FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD N. BELL, *Plaintiff-Appellant*, v. WILMOTT STORAGE SERVICES, LLC, *Defendant-Appellee.*	No. 19-55882 D.C. No. 2:18-cv-07328- CBM-MRW
RICHARD N. BELL, *Plaintiff-Appellee*, v. WILMOTT STORAGE SERVICES, LLC, *Defendant-Appellant*, and ROE CORPORATIONS; IADVANTAGE, LLC; DOES, *Defendants.*	No. 19-56181 D.C. No. 2:18-cv-07328- CBM-MRW OPINION

Appeal from the United States District Court
for the Central District of California
Consuelo B. Marshall, District Judge, Presiding

Argued and Submitted August 13, 2020
Pasadena, California

Filed September 9, 2021

Before: Kim McLane Wardlaw and Richard R. Clifton, Circuit Judges, and Jennifer Choe-Groves,* Judge.

Opinion by Judge Wardlaw;
Concurrence by Judge Clifton;
Concurrence by Judge Choe-Groves

* The Honorable Jennifer Choe-Groves, Judge for the United States Court of International Trade, sitting by designation.

SUMMARY**

Copyright

The panel reversed the district court's grant of summary judgment in favor of the defendant based on a putative de minimis use defense in a copyright case, and remanded for consideration of remaining defenses and damages issues.

The panel held that the concept of de minimis copying is properly used to analyze whether so little of a copyrighted work has been copied that the allegedly infringing work is not substantially similar to the copyrighted work and is thus non-infringing. However, once infringement is established, that is, ownership and violation of one of the exclusive rights in copyright under 17 U.S.C. § 106, de minimis use of the infringing work is not a defense to an infringement action.

Plaintiff Richard Bell alleged that Wilmott Storage Services, LLC, infringed his copyright in a photograph of the Indianapolis skyline. The panel concluded that Wilmott publicly displayed the photo on its website, even though the photo was accessible only to members of the public who either possessed the specific pinpoint address or who performed a particular type of online search, such as a reverse image search. Applying the *Perfect 10* "server test," the panel reasoned that Wilmott's server was continuously transmitting the image to those who used the specific pinpoint address or were conducting reverse image searches using the same or similar photo. Thus, Wilmott transmitted,

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

and therefore displayed, the Indianapolis photo without Bell's permission. The panel further concluded that Wilmott's display was public by virtue of the way it operated its servers and its website.

Having concluded that Wilmott publicly displayed the Indianapolis photo, the panel wrote that it would ordinarily ask whether the infringing work was substantially similar to the copyrighted work. Here, however, the panel concluded that the "degree of copying" was total because the infringing work was an identical copy of the copyrighted Indianapolis photo. Accordingly, there was no place for an inquiry as to whether there was de minimis copying, and thus no infringement. Agreeing with other circuits, the panel wrote that the Ninth Circuit has consistently applied the de minimis principle to determine whether a work is infringing by analyzing the quantity and quality of the copying to determine if the allegedly infringing work is a recognizable copy of the original work, in other words, whether the works are substantially similar. The panel wrote that the Ninth Circuit has never recognized a de minimis defense based on the allegedly minimal use of concededly infringing material. The panel thus rejected Wilmott's "technical violation" theory of a de minimis defense adopted by the district court.

The panel reversed the district court's grant of summary judgment. Because the panel held that Wilmott was not entitled to judgment on its de minimis defense, the panel also vacated the district court's denial of Wilmott's motion for attorney's fees. Accordingly, the panel dismissed Wilmott's cross-appeal as moot.

Concurring, Judge Clifton, joined by Judge Wardlaw, wrote that he joined fully in the opinion. He wrote separately to discourage Bell's further pursuit of his copyright claims

given the circumstances, including Bell's filing of many other copyright suits and the fact that his claims were based on a copyright that might not belong to him.

Concurring in part, Judge Choe-Groves wrote that she agreed with the majority that the de minimis concept was not a defense for Wilmott's wholesale copying and with the majority's result vacating the grant of summary judgment and remanding. Judge Choe-Groves wrote that she would remand for the district court to first consider the threshold question of whether Bell owns the copyright in the Indianapolis photo, with consideration of the jury verdict in a related case, and to address Wilmott's alleged violation and defenses only if the district court finds valid copyright ownership.

COUNSEL

Gregory Keenan (argued), Digital Justice Foundation, Floral Park, New York; Andrew Grimm, Digital Justice Foundation, Omaha, Nebraska; Ryan A. Hamilton, Hamilton Law LLC, Las Vegas, Nevada; for Plaintiff-Appellant/Appellee.

Paul D. Supnik (argued), Law Office of Paul D. Supnik, Beverly Hills, California, for Defendant-Appellee/Appellant.

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