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Cases of Note -- Copyright: Flunking the Incredibly Low Feist Test

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LEGAL ISSUES



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Cases of Note — Copyright

Flunking the Incredibly Low Feist Test

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Charles Syrus v. Clay Bennett; Oklahoma City Thunder, UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, 2011 U.S. App. LEXIS 22304.

Oklahoma City Thunder is a pro basketball team previously the Seattle Supersonics but now in OKC, hence the new name. It's an interactive age, and **Thunder** put out a request for fans to "share ideas" with the team. Quick to respond, songwriter **Syrus** wrote a song for them and registered it for copyright. In a self-promotion, he gave a copy to the mayor, an unnamed coach, and the team's head cheerleader. No one showed much interest.

However, the phrases "Thunder Up," "Go Thunder," and "Let's Go Thunder" were used in ads, on banners, and were chanted by cheerleaders and crowd at games. A miffed **Syrus** said these were taken from his lyrics and violated his copyright. Naturally he sued. And not shy in his demands, he wanted "20-30% of net gross" of the team's revenue as damages.

Yes, you can see exactly where this is headed. But if you're just sitting around watching paint dry, you may want to read further.

OKC Thunder won dismissal of the complaint under Rules 8(a)(2) and 12(b)(6) of the FRCP.

If you watch John Travolta in "A Civil Action" you'll see 12(b)(6) made fun of. Travolta plays an ambulance chaser who likes to haul off and sue big corporations with very thin factual allegations, then rummage through their records under Discovery seeking wrong-doing. It's one of Hollywood's "THEY're poisoning our water" extravaganzas.

Trial lawyers seem to worship the movie and show it at Continuing Legal Eds when in fact, Travolta's lawyering is grossly incompetent. He blunders into a deposition without the faintest idea how leather is tanned, volume of chemicals used, or method of disposal. So he can't catch the central-casting villain tanner in any lies.

And he seems to have no knowledge of EPA regs requiring disposal certificates, the absence of which would show the toxic gunk was dumped on the ground.

Not to mention his disbarable offense of refusing healthy settlements without informing

the clients. But in Hollywood Land, that's not an ethical issue because his heart bleeds for the poor wee victims and burns with hatred of the evil corporations.

So there is a good reason for 12(b)(6). If nothing else, it keeps nincompoop lawyers from wrecking the client's case.

I love this definition. A complaint must have "enough facts to state a claim to relief that is plausible on its face." **Bell Atl. Corp. v. Twombly**, 550 U.S. 544, 570 (2007). Or you can try "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 555.

Defendant **Clay Bennett**, Prez of Professional Basketball Club, LLC, which owns **OKC Thunder**, was out because there were no allegations whatsoever about him and hence no plausible claim.

Thunder was out because the trite little phrases are not subject to copyright protection.

But hanging on like a pitbull, **Syrus** went to the Tenth Circuit.

So What is the Feist Thingy?

Feist Publ'ns, Inc. v. Rural tel. Serv. Co., 499 U.S. 340 (1991) involved copyright protection for a phone book that had separate business and residential sections. Copyright protects "original works of authorship fixed in any tangible medium of expression." 17 U.S.C.

§ 102(a). Tangible — phone book. Original — not copied from someone else and holding some minimal degree of creativity. How minimal? That hum-drum phone book organization was considered sufficiently original. Setting a very low standard of creativity indeed.

Words and short phrases are generally not protected, particularly when they "convey an idea typically expressed in a limited number of stereotyped fashions." **Narell v. Freeman**, 872 F.2d 907, 911 (9th Cir. 1989). A short phrase might be protected if the degree of creativity were sufficient. **Melville B. Nimmer & David Nimmer**, *Nimmer on Copyright*, § 2.01[B], at 2-17 (Matthew Bender, Rev. Ed. 2011).

Anyone who has lived through the dreadful years of "teen spirit" knows that "Go Dogs (Panthers, Toads, Mako Sharks, etc.)" is about as stereotyped as they come. Some teensy-weensy degree of originality is required. Or is the *sine qua non* of copyright, as they say. **Feist Publ'ns, Inc.**, 499 U.S. at 348.

And Syrus Flails About

Syrus argued that single words like "Budweiser" and "Coors" get protection. So ... "Go Thunder" should as well. But he hopelessly confuses copyright with trademark. Trademark rights "grow out of ... use" and do not "depend upon novelty, invention, discovery, or any work of the brain." **Trade-Mark Cases**, 100 U.S. 82, 94 (1879).

Syrus never used "Go Thunder" in commerce as a mark for any goods. 🐾



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or even a taxi, I am always interested in how people interact with books, magazines, newspapers, technology. And the astute **David Mash (Lander University)** actually recorded his unscientific observations in this issue, p.46.

If you have followed **Ann Okerson's liblicense**, there is repeated discussion of this by **Jim O'Donnell** and many others! **No, Virginia, the print book is not dead!**

And speaking of **Liblicense**, it has been moved seamlessly from **Harvard** to the **Center for Research Libraries**, where **Ann** is now based! Congratulations to both **Ann** and **CRL**!

Do you know that we did some video interviews during the **31st Charleston Conference** and **Ann** was one of them. Watch for announcements on the **ATG NewsChannel** www.against-the-grain.com/.

As we go to press, I just learned from the approval plan legend **Richard Abel** that **Don Stave** just died. **Richard** reminds us that **Don** was the principal inside man who helped develop the systems to get books to academic and research libraries cheaper and faster. **Richard** promises to write a memorial about **Don** for **ATG**.

And finally, **Happy New Year!** Have heard from many of you with wishes for the New Year! **Sandy Paul, Laura Berg, Jack Montgomery, Clara-Mae Chitum, Betty and Sevgin Oktay, Corrie Marsh**, and many of you! Happy New Year and much love always. Your editor. 🐾