



*United States v. Moran*

757 F. Supp. 1046 (D. Neb. 1991)

KOPE, MAGISTRATE J.: . . . Dennis Moran (Moran), the defendant, is a full-time Omaha, Nebraska, police officer and the owner of a “mom-and-pop” movie rental business which rents video cassettes of copyrighted motion pictures to the public. On April 14, 1989, agents

of the Federal Bureau of Investigation (FBI) executed a court-ordered search warrant on the premises of Moran's business. The FBI seized various video cassettes appearing to be unauthorized copies of copyrighted motion pictures, including "Bat 21," "Big," "Crocodile Dundee II," "The Fourth Protocol," "Hell-Bound: Hellraiser II," and "Mystic Pizza." The parties have stipulated that these six motion pictures are validly copyrighted motion pictures. The parties have further stipulated that each of the six motion pictures was distributed to Moran, with the permission of the copyright holder, between February 1, 1989, and April 14, 1989. The parties have further stipulated that at least one of the movies identified was reproduced by Moran onto a video cassette, without the authorization of the copyright holder, placed into inventory for rental, and subsequently rented. . . .

. . . Moran further advised the FBI agents that he would affix to the [] copies title labels for the copyrighted motion pictures and a copy of the FBI copyright warning label commonly found on video cassette tapes. Moran advised the FBI agents that he put the title labels and FBI warning on the tapes to stop customers from stealing or duplicating the tapes. . . .

Moran testified that he began to "insure" copyrighted video cassettes, meaning that he duplicated copyrighted video cassettes which he had validly purchased from distributors, when he realized copyrighted tapes were being vandalized. Moran testified he was under the impression that "insuring" tapes was legal whereas "pirating" tapes was not. For practical purposes, Moran defined "insuring" versus "pirating" as meaning that he could duplicate a copyrighted tape provided he had purchased the copyrighted tape and did not endeavor to rent both the copyrighted tape and the duplicate he had made. Moran testified that he formulated his belief about "insuring" versus "pirating" when talking with various colleagues in the business and from reading trade publications. However, Moran was not able to specifically identify the source of his information.

There was no persuasive evidence that Moran made multiple copies of each authorized version of the copyrighted material. The evidence indicates that Moran purchased more than one copyrighted tape of the same movie, but the persuasive evidence also reveals that Moran made only one copy of each copyrighted tape he purchased. There was no persuasive evidence that Moran endeavored to rent both the copyrighted tape and the duplicate. When Moran made the unauthorized copy, he put the unauthorized copy in a package made to resemble as closely as possible the package containing the original copyrighted motion picture Moran had purchased from an authorized distributor. . . .

### A.

It must first be determined whether the word "willfully," as used in 17 U.S.C. §506(a), requires a showing of "bad purpose" or "evil motive" in the sense that there was an "intentional violation of a known legal duty." Adopting the research of the Motion Picture Association of America, the government argues that the term "willful" means only "an intent to copy and not to infringe." . . . On the other hand, Moran argues that the use of the word "willful" implies the kind of specific intent required to be proven in federal tax cases, which is to say, a voluntary, intentional violation of a known legal duty. . . .

Apparently no case has compared and analyzed the competing arguments, i.e., whether the word "willfully" requires either a showing of specific intent, as suggested by Moran, or the more generalized intent suggested by the government. Indeed, a leading text writer acknowledges that there are two divergent lines of cases, one of which requires specific intent and another which does not. . . .

I am persuaded that under 17 U.S.C. §506(a) “willfully” means that in order to be criminal the infringement must have been a “voluntary, intentional violation of a known legal duty.” . . . I am so persuaded because I believe that in using the word “willful” Congress intended to soften the impact of the common-law presumption that ignorance of the law or mistake of the law is no defense to a criminal prosecution by making specific intent to violate the law an element of federal criminal copyright offenses. I came to this conclusion after examining the use of the word “willful” in the civil copyright infringement context and applying that use to the criminal statute. . . . (There is a general principle in copyright law of looking to civil authority for guidance in criminal cases). . . .

In the statutory damage context, a civil plaintiff is generally entitled to recover no less than \$250.00 nor more than \$10,000.00 per act of infringement.\* 17 U.S.C. §504(c)(1). But where the infringement is committed “willfully,” the court in its discretion may increase the award of statutory damages up to a maximum of \$50,000.00 per act of infringement. 17 U.S.C. §504(c)(2). On the other hand, in the case of “innocent infringement,” if the defendant sustains the burden of proving he/she was not aware, and had no reason to believe, that his/her acts constituted an infringement of the copyright, and the court so finds, the court may in its discretion reduce the applicable minimum to \$100.00 per act of infringement.\*\* 17 U.S.C. §504(c)(2). . . .

As noted text writers have concluded, the meaning of the term “willful,” used in 17 U.S.C. §504, must mean that the infringement was with knowledge that the defendant’s conduct constituted copyright infringement. *Nimmer, supra* p. 6, §14.04[B][3] at 14-40.3-14-40.4 (citations omitted). Otherwise, there would be no point in providing specially for the reduction of awards to the \$100.00 level in the case of “innocent” infringement since any infringement which was nonwillful would necessarily be innocent.

The circuit courts of appeal which have considered the issue have all adopted *Nimmer’s* formulation with regard to the meaning of the word “willful” for purposes of 17 U.S.C. §504(c)(2) and statutory civil damages. . . .

There is nothing in the text of the criminal copyright statute, the overall scheme of the copyright laws, or the legislative history to suggest that Congress intended the word “willful,” when used in the criminal statute, to mean simply, as the government suggests, an intent to copy. Rather, since Congress used “willful” in the civil damage copyright context to mean that the infringement must take place with the defendant being knowledgeable that his/her conduct constituted copyright infringement, there is no compelling reason to adopt a less stringent requirement in the criminal copyright context. Accordingly, I find that “willfully,” when used in 17 U.S.C. §506(a), means a “voluntary, intentional violation of a known legal duty.” . . .

## B.

[I]t is important to recognize that the rule does not require that a defendant’s belief that his conduct is lawful be judged by an objective standard. Rather, the test is whether Moran truly believed that the copyright laws did not prohibit him from making one copy of a video cassette he had purchased in order to “insure” against vandalism. . . . Of course, the more unreasonable the asserted belief or misunderstanding, the more likely it is that the finder of fact will consider

\*The court made an error here. At the time, a court could increase the award to a maximum of \$10,000 with respect to any one work infringed, not per act of infringement. Now, the Act sets the amount at \$150,000. *See* 17 U.S.C. §504(c)(2). — Ebs.

\*\*The court made the same error here. A court could decrease the award to a maximum of \$100 with respect to any one work infringed, not per act of infringement. Now, the Act sets the amount at \$200. *See id.* — Ebs.

the asserted belief or misunderstanding to be nothing more than simple disagreement with known legal duties imposed by the law, and will find that the government has carried its burden of proving knowledge. . . .

In summary, when Moran's actions were viewed from the totality of the circumstances, the government failed to convince me beyond a reasonable doubt that Moran acted willfully. Moran is a long-time street cop who was fully cooperative with law enforcement authorities. He is obviously not sophisticated and, at least from the record, his business operation of renting movies to the public was not large or sophisticated. Rather, Moran's business appears to have been of the "mom-and-pop" variety. Moran's practice of "insuring," while obviously shifting the risk of loss from Moran to the copyright holder, was conducted in such a way as not to maximize profits, which one assumes would have been his purpose if he had acted willfully. For example, Moran purchased multiple authorized copies of the same movie, but he made only one unauthorized copy for each authorized version purchased. This suggests that Moran truly believed that what he was doing was in fact legal. I therefore find Moran not guilty.

### NOTES AND QUESTIONS

1. Which interpretation of the willfulness requirement makes more sense to you?
2. Congress amended §506 in 1997 as part of the No Electronic Theft (NET) Act, which we discuss in more detail below. Under revised §506, "evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish willful infringement." Does this resolve the controversy the *Moran* court discussed about the definition of "willfully"?