

TYPES NOT MAPPED YET May 18, 2021 | TTR not mapped yet | Michael L. Nepple

Contributory copyright infringement: Can you ever know what you don't know?

At its core, indirect copyright infringement requires direct infringement, plus an indirect infringer who knew of it, and either materially contributed to or induced the direct infringement. But what level of “knowledge” of the direct infringement must the indirect infringer possess? In a photographer’s lawsuit against image-sharing social media company Pinterest, a federal court in California dismissed a photographer’s indirect infringement claim because he did not allege that the company knew of specific acts of infringement.

In *Davis v. Pinterest, Inc.*, 2021 WL 879798 (N.D. Cal. Mar. 9, 2021), photographer Harold Davis sued Pinterest for direct infringement (not at issue in the opinion), and for contributory copyright infringement of his photographs of delicate peonies, poppies, irises and other flora and fauna. Davis’s contributory infringement claim alleged that Pinterest had constructive knowledge of infringement, or was willfully blind to infringement.

Davis based his claims on the presence of thousands of infringing photos on Pinterest, and the structure of Pinterest’s site, which he alleged allowed users to copy photos from the Internet, remove the copyright owner’s identity, and post them.

Pinterest argued that Davis’s contributory infringement claim required him to plead that it had actual knowledge of specific examples of infringement of his copyrights.

Judge Haywood Gilliam, Jr. agreed with Pinterest and held that in a claim against an “online file sharing service” with a “substantial noninfringing use,” a plaintiff must allege the defendant had “actual knowledge of specific acts of infringement.” Because Davis did not plead Pinterest’s actual knowledge, his contributory infringement claim failed.

The Court also found that even if constructive knowledge could substitute for actual knowledge, Davis failed to adequately plead Pinterest’s constructive knowledge. Judge Gilliam noted that Davis did not allege that Pinterest had constructive knowledge of infringement of Davis’s copyrights; Davis alleged only knowledge of infringements generally. The court also found that although Davis sent notices of infringement to Pinterest, the notices did not identify specific Davis photographs or user posts. In fact, when Pinterest requested this information, Davis responded it would be “impracticable” to provide.

On Davis’s willful blindness theory, the Court found that while willful blindness may serve as a “proxy for knowledge,” Davis had to allege that Pinterest both “subjectively believed that infringement was occurring” and that it “took deliberate actions to avoid learning about the infringement.” Importantly, as with constructive knowledge, Judge Gilliam held Davis must allege that Pinterest was willfully blind to infringements of his copyrights, and not just allege Pinterest was indifferent “to the risk of copyright infringement generally.” Because Davis did not make this allegation, his willful blindness contributory infringement claim also failed.

In some circumstances, under Ninth Circuit law, an intermediary can be liable for indirect infringement if it “knows” about a direct infringement — whether that knowledge is actual, constructive, or obtained by willful blindness. But this decision holds that where the intermediary is an online file sharing service with a substantial noninfringing use, only allegations of the intermediary’s actual knowledge of infringement are sufficient.



authorsTest

michael

Michael L. Nepple