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Deborah Pines
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Attorney Hit With Sanctions For Poor Brief

BY DEBORAH PINES

A FEDERAL appeals panel in Manhattan took the unusual step this week of sanctioning a Manhattan lawyer, and not his client, for filing a deficient appellate brief in a copyright case.

The panel complained that the brief did not cite "a single statute or court decision related to copyright" or "present a coherent legal theory."

The U.S. Court of Appeals for the Second Circuit panel, possibly signaling a new get-tough attitude toward appellate advocacy, ordered Stephen A. Weingrad of Weingrad & Weingrad, to pay his adversary's appellate fees, estimated to be close to \$30,000, as a sanction for a frivolous appeal.

"Appellant's Brief is at best an invitation to the court to scour the record,

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Panel Sanctions Attorney for Poor Brief

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research any legal theory that comes to mind, and serve generally as an advocate for appellant," the panel declared in an unsigned per curiam ruling in *The Ernst Haas Studio Inc. v. Palm Press Inc.*, 97-9259. "We decline the invitation."

The opinion, filed Tuesday, comes two months after Second Circuit Judge Roger J. Miner used a speech at Pace University School of Law to call for sterner responses from the court, including sanctions, to what he perceived as a rise in shoddy appellate advocacy. Circuit judges must do more to "advance the cause of professional responsibility," Judge Miner said in his talk. (*NYLJ*, Nov. 16)

In addition to sanctioning Mr. Weingrad, the three-judge Second Circuit panel also affirmed dismissal of the suit filed by his client, The Ernst Haas Studio, which alleged a greeting card-maker, Palm Press, had infringed its copyright in a photograph of Albert Einstein taken by the now-deceased photographer Ernst Haas. The panelists were Second Circuit Chief Judge Ralph K. Winter and Second Circuit Judges Thomas J. Meskill and Pierre Leval.

Theory Lost

In response to the sanction, Mr. Weingrad said, "I don't accept as fair or just sanctioning a lawyer because he was espousing his client's claim." He conceded, however, that his brief was particularly short. He said he had to remove portions of his argument when the case's main theory — that

the studio was about to receive a new copyright registration — had to be scuttled because the registration was denied. He said the lower court had prevented him from amending his complaint to reflect a new theory — that the photographer never had abandoned his copyright in the disputed photo.

His adversary, Jeffrey A. Berchenko, of Berchenko & Korn, in San Francisco, said he actually was a little disappointed by the Second Circuit ruling. "I could be guilty of wanting to have my cake and eat it, too," he said. In addition to granting the sanctions, he had wanted the Circuit to address the case's merits, he said.

The New York-based Ernst Haas Studio, run by Alexander Haas, the photographer's son, licenses the Haas photographic collection. The disputed photo — titled "Albert Einstein Thinking" — was one Mr. Haas had taken in 1953 of the late physicist in his study at Princeton. The image was published in the June 1953 issue of *Vogue*, a Conde Nast Publication.

In May 1996, the Haas Studio filed suit against Palm Press, of Berkeley, Calif., after Palm used the image on a series of note cards. The Haas Studio claimed it was awaiting registration for the photo from the Register of Copyrights. When registration was denied, Southern District Judge Loretta Preska dismissed the suit.

"Plaintiff has not properly alleged the first element of its copyright infringement claim" — ownership of a valid copyright, Judge Preska found.

On appeal, The Haas Studio claimed two errors by the district court. First,

it claimed errors in reviewing its claim that Conde Nast, which obtained a copyright registration for its magazine in 1953 and renewed that in 1981, had reverted the photo copyright to The Studio. Second, it claimed The Studio had been denied permission to amend its complaint to raise that point.

Nine Pages

The Second Circuit found multiple deficiencies with The Studio's appellate brief asserting those claims.

"Although the issues raised are complex," the panel noted the brief was just nine pages and lacked any copyright statute, case citations or clear articulation of its legal theories. The panel said the brief failed to satisfy the requirement in Fed. R. App. P. 28 that an appellant's main briefs contain key issues and contentions, and their support in case law, statutes and the record.

"Appellant's brief utterly fails to comply with this mandatory direction," the panel wrote. "A reasonable reader of the Brief is left without a hint of the legal theory proposed as a basis for reversal."

The panel affirmed the case dismissal and ordered sanctions of reasonable appellate attorney's fees to be paid by Mr. Weingrad, pursuant to Fed. R. App. P. 38. "Because the frivolous nature of the Brief is due to counsel, he should bear sole liability for these fees," the panel wrote.

The panel ordered the amount of the fees be fixed on remand by the district court.