" to Miramax under circumstances that implied that Miramax would pay him, if it used his screenplay.

Federal District Judge Audrey Collins had earlier dismissed Grosso's lawsuit against Miramax, in response to its motion for summary judgment, because Judge Collins concluded that Grosso's implied contract claim was preempted. As a result, the appellate court reversed that ruling and remanded the case to the District Court for further proceedings.

Miramax did not come away completely empty-handed. In addition to his implied contract claim, Grosso also alleged that "Rounders" infringed the copyright to his "Shell Game" script. Judge Collins dismissed that claim too. And the appellate court affirmed that ruling. It did so, Judge Schroeder explained, because it agreed that Miramax's movie and Grosso's script were not substantially similar, because they do not have the same themes, settings, characters, or plots. "Both works have poker settings but the only similarities in dialogue between the two works come from the use of common, unprotectible poker jargon."

Grosso was represented by John A. Marder of Manning & Marder Kass Ellrod Ramirez in Los Angeles. Miramax was represented by Richard L. Charnley of Nelson Thompson Pegue & Thornton in Santa Monica.

Editor's note: This opinion breaks no new ground with its ruling that implied contract claims are not preempted by the Copyright Act. Though some earlier decisions ruled otherwise, they were wrong. Implied contract claims always require proof of something that copyright law alone does not: an actual agreement between two parties who are in privity with one another (even if the agreement is implied from the circumstances). Nevertheless, District Judge Collins was right to dismiss the entire case, including the implied contract claim; and the appellate court was wrong in reversing the dismissal of the implied contract claim, for a reason that has nothing to do with preemption. The question of whether an implied contract exists is entirely separate from whether it has been breached. Even assuming that Grosso alleged sufficient facts to get to a jury on the question of whether an implied contract exists between himself and Miramax, Grosso still must prove that Miramax breached the agreement. That, however, is something he can't do, given that Judge Collins found, and the appellate court agreed, that "Rounders" and "The Shell Game" are not substantially similar. This is so, because in order for an implied contract to be breached under California law, the two works must be "substantially similar" - not in the copyright sense of that phrase (which requires substantial similarity of copyright-protected material), but in the everyday sense of the word (which allows consideration of unprotected material as well). (See, e.g., Stanley v. CBS, 35 Cal.2d 653, 660 (1950); and Lionel S. Sobel, The Law of Ideas, Revisited, 1 UCLA ENTERTAINMENT LAW REVIEW 9, 77-87 (1994).)

Grosso v. Miramax Film Corp., 383 F.3d 965, 2004 U.S.App.LEXIS 18909 (9th Cir. 2004)

New Line wins dismissal of suit asserting that its Adam Sandler film "Little Nicky" infringed former hockey player's poem and screenplay "The Keeper"

Douglas Alan Stromback, a former professional hockey player, sued New Line Cinema claiming its movie "Little Nicky" infringed his poem and screenplay "The Keeper." The District Court granted summary judgment to New Line, holding that no reasonable jury could find that New Line's movie is substantially similar to Stromback's poem and screenplay. Stromback appealed, but without success.

Stromback argued that in 1999 he shared his poem and screenplay with Larry Hess and John Apothaker who allegedly gave copies to New Line. Subsequently, in 2000, New Line Cinema released its movie "Little Nicky," starring Adam Sandler. After viewing the film, Stromback claimed that "Little Nicky" contained substantial similarities to "The Keeper."

To establish copyright infringement, a plaintiff must prove that: (1) the defendant had access to the allegedly-infringed work, and (2) the defendant's work is substantially similar to protected expression in the allegedly-infringed work. New Line conceded the issue of access, so Judge Gordon Quist (sitting by designation on the Court of Appeals) focused solely on the issue of substantial similarity.

Applying the "ordinary observer test," Judge Quist held that the two works were "completely dissimilar in both their overall look and feel and in their constituent expressive elements." The judge also found that the "themes, plots, moods, and settings of the works were dissimilar." "The Keeper" is a dark, humorless story whose theme is that "power and success in life can be attained through rhyming." By contrast, "Little Nicky" is a comedy whose theme is that "good should and will prevail over evil."

Although Judge Quist acknowledged that there were a few similarities, such as "references to Hell and the devil and interracial families," he nonetheless confirmed the District Court's finding that "a reasonable person could not conclude that New Line Cinema copied *protected* expression from 'The Keeper.'"

Stromback further argued that New Line's admission that it had access to "The Keeper" precluded a finding of no substantial similarity as a matter of law. Judge Quist disagreed stating that "[n]o amount of proof of access will suffice to show copying if there are no similarities."

Judge Quist also affirmed the District Court's denial of Stromback's request for discovery of the prior versions of the screenplay "Little Nicky" in order to determine whether these prior versions infringed "The Keeper." It held that only the version of the allegedly infringing work presented to the public should be considered, not earlier drafts of the screenplay.

Stromback also challenged the District Court's ruling that the Copyright Act preempted his state law claims of misappropriation, interference with prospective economic advantage, and misappropriation of trade secrets. Judge Quist affirmed the preemption of the misappropriation and interference claims, but concluded that Stromback's misappropriation of trade secrets claim was not preempted. Nevertheless, the judge held that the

claim was properly dismissed because "The Keeper" was not a trade secret as a matter of law. A trade secret is premised on the theory that it derives its value from its secrecy; but Judge Quist ruled that "The Little Keeper" did not have independent value from its secrecy. Rather, the only possible way the work would have "independent economic value" is through public exploitation.

Stromback was represented by Andrew J. Kochanowski of Sommers Schwartz Silver & Schwartz in Southfield. New Line Cinema was represented by Herschel P. Fink of Miller Schwartz & Cohn in Detroit. (MLS)

Strombeck v. New Line Cinema, 384 F.3d 283, 2004 U.S.App.LEXIS 19229 (6th Cir. 2004)

Music producer and publisher Carl Jackson must re-assign his 50% copyright interest in "Real Live Woman" to country songwriter Bobbie Cryner, because of "reclamation" clause in Cryner's contract with Famous Music from whom Jackson acquired his interest

"It may not be fair, but it is the law." That's what Tennessee Court of Appeals Judge William Cain said as he regretfully affirmed the trial court's holding that Carl Jackson, who does business as Lonesome Dove Music, is bound by the "reclamation of rights" provision in the contract between Famous Music Corporation and songwriter Bobbie Cryner.

Jackson "discovered" Cryner, a waitress whom he took under his wing and for whom he negotiated a valuable song-writing contract with Famous Music. Jackson entered into a separate contract with Famous Music, which provided that Famous Music would assign to Jackson 50% of its copyright ownership in Cryner's compositions in exchange for his services as a coproducer.

However, in the Cryner-Famous Music contract, there was a "reclamation" clause that required Famous Music to re-assign to Cryner all compositions that had not been commercially exploited once the contract had expired. Therefore, after the contract expired, Famous Music re-assigned to Cryner its 50% of the copyrights in her unexploited songs. Jackson, however, refused to re-assign his 50% interest, claiming that the reclamation clause did not apply to him.

One of these unexploited compositions was "Real Live Woman," which country vocal artist Trisha Yearwood made a huge success after Cryner reclaimed the copyright interest.

Judge Cain found that the Cryner-Famous Music contract was unambiguous and that Jackson not only was

familiar with its terms, he specifically negotiated the reclamation clause, the very clause "which brings him grief." Although Jackson was not a party to the Cryner-Famous Music contract, he too was bound by its terms because he was an assignee and thus "stand[s] in the shoes of" his assignor (Famous Music).

Judge Cain determined that as an assignee, Jackson could not acquire from Famous Music any rights greater than the rights Famous Music had acquired under the Cryner contract. Therefore, like Famous Music, Jackson was bound by the reclamation clause. Though the terms of the contract were detrimental to Jackson who received no monetary gain for single-handedly creating Cryner's career, Judge Cain stated (in an opinion marked "not selected for publication"), "It may not be fair, but it is the law. And . . . it is with regret that I issue this opinion."

Carl Jackson was represented by James E. Zwickel in Nashville. Bobbie Cryner was represented by Jay Scott Bowen and Joshua E. Perry in Nashville. *(MLS)*

Child Bride Music, Inc. v. Jackson, 2004 Tenn.App.LEXIS 271 (Tenn.App. 2004)

Bridgeport Music's aggressive pursuit of unsuccessful copyright infringement suit did not, by itself, justify large attorneys fees award to Sony Music, federal appeals court rules

Bridgeport Music lost a copyright infringement suit it had filed against Sony Music. And for a while, it looked as though Bridgeport would pay dearly for that loss. It still may, though not necessarily.

After federal District Judge Thomas Higgins granted Sony's summary judgment motion, the judge also found that Sony was the prevailing party and thus was entitled to its attorneys fees and costs. Because Bridgeport's aggressive prosecution of its claims resulted in extensive motion practice over minor issues, increasing attorney fees on both sides, Judge Higgins awarded Sony \$143,503.59 in fees and \$8,339.65 in costs.

On appeal Bridgeport argued that the District Court's award was impermissibly punitive and failed to consider the disparity of financial resources between Bridgeport and Sony.

In an opinion marked "Not Recommended for Full-Text Publication," Court of Appeals Judge Ralph Guy, Jr., agreed that Sony was entitled to fees and costs. However, Judge Guy said an award of fees must be consistent with the Copyright Act and consider the relevant factors. Also, fees cannot be awarded simply because of voluminous pleadings or annoying conduct by counsel, Judge Guy ruled.

For these reasons Judge Guy vacated the award and remanded the case for further fact finding.

Bridgeport was represented by Richard S. Busch of King & Ballow in Nashville. Sony was represented by Timothy L. Warnock of Bowen, Riley Warnock & Jacobsen in Nashville. (MAR)

Bridgeport Music, Inc. v. Sony Music Entertainment, Inc., 114 Fed.Appx. 645, 2004 U.S. App. LEXIS 13782 (6th Cir. 2004)

Arista Records may sue Spanish website Puretunes.com in United States federal court, because downloads by D.C. residents gave court personal jurisdiction

Federal District Judge Royce Lamberth ruled that Arista Records has established personal jurisdiction over Sakfield Holding Company, which is the owner and operator of the Spanish website Puretunes.com. Although Sakfield is located in Madrid, Judge Lamberth found that Arista successfully proved both specific and general jurisdiction over Sakfield.

Arista and several other well-known record companies alleged that Sakfield owned and operated Puretunes, a website that allowed people in the District of Columbia to download copyrighted musical works without authorization.

The judge concluded that the court had specific jurisdiction over Sakfield because Arista produced a declaration by a D.C. resident who claimed he downloaded music files from Puretunes. "A single act by defendant in the jurisdiction can be sufficient to constitute 'transacting business' and thereby confer jurisdiction," opined Judge Lamberth. Even though the transaction took place in cyberspace, this is not enough to ward off jurisdiction.

Arista also established that the court had general jurisdiction over Sakfield, which requires proof that the defendant is "doing business" in the District. Judge Lamberth found that Sakfield's Puretunes website allowed customers to download music files 24 hours a day, which constitutes "purposeful, active, systematic, and continuous activity," regardless of whether the residents subscribed to paid plans or not. But, to determine if Sakfield was "doing business" in the District of Columbia, the judge needed to examine the frequency and volume of the firm's transactions with District residents." However, this information was not available because Sakfield destroyed the data stored on its servers, even though it knew litigation was imminent. Although a computer expert was able to extrapolate some data that showed approximately 241 Puretunes users resided in the District and downloaded approximately 20,000 music files, Sakfield attacked the methodologies used to find this information. Judge Lamberth held that "[d]estruction of evidence raises the presumption that disclosure of the materials would be damaging." Therefore, he found this evidence sufficient to establish that Sakfield had maintained continuous and systematic contacts with the District of Columbia.

Judge Lamberth also noted that Sakfield failed to give Arista information about credit card transactions for purchases made on the Puretunes website, as the court had previously ordered. Because of Sakfield's failure to comply with the court order, Judge Lamberth inferred that the credit card records included transactions with D.C. residents, thus holding that Arista met its burden of establishing personal jurisdiction over Sakfield.

Arista Records and the other record companies were represented by Steven B. Fabrizio of Jenner & Block, and by Dean C. Garfield of the Recording Industry Association of America in Washington, D.C. Sakfield Holding Company was represented by Ralph Louis Lotkin in Washington, D.C. (MLS)

Arista Records, Inc. v. Sakfield Holding Company, 314 F.Supp.2d 27, 2004 U.S.Dist.LEXIS 7023 (D.D.C. 2004)

Rap musician "Project Pat" Houston was properly convicted of possessing a firearm, despite prosecutor's questions about "gangsta rap" and songs about guns, federal appeals court affirms

Rap musician "Project Pat" Houston was arrested in Memphis when a police officer found two loaded handguns in his black Cadillac SUV. After a jury convicted him, Houston filed a motion for a new trial and for judgment of acquittal. Federal District Court Judge Robert H. Cleland denied both motions. Houston appealed.

On appeal Houston argued that questioning prospective jurors during voir dire about their reactions to "gangsta rap" was extraneous and prejudicial. Houston's defense at trial was that the guns were not his and he was completely unaware of their location in his vehicle

In an opinion marked "Not Recommended for Full-Text Publications, Court of Appeals Judge Martha Craig Daugherty ruled that Houston's connection with "gangsta rap" was relevant because during Houston's arrest he told police that he needed the guns for "protection" because he was in the "dangerous" business of rap music.

Houston also argued that the District Court should have declared a mistrial when the prosecutor asked a defense witness if he knew whether Houston liked guns or wrote songs about guns. Judge Daugherty ruled that the isolated reference to Houston's songs about guns was not so egregious as to require a mistrial because when defense counsel objected, the prosecutor immediately dropped the line of questioning.

For these reasons Judge Daugherty affirmed Houston's conviction for being a felon in possession of a firearm.

Houston was represented by John E. Herbison in Nashville. The U.S. was represented by Tony R. Arvin, Assistant U.S. Attorney in Memphis. (MAR)

U.S. v. Houston, 110 Fed.Appx.536, 2004 U.S. App. LEXIS 19196 (6th Cir. 2004)

Reebok not directly or secondarily liable for others' television commercials or websites using "Crossover King" trademark, federal District Court decides

Is Allen Iverson the "Crossover King?" Iverson once was a poverty-stricken boy destined to become a basketball player for the Philadelphia 76ers with a Reebok endorsement agreement.

The "Crossover King" trademark is a basketball player in action with a crossover dribble, moving ball, and name "Crossover King." Gary and Maurice Sidney own the "Crossover King" trademark and their company, SB Designs, markets basketball apparel with it. SB Designs and Reebok discussed, but never came to an agreement, allowing Reebok to use "Crossover King" with Iverson endorsements, although Reebok had physical access to the trademark's art pieces.

When commercials and sponsored websites — such as those of Iverson's promotional company, "Crossover Promotions" — began using the "Crossover King" trademark with Iverson, SB Designs sued Reebok for trademark infringement. Reebok argued there was no direct infringement and it should not be held secondarily liable (vicarious or contributory) for Crossover Promotions' or any other alleged third party website infringers.

Federal District Court Judge Robert W. Gettleman found Reebok never used "Crossover King" trademarks in *its* commercials, and so granted Reebok's motion for summary judgment. The judge also ruled Reebok is not *vicariously* liable because the "mere existence of a relationship" or "prior dealings" with alleged infringing websites is not enough. Also, there was no evidence Reebok owned, endorsed, or otherwise affiliated itself with these websites. There was no *contributory* liability because there was no evidence: that Reebok supplied products to an alleged infringer; or that Reebok knew or should have known of any infringement; or that Reebok controlled or monitored alleged infringing websites or materials.

Judge Gettleman therefore granted summary judgment in favor of Reebok on both vicarious and contributory liability.

SB Designs was represented by Christopher V. Langone of Langone Law Firm in Chicago. Reebok was represented by Charles A. Laff of Michael Best & Fredrich in Chicago. (SG)

SB Designs v. Reebok Int'l, Ltd., 338 F.Supp.2d 904, 2004 U.S.Dist.LEXIS 19669 (N.D.III. 2004)

Ruling that the NCAA's "Two in Four Rule" violates federal antitrust law is reversed by federal appeals court, because promoters of college basketball tournaments failed to define relevant market

The NCAA has achieved a significant victory against promoters of college basketball tournaments who had objected to the NCAA's "Two in Four Rule."

The "Two in Four Rule" allows Division I college basketball teams to compete in no more than two non-NCAA tournaments every four years. In 2003, federal District Judge Edmund Sargus enjoined the NCAA from enforcing the rule, because he found there was no offsetting benefit to justify the substantial reduction in the number of school-scheduled games caused by the rule (*ELR* 25:8:15). However, a federal Court of Appeals has reversed.

District Judge Sargus had held that a formal market analysis was unnecessary because the promoters showed that the rule produced anti-competitive effects. Court of Appeals Judge Alice Batchelder disagreed. The relevant market was not apparent, so the effect on customers was impossible to assess, said Judge Batchelder.

Judge Batchelder held that Judge Sargus should have evaluated the NCAA's rule under the full Rule of Reason analysis rather than the quick-look Rule of Reason analysis he had used. The full Rule of Reason requires that the promoters establish significant anticompetitive effects within the relevant market. Judge Batchelder held that the promoters failed to establish the relevant market and the record was not sufficient to support Judge Sargus' decision.

The promoters were represented by Wilber Benjamin Markovits of Markovits & Greiwe in Cincinnati. The NCAA was represented by Gregory L. Curtner of Miller Canfield Paddock & Stone in Ann Arbor. (MAR)

Worldwide Basketball and Sports Tours v. National Collegiate Athletic Association, 388 F.3d 955, 2004 U.S.App.LEXIS 23817 (6th Cir. 2004) Michigan football camp coaches not liable for death of high school player under state law allowing tort actions against governmental employees only for gross negligence and only when the tortious act in question is the proximate cause of the injury

High school football player Jeremy Tarlea collapsed after a one-and-half-mile run at a three-day, pre-season football conditioning camp in Michigan on a humid August in 2002, and he died one week later at the University of Michigan Hospital, never having regained consciousness. Soon after, his parents brought suit against the high school coaches who oversaw the training camp. The coaches, Jack Crabtree, Mike Price and Randy Dunny, moved for summary disposition pursuant to Michigan's governmental tort liability act, which gives government employees immunity from such actions, with limited exceptions.

The trial court denied their motion, concluding it was up to a jury to decide if the coaches, who were governmental employees under Michigan law, were entitled to protection under the tort liability act. However the three coaches appealed to the Court of Appeals of Michigan; and it ruled in their favor, dismissing the claims made by Tarlea's parents.

In looking at the facts of the tragic case, Judge Henry William Saad was unable to see how the higher level of scrutiny required by the governmental tort liability act could be met. Michigan statutory law says "[t]hat a governmental employee is not responsible in tort for personal injuries unless the governmental employee is grossly negligent," defined as "[c]onduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." In addition, the Michigan Supreme Court has added that "[n]o liability attaches to the misconduct of a governmental employee unless the tortious behavior is 'the proximate cause' of the plaintiff's injuries, that is to say 'the one most immediate, efficient, and direct cause[.]""

Judge Saad noted that the one-and-a-half-mile run was an optional part of the camp's training; that "[t]he coaches made sure there was water available throughout the camp while the students were exercising"; that "[t]he coaches never discouraged students from resting or taking water breaks"; and that, during the run, "[t]he coaches stationed themselves around the running track so they could observe the students." Addressing the state of the weather - 71 degrees Fahrenheit with a relative humidity of 93 percent – on the day Tarlea collapsed, the judge noted "[t]he evidence suggested nothing inappropriate about running in weather conditions of the day[.]" He said: "[N]o reasonable person could conclude that [the coaches] acted with 'reckless disregard."" Therefore, the three could not be found grossly negligent.

The judge noted that even if gross negligence had been found, the issue of proximate cause was a blind alley argument. "No reasonable person could find that the coaches' alleged misconduct was *the* proximate cause of Tarlea's death." In coming to this conclusion, Judge Saad noted, along with other variables, that Tarlea chose to run though he wasn't required to; that the boy could have stopped any time he chose; and the fact that Tarlea's parents withheld consent for an autopsy procedure on their son. "Indeed, without an autopsy, to say precisely what caused Tarlea's death is pure speculation."

The Tarleas were represented by Frederic M. Rosen in Detroit. Crabtree, Price and Dunny were represented by Timothy J. Mullins of Cox Hodgman & Giarmarco in Troy. (AMF)

Tarlea v. Crabtree, 687 N.W.2d 333, 2004 Mich.App.LEXIS 1894 (Mich.App 2004)

Court denies Tetris videogame creator's request for preliminary injunction against Games International, in case alleging infringement of copyright and trademark rights, and enjoins creator from interfering with Games International merchandising rights

It's game over for *Tetris*' merchandising rights, but all other intellectual property rights are still in play.

While employed at the Computer Center of the Academy of Sciences of the U.S.S.R., Alexey Pajitnov "created, named and developed *Tetris* in 1984 and 1985, now recognized as one of the most popular video games in the world." As a Soviet citizen, Pajitnov was unable to exploit the game, but he was allowed to permit its exploitation by the Soviet government. In 1986 Pajitnov did just that by granting rights to his employer, the CCAS; yet this is where the story gets messy.

CCAS claims it was granted *Tetris*' rights in perpetuity while Pajitnov claims he limited the grant to 10 years. This grant was confirmed by numerous conflicting agreements, letters and registrations. The only thing clear about these subsequent affirmations is that Pajitnov excluded the merchandising rights from the original grant and subsequently executed an operative legal document assigning *Tetris*' merchandising rights to CCAS with no time limitation.

Complicating the matter further, CCAS subsequently granted its rights (whatever they were at the time) to "the then export agency of the Soviet Union . . . Soviet Elorg, to act as CCAS's licensing agent for transactions abroad." Further, in March of 1989, Soviet Elorg granted Nintendo Entertainment Systems an

exclusive worldwide license for 5 years. As the time limit approached on both the Nintendo grant and Pajitnov's alleged limited grant to CCAS, both Pajitnov and Soviet Elorg "prepared to retake control over the *Tetris* property rights in accordance with their respective views on the duration of the original grant by Pajitnov."

In an effort to resolve the issue, Pajitnov and Soviet Elorg, through their newly created corporate entities Blue Planet Software and Games International, agreed to create a new partnership called The Tetris Company that would hold the ownership rights that each party contended it possessed. Disputes within The Tetris Company arose and Pajitov withdrew. He requested a preliminary injunction to prevent Soviet Elorg from casting a "substantial cloud on the title of the property." Soviet Elorg counterclaimed for the same.

Judge Sidney H. Stein denied both preliminary injunction requests because "each side finds some support for its reasonable and respective ownership claims" and thus "it cannot be said at this point in the litigation that either side is likely to succeed on the merits. . . ."

Judge Stein found the original grant from Pajitov to CCAS to be ambiguous and thus will use the parties' intent to resolve the ambiguity, later in the case. Further, the judge noted that both trademark and copyright registrations, which Soviet Elorg completed and claimed proved its ownership, are prima facie evidence of ownership yet they don't supersede contractual agreements and thus aren't controlling.

However the subsequent merchandising rights assignment was not ambiguous. Therefore that agreement controls, and Judge Stein granted Soviet Elorg's preliminary injunction request to prevent Pajitnov from interfering with *Tetris'* merchandising rights.

Blue Planet Software and Alexey Pajitnov were represented by John J. Kirby, Jr., of Latham & Watkins in New York. Games International and Elorg Company were represented by Glenn D. Bellamy of Greenebaum Doll & McDonald in Cincinnati and Mark Norman Mutterperl of Fulbright & Jaworski in New York. (ANC)

Blue Planet Software v. Games International, 334 F.Supp.2d 425, 2004 U.S.Dist.LEXIS 18562 (S.D.N.Y. 2004)

Common law "fair comment" privilege may be used as defense by television station in a defamation and privacy suit filed by private individual, rules Supreme Court of Oklahoma

After Oklahoma television station KFOR aired two broadcasts of the Brad Edwards-hosted "In Your Corner"

which included clips of dissatisfied patients of plastic surgeon James E. Magnusson, Magnusson filed suit against KFOR and Edwards for defamation, invasion of privacy and intentional infliction of emotional distress. Magnusson alleged that the broadcasts—at one point showing footage of a former Magnusson patient displaying "a hip-to-hip scar resulting from an alleged 'botched' tummy [tuck]"—"[c]ontained false statements and created untrue impressions of his professional skills." KFOR and Edwards responded to these allegations by filing a motion for summary judgment on the grounds that the doctor couldn't show that the statements in the broadcasts were false; that they caused him no actionable harm; and that the broadcasts were constitutionally-protected "expressions of opinion" both under the Oklahoma and U.S. constitutions.

In a unanimous opinion written by Justice Yvonne Kauger, the Oklahoma Supreme Court rejected Magnusson's argument that a defense based on the common law "fair comment" privilege was unavailable to his opponents and, that, even if it were available, it could not be maintained in a suit by a private individual such as he.

Justice Kauger distinguished the "fair comment" privilege from both the common law fair report privilege and Oklahoma's statutory counterpart to fair comment privilege, calling the common law fair comment privilege the broadest of the three. Under the defense, she noted, a statement is generally privileged when it "deals with a matter of public concern," "is based on true or privileged facts," and "[r]epresents the actual opinion of the speaker, but is not made for the sole purpose of causing harm."

As to the first element, Justice Kauger noted that "[p]ublic health is clearly a matter of public consonance," because the "[a]vailability and skills of surgeons constitute matters relating to a community's public health." As to the veracity of the claims made by the former patients of Magnusson, the justice noted that even Magnusson himself didn't allege that these opinions were false. "Statements about an individual which cannot be proven 'true' or 'false,' because they are opinions or conclusions based on a review of the individual's actions, are privileged."

As to whether the former patients' statements were facts or opinions, Justice Kauger said "[t]he statements here cannot reasonably be interpreted as stating actual facts about the doctor." The judge also noted that the overwhelming majority of jurisdictions "[f]aced with the issue of whether to protect similar broadcasts have determined such exaggerated criticisms [as those in 'In Your Corner'] to be the type of statements that our society, interested in free and heated debate about matters of social concern, has chosen to protect." She reminded Magnusson that he was given the opportunity to respond to the allegations made in the "In Your Corner" broadcast (Magnusson sent a fax) and that there

was no showing that any facts were withheld from the broadcast. "Similar consumer reports have been determined to be constitutionally protected expressions."

While there was no direct guidance as to whether the defense could be raised by the media against a private individual's claim in Oklahoma, Justice Kauger allowed it. "[I]n a proper case, we determine that Oklahoma law supports the utilization of the common law defense of fair comment in a defamation cause filed by a private individual."

James E. Magnusson was represented by Holly Hefton in Oklahoma City. KFOR and Edwards were represented by Robert D. Nelon and Jon Epstein in Oklahoma City. (AMF)

Magnusson v. New York Times Co., 98 P.3d 1070, 2004 Okla.LEXIS 57 (Okla. 2004)

Police officer is entitled to trial in defamation case against Denver radio talk show host Peter Boyles who said policeman had committed crimes and had extramarital affairs, Colorado Court of Appeals holds

After a Denver police officer was stabbed during a fight in a restaurant parking lot in 1997, local KHOW talk show host Peter Boyles spouted off, claiming the assailant was the "son of a high-ranking Denver police woman." In later broadcasts, Boyles mentioned the son, policeman Bryan Gordon, by name. Soon after, Gordon and his wife, Betty, sued Boyles and Jacor Broadcasting, which owned and operated KHOW, for defamation, intentional infliction of emotional distress, false light, loss of consortium, negligent supervision and respondeat superior.

Boyles and Jacor moved for summary judgment on all of the Gordons' claims; and the trial court granted their motion. But the Gordons appealed, and the Court of Appeals of Colorado has reversed the dismissal of their case.

Colorado Court of Appeals Judge Janice Davidson determined that Boyles' alleged remarks about the stabbing where defamatory *per se*, because they accused Gordon of a criminal offense. Judge Davidson also ruled that remarks made by Boyles about Gordon's alleged extramarital activities were defamatory per se as well, even though Gordon is a man. "[T]he notion that while the imputation of sexual immorality to a woman is defamatory per se, but is not so with respect to a man, has no place in modern jurisprudence," said the judge.

Judge Davidson also agreed with the Gordons that "[e]xtrinsic evidence may be used to establish that [Boyles' statements were] about Gordon without affecting the per se defamatory meaning." In looking at Boyles' broadcasts as a whole, and specifically noting

Gordon's partner's statement that he understood the broadcasts to refer to Gordon, Judge Davidson concluded "[t]here is ample evidence in the record to raise a question of fact concerning all the publications."

The judge sided with Boyles, however, concerning his mention of Gordon's apparent history of domestic violence. The judge used Gordon's arrest record to conclude there was enough "truth" in the broadcast by Boyles to defeat a defamation claim on this issue. Additionally, the judge didn't buy the Gordons' argument that Boyles' behavior was outrageous enough to satisfy a claim for intentional infliction of emotional distress.

The judge, however, landed back on the Gordons' side as it pertained to their claims of negligent supervision and respondeat superior – agreeing that the trial court erred in permitting summary judgment on these claims. Further, said the judge: "Because Betty Gordon's claim for loss of consortium is a derivative claim, the grant of summary judgment against her also must be reversed."

As a result, the case was remanded back to a trial court for further proceedings.

The Gordons were represented by Marc F. Colin of Bruno Bruno & Colin in Denver. Boyles and Jacor were represented by Daniel R. Satriana, Jr., of Clisham Satriana & Biscan in Denver. (AMF)

Gordon v. Boyles, 99 P.3d 75, 2004 Colo.App.LEXIS 210 (Colo.App. 2004)

Michigan statute regulating display of sexually explicit material is constitutional, federal District Court rules in case filed by bookstores and publishing industry associations

After the Michigan legislature passed amendments to a statute clarifying state rules on the "dissemination, exhibition and display of sexually explicit materials deemed harmful to children," Athenaco Book Shop, along with several state bookstores and publishing industry trade associations, sued Michigan's Attorney General, Mike Cox, and the state's 83 county prosecutors. Athenaco and company, fearing prosecution under the statute, and concerned it might be construed to include classics such as "Lolita" and "Portnoy's Complaint," claimed the amendments were facially void because they were vague and overbroad. A federal District Court in Michigan sided with the state, however, saying the "[plaintiffs] have fallen short of the standard required for a successful facial challenge[.]"

In a lengthy opinion, federal District Judge Anna Diggs Taylor noted that the statute, which "imposes criminal liability on those who disseminate sexually explicit matter that is harmful to minors," does not "expand the . . . universe of materials that are governed by the statute, but rather only revises the manner in which sexually explicit materials may be displayed or disseminated to minors." Since the statute's definition of sexually explicit material had been intact well before the suit arose, Athenaco's case was limited to the amendments.

Because the state had codified and elaborated on the three-part test for which materials are harmful to minors set forth in the landmark case *Miller v. California*, Athenaco's First Amendment concerns of losing "Lolita" and similar books to the law were unfounded, said the judge. "[The] works that Plaintiffs fear will be targeted . . . are not subject to the Act's proscriptions because a reasonable person could conclude that those works clearly have literary and educational merit for minors."

Athenaco also challenged the amendment on the grounds that its provisions limited their choices as to how they could display the protected material; and this was not only a detriment, but too broad a limit on their customer's First Amendment rights. The judge, again, balked: "As discussed above, the Act's sweep is not as broad as Plaintiffs apprehend because materials must meet all three . . . aspects of the *Miller* test in order to be subjected to the display and dissemination restrictions." Judge Taylor further noted that the act doesn't stop bookstores from "selling or showing non-obscene sexually explicit [materials]," but only restricted how this material may be displayed. Therefore, it struck a balance between protecting minors and allowing adults access to adult material. "The Act, then, does not unconstitutionally infringe on adults' rights because it does not confine adults to a literary collection that is only suitable for young children."

An act that is not overbroad may still be too vague to be Constitutional, which was another of Athenaco's arguments in challenging some of the amendments' language. The judge generally construed the contested words and phrases in a light most constitutionally acceptable, to disarm Athenaco's challenges. Notably, as to the fear that the amendments' terms "exhibit" and "show" may, under the act, "[a]pply to books whose covers are innocuous but whose contents, of which the Plaintiffs may be unaware, are harmful to minors," the judge was dismissive. "Assuming, arguendo, that the terms . . . do apply to content, . . . the Act's function in practice and mitigates any potential vagueness by specifying that complainants only are subject to criminal penalties if they knowingly or recklessly 'exhibit' or 'show' materials that are harmful to minors." As to Athenaco's claims that Michigan failed to make clear whether the language "allow to examine" meant "to affirmatively grant permission" or to "let do or happen," Judge Taylor cleared up the matter, using a construction created by a Virginia Supreme Court decision: "[a] violation must consist of proof beyond a reasonable doubt that the bookseller knowingly afforded juveniles an opportunity to peruse harmful materials in his store, or, being aware of facts sufficient to put a reasonable person on notice that such opportunity existed, took no reasonable steps to prevent the perusal of such materials by juveniles."

Ultimately, the judge wasn't persuaded by the argument that should Athenaco be charged with exhibiting or showing pornography to children, this would be particularly devastating. "[B]ooksellers bear no greater burden than anyone else in this instance."

Athenaco Book Shop and its co-plaintiffs were represented by Herschel P. Fink of Honigman Miller Schwartz & Cohn in Detroit. Attorney General Mike Cox and his co-defendants were represented by Margaret A. Nelson of the Michigan Attorney General's office in Lansing. (AMF)

Athenaco, Ltd. v. Cox, 335 F.Supp.2d 773, 2004 U.S.Dist.LEXIS 18484 (E.D.Mich. 2004)

Federal law allowing civil actions for interception of electronic communications does not apply to possession of decrypting devices, but Illinois conversion law does apply to intangible property like television programming, federal court rules in DirecTV lawsuit

With a view to kill Dale and William Ostrowski's supposed decryption of its satellite programming without authorization, DirecTV recently sued them for: unauthorized interception and exhibition of copyrighted materials; possession, manufacture or assembly of a device useful for the surreptitious interception of electronic communications in violation of 18 U.S.C. § 2512(1)(b); and civil conversion under Illinois common law.

Dale Ostrowski moved to dismiss the last two counts. In her motion, Ostrowski argued that § 2512(1)(b) does not create a civil cause of action; and that she could not be sued for common law conversion under Illinois law because it doesn't extend to intangible property such as DirecTV's programming.

Federal District Judge Mark Filip agreed with Ostrowski's first assertion. Noting a split among courts as to this issue, Judge Filip concluded the law "is most fairly read to render actionable alleged violations involving interception, disclosure, or intentional use of communications, as contrasted with, for example, simple possession of dubious devices."

The judge sided with DirecTV, however, on Ostrowski's contention that Illinois common law doesn't recognize conversion when intangible property is at

stake. DirecTV's property was its satellite programming, which Ostrowski claimed could not be the subject of conversion. Ostrowski also argued that DirecTV failed "to allege a demand for or right to immediate possession" of its property, which the judge saw as probably "another way of saying that the deprivation of intangible property is not an actionable conversion because intangible property often cannot be effectively demanded or returned."

Judge Filip noted a split in the case law on this issue, and, particularly, the lack of pointed law in Illinois on this subject. But, in weeding through the various pertinent opinions, and noting a trend in state law toward "protecting against the misuse of confidential business information through conversion," he concluded that "[t]he Court has cast its vote with the courts finding that the tort of conversion is available in such cases as this one." He emphatically added "[t]here is perhaps no very valid and essential reason why there might not be conversion of intangible property."

Dale Ostrowski was represented by Todd C. Lyster of Todd C. Lyster & Associates in Chicago. DirecTV, Inc., was represented by Paul Alan Rettberg of Querrey & Harrow in Chicago. (AMF)

DirectTV, Inc. v. Ostrowski, 334 F.Supp.2d 1058, 2004 U.S.Dist.LEXIS 8417 (N.D.III. 2004)

Manufacture and sale of cable descrambling boxes is illegal, even separate from use, federal District Court holds

When Comcast of Illinois caught wind that Platinum Electronics was manufacturing and selling illegal cable descrambling boxes via the Internet, it hired a special investigator to buy one and test it out. The boxes were compatible with the Illinois cable system, so Comcast sued Platinum Electronics and its registered agent, Steven M. Abboud, for declaratory, injunctive and monetary relief, claiming compensation owed for the illegal manufacture, modification, sale and distribution of cable television pirate decoders. Comcast also claimed enhanced damages of \$50,000.

Abboud did not contest that the devices were made and sold, but he opposed Comcast's motion for summary judgment against him seeking money damages totaling over \$225,000.

Federal District Judge Joseph Bataillon rejected Abboud's argument that the manufacture, sale and distribution of the devices were legal under the Cable Communications Act. "Several courts have interpreted [the Act] to prohibit sales of cable descramblers identical to those sold by the defendants if the seller knew or intended that the device would be used for unauthorized reception of cable television programming service." This

meant the judge only needed to find intent on the part of Abboud, which the judge had no problem doing. "The best evidence of a defendant's true intent is the nature of the 'pirate' devices sold," said the judge, who also noted that evidence lay in the fact instructions were included with the descramblers, and that Abboud's website advertised the devices as "100% bulletproof," meaning they were "immune from electronic counter-security measures."

Judge Bataillon had little regard for Abboud's claims that the devices may be purchased for other reasons besides gaining free cable illegally; nor did he accept the argument that, since disclaimers on the Platinum Electronics' website and those included with the devices urged the buyer to agree to not use the decoders illegally, Abboud and his company were not liable for any resulting illegal activity. "[E]very reported decision in which this 'disclaimer defense' was raised holds that disclaimers do not shield sellers of cable descramblers from liability."

The judge awarded damages to Comcast based on Abboud's profits; Comcast's costs in filing the suit, should they be accounted for; as well as enhanced damages under the Act for the maximum allowed amount of \$50,000. "[A]nything less than \$50,000 would be uncalled for. The defendant, speaking through its president and CEO, Mr. David J. Abboud, made huge sums of money, well knowing that it was—and he was—repeatedly and brazenly flouting the law in so doing." Moreover, Judge Bataillon issued a permanent injunction against Abboud's ever manufacturing such devices again.

Comcast of Illinois was represented by Jeffrey R. Platt of Coman Anderson in Chicago. Steven M. Abboud represented himself. Abboud was represented by J. William Gallup of Gallup Schaefer in Omaha. *(AMF)*

Comcast v. Platinum Electronics, 336 F.Supp.2d 957, 2004 U.S.Dist.LEXIS 19074 (D.Neb. 2004)

Boston did not violate periodical publishers' First Amendment rights when it banned their use of newsracks in architecturallyprotected area known as Back Bay

Incensed at the Back Bay Architectural Commission's preservation-induced decision to pass a Guideline which banned the use of newsracks in Boston's Back Bay area, local publishers brought suit against the city and others, claiming their First Amendment rights were violated. Named in the lawsuit filed by HOP Publications, Weekly Dig, and Improper Publications — who publish "Editorial Humor," "Boston's Weekly Dig" and "The Improper Bostonian" — were also Boston Mayor Thomas Menino,

Environmental Department Director Antonia M. Pollack and Anthony Gordon, Chairman of the city agency Back Bay Architectural Commission.

Applying the standards set in a 1996 federal Court of Appeals decision which dealt with the same issue and a nearly identical city Guideline in a different area of Boston, the court ruled for the city. Federal District Judge Douglas Woodlock noted that the correct standard for the city statute was one of intermediate scrutiny; that is, the Commission-created Guideline should be upheld "if it was 'narrowly tailored to serve a significant governmental interest, and allow[ed] for reasonable alternative channels of communication.""

The publishers didn't contest this standard, nor did they argue that the city's aesthetic interests in the Back Bay, a National Register District, weren't a significant government interest. Rather, they said that the Guideline, which also banned other so-called "street furniture" in the district, failed to "pass constitutional muster" because it wasn't "narrowly tailored" and didn't "allow for adequate alternative means for them to distribute their newspapers."

The publishers' main arguments were that, unlike the earlier case, there was no evidence that the Commission made any efforts to seek out options besides "the flat ban on newsracks. . . ." The publishers also argued that because their newspapers are distributed mostly from newsracks, alternative means would be prohibitively expensive.

Broadly applying the earlier case, Judge Woodlock said the "narrowly tailored" standard was met, since it only requires that the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." As to the publishers' contention the city failed to look for other means to reach their goals, the judge noted that three public meetings held by a Back Bay neighborhood group which included discussions for and against the Guideline as proof that different routes of action were considered. "[W]hile the commission itself never issued a written statement recounting in detail its deliberations, it is quite clear that it did not pull the Guideline out of thin air," said the judge. The judge also discounted the publishers' claims that other means of distribution in the district would be too expensive.

Therefore, he concluded, the city did not violate the publishers' First Amendment rights.

HOP Publications and the other publishers were represented by Mark W. Batten of Proskauer Rose in Boston and by John G. Swomley of Swomley & Associates in Boston. The City of Boston was represented by William T. Cuttle of the City of Boston Law Department. *(AMF)*

HOP Publications, Inc. v. City of Boston, 334 F.Supp.2d 35, 2004 U.S.Dist.LEXIS 17203 (D.Mass. 2004)

Beanie Babies maker Ty, Inc., wins summary judgment in copyright infringement case, because publisher of Beanie Babies collectors' guide copied more than allowed by fair use doctrine

Publications International can produce its Beanie Babies collectors' guide, but not without paying a license fee

In 1998, Publications International began selling a book entitled *For the Love of Beanie Babies*, which displays "color photographs of Ty's Beanie Babies toys." The book contains color photographs of "nearly every item in Ty's Beanie Babies plush toy line that was in existence" at the time the book was prepared. These photographs were both small and large, and appeared on the cover along with interior full-page shots. Publications International didn't obtain, or try to obtain, any license to produce the book or the photographs reproduced in it.

During the marketing and subsequent sale of Publications International's book, Ty "entered into license agreements with at least seven publishers to publish books and magazines about Beanie Baby toys." In addition, Ty collected over \$2.5 million in royalties and settlement amounts.

Ty sued Publications International for copyright infringement several years ago, and won the case with a summary judgment motion. However, Ty's initial victory was appealed to the Court of Appeals where Judge Richard Posner remanded the case because "at least some of Publications International's books are collector's guides . . . [and] the fair use doctrine may have given Publications International the right to use photos of Beanie Babies in its collectors guides, even without a license from Ty." (ELR 24:6:17). However Judge Posner went on to add "[w]hile summary judgment is plainly not warranted with regard to all the books that the district court found infringed Tv's copyrights, it may be warranted with regard to some of them. . . . We do not preclude consideration on remand of the possibility of partial summary judgment."

On remand, Judge James Zagel granted summary judgment against Publications International again, ruling that a fair use defense did not shield it from liability. After finding that all four fair use factors weigh against Publications International, the judge specifically focused the amount of material Publications International copied. Judge Zagel commented, "Without drawing the line as to what amount of use of the photographs [in the unlicensed book] would be necessary to produce a marketable collectors' guide, it is clear that [Publications International] clearly crossed any line that could reasonably be drawn. Its use of these photographs had more to do with boosting sales by enticing Beanie Baby enthusiasts to purchase the books than with producing a marketable collectors' guide."

Ty was represented by Avrum Sidney Katz of Welsh & Katz in Chicago. Publications International was represented by Anthony C. Valiulis Much Shelist Freed Denenberg Ament & Rubenstein in Chicago, along with William F. Patry of Thelen Reid & Priest in New York. (ANC)

Ty, Inc. v. Publications International, 333 F.Supp.2d 705, 2004 U.S.Dist.LEXIS 18724 (N.D. Ill. 2004)

Previously Reported:

Yahoo/Nazi memorabilia case to be reheard. The Ninth Circuit Court of Appeals has decided to rehear en banc the case of Yahoo! Inc. v. La Ligue Contre Le Racisme, in which Yahoo is seeking a declaratory judgment that two French organizations cannot enforce, in United States courts, a judgment they obtained against Yahoo in a French court, some years ago. The French judgment found that Yahoo had violated a French law that prohibits the display of Nazi memorabilia something that Yahoo did, for a while - even though Yahoo did so from a website it hosts on a server in the United States (ELR 22:8:5). Yahoo won the first round of its U.S. declaratory relief lawsuit, when a federal District Court ruled in its favor on First Amendment grounds (ELR 23:7:6). But then, a three-judge panel of the Ninth Circuit ruled (2-to-1) that the District Court did not have personal jurisdiction over the two French organizations, and thus the panel reversed Yahoo's victory on that ground (ELR 26:7:17). It is that jurisdictional ruling that the full Ninth Circuit has voted to rehear. Yahoo! Inc. v. La Ligue Contre Le Racisme, No. 01-17424 (9th Cir., Feb. 10, 2005), available at www.ca9.uscourts.gov/ coa/newopinions.nsf/9858BF5F58366BF488256FA4005 DDF31/\$file/0117424ebo.pdf?openelement

Cert denied in Dorothy Parker poems case. The United States Supreme Court has denied Stuart Silverstein's petition for certiorari in *Silverstein v. Penguin Putnam*, where the Second Circuit Court of Appeals reversed a judgment that a book of Dorothy Parker poems published by Penguin Putnam infringed the compilation copyright to Silverstein's book of previously uncollected Dorothy Parker poems, because the appeals court doubted that Silverstein's selection of poems was sufficiently "creative" to be protected by copyright, and because it concluded that any interest Silverstein may have in his compilation is too "slight" to be protected by injunction (*ELR* 26:5:18). *Silverstein v. Penguin Putnam*, 125 S.Ct. 815, 2004 U.S.LEXIS 8253 (2004).

DEPARTMENTS

Entertainment Lawyer News:

Karen Pagnanelli named partner of Mitchell Silberberg & Knupp. Intellectual property and technology litigator Karen G. Pagnanelli has become a partner of Mitchell Silberberg & Knupp in Los Angeles. Pagnanelli successfully represented the recording industry in In re Aimster Copyright Litigation (ELR 25:5:9); and in an infringement action against a CD manufacturer, she and her partner won a jury verdict of more than \$136 million, the largest copyright verdict in U.S. history. Pagnanelli graduated from Southwestern University School of Law, magna cum laude, where she was Research Editor of the Southwestern University Law Review. She also clerked for the Honorable Charles F. Eick, United States Magistrate Judge in the Central District of California, and for the Honorable Virginia A. Phillips, now a United States District Judge in the Central District of California.

Scott Bain and Martha Heller become partners, and Kathryn Comerford Todd becomes Of Counsel, to Wiley Rein & Fielding. Scott E. Bain has been named a partner in Wiley Rein & Fielding in Washington D.C., in the firm's Intellectual Property and Internet & E-Commerce Practices. Bain specializes in the litigation, licensing and acquisition of copyright, patent, trademark and other intellectual property rights in the fields of communications, entertainment, publishing. software, consumer electronics and education. He received his J.D. from Boalt Hall School of Law, University of California, Berkeley, and he joined the firm following his clerkship at the Federal Circuit. Martha E. Heller also has been become a partner in the firm, in its Communications Practice. She represents broadcast, cable and other media clients on a broad range of rulemaking, transactional and other regulatory issues before the Federal Communications Commission. She also has particular knowledge of and experience with media mergers and acquisitions and litigation impacting the mass media. Heller received her J.D. from the University of Virginia School of Law. Kathryn Comerford Todd has become Of Counsel to the firm, in its Communications, Appellate and Litigation Practices, representing clients in matters involving First Amendment and commercial speech issues, Internet, privacy and unconstitutional takings claims. She received her J.D., magna cum laude, from Harvard Law School, and joined the firm following clerkships for the

Honorable Clarence Thomas, Supreme Court of the United States, and the Honorable J. Michael Luttig, U.S. Court of Appeals for the Fourth Circuit.

Peter Fields and David Chidekel join Wolf Block Schorr and Solis-Cohen to form entertainment law practice in New York office. The mid-Atlantic law firm of Wolf Block Schorr and Solis-Cohen have announced the formation of a new Entertainment Law Practice to be headquartered in its New York office. It will be led by Peter A. Fields and David H. Chidekel, who have join the firm as lateral partners. Fields has experience in public and private financings, mergers and acquisitions, intellectual property, e-commerce ventures and Internet service and content providers. He has represented motion picture, television and video producers, distributors and investors as well as actors, writers, directors, musicians, fashion designers and authors. Prior to practicing law, Fields worked at Tri-Star Pictures and Columbia Pictures in New York. He received his undergraduate degree from the State University of New York at Albany and his J.D. from Brooklyn Law School. Chidekel specializes in music industry transactions, but also has represented companies in the motion picture and television industries. He has served as an attorney, advisor and consultant to 3G Global Management, Napster, Applesoup.com, eMusic and as the chairman of iVillage.com. Chidekel graduated with a B.A., cum laude, from the University of Connecticut and received his J.D. from Hofstra University Law School.

In the Law Reviews:

ENTERTAINMENT AND SPORTS LAWYER, published by the ABA Forum on the Entertainment and Sports Industries, 321 N. Clark Street, Chicago, IL 60610-4714, has issued Volume 22, Number 3 with the following articles:

Paul Hamm Wins Fight to Keep His Gold Medal, by Maidie E. Oliveau, 22/3 Entertainment and Sports Lawyer 1 (2004) (for publisher, see above)

Are DVR 'Ad-Skips' Theft and a Breach of an Implied Contract? by James D. Nguyen and Gregory J. Hall, 22/3 Entertainment and Sports Lawyer 1 (2004) (for publisher, see above)

Making Sense of Sports Statistics by Jim Albert, 22/3 Entertainment and Sports Lawyer 1 (2004) (for publisher, see above)

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Occupation Failures and the Legality of Armed Conflict: The Case of Iraqi Cultural Property by Mary Ellen O'Connell, 9 Art Antiquity and Law 323 (2004)

Presidents and Preservation: The US Antiquities Act of 1906 by Carolyn Shelbourn, 9 Art Antiquity and Law 363 (2004)

Copyright and the First Amendment: Defining the Delicate Balance by Barbara Hoffman, 9 Art Antiquity and Law 383 (2004)

Educational Programs Calendar:

Rip, Mix and Burn, Baby! Will Digital Music Sampling Overtake the Music Industry?, March 29, 11:45 a.m.-1:30 p.m., Wyndham Bel Age Hotel, West Hollywood. This luncheon presentation, sponsored by the Intellectual Property & Entertainment Law Section, Music Law Subcommittee, of the Los Angeles County Bar Association, will seek to answer such questions as What do the Newton and Bridgeport decisions mean for the music industry's previous laissez-faire attitude towards sampling? Will the industry soon succumb to a more litigious disposition, and what does that mean for artists and labels? And Will common licensing become the norm as the generations of fans of music downloading demand to exercise their creativity? For additional information, call (213) 896-6560 or register online at http://calendar.lacba.org/calendar.

Counseling Clients in the Entertainment Industry 2005, March 30-April 1 in New York City and Live Webcast, www.pli,edu, March 30-April 1. Registration is for one, two or three days of the program, sponsored by the Practising Law Institute. Day one will delve into Television, the Computer & Video Game Industry; Ethics and Hot Topics in Entertainment Law: Recent Court Decisions. Day two will focus on Film and Theater; Rights, Clearance and Intellectual Property; Theater Financing and Production; and Day three, the Music Publishing and Sound Recordings Business. For additional information, call (800) 260-4PLI or online at www.pli.edu.

The Golden State of Alternative Dispute Resolution, April 14-16, Millennium Biltmore Hotel, Los Angeles. Sponsored by The American Bar Association Section of Dispute Resolution, this seventh annual conference features, among others, a plenary session on When Harry Met Sally: Is the Entertainment Industry's Infatuation with ADR True Love, or Are They Just Faking It?; Mediation of Copyright and Trademark Disputes: Cutting the Gordian Knot; and Breaking Impasse: Wisdom from the Entertainment/Intellectual Property Trenches; and Tales of Negotiation and Mediation in the Media. For further information, contact the ABA Section of Dispute Resolution, 740 15th St. NW, Washington, D.C. 20005, call 202-662-1680 or online at www.abanet.org/dispute.

Representing Your Local Broadcaster: 24th Annual Legal Forum, Sunday, April 17, 2005, The Bellagio, Las Vegas, Nevada. The program is sponsored by the American Bar Association Forum on Communications Law, the National Association of Broadcasters, and the Federal Communications Bar Association. For additional information, contact the ABA Forum staff Teresa Ucok at 312-988-5658 or e-mail tucok@staff.abanet.org.

International Trademark Association 127th Annual Meeting, May 14-18, San Diego Convention Center, San Diego. Among the many sessions, the keynote address by CMG Worldwide Chairman and CEO Mark A. Roesler will highlight Navigating Intellectual Property Rights for Celebrities. Other panels will examine That's Entertainment: Trademarks in Popular Culture; Product Placement and Misplacement-The Good, the Bad and the Ugly; Sports Marketing-The Real Dream Team; Toy, Entertainment and Sports Industries Breakout-Marketing to Children: Character Licensing and Co-Branding: Use (and Misuse) of Third-Party Trademarks and Trade Celebrity Endorsements-Pros and Merchandising and Co-Promotion and the Movies: and Negotiating Licensing and Sponsorship Agreements Workshop. For additional information, www.inta.org/sandiego.

Litigating Trademark, Domain Name, and Unfair Competition Cases, May 19-20, Washington, D.C. This Sixth Annual Advanced American Law Institute-American Bar Association program Developing the Litigation Strategy; Developing and Executing the Discovery Plan; Using the Internet in Trademark Litigation; Strategies to Develop and Detect Confusion Evidence; Trademark Dilution after Victoria's Secret; Use of Expert Witnesses; Strategies for Funding IP Litigation: Insurance and Other Avenues; Ethical Issues; Strategies for Dealing with Infringements and Related Issues Outside the United States; Temporary Restraining Orders, Injunctions, and Seizure Orders; Strategies for Mediation and Other Forms of Alternative Dispute Resolution; Trying the Intellectual Property Case to the Jury; Strategies for Securing and Obtaining Monetary Relief; and the View from the Bench. For additional information, phone 800-CLE-NEWS; FAX 215-243-1664; or online at www.ali-aba.org.

Advanced Seminar on Copyright Law 2005, May 23-24, New York City. Sponsored by the Practising Law Institute, the program will examine How to Deal with Copyright Ownership and Transfer Issues; How to Draft Licensing Agreements; the Important Issues in Copyright Litigation; Intersection of Entertainment Law and Copyright; Intersection of Trademark Law and

Copyright; Intersection of Right of Publicity and Copyright; and Music and Movies on the Internet. For additional information, call (800) 260-4PLI or online at www.pli.edu.

Advanced Seminar on Trademark Law 2005, June 30, New York City. This Practising Law Institute program will provide an Up-To-Date Look at Important Trademark Issues in the Face of Rapidly Occurring Economic and Technological Changes in the United States and the World. For additional information, call (800) 260-4PLI or online at www.pli.edu.

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