

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

Norma Chase,)	
)	
Plaintiff)	
)	
vs.	)	CIVIL ACTION
)	
Public Utility Commission	)	No. 1:05-CV-2375
of Pennsylvania,)	
Wendell F. Holland,	)	JUDGE KANE
James H. Cawley,)	
Bill Shane,	)	FILED ELECTRONICALLY
Kim Pizzingrilli, and)	
Terrance J. Fitzpatrick,)	
)	
Defendants)	

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND IN
OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS

TABLE OF CONTENTS

Introduction and Procedural History 1

Question Involved 4

The Right to Acquire Information 5

The Claimed Justification for the Restriction 6

Federal Copyright 8

Preemption of State Law 9

Plaintiff's Right of Action 17

Conclusion 21

TABLE OF CITATIONS

Banks v. Manchester, 128 U.S. 244, 9 S. Ct. 36, 32 L. Ed. 425 (1888)	8
Blessing v. Freestone, 520 U.S. 329, 117 S. Ct. 1353, 137 L. Ed. 2d 569 (1997)	17-19
Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 109 S. Ct. 971, 103 L. Ed. 2d 118 (1989)	9
Callaghan v. Myers, 128 U.S. 617, 9 S. Ct. 177, 32 L. Ed. 547 (1888)	8
Commissioner v. Wodehouse, 337 U.S. 369, 69 S. Ct. 1120, 93 L. Ed. 419 (1949)	18
Compco Corporation v. Day-Brite Lighting, Inc., 376 U.S. 234, 84 S. Ct. 779, 11 L. Ed. 2d 669 (1964)	10, 18
Copyright Act of 1976	
17 U.S.C. § 101	13
17 U.S.C. § 102	12-13
17 U.S.C. § 103	12
17 U.S.C. § 106	11
17 U.S.C. § 301	passim
17 U.S.C. § 301(a)	10, 14
17 U.S.C. § 301(b)(3)	11-12, 14
17 U.S.C. § 501-13	20
17 U.S.C. § 506(c)	20
17 U.S.C. § 701	19
17 U.S.C. § 1338	20
Dun & Bradstreet Software Services Inc. and Geac Computer Systems, Inc. v. Grace Consulting, Inc., 307 F. 3d 197 (3d cir. 2002)	12, 13-15, 16
Durham Industries, Inc. v. Tomy Corporation, 630 F. 2d 905 (2nd cir. 1980)	15
eBay, Inc. v. Mercexchange, LLC, ___ U.S. ___, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006)	18

Feist Publications v. Rural Telephone Service Company, 499 U.S. 340, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991)	. . . . .	6-7, 14
Fox Film Corporation v. Doyal, 286 U.S. 123, 52 S. Ct. 546, 76 L. Ed. 1010 (1932)	. . . . .	18
Gonzaga v. Doe, 536 U.S. 273, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002)	. . . . .	19
H.R. Rep. No. 94-1476, 94th Congress, 2d Session 19 (1976)	. . . . .	14-15, 19
H.W. Wilson Company v. National Library Service Company, 402 F. Supp. 456 (S.D. N.Y. 1975)	. . . . .	15
Lipman v. Massachusetts, 475 F. 2d 565 (1st cir. 1973)	. . . . .	10
Maleski v. Insurance Commissioner of Pennsylvania, 641 A.2d 1 (Pa. Cmwlth. 1994)	. . . . .	7
Nimmer on Copyright:		
§ 1.01[B][1][j]	. . . . .	11
§ 1.01[B][3][a]	. . . . .	15-16
Nixon v. Warner Communications, Inc., 435 U.S. 589, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978)	. . . . .	5
North Jersey Media Group v. Ashcroft, 308 F.3d 198 (3rd cir. 2002)	. . . . .	5-6
ProCD v. Zeidenberg, 86 F. 3d 1447 (7th cir. 1996)	. . . . .	15
Publicker Industries, Inc. v. Cohen, 733 F.2d 1059 (3rd cir. 1984)	. . . . .	5
Rand McNally v. Fleet Management Systems, 591 F. Supp. 726 (N.D. Ill. 1983)	. . . . .	15
Richmond Newspapers v. Virginia, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980)	. . . . .	5

Pennsylvania Right-to-Know Law	
65 P.S. § 66.1 et seq.	4
65 P.S. § 66.1	7
65 P.S. § 66.3 (repealed)	7
65 P.S. § 66.7	7
Ruch v. Wilhelm, 352 Pa. 586, 43 A. 2d 894 (1945)	6
Sears, Roebuck & Company v. Stiffel Company, 376 U.S. 225, 84 S. Ct. 784, 11 L. Ed. 2d 661 (1964)	9-10
Sierra Club v. Public Utility Commission, 702 A. 2d 1131 (Pa. Cmwlth. 1997), affirmed 557 Pa. 11, 731 A. 2d 133 (1999) 3, 5, 6-7	
Toney v. L'Oreal, USA, 406 F. 3d 905 (7th cir. 2005)	14
United States Code 42 U.S.C. § 1983	17, 19
United States v. Smith, 787 F.2d 111 (3rd Cir. 1986)	5
Wheaton v. Peters, 33 U.S. 591, 8 L. Ed. 1055 (1834)	8
Whiteland Woods v. Township of West Whiteland, 193 F.3d 177 (3rd cir. 1999)	5

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND IN
OPPOSITION TO MOTION FOR JUDGMENT ON THE PLEADINGS

Introduction and Procedural History

Plaintiff, acting pro se, is a Pittsburgh lawyer; defendants are the Pennsylvania Public Utility Commission and the individual commissioners.¹ The court reporting firms that provide services to the PUC were originally joined; their dismissal motions were granted on November 14, 2006. The dismissal order was supported by an opinion which stated the history of this action as follows:

Plaintiff Norma Chase initiated this action by filing a pro se complaint in this Court on November 16, 2005. Defendants separately moved to dismiss Plaintiff's complaint: PUC on January 17, 2006, Commonwealth Reporting and Sargent's on January 18, 2006, and Precision on January 19, 2006. Plaintiff then filed an amended complaint on February 9, 2006, adding PUC officers Wendell F. Holland, James H. Cawley, Bill Shane, Kim Pizzingrilli, and Terrance J. Fitzpatrick as defendants. These Defendants moved to dismiss Plaintiff's amended complaint on February 16, 2006.

On February 26, 2006, Plaintiff filed an unopposed motion for leave to submit a second amended complaint which this Court granted. Plaintiff then filed her second amended complaint on February 27, 2006. In an order

¹ References herein to the PUC are intended to include the individual commissioners except where the context indicates otherwise.

dated March 2, 2006, this Court denied Defendants' existing motions to dismiss as moot. Defendants then filed separate motions to dismiss Plaintiff's second amended complaint on March 27, 2006. Plaintiff filed an omnibus brief in opposition to Defendants' motions to dismiss on April 20, 2006. Defendants Commonwealth Reporting and Sargent's filed a reply brief on May 8, 2006. [Opinion at 7-8; record references omitted.]

The remaining defendants answered the complaint, and all parties entered into a stipulation as to all material facts on January 19, 2007. Resolution of the case on dispositive motions is accordingly appropriate.

Plaintiff asked the PUC for an at-cost copy of a transcript of its January 13, 2005 public meeting, and was turned down; she was told to contact Commonwealth Reporting Company. She was also told that she could review the transcript at PUC headquarters and take notes, but that no copies could be made. Stipulation at ¶ 1-5.

Commonwealth Reporting Company had prepared the transcript and would have charged plaintiff \$2.80 per page, or \$86.80 for a copy of the 42-page transcript (11 of the pages are non-billable "lay-ins"). Stipulation at ¶ 1. Plaintiff submits that cost of reproduction, with the PUC providing the copy or

permitting her to make one in its office², is more appropriate. She withdraws her claim for counsel fees.

The PUC's refusal reflects its policy of referring transcript requests to the appropriate reporting agency. In prior state litigation³ in which that policy was upheld, the PUC took the position that the copy rates charged by reporters are a legitimate form of supplemental compensation for prior services.

Stipulation at ¶ 7.

The contract⁴ governing the provision of court reporting services to the PUC states:

[A title page] should also include the following disclaimer⁵: *Any reproduction of this transcript is prohibited without authorization by the certifying agency.*
[Stipulation at ¶ 12; original emphasis.]

The contract also provides that if *Sierra Club* is modified or overruled, "the parties will attempt to amend the contract to comply with the requirements of

² Plaintiff has never sought to impose the duty of providing her with a copy on Commonwealth Reporting Company.

³ *Sierra Club v. Public Utility Commission*, 702 A. 2d 1131 (Pa. Cmwlth. 1997), affirmed 557 Pa. 11, 731 A. 2d 133 (1999).

⁴ Exhibit 3 to Stipulation.

⁵ Why the PUC calls this a "disclaimer" is a mystery.

the Right to Know Act [65 P.S. § 66.1 et seq.] as interpreted by the courts." Stipulation at ¶ 12.

Arrangements for court reporting services to the PUC are also subject to the Special Contract Terms and Conditions (Contract No. 9985-07, Exhibit 4), applicable to Commonwealth agencies generally. This contract permits agencies to copy transcripts for internal use and for other agencies but prohibits them from supplying them to litigants or other persons absent exigent circumstances or a court order. There is one more exception: transcripts are "deemed to have entered the public domain[]" after five years and may be copied for the public. Stipulation at ¶ 11.

The Question Involved

Does the refusal of the Pennsylvania Public Utility Commission to provide plaintiff with a copy of the transcript of its January 13, 2005 public meeting at cost of reproduction violate her rights under the First Amendment and the preemption provisions of the Copyright Act?

The Right to Acquire Information

Plaintiff's right of access to the information contained in the transcript is not in dispute, and there is no claim that any security or privacy concerns justifying restricting the manner of her access. The transcript is a public record: *Sierra Club, supra*. Plaintiff has a First Amendment right of access to it. See generally *Richmond Newspapers v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980) (First Amendment grants right of access to judicial proceedings) *United States v. Smith*, 787 F. 2d 111 (3rd Cir. 1986) (right of access includes access to transcripts); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978) (general right to inspect and copy public records and documents, judicial and otherwise, respected by courts in this country; no special showing of need required); *Publicker Industries, Inc. v. Cohen*, 733 F. 2d 1059 (3rd cir. 1984) (same); *Whiteland Woods v. Township of West Whiteland*, 193 F. 3d 177 (3rd cir. 1999) (right of access extends to open administrative proceedings).⁶

⁶ But see *North Jersey Media Group v. Ashcroft*, 308 F. 3d 198 (3rd cir. 2002). *North Jersey* contains

The Claimed Justification for the Restriction

The sole justification advanced by the PUC for treating this transcript differently from other public-record documents is as follows:

[Plaintiff] cannot force the agency to give her what is the reporter's property at a reduced fee. [Brief in Support of Defendants' Motion for Judgment on the Pleadings at 8.]

The transcript in the PUC office is the property of the PUC. The PUC cites no authority whatsoever for the proposition that a reporting agency retains a proprietary interest⁷ in a transcript. *Sierra Club* did not create any such interest.⁸ Rather, it allowed the

dictum critical of *Whiteland Woods*. *North Jersey* involved deportation proceedings; openness threatened national security. No such threat was presented in *Whiteland Woods*.

⁷ Proprietary interests are substantive rights and cannot be created by regulation. *Ruch v. Wilhelm*, 352 Pa. 586, 43 A. 2d 894 (1945).

⁸ Commonwealth Reporting Company, intervening in *Sierra Club*, asserted that transcripts are the work product of court reporters and that reporters accordingly have a proprietary interest in them. The court stopped short of recognizing such an interest.

Feist Publications v. Rural Telephone Service Company, 499 U.S. 340, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991), stating that "[C]opyright rewards originality, not effort[]", is dispositive of any claim that the labor involved in producing transcripts gives reporters a proprietary interest in them. Any analogy

PUC, on policy grounds including reporter compensation, to treat transcripts as *if* they were reporter property.

The *Sierra Club* decision was based on a clause in Pennsylvania's Right-to-Know Act permitting state agencies to enact "reasonable regulations" governing copying; that clause (65 P.S. § 66.3) was removed with the 2002 amendments to the Act. Act of June 29, 2002, P.L. 663, effective in 180 days. The copy cost provisions are now found at 65 P.S. § 66.7(b), which states:

Duplication. Fees for 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, and any conflict between federal and state law was eliminated.⁹

to attorney work product must fail; attorney work product is protected for confidentiality reasons. The only property right created by the doctrine belongs to the client or a successor to the client's interest. See generally *Maleski v. Insurance Commissioner of Pennsylvania*, 641 A. 2d 1 (Pa. Cmwlth. 1994) (single judge opinion).

⁹ Genuine copyright continues to be accommodated by 65 P.S. § 66.1, which states that the term "public record" shall not include any document whose publication is restricted by "statute law." Copyrighted written material in the possession of a state agency would be such a document.

Federal Copyright

The PUC recognizes the unavailability of federal copyright protection for transcripts, acknowledging that transcripts are not the original work of court reporters.¹⁰ Plaintiff would add that the Supreme Court of the United States long ago rejected the concept of a copyright in judicial records: *Wheaton v. Peters*, 33 U.S. 591, 668, 8 L. Ed. 1055, 1083 (1834) (no reporter of decisions can claim copyright in opinions), *Banks v. Manchester*, 128 U.S. 244, 253, 9 S. Ct. 36, 40, 32 L. Ed. 425, 429 (1888) (neither judges nor state can hold any copyright in judicial opinions); *Callaghan v. Myers*, 128 U.S. 617, 666, 9 S. Ct. 177, 191, 32 L. Ed. 547, 562 (1888) (fruit of labor of judges and reporters of decisions is property of the people). What these decisions mean is that no one can have a proprietary interest in a transcript that has become a public record. The participants that make the "verbal contributions"¹¹ without which the transcript would not

¹⁰ *Lipman v. Massachusetts*, 475 F. 2d 565 (1st cir. 1973) (reporter's claim of copyright in transcript rejected).

¹¹ Brief in Support of Defendants' Motion for Judgment on the Pleadings at 7.

exist are also disqualified regardless of the creativity of those contributions.

Preemption of State Law

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

In *Sears, supra*, the question was 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

¹² 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).

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, *Compro 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 PUC does not dispute that the *right* claimed is among those within the general scope of copyright. 17 U.S.C. § 106, Exclusive rights in copyrighted works, includes the right of reproduction, precisely the right claimed here.

The PUC does not invoke the provision in 17 U.S.C. § 301(b) (3) relating to other legal or equitable rights. That subsection preserves 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. A leading copyright commentator observes:

Although there is a tendency for wronged plaintiffs to catalogue the iniquities that have befallen them under the rubric of every evil known to humanity, to the extent that the essence of the wrong is copyright infringement, then dressing it up in ill-fitting clothes cannot alter its identity. [*Nimmer on Copyright, supra* 1.01[B][1][j], p 1-49.]

To be preserved under § 301(b)(3), 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 injury.

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 part¹³:

Subject matter of copyright: In general

(a) Copyright protection subsists, in accordance with this title, in original works

¹³ Section 103 deals with derivative works and has no application here.

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[.]

. . . .

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.¹⁴ 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:

¹⁴ 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.

[T]he District Court failed to consider evidence that Geac's 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[.] [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.¹⁵ 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,

¹⁵ There is authorship, in the limited sense of human agency, in fixing the spoken words of others in a tangible medium of expression, but it is not original authorship. For an example of matter held to be outside the "subject matter of copyright", see *Toney v. L'Oreal, USA*, 406 F. 3d 905 (7th cir. 2005) (plaintiff's likeness held not to have been "authored" and claim regarding its use held not preempted).

or because it has fallen¹⁶ into the public domain[.]

The quoted language in *Geac* is incompatible with this purpose. The Seventh Circuit stated in *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 § 301). See also *Rand McNally v. Fleet Management Systems*, 591 F. Supp. 726 (N.D. Ill. 1983) (irrelevant under § 301 that collected facts at issue might turn out not to be copyrightable).

Nimmer explains the fallacy in treating originality

¹⁶ Transcripts of public legal proceedings are born into the public domain.

as a prerequisite for preemption:

What if a work clearly falls within "the subject matter of copyright as specified by Sections 102 and 103," but the work fails to achieve federal protection because it lacks originality, or because there has been a failure to observe one of the required formalities[?] If such work is thereby excluded from the federal sphere of copyright protection, does that mean that it is therefore not pre-empted from state law protection? . . . It is clear that failure to meet the required standards for federal protection will not negate federal pre-emption. Otherwise, noncompliance with the conditions to limited federal protection could lead to a more unlimited form of state protection. Such a result would roundly contravene not only the expressed legislative intent, but the very purpose of the pre-emption structure. [*Nimmer, supra*, § 1.01[B][3][a], p. 1-63; footnotes omitted.]

Geac need not control 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 § 301 is inapplicable, any state law¹⁷ granting court reporters the right to exclude others from copying their transcripts of public proceedings would conflict with the First Amendment.

¹⁷ The PUC has cited no such law. Presumably, before a law can escape federal preemption, it must exist.

Plaintiff's Right of Action

Your Honorable Court has raised the question of whether § 301 creates a private right of action. The starting point for the analysis is 42 U.S.C. § 1983, which provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

Plaintiff has a right of redress under § 1983 not only for deprivation of her First Amendment rights but for deprivation of rights granted by federal statute. *Maine v. Thiboutot*, 448 U.S. 1, 100 S. Ct. 2502, 65 L. Ed. 2d 255 (1980).

The criteria for determining whether a statute creates a private right were set forth in *Blessing v. Freestone*, 520 U.S. 329, 117 S. Ct. 1353, 137 L. Ed. 2d 569 (1997). In that case the Supreme Court stated:

[There are] the three principal factors this Court has used to determine whether a statute creates a privately enforceable right: whether the plaintiff is one of the "intended beneficiaries of the statute," whether the plaintiffs' asserted interests are not so

"'vague and amorphous' as to be 'beyond the competence of the judiciary to enforce,'" and whether the statute imposes a binding obligation on the State. [*Id.* at 338, 117 S. Ct. at 1358, 137 L. Ed. 2d at 580; citations omitted.]

Copyright is a monopoly. *Commissioner v. Wodehouse*, 337 U.S. 369, 69 S. Ct. 1120, 93 L. Ed. 419 (1949). Copyright is the right to exclude others from copying something. *eBay, Inc. v. Mercexchange, LLC*, ___ U.S. ___, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006); *Fox Film Corporation v. Doyal*, 286 U.S. 123, 52 S. Ct. 546, 76 L. Ed. 1010 (1932). Thus, a copyright in one person is in derogation of the rights of all other persons. Conversely, when a law precludes copyright, it gives those others the right to copy, in keeping with the policy that what Congress has left in the public domain may be freely copied. *Compco, supra*. "No person may restrict others from copying" and "All persons have the right to copy" are two ways of saying the same thing. There is nothing vague or amorphous about the right granted.

Finally, § 301 imposes a binding obligation on the state:

[N]o person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

There is nothing precatory about that language. The Congressional report states that the bill "prevents the States from protecting" material that fails to qualify for federal copyright. H.R. Rep. No. 94-1476, *supra*. That is a mandate.

The satisfaction of the three-prong test raises a rebuttable presumption that a statute creates a private right.¹⁸ *Blessing* goes on to say:

[D]ismissal is [nonetheless] proper if Congress "specifically foreclosed a remedy under § 1983." [Citation omitted.] Congress may do so expressly, by forbidding recourse to § 1983 in the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983. [*Id.* at 341, 100 S. Ct. at 1360, 65 L. Ed. 2d at 582; citation omitted.]

Nothing in the Copyright Act forecloses a private remedy under § 1983, nor does the Act provide for a comprehensive enforcement scheme¹⁹, particularly with

¹⁸ Strictly speaking, the question is whether the statute grants a private right, not whether it creates a private remedy; § 1983 provides the remedy. *Gonzaga v. Doe*, 536 US 273, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002).

¹⁹ There is no body created to enforce Title 17. The functions of the Copyright Office do not include enforcement. 17 U.S.C. § 701.

regard to preemption.²⁰ Copyright controversies, including preemption disputes, are ordinarily resolved through civil litigation.²¹ When individual rights protected by the Act are infringed under color of law, there is no reason that the responsible governmental bodies or officials should not be subject to suit for prospective declaratory relief when Eleventh Amendment immunity does not apply.²²

To construe the Copyright Act in the manner urged by the PUC would deprive plaintiff of any federal recourse for restraints that violate § 301, notwithstanding that federal courts have exclusive jurisdiction of copyright questions, 17 U.S.C. § 1338.

²⁰ The only enforcement provision remotely relevant to preemption is § 506(c), Fraudulent Copyright Notice, which provides:

Any person who, with fraudulent intent, places on any article a notice of copyright or words of the same purport that such person knows to be false, or who, with fraudulent intent, publicly distributes or imports for public distribution any article bearing such notice or words that such person knows to be false, shall be fined not more than \$2,500.

This is only useful when knowing falsity and fraudulent intent can be proven.

²¹ See generally 17 U.S.C. § 501-513.

²² The PUC has not pursued its initial claim of immunity.

