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Cases of Note -- Space Aliens Meet Barney And Stephen King Is Watching Us All

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LEGAL ISSUES

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Cases of Note — Space Aliens Meet Barney And Stephen King Is Watching Us All

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Copyright - Damage Calculation For Space Alien Photos or Why You Should be Glad You're Not a Free-Lance Photog

Douglas M. Bruce v. Weekly World News, Inc., et al.

United States Court of Appeals for the First Circuit

310 F.3d 25; 2002 U.S. App. LEXIS 22626

Douglas **Bruce** is a free-lance photog who in 1992 snapped a pic of Billy Jeff Clinton shaking hands with a Secret Service agent. He sold said pic to The Picture Group, a photo stock agency. **World News** bought the photo and — without **Bruce's** authorization — superimposed a space alien over the head of the SS agent. **World News** had been using the alien gimmick in political campaign coverage since 1990.

Your guess as to the marketing strategy. The UFO conspiracy demographic? A tabloid spoof of itself?

World News published the photo on Aug. 11, 1992 captioned "Alien Backs Clinton!"

The picture was used several more times with **World News** paying Picture Group \$500 each time which split with **Bruce** netting him a big \$1,775. Then Picture Group went out of business.

In 1994, **World News** began selling t-shirts embossed with the alien photo. **Bruce** hired a lawyer and **World News** offered him what seems like a contemptible \$500 for a release of copyright but in fact was industry standard.

Meanwhile, feeling they were on a roll, **World News** began simply wallowing in alien cover photos and t-shirts including twelve senators as aliens, **Bob Dole** endorsed by alien and **G.W. Bush** greeting alien. **Bruce's Clinton** & alien was used as insets with many of these, in a collage of previous **World News** covers, and 48 times as a subscription drive inside the paper.

Bruce sued for copyright infringement and won \$20,000 and change at the district court level. There was no issue as to infringement because what could **World News** do but admit they'd done it.

This was based on unauthorized use in editorial and two different t-shirts and on the Internet (\$300 + \$800 + \$1,200) times a **multiplier of 5** (as punishment for the unauthorized use) plus one half the t-shirt sales revenue.

You can see from the dinky fees what a desperate business free-lance photography is for the man who can't capture a Jackie Kennedy swimming nude or Princess Fergie having her toes sucked. But that multiplier of five is intriguing.

As you can imagine, once you're in the tabloid alien photog business, you get an inflated view of your worth. And **Bruce** appealed asking for much, much more.

On Appeal

The First Circuit reviewed *de novo* the standard for calculating damages with a requirement of "clear error" before upsetting the \$20,000. See *Tamko Roofing Prods., Inc. v. Ideal Roofing Co.*, 282 F.3d 23, 34 (1st Cir. 2002).

Bruce was entitled to (1) actual damages — lost income and profits; and (2) nonduplicative profits earned by **World News** — which is to say anything **World News** got which wasn't covered by **Bruce's** actual damages. See 17 U.S.C. § 504(b); *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1170-77 (1st Cir. 1994).

Actual Damages

The district court gave **Bruce** only half of \$2,200 in licensing fees since he would have split with The Picture Group which was out of business. **Bruce** said **World News** was unjustly enriched by this and he should get all of it. The First Circuit agreed.

Yes, **Bruce** had contracted away half. But the **unjust enrichment doctrine** requires a choice of the most deserving recipient. And

World News was the villainous copyright infringer. See *Invest Almaz v. Temple-Inland Forest Prods.*, 243 F.3d 57, 64 (1st Cir. 2001).

Bruce was peeved that the district court ruled he could be paid only for the first unauthorized use of his photo and not all the others. For example, it was used repeatedly in ads for the t-shirts. He figured the Clinton & alien was so popular he could have hung tough with **World News** and demanded a healthy per use fee. See *Iowa State Univ. Res.*

Found., Inc. v. Am. Broad. Cos., 475 F. Supp. 78,83 (S.D.N.Y. 1979)

("[The infringer] cannot expect to pay the same price in damages as it might have paid after freely negotiated bargaining, or there would be no reason scrupulously to obey the copyright law."), aff'd, 621 F.2d 57 (2d Cir. 1980).

The district court, as you will see, based the one-time fee on the publishing industry habit of crassly abusing authors and writers. The starving, artsy wretch begs for a buyer and must surrender all copyright without a clue as to what use the publisher intends for his product. The publisher smirks and dangles the potential for fame with subsequent higher prices for later product. But somehow this never materializes.

The Appellate Court held the actual damages to **Bruce** were a question of fact as to the reasonable fee he might have received. So the clear error standard came into play. And there was no clear error.

Expert testimony as to prevailing industry practice was that **Bruce** didn't have a prayer of getting a per-use licensing fee. See, e.g., *De Graffenried v. United States*, 25 Cl. Ct. 209, 220-21 (1992) (relying, in patent-infringement case, on evidence that industry practice was to negotiate a single up-front royalty, rather than a per-use royalty).

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Bruce's expert said he should get "whatever we feel is fair," while **World News'** expert presented chapter and verse on how the entire industry pays one up-front fee, take-it-or-leave-it. And the district court as fact finder was entitled to decide **World News'** expert was the most credible.

Which we all know he was.

These pathetic fees for free-lance work are proof that the whole Tasini imbroglio is pure nonsense except for the lawyer's cut of the class damages.

Unsold T-shirts

Bruce was awarded licensing fees for the use of his photo on two t-shirts plus the revenue **World News** took in from sales. **Bruce** claimed \$1 to \$3 on each t-shirt manufactured, not just those sold. But his own expert witness admitted in 25 years in the business she had never seen such a contract.

His position wasn't totally berserk. World News had given the unsold ones away for promotional purposes. Which is to say World News got a profit from them. And would seem to put this in that (2) nonduplicative profit area.

However **World News'** expert convincingly testified there was no industry practice of per use royalty for promotional items. And again no clear error.

Nonduplicative Damages

Bruce claimed a share of profits **World News** got from ad revenues and tabloid sales due to the use of his fabulous photo. And he might have had something here because a Clinton-embraces-alien cover must have made that paper fairly fly off the grocery store racks.

But his lawyer flubbed it by not properly pursuing discovery.

If he had merely requested gross revenues, there would have been a simply incredible burden shift to **World News** to prove that income was due to other sources than his photo. See 17 U.S.C. § 504(b); *Data Gen. Corp.*, 36 F.3d at 1173.

But he didn't ask for gross advertising and sales revenues. Instead he asked for profits "derived in any way or realized from the use of Plaintiff's Photographs." And **World News** answered none but from t-shirt sales.

And then he didn't object or move to compel discovery. See, e.g., *Worster v. U.S. Postal Serv.*, 2002 U.S. pp. LEXIS 2703, No. 99-00726 (4th Cir. Feb. 20, 2002) (holding that party's failure to file motion to compel production of documents waives argument on appeal).

Gag. You can imagine the unpleasant hour his lawyer had trying to explain away that little goof-up. This WAS the COVER PHOTO.

The lure that makes you lift it off the shelf and begin leafing through all the moronic drug abusing stars and nearly nude, hot-bodied starlets.

And they used it over and over again.

They put it on t-shirts, for gosh sakes. Is there any greater evidence for an American as to success of a photo? A t-shirt totally validates it. It simply screams out "Fifteen minutes of fame!"

Apportioning T-shirt Sales

The district court split the t-shirt profits 50-50. The reasoning was **Bruce** produced only the Clinton (non-alien) half of the photo. **Bruce** said when the t-shirt reached icon status, apportionment became so speculative that he should get the benefit of the doubt. See *Bus. Trends Analysts, Inc. v. Freedomia Group, Inc.*, 887 F.2d 399, 407 (2d Cir. 1989) (noting

that apportionment may be "impossible" where two concepts have become too intertwined); *Walker v. Forbes, Inc.*, 28 F.3d 409, 414 (4th Cir. 1994).

Presumably "benefit of the doubt" meaning he should get all the money.

The First Circuit felt the district court had been more than generous with **Bruce**. His photo was so boringly generic that it had next to no sales value.

Certainly as evidenced by his handing it over for the original \$500.

It was the addition of the alien that gave it the oomph.

And in cases where "star power" boosts the value of a photo, the plaintiff typically gets far less than half. See *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 398, 60 S.Ct. 681 (1940).

Copyright - Statutory Damages for Barney the Dinosaur or Why Not to Be Your Own Lawyer

Lyons Partnership v. Pamela Holmes, d.b.a. Pamela's Razz Pizzazz

United States Court of Appeals for the Seventh Circuit

34 Fed. Appx. 229, 2002 U.S. App. LEXIS 7500

Lyons Partnership owns the frequently-mocked but wildly lucrative dinosaur characters in the t.v. series "Barney and Friends." **Pamela Henry** rented and performed in costumes infringing their copyright.

When **Lyons** sued, **Henry** chose to be her own lawyer.

I mean it never looks hard on t.v.

I have a lot of painful personal experience with this. When I was practicing law my clients were frequently embroiled with bozos who appeared pro se. And it always infuriated me that the judges paid such deference to them, holding their hands and giving them extra time on every little thing.

But here we get a very different result.

Lyons served one of those exhaustive interrogatories on her asking among other things if she currently had or had ever rented "any 'Putative Barney' [which shall refer to] any purple, magenta, violet or similarly-colored adult-sized costume resembling or imitating a dinosaur, hippopotamus, dragon, reptile, alligator, or similar creature, and/or referred to by any name, including but not limited to 'Purple Dino,' 'Purple Dinosaur,' 'Hillary the Hippo,' 'Purple Hippo,' 'Duffy the Dragon,' 'Purple Alligator,' 'Dino,' 'Purple Gator' or 'Purple Monster.'"

Henry answered "no."

She was asked the same about green dinosaur "Baby Bop" costumes.

Again she said "no."

A year later, she apparently got an attorney who explained she could defend against statutory damages by showing she was using her own purple dinosaur before **Lyons** had registered **Barney**. And her story changed.

The lawyer filed supplemental responses saying she had had a purple dino back in 1984.

The federal judge had of course dumped the pro se mess into the hands of a magistrate. And he had no trouble finding that she had lied and imposing sanctions — to wit, she was barred from defending against statutory damages. Which amounted to \$22,500 for **Barney** and the same for **Baby Bop** plus \$55,543 in attorney's fees and \$2,100 in costs.

Ouch. You try to save money on lawyers and this is what you get.

She appealed, getting deeper into the bills of course, and got slammed again. **Henry** claimed to not know the meaning of "putative **Barney**" but then admitted she knew it meant "supposed." And of course **Lyons'** terribly efficient big firm lawyers had defined it for her. See, e.g., *In re Golant*, 231 F.3d 931, 936 (7th Cir. 2001) (district court's finding that party against whom discovery sanctions are imposed displayed willfulness, bad faith, or fault is reviewed for clear error).

Henry argued she should not have been denied a belated request for a jury trial on damages. The Federal Rules of Civil Procedure gave her ten days following service of the final pleading to ask for a jury trial, and after that it's waived. Even for pro se folks. See Fed. R. Civ. P. 38(b),(d); *Members v. Paige*, 140 F.3d 699, 701-02 (7th Cir. 1998). **Henry's** request was a year and a half late.

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of her infringement. All those media conglomerates have folks out there cruising and looking for infringements. And some pay finders fees to informers.

In a particularly grody part of North Charleston is a harmless little day care center with Disney characters painted on the outside walls. They're safe so far because no tourist in the history of the Lowcountry has ever ventured into the wilds of North Charleston. But if I were to pick up the Disney informers' hot line ...

Copyright Infringement — It Has To Be At Least Sort Of Similar

Anne Hiltner v. Simon and Schuster, Inc., et al.

United States Court of Appeals for the First Circuit

34 Fed. Appx. 394; 2002 U.S. App. LEXIS 8718

This falls into the "this just in" category.

Anne Hiltner sued Stephen King, Simon & Schuster and Glassbook, Inc. for copyright infringement and invasion of privacy. She claimed King's novella *Riding the Bullet* was lifted from an unpublished manuscript entitled *Robert Adams*, written

Perhaps her biggest mistake was in not realizing that Lyons didn't come after her at random. They must have had specific knowledge

of her infringement. All those media conglomerates have folks out there cruising and looking for infringements. And some pay finders fees to informers.

by her late brother with her having an ownership in the copyright as his heir.

Copyright

The Ninth Circuit found that the two works were neither "substantially similar" — neither sequence of events nor character development — nor was anything from *Robert Adams* quoted directly. See 4 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 13.01[B], at 13-8 to 13-9 (2001) (to state an actionable copyright claim, a plaintiff must show that "the defendant's work is substantially similar to [the] work [in question] such that liability may attach").

They don't address the issue of how King might have had access to an unpublished manuscript. But presumably the brother submitted it to Simon & Schuster, probably over the transom so the thing was immediately trashed.

Invasion of Privacy

There are four potential forms of invasion of privacy: (1) unreasonable intrusion into the seclusion of another; (2) appropriation of someone's name or likeness; (3) public disclosure of private facts; and (4) publicity that unreasonably places another in a false light.

The Court found that since there was no shred of similarity between the characters in the two works, King had not (2) appropriated her identity. Since nothing in *Riding the Bullet* deals with her private life, (3) and (4) are knocked out.

And finally as to (1) intrusion into seclusion:

"[H]er allegation that she has been under surveillance for years is completely conclusory and is not supported by specific facts."

Questions & Answers — Copyright Column

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QUESTION: Professors often ask librarians why the library does not just go ahead and digitize the entire collection. How should one respond to this?

ANSWER: I suggest loud guffaws! Faculty members appear to think the only reason that they do not have digital access to everything is laziness on the part of librarians. They are usually unaware of the major copyright concerns that would accompany such an effort. In fact, Project Gutenberg and other digital projects have had more difficulty with copyright than anything else.

A more serious answer to the faculty is that it would take a huge grant to fund the digitization project itself and an even larger on-going grant to pay the copyright royalties. Few copyright owners would be willing to permit digitization for a flat fee, and likely would charge a per use royalty. Moreover, some publishers would flatly refuse to grant permission to digitize under any conditions. Thus, library collections probably will not ever be solely in digital format, or at least in most of our lifetimes.

QUESTION: The library is trying to do a much better job in managing its electronic reserves collection by seeking permission for reproducing the work for the reserve collection after the first semester use, etc. A faculty member does not want to ask permission for using an article repeatedly and has asked if he could not simply place his personal copy of the physical journal issue on reserves.

ANSWER: Certainly, it is only when the library reproduces the work either through photocopying or electronically for reserves that the library needs to be concerned with keeping records, seeking permission after the first semester, and the like. Placing the hard copy on reserve, either from the library's own collection or the professor's personal copy of the journal issue, is fine.

QUESTION: What is the personal liability for a librarian who writes copyright guidelines for faculty when faculty members either do not understand the guidelines and infringe or simply do not comply with them?

ANSWER: It is the direct infringer and the institution that would be liable for infringing copyright in violation of the policy or guidelines, not a librarian who drafts guidelines for the institution. The librarian who drafts the guidelines is doing so at the request of a college or university official as a part of his or her job duties. Librarians are not responsible for ensuring that every faculty member and student follow the policy or the law down to the nth degree. While an unhappy copyright owner could initially name the librarian in a suit against the institution and/or the faculty member, it is likely that the suit would be dropped against the librarian who was not responsible for the infringing conduct.

QUESTION: How can the provider of full text articles in a database restrict delivery of articles from that database via interlibrary loan? Is there a difference between electronic delivery and printing and manual delivery?

ANSWER: Most databases are not only copyrighted, but they are also governed by

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