Boundary Cases

Copyright Law – Professor Grimmelmann
Class 6 – September 9, 2008

Computer Software

Key distinctions

- Literary works vs. audiovisual works
  - (And PGS, sound recordings, etc.)
- Source code and object code
- Literal copying vs. nonliteral copying vs. reverse engineering vs. cloning

Apple v. Franklin

- Is source code copyrightable?
- Is object code copyrightable?
- What about § 102(b)?
- What about achieving compatibility?
- Is copyrightability the right place to raise these issues? Where else could they arise?

Characters

Bond

James Bond?

Harry Potter and the Leopard-Walk-up-to-Dragon

Tanya Grotter and the Magic Double Bass

TITLE
HISTORY

TITLE
HISTORY

Who owns Norm and Cliff?

JACK DANIEL'S
MEET ME IN
Cheers
WASH YOUR HANDS
IT IS THE LAW
LAVESE LAS MANOS
ES LA LEY

The 501st Legion

Doctrine

- The "distinctive delineation" test controls
- What makes a character sufficiently distinctive?
- Have the courts mistaken *memorable* characters for *distinctive* ones?
- Is this a job for copyright or for trademark?

Wrap-up:
Court opinons

der the ADA, the secretary was to adopt rules and regulations relating to inspections of licensed or registered premises, investigation of complaints, and the seizure and impoundment of animals. We have reviewed the Kansas Administrative Regulations insofar as they apply to animal welfare. See K.A.R. 9-13-1 *et seq.* Our review of the regulations in effect at the time of the search does not reveal any limitation on the time, place, and scope of a search and seizure operation to be conducted under the ADA. In fact, testimony in this particular action by one of the inspectors indicated that the inspectors believed they had unlimited discretion to decide when and where to inspect.

We conclude that there were no limits on the time, scope, or place of the search undertaken or of any search and seizure conducted in this case under the statutes authorizing inspections and seizures. The administrative and statutory scheme in place in the State of Kansas allows a search and seizure to take place when the livestock commissioner has "reasonable grounds" to believe that the statutes have been violated. The seizure statute says nothing about where the seizures may be made. It says nothing about when they may be made. There was no limitation placed on the scope of this particular search and seizure operation, nor do the statutes or administrative regulations place any limitation on the scope of the seizure operation.

We hold that, under the facts shown, the search and seizure operation undertaken on the defendant's premises did not comport with the requirements of the Fourth Amendment. The search and seizure operation was not limited by order, statute, or regulation as to time, place, and scope of the search. Such a limitation is required by the *Burger* decision for a warrantless search and seizure to be considered lawful and reasonable. As a result, we conclude that the search conducted in this action violated the defendant's right to be free from unlawful searches and seizures. We further hold that the trial court did not err in suppressing the evidence in the instant matter. It is axiomatic that any evidence obtained during an unlawful search and seizure is inadmissible in the prosecution of the defendant whose rights were violated by such search and seizure.

[7] The State argues that a decision affirming the trial court will cripple the enforcement of the ADA. It bases its argument partially on the premise that a search warrant is not obtainable under our statute for a violation of administrative regulations. This argument lacks merit on the facts presented. In the instant matter, the defendant is charged with a crime, and a search warrant was certainly available to the regulatory officials if probable cause existed that the crime of cruelty to animals was taking place. Neither are we persuaded that the exigency of the situation, due to the condition of the animals, required prompt emergency action. If the proper steps are followed, we suspect that a search warrant can be obtained in nearly the same time frame as it takes to obtain an emergency administrative order.

In addition to the decisions of the United States Supreme Court, there are decisions of sister states in accord with our holding in the present matter. In *Commonwealth v. Lipomi*, 385 Mass. 370, 432 N.E.2d 86 (1982), the Massachusetts Supreme Judicial Court dealt with an administrative inspection warrant which authorized the search of a retail pharmacy. The trial court had ordered the evidence suppressed. On appeal, the Massachusetts court affirmed the decision of the trial court, saying:

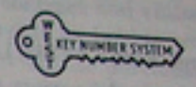
"The defendant argues that any authority to inspect granted by G.L. c. 13, § 25, is invalid, however, because the statute fails to impose appropriate limitations as to the time, place, and scope of such inspections. See, *e.g.*, *United States v. Biswell, supra* [406 U.S.] at 315 [92 S.Ct. at 1596]; *Colonnade Catering Corp. v. United States, supra* [397 U.S.] at 77 [90 S.Ct. at 777]. In the absence of consent or exigent circumstances, the legality of a warrantless administrative inspection of a pervasively regulated business depends on the authority of a valid statute which carefully limits the inspection authority in time, place, and scope. [Citation omitted.]" 385 Mass. at 382, 432 N.E.2d 86.

The Massachusetts court found no such limitation in its regulatory scheme and, thus, concluded that evidence obtained as a result of the administrative search was not admissible. See also *Massage Foundation v. Nelson*, 87 Wash.2d 948, 558 P.2d 231 (1976) (Statutes authorizing warrantless regulatory inspections of massage parlors failed to set forth adequate limitations on purpose, time, place, or scope of such inspections and were invalid.).

We think the situation presented to this court is analogous to that found in *Commonwealth v. Lipomi*. There certainly was no consent to the search in this case; indeed, the defendant asked the inspecting authorities to leave her premises, and they refused to do so. The State has shown us no indication that any exigent circumstances existed. Indeed, the proceedings which resulted in the issuance of the emergency administrative order were the result of two prior inspections, one of which dated back several months. The regulatory scheme in Kansas has no statute or regulation which carefully limits the inspecting authorities as to time, place, and scope. Accordingly, the evidence seized based on the authority of the emergency administrative order was obtained in violation of the defendant's rights and cannot be admitted against her.

As we pointed out earlier, this decision relates only to the question of whether the evidence seized is admissible during the criminal trial of this defendant. However, in view of the comments made in this opinion, we would suggest that a legislative overview be taken to correct deficiencies pointed out in this opinion. We would also suggest that, in the future, a search warrant be obtained in situations such as that presented in this appeal. We have no doubt that, if the proper evidence is presented, such a warrant can be obtained to search for evidence of the crime of cruelty to animals. In proceeding in this fashion, we believe that the constitutional rights of our citizens will be better protected and, in addition, the likelihood of any evidence seized being admissible at a criminal trial will be greatly enhanced.

Affirmed.



16 Kan.App.2d 389

STATE of Kansas, ex rel. Robert T. STEPHAN, Attorney General, Appellee,

v.

COMMEMORATIVE SERVICES CORPORATION, Norman Anderson, an Individual, et al., Appellants.

No. 66525.

Court of Appeals of Kansas.

Dec. 31, 1991.

Review Denied March 10, 1992.

State brought action against cemetery company selling burial merchandise on preneed basis, and against its CEO, based on failure to place proceeds of sales in trust as required by contract and statute. The Butler District Court, John E. Sanders, awarded damages, and cemetery company and CEO appealed. The Court of Appeals, Lewis, J., held that: (1) burial markers were included in term "burial merchandise" prior to amendment of statute; (2) Consumer Protection Act should not be applied retroactively; (3) penalties assessed pursuant to Consumer Protection Act for illegal action prior to its adoption were improper; (4) CEO was personally liable for deceptive acts of corporation; (5) consumers suffered actual damage from failure to place proceeds in trust; and (6) CEO was not entitled to set off against nonparties.

Affirmed in part, reversed in part, and remanded.

1. Sales ⇐10

For purpose of statute regulating contracts for sale of burial merchandise on