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April 2001

## Napster Violated Copyright Law

**SUMMARY:** *Napster*, an internet website that allowed users to exchange musical recordings, violated federal copyright law, even though the site itself did not store the recordings. *A&M Records, Inc. v. Napster, Inc.* was decided by the United States Court of Appeals for the Ninth Circuit on February 12, 2001.

**BACKGROUND:** The Moving Picture Experts Group created a standard file format for digitally storing audio recordings in 1987. Digital MPEG-3, or MP3, files are created through a process known as "ripping." With ripping software, a person can save audio recordings directly to the computer's hard drive by compressing the audio file, as from a compact disk (CD), into an MP3 file. Once in this format, the file can be readily transferred to other computers via the internet, or saved to a CD if the person owns a ROM burner (a device capable of recording onto CD-ROM).

The Napster website allowed computer users from around the world to share musical recordings over the internet. All the users needed to do was download the site's MusicShare software. This software allowed users to search other users' computers for MP3 music files they wanted, to make copies of the files on their own hard drives, and to transfer those copies to other users via the internet or to other storage media, such as CD-ROM.

The Napster site facilitated this transfer by providing the MusicShare software and maintaining a library of the names of the available recordings on users' computers. A person seeking a particular recording could log onto Napster, search for the recording, and download it in MP3 format if the user who had the song on his or her hard drive was logged on. While it provided the means for users to share MP3 files, the Napster site did not contain any of the recordings themselves. All of the MP3 files shared over the network were stored on users' computers.

During the website's history, millions of people used Napster to share musical recordings over the internet. None of the people who shared or received music over the network paid any fee or royalty to a recording company or musical artist. (At some point, however, someone had typically paid for the recording that was first converted to MP3 format and made available over Napster.)

A&M Records, joined by Geffen Records, Interscope Records, Sony Music, MCA Records, Atlantic Recording, Island Records, Motown Record Company, and Capitol Records, sued Napster, alleging that the website violated copyright law and seeking a preliminary injunction to shut the website down. The U.S. District Court for the Northern District of California granted the injunction, and Napster appealed to the Ninth Circuit Court of Appeals.

**ANALYSIS:** The plaintiffs claimed that Napster's activities constituted a violation of their copyright in the works shared. The term copyright actually covers five rights that are exclusively held by the

copyright owner. The copyright holder has the exclusive right to 1) copy the work, 2) prepare derivative works, 3) distribute the work, 4) perform the work publicly, and 5) display the work publicly. The plaintiffs alleged that Napster users violated at least two of these—copying protected works, and distributing them.

Although copyright law is designed to encourage artistic endeavors by protecting the creators' rights in their artwork, the law also furthers the public interest in copyrighted works by allowing what is known as "fair use" of protected works. Under the "fair use" doctrine, the public may make limited use of copyrighted material without owing compensation to the copyright holder. A teacher, for example, could read a few paragraphs from a novel in class without violating the book's copyright. A music teacher could demonstrate the sound of an oboe by playing a bit of a popular song, again, without violating the composer's copyright.

Napster argued that what its users did with the help of its website constituted fair use of the musical recordings traded as MP3 files. The company specified three types of fair use the site promoted. First, they cited sampling, where users listen to a selection or two by an artist before going out and buying a CD or other recording of the artist's songs. Second, Napster identified space-shifting, where users who already owned the songs simply accessed them in another format online. Finally, Napster said its users had permission or consent from both new and established artists to share their music as a way to generate more interest in the artist or group.

In determining whether a particular alleged infringement of copyright is a fair use of the protected work, courts make several inquiries. They look at 1) the purpose and character of the use; 2) the nature of the copyrighted work; 3) the amount and substance of the portion used in relation to the work as a whole; and 4) the effect of the use on the market value of the work.

When a court considers the purpose and character of the use, it looks at whether it is "transformative." That is, whether the use transforms the work for some different or further purpose. For example, a court may find that reading a few paragraphs from a novel to get a class discussion going, or playing a riff from a popular song to demonstrate the sound of an oboe, does transform the use to some further purpose. On the other hand, photocopying the whole novel, or passing out a recording of the original song, would not transform the work. Here, the court found that Napster's website, which allowed users to share files that were essentially identical to the original recording, did not constitute a transformative use. Changing the medium from a CD to an MP3 file did not transform the use—typical Napster users simply listened to the MP3 files, the same way they would have listened to a CD.

The second factor, the nature of the copyrighted work, also weighed against Napster. Creative works receive greater protection than fact-based

works. At least in part, this is because facts are available for anyone to discover and use and, once someone has compiled facts, the public interest is served in some use of that information. Musical compositions are creative in nature, and therefore less likely to be exempted from copyright by fair use.

How much of the work is used is also a crucial consideration. Photocopying a page from a large book harms the copyright holder's interests much less than copying the whole work. A single page is hardly replacement for the whole work, which an interested party would still buy. A copy of the whole work, however, is precisely a replacement for the whole work and therefore deprives the copyright holder of the chance to sell the work to the copy's recipient. In this case, Napster users typically shared a full copy of the recording.

Finally, there is the consideration of the use's impact on the market value of the work. Where the use does not reduce the market for the work, it tends toward fair use. Where it meaningfully reduces the market, the use is less likely to be fair. The parties provided differing views on this issue. The plaintiffs' expert conducted a study showing that Napster use reduced album purchases among the college student marketplace. Defendants provided their own expert, who testified that Napster actually enhanced recordings sales by exposing the market to a greater variety of music. Although the district court allowed both experts' reports to come into evidence, the court did not rely on the defendant's expert's findings. The district court opined that those findings were based on inadequate evidence.

Having reviewed the general components of fair use, the court turned to the specific fair uses Napster had identified—sampling, space-shifting and consent. The district court had found that even if some Napster users purchased recordings after sampling an artist's recordings through the website, many did not. And regardless of whether they did, downloading for free songs the artists offer for sale constitutes a commercial use of the recording, in violation of copyright law. The court also concluded that Napster harmed the digital download market, which recording companies are developing on a fee basis.

For its space-shifting argument, Napster relied on cases in which the courts had upheld the right to move copyrighted works from one medium to another. Napster cited cases in which courts had held that VCRs, and technology allowing a person to record an MP3 from a CD, did not violate copyright law. In this case the court distinguished those examples because they involved home use of the recording. Here, Napster users were sending and receiving the files to hundreds, thousands, even millions of other users. Thus, the fact that some initial CD purchaser converted the song to MP3 format did not shield from copyright infringement all the other users who then secured a copy of the recording.

Finally, the court addressed Napster's argument that it had permission to circulate the music from new and established artists. The court noted that some groups and recording companies make available portions of their songs, or full songs that expire after a certain listening period, over the internet. Through Napster, however, users trade full-length versions of the songs that do not expire. By making portions of or limited duration songs available, artists were not granting permission for Napster to circulate full, unrestricted versions of songs. Some copyright holders had given Napster permission to circulate certain recordings and the plaintiffs made no challenge to those situations.

The final issue was the extent that Napster itself was liable for infringement—after all, no recordings were stored on Napster's computers. Plaintiffs alleged that Napster was liable for contributory infringement and vicarious infringement. A person may be liable under the first principle when he knowingly contributes to another's infringement. The district court had found that Napster, which had

developed the software and maintained a technical support service, was fully aware of the uses to which Napster fans were putting the site and actively furthered that use. The Court of Appeals agreed, finding sufficient evidence to support a ruling that Napster had engaged in contributory infringement.

A court may find a party vicariously liable when the party has a financial interest in the infringement and has the right and ability to supervise, and therefore to stop, the infringing activity. Napster's financial success as a company relied on the trading of recordings by its users. Further, Napster had stopped some uses of its network where copyright holders had complained. The court found that this admission by Napster supported the district court's finding that Napster had the power to police its network. Because it stood to gain by the infringement, and had the power to stop it and did not, the court found sufficient evidence to support a claim for vicarious liability.

Because it found that the plaintiffs were likely to prevail in a trial on the merits, it sustained the injunction.

#### **EXCERPTS FROM THE COURT'S OPINION (By Judge Beezer):**

"The district court first concluded that downloading MP3 files does not transform the copyrighted work. This conclusion is supportable. Courts have been reluctant to find fair use when an original work is merely retransmitted in a different medium. Th[e] 'purpose and character' element also requires the district court to determine whether the allegedly infringing use is commercial or noncommercial. A commercial use weighs against a finding of fair use but is not conclusive on the issue. The district court determined that Napster users engage in commercial use of the copyrighted materials largely because (1) 'a host user sending a file cannot be said to engage in a personal use when distributing that file to an anonymous requester' and (2) 'Napster users get for free something they would ordinarily have to buy.' The district court's findings are not clearly erroneous....

"The record supports a finding that free promotional downloads are highly regulated by the record company plaintiffs and that the companies collect royalties for song samples available on retail Internet sites. Evidence relied on by the district court demonstrates that the free downloads provided by the record companies consist of thirty-to-sixty second samples or are full songs programmed to 'time out,' that is, exist only for a short time on the downloader's computer. In comparison, Napster users download a full, free and permanent copy of the recording. The determination by the district court as to the commercial purpose and character of sampling is not clearly erroneous....

"Napster further argues that the district court erred in rejecting its evidence that the users' downloading of 'samples' increases or tends to increase audio CD sales. The district court, however, correctly noted that 'any potential enhancement of plaintiffs' sales ... would not tip the fair use analysis conclusively in favor of defendant.' We agree that increased sales of copyrighted material attributable to unauthorized use should not deprive the copyright holder of the right to license the material. Nor does positive impact in one market, here the audio CD market, deprive the copyright holder of the right to develop identified alternative markets, here the digital download market....

"We agree that if a computer system operator learns of specific infringing material available on his system and fails to purge such material from the system, the operator knows of and contributes to direct infringement. Conversely, absent any specific information which identifies infringing activity, a computer system operator cannot be liable for contributory infringement merely because the structure of the system allows for the exchange of copyrighted material. To enjoin simply because a computer network allows for infringing use would, in our opinion, ...potentially restrict activity unrelated to infringing use."



## Wife of Drug Dealer Protected from Forfeiture

**SUMMARY:** The government could not seize the home of the wife of a deceased drug dealer under criminal forfeiture laws where the woman was unaware of her husband's illegal activity prior to his arrest. *United States v. Real Property at 221 Dana Avenue* was decided by the First Circuit Court of Appeals on February 6, 2001.

**BACKGROUND:** William Gass purchased a home at 221 Dana Avenue in Hyde Park, Massachusetts, on February 5, 1990. The deed to the house was in his name only. Since 1990, Kathleen Gass lived with him there. The two were married on January 8, 1995. Mrs. Gass worked as an accountant for the Department of Housing and Urban Development, while Mr. Gass operated a taxi service out of the home. Mrs. Gass did not contribute to the purchase of the home, but she did contribute to the household expenses, including food and clothing. The couple have a son, who was born about 1992.

Mr. Gass operated his taxi business out of a separate apartment located in the downstairs of the house. Mrs. Gass did not go into that office, and did not even have a key to it. Unbeknownst to her, her husband was selling cocaine out of the first floor office, in addition to running his taxi service.

The government got wind of Mr. Gass's activities and began investigating him in 1997. With the help of a confidential informant, government agents with the Drug Enforcement Agency and U.S. Customs Service made a few controlled drug buys at the property. On January 8, 1998, they arrested Gass and charged him with cocaine distribution. When they searched the property, they found 490 grams of cocaine and nearly \$60,000 in cash. They also found a scale and other equipment that the informant said were used to measure out the drug. The time of the search was the first time Mrs. Gass learned that her husband was selling cocaine.

William Gass executed a will leaving all of his property to his wife on January 19, 1998. On January 29, 1998, he committed suicide on the property. Five days later, the government filed a complaint seeking forfeiture of the property at 221 Dana Avenue pursuant to federal drug laws.

In October 1999, a jury trial was commenced on the forfeiture action. The court dismissed the jury, finding that there were no factual issues in dispute and that all that remained in the case were legal issues, for the court's decision. The court found in favor of the government, ruling it had the right to seize Mrs. Gass's property because of her husband's drug offense. This appeal followed.

**ANALYSIS:** At trial, Kathleen Gass had argued that under the forfeiture statute she was an "innocent owner" of the property and therefore forfeiture was not appropriate. The trial court rejected this argument. Instead, it adopted the government's position that Gass was not "innocent" at the time she received the property because she was aware of its use for cocaine distribution at that time. This argument was based on the premise that Gass took her interest in the property at the time of her husband's death through his will. She had learned of the illegal drug transactions when the house was searched a few weeks before. The government had also made a policy argument at trial that allowing Gass to retain the property under the circumstances would create a large loophole in the forfeiture scheme: it would allow drug criminals to avoid forfeiture simply by transferring property to an unsuspecting relative before law enforcement caught up to them.

The appeals court looked first at the language in the forfeiture statute concerning "innocent owners." That language provided that "no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission...committed or omitted without the knowledge or consent of that owner." This language, the court noted, did not make clear the property interest that established a person as an "owner," nor did it specify at what point an owner's "knowledge or consent" was to be assessed for purposes of determining the owner's innocence.

Looking at the legislative history--the notes on the hearings surrounding passage of the law--the court found a statement that "the term 'owner' should be broadly interpreted to include any person with a recognizable legal or equitable interest in the property seized."

The appeals court also noted that the U.S. Supreme Court had interpreted the innocent owner provision in one case. In that case it found that the term "owner" was not limited to bona fide purchasers of the property; that someone who acquires an ownership interest after the illegal acts have occurred may still assert the defense; and that equitable considerations may play a role in construing the statute.

The courts that have looked at the forfeiture statute have recognized that state law is the proper source for determining the property interests at stake. What they have not agreed upon is the point at which the property owner's knowledge of the crime should be assessed. The government argued in this case that the appropriate time to determine whether a property owner was "innocent" of knowledge or consent of the criminal acts was the time the property was transferred. The Eleventh Circuit has agreed with this argument, holding that an owner who knew of the criminal acts at the time he or she received the property could not claim the innocent owner defense. One court, however--the Third Circuit Court of Appeals--has held that a person can assert the defense if he or she did not own the property at the time of the crime and was therefore not in a position to consent to its use for drug activities.

Regardless of the approach, the courts that have looked at the forfeiture statute agree that the critical issues are when the owner knew of the criminal activity, and when he or she became an owner of the property. The government and the trial court took the position that Gass became aware of her husband's drug selling before she became the owner of the property. Therefore, following the reasoning of the Eleventh Circuit, she could not have been an innocent owner.

The court of appeals disagreed with this conclusion. First, under Massachusetts law, Gass did have an interest in the property at 221 Dana before she found out about his drug dealing. This is because Massachusetts law protects the rights of a spouse in marital property. This protection means that when the marriage ends by death or divorce, the wife takes a share of the property. Where the marriage ends by death, this right is called a dower interest. When it ends by divorce, the dower interest disappears, but the spouse receives an equitable distribution of the marital property.

Rights to dower and marital distribution pass property to one spouse only at death or divorce. Yet a spouse cannot be deprived of these rights without consent even during the marriage. To what extent they constitute rights in property during the marriage is a

subject of some debate. Courts have described the interest in marital property that exists during the marriage as "inchoate" rights, that is, rights that are incomplete, or have only begun to take form. The government cited a Tenth Circuit case in which the court had held that inchoate rights are not an interest in property but a mere possibility and therefore were not an interest in property for the purpose of the innocent owner defense. The appeals court, however, distinguished that case, which applied Colorado law, from this one. In an 1866 case, the Supreme Court of Massachusetts opined that a wife's "inchoate right of dower is a right of a very peculiar nature. It is a right of which nothing but her death or voluntary act can deprive her, and so it is something more than a mere possibility." Since state law controls regarding property rights, the court followed this reasoning rather than the Colorado case.

In creating the innocent owner defense, the appeals court reasoned, Congress was balancing two distinct purposes of the drug forfeiture law. One purpose was to discourage drug crimes by enforcing forfeiture of the property used to further those crimes. The other purpose, however, was to ensure that innocent property owners did not lose their property through unwitting association with drug criminals. The government had argued that forfeiture was necessary in this case to advance the first objective, but the appeals court did not agree. It reasoned that forfeiture here would cut against Congress's intentions.

As to the deterrence facet of the forfeiture law, it did not apply to Mrs. Gass because she had no knowledge of the drug distribution until Mr. Gass was arrested. And it didn't apply to Mr. Gass either, as he had committed suicide and was thus unable to enjoy the property. Allowing the innocent owner defense, the government had warned, would open a loophole whereby drug criminals could simply keep family in the dark about their crimes and then transfer property to them when the law closed in. The appeals court found this argument inapplicable because Mrs. Gass already had an interest in the property before she became aware of the crime. What's more, if her husband had wanted to shield the property, he could have transferred it to her when he first started dealing in drugs, at which point she would clearly have been an innocent owner.

Finding that Mrs. Gass did have an interest in the property before her husband's death, and before she found out about his drug crime, and that the purposes of the forfeiture statute would not be served by taking her home away, the court of appeals vacated the decision below and dismissed the government's forfeiture action.

**EXCERPTS FROM THE COURT'S OPINION (By Judge Lynch):** "The courts have created various doctrines over the years intended to deal with the practical considerations of how best to effectuate the twin legislative objectives behind forfeiture: the deterrence of drug activities by forfeiture of property involved and the protection of the innocent from loss of their property interests by virtue of their association with drug criminals. The deterrence objective applies to both use of drug proceeds and use of property as an instrument for drug dealing. As part of its deterrence objective, forfeiture is meant to prevent drug dealers from benefiting from their crimes by putting their profits from drug activities in other hands and also to discourage those associated with drug dealers from facilitating or even consenting to such crimes....

"The government's interest in having bright-line tests for forfeiture is certainly legitimate. Such tests are easy to administer.

They are more predictable and hence provide clearer notice. It may be that common situations can be governed by bright-line tests. But the tests cannot be unmoored from the settings to which they are applied, and no single rule can adequately cover all situations. More fundamentally, such tests must aim to carry out the dual purposes of Congress in enacting the forfeiture statute: the deterrence of drug crimes and the protection of innocent owners. Although Congress's purposes are somewhat at odds with each other, we do not view the issue before us in quite the same terms as the government--that is, as posing a choice between a Scylla and a Charybdis, threatening to do harm to one of Congress's purposes or the other. To the contrary, we see no congressional purpose furthered by rejecting claimant's innocent owner defense on these facts.

"The government's argument here has several problems. Most importantly, it skips past the fact that, under Massachusetts law, claimant had a partial interest in the property, the marital home, at the time of the illegal activity, and that interest existed long before she knew that her husband was dealing drugs. Thus, as to those interests, we need not reach the broader question of whether, under other circumstances, the innocent owner defense may be asserted by a post-illegal-act transferee with post-illegal-act knowledge-- that is, by a claimant who knew about the illegal activities when he or she acquired the property interest, but who did not know about those activities when they were occurring. Rather, because the claimant in this case had a partial interest in the property prior to learning about the illegal activities, and because the congressional purpose of deterring drug crimes would not be served by forfeiture, we conclude that she may assert the innocent owner defense....

"Claimant had a type of property interest created by Massachusetts in an effort to protect a spouse's interest in marital property in the event the marriage ends, whether by death or by divorce. In the case of a spouse's death, Massachusetts recognizes several protected interests, including the dower interest, whereby a surviving spouse receives a life estate in one third of all real property owned by the deceased spouse at the time of death. The Commonwealth also protects surviving spouses against being intentionally or inadvertently disinherited under the deceased spouse's will by allowing the surviving spouse to waive the will and take a share of the decedent spouse's estate as prescribed by the elective share statute; if the deceased left [children], the surviving spouse may waive the will and elect to receive at least one third of all real and personal property. In situations where a spouse died intestate, Massachusetts' statute of descent and distribution provides that the surviving spouse is entitled to inherit varying shares of the deceased spouse's estate depending on whether the deceased spouse is also survived by [children] or kindred; if the deceased spouse left issue, that surviving spouse takes one half of the personal and real property outright. Here, claimant's dower interest amounted to a life estate in one third of the property located at 221 Dana Avenue....

"We do not know whether the government, if it had recognized that Mrs. Gass was an innocent owner of a one third interest, would have exercised its prosecutorial discretion to attempt to forfeit any arguable remaining interest.... But assuming arguendo the government intends the present action to reach any remaining interests, such effort fails because forfeiture would not, on these facts, serve any congressional purpose behind the forfeiture statute."



## Father Liable for Son's Friend's Negligence

**SUMMARY:** A father was liable to a minor girl injured when she rode with his son's friend on the father's 3-wheeled ATV. The Court of Appeals of New York decided *Rios v. Smith* on February 13, 2001.

**BACKGROUND:** Desiree Rios and her younger sister accompanied minors Frank Smith and Theodore Persico, Jr., to a farm in Saugerties, New York, owned by the Persico family. They stayed in one of the residences on the property, where Theodore's father (Persico) kept two three-wheeled ATVs for use by his five sons.

On a day when Persico was not present, Theodore and Smith asked the Rios sisters if they wanted to go for a ride on the ATVs. They said they did. Rios climbed aboard the vehicle driven by Smith, while her sister rode with Theodore. Smith and Theodore popped wheelies with the vehicles and then began racing down a blacktop pathway. Smith left the pathway, began to climb a grassy incline and hit a tree. Rios was thrown into the tree and the ATV came to rest on top of her. She was seriously injured.

Rios's suit included a claim against Persico for negligent entrustment of a dangerous instrumentality (the ATV) to a minor. The trial court instructed the jury to determine whether Persico failed to use reasonable care in entrusting the ATVs to his son, with knowledge that his son might lend one of them to a companion, and whether entrusting the ATVs as such created an unreasonable risk of harm to others.

The jury found in Rios' favor, finding Persico 35% liable, Smith 40% liable and plaintiff 25% liable for her injuries. They awarded her \$6,800,000 for past pain and suffering and \$2,250,000 for future pain and suffering. Persico appealed the decision, seeking a reduction in damages and reversal of the decision finding him liable for Smith's conduct. The appellate court reduced the damages but did not disturb the liability finding. Persico then appealed to the Court of Appeals (New York's highest court).

**ANALYSIS:** The legal theory of negligent entrustment is used by plaintiffs who are injured by a minor. It is an effort to recover from the parents, who typically have assets or insurance coverage that can go toward satisfying a damages award. The reasoning behind the negligent entrustment theory is that parents are responsible for their children's conduct and are in a position to control that conduct. Persico argued that negligent entrustment can apply to the conduct of a parent in facilitating an injury caused by his own child, but cannot apply where the minor causing the injury was someone else's child.

The Court of Appeals began its analysis by noting that New York courts generally do not recognize claims against parents for failure to supervise and control their children. The reason for this is the potential harm such cases could cause to the parent-child relationship. Citing an old New York case, the court noted that were such suits allowed, virtually any injury caused by a minor would lead to a negligence claim against the parents.

In two later cases, however, the Court of Appeals distinguished general failure-to-supervise and failure-to-control cases from situations where the risk of harm to a third party was plainly foreseeable. Such a situation has been found to arise where the

parent entrusts the child with a dangerous instrumentality, such as a motor vehicle. Persico had testified that he was aware his sons had ridden the ATVs with passengers in the past and that it was likely they had performed "wheelies" while riding them. He also acknowledged that Frank Smith had been a regular visitor to the farm. Persico had not established any rules regarding his sons' use of the ATVs or their ability to lend them to friends. From these facts, the court determined that it was foreseeable one of Persico's sons might take passengers for a ride, with a friend, ride recklessly, and that one of the passengers might suffer injury.

Persico also argued that an ATV was not a dangerous instrumentality (an automobile is the typical vehicle involved in such cases). The court found, however, that the vehicles were capable of going 20 to 30 miles per hour and were used throughout the 40 acre farm; thus, it was not error to submit the question of whether an ATV was a dangerous instrumentality to the jury at trial.

Finding Rios's injuries foreseeable to Persico, and that an ATV could be a dangerous instrumentality, the Court of Appeals affirmed the decision in Rios's favor.

**EXCERPTS FROM THE COURT'S OPINION (By Judge Graffeo):** "[W]e have long recognized that a parent's negligence in failing to properly supervise and control a child will generally not constitute a tort actionable by the child. This principle was grounded in fundamental concerns regarding the detrimental effects of potential liability on the parent-child relationship. In particular, the Court cautioned that, if negligent supervision claims were allowed, 'it would be the rare parent who could not conceivably be called to account in the courts for his [or her] conduct toward his [or her] child.... Recognizing this potential strain on familial relations, we held that a claim on behalf of an infant against a parent, or by a party seeking contribution or indemnification against a parent, predicated on the parent's negligent failure to supervise that child would not lie....

"In [another case], we concluded that...a mother could not be held liable for leaving her child unsupervised at a shopping mall, despite her knowledge of the child's propensity for violent physical outbursts.... [W]e again emphasized that it is 'unreasonable to burden parents and guardians \* \* \* by exposing them to rebound liability, flowing from a child's or adult's natural deficits or personal qualities' based merely on 'general allegations.' In order to establish the basis for liability, a plaintiff must prove the 'extraordinariness or patent foreseeability of the particular situation.' Thus...parental liability for negligent entrustment is limited to circumstances where a parent's conduct creates a particularized danger to third persons that is plainly foreseeable.

"Here, Persico asserts that...he may not be held liable for negligent entrustment because Smith, the operator of the ATV at issue, is unrelated to him. However, this contention places strictures on the controlling precedent that simply do not exist. As the Court [has] stated..., a parent owes a duty to protect third parties from harm that is clearly foreseeable from the child's improvident use or operation of a dangerous instrument, where such use is found to be subject to the parent's control."



## Twelfth Amendment did not Stop Bush-Cheney Ticket

**SUMMARY:** The Twelfth Amendment, which prohibits the electors of any state from casting votes for both a presidential and vice-presidential candidate who are inhabitants of their state, did not stop the Texas electors from voting for George Bush and Dick Cheney in the 2000 election. *Jones v. Bush* was decided December 1, 2000, by the U.S. District Court for the Northern District of Texas.

**BACKGROUND:** Three Texas voters filed suit in federal court alleging that the Twelfth Amendment to the Constitution prohibited that state's electoral college members from voting for both George Bush and Dick Cheney for president and vice president of the United States. The voters sought a preliminary injunction prohibiting the electors from casting their votes for the two candidates.

Bush and Cheney, whose interests were at stake in the suit, defended the action. They argued that the plaintiffs lacked standing to bring the suit and that their suit constituted a non-justiciable political question outside the jurisdiction of the courts.

**ANALYSIS:** The Twelfth Amendment provides, in part, that "The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves[.]" The Texas voters argued that this provision prevented Texas electors from voting for the Republican presidential ticket because both George W. Bush and Richard B. Cheney were inhabitants of Texas.

Bush and Cheney countered by arguing that the Texas voters had no standing to bring the suit, and that it was a political question. Standing requires that the party that attempts to bring a suit is the party whose interests are at stake. Allowing someone else to bring a lawsuit, who may not zealously pursue justice, would be unfair to the persons whose rights are being decided. A court will not decide a case when a party lacks standing to sue. Because of separation of powers, courts also avoid questions that are strictly political in nature. Issues that are solely political are the province of the legislative branch of government.

Citing Supreme Court precedent, the court opined that in order to have standing, the plaintiffs must show that they have suffered actual injury, that the injury is traceable to the defendants' conduct and that the injury would likely be addressed if they won their lawsuit.

The plaintiffs said their injury was a denial of their constitutional right to have their elected officials secure office according to the rules of the Constitution and applicable laws. They argued that they also had the right to protect the interests of other candidates for president and vice president who could not win if Bush and Cheney secured the state's electoral votes. Finally, they argued that if the electors supported Bush and Cheney, against the Twelfth Amendment's commands, it would interfere with plaintiffs' right to cast a meaningful vote.

The court disagreed with plaintiffs' standing claims. The rights to government in accordance with the Constitution and to cast a meaningful vote were too remote to constitute actual injury to the Texas voters. And plaintiffs did not have the right to assert other candidates' claims that Bush and Cheney were not entitled to the Texas electoral votes. That right, if it existed, would belong to the other candidates themselves. Lacking actual injury, and not themselves opposing candidates, the Texas voters had no standing to challenge the Bush/Cheney ticket's entitlement to the state's electoral votes.

Because the plaintiffs were likely to appeal the district court's decision, and in light of the tight election time frame, the court

continued to the merits of plaintiffs' claim. Looking at a dictionary definition of "inhabitant" published at the time of the Constitution, the court determined that Cheney was not an inhabitant of Texas, but instead a resident and inhabitant of Wyoming. Cheney had moved from Wyoming to Texas to work for a Texas corporation. On July 21, 2000, he had declared his intention to return to Wyoming. After that date, he traveled to Wyoming to register to vote, voted there in two elections, withdrew his Texas voting registration, secured a Wyoming driver's license and sold his house in Texas. Thus, Cheney was an inhabitant of Wyoming and not Texas and his candidacy did not violate the Twelfth Amendment.

**EXCERPTS FROM THE COURT'S OPINION (By Judge Fitzwater):** "Plaintiffs' assertion that a violation of the Twelfth Amendment will harm them by infringing their right to cast a meaningful vote...fails to satisfy the Article III requirement of a 'distinct and palpable injury.' This type of injury is necessarily abstract, and plaintiffs conspicuously fail to demonstrate how they, as opposed to the general voting population, will feel its effects. Indeed, the undifferentiated and general nature of the claimed harm is illustrated by § 58 of plaintiffs' amended complaint, in which they allege that if the Texas Electors are permitted to vote for Governor Bush and Secretary Cheney, 'Plaintiff[s] and all other American citizens will suffer immediate and irreparable injury[.]' Absent a stronger showing of a particularized, palpable injury, plaintiffs have fallen short in their attempt to establish standing to vindicate their own interests in this suit....

"Separate from their own asserted interests, plaintiffs maintain that they 'have standing to protect the interests of the non-defendant candidates for President and Vice President.' This statement appears to suggest that plaintiffs have third party standing to assert the interests of all non-defendant candidates for President and Vice President who appeared on the general election ballot in Texas. None of the [cases plaintiffs cite], however, establishes standing for voters to vindicate the interests of candidates for public office. [Those cases] involved voter challenges to ballot access restrictions. In the present case, however, plaintiffs essentially assert a per se third party standing right to 'protect the interests of the non-defendant candidates.'...

"The court's inquiry into the meaning of "inhabitant" is informed by definitions of the term contained in dictionaries in use at the time the Twelfth Amendment was adopted and ratified. In 1792 a law dictionary defined "inhabitants" of a town or parish as follows:

with respect to the public assessments, and the like, [inhabitants] are not only those who dwell in an house there, but also those who occupy lands within such town or parish, although they be dwelling elsewhere. But the word inhabitants doth not extend to lodgers, servants, or the like; but to householders only.

Webster's dictionary, published in 1828, defined "inhabitant," in pertinent part, as a

dweller, one who dwells or resides permanently in a place or who has a fixed residence, as distinguished from an occasional lodger or visitor.... One who has a legal settlement in a town, city or parish....

"The record shows that Secretary Cheney has both a physical presence within the state of Wyoming and the intent that Wyoming be his place of habitation."



## The Teacher's Page – Comments & Discussion Questions

### Napster

For a short discussion on copyrights, see the discussion on the next page. There is a conflict that now exists between copyright law and the internet. One of the purposes of copyright law is to protect the creator of artistic works and insure that they are appropriately compensated for the use of their creations. On the other hand, one of the basis concepts (or misconceptions) concerning the internet is that vast amounts of information and materials will be widely available – *FREE!* How can copyright law and the internet coexist?

One of the purposes of all law, including copyright law, is to further the public interest. Do you think that protecting someone's copyright should take priority over the internet's capability of providing information for free? Would creativity be stifled if people knew their creation could, in effect, be stolen from them and distributed freely? Do you think that Napster furthers or harms the public interest? Should distribution on the internet be considered fair use? What do you think the limits of fair use should be on the internet?

Do you think it was fair to hold a website liable when copyrighted material is transferred using the website even though someone else is doing the actual transfer? Should internet providers such as AOL be required to police the use of its service so that copyright violations do not occur? Is it appropriate to allow for distribution of copyrighted works just because technological advancements make it possible? What other technological advances do you know of that make copying music, literature, etc. easier?

### Drug Forfeiture Laws

The vigorous war on drugs has led to the enactment of forfeiture laws. These laws provide for the forfeiture of property used in drug transactions and property that has been acquired through drug transactions. The purpose of these laws is to deter drug activity by making someone think twice before he or she sells drugs out of his or her car or house and to make people aware that they might not be able to enjoy their "ill-gotten-gains" in any event. These laws have been held constitutional. Do you agree with the concept of forfeiture laws? Is it right to take homes, cars, money and other property away from persons convicted of drug offenses – even if they serve long prison sentences?

Sometimes innocent parties are harmed by the enforcement of these laws. Do you agree with the court's analysis in this case? The court's conclusion seems to rest on a technicality in Massachusetts law that the wife had a partial interest in the property as a result of marriage. Do you think the result should have been the same even if this technicality was not present? Is it fair to link a person's right to keep property to his knowledge of prior owner's use of it? What about a family member who knew of the drug transactions but was not in a position to stop the illegal activity. Should they be penalized?

Forfeiture laws are not just related to drug crimes. Forfeiture laws exist to take cars away from convicted johns in prostitution cases. Forfeiture laws exist to take car from drunk drivers. Do you think these laws are fair? Would you propose other forfeiture laws in other cases? Keep in mind the rights of other family members or innocent victims that may depend on a car for transportation or a house for shelter. How would you protect their interests?

### Bush-Cheney Ticket

With all of the publicity surrounding the Florida election results, very little attention was paid to this case. However, had this case been decided differently, it is unlikely that George Bush and Dick Cheney would be President and Vice President together today.

The case was decided on *standing* grounds. In other words, the wrong people brought the suit. Al Gore would have been the proper party. However the requirement of the Twelfth Amendment and the actual merits of the case are quite interesting.

The Twelfth Amendment precludes the electors from a particular state from voting for a president and vice president both from that state. It does not explicitly preclude both parties on a presidential ticket coming from the same state. However, it does so as a practical matter since no ticket would want to concede the votes from a state in an election. Why do you think that the Founders included this provision in the Constitution? (The original provision is Article 2, Section 3 and is identical for this provision.) Why didn't the Founders just require that the president and vice president come from different states?

Do you think that the steps taken by Dick Cheney to move back to his home state of Wyoming were sufficient to make him an "inhabitant" of Wyoming? Or, do you think that Dick Cheney should have been considered an "inhabitant" of Texas?

### Father Liable for Son's Friend

Last month's issue of *Courtroom & Classroom* presented a case in which a husband was not liable for the drunken driving of his wife. The *Rios* case presents a policy issue that is a little closer to home for the students. When should a parent be liable for the negligence of his or her child? (Actually, the case takes the question a little further and asks when should a parent be liable for an accident caused by someone else's child?)

The court first states that parents are not generally liable for the failure to supervise and control their children. Do you agree with this approach or should parents generally *be* liable for any injuries caused by a child? What are the policy considerations for each position? On the one hand, making parents generally liable would lead to a flood of lawsuits. On the other hand, wouldn't making them generally liable lead to better parental supervision of children? Would this cause too much strain on the parent-child relationship?

The court bases its decision on the concept of negligent entrustment holding a parent liable in circumstances where a parent's conduct creates a particularized danger to third persons that is plainly foreseeable. Do you agree with this approach? The court talks mainly about the use of motor vehicles. What if the injury is caused by some other instrumentality? A gun? A sling shot? A golf ball? A bicycle? Does the age of the child involved have any impact on the parent's level of liability? What if the child causing the injury was 5? 10? 16? 18? 20? When should the parent be liable?

In this case, the parent was liable for someone else's child's conduct. Was this appropriate? What if Persico had told the children not to ride the ATVs? What if Rios was operating the ATV herself when she was injured? What circumstances would make you change the result?





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## Copyrights

Copyrights are to artistic works as patents are to inventions. A copyright is the right granted by federal law to the author or originator of certain literary or artistic productions, whereby, for a limited period, the exclusive privilege is given to the person to make copies of the same for publication and sale.

Congress is empowered under the United States Constitution, Article I, Section 8, Clause 8, "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."

Federal copyright law protects "original works of authorship fixed in any tangible medium of expression." Such categories of works include 1) literary works, 2) musical works, 3) dramatic works, 4) pantomimes and choreographic works, 5) pictorial, graphic, and sculptural works, 6) motion pictures and other audiovisual works, and 7) sound recordings. The statutory protection also takes into account scientific discoveries and technological developments that have generated new forms of creative expression that never existed before, such as electronic music and computer programs. Protection is not limited to the listed categories, but is only illustrative of what types of works can be copyrightable.

An individual must create an "original" work by personal skill, labor, or judgment, and without directly copying or evasively imitating the work of another in order for it to qualify for copyright protection. The artistic merit, creativity, or literary skill of the work has no bearing on the right to be given a copyright. As long as a work is the product of independent

creation, its creator is eligible to receive a copyright for it. However, ideas, procedures, processes, systems, methods of operation, concepts, and principles or discoveries, regardless of their form, are not within the scope of copyright protection.

Copyrights are granted only for a definite limited term. Congress has no authority to grant perpetual copyrights. Prior to the revision of federal copyright law in 1978, the total life of a copyright was, in general, fifty-six years. Copyright in a work created on or after January 1, 1978 endures for a term consisting of the life of the author and fifty years after the author's death. This time ensures and author and his or her dependents enjoy the fair economic benefits from the work. If a copyright is owned by a corporation, it generally lasts for seventy five years. On the final expiration of a copyright term, the work falls into the public domain and is subject to the unrestricted use of all persons.

A copyright grants the owner or creator the exclusive right to control the copying, reproduction, republication, distribution, or sale of the work. The public must, however, be given formal notice of every work in which a copyright is claimed to prevent persons from making themselves subject to penalties imposed by statute for violating the copyright without knowing about it. That is why you always see the copyright symbol ( the letter C in a circle) or the word "Copyright" on writings or other artistic works.



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