

Copyright Developments

Zazzle's Insufficient Copyright Oversight Procedures Support Willful Infringement Finding

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By [Dasha Chestukhin](#)

In a recent decision, the Ninth Circuit reversed a district court's finding, as a matter of law and notwithstanding the jury's verdict, that a defendant's copyright infringement was not willful, but affirmed the district court's refusal to award attorneys' fees to the prevailing plaintiff (without prejudice to the plaintiff seeking reconsideration of this refusal on remand).

Plaintiff Greg Young Publishing, Inc. ("GYPI") serves as the licensing agent for visual artists, including Kerne Erickson and Scott Westmoreland. Zazzle is an online marketplace that allows a user to upload images and select them to appear on various consumer products (e.g., coffee mugs, posters, t-shirts, etc.) that are offered for sale to the public and, when ordered by a consumer, produced and delivered by Zazzle, after it pays a royalty to the uploading user.

GYPI sued Zazzle for infringing the copyrights in 35 Erickson works and six Westmoreland works, seeking \$2.1 million in damages.

At trial, the jury found that, during the period at issue in the case, Zazzle never deviated from or improved its oversight system for copyright infringement, despite repeated notice of that system's inefficiency. Moreover, Zazzle, despite receiving a catalog of GYPI's images and knowing that it had to take special care with regard to those images, never provided GYPI's catalog to its content management team and further continued to sell products infringing on the relevant copyrights. Finally, Zazzle relied upon a user certification process it knew evinced false certifications and failed to remove a user who had marketed over 2,000 infringing products.

Consequently, the jury found Zazzle's infringement was willful as to at least five of the 35 works at issue, and awarded GYPI \$460,800 in damages. On Zazzle's post-trial motion, the district court reversed the jury's holding as to willfulness and reduced the damages award to \$351,000. The district court also denied GYPI's post-judgment motion for attorneys' fees despite the fact that GYPI was the prevailing party and did not appear to have an improper motivation in bringing suit. In particular, the district court found that an award of attorneys' fees was not justified due to GYPI's low recovery as compared to its sought damages, the objective reasonableness of Zazzle's legal arguments, and the failure of an attorneys' fees award to act as a deterrent because Zazzle raised novel legal arguments. GYPI appealed, contesting the district court's willfulness determination as well as the damages and attorneys' fees awards.

The Ninth Circuit held that a reasonable jury could have found that Zazzle acted recklessly by knowingly relying on obviously insufficient oversight mechanisms. As such, it reversed the district court's judgment as a matter of law that Zazzle's infringement was not willful, and remanded the case to the district court for entry of judgment consistent with the jury's original verdict.

Nevertheless, the Ninth Circuit found that the district court had not abused its discretion in declining to award attorneys' fees, pointing to GYPI's low recovery at trial as well as Zazzle's partial victory as to GYPI's DMCA claim on summary judgment. However, the Ninth Circuit expressly left the door open for GYPI to seek reconsideration of its attorneys' fees motion in light of the reinstated willfulness finding.