**17.37 Copyright—Damages—Willful Infringement**

**(17 U.S.C. § 504(c)(2))**

An infringement is considered willful when the plaintiff has proved both of the following elements by a preponderance of the evidence:

 First, the defendant engaged in acts that infringed the copyright; and

 Second, the defendant knew that those acts infringed the copyright, or the defendant acted with reckless disregard for, or willful blindness to, the copyright holder’s rights.

**Comment**

The statutory damage maximum for willful infringement is $150,000. 17

U.S.C. § 504(c)(2).

Since at least 2008, the Ninth Circuit has recognized that “a finding of ‘willfulness’ . . . can be based on either ‘intentional’ behavior, or merely ‘reckless’ behavior.” *In re Barboza*, 545 F.3d 702, 707 (9th Cir. 2008) (citations omitted); *see also Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 991 (9th Cir. 2017)(“[T]o prove ~~‘~~willfulness~~’~~ under the Copyright Act, the plaintiff must show (1) that the defendant was actually aware of the infringing activity, or (2) that the defendant’s actions were the result of ~~‘~~reckless disregard~~’~~ for, or ~~‘~~willful blindness~~’~~ to, the copyright holder’s rights.” (quoting *Wash. Shoe Co. v. A-Z Sporting Goods Inc.*, 704 F.3d 668, 674 (9th Cir. 2012) (brackets in original)); *see also Erickson Prods., Inc. v. Kast*, 921 F.3d 822, 833 (9th Cir. 2019) (“Negligence is a less culpable mental state than actual knowledge, willful blindness, or recklessness, the three mental states that properly support a finding of willfulness.” (citations omitted)).

To refute evidence of willful infringement, the defendant must “not only establish its good faith belief in the innocence of its conduct, it must also show that it was reasonable in holding such a belief.” *Peer Int’l Corp. v. Pausa Records, Inc*., 909 F.2d 1332, 1336 (9th Cir. 1990) (holding that a defendant who ignored revocation of its license to a copyrighted work, and continued to use work after revocation, willfully infringed that work). Even if one is notified of an alleged infringement, continued use of a work “does not constitute willfulness so long as one believes reasonably, and in good faith, that he or she is not infringing.”*Evergreen Safety Council v. RSA Network Inc.*, 697 F.3d 1221, 1228 (9th Cir. 2012) (citations omitted); *see also VHT, Inc. v. Zillow Grp*.*, Inc.*, 918 F.3d 723, 748-49 (9th Cir. 2019) (concluding that substantial evidence did not support the jury’s finding of willfulness when the alleged infringer took “appropriate responsive measures after receiving” the notice of copyright infringement and the copyright owner refused to come forth with information to show copyright ownership).

A finding of willful infringement may also be relevant to whether the defendant’s income taxes are deductible under 17 U.S.C. § 504(b). *See, e.g.*, *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 487-88 (9th Cir. 2000) (holding in a case involving allocation of defendant’s profits under 17 U.S.C.§ 504(b), that “non-willful infringers” were entitled to deduct from damage assessment income taxes and management fees actually paid); *Oracle Am., Inc. v. Google Inc.*, 131 F. Supp. 3d 946, 949-53 (N.D. Cal. 2015) (providing an overview of Ninth Circuit precedent on whether a willful infringer may deduct expenses under 17 U.S.C.§ 504(b)).

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