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Recent Developments: Computer Software Copyrightability

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Recent Developments

UNCONSTITUTIONAL SEX-BASED MORTALITY TABLES

In *Arizona Governing Committee for Tax Deferred Annuity and Compensation Plans v. Nathalie Norris* ___U.S.___, 103 S.Ct. 3492, 77 L.Ed.2d. 1236 (1983), the Supreme Court of the United States held that an employer may not offer its employees' life annuity plans from private insurance companies that use sex-based actuarial mortality tables. To allow employers to do so, the Court found, would in effect permit the practice of discrimination on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000 et seq., which makes it unlawful employment practice "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000 e-2(a)(1) (1964).

I.

Since 1974, Arizona's Governing Committee for Tax Deferred Annuity and Deferred Compensation plans has administered a deferred compensation plan whereby it has selected several insurance companies to participate in the "Plan" and, in turn, has offered its employees to enroll in the plan. When an employee chooses to participate in Arizona's plan, he must designate one of the participating companies chosen by Arizona in which he wishes to invest his deferred wages. Once the employee so designates and decides the amount of compensation to be deferred each month, Arizona is responsible for withholding the appropriate sums from the employee's wages and directing those sums to the appropriate company.

Insurance companies generally base the amount of monthly retirement benefits due a retired employee on: 1) the amount of compensation the employee defers; 2) the employee's age at retirement; and 3) the employee's sex. All the companies chosen by Arizona to participate in the plan employ sex-based mortality tables to calculate benefit amounts. The tables award a man larger monthly payments than a woman who deferred the same amount of compensation and retired at the same age.

On May 3, 1975, respondent Nathalie Norris, an employee of the Arizona Department of Economic Security, elected to participate in Arizona's plan, and invested her deferred compensation in Lincoln National Insurance Company's fixed annuity contract. *Norris*, 103 S.Ct. at 3495.

On April 25, 1978, Norris brought suit against the state, the governing committee and several of its members, alleging that the plan discriminates on the basis of sex.

II.

The Court's opinion first probed the question of whether the defendants would have violated Title VII had they conducted the entire plan themselves, without the participation of any insurance companies. The Court found direction in its opinion in *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978), which was apparently the first challenge to contribution differences based on valid actuarial tables since the enactment of Title VII in 1974. In *Manhart*, the Court held that an employer had violated the statute by requiring its female employees to make larger contributions to a pension fund than male employees in order to obtain the same monthly benefits upon retirement. The Court found that the pension fund treated each woman "in a manner but for (her) sex would (have been) different." 435 U.S. at 710, quoting *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1174 (1971).

Applying the "but for" standard illustrated in *Manhart*, the Court in *Norris* wholly rejected the defendants' contention that the Arizona plan does not discriminate on the basis of sex because a man and a woman who defer the same amount of compensation will obtain upon retirement policies having approximately the same present actuarial value. The Court found no difficulty in holding that the "classification of employees on the basis of sex is no more permissible at the pay-out stage of a retirement plan than at the pay-in stage." *Norris*, 103 S.Ct. at 3497. It further noted that the defendants' assumption that sex may be properly used to predict longevity is inconsistent with the lesson of *Manhart*: that Title VII requires employers to treat their employees as *individuals*, not "'as simply components of a racial, religious, sexual, or national class.'" *Norris*, 103 S.Ct. at 3498, quoting *Manhart*, 435 U.S. at 708 (emphasis by Court).

Thus, the majority opinion established that "it is just as much discrimination 'because of... sex' to pay a woman lower benefits when she has made the same contributions as a man as it is to make her pay larger contributions to obtain the same benefits." *Id.* at 3499.

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COMPUTER SOFTWARE COPYRIGHTABILITY

In *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983), the United States Court of Appeals for the Third Circuit reversed the denial of Apple's motion for preliminary injunction seeking to restrain Franklin from infringing copyrights on 14 of its software programs. The unanimous three-judge panel ruled that copyright protection does extend to operating programs.

Franklin manufactures and sells the Ace 100 personal computer designed to be "Apple compatible" so that peripheral equipment and software designed for the Apple II could be used in conjunction with the Ace 100. In order to achieve this compatibility, Franklin admittedly copied 14 of Apple's operating system programs (the instructions which tell the computer which functions to perform). Operating programs can be stored on a variety of memory devices such as semi-conductor "micro-chips," which are connected to the circuitry, and "floppy disks" (flexible magnetic disks similar to phonograph records). These programs are referred to as software, whereas the machinery of the computer is known as hardware.

Franklin explained that designing its own programs would be impractical and would not ensure 100% compatibility because "there were just too many entry

points in relationship to the number of instructions in the program." *Apple*, 714 F.2d at 1245. Franklin defended, however, that the operating programs were not copyrightable; first, because they are embedded on a micro-chip and are therefore a form of machinery and second, because they cannot be distinguished from the concept of operating the computer system, they are more than the mere expression of an idea. Copyright Act of 1976, 17 U.S.C. § 102 (1976).

Both of Franklin's arguments were rejected by the court which reasoned that the programs do not meet the requirements of the Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq.* The programs are "literary works," and they are "fixed in [a] tangible medium of expression." *Id.* at § 102(a). The court went on to hold that "the medium is not the message" and the fact that a program is recorded on a device which is part of the machinery is a mere change in the tangible form. *Apple*, 714 F.2d at 1251. In response to Franklin's second argument that an operating system is a mere method of operation and not protected, the court relied on Congress's Commission on New Technological Uses report which stated "[t]hat the words of a program are used ultimately in the implementation of a process should in no way affect their copyrightability." *id.* The court also found that Apple was seeking only to copyright the instructions and not the computer operating method.

With the growing number of personal computers in businesses and private homes throughout the United States, this decision protects not only large computer companies such as Apple, but also the individual computer operator who creates his/her own operating program.

by Sylvia Halkousis

LACK OF JURY IMPARTIALITY REQUIRED FOR NEW TRIAL

In *McDonough Power Equipment, Inc. v. Greenwood*, ___ U.S. ___ (1984), the United States Supreme Court clarified the bases upon which a motion for new trial made as a result of a juror's failure to disclose information on voir dire will be granted. To prevail upon such a motion, a party must show that a juror's answer to a material question on voir dire was dishonest and that had the juror answered honestly, grounds establishing a challenge for cause would have been present.

In *McDonough Power*, Billy Greenwood and his parents brought suit against McDonough Power Equipment Incorporated to recover damages for injuries sustained by Billy when his feet came in contact with the blades of a riding lawn mower manufactured by McDonough, Inc. During voir dire, prospective jurors were asked if they or any of their family members had ever sustained a severe injury. One individual, who eventually became a member of the jury, failed to respond to this question. After the trial, the United States District Court entered judgment upon a jury verdict for McDonough, Inc.

After entry of the judgment, the Greenwoods requested and received permission to approach the jurors in an attempt to elicit information regarding injuries sustained by them or members of their families. Despite discovery of evidence that a juror had not disclosed information regarding such injuries, the district court denied the Greenwood's motion for a new trial, stating that the jury verdict was fair and well-supported.

The Greenwoods appealed to the Court of Appeals for the Tenth Circuit which reversed the district court judgment. In *Greenwood v. McDonough Power Equipment, Inc.*, 687 F.2d 338 (10th Cir. 1982), the court of appeals held that the Greenwood's right of per-emptory challenge had been prejudiced because of the juror's failure to respond to a question on voir dire. To cure the error of the juror's "probable bias," a new trial was granted. The Supreme Court however, reversed, holding that a new trial will not be granted unless a juror's nondisclosure results in a partial jury.

The court's opinion begins by tracing the legislative and judicial history of the harmless error rules. These rules were adopted to curb the abuses of appellate review procedures because at one time "courts of review tower[ed] above the trials... as impregnable citadels of technicality" with trials representing attempts to get reversible error on the record. *Kotteakos v. United States*, 328 U.S. 750, 759 (1946). The effect of the harmless error rules is that courts, in their judgment, can disregard errors in the proceeding which do not interfere with the fairness of the trial.

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RAPE TRAUMA SYNDROME

For the first time in Maryland, a trial court has held that expert testimony on the victim's emotional trauma is admissible in a rape case to show the victim did not consent to intercourse. *State v. Allewalt*, docket No. 83-CR-2517 (Circuit Court for Baltimore County November 4, 1983). Relying on consent as his defense, Allewalt was convicted of rape after a psychiatrist described the symptoms the complainant suffered, and testified that they were attributable to the emotional condition known as rape trauma syndrome.

Rape trauma syndrome is a specific type of stress disorder which arises from the emotional impact of being raped. The symptoms most commonly associated with rape trauma syndrome include fear of men in general, fear of being alone, fear of being raped again, disturbance in sleep habits, loss of appetite, depression, and a sense of shame.

Without the support of expert testimony on rape trauma syndrome, the defense of consent was often difficult to disprove because of lack of physical evidence. Many times the decision in such a case would be based solely on the testimony of the complainant and defendant; therefore, the credibility of each testimony was critical in the determination of the outcome. By allowing the expert to testify, the complainant's testimony that she did not consent to intercourse can be corroborated by the testimony of a psychiatrist. Rape trauma testimony, therefore, could significantly strengthen the prosecution's case.

Only a handful of states have directly decided the issue of admissibility of rape trauma syndrome. Minnesota, the only state with more than one decision on point, has held that the admission of expert testimony on rape trauma syndrome is reversible error. *State v.*