



Frommer Lawrence & Haug Attorney Mark P. Walters Gains One of the Largest Awards Ever for Indirect Profits in a Copyright Matter for Lucky Break

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SEATTLE – (April 9, 2010) – Plastic Thanksgiving turkey wishbones selling for \$.99 each really turned out to be worth \$1.7 million to a Seattle company.

The Ninth Circuit Court of Appeals on Wednesday affirmed an award of \$1.7 million to Lucky Break Wishbone Corporation over retailer Sears, Roebuck and Co. and advertising giant Young & Rubicam, Inc. The decision was seen as a victory for U.S.-based intellectual property rights and small business competing in a global environment.

The copyright case concerned the plastic turkey bones used in a Thanksgiving promotion for Sears and was argued for Lucky Break by Frommer Lawrence & Haug attorney, Mark P. Walters.

Lucky Break first filed its suit in March 2006, alleging that in June 2005, Young & Rubicam approached Lucky Break to express interest in distributing their wishbones as part of a Thanksgiving promotion for Sears. Lucky Break provided a sample of the product – a plastic wishbone able to break like a real wishbone – and prepared to manufacture one million wishbones, but no deal was reached.

Lucky Break later determined that Sears had hired a company called Apex Products LLC to produce the wishbones in China for the Sears 2005 WISH BIG campaign, which Lucky Break said were “substantially similar or virtually identical” to its copyrighted product, which is proudly made in the USA. Sears and Young & Rubicam maintained that the wishbone used in their promotion was an imitation of a real turkey bone, rather than any competing plastic wishbone.

The matter was brought to trial in July 2008, where a jury in the district court ruled that Sears had infringed Lucky Break Wishbone Corp.'s copyright on their wishbone design. The jury also ruled that both Sears and Young & Rubicam had infringed Lucky Break’s copyrighted product warning statement. Key testimony was provided by an expert in avian osteology, or bird bones, who testified that Lucky Break’s product differs substantially from actual turkey bones. Specifically, seven different artistic features of design make Lucky Break’s wishbone unique. As a result, the osteologist argued, Sears’ plastic wishbone could not have been copied from nature and instead must have been copied based on Lucky Break’s product. The district court agreed with the osteologist’s determination.

The court denied Sears’ appeal over the initial ruling, resulting in one of the largest-ever awards for indirect profits from an infringing advertisement or promotion. \$1.5 million was awarded as indirect profit.

The decision, overseen by Judge Thomas S. Zilly and Circuit Judges William Fletcher, Arthur Alarcon and Johnnie Rawlinson, comes after a lengthy appeal

process beginning in 2008. Sears challenged the initial ruling of the U.S. District Court for the Western District of Washington on several counts, including whether Lucky Break's wishbone was protectable under the Copyright Act and whether Sears in fact infringed Lucky Break's copyright. In this week's ruling, the Ninth Circuit Court of Appeals denied each of Sears' challenges in support of Lucky Break's initial award.

The wishbones were invented and are marketed by Seattle businessman, Ken Ahroni, President of Lucky Break.

"The Ninth Circuit's decision reaffirms the validity of Lucky Break's claims and originality in product design," said attorney Walters. "As business becomes more globalized, it will be critical that U.S. courts uphold intellectual property rights in a manner that continues to encourage innovation and creativity. This case is an excellent example of the principle in action," he added.