

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

<b>NORMA CHASE,</b>	:	
	<b>Plaintiff</b>	:
	:	<b>No. 1:05-CV-2375</b>
<b>v.</b>	:	
	:	<b>Judge Kane</b>
<b>PUBLIC UTILITY COMMISSION OF PENNSYLVANIA, COMMONWEALTH REPORTING COMPANY, SARGENT'S COURT REPORTING SERVICE, INC., and PRECISION REPORTING, INC.,</b>	:	<b>Document Electronically Filed</b>
	<b>Defendants</b>	:

**BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION  
FOR SUMMARY JUDGMENT**

**STATEMENT OF THE CASE**

This is a civil action for declaratory relief as well as costs of suit and counsel fees brought pursuant to the Civil rights Act of 1871, 42 U.S.C. § 1983. Plaintiff, attorney Norma Chase, is representing herself. The defendants are the Public Utility Commission of Pennsylvania (PUC), Wendell F. Holland, James H.

Cawley, Bill Shane, Kim Pizzingrilli, and Terrence J. Fitzpatrick in their official and individual capacity.

Plaintiff alleges that the PUC's policy concerning public meeting transcripts violates her constitutional rights under the First Amendment. Under this policy, individuals are allowed to inspect transcripts and take notes but they are not furnished with transcript copies at cost of copying or otherwise. Plaintiff claims that this policy, under which those seeking transcripts are directed to purchase them from the appropriate reporting service, is in violation of her right to acquire and disseminate information about governmental proceedings. Plaintiff further alleges that the defendants joined under the amended complaint are responsible for PUC policies, and for ensuring that those policies are constitutional and legal.

Plaintiff filed her Complaint on November 16, 2005. On January 17, 2006, the PUC filed a motion to dismiss the complaint pursuant to F.R.C.P. 12(b)(6). Plaintiff then filed an Amended Complaint on February 9, 2006, in which she named as additional defendants Commissioners Kim Pizzingrilli, Bill Shane and Terrence Fitzpatrick, Commission Chairman Wendell F. Holland and Commission Vice-Chairman James H. Cawley, in their official capacities. Plaintiff then filed a Second Amended Complaint on February 27, 2006, naming the commissioners as defendants in their personal capacity. Defendant PUC and its commissioners have filed three motions to dismiss in response to plaintiff's series of

complaints/amended complaints. On January 12, 2007, defendants filed a Motion for Judgment on the Pleadings. On March 13, 2007, plaintiff filed a Motion for Summary Judgment as well as a brief in support of that motion and in opposition to defendants' Motion for Judgment on the Pleadings. This brief is in opposition to plaintiff's Motion for Summary Judgment and in response to plaintiff's brief in opposition.

### **QUESTION PRESENTED**

- I. Whether Defendants are entitled to judgment in their favor because the preemption provision of the federal Copyright Act furnishes no private cause of action concerning invalidation of state laws or policy?**
  
- II. Whether Defendants are entitled to judgment in their favor because public hearing transcripts do not come within the subject matter of copyright as specified by sections 102 and 103 of the federal Copyright Act.**
  
- III. Whether Defendants are entitled to judgment in their favor because plaintiff has failed to demonstrate a violation of her First Amendment rights?**
  
- IV. Whether plaintiff is entitled to attorney's fees should she prevail in this matter?**

## ARGUMENT

**I. Defendants are entitled to judgment in their favor because the preemption provision of the federal Copyright Act furnishes no private cause of action concerning invalidation of state laws or policy?**

Plaintiff's claim against the PUC pursuant to the Federal Copyright Act, Title 17 U.S.C. § 301, fails as this provision furnishes no private cause of action concerning invalidation of state laws or policies. Section 301, the preemption provision of the Copyright Act merely provides that:

“(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any state.

17 U.S.C. § 301(a). Under the facts as alleged by plaintiff, no cause of action is available to plaintiff against the PUC under any of the provisions of the federal Copyright Act laws cited in plaintiff's complaint. Even if the Copyright Act furnished such a private cause of action, § 301 provides that two conditions that both must be satisfied for preemption of a right under state law: (1) the work in which the right is asserted must be fixed in tangible form and come within the subject matter of copyright as specified in § 102, (2), the right must be equivalent to any of the rights specified in § 106. See Donald Frederick Evans & Associates,

Inc. v. Continental Homes, Inc., 785 F.2d 897, 913-14 (11th Cir.1986); Ehat v. Tanner, 780 F.2d 876, 878 (10th Cir.1985); Harper & Row Publishers, Inc. v. Nation Enterprises, 723 F.2d 195, 199-200 (2d Cir.1983), *rev'd on other grounds*, 471 U.S. 539 (1985). As will be argued below, public hearing transcripts do not come within the subject matter of copyright. Therefore, judgment should be entered in favor of the defendants on plaintiff's federal copyright law claims.<sup>1</sup>

**II. Defendants are entitled to judgment in their favor because public hearing transcripts do not come within the subject matter of copyright as specified by Sections 102 and 103 of the Federal Copyright Act.**

Public hearing transcripts, such as those stenographically recorded during PUC hearings, do not come within the subject matter of the Copyright Act as specified by §§ 102 and 103 of the Act.<sup>2</sup> The *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author. Feist Publ'ns v. Rural Tel. Serv. Co., 499 U.S. 340, 347-48 (1991) (citing Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 547-549 (1985)). The term, Original, as used in copyright law, merely means that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. Feist Publ'ns, at

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<sup>1</sup>Plaintiff, asserts that "Presumably, before a law can escape federal preemption, it must exist." Pl. Brief at fn. 17, p. 16. Conversely, however, before a can be subjected to preemption, it must exist.

<sup>2</sup>Defendants have not at any time asserted that they, the PUC, or any given reporting agency possess or confer copyright protection regarding public hearing transcripts.

345. (citing 1 M. Nimmer & D. Nimmer, Copyright §§ 2.01[A], [B] (1990).

Admittedly, only an extremely low level of creativity is required; even a slight amount will suffice. Id. § 1.08 [C] [1]. However, such works must possess at least some small amount of creative spark, “no matter how crude, humble or obvious” it might be. Id.

The United States Supreme Court has held that, for copyright law, originality is a not only a statutory, but also a constitutional requirement. Feist Publ'ns, 499 U.S. at 346. Congress' power to enact copyright laws is found in Article I, § 8, cl. 8, of the Constitution, which authorizes Congress to “secur[e] for limited Times to Authors ... the exclusive Right to their respective Writings.” The terms “authors” and “writings” have been defined the Supreme Court.

The Trade-Mark Cases, 100 U.S. 82 (1879) defined the constitutional scope of “writings” by determining that, for work to be classified “under the head of writings of authors, originality is required.” 100 U.S., at 94. In defining the word “authors,” as in a constitutional sense, the Supreme Court determined it to mean “he to whom anything owes its origin; originator; maker.” Feist Publ'ns, 499 U.S. at 346 (quoting, Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 at 58 (1884)). Just as in The Trade-Mark Cases, in Burrow-Giles, the Court greatly emphasized the creative element of originality and described the concept of copyright as being limited to “original intellectual conceptions of the author,” 111

U.S., at 58, 4 S.Ct., at 281, and underscored the importance of the requisite showing of “the existence of those facts of originality, of intellectual production, of thought, and conception,” in an action for infringement. *Id.*, at 59-60, 4 S.Ct., at 281-282. Public hearing transcripts are neither original works created independently by the stenographer or reporter service, nor are they possessed of even the required slight amount of creativity. A transcript is not independently created by the stenographer, as it would not exist at all without the verbal contributions of the participants of the meeting. Neither does it entail any creativity, as the entirety of a transcript’s contents come from without the mind or intellect of the stenographer. Accordingly, public hearing transcripts which by their nature and substance do not possess the requisite originality or creativity, do not come within the subject matter of the Copyright Act. Therefore, judgment should be entered in favor of the defendants on plaintiff’s federal copyright law claims.

**III. Defendants are entitled to judgment in their favor because plaintiff has failed to demonstrate a violation of her First Amendment rights.**

In order to state a claim under 42 U.S.C § 1983, plaintiff must show both that she was deprived of a right, privilege, or immunity secured by the Constitution or laws of the United States and that the conduct complained of was committed by

a person acting under color of state law. *See Piecknick v. Pennsylvania*, 36 F.3d 1250, 1255-56 (3d Cir.1994). Plaintiff asserts that she has been deprived of her First Amendment rights of access to and dissemination of information.

Specifically, plaintiff alleges that this violation of her rights stems from the PUC's policy of allowing access to transcripts for purposes of inspection and note taking, but directing those seeking photocopies to obtain such copies from the reporter service that owns the transcript. To the contrary, plaintiff, by this policy, has complete access to the transcripts she desires. Plaintiff merely wants to get a copy for less than the fee the reporter is asking. Plaintiff's access is not denied or infringed upon. Public hearing transcripts are available for her inspection, she can make notes, and she could even make notes that amount to a longhand reproduction of the transcript. She can return for inspection of the transcripts as often as she pleases. She cannot force the agency to give her what is the reporter's property at a reduced fee. She cannot name her price, as it were. When a business entity produces a product, the consumer cannot simply demand to obtain the product at the price they desire. That is plaintiff's goal here.

It is undisputed that plaintiff has the right to access public transcripts, to inspect them and take notes. It is also undisputed that plaintiff has the right to obtain copies of the transcripts. However, plaintiff does not have the right to name her price. Plaintiff has not been denied her rights regarding the public hearing

transcripts she seeks. Therefore, judgment should be entered in favor of the defendants on plaintiff's federal copyright law claims.

**IV. Plaintiff is not entitled to attorney's fees should she prevail in this matter.**

Plaintiff, as a pro se litigant is not able to receive attorney's fees whether or not she prevails in this case. The Third Circuit has recognized the importance of reimbursing a successful plaintiff for financial debts to his or her attorney and providing that plaintiff with objective representation. In Pitts v. Vaughn, 679 F.2d 311 (3d Cir.1982), the Court held that a pro se non-lawyer litigant is not entitled to fees under Civil Rights Attorney's Fees Awards Act. Further, Third Circuit decisions have been in keeping with Kay v. Ehrler, 900 F.2d 967, 971 (6th Cir.1990)), in which the court of appeals held that a pro se plaintiff who was an attorney and who prevailed on civil rights claim was not entitled to attorney's fees under civil rights attorney's fee statute. The Third Circuit "agree(s) (that) that the logic of Kay ... supports the ... conclusion that a rule barring attorney-objectors from recovering attorney's fees would blunt any temptation of attorneys to "advance garden variety objections" in order to recover a salary of fees." Zucker v. Westinghouse Elec., 374 F.3d 221, 229 (3d Cir. 2004). In so holding, the Court stated that, "(d)enial of a fee award to attorneys who represent themselves will

serve as a prophylactic to deter those attorneys ... who may be guided by financial incentives to pursue unnecessary litigation or to provide representation that is not sufficiently guided by objective, rational decision-making. And we decline to create such an incentive today.” *Id.* Therefore, regardless of whether plaintiff prevails in this matter, she should not be awarded attorney’s fees as part of costs.

### **CONCLUSION**

For the foregoing reasons, the Court should deny plaintiff’s Motion for Summary Judgment, grant defendants’ Motion for Judgment on the Pleadings, and otherwise enter judgment in favor of the defendants on the entirety of plaintiff’s claims.

Respectfully submitted,

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Date: April 11, 2007

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<b>COMMONWEALTH REPORTING</b>	:	
<b>COMPANY, SARGENT’S COURT</b>	:	
<b>REPORTING SERVICE, INC., and</b>	:	
<b>PRECISION REPORTING, INC.,</b>	:	
<b>Defendants</b>	:	

**CERTIFICATE OF SERVICE**

I, John G. French, Deputy Attorney General for the Commonwealth of Pennsylvania, Office of Attorney General, hereby certify that on April 11, 2007, I caused to be served a true and correct copy of the foregoing document titled, Brief in Opposition to Plaintiff’s Motion for Summary Judgment, via electronic filing, to the following:

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