UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-7561
Summary Calendar

MILTON LANCE, d/b/a PECOS MUSIC,

Plaintiff-Appellee,

VERSUS

FREDDIE RECORDS, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
(CA-C-90-21)

(February 17, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

This is a copyright infringement action. Plaintiff, Milton Lance d/b/a Pecos Music, sued Freddie Records, Inc. for the unauthorized reproduction and distribution of a musical work. After a bench trial, the court found that the Defendant willfully infringed upon the Plaintiff's protected rights. The court awarded Plaintiff statutory damages, costs and attorney's fees. Defendant appeals. Finding no error, we affirm.

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background and Procedural History

Milton Lance, d/b/a Pecos Music ("Lance"), operates a music publishing business. Lance contracts with songwriters for the exclusive use of their songs, and draws his income from licensing the use of these songs by third parties. Lance protects his investment in the songs under the Copyright Act, 17 U.S.C. §§ 101-914 (1977 and Supp. 1992). When a work is registered under the Copyright Act, the copyright owner has the exclusive rights to, among other things, reproduce the copyrighted work and distribute it for sale. See 17 U.S.C. § 106. Lance owns the copyright for the song that forms the basis of this dispute, "Hoy Amaneci Pensando En Ti" (hereinafter "the song").

Freddie Records, Inc., produces, manufactures, sells, and distributes recorded tapes and records. Freddie Records specializes in "Tejano" music, Spanish language music popular in South Texas. In late 1986, Freddie Records released an album, identified as record 1373. Record 1373 contained the song, but it was used without the permission of the copyright holder, Lance. Subsequently, in 1988, Freddie Records received a retroactive copyright license for the use of the song on record 1373.

In September 1989, Freddie Records released another album containing the song, this album being identified as record 1484. The use of the song on record 1484 was again without permission of the copyright holder. The previously issued authorization was valid only for the 1986 release of the song, on record 1373. See R. Vol. 1 at 28.

After the release of record 1484, Lance sued Freddie Records for copyright infringement. 17 U.S.C. § 501(a) (Supp. 1992). Following a bench trial, the district court entered a judgment against the Defendant, finding that Freddie Records had willfully infringed Lance's valid copyright. Statutory damages of $50,000 were awarded; attorney's fees and costs were also taxed against the Defendant. Freddie Records now challenges the amount of damages awarded, and the amount of attorney's fees assessed. Additionally, Appellant contends that the court erred by allowing into evidence the certificate of copyright registration issued to Lance for the song.[2]

Analysis

Freddie Records first contends that the court erred in awarding $50,000 in statutory damages to Plaintiff. This award was based on a finding that Freddie Records willfully infringed the Plaintiff's copyright. Appellant urges us to find that this holding is clearly erroneous because the finding of willfulness is not supported by sufficient evidence.

17 U.S.C. § 504(a) gives the copyright owner the choice to

[2] Appellant's fourth point of error, the alleged prejudice of the district court as evidenced by various comments made in its findings of fact and conclusions of law, is without merit. A review of the record fails to support any claim of prejudice on the part of the district court against the Appellant. See, e.g., United States v. MMR Corp., 954 F.2d 1040, 1044-45 (5th Cir. 1992) (no "pervasive bias or prejudice" shown where court referred to defendants as "bid-riggers"); S.E.C. v. First City Financial Corp., 890 F.2d 1215, 1222-23 (D.C. Cir. 1989) (references in district court's opinion to defendants as "greenmailers" and "active corporate raiders" fail to demonstrate bias of trial court).

recover either actual damages and profits earned by the infringer, id. at § 504(b), or statutory damages, id. at § 504(c).[3] Under 17 U.S.C. § 504(c)(2) where a copyright owner proves that the infringement was committed willfully, the court has the discretion to award statutory damages in an amount not to exceed $100,000. Willfulness is a factual determination which we will not upset on appeal unless the finding is clearly erroneous. See Chi-Boy Music v. Charlie Club, Inc., 930 F.2d 1224, 1227 (7th Cir. 1991); Video Views, Inc. v. Studio 21, Ltd., 925 F.2d 1010, 1020-21 (7th Cir.), cert. denied, 112 S.Ct. 181 (1991). Willfulness is shown where the infringer was provided with oral or written notice of its transgression of the copyright. Video Views, Inc., 925 F.2d at 1021. Willfulness can also be shown where the defendant has recklessly disregarded the plaintiff's rights, or upon a showing that the defendant knew or should have known it infringed upon a copyrighted work. Basic Books, Inc. v. Kinko's Graphics Corp., 758 F.Supp. 1522, 1543 (S.D.N.Y. 1991).

The record supports a conclusion that Freddie Records had notice of its copyright violations or "should have known" of them. Plaintiff's exhibit 15 is a letter dated October 8, 1989, from Lance to Mr. Lee Martinez, Vice President of Freddie Records. This letter informed Martinez that record 1484 contained an unlicensed version of the song. The district court was presented with

[3] Appellant's reply brief argues that since no election was made by the plaintiff, Lance is limited to recovering only actual damages. This is incorrect, as an election was made during plaintiff's opening statement to the court. R. Vol. 4 at 4.

testimony from Martinez that Freddie Records thought that no additional license was necessary for record 1484 because they believed the earlier license, issued for record 1373, covered any subsequent issuance of the song. This testimony conflicted with deposition testimony given by Martinez that Freddie Records was in fact waiting for a second license; when one was not procured, they released the song anyway. See R. Vol. 1 at 28. Perhaps most importantly, the district court found that Freddie Records was not a neophyte in the music industry. Rather, this was an organization with over twenty years in the music business. Consequently, it was quite familiar with the applicable copyright laws. The finding of willful copyright infringement is adequately supported by the record, and is not clearly erroneous.

17 U.S.C. § 504(c)(2) vests the district court with discretion in arriving at an appropriate statutory damage amount. One of the goals in imposing statutory damages on a copyright infringer is to deter future violations of the copyright laws, with an eye to proving that it "costs less to obey the copyright laws than to violate them." Video Views, Inc., 925 F.2d at 1021 (citations omitted). Because the defendant is a sophisticated participant in the music industry, and is not unfamiliar with the copyright laws, we cannot say that the award of $50,000 in statutory damages was a clear abuse of the trial court's discretion. See, e.g., Basic Books, Inc., 758 F.Supp. at 1544 (fine of $510,000 appropriate in light of defendant's position in industry).

Appellant's second point of error is that the district court

again abused its discretion in awarding $27,195 in attorney's fees. 17 U.S.C. § 505 provides, "Except as otherwise provided by this title, the court may also award a reasonable attorney's fee to the prevailing party as part of the costs." The award of attorney's fees is a decision that the Copyright Act "firmly commits" to the discretion of the district court. Video Views, Inc., 925 F.2d at 1021.

The district court properly applied the Lodestar method to calculate attorney's fees, as it is employed in the Fifth Circuit. The Lodestar is computed by multiplying the number of hours reasonably expended by the attorney times the prevailing hourly rate in the community in which he performed the work. After the Lodestar amount is determined, a court must then apply the twelve factors set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974), to adjust that figure up or down. See Longden v. Sunderman, 979 F.2d 1095, 1099 (5th Cir. 1992).[4]

Appellant contends that the district court abused its discretion in not fully explaining how each of the twelve Johnson factors affected the awarding of attorney's fees. This argument is without merit. The opinion clearly shows that the district court

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[4] The Johnson factors are: (1) time and labor required, (2) novelty and difficulty of the issues, (3) skill required to perform the legal services properly, (4) preclusion of other employment, (5) customary fees, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) amount involved and results obtained, (9) experience, reputation and ability of the attorneys, (10) undesirability of the case, (11) nature and length of the professional relationship with the client, and (12) awards in similar cases. Longden, 979 F.2d at 1099 n.10 (citations omitted).

considered each of the twelve Johnson factors, and in fact adjusted the award by reducing one of the attorney's hours by twenty percent. We cannot say that the district court abused its discretion in arriving at the amount assessed. See Copper Liquor, Inc. v. Adolph Coors Co., 624 F.2d 575, 581 (5th Cir. 1980) ("Parroting" of Johnson factors not required; on review of attorney's fee award, court will look for assurance that award arrived at by consideration of correct standards).

In its final point of error, Appellant contends that the district court abused its discretion by allowing into evidence the certificate of copyright registration covering the song. Appellant argues that the document was not properly authenticated under the Federal Rules of Evidence, was hearsay, and should not have been admitted into evidence.[5]

The district court admitted the document under Fed. R. Evid. 803(8)(A) which allows an exception to the hearsay rule for "Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency. . . ." The court held that under Fed. R. Evid. 902(1) "Domestic public document under seal," extrinsic evidence of authenticity of the certificate of copyright

[5] 17 U.S.C. § 410(c) provides that once properly admitted into evidence, the certificate of copyright registration "shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate." Consequently, a properly authenticated and admitted certificate of copyright registration carries the plaintiff's burden of showing that he in fact owns the song and is entitled to damages for copyright infringements occasioned by the unauthorized use of the work. See Lakedreams v. Taylor, 932 F.2d 1103, 1108 n.10 (5th Cir. 1991).

registration was unnecessary. Appellant urges us to find that 902(1) was not met in this case, because the official seal was issued by the Library of Congress. Close inspection of the seal reveals that it was issued by the United States Copyright Office, signed by the Register of Copyrights, and bears the legend: "The certificate, issued under this seal of the Copyright Office in accordance with the provisions of section 410(a) of title 17, . . . attests that copyright registration has been made for the work identified below. The information in this certificate has been made a part of the Copyright Office records."[6] The requirements of Fed. R. Evid. 902(1) have been met. The admission of the certificate into evidence was not an abuse of the trial court's discretion.

CONCLUSION

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

[6] See also 37 CFR § 201.1(d) (directing that requests for records of registrations be addressed to "Reference and Bibliography Section, LM-450, Copyright Office, Library of Congress. . . .").