

## Newspaper Ad Copyright Decision Upheld

(Continued From Preceding Page)

ed to the advertiser. The court reasoned that to hold that the preparer had the copyright would produce an absurd result. The absurd result was that whenever the advertisement was prepared by a third party, such as an advertising agency, publication of the advertisement would infringe the copyright. The assumed absurdity is untrue, of course. The copyright is not infringed when the advertisement is published in accordance with the intention of the parties. The advertiser unquestionably has a license to do that.

When the Canfield case was appealed to the Court of Appeals for the Fifth Circuit, it expressly declined to pass upon the ownership of the copyright but held the copyright invalid because of insufficiency of notice. Unlike the situation here, there was no individual copyright notice on the advertisement, as required.

The presence of a copyright notice on each copyrighted advertisement in the Beacon may alleviate substantially the concern of the court in Brattleboro Publishing Co. The advertisers are not left in a continuing state of ignorance about the copyright claims of the newspaper.

Moreover, the only person with any incentive to enforce the copyright is the publisher of the newspaper. Short of some possible misuse, the advertiser has no incentive to prevent republication by another newspaper at a very cheap rate, but the newspaper publisher may understandably be concerned about what it regards as unfair competition.

Considerations of fairness and appropriateness, however, are of little concern here. Congress has made the choice, and it is for us to apply the statute as the Congress intended. As rewritten in 1976, the Copyright Act requires the conclusion that the copyright is owned by the newspaper publisher whose employees prepared it, unless there is a written agreement signed by it and the advertiser that the work should be considered work for hire.

### III.

The district court absolved the publisher, Caroline Schock, of the Free Press from any personal liability. She had the largest financial investment in the Free Press and the nominal title of publisher, but she had no real authority and her duties were minimal.

In addition to statutory penalties, the district court held that the infringements were willful and awarded attorneys' fees, the amount of which is yet to be determined.

We affirm both of these rulings. The case is to be remanded for further proceedings to determine and assess the attorneys' fees.

**AFFIRMED AND REMANDED HALL, Circuit Judge, dissenting:**

I cannot agree with the majority's conclusion that the copyrights in this case are owned by the publisher of the newspaper whose staff prepared the ads. For this reason, I respectfully dissent.

Neither the language of the amended statute nor its legislative history convinces me that Congress intended to change the employer-employee relationship for copyright purposes or to construe it so narrowly as to mandate the result reached by the majority in this case. In my view, the district court in Canfield v. The Ponchatoula Times, correctly decided this issue, when it held that under the 1976 Copyright Act, as under the previous statute, the advertiser—not the newspaper—is the copyright owner of the ad commissioned by the advertiser but designed, prepared, and printed by the newspaper.

As the district court in Canfield noted, the arrangement between an advertiser and a newspaper which creates and runs the ad is not a traditional employer-employee relationship. Nevertheless, the ads in this case, as in Canfield, were created at the insistence and expense of the advertisers, who retained the right to control and supervise both the nature and content of the ads. In fact, one of

the advertisers in the instant case, the co-owner of a car dealership, originated a slogan used in his ad. Regardless of whether the advertiser's control is ever exercised, however, the only rational conclusion is that Congress under the 1976 Act intended for the ad produced by the newspaper to be a work made for hire.

This conclusion is fully supported by the language of Section 201(b) of the 1976 Copyright Act and its legislative history:

In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

Comments contained in the House Report accompanying this section confirm that:

Section 201(b) of the bill adopts one of the basic principles of the present law: that in the case of works made for hire the employer is considered the author of the work, and is regarded as the initial owner of copyright unless there has been an agreement otherwise. The subsection also requires that any agreement under which the employee is to own rights be in writing and signed by the parties.

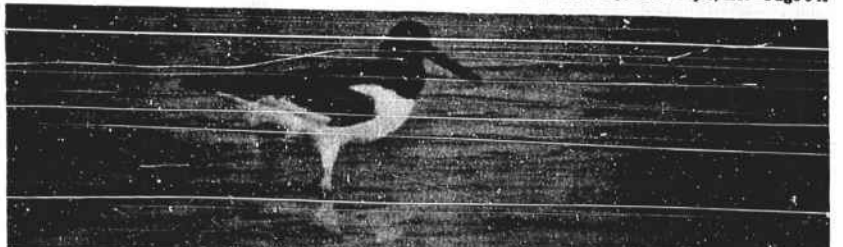
The House Report further demonstrates Congress' rejection of certain amendments to the work-made-for-hire doctrine proposed by

motion picture screenwriters and composers:

Their proposal was for the recognition of something similar to the 'shop right' doctrine of patent law: with some exceptions, the employer would acquire the right to use the employee's work to the extent needed for purposes of his regular business, but the employee would retain all other rights as long as he or she refrained from the authorizing of competing uses. However, while this change might theoretically improve the bargaining position of screenwriters and others as a group, the practical benefits that individual authors would receive are highly conjectural. The presumption (sic) that initial ownership rights vest in the employer for hire is well established in American copyright law, and to exchange that for the uncertainties of the shop right doctrine would not only be of dubious value to employers and employees alike, but might also reopen a number of other issues.

Despite the majority's conclusion to the contrary, its holding in favor of the Beacon does produce an absurd result, whereby the advertisers become infringers of the party they hired to produce their ads. Surely, this result was not what Congress intended when it passed the 1976 amendments, as demonstrated by its specific rejection of the shop right doctrine.

For the foregoing reasons, I would reverse the judgment of the district court.



THE LONG BILL of the Oystercatcher gives us a clue to its feeding habits. PHOTO BY BILL FAVER

## Bills Of Birds Give Clues To Diet

Just as we can identify the food animals are likely to eat by the shape of their mouths and teeth, we can speculate on diets of birds by the shapes of their bills. Birds have bills shaped for cracking seed, for probing mud, for digging insects from bark, for catching fish, for sucking nectar from flowers, or for scooping food from the water.



Bill Faver

The bills of hummingbirds are straight and slender for probing deep into flowers for nectar. Most sparrows, warblers, kinglets and similar small birds use their short bills for eating small seed, berries and insects.

and minnows for their nourishment.

Along our coast, many of the shorebirds depend upon the ability to probe the sand and mud between the tides in search of small crustacea, snails, etc. Their bills are long and slender and the holes left in the sand attest to the uses to which they are put. Some of the birds with this type bill are the sandpipers, willets, whimbrels, knots, dunlins and avocets.

Other waterbirds have bills designed for catching fish. The herons, ibis, egrets, and anhinga use their bills in stalking and overtaking frogs, crabs

Birds using their bills for scooping fish from water are the pelicans the spoonbills. Pelicans have hooked upper mandibles and distensible throat pouches and can grip large fish and bring them into the "baskets" or pouches. Spoonbills place their wide spoon-like bills underneath the water and move them from side to side like a windshield wiper as they walk along and "spoon-up" small fish and other marine life.

Bills of birds give us clues about what they do for food. We can infer a great deal about the bird's diet by examining its bill, for the bill has been formed to handle the food the bird eats.

# The Thing You'll Like Most About Our Home Equity Loan Is Having To Pay The Interest.

Because the interest is all you have to pay until a home equity loan from NCNB reaches maturity. LineOne® Equity is a revolving line of credit based on the equity in a home. And it's one of the few consumer loans for which interest deductions may still be allowable under the new tax law. But it's different from most other home equity loans in that it allows you to pay as little or as much of the principal each month as you choose. You even have the option of only paying the interest each month. And that's a big plus, which can be seen from the chart shown below.

### Line Of Credit Monthly Repayment Schedule.

Credit Amount	NCNB <sup>1</sup>	Bank A <sup>2</sup>	Bank B <sup>2</sup>	Bank C <sup>2</sup>
\$10,000	\$71	\$150	\$170	\$300
\$20,000	\$142	\$300	\$340	\$600
\$50,000	\$354	\$750	\$850	\$1500
\$100,000	\$708	\$1500	\$1700	\$3000

<sup>1</sup>Assumes an 8 1/2% rate and an outstanding balance equal to the credit amount shown, 15 yr. term. <sup>2</sup>Interest-only payment option. <sup>3</sup>Required payments as a percentage of outstanding balance (interest and principal payment).

What's more, LineOne Equity from NCNB can offer you advantages that home equity loans from most banks

<sup>1</sup>Example is based on NCNB's Prime Rate plus 1%. NCNB's Prime Rate is the rate announced by NCNB from time to time as its Prime Rate. Although the Annual Percentage Rate may vary, on December 10, 1986 the Annual Percentage Rate was 8 1/2%.

Equal Housing Lender

across the state just don't. Which include: 1) No origination fees; 2) A fast closing of usually 10 to 15 business days after you apply; 3) No fees for unused credit; and 4) A credit line of up to \$100,000 or more, or up to 100% of the equity in your home.

But best of all, LineOne Equity allows you to use your credit anytime, anywhere, just by writing a check.

So visit your local NCNB office or call Phone-A-Loan at 1-800-342-9701 (in Greensboro, 855-NCNB), and ask about LineOne Equity.

Then, compare it to other home equity loans. We think that you'll find LineOne Equity to be an item of interest.

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