

# TWO CENTS WORTH

*Jury verdict is a victory for rights holders* BY PETER SKINNER

First, let's get one thing straight. Houston photographer and ASMP member John Blackmer is not a litigious person—he does not go looking for legal fights. In fact, and in this probably he is like the majority of ASMP members, Blackmer would be very happy to be known as a competent professional photographer who does his job well and has a stable of satisfied, well-paying clients.

Blackmer, a 1981 graduate of Syracuse University (photojournalism) and an ASMP member since 1991 is from a newspaper background. He worked on papers from 1979-1991 in Syracuse, New York; Boise, Idaho; Orange County, Calif.; and Phoenix, Ariz., and is a former National Press Photographer of the Year. On becoming a freelancer in 1991, he sought advice on the business from a friend from college days, Seth Resnick. And then he embarked on a freelance career, based in Houston, carving a niche in making lifestyle and product images for developers and builders. His photographs in the Houston market have helped many of his clients win awards for their projects. One thing he has aggressively protected is his copyright in those images and he has been very strict and specific about re-use rights. It has paid off, as Blackmer has generated many sales from re-use of images made in the 1990s.

"I have adopted the approach that you never get what you don't ask for so when I am negotiating an assignment I ask a lot of questions and negotiate in a way that is understandable to clients. I am concerned about doing the best job, getting paid for it, and also about my reputation in this market," he said. In the field in which Blackmer specializes, unauthorized usage is fairly common. Images used in one builder's

brochure might be scanned by another company for their collateral; a photograph made of an estate site for a development company becomes fair game for some other entity involved in the development. As a freelance/contract photographer, Blackmer said all he would like is the courtesy of a phone call and the opportunity to negotiate the resale and use of his work. Not much to ask, is it?

However, like most photographers who find work being used without authorization or compensation, Blackmer's standard procedure is to contact the other party seeking payment without legal recourse. He politely points out that he makes a certain portion of his income from licensing re-usage rights and follows up with an invoice. Invariably, and unfortunately, the invoice is ignored until legal documents which convey the threat of a suit are waved in front of the offending party. At that stage, payment is usually forthcoming. It's not a pleasant situation for either party and Blackmer knows that he may have lost a client. Still, who wants clients that rip off images and refuse to pay until a lawyer is hired?

Most of Blackmer's infringement matters have been settled out of court, thanks to the emphasis with which his attorney Dana LeJune of LeJune & Singer, Houston, has issued the threat of further legal action. But one infringer, a Texas builder and developer, took the fight through the legal system until finally a jury had to decide who was right.

Without going into all the nuances, the matter revolved around Monarch Developments of Texas, Inc., a wholly-owned subsidiary of the giant British holding company, Taylor-Woodrow, LLC, infringing two of Blackmer's copyrighted

images which he originally shot for a custom builder. Of seven custom builders constructing homes in a Monarch development, Blackmer had done work for six of them and the president of Monarch was well aware of that. However, that didn't stop Monarch from purloining one of those images and using it on a billboard.

Subsequently, Blackmer sent an invoice for a year's usage, an action that triggered an abusive phone call from Monarch's president, including a threat "to be taken from Monarch's list of photographers." However, after a lengthy and contentious discussion, the retroactive license fee and duration of usage were negotiated and a fee for that usage paid. But that was not the end of it.

Attorney LeJune explained that the company's CEO later testified that he "shoved the letter (of agreement) into the file and didn't read it, then paid the bill." A few months later, LeJune said, the company again used Blackmer's work, this time, in eight consecutive monthly issues of builder magazine ads, and left the billboard up four months longer than the previously negotiated term of the license. Enough is enough, Blackmer figured, and initiated legal action against Monarch and the ad

**"Fortunately, Blackmer had done everything right: his copyrights were registered, making him eligible for statutory damages."**

agency involved. Monarch then sued the builder, but dismissed it from the suit after only a short time—after reaching an agreement on how it would testify.

Monarch dug its heels in and, according to LeJune, “They (Monarch Developments) fought like hell, and tried some very underhanded tactics to prejudice the jury.” Fortunately, Blackmer had done everything right: his copyrights were registered, making him eligible for statutory damages, and all agreements were in writing—his paperwork was in order. Ultimately, justice was done. Not only did Monarch Developments pay for its blatant disregard of photographers’ rights—to the tune of more than \$130,000—the judge also slammed others of the same ilk.

Monarch’s taking it to the jury really backfired; actual damage verdict, \$5,500; statutory damage verdict, \$60,000.02; attorney fees, \$66,000.” And why the two cents? After the verdict, the jury foreman explained that was their “two cents;” they wanted to “send a message” to the company’s management that it is not the photog-

rapher’s job to police his copyrights, it’s the company’s job.

Blackmer said it was very satisfying having the jury throw in their “two cents” in their ruling for damages. “In addition, I’m grateful for the opportunity of having a no nonsense federal judge hear the case. There were some underhanded tactics the defendant’s counsel tried, and the judge did not let any of it fly,” he said.

All photographers can take heart in part of the final order by US District Court judge David Hittner, Southern District of Texas: “The evidence produced at trial, which was relied upon by the jury in assessing statutory damages against Defendants, demonstrated that Defendants used Plaintiff’s copyrighted images without authorization and only ceased doing so when suit was filed. The evidence showed that the problem of developers engaging in such tactics was widespread. Therefore, the Court finds that an award of attorney’s fees is warranted in order to advance the principles of appropriate compensation and deterrence

from future misconduct.”

And how does John Blackmer feel after this long, drawn-out, and stressful—but ultimately satisfying—process. Well, he’s glad he went the distance and fought for his rights; is delighted that the laws which were written to protect creators were upheld by a jury and judge who saw through the legal smokescreen thrown up by Monarch’s lawyers; is grateful for having a truly zealous attorney in Dana LeJune; is appreciative of the “well done and congratulatory messages from colleagues and supportive clients;” and is relieved it’s all over. But, in his own words, he really feels like “a grape that had been sucked through the trunk of an elephant, and dropped out the tail end as a raisin.”

“It was, however, a really valuable educational experience for me, and I’d do it again in a heartbeat. I’d also encourage every other photographer/author/artist to stand up for their work. If we don’t, and there are no consequences for people taking our work, our markets will be only suffer and be shaped by this,” said Blackmer .∞

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## **ADVERTISEMENT**

## CADET MURDER CASE IMAGE SUIT IS SETTLED

A copyright lawsuit filed in U.S. District Court in Dallas, Texas against more than a dozen media defendants has been settled for a confidential amount. The plaintiff, a Dallas "glamour shots" studio, alleged that it owned the rights to the portraits of the victim in the high-profile *Cadet Murder Case*, and that numerous newspapers, agencies, and television companies were not entitled to use the image without paying license fees.

A few weeks prior to the December, 1995 murder of Adrienne Jones in Plano, Texas, the girl's mother had arranged for a portrait session with Texas Hot Shots, doing business as Hot Looks, Inc. Subsequently, when the bizarre circumstances of the love triangle murder, and the fact that the couple charged (and eventually found guilty) had been accepted to prestigious military academies, became highly-publicized, the "glamour" portraits of Jones were suddenly in great demand.

Houston attorney Dana LeJune was retained by Hot Looks to recoup license fees for the wide-spread use of the photographs which had been made available to the media by Jones's mother. The media defendants tried to get the mother to cooperate in their defense of the copyright claims by having her deny publicity rights to Hot Looks. LeJune argued that while some states do allow the publicity rights of a person to survive his or her death, in Texas the right is not automatic. An heir may register the claim to the publicity rights with the Texas Secretary of State, but that must be done within one year of the death. After one year, all claims to publicity

rights are waived. Because Jones's mother had not registered the claim within the year, Hot Looks was the only entity which could charge for use of the portraits of Adrienne Jones following her tragic death.

The news media defendants raised the "news reporting defense" under fair use, arguing that because they were reporting news, and to adequately convey the ideas within the story, they had to use Jones's portraits.<sup>1</sup>

However, LeJune argued that while the media defendants could have used many other images of Jones, including snapshots of her in her high school cheerleading outfit, they chose not to do so. "The primary reason they chose to use the obviously professional portraits is that they were sexy, glamorous and rendered the love triangle gone awry byline much more sensational than it would otherwise have been," said LeJune. "Thus, the images' use was much more profitable to the defendants, and not protected by fair use."

The amounts of the settlements were not disclosed; a spokesman for Hot Looks was permitted to say only that the settlements were "very satisfactory." Photographer and stock photography agent Jim Pickerell of Maryland was the expert witness for Hot Looks.

<sup>1</sup> Profit motivation can also negate fair use under the news-reporting portion of the exception. Because the facts can be copied in a broadcast without the need to reproduce the expression, a claim that the image used is newsworthy does not necessarily validate a fair use. ∞ — Peter Skinner

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ESTATE OF Dean M. VANE, Richard J. Vane, Executor substituted in place and stead of Dean M. Vane, Deceased, Plaintiff-Appellant Cross-Appellee, v.

THE FAIR, INC., Defendant-Appellee, Cross-Appellee,

Vance-Mathews, Incorporated, Defendant-Appellee.

No. 87-2757.

United States Court of Appeals, Fifth Circuit

July 14, 1988.

Rehearing Denied Aug. 11, 1988.

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Photographer brought action against department store and advertiser for infringement of copyright in connection with use of photographic slides in television advertising. The United States District Court for the Eastern District of Texas, A. Joe Fisher, J., 676 F.Supp. 133, entered judgment in favor of photographer with respect to infringement claim against department store, but found that advertiser was innocent infringer and limited amount of damages to value of slides. Photographer appealed. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) district court properly ruled that expert testimony presented by photographer was inadequate to establish department store's profits attributable to infringement, and (2) evidence supported finding that advertiser was innocent infringer.

Affirmed.

**1. Evidence** When financial records sufficiently detailed to show copyright infringer's sales are not available, expert testimony may be used to develop either such proof or proof of infringer's profits rather than its sales. 17 U.S.C.A. § 504(b).

**2. Evidence** Testimony of photographer's expert was inadequate to establish department store's profits attributable to copyright infringement resulting from store's use of photographic slides in television commercials; lump-sum figure for profits attributable to television commercials that contained copyrighted slides did not account for fact that infringed material constituted only fraction of any given commercial, and expert did not take into account different ele-

ments of commercials in generating profits for infringer.

**3. Copyrights and Intellectual Property** Evidence supported district court's finding that advertiser was innocent infringer with respect to copyrighted photographic slides used in television commercial for department store; president of advertiser testified that agency had no knowledge that slides were copyrighted, and evidence indicated that photographer had failed to affix any copyright mark or notice to slides he delivered to department store.

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Dana Andrew Lejune, Neal J. Mosely, Houston, Tex., Alto V. Watson, Beaumont, Tex., for Estate of Vane.

Denise Hubbard, Lipscomb Norvell, Jr., Benckenstein, Norvell, Bernsen & Nathan, Beaumont, Tex., for Vance-Mathews, Inc.

Tom Hanna, Roger Hepworth, Mehaffy, Weber, Keith & Gonsoulin, Beaumont, Tex., for The Fair, Inc.

Appeals from the United States District Court for the Eastern District of Texas.

Before WISDOM, RUBIN, and JONES, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

The owner of an infringed copyright asks this court to increase the amount of damages awarded it by the district court and to find liability on the part of a co-defendant the district court held to have been an innocent infringer. We find that the district court did not err in failing to base the damage award on those profits of the infringer allegedly attributable to the infringement because the infringer did not establish the amount of those profits, if any there were, and the court did not err in finding the co-defendant innocent. Accordingly, we affirm.

## I.

The Fair, a chain of retail stores, hired photographer Dean Vane to prepare slides showing its merchandise with the stated purpose of using the slides in printed advertising material to be mailed to its

customers. Later, however, The Fair hired Vance-Mathews, Inc., an advertising agency, to produce television commercials, which incorporated some of Vane's slides as well as a substantial amount of material from other sources. Several television stations aired the commercials. Vane brought an action based on copyright infringement against The Fair, asserting that his agreement with The Fair involved merely a license to use the slides to produce mailers and that he retained all other rights to the slides provided by copyright law. Vane also contended that Vance-Mathews, the advertising agency that had produced the commercials, was liable as an infringer. The district court granted Vance-Mathews's motion for a directed verdict on the theory that Vance-Mathews was an innocent infringer and could therefore be liable only to the extent of profits it had gained through the infringement, of which there were none. The court held that The Fair was liable, and it awarded damages in the amount of \$60,000, an amount representing the value of the use of the slides in the commercials. 676 F.Supp. 133. The court refused to make a damage award based on profits The Fair had accrued by virtue of the infringement; it found that the evidence was too speculative to support such an award. On appeal, Vane contends that the court erred in denying an award based on The Fair's profits and in granting Vance-Mathews's motion for a directed verdict.

## II.

In a copyright infringement action, the infringer is liable for either statutory damages or the copyright owner's actual damages together with any additional profits of the infringer that are attributable to the infringement.<sup>1</sup> Vane elected to seek actual damages and profits. The statute that authorizes this recovery also provides that in establishing the infringer's profits, the copyright owner need prove only the infringer's gross revenues, while the infringer must prove his deductible expenses and must show which elements of profits are attributable to sources other than the copyrighted work.<sup>2</sup> Vane attempted through discovery to obtain financial records of The Fair that would enable him to satisfy his burden of proving The Fair's gross revenues attributable to the infringement, but the records were not detailed enough to show the amount received from the sales of particular items shown in the slides. Therefore Vane attempted to establish The Fair's gross revenues, and ultimately its profits, by introducing as an expert witness Dr. Herbert Lyon, Professor of Marketing at the University of Houston's College of Business Administration. Dr. Lyon testified that he had conducted a multiple regression analysis designed to show how much each dollar The Fair spent on television advertising would yield in sales. Dr. Lyon examined monthly data, including profit-and-loss statements and summaries of media costs over a

five-year period. He calculated that The Fair sold approximately \$25.60 in merchandise for every dollar it spent on television advertising. He multiplied \$25.60 by the number of dollars The Fair spent on the infringing television commercials to yield a gross revenue figure, then deducted certain costs to The Fair, including the actual cost that The Fair had paid for the merchandise it sold, transportation charges for getting the merchandise to the stores, a 3% allowance for pilferage, and some other direct operating expenses. After adjusting the resulting figure for inflation, Dr. Lyon concluded that The Fair's profits attributable to its infringement of Vane's slides exceeded \$694,000.

The district court held that Van had not brought forth sufficient proof of The Fair's profits and refused to award damages based on Dr. Lyon's calculations.

[1, 2] When financial records sufficiently detailed to show an infringer's sales are not available, expert testimony may be used to develop either such proof or, as Vane attempted, proof of its profits rather than its sales. But it is the trial court's role to evaluate this testimony.<sup>4</sup> The trial court in this case concluded, with ample basis, that the testimony introduced was inadequate to establish The Fair's profits attributable to the infringement

In conducting his analysis, Dr. Lyon took into account a variety

of factors designed to refine his calculations. For instance, his model purported to consider seasonal sales trends, specifically the pre-Christmas boom in sales; the downward economic trend in the Houston area in the early 1980's; and the carryover effect by which an advertisement continues to contribute to some sales long after its initial airing. By taking such factors into account, Dr. Lyon testified, he attempted to produce a model that would analyze with the greatest possible precision the relationship between advertising dollars spent and resulting profits.

Cross-examination, however, brought to light a number of potential shortcomings in this analysis. Dr. Lyon's model yielded only a lump-sum figure for profits attributable to the television commercials that contained infringed material as a whole without accounting for the fact that the infringed material constituted only a fraction of any given commercial. Some portion of the profits may have been attributable to the infringement, but much of the profits must be attributed to non-infringing aspects of the commercials. Testimony at trial showed from three perspectives why the use of an undifferentiated figure does not convincingly establish what profits are attributable to the infringement.

First, the cost of slides used in a commercial is only one of many expenses involved. The single figure for "dollars spent on television

advertising" must be composed of lesser expenditures for a variety of goods and services: photographs used in the commercial, fees paid to the producer of the commercial, and air time for showing the commercial, to name a few. If, for instance, 50% of the cost to someone airing a commercial went to television stations to pay for air time, another 30% went to the producer, and 20% went to purchase ten slides used in the commercial, which also used five infringed slides, then it would be wholly illogical to treat the entire profits derived from airing the commercial as attributable to the five infringed slides. Yet this is, in essence, what Vane asked the district court to do. Dr. Lyon testified that he had adjusted the sales figures his model yielded to account for air time and production costs, but neither his testimony nor the computer printouts introduced as an exhibit make clear what this adjustment was. Even if Dr. Lyon's analysis accurately showed the relationship between dollars spent on advertising and profits yielded, it did not show the relationship between the dollars that should have been spent on the rights to use Vane's slides and the total television advertising costs. Evidence of this relationship might have provided a basis for showing what portion of the profits the commercials yielded were attributable to the infringement.

Second, the infringed slides appeared during only part of the time the commercials were on the

air. Vane testified that the general format of the commercials in question consisted of a "trailer" or introductory film segment setting forth a theme for the commercial, followed by a segment featuring various items of merchandise, concluding with another brief trailer. To the extent that Vane's slides appeared in the commercials, they appeared only in the middle segments, never in the trailers. Moreover, the middle segments that contained infringed slides also contained non-infringed slides. If only eight seconds of a thirty-second commercial contained infringed slides, it would be irrational to believe that all the profits the commercial brought in were due to those slides.

Third, Dr. Lyon's model did not purport to show the relative importance of different elements of the commercials in generating profits for The Fair. On cross-examination, counsel for The Fair asked Dr. Lyon:

If we take your figures that are given here of some \$600,000 that you say are attributable to the TV advertising dollar, do you express any opinion as to what percentage of that should be attributable to Mr. Vane's slides as contrasted to the work product of Vance-Mathews in putting the commercial together?

Dr. Lyon responded:

No, sir.... I'm simply looking at the revenue or gross revenues generat-

ed by those ads. I did not look at the ads specifically. I don't think-I mean, I thought of that issue, but I don't think it can be answered.

Photographs of particular items featured in commercials doubtless play a role in producing sales, but, we assume, so do such aspects of the commercials as text of the voice-overs, general slogans or phrases promoting the store itself, and overall concept of the commercial's message. Vane himself described the trailers that introduced the commercials as "a very nice attention-getting device, which is the first responsibility of an ad." Dr. Lyon admitted on cross-examination that the carry-over benefit of an advertisement promoting a particular sales event, such as a Father's Day sale or an Easter sale, would probably be achieved primarily because the advertisement promoted name recognition of the store that was holding the sale. But Dr. Lyon's model did not show what part of the Fair's profits should be attributed to these factors rather than to the use of the infringed slides. By pointing to these problems in Dr. Lyon's analysis, we do not suggest that a calculation based on a mathematical formula involving the ratio of fair cost of infringed material to entire cost of commercial, or length of air time of infringed material to length of entire commercial, would be the only means of showing profits. The question will often be highly fact-specific. We merely hold that it was not error for the district court to reject

this attempt to show revenues attributable to the infringement as speculative.

### III.

[3] The district court orally granted Vance-Mathews's motion for a directed verdict and later rendered judgment in favor of Vance-Mathews "for the reasons announced by the Court at that time." Although the district court did not specifically state the statutory authority for its grant of the motion, we affirm on the basis that Vance-Mathews was an innocent infringer as defined by 17 U.S.C. § 405(b) (1982). That section states, in relevant part:

Any person who innocently infringes a copyright, in reliance upon an authorized copy or phonorecord from which the copyright notice has been omitted, incurs no liability for actual or statutory damages under Section 504 [17 U.S.C. § 504] for any infringing acts before receiving actual notice that registration for the work has been made under Section 408 [17 U.S.C. § 408], if such person proves that he or she was misled by the omission of notice.

The Copyright Act defines "copies" as "material objects ... in which a work is fixed"<sup>5</sup> and provides that "[t]he term 'copies' includes the material object ... in which the work is first fixed."<sup>6</sup>

Vance-Mathews raised the defense of innocent infringement in its

First Amended Original Answer and relied on § 405(b) in its argument in support of its motion for a directed verdict. At trial, the president of Vance-Mathews testified that the agency had no knowledge that the slides were copyrighted, or that anyone claimed that they were copyrighted, or that the slides belonged to anyone other than The Fair. He also stated that if the slides had borne a notice of copyright, the agency would have checked with The Fair to see whether use of the slides in a commercial posed any problems. A senior vice-president of The Fair testified that none of the slides or photographs it received from Vane bore any copyright markings, nor did Vane attempt to have copyright

markings affixed after he delivered the materials to The Fair. He further testified that at the time The Fair turned the slides over to Vance-Mathews, none of them bore copyright markings.

Although Vane testified that it was his practice to stamp slides with an indication of his copyright before sending them to clients, he acknowledged that "some could have slipped through, I suppose, considering the volume of slides I tendered." At trial, counsel for The Fair presented Vane with 58 boxes of slides of his work as well as a number of black-and-white photographs that Vane had previously delivered to The Fair. Vane testified that if they were originals

rather than copies of his slides and photographs, he would expect them to bear his copyright mark, but after inspecting them, he failed to identify a single slide or photograph that bore notice of copyright.

In this non-jury trial, it was the judge's role to resolve any conflicting inferences arising from witnesses' testimony. Both Vance-Mathews executives testified unequivocally that the slides they received were not marked, and its president further testified that the agency would have inquired about ownership of rights to the slides if th

# PHOTODISTRICT NEWS

## VOLUME VII ISSUE IX

### AUGUST, 1987

## TEXAS COPYRIGHT VICTORY

by Nancy Madlin

An infringement case recently decided in a Texas federal court provides some welcome good news for self-employed photographers on the subject of copyright. Deciding the question of whether or not freelancers working without an explicit contract should be considered "employees" working under work for hire, the court proclaimed that common sense should rule. In other words, freelancers aren't employees, and therefore they are presumed to own the copyright to their own work.

Sensible sentiments, indeed, but nonetheless considered cause for celebration. The reason: It contradicts the infamous 1985 ruling out of Denver in the case of Peregrine v. Lauren Corp. In that case, the judge agreed with the client that, since all employees work under work-for-hire rules, freelancers should too.

This most recent Texas ruling giving freelancers back their rights strictly applies as precedent only to the jurisdiction where it was issued. Nonetheless, like the Peregrine case before it, it is sure to be discussed across the nation as an important interpretation of copyright law.

But the case, Vane vs. The Fair, Inc. department store, contains many other interesting twists and turns as well; issues of crucial interest to photographers seeking damages for copyright infringement. Still awaiting appeal, for example is the question of how a photographer can determine the amount of profit made by an infringer as a result of his act. Although copyright law clearly gives the injured party the right to claim those profits as his own, there is currently no tried-and-true method of determining that amount in cases involving advertisement.

Another question to be resolved perhaps on appeal is: Who should be considered the guilty parties in an infringement? Vane and his lawyers are arguing that those acting as agents of infringers are culpable as well. In this case, they're saying the ad agency that arranged for the improper use of Vane's photographs is clearly not an innocent bystander to its client's act of infringement.

In 1983 and 1984, Dallas fashion photographer Dean Vane (formerly of Houston, Chicago and New York) shot 12 mailers for regional clothing chain The Fair, headquartered in Beaumont. Although he had no contract with The Fair, Vane explicitly stated on each invoice that he was billing for work done for the mailer produced on a specific date. A month after the last mailer was completed, Vane got a congratulatory call from the mother of one of his teen-aged models. "They're running your photos on TV!" Boy, were they ever. Over a ten-month period, The Fair used 65 of Vane's photos an average of 3.5 times each, producing a series of 30-second spots that ran 728 times in five cities across Texas and Louisiana. The way Vane and his lawyers figure it, that's more than 2,500 acts of copyright infringement. By their estimation, that means The Fair owed Vane \$60,000 for usage fees alone. (Fourteen of the models have also sued The Fair.)

"I called up the client, and I said, 'We're going to have to work something out,'" recalls

Vane. "I wasn't looking to sue them; I was just looking to get paid a reasonable sum for that use. At that point, they could have just given me a check for \$10,000."

The store's president seemed amicable at first but proved reluctant to set a date for a meeting to discuss the problem. "Eventually, they stopped returning my phone calls," says Vane. "And they never answered any of the letters." After one final sally-a letter that said, as Vane recalls, "I'm a New Yorker, and I'm not going to go away. I'll keep coming after you the rest of my life." -went unanswered, he realized he'd have to hand the problem over to his lawyer.

Or, as it turned out, his three lawyers. Vane hired as his trial attorney Dana LeJune of Houston, who, as a paralegal, had worked on Vane's 1981 personal injury case against 7-11 stores. (On Christmas Day, says Vane, he walked into the 7-11 to buy some eggnog to bring to a party; he also had a sandwich. On the way out to his car, he was beaten up in the parking lot by an over-zealous employee who thought he hadn't paid for the sandwich.) LeJune then brought in patent and copyright specialist Neal Mosely, who handled the research and the paperwork on that subject. Later, they also had to hire a third lawyer who worked near the court in Beaumont to keep things running smoothly there. "To make sure we could communicate with the judge," says Vane, "we hired this 76-year-old Texan who went to law school with him. They play golf together; they've been friends for 50 years."

Although the lawyers felt they had an airtight case on infringement, this case nonetheless presented certain challenges. Prime among them was the task of reasonably estimating how much profits were taken in by the Fair as a result of these advertisements. This was by no means a hypothetical question; if they could show profits, they could collect them for Vane.

"Let's say a business infringes the copyright of a picture and uses it on a poster-then it's simple to figure out the profits," explains attorney LeJune. "You say: How many posters did they sell, times the price, minus their cost to produce it. Profit is what's left. But in the case of a retailer who sells many different goods using TV advertising, it is very difficult to prove what profits the store got from those ads."

The method they chose to determine those profits was regression analysis, performed by an economist from the University of Houston. As LeJune recalls it, the economist said, "Get me the sales data for a six-year period, and we'll see if there's any relationship between how much they spend on each kind of advertising and promotion and their income."

The result, produced on a computer, showed a "strong correlation" between TV advertising and sales. Very strong indeed: For every \$1 The Fair spent on TV advertising, said the computer model, they got back \$25.50 in gross sales. By LeJune's reckoning, that meant they owed Dean Vane \$694,000. (The amount spent on the TV campaign times the \$25.00 average profits, minus the 60 percent cost of goods the Fair had declared on its taxes.)

In addition, they were asking the court to compensate Vane for what he should have received in usage fees. According to expert witness Bob Gomel, an established Houston photographer and founder of several ASMP chapters in the region, Those fees would total \$60,000. The Fair's expert said the number was more like \$20,000.

According to the way Vane's lawyers see the facts, it was not The Fair alone who was liable for these amounts; they felt that the ad agency, Vance-Matthews, Inc., of

Beaumont was equally at fault. "There is ample proof that the agency bought the airtime and arranged for the slides to be put in the commercial," says LeJune. "As the agent of the retailer, they actually infringed on behalf of their client."

For their part, The Fair's lawyers argued that there was no infringement because the company owned the copyright under the work-for-hire rules.

In May, the judge ruled that Vane was due \$60,000 in usage fees because, as a freelancer, he owned the copyright to the pictures used in the ads. "The Fair took the position all along that Vane was an employee," says copyright lawyer Mosley. "But the court held that he was not." In this opinion, the judge specifically extended to photographers rights that had recently been granted another kind of independent contractor. In that case, *The Easter Seal Society v. Playboy Enterprises*, the circuit court in New Orleans ruled that a TV station hired as an independent contractor to produce a fundraising documentary owned the rights to the film. (Film which later turned up as part of an "adult" movie, which brought Easter Seals to court.)

The judge in the Vane case rejected the profit figure based on regression analysis as too "speculative," and he also let the ad agency off the hook. At press time in July, LeJune was preparing the appeal that would take these two issues before the New Orleans circuit court. The lawyers believe their case is quite a solid one, since regression analysis has been used for decades in federal court on anti-trust and civil rights matters. "Experts have said that this is the only way to show how much profit was made as a result of advertising," says LeJune. "This isn't economic mumbo-jumbo; it's sound statistical analysis. I believe the Fifth [Circuit Court] will give us an ear and hold that it's an acceptable method of proof."

LeJune is equally positive about bringing the ad agency back into the case. "The agency says they're an 'innocent infringer,' but I believe the agency relationship precludes that category." Photographer Vane is understandably pleased with the results of his case so far, and he has complete faith in LeJune, who he calls "a brilliant attorney." But he's also weary of the fray and eager to get it all behind him. "It's been quite a rocky three years," he says.

As soon as he gets his money, Vane says, he plans to high-tail it out of Texas, which he describes as "barbaric." "I lived in Chicago in the Seventies and I'm going back there. There's lots of work there, and it's a good professional business," he says. "Here, business is a joke. They don't know the difference between a fashion photo and a bar mitzvah picture."

Vane also has suffered along with others in the region due to the collapse of the oil boom. "A lot of the assistants had to be let go," he says, "and so now they're all on the market willing to work for literally nothing."

After spending several years here, he says, he was not surprised at all by the attitude of the court in failing to award him profits. "All they can think is: 'This much money for pictures?' To them, photography is not a profession. It's what you do on vacation."

**812 S.W.2d 53, Baker v. International Record Syndicate, Inc., Tex.App.-Dallas (1991)**

**\*53 15 UCC Rep.Serv.2d 875**

**Jeff BAKER d/b/a Jeff Baker Photography, Appellant,**

**INTERNATIONAL RECORD SYNDICATE, INC., Appellee.**

No. 05-90-00914-CV. Court of Appeals of Texas, Dallas.

June 4, 1991.

Photographer brought breach of contract action against customer to recover for damage to negatives. The 116th Judicial District Court, Dallas County, Frank Andrews, J., determined that liquidated damages provision was unenforceable and awarded damages based on jury findings. Photographer appealed. The Court of Appeals, Enoch, C.J., held that: (1) liquidated damages clause of contract satisfied requirements that harm caused by breach be difficult of estimation, that amount of liquidated damages be reasonable forecast of just compensation, and that liquidated damages not be disproportionate to actual damages, and (2) there was competent evidence supporting award of attorney fees.

Reversed and rendered.

**1. DAMAGES** k76 115 ---- 115IV Liquidated Damages and Penalties 115k75 Construction of Stipulations 115k76 In general.

Tex.App.-Dallas 1991. "Liquidated damages" are meant to

be the measure of recovery in the event of nonperformance or breach of contract.

See publication Words and Phrases for other judicial constructions and definitions.

**2. DAMAGES** k83 115 ---- 115IV Liquidated Damages and Penalties 115k83 Questions for jury.

Tex.App.-Dallas 1991. Determination of whether contractual clause is enforceable as a liquidated damages provision or void as a penalty is a question of law.

**3. DAMAGES** k79(1) 115 ---- 115IV Liquidated Damages and Penalties 115k75 Construction of Stipulations 115k79 Certainty as to Amount of Actual Damage 115k79 (1) In general.

[See headnote text below]

**3. DAMAGES** k80(1) 115 ---- 115IV Liquidated Damages and Penalties 115k75 Construction of Stipulations 115k80 Proportion of

Sum Stipulated to Actual Debt or Damage 115k80(1) In general.

Tex.App.-Dallas 1991. Liquidated damages will be enforced when court finds that the harm caused by breach is incapable or difficult of estimation and that the amount of liquidated damages is a reasonable forecast of just compensation, and if liquidated damages are not disproportionate to actual damages; if liquidated damages are disproportionate, they can be declared a penalty and recovery limited to actual damages proven. V.T.C.A., Bus. & C. Sec. 2.718(a).

**4. DAMAGES** k163(3) 115 ---- 115IX Evidence 115k163 Presumptions and Burden of Proof 115k163(3) Liquidated damages and penalties.

[See headnote text below]

**4. DAMAGES** k184 115 ---- 115IX Evidence 115k183 Weight and Sufficiency 115k184 In general.

Tex.App.-Dallas 1991. Party asserting that liquidated damages clause is, in fact, a penalty provision as burden of proof, and evidence related to difficulty of estimation and reasonable forecast must be viewed at the time the contract was executed.

**5. DAMAGES** k79(1) 115 ---- 115IV Liquidated Damages and Penalties 115k75 Construction of Stipulations 115k79 Certainty as to Amount of Actual Damage 115k79(1) In general.

Tex.App.-Dallas 1991. Contract clause providing liquidated damages to photographer of \$1,500 per negative for loss of or damage to negatives of photographs taken of musical group satisfied requirements for valid liquidated damages clause that harm caused by breach be incapable or difficult of estimation, in view of evidence of widely varying income from photographs, and that amount of liquidated damages was a reasonable forecast of just compensation, in view of long-term earning power of photographs and unknown potential for fame of the subject.

**6. DAMAGES** k184 115 ---- 115IX Evidence 115k183 Weight and Sufficiency 115k18 In general.

Tex.App.-Dallas 1991. Evidence showing the value of several of photographer's other projects was not evidence of value of damaged negatives in question, for purposes of showing that contractual liqui-

dated damages provision with respect to loss of or damage to negatives was disproportionate to actual damages.

**7. DAMAGES** k80(1) 115 ---- 115IV Liquidated Damages and Penalties 115k75 Construction of Stipulations 115k80 Proportion of Sum Stipulated to Actual Debt or Damage 115k80(1) In general.

Tex.App.-Dallas 1991. Even assuming that jury's finding of \$15,000 in actual damages for damage to 34 photographic negatives was accurate assessment, that sum was not so disproportionate to the \$51,000 liquidated damages figure as to abrogate the parties' agreement.

**8. JUDGMENT** k199(1) 228 ---- 228VI On Trial of Issues 228VI(A) Rendition, Form, and Requisites in General 228k199 Notwithstanding Verdict 228k199(1) In general.

Tex.App.-Dallas 1991. For trial court to disregard jury's findings and enter judgment notwithstanding verdict, it must determine that there was no evidence on which jury could have made its findings, reviewing the evidence in the light most favorable to the jury finding and considering only the evidence and inferences that support the finding, and where there is more than a scintilla of competent evidence to support the finding, judgment notwithstanding the verdict cannot be sustained.

**9. COSTS** k194.32 102 ---- 102VIII Attorney Fees 102k194.24 Particular Actions or Proceedings 102k194.32 Contracts.

Tex.App.-Dallas 1991. Competent evidence supported \$5,000 award of attorney fees to photographer in breach of contract action against customer for damage to negatives. V.T.C.A., Civil Practice & Remedies Code Sec. 38.001.

\*54 Dana Andrew Lejune, Houston, for appellant.

Will Pryor, Dallas, for appellee.

Before ENOCH, C.J., and CHADICK (FN1) and CARVER (FN2), JJ.

OPINION ON MOTION FOR REHEARING

ENOCH, Chief Justice.

The opinion of this court issued April 15, 1991 is withdrawn. This is the opinion of the court. Jeff Baker, d/b/a Jeff Baker Photography (Baker), appeals a judgment rendered in his favor in a breach of contract case. The trial court determined that a liquidated damages provision was unenforceable and awarded damages to Baker based on jury findings. We reverse the trial court's judgment and render judgment for Baker.

International Record Syndicate (IRS) hired Baker to take photographs of the musical group Timbuk-3. Baker mailed thirty-

seven "chromes" (negatives) to IRS via the business agent of Timbuk-3. When the chromes were returned to Baker, holes had been punched in thirty-four of them. Baker sued for the damages to these chromes. The trial court submitted the issues of actual damages and attorney's fees to the jury. The jury found \$15,000 in actual damages and \$5000 for attorney's fees. The trial court rendered judgment awarding \$51,000 in actual damages and \$5000 for attorney's fees. The damage award was pursuant to a liquidated damages clause, which set damages at \$1500 per chrome. The trial court later modified the judgment, awarded Baker the \$15,000 actual damages found by the jury, and eliminated the attorney's fee award.

#### LIQUIDATED DAMAGES

[1][2] The provision printed on Baker's invoice states: "[r]eimbursement for loss \*55 or damage shall be determined by a photograph's reasonable value which shall be no less than \$1500 per transparency." A liquidated damages clause is meant to be the measure of recovery in the event of nonperformance or breach of a contract. *Stewart v. Basey*, 150 Tex. 666, 245 S.W.2d 484, 486 (1952). The determination of whether a contractual clause is enforceable as a liquidated damages provision or void as a penalty is a question of law.

*Mayfield v. Hicks*, 575 S.W.2d 571, 576 (Tex.Civ.App.--Dallas

1978, writ ref'd n.r.e.).

The Uniform Commercial Code provides:

Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

TEX.BUS. & COM.CODE ANN. Sec. 2.718(a) (Tex.UCC) (Vernon 1968).

[3][4] Under Texas law, a liquidated damages provision will be enforced when the court finds (1) the harm caused by the breach is incapable or difficult of estimation, and (2) the amount of liquidated damages is a reasonable forecast of just compensation. *Advance Tank & Constr. Co. v. City of DeSoto*, 737 F.Supp. 383, 384 (N.D.Tex.1990); *Rio Grande Valley Sugar Growers, Inc. v. Campesi*, 592 S.W.2d 340, 342 n. 2 (Tex.1979). This might be termed the "anticipated harm" test. The party asserting that a liquidated damages clause is, in fact, a penalty provision has the burden of proof. *Commercial Union Ins. Co. v. La Villa School Dist.*, 779 S.W.2d 102, 106 (Tex.App.--Corpus Christi 1989, no writ). Evidence related to the difficulty

of estimation and the reasonable forecast must be viewed as of the time the contract was executed. *Mayfield*, 575 S.W.2d at 576.

[5] Baker testified that he had been paid as much as \$14,000 for a photo session, which resulted in twenty-four photographs and that several of these photographs had also been resold. Baker further testified that he had received as little as \$125 for a single photograph. Baker also testified he once sold a photograph for \$500. Subsequently, he sold reproductions of the same photograph three additional times at various prices; the total income from this one photo was \$1500. This particular photo was taken in 1986 and was still producing income in 1990. Baker demonstrated, therefore, that an accurate determination of the damages from the loss of a single photograph is virtually impossible.

Timbuk-3's potential for fame was an important factor in the valuation of the chromes. At the time of the photo session, Timbuk-3's potential was unknown. In view of the inherent difficulty in determining the value of a piece of art, the broad range of values and long-term earning power of photographs, and the unknown potential for fame of the subject, \$1500 is not an unreasonable estimate of Baker's actual damages.

Additionally, liquidated damages must not be disproportionate to actual damages. If the liquidated

damages are shown to be disproportionate to the actual damages, then the liquidated damages can be declared a penalty and recovery limited to actual damages proven. *Commercial Union Ins. Co.*, 779 S.W.2d at 107. This might be called the "actual harm" test. The burden of proving this defense is upon the party seeking to invalidate the clause. *Id.* The party asserting this defense is required to prove the amount of the other party's actual damages, if any, to show that the actual loss was not an approximation of the stipulated sum. *Id.* at 106-07; *Johnson Eng'rs, Inc. v. Tri-Water Supply Corp.*, 582 S.W.2d 555, 557 (Tex.Civ.App.--Texarkana 1979, no writ).

[6] While evidence was presented that showed the value of several of Baker's other projects, this was not evidence of the value of the photographs in question. The evidence clearly shows that photographs are unique items with many factors bearing on their actual value. Each of the thirty-four chromes may have had a different value. Proof of this loss is difficult; where damages are real but difficult to prove, injustice will be done the injured party if the court substitutes the requirements of judicial proof for the parties' own informed agreement as to what is a reasonable measure of damages. The evidence offered to prove Baker's actual damages lacks probative force. IRS failed to establish Baker's actual damages as to these particular photographs.

[7] Even assuming that the jury's findings as to damages are an accurate assessment, we do not agree that that sum is so disproportionate to the stipulated sum so as to abrogate the parties' agreement. Consequently, we conclude that the facts and circumstances of this case require that we reach a decision contrary to the one made by the trial court. We sustain Baker's first point of error and hold that the liquidated damages clause is enforceable.

#### ATTORNEY'S FEES

[8][9] In his original petition, Baker pleaded a breach of contract and sought attorney's fees pursuant to section 38.001 of the Civil Practice and Remedies Code. At trial, Baker's attorney took the stand and testified that a one-third or 40% contingency fee was reasonable. All testimony on reasonableness and necessity of attorney's fees was un rebutted. The jury awarded Baker \$5000 in attorney's fees. The trial court then rendered judgment setting aside the award of attorney's fees. For a trial court to disregard a jury's findings and enter a judgment notwithstanding the verdict, it must determine that there is no evidence upon which the jury could have made its findings. *Dowling v. NADW Mktg., Inc.*, 631 S.W.2d 726, 728 (Tex.1982); *Collision Center Paint & Body, Inc. v. Campbell*, 773 S.W.2d 354, 356 (Tex.App.--Dallas 1989, no writ).

We review the evidence in the light most favorable to the jury finding, considering only the evidence and inferences that support the finding and rejecting the evidence and inferences contrary to the finding. *Navarette v. Temple Indep. School Dist.*, 706 S.W.2d 308, 309 (Tex.1986); *Collision Center*, 773 S.W.2d at 357. Where there is more than a scintilla of competent evidence to support the jury's finding, then the judgment notwithstanding the verdict should be reversed. *Collision Center*, 773 S.W.2d at 356-57. We sustain Baker's second point of error.

We reverse the judgment of the trial court. We render judgment for Baker in the amount of \$51,000 for actual damages and \$5000 for attorney's fees. TEX.R.APP.P. 80(b)(3).

FN1. The Honorable T.C. Chadick, Justice, Retired, Supreme Court of Texas, sitting by assignment.

FN2. The Honorable Spencer Carver, Justice, Retired, Court of Appeals, Fifth District of Texas at Dallas, sitting by assignment.

PHOTODISTRICT NEWS  
VOLUME X ISSUE X  
AUGUST, 1990

DALLAS PHOTOG WINS DAMAGES IN HOLE-  
PUNCHING CASE

by Lisa Levy

In a recent court case in Texas, Dallas photographer Jeff Baker was awarded \$15,000 for damage done to 34 chromes he had taken of the rock band Timbuk 3.

Baker was hired to take the publicity shots by I.R.S., Inc., a record company based in Universal City, California, in early 1988. Since it was a rush job, the record company asked him to send the transparencies directly to the band in Austin. When Baker got the chromes back five months later, he discovered holes had been punched in 34 of the 37 images.

Baker immediately called I.R.S., and sent them a letter of grievance, which reiterated the key points on the standard ASMP invoice form that referred to usage rights, clients liability for lost or damaged work and the reimbursement of \$1,500 for each transparency lost or damaged.

In September Baker received a letter from Paul Farberman, I.R.S.'s vice president of business affairs. While Farberman admitted that the "damage to the transparencies is indeed unfortunate," he also stated that "I.R.S. cannot accept the responsibility for this damage" and went on to say that no employee of I.R.S. had damaged the chromes. "How they got the holes unfortunately has never been determined," says Farberman. Everyone from the band, to the band's management, to I.R.S. employees deny doing it.

Realizing that any sort of reimbursement was unlikely without legal aid, Baker contacted Richard Weisgrau, ASMP's national executive director, to obtain names of attorneys. "Both of the Dallas attorneys I contacted didn't want to touch the case," Baker says, "so I called Houston attorney Dana LeJune, and he jumped on it."

"I took the case because I like to represent photographers in general," explains LeJune. "I thought that Jeff would make a good client and that he had a strong case." The liquidated damages provision in Baker's paperwork basically stated that, if the client pays an invoice, then the client has agreed to the terms and conditions stated on the invoice, including a \$1,500 liability for each lost or damaged transparency.

As a first step in pursuing the matter, LeJune sent a letter to I.R.S. president Jay Boberg in October, 1988, requesting a settlement of \$51,000 (34 chromes at \$1,500 each) to be paid in 30 days to avoid a lawsuit. Payment wasn't made, and LeJune filed suit against

I.R.S.

I.R.S. offered a \$2,000 settlement, but Baker did not accept. The case came to trial in Texas State District Court in Dallas in February, 1990.

The three charges brought against I.R.S. were: 1) breach of liquidated damages contractual provision; 2) negligence; and 3) conversion (to willfully exercise control over the personal property of another without owner's consent).

The arguments presented by both LeJune and I.R.S.'s attorney Will Pryor in the four-day trial reveal the subjective nature of the valuation of a photograph and therefore the difficulty of enforcing the liquidated damages clause.

To convince the jury that I.R.S. was guilty of negligence and conversion, LeJune had only to present the evidence—the chromes in question. They had been delivered to I.R.S. undamaged (Timbuk 3's manager had sworn that they were undamaged when he delivered them) and returned to Baker with holes in them.

Another important point was that although LeJune was unable to prove that I.R.S. or its employees had punched the holes, "I.R.S. was unable to show that the holes were punched when they were not in their possession," says LeJune.

But proving the liquidated damages clause enforceable was more complex.

As the valuation of a photograph is abstract at best, the following factors are taken into consideration: technical excellence, the selective eye of the photographer, the established prestige and earning level of the photographer, the uniqueness of the subject matter, established sales and the frequency of acceptance by users.

LeJune was able to convince the jury that Baker was an established photographer with an impressive client and earnings history. But proving each chrome was worth \$1,500 was difficult.

In a trial such as this, which has no precedent in the state of Texas, only facts relating to the current case can be presented. Two expert witnesses, photographers Gary McCoy and Doug Handel, testified on Baker's behalf but they were not permitted to present information on their past experiences with damaged or lost slides as precedent material to the jury. Thus it was difficult to show the actual sales potential of the chromes.

Another problem was the placement of the holes on the chromes: Each of the 34 chromes is a portrait of the two band members of Timbuk 3 and most of the holes were punched in the bottom left corner of the transparency.

LeJune argued that the liquidated damages clause states that each transparency is valued at \$1,500, a fair and reasonable forecast of foreseeable damages at the time of the agreement, and that, as LeJune says, "the agreement doesn't say, 'if you partially damage

them' it's any different." In other words, a hole is a hole is a hole.

I.R.S.'s attorney, however, pressed the point that the images "were damaged, but were not rendered commercially useless, as the holes were punched on the border of large chromes." Pryor's main argument was that, if cropped, the images could, theoretically, be used commercially. "I was able to produce proof that they could be used" says Pryor, referring to the reproduction of an image from the 1988 shoot in a Playboy magazine article on Timbuk 3.

"The heart of the issue is that the ordinary lay person can't comprehend why a photograph is intrinsically valuable," says Baker, "and you're trying to convince not only the jury, but the judge of that."

LeJune succeeded in convincing the jury that Baker and I.R.S. had entered into an agreement (which stipulates \$1,500 per transparency value, etc.) but they were only awarded \$15,000 plus \$5,000 in attorney fees, not the \$51,000 that was sought.

This most likely reflected Pryor's defense that although Baker had indeed suffered damages, it was unlikely that he would ever earn \$51,000 in resales or other future uses of the chromes. Pryor argued that "in this case the amount is disproportionate to Baker's actual or foreseeable damages," and should therefore be considered an unfair penalty.

Another problem was that the images were not perceived as unique—a factor that has played a significant role in past cases in which the full \$1,500 per transparency were awarded. The more difficult it would be to recreate the images, the easier it is for the plaintiff's attorney to convince a court that the chromes are valuable property.

Following Baker's February trial, his attorney filed a judgment requesting that Judge Frank Andrews change the award to the full \$51,000. Judge Andrews agreed, and modified the judgment to \$51,000 plus attorney fees and interest, in April, 1990. But the thrill of this coup didn't last long, as I.R.S. filed a motion for a hearing to either modify the judgment or grant a new trial. The hearing took place June 8, in Dallas.

At that hearing, Pryor claimed that the liquidated damages clause was not enforceable because the amount was disproportionate to actual damages, as he had before, and that the jury's decision of \$15,000 was fair. He also stressed that "the liquidated damages clause can't be enforced in every situation across the board."

Judge Andrews overruled the motion for a new trial, and also dropped the award back down to \$15,000 plus pre-judgment interest. He also decided that Baker wasn't entitled to attorney fees, based on I.R.S.'s defense that proper evidence hadn't been introduced to merit such an award.

"This case shows to what extent a photographer needs to be informed about contract law and the wording of the laws," Baker says. "The fight becomes about the wording of the law."

Since laws vary from state to state "it becomes the Photographer's responsibility to find out what the laws are in his/her state, and which ones are enforceable in their state," Baker explains. "It's our business to educate our clients about what the terms and conditions really mean, and not just assume that they understand...and it takes a watchdog organization like ASMP fighting tooth and nail to help us get even half of what we deserve."

At the time this story went to press, Baker was waiting to hear from ASMP about whether or not they would back an appeal.