

*Final Version. As per
to jury*

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

Corbis Corporation,

3:07CV3741

Plaintiff

v.

FINAL JURY INSTRUCTIONS

Nick Starr, et al.,

Defendants

2010 APR -9 PM 4:19
CLERK U.S. DISTRICT COURT
NORTHERN DISTRICT OF OHIO
TOLEDO

FILED

Members of the Jury:

I will now give you my final instructions.

If you see any conflict between these instructions and the initial instructions I gave you at the beginning of the trial, you must follow these instructions.

You may make whatever notes you want to make on your copy. Also you may take your copy with you to the jury room.

If I make any changes while reading the instructions, I will note them on my copy and deliver it to you as the original and binding copy of the instructions.

I will first give you some general information about your duties. Then I will tell you about the legal issues in the case.

Please listen to all instructions carefully. Your thoughtful attention as I read the instructions is essential.

First, the general instructions:

General Introduction

You must follow the law as I state it to you, and to apply that law to the facts as you find them from the evidence in this case. Even if you disagree with my statement of the law, you must follow these instructions. You cannot substitute your own views as to what the law should be for what I tell you in these instructions.

You must consider the instructions as a whole.

You can decide this case, and must base your verdict only on, the evidence that has come to you in the courtroom.

You must not be affected in any way by bias, prejudice or favor toward any party. Individuals, corporations, and entities of all kinds are equally entitled to the same fair trial.

The parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by me, and reach a just verdict regardless of the consequences.

Corporations as Parties

All the parties to this litigation are corporations. A corporation acts, however, through its individual employees and is responsible for the acts of its employees.

Evidence

Evidence, as I told you in my initial instructions and reminded you from time to time during the trial, includes the sworn testimony of the witnesses and the exhibits, which you will have with you in the jury room, admitted into evidence.

Some evidence is “direct” evidence; other evidence is “circumstantial” evidence. You are to consider and evaluate each equally.

Direct evidence is direct proof of a fact, such as testimony of an eyewitness, or an exhibit that displays or relates a fact directly. Someone who tells you he saw it raining or shows you a picture of a thunderstorm provides direct evidence about the weather.

Circumstantial evidence is evidence that tends to prove or disprove the existence or nonexistence of certain other facts. Someone who walks in wearing wet clothing and shaking out an umbrella provides circumstantial evidence about the weather.

The law does not require a party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters in issue.

Likewise the law does not require any party to produce as exhibits all papers and things mentioned in the evidence in the case.

Do not speculate as to what has not come into evidence. You can only consider the evidence presented during the trial.

Something that I have told you to disregard is not evidence. If I have instructed you during the trial to disregard something that you heard or saw, you cannot consider it in your deliberations.

Questions and Statements by Lawyers and the Court

The lawyers' questions are not evidence. Only what the witnesses say in response to questions is evidence. Where a witness's responses either affirms ~~or denies~~ an assertion in a question such affirmation or denial is evidence, as is any statement by the witnesses in response to a question.

The lawyers' opening statements and closing arguments are not evidence. They express what the lawyers believe the evidence will be or has been and what it means.

You can consider what the lawyers say in their opening statements and closing arguments as you evaluate and interpret the evidence. But on their own, such statements and arguments are not evidence, and cannot supply facts missing or not found in the testimony of witnesses or exhibits.

Similarly, questions and statements by me are not evidence. Only the witness's responses to my questions are evidence.

Do not consider any questions or statements by me as expressing any view on my part as to how you should decide the case. The decision on the outcome is for you alone to make on the basis only of the evidence. Speculation on your part as to my views on the outcome is not proper, and can play no role whatsoever in your deliberations or determination of your verdict.

Evaluation of the Evidence; Credibility of Witnesses

During your deliberations you must consider all of the evidence.

This does not mean that you must accept all the evidence as true or accurate. It is solely and entirely up to you to determine what evidence to believe or disbelieve, and how much weight to give to any part of the evidence.

In assessing the accuracy and truthfulness of the evidence, and how much weight to give to it, there are several things that you may consider. Among these are:

- a witness's personal, financial, or other significant relationship – good or bad – to a party;
- how the outcome of the case may affect the witness;
- the witness's opportunity and ability to observe or acquire knowledge about the facts about which the witness testified;
- the witness's intelligence, fairness, candor, and manner of testifying;
- the extent to which other evidence supports or contradicts a witness's testimony or an exhibit;
- whether at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witnesses' testimony, or the witness has been otherwise discredited or impeached by contradictory evidence;
- a showing that the witness testified inaccurately or untruthfully about a material matter; and
- any other factors or aspects of the witness's testimony or other evidence in the case that you conclude reasonably bear on the truthfulness or accuracy of the

witness's testimony.

If you believe that any witness has been discredited or impeached, you can give or decline to give the witness's testimony such credit or weight you think it deserves.

If you conclude a witness knowingly testified falsely about any material matter, you can, if you so choose, distrust such witness's other testimony, give it only such credit you think it deserves, or entirely reject the witness's testimony.

You may accept or reject the testimony of any witness in whole or in part.

The weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or nonexistence of any fact. You may find testimony by a smaller number of witnesses as to a fact is more credible than contrary testimony by a larger number of witnesses.

Drawing Inferences; Reaching Conclusions

Though you may consider only the evidence in the case, you can draw such reasonable inferences from the evidence as you find justified in the light of common experience.

In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts established by the testimony and the evidence in the case.

Burden of Proof

The plaintiff has the burden of proving every essential element of any claim by a preponderance of the evidence.

The defendant^s has^e the burden of proving every essential element of any defense by a preponderance of the evidence.

In your determination as to whether a fact in issue has been proven by a preponderance of the evidence, it does not matter which party called a particular witness or produced a particular exhibit.

“Preponderance of the Evidence”

To establish a claim or defense by a “preponderance of the evidence” means showing that the claim or defense is more likely true than not true.

A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true.

To have proven by a preponderance of the evidence means simply that the proverbial balance has tilted, however slightly, in favor of what is sought to be proved.

This concludes the general instructions, and now I shall instruct you on the law applicable to the specific claims at issue in this case.

Law Applicable to Plaintiff's Claims

As I told you at the beginning of the trial, I have previously found that each defendant infringed plaintiff Corbis Corporation's copyrights in the four photographs at issue in this case.

You are to determine the amount of damages the defendants owe to Corbis as a result of their infringement.

To determine the amount of damages, you must determine by a preponderance of the evidence:

1. The actual damages suffered by Corbis as a result of the defendants' infringement;
2. WCOIL's profits from its infringement of Corbis' copyrights
3. Master Maintenance's profits from its infringement of Corbis' copyrights; and
4. The amount of statutory damages appropriate under all the circumstances in this case.

The amount of damages to be awarded against each defendant can depend on the state of mind of the persons responsible for the infringement, including whether the infringement was *willful, or innocent.*

The law allows Corbis to recover either: 1) its actual damages, plus the defendants' profits from their infringements; or, at Corbis's option, 2) statutory damages.

The law permits Corbis, after you have returned your verdict, to choose which type of damages it will recover.

Actual Damages

Actual damages compensate a copyright owner for losses due to infringements.

The term "actual damages" means the amount of money, as shown by a preponderance of the evidence, that Corbis would have charged and the defendants would have paid, had the defendants sought and Corbis given them permission to use the photographs in the manner and to the extent the defendants used them.

In determining the amount of Corbis's actual damages, keep in mind that a principal purpose of the protections given under copyright law, including the right to recover actual damages for infringement, is to enable creators to earn a living by selling or allowing others to use their copyrighted works.

Infringers' Profits

In addition to a verdict for its actual damages, Corbis also is entitled to defendants' profits attributable to their infringements, to the extent you have not already taken those profits into account in determining Corbis' actual damages.

For Corbis to show the defendants' profits from their infringements, the law only requires Corbis to present evidence of: 1) the defendants' gross revenues; and 2) a reasonable relationship, either direct or indirect, between those revenues and the infringements.

Once Corbis presents evidence as to these two elements, the law shifts the burden of proof to the defendants to prove any reduction in this amount by a preponderance of the evidence.

This means that the defendants each must prove, by a preponderance of evidence, the extent to which, during the period of infringement, its profits, taking into account related business expenses, were attributable to factors other than the infringements.

Statutory Damages

Alternatively, and at its sole discretion following return of your verdict, Corbis may elect to recover statutory damages for each work infringed by defendants. The law gives you broad discretion to determine the amount of statutory damages.

In deciding the amount of a just award of statutory damages, consider the purposes served by an award of such damages, which include:

1. Relieving copyright owners of the often difficult burden of proving their actual damages and the defendant's profits;
2. Providing adequate compensation to a copyright owner and taking the benefits of infringement from the infringer;
3. Deterring the infringer and others who might be tempted in the future to infringe the rights of copyright owners; and
4. Where appropriate, punishing the infringer.

Statutory damages are available without proof of plaintiff's actual damages, defendants' profits, or other direct economic effects of the infringements.

(and that means photographs in this case)

One Statutory Damage Award Per Work

Each infringed work is entitled to one award of statutory damages within the range specified by the law.

You can make one and only one award of statutory damages for each "work" infringed. This is so, regardless of the number of infringing copies produced or how many defendants jointly infringed the work.

In this case each of the four photographs is a separate "work."

State of Mind and Corresponding Ranges of Statutory Damages

The law prescribes different amounts of, or ranges for statutory damages depending on the infringer's state of mind.

In determining your award of statutory damages, you must remain within the applicable range as described in this instruction.

Corbis claims that the defendants acted willfully.

The defendants claim they acted innocently.

Corbis has the burden of proving by a preponderance of the evidence that a defendant acted willfully. If you find that Corbis has met its burden of proof as to a defendant's willfulness, you shall determine the amount of statutory damages within the range \$750 to \$150,000 as to each work infringed.

A defendant has the burden of proving by a preponderance of the evidence that it acted innocently. If you find that a defendant has met its burden of proof as to the innocence of its infringement, you shall determine the amount of statutory damages within the range \$200 to \$30,000 as to each work infringed.

If you find that Corbis has not met its burden of proof as to a defendant's willfulness and, as well, that that defendant has not met its burden of proof as to its innocent infringement, you shall determine the amount of statutory damages within the range \$750 to \$30,000 as to each work infringed.

Willful Infringement

Infringement is willful if a defendant either had actual knowledge that it was infringing plaintiff Corbis' copyright or it acted in reckless disregard of that right.

To be willful, infringement need not have been malicious.

You can infer a defendant's state of mind, including reckless disregard, from its conduct. In determining whether Corbis has proven that a defendant acted willfully, consider all the facts and circumstances, including, in particular, any notice the defendant had of the copyrights and a defendant's efforts to mislead or conceal their infringements.

Statutory Damages: Factors

In determining, within the appropriate range, the amount of statutory damages, among the factors you are to consider are:

1. The revenues, if any, lost by plaintiff Corbis from the defendants' infringements;
2. The revenue, if any, received by defendants from the infringement;
3. The expenses saved and profits gained by the defendant as a result of the infringements, in connection with their infringement;
4. Other benefits the defendants may have derived from the infringements;
5. The nature and/or value of Corbis's copyrights;
6. The duration and extent of infringement;
7. The need to deter the defendants and others from infringement in the future;
8. The defendants' financial situation;
9. The number of works infringed; and
10. If you have found willful or innocent infringement as to either defendant or both defendants, the need for or appropriateness of punishment for such conduct.

Innocent Infringement: Effect on Statutory Damages

If a defendant proves by preponderance of the evidence that it innocently infringed Corbis's copyright, you may reduce the statutory damage award to a sum as low as \$200 per work.

To prove innocent infringement, a defendant must prove by a preponderance of the evidence that it:

1. Did not know or have reason to know that it was using a copyrighted work;
2. Did not have reasonable access to determine whether the work was copyrighted; and
3. Gave due and reasonable attention to and consideration of the possibility that the work might have been protected by copyright.

Simple ignorance is not innocence.

Deliberations; Verdict

Before beginning your deliberations select a foreperson who will preside over your deliberations and sign any communications with the court before the final return of your verdict.

The foreperson has no greater weight or say in your deliberations. You all participate as equals in the discussion.

Only discuss the case when all of you are present in the jury room – and only discuss it in the jury room.

Do not talk with anyone else about the case until after you have returned your verdicts[✓] and been discharged.

Your verdict must represent the considered judgment of each juror.

To return a verdict, it is necessary that each juror agree thereto: your verdict must be unanimous.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching a verdict if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of all the evidence in the case with your fellow jurors.

In the course of your deliberations, do not hesitate to re-examine your views, and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence, solely because of the opinion of your fellow jurors, or merely to return a verdict.

Remember at all times you are not partisans. You are judges – judges of the facts in this

case. Your sole interest is to seek the truth from the evidence in the case.

I remind you that you can base your verdict only on the evidence that you heard and saw in the courtroom, which includes the exhibits that will be with you in the jury room.

I also remind you that you cannot consider or consult anything that was not evidence.

I have prepared verdict forms for you to sign once you have reached your unanimous verdicts. Once you have reached your verdicts, fill out the form so that it accurately reflects those verdicts and place the date, time and your signatures on the form.

[Explain forms]

If, during your deliberations, you desire to communicate with me, the foreperson should write the message or question and give the note to the clerk to give to me.

I will respond as promptly as possible either in writing or by having you return to the courtroom so that I can address you orally.

With regard to any message or question you might send, never state or otherwise disclose your numerical division at the time.

When you recess during the day or adjourn, tell the clerk. You alone determine when to deliberate. If you desire meals or other amenities, tell the clerk.

The mark-up of these instructions and exhibits will be sent to the jury room shortly.