

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

|                             |   |                      |
|-----------------------------|---|----------------------|
| Norma Chase,                | ) |                      |
|                             | ) |                      |
| Plaintiff                   | ) |                      |
|                             | ) |                      |
| vs.                         | ) |                      |
|                             | ) | CIVIL ACTION         |
| Public Utility Commission   | ) |                      |
| of Pennsylvania, Wendell F. | ) | No. 1:05-CV-2375     |
| Holland, James H. Cawley,   | ) |                      |
| Bill Shane, Kim             | ) | JUDGE KANE           |
| Pizzingrilli, Terrance J.   | ) |                      |
| Fitzpatrick, Commonwealth   | ) | FILED ELECTRONICALLY |
| Reporting Company,          | ) |                      |
| Sargent's Court Reporting   | ) |                      |
| Service, Inc., and          | ) |                      |
| Precision Reporting, Inc.,  | ) |                      |
|                             | ) |                      |
| Defendants                  | ) |                      |

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS

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BRIEF IN OPPOSITION TO MOTIONS TO DISMISS

Introduction

Plaintiff filed this declaratory judgment action against the Pennsylvania Public Utility Commission and the three court reporting firms that provide it with stenographic services. The chronology that has been pled is simple. Plaintiff contacted the PUC in an effort to obtain a transcript of its January 13, 2005 public meeting, inquiring about the cost. She was told that the PUC did not permit transcripts to be copied, and that she would have to obtain the transcript from Commonwealth Reporting Company. Complaint at ¶¶ 8-10. She was also advised that she could review the transcript at the PUC office and take notes, but that no copies could be made. Complaint at ¶¶ 11-12. Plaintiff then reiterated her request in a letter, noting that she was happy to pay the cost of copying. Exhibit A to Complaint; Complaint at ¶ 13. She received a telephone response reiterating the PUC's no-copying policy. Complaint at ¶ 14.

Thus, plaintiff is not trying to "get transcripts for free" as claimed by Precision Reporting, Inc. at

page 5 of its brief. Rather, she is asserting that the PUC has an obligation to provide her with a copy at the cost of reproduction. She does not seek to impose that duty on the reporter defendants, and Commonwealth Reporting and Sargent's are correct in stating, at page 4 of their joint brief, that plaintiff made no request of any of the reporter defendants. Plaintiff certainly has no reason to believe that Commonwealth Reporting would provide her with a copy of the transcript at cost.

The PUC policy is based on the assumption that the reporter defendants have a right to restrict the copying of their transcripts. Plaintiff seeks a declaration that no such right exists under federal law, that no such right can exist under state law because of federal preemption, and that no justification exists for the PUC's policy.

### Joinder

Federal Rule of Civil Procedure 19, Joinder of Persons Needed for Just Adjudication, states in subsection (a):

(a) Persons to be Joined if Feasible.

A person who is subject to service of process and whose joinder will not deprive the court of

jurisdiction over the subject matter of the action shall be joined as a party in the action if

(1) in the person's absence complete relief cannot be accorded among those already parties, or

(2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may

(i) as a practical matter impair or impede the person's ability to protect that interest or

(ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. . . .

While plaintiff's direct controversy is with the PUC, Commonwealth Reporting and Sargent's both take the position that they have the right to exclude others from copying their transcripts. This is evidenced by the notices that their transcripts bear, purporting to prohibit unauthorized reproduction. Complaint at ¶¶ 18-19. By that notice, they claim an interest relating to the subject of this action. Complete relief cannot fairly be afforded without giving them a chance to defend their claim of a right to restrict copying. They are, moreover, so situated that the disposition of the action may impede their ability to protect their

interests and may leave the PUC with inconsistent obligations.

Precision was joined in an abundance of caution; it puts no restrictive notices on its transcripts. Complaint at ¶¶ 20. But if the PUC has an obligation to Commonwealth Reporting and Sargent's, it has that same obligation to Precision; the PUC can hardly make its copying policy dependent on which reporting agency prepares a transcript, and it cannot assume that a reporting agency that does not state its perceived rights on the transcript has no objection to its transcripts being copied for the public by the PUC. While Precision's brief has acknowledged that Precision has no federal copyright, whether it claims any state-law right to restrict copying is not clear. Plaintiff submits that a decision as to whether to dismiss Precision as a party is best deferred until the pleadings are closed.

#### Eleventh Amendment Immunity

The PUC claims Eleventh Amendment immunity, correctly pointing out that a civil rights suit may not be brought against the Commonwealth of Pennsylvania.

The PUC, however, has been held not to be an arm of the state for Eleventh Amendment purposes.<sup>1</sup> *National Railroad Passenger Corporation (Amtrak) v. Public Utility Commission*, 342 F. 3d 242 (3d cir. 2003). In *Amtrak*, the court quoted an earlier District Court decision reaching that conclusion, noted a prior Circuit decision holding that the original ruling was law of the case, and reiterated that the District Court decision was binding. The reasoning of the original decision is summarized with no indication of disapproval.<sup>2</sup>

The issue, however, is one with respect to which the Third Circuit has sent mixed signals. In *Wheeling & Lake Erie Railway Company v. Public Utility Commission*, 141 F. 3d 88 (3rd cir. 1998), the PUC's assertion that it was not an arm of the state under *Christy, supra* was accepted by *Wheeling*, and the court noted this

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<sup>1</sup> The criteria for this determination were set forth in *Christy v. Pennsylvania Turnpike Commission*, 54 F. 3d 1140, 1144 (3d Cir. 1995). They include the extent to which a judgment against the entity would impact the state treasury and the extent of independence enjoyed by the entity.

<sup>2</sup> The District Court decision in *Amtrak* had been reported as *Southeastern Pennsylvania Transportation Authority v. Public Utility Commission*, 210 F. Supp. 2d 689 (E.D. Pa. 2002); the court summarized the history of the litigation and characterized PUC's claim that it was not an arm of the state as a "nonstarter". [*Id.* at 715.]

concession without further discussion of the issue. It went on to hold that Congress had abrogated the PUC's immunity, but then ruled in favor of the PUC on the ultimate issue. Subsequently, in *MCI Telecommunications Corporation v. Public Utility Commission*, 271 F. 3d 491 (3rd cir. 2001), the court held, with no discussion of the "arm of the state" test, that the PUC's immunity had been waived.

In light of the uncertainty created by these decisions, plaintiff amended her complaint to add the individual Commissioners as defendants pursuant to *Ex Parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908). *Young* permits state officials to be sued for declaratory relief under limited circumstances, described as follows in *Verizon v. Public Service Commission of Maryland*, 535 U.S. 635, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002):

In determining whether the [*Young*] doctrine avoids an Eleventh Amendment bar to suit, a court need only conduct a "straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." [*Id.* at 646, 122 S. Ct. at 1760, 152 L. Ed. 2d at 882; citation omitted.]

That is precisely what the instant complaint does.

The Right to Acquire Information

This is not a case in which access to information is being denied because of security or privacy concerns. It is not disputed that plaintiff has a right to the information contained in the transcript; she has been invited to read it and take notes. It is a public record: *Sierra Club v. Public Utility Commission*, 702 A. 2d 1131 (Pa. Cmwlth. 1997), *affirmed* 557 Pa. 11, 731 A. 2d 133 (1999).

The First Amendment grants, generally, a right of access to judicial proceedings. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980). That includes access to transcripts: *United States v. Smith*, 787 F. 2d 111 (3rd Cir. 1986). The Supreme Court has also recognized a broader right to access to public records. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978). In that case the court stated:

It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, *including* judicial records and documents. [Emphasis added.] . . . American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit. The interest necessary to support the issuance of a

writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies[.] [Id. at 598, 98 S. Ct. at 1312, 55 L. Ed. 2d at 580.]

Accord: *Publicker Industries, Inc. v. Cohen*, 733 F. 2d 1059 (3rd cir. 1984).

The Third Circuit has construed the right of access as extending, under some circumstances, to administrative proceedings: *Whiteland Woods v. Township of West Whiteland*, 193 F. 3d 177 (3rd cir. 1999); *North Jersey Media Group v. Ashcroft*, 308 F. 3d 198 (3rd cir. 2002). These decisions differ as to how much of a showing of historical openness is required for a First Amendment right to access to administrative proceedings, with *Whiteland Woods* relying on Pennsylvania's Sunshine Law (65 Pa.C.S. § 271-86) and *North Jersey*, in dictum, giving less significance to statutorily mandated openness.<sup>3</sup> Here, the openness of the proceeding is not in dispute.

First Amendment policy -- free dissemination of information -- is frustrated by the monopolistic restrictions here. In *Legi-Tech v. Keiper*, 766 F. 2d

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<sup>3</sup> *North Jersey* did not involve state proceedings. It involved deportation proceedings and serious security concerns militating against openness. *Whiteland Woods* involved no such concerns.

728 (2d cir. 1995), the Second Circuit held that it was improper for a state to refuse to permit a potential data reseller to subscribe to a state-owned computerized database that was available through subscription to the general public. The District Court had upheld the restriction, stating that the law imposing it "is reasonable since it only seeks to protect the state's natural monopoly on computer supplied legislative information."<sup>4</sup> The Circuit retorted:

There is nothing natural about the alleged monopoly in the instant case. . . . The evils inherent in allowing government to create a monopoly over the dissemination of public information in any form seem too obvious to require extended discussion. [*Id.* at 733.]

For a state to grant a monopoly to a for-profit private entity is even less natural.

Access, when it is granted, should be uniform. Plaintiff respectfully submits that the arbitrary distinction made by the PUC between citizens seeking transcripts and citizens seeking other documents violates the Fourteenth Amendment as well as the First. While this is not a suspect classification requiring strict scrutiny, it is a classification with no legal

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<sup>4</sup> The District Court opinion is reported at 601 F. Supp. 371 (N.D. N.Y. 1984).

basis. In *McLaughlin v. Florida*, 379 U.S. 184, 85 S. Ct. 283, 13 L. Ed. 2d 222 (1964) the United States Supreme Court held:

Classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." [*Id.* at 191, 85 S. Ct. at 287, 13 L. Ed. 2d at 227.]

The distinction the PUC makes here does not meet that standard.

#### The Claimed Justification for the Restriction

The defendants rely on the decision in *Sierra Club, supra*. *Sierra Club* involved state law; it is not dispositive of the federal questions raised in this action.

The Sierra Club, contemplating intervention in a base rate case, sought copies of the voluminous transcripts of the proceedings that had already taken place. The PUC refused to provide copies, telling the Sierra Club that it would have to purchase copies from Commonwealth Reporting. The PUC's contract with the reporting firms stipulated that it would not provide copies to any litigant. The Commonwealth Court, in a

plurality decision, rejected the Sierra Club's claim that the Right-to-Know Law (65 P.S. § 66.1 et seq.) obligated the PUC to provide copies at cost of reproduction. The court relied upon 65 P.S. § 66.3, which provided:

Any citizen of the Commonwealth of Pennsylvania shall have the right to take extracts or make copies of public records and to make photographs or photostats of the same[.] . . . The lawful custodian of such records shall have the right to adopt and enforce reasonable rules governing the making of such extracts, copies, photographs or photostats.

The court held that the PUC's policy was a "reasonable rule." Its analysis was as follows:

The policy behind its regulation and its contracts, the PUC points out, is that base rate cases are voluminous . . . and the court reporting firms have resources to meet turnaround and copying requirements that the PUC lacks. *The PUC contends that a comparison to cost of reproduction is inappropriate because the court reporter is being compensated for professional services, i.e., stenographic recording of the testimony and preparation of the original transcript, as well as for the cost of reproduction.* [Emphasis added.] The PUC notes that its current system does not preclude anyone from examining the records free of cost but simply provides an equitable means of distributing all of these costs among the litigants. It argues that petitioners' demand here is contrary to the general principle that parties pay their own costs to advance their private interests through litigation and that the public should not be required to underwrite such expenses.

We agree that under all the above-described circumstances the PUC's reproduction policy is reasonable. [702 A. 2d at 1136.]

The Supreme Court of Pennsylvania unanimously affirmed on the basis of the plurality opinion.

The defendants overlook the 2002 amendments to the Right-to-Know Law. Act of June 29, 2002, P.L. 663, effective in 180 days. The "reasonable rules" provision was removed. The copy cost provisions are now found at 65 P.S. § 66.7(b), which states:

Duplication. Fees for duplication by photocopying, printing from electronic media or microfilm, copying onto electronic media, transmission by facsimile or other electronic means and other means of duplication must be reasonable and based on prevailing fees for comparable duplication services provided by local business entities.

With this enactment, cost of commercial reproduction became the standard, across the board. The Commonwealth Court's conclusion that it was not an appropriate standard is a dead letter.

It is, however, a dead letter worth rereading. The court did not hold, as then urged by Commonwealth Reporting, that a court reporter has a work-product proprietary right in a transcript<sup>5</sup>, but permitted the

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<sup>5</sup> This contention is not mentioned in the opinion. The fact that it was made has been pled by this plaintiff. Complaint at ¶ 17.

PUC to treat reporters as *if* such a right existed.<sup>6</sup> A payment to a reporter for work that *has already been paid for* by the agency that contracted for the reporter's professional services amounts to a royalty. Royalties are not appropriate when no copyright exists:

Transcripts of court proceedings are not original works of authorship subject to the protection of the Copyright Act (17 U.S.C. § 101). . . . Because transcripts filed with the clerk are public records, they may be used, reproduced and provided to attorneys, parties, and the general public *without additional compensation* to the court reporter, contractor, or transcriber. [Memorandum of the Administrative Office of the United States Court re Filing and Availability of Official Transcripts of Court Proceedings, October 22, 2002<sup>7</sup>; emphasis added.]

Commonwealth Reporting and Sargent's, in their summary of *Sierra Club*, and their enumeration (at page 8 of their joint brief) of the reasons for the holding, omit any mention of the "compensat[ion] for professional

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<sup>6</sup> Compare *State ex rel. Slagle v. Rogers*, 103 Ohio St. 3d 89, 84 N.E. 2d 55 (2005), where the Supreme Court of Ohio held that a statute governing transcript copy rates to be paid by litigants controlled over another statute giving the general public the right to copy transcripts. The court did not find a property interest in the reporter, and plaintiff is not aware of any American court that has recognized such an interest. *Slagle*, like *Sierra Club*, did not discuss copyright law or any other federal question.

<sup>7</sup> The memorandum is online at:

[www.pawb.uscourts.gov/pdfs/transcripts.pdf](http://www.pawb.uscourts.gov/pdfs/transcripts.pdf)

services" rationale for the *Sierra Club* decision; they do not acknowledge that one of the purposes of the policy that was upheld was to protect their copy income.<sup>8</sup> If *Sierra Club* was not about copy income, it is difficult to understand why Commonwealth Reporting intervened in the action. The instant case is likewise about the supposed right of court reporters to generate additional revenue by excluding others from copying transcripts.

#### Federal Copyright

The First Amendment does not grant anyone the right to infringe another person's copyright; both are constitutional rights, and the provisions for them must accordingly be construed together. See generally *Harper and Row Publishers v. Nation Enterprises*, 471 U.S. 539, 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985). However, in this case there is no tension between the First Amendment and the Copyright Clause.

The United States Constitution provides as follows in Article I, Section 8, Clause 8:

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<sup>8</sup> The PUC has a fiscal interest in protecting that income; court reporters can be expected to want more for recording and transcription when they have no expectation of copy income.

The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]

Early on, the United States Supreme Court rejected the concept of a copyright in a public record; in *Wheaton v. Peters*, 33 U.S. 591, 8 L. Ed. 1055 (1834), which involved reporters of decisions, the Court stated:

It may be proper to remark that the court are unanimously of opinion, that no reporter has or can have any copyright in the written opinions delivered by this court; and that the judges thereof cannot confer on any reporter any such right. [*Id.* at 668, 8 L. Ed. at 1083.]

In *Banks v. Manchester*, 128 U.S. 244, 9 S. Ct. 36, 32 L. Ed. 425 (1888), the issue was the propriety of a state-court reporter of decisions securing a copyright on behalf of the state pursuant to a state statute. The court held both the copyright and the statute to be invalid, stating:

Judges . . . receive from the public treasury a stated annual salary . . . and can themselves have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labors. This extends to whatever work they perform in their capacity as judges, and as well to the statements of cases and head notes prepared by them as such, as to the opinions and decisions themselves. The question is one of public policy, and there has always been a judicial consensus, from the time of the decision in [*Wheaton*] that no copyright could under the statutes passed by Congress, be

secured in the products of the labor done by judicial officers in the discharge of their judicial duties. [*Id.* at 253, 9 S. Ct. at 40, 32 L. Ed. at 429.]

The point was reiterated in *Callaghan v. Myers*, 128 U.S. 617, 9 S. Ct. 177, 32 L. Ed. 547 (1988)<sup>9</sup>, where the court stated:

It was decided by this court in [*Wheaton*], and is now universally conceded, that the opinions of the judges are public property, and not the subject of copyright by the reporter. This necessarily results from the relation sustained by the judges toward the people, they being public officers employed and paid to render a purely public service. The result of the labors of the judges is, therefore, the property of the people by whom and for whom they are employed; and if any such element of literary property attaches to their labors as to render them susceptible of copyright, the people alone are entitled to such copyright. In like manner the reporter being a public servant or agent, the product of his labor is likewise the property of the people; and if copyrighted at all, it can only be done in the name of, and for the benefit of the people. [*Id.* at 666, 9 S. Ct. at 191, 32 L. Ed. at 562.]

The same reasoning is applicable to members of any tribunal and to records of the proceedings of any tribunal. Moreover, the incentive that the Copyright Clause provides for creativity is properly made inoperative in legal proceedings, regardless of who is

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<sup>9</sup> In *Callaghan*, the Court upheld the right of a reporter of decisions to copyright so much of his report as reflected his own intellectual labor.

speaking at any given moment. No person whose words are being taken down in such a proceeding should be motivated in choosing those words by the prospect of literary property rights, and no such person should have the ability to exclude others from disseminating the record of the proceeding on the basis of such rights.

And, where court reporters are concerned, the requisite originality for copyright is completely absent. *Lipman v. Massachusetts*, 475 F. 2d 565 (1st cir. 1973). In *Lipman*, the court reporter who took the testimony in the Chappaquiddick inquest claimed a copyright in the transcripts.<sup>10</sup> The court responded as follows:

Since transcription is by definition a verbatim recording of other persons' statements, there can be no originality in the reporter's product. [*Id.* at 568.]

Plaintiff does not doubt that court reporting is hard work. However, in *Feist Publications v. Rural Telephone Service Company*, 499 U.S. 340, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991), the Supreme Court rejected "sweat-of-brow" copyright, observing

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<sup>10</sup> The controversy was between Lipman and state court officials.

"[C]opyright rewards originality, not effort."<sup>11</sup> *Id.* at 364, 111 S. Ct. at 1297, 113 L. Ed. 2d at 381.

### Preemption of State Law

The First Amendment, by virtue of the Supremacy Clause, controls over any state law purporting to grant a copyright<sup>12</sup>, except where Congress has authorized that grant pursuant to the Copyright Clause.<sup>13</sup>

In *Banks, supra*, the Supreme Court stated:

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<sup>11</sup> *Feist* is dispositive of Commonwealth Reporting's work-product claim. The attorney work product doctrine is a confidentiality principle and has no analogue here. See generally *Maleski v. Insurance Commissioner of Pennsylvania*, 641 A.2d 1 (Pa. Cmwlth. 1994).

<sup>12</sup> Pennsylvania has never enacted a law giving reporters the right to restrict transcript copying, but this has obviously not stopped state agencies from acting as if there were such a law. Some trial courts have done likewise. See *In re Ownership of Notes and Reproduction of Transcripts (Appeal of Medico)*, 763 A.2d 575 (Pa. Cmwlth. 2000), *allocatur denied* 566 Pa. 689, 784 A.2d 121 (2001) (Luzerne County Prothonotary held to lack standing to appeal administrative order adopting local rule restricting copying). See also Article 5, § 10(c) of the Pennsylvania Constitution, prohibiting the enlargement or diminution of substantive rights of litigants through procedural rules.

<sup>13</sup> Supremacy Clause preemption has been found in the patent context notwithstanding the absence of First Amendment considerations. *Sears, Roebuck & Company v. Stiffel Company*, 376 U.S. 225, 84 S. Ct. 784, 11 L. Ed. 2d 661 (1964); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 109 S. Ct. 971, 103 L. Ed. 2d 118 (1989).

No authority exists for obtaining a copyright, beyond the extent to which Congress has authorized it. A copyright cannot be sustained as a right existing at common law; but, as it exists in the United States, it depends wholly on the legislation of Congress. [Citing *Wheaton*.] [128 U.S. at 252, 9 S. Ct. at 39, 32 L. Ed. at 428.]

Some years later, in *Sears, supra*, the Court considered the question of whether an unfair competition claim based on the copying of an article could succeed when the patent claim was rejected and no copyright was asserted. The answer was negative:

To allow a State by use of its law of unfair competition to prevent the copying of an article which represents too slight an advance to be patented would be to permit the State to block off from the public something which federal law has said belongs to the public. [Id. at 231-32, 84 S. Ct. 789, 11 L. Ed. 2d at 667.]

[B]ecause of the federal patent laws a State may not, when the article is unpatented and uncopyrighted, prohibit the copying of the article itself or award damages for such copying. [Citations omitted.] The judgment below did both and in so doing gave *Stiffel* the equivalent of a patent monopoly on its unpatented lamp. That was error[.] [Id. at 232-33, 84 S. Ct. at 789, 11 L. Ed. 2d at 667-668.]

The same day, the Court decided another patent case, *Compco Corporation v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 84 S. Ct. 779, 11 L. Ed. 2d 669 (1964), and stated:

Today we have held in [Sears] that when an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article. To forbid copying would interfere with the federal policy . . . of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain. [*Id.* at 237, 84 S. Ct. 15 782, 11 L. Ed. 2d at 672.]

The Copyright Act of 1976 addressed the issue of federal preemption as follows:

*Section 301. Preemption with respect to other laws*

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to:

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

. . . .

(3) activities violating legal or equitable rights that are not equivalent to

any of the exclusive rights within the  
general scope of copyright as specified by  
section 106[.]

. . . .

. . . .

The first question is whether the *right* claimed is  
among those within the general scope of copyright. 17  
U.S.C. § 106, Exclusive rights in copyrighted works,  
states in pertinent part:

[T]he owner of copyright under this title has  
the exclusive rights to do and to authorize any  
of the following:

- (1) to reproduce the copyrighted works in  
copies . . .

. . . .

That is precisely the right claimed here.

The provision in 17 U.S.C. § 301(b) (3) relating to  
other legal or equitable rights has no application. The  
purpose of that subsection is to preserve state-law  
causes of action for conduct that may incidentally  
include copying but with respect to which copying is not  
the gravamen of the offense. To survive preemption, the  
cause of action must require some additional element,  
and must be qualitatively different from copyright. *Dun  
& Bradstreet Software Services Inc. and Geac Computer  
Systems, Inc. v. Grace Consulting, Inc.*, 307 F. 3d 197

(3d cir. 2002). In *Geac*, theft of trade secrets through breach of trust was held not to be a preempted cause of action. The concern of the injured party was with the use of the trade secrets, not their copying per se. Copy income was not what was jeopardized by the wrongful conduct.

The only remaining question is whether a transcript comes "within the subject matter of copyright as specified by sections 102 and 103." Section 102 states in pertinent part<sup>14</sup>:

*Subject matter of copyright: In general*

(a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;

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<sup>14</sup> Section 103 deals with derivative works and has no application here.

(6) motion pictures and other audiovisual works;

(7) sound recordings; and

(8) architectural works.

. . . .

Here is how 17 U.S.C. § 101 defines the term

"literary works":

"Literary works" are works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia[.]

By this standard, a computer program is a literary work. *Geac, supra*. So is a transcript.

The word "original" nowhere appears in § 301, and plaintiff submits that it is not part of the description of what type of work is "within the subject matter of copyright" for preemption purposes.<sup>15</sup> The *Geac* court concluded otherwise; plaintiff respectfully submits that this was error.

The allegedly stolen trade secrets included a customer list, and Grace *did not claim preemption* with respect to the list. The court stated:

In entering summary judgment, the District Court failed to consider evidence that *Geac's*

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<sup>15</sup> If that phrase were intended to incorporate § 102 in its entirety, the words "fixed in a tangible medium of expression" in § 301(a) would be redundant.

customer lists were not copyrightable material and, therefore, that claims alleging a violation of state laws were not preempted. [Under *Feist*, data or facts "do not trigger copyright" because they are not original in the constitutional sense[]]. Therefore, the claims that Grace misappropriated Geac's client lists were not preempted and the District Court as a matter of law should not have dismissed them. [*Id.* at 219.]

While the finding of non-preemption with respect to the customer list was clearly correct under § 301(b)(3), plaintiff respectfully submits that the types of works enumerated in § 102 are within the subject matter of copyright for purposes of § 301(a) without regard to originality.<sup>16</sup> The purpose of § 301(a) was explained in the accompanying report of the House of Representatives. H.R. Rep. No. 94-1476, 94th Congress, 2d Session 19 (1976). The report states:

As long as a work fits within one of the general subject matter categories of sections 102 and 103, the bill prevents the States from protecting it even if it fails to achieve Federal statutory copyright because it is too minimal or lacking in originality to qualify, or because it has fallen into the public domain[.]

The conclusion of the Geac court is incompatible with this purpose. As the Seventh Circuit stated in

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<sup>16</sup> There is authorship, in a limited sense, in fixing the spoken words of others in a tangible medium of expression, but it is not original authorship.

*ProCD v. Zeidenberg*, 86 F. 3d 1447 (7th cir. 1996):

[T]he judge thought that the data . . . are "within the subject matter of copyright" even if, after *Feist*, they are not sufficiently original to be copyrighted. [Citations omitted.] One function of § 301(a) is to prevent states from giving special protection to works of authorship that Congress has decided should be in the public domain, which it can accomplish only if "subject matter of copyright" includes all works of a type covered by sections 102 and 103, even if federal law does not afford protection to them. Cf. [Bonito] (same principle under patent laws). [Id. at 1453.]

Accord: *Durham Industries, Inc. v. Tomy Corporation*, 630 F. 2d 905, note 15 at 919 (2nd cir. 1980). Compare *H.W. Wilson Company v. National Library Service Company*, 402 F. Supp. 456, 458 (S.D. N.Y. 1975) (same result reached prior to enactment of preemption statute). See also *Rand McNally v. Fleet Management Systems*, 591 F. Supp. 726 (N.D. Ill. 1983) (irrelevant for preemption purposes that collected facts at issue might turn out not to be copyrightable).

Geac need not control the disposition of this case; transcripts contain more than data or facts. There is original authorship in transcripts, but it is that of every participant except the reporter.

Moreover, even assuming *arguendo* that Pennsylvania has the ability to grant court reporters the right to

exclude others from copying their transcripts, Pennsylvania has, as noted, never done so. The PUC has no right to condition plaintiff's acquisition of a transcript copy on her payment of a royalty to the court reporter.

Conclusion

Plaintiff has pled facts which, if proven, warrant relief. The 12(b) motions should be denied.

Date: \_\_\_\_\_  
s / 4-20-06

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