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(6TH CIR. 2007)**

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**ZOMBA ENTERPRISES, INC. V. PANORAMA  
RECORDS, INC.**

***491 F.3D 574 (6TH CIR. 2007)***

I. INTRODUCTION

Zomba Enterprises, Inc. and Zomba Songs, Inc. (“Zomba”) filed a claim in the United States District Court of the Middle District of Tennessee, alleging thirty counts of copyright infringement against Panorama Records, Inc. (“Panorama”) for each Zomba-owned musical composition that Panorama recorded and sold in its karaoke packages.<sup>1</sup> Zomba alleged that Panorama infringed its copyrights by clearly making a reproduction of both the musical composition and the lyrics of its songs.<sup>2</sup> Zomba sought statutory damages pursuant to 17 U.S.C. § 504(c) and sanctions based on Panorama’s continued distribution of unlicensed copies of Zomba-owned songs.<sup>3</sup> Panorama asserted no affirmative defenses other than estoppel, laches, waiver and acquiescence.<sup>4</sup>

Three months after Zomba filed its complaint, the parties entered into a consent order in which Panorama agreed to be restrained from distributing and releasing any karaoke package containing compositions owned or administered by Zomba.<sup>5</sup> Panorama breached this order within a week and resumed selling discs containing Zomba’s copyrighted work.<sup>6</sup> This conduct continued for over a year.<sup>7</sup> The parties filed cross-motions for summary judgment on the infringement claim.<sup>8</sup> Panorama’s

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1. *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 579 (6th Cir. 2007).

2. *Id.*

3. *Id.* at 578, 580.

4. *Id.* at 579.

5. *Id.* at 579-80.

6. *Id.* at 580.

7. *Zomba*, 491 F.3d at 580.

8. *Id.*

counsel withdrew, and the district court granted Zomba's motion for summary judgment on the issue of copyright infringement and denied Panorama's fair-use defense.<sup>9</sup> Panorama was unable to obtain new counsel and subsequently failed to file required pretrial documents and appear at the pretrial conference.<sup>10</sup> The district court entered a default judgment against Panorama on the issue of damages.<sup>11</sup> Panorama responded by filing for bankruptcy in the Bankruptcy Court for the District of Massachusetts.<sup>12</sup> Panorama moved to transfer the case; however, the district court denied its motion and held a hearing to determine the amount of damages.<sup>13</sup> The district court ruled that Panorama's infringement was willful and awarded Zomba \$31,000 for each of the twenty-six infringements, plus attorneys' fees and costs.<sup>14</sup> Panorama appealed this decision, and the United States Court of Appeals for the Sixth Circuit affirmed the district court's judgments in all respects.<sup>15</sup>

## II. BACKGROUND

Karaoke is a "widely popular" form of entertainment, and Panorama has been in the business of manufacturing and selling karaoke discs since 1998.<sup>16</sup> Each month, Panorama issues a new disc containing musical compositions and lyrics to songs from a variety of musical genres.<sup>17</sup> To create the discs, Panorama hires musicians to record a musical composition of a song that had been made popular by another artist.<sup>18</sup> These discs also contain a graphic element that displayed song lyrics on a screen so that karaoke participants could sing along.<sup>19</sup>

Without Anna Music ("Without Anna") is a music publishing

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9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Zomba*, 491 F.3d at 580.

14. *Id.*

15. *Id.* at 578.

16. *Id.* at 577-78.

17. *Id.* at 578.

18. *Id.*

19. *Zomba*, 491 F.3d at 578-79.

company which owns the copyrights to a variety of songs.<sup>20</sup> In 2000, Without Anna discovered that some of the songs for which it owned copyrights were recorded and distributed in Panorama’s karaoke packages.<sup>21</sup> Without Anna sent a cease-and-desist letter demanding that Panorama stop selling unlicensed copies of its songs.<sup>22</sup> Panorama began negotiating for licenses and eventually acquired licenses from Without Anna for songs released on Panorama’s karaoke packages.<sup>23</sup>

In February 2002, Zomba, another music publishing company, which owns and administers the copyrights to a variety of musical compositions, discovered that Panorama’s karaoke packages contained copies of songs it owned.<sup>24</sup> Zomba sent a cease-and-desist letter to Panorama which included terms upon which Zomba would be willing to grant a license for the songs used in Panorama’s karaoke packages.<sup>25</sup> Panorama did not stop selling discs containing Zomba songs.<sup>26</sup> In April 2002, Zomba sent another cease-and-desist letter.<sup>27</sup> While Panorama responded, no licenses were acquired and Panorama continued selling karaoke discs containing Zomba’s copyrighted material.<sup>28</sup>

In January 2003, Zomba filed suit against Panorama alleging 30 counts of copyright infringement.<sup>29</sup> In April 2003, the parties entered into a consent order in which Panorama agreed to stop exploiting karaoke packages containing Zomba’s songs.<sup>30</sup> Within one week, Panorama breached this order.<sup>31</sup> After a year of this

20. *Id.* at 579.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Zomba*, 491 F.3d at 579. Zomba’s proposed license included terms in which it was willing to grant Panorama a license for its songs: \$250 fixing fee for each Zomba-owned song on each package, plus royalties of \$0.16 per song per CD sold for the first half of the of the five-year license term, and \$0.19 per song per CD sold for the second-half of the term. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* Zomba asserted one count of copyright infringement for each Zomba-owned song that Panorama recorded and sold in its karaoke packages. *Id.*

30. *Id.* at 579-80.

31. *Zomba*, 491 F.3d at 580.

conduct, Zomba moved for sanctions.<sup>32</sup> Panorama and Zomba filed cross-motions for summary judgment.<sup>33</sup> The district court granted Zomba's motion and rejected Panorama's fair-use defense.<sup>34</sup>

### III. LEGAL ANALYSIS

#### A. Issues

On appeal, the Sixth Circuit considered whether (1) Panorama had a valid fair-use defense, (2) the district court erred by concluding the infringement was willful, (3) Panorama was properly subject to enhanced statutory damages, (4) the district court abused its discretion by refusing to transfer the case, and (5) the district court erred in awarding Zomba attorneys fees.<sup>35</sup>

#### B. Discussion

##### 1. Validity of Panorama's Fair Use Defense

For a copyright infringement claim to be successful in the Sixth Circuit, the plaintiff must prove two elements.<sup>36</sup> First, the plaintiff must establish ownership of the copyright.<sup>37</sup> Second, the plaintiff must prove copying by the defendant.<sup>38</sup> Panorama did not dispute either element.<sup>39</sup> Instead, Panorama argued that the fair use doctrine precluded liability for infringement.<sup>40</sup> The court

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32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Zomba*, 491 F.3d. at 581 (citing *ATC Distrib. Group, Inc. v. Whatever It Takes Transmission and Parts, Inc.*, 402 F.3d 700, 705 (6th Cir. 2005) and *Ellis v. Diffie*, 177 F.3d 503, 506 (6th Cir. 1999)).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*; see also 17 U.S.C. § 107 (2006) (stating that use of a copyrighted work for the purposes of "criticism, comment, news reporting, teaching,

considered the following four factors in analyzing the fair use claim: (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the use in relation to the copyrighted work as a whole, and (4) the effect of the use upon the potential market for or value of the copyrighted work.<sup>41</sup> The Sixth Circuit focused on the character of use and the effect on the market while quickly dismissing the other elements as clearly falling within the scope of copyright infringement.

*a. Purpose and Character of Use*

The court stated that the central purpose in reviewing the “purpose and character of the use” of a copyrighted work by one who is not the copyright owner is to determine whether the use creates a new work that is “transformative” or alters the original work with new expression, meaning, or message.<sup>42</sup> Additionally, courts consider whether such use of the work is of a commercial nature.<sup>43</sup> Panorama argued that its use was transformative because its karaoke packages are used for “teaching.”<sup>44</sup> Panorama claimed that their karaoke packages encourage creativity among their consumers and therefore qualify as transformative works.<sup>45</sup> The Sixth Circuit concluded that karaoke is primarily a form of entertainment and Panorama’s “teaching” argument was meritless.<sup>46</sup> Furthermore, the Sixth Circuit found that Panorama’s use of the songs was commercial in nature and its utilization by karaoke performers was irrelevant in this determination.<sup>47</sup>

*b. Effect on the Potential Market for the Copyrighted Work*

In examining this factor, the court considered whether or not the karaoke packages created by Panorama had a harmful effect on the

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scholarship, or research” does not constitute copyright infringement).

41. *Zomba*, 491 F.3d at 581-82 (quoting 17 U.S.C. § 107).

42. *Id.* at 582 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 582-83.

47. *See Zomba*, 491 F.3d at 583.

potential market for the licenses to Zomba's songs.<sup>48</sup> Panorama failed to prove its copying did not adversely affect the potential market value of Zomba's copyrights.<sup>49</sup> Panorama claimed that Zomba and Panorama operated in different markets.<sup>50</sup> The court, however, found this argument to be factually incorrect.<sup>51</sup> Zomba was in the business of licensing its musical compositions to manufacturers of karaoke products.<sup>52</sup> Thus, it properly follows that Panorama's unlicensed copying of Zomba's songs deprived Zomba of licensing revenues it otherwise would have received.<sup>53</sup>

## 2. Willfulness

Panorama argued that even if it did infringe upon Zomba's copyrights, its infringement was innocent and not willful.<sup>54</sup> Furthermore, Panorama asserted that it held a good-faith belief that the use of Zomba's songs was a fair use and that this belief prevented a finding of willfulness.<sup>55</sup> Infringement is willful if it is done "with knowledge that [one's] conduct constitutes copyright infringement."<sup>56</sup> The court determined that the fundamental issue was not whether Panorama held in good faith its belief that its copying was fair use, but whether Panorama *reasonably* believed its conduct did not amount to copyright infringement.<sup>57</sup> The Court dismissed Panorama's argument holding that Panorama exhibited a reckless disregard for Zomba's rights.<sup>58</sup> The fact that Panorama continued to sell karaoke packages containing copies of Zomba's songs even after the district court entered its consent order forbidding Panorama from doing so made its reliance on the

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48. *Id.* at 583-84.

49. *Id.* at 583.

50. *Id.*

51. *Id.*

52. *Id.* at 583-84.

53. *Zomba*, 491 F.3d at 584.

54. *Id.*

55. *Id.*

56. *Id.* (quoting *Princeton Univ. Press v. Mich. Document Servs., Inc.*, 99 F.3d 1381, 1392 (6th Cir. 1996)).

57. *Id.* (emphasis in original).

58. *Id.* at 585.

defense of fair use entirely unreasonable.<sup>59</sup> Accordingly, the Sixth Circuit affirmed the district court’s holding that Panorama’s infringements were willful and rejected the fair use defense.<sup>60</sup>

### 3. Amount of Statutory Damage Award

Panorama claimed that the district court abused its discretion in calculating the statutory-damage award claiming it was disproportionate and unreasonable under the Eighth Amendment and the Fifth Amendment’s Due Process Clause.<sup>61</sup> The Sixth Circuit concluded that the district court did not abuse its discretion and found that the amount of \$30,000 per work infringed was a sufficient penalty for willful infringement.<sup>62</sup>

Panorama next argued that such a high award of statutory damages in relation to relatively low actual damages rendered the district court’s award an “excessive fine” under the Eighth Amendment.<sup>63</sup> The Sixth Circuit found Panorama’s argument meritless because the Excessive Fines Clause does not limit a money damage award in a civil suit when the government is not receiving a share of the damages awarded.<sup>64</sup>

Panorama further argued, based on *Gore* and *Campbell*, that an award of statutory damages that is thirty-seven times the actual damages was unconstitutionally high and in violation of its substantive due process rights.<sup>65</sup> The court distinguished *Gore* and *Campbell*, noting those cases to involved punitive damage awards while this case involved a statutory damage award.<sup>66</sup> Accordingly, the Sixth Circuit rejected Panorama’s argument and upheld the damages.<sup>67</sup>

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59. *Zomba*, 491 F.3d at 585.

60. *Id.*

61. *Id.*

62. *Id.* at 586.

63. *Id.*

64. *Zomba*, 491 F.3d at 586 (citing *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 264 (1989)).

65. *Id.*; see also *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

66. *Zomba*, 491 F.3d at 586-87.

67. *Id.* at 588; see also *St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919) (recognizing that the award of statutory damages for 113

#### 4. *Motion to Transfer*

Panorama also argued that the district court erred by refusing to transfer the case pursuant to 28 U.S.C. § 1404(a).<sup>68</sup> Panorama originally asked the district court to transfer the case to the U.S. District Court for the Southern District of New York, the U.S. District Court for the District of Massachusetts, or the U.S. Bankruptcy Court for the District of Massachusetts.<sup>69</sup> On appeal, Panorama argued only that the district court should have transferred the case to the bankruptcy court.<sup>70</sup> Panorama claimed that the parties, witnesses, and events for the case lacked ties to Tennessee and that the case was related to the bankruptcy proceeding in Massachusetts.<sup>71</sup> The court dismissed this argument concluding that Nashville, Tennessee was the site of the infringement and that under 28 U.S.C. § 1334(b), district courts are not deprived of jurisdiction over cases related to a pending bankruptcy.<sup>72</sup> Since Panorama was unable to provide additional evidence to suggest any reason why the district court's refusal to transfer the case constituted abuse of discretion, its argument was rejected.<sup>73</sup>

#### 5. *Attorney Fees*

Panorama's final claim on appeal was that the district court abused its discretion by awarding attorney fees to Zomba.<sup>74</sup> Under the Copyright Act, the district court has discretion to allow the recovery of full costs and may also award reasonable attorney fees

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times the amount of actual damages was not a violation of due process rights).

68. *Zomba*, 491 F.3d at 588; *see also* 28 U.S.C. § 1404(a) (2006) (stating that a district court may transfer any civil action to any other district or division where it might originally have been brought).

69. *Zomba*, 491 F.3d at 588.

70. *Id.*

71. *Id.*

72. *Id.* at 588-89 (citing 28 U.S.C. § 1334(b) (stating that district courts "have original but not exclusive jurisdiction of all civil proceedings . . . related to cases under Title 11")).

73. *Id.*

74. *Zomba*, 491 F.3d at 589.

as part of costs.<sup>75</sup> Panorama argued that the district court abused its discretion by failing to consider the factors set forth in *Fogerty*.<sup>76</sup> The Sixth Circuit concluded that based on the need to deter such unreasonable conduct, the district court properly awarded Zomba attorney fees.<sup>77</sup>

#### IV. CONCLUSION

The United States Court of Appeals for the Sixth Circuit found that the district court properly granted Zomba's motion for summary judgment for copyright infringement and accordingly awarded Zomba statutory damages and attorney fees.<sup>78</sup> The Sixth Circuit held that Zomba provided sufficient evidence to meet its burden by proving that Panorama willfully infringed upon its copyrighted compositions.<sup>79</sup> The Court held that the fact that Panorama continued to sell karaoke packages containing copies of Zomba's songs after the district court entered its consent order forbidding Panorama from doing so made its reliance on the defense of fair use wholly unreasonable and its actions willful infringement.<sup>80</sup> Furthermore, Panorama's unreasonable conduct allowed the district court to properly award \$30,000 per work infringed upon and attorney fees.<sup>81</sup>

*Kathryn Formeller*

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75. *Id.* (citing 17 U.S.C. §505).

76. *Id.*; see also *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994) (listing the factors which guide courts' discretion in awarding attorney fees: frivolousness, motivation, objective unreasonableness, and the need to advance considerations of compensation and deterrence).

77. *Zomba*, 491 F.3d at 589.

78. *Id.* at 577-78.

79. *Id.* at 585.

80. *Id.*

81. *Id.* at 586.

