



United States District Court Southern District of Florida

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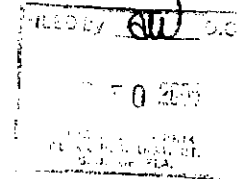
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 97-3924-CIV-LENARD/SIMONTON

CONSENT CASE



JERRY GREENBERG,

Plaintiff,

v.

NATIONAL GEOGRAPHIC SOCIETY, et al.

Defendants.

ORDER ON MOTIONS FOR JUDGMENT AS A MATTER OF LAW,
MOTION FOR REDUCTION IN JURY AWARD, OR
IN THE ALTERNATIVE FOR REMITTITUR

Presently pending before this Court is Defendants' Motion for Judgment as a Matter of Law (ore tenus motion made at the close of the evidence), Plaintiff's Motion for Judgment as a Matter of Law (DE # 292), and Defendant's Motion for Reduction in Jury Award or in the Alternative for Remittitur (DE # 290). The Court has heard oral argument, and supplemental briefs have been filed. For the reasons stated below, the Motions for Judgment as a Matter of Law filed by Plaintiff and by Defendants National Geographic Society and National Geographic Enterprises, and the Motion for Reduction in Jury Award or Remittitur are denied. The Motion for Judgment as a Matter of law is granted as to Defendant Mindscape on the issue of willfulness.

I. MOTION FOR A JUDGMENT AS A MATTER OF LAW, REDUCTION IN JURY
AWARD OR REMITTITUR

Defendants filed a motion for a judgment as a matter of law on the issue of willfulness, for a reduction of the jury award, or in the alternative, for remittitur.

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Defendants argue that the verdict finding willfulness was unsupported, and is contrary to law and evidence, and that Plaintiff failed to introduce evidence that Defendants willfully infringed the copyrights. Thus, Defendants contend that the jury award should be reduced to the maximum allowed under a finding of regular infringement.

Specifically, Defendants argue that judgment should be entered for them as a matter of law on the issue of willfulness because (a) they presented undisputed evidence, that they believed that they had the right to publish the photographs; and (b) Defendants were legally entitled under §201(c) of the Copyright Act to republish all four works as a collective work; and (c) that Defendants reasonably relied in the advice of counsel.

Although much of Defendants' argument applies collectively to all three defendants, Defendant Mindscape argues separately that it is entitled to judgment as a matter of law on the issue of willfulness since there is no evidence in the record that it acted willfully, and Plaintiff is not entitled to attribute willfulness to Mindscape based solely on evidence of willful intent on the part of the other defendants.

In opposition, Plaintiff states that there is sufficient evidence on the record for the jury to have found that Defendants were willful infringers. In addition to activities engaged in by the Geographic defendants prior to the commencement of this litigation, Plaintiff submits that when the Eleventh Circuit held in favor of Plaintiff, the Defendants knowingly continued the infringement; and as the Eleventh Circuit's ruling is binding and final, Defendants must be considered willful infringers.

With respect to Mindscape, Plaintiff has acknowledged that the basis for holding Mindscape accountable for willfulness was the intent of the other defendants, and that Plaintiff was "relying upon the willfulness of the Geographic defendants in order to

impute willfulness to Mindscape" (DE # 281 at 120).¹ Plaintiff relies upon the principle that all infringers are jointly and severally liable for the damages caused by the infringement as the basis for holding Mindscape liable for the entire amount of the verdict.

In the alternative, Defendants argue that as the damages awarded by the jury exceed the amount established by the evidence, this Court should grant Defendants remittitur. Specifically Defendants contend, that (a) the award was not supported by the evidence (namely Plaintiff's prior income); (b) the award was itself excessive; (c) the damages are quantifiable, and there is no competent substantial evidence to justify the award; and (d) the award must have been based upon sympathy or emotion.

In opposition, Plaintiff argues that Defendants' motion for remittitur should be denied because (a) this case depended heavily on credibility, which should be determined by a jury; (b) the award was within the statutory limits and it was within the jury's discretion to award the maximum; (c) an award of statutory damages does not have a determinable measurement, and because statutory damages are both compensatory and punitive there is no need for correlation to actual damages; and (d) the jury found that Defendants' infringement was willful, and that the size of the award is predicated on Defendants' demonstrated indifference to copyright law.

¹ Plaintiff also acknowledges that Mindscape ceased operations by October 2000, prior to the date of the Eleventh Circuit's opinion finding infringement, and that "as a practical matter" this issue is moot (DE # 298 at 3).

II. JUDGMENT AS A MATTER OF LAW

A. Standard of Review

Under Fed. R. Civ. P. 50, a court may grant a motion for judgment as a matter of law when there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue. When considering the merits of a motion under Rule 50(b), a court must view all of the evidence adduced at trial and must draw all reasonable inferences in the light most favorable to the nonmoving party. *Montgomery v. Noga*, 168 F.3d 1282, 1289 (11th Cir. 1999). Judgment as a matter of law is appropriate where the evidence "is so one-sided that one party must prevail as a matter of law". *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1244 (11th Cir. 1999) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)).

The Eleventh Circuit has held that in reviewing of a renewed motion for judgment as a matter of law after a jury has rendered its verdict, "[w]e must determine 'whether the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable men could have reached.'" *Gilchrist Timber Co. v. ITT Rayonier*, 127 F.3d 1390, 1392 (quoting *Rabun v. Kimberly-Clark Corp.*, 678 F.2d 1053, 1057 (11th Cir. 1982)).

The trial judge may not re-weigh the evidence, make credibility determinations or substitute its judgment for that of the jury. Moreover, the court "must disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 135 (2000).

B. Defendants National Geographic Society and National Geographic Enterprises

The Court has carefully reviewed the transcripts of the trial, as well as the arguments ably presented by counsel in the voluminous memoranda directed to the

sufficiency of the evidence to establish willfulness. Construing the evidence in a light most favorable to the non moving party, including the advice of counsel defense and the actions of the Geographic defendants after the Eleventh Circuit's decision, this Court finds that a reasonable jury could find that Defendants were willful in their infringement of Plaintiff's copyright.

This conclusion is not altered by the fact that the Second Circuit Court of Appeals has disagreed with the decision of the Eleventh Circuit Court of Appeals. Defendants filed as supplemental authority the Second Circuit's opinion in *Faulkner v. National Geographic Society*, to support their contention that their reliance on the advice of counsel was reasonable. 409 F.3d 26 (2nd Cir. 2005). However, the Eleventh Circuit previously ruled that Defendants had, in fact, infringed on Plaintiff's copyright. *Greenberg v. National Geographic Society*, 244 F.3d 1267 (11th Cir. 2001). The Eleventh Circuit's decision is the law of this case, thus the *Faulkner* decision is not persuasive. Moreover, the *Faulkner* decision was obviously not presented to the jury, and therefore could not serve as a basis to support the ruling on a motion for judgment as a matter of law at the close of the evidence.

Therefore, relief under Rule 50(b) is not warranted as to the Geographic defendants.

C. Defendant Mindscape

The sole basis upon which Plaintiff seeks to hold Mindscape liable for willful infringement is the imputed state of mind of the Geographic defendants. The undersigned concurs that the law is well-settled that infringers are jointly and severally liable for damages awarded as a result of copyright infringement, and that there is no

basis to apportion such an award based upon the degree of culpability. However, this rule applies only where the damages are based upon defendants who acted with the same intent. The only cases which the undersigned has located which address this issue have recognized that a defendant-by-defendant analysis must be used to determine whether it is appropriate to impose the enhancement of statutory damages based on willful infringement pursuant to 17 U.S.C. § 504(c)(2). This distinction was expressly recognized by the Second Circuit Court of Appeals in *Fitzgerald Publishing Co. v. Baylor Publishing Co.*, 807 F.2d 1110 (2nd Cir. 1986), which reversed the decision of the District Court which refused to make both defendants jointly and severally liable for the full award of statutory damages, despite the finding that both defendants acted willfully. Initially, the Second Circuit distinguished *Hospital for Sick Children v. Melody Fare Dinner Theatre*, 516 F. Supp. 67 (E.D. Va. 1980), in which the Court imposed joint and several liability for a basic award of statutory damages, and then increased the award against one of the defendants: "*Melody Fare* is inapposite to the instant case. There the court found that only one of the two defendants willfully infringed the plaintiff's copyright. Here, in contrast, the district court found that both [defendants] willfully infringed [plaintiff's] copyright." 807 F.2d at 1116. In declining to permit an apportionment of damages between two willful infringers, the Second Circuit expressly recognized:

[Section] 504(c) provides two opportunities for a defendant to escape the full measure of joint and several liability with a more culpable defendant. It can establish that it was an innocent infringer under § 504(c)(2), or it may successfully oppose the plaintiff's contention that it willfully infringed plaintiff's copyright. Nevertheless, when the copyright owner has successfully established that two or more defendants were willful infringers, § 504(c)(2) is unconcerned about

gradations in blameworthiness.

807 F.2d at 1117. *Accord United States Media Corp. v. Edde Entertainment Corp.*, 1998 WL 401532 (S.D.N.Y. 1998) at * 21 (holding non-willful infringers jointly and severally liable only for that portion of the award which did not depend upon a determination of willfulness).

Under the circumstances of this case, since Plaintiff concedes that the only basis upon which Mindscape could be found willful is the imputed intent of the Geographic defendants, the undersigned concludes that Mindscape is entitled to judgment as a matter of law on the issue of willfulness. Therefore, the judgment against Mindscape will be reduced to \$80,000.00,² which is the amount permitted absent the enhancement for willfulness.

III. REMITTITUR

A. Standard of Review

Remittitur is a substitution of the court's judgment for that of the jury regarding the appropriate award of damages. The court orders remittitur when it believes the jury's award is *unreasonable on the facts*. *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1331-32 (11th Cir. 1999), *cert. denied*, 528 U.S. 931 (1999) (emphasis in original).

"When the jury's verdict is within the bounds of possible awards supported by the evidence, its award should not be disturbed." *Carter v. DecisionOne Corp.*, 122 F.3d 997, 1006 (11th Cir. 1997). "A grossly excessive award may warrant a finding that the jury's verdict was swayed by passion and prejudice and thus necessitate a new trial." *Goldstein v. Manhattan Indus.*, 758 F.2d 1435, 1447 (11th Cir. 1985). Under federal law,

² This total is based upon \$20,000.00 per work for four works infringed.

remittitur may be ordered where "the award is so high as to shock the judicial conscience and constitute a denial of justice." *Ismail v. Cohen*, 899 F.2d 183, 186 (2nd Cir. 1990).

B. Analysis

In the case at bar the jury awarded Plaintiff \$400,000.00, which is the maximum amount in statutory damages permitted where there is a finding of willfulness. Thus, the verdict awarded was within the statutory range as prescribed by the Copyright Act, 17 U.S.C. § 504(c), and the undersigned concludes that it does not exceed a maximum limit within a reasonable range.³

The Supreme Court has found that an award of statutory damages may serve purposes traditionally associated with legal relief, such as compensation and punishment. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 352 (1998). Thus, is not necessary for an award of statutory damages to have a correlation to the actual damages, or to a plaintiff's prior income from an infringed work. Therefore, the undersigned rejects Defendants' argument that the verdict amount was not supported by the evidence.

In determining whether the verdict itself is excessive, this Court cannot simply substitute its own judgment for the jury's, merely because the verdict exceeds what the court would have found. In this case, although the verdict is generous, it is within the statutory range, and does not shock the judicial conscience. The undersigned notes that

³ The undersigned notes that the amount of statutory damages allowed for willful infringement was raised from \$100,000.00 to \$150,000.00 per work in 1999, and was made applicable to actions brought on or after the date of enactment. Pub. L. No. 106-160, § 4, 113 Stat. 1774 (Dec. 9, 1999). The parties agreed that the applicable limit in the case at bar was \$100,000.00 per work.

although there were only four works involved, those works were composed of sixty four photographs.⁴

Finally, Defendants argue that the jury verdict was based upon the jury's improper sympathy for Plaintiff. Although the court can remit a verdict if the jury was unduly influenced by passion or prejudice, it cannot second guess the jury's decision without evidence of such influence. The jury was specifically instructed that its decision must not "be influenced in any way by sympathy, or by prejudice, for or against anyone" (DE # 285 at 110). The jury was also instructed as follows regarding the factors in determining the amount of statutory damages:

After you consider the Society's state of mind and what effect that has in setting your award, you may also consider these factors or guideposts in arriving at a final award.

Understand that the general goal of the Copyright Act for statutory damages is to determine an amount to compensate Greenberg for the infringement of his copyrights. To determine where in these different ranges to set the award, you may also consider all, some, or none of the following factors:

One, the revenues, if any, lost by Greenberg as a result of the Society's infringing activity;

Two, the expenses saved by the Society in connection with the infringements;

Three, the profits realized by the Society in connection with the infringements;

Four, the value and/or nature of Greenberg's copyrights;

Five, the need, if any, to deter the Society and others from committing copyright infringements in the future;

⁴ If Plaintiff had prevailed in its argument that the number of works infringed was the total number of photographs involved in the four collective works, the maximum amount of statutory damages would have been \$6,400,000.00.

Six, the prior conduct of the parties.

Ultimately, you must use your best judgment and discretion within the statutory limits I have provided you.

(DE # 285 at 118-19).

These instructions have not been challenged. In the instant case, based upon the facts presented at trial the jury could have easily predicated a large part of the award, *inter alia*, as a punishment and a deterrent, and based upon the nature and number of photographs in each collective work, and not due to sympathy. Thus, as to the Geographic defendants, the undersigned finds that the verdict is not excessive, and the award will not be reduced.

IV. CONCLUSION

Based upon the foregoing analysis, and after a review of the record as a whole, and considering all of the arguments of counsel, including those not specifically addressed in the above discussion, it is hereby

ORDERED AND ADJUDGED that the *ore tenus* Motion for Judgment as a Matter of Law, made at the close of the evidence, as to the issue of willfulness is **GRANTED** as to Defendant Mindscape, and the award against Mindscape will be reduced to \$80,000.00. It is further

ORDERED AND ADJUDGED that the *ore tenus* Motion for Judgment as a Matter of Law, made at the close of the evidence, as to the issue of willfulness is **DENIED** as to Defendants National Geographic Society and National Geographic Enterprises. It is further

ORDERED AND ADJUDGED that Plaintiff's Motion for Judgment as a Matter of Law (DE # 292) is **DENIED**. It is further

ORDERED AND ADJUDGED that Defendants' Motion for Reduction in Jury Award or in the Alternative for Remittitur (DE # 290) is **DENIED**.

DONE AND ORDERED in Miami, Florida, this 30th day of September, 2005.


ANDREA M. SIMONTON
UNITED STATES MAGISTRATE JUDGE

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