

# Do Tiger Woods, Dustin Hoffman, and Other Celebrities Own Information About Themselves?

KRISTA L. WITANOWSKI

The often-fractious interface between the First Amendment and intellectual property law led to a lively panel discussion at the Forum's Seventh Annual Meeting, February 14-16, 2002, in Boca Raton, Florida. The panel specifically explored laws that protect celebrities and their images, extend an author's ownership rights in a creation long after death, and prevent full coverage at sporting events.

## Background

In *Zacchini v. Scripps-Howard Broadcasting Co.*, the U.S. Supreme Court directly addressed the right of publicity for the first and thus far only time.<sup>1</sup> Zacchini, who performed a human cannonball act, sued a TV station that had secretly taped and broadcast his entire performance without consent.<sup>2</sup> The Court held that, under Ohio common law, the First Amendment did not protect the television station against a right of publicity.<sup>3</sup> The Court's rationale for affirming the right of publicity was "the straight-forward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which [the defendant] would normally pay."<sup>4</sup>

## Who Gets the Money?

The panel teed off with a review of the recent Tiger Woods case, *ETW Corp. v. Jireh Publishing, Inc.*<sup>5</sup> ETW Corp. sued the publisher under the Lanham Act for

selling a print allegedly using the name, image, and likeness of Tiger Woods.<sup>6</sup> Both parties moved for summary judgment on issues of freedom of speech and expression, lack of customer confusion, and likelihood of confusion.<sup>7</sup> The U.S. District Court for Northern Ohio granted the defendant's motions for summary judgment because the plaintiff failed to establish the validity of its claim to trademark rights in the image of Tiger Woods.<sup>8</sup> The court found no evidence that the plaintiff actually used the allegedly infringing image of Tiger Woods as a trademark.<sup>9</sup> Furthermore, the First Amendment protected the defendant's print as an artistic creation seeking to express a message.<sup>10</sup>

Moderator Barbara Wall, former Forum Chair and senior legal counsel for Gannett Co., asked Tiger Woods's agent, John Oney of International Group Management, "Why do sports figures believe that they should try to restrict the type of products that are really there for fans to show their loyalty to the talents of those who serve the public?" The answer? According to Oney, the athletes, artists, and models whom he represents are human beings, i.e., ordinary people who have achieved something on the playing field or elsewhere. Oney's role as a sports agent is to manage their careers and assets, including endorsements. Referring specifically to the Ted Williams baseball bat and the Duke Snyder mitt, Oney acknowledged these items as "a part of America after all," but pointed out that endorsements generate a significant percentage of an athlete's income. "Our licensees are making and selling products," Oney explained. "Our clients are endorsing Nike tennis shoes and Titleist golf clubs and in return they acquire royalties."

Like many sports agents, Oney deals with both manufacturers, to get product endorsements, and the media, to publicize his clients' achievements. After observing that Oney differentiated be-

tween news reporting and the other ways that an athlete can gain publicity, Moderator Wall asked, "What is it about the image versus the words in the article that makes you protest the one but live with the other?" "The short answer is the media," responded Oney. The difference is not between words and pictures, he added. If the athlete's image is part of a news report, it is acceptable and would not jeopardize his client's commercial rights. In other words, there would be no need to get a license if the image is part of the news story because "it is part and parcel of the news report capturing the words and image of the event."

However, Oney supported the right of athletes to be compensated when third parties profit from their images. When *Zacchini* was handed down in 1977, he continued, athletes like Billie Jean King and Arnold Palmer needed years to accumulate enough money to retire if they had a career-ending injury. During the past ten to fifteen years, the money in professional sports and the celebrity status of athletes have exploded. Now, seventeen-year-old golfers are "set for life" by placing their image on merchandise and making other endorsements, he said.

## Does It Sell Newspapers?

Joseph Beck, of Kilpatrick Stockton LLP in Atlanta, who represented the Houghton Mifflin Co. in *The Wind Done Gone* case,<sup>11</sup> made a strong argument for distinguishing between news and merchandising, citing *Montana v. San Jose Mercury News Inc.*<sup>12</sup> Football star Joe Montana sued a newspaper for distributing posters that reproduced a photograph of him that was first printed on the newspaper's front page.<sup>13</sup> Montana claimed misappropriation under the common law and the California Civil Code.<sup>14</sup> The trial court granted summary judgment to the newspaper and the appellate court affirmed.<sup>15</sup> The appellate court held that the posters

---

Krista L. Witanowski (kwitanowski@yahoo.com) is a third-year student at the Syracuse (N.Y.) University College of Law, a Master's degree candidate in the Television, Radio, and Film program at S.I. Newhouse School of Public Communications, and a recipient of a Forum scholarship to the Seventh Annual Forum.

reported “newsworthy items of public interest” and that a “newspaper has a constitutional right to promote itself by reproducing its originally protected articles or photographs of a public figure,” as long as it does not falsely imply that the public figure endorses the newspaper.<sup>16</sup>

Beck represents the music group OutKast in a case currently before the Sixth Circuit, *Rosa Parks v. LaFace Records*.<sup>17</sup> Civil rights activist Rosa Parks sued OutKast’s record company under several legal theories for performing, marketing, and distributing a song that used her name as the title.<sup>18</sup> The U.S. District Court for the Eastern District of Michigan granted the defendant’s motion for summary judgment of all claims, holding that the right of publicity was inapplicable under the First Amendment because the content of the expressive work bore a relationship to the use of a celebrity’s name.<sup>19</sup> The court noted the obvious relationship between the content of the song and its title and rendered the right of publicity inapplicable in this case.<sup>20</sup> The court went on to hold that the defendant’s right to freedom of expression outweighed Parks’s interests under the Lanham Act and Michigan’s unfair competition laws.<sup>21</sup>

ABC’s Henry Hoberman made an interesting point about the right of publicity, explaining that “the problem with the right of publicity tort is that it tends to be unbridled, a vehicle that agents like Oney use to control what the press writes about celebrity clients. Unlike copyright law, which has safeguards like the idea-expression dichotomy and fair use constructs, the right of publicity has no such constraints. The First Amendment has to come in and be that safeguard.”

Hoberman discussed the publicity tort in light of *Hoffman v. Capital Cities/ABC*.<sup>22</sup> In *Hoffman*, *Los Angeles Magazine* claimed that its use of a digitally altered photograph from the movie *Tootsie* was protected under the First Amendment. The magazine had featured Tootsie’s famous pose in a fashion layout with the explanation that “Dustin Hoffman isn’t a drag in a butter-colored silk gown by Richard Tyler and Ralph Lauren heels.”<sup>23</sup>

Opining that the actor was “one of our country’s living treasures,”<sup>24</sup> the U.S. District Court for Central California found for Hoffman and held that the photo was commercial in nature

rather than editorial because of its exploitation of Hoffman’s image.<sup>25</sup>

“The most offensive part of the district court’s opinion,” according to Hoberman, “was the inclination to substitute the judge’s own judgment about the artistic merit and the social value of the speech for [that of] the editors.” The district court said that the photograph and the article expressed no commentary about fashion trends, let alone a “coordinated or unified view of current fashions.” “That is a frightening formulation,” added Hoberman. “The real danger in these cases is you have judges and juries substituting their own predilections and their own notions of what is important socially and what is of value to the American people for editors, writers, publishers, and artists.”

The case was appealed to the Ninth Circuit, which applied a three-part test to reverse the lower court decision.<sup>26</sup> The first issue was whether Dustin Hoffman was a public figure.<sup>27</sup> Finding the actor indeed to be one, the court moved on to the second test: whether the photograph was commercial or editorial in nature.<sup>28</sup> The court found that the photograph was not purely commercial by using the *Bolger* formula,<sup>29</sup> which examines whether the speech proposes a commercial transaction.<sup>30</sup> The article in which the contested photo appeared was a “combination of fashion photography, humor, and visual and verbal editorial comment on classic films and famous actors.”<sup>31</sup> Furthermore, “[a]ny commercial aspects are ‘inextricably entwined’ with expressive elements, and so they cannot be separated out ‘from the fully protected whole.’”<sup>32</sup>

In the final part of the test, the court examined the magazine’s intentions in publishing the article and Hoffman’s photograph, specifically whether there was clear and convincing evidence of actual malice.<sup>33</sup> The court held that Hoffman failed to prove that the defendant intended to create a false impression in the minds of its readers by altering the *Tootsie* photograph.<sup>34</sup> Furthermore, all but one of the references to the article made it clear that the defendant used digital techniques to substitute current fashions for the clothes worn in the original films.<sup>35</sup>

Shortly after the Ninth Circuit decided the *Hoffman* case, it issued another decision that reached the opposite conclusion. In *Downing v. Abercrombie & Fitch*,<sup>36</sup> a group of surfers sued the

clothing store for publishing their photograph without permission in a catalogue that was intended for commercial benefit; the surfers were identified by name.<sup>37</sup> The appellate court concluded that use of the photograph did not contribute significantly to a matter of the public interest and, therefore, the defendant could not rely on the First Amendment as a defense.<sup>38</sup> The court distinguished this case from *Hoffman* on the basis that “Abercrombie’s use was much more commercial in nature and, therefore, not entitled to the full First Amendment protection accorded to *L.A. Magazine*’s use of Hoffman’s image.”<sup>39</sup>

### But Is It Art?

The panel next discussed *Comedy III Productions, Inc. v. Saderup*,<sup>40</sup> better known as the *Three Stooges* case. The plaintiff, as owner of the rights to the Three Stooges, objected when the defendant created a lithograph of Larry, Moe, and Curly and immortalized their mugs on silk-screened T-shirts.<sup>41</sup>

According to the California Supreme Court, the state appellate court made an error by holding that the lithograph and T-shirts deserved no First Amendment protection “simply because they were reproductions rather than the original works of art.”<sup>42</sup> Despite its finding that the reproductions were entitled to First Amendment protection, the state supreme court nevertheless affirmed the appellate ruling after it formulated and applied the following balancing test: Did the work “add significant creative elements so as to be transformed into something more than a mere celebrity likeness or imitation?”<sup>43</sup> In addition, the court discussed whether the offending party stood to make a profit on the use of the name and likeness.<sup>44</sup> Finding that there were no such creative elements and the use of the image was commercial, the court upheld the right of publicity.<sup>45</sup>

The Three Stooges lithograph itself embodies many of the points raised by the panel’s discussion. After John Oney commented that he personally saw “no satire, parody or further communicative content” in it, Henry Hoberman responded, “that’s the problem. . . . You’re imposing your own subjective value on whether that drawing of the Three Stooges has any artistic merit, which is similar to the problem with the latitude that the courts have given in this area.”

After the panel discussed how *ETW Corp.* would have been decided in light of the *Three Stooges* balancing test, Oney discussed one of the problems of dealing with celebrities: “Judges are introducing colorful comments about *Hoffman* in their opinions. I find too often that judges’ brains virtually turn to mush when celebrities get involved. The major problem when you have celebrity cases is that it is hard to get the judge who is a sports fanatic or star struck to give a good analysis.”

Celebrities’ commercialism through production of baseball cards, autographs, and coins has resulted in a money explosion, he noted, adding that some commercial enterprises stand to make enormous profits if merchandise is protected by the First Amendment.

### ***Gone With The Wind vs. The Wind Done Gone***

Martin Garbus, of Frankfurt Garbus Kurnit Klein & Selz in New York and lead counsel for the plaintiff in *SunTrust Bank v. Houghton Mifflin Co.*,<sup>46</sup> focused the panel’s discussion on another American icon, *Gone With The Wind* (*GWTW*). The U.S. District Court for the Northern District of Georgia found that Alice Randall’s (*TWDG*) infringed on *GWTW*’s copyright, held that irreparable injury could be presumed, and granted a preliminary injunction.<sup>47</sup> On appeal, Houghton Mifflin argued that there was “no substantial similarity between the two works or, in the alternative, that the doctrine of fair use protects *TWDG* because it is primarily a parody of *GWTW*.”<sup>48</sup> The Eleventh Circuit agreed that *TWDG* was a parody and that furthermore there would be little risk of market substitution because the works were unlikely to be confused.<sup>49</sup>

Garbus discussed the *SunTrust* case within the context of the lower court decision. The district court judge found that *TWDG* copied Mitchell’s vision and story, retold *GWTW*, and then provided a critical sequel. Sequels are big business in publishing: “*GWTW* and the derivative works based upon it have generated millions of dollars for the copyright holders.”<sup>50</sup>

There were artistic issues at stake as well, said Garbus. Fifteen fictional characters were taken from *GWTW* that used the same mannerisms, attributes, and distinct features. *TWDG* used the same physical locations as the original. The

district court judge, Garbus reported, found the book to be overly derivative: “The new work’s use of copyright materials from *Gone With the Wind* goes well beyond that which is necessary to create a parody and, thus, makes excessive use of the original work.”<sup>51</sup>

“Now this gets to the bigger problem of how do you decide these kinds of issues? How does one judge a work of art?” asked Garbus, who used *Rogers v. Koons*<sup>52</sup> to illustrate his point. The original work at issue was a black-and-white shot taken by photographer Art Rogers of a couple and eight German Shepherd puppies.<sup>53</sup> Jeff Koons, a sculptor, instructed artisans under his employ to copy the copyrighted photograph.<sup>54</sup> The Second Circuit affirmed summary judgment for plaintiff and issued a contempt order for Koons’s failure to relinquish four copies of the resulting wood sculpture.<sup>55</sup> The court held that copies were made primarily for the defendant’s commercial benefit.<sup>56</sup> Garbus disagreed with the decision, contending that Koons had transformed the photograph into a new creation that should have afforded First Amendment protection to the defendant.

According to Garbus, the *Koons* case dealt implicitly with the questions of “who is the person doing the transforming and who is the person doing the derivative work?” But Garbus said that courts should not use “talent” as a criterion in determining whether to grant protection to a work: “It is dangerous to say, but I think because Koons did not have an art school, art league background, he was punished for it. That is why it is dangerous to say that Alice Randall is . . . someone who fundamentally took a story and latched stick figures on it and then created a sequel.”

Joseph Beck, who represented the Houghton Mifflin Company, discussed two other aspects of the *SunTrust* case. First, said Beck, *SunTrust* raised the fact that injunctions “are no longer automatic if you prove likelihood of success.” In the Eleventh Circuit, Beck added, an injunction depends on four factors: “the strong likelihood that the case will succeed on its merits, a substantial threat of irreparable injury in the absence of an injunction, the threatened injury to the plaintiff weighed against the potential harm of an injunction to the defendant, and protection of the public interest.” Second, the *SunTrust* case demonstrates the conflict between the Copyright

Clause and the First Amendment.

According to Beck, the outcome of *SunTrust* hinges on whether there “was too much [material] taken under the third criterion in the fair use factor: the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” Beck described how the Eleventh Circuit resolved the fair use issue. First, the court asked, “was the overriding purpose of the book parody?” Judge Birch analyzed the use of parody at length and, in his concurring opinion, Judge Marcus said that “[*TWDG*’s] main aim being to shatter *Gone With The Wind*’s window on life in the antebellum and Civil War South.”<sup>57</sup> Therefore, Beck said, parody was the overriding purpose. “The second factor, and this is why the Mitchell estate lost, and why they will lose at trial,” he added, “is there was no copyright harm to *Gone With The Wind*. *The Wind Done Gone* will not supplant the market for *GWTW*. In fact, there is no likelihood that the Mitchell estate would ever license such a book.”

### **Too Many “Time-Outs” for Sports Reporters?**

Barbara Wall framed the discussion of sports reporting and credentialing as follows: “More and more frequently sports organizations that credential reporters are putting restrictions on those credentials. The restrictions originally were rather benign—the photographs were not to be used for any commercial purposes. Then increasingly the restrictions have veered into the Internet world and the credentialing organizations have tried to impose restrictions on how quickly or slowly information is disseminated on the Web. Some sports organizations have said in credentials that the ownership of any photographs taken at the event belong to the credentialing organization and not the photographer.”

“What are sports organizations trying to do?” Wall asked Edward Ristaino of Akerman, Senterfett & Eidson, P.A. of Miami. Not surprisingly, the impetus is a financial one, according to Ristaino. “With the franchise prices exceeding \$700 to \$800 million, sharp executives for the sports teams are trying to maximize their revenue opportunities,” especially such revenue sources as streaming video on Internet sites. Executives want to exploit the information that reporters gather at the event and allow the

team owners, rather than the news organization, to pocket ancillary revenue.

Ristaino continued, "There is recognition of the news as a necessary evil. For example, in Florida, the Miami Dolphins were a playoff team. However, for the weeks leading up to the playoff series, the *Miami Herald* and *Sun Sentinel* . . . wrote that these are the same old Dolphins; they will make the playoffs and be bounced in the first round. And if they make the second round, they'll be bounced then."

The Miami Dolphins failed to sell out its playoff games, a fact that the Dolphins organization attributed to negative coverage by the team's hometown news media. Wall was not sympathetic: "What property right allows sports executives to prevent the dissemination of the news content in a way that would maximize revenue for the team? In other words, why should sports executives be able to make money on information?" Ristaino replied, "I think you start with the premise that access to the event or game is a privilege and not a right. Anticipating the pressures building to realize revenues, sports organizations are going to try to limit ancillary uses of news content to news uses and try to exploit them in other ways."

George Freeman, associate general counsel of the New York Times Company, talked about the National Basketball Association's (NBA) suit against the newspaper for selling five photographs from the 1999 NBA playoffs for \$900 through its online store. The NBA claimed that the sale of the photographs violated the terms of the association's credentials issued to newspaper photographers.

Sports organizations have relied heavily on *Post Newsweek Stations-Connecticut, Inc. v. Travelers Insurance Co.*<sup>58</sup> to bolster their argument. The 1981 World Figure Skating Championship, held in the Hartford, Connecticut, civic center, was controlled by an international skating organization that had granted exclusive television rights to a production company.<sup>59</sup> Before broadcasting the competition, a local television station was required to sign an agreement prohibiting the broadcast of the event until after the production company aired it.<sup>60</sup> The station was also required to indemnify the insurance company if the agreement was breached.<sup>61</sup> The court denied the station's motion for a preliminary in-

junction, found that the station had no constitutional right of special access to the event, and held that the restrictions were not arbitrary.<sup>62</sup>

But the *New York Times*'s Freeman holds the view that "if 30,000 to 80,000 people are there and the [NBA] spends millions of dollars promoting its events, it really cannot hide under the rubric that this is a private performance."

### **The Last Word: Intellectual Property Law or the First Amendment?**

Beck's closing thoughts included his opinion that "copyright is a concern to many people these days because of its expansiveness," especially the fact that copyright protection lasts for the life of the author plus seventy years. In addition, another troublesome aspect of copyright law could lead to incursions on newsgathering turf, i.e., "individuals can bring items that were once in the public domain back to life." For example, Van Gogh's *Starry Night* is in the public domain, but copyright law protects the image when it is printed on a greeting card or silk-screened on a man's tie. The postcard and tie meet the criteria set forth by the *Feist Publications, Inc. v. Rural Telephone Service* case: originality in selection, arrangement, and coordination.<sup>63</sup>

Beck found the *Rosa Parks* case to be interesting because the song is not about her. When the song is not about Rosa Parks but uses her name in the title and the refrain is "[h]ush that fuss, everybody move to the back of the bus," is that sufficient to raise a right of publicity claim against OutKast? Is the music protected or is it merchandise? Beck said that the *SunTrust* case will answer many of these questions.

John Oney suggested that the skirmish over credentials reflects a larger battle. According to Oney, "if you have a media outlet that does not like the restrictions, you can usually trace that directly back to another outlet that paid for the exclusive broadcast rights." The solution, he said, is simple: "In order to end the credentialing process, reporters and members of the sporting press need to get together and refuse to sign the accreditation forms. Do it publicly and together, make an issue out of it. The ultimate power is that fans care about their team, but they care about the free press even more. The remedy is not in the courts, the solution is with people taking a stand about something that is im-

portant to them."

Henry Hoberman expressed his concerns about the expansion of the right of publicity tort to allow a continued monopoly of expression over what the media says about celebrities: "I think that celebrities and sports figures need to understand that they cannot have it both ways. People like Tiger Woods and Dustin Hoffman make their living at the pleasure of the public. They owe their success to the fans. The notion that they can control what is said about them, i.e.—Dustin Hoffman does not like that a picture of him has armpit hair, and Tiger Woods does not like the way an artist paints him in the *Masters*, is an anathema."

Hoberman thinks that communications attorneys should keep abreast of two disturbing trends. First, *Downing v. Abercrombie & Fitch* suggests that "the reach of the First Amendment rights should be dependent on the speaker," Hoberman said, adding, "when you look at *Hoffman* and *Downing*, decided by the same court within two months of each other in exactly the opposite way, you can glean the distinction that the court made between Abercrombie & Fitch as a commercial retailer and *LA Magazine* as a traditional media organization." Secondly, Hoberman claimed that "we need to watch carefully to make sure the *Three Stooges* logic is not contagious, that is the importation of the notion that the for-profit motive should be a dispositive factor in the First Amendment analysis."

George Freeman concluded that "[t]he reason why this topic is so fascinating is because there is an incredible disconnect between First Amendment law and copyright law. . . . [T]he two laws have not been bridged and there may not be a way to bridge those laws in a way that will placate both sides of that divide." According to Freeman, "the notion that a federal court judge could issue a prior restraint against *The Wind Done Gone* . . . is totally mind-boggling. Likewise, the notion that the Martin Luther King estate can successfully promote a case in court claiming copyright over the use in a CBS historic documentary of the "I have a dream" speech totally mixes some kind of copyright theory that I cannot begin to understand with reality and the First Amendment."

Freeman's comment elicited a quick response from Beck, the attorney for the Martin Luther King estate: "CBS used 62 percent of 'I have a dream' in that docu-

mentary that they sold for profit, and translated and sold on CDs and videocassettes around the world. In addition, CBS sold footage from ‘I have a dream’ for \$1,000 a minute to public schools, with a thirty-second minimum. CBS did not write the words. Let them use the video, and take the soundtrack off. Martin Luther King copyrighted that speech, along with two dozen other works in 1963 and he sued the first infringer.”

Garbus predicted that it will be possible to bridge the gap between free speech and intellectual property rights by adopting different standards in copyright law and by having a commitment to history and the First Amendment. He suggested that “you truly could not write about racism in America without the Rodney King beating. You cannot tell anything about America or about the Vietnam period unless you have the Trang Bang film. You have to have the Zapruder clip to show what happened at the Kennedy assassination. Lastly, you have to have the Martin Luther King film available for everybody so you can write about the history of that period.”



#### Endnotes

1. 433 U.S. 562 (1977).
2. *Id.* at 564.
3. *Id.* at 575.
4. *Id.* at 576 (quoting Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and*

*Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326, 331 (1966)).

5. 99 F. Supp. 2d 829 (N.D. Ohio 2000).
6. *Id.* at 830.
7. *Id.*
8. *Id.* at 831.
9. *Id.* at 832.
10. *Id.* at 835.
11. *SunTrust Bank v. Houghton Mifflin*, 268 F.3d 1257 (11th Cir. 2001).
12. 40 Cal. Rptr. 2d 639 (Cal. Ct. App. 1995); *modified by* 35 Cal. App. 4th 813d (Cal. Ct. App. 1995); *review denied*, No. S047073, 1995 Cal. LEXIS 5089 (Cal. Aug. 17, 1995).
13. 40 Cal. Rptr. 2d at 640.
14. *Id.*
15. *Id.*
16. *Id.* at 643.
17. *Parks v. LaFace Records*, 76 F. Supp. 2d 775 (E.D. Mich. 1999).
18. *Id.* at 777–78.
19. *Id.* at 780.
20. *Id.*
21. *Id.* at 782.
22. 255 F.3d 1180 (9th Cir. 2000).
23. *Id.* at 1183.
24. *Hoffman v. Capital Cities/ABC, Inc.*, 33 F. Supp. 2d 867, 869 (C.D. Cal. 1999).
25. *Id.* at 873.
26. *Hoffman*, 255 F.3d at 1184.
27. *Id.*
28. *Id.*
29. *See Bolger v. Youngs Drug Prods. Corp.* 463 U.S. 60, 66 (1983).
30. *Hoffman*, 255 F.3d at 1184.
31. *Id.*
32. *Id.* (quoting *Gaudiya Vaishnava Soc’y v. City & County of San Francisco*,

952 F.2d 1059, 1064 (9th Cir. 1991) (as amended)).

33. *Id.* at 1186.
34. *Id.* at 1189.
35. *Id.* at 1188.
36. *Downing v. Abercrombie & Fitch*, 265 F.3d 994 (9th Cir. 2001).
37. *Id.* at 999.
38. *Id.* at 1002.
39. *Id.* at 1003 n.2.
40. 21 P.3d 797 (2001).
41. *Id.* at 801.
42. *Id.* at 799.
43. *Id.*
44. *Id.* at 810.
45. *Id.*
46. *SunTrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257 (11th Cir. 2001).
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 1274.
51. *SunTrust v. Houghton Mifflin, Inc.*, 136 F. Supp. 2d 1357, 1385 (N.D. Ga. 2001).
52. 960 F.2d 301 (2d Cir. 1991).
53. *Id.* at 304.
54. *Id.* at 305.
55. *Id.* at 313.
56. *Id.* at 312.
57. *SunTrust v. Houghton Mifflin, Inc.*, 136 F. Supp. 2d 1357, 1387 (N.D. Ga. 2001) (Marcus, J., concurring opinion).
58. 510 F. Supp. 81 (D. Conn. 1981).
59. *Id.* at 83.
60. *Id.* at 83–84.
61. *Id.*
62. *Id.* at 86.
63. 499 U.S. 340, 349 (1991).