Willful Copyright Infringement Requires Proof of Intent in the Ninth Circuit

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A pro bono case in the Ninth Circuit just made it harder for plaintiffs to prove copyright infringement is willful.

On Tuesday, in the case of Erickson Productions Inc. v Kast, the Ninth Circuit clarified that an accused willful infringer must either know about or recklessly disregard the copyright in suit. This requires proof of the infringer’s intent. A court had found Kraig Kast liable for $450,000 for uploading three copyrighted photos to a website he had developed. The trial court instructed the jury that the defendant could be liable for enhanced damages if the accused infringer “should have known that [his] acts infringed plaintiffs’ copyright”.

A unanimous Ninth Circuit panel reversed and ordered a new trial. Writing for the court, Judge Michael Day Hawkins reasoned that “should have known” is the standard for negligence, not willfulness. “Negligence is a less culpable mental state than actual knowledge, willful blindness, or recklessness, the three mental states that properly support a finding of willfulness.” For a jury to find willfulness requires an inquiry into the defendant’s state of mind, not what it should have been.

As most copyright practitioners are well aware, the question of willfulness can be important in a case where the plaintiff is seeking statutory damages. Statutory damages for willful infringement can be up to $150,000 per infringement, versus $30,000 for infringement that is not willful. Thus, at retrial, Kast will face maximum damages of only $90,000 (and, possibly, an attorneys’ fees award).

Going forward, the idea that a defendant had “constructive knowledge” of the copyright will not suffice in the Ninth Circuit. Copyright trolls seeking large settlements based on vague standards of willfulness may need to adjust their expectations.

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