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lent criminal activity. Soldier of Fortune Magazine, Inc., and its parent, Omega Group, Ltd., appealed the $4,375,000 jury verdict. In January of 1985, Michael Savage submitted the following personal service advertisement to Soldier of Fortune: “GUN FOR HIRE: 37 year old professional mercenary desires jobs. Vietnam Veteran. Discrete [sic] and very private. Body guard, courier, and other special skills. All jobs considered.” Savage testified that he only intended to obtain legitimate jobs, but the majority of the 30 to 40 phone calls a week he received sought his participation in criminal activity. In response to the Soldier of Fortune ad, Savage was enlisted to murder an individual and accompanied John Moore and Sean Doutre to the victim’s home on August 26, 1985. As the victim and his son were driving down the driveway, Doutre killed Braun and wounded his son.

The Court of Appeals for the Eleventh Circuit concluded that the district court in Alabama correctly applied Georgia law. The court held that the lower court properly applied the risk-utility balance by instructing the jury that it could hold the magazine publisher liable only if the advertisement on its face would alert a reasonably prudent publisher to the clearly identifiable unreasonable risk of harm to the public that the advertisement posed. The court rejected Soldier of Fortune’s argument that the instructions placed an intolerable burden upon the press and chilled protected speech. The First Amendment does not protect commercial speech related to illegal activity. The court also held that the district court’s modified negligence standard satisfied the First Amendment’s interests in protecting the commercial and core speech at issue in this case. The district court stressed that the jury could find Soldier of Fortune negligent only if Savage’s advertisement “on its face” would have alerted a reasonably prudent publisher that the ad contained a clearly identifiable unreasonable risk that the offer is one to commit a serious violent crime. The court of appeals also held that sufficient evidence existed to sustain the jury determination that publication of the ad was the proximate cause of injuries to the plaintiff and that the chain of causation was not broken.

-J.F.B.


A computer manufacturer brought suit against a software cartridge manufacturer for trademark and copyright infringement in
violation of §§ 32(1) and 43(a) of the Lanham Act and the Copyright Act. The District Court for the Northern District of California required the recall of Accolade's infringing games within 10 business days. The Ninth Circuit Court of Appeals stayed the recall order. Appellee Sega Enterprises develops and markets video entertainment systems, including the "Genesis III" console and video game cartridges. Sega licensed a patented trademark security system for the Genesis III. When a game cartridge is inserted, the microprocessor contained in the Genesis III searches the game program for four bytes of data consisting of the letters "S-E-G-A" which constitutes the initializing code. If the Genesis III finds the initialization code, the game will operate and the monitor displays "Produced by or under license from Sega Enterprises, Ltd." for approximately three seconds. Through reverse engineering on Sega game cartridges, Accolade engineers discovered the initialization code and added the code to all games marketed for the Genesis III. Unbeknownst to Accolade, the standard header file in the Genesis III games caused the display of the Sega message, although Accolade's packaging stated that Accolade is not associated with Sega.

The Ninth Circuit held that when the person seeking understanding of the unprotected functional elements of a program has a legitimate reason for doing so, and when no other means of access to the unprotected elements exist, disassembly of copyrighted object code is, as a matter of law, a fair use of the copyrighted work. The court analyzed section 107 of the Copyright Act and concluded that Accolade clearly had the better case on the fair use issue. The court stressed that the ultimate aim of the Copyright Act is to stimulate the artistic creativity for the general public good. The court also held that when there is no other method of access to the computer that is known or readily available to rival cartridge manufacturers, the use of the initialization code by a rival does not violate the Lanham Trademark Act even though that use triggers a misleading trademark display.

-J.F.B.


In distributing the television rights to their games, the NBA owners allowed NBC and TNT to telecast nationally a set number of games per season. The individual teams retained the rights to the remainder of the broadcasts and could split them between local